Supreme Court No. _____
Court of Appeals, Division III, No. 402126

SUPREME COURT
OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY,

Respondent,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND INTRODUCTION

Grant County Public Utility District No. 2 ("Grant") seeks review of the opinion of the Court of Appeals, Division Three, in *Public Utility District No. 1 of Chelan County v. Public Utility District No. 2 of Grant County*, No. 40212-6-III. Grant seeks review under RAP 13.4(b)(1) and (b)(4).

This case is about whether energy contracts drafted 50-70 years ago must be construed as the drafters understood energy at the time, or should be construed as the parties understand energy currently—where hydropower has a greater economic value than "undifferentiated" power. When these contracts were executed, no one considered that power from different sources would yield different economic value. Power companies understood power as simply "power"—regardless of its source. Nonetheless, the Court of Appeals held that these contracts, requiring the delivery of a certain "amount" of "Encroachment Power," must now be interpreted as requiring one public utility district to somehow isolate and deliver pure

hydropower—*i.e.*, power derived from only a hydro source—because hydropower is now worth more in today's green energy economy.

Factually, the Court of Appeals ducked the undisputed reality that electrons cannot be "color-coded" based on their source. Its ruling renders the parties' historical power agreement impossible to fulfill, both as-written and under the laws of physics.

Legally, the Court of Appeals' holding circumvents (if not outright disregards) this Court's jurisprudence from *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005), *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), and *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). RAP 13.4(b)(1). Moreover, the holding has already had a profound impact on how legacy contracts in Washington's energy sector are interpreted, with the potential to impact old contracts across numerous other long-standing industries. RAP 13.4(b)(4). For

these reasons, and consistent with RAP 13.4(b)(1) and (b)(4), Grant respectfully requests that the Court accept review.

II. COURT OF APPEALS DECISION

Grant seeks review of the opinion issued by the Court of Appeals, Division Three, in *Chelan PUD v. Grant PUD*, No. 40212-6-III, https://www.courts.wa.gov/opinions/pdf/402126_unp.pdf ("Slip op." or "Opinion"). *See* Appendix A. Non-party Public Utility District No. 1 of Pend Oreille County ("Pend Oreille") has filed a motion to publish the Opinion. *See* Appendix B.

III. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in subjugating the intent of the parties at the time they drafted the 1955 and 1974 Agreements, in favor of current economic factors, to hold that the 1955 and 1974 Agreements unambiguously require Grant to send pure hydropower to Chelan as a matter of law? **Yes.**[1]

[1] Grant is not seeking RAP 13.4(b) review of the portion of the Opinion limiting *Campeau v. Yakima HMA, LLC*, 3 Wn.3d 339, 551 P.3d 1037 (2024) and affirming dismissal of Grant's unjust

IV. STATEMENT OF THE CASE

A. The Parties and the Encroachment Agreements

Grant and Public Utility District No. 1 of Chelan County ("Chelan") are two public utility districts located in the Mid-Columbia River basin. 1CP 10, 39. In 1933, Chelan constructed a hydroelectric dam, the Rock Island Project. 1CP 11, 40. In 1955, Grant proposed two hydroelectric dams, called the "Priest Rapids Hydroelectric Development" project, downstream from Rock Island. *Id*. One of those dams, the Wanapum Dam, would "encroach" on Rock Island's tailwater, reducing the amount of energy produced by Rock Island. *Id*.

1. The 1955 Agreement

Before Grant could start construction of the Priest Rapids Project, the Federal Power Commission ("FPC") needed to approve Grant's application and issue a project license. 1CP 11, 40. To avoid a dispute, Chelan and Grant entered into the

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enrichment counterclaim. Should the Court accept review, the Court has discretion to broaden its review to include Division Three's application of *Campeau*. RAP 13.7(b).

1955 Encroachment Agreement ("1955 Agreement") on August 8, 1955. 7CP 1222-25.

Paragraph 1 of the 1955 Agreement stated:

> Grant agrees to fully compensate Puget and Chelan and each of them or their successors in interest in the Rock Island Project for all loss, damage and expense which Puget and Chelan or either of them or their successors in interest in the Rock Island Project shall sustain or incur by reason of the construction or operation of said Priest Rapids Hydroelectric Development or any part thereof.

7CP 1223 (¶ 1).[2] Paragraph 2 of the 1955 Agreement explained how Grant would "fully compensate" Chelan for "all loss":

> Without limiting the generality of the foregoing, Grant agrees regarding loss of power and energy, ***to compensate*** … Chelan ***for all loss in the generation of power and energy*** at the Rock Island Project which shall result from the backwater of the Wanapum Project, ***by delivering*** to Puget and Chelan ***the amount of***

[2] Chelan purchased Puget Sound Power & Light's ("Puget") interest in the Rock Island Project on January 6, 1956. 1CP 60-61 (¶ 4).

> ***power and energy so lost*** at the Rock Island Project….

Id. (¶ 2) (emphasis added). Grant was to deliver the power:

> Simultaneously with the occurrences of the losses at Rock Island Project to the end that ***the amount of power and energy*** available to [Chelan] from the Rock Island Project … shall be at all times equal to the power and energy which would have been available to [Chelan] at the Rock Island Project in the absence of said Priest Rapids Hydroelectric Development.

7CP 1223-24 (¶ 2) (emphasis added).

By its terms, the 1955 Agreement did not specify hydropower, or any other power source, as the power required to be delivered to Chelan. 7CP 1222-25, 1171-72 (73:19–74:1). This is consistent with the energy industry at the time.

The parties understood at the time that "power" was synonymous with what would later be called "undifferentiated system power," *i.e.*, power on the company's system regardless of source. *E.g.*, 9CP 1414-15 (¶ 12) (expert testimony); *also* VRP 27:17-20 (superior court stating, "I mean, it seems fairly

obvious to [the] Court that in 1955, they had no idea that people would say that coal burning power was just not as good as hydropower--"); VRP 110:22-24 (similar).

2. The 1974 Agreement

In 1973, Chelan applied to the FPC to add a second powerhouse to the Rock Island Project. 1CP 14 (¶ 27), 42 (¶ 27). This triggered a dispute over the interpretation of the 1955 Agreement, which was settled by the parties' 1974 "Agreement Relating to Wanapum Development Encroachment on Rock Island Project" ("1974 Agreement"). 1CP 14-15, 42; 8CP 1311-20 (1974 Agreement). The 1974 Agreement was a settlement agreement, resolving all disputes and serving as the operative agreement going forward. 8CP 1312 (Recital 9).

Grant's compliance with the 1974 Agreement was "accepted by Chelan as full and satisfactory performance of Grant's obligations under the 1955 Agreement":

> The parties intend and agree that the covenants to be performed by Grant under this agreement and performance thereof are accepted by Chelan as full

> and satisfactory performance of Grant's obligations under the 1955 Agreement. Chelan accepts Grant's covenants herein to deliver Encroachment Power and performance of the covenants herein in lieu of any claim on the part of Chelan for any loss or damage to Chelan … arising under the 1955 Agreement, whether such loss or damage relates to loss of power and energy or otherwise without limitation … Chelan agrees that execution and performance hereof is such compliance.

8CP 1317 (§ X).

The Court of Appeals declined to discuss the significance of Paragraph 10 in the 1974 Agreement, let alone apply it. The Court of Appeals similarly failed to apply the defined terms central to this dispute. The 1974 Agreement specifically defines the term "Encroachment Power":

> Encroachment Power shall mean the electrical capacity and energy due to Chelan from Grant under the provisions of this agreement.

Id. 1313 (§ II(d)). Critical to the merits here, Chelan concedes that the 1974 Agreement does not specify the source of

encroachment power that Grant is obligated to deliver. 7CP 1182-87 (120:20–121:1, 121:10–125:9).

B. For Decades, Grant Performed Consistent with the Parties' Mutual Understanding at the Time that Hydropower Was No More Valuable Than "Undifferentiated" Power.

1. Hydropower did not have independent economic value over other types of power when the Agreements were drafted.

Prior to the late 1990s, energy markets in the western United States traded only one thing: "undifferentiated" power. 9CP 1414 (¶ 12). "Undifferentiated" power is power that is not tracked to a specific generating source or fuel type. 7CP 1201, 1204 (187:19-25, 195:5-10); 7CP 1247-48 (190:19–191:7); 9CP 1411-12 (¶ 7).

The concept of power being defined by its generating source was not developed until the early 2000s, when the modifiers "differentiated" and "undifferentiated" started being used. 7CP 1164-65 (21:4–22:12). Today, power generators trade the renewable attribute of "green" energy through an accounting credit—a certificate called a renewable energy

credit ("REC"). 7CP 1201 (187:15-25). As Chelan concedes, prior to the early 2000s, utilities had no reason to track the source of power on their system. *Id*.

It also is undisputed that there was no specific or unique market for hydropower at the time the Agreements were signed. 7CP 1186, 1201-02 (23:10-13, 187:15–188:18). At the time, the source or type of power did not matter—hydropower was not recognized as having any distinct value over other types of power. 9CP 1413-1414 (¶ 12).

2. Grant has performed under the 1974 Agreement, by delivering undifferentiated power.

Since the execution of the 1974 Agreement, Grant has performed its obligations by sending undifferentiated power in the required amounts to Chelan. 9CP 1533 (¶ 3), 1539 (¶ 20). Because Grant owns two dams on the Columbia River, some of the power delivered by Grant was likely hydropower. 9CP 1539 (¶ 20). But Grant also purchased power from non-hydro sources. *Id*. Thus, when Grant sent encroachment power to

Chelan, it sent the mix of hydropower and non-hydro power from Grant's system—*i.e.*, "undifferentiated" power. *Id*.

This was (and remains) the ***only*** way Grant could deliver encroachment power to Chelan. 7CP 1250-51 (200:2-20; 211:8-23). There was (and remains) no "direct line" from Grant's dam to Chelan's dam that somehow bypasses the power grid. *Id.*

3. The "Hourly Coordination" system does not change what, or how, power is delivered.

The Court of Appeals accepted Chelan's claims that because encroachment power was later delivered to Chelan via the "Hourly Coordination" system, "the encroachment power was ***accounted for*** as Rock Island Project generation, even though the physical generation occurred at Wanapum Dam." Slip. op. at 5 (quoting 1CP 17) (emphasis added). This represents a fundamental misunderstanding of the Hourly Coordination system, and conflates an accounting function with the physical delivery of electricity. In confusing accounting methods with physics, the Court of Appeals adopted Chelan's

desired inference that Grant performed under the 1974 Agreement by delivering hydropower. *Id*. This simply is not true—and is contrary to the record.

The Hourly Coordination is "a scheduling convenience" utilized by dam owners on the Mid-Columbia River. 7CP 1244 (102:7-12), 1245-46 (147:20–148:25). It was developed decades after the 1955 Agreement, and is not an isolated agreement between Grant and Chelan. 6CP 1049. It is an accounting mechanism that allows the accounting departments of the participating utilities to have power "deemed" as hydropower. Naturally, because it is scientifically impossible, there is no "color-coding" system for identifying that certain electrons sent by Grant are "hydropower electrons" 7CP 1244 (102:7-12); 1245-46 (147:20–148:25); *also* 7CP 1249-50 (199:24–200:13).[3] Therefore, even though Grant delivered

[3] The only way to guarantee power came solely from a hydropower source is if there were an isolated transmission line running from the dam to the end purchaser. It is undisputed that Grant does ***not*** have such an isolated transmission line and instead stores all of its power—generated and purchased—on

encroachment power to Chelan via Hourly Coordination, it did not certify or guarantee that the power was pure hydropower. Nor could it.

Below, Chelan also sought to side-step physics by arguing that "slice contracts" (also termed "output" contracts) would enable Grant to provide pure hydropower as encroachment power. *E.g.*, Resp.Br. 45, n.8. But slice contracts sell a "right" to a "percentage of" the "output" of a specific project. 4CP 723; 7CP 1245 (147:13–148:25); 10CP 1647 (16:1-15). As such, the "amount" of power allocatable under slice contracts fluctuates with the power generation of the particular source during any given accounting period.

Indeed, the percentages of output sold in these contracts are not even allocated in the Hourly Coordination system. 7CP 1245-246 (147:20–148:9), 1207-208 (203:7–204:3), 1244 (102:7-12); 6CP 1104-05; 10CP 1649 (145:4-25). And, even

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its power grid for transmission to purchasers. 7CP 1250-51 (200:2-20; 211:8-23).

under these slice contracts, Grant does not warrant that the purchaser is receiving purely hydro-sourced electrons; rather, the purchaser can show that its energy is obtained through a purchased right to a percentage of a source's output. 10CP 1653-655 (175:4–177:18).

Perhaps even more to the point, "slice" and "output" contracts are entirely different types of contracts than the 1955 and 1974 Agreements at issue in this case. If these contracts are what Chelan and Grant had intended with the 1955 and 1974 Agreements, that is what they would have drafted—they did not.

C. After Decades of Delivering Undifferentiated Power to Chelan, in 2014, Chelan Claimed the 1974 Agreement Required Grant to Deliver Pure Hydropower.

In 2014, Chelan demanded for the first time that Grant attest that the encroachment power it was delivering to Chelan was pure hydropower. 7CP 1237-38 (47:13–48:20), 1242-43 (73:4–74:8). Grant declined because Grant had always delivered undifferentiated system power to Chelan and is

physically incapable of delivering pure hydropower to Chelan. 7CP 1238 (48:21-25), 1208-09 (204:4–205:13). Chelan filed suit. 1CP 9-23.

D. The Superior Court's Summary Judgment Decision.

The parties cross-moved for summary judgment. 6CP 1091-126, 1129-154. At the conclusion of the hearing, the superior court agreed that Grant and Chelan did not contemplate the source of the encroachment power at the time any of the agreements were drafted:

> [N]o one contemplated that the one type of power would be more valuable than the other in either of these agreements -- any of these agreements.

VRP 110:22–111:2.

But the superior court decided it was not "fair" to ratepayers today to apply the intent of the parties in 1974:

> I think that – one thing that drives me, you guys, I don't see – I don't like the idea the idea that through a – lack of creativity of counsel, didn't think of an argument, didn't think of a situation, ***you know, back in 1955 or***

> ***in 1974, they didn't think of the future – they didn't have a crystal ball***. So we're going to let one group of rate payers get a benefit and the other group of rate payers gets a – you know, has to pay. ***It's just a transfer of money from one household or one entity or one business to another, and that doesn't seem fair.***
>
> So that's really at the heart of this decision of mine today.

VRP 115:9-22 (emphasis added). Based on its perceived balance of equities (which neither party had argued)—rather than applying the rules of contract interpretation—the superior court granted Chelan's motion for summary judgment and denied Grant's. 11CP 1804-08, 1810-13.

E. The Court of Appeals' Opinion.

The Court of Appeals affirmed on different grounds. Slip op. at 1. The Court of Appeals held that because "[i]t is undisputed that the value of hydropower is greater than undifferentiated power" the 1955 Agreement unambiguously requires Grant to supply pure hydropower to Chelan as encroachment power as a matter of law. *Id*. at 13. The Court of

Appeals also injected the current distinction between differentiated and undifferentiated power into the 1974 Agreement as if the parties contemplated it at the time:

> Grant emphasizes that nothing in the agreement requires encroachment power to be hydropower. Once again, we disagree with Grant. ***While nothing in the agreement requires encroachment power to be hydropower, nothing in the agreement permits encroachment power to be undifferentiated power***.

Slip. op. at 15 (emphasis added). The Court of Appeals held that "encroachment power"—despite being a defined term under the 1974 Agreement—meant pure hydropower as matter of law. *Id*. at 15-16.

Pend Oreille—a non-party public utility district with substantial interest in the precedent set by the Court of Appeals' analysis in this case—filed a motion to publish. Appendix B. As Pend Oreille notes, "the Opinion addresses, as a matter of first impression, an important issue that affects many similar contracts within the Pacific Northwest." *Id.* at 4.

Grant respectfully requests review by this Court.

V. ARGUMENT

A. The Opinion Conflicts with Washington Law on Contract Interpretation Articulated in *Hearst Commc'ns, Inc. v. Seattle Times Co*.

RAP 13.4(b)(1) provides that a petition for review will be accepted "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." The Opinion conflicts with *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493—it fails to apply Washington's rules of contract interpretation to the 1955 and 1974 Agreements.

1. The Opinion conflicts with *Hearst*'s objective manifestation rule.

This Court clarified how Washington courts interpret contracts in *Hearst*, 20 years ago. There, the Court reconciled the context rule first adopted in *Berg v. Hudesman*, 115 Wn.2d 657, and the objective manifestation theory of contracts: "Washington continues follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective

manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst*, 154 Wn.2d at 503. As explained in *Hearst*, a court must apply the objective manifestations of defined terms in a contract. *Id.* at 505.

Here, the objective manifestations of the parties to these Agreements are gleaned from the language used by the parties at the time. In reconciling the two Agreements, the objective manifestation of the 1974 Agreement is, first and foremost, that performance under the 1974 Agreement controls—the 1955 Agreement does not. 8CP 1317 (§ X, quoted *supra*). Yet, the Court of Appeals focused on trying to interpret the 1955 Agreement by applying today's market economics.

As to the 1955 Agreement, the Opinion declined to give effect to the terms provided in Paragraph 2, which specifically explained how Grant was to compensate Chelan for lost energy generation as provided generally in Paragraph 1. Slip op. at 14 (holding Grant's reading "requires [the court] to ignore the

generality of paragraph 1"). Doing so ignored the objective manifestations of the two paragraphs at issue.

Paragraph 1 obligates Grant to compensate Chelan "for all loss, damage and expense" arising from the construction or operation of the Priest Rapids Project. 7CP 1223 (¶ 1). By its terms, "loss, damage and expense" is not limited to just reduced power generation, but also includes other losses, damages, and expenses, such as expenses for installing equipment to measure encroachment losses. 1CP 61; 7CP 1176 (84:12–87:11). Paragraph 2—without limiting Grant's obligation to pay for "all loss, damage, and expense"—specifies how Grant is to compensate Chelan for "loss of power and energy." Specifically, "By delivering to [Chelan] the ***amount*** of power and energy so lost." 7CP 1223 (¶ 2) (emphasis added).

But the Opinion clung to the generality of Paragraph 1 without application of the specificity in Paragraph 2. It elevated the general terms over the specific and ignored the drafters' understanding of what encroachment power was. The

Opinion rendered Paragraph 2 of the 1955 Agreement superfluous. *Cf. Hearst*, 154 Wn.2d at 506 (applying the definitions as adopted by the parties without addition or omission of terms); *accord Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009) ("Courts should not adopt a contract interpretation that renders a term ineffective or meaningless.").

Moreover, the 1974 Agreement defines "Encroachment Power"—the very thing that Grant was obligated to send to "fully compensate" Chelan for "all loss." "Encroachment Power" is "the electrical capacity and energy due to Chelan from Grant under the provisions of this agreement." 8CP 1313 (§ II(d)). The definition undisputedly does not specify a source from which encroachment power must be generated. Thus, the objective manifestation of the contract language is that "Encroachment Power" is not source-specific. *See Hearst*, 154 Wn.2d at 504 ("We do not interpret what was intended to be written but what was written.").

Further still, the 1974 Agreement provides that Grant's delivery of "Encroachment Power," as it is defined in the 1974 Agreement, is "accepted by Chelan as full and satisfactory performance of Grant's obligations under the 1955 Agreement." 8CP 1317 (§ X). The objective manifestation of this term is unassailable: Grant's delivery of "Encroachment Power," which by its definition is not source-specific, satisfies Grant's obligations to Chelan under the 1955 Agreement.

The Opinion's dismissal of the 1974 Agreement, and of Paragraph 10 in particular, turned *Hearst*'s prescribed analysis on its head. The Opinion stated that, "***while nothing in the agreement requires encroachment power to be hydropower, nothing in the agreement permits encroachment power to be undifferentiated power***." Slip op. at 15 (emphasis added). The Opinion ignored that, at the time of contracting, it is undisputed that "encroachment power" could not have been anything other than "undifferentiated power."

This is an incredible pivot from *Hearst*. Compare that sentence from the Court of Appeals with this Court's in *Hearst*: "there is nothing in the definition of agency expenses or the loss operations clause that purports to deal with alternative means of calculating losses, e.g., losses caused by a strike as opposed to losses caused by a marketplace unable to sustain two newspapers." *Comparing* Slip op. 15 (quoted *supra*) *with* 154 Wn.2d at 506. In *Hearst*, the absence of the requested language from the definitions was an "objective manifestation" of the drafting parties' intent not to include them. *Id.*

Thus, under *Hearst*'s objective manifestation theory, because "nothing in the agreement requires encroachment power to be hydropower," Slip op. 15, ***that is the objective manifestation of the parties' intent***. *Hearst*, 154 Wn.2d at 504 (quoted *supra*) *and* at 510 ("Even if the parties intended to require that agency remainder be calculated differently …, they failed to reduce such an intention to writing.… Hearst

essentially asks us to rewrite the JOA by revising the loss operations clause, something we are not at liberty to do.").

The Court of Appeals' conclusion that, by the plain language, "nothing in the agreement requires encroachment power to be hydropower," Slip op. at 15, while simultaneously holding that the Agreement nevertheless "requires Grant to return hydropower for hydropower," Slip op. at 1, is patently inconsistent with the principles of contract interpretation announced 20 years ago in *Hearst*. The Court should grant review. RAP 13.4(b)(1).

2. The Opinion applies extrinsic evidence about the Parties' understanding of hydropower today, rather than at the time of contracting, contrary to *Hearst, Berg*, and *Int'l Marine*.

As this Court explained in *Hearst*, if assistance is needed to determine the meaning of a specific term in a contract, Washington courts may use extrinsic evidence "'to determine the meaning of ***specific words and terms used***' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" *Hearst*, 154 Wn.2d at

503 (quoting *Hollis v. Garwall*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)) (emphasis added in *Hearst*). The Court explained that extrinsic evidence was appropriately consulted in *Berg* to determine the meaning of the undefined term "gross rentals." *Id.* at 502. In contrast, extrinsic evidence was not needed in *Hearst* because the parties did not seek interpretation of an undefined term, but rather the interpretation of the defined contract term, "agency expenses." *Id*. at 505; *see also id.* at 509 ("extrinsic evidence may be used only to determine the meaning of specific words in the agreement").

Applying the extrinsic evidence of the changing monetary value of source-specific power from 70 years ago (and a fundamental misunderstanding of the Hourly Coordination system), the Opinion held that because hydropower is ***currently*** more valuable than undifferentiated power, the parties' intent ***in 1955*** was that Grant would deliver pure hydropower to "fully compensate" Chelan "for all loss,

damage and expense" it sustained. Slip. op. at 13; *compare with Hearst*, 154 Wn.2d at 509 (quoted *supra*).

It is of course undisputed that hydropower ***is currently*** more valuable than undifferentiated power. *See, e.g.*, 9CP 1414 (¶ 11). But the Opinion ignored the rest of the undisputed evidence—that ***at the time*** the 1955 and 1974 Agreements were executed, hydropower was not more valuable than undifferentiated power, and that Grant was only delivering undifferentiated system power. 9CP 1414-15 (¶ 12).

This Court has said it is the extrinsic evidence of the parties' intent "at the time they executed the contract" that is relevant. *Int'l Marine*, 179 Wn.2d at 282 ("During interpretation, a court's primary goal is to ascertain the parties' intent ***at the time they executed the contract***.") (citing *Berg*, 115 Wn.2d at 663) (emphasis added); *accord Berg*, 115 Wn.2d at 667 ("extrinsic evidence is admissible as to the entire circumstances under which the contract was made"). But the Court of Appeals did the opposite.

The Opinion presents an about-face from what the law has been for decades. *E.g.*, *Berg*, 115 Wn.2d at 667 (quoted *supra*); *Int'l Marine*, 179 Wn.2d at 282 (quoted *supra*). The Court should grant review. RAP 13.4(b)(1).

B. This Petition Involves the Interpretation of Legacy Contracts, Which Is an Issue of Substantial Public Importance that Should Be Determined by the Supreme Court.

Under RAP 13.4(b)(4), the Court may grant review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." This petition involves exactly that.

Utilities across the region are operating under contracts that are over 50 years old. *E.g.*, Appendix B at 1 ("the Opinion addresses, as a matter of first impression, an important issue that affects similar contracts within the Pacific Northwest…. Like many other Washington Utilities, Pend Oreille has contracts that will likely be affected by the Court's analysis") and 8 ("The Opinion also presents a decision of general public interest and importance…").

The Opinion holds that as the industry evolves, old contracts will be interpreted by applying the industry's current understanding of market economics, instead of how parties understood what they were negotiating at the time the contract was executed. *E.g.*, Slip op. at 15 (quoted *supra*). For those utilities in Grant's position, this is an inequitable result that could not have been contemplated 50+ years ago. For those utilities in Chelan's position (including Pend Oreille), this alleviates having to revisit old contracts that did not contemplate modern market conditions.

Yet there still is no meeting of the minds. Contracts, outdated due to changing times or economies, should not be construed based on litigants' present-day view of the equities; rather, they should be construed according to our state's principles of contract interpretation. *E.g.*, *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 176-77, 94 P.3d 945 (2004) (discussing Washington's "objective manifestation test for contracts" and noting, "parties are free to enter into, and

courts are generally willing to enforce, contracts that do not contravene public policy."). The stability and certainty of contract law will guide businesses—including public utility districts operating under half-a-century-old power agreements—as to when and how best to renegotiate their legacy contracts to account for a changing economy.

The Court of Appeals' Opinion has reverberated throughout the Pacific Northwest's energy industry. *E.g.*, Appendix B at 7 ("Pend Oreille is not alone in having contracts that may be affected by the Opinion …"). The Opinion likewise has direct application to every other industry operating under old contracts.

Even now, other utilities in the state are hoping to adopt the Opinion to obtain unexpectedly favorable results. As non-party Pend Oreille notes,

> Even where contract language and context differ from the facts in the present appeal, the Court's identification of the increased value of hydropower over undifferentiated

> power, and the corresponding effect on a party's obligation to compensate for 'loss, damage and expense,' is a determination of first impression in Washington, and as such has value able precedential effect for similar cases.

Appendix B, at 7.

While Chelan and Grant (and others) disagree about the way these legacy contracts should be interpreted and applied, there can be no meaningful disagreement that the Opinion's decision on how to interpret these legacy contracts is an issue of substantial public importance. Given the profound impact of the Opinion's analysis and conclusion on Washington's energy industry, and because the Opinion's analysis did not engage in the contractual interpretation analysis prescribed in *Hearst* and its progeny, this is "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Court should accept review.

VI. CONCLUSION

Grant respectfully submits that the time has arrived for the Court to revisit contract interpretation. The Court of Appeals' Opinion conflicts with the rules of contract interpretation established by this Court in *Berg, Hearst,* and *Int'l Marine*. It ignored the objective manifestation theory and applied extrinsic evidence to give effect to the parties' current understanding of hydropower, instead of as an aid to understanding the parties' mutual intent at the time the agreements were executed. This new framework for interpreting legacy contracts has immediate and significant impact on the energy industry and other key industries that operate under contracts agreed to many decades ago. Grant respectfully requests the Court accept review under RAP 13.4(b)(1) and (4).

I certify that this document contains 4,924 words, in compliance with RAP 18.17.

Respectfully submitted this 10th day of July 2025.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

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DATED this 10th day of July 2025, at Spokane, Washington.

s/ *John D. Cadagan*
John D. Cadagan, WSBA #47996

APPENDIX A

FILED
JUNE 10, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, a municipal corporation, Respondent, v. PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, a municipal corporation, Appellant.	)	No. 40212-6-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Public Utility District No. 2 of Grant County (Grant) appeals the trial court's summary judgment order construing the parties' contracts in favor of Public Utility District No. 1 of Chelan County (Chelan). We conclude there is no genuine issue of material fact, that the 1955 agreement between the parties unambiguously requires Grant to fully compensate Chelan for all loss, damage, and expense Chelan sustains by reason of Grant's construction of the Wanapum Dam and, in the context of this dispute, requires Grant to return hydropower for hydropower. We further conclude that Grant's unjust enrichment counterclaim against Chelan is barred by the three-year statute of limitations and that the period of limitations should not be equitably tolled. We affirm the trial court's summary judgment order.

FACTS

Grant and Chelan are two public utility districts located in the mid-Columbia River basin, and both own and operate hydroelectric dams. In 1955, Grant proposed to construct two hydroelectric dams, termed the "Priest Rapids Hydroelectric Development," downstream from Chelan's existing Rock Island Dam. Clerk's Papers (CP) at 11-12. Grant's construction of the upper dam, Wanapum Dam, would encroach on the tailwaters of Chelan's upstream Rock Island Dam, reducing that dam's capacity to generate power. To facilitate regulatory approval for its new project, Grant agreed to fully compensate Chelan. The agreement, referred to as the "1955 Agreement," provides in relevant part:

> 1. Grant agrees to fully compensate Puget[1] and Chelan and each of them or their successors in interest in the Rock Island Project for all loss, damage and expense which Puget and Chelan or either of them or their successors in interest in the Rock Island Project shall sustain or incur by reason of the construction or operation of said Priest Rapids Hydroelectric Development or any part thereof. . . .
>
> 2. Without limiting the generality of the foregoing, Grant agrees regarding loss of power and energy, to compensate Puget and Chelan for all loss in the generation of power and energy at the Rock Island Project which shall result from the backwater of the Wanapum Project . . . to the end that the amount of power and energy available to Puget and Chelan from the Rock Island Project . . . shall at all times equal the power and energy which would have been available to Puget and Chelan at the Rock Island Project in the absence of said Priest Rapids Hydroelectric Development.

[1] Puget Sound Power & Light Company co-owned the Rock Island Project with Chelan until Chelan purchased its interest in early 1956.

Clerk's Papers (CP) at 56-57. The agreement does not state the source of power, hydropower or otherwise, that Grant is required to return to Chelan.

Grant and Chelan later entered into the "1967 Agreement." CP at 60. This agreement established how the encroachment losses at the Rock Island Project would be calculated and how Grant would deliver replacement power to Chelan. The 1967 Agreement provides that "[n]othing contained in this agreement shall be construed as altering, amending or abrogating in any manner the agreement of August 8, 1955, . . . and said agreement shall be and remain in full force and effect." CP at 68. Although the agreement explains in great detail how the amount of return power will be calculated, it likewise does not state the source of power that Grant is required to return to Chelan.

In 1973, Chelan sought to add a second powerhouse to the Rock Island Project. This caused a dispute between Grant and Chelan about the second powerhouse's effect on the 1967 Agreement. They entered into the "1974 Agreement," wherein Grant agreed to compensate Chelan for the total power loss at the first powerhouse and one-half of the power loss at the second powerhouse. CP at 15, 99. The 1974 Agreement terminated the 1967 Agreement, but not the 1955 Agreement.

The 1974 Agreement reads in relevant part:

RECITALS

. . . .

7. Grant and Chelan have long been in disagreement as to the proper interpretation of the 1955 Agreement, Grant contending that the agreement was intended to indemnify for loss only at Rock Island as it existed in 1955, and Chelan contending that the agreement was intended to indemnify for loss resulting to any expanded project as well as the project as it existed in 1955. . . .

. . . .

9. In order to resolve the dispute between them and to resolve all present and future controversy relative to this matter between them, the parties enter into this agreement.

. . . .

SECTION II—DEFINITIONS

. . . .

(d) Encroachment Power shall mean the electrical capacity and energy due to Chelan from Grant under the provisions of this agreement.

. . . .

SECTION V—DETERMINATION OF AMOUNTS OF ENCROACHMENT POWER

[T]he amount of Encroachment Power which is to be delivered to Chelan simultaneously with the loss of power and energy by reason of encroachment shall be computed and determined according to the principles and formula set forth in Exhibit "A". Encroachment power will be computed and delivered on operable units only.

. . . .

SECTION IX—EFFECT ON 1967 AGREEMENT

> This agreement is intended to fully supersede and replace the 1967 Agreement when Chelan has installed and made operable one or more generating units in the Added Plant . . . .

SECTION X—EFFECT ON 1955 AGREEMENT

> The parties intend and agree that the covenants to be performed by Grant under this agreement and performance thereof are accepted by Chelan as full and satisfactory performance of Grant's obligations under the 1955 Agreement. Chelan accepts Grant's covenants herein to deliver Encroachment Power and performance of the covenants herein in lieu of any claim on the part of Chelan for any loss or damage to Chelan or the Existing Plant or Added Plant, arising under the 1955 Agreement, whether such loss or damage relates to loss of power and energy or otherwise without limitation.

CP at 99-105. Like the 1955 and 1967 Agreements, the 1974 Agreement does not state the source of power, hydropower or otherwise, that Grant was required to return to Chelan.

From 1973 until 2019, the parties accounted for and organized the delivery of encroachment power through an "Hourly Coordination Agreement." CP at 17, 1104. Under this agreement, "the encroachment power was accounted for as Rock Island Project generation, even though the physical generation occurred at Wanapum Dam." CP at 17. This led the encroachment power to be accounted for as hydropower generated at the Rock Island Project. In 2019, Grant changed to a dynamic schedule, which delivers the same amount of power but does not account for it as hydropower from the

Rock Island Project, but rather as undifferentiated imported power from Grant County. This change prompted the present litigation.

In May 2020, Chelan filed this action for declaratory and injunctive relief, seeking a declaration that Grant was contractually obligated to provide encroachment power from hydropower sources and an injunction preventing Grant from delivering encroachment power from nonhydropower sources.

Chelan argues that only hydropower satisfies Grant's duties under the various agreements. Using language from paragraph 1 of the 1955 Agreement, Chelan argues that Grant must "fully compensate" it for "all loss, damage and expense" sustained by it due to the operation of the Wanapum Dam, and the market value of hydropower is greater than undifferentiated sources. CP at 56. Using language from paragraph 2 of the 1955 Agreement, Chelan additionally argues that the "loss of power and energy" from the Rock Island Project is hydropower and that Grant is required to provide encroachment power that is "equal [to] the power and energy" that would have been available to Chelan if the Wanapum Dam had not been constructed. CP at 56-57.

Grant admits that it delivered some of the encroachment power from hydropower sources, but it denies ever exclusively providing it from hydropower sources. It alleges it has always delivered system power regardless of source. It characterizes the Hourly Coordination Agreement as delivering power from Grant's balancing authority,

"includ[ing] any power purchase contained in or delivered to the Grant BA," rather than the Wanapum Dam specifically. CP at 44. Although Grant admits that hydropower has a higher market value than other forms of power, it claims that this is irrelevant to the parties' agreement, which does not require a particular form of encroachment power to be delivered.

In October 2022, Grant filed a counterclaim for unjust enrichment, asserting that it overdelivered power to Chelan in 2015, and Chelan had only partly reimbursed it. It sought a declaration that it was not required to return hydropower for hydropower, judgment for its unjust enrichment counterclaim, and reasonable attorney fees and costs. Chelan responded that Grant's counterclaim was barred by the three-year statute of limitations.

In early 2023, Grant moved for partial summary judgment. In its motion, it argued that none of the parties' written agreements specified the source of the power to be delivered, only the amount. It also argued that this interpretation comports with the course of performance under the agreements.

Chelan, in opposing Grant's motion, argued that the agreements do not specify the source of the power because the context and circumstances surrounding the agreements made it clear that the only power being discussed was hydropower. To support its position, Chelan included a 2014 e-mail exchange between one of Grant's employees and

one of its employees discussing the 2019 change from a pseudo-tie to a dynamic schedule. Grant's employee wrote, "We plan to implement a dynamic signal. A pseudo-tie would be appropriate if the Encroachment Agreement gave Chelan a slice of [Wanapum]. However, the Agreement only creates an obligation for Grant to deliver certain quantities of energy and capacity, without specifying that they come from [Wanapum]." CP at 325. Chelan's employee responded by saying that "[b]oth Grant and Chelan historically have treated the encroachment power as being sourced from [Wanapum Dam's hydropower] in reports and descriptions of the projects" and characterizing Grant's position as "a significant change from past practices." CP at 324.

Chelan also included evidence that Grant had accounted for its transfer of encroachment power to Chelan by subtracting it from the Wanapum Dam and Priest Rapids Project hydrogeneration. Similarly, in filings with the Federal Energy Regulatory Commission, Grant accounted for the Rock Island encroachment in its Priest Rapids Hydroelectric Project generation.

On February 10, 2023, the trial court denied Grant's motion for summary judgment, concluding that Grant had failed to show that there are no genuine issues of material fact.

On November 20, 2023, Chelan moved for summary judgment. It argued that "the only type of generation equal to that which Chelan could generate at Rock Island in

Wanapum's absence is hydropower. The Parties refer to the hydropower Grant owes Chelan as 'encroachment power.'" CP at 1092. As part of its motion for summary judgment, Chelan included a partial transcript of the deposition of Grant's former general manager Kevin Nordt where he states that "'encroachment' is a term that is used in hydroelectric power." CP at 914. He further indicated that he was not aware of the term being used in relation to other forms of power generation.

In its motion for summary judgment, Chelan also quoted from a joint statement issued by itself and Grant just before signing the 1974 Agreement, which read: "'[I]n accordance with agreements between the two Districts, Wanapum returns on a continuous basis the capacity and energy to keep Rock Island generation equivalent to what the Rock Island Plant could have generated under the same situation had the Wanapum Reservoir not existed.'" CP at 1099. Chelan argued that because Wanapum returns only hydropower, this joint statement confirmed the parties' practice that Grant had always returned hydropower for hydropower.

Chelan also addressed Grant's unjust enrichment claim. It denied owing "Grant anything for the period between July 9, 2014 and August 4, 2014, which constitutes the remaining $376,108.45 that Grant now claims in this lawsuit." CP at 1111. Chelan argued that it was entitled to summary judgment because the three-year statute of limitations had expired.

Grant filed a cross motion for summary judgment. It argued that the agreements, by their plain terms, address only the amount of energy to be delivered and not its source. It also disputed that it had provided exclusively hydropower in the past, arguing instead that the evidence showed it had provided undifferentiated system power. It argued that both entities knew how to draft agreements specifying the source of power but had not done so.

Grant further noted that when the parties began their negotiations in the 1950s, the energy market did not differentiate different sources of power. It was not until the 1990s that a separate market began to emerge for differentiated power sources, such as green energy. Further, it was not until the 2010s that hydropower could be sold for higher prices than undifferentiated power. According to Grant, Washington utilities were not forced to track or care about the generating source of power until the early 2000s.

Grant's opposition to Chelan's summary judgment motion addressed the statute of limitations concerns. It alleged that the parties had been in continuous negotiations over the disputed amount since 2015. It argued that the three-year statute of limitations should be equitably tolled because either Chelan was negotiating in good faith—in which case the claim had not yet accrued—or it was negotiating in bad faith—in which case Grant would meet the requirements to have the statute of limitations equitably tolled.

On January 5, 2024, the trial court granted summary judgment for Chelan. It concluded that the only reasonable interpretation was that Grant had to provide encroachment power from a hydropower source, i.e., hydropower for hydropower. It further concluded that Grant had represented to Chelan and others that the encroachment power was from hydropower sources. It found no genuine issue of material fact about whether the statute of limitations on Grant's unjust enrichment claim had run—it had. Grant appeals the trial court's summary judgment order to this court.

ANALYSIS

We review summary judgment orders de novo and engage in the same analysis as the trial court. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). We consider the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Rinehold v. Renne*, 198 Wn.2d 81, 96, 492 P.3d 154 (2021). Summary judgment is appropriate only if the sworn pleadings submitted with the motion show there is no genuine issue as to any material fact. CR 56(c). A genuine issue of material fact exists when reasonable minds could differ on the facts that control the outcome of the case. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

GRANT'S CONTRACTUAL OBLIGATION

Grant argues the trial court erred by concluding as a matter of law that it was contractually obligated to return hydropower for hydropower. We disagree.

In *GMAC v. Everett Chevrolet, Inc.*, we set forth several principles that govern our review here:

> "The touchstone of contract interpretation is the parties' intent." "Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used."
>
> "An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective." "A court will not read ambiguity into a contract where it can reasonably be avoided."
>
> Whether a contract is ambiguous is a question of law. A contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings. "If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties' intent; if two or more meanings are reasonable, a question of fact is presented." Summary judgment as to a contract interpretation is proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning.

179 Wn. App. 126, 134-35, 317 P.3d 1074 (2014) (footnotes and internal quotation marks omitted) (quoting *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 4-5, 277 P.3d 679 (2012); *Seattle-First Nat'l Bank v. Westlake Park Assocs*., 42 Wn. App. 269, 274, 711 P.2d 361 (1985); *Mayer v. Pierce County Med. Bureau, Inc*., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995); *Martinez v. Kitsap Pub. Servs*., 94 Wn. App. 935, 943, 974 P.2d 1261 (1999)).

In paragraph 1 of the 1955 Agreement, Grant agreed to "fully compensate" Chelan "for all loss, damage and expense" it sustained "by reason of the construction or

operation of" the Wanapum Dam. CP at 56. It is undisputed that the value of hydropower is greater than undifferentiated power—the type of power Grant presently is returning to Chelan. It is further undisputed that Chelan would have had this additional hydropower had Grant not constructed the Wanapum Dam. We conclude, by returning undifferentiated power, which has a lower market value, Grant is not fully compensating Chelan for its "loss, damage and expense." We also conclude that this obligation in the 1955 Agreement is unambiguous.[2]

Grant has two counterarguments why paragraph 1 of the 1955 Agreement is either ambiguous or does not control. Its first counterargument focuses on paragraph 2 of the

[2] A court may consider the actions of the parties after they signed their contract as evidence of their mutual intent at the time of signing. *City of Union Gap v. Printing Press Props., LLC*, 2 Wn. App. 2d 201, 225, 409 P.3d 239 (2018). The 1974 joint statement by the parties, quoted earlier, supports Chelan's argument that the parties had always returned hydropower for hydropower. Grant's counterevidence—about using its own undifferentiated sources—relies either on its early unilateral practice (unknown to Chelan) or on a new practice begun in 2019 and is thus not evidence of the parties' mutual intent at the time they signed the 1955 Agreement.

1955 Agreement.[3] Grant argues that, under this provision, its responsibility is limited to returning to Chelan the same *amount* of power Chelan lost by reason of its construction of the Wanapum Dam. We disagree. In making this argument, Grant ignores paragraph 2's opening phrase, "Without limiting the generality of the foregoing." "Foregoing" means "listed, mentioned, or occurring before." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 490 (11th ed. 2003). Grant's argument requires us to ignore the generality of paragraph 1, which requires Grant to fully compensate Chelan for its loss, damage and expense. We decline to ignore paragraph 2's opening phrase. *See Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) ("An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective."). For this reason, we reject Grant's first counterargument.

[3] For the reader's benefit, we again quote the relevant language of paragraph 2 of the 1955 Agreement:

> *Without limiting the generality of the foregoing*, Grant agrees . . . to compensate . . . Chelan for all loss in the generation of power and energy at the Rock Island Project which shall result from the backwater of the Wanapum Project . . . to the end that the amount of power and energy available to . . . Chelan from the Rock Island Project . . . shall at all times equal the power and energy which would have been available to . . . Chelan at the Rock Island Project in the absence of [the Wanapum Dam].

CP at 56-57 (emphasis added).

Grant's second counterargument focuses on section X of the 1974 Agreement.[4] Grant argues that, under the 1974 Agreement, its 1955 obligation to fully compensate Chelan for any loss, damage and expense became limited to returning undifferentiated power. In making this argument, Grant emphasizes that nothing in the agreement requires encroachment power to be hydropower. Once again, we disagree with Grant. While nothing in the agreement requires encroachment power to be hydropower, nothing in the agreement permits encroachment power to be undifferentiated power. We conclude that nothing in the 1974 Agreement alters Grant's obligation to fully compensate Chelan for all loss, damage and expense.

In summary, the parties' agreements are unambiguous with respect to the present dispute. The 1955 Agreement requires Grant "to fully compensate . . . Chelan . . . for all loss, damage and expense which . . . Chelan . . . shall sustain or incur by reason of the

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[4] For the readers benefit, we again quote the relevant language of section X of the 1974 Agreement:

> The parties intend and agree that the covenants to be performed by Grant under this agreement and performed thereof are accepted by Chelan as full and satisfactory performance of Grant's obligations under the 1955 Agreement. Chelan accepts Grant's covenants herein to deliver Encroachment Power and performance of the covenants herein in lieu of any claim on the part of Chelan for any loss or damage to Chelan or the Existing Plant or Added Plant, arising under the 1955 Agreement, whether such loss or damage relates to loss of power and energy or otherwise without limitation.

CP at 105.

construction or operation of" the Wanapum Dam. CP at 56. We reject Grant's arguments that paragraph 2 of the 1955 Agreement and/or section X of the 1974 Agreement alters its obligations with respect to the present dispute. We affirm the trial court's grant of summary judgment on this issue.

EQUITABLE TOLLING OF GRANT'S COUNTERCLAIM

Grant argues the trial court erred by refusing, as a matter of law, to apply equitable tolling to its 2022 counterclaim that Chelan had been unjustly enriched by not paying for power Grant overdelivered to Chelan in 2014. We disagree.

"General jurisdiction courts have the power, in limited circumstances, to equitably toll a statute of limitations established by the legislature. . . . Given our due regard for the legislature, equitable tolling must be applied sparingly but is available when justice demands it." *Campeau v. Yakima HMA, LLC*, 3 Wn.3d 339, 341, 551 P.3d 1037 (2024) (citation omitted). "'[Washington law] allows equitable tolling [1] when justice requires. The predicates for equitable tolling are [2] bad faith, deception, or false assurances by the defendant and [3] the exercise of diligence by the plaintiff. In Washington equitable tolling is appropriate [4] when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.'" *Fowler v. Guerin*, 200 Wn.2d 110, 119, 515 P.3d 502 (2022) (alterations in original) (quoting *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998)). "The purpose underlying statutes of

limitations is to protect against (1) litigating stale claims, (2) loss of evidence, and (3) fading memories." *Campeau*, 3 Wn.3d at 346. "The party asserting that equitable tolling should apply bears the burden of proof." *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (2009). "Although we give deference to the trial court's factual determinations, we review the decision of whether to grant equitable relief de novo." *Id.*

As to the exercise of diligence by Grant, it is not clear how diligently it worked to resolve the issue. A statement from Grant's former chief executive officer made in a deposition indicated that he was "hoping that the staff was going to continue to work and get [the overdelivery issue] resolved." CP at 1481. At another point in the deposition, he also noted that "in 2016, we were not able to get a resolution. Grant believed this was owed, Chelan said it wasn't, and, again, you know, it was like, well, we're not figuring this out, and my thinking was, well, hopefully at some point in time here we'll be able to get this worked through." CP at 1480. The record does not show significant movement on this issue since 2015 or 2016. Although Grant alleges that the negotiations continued through 2017 and ended sometime between 2017 and 2020, the record does not include these negotiations. *Hoping* that an issue eventually gets resolved is not diligence. Accordingly, given the extraordinary nature of equitable tolling, we cannot conclude that Grant was sufficiently diligent to meet this requirement.

Additionally, it is not clear that Chelan acted in bad faith, nor deceived or falsely assured Grant. The record clearly shows that Chelan did not believe that it owed Grant any payment for an overdelivery. Nevertheless, Chelan retained the disputed liability on its books and tried to negotiate a settlement. We see no evidence of bad faith conduct on Chelan's part, and its bookkeeping entry for such a large potential liability does not appear to be inconsistent with typical business practices.

Given the extraordinary nature of equitable tolling and Grant's failure to adequately show its own diligence or Chelan's bad faith, we conclude, as a matter of law, that Grant has failed to adequately show it is entitled to equitable tolling of its unjust enrichment counterclaim. We conclude that the trial court properly dismissed Grant's counterclaim on summary judgment.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.

Murphy, J.

APPENDIX B

Case No. 40212-6-III

**IN THE COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY,

Respondent,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY,

Appellant.

MOTION TO PUBLISH

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TABLE OF AUTHORITIES

I. IDENTITY AND INTEREST OF MOVING PARTY

This motion is made by Public Utility District No. 1 of Pend Oreille County ("Pend Oreille"). Pend Oreille is not a party to the appeal or proceedings below. Pend Oreille is a non-profit public utility district authorized and governed by Title 54 RCW. Pend Oreille owns and operates electric generation, transmission, and distribution facilities, including hydroelectric projects, primarily to serve its 10,100 retail customers located in Pend Oreille County.

In addition to its owned hydropower-generating assets, Pend Oreille has contractual rights to receive wholesale power, including encroachment power, under various agreements. At least some of those contracts give Pend Oreille the right to receive power from hydroelectric facilities.

The Court's unpublished opinion dated June 10, 2025, in the above-captioned matter (the "Opinion") directly addresses a series of contracts executed between Public Utility District No. 2 of Grant County ("Grant") and Public Utility District No. 1 of

Chelan County ("Chelan"). However, for the reasons identified below, the Opinion addresses, as a matter of first impression, an important issue that affects many similar contracts within the Pacific Northwest – the value of hydropower as a specified product in relation to contract damages. Like many other Washington utilities, Pend Oreille has contracts that will likely be affected by the Court's analysis, and therefore has an interest in the publication of the Opinion.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.3(e), Pend Oreille requests publication of the Court's unpublished Opinion dated June 10, 2025, in the above captioned matter, a copy of which is attached hereto as Appendix A.

III. RELEVANT FACTS TO MOTION

In this appeal, Grant challenged the trial court's summary judgment order construing the parties' contracts in favor of Chelan. Grant and Chelan are parties to a series of contracts that provide for how Grant compensates Chelan for lost power

generation at Chelan's Rock Island Dam due to tailwater encroachment by Grant's Wanapum Dam. *Opinion*, pg. 2-3. Among other things, the parties' 1955 agreement requires Grant "to fully compensate…Chelan…for all loss, damage and expense which [Chelan] shall sustain or incur by reason of the construction or operation of said Priest Rapids Hydroelectric Development or any part thereof…" *Id*. at 2. For decades, Grant accounted for the delivery of encroachment power as hydroelectric generation. *Id.* at 5. However, in 2019, Grant began to deliver encroachment power not as hydropower, "but rather as undifferentiated imported power from Grant County." *Id.* at 5-6.

Chelan sought a declaratory judgment that Grant was required to provide encroachment power from hydroelectric sources. *Id.* at 6. The trial court granted summary judgment for Chelan. *Id.* at 11. The court of appeals affirmed, concluding that the parties' agreement unambiguously required Grant to deliver hydroelectric power in order to fully compensate Chelan for its "loss, damage and expense." *Id.* at 13. As part of its analysis, the

Court correctly found that undifferentiated power (that is, not from a specific, carbon-free source such as hydropower) has a lower market value than hydropower. *Id.*

Similar to Grant and Chelan, Pend Oreille has multiple contracts that may be affected by the Court's analysis in its Opinion. Specifically, Pend Oreille has contracts with the City of Seattle relating to Seattle's Boundary Hydroelectric Project, which lies downstream of Pend Oreille's Box Canyon Hydroelectric Project. Those contracts provide both for encroachment compensation (i.e., Seattle's compensation to Pend Oreille for Boundary Dam's encroachment on Box Canyon Dam), as well as for delivery of power from Boundary Dam to Pend Oreille as historic compensation for preventing Pend Oreille from developing a separate hydroelectric project near Boundary Dam's location.

Both spheres of compensation could be affected by the Court's analysis in its Opinion. Even where contract language and context differ from the facts in the present appeal, the Court's

identification of the increased value of hydropower over undifferentiated power, and corresponding effect on a party's obligation to compensate for "loss, damage and expense," is a determination of first impression in Washington, and as such has valuable precedential effect for similar cases.

Pend Oreille is not alone in having contracts that may be affected by the Opinion. The Federal Energy Regulatory Commission ("FERC") regularly requires its hydroelectric licensees to provide encroachment compensation to affected project owners[1], pursuant to FERC's authority under Section 10(c) of the Federal Power Act.[2] And certainly other utilities may have legacy wholesale contracts that could benefit from the

[1] *E.g.*, *Pub. Util. Dist. No. 1 of Douglas Cnty., Wash.*, 141 FERC ¶ 62,104 (2012) (requiring Douglas PUD to compensate for encroachment on the upstream Chief Joseph Project).

[2] "…Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor." 16 U.S.C. § 803(c).

Court's Opinion.

IV. GROUNDS FOR PUBLICATION AND ARGUMENT

Pursuant to RAP 12.3(e), publication of the Opinion is necessary because it "determines an unsettled or new question of law" and "is a decision of general public interest or importance." RAP 12.3(e).

The Opinion determines an unsettled or new question of law since it determines, as a matter of first impression in Washington, that the value of hydropower (as distinguished from "undifferentiated power as discussed in the Opinion) may be considered in a contract requiring one party to compensate another for the "loss, damage and expense" associated with lost power production. To Pend Oreille's knowledge, no other case addresses this issue in the context of wholesale or encroachment power contracts between Washington utilities. Because the Opinion articulates this point as a matter of first impression, the Opinion has precedential effect and makes publication

appropriate and helpful for future litigants. *See* RAP 12.3(e); *see also LaPlant v. Snohomish Cnty.*, 162 Wn. App. 476, 483, 271 P.3d 254 (2011) (a finding that the opinion will be of precedential value was grounds to grant a motion to publish).

The Opinion also presents a decision of general public interest and importance. The Pacific Northwest is largely powered with hydroelectricity, which represents the single greatest fuel type serving Washington consumers. [3] And contractual rights to receive hydropower are increasingly important given the state's efforts to rapidly decarbonize the electric sector. In 2019, the Washington State Legislature enacted the Clean Energy Transformation Act ("CETA"). [4] Among other things, CETA requires all electric utilities to be 100 percent greenhouse gas neutral by January 1, 2030. RCW

[3] Washington State Department of Commerce, *Fuel Mix Disclosure* (May 21, 2025), https://www.commerce.wa.gov/energy-policy/electricity-policy/fuel-mix-disclosure/.
[4] Laws of 2019, ch. 28 (codified at chapter 19.405 RCW).

19.405.040(1). To comply with this requirement, utilities must serve their loads with renewable resources and nonemitting electric generation, which includes hydropower. RCW 19.405.040(1)(a); RCW 19.405.020(33). As such, and as the Court correctly noted in the Opinion, the value of hydropower is greater than undifferentiated power. With a multitude of regional contracts addressing the delivery of hydropower, there are certainly other contract parties that will be benefitted by having the Court's analysis in interpreting and understanding their rights and obligations.

Just like Chelan, Pend Oreille has contractual rights to receive hydropower under several of its wholesale and encroachment agreements. If those rights are ever put in jeopardy, the Court's Opinion will serve as helpful precedent in interpreting and applying contract language.

For the foregoing reasons, Pend Oreille requests the Court grant its Motion for Publication.

//

V. CONCLUSION

The Opinion delivered by this Court will be helpful for other contract parties – including Pend Oreille – in analyzing the value of hydropower in legacy agreements. Since it addresses this as a matter of first impression in Washington, and is a decision of general public interest and importance, it has precedential value. Thus, the Opinion should be published in accordance with RAP 12.3(e).

I certify that this Motion to Publish contains 1398 words and is in compliance with RAP 18.17.

Respectfully submitted this 30th day of June 2025.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

I hereby certify that on June 30, 2025, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants in this case who are registered eportal users will be served by the appellant system.

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APPENDIX

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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, a municipal corporation, Respondent, v. PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, a municipal corporation, Appellant.	)	No. 40212-6-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Public Utility District No. 2 of Grant County (Grant) appeals the trial court's summary judgment order construing the parties' contracts in favor of Public Utility District No. 1 of Chelan County (Chelan). We conclude there is no genuine issue of material fact, that the 1955 agreement between the parties unambiguously requires Grant to fully compensate Chelan for all loss, damage, and expense Chelan sustains by reason of Grant's construction of the Wanapum Dam and, in the context of this dispute, requires Grant to return hydropower for hydropower. We further conclude that Grant's unjust enrichment counterclaim against Chelan is barred by the three-year statute of limitations and that the period of limitations should not be equitably tolled. We affirm the trial court's summary judgment order.

FACTS

Grant and Chelan are two public utility districts located in the mid-Columbia River basin, and both own and operate hydroelectric dams. In 1955, Grant proposed to construct two hydroelectric dams, termed the "Priest Rapids Hydroelectric Development," downstream from Chelan's existing Rock Island Dam. Clerk's Papers (CP) at 11-12. Grant's construction of the upper dam, Wanapum Dam, would encroach on the tailwaters of Chelan's upstream Rock Island Dam, reducing that dam's capacity to generate power. To facilitate regulatory approval for its new project, Grant agreed to fully compensate Chelan. The agreement, referred to as the "1955 Agreement," provides in relevant part:

> 1. Grant agrees to fully compensate Puget[1] and Chelan and each of them or their successors in interest in the Rock Island Project for all loss, damage and expense which Puget and Chelan or either of them or their successors in interest in the Rock Island Project shall sustain or incur by reason of the construction or operation of said Priest Rapids Hydroelectric Development or any part thereof. . . .
>
> 2. Without limiting the generality of the foregoing, Grant agrees regarding loss of power and energy, to compensate Puget and Chelan for all loss in the generation of power and energy at the Rock Island Project which shall result from the backwater of the Wanapum Project . . . to the end that the amount of power and energy available to Puget and Chelan from the Rock Island Project . . . shall at all times equal the power and energy which would have been available to Puget and Chelan at the Rock Island Project in the absence of said Priest Rapids Hydroelectric Development.

[1] Puget Sound Power & Light Company co-owned the Rock Island Project with Chelan until Chelan purchased its interest in early 1956.

Clerk's Papers (CP) at 56-57. The agreement does not state the source of power, hydropower or otherwise, that Grant is required to return to Chelan.

Grant and Chelan later entered into the "1967 Agreement." CP at 60. This agreement established how the encroachment losses at the Rock Island Project would be calculated and how Grant would deliver replacement power to Chelan. The 1967 Agreement provides that "[n]othing contained in this agreement shall be construed as altering, amending or abrogating in any manner the agreement of August 8, 1955, . . . and said agreement shall be and remain in full force and effect." CP at 68. Although the agreement explains in great detail how the amount of return power will be calculated, it likewise does not state the source of power that Grant is required to return to Chelan.

In 1973, Chelan sought to add a second powerhouse to the Rock Island Project. This caused a dispute between Grant and Chelan about the second powerhouse's effect on the 1967 Agreement. They entered into the "1974 Agreement," wherein Grant agreed to compensate Chelan for the total power loss at the first powerhouse and one-half of the power loss at the second powerhouse. CP at 15, 99. The 1974 Agreement terminated the 1967 Agreement, but not the 1955 Agreement.

The 1974 Agreement reads in relevant part:

RECITALS

. . . .

7. Grant and Chelan have long been in disagreement as to the proper interpretation of the 1955 Agreement, Grant contending that the agreement was intended to indemnify for loss only at Rock Island as it existed in 1955, and Chelan contending that the agreement was intended to indemnify for loss resulting to any expanded project as well as the project as it existed in 1955. . . .

. . . .

9. In order to resolve the dispute between them and to resolve all present and future controversy relative to this matter between them, the parties enter into this agreement.

. . . .

SECTION II—DEFINITIONS

. . . .

(d) Encroachment Power shall mean the electrical capacity and energy due to Chelan from Grant under the provisions of this agreement.

. . . .

SECTION V—DETERMINATION OF AMOUNTS OF ENCROACHMENT POWER

[T]he amount of Encroachment Power which is to be delivered to Chelan simultaneously with the loss of power and energy by reason of encroachment shall be computed and determined according to the principles and formula set forth in Exhibit "A". Encroachment power will be computed and delivered on operable units only.

. . . .

SECTION IX—EFFECT ON 1967 AGREEMENT

> This agreement is intended to fully supersede and replace the 1967 Agreement when Chelan has installed and made operable one or more generating units in the Added Plant . . . .

SECTION X—EFFECT ON 1955 AGREEMENT

> The parties intend and agree that the covenants to be performed by Grant under this agreement and performance thereof are accepted by Chelan as full and satisfactory performance of Grant's obligations under the 1955 Agreement. Chelan accepts Grant's covenants herein to deliver Encroachment Power and performance of the covenants herein in lieu of any claim on the part of Chelan for any loss or damage to Chelan or the Existing Plant or Added Plant, arising under the 1955 Agreement, whether such loss or damage relates to loss of power and energy or otherwise without limitation.

CP at 99-105. Like the 1955 and 1967 Agreements, the 1974 Agreement does not state the source of power, hydropower or otherwise, that Grant was required to return to Chelan.

From 1973 until 2019, the parties accounted for and organized the delivery of encroachment power through an "Hourly Coordination Agreement." CP at 17, 1104. Under this agreement, "the encroachment power was accounted for as Rock Island Project generation, even though the physical generation occurred at Wanapum Dam." CP at 17. This led the encroachment power to be accounted for as hydropower generated at the Rock Island Project. In 2019, Grant changed to a dynamic schedule, which delivers the same amount of power but does not account for it as hydropower from the

Rock Island Project, but rather as undifferentiated imported power from Grant County. This change prompted the present litigation.

In May 2020, Chelan filed this action for declaratory and injunctive relief, seeking a declaration that Grant was contractually obligated to provide encroachment power from hydropower sources and an injunction preventing Grant from delivering encroachment power from nonhydropower sources.

Chelan argues that only hydropower satisfies Grant's duties under the various agreements. Using language from paragraph 1 of the 1955 Agreement, Chelan argues that Grant must "fully compensate" it for "all loss, damage and expense" sustained by it due to the operation of the Wanapum Dam, and the market value of hydropower is greater than undifferentiated sources. CP at 56. Using language from paragraph 2 of the 1955 Agreement, Chelan additionally argues that the "loss of power and energy" from the Rock Island Project is hydropower and that Grant is required to provide encroachment power that is "equal [to] the power and energy" that would have been available to Chelan if the Wanapum Dam had not been constructed. CP at 56-57.

Grant admits that it delivered some of the encroachment power from hydropower sources, but it denies ever exclusively providing it from hydropower sources. It alleges it has always delivered system power regardless of source. It characterizes the Hourly Coordination Agreement as delivering power from Grant's balancing authority,

"includ[ing] any power purchase contained in or delivered to the Grant BA," rather than the Wanapum Dam specifically. CP at 44. Although Grant admits that hydropower has a higher market value than other forms of power, it claims that this is irrelevant to the parties' agreement, which does not require a particular form of encroachment power to be delivered.

In October 2022, Grant filed a counterclaim for unjust enrichment, asserting that it overdelivered power to Chelan in 2015, and Chelan had only partly reimbursed it. It sought a declaration that it was not required to return hydropower for hydropower, judgment for its unjust enrichment counterclaim, and reasonable attorney fees and costs. Chelan responded that Grant's counterclaim was barred by the three-year statute of limitations.

In early 2023, Grant moved for partial summary judgment. In its motion, it argued that none of the parties' written agreements specified the source of the power to be delivered, only the amount. It also argued that this interpretation comports with the course of performance under the agreements.

Chelan, in opposing Grant's motion, argued that the agreements do not specify the source of the power because the context and circumstances surrounding the agreements made it clear that the only power being discussed was hydropower. To support its position, Chelan included a 2014 e-mail exchange between one of Grant's employees and

one of its employees discussing the 2019 change from a pseudo-tie to a dynamic schedule. Grant's employee wrote, "We plan to implement a dynamic signal. A pseudo-tie would be appropriate if the Encroachment Agreement gave Chelan a slice of [Wanapum]. However, the Agreement only creates an obligation for Grant to deliver certain quantities of energy and capacity, without specifying that they come from [Wanapum]." CP at 325. Chelan's employee responded by saying that "[b]oth Grant and Chelan historically have treated the encroachment power as being sourced from [Wanapum Dam's hydropower] in reports and descriptions of the projects" and characterizing Grant's position as "a significant change from past practices." CP at 324.

Chelan also included evidence that Grant had accounted for its transfer of encroachment power to Chelan by subtracting it from the Wanapum Dam and Priest Rapids Project hydrogeneration. Similarly, in filings with the Federal Energy Regulatory Commission, Grant accounted for the Rock Island encroachment in its Priest Rapids Hydroelectric Project generation.

On February 10, 2023, the trial court denied Grant's motion for summary judgment, concluding that Grant had failed to show that there are no genuine issues of material fact.

On November 20, 2023, Chelan moved for summary judgment. It argued that "the only type of generation equal to that which Chelan could generate at Rock Island in

Wanapum's absence is hydropower. The Parties refer to the hydropower Grant owes Chelan as 'encroachment power.'" CP at 1092. As part of its motion for summary judgment, Chelan included a partial transcript of the deposition of Grant's former general manager Kevin Nordt where he states that "'encroachment' is a term that is used in hydroelectric power." CP at 914. He further indicated that he was not aware of the term being used in relation to other forms of power generation.

In its motion for summary judgment, Chelan also quoted from a joint statement issued by itself and Grant just before signing the 1974 Agreement, which read: "'[I]n accordance with agreements between the two Districts, Wanapum returns on a continuous basis the capacity and energy to keep Rock Island generation equivalent to what the Rock Island Plant could have generated under the same situation had the Wanapum Reservoir not existed.'" CP at 1099. Chelan argued that because Wanapum returns only hydropower, this joint statement confirmed the parties' practice that Grant had always returned hydropower for hydropower.

Chelan also addressed Grant's unjust enrichment claim. It denied owing "Grant anything for the period between July 9, 2014 and August 4, 2014, which constitutes the remaining $376,108.45 that Grant now claims in this lawsuit." CP at 1111. Chelan argued that it was entitled to summary judgment because the three-year statute of limitations had expired.

Grant filed a cross motion for summary judgment. It argued that the agreements, by their plain terms, address only the amount of energy to be delivered and not its source. It also disputed that it had provided exclusively hydropower in the past, arguing instead that the evidence showed it had provided undifferentiated system power. It argued that both entities knew how to draft agreements specifying the source of power but had not done so.

Grant further noted that when the parties began their negotiations in the 1950s, the energy market did not differentiate different sources of power. It was not until the 1990s that a separate market began to emerge for differentiated power sources, such as green energy. Further, it was not until the 2010s that hydropower could be sold for higher prices than undifferentiated power. According to Grant, Washington utilities were not forced to track or care about the generating source of power until the early 2000s.

Grant's opposition to Chelan's summary judgment motion addressed the statute of limitations concerns. It alleged that the parties had been in continuous negotiations over the disputed amount since 2015. It argued that the three-year statute of limitations should be equitably tolled because either Chelan was negotiating in good faith—in which case the claim had not yet accrued—or it was negotiating in bad faith—in which case Grant would meet the requirements to have the statute of limitations equitably tolled.

On January 5, 2024, the trial court granted summary judgment for Chelan. It concluded that the only reasonable interpretation was that Grant had to provide encroachment power from a hydropower source, i.e., hydropower for hydropower. It further concluded that Grant had represented to Chelan and others that the encroachment power was from hydropower sources. It found no genuine issue of material fact about whether the statute of limitations on Grant's unjust enrichment claim had run—it had. Grant appeals the trial court's summary judgment order to this court.

ANALYSIS

We review summary judgment orders de novo and engage in the same analysis as the trial court. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). We consider the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Rinehold v. Renne*, 198 Wn.2d 81, 96, 492 P.3d 154 (2021). Summary judgment is appropriate only if the sworn pleadings submitted with the motion show there is no genuine issue as to any material fact. CR 56(c). A genuine issue of material fact exists when reasonable minds could differ on the facts that control the outcome of the case. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

GRANT'S CONTRACTUAL OBLIGATION

Grant argues the trial court erred by concluding as a matter of law that it was contractually obligated to return hydropower for hydropower. We disagree.

In *GMAC v. Everett Chevrolet, Inc.*, we set forth several principles that govern our review here:

> "The touchstone of contract interpretation is the parties' intent." "Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used."
>
> "An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective." "A court will not read ambiguity into a contract where it can reasonably be avoided."
>
> Whether a contract is ambiguous is a question of law. A contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings. "If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties' intent; if two or more meanings are reasonable, a question of fact is presented." Summary judgment as to a contract interpretation is proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning.

179 Wn. App. 126, 134-35, 317 P.3d 1074 (2014) (footnotes and internal quotation marks omitted) (quoting *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 4-5, 277 P.3d 679 (2012); *Seattle-First Nat'l Bank v. Westlake Park Assocs*., 42 Wn. App. 269, 274, 711 P.2d 361 (1985); *Mayer v. Pierce County Med. Bureau, Inc*., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995); *Martinez v. Kitsap Pub. Servs*., 94 Wn. App. 935, 943, 974 P.2d 1261 (1999)).

In paragraph 1 of the 1955 Agreement, Grant agreed to "fully compensate" Chelan "for all loss, damage and expense" it sustained "by reason of the construction or

operation of" the Wanapum Dam. CP at 56. It is undisputed that the value of hydropower is greater than undifferentiated power—the type of power Grant presently is returning to Chelan. It is further undisputed that Chelan would have had this additional hydropower had Grant not constructed the Wanapum Dam. We conclude, by returning undifferentiated power, which has a lower market value, Grant is not fully compensating Chelan for its "loss, damage and expense." We also conclude that this obligation in the 1955 Agreement is unambiguous.[2]

Grant has two counterarguments why paragraph 1 of the 1955 Agreement is either ambiguous or does not control. Its first counterargument focuses on paragraph 2 of the

[2] A court may consider the actions of the parties after they signed their contract as evidence of their mutual intent at the time of signing. *City of Union Gap v. Printing Press Props., LLC*, 2 Wn. App. 2d 201, 225, 409 P.3d 239 (2018). The 1974 joint statement by the parties, quoted earlier, supports Chelan's argument that the parties had always returned hydropower for hydropower. Grant's counterevidence—about using its own undifferentiated sources—relies either on its early unilateral practice (unknown to Chelan) or on a new practice begun in 2019 and is thus not evidence of the parties' mutual intent at the time they signed the 1955 Agreement.

1955 Agreement.[3] Grant argues that, under this provision, its responsibility is limited to returning to Chelan the same *amount* of power Chelan lost by reason of its construction of the Wanapum Dam. We disagree. In making this argument, Grant ignores paragraph 2's opening phrase, "Without limiting the generality of the foregoing." "Foregoing" means "listed, mentioned, or occurring before." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 490 (11th ed. 2003). Grant's argument requires us to ignore the generality of paragraph 1, which requires Grant to fully compensate Chelan for its loss, damage and expense. We decline to ignore paragraph 2's opening phrase. *See Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) ("An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective."). For this reason, we reject Grant's first counterargument.

[3] For the reader's benefit, we again quote the relevant language of paragraph 2 of the 1955 Agreement:

> *Without limiting the generality of the foregoing*, Grant agrees . . . to compensate . . . Chelan for all loss in the generation of power and energy at the Rock Island Project which shall result from the backwater of the Wanapum Project . . . to the end that the amount of power and energy available to . . . Chelan from the Rock Island Project . . . shall at all times equal the power and energy which would have been available to . . . Chelan at the Rock Island Project in the absence of [the Wanapum Dam].

CP at 56-57 (emphasis added).

Grant's second counterargument focuses on section X of the 1974 Agreement.[4] Grant argues that, under the 1974 Agreement, its 1955 obligation to fully compensate Chelan for any loss, damage and expense became limited to returning undifferentiated power. In making this argument, Grant emphasizes that nothing in the agreement requires encroachment power to be hydropower. Once again, we disagree with Grant. While nothing in the agreement requires encroachment power to be hydropower, nothing in the agreement permits encroachment power to be undifferentiated power. We conclude that nothing in the 1974 Agreement alters Grant's obligation to fully compensate Chelan for all loss, damage and expense.

In summary, the parties' agreements are unambiguous with respect to the present dispute. The 1955 Agreement requires Grant "to fully compensate . . . Chelan . . . for all loss, damage and expense which . . . Chelan . . . shall sustain or incur by reason of the

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[4] For the readers benefit, we again quote the relevant language of section X of the 1974 Agreement:

> The parties intend and agree that the covenants to be performed by Grant under this agreement and performed thereof are accepted by Chelan as full and satisfactory performance of Grant's obligations under the 1955 Agreement. Chelan accepts Grant's covenants herein to deliver Encroachment Power and performance of the covenants herein in lieu of any claim on the part of Chelan for any loss or damage to Chelan or the Existing Plant or Added Plant, arising under the 1955 Agreement, whether such loss or damage relates to loss of power and energy or otherwise without limitation.

CP at 105.

construction or operation of" the Wanapum Dam. CP at 56. We reject Grant's arguments that paragraph 2 of the 1955 Agreement and/or section X of the 1974 Agreement alters its obligations with respect to the present dispute. We affirm the trial court's grant of summary judgment on this issue.

EQUITABLE TOLLING OF GRANT'S COUNTERCLAIM

Grant argues the trial court erred by refusing, as a matter of law, to apply equitable tolling to its 2022 counterclaim that Chelan had been unjustly enriched by not paying for power Grant overdelivered to Chelan in 2014. We disagree.

"General jurisdiction courts have the power, in limited circumstances, to equitably toll a statute of limitations established by the legislature. . . . Given our due regard for the legislature, equitable tolling must be applied sparingly but is available when justice demands it." *Campeau v. Yakima HMA, LLC*, 3 Wn.3d 339, 341, 551 P.3d 1037 (2024) (citation omitted). "'[Washington law] allows equitable tolling [1] when justice requires. The predicates for equitable tolling are [2] bad faith, deception, or false assurances by the defendant and [3] the exercise of diligence by the plaintiff. In Washington equitable tolling is appropriate [4] when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.'" *Fowler v. Guerin*, 200 Wn.2d 110, 119, 515 P.3d 502 (2022) (alterations in original) (quoting *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998)). "The purpose underlying statutes of

limitations is to protect against (1) litigating stale claims, (2) loss of evidence, and (3) fading memories." *Campeau*, 3 Wn.3d at 346. "The party asserting that equitable tolling should apply bears the burden of proof." *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (2009). "Although we give deference to the trial court's factual determinations, we review the decision of whether to grant equitable relief de novo." *Id.*

As to the exercise of diligence by Grant, it is not clear how diligently it worked to resolve the issue. A statement from Grant's former chief executive officer made in a deposition indicated that he was "hoping that the staff was going to continue to work and get [the overdelivery issue] resolved." CP at 1481. At another point in the deposition, he also noted that "in 2016, we were not able to get a resolution. Grant believed this was owed, Chelan said it wasn't, and, again, you know, it was like, well, we're not figuring this out, and my thinking was, well, hopefully at some point in time here we'll be able to get this worked through." CP at 1480. The record does not show significant movement on this issue since 2015 or 2016. Although Grant alleges that the negotiations continued through 2017 and ended sometime between 2017 and 2020, the record does not include these negotiations. *Hoping* that an issue eventually gets resolved is not diligence. Accordingly, given the extraordinary nature of equitable tolling, we cannot conclude that Grant was sufficiently diligent to meet this requirement.

Additionally, it is not clear that Chelan acted in bad faith, nor deceived or falsely assured Grant. The record clearly shows that Chelan did not believe that it owed Grant any payment for an overdelivery. Nevertheless, Chelan retained the disputed liability on its books and tried to negotiate a settlement. We see no evidence of bad faith conduct on Chelan's part, and its bookkeeping entry for such a large potential liability does not appear to be inconsistent with typical business practices.

Given the extraordinary nature of equitable tolling and Grant's failure to adequately show its own diligence or Chelan's bad faith, we conclude, as a matter of law, that Grant has failed to adequately show it is entitled to equitable tolling of its unjust enrichment counterclaim. We conclude that the trial court properly dismissed Grant's counterclaim on summary judgment.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.

Murphy, J.

GORDON TILDEN THOMAS CORDELL LLP

July 10, 2025 - 3:30 PM

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