

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Petitioner-Respondent
on Review,

v.

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

Respondents,

and

THE CITY OF COTTAGE GROVE,
an Oregon municipal corporation,

Respondent-Petitioner
on Review.

Supreme Court No. S062036

CA No. 147071

Water Resources Department Case
No. S42117

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

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

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

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PETITIONER-ON-REVIEWCITYOFCOTTAGEGROVE’S
BRIEFONTHEMERITS

I. INTRODUCTION

Between 1977 and 1999, petitioner-on-review City of Cottage Grove (“Cottage Grove” or “the City”) undertook development of municipal water works that would enable it to divert 6.2 cubic feet per second (cfs) of water from the Row River after completion of the project. Cottage Grove’s development was authorized by a “water right permit” that the Oregon Water Resources Department (“OWRD”) issued to it. The City’s water right permit included a timeline within which Cottage Grove was to complete construction of the project and diversion of the full 6.2 cfs that the permit allowed, but OWRD had statutory authority to extend that timeline. OWRD did so on several occasions prior to 1999.¹

In 1999, due to then-existing circumstances, Cottage Grove ordinarily would have sought another extension of its development timeline. However, at that time, OWRD had suspended processing extension requests and was not requiring municipal permit holders like

¹ The present case does not involve any issue concerning the propriety of OWRD’s grant of the various extensions of time prior to its final extension order, granted on September 14, 2010, that is at issue in this case.

Cottage Grove to seek such extensions. OWRD ultimately granted Cottage Grove an additional extension of time on September 14, 2010, after a contested case proceeding.

By the time of the September 2010 extension, Cottage Grove already had completed construction of its municipal water works and had diverted the full 6.2 cfs of water contemplated by its permit. In other words, when OWRD granted Cottage Grove's extension, there was no additional water left to appropriate under Cottage Grove's permit; Cottage Grove already was diverting the full amount of water allowed under its permit, and it was not seeking to appropriate any additional amount of water following the extension.

In view of those circumstances, OWRD determined that certain then-recently-enacted statutory conditions—now codified at ORS 537.230(2)(b) and (c)—did not apply to, and therefore did not need to be considered in connection with, Cottage Grove's extension. OWRD reasoned that those conditions apply only when an extension entails future appropriation, following an extension, of additional amounts of water under a water right permit.

At approximately the same time, and because it had appropriated all of the water that its permit authorized, Cottage Grove also requested and received from OWRD a “water right certificate” that memorialized Cottage Grove’s right to divert 6.2 cfs of water from the Row River, without imposing any conditions relating to ORS 537.230(2)(b) and (c).

This case arises out of a judicial review proceeding initiated by respondent-on-review WaterWatch of Oregon, Inc. (“WaterWatch”), pursuant to ORS 183.482,² in which WaterWatch challenged only OWRD’s *extension order*. Neither WaterWatch nor any other party timely challenged the issuance of Cottage Grove’s water right certificate.

On judicial review to the Court of Appeals, WaterWatch argued that OWRD should have imposed the conditions described in ORS 537.230(2)(b) and (c) in issuing Cottage Grove’s extension order. WaterWatch’s argument was premised on the contention that, in granting an extension, OWRD should not consider the amount of water that a municipality has actually appropriated for municipal use at the time that OWRD decides to grant the extension. Rather, WaterWatch asserted,

² ORS 183.482(1) provides that “[j]urisdiction for judicial review of contested cases is conferred upon the Court of Appeals.”

OWRD should look back to the degree of appropriation that existed at the time of the last expiration date and impose conditions based on *that* degree of appropriation, the logical conclusion of that argument being that OWRD would impose new conditions on a municipality's use of water already actually appropriated for municipal use.

Cottage Grove asked the Court of Appeals to reject WaterWatch's challenge to OWRD's extension order for two independent reasons. The first reason lies in the wording of ORS 537.270: Under that statute, a water right certificate that is not timely challenged is deemed "conclusive evidence of the * * * extent of the appropriation therein described in any proceeding in any court or tribunal of the state[.]" Because neither WaterWatch nor any other party timely challenged Cottage Grove's water right certificate, Cottage Grove contended that that certificate supplied "conclusive evidence" in this judicial review proceeding of Cottage Grove's right to divert 6.2 cfs of water from the Row River free from the conditions in ORS 537.230(2)(b) and (c), and WaterWatch's challenge to OWRD's extension order was therefore moot.

Second, Cottage Grove argued that, even if this case remained justiciable notwithstanding Cottage Grove's water right certificate,

OWRD did not err in concluding that the conditions in ORS 537.230(2)(b) and (c) do not apply to Cottage Grove’s extension. Instead, Cottage Grove asserted, OWRD correctly determined that those conditions apply only where an extension entails future construction to appropriate—*following the extension*—additional water authorized by the permit. Cottage Grove’s extension entailed no such future appropriation.

The Court of Appeals rejected both of the City’s arguments. As an initial matter, the Court of Appeals held that this case was not moot, concluding both that ORS 537.270 posed no impediment to WaterWatch’s challenge and that the Court of Appeals’ jurisdiction under OWRD’s extension order also gave it jurisdiction to vacate Cottage Grove’s water right certificate.³ *WaterWatch of Oregon, Inc. v. Water Resources Dept.*, 259 Or App 717, 731-32 (2013). On the merits, the Court of Appeals held that OWRD had erred in failing to apply the conditions in ORS 537.230(2)(b) and (c) to Cottage Grove’s extension. *Id.* at 742. For

³ As noted, OWRD’s extension order was a contested case order subject to judicial review pursuant to ORS 183.482. Cottage Grove’s water right certificate was an order in other than a contested case and, as explained in greater detail below, was subject to different jurisdictional requirements for judicial review set out in a different statute, ORS 183.484.

the reasons that follow, the Court of Appeals in so holding acted without jurisdiction and contrary to the legislature's intent. The Court of Appeals decision should therefore be reversed.

II. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Question One: ORS 537.250 requires OWRD to issue a water right certificate if OWRD is “satisf[ie]d that an appropriation [of water] has been perfected in accordance with the provisions of the Water Rights Act.” ORS 537.270, in turn, provides that a water right certificate issued “in accordance with the provisions of ORS 537.250” is, if not timely challenged, “conclusive evidence of the priority and extent of the appropriation therein described in any proceeding in any court or tribunal of this state[.]” Here, OWRD issued Cottage Grove a water right certificate because it was satisfied that Cottage Grove had perfected its appropriation in accordance with the provisions of the Water Rights Act. Is Cottage Grove’s water right certificate conclusive evidence of the extent of Cottage Grove’s appropriation, rendering this litigation moot?

Proposed Rule of Law: A water right certificate that is not timely challenged supplies conclusive evidence of the extent of the holder’s water

right, ORS 537.270, and cannot be collaterally attacked in any judicial proceeding, including this challenge to OWRD's extension order.

Question Two: ORS 183.482 grants the Court of Appeals jurisdiction to review agency contested case orders; another statute, ORS 183.486, sets out the scope of relief that the Court of Appeals may provide in reviewing, among other things, a contested case order properly before the Court pursuant to ORS 183.482. In providing in ORS 183.486(1)(b) that the Court of Appeals may grant "ancillary relief [that it] finds necessary" in a proceeding under ORS 183.482, did the legislature intend to allow the Court of Appeals to reach beyond the contested case order over which the Court had jurisdiction and assess the legal validity of other orders over which the Court lacked jurisdiction?

Proposed Rule of Law: ORS 183.486 articulates the scope of relief that a reviewing court may provide in a case in which the reviewing court already has properly obtained jurisdiction. ORS 183.486 does not provide a basis, on judicial review of a contested case order under ORS 183.482, to judicially review an order in other than a contested case where the jurisdictional requisites of ORS 183.484 have not been satisfied.

Question Three: ORS 537.230(2)(b) requires OWRD to place certain conditions on an extension of time to complete development under a water-right permit if the extension entails diversion of water “beyond the maximum rate diverted for beneficial use *before the extension.*”

(Emphasis added.) Did the legislature intend the phrase “before the extension” to refer to the time before the prior extension (if any) expired, or to the time before OWRD decides the current extension request?

Question Four: ORS 537.230(2)(c) requires OWRD to apply conditions to “the undeveloped portion of the [water-right] permit” at the time OWRD grants an extension of time. Did the legislature intend “the undeveloped portion of the permit” to refer to the undeveloped portion at the time that the prior extension (if any) expired, or the time when OWRD decides the current extension request?

Combined Proposed Rules of Law: The text, context, and legislative history of ORS 537.230(2)(b) and (c) show that the legislature intended OWRD to consider and apply the conditions in those subsections only to future appropriation of water under a water right permit following OWRD’s grant of an extension application.

III. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

A. Background regarding Oregon’s Water Rights Act

Before addressing the specific historical and procedural facts involved in this case, it is helpful to review generally the statutory framework that governs Oregon municipalities like Cottage Grove in appropriating water resources for municipal use.

All water within the State of Oregon, from whatever source, is owned by the public and may be appropriated only in accordance with the provisions of Oregon’s Water Rights Act. ORS 537.110 and ORS 537.120. As a general matter, persons or entities—including municipalities—seeking to appropriate public water resources must obtain a “water right permit.” *See* ORS 537.211 (describing water right permits). A water right permit authorizes the permit holder to divert a defined flow of water from a water source. *Id.*

The water right permit also sets out a length of time in which the permit holder must construct any proposed water works necessary to accomplish the diversion authorized by the permit. *Id.* Holders of permits authorizing the appropriation of water for municipal uses initially have 20 years within which to “commence and complete the construction of any

proposed works.” ORS 537.230(2). That 20-year deadline to complete construction is not an absolute one, however; OWRD “may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit[.]” *Id.*

Significantly, no provision of the Water Rights Act requires water right permit holders to seek extensions of time in advance of the expiration date of a permit or a prior extension order. Neither does any provision of the Water Rights Act mandate timelines within which OWRD must decide requests for extensions of time. Instead, the Water Rights Act provides that OWRD “*may*, after 60 days’ notice * * * order the cancellation of” a water right permit if “the time within which any appropriation under a permit should have been perfected has expired and the owner of the permit fails or refuses within three months thereafter to submit to [OWRD] proof of completion of the appropriation * * *.” ORS 537.260(1) (emphasis added). In other words, OWRD has *discretion* to cancel a permit if an appropriation has not been completed and perfected timely, but it is not *required* to do so. *Id.*⁴

⁴ This case does not provide this court any occasion to decide whether the cancellation provisions in ORS 537.260(1) apply to water

Once a permit holder has completed construction of the proposed works and has actually diverted the flow of water contemplated by the permit, the permit holder may seek a “water right certificate” from OWRD. *See* ORS 537.250(1) (describing issuance of water right certificate). OWRD “*shall* issue” a water right certificate if it receives “a request for issuance of a water right certificate accompanied by the survey required under ORS 537.230(4) that shows, to the satisfaction of [OWRD], that an appropriation has been perfected in accordance with the provisions of the Water Rights Act.” *Id.* (emphasis added). Among other things, a water right certificate sets out the “extent * * * of the right” of the certificate holder. ORS 539.140.

The legislature has taken steps to ensure the finality of water right certificates. Specifically, ORS 537.270 expressly insulates from collateral attack “the priority and extent” of the water right described in a water right certificate. That statute provides:

“A water right certificate issued in accordance with the provisions of ORS 537.250 which, after the expiration of three months from the date it is issued, has not been contested and canceled in the manner provided in ORS 537.260 * * * *shall be conclusive evidence of the priority and extent of the*

right permits for municipal use.

appropriation therein described in any proceeding in any court or tribunal of the state, except in those cases where the rights of appropriation thereby described have been abandoned subsequent to issuance of the certificate.”

(Emphasis added.) Finally, it must be noted that there is no dispute in this case that a water right certificate is an order in other than a contested case, and therefore is subject to judicial review pursuant only to the provisions of ORS 183.484.

B. Cottage Grove’s Water Right Permit and Development of its Municipal Water Works

With the foregoing statutory framework in mind, Cottage Grove turns to the specific facts in this case. On November 14, 1977, Cottage Grove obtained a water right permit for municipal use.⁵ (Rec 826-33, 903, 1189.) That permit authorized Cottage Grove to construct municipal water works sufficient to divert 6.2 cfs of water from the Row River. (*Id.*) Between 1977 and 1999, Cottage Grove obtained extensions of time in which to continue construction of that proposed municipal water works. (*See id.* at 826-33, 1189.)

⁵ Cottage Grove states the facts consistently with the findings of fact, which WaterWatch has not challenged, set out in OWRD’s final order. *See Meltebeke v. Bureau of Labor & Indus.*, 322 Or 132, 134, 903 P2d 351 (1995) (unchallenged factual findings are binding in a judicial review proceeding).

On October 1, 1999, Cottage Grove again needed to obtain an extension of time in which to complete the proposed municipal water works. (*See id.*) At that time, however, OWRD was engaged in protracted rulemaking and related activity and, as a result, was not requiring municipal permit holders to submit new applications for permit extensions. (*Id.* at 1189.) Consistently, Cottage Grove did not submit an extension request at that time, but continued with reasonable diligence in constructing its proposed works. As of 1999, Cottage Grove had appropriated half of the water contemplated by its permit; that is, the City had appropriated 3.1 cfs of water for beneficial use, out of the total 6.2 cfs of water authorized to be diverted by its water right permit. (Rec 880.)

All in all, between 1979 and 2007, Cottage Grove expended \$8.31 million in connection with developing those proposed works and related costs. (Rec 820.) Nearly 40 percent of that total expenditure was made after October 1, 1999, when OWRD was not requiring municipalities to submit new applications for extensions of time to perfect water rights. (*Id.*)

C. HB 3038 (2005)

During the 2005 legislative session, the legislature amended ORS 537.230, the provision of the Water Rights Act governing extensions of time. *See* Or Laws 2005, ch 410, § 1. Both WaterWatch and OWRD participated in the development of that legislation.

As amended in 2005, ORS 537.230(2) provides, in part:

“[T]he [D]epartment may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit under the following conditions:

“(a) The holder shows good cause. * * *.

“(b) The extension of time is conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use *before the extension* only upon approval by the department of a water management and conservation plan; and

“(c) For the first extension issued after June 29, 2005, for a permit for municipal use issued before November 2, 1998, the department finds that the *undeveloped portion of the permit* is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. * * *. ”

(Emphases added.)

Subsections (b) and (c) require OWRD, when certain circumstances are present, to impose conditions on future water use in granting an extension of time in which to perfect a water right. Specifically,

subsection (b) requires that the prospective user have a water management and conservation plan, to the extent that the extension entails diverting water “beyond the maximum rate diverted for beneficial use before the extension.” And subsection (c) requires “the undeveloped portion of the permit,” *i.e.*, the portion of the total flow of water authorized by the permit to be diverted but not yet actually diverted, to be conditioned to maintain the persistence of certain fish species.

D. Cottage Grove’s Extension Application and Water Right Certificate

Following years of uncertainty as to OWRD’s municipal extension policy, Cottage Grove filed an application for an extension of time on December 11, 2007. (Rec 815-858, 1189.) On January 20, 2008, OWRD placed Cottage Grove’s extension application on administrative hold at Cottage Grove’s request. (*Id.* at 812-13, 1189.)

On August 8, 2008, OWRD removed the administrative hold on Cottage Grove’s extension application at Cottage Grove’s request and resumed processing the application. (*Id.* at 803, 1189.) At that time, the City had completed construction of its municipal water works and, on

July 10, 2008, had fully diverted for municipal purposes 6.2 cfs of water as authorized by its permit. (*See id.* at 797-98, 1189.)

On August 19, 2008, OWRD issued a proposed final order granting Cottage Grove's extension request. (*Id.* at 787-93.) In proposing to grant Cottage Grove's extension request, OWRD declined to impose the conditions set out at ORS 537.230(2)(b) and (c), which the legislature had added to ORS 537.230(2) in 2005, finding that, "[a]s of July 10, 2008, the permit holder has diverted the total 6.2 cfs of water authorized under" Cottage Grove's water right permit, and that therefore "[t]here is no 'undeveloped portion' of" Cottage Grove's permit. (*Id.* at 790.) In so ruling, OWRD necessarily concluded that, in assessing what portion of a permit, if any, is "undeveloped," and in assessing "the maximum rate" of water that the permit holder had "diverted for beneficial use before the extension," the legislature intended OWRD to look to the circumstances as they exist at the time OWRD decides the extension request. (*See id.*) In light of those circumstances, OWRD's grant of Cottage Grove's extension request would not entail diversion of any amount of water beyond "the maximum rate diverted" before the grant of the extension, and no portion of Cottage Grove's permit remained undeveloped. OWRD therefore

concluded that the circumstances supplied no basis on which to apply the conditions in ORS 537.230(2).

WaterWatch filed a protest to OWRD's proposed final order. And, following a series of procedural steps not pertinent to the present inquiry, on September 14, 2010, OWRD issued a final order in a contested case in which it granted Cottage Grove an extension of time to perfect its water right, but without finding any basis in the circumstances to consider or apply to that extension the conditions in ORS 537.230(2)(b) and (c).

Shortly thereafter, Cottage Grove requested a "water right certificate." As noted, under ORS 537.250(1), OWRD "shall issue" a water right certificate if it is "satisf[ied] * * * that an appropriation has been perfected in accordance with the provisions of the Water Rights Act[.]" Because OWRD was "satisf[ied]" that Cottage Grove had perfected its water right "in accordance with the provisions of the Water Rights Act," including ORS 537.230, OWRD issued Cottage Grove a water right certificate on October 15, 2010. (*See* App-1-3, Cottage Grove's Answering Brief (water right certificate).)

E. The Court of Appeals Decision

On November 15, 2010, two months after OWRD issued its final order in a contested case and one month after OWRD issued Cottage Grove its water right certificate, WaterWatch filed a petition for judicial review in the Court of Appeals pursuant to ORS 183.482, seeking (by its terms) judicial review only of OWRD's contested case order granting Cottage Grove an extension of time. Before that court, WaterWatch's petition did not raise any issue challenging OWRD's conclusion that "good cause" supported granting Cottage Grove's request for an extension of time. *See* ORS 537.230(2)(a) (setting out that criterion for extensions). Rather, WaterWatch's petition challenged only OWRD's conclusion that the circumstances supplied no basis for considering or applying to Cottage Grove's extension of time the conditions in ORS 537.230(2)(b) and (c).

Although Cottage Grove defended OWRD's extension order on its merits in the judicial review proceeding before the Court of Appeals, Cottage Grove also raised a predicate, procedural issue. Specifically, Cottage Grove moved to dismiss WaterWatch's petition for judicial review of OWRD's extension order on the ground that Cottage Grove's

subsequently issued—and unchallenged—water right certificate rendered moot any challenge of the extension order.

ORS 183.482 is the provision of the Oregon Administrative Procedures Act (APA) that governs judicial review of orders in contested cases. As the Court of Appeals recognized, however, Cottage Grove’s water right certificate is an “order in other than a contested case,” *WaterWatch*, 259 Or App at 725, and judicial review of *that* kind of order is governed by very different procedural requirements than contested case orders. To challenge Cottage Grove’s water right certificate, WaterWatch had to file a petition for judicial review with “the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has a principal business office” within 60 days of issuance of the order. ORS 183.484. Neither WaterWatch nor any other party filed any such petition respecting the award of Cottage Grove’s water right certificate.⁶

⁶ WaterWatch represents that it lacked actual notice of issuance of the City’s water right certificate. As explained in greater detail below, no statute or rule obligates OWRD to provide public notice of those decisions, nor does any provision of law require OWRD to transmit such notice of such decisions to persons separately, and expressly, entitled to challenge water right certificates under ORS 537.260.

The Court of Appeals was undaunted by ORS 537.270 or fact that no one had challenged Cottage Grove's water right certificate. Instead, the Court of Appeals reasoned that its jurisdiction over the extension order also gave it authority to rule on the validity of the City's water right certificate, notwithstanding the fact that the jurisdictional requisites ordinarily applicable to orders in other than contested cases had not been met. *WaterWatch*, 259 Or App at 731-32. And, turning to the only issue properly before it—*i.e.*, OWRD's extension order—the Court of Appeals ruled that OWRD had construed ORS 537.230(2) incorrectly in declining to impose the conditions in ORS 537.230(2)(b) and (c) retroactively to Cottage Grove's existing beneficial use of water. *WaterWatch*, 259 Or App at 735-42. In light of those conclusions, the Court of Appeals reversed OWRD's final order in a contested case and, despite the fact that the water right certificate was not even properly before it, purported to vacate Cottage Grove's water right certificate. *Id.*

In concluding that Cottage Grove's water right certificate did not render *WaterWatch*'s challenge moot, the Court of Appeals proceeded along two separate but related paths. First, the court—relying on its reading of this Court's decision in *Hamel v. Johnson*, 330 Or 180, 998 P2d

661 (2000)—determined that the case was not moot because, in the Court of Appeals’ view, OWRD’s extension order was a necessary predicate to the water right certificate and, if it turned out that OWRD’s construction of 537.230(2) was wrong, the extension would be invalid and OWRD would have lacked the authority to issue the certificate. *See WaterWatch*, 259 Or App at 729 (asserting, without statutory analysis, that a legally deficient extension extinguishes “a necessary predicate for” a water right certificate, which is “*perfection of the water right in accordance with the Act*”) (emphasis in original).⁷

Second, the Court of Appeals held that ORS 183.486(1)(b) also granted it the authority to rule on the unchallenged water right certificate. That statute provides that, on judicial review of an order in a contested case, the Court of Appeals may “[o]rder such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.” *WaterWatch*, 259 Or App at 729. In the Court of Appeals’

⁷ The Court of Appeals ignored a phrase that the legislature has inserted into ORS 537.250(1)—*i.e.*, that the request for a water right certificate shows perfection in accordance with the Water Rights Act “to the satisfaction of [OWRD].” ORS 537.250(1). There can be no dispute in this case that OWRD was satisfied that the City had perfected its water right in accordance with the Water Rights Act.

view, that provision allowed it to reach beyond the final order actually before it and to rule on the validity of different final orders—even if the statutes governing judicial review of those other orders assigned review jurisdiction to different courts and the time limitations for such judicial review had expired. *Id.* at 729-31.

Turning to the merits, the Court of Appeals held that ORS 537.230(2) required OWRD to look back to conditions existing on the expiration date of the last extension that Cottage Grove had received to determine whether the conditions in ORS 537.230(2)(b) and (c) applied. *WaterWatch*, 259 Or App at 742. In the Court of Appeals' view, the fact that circumstances regarding a municipality's actual beneficial use of water may have changed significantly since that time was not relevant. *Id.*

In light of that holding, and in reliance on its prior expansive assessment of its own authority, the Court of Appeals reversed OWRD's extension order, vacated the City's water right certificate (even though no court had ever properly obtained judicial review jurisdiction over that agency order, and even though WaterWatch had never specifically requested that relief), and remanded the case to OWRD for

reconsideration of Cottage Grove's extension application. *Id.* Cottage Grove then sought this court's review, which this court allowed.

IV. SUMMARY OF ARGUMENT

In this judicial review proceeding, WaterWatch challenges OWRD's contested case order that granted Cottage Grove an extension of time to perfect its water right but did not impose conditions set out in ORS 537.230(2)(b) and (c). WaterWatch's challenge is moot, however, because Cottage Grove's subsequently issued (but unchallenged) water right certificate supplies "conclusive evidence" of the extent of Cottage Grove's water right. Further, the Court of Appeals lacked jurisdiction to assess the legal validity of Cottage Grove's certificate in this judicial review of a contested case order pursuant to ORS 183.482, because Cottage Grove's water right certificate is an order in other than a contested case that no party properly challenged pursuant to ORS 183.484.

In any event, WaterWatch's challenge to OWRD's extension order also fails on its merits. OWRD correctly concluded that the circumstances in this case provided no basis for considering or applying the conditions in ORS 537.230(2)(b) and (c), because Cottage Grove already had

appropriated all water under its water right permit when OWRD issued the extension order.

V. ARGUMENT

A. A judicial decision regarding OWRD's extension order will have no practical effect on the parties' rights.

The courts of this state will render decisions in cases only where the case presents a “justiciable controversy.” *Yancy v. Shatzer*, 337 Or 345, 349, 97 P3d 1161 (2004). One of the “constellation of related issues” that is “[e]ncompassed within the broad question of justiciability” is the question whether a “decision [in the case] will have a practical effect on or concerning the rights of the parties.” *Id.* (citing *Brumnett v. PSRB*, 315 Or 402, 405, 848 P2d 1194 (1993)). If not, the case is “moot,” and it does not present a justiciable controversy. *Id.*

The controversy purportedly posed by the petition for judicial review in the present proceeding is whether OWRD erred in granting Cottage Grove an extension of time in which to perfect its water right. That controversy is not a “justiciable” one, however, because a decision regarding the legal validity of OWRD’s extension order will not and, indeed, cannot have any practical effect on Cottage Grove’s right to appropriate 6.2 cfs of water from the Row River free from the conditions

established by ORS 537.230(2)(b) and (c). For the reasons explained below, Cottage Grove's water right certificate establishes conclusively the extent of Cottage Grove's water right and insulates that right from the collateral attack that WaterWatch attempts to mount in this judicial review proceeding.

1. The sole agency order over which the Court of Appeals had jurisdiction was OWRD's extension order.

The Court of Appeals is not a court of general jurisdiction. Rather, the Court of Appeals' jurisdiction is limited solely to the jurisdiction that the legislature has granted to it by statute. *See City of Lowell v. Wilson*, 197 Or App 291, 296, 105 P3d 856 (2005) (noting that Court of Appeals "cannot acquire authority to act except in the manner provided by statute" (quoting *City of Klamath Falls v. Winters*, 289 Or 757, 763, 619 P2d 217 (1980), and *McCarger v. Moore*, 89 Or 597, 599, 175 P 77 (1918))).

Judicial review of agency orders is no exception to that jurisdictional limitation. The Court of Appeals' jurisdiction in reviewing agency orders also arises solely under statute and accordingly is "subject to [the] limitations imposed by the statute conferring the right." *Ososke v. Driver & Motor Vehicle Servs.*, 320 Or 657, 659-60, 891 P2d 633 (1995)

(so noting in the context of a judicial review proceeding under ORS 183.482, and holding that failing to comply with the 60-day limit for filing a petition for judicial review in ORS 183.482(1) is a jurisdictional defect).

The Oregon APA distinguishes between two types of agency orders: contested case orders and orders in other than contested cases. *Compare* ORS 183.310(2)(a) (defining “[c]ontested case”), ORS 183.411 to 183.470 (setting forth rules applicable to contested case hearings), and ORS 183.482 (authorizing judicial review of contested case orders) *with* ORS 183.484 (authorizing judicial review of orders in other than contested cases). Significantly for this case, the legislature has set out separate, independent, and limited statutory bases authorizing judicial review of those two types of orders, *viz.*, ORS 183.482 (contested cases) and ORS 183.484 (orders in other than contested cases); *cf. Ososke*, 320 Or at 659 (noting that appellate jurisdiction is both created and limited by statute).

Those two different judicial review statutes contain independent jurisdictional requirements. For example, ORS 183.482 grants the Court of Appeals judicial review jurisdiction over agency contested case orders,

but only if a proper party files a petition for judicial review with the Court of Appeals within 60 days of service of the agency's contested case order. ORS 183.482(1). By contrast, the legislature has granted to different courts the jurisdiction to judicially review orders in other than contested cases. Specifically, jurisdiction for judicial review of orders in other than contested cases lies either with the Marion County Circuit Court or "the circuit court for the county in which the petitioner resides or has a principal business office." ORS 183.484(1). A circuit court obtains jurisdiction over an order in other than a contested case *only* if a proper party files a petition for judicial review in the appropriate circuit court within 60 days of service of the order. *Id.*

Moreover, a related statute, ORS 183.500, provides that "[a]ny party to the proceedings [on judicial review of an order in other than a contested case] before the circuit court may appeal from the judgment of that court to the Court of Appeals[.]" In other words, the Court of Appeals *never* obtains direct judicial review jurisdiction over orders other than in contested cases. Instead, the *sole* means by which the Court of Appeals permissibly may obtain jurisdiction over such orders is when it obtains

appellate jurisdiction over a circuit court judgment following the circuit court's judicial review of such an order. ORS 183.484 and ORS 183.500.

As noted, WaterWatch initiated this judicial review proceeding by filing a petition for judicial review in the Court of Appeals, seeking judicial review of OWRD's grant of the City's request for an extension—a contested case order. But WaterWatch's petition for judicial review made no mention of, much less sought judicial review of, OWRD's issuance of a water right certificate to Cottage Grove. Thus, the Court of Appeals properly obtained judicial review jurisdiction over *OWRD's extension order* pursuant to *ORS 183.482*, but that was the *only* order over which the Court of Appeals properly obtained jurisdiction. And, accordingly, ORS 183.482 supplies the sole jurisdictional basis for the Court of Appeals' exercise of authority in this case. *Cf. Ososke*, 320 Or at 659 (noting that judicial review jurisdiction over agency orders is both created and limited by statute). The Court of Appeals had no jurisdiction to rule on Cottage Grove's water right certificate.

2. Cottage Grove's water right certificate is conclusive evidence in this proceeding of Cottage Grove's right to divert 6.2 cfs of water free of the statutory conditions at issue.

On judicial review of OWRD's order granting Cottage Grove an extension of time to perfect its water right, WaterWatch contended that OWRD's extension order was based on an erroneous interpretation of ORS 537.230(2). In making that argument, WaterWatch sought a judicial determination affecting Cottage Grove's water rights—specifically, it sought a judicial declaration that Cottage Grove does not have a right to divert 6.2 cfs of water from the Row River free from the conditions in ORS 537.230(2)(b) and (c). Instead, in WaterWatch's view, because Cottage Grove had appropriated only 3.1 cfs of water from the Row River as of October 1, 1999, Cottage Grove may continue to divert only 3.1 cfs of water free from those statutory conditions, with the remaining 3.1 cfs that Cottage Grove had not yet appropriated on October 1, 1999—but had appropriated when OWRD issued its extension order—subject to those conditions.

The difficulty with WaterWatch's argument, however, is that a judicial decision regarding the legality of OWRD's extension order—even

one in WaterWatch’s favor—cannot, standing alone, have any practical effect on the extent of Cottage Grove’s water right: After OWRD issued its extension order, it subsequently issued a water right certificate to Cottage Grove which no one, including WaterWatch, challenged timely, and with respect to which the Court of Appeals lacked judicial review jurisdiction in any event. As noted above, in ORS 537.270 the legislature has expressly insulated unchallenged water right certificates from any collateral attack that seeks to controvert the “extent of the appropriation therein described in any proceeding in any court or tribunal of the state”—a description that is meaningless unless it includes judicial review proceedings. ORS 537.270.

Because the issuance of Cottage Grove’s water right certificate went unchallenged, that certificate is a valid one that supplies “conclusive evidence” of the extent of Cottage Grove’s appropriation. ORS 537.270. Cottage Grove’s certificate was “issued in accordance with the provisions of ORS 537.250.” *Id.* When OWRD issued Cottage Grove’s certificate, OWRD was “satis[fied]” that Cottage Grove had perfected its appropriation “in accordance with the provisions of the Water Rights Act.” ORS 537.250(1). OWRD therefore issued to Cottage Grove a water

right certificate setting out, among other things, the extent of Cottage Grove’s water right—*i.e.*, Cottage Grove’s right to divert 6.2 cfs of water from the Row River free from the conditions in ORS 537.230(2)(a) and (c).⁸

To prevent Cottage Grove’s water right certificate from becoming conclusive as to the extent of Cottage Grove’s appropriation, either WaterWatch or another proper party had to file a timely and successful challenge to the certificate. At least two mechanisms exist for challenging water right certificates. First, because a water right certificate is an order in other than a contested case, a proper party may file a petition for judicial review in the appropriate circuit court pursuant to ORS 183.484. And second, “[a]ny person owning an application, permit or water right certificate subsequent in priority may jointly or severally contest before [OWRD] the issuance of the water right certificate[.]” ORS 537.260(3).

⁸ More specifically, ORS 537.250(1) requires that the “survey required under ORS 537.230(4)” demonstrate “that an appropriation has been perfected in accordance with the provisions of the Water Rights Act[.]” The “survey required under ORS 537.230(4)” constitutes a “map of the survey” performed by a water right examiner. ORS 537.230(4). WaterWatch has not argued in this judicial review proceeding that Cottage Grove’s ORS 537.230(4) survey was in any way legally deficient.

WaterWatch is not a party “owning an application, permit or water right certificate subsequent in priority” to Cottage Grove’s. Accordingly, to prevent Cottage Grove’s water right certificate from becoming “conclusive evidence” of the “extent” of Cottage Grove’s water right, WaterWatch had to file a petition for judicial review in the appropriate circuit court within 60 days of service of the certificate. ORS 183.484. WaterWatch did not do so, and the extent of Cottage Grove’s appropriation described in its water right certificate is now conclusive as against any collateral attack. ORS 537.270.

WaterWatch asked the Court of Appeals to disregard the legislative mandate in ORS 537.270 on the basis that WaterWatch received no formal notice of OWRD’s issuance of Cottage Grove’s water right certificate—in effect, asking for judicial amendments to both ORS 537.270 and ORS 183.484 that would provide some additional basis for asserting jurisdiction over Cottage Grove’s water right certificate. The problem with that argument is that exceptions like the one claimed by WaterWatch are legislative work, and there is no provision of law that *requires* that any such notice to be given. Indeed, the legislature has not even deemed it appropriate to provide any notice requirement with respect to persons

expressly authorized to challenge the water right certificate under ORS 537.260(3). The legislature's failure to impose any public notice requirement *even while expressly acknowledging the right of certain parties to challenge water right certificates* surely reflects a conscious choice on the part of the legislature not to require public notice of water right certificates. *Cf. Emerald People's Utility Dist. v. Pac. Power & Light Co.*, 302 Or 256, 269, 729 P2d 552 (1986) (inferring an intentional omission on the part of the legislature based on similar context). Such a public notice requirement might be a legitimate policy choice, perhaps even a wise one. But the appropriate governmental body to make that *change* to current law is the legislature, not the Court of Appeals. *See id.* (noting that "[i]t is not [this court's] role to do what the legislature, for whatever reason, has not seen fit to do").

Because the legislature in ORS 537.270 expressly insulated unchallenged water right certificates from any collateral attack seeking to controvert "the extent of the appropriation" described in the certificate, any judicial decision regarding the legal validity of OWRD's extension order cannot permissibly affect the extent of the appropriation described in Cottage Grove's water right certificate. Cottage Grove therefore holds a

conclusive right to divert 6.2 cfs of water from the Row River pursuant to a certificate that does not impose any conditions contemplated by ORS 537.230(2)(b) and (c). No decision by the Court of Appeals concerning OWRD's extension order could have any practical effect on that fact. This case is moot. *See Brumnett*, 315 Or at 406 (a case is moot if "a court's decision no longer will have a practical effect on or concerning the rights of the parties").

3. Neither this Court's decision in *Hamel v. Johnson* nor ORS 183.486(1)(b) override ORS 537.270.

Despite the legislature's clear mandate in ORS 537.270 that a water right certificate be "conclusive evidence of the * * * extent of the appropriation therein described in any proceeding in any court or tribunal of this state," and despite the fact that the Court of Appeals never obtained jurisdiction over Cottage Grove's water right certificate, the Court of Appeals nonetheless held that it permissibly could render a decision overriding the water right described in Cottage Grove's water right certificate.

The Court of Appeals reached that conclusion on two separate but related bases. First, the Court of Appeals relied on this Court's decision in

Hamel v. Johnson, 330 Or 180, 998 P2d 661 (2000), reading that case as holding expansively that *no* agency order is beyond collateral attack if *any* predicate agency action may have been legally erroneous, even if—as is the case here—the legislature has decided to render the ultimate agency order immune from collateral attack. Second, the Court of Appeals—without resorting to the statutory construction methodology customarily employed by this state’s appellate courts—concluded that ORS 183.486(1)(b) grants it authority to exercise judicial review jurisdiction respecting orders over which the court has not properly obtained—and, indeed, *cannot* properly obtain—judicial review jurisdiction. Neither of those bases withstands scrutiny.

(a) The Court of Appeals read this Court’s decision in *Hamel* far too broadly.

In *Hamel*, a Snake River Correctional Institution inmate petitioned for a writ of *habeas corpus*, challenging a January 1997 parole board order that postponed the inmate’s May 29, 1997, release date. 330 Or at 182-83. The inmate argued that the board’s January 1997 order was legally erroneous because the board had applied the wrong version of a statute in

determining that grounds existed for the postponement. As this court explained:

“According to [the inmate], the Board did not have a valid reason to postpone his release date, because it applied the incorrect version of ORS 144.125(3) in making the decision to do so. If the Board had applied the correct version of that statute, [the inmate asserted], then it would have concluded that he did not suffer from a ‘severe emotional disturbance such as to constitute a danger to the health or safety of the community,’ ORS 144.125(3) (1987), and it would have released him on parole on May 29, 1997.”

Id. at 185. The trial court declined to grant the inmate *habeas* relief, and the inmate appealed. *Id.* at 183.

In October 1998, while the inmate’s appeal was still pending, and after the inmate’s original May 29, 1997, release date had passed, the board issued a second order postponing the inmate’s release date. *Id.* at 183. In issuing that second order, the board attempted to correct any purported legal deficiencies in its first order, relying “on information that had not been available to it when it issued its 1997 order, including a psychological evaluation of [the inmate] that was performed in 1998.” *Id.*

On the board’s motion, the Court of Appeals dismissed the inmate’s appeal as moot, but this court reversed. *Id.* at 183-84. After analyzing the pertinent statutes, this court noted that, “[u]nder ORS 144.245(1), the

Board was required to release [the inmate] on [May 29, 1997,] *unless the Board identified a valid reason for postponing his release.*” *Id.* at 187

(emphasis added). Thus, this court reasoned,

“if [the inmate] were to prevail on his claim that the Board’s reason for postponing his release date under ORS 144.125(3) was not valid, then the Board should have released him on parole on May 29, 1997, and his continued imprisonment is unlawful. The Board is not entitled to rely on evidence and reasons that it acquired after that date to justify its decision not to release [the inmate] then. * * * [If the inmate] had been released on parole, then the Board could not have issued its 1998 order.”

Id. at 188. In other words, without any basis prior to the inmate’s May 29, 1997, release date to order a valid postponement of that release date, compliance with the statutory mandate in ORS 144.245(1) would have meant that the inmate would have been out of custody when the board issued its second order. *See id.* Release—the precise purpose for which the “Great Writ” had been created—was mandated, and some later order that the board might have issued simply was not relevant.

The Court of Appeals itself acknowledged that the analogy between *Hamel* and this case is an “imperfect” one. *WaterWatch*, 259 Or App at 727. The Court of Appeals got that part right; in fact, this court’s decision in *Hamel* simply has no application to this case.

The board in *Hamel* had issued what it intended to be a superseding postponement order that corrected purported defects in its first order, based on information obtained only after the board would otherwise have been legally obligated to release the inmate on parole. 330 Or at 188. That is, the record in *Hamel* showed a *habeas corpus* petitioner incarcerated at a time when the applicable law required him to be freed, and before any contrary evidence even existed.

Unlike *Hamel*, this case does not involve an agency attempting to supersede a prior, potentially defective order by issuing a duplicate order, corrected with information obtained after the critical point in time. Here, Cottage Grove's water right certificate is an order of independent legal significance that the legislature has made "*conclusive*" as against any collateral attack on the extent of the certificate holder's appropriation. See ORS 537.270 (so stating).

The very enactment of a provision granting water right certificates conclusive effect necessarily assumes the possibility of predicate defects in the certificate-issuing process. That is, the only reason the legislature would need expressly to deem a water right certificate to be "conclusive evidence" of the extent of an appropriation would be if the legislature

anticipated and sought to foreclose the risk that other parties might attempt to controvert the extent of that appropriation with *other* evidence that, absent the finality supplied affirmatively by the statute, might raise a genuine dispute. ORS 537.270 demonstrates a legislative intent to provide water-right holders with certainty that would facilitate planning and investment, as against a specific risk—*viz.*, the risk that a water right could be subject to collateral attack. In holding that a predicate defect in OWRD’s extension order could have the ancillary effect of denying Cottage Grove the safe harbor provided by ORS 537.270, the Court of Appeals created precisely the problem that ORS 537.270 seeks to prevent.

(b) ORS 183.486(1)(b) does not permit the Court of Appeals to exceed its judicial review jurisdiction.

The Court of Appeals also suggested that a decision regarding the legal validity of OWRD’s extension order would have a practical effect on the parties’ rights for a second reason: Despite the fact that no party had timely challenged Cottage Grove’s water right certificate, ORS 183.486(1)(b) nonetheless gave the Court of Appeals authority to reach beyond the only order over which the court had jurisdiction—*i.e.*, OWRD’s extension order—to rule on the legal validity of Cottage Grove’s

water right certificate and, ultimately, to *vacate* Cottage Grove's water right certificate.

The Court of Appeals interpretation of ORS 183.486(1)(b) cannot be squared with the text and context of that statute. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (setting out this court's statutory interpretation methodology).⁹

As noted above, Oregon's APA distinguishes between two types of agency orders and vests judicial review jurisdiction over those orders in two different courts. *See* ORS 183.482 (granting judicial review jurisdiction over contested case orders to the Court of Appeals) and ORS 183.484 (granting judicial review jurisdiction over orders other than in contested cases to certain circuit courts). Further, the APA specifically

⁹ The legislative history does not appear to assist in construing ORS 183.486(1)(b). The sole discussion of that provision notes, without further discussion of its scope, that it was drawn from Florida's administrative procedure statutes. Minutes, House Committee on Judiciary, HB 2497, May 7, 1979, 4. Further, Cottage Grove has found no Florida Supreme Court decision predating the Oregon legislature's adoption of that provision that interprets the terms of ORS 183.486(1)(b) in any manner relevant to the present case. *See Clackamas County Assessor v. Vill. at Main St., Phase II*, 349 Or 330, 338, 245 P3d 81 (2010) (when the legislature adopts another state's statute, this court presumes the legislature also adopts the preexisting interpretations of that statute announced by that state's highest court).

assigns jurisdiction with respect to orders in other than contested cases to the Court of Appeals only in the form of appellate jurisdiction over circuit court judgments on judicial review of such orders. ORS 183.500.

Within that legal framework, ORS 183.486 sets out the scope of relief that a reviewing court may provide in a judicial review proceeding, *assuming that the reviewing court already has properly obtained judicial review jurisdiction over the agency order. See Ososke, 320 Or at 659* (judicial review jurisdiction created and limited by statute).

ORS 183.486(1) provides:

“The reviewing court’s decision under ORS 183.482 or 183.484 may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

“(a) Order agency action required by law, order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings or decide the rights, privileges, obligations, requirements or procedures at issue between the parties; and

“(b) Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(Emphases added.)

In determining that it had the authority to rule on the legal validity of Cottage Grove’s water right certificate and, ultimately, to *vacate* that certificate, the Court of Appeals relied on the statement in ORS 183.486(1)(b) that a reviewing court may “[o]rder such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.” That is, the Court of Appeals interpreted “ancillary relief” in ORS 183.486(1)(b) as encompassing judicial review of and authority over orders in other than contested cases, even where the jurisdictional requisites of ORS 183.484 have not been satisfied.

Contrary to the Court of Appeals’ view, ORS 183.486(1)(b) cannot be construed as creating jurisdiction where none existed before, subject only to the Court of Appeals essentially unfettered determination that such extra-jurisdictional action has become “necessary.”

The text of ORS 183.486 itself references the jurisdictional bases which necessarily define—and limit—the scope of a reviewing court’s authority. In defining the scope of relief that a reviewing court permissibly may grant, ORS 183.486(1) expressly notes that the reviewing court’s decision will be one either “under ORS 183.482” or one under “ORS 183.484.” Thus, it is only within the confines of a “decision under

ORS 183.482 or 183.484” that a reviewing court may “[o]rder such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.” Put differently, ORS 183.486 can apply only in a proceeding in which the reviewing court has jurisdiction to review a final agency order. Those predicate jurisdictional limits necessarily also limit the scope of relief that ORS 183.486(1)(b) authorizes. Thus, whatever the specific contours of permissible “ancillary relief” that a reviewing court may contemplate in a judicial review proceeding, ORS 183.486(1)(b) does not authorize a reviewing court to grant relief that requires it to reach beyond those jurisdictional limits.

Yet, that is precisely what the Court of Appeals interpreted ORS 183.486(1)(b) to authorize in this case. To be sure, the Court of Appeals properly had judicial review jurisdiction to review OWRD’s extension order. But the Court of Appeals had *no* judicial review jurisdiction to review Cottage Grove’s water right certificate. No one timely challenged OWRD’s issuance of that certificate. And, even if the certificate had been challenged timely, the Court of Appeals would still lack judicial review jurisdiction over it in rendering a decision, as it did in this case, “under ORS 183.482.” The only jurisdiction granted to the

Court of Appeals with respect to orders in other than contested cases is granted by ORS 183.500: appellate jurisdiction over circuit court judgments on judicial review from those orders. ORS 183.484 and ORS 183.500; *cf. Ososke*, 320 Or at 659 (judicial review jurisdiction is both created and limited by statute).

Moreover, and perhaps most importantly: Because Cottage Grove's water right certificate was not challenged timely, *no* court had jurisdiction to review that certificate. It follows that no court had jurisdiction to render a "decision under ORS * * * 183.484" respecting the certificate, which is the necessary predicate to granting *any* relief that ORS 183.486(1) might authorize with respect to the certificate. The Court of Appeals therefore lacked the jurisdiction and authority to rule on the legal validity of Cottage Grove's water right certificate, and it certainly lacked the jurisdiction and authority to *vacate* that water right certificate. Such rulings are no part of a "decision under ORS 183.482"—the only kind of decision that the proceeding for judicial review actually tendered to the Court of Appeals gave that court authority to render in this case.

Because the Court of Appeals lacked jurisdiction to review Cottage Grove's water right certificate, ORS 183.486(1)(b) does not supply a basis

for concluding that this case presents a justiciable controversy. Instead, this challenge of OWRD's extension order is moot and should be dismissed.

B. On the merits: The legislature intended OWRD to look to contemporaneous circumstances in assessing the applicability of the conditions in ORS 537.230(2).

Because Cottage Grove's water right certificate prevents any judicial decision regarding OWRD's extension order from having a practical effect on the extent of Cottage Grove's appropriation, this Court should reverse the Court of Appeals decision and dismiss this case as moot. Doing so will serve the salutary purpose of reminding the Court of Appeals that its jurisdiction extends only so far as the legislature has chosen to extend it, and no further. Any other interpretation sets the Court of Appeals at large in judicial review proceedings to identify any other administrative orders even tangentially related to the case before it, to judge the legality of those orders, and to assess remedies subject only to what it, in its sole discretion, deems necessary. In such circumstances, no party to a judicial review proceeding will be able to assess with confidence what is, and what is not, at issue. That unsupportable demon needs to be exorcised.

However, and in the event that this Court determines that this case is not moot, this Court should still reverse the Court of Appeals decision on the underlying merits.

Those underlying merits turn on the question whether OWRD correctly interpreted two provisions of ORS 537.230(2), both of which require OWRD, if certain circumstances are present, to impose certain conditions in granting an extension of time in which to perfect a water right. Here, OWRD interpreted ORS 537.230(2) as requiring it to assess whether the conditions in that statute apply to a request for extension of time, based on the circumstances that exist at the time OWRD decides the extension request.

Such an interpretation permits municipalities such as Cottage Grove to continue the important work of providing adequate water supplies for their growing populations, projects which require significant public investment in planning, engineering, and infrastructure over significant periods of time. Under OWRD's interpretation, municipalities can proceed with water-works construction safe in the knowledge that any conditions to which further development may be subject will apply *prospectively* when OWRD resolves a municipality's extension request.

The municipality will not be forced to halt its work in supplying its population with adequate water in order to avoid the possibility that conditions applied retroactively to existing, and previously unconditioned, beneficial use of water would impair both the viability of the municipal infrastructure and the municipality's ability to cover the substantial public investment necessary to construct it.¹⁰

The Court of Appeals interpreted ORS 537.230(2) differently and, in doing so, exposed many municipalities in this state to precisely those risks. There is no reason for concluding that the legislature intended such a result. As amplified below, nothing suggests that, in enacting ORS 537.230(2), the legislature intended to so significantly interrupt the ability of municipalities to proceed forward with reasonable diligence developing infrastructure to provide adequate water supplies to their growing populations. The Court of Appeals' interpretation of ORS 537.230(2) is incorrect and should be reversed.

¹⁰ As noted above, with respect to this case, between 1979 and 2007 Cottage Grove expended approximately \$8.31 million in connection with the municipal water works necessary to divert the total amount of water authorized by Cottage Grove's water right permit. Approximately \$3.3 million was expended after 1999, during the period of time when OWRD suspended processing of extension requests and did not require holders of permits for municipal use to submit them.

As noted above, the two conditions at issue in this litigation are set out in ORS 537.230(2)—specifically, in subsections (b) and (c). That statute provides:

“The holder of a permit for municipal use shall commence and complete the construction of any proposed works within 20 years from the date on which a permit for municipal use is issued under ORS 537.211. The construction must proceed with reasonable diligence and be completed within the time specified in the permit, not to exceed 20 years. However, [OWRD] may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit under the following conditions:

“(a) The holder shows good cause. In determining the extension, [OWRD] shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right;

“(b) *The extension of time is conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use before the extension only upon approval by [OWRD] of a water management and conservation plan; and*

“(c) *For the first extension issued after June 29, 2005, for a permit for municipal use issued before November 2, 1998, [OWRD] finds that the undeveloped portion of the permit is conditioned to maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law. [OWRD] shall base its finding on existing data and upon the advice of the State*

Department of Fish and Wildlife. An existing fish protection agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is conclusive for purposes of the finding.

(Emphases added.)

There is no dispute in this case as to the *substance* of the conditions in ORS 537.230(2)(b) and (c). Instead, the parties in this case dispute only *when* those conditions apply.

ORS 537.230(2)(b) requires an extension to be conditioned to require an approved water management and conservation plan to the extent that the extension contemplates diversion of water “beyond the maximum rate diverted for beneficial use *before the extension*[.]”

(Emphasis added.) The parties in this case dispute whether, in using the phrase “before the extension,” the legislature intended to refer to the time up to and immediately preceding OWRD’s decision on an extension request, or instead intended to refer to the circumstances as they existed at the time of a prior permit or extension order’s expiration—circumstances which may have changed significantly by the time OWRD decides the extension request as a result of a municipality’s ongoing efforts to complete construction of water infrastructure with reasonable diligence.

Similarly, ORS 537.230(2)(c) requires OWRD to assess whether future development of “*the undeveloped portion of the permit*” will interfere with certain fish species. (Emphasis added.) The parties agree that “the undeveloped portion of the permit” constitutes that part of the total flow contemplated by the permit that, at a certain point in time, has not yet actually been diverted. But, like ORS 537.230(2)(b), the parties dispute the *point in time* that OWRD must decide the degree of development of the permit.

OWRD interpreted those phrases as referring to the time at which OWRD decides the extension request, ensuring that public investment in permit development up to the time OWRD decides the extension request will not be significantly compromised or wasted due to the retroactive application of the conditions in ORS 537.230(2) to water already actually appropriated for beneficial use. To the contrary, WaterWatch asserts (and the Court of Appeals held) that the pertinent circumstances freeze at the time of a prior permit’s or extension order’s expiration, forcing municipalities either to halt their progress in developing public water supplies or risk wasting the significant public investment necessary to complete that development.

Thus, although this case involves two different provisions of ORS 537.230(2), it poses only a single question with respect to those two provisions: Whether the circumstances existing at the time OWRD decides to grant an extension request control application of the conditions in ORS 537.230(2) or, instead, whether past circumstances that may have changed significantly when OWRD decides the extension request nonetheless control the analysis.

The text of ORS 537.230(2), in context, demonstrates that the legislature intended OWRD to look to present circumstances, not past ones. *See State v. Marsh & McLennan Cos.*, 353 Or 1, 12, 292 P3d 525 (2012) (noting that analysis of “text in context” is “primary” in ascertaining legislative intent).

The phrase “before *the extension*” in ORS 537.230(2)(b), whether read in isolation or in context, admits of only one sensible answer. The term, “the extension,” is a reference to a specific event—the granting of an extension. *See Webster’s Third New Int’l Dictionary* 804-05 (unabridged ed 2002) (defining “extension” as “an increase in length of time: increased or continued duration; *specifically*: an agreement on or concession of additional time (as for meeting an overdue debt or fulfilling a legal

formality)). Until such a grant occurs, there *is no* “extension”; there is only an *application* for one which, unless it is granted, amounts to a nullity.

The legislature’s use of the term “the extension,” instead of use of the term “the application,” is and should be dispositive.

The use of the definite article, “the,” likewise is dispositive. That article, as used particularly in subsection (b), obviously refers to some definite, specific antecedent. *Cf. State v. Lopez-Minjarez*, 350 Or 576, 583, 260 P3d 439 (2011) (noting that effect of legislature’s use of definite article, “the”). That antecedent is found in the same subsection, which Cottage Grove repeats here for clarity:

“(b) The *extension of time* is conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use before *the* extension only upon approval by [OWRD] of a water management and conservation plan
* * *.”

ORS 537.230(2)(b) (emphases added). As a matter of ordinary English, the second reference to “the” extension can refer back only to the initial reference to an extension in the same sentence—*i.e.*, to the present extension of time granted by OWRD. So understood, the subsection’s use of the word “before” can mean only “at any time preceding the issuance of the present extension.”

Similarly, as a matter of text, the “portion of the permit” that is “undeveloped” can only be ascertained in the context of OWRD granting an application for an extension of time. *See* ORS 537.230(2)(c) (requiring conditions to be applied to “the undeveloped portion of the permit”). That is, when OWRD grants an application for an extension of time, the portion of a permit that actually has been developed can be ascertained; the statute’s text supplies no basis for meaningfully identifying the degree of permit development until OWRD turns an application into an extension.

Furthermore, ORS 537.230(2)(c) goes on to note that “[OWRD] *shall base its finding on existing data * * **.” As a matter of text, nothing excludes from OWRD’s “finding” for purposes of ORS 537.230(2)(c) the factual issue of a water right permit’s degree of development and, in turn, the factual issue of the maximum water diverted before the extension for purposes of ORS 537.230(2)(b).¹¹

¹¹ Even if the “existing data” on which ORS 537.230(2)(c) instructs OWRD to “base its finding” refers only to data regarding the fish species which ORS 537.230(2)(c) seeks to protect, it would be incongruous to impose conditions on water usage employing existing data regarding protected fish species yet using data potentially years out of date regarding the degree to which a water right permit has been developed (and, in turn, the maximum rate diverted before the extension). Put simply, it is more reasonable that the legislature would have intended OWRD to have the

As the foregoing illustrates, the text of ORS 537.230(2) unambiguously directs OWRD to assess circumstances existing at the time it decides an extension request in determining whether the conditions in ORS 537.230(2) apply. And Cottage Grove’s straightforward reading of ORS 537.230(2) is confirmed when context is added to the inquiry. First, as noted, ORS 537.230(2) is specifically concerned with OWRD’s authority to grant extensions of time. *See* ORS 537.230(2) (authorizing OWRD to “order and allow an extension of time”). Relatedly, the legislature in ORS 537.230(2) refers to OWRD’s extension orders in contradistinction from “the time specified in the permit,” *i.e.*, the prior expiration date. *See id.* (noting that construction of proposed works must be completed “within *the time specified in the permit*,” but that OWRD may “*order * * * an extension of time * * ** beyond *the time specified in the permit*”).

Given that the legislature easily could have resolved the potential ambiguity of the phrase “before the extension” in ORS 537.230(2)(b) by referring, as it had elsewhere in the same statute, to “the time specified in

same contemporaneous information concerning the uses being made of appropriated water that it would have concerning the fish *in* that water.

the permit,” it is more likely that the legislature intended “the extension” to refer to something different than the prior expiration date. *Cf. Morgan v. Amex Assurance Co.*, 352 Or 363, 372, 287 P3d 1038 (2012) (noting that “the ‘use of a term in one section [of a statute] and not in another section of the same statutes indicates a purposeful omission’”) (quoting *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993)). That is, even if it were to be conceded that the phrase “the extension” was ambiguous, it certainly is more likely that the legislature intended “the extension” to refer to OWRD’s extension order, and therefore also intended that OWRD look to contemporaneous circumstances in assessing the “maximum rate [of water] diverted for beneficial use before the extension.” ORS 537.230(2)(b).

The broader context of ORS 537.230 also suggests that the legislature intended OWRD to assess the applicability of the conditions in ORS 537.230(2) based on contemporaneous circumstances. Significantly, no provision of law prohibits a permit holder from continuing to pursue with reasonable diligence the perfection of the holder’s water right *after* a prior expiration date, while awaiting a decision from OWRD on a request for an extension of time. And, relatedly, no provision of law mandates

timelines in which OWRD must decide extension requests.¹² Put differently, under the Water Rights Act, OWRD is free to consider and decide extension applications long after the request has been made and, potentially, long after circumstances existing at the time of a prior permit or extension order expiration date have changed significantly, including specifically the degree to which the municipality has made further actual beneficial use of the water identified in the permit.

That is precisely what happened in this case. When Cottage Grove's permit came up for renewal in October 1999, OWRD had suspended consideration of extension requests while it engaged in protracted rulemaking. Yet, in light of the significant public investment at issue, Cottage Grove had no practical alternative but to press forward with construction of its proposed works to ensure that it would be able to provide adequate water supplies to its growing population in the future,

¹² As explained above, ORS 537.260 grants OWRD *discretion* to cancel water right permits if the permit holder has failed to comply with a permit deadline and proper notice of cancellation is provided to the permit holder. But nothing in that statute *requires* OWRD to cancel a permit, even if the permit holder has failed to perfect the holder's water right within the timelines contemplated by the permit.

and also to ensure that the significant public money already expended on the project did not go to waste.

Now, however, after the City has engaged in the additional development of its public infrastructure, and expended the necessary money to do so, WaterWatch contends, and the Court of Appeals held, that the lawfulness of Cottage Grove's water usage must be measured against the degree of development that Cottage Grove had achieved in 1999. For the reasons explained above, absolutely nothing in the text and context of ORS 537.230(2) compels that result, and in fact the text and context indicate that the opposite is true.

The legislative history also confirms that the legislature did not intend OWRD to impose the conditions set out in ORS 537.230(2) in circumstances like those presented here. The Court of Appeals correctly noted that "the specific timing question at issue here was not directly addressed in public hearings" on HB 3038 (2005), which amended ORS 537.230(2) to include the two conditions at issue in this case. *WaterWatch*, 259 Or App at 741. But the Court of Appeals ignored evidence in the legislative history that shows, albeit at a broader level, that

the legislature did not anticipate ORS 537.230(2) operating in the way that the Court of Appeals now has held that it does.

The primary purpose behind HB 3038 was to overrule the Court of Appeals decision in *WaterWatch v. Water Resources Comm’n*, 193 Or App 87, 88 P3d 327, *vacated*, 339 Or 275 (2005), and to enact the initial 20-year timeline to commence and complete construction of proposed works for municipal water uses.¹³ See, e.g., Tape Recording, House Committee on Water, HB 3038, Mar 28, 2005, Tape 55, Side B (statement of Richard Glick) (summarizing bill); Tape Recording, Senate Committee on Environment and Land Use, HB 3038, May 19, 2005, Tape 94, Side A

¹³ In *WaterWatch v. Water Resources Comm’n*, the Court of Appeals interpreted *former* ORS 537.230 (which imposed an initial five-year period in which to complete construction of water infrastructure but also allowed for extensions of that timeframe) as requiring municipalities to actually begin construction within the initial five-year period. See *WaterWatch*, 259 Or App at 737-38 (discussing prior *WaterWatch* decision). As the Court of Appeals noted, its prior decision was contrary to OWRD’s

“long-standing interpretation and application of [*former* ORS 537.230], in which [OWRD] granted permits and allowed multiple extensions of time with the understanding that the construction requirement did not apply to municipal water-use permits, and thus raised concerns about the viability of existing municipal permits and the ability of municipalities to plan for future water supply.”

Id. at 738.

(statement of Sen Ben Westlund) (noting that “state law requires communities to plan for 20 years of growth,” but the Court of Appeals decision in *WaterWatch* “raise[d] the possibility, indeed, probability, that” Oregon’s “careful, long-term planning approach, something that is key to our entire land use system, will be thrown out”). In other words, the primary purpose of HB 3038 was to *facilitate* municipal development of adequate infrastructure to supply water resources to municipal populations.

WaterWatch initially opposed HB 3038. A representative from WaterWatch explained WaterWatch’s opposition in a public hearing before the House Committee on Water:

“The past practice of [OWRD] and the municipal water suppliers has been to allow municipal water suppliers to obtain an appropriation permit far, far in advance of any likely actual use of the water—sometimes 50 years in advance. The way that’s been accomplished in general is an appropriation permit is issued, it’s under the statute supposed to be developed in five years, and then [OWRD] grants an extension of time to develop it, sometimes for as long as 50 years. * * * The result of the past practice is an astounding number of very old water appropriation permits that *have never been put to use, but that could be put to use today without any evaluation of whether it makes sense after many, many years, after changes in values, after changes in needs, after new information.*”

Tape Recording, House Committee on Water, HB 3038, Mar 28, 2005, Tape 56, Side B (statement of Brian Posewitz) (emphasis added). The same WaterWatch representative reiterated the same point before the Senate Committee on Environment and Land Use:

“[W]e’re just trying to show that there are a significant number of old municipal water permits *that have not been put to use*. *
* * Our problem with that is that they got a public interest analysis * * *[a]nd then they’ve sat on it. And they’ve got extensions and extensions and extensions *and now all of a sudden, they pop up and say, we want to put this permit to use*, but there’s no chance for the public to say this will have an unreasonable detrimental impact on this watershed.”

Tape Recording, Senate Committee on Environment and Land Use, HB 3038, June 2, 2005, Tape 95, Side B (statement of Brian Posewitz) (emphases added). In other words, in the context of a bill that would require extensions of time to carry certain conditions on a municipality’s development of its water right permit, WaterWatch primarily was concerned with OWRD granting extensions of time to develop *undeveloped permits*, issued long before, that then could be developed without consideration whether the *future appropriations* following the extension would be in the public interest or be environmentally sound.

As HB 3038 progressed through the legislature, WaterWatch advocated in favor of two amendments to the bill. First, WaterWatch advocated for “a limit on how long [permit holders] can get an extension for”—*i.e.*, an outside time limitation beyond which further permit extensions would not be available. Tape Recording, Senate Committee on Environment and Land Use, HB 3038, June 2, 2005, Tape 95, Side B (statement of Brian Posewitz). And second, WaterWatch advocated for “an opportunity to consider, *before an extension is granted*, what is the impact *going to be* on the the in-stream resources.” *Id.* (emphases added).

WaterWatch ultimately was unsuccessful in obtaining an outside time limitation on permit extensions. But WaterWatch successfully obtained the latter amendment for which it advocated. That amendment became the condition codified at ORS 537.230(2)(c),¹⁴ and its purpose was to require OWRD to “ensure that the undeveloped portion of [a] municipal permit was conditioned by [OWRD] in such a way that maintained the persistence of fish species that are listed under federal or

¹⁴ The condition in ORS 537.230(2)(b) requiring an approved water management and conservation plan to the extent an extension entails diverting water “beyond the maximum rate diverted for beneficial use before the extension” had been drafted into HB 3038 from the outset.

state law as sensitive, threatened, or endangered.” Tape Recording, Senate Committee on Environment and Land Use, HB 3038, June 2, 2005, Tape 105, Side B (statement of OWRD representative Adam Sussman, discussing A7 amendments to HB 3038). A WaterWatch representative explained WaterWatch’s understanding of that amendment as “requir[ing] a decision [from OWRD] to be based on *all existing data* which can be brought forward in the existing agency process that allows public participation in extension proceedings. And that’s all I wanted to get on the record.” *Id.* (statement of Doug Myers) (emphasis added).

Taken together, the legislative history demonstrates that the enactment of the conditions in ORS 537.230(2) was motivated by concerns regarding *future* development of a water right permit that, following OWRD’s grant of an extension of time, would *exceed* present actual beneficial use, without an assessment whether that *increased future use* would be consistent with the public interest or be environmentally sound. Nothing in the legislative history suggests that the legislature, in enacting those conditions, intended OWRD to audit a municipality’s actual *present* beneficial use of water and apply, retroactively, conditions to that actual existing use that had not previously applied to it. Such a

shift in the law would be significant; retroactively applying conditions such as those set out in ORS 537.230(2) to existing, unconditioned municipal use of water could seriously impair both the viability of a municipality's water infrastructure as well as the municipality's ability to cover the public investment that funded it. If the legislature actually intended to effect such a significant change to the law, one would expect the legislative history to contain some suggestion of that intent. *Cf. State v. Ainsworth*, 346 Or 524, 534, 213 P3d 1225 (2009) (noting that this Court expects an intent on the part of the legislature to change the law significantly to find some affirmative expression in the legislative history). But the legislative history contains no such suggestion.

Instead, the text, context, and legislative history of ORS 537.230(2) consistently show that the legislature intended OWRD to look to contemporaneous circumstances in deciding extension requests. When OWRD decided Cottage Grove's extension request at issue in this case, Cottage Grove had fully developed the 6.2 cfs of water contemplated by its permit. Cottage Grove's extension therefore did not entail diversion of any water "beyond the maximum rate diverted for beneficial use before the extension," ORS 537.230(2)(b), nor, at the time of Cottage Grove's

extension, was there any “undeveloped portion” of Cottage Grove’s permit. OWRD properly concluded that the conditions in ORS 537.230(2)(b) and (c) did not apply to Cottage Grove’s extension, and the Court of Appeals erred in reaching a contrary conclusion.

VI. CONCLUSION

For all of the foregoing reasons, petitioner-on-review Cottage Grove respectfully requests that this court reverse the Court of Appeals decision and affirm the final order of the Water Resources Department.

DATED this 12th day of June, 2014.

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**CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 13,038 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ Jordan R. Silk

Jordan R. Silk, OSB No. 105031

CERTIFICATE OF FILING AND SERVICE

I certify that on June 12, 2014, I filed the original of this
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I further certify that on June 12, 2014, I served a copy of the
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