

IN THE SUPREME COURT OF THE STATE OF OREGON

WATERWATCH OF OREGON, INC.,
Petitioner,
Respondent on Review

v.

WATER RESOURCES DEPARTMENT,
OREGON WATER RESOURCES COMMISSION,
Respondents Below,

and

THE CITY OF COTTAGE GROVE,
Respondent,
Petitioner on Review

Water Resources Department
No. S42117

Court of Appeals
147071

Supreme Court
S062036

**BRIEF OF *AMICI CURIAE* LEAGUE OF OREGON CITIES
AND THE OREGON WATER UTILITIES COUNCIL
ON THE MERITS**

On Judicial Review of a Final Order of the Water Resources Department

Opinion filed: December 11, 2013

Authored by: Armstrong, Presiding Judge

Concurring Judge(s): Duncan, Judge, and Brewer, Judge *pro tempore*

(Counsel listed on inside cover)

June 12, 2014

W. MICHAEL GILLETTE,
OSB #660458
JORDAN R. SILK, OSB #105031
Schwabe, Williamson & Wyatt, P.C.
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: (503) 222-9981
Email: wmgillette@schwabe.com
jsilk@schwabe.com

*Attorneys for Petitioner on Review
The City of Cottage Grove*

ANNA M. JOYCE, OSB #013112
Solicitor General
INGE D. WELLS, OSB #881137
Senior Assistant Attorney General
Oregon Department of Justice
Appellate Division
1162 Court Street NE
Salem, OR 97301
Telephone: (503) 378-4402
Email: inge.d.wells@doj.state.or.us

*Attorney for Respondents Water
Resources Department and Oregon
Water Resources Commission*

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

*Attorney for Respondent on Review
WaterWatch of Oregon*

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

*Attorney for Respondent on Review
WaterWatch of Oregon*

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

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

TABLE OF CONTENTS

	Page
I. QUESTIONS PRESENTED.....	1
II. PROCEDURAL AND FACTUAL HISTORY.....	1
III. SUMMARY OF ARGUMENT.....	3
A. OWRD appropriately exercised its delegated authority in certifying the City’s water right.....	3
B. OWRD’s certification decision renders this case moot.....	4
C. The Court of Appeals’ Interpretation of House Bill 3038 (2005) Impairs Existing Municipal Water Use.....	4
D. The Court of Appeals improperly asserted jurisdiction over an order not before the court.....	5
IV. ARGUMENT.....	5
A. OWRD appropriately exercised its delegated authority in certifying the City’s water right.....	5
1. The Growing Communities Doctrine of municipal water rights provides important context to OWRD’s decision.....	6
2. The Water Rights Act delegates OWRD authority to regulate municipal water development, and also provides safeguards to municipalities consistent with the Growing Communities Doctrine.....	10
3. OWRD properly exercised its delegated authority in certifying Cottage Grove’s water right.....	14
B. OWRD’s certification decision renders this case moot.....	16
C. The Court of Appeals’ Interpretation of HB 3038 Impairs Existing Municipal Water Use.....	21

- 1. The Court of Appeals did not appreciate the practical context and consequences of the court’s decision.....22
 - 2. The court’s interpretation of HB 3038 is improper given the retroactive effect of the court’s decision.....26
- D.** The Court of Appeals improperly asserted jurisdiction over an order not before the court.....30
- V.** CONCLUSION.....34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Black v. Arizala</i> , 337 Or 250, 95 P3d 1109 (2004)	27, 28
<i>Butler v. United Pacific Ins. Co.</i> , 265 Or 473, 509 p2d 1184 (1973)	10
<i>City and County of Denver v. Sheriff</i> , 105 Colo 193, 96 P2d 836 (1939).....	7
<i>Hale v. Water Resources Department</i> , 184 Or App 36, 55 P3d 497 (2002) (applying <i>Springfield</i> , 290 Or 217, 228-29)	13
<i>In the Matter of the Consolidated Case Involving Applications for Extension of Time for Clackamas River municipal permits, Order on Reconsideration (March 21, 2013)</i>	31
<i>Joseph v. Lowery</i> , 261 Or 545, 495 P2d 273 (1972)	27, 28
<i>Kempf v. Carpenters & Joiners Local Union</i> , 229 Or 337, 367 P2d 436 (1961)	28
<i>Linn-Benton-Lincoln Educ. Ass’n v. Linn-Benton-Lincoln ESD</i> , 163 Or App 558, 989 P2d 25 (1999)	28
<i>Lovinger v. Lane County</i> , 206 Or App 557, 138 P3d 51 (2006)	26
<i>Murphy v. Nilsen</i> , 19 Or App 292, 527 P2d 736 (1974)	28
<i>Portland General Electric Company v. Mead</i> , 235 Or App 673 (2010)	26
<i>Springfield Educational Association v. Springfield School District No. 19</i> , 290 Or 217, 621 P2d 547 (1980)	10, 11, 12

<i>State ex rel Juvenile Dept. of Multnomah County v. Nicholls</i> , 192 Or App 604, 87 P3d 680 (2004)	27
<i>State ex rel State Engineer v. Crider</i> , 78 NM 312, 431 P2d 45 (1967)	7
<i>Strizver v. Wilsey</i> , 210 Or App 33, 150 P3d 10 (2006)	26, 28
<i>WaterWatch of Oregon, Inc. v. Boeing Agri-Industrial Co.</i> , 155 Or App 381, 963 P2d 744 (1998)	20
<i>WaterWatch of Oregon Inc. v. Water Resources Commission</i> , 193 Or App 87, 88 P3d 327 (2004), <i>vacated</i> 339 Or 275, 119 P3d 221 (2005)	8, 9, 20, 22
<i>WaterWatch of Oregon, Inc. v. Water Resources Dept.</i> , 259 Or App 717, 316 P3d 330 (2013)	20, 23, 25, 26, 28, 30
<i>Whipple v. Howser</i> , 291 Or 475, 632 P2d 782 (1981)	26
<i>Wiser v. Elliot</i> , 228 Or App 489, 209 P3d 337 (2009)	10

Statutes

California Water Code 106.5 and 1264	7
Or Laws 1913, Chapter 279	8
2005 Or Laws, Chapter 410, § 1	9, 27
2005 Or Laws, Chapter 410, § 1(2)(a)	12
2005 Or Laws, Chapter 410, § 5(2)	27
ORS 34.020	19
ORS 92.040	18
ORS 183.310(6)(a)(C)	32
ORS 183.400(2)	33
ORS 183.482	31

ORS 183.482(3)	21
ORS 183.484	13, 17, 30
ORS 183.486(1)(b)	30, 33
ORS 197.015(10)(a)	18
ORS 197.015(10)(b)(G)	18
ORS 197.015(12)(a)(A)	19
ORS 197.195	19
ORS 197.360-380	19
ORS 197.825	18
ORS 197.828	19
ORS 468B.050	32
ORS 536.075(5)	21
ORS 537.150	11
ORS 537.150(3)	10
ORS 537.153	10
ORS 537.153(3)	10
ORS 537.170	11
ORS 537.170(8)	10
ORS 537.173	21
ORS 537.230	9
ORS 537.230(2)(a)	12, 16
ORS 537.230(2)(b)	25
ORS 537.250	13, 16, 17, 30
ORS 537.250(1)	18

ORS 537.260.....	11, 15
ORS 537.260(3)	17
ORS 537.262.....	13
ORS 537.270.....	13, 17
ORS 537.410.....	11
ORS 537.410-445	12
ORS 540.610(4).....	8
Washington Revised Code 90.03.260(5).....	7

Rules

OAR 340-045-0033	32
OAR 690-310-0160 to 0170.	11
OAR 690-315-0060	12, 31
OAR 690-315-0100	12

Legislative History

House Bill (HB) 3038 (2005)	
.....	4, 5, 9, 12, 15, 21, 22, 23, 25, 26, 27, 28, 29, 31, 32

Other Authorities

2010 Census Profiles for Oregon Cities, http://www.pdx.edu/prc/2010-census-profiles-oregon-cities- alphabetically	3
Certificate of Water Right 86670	13
City of Amity Permit Information (S-39599), http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp id=45984	2

City of Enterprise Permit Information (S-36777 & S-39123), http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=45336 and http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=45876	2
City of Philomath Permit Information (S-49245), http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=49016	1
City of Seaside Permit Information (S-30117), http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=43864	2
City of Wheeler Permit Information (G-12196), http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=22848	2
Janis Carpenter, <i>Water for Growing Communities</i> , 27 Env'tl L 127, 134-35 (1997)	7
ODEQ 1200-C General Permit for stormwater discharge, http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes1200c/permit.pdf	32
Tri-City Water District Permit (S-40699) Information, http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=46272	2
WaterWatch Website, http://waterwatch.org/programs/watch-dogging-oregons-water-use/watch-dogging-program	20

I. QUESTIONS PRESENTED

The Oregon Water Utilities Council and the League of Oregon Cities (collectively “*Amici*”) concur with Petitioner-on-Review City of Cottage Grove’s (“Cottage Grove”) statement of the questions presented and with Cottage Grove’s proposed rules of law.

II. PROCEDURAL AND FACTUAL HISTORY

Amici concur with Cottage Grove’s explanation of the nature of this case, the procedural history of the case, and the material facts. *Amici* offer the following additional facts to provide important context to the questions before this court.

Many municipal water providers across the state are currently supplying water to their communities under permits with expired development deadlines. Some of these municipalities have had permit extension applications pending with the Oregon Water Resources Department (“OWRD”) for many years. Others have not yet applied for a permit extension. The following table provides a few examples to illustrate this situation:

Permit	Permitted Volume (cfs)	Water Source	Permit Expiration Date	Permit Extension Application Date	Reference
City of Philomath (S-49245)	3.5	Marys River	10/1/1993	5/1/2012	http://apps.wr.d.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=49016

Permit	Permitted Volume (cfs)	Water Source	Permit Expiration Date	Permit Extension Application Date	Reference
Tri-City Water District (S-40699)	3	S. Umpqua River	10/1/1997	10/2/2003	http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=46272
City of Enterprise (S-36777 & S-39123)	27 total	Wallowa River tributaries	10/1/1998	3/25/2010 and 5/6/2010	http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=45336 and http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=45876
City of Wheeler (G-12196)	3.6	Wells near Nehalem River	10/1/1999	5/3/2004	http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=22848
City of Seaside (S-30117)	1.2	S. Fork Necanicum River tributaries	10/1/1997	None submitted	http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=43864
City of Amity (S-39599)	1	S. Yamhill River	10/1/1998	None submitted	http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=45984

In addition, many Oregon cities have grown considerably since the late 1990s when the protracted legal process surrounding municipal water rights began. For example, the 2010 United States Census found that Happy Valley grew 208 percent, Bend grew 47 percent, and Central Point grew 37 percent between 2000 and 2010. *See* <http://www.pdx.edu/prc/2010-census-profiles-oregon-cities-alphabetically>. Water use in cities like these is therefore considerably greater now than it was in the late 1990s.

III. SUMMARY OF ARGUMENT

The Court of Appeals' decision is contrary to the Oregon Water Rights Act and the doctrine of prior appropriation on which the Act is based. The court's decision threatens public water resources currently in use and hampers the ability of municipalities across the state to develop future water supplies for growing communities. In addition, the court's retroactive application of law and broad assertion of jurisdiction over unappealed administrative orders could unravel a broad range of agency decisions.

A. OWRD appropriately exercised its delegated authority in certifying the City's water right

The Oregon Water Rights Act's flexible, long term process for municipal water rights is grounded in the Growing Communities Doctrine of western water law. The Water Rights Act delegates authority to OWRD to oversee municipal water right development and provides for decreasing levels of public process as a municipality becomes more invested in the infrastructure needed to

utilize its permitted water. In this case, OWRD properly utilized its delegated authority to issue a water right certificate to Cottage Grove because the city had fully utilized its permitted water, and the delay associated with the city's permit extension was caused by protracted legal process.

B. OWRD's certification decision renders this case moot

Under the Water Rights Act, an unchallenged certificate provides conclusive evidence of the certificate holder's right to appropriate water. Under the Administrative Procedure Act ("APA") and the Water Rights Act, WaterWatch was not entitled to notice of OWRD's certification decision and was required to challenge the certificate in circuit court as an order in other than a contested case. Because WaterWatch failed to do this, Cottage Grove's certificate mooted WaterWatch's challenge to OWRD's prior permit extension order.

C. The Court of Appeals' Interpretation of 2005 House Bill 3038 Impairs Existing Municipal Water Use

The Court of Appeals failed to recognize that many cities have developed substantial water resources since the late 1990s without approved permit extensions and that this situation is a result of OWRD's decision not to process permit extension requests for many years. The court's interpretation of House Bill (HB) 3038 (2005) retroactively subjects this existing water use to water conservation and fish persistence requirements. This result is contrary to the legislative intent of HB 3038 and to principles of statutory construction. This

court should overrule the Court of Appeals' interpretation of HB 3038 in order to avoid jeopardizing public water supplies and prevent future litigation regarding the validity and contours of municipal water rights across the state.

D. The Court of Appeals improperly asserted jurisdiction over an order not before the court

The Court of Appeals asserted jurisdiction over Cottage Grove's water right certificate in violation of the APA's judicial review scheme. This decision allows litigants to attack collaterally a broad array of previously unchallenged agency decisions, including historic water right permits and other tiered and sequential agency decisions. This result is contrary to legislative intent and could broadly undermine the decision-making systems of administrative agencies. This court should therefore hold that the Court of Appeals lacked jurisdiction over Cottage Grove's water right certificate.

IV. ARGUMENT

A. OWRD appropriately exercised its delegated authority in certifying the City's water right

The Growing Communities Doctrine of western water law encourages a long term, flexible process that allows municipalities to deliver needed public water supplies reliably and to plan for future growth. The Water Rights Act has long reflected the principles of this common law doctrine and HB 3038 reinforced these principles. The Water Rights Act delegates authority to OWRD to manage the municipal water right development process and provides increasing safeguards for municipal water rights holders throughout the process.

OWRD properly utilized its delegated authority in this case to extend and certify Cottage Grove's water right. OWRD recognized that the city had no practical choice but to continue developing its water right in the face of prolonged uncertainty regarding the legal status of municipal water rights across the state. OWRD therefore appropriately allowed Cottage Grove to fully utilize its water right before formally extending the development deadlines in the city's permit. Moreover, because OWRD's permit extension decision documented the city's perfection of its water right, OWRD properly approved the city's subsequent application for certification of the water right.

1. The Growing Communities Doctrine of municipal water rights provides important context to OWRD's decision

The Water Rights Act reflects the prior appropriation doctrine of western water law. Under this doctrine, water rights are gained through the application of water to beneficial use. Conversely, water rights may be lost through non-use.

As municipalities grow, their demand for water and the number of ratepayers to support water development grow as well. This situation causes municipalities to put more of their permitted water to use over time. Western water law has long recognized the special responsibility and needs of municipal water suppliers through the Growing Communities Doctrine.

The Growing Communities Doctrine reconciles the use-it-or-lose-it principle of prior appropriation with the special circumstances of municipal

water suppliers through two key features. First, the Growing Communities Doctrine allows municipal water suppliers to hold water rights in anticipation of future needs by affording them more time to put their water rights to beneficial use. Second, the Growing Communities Doctrine generally exempts municipal water rights from forfeiture through nonuse. *See* Janis Carpenter, *Water for Growing Communities*, 27 *Envtl L* 127, 134-35 (1997).

Some western states have recognized the Growing Communities Doctrine as a feature of their common law and others have adopted the doctrine through legislation. *See, e.g., State ex rel State Engineer v. Crider*, 78 NM 312, 315, 431 P2d 45 (1967) (“The claim however contemplated water for future use to meet requirements resulting from the increase in population. The right to appropriate water for future use is fully recognized by most authorities.”); *City and County of Denver v. Sheriff*, 105 Colo 193, 202, 96 P2d 836, 841 (1939) (“it is not speculation, but the highest prudence on the part of the City to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable time”). Other states have adopted the doctrine through legislation. *See, e.g.,* California Water Code 106.5 and 1264 (“It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses.”); Washington Revised Code 90.03.260(5) (“If for municipal water supply, the

application shall give the present population to be served, and, as near as may be estimated, the future requirement of the municipality.”).

Oregon’s water rights statutes have long incorporated the principles of the Growing Communities Doctrine. The Oregon Legislature first recognized the Growing Communities Doctrine in 1914. Legislation enacted that year stated the following:

“The right of all cities and towns * * * to acquire rights to the use of water and natural streams and lakes * * *, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes and for such future, reasonable and usual municipal purposes that may be anticipated by reasons of growth or population or to secure sufficient water supply in cases of emergency, is hereby expressly confirmed.”

Or Laws 1913, ch 279. This policy is codified today at ORS 540.610(4).¹

In 2005, the Legislative Assembly reinforced the principles of the Growing Communities Doctrine by invalidating the Court of Appeals’ holding in *WaterWatch of Oregon Inc. v. Water Resources Commission*, 193 Or App 87, 88 P3d 327 (2004) (“*Tenmile Creek*”), vacated 339 Or 275, 119 P3d 221

¹ The current ORS 540.610(4) reads as follows:

“The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.”

(2005). In *Tenmile Creek*, the Court of Appeals held that the Coos Bay North Bend Water Board (“CBNB”) was not entitled to a water right permit under ORS 537.230 because CBNB did not plan to begin physical construction of its water diversion infrastructure within five years of receiving its permit. The Legislative Assembly responded to this decision with HB 3038, which amended ORS 537.230 to allow municipal water suppliers up to 20 years to commence and complete construction of water diversion works pursuant to permits issued after the effective date of the act. This legislation also allowed municipal water suppliers to apply for extensions of time beyond the 20 years to complete construction or to perfect a water right. *See* 2005 Or Laws, ch 410, § 1. HB 3038 further established the special procedures at issue in this case for municipal water providers already holding water right permits for which an extension is required. HB 3038, therefore, incorporated the principles of the Growing Communities Doctrine by extending the timeline for municipalities to perfect their water rights and affirming municipal water rights through the permit extension process.

The Growing Communities Doctrine is central to this case because this court’s decision will affect the ability of municipalities to provide essential water supplies to the public in the immediate future and over time. The Legislative Assembly has codified the principles of the Growing Communities Doctrine and therefore the court should interpret the Water Rights Act to be

consistent with these principles. This interpretive practice is employed frequently. *See, e.g., Butler v. United Pacific Ins. Co.*, 265 Or 473, 479 n.3, 509 p2d 1184 (1973) (considering the common law in existence at time of enactment of statute in question). For example, the Court of Appeals recently utilized common law in applying Oregon’s adverse possession statute in *Wiser v. Elliot*, 228 Or App 489, 498, 209 P3d 337, 343 (2009). Specifically, in *Wiser*, the court recognized that the statutory definition of “hostile possession” incorporates and codifies the common law adverse possession element of hostility. The court then evaluated plaintiff’s adverse possession claim in light of the common law governing hostility. This court should similarly utilize the Growing Communities Doctrine to evaluate WRD’s decision in this case.

2. The Water Rights Act delegates OWRD authority to regulate municipal water development, and also provides safeguards to municipalities consistent with the Growing Communities Doctrine

The Water Rights Act delegates substantial decision-making authority to OWRD throughout the municipal water right development process. When a municipality applies for a new water right, among the determinations that OWRD must make is whether the proposed water use is in the “public interest.” ORS 537.153; ORS 537.170(8).² Under this court’s *Springfield* decision, the

² OWRD must also determine whether water is available for the proposed use, whether the proposed use will injure existing water users, and whether the nature of the proposed use is a beneficial use that is consistent with the use regulations for the local watershed. *See* ORS 537.150(3); ORS 537.153(3).

“public interest” is a term of delegation that requires WRD to make a policy decision about what constitutes the public interest in water resources and to apply WRD’s policy in specific instances. *Springfield Educational Association v. Springfield School District No. 19*, 290 Or 217, 228-29, 621 P2d 547, 555-56 (1980).

All proposed water right permits are subject to public notice and comment. *See* ORS 537.150. Anyone may protest the issuance of a water right permit and OWRD may hold a contested case hearing on the permit if the protest raises a “significant dispute.” ORS 537.170; OAR 690-310-0160 to 0170.

Once OWRD has issued a water right permit, the department continues to oversee the development and perfection of the water right. The Water Rights Act, however, provides increasing safeguards to permit holders throughout the water right development process in order to facilitate planning and investment in the permitted water use.

If a water permit holder fails to meet deadlines or other requirements of the water permit, OWRD has discretion to cancel the permit. ORS 537.260 (“the department may * * * order the cancellation of the permit”); *see also* ORS 537.410 (providing same authority to Water Resources Commission). OWRD, however, must provide the permit holder with written notice and the

opportunity for a contested case hearing before cancelling the permit. *See* ORS 537.410-445.

The Water Rights Act also grants WRD particular discretion to extend municipal water rights permits. Specifically, HB 3038 allows WRD to extend a municipal water permit if the permit holder shows “good cause.” 2005 Or Laws, ch 410, § 1(2)(a), codified at ORS 537.230(2)(a). Under this court’s *Springfield* methodology, “good cause” is also a term of delegation that requires policy decision-making by OWRD. *Springfield*, 290 Or at 555. Through the use of the term “good cause,” the Legislative Assembly therefore has provided flexibility in municipal water development timelines and delegated authority to OWRD to set policy regarding municipal permit extensions.

Although the Water Rights Act does not provide for public process regarding municipal permit extensions, OWRD has used its delegated authority to establish a public process. Specifically, OWRD provides public notice of municipal permit extensions and allows anyone “affected or aggrieved” by an extension decision to seek a contested case hearing. OAR 690-315-0060 and OAR 690-315-0100.

The Legislative Assembly has also delegated authority to OWRD to certificate water rights, but here the Water Rights Act directs OWRD to ensure the finality of certification decisions. Specifically, the Water Rights Act states that OWRD “shall issue” a water rights certificate in response to an application

“that shows, to the satisfaction of [OWRD] that an appropriation has been perfected in accordance with the provisions of the Water Rights Act[.]”

ORS 537.250. This provision therefore delegates authority to OWRD to determine whether a water right has been properly perfected, but requires OWRD to issue a certificate once OWRD concludes that the requirements for certification have been met. *See Hale v. Water Resources Department*, 184 Or App 36, 43, 55 P3d 497 (2002) (applying *Springfield*, 290 Or 217, 228-29) to uphold OWRD certification decision).

Relatedly, the Water Rights Act does not provide for public process before certificate issuance and only allows water users affected by a certificate to challenge the issuance of a certificate through a contested case hearing. *See* ORS 537.250; ORS 537.262. All other certificate opponents must challenge certificate issuance in circuit court as an order in other than a contested case. *See* ORS 183.484; ORS 537.250; Certificate of Water Right 86670, *available at* http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=170378

Finally, an unchallenged water right certificate provides “conclusive evidence of the priority and extent” of a water right. ORS 537.270. The purpose of a water right certificate therefore is to establish a water user’s vested right to a particular water use. In the case of municipal water rights holders, a certification decision secures the municipality’s investment in its water infrastructure and facilitates community planning efforts.

In sum, the Legislature has delegated authority to OWRD to allocate Oregon's water resources and to ensure appropriate development of water rights. The Water Rights Act provides for broad public involvement and consideration of the public interest when a prospective water user applies for a water right permit. Once OWRD issues a permit, OWRD has discretion to balance the practical needs of the permittee with the broader interest in stewardship of water resources. When a permittee has completed the investment needed to fully utilize its permitted water right, the Water Rights Act protects that investment by requiring OWRD to issue a certificate for the water right.

3. OWRD properly exercised its delegated authority in certifying Cottage Grove's water right

The history of Cottage Grove's water right reflects nearly two decades of uncertainty regarding the legal status of municipal water rights across the state. Cottage Grove's prior permit cycle ended in 1999, during the time period when OWRD was not processing permit extension applications because OWRD was engaged in protracted rulemaking on this topic. Like many other municipalities, Cottage Grove relied on OWRD's assertions that the lack of a timely permit extension would not prevent the city from continuing to develop its water right. (Rec.1123). Cottage Grove therefore continued to invest the resources necessary to develop its water infrastructure and make full use of its water right permit. (Rec. 820).

Eight years later, following the passage of HB 3038 and the completion of OWRD's related rulemaking, Cottage Grove was nearing completion of a new diversion structure and water treatment plant. Because this new infrastructure would enable Cottage Grove to make practical use of the full quantity of water in the city's permit, Cottage Grove sought an extension of its permit to clarify its right to this water. OWRD responded to this request by allowing Cottage Grove to complete its work and document the full development of the city's water right before evaluating Cottage Grove's permit extension request. As a result, OWRD's permit extension order concluded that there was no remaining undeveloped portion of Cottage Grove's water right.

OWRD's permit extension decision was consistent with the agency's delegated authority under the Water Rights Act. At the time that OWRD originally issued Cottage Grove's permit in 1977, OWRD concluded that it was in the public interest for Cottage Grove to use 6.2 cfs of water from the Row River for municipal purposes. When Cottage Grove ran past the 1999 deadline in its permit³ to utilize some of this water, OWRD declined to cancel the city's permit due to the protracted legal process surrounding municipal permit extensions. See ORS 537.260. OWRD later made a similar determination that there was good cause to amend Cottage Grove's water development deadline through the permit extension. See ORS 537.230(2)(a). These policy decisions

³ As described in Cottage Grove's Brief on the Merits page 9, this 1999 deadline was the result of multiple permit extensions.

were within OWRD's discretion and were appropriate given the city's practical need for water and the legal history surrounding municipal water rights.

Moreover, OWRD's subsequent certification decision was the appropriate legal consequence of Cottage Grove's permit extension. OWRD's permit extension decision clearly documented the full development of Cottage Grove's water right. As a result, OWRD properly certificated Cottage Grove's water right in response to Cottage Grove's subsequent application for certification. *See* ORS 537.250 (providing that OWRD "shall issue" a certificate in response to an application that shows perfection "to the satisfaction of the department").

In conclusion, the Water Rights Act incorporates the principles of the Growing Communities Doctrine by providing a long term, flexible process for development of municipal water rights. The Water Right Act also delegates authority to OWRD to manage this process and determine whether a municipality has appropriately developed its water rights over time. In this case, OWRD determined that Cottage Grove had adequately perfected its water right given the extended period of legal uncertainty stemming from administrative rulemaking, litigation, and legislative action concerning municipal water rights.

B. OWRD's certification decision renders this case moot.

The Court of Appeals' mootness decision ignores the judicial review

scheme of the Water Rights Act and fails to recognize the factual and procedural history of this case. Under ORS 537.270, an unchallenged water right certificate provides “conclusive evidence of the priority and extent” of a water right. Except for water users affected by a certificate, anyone wishing to appeal a certificate must do so in circuit court under APA procedures governing challenges to orders in other than contested cases. *See* ORS 183.484; ORS 537.250; ORS 537.260(3). In the instant case, WaterWatch failed to bring a timely challenge to the certificate issued by OWRD to Cottage Grove. Under the Water Rights Act and APA, therefore, WaterWatch’s challenge to Cottage Grove’s permit extension is moot.

Despite the statutory requirements for challenging a water right certificate, the Court of Appeals held that WaterWatch’s challenge to the permit extension was not moot because the certificate was predicated on the extension and WaterWatch did not have sufficient notice of OWRD’s issuance of the certificate. This reasoning is contrary to legislative decisions to minimize public process at the certification stage of water rights development and to require public challenges to certificates to proceed in circuit court.

As described in Part IVA(2) above, municipal water rights development is a lengthy process involving multiple regulatory stages. The Water Rights Act provides for robust public involvement in the initial permitting stage of a water right. OWRD has utilized its delegated authority to provide an additional, more

limited public process for municipal permit extension decisions. The Water Rights Act, however, does not provide for public notice of OWRD decisions at the final stage of water right certification. Rather, the Water Rights Act directs OWRD to examine a water right holder's technical compliance with the terms of the holder's permit. If OWRD is satisfied with the permit holder's compliance with permit terms, OWRD must issue the certificate. *See* ORS 537.250(1).

This sequence of diminishing public involvement is not unique to the Water Rights Act. For example, the land use statutes include a similar procedural structure for land division approvals. The local government's review of an application to subdivide land is a "land use decision" subject to public notice and hearing requirements, as well as appeal rights to the Oregon Land Use Board of Appeals. *See* ORS 92.040; ORS 197.015(10)(a); ORS 197.825. This initial decision approves a preliminary plat for the subdivision. Later, after the developer determines the final design of the subdivision, the local government must approve the final plat. This final local approval, however, is expressly excluded from the statutory definition of a land use decision. *See* ORS 92.040; ORS 197.015(10)(b)(G). This avoids additional public process and forces appeals of a final plat to be brought in circuit court in

a writ of review proceeding. *See* ORS 34.020.⁴ This sequence allows for robust public involvement in the initial stage of subdivision development, but provides security of investment in approved subdivision concepts and encourages finality of final plat approvals.

Similar to the subdivision statutes, the procedural structure of the Water Rights Act is designed to provide security to investments in water resource development and to encourage the finality of certification decisions. This structure is consistent with the Growing Communities Doctrine because the structure facilitates planning and financing of water infrastructure for anticipated population growth.

The Court of Appeals' decision fails to respect the public involvement and judicial review scheme of the Water Rights Act. Although OWRD's certificate decision was related practically to OWRD's permit extension decision, the two are separate decisions with separate procedural and judicial review requirements. Following two years of WaterWatch administrative appeals of OWRD's permit extension decision, Cottage Grove utilized its right under the Water Rights Act to seek certification of its water right. OWRD

⁴ The subdivision statutes further streamline the permitting process in some cases. First, any subdivision of land within an urban growth boundary is defined as a "limited land use decision." These decisions provide for more limited public process and a more narrow scope of review at the Land Use Board of Appeals. *See* ORS 197.015(12)(a)(A); ORS 197.195; ORS 197.828. Second, some partitions and subdivisions qualify as "expedited land divisions" which allow a developer to choose either a specialized permitting process or a traditional land use process. ORS 197.360-380.

responded to this request by granting the certification, consistent with OWRD's authority and obligation under the Water Rights Act.

The proper forum for WaterWatch to challenge OWRD's certification decision was circuit court but WaterWatch failed to avail itself of that forum. Although WaterWatch was not entitled to notice of OWRD's issuance of the certificate, WaterWatch could have simply inquired of OWRD regarding actions to certify Cottage Grove's water right following issuance of OWRD's final order on the permit extension. WaterWatch is a sophisticated party that closely monitors and regularly challenges OWRD decisions. *See, e.g., Tenmile Creek*, 193 Or App 87; *WaterWatch of Oregon, Inc. v. Boeing Agri-Industrial Co.*, 155 Or App 381, 963 P2d 744 (1998); <http://waterwatch.org/programs/watch-dogging-oregons-water-use/watch-dogging-program> (stating that WaterWatch "tracks the actions of [OWRD]" and that WaterWatch "monitors and challenges * * * water allocation decisions"). Moreover, WaterWatch was intimately familiar with the status of Cottage Grove's water right, and should have anticipated that Cottage Grove would seek certification of its water right following OWRD's final order on Cottage Grove's permit.⁵

WaterWatch also did not take advantage of opportunities to prevent

⁵ At the time that OWRD issued the certificate for Cottage Grove's water right, WaterWatch had been litigating Cottage Grove's permit extension for over two years. *See WaterWatch of Oregon, Inc. v. Water Resources Dept.*, 259 Or App 717, 722, 316 P3d 330 (2013).

OWRD from issuing a certificate to Cottage Grove in the first instance. After OWRD issuance of its final order on the permit extension, WaterWatch could have filed exceptions to the September 14, 2010, Final Order with the Water Resources Commission. *See* ORS 537.173. WaterWatch did not do this. In addition, WaterWatch could have swiftly appealed the Final Order on the permit extension to the Court of Appeals and asked that court to stay issuance of the certificate under ORS 183.482(3) and ORS 536.075(5). Because WaterWatch waited until after OWRD had issued the certificate to appeal the permit extension order, the Court of Appeals lacked authority to stay the certificate.

In sum, OWRD's issuance of a water right certificate to Cottage Grove supplied conclusive evidence of the city's right to use the water granted in its earlier permit, and WaterWatch failed to properly challenge issuance of the certificate in circuit court. WaterWatch was not entitled to notice of OWRD's certification decision, nor to a collateral attack on the certificate in the Court of Appeals. As a result, this case concerning OWRD's earlier permit extension decision is moot.

C. The Court of Appeals' Interpretation of HB 3038 Impairs Existing Municipal Water Use

The Court of Appeals' retroactive application of HB 3038's water use conditions is extremely damaging to municipalities across this state and contrary to principles articulated by this court to determine legislative intent.

The court did not recognize that many cities have developed substantial water resources since the late 1990s without approved permit extensions, and that this situation is a result of OWRD's decision not to process permit extension requests for many years. The court's interpretation of HB 3038 retroactively subjects this existing water use to water conservation and fish persistence requirements. This necessarily requires temporary curtailment of existing water use in some cases and may also lead to permanent curtailment of municipal water use. This dynamic jeopardizes public water supplies and invites future litigation regarding the validity and contours of municipal water rights across the state.

Although the Court of Appeals determined that the meaning of the statutory provisions at issue in this case is unclear, the court failed to follow the required interpretive methodology to determine the Legislative Assembly's intent. Because retroactive application of HB 3038's water use conditions impairs existing water rights, the Court of Appeals should have declined to apply these statutory provisions retroactively, given the lack of evidence that the Legislative Assembly intended a retroactive result.

1. The Court of Appeals did not appreciate the practical context and consequences of the court's decision

OWRD's protracted rulemaking and the *Tenmile Creek* litigation effectively prevented many municipalities from perfecting their water rights in compliance with their permits. The Court of Appeals' decision does not

consider the cause or the implications of the permit cycle issue faced by municipalities across the state. Instead, the court implied that its retroactive application of HB 3038 water use conditions was necessary to prevent Cottage Grove from becoming a model for municipalities to suddenly build new infrastructure to make full use of their permitted water—all in an attempt to circumvent the requirements of HB 3038 for fish protection and water conservation. *See WaterWatch v. OWRD*, 259 Or App 717, 741, 316 P3d 330 (2013). This reasoning ignores history and does not reflect the reality of municipal water supply development on which the Legislative Assembly based HB 3038.

Cottage Grove is typical of Oregon municipalities in that the development of its water right was tied to the expansion of its water supply and treatment infrastructure. The need for additional water supply infrastructure was a result of long term population growth. Relatedly, the opportunity to develop the infrastructure arose from the gradual development of the city's ratepayer base and careful financial planning. OWRD originally issued Cottage Grove's permit for 6.2 cfs of municipal water in 1977, but the city had only developed a portion of this water at a cost of approximately \$5 million by the end of the city's previous permit cycle in 1999. It took another nine years and approximately \$3.3 million for the city to complete infrastructure development and make full beneficial use of its permitted water. (Rec. 820).

The fact that Cottage Grove's permit development deadline was expired while Cottage Grove continued developing its water right from 1999-2008 reflects the years of OWRD inaction on municipal extensions created by protracted legal processes. The Water Rights Act does not place a deadline on OWRD approval of permit extensions, and OWRD does not have the resources to timely process permit extension applications. *See, e.g.*, City of Philomath, City of Enterprise, Tri-City Water District, and City of Wheeler examples discussed above in Part II. Because of this situation, municipalities across the state have developed their water systems and increased their water use significantly over an extended period of time following the end of their previous permit cycle. These actions have been essential in order for municipalities to supply water to their communities and to plan for future growth.

The Court of Appeals' decision places this existing municipal water use in limbo by retroactively subjecting these resources to water conservation and fish persistence requirements. The Court of Appeals denied that its decision jeopardizes water developed after the end of a permit cycle, but that is the necessary and logical consequence of the decision. In a footnote near the end of its opinion, the Court of Appeals addressed *Amici's* argument on this issue and stated:

That is, nothing in this opinion requires a city to cease using water that has been applied to beneficial use

after its permit has expired or prohibits a city from increasing its water use pending departmental approval of an extension application. We hold only that those actions are not considered “development” for purposes of ORS 537.230(2)(c) and do not occur “before the extension” for purposes of ORS 537.230(2)(b). We express no opinion as to whether such actions would otherwise be prohibited under the Water Rights Act, a question that is not before us.

WaterWatch v. OWRD, 259 Or App at 742, n.25.

This explanation ignores the key fact that water conservation and fish persistence requirements in most cases will operate to reduce the amount of water available for municipal purposes. In circumstances where additional water has been placed into use following the end of a permit cycle, the Court of Appeals’ opinion retroactively reduces the volume or rate of flow available for municipal use if it is later determined that the water use does not meet conservation or fish persistence standards.

Moreover, the Court of Appeals’ interpretation of the water conservation provision HB 3038 creates an additional requirement in some cases for temporary curtailment of water developed after the end of a permit cycle. HB 3038 requires permit extensions to be “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). The Court of Appeals interpreted “the extension” in this provision to refer retroactively to the prior permit

extension. *WaterWatch*, 259 Or App at 742 n.25. Therefore, in municipalities without OWRD-approved water conservation plans, the continued use of any water developed after the end of the municipality's prior permit cycle would be prohibited until OWRD approved a water conservation plan for that municipality.

Even if the fish persistence and water conservation standards do not permanently require a reduction in water use in a particular case, the Court of Appeals' decision still places a cloud of uncertainty over existing municipal water use that must be resolved through additional regulatory process.

2. The court's interpretation of HB 3038 is improper given the retroactive effect of the court's decision.

Because the Court of Appeals did not acknowledge the retroactive effect of its decision, the court did not consider the proper method of statutory interpretation concerning the retroactivity of statutes. As with any statute, legislative intent is the touchstone for judicial interpretation of potentially retroactive legislation. *See Whipple v. Howser*, 291 Or 475, 480-82, 632 P2d 782 (1981). However, the Court of Appeals, following this court's guidance, has repeatedly noted that if a statute lacks a retroactivity clause, then "the legislative record is typically silent and of no assistance." *Portland General Electric Company v. Mead*, 235 Or App 673, 681, P3d 1048 (2010); *Strizver v. Wilsey*, 210 Or App 33, 37, 150 P3d 10 (2006); *Lovinger v. Lane County*, 206

Or App 557, 566, 138 P3d 51 (2006); *State ex rel Juvenile Dept. of Multnomah County v. Nicholls*, 192 Or App 604, 609, 87 P3d 680 (2004).

There is no clear retroactivity clause in HB 3038 regarding application of the water conservation and fish persistence requirements of the statute.

Section 5(2) of the statute does apply these water use provisions generally to permit extension applications that were pending before OWRD prior to the effective date of HB 3038. *See* 2005 Or Laws, ch 410, § 5(2). But HB 3038 does not say that the water use conditions apply prospectively to future water development under an extended permit or that the conditions apply retroactively to previously developed water. Specifically, HB 3038 refers to “the extension” and “the undeveloped portion of the permit” but does not specify which permit extension is relevant for measuring the development of a water right. *See* 2005 Or Laws, ch 410, § 1 (codified at ORS 537.230(2)).

This court “assume[s] that the legislature intends its amendments to existing legislation to apply prospectively unless the legislature signals an intention to apply an amendment retrospectively.” *Black v. Arizala*, 337 Or 250, 271, 95 P3d 1109 (2004). In addition, statutes that are “procedural or remedial” presumptively apply retroactively, whereas statutes that are “substantive” are presumed to apply prospectively only. *See Joseph v. Lowery*, 261 Or 545, 549, 495 P2d 273 (1972).

To determine whether a particular statute is procedural or remedial, as opposed to substantive, Oregon courts “avoid invoking the terms as mere labels and strive to examine meaningfully the substance of the legislation.” *Strizver*, 210 Or. App. at 38 (citing *Joseph*, 261 Or at 547). As explained by this court, the basic test for whether a law is “substantive” concerns whether retroactive application of the statute will “impair existing rights, create new obligations or impose additional duties with respect to past transactions.” *Joseph*, 261 Or at 547 (quoting *Kempf v. Carpenters & Joiners Local Union*, 229 Or 337, 343, 367 P2d 436 (1961)).

The Court of Appeals recognized the ambiguity of the Legislative Assembly’s intent as to when the water conservation and fish persistence requirements of HB 3038 should apply. Specifically, the court stated that “the specific timing question at issue here was not directly addressed in public hearings on the bill[.]”⁶ *WaterWatch*, 259 Or. App. at 735, 741.

Nevertheless, the Court of Appeals did not evaluate the statute using the interpretive methodology set forth in *Black*, *Joseph*, and *Kempf*, and did not

⁶ The Court of Appeals relied significantly on the more general legislative history of HB 3038, primarily on statements in the legislative record made by WaterWatch. *WaterWatch*, 259 Or App at 739-40. WaterWatch’s opinion of HB 3038 does not constitute persuasive evidence of legislative intent. *Linn-Benton-Lincoln Educ. Ass’n v. Linn-Benton-Lincoln ESD*, 163 Or App 558, 569, 989 P2d 25 (1999) (witness statements “are not direct expressions of legislative intent”); *Murphy v. Nilsen*, 19 Or App 292, 296, 527 P2d 736 (1974) (testimony from persons interested in the legislation “is incompetent” for the purpose of determining legislative intent).

“examine meaningfully” the effect of the provisions at issue in this case on existing municipal water rights. Given the ambiguity regarding legislative intent and the fact that retroactive application of HB 3038’s water use conditions impairs existing water rights, the Court of Appeals’ interpretation was in error.

Finally, the Court of Appeals’ statutory construction is not necessary to prevent municipalities from evading water conservation and fish persistence requirements. OWRD may refuse to extend a water right permit if a municipality delays applying for a permit extension in order to develop water free of the requirements of HB 3038. As described in Part A2 above, the APA and Water Rights Act also provide remedies for improper certification of a water right. The court’s retroactive application of the water use conditions of HB 3038, therefore interferes with the authority delegated to OWRD under the Water Rights Act to regulate the development and use of municipal water rights.

In sum, the Court of Appeals failed to recognize that its retroactive application of the water conservation and fish persistence requirements of HB 3038 impairs legitimate existing municipal water use. Because there is no evidence that the Legislative Assembly intended this result, this court should correct the Court of Appeals’ statutory interpretation.

D. The Court of Appeals improperly asserted jurisdiction over an order not before the court

The Court of Appeals’ decision to assert jurisdiction over Cottage Grove’s water right certificate violates the APA and improperly empowers the courts to unravel a broad array of previously unchallenged agency decisions. In the water law context, the Court of Appeals’ decision allows circuit courts to strike down municipal water rights certificates based on defects in earlier permit-extension orders that no person challenged. In other cases where an administrative rule or order is invalidated on judicial review, a variety of unchallenged permits issued under the invalid rule or order could also be nullified. This result is contrary to legislative intent and could broadly undermine the decision-making systems of administrative agencies.

The Court of Appeals reached beyond the permit extension order before the court to invalidate the water rights certificate subsequently issued by OWRD to Cottage Grove. The court asserted jurisdiction over the certificate under ORS 183.486(1)(b), which allows for “ancillary relief * * * to redress the effects of official action wrongfully taken or withheld.” *WaterWatch*, 259 Or App at 729. The court made this decision despite the fact that the APA and the Water Rights Act provide for judicial review of water rights certificates in circuit court as orders in other than contested cases. *See* ORS 183.484; ORS 537.250.

The court's decision sets the stage for additional litigation regarding future municipal water rights certificates. Many future municipal water rights certificates will be based on permit extension decisions that have been issued post-HB 3038 or that will be issued in the future. *See, e.g., In the Matter of the Consolidated Case Involving Applications for Extension of Time for [various Clackamas River municipal permits]*, Order on Reconsideration (March 21, 2013), available at

http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_details.aspx?snp_id=135322

(incorporating water conservation plan and fish persistence requirements into various extension approvals for municipal water rights permits involving water withdrawals from the Clackamas River). The Court of Appeals' decision allows challenges to future water right certifications in circuit court on the basis that OWRD did not adequately condition prior permit extensions, even if those prior extensions were not timely challenged. Just as the Court of Appeals ignored APA procedures and timelines for challenging a water certificate, circuit courts will be empowered to ignore APA and Water Rights Act provisions that require permit extensions to be challenged through contested cases and the Court of Appeals. *See* ORS 183.482; OAR 690-315-0060 and OAR 690-315-0100 (providing for contested cases on protests of water permit extensions). These certificate challenges could result in cancellation of municipal water rights due to long-resolved, technical permit cycle issues

resulting from the period of legal uncertainty preceding HB 3038 and related OWRD rulemaking. This prospect adds another layer of risk and uncertainty to municipal water rights holders.

The court's decision also threatens other types of tiered and sequential agency decisions. For example, the Oregon Department of Environmental Quality ("ODEQ") issues general permits to cover various categories of activities that create discharges to air and water. These general permits may be issued as orders in other than contested cases. *See, e.g.*, ORS 468B.050 and OAR 340-045-0033 (allowing ODEQ to issue general water discharge permits as orders); ORS 183.310(6)(a)(C) (defining ODEQ permits issued under ORS 468B.050 as "orders" for purposes of the APA). Individuals and organizations sometimes must apply to ODEQ for coverage under these general permits, and these applications are subject to public comment periods in some cases. In response to an application and public comments, ODEQ issues an order allowing or denying an applicant's coverage under the general permit. *See, e.g.*, ODEQ 1200-C General Permit for stormwater discharge; *available at* <http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes1200c/permit.pdf> (requiring application and 14-day public comment period for construction activities disturbing more than five acres of land). The precedent set by the Court of Appeals in this case also allows circuit courts reviewing general permits to invalidate subsequently-issued coverage orders, even if an individual

coverage order was not timely challenged. This result creates a risk that business activities conducted under general permits may be deemed unlawful, even if the coverage order authorizing the activity was not specifically challenged and the business operated in accordance with the general permit and in reliance on DEQ's permit coverage decision.

The Court of Appeals' interpretation of ORS 183.486(1)(b) has even broader implications when a court invalidates an agency rule in response to a challenge to an order implementing the rule. The APA allows a court to determine the validity of a rule in the context of a challenge to an agency order applying the rule. ORS 183.400(2). If a court strikes down a rule in this circumstance, the Court of Appeals' interpretation of ORS 183.486(1)(b) arguably allows the court to also invalidate any and all agency authorizations issued pursuant to the rule, even if those authorizations were not timely challenged and could not otherwise be adjudicated by the court. Such a scenario could dismantle entire systems of agency decision-making and create widespread collateral damage to permit holders that have relied on issued permits to conduct their business affairs.

In sum, the Court of Appeals' assertion of jurisdiction over an agency order not properly before the court creates a dangerous precedent with far-reaching implications to administrative law. This court should therefore hold

that the Court of Appeals lacked jurisdiction over Cottage Grove's unchallenged water right certificate.

V. CONCLUSION

For the forgoing reasons, *Amici* respectfully request 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.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

/s/ Richard M. Glick

RICHARD M. GLICK, OSB #792384

Email: rickglick@dwt.com

MICHAEL J. GELARDI, OSB #083347

Email: michaelgelardi@dwt.com

Davis Wright Tremaine LLP

1300 SW Fifth Ave., Suite 2400

Portland, OR 97201

Telephone: (503) 241-2300

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

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b); (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 8,998 words and further certify that (3) this brief complies with the minimum type size limitation pursuant to ORAP 5.05(4)(f) and (4) the font size is 14 point Times New Roman.

DAVIS WRIGHT TREMAINE LLP

/s/ Richard M. Glick
RICHARD M. GLICK, OSB #792384
Email: rickglick@dwt.com
MICHAEL J. GELARDI, OSB #083347
Email: michaelgelardi@dwt.com
Davis Wright Tremaine LLP
1300 SW Fifth Ave., Suite 2400
Portland, OR 97201
Telephone: (503) 241-2300
*Attorneys for Amici Curiae Oregon
Water Utilities Council and League of
Oregon Cities*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 12th day of June, 2014, I filed the foregoing BRIEF OF *AMICI CURIAE* LEAGUE OF OREGON CITIES AND THE OREGON WATER UTILITIES COUNCIL ON THE MERITS with the State Court Administrator by using the court's electronic filing system, and I hereby certify that I served copies of the above document to the following parties by eFile through the State Court Administrator, if applicable, or, if not applicable, by U.S. Postal Service, first class mail:

Lisa A Brown
Water Watch of Oregon
213 SW Ash, Suite 208
Portland, OR 97204
Email: lisa@waterwatch.org

Attorney for WaterWatch of Oregon Inc.

W. Michael Gillette
Jordan R Silk
Schwabe Williamson & Wyatt PC
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204
Email: wmgillette@schwabe.com
Email: jsilk@schwabe.com

Attorney for City of Cottage Grove

Anna M. Joyce
Inge D. Wells
Oregon Department of Justice
Appellate Division
1162 Court Street NE
Salem, OR 97301
Email: inge.d.wells@doj.state.or.us

Email: anna.joyce@state.or.us

Attorney for Respondents Water Resources Department and Oregon Water Resources Commission

Thomas M. Christ, OSB #834064
Cosgrave Vergeer Kester LLP
888 S.W. Fifth Avenue, Suite 500
Portland, OR 97204
Email: tchrist@cosgravelaw.com

Attorney for Respondent on Review WaterWatch of Oregon

DAVIS WRIGHT TREMAINE LLP
/s/ Richard M. Glick
Richard M. Glick, OSB #792384
1300 SW Fifth Avenue, Suite 2400
Portland, Oregon 97201
Telephone: 503-241-2300
Fax: 503-788-5299
Email: richardglick@dwt.com
Of Attorneys for *Amici Curiae* Applicants,
Oregon Water Utilities Council and
The League of Oregon Cities