IN THE SUPREME COURT OF THE STATE OF OREGON

WATERWATCH OF OREGON, INC., an Oregon nonprofit corporation, Petitioner, Respondent on Review v. OREGON WATER RESOURCES DEPARTMENT, a state agency; and OREGON WATER RESOURCES COMMISSION, a state agency; Respondents, and, CITY OF COTTAGE GROVE, an Oregon municipal corporation, Respondents, Petitioner on Review	Water Resources Dept. No. S42117 CA A147071 SC S062036

RESPONDENT ON REVIEW WATERWATCH OF OREGON, INC.'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals on
Judicial Review of the Final Order of the Water Resources Department

Court of Appeals Opinion Filed: December 11, 2013
Before: Armstrong, Judge; Duncan, Judge; Brewer, Judge *pro tempore*
Author of Opinion: Armstrong, Presiding Judge
Concurring Judges: Duncan, Judge; Brewer, Judge *pro tempore*

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BRIEF ON THE MERITS OF WATERWATCH OF OREGON, INC.

I. STATEMENT OF THE CASE

WaterWatch filed a timely petition for review in the Court of Appeals to a final order in a contested case issued by the Oregon Water Resources Department ("WRD") that extended the development deadline conditions of a water permit ("extension order") held by the City of Cottage Grove ("City"). WaterWatch asserted, and the Court of Appeals held, that the extension order was unlawful because it failed to include certain water conservation and fish protection permit conditions required by ORS 537.230(2)(b) and (c).

During the 60-day appeal period for the extension order prescribed by ORS 183.482, the City applied for and WRD issued, without notice to WaterWatch, a water right certificate ("certificate"). The unlawful extension was a legal prerequisite to issuance of the certificate.

Eight months after WaterWatch filed the petition for review of the extension order, City and WRD moved for dismissal claiming that the subsequent certificate order mooted WaterWatch's challenge to the extension order. The Court of Appeals disagreed. Nothing in the water code, or elsewhere in statute or rule, protects the certificate from being set aside in

this situation. Further, an agency cannot moot a timely challenge to an order by issuing a subsequent order that is legally dependent on the challenged order, particularly where, as here, no notice of the subsequent order was provided to petitioner.

The decision is also correct on the merits. In 2005, the legislature amended the municipal water permit extension statute to require approval of a Water Management and Conservation Plan ("water conservation plan") for any water not "diverted for beneficial use before the extension," and to require that the "undeveloped portion" of the permit be conditioned to protect imperiled fish. ORS 537.230(2)(b)-(c). The purpose of the extension process is to extend a permit's development deadline conditions. The text, context and history of the statute demonstrate that the water conservation plan and fish protection conditions must be applied to the portion of the permit not diverted by the expiration of the development deadline conditions, *i.e.* the portion for which the extension is needed.

WRD interprets ORS 537.230(2)(b)-(c) to require conditioning of the portion of the permit not diverted at the time WRD issues an extension order, with no regard to the permit's development deadline conditions. The interpretation allowed the city to evade the water conservation plan and fish protection conditions by delaying the extension process for years. During

this delay it diverted all the additional water it sought pursuant to the extension and then claimed all the water had been beneficially used and that there was no "undeveloped portion" of the permit. WRD's interpretation is inconsistent with legislative intent. The Court of Appeals decision should be affirmed.

II. NATURE OF THE PROCEEDING

A. Overview of legal framework: water permits, extensions and certificates under Oregon's water code

Oregon's water allocation system specifies that water may be "appropriated for beneficial use, as provided in the Water Rights Act and not otherwise." ORS 537.120. Oregon water law also mandates that a person may not use, store or divert any waters until WRD issues a permit to appropriate the waters (except for limited exempt uses not at issue here). ORS 537.130(2), ORS 537.535. The Water Rights Act includes ORS 537.211, which requires that each water permit issued "shall specify the details of the authorized use and shall set forth any terms, limitations and conditions as the department considers appropriate * * *." ORS 537.010

Included in the permit conditions are three deadlines regarding permit development: (1) beginning construction; (2) completing construction; and (3) completing full application of water to the proposed use. (*See for example,* ER-4.) After a water permit is issued, WRD may, if certain

standards are met, grant a permit holder an extension of time to develop the permit. ORS 537.230(2) (for municipal permits). The effect of the extension is to delay the development deadlines by extending them from the expiring deadlines to future deadlines. (Here, the order would grant City an extension from October 1, 1999 to October 1, 2013). (ER-19, 28).

A water permit gives the holder the right to use water in accordance with the permit and to ultimately file what is denominated a "Claim of Beneficial Use" to obtain a water right certificate for that amount. ORS 537.260(2). A permit holder may only certificate the amount of water developed in accordance with *all* the terms of the permit, including the original development deadlines, as amended by any extensions. *Id.; see also* OAR 690-014-0100. Accordingly, beneficial use of water and certification of a water right requires compliance with permit conditions and the law, including development deadlines and conditions imposed by extensions of time to develop the permit.

In 2005, the Oregon legislature amended the statute governing municipal extensions through HB 3038. 2005 Or Laws, ch 410 (WW App-5-10). The bill was a compromise negotiated by WRD, municipal interests including the League of Oregon Cities, and WaterWatch. *See WaterWatch of Oregon, Inc. v. Water Resources Dept.*, 259 Or App 717, 739, 316 P3d 330

(2013). Section (5)(3) of the bill protected old undeveloped municipal permits from cancellation for failure to begin timely construction, while Section (1)(2)(b)-(c) of the bill required WRD to condition extensions of these old permits to require a water conservation plan and fish protection as follows.

> "(2) 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, *the department 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:*
> * * * * *
> (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*."

ORS 537.230(2)(b)-(c) (emphasis added).

New administrative rules were enacted in 2005 to implement HB 3038. OAR 690-315. The rules define "undeveloped portion of the permit" to mean "the portion of the permit that is the difference between the

maximum rate, or duty if applicable, specified in the permit and the maximum rate, or duty if applicable, diverted for beneficial use before the extension." OAR 690-315-0010(6)(g).

B. City's Water Permit, Extension order and Certificate

The facts regarding the permit, extension and certificate are not generally in dispute but the City and WRD incorrectly assert that delays beyond City's control caused it to apply for an extension eight year after its development deadlines expired.

The permit at issue was issued in April of 1977, containing two permit conditions providing deadlines for development:

> "Actual construction work shall begin on or before November 14, 1978 and shall thereafter be prosecuted with reasonable diligence and be completed on or before October 1, 1979;
>
> Complete application of the water to the proposed use shall be made on or before October 1, 1980."

(ER-1, 4). The deadlines for completion of construction and for complete application of the water ("development deadlines") were later amended through the issuance of three permit extensions—not including the proposed extension at issue, most recently to October 1, 1999. *Id.*

When the last extension of the development deadlines expired on October 1, 1999, the City had diverted a maximum rate of 3.1 cubic feet per

second ("cfs") of the permit's 6.2 cfs. (WaterWatch Ex. 228 at 11, showing diversion of .336 million gallons over four hours).

On January 13, 2003, WRD sent a letter to City announcing that the Water Resources Commission had adopted new administrative rules (effective November 1, 2002) governing municipal permit extensions. (ER-6, *citing* OAR 690-315-0070 through 0100). In 2003, City had neither completed construction nor had it diverted water at the full rate of 6.2 cfs under the permit (ER-9, stating that the "maximum rate of beneficial use was 3.1 cfs in 2007); *see also* (WRD Ex. A-9 at 4). WRD's 2003 letter stated that if permit development was not complete, "[City] must submit an application for extension of time to complete construction of the water system and/or complete beneficial use of water to the full extent of the permit." (ER-6). A form accompanying the letter directed that if "Development of the Permit is Not Complete," then "the permit holder will submit a permit extension of time application to **WRD no later than 90 days from the date of this letter (April 13, 2003).**" (ER-8) (emphasis in original). City did not submit the required extension application by April 13, 2003. WRD took no action in response to City's failure to submit an extension application.

City waited until December 11, 2007 to apply for an extension. (ER-15, Finding #5). At that time, the new extension rules implementing HB

3038 had been in place for two years. OAR 690-315. City filed its extension application more than eight years after the permit's last extension expired, and nearly five years after WRD sent its 2003 letter stating that City needed to apply for an extension within 90 days.

When it filed its extension application, City had only diverted half of the permitted amount (3.1 cfs). (ER-9).[1]

On January 28, 2008, City voluntarily requested that WRD suspend processing of its extension application by asking that WRD put the late-filed application on "administrative hold." (WRD Ex. A-7). WRD granted the hold on January 30, 2008. (WRD Ex. A-6).

The City's requested delay continued for six months, during which time City doubled its diversion to the full amount of the permit. (ER-9). In August, 2008, City reported to WRD that on July 10, 2008 (nearly nine years after the permit's development deadlines expired and while it had placed its extension application on hold), the full rate of the permit was diverted from 8 am to 1:50 pm. *Id.* The letter requested that WRD remove the administrative hold and stated that "[t]he City has now beneficially used

[1] WRD incorrectly states that City had put the full rate of the permit to beneficial use before submitting its extension request. (At 20).

all 6.2 cfs authorized under Permits S-42117…" and "[c]onsequently, there is no undeveloped portion of permit S-42117." *Id.*

WRD issued a Proposed Final Order for the extension finding that "[a]s of July 10, 2008, the permit holder has diverted the total 6.2 cfs of water authorized under Permit S-42117 for municipal purposes. There is no "undeveloped portion" of Permit S-42117 as per OAR 690-315-0010(6)(g)." (ER-16, Finding #11); *see also,* (ER-19, Conclusion of Law #7). The Proposed Final Order also found that "the total 6.2 cfs of water allowed has been diverted from the Row River for beneficial municipal purposes under the terms of this permit." (ER-17, Finding #25).

Despite these findings, the Proposed Final Order proposed to:

> "Extend the time to complete construction of the water system under Permit S-42117 from October 1, 1999 to October 1, 2013.
>
> *Extend the time to apply the water to beneficial use* under Permit S-42117 from October 1, 1999 to October 1, 2013."

(ER-19) (emphasis added); *see also,* (ER-16, Finding #10, stating that remaining work includes "completing construction of the water system and applying the water to full beneficial use.")

Based on its finding that there was no "undeveloped portion of the permit," WRD did not include any conditions in the extended permit to protect imperiled fish pursuant to ORS 537.230(2)(c). (ER 18, Finding #6).

WRD also did not require a water conservation plan pursuant to ORS 537.230(2)(b).

WaterWatch filed a timely administrative protest to the Proposed Final Order and participated in a contested case hearing. (ER-22).

On September 14, 2010, WRD issued the extension order as a Final Order in contested case. (ER-22-39).

On October 15, 2010 (31 days into the 60-day appeal period allowed by ORS 183.482 for the extension order and with no notice to WaterWatch), WRD issued City's water right certificate for 6.2 cfs as an order in other than a contested case. The extension order is a legal prerequisite of the certificate; the certificate could not have been issued but for the extension order.

On November 15, 2010, WaterWatch filed a timely petition for review of the extension order with the Court of Appeals.

Eight months after WaterWatch filed its petition for review, City and WRD filed motions to dismiss for mootness based on issuance of the certificate. The motions to dismiss were denied.

C. Court of Appeals' decision

The Court of Appeals determined that the subsequent certificate order did not moot WaterWatch's challenge to the extension order. The court summarized:

> "our ability to review a challenge to the department's extension order is not rendered moot by the department's subsequent issuance of the water-right certificate because the certificate issued before the time for petitioner to seek judicial review of the extension order had expired, the department's authority to issue the certificate was predicated on the legality of the extension order, and petitioner had no practical ability to seek judicial review of the certificate."

259 Or App at 732.

The extension order was unlawful because WRD failed to include the statutorily required ORS 537.230(2)(b)-(c) water conservation plan and fish protection permit conditions. When the legislature required extension orders to include fish protection conditions for the "undeveloped portion of the permit," as well as a water conservation plan for the portion of the permit not "diverted for beneficial use before the extension," the legislature intended that these conditions would attach to the portion of the permit for which the extension was needed. That portion is defined by the expired development deadlines that must be extended and is equal to the portion of water not diverted for beneficial use by the expiration of those deadlines.

III. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Question One: Does ORS 537.270 prevent the Court of Appeals from directing WRD to vacate a water right certificate, or in the alternative condition water use under the certificate, where WRD issues the certificate predicated upon an extension order which is found to be unlawful after a timely challenge by a party that had no notice of the issuance of the certificate?

Proposed Rule of Law: No. ORS 537.270 does not apply to the parties or issues in this case, and does not prevent vacating or conditioning a certificate as a remedy in an appeal under ORS 183.482 of an extension order that is a legal prerequisite to the certificate, and where the appeal challenges neither the "priority date" nor the "extent of appropriation" in the certificate. Where a court finds an extension order unlawful because it failed to include certain water use conditions required by the water code, the court may, under the remedies provided by the Administrative Procedure Act ("APA"), set aside the agency action by directing the agency to vacate the subsequently issued certificate which could not lawfully be issued without a valid extension order. In the alternative, the court may order WRD to condition water use under the certificate consistent with a lawful extension order.

Question Two: Where issuance of a water right certificate requires as a legal prerequisite a lawful extension order and the Court of Appeals finds, pursuant to a timely filed petition for review of a final order in contested case, that the extension order was unlawful, can the court set aside the agency action by ordering the certificate vacated as ancillary relief under ORS 183.486(1), where, as here, the certificate was issued with no notice to petitioner during the 60-day period allowed by ORS 183.482 for seeking judicial review of the extension order?

Proposed Rule of Law: Yes. If the court finds an extension order unlawful based on a timely challenge under ORS 183.482, then ORS 183.486(1)(b) allows the court to set aside the subsequently issued certificate. Where the certificate is legally predicated on the extension order and the certificate was issued without notice to petitioner during the ORS 183.482 appeal period for the extension order, the certificate may be set aside, even where the certificate is an order in other than a contested case. This relief is encompassed within the legislative directive to the Court of Appeals to "provide whatever relief is appropriate irrespective of the original petition," (ORS 183.486(1)) including "set[ting] aside agency action" (ORS 183.486(1)(a)) and "[o]rder[ing] such ancillary relief as the

court finds necessary to redress the effects of official action wrongfully taken or withheld." ORS 183.486(1)(b).

Question Three: ORS 537.230(2)(b) requires WRD to condition extensions of time for municipal water permits to require approval of a water conservation plan for water diverted "beyond the maximum rate diverted for beneficial use before the extension." Did the legislature intend that the "maximum rate diverted for beneficial use before the extension" be measured in accordance with the permit's express conditions (including the development deadline conditions) and to reflect that the extension begins when the last development deadlines expire, or did the legislature intend that such measurement occur at the time WRD issues the extension order?

Question Four: ORS 537.230(2)(c) requires WRD to issue extensions of time for municipal water permits only if WRD finds that "the undeveloped portion of the permit is conditioned to maintain * * * the persistence of fish species listed as sensitive, threatened or endangered under state or federal law." Did the legislature intend that "undeveloped portion of the permit" be measured in accordance with the permit's express conditions and thus at the expiration of the development deadline conditions, or did it intend for WRD to deem water diverted outside of those conditions to be a "[]developed portion of the permit"?

Combined Proposed Rules of Law: The text, context and legislative history of ORS 537.230(2)(b)-(c) show that the legislature intended WRD to consider and apply both the water conservation plan and fish protection conditions to the portion of the permit for which the extension is needed. That portion of the permit is the portion that had not been diverted at the time the prior development deadlines expired.

IV. SUMMARY OF ARGUMENT

The Court of Appeals correctly found that the case is not moot. WRD's issuance of the certificate, which could not issue but for the extension order, during the statutorily allowed period for challenging the extension order and with no notice to petitioner, cannot moot the case. First, ORS 537.270 does not prevent the court from setting aside the certificate or dictate the conclusiveness argued by City and WRD. Enacted in 1917 and never substantively amended, ORS 537.270 does not apply to the issues in this case because WaterWatch challenges neither the extent nor priority date of the certificate. Additionally, the statute does not apply to WaterWatch because WaterWatch owns no water right subsequent in priority to City's. Second, an agency cannot moot a timely challenge to a final order by issuing a subsequent order that it could not issue but for the first order, particularly where, as here, the agency provided no notice of the subsequent order to

petitioner. Third, because the Court of Appeals had jurisdiction to hear WaterWatch's timely filed challenge to the extension order pursuant to ORS 183.482, ORS 183.486(1) provides ample authority for the court to craft the relief ordered here—namely reversing and remanding the unlawful extension order and ordering WRD to vacate the certificate it could not have issued but for the extension order.

The extension order was unlawful because WRD failed to include statutorily mandated water conservation plan and fish protection conditions. ORS 537.230(2)(b)-(c). The text, context and history demonstrate that the conditions must be applied to the discrete portion of the permit for which the extension is needed—that portion not diverted at the expiration of the development deadlines. City and WRD urge that instead the conditions be applied to the portion not diverted whenever WRD issues an extension order, but that would allow beneficial use and development of a permit outside of the express terms of the permit which is inconsistent with the purpose of the extension statute, the language of the extension order, and related water statutes and rules. Moreover, the interpretation urged by City and WRD would make ORS 537.230(2)(b)-(c) superfluous by allowing cities to determine whether or when the requirements apply. The Court of Appeals decision should be affirmed.

V. ARGUMENT

To determine statutory intent, the court is guided by *Portland General Electric Co. v. Bureau of Labor and Industries* (317 Or 606, 859 P2d 1143 (1993)), as modified by *State v. Gaines.* 346 Or 160, 206 P3d 1042 (2009). The first level of analysis under *PGE* is to examine the text and the context of the statute. 317 Or at 610-612. Consideration of the regulatory context of a statute is proper at the first level of the *PGE* analysis. *Fisher Broadcasting, Inc. v. Department of Revenue*, 321 Or 341, 898 P2d 1333 (1995) (considering relevant statutes, when taken together as context in the first level *PGE* analysis); *Department of Land Conservation and Development v. Jackson County*, 151 Or App 210, 948 P2d 731 (1997) (considering administrative rules as context in the first level *PGE* analysis). In urging this court to reverse the Court of Appeals, City and WRD urge interpretations of both the water code's extension statute and the APA that are inconsistent with text, context and legislative history.

A. WRD's issuance of the water right certificate, during the ORS 183.482 appeal period for the legally prerequisite extension order, cannot moot WaterWatch's challenge to the extension order.

City and WRD incorrectly claim that issuance of the certificate rendered WaterWatch's challenge to the extension order moot, urging that the certificate cannot be set aside as part of a remedy under ORS 183.486(1).

That claim does not stand up to analysis. City and WRD urge this court to accept a mythology surrounding the nature and effect of water right certificates that does not conform to statute or with this court's previous opinions. They further urge that state agencies be allowed to circumvent and, essentially, write out of existence the APA's statutory review procedures for final orders by issuing subsequent orders during the appeal period with no notice. They then complain that petitioner did not raise the same substantive issues raised in this proceeding in a challenge to the subsequent order in circuit court. That formulation of the APA should be soundly rejected by this court.

1. ORS 537.270 does not protect City's certificate from being vacated, or, in the alternative, from a remedy that would require addition of water use conditions required by statute.

Any conclusiveness provided by ORS 537.270 for certificates is not absolute and, on these facts, the statute does not prevent a court from exercising its remedial authority under ORS 183.486(1). The court can order the certificate to be vacated, or in the alternative order water use under the certificate to comply with ORS 537.230(2)(b)-(c).[2]

[2] City mistakenly asserts that WaterWatch never requested vacation of the certificate. (At 22). In its response to the motions to dismiss, WaterWatch stated that if it prevailed on the merits "the [extension order] *and* the certificate are both unlawful and should withdrawn or modified to correct the deficiencies." (At 15, incorporated by reference into WaterWatch's

a) The plain language of ORS 537.270 makes it inapplicable to the issues in this case.

In certain challenges, ORS 537.270 makes a certificate "conclusive evidence of the priority and extent of the appropriation." One reason ORS 537.270 does not give the certificate any conclusiveness here is that WaterWatch is not challenging either of these elements of the certificate. Vacating the certificate because the prerequisite extension was unlawful is not a judicial determination of the extent or priority of the certificate. Likewise, ordering that water use under the certificate be conditioned to comply with ORS 537.230(2)(b)-(c) also would not impact its extent or priority.

No dispute exists about the priority of the certificate, which is simply the date of the permit application (September 22, 1977). (ER-1). Neither is the extent of appropriation at issue. The relevant definition of "extent" is "the range (as of inclusiveness or application) over which something extends * * * **:** the point or degree to which something extends * * * " *Webster's 3d Int'l Dictionary* at 805 (unabridged ed 2002). The challenge here has nothing to do with the degree to which the appropriation extends, which, if

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Reply Brief at 11); *see also id.* at 8 (stating that issuance of the certificate was unlawful). In any case, ORS 183.486(1) directs the court to "provide whatever relief is appropriate irrespective of the original form of the petition."

the extension were to be validly approved and a valid certificate issued, would remain unchanged at 6.2 cfs. Conditions imposed pursuant to ORS 537.230(2) might limit use during certain times of the year (*i.e.*, requiring some curtailment of water use during low flow periods when streamflows are needed for fish), but would not reduce the maximum amount, or extent, of the certificate.

City claims that ORS 537.270 gives it a conclusive right to divert 6.2 cfs "pursuant to a certificate that does not impose any conditions." (At 34). Similarly, WRD claims that as used in ORS 537.270 "priority and extent of the appropriation" means "the right to use the water for municipal purpose." (At 12). ORS 537.270 does not support these overbroad claims. City and WRD confuse the *extent* of the appropriation with the *conditions* of the appropriation. For example, City's certificate has this condition of use (among others): "[t]he use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows." (City Ans Br, App-3). That condition does not change the *extent* of the appropriation which is 6.2 cfs. In sum, this proceeding does not entail a challenge to the extent or priority or the appropriation. Rather, because the extension order necessary for issuance of the certificate was unlawful, the certificate order should be set aside and

vacated, or conditioned consistent with a lawful extension order that includes water conservation plan and fish protection conditions.

Because this proceeding involves neither the priority nor the extent of the appropriation, ORS 537.270 does not make the City's certificate conclusive here.

b) ORS 537.270 does make the certificate conclusive as to WaterWatch.

ORS 537.270 identifies two different types of certificates—those issued pursuant to ORS 537.250 after perfection of a water permit (like City's), and those issued pursuant to ORS 539.140 after a water rights adjudication. For certificates like City's, ORS 537.270 provides "conclusive evidence of the priority date and extent of the appropriation" if "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."

City (and WRD) ignore this court's opinion in *Cleaver v. Judd*, cited by the Court of Appeals, which confirms that ORS 537.270 was only intended to make a certificate conclusive as to an owner of a water right subsequent in priority to the certificate. 238 Or 266, 270, 393 P2d 193 (1964) ("It is apparent that ORS 537.270, read together with ORS 537.260, was intended to make a water right certificate conclusive only against a person whose water right was 'subsequent in priority.'") WaterWatch is not

a party "owning an application, permit or water right subsequent in priority." ORS 537.260(3). Therefore the certificate is not conclusive as to WaterWatch. ORS 537.270 does not limit the court's ability to address the certificate here.

Wilber v. Wheeler, 273 Or 855, 543 P2d 1052 (1975) (en banc), also cited by the Court of Appeals, found notice issues significant in deciding the case. In *Wilber*, this court determined that although ORS 537.270 does not foreclose the interest of an owner whose water right originated prior to that claimed by a subsequent certificate holder, the statute does limit the rights of a certificate holder to seek corrections of his own certificate, with "a possible exception for clerical errors." *Id.* at 864. The court reasoned that "[s]ince the owner of a prior right receives no notice of the issuance of a subsequent certificate and is not granted any opportunity to contest its validity, it seems clear that his prior vested rights cannot be impaired by the issuance of subsequent certificates. However, the owner of any particular certificate receives a copy of that certificate and thereby has notice of its terms." *Id*. Notice was significant to the resolution of *Wilber*. Because WaterWatch received no notice of the certificate, *Wilber* further shows why ORS 537.270 is inapplicable to WaterWatch here.

c) WRD's claim that ORS 537.270 makes a "certificate conclusive in "in *any* proceeding in *any* court" is

contradicted by its issuance of certificates as final orders reviewable under ORS 183.484 and its position that WaterWatch should have accordingly challenged City's certificate.

WRD maintains that ORS 537.270 makes a "certificate conclusive in *any* proceeding in *any* court." (At 12, emphasis original). That position is contradicted by the same statute under which WRD claims WaterWatch should have challenged the certificate—ORS 183.484, allowing judicial review of certificates as orders in other than a contested case. WRD confirms that City's certificate is a final order in other than a contested case, citing ORS 183.484, and asserts that "a remedy exists for the wrongful issuance of a water right certificate in the form of a circuit court proceeding filed in a timely fashion." (At 15, 17).[3, 4] A certificate cannot be both reviewable under ORS 183.484 *and* conclusive "in *any* proceeding in *any* court."

d) Legislative history shows why ORS 537.270 does not shield City's certificate from an ORS 183.486(1) remedy.

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[3] City's certificate states it is an order in other than a contested case subject to review under ORS 183.484, and in addition, under ORS 537.260(3) by any person with an application, permit, or water right subsequent in priority. (City Ans Br, App-2).

[4] WRD's actions belie its position. In another matter, WRD withdrew a certificate for reconsideration pursuant to ORS 183.484(4) more than seven months after issuance, demonstrating the certificate was not conclusive. *WaterWatch of Oregon, Inc. v. Oregon Water Resources Department*, Marion County Circuit Court, C11C13222 (City Ans Br, App-31).

The language of ORS 537.270 remains substantively unchanged from its first enactment by the Oregon legislature in 1917 (HB 258, ch 366 § 8; Olsons Laws 1920 § 5775). The sole legislative amendments were made in 1923, only to update water code references from Lord's Oregon Laws to Oregon Laws. (HB 170, ch 283 §40; Oregon Code 47-807). With minor housekeeping edits, this language exists today as ORS 537.270.

WRD's argument that legislative intent was to "shield a certificate from collateral attack" (at 12) must be read in its light of the statute's historical context and future statutory developments. The APA did not exist in 1917. Today, certificates issued pursuant to ORS 537.250 are issued as orders in other contested cases and are reviewable not only in accordance with ORS 537.260(3), but additionally under ORS 183.484 and the water code's accompanying provision ORS 536.075(1). Those statutes were enacted in 1975 and 1985, respectively, 58 and 68 years *after* the language of ORS 537.270. WRD asks this court to believe that the intent of the legislature in enacting *now* ORS 537.270 was to preclude the Court of Appeals from vacating a certificate as part of a review under a regime of administrative law that provides for remedies and procedures that were not extant in 1917 and that are designed expressly for the purpose of reviewing

and modifying agency action. That view has no support in the legislative history.

Further, WaterWatch's timely appeal of the extension order following a contested case hearing was not a "collateral attack" on the certificate. WaterWatch was not even aware of the certificate when it filed the petition review. WaterWatch's challenge of the extension order eliminated the very foundation upon which the certificate rested. Without that legal foundation, the court properly set aside WRD's action in issuing the certificate.

e) Even if this court does not affirm setting aside the agency action by vacating the certificate, water use under the certificate must be conditioned to comply with ORS 537.230(2)(b)-(c).

The Court of Appeals correctly ordered the certificate vacated. However, even if this court does not affirm vacation of the certificate, it should order WRD to condition water use under the certificate to reflect the water conservation plan and fish protection conditions required by ORS 537.230(2)(b)-(c). WRD's issuance of the defective certificate prior to the Court of Appeals determining that such conditions were required by a lawful extension order does not shield water use under the certificate from these conditions.

There is agency precedent for this type of action. WRD can enforce an irrigation season on a certificate even if no irrigation season condition is

included in the certificate. OAR 690-250-0070(1). This demonstrates that water use under certificates can be conditioned after issuance. The statutory authority cited for the rule is broad (ORS 537.540). That same authority exists for WRD to apply the statutorily required conditions here.

In *Tudor v. Jaca*, this court ordered changes to water use under a certificate based on judicial interpretation of a water rights decree. 178 Or 126, 157, 165 P 770 (1946). The case is instructive as to the nature of certificates. The appellant, citing *then* OCLA § 116-436 (*now* ORS 537.270), argued that the court's interpretation of the decree could not be enforced because it "destroyed the sanctity of the water right certificate" which appellant contended "ha[d] become final and binding on the whole world." *Id.* This court rejected that argument, stating that "[i]n considering the effect of the certificate as evidence, therefore, the conditions and limitations contained in the decree must be regarded as embodied therein, and the certificate is subject to any modification that may result from a judicial interpretation of any ambiguity in such conditions or limitations." *Id.* at 157. The court instructed that water use under the certificate be regulated accordingly. *Id.*

Here, City's certificate had as a prerequisite the extension order and the certificate states that the use is limited to beneficial use:

> "[t]he amount of water to which this right is entitled is *limited to an amount actually used beneficially*, and shall not exceed 6.2 CUBIC FEET PER SECOND or its equivalent in case of rotation, measured at the point of diversion."

(City Ans Br, App-2 (emphasis added)). Beneficial use does not include water use outside of or in violation of the terms of a permit governing that use. If a valid extension order requires a water conservation plan and fish protection as conditions of water use, as the Court of Appeals determined, then only water use made in compliance with such conditions could be lawfully deemed "an amount actually used beneficially" under the certificate. Even if the certificate were not vacated, just as in *Tudor*, the court can require WRD to add or enforce legally required conditions of water use to the City's certificate.

In sum, setting aside the agency action by vacating the certificate was the appropriate ancillary relief here under the APA, but it is not the only ancillary relief available. The court could also order, as ancillary relief, that water use under the certificate be conditioned to ensure that water is used beneficially in compliance with ORS 537.230(2)(b)-(c). The case is not moot. WRD's complicity in gaming the process by issuing the certificate, without notice, prior to determination of the lawfulness of the legally requisite extension order does not excuse WRD from conditioning use under

the certificate to meet statutorily required public interest standards for water conservation and fish protection.

2) Under *Hamel v. Johnson*, WRD may not moot WaterWatch's challenge to the extension order by issuing the certificate in reliance on the extension order.

In *Hamel v. Johnson*, this court held that an appeal of a 1997 order issued by the Board of Parole and Post-Prison Supervision ("Board") postponing a prisoner's release date was not rendered moot by a 1998 Board order because the Board never would have had the legal authority to issue the 1998 order if petitioner's release had not been postponed by the challenged 1997 order. 330 Or 180, 187-88, 998 P2d 661 (2000).

Here, WRD's issuance of the certificate cannot moot WaterWatch's challenge to the extension order, because, as in *Hamel*, the certificate order could not have been issued but for the challenged extension order.

The essential dispute in *Hamel* concerned the interpretation of sentencing guidelines. 330 Or at184-87. Petitioner appealed a 1997 order postponing his release from 1997 until 1999, but while that appeal was pending, the Board issued a second order further postponing petitioner's release date. *Id.* at 182-83. In issuing the 1998 order, the Board relied on information not available to it when it issued the 1997 order, including a psychological evaluation performed in 1998 (*id.* at 183)—in other words, the

Board could not have issued the 1998 order but for the challenged 1997 order that had kept the petitioner in prison. The Board argued that the1998 order rendered petitioner's challenge to the 1997 order moot; the Court of Appeals agreed. *Id.* at 183-84. However, this court reversed stating that if the 1997 order was not valid then the prisoner should have been released in 1997 and the Board was therefore not entitled to rely on evidence it had collected in 1998. *Id.* at 188. Indeed, "if petitioner had been released on parole, then the Board could not have issued its 1998 order." *Id*. Therefore, this court found that the petitioner's challenge to the 1997 order did not become moot upon issuance of the 1998 order. *Id.*

The same principle of administrative law applies here. Just as the Board could not have issued its 1998 order in *Hamel* if the 1997 order was invalid, WRD could not have issued the certificate here without the challenged extension order. Certificate issuance was dependent on the extension order's amendment of the expired development deadlines. If the extension order is unlawful, then issuance of the certificate based on that order is also unlawful and cannot render WaterWatch's challenge to the extension order moot.

WRD's only argument against application of the *Hamel* rule here is its claim that a water right certificate is "not merely another order" but "it is a

conclusive certificate of the right to use water." (At 13-14). In other words, WRD argues that because the second order is a certificate, WRD should be allowed to operate outside of the tenets of Oregon administrative law. That is wrong. As already established, in this proceeding the certificate is not conclusive evidence of anything—it is an agency order dependent for its existence on the challenged extension order. Nothing about a certificate makes *Hamel* inapplicable.

City complains that the Court of Appeals read *Hamel* so broadly "that *no* agency order is beyond collateral attack if *any* predicate agency action may have been legally erroneous * * *." (At 35). That is hyperbole.[5] Here, there was a timely challenge to an order necessary to the issuance of the certificate, with the latter issued during the period allowed by the APA for filing the challenge. The decision only affects a subsequent agency order issued without notice and resting on a foundational order found to be legally defective as the result of a lawful and timely APA appeal.

Finally, City further argues that *Hamel* is inapplicable because there the second order was of the same type as the first order, while the certificate is a different type of order than the extension. (At 38). However, the *Hamel*

[5] Fears of *Amici Curiae* League of Oregon Cities and the Oregon Water Utilities Council ("*amici*") about water quality permits are similarly confused because they ignore the specifics of the decision.

analysis did not revolve around the type of orders but, rather—as the Court of Appeals explained on remand, on the fact that "[i]f [the first] order was invalid, there would have been no occasion for a second order." *Hamel v. Johnson*, 169 Or App 216, 218, 9 P3d 719 (2000). The same situation exists here.

3) ORS 183.486(1) provides authority for the Court of Appeals to set aside the agency action by vacating the certificate on these facts.

The City and WRD urge that an agency can moot a challenge to an order by issuing a subsequent order that it legally could not issue but for the first order, during the statutorily allowed time for challenge of the first order, with no notice of the subsequent order to a party that had just completed a hearing regarding the first order. In essence, they urge that agencies be allowed to circumvent the appeal procedures in this manner, all the while complaining that petitioner did not raise the same substantive issues by challenging the subsequent order in a different court. That subversion of the APA should be soundly rejected by this court, as it was by the Court of Appeals.

a) ORS 183.486(1) does not limit the authority of the court as asserted by City and WRD.

City and WRD argue for limits to the relief that the Court of Appeals may provide under ORS 183.486(1) that do not appear in the statute and conflict with its broad language. In full, ORS 183.486(1) provides:

> **183.486 Form and scope of decision of reviewing court.** (1) 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.*

(emphasis added). It is hard to imagine a broader directive from the legislature than that a court provide "whatever relief is appropriate." The plain meaning of whatever is "any * * * that**:** all * * * that." *Webster's 3d Int'l Dictionary* at 2600 (unabridged ed 2002). "Whatever relief" is not a term of limitation.

Moreover, the text of the statute specifically authorized the Court of Appeals to "[o]rder such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld." ORS 183.486(1)(b). Thus the legislature envisioned cases, such as this one, where addressing a challenged order would not, by itself, provide an adequate

remedy for the harmful effects of the order. ORS 183.486(1)(a) specifically authorizes the court to "set aside agency action" as one type of relief. Taken together, ORS 183.486(1) and (1)(a)-(b) authorize the Court of Appeals to provide whatever ancillary relief is needed to redress the effects of the wrongfully issued extension order, including specifically "set[ting] aside agency action" by vacating the certificate.[6]

If the legislature had intended that in granting whatever ancillary relief the court finds necessary, the court be barred from setting aside agency action that may have been reviewable in another court, the legislature could easily have said that. In insisting on such limits, City improperly urges this court to ignore the terms and substance of the statute, insert what has been omitted, and omit what has been inserted. ORS 174.010.

WRD cites *Burns v. Board of Psychologist Examiners*, 116 Or App 422, 841 P2d 690 (1992), in support of preventing the Court of Appeals from reaching the certificate here, but the comparison fails. (At 17). *Burns* addressed, in part, whether this court's *dicta* in *Burke v. Children's Services Division* (288 Or 533, 544, 607 P2d 141 (1980)) that ORS 183.486(1) "clearly authorizes monetary relief" extends to awarding compensation for

[6] The Court of Appeals also had jurisdiction of this case pursuant to ORS 536.075, which directs the court to "make such disposition of the case as the court determines to be appropriate." ORS 536.075(6).

tort claims. The *Burns* opinion found that this authority did not so extend, but not just because there was another remedy elsewhere as WRD suggests. Observing that jury trials are not available under either ORS 183.482 or ORS 183.484, the court further reasoned that "[i]f the legislature had intended to give this court and the circuit court the authority to award compensation for tort claims in the course of reviewing administrative orders, we think it would have been far less oblique in saying so than ORS 183.486(1)(b) reads." *Id.* at 425. Here, the relief ordered by the Court of Appeals is a type of specific relief enumerated in ORS 183.486(1)(a) ("set aside agency action") and a type regularly provided by the court.[7] In sum, setting aside an agency order in an APA proceeding as part of an ORS 183.486(1) remedy is not comparable to awarding Tort Claims Act damages.

City's reliance on *Ososke v. Driver & Motor Vehicle Servs.* is also misplaced. 320 Or 657, 891 P2d 633 (1995). The issue there was whether a petition for review had been timely filed pursuant to ORS 183.482 and therefore whether the Court of Appeals had jurisdiction. WaterWatch filed a timely petition for review of the extension order with the Court of Appeals. The question is whether the court can set aside the certificate under ORS 183.486(1) in its review of the requisite extension order. The answer is yes.

[7] There is also no requirement for provision of jury trial here as in *Burns*.

Finally, City incorrectly asserts that ORS 183.500 provides the sole means by which the Court of Appeals may obtain jurisdiction over an order in other than a contested case. (At 27-28, 41). ORS 183.500 simply provides for an appeal of a circuit court ruling to the Court of Appeals. It does not state nor even imply that the Court of Appeals may never address an order in other than contested case in an ORS 183.486(1) remedy.

b) Setting aside the agency action by vacating the certificate was the necessary ancillary relief under ORS 183.486(1).

WRD's claim that WaterWatch needed to challenge the certificate to avoid mootness is disingenuous at best. WRD was well aware that WaterWatch opposed granting the certificate without the fish protection and water conservation plan conditions—that was clearly demonstrated by WaterWatch's protest, hearing briefs, and in WaterWatch's exceptions to the Amended Proposed Order. *See* (ER 22-37). Moreover, WRD sent the certificate to the City without any notice to WaterWatch. It does not require an abundance of cynicism to conclude that WRD's issuance of the certificate, hard on the heels of its issuance of the extension order, before the appeal period on that extension had run and where a petition for review would stay the extension order and thus also certificate issuance (ORS 536.075(5)), was calculated to frustrate WaterWatch's legitimate right of appeal.

On these facts, ORS 183.486(1) provided the Court of Appeals with ample authority to set aside the certificate by directing WRD to vacate it. In addition to reversing and remanding the extension order for revision consistent with the decision, setting aside the agency action by ordering the certificate vacated was the appropriate and necessary ancillary relief under ORS 183.486(1)(b).

c) The APA review construct urged by WRD and City is inconsistent with the plain language and public policy goals of the APA.

City and WRD urge that once the certificate was issued, WaterWatch could not raise the legal defects of the extension order—issued after a contested hearing—in the Court of Appeals, but only in circuit court. [8] This unworkable proposal ignores the legal dependency of the certificate on the extension order and the nature of the proceeding.

i) There was no notice to WaterWatch of the certificate issuance, and no practical way for WaterWatch to challenge the certificate.

WaterWatch was given no notice of the certificate and, as noted by the Court of Appeals, "[WaterWatch] had no practical ability to seek review

[8] *Amici* oddly argue that the Court of Appeals decision would allow challenges to certificates "in circuit court on the basis that OWRD did not adequately condition prior permit extensions" (at 31)—that is *exactly* what *amici*, City and WRD argue WaterWatch should have done.

of the certificate." 259 Or App at 338-339. City and WRD urge a reading of the APA that would allow agencies to preclude lawful judicial review of orders by simply issuing subsequent orders with no notice. This approach ignores the plain language and the public policy goals of the APA.

Moreover, while there was no practical way for WaterWatch to challenge the certificate, *Hamel* suggests that a state agency should not be permitted to evade review of a defective order by issuing a subsequent order in reliance on the first—regardless of whether the agency provides notice of the subsequent order.

ii) City and WRD's arguments about notice are incorrect.

While maintaining that certificate issuance rendered WaterWatch's challenge to the extension order moot, WRD and City emphasize that there was no notice requirement for the October 15, 2010 issuance of the certificate. However, if City and WRD truly believe that issuance of the certificate mooted WaterWatch's challenge to the extension order, WaterWatch's filing of the petition for review on November 15, 2010 created a duty pursuant to ORAP 8.45 for counsel of WRD and the City to notify the court and WaterWatch of the certificate. ORAP 8.45 (requiring that "[e]xcept as to facts the disclosure of which is barred by the attorney-client privilege, when a party becomes aware of facts that probably render an

appeal moot, that party shall provide notice of the facts to the court and to the other party or parties to the appeal, and may file a motion to dismiss the appeal.").

City and WRD became aware of the certificate issuance on October 15, 2010. Had counsel complied with ORAP 8.45 by at least December 13 (28 days after the petition for review was filed), WaterWatch could have filed a timely petition for reconsideration or judicial review to the certificate by the December 14, 2010 deadline. Instead, City and WRD waited more than eight months after the petition was filed before they filed motions to dismiss (until July 19 and July 28, 2011 respectively)—well after the time to challenge the certificate had expired.

Moreover, City's assertion that WaterWatch seeks "judicial amendments" to ORS 537.270 and ORS 183.484 pertaining to notice of certificates (at 32) is inaccurate. Rather, WaterWatch asserts that if an agency does not provide notice of a subsequent order that is legally predicated on a challenged order, the agency cannot use the subsequent order (and lack of challenge to the order) to moot the challenge to the first order, as WRD attempts to do here. Without notice, the agency must assume the risk that its subsequent order may be set aside as part of an ORS 183.486(1) remedy.

Likewise, WRD relies on *obiter dicta* from *In Re: Willow Creek*, 74 Or 592, 144 P 505 (1914), to argue that certificate issuance provides notice akin to the recording of a deed (at 15), but that ignores the many specific statutory notice and other requirements of Oregon's real property recordation statutes (ORS 93.600 *et. seq*). Unlike the water code, which requires only that WRD mail the original certificate to the owner and maintain a record of the certificate somewhere in the Water Resources Department (ORS 539.140), the real property recordation statutes require much more, including but not limited to: strict timelines for recordation and a requirement that the conveyor of property actually record the document (ORS 93.635 (1)); certified recordation by the county clerk (ORS 93.629); and prescribed effects against subsequent good faith purchasers without notice where recording does not occur (ORS 93.640). By contrast, WRD is not a neutral third party recorder and lacks any such recording requirements. WRD's files are maintained for record keeping purposes by, in this case, an agency that had recently completed a contested case involving the very order necessary to issuance of the certificate. WRD was a represented party to this matter, not a neutral recorder of instruments. WRD's arguments should be rejected.

iii) The APA construct urged City and WRD is unworkable and would not promote judicial economy.

Even if WaterWatch had notice of the certificate, City and WRD's construct makes no sense. A contested case hearing was already held regarding the legal defects of the extension order. There would be nothing to gain from relitigating the same issues in circuit court.

The right process is to implement ORS 183.486(1) as written, allowing the Court of Appeals to set aside the certificate that is legally predicated on the unlawful extension order, and which was issued halfway through the appeal period for the extension order. If WRD and City want review of orders in contested case to occur in circuit court, their remedy is with the legislature.

iv) WRD's interpretation should be rejected because it compresses, or erases, the appeal period allowed by ORS 183.482.

WRD issued the certificate only half way through the appeal period for the extension order, and under WRD's interpretation it could have issued the certificate on day one of the appeal period. WRD argues that if WaterWatch had filed its petition for review earlier in the statutorily allowed appeal period "WRD would have known it was contesting the extension."

(At 15). In fact, filing a petition for review of an order issued by WRD or the Water Resources Commission, such as the extension order, "shall stay enforcement of the order," except on a determination by WRD or the Commission of substantial public harm. ORS 536.080. However, the Court of Appeals correctly rejected this construct. WRD should not be permitted to compress (or effectively erase) the period allowed by the APA for filing a petition for review (60-days) by issuing a subsequent order with no notice.

B. On the merits: ORS 537.230(2)(b)-(c) require WRD to place conditions on the portion of the permit for which the extension is needed.

ORS 537.230(2)(b) specifies that the extension be conditioned to require that "the [permit] 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." ORS 537.230(2)(c) requires that "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." By rule, WRD has defined "undeveloped portion of the permit" to mean "the portion of the permit that is the difference between the maximum rate, or duty if applicable, specified in the permit and the maximum rate, or duty if

applicable, diverted for beneficial use before the extension." OAR 690-315-0010(6)(g).

These conditions must be applied to the portion of the permit not diverted as of expiration of the development deadlines, which is the very portion for which an extension order is required. WRD's interpretation instead would allow permit holders to determine whether or when the conditions apply by delaying when they apply for an extension and then by requesting delays in the processing of an application until all the water has been diverted. City and WRD present tortured grammatical analyses, focusing on overly narrow fragments of the statutory language, but ignore the intent of HB 3038, the purpose of extensions, the context of related water code provisions and rules, and the extension order itself. There is no support in the statute or the related context for the proposition that the water City diverted nine years after its development deadlines expired could be deemed "diverted for beneficial use" or that such a diversion of water constitutes a "[]developed portion of the permit."

1. The interpretation urged by City and WRD is flatly inconsistent with the water code, including the extension statute, and with the extension order.

While City and WRD attempt to extrapolate from word tense and the meaning of "the" to support their positions, they focus too narrowly on the

terms "before the extension" and "undeveloped portion." The proper analysis focuses on the full terms "diverted for beneficial use before the extension" and "undeveloped portion of the permit." City and WRD's errors lead them to ignore the fundamental purpose and language of extension orders and of the water code, and to urge a statutory interpretation that runs directly afoul of both.

a) City and WRD urge an interpretation of "diverted for beneficial use before the extension" that is inconsistent with the purpose of extensions, related water code provisions, and the extension order.

ORS 537.230(2)(b) applies the water conservation plan requirement water not yet "diverted for beneficial use before the extension." "Beneficial use" is a term used throughout Oregon's water code and rules, including in the extension scheme. The text of ORS 537.230(2)(b), and the statutory and rule context, demonstrate that it means *diverted in accordance with the terms of the permit*, including the development deadlines, not diverted whenever WRD issues an extension order.

There is no mystery or dispute as to which portion of a permit an extension order addresses. An extension addresses a discrete and specific portion of the permit: that portion not developed before expiration of the permit's original development deadlines, as amended by previous

extensions. The reasons for this are embedded in the fundamentals of Oregon's water code, which City and WRD ignore altogether.

Oregon's water allocation system specifies that water may be "appropriated for beneficial use, as provided in the Water Rights Act and not otherwise." ORS 537.120. Oregon water law also mandates that a person may not use, store or divert any waters until WRD issues a permit to appropriate the waters (except for limited exempt uses not at issue here). ORS 537.130(2), ORS 537.535. The Water Rights Act includes ORS 537.211, which requires each water permit to "specify the details of the authorized use and shall set forth any terms, limitations and conditions as the department considers appropriate * * *." ORS 537.010. As the Oregon Attorney General's office explained in an advice letter to WRD, "[p]ermit conditions are an integral part of the permit and describe how development and water use may occur under the permit." (WW Ex. 214 at 7). Among the required permit conditions are development deadlines. ORS 537.230(1)-(2).

The purpose of extensions stems from the role that permit conditions play in obtaining a water right certificate, also called "perfecting" a water right. To perfect a water right, the permit holder must submit "proof" that the water was used in compliance with the permit conditions (including the development deadlines). By rule this "proof" is denominated a Claim of

Beneficial Use (OAR 690-014-0020(3)) and must include "sufficient information for the Director to determine the extent of beneficial use developed within the conditions or limits of the permit or transfer final order, *including any specified development time limits*." OAR 690-014-0100(2) (emphasis added) (WW App-4). A permit holder may obtain a water right certificate for only the amount of water diverted by the development deadlines, as amended by any extensions. ORS 537.250(1) (WW App-3). WRD has explained that a permit holder may not include water diverted after the expiration of a development deadline in a final proof survey (another term for the Claim of Beneficial Use) but that it may "apply for an extension of time and may request the construction and water development deadlines be extended such that when the permit holder does submit its final proof survey it may show that the construction and full application of water to beneficial use has occurred consistent with all of the terms of the permit—including those deadlines which have been extended. ORS 537.230(2)"). (WRD Motion for Summary Determination, Item 58, 249-250); *see also*, (WW Ex. 214) (Oregon Attorney General letter of advice to WRD concluding that WRD may not issue a certificate absent compliance with permit conditions and calling the period before expiration of the deadlines "the development period.")

Given these certification requirements, when – as here – only a portion of the water available under the permit has been diverted by the expiration of the development deadlines, a permit holder must get an extension in order to ultimately certificate the portion of the permit not diverted as of the deadlines. The extension order covers the time period from the date that the development deadlines expired to some point in the future – here, from October 1, 1999 to October 1, 2013. (ER-19, 28). Thus when the legislature used the terms "undeveloped portion of the permit" and the "maximum rate diverted for beneficial use before the extension" in amending the extension statute, the text and statutory and rule context demonstrates that it was referring to that portion of the permit for which the extension is needed. The date on which WRD issues an extension order does not determine the portion of the permit for which the extension is needed.

WRD's rules define "beneficial use" as "the reasonably efficient use of water without waste for a purpose *consistent with the laws, rules* and the best interests of the people of the state." OAR 690-300-0101(5) (emphasis added) (WW App-4). By rule WRD states that "[e]xtensions may be granted for the reasonable time necessary to complete water development or apply all the water to beneficial use." OAR 690-315-0090; *see also,* OAR 690-315-0010(1)(b) (stating that extensions can be granted to "[c]omplete

construction or completely apply water to the full beneficial use pursuant to ORS 537.230 and 537.630."); OAR 690-315-0070(1) (stating same). These rules reflect that a diversion not made in accordance ORS 537.230(2) and ORS 537.211, which mandate the permit condition development deadlines, is not a diversion for beneficial use.

That is why here, where City had only diverted half of the permit amount by expiration of the development deadlines, WRD found that the work remaining to be done included "applying the water to full beneficial use." (ER-16, Finding #10). The Proposed Final Order thus proposed to "[e]xtend the time to *apply the water to beneficial use* under Permit S-42117 from October 1, 1999 to October 1, 2013." (ER-19) (emphasis added).[9] In other words, in the absence of the extension, water diverted by City after October 1, 1999 would not be considered diverted for beneficial use—the whole point of the extension is to provide an administrative process to allow such diversion to become classified as "beneficial use" (and ultimately certificated) in accordance with the water code. City and WRD argue that water was diverted for beneficial use before the extension for purposes of evading ORS 537.230(2)(b), but contradict that argument by acknowledging

[9] Though not phrased consistently with WRD's rules and the permit, the Final Order combines the extension of the deadlines by stating "The OWRD grants the extension of time to perfect Permit S-42117 from October 1, 1999 to October 1, 2013." (ER-28).

through the extension application and order that City needed the extension to divert the water to beneficial use.

In sum, nothing in the water permitting and extension scheme allows the City to be deemed to have "diverted [water] for beneficial use" nine years after the permit's development deadlines expired.

b) "Before the extension" does not mean before WRD issues the extension order.

WRD and City assert that as used in ORS 537.230(2)(b), "before the extension" means before WRD issues the extension order. That assertion is wrong because it ignores the terms and purpose of the extension, and requires words to be added to the statute. City's extension covers the time period "from October 1, 1999 to October 1, 2013." (ER-19, 28). Again, the extension period runs from the expiration of the prior development deadlines because work done and water diverted outside of the permit deadlines cannot be included in a Claim of Beneficial Use. To be consistent with the purpose and context of extensions, and the terms of the extension itself, "before the extension" must mean before October 1, 1999. That interpretation requires no words to be added and it recognizes the operative dates of the extension. WRD and City's interpretation requires the court to insert words which is inconsistent with basic principles of statutory construction. ORS 174.010.

c) A water permit cannot be "developed" outside of its express conditions, including the development deadlines.

ORS 537.230(2)(c) requires WRD to condition the "undeveloped portion of the permit" to protect listed fish, but City and WRD claim that City successfully evaded this requirement by diverting water nine years after expiration of the permit's development deadlines. That interpretation cannot be upheld because the notion that a permit can be "developed" without regard to express permit conditions, including statutorily required development deadlines, does not make sense, arbitrarily nullifies permit conditions, and is inconsistent with the water code.

The relevant definition for "permit" is "a written warrant or license granted by one having authority." *Webster's Third New Int'l Dictionary* at 1683 (unabridged ed 2002). The relevant question is whether a permit holder can develop a permit through actions that do not comply with its express conditions. The answer is no. Permit development must be measured against the permit's conditions. WRD's interpretation would result in a permit holder simultaneously failing to comply with the terms of the permit while continuing to develop the permit. That interpretation cannot be upheld because it is inconsistent with the statutory text and renders permit terms meaningless.

The idea that the legislature intended that permits be developed outside their express terms is inconsistent with the legislature's requirement that, except for limited exempt uses not at issue here: (1) a person may not use, store or divert any waters until WRD issues a permit to appropriate the waters (ORS 537.130(2), ORS 537.535); and (2) each permit "shall specify the details of the authorized use and shall set forth any terms, limitations and conditions as the department considers appropriate * * *." ORS 537.211. As noted above, the Oregon Attorney General's office has stated that "[p]ermit conditions are an integral part of the permit and describe how development and water use may occur under the permit." (WW Ex. 214 at 7). There is no support in the water code or the extension statute for the proposition that City's diversion nine years after expiration of the deadline conditions is a "[]developed portion of the permit."

d) WRD's interpretation of its rule defining "undeveloped portion of the permit" is inconsistent with its rules and with ORS 537.230(2).

WRD's rule defines "undeveloped portion of the permit" in a manner closely mimicking ORS 537.230(2)(b)—as the amount beyond that "diverted for beneficial use before the extension." OAR 690-315-0010(6)(g). As already established, this phrase means diverted before expiration of the development deadlines. WRD's interpretation of its rule cannot be upheld

because it is inconsistent with both the rule and with ORS 537.230(2). *Don't Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or 132, 142, 881 P2d 119 (1994).

e) WRD's interpretation of ORS 537.230(2)(b)-(c) is inconsistent with Oregon law on water permit cancellation.

WRD may cancel a permit where a permit holder fails to develop its permit by the development deadlines without seeking an extension amending those deadlines. ORS 537.260(1) (WW App-3); *see also*, (WW Ex. 214 at 7) (Oregon Attorney General letter of advice stating, "Where an extension is necessary and no request is made the Department may proceed to cancel the permit under ORS 537.260 * * *.")

Oregon law is clear that permits may be cancelled under ORS 537.260(1) for failure to show water use consistent with permit by the permit's deadlines. *Green v. Wheeler*, 254 Or 424, 458 P2d 938 (1969), *cert den*, 397 US 990 (1970). The legislature is presumed to have legislated ORS 537.230(2)(b)-(c) in light of related judicial decisions. *See Marriage of Weber*, 337 Or 55, 67-68, 91 P3d 706 (2004) ("[a]s part of this court's well-established statutory construction methodology, this court presumes that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes."). Therefore, the legislature could not

have intended ORS 537.230(2)(b)-(c) as an invitation to expand water use outside of a permit's development deadlines and deem such diversion as permit development.

Further, WRD's rules require it to initiate cancellation proceedings if the development deadlines expire and no Claim of Beneficial Use is filed:

> "The Claim of Beneficial Use shall be submitted to the Department within one year after the use was reported to the Department as being complete or the beneficial use date allowed in the permit or transfer final order, whichever occurs first. Failure to comply with this section *shall cause the Director to initiate permit cancellation proceedings* as provided by ORS 537.260."

OAR 690-014-0190 (emphasis added) (WW-App-4). WRD did not follow this rule here and its interpretation of ORS 537.230(2)(b)-(c) directly conflicts with the rule. WRD cannot simultaneously comply with this rule *and* allow a permit holder to "beneficially use" and "develop" additional water under a permit for nine years after the development deadlines expire, as it did here.

In sum, City and WRD's interpretation of ORS 537.230(2)(b)-(c) conflicts with the statutes, opinions and rules prescribing cancellation as a consequence for failure to comply with the permit deadlines.

f) WRD and the City's grammatical analyses are unsound.

WRD's "present tense" argument is not sound. WRD argues that because the statute requires that "the department finds" that the use "is

conditioned to maintain" listed fish, the agency cannot "look backward." (At 21). However, the water code, including the extension statute, is full of such "present tense" language requiring WRD to make a finding based on past events. For example, in making its "good cause" determination for issuing extensions, ORS 537.230(2)(a) requires that "the department shall give due weight to" a list of factors including whether other governmental requirements "have significantly *delayed*" completion. (Emphasis added). The Proposed Final Order's "good cause" analysis is replete with WRD's analysis of past actions taken to develop the permit. (ER 17-18, Findings 21-27). Similarly, the certification statute states that "the department may determine" (present tense) the extent to which an appropriation has been perfected based on "the extent that the water applied for has been *actually applied* to the beneficial use" ORS 537.260(2) (emphasis added). Indeed, it is hard to conceive how a statute could use the past tense to describe a decision that WRD must make in the future.

WRD's argument about "present municipal uses" also does not make sense. WRD erroneously suggests that WaterWatch argues for a "more expansive meaning" of ORS 537.230(2)(c) than was adopted and that WaterWatch's position here is inconsistent with its 2005 concerns over "future out-of-stream uses." (At 29). WRD urges that the statute was not

"intended to impact present municipal uses." *Id.* WRD misses the plain fact that as viewed from 2005, City's doubling of its diversion to the full permitted amount on July 10, 2008 (ER-9) was a "future-out-of-stream use[]." Moreover, under WRD's interpretation, a diversion occurring 20 years after passage of HB 3038 would be a "present municipal use" not subject to ORS 537.230(2)(b)-(c). There is no support for that interpretation.

The City and WRD also make erroneous arguments about the term "existing data." ORS 537.230(2)(c) requires WRD make its fish protection finding based on "existing data and upon the advice of the State Department of Fish and Wildlife." This term refers specifically to data regarding imperiled fish. The intent was to require the fish protection "decision to be based on all existing data, which can be brought forward in the existing agency process that allows public participation in extension proceedings." Testimony, Senate Committee on Environment and Land Use, HB 3038-A, June 2, 2005, Ex. M (Statement of Doug Myers). Additionally, the cities wanted to limit analysis to existing data to avoid waiting for new science.

City complains that this means WRD would use current fish data yet measure City's diversion at the expiration of the development deadlines some years back. Any mismatch here was created by City's own calculated

delay; if cities file timely extension applications, as they are supposed to, there would be no mismatch.

g) City and WRD urge an interpretation that makes ORS 537.230(2)(b) and (c) superfluous.

By arguing for a process that allows cities to determine which portion of a permit is subject to ORS 537.230(2)(b)-(c), City and WRD urge an interpretation that effectively writes these statutory requirements out of the law. If the portion of the permit subject to these requirements is measured at the time WRD issues an extension order, then any permit holder could do what the City did here: allow the permit's development deadlines to expire, wait many more years before applying for an extension, place the application on administrative hold and then divert the full amount of the permit.[10] That interpretation renders ORS 537.230(2)(b)-(c) superfluous, because the requirements can easily be evaded by manipulating the timing of the extension process. ORS 537.230(2)(b)-(c) embody public policy decisions made by the legislature regarding the importance of water conservation and the protection of imperiled species of fish. City and WRD's interpretation of the statute cannot be the correct because that reading would render ORS 537.230(2) (b)-(c) superfluous.

[10] For example, the cities of Seaside and Amity hold permits with development deadlines that expired 17 and 16 years ago, respectively, and neither has yet applied for an extension. (*Amici* at 2).

Amici argue that if cities try to evade the standard in this manner (as City did here), WRD could deny the extension under the "good cause" standard of ORS 537.230(2)(a). (At 34). However, that leaves application of subsections (b) and (c) up to WRD's discretion as part of "good cause," allowing the agency to circumvent the statute and legislative intent. *Amici's* construct fails to give effect to all of the provisions of ORS 537.230(2) as the court should. ORS 174.010.

Moreover, the interpretation urged by City and WRD creates an unfair result where permit holders who timely file for extensions are subject to water conservation plan and fish protection conditions, while permit holders who delay for years or decades while diverting all of the water evade those conditions. The legislature did not intend such a result.

2. HB 3038 was a compromise intended, in part, to protect imperiled fish.

ORS 537.230(2)(b)-(c) were enacted by the legislature in HB 3038. 2005 Or Laws, ch 410 (WW-App 5-10). The bill was a response to the Court of Appeals opinion in *WaterWatch of Oregon, Inc. v. Water Resources Comm'n*, holding that the Commission erred as a matter of law by granting a municipal water permit where the requirements of *then* ORS 537.230(1) would not be met because the Water District applicant did not intend to begin construction before the expiration of the statute's five-year deadline to

complete construction. 193 Or App 87, 88 P3d 327 (2004), *vac'd by*, 339 Or 275 (2005) (finding that intervening passage of legislation may foreclose judicial review).

City incorrectly claims that "[t]he primary purpose behind HB 3038 was to overrule the Court of Appeals decision in *WaterWatch v. Water Resources Comm'n.*" (At 58). WRD is likewise incorrect in claiming that the "clear purpose of the statute was to preserve municipal water right permits" (at 24), while hiding in a footnote the Staff Measure Summary paragraph stating the bill would require WRD to condition extensions to protect listed fish.[11] (At 26-27). HB 3038 "represented a compromise." 259 Or App at 739. As Chairman of the Senate Committee on Environment and Land Use, Mr. Ringo, explained: "There was a work group that met that put together a compromise on this. That was a good meeting in terms of protecting the interests of the cities on their water rights but the consideration would include the interest of the instream water and how that might [affect] recreation and fish." *Id.* at 741 (internal citation omitted).

[11] That section of the Senate Committee on Environment and Land Use, Staff Measure Summary, 6/10/2005 reads: "EFFECT OF COMMITTEE AMENDMENT: Requires the Water Resources Department to condition extensions of municipal water right permits to maintain populations of fish listed as sensitive, threatened or endangered under state or federal law."

While Section 5(3) of HB 3038 protects old undeveloped municipal permits from cancellation for failure to timely commence and complete construction, Section 1(2)(b)-(c) placed into law for the first time the *requirement* that WRD add the water conservation plan and fish protection conditions to extension orders. Prior to HB 3038, WRD issued municipal extensions under the heavily discretionary "good cause" standard of *then* ORS 537.230(2), *now* ORS 537.230(2)(a). In enacting these new provisions, the legislature limited WRD's discretion under the "good cause" standard by additionally *requiring* WRD to address the critical issues of water conservation and fish protection as old water permits—many issued without any environmental review—are extended.

In sum, the history of ORS 537.230(2)(b)-(c) demonstrates that the legislature intended the conditions to meaningfully address water conservation and fish protection, not to let cities and WRD decide whether or when to apply them.

3. *Amici's* "retroactive" argument is unsound.

Amici claim the Court of Appeals failed to acknowledge the "retroactive effect of its decision" and so did not engage in proper statutory interpretation. (At 26). That assertion is wrong.

Amici concede that HB 3038's amendments to ORS 537.230 apply to extension requests pending when the bill passed in 2005. (At 27, *citing* 2005 Or Laws, ch 410, § 5(2) (stating that the amendments apply to extension requests "made before, on or after" passage of the bill). For an extension application pending in 2005 where deadlines sought to be extended had expired, or where as here City waited eight years after its deadlines expired to even file its extension application, the text and the purpose of ORS 537.230(2) *necessarily* make it retroactive because the extension runs from the expired deadlines. Here City's 2007 extension application requested an extension starting October, 1 1999 (ER-15, Finding #5)—in other words, City requested, needed, and received a *retroactive* extension. That is consistent with the text and purpose of the statute, as is applying the ORS 537.230(2)(b)-(c) conditions to the portion of the permit subject to the requested extension.

4. The "Growing Communities Doctrine" should not influence the court's decision.

Amici's request that the court utilize the "Growing Communities Doctrine" ("doctrine") to evaluate WRD's decision should be rejected. (At 6-10). *Amici* cite *Wiser v. Elliot* (228 Or App 489, 209 P3d 337 (2009)) in support but that opinion interpreted a statute that codified the common law principle of adverse possession. In contrast, the doctrine—to the extent is

exists at all—is not—as *amici* suggest—a precept of common law. Rather it is a catch all academic term describing various ways in which legislatures, courts, and agencies have treated municipal water suppliers within various state water codes. *See* Janis Carpenter, *Water for Growing Communities*, 27 Envtl L 127, 134-135 (1997). *Amici* rely on Carpenter's article but fail to note her conclusion: "Courts, with their necessarily limited focus, should not be expected to decide critical 'growing communities' issues without more legislative guidance." *Id.* at 149. Whether one perceives HB 3038 as consistent with the doctrine is immaterial. The question here is strictly one of statutory interpretation. *Amici's* suggestion that the court apply the doctrine should be rejected.

5. City and *amici's* policy arguments are unfounded.

City complains that under the Court of Appeals' decision, cities risk halting progress or "wasting" investments (at 50), while *amici* complain of a "cloud of uncertainty" (at 26), but this is crying wolf. WRD directed City to apply for an extension by April 13, 2003 (ER-8), more than five-years before City expanded its facilities and doubled its diversion in 2008. City also had ample time after the 2005 enactment of HB 3038 to request an extension prior to making its 2008 investments, but did not apply until December 2007 and then delayed processing of the application until August,

2008. If the City wanted the certainty of knowing what conditions would be placed on its extension, it should have timely applied. The water conservation plan and fish conditions have proven workable across Oregon. Any risk or uncertainty here results directly from the City's choice to try and evade ORS 537.230.

Further, City holds significant water rights in addition to the permit at issue (including 14 cfs in senior water rights transferred to the same point of diversion but not yet being used there). (ER-16, PFO, Findings #12-13). Conditioning the permit as required by statute does not put City's investment at risk.

City also asserts that "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." (At 55). This conveniently ignores the eight years City waited to apply for its extension. More importantly, even if true, it is irrelevant to the issue of which portion of the permit must be conditioned.

Amici's claim that the Court of Appeals' decision would require "temporary curtailment" of water use in some cases until a water conservation plan is complete is also crying wolf. (At 25-26). Cities have

been on notice for nine years that extensions are conditioned to require water conservation plans. On behalf of City of Bend, Mr. Glick (counsel for *amici* here) testified that under HB 3038 "[e]xtensions of time * * * will be tied to a showing of good cause and a solid water management and conservation plan" and that a "a long lead time is required" to develop water supplies. Testimony, Senate Committee on Environment and Land Use, HB 3038-A, May 19, 2005, Ex. G (Statement of Richard M. Glick) at p. 4, 1. To claim now that cities cannot have water conservation plans completed and approved as part of the extension process is unfounded.

Importantly, the fish protection and water conservation plan conditions are not onerous. Many cities across Oregon are now operating under extended permits that include these conditions. The sky has not fallen. In fact, cities are benefitting from implementing the proven water conservation measures required by the water conservation plans,[12] and the fish protection conditions have proven to be workable. Water resources are not infinite. Fish are an integral part of Oregon's economy, culture and environment. Oregon can and should chart a course where cities develop water supplies accounting for water conservation and the needs of imperiled

[12] The plans do not—as *amici* claim—reduce the amount of water available for municipal purposes. Rather, they require implementation of basic planning and conservation measures. OAR 690-086.

fish—that is what ORS 537.230(2)(b)-(c) requires. The Court of Appeals opinion should be affirmed.

VI. CONCLUSION

The case is not moot and the extension order was unlawful. WaterWatch respectfully requests this court to affirm the ruling by the Court of Appeals. In the alternative, WaterWatch requests that this court affirm the ruling on the merits and order water use under the certificate to be conditioned as required by ORS 537.230(2)(b)-(c).

Dated: August 14, 2014.

Respectfully submitted,

/s/ Lisa A. Brown
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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in 5.05(2)(a)) is 13,928.

Type size

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

/s/ Lisa A. Brown

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed the attached Brief with the State Court Administrator, Appellate Records Section by using the Oregon Appellate eFiling system on August 14, 2014.

I further certify that on August 14, 2014, I used the court's electronic filing system to electronically serve the attached Brief upon: Jordan R. Silk and W. Michael Gillette, attorneys for petitioner on review City of Cottage Grove; Denise G. Fjordbeck, attorney for respondents Oregon Water Resources Department and Oregon Water Resources Commission; Richard M. Glick, attorney for *Amici Curiae* Oregon Water Utilities Council and League of Oregon Cities; and Thomas M. Christ, attorney for respondent on review WaterWatch of Oregon.

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