

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
COMMISSION, a state agency, and
WATER RESOURCES
DEPARTMENT, a state agency,

Respondents,

and,

CITY OF COTTAGE GROVE, an
Oregon municipal Corporation,

Respondent,
Petitioner on Review.

Water Resources Department No.
S42117

CA A147071

SC S062036

BRIEF ON THE MERITS OF WATER RESOURCES DEPARTMENT AND
WATER RESOURCES COMMISSION

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

Opinion Filed: December 11, 2013

Before: Armstrong, Judge; Duncan, Judge; and Brewer, Judge
Author of Opinion: Armstrong, Judge

Continued...

SEAN DAVID KELLY #970735
Sean Kelly PC
30 N. 5th Street
P.O. Box 725
Cottage Grove, Oregon 97424
Telephone: (541) 942-2453
Email: sean@oregonlawoffice.com

Attorney for Petitioner on Review

JORDAN R. SILK #105031
Hon. W. MICHAEL GILLETTE
#660458
Schwabe Williamson & Wyatt PC
1211 S.W. 5th Avenue, Suite 1900
Portland, Oregon 97204
Telephone: (503) 796-2761
Email: jsilk@schwabe.com
wmgillette@schwabe.com

Attorneys for Petitioner on Review

THOMAS M. CHRIST #834064
Cosgrave Vergeer Kester LLP
888 SW 5th Ave Ste 500
Portland, OR 97204
Telephone: (503) 323-9000
Email: tchrist@cosgravelaw.com

Attorney for Respondent on Review

LISA A. BROWN #025240
Water Watch of Oregon
213 S.W. Ash Suite 208
Portland, Oregon 97204
Telephone: (503) 295-4039
Email: lisa@waterwatch.org

Attorney for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
DENISE G. FJORDBECK #822578
Attorney-in-Charge
Civil/Administrative Appeals
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
denise.fjordbeck@doj.state.or.us

Attorneys for
Water Resources Department and
Water Resources Commission

TABLE OF CONTENTS

STATEMENT OF THE CASE	1
LEGAL FRAMEWORK	4
NATURE OF THE PROCEEDING	6
SUMMARY OF ARGUMENT	8
ARGUMENT	10
A. The petition for judicial review is moot.....	10
1. ORS 537.270 is unambiguous as to the effect of the certificate.....	11
2. Notice of the certificate is not required.	14
3. ORS 183.486 does not authorize the court to grant relief that is outside the scope of its authority.	16
B. The Water Resources Department correctly interpreted ORS 537.230(2)(c).....	18
1. ORS 537.270(2)'s text.	18
2. The context also supports WRD's reading of the statute.	22
3. Legislative history supports WRD's construction of the statute.	25
CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases Cited

<i>Brumnett v. Psychiatric Sec. Review Bd.</i> , 315 Or 402, 848 P2d 1194 (1993).....	10
<i>Burns v. Board of Psychologist Examiners</i> , 116 Or App 422, 841 P2d 690 (1992).....	17
<i>Cuff v. Department of Public Safety Standards and Training</i> , 345 Or 462, 198 P3d 931 (2008).....	21
<i>Force v. Dept. Of Revenue</i> , 350 Or 179, 252 P3d 306 (2011).....	23

<i>Green v. Wheeler</i> , 254 Or 424, 458 P2d 938 (1970).....	5
<i>Hamel v. Johnson</i> , 330 Or 180, 998 P2d 661 (2000).....	13
<i>In Re: Willow Creek</i> , 74 Or 592, 144 P 505 (1914).....	15
<i>Liberty Northwest Ins. Corp., Inc. v. Watkins</i> , 347 Or 687, 227 P3d 1134 (2010).....	20
<i>Martin v. City of Albany</i> , 320 Or 175, 880 P2d 926 (1994).....	21
<i>State v. Cloutier</i> , 351 Or 68, 261 P3d 1234 (2011).....	23
<i>State v. Gaines</i> , 346 Or 160, 206 P3d 1042 (2009).....	18, 25
<i>Teel Irr. Dist. V. Water Resources Dept.</i> , 323 Or 663, 919 P2d 1172 (1996).....	11
<i>VLV v. Board of Parole</i> , 338 Or 44, 106 P3d 145 (2005).....	20
<i>WaterWatch of Oregon, Inc. v. Water Resources Com’n.</i> , 193 Or App 87, 88 P3d 327 (2004), vacated by, 339 Or 275 (2005).....	19
<i>WaterWatch of Oregon, Inc. v. Water Resources Com’n.</i> , rev allowed, 337 Or 476 (2004)	19
<i>Wilber v. Wheeler</i> , 273 Or 855, 543 P2d 1052(1975).....	14

Constitutional and Statutory Provisions

2005 Or Laws, ch 410.....	19, 24
<i>Former</i> ORS 537.230(1).....	5, 25
<i>Former</i> ORS 537.230(2).....	25
<i>Former</i> ORS 547.230(1).....	25
ORS 181.640(1)(a) - (d).....	22
ORS 183.482.....	15, 16
ORS 183.484.....	15, 16

ORS 183.486.....	3, 9, 16, 17
ORS 537.110.....	4
ORS 537.120.....	4
ORS 537.130.....	4
ORS 537.230.....	9, 25, 26, 30
ORS 537.230(1).....	23
ORS 537.230(1)(a).....	23
ORS 537.230(1)(b)	23
ORS 537.230(1)(c).....	23
ORS 537.230(2).....	5, 19, 24
ORS 537.230(2)(a).....	5, 24
ORS 537.230(2)(b)	24
ORS 537.230(2)(c).....	2, 10, 18, 19, 23, 24, 27, 29, 31
ORS 537.230(4).....	5
ORS 537.250.....	6, 11, 14
ORS 537.250(1).....	5, 15
ORS 537.250(3).....	6, 13
ORS 537.250(3)(a).....	6
ORS 537.250(3)(b)	6
ORS 537.260.....	6, 11, 25
ORS 537.260(1).....	22
ORS 537.260(3).....	12
ORS 537.270.....	6, 10, 11, 12
ORS 537.270(2).....	18
ORS 537.410(2).....	25
ORS 539.010(5).....	23
ORS 539.140.....	6, 11, 15
ORS 540.610.....	6
ORS 567.230(2)(c).....	4

Other Authorities

House Bill 3038	19, 24, 27, 28, 29
House Bill 3038 Enrolled, Section 5 (2).....	24
House Bill 3038 Enrolled, Section 5(1).....	24
House Bill 3038 Enrolled, Section 5(3).....	24
House Bill 3038-B	26
Minutes, Senate Committee on Environment and Land Use, June 2, 2005	27
Senate Committee on Environment and Land Use, Staff Measure Summary, 6/10/2005	27
<i>Webster's 3d Int'l Dictionary</i> (Springfield, MA 1966)	12, 17

BRIEF ON THE MERITS OF WATER RESOURCES DEPARTMENT AND WATER RESOURCES COMMISSION

STATEMENT OF THE CASE

The City of Cottage Grove applied for, and the Water Resources Department granted, an extension of time to complete development under a permit to withdraw water from the Row River. Because the city had already diverted the full amount of water allowed under the permit, the department determined that there was no “undeveloped portion of the permit” and did not impose conditions to maintain the persistence of sensitive, threatened, or endangered fish. Before WaterWatch filed this appeal of the extension decision, the department issued a water right certificate, which was not challenged and became final three months after it was issued.

The certificate *should* have mooted this appeal. Once the time to challenge the certificate had passed, it is irrelevant whether the Water Resources Department erred in granting an extension to develop the water right permit. Reversing the extension request can have no effect on the conclusive certificate.

But the Court of Appeals concluded otherwise. It declined to dismiss the case as moot, and then issued an opinion in which it concluded that the department erred in granting the extension, reversed the extension, *and vacated the issuance of the water right certificate.*

The Court of Appeals’ decision is flawed in two respects. First, the court misapprehended the nature of water rights certificate and the scope of the court’s remedial authority in this circumstance. Water right certificates are *sui generes*. A water right certificate that is not challenged within 3 months is *conclusive* proof of the certificate holder’s priority and extent of appropriation in *any* proceeding in *any* court. The Court of Appeals erred in denying the motions to dismiss submitted by the city and the state respondents.

Second, the decision is incorrect on the merits because the department properly granted the city’s request for extension.¹ The city had applied the entire rate of water allowed under the permit to beneficial use, so there was no “undeveloped portion of the permit.” Because the conditions included in ORS 537.230(2)(c) apply only to the undeveloped portion, the department did not err in not including those conditions. The department was correct in granting an extension of the water right permit. The decision of the Court of Appeals should be reversed and the petition for judicial review should be dismissed. In the alternative, the order granting the extension should be affirmed.

¹ The City of Cottage Grove sought and was granted review of the opinion of the Court of Appeals. Although the department and the Water Resources Commission did not themselves seek review, their position is aligned with that of the city.

FIRST QUESTION PRESENTED

Does the issuance of an unchallenged water right certificate render moot a pending challenge to an application for extension of time to develop a water right permit?

FIRST PROPOSED RULE OF LAW

Yes. A water right certificate that is not challenged within 3 months is conclusive as to the right to divert the specified rate from the identified source and point of diversion.

SECOND QUESTION PRESENTED

Does the additional relief that a court is empowered to order under ORS 183.486 include the authority to vacate a water right certificate that has become conclusive by operation of law?

SECOND PROPOSED RULE OF LAW

No. If a water right certificate is not challenged within 3 months, it is not subject to collateral attack in a proceeding regarding a different agency order.

THIRD QUESTION PRESENTED

The department shall grant an extension of time for a municipal permit holder to develop its water right permit if the permit issued before November 2, 1999 and the extension issued after June, 2005 if the department “finds that the undeveloped portion of the permit is conditioned to maintain * * * the persistence of fish species listed as sensitive, threatened, or endangered.” Is the

undeveloped portion of the permit measured at the time the department is making the finding, or at the time that the previous extension expired?

THIRD PROPOSED RULE OF LAW

The text, context, and legislative history of ORS 567.230(2)(c) demonstrate that the undeveloped portion of the permit is to be determined as of the time that the extension is considered by the Water Resources Department.

LEGAL FRAMEWORK

The initial question before this court is the legal effect of the issuance of a water right certificate to the City of Cottage Grove. To answer that question, the state agencies believe that it would be helpful to set forth the process through which water rights are permitted, developed, and certificated.

All water in Oregon from all sources belongs to the public.

ORS 537.110. With exemptions not relevant here, water may be appropriated for use only through the mechanisms provided for in the Water Code.

ORS 537.120. A person or entity that wishes to acquire the right to use water for a beneficial use must apply for and obtain a permit from the Water

Resources Department (WRD). ORS 537.130. If the department ultimately approves the application and issues a permit, the permittee may proceed to build the necessary works and take whatever actions are needed to put the water to beneficial use and perfect the appropriation. A permit is not a perfected water right; it merely allows the use of water with conditions and limitations. *Green*

v. Wheeler, 254 Or 424, 458 P2d 938 (1970). A water right becomes vested only when a certificate is issued. *Id.* at 430.

A permittee is required to proceed with construction with reasonable diligence, and to complete the necessary works within the time specified in the permit, not to exceed twenty years for a municipal use.² ORS 537.230(2). As in the present case, a municipal permittee may request an extension for good cause. ORS 537.230(2)(a).

When the permittee puts the water under the permit to beneficial use, it is required to hire a certified water rights examiner to survey the appropriation. Within one year of putting the water to beneficial use, the permittee is required to submit that survey, along with an application for a certificate, to the department. ORS 537.230(4). If the survey and application show, to the satisfaction of the department, that the appropriation has been perfected, the department “shall” issue a certificate. ORS 537.250(1). Once the department issues the certificate,

Rights to the use of water acquired under the provisions of the Water Rights Act, as set forth in a certificate issued under subsection (1) of this section, shall continue in the owner thereof so long as the water shall be applied to a beneficial use under and in accordance with the terms of the certificate, subject only to loss:

² Prior to 2005, construction was required to be completed for all uses within 5 years. *Former* ORS 537.230(1).

(a) By nonuse as specified and provided in ORS 540.610 [forfeiture for non-use]; or

(b) As provided in ORS 537.297 [cancellation when owner is no longer a municipal applicant].

ORS 537.250(3). Thus, once a certificate has been issued, it is subject to loss only under specified circumstances. ORS 537.270 sets forth the effect of the issuance of a certificate:

A water right certificate issued in accordance with the provisions of ORS 537.250 which, after the expiration of three months from the date it is issued, has not been contested and canceled in the manner provided in ORS 537.260, and a water right certificate, when issued under ORS 539.140, shall be conclusive evidence of the priority and extent of the appropriation therein described in any proceeding in any court or tribunal of the state, except in those cases where the rights of appropriation thereby described have been abandoned subsequent to issuance of the certificate.

As is further set forth below, the legal effect of these statutory provisions is to render the challenge to the permit extension moot.

NATURE OF THE PROCEEDING

In 1977, the Water Resources Department granted the City of Cottage Grove a permit to appropriate 6.2 cubic feet/second (cfs) from the Row River for a municipal water supply. This proceeding concerns an application for an extension of time to complete work under the permit and put the water to beneficial use. The Water Resources Department granted an extension, and the city then submitted an application for a water right certificate. The water right certificate application was granted, and the certificate recorded. WaterWatch,

the petitioner in this proceeding, sought judicial review of the extension order, but did not seek review of the certificate. As a result, the city and the state agencies contend that the Court of Appeals erred in reaching the merits of the extension.

The Court of Appeals adopted the department's factual findings in the extension order. Because the chronology and relative timing of events is key to understanding why this matter is moot, those findings are summarized as follows:

The department issued a permit to divert water from the Row River for municipal use in 1977. Between 1977 and 1999, the city sought and received a number of extensions of time to complete construction of the necessary water treatment plant. Beginning in 1999, the department was engaged in protracted rulemaking proceedings, and suspended action on all extension requests. The new rules came into effect in 2005.

By 2008, the city had completed the treatment plant and the diversion structure necessary to divert the volume of water allowed under the permit. In July 2008, the city diverted the entire amount to which it was entitled, 6.2 CFS, for a period of several hours.

Meanwhile, in late 2007, the city submitted an application for an extension of time; soon thereafter, it asked the department to hold the application. After the city had diverted the full rate of 6.2 CFS, the city asked

the department to process the application. The department issued an order granting the extension on September 14, 2010.

On October 15, 2010, the city applied for a certificate of water right and the department granted that application. On November 15, 2010, WaterWatch filed a timely petition for review of the order granting the extension, asserting that the department erred in granting the extension without requiring conditions to maintain the existence of certain fish species. It did not challenge the granting of the water right certificate.

After the water right certificate became final, the city and the state agency respondents moved to dismiss this proceeding as moot. The court denied the motion. Both the city and the state agencies renewed the motion in their respective briefs.

The Court of Appeals reversed and remanded the extension, holding that the “undeveloped portion of the permit” should have been measured as of the time that the prior extension expired in 1999 and that the department should have imposed conditions on the grant of the extension. The court remanded the order to the department with instructions to vacate the water right certificate and to reconsider the extension application

SUMMARY OF ARGUMENT

This case is moot. Petitioners seek review of an order extending the city’s time to develop the city’s water right. But after the department issued

that order, the city applied for and the department granted a water right certificate. Petitioners did not challenge the issuance of the certificate and thus, three months later, the certificate became—by operation of law—“conclusive” as to the city’s water right. At that point, this judicial review proceeding was no longer justiciable.

In concluding otherwise, the Court of Appeals held that despite the existence of the unchallenged certificate, it nonetheless could grant relief in petitioner’s challenge to the extension - by not merely reversing the order granting that extension, but also vacating the order issuing the certificate. That holding misconstrues the scope of the court’s remedial power on judicial review of an agency order. ORS 183.486 allows a court reviewing an agency order broad authority to redress the effects of an unlawful agency action. However, that authority is not limitless. It does not empower the court to undertake action that the law otherwise forbids. The legislature has expressly provided that a water right certificate, once final, is, as a matter of law, *conclusive* in any proceeding in any court. A court reviewing an extension order, therefore, does not have the authority reach outside the scope of the proceeding and reverse an unchallenged water rights certificate that has already become final. Because the court can grant no effective relief, this case is moot and should be dismissed.

If this court reaches the merits, it should affirm the department’s order. The purpose of the 2005 legislation amending ORS 537.230 was to ensure that

municipalities could proceed with water development projects that had long been planned. The text, context, and legislative history of ORS 537.230(2)(c) thus demonstrate that the legislature intended that the “undeveloped portion of the permit” be determined by the department as of the time that the extension request was decided. In the present case, at the time the department decided the city’s extension request, the city had applied the entire rate allowed under the permit to beneficial use and had fully completed the necessary works; there was no undeveloped portion of the permit.

ARGUMENT

Petitioner challenged the department’s order granting an extension of time for the water right permit. This court need not reach the merits of that challenge because the case is moot. In any event, as further explained below, the department correctly granted the extension request.

A. The petition for judicial review is moot.

An appeal is moot when a court can no longer provide any effective relief between the parties. *Brumnett v. Psychiatric Sec. Review Bd.*, 315 Or 402, 406, 848 P2d 1194 (1993). No effective relief is possible here. Once the time to challenge that certificate had passed, the certificate was conclusive evidence of the priority and extent of appropriation in any proceeding. ORS 537.270. As explained below, the text, context, and legislative history of that statute demonstrates that the legislature intended the issuance of a water rights

certificate to be final. In a judicial review proceeding, therefore, the appellate court does have authority to reach beyond the order on review to overturn an unchallenged water rights certificate.

1. ORS 537.270 is unambiguous as to the effect of the certificate.

A water right permit allows the use of water, subject to the conditions and limitations set forth in that permit. By contrast, a water right certificate grants to the holder a valuable property right, a right that can be lost only by failing to continue the beneficial use of the water. *Teel Irr. Dist. V. Water Resources Dept.*, 323 Or 663, 668, 919 P2d 1172 (1996). That distinction is critical: in the absence of forfeiture, a court has no authority to vacate a final water right certificate.

As noted above, ORS 537.270 unambiguously sets forth the effect of the issuance of a certificate:

A water right certificate issued in accordance with the provisions of ORS 537.250 which, after the expiration of three months from the date it is issued, has not been contested and canceled in the manner provided in ORS 537.260, and a water right certificate, when issued under ORS 539.140, shall be conclusive evidence of the priority and extent of the appropriation therein described in any proceeding in any court or tribunal of the state, except in those cases where the rights of appropriation thereby described have been abandoned subsequent to issuance of the certificate.

(Emphasis added.)

The best evidence of the legislature's intent in enacting ORS 537.270 is the language of the provision itself: a water right certificate is conclusive

evidence of the right to use water in any court proceeding. The plain meaning of conclusive is “putting an end to debate or question especially by reason of irrefutability.” *Webster’s 3d Int’l Dictionary* at 471 (Springfield, MA 1966). In other words, once the three-month challenge period had passed, the city’s right to use water under the certificate was irrefutable. The only relevant exception to that rule is forfeiture for nonuse. Legislative intent to shield a certificate from collateral attack is apparent.

The Court of Appeals posited that ORS 537.270 is intended only to make a certificate conclusive as to those with water rights of subsequent priority. But the text of the statute cannot be read to be so limited: it applies in any proceeding in any court or tribunal. The priority and extent of the appropriation – in other words, the right to use the water for municipal purposes – is conclusively established. If it were intended to apply only to subsequent appropriators, it would say that.

To be sure, ORS 537.260(3) does allow other appropriators, either before or within 90 days after issuance of a certificate, to contest the issuance of the certificate with the department. If ORS 537.270 were intended to apply only to those proceedings, a simple cross-reference to that section would have sufficed. Instead, the legislature made the certificate conclusion in *any* proceeding in *any* court.

As noted above, ORS 537.250(3) also provides that the right of use of a certificate holder continues unless later forfeited. Taken together, these provisions evidence an intention that water right certificates be treated differently than other agency orders. A water right certificate indicates that a vested property right to the use of water has passed. Once it has issued, it can only be dissolved under established statutory procedures.

In finding that this matter is not moot because the court could simply vacate the water right certificate, the Court of Appeals relied on this court's decision in *Hamel v. Johnson*, 330 Or 180, 998 P2d 661 (2000). There, the parole board issued an order deferring petitioner's previously established parole release date by two years. While judicial review of that order was pending, the board issued a second order deferring release, and the board moved to dismiss the judicial review as moot. This court disagreed, because but for the first deferral, petitioner would have been released on parole, and the second order would never have issued at all.

The Court of Appeals analogized the present situation to *Hamel*, reasoning that the certificate would not have been issued but for the approval of the extension. That may be true, but it ignores the legal significance of the certificate. This matter is moot not merely because the certificate came later, but because the certificate conclusively establishes the city's water right. A water right certificate is not merely another order issued by the department with

regard to the water right permit; it is a conclusive certificate of the right to use water.

2. Notice of the certificate is not required.

The Court of Appeals explained the failure to challenge the certificate as a consequence of the failure of the department to give specific notice that a certificate had been issued. No such notice was required; like a deed record, the certificate itself serves as notice to all interested persons of the city's property interest. The statutory scheme is designed to "protect the reliability of the record title and to promote the stability of water rights." *Wilber v. Wheeler*, 273 Or 855, 864, 543 P2d 1052(1975).

Moreover, petitioner was aware that the city had completed its work under the permit. Cottage Grove completed their works and put the entire 6.2 CFS to beneficial use on July 10, 2008. Less than a month later, the city reinstated its application for an extension of time. Thus, at the time that the extension was being considered by the department, all parties — including petitioner —were aware that the works had been completed and the full rate of water allowed had been diverted. The Findings of Fact included in the incorporated into the Final Order state those facts, which are not disputed. ER 32. The only further actions needed for a certificate to issue under ORS 537.250 were approval of the extension; a final proof survey by a certified water rights examiner; and an application for a certificate. The final order

approving the extension was issued on September 14, 2010. Unsurprisingly, the city almost immediately applied for a certificate, submitting the required survey, and the certificate was issued on October 15, 2010. At that point, no petition for judicial review had been filed. WaterWatch chose to wait to file until Monday, November 14, 2010, the final day allowed under ORS 183.482.

The certificate was an order in other than contested case. ORS 183.484. WaterWatch did not file a petition for judicial review of the certificate, which became conclusive by operation of law.

WaterWatch did not receive specific notice of the issuance of the certificate; no rule or statute required such notice. Rather, as with all certificates, the department recorded the certificate in its records and transmitted the original to the city. ORS 537.250(1); ORS 539.140. A certificate, like a deed record, functions as notice to the world that a vested property right exists. *See In Re: Willow Creek*, 74 Or 592, 610, 144 P 505 (1914) (water right certificates serve much the same purpose as records of title to real estate). WaterWatch was on notice that prerequisites for a certificate were met. Had it filed its petition for judicial review sooner, the department would have known that it was contesting the extension. In the absence of a petition, the department found that the permitted water right had been perfected; under those circumstances, ORS 537.250(1) required the issuance of a certificate.

In sum, the department followed the required statutory procedure for the issuance of a water right certificate. The failure to challenge the certificate in a timely fashion is not somehow excused by a lack of notice addressed specifically to petitioner.

3. ORS 183.486 does not authorize the court to grant relief that is outside the scope of its authority.

Because the water right certificate is conclusive as to the city's right to appropriate and use water from the Row River, it is irrelevant whether the department erred in granting the extension request; remanding the extension to the department for further proceedings would be a nullity. Whether the department erred in some preliminary stage of the permitting process has no present effect on the water right certificate.

In concluding otherwise, the Court of Appeals held that ORS 183.486, which authorizes a reviewing court to grant ancillary relief when it reverses or modifies an agency order, authorizes a court reviewing the issuance of an extension to vacate the water right certificate. Indeed, ORS 183.486 gives the courts broad authority to effectuate the decisions made under ORS 183.482 (review of contested cases) and ORS 183.484 (review of orders in other than contested cases). However, that authority does not extend to overturning a conclusive water right certificate after more than three months have elapsed

since it was issued. In this respect, water rights certificates are *sui generis*. The Court of Appeals erred in failing to recognize that unique nature.

ORS 183.486 allows a court to issue ancillary relief “to redress the effects of official action wrongfully taken or withheld.” Ancillary relief is relief that is subordinate or subsidiary, auxiliary or supplementary to the main relief sought. *Webster’s 3d Int’l Dictionary* at 80. Although this court has never squarely decided the issue, it is generally accepted that the power to order ancillary relief does not include the power to award tort damages, for which another, exclusive remedy exists under the Tort Claims Act. *See Burns v. Board of Psychologist Examiners*, 116 Or App 422, 424-5, 841 P2d 690 (1992). Likewise, 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. Having failed to avail itself of that remedy, WaterWatch should not be allowed to have the certificate set aside.

A court may exercise only so much authority as is granted to it by law. A water right certificate, once three months has passed, may be set aside only if forfeiture by non-use is proven. The Court of Appeals simply lacked authority to ignore the conclusive nature of the certificate.

B. The Water Resources Department correctly interpreted ORS 537.230(2)(c).

For the reasons set forth above, this court need not reach the merits of the order granting the extension request. However, if the court does reach that issue, it should affirm the decision of the department. At the time that the department granted the extension, the city had made full beneficial use of the entire rate of water allowed under the permit. No “undeveloped portion” of the permit existed and therefore no part of the water right to which conditions could attach. The Court of Appeals erred in determining otherwise.

ORS 537.230(2)(c), which requires that certain extensions of water right permits be conditioned to maintain the persistence of listed fish species, was enacted in 2005 in reaction to a decision of the Court of Appeals that placed municipal permittees at a substantial disadvantage in developing their water rights. The text, context, and legislative history of that statute all support WRD’s view that “the undeveloped portion of the permit” is measured as of the time that WRD considers the extension request. The order of the department granting the city’s extension request should be affirmed.

1. ORS 537.270(2)’s text.

The starting point for the construction of a statute is the language of the statute itself. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). Indeed, in the absence of ambiguity, the text is also the end point, for it is the best

indication of the intent of the legislature. ORS 537.230(2), as amended in 2005, is unambiguous in its application.

In 2004, the Court of Appeals decided *WaterWatch of Oregon, Inc. v. Water Resources Com'n.*, 193 Or App 87, 88 P3d 327 (2004), *vacated by*, 339 Or 275 (2005). The order on review in that case granted an extension of time to develop a water right permit for Ten Mile Creek in Coos County; the Court of Appeals reversed the extension. The water board sought review, and this court allowed the petition. *WaterWatch of Oregon, Inc. v. Water Resources Com'n.*, *rev allowed*, 337 Or 476 (2004). While the case was pending, the 2005 legislature enacted HB 3038, 2005 Or Laws, Chapter 410. One provision of that bill legislatively overruled the Court of Appeals' decision that municipalities were required to complete construction within 5 years. Accordingly, this court vacated the decision and remanded for consideration of other issues that the Court of Appeals had not decided. *WaterWatch of Oregon, Inc. v. Water Resources Com'n.*, 193 Or App 87, 88 P3d 327 (2004), *vacated by*, 339 Or 275, 278-279 (2005). The history of the 2005 legislation is discussed in greater detail below.

Among the provisions included in the 2005 legislation is the language at issue here, ORS 537.230(2)(c), an entirely new provision of the statute that did not exist before. That section states:

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. The department shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife.

(Emphasis added.)³

Here, the city put the full rate of water allowed to beneficial use before submitting its extension request. However, when the prior extension granted to the city expired in 1999, the city was using only a portion of the water allocated to it. It is therefore critical to decide the date on which the undeveloped portion of the permit is to be determined.

As always, the language that is actually used by the legislature is the best source for determining legislative intent. This court assumes that the legislature intends statutes to be read in a fashion that is consistent with syntax and grammar. *Liberty Northwest Ins. Corp., Inc. v. Watkins*, 347 Or 687, 693-694, 227 P3d 1134 (2010). In particular, the verb tense used can be dispositive as to legislative intent. *VLV v. Board of Parole*, 338 Or 44, 50, 106 P3d 145 (2005). Use of the present tense is a strong indication that the language refers to

³ June 25, 2005 was the effective date of the statute. November 2, 1998 was the effective date of rules adopted by the Water Resources Commission that required a more thorough environmental review of water right permits than had previously been the case.

conditions existing at the time of the decision. *Martin v. City of Albany*, 320 Or 175, 181, 880 P2d 926 (1994).

The operant phrase in this statute is “the department finds,” in the simple present tense. The following phrase, “is conditioned to maintain” is also in the present tense, albeit in passive voice. Both phrases connote present action. Present action is reinforced by the second sentence of the statute: “The department shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife.” In that sentence, the simple future tense is used to express an action that will occur in the future. Nothing in this phraseology indicates an intention that the department look backward to make the finding that it must make; rather, the use of the present tense directs the department to look at the information that is available at the time it is making the decision.

Cuff v. Department of Public Safety Standards and Training, 345 Or 462, 198 P3d 931 (2008) illustrates this court’s use of principles of grammar. The relevant statute there provided that the department may revoke the certification of an officer if the officer “does not meet the minimum applicable standards.”

This court held:

As a matter of simple grammar, the key phrases of those provisions are worded in the present tense. That is, the statute gives DPSST the *present* authority to revoke a public safety officer’s certification based on the public safety officer’s *present* failure to “meet the applicable minimum standards” established under

ORS 181.640(1)(a) to (d). The plain wording of that statute does not support an interpretation that DPSST has authority to revoke a public safety officer's certification because that officer failed to meet minimum standards at some point in the past.

345 Or at 470.

The phrase, “the undeveloped portion of the permit” itself connotes the permit as it exists at the time the decision is made. No party has suggested that the city did not have the right to continue work under the permit during the time before it applied for an extension; indeed, for much of that time, the department was not accepting applications for extensions. *See* ORS 537.260(1) (providing that a municipal permit is not subject to cancellation if not perfected within the applicable time period). If the legislature had intended that the development of the permit be measured as of the time of the expiration of the last extension, it could have said so; that it did not also indicates an intention that the current state of development be considered.

As applied to this case, the department must make a present finding as to the undeveloped portion of the permit. The department found that the entire rate of 6.2 CFS had been put to beneficial use, and therefore there was no undeveloped portion. That determination was correct.

2. The context also supports WRD's reading of the statute.

Statutory construction is also informed by the context. Context includes other provisions of the same enactment, as well as other related statutes. *Force*

v. Dept. Of Revenue, 350 Or 179, 188, 252 P3d 306 (2011) (other provisions of same statute); *State v. Cloutier*, 351 Or 68, 98-99, 261 P3d 1234 (2011) (statutes on the same subject). The context of ORS 537.230(2)(c) supports the department's construction of that statute.

As noted, the legislature enacted ORS 537.230(2)(c) as part of a statutory package directed to permits for municipal uses. ORS 537.230(1), as amended, provides a twenty-year period (rather than five years) for a municipal permittee to complete construction, and sets forth the conditions under which that time can be extended by WRD:

- (a) The holder shows good cause. In determining the extension, the department shall give due weight to the considerations described under ORS 539.010 (5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right;
- (b) The extension of time is conditioned to provide that the holder may divert water beyond the maximum rate diverted for beneficial use before the extension only upon approval by 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. The department shall base its finding on existing data and upon the advice of the State Department of Fish and Wildlife. An existing fish protection agreement between the permit holder and a state or federal agency that includes conditions to maintain the persistence of any listed fish species in the affected portion of the waterway is conclusive for purposes of the finding.

HB 3038 Enrolled, Section 1, (2), 2005 Or Laws Ch 410, codified at ORS 537.230(2). The structure of subsection (b) of the statute, like subsection (c), clearly refers to the status of development at the time the extension decision is made. The phrase, “before the extension” can be read only to mean the time of decision. Again, had the legislature intended to refer to the maximum rate applied to beneficial use at the time the previous extension expired, it could easily have said so.

Similarly, subsection (a) of the statute uses present and future tense constructions: the department “shall give” (simple future tense) consideration to whether other government requirements “have delayed” (present perfect) the project. That section is once again directed to the time that the decision is made.

The statute also made it clear that it was intended to apply to all permits issued after its effective date, and to all extensions to permits. HB 3038 Enrolled, Sections 5(1) and (2). And the statute provided that extensions that were granted before the act was adopted are not subject to challenge for exceeding time limits. Sections 5(3). The clear purpose of the statute as a whole was to preserve municipal water right permits.

As further context, the structure of the water code in general favors a construction that promotes development of municipal water rights. Even prior to the 2005 amendments, numerous provisions promoted and favored municipal

rights. *Former* ORS 537.230(1) exempted municipalities from a requirement to begin construction within one year; *former* ORS 537.230(2) allowed consideration of governmental requirements in determining if good cause had been shown for an extension. ORS 537.410(2) provided that a municipal permit is not subject to cancellation for failure to perfect or otherwise comply with provisions of the permit. ORS 537.260 allowed a municipality to partially perfect its water right without losing its priority or suffering cancellation of the remainder. All of these provisions favor the preservation of municipal water rights.

3. Legislative history supports WRD's construction of the statute.

Legislative history is also considered at the first level of analysis of statutory construction. *Gaines*. The legislative history of ORS 537.230, as amended, demonstrates that the legislature intended the department to consider all existing circumstances when deciding an extension request.

As noted above, the legislative language at issue had its genesis in a 2004 decision of the Court of Appeals. In that case, the Coos Bay-North Bend Water Board sought a permit to appropriate water from Ten Mile Creek for future municipal use. WaterWatch and others objected, asserting that *former* ORS 547.230(1) required that construction be completed within 5 years, and the record showed that construction would not even begin in that time frame. The commission asserted that the relevant issue was whether the municipality would

pursue construction, including necessary planning and financing, with reasonable diligence for a municipal water user, with extensions as necessary to allow development of the permit. Because a municipality must plan for future water needs, the commission asserted that the five-year time limit was not strictly applicable to municipalities. In determining whether a municipality was proceeding with reasonable diligence, the agency considered not only dirt-and-shovel construction, but planning and financing efforts that are unique to municipal users. The Court of Appeals disagreed with that interpretation, and reversed and remanded the permit.

The 2005 legislation amended ORS 537.230 to allow a municipal user twenty years in which to begin and complete construction of the works necessary to perfect the use. A staff measure summary prepared for the Senate committee that adopted the fish condition at issue here describes the background thusly:

Municipalities assert that it is necessary for them to hold water rights that may be considerably larger than they currently need in order to plan for future growth. In such cases, it may not be practical for the municipality to construct water works to develop the water right for years or even decades after the original application. Application of the recent Court of Appeals holding would require municipalities to either develop their unused water rights or, more likely, abandon part of the right due to non-use.

HB 3038-B allows municipalities to keep the water rights they have, and allows the department to issue extensions of the time to develop the right upon a showing of good cause.

Senate Committee on Environment and Land Use, Staff Measure Summary, 6/10/2005. Thus the purpose of the legislation was to preserve long-standing water right permits that had not yet been developed and to set out limits and conditions for the future development of those rights.⁴

As originally proposed and passed by the House, HB 3038 did not include the subsection that became ORS 537.230(2)(c). That subsection was added while the bill was pending in the Senate Committee on Environment and Land Use. Various stakeholders, including WaterWatch, negotiated the language. Ex M, Minutes of the Senate Committee on Environment and Land Use, June 2, 2005, p 1.⁵ As a result of those negotiation and amendment, WaterWatch withdrew its opposition to the bill. Minutes, Ex M, p 2. In its written testimony, WaterWatch's spokesman described the language as "less than ideal," but "will at least explicitly require some consideration of environmental impacts before extending the time to develop." *Id.* He emphasized that the extension decision is "to be based on all existing data." Nothing in his testimony states that the department was not to consider the

⁴ To be sure, the same summary acknowledges that the committee amendment that added ORS 537.230(2)(c) to the legislation also required the department to condition extensions on maintenance of fish populations; however, the driving impetus for the legislation was to prevent the loss of municipal water rights that had long been in development.

⁵ The minutes and supporting exhibits are appended to this brief.

conditions that existed at the time the extension was decided, but rather conditions as they existed many years before.

A spokesman for the Special Districts Association of Oregon also submitted written testimony at the committee meeting on June 2, 2005.

Minutes, Ex N. That testimony emphasized the need for water suppliers to consider long term needs of customers of the future, as well as the lengthy time periods required for planning, financing, testing, and construction of treatment plants. Stability and predictability are essential to those efforts; water rights must be secured and must remain available over a period of many years.

The concerns that were intended to be addressed by the Senate amendments to HB 3038 were described in earlier testimony to the Senate Committee and to the House Committee on Water. For example, in written testimony submitted to the Senate committee on May 19, 2005, the board president for WaterWatch describes the problems he perceived with lengthy extensions of municipal water right permits:

The past practice has resulted in an astounding number of old permits that would allow a new water use today without any evaluation of whether that water use makes sense in light of competing interests and alternative sources of water. The past practice also has resulted in issuance of new permits today for possible use in the future, leaving little or no opportunity to consider, before the actual use of the water, whether it still makes sense in light of competing interests and alternative sources of water. Finally, the past practice has resulted in a stockpiling of permits far beyond what is reasonably required to meet future needs.

Minutes, May 19, 2005, Ex J, pp 3 – 4. WaterWatch opposed extending the time period for construction from 5 years to 20 years for municipal uses. *Id.* at p 6 – 7. Significantly, however, WaterWatch did not advocate retrospective review of permits where water had already been put to beneficial use; rather, its concerns revolved around future out-of-stream uses.

In sum, the concerns that were addressed by ORS 537.230(2)(c) related to the possibility that water that is not presently needed could be tied up for decades into the future without any environmental review. The statute was not intended to impact present municipal uses.

WaterWatch now advocates for a more expansive meaning for ORS 537.230(2)(c) than that which was actually adopted as a compromise between its views and the needs of municipal water districts. That compromise was to require consideration of sensitive, threatened, and endangered fish species at the time of an extension where the municipal user has not already expended the resources to fully develop the water right; as to the undeveloped portion, WRD must consider those impacts. But nothing in the legislative history of HB 3038 supports a construction that would require WRD to ignore the expenditure of time and resources that has already lawfully occurred.

In sum, the 2005 legislation was intended to ensure that the Water Resources Department consider all of the information available to it in making a decision to extend the time for a water right permit. Nothing in the text,

context, or legislative history supports a construction that would require the department to ignore beneficial uses that have already occurred at the time of its decision. The department properly interpreted ORS 537.230 in granting the extension to Cottage Grove.

CONCLUSION

The issuance of the conclusive water right certificate to the City of Cottage Grove rendered this case moot. The decision of the Court of Appeals should therefore be vacated and the petition dismissed. If this court does consider the merits, the Water Resources Department properly considered the

beneficial use already developed in determining that there was no undeveloped portion to trigger ORS 537.230(2)(c). The decision of that Court of Appeals should be reversed and the final order of the Water Resources Department should be affirmed.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Denise G. Fjordbeck

DENISE G. FJORDBECK #822578
Attorney-in-Charge
Civil/Administrative Appeals
denise.fjordbeck@doj.state.or.us

Attorneys for
Water Resources Department and
Water Resources Commission

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 12, 2014, I directed the original Brief on the Merits of Water Resources Department and Water Resources Commission to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Lisa A. Brown and Thomas M. Christ, attorneys for respondent on review Waterwatch of Oregon, Inc.; Jordan R. Silk and W. Michael Gillette, attorneys for petitioner on review City of Cottage Grove; and upon Richard M. Glick, attorney for amicus parties League of Oregon Cities and Oregon Water Utility Commission, by using the court's electronic filing system.

Continued...

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,170 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Denise G. Fjordbeck

DENISE G. FJORDBECK #822578

Attorney-in-Charge

Civil/Administrative Appeals

denise.fjordbeck@doj.state.or.us

Attorney for

Water Resources Department and

Water Resources Commission