

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Certificate 76600, in the )  
Name of Sutherlin Water Control District, )  
*Certificate Holder* )  
and )  
Ray and Diane Cox, )  
*Contestants* )

**FINAL ORDER**

**DISPOSITION:** The contest is dismissed.

**History of Proceedings**

This proceeding was initiated after the Oregon Water Resources Department (Department) issued certificate 76600 on August 17, 2000, to the Sutherlin Water Control District (District) and Contestants Coxes submitted a contest to the certificate

On May 11, 2001, the Department issued a Notice of Contested Case and Prehearing Conference raising the issue of whether the contestants had standing under ORS 537.260(3) to contest the issuance of the certificate.<sup>1</sup> A prehearing conference was held on June 4, 2001, during which Hearing Officer Weisha Mize directed the parties to brief the question of standing. The Department, the District, and Contestants Coxes (Contestants) submitted briefs on the issue. On August 30, 2001, the Hearing Officer issued a Proposed Order finding Contestants lacked standing to challenge certificate 76600 and dismissing the contested case proceeding against the certificate. On September 7, 2001, the Hearing Officer issued an Amended Proposed Order including a finding omitted in error from the August 30, 2001 Proposed Order.

The Department and Contestants filed exceptions to the Amended Proposed Order. The Department argued that the Contestants, as owners of land listed in certificate 76600, had standing to challenge the certificate under ORS 537.260. The Contestants argued that

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<sup>1</sup> A single contested case was initiated to hear contests to certificate 76600 filed by the Coxes, and by Jess Terrel and David Andrews. In addition, Jess Terrel contested issuance of certificates 76589 and 76599, which were also issued to the District. These other contests were disposed of in separate orders and are not at issue here.

ORS 537.260 did not provide the exclusive means for contesting Certificate 76600 and argued they had standing under ORS 537.260.

Following the period for filing exceptions, the District and the Contestants submitted additional filings.<sup>2</sup> It is within the Director's discretion to provide an opportunity for additional argument after parties have filed exceptions to a proposed order. Accordingly, with the exception of Contestants' response to the Oregon Water Resources Congress ("OWRC") filing described below, I have determined that additional argument is appropriate in this case and have considered these arguments.

In addition, the OWRC filed an Amicus Response to Contestant Coxes' and the Department's Exceptions to Amended Proposed Order on November 16, 2001. The OWRC has not moved to appear as a party in this case. Under ORS 183.460 and OAR 137-003-0650 only the agency and parties are authorized to file exceptions. Persons must file exceptions in order to participate in the process following issuance of a proposed order and OWRC has not qualified itself to file exceptions. Accordingly, I have not considered OWRC'S Amicus Response or Contestant Cox Response to Amicus Response of Oregon Water Resources Congress to Contestants Cox and the Department's Exceptions to Amended Proposed Order.

### **Opinion**

#### 1. Standing under ORS 537.260 to Contest Certificate 76600

The issue under consideration is whether Contestants have standing to challenge the issuance of Certificate 76600. The hearing officer concluded that Contestants did not have standing and consequently dismissed the contested case hearing. Both the Department and Contestants filed exceptions asserting that this decision was in error. They argue that, under ORS 537.260, an "owner" of a water right can challenge the issuance of a certificate within three months of its issuance, and that an owner of land listed in the tabulation of place of use is an "owner" of the certificate under ORS 537.260. For the reasons that follow, I conclude that the hearing officer correctly dismissed the Coxes' contest.

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<sup>2</sup> The District filed Certificate Holder's Response To Contestant Cox's And The Department's Exceptions To Amended Proposed Order And Response To Department's Motion to Re-Instate Hearing on November 5, 2001. Contestants filed Contestants Cox Response To Amicus Response Of Oregon Water Resources Congress To Contestants Cox And The Department's Exceptions To Amended Proposed Order And A Motion To Re-Instate Hearing on December 3, 2001, and Contestants Coxes' Response To Certificate Holder's Response To Contestant Cox's And The Department's Exceptions To Amended Proposed Order And Response To Department's Motion To Re-Instate Hearing on December 6, 2001.

Subject to exceptions not pertinent here, under ORS 537.270, a water right certificate is conclusive proof of the right if it is not contested and canceled in the manner provided in ORS 537.260 within three months of issuance. ORS 537.260(3) provides in relevant part:

(3) Any person owning an application, permit or water right certificate subsequent in priority may jointly or severally contest before the department the issuance of the water right certificate at any time before it has issued and after the time has expired for the completion of the appropriation under the permit, or within three months after issuance of the certificate.

Under the express terms of ORS 537.260(3), only those “owning an application, permit or water right certificate subsequent in priority” may contest a certificate within three months after its issuance. In its exceptions the Department argued, nonetheless, that an owner of the subject certificate was also authorized to contest the certificate under ORS 537.260(3) because the Oregon Supreme Court had so stated in *Wilber v. Wheeler*, 273 Or 885, 864-865 (1974). The Department relied on the rule of statutory construction that a court’s interpretation of a statute becomes part of the text of the statute “as if written into it at the time of its enactment.” *Stephens v. Bohlman*, 314 Or 344, 350 n. 6 (1992).

On further review, the Oregon Department of Justice now advises that, although the *Wilber v. Wheeler* court made the statement that a contest filed by an owner of a certificate could be brought under ORS 537.260(3), it did so in *dictum*. The *Wilber* court was not actually presented a contest filed by an owner within three months of certificate issuance, and so did not actually hold that such a contest is proper. The rule of *stare decisis*, which was the basis for the court’s statement in *Stephens v. Bohlman* that a prior court decision should be read as statutory text, applies only to “authoritative interpretations” of a statute. *SAIF Corp. v. Allen*, 320 Or 192, 204 (1994). “Dictum in prior cases construing a statute is ‘not within the doctrine of *stare decisis*’”. *Id. citing Safeway Stores v. State Bd. of Agriculture*, 198 Or 43, 81 (1953). In the absence of an authoritative interpretation of ORS 537.260(3) by any Oregon appellate court, a statute should be given its plain, natural, and ordinary meaning under the well-established statutory interpretation template set forth in *Portland General Electric v. Bureau of Labor and Indus.*, 317 Or 606, 611 (1993) (*PGE*). The plain, natural and ordinary meaning of “subsequent,” the operative term in ORS 537.260(3), is “following in time,” “following in order of place: succeeding.” *Webster’s Third New Int’l Dictionary*, 2278 (unabridged ed 1993) (*Webster’s*); see *Carrigan v. State Farm Mut. Auto. Ins. Co.*, 326 Or 97, 102 (1997) (relying on *Webster’s* in a *PGE* analysis to determine the plain, natural, and ordinary meaning of a statute).

In addition, the Oregon Department of Justice advises that the *dictum* of the *Wilber* court pertaining to ORS 537.260(3) is of only limited historical applicability and should not be given significant persuasive value in light of *PGE* and changes to the Administrative Procedures Act (“APA”) since the initiation of the *Wilber* litigation.

With respect to the first issue (application of *PGE*), the *Wilber* court’s discussion of ORS 537.260(3) appears to be driven by considerations and principles of statutory interpretation that are no longer applicable at the first level of a *PGE* analysis. The *Wilber* court was concerned that any interpretation of ORS 537.260(3) not allowing a certificate holder to challenge his or her own certificate under that statute would either leave the certificate holder with no other avenue to challenge an erroneous certificate, or alternatively would allow a certificate holder to challenge their certificate at any time, thereby failing to protect the “reliability of record title” of water rights, with the result of undermining the “stability of water rights.” *Wilber* at 864. That is, the *Wilber* court was concerned that any other interpretation of the statute would lead to a result it perceived as absurd.

The absurd results doctrine, however, is not applicable at the first level of a *PGE* analysis. Adhering to the *Wilber* court’s *dictum* would require an effective rewrite of ORS 537.260(3), employing a principle of statutory construction that the courts have declined to follow since *PGE* was decided. *Clackamas County v. Gay*, 146 Or App 706, 712, 717 (1997) (Landau, concurring) (stating that “pre-*PGE* cases rewriting statutes have been implicitly superseded by the court’s most recent template for construing statutes, described in *PGE*” and “since *PGE*, the Supreme Court has declined every invitation to rewrite the language of a statute”); *State v. Vasquez-Rubio*, 323 Or 276, 282 (1996); *Fleetwood Homes of Oregon v. Vanwechel*, 164 Or App 637, 642 (1999) (“we do not apply the absurd results principle to determine legislative intent when there is no ambiguity in the text and context of the statute. The absurd results principle is applicable only at the third level of the *PGE* analysis...” citing *Young v. State*, 161 Or App 32, 37-40 (1999)). In the case of ORS 537.260(3), the phrase “subsequent in priority” is unambiguous. Consequently, the absurd results principle does not come into play because there is no need to move beyond the first level (text and context) in a *PGE* analysis.

Second, the *Wilber* court’s concern that the certificate holder would have no other possible avenue to challenge an erroneous certificate is no longer valid in light of the APA. The APA now provides for judicial review of orders in “other than contested cases.” ORS 183.484. This provision was added to the APA when it was substantially

rewritten and clarified in 1975, and did not exist when the *Wilber* litigation began in 1974. *Wilber* at 858; Oregon Laws 1975, chapter 759, § 16 (now codified as ORS 183.484). Thus, the *Wilber* court may not have considered that the person to whom a certificate is issued has other avenues of challenge and judicial review available.

As the APA now allows for challenges to orders in other than contested cases, a certificate owner may challenge his own certificate in circuit court pursuant to ORS 183.484. Such a challenge must be filed within 60 days of the issuance of the agency's order. ORS 183.484(2). The *Wilber* court's concern about protecting the "record title" and stability of water rights is actually supported by requiring such a person to contest within 60 days under ORS 183.484, instead of the longer three month period provided for under ORS 537.260(3).

Contestants do not claim to be, nor are they in fact, the holder of an application, permit, or certificate junior in priority to the certificate at issue.<sup>3</sup> Application of the plain, natural, and ordinary meaning of ORS 537.260(3) therefore leads to the conclusion that Contestants do not fall within the statutorily-enumerated class of persons who may maintain a contest under ORS 537.260(3). Because Contestants do not hold an application, permit or certificate junior in priority to the certificate in question, it is immaterial whether or not they are "owners" of that certificate.

## 2. Standing to contest Certificate 76600 pursuant to ORS 537.407

The remaining question is whether ORS 537.407 provides an alternative means for Contestants to challenge the certificate in this case. The hearing officer concluded that ORS 537.260 provides the exclusive means by which persons may challenge a water right certificate issued pursuant to the process codified at ORS 537.400 *et seq.*

ORS 537.407(3) provides a limited opportunity for challenges to certificates, like this one, issued under ORS 537.407(1). A person making such a challenge was required, before August 1, 1997, to submit written material demonstrating that the reservoir should not be exempt because it results in injury to an existing water right. ORS 537.407(3)(b). The record includes evidence that Contestants submitted information regarding this certificate in writing before August 1, 1997, but the hearing officer did not expressly so find, or determine whether the submission met the requirements of ORS 537.407(3).

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<sup>3</sup> Contestants claim ownership of the certificate at issue in this case. Assuming, without deciding, that they are correct, contestants would own a certificate *identical* in priority to the certificate at issue in this case. A certificate owner with an identical priority does not have standing under the express terms of ORS 537.260(3), which provides standing only for those "subsequent" or junior in priority.

Contestants' submission, even if timely and otherwise legally sufficient under ORS 537.407(3), does not now provide an avenue for challenge to Certificate 76600. ORS 537.407(6) provides that if the director determines that an existing reservoir results in injury to an existing water right, the Department must require the reservoir owner to mitigate injury to existing water rights. Under ORS 537.407(7), if the Department does not take such action within 180 days of receiving written comments, the certificate "shall continue with the same terms and conditions included with the certificate." The Department did not take such action here. ORS 537.407 provides no other opportunities to challenge certificates issued under that statute.


### Conclusions of Law

1. Contestants do not have standing to challenge this certificate under ORS 537.260(3).
2. ORS 537.407 does not provide an alternative means for review of this certificate.

### Order

Now, therefore, it is ORDERED that the contest is dismissed.

Dated this 25<sup>th</sup> day of November, 2002.

  
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Paul R. Cleary, Director  
Oregon Water Resources Department

### Judicial Review Rights

Under the provisions of ORS 536.075(2), any party affected by this Order may seek review by filing a petition for judicial review. The petition for review must be filed within 60 days of the date this Order is served. Date of service shall be the date on which the order is delivered or mailed. Judicial review is pursuant to the provisions of ORS 183.482 to the Court of Appeals.