

1 c. Final Orders Must be Reviewed Through the APA Process

2 Plaintiffs' Complaint is predicated on receiving a declaratory judgment
3 effectively reversing the decision of the Secretary of State. However, because the
4 Secretary of State issued a final order, Plaintiffs' only relief could be through the
5 procedures set forth in the APA. "The Oregon Administrative Procedures Act, ORS
6 183.310 et seq, establishes a comprehensive pattern for the judicial review of
7 administrative decisions. The various APA statutes governing judicial review provide the
8 sole and exclusive methods of obtaining judicial review." *Bay River, Inc. v.*
9 *Environmental Quality Com.*, 26 Or. App. 717, 720 (1976).

10 In this situation the proper review process is via ORS § 183.484 because this is an
11 order in other than a contested case. The phrase "order in other than contested case" is
12 not defined by statute. Therefore, an order in other than a contested case is determined
13 by eliminating what it is not. Here the order is not: a) an action falling under one of the
14 four contested case proceedings listed in ORS § 183.310(2)(a); b) a rule under ORS §
15 183.310(9); and c) a declaratory ruling as defined by ORS § 183.410. Additionally, in
16 ruling on the type of agency action at issue, the court looks to whether the operative
17 statute provides for a contested-case hearing. *Oregon Business Planning Counsel v.*
18 *Dept. of Land Conservation & Dev.*, 290 Or. 741, 748, 626 P2d 350 (1981). Here the
19 final order from the Secretary of State does not meet any of the definitions of a contested
20 case, nor was it based on a statute providing for a contested case hearing, therefore this
21 matter should be reviewed as an order in other than a contested case.¹

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23 ¹ However, if this is an order that can qualify for a contested case hearing, then the court
24 would still not have jurisdiction over this matter for two reasons. First, Plaintiffs would
25 be required to seek relief through a contested case hearing and have not yet done so.
26 "The Circuit Court has no jurisdiction to review agency orders that, as in this case, trigger
 the availability of a contested case hearing." *Bay River, Inc. v. Environmental Quality*
 Com., 26 Or. App. 717, 554 P2d 620, 623 (1976). Second, pursuant to ORS § 183.842, a
 contested case is reviewed by the Court of Appeals and not the Circuit Court. Therefore,
 whether the final order emanates from a contested case or an order from other than a
 contested case, the Court lacks jurisdiction on this matter.

1 d. Petition for Review was Required Within 60 Days of the Order

2 Pursuant to ORS 183.484(2), a petition for review of an order is required to be
3 filed with the circuit court within 60 days following the date the order is served. The
4 order was issued on September 29th, 2011, and Plaintiffs have not yet petitioned the court
5 for judicial review. However, even if the court were to view the Complaint as a petition
6 for review, the action was filed on January 17th, 2012, well beyond the 60 day window
7 required. See **Exhibit C** – OJIN Printout of Case Proceedings.

8 **II. The Court Cannot Maintain Jurisdiction if Plaintiffs Have Circumvented the**
9 **Judicial Review Process**

10 The Oregon APA provides the sole remedy for plaintiffs, as such “when APA
11 review is available, APA jurisdiction is *exclusive*.” *Lake County*, at 166 (emphasis
12 added). A party may not circumvent the exclusive APA review process by filing a
13 declaratory judgment action after the time for petitioning for judicial review has passed.
14 *Bay River*, at 720. In this situation, Plaintiff Reeves, on behalf of the other Plaintiffs who
15 elected him as their chairperson, and through Plaintiff’s counsel, sought a decision from
16 the Oregon Secretary of State. The Secretary of State rendered an answer and issued a
17 final order. At that point, because the answer was a final order, plaintiffs’ exclusive
18 remedy was to file for judicial review within 60 days of the order. They have not done
19 so. Instead, plaintiffs missed the opportunity for review and are now seeking to
20 circumvent the judicial review process of the APA by seeking relief through the
21 Declaratory Judgment Act. In *Lake County*, similar to this matter, a party sought
22 declaratory and injunctive relief from a final order of the Division of State Lands. The
23 Court of Appeals ruled that the APA remedy was exclusive and therefore the claims for
24 injunctive and declaratory relief should have been dismissed for lack of jurisdiction.
25 *Lake County*, at 166. Here is the same situation; plaintiffs have filed for a declaratory
26 judgment, when in reality they should have filed for judicial review via the APA. As

1 such, the action should be dismissed for lack of jurisdiction.

2 **III. Plaintiffs Should Not Be Entitled to Amend Their Pleadings**

3 Finally, this matter should be dismissed and Plaintiffs should not be entitled to
4 amend or re-plead their complaint for two reasons. First, Plaintiffs sought relief via the
5 Declaratory Judgment Act. To properly seek judicial review they are required to re-file
6 as a properly filed petition for review, which would be a separate matter, and the 60 days
7 have already passed for review. But more importantly, Plaintiffs did not file their initial
8 complaint on this matter until more than 60 days after the order was drafted. As such,
9 even if the court were to determine the initial complaint met the minimum requirements
10 for a petition for review, the petition for review would have been untimely.

11 **IV. Conclusion**

12 The Secretary of State made a determination on the leadership of the LPO. The
13 agency issued a final order on the question and as such both Plaintiffs and Defendants
14 became subject to the APA. A final order of an agency must be reviewed through the
15 judicial review provisions of ORS 183.480. A court does not have jurisdiction to review
16 the order of a state agency in any other proceeding and manner than that described in the
17 APA. Plaintiffs have attempted to circumvent the APA process through the use of the
18 Declaratory Judgment Act, but a declaratory judgment is not available in this situation.
19 As such the court should dismiss the Complaint for lack of jurisdiction.

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1 Respectfully submitted this 6th day of August, 2012.
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4 Respectfully submitted,
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8 /s/ COLIN ANDRIES, OSB 051892
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing DEFENDANTS KNIGHT, TABOR,
3 VETANEN, WESTON, SKYBA AND KARLOCK'S RULE 21 MOTIONS AGAINST
4 PLAINTIFFS' SECOND AMENDED COMPLAINT on:

5 Tyler Smith
6 Nathan Goin
7 Tyler Smith & Associates
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10 Attorneys for Plaintiff

11 by the following indicated method(s):

- 12 by faxing a copy thereof to the attorney at the fax number shown above,
13 which is the last known fax number for the attorney's offices, on the date
14 set forth below.
- 15 by mailing a full, true and correct copy thereof in a sealed, first class
16 postage prepaid envelope, addressed to the attorneys as shown above, at
17 the last-known address of the attorneys, and deposited with the United
18 States Postal Service at Portland, OR, on the date set forth below.
- 19 by causing a full, true and correct copy thereof to be personally hand-
20 delivered to the above named attorneys.
- 21 by e-mailing a copy to the attorney at the e-mail address shown above,
22 which is the last known e-mail address for the attorneys, on the date set
23 below.

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