

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MEL STEWART,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 DIVISION OF STATE LANDS,)
11)
12 Respondent.)
13

LUBA No. 93-023

FINAL OPINION
AND ORDER

14
15 Appeal from Division of State Lands.

16
17 Mel Stewart, Corvallis, represented himself.

18
19 William R. Cook, Assistant Attorney General, Salem,
20 represented respondent.

21
22 HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,
23 Referee, participated in the decision.

24
25 DISMISSED 07/13/93

26
27 You are entitled to judicial review of this Order.
28 Judicial review is governed by the provisions of ORS
29 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals respondent's denial of his
4 application for a "Removal-Fill Permit."¹

5 **FACTS**

6 Petitioner's property includes wetlands. Petitioner
7 requested approval from the Oregon Division of State Lands
8 (DSL) to conduct removal and fill activity in conjunction
9 with housing construction on his property. Petitioner's
10 removal-fill permit request was denied by DSL on June 15,
11 1992. Petitioner requested and was given a contested case
12 hearing on the permit request.² The Director of DSL
13 thereafter issued a final order denying petitioner's
14 request. Petitioner has appealed the director's final order

¹ORS 196.810(1) provides in part, as follows:

"Except as otherwise specifically permitted * * * no person
* * * shall remove any material from the beds or banks or fill
any waters of this state without a permit issued under
authority of the Director of the Division of State Lands
* * *."

²ORS 196.825(6) provides, in part, as follows:

"Any applicant whose application for a permit has been denied
* * * may, within 10 days of the denial of the permit * * *
request a hearing from the director. Thereupon the director
shall set the matter down for hearing, which shall be conducted
as a contested case in accordance with ORS 183.415 to 183.430,
183.440 to 183.460 and 183.470. After such hearing, the
director shall enter an order containing findings of fact and
conclusions of law. The order shall rescind, affirm or modify
the director's initial order. Appeals from the director's
final order may be taken to the Court of Appeals in the manner
provided by ORS 183.482."

1 both to this Board and to the Oregon Court of Appeals.

2 **DECISION**

3 Respondent moves to dismiss this appeal, arguing that
4 the court of appeals has exclusive jurisdiction to review
5 the contested case order challenged in this appeal. We
6 grant the motion.

7 This Board does not have jurisdiction to review state
8 agency contested case orders. Pilling v. LCDC, 22 Or LUBA
9 188, 192 (1991). ORS 196.825(6) explicitly provides that
10 DSL removal-fill permit decisions are contested case orders
11 and that appeals of such orders are to the court of appeals,
12 pursuant to ORS 183.482. Jurisdiction for initial review of
13 state agency contested case orders is conferred on the court
14 of appeals. Id. ORS 197.825(2)(d) explicitly provides that
15 LUBA's jurisdiction "[d]oes not include those land use
16 decisions of a state agency over which the Court of Appeals
17 has jurisdiction for initial judicial review under ORS
18 183.400, 183.482 or other statutory provisions."

19 Petitioner suggests this might be a case where LUBA and
20 the court of appeals have split jurisdiction, but petitioner
21 does not identify any authority for his suggestion, and we
22 are aware of none. Petitioner also suggests this appeal
23 should be submitted to the court of appeals for a
24 determination of jurisdiction pursuant to ORAP 4.74 (Summary
25 Determination of Jurisdiction by Court of Appeals).
26 However, ORAP 4.74 only provides a basis for summary

1 determination of jurisdiction by the court of appeals where
2 the question is whether LUBA or the circuit court has
3 jurisdiction. ORAP 4.74 does not provide a basis for
4 referring to the court of appeals the question of whether
5 LUBA or the court of appeals is the proper forum for review
6 of the disputed contested case order.

7 It is petitioner's burden to establish that we have
8 jurisdiction in this matter. Petitioner has failed to do
9 so. This appeal is dismissed.