

A GUIDE TO AFFIDAVITS ASSERTING NON-USE

By submitting affidavits alleging non-use, you are making a statement under oath that the information you are giving about the water right is from your personal knowledge and is true. Based on this information, the Oregon Water Resources Department (Department) may initiate an administrative proceeding to cancel all or a portion of the water right.

You are also affirming that you have read Oregon Revised Statute (ORS) 540.610(2) and Oregon Administrative Rule (OAR) 690-017-0800, which set out the grounds by which the water right holder can rebut the presumption of forfeiture. Please see the attached copy of the statute and rules.

Your assertion that all or a portion of the water right has not been used beneficially for at least 5 successive years may be rebutted by the owner showing that one or more of the grounds listed in the statute or rule applies. If so, the non-use may be excused and the right will not be forfeit nor canceled. If the 5-year period of non-use ended more than 15 years ago, and the right has been used since then, no cancellation action can legally be initiated.

The water right certificate states the name of the person, or entity, the certificate was originally issued to, the source of water, the use of water, the number of acres and the location of the water right by county, township, range, section and $\frac{1}{4}$ $\frac{1}{4}$ (quarter-quarter) section. The tax lot number can be obtained from the county tax assessor's office for which the land in question is located.

You must include a copy of the county tax plat map with the affidavit and mark on the map the location of the water right, or the portion of the water right, you assert has not been beneficially used. Please see the example provided.

To locate the information for the water right certificate, you may contact your local Watermaster. Please see the RESOURCES section below for contact information.

You are stating that you are willing to testify in an administrative hearing to all allegations contained in your affidavit. **You have the burden to prove the alleged non-use by a preponderance of the evidence.**

The affidavit must describe your knowledge about the non-use, and it should be detailed. If you live next door, say how long you have lived there, what part of the land in question you have observed and the frequency of your observations. If you can only see the property from the road as you drive by explain what you can see and how frequently you drive by. Perhaps you walk along the stream, share a diversion or delivery system, perform regular ditch maintenance, or have some other reason to see the land, diversion, and/or delivery system so that you know no water has been diverted or applied. Describe this in detail. Perhaps you do not know about the diversion of water but are drawing the conclusion that water has not been used because you have not seen any evidence of irrigation and have not seen pipes, sprinklers, or water in the ditch. Whatever your basis is for knowledge about non-use on the property, describe it and give as many facts as possible.

Keep in mind, often the land for which a water right was originally obtained has now been subdivided into several different tax lots, each with a different owner. Some owners may have stopped using the water and others may still be using all or part of the right on their property.

The affidavit requires a statement of the time frame of the non-use that you *personally* know about. If you do not know from your own observations that this reported non-use occurred, do NOT include it. The only facts you should be relying on and including in your affidavit are what you have personally seen. The time frame you describe should be consistent with the reason you are familiar with the land and the water rights.

RESOURCES

Oregon Water Resources Website: www.oregon.gov/owrd

For Statutes and Rules, use the following address:

<https://www.oregon.gov/OWRD/programs/policylawandrules/Pages/default.aspx>

For a list of Oregon Watermaster Offices, use the following address:

<https://www.oregon.gov/OWRD/aboutus/contactus/Pages/RegionalOfficesandWatermastersDirectory.aspx>

For the water right certificate use the following address:

<https://www.oregon.gov/OWRD/programs/WaterRights/WRIS/Pages/default.aspx>

Use the Water Rights Information System (WRIS) to find a copy of the certificate (or other documents). Copies may also be requested by water right application number from the Water Rights Division at 503-986-0900 (copy fees will apply).

Oregon County Offices: <https://sos.oregon.gov/blue-book/Pages/local.aspx>

Map Information: The map submitted with the affidavit asserting non-use of a water right must clearly indicate the tax lot or property that the water right is attached to and show by drawing or some other form of demarcation where the water right is NOT being used. If it is only a portion of the water right that is not being used, only a portion should be marked. If the entire right is not being used, the area the right covers should be marked.

**INSTRUCTIONS FOR COMPLETING THE
AFFIDAVIT ASSERTING NON-USE OF A WATER RIGHT**

1. Complete information regarding legal name, address, telephone number and email. The Department will contact you using this information.
2. Complete information regarding the water right certificate number, the name of the person(s) to whom the water right certificate was issued, the source of water, the use of water and the priority date of the water right.

Please see the “RESOURCES” portion of ‘A Guide to Affidavits Asserting Non-Use’ if you need help finding information to answer the questions in the affidavit.

3. List the total number of acres noted on the certificate, if applicable.
4. Identify the Township, Range, Quarter-Quarter Section(s), Section(s), and County. Attach a copy of the certificate.
5. If the **entire** water right, or **a portion** of a water right, is forfeit due to non-use, check the appropriate one, and complete the type of use and the alleged period of non-use by month and year. Explain your knowledge regarding the alleged non-use in as much detail as you can so that it would be clear to anyone reading your affidavit how you know the right has not been used. **Please contact the Department for assistance if you have questions. Phone: (503) 986-0801.**
6. Illustrate on the **county tax plat map** the lands to which the water right is appurtenant AND show the portion of the water right that has not been used (either the entire right or the portion that has not been used). You must state the number of acres of the right that has not been used.
7. List the tax lots within which the water right is located. If you are asserting that the entire right hasn’t been used, you must still list the tax lots within which the right is located so the legal owners of the right can be notified. If you are asserting that a portion has not been used, you must do the same.
8. Indicate whether the subject water right is within the boundaries of an irrigation district or federal reclamation project.
9. Initial to show that you have read these laws: (ORS 540.610(2) and OAR 690-017-0800).
10. Initial to show that you have read this statement and understand your responsibilities as the proponent of this cancellation.
11. Sign the affidavit and have it notarized.

12. Complete the Proof of Service which indicates you mailed a copy this affidavit to the legal land owner and occupant of the lands to which the water right is appurtenant.

**Mail to: Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271**

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

State of Oregon)
)ss AFFIDAVIT ASSERTING NON-USE
County of) OF WATER RIGHT

Affiant information

1. I, _____
(Legal Name)
- of _____
(Residential Address-**and** your mailing address if different)
- _____, _____, _____
(City) (State) (Zip Code)
- Phone (_____) _____, E-mail _____ say that:

Certificate information (If you are alleging non-use of more than one certificate, complete a separate affidavit for **each** certificate.)

2. Water Right Certificate number _____, issued to _____
authorizes use of water from (*source*) _____
for (*use*) _____
under a priority date of _____.
3. The total number of acres described in the certificate is _____.
4. The subject water right is located in Township _____ N / S, Range _____ E / W, in
the _____ 1/4 _____ 1/4, of Section(s) _____, in
_____ County, Oregon.

Yes / No Certificate attached?

Attach additional pages to provide a detailed description, if needed.

Tax Plat Map illustration A county tax plat map is required, no substitute is permitted. Please see the attached example.

6. I have illustrated on the attached **tax plat map** the lands to which the water right in question is appurtenant, AND

I have illustrated on the attached tax plat map, the location of the **portion or entirety** of the water right which has **not** been exercised, totaling _____ acres. Please see the attached example.

7. The location of the unused water right is situated in the following tax lot(s):

8. Is the subject water right within the boundaries of an irrigation district or federal reclamation project? _____ Yes _____ No. If Yes, name of Irrigation District or Federal Reclamation Project: _____

9. I have read the provisions of Oregon Revised Statutes 540.610(2) and Oregon Administrative Rules 690-017-0800 and believe the presumption of forfeiture for **five or more successive years** of non-use may **not** be rebutted by the holder(s) of this water right.

_____ (Initial to indicate you have read these laws)

10. I agree to testify in a hearing to all allegations contained in this affidavit. I understand that as the proponent, I have the burden of proof on the alleged non-use.

_____ (Initial to indicate you have read this statement and understand your responsibilities).

Signature and Oath

10. Under penalty of perjury, I do solemnly swear or affirm that the foregoing is a true statement of the facts as I know them to be from my personal knowledge.

(Signature of Affiant)

Sworn to and subscribed before me this _____ day of _____, 2_____.

(Notary Public of Oregon)

My Commission Expires _____

(SEAL)

**PROOF OF SERVICE OF
AFFIDAVIT ASSERTING NON-USE**

OAR 690-17-0400 requires that an affiant provide proof that an affidavit asserting non-use has been served upon the legal land owner and occupant of the lands to which the water right is appurtenant.

I certify that on the _____ day of _____, 20____, I served the attached Affidavit Asserting Non Use of Water Right by mailing in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

Name:

Name:

Address:

Address:

City, State, Zip:

City, State, Zip:

Name:

Name:

Address:

Address:

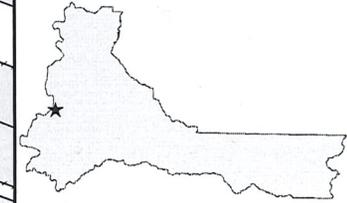
City, State, Zip:

City, State, Zip:

Attached additional page if needed

07 3W 23CB

07 3W 23CB
SALEM



MARION COUNTY, OREGON
NW1/4 SW1/4 SEC23 T7S R3W W.M.
SCALE 1" = 100'

LEGEND

- LINE TYPES
- Taxlot Boundary
 - Road Right-of-Way
 - Railroad Right-of-Way
 - Private Road ROW
 - Subdivision/Plat Bndry
 - Waterline - Taxlot Bndry
 - Historical Boundary
 - Easement
 - Railroad Centerline
 - Taxcode Line
 - Map Boundary
 - Waterline - Non Bndry

- CORNER TYPES
- + 1/16TH Section Cor.
 - ⊙ DLC Corner
 - ⊕ 1/4 Section Cor.
 - 16, 15 Section Corner
 - 21, 22

- NUMBERS
- Tax Code Number
000 00 00 0
- Acreege
0.25 AC
- All acres listed are Net Acres, excluding any portions of the taxlot within public ROWs

NOTES

Tick Marks: A tick mark in the road indicates that the labeled dimension extends into the public ROW

CANCELLED NUMBERS	
111	11500
112	11700
1600	11800
3100	12000
3300	13200
3800	13300
4800	
4900	
5100	
5200	
5300	
5500	
6100	
7100	
7200	
7300	
7400	

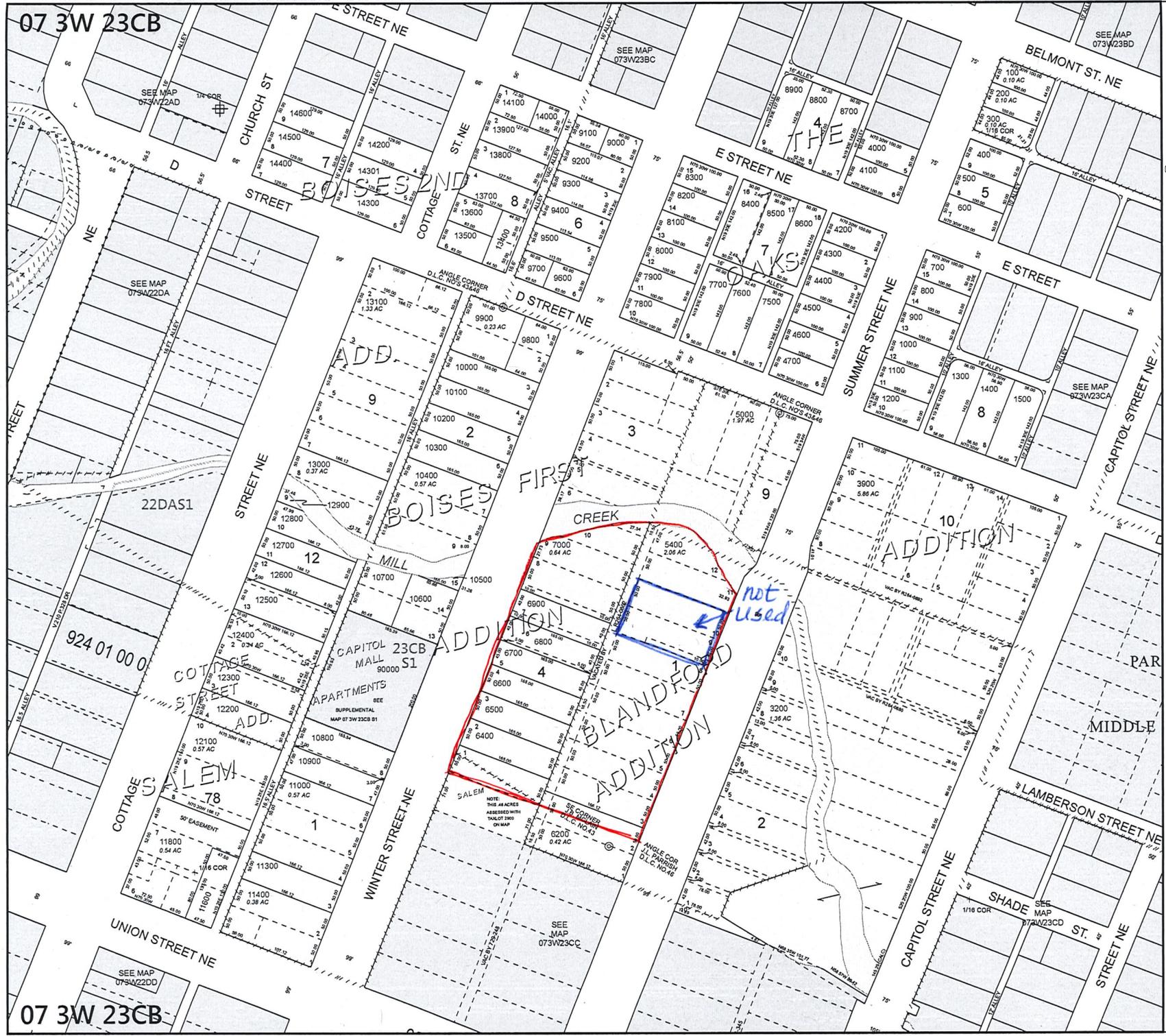
DISCLAIMER: THIS MAP WAS PREPARED FOR ASSESSMENT PURPOSES ONLY



FOR ADDITIONAL MAPS VISIT OUR WEBSITE AT www.co.marion.or.us

PLOT DATE: 1/24/2018

SALEM
07 3W 23CB



**OREGON WATER RESOURCES DEPARTMENT
OREGON REVISED STATUTES Chapter 540
Distribution of Water; Watermasters; Change in Use;
Transfer or Forfeiture of Water Rights**

FORFEITURE OF WATER RIGHTS

- 540.610 Use as measure of water right; forfeiture for nonuse; confirmation of rights of municipalities
- 540.612 Exemption from forfeiture
- 540.621 Cancellation of abandoned water right upon request of owner
- 540.631 Cancellation of forfeited water right; notice
- 540.641 Protest of cancellation; procedure
- 540.650 Issuance of new water right certificate for water rights not canceled
- 540.660 Affidavit of watermaster that circumstances prevent use of water right in accordance with terms of certificate; procedures for cancellation of right
- 540.670 Effect of cancellation of primary water right on supplemental right; change from supplemental to primary right; priority date

FORFEITURE OF WATER RIGHTS

540.610 Use as measure of water right; forfeiture for nonuse; confirmation of rights of municipalities. (1) Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right.

(2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing one or more of the following:

(a) The water right is for use of water, or rights of use, acquired by cities and towns in this state, by appropriation or by purchase, for all reasonable and usual municipal purposes.

(b) A finding of forfeiture would impair the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired.

(c) The use of water, or rights of use, are appurtenant to property obtained by the Department of Veterans' Affairs under ORS 407.135 or 407.145 for three years after the expiration of the period of redemption provided for in ORS 18.964 while the land is held by the Department of Veterans' Affairs, even if during such time the water is not used for a period of more than five successive years.

(d) The use of water, or rights of use, under a water right, if the owner of the property to which the right is appurtenant is unable to use the water due to economic hardship as defined by rule by the Water Resources Commission.

(e) The period of nonuse occurred during a period of time within which land was withdrawn from use in accordance with the Act of Congress of May 28, 1956, chapter 327 (7 U.S.C. 1801-1814; 1821-1824; 1831-1837),

or the Federal Conservation Reserve Program, Act of Congress of December 23, 1985, chapter 198 (16 U.S.C. 3831-3836, 3841-3845). If necessary, in a cancellation proceeding under this section, the water right holder rebutting the presumption under this paragraph shall provide documentation that the water right holder's land was withdrawn from use under a federal reserve program.

(f) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted to the commission or the commission initiated cancellation proceedings under ORS 540.631, whichever occurs first.

(g) The owner of the property to which the water right was appurtenant is unable to use the water because the use of water under the right is discontinued under an order of the commission under ORS 537.775.

(h) The nonuse occurred during a period of time within which the water right holder was using reclaimed water in lieu of using water under an existing water right.

(i) The nonuse occurred during a period of time within which the water right holder was reusing water through land application as authorized by ORS 537.141 (1)(i) or 537.545 (1)(g) in lieu of using water under an existing water right.

(j) The owner or occupant of the property to which the water right is appurtenant was unable to make full beneficial use of the water because water was not available. A water right holder rebutting the presumption under this paragraph shall provide evidence that the water right holder was ready, willing and able to use the water had it been available.

(k) The holder of a water right is prohibited by law from using the water. If the prohibition is subject to remedial action that would allow the use of the water, the water right holder shall provide evidence that the water right holder is conducting the remedial action with reasonable diligence.

(L) The nonuse occurred during a period of time within which the exercise of all or part of the water right was not necessary due to climatic conditions, so long as the water right holder had a facility capable of handling the full allowed rate and duty, and was otherwise ready, willing and able to use the entire amount of water allowed under the water right.

(m) The nonuse occurred during a period of time within which the water was included in a transfer application pending before the Water Resources Department.

(n) The nonuse of a supplemental water right occurred during a period of time when the primary water right used in conjunction with that supplemental water right was leased as an in-stream water right pursuant to ORS 537.348.

(3) Notwithstanding subsection (1) of this section, if the owner of a perfected and developed water right uses less water to accomplish the beneficial use allowed by the right, the right is not subject to forfeiture so long as:

(a) The user has a facility capable of handling the entire rate and duty authorized under the right; and

(b) The user is otherwise ready, willing and able to make full use of the right.

(4) The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.

(5) After a water right is forfeited under subsection (1) of this section, the water that was the subject of use shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing

priorities. [Amended by 1985 c.689 §5; 1987 c.339 §4; 1989 c.699 §1; 1989 c.833 §61a; 1991 c.370 §6; 1995 c.356 §2; 1995 c.366 §1; 1997 c.42 §5; 1997 c.244 §5; 1997 c.283 §1; 1999 c.335 §3; 1999 c.804 §§3,4; 2005 c.222 §1; 2005 c.542 §70; 2005 c.625 §70]

540.612 Exemption from forfeiture. If a district, as defined in ORS 540.505, petitions for a transfer as provided in ORS 540.574 no later than the end of the calendar year of the fifth year of nonuse under ORS 540.610 (1), the forfeiture provisions of ORS 540.610 shall not apply to the lands from which the water right is sought to be transferred pending approval of the district's petition. The time required for the processing of the petition, including any time required for hearings, appeals and completion of an authorized change, shall not be included when computing a five-year period of nonuse under the provisions of ORS 540.610 (1). [1991 c.957 §11]

540.615 [1961 c.140 §1; 1987 c.339 §5; repealed by 1989 c.699 §4]

540.620 [Repealed by 1955 c.671 §1]

540.621 Cancellation of abandoned water right upon request of owner. Whenever the owner of a perfected and developed water right certifies under oath to the Water Resources Commission that the water right has been abandoned by the owner and that the owner desires cancellation thereof, the commission shall enter an order canceling the water right. Effective upon the date of the entering of such order, the water which was the subject of use under the water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities. [1955 c.670 §1; 1979 c.67 §5; 1985 c.673 §96]

540.630 [Repealed by 1955 c.671 §1]

540.631 Cancellation of forfeited water right; notice. Whenever it appears to the satisfaction of the Water Resources Commission upon the commission's own determination or upon evidence submitted to the commission by any person that a perfected and developed water right has been forfeited as provided in ORS 540.610 (1), and would not be rebutted under ORS 540.610 (2), the commission shall initiate proceedings for the cancellation of such water right by causing written notice of such initiation of proceedings to be given by registered or certified mail, return receipt requested, to the legal owner of the lands to which the water right is appurtenant and to the occupant of such lands. The notice to the legal owner shall be addressed to the legal owner at the owner's last address of record in the office of the county assessor of the county in which the lands are located. The notice shall contain a complete description of the water right and of the lands to which the water right is appurtenant. The notice shall state that the legal owner or the occupant has a period of 60 days from the date of the mailing of the notice within which to protest the proposed cancellation of the water right. [1955 c.670 §2; 1985 c.673 §97; 1989 c.699 §2; 1991 c.249 §53]

540.640 [Repealed by 1955 c.671 §1]

540.641 Protest of cancellation; procedure. (1) If the legal owner or the occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water right within the 60-day period prescribed in the notice, the Water Resources Commission may enter an order canceling the water right.

(2) If the legal owner or the occupant receiving notice as provided in ORS 540.631 files a protest against the proposed cancellation of the water right with the commission within the 60-day period prescribed in the notice, the commission shall fix a time and place for a hearing on the protest. The commission shall cause written notice of the hearing to be given at least 10 days prior to the hearing to the person protesting the cancellation of the water right and to any other person who in the opinion of the commission is an interested party to the proceeding. The hearing shall be held by the commission and shall be conducted under the provisions of ORS chapter 183 pertaining to contested cases. After the hearing the commission shall enter an order canceling the water right, canceling in part or modifying the water right, or declaring that the water right shall not be canceled or modified. [1955 c.670 §3; 1975 c.581 §26c; 1983 c.807 §3; 1985 c.673 §98]

540.650 Issuance of new water right certificate for water rights not canceled. If the order of the Water Resources Commission or the final decree on the appeal therefrom under ORS 540.641 cancels in part or modifies the water right, that portion of the water right not canceled or continued as modified shall be reaffirmed by a new water right certificate issued by the commission. Such certificate shall be of the same character as that described in ORS 539.140. The certificate shall be recorded and transmitted to the owner of the water right as provided in ORS 539.140. [1955 c.670 §4; 1979 c.67 §6; 1985 c.673 §99]

540.660 Affidavit of watermaster that circumstances prevent use of water right in accordance with terms of certificate; procedures for cancellation of right. (1) If a watermaster has reason to believe that circumstances exist that prevent a water right from being exercised according to the terms and conditions of the water right certificate issued under ORS 537.250 or 539.140, such as the land to which the water right is appurtenant is covered by an impermeable surface, or the diversion mechanism used to appropriate water under a water right is no longer operable, the watermaster shall file an affidavit with the Water Resources Director. The affidavit shall state that to the best of the watermaster's knowledge, there is no physical way the water may be applied to a beneficial use in accordance with the terms and conditions of the water right certificate.

(2) If the watermaster files an affidavit under subsection (1) of this section each year for five consecutive years, the affidavits shall constitute prima facie evidence that the water has not been applied to a beneficial use for five years and the Water Resources Commission shall initiate proceedings under ORS 540.631 to cancel the water right.

(3) The Water Resources Department shall provide notice of the affidavit filed with the Water Resources Director under subsection (1) of this section. The department shall provide such notice in the following manner:

(a) If there are 25 or fewer record owners of the land, the department shall mail a copy of the affidavit to each record owner.

(b) If there are more than 25 record owners, the department shall provide general notice by publication according to the procedures established in ORS 193.010 to 193.100.

(c) If the land is within the boundaries of an irrigation district, the department shall mail a copy of the affidavit to the irrigation district.

(4) As used in this section, "record owner" means the person shown as the owner of the land in the county deed records established under ORS chapter 93. [1987 c.339 §1]

540.670 Effect of cancellation of primary water right on supplemental right; change from supplemental to primary right; priority date. (1) The cancellation of a primary water right for nonuse under ORS 540.641 shall not also cancel a supplemental water right unless the supplemental water right also has not been used beneficially for five or more years.

(2) If the Water Resources Commission cancels a primary water right under ORS 540.641 the commission may issue a new water right certificate changing the supplemental water right to a primary right if the commission finds that the change would not result in injury to existing water rights.

(3) A supplemental right changed to a primary right under subsection (2) of this section shall retain the priority date of the supplemental right. [1987 c.339 §2]

**OREGON ADMINISTRATIVE RULE CHAPTER 690; DIVISION 17
CANCELLATION OF PERFECTED WATER RIGHTS**

690-017-0005

Introduction

These rules define the process the Water Resources Department will follow when cancelling a perfected water right. The action to cancel the perfected water right can be initiated as the result of a request by the record owner of the land to which the water right is appurtenant, or as the result of a request to determine the validity of a water right which may be forfeited due to five successive years of non-use.

Stat. Auth.: ORS 183, ORS 339, ORS 536, ORS 537 & ORS 540

Stats. Implemented:

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90

690-017-0010

Definitions

- (1) "Affidavit" means a declaration upon oath, in writing, signed by the party and sworn to before a notary public.
- (2) "Affiant" means the individual completing, swearing to and signing an affidavit.
- (3) "Bankruptcy" means proceedings under federal bankruptcy statutes to relieve a debtor (the bankrupt) from insurmountable debt. The commencement of a bankruptcy action occurs with the date a petition for relief is filed by a debtor or creditor to the bankruptcy court.
- (4) "Cancellation" means the action taken by the Director, the Commission, or the courts to abolish all or part of a permit or certificate of water right.
- (5) "Deed-in-Lieu" means a deed tendered by the record owner to prevent the creditor from asserting a legal right to recover payment of a debt through a foreclosure action.
- (6) "District" has the meaning of the term as defined in ORS 540.505
- (7) "Foreclosure" means a proceeding in or out of court to extinguish all right, title and interest of the record owner(s) of property in order to sell or repossess the property to satisfy a lien against it. A foreclosure action begins on the date presentation of the official demand for payment is made to the debtor by the creditor by certified mail.
- (8) "Forfeiture" means the loss of a water right caused by the failure of the appropriator or record owner of the right to use the water for five successive years.
- (9) "Judicial Action" means a suit, injunction, or litigation filed with or allowed by the courts.
- (10) "Natural Disaster" means an act of God, such as flooding or erosion, which occurred with such magnitude that it either prohibited or severely limited the ability to use the water.
- (11) "Perfected Water Right" means a water right which has been confirmed by the issuance of a certificate of water right or by a court decree.
- (12) "Presumption of Forfeiture" means a conclusion established by statute that a water right, in whole or in part, is forfeited by nonuse of the right for five successive years.
- (13) "Principal Farm Operator" means the record owner, including a lessee to whom the right of possession of agricultural property has been granted by the lessor for a specified period of time in return for a consideration.
- (14) "Rebuttable Presumption" means a presumption which, by statute, may be overcome by evidence sufficient to explain or disprove the presumption.
- (15) "Record Owner" means the person shown as the owner of the land in the county deed records established under ORS Chapter 93.

Stat. Auth.: ORS 536.025 & 536.027

Stats. Implemented: ORS 540.610-540.670

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90; WRD 7-2004, f. & cert. ef. 11-5-04

690-017-0100

Cancellation Authorized by Record Owner

- (1) Perfected water rights shall be cancelled by order of the Director in accordance with the provisions of ORS 540.621 when so requested by notarized affidavit of the record owner of the land to which the water right in question is appurtenant.
- (2) The affidavit shall contain, at a minimum, the following:
 - (a) A statement that the affiant is the record owner of the lands associated with the water right in question;
 - (b) The certificate number of the water right;
 - (c) A statement that the affiant has abandoned any and all interest in and to all or a specified portion of the water right;

(d) Where only part of the right has been abandoned, a description of the specific place of use by quarter-quarter section and acres on which the right has been abandoned, with information sufficient to determine the lands on which the right is not to be cancelled; and

(e) A request that all or part of the certificate be cancelled.

(f) A statement of whether, to the best of the affiant's knowledge, the subject water right is within the boundaries of a district or federal reclamation project.

(3) Based on the best information available to the Department, if the subject water right is within the boundaries of a district or federal reclamation project, the Department shall, as applicable, provide the district and the United States Bureau of Reclamation notice of the water right cancellation request.

Stat. Auth.: ORS 536.025 & 536.027

Stats. Implemented: ORS 540.610-540.670

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90; WRD 7-2004, f. & cert. ef. 11-5-04

690-017-0200

Watermaster Affidavit of Inability to Appropriate or Beneficially Use Water

(1) If a watermaster has reason to believe that circumstances exist that prevent a water right from being exercised, including but not limited to, the lands being covered by an impermeable surface or the diversion mechanism used to appropriate the water is no longer operable, the watermaster shall file an affidavit with the Water Resources Director.

(2) The affidavit shall state:

(a) The date and time the land or diversion mechanism or other evidence was inspected by the watermaster;

(b) The names of all record owners of the land where the water right is appurtenant and the owners' address as it appears in the county assessors' records; and

(c) The watermaster's findings during the inspection that indicate the water right cannot be exercised.

Stat. Auth.: ORS 183, ORS 339, ORS 536, ORS 537 & ORS 540

Stats. Implemented:

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90

690-017-0300

Notice of Watermaster Affidavit to Record Owner

(1) The Water Resources Department shall notify each record owner of the land described by an affidavit submitted by a watermaster under ORS 540.660 in the following manner:

(a) If there are 25 or fewer record owners of the land, the department shall mail a copy of the affidavit to each record owner;

(b) If there are more than 25 record owners, the department shall provide general notice by publication according to the procedures established in ORS 193.010 to 193.100; and

(c) If the land is within the boundaries of an irrigation district, the Department shall mail a copy of the affidavit to the irrigation district.

(2) The record owner named in an affidavit shall be given the option of voluntarily relinquishing the water right or portion thereof, continuing to be the subject of the filing of such affidavits each year for a period of five successive years, or of applying the water to the use authorized by the certificate.

(3) If the watermaster files an affidavit each year for five successive years, the Water Resources Department shall initiate proceedings under ORS 540.631 to cancel the water right.

Stat. Auth.: ORS 183, ORS 339, ORS 536, ORS 537 & ORS 540

Stats. Implemented:

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90

690-017-0400

Cancellation Initiated by Department

(1) The Department shall initiate proceedings to cancel a perfected water right, as provided in ORS 540.631 and these rules, whenever it appears that a right has been forfeited as provided in 540.610. The decision to initiate cancellation proceedings shall be based on evidence submitted to the Department, by any person, that alleges five or more years of nonuse so as to create a presumption of forfeiture, and from which evidence it further appears the presumption of forfeiture would not likely be rebutted under OAR 690-017-0800(2)(a), (d) or (e).

(2) Where the evidence submitted to the Department is in the form of affidavits, notarized affidavits from two individuals shall be required. An affidavit shall contain the following:

(a) Name, address and telephone number of affiant;

- (b) Page number of the certificate in question as recorded in the State Record of Water Right Certificates, name of the person to whom the certificate was issued, and priority date of the certificate;
 - (c) Township, range, quarter-quarter section and number of acres to which the certificate in question is appurtenant;
 - (d) The use for which the water right was issued;
 - (e) The source of water to be used as provided in the certificate;
 - (f) A statement of the affiant's knowledge of the lands described in the certificate in question, and an explanation of how the affiant gained this knowledge;
 - (g) A statement that the affiant knows with certainty that no water from the allowed source has been used for the authorized use on the lands, or a portion of the lands, the portion being accurately described, under the provisions of the water right within a period of five or more successive years, and the beginning and ending years of the period of nonuse. Where possible, beginning and ending months should also be given;
 - (h) A statement that the affiant believes the allegation of nonuse will not be rebutted under any of the grounds for rebuttal set out in ORS 540.610;
 - (i) A copy of the county tax plat map illustrating the lands to which the subject water right is appurtenant, and if applicable, the location of the portion of the water right asserted to have been forfeited;
 - (j) The affiant's agreement to testify in a hearing before the Water Resources Department if necessary;
 - (k) To the best of the affiant's knowledge, a statement of whether the subject water right is within the boundaries of a district or federal reclamation project; and
 - (l) Proof that the affidavit(s) have been served upon the legal owner of the lands to which the water right is appurtenant and to the occupant of such lands.
- (3) Based on the best information available to the Department, if the subject water right is within the boundaries of a district or federal reclamation project, the Department shall provide notice of receipt of affidavits submitted under this rule, as applicable, to the district and the United States Bureau of Reclamation at least 90 days prior to initiating a cancellation proceeding.
- (4) Where the evidence submitted is solely from Department personnel, such evidence shall be submitted in the form of an affidavit and contain all information described in section (2) of this rule. In addition, the affidavit shall be supported by stream or canal gaging records, water or electric meter readings, static level measurements, system capacity calculations, a summary of field investigations, photos, maps, or other relevant data covering each year of the period of alleged nonuse.
- (5) The Department shall initiate proceedings to cancel a water right under ORS 540.631 within 180 days of receiving the evidence required under sections (1) and (2) of this rule.
- (6) The Department shall notify the record owner of the land to which a perfected water right is appurtenant that it intends to cancel all or a portion of the water right. The occupant of affected lands, if other than the owner, shall also be notified. If the subject water right is within the boundaries of a district or federal reclamation project, the Department shall, as applicable, mail a copy of the cancellation notice to the district and the United States Bureau of Reclamation. Notice shall be sent to the record owner of the land or occupant by certified mail, return receipt requested. The notice to the record owner shall be addressed to the owner at the owner's last address or record in the office of the county assessor of the county in which the lands are located. The notice shall contain the following:
- (a) A description of the water right and the land to which the water right is appurtenant;
 - (b) A statement that the information before the Director creates a rebuttal presumption of forfeiture;
 - (c) A statement that the record owner or the occupant has a period of 60 days from the date of the mailing of the notice within which to protest the proposed cancellation either by asserting that the water right has been used, or by making rebuttal in the manner and on the grounds provided in OAR 690-017-0600 and 690-017-0800;
 - (d) Notice that if the record owner intends to rebut the presumption of forfeiture, the protest shall include a statement of the grounds for rebuttal relied upon, and shall be accompanied by appropriate supporting documentation; and
 - (e) A statement that, following receipt of a protest against the proposed cancellation and determination that the presumption of forfeiture has not been rebutted, a contested case hearing will be scheduled.

Stat. Auth.: ORS 536.025 & 536.027

Stats. Implemented: ORS 540.610-540.670

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90; WRD 7-2004, f. & cert. ef. 11-5-04

690-017-0500

Cancellation Not Protested

If the record owner or occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water within the 60-day period prescribed in the notice, the Water Resources Department shall enter an order cancelling the water right as provided in ORS 540.641.

Stat. Auth.: ORS 183, ORS 339, ORS 536, ORS 537 & ORS 540

Stats. Implemented:

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90

690-017-0600

Protest of Cancellation/Statement of Intent to Rebut Presumption of Forfeiture

(1) A protest submitted to the Water Resources Department by the record owner or occupant of the land on which a cancellation of a perfected water right is proposed shall include the following:

(a) A written statement citing the reasons the record owner or occupant believes the water right has not been forfeited by nonuse; and

(b) The statutory fee for filing the protest.

(2)(a) Where the record owner or occupant intends to rebut the presumption of forfeiture by claiming one or more of the grounds for rebuttal established in ORS 540.610(2) and as further defined in OAR 690-017-0800, grounds claimed for rebuttal shall be stated in the protest;

(b) Where applicable, documentary evidence in support of the rebuttal as described in OAR 690-017-0800(3) shall be submitted with the protest.

(3)(a) On receipt of a protest claiming rebuttal and supporting documentary evidence, a determination shall be made whether the presumption of forfeiture has been rebutted;

(b) Where rebuttal is found to have been made, the matter shall be closed and no further action taken to cancel the water right;

(c) Where it is determined that the presumption of forfeiture has not been rebutted, the Department shall initiate proceedings to cancel the right as provided in OAR 690-017-0700.

Stat. Auth.: ORS 183, ORS 339, ORS 536, ORS 537 & ORS 540

Stats. Implemented:

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90

690-017-0700

Cancellation Hearing

(1) If the Department receives a protest to the proposed cancellation of a water right within the prescribed 60-day period, a hearing on the protest shall be scheduled. The protestant shall be given not less than ten days notice of the hearing time and place.

(2) The hearing shall be held by the Department's Hearings Referee, and shall be conducted under the provisions of ORS 183.310 to 183.550 pertaining to contested cases.

(3) In contested case hearings where the initial determination was made that the presumption of forfeiture had not been rebutted, the owner may offer additional evidence in support of rebuttal.

(4) After the hearing the Hearings Referee shall enter a proposed order:

(a) Cancelling the water right;

(b) Cancelling in part or modifying the water right; or

(c) Declaring that the water right shall not be cancelled or modified.

(5) If no exceptions or objections to the proposed order are filed within the time allowed, the Hearings Referee shall issue a final order.

Stat. Auth.: ORS 183, ORS 339, ORS 536, ORS 537 & ORS 540

Stats. Implemented:

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90

690-017-0800

Grounds for and Manner of Rebutting a Presumption of Forfeiture

(1) Any record owner or occupant rebutting a presumption of forfeiture for nonuse of water under ORS 540.610(2), as provided in these rules, shall provide evidence that rebuts the presumption of forfeiture.

(2) A presumption of forfeiture may be rebutted by showing one or more of the following:

(a) The water right is for reasonable and usual municipal use of water;

(b) A finding of forfeiture would impair the rights of cities and towns to the use of water, whether acquired by appropriation or purchase, or previously recognized by legislative act, or which may be acquired in the future;

(c) The owner of the property was unable to use the water due to economic hardship as defined in section (3) of this rule;

(d) The period of nonuse occurred during a period of time within which land was withdrawn from use under the Federal Soil Bank Program or the Federal Conservation Reserve Program;

(e) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted or cancellation proceedings were initiated under ORS 540.631, whichever occurs first; and

(f) The owner of the property to which the water right is appurtenant is unable to use the water because the use of water under the right is discontinued by an order of the Commission under ORS 537.775 (wasteful or defective wells).

(3) An economic hardship exists only during the following periods of time:

(a) During a bankruptcy action initiated by or for the record owner or principal farm operator;

(b) During a foreclosure of real or personal property of the record owner or principal farm operator. The foreclosure of personal property must directly affect the ability to use the water in question;

(c) During the redemption periods as provided in ORS 23.530 to 23.600;

(d) Three calendar years following the expiration of redemptions as provided in ORS 23.530 to 23.600; or, three years from the date of recording of a deed in lieu of foreclosure tendered by the record owner or principal farm operator in payment of debt owed; and

(e) The time during which judicial actions limit or prohibit the record owner's or principal farm operator's use of the water in question;

(f) The time during which a natural disaster would limit or prohibit the record owner's or principal farm operator's use of the water in question.

(4) Documentation supporting rebuttal based on enrollment in a federal program, bankruptcy, foreclosure or foreclosure redemption, natural disaster, or the 15-year statute of limitations on cancellation as provided for in ORS 540.610(2) may include, but is not limited to, the following items:

(a) The enrollment contract or agreement between the record owner, occupant, or principal farm operator and the appropriate federal jurisdiction;

(b) Affidavits by knowledgeable parties such as employees administering the federal programs;

(c) Court pleadings, filings or other legal documentation of bankruptcy or foreclosure;

(d) Documents from financial, mortgage, lending or title institutions; and

(e) Sworn statements by a watermaster, soil scientist, or insurance claim adjuster.

Stat. Auth.: ORS 183, ORS 339, ORS 536, ORS 537, & ORS 540

Stats. Implemented:

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90

690-017-0900

Time Period of Non-Use

Where the rebutted nonuse occurs as an intervening period within an unrebutted period of nonuse totally five or more years, the remaining unrebutted years of nonuse will be treated as consecutive and cancellation will be initiated.

Stat. Auth.: ORS 183, ORS 339, ORS 536, ORS 537 & ORS 540

Stats. Implemented:

Hist.: WRD 12-1988, f. & cert. ef. 8-10-88; WRD 17-1990, f. & cert. ef. 9-27-90