

Secretary of State  
Certificate and Order for Filing  
**PERMANENT ADMINISTRATIVE RULES**

I certify that the attached copies\* are true, full and correct copies of the PERMANENT Rule(s) adopted on October 22, 2004 by the  
Date prior to or same as filing date.

Water Resources Commission  
Agency and Division

690  
Administrative Rules Chapter Number

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to become effective November 5, 2004 Rulemaking Notice was published in the August 1, 2004 Oregon Bulletin.\*\*  
Date upon filing or later Month and Year

**RULEMAKING ACTION**

List each rule number separately, 000-000-0000.

**ADOPT:**

Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

690-018-0025

**AMEND:**

690-017-0010, 690-017-0100, 690-017-0400  
690-018-0010, 690-018-0012, 690-018-0014, 690-018-0020, 690-018-0040, 690-018-0050, 690-018-0062, 690-018-0090

**REPEAL:**

Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.  
Amend and Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

Stat. Auth.: ORS 536.025, 536.027, 537.480

Other Authority:

Stats. Implemented: ORS 540.610 - 540.670 and 537.455 to 537.500

**RULE SUMMARY**

The Water Resources Commission amended rules relating to water right cancellation (OAR Chapter 690, Division 17) and the allocation of conserved water (OAR Chapter 690, Division 18).

The changes to the water right cancellation rules modify the cancellation request and affidavit requirements in order to enhance the notification of interested parties of proposed water right cancellation actions. The rules also establish timelines for the Department to initiate a water right cancellation proceeding under the provisions of ORS 540.631.

The changes to the allocation of conserved water rule implement changes to the allocation of conserved water statutes (ORS 537.455 to 537.500) as a result of HB 2456 (Oregon Laws, 2003); implement fees established by HB 2268 (Oregon Laws, 2003); clarify that the applicant pays the newspaper notice publication costs; establish a requirement for district's seeking allocations of conserved water to adopt a policy articulating how they will approach such allocations; and make minor housekeeping changes to improve the readability of the rules.

New statutory provisions implemented include the applicant's ability to choose the priority date of the conserved water - same as or one minute junior to the originating right; allow for consideration of conservation projects implemented up to 5 years prior to application submittal; and provide for applications to be submitted for a "water use subject to transfer."

\_\_\_\_\_  
Authorized Signer

11/5/04  
Date

\*Copies include a photocopy of this certificate with paper copy of each rule listed in the Rulemaking Action.

\*\*The *Oregon Bulletin* is published on the 1<sup>st</sup> of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 p.m. on the 15<sup>th</sup> day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 p.m. on the preceding workday.

**OREGON ADMINISTRATIVE RULES  
WATER RESOURCES DEPARTMENT  
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 Ch. 183, 339, 536, 537 & 540

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**

~~(6)~~ **(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.

~~(7)~~ **(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.

~~(8)~~ **(9)** "Judicial Action" means a suit, injunction, or litigation filed with or allowed by the courts.

~~(9)~~ **(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.

~~(10)~~ **(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.

~~(11)~~ **(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.

~~(12)~~ **(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.

~~(13)~~ **(14)**"Rebuttable Presumption" means a presumption which, by statute, may be overcome by evidence sufficient to explain or disprove the presumption.

~~(14)~~ **(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 and ORS 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 10-2004, 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 and ORS 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 10-2004, f & cert. ef. 11-5-04

### **690-017-0200**

#### **Watermaster Affidavit of Inability to Appropriately 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 Ch. 183, 339, 536, 537 & 540

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 Ch. 183, 339, 536, 537 & 540

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; ~~(2)(a)-(g)~~; and

**(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)~~ **(i)** 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)~~ **(3)** 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)~~ **(4)** 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** each 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 and ORS 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 10-2004, 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 Ch. 183, 339, 536, 537 & 540

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 Ch. 183, 339, 536, 537 & 540

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 Ch. 183, 339, 536, 537 & 540

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 Ch. 183, 339, 536, 537, & 540

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 Ch. 183, 339, 536, 537 & 540

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