

Corrected copy

CERTIFICATE AND ORDER FOR FILING PERMANENT ADMINISTRATIVE RULES WITH THE SECRETARY OF STATE

I HEREBY CERTIFY that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on September 21, 1990 (Date)

by the Water Resources Commission (Department) (Division)

to become effective September 27, 1990 (Date)

The within matter having come before the Water Resources Commission (Department) (Division)

all procedures having been in the required form and conducted in accordance with applicable statutes and rules and being fully advised in the premises:

Notice of Intended Action published in Secretary of State's Bulletin: NO [] YES [x] Date Published: May 15, 1990

NOW THEREFORE, IT IS HEREBY ORDERED THAT the following action be taken: (List Rule Number(s) or Rule Title(s) on Appropriate Lines Below)

Adopted: (New Total Rules)

Amended: (Existing Rules) OAR Chapter 690-17-005, 010, 100 amended; 200 renumbered to 400 and amended; 300 renumbered to 200 and amended; 400 renumbered to 300 and amended; 500, 600, 700, 800, 900 amended.

Repealed: (Total Rules Only)

as Administrative Rules of the Water Resources Department (Department) (Division)

DATED this 25th day of September, 19 90

By: William H. Young (Authorized Signer)

Title: Director

Statutory Authority: ORS 536.025, 536.029

Chapter(s) Oregon Laws 19

House Bill(s) 19 Legislature; or Senate Bill(s) 153, 19 89 Le

Subject Matter: Cancellation of perfected water rights.

For Further Information Contact: Weisha Mize (Rule Coordinator) Phone: 378-3066

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SECRETARY OF STATE

CERTIFICATE AND ORDER
FOR FILING

PERMANENT

ADMINISTRATIVE RULES WITH THE SECRETARY OF STATE



I HEREBY CERTIFY that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on September 21, 1990
(Date)

WATER RESOURCES COMMISSION

(Department)

(Division)

become effective September 27, 1990
(Date)

The within matter having come before the WATER RESOURCES COMMISSION

(Department)

(Division)

after

procedures having been in the required form and conducted in accordance with applicable statutes and rules and being fully advised in the premises:

Notice of Intended Action published in Secretary of State's Bulletin: NO YES Date Published: May 15, 1990

NOW THEREFORE, IT IS HEREBY ORDERED THAT the following action be taken: (List Rule Number(s) or Rule Title(s) on Appropriate Lines Below)

Proposed:
(New Total Rules)

Repealed:
(Existing Rules)

WAR CHAPTER 690 DIVISION 17

Repealed:
(Stat Rules Only)

Administrative Rules of the WATER RESOURCES DEPARTMENT

(Department)

(Division)

DATED this 25th day of September, 19 90

By: William H. Young
(Authorized Signer)
Title: Director

Statutory Authority: ORS 536.025, 536.029

Chapter(s) _____, Oregon Laws 19 _____ or

House Bill(s) _____, 19 _____ Legislature; or Senate Bill(s) 153, 19 89 Legislature

Subject Matter: CANCELLATION OF PERFECTED WATER RIGHTS

For Further Information Contact: WEISHA MIZE

(Rule Coordinator)

Phone: 378-3066

**WATER RESOURCES DEPARTMENT
ADMINISTRATIVE RULES
CHAPTER 690, DIVISION 17**

CANCELLATION OF PERFECTED WATER RIGHTS

INTRODUCTION

690-17-005 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 nonuse.

DEFINITIONS

690-17-010 (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) **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) **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) **JUDICIAL ACTION** means a suit, injunction, or litigation filed with or allowed by the courts.

(9) 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) 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) 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) 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) REBUTTABLE PRESUMPTION means a presumption which, by statute, may be overcome by evidence sufficient to explain or disprove the presumption.

(14) RECORD OWNER means the person shown as the owner of the land in the county deed records established under ORS Chapter 93.

CANCELLATION AUTHORIZED BY RECORD OWNER

690-17-100 (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;

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

WATERMASTER AFFIDAVIT OF INABILITY TO APPROPRIATE OR BENEFICIALLY USE WATER

690-17-200 (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, except for those lands within an irrigation district which are included in a petition filed by a district under OAR Chapter 690, Division 13, prior to July 1, 1992.

(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.

NOTICE OF WATERMASTER AFFIDAVIT TO RECORD OWNER

690-17-300 (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.

(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.

CANCELLATION INITIATED BY DEPARTMENT

690-17-400 (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 690-17-800(2)(a), (2)(d) or (2)(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) The affiant's agreement to testify in a hearing before the Water Resources Department if necessary.

(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 subsection (2)

of this section. 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.

(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. Notice shall be sent to 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 of 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 rebuttable 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 690-17-600 and 690-17-800.

(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.

CANCELLATION NOT PROTESTED

690-17-500 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.

PROTEST OF CANCELLATION / STATEMENT OF INTENT TO REBUT PRESUMPTION OF FORFEITURE

690-17-600 (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.
 - (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 690-17-800, grounds claimed for rebuttal shall be stated in the protest.
- (b) Where applicable, documentary evidence in support of the rebuttal as described in OAR 690-17-800(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 690-17-700.

CANCELLATION HEARING

690-17-700 (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 10 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.

GROUND FOR AND MANNER OF REBUTTING A PRESUMPTION OF FORFEITURE

690-17-800 (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 (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.

(f) The owner of the property to which the water right is appurtenant was 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.

(e) The time during which judicial actions limit or prohibit the record owner's or principal farm operator's normal 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;

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

TIME PERIOD OF NON-USE

690-17-900 Where the rebutted nonuse occurs as an intervening period within an unrebutted period of nonuse totalling five or more years, the remaining unrebutted years of nonuse will be treated as consecutive and cancellation will be initiated.

September 21, 1990