

## **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.

#### **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. The action must be based on a preponderance of the evidence in accordance with ORS chapter 183.
- (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, except as provided in ORS 540.610(3) and (4) and ORS 540.612.
- (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 the presumption of forfeiture established pursuant to ORS 540.610(1), which the appropriator may overcome by proving, by a preponderance of the evidence, one or more of the exemptions from forfeiture in ORS 540.610(2).

(15) "Record Owner" means the person shown as the owner of the land in the county deed records established under ORS Chapter 93.

## **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.

## **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) 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;
- (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) A summary of the evidence supporting the watermaster's statement as provided in subsection (2)(a).

#### **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 and OAR 690-017-0200 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 cancellation proceedings under ORS 540.631. The Department shall give notice of the proposed cancellation as provided in OAR 690-017-0400(6).

#### **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 to the satisfaction of the Director that a right has been forfeited as provided in ORS 540.610 and is not likely to be exempt under ORS 540.610(3) and (4) or would not likely be rebutted under ORS 540.610(2). A decision to initiate cancellation proceedings may be based on evidence submitted to the Department in the form of affidavits from persons other than the Department, as provided in section (2) of this rule, or based on evidence available to the Department, as provided in section (4) of this rule.

(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, email address, if available, 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 a map or aerial imagery with sufficient information to enable the Department to determine 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; and
  - (k) 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, 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 Department initiates cancellation proceedings based on evidence available to the Department, the Department shall include, in its notice of proposed cancellation, the information described in sections (2)(b) - (e) and findings of fact on the matters described in sections (2)(f) - (h). The notice of proposed cancellation 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, aerial imagery, maps, evapotranspiration data, or other relevant evidence covering each year of the period of alleged nonuse.
- (5) Within 180 days of receiving the affidavits under section (2) of this rule, the Department shall either:
- (a) Initiate proceedings to cancel a water right under ORS 540.631, or

(b) Notify the affiants, the record owner of the affected lands, and the occupant of the affected lands, if other than the owner, that the Department is closing the matter because the Department is not satisfied that a right has been forfeited as specified in section 1 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 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 OAR 690-017-0600 and 690-017-0800;
- (d) Notice that if the record owner intends to rebut the presumption of forfeiture or establish an exemption from forfeiture under ORS 540.610(3)-(4) or ORS 540.612, the protest shall include a statement of the grounds for rebuttal or exemption 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 or an exemption from forfeiture has not been established, a contested case hearing will be scheduled.

#### **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.~~

#### **690-017-0600**

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

(1) Except as described in sections (2) and (3) of this rule, protests are governed by Or Laws 2025, ch 575, section 2 and 3, and by OAR chapter 690, division 2. If no protest on a proposed final order that is governed by these rules is timely received, by operation of law, the proposed final order shall become a final order on the date that is 33 days after the close of the time period for submitting a protest, with no further action required by the Department.

(2)(a) Only a record owner or occupant may protest the proposed cancellation. 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, or intends to establish an exemption from forfeiture under ORS 540.610(3)-(4) or ORS 540.612, grounds claimed for rebuttal or exemption 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 or exemption and supporting documentary evidence, the Department shall review the evidence before referring the protest for hearing;

(b) Upon review of the rebuttal or exemption evidence, and subject to OAR 690-002-0235(2), the Department may either refer the protest for hearing or notify the protestant(s) that the Department is withdrawing the proposed final order and closing the matter.

(4) Sections (1) - (3) of this rule do not apply to a notice of a cancellation proceeding if the notice results from an assertion of forfeiture included in a protest of a transfer application made under OAR chapter 690, division 380. The transfer applicant need not submit a protest of the notice of a cancellation proceeding in this circumstance. The Department shall, subject to OAR 690-002-0235(2), refer the transfer protest(s) for hearing. The hearing on the transfer protest(s) shall include issues related to the notice of cancellation proceeding.

## **690-017-0700**

### **Cancellation Hearing**

(1) Except as described in subsection (2) of this rule, hearings on proposed cancellations are governed by Or Laws 2025, ch 575, sections 2 and 3, and OAR chapter 690, division 2. Proposed final orders shall become final by default as provided in OAR 690-002-0235.

(2) The protestant and any person(s) asserting forfeiture shall be given not less than 30 days' notice of the hearing.

(3) The Director shall consider any exceptions to the Administrative Law Judge's proposed order and issue a final order.

## **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 grounds for rebuttal in ORS 540.610(2).

(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 18.960 to 18.985;
- (d) Three calendar years following the expiration of redemptions as provided in ORS 18.960 to 18.985; 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 use of the water in question; and
- (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.

**690-017-0900**

**Time Period of Non-Use**

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