



Forfeiture & Cancellation of Water Rights

By Heath A. Curtiss and Laura A. Schroeder

Long ago, Oregon chose the doctrine of prior appropriations as a means to manage water and assure its delivery to those who first put it to beneficial use. However, it soon became evident that the efficient allocation of water required more than simple water delivery by priority. To that end, the legislature adopted, among other things, cancellation and forfeiture statutes. As each summer brings with it water shortages in much of Oregon, a thorough understanding of the law behind forfeiture and cancellation will hopefully provide remedies to those who would otherwise be without.

Forfeiture and Cancellation

Or. Rev. Stat. 540.610 *et seq.*; Or. Admin. R. 690-017

As mentioned above, beneficial use is the ultimate object of water allocation in Oregon. If water is no longer used, the right may be cancelled, either voluntarily or at the behest of the Water Resources Department (WRD). In other words, "use it or lose it." A water right can be voluntarily cancelled by its owner at any time. Failure to use appropriated water for a period of five consecutive years within the previous twenty establishes a "rebuttable presumption of forfeiture," and WRD may conduct involuntary cancellation proceedings itself. Or. Rev. Stat. 540.610(1), (2)(f).

Forfeiture proceedings are initiated in one of two ways. First, the watermaster has the option to file

affidavits with the Water Resources Director (Director) if it is found that 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." Or. Rev. Stat. 540.660. The WRD must notify the affected landowner(s) that the watermaster is alleging nonuse. Those notified must modify their water use to prevent forfeiture. Five affidavits in five consecutive years will require the Water Resources Commission (WRC) to begin cancellation proceedings. *Id.* This procedure is only rarely used likely because of the requirement that the affiant must state that the water cannot physically be applied, a limitation of nonuse related to the point of diversion or appropriation.

More frequently the affidavits are presented more generally for non-use. *Any person* can submit "evidence" directly to WRD that a water right has been in non-use for five consecutive years; the WRC can then initiate proceedings immediately. Or. Rev. Stat. 540.631; *see also B&G Resources v. Oregon Water Resources Department*, CC 97-15 (Jan. 1999) (holding that a watermaster is "any person" within the meaning of the statute). The water user need not be notified of alleged non-use until forfeiture proceedings begin. This notification may come as a surprise to the holder, who until that date may have been unaware of use or condition requirements. Once notified that the WRD intends to cancel a water right,

the user has sixty days to file a protest that can allege any of thirteen rebuttals listed in Or. Rev. Stat. 540.610(2). If the cancellation is protested, the WRD will conduct a hearing pursuant to the Oregon Administrative Procedures Act, Or. Rev. Stat. 183.100 *et seq.*, and based on its findings, will cancel, modify, or affirm the water right. Or. Rev. Stat. 540.631. If no protest is timely filed, the rights are presumed abandoned and the water rights will be cancelled immediately.

Water rights can also be cancelled voluntarily. If the user certifies under oath that the water right has been abandoned, the WRD will enter an order canceling the water right immediately. Or. Rev. Stat. 540.621. This raises interesting issues with regard to rights within irrigation districts, within ditch companies, or along shared ditches. Or. Admin. R. 690-017-0300 requires that WRD notify the record owner, and if applicable the irrigation district, in the event the watermaster submits an affidavit pursuant to Or. Rev. Stat. 540.660, and Or. Admin. R. 690-017-0400 requires that WRD notify the record owner and occupant if cancellation proceedings are initiated by the department. However, the rules do not provide for notification of voluntary abandonment. By decreasing the quantity of water available, a cancellation authorized by the record owner could potentially interfere with the water delivery obligations of irrigation districts and ditch companies, or the financial obligations of lenders and creditors, who would be without opportunity to protest as notification of the abandonment would have never been issued. Proposed regulatory amendments alleviating this burden have been limited, likely because Oregon law does not clearly define water right ownership or interests.

One might suspect that cancellation proceedings initiated by the WRD present the same challenge, and to the extent that cancelled water rights are no longer available to the district, that is correct. However, the district does have the option to impose a transfer "before the end of the calendar year of

Continued on page 00

Forfeiture & Cancellation...
Continued from page 23

540.612. The clock stops running the moment the district petitions for transfer. A prudent manager will monitor rights within the district for nonuse and propose transfers, pursuant to Or. Rev. Stat. 540.572, before cancellation proceedings begin.

Within the last few years, the case-law surrounding cancellation and forfeiture has seen surprising developments. First, irrigation occurring by natural subirrigation is not a beneficial use and will not preclude the cancellation of water rights. *Staats v. Newman*, 164 Or.App. 18 (1999). The Staats were running water through ditches and relying on subsurface seepage and capillary action to adequately irrigate their property. Their neighbors filed affidavits alleging nonuse which initiated cancellation proceedings. WRD found for the neighbors, citing its own administrative rules which define "irrigation" as the "artificial application of water. . . ." (emphasis added) OAR

690-300-0010(26). The Court of Appeals affirmed, noting that with regard to use, "[t]he department's interpretation . . . is subject to highly deferential review." *Staats* at 23. In the end, subirrigation methods must be controlled by the holder or face cancellation.

Of further interest, in 2003 the Court of Appeals held that a water right transferred to in-stream use cannot be cancelled for pre-issuance abandonment once the three month appeal period has run. *Kerivan v. Water Resources Commission*, 188 Or.App. 491 (2003). In *Kerivan*, senior water rights were transferred to in-stream use without protest. Between nine and sixteen months later, the newly certificated in-stream rights were challenged by junior appropriators on grounds that the rights had been abandoned previous to transfer. The WRD refused to initiate cancellation proceedings and the trial court dismissed the subsequent petition for judicial review. The Court of Appeals affirmed the dismissal, holding that in-stream water rights were conclusive

and secure unless abandoned subsequent to the issuance of the certificate. *Id.* at 502. By not protesting at the time of transfer and waiting until after the transfer order had been entered, the junior appropriators were precluded from asserting abandonment. This holding is consistent with other western states that allow the water right holder to "restart" the forfeiture clock upon entry of a final order on transfer.

Cancellation can provide both hope and hazard for those using water in the State of Oregon. On the one hand, by pursuing cancellation proceedings, water that would otherwise go unused is made available to junior appropriators. On the other hand, water users must be mindful to prevent the cancellation of their own right. To that end, Schroeder Law Offices has provided forms, checklists, and links to pertinent statutory and administrative provisions to assist in the cancellation process at www.water-law.com/cancellation.htm. 