

# Use It or Lose It

## Water Rights and Water Issues in Oregon

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While out West, Mark Twain once said, "Whiskey's for drinking, water's for fighting." In organic agriculture, much attention is paid to the importance of soil and crop varieties but not to the third leg of the stool—water. Drought, environmental concerns, growing urban populations and the demands of more senior water users threaten to upend this stool. The Klamath water crisis underscored how water that farmers take for granted can suddenly evaporate under the threat of conflicting uses. While the abundance or scarcity of water varies throughout the state, all Oregon water users live by the same set of rules.

Most states west of the Mississippi follow the doctrine of "prior appropriation." In contrast to riparian rights granted according to the landowner's proximity to water bodies and flowing streams, the doctrine of prior appropriation allocates rights to the landowner who diverts water first. In times of scarcity, the first person to obtain a water right is the last to be shut off.

In 1909, the state declared that all surface waters belong to the public. In 1955, all groundwater was declared public. Ever since, a private right to use public waters must be obtained from the state's Water Resources Department, unless a statutory exemption applies. A right to use water, once perfected into a "certificated" water right, is a valuable type of property right that attaches to the land or becomes "appurtenant," and runs with the land upon subsequent transfers of property.

This water certificate must be exercised for beneficial use, and the water must not be wasted. In Oregon, failure to use water on all appurtenant lands for a period of five continuous years in any 15-year period can result in forfeiture.

### What is a water right, and how do I get one?

In prior appropriation states, water is allocated on a first come, first served basis. In Oregon, where the state determines that a source is over-allocated, no new applications are permitted. In areas of low water availability, new water users have to obtain water from senior users through transfer or sale. There are six critical surface water areas of the state where no new permits are being issued. There are also 11 groundwater limited areas, including the North Willamette Valley and much of the Columbia River plateau, where new water rights are restricted to a few designated uses.

All water in Oregon must be put to "beneficial use." Not just any use of water qualifies. Passive water use, for example, will not qualify as the beneficial use necessary to create and maintain a water right. Only the artificial application of water constitutes irrigation, and naturally occurring sub-irrigation does not qualify as a "beneficial use." Further, beneficial use implies that water is used without waste.

There are three steps to obtaining a water right in Oregon. First an irrigator must apply for a new water right to the Oregon Water Resources Department. If the department finds that water is available and additional use is in the public interest, then it may issue a permit.

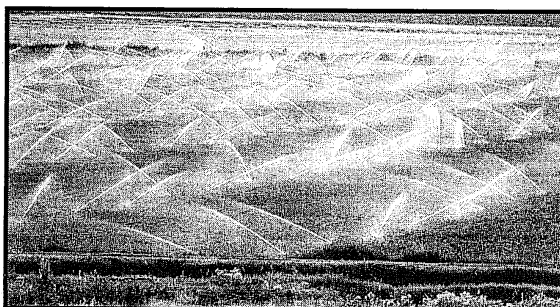
Second, an applicant must develop the water right and construct a water diversion, delivery and application system. A water permit sets a time by which well construction must be completed and the water put to beneficial use. Other conditions may also be placed on the permit, such as using fish screens, installing monitoring equipment and reporting water use. Time extensions are available if there is good cause and the permit holder has shown diligence.

Third, within a year of completing the water system and beneficially applying the water, the permittee must submit a map and a water-use report prepared by a Certified Water Rights Examiner that illustrates the extent that the permittee "perfected" the water use. (The Water Resources Department maintains a list of Certified Water Rights Examiners in the state.) If the department determines that the permit conditions have been met, a water right certificate will be issued. The "certificated" water right will continue to be valid as long as the water is used according to the provisions of the water right at least once every five years.

A water right certificate does not guarantee water delivery. The prior-appropriation doctrine authorizes diversions of water only to the extent that water is

available. The amount of water available depends on both the water supply and the needs of other senior water rights. The priority of water users is determined by the date on the certificate.

Many farmers believe they have "vested" water rights because their farm has used water since before the Oregon water code was adopted. However, even "vested" rights can be cancelled for lack of due diligence.



Water Resources Department

If a water permit is unavailable, a water user may be able to obtain a limited license to divert and use water for a short-term or fixed duration. Limited licenses are junior to all other uses and subject to revocation. Irrigation uses are generally not allowed under a limited license, except in cases of severe drought.

### Do I really need a water permit?

There are several uses of water that are exempt from permitting. Animals can drink directly from a surface source without a permit as long as the water is not diverted from its natural course. In certain conditions, an off-stream watering tank or trough can be used to water animal stock. Surface water may also be used to control fire, protect fish and manage land and forest if water use is not the primary intended activity. Natural surface springs can also be used without a permit if the spring does not flow off the property.

For groundwater resources, there is also a domestic use exception. In addition to an exception for stock watering, domestic well water users can irrigate up to one-half acre without having a water permit. Commercial well users can use up to 5,000 gallons per day without a permit. Exempt uses are allowed only if water is available and used for a beneficial purpose without waste.

### Forfeiture of water rights

A water right certificate remains valid as long as it is not forfeited for non-use for a period of five or more consecutive years in any 15-year period. Water for any portion of an acreage described on the certificate that is not used for five years in any 15-year period can be forfeited in a cancellation proceeding and reverts to the stream and the next junior appropriator. For example, if a farmer has a certificated water right to irrigate 40 acres but only irrigates ten of those acres for five or more years, the other 30 acres of water right are subject to forfeiture and cancellation.

Forfeiture is not automatic. The Water Resources Department initiates forfeiture proceedings based on the sworn testimony of two individuals with firsthand knowledge. Any person can submit evidence of non-use to the department. A water user need not be notified of alleged non-use until forfeiture proceedings begin. If more than 20 years have passed since the five-year period of non-use, then the water right is not subject to cancellation.

Who wants water rights? Seventy-five percent of the water taken from state rivers goes to agriculture. On many streams throughout the state, by the end of summer, there is only enough water to supply users with rights established in the late 1800s. Junior users who compete for scarce water can better secure their own water by policing the water use of more senior users. Fish also compete for scarce water, and many environmental groups are dedicated to returning more water to the rivers for in-stream purposes. Groups like WaterWatch of Oregon secure more running water in the river by policing water use or non-use by irrigators.

Preventing cancellation requires factual proof that water is beneficially used at least one year in every five.

Forfeiture is a fact-based inquiry in a legal proceeding. Once a certificate holder receives notice that a water right is being contested, a user has 60 days to file a protest to the cancellation that can allege any of 13 statutory bases to rebut forfeiture. If the cancellation is protested, then the department conducts a hearing prior to cancellation. The water user has the burden of proof.

Once a water right is unused for five or more consecutive years it is subject to forfeiture and cancellation even if the property owner begins to use the water again. Re-use does not reinstate the water right. This is true even if the current owner did not own the property when the use was discontinued.

One method of restarting the clock on forfeiture is to transfer water rights to a new point of appropriation or for a new use, such as in-stream uses. Recent court rulings and a state attorney general opinion support the

position that the 15-year clock starts over when the department grants a transfer for a water right. However, according to Michael Mattick, water master for Lane county, the department now requires definitive proof of continuous beneficial use before granting a transfer.

To prove water use, the department provides an "Evidence of Use Affidavit" on its web site (see [www.wrd.state.or.us/publication/forms/index.shtml](http://www.wrd.state.or.us/publication/forms/index.shtml)). The form provides general guidelines on important information to keep on record to defend a water right. First,

know where the water was applied and for what authorized purposes. Second, know the capacity of the system. Using less than a permitted right will not result in forfeiture if the user is ready, willing and able to use the full amount. If the system capacity is less than the water right, the user is not ready, willing and able, and the water right could be cancelled to the extent the system lacks capacity. The department also recommends keeping the following forms of documentation: dedicated power usage records or receipts; dated aerial photographs or other photographs; a current crop management plan; copies of receipts from sales of irrigated crops or for expenses relating to the use of water (i.e. seed purchases); and eyewitness corroboration.

Water Master Michael Mattick explained that the department only cancels one or two water rights per year and most challenges to water rights come from parties who have some other dispute. He also cautioned that environmental challenges to water rights to promote more water in-stream may have the opposite effect by encouraging right holders to use more water in order to avoid forfeiture and cancellation.

### How can I change the use under my water right?

A water right declares how much water may be used over how many acres. This is usually measured in cubic feet per second (rate) and acre feet of water (duty). For example, as to duty, an irrigator with two acre feet of water would be able to put three inches of water down eight separate times over the total approved acreage. The irrigator cannot use more than allowed and cannot "spread" or enlarge the water use.

However, there are a number of ways to change the irrigated acres, and even increase the amount of acres under irrigation. First, a user can transfer water from land no longer irrigated to new land. Temporary transfers are granted up to five years. A map meeting the department's requirements must be submitted. The land the water was transferred from must remain dry. Applications for a permanent transfer must include a map prepared by a Certified Water Rights Examiner. Any interested party can challenge a transfer request on the grounds that the water is subject to forfeiture or that the transfer would result in injury to other users. Transfers retain the priority date of the original water right.

Second, an irrigator can enlarge the acreage irrigated through water conservation. The 1987 Instream Water Rights Act encourages conservation of water by allowing users to "spread" 75 percent of the conserved water to additional acres. The other 25 percent of the conserved water must be dedicated back to the public. The result is less water overall in the permit but an increase in the acres irrigated and a benefit to the public. This process has been little used in Oregon.

### What do I do now?

All legally established water rights are on record in

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the Salem office of the Water Resources Department. These records are also maintained in the local watermaster's office and the department's web site (see [www.wrd.state.or.us](http://www.wrd.state.or.us)). To check a water right, you need a legal description of the property or a current county assessor's tax lot map of the property, including township, range and section. The web site contains a searchable database that shows the status of the water right and whether it is certificated. When purchasing property, due diligence might include contacting the neighbors to see if the water right went unused for any consecutive five-year period over the last 15 years.

Remember, water rights are property rights, and they can be sold independently of the land. For water rights that are unused and not likely to be used in the next few years, consider leasing or selling them with a temporary or permanent transfer. Other users in the same aquifer may wish to purchase those water rights. Additionally, there may be environmental interests that will purchase those rights to transfer them to in-stream uses for fish habitat. Finally, water rights can be voluntarily cancel to make them available for the next junior user or dedicate them for in-stream purposes, potentially qualifying for tax benefits.

In any instance, like other valuable property rights, it makes sense to know the law and obtain good counsel when applying for a water right, contesting someone else's water right, or defending or transferring water rights. With a little diligence farmers can assure that they have the right to continue to use water in the future.

Contact Oregon Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1271; (503) 986-0900; [www.wrd.state.or.us](http://www.wrd.state.or.us).

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