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What to Do When You Receive a Notice of Cancellation on Your Water Right

Laura Schroeder & Sarah Liljefelt

April 22, 2020

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Presentation Outline

- Exempt Uses
- Cancellation of Temporary & Inchoate Rights
- Forfeiture
- Voluntary & Involuntary Abandonment
- Avoiding Cancellation





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Exempt Uses



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Common Exempt Uses:

- **Domestic use** of groundwater
 - 15,000 gallons per day (group or individual)
- **½ Acre Irrigation** from groundwater for lawn or non-commercial garden
- **Commercial/Industrial use** of groundwater
 - 5,000 gallons per day
- **Livestock watering** from surface or groundwater
- **Rainwater collection** from precipitation
 - Only from artificial, impervious surface



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No Cancellation for Exempt Uses

- An exempt groundwater use “constitutes a right equal” to a ground water right certificate (ORS 537.545(2))
- Exempt uses are regulated, but not cancelled for nonuse or violation
 - May stack types (Example: exempt domestic plus exempt livestock)
 - 1 exemption per owner (not well/tax lot)
 - Must register exempt wells/uses (ORS 537.545)
 - Submit map of location (usually done by driller)
 - State the exempt use(s)
 - \$300 fee



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Cancellations of Temporary Uses



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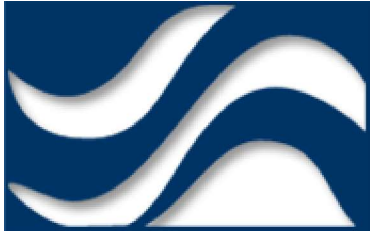
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Temporary Water Uses Subject to Cancellation

- **Limited Licenses, Temporary Transfers, Instream Leases**
 - Temporary water uses or changes
 - Cancellation is rare due to the limited duration of these authorizations

BEFORE THE WATER RESOURCES DEPARTMENT OF THE STATE OF OREGON	
IN THE MATTER OF THE CANCELLATION) OF LIMITED LICENSE LL-)	ORDER)
Findings of Fact	
<ol style="list-style-type: none">1. Limited License LL- was issued on , for the use of water to establish a hazelnut orchard.2. The Director may issue a limited license for irrigation if the sole purpose of the use is: (a) To provide water necessary to establish a crop for which no further irrigation will be required after the crop is established ORS 537.143(6)(a).3. The license holder has applied for a permit to irrigate the same lands as LL- , therefore requesting continuing irrigation of a crop contrary to ORS.143(6)(a).	
Order	
<ol style="list-style-type: none">1. NOW, THEREFORE, it is hereby ORDERED that the license is canceled in accordance with the provisions of OAR 690-340-0030(6).	



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Limited Licenses

- **Limited Licenses**
 - OWRD may revoke a limited license if:
 - Injury to another water user; or
 - Interference with a minimum perennial instream flow
 - ORS 537.143(2)/OAR 690-340-0030(6)
- **Cancellation Process**
 - OWRD issues an order “in other than contested case”
- **Challenge**
 - May be appealed in a Petition for Judicial Review (State Circuit Court)



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Temporary Transfers

- **Temporary Transfers**

- OWRD may revoke a temporary transfer if:
 - Injury to another water right; or
 - Results in enlargement; or
 - Conditions of the temporary transfer are not met
 - OAR 690-380-8004(9)

- **Cancellation Process**

- OWRD may seek compliance & then issue an order “in other than a contested case”

- **Challenge**

- May be appealed in a Petition for Judicial Review (State Circuit Court)



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Instream Leases

- **Instream Leases (OAR 690-077-0077)**
 - Injury to another water right; or
 - Results in enlargement; or
 - Failure to follow the instream lease requirements (e.g., continue using water)
- **Cancellation Process**
 - OWRD typically denies a renewal application in a future year
 - Order modifying or terminating the lease
 - Provision of original order approving the lease
- **Challenge**
 - Final order in other than a contested case may be appealed in a PJR



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Cancellations of Inchoate Water Uses (Permits & Permanent Transfers)



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Inchoate Water Uses Subject to Cancellation

- **Permits & Permanent Transfers**
 - Allow water use or alteration of existing water right certificate
 - Inchoate = not perfected
- **Subject to Cancellation for:**
 - Failure to develop full permitted use
 - Violation of element or condition of use
 - Failure to complete transfer for type of use or place of use (OAR 690-380-6010)
 - Exception: POD/POA reverts to previous
 - Failure of Procedure (deadlines for construction, beneficial use, and COBU)



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Elements of a Water Use Right



- Source (surface or ground water)
- Beneficial Use
- Place of Use
- Point of Diversion or Appropriation
- Rate
- Volume/Duty
- Conditions



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- **Source**

- **Purpose**

- **Rate**

- **Priority**

- **Volume**

STATE OF OREGON
COUNTY OF MARION
PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS PERMIT IS HEREBY ISSUED TO

WOODBURN, OREGON 97071

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER:

SOURCE OF WATER: A WELL IN CHAMPOEG CREEK BASIN

PURPOSE OR USE: SUPPLEMENTAL IRRIGATION OF 51.4 ACRES

MAXIMUM RATE: 0.642 CUBIC FOOT PER SECOND

PERIOD OF USE: MARCH 1 THROUGH OCTOBER 31

DATE OF PRIORITY: APRIL 7, 1999

POINT OF DIVERSION LOCATION: NE 1/4 NE 1/4, SECTION 27, T4S, R2W, W.M.;
240 FEET SOUTH & 1250 FEET WEST FROM NE CORNER, SECTION 27

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second (or its equivalent) and 2.5 acre-feet for each acre irrigated during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SW 1/4 SE 1/4	4.1 ACRES
SE 1/4 SE 1/4	4.1 ACRES
SECTION 22	
NE 1/4 NE 1/4	21.2 ACRES
NW 1/4 NE 1/4	21.3 ACRES
SE 1/4 NE 1/4	0.7 ACRE
SECTION 27	
TOWNSHIP 4 SOUTH, RANGE 2 WEST, W.M.	

Measurement, recording and reporting conditions:

A. Before water use may begin under this permit, the permittee

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Season

Point of
Diversion

Place of
Use

Condition

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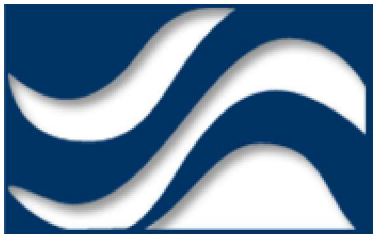
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SW 1/4	SE 1/4	4.1 ACRES
SE 1/4	SE 1/4	4.1 ACRES
SECTION 22		
NE 1/4	NE 1/4	21.2 ACRES
NW 1/4	NE 1/4	21.3 ACRES
SE 1/4	NE 1/4	0.7 ACRE
SECTION 27		
TOWNSHIP 4 SOUTH, RANGE 2 WEST, W.M.		

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Challenging Cancellation

- OWRD determines no appropriation under permit or nonuse for 5 or more years
 - Certified letter giving notice of intent to cancel permit in 60 days (OAR 690-320-0020)
 - Submit Claim of Beneficial Use (“COBU”)
 - Application for extension of time
 - Correct deficiencies during extension period
- OWRD Final Order cancelling permit (after 60-day notice period)
 - Request reconsideration
 - File Petition for Judicial Review



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Challenging Cancellation

- If proof of perfection is to the extent of the permit/transfer, then certificate issued
- If proof of perfection is *different* or *less* than extent of permit/transfer:
 - First class mail letter giving notice of intent to issue certificate to lesser extent than the permit or transfer with proposed certificate enclosed (OAR 690-330-0010/OAR 690-380-6040)
 - Request reconsideration of proposed certificate – OWRD may:
 - Approve & issue changed certificate
 - Deny in writing & keep proposed certificate
 - Field investigation – new certificate & contested case
 - Application for extension of time



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Cancellations of Certificates: Forfeiture



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Forfeiture

- **Certificates**
 - Permanent real property interest
 - Requires administrative process for cancellation (not automatic)
- **Subject to Cancellation for Statutory Nonuse of 5 or More Years**
 - Incorrect place of use
 - Incorrect purpose of use
 - Exception: Incorrect POD (no similar case law for POA)
- **Lookback**: 5-year period ending within last 15 years

Forfeiture

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- **Initiation:**
 - Two affidavits of nonuse from people who know “with certainty” nonuse occurred
 - OWRD staff initiated
- OWRD “shall” initiate proceedings within 180 days of receiving affidavit



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Forfeiture

- **Challenge:**
 - Evidence of Use Affidavit
 - Refute Nonuse
 - Statutory affirmative defenses

Application for Water Right Transfer Evidence of Use Affidavit



Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301-1266
(503) 986-0900
www.wrd.state.or.us

Please print legibly or type. Be as specific as possible. Attach additional pages if you need more spacing.
Supporting documentation must be attached.



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Forfeiture Defenses

- The water right is for reasonable and usual municipal use of water
- Cancellation would impair the rights of cities and towns to use water
- Economic Hardship (bankruptcy, etc)
- The land was withdrawn from use (e.g., Federal Conservation Reserve Program)
- Lookback Period (5 year period ended more than 15 years ago)
- Water under the right is discontinued by an order of the Commission under ORS 537.775 (wasteful or defective wells)
- Nonuse during transfer or primary right instream lease
- Water was not available, but user was ready/willing/able
- Use less water to accomplish beneficial use, but ready/willing/able to use full rate/duty
- More!



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Review of Decision

- Protest the Cancellation
 - Within 60 days
- OWRD Review as Contested Case
- Appeal to Court of Appeals





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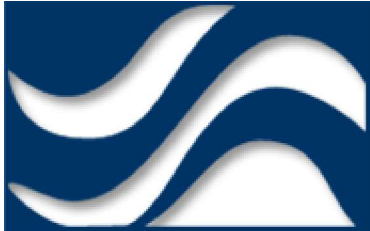
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Voluntary Cancellation & Abandonment



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Abandonment

- Court created doctrine
- Intent to disregard a known right
- Intent can be shown by physical acts
 - Filling in ditches, remove pipes, building permanent structures within POU, etc.
- Voluntary Cancellation
 - ORS 540.621 – can request cancellation or partial cancellation of an abandoned certificate





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Avoiding Cancellation



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Avoiding Cancellation

- Know your water rights!!
- Consult with a professional
 - Due diligence
 - Best way to respond to OWRD
- Beneficially use water under the conditions of use once every five years
- Affidavits of use
 - Request during purchase of land from previous owners
- Preserve records of water use
 - Meter readings, power bills, water use reports, photographs, etc.



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COVID-19 Webinar Series

- *Next Week:* “What Options Are Available When You Receive Notice Your Well Construction is Non-Compliant?”
- Registration Link for April 29, 2020 12:00 PM to 1:00 PM available in the email following the webinar
- Go to our website: www.water-law.com or sign up for our blog for registration information!



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S.B. 98 Broadens Ability to Turn Wastewater into Renewable Natural Gas

Written October 2, 2019 by Rachelq Harman

Categories: [Legislation, Oregon, Water law](#)

Tags: [biogas](#), [clean drinking water](#), [Clean Water Act](#), [conservation](#), [renewable natural gas](#), [rng](#), [wastewater](#), [water](#), [water law](#)

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Starting September 29, 2019, natural gas providers in Oregon will have a new, renewable way of powering their customers' homes. Governor Kate Brown executed a new law at the end of July, 2019 allowing capture, treatment, and conversion of methane found in wastewater into renewable...

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Wifi Through the Sewers in Anacortes

Written September 26, 2019 by Brian Fairbanks

Categories: [International, Washington](#)

Tags: [international](#), [land use](#), [municipal water](#), [washington](#)

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The city of Anacortes, WA, is making news by running part of its new fiber optic cable network through its water system. Brown and Caldwell's Water News for September 25, 2019, links to a report by KUOW News: "Wifi wires will run through water pipes..."

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