



# Oregon

Tina Kotek, Governor

**Water Resources Department**

725 Summer Street NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

## **Testimony for Senate Bill 718**

### **Senate Committee on Natural Resources**

#### **Senator Jeff Golden, Chair**

Submitted by: Bryn Hudson, Legislative Coordinator

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Thank you for the opportunity to provide information related to Senate Bill 718 which provides that if the Governor declares a county drought exists, any non-use for that calendar year for certificated water rights in that county do not count towards forfeiture. This testimony is provided for informational purposes and the Department is not taking a position at this time.

### **Background on Forfeiture**

Under Oregon law, all water belongs to the public. With some exceptions, cities, farmers, businesses, and other water users must obtain a right from the Department to use water from any source - whether it is underground, or from lakes or streams.

Oregon's water laws are based on the principle of prior appropriation. Water is distributed by priority date – junior, or newer, water rights can be regulated off in times of shortage to provide water to senior, or older, rights. Beneficial use is the measure of a water right, and water must be used for a water right to remain valid, otherwise it could be forfeited and subject to cancellation (see Oregon Revised Statutes 540.610).

For context, the water right system operates under the premise that water is a public resource and that the beneficial use of that resource should be maximized. As such, if a water right holder is not using or no longer needs the use of water, the law seeks to allow others to use that water, so as to maximize the benefits of water use in the state. While water rights provide an asset for the holder, not canceling water rights can impact existing junior water right holders, as well as individuals that would like to obtain a water right but cannot because water is not available. When water is not used for long periods of time under a water right, other water users in the area come to depend on and make investments based on the assumption that water is available for their use.

A water right remains valid as long as it is not cancelled, and beneficial use of the water continues without a lapse of five or more consecutive years. If a portion of a water right is not used for five consecutive years, that portion of the right is presumed forfeit. For example, if a water right allows for irrigation of 40 acres and the same 15 acres are not irrigated, for five consecutive years, the portion of the water right for those 15 acres is presumed forfeit.

While non-use for five consecutive years establishes a presumption of forfeiture, that presumption is rebuttable by introducing evidence to the contrary (that water was used for a beneficial purpose) or by showing that one or more scenarios in statute exist that rebut the

presumption as laid out in ORS 540.610(2). There is a 15-year statute of limitations on non-use and there are currently 14 rebuttals.

A common misconception about forfeiture is that a water user must use all the quantity of water authorized in the water right in order to prevent forfeiture. ORS 540.610(3) provides that if the owner of the water right uses less water to accomplish the beneficial use allowed by the right, the right is not subject to forfeiture so long as: (a) the user has a facility capable of handling the entire rate and duty authorized under the right; and (b) the user is otherwise ready, willing and able to make full use of the right. Rate is the volume per unit of time that water may be diverted from a surface water source or groundwater source, and duty is the annual volume of water allowed per acre. In addition, rebuttals to forfeiture provide options for using less water, for example, when water is not available (such as during a drought).

Cancellation of a forfeited water right is not automatic. A cancellation proceeding determines whether a water right evidenced by a certificate has been partially or entirely forfeited by a failure to make beneficial use of the water under the terms and conditions of the certificate for a period of five or more successive years. Administrative proceedings to determine the validity of a water right are typically initiated when individuals with firsthand knowledge provide sworn affidavits asserting non-use. Once affidavits are filed, notice of the proposed cancellation of the right is provided to the water right holder. A contested case hearing is held if the holder of the right protests the proposed cancellation. If the holder does not protest, the right is cancelled.

### **State Drought Declaration Process Under ORS 536.740**

Not all counties that experience drought conditions receive a drought declaration from the state. Some counties regularly seek drought declarations, whereas others do not. In order for a county to receive a drought declaration under ORS 536.740, a county declares a drought emergency and submits a request to the Oregon Department of Emergency Management. The request is reviewed by the Water Supply Availability Committee and Oregon's Drought Readiness Council, who ultimately make recommendations to the Governor's Office on whether to declare drought in an area. The Governor may then choose to issue an Executive Order declaring a drought emergency.

Drought declarations are intended to provide existing water right holders with access to emergency water management tools. Though not generally used, the Governor or the Oregon Water Resources Commission can also direct state agencies and political subdivisions to implement a water conservation plan or water curtailment plan when a Governor's drought declaration is in effect.

### **Department Understanding of SB 718**

SB 718 provides that for a calendar year in which there is a Governor-declared drought emergency in a county, pursuant to ORS 536.740, that year does not count toward the five successive years required in order to presume forfeiture.

While the bill is unclear, it is our understanding that the intent is that for each year a drought is declared, the five-successive years of non-use required for a water right to be presumed forfeited starts over for all water rights within that area. This will result in all water rights within that county being no-longer subject to forfeiture for the next five years, even if the rights had not

been used for decades and had no infrastructure or intent to do so. In some counties where drought is a regular occurrence, it could mean that non-use occurs for several decades. For example, Lake County received a Governor's drought declaration in 2022, 2021, 2020, 2018, 2015, 2014, 2012, 2010, 2007, 2005, 2002, and 2001. If this bill were in effect, any water rights within the area would not be subject to forfeiture between approximately 1997 through 2027, and there would not need to be any water use under the right during that time. Since the transfers law also references this statute, it also appears that it may result in water rights that are currently not eligible for transfer to be eligible.