

## Chapter 537

### Appropriation of Water Generally

#### Chapter 537

CASE CITATIONS: *Smyth v. Jenkins*, (1956) 208 Or 92, 299 P2d 819; *Warner Valley Stock Co. v. Lynch*, (1959) 215 Or 523, 336 P2d 884; *Fitzstephens v. Watson*, (1959) 218 Or 185, 344 P2d 221.

LAW REVIEW CITATIONS: 36 OLR 197, 241; 3 WLJ 295-316.

#### 537.010

CASE CITATIONS: *Federal Power Comm. v. Oregon*, (1955) 349 US 435, 453, 75 S Ct 832, 843, 99 L Ed 1215, 1229; *Phillips v. Gardner*, (1970) 2 Or App 423, 469 P2d 42.

ATTY. GEN. OPINIONS: Authority of State Engineer in the prevention of wastage, 1952-54, p 146.

LAW REVIEW CITATIONS: 46 OLR 244.

#### 537.110 to 537.320

LAW REVIEW CITATIONS: 3 WLJ 318.

#### 537.110

##### NOTES OF DECISIONS

The water flowing over the public domain is a part thereof, and the general government may grant or otherwise dispose of its riparian interest separate from the rest of the estate. *Hough v. Porter*, (1909) 51 Or 318, 95 P 732, 98 P 1083, 102 P 728.

This section was not unconstitutional as denying due process of law under U.S. Const. Amend. XIV, §1. *Re Hood River*, (1925) 114 Or 112, 115, 227 P 1065.

Water escaping from a city reservoir and allowed to find its way to the natural level of the country is subject to appropriation. *Vaughan v. Kolb*, (1929) 130 Or 506, 280 P 518.

FURTHER CITATIONS: *Eldredge v. Mill Ditch Co.*, (1919) 90 Or 590, 598, 177 P 939; *California-Ore. Power Co. v. Beaver Portland Cement Co.*, (1934) 73 F2d 555.

LAW REVIEW CITATIONS: 25 OLR 160; 30 OLR 257; 2 WLJ 345-351.

#### 537.120

##### NOTES OF DECISIONS

###### 1. In general

After water has been diverted from a natural stream into ditches or other artificial works, it becomes personal property and cannot be appropriated. *Vaughan v. Kolb*, (1929) 130 Or 506, 280 P 518.

It is debatable whether, subsequent to 1909, an appropriation can be initiated by adverse use or in any other

manner not prescribed by statute. *Tudor v. Jaca*, (1945) 178 Or 126, 164 P2d 680.

If a prior appropriator desires to enlarge his appropriation, he must make a new appropriation, but such new appropriation will be inferior to all intervening rights. *Id.*

Subsequent appropriators may insist that prior appropriations are not enlarged, if the enlargement interferes with their rights. *Id.*

A prior appropriator cannot claim or use more water than is reasonably necessary for the purpose of his appropriation. *Id.*

Abandonment, as applied to an appropriation, is an intentional relinquishment of a known right. *Id.*

Forfeiture of a water right is involuntary or forced loss thereof because of appropriator's or owner's failure to perform some act required by statute. *Id.*

Claims to vested rights are to be adjudicated by the statutory procedure and that adjudication is final, subject to appeal. *Calderwood v. Young*, (1957) 212 Or 197, 315 P2d 561, 319 P2d 184.

Where water escaped from irrigation district lands to the natural flow of a river, no one could rightfully take the same from the river, except by appropriation. *Jones v. Warm Springs Irr. Dist.*, (1939) 162 Or 186, 91 P2d 542.

Water escaping from a United States irrigation project by deep percolation was of public character even as against the United States. *United States v. Warm Springs Irr. Dist.*, (1941) 38 Fed Supp 239.

###### 2. Riparian ownership

A riparian owner's right to the natural flow of the stream substantially undiminished has been abrogated. *California-Ore. Power Co. v. Beaver Portland Cement Co.*, (1934) 73 F2d 555, affirmed (1935) 295 US 142, 55 S Ct 725, 79 L Ed 1356.

There is no such thing as prior riparian ownership so far as distribution of water for irrigation purposes between riparian owners is concerned. *Hough v. Porter*, (1909) 51 Or 318, 95 P 732, 98 P 1083, 102 P 728.

Conceding that title to bed of stream which is navigable in fact is in riparian owners, they do not own the water itself, but only the use of it as it flows by their property. *Guilliams v. Beaver Lake Club*, (1918) 90 Or 13, 175 P 437.

Riparian owner of land, abutting on both banks of a slough, is entitled to have water flow as it is naturally accustomed to flow. *Stephens v. Eugene*, (1918) 90 Or 167, 175 P 855.

Where defendants had made no appropriation of the water in controversy, and all the parties based their rights thereto as riparian owners, the decree was predicated upon that ground. *Pacific Livestock Co. v. Davis*, (1911) 60 Or 258, 119 P 147.

FURTHER CITATIONS: *Re Hood River*, (1925) 114 Or 112, 227 P 1065; *Re Willow Creek*, (1926) 119 Or 155, 236 P 487, 237 P 682, 239 P 123; *Staub v. Jensen*, (1947) 180 Or 682, 178 P2d 931; *Gardner v. Dollina*, (1955) 206 Or 1, 288 P2d 796; *Warner Valley Stock Co. v. Lynch*, (1959) 215 Or 523, 336 P2d 884.

LAW REVIEW CITATIONS: 36 OLR 193, 204, 215, 221, 241; 2 WLJ 345; 3 WLJ 339, 342.

## 537.130

## NOTES OF DECISIONS

It is debatable whether, subsequent to 1909, an appropriation of water can be initiated by adverse use, or in any other manner than under the statutory procedure. *Tudor v. Jaca*, (1945) 178 Or 126, 164 P2d 680.

State Engineer's determination of questions of fact is entitled to great weight on appeal. *Appleton v. Ore. Iron & Steel Co.*, (1961) 229 Or 81, 358 P2d 260, 366 P2d 174.

A dam constructed not for the purpose of impounding waters in Greaser Lake but to reclaim land in south Warner Valley by confining and directing the waters was not a violation of this section. *Warner Valley Stock Co. v. Lynch*, (1959) 215 Or 523, 336 P2d 884.

Part of the ownership of defendant's grantor consisted of the riparian right to use the waters in the watercourse flowing from a spring on the land to the extent that use did not conflict with superior rights derived through the water code, and this interest could be conveyed to plaintiff. *Fitzstephens v. Watson*, (1959) 218 Or 185, 344 P2d 221.

FURTHER CITATIONS: *Gardner v. Wright*, (1907) 49 Or 609, 91 P 286; *Watts v. Spencer*, (1908) 51 Or 262, 94 P 39; *Williams v. Altnow*, (1908) 51 Or 275, 95 P 200, 97 P 539; *Davis v. Chamberlain*, (1908) 51 Or 304, 98 P 154; *Hough v. Porter*, (1909) 51 Or 318, 95 P 732, 98 P 1083, 102 P 728; *Re Hood River*, (1924) 114 Or 112, 174, 227 P 1065; *California-Ore. Power Co. v. Beaver Portland Cement Co.*, (1934) 73 F2d 555; *Gardner v. Dollina*, (1955) 206 Or 1, 288 P2d 796; *Smyth v. Jenkins*, (1956) 208 Or 92, 299 P2d 819; *Day v. Hill*, (1965) 241 Or 507, 406 P2d 148; *Phillips v. Gardner*, (1970) 2 Or App 423, 469 P2d 42.

LAW REVIEW CITATIONS: 36 OLR 221, 241; 3 WLJ 342.

## 537.140

## NOTES OF DECISIONS

Under a former similar statute, where appropriations and improvements were made in good faith, the fact that the map filed showing the route of the ditch did not show the precise line of the ditch did not destroy its sufficiency. *Re Willow Creek*, (1915) 74 Or 592, 633, 144 P 505, 146 P 475.

Failure to file map on completion of a pipe line under former similar statute did not defeat appropriation. *State v. People's W. Coast Hydro-Elec. Corp.*, (1929) 129 Or 475, 278 P 583.

A map of record and notice of appropriation for reclamation are notice to subsequent appropriators of the contemplated appropriation. *Re Deschutes River*, (1930) 134 Or 623, 286 P 563, 294 P 1049.

Notice and map which an appropriator of water for irrigation is required to file marks the limit of the proposed enterprise. *Id.*

FURTHER CITATIONS: *Phillips v. Gardner*, 2 Or App 423, 469 P2d 42.

ATTY. GEN. OPINIONS: Authority of State Engineer to accept and file an application for permit to appropriate water which has been withdrawn from appropriation, 1936-38, p 161; right of alien to secure a permit to appropriate water, 1932-34, p 38; engineer's authority to accept application for permit to appropriate water withdrawn from appropriation by legislative Act, 1936-38, p 161.

## 537.150

## NOTES OF DECISIONS

The right given by a permit is merely a contingent right which may ripen into a complete appropriation, or may be defeated by the failure of the holder to comply with the terms of the statute. *Morse v. Gold Beach Water, Light & Power Co.*, (1938) 160 Or 301, 84 P2d 113.

FURTHER CITATIONS: *Re Deschutes River*, (1930) 134 Or 623, 286 P 563, 294 P 1049; *Re White River*, (1933) 141 Or 504, 16 P2d 1109.

## 537.160

## NOTES OF DECISIONS

See also cases under ORS 536.065.

Where no cause has been shown by an applicant to entitle him to an extension of time, the action of the State Engineer and the circuit court in refusing to grant an extension will be affirmed by the Supreme Court. *Re White River*, (1936) 155 Or 148, 62 P2d 22.

Commencement of work by the appropriator is the condition on which a permit is issued. If he does not do so, it is fatal to the completion of the appropriation, although reasonable diligence was exercised after the one year period. *Morse v. Gold Beach Water, Light & Power Co.*, (1938) 160 Or 301, 84 P2d 113.

Although the statute does not state the amount of work required within the year following date of approval of application, it is the reasonable intent of the statute that the construction work must be so substantial in character as to manifest good faith and the intent to exercise reasonable diligence in the completion of the project. *Id.*

The State Engineer's discretion as to extension of time has no application to the mandatory terms of the statute requiring actual construction work to begin on a project within one year from date of approval of the application for a permit. *Id.*

Where the plans for defendant's proposed project were approved by the State Engineer, he must have found that the proposed use would not prejudicially affect the public interest. *State Game Comm. v. Beaver Portland Cement Co.*, (1942) 169 Or 1, 124 P2d 524, 126 P2d 1094.

A permit was properly canceled by the State Engineer, where construction work was not seriously commenced within the one year period, and it was shown that the purpose of the permit holder was more to deprive the competitor of water than to obtain water for his own system. *Morse v. Gold Beach Water, Light & Power Co.*, (1938) 160 Or 301, 84 P2d 113.

The State Engineer's approval of plans for reconstruction of a hydroelectric project amounted, in the game commission's suit for injunction, to findings that the reconstruction would not change the use of the water from that set forth in the original applications, that it would not conflict with determined water rights, and would not menace public safety and welfare. The approval did not determine that commercial and game fishing would or would not be affected. *State Game Comm. v. Beaver Portland Cement Co.*, (1942) 169 Or 1, 124 P2d 524, 126 P2d 1094.

FURTHER CITATIONS: *Re Hood River*, (1925) 114 Or 112, 227 P 1065.

ATTY. GEN. OPINIONS: Duty to hold hearing in approval or rejection of application, 1954-56, p 122.

## 537.170

ATTY. GEN. OPINIONS: State game or fish commission filing claims for appropriation of water for propagation and

protection of fish, 1940-42, p 58; game commission's remedy where riparian owner attempts to drain lake, 1940-42, p 485.

LAW REVIEW CITATIONS: 46 OLR 245; 3 WLJ 280, 384, 385.

537.180

NOTES OF DECISIONS

Since an appeal was not taken therefrom, the decision of the State Engineer was final. Re Walla Walla River, (1933) 141 Or 492, 502, 16 P2d 939.

FURTHER CITATIONS: Warner Valley Stock Co. v. Lynch, (1959) 215 Or 523, 336 P2d 884.

ATTY. GEN. OPINIONS: Duty to hold hearing in approval or rejection of application, 1954-56, p 122.

537.185

NOTES OF DECISIONS

Under former similar statute failure to appeal from the State Engineer's order made it final. Oakes v. Dickson, (1960) 225 Or 95, 357 P2d 385.

FURTHER CITATIONS: Smyth v. Jenkins, (1956) 208 Or 92, 299 P2d 819; Warner Valley Stock Co. v. Lynch, (1959) 215 Or 523, 336 P2d 884; Cleaver v. Judd, (1964) 238 Or 266, 393 P2d 193.

ATTY. GEN. OPINIONS: Duty to hold hearing in approval or rejection of application, 1954-56, p 122.

537.190

LAW REVIEW CITATIONS: 3 WLJ 282.

537.210

ATTY. GEN. OPINIONS: Effect of failure to mail indorsed application to applicant, 1954-56, p 210.

537.220

CASE CITATIONS: Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938.

537.230

NOTES OF DECISIONS

State Engineer had authority to waive failure to request extension of time for completion of work. Smyth v. Jenkins, (1956) 208 Or 92, 299 P2d 819.

537.240

CASE CITATIONS: Smyth v. Jenkins, (1956) 208 Or 92, 299 P2d 819.

537.250

NOTES OF DECISIONS

Where the appropriator has performed all of the acts which are incidental to the acquisition of a water right, the perfected right is considered to have existed from the date of the initial act. Re Hood River, (1925) 114 Or 112, 114, 227 P 1065.

Water or the right thereto is not separated from the land by the making of an application for and obtaining a permit and certificate of water right, even though the water right

certificate is recorded separately from the deeds to the land. Skinner v. Silver, (1938) 158 Or 81, 75 P2d 21.

A certificate is conclusive only against a person whose right is "subsequent in priority." Cleaver v. Judd, (1964) 238 Or 266, 393 P2d 193.

Water right certificate, not the permit, even when followed by a beneficial use, marks the point at which a water right becomes vested. Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938, cert. denied, 397 US 990.

FURTHER CITATIONS: Pacific Livestock Co. v. Cochran, (1914) 73 Or 417, 432, 144 P 688; California-Ore. Power Co. v. Beaver Portland Cement Co., (1934) 73 F2d 555; Smyth v. Jenkins, (1956) 208 Or 92, 299 P2d 819; Phillips v. Gardner, (1970) 2 Or App 423, 469 P2d 42.

LAW REVIEW CITATIONS: 3 WLJ 342.

537.260

NOTES OF DECISIONS

State Engineer had authority to waive failure to request extension of time for completion of work. Smyth v. Jenkins, (1956) 208 Or 92, 299 P2d 819.

Under this statute the State Engineer is vested with a wide discretion. Id.

A certificate is conclusive only against a person whose right is subsequent in priority. Cleaver v. Judd, (1964) 238 Or 266, 393 P2d 193.

The permit was inchoate and not vested until the permittee fully complied with all the statutory specifications. Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938, cert. denied, 397 US 990.

537.270

NOTES OF DECISIONS

A certificate is conclusive only against a person whose right is "subsequent in priority." Cleaver v. Judd, (1964) 238 Or 266, 393 P2d 193.

In an action involving the right to use the waters of a creek, a water right certificate issued pursuant to a decree in a former action adjudicating the rights of predecessors in interest, though entitled to evidentiary effect, was regarded as embodying the conditions and limitations of the decree upon which it was based, and as subject to any modifications which might result from judicial interpretation of such conditions or limitations. Tudor v. Jaca, (1946) 178 Or 126, 164 P2d 770.

LAW REVIEW CITATIONS: 3 WLJ 336.

537.290

ATTY. GEN. OPINIONS: Authority of State Engineer to issue a certificate to the United States without the 50 years' limitation contained in this section, 1932-34, p 375; authority of State Engineer to eliminate statutory provisions from water right certificates issued to the Federal Government, 1936-38, p 440.

537.300

NOTES OF DECISIONS

The primary reservoir permit contemplates a storage of water in some locality where it can be utilized for irrigation. The secondary permit contemplates that users of the water shall acquire a permanent ownership by agreement with the owner for a specified quantity of the stored water for the needs of and use upon his land. Cookinham v. Lewis, (1911) 58 Or 484, 491, 114 P 88, 115 P 342.

LAW REVIEW CITATIONS: 25 OLR 168; 3 WLJ 324.

537.310

LAW REVIEW CITATIONS: 46 OLR 159; 3 WLJ 279.

537.410

CASE CITATIONS: Re White River, (1936) 155 Or 148, 62 P2d 22.

537.420

CASE CITATIONS: Smyth v. Jenkins, (1956) 208 Or 92, 299 P2d 819; Cleaver v. Judd, (1964) 238 Or 266, 393 P2d 193.

537.505 to 537.795

ATTY. GEN. OPINIONS: Crediting on new application of fees collected by State Engineer for issuing permit for appropriation of underground waters, 1926-28, p 252; amount of fees to be collected by State Engineer on applications for permits to appropriate underground water, 1930-32, p 61; authority of State Engineer to issue permits for appropriation of underground waters east of Cascade Mountains, 1930-32, p 695; State Engineer's authority to issue permits for appropriation of underground waters, 1940-42, p 635; issuance of certificate if use violated statutes, 1958-60, p 25.

LAW REVIEW CITATIONS: 47 OLR 229-236; 3 WLJ 317-335.

537.525

CASE CITATIONS: Phillips v. Gardner, (1970) 2 Or App 423, 469 P2d 42.

537.575

ATTY. GEN. OPINIONS: Approval of applications under former law, 1954-56, p 117.

537.585

ATTY. GEN. OPINIONS: Issuance of certificate if use violated statutes, 1958-60, p 25.

537.595

ATTY. GEN. OPINIONS: Issuance of certificate if use violated statutes, 1958-60, p 25.

537.605

ATTY. GEN. OPINIONS: Persons entitled to certificates of registration, 1958-60, p 25.

537.615

#### NOTES OF DECISIONS

Applicant for water right is charged with the knowledge of the requirements imposed by the statutes in perfecting a water right. Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938, cert. denied, 397 US 990.

537.620

ATTY. GEN. OPINIONS: Authority of State Engineer in the prevention of wastage, 1952-54, p 146.

537.625

#### NOTES OF DECISIONS

If the requirements for perfection of an appropriation are not met, the State Engineer may cancel a permit in accordance with the procedure in ORS 537.260. Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938, cert. denied, 397 US 990.

Water right certificate, not the permit, even when followed by a beneficial use, marks the point at which a water right becomes vested. Id.

537.630

#### NOTES OF DECISIONS

Applicant for water right, not the State Engineer, has the duty to see that the requirements for perfecting a water right have been fulfilled. Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938, cert. denied, 397 US 990.

Water right certificate, not the permit, even when followed by a beneficial use, marks the point at which a water right becomes vested. Id.

537.635

#### NOTES OF DECISIONS

Assignee who failed to file assignment with State Engineer could not complain of lack of notice regarding cancellation of permit. Green v. Wheeler, (1969) 254 Or 424, 458 P2d 938, cert. denied, 397 US 990.

537.665

ATTY. GEN. OPINIONS: Investigation of underground water supply, 1954-56, p 117.

537.730

ATTY. GEN. OPINIONS: Classifying ground water, 1960-62, p 426.

537.735

LAW REVIEW CITATIONS: 3 WLJ 280.

537.775

LAW REVIEW CITATIONS: 46 OLR 245.

537.800

#### NOTES OF DECISIONS

1. In general
2. Appropriation
3. Permit to appropriate water
4. Landowner's right

#### 1. In general

This statute, together with Ore. Const. Art. I, §18, had the effect of limiting the common-law riparian rights. Minton v. Coast Property Corp., (1935) 151 Or 208, 46 P2d 1029.

Springs and seepage water therefrom were part and parcel of the land itself. The right, title and interest therein passed by virtue of a mortgage and foreclosure proceedings thereunder. Skinner v. Silver, (1938) 158 Or 81, 75 P2d 21.

#### 2. Appropriation

The right of appropriation of the waters of a spring does not differ from the right of appropriation of the waters of a flowing stream. Brosnan v. Harris, (1901) 39 Or 148, 65 P 867.

The prior appropriator of the waters of a spring will be as much protected as the appropriator of the waters of a

stream. *Brosnan v. Harris*, (1901) 39 Or 148, 65 P 867; *Hildebrandt v. Montgomery*, (1925) 113 Or 687, 234 P 267.

Waters flowing through a gulch, and derived from melting snows and springs, are subject to appropriation. *Borman v. Blackmon*, (1911) 60 Or 304, 310, 118 P 848.

Waste water escaping from a city reservoir and allowed to find its way to the natural level of the country is subject to appropriation under this section regardless of a contract entered into by the city for disposition thereof. *Vaughan v. Kolb*, (1929) 130 Or 506, 280 P 518.

### 3. Permit to appropriate water

A person needs no permit to use the seepage water which arises upon his own land. *Barker v. Sonner*, (1931) 135 Or 75, 294 P 1053.

A permit from the State Engineer to appropriate water does not authorize a trespass upon private land to obtain such water, and a court will not assist the taking of such water and confirm the trespass. *Minton v. Coast Property Corp.*, (1935) 151 Or 208, 46 P2d 1029.

### 4. Landowner's right

The landowner may prevent spring water from passing off his own land. *Morrison v. Officer*, (1906) 48 Or 569, 87 P 896.

A spring having no overflow and but little seepage belongs exclusively to the landowner, and other owners have no right to appropriate the water thereof. *Henrici v. Paulson*, (1929) 128 Or 514, 274 P 314; *Henrici v. Paulson*, (1930) 134 Or 222, 293 P 424.

The filing upon the water of springs before the State Engineer, and obtaining a permit and certificate, have only the effect of protecting the right of the owner of the land to the water in case there should be an increase of the flow from the springs so as to pass from the land in question

to other lands. *Skinner v. Silver*, (1938) 158 Or 81, 75 P2d 21.

Spring or seepage waters, which are not public waters, may be filed for only by the owner of the land. *Id.*

The legislature has the power to provide that the person upon whose land the seepage or spring waters first arise has the right to the use of such waters. *Id.*

Where waters leaving a spring on owner's land flow into a watercourse, which does not leave owner's land before emptying into another watercourse, the waters are subject to appropriation and the owner has no preference over other persons. *Fitzstephens v. Watson*, (1959) 218 Or 185, 344 P2d 221.

FURTHER CITATIONS: *David v. Brokaw*, (1927) 121 Or 591, 256 P 186; *Klamath Dev. Co. v. Lewis*, (1931) 136 Or 445, 299 P 705; *Staub v. Jensen*, (1947) 180 Or 682, 178 P2d 931.

ATTY. GEN. OPINIONS: Application for appropriation of irrigation district's waste waters, 1940-42, p 153.

LAW REVIEW CITATIONS: 3 WLJ 325, 334, 340.

537.810

LAW REVIEW CITATIONS: 47 OLR 229-236.

537.990

ATTY. GEN. OPINIONS: Authority of State Engineer in the prevention of wastage, 1952-54, p 146; issuance of certificate if use violated statutes, 1958-60, p 25.