

## Chapter 539

### Determination of Water Rights Initiated Before February 24, 1909

#### Chapter 539

##### NOTES OF DECISIONS

When applicant for a permit to construct water reservoirs filed its application and objectors filed protests with State Engineer, hearing was held, order rejecting application made, applicant served notice of appeal and filed transcript with circuit court and State Engineer certified exhibits and transcripts, the procedure was sufficient to give the court jurisdiction to reexamine the issues, subject to certain limitations. *Warner Valley Stock Co. v. Lynch*, (1959) 215 Or 523, 336 P2d 884.

FURTHER CITATIONS: *Appleton v. Ore. Iron & Steel Co.*, (1961) 229 Or 81, 358 P2d 260, 366 P2d 174.

LAW REVIEW CITATIONS: 36 OLR 212; 3 WLJ 296, 297, 318.

#### 539.010

##### NOTES OF DECISIONS

1. In general
2. Quantity
3. Time of appropriation
4. Notice

See also cases under ORS 537.110.

##### 1. In general

The statutes providing for the appropriating of surplus waters do not permit any infringement of any water right obtained before their enactment. *Pringle Falls Power Co. v. Patterson*, (1913) 65 Or 474, 484, 128 P 820, 132 P 527; *Re Willow Creek*, (1915) 74 Or 592, 602, 144 P 505, 146 P 475.

A vested right could be acquired in waters which seasonally overflow the land. *Eastern Ore. Land Co. v. Willow River L. & I. Co.*, (1912) 119 CCA 437, 201 Fed 203, 215.

Under the pre-existing law, notice of an appropriation of water was essential to the acquisition of water rights as against the claims of subsequent appropriators. *Re Silvies River*, (1925) 115 Or 27, 101, 237 P 322.

A homestead patent from the United States did not carry with it the common-law rights which attach to riparian proprietorship. *California Ore. Power Co. v. Beaver Portland Cement Co.*, (1935) 295 US 142, 55 S Ct 725, 79 L Ed 1356.

The use of waters of a spring conferred upon the user a vested right to the water. *Brosnan v. Harris*, (1901) 39 Or 148, 65 P 867, 87 Am St Rep 649, 54 LRA 628.

##### 2. Quantity

Every riparian owner, regardless of the date of settlement, is entitled to the quantity of water reasonably essential to his domestic use and for the watering of his stock, including sufficient supply for the proper irrigation of such garden produce as is essential to the proper sustenance of his family. *Hough v. Porter*, (1909) 51 Or 318, 95 P 732, 98 P 1083, 102 P 728.

Where a mill company had a right to divert water for

power purposes and did not need the water during certain summer months, and had never used it at that time, it had no right to the water during those months. *Re North Powder River*, (1915) 75 Or 83, 93, 144 P 485, 146 P 475.

Where the deliverable quantity was determined, an irrigation company could not lawfully contract to deliver to the water user a greater amount. *Re Willow Creek*, (1926) 119 Or 161, 236 P 487, 763, 237 P 682, 239 P 123.

The amount of water to which an appropriator was entitled for irrigation purposes was governed by the amount of water necessary for the land cultivated, not exceeding the amount awarded, and no more. *Broughton v. Stricklin*, (1934) 146 Or 259, 28 P2d 219, 30 P2d 332.

##### 3. Time of appropriation

If the State Engineer denies an application for extension of time, the appropriator may appeal to the circuit court where the matter must be in the form of a justiciable controversy between adverse parties. *Broughton's Estate v. Cent. Ore. Irr. Dist.*, (1940) 165 Or 435, 101 P2d 425, 108 P2d 276.

The State Engineer's order granting an extension of time within which to complete appropriation of water to a beneficial use was a "final order" from which an appeal would lie. *Id.*

Abandonment does not arise from nonuse while performing necessary work to perfect the right, if the work is commenced within the time required. *Appleton v. Ore. Iron & Steel Co.*, (1961) 229 Or 81, 358 P2d 260, 366 P2d 174.

Subsection (6) cures the defect for failure to file a map as required in 1906. *Id.*

Where delay was occasioned by injunction, the rights of the irrigation company were not affected. *Re Silvies River*, (1925) 115 Or 27, 31, 237 P 322.

The provisions of this section regarding the time within which the full amount of water appropriated should be applied to a beneficial use were not applicable to Carey Act land reclaimed under a contract with the state. *Re Deschutes River*, (1930) 134 Or 623, 286 P 563, 294 P 1049.

An extension of time to applicants to complete the appropriation of inchoate water rights was properly granted by the State Engineer. *Broughton's Estate v. Cent. Ore. Irr. Dist.*, (1940) 165 Or 435, 101 P2d 425, 108 P2d 276.

The findings of the State Engineer on an application for a time extension were presumed correct. *Id.*

Although application for an extension of time was unopposed, the State Engineer must examine the facts and grant or deny the application. *Id.*

The State Engineer did not act arbitrarily in allowing two years' extension in view of the large investment and litigation involved. *Id.*

Under the circumstances of the times, 1906 to 1910, the appropriator proceeded with reasonable diligence to do the work necessary to perfect his appropriation. *Appleton v. Ore. Iron & Steel Co.*, (1961) 229 Or 81, 358 P2d 260, 366 P2d 174.

##### 4. Notice

Subsection (6) applies only where there has been a mis-

take, and not where the notice expresses the intention. Re Umatilla River, (1918) 88 Or 376, 168 P 922, 172 P 97.

FURTHER CITATIONS: Laurance v. Brown, (1919) 94 Or 387, 185 P 761; Norwood v. Eastern Ore. Land Co., (1924) 112 Or 106, 117, 227 P 1111; Dill v. Killip, (1944) 174 Or 94, 147 P2d 896.

LAW REVIEW CITATIONS: 36 OLR 204, 205, 241; 2 WLJ 345.

## 539.020

## NOTES OF DECISIONS

The water code does not deny due process of law under U.S. Const., Am. 14, §1. Pacific Livestock Co. v. Lewis, (1915) 241 US 440, 36 S Ct 637, 60 L Ed 1084.

The court, in classifying lands according to nature of soil, and ascertaining the amount of water sufficient for various classes of land, may properly treat the matter of seepage and evaporation. Re Umatilla River, (1918) 88 Or 376, 168 P 922, 172 P 97.

Board of Control [now State Engineer] did not have jurisdiction to supervise the distribution of water before priorities had been determined. Wattles v. Baker Co., (1911) 59 Or 255, 117 P 417.

A suit brought in the circuit court to restrain an irrigation district from interfering with the natural flow of water in a stream was tantamount to a petition addressed directly to the water board [now State Engineer]. Oregon Lbr. Co. v. East Fork Irr. Dist., (1916) 80 Or 568, 572, 157 P 963.

FURTHER CITATIONS: Re Willow Creek, (1915) 74 Or 592, 613, 144 P 505, 146 P 475; Amalgamated Sugar Co. v. Hempe, (1915) 226 Fed 1012; Re Sucker Creek, (1917) 83 Or 228, 163 P 430; Byers v. We-Wa-Ne, (1917) 86 Or 617, 169 P 121; Re Chewaucan River, (1918) 89 Or 659, 669, 171 P 402, 175 P 421; Pacific Livestock Co. v. Balcombe, (1921) 101 Or 233, 199 P 587; Squaw Creek Irr. Dist. v. Mamero, (1923) 107 Or 291, 294, 214 P 889; Re Hood River, (1924) 114 Or 112, 126, 227 P 1065; Hutchinson v. Stricklin, (1934) 146 Or 294, 28 P2d 295; California-Ore. Power Co. v. Beaver Portland Cement Co., (1935) 295 US 142, 55 S Ct 725, 79 L Ed 1356; Dill v. Killip, (1944) 174 Or 94, 147 P2d 896; Beisdel v. Wood, (1947) 182 Or 66, 185 P2d 570; Gardner v. Dollina, (1955) 206 Or 1, 288 P2d 796.

ATTY. GEN. OPINIONS: Authority of State Engineer to regulate distribution of water when the rights of users have not been adjudicated, 1948-50, p 378.

LAW REVIEW CITATIONS: 5 OLR 91; 36 OLR 212; 3 WLJ 342.

## 539.030

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

## 539.040

## NOTES OF DECISIONS

Prescribing notice by registered mail is within the province of the legislature. Re Willow Creek, (1915) 74 Or 592, 620, 144 P 505, 146 P 475.

The notice is sent to the person's postoffice address. Id.

## 539.050

## NOTES OF DECISIONS

Claimant who filed statement was an adverse party to be served with notice of appeal from the decree of the circuit

court. Re Chewaucan River, (1918) 89 Or 659, 171 P 402, 175 P 421.

## 539.060

CASE CITATIONS: Re Althouse Creek, (1917) 85 Or 224, 162 P 1072; Re Chewaucan River, (1918) 89 Or 659, 670, 171 P 402, 175 P 421.

## 539.080

## NOTES OF DECISIONS

Before the 1947 amendment, in so far as this section exempted from payment claimants having permits issued under Acts of 1909, the law was not discriminatory. Pacific Livestock Co. v. Cochran, (1914) 73 Or 417, 430, 144 P 668.

Payment of fees by claimant under protest, in proceedings instituted in order that he might establish his claim and not suffer a forfeiture thereof, was not voluntary so as to preclude him from subsequently suing to recover the same on the ground that the fees exacted were illegal. Id.

FURTHER CITATIONS: Re Deschutes River, (1930) 134 Or 623, 286 P 563, 294 P 1049.

ATTY. GEN. OPINIONS: Exaction by State Engineer of fees in advance from the United States, 1926-28, p 135; right of state to tax exercise of right for use of water covered thereby, 1928-30, p 620; recording fees for filing notices of contest of claims with State Engineer relative to rights to waters of streams, 1936-38, p 117; fees for recordation of certificate of water rights, 1948-50, p 330.

## 539.100

## NOTES OF DECISIONS

Failure to contest a claim under this section did not preclude an aggrieved party from filing exceptions. Re North Powder River, (1915) 75 Or 83, 144 P 485, 146 P 475.

## 539.120

CASE CITATIONS: Masterson v. Pac. Livestock Co., (1933) 144 Or 396, 24 P2d 1046; Staub v. Jensen, (1947) 180 Or 682, 178 P2d 931; Gardner v. Dollina, (1955) 206 Or 1, 288 P2d 796.

## 539.130

## NOTES OF DECISIONS

The decision of the State Engineer, if not appealed from, becomes final. Re Walla Walla River, (1933) 141 Or 492, 502, 16 P2d 939.

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

FURTHER CITATIONS: Masterson v. Pac. Livestock Co., (1933) 144 Or 396, 24 P2d 1046; Warner Valley Stock Co. v. Lynch, (1959) 215 Or 523, 336 P2d 884.

## 539.140

## NOTES OF DECISIONS

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

FURTHER CITATIONS: Re Deschutes River, (1930) 134 Or 623, 286 P 563, 294 P 1049; Smyth v. Jenkins, (1956) 208 Or 92, 299 P2d 819.

ATTY. GEN. OPINIONS: Fees for recordation of certificate of water rights, 1948-50, p 330.

539.150

NOTES OF DECISIONS

The procedural provisions of the statute are valid. *Pacific Livestock Co. v. Lewis*, (1916) 241 US 440, 36 S Ct 637, 60 L Ed 1084.

The appellate court will consider only errors which are shown with reasonable certainty to have been prejudicial. *Re Silvies River*, (1925) 115 Or 27, 31, 237 P 322.

Where contestants have made no objections to a priority claim, as set out in the amended application of contestees, the court's decree allowing the prior claim cannot be questioned on appeal. *Re Owyhee River*, (1928) 124 Or 44, 259 P 292.

The circuit court is a court of general jurisdiction, in determining the right to use water of a stream. The proceedings are like those of a suit in equity except that any proceedings including the entry of the decree may be had in vacation with the same force and effect as in term time. *Abel v. Mack*, (1930) 131 Or 586, 283 P 8.

The function of an adjudication under the Water Code is primarily to allocate definite quantities of water on the basis of a prior or contemplated use. *California-Ore. Power Co. v. Beaver Portland Cement Co.*, (1934) 73 F2d 555.

The circuit court, whether in reviewing the State Engineer's determination or in making an original disposition of the suit, is not acting in an administrative capacity; its determination is *res judicata* as to all parties and issues properly before it. *Id.*

The enactment of ORS 19.026 (1) did not result in a repeal of this section by express provision or implication. *Appleton v. Ore. Iron & Steel Co.*, (1961) 229 Or 81, 358 P2d 260, 366 P2d 174.

Motion to dismiss appeal because of omission from the notice of appeal of names of a water users' association was filed too late. *Re Willow Creek*, (1925) 119 Or 155, 177, 236 P 487, 763, 237 P 682, 239 P 123.

Where no objection was made in the circuit court to showing of priority in amended application claiming water rights, application was to establish *prima facie* case of the truth of the priority claim. *Re Owyhee River*, (1928) 124 Or 44, 259 P2d 292.

After obtaining jurisdiction in a suit for application to construct water reservoirs, the circuit court was empowered to exercise the powers of a court of equity in reviewing the determination of the State Engineer, and could reexamine *de novo* the findings of the State Engineer to the extent there was no usurpation of the legislative function. *Warner Valley Stock Co. v. Lynch*, (1959) 215 Or 523, 336 P2d 884.

In exercising his equity powers, a trial judge was privileged to rely on those findings within the State Engineer's special competence. *Id.*

539.170

ATTY. GEN. OPINIONS: The State Engineer's order determining the area of land reclaimed and irrigated as conclusive until modified by a decree of the circuit court, 1940-42, p 8; duty of State Engineer to regulate distribution of water, 1948-50, p 378.

539.190

NOTES OF DECISIONS

One who has not appealed from the decree may not invoke the jurisdiction of the Supreme Court by way of

a new investigation to revise the decree. *Re Umatilla River*, (1918) 88 Or 376, 168 P 922, 172 P 97.

A decree entered in the circuit court on mandate from the Supreme Court after appeal is final except as to matters resubmitted under the mandate, subject only to the special statutory provisions authorizing the circuit court on certain applications to grant a rehearing. *Re Silvies River*, (1927) 122 Or 47, 257 P 693.

An application within six months after determination of an appeal is within time. *Oliver v. Jordan Valley Land & Cattle Co.*, (1931) 137 Or 243, 1 P2d 1097.

A water user is a "party interested" in respect of the right to apply for a rehearing, although not a party to a former appeal from a determination of the right to waters of the stream of which he is a user. *Id.*

Service of notice, as required by this section, upon the interested parties confers upon the court jurisdiction of the application for rehearing. *Id.*

All water users are entitled to notice of rehearing where allowance of the petition may affect their rights. *Id.*

One of the reasons for this section is to correct the descriptions of ditches or clerical errors occurring by an oversight or vagueness of expression. *Id.*

That the notices were not mailed "forthwith" was not an objection to a rehearing where the time consumed was because of a change in judges and other reasons and where after a rehearing was allowed the claimant acted promptly in sending out notices. *Id.*

539.200

NOTES OF DECISIONS

A 1929 decree adjudicating water rights in Warner Valley subordinated the rights of the lower owner to the rights of the upper owners, although the latter were not parties to the proceeding. *Warner Valley Stock Co. v. Lynch*, (1959) 215 Or 523, 336 P2d 884.

LAW REVIEW CITATIONS: 3 WLJ 343.

539.210

NOTES OF DECISIONS

All controversies on matters which existed before entry of a decree, and were or could have been litigated in an earlier determination are settled and not open to question by any of the parties to the litigation or their privies. *Adams v. Perry*, (1941) 168 Or 132, 119 P2d 581.

The determination of the State Engineer, as confirmed or modified by the court, is conclusive as to all prior and existing rights. *Bull v. Siegrist*, (1942) 169 Or 180, 126 P2d 832.

An adjudication under the water code awarding defendants certain water rights did not conclude plaintiff from asserting rights as adverse user where adverse use began prior to the code and plaintiff received no notice of pendency of adjudication, even if she had actual knowledge. *Staub v. Jensen*, (1947) 180 Or 682, 178 P2d 931.

Filing of an application for permit did not constitute an abandonment of plaintiff's rights by adverse user; the law presumes the contrary. *Id.*

FURTHER CITATIONS: *Ebell v. City of Baker*, (1931) 137 Or 427, 299 P 313.

ATTY. GEN. OPINIONS: Duty of State Engineer to regulate distribution of water, 1948-50, p 378.

LAW REVIEW CITATIONS: 3 WLJ 343.