

Chapter 540

Distribution of Water; Watermasters; Change in Use, Transfer or Abandonment of Water Rights

Chapter 540

NOTES OF DECISIONS

When a state agency exercising a power granted to it by the legislature undertakes to appropriate any of the waters of the state it must do so pursuant to the provisions of the water code, and in a controversy with a private owner of water the state is subject to the rules of law that govern the rights of the private litigant. *Withers v. Reed*, (1952) 194 Or 541, 243 P2d 283.

LAW REVIEW CITATIONS: 3 WLJ 318, 336.

540.010 to 540.150

LAW REVIEW CITATIONS: 3 WLJ 296, 297.

540.010

CASE CITATIONS: *Gardner v. Dollina*, (1955) 206 Or 1, 288 P2d 796.

540.020

CASE CITATIONS: *Wattles v. Baker County*, (1911) 59 Or 255, 260, 117 P 417; *Masterson v. Kennard*, (1932) 140 Or 288, 12 P2d 560; *State v. Stewart*, (1939) 163 Or 585, 96 P2d 220; *Gardner v. Dollina*, (1955) 206 Or 1, 288 P2d 796; *Smyth v. Jenkins*, (1956) 208 Or 92, 299 P2d 819.

ATTY. GEN. OPINIONS: Watermaster's status as preventing his owning irrigated land or receiving pecuniary aid from an irrigation company, 1930-32, p 504; appointment of a watermaster as discretionary with State Engineer, 1940-42, p 201.

540.030

NOTES OF DECISIONS

The State Engineer has no authority to enter into an agreement whereby he would accept a conveyance of a water right which water right is to be retransferred, if as a result of an investigation he concludes that an irrigation project would not be feasible. *Rowley v. City of Medford*, (1930) 132 Or 405, 285 P 1111.

The State Engineer properly granted an extension of time to applicants to complete the appropriation of inchoate water rights, where the only opposition was offered by an irrigation district which had hindered the applicants in the development of water rights. *Broughton's Estate v. Cent. Ore. Irr. Dist.*, (1940) 165 Or 435, 101 P2d 425, 108 P2d 276.

FURTHER CITATIONS: *Wattles v. Baker County*, (1911) 59 Or 255, 117 P 417.

ATTY. GEN. OPINIONS: Authority of State Engineer to make reasonable regulations to secure equal and fair distribution of water, 1922-24, p 672; appointment of water-

master as discretionary with State Engineer, and engineer and assistants as having same authority as watermasters, 1940-42, p 201; duty of State Engineer to regulate distribution of water, 1948-50, p 378.

540.040

NOTES OF DECISIONS

1. In general

A watermaster must preserve priorities and quantities of irrigation water, consistent with the highest duty of water, as applied to all concerned. *Nault v. Palmer*, (1920) 96 Or 538, 190 P 346.

For an erroneous construction of a decree determining water rights, a watermaster may not be held liable in damages. *Norwood v. E. Ore. Land Co.*, (1932) 139 Or 25, 5 P2d 1057, 7 P2d 996.

A decree declaring that a certain amount of water shall not be taken as granting that specific amount to any water user, but shall only be taken as a rule and guide for the watermaster in the distribution of a maximum amount to any water user, was improper in view of subsections (1) and (2). *Re Umatilla River*, (1918) 88 Or 376, 168 P 922, 172 P 97.

The watermaster and an appropriator changing the application or use of water pursuant to an ex parte void order of the State Water Board [now State Engineer] were joint tortfeasors. *Norwood v. E. Ore. Land Co.*, (1932) 139 Or 25, 5 P2d 1057, 7 P2d 996.

Although no statutory provision appeared to authorize the cancellation of a water right certificate and the issuance of a new one where its terms were affected by judicial interpretation of the decree upon which it was based, it was required that the watermaster in regulating the division and use of the waters involved, under the direction of the State Engineer, should be governed by the court's interpretation. *Tudor v. Jaca*, (1946) 178 Or 126, 165 P2d 770.

2. Subsection (3)

Before the 1953 amendment, an adjudication of water rights governed the action of the watermaster. Unless a party could show such a right, he was not protected in diverting or using water by an authorization by the watermaster. *Brosnan v. Boggs*, (1921) 101 Or 472, 198 P 890.

Before the 1953 amendment, the watermaster was an administrative officer whose duty it was to distribute water according to the decree adjudicating water rights. *Norwood v. E. Ore. Land Co.*, (1932) 139 Or 25, 5 P2d 1057, 7 P2d 996.

Suit for injunction against watermaster was not an appropriate means to quiet title to water rights. *Calderwood v. Young*, (1957) 212 Or 197, 315 P2d 561, 319 P2d 184.

3. Subsection (5)

An unauthorized use of water constitutes waste which the watermaster is authorized to prevent. *Squaw Creek Irr. Dist. v. Manero*, (1923) 107 Or 291, 214 P 889.

The watermaster is duty bound to prevent unreasonable

waste. *Bennett v. Salem & Guenther*, (1951) 192 Or 531, 235 P2d 772.

To prevent waste of water, the watermaster should have closed the headgates or arranged the apparatus which was in use. *Broughton v. Stricklin*, (1934) 146 Or 259, 28 P2d 219, 30 P2d 332.

FURTHER CITATIONS: *Krebs v. Perry*, (1930) 134 Or 290, 292 P 319, 293 P 432; *State v. Stewart*, (1939) 163 Or 585, 96 P2d 220.

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

LAW REVIEW CITATIONS: 46 OLR 245.

540.060

CASE CITATIONS: *State v. Chandler*, (1925) 113 Or 652, 654, 234 P 266.

540.080

NOTES OF DECISIONS

An "emergency" within the meaning of this section, entitling a watermaster to claim for services of assistants, was shown. *Brewster v. Crook County*, (1916) 81 Or 435, 439, 159 P 1031.

540.140

NOTES OF DECISIONS

The priorities established by this section were superseded by the adoption of the 1909 Water Act setting forth the doctrine of prior appropriation. *Phillips v. Gardner*, (1970) 2 Or App 423, 469 P2d 42.

LAW REVIEW CITATIONS: 3 WLJ 279.

540.210

LAW REVIEW CITATIONS: 3 WLJ 296, 297.

540.220

LAW REVIEW CITATIONS: 3 WLJ 296, 297.

540.230

LAW REVIEW CITATIONS: 3 WLJ 296, 297.

540.310 to 540.440

LAW REVIEW CITATIONS: 3 WLJ 296.

540.350

ATTY. GEN. OPINIONS: Action against irrigation district for flood damage, 1960-62, p 204.

540.420

CASE CITATIONS: *McPhee v. Kelsey*, (1903) 44 Or 193, 74 P 401, 75 P 713; *Carnes v. Dalton*, (1910) 56 Or 596, 110 P 170; *Ison v. Sturgill*, (1910) 57 Or 109, 109 P 579, 110 P 535.

540.510 to 540.550

LAW REVIEW CITATIONS: 3 WLJ 296, 297.

540.510

NOTES OF DECISIONS

Riparian rights were not affected by the adoption of this section. *Norwood v. E. Ore. Land Co.*, (1924) 112 Or 106, 227 P 1111.

Requiring water to remain appurtenant to the land upon which it is used is a valid exercise of the legislative powers to regulate the distribution of the waters of the state. *Broughton v. Stricklin*, (1934) 146 Or 259, 28 P2d 219, 30 P2d 332.

FURTHER CITATIONS: *Cabell v. Fed. Land Bank*, (1943) 173 Or 11, 144 P2d 297; *Dill v. Killip*, (1944) 174 Or 94, 147 P2d 896.

LAW REVIEW CITATIONS: 46 OLR 245; 3 WLJ 389.

540.520

NOTES OF DECISIONS

A water right may be transferred separately from the land to which it is appurtenant. *Haney v. Neace-Stark Co.*, (1923) 109 Or 93, 216 P 757, 219 P 190.

A water right appurtenant to land for irrigation is not inseparable from the land. *Re Deschutes R.*, (1930) 134 Or 623, 286 P 563, 294 P 1049.

This section should be given a reasonable construction. *Id.*

A change in the place of use of water by an appropriator cannot be made if the change injuriously affects others. *Hutchinson v. Stricklin*, (1934) 146 Or 285, 28 P2d 225.

Water made appurtenant to one tract cannot be lawfully used on a detached tract, even though owned by the same person, without the approval of the State Engineer. *Broughton v. Stricklin*, (1934) 146 Or 259, 28 P2d 219, 30 P2d 332.

A person making an appropriation has a vested right and can enjoin another having prior appropriation rights from changing his manner, method and period of appropriation without the consent of the State Engineer. *Oliver v. Skinner & Lodge*, (1951) 190 Or 423, 226 P2d 507.

Application to the State Engineer was a condition precedent under this statute to the exercise of the right to change the place of the use of water from that specified by the decree in a proceeding for the adjudication of water rights. *Broughton v. Stricklin*, (1934) 146 Or 259, 28 P2d 219, 30 P2d 332.

An arrangement between a milling company and upper irrigators whereby during the specified period the company would refrain from demanding water to which it was entitled, so as to make it available to the upper irrigators, would result in a change of place of use of the company's water within the meaning of this section. *Hutchinson v. Stricklin*, (1934) 146 Or 285, 28 P2d 225.

ATTY. GEN. OPINIONS: Authority to return filing fee for which no service has been performed and no expense incurred, 1938-40, p 503; application to store instead of using water, 1950-52, p 206.

540.530

NOTES OF DECISIONS

An application of an irrigation company for the privilege of transferring its rights to water stored for irrigation to the extent of the amount allowed per acre should be allowed. *Re Willow Creek*, (1915) 74 Or. 592, 144 P 505, 146 P 475.

540.610 to 540.650

LAW REVIEW CITATIONS: 3 WLJ 336-344.

540.610

NOTES OF DECISIONS

1. In general

Priority of right to water extends only to what is needed for the use for which the water has been appropriated. *Re Umatilla R.*, (1918) 88 Or 376, 168 P 922, 172 P 97; *Broughton v. Stricklin*, (1934) 146 Or 259, 277, 28 P2d 219, 30 P2d 332.

A decree of the circuit court in proceedings to determine the right to use water of the stream for irrigation purposes is *res adjudicata* upon the question of abandonment. *Abel v. Mack*, (1930) 131 Or 586, 283 P 8.

Beneficial use is the limit of the right to the use of water in Oregon. *Re Deschutes R.*, (1934) 148 Or 389, 36 P2d 585.

All wasting of water should be suppressed by the court in adjudicating water rights. *Id.*

It is the duty of a watermaster, or of those who administer a decree relating to water rights, to allocate the water so there will be no waste thereof. *Id.*

An appropriator of water shall not divert more water than is actually put to use, reasonable transmission losses excepted. *Bennett v. Salem*, (1951) 192 Or 531, 235 P2d 772.

Findings of the lower court that plaintiff failed to use the water were approved because plaintiff had no way of diverting water for his use even if it had been available, which he denied. *Day v. Hill*, (1965) 241 Or 507, 406 P2d 148.

2. Applicability to state

In the opening phrase of this section, the legislature declared that this statute was passed for the public good; therefore, the state is not exempt from the provisions of this section under the maxim, *nullum tempus*. *Withers v. Reed*, (1952) 194 Or 541, 243 P2d 283.

The state, as the owner of a water right, is referred to in the term "all rights" and is subject to the provisions of this section. *Id.*

Where land with a water right appurtenant was acquired by the state by default of the mortgagor upon a mortgage to the World War Veterans' State Aid Commission in 1932, the state lost the water right when it failed to use the water during its 13 years of ownership. *Id.*

The terms of this section constituted a condition of the right held by the state's predecessor in interest, and when the state succeeded to the ownership of the land with its appurtenant water right, it took it burdened with the obligation which this section imposes and subject to the loss of the right should the obligation not be fulfilled. *Id.*

3. Applicability to irrigation district

In determining whether an irrigation district is bound by this section, the maxim, *nullum tempus*, would not apply. *Withers v. Reed*, (1952) 194 Or 541, 243 P2d 283.

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

LAW REVIEW CITATIONS: 3 WLJ 382, 389.

540.710 to 540.750

LAW REVIEW CITATIONS: 3 WLJ 297.

540.710

CASE CITATIONS: *Calderwood v. Young*, (1957) 212 Or 197, 315 P2d 561, 319 P2d 184.

540.720

LAW REVIEW CITATIONS: 46 OLR 245.

540.740

NOTES OF DECISIONS

Taking of water under a void order of the State Water Board [now State Engineer] was a continuing trespass, which equity could enjoin under this section. *Norwood v. E. Ore. Land Co.*, (1924) 112 Or 106, 227 P 1111.

Suit for injunction against watermaster was not an appropriate means to quiet title to water rights. *Calderwood v. Young*, (1957) 212 Or 197, 315 P2d 561, 319 P2d 184.

540.990

LAW REVIEW CITATIONS: 40 OLR 37; 3 WLJ 297.