

## WATER LAWS

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.

### 539.005 to 539.040

\*LAW REVIEW CITATIONS: 28 WLR 285 (1992).

### 539.010

See also cases under ORS 537.110.

#### NOTES OF DECISIONS

##### 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 preexisting 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.

\*Extent of vested right is limited to amount actually in beneficial use prior to 1909 date. *State ex rel Cox v. Hibbard*, 31 Or App 269, 570 P2d 1190 (1977).

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

FURTHER CITATIONS: *Laurence 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

**\*NOTE: Repealed September 27, 1987; ORS 539.021 enacted in lieu.**

\*See annotations under ORS 539.021.

#### 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.