

## ANNOTATIONS

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 194.

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. Warmsprings 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. Warmsprings 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; \*4 EL 332 (1974).

### 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.

\*The exercise of water rights established prior to appropriation under this chapter as between the original grantors of the right and their grantees or as between their respective successors in interest is not unlawful. *Jewell v. Kroo*, 268 Or 103, 517 P2d 657, 518 P2d 1305 (1973).

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.

\*ATTY. GEN. OPINIONS: Storage rights to store water for later beneficial use are not subordinate to later priority direct use rights unless made so by explicit conditions imposed on storage right, (1989) Vol 46, p 290.

LAW REVIEW CITATIONS: 36 OLR 221, 241; 3 WLJ 342; \*16 EL 583, 592 (1986); \*21 EL 7 (1991).

### 537.140 to 537.240

\*ATTY. GEN. OPINIONS: Storage rights to store water for later beneficial use are not subordinate to later priority direct use rights unless made so by explicit conditions imposed on storage right, (1989) Vol 46, p 290.

### 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.