

WATER LAWS

tion of water right under this section had run. *Crandall v. Water Resources Dept.*, 290 Or 771, 626 P2d 877 (1981).

*Under this section, proponents of cancellation of water rights have burden to prove by reliable and substantial evidence that holder of water right failed to use appropriated water for period of five successive years. *Rencken v. Young*, 300 Or 352, 711 P2d 954 (1985).

*This section is a forfeiture statute and no intent to abandon water right is required. *Rencken v. Young*, 300 Or 352, 711 P2d 954 (1985).

*Where water is drawn from designated source, in designated amount and for beneficial use, unauthorized change in point of diversion does not constitute failure to use water. *Russell-Smith v. Water Resources Dept.*, 152 Or App 88, 952 P2d 104 (1998), Sup Ct **review denied**.

*Requirement for continuity of beneficial use applies for periods preceding perfection of water right. *Hale v. Water Resources Dept.*, 184 Or App 36, 55 P3d 497 (2002).

*Use of water on land other than land specified in water right certificate constitutes nonuse for purpose of forfeiture. *Hannigan v. Hinton*, 195 Or App 345, 97 P3d 1256 (2004).

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; *28 EL 919, 1137 (1998); *36 EL 1383 (2006).

540.621

*LAW REVIEW CITATIONS: 36 EL 1383 (2006).

540.631

NOTES OF DECISIONS

*Issuance of water right certificate for transferred water right and passage of 15-year period terminates ability to cancel new certificate based on abandonment of water right prior to transfer. *Kerivan v. Water Resources Commission*, 188 Or App 491, 72 P3d 659 (2003), Sup Ct **review denied**.

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; *27 EL 151 (1997).

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.

*Because this section provides adequate state remedy for protection of right to use water, trial court erred in awarding attorney fees for 42 U.S.C. 1983 claims under 42 U.S.C. 1988. *Saylor v. Water Resources Dept.*, 100 Or App 745, 788 P2d 494 (1990), Sup Ct **review denied**.

540.990

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

Chapter 541 Water Distributors; Water Releases; Conservation and Storage; Water Development Projects; Watershed Management and Enhancement

541.010

NOTES OF DECISIONS

A mutual ditch company organized for the sole purpose of transmitting and delivering to appropriators and owners of the water the quantity to which each is entitled is not a "general corporation," a "public service

corporation," or a "common carrier." *Eldredge v. Mill Ditch Co.*, (1919) 90 Or 590, 177 P 939.

A corporation organized for profit for the purpose of supplying water to all persons whose lands lie within reach of its ditch is the owner of the use of the water appropriated. A mutual ditch corporation organized for the purpose of carrying water to its stockholders is simply the agent of the appropriator to carry his water