

ANNOTATIONS

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.

*Irrigation district in whose name water right certificate is issued is holder of water use subject to transfer and may seek change of diversion point under certificate. *Fort Vannoy Irrigation District v. Water Resources Commission*, 214 Or App 88, 162 P3d 1066 (2007), **aff'd** 345 Or 56, 188 P3d 277 (2008).

*"Water use subject to transfer" refers to legal right established by water right certificate. *Fort Vannoy Irrigation District v. Water Resources Commission*, 345 Or 56, 188 P3d 277 (2008).

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.

*"Point of diversion" means place designated by permittee in application for water rights and in certificate. *Vandehey v. Wheeler*, 13 Or App 25, 507 P2d 831 (1973), Sup Ct **review denied**.

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.

*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.

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 595.

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.

*Water certificate holder who used water only to wet some of her land to assist with plowing did not "irrigate" her land and this was not sufficient "beneficial use" to prevent forfeiture of water right for nonuse. *Hennings v. Water Resources Dept.*, 50 Or App 121, 622 P2d 333 (1981).

*Where water rights certificate authorized use of 40 cubic feet of water per second for power generation purposes, but for more than five consecutive years flow in creek at mill's diversion point was only 22 cubic feet per second, there was evidence to support finding of Director of Water Resources Department that there had been forfeiture of 15.6 cubic feet per second. *Crandall v. Water Resources Department*, 290 Or 771, 626 P2d 877 (1981).

*Proof that during period of five successive years an average of only 22 cubic feet per second of water was available for use by flour mill having capacity of 24.4 cubic feet per second was not proof that mill never used 24.4 cubic feet per second, so there was no proof that five year period of nonuse necessary for cancella-