Chapter 538

1967 REPLACEMENT PART
(1969 reprint)

Withdrawal of Certain Waters from Appropriation; Special Municipal and County Water Rights

DIVERSION BY MORROW COUNTY

538.010 Waters diverted from Ditch Creek; rights of use and appropriation; certificate; time limitation

538.020 Acquisition of property necessary for storage and diversion

WITHDRAWALS FROM APPROPRIATION

538.110 Tumalo Creek, Deschutes County; diversion prohibited; excepted uses; existing rights

538.120 Silver Creek, Marion County, and Brushes Creek, Curry County, and tributaries; diversion prohibited

538.125 Certain appropriations vested notwithstanding ORS 538.120

538.130 Condemnation of lands for park; vested and riparian rights not affected

538.140 Diamond Lake and tributaries; diversion, interruption or appropriation of waters prohibited; excepted uses

538.150 Hackett Creek, Clackamas County, and tributaries; appropriation, condemnation and diversion prohibited; protection of fish

538.160 Hackett Creek; vested rights not affected; condemnation of land for park not prevented

538.170 Johnson Creek in Multnomah and Clackamas Counties; limitations on appropriation or diversion

538.180 Johnson Creek; existing rights; condemnation of land for park

538.190 Lake of the Woods and tributaries, Klamath County; diversion, interruption or appropriation of waters prohibited; excepted uses

538.200 Streams forming waterfalls near Columbia River Highway; withdrawal from appropriation or condemnation; diversion or interruption prohibited

538.210 Condemnation of lands for park not prevented; vested and riparian rights not affected; condemnation of lands or appropriation of waters for fish culture not prevented

538.220 Waters of Mill and Barr Creeks, Jackson County, withdrawn; exceptions

538.230 Vested water rights not affected; condemnation for park not prevented

538.251 Tributaries of Columbia River; limitations on appropriation or diversion

538.260 Existing rights not affected; appropriation and use for certain purposes permitted

538.270 Rogue River; withdrawal from appropriation; excepted water uses; tributaries

538.280 McNulty Creek; withdrawal from appropriation; exceptions

538.290 McNulty Creek; existing rights not affected

538.300 Milton Creek and tributaries; withdrawal from appropriation; exception; existing rights

MUNICIPAL WATER SUPPLY

538.410 Confirmation of water rights acquired prior to February 24, 1909, for municipal supply; rejection of applications injurious to municipal supply; statements of supply

538.420 Portland's right to waters of Bull Run and Little Sandy Rivers; vested rights, etc., not impaired; applicability of law

538.430 Medford and Eagle Point Irrigation District; right to waters of Big Butte Creek; generation, sale and distribution of electric energy by irrigation district

538.440 Bend; right to waters of Tumalo Creek

538.450 Pendleton; right to waters of Umatilla River

CROSS REFERENCES

Compliance with state water resources policy required, 536.300 to 536.400

Goose Lake compacts, cooperation in, 536.410

Ground water, use of regulated, 537.505 to 537.795

Klamath River Basin Compact, 542.620

Power projects, method of appropriation for, 536.410, 543.110

State parks and recreation programs, Ch. 390

Withdrawal of water by water resources board, 536.410

Withdrawal of water in critical ground water area, 537.735

Withdrawal of water involved in survey project, 542.040

538.110

Bend water supply, 538.440

538.270

Dams and structures in Rogue River, limitations on, 542.210

538.410

Diversion of water by cities for sewage disposal, 224.030

538.430

Irrigation districts, authority to provide electric energy, 261.310, 545.102

DIVERSION BY MORROW COUNTY

538.010 Waters diverted from Ditch Creek; rights of use and appropriation; certificate; time limitation. (1) The waters of Ditch Creek which were diverted to and became a part of the waters of Willow Creek, under the provisions of chapter 324, Oregon Laws 1939, are subject to the same rights of use and appropriation as the original waters of Willow Creek.

(2) The right of the county court of Morrow County to divert and store the waters of Ditch Creek, acquired under the certificate issued by the State Engineer licensing such diversion and storage, shall date from the time the application to divert and store such waters was filed. The waters shall be used for the purposes, in the manner and under the conditions set forth in the certificate, for such time as the use is for the public interest. If the waters are not used under the license for a five-year period, the license shall expire.

538.020 Acquisition of property necessary for storage and diversion. The county court of Morrow County may, for the purposes set forth in chapter 324, Oregon Laws 1939, acquire, in the name of the county and for the use of the public, by purchase, eminent domain proceedings, lease, grant, gift, bequest, devise or any other legal means, real and personal property, rights of way, easements and other property rights or privileges necessary to effect the storage and diversion of the waters referred to in that Act, and maintain and care for such property and rights in the manner provided by statute for the care and maintenance of other county property.

WITHDRAWALS FROM APPROPRIATION

538.110 Tumalo Creek, Deschutes County; diversion prohibited; excepted uses; existing rights. For the purpose of maintaining and perpetuating the recreational and scenic resources of Oregon, the waters of that portion of Tumalo Creek, in Deschutes County, situated above a point one-half mile above the intake of the Columbia Southern Canal in section 2, township 18 south, range 10 east, Willamette Meridian, in Deschutes County, shall not be diverted for any purposes whatsoever, except for municipal, domestic and stock uses. Nothing in this section shall be construed to impair any vested rights existing as of June 4, 1929, in the creek or its tributaries. This section shall not apply to the waters of the south fork of Tumalo Creek.

[Amended by 1959 c.223 §1]

538.120 Silver Creek, Marion County, and Brushes Creek, Curry County, and tributaries; diversion prohibited. The waters of the north and south forks of Silver Creek and of all tributaries thereof above the confluence of the north and south forks of Silver Creek, all in Marion County, also Brushes Creek and all its tributaries in township 33 south, range 14 west, Willamette Meridian, in Curry County, are withdrawn from appropriation or condemnation, and shall not be diverted or interrupted for any purpose whatsoever, except for use in state parks and except as set forth in ORS 538.130 and section 2 of chapter 480, Oregon Laws 1965.

[Amended by 1965 c.480 §1]

538.125 Certain appropriations vested notwithstanding ORS 538.120. All appropriations made under the provisions of section 2, chapter 480, Oregon Laws 1965, shall become vested when completed as provided by ORS 537.250. Any person having obtained a vested water right prior to April 19, 1967, under the provisions of section 2, chapter 480, Oregon Laws 1965, may apply to the State Engineer for an increase of his vested water rights, as provided by ORS chapter 537.

[1967 c.169 §1]

Note: 1967 c.480 §2 (repealed by 1967 c.169 §2) permitted limited appropriation of waters of the north fork of Silver Creek.

538.130 Condemnation of lands for park; vested and riparian rights not affected. ORS 538.120 shall not prevent the condemnation for public park purposes of any lands through which any of the streams flow, nor affect vested rights or the rights of riparian proprietors of such lands in or to the water of the creeks or streams.

538.140 Diamond Lake and tributaries; diversion, interruption or appropriation of waters prohibited; excepted uses. In order to maintain, increase and perpetuate game fish and game fish propagation within Oregon, the waters or use of the waters of Diamond Lake and its tributaries situated in Douglas County shall not be diverted, interrupted or appropriated for any purpose whatsoever, except for domestic use on contiguous and surrounding land.

538.150 Hackett Creek, Clackamas County, and tributaries; appropriation, condemnation and diversion prohibited; protection of fish. The waters of Hackett Creek, a tributary of the Sandy River located in Clackamas County, and of the tributaries of Hackett Creek, are withdrawn from appropriation or condemnation and shall not be diverted or interrupted for any purpose whatsoever, except for protecting fish life therein by the State Game Commission.

538.160 Hackett Creek; vested rights not affected; condemnation of land for park not prevented. ORS 538.150 shall not affect vested water rights or prevent condemnation for public park purposes of lands through which Hackett Creek or its tributaries flow.

538.170 Johnson Creek in Multnomah and Clackamas Counties; limitations on appropriation or diversion. (1) Except as provided in subsection (2) of this section, the waters of Johnson Creek, a tributary of the Willamette River and located in Multnomah and Clackamas Counties and all tributaries thereof, except flows of Crystal Springs Creek and its tributaries in excess of 10 cubic feet per second measured at the mouth of Crystal Springs Creek, are withdrawn from appropriation or condemnation, and shall not be diverted or interrupted for any purpose whatsoever, except for the purpose of protecting fish life therein by the State Game Commission.

(2) The tributaries withdrawn from appropriation and condemnation, but not the main channel, of Johnson Creek which are within Multnomah County are open to appropriation and storage from December 1 to June 1 of each year. Water stored during this period may be used at any time.
[Amended by 1953 c.221 §2; 1965 c.249 §1]

538.180 Johnson Creek; existing rights; condemnation of land for park. ORS 538.170 shall not affect rights to the use of Johnson Creek recognized or acquired pursuant to section 2, chapter 273, Oregon Laws 1935; nor shall anything contained in ORS 538.170 prevent condemnation for public park purposes of lands through which Johnson Creek flows.

538.190 Lake of the Woods and tributaries, Klamath County; diversion, interruption or appropriation of waters prohibited; excepted uses. In order to maintain, increase and perpetuate game fish and game fish propagation within Oregon, the waters or use of the waters of Lake of the Woods and its tributaries, situated in Klamath County, not already appropriated, shall not be diverted, interrupted or appropriated for any purpose whatsoever, except for domestic use on contiguous and surrounding land.

538.200 Streams forming waterfalls near Columbia River Highway; withdrawal from appropriation or condemnation; diversion or interruption prohibited. The following streams and waters thereof forming waterfalls in view of, or near, the Columbia River Highway, from Sandy River to Hood River, the first 13 of which are in Multnomah County and the remainder of which are in Hood River County, are withdrawn from appropriation or condemnation, and shall not be diverted or interrupted for any purpose whatsoever, except as mentioned in ORS 538.210, to-wit:

(1) Latourell Creek—forming Latourell Falls.

(2) Young Creek — forming Shepperd Dell Falls.

(3) Bridal Veil Creek — forming Bridal Veil Falls.

(4) Coopey Falls Creek.

(5) Mist Falls Creek.

(6) Wahkeena Creek — forming Wahkeena Falls, formerly known as Gordon Falls.

(7) Multnomah Creek — forming Multnomah Falls.

(8) Oneonta Creek — forming Oneonta Falls and Gorge.

(9) Horse Tail Creek — forming Horse Tail Falls.

(10) McCord Creek, formerly known as Kelly Creek — forming Elowah Falls.

(11) Moffatt Creek — forming Wahe Falls.

(12) Tanner Creek—forming Wahclella Falls.

(13) Eagle Creek — forming Metlako Falls.

(14) Ruckle Creek, formerly known as Deadman's Creek.

(15) Herman Creek.

(16) Summit Creek — forming Camp Benson Falls.

(17) Lindsey Creek — forming Lindsey Falls.

(18) Spring Creek.

(19) Warren Creek.

(20) Cabin Creek.

(21) Starvation Creek — forming Starvation Falls.

(22) Viento Creek.

(23) Phelps Creek, except those creeks which are tributary to Phelps Creek and which arise in the north one-half of section 5, township 2 north, range 10 east of the Willamette Meridian, subject to prior rights.
[Amended by 1953 c.48 §2]

538.210 Condemnation of lands for park not prevented; vested and riparian rights not affected; condemnation of lands or appropriation of waters for fish culture not prevented. ORS 538.200 shall not prevent the condemnation for public park purposes of any lands through which any of the streams flow; nor affect vested rights or the rights of riparian proprietors of such lands in or to the waters of the creeks or streams; nor prevent the condemnation of any lands through which any of the streams flow, for the purpose of establishing, maintaining and operating thereon salmon fish culture work, nor prevent the Fish Commission of Oregon from appropriating any waters for fish culture work; provided, that no waters shall be taken from above the falls in the streams mentioned in ORS 538.200.

538.220 Waters of Mill and Barr Creeks, Jackson County, withdrawn; exceptions. The waters described as follows are withdrawn from appropriation or condemnation, and shall not be diverted or interrupted for any purpose whatsoever, except for domestic purposes and protecting fish life therein by the State Game Commission:

(1) The waters of Mill Creek, in Jackson County, beginning in section 22, township 31 south, range 4 east, Willamette Meridian, running thence southwesterly through township 31 south, range 3 east, Willamette Meridian, and township 32 south, range 3 east, Willamette Meridian, to a junction with the Rogue River in section 32, township 32 south, range 3 east, Willamette Meridian, together with the tributaries of said Mill Creek; and

(2) Barr Creek, in Jackson County, beginning in section 1, township 32 south, range 3 east, Willamette Meridian, and in section 6 and section 7, township 32 south, range 4 east, Willamette Meridian, running thence in a general southwesterly direction through township 32 south, range 3 east, Willamette Meridian, to a junction with the Rogue River in section 32, township 3 east, Willamette Meridian, together with the tributaries of said Barr Creek.
[Amended by 1959 c.104 §1]

538.230 Vested water rights not affected; condemnation for park not prevented. ORS 538.220 shall not affect vested water rights or prevent condemnation for public park purposes of lands through which Mill and Barr Creeks or their tributaries flow.

538.240 [Repealed by 1963 c.95 §1]

538.250 [Repealed by 1953 c.222 §3]

538.251 Tributaries of Columbia River; limitations on appropriation or diversion. Except as provided in paragraphs (a) to (e) of subsection (4) of this section, the following waters, all being tributaries of the Columbia River, are withdrawn from appropriation and shall not be diverted or interrupted for any purpose, except for protecting fish life therein by the fish commission or the game commission of Oregon:

(1) Clatskanie River and its tributaries in Columbia County.

(2) Klaskanine River and its tributaries in Clatsop County.

(3) Lewis and Clark River in Clatsop County.

(4) Sandy River and its tributaries in Multnomah and Clackamas Counties, except:

(a) Beaver Creek and its tributaries.

(b) Buck Creek and its tributaries.

(c) The tributary of the Sandy River in Multnomah County which empties into the Sandy River near the north quarter corner, section 10, township 1 south, range 4 east, Willamette Meridian, and its tributaries, and is locally known as Big Creek.

(d) All tributaries, but not the main channel, of the Sandy River within Multnomah County and below the point where the stream described in paragraph (c) of this subsection empties into the Sandy River are open for appropriation and storage from December 1 to June 1 of each year. Water stored during this period may be used at any time.

(e) Trout Creek in Multnomah County and its tributaries.

(5) Scappoose Creek in Columbia County.

(6) Tillasqua Creek in Clatsop County.
[1953 c.222 §2; 1961 c.366 §1]

538.260 Existing rights not affected; appropriation and use for certain purposes permitted. ORS 538.251 shall not affect any

existing rights to appropriate or use water, or any renewals or extensions thereof, or prevent appropriation and use of such water for domestic, stock, municipal, public park or recreational purposes.

538.270 Rogue River; withdrawal from appropriation; excepted water uses; tributaries. Subject to water rights existing on May 26, 1967, the waters flowing in the main channel of the Rogue River from its intersection with the south line of section 27, township 33 south, range 1 east of the Willamette Meridian in Jackson County, to its confluence with the Pacific Ocean, are withdrawn from appropriation; except that this section shall not prevent the appropriation and use of such waters for domestic, stock, irrigation, municipal, fish, wildlife and recreation purposes, nor prevent the appropriation, diversion and use of the waters of any stream tributary to the river.
[Amended by 1959 c.205 §1; 1967 c.310 §1]

538.280 McNulty Creek; withdrawal from appropriation; exceptions. The waters of McNulty Creek, a tributary of Scappoose Bay, in Columbia County, are withdrawn from appropriation except for storage during the period beginning November 1 and ending on March 31 of each year in reservoirs not constructed in the channel of McNulty Creek below a line one mile west of the range line between ranges 1 and 2 west, Willamette Meridian.
[Amended by 1955 c.82 §1]

538.290 McNulty Creek; existing rights not affected. ORS 538.280 shall not affect any existing rights to the waters of McNulty Creek that have been acquired or are in the process of being acquired under the water laws of this state.
[Amended by 1955 c.82 §2]

538.300 Milton Creek and tributaries; withdrawal from appropriation; exception; existing rights. The unappropriated waters of Milton Creek and its tributaries, in Columbia County, are withdrawn from appropriation except for domestic use through the year and storage during the period beginning November 1 and ending April 30 of each year. Nothing contained in this section shall impair the existing rights of any person to the use of such waters.

MUNICIPAL WATER SUPPLY

538.410 Confirmation of water rights acquired prior to February 24, 1909, for municipal supply; rejection of applications injurious to municipal supply; statements of supply. All rights to the waters of the lakes, rivers and streams of this state acquired before February 24, 1909, for the purposes of municipal water supply are confirmed, and no rights acquired under the Water Rights Act (as defined in ORS 537.010) shall impair the rights of any municipal corporation to waters taken before February 24, 1909. The State Engineer shall reject, or grant subject to municipal use, all applications where, in his judgment, the appropriation of the waters applied for impairs a municipal water supply. Municipal corporations of the state, on request of the State Engineer, shall furnish him with a statement of the amount and source of the municipal water supply, with probable increase or extension of the same.

538.420 Portland's right to waters of Bull Run and Little Sandy Rivers; vested rights, etc., not impaired; applicability of law. (1) Exclusive right to the use of waters of Bull Run and Little Sandy Rivers is granted to the City of Portland. However, the Water Rights Act (as defined in ORS 537.010) shall not impair the rights of any person who, on February 24, 1909, had any vested right to or valid appropriation or bona fide notice of appropriation of the waters of either Bull Run River or Little Sandy River, under laws theretofore in effect or under any valid contract or deed of conveyance theretofore made with or by the City of Portland.

(2) ORS 541.010 to 541.080 shall not apply to Bull Run Creek or River.

538.430 Medford and Eagle Point Irrigation District; right to waters of Big Butte Creek; generation, sale and distribution of electric energy by irrigation district. (1) Subject to water rights existing on May 29, 1925, the City of Medford, in Jackson County, is granted the exclusive right to use for municipal purposes all the waters of Big Butte Creek, a tributary of Rogue River situated in Jackson County, and of the springs at the head which form the creek, and of its tributaries. The City of Medford, any of its officers, and others on its behalf may appropriate all the waters for these

purposes and an application therefor may be made for the benefit of the city, either by it in its own name, or by any of its officers or by any other person on its behalf. No person shall appropriate or be granted a permit to use any of the waters except as provided in this section, and for the use and benefit of the city. But the City of Medford may, under this grant, divert such waters from their watershed and convey them to the city and elsewhere for use by it for municipal purposes, either within or without the city limits. All of such waters are withdrawn from future appropriation, except for such use and benefit of the City of Medford; provided however, that the Eagle Point Irrigation District may establish and use an additional point of diversion below the diversion point in use on April 1, 1953, under its permit number 6396 which authorizes the appropriation of not to exceed 100 cubic feet per second.

(2) Subject to rights existing on July 21, 1953, to the use of the waters of Big Butte Creek, and of the springs at the head which form the creek, and of its tributaries, including the rights granted in subsection (1) of this section to the City of Medford to the use of such waters and the right of future appropriation of such waters, the Eagle Point Irrigation District is granted the right to appropriate and use up to and including 100 cubic feet per second of the waters of Big Butte Creek, using the diversion site of the Eagle Point Irrigation District existing on April 1, 1953, for the purpose of generating electric energy; provided, however, that not less than 10 cubic feet per second of said waters shall be permitted to pass said diversion point and remain in the channel of said stream at all times other than times when said waters are diverted for irrigation purposes. The Eagle Point Irrigation District may:

(a) Enter into such contracts and perform such other acts as it deems necessary or desirable for the generation of electric energy and the construction and maintenance of facilities for the generation of electric energy.

(b) Enter into such arrangements as it deems proper for the use, sale or distribution of the electric energy which is generated.

(3) In performing any of the acts under subsection (2) of this section, the Eagle Point Irrigation District shall not be deemed a public utility as defined in ORS 757.005. [Amended by 1953 c.572 §2; 1963 c.231 §1]

538.440 Bend; right to waters of Tumalo Creek. Whenever the City of Bend, Deschutes County, shall have acquired the right to appropriate or use from the Deschutes River at least 11 cubic feet per second of water for delivery into the feed canal belonging to Deschutes County Municipal Improvement District, which feed canal is now supplied from the Deschutes River at a diversion located in or near Bend, then the city may take from the direct flow of Tumalo Creek, in Deschutes County, not to exceed 11 cubic feet per second of water for providing a supply of water for domestic and municipal purposes; provided, however, that should the waters of the Deschutes River so acquired for the purpose of the exchange be appurtenant to lands calling for a different point of diversion, the place of use and point of diversion of the water may be changed to meet the requirements of this section.

538.450 Pendleton; right to waters of Umatilla River. (1) Subject to water rights existing on March 8, 1941, there is granted to the City of Pendleton, Umatilla County, and its water commission, the exclusive right to use for public or municipal purposes or use, or for the general use and benefit of people within or without the city, all waters of the north fork of the Umatilla River, the springs at the head which form the stream, and its tributaries to the confluence of the north fork with the main stream of the Umatilla River in the northwest quarter of section 22, township 3 north of range 37 east of the Willamette Meridian, which north fork is a tributary of the Umatilla River situated in Umatilla County.

(2) The City of Pendleton, its water commission, any of the city's agents, agencies and officers, and others on its behalf, may appropriate all such waters for these purposes and uses, and application therefor may be made for the benefit and use of the city, as above set forth, either by the city in its own name, or by any of its agents, agencies or officers or by any other persons on its behalf.

(3) No person shall appropriate or be granted a permit to the use of any of such waters, except as provided in this section. But the City of Pendleton may, under this

grant, divert such waters from their watershed and convey them to the city and elsewhere for use by it for public or municipal purposes or use or for the general use and benefit of people within or without the city. All of such waters are withdrawn from future appropriation, except for use and benefit of the city as set forth in this section.

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Robert W. Lundy, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law.

Done at Salem, Oregon,
on December 1, 1967.

Robert W. Lundy
Legislative Counsel