Chapter 539

1971 REPLACEMENT PART

Determination of Water Rights Initiated before February 24, 1909

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CROSS REFERENCES

Administrative procedures governing state agencies, 183.310 to 183.500

Conformance to state water resources policy required, 536.300 to 536.400

Fills in waters of state for dams or diversions under chapter not subject to permit requirement, 541.695

Suits to determine water rights, under 1891 and 1905 Acts, 541.080, 541.310, 541.320

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539.010 Protection of water rights vested or initiated prior to February 24, 1909. (1) Actual application of water to beneficial use prior to February 24, 1909, by or under authority of any riparian proprietor or his predecessors in interest, shall be deemed to create in the riparian proprietor a vested right to the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years.

(2) Where any riparian proprietor, or any person under authority of any riparian proprietor or his predecessor in interest, was, on February 24, 1909, engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in the riparian proprietor; provided, that the works were completed and the water devoted to a beneficial use within a reasonable time after February 24, 1909. The State Engineer, in the manner provided in subsection (5) of this section, may determine the time within which the water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the State Engineer.

(3) Nothing contained in the Water Rights Act (as defined in ORS 537.010) shall affect relative priorities to the use of water among parties to any decree of the courts rendered in causes determined or pending prior to February 24, 1909.

(4) The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act (as defined in ORS 537.010) where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and in compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter.

(5) The State Engineer shall, for good cause shown upon the application of any appropriator or user of water under an appropriation of water made prior to February 24, 1909, or in the cases mentioned in subsections (2) and (4) of this section, where actual construction work was commenced prior to that time or within the time provided in law then existing, prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use. In determining said time he shall grant a reasonable time after the construction of the works or canal or ditch used for the diversion of the water, and in doing so, he shall take into consideration the cost of the appropriation and application of the water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. For good cause shown the State Engineer may extend the time.

(6) Where appropriations of water attempted before February 24, 1909, were undertaken in good faith, and the work of construction or improvement thereunder was in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or voided in proceedings under this chapter because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording or publication thereof.

(7) All rights granted or declared by the Water Rights Act (as defined in ORS 537.010) shall be adjudicated and determined in the manner and by the tribunals provided therein. The Water Rights Act shall not be held to bestow upon any person any riparian rights where no such rights existed prior to February 24, 1909.

539.020 State Engineer to determine rights on petition of water users; transfer of suit to engineer. Upon a petition to the State Engineer signed by one or more water users upon any stream, requesting determination of the relative rights of the various claimants to the waters of that stream, the State Engineer, if upon investigation he finds the facts and conditions justify it, shall make a determination of the rights, fixing a time for taking testimony and making such examination as will enable him to determine the rights of the various claimants. In case suit is brought in the circuit court for determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the State Engineer for determination as provided in this chapter.

539.030 Notice of investigation of stream. (1) The State Engineer shall prepare a notice, setting forth the date when he or his assistant will begin such investigation as may be necessary for a proper determination of the relative rights of the various claimants to the use of the waters of the stream. The notice shall be published in two issues of one or more newspapers having general circulation in the counties in which the stream is situated, the last publication of the notice to be at least 10 days prior to the date set in the notice for the beginning of the investigation by the State Engineer or his assistant. Such notice shall include instructions that each person claiming the right to the use of any waters of the stream shall file with the State Engineer within 15 days after the date set in the notice for the beginning of the investigation a written notification of intention to file a claim, containing the name and mailing address of the claimant, the character of use and location of the right to be claimed, the date of initiation of the right to be claimed and whether the right to be claimed is described in a permit or water right certificate issued by the State Engineer under ORS 537.210 or 537.250.

(2) The State Engineer shall also send by registered mail to each person owning or in possession of lands bordering on and having access to the stream or its tributaries, in so far as they can reasonably be ascertained, a notice similar to that provided in subsection (1) of this section, including similar instructions.

[Amended by 1955 c.669 §1]

539.040 Notice of hearing by engineer. (1) As soon as practicable after the examination and measurements are completed, as described in ORS 539.120, the State Engineer shall prepare a notice setting forth a place and time certain when he or his authorized assistant shall begin taking testimony as to the rights of the various claimants to the use of the waters of the stream or its tributaries. The notice shall be published in two issues of one or more newspapers having general circulation in the counties in which the stream is situated, the last publication of the notice to be at least 30 days prior to the beginning of taking testimony by the engineer or his authorized assistant.

(2) The State Engineer shall also send by registered mail to each claimant or owner who filed with the State Engineer as provided in ORS 539.030 a notification of intention to file a claim, a notice similar to that provided in subsection (1) of this section setting forth the date when the engineer or his authorized assistant will take testimony as to the rights to the use of the water of the stream. The notice must be mailed at least 30 days prior to the date set therein for taking testimony.

[Amended by 1955 c.669 §2]

539.050 Statement of claimant; contents. The State Engineer shall inclose with the notice sent as provided in subsection (2) of ORS 539.040, and shall make available upon request to any other claimant or owner, a blank form on which the claimant or owner shall present in writing all the particulars necessary for determination of his right to the use of the waters of the stream to which he lays claim, the statement to include the following:

(1) The name and post-office address of the claimant.

(2) The nature of the right or use on which the claim is based.

(3) The time of initiation of the right or commencement of the use, and if distributing works are required, the dates of beginning and completion of construction.

(4) The dates of beginning and completion of enlargements.

(5) The dimensions of the ditch as originally constructed and as enlarged.

(6) The date when the water was first used for irrigation or other beneficial purposes, and, if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the amount and general location of the land the ditch is intended to irrigate.

(7) The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right.

[Amended by 1955 c.669 §3]

539.060 Verification of statement; administration of oath. Each claimant or owner shall be required to certify to his statements under oath. The State Engineer or his authorized assistant may administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for the statement.

539.070 Hearing by engineer; adjournments. Upon the date named in the notice for taking testimony, the State Engineer or

his authorized assistant shall begin taking testimony and shall continue until completed. But the engineer may adjourn the taking of testimony from time to time and from place to place, to suit the convenience of those interested.

539.080 Fees; disposition. (1) At the time of submission of proof of appropriation, or at the time of taking testimony for determination of rights to water, the State Engineer shall collect from each claimant or owner a fee of $1.50 for recording the water rights certificate, when issued, in the office of the county clerk, together with an additional fee, as follows:

(a) For irrigation use, 75 cents for each acre of irrigated lands up to 100 acres; 50 cents for each acre in excess of 100 acres up to 500 acres; 35 cents for each acre in excess of 500 acres up to 1,000 acres; and 25 cents for each acre in excess of 1,000 acres; the minimum fee for any claimant or owner to be $15.

(b) For power use, 75 cents for each theoretical horsepower up to 100 horsepower; 50 cents for each horsepower in excess of 100 up to 500 horsepower; 35 cents for each horsepower in excess of 500 horsepower up to 1,000 horsepower; and 25 cents for each horsepower in excess of 1,000 horsepower, as set forth in such proof; the minimum fee for any claimant or owner to be $15.

(c) For mining or any other use, $10 for the first second-foot or fraction thereof, and $2 for each additional second-foot.

(2) Where the proof shows that the water right was initiated by making application for a permit to the State Engineer under the provisions of ORS chapter 537, the claimant or owner in such cases shall be given credit for the money paid as examination and recording fees, and fees paid in recording the water right certificate with the county clerk.

(3) All the fees collected by the State Engineer shall be paid by him into the General Fund of the State Treasury, except those fees due or to be paid to the county clerk.

[Amended by 1971 c.621 §37]

539.090 Notice to claimants of right to inspect evidence, and of place of court hearing. Upon the completion of the taking of testimony by the State Engineer, he shall at once give notice by registered mail to the various claimants that all of the evidence will be open to inspection of the various claimants or owners. The notice shall specify the times when and the places where the evidence will be open to inspection, and the engineer shall keep the evidence open for inspection at the specified times and places. The earliest time for inspection shall be at least 10 days after mailing the notice; and, in the aggregate, the hours during which the engineer is to keep the evidence open to inspection shall at least equal 80 hours, counting only the hours between 8 a.m. and 5 p.m. during any day of the week except Sunday. The engineer shall also state in the notice the county in which the determination will be heard by the circuit court; provided, that the cause shall be heard in the county in which the stream or some part thereof is situated.

[Amended by 1955 c.191 §1]

539.100 Contest of claims submitted to engineer; notice by contestant; service on contestee. Should any person owning any irrigation works, or claiming any interest in the stream involved in the determination, desire to contest any of the rights of the persons who have submitted their evidence to the State Engineer as provided in ORS 539.020 to 539.090, such person shall, within 15 days after the expiration of the period fixed in the notice for public inspection, or within such extension of the period, not exceeding 20 days, as the State Engineer may allow, notify the State Engineer in writing, stating with reasonable certainty the grounds of the proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney. Upon the filing of a statement of contest, service thereof shall be made by the contestant upon the contestee by mailing a copy by registered mail addressed to the contestee or to his authorized agent or attorney at his post-office address as stated in his statement and proof of claim. Proof of service shall be made and filed with the State Engineer by the contestant as soon as possible after serving the copy of statement of contest.

539.110 Hearing of contest; notice of; procedure. The State Engineer shall fix the time and a convenient place for hearing the contest, and shall notify the contestant and the person whose rights are contested to appear before him or his authorized assistant at the designated time and place. The date of hearing shall not be less than 30 nor more than 60 days from the date the

notice is served on the parties. The notice may be served either personally or by registered mail addressed to the parties at their post-office addresses as stated in the statement and proof of claimant. The State Engineer may adjourn the hearing from time to time upon reasonable notice to all the parties interested; may issue subpenas and compel the attendance of witnesses to testify, which subpenas shall be served in the same manner as subpenas issued out of the circuit court; may compel the witnesses so subpenaed to testify and give evidence in the matter; and may order the taking of depositions and issue commissions therefor in the same manner as depositions are taken in the circuit court. The witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest. The burden of establishing his claim shall be upon the claimant whose claim is contested. The evidence may be taken by a duly appointed reporter.

539.120 Examination by engineer of stream and diversions, in contest; record; map. The State Engineer, or some qualified assistant, shall proceed at the time specified in the notice to the parties on the stream given as provided in ORS 539.030, to make an examination of the stream and the works diverting water therefrom used in connection with water rights initiated prior to February 24, 1909, for which a notification of intention to file a claim was filed with the State Engineer as provided in ORS 539.030. The examination shall include the measurement of the discharge of the stream and of the capacity of the various diversion and distribution works, and an examination and approximate measurement of the lands irrigated from the various diversion and distribution works. The State Engineer shall take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested. The observations and measurements shall be reduced to writing and made a matter of record in his office. The State Engineer shall make or have made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of the stream, the location of each diversion point and each ditch, canal, pipeline or other means of conveying the water to the place of use, and the location of lands irrigated, or in connection with which the water is otherwise used, within each legal subdivision.

[Amended by 1955 c.669 §4]

539.130 Findings of fact and determination of engineer; certification of proceedings; filing in court; fixing time for hearing by court; notice; force of engineer's determination. (1) As soon as practicable after the compilation of the data the State Engineer shall make and cause to be entered of record in his office findings of fact and an order of determination determining and establishing the several rights to the waters of the stream. The original evidence gathered by the engineer, and certified copies of the observations and measurements and maps of record in his office, in connection with the determination, as provided for by ORS 539.120, together with a copy of his order of determination and findings of fact as they appear of record in his office, shall be certified to by him and filed with the clerk of the circuit court wherein the determination is to be heard. A certified copy of the order of determination and findings shall be filed with the county clerk of every other county in which the stream or any portion of a tributary is situated.

(2) Upon the filing of the evidence and order with the court the State Engineer shall procure an order from the court, or any judge thereof, fixing the time at which the determination shall be heard in the court, which hearing shall be at least 40 days subsequent to the date of the order. The clerk of the court shall, upon the making of the order, forthwith forward a certified copy to the State Engineer by registered mail.

(3) The State Engineer shall immediately upon receipt thereof notify by registered mail each claimant or owner who has appeared in the proceeding of the time and place for hearing. Service of the notice shall be deemed complete upon depositing it in the post office as registered mail, addressed to the claimant or owner at his post-office address, as set forth in his proof theretofore filed in the proceeding. Proof of service shall be made and filed with the circuit court by the State Engineer as soon as possible after mailing the notices.

(4) The determination of the State Engineer shall be in full force and effect from the date of its entry in his records, unless and until its operation shall be stayed by a stay bond as provided by ORS 539.180.

539.140 Water right certificates. Upon the final determination of the rights to the waters of any stream, the State Engineer shall issue to each person represented in the determination a certificate setting forth the name and post-office address of the owner of the right; the priority of the date, extent and purpose of the right, and if the water is for irrigation purposes, a description of the legal subdivisions of land to which the water is appurtenant. The certificate shall be transmitted by the engineer, by registered mail, to the county clerk of the county in which the right is located. The county clerk upon receipt of the recording fee of $1.50, collected as provided in ORS 539.080, shall record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificates to the owners.
[Amended by 1971 c.621 §38]

539.150 Court proceedings; equity practice; proceedings in vacation; exceptions to engineer's findings and order; service; hearing; remand for further testimony; decree; appeal. (1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by his attorney, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or his attorney upon each such adverse party in person, or upon his attorney if he has appeared by attorney, or upon his agent. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to him by registered mail, addressed to his place of residence, as set forth in his proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a decree affirming the determination of the State Engineer. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the State Engineer may appear on behalf of the state, either in person or by the Attorney General. The court may, if necessary, remand the case for further testimony, to be taken by the State Engineer or by a referee appointed by the court for that purpose, as in a suit in equity. Upon completion of the testimony and its report to the State Engineer, he may be required to make a further determination.

(4) After final hearing the court shall enter a decree affirming or modifying the order of the State Engineer, and may assess such costs as it may deem just. Appeals may be taken to the Supreme Court from the decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the decree.

539.160 Transmittal of copy of decree to engineer; instructions to watermasters. The clerk of the circuit court, immediately upon the entry of any decree by the circuit court or judge thereof, as provided by ORS 539.150, shall transmit a certified copy of the decree to the State Engineer, who shall immediately enter the same upon the records of his office and shall forthwith issue to the watermasters instructions in compliance with the decree, and in execution thereof.

539.170 Division of water pending hearing. While the hearing of the order of the State Engineer is pending in the circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the engineer, the division of water from the stream involved in the appeal shall be made in accordance with the order of the State Engineer.

539.180 Bond to stay operation of engineer's determination; notice to watermaster. At any time after the determination of the State Engineer has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond in the circuit court wherein the determination is pending, in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced. Immedi-

ately upon the filing and approval of the bond, the clerk of the circuit court shall transmit to the State Engineer a certified copy of the bond, which shall be recorded in the records by him, and he shall immediately give notice thereof to the watermaster of the proper district.

539.190 Rehearing by circuit court. Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed, within six months from the date of the decree of the circuit court on the mandate of the Supreme Court, the State Engineer or any party interested may apply to the circuit court for a rehearing upon grounds to be stated in the application. If in the discretion of the court the application states good grounds for the rehearing, the circuit court or judge shall make an order fixing a time and place when the application shall be heard. The clerk of the circuit court shall, at the expense of the petitioner, forthwith mail written notice of the application to the State Engineer and to every party interested, and state in the notice the time and place when the application will be heard.

539.200 Conclusiveness of determinations as to water rights. The determinations of the State Engineer, as confirmed or modified as provided by this chapter in proceedings, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

539.210 Duty of claimants to appear and submit proofs; nonappearance as forfeiture; intervention in proceedings. Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law. Any claimant who fails to appear in the proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by him. Any person interested in the water of any stream upon whom no service of notice has been had of the pendency of proceedings for determination of the rights to the use of water of the stream, and who has had no actual knowledge or notice of the pendency of the proceedings may, at any time prior to the expiration of one year after entry of the determination of the State Engineer, file a petition to intervene in the proceedings. The petition shall contain, among other things, all matters required by this chapter of claimants who have been duly served with notice of the proceedings, and also a statement that the intervenor had no actual knowledge or notice of the pendency of the proceedings. Upon the filing of the petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable and thereafter shall have all rights vouchsafed by this chapter to claimants who have been duly served.

539.220 Procedure when rights to same stream have been determined in different proceedings. Whenever the rights to the waters of any stream have been determined as provided in this chapter and it appears by the records of such determination that it had not been at one and the same proceeding, then the State Engineer may open to public inspection all proofs or evidence of rights to the water, and his findings in relation thereto, in the manner provided in ORS 539.090. Any person who then desires to contest the claims or rights of other persons, as set forth in the proofs or established by the State Engineer, shall proceed in the manner provided for in ORS 539.100 and 539.110; provided, that contests may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.

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, 1971.

Robert W. Lundy
Legislative Counsel