

Chapter 540

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Distribution of Water; Watermasters; Change in Use, Transfer or Abandonment of Water Rights

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**WATER DISTRICTS; WATERMASTERS;
DISTRIBUTION OF WATER
GENERALLY**

540.010 Water districts; creation; purposes. The Water Resources Commission shall divide the state into water districts, which shall be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the state. Water districts shall not be created until necessary. [Amended by 1985 c.673 §82]

540.020 Watermasters; appointment; removal; Water Resources Director vested with powers of watermaster. (1) The Water Resources Director shall appoint one watermaster for each water district. The watermaster shall hold office until removed by the director, and shall be subject to any applicable provision of the State Personnel Relations Law. The director shall fill all vacancies which occur in the office.

(2) The director, or any duly authorized assistant, shall have the powers and authority of a watermaster in the distribution of water in any water district. [Amended by 1985 c.421 §5]

540.030 Water Resources Director; general duties regarding water distribution. The Water Resources Director shall:

(1) Have general control over the watermasters.

(2) Execute the laws relative to the distribution of water and perform other functions as may be assigned to the director. [Amended by 1953 c.395 §3; 1985 c.673 §82a]

540.040 [Amended by 1953 c.395 §3; 1957 c.341 §10; 1963 c.410 §1; repealed by 1985 c.421 §17]

540.045 Watermaster duties. (1) Each watermaster shall:

(a) Regulate the distribution of water among the various users of water from any natural surface or ground water supply in accordance with the users' existing water rights of record in the Water Resources Department.

(b) Upon the request of the users, distribute water among the various users under any partnership ditch, pipeline or well or from any reservoir, in accordance with the users' existing water rights of record in the department.

(c) Divide the waters of the natural surface and ground water sources and other sources of water supply among the canals, ditches, pumps, pipelines and reservoirs taking water from the source for beneficial use, by regulating, adjusting and fastening the headgates, valves or other control works at the several points of diversion of surface water or the several points of appropriation

of ground water, according to the users' relative entitlements to water.

(d) Attach to the headgate, valve or other control works the watermaster regulates under paragraph (c) of this subsection, a written notice dated and signed by the watermaster, setting forth that the headgate, valve or other control works has been properly regulated and is wholly under the control of the watermaster.

(e) Perform any other duties the director may require.

(2) When a watermaster must rely on a well log or other documentation to regulate the use or distribution of ground water, the regulation shall be in accordance with ORS 537.545 (3).

(3) As used in this section, "existing water rights of record" includes all completed permits, certificates, licenses and ground water, spring and surface water registration statements filed under ORS 537.605 or 539.240 and related court decrees. [1985 c.421 §3; 1989 c.691 §15; 1991 c.102 §11]

540.050 District attorneys to represent Water Resources Director and watermasters. The district attorney shall appear on behalf of the Water Resources Director or any watermaster in any case which may arise in the pursuance of the official duties of the director or watermaster within the jurisdiction of the district attorney. [Amended by 1985 c.421 §6]

540.060 Arrest by watermaster; complaint against offender. The watermaster or an assistant appointed by the watermaster shall have power to arrest any person violating a provision of the Water Rights Act (as defined in ORS 537.010), ORS 537.120 to 537.360 or 537.505 to 537.795 and turn the person over to the sheriff or other competent police officer within the county. At the time the watermaster delivers the arrested person into the custody of the sheriff, the watermaster or assistant watermaster making the arrest shall file a complaint, as defined in ORS 131.005, against the person arrested. [Amended by 1957 c.341 §11; 1985 c.421 §7]

540.070 [Repealed by 1957 c.546 §8]

540.071 [1957 c.546 §2; 1961 c.636 §1; 1963 c.410 §2; repealed by 1985 c.421 §17]

540.075 Office space and equipment for watermaster. (1) The county court or board of county commissioners of each county in which the water district of the watermaster is located shall furnish the watermaster a suitable office and office equipment.

(2) If a water district includes all or parts of two or more counties, the office of the watermaster for the water district shall be in the county designated by the director and the county court or board of county commis-

sioners of that county shall provide a suitable office with necessary office equipment for the watermaster. [1985 c.421 §2]

540.080 Employment of assistant watermasters; compensation and expenses; termination of service. (1) With the approval of the Water Resources Director, a watermaster may employ assistants to aid in the discharge of the watermaster's duties. The assistants shall take the same oath as the watermaster and shall obey the watermaster's instructions. Compensation and actual and necessary traveling expenses of an assistant shall be paid by the county court or board of county commissioners upon certificates of the watermaster by an order made at a regular term when sitting for the transaction of county business. If no provision for such payment is made, the assistant's compensation and expenses shall be paid by the water users concerned, as provided in ORS 540.100 to 540.130.

(2) The term of service of an assistant watermaster may be terminated at any time by the director or the watermaster. [Amended by 1957 c.546 §3; 1961 c.636 §2; 1985 c.421 §8]

540.090 [Amended by 1957 c.546 §4; 1961 c.636 §3; 1979 c.18 §1; repealed by 1985 c.421 §17]

540.100 Division of water among users; payment. (1) When water users are unable to agree to the distribution or division of water, a majority of them may request the watermaster of the district in which the distribution or division is in dispute to make a just division or distribution of water among the parties entitled to the use of the water. The request shall be in writing and shall set forth the pertinent facts of the dispute.

(2) If no provision has been made for payment of the necessary assistant watermaster or expenses as provided by ORS 540.080, the assistant shall be paid by the water users among whom the distribution or division is made.

(3) The expense of any assistant watermaster shall be paid by the water users in proportion to the area of land for which each water user is entitled to the use of water, so that each one shall pay the same rate per acre. [Amended by 1957 c.546 §5; 1961 c.636 §4; 1979 c.18 §2; 1985 c.421 §9]

540.110 [Amended by 1981 c.897 §58; repealed by 1985 c.421 §17]

540.120 Payment by one water user as giving lien on lands of others; notice; foreclosure. (1) If one or more of the water users concerned in a distribution or division under ORS 540.100 pay the wages and expenses for another user who fails to contribute a just share or proportion of the wages and expenses, the user paying the wages and expenses shall be entitled to a lien upon the

lands of the delinquent user entitled to use of water, in the amount of the delinquent user's just share or proportion.

(2) The lien shall be made effective by filing written notice of intent to claim a lien for payment of wages and expenses under subsection (1) of this section with the county clerk of the county in which the lands of the delinquent water user are situated.

(3) The notice of intent filed under subsection (2) of this section shall:

(a) Be verified by the watermaster or assistant watermaster;

(b) Specify the particular items of wages and expenses for which the lien is claimed;

(c) Describe the lands of each water user upon which the lien is claimed; and

(d) State the name of the owner or reputed owner of the lands.

(4) The lien shall be filed within 60 days from the completion of the distribution or division, and suit to foreclose the lien shall be brought in the circuit court of the county in which the lands or any part of the lands are situated, within six months from the date of filing the notice of lien.

(5) If suit is necessary to foreclose the lien, the plaintiff may recover reasonable attorney fees at trial and on appeal in addition to the costs and disbursements prescribed by law. The lien shall be foreclosed in the manner provided by law for the foreclosure of liens against real property.

(6) A lien filed under this section shall not be considered an exclusive remedy. [Amended by 1985 c.421 §10]

540.130 Advance payment. If no provision has been made for payment of the assistant watermaster or expenses as provided in ORS 540.080, before proceeding to make any distribution or division the Water Resources Director may require the water users requesting the distribution or division to pay in advance the estimated compensation and expenses involved in the work. The director shall keep a true and full account of all moneys paid in advance under this section. Upon the expiration of the period for which the services are required, the director shall refund to the water users any unexpended balance of the moneys paid in advance. [Amended by 1957 c.546 §6; 1961 c.636 §5; 1979 c.18 §3; 1985 c.421 §11]

540.135 Disposition of funds collected under ORS 540.100 to 540.130 and 540.220. Any moneys collected under ORS 540.100 to 540.130 and 540.220 shall be paid to the Water Resources Director and deposited by the director in a revolving fund to be dispersed for the purpose for which it was collected. [1961 c.636 §9; 1985 c.421 §12]

540.140 Insufficiency of water for all users; preference of domestic over agricultural use, and agricultural over manufacturing use. When the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall, subject to such limitations as may be prescribed by law, have the preference over those claiming such water for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

540.145 Rules for distribution of water; applicability. The Water Resources Commission may adopt rules to secure the equal and fair distribution of water in accordance with the rights of the various users. The rules shall apply to all water rights that have been established:

(1) By court decree;

(2) Under an order of the commission or the Water Resources Director in proceedings for the determination of relative rights to the use of water; or

(3) Through permits to appropriate water or certificates of water rights issued by the commission. [1985 c.673 §81]

540.150 Rotation in use; notice to watermaster. To bring about a more economical use of the available water supply, water users owning lands to which are attached water rights may rotate in the use of the supply to which they may be collectively entitled. Whenever two or more water users notify the watermaster that they desire to use the water by rotation, and present a written agreement as to the manner of rotation, the watermaster shall distribute the water in accordance with the written agreement.

DISTRIBUTION OF WATER FROM IRRIGATION DITCHES AND RESERVOIRS

540.210 Distribution among users from ditch or reservoir; when and how made.

(1) Whenever any water users from any ditch or reservoir, either among themselves or with the owner thereof, are unable to agree relative to the distribution or division of water through or from the ditch or reservoir, either the owner or any such water user may apply to the watermaster of the district in which the ditch or reservoir is located, by written notice, setting forth such facts, and asking the watermaster to take charge of the ditch or reservoir for the purpose of making a just division or distribution of water from it to the parties entitled to the use thereof.

(2) The watermaster shall then take exclusive charge of the ditch or reservoir, for the purpose of dividing or distributing the water therefrom in accordance with the respective and relative rights of the various users of water from the ditch or reservoir, and shall continue the work until the necessity therefor shall cease to exist.

(3) The distribution and division of water shall be made according to the relative and respective rights of the various users from the ditch or reservoir, as determined by the Water Resources Director, by decree of the circuit court, or by written contract between all of the users filed with the watermaster.

(4) The circuit court having jurisdiction may request the watermaster of the district to take charge of any such ditch or reservoir, and to enforce any decree respecting such ditch or reservoir made under the jurisdiction of the court.

540.220 Payment of assistant watermaster. (1) A watermaster may appoint an assistant to take charge of the ditch, pipeline or reservoir involved in a distribution or division of water under ORS 540.210. The assistant watermaster shall be paid by the water users from the ditch, pipeline or reservoir for the cost of the distribution. The Water Resources Commission may require the water users to pay in advance the estimated compensation and expenses of the assistant involved in the distribution or division of the water.

(2) In the case of partnership ditches, pipelines or mutual irrigation corporations organized for the benefit of the members or stockholders, the expense of the assistant shall be paid by the water users in proportion to the area of land for which each water user is entitled to the use of water from the ditch, pipeline or reservoir, so that each shall pay the same rate per acre.

(3) In the case of ditches, pipelines and reservoirs constructed and operated for sale or rental of water, the wages and expense of the assistant shall be paid by the owner of the ditch, pipeline or reservoir, unless otherwise provided in written contracts with water users using water from the ditches, pipelines and reservoirs involved in the distribution or division of water. [Amended by 1957 c.546 §7; 1961 c.636 §6; 1979 c.18 §4; 1985 c.421 §13; 1985 c.673 §83]

540.230 Distribution of waste or seepage water; payment. Whenever a watermaster is called upon, in accordance with the provisions of ORS 540.210, to distribute the waters of any ditch containing or carrying waste or seepage water, the holder of the right to the use of such waste or seepage water shall pay the total cost of the

installation of measuring devices for the measurement of the waste or seepage water and the total expense of measuring and distributing it.

540.240 Lien for wages and expense; property subject to lien; monthly payment. In the case of a partnership ditch, pipeline or reservoir, or a ditch, pipeline or reservoir owned in common or by a mutual irrigation company incorporated under the laws of this state, the wages of the assistant watermaster and expenses incurred by the assistant in making the distribution provided for by ORS 540.210 to 540.240, and the necessary and proper expense of installation and maintenance of measuring devices and headgates to provide for the just distribution of water among the several users in accordance with their respective and relative rights, shall be a lien upon the ditch, pipeline or reservoir. The lien shall attach to each tract of land entitled to the use of water for irrigation from the ditch, pipeline or reservoir, and upon the crops produced upon the lands during the irrigation season for which the distribution is made. If a ditch, pipeline or reservoir is owned or operated by a person engaged in the business of selling or renting water from the ditch, pipeline or reservoir, the wages and expense shall be a lien upon the ditch, pipeline or reservoir. The wages and expense shall be paid monthly by the water users, the mutual irrigation company, or the person engaged in the business of selling or renting water from a ditch, pipeline or reservoir. [Amended by 1985 c.421 §14]

540.250 Lien, notice of intent to claim; foreclosure; attorney fees. (1) If not paid, the lien under ORS 540.240 may be made effective by the assistant filing a notice in writing of intention to claim a lien for the assistant's wages and expense with the county clerk of the county in which the ditch, pipeline or reservoir and lands are situated.

(2) The notice filed under subsection (1) of this section shall:

(a) Be verified and subscribed by the watermaster or assistant;

(b) Specify the particular items of wages and expense for which the lien is claimed;

(c) Describe the lands of each water user upon which the lien is claimed; and

(d) Set forth the name of the ditch, pipeline or reservoir and the name of the owner or reputed owner of the lands and ditch, pipeline or reservoir against which the lien is claimed.

(3) The lien shall be filed within 60 days from the completion of distribution. Suit to foreclose the lien shall be brought in the

circuit court of the county in which all or part of the lands, ditch, pipeline or reservoir, or any part, are situated, within six months from the date of filing the notice.

(4) If suit is necessary to foreclose the lien, the plaintiff shall be allowed to recover a reasonable attorney fee at trial and on appeal in addition to the costs and disbursements prescribed by law. The lien shall be foreclosed in the manner provided by law for the foreclosure of liens against real property. [Amended by 1981 c.897 §59; 1985 c.421 §15]

540.260 Payment by one user; lien against other users; enforcement; remedy not exclusive. (1) One or more of the water users from any partnership or mutual irrigation company ditch or pipeline may pay the wages and expense of the assistant watermaster and, as against any other user failing to contribute the user's share or proportion of the wages and expense, shall be entitled to a lien upon the lands of the delinquent user entitled to the use of water from the ditch, pipeline and reservoir and upon the share or interest of the owner in the ditch, pipeline or reservoir, for the user's just share or proportion.

(2) The lien shall be made effective by filing a similar notice to that prescribed under ORS 540.250 within 60 days from the date of payment of the wages and expense, with the county clerk. It may be enforced and foreclosed, and the same procedure, including the allowance of reasonable attorney fees, shall be followed in the foreclosure as in the case of a lien claimed and foreclosed by the watermaster under ORS 540.250. The lien shall not be considered an exclusive remedy. [Amended by 1985 c.421 §16]

540.270 Irrigation districts and improvement companies not affected. Nothing contained in ORS 540.210 to 540.260 shall be applicable to the distribution of water from the irrigation systems or works of irrigation districts or district improvement companies unless requested by the district. Distribution of water from such irrigation systems or works shall be under the exclusive control of the directors of the irrigation districts and district improvement companies unless the watermaster has been requested by the district to distribute the water. [Amended by 1969 c.303 §1]

HYDRAULIC WORKS AND STRUCTURES; MEASURING DEVICES; DITCH RIGHT OF WAY

540.310 Ditches and canals; headgates; measuring devices; flumes along lines of ditches. (1) The owner of any ditch or canal shall maintain to the satisfaction of the Water Resources Commission a substantial headgate at the point where the water is di-

verted. It shall be of such construction that it can be locked and kept closed by the watermaster.

(2) The owner shall construct and maintain, when required by the commission, suitable measuring devices at such points along the ditch as may be necessary to assist the watermaster in determining the amount of water that is to be diverted into the ditch from the stream, or taken from it by the various users.

(3) When necessary for the protection of other water users, the commission may require flumes to be installed along the line of any ditch. [Amended by 1985 c.673 §84]

540.320 Noncompliance with requirements; effect. If any owner of irrigation works refuses or neglects to construct and put in headgates, flumes or measuring devices, as required under ORS 540.310, after 10 days' notice, the watermaster may close the ditch, and it shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of headgates lawfully closed, until the requirements of the Water Resources Commission as to such headgates, flumes or measuring devices have been complied with. [Amended by 1985 c.673 §85]

540.330 Reservoirs; measuring devices; effect of noncompliance. (1) Any owner or manager of a reservoir, located across or upon the bed of a natural stream, shall construct and maintain, when required by the Water Resources Commission, a measuring device below, and one above, the reservoir on each stream or source of supply discharging into the reservoir, to assist the watermaster in determining the amount of water to which appropriators are entitled and thereafter diverting it for their use.

(2) If any owner or manager of a reservoir located across the bed of a natural stream neglects or refuses to put in a measuring device after 10 days' notice by the commission, the watermaster may open the sluiceway or outlet of the reservoir, and it shall not be closed, under penalties of the law for changing or interfering with headgates, until the requirements of the commission as to such measuring devices are complied with. [Amended by 1985 c.673 §86]

540.340 Reservoir and diversion dam; suitable outlet; effect of noncompliance. (1) Whenever it may be necessary for the protection of other water users, the Water Resources Commission shall require every owner or manager of a reservoir or diversion dam, located across or upon the bed of a natural stream, to construct and maintain a suitable outlet in the reservoir or diversion

dam which will allow the free passage of the natural flow of the stream. The commission shall determine what constitutes a suitable outlet.

(2) If any owner or manager of a reservoir or diversion dam refuses or neglects to construct or put in such outlet in the reservoir or diversion dam after 10 days' notice by the commission, the commission may close the ditch carrying water from the reservoir or diversion dam and it shall not be opened or any water diverted from the reservoir or diversion dam, under the penalties prescribed by law for the opening of headgates lawfully closed, until the requirements of the commission regarding such outlet have been complied with. [Amended by 1985 c.673 §87]

540.350 Dams, dikes and other hydraulic works; when showing for power generation use to be made; examination and approval by commission; approval not to relieve owners of responsibility; inspections; modification of works; hearing. (1) No person, firm or private or municipal corporation shall construct any dam, dike, or other hydraulic structure or works, the failure of which the Water Resources Commission finds would result in damage to life or property, unless the commission has made an examination of the site and of the plans and specifications and other features involved in the construction of such works, and has approved them in writing.

(2) When a person, firm or private or municipal corporation seeks the written approval of the Water Resources Commission, of the site, plans, specifications and features for a dam more than 25 feet high at a site where there is an average annual flow exceeding two cubic feet a second, that party must demonstrate that the dam includes measures that make it readily adaptable to power generation in a manner meeting statutory requirements for the safe passage of fish. These measures shall include the installation of a pressure conduit, penstock, drain or similar water diversion system at the time the dam is built.

(3) A person, firm or private or municipal corporation seeking approval for a dam described in subsection (2) of this section need not make the showing required by that subsection if that party demonstrates to the commission's satisfaction that:

(a) It is not likely the installation of hydroelectric generating facilities at the proposed site would be feasible anytime during the life of the proposed dam; or

(b) It would be more feasible to install hydroelectric facilities after construction of the proposed dam.

(4) The commission's approval of the site, plans and specifications, or other features involved in the construction, maintenance and operation of any hydraulic works whatsoever shall not relieve the owners of their legal responsibilities.

(5) The commission may make inspections of any hydraulic structure, the site thereof, and of the plans and specifications, and any other features involved in the construction, maintenance and operation of the works. If, as a result of the inspections, the commission considers any modifications necessary to insure the safety of the works with reference to possible damage to life or property, the commission shall notify the legal owners by registered mail or by certified mail with return receipt, stating why the works are unsafe. The notice shall set forth the modifications necessary to insure the safety of the works in so far as it affects possible damage to life or property. The notice also shall set a hearing at a time and place as will give the owners a reasonable time to prepare for the hearing. [Amended by 1981 c.210 §1; 1985 c.673 §88; 1991 c.249 §51]

540.360 Order to modify. After the hearing the Water Resources Commission may issue a written order to the owners to make such modifications as the commission considers necessary to insure the safety of the works with reference to possible damage to life or property and shall fix the time within which work shall begin in good faith and the time for completion. The owners, upon receipt of the order, shall make the modifications ordered within the time limit prescribed or shall initiate an appeal as above provided. [Amended by 1975 c.581 §26a; 1981 c.210 §2; 1985 c.673 §89]

540.370 Enforcing compliance with order or decree. (1) If the owners fail to make the modifications within the time limits set by the Water Resources Commission, or to institute their appeal or to comply with the decree of the appellate court in case an appeal is taken, the commission shall issue an order in writing to the owners directing that the gates be kept open, or an opening made in the dam if necessary, or that the structure shall not be used for the storage, restraint or conveyance of water until the modifications have been made.

(2) No owner shall refuse to comply with the orders of the commission or the decree of an appellate court.

(3) In case of noncompliance, the commission shall direct the watermaster or other authorized assistant to carry out the orders, or the commission may file a copy of the commission's order with the Attorney General or with the district attorney of the county within which the works are located.

The Attorney General or district attorney shall bring proceedings in the name of the state, in the circuit court of the county within which the works or any part thereof are situated, to abate the offending works. The court, after a full hearing on the matter, may declare the works a nuisance and order their removal, or order any repairs or alterations, and may enforce its orders in the manner provided by law. [Amended by 1985 c.673 §90]

540.380 Reports of consultants; payment. The Water Resources Commission may accept the reports of consulting engineers, geologists or other specialists whom the owners of the works in question may have employed. But if, for any reason, the commission considers the reports insufficient, the commission may employ consulting engineers, geologists or other specialists outside the Water Resources Department to make special examinations and inspections and to prepare reports for the commission's guidance. The cost of such special examinations, inspections and reports shall be paid by the commission from any funds at the commission's disposal, or it may be divided by mutual agreement between the state and the owners. [Amended by 1985 c.673 §91]

540.390 Inspection upon application by resident, landowner or commission's own motion; expenses; deposit by applicant; payment by owner of works; lien. Should any person residing on or owning land in the neighborhood of any dam, dike or other hydraulic structure after completion, or in course of construction, apply to the Water Resources Commission in writing desiring an inspection of the works, the commission may order an inspection, or the commission may make such order on the commission's own motion. Before doing so the commission may require the applicant for inspection to deposit a sum of money sufficient to pay the expenses of an inspection. If the application appears to the commission not to have been justified the commission may cause the whole or part of the expenses to be paid out of the deposit. If the application appears to have been justified, the commission may require the owner of the works to pay the whole or any part of the expenses of the inspection, and it shall constitute a valid lien against the works, which may be enforced in the same manner as provided for the enforcement of mechanics' liens. [Amended by 1985 c.673 §92]

540.400 Law not applicable to certain works. ORS 540.350 to 540.390 shall not apply to:

(1) Any dam less than 10 feet in height or impounding less than 3,000,000 gallons of water.

(2) Splash dams used for driving logs.

(3) Farm dikes constructed by individuals on their own property.

(4) Ditches carrying less than five cubic feet of water per second.

540.410 Use of watercourse to deliver reservoir water; notice to watermaster; adjustment of headgates; expenses; liability for, and collection of, payment. Whenever the owner, manager or lessee of a reservoir constructed under the provisions of the Water Rights Act, as defined in ORS 537.010, desires to use the bed of a stream, or other watercourse, to carry stored or impounded water from the reservoir to the consumer of the water, the owner, manager or lessee shall, in writing, notify the watermaster of the district in which the stored or impounded water from the reservoir is to be used, giving the date when it is proposed to discharge water from the reservoir, its volume, and the names of all persons and ditches entitled to its use. The watermaster shall then close, or so adjust the headgates of all ditches from the stream or watercourse, not entitled to the use of such stored water, as will enable those having the right to secure the volume to which they are entitled. The watermaster shall keep a true and just account of the time spent in the discharge of the watermaster's duties as defined in this section, and the Water Resources Commission shall present a bill of one-half the expense so incurred to the reservoir owner, manager or lessee. If the owner, manager or lessee neglects for 30 days, after presentation of the bill of costs, to pay it, the costs shall be made a charge upon the reservoir and the state shall have a preference lien therefor. Upon notice from the commission, the Attorney General shall foreclose the lien and collect the amount due, as provided in this section, in the same manner as other liens on real property are foreclosed. [Amended by 1955 c.39 §1; 1961 c.636 §7; 1985 c.673 §93]

540.420 Maintenance and operation of jointly owned ditches; performance by coowner; recovery from one in default. In all cases where ditches are owned by two or more persons and one or more of such persons fails or neglects to do a proportionate share of the work necessary for the proper maintenance and operation of the ditch, or to construct suitable headgates or measuring devices at the points where water is diverted from the main ditch, the owner desiring the performance of such work may, after having given 10 days' written notice to the other owner who has failed to perform a proportionate share of the work, perform such share, and recover therefor from the person

in default the reasonable expense of the work.

540.430 Effect of nonpayment by coowner; lien on interest; foreclosure; stoppage of delivery of water. (1) Upon the failure of any coowner to pay a proportionate share of the expense, as mentioned in ORS 540.420, within 30 days after receiving a statement of the same as performed by the coowner, the latter may secure payment of the claim by filing an itemized and sworn statement thereof, setting forth the date of performance and the nature of the labor performed, with the county clerk of the county wherein the ditch is situated. When so filed it shall constitute a valid lien against the interest of the person in default, which lien may be established and enforced in the same manner as provided by law for the enforcement of mechanic's liens.

(2) In lieu of proceeding to enforce the lien, the person performing the labor may file an itemized and sworn statement with the watermaster of the district within which the ditch is located, setting forth the date of performance, the nature of the labor performed, the total expense incurred by the person and the proportion of the expense each owner should pay, together with a written request that the watermaster take charge of the distribution of the water from the ditch to the parties entitled to the use thereof. Thereupon the watermaster may proceed to distribute the water in accordance with established rights. However, if an owner or user has not paid the proportion of expenses of the owner or user incurred for the proper maintenance and operation of the ditch, the watermaster may serve such party with written notice, personally, by registered mail or by certified mail with return receipt, setting forth the proportion of expenses incurred for which the owner or user is obligated to pay. If the party so served refuses or neglects to pay that part of the expense within 10 days after the serving or mailing of the notice, the watermaster may refuse to deliver water to be used upon the lands of such person until after the expense has been paid. [Amended by 1991 c.249 §52]

540.435 Commission authority to order installation of totalizing measuring device and submission of annual water use report; hearing; effect of failure to comply with order. (1) In addition to any other authority of the commission to order installation of a measuring device, if the commission finds accurate water use information necessary because of serious water management problems created by ground water decline, unresolved user disputes or frequent water shortages, the commission by rule may require a water right owner using any sur-

face or ground water source within the state to install a totalizing measuring device and to submit annually a water use report.

(2) Before the commission implements any requirements under subsection (1) of this section the commission shall:

(a) Cause a hearing to be conducted in the affected area to determine whether a serious management problem exists; and

(b) Allow any affected person an opportunity to present alternative methods or devices that could be used to provide the information necessary to manage the water resource or to alleviate the water management problem.

(3) The watermaster may prohibit the diversion or use of water by anyone who has failed to comply with a commission rule or order requiring installation of measuring devices or submission of a water use report. [1987 c.649 §7]

540.440 Owner to clear weeds from ditch right of way. All persons owning or controlling any water ditches shall keep their right of way along the ditches clean and free from wild oats, mustard, thistles, or any weeds or obnoxious grasses whatsoever.

CHANGES IN USE OF WATER; TRANSFER OF WATER RIGHTS; EXCHANGE

540.505 "District" defined. As used in ORS 540.505 to 540.578, "district" means an irrigation district formed under ORS chapter 545, a drainage district formed under ORS chapter 547, a water improvement district formed under ORS chapter 552, a water control district formed under ORS chapter 553 or a corporation organized under ORS chapter 554. [1991 c.957 §2]

540.510 Appurtenancy of water to premises; restrictions on change of use or place of use or point of diversion; severability of right to use conserved water.

(1) Except as provided in subsections (2) to (4) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the owner of any certificated water right may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established.

(2) Subject to the limitations in ORS 537.490, any right to the use of conserved water allocated by the Water Resources

Commission under ORS 537.475 may be severed from the land and transferred or sold after notice to the commission as required under ORS 537.490.

(3)(a) Any water used under a permit or certificate issued to a municipality, or under rights conferred by ORS 538.410 to 538.450, or under the registration system set forth in ORS 537.132, may be applied to beneficial use on lands to which the right is not appurtenant if:

(A) The water is applied to lands which are acquired by annexation or through merger, consolidation or formation of a water supply authority, so long as the rate and use of water allowed in the original certificate is not exceeded;

(B) The use continues to be for municipal purposes and would not interfere with or impair prior vested water rights; or

(C) The use is authorized under a permit granted under ORS 468B.050 and for which a reclaimed water registration form has been filed under ORS 537.132.

(b) As used in this subsection, "municipality" means a city, a port formed under ORS 777.005 to 777.725 and 777.915 to 777.953, a domestic water supply district formed under ORS chapter 264 or a water supply authority formed under ORS chapter 450.

(4) Pursuant to the provisions of ORS 540.570, any water used under a permit or certificate issued to a district may be applied to beneficial use on lands within the district to which the right is not appurtenant.

(5) The relocation of a point of diversion as necessary to follow the movements of a naturally changing stream channel does not constitute a change in point of diversion for purposes of ORS 540.520 if:

(a) The diversion point stays within 500 feet of the point of diversion on record with the Water Resources Department; and

(b) The change does not move the diversion point upstream or downstream beyond the diversion point of another appropriator.

(6) The sale or lease of the right to the use of conserved water under ORS 537.490 does not constitute a change of use or a change in the place of use of water for purposes of ORS 540.520. [Amended by 1987 c.264 §11; 1989 c.7 §1; 1989 c.707 §3; 1991 c.370 §5; 1991 c.957 §7]

540.520 Application for change of use, place of use or point of diversion; public notice; filing of protest; hearing. (1) Except when the application is made under ORS 541.327, whenever the owner of a water right for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point

of diversion, or the use made of the water, an application to make such change, as the case may be, shall be filed with the Water Resources Commission.

(2) The application required under subsection (1) of this section shall include:

- (a) The name of the owner;
- (b) The previous use of the water;
- (c) A description of the premises upon which the water is used;
- (d) A description of the premises upon which it is proposed to use the water;
- (e) The use which is proposed to be made of the water;
- (f) The reasons for making the proposed change; and
- (g) Evidence that the water has been used over the past five years according to the terms and conditions of the owner's water right certificate.

(3) Upon the filing of the application the commission shall give notice by publication in a newspaper having general circulation in the area in which the water rights are located, for a period of at least three weeks and not less than one publication each week. The cost of the publication shall be paid by the applicant in advance to the commission. In applications for only a change in place of use or for a change in the point of diversion of less than one-fourth mile, and where there are no intervening diversions between the old diversion of the applicant and the proposed new diversion, no notice need be published.

(4) Applications requiring publication of notice shall not be approved within less than 20 days after the last date the notice appeared in the newspaper.

(5) Any person may file, jointly or severally, with the commission at any time prior to approval of a pending application, a protest against approval of the application.

(6) Whenever a timely protest is filed, or in the opinion of the commission a hearing is necessary to determine whether the proposed changes as described by the application would result in injury to existing water rights, the commission shall hold a hearing on the matter. Notice and conduct of the hearing shall be under the provisions of ORS 183.310 to 183.550, pertaining to contested cases, and shall be held in the area where the rights are located unless all parties and persons who filed a protest under this subsection stipulate otherwise. [Amended by 1983 c.807 §1; 1985 c.673 §94; 1987 c.339 §3; 1989 c.1000 §7]

540.530 Order authorizing change of use, place of use or point of diversion;

new certificate. (1) If, after hearing or examination, the Water Resources Commission finds that the proposed change can be effected without injury to existing water rights, the commission shall make an order approving the transfer and fixing a time limit within which the approved changes may be completed. The time allowed by the Water Resources Commission for completion of an authorized change shall not be used when computing a five-year period of nonuse under the provisions of ORS 540.610 (1).

(2) If a certificate covering the water right has been previously issued, the commission shall cancel the previous certificate and, when proper proof of completion of the authorized changes has been filed with the commission, issue a new certificate preserving the previously established priority of rights and covering the authorized changes. If only a portion of the water right covered by the previous certificate is affected by the changes, a separate new certificate may be issued to cover the unaffected portion of the water right.

(3) Upon receiving notification of the merger or consolidation of municipal water supply entities, or the formation of a water supply authority under ORS chapter 450, the commission shall cancel the previous certificates of the entities replaced by the merger, consolidation or formation and issue a new certificate to the newly formed municipality or water supply authority. The new certificate shall preserve the previously established priority of rights of the replaced entities and shall allow beneficial use of the water on any lands acquired in the merger, consolidation or formation. [Amended by 1975 c.581 §26b; 1983 c.807 §2; 1985 c.673 §95; 1989 c.707 §4]

540.533 Application for exchange of water; fee. (1) Any person holding a water right established by court decree, a water right certificate or a water right for which proof of beneficial use has been approved by the director or commission or any person applying for or holding a permit issued under ORS 537.211 for use of water for an in-stream purpose may apply to the Water Resources Commission for permission to use stored, surface or ground water from another source in exchange for supplying replacement water in an equal amount to satisfy prior appropriations from the other source, if:

(a) The source of the person's appropriation is at times insufficient to fully satisfy the appropriation;

(b) Better conservation and use of the waters of the state can be accomplished; or

(c) The person can develop water for appropriation under the permit for use of water for an in-stream purpose, but cannot eco-

nomically convey the water to its point of use.

(2) A person may apply for an exchange under this section among any combination of surface, storage or ground water rights.

(3) An application for exchange shall be accompanied by:

(a) Any map, plan or other information required by the commission; and

(b) The fee required under ORS 536.050. [1987 c.815 §2]

540.535 Notice of application for exchange. After receipt of an exchange application, the commission shall give notice of the application by publishing notice of the application in a newspaper having general circulation in the area in which the water uses are located at least once each week for at least three successive weeks. The cost of providing the notice by publication shall be paid in advance by the applicant to the commission. [1987 c.815 §3]

540.537 Order allowing exchange; order terminating exchange. (1) The Water Resources Commission shall issue an order allowing an exchange unless the commission finds any of the following:

(a) The proposed exchange would adversely affect other appropriators.

(b) The proposed exchanges would be too difficult to administer.

(c) The proposed exchange would adversely affect the public interest as determined under ORS 537.170 (5).

(d) A sufficient quantity of water would not be available to replace the water to be used under the exchange. In determining whether replacement water will be equal to the water exchanged, the commission may consider relative consumptive uses and transmission losses.

(2) The commission may include any condition the commission considers necessary in an order allowing an exchange.

(3) The commission shall issue an order terminating the exchange:

(a) If water is not applied under the exchange within the time fixed by the commission in the order approving the exchange;

(b) Upon written request signed by all parties to the exchange;

(c) Upon finding that any other termination condition specified in the original order has occurred; or

(d) Upon attainment of a termination date specified in the original exchange order.

(4) For purposes of subsection (3) of this section, the time fixed for implementing the exchange shall include any extension granted

by the commission for good cause shown. [1987 c.815 §4]

540.539 Exchange subject to beneficial use requirements. An exchange of water under ORS 540.533 to 540.537 is subject to the requirements of beneficial use under ORS 540.610. [1987 c.815 §5]

540.540 [Renumbered 540.545 in 1987]

540.541 Delivery and use of water under exchange. (1) Any water made available to a person under an exchange shall be delivered in accordance with the order allowing the exchange. The use of water under an exchange is without prejudice to, but shall be considered use and enjoyment of, the permitted, certificated or decreed right held by that water user at the time the exchange was approved.

(2) The use of water under a permit may be perfected by application of exchange water to the use specified in that permit. Upon receipt of proof satisfactory to the commission that water has been used under the exchange for the purposes of and within the limitations of the permit, the commission shall issue a certificate of the same character as that described in ORS 539.140. The certificate shall incorporate the source, conditions and priority of the permit existing at the time the exchange was approved.

(3) If regulation by the watermaster is required, after implementation of the exchange, water shall be delivered in accordance with the terms and conditions of the order allowing the exchange. [1987 c.815 §6]

540.543 Regulation of headgates when water provided by exchange. If water for an in-stream use is provided by exchange, the watermaster shall regulate headgates and other diversion points as necessary to assure that the exchange water is not diverted from the channel at any point above the most downstream point of use specified in the permit or certificate that establishes the right to use of water for an in-stream purpose. [1987 c.815 §7]

540.545 County acquiring land in district; transfer of water rights to other lands; authority of county court. Whenever the title to lands within a district has been or is acquired by the county within which the land is located, by foreclosure of tax liens or otherwise, the county court or board of county commissioners, upon request of the district, may make application under the provisions of ORS 540.505 to 540.578 to have the water rights appurtenant to such lands transferred to other lands within the district which are owned by the county or privately owned. [Formerly 540.540; 1991 c.957 §8]

540.550 Ratification of prior transfer of water rights to irrigation district. All

attempted transfers or sales, prior to March 6, 1931, to an irrigation district, of water rights which theretofore had been appurtenant to lands located in the district and which lands at the time of the attempted transfer or sale were owned by the county, shall be considered to be legal and binding, and the water rights which were appurtenant to such lands shall be considered to have become the property of the district to which attempted to be conveyed, but appurtenant only to lands within the boundaries of the district as they existed on March 6, 1931, if the irrigation district applied to the Water Resources Director, within five years after March 6, 1931, under the provisions of section 47-712, Oregon Code 1930, as amended by chapter 102, Oregon Laws 1931, to have the water rights made appurtenant to other lands within the irrigation district. In that event, the county shall sell the lands without any water rights being appurtenant thereto. If the irrigation district failed within five years after March 6, 1931, to make such application, then title to the water rights shall be considered to have been forfeited.

Note: 540.550 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 540 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

540.560 Order changing description of land to which water right is appurtenant; limitation; purpose; hearing; effect of final order. (1) If the commission considers that a certificate of water right does not identify the lands to which the right is appurtenant with sufficient specificity for management, delivery or transfer of that right, the commission may issue an order clarifying and refining the description of the land to which the water right is appurtenant.

(2) An order issued under this section may not reduce the rate, duty or number of acres stated in the certificate of water right. The sole purpose of an addendum to a water right certificate is to better define the location of acreage to which the water right is appurtenant, where the certificate states only that the use is limited to a number of acres within a larger tract.

(3) Any order issued under this section shall be served on the legal owner of the land to which the water right is appurtenant and on the occupant of the land, by certified mail, return receipt requested. If the owner or occupant files a written request for a hearing within 30 days after service of the order, the commission shall conduct a hearing of the matter under ORS 183.413 to 183.484.

(4) A final order under this section shall become an addendum to and shall be filed

with the certificate of water right that the order clarifies. For all purposes, the final order shall constitute the description of the land to which the water right is appurtenant. [1987 c.649 §9]

540.570 Use of water on alternate acreage to that specified in certificate; procedure. (1) Upon compliance with subsection (2) of this section, a district may deliver water appurtenant to any land within the legal boundaries of the district, to an equal acreage elsewhere within the legal boundaries of that district.

(2) When a district or an owner or an owner's agent within a district who is subject to the charges or assessments of the district wishes to use water on alternate acreage within the district, if the district has approved the owner's request, the district shall notify the commission of that intent at least 60 days before the beginning of the irrigation season. The notice shall be signed by the owners of the affected lands.

(3) The commission may deny the request to use water on the alternate acreage if such use would interfere with existing water rights or result in enlargement of the water right. If the commission fails to deny the request to use water on alternate acreage before the beginning of the irrigation season, the commission's approval shall be considered to have been granted.

(4) The commission by rule may require that a district maintain or submit documentary evidence, including maps, of the lands from which and to which water is to be applied under this section each irrigation season.

(5) The right of a district to deliver water to alternate acreage under this section shall be limited to a period of one irrigation season and to the acreage identified by the district in its notice to the commission. Any intended use of water on alternate acreage in a subsequent irrigation season shall require renotification by the district before each irrigation season.

(6) The application of this section shall not toll the time period of nonuse under ORS 540.610 as to the land to which the water was originally appurtenant. [1987 c.649 §10; 1991 c.957 §9]

540.572 Application of certificated water to other irrigable land within district; notice of intent to transfer. (1) Upon compliance with this section and ORS 540.574 and 540.576, whenever land within the legal boundaries of a district is no longer irrigated or susceptible of irrigation, the district may apply the certificated water to which such land is entitled to other irrigable lands

within the legal boundaries of the district if the district:

(a) Is managed by a full-time manager; and

(b) Is implementing a conservation plan approved by the Water Resources Commission, and meets all other management responsibility criteria for districts and conservation and efficiency criteria required by the Water Resources Commission.

(2) If a water user of a district has not made beneficial use of the water to which the user is entitled for a period of four successive years, the district shall advise the user and any security interest holder of record that if the user does not use the water for a fifth successive year, the district may petition the Water Resources Commission for a transfer of the water right under ORS 540.574.

(3) When a district wishes to transfer the use of water under this section, the district shall provide notice of its intent to petition for a transfer to the user and any security interest holder of record of the land whose right of record would be transferred. The notice shall be sent to the last-known address for the user with a return receipt requested.

(4) The notice required under subsection (3) of this section shall:

(a) Include:

(A) The number of acres for which the user is being charged or assessed;

(B) A general description or tax lot of the land to which the water is assigned;

(C) A description of the use; and

(D) A request for confirmation that the information in the notice is correct.

(b) Advise the user that:

(A) The district has determined that the user's land is no longer irrigated or susceptible of irrigation and that the district intends to petition the Water Resources Commission for approval to transfer the user's water right to other lands in the district.

(B) If the user disagrees with the determination of the district that the user's land is no longer irrigated or susceptible of irrigation or if the user has some other objection to the proposed action of the district, the user shall so advise the district in writing within 30 days after the notice is mailed.

(C) The user shall advise the district in writing within the foregoing time period if the user believes the presumption of forfeiture under ORS 540.610 is rebuttable for a reason provided under ORS 540.610.

(5) If the district receives a written objection within 30 days after the mailing of the notice under subsection (3) of this section, the district manager shall attempt to resolve the matter with the user. If the user's objections cannot be resolved by the manager, a hearing shall be held before the board of directors who shall make a determination whether to proceed with the petition to the Water Resources Commission.

(6) If no written objections are received by the district within 30 days after the mailing of the notice under subsection (3) of this section, or following resolution or hearing under subsection (5) of this section, the district may petition the Water Resources Commission for approval of the transfer under ORS 540.574.

(7) As used in this section:

(a) "Irrigable land" means land that is currently under irrigation or susceptible of irrigation for agricultural, horticultural, viticultural or grazing purposes.

(b) "No longer irrigated or susceptible of irrigation" means:

(A) Land on which water for irrigation has not been applied for a period of five successive irrigation seasons; or

(B) Land that does not have reasonable access to the system of irrigation works of the district, or that cannot be irrigated from or that is not susceptible to or would not, by reason of being permanently devoted to uses other than agricultural, horticultural, viticultural or grazing, be directly benefited by actual irrigation from the district.

(c) "Owned" or "controlled" means ownership in fee, purchase on a land sale contract, option to purchase or lease.

(d) "User" means an owner of land with an appurtenant water right who is subject to the charges or assessments of a district and from whose land the water right would be transferred by the petition and map filed under ORS 540.574 and an owner of land to which the water right would be transferred. [1991 c.957 §3]

540.574 Petition for approval of transfer. (1) In accordance with the requirements of subsection (3) of this section, a district may petition the Water Resources Commission for approval and acceptance of a district map indicating the transfer of the location and use of the water rights within the district or any part of the district. The map shall be in a form satisfactory to the commission and shall be certified by the district rather than a certified water right examiner. In no event shall the petition and map expand a water right of the district or its users beyond the total right of record for the dis-

tract. If the district complies with the requirements of ORS 540.572 to 540.578, and after the opportunity for hearing under ORS 540.578, the commission shall issue an order approving the transfer and proceed as provided in ORS 540.530 (1) and (2).

(2) If the commission denies the petition under subsection (1) of this section, the commission shall hold a hearing on the denial. Notice and conduct of the hearing shall be according to the provisions of ORS 183.310 to 183.550 applicable to a contested case proceeding. The hearing shall be conducted in the area of the state where the right is located unless the parties and the persons who file the protest under this section stipulate otherwise.

(3) The petition required under subsection (1) of this section shall include:

(a) The name of the district and the certificate number of each water right contained in the petition.

(b) The names of all users within the district from whose lands water rights are to be transferred.

(c) The names of all users within the district to whose lands water rights are to be transferred.

(d) A general description of the district boundaries.

(e) A general description of the users' land and the water right for each parcel from which and to which water rights are to be transferred. If the water right is on a tract of land of five acres or less, a notation of the acres of water right on the assessor's tax map shall be sufficient for identification of the place of use and the extent of use.

(f) A description of the use that is proposed to be made of the water on each parcel.

(g) An affirmation by the petitioner that the map and petition are accurate to the best of the petitioner's knowledge.

(h) A statement by the petitioner that notice has been given as required under ORS 540.572 (2), and that the water right has not previously been forfeited under ORS 540.610 due to an earlier or longer period of nonuse. [1991 c.957 §4]

540.576 Notice of petition; protest; user rights. After filing a petition under ORS 540.572, the district shall send a copy of the petition and map and a notice to the users of the district whose right of record is to be transferred and who are to receive the transferred right. The copy of the petition and the notice shall be sent to the last-known address of the user with a return receipt requested. The notice accompanying the petition shall advise the user that:

(1) Sixty days after the date of mailing of the notice, the Water Resources Commission shall accept the petition and the water right shall be transferred unless a protest is filed or the petition does not meet the requirements of ORS 540.572 to 540.578; and

(2) The user has the right to protest the petition and transfer in the manner described in ORS 540.578. [1991 c.957 §5]

540.578 Filing of protest; hearing on proposed transfer. (1) Any user may file with the Water Resources Commission, within 60 days after the date of mailing the notice under ORS 540.576, a protest against approval of the petition, map and transfer. Whenever a timely protest is filed, or in the opinion of the commission a hearing is necessary to determine whether the district has complied with the requirements of ORS 540.572 to 540.578, or the proposed transfers described in the petition would result in injury to existing water rights, the commission shall hold a hearing on the matter. The hearing shall be conducted according to the provisions of ORS 183.310 to 183.550 applicable to contested case proceedings. The hearing shall be held in the area of the state where the rights are located unless the parties and the persons who filed the protest under this section stipulate otherwise.

(2) If, after examination or hearing, the commission finds that the petition complies with the requirements of ORS 540.572 to 540.578, and that the proposed changes described in the petition would not result in injury to existing water rights, the commission shall issue an order approving the transfer and proceed as provided in ORS 540.530 (1) and (2).

(3) A certificate issued under this section for the transferred water right shall have the evidentiary effect provided for in ORS 537.270 unless the right to appropriate water described in the certificate is forfeited after the certificate is issued. [1991 c.957 §6]

ABANDONMENT OF WATER RIGHTS

540.610 Use as measure of water right; abandonment of right for nonuse; nonapplicability of section; confirmation of rights of municipalities. (1) Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right. Thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of

appropriation in the manner provided by law, subject to existing priorities.

(2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing one or more of the following:

(a) The water right is for use of water, or rights of use, acquired by cities and towns in this state, by appropriation or by purchase, for all reasonable and usual municipal purposes.

(b) A finding of forfeiture would impair the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired.

(c) The use of water, or rights of use, are appurtenant to property obtained by the Department of Veterans' Affairs under ORS 407.135 or 407.145 for three years after the expiration of redemptions as provided in ORS 23.530 to 23.600 while the land is held by the Director of Veterans' Affairs, even if during such time the water is not used for a period of more than five successive years.

(d) The use of water, or rights of use, under a water right, if the owner of the property to which the right is appurtenant is unable to use the water due to economic hardship as defined by rule by the commission.

(e) The period of nonuse occurred during a period of time within which land was withdrawn from use in accordance with the Act of Congress of May 28, 1956, chapter 327 (7 U.S.C. 1801-1814; 1821-1824; 1831-1837), or the Federal Conservation Reserve Program, Act of Congress of December 23, 1985, chapter 198 (16 U.S.C. 3831-3836, 3841-3845). If necessary, in a cancellation proceeding under this section, the water right holder rebutting the presumption under this paragraph shall provide documentation that the water right holder's land was withdrawn from use under a federal reserve program.

(f) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted to the commission or the commission initiated cancellation proceedings under ORS 540.631, whichever occurs first.

(g) The owner of the property to which the water right was appurtenant is unable to use the water because the use of water under the right is discontinued under an order of the commission under ORS 537.775.

(h) The nonuse occurred during a period of time within which the water right holder

was using reclaimed water in lieu of using water under an existing water right.

(3) The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed. [Amended by 1985 c.689 §5; 1987 c.339 §4; 1989 c.699 §1; 1989 c.833 §61a; 1991 c.370 §6]

540.612 Exemption from forfeiture for right subject to petition filed under ORS 540.574. If a district, as defined in ORS 540.505, petitions for a transfer as provided in ORS 540.574 no later than the end of the calendar year of the fifth year of nonuse under ORS 540.610 (1), the forfeiture provisions of ORS 540.610 shall not apply to the lands from which the water right is sought to be transferred pending approval of the district's petition. The time required for the processing of the petition, including any time required for hearings, appeals and completion of an authorized change, shall not be included when computing a five-year period of nonuse under the provisions of ORS 540.610 (1). [1991 c.957 §11]

540.615 [1961 c.140 §1; 1987 c.339 §5; repealed by 1989 c.699 §4]

540.620 [Repealed by 1955 c.671 §1]

540.621 Cancellation of abandoned water right upon request of owner. Whenever the owner of a perfected and developed water right certifies under oath to the Water Resources Commission that the water right has been abandoned by the owner and that the owner desires cancellation thereof, the commission shall enter an order canceling the water right. Effective upon the date of the entering of such order, the water which was the subject of use under the water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities. [1955 c.670 §1; 1979 c.67 §5; 1985 c.673 §96]

540.630 [Repealed by 1955 c.671 §1]

540.631 Notice by Water Resources Commission of initiation of proceedings to cancel forfeited water right. Whenever it appears to the satisfaction of the Water Resources Commission upon the commission's own determination or upon evidence submitted to the commission by any person that a perfected and developed water right has been forfeited as provided in ORS 540.610 (1), and would not be rebutted under ORS 540.610 (2), the commission shall initiate proceedings for the cancellation of such water right by causing written notice of such

initiation of proceedings to be given by registered or certified mail, return receipt requested, to the legal owner of the lands to which the water right is appurtenant and to the occupant of such lands. The notice to the legal owner shall be addressed to the legal owner at the owner's last address of record in the office of the county assessor of the county in which the lands are located. The notice shall contain a complete description of the water right and of the lands to which the water right is appurtenant. The notice shall state that the legal owner or the occupant has a period of 60 days from the date of the mailing of the notice within which to protest the proposed cancellation of the water right. [1955 c.670 §2; 1985 c.673 §97; 1989 c.699 §2; 1991 c.249 §53]

540.640 [Repealed by 1955 c.671 §1]

540.641 Cancellation if no protest; procedure for cancellation if owner or occupant files protest. (1) If the legal owner or the occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water right within the 60-day period prescribed in the notice, the Water Resources Commission may enter an order canceling the water right.

(2) If the legal owner or the occupant receiving notice as provided in ORS 540.631 files a protest against the proposed cancellation of the water right with the commission within the 60-day period prescribed in the notice, the commission shall fix a time and place for a hearing on the protest. The commission shall cause written notice of the hearing to be given at least 10 days prior to the hearing to the person protesting the cancellation of the water right and to any other person who in the opinion of the commission is an interested party to the proceeding. The hearing shall be held by the commission and shall be conducted under the provisions of ORS 183.310 to 183.550 pertaining to contested cases. After the hearing the commission shall enter an order canceling the water right, canceling in part or modifying the water right, or declaring that the water right shall not be canceled or modified. [1955 c.670 §3; 1975 c.581 §26c; 1983 c.807 §3; 1985 c.673 §98]

540.650 Issuance of new water right certificate for water rights not canceled. If the order of the Water Resources Commission or the final decree on the appeal therefrom under ORS 540.641 cancels in part or modifies the water right, that portion of the water right not canceled or continued as modified shall be reaffirmed by a new water right certificate issued by the commission. Such certificate shall be of the same character as that described in ORS 539.140. The

certificate shall be recorded and transmitted to the owner of the water right as provided in ORS 539.140. [1955 c.670 §4; 1979 c.67 §6; 1985 c.673 §99]

540.660 Affidavit of watermaster that circumstances prevent use of water right in accordance with terms of certificate; procedures for cancellation of right. (1) If a watermaster has reason to believe that circumstances exist that prevent a water right from being exercised according to the terms and conditions of the water right certificate issued under ORS 537.250 or 539.140, such as the land to which the water right is appurtenant is covered by an impermeable surface, or the diversion mechanism used to appropriate water under a water right is no longer operable, the watermaster shall file an affidavit with the Water Resources Director. The affidavit shall state that to the best of the watermaster's knowledge, there is no physical way the water may be applied to a beneficial use in accordance with the terms and conditions of the water right certificate.

(2) If the watermaster files an affidavit under subsection (1) of this section each year for five consecutive years, the affidavits shall constitute prima facie evidence that the water has not been applied to a beneficial use for five years and the Water Resources Commission shall initiate proceedings under ORS 540.631 to cancel the water right.

(3) The Water Resources Department shall provide notice of the affidavit filed with the Water Resources Director under subsection (1) of this section. The department shall provide such notice in the following manner:

(a) If there are 25 or fewer record owners of the land, the department shall mail a copy of the affidavit to each record owner.

(b) If there are more than 25 record owners, the department shall provide general notice by publication according to the procedures established in ORS 193.010 to 193.100.

(c) If the land is within the boundaries of an irrigation district, the department shall mail a copy of the affidavit to the irrigation district.

(4) As used in this section, "record owner" means the person shown as the owner of the land in the county deed records established under ORS chapter 93. [1987 c.339 §1]

540.670 Effect of cancellation of primary water right on supplemental right; change from supplemental to primary right; priority date. (1) The cancellation of a primary water right for nonuse under ORS 540.641 shall not also cancel a supplemental water right unless the supplemental water

right also has not been used beneficially for five or more years.

(2) If the Water Resources Commission cancels a primary water right under ORS 540.641 the commission may issue a new water right certificate changing the supplemental water right to a primary right if the commission finds that the change would not result in injury to existing water rights.

(3) A supplemental right changed to a primary right under subsection (2) of this section shall retain the priority date of the supplemental right. [1987 c.339 §2]

PROHIBITED ACTS; INJUNCTIONS

540.710 Interference with headgate, or use of water denied by watermaster or other authority; evidence of guilt. No person shall wilfully open, close, change or interfere with any lawfully established headgate or water box without authority, or wilfully use water or conduct water into or through the ditch of the person which has been lawfully denied the person by the watermaster or other competent authority. The possession or use of water when the same shall have been lawfully denied by the watermaster or other competent authority shall be prima facie evidence of the guilt of the person using it.

540.720 Unauthorized use or waste of water; evidence of guilt of user. No person shall use without authorization water to which another person is entitled, or wilfully waste water to the detriment of another. The possession or use of such water without legal right shall be prima facie evidence of the guilt of the person using it.

540.730 Obstruction interfering with use of works or access thereto prohibited. Whenever any appropriator of water has the lawful right of way for the storage, diversion, or carriage of water, no person shall place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto.

540.740 Injunctive relief against action of watermaster. Any person who may be injured by the action of any watermaster may appeal to the circuit court for an injunction. The injunction shall only be issued in case it can be shown at the hearing that the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights to the use of water. [Amended by 1985 c.673 §100]

540.750 Injunction suits; notice and hearing to authorize restraining order; time of hearing. In suits for injunction affecting the use of water from streams upon which the rights to water have been determined, no restraining order shall be granted before hearing had after at least three days' notice thereof, served upon all parties defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than 15 days after issues joined, unless for good cause shown further time be allowed.

PENALTIES

540.990 Penalties. (1) Violation of any provision of ORS 540.440 is punishable, upon conviction, by a fine of not less than \$25 nor more than \$150, together with the costs and disbursements of the action, and in default of the payment of the fine and costs, by confinement in the county jail one day for each \$2 thereof. Justice courts shall have concurrent jurisdiction with the circuit courts in the trial of all proceedings under this subsection.

(2) Violation of any provision of ORS 540.710, 540.720 or 540.730, or 540.370 (2), is punishable, upon conviction, by a fine of not less than \$10 nor more than \$250, or by imprisonment in the county jail for not more than six months, or both. Justice courts and district courts shall have concurrent jurisdiction with the circuit courts in the trial of all violations under this subsection.