

LORD'S OREGON LAWS

SHOWING

All the Laws of a General Nature in Force in the
State of Oregon

Including the Sessions of 1909, and the Laws and Constitutional
Amendments Adopted at the General Election of 1910

Compiled and Annotated

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CHAPTER II.

OF THE APPROPRIATION OF WATER FOR MINING AND ELECTRICAL POWER.

§ 6551. Use of Water for Mining and Electrical Power a Public One.

The use of the water of the lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state and to furnish electrical power for all purposes, is declared to be a public and bene-

(§§ 6548-6551)

ficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial use is hereby granted; *provided*, that the provisions of this act do not apply or extend to that certain stream situated in Multnomah county, Oregon, known as Multnomah creek, and sometimes called Coon creek, which stream forms Multnomah falls, but said stream and the flow of water therein shall not be diverted or interrupted for any purposes whatsoever. [L. 1899, p. 172, § 1; B. & C. § 5022; L. 1907, c. 145, p. 288.]

See notes to §§ 6594, 6624.

This section and § 6552, authorize corporations engaged in furnishing electrical power for all purposes to use the surplus water of the streams of the state for water power, and to condemn the rights of riparian proprietors, and also rights of way for ditches. Section 6555 declares that when the point of diversion shall have been selected the appropriator shall post a certain notice thereat, and § 6556 requires the filing for record within ten days thereafter of a similar notice, and a map showing the general route of the ditch. Section 6557 provides that when such corporation shall have acquired the right to appropriate water in the manner provided, it may condemn lands necessary for the right of way for its ditch; and it was held that where a corporation organized for furnishing electrical power for all purposes has selected a point for the diversion of the water of a stream, and has surveyed and located the line of its ditch, and has posted the required notice, and filed the notice and map, its right to appropriate the water is thereby acquired. Thereafter the corporation may maintain an action of condemnation without showing that it is the sole owner of the banks of the stream in question from the point of the proposed diversion to the mouth thereof, or that it has secured from the riparian proprietors below the proposed point of diversion the right to divert the surplus water in such stream: *Grande Ronde Elec. Co. v. Drake*, 46 Or. 243, 78 Pac. 1031.

The provision in § 18, Art. I, Const. Or., that private property shall not be taken for public use without just compensation first assessed and tendered, impliedly prohibits the taking of private property for private use, even though just compensation be made therefor: *Grande Ronde Elec. Co. v. Drake*, *supra*.

The necessity of exercising the right of eminent domain in general classes of cases is a legislative question, but whether the use in a particular instance is public or private,

and the extent of the use necessary, are to be determined by the courts as questions of fact; for example, the legislature may determine that corporations furnishing electricity for sale shall be allowed to condemn private property for their use, yet as to the nature of the use to which a particular piece of property is to be put and the extent of the needs of the condemnor, there may be a question, which the courts must decide: *Grande Ronde Elec. Co. v. Drake*, *supra*.

Sections 6551-6556 declare the use of water of the streams of the state for furnishing electric power for all purposes a public use, and authorize corporations created for such purpose to use such streams therefor, so that the use may not materially impair the rights of prior appropriators, on the corporation complying with certain prescribed conditions. Section 6557 declares that when such corporation shall have acquired the right to appropriate the water "in the manner hereinbefore provided it may proceed to condemn lands and premises necessary for right of way for its ditch"; and §§ 6558 and 6559 authorize such corporations, when authorized as so provided, to appropriate water and construct and maintain a ditch, to maintain an action to condemn a right of way for such ditch, and also for the condemnation and appropriation of the right to the flow of the water in any stream from which it is proposed to divert water below the point of diversion vested in riparian proprietors; and it was held that a corporation, having so acquired the right to appropriate water, may maintain an action either to condemn land for a ditch, or to condemn the right to have the water flow in the channel of the stream through the premises of a riparian proprietor, or it may sue for both purposes in one action when both rights are vested in the same defendant: *Grande Ronde Elec. Co. v. Drake*, *supra*.

Also bearing on this point as applies to cities or towns, see *McMinnville v. Howenstine*, Or....., 109, Pac. 81.

§ 6552. Who May Use Water for Electric Power and Mining.

All persons, companies, and corporations having title or possessory right to any mineral or other land, shall be entitled to the use and enjoyment of the water of any lake or running stream within the state for mining and other purposes in the development of the mineral resources of the state, or to furnish electrical power for any purposes; and such waters may be made available to the full extent of the capacity thereof without regard to deterioration in quality or diminution in quantity, so that such use of the same does not materially affect or impair the rights of prior appropriations. [L. 1899, p. 172, § 2; B. & C. § 5023.]

§ 6553. Right of Way and Reservoir Sites May be Condemned.

All such persons, companies, and corporations may appropriate and divert (§§ 6552, 6553)

such waters, and may condemn right of way for ditches, canals, flumes, and pipe lines for the carrying of same, and may condemn the rights of riparian proprietors upon the lake or stream from which such appropriation is made, upon complying with the terms of this act. Such persons, companies, and corporations shall also have the right to condemn lands for the sites of reservoirs for storing water for future use, and for rights of way for feeders carrying water to such reservoirs, and for ditches, canals, flumes, or pipe lines carrying the same away, and shall have the right to take from any lake or running stream in this state and store away any water not previously appropriated or not needed for immediate use by any person having a superior right thereto. [L. 1899, p. 172, § 3; B. & C. § 5024.]

§ 6554. Land May be Entered Upon for Surveys and Location.

Such persons, companies, and corporations may enter upon any land for the purpose of locating a point of diversion of the water intended to be appropriated, and upon any land lying between such point and the lower terminus of its proposed ditch, canal, flume, or pipe line for the purpose of examining the same and of locating and surveying the line of such ditch, canal, flume, or pipe line, together with the lines of necessary distributing ditches and feeders for reservoirs, and to locate and determine the site for reservoirs for storing water. [L. 1899, p. 173, § 4; B. & C. § 5025.]

§ 6555. Appropriator Must Post Notice.

When a point of diversion shall have been selected, such appropriator shall post in a conspicuous place thereat a notice in writing containing a statement of the name of the ditch, canal, flume, or pipe line and of the owner thereof, the point at which its head gate is proposed to be constructed, a general description of the course of said ditch, canal, flume, or pipe line, the size or dimensions of the same in width and depth, the number of cubic inches of water (by miners' measurement under a six-inch pressure) intended to be appropriated, and the number of reservoirs, if any. [L. 1899, p. 173, § 5; B. & C. § 5026.]

§ 6556. Maps of Description and Definite Location to be Filed.

Within ten days from the date of posting such notice, such appropriator shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume or pipe line, distributing ditches, reservoirs, and feeders are situated, a similar notice, and at the same time shall file a map showing the general route of said ditch or canal or flume or pipe line; and in case said ditch or canal or flume or pipe line, distributing ditches, reservoirs, and feeders shall not lie wholly in one county, such notice and map shall be filed in the office of the county clerk or recorder of conveyances of each county in which any portion of said ditch or canal, flume, pipe line, distributing ditches, reservoirs, and feeders may be situated. Within sixty days from the completion of such ditch or canal or flume or pipe line, such appropriator shall in like manner file a

(§§ 6554-6556)

map of definite location of said ditch or canal or flume or pipe line, by legal subdivisions of the land traversed thereby in case it is surveyed, with the points of location of reservoirs, if any, designated thereon. It shall be the duty of every county clerk or recorder of conveyances, immediately upon the filing of such notice in his office, to record the same in a book kept for such purpose, and he shall file and preserve such maps among the records of his office. [L. 1899, p. 173, § 6; B. & C. § 5027.]

§ 6557. Appropriator May Proceed to Condemn Right of Way.

When such persons, companies, and corporations shall have acquired the right to appropriate water in the manner hereinbefore provided, it may proceed to condemn lands and premises necessary for right of way for its ditch or canal or flume or pipe line, and likewise for its distributing ditches and feeders and for sites for reservoirs; but right of way for the main line of said ditch or canal or flume or pipe line shall not exceed fifty feet in width, and for each distributing ditch or feeder thirty feet in width, and for a site for each reservoir twenty acres from one owner, or for every ten thousand inches of water (miners' measurement, as aforesaid), or fraction thereof over half, of the capacity of the main ditch or canal or flume or pipe line for every twenty miles of its length. [L. 1899, p. 174, § 7; B. & C. § 5028.]

§ 6558. Mode of Procedure to Condemn.

Whenever any persons, companies, and corporations authorized as hereinbefore provided to appropriate water and to construct and maintain a ditch or canal or flume or pipe line for mining purposes, or to furnish electrical power for any purpose, and to condemn lands for right of way and sites for reservoirs, is unable to agree with the owner of such lands as to compensation to be paid therefor, or if such owner be absent from the state or incapable of acting, such persons, companies, and corporations, may maintain an action in the circuit court of the county in which the lands sought to be appropriated or some portion thereof are situated, for the purpose of having such lands appropriated to its use and for determining the compensation to be paid to such owner therefor. The proceedings in such action, to final determination, shall be the same as those prescribed in chapter I of title XLV. [L. 1899, p. 174, § 8; B. & C. § 5029.]

§ 6559. Appropriation Below Contiguous Owners' Point of Diversion.

Such persons, companies, and corporations may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it or they propose to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such action shall be brought in the county where the lands to be affected, or some portion thereof, are situated, and the manner of procedure therein shall be similar to that prescribed for the condemnation of lands in chapter I of title XLV; *provided*, that no person owning lands lying con-

(§§ 6557-6559)

tiguous to any natural stream shall, without his consent, be deprived of water for household or domestic use, or for the purpose of watering his stock, or of water necessary to irrigate crops growing upon such lands, and actually used therefor, nor shall the rights of any prior appropriator, without his consent, be materially affected or impaired, regardless of whether such appropriation was made for use upon riparian or nonriparian land. [L. 1899, p. 174, § 9; B. & C. § 5030; L. 1903, (sp. sess.) p. 25.]

§ 6560. Actual Construction, When to be Begun.

Within six months from the date of the posting of the notice above prescribed, the persons, companies, and corporations proposing to appropriate the water therein mentioned shall commence the actual construction of their or its proposed ditch or canal or flume or pipe line, and shall prosecute the same without intermission (except as resulting from the act of God, the elements, or unavoidable casualty), until the same be completed; and the actual capacity of said ditch or canal or flume or pipe line when completed shall determine the extent of the appropriation, anything contained in the notice to the contrary notwithstanding. Upon a compliance with the provisions of this act, the right to the use of the water appropriated shall relate back to the date of posting said notice. [L. 1899, p. 174, § 10; B. & C. § 5031.]

§ 6561. Existing Appropriations Upheld.

All existing appropriations of water made for beneficial purposes by any persons, corporations, or company, in accordance with the laws of the United States, or in accordance with the laws of the state of Oregon or the decisions of the supreme court, or the established customs and regulations of the district in which such appropriations have been made, shall be respected and upheld to the extent of the amount of water actually appropriated, nor shall any existing mill be deprived of its water power, however lawfully acquired, without the consent of its owner; and all controversies respecting rights to water under the provisions of this act shall be determined by the date of the appropriations as respectively made thereunder by the parties. [L. 1899, p. 175, § 11; B. & C. § 5032.]

§ 6562. Extension of Ditch to Conform to Changes Requiring it.

In case the channel of any natural stream shall become so cut out, lowered, turned aside, or otherwise changed, from any cause, as to prevent any ditch or canal or flume or pipe line or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the persons, companies, or corporations owning such ditch or canal or pipe line, flume, or feeder shall have the right to extend the head of such ditch or canal or pipe line, flume, or feeder to such distance upon the streams which supplies the same as may be necessary for securing a sufficient flow of water into the same; and for such purpose such persons, companies, or corporations shall have the same right to maintain proceedings for condemnation of right

(§§ 6560-6562)

of way for such extension as in case of constructing a new ditch, and the priority of right to take the water from such stream through any ditch or canal or pipe line, flume, or feeder shall be unaffected in any respect by reason of a change in the place of diversion; *provided*, no such change shall interfere with the complete use or enjoyment of any other ditch or canal, pipe line, flume, or feeder lawfully constructed; and when from any cause the line of any ditch or canal, pipe line, flume, or feeder along the line of common user, by reason of the faulty construction of such portion of such ditch, canal, flume, or pipe line, and the persons, companies, or corporations securing the use of the same shall be liable to the owner, persons, companies, or corporations for all damages by it sustained growing out of the enlargement of said ditch, canal, flume, or pipe line, or the increased volume of water turned therein. [L. 1899, p. 175, § 12; B. & C. § 5033.]

§ 6563. Bond for Payment of Costs of Change.

Before proceeding to secure the right to make use of any portion of the ditch, canal, flume, or pipe line, the persons, companies, or corporations seeking to secure the same shall execute and deliver to the owner persons, companies, or corporations a bond with sufficient sureties in an amount equal to the original cost of construction and the estimated cost of enlargement of the portion of said ditch, canal, flume, or pipe line sought to be subjected to a double use, conditional for the payment on demand to the owner persons, companies, or corporations of a reasonable proportion of the original cost of construction of such portion of said ditch, canal, flume, or pipe line and of the cost of enlargement thereof, together with a reasonable proportion of the cost of its maintenance as enlarged, and of all damages that may at any time accrue to the owner persons, or companies, or corporations, and for which it shall have a right of recovery against said other persons, companies, or corporations by reason of the provisions of this section; *provided*, that in case the persons, companies, or corporations owning said ditch, canal, flume, or pipe line shall object to the amount or sufficiency of the sureties on such bond, it shall serve upon the corporations, companies, or persons desiring to use such ditch, canal, flume, or pipe line within ten days after receiving said bond a notice specifying particularly the objections thereto, and the sufficiency of the sureties, or the amount of the bond shall be determined by the judge of the circuit court of the county where said ditch, canal, flume, or pipe line is situated, and said judge may hear evidence at chambers in relation [* * *] as originally constructed can no longer be maintained, the persons, companies, or corporations owning the same may alter the course thereof and for such purpose may condemn lands for right of way as in case of original construction. [L. 1899, p. 175, § 12; B. & C. § 5033.]

.This and the preceding section are printed as in the enrolled bill. They have evidently been made up from §§ 6535, 6537, and confused in the transcribing.

§ 6564. Shortest Practicable Route Must be Selected.

Whenever it becomes necessary to construct any ditch, canal, flume, pipe

line, distributing ditches, or feeders across the improved or occupied lands of another, under the provisions of this act, such persons, companies, or corporations shall select the shortest and most direct route practicable, having reference to cost of construction, upon which said ditch, canal, flume, pipe line, distributing ditches, or feeders can be constructed with uniform or nearly uniform grade. [L. 1899, p. 177, § 13; B. & C. § 5034.]

§ 6565. Land Not to be Burdened With More Than One Ditch.

No tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more ditches or canals, flumes, or pipe lines, constructed under this act for the purpose of conveying water through said property when the same object can be feasibly and practically attained, uniting and conveying all the water necessary to be conveyed through such property in one ditch, canal, flume, or pipe line, and any persons, companies, or corporations having constructed a ditch, canal, flume, or pipe line for the purpose hereinbefore provided shall allow any other persons, companies, or corporations to enlarge such ditch, canal, flume, or pipe line, so as not to interfere with the operations of the persons, companies, or corporations owning the same, and use such ditch, canal, flume, or pipe line in common with the persons, companies, or corporations owning the same, upon payment to such persons, companies, or corporations of a reasonable proportion of the cost of constructing and maintaining such ditch, canal, flume, or pipe line. Such persons, companies, or corporations shall be jointly liable to any person damaged. [L. 1899, p. 177, § 14; B. & C. § 5035.]

See note to § 6563, *ante*.

§ 6566. Natural Depressions in Earth May be Utilized.

In constructing a ditch, canal, flume, or pipe line, distributing ditches or feeders, under the provisions of this act, the owner or owners thereof may make use of natural depressions in the earth along the line thereof to all intents and purposes as parts of said ditch, canal, flume, or pipe line, distributing ditches or feeders; and it may conduct the water appropriated by it along the channel of any natural stream, but not so as to raise the water thereof above ordinary high-water mark, and may take the same out again at any point desired without regard to the prior rights of others to water from said stream, but due allowance shall be made for evaporation and seepage. [L. 1899, p. 177, § 15; B. & C. § 5036.]

§ 6567. Head Gates Must be Maintained.

The owner or owners of every ditch, canal, flume, or pipe line constructed under the provisions of this act shall be required to erect and keep in good repair a head gate at the head of its ditch, canal, flume, or pipe line, which, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The framework of such

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head gate shall be of timber not less than four inches square, and the bottom, sides and gate or gates shall be of plank not less than two inches in thickness. [L. 1899, p. 177, § 16; B. & C. § 5037.]

§ 6568. Liability for Damages From Leakage or Overflow.

The owner or owners of every ditch, canal, flume, or pipe line constructed under the provisions of this act shall be liable for all damages done to the persons or property of others, arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch, canal, flume, or pipe line, or reservoir; *provided*, that damage resulting from extraordinary and unforeseen action of the elements, or attributed in whole or in part to the wrongful interference of another with said ditch, canal, flume, pipe line, or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same, shall not be recovered against said corporations, companies, or persons. [L. 1899, p. 178, § 17; B. & C. § 5038.]

§ 6569. Bridges at Road Crossing, Liability for Neglect to Build.

The owner or owners of every ditch, canal, flume, or pipe line constructed under the provisions of this act across any public highways or public traveled road shall put a good substantial bridge, not less than fourteen feet in breadth, over such ditch, canal, or flume, where it crosses said highway or road. Travel shall not be suspended by the construction of said ditch, canal, flume, or pipe line, and such bridge shall be completed within three days from the time said highway or road is intersected. In case such bridge is not so constructed and completed, it shall be the duty of the road supervisor of the road district in which the point of intersection is situated to construct said bridge, and he shall bring an action in his own name, as supervisor, for the use and benefit of his road district, in any court of competent jurisdiction, to recover the expense of constructing said bridge; and in such action, in addition to the costs and disbursements provided by statute, he shall recover such sum as the court or justice, if the action be brought in a justice's court, may adjudge to be reasonable as attorney fees in said action. Appeals may be taken in such cases as in other actions. [L. 1899, p. 178, § 18; B. & C. § 5039.]

§ 6570. Embankments and Reservoirs Must be Built and Kept so as to Prevent Damage.

The owner or owners of every ditch, canal, flume, or pipe line constructed under the provisions of this act shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or demand. [L. 1899, p. 178, § 19; B. & C. § 5040.]

(§§ 6568-6570)

§ 6571. Right to Appropriate Lost by Abandonment.

The right to appropriate water hereby granted may be lost by abandonment; and if any persons, companies, or corporations constructing a ditch, canal, flume, or pipe line under the provisions of this act shall fail or neglect to use the same for a period of two years at any time, it shall be taken and deemed to have abandoned its appropriation, and the water appropriated shall revert to the public and be subject to other appropriations in order of priority; but the question of abandonment shall be one of fact, to be tried and determined as other questions of fact. [L. 1899, p. 179, § 20; B. & C. § 5041.]

§ 6572. Willful Injury to Ditch, Etc., Penalty for.

Any person who shall knowingly and willfully cut, dig, break down, or open any gate, bank, embankment, or side of any ditch, canal, flume, or pipe line, feeder, or reservoir, constructed under the provisions of this act, the property of another, with intent maliciously to injure the owner or owners of such property or any other person, or for his or her own gain, by unlawfully causing the water contained in said ditch, canal, flume, pipe line, feeder, or reservoir to run or pour thereout with intent of stealing the same or appropriating it for his or her own gain, profit, benefit, or advantage, without the consent of the owner or owners thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than \$10 nor more than \$300, or by imprisonment in the county jail, not less than one month nor more than one year. Justices' courts shall have jurisdiction of all prosecutions arising under this section. The person so trespassing shall also be liable for all damage caused by his or her act to the owner or owners of said property, or any person or persons injured by his or her wrongful act. [L. 1899, p. 179, § 21; B. & C. § 5042.]

§ 6573. Parties in Suits for Protection of Water Rights.

In any suit which may hereafter be commenced for the protection of rights to water acquired under the provisions of this act, the plaintiff may make any and all persons who have diverted water from the same stream or source parties to such suit, and the court may in one decree determine the relative priorities and rights of all parties to such suit. Any person claiming a right on said stream or source, not made a party to such suit, may become such on application to the court, when it is made to appear that he is interested in the result of the suit, and may have his right determined; and the court may, at any stage, on its own motion, require any or all persons having or claiming rights to water on said stream or source to be brought in and made parties to said suit, when it appears that a complete determination of the issue involved cannot be made without the presence of such person or persons. [L. 1899, p. 179, § 22; B. & C. § 5043.]

§ 6574. Rights of Way Over State Lands.

The right of way to the extent hereinbefore specified, for the ditches or canals, flumes, pipe lines, distributing ditches, and feeders of any persons,

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companies, or corporations appropriating water under the provisions of this act, across any and all lands belonging to the state of Oregon, and not under contract of sale, is hereby granted. [L. 1899, p. 180, § 23; B. & C. § 5044.