

BEFORE THE STATE ENGINEER OF OREGON

Wasco County

IN THE MATTER OF THE)
CANCELANON OF CERTAIN)
WATER RIGHTS IN THE)
NAMES OF GEORGE F. GILL,)
HIGHLAND ORCHARD COMPANY)
AND GEORGE W. JOHNSON _ _ _)

STATEMENT
FINDINGS OF FACT
CONCLUSIONS
AND
ORDER

STATEMENT

- 1 -

On October 7, 1964, Preston Lindhorst, Paul Hulse, William L. Hulse, Carl Casey, and Richard C. Cantrell submitted affidavits alleging that the water had not been used on certain lands now owned by L. C. Lyda, for irrigation, as authorized under certain water rights for more than five years and requested institution of proceedings for cancelation of said rights.

- 2 -

Subsequently, this proceeding was initiated by the State Engineer under the provisions of ORS 540.631 to 540.650 for cancelation on grounds of abandonment of certain rights. The water rights in question are:

(a) For the use of not to exceed 0.20 cubic foot per second of water from Fifteenmile Creek through the Orchards Ridge Ditch, under a date of priority of September 5, 1922, for irrigation of 16.0 acres in the SE¼ SW¼ of Section 7, Township 2 South, Range 13 East, W.M., evidenced by certificate of water right recorded in Volume 5, page 4841, State Record of Water Right Certificates.

(b) For the use of not to exceed 0.75 cubic foot per second of water from Fifteenmile Creek through the Orchards Ridge Ditch, under a date of priority of April 25, 1928, evidenced by certificate of water right recorded in Volume 8, page 8105, State Record of Water Right Certificates, as amended by order of the State Engineer recorded in Volume 2, page 362, Special Order

Record, for irrigation of the following lands:

20.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$

20.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$

20.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$

Section 18

Township 2 South, Range 13 East, W.M.

(c) For the use of not to exceed 1.76 cubic feet per second of water from Fifteenmile Creek through the Orchards Ridge Ditch, under a date of priority of March 28, 1930, evidenced by certificate of water right recorded in Volume 9, page 10112, State Record of Water Right Certificates, as amended by order of the State Engineer recorded in Volume 2, page 361, Special Order Record, for irrigation of the following lands:

20.0 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$

Section 12

21.0 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$

Section 13

Township 2 South, Range 12 East, W.M.

40.0 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$

Section 7

10.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$

10.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$

30.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$

10.0 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$

Section 18

Township 2 South, Range 13 East, W.M.

(d) For the use of not to exceed 2.68 cubic feet per second of water from Fifteenmile Creek through the Orchards Ridge Ditch, under a date of priority of October 27, 1909, evidenced by certificate of water right recorded in Volume 4, Page 3483, State Record of Water Right Certificates, as amended by order of the State Engineer recorded in Volume 2, page 361, Special Order Record, for irrigation of the following lands:

30.0 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$

40.0 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$

Section 12

Township 2 South, Range 12 East, W.M.

25.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$

25.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$

25.0 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$

25.0 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$

25.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$

20.0 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$

Section 7

Township 2 South, Range 13 East, W.M.

That part of the right in the above described proceedings, paragraph (d), for the use of not to exceed 3.73 cubic feet per second of water for domestic use and irrigation of the following lands:

10.0 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
2.0 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$
5.0 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$
40.0 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 12

18.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
30.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
20.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 13

10.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 14
Township 2 South, Range 12 East, W.M.

10.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
20.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
15.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$
40.0 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$
30.0 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$
15.0 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
Section 7

Township 2 South, Range 13 East, W.M.

is not in question.

- 3 -

Notice of initiation of such proceedings was given by notice dated December 10, 1964. Said notice was sent by certified mail to L. C. Lyda, Route 1, Forest Grove, Oregon, owner of said lands, and to Charles Nelson, Route 1, Dufur, Oregon, occupant of lands described in the above paragraphs (a), (b), and (c).

- 4 -

On February 8, 1965, the State Engineer received a protest (objection) filed by T. Leland Brown, Attorney at Law, in behalf of L. C. Lyda, protesting cancelation of the water rights in question as described above.

- 5 -

On January 6, 1966, the State Engineer notified all interested parties that a hearing on the protest of L. C. Lyda against the proposed cancelation of the water rights would be held before the State Engineer in the Courthouse

Annex, Wasco County, in Room 114 at The Dalles, Oregon, on Wednesday, February 2, 1966, commencing at 9:00 a.m.

- 6 -

The hearing was held in the Circuit Court Room in the Wasco County Courthouse at the designated time before Chris L. Wheeler, State Engineer. Louis S. Bonney, Assistant Attorney General, appeared in behalf of the State Engineer. L. C. Lyda was represented by T. Leland Brown and Sam Van Vactor, Attorneys at Law, The Dalles, Oregon. Testifying in behalf of L. C. Lyda were: L. C. Lyda, Charles E. Nelson, Pearl E. Winslow and Earl Byron Benedict. Testifying in behalf of the State Engineer were: Richard C. Cantrell, Paul Hulse, William L. Hulse, Charles Engle, Calvin C. Casey, and Marion McAllister, all of whom are holders of water rights on Fifteen-mile Creek.

FINDINGS OF FACT

- 1 -

The lands involved in this proceeding lie for the most part on the ridge between Fifteenmile Creek to the north and east, and Rail Hollow on the south and east. They are primarily on the eastern most edge or lower end of Orchards Ridge Ditch. Witnesses referred to various fields as they were known locally: Haines field located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, Township 2 South, Range 12 East, W.M.; Striber field located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 2 South, Range 12 East, W.M.; NW $\frac{1}{4}$ SW and part of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, Township 2 South, Range 13 East, W.M.; Packing House field located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ and part of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 2 South, Range 13 East, W.M.; and the Gill field located in the NE $\frac{1}{4}$ of Section 7, Township 2 South, Range 13 East, W.M.

The Orchards Ridge Ditch was completed about 1918 to irrigate 500 acres of land as evidenced by certificate of water right recorded in Volume 14, page 3483, State Record of Water Right Certificates, said lands being within Sections 12 and 13, Township 2 South, Range 12 East, W.M., and Section 7,

Township 2 South, Range 13 East, W.M. Subsequently, rights were perfected for the irrigation of an additional 217 acres as evidenced by certificates recorded on pages 4841, 8105 and 10112, State Record of Water Right Certificates. The water supply to the Orchards Ridge Ditch is not adequate during the summer months and this ditch did not have adequate carrying capacity for all of these water rights until Mr. Lyda enlarged it in 1964.

The testimony presented was not in serious disagreement except as to the actual effect of subbing or subirrigation. The witnesses, with the exception of L. C. Lyda, are long-time residents and farmers in the area who possess particular knowledge of the irrigation practices. Therefore, their testimony is summarized in some detail.

- 2 -

The testimony of Richard C. Cantrell, Paul Taylor Hulse, William C. Hulse and Calvin C. Casey is summarized together since their knowledge of nonuse of water refers primarily to lands in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 2 South, Range 12 East, W.M., and all of Section 18, Township 2 South, Range 13 East, W.M., lying south of and adjacent to Rail Hollow Road.

Richard C. Cantrell testified that he has lived in the vicinity of Dufur since 1952; that he was born and raised there up until 1942; that he has a feed route and passes by the lands in question adjacent to the county road quite often during the summertime; that he has seen no water upon any lands which are visible from the road since 1955; and that he had not observed any water in the ditch diverting from Orchards Ridge Ditch and crossing the Rail Hollow Road until the fall of 1964.

Paul Taylor Hulse testified that he has resided on a place about four miles from the Lyda lands since 1960 and prior to that time resided about 12 miles southeast of Dufur; that he has observed lands which are visible from the county road and been upon the lands on the south side when riding for cattle about 1950 to 1953; that at no time had he observed any evidence of

irrigation upon these lands; had not observed any water in the ditch which crosses this road until 1964; and that he had observed no stock water ponds on the south side of the road and the only water available to his knowledge for cattle was from Birch Creek.

William C. Hulse testified that he was born and raised in the Dufur area; that he has resided on a place three miles west of Dufur for the past nine years; had observed the Lyda lands from the Rail Hollow Road and rode over the lands to the south about 1950 to 1953, but had not been on the lands to the north; that he visited with Charles Nelson while a resident on the Lyda lands (the house and ranch buildings being to the south of the road); that he had observed some water crossing the Rail Hollow Road on to the Lyda lands to the south for the past three or four years; that he did not know where it came from but that it could have been used for some irrigation or stock use; and that he has no knowledge of any irrigation upon the lands on the south side of the road prior to 1964.

Calvin C. Casey testified that he has resided some five miles southwest of Dufur for the past 22 years; that he is familiar with the Lyda lands south of Rail Hollow Road and those on the northerly part which can be observed from this road; that he has been a substitute mail carrier for about the past 15 years and travels this road when on duty; that he is familiar with the ditch which crosses this road from the north and this is the only source of water from the Orchards Ridge Ditch to the lands on the south side; that he had observed a small amount of flow in this ditch almost every year which, if used for irrigation, would not cover over one acre of land; and that he had not observed any irrigation on the lands on the south side nor any on the lands to the north which can be seen from this road.

- 3 -

Charles Engle testified that he has resided in the Dufur area for the past 21 years and his lands adjoin a part of the Lyda lands on the north; that he is familiar with lands on both sides of Rail Hollow Road; that

he had been upon most of these lands nearly every year for the past 20 years riding for cattle and hunting; and that he had observed no irrigation on any of these lands for the past 20 years, prior to 1964. That prior to being in the ownership of Mr. Lyda, all property was owned by Frank Normandin and no irrigation was observed during this time; that a stock water pond is located about one-half mile north of Rail Hollow Road which is mostly filled by surface runoff, but could be filled by a ditch if any water passes from the McAllister lands; that he had never seen any ditches on the Lyda lands nor any water there except that which was allowed to overflow from the McAllister pond or lands.

- 4 -

Marion McAllister testified that he has owned and farmed property located 7 miles southwest of Dufur since 1939, and lived in the Dufur area all of his life; that his property adjoins the Lyda lands on many sides (being intermingled); that he has been secretary-treasurer of the Orchards Ridge Ditch Company since 1947 and has assumed ditch patrolling duties of the ditches since 1953. He referred to two other ditches which were not shown on State Engineer's exhibit No. 1, and drew these ditches in blue ink thereon. These ditches follow ridges to the north and south and divert water from the main Orchards Ridge Ditch for distribution to various users.

Mr. McAllister's testimony as to use or nonuse of water is as follows: No water used for irrigation from the northerly branch ditch except for his lands in the NW $\frac{1}{4}$ of Section 7, Township 2 South, Range 13 East, W.M., prior to 1964; No irrigation to his knowledge upon the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7; No water applied to the NE $\frac{1}{4}$ of Section 7 from this northerly ditch prior to 1965; No irrigation upon the lands in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 from 1950 to 1954 or from 1956 to 1964; No irrigation upon the lands in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 2 South, Range 12 East, W.M., from this northerly ditch prior to 1964; The NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, Township 2 South, Range 12 East, W.M., was not irrigated from 1940 to 1965; No irrigation to his knowledge upon the lands in the NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, Township 2 South,

Range 13 East, W.M., nor the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 2 South, Range 12 East, W.M., between 1948 and 1965 except possibly some subirrigation at times. The ditch on the range line between 12 and 13 East has been used for stock water for quite some time by diversion from his property which, if used for irrigation, would possibly cover one acre (Tr. 49-60). Any water which was diverted into the ditch between Ranges 12 and 13 East to the lands south of Rail Hollow Road, was released by Mr. McAllister upon the request of Charles Nelson and was to be used for stock or domestic purposes. Some water may have been carried across this road which was drainage or seepage water from the McAllister lands. A pond was built by Mr. McAllister upon his lands about 1953 to be used as in storage within his system. He sprinkled from this pond.

- 5 -

Charles E. Nelson testified that he has lived for the past 16 years about 7 $\frac{1}{2}$ miles southwest of Dufur on what is now the Lyda ranch; that he rented the property from Fred Normandin in October 1949 and still occupies the place as a tenant; that he does not know of any irrigation on the lands prior to his leasing but it had appearances of being irrigated; that he has continued such irrigation practices with any water available by the small ditches and seepage; that the ditch lines as noted on State Engineer's exhibit No. 1 are approximately correct; that 12 $\frac{1}{2}$ acres of alfalfa on the Gill field were irrigated as much as possible with the available water until about 1953 or 1954; that the Stuber field was irrigated from the ditch on top of the ridge by seepage and some small ditches and received some seepage from the McAllister field. That lands south of Rail Hollow Road were irrigated with some seepage from other fields and water available from the ditch down the range line by seepage and placing small dirt dams in the ditch; that the amount of water available for his use decreased after Mr. McAllister built his pond and the water was then very scarce; that he

requested Mr. McAllister many times each year to turn some water down the ditch to the south from his pond to be used mainly for stock and domestic purposes to aid the amount of water in the springs and well. That during the year of 1965, he and Mr. Lyda (Tr. 86) rebuilt part of the Orchards Ridge Ditch with a bulldozer and increased the flow considerably and used it all for irrigation; that there were ponds on the Lyda lands north of the road used for stock (not located or identified) which are filled from a ditch when water is available; that most of the stock water on the south side of the road is from Larch Creek; that they were not able to do any irrigation on the Stuber field from 1954 to 1964, and he let available water go on down to the Gill field to be used primarily for stock; that water on the south side of the road came into the range line ditch when Mr. McAllister was irrigating and when available was used by seeping from the ditch; that he could make no estimate on the amount of flow or area of lands covered or the distance from the ditch that the seepage would extend; and that there was no irrigation on the Haines field prior to 1964.

- 6 -

Pearl E. Winslow testified that he resides four miles southwest of Dufur on the Rail Hollow Road; that he worked on the Lyda place and was familiar with it since 1945; that he had observed water in the ditches which irrigated especially the Gill field by flooding; that the place south of the road was irrigated in the early 1930's; that the Gill field was irrigated four or five years ago; and that he has no knowledge of irrigation on the Stuber field.

- 7 -

Earl Byron Benedict testified that he has lived about one mile from the Lyda place since 1919; that he has helped in the harvest on the Lyda place since 1961, on the north side of the road one year and on the south side of the road the following year; that he had observed water in both the northerly and southerly ditches and some subirrigation on lands to the south on alfalfa growth. He had no estimate of the amount of water or area covered by subirrigation. His testimony covers the years of 1961 through 1964.

L. C. Lyda testified that he acquired the lands in September 1957 and in 1958 attempted to divert additional water down the Orchards Ridge Ditch by diverting more water from Fifteenmile Creek; that he was able to secure a small amount but that the ditch would not carry much additional flow; that most of this flow was being diverted and used for other irrigation and it also went into a pond on the McAllister place; that there was no ditch to divert water through to the Gill field; that he diverted some water on to the Stuber field in 1958, some to lands on the south side of the road and also some on to the Packing House field; that the use was about the same in 1959 except they needed more water on the south side of the road for domestic and stock uses; that the same conditions existed in 1960, 1961 and 1962; that in 1962 most of the available water was turned to the south part of the place and that water was very short during those years. That in 1964 he repaired and rebuilt the Orchards Ridge Ditch by use of a cat and back hoe; that he installed a headgate and some pipe which cost close to \$4,000; that he enlarged the ditch to the south and made another diversion from the main ditch; that with the additional flow of water he irrigated the Packing House and Stuber fields but not the Gill field (Tr. 119); that he did not have enough water to operate both the northerly and southerly ditches; that in 1965 he went to gravity sprinkling and irrigated all lands allowed under the permits which was the first time he had a sprinkler system; that he has had stock on the place every year and one stock pond was located between the north and south ditch in Section 7 and water was diverted into the pond mostly from the north ditch. He claimed to have irrigated approximately five acres in the Stuber field by flooding and with seepage or drainage waters from 1958 to 1963, approximately 10 or 11 acres by flooding and seepage in the Packing House field during the same period; that there was no irrigation in the Gill field during this time and any water on lands south of the road was by seepage only (no flooding) and no estimate of amount of land covered in this manner (Tr. 130-135); that he

was aware there was adequate water in Fifteenmile Creek for irrigation during the irrigation season if he had been able to divert it to his lands.

- 9 -

On redirect examination, Marion McAllister testified that he normally opened Orchards Ridge Ditch about June 1; that water usually became short by July 4 (earlier some years); that water has always been available from Fifteenmile Creek to fill the rights; that he usually shut the ditch off November 1; and that there had been no irrigation on the Stuber field from 1940 to date.

- 10 -

The use of water for domestic purposes as evidenced by the certificate recorded in Volume 4, page 3483, State Record of Water Right Certificates, was not an issue in this proceeding. The testimony affirms the existence of a stock water pond located between the northerly and southerly ditches in Section 7, Township 2 South, Range 13 East, W.M. The location as to the specific forty acre tract was not defined. The testimony does not refer to any domestic use within the area, the only domestic use referred to was at or near the ranch buildings located south of Rail Hollow Road in the southerly part of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, Township 2 South, Range 13 East, W.M.

CONCLUSIONS

- 1 -

There is no dispute of nonuse of water on the Haines field in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, Township 2 South, Range 12 East, W.M., since no irrigation was claimed prior to 1964; nor of the Gill field in the NE $\frac{1}{4}$ of Section 7, Township 2 South, Range 13 East, W.M., since Mr. Lyda testified there was no ditch to divert water on to this field and that it was not irrigated from 1958 through 1963, and they did not use the northerly ditch during this period. The evidence is clear that the following lands:

30.0 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$
40.0 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$
Section 12
Township 2 South, Range 12 East, W.M.

25.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$
20.0 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$

Section 7

Township 2 South, Range 13 East, W.M.,

as evidenced by the certificate recorded on page 3483, State Record of Water Right Certificates, have not been irrigated for a period of more than five successive years (1958 through 1963). There can be little doubt but that the water right was abandoned during this period. Under the provisions of ORS 540.610 (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 the water appropriated for a period of five successive years, the right to use shall cease and the failure to use shall be conclusively presumed to be an abandonment of 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 rights".

The water right, not being used for more than five successive years, was forfeited and if there has been any subsequent use of water it would have been illegal. The right, when forfeited, reverts to the public and the statutes (ORS Chapter 537) provide an exclusive way to obtain a new right on the land, namely issuance of a permit by the State Engineer. The evidence does not show any actual irrigation after Mr. Lyda acquired the property in 1957 up until he improved the ditch in 1964 and the installation of a sprinkler system in 1965.

Any benefit that may have been derived from subbing or seepage from the ditch would be incidental. It is not material how the irrigation was carried out, but it is essential that a system be employed that will identify the specific tract of land, particularly as to the extent of the area (number of acres) actually irrigated in order to constitute a valid appropriation.

The testimony of Charles E. Nelson, lessor of the lands in question from October 1949, and L. C. Lyda, who acquired these lands in September 1957, is in accord that the water available for their irrigation was in "short supply" from 1958 through 1963. Mr. Nelson's testimony also relates to the years 1950 through 1963. They contend that certain lands were irrigated "when water was available" either in the ditches or from seepage from other irrigated lands. They also testified that from one to three times each season Mr. McAllister was requested to release some water for their use. Such request related to water in the ditch that conveys flow to the lands south of Rail Hollow Road to be used primarily for stock and to increase the flow of springs in the area.

In 1958 they investigated the possibility of increasing the flow in Orchards Ridge Ditch. They removed some rocks from the stream and secured some additional water; however the ditch would not carry much additional flow. Sometime during 1964 Mr. Lyda installed a headgate, secured a cat and back hoe, and repaired and rebuilt the Orchards Ridge Ditch at a cost to him of "close to \$4000". The Ditch Company did not assist in this construction since no money was available for such work. With this increased volume of water, they irrigated lands that could be flooded in 1964; in 1965 "they went to gravity sprinklers" and irrigated the entire area allowed by the permits.

The evidence presented is not sufficient to determine why ample water to irrigate with was not delivered to Mr. Lyda's lands involved herein. It may have been due to lack of headgate, inadequate ditch capacity, or by upper users on the ditch taking more than their proportionate share. It is not necessary to determine the reason because the holder of the water rights has the obligation to take the required steps to receive his water or forfeit the right if he fails to do so for the statutory period of five years. Adequate remedy at law existed to solve any of the problems presented: inadequate headgate or ditch capacity, ORS 540.320 through 540.330, and improper use

by other persons, ORS 540.210 through 540.220.

The testimony is uncontroverted that from 1958 through 1963 the water supply in Orchards Ridge Ditch was not sufficient for all rights within this system; that Fifteenmile Creek had adequate water for such use if it could have been diverted and conveyed to the lands through this ditch; that not until sometime in 1964 were the headworks and ditch rebuilt to convey sufficient water to the lands; that neither Mr. Nelson nor Mr. Lyda made demands to the Ditch Company to secure any water which may have been in the Orchards Ridge Ditch system for their use.

- 4 -

The testimony of Marion McAllister was that no water was used upon the lands in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 2 South, Range 13 East, W.M., from 1950 to 1954 and from 1956 to 1964; that there was no irrigation upon the lands in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 2 South, Range 13 East, W.M.; that there was no irrigation from the northerly ditch prior to 1964; that no water was applied to the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 2 South, Range 12 East, W.M., prior to 1964; that water was applied to parts of the NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, Township 2 South, Range 13 East, W.M., and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 2 South, Range 12 East, W.M., prior to 1948; that there had been no irrigation since that time until 1964 and 1965 (Tr. 50-56), but possibly there had been some irrigation from seepage or subirrigation. The only water diverted into the ditch between ranges 12 and 13 East across Rail Hollow Road was for stock and domestic purposes and possibly some subirrigation to the extent of one acre. The testimony of Charles Engle supports the testimony of Mr. McAllister as to all lands.

Testimony in regard to water diverted and used upon the lands south of Rail Hollow Road is not in serious conflict, nor that such water came from seepage from the McAllister lands and a small flow that was released upon Mr. Charles Nelson's request to be used for stock and domestic purposes, and there was no definable value from seepage and subirrigation. The testimony of Richard C. Cantrell, Paul T. Hulse, William C. Hulse and Calvin C. Casey is

in agreement as to nonuse of water for irrigation upon the Lyda lands south of and adjacent to Rail Hollow Road.

- 5 -

L. C. Lyda urges that the state is barred from instituting this proceeding on the doctrine of laches and cites Withers vs. Reed, 194 Or. 541 P. 563. The state's position in that case was an appropriator, the same as L. C. Lyda is here, and not as a regulating agency under its police powers as it is here. The position has no merit.

The clear intent of the legislature was to provide a reasonable procedure for determining those rights which had been forfeited, not revalidate all those against whom no proceedings were immediately taken. If the right had not been used for five successive years, it was at that time lost and the procedure is simply one for determining the facts with adequate protection to the landowners to present those facts.

It is indeed unfortunate that the protestant expended money without determining their status, but it was his obligation to know the laws of forfeiture. It may be noted that this expenditure is not a total loss since there is nothing that would prevent Mr. Lyda from filing applications for storage of water and the use of the stored water and streams for irrigation. The water supply would suffer from later priority, but it would be usable. The sprinkling system which is the bulk of the expense could also be sold or used on other property.

The waterusers proposing the cancelation initiated the action in the fall of 1964, almost immediately after they had constructive notice (installation and use of the sprinkling system) of Mr. Lyda's intent to attempt use of water under the old rights. They suffered no injury until the water was again put to use and action initiated within that same irrigation season certainly could not be considered undue delay.

- 6 -

The protestant further urges that there is no provision for canceling only part of a right. This has absolutely no merit. ORS 540.641 specifically

provides that:

" * * * * After the hearing the State Engineer 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. * * * *"

- 7 -

It appears that the rights to use water for irrigation have been forfeited and should be canceled.

ORDER

NOW, THEREFORE, it is hereby ORDERED that the right for the use of not to exceed 0.20 cubic foot per second of water from Fifteenmile Creek through the Orchards Ridge Ditch, under a date of priority of September 5, 1922, for irrigation of 16.0 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 2 South, Range 13 East, W.M., evidenced by certificate of water right recorded in Volume 5, page 4841, State Record of Water Right Certificates, is canceled;

And the right for the use of not to exceed 0.75 cubic foot per second of water from Fifteenmile Creek through Orchards Ridge Ditch, under a date of priority of April 25, 1928, evidenced by certificate of water right recorded in Volume 8, page 8105, State Record of Water Right Certificates, as amended by order of the State Engineer recorded in Volume 2, page 362, Special Order Record, for irrigation of the following lands:

20.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
20.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
20.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
Section 18,
Township 2 South, Range 13 East, W.M.,

is canceled;

And the right for the use of not to exceed 1.76 cubic feet per second of water from Fifteenmile Creek through the Orchards Ridge Ditch, under a date of priority of March 28, 1930, evidenced by certificate of water right recorded in Volume 9, page 10112, State Record of Water Right Certificates, as amended by order of the State Engineer recorded in Volume 2, page 361, Special Order Record, for irrigation of the following lands:

20.0 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 12

21.0 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 13
Township 2 South, Range 12 East, W.M.

40.0 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$
Section 7

10.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
10.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
30.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$
10.0 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$
Section 18
Township 2 South, Range 13 East, W.M.,

is canceled;

And the right for the use of not to exceed 2.68 cubic feet per second of water from Fifteenmile Creek through the Orchards Ridge Ditch, under a date of priority of October 27, 1909, evidenced by certificate of water right recorded in Volume 4, page 3483, State Record of Water Right Certificates, as amended by order of the State Engineer recorded in Volume 2, page 361, Special Order Record, for irrigation of the following lands:

30.0 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$
40.0 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$
Section 12
Township 2 South, Range 12 East, W.M.

25.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$
20.0 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$
Section 7
Township 2 South, Range 13 East, W.M.,

is canceled.

It is FURTHER ORDERED that the certificate of water right recorded in Volume 4, page 3483, State Record of Water Right Certificates, is canceled; and in lieu thereof a certificate be issued to Orchards Ridge Ditch Company, Marion McAllister, Secretary-Treasurer, Dufur, Oregon, covering that part of the water right not in question which is for the use of not to exceed 3.73 cubic feet per second of water from Fifteenmile Creek, through the Orchards Ridge Ditch, under a date of priority of October 27, 1909, for domestic use

and irrigation of the following lands:

10.0 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
2.0 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$
5.0 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$
40.0 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 12

18.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
30.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
20.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
25.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 13

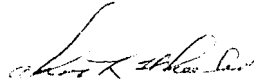
10.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 14

Township 2 South, Range 12 East, W.M.

10.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
20.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
15.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$
40.0 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$
30.0 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$
15.0 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
Section 7

Township 2 South, Range 13 East, W.M.

Dated at Salem, Oregon this 17th day of April 1968.



CHRIS L. WHEELER
State Engineer

Handwritten notes:
Approved by [unclear]
[unclear]
[unclear]
[unclear]