

MAY 21 4 34 PM '70

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASCO

FILED

MAY 21 1970

By *W. Howard* COUNTY CLERK
JW Deputy

1 L. C. LYDA,

2 Appellant,

3 vs.

NO. 11904

4 CHRIS L. WHEELER, STATE
5 ENGINEER OF THE STATE OF
6 OREGON,

7 Respondent.

INDEXED

DECREE

10 This matter having come on for hearing before the
11 undersigned Judge of the above-entitled Court on the appeal of
12 L. C. Lyda, December 4, 1968.

13 Both parties made opening statements, produced evidence,
14 made final arguments and appellant submitted a written brief, and
15 the Court being fully advised in the premises; now, therefore, it is
16 hereby

17 ORDERED, ADJUDGED AND DECREED THAT:

18 1. The Findings of Fact made by the Court as attached
19 hereto are hereby incorporated into this Decree by reference.

20 2. The decision of the State Engineer is hereby reversed
21 and the following water rights with priorities as indicated are
22 hereby confirmed to L. C. Lyda:

23 A. The right for the use of not to exceed 0.20 cubic
24 foot per second of water from Fifteenmile Creek through the Orchards
25 Ridge Ditch, under a date of priority of September 5, 1922, for
26 irrigation of 16.0 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 2 South,
27 Range 13 East, W.M., evidenced by certificate of water right recorded
28 in Volume 5, page 4841, State Record of Water Right Certificates,

29 B. And the right for the use of not to exceed 0.75 cubic
30 foot per second of water from Fifteenmile Creek through Orchards
31 Ridge Ditch, under a date of priority of April 25, 1928, evidenced
32

P90-819

MORRISON & BAILEY
ATTORNEYS AT LAW
1770 N. STANDARD PLAZA
PORTLAND, OREGON 97204

1 by certificate of water right recorded in Volume 8, page 8105, State
2 Record of Water Right Certificates, as amended by order of the State
3 Engineer recorded in Volume 2, page 362, Special Order Record, for
4 irrigation of the following lands:

5 20.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
6 20.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
7 20.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
8 Section 18
Township 2 South, Range 13 East, W.M.

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

16 20.0 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$
17 Section 12
18 21.0 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$
19 Section 13
Township 2 South, Range 12 East, W.M.
20 40.0 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$
21 Section 7
22 10.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
23 10.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
24 30.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$
25 10.0 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$
Section 18
Township 2 South, Range 13 East, W.M.

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

32 -----

MORRISON & BAILEY
ATTORNEYS AT LAW
17TH FLOOR STANDARD PLAZA
PORTLAND, OREGON 97204

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

4 25.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
5 25.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
6 25.0 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$
7 25.0 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$
8 25.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$
9 20.0 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$
Section 7
Township 2 South, Range 13 East, W.M.

10 E. and the right for the use of not to exceed 3.73 cubic
11 feet per second of water from Fifteenmile Creek, through Orchards
12 Ridge Ditch, under a date of priority of October 27, 1909, evidenced
13 by certificate of water right recorded in Volume 4, page 3483, State
14 Record of Water Right Certificates, for domestic use and irrigation
15 of the following lands:

16 10.0 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
17 2.0 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$
18 5.0 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$
19 40.0 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$
20 Section 12
21 18.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
22 30.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
23 20.0 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
24 25.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 13
25 10.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 14
Township 2 South, Range 12 East, W.M.

26 10.0 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
27 20.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
28 15.0 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$
29 40.0 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$
30 30.0 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$
31 15.0 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
Section 7
Township 2 South, Range 13 East, W.M.

31 DATED this 21st day of May, 1970
32 M.W. Wilkinson
Circuit Judge

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF WASCO

FILED

MAY 22 1970

By Habburn COUNTY CLERK Deputy

5 L. C. LYDA,

6 Appellant,

NO. 11904

7 v.

8 CHRIS L. WHEELER, STATE
9 ENGINEER OF THE STATE OF
10 OREGON,

Respondent.

FINDINGS OF FACT

11
12 The Court being fully advised makes the following

13 FINDINGS OF FACT

14 1. Neither L. C. Lyda nor any of his predecessors in
15 interest have abandoned any water rights.

16 2. Neither L. C. Lyda nor any of his predecessors had
17 any intention of abandoning any water rights whatsoever.

18 3. The predecessors of L. C. Lyda helped form and build
19 the Orchards Ridge Ditch through which the lands in question have
20 been irrigated and they have paid all the annual water assessments
21 since the inception of the Orchards Ridge Ditch to date.

22 4. L. C. Lyda has expended over \$4,500 of his own money
23 to rebuild the Orchards Ridge Ditch and install a head gate and a
24 wier on the main canal.

25 5. Water from Fifteenmile Creek has been appropriated
26 by use of the water rights here in question through Orchards Ridge
27 Ditch and applied to the beneficial use domestic, stock and irrigation
28 use of the lands in question now owned by L. C. Lyda in each and
29 every year since 1909.

30 6. The opinion of the Court, marked Exhibit "A", and by
31 this referecne made a part hereof, is hereby incorporated by reference.

32 DATED this 21st day of May, 1970.

Page FINDINGS OF FACT

M. W. Wilkinson
Circuit Judge

P 70-819

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASCO

L. C. LYDA,

Appellant,

vs.

CHRIS L. WHEELER, STATE
ENGINEER OF THE STATE OF
OREGON,

Respondent.

No. 11904

MEMORANDUM OPINION

This case is an appeal de novo from a decision of the State Engineer cancelling the water rights of L. C. Lyda, Appellant, on the ground that the water had not been used for the statutory period required to prevent abandonment under the statutes pertaining to such water rights.

The proceeding was originally initiated by some of the neighbors to the Appellant's land, who attempted to withdraw their affidavits on the basis that they did not understand what they had signed. The State Engineer proceeded on his own and found that the abandonment had occurred.

The Appellant filed a brief in this matter and I have put off making the decision all this time because I thought the State would, in turn, file a brief, but so far nothing has been filed and time has long passed to decide the case.

Witnesses called for the State Engineer were neighbors whose knowledge was not very broad concerning the actual facts pertaining to the use of the water. It generally consisted of casual observations made by driving along the road or driving cattle by the property, deer hunting or riding for stray cattle,

EXHIBIT "A"
P70-819

and the testimony of a mail carrier who had driven down the road. Frankly, I have not been impressed by this kind of testimony.

Mr. McAllister is probably the most credible witness in behalf of the State Engineer. He had an active office in the ditch company, was a neighbor who lived above the Lyda land and had the first opportunity to the water over Lyda as it went through his place. From his testimony it is obvious that he took advantage of this opportunity in that he built a pond and diverted the water and didn't let any more of it go down the ditch than he absolutely had to. Obviously if the Lyda right is cut off, McAllister will benefit.

On the other hand, Lyda acquired the land in 1957 and took over the farm at that time. Previously it had been worked by a witness, Nelson, who is now deceased. The record discloses that Lyda did actually use the water with a ditch irrigation system, and it is my opinion from the facts of this case that there was sufficient continuous use of the water to preclude abandonment under the strict construction of the statute.

Mr. McAllister admitted that Nelson tried to get water while he was farming the property and there is no question that Lyda also requested water from McAllister. I do not wish to imply McAllister refused to give them water, as he did allow some water to go to what is now the Lyda property.

The crux of this matter seems to be the building of the pond by McAllister. Prior to that time the fields had been watered on the Lyda property, but after the pond was built there was a shortage of water to irrigate, which is a far cry from abandonment. Nelson tried to get water while he farmed the place and when Lyda took

over he tried to get sufficient water to irrigate with and, not being able to make too much headway with McAllister, he worked on the headgate and ditches himself to try to get a better flow of water down to his property. These facts are not consistent with abandonment.

In more recent years Mr. Lyda has improved the irrigation system to make better distribution of the water and has spent considerable money on bettering the ditches and irrigation system. However, the insufficiency of water has kept him from irrigating all of the fields in consecutive years.

He has used the water during the entire period for stock water and domestic purposes, has rejuvenated some of the springs on the land which permits better sub-irrigation and, generally, has made an attempt to get more water through all the years involved.

It is, therefore, my opinion there was no intent on Lyda's part to abandon for a period of five successive years, as he has used all the water he could get. His trouble, as above stated, was getting the water through the McAllister property after McAllister constructed his pond, and this is not abandonment in my opinion. Under the facts of this case the State Engineer has not carried the burden of proof to prove abandonment as required by the ordinary definitions of that term. It is also to be remembered that the decree of 1915 establishing the water rights

EXHIBIT "A"

P70-819

PAGE FOUR - MEMORANDUM OPINION

on this property provided for domestic and stock use as well as irrigation and, in my opinion, shortage of water to maintain these uses during the years is not abandonment. The decision of the State Engineer is, therefore, reversed.

Dated this 30th day of April, 1970.


Circuit Judge

EXHIBIT "A"
770-819

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASCO

FILED

APR 8 0 1970

Malcolm
COUNTY CLERK
DEPUTY

L. C. LYDA,)
))
 Appellant,))
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 vs.))
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CHRIS L. WHEELER, STATE))
ENGINEER OF THE STATE OF))
OREGON,))
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 Respondent.))
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No. 11904
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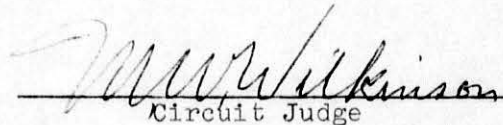
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PAGE FOUR - MEMORANDUM OPINION

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Dated this 30th day of April, 1970.


Circuit Judge



STATE OF OREGON
STATE ENGINEER
WATER RESOURCES DEPARTMENT
516 PUBLIC SERVICE BUILDING
SALEM 97310

REFER TO
FILE NO. _____

May 27, 1968

FILED

MAY 29 1968

Mr. H. A. Howard
Clerk of the Circuit Court
County Courthouse
The Dalles, Oregon 97058

#11904

H. A. Howard COUNTY CLERK
By *JD* Deputy

Dear Mr. Howard:

Enclosed are certified copies of the following documents together with an affidavit of mailing a copy of the State Engineer's order to the attorney for the protestants:

Affidavits of Preston Lindhorst, Carl Casey, Richard C. Cantrell, Paul Hulse and William L. Hulse stating knowledge of nonuse of water

Certificates of water rights recorded on pages 3483, 4841, 8105 and 10112, State Record of Water Right Certificates

Order approving application of George W. Johnston for change in place of use of water

Notice of proposed cancelation to L. C. Lyda and Charles Nelson

Objection of L. C. Lyda against cancelation of water rights

Notice of hearing

Amended protest

Protestant's memorandum

State Engineer's order dated April 17, 1968 and letters transmitting copies of order

Notice of appeal

Designation of record

Undertaking for appeal

Mr. H. A. Howard

2

May 27, 1968

Transcript of hearing

State Engineer's exhibit No. 1 and protestant's exhibit No., together with affidavit, are being mailed under separate cover.

Very truly yours,



CHRIS L. WHEELER
State Engineer

CLW:eh

enclosures
under separate cover

IN THE MATTER OF)
THE CANCELATION)
OF WATER RIGHTS)

A F F I D A V I T

FILED

MAY 29 1968

STATE OF OREGON)
) ss.
County of Marion)

11904

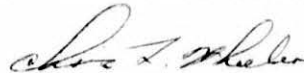
By Hubbard COUNTY CLERK
 Deputy

I, CHRIS L. WHEELER, State Engineer, being first duly sworn, depose and say:

That as one of my official duties, after hearing held upon the above entitled matter, on the 17th day of April 1968, I made and entered an order canceling the certificates of water right recorded in Volume 4, page 3483; Volume 5, page 4541; Volume 8, page 8105; Volume 9, page 10112, State Record of Water Right Certificates.

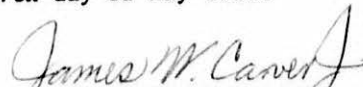
That on the 19th day of April 1968, I served a copy of said order upon the firm of Brown and Van Vactor, The Dalles, Oregon, attorneys for L. C. Lyda, by having deposited in the United States Post Office at Salem, Oregon, a full, true and correct copy thereof, addressed to the said above mentioned persons at the above mentioned address, and fully prepaying the postage thereon.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of May 1968.



CHRIS L. WHEELER
State Engineer

Subscribed and sworn to before me this 27th day of May 1968.


Notary Public for Oregon

My commission expires:

Feb. 19, 1972

WILLIAM H. MORRISON
RALPH R. BAILEY
JACK H. DUNN
JAMES G. SMITH
NATHAN L. COHEN
HOWARD K. BEEBE
ROBERT H. HOLLISTER
ROBERT R. CARNEY
FRANK E. MAGEE
THOMAS E. COONEY
RICHARD A. VAN HOOMISSEN
TOM F. PRICE
THOMAS S. MOORE
MORTON H. ZALUTSKY
DAVID C. LANDIS
PAUL W. JONES
WALTER H. GREBE
GARR M. KING
GEORGE M. JOSEPH
ROBERT S. BALL

MORRISON & BAILEY
ATTORNEYS AT LAW
17TH FLOOR STANDARD PLAZA
PORTLAND, OREGON 97204
TELEPHONE 224-6440

May 16, 1968

County Clerk
Wasco County Courthouse
The Dalles, Oregon

Re: Lyda v. Wheeler, State Engineer of the
State of Oregon

Dear Sir:

We enclose herewith Certificate of Service of the copy of
the Notice of Appeal and Designation of Record which we
filed with your office yesterday. Please enclose it in the
file.

Very truly yours,

MORRISON & BAILEY

Walter H. Grebe

Walter H. Grebe

WHG/bh
Enclosure

FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASCO

MAY 17 1968

Walter H. Grebe
By _____ COUNTY CLERK
Deputy

1 L. C. LYDA,
2
3

Appellant,

No. 11904

4 vs.

CERTIFICATE OF SERVICE

5
6 CHRIS L. WHEELER, STATE
7 ENGINEER OF THE STATE OF
8 OREGON,

Respondent.

9 I hereby certify that I served the Notice of Appeal and
10 Designation of Record on Chris L. Wheeler, State Engineer, State of
11 Oregon, respondent herein, on the 16th day of May, 1968, by mailing
12 to him a true and correct copy thereof, certified by me as such. I
13 further certify that said copy was placed in a sealed envelope addressed
14 to said Chris L. Wheeler, State Engineer of the State of Oregon, at
15 Salem, Oregon, his last known address, and deposited in the Post Office
16 at Portland, Oregon, on the 16th day of May, 1968, and that postage
17 thereon was prepaid.

Walter H. Grebe

Walter H. Grebe
Of Attorneys for Appellant

MORRISON & BAILEY
ATTORNEYS AT LAW
17TH FLOOR STANDARD PLAZA
PORTLAND, OREGON 97204

FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASCO

MAY 16 1968

Morrison & Bailey
COUNTY CLERK
Deputy

L. C. LYDA,

Appellant,

No. 11904

vs.

DESIGNATION OF RECORD

CHRIS L. WHEELER, STATE
ENGINEER OF THE STATE OF
OREGON,

Respondent.

Appellant L. C. Lyda hereby designates for an inclusion in the record on appeal from the order cancelling certain water rights of L. C. Lyda dated April 17, 1968, by the State Engineer of the State of Oregon as follows:

I.

All the testimony, arguments, statements of counsel, exhibits and evidence offered or received at the hearing or hearings.

II.

The entire hearing file.

DATED: May 16, 1968.

L. C. Lyda
L. C. Lyda

MORRISON & BAILEY

Walter H. Bailey
Attorneys for L. C. Lyda

MORRISON & BAILEY
ATTORNEYS AT LAW
17th FLOOR STANDARD PLAZA
PORTLAND, OREGON 97204

FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASCO

NOV 15 1968
National County Clerk
NOV 15 1968
11904

L. C. LYDA,

Appellant,

vs.

UNDERTAKING FOR APPEAL

CHRIS L. WHEELER, STATE
ENGINEER OF THE STATE OF
OREGON,

Respondent.

WHEREAS, the above named appellant is appealing from that certain order of Chris L. Wheeler, State Engineer for the State of Oregon, cancelling certain water rights of appellant and dated the 17th day of April, 1968.

NOW THEREFORE, L. C. Lyda, as principal, and L
Lloyd E. Loop, as surety, are jointly and severally bound and undertake that said appellant will pay all costs that may be adjudged to the State Engineer in this matter upon the appeal in the sum of \$100.00.

L. C. Lyda
Principal

Lloyd E. Loop
Surety

MORRISON & BAILEY
ATTORNEYS AT LAW
17TH FLOOR STANDARD PLAZA
PORTLAND, OREGON 97204

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TYPE-ERASE
CORRECTION TAP

13-044

FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASCO

MAY 16 1968
Morrison & Bailey
COUNTY CLERK
DEPUTY No. 11904

L. C. LYDA,

Appellant,

vs.

NOTICE OF APPEAL

CHRIS L. WHEELER, STATE
ENGINEER OF THE STATE OF
OREGON,

Respondent.

TO: CHRIS L. WHEELER, STATE ENGINEER OF THE STATE OF OREGON

Notice is hereby given that L.C. Lyda, the agrieved person in the above entitled matter is hereby appealed from that certain order of the State Engineer of the State of Oregon cancelling certain water rights owned by L. C. Lyda entered on the 17th day of April, 1968, and the whole thereof.

DATED: May 16, 1968.

L. C. Lyda

L. C. Lyda

MORRISON & BAILEY

Morrison & Bailey

Attorneys for L. C. Lyda

MORRISON & BAILEY
ATTORNEYS AT LAW
17TH FLOOR
PORTLAND OREGON 97204

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NOTICE OF APPEAL