

BEFORE THE STATE ENGINEER OF OREGON

Marion County

IN THE MATTER OF THE PERMITS HELD )  
BY JOHN J. MORITZ, NOS. R-1101 )  
AND 19981 )  
----- )

O R D E R  
CANCELLING PERMITS

On October 4, 1950, John J. Moritz filed two applications for permits in the office of the State Engineer. These applications are designated in the records of the State Engineer as Applications No. R-25335 and No. 25336.

Application No. R-25335 was approved by the issuance of Permit No. R-1101 on June 15, 1951, and is for the construction of a reservoir and the storage therein of one acre foot of water from an unnamed tributary of the Little Pudding River to be appropriated under Application No. 25336, Permit No. 19981 for irrigation. The date for beginning of construction was set as June 15, 1952 and the date for completion of construction as October 1, 1953.

Application No. 25336 was approved by the issuance of Permit No. 19981 on June 15, 1951 and is for the appropriation of 0.375 c.f.s. from an unnamed stream, a tributary of the Little Pudding River and the reservoir to be constructed under Application No. R-25335, Permit No. R-1101 for the irrigation of 30 acres.

On the 15th day of February, 1954, a Notice of Protest was filed in the office of the State Engineer. It is alleged therein that:

- (a) Said permittee has failed to commence actual construction authorized by the permits within the time required by law.
- (b) If the said permittee has commenced construction work as required by law, he has failed and neglected to prosecute the work thereon with reasonable diligence and has failed to complete the construction work within the time required by law or as fixed by the permit. Nothing in this contention shall be construed as admission on the part of this objector that said John Moritz has commenced actual construction of the work.

- (c) Said permittee has failed and neglected to commence, prosecute or complete the construction of the diversion works referred to in the permit to appropriate public waters.

It further alleges that should John Moritz apply for an extension of time or should application for extension of time heretofore have been made for the commencement, prosecution or completion of the improvements herein before referred to such application ought to be denied.

Under the provisions of ORS 537.420 notices to the following parties that there would be a hearing as provided for in ORS 537.430 were sent by registered mail. The time fixed in the said notice of hearing was the 24th day of March, 1954, at 10:00 a.m. in the office of the State Engineer, Salem, Oregon, which date was more than 30 days and less than 60 days from the date of mailing such notice. At the date, time and place of such hearing there appeared the following parties: Mr. and Mrs. Daryl E. Otjen with their legal counsel, Sam F. Speerstra of the firm Rhoten, Rhoten and Speerstra of Salem, Oregon; Mr. John J. Moritz holder of Permits Nos. R-1101 and 19981; Mr. Earsel L. Stow; Mr. Henry J. Beutler; and Mr. and Mrs. William Leonard Peterson. At this hearing Mr. Daryl E. Otjen, Mr. John J. Moritz and Mr. Earsel L. Stow presented evidence and the other persons were given the opportunity to make any oral statement they wished.

On the afternoon of March 24, following the hearing, an inspection of the premises was made by Robert D. Best, Assistant State Engineer, of this office. This inspection was made in the company of Mr. John J. Moritz and Mr. Daryl E. Otjen.

This order is based on evidence introduced at the hearing, the records and files of the State Engineer, and the observations made by Robert D. Best of this office as is set forth in his report dated March 26, 1954, which report, by reference, is made a part of this order.

The stream in question has its source at a series of springs in the NW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 15, Township 8 South, Range 2 West of the Willamette Meridian, and flows in a general north and northeasterly direction to its junction with the Little Pudding River. The stream from its source to the Little Pudding River has a well defined channel.

At the hearing Mr. John J. Moritz testified that the only work which had been done was the installation of a check dam in the stream. This check consisted of four or five 2 inch by 12 inch planks set in shallow trenches in the banks of the stream. The bottom plank was cut to hold a 6 inch tile to allow part of the water to pass on down stream. Two days after this check was installed it washed out and it had not been replaced. Mr. John J. Moritz further stated that no diversion had been made from the stream at any time.

ORS 537.230 provides that actual construction work must begin within one year from the date of approval of the application and the construction of any proposed irrigation or other work shall thereafter be prosecuted with reasonable diligence. In the case of Morse vs. Gold Beach Water Company, 160 Or. 305, wherein the Supreme Court held:

"The discretion which is vested in the Engineer for extension of time has no application, however, to the mandatory terms of the statute requiring actual construction work to begin on the project within one year from date of approval of the application for a permit."

It further states that:

"The statute does not state the amount of construction work required within the year following date of approval of application, but we think it is the reasonable intentment of the act that the construction work must be so substantial in character as to manifest good faith and the intent to exercise reasonable diligence in the completion of the project."

STATE OF OREGON

DEPARTMENT OF TRANSPORTATION

OFFICE OF THE STATE ENGINEER

Salem, Oregon

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March 26, 1954

From the inspection of the premises as is set out in the report dated March 26, 1954, and from the statements made by Mr. John J. Moritz, the work which he had done in perfecting the appropriation is not of such a character to constitute beginning of construction in good faith. It is further believed that this work cannot be considered as substantial in character to manifest reasonable diligence in the prosecution towards the ultimate finish of the project.

NOW, THEREFORE, it is hereby ORDERED that the permits which are held by John J. Moritz, which permits are designated in the records of the State Engineer as Permits Nos. R-1101 and 19981, be cancelled from the records, and the same be of no further force or effect.

Dated at Salem, Oregon, this 2nd day of April, 1954.

  
CHAS. E. STRICKLIN  
State Engineer

STATE OF OREGON  
STATE ENGINEER  
WATER RESOURCES DEPARTMENT  
SALEM

R-28168  
& 28169  
R-25335  
& 25336

REFER TO  
FILE NO.

March 26, 1954

Mr. Chas. E. Stricklin  
State Engineer  
303 State Office Bldg.  
Salem, Oregon

Dear Mr. Stricklin:

Pursuant to the agreement at the conclusion of the hearing which was held in the office of the State Engineer on Wednesday, the 24th day of March, at 10:00 o'clock a.m., I met with Mr. John J. Moritz and Mr. Daryl E. Otjen at 2:00 o'clock p.m. of the same day at the property of John J. Moritz for the purpose of an inspection of the premises and the stream in question.

The stream in question had been re-aligned during 1952 by use of a contour dragline, and at the present time the ditch through which the creek now travels is approximately  $1\frac{1}{2}$  feet in bottom width,  $4\frac{1}{2}$  feet top width, and about 4 feet in depth. No measurements were taken of the flow of water in this stream but it is estimated that there is a flow at the present time of from 0.75 cfs to 1 cfs.

At one point along this ditch there is evidence of the banks having been notched for the purpose of placing planks across the stream to stop the flow of water. Along the bank there were a few 2" x 12" planks about  $5\frac{1}{2}$  feet in length and 1 piece of 6" tile. This is the dam which Mr. Moritz testified in the hearing had washed out the second day after it had been placed in this ditch.

Throughout the reach of the stream, through the property apparently owned by Mr. Moritz, there was no evidence of any water having been diverted though this would not show if he had been using a portable pump and pipeline.

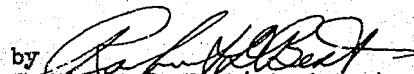
It also did not appear that any effort had been made other than the small temporary structure towards the construction of a dam, and it further did not appear that a structure which would store any amount of water could be built without flooding a fairly large area of the bottom land on his property.

The general topography is slightly rolling with the stream following along a rather wide flat valley at the location of Mr. Moritz' reservoir site. It is estimated that a dike of 3 to 4 feet in height at the location of the proposed reservoir would have a top length of about 1500 feet and the area would cover about  $4\frac{1}{2}$  to 5 acres. It further appeared that in order to impound the one acre foot, as authorized in the permit held by Mr. Moritz, it would have to be done by excavation in order to keep from flooding a large area of the bottom lands.

Because Mr. Moritz was recovering from a heart attack which he had last fall, I did not request him to accompany on the investigation of the stream above his property.

The stream stays within a well defined natural channel to the source which consists of a series of well defined springs of which there appeared to be 3 large springs as the main source. Mr. Otjen stated that these springs maintain a continuous flow throughout the year but that the flow would be somewhat less than it is at the present time.

Respectfully submitted,

by   
Robert D. Best, Assistant

RDB:gk