

Lincoln County

IN THE MATTER OF THE APPLICATION )  
 OF FRANK STENZEL FOR AN EXTENSION )  
 OF TIME IN WHICH TO COMPLETE )  
 CONSTRUCTION AND MAKE COMPLETE )  
 APPLICATION OF WATER UNDER HIS )  
 PERMIT NO. 12609. )  
 ----- )

O R D E R  
EXTENDING TIME

On April 17, 1937, Frank Stenzel filed with the State Engineer an application for a permit to appropriate 1.5 second-feet of water from Little Creek for domestic and municipal use. This application was approved on June 11, 1937 by issuance of Permit No. 12609, with a priority of April 17, 1937. The terms of this permit provide that construction should be commenced on or before June 11, 1938; that construction be completed on or before October 1, 1939; and that the water involved be completely applied on or before October 1, 1940.

Construction under Permit No. 12609 was not completed on October 1, 1939 and Mr. Stenzel submitted an application for an extension of time in which to complete construction. In his application for an extension of time the permittee made affidavit to the effect that he had constructed a diversion dam and installed 3800 feet of 6 inch wood pipe and 3000 feet of smaller pipe at a total cost of \$4,500.00.

The State Engineer is authorized (Section 116-424 O.C.L.A.) to grant extensions of time for good cause shown, within which to complete work or perfect a water right under a permit.

The statements contained in Mr. Stenzel's first application for an extension of time indicate that reasonable diligence was shown and the time for completion of construction under his permit was extended to October 1, 1940.

On September 23, 1940, Mr. Stenzel filed another application for an extension of time in which to complete construction and make complete application of water under his permit.

On December 18, 1940 the State Engineer received a protest on the part of the City of Newport by its Attorney, Mr. G. K. Litchfield, against the granting of Mr. Stenzel's application for an extension of time.

On March 12, 1941, a hearing was held by a duly authorized assistant of the State Engineer to determine whether or not the application for extension of time should be granted. At this hearing the City of Newport was represented by its Attorney, Mr. G. K. Litchfield, and Mr. Stenzel appeared without counsel, on his own behalf.

During the hearing it was clearly shown by the comprehensive and apparently accurate testimony of seemingly reliable witnesses that the City of Newport is a growing municipality with water requirements increasing proportionately more rapidly than the population; that the present water supply of the City of Newport is barely adequate to meet the present demands and that other sources of unappropriated water, fit for municipal use, are far distant from the city.

The city contends that the 1.5 second-feet named in the protestee's permit is far in excess of the quantity that can be beneficially used by him and that the fact that this permit is of record for this quantity of water, prohibits the city from proceeding with construction under its Permit No. 13427 to appropriate 3.0 second-feet of water from Little Creek with priorities of January 12, 1938 and January 20, 1938, because at some seasons Little Creek does not carry 1.5 second-feet of water.

The city also contends that in fact Mr. Stenzel can use beneficially considerably less water than that flowing in Little Creek

during extreme low stages of the stream.

If the city is correct in its contentions that Mr. Stenzel can beneficially use only a small part of the quantity of water specified in his permit and that Little Creek throughout the entire year furnishes more water than Mr. Stenzel can beneficially use, then the city may safely proceed with construction preparatory to the use of the surplus water, because under the laws of this state, beneficial use is the measure of a water right and a water right can be completed and perfected only to the extent of the quantity of water actually beneficially used.

The above contentions of the City of Newport, while instructive as to the motives and purposes of its protest, are not pertinent to the sole grounds on which the State Engineer may deny this application for an extension of time, namely, the failure diligently to prosecute the projected work to its ultimate completion; therefore, insofar as this Order is concerned, only that testimony and evidence which bears directly upon the determination of diligence, has been considered.

Progress between October 1, 1939 and October 1, 1940 under Permit No. 12609 is described in the permittee's application for an extension of time as the enlargement of fill carrying pipe across draw, the improvement of maintenance road and the making of connections for five additional customers and the application for an extension of time describes a use of water up to September 23, 1940 for the irrigation of 30 acres (golf course) and for domestic supply of 40 houses, several apartments and a large club house.

This showing of diligence was disputed by the protestant only as to the number of additional customers served, which number was established as three.

In deciding as to diligence of progress of work under the permit in question it is necessary to take into consideration the

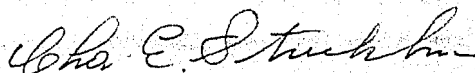
considerable amount of construction accomplished prior to that described in the application for an extension of time which is now in question. The State Engineer has knowledge of this construction from observation in the field as has the protestant, as evidenced by the testimony of its witnesses.

Section 116-424 and Section 116-403 O. C. L. A. require the State Engineer, in deciding as to diligence, to give due weight to the market for water and the income or use that may be required to provide fair and reasonable returns upon the investment where such items are pertinent.

After carefully considering all of the evidence submitted, it is believed that a showing of diligence in the matter of progress toward completion of the appropriation contemplated under Permit No. 12609 has not been substantially refuted by the protestant and that diligence has been exercised to a degree, which requires the State Engineer to extend the time and,

IT THEREFORE IS HEREBY ORDERED that the time for completion of construction and complete application of water under Permit No. 12609 in the name of Frank Stenzel be extended until October 1, 1941.

Dated at Salem, Oregon, this 18th day of March, 1941.

  
CHAS. E. STUCKLIN  
State Engineer