

IN THE MATTER OF APPLICATION NO. 8881,
LYLE L. FREY AND OLGA FREY, ASSIGNEES;
and APPLICATION NO. 15627, MRS. JEAN A.
PRENTISS, APPLICANT°

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RULING

General:

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Application No. 8881 was filed on April 25, 1929 by Pio Esain and Daniel Esparza to appropriate 1.0 c.f.s. of the waters of Chimney Creek at a point in the NE 1/4 SW 1/4 Section 30, T. 41 N., R. 38 E., M.D.B.&M., to irrigate 40.2 acres of land in the NE 1/4 SW 1/4, Lots 3 and 4, Section 30; Lot 1, Section 31, T. 41 N., R. 38 E., M.D.B.&M.; SE 1/4 SE 1/4 Section 25; and NE 1/4 NE 1/4 Section 36, T. 41 N., R. 37 E., M.D.B.&M., between March 15th and September 15th of each year. Protests were filed against the granting of this application by Gerhard Miller, Sr., and by J. C. Charters and Emrick Simonich on January 14 and January 21, 1930, respectively. This application now stands in the name of Lyle L. Frey and Olga Frey.

Application No. 15627 was filed May 5, 1954 by Jean A. Prentiss to appropriate 2.3 c.f.s. of the waters of Chimney Creek at a point in the NE 1/4 NE 1/4 Section 36, T. 41 N., R. 37 E., M.D.B.&M., to irrigate 92 acres of land in part of N 1/2 NE 1/4 Section 33, and S 1/2 SE 1/4 Section 28, T. 41 N., R. 37 E., M.D.B.&M. between January 1st and December 31st of each year. Protest against the granting of this application was filed November 3, 1954 by Lyle L. Frey.

Field Investigation:

In accordance with office letter of October 10, 1955, a field investigation was made on the afternoon of October 19, 1955. Present for said investigation were the following parties:

F. N. Dondero, Deputy State Engineer.
Mrs. Jean A. Prentiss, Applicant under Application No. 15627.
Charles Prentiss, Husband of Mrs. Prentiss.
Richard G. Campbell, Attorney for Mrs. Prentiss.
Lyle L. Frey, Protestant to Application No. 15627 and
Assignee to Application No. 8881.
Mrs. Olga Frey, Assignee to Application No. 8881.
Donald M. Leighton, Attorney for Lyle L. Frey and Olga Frey.
W. A. Roof, Jr.,

Grounds of Protest:

Protests to the granting of Application No. 8881 are as follows:

On January 14, 1930 by Gerhard Miller, Jr. on the grounds he has used the water from Chimney Creek for watering horses and cattle since the year 1898 and that his predecessors, Asa Moore and H. Darrah, have used these waters for watering horses and cattle since the year 1884.

On January 21, 1930 by J. C. Charters and Emerick Simonich on the grounds that they are permittees under Applications Nos. 2130 and 7339. These

permits were granted for the waters of Tony Creek and its tributaries; that all the water available for irrigation purposes from Tony Creek and its tributaries has been appropriated by said Protestants under Applications 2130 and 7339; that during the past four years there has not been sufficient water from Tony Creek and its tributaries to satisfy the rights of said protestants; that there is no water from Chimney Creek now available for appropriation; that there has not been and there is not now sufficient water from Chimney Creek to satisfy all of the water rights, both vested and statutory, now existing and appurtenant to said Tony Creek Stream System, of which Chimney Creek is the principal tributary; that said protestants are now diverting water from Tony Creek by means of a ditch a short distance from their ranch; that said protestants intend to and will file an application to change the point of diversion under their two Applications Nos. 2130 and 7339; that it is the intention and desire of said protestants to divert water from Chimney Creek, as the principal tributary of said Tony Creek Stream System, about four miles from their said ranch, through a pipe or aqueduct; that it will be necessary for said protestants to change their point of diversion from Tony Creek and its tributaries in order to obtain sufficient water to satisfy their water rights under Applications Nos. 2130 and 7339 and that if said Application No. 8881 is allowed, it will deprive said protestants of their legal rights under Applications Nos. 2130 and 7339 in that protestants will be deprived of water from Chimney Creek, the principal tributary of Tony Creek Stream System to which said protestants are legally and justly entitled.

Protest to the granting of Application No. 15627 is as follows:

On November 3, 1954 by Lyle L. Frey on the grounds that he is the owner of lands irrigated from Tony Creek and that the waters applied for under Application No. 15627 (Chimney Creek), is a part of the source of the water flowing in Tony Creek; that he is the owner of a decreed right of Chimney Creek in the amount of 29.82 acre feet for the irrigation of 8.14 acres in Section 30, T. 41 N., R. 38 E., and that if water is diverted by Jean A. Prentiss under the above numbered application, the rights to water owned by protestant will be materially affected.

Opinion:

Prior to the time that the Freys purchased all of the water rights on Tony Creek much was done toward devising methods by which the waters on the Tony Creek Stream System could be economically distributed to the various owners, but apparently with little success. Upon the acquisition of all the water rights on Chimney and Tony Creeks, it appears that Mr. Frey was in a position to utilize the available water in the most economical manner.

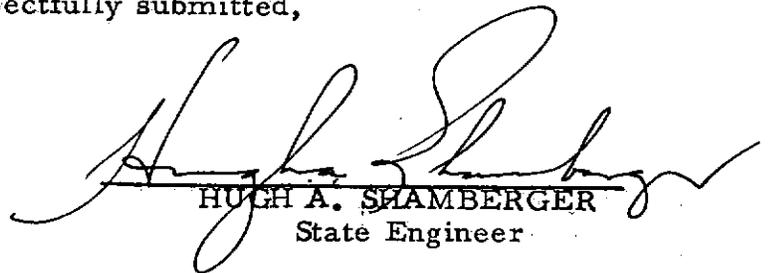
It is the opinion of the State Engineer that, although the records show no surplus water, there may be periods of some abnormal water supply which could be utilized. Therefore, in order to eliminate any doubt as to surplus water, it is the opinion of the State Engineer that Application No. 8881 in the name of Lyle L. Frey and Olga Frey be approved, since it is a prior appropriation to Application No. 15627, and that Application No. 15627 in name of Mrs. Jean A. Prentiss be denied.

RULING

The protests to the granting of Application No. 8881 are hereby overruled and a permit will be issued thereunder upon receipt of the statutory permit fee.

The protest to the granting of Application No. 15627 is sustained and said application denied on the grounds that there is no unappropriated water in the source.

Respectfully submitted,


HUGH A. SHAMBERGER
State Engineer

Dated this 18th day of
May, 1956.

EM : at