

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATIONS 35563)
AND 35564 FILED TO APPROPRIATE THE)
FLOOD WATERS OF DESERT CREEK,)
SMITH VALLEY (107), LYON COUNTY,)
NEVADA.)

RULING

4636

GENERAL

I.

Application 35563 was filed June 26, 1978, by Fred Fulstone, Jr. to appropriate 2.0 cubic feet per second (cfs) of flood waters from Desert Creek in Smith Valley for stockwater for 10,000 sheep within parts of Sections 6 and 8, T.10N., R.24E., M.D.B. & M. The proposed point of diversion is located in the NW¼ NW¼ of Section 16, T.10N., R.24E., M.D.B. & M.¹

Application 35564 was filed June 26, 1978, by Fred Fulstone, Jr. to appropriate 8.0 cfs of flood waters from Desert Creek for irrigation of 920 acres within parts of Sections 6 and 8, T.10N., R.24E., M.D.B. & M. The proposed point of diversion is the same as Application 35563.²

II.

Application 35563 was timely protested by L. S. Day, Inc. on the following grounds:¹

L. S. Day, Inc., a ranch situated on Desert Creek, wishes to protest the application for water from Desert Creek per Application No. 35563. This ranch together with William Weaver Jr have used the Desert Creek waters since 1860 and were decreed all waters through the C-125. There is very little or no flood water on Desert Creek 3 years out of 5 and the years there is flood water it runs for a very short period of time. The application for appropriation of use of these flood waters hve (sic) been turned down numerous times in the past by the state water engineer.

¹ File No. 35563, official records in the office of the State Engineer.

² File No. 35564, official records in the office of the State Engineer.

Application 35564 was timely protested by L. S. Day, Inc. on the following grounds:²

L. S. Day, Inc., a ranch situated on Desert Creek, wishes to protest the application for water from Desert Creek per Application No. 35564. This ranch together with William Weaver Jr., have used the Desert Creek waters since 1860 and were decreed all waters through the C-125. There is very little or no flood water on Desert Creek 3 years out of 5 and the years there is flood water it runs for a very short period. The application for appropriation of use of these flood waters have been denied numerous times in the past by the state water engineer.

III.

Applications 35563 (and 35564) were timely protested by William M. Weaver, Jr. on the following grounds:^{1,2}

William M. Weaver, Jr., a rancher on Desert Creek, wishes to protest the application for water from desert Creek per application No. 35563 (and 35564). This ranch together with L. S. Day, Inc. have used Desert Creek waters since 1860 and were decreed all waters through the C-125. There is very little or no flood water on Desert Creek 3 years out of 5 and the years there is flood water it runs for a very short time. The appropriation of use of these flood waters have been turned down numerous times in the past by the State Water Engineers Office.

IV.

Applications 35563 and 35564 were timely protested by the Walker River Irrigation District on the following grounds:^{1,2}

The waters of Desert Creek are fully appropriated under Federal Court Decree C-125 and any flood waters of the Desert Creek are tributary to the West Walker River and are appropriated by the Walker River Irrigation District for the benefit of the constituents of the District under Certificate Record No. 8859, recorded in Book 29, Page 8859 under a priority of appropriation of June 6th, 1919.

V.

Application 16970 was filed June 21, 1956, by Fred M. Fulstone, Jr. to appropriate 15 cfs of flood and surplus waters from Desert Creek for irrigation of 640 acres within parts of Sections 16, 20, and 21, T.10N., R.24E., M.D.B.& M. The proposed point of diversion is located within the SW¼ NE¼ of Section 20, T.10N., R.24E., M.D.B.& M. Application 16790 was timely protested by several parties and was subsequently denied by State Engineer's Ruling No. 329 on May 25, 1959, because the granting of a permit would impair the value of existing rights and would be detrimental to the public welfare.³

VI.

Application 25014 was filed April 10, 1969, by Fred M. Fulstone, Jr. to appropriate 10.0 cfs from Desert Creek for irrigation of 800 acres within parts of Sections 8, 9, 16, 20, and 21, T.10N., R.24E., M.D.B.& M. The proposed point of diversion is located within the SW¼ NE¼ of Section 20, T.10N., R.24E., M.D.B.& M. Application 25014 was timely protested by several parties. The State Engineer subsequently denied Application 25014 by ruling at a hearing on July 28, 1970, because of the State Engineer's Ruling No. 329 dated May 25, 1959, denying Application 16970 which proposed to appropriate the flood and surplus waters of Desert Creek, and on the grounds that granting a permit would impair the value of existing rights and would be detrimental to the public welfare.⁴

FINDINGS OF FACT

I.

By letter dated June 4, 1979, the attorney for Fred M. Fulstone, Jr. requested a two year moratorium on action on

³ File No. 16790, official records in the office of the State Engineer.

⁴ File No. 25014, official records in the office of the State Engineer.

Applications 35563 and 35564 while the applicant undertook certain water studies to establish that the amount of water flowing in Desert Creek at the applicant's point of diversion is not sufficient in quantity to reach the West Walker River and is unappropriated. By letter dated September 10, 1979, the State Engineer decided to withhold action on the applications for a one year period and stated that further requests to delay action on the applications would be considered if evidence can be submitted that studies are underway.^{1,2}

By letters dated March 10, 1980, and March 5, 1981, Mr. Fulstone's attorney requested additional extensions of a year for additional study to determine if there is unappropriated water in Desert Creek, and by letters dated April 28, 1980, and March 17, 1981, respectively, the State Engineer granted additional extensions of one year.^{1,2}

By letter dated February 17, 1982, Mr. Fulstone's attorney reported results for years 1980, an average-to-good year, and 1981, a totally dry year. The attorney expected 1982 to be a good water year and requested an additional extension of one year to continue the study. By letter dated February 22, 1982, the State Engineer stated that he would withhold action on the applications for an additional year.^{1,2}

The files for Applications 35563 and 35564 contain no more correspondence concerning the study of Desert Creek nor do the files have any reports of study results or data except for the attorney's letter dated February 17, 1982.^{1,2}

II.

By letter dated September 18, 1997, the State Engineer's staff inquired if Mr. Fulstone had an interest in Applications 35563 and 35564, and requested the stream flow measurements that were taken during the years 1979 through 1983.^{1,2}

Mr. Fulstone replied by letter dated October 13, 1997, that he still had interest in the applications, some of his consultants had

passed away, and that he had asked his attorney to try to obtain the streamflow measurements.^{1,2}

III.

By certified mail to Mr. Fulstone dated November 19, 1997, the State Engineer's staff requested the stream flow measurements taken during the years 1979 through 1983, and requested these measurements be submitted by February 23, 1998, and a properly endorsed return receipt was received in the office of the State Engineer on November 20, 1997.¹ Copies of previous actions concerning Applications 16970 and 25014 were also sent. On November 21, 1997, at Mr. Fulstone's request, copies of correspondence concerning Applications 35563 and 35564 were sent to his attorney and consulting engineer.^{1,2}

No stream flow data have been received in the State Engineer's office as a result of the requests dated September 18, 1997, and November 19, 1997.^{1,2}

IV.

The State Engineer has twice denied applications from Fred M. Fulstone, Jr. to appropriate water from Desert Creek on grounds that granting permits for the applications, be it direct diversion of Desert Creek or the flood and surplus waters of Desert Creek, would impair the value of existing rights and would be detrimental to the public welfare. Furthermore, in Ruling No. 329, the State Engineer found that the waters of Desert Creek are tributary to the Walker River, and are administered under the Walker River Decree in the United States District Court for the District of Nevada, Case in Equity, C-125. The flood and surplus waters are used to satisfy decreed rights on the Walker River Stream System.^{3,4,5}

⁵ State Engineer's Ruling No. 329, dated May 25, 1959, official records in the office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶

II.

Before either approving or rejecting an application, the State Engineer may require such additional information as will enable him to properly guard the public interest.⁷

III.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:⁸

- A. there is no unappropriated water at the proposed source; or
- B. the proposed use conflicts with existing rights; or
- C. the proposed use threatens to prove detrimental to the public interest.

IV.

The applicant has failed to submit to the State Engineer's Office the required streamflow information to show the availability of water in Desert Creek. The State Engineer concludes that without the requested streamflow information, sufficient information is not available to properly guard the public interest.

V.

The State Engineer has twice denied applications to appropriate waters from Desert Creek on grounds that granting permits for the appropriations would impair the value of existing rights and would be detrimental to the public welfare. In these denials the State Engineer concluded the waters of Desert Creek are administered under the Walker River Decree in the United States

⁶ NRS § Chapter 533.

⁷ NRS § 533.375.

⁸ NRS § 533.370(3).

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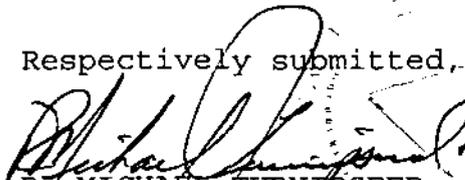
District Court for the District of Nevada, Case in Equity C-125.

The State Engineer in this ruling takes note of the previous rulings and concludes that to grant permits for Applications 35563 and 35564 would conflict with existing rights and threaten to prove detrimental to the public interest.

RULING

Applications 35563 and 35564 are hereby denied on the grounds that the applicant has not submitted the requested information required by NRS 533.375, and that the granting of permits would conflict with existing rights and would threaten to prove detrimental to the public interest. No ruling is made on the merits of the protests.

Respectively submitted,


R. MICHAEL TURNPSEED, P.E.
State Engineer

RMT/CAB/cl

Dated this 9th day of
June, 1998.