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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR)	PETITION FOR REVIEW AND RESPONSE
TRANSFER NO. 82640 IN THE)	TO AMMENDED PRELIMINARY
NAME OF CLINTON K. AND ESTELITA ASTON)	ORDER FOR TRANSFER NO. 82640
)	
CLAIMANT)	PROTESTANT

I, Jay Norman Fannesbeck, being an owner of interest in a well located in the NE ¼ NE ¼ Sec. 36 T15S R38E, Water Right #13-2209, hereby files this Petition for Review and Response to Preliminary Order for Transfer No. 82640, before the Director, Mr. Gary Spackman, of the Idaho Department of Water Resources in the above referenced proceedings. Responding to a contested hearing held on July 16 and 17 and in response to a Preliminary Order issued on August 5, 2019, I hereby file this right to petition the Director to review errors and to reintroduce important facts and information that allows the truth to be seen and heard.

Protest

My protest to this transfer application has been on the basis that we were are again discussing the same issue, water rights that had been bargained away by the Schvaneveldts in order to motivate my father, Norman D. Fannesbeck to trade ownership interest in two groundwater wells developed by Fannesbecks and Lee Schvaneveldt in the early 60's.

Again I am in a position to discuss and resolve as per protest:

“same unresolved issues that existed with transfer application #70722 which current applicant now ignores after so adamantly protesting and stirring up other protests – and providing inaccurate information, same issues that he protested, now apply to him.”

The remedy to resolve my protest was to:

“...fix and update water right 13-2209 to reflect accurate history and then determine if transfer (82640) is even necessary or allowable...”

dated the 16th day of September, 2018.

Included in the basis for this protest is the most important fact that needs to be discussed, highlighted, and addressed, is that the place of use for License 13-2209 was accomplished with the use of two distinct ground water diversion points, which are commonly referred to at these hearings as well #1 and well #2. Both wells producing very close to 3 cfs each.

The land list for this water right includes land that has been exclusively watered by well #1 and land exclusively watered by well #2. Both of these wells were in production at the time a licensing examiner came on July of 1966, to inspect the irrigation works. It took the production of both of these wells to establish the land use list.

Well #1 has been physically measured by IDWR personnel and determined to be 2.87 cfs. There is a Micrometer meter on it. Well #2, while never having been actually measured or having a meter installed, has been documented as 2.80 cfs.

ANALYSIS

Ownership of Water Right 13-2209

The November 16, 2004 Agreement (exhibit 325) between Jay Norman Fannesbeck, ElRay Balls, and Sid Schvaneveldt, describes a totally valid and executed agreement created by their parents in the mid 60's. This agreement was initiated to satisfy the facts discussed with IDWR personnel, and under their advisement we began to document our communications in writing instead of oral agreements and handshakes. It was hard at this time to know precisely how to proceed. Both Norman Fannesbeck and Lee Schvaneveldt had passed away before November 2003 when a pre-conference hearing for transfer 70722 was held. Fannesbecks had not been made aware of most of the communications taking place with the well permits. Sterling and Vereen Bingham were adamant that it was for them to complete the water permit G-28818. The Cooleys or Lee Schvaneveldt took charge for G-29935. Lee sold the farm out from under Jerry Schvaneveldt in 1964 to the Cooleys and repossessed it back later in 1966.

Documents that could support or provide answers could not be obtained from the Eastern Regional Office of the IDWR prior to the November 2003 prehearing conference. At the conference, I was advised to collect affidavits from anyone that had firsthand knowledge and advised to do the agreement. (exhibit 337, which can be verified by Sharla Cox as the handwriting of Ron Carlson) The parties who signed the documents accepted it as the best evidence we could provide at the time, attesting, that an earlier oral agreement had taken place, and was willingly executed as stated. Testimony of Fannesbecks, ElRay Balls, Charlotte Schvaneveldt.

Admission is an important defense to the Statute of Frauds. Fannesbeck, Balls, and Charlotte Schvaneveldt, all admitted under oath during these hearings that the November 2004 Agreement was valid and represented what they felt and knew to be true to the best of their knowledge.

The Idaho Supreme Court reaffirmed the traditional rule that **part performance** of a real estate agreement ... constitute an exception to the statute of frauds... a contract that would otherwise be unenforceable because it does not comply with the statutory writing formalities, may be enforced..., **Hoke v NeYada**. 387 P3d 118 (Idaho 2016) Joseph Singer, Professor of Law, Harvard Law School.

From 1966 when this trade agreement took place and on, Fannesbeck's became the exclusive users of well #1. Schvaneveldt's and Balls became the exclusive users of well #2.

The Lee/Sidney Schvaneveldt line of ownership has never diverted even one cup of water from well #1 to satisfy any irrigation for the land now owned by Mr. Clinton Aston since well #2 became operable.

It is wrong to remove water from well #1 and add it to a land list established by diversion from well #2. It will take some thinking outside the box, but in this unique case, the only fair and right thing to do, is to recognize that the 87 acres associated with Schvaneveldt property, from the land list for 13-2209, was established right from the beginning from well #2, never from well #1. A diversion rate that comports to this 87 acres should be assigned by the Department to water right 13-8026 without moving or reducing the rate for 13-2209, and reduce acres from 13-4120 by the amount assigned to 13-8026. This nonsense of a stacked water right. Every acre that Aston would consider irrigated on his farm has received water from one and only one source and that is well #2 since June of 1962.

I do consider it an injury to the Fannesbecks to reduce the land list of 13-2209 whereas this acreage was legitimately bargained from the Schvaneveldts to the Fannesbecks, and Fannesbecks have applied the water attached to these acres to Fannesbeck land located in Section 16 and 21 (Ex. 322) in what is legitimately recognized by the Statutes of the State of Idaho as an "Accomplished Transfer". Idaho Code 42-1425

I started pressing harder for someone to help me find documentation that I suspected the IDWR must have, and in April of 2005, with the aid of Roger Warner who worked at the Eastern Regional Office at the time, and I believe her name was Kay Walker in Boise, we finally started to uncover documentation located in the vault at Boise. The new discovery of documentation eventually led to a conference held in Idaho Falls on June 30, 2005, with several members of the staff in Idaho Falls and a phone conference with Boise. ElRay and I were directed to file Statutory Claim 13-7661 as opposed to a Transfer application due to the resistance coming from Mr. Clinton Aston.

The hearing officer was correct in his assessment in his letter sent to Mr. Aston on October 17, 2011 denying a change in ownership of water right 13-2209. (Ex. 346)

The hearing officer is in error to declare that the agreement has no effect.

Ownership of Water Right 13-4120

The Fredrickson letter does constitute a conveyance of water right 13-4120 under the doctrine of part performance and promissory estoppels. The conveyance, however flawed, stated the elements intended adequately enough for any reasonable mind to understand and was executed with the filing of Claim 13-7661. Zane Fredricksen stated while under oath, as a witness at the hearing, that he wanted ElRay Balls to have the water right appurtenant to the property he owned (Part II, Track 2, @ 3:25). He also stated that he had communicated with FLR, before they became the new owner, that he gave the water right to ElRay. Mr. Warren Petersen, Vice President of FLR, in a letter to the IDWR, stated they did not own or claim the water right (Ex. 119). The hearing officer erred in his analysis of the Fredricksen letter.

Validity of Water Right 13-4120

There was absolutely no evidence introduced that provided “ **a preponderance of evidence that Lee Schvaneveldt or Sid Schvaneveldt established a beneficial use water right on June 26, 1962 with a diversion rate of 2.80 cfs for the irrigation of 187 acres.**” To establish the priority date for when water was actually put to beneficial use, Aston referred to the specification data on the 75 horse power motor for well #1 and claimed the manufacture date as the manufacture date for the 100 hp motor on well #2. The priority date for well #2 has not been challenged, and the need for this exhibit was unnecessary, only serving as an act of deception on the part of Aston. (Exhibit 120)

Exhibit 115 is another act of deception. Aston shows us a picture of a 15 inch culvert 10 feet long, with an 8 inch piece of aluminum pipe inside it. What he fails to show is the rest of the makeshift culvert which consists of two old 4 ft. water softener tanks with the ends cut out, laying end to end from the end of the other culvert, with the section of 8 inch aluminum pipe set inside. The makeshift culvert

sections appear to be protection only for the aluminum pipe. The size of the aluminum pipe casts a lot of doubt that it was a remnant of the old irrigation mainline as this particular section of mainline would most likely have been either 6 or 5 inch according to exhibit 114.

The testimony of ElRay Balls has been embellished. He clearly testified that he helped “scatter pipe” and knew that they had put a mainline under the road. His testimony did not include any mention of actually seeing water applied to the ground or of himself moving pipe while it was supposedly being irrigated. Something that I was pressing to understand before Mr. Harris objected and the Hearing Officer cut me off, not letting me finish my questioning. His memory did show by his own admission that it was failing him.

But the most important testimony that should have put this whole argument to rest, was that of Charlotte Schvaneveldt, Sid’s wife, and previous owner to Aston.

July 16, 2019 Hearing, Track I, at 1:07:48

Rob Harris questioning her as a witness for Aston in reference to the NWNW Sec. 9:

RH: Did you ever move handlines on the parcel

CS: NO...

RH: What were you growing

CS: Dry farm hay

RH: Did Sid ever tell you that he tried to irrigate this parcel

CS: NO

Was then asked if she thought this parcel was worth farming...?

CS: NO

Evidence at the hearing clearly pointed out that irrigation has not taken place north of the county road prior to or on July 15, 1966, nor was any irrigation taking place on the SWNW 9 as per examination by IDWR. If the department wants to discredit its own employee making the examination, that is the choice of IDWR, but it appears that if we hold to letting the records speak for themselves, in truth, Water Right 13-4120 or 13-8026 which should completely replace 13-4120, should be held to the irrigation of 87 acres. (exhibit 338)

CONCLUSION

This hearing has introduced many a moral and ethical question. We are conducting some backpedaling on previous agreements that the IDWR may be improperly interfering with. Aston's choice to continue pushing forward is moving him closer to some unfavorable exposure which I favor trying to avoid. I am greatly concerned with so many uses of partial truth that many participants to this contested case are finding it very disturbing.

I am reminded of a favorite remark by a good lawman, Kent Foster, who loved to say..."most of the time a poor settlement is better than a great case".

Dated this 12th day of November, 2019

Jay Norman Fennesbeck
Protestant

I certify that I have served a copy to the following via e-mail:

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On this 2nd day of September, 2019

Jay Norman Fannesbeck
protestant

