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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	**)**	**FONNESBECK PETITION FOR**
TRANSFER NO. 82640 IN THE	**)**	**RECONSIDERATION**
NAME OF CLINTON K. AND ESTELITA ASTON	**)**	
	)	
	)	

Protestant, Jay Norman Fonnesbeck, 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 Reconsideration in response to *Order Denying Motion to Dismiss: Final Order on Exceptions* filed by the Director, Mr. Gary Spackman, January 31, 2020, of the Idaho Department of Water Resources in the above referenced proceedings. I hereby file this right to petition the Director to be so kind to review some possible errors and inconsistencies in interpretation , to reintroduce important facts and information that allows the truth, the whole truth, to be seen and heard, and also request the director to be more specific and enlightening regarding some of his conclusions . I do not wish to burden the Director, but he has arrived at certain conclusions without out providing any support other than to defer back to the Hearing Officer in this case.

BACKGROUND

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. Fonnesbeck to trade ownership interest in two groundwater wells developed by Fonnesbecks and Lee Schvaneveldt in the early 60's. Ex. 323

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.

ARGUMENT

Ownership of Water Right 13-2209

The November 16, 2004 Agreement (exhibit 325) between Jay Norman Fonnesbeck, 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 Fonnesbeck and Lee Schvaneveldt had passed away before November 2003 when a pre-conference hearing for transfer 70722 was held. Fonnesbecks 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 in the later part of 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 Fonnesbecks, ElRay Balls, Charlotte Schvaneveldt.

Admission is an important defense to the Statute of Frauds. Fonnesbeck, 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, Fonnesbeck'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. Aston, himself while testifying under oath at the hearing in July, testified that his Grandpa Sterling Bingham had enlightened him on this trade and that it had taken place. (Track 4, 1:06:15 thru 1:07:20, July 16, 2019)

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 or spring of 1963.

I do consider it an injury to the Fonnesbecks to reduce the land list of 13-2209 whereas this acreage was legitimately bargained from the Schvaneveldts to the Fonnesbecks, and Fonnesbecks have applied the water attached to these acres to Fonnesbeck 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. This is when the backfile for 13-2209 was first uploaded to the Department's data base. This is when we discovered the documentation for lapsed permit G-29935. Neither my father or Uncle Mike had ever seen these documents before and were not even aware of their existence. 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 in his preliminary order that the agreement has no effect. It is wrong to assume that Fonnesbeck's or Balls just sat on their thumbs and did nothing for the past 50 years. The Department did nothing to resolve the Balls transfer application for 7 or 8 years. I know, adamantly, that I have been told to let the Bear River Adjudication resolve what we are working on right now by IDWR staff continuously.

The Hearing officer and the Director are both in error to assume that no action has taken place to resolve 13-2209. There have been many trips to Idaho Falls and to Boise to gather information and because what we were looking for was not in the Data Base, Department staff has not been very helpful and we have been told way to often that this will be solved in the upcoming adjudication, and we should wait until that time. This same advice is still being extended to this date.

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 if a water right actually existed (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. Permission was not extended to Mr. Aston, the FLR letter was sent declaring they had no claim to any water rights, and confirmed what Mr. Fredricksen had testified to, that He told FLR that he had granted the water rights if any existed to El Ray Balls.

Validity of Water Right 13-4120

To this date, no evidence has been introduced that has even provided **" a preponderance of evidence that Lee Schvaneveldt or Sid Schvaneveldt established a beneficial use 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 refered 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. Ex. 120. Aston also provided easement records for a 3-phase power line to be installed by Utah Power and Light. Ex. 122. Records show that a power line would be installed along the highway to well #1 but does not show an easement to run lines to well #2. This evidence agrees with the testimony of Myron Fonnesbeck affidavit that he was not sure if the power to well #2 was installed by the fall of 1962 or spring of 1963. Ex. 323 @ pg. 42

Exhibit 115 is an 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 which is acting as the culvert for the water which must run under the road . 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 (February 28, Track 5, @ 44:00 thru 1:20:00)
has been exaggerated by Aston. He clearly testified that he had helped his Brother in Law, Jerry Schvaneveldt at one time "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. He also could not establish a year that any of this took place, or how successful were their efforts. Something that I was pressing to understand before Mr. Harris objected and the Hearing officer cut me off. His memory did show by his own admission that it was failing him. His memory is vague, and while ElRay is trying to be as honest as possible, his memory at his present age is not reliable, and very likely was steered by so much time spent discussing Ex. 115, Ex. 300, and the previous testimony of Fredrickson who testified that he wanted ElRay to have the water rights if any existed in the NWNW sec. 9 February 28, Track 2, 0:00 thru 21:00

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

Track 2, at 3:50 thru 5:30

Jay Fonnesbeck questioning same witness in reference to the NWNW Sec. 9

JF: I heard you testify earlier to the best of your memory, you have NO remembrance of irrigating above the road

CS: NO…not on the north side, NO we never did

JF: So…do you have any reasoning or understanding why when Sid filled out this map for the water claim, why he claimed he was irrigating north of the road?

CS: I have NO idea…

Add to Charlotte's testimony, the many testimonies of all the neighbors (Bingham, Fonnesbecks, Fredrickson, White, Olson, Campbell, Gunnel, Spradlins, Brian Balls, Shaun Schvaneveldt) who live in the proximity and even bordering this particular parcel, that they have never in their life time witnessed the NWNW sec. 9 ever being irrigated. Evidence at the hearings provided no supporting documentation, no county records, no assessment records, no crop reporting records, were introduced that supported irrigation taking place or ever established on any of the NWNW sec. 9.

As was mentioned in the Hearings by many, the best action the department could carry out in this case is to actually do a field exam which has not been done since 1966.

I do not agree with the Director's conclusion that there is substantial evidence in the record to show that the NWNW Sec. 9 was irrigated with groundwater.

Evidence in the administrative record clearly pointed out that irrigation was not taking 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. (IDWR 13-2209 backfile, 1 -17) Confirmation that these parcels were not being irrigated or intended at the time to be irrigated, can be found by Mr. Lee Schvaneveldt's own signature

attesting to the fact on the Proof Sheet / Deposition of Holder. (IDWR 13-2209 backfile, 23,24) Also, lapsed permit G-29935, clearly shows that there was never any intention to irrigate the NWNW sec. 9. 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 does not meet the acid test of putting water to a beneficial use prior to March 1963 and therefore is not a valid claim. Water right 13-8026 should be denied because it is an attempt to take a right that has been legally and lawfully bargained away and by an accomplished transfer moved to other lands. 13-8026 does identify a place of use that was flood irrigated prior to March 1963 and would validate a Statutory Claim filed on these acres. The risk of proving up a Statutory Claim, in this case, is that the legal and only way to get to the acres Aston desires is to finish proving up the original permit for well #2 that was cancelled.

CONCLUSION

I am asking the Director to please review again this contested case. I am not an Attorney. I am clumsy with my handling my side of the case. I was hoping for a different outcome, but I do know what the truth is and everything I can provide in this case is verifiably true. Please review tracks 4 & 7 of the July Hearing.

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 consequences. 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 concerned about my own mental health dealing with inconsistencies of interpretation and setting aside or just plain ignoring truth that has been presented.

The standard for "Clear and Convincing " evidence was met in the Administrative Record before any hearing even took place. The transfer should have never been applied for . As a result, this transfer application has presented the evidence that Aston should be held to the irrigation of 87 acres until permit G-29935 has been reopened and proved and licensed which would restore him to the 127 acres of irrigated land that he purchased in the beginning and has irrigated for the past 15 years.

Dated this 14th day of February, 2020

s/ J Fonnesbeck
Jay Norman Fonnesbeck

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

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