

BEFORE THE LOCAL GROUND-WATER BOARD FOR BANNOCK COUNTY

STATE OF IDAHO

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Department of Water Resources
Eastern District Office

HERMAN REISNER, THELMA REISNER,
JOHN HART, FRED HART, KEITH BENNETT,
ALICE DENNY, AND JULIA BLANCHARD

Claimants

v.

REID STEWART

Respondent

FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

This matter came on regularly for hearing on January 29, 1969, before the Local Ground-Water Board for Bannock County, consisting of Mr. Jack A. Barnett, Deputy State Reclamation Engineer, Chairman; Mr. Marshall K. Corbett, a geologist appointed by the Judge of the District Court; and Mr. Boyd Gunter, a resident irrigation farmer of Bannock County, who was selected by the other two Board members.

Claimants were represented by their attorneys, Merrill K. Gee and Howard L. Armstrong. Respondent was represented by attorney R. D. Merrill. The hearing was held in the afternoon of January 29 and the morning of January 30. It was intended to continue with the hearing in the afternoon of January 30. However, during the noon recess, attorney R. D. Merrill was unexpectedly taken seriously ill. The remainder of the hearing was continued until March 28, 1969. Upon reconvening the hearing, the Board was informed that at this and future hearings, the respondent, Reid S. Stewart, would be represented by himself and his engineer, Frank W. Haws.

At the conclusion of the hearing on March 23, 1969, a request was made by claimants' counsel that the names Alice Denny and Julia Blanchard be added to the names of the claimants in this case. With the stipulation that the claimants' case would stand with the data and facts already submitted and additional testimony would not be required to represent the additional claimants' position, and hearing no objections, the two names were added to the list of claimants.

Following the hearing, the Board found that the claimants and respondents had failed to provide the Board with enough facts and data to decide the case. With this in mind and following the urging of both parties, the Board requested by letter of April 1, 1969, that the Idaho Department of Reclamation conduct an investigation to determine the ground-water hydrology of the area and the use made of the spring waters and ground waters by the claimants and respondents. A subsequent hearing was held on December 16, 1969, for the Board to hear the results of the requested investigation.

Having heard and reviewed all the evidence presented to the Board and having consulted all of the County, State and Federal Government records that the Board felt necessary, as agreed to by the parties, and having reviewed the transcript of a previous court action on the matter which has been designated Civil No. 23583, as agreed to by the parties, the Board makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

A. WATER RIGHTS

The Ground-Water Board finds that there are three types of rights to water from the spring referred to in the hearing as the Reisner Spring. The first type (I) is surface flood irrigation rights; the second type (II) is domestic rights; and the third type (III) is pumped sprinkler irrigation rights. The Board also finds ground-water rights (IV) to pump from two wells.

I. Surface Flood Irrigation Rights

The Board finds that all of the surface flood irrigation using spring water was initiated in about 1930. The diversion of water is from the spring area that was referred to as the Reisner Springs at the Board's hearings, and is located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E. The water is diverted from the natural spring stream channel in the above-described area near the spring issuance. The Board finds that all right holders to this type of right have an equal priority dating 1930. The Board also finds that individuals holding this type of right are entitled to as much as an inch to the acre for irrigation and additional waters for conveyance loss in the long canal used to deliver the water. Testimony was given that as much as another inch to the acre is required to deliver the water to the end of the two-mile-long canal. With this in mind, the Board finds that the individuals are

entitled to conveyance water in proportion to the distance down the canal from the springs that their diversion occurs. That is to say that an individual diverting one-half mile down the canal would be entitled to one-fourth inch per acre of additional conveyance water. The Board then finds that the rights to divert out of the Reisner Spring by gravity means with a 1930 priority are listed as follows in order of their diversion:

- a. J. Levers Juchao, c/o Keith Bennett, 7.1 acres of irrigation in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E.; 7.1 inches irrigation water plus 1.4 inches conveyance water make a total diversion at the spring of 8.5 inches (.16 c.f.s.).
- b. Ettna E. Gilbert (not a party of the Ground-Water Board), 10.2 acres of irrigation in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E.; 10.2 inches irrigation water plus 3.0 inches of conveyance water make a total diversion at the spring of 13.2 inches (.26 c.f.s.).
- c. Herman Reisner, 20.4 acres of irrigation in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E.; 20.4 inches irrigation water plus 14.2 inches of conveyance water make a total diversion at the spring of 34.6 inches (.69 c.f.s.).
- d. H. Vance Polk, c/o Richard Butmaster (not a party of the Ground-Water Board), 5.3 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T. 10 S., R. 37 E.; 5.3 inches irrigation water plus 4.2 inches of conveyance water, making a total of 9.5 inches (.19 c.f.s.).
- e. Herman Reisner, 12.8 acres of irrigation in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T. 10 S., R. 37 E.; 12.8 inches irrigation water plus 12.8 inches of conveyance water, making a total of 25.6 inches (.51 c.f.s.).

Total surface flood irrigation rights: 1.81 c.f.s.

II. Domestic Rights

The Board finds that Thelma Reisner Ramey (widow of Wilford Reisner) is entitled to a total of .06 c.f.s. (25 gallons per minute) to be pumped from the head of the spring with a 1932 priority, to be used for a home

(.69 cfs) (30.4 ac)

51 cfs (12.8 ac)

located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E. Said water is also to be used for incidental yard irrigation, including up to one-fourth acre of garden.

Total domestic rights: .06 c.f.s.

III. Sprinkler Irrigation

The Board finds that individuals have been using waters from the springs for pumping and sprinkler irrigation since 1953 and such rights have a priority as of that year. The Board finds that the pump diversion, located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, is sufficiently close to the spring area that conveyance waters are not required, and the Board determines that irrigation practices require no more than .8 inches of water per acre. With this in mind, the Board finds the following rights:

- (36.64)
- (16)
- 15.4
- 20.0
- a. Herman Reisner, 35.7 acres of irrigation in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E.; total diversion of 28.6 inches (.47 c.f.s.).
 - b. Herman Reisner, 15.6 acres of irrigation in the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E.; total diversion of 12.5 inches (.25 c.f.s.).
 - c. Thelma Reisner Ramey, 15.4 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E.; total diversion of 12.3 inches (.25 c.f.s.).
 - d. Thelma Reisner Ramey, 20.0 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, T. 11 S., R. 37 E.; total diversion of 16.0 inches (.30 c.f.s.).
- Total pumped diversion: 1.27 c.f.s.

The Board therefore finds that there is a total right of 3.14 c.f.s. from the Reisner Springs.

IV. Ground-Water Rights

- a. The Board finds that the claimants Julia Blanchard and Alice Denny are entitled to the licensed right issued in the name of Edward Denny by virtue of their ownership of Lots 3 and 4 in Section 7, T. 11 S., R. 37 E. This licensed right has been designated by the number 23673 (29-2330) in the records of the Idaho Department of Reclamation. It has a priority of

February 27, 1953, to divert 1.2 c.f.s. from a well located in Lot 3 of said Section 7. The right is to irrigate up to 90 acres of ground in Lots 3 and 4 of the Section (W $\frac{1}{2}$ SW $\frac{1}{4}$).

b. The Ground-Water Board finds that Reid Stewart has a licensed right, which has been given the number 25728 (29-2366), to divert water from a well located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, T. 11 S., R. 37 E., (referred to as Stewart Well #1). This right was originally in the name of Mark Dunford Weston and Lois L. Weston. Mr. Stewart has a right to use these waters by virtue of his ownership of the lands upon which the well is located and the lands that are irrigated from it. This licensed right has a priority of May 26, 1955, to irrigate 120 acres from the well. The lands to be irrigated are in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 7.

* c. The Board finds that Application No. 30723 (29-2466), filed with the Idaho Department of Reclamation to pump water from the well before-mentioned (Stewart Well #1) in Section 7, is in the name of Reid Stewart; that, in fact, a water right has been established to irrigate up to as much as 200 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 18, T. 11 S., R. 37 E. This established right is to divert up to as much as an additional 4.0 c.f.s. from this well. The license for this right has not been issued, pending the decision of the Ground-Water Board. The Board finds that this license, when issued, should be limited to the actual amount diverted and used prior to the time that the proof of beneficial use of the waters was submitted and the lands irrigated should likewise be limited. The priority date of this second right on the well, referred to in the Ground-Water Board hearing as the Reid Stewart Well #1, should be September 14, 1962.

B. GROUND-WATER HYDROLOGY

The Board finds that the ground water in the area of the Reisner Spring, the Alice Denny Well and the Stewart Well is of a common source. Hydrologic data, dye tests, and the testimony by scientists studying the occurrence and movement of the water has led the Board to conclude that this is a common source. The water is flowing from the southeast to the northwest, and the aquifers encountered in the Stewart Well and the Alice Denny Well, and other wells in the general area, are the same aquifers that carry the water that issues at the Reisner Springs. The Reisner Spring area represents a natural overflow to the ground-water system and the amount of discharge from the springs is very sensitive to small water-level changes in the aquifer.

The Ground-Water Board finds from evidence and testimony that the flow of the Reisner Springs has decreased over the years. The Ground-Water Board determines that the decrease in flow has been brought about by at least three factors:

I. The flow of the springs varies to a certain extent seasonally and from season to season, as precipitation varies. Precipitation is one of the sources of recharge to the aquifer and therefore to the springs.

II. The spring flow has decreased because of reduction in surface-water irrigations in the area, starting back at least as early as 1941 and continuing to the present. Most of the surface water irrigation on the bench lands above the spring level has been with waters imported into the area from the Portneuf River by the Portneuf-Marsh Valley Canal. Some of the water from this source percolated down to the aquifer and recharged the aquifer, hence adding to the flow of the spring. Stopping of this irrigation practice has thereby decreased the flow of the spring. Both the claimants and the respondents, as well as others in the area, have stopped their use of these surface waters over the years.

III. The Ground-Water Board finds that the pumping of the Stewart Well and several other wells in the immediate region has taken water from the aquifer and thereby reduced the discharge of the spring. The Board further finds, however, that there was not sufficient evidence introduced by the claimants in the case, nor was there sufficient evidence presented at a later date by the Idaho Department of Reclamation, for the Board to determine whether the effect of the Stewart Well alone was appreciable and could be measured.

The Ground-Water Board finds that the testimony given demonstrates that the pumping of the Stewart Well has, to some undetermined extent, lowered the water in the Alice Denny Well and thereby reduced the production of the well owned by claimants Alice Denny and Julia Blanchard. Both of these wells are diverting water from the same aquifer system. The Board further finds, however, that the construction of the well referred to as the Alice Denny Well is such that only the top few feet of water in this aquifer are available to the pump. Lowering of the water levels in the aquifer only a portion of a foot can affect this well, and minimum drawdown caused by pumping of the Alice Denny Well itself is significant to the production of the well.

CONCLUSIONS OF LAW

The Ground-Water Board finds that, in the case of the alleged interference of the Stewart Well with the Reisner Spring, the burden of proof of the interference must rest with the accusing party. The Ground-Water Board finds that, with the data submitted to it by the parties and the additional data supplied by the Idaho Department of Reclamation, it is not able to determine whether or not the damages alleged by the claimants are significant and real; therefore, the Board is not able to award any relief to the claimants. Because of this, the Board finds that the claimants have failed to make the showing to the Board that is required of them as accusing parties, if they are to prevail in the matter.

The Board also finds that the development of the well by the claimants Alice Denny and Julia Blanchard does not represent a reasonable effort to develop the ground-water resources of the aquifer. With respect to the claim of the well owners, the Board wishes to cite a portion of Section 42-226 of the Idaho Code:

"...and, while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided."

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters herein its order as follows:

1. That the respondent Reid Stewart be allowed to continue to pump his well within the rights set forth in the Findings of Fact, without regard to interference with the Reisner Springs until such time as the right holders in the spring have conclusively demonstrated the extent of the alleged interference with their rights specified in these findings before a court of law or a Local Ground-Water Board, and/or until the claimants Julia Blanchard and Alice Denny have proceeded with reasonable diligence and effort to develop the ground-water resources under their property and demonstrated this before a court of law or a Local Ground-Water Board.

2. That the respondent Reid Stewart immediately proceed with the installation of a measuring device on his system that will allow the Idaho Department of Reclamation within the next 60 days to measure the total discharge of his well and observe the irrigation from this well. The water rights established under Water License No. 25728 and Application No. 30723 should be limited to the amount of water actually being produced, and that he should not be allowed to irrigate lands in addition to those described in his licensed right or in addition to land actually irrigated prior to the submission of proof under the pending license. The measuring device is to be accessible for inspection by the Idaho Department of Reclamation at any reasonable time.

3. That within 90 days the claimants, Herman Reisner, Thelma Reisner Ramey, John Hart, Fred Hart, and Keith Bennett, proceed to install a measuring device on the springs that is of a standard type to be approved by the Department of Reclamation, and which can measure the amount of water issuing from the springs. Said measuring device is to be accessible for inspection by the Idaho Department of Reclamation at any reasonable time.

4. That Alice Denny and Julia Blanchard be allowed to continue to pump their well in a manner that they see fit, within the rights set forth here, but should not be allowed to produce water from a deepened or improved well until such time as a measuring device approved by the Idaho Department of Reclamation is installed so that the actual production of their improved well can be monitored.

Dated this 1st day of July, 1970.

LOCAL GROUND-WATER BOARD FOR BANNOCK COUNTY

Jack A. Barnett

Jack A. Barnett

Marshall K. Cortett

Marshall K. Cortett

Boyd Gunter

Boyd Gunter