



United States
Department of
Agriculture

Forest
Service

Nez Perce National Forest
Salmon River Ranger District

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File Code: 2700/5300

Date: June 18, 2001

Gary Spackman
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705

RECEIVED
JUN 21 2001
WATER RESOURCES
WESTERN REGION

Dear Mr. Spackman:

We have become aware of some water rights business that has been initiated by Mr. James Bonato of Lucile, Idaho. Mr. Bonato has filed application number 79-07263 to appropriate the public waters of the State of Idaho. In addition, he has made claim number 79-13962 in the Snake River Basin Adjudication (SRBA). Our involvement and interest in this matter is that the point of diversion for both water uses is on National Forest System Land (NFS). In addition, a conveyance across the NFS is involved.

BACKGROUND

These water uses already exist. Forest Service Law Enforcement Officer Peter S. Deane (Deane) discovered a diversion and pipeline leading to the Bonato property on the Nez Perce National Forest in 1998. Deane found an old irrigation ditch. Two inch diameter black plastic pipe was buried from the ditch to the private land. The pipe continued upstream within the ditch approximately 50 feet and included a valve to control flow. There was also a small dam forming a catch pool in the ditch at the end of the pipe to aid the establishment of a continuous flow of water into the pipe. Mr. Bonato is not authorized to occupy and use the NFS for these purposes. It is a violation of 16 U.S.C. 551 and 36 CFR 261.10(a). On October 29, 1998, Deane cited Mr. Bonato under these authorities for maintaining an unauthorized water system on the NFS. Bonato paid a \$100 fine.

On July 8, 2000, Mr. Deane found the Bonato improvements were not only still on the NFS and being used, but that those improvements had been expanded. Mr. Bonato told Mr. Deane that in January of 2000, he had added 300 feet of 5 inch white plastic pipe to his water system (for which he was previously cited) because he had a water right from the State of Idaho. Additional improvements include a crude wood frame with net wire mesh screening mechanism to prevent floating and suspended debris from entering the smaller 2 inch pipe. The pipe is placed in an old failing ditch. It would appear that the pipe in the ditch would eliminate the necessity of maintaining the failing ditch while aiding continued water flow. Deane relayed to Mr. Bonato that regardless of whether or not he has a water right, he must still obtain permission from the Forest Service to make or place improvements on the NFS. Mr. Bonato replied that he was too busy and did not have time to contact the Forest Service about this business. Mr. Bonato was cited a second time under the same authorities based on Deane's July 8, 2000 finding of continued and expanded unauthorized occupancy. He paid \$100 fine May 10, 2001.



Steven M. Spencer, Forest Service Water Right Specialist, has researched current and historic Idaho Department of Water Resources (IDWR) records for water uses that may have been diverted from sources on the NFS in Section 8, T25N, R1E and used on adjacent private land. IDWR records were initially searched using the surnames Bonato and Gill, as well as searching by legal locations in Sections 4, 5, and 8, T25N, R01E. He also researched water rights applications and claims electronically and reviewed water right case files at the Western Regional and State Offices in Boise. He discussed this matter with IDWR Water Right Agent Daniel A. Nelson at the Western Regional Office.

The list of water rights intensely researched was limited to those diverted in Section 8 (which is all NFS) and used on private land in Sections 4 and 5. The final list of three subject water rights is: 79-04030, 79-07263 and 79-13962.

WATER RIGHTS

79-04030 – Number 79-04030 was filed by George J. Gill &/or Opal Gill in 1974 pursuant to Idaho Code 42-225a (subsequently amended and redesignated 42-243). We understand this to be a claim to a water right pursuant to the above referenced statute and not a water right. It is also known as a statutory claim. Such claims have never been field verified. They are merely a claim to a water right, the elements of which must be proven at some time in the future.

The claim is to divert water from Cabin Creek in the NWNE of Section 8, T25N, R01E (which is on the NFS) for domestic purposes and to irrigate 60 acres, all uses in Section 4, T25N, R01E (which is all private land). Water was diverted by means of a check dam through a ditch across the NFS to the Gill private land. Evidently the ditch continued on Gill's property to their points of use on their private land in Section 4. It has a priority date of January 23, 1902 for 0.04 cfs for domestic and 1.20 cfs for irrigation. The hand sketch map that accompanied this claim clearly shows a diversion of water in Section 8 with all places of use in Section 4.

George Gill passed away in January of 1979, and the property was apparently split between his two sons, Melvin and Deward Gill. In August of 1982, the IRS placed a federal estate tax lien order on the estate of George Gill.

With the commencement of the Snake River Basin Adjudication (SRBA) in 1987, Melvin and Deward Gill filed separate claims for water rights in the SRBA in accordance with the order of the SRBA Court for their individual interests in their father's estate including 79-04030. Their claims in the SRBA are each numbered 79-04030. Melvin Gill's claim is dated received by IDWR July 25, 1988. Deward Gill's claim was received by IDWR September 22, 1988. Other than the name of the claimant, all other elements of their claims are identical.

On November 4, 1991, in a Judgement and Decree of partition in the Second Judicial District, Deward Gill and Melvin Gill were awarded certain properties from their father's estate. Deward's property included the SESE of Section 5. On February 6, 1992, a notice of change of ownership for A79-04030 from Melvin Gill to Deward Gill pursuant to the above court decision was received by IDWR, making Deward Gill the sole owner of this claim.

79-07263 – Application No. 79-07263 to acquire a permit to develop water was filed by James Bonato April 30, 1998. It has not proceeded beyond the status of an application because of various information needs and procedural concerns identified by IDWR. It is "on hold" pending satisfaction of those needs, possibly most significant to IDWR is the Salmon River Moratorium. These are all outlined and discussed elsewhere in this document.

The application is to divert water from Cabin Creek in Section 5 for domestic, stockwater and to irrigate 5 acres. The applicant indicates through the information provided on the application that he owns all the property involved, that the diversion works is an active preexisting head gate and ditch and that the only change needed in the future will be running domestic water lines off the ditch.

79-13962 – Number 79-13962 is a claim in the SRBA based on beneficial use dating back to 1902, filed by James Bonato. The diversion is from Cabin Creek in the NENE of Section 8 through a head gate and 400 feet of ditch to irrigation of 5 acres in the SESE of Section 5.

This claim will not be investigated by IDWR until it is being prepared and recommended by the director to the SRBA court in 2005.

COMPARISON OF CLAIMS

Water rights 79-04030, 79-07263 and 79-13962 have two common elements:

1. They are each actually diverted from the same location, Section 8, T25N, R1E. This is all National Forest System land.
2. They are each used on private land that was at one time owned by George Gill.

The Gill claims have evolved over the years. George claimed domestic and irrigation and no stockwater. Deward and Melvin claimed stockwater and irrigation and no domestic. Other than the fact Deward and Melvin apparently evenly divided their father's claim to a water right between themselves and the places of use have slight changes in quarter-quarters and acres, the important consistent element of Gill's claims are that they diverted water from NFS land in Section 8 and used it on their private land in Section 4.

A comparison of the Gill and Bonato claims follows:

	<u>George 79-04030</u>	<u>Deward 79-04030</u>	<u>Bonato 79-07263</u>	<u>Bonato 79-13962</u>
Priority Date	1/23/1902	1/23/1902	4/30/1998	12/31/1902
Source	South Fork Cow Creek	Cabin Creek	Cabin Creek	Cabin Creek
Tributary to	(Blank)	Cow Creek	Cow Creek	Cow Creek
Point of Diversion	NWNE Sec 8 T25N R1E	NENE Sec 8 T25N R1E	(blank) Sec 5 T25N R1E	NENE Sec 8 T25N R1E
Diverting Works	Check dam Gravity Ditch	Ditches	Head gate in ditch	12" head gate w/ 400' of ditch
Purpose of Use	Domestic Irrigation	Stockwater Irrigation	Domestic Irrigation Stockwater	Irrigation

Purpose and Season of Use				
Domestic	1/1-12/31		1/1-12/31	
Irrigation	3/1-12/1	3/1-12/1	3/15-11/15	3/15-11/15
Stockwater		1/1-12/31	1/1-12/31	
Quantity (cfs)				
Domestic	0.04		0.06	
Irrigation	1.20	0.60	0.10	0.166
Stockwater		0.05	0.06	
Place of Use				
<u>(GILL)</u>	NESW 5			
<u>All in Sec 4</u>	NESW 15	NESW 10 & S		
T25N R1E	NWSE 40	NWSE 5 & S		
and acres		SWNE 5		
		SENE 10		
		NWSW S		
		SWSW S		
<u>(BONATO)</u>				
<u>All in Sec 5</u>				
T25N R1E			SESE 5	
Total	60 acres	30 acres	5 acres	5 acres

CHRONOLOGY OF FACTUAL INFORMATION

This chronology of factual events is supported by documents and records. The events depicted are particular to the legal descriptions of the points of diversion (POD) and the places of use (POUs) claimed by Gills and Bonatos. The POD is located on National Forest System land in the NWNE of Section 8. All POUs are on private land – Gills are in Section 4 and Bonatos in the SESE of Section 5.

Emphasis throughout is added.

- 6/15/1846 The Oregon Compromise is signed whereby Great Britain relinquished all claim to the Oregon Country (the present day states of Idaho, Oregon and Washington) to the Government of the United States of America. Thus, all this land is now public domain under the exclusive ownership and control of the federal government.
- 5/10/1906 The Weiser Forest Reserve is established through Presidential Proclamation by Theodore Roosevelt, President of the United States. The map accompanying this proclamation shows Sections 5 and 8 are within the forest reserve and Section 4 is private land outside the forest reserve boundary. Lands within the forest reserve that were part of any existing valid entry, lawful filing duty of record or were settled pursuant to law were specifically excepted in the proclamation. Subsequent federal actions changed the Weiser Forest Reserve to the Weiser National Forest on March 2, 1907, and added this particular part of the Weiser National Forest to the Nez Perce National Forest on July 1, 1908.

7/13/1998 Memorandum of telephone call from Cricket Bonato to IDWR about the 6/10/1998 letter. There is apparently a message left on the IDWR answering machine. The memo is initialed by "SL", presumably Steve Lester. The message included they just bought the place, the ditch and irrigation are already in place, and they are not seeking new irrigation.

7/15/1998 Letter from IDWR to Bonato clarifying the Salmon River Moratorium – that it applies to all applications for diversion of surface water. But that "IDWR may be able to process your application if you provide documentation which shows your application meets any of the exceptions to the moratorium." And "IDWR will hold your application pending any changes in the moratorium, or if information is provided to IDWR that shows your application meets any of the moratorium exceptions."

7/27/1998 Letter from Cricket Bonato received by IDWR providing information on their application 79-07263 regarding homesteading, ownership, irrigation ditch, water rights and their property.

7/31/1998 Letter from IDWR responding to that of Bonato 7/27/1998, relaying specific information that must be provided to IDWR to process application 79-07263 – "that the proposed use was developed previous to November of 1987" and that "IDWR has no record of any water rights in the SE ¼ of ... Section 5." "A second option is to file a claim in the Snake River Basin Adjudication (SRBA)... you must show that the development was in place previous to May 20, 1971."

10/29/1998 1st Citation by Deane

11/10/1998 Letter from IDWR to Bonato that Daniel Nelson has taken over this case and that "Our office still has not received the information that Maria asked you to send to our office. We will not be able to process this application until proof of priority has been sent."

11/15/1998 IDWR Memorandum Nelson to Lester regarding the Bonato application and information for 79-07263 – "... let me know if they are adequate to process the permit application." Also routed to Jan Shurte.

11/16/1998 Letter from IDWR Nelson to Bonato pertaining to application 79-07263, information on Deward Gill's adjudication claim 79-04030 and that Bonato must show proof that his property was being irrigated prior to 1987.

11/17/1998 Letter from Melvin Gill to Bonato. Exerts with emphasis added: "... my parents bought this property (including the parcel you now own) in 1948 and the ditch you refer to was there then. ... refer to water right #A79-04030 filed with the Dept. of Water Resources which references this ditch."

11/23/1998 Cricket Bonato response to 11/16/1998 IDWR. This is a hand written note on the actual IDWR letter with enclosed 11/17/1998 letter from Melvin Gill.

- Undated Hand written response from Shurte to Nelson in it's entirety. Emphasis is added:
 Dan,
 The only problem I can see with this scenario is that 79-04030 covers lands in Section 4 rather than Section 5. This app. doesn't state which ¼ ¼. He can still file a claim if he feels he has a right to – we can't prevent him, however, it will be very questionable since the original claim was for Sec. 4. If he begins to divert from Cabin Creek & someone complains, it seems to me he should be cautioned that he will have to prove Sec. 5 land was originally irrigated from Cabin Creek even though it was never claimed by the Gills in 1974. As a matter of fact, there is no land in Sec. 5 with a previously existing right. If he intends to file, maybe he should file it as a B/U claim without trying to say it has anything to do with 79-04030. He can't do a change of ownership on A79-04030 to split it since it covers Sec. 4.
- Jan
- BOTTOMLINE – I wouldn't advise him that the claim will be solid – it is extremely questionable. He can file if he wants to – It's no late fee due.
 Thanks, Jan.
- 12/28/1998 IDWR Memorandum – Lester reply to memo of 11/25/98 from Nelson on 79-07263. Exerts with emphasis added:
 From your research, it appears that Bonato needs a SRBA claim – for irrigation use dating to before 1971.
 If claim irrig in SRBA, then appl. is reduced to multi-domestic & maybe some stockwater. The original appl. states future domestic. Salmon River moratorium does not allow community system for multi-domestic served by surface water... The only approval we can issue in this case is a use falling within 42-111.
Conclusion:
 (1) file appropriate SRBA claim...
 (2) reduce app. to (remaining) elements where
 a) process if total use meets 42-111...
 b) hold if not as in (a).
- 1/13/1999 Letter from IDWR Nelson to Bonato. The substance is to file a claim for irrigation in the SRBA and let the court determine if it is valid. And also to retain application for permit 79-07263.
- 5/1/1999 SRBA claim 79-13962 is received by IDWR from Bonato. It is returned to him twice as documented in letters dated 5/28/1999 and 6/16/1999 to complete information and filing requirements omitted by the applicant.
- 7/8/2000 2nd Citation by Deane.
- 4/13/2001 Most recent conversation between Steve Spencer and Dan Nelson on the status of application 79-07263 and claim 79-13963 is that the application is on hold pending the disposition of claim no. 79-13963 in the SRBA. Basin 79 claims are not due to be prepared and recommended to the SRBA Court until late in 2005.
- 5/10/2001 Bonato pays 2nd \$100 fine.

5/16/2001 Letter from Forest Service to Bonato to remove pipes and materials from the NFS hand delivered by Deane.

FOREST SERVICE ISSUES

An issue common to all three claims – the diversion and ditch. – the diversion and ditch that is the subject of statutory claim number 79-04030 filed by George J. Gill &/or Opal Gill and as initially filed in the SRBA as two claims by Deward and Melvin Gill, and is the existing structure shown in the Bonato claims is failing and in need of significant maintenance. The ditch is old, silting in, the banks are sloughing in and several large trees on the ditch bank have fallen across the remnants of the old ditch, their uprooted root wads further destroying the ditch banks. There are no fewer than 7 locations as one approaches Cabin Creek where water is sometimes seeping and at other times flowing over the damaged and deteriorating ditch bank back into Cabin Creek. There is an approximate 12 inch in diameter cement head gate structure with moveable metal head gate that was originally designed to control flow from Cabin Creek into the ditch. Mr. Melvin Gill, son of George and Opal Gill, retains a right to trail cattle through the subject private land to the adjacent NFS land where he is authorized to graze cattle, has told Deane and Spencer that he personally closed this head gate and no water flowed into or through the ditch across the NFS to the private land from 1992, the year following the court judgement and decree of partition, until Bonato opened the head gate in 1998.

79-04030 issue – This right may be subject to forfeiture because, according to Melvin Gill, no water flowed in the ditch during six irrigation seasons between 1992 and 1997. It is extremely doubtful that the ditch could handle 0.60 cfs (30 inches) of water. And the check dam constructed by Bonato further obstructs water flow in the ditch. It appears that this water right has not been used for the 9 years between 1992 and 2000. An adjacent landowner further down the ditch recently contacted Deane about reestablishing water flow in the ditch because there is no water flowing in the ditch as it exits Bonatos property. If water is diverted and no water leaves the Bonato property there can be no use of water as claimed in 79-04030.

79-07263 – Bonato's hand written application for 79-07263 contains many problems. Personal communication and letters that IDWR exchanged with Bonato don't seem to resolve the issues. One immediate problem we see is that this is an application. It has not been approved. However water is being diverted right now. And it has been going on for over three years. Additional observations concerning information and specific entries on this application are:

Number 2. Source of water supply has, "Existing irrigation ditch with head gate 12"". The source should be Cabin Creek.

Number 3. Location of point of diversion has Section 5 with no quarter-quarter information. The correct location of this diversion is the NWNE of Section 8.

Number 6. Proposed diverting works. The work proposed is crossed out and replaced with "existing". Part a is completed with, "Active preexisting 12" headgate with (approximately) 400 LF of ditch and drainage back to Cabin Creek. As described previously in this document, the ditch is old and was not being used until Bonato began using it after purchasing the property in 1997. The pipe from the ditch is new and is needed to deliver water for the uses that Bonato is applying for and is already using.

Number 8. Description of proposed uses. Part b stockwatering is completed, "Future 12 horses". Part d domestic is completed with, "Future 3 ea". Part e other is completed, "(can't read) irrigation, garden irrigation". We question the propriety of applying for "future uses" under state law.

Number 9. Description of place of use. No quarter-quarter information is marked. Applicant should complete this portion.

Number 10. Describe any other water right used for the same purpose. The response is, "none". Although filed after this application was made, the correct response is now that Bonato has filed claim no. 79-13962 in the SRBA.

Number 11.a. Who owns the property at the point of diversion? The response is, "James E. Bonato." This is incorrect. The POD is clearly on National Forest System land. The land lines and property corners are well marked. Bonato is not authorized to occupy and use the NFS land for this purpose. He has been cited twice for this violation.

Number 12. Remarks: "We are claiming preexisting property features at the time of purchase, no changes are needed or necessary except for running domestic water lines off ditch in the future". We acknowledge the preexisting old ditch used for irrigation in Section 4. Water was never previously used as per this application so development is necessary. Bonato has added to the preexisting features several hundred feet of pipe to effectuate the use being applied for. And again, this use is active, despite no authorization from the State of Idaho to divert and use water or from the United States of America to occupy and use the NFS land involved.

The map provided as part of the application clearly shows a property line with all improvements within the applicants private property. And as mentioned previously herein, this is a gross misrepresentation by the applicant. Land lines and property corners are clearly marked on the ground. The map that is part of Bonato's subsequent claim in the SRBA shows water is diverted in Section 8.

79-13962 – Bonato's hand written notice of claim to a water right filed in the SRBA for 79-13962 contains the same basic information as his application for 79-07263. Our observations are:

We question the claimed priority date for 79-13962 as 12/31/1902. No water was ever diverted and used in Section 5 until Bonato added a pipe to an old existing irrigation ditch to take water to his property sometime after he acquired the property in August of 1997.

The point of diversion is changed from Section 5 to the NENE of Section 8. However, this is still incorrect. There is only one POD for all these claims and it is in the NWNE of Section 8.

The place of use now has the quarter-quarter added as the SESE of Section 5.

The map clearly shows water being conveyed in a ditch from Section 8 to Section 5.

OTHER COMPLICATIONS

The Salmon and Clearwater Basin Moratorium – This order by the Director of the IDWR prohibits processing new applications for permits to appropriate the surface water resources within these two river basins. IDWR has notified Bonato of this extenuating circumstance and the exceptions to the order. As the exceptions apply to Bonato's application 79-07263, they are that the use of water must be domestic as defined in Section 42-111, Idaho Code or that the use must have commenced prior to the Snake River Basin Adjudication in November of 1987.

There are several references in IDWR internal memoranda that this is a significant problem for the Bonato application and claim. The facts do not offer any evidence that water was being used in Section 5 prior to November 1987. On the contrary, there is no evidence that water was ever used in Section 5 prior to Bonato acquiring land in 1997. And exactly when water was actually first diverted and used by Bonato in the SESE of Section 5 is still unknown. However, since the deed to this property to Bonato is dated 8/18/1997, any date prior would be suspect. The Gills owned the property for over 50 years and filed claims for water use in Section 4 because that is where water was being used. No use of water in Section 5 was made or claimed until 1998 by Bonato. In addition, the Bonato application for domestic use is for 3 future houses. We have previously questioned applying for future uses.

Please note that the receipt for this application is made out to "Wooden Bucket Retreat". Bonato's repeatedly have flyers posted in Lucile and the surrounding area offering various commercial services to the public. Wooden Bucket Retreat must be one of the several businesses or services they are trying to "do business as". They may have one residence that might otherwise qualify as a single family domestic use, but they continue to offer commercial services and enterprises from this one location and thereby may not meet the tenants of 42-111.

IDWR has determined to hold this application pending changes in the moratorium and the disposition of their beneficial use claim in the SRBA. However, Bonato's water use is clearly in violation of this moratorium because they are actually diverting and using water right now without approval from IDWR, they cannot provide any evidence that their water use existed prior to November, 1987, and because of their repeated attempts and efforts to operate a business at this location. We urge you to consider the available information, evidence and documents and to independently investigate this matter. If you reach the same conclusion we have, then Bonato's should be notified immediately that their present use of water is not approved and must cease immediately. We can see no way that this application could be approved. We will vigorously protest it if it ever proceeds in its present form and is advertised. They could change their POD to a location off of the NFS and probably eliminate our involvement in this application.

The Snake River Basin Adjudication – Claim 79-13962 for irrigation use also has problems in that irrigation in Section 5 did not begin any earlier than 1998. It is a use that should be applied for within the normal state procedures. It cannot be a beneficial use claim because it does not predate 1971. We can see no utility in trying to transfer part of 79-04030 because it is essentially a beneficial use claim, too. In addition, the evidence indicates that 79-04030 may have possibly been forfeited and that Bonato may have actually facilitated forfeiture with his check dam, use of water (that is still not authorized) and indication from the neighbor that no ditch water flows off the Bonato property in Section 5 into Section 4.

CONCLUSION

This is an important matter that the Forest Service is dealing with right now. We would appreciate your attention to the facts presented and consider elevating it to a high priority so that this issue can be resolved. We are available to discuss any of the issues raised in this document at your convenience.

We know that you operate according to state law and must receive applications and claims as they are submitted to you. And we know your people who have been involved with these particular applications and claims have made extraordinary efforts to work with the claimants to secure information and to explain the situation. There is no insinuation or underlying sentiments by the Forest Service that IDWR has made any errors or shown any favoritism to Gills or Bonatos in these matters.

Our interest was drawn to this area and these water rights on a completely unrelated matter. Our review of the information offered to you by the claimants differs in several critical areas. We hope our perspective will assist you in evaluating and processing the application and claims. We believe we can collaborate to our mutual advantage, sharing information that will help both our agencies to manage the public resources for which we are responsible.

If you have any question on this matter, please contact Jack Carlson or Pete Deane at the Slate Creek Ranger Station at (208) 839-2211 or Steve Spencer in Boise at 331-5944. We would be pleased to discuss the matter with you and take you on the ground to investigate the situations identified herein.

Sincerely,

A handwritten signature in cursive script that reads "Jack M. Carlson". The signature is written in dark ink and is positioned above the printed name and title.

JACK M. CARLSON
District Ranger