

Jay N. Fonnesebeck
6022 W. Hwy 36
Weston, Idaho 83286
Telephone (208)747-3295
Cell Phone (435) 760-0143
Email to jfonnes@gmail.com

RECEIVED
APR 15 2019
Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

I, Jay Norman Fonnesebeck, 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 before Mr. James Cefalo, Presiding Officer for the Idaho Department of Water Resources in the above referenced proceedings. Responding to a contested hearing held on February 26 and 27 and in response to a Preliminary Order issued on April 1, 2019, I hereby file this right to petition the hearing officer to reconsider facts that are in error 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 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.

Removing 0.62 cfs from Water Right 13-2209 is wrong and injurious to those who have the bonafide rights to the well attached to this license.

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 as well #1 and well #2. Both wells producing very close to 3 cfs each. Well #1 has been physically measured by IDWR personnel and determined to be 2.87 cfs. There is a Micrometer meter on it and has been since 2008. Well #2 to this very day has never been actually measured and its production has never been more than guesswork.

ANALYSIS

Ownership of Water Right 13-2209

Fonnesbecks were not privileged to most of the communications taking place. 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 late 1966 or 67.

The November 16, 2004 Agreement between Jay Norman Fonnesbeck, ElRay Balls, and Sid Schvaneveldt, is totally valid and executed 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 we should proceed. Both Norman Fonnesbeck and Lee Schvaneveldt had passed away by November 2003 when a pre-conference hearing for transfer 70722 was held. The parties who signed the document accepted it willingly as the best evidence we could provide at the time that such an agreement took place and was willingly executed as stated.

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.

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.

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. The hearing officer erred in his analysis.

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.**" The preponderance of evidence at the hearing clearly pointed out that no irrigation water has been used north of the county road for over 50 years.

CONCLUSION

I believe the general conclusion of the hearing officer can be acceptable if we can determine the correct analysis from the facts that are available and not barring those that can bring the truest light on this complicated situation involving the two wells. It could be livable and comport to facts if the transfer allowed moving the place of use for water right 13-8026 from 13-2209, but it will never be acceptable to this protestant to reduce the diversion rate and add it to 13-8026.

Dated this 15th day of April 2019

Jay Norman Fannesbeck
Protestant

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

Robert Harris
Holden Kidwell
100 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, Id 83405

William or Shelly Spradlin
6995 West 2200 South
Weston, Idaho 83286

James Cefalo
IDWR
Idaho Falls, Id 83402