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BEFORE THE
DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO

In the Matter of	)	
Application for Transfer	)	Protest and Pleading
No. 70722	)	
ElRay and Janice Balls	)	Jay Norman Fonnesebeck
	)	Protestant
Claimants	)	
	)	

1. Jay Norman Fonnesebeck, owner of interest in a well located in the NE ¼ NE ¼ Sec. 36 T15S R38E Water License #13-2209, hereby files this protest and pleading on January 5, 2011 before Mr. James Cephalo, Presiding Officer for the Idaho Department of Water Resources in the above referenced proceedings:

Protest

2. Let the record show that transfer No. 70722 was applied for, in error, with the assistance of a water resource officer for lack of current or up to date records existing at the Eastern Regional office at the time the application was made.
3. The IDWR Eastern Regional Office could not find a record, therefore Mr. ElRay Balls drove to Idaho Falls on July 23, 2003 with the intent to file a Statutory Claim for water he has been using out of a well located in the NW ¼ NE ¼ Sec. 8 T16S R38E and was later steered to file an application for transfer based upon an electronic record that still showed his land listed on License 13-2209. Water Resources maintain that it was the most current record they had on file and therefore it was assumed that filing the transfer was the correct action based on the face of the record.
4. Also, If the transfer were to be approved, it is proposed that the maximum volume of water that would then be allowed to be pumped from well #1, after the transfer, would be reduced from 2.87 to 1.94 cfs which is an injury under issue #1 for consideration in an application for transfer and I cannot accept this.

History and Background

5. That a chain of events took place beginning in 1960, which included a venture joining Lee Schvaneveldt, Norman Fonnesbeck, and Myron Fonnesbeck as partners in the development of two ground water wells. (Fonnesbeck, Exhibit 3, Sale of Real Property and Receipt and Agreement, 23 Nov. 1960)
6. That permits G-28818 and G-29935 were issued allowing the Fonnesbecks and Schvaneveldts the right to develop and put to beneficial use a total of 10 cfs of subterranean water from 3 separate diversion points. (Backfile pg. 3,4) (Fonnesbeck, Exhibit 4)
7. That 2 cfs and 1 of the diversion points (1/3 of the 6 cfs granted under permit G-28818) had been made exclusive to development by a third party, Mr. Lewis Bingham, separate of the Fonnesbecks and Schvaneveldts, the Fonnesbecks and Schvaneveldts still had the right by permit to develop and appropriate 8 cfs from two separate well locations or diversion points.
8. That a substantial amount of money was given to Mr. Bingham by the Fonnesbecks and Schvaneveldt to come into a well site on his property, and at the time, his intentions was to develop another well site that had more interest to him. (Backfile pg. 3, Fonnesbeck, Exhibit 3)
9. That the Fonnesbecks and Schvaneveldts did develop and put into production two wells simultaneously which I will refer to as the following:

Well #1 located in the NE ¼ NE ¼ Sec. 36 T15S R38E permit #G-28818
Well #2 located in the NW ¼ NE ¼ Sec 8 T16S R38E permit #G-29935
10. That well #1 was installed as a high volume low head pumping station and was proven to deliver 2.87 cfs, and well #2 was installed to deliver the same volume at high pressure.
11. The Fonnesbecks were flood irrigators and the Schvaneveldts were sprinkle irrigators.
12. That by practicality of use, the Fonnesbecks eventually made exclusive use of well #1 and the Schvaneveldts exclusive use of well #2.
13. That the Bingham had taken upon themselves the responsibility for making the filings leading toward perfecting the water rights on well #1, and Lee Schvaneveldt the same for making the filings on well #2.
14. That in the middle of critical years for finishing the proofs of completion for these wells, Lee sold his farm to LeRoy Cooley, and Mr. Cooley became the Fonnesbecks new partner. (Fonnesbeck, Exhibit 6) This sale had troubles and before long, Lee was negotiating with the Fonnesbecks to trade interests in the two wells. The Fonnesbecks were not interested, the location of well #2 had better potential for future use. As time went on, more problems were surfacing, and one of great importance involved getting the necessary filings made in regard to establishing water rights.

15. That noticeable mistakes were being made that could have been corrected at the time had the Fonnesbecks been given more involvement in the filings process, and some of these mistakes need to be discussed and corrected. (Backfile pg. 16,11,13)
16. That there came a point where Lee Schvaneveldt insisted that he needed full ownership of well #2 to solve his problems with the sale of his farm and the Fonnesbecks agreed to trade out of well #2 with the understanding that as part of the trade, they would also own all of the water rights that were established under well #1.
17. Therefore, the water rights associated with the use of Well #1 had already been moved or transferred from the property of Lee Schvaneveldt, by agreement, before Elray and Janice Balls took possession of the subject place of use and applied on lands belonging to the Fonnesbecks. (Fonnesbeck, Exhibit 13)
18. From that time and through the following years, the water users in the area have peacefully acknowledged this move and the Weston Creek Irrigation Company has accommodated the move by having the Water Master schedule our turns so that we would use our well water comingled with our shares of Weston Creek and delivered through Irrigation Company canals to our land in Sections 8, 9, 16 and 21. (I. C. 42-1425 (1))
19. That NRCS records acknowledge this move. (Fonnesbeck, Exhibit 11)
20. That the U.S. Geological Survey acknowledges on its 1968 printing of the Weston Canyon Quadrangle Map, the pond Norman Fonnesbeck built in the SW ¼ SW ¼ Sec. 16 T16S R38E to accommodate the additional source of water on Fonnesbeck land in sections 16 and 21. (Fonnesbeck, Exhibit 10)
21. That this series of events took place prior to March of 1969 (Idaho Session Laws, C. 303 '69), and during this period of time, laws had not been enacted requiring the application process as is followed today, and therefore, moving the water from Schvaneveldt land in sections 8, 10, and 11, to Fonnesbeck land was accomplished legally according to the rules and laws existing at that time. (I. C. 42-108, pre '69)

(In fact, the understanding that was adopted in the minds of water users in our area was, that, if you could secure a point of diversion, you were given a right to pump X amount of water and you could use it where ever as long as you didn't exceed X amount. That it could only be used on specific acres on a land list was not part of our understanding and the land list was only seen as important in the earlier stages for establishing the X amount that could be used.)

22. A needed updating of records (and thinking) did not take place, and therefore, a current and more accurate record needs to be completed at this time.
23. That prior to April of 2005, the Eastern Regional Office would provide an electronic record of pertinent details on a water right, but in our case, did not make or have available many of the records that could have helped move this process along in a more timely manner. Since then, our digging and prodding for information, and the advances in technology being made to make records more accessible, has helped immensely with getting our arms around additional

evidence needed to bring our activities and current water rights record in line with current needs.

Conclusion

24. In summary, the IDWR Eastern Regional Office could not find a record, therefore Mr. ElRay Balls drove to Idaho Falls on July 23, 2003 with the intent to file a Statutory Claim for water he has been using out of well #2 located in the NW ¼ NE ¼ Sec. 8 T16S R38E and was later steered to file an application for transfer based upon an electronic record that still showed his land listed on the License for well #1. Water Resources maintain that it was the most current record they had on file and therefore it was assumed that filing the transfer was the correct action based on the face of the record.
25. Mr. Sidney Schvaneveldt made the same trip on January 18, 1980 and filed a Statutory claim #13-4120. He had discovered that Water Resources could not produce or recover any record of a License or any water right issued for the use of well #2, yet, he strongly asserts that one was issued. By filing the claim, he acknowledged that License 13-2209 issued for well #1 was off limits to him due to the previous trade by our fathers. The same should apply to ElRay.
26. For the previously mentioned reasoning alone, Transfer #70722 should have never been applied for, should have been withdrawn, or should now be denied.
27. For the record, I have provided this answer for what needs to be done in regard to updating one part of Water License 13-2209.
28. The Fonnesbecks acted on this well agreement and to the best of my knowledge, we were applying this new source of water to our land in Sections 16 and 21 as early as the 1964 irrigation season. This move satisfied the additional place of use for the Fonnesbecks permitted under G-29935. This move and land list from Lee Schvaneveldt's share of License 13-2209 was legally bargained for and should be included with updating records favoring the Fonnesbecks.
29. The Schvaneveldts continued to pump and use the water from well #2 the same as before the trade agreement, which, is continuous as a primary source for their land in Section 8 and as a supplementary source for the farm in sections 10 and 11. It is and was their responsibility to perfect their right. As part of permit G-29935, the SW ¼ of the NW ¼ of Sec. 9 was added to their land list. The land use list for the Fonnesbecks on this permit should be reapplied to ElRays land.
30. The IDWR should take notice that the point of diversion for permit G-29935 could have been added by amendment to permit G-28818 and the elements of a water right would appear more in line with acceptable criteria permitted under License 13-2209. This should be discussed as there is some evidence that this request may have been introduced at a critical point and not followed up. (Backfile pgs. 7, 9-13)

- 31. It is my opinion, based on what I have seen, heard, participated in, and observed over the years, that ElRay Balls is being wrongfully denied water from a well that he has an ownership interest in. To the best of my knowledge, I know he is being wrongfully denied. He should be granted and a record maintained for his right to use the water from well #2, but not by the transfer as applied for which is the issue to be resolved at this hearing.**
32. There are mistakes that need to be discussed and corrected with License 13-2209, and under advisement of IDWR officers, Claim #13-7661 has been filed to prevent any further delays to ElRay using water he is entitled to and also to try to get our arms around and pull back together everything that took place earlier in the history of these two wells and create an accurate record. Not to enlarge, not to stack, but yes, to circumvent the transfer process and issues at hand until a resolution can be achieved, and we can peaceably approach doing what is necessary now to bring the record on the use of these two wells up to date.

I would be more than glad to discuss this claim as part of the settlement issues before the Hearing Officer if it would be of value and within the scope of this hearing.

I certify that I have personally hand delivered a copy of this pleading to each party at this hearing this day, being the fifth day of January, 2011:

Mr. James Cephalo, Presiding Officer

Mr. ElRay Balls or representative

Mr. Sidney L. Schvanevedt or representative

Jay Norman Fonnesbeck