

T3571 CRAIN

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

RECEIVED

OCT 2 1990

Department of Water Resources
Eastern District Office

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 3571 OF) ORDER DENYING TRANSFER
WATER RIGHT NO. 22-0638 IN)
THE NAME OF DEAN CRAIN)

This matter having come before the Idaho Department of Water Resources (department) during the review of application for transfer no. 3571 filed pursuant to Section 42-222, Idaho Code, the Department finds, concludes and orders as follows:

FINDINGS OF FACT

1. On May 2, 1989, Dean Crain (applicant) filed an application with the department to transfer 2.20 cfs of water under right no. 22-0638. The application proposed changing the point of diversion, place of use and nature of use of right no. 22-0638.

2. Records of the department for water right no. 22-0638 include a statement from a deputy watermaster of State Water District 01 that the right in question has not been used since 1976 when the ditch was washed out by the Teton Dam flood.

3. On April 4, 1990, the department sent correspondence to the applicant requesting that evidence be submitted to show that right no. 22-0638 had not undergone a period of five consecutive years or more of non-use.

4. On July 24, 1990, the department sent the applicant a

notice of pending order denying the transfer application since evidence concerning use of the right had not been submitted. The notice allowed the applicant an additional 15 days in which the applicant could submit the requested evidence or show cause why the application should not be denied.

5. On August 8, 1990, the applicant submitted his own affidavit stating that the right had been used on land owned by the applicant but had been transferred to a different point of diversion known as the Pincock-Byington Ditch. Also submitted was a map showing the applicant's land and a listing of rights delivered to the Pincock-Byington Ditch.

6. On August 17, 1990, the department again sent the applicants a notice of pending order denying the transfer since the applicant had not submitted sufficient evidence concerning use of the right.

7. On September 4, 1990, the department received a second affidavit signed by the applicant which stated that water right no. 22-0638 had been delivered through the Pincock-Byington Ditch to irrigate land owned by the applicant. The applicant also submitted certain tax records as proof of ownership of the lands recorded as the place of use under the original right. The legal land description given on the tax records however does not match the legal land description given as the place of use for water right no. 22-0638.

CONCLUSIONS OF LAW

1. Section 42-222(1), Idaho Code provides direction and authority to the department in the review and approval of

water right transfer applications. The statute states in part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code.... In the event that the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same....

2. Section 42-222(2), Idaho Code also states in part that:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation....

3. The Idaho State Supreme Court has ruled in Jenkins v. State, Department of Water Resources, 103 Idaho 384, 387, that:

[T]he director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other rights.

4. Information available to the department indicates that the water right proposed to be transferred, water right no. 22-0638, has been lost and forfeited due to non-use for a period of five or more consecutive years. The department has asked the applicant to submit evidence showing that the right has not been lost due to non-use for a period of five or more consecutive years. The applicant has not submitted sufficient evidence to show that the right has not been lost due to non-use.

5. The applicant has further failed to demonstrate that he owns the land to which the right is appurtenant, or to secure

consent to the proposed transfer from the appropriate landowner of record.

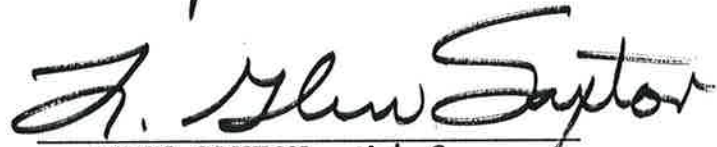
6. Approval of the proposed changes would result in injury to other water rights holders who have made beneficial use of the water which has been lost under right no. 22-0638.

7. Application for Transfer No. 3571 of Water Right no. 22-0638 should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 3571 of Water Right No. 22-0638 is DENIED.

Dated this 27th day of September, 1990.


L. GLEN SAXTON, Chief
Water Allocation Bureau