

T3309 DRAKE

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

#3309
RECEIVED
MAR 23 1990
Department of Water Resources
Eastern District Office

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 3309 OF WATER RIGHT NO.)
22-0231 IN THE NAME OF ASA J. DRAKE)
JOANN P. DRAKE)
_____)

ORDER ADOPTING
PROPOSED MEMORANDUM
DECISION AND ORDER

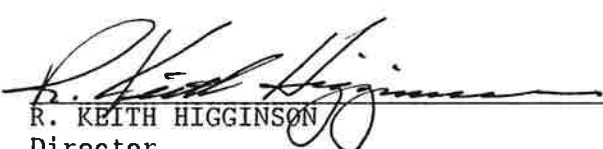
WHEREAS, R. Keith Higginson, Director of the Department of Water Resources having issued and served a copy on the parties on February 6, 1990, a Proposed Memorandum Decision and Order in the above-captioned matter, pursuant to Section 67-5211, Idaho Code; and,

WHEREAS, more than fifteen days have passed since the service of the Proposed Memorandum Decision and Order; and,

WHEREAS, no exception to that Proposed Memorandum Decision and Order has been received;

IT IS, THEREFORE, HEREBY ORDERED that said Proposed Memorandum Decision and Order be adopted and issued as the Final Decision and Order and Application for Transfer No. 3309 is DENIED.

Dated this 13TH day of MARCH, 1990.



R. KEITH HIGGINSON
Director

BEFORE THE DIRECTOR

OF THE

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 3309
OF WATER RIGHT NO. 22-00231

ASA J. DRAKE OR JOANN P. DRAKE,
Applicant.

Source: Patterson Creek

County: Teton

PROPOSED MEMORANDUM DECISION AND ORDER
DENYING APPLICATION FOR TRANSFER NO. 3309
OF WATER RIGHT NO. 22-00231

Asa J. Drake and JoAnn P. Drake having filed with the Department of Water Resources application for transfer No. 3309 of water right No. 22-00231 to add a point of diversion and change the place of use for a portion of the right, the application having been advertised, and a field inspection having been conducted, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

The Application

1. On March 20, 1987, Asa J. Drake or JoAnn P. Drake applied to the Department of Water Resources to change the place of use and add a point of diversion to decreed right No. 22-00231. This right was originally decreed to Richard Drake in the case of Rexburg Irrigation Company vs Teton Irrigation Canal Company dated December 16, 1910. The right provided for the diversion of 3.20 cubic feet per second from Patterson Creek tributary to the Teton River with a

priority of June 1, 1890. The point of diversion was not specified in the decree and though no irrigated acreage was listed, the place of use was identified as the S1/2NE1/4, Section 31, W1/2NW1/4, Section 32, Township 4 North, Range 45 East.

The application for transfer proposes to change the place of use and the method of water delivery for a portion of the right. This change would require water be discharged into the Teton River from Patterson Creek. This commingled water would be rediverted by pump in the SE1/4NE1/4NW1/4, Section 20, Township 4 North, Range 45 East and used to irrigate 47 acres in the S1/2SW1/4, Section 17 and 43 acres in the N1/2NW1/4, Section 20, Township 4 North, Range 45 East. The remainder of the water right would continue to be diverted from Patterson Creek within the SW1/4SE1/4, Section 36, Township 4 North, Range 44 East and used to irrigate 70 acres of the original decreed place of use in the S1/2NE1/4, Section 31, Township 4 North, Range 45 East. Under the proposed change a total of 160 acres would be irrigated.

2. Notice of the application was published in the Teton Valley News on April 2 and 9, 1987. No protests against approval of the application were received by the Department within the time period specified by statute.

3. On October 5, 1987, staff from the Department of Water Resources and a deputy Snake River watermaster conducted an on-site field inspection. Their investigation found that the land being dewatered by the proposed transfer was primarily unirrigated bottom land being utilized as pasture.

4. The USGS topographic map and orthophoto map of the

decreed place of use shows cultivated land throughout most of the S1/2NE1/4, Section 31, excluding a farmstead and the channel of Patterson Creek. Approximately, twelve (12) acres of cultivated land is also evident in the SW1/4NW1/4, Section 32.

5. Water rights diverted from Patterson Creek and the Teton River are subject to regulation by the watermaster of Snake River Water District 1.

6. Decreed right 22-00231 has the earliest priority (June 1, 1890) of the four Patterson Creek water rights.

7. Water rights from the Teton River and its tributaries with a priority of June 1, 1890 are cut every year. However, the natural flow of Patterson Creek normally continues to decline until it no longer reaches the Teton River. When this occurs, Patterson Creek is regulated as a non-tributary and water is distributed to the water rights on Patterson Creek. Consequently, right 22-00231 continues to be delivered water at times when it would not be delivered on the Teton.

8. All of the water rights on Patterson Creek are currently combined in a pipeline. The ground from which the water is proposed to be transferred is not served by the pipeline.

9. The applicants do not propose to abandon their use of the Patterson Creek pipeline. If the 3.20 cubic feet per second is released past the Patterson Creek pipeline it would normally be lost in the channel and would not reach the Teton River.

10. Historically, this right has been used for the irrigation of up to 85 acres of land located within the S1/2NE1/4, Section 31 and W1/2NW1/4, Section 32, all in Township 4 North, Range

45 East.

11. Idaho Code, Section 42-222, (para. 1)(1988 supp.) 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 upon the conditions provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right and the changes in the local public interest as defined in Section 42-203A, Idaho Code.

CONCLUSIONS OF LAW

1. The applicants, Asa J. Drake and JoAnn P. Drake, are the successors in interest to water right 22-00231 decreed to Richard Drake in the case of Rexburg Irrigation Canal Company vs Teton Irrigation Canal Company, dated December 16, 1910.

2. The approval of the proposed change to irrigate 160 acres would result in an expansion in the use of water under right 22-00231.

3. If the 3.20 cubic feet per second is released past the Patterson Creek pipeline it would constitute a waste of water.

4. The change in point of diversion from Patterson Creek to the Teton River would cause a reduction of water available to fill existing water rights on the Teton River.

5. The change in point of diversion must be denied. Since the applicants would have no way to irrigate the new lands of the proposed place of use from the Patterson Creek source they would be injured if the place of use change requested were approved.

ORDER

IT, THEREFORE, IS HEREBY ORDERED and application for transfer No. 3309 of decreed water right No. 22-00231 is DENIED.

Dated this 5th day of February, 1990.



L. GLEN SAXTON,
HEARING OFFICER

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT on this the 6th day of February, 1990, a true and correct copy of the Order Issuing Proposed Decision and the Proposed Memorandum Decision and Order were mailed postage prepaid to:

Asa J. or JoAnn P. Drake
Route 1
Victor, ID 83455



RITA I. FLECK
Secretary/Records Manager

BEFORE THE DIRECTOR OF THE DEPARTMENT
OF WATER RESOURCES OF THE
STATE OF IDAHO

RECEIVED

FEB - 9 1990

Department of Water Resources
Eastern District Office

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 3309 OF WATER RIGHT)
NO. 22-0231 IN THE NAME OF ASA J.)
DRAKE OR JOANN P. DRAKE)

ORDER ISSUING
PROPOSED MEMORANDUM
DECISION

R. Keith Higginson, Director of the Department of Water Resources, having reviewed the attached proposed decision prepared by his appointee, L. Glen Saxton, who conducted the hearing or who has read the record in the this case, hereby approves the same as a proposed decision pursuant to Idaho Code, Sec. 67-5211.

Each party to these proceedings who appeared at the hearing is given the opportunity, pursuant to Idaho Code, Sec. 42-1701A and 67-5211, to file exceptions to the proposed decision and to present briefs and oral arguments. If no timely and proper exceptions are received, an order by the Director will be entered adopting the proposed decision as his final decision.

I.
EXCEPTIONS

A. To be considered by the Director, exceptions must:

1. be received by the Director on or before the 15th day following the day of service of this Order and the proposed decision,

2. specifically identify the portions of the proposed decision to which exceptions are made and specifically state the grounds for those exceptions, and

3. be sent to each of the parties who appeared or their attorneys.

II.
BRIEFS

A. Any briefs in support of exceptions to the proposed decision shall be filed with the Director at the same time that party's exceptions are filed with the Director.

B. All response briefs to the exceptions must be filed with the Director within 15 days after the exceptions were served upon the responding party.

III.

A. No oral arguments before the Director on the proposed decision will be held unless specifically requested by a party filing exceptions to the proposed decision and unless that request is filed with the Director concurrently with the filing of that party's exception.

B. If oral arguments have been properly requested by a party filing exceptions, any other party, upon reasonable notice to the Director, shall have the right to present oral argument in response to the exceptions filed.

C. Oral arguments before the Director on exceptions to the proposed decision shall be heard at the discretion of the Director, pursuant to Idaho Code, Sec. 42-1701A. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour the oral arguments will take place and of the period of time allocated for the arguments of this case. Unless the Director orders otherwise, all oral arguments shall be heard in Boise, Idaho.

IV.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests oral arguments and other matters filed with the Director in connection with the proposed decision shall be served on all other parties to these proceedings in accordance with Rule 7.2.

V.

FINAL DECISION

Following the submission of all exceptions, briefs and oral arguments, if they are heard, the Director shall issue a final decision adopting, modifying or rejecting and replacing the proposed decision. Copies of the decision and order shall be served on all parties.

Dated this 6th day of February, 1990.


R. KEITH HIGGINSON
Director

BEFORE THE DIRECTOR

OF THE

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 3309
OF WATER RIGHT NO. 22-00231

ASA J. DRAKE OR JOANN P. DRAKE,
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CONCLUSIONS OF LAW

1. The applicants, Asa J. Drake and JoAnn P. Drake, are the successors in interest to water right 22-00231 decreed to Richard Drake in the case of Rexburg Irrigation Canal Company vs Teton Irrigation Canal Company, dated December 16, 1910.

2. The approval of the proposed change to irrigate 160 acres would result in an expansion in the use of water under right 22-00231.

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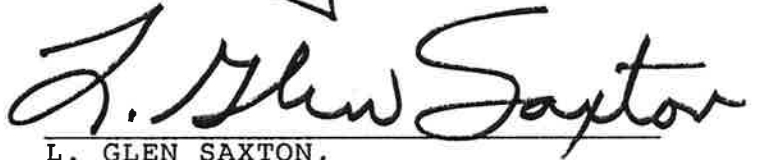
4. The change in point of diversion from Patterson Creek to the Teton River would cause a reduction of water available to fill existing water rights on the Teton River.

5. The change in point of diversion must be denied. Since the applicants would have no way to irrigate the new lands of the proposed place of use from the Patterson Creek source they would be injured if the place of use change requested were approved.

ORDER

IT, THEREFORE, IS HEREBY ORDERED and application for
transfer No. 3309 of decreed water right No. 22-00231 is DENIED.

Dated this 5th day of February, 1990.



L. GLEN SAXTON,
HEARING OFFICER

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT on this the 6th day of February,
1990, a true and correct copy of the Order Issuing Proposed
Decision and the Proposed Memorandum Decision and Order were
mailed postage prepaid to:

Asa J. or JoAnn P. Drake
Route 1
Victor, ID 83455



RITA I. FLECK
Secretary/Records Manager

TO: File T22-0231

FROM: Ernest Carlsen *etc*

RE: Grounds for Denial

DATE: December 18, 1987

I feel there are sufficient grounds to deny this application. It represents an expansion of the water right and the change would be impractical to regulate.

Expansion of the water right will occur because of an increase in the number of acres to be irrigated after the change with a collateral increase in the consumptive use of water. Information provided on the application portrays that 160 acres have historically been irrigated under this right. This figure was probably derived from the decree which lists four 40 acre subdivisions as the place of use. The decree, however, does not specify the number of irrigated acres.

It is obvious from information obtained during a field investigation, and referencing the USGS Topographic Map, that the land historically irrigated was less than 160 acres. Half of the decreed place of use is the W1/2NW1/4, Section 32. This 80 acre tract is utilized as pasture and is the land being dewatered. The USGS Topographic Map shows Boquet Creek flowing through the N1/2 of the NW1/4NW1/4, essentially dividing it in half. With the creek acting as a natural barrier it is highly unlikely that land north of the creek channel was irrigated with water from Patterson Creek. Furthermore, the application states that sub-water will be relied on to provide water for at least a part of the pasture. This is an indication Mr. Drake has previously relied on sub-water to maintain the pasture rather than irrigating it with water from Patterson Creek.

There is also the question of whether or not the change could be regulated by the watermaster. Presently, the entire flow of Patterson Creek is diverted into a gravity flow pipeline approximately 2 miles upstream from the creek's confluence with the Teton River. To deliver Patterson Creek water to the new point of diversion it would either have to bypass the pipeline diversion or be transported in the pipeline. Since the watermaster has no authority to regulate distribution of water carried by the pipeline, expecting him to control water discharged from it into the Teton River is not reasonable and would be impractical. The watermaster could regulate the pipeline diversion allowing a designated amount of water to remain in the creek channel. However, it would sink before reaching the Teton River and consequently could not be delivered to the new point of diversion.

Transfer No. 3309

Water Right No. 22-0231

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Denius

APPLICATION FOR TRANSFER OF WATER RIGHT

To Change the Point of Diversion and/or the Place of Use

Name of applicant Asa J. or JoAnn P. Drake Phone 354-2501
Post Office address Rt.#1, Victor, ID 83455

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

a. Decree No. 22-0231 Decreed to Richard Drake (Name)
in case of Rexburg Irrigation Canal Co vs Teton Irrigation Canal Co.
dated in Dec. 16, 1910 in Sixth Judicial Dist county of Fremont (Name of court)

b. License No. _____ issued by the Idaho Department of Water Resources

c. Claim No. _____ on file with the Idaho Department of Water Resources

2. If applicant is not the original holder of this right, explain how it was acquired and attach a copy of the deed or other evidence of ownership of the land to which the right is appurtenant Deeded by Richard Drake to Asa M.B. Drake who deeded it to applicant Asa J. Drake

3. Source of water Patterson Creek tributary to Teton River

4. Date of priority June 1, 1890

5. Water is used for the following purposes:

amount 3.2cfs for Irrigation purposes from NOT to SPECIFIED
amount _____ for _____ purposes from _____ to _____
amount _____ for _____ purposes from _____ to _____ (month/day — both dates inclusive)

6. Total amount of water under right: a. 3.2 cubic feet per second
&/or
b. _____ acre feet per annum

7. Location of original point of diversion is NOT SPECIFIED ¼ of Section _____
Township _____ Range _____, B.M., in _____ County
Additional points of diversion, if any _____

8. Lands irrigated or place of use:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
4N	45E	31			X	X													
		32						X	X										

Total number of acres to be irrigated 160

9. Describe any other water rights used for the same purpose as described above None

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of nonuse? no If yes, describe in item D, REMARKS.

Irrigated by subwater rising from the River.

C.

[illegible]

Total number of acres to be irrigated

- 4.



D. REMARKS

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge. I understand that any willfull misrepresentations made in this application may result in voiding its approval.

Asa J. Drake
(Signature of Applicant)

Subscribed and sworn to before me this 20th day of MARCH, 19 87.

Russell D. Carter
(Notary Public)

My commission expires 2/14/89

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. 22-0231 and said application is hereby DENIED, subject to the following limitations and conditions:

Witness my hand this 13th day of MARCH, 19 90.

L. Keith Higgins
Director

FOR DEPARTMENT USE ONLY

Received by ESV Date 3/20/87
Prelim. check by Kaw Fee 50⁰⁰
Receipted by ESV Date 4/1/87
Published in TETON VALLEY NEWS
Pub. dates 4-2 & 4-9-1987
Watermaster recommendation requested on WD#01
4-9-87 rec'd. 4-13-87

Protest filed by _____
Copies of protest forwarded by _____
Hearing held by _____ Date _____
Recommended for approval denial
by RDC