BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 77610 IN THE NAME OF PARKINSON FARMS	)))	**FINAL ORDER DENYING APPLICATION FOR TRANSFER**

On November 8, 2011, Parkinson Farms ("Parkinson") filed Application for Transfer No. 77610 with the Idaho Department of Water Resources ("Department"), proposing to add a point of diversion to three ground water rights.

The transfer was advertised to the public beginning on November 17, 2011. Protests were filed by Seth Beal, Darrell L. McDonald, Norman Sowards, Darrell E. McDonald, and Kirby Jensen. Norman Sowards and Darrell E. McDonald were initially represented by James P. Speck, an attorney with the law firm Speck & Aanestad. Mr. Speck now represents only Darrell E. McDonald. Mr. Beal withdrew his protest on May 7, 2012.

A pre-hearing conference was held on January 20, 2012. The parties were unable to resolve the issues of protest at that time and asked the Department to conduct a formal hearing. A hearing was held on May 17 and 18, 2012, in Arco, Idaho. The parties offered testimonial evidence, expert reports, and other documents into the administrative record.

Relying on the evidence in the administrative record, the hearing officer issued a *Preliminary Order Approving Application for Transfer* ("First Preliminary Order") on August 22, 2012. Petitions for reconsideration were filed by Kirby Jensen and by Mr. Speck on behalf of Darrell E. McDonald. The petitions for reconsideration were denied by the hearing officer on September 25, 2012.

On October 10, 2012, protestant Kirby Jensen filed a *Petition for Review of the Preliminary Order* with the Director of the Department ("Director"). The Director reviewed the administrative record and issued an order remanding the matter to the hearing officer for further development of the record ("Remand Order"). The Remand Order asked the hearing officer to request a memo from Department technical staff addressing certain questions relating to the Big Lost River Aquifer.

Department employee Dennis Owsley submitted a staff memo to the hearing officer on April 30, 2013 ("Owsley Memo" labeled as Exhibit IDWR10). A supplemental hearing was held on August 13, 2013, in Arco, Idaho. The parties offered additional evidence into the record. Mr. Speck represented only Darrell E. McDonald at the supplemental hearing. Protestants Darrell L. McDonald and Norman Sowards did not attend the supplemental hearing and, therefore, waived their right to cross examine witnesses and object to the introduction of evidence.

SUPPORT DATA
IN FILE # 34-2497

SCANNED
MAY 30 2014

On January 7, 2014, the hearing officer issued his *Second Preliminary Order Approving Application for Transfer* ("Second Preliminary Order").

On January 23, 2014, a *Petition for Reconsideration of Second Preliminary Order Approving Application for Transfer* was filed by Kirby Jensen. An *Order Denying Petition for Reconsideration* was issued by the hearing officer on January 24, 2014.

On February 6, 2014, a *Petition for Review of the Second Preliminary Order* was filed by Kirby Jensen, taking exception with the Second Preliminary Order and asking the Director to review the Second Preliminary Order.

After carefully considering all of the evidence in the augmented administrative record, the Department finds, concludes, and orders as follows:

APPLICATION FOR TRANSFER NO. 4573

In 1995, Parkinson filed Application for Transfer No. 4573 ("Transfer 4573") seeking to add a point of diversion to ground water rights 34-2497, 34-2505, 34-2506, and 34-4008. The proposed point of diversion was a new ground water well to be drilled in the SESW of Section 34, T05N, R26E.

Transfer 4573 proposed the same water conveyance system proposed in the pending transfer application. Ground water was to be injected into the Island Canal, then injected into the Eastside Canal, then injected into the Big Lost River, then re-diverted through the Munsey Canal to the Parkinson place of use.

Notice of Transfer 4573 was published, and Transfer 4573 was protested by a group called the Big Lost River Water Users Association. The contested transfer application resulted in an administrative hearing, held on November 1, 1995.

On May 30, 1996, the Department issued a Final Order denying Transfer 4573 ("1996 Order"). The 1996 Order stated that "Parkinson did not satisfy [its] burden of proof regarding issues of injury, enlargement, or local public interest." (1996 Order, page 6). "The issues of injury to surface water users caused by a reduction in flows to the Big Lost River and injury to ground water users caused by ground water withdrawals at the location of the proposed point of diversion were not addressed by Parkinson." (1996 Order, pages 5-6)

In a post-hearing brief for the pending application, Mr. Speck argued that Transfer 77610 should be dismissed with prejudice under the doctrine of res judicata. The Remand Order also raised the question of the applicability of res judicata.

The doctrines of res judicata and collateral estoppel apply to administrative proceedings before the Department. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 844 (2003).

In the *Second Preliminary Order Approving Application for Transfer*, dated January 7, 2014, the hearing officer stated the following in responding to the issue of res judicata:

> Although the applications are similar, Transfer 77610 is not identical to Transfer 4573. The current transfer proposes to use an existing well rather than drill a new well. The existing well proposed to be added in Transfer 77610 is located approximately 500 feet away from the proposed well site described in Transfer 4573. Transfer 77610 includes water right 34-2490 and does not include water rights 34-2505 and 34-2506. The total amount of water rights included in Transfer 4573 was 5.32 cfs. This Order approving Transfer 77610 only authorizes a change in point of diversion for 3.17 cfs.
>
> In addition, the hydrologic data presented in this contested case differs from the data presented in the previous case. Transfer 4573 was filed nearly twenty years ago. Since that time, the Department, Water District 34, and other resource agencies have continued to collect hydrologic data within the Big Lost River Basin. During the hearing, experts for Parkinson and the protestants relied on data collected in the last twenty years.
>
> Mr. Speck argues that the issues of injury and local public interest were already decided in the previous transfer application. He supports his argument by characterizing the issues in very broad terms. For example, Mr. Speck asserts that the Department determined that "the addition of a new proposed point of diversion eight miles up gradient from the existing points of diversion causes injury to [ ] senior water rights and is not in the local public interest." This is too broad of a statement. Denial of Transfer 4573 was limited to the water rights and the point of diversion proposed in that transfer.
>
> The proposition that the denial of Transfer 4573 represents a broad restriction on all transfers in the Big Lost River Basin seeking to add points of diversion up-gradient from existing points of diversion is misplaced. In July 2009, the Department approved Transfer 75394 filed by Douglas and Lore Schureman. Transfer 75394, which was not protested, added a point of diversion to ground water rights 34-4132 and 34-10058. The proposed new point of diversion was located 7.5 miles north of the existing Schureman wells. The new Schureman point of diversion is located within one mile of the Parkinson proposed point of diversion. Clearly, the 1996 Order did not restrict the Department's ability to approve transfers similar to Transfer 4573.
>
> Finally, there is a question of whether the record assembled in the contested case for Transfer 4573 was adequate. The 1996 Order indicates that Parkinson did not

> provide any evidence addressing the question of injury. Consequently, the findings and conclusions in the 1996 Order may have been based on an incomplete administrative record.
>
> As stated above, the pending transfer application differs from the previous transfer application. The hydrologic data available to the Department today differs from that existing in 1996. Application for Transfer 77610 will be considered on its merits based on the evidence in the administrative record.

The 1996 Order that denied Transfer 4573 determined that Parkinson did not satisfy his burden of proof. In the present matter, the hearing officer states that, in the earlier contested case hearing for Transfer 4573, Parkinson did not submit any evidence about injury. The hearing officer refers to the holding in the 1996 Order and writes that "the findings and conclusions in the 1996 Order may have been based on an incomplete administrative record." If a contested case resulted in a determination adverse to the applicant, failure of the applicant to satisfy his burden of proof does not overcome the core principle of res judicata that a matter once decided should not be relitigated.

The hearing officer identifies factual differences between the current application for transfer and application for Transfer 4573. He distinguishes the two applications by stating that the well identified as a new point of diversion by the current application is 500 feet away from the point of diversion proposed by Transfer 4573. The hearing officer also distinguishes the two applications because of a lesser flow diversion proposed from the newly proposed well of 3.17 cfs compared to a flow rate of 5.2 cfs proposed by the previous Transfer 4573. These facts on their own do not establish enough factual dissimilarity to warrant reconsideration of the earlier Parkinson transfer.

New data can be a basis for reconsideration when the new data reflects an actual change in hydrologic and hydrogeologic conditions from data that was available at the time of the first transfer application. Approximately 20 years of new ground water data has been collected since the 1996 order was issued, and the additional data is grounds for consideration of a new Parkinson application.

Because of additional hydrologic and hydrogeologic data that show a change in conditions, particularly in ground water levels, this decision will consider the current Parkinson transfer on its merits.

FINDINGS OF FACT

1. Transfer Application 77610 proposes to add a point of diversion to three ground water rights: 34-4008, 34-2497 and 34-2490. The point of diversion proposed to be added to the rights is an existing ground water well owned and operated by Parkinson located in the NESWSW of Section 34, T05N, R26E ("Parkinson Well").

2. Currently, two water rights are associated with the Parkinson Well: 34-7176 and 34-12368. Right 34-7176 bears a 1977 priority date and authorizes the diversion of 7.80 cfs. Right 34-

12368 is an enlargement of right 34-7176. The flow rate for both water rights in combination is limited to a diversion rate of 7.80 cfs.

3. Water diverted from the Parkinson Well under existing water rights is open-discharged into the Island Canal, which flows into the Eastside Canal. The water is then injected into the Big Lost River in the NWNW of Section 26, T04N, R26E and is re-diverted from the Big Lost River into the Munsey Canal in the same quarter-quarter. Water is delivered by the Munsey Canal to the irrigation place of use described in the water rights. (Exhibit P12, Figure 1 depicts this conveyance system.)

4. Water rights 34-4008 and 34-2497 identify three common points of diversion, located in Section 11, T03N, R26E. These three wells are located approximately eight miles south of the Parkinson Well. Right 34-4008 authorizes the diversion of 2.60 cfs. Right 34-2497 authorizes the diversion of 0.57 cfs. In combination, these water rights authorize the diversion of 3.17 cfs.

5. One of the ground water wells identified as a point of diversion in water rights 34-4008 and 34-2497, located in the SENE of Section 11, was drilled in 1970. The well driller's report for the 1970 well shows that it was drilled 78 feet deep and intersected layers of sand, gravel, and clay. (Exhibit IDWR7 (1970 well)) Department records do not include well logs for the other two wells in Section 11, which are identified in rights 34-4008 and 34-2497.

6. Parkinson submitted a hand-written well log from the "ASC Office." (Exhibit A17) Parkinson asserts that this well log is for one of the wells located in the SENE of Section 11. The Parkinson family owned the property in 1966, the year the well was drilled. (Testimony of Ralph Parkinson) The well log describes a 105-foot well, intersecting layers of sand, gravel, and clay. (Exhibit A17)

7. Static water levels for the wells in Section 11 are consistent with the Big Lost River Aquifer levels for the area estimated by Bassick and Jones in 1992. (See Exhibit A19, page 2)

8. Water right 34-2490 lists one point of diversion, located in the NESE of Section 14, T03N, R26E. This ground water well is located approximately nine miles south of the Parkinson Well. Right 34-2490 authorizes the diversion of 2.09 cfs. Water right 34-2289 (not included in the pending transfer application) is also authorized diversion of water from the well located in the NESE of Section 14.

9. Permit 34-2289 was issued to Wilse Nielsen in 1949, authorizing the development of three ground water wells, including a well in the NESE of Section 14, T03N, R26E. (Water Right File for 34-2289) The statement of completion filed by Wilse Nielsen documents that a 94-foot well was constructed in Section 14 some time prior to 1959. (Id.)

10. During the hearing, two well logs were offered into the evidentiary record. One well log, in the name of Wilse Nielsen, describes a well constructed in 1962 in the NESE of Section 14 under Permit No. 21070 (34-2289). The other well log is for a well drilled for Rulon Burke

under Permit G33113 (34-2490) but contains errors in the legal description for the well. (Exhibits IDWR7 (1962 well) and IDWR9)

11. The two well logs each describe different lithologies of the area. The Wilse Nielsen well log describes 200 feet of a mixture of sand, clay and lava. (Exhibit IDWR7) The Rulon Burke well log describes 360 feet of lava and basalt. (Exhibit IDWR9) Ralph Parkinson testified that there are two wells in Section 14, located one foot apart, but only one well is currently being used to divert water rights 34-2490 and 34-2289.

12. The Snake River Basin Adjudication ("SRBA") partial decree for water right 34-2490 includes a condition which states: "This water right shall be administered as separate from the Big Lost River and its tributaries."

13. The upper strata of the Big Lost River Aquifer are primarily comprised of unconsolidated alluvial material (clay, sand and gravel). (Testimony of Dr. Wood and Dr. Brockway) The Eastern Snake Plain Aquifer ("ESPA") near Arco is comprised of basalt and clay. (Id.)

14. The ground water wells described in rights 34-4008 and 34-2497 divert water from the Big Lost River Aquifer. The ground water well located in Section 14, T03N, R26E, described in right 34-2490, might not divert water from the Big Lost River Aquifer and has now been judicially separated from the Big Lost River Aquifer for administration purposes. (SRBA Partial Decree for 34-2490)

15. The four existing ground water wells described in rights 34-4008, 34-2497 and 34-2490 do not produce the full diversion rate authorized under the water rights associated with the wells. (Testimony of Ralph Parkinson) Parkinson has not taken any action in recent years to improve the yield from these wells. (Id.)

16. There is no evidence in the record to establish that there is insufficient ground water underlying the existing wells to supply the needed water to the place of use for irrigation.

17. Water rights 34-4008 and 34-2497 authorize the irrigation of 255 acres in Sections 10 and 11, T03N, R26E. Water rights 34-7176 and 34-12368 (the existing rights at the Parkinson Well) authorize the combined irrigation of 885 acres. The combined place of use for water rights 34-7176 and 34-12368 includes the 255 acres described in water rights 34-4008 and 34-2497.

18. The Parkinson Well was originally drilled in 1977 to a depth of 160 feet. (Exhibit A9, page 3) The original well was pump tested at 4,200 gpm (9.36 cfs) for nine hours and resulted in a drawdown in the well of 50 feet. The static water level in September 1977 was 20 feet below land surface. (Id. at Attachment 1)

19. The Parkinson Well was deepened in 2010 to increase the water yield. (Testimony of Ralph Parkinson) In addition, the pump was replaced and the size of the bowls was increased.

(Exhibit IDWR3) After the deepening and maintenance work, the Parkinson Well produced about 12.40 cfs. (Testimony of Ralph Parkinson)

20. The Parkinson Well is currently 239 feet deep with perforations in the bottom 209 feet of the well. (Exhibit A9, page 3) The static water level in the deepened well was 46 feet below land surface at the time the deepened well was completed in January 2010. (Id. at Attachment 1)

21. When water is being pumped from the Parkinson Well, the pumping water level in the well is approximately 83 feet below land surface (Exhibit A9, page 18).

22. Water levels in the aquifer underlying the location of the Parkinson Well decrease with depth. When water is being pumped from the Parkinson well, water level drawdown will result in more water withdrawn from the upper water bearing zones intercepted by continuous perforations in the Parkinson well casing.

23. The Parkinson Well is monitored by Water District 34. Water district records show the volume of water diverted from the Parkinson Well has ranged from 478 acre-feet diverted in 2006 to 2,237 acre-feet diverted in 2002. Assuming a diversion rate of 7.80 cfs, the rate authorized by the existing rights at the Parkinson Well, 2,237 acre-feet equates to 145 days of pumping.

24. Some of the water diverted from the Parkinson Well is lost during conveyance to the Parkinson place of use. The exact amount of conveyance loss was not established in the administrative record. Protestant Darrell E. McDonald, who conveys ground water a similar distance as Parkinson, is charged about 45% conveyance shrink by the Big Lost River Irrigation District. (Testimony of Darrell E. McDonald)

25. Approximately 50 acres of the combined place of use for water rights 34-4008 and 34-2497 were not irrigated between 2006 and 2011. (Exhibit IDWR4) These acres are located in Sections 10 and 11, T03N, R26E. (Id.)

26. The 50 acres in question could not have been irrigated between 2006 and 2011 because the ground was being used as an open gravel pit. (Testimony of Ralph Parkinson) Parkinson purchased the property from the State of Idaho. (Id.) Within the sale agreement, the State of Idaho reserved the rights to the subsurface minerals, including gravel. (Id.)

27. The State of Idaho started extracting gravel from the site in 2004. (Exhibit IDWR4) By 2006, the full 50 acres was a gravel pit. (Id.) In 2011, the gravel mining operation was concluded and the land was reclaimed. (Testimony of Ralph Parkinson) Parkinson did not receive any compensation from the gravel mining operation. (Id.)

28. Protestant Darrell E. McDonald owns a ground water well (known locally as the Toone Well) which is located approximately ¼ mile east of the Parkinson Well. The water rights associated with Mr. McDonald's well (34-2480A, 34-7028A and 34-7234) authorize a combined diversion rate of 6.60 cfs.

29. Protestant Norman Sowards owns a ground water well located approximately ½ mile north of the Parkinson Well. The water rights associated with Mr. Sowards's well (34-2302 and 34-7228) authorize a combined diversion rate of 4.12 cfs. Protestant Darrell L. McDonald has leased the place of use under water rights 34-2302 and 34-7228 from Mr. Sowards since 2008. (Testimony of Darrell L. McDonald)

30. Telford Lands LLC ("Telford") owns two wells in the area, one located 220 feet north and one approximately ½ mile south of the Parkinson Well. (Testimony of Ralph Parkinson)

31. The Big Lost River Aquifer is located in a long, narrow valley and is confined on both sides by older, less-permeable rock layers. (Exhibit A9, page 3) The aquifer includes an upper layer of unconsolidated alluvial material, approximately 200-250 feet thick, which constitutes the main source for the ground water diversions in the valley. (Testimony of Dr. Wood; Exhibit P12, pages 3-5)

32. "The valley fill is comprised of alternating layers of sand, gravel, silt, clay, and boulders." (Exhibit IDWR10, page 2) "The relatively young, unconsolidated alluvial deposits transmit large amounts of water, yielding large flows of water to wells." (Exhibit A9, page 2)

33. The aquifer in the area of the Parkinson Well is comprised of "a series of unconsolidated gravels and sands with minor layers of clay." (Exhibit A9, page 2) "A substantial clay layer exists at approximately 200 to 280 feet below ground, above which a highly productive water-producing zone of sand and gravel is present with water levels typically from 20 to 80 feet below land surface." (Exhibit P12, page 3 (citing Crosthwaite 1970))

34. Perched and artesian zones exist throughout the aquifer due to various disconnected clay lenses. (Exhibit IDWR10, page 3; Exhibit PK22, page 6) "Clay layers are commonly reported as not water yielding in the driller's logs and wells completed below [clay layers] often display semi-confined conditions, indicating the clay is relatively impermeable." (Exhibit IDWR10, page 5)

35. "The areal extent of individual clay lenses is unknown, but in the Arco area, the clay and basalt sequences are laterally extensive and strongly influence lateral movement of ground water." (Exhibit IDWR10, page 3 (citing Crosthwaite 1970)) Ground water can become perched on the clay lenses and disconnected from the regional aquifer, particularly at the south end of the aquifer where clay layers are more prevalent. (Testimony of Dennis Owsley; Exhibit IDWR10, pages 4-5)

36. "The Big Lost River Aquifer merges with the larger [ESPA] a few miles south of Arco." (Exhibit IDWR10, page 3) There is a transition zone between the Big Lost River Aquifer and the ESPA where the two aquifers overlap. (Exhibit A20, page 4) The alluvial layers become thinner and disappear as ground water percolates downward to the basalt layers of the ESPA. (Exhibit P12, page 5)

37. "Groundwater development in the Big Lost valley was minimal prior to the 1950s." (Exhibit P12, page 6) "Beginning in the late 1950s and continuing through the 1980s, many irrigation wells were developed, with most of the groundwater pumping concentrated in a region approximately 6 miles north to 6 miles south of Moore." (Id.) The Parkinson Well is located in the middle part of this zone of ground water pumping.

38. "On an annual basis, aquifer water levels respond to the water supply conditions in the valley." (Exhibit IDWR10, page 6) In water short years, aquifer levels decline in response to additional pumping, a reduction in recharge from irrigation practices, and a reduction of leakage from flow in the Big Lost River. (Id.)

39. There is a strong correlation between the Big Lost River and ground water levels in the aquifer. (Exhibit A9, page 3) "In areas where aquifer levels are at or near the land surface, ground water discharges into the Big Lost River channel and contributes to the flow of the river." (Exhibit IDWR10, page 7) "In areas where the aquifer levels are below the elevation of the bottom of the river channel, water seeps from the bottom of the river channel into the underlying aquifer." (Id.)

40. In this order, it is necessary to distinguish between river gains upstream around Moore and rising water in the Arco area. For purposes of this order, "river gains" or "river inflow" refers exclusively to the gains upstream of the Moore area.

41. For purposes of this order, the term "rising water" is defined as the water rising out of the ground as springs or seeps, including accretion to the Big Lost River, in the area between the head of Boyle Creek (located about two miles north of the Arco Diversion) and the USGS Stream Gage #13132500 (Big Lost River near Arco, Idaho). Although ground water can contribute to springs and river flow in other areas of the valley, the term "rising water" will be confined to this specific area.

42. Historically, the regional (un-perched) aquifer has been high enough that the Big Lost River and the aquifer are hydraulically connected in the area between the Darlington Sinks and the Moore Diversion. (Exhibit P12, page 30; Exhibit PK22) In recent years, ground water pumping and frequent drought cycles have led to the aquifer and the river becoming disconnected between the Darlington Sinks and Moore. (Exhibit IDWR10, pages 7-8)

43. Between 2004 and 2012, ground water levels in the Big Lost River basin south of Moore have risen to near "pre-1985" levels. Water levels in one well, "03N 27E 08BCB1" have risen from approximately 25 feet below ground surface in 2004 to approximately 10 feet below ground surface in 2012. (Exhibit IDWR10, page 11)

44. Nonetheless, "the river and aquifer are now disconnected throughout most of the valley below the Darlington Sinks", which are located approximately 11 miles north of the Parkinson Well. (Exhibit P12, page 30; Exhibit IDWR10, page 7) "[A]ctive management of groundwater depletions would be a necessary component of any reestablishment of a hydrologic connection [between the aquifer and the river]." (Exhibit P15, page 5)

45. Rising water, when it exists, can result in as much as 75 cfs of flow in springs, sloughs, and in the river channel. (Exhibit IDWR10, page 9 (citing Stearns et. al 1938)) Rising water is the source of a number of water rights in the Arco area. (Exhibit P15, pages 4-5) Most of these water rights have priority dates junior to 1920.

46. IDWR Technical Hydrologist, Dennis Owsley, identified two possible hydrogeologic conditions that could cause rising water: (1) The regional (un-perched) aquifer is elevated to a point that the water table intersects the land surface; and/or (2) Percolating water encounters a clay layer that impedes downward flow and the water moves laterally on top of the clay layer until it intersects the land surface (In other words, percolating water becomes perched or disconnected from the regional aquifer).

47. Another possible hydrologic condition could lead to the appearance of rising water. Rising water could occur if a portion of the regional (un-perched) aquifer became disconnected by a clay layer and, therefore, became perched. (See Exhibit PK13, page 4; Exhibit IDWR10, pages 10-13) Determining the exact mechanism leading to rising water is not critical, however, because the ultimate source of the rising water is the same. (Testimony of Dennis Owsley)

48. The primary source of rising water is leakage from the Big Lost River and incidental leakage from irrigation practices between Moore and Arco. (Exhibit IDWR10, pages 8-10; Testimony of Joel Anderson and Steve Tibbets) Instantaneous leakage from the river channel between Moore and Arco can be as high as 200 cfs. (Exhibit IDWR10, page 9 (citing Stearns et. al 1938))

49. The correlation between flow in the river channel in the Moore to Arco reach and the existence of rising water has been known for a long time. In 1925, Lynn Crandall, the Commissioner of the Big Lost River, stated:

> Material and considerable benefit results from the maintenance of a high water table in [the Moore to Arco] section of the river, not only to lands that are thus "sub-irrigated", but also to the holders of natural flow rights around Arco who receive a large amount of water from the drain off of this water table late in the summer that they would not otherwise obtain, it thus follows that it is a fair and proper procedure to carry the water through this section of river channel, so that the losses that thus occur may build up the water table in years of average or better than average run-off. (Exhibit IDWR 11)

50. A 1938 report titled Geology and Ground-Water Resources of the Snake River Plain in Southeastern Idaho, prepared by Harold Stearns, Lynn Crandall and Willard Steward includes the following statement(s):

> Between the Moore Dam and a point about a mile above Arco, a distance of 9 miles, the river flows across Moore Sinks. In years of plentiful water supply, when the river runs through this section for several months and large volumes of water are

> used in the irrigation of adjacent lands, as much as 75 second-feet of return flow rises in the river channel and in several spring-fed creeks a mile or two above Arco. In dry years, however, this return flow decreases to practically nothing. When the ground-water levels are low in this section more than 200 second-feet must be discharged past the Moore Dam in order for any water to reach Arco.
>
> It is suggested that in years of plentiful supply it would be best to carry the water from Leslie to Arco in the present river channel, because the large losses that occur under such conditions build the water table up beyond the height required to supply the capacity of the underground outlets from the valley, and the surplus water then appears as ground-water inflow into the river and adjacent channels and provides a substantial addition to the supply available late in the season. In dry years, however, the available supply is inadequate to build the water table to this height, and most of the water contributed to the water table in such years is a total loss to the valley. (Exhibit IDWR 12, page 256)

51. Lower flow in the Big Lost River channel below Moore "has reduced, if not eliminated, the source of the rising water." (Exhibit IDWR10, page 10) "[S]light variations in river channel seepage can have a significant impact on aquifer water levels." (See Exhibit A23, page 5)

52. During future years of high water flows in the Big Lost River, the recent increases in ground water levels combined with additional managed and unmanaged recharge from the Big Lost River may result in more rising water. The applicant agrees with the possibility of restoring the rising water conditions to historic levels by stating:

> The valley has been largely devoid of rising water for the past 30 years; however it can re-occur under the right conditions. In 2011, "rising water" occurred at the Arco Gage and in the Ferris Slough (District 34 Annual Watermaster Report for 2011) when levels in the aquifer rose due to several years of near average flows in the Big Lost River from 2009 to 2011 (Owsley Figure 4).

(Exhibit A20, pg. 7).

53. Flow in the Big Lost River channel between Moore and Arco is governed by three factors:

- Excess flows, or high water, which is released past the Moore diversion because it exceeds the irrigation demand within the basin.
- River operations under Rule 30 (IDAPA 37.03.12 Water Distribution Rules – Water District 34).
- Ground water pumping (aquifer levels). When aquifer levels are high enough to intersect land surface, the Big Lost River is a discharge source for the aquifer and ground water discharges to the river.

54. The USGS maintains a stream gage on the Big Lost River below Mackay Reservoir (#13127000). The annual stream flow measured at this site is a good representation of the water entering the lower Big Lost River Basin at this location, because there is very little subsurface water flow in the area of the stream gage. (See Exhibit PK21, page 9; Exhibit IDWR 12, pages 247-248) Flow in the Big Lost River below Mackay Reservoir represents approximately 75% of the total water supply entering the lower basin. (See Exhibit IDWR12, page 245)

55. Since 1987 (a period of 27 years), the annual flow in the Big Lost River below Mackay Reservoir has been less than the 62-yr average in 21 of 27 years. (Exhibit IDWR10, page 7 (average based on 1950-2012 data)) Since 2000, the annual flow in the Big Lost River below Mackay Reservoir has been less than the 62-yr average every year except 2006. (Id.) Drought periods identified through the evaluation of well hydrographs correspond with the flows in the Big Lost River below Mackay Reservoir (Exhibit IDWR 10, pg. 7).

56. The lack of flow at the Big Lost River below Mackay Reservoir gage is significant because the measurement site is located upstream of most of the ground water pumping occurring in the basin. (See Exhibit P12, page 6) The lack of flow in the Big Lost River downstream of Moore can be traced to the lack of flow in the Big Lost River below Mackay Reservoir.

57. A second factor affecting flow in the Big Lost River channel between Moore and Arco is the manipulation of river flows under Rule 30 (IDAPA 37.03.12). The Eastside Canal was built to convey irrigation water along the east side of the valley and minimize seepage losses. (Exhibit A20, page 6) The Eastside Canal is frequently used, instead of the natural river channel, to convey river water between Moore and Arco. (Testimony of Jim Rindfleisch) Water is diverted into the Eastside Canal at the Moore Diversion, then conveyed along the east side of the valley, and injected back into the Big Lost River channel just upstream of the Arco and Munsey points of diversion. The increased use of the Eastside Canal to convey river water has resulted in a reduction in rising water. (Testimony of Dr. Brockway)

58. The watermaster for Water District 34 observed rising water in the Arco area at the end of the 2011 irrigation season. (Exhibit IDWR10, page 9) This was reportedly the first time in about 30 years that there has been rising water. (Id.)

59. Department records for Water District 34 confirm that a significant amount of water was allowed to flow in the Big Lost River channel between Moore and Arco during the 2011 irrigation season. (See Flows Past the Moore Diversion, 2011 WD34 Records) Over 60,000 acre-feet of water flowed past the Moore Diversion in June/July 2011. (Id.)

60. A third factor in reduced river flows is ground water pumping. The estimated average pumping from 1959 through 1987 is 38,290 acre-feet/year and the estimated average pumping for 1988 through 2009 is 60,730 acre-feet/year (Exhibit P12, pg. 32). This increase in ground water pumping has resulted in a lower water table throughout the valley. The lowering of the water table has resulted in the hydraulic connection between the Big Lost River and the underlying aquifer to migrate up-valley, reducing the ground water contribution to the river flows in the lower portion of the valley (Exhibit IDWR 10, pg. 6).

61. The change proposed by Parkinson in the pending transfer application will have no measurable effect on the amount of water in the Big Lost River at the stream gage below Mackay Reservoir.

62. The change proposed by Parkinson will have no measurable effect on river operations under Rule 30.

63. The change proposed by Parkinson will, however, result in additional diversion of ground water that will deplete the ground water resources and will contribute to the general reduction in ground water levels that has increased the disconnection of the ground water from the Big Lost River. Surface water discharge or "rising waters" have also been reduced by decreased aquifer recharge resulting from the diversion of water to the Eastside Canal under Rule 30 and ground water pumping, which has lowered the water table (Exhibit A20, pg 10).

64. Parkinson hired Dr. Tom Wood of Clearwater Geosciences LLP to conduct "an assessment of the impact of adding an additional 200 inches (1,796 gpm) to the [Parkinson Well]." (Exhibit A9, page 1)

65. Dr. Wood conducted an aquifer test at the Parkinson Well between July 28 and August 1, 2011. (Exhibit A9, page 4) A well located ¼ mile south-southwest of the Parkinson Well was used as an observation well. (Id.) The results of the observation well were ultimately rejected by Dr. Wood because of concerns of data reliability. (Testimony of Dr. Wood)

66. At the time of the aquifer test, the depth to water at the Parkinson Well was 32 feet. (Testimony of Dr. Wood) The Parkinson Well was pumped at an average rate of 5,117 gpm (11.4 cfs) for four days. (Exhibit A9, page 4) Applying the Cooper-Jacob solution for unconfined aquifers, Dr. Wood estimated the transmissivity of the local aquifer to be 35,000 ft^2/day and the storage coefficient to be 0.12. (Id.)

67. Dr. Wood set up a model to evaluate the potential impacts to neighboring wells. He incorporated the following assumptions in his model: (1) The aquifer is 200 feet thick; (2) The aquifer in the area of the Parkinson Well is unconfined; (3) No-flow boundaries exist 5,750 feet to the east and 9,500 feet to the west of the Parkinson Well, representing the interface of the alluvial aquifer with the less-permeable rock layers of the mountains; (4) A no-flow boundary exists 21,600 feet to the south of the Parkinson Well, representing the point where water can no longer be drawn up-gradient to supply water to the well; and (5) The 4.00 cfs described in the transfer application would be diverted for 6 months (April 15 to October 15). (Exhibit A9)

68. Applying the assumptions described above, Dr. Wood predicted the drawdown impact caused by the diversion of an additional 4.00 cfs from the Parkinson Well would be 14 feet at the Parkinson Well and would be 4 feet at a distance of ¼-mile from the well.

69. Dr. Wood's drawdown estimate is conservative. Parkinson is unlikely to divert the additional cfs for the full irrigation season. Water district records suggest the maximum number of

days per year the Parkinson Well has been used is about 145 days. (See Exhibit IDWR3) In addition, the First Preliminary Order limits the additional diversion rate from the Parkinson Well to 3.17 cfs (the transfer of water right 34-2490 is denied).

70. Dr. Wood's model was based on a total diversion volume of 1,460 acre-feet (4.00 cfs x 184 days x 1.9835). However, the expected total diversion volume, given the reductions described above, will be about 910 acre-feet (3.17 cfs x 145 days x 1.9835).

71. Dr. Wood performed a second model analysis, seeking to account for drought conditions. The second model incorporated all of the assumptions set forth above, but reduced the transmissivity rate to 28,000 ft^2/day to represent the thinning of the aquifer during a drought. (Exhibit A9, page 6) The second model predicted the drawdown would be 17 feet at the Parkinson Well and the drawdown at a distance of ¼ mile from the well would be just over 4 feet. (Id.)

72. Protestants Norman Sowards and Darrell E. McDonald hired Dr. Charles G. Brockway of Brockway Engineering, PLLC to "evaluate the effect of additional groundwater pumping from [the Parkinson Well]" and to "evaluate the potential impact of the proposed transfer on groundwater and surface water supplies." (Exhibit P12, page 1)

73. Dr. Brockway derived a transmissivity value for the local aquifer using specific capacity estimates for 17 nearby wells. (Exhibit P12, pages 8-9) Dr. Brockway calculated the average transmissivity in the area to be 49,800 ft^2/day. (Id.)

74. Dr. Brockway found that the transmissivity value used by Dr. Wood (35,000 ft^2/day) was reasonable and "should be adopted as the best transmissivity estimate at this time in the local vicinity of the Parkinson Well." (Exhibit P12, page 9) Dr. Brockway agreed with Dr. Wood's use of aquifer or no-flow boundaries. (Id. at page 10) Dr. Brockway also assumed the same value for storativity as was used by Dr. Wood (0.12). (Testimony of Dr. Brockway)

75. Assuming no-flow aquifer boundaries to the east and west of the Parkinson Well and a diversion rate of 4.00 cfs for 215 days, Dr. Brockway estimated the drawdown at the McDonald Well (located ¼ mile from the Parkinson Well) would be 3.85 feet. (Id. at pages 8-12)

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 sets forth the criteria used to evaluate transfer applications:

> 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, 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 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within

which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

2. The applicant bears the burden of proof for all of the factors listed in Section 42-222.

3. Prior to the first hearing, the parties stipulated that the review criteria relating to the local economy of the watershed and to a change in beneficial use are not at issue in this contested case. There is no evidence in the record suggesting that these two review criteria are applicable to the pending transfer application.

Injury to Ground Water Rights

4. Dr. Brockway and Dr. Wood predict the drawdown at the McDonald well (located ¼-mile to the east of the Parkinson Well), caused by the diversion of an additional 4.00 cfs from the Parkinson Well, and could be as much as 4 feet. The Brockway and Wood projections are based on the assumption that the additional 4.00 cfs will be diverted at the Parkinson Well for the entire irrigation season.

5. The actual drawdown at the McDonald well will be less than predicted because it is unlikely that Parkinson will divert water for the entire authorized irrigation season.

6. Water right 34-2490 cannot be included in this application for transfer because its point of diversion, by decree, is not within the Big Lost River Aquifer. To allow a ground water right that has been judicially separated from the Big Lost River Aquifer to be transferred into the aquifer creates a new depletion to the aquifer and would result in injury to water rights existing within the aquifer, including Parkinson's other ground water rights.

7. The actual drawdown will also be less than predicted if the total amount diverted is limited to 3.17 cfs, the combined diversion rate authorized by rights 34-4008 and 34-2497.

8. Protestant Kirby Jensen argues that the Department should evaluate injury between ground water rights by the same standard used to evaluate injury between surface water rights. Mr. Jensen argues that *any* diminishment of existing ground water levels resulting from a proposed change in ground water point of diversion equates to injury and violates Idaho Code § 42-222. Mr. Jensen also argues that, because the Big Lost River Aquifer has a hydraulic gradient, by moving its ground water point of diversion up-gradient, Parkinson will be taking water away from (or diminishing the water supply for) the ground water users between the existing points of diversion and the proposed point of diversion.

9. To adopt the injury evaluation standard proposed by Mr. Jensen would block virtually all ground water transfers in the state of Idaho. Any time a ground water point of diversion

is changed it naturally results in a lowering of the water table in the area of the proposed point of diversion. Some lowering of the water table is expected and is reasonable if the lowering of ground water levels does not injure other water rights. As discussed above, the well draw down at the well closest to the Parkinson well is expected to be less than 4 feet. The drawdown projected to occur at neighboring wells as a result of this transfer is reasonable.

10. The protestants argue that the transfer should be denied because of potential drawdown impacts to existing domestic wells. In a 1982 case, the Idaho Supreme Court determined that the reasonable pumping level standard of Idaho Code § 42-226 does not apply to domestic wells used prior to 1978. (See *Parker v. Wallentine*, 103 Idaho 506 (1982)) In his report, Dr. Brockway identified multiple sites where pre-1978 domestic wells may exist based on well logs found in the Department's files.

11. In an administrative hearing for a transfer application, the applicant bears the burden of proving that the transfer will not injure other water rights. (Idaho Code § 42-222) However, if a protestant seeks the protection of *Parker v. Wallentine*, that would insulate a water right from the reasonable pumping level standard of the Ground Water Act, the protestant must come forward with evidence establishing: (1) that the water was beneficially used prior to March 29, 1978 for domestic purposes, (2) the approximate pumping capacity of the well, and (3) the historical water levels in the well that must be protected.

12. Without this information, the Department cannot evaluate the protestant's historical pumping level protection claim. Once the above information is provided by the protestant, the burden of defending against the *Parker v. Wallentine* protection of ground water pumping levels is borne by the applicant. In this case, none of the protestants own or operate domestic wells that would qualify for protection under *Parker v. Wallentine*.

13. There is not sufficient information in the administrative record to determine whether any of the domestic wells identified by Dr. Brockway qualify for protection of historic ground water levels under *Parker v. Wallentine*. Dr. Brockway testified that he does not know whether any of the domestic wells identified in his report have been deepened, replaced, or abandoned. If any of these domestic wells still exist, no evidence was presented relating to the pumping capacity or current pumping levels in the wells.

Injury to Surface Water Rights

14. The evidence in the administrative record suggests two ways in which surface users could be impacted by the proposed transfer. First, the protestants argue that the proposed change will reduce the existence of rising water in the basin. Second, the protestants argue that the proposed change will lower the water table in certain areas of the Big Lost River, increasing leakage from the bottom of the Big Lost River channel, and reducing the amount of water available to fill existing water rights from the Big Lost River. These two types of impact are evaluated separately.

Rising Waters

15. The findings of fact define the term "rising water." Evidence establishes that leakage from the Big Lost River channel and incidental leakage from irrigated lands between Moore and Arco are the primary sources of rising water. Dr. Wood testified that the approval of this transfer will decrease "rising water" where the regional aquifer is contributing to the rising water. He further testified that this impact on "rising water" would be small but real (Protestant Post Hearing Brief, pg. 10).

16. Rule 30.01 of the Water Distribution Rules for Water District 34 (IDAPA 37.03.12) authorizes the watermaster to divert the entire flow of the Big Lost River through the Eastside Canal when certain conditions are satisfied, rather than allowing the river to flow in its natural channel between Moore and Arco. Senior Big Lost River water rights in the Arco area are conveyed through the Eastside Canal. (Testimony of Jim Rindfleisch)

17. Water District 34 records show that water is only allowed to flow in the natural river channel between Moore and Arco during high flow events and during times when irrigation demand is low or non-existent. Outside of high flow events, on average, river water is conveyed by the Eastside Canal during about 80% of the irrigation season. (Testimony of Jim Rindfleisch)

18. The Big Lost Irrigation District has proactively diverted water for ground water recharge during periods of high flow. The purpose of the ground water recharge is to increase ground water levels and to restore flows in the Big Lost River. The reduction in the reach gain which has historically provided a portion of the water supply below Moore is estimated to be 13,000 acre-feet/year in normal years and 20,000-30,000 acre-feet/year in low water years (Exhibit P12, pg. 33). The ground water recharge efforts administered by the Big Lost Irrigation District in the years 2009-2012 ranged between 8,000 to 25,000 acre-feet/year (Exhibit IDWR 10, pg.17).

19. Rule 50 of the Water Distribution Rules for Water District 34 (See Rule 50, IDAPA 37.03.12) recognize the hydraulic relationship between flows in the Big Lost River and ground water by requiring ground water users to mitigate when a senior surface water right holder calls for water. When a call for conjunctive management is filed with IDWR, ground water users must deliver to the Big Lost River 20% of their total pumping volumes as mitigation for depletions to the Big Lost River caused by ground water pumping.

20. The fact that hydraulic connection between the river and ground water is dependent on flows in the Big Lost River and conveyance through the Eastside Canal does not eliminate the relationship between ground water pumping, ground water levels, and river flows.

Reduction of Big Lost River Flows

21. The second surface water injury concern relates to diminishing the flow in the Big Lost River upstream of Moore. The protestants argue that pumping additional water from the proposed well will lower the water table in the Moore area, causing the river to become more disconnected from the aquifer. This will have the effect of moving the area of communication

between the aquifer and the river farther upstream, increasing the losses from the bottom of the river channel, and reducing the amount of water available to satisfy senior water rights from the Big Lost River. Historically the regional water table has been connected with the Big Lost River in the Moore area (Exhibit IDWR 10, pg. 8) Additionally, this connection has been observed as recently as 1998 and with the proper management of ground water and an extended period of wet years, the connection near Moore might be reestablished (Protestant Post Hearing Brief, pg.13) .

22. Ground water levels in the area of the Parkinson well have risen during recent years. There is a possibility, through continued recharge efforts and tighter management of both the ground water and surface water resources in the Big Lost River Basin, that the connection between ground water and surface water will be increased.

Available Water Supply

23. There is no evidence that water is unavailable at the location of the existing points of diversion. This particular inquiry is addressed in more detail under the local public interest heading.

Enlargement of Water Rights

24. Parkinson sufficiently demonstrated that approval of this transfer will not result in the enlargement of the water rights. The place of use for the water rights is not being changed. The acres authorized under the water rights will continue to be irrigated.

25. During the initial hearing, the hearing officer raised a question about possible forfeiture of a portion of water rights 34-4008 and 34-2497. A 50-acre portion of the place of use for those rights was not irrigated between 2006 and 2011 because the area was being mined for gravel by the State of Idaho. (See Exhibit IDWR4)

26. Pursuant to Idaho Code § 42-222(2), if a water right is not put to full beneficial use for a period of five or more years, the water right, or a portion thereof, may be forfeited. Idaho Code § 42-223 sets forth certain exceptions to forfeiture, including the following:

> No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis. (Section 223(6))

27. The evidence in the administrative record indicates that the mining activities taking place on Parkinson's land were out of Parkinson's control. Therefore, the non-irrigation of the acres associated with the mining area would have also been outside of Parkinson's control. The forfeiture exception listed in Section 223(6) protects water rights 34-4008 or 34-2497 from forfeiture during the gravel extraction time period.

Conservation of Water Resources

28. The transfer application is consistent with the conservation of water resources within the state of Idaho. The conveyance and irrigation practices proposed in the transfer application are consistent with the standard irrigation practices employed in the Big Lost River Basin.

Local Public Interest

29. Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." (Idaho Code § 42-202B(3))

30. The Remand Order included four specific questions relating to the local public interest. In addition, on page 4 of the Remand Order, the Director states a concern that approving the pending transfer will lead to an exodus of ground water rights up-gradient in the Big Lost River Valley.

Question 1: Is ground water unavailable at the location of the existing points of diversion?

31. In determining the public interest, availability of water at the existing points of diversion is a factor the Department may weigh in balancing the need for a change in the point of diversion against the impact to the water resources that the proposed change would cause. Dr. Wood testified that withdrawals from the wells at the existing points of diversion in this matter will not impact the river flows as significantly as withdrawals from the Parkinson Well (Protestant Post Hearing Brief, pg. 6).

Question 2: Is it in the local public interest to increase diversions of ground water in an area where existing pumping caused ground water level declines that may have (a) dried up portions of the Big Lost River, (b) decreased the quantity of water available to senior water right holders?

32. See the discussion on rising water and reduction of Big Lost River flows above. Evidence in the administrative record indicates that the Big Lost River Aquifer is now generally disconnected from the Big Lost River downstream of the Darlington Sinks. Evidence also establishes that basin-wide ground water pumping has contributed, in part, to the disconnection. Dr. Brockway states that the disconnection can only be fully addressed through management of ground water pumping.

Question 3: Is it in the local public interest to allow additional pumping in an area where recent ground water levels have been rising, perhaps because of local efforts to recharge the aquifer, and frustrate attempts to restore the historical hydraulic connection between the ground water and surface water in the Big Lost River?

33. Recharge occurring in Big Lost River Basin is authorized under water rights 34-7571 and 34-7573, held in the name of Water District No. 34. Both of these water rights have 1995 priority dates, which means water can only be diverted for recharge when the water supply in the basin exceeds the demand under senior irrigation water rights.

34. The recharge efforts taking place since 2000 have not restored aquifer levels to historic levels. Since 2004, ground water levels have been rising, and ground water recharge in combination with more careful accurate water administration and mitigation for ground water pumping may again restore the connection between ground water and surface water flows in the Big Lost River. (see Evaluation Criteria No. 22)

Question 4: Is it in the local public interest to increase risk to junior water users of a delivery call that could result in curtailment?

35. Parkinson currently diverts water from the Big Lost River Aquifer through his existing wells. Pumping ground water from the existing wells for the water rights sought to be transferred impacts aquifer water levels. Because the existing wells are located approximately eight miles down-basin, however, the affect on ground water pumping on water levels where the ground water levels are close to the river elevation is minimal. In contrast, all of the pumping from the Parkinson well will negatively impact ground water levels in the area where ground water levels are close to the elevation of the river.

36. According to the analysis prepared by Dr. Brockway, the amount of water associated with this transfer only constitutes ½ of 1% of the total ground water rights within the Big Lost River Valley. (Exhibit P12, page 7)

37. According to a previous IDWR decision, *Final Order*, In the Matter of Applications for Transfer No. 5174 in the name of Dennis M. Baker and No. 5175 in the name of Huf-n-Puf Trust (Nov.25, 1998), the quantity of water sought to be transferred compared to the total water diverted, or a determination that the impacts are not measurable, is not grounds for approval. The appropriate analysis is whether the impacts are real and can reasonably be determined.

Additional Question: Is it in the local public interest to allow water users in Basin 34 to "continue to move ground water points of diversion farther upstream in the Big Lost River Basin." (Remand Order, page 4)

38. The Department approved a nearly-identical transfer in 2009 (Transfer No. 75394). (Exhibit IDWR2) There may be other applications to move points of diversion up-basin if Parkinson's application for transfer is approved Reference to a previously approved transfer is not grounds for approval of a second transfer if the criteria of Idaho Code § 42-222 are not satisfied.

39. Demands for the limited water resources in both the Big Lost River Basin and the Snake River Basin have spawned multiple controversies and litigation. The following parallels between the Big Lost River Basin and the Snake River Basin can be drawn:

- There is a hydraulic connection between ground water and surface water.
- Delivery of surface water for irrigation enhanced aquifer water levels and aquifer discharge to the river.
- Pumping of ground water for irrigation depleted river flows.
- Efficiency of water application and expansion of irrigated acres depleted river flows.
- Activities that will exacerbate the depletions of river flows should be carefully scrutinized and, in many instances, prohibited.

40. The Director should not approve applications for water use that will aggravate or increase the demands on the surface water resources without adequate mitigation.

Ground Water Moratorium

41. On April 30, 1993, the Department issued an Amended Moratorium Order ("Moratorium"), which included the Big Lost River Basin. The Order established a moratorium on the "processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources . . ." (Moratorium, page 4). "The moratorium does not apply to applications for drilling permits to replace or deepen existing wells having valid existing water rights nor to applications for transfer of existing water rights." (Id. at page 5, emphasis added)

42. Protestant Kirby Jensen argues that the additional ground water point of diversion proposed in the Parkinson transfer application is equivalent to a new appropriation in the local area of the proposed point of diversion. Using Mr. Jensen's approach, in every transfer proposing to change a ground water point of diversion, it would be possible to define a small enough geographic area within which the proposed point of diversion could be considered a new appropriation. This would have the effect of blocking all ground water transfers within the Moratorium area which is inconsistent with the plain language of the Moratorium.

43. The Moratorium clearly states that it does not apply to the transfer of existing water rights. Existing water rights may be changed, including adding points of diversion, provided the changes do not violate the criteria set forth in Idaho Code § 42-222. (See also Idaho Code § 42-237 ("[W]ithdrawal of waters from the same ground water supply at another location in lieu of withdrawal at the original location shall be considered a change in point of diversion."))

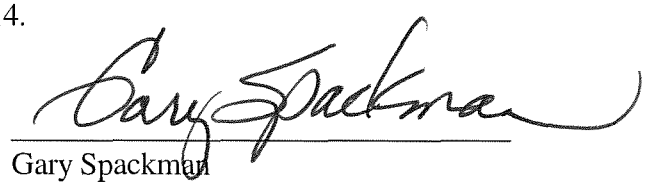
Summary

44. Parkinson did not satisfy its burden of proof for the review criteria set forth in Idaho Code § 42-222. In order to prevent injury to other water rights and to satisfy the local public interest, Parkinson's application for transfer should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 77610 in the name of Parkinson Farms is DENIED.

Dated this 29th day of May, 2014.



Gary Spackman
Director

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of May, 2014, I mailed a true and correct copy, certified and postage prepaid, of the foregoing FINAL ORDER DENYING APPLICATION FOR TRANSFER to the person(s) listed below:

Parkinson Farms
2253 North 3100 West
Arco, ID 83213

Kirby A. Jensen
2781 North 3375 West
Moore, ID 83255

James P. Speck
Speck & Aanestad
PO Box 987
Ketchum, ID 83340

Darrell L. McDonald
PO Box 246
Arco, ID 83213

Norman K. Sowards
3186 W 3000 N
Moore, ID 83255

Deborah J. Gibson
Assistant to the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or
(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate

action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.