

RECEIVED**FEB 06 2014****DEPARTMENT OF
WATER RESOURCES**

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BEFORE THE DEPARTMENT OF WATER SOURCES
 OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION) **PETITION FOR REVIEW OF**
 FOR TRANSER NO. 77610 IN THE) **THE SECOND**
NAME OF PARKINSON FARMS) **PRELIMINARY ORDER**

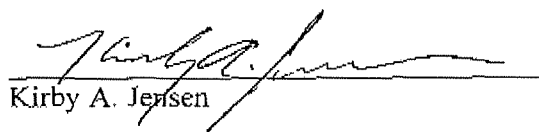
Kirby A. Jensen, representing himself, hereby respectfully petitions this department for Review of the *Second Preliminary Order Approving Application for Transfer* issued on January 24th 2014. This petition is supported and accompanied by a *Memorandum in Support of Second Petition for Review*, as well as the evidence submitted, oral arguments, testimony, questions and comments which were made at a the two hearing on this matter which were held in Arco, Idaho. The first on May 17th & 18th 2012 and the second on August 13th 2013.

The primary basis for this petition for review is that this transfer application would be equivalent to a "new appropriation" and could affect those who have water rights which are down gradient of the new point of diversion and up gradient of the original point of diversion, thus creating a "sub-class" of individuals who would be denied protection by the 1993 Amended Moratorium Order. The 14th Amendment of the Constitution of the United States of America states: "nor" [shall any state] "deny to any person within its jurisdiction the equal protection of the laws." Further, it would seem that the 1993 Amended Moratorium Order would be the law governing new appropriations in this basin.

The secondary basis for this petition for review is the Hearing Officer erroneously based his decision on 42-226, when in fact the correct statutes governing changes in points of diversion are 42-108 and 42-222 which specifically prohibit the injury to other water rights.

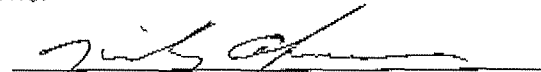
I again respectfully petition this department to review its *Second Preliminary Order Approving Application for Transfer* issued on January 24th 2014.

Dated this 6th day of February, 2014


Kirby A. Jensen

CERTIFICATE OF MAILING

I certify that on this 6th day of February, 2014, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies prepaid and addressed as follows:


Kirby A. Jensen

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BEFORE THE DEPARTMENT OF WATER SOURCES
 OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION) MEMORANDUM IN SUPPORT OF
 FOR TRANSER NO. 77610 IN THE) PETITION FOR REVIEW OF THE
NAME OF PARKINSON FARMS) SECOND PRILIMINARY ORDER

Kirby A. Jensen, representing himself, hereby respectfully petitions this department for review of its *Preliminary Order Approving Application for Transfer* issued on January 24th 2014.

Idaho Code 42-222 would seem to be the appropriate statute governing changes in point of diversion.

“no person shall be authorized to change the period of use or nature of use, point of diversion or place of use of water unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code.” (Idaho Code 42-108) (underline added)

“The person entitled to the use of water...may change the point of diversion, period of use, or nature of use,...if the water rights of others are not injured by such change in point of diversion, place of use, period of use, or nature of use,” (Idaho Code 42-222) (underline added)

“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,” (Idaho Code 42-222) (underline added)

“The provisions of section 42-222, relating to change of point of diversion and change of place of use of water, shall be applicable to waters accruing from water rights, provided, that the withdrawal of waters form the same ground water supply at another location in lieu of withdrawal tat the original location shall be considered a change of point of diversion.” (Idaho Code 42-237) (2nd underline added)

“Any change in the point or points of diversion of water shall require approval of the director of the department of water resources as provided in section 42-222, Idaho Code,” (Idaho Code 42-341)

“The legislature finds and declares that...many persons...changed the place of use, point of diversion, nature of use,...of their water rights without compliance with the transfer provisions of section 42-108 and 42-222, Idaho Code.” (Idaho Code 42-1425) (underline added)

“The legislature further finds...is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause undue financial impact...” (Idaho Code 42-1425) (1st and 4th underlines added)

“...may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured....” (Idaho Code 42-1425) (3rd underline added)

“If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change....” (Idaho Code 42-1425) (underline added)

“The construction and operation of the project shall be subject to such additional conditions and limitations as shall be imposed by the director pursuant to sections 42-203A, 42-222 and 42-234, Idaho Code. (Idaho Code 42-5225)

Now let's look at 42-226 to see how it applies to transfers.

“...while the doctrine of “first in time is first in right” is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels....” (Idaho Code 42-226) (underline added)

The Hearing Office states; “Injury between ground water users is governed by Idaho Code 42-226,...” This would seem inappropriate for several reasons:

- a. While 42-226 addresses full economic development, this transfer is for water rights which have already been developed.
- b. There is currently a moratorium regarding permits to appropriate water from all surface and ground water sources within the Eastern Snake River Plain Area and all tributaries there to, which includes the Big Lost River drainage. This would seem to have halted the full economic development of underground water in the areas referred to in the moratorium for the time being. (Amended Moratorium Order, dated April 30th 1993)
- c. “...applications for transfer will be treated under terms of this amended moratorium order and may be considered for approval by the department in

connection with proposed mitigation or compensation for prior water rights”.
(Amended Moratorium Order, dated April 30th 1993)

- d. Idaho Codes 42-108 and 42-222 specifically address changes in points of diversion and injury.
- e. Form 222 IDWR Instructions for filing an application for transfer of a water right, page 1;

The Department must ensure that a proposed transfer does not:

Injure other water rights

Enlarge the original water right

Conflict with the local public interest

Prevent the conservation of water resources within Idaho

Adversely affect the local economy

The transfer applicant is responsible for providing information
demonstrating compliance with the requirements. (underline added)
(underline added).

- f. No reasonable pumping levels have been established in the Big Lost River basin, therefore it seems evident that no protection from injury has been established.
- g. As stated above from the Form 222, “The Department must ensure that a proposed transfer does not: Injure other water rights.” How then can the Department ensure no injury will happen to senior water rights, by using reasonable pumping levels, if no reasonable pumping levels have been established?
- h. While conducting research to prepare this memorandum, one of the resources used was web address <http://legislature.search.idaho.gov/search>. Entering 42-222 in the search bar at the top of the page found 336 hits in 87 documents. Entering 42-226 found 10 hits in 3 documents. No other statutes refer to 42-226.
- i. There are no references to ground water transfers, or any transfers, in 42-226.

As to, will this transfer cause injury to other water rights, consider the following.

In his Final Order dated August 7th, 1990, then director Keith Higginson recognized the “unusual water system” properly described by the name Big Lost River Basin.

In his Findings and Conclusions, item #2, he states:

“The name, “Big Lost River” properly describes this unusual water system. During the course of its travel from the mountain watershed to the place of discharge onto the Snake Plain the water of the river sinks then rises again at several locations. The result is a closely interconnected surface and ground water system within the basin. These surface and ground waters are, for the most part, one single water source. Diversion and consumptive use of the water, whether from a surface diversion or from a well, decreases the total water supply available and can have an effect on other uses of the resource.”
(underline added.)

Further, in his Findings and Conclusions, item #5, he states, in part:

“These wells intercept part of the total water supply of the basin and, except as hereafter noted, have an impact on the quantity of water available to those diverting surface water from the Big Lost River and its tributaries. There is only a finite quantity of water within the system and any increase in consumptive use of surface or ground water at one location results in a decrease in water supply available for use at another location either inside or outside the basin at some later time.”

As recognized by then director Higginson, there is only a finite quantity of water within the system and any increase of use at one location results in a decrease in water supply available for use at another location.

As recognized by hearing officer Cefalo in his Findings of Facts, the new point of diversion is approximately 8 miles north (upgradient) of the original points of diversion.

It would seem then that those water users between the new point of diversion and the original points of diversion would then experience a decrease in water supply available for their use, thus causing injury to other water users.

At the second hearing, three witnesses testified that they've been denied their surface water rights many years over the last twenty or more. This would seem to be a clear violation of Article XV, Section 4 of the Idaho Constitution which states in part; “shall not thereafter, without his consent, be deprived of the annual use of the same”.

I.C. 42-101 addresses water appropriations and states in part, “its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved”. It would seem that the state is in violation of this statute in its administration of water rights in the Big Lost River basin. Below is a short list of why that would seem to be so:

- As mentioned above, some senior surface water users have been denied their prior appropriated rights.
- Senior ground water rights have received no protection by the maintenance of reasonable pumping levels.
- There has been little if any administration of ground water rights by priority, yet surface water rights are regularly administered by priority.
- There has been little if any administration or control of diversion rates from wells, yet surface water rights are regularly administered by diversion rate.
- It has been established that ground water diversions have an impact on surface water flows, yet little if any mitigation has been provided in lieu of administration by priority date of ground water.

Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States

The equal protection clause states: "nor deny to any person within its jurisdiction the equal protection of the laws". I.C. 42-101 would seem to echo that by stating: "shall equally guard all the various interests involved". The short list provided above would indicate clear violations of the Fourteenth Amendment and I.C. 42-101.

The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Raymond v. Chicago Union Traction Company*, 207 U.S. 20

The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226.

This transfer seems to be a result of Parkinson Farms inability to divert their full water rights from their existing wells south of Arco. Yet very little evidence, if any was provided as to if that was actually the case and if so, why.

The water rights being transferred are senior to may ground water rights in the basin, the latest being 1967. Parkinsons could have sought administrative action as provided for in IDAPA 37.03.12.045

However, Parkinsons have two water rights currently associated with their well 8 miles to the north, or upstream, which have an earliest priority of 1977.

It would seem then if Parkinsons were to seek administrative action to protect their water rights in the southern wells, they would run the risk of curtailment of their water right associated with the northern, or upstream well.

As has been mentioned earlier, three witnesses testified that they've been denied their surface water rights many years over the last twenty or more. It would seem to be a further violation of their constitutional guarantees of protection to allow Parkinson Farms to divert additional waters up gradient, or upstream from them.

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. I.C. 42-602

We conclude that the director's duty to distribute water pursuant to this statute is a clear legal duty. The director himself testified that he was aware that his duty to deliver water under I.C. § 42-602 is mandatory. (Musser v Higginson)

Favoritism is defined as the practice of giving unfair preferential treatment to one person or group at the expense of another. If surface water diversions in the Big Lost River basin are administered by priority date and ground water diversions are essentially unadministered, wouldn't that be favoritism? It would seem so.

In conclusion; Surface and ground water users in the lower or down gradient part of the Big Lost River basin have been suffering the cumulative effects of upstream diversions, conversions from flood to sprinkler irrigation, expansions of irrigated acres, unregulated diversions of ground and some surface waters, development of new lands, upstream changes in points of diversion and the failure of junior ground water users to mitigate injury to surface flows.

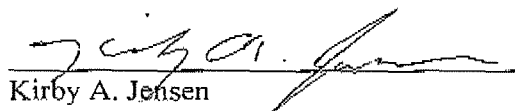
Lower valley surface and ground water users are also held responsible to call for mitigation or/or administration to alleviate injury caused by upstream, up gradient and/or junior water rights. Thus the lower valley water users are constantly at the mercy of upstream or up gradient uses. It would seem only appropriate that they could rely on the Department of Water Resources to "equally guard all the various interests involved" as required in I.C. 42-101.

To re-emphasize, granting approval of Transfer 77610 would be good for Parkinson Farm, but at the expense of others. Although unintentional, granting approval of Transfer 77610 could be viewed as favoritism.

Having the highest regard for the Hearing Officer and the Director, it is with respect that I say to you, approving Transfer 77610 would seem to be inappropriate.

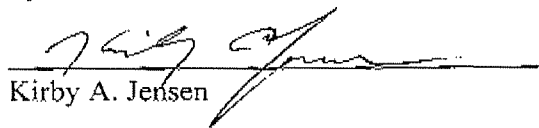
Please review the Second Preliminary Order Approving Application for Transfer No. 77610.

Thank you for reviewing this matter.


Kirby A. Jensen

CERTIFICATE OF MAILING

I certify that on this 6th day of February, 2014, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies prepaid and addressed as follows:


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Fax Cover Sheet

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Number of pages, including cover sheet:

11

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