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Department of Water Resources  
Eastern Region

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

|                                    |   |                           |
|------------------------------------|---|---------------------------|
| IN THE MATTER OF APPLICATION       | ) |                           |
| FOR TRANSFER NO. 77610 IN THE      | ) |                           |
| NAME OF PARKINSON FARMS            | ) | <b>POST HEARING BRIEF</b> |
|                                    | ) |                           |
| <b>Parkinson Farms, Applicant.</b> | ) |                           |
| _____                              | ) |                           |

Protestant, Darrell E. McDonald, respectfully submits his Post Hearing Brief in this matter.

**INTRODUCTION**

On November 8, 2011, Parkinson Farms ("Parkinson") filed Application for Transfer No. 77610 with the Idaho Department of Water Resources ("Department"), proposing to add as a point of diversion to ground Water Rights 34-4008, 34-2497 and 34-2490 an existing well (the "Parkinson Well") approximately eight (8) miles up gradient from the wells which are the legal points of diversion for these water rights (the "Transfer Application"). The Transfer Application was properly advertised and numerous protests were timely filed. A contested hearing was held on May 17 and 18, 2012. On August 22, 2012, the Hearing Officer issued his Preliminary Order Approving Application for Transfer (the "Preliminary Order") approving the additional point of diversion for Water Rights 34-4008 and 34-2497 but denying that change for Water Right 34-2490. On September 5, 2012, Petitions for Reconsideration were filed by Protestants Darrell E. McDonald and Kirby A. Jensen ("Jensen"). On September 25, 2012, the Hearing Officer issued his Order Denying

Kirby A. Jensen (“Jensen”). On September 25, 2012, the Hearing Officer issued his Order Denying Petitions for Reconsideration. On October 10, 2012, Jensen filed his Petition for Review of the Preliminary Order. On February 6, 2013, the Director of the Department issued an Order Remanding Contested Case to Hearing Officer directing the preparation and submission of a Department Staff Memorandum addressing certain factual issues, allowing the submission of additional evidence into the record and requiring the Hearing Officer to address specific legal issues based on the evidence in the record (the “Remand Order”). A supplemental hearing was then held on August 13, 2013 (the “Supplemental Hearing”).

In 1995, Parkinson filed Application for Transfer No. 4573 to add a point of diversion to Water Rights Nos. 34-2497, 34-4008, 34-2505 and 34-2506 (“Transfer 4573”). The proposed new point of diversion was a well to be constructed less than one-half mile from the Parkinson Well. Water from that new well, like the water from the Parkinson Well in this Transfer Application, was to be pumped into the adjacent Island Canal. Transfer 4573 also proposed that the water be delivered through the exact same canals and ditches and to basically the same place of use as in the pending proceedings. Transfer 4573 was protested and a contested hearing held in November, 1995, resulting in the Final Order dated May 30, 1996, denying the requested changes (Jensen’s Exhibit 35, the “Transfer 4573 Final Order”). One of the legal inquiries the Department must make on remand in this matter is whether or not the Transfer 4573 Final Order precludes Parkinson from pursuing the changes requested in this matter based on the doctrine of *res judicata*.

If Parkinson is not barred from proceeding with the Transfer Application in this matter, the fundamental issue becomes whether the Department should approve the Transfer Application under Idaho Code § 42-222 and the judicial and administrative decisions interpreting the statute. Idaho

Code § 42 222 sets forth the guidelines which govern requests to change elements of a water right, and provides, in part, that the Department,

[S]hall examine all of 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 of use of the original right, and the change is consistent with the conservation of water resources within the State of Idaho, and is in the local public interest as defined in Section 42-203A(5), Idaho Code, and the new use is a beneficial use. . . .

Parkinson has the ultimate burden of proving that the Transfer Application satisfies all of the statutory requirements.

## ARGUMENT

### **I. The doctrine of “res judicata” requires the Department to dismiss the Transfer with prejudice.**

The doctrine of *res judicata* covers both claim preclusion and issue preclusion. With respect to the latter, the Idaho Supreme Court has stated:

The general rule is that once a judgment is entered it is *res judicata* with respect to all issues which were or could have been litigated. *Compton v. Compton*, 101 Idaho 328, 333, 612 P.2d 1175, 1180 (1980); *Magic Valley Radiology, P.A. v. Lolouch*, 123 Idaho 434, 436-37, 849 P.2d 107, 109-110 (1993); *Farmers Nat’l Bank v. Shirey*, 126 Idaho 63, 70, 878 P.2d 762, 769 (1994). Five factors are required for collateral estoppel to bar relitigation of an issue decided in an earlier proceeding:

(1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. (citations omitted).

*Waller v. State of Idaho, Idaho Dept. of Health and Welfare*, 192 P.3d 1058 (Idaho 2008)

*Sagewillow Inc. v. Idaho Department of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003)

involved judicial review of a decision by the Department in a contested transfer application proceeding that the subject water right had been forfeited. Four years earlier, Sagewillow had filed an application to change the point of diversion and place of use of the same water right. Nobody protested and that transfer was approved in 1992. Sagewillow argued that the transfer approved in 1992 barred the Department from reviewing the issue of forfeiture of the same water right in a subsequent transfer application proceeding. The Supreme Court held that the doctrine of *res judicata* applies to administrative proceedings (*Id.* at p. 844), so it must be addressed in these proceedings on the Transfer Application<sup>1</sup>.

As noted by the Director in the Remand Order, the following Findings of Fact were made in the Transfer 4573 Final Order:

17. Ground water in the vicinity of the proposed well site is tributary to the Big Lost River. Consumptive use of ground water in the Moore area and upstream of Moore reduce flows in the Big Lost River. The shortage of water in the Big Lost River has been aggravated by several years of drought. The Big Lost River has dried up below the Moore diversion and return flows from ground water have not replenished the stream. water rights normally satisfied in the lower portions of the Big Lost River have not been delivered.

18. The Department has determined that wells located in the vicinity of the proposed well site and wells located in the vicinity of the old wells divert water tributary to the Big Lost River. The old wells are located in the south boundary line of tributary ground water, however, and withdrawals from a well at the location of the old wells will not impact river flows as significantly as

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<sup>1</sup> The Supreme Court went on to hold in *Sagewillow* that the Department was not precluded from considering forfeiture or abandonment of the water right in question since that specific issue had not been actually litigated and decided in the previous transfer proceeding. In contrast, the issues of injury to other water rights and local public interest were litigated and decided in Transfer 4573.

withdrawals from a well located at the proposed well site.

On the basis of these Findings of Fact, the Director then concluded as follows:

4. The Association established that water users near the proposed point of diversion would be injured by the withdrawals from the proposed well.
5. The Association established that further depletions of water in the Moore area would affect stream flows in the Big Lost River and would lower or reduce available ground water down gradient of the proposed well.
6. Parkinsons did not satisfy their burden of proof regarding issues of injury, enlargement, or local public interest.

In Transfer 4573, Parkinson had the burden of proof on and actually litigated in a contested hearing, and the Director specifically decided, the issue of whether or not the addition of a new proposed point of diversion eight miles up gradient from the existing points of diversion causes injury to any senior water rights and is not in the local public interest. These are two issues that must be decided in every transfer proceeding before the Department. The exact same issues are raised in the pending proceeding.

The five factors for issue preclusion to bar the relitigation of these issues in this proceeding are clearly met: (1) Parkinson had a full and fair opportunity to litigate both of these issues in Transfer 4573; (2) the issues of injury to senior water rights and the local public interest in Transfer 4573 and the pending proceeding are identical; (3) the issues of injury to senior water rights and the local public interest were actually decided in Transfer 4573; (4) the Transfer 4573 Final Order is the equivalent of a final judgment on the merits in Transfer 4573; and (5) Parkinson, as the Applicant in Transfer 4573, was a party to that proceeding and is the Applicant in the present proceeding.

In his Remand Order, the Director stated as follows:

In order to justify consideration of the new application by the Department, Parkinson must establish new facts or law in order to justify revisiting the previously rejected transfer. For example, if Parkinson could show that hydrologic conditions are significantly different than the conditions existing in 1996, these different conditions may justify consideration of another transfer application.

In other words, in the present case Parkinson has the burden of proof to establish that the issues of injury to senior water rights and local public interest are different in the pending proceeding due to significant changes in hydrologic conditions from those existing in 1995 and 1996. Parkinson has failed completely to meet this burden.

In fact, the evidence clearly shows that the hydrologic conditions have not changed from 1995-1996 to the present. First, Parkinson and the expert witnesses testifying for both Parkinson (Tom Wood, Ph.D., PG (“Wood”)) and Protestant, Darrell E. McDonald (Charles G. Brockway, Ph.D., P.E. (“Brockway”)), agreed that the shortage of water in the Big Lost River Basin at the current time has been aggravated by several years of drought just as the Director found in Transfer 4573. Second, Parkinson, Wood and Brockway also all agreed that the Big Lost River has dried up below the Moore diversion and return flows from ground water are not replenishing the stream at the present time just as the Director found in Transfer 4573. Dennis Owsley (“Owsley”), the Department’s engineer who prepared the Staff Memorandum requested by the Remand Order (“the “Owsley Memorandum”), Brockway and Wood all agreed this disconnect commenced in the mid-1980's and has continued with very minor exceptions to the present. Third, Wood testified that the hydraulic head conditions between the Big Lost River and the adjacent aquifer have been consistent from 1991 until now and that the separation between them has remained essentially the same. Fourth, Wood testified that withdrawals from the wells at the existing points of diversion in this matter will not impact river flows as significantly as withdrawals from the Parkinson Well, just as

the Director determined in Transfer 4573. Fifth, in his Technical Response to the IDWR Director Remand and the Owsley Report (Parkinson Exhibit 20, the “Technical Response”), Wood analyzed and described the current hydrogeology of the Big Lost River aquifer and its sub-units from Moore to south of Arco, and then testified that there had been no changes in that hydrogeology since 1995 and 1996. Sixth, Wood stated in his Technical Response and testified at the hearing that use of the East Side Canal to carry the flow of the Big Lost River below the Moore diversion had been done for years prior to the adoption of Rule 30 in 1994. Seventh, Brockway, in his report submitted at the initial hearing (Exhibit P12) also described the current hydrogeology of the aquifers at issue in these proceedings and then testified that there have been no changes in that hydrogeology from 1996 to today. Brockway then testified that he agreed with Owsley’s description of the current hydrogeology of these aquifers set forth in the Owsley Memorandum and that Owsley’s description of the hydrogeology also accurately described what existed in 1996. Eighth, Owsley described and testified to two distinct mechanisms that could create the “rising waters” at Arco, and Brockway testified those mechanisms remain consistent from 1996 to today. Last, Parkinson has not presented any evidence of any changes in the hydrologic conditions from 1995-96 to today that bear on the issues of injury to senior water rights or the local public interest.

Based on all of the evidence in the record in this matter, it is clear that the hydrologic conditions existing at the time of the consideration and denial in Transfer 4573 were not significantly different from those that exist today. Therefore, the Department must conclude that Parkinson is barred by the doctrine of *res judicata* from relitigating those same issues in the present proceeding and this Transfer must be denied.

**II. The Transfer Application will result in injury to other water rights.**

I.C. § 42-222 permits transfers of water rights provided “no other water rights are injured thereby”. This is a codification of the “no injury rule” developed in common law and based upon the premise that a junior water right holder has the vested right to a continuance of stream conditions as they existed at and subsequent to the time he made his appropriation. *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). The “injury” must be to a water right. *Colthorp v. Mountain Home Irrigation District*, 66 Idaho 173, 157 P.2d 1005 (1945); *In re: Johnson*, 50 Idaho 573, 300 P. 492 (1931); *Hard v. Boise City Irrigation and Land Co.*, 9 Idaho 589, 76 P. 331 (1904); *In Re Department of Reclamation*, 50 Idaho 573, 580, 300 P. 492 (1931)(“The term ‘injured’ as used in [I.C. § 42-222] applies to injury to the water right of another.”). An “injury” which will bar a change in a water right must be to one of the elements or attributes of a water right. *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 154 P.2d 507 (1954). If the Transfer Application will result in a “real and determinable” depletion of flows of water available for other water rights, “injury” will occur and the transfer must be denied. See, *In the Matter of Application for Transfer No. 5174 in the name of Dennis M. Baker and No. 5175 in the name of Huf-n-Puf Trust*, Final Order dated November 25, 1998 (the “Baker/Huf-n-Puf Transfer”).

**A. The proposed transfer will result in a real and determinable depletion of the flows of the Big Lost River and tributaries causing injury to senior water rights diverting from those sources.**

In his Remand Order, the Director described the injury analysis that should be done in this matter, where the proposed additional point of diversion is several miles up-gradient from the existing wells, as follows:

When the location of the proposed new well is eight miles up-gradient from the existing points of diversion, however, pumping from the new well could aggravate declines in ground water levels or might cause reductions in surface water flows supplying senior water rights. The law requires consideration and analysis of the

effect of pumping on senior water rights. As part of the remand, the hearing officer should broadly evaluate the effect the proposed transfer would have on senior water rights and not defer consideration of a required, statutory criterion.

*Remand Order*, p.4. The Director then requested Department technical staff prepare a memorandum addressing specific points relating to the relationship between ground water and Big Lost River flows, focusing on “rising water” which supplies water to the Big Lost River from the aquifer.

The Owsley Memorandum describes two “mechanisms” that facilitate the occurrence of “rising water”. The first is where the regional aquifer levels elevate to where they intersect land surface. The second occurs when incidental recharge encounters a clay layer resulting in a perched portion of the aquifer that eventually intersects land surface. Brockway and Wood both agreed with this analysis. The issue of injury to senior water rights in this proceeding must then consider the impact of the additional pumping from the Parkinson Well on these two “mechanisms” that cause water from the aquifer to become “rising water” which then supplies water to senior water right holders diverting from the Big Lost River and its tributaries.

The first step is to determine what, if any, impact pumping from the existing points of diversion has on “rising water”. The Owsley Memorandum states at p.15, “The impact on rising water from pumping at the existing points of diversion are likely not significant since existing points of diversion are located southwest of the area of rising water.” Brockway concurred with that statement in his direct testimony at the Supplemental Hearing “Simply because the presence of ground water is too deep at [the locations of the existing points of diversion].” He supported this testimony by comparing the land surface elevations in the Big Lost River, Ferris slough and other drains in the area with the static water levels in wells in the vicinity of the existing points of diversion concluding the latter are well below the former. (*See also, Exhibit P15, p.3*). Owsley

clarified this point in his concluding testimony at the Supplemental Hearing, stating, “[T]he existing POD’s are outside of my defined area of rising waters as Dr. Brockway testified, that that’s (sic) kind of up on an elevated slope and it’s above and outside of the area where we’ve historically seen rising waters.”

The next step is to determine if the additional pumping from the Parkinson Well will have an impact on the “rising water”. The Owsley Memorandum, responding to this very question as posed by the Director in the Remand Order, states, “Available data indicate that seepage from the Big Lost River and diversion infrastructure is the source of the rising water. Therefore, moving the separation line between the aquifer and the river up-valley will tend to reduce the volume of rising water near Arco.” and “Moving the point of diversion up-valley will cause greater impacts to the currently connected reach of the river which will move the connection point between the river and the aquifer further up the valley.” *Owsley Memorandum, p.15*. Owsley concluded as follows:

Approval of the proposed transfer will result in further separation of the Big Lost River and the aquifer near Moore. Since water in the river below this point is considered the source of the rising water near Arco, approval of this transfer will further reduce the likelihood that rising water will appear.

and,

The incidental leakage through delivery of the 4 cfs proposed in this transfer will not overcome the impacts from lowering the water table at the current hydraulic connection point. . . .

*Owsley Memorandum, p.17*. In his testimony at the Supplemental Hearing, Owsley stated the most critical zone for contributions to “rising water” is between Moore and Arco. On cross-examination, Wood testified that such additional ground water pumping from the regional aquifer will decrease “rising water” where the regional aquifer is contributing to the rising water (which is the first “mechanism” identified in the Owsley Memorandum). Wood then stated this impact on “rising

water” would be small but real.

Brockway identified a total of 199 Big Lost River and tributary water rights in the Moore to Arco reach totaling 212.8 cfs in decreed diversion rate, and listed 29 of those water rights from sources fed by rising water exclusively totaling 14.5 cfs in decreed diversion rate with priority dates as early as May 1, 1886. *Exhibit P15*, pp. 3-5. Brockway gave his expert opinion on this point as follows:

The proposed pumping [from the Parkinson Well] will reduce water levels in the regional aquifer, and will reduce the magnitude of water perched on localized clay layers in the uppermost portion of the aquifer. These effects will reduce the magnitude of “rising water” in the Big Lost River, to the extent it exists. A reduction in rising water equates to a real and actual reduction in surface water supply for water rights in the Big Lost River.

*Exhibit P16*, p.7.

In the *Baker/Huf-n-Puf Transfer*, expert testimony established that depletion of flow in the Big Wood River caused by the proposed transfer would be approximately 0.012% of the lowest mean annual flow of the Big Wood River over the past 70 plus years and the annual depletion would be nearly 25 acre-feet. In this matter, Brockway calculated that the net annual depletion of the aquifer from pumping 4 cfs at the Parkinson Well for 100 days was 595 acre-feet which is 2.3% of the ground water flow at Moore. *Exhibit P12*, p.27. These are “real and determinable” depletions which will cause real and actual injury to senior Big Lost River water rights. Under the standard for injury established in the *Baker/Huf-n-Puf Transfer*, this Transfer Application must be denied.

### **III. The Transfer Application is not in the local public interest.**

When, as here, there is a proposed change in a point of diversion, place of use, period of use, or nature of use, Idaho law requires that:

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 . . . the change is . . . in the local public interest as defined in § 42-202B, Idaho Code.**

I.C. § 42-222 (emphasis added). Section 42-202B(3) of the Idaho Code defines the local public interest 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.”

In his Remand Order at p.4, the Director states:

Finally, the local public interest may not be well served if water users holding water rights authorizing diversion at downstream locations are allowed to continue to move ground water points of diversion further upstream in the Big Lost River Basin. These new points of diversion, as a whole, cause upstream ground water declines resulting in additional hydraulic separation between ground water flows and flows in the Big Lost River. Furthermore, there is no evidence that Parkinson cannot pump ground water at the location of the present points of diversion. Parkinson may just have to lift the water from a greater depth.

The Director then stated that after the additional evidence is submitted, the hearing officer must address the local public interest criterion through four specific inquiries, holding Parkinson responsible for the burden of proof:

1. *Is ground water unavailable at the location of the existing points of diversion?*

Parkinson simply failed to even attempt to address this question, so there remains NO evidence that he cannot pump ground water at those existing points of diversion.

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?* Brockway performed an analysis of groundwater pumping, aquifer levels, and streamflow data and determined with a high degree of certainty that groundwater levels are the primary cause of reduced groundwater

levels and hence reduced gain to the Big Lost River, and that additional pumping would further reduce the gain and inhibit or delay any potential reconnection of the aquifer with the river near Moore. *Exhibit P12*, pp.15-27. Brockway gave his opinions that,

A robust statistical analysis provided in Brockway (2012) ... indicates that a significant relationship between aquifer levels and both streamflow and pumping exists, but that groundwater pumping is the primary factor influencing aquifer water levels.

*Exhibit P16*, p.7, and

No matter how the data is evaluated, the relationship between groundwater pumping and aquifer levels is stronger than the relationship between streamflow and aquifer levels.

*Id.*, p.10.

Brockway also stated that,

The regional water table has historically been connected with the Big Lost River in the Moore area as recently as 1998, corresponding with the period during which the groundwater levels last approached historic levels due to the wet years of the late 1990s. With proper management of groundwater and an extended period of wet years, the connection near Moore might be reestablished. This reestablishment could be delayed or prevented due to the drawdown caused by the proposed pumping as shown in Brockway (2012), Figure 5.

*Exhibit P15*, p.2, and,

The groundwater and surface water systems are connected, but the reach gain which has historically provided a portion of the water supply in the Big Lost River below Moore has been eliminated by the declining groundwater levels. The reduction in surface water diversions due to this effect is approximately 13,000 acre-feet/year in normal years, and 20,000 to 30,000 acre-feet/year in low water years. Additional pumping from the aquifer will exacerbate this shortage and delay any incipient reconnection if groundwater levels recover, resulting in larger depletions of surface water supply for senior rightholders than would otherwise occur.

*Exhibit P12*, p.33. Wood disagreed with these opinions but did not present his own statistical analysis to refute them. The evidence supports a finding by the Department that existing

pumping caused ground water level declines that have (a) dried up portions of the Big Lost River, and (b) decreased the quantity of water available to senior water right holders.

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?* In response to the specific factual question posed by the Director in his *Remand Order* regarding quantities of water diverted for ground water recharge over the past 20 years, Owsley identified the annual managed recharge over the past four years, based on records of the current watermaster, to range from approximately 8000 acre-feet to approximately 25,000 acre-feet. Owsley noted records of the previous watermaster included incidental recharge and thus were not useful. Wood's comment on this question is, "Although interesting an important work; *this question is not germane to this water transfer application*. It is answered in the Owsley Report." *Applicant's Exhibit 20*, p.10 (emphasis added). Parkinson thus chooses to ignore this issue claiming, instead, it is not relevant despite specific direction from the Director.

4. *Is it in the local public interest to increase risk to junior water users of a delivery call that could result in curtailment?* All of the evidence points toward a conclusion that the increased ground water pumping requested by this transfer application will reduce water available to senior surface water right holders which necessarily means it will increase the risk of a delivery call against other ground water pumpers in the vicinity of the Parkinson Well. The only evidence Parkinson chose to present which relates to this inquiry is the May 2, 2103 IDWR letter regarding mitigation pursuant to Basin 34 Rule 50. His position appears to be that there is

no such risk since any delivery call can always be mitigated and avoided by simply paying the amounts required under Rule 50.

Parkinson has not met his burden of proof on any of these legal inquiries which form the overall inquiry of whether or not his transfer application is "in the local public interest."

Therefore, the Department must conclude that it has not been established that the diversion of the additional 4 cfs of water from the Parkinson Well requested by the Transfer Application "is in the local public interest." On that basis, the Transfer Application must be denied.

### CONCLUSION

The Department should conclude that the doctrine of *res judicata* bars Parkinson from relitigating the issues of injury to other water rights and local public interest which he litigated in Transfer 4573. If the Department disagrees on this legal point, the evidence supports a finding that the Transfer Application will result in injury to senior Big Lost River water rights under the standard established in the Baker/Huf-n-Puf Transfer and is not in the local public interest. Therefore, the Transfer Application must be denied.

Dated this 5<sup>th</sup> day of September, 2013.

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By:   
James P. Speck

### CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of September 2013, I served a true and correct copy of the within and foregoing document upon the persons named below in the manner noted:

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