

Kirby A. Jensen
 2781 N 3375 W
 Moore, Idaho 83255-8715
 Telephone: 208-589-5472
 Facsimile: 208-527-3750
 Email: kirby@ida.net

RECEIVED

JAN 21 2014

Department of Water Resources
 Eastern Region

**BEFORE THE DEPARTMENT OF WATER SOURCES
 OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION) PETITION FOR
 FOR TRANSER NO. 77610 IN THE) RECONSIDERATION OF
 NAME OF PARKINSON FARMS) SECOND PRELIMINARY ORDER
) APPROVING APPLICATION
) FOR TRANSFER
 _____)**

On January 7th, 2014 Hearing Officer James Cefalo issued a Second Preliminary Order approving Application for Transfer # 77610 in the name of Parkinson Farms (hereafter referred to as "the Order"). Kirby Jensen hereby files a Petition for Reconsideration of the Order with the following rational.

My apologies to the Hearing Officer and the Other Parties for failing to communicate better in the previous actions. It is with the greatest respect for your opinions and interpretations that I disagree with the Order. Following are items which the Hearing Officer may want to reconsider or has perhaps failed to consider.

My motives for protesting this application and subsequent actions in that regard are only altruistic. My concerns are for the welfare and interests of the residents of the valley in general and have no ill will toward the Parkinsons. Having lived in this valley over 60 years and observing the changes which have taken place, there may be some value in sharing that knowledge with the Hearing Officer in his decisions regarding this application for transfer.

In the Final Order issued by Director Higginson, August 7th 1990, page 2, No. 5, 4th sentence, he says; "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 the water supply available for use at another location either inside or outside the basin at some later time." (underline added)

At the second hearing, Dr. Brockway was asked, by myself, if he agreed with that statement. His reply, "It's just simple math". In a nutshell, this transfer will do just as Director Higginson explained, the increased diversion proposed at the new point of diversion will decrease the water supply to those down gradient of it. And because the

true connection between the new point of diversion and the original points of diversion is unknown, if there is one, could result in this new diversion being from a different source.

Yes, in general terms the source is the same, the Big Lost River Drainage. However true connectivity of the water available at the new point of diversion and the original points of diversion were never discussed and may not exist. Either way, this new point of diversion is a new diversion up flow of those below it.

Approving this application will only further the interests of Parkinson Farms and will do nothing to further the public interests, and is, in my opinion, contrary to the public interests as it will decrease an already scarce, or inadequate supply of water in the lower portion of the valley. Testimony was provided by three witnesses that they have been deprived of their water for many years.

Although well intentioned, approving this application with the advancement of priority date could be described as a "paper promise". For it has been established at the second hearing that there is little if any regulation of the diversion rates of wells. Let alone any active administration of wells by priority date.

Parkinson Farms is only one of several who are attempting to move their points of diversion further up the source. A couple of years ago, Telford Lands applied for one on the west side of the valley, and currently have an application on the east side in close proximity to this transfer. There are water bank transfers currently existing that will ultimately result in transfer applications. And a notice was just posted in the Arco Advertiser this week, of an application to stack all points of diversion belonging to one individual. Stacking of these rights could be tantamount to many transfers.

Below are some additional thoughts why it may be best to reconsider the approval of this transfer.

The Amended Moratorium Order, Eastern Snake River Plain Area, April 30th, 1993

The Order established a moratorium on "new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake River Plain Area and all tributaries thereto". (underline added)

1. The Hearing Officer may want to consider that this transfer is in fact a new appropriation of the ground water source that continues down gradient and supplies water to users who would otherwise be unaffected by the original diversions, or in close proximity there to.
2. The "Eastern Snake River Plain Area and all tributaries thereto" encompasses a large area. Individuals with water right interest down gradient of the new proposed point of diversion and within the Big Lost River drainage would be similarly situated with other individuals protected by the moratorium.
3. The equal protection clause of Amendment XIV of the Constitution of the United States:

“nor shall any State... deny to any person within its jurisdiction the equal protection of the laws.”

4. The Hearing Officer may want to reconsider the effect of this transfer on those who are down gradient of the new point of diversion. It would seem that the 14th amendment ensures them equal protection from new diversions of the water source that serves them.
5. Perhaps there is wording in the Moratorium Order that is in violation of the 14th amendment.

The Order also establishes criteria for considering applications for transfer. The last sentence of the Order: “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”. (underline added)

1. Was mitigation or compensation for prior water rights ever proposed by the applicant? If none were, perhaps this application should have never been considered.
2. Article XV Water Rights of the Constitution of the State of Idaho states in part:
“such person...shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved”
3. At the second hearing, three witnesses, who have lands south of the new point of diversion, testified that they have been denied use of their water for many of the years since the early 90s.
4. These same individuals also testified that they have received no mitigation to compensate for lack of their water.
5. The Hearing Officer may want to reconsider adding a new point of diversion up gradient or up stream of them, as it may be considered a further violation of their water rights as guaranteed by the Idaho Constitution.

Idaho Codes 44-222 and 44-226

Statute 42-226 states in part; “The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, 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 as may be established by the director of the department of water resources as herein provided....

All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use.” (underlines added)

1. To gain an understanding of this statute, some key words have been underlined. Those words are appropriation, allotment, development and protected.
2. The water rights that are the subject of this transfer application have already been appropriated, allotted and developed.
3. The word protected would seem to be in context with the appropriation, allotment and development of the ground water resources.
4. Nowhere in this statute is the term or concept of injury addressed.
5. The Hearing Officer may want to reconsider applying this statute to transfers.

Statute 42-222 states in part; "Any person... who shall desires to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.... 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," (underline added)

1. It would seem to be clearly stated that 42-222 is the statute relevant to transfers and that 42-226 is relevant to appropriation.
2. "Provided no other water rights are injured thereby" seems to clearly state a requirement of approving a transfer.
3. As mentioned earlier, the current Moratorium Order requires mitigation or compensation for prior water rights. To my knowledge, none has been proposed in the Order.
4. Perhaps the Hearing Office may want to reconsider approving the transfer because without mitigation or compensation it would seem impossible for Parkinson Farms to divert more water upstream from the original points of diversion without affecting others using that same water source.

FUNDAMENTAL DIFFERENCES IN PERCEPTIONS OF THE AQUIFER

It would appear the Hearing Officer views the Big Lost River Aquifer (hereafter referred to as "the aquifer") as being similar to a lake, reservoir or a confined aquifer.

Let's suppose we look at the Big Lost River drainage as just that, a drainage. In which there are various ground-waters, aquifers or sub-aquifers, being very diverse, having many characteristics and dynamics. Such as: (including supporting evidence)

1. **Constantly percolating and/or flowing down gradient, unless intersecting something of a confining nature.**
 - a. Order page 9, Exhibit IDWR 11, (natural flow rights receive water from the drain off of this water table)
 - b. Order page 9, Exhibit IDWR 12, (required to supply the capacity of the underground outlets from the valley)

- c. Order page 9, Exhibit IDWR 12, (groundwater inflow into the river and adjacent channels and provides a substantial addition to the supply available late in the season)
- d. Exhibit IDWR 12, page 245, 3rd sentence from the bottom, (the main underflow of the valley escapes through the lava and follows the present surface channel)
- e. Exhibit IDWR 12, page 246, 3rd paragraph, 2nd sentence from the bottom, (keeping pace with the downstream advance of the water in the surface channel)
- f. Exhibit IDWR 12, page 247, 3rd paragraph, 2nd sentence, (the creek receives inflow from the ground water of the main valley)
- g. Exhibit IDWR 12, page 247, 4th paragraph, 2nd sentence, (in which the river receives ground-water inflow)
- h. Exhibit IDWR 12, page 247, 4th paragraph, 2nd to last sentence, (corresponding to a restriction in the flow of ground water beneath them)
- i. Exhibit IDWR 12, page 247, 5th paragraph, 1st sentence, (much water escapes under and around the dam)
- j. Exhibit IDWR 12, page 247, 5th paragraph, 2nd sentence, (this water returns to the river above the narrows)
- k. Exhibit IDWR 12, page 248, 1st paragraph, 3rd sentence, (rate of underflow is nearly in equilibrium with the supply of water)
- l. Exhibit IDWR 12, page 248, 2nd paragraph, 1st sentence, (groundwater level drops rapidly below the river level)
- m. Exhibit IDWR 12, page 248, 2nd paragraph, 2nd sentence, (water again rises and flows into the river channel)
- n. Exhibit IDWR 12, page 249, 1st sentence, (approximately 109,000 acre-feet annually moved underground past the Moore Dam)
- o. Exhibit IDWR 12, page 249, 3rd sentence from the last, (part of this underflow leaves the valley under the land of the Utah Construction Co., west of Arco at great depth)
- p. Exhibit IDWR 12, page 250, 1st sentence, (return flow rises in the river channel and in several spring-fed creeks a mile or two above Arco)
- q. Exhibit IDWR 12, page 250, 2nd paragraph, 2nd sentence, (the main ground-water flow continues southward beneath the lavas)
- r. Exhibit IDWR 12, page 253, 4th sentence, (main ground-water flow was found)
- s. Exhibit IDWR 12, page 253, 5th sentence, (the portion of the ground-water flow)
- t. Exhibit IDWR 12, page 253, 6th sentence, (the largest flow down the valley)
- u. Exhibit IDWR 11, page 1, last sentence, (the large losses to the underground flow)
- v. Exhibit PK 22, page 5, 2nd to last paragraph, 4th sentence, (ground water continues down slope)
- w. Exhibit PK 22, page 6, 1st sentence, (natural discharge...as the ground water leaves the basin south of Arco)

- x. Exhibit PK 22, page 6, last paragraph, 2nd sentence, (great volumes of water vanish...and emerge in the channel)
- y. Exhibit PK 22, page 11, 3rd paragraph, 3rd sentence, (lowest levels...late winter and early spring)
- z. Exhibit PK 22, Page 21, 2nd paragraph, 2nd sentence, (underflow from big lost river moves southward)
- aa. Exhibit PK 22, Page 21, 2nd paragraph, 3rd sentence, (425 cfs is the ground-water outflow at the mouth of the basin south of Arco)
- bb. Exhibit PK 22, Page 26, #3, 1st sentence, (alter the ground-water hydraulic gradient)
- cc. Exhibit PK 22, Page 27, 2nd sentence, (tributary ground water)
- dd. Exhibit PK 22, Page 28, #5, 1st sentence, (fact that ground water is leaving the basin)
- ee. Exhibit PK21, Page 8, 5th sentence, (308,000 acre-feet were discharged as subsurface flow)
- ff. Exhibit PK21, Page 40, 1st sentence, (ground-water underflow to the plain)
- gg. Exhibit IDWR 10, page 3, 1st paragraph, 6th sentence, (strongly influence lateral movement of ground water)
- hh. Exhibit IDWR 10, page 3, 5th paragraph, 2nd sentence, (relatively steeper hydraulic gradient)
- ii. Exhibit IDWR 10, page 5, 4th paragraph, 1st sentence, (the direction of ground water flow is north to south)
- jj. Exhibit IDWR 10, page 5, 4th paragraph, 3rd sentence, (hydraulic gradient though the valley)
- kk. Exhibit IDWR 10, page 5, 4th paragraph, 3rd sentence, (and the quantity of water moving through the aquifer)

2. Having no general static level.

- a. Consider Exhibit PK 16, water levels in six USGS well measurements in 2009 with elevations from low to high of 4778, 5161, 5265, 5279, 5420 and 5685, with the highest being 5 miles north of Darlington and the lowest being 2 miles north of Arco.
- b. Exhibit IDWR 12, page 245, 2nd sentence from the bottom, (the relationship between the water table and the land surface differs from place to place in response to the geology)
- c. Exhibit IDWR 12, page 246, 4th paragraph, last sentence, (the creek usually dries up at its mouth early each winter, owing to the lowering of the adjacent water table)
- d. Exhibit IDWR 12, page 249, 3rd sentence from the last, (part of this underflow leaves the valley under the land of the Utah Construction Co., west of Arco at great depth)
- e. Exhibit PK21, Page 46, last sentence, (location of the steep water table decline)

3. **Having varied rates of flow, either horizontal, vertical or lateral, and at various elevations.**
- a. Exhibit IDWR 12, page 246, 3rd paragraph, 2nd sentence from the bottom, (keeping pace with the downstream advance of the water in the surface channel)
 - b. Exhibit IDWR 12, page 248, 1st paragraph, 3rd sentence, (rate of underflow is nearly in equilibrium with the supply of water)
 - c. Exhibit IDWR 12, page 248, 2nd paragraph, 1st sentence, (groundwater level drops rapidly below the river level)
 - d. Exhibit IDWR 12, page 249, 3rd sentence from the last, (part of this underflow leaves the valley under the land of the Utah Construction Co., west of Arco at great depth)
 - e. Exhibit IDWR 12, page 253, 5th sentence, (the portion of the ground-water flow)
 - f. Exhibit IDWR 12, page 253, 6th sentence, (the largest flow down the valley)
 - g. Exhibit PK 21, page 9, 2nd to last sentence, (relatively small amount of under flow, 15cfs)
4. **Having varied water levels and depths.**
- a. Exhibit PK 13, page 2, paragraph 3, 5th sentence, (245 foot head difference)
 - b. Exhibit PK 13, page 3, 5th sentence, (noted several wells where cascading water was occurring in them)
 - c. Exhibit IDWR 10, page 5, 4th paragraph, last sentence, (water levels in these wells are higher than the water levels in the deeper wells in the area)
5. **Difficult to predict or duplicate how soon or how much a change in one area will affect another.**
- a. Exhibit IDWR 12, page 255, 2nd paragraph, 2nd sentence, (practically any plan will modify to some extent the existing ground-water situation and will thus affect certain existing rights adversely)
 - b. Exhibit IDWR 10, page 14, last sentence, (information for quantifying the impacts to each individual aquifer subunit is lacking)
 - c. Exhibit IDWR 10, page 5, 1st sentence, (difficult to identify due to the heterogeneity of the alluvial deposits, and the interconnection within wells completed at various depths)

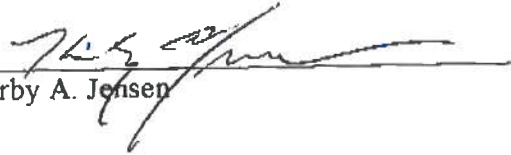
Why emphasize these points? Because this transfer would seem to create an additional interruption to the subterranean water flow which supplies water to other water rights, both surface and ground, between the new point of diversion and the original ones. Essentially being equivalent to a new up gradient or up flow appropriation.

Again, approving this transfer, at this time, with the condition of advancing the priority date as a protection to senior water right holders may be inappropriate and/or offensive to other senior water right holders. As there is currently a lack of measurement and/or control of ground water diversions in Basin 34, or any established reasonable

pumping levels, or any other active administration of ground water rights. These facts are well documented.

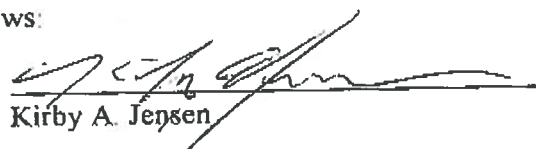
Thanks again for your time and for reconsidering the approval or denial of Application for Transfer # 7761.

Dated this 21st day of January, 2014


Kirby A. Jensen

CERTIFICATE OF MAILING

I certify that on this 21st day of January, 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

1. Original to:

James Cefalo
Department of Water Resources
900 N. Skyline Drive
Idaho Falls, Idaho 83402

(X) First Class Mail
() Hand Delivery
(X) Facsimile
() Overnight Mail
() Email

2. Copies to:

Director, Gary Spackman
Department of Water Resources
PO Box 83720
Boise, Idaho 83720-0098

(X) First Class Mail
() Hand Delivery
() Facsimile
() Overnight Mail
() Email

Parkinson Farms
2253 North 3100 West
Arco, Idaho 83213

(X) First Class Mail
() Hand Delivery
() Facsimile
() Overnight Mail
() Email

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

(X) First Class Mail
() Hand Delivery
() Facsimile
() Overnight Mail
() Email

Darrell L. McDonald
P.O. Box 246
Arco, Idaho 83213

(X) First Class Mail
() Hand Delivery
() Facsimile
() Overnight Mail
() Email

RECEIVED

JAN 21 2014

Department of Water Resources
Eastern Region

Fax Cover Sheet

To:

James Cefalo, Idaho Department
of Water Resources

Date:

1/21/2014

Fax Number:

208-525-7177

Number of pages, including cover sheet:

10

From:

Kirby A. Jensen

Phone:

208-589-5472