

**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)	ORDER REMANDING CONTESTED
_____)	CASE TO HEARING OFFICER

On October 12, 2012, Kirby A. Jensen (“Jensen”) filed a *Petition for Review of the Preliminary Order* issued on August 22, 2012 by hearing officer James Cefalo (“the hearing officer”). The stated basis of the petition is that the “transfer would be equivalent to a ‘new appropriation’ and could affect those who have water rights down gradient of the new point of diversion and up gradient of the original point of diversion . . .” The petition also raises an issue of Equal Protection under the 13th Amendment of the United States Constitution. The *Petition for Review of the Preliminary Order* is interpreted as exceptions filed with the Director of the Idaho Department of Water Resources (“Director”) pursuant to IDAPA 37.01.01.730.02.c. and will hereafter be referred to as “the exceptions.”

A *Memorandum in Support of Petition for Review of the Preliminary Order* was filed with the exceptions. The memorandum discusses the integral relationship between ground water and surface water in the Big Lost River Basin. The director determines that the assertion that the application for transfer is equivalent to a new appropriation was intended to raise a question about the possible depletions to flows in the Big Lost River and tributary springs caused by additional up-gradient diversion of ground water. For the reasons described below, the Director remands this matter to the hearing officer pursuant to IDAPA 37.01.01.730.02.d for additional factual development and consideration.

Impact of the Proposed New Point of Diversion on Existing Surface Water Rights

Finding of Fact number 20 of the hearing officer’s *Preliminary Order Approving Application for Transfer* (“the preliminary order”) states:

Approval and completion of the proposed transfer of water rights 34-4008 and 34-2497 may result in more water in the Big Lost River aquifer. Currently, Mr. Parkinson has the authority to divert and use the full amount of water listed in rights 34-4008 and 34-2497. If the pending transfer is approved, and 3.17 cfs under rights 34-4008 and 34-2497 is diverted from the Parkinson Well, roughly half of the water will be lost during conveyance. A large portion of this conveyance loss is due to

seepage losses, resulting in direct returns to the Big Lost River aquifer. The net amount of water from the aquifer actually used by Parkinson would be less than is currently authorized.

The hearing officer's speculation that diversion from the proposed point of diversion "may result in more water in the Big Lost River aquifer," is apparently based on an estimate of percolation of water pumped from the proposed well when it is delivered through surface canals to the Parkinson place of use.

The above reasoning assumes that the geologic formations and hydrogeologic conditions underlying the two locations of the existing points of diversion and the proposed point of diversion are similar, and that water diverted from the new point of diversion is identical to water diverted from the existing, authorized points of diversion. In contrast, the record establishes that:

- The aquifer in the area of the Parkinson Well is comprised of "a series of unconsolidated gravels and sands with minor layers of clay." (Wood Report, 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." Finding of Fact no. 29.
- In 2010, the ground water level at the location of the proposed new point of diversion was approximately 42 feet below land surface.
- Prior to the advent of significant ground water pumping, ground water in the area of the proposed point of diversion and surface water in the Big Lost River were hydraulically connected.
- There is a strong correlation between flow in the Big Lost River and ground water levels in the aquifer. Finding of Fact no. 28.
- Ground water levels in the area of the proposed new point of diversion have been increasing in recent years. If the rising ground water level trend continues, the ground water and surface water in the Big Lost River will once again hydraulically connect.
- The proposed point of diversion was reconstructed in 2010. The well casing is perforated through its entire length from 30 feet to its bottom depth of 239 feet. Ground water enters the casing through the entire length of water-saturated strata, interconnecting any separation caused by "minor layers of clay."
- There is no evidence that ground water is unavailable at the existing points of diversion to fully supply the quantity of water authorized to be diverted by the Parkinson water rights.

In addition, the following information is known or has been reported to the Department:

- In recent years, the Big Lost River has flowed near Arco, Idaho, even though the river might be dry upstream. These flows are locally known as "rising waters," and have historically been the source of water to satisfy senior surface water rights.
- The Big Lost River aquifer is comprised of various aquifer units. The ground water level with respect to land surface declines in each of these units, suggesting separation between water bearing units. The separation is probably caused by the "minor layers of clay."

- In recent years, water users in the Big Lost River Basin have diverted significant quantities of surface water from the Big Lost River for ground water recharge. The purpose of the ground water recharge is to raise ground water levels and restore, where possible, flows in the Big Lost River.
- The direction of the ground water gradient is from the north to the south. It is very possible that shallow ground water in the area of the proposed point of diversion encounters one or more of the layers of clay and contributes to the “rising waters” down-gradient of the proposed point of diversion and downstream in the Big Lost River.
- Ground water levels at the location of the existing points of diversion are deeper than ground water levels at the location of the proposed new point of diversion.
- Water levels in the area of the existing Parkinson wells are deeper than water levels at the location of the proposed point of diversion.

Given the above information that is within the record or outside the record but known to the Department, the statement in finding of fact no. 20 that “[a]pproval and completion of the proposed transfer . . . may result in more water in the Big Lost River aquifer” is overly simplistic and does not take into consideration the information cited above. The approval and completion of the proposed transfer could also result in a reduction of water in the Big Lost River aquifer that supplies water to existing surface water right holders. The uncertainty of the hearing officer’s finding calls into question whether the applicant satisfied its burden of proof at the hearing. At a minimum, there are germane facts on this issue that were not considered by the hearing officer. This matter should be remanded to the hearing officer for additional factual development and consideration.

Delivery Call as a Substitute Remedy for Injury Analysis

Paragraphs 14 of the Preliminary Order section titled “Evaluation Criteria/Analysis” stated the following:

14. The protestants raised a concern that the aquifer is being “mined” or “depleted.” The Brockway Report includes extensive analysis of the current status of the Big Lost River aquifer. A transfer proceeding is not the proper arena for addressing basin-wide declines in aquifer levels. Questions of aquifer depletion or over-appropriation of a water source resulting in injury to senior right holders should be addressed within a delivery call before the department.

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.

When the Department is considering an application for transfer proposing an additional point of diversion, the most likely analysis of injury is the effect pumping from the new well would have on existing ground water rights. 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 surface 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.

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 farther 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 the ground water 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.

Prior Final Order by the Department

In the early 1990's, Parkinson filed application for transfer no. 4373 to add a point of diversion to water rights nos. 34-2497 and 34-4008 (and two other water rights). The new point of diversion was to be located in the NESWSW, Section 34, T5N, R26E. These are the identical water rights sought to be transferred by the present application for transfer and the identical well location of the new point of diversion sought by the present application for transfer.

The earlier application for transfer no. 4373 was denied by final order dated May 30, 1996. The current application for transfer is a second, identical attempt to add a point of diversion that was once denied by the Department.

There is a question about whether Parkinson should be allowed to pursue a second application for transfer identical to the original, denied application for transfer. The better operative question is: What hydrologic facts have changed since the original denial that would justify the Department in considering a new, but identical application?

Findings of Fact nos. 17 and 18 in the May 30, 1996 final order state the following:

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 Basin 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 withdrawals from a well located at the proposed well site.

These findings in a previous 1996 final order for an identical application for transfer should be presumed correct, given the hydrologic conditions that existed at the time of the 1996 decision. The doctrine of res judicata bars parties from relitigating factual and legal issues that were decided in previous proceedings. See *Aldape v. Akins*, 105 Idaho 254, 256, 668 P.2d 130, 132 (Ct. App. 1983) (“The doctrine of res judicata precludes the relitigation of a matter previously adjudicated.”). The doctrine of res judicata applies to administrative proceedings of the Department. *Sagewillow, Inc. v. Idaho Dept. of Water Res.*, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003). 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. Merely attempting to show that the previous findings were incorrect is not sufficient. Parkinson had an opportunity to factually justify its application for transfer in 1996 under the then existing hydrologic conditions. It did not satisfy its burden of proof in 1996.

The preliminary order issued by the hearing officer does not require Parkinson to establish why the Department should consider an identical application for transfer. This should be considered on remand as well.

Department Staff Memorandum

The relationship between ground water and surface water in the Big Lost River Basin is an important consideration in determining how further water use in the basin should develop. Facts about the relationship should be thoroughly investigated and analyzed. The hearing officer should request a memorandum from the Department’s technical staff. Department staff should, at a minimum, attempt to answer the following questions:

- What is the hydrogeology of the Big Lost River aquifer and any aquifer subunits from approximately Moore, Idaho, downstream to a location south of Arco, Idaho, where the gradient of the aquifer suddenly steepens, and becomes part of the larger Snake River Plain Aquifer?
- Is the water in sub-aquifers of the Big Lost River aquifer the source of the “rising waters” in the Arco area, and, if not, what is the source of the rising waters?
- Is the water in the various sub-aquifer units commingling in the deepened Parkinson well because of the decreasing gradient with depth?
- What is the impact of pumping from the proposed point of diversion on each of the sub-aquifer units?
- What is the impact of pumping from the proposed point of diversion on rising water in the Big Lost River?
- What would be the impact on rising waters of pumping Parkinson’s water rights from the existing points of diversion?
- Over the last 20 years, what are the quantities of water diverted by Water District 34 and delivered for ground water recharge?

Following submittal of the staff memorandum, the parties should be granted an opportunity to augment the record regarding any of the above factual issues and any additional factual issues related to questions of the hydrologic impacts of the proposed transfer. Department staff who prepared the memorandum may be deposed. The parties may choose to augment the record by written documentation, or may request a hearing to augment the record. If a hearing is held to augment the record, Department staff will be available to testify, within reasonable limits.

After the additional evidence is submitted, the hearing officer should apply the following legal inquiries to the facts, holding the applicant responsible for its burden of proof.

- Will the proposed diversion injure other water rights by causing a reduction in rising waters in the Big Lost River?
- Is approval of and diversion from the additional point of diversion in the public interest?
 - Is ground water unavailable at the location of the existing points of diversion?
 - 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?
 - 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?
 - Is it in the local public interest to increase the risk to junior water users of a delivery call that could result in curtailment?

- Should a prior decision by the Department denying an almost identical application for transfer filed by Parkinson, after a hearing and issuance of a final order, affect whether this application for transfer should be approved?

ORDER

IT IS HEREBY ORDERED that the above titled matter is remanded to the hearing officer.

IT IS FURTHER ORDERED that the hearing officer shall issue an order to augment the record and receive additional evidence into the record in accordance with the narrative set forth above and the procedural rules of the Department.

IT IS FURTHER ORDERED that, following completion of augmenting the record, the hearing officer shall apply the law to the facts and issue an amended preliminary order.

Dated this 6th day of February, 2013.


Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2013, a true and correct copy of the document described below was served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document Served: **ORDER REMANDING CONTESTED CASE TO HEARING OFFICER**

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



Deborah J. Gibson
Assistant to the Director