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Department of Water Resources
Eastern Region

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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 77610 IN THE	)	
NAME OF PARKINSON FARMS	)	PETITION FOR
	)	RECONSIDERATION
<u>Parkinson Farms, Applicant.</u>	)	
	)	

Darrell L. McDonald ("McDonald"), by and through his counsel of record, James P. Speck of Speck & Aanestad, A Professional Corporation, hereby submits this Petition for Reconsideration of the Preliminary Order Approving Application for Transfer, dated August 22, 2012 (the "Order").

I. FINDINGS OF FACT

44. The Brockway Report includes a detailed analysis of the effects of ground water pumping on water levels in the Big Lost River aquifer. Dr. Brockway argues that the aquifer is over-appropriated, particularly in drought years, resulting in significant reductions in ground water levels over the last 25 years. Dr. Brockway testified that the aquifer is being depleted because the water level reductions in drought years are becoming more significant and the aquifer is not recovering during good water years.

McDonald's Response: The Applicant did not present any testimony to refute or even comment upon this section of the Brockway Report. Therefore, the finding of fact should be modified by adding "there is no evidence in the record to contradict or otherwise refute this oral and written testimony."

II. EVALUATION CRITERIA / ANALYSIS

4. Parkinson sufficiently demonstrated that the proposed transfer will not injure other water rights.

McDonald's Response: The Applicant did not present any evidence of the impact of the proposed transfer on nearby domestic wells. The Applicant bears the burden of proof to establish that "no other water rights are injured" by its proposed transfer. In particular, the Applicant bears the burden to show that pumping the additional water from the Parkinson Well will not cause the water level to decline in any domestic well drilled and in use prior to March 29, 1978, unless it is willing to provide compensation or mitigation to the domestic water right holder for the decline in water levels. Therefore, this statement should be changed to reflect that the Applicant has not met his burden of proof on the issue of injury to other water rights.

11. 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 levels" 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.

McDonald's Response: Dr. Brockway's report, in Figure 5 and Table 2, identifies domestic water rights from the IDWR database. The information provided was not based solely on well logs in IDWR's files. In fact, Table 2 lists the current owner in the IDWR database. Therefore, there is no reason to state that the domestic wells for these water rights "may" exist.

This portion of Paragraph 11 should be deleted or corrected.

12. There is not sufficient information in the administrative record to make a determination of 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.

McDonald's Response: This statement is incorrect. Dr. Brockway's report lists the current owners of domestic water rights taken from the IDWR database. No evidence was presented by any other party to the effect that any of these domestic water rights are no longer in use. The mere fact that Dr. Brockway testified he did not know whether any of these water rights had been "abandoned" is not evidence that they have, in fact, been abandoned. The burden of proof on the issue of injury to these domestic water rights is on the Applicant and it has not met that burden.

13. To qualify for protection of historic ground water levels under *Parker v. Wallentine*, a well owner must establish that the domestic well in question was in fact drilled prior to 1978, the water level in the well at the time the well was completed, the current water level in the well, and that the well continues to be used for domestic purposes. The administrative record for this case does not include sufficient information to make a *Parker v. Wallentine* determination. Further, none of the well owners are parties to the contested case. It is unlikely that a third party can assert protection under *Parker v. Wallentine* for a well owned and used by another person.

McDonald's Response: The evidence presented in Dr. Brockway's report and as testified to by Dr. Brockway at the hearing establishes that there are numerous domestic well water rights with priority dates prior to July 1, 1978, where the water level in those wells will be drawn down by the additional pumping resulting from the proposed transfer. Unless in the unlikely event those wells are drawing water from levels higher than what they were when the original wells were drilled, *i.e.* their historic pumping levels, any decline caused to the current water level in

such wells is injury to the domestic water right. The fact that none of the well owners are parties to this proceeding is irrelevant as the specific issue under Idaho Code § 42-222 is whether or not any other water rights are injured, not just the water rights owned by parties to the contested proceeding. The burden to establish no such injury will occur falls on the Applicant and it has not met that burden. Therefore, the statements in Paragraph 13 should be corrected accordingly.

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.

McDonald’s Response: This transfer application cannot be approved if “any” water rights will be injured by the proposed change. A basin-wide decline in aquifer levels due to current pumping will only be exacerbated by the addition of another 3.17 cfs diversion from the Parkinson Well. As noted in the Finding of Fact, such over-appropriation will result in injury to senior right holders. Idaho Code § 42-222 does not exclude the examination of this type of injury. Therefore, the analysis of aquifer depletion by Dr. Brockway in his report and oral testimony must be addressed in this Finding of Fact.

21. 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) likely applies to this case. No portion of water rights 34-4008 or 34-2497 has been lost to forfeiture.

McDonald’s Response: When the Applicant purchased the 50 acres in question, the mineral rights were specifically reserved by the State of Idaho. Therefore, the Applicant was well aware that the property might be mined in such a fashion that it would preclude the use of

water rights to irrigate that property. It was well within the Applicant's control to take steps to protect the water rights appurtenant to those 50 acres from forfeiture by transferring them to other property, requesting an extension to avoid such loss, or leasing those water rights to the Water Supply Bank. The forfeiture exception listed in Idaho Code § 42-223(6) does not apply to this set of facts.

III. CONCLUSIONS OF LAW

Parkinson met its burden of proof for the review criteria set forth in Idaho Code § 42-222. Water right 34-2490 must be excluded from the transfer approval because it describes a point of diversion outside of the Big Lost River aquifer and would result in injury to other water rights if it were allowed to be transferred. In order to prevent injury to other water rights, the transfer approval should include a condition that the 3.17 cfs transferred to the Parkinson Well carries a priority date of the date of this approval.

McDonald's Response: The Applicant has not met its burden of proof on the issue of injury to other water rights. Therefore, the Application for Transfer should be denied. In the alternative, it would be appropriate to impose a condition similar to that IDWR has imposed on new ground water right permits to protect pumping levels which would read as follows:

The right holder is responsible to insure that pumping under this water right does not directly cause the water level to significantly decline in any domestic well drilled and in use prior to March 29, 1978, or to cause the water level in any other well having a prior right to exceed a reasonable pumping level, unless the right holder provides reasonable compensation or mitigation to the prior water right holder for the reduced water levels as determined by the Director.

Dated this 5th day of September, 2012.

SPECK & AANESTAD
A Professional Corporation
Attorneys for Protestant Darrell L. McDonald

By


James P. Speck

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2012, I served a true and correct copy of the foregoing PETITION FOR RECONSIDERATION on the following persons in the manner designated below:

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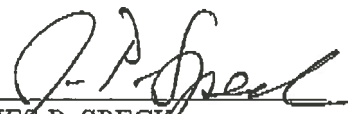
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Eastern Region

FAX COVER SHEET/MEMO

To:	Idaho Dept of Water Resources	Date:	9/5/12
Fax #:	(208) 525-7177	Pages:	8 , including cover
From:	James P. Speck		
Subject:	IN THE MATTER OF APPLICATION FOR TRANSFER NO. 77610 IN THE NAME OF PARKINSON FARMS		

COMMENTS:

Attached for filing in the above matter is a *Petition for Reconsideration*.