

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 77610 IN THE)	ORDER DENYING PETITIONS
<u>NAME OF PARKINSON FARMS</u>)	FOR RECONSIDERATION

On November 8, 2011, Parkinson Farms ("Parkinson") filed Application for Transfer No. 77610 with the Idaho Department of Water Resources ("Department"), proposing to add a point of diversion to ground water rights 34-4008, 34-2497 and 34-2490.

The transfer was advertised to the public beginning on November 17, 2011. Protests were filed by Seth Beal, Darrell L. McDonald, Norman Sowards, Darrell E. McDonald, and Kirby Jensen. Norman Sowards and Darrell E. McDonald are represented by James P. Speck, an attorney with the firm Speck & Aanestad. Mr. Beal withdrew his protest on May 7, 2012.

A pre-hearing conference was held on January 20, 2012. The parties were unable to resolve the issues of protest at that time and asked the Department to conduct a formal hearing. A hearing was held on May 17 and 18, 2012, in Arco, Idaho.

On August 22, 2012, the hearing officer issued a Preliminary Order Approving Application for Transfer ("Preliminary Order"). Protestant Kirby Jensen filed a Petition for Reconsideration and Memorandum in Support of Petition for Reconsideration (collectively referred to as the "Jensen Petition") with the hearing officer on September 4, 2012. Protestants Darrell E. McDonald and Norman Sowards, through their attorney James Speck, filed a Petition for Reconsideration ("Speck Petition") on September 5, 2012. The Jensen Petition and Speck Petition were filed in a timely manner. (Rule 730, IDAPA 37.01.01)

Issues Raised in the Jensen Petition

Mr. Jensen asserts that the Preliminary Order failed to address an argument raised in his protest and during the hearing relating to the applicability to this contested case of the 14th Amendment of the United States Constitution. Mr. Jensen argues that, if the transfer is approved, certain water users within the Big Lost River basin will not be afforded equal protection under the laws of the state of Idaho. The Jensen Petition implies that the hearing officer agreed during the hearing that a "sub-class" of water users would be created as a result of the proposed transfer.

Statements made by the hearing officer during the hearing, in an attempt to rephrase and understand the arguments being advanced by the parties, should not be construed as a decision on or agreement with the argument being advanced. Approval of this transfer application will not create a "sub-class" of water users. The evidence presented at hearing does not support the assertion that the protestants, or any of the water users in the Big Lost River basin, are being denied full protection under the laws of the state of Idaho.

The Jensen Petition also restates an argument raised by Mr. Jensen at hearing, that the pending application for transfer is barred by the 1993 Amended Moratorium Order. The Preliminary Order directly addressed this argument. The pending transfer application is not a new appropriation and is therefore not barred by the 1993 Amended Moratorium Order.

Issues Raised in the Speck Petition

The Speck Petition asks the hearing officer to accept Dr. Brockway's statements (from his report and his testimony) regarding depletion of the Big Lost River aquifer as fact because they were uncontested. Characterizing the depletion evidence presented by Dr. Brockway as uncontested is not accurate. During the hearing, there were multiple questions posed to Dr. Brockway by the hearing officer and by Parkinson regarding the methodology used by Dr. Brockway to arrive at his conclusion relating to aquifer depletion.

As stated in the Preliminary Order, the question of basin-wide aquifer declines is more appropriately raised in a delivery call. Parkinson has existing water rights from the Big Lost River aquifer that already constitute a portion of the overall annual diversion from the aquifer. Approval of Transfer 77610 does not increase the diversion rate authorized under Parkinson's water rights and does not increase the authorized diversion from the Big Lost River aquifer. If the Big Lost River aquifer is being depleted, as Dr. Brockway asserts, the depletion is a result of all of the ground water diversions from the aquifer, not solely a result of Parkinson's diversion. Restricting this and all future transfers within the aquifer based on a basin-wide depletion analysis is not supported by law or rule.

The Speck Petition raises a number of issues relating to *Parker v. Wallentine*, its applicability to this transfer application, and the burdens of proof under Idaho Code § 42-222 and under a *Parker v. Wallentine* analysis. In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Idaho Supreme Court determined that a later in time appropriator should be enjoined from pumping ground water for irrigation that almost immediately dried up a domestic well located nearby. The Court held that the water right for the domestic well was perfected prior to the irrigation water right and before the reasonable pumping level standard was applied to domestic uses by the Legislature in 1978, and that the domestic water right holder was entitled to the protection of the ground water pumping level existing prior to pumping by the junior appropriator.

In an administrative hearing for a transfer application, the applicant bears the burden of proving that the transfer will not injure other water rights. (Idaho Code § 42-222) However, if a protestant seeks the protection of *Parker v. Wallentine* that would insulate a water right from the reasonable pumping level standard of the Ground Water Act, the protestant must come forward with evidence establishing: (1) that the water was beneficially used prior to March 29, 1978 for domestic purposes, (2) the approximate pumping capacity of the well, and (3) the historical water levels in the well that must be protected. Without this information, the Department cannot evaluate the protestant's historical pumping level protection claim. Once the above information is provided

by the protestant, the burden of defending against the *Parker v. Wallentine* protection of ground water pumping levels is borne by the applicant.

“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*.” (Preliminary Order, page 9) It is not certain whether any of the domestic wells identified by Dr. Brockway are still in existence or are still in use. There is a distinct possibility that many of these wells have been deepened, replaced, or abandoned. If these wells do still exist, there was no evidence presented relating to the pumping capacity or historical pumping levels in the wells.

Even if the protestants were able to establish the three elements described above, the evidence presented at hearing suggests that the drawdown at most of the domestic wells identified by Dr. Brockway would be insignificant. As stated in the Preliminary Order, the drawdown estimates prepared by Dr. Wood and Dr. Brockway were nearly identical. Dr. Wood and Dr. Brockway estimated approximately 4 feet of drawdown at a distance of ¼ mile from the Parkinson Well as a result of this transfer. However, these drawdown estimates were based on an additional diversion rate of 4.00 cfs, rather than the 3.17 cfs authorized in the transfer approval. These drawdown estimates were also based on the assumption that the additional 4.00 cfs would be diverted for the full irrigation season and that there would be no contributions to the aquifer from surface water sources. Therefore, the actual drawdown at ¼ mile from the well will be much less than 4 feet.

The Speck Petition raises an issue relating to the mining activities taking place at the Parkinson’s irrigation place of use, which resulted in more than five years of non-use on some of the irrigated acres. Mr. Speck argues that the forfeiture exception set forth in Idaho Code § 42-223(6) does not apply to this set of facts because Parkinson could have taken steps to protect the water rights from forfeiture, such as leasing a portion of the water rights to the Idaho Water Supply Bank (“WSB”).

Although leasing the water rights to the WSB would have been a means to avoid forfeiture, the availability of the WSB option does not change the fact that the alteration of the water right place of use was outside of the control of Parkinson. The Speck Petition does not include any new information or any persuasive arguments relating to Parkinson’s non-use of water during the gravel excavation process. Evidence strongly suggests that Idaho Code § 42-223(6) does apply to Parkinson’s non-use of a portion of its water rights.

Finally, the Speck Petition proposes that, if the arguments raised in the petition are not accepted, the hearing officer should, in the alternative, add the following condition to Parkinson’s water rights:

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.

The condition proposed by Mr. Speck is simply a restatement of the legal principles governing ground water diversions within the state of Idaho. The Parkinson water rights are subject to Idaho Code § 42-226 and the *Parker v. Wallentine* decision, regardless of whether this condition is specifically included on the water rights. Although many of the conditions listed on water rights by the Department are simply restatements of Idaho law, in this particular case, there is no apparent necessity to add the proposed condition to Parkinson's water rights.

ORDER

IT IS HEREBY ORDERED that the Jensen Petition and the Speck Petition are DENIED.

Dated this 25th day of September, 2012.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of September 2012, I mailed a true and correct copy, certified and postage prepaid, of the foregoing ORDER DENYING PETITIONS FOR RECONSIDERATION to the person(s) listed below:



Sharla Cox
Administrative Assistant

US MAIL - CERTIFIED

RE: Order Denying Petitions for Reconsideration (Transfer No. 77610)

**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**

**Seth Beal
2827 North 3375 West
Moore, ID 83255**

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.