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	)))	**PRELIMINARY ORDER APPROVING APPLICATION FOR TRANSFER**

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. The parties offered testimonial evidence, expert reports, and other documents into the administrative record. After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Transfer Application 77610 proposes to add a point of diversion to three ground water rights: 34-4008, 34-2497 and 34-2490. The point of diversion proposed to be added to the rights is an existing ground water well owned and operated by Parkinson located in the NESWSW of Section 34, T05N, R26E ("Parkinson Well").

2. Currently, two water rights are associated with the Parkinson Well: 34-7176 and 34-12368. Right 34-7176 carries a 1977 priority date and authorizes the diversion of 7.80 cfs. Right 34-12368 is an enlargement of right 34-7176. Both water rights in combination are limited to a diversion rate of 7.80 cfs.

3. Water diverted from the Parkinson Well under rights 34-7176 and 34-12368 is open-discharged into the Island Canal, which flows into the East Side Canal. The water is then injected into the Big Lost River in the NWNW of Section 26, T04N, R26E and is re-diverted from the Big Lost River into the Munsey Canal in the same quarter-quarter. Water is delivered by the Munsey Canal to the irrigation place of use described in the rights.

IN FILE # 34-2497

4. Water rights 34-4008 and 34-2497 list the same three points of diversion, located in Section 11, T03N, R26E. These three wells are located approximately 8 miles south of the Parkinson Well. Right 34-4008 authorizes the diversion of 2.60 cfs. Right 34-2497 authorizes the diversion of 0.57 cfs. In combination, these rights authorize the diversion of 3.17 cfs.

5. One of the points of diversion described in water rights 34-4008 and 34-2497, the ground water well located in the SENE of Section 11, was drilled in 1970. The Well Drillers Report for the 1970 well shows that it was drilled 78 feet deep and intersected layers of sand, gravel, and clay. (Exhibit IDWR7) IDWR records do not include a well log for the other two ground water wells in Section 11, described in water rights 34-4008 and 34-2497.

6. Water right 34-2490 lists one point of diversion, located in Section 14, T03N, R26E. This ground water well is located approximately 9 miles south of the Parkinson Well. Right 34-2490 authorizes the diversion of 2.09 cfs.

7. The IDWR file for right 34-2490 includes a Well Drillers Report for a ground water well drilled under Permit No. G33113, which became licensed water right 34-2490. (Exhibit IDWR9) The well was drilled in 1966 for Ruland Burke, the owner of Permit No. G33113 at the time. The legal description listed on the Well Drillers Report is in error. There are no recorded ground water wells or water right points of diversion within the legal description listed on the Well Drillers Report.

8. The Well Drillers Report for the ground water well in Section 14 shows it was drilled 360 feet deep and intersected layers of clay, lava, and basalt. (Exhibit IDWR9) The lithology of the aquifer layers intersected by the 34-2490 ground water well is similar to the lithology of another well located in Section 14. (See Nelson Well Report, IDWR 7) The other well in Section 14 also intersected layers of clay and lava. (Id.)

9. Water right 34-2490 includes a condition which states: "This water right shall be administered as separate from the Big Lost River and its tributaries." The upper strata of the Big Lost River aquifer are primarily made up of unconsolidated alluvial material (clay, sand and gravel). (Testimony of Dr. Wood and Dr. Brockway) The Eastern Snake River Plain Aquifer ("ESPA") near Arco is comprised of clay, basalt, and lava. (Id.)

10. The ground water wells described in rights 34-4008 and 34-2497 divert water from the Big Lost River aquifer. The ground water well located in Section 14, T03N, R26E, described in right 34-2490, does not intersect or divert water from the Big Lost River aquifer.

11. The four ground water wells described in rights 34-4008, 34-2497 and 34-2490 do not produce the full diversion rate authorized under the water rights associated with the wells. (Testimony of Ralph Parkinson) Parkinson has not taken any actions to improve the yield from these wells. (Id.)

12. Water rights 34-4008 and 34-2497 authorize the irrigation of 255 acres in Sections 10 and 11, T03N, R26E. Water right 34-2490 authorizes the irrigation of 119 acres in Sections 14 and 23, T03N, R26E.

13. Water rights 34-7176 and 34-12368 combined authorize the irrigation of 885 acres. The place of use for water right 34-7176 includes the 255 acres described in water rights 34-4008/34-2497 and the 119 acres described in water right 34-2490.

14. The transfer application limits the amount of water being transferred to the Parkinson Well under the three water rights to 4.00 cfs. The application states that no more than 4.00 cfs of additional water will be diverted from the Parkinson Well.

15. The Parkinson Well was originally drilled in 1977 to a depth of 160 feet. (Wood Report, page 3) The original well was pump tested at 4200 gpm (9.36 cfs) for 9 hours and resulted in a drawdown in the well of 50 feet. The static water level in September 1977 was 20 feet below land surface. (Wood Report, attachment 1)

16. The Parkinson Well was deepened in 2010 to increase the water yield. (Testimony of Ralph Parkinson) In addition, the pump was replaced and the size of the bowls was increased. (Exhibit IDWR3) Prior to 2010, the Parkinson Well produced about 5.60 cfs. (Testimony of Ralph Parkinson) After the deepening and maintenance work, the Parkinson Well produced about 12.40 cfs, an increase in yield of about 6.80 cfs. (Id.)

17. The Parkinson Well is currently 239 feet deep with perforations in the bottom 209 feet of the well. (Wood Report, page 3) The static water level in the deepened well was 46 feet below land surface at the time the well was completed in January 2010. (Wood Report, attachment 1)

18. The Parkinson Well is monitored by Water District 34 and has been assigned WMIS (Water Management Information System) No. 187. WMIS records show the volume of water diverted from the Parkinson Well has varied from 613 acre-feet diverted in 2011 to 2,237 acre-feet diverted in 2002. Assuming a diversion rate of 7.80 cfs, the rate authorized by the existing rights at the Parkinson Well, 2,237 acre-feet equates to 145 days of pumping.

19. Some of the water diverted from the Parkinson Well is lost during conveyance to the Parkinson place of use. The exact percentage of conveyance loss was not established in the administrative record. Protestant Darrell L. McDonald, who conveys ground water a similar distance as Parkinson, is charged a 45% conveyance shrink by Water District 34.

20. 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.

21. Approximately 50 acres of the combined place of use for water rights 34-4008 and 34-2497 were not irrigated between 2006 and 2011. (Exhibit IDWR4) These acres are located in Sections 10 and 11, T03N, R26E. (Id.)

22. The 50 acres in question could not have been irrigated during that time period because the ground was being used as an open gravel pit. (Testimony of Ralph Parkinson) Parkinson purchased the property from the state of Idaho. (Id.) Within the sale agreement, the state of Idaho reserved the rights to the subsurface minerals, including gravel. (Id.)

23. The state of Idaho started extracting gravel from the site in 2004. (Exhibit IDWR4) By 2006, the full 50 acres was being used as a gravel pit. (Id.) In 2011, the gravel mining operation was concluded and the land was reclaimed. (Testimony of Ralph Parkinson) Parkinson did not receive any compensation from the gravel mining operation. (Id.)

24. Protestant Darrell E. McDonald owns a ground water well (known locally as the Toone Well) located approximately ¼ mile east of the Parkinson Well. The water rights associated with Mr. McDonald's well (34-2480A, 34-7028A and 34-7234) authorize a combined diversion rate of 6.60 cfs.

25. Protestant Norman Sowards owns a ground water well located approximately ½ mile north of the Parkinson Well. The water rights associated with Mr. Sowards' well (34-2302 and 34-7228) authorize a combined diversion rate of 4.12 cfs. Protestant Darrell L. McDonald has leased the place of use under water rights 34-2302 and 34-7228 from Mr. Sowards since 2008. (Testimony of Darrell L. McDonald)

26. Telford Lands LLC ("Telford") owns and operates two wells located 220 feet north of the Parkinson Well. (Applicant's Exhibit 7) Telford did not protest the pending transfer application. Telford was aware of the Parkinson transfer prior to the transfer application being filed. (Testimony of Ralph Parkinson; Wood Report, page 4)

27. The Big Lost River aquifer is a long, narrow valley and is confined on both sides by older, less-permeable rock layers. (Wood Report, page 3) The Big Lost River aquifer includes an upper layer of unconsolidated alluvial material, approximately 200-250 feet thick, which constitutes the main source for the ground water diversions from the aquifer. (Testimony of Dr. Wood; Brockway Report, pages 3-5) "The relatively young, unconsolidated alluvial deposits transmit large amounts of water, yielding large flows of water to wells." (Wood Report, page 2)

28. "At the mouth of the valley, the gradient drops sharply as the flow in the alluvial system discharges into the basalts of the Eastern Snake Plain Aquifer." (Brockway Report, page 5) "Seasonal and climatic cycles have a pronounced effect on flow in the [Big Lost River] and water levels in the aquifer." (Wood Report, page 3) There is a strong correlation between flow in the Big Lost River and ground water levels in the aquifer. (Id.)

29. 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." (Brockway Report, page 3 (citing Crosthwaite, 1970))

30. Parkinson hired Dr. Tom Wood of Clearwater Geosciences LLP to conduct "an assessment of the impact of adding an additional 200 inches (1796 gpm) to the [Parkinson Well]." (Wood Report, page 1) Dr. Wood filed an initial report with the Department in September 2011, prior to the filing of the transfer application. Dr. Wood submitted a revised report in October 2011. Dr. Wood prepared a final report in 2012, intended to replace the original and revised reports. The date on page 1 of the final report should be April 29, 2012. (See Wood Report, page 6)

31. Dr. Wood conducted a pump test between July 28 and August 1, 2011 at the Parkinson Well. (Wood Report, page 4) A well located ¼ mile south-southwest of the Parkinson Well was used as an observation well. (Id.) The results of the observation well were ultimately not used by Dr. Wood because of concerns of data reliability. (Testimony of Dr. Wood)

32. At the time of the pump test, the depth to water at the Parkinson Well was 32 feet. (Testimony of Dr. Wood) The Parkinson Well was pumped at an average rate of 5,117 gpm for four days. (Wood Report, page 4) Using the Cooper-Jacob solution for unconfined aquifers, Dr. Wood estimated the transmissivity of the local aquifer to be 35,000 ft^2/day and the storativity coefficient to be 0.12. (Id.)

33. Dr. Wood set up a model to evaluate the potential impacts to neighboring wells. Dr. Wood incorporated the following assumptions in his model: (1) The aquifer is 200 feet thick; (2) The aquifer in the area of the Parkinson Well is unconfined and is made up of permeable sand and gravel layers; (3) No-flow boundaries exist 5,750 feet to the east and 9,500 feet to the west of the Parkinson Well, representing the interface of the alluvial aquifer with the less-permeable rock layers of the mountains forming the Big Lost River Valley; (4) A no-flow boundary exists 21,600 feet to the south of the Parkinson Well, representing the point where water can no longer be drawn up-gradient to supply water to the well; and (5) The 4.00 cfs described in the transfer application would be diverted for 6 months (April 15 to October 15). (Wood Report)

34. Using the assumptions described above, Dr. Wood predicts the drawdown impact caused by the diversion of an additional 4.00 cfs from the Parkinson well would be 14 feet at the Parkinson Well and would be 4 feet at a distance of ¼ mile from the well.

35. Dr. Wood's drawdown estimate is conservative. Parkinson Farms is unlikely to divert the additional cfs for 6 months (214 days). WMIS records suggest the maximum number of days per year the Parkinson Well has been used is about 150 days. (See Finding of Fact 18) Some amount of water will be added to the aquifer through canal seepage and recharge from flood irrigation. There will also be some amount of recharge or contribution from the mountain rock formations on the east and west sides of the valley.

36. Dr. Wood performed a second model analysis, seeking to account for drought conditions. The second model incorporated all of the assumptions set forth above, but reduced the transmissivity rate to 28,000 ft^2/day to represent the thinning of the aquifer during a drought. (Wood Report, page 6) The second model predicted the drawdown at the Parkinson Well would be 17 feet and the drawdown at a distance of ¼ mile from the well would be just over 4 feet. (Wood Report, page 6)

37. During the 2011 irrigation season, Parkinson asked Roger Totten, the watermaster for Water District 34, to conduct periodic measurements of the Parkinson Well and the Telford wells to see if pumping from the Parkinson Well had an effect on the production at the Telford wells.

38. Mr. Totten's record shows that even though the Parkinson Well diverted over 570 inches (11.4 cfs) between July 30 and August 27, 2011, the discharge from the Telford wells was not reduced during that time period. The diversion from the Parkinson Well in 2011 was in excess of the existing rights at the well.

39. Parkinson testified that 2011 was a very good water year and that he only ran his ground water wells for 48 days. (Testimony of Ralph Parkinson) The effect of the Parkinson Well on the Telford wells may have been masked by an unusually high influx of surface water into the aquifer.

40. Protestants Norman Sowards and Darrell E. McDonald hired Dr. Charles G. Brockway of Brockway Engineering, PLLC to "evaluate the effect of additional groundwater pumping from [the Parkinson Well]" and to "evaluate the potential impact of the proposed transfer on groundwater and surface water supplies." (Brockway Report, page 1)

41. Dr. Brockway derived a transmissivity value for the local aquifer using specific capacity estimates for 17 nearby wells. (Brockway Report, pages 8-9) Dr. Brockway calculated the average transmissivity in the area to be 49,800 ft^2/day. (Id.) Ultimately, Dr. Brockway found that the transmissivity value used by Dr. Wood (35,000 ft^2/day) was reasonable and "should be adopted as the best transmissivity estimate at this time in the local vicinity of the Parkinson Well." (Brockway Report, page 9) Dr. Brockway agreed with Dr. Wood's use of aquifer or no-flow boundaries. (Brockway Report, page 10) Dr. Brockway also assumed the same value for storativity as was used by Dr. Wood (0.12). (Testimony of Dr. Brockway)

42. Dr. Brockway found that "[p]umping additional flow from the Parkinson Well will cause a greater drawdown in the vicinity of the well than would otherwise occur if the well was limited to the decreed flow of 7.8 cfs." (Brockway Report, page 8) Assuming no-flow aquifer boundaries to the east and west of the Parkinson Well and a diversion rate of 4.00 cfs for 215 days, Dr. Brockway estimated the drawdown at the McDonald Well (located ¼ mile from the Parkinson Well) would be 3.85 feet. Dr. Brockway's and Dr. Wood's findings regarding the potential drawdown at the McDonald and Sowards wells are almost identical. Dr. Brockway believes that each additional foot of drawdown at the McDonald Well (Toone Well) equates to a reduction in flow of 17.4 gallons per minute. (Brockway Report, page 13)

43. Ground water does not currently contribute to flows in the Big Lost River in the area of the Parkinson Well. (Wood Report, page 5) Dr. Brockway confirms that there are no gains to the Big Lost River from ground water occurring below Moore: "A completely perched river is now generally the normal condition below Moore." (Brockway Report, page 30) Additional diversion from the Parkinson Well will not have any impact in the water levels in the Big Lost River.

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.

45. In 1995, Parkinson Farms filed Application for Transfer 4573 seeking to add a point of diversion to water rights 34-2497, 34-2505, 34-2506, and 34-4008. The added point of diversion was a new ground water well to be drilled in the SESW of Section 34, T05N, R26E, less than ½ mile from the Parkinson Well.

46. Transfer 4573 proposed the same conveyance plan as is proposed in the pending transfer application. Water was to be injected into the Island Ditch, then injected into the East Side Canal, then injected into the Big Lost River, then re-diverted through the Munsey ditch to the Parkinson Farms place of use.

47. Transfer 4573 was advertised to the public and was protested by a group called the Big Lost River Water Users Association. The contested transfer application resulted in a hearing, held on November 1, 1995.

48. On May 30, 1996, the Department issued a Final Order denying Transfer 4573. The Order stated that "Parkinsons did not satisfy their burden of proof regarding issues of injury, enlargement, or local public interest." (Final Order, page 6). "The issues of injury to surface water users caused by a reduction in flows to the Big Lost River and injury to ground water users caused by ground water withdrawals at the location of the proposed point of diversion were not addressed by Parkinsons." (Final Order, pages 5-6)

EVALUATION CRITERIA / ANALYSIS

1. 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.

2. The applicant bears the burden of proof for all of the factors listed in Section 42-222.

3. Prior to the hearing, the protestants stipulated that the review criteria relating to the local economy of the watershed and the criteria relating to new beneficial uses are not at issue in this contested case. There is no evidence in the record suggesting that these two review criteria are applicable to the pending transfer application.

Injury to Other Water Rights

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

5. Injury between ground water users is governed by Idaho Code § 42-226, which states: "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 . . ." Reasonable pumping levels have not been established in the Big Lost River basin. Therefore, the reasonableness of drawdown impacts to neighboring wells caused by a proposed transfer will be evaluated on a case-by-case basis.

6. Rule 45 of the Water Distribution Rules for Water District 34 states: "Should curtailment of ground water rights become necessary to protect a senior ground water right(s), administration will be based upon reasonable pumping levels and the prior appropriation doctrine as required by law." (IDAPA 37.03.12.45)

7. The Water Distribution Rules for Water District 34 also establish a mechanism whereby surface water users from the Big Lost River below Mackay Dam can request augmentation of surface flows or mitigation for the diminishment to the surface water supply caused by ground water pumping. (See IDAPA 37.03.12.50)

8. Water right 34-2490 cannot be included in Transfer Approval 77610 because its point of diversion is not within the Big Lost River aquifer. Evidence strongly suggests water right 34-2490 diverts from the ESPA. (See Findings of Fact 6-10) To allow an ESPA ground water right to be transferred into the Big Lost River basin would create a new depletion to the Big Lost River aquifer and would result in injury to water rights existing within the Big Lost River aquifer, including Parkinson's rights within the basin.

9. Dr. Brockway and Dr. Wood predict the drawdown caused by the diversion of an additional 4.00 cfs from the Parkinson Well could be as much as 4 feet at the McDonald well

(located ¼ mile to the east of the Parkinson Well). The actual drawdown at the McDonald Well will be less than 4 feet given the factors described above (shorter pumping season, recharge from surrounding canals and flood irrigation, and recharge from the rocks surrounding the basin). The actual drawdown will also be less than 4 feet because the total amount transferred is limited to 3.17 cfs, the combined diversion rate authorized by rights 34-4008 and 34-2497, rather than the 4.00 cfs proposed in the application. The amount of additional drawdown occurring at neighboring wells as a result of this transfer is reasonable because it will not have a significant impact on pumping from the neighboring wells.

10. The water rights being transferred into the Parkinson Well, 34-2497 and 34-4008, carry priority dates of 1966 and 1967 respectively. In the event water rights in the Big Lost River aquifer are curtailed in the future on the basis of priority, in order to protect other water users from injury, the additional 3.17 cfs being transferred to the Parkinson Well must carry a junior priority date. The additional 3.17 cfs should be assigned a priority date of the date of the transfer approval.

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.

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.

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.

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.

15. Restricting the transfer of valid water rights within the Big Lost River aquifer will do very little, if anything, to address the basin-wide water level concerns raised by Dr. Brockway. Although Dr. Brockway's analysis of the status of the Big Lost River aquifer is well-written and

informative, it does not affect the outcome of this contested case and would be more-relevant in a water call proceeding.

16. Protestant Kirby Jensen argued that the effects of the proposed transfer should be evaluated in the same way as surface water transfers. Because the aquifer has a north-to-south gradient, Mr. Jensen argues, Parkinson will be taking water away from (or diminishing the water supply for) the ground water users between the down-gradient current points of diversion and the up-gradient Parkinson Well.

17. To adopt the evaluation standard proposed by Mr. Jensen would render the "reasonable pumping level" provision of Idaho Code § 42-226 meaningless and would block virtually all transfers in the Big Lost River aquifer and in the ESPA. Impacts to ground water users within the Big Lost River aquifer resulting from transfers of ground water rights within the aquifer will continue to be evaluated using Idaho Code § 42-226, not the surface-water standards proposed by Mr. Jensen.

Enlargement of Water Rights

18. Parkinson sufficiently demonstrated that approval of this transfer will not result in the enlargement of the water rights. The place of use for the water rights is not being changed. The acres authorized under the water rights will continue to be irrigated.

19. During the hearing, the hearing officer raised a question about possible forfeiture of a portion of water rights 34-4008 and 34-2497. A 50-acre portion of the place of use for those rights was not irrigated between 2006 and 2011. (See Exhibit IDWR4)

20. Pursuant to Idaho Code § 42-222(2), if a water right is not put to full beneficial use for a period of five or more years, the water right, or a portion thereof, may be forfeited. Idaho Code § 42-223 sets forth certain exceptions to forfeiture, including the following:

> No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis. (Section 223(6))

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.

Conservation of Water Resources

22. The transfer application is consistent with the conservation of water resources within the state of Idaho. As described above, approval of the transfer may result in more water being available in the Big Lost River aquifer.

Local Public Interest

23. The local public interest analysis under Section 42-222 is meant to be separate and distinct from the injury analysis. Local public interest is defined 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." (Idaho Code § 42-202B(3))

24. The Applicant presented evidence that the ground water rights would continue to be used for agricultural purposes, the primary use of ground water in the local community. The Applicant met its burden of proof for this element.

Ground Water Moratorium

25. On April 30, 1993, the Department issued an Amended Moratorium Order ("Moratorium"), which included the Big Lost River basin. The Order established a moratorium on the "processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources . . ." (Moratorium, page 4) "The moratorium does not apply to applications for drilling permits to replace or deepen existing wells having valid existing water rights nor to applications for transfer of existing water rights." (Id. at page 5, emphasis added)

26. The protestants argued that the pending transfer application, in effect, constitutes a new appropriation for the water users located near the Parkinson Well and is therefore barred by the Moratorium. This argument is only valid for water right 34-2490 because that right is not located in the Big Lost River aquifer. The Moratorium clearly states that it does not apply to the transfer of existing water rights. Existing water rights may be changed, including adding points of diversion, provided the changes do not violate the criteria set forth in Idaho Code § 42-222. Therefore, the Moratorium does not bar the processing or approval of the pending transfer application for water rights 34-4008 and 34-2497.

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.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 77610 in the name of Parkinson Farms is APPROVED in part and upon conditions. The transfer of water right 34-2490 is DENIED. Water rights 34-4008 and 34-2497 have been changed as described in Transfer Approval 77610, issued in conjunction with this Order.

Dated this 22nd day of August, 2012.

James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 22ND day of August 2012, I mailed a true and correct copy, certified and postage prepaid, of the foregoing PRELIMINARY ORDER APPROVING APPLICATION FOR TRANSFER to the person(s) listed below:

Sharla Cox
Administrative Assistant

US MAIL - CERTIFIED
RE: Preliminary Order Approving Application for 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
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Darrell L. McDonald
PO Box 246
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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.