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	)))	**SECOND 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 three ground water rights.

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 were initially represented by James P. Speck, an attorney with the law firm Speck & Aanestad. Mr. Speck now represents only Darrell E. McDonald. 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. The parties offered testimonial evidence, expert reports, and other documents into the administrative record.

Relying on the evidence in the administrative record, the hearing officer issued a *Preliminary Order Approving Application for Transfer* on August 22, 2012. Petitions for reconsideration were filed by Kirby Jensen and by Mr. Speck on behalf of Darrell E. McDonald. The petitions for reconsideration were denied by the hearing officer on September 25, 2012.

On October 10, 2012, protestant Kirby Jensen filed a Petition for Review with Gary Spackman, the Director of the Department. Mr. Spackman reviewed the administrative record and issued an order remanding the matter to the hearing officer for further development of the record ("Remand Order"). The Remand Order asked the hearing officer to request a memo from Department technical staff addressing certain questions relating to the Big Lost River Aquifer.

Department employee Dennis Owsley provided a staff memo to the hearing officer on April 30, 2013 ("Owsley Memo" labeled as Exhibit IDWR10). A supplemental hearing was held on August 13, 2013, in Arco, Idaho. The parties were allowed to offer additional evidence into the record. Mr. Speck represented only Darrell E. McDonald at the supplemental hearing. Protestants Darrell L. McDonald and Norman Sowards did not attend the supplemental hearing and, therefore, waived their right to cross examine witnesses and object to the introduction of evidence.

After carefully considering all of the evidence in the augmented administrative record, the Department finds, concludes, and orders as follows:

APPLICATION FOR TRANSFER NO. 4573

In 1995, Parkinson filed Application for Transfer No. 4573 ("Transfer 4573") seeking to add a point of diversion to ground water rights 34-2497, 34-2505, 34-2506, and 34-4008. The proposed point of diversion was a new ground water well to be drilled in the SESW of Section 34, T05N, R26E.

Transfer 4573 proposed the same water conveyance system as is proposed in the pending transfer application. Ground water was to be injected into the Island Ditch, then injected into the Eastside Canal, then injected into the Big Lost River, then re-diverted through the Munsey ditch to the Parkinson place of use.

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 an administrative hearing, held on November 1, 1995.

On May 30, 1996, the Department issued a Final Order denying Transfer 4573 ("1996 Order"). The 1996 Order stated that "Parkinson[ ] did not satisfy [its] burden of proof regarding issues of injury, enlargement, or local public interest." (1996 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 <u>were not addressed by Parkinson</u>[ ]." (1996 Order, pages 5-6 (emphasis added))

In a post-hearing brief for the pending application, Mr. Speck argued that Transfer 77610 should be dismissed with prejudice under the doctrine of res judicata. The Remand Order also raises the question of the applicability of res judicata.

Although the applications are similar, Transfer 77610 is not identical to Transfer 4573. The current transfer proposes to use an existing well rather than drill a new well. The existing well proposed to be added in Transfer 77610 is located approximately 500 feet away from the proposed well site described in Transfer 4573. Transfer 77610 includes water right 34-2490 and does not include water rights 34-2505 and 34-2506. The total amount of water rights included in Transfer 4573 was 5.32 cfs. This Order approving Transfer 77610 only authorizes a change in point of diversion for 3.17 cfs.

The doctrines of res judicata and collateral estoppel apply to administrative proceedings before the Department. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 844 (2003). However, given the differences between Transfer 4573 and Transfer 77610, it is difficult to justify dismissing the pending application on the basis of res judicata.

In addition, the hydrologic data presented in this contested case differs from the data presented in the previous case. Transfer 4573 was filed nearly twenty years ago. Since that time, the Department, Water District 34, and other resource agencies have continued to collect hydrologic data within the Big Lost River Basin. During the hearing, experts for Parkinson and the protestants relied on data collected in the last twenty years.

Mr. Speck argues that the issues of injury and local public interest were already decided in the previous transfer application. He supports his argument by characterizing the issues in very broad terms. For example, Mr. Speck asserts that the Department determined that "the addition of a new proposed point of diversion eight miles up gradient from the existing points of diversion causes injury to [ ] senior water rights and is not in the local public interest." This is too broad of a statement. Denial of Transfer 4573 was limited to the water rights and the point of diversion proposed in that transfer.

The proposition that the denial of Transfer 4573 represents a broad restriction on all transfers in the Big Lost River Basin seeking to add points of diversion up-gradient from existing points of diversion is misplaced. In July 2009, the Department approved Transfer 75394 filed by Douglas and Lore Schureman. Transfer 75394, which was not protested, added a point of diversion to ground water rights 34-4132 and 34-10058. The proposed new point of diversion was located 7.5 miles north of the existing Schureman wells. The new Schureman point of diversion is located within one mile of the Parkinson proposed point of diversion. Clearly, the 1996 Order did not restrict the Department's ability to approve transfers similar to Transfer 4573.

Finally, there is a question of whether the record assembled in the contested case for Transfer 4573 was adequate. The 1996 Order indicates that Parkinson did not provide any evidence addressing the question of injury. Consequently, the findings and conclusions in the 1996 Order may have been based on an incomplete administrative record.

As stated above, the pending transfer application differs from the previous transfer application. The hydrologic data available to the Department today differs from that existing in 1996. Application for Transfer 77610 will be considered on its merits based on the evidence in the administrative record.

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 existing water rights is open-discharged into the Island Canal, which flows into the Eastside 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 water rights. (Exhibit P12, Figure 1 provides a good representation of this conveyance system.)

4. Water rights 34-4008 and 34-2497 list three common 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 ground water wells described in water rights 34-4008 and 34-2497, 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 (1970 well)) Department records do not include well logs for the other two wells in Section 11, which are identified in rights 34-4008 and 34-2497.

6. Parkinson provided a hand-written well log from the "ASC Office." (Exhibit A17) Parkinson asserts that this well log is for one of the wells located in the SENE of Section 11. The Parkinson family owned the property in 1966, the year the well was drilled. (Testimony of Ralph Parkinson) The well log describes a 105-foot well, intersecting layers of sand, gravel, and clay. (Exhibit A17)

7. Static water levels for the wells in Section 11 are consistent with the Big Lost River Aquifer levels for the area estimated by Bassick and Jones in 1992. (See Exhibit A19, page 2)

8. Water right 34-2490 lists one point of diversion, located in the NESE of 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. Water right 34-2289 (not included in the pending transfer application) is also diverted from the well located in the NESE of Section 14.

9. Permit 34-2289 was issued to Wilse Nielsen in 1949, authorizing the development of three ground water wells, including a well in the NESE of Section 14, T03N, R26E. (Water Right File for 34-2289) The Statement of Completion filed by Wilse Nielsen indicates that a 94-foot well was constructed in Section 14 at some point prior to 1959. (Id.)

10. During the hearing, two well logs were offered into the evidentiary record. One well log, in the name of Wilse Nielsen, describes a well constructed in 1962 in the NESE of Section 14 under Permit No. 21070 (34-2289). The other well log is for a well drilled for Rulon Burke under Permit G33113 (34-2490) but contains errors in the legal description for the well. (Exhibits IDWR7 (1962 well) and IDWR9)

11. The two well logs provide different descriptions of the lithology of the area. The Wilse Nielsen well log describes 200 feet of a mixture of sand, clay and lava. (Exhibit IDWR7) The Rulon Burke well log describes 360 feet of lava and basalt. (Exhibit IDWR9) Ralph Parkinson testified that there are two wells in Section 14, located one foot apart, but only one well is currently being used to divert water rights 34-2490 and 34-2289.

12. The Snake River Basin Adjudication ("SRBA") partial decree for 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."

13. 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 Plain Aquifer ("ESPA") near Arco is comprised of clay, basalt, and lava. (Id.)

14. 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, might not divert water from the Big Lost River Aquifer and has now been judicially separated from the Big Lost River Aquifer for administration purposes. (SRBA Partial Decree for 34-2490)

15. The four existing 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 action in recent years to improve the yield from these wells. (Id.)

16. Water rights 34-4008 and 34-2497 authorize the irrigation of 255 acres in Sections 10 and 11, T03N, R26E. Water rights 34-7176 and 34-12368 (the existing rights at the Parkinson Well) authorize the combined irrigation of 885 acres. The combined place of use for water rights 34-7176 and 34-12368 includes the 255 acres described in water rights 34-4008 and 34-2497.

17. Parkinson's transfer application voluntarily limited the amount of water being transferred to the Parkinson Well. The application stated that no more than 4.00 cfs of additional water will be diverted from the Parkinson Well.

18. The Parkinson Well was originally drilled in 1977 to a depth of 160 feet. (Exhibit A9, 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. (Id. at Attachment 1)

19. 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) After the deepening and maintenance work, the Parkinson Well produced about 12.40 cfs. (Testimony of Ralph Parkinson)

20. The Parkinson Well is currently 239 feet deep with perforations in the bottom 209 feet of the well. (Exhibit A9, page 3) The static water level in the deepened well was 46 feet below land surface at the time the deepened well was completed in January 2010. (Id. at Attachment 1)

21. The Parkinson Well is monitored by Water District 34. Water district records show the volume of water diverted from the Parkinson Well has ranged from 478 acre-feet diverted in 2006

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.

22. Some of the water diverted from the Parkinson Well is lost during conveyance to the Parkinson place of use. The exact amount of conveyance loss was not established in the administrative record. Protestant Darrell E. McDonald, who conveys ground water a similar distance as Parkinson, is charged about 45% conveyance shrink by the Big Lost River Irrigation District. (Testimony of Darrell E. McDonald)

23. 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.)

24. 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.)

25. 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.)

26. Protestant Darrell E. McDonald owns a ground water well (known locally as the Toone Well) which is 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.

27. Protestant Norman Sowards owns a ground water well located approximately ½ mile north of the Parkinson Well. The water rights associated with Mr. Sowards's 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)

28. Telford Lands LLC ("Telford") owns two wells in the area, one located 220 feet north of and one approximately ½ mile south of the Parkinson Well. (Testimony of Ralph Parkinson) Telford did not protest the pending transfer application even though it was aware of the Parkinson transfer prior to the application being filed. (Id.; Exhibit A9, page 4)

29. The Big Lost River Aquifer runs through a long, narrow valley and is confined on both sides by older, less-permeable rock layers. (Exhibit A9, page 3) The aquifer includes an upper layer of unconsolidated alluvial material, approximately 200-250 feet thick, which constitutes the main source for the ground water diversions in the valley. (Testimony of Dr. Wood; Exhibit P12, pages 3-5)

30. "The valley fill is comprised of alternating layers of sand, gravel, silt, clay, and boulders." (Exhibit IDWR10, page 2) "The relatively young, unconsolidated alluvial deposits transmit large amounts of water, yielding large flows of water to wells." (Exhibit A9, page 2)

31. The aquifer in the area of the Parkinson Well is comprised of "a series of unconsolidated gravels and sands with minor layers of clay." (Exhibit A9, 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." (Exhibit P12, page 3 (citing Crosthwaite 1970))

32. Various disconnected clay lenses exist throughout the aquifer that allow perched and artesian zones to develop. (Exhibit IDWR10, page 3; Exhibit PK22, page 6) "Clay layers are commonly reported as not water yielding in the driller's logs and wells completed below [clay layers] often display semi-confined conditions, indicating the clay is relatively impermeable." (Exhibit IDWR10, page 5)

33. "The areal extent of individual clay lenses is unknown, but in the Arco area, the clay and basalt sequences are laterally extensive and strongly influence lateral movement of ground water." (Exhibit IDWR10, page 3 (citing Crosthwaite 1970)) Ground water can become perched on the clay lenses and disconnected from the regional aquifer, particularly at the south end of the aquifer where clay layers are more prevalent. (Testimony of Dennis Owsley; Exhibit IDWR10, pages 4-5)

34. "The Big Lost River Aquifer merges with the larger [ESPA] a few miles south of Arco." (Exhibit IDWR10, page 3) There is a transition zone between the Big Lost River Aquifer and the ESPA where the two aquifers overlap. (Exhibit A20, page 4) The alluvial layers become thinner and disappear as ground water percolates downward to the basalt layers of the ESPA. (Exhibit P12, page 5)

35. "Groundwater development in the Big Lost valley was minimal prior to the 1950s." (Exhibit P12, page 6) "Beginning in the late 1950s and continuing through the 1980s, many irrigation wells were developed, with most of the groundwater pumping concentrated in a region approximately 6 miles north to 6 miles south of Moore." (Id.) The Parkinson Well is located in the middle part of this zone of ground water pumping.

36. "On an annual basis, aquifer water levels respond to the water supply conditions in the valley." (Exhibit IDWR10, page 6) "In water short years, aquifer levels decline in response to additional pumping", a reduction in recharge from irrigation practices, and a reduction of leakage from flow in the Big Lost River. (Id.)

37. There is a strong correlation between the Big Lost River and ground water levels in the aquifer. (Exhibit A9, page 3) "In areas where aquifer levels are at or near the land surface, ground water discharges into the Big Lost River channel and contributes to the flow of the river." (Exhibit IDWR10, page 7) "In areas where the aquifer levels are below the elevation of the bottom of the river channel, water seeps from the bottom of the river channel into the underlying aquifer." (Id.)

38. In this order, it is necessary to distinguish between river gains occurring upstream of around Moore and rising water occurring in the Arco area. For purposes of this order, "river gains" or "river inflow" refers exclusively to the gains occurring upstream of the Moore area.

39. For purposes of this order, the term "rising water" is defined as the water rising out of the ground as springs or seeps, including accretion to the Big Lost River, in the area between the head of Boyle Creek (located about two miles north of the Arco Diversion) and the USGS Stream Gage #13132500 (Big Lost River near Arco, Idaho). Although ground water can contribute to springs and river flow in other areas of the valley, the term "rising water" will be confined to this specific area.

40. Historically, the regional (un-perched) aquifer has been high enough that there has been communication between the Big Lost River and the aquifer between the Darlington Sinks and the Moore Diversion. (Exhibit P12, page 30; Exhibit PK22) In recent years, ground water pumping and frequent drought cycles have led to the aquifer and the river becoming disconnected between the Darlington Sinks and Moore. (Exhibit IDWR10, pages 7-8)

41. "[T]he river and aquifer are now disconnected throughout most of the valley below the Darlington Sinks", which are located approximately 11 miles north of the Parkinson Well. (Exhibit P12, page 30; Exhibit IDWR10, page 7) "[A]ctive management of groundwater depletions would be a necessary component of any reestablishment of a hydrologic connection [between the aquifer and the river]." (Exhibit P15, page 5)

42. Rising water, when it exists, can result in as much as 75 cfs of flow in springs, sloughs, and in the river channel. (Exhibit IDWR10, page 9 (citing Stearns et. al 1938)) Rising water is the source of a number of water rights in the Arco area. (Exhibit P15, pages 4-5) Most of these water rights have priority dates junior to 1920.

43. IDWR Technical Hydrologist, Dennis Owsley, identified two possible mechanisms that could cause rising water: (1) The regional (un-perched) aquifer is elevated to a point that the water table intersects the land surface; and/or (2) Percolating water encounters a clay layer that impedes downward flow and the water moves laterally on top of the clay layer until it intersects the land surface (In other words, percolating water becomes perched or disconnected from the regional aquifer).

44. The first mechanism identified by Mr. Owsley is the least probable. Hydrograph data indicate that the top of the regional (un-perched) aquifer has historically been below land surface in the Arco area. (See Exhibit IDWR10, page 12; Exhibit P15, page 3; and Testimony of Dr. Brockway) Rising water was present in 2011 even though the regional aquifer in the Arco area was well below land surface. (Exhibit IDWR10, pages 9-13)

45. A third possible mechanism could lead to the appearance of rising water. Rising water could occur if a portion of the regional (un-perched) aquifer became disconnected by a clay layer and, therefore, became perched. (See Exhibit PK13, page 4; Exhibit IDWR10, pages 10-

13) Determining the exact mechanism leading to rising water is not critical, however, because the ultimate source of the rising water is the same. (Testimony of Dennis Owsley)

46. The primary source of rising water is leakage from the Big Lost River between Moore and Arco. (Exhibit IDWR10, pages 8-10; Testimony of Joel Anderson and Steve Tibbets) Instantaneous leakage from the river channel between Moore and Arco can be as high as 200 cfs. (Exhibit IDWR10, page 9 (citing Stearns et. al 1938))

47. The correlation between flow in the river channel in the Moore to Arco reach and the existence of rising water has been known for a long time. In 1925, Lynn Crandall, the Commissioner of the Big Lost River, stated:

> Material and considerable benefit results from the maintenance of a high water table in [the Moore to Arco] section of the river, not only to lands that are thus "sub-irrigated", but also to the holders of natural flow rights around Arco who receive a large amount of water from the drain off of this water table late in the summer that they would not otherwise obtain, it thus follows that it is a fair and proper procedure to carry the water through this section of river channel, so that the losses that thus occur may build up the water table in years of average or better than average run-off. (Exhibit IDWR 11)

48. A 1938 report titled *Geology and Ground-Water Resources of the Snake River Plain in Southeastern Idaho*, prepared by Harold Stearns, Lynn Crandall and Willard Steward includes the following statement:

> It is suggested that in years of plentiful supply it would be best to carry the water from Leslie to Arco in the present river channel, because the large losses that occur under such conditions build the water table up beyond the height required to supply the capacity of the underground outlets from the valley, and the surplus water then appears as ground-water inflow into the river and adjacent channels and provides a substantial addition to the supply available late in the season. In dry years, however, the available supply is inadequate to build the water table to this height, and most of the water contributed to the water table in such years is a total loss to the valley. (Exhibit IDWR 12, page 256)

49. The recent lack of flow in the Big Lost River channel below Moore "has reduced, if not eliminated, the source of the rising water." (Exhibit IDWR10, page 10) "[S]light variations in river channel seepage can have a significant impact on aquifer water levels." (See Exhibit A23, page 5)

50. Flow in the Big Lost River channel between Moore and Arco is governed by two factors. First, it is the product of excess flows, or high water, which is released past the Moore diversion because it exceeds the irrigation demand within the basin. Second, it is governed by river operations under Rule 30 (IDAPA 37.03.12 Water Distribution Rules – Water District 34).

51. The USGS maintains a stream gage on the Big Lost River below Mackay Reservoir (#13127000). The annual stream flow measured at this site is a good representation of the water entering the lower Big Lost River Basin at this location, because there is very little subsurface water flow in the area of the stream gage. (See Exhibit PK21, page 9; Exhibit IDWR 12, pages 247-248) Flow in the Big Lost River below Mackay Reservoir represents approximately 75% of the total water supply entering the lower basin. (See Exhibit IDWR12, page 245)

52. Since 1987 (a period of 27 years), the annual flow in the Big Lost River below Mackay Reservoir has been less than the 62-yr average in 21 of 27 years. (Exhibit IDWR10, page 7 (average based on 1950-2012 data)) Since 2000, the annual flow in the Big Lost River below Mackay Reservoir has been less than the 62-yr average every year except 2006. (Id.) The lack of water at the Big Lost River below Mackay Reservoir stream gage is not necessarily a result of a lack of precipitation. (See Exhibit P12, Figure 12 (Annual precipitation measured at the Mackay Ranger Station was above or near average in 9 of 11 years (2000-2010).)

53. The lack of flow at the Big Lost River below Mackay Reservoir gage is significant because the measurement site is located upstream of most of the ground water pumping occurring in the basin. (See Exhibit P12, page 6) The lack of flow in the Big Lost River downstream of Moore can be traced to the lack of flow in the Big Lost River below Mackay Reservoir.

54. The second factor affecting flow in the Big Lost River channel between Moore and Arco is the manipulation of river flows under Rule 30 (IDAPA 37.03.12). The Eastside Canal was built to convey irrigation water along the east side of the valley and minimize seepage losses. (Exhibit A20, page 6) "Sediments near the sides of the valley have lower permeability due to the deposition of alluvial fans, the deposition of clay and silt from flood over bank deposits, and less high energy river erosion." (Id.)

55. The Eastside Canal is now frequently used, instead of the natural river channel, to convey river water between Moore and Arco. (Testimony of Jim Rindfleisch) Water is diverted into the Eastside Canal at the Moore Diversion, then conveyed along the east side of the valley, and injected back into the Big Lost River channel just upstream of the Arco and Munsey points of diversion. Diverting the flow of the river through the Eastside Canal reduces seepage losses significantly. (Id.) The increased use of the Eastside Canal to convey river water has resulted in a reduction in rising water. (Testimony of Dr. Brockway)

56. The watermaster for Water District 34 observed rising water in the Arco area at the end of the 2011 irrigation season. (Exhibit IDWR10, page 9) This was reportedly the first time in about 30 years that there has been rising water. (Id.)

57. Department records for Water District 34 confirm that a significant amount of water was allowed to flow in the Big Lost River channel between Moore and Arco during the 2011 irrigation season. (See *Flows Past the Moore Diversion*, 2011 WD34 Records) Over 60,000 acre-feet of water flowed past the Moore Diversion in June/July 2011. (Id.)

58. The change proposed by Parkinson in the pending transfer application will have no effect on the amount of water in the Big Lost River at the stream gage below Mackay Reservoir. The change proposed by Parkinson will have no effect on river operations under Rule 30.

59. 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]." (Exhibit A9, page 1)

60. Dr. Wood conducted a pump test between July 28 and August 1, 2011 at the Parkinson Well. (Exhibit A9, 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)

61. 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 (11.4 cfs) for four days. (Exhibit A9, 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.)

62. Dr. Wood conducted a second pump test on May 4, 2012, using the well owned by Telford, located 222 feet to the North of the Parkinson Well. Even though the results of the second pump test may be favorable for Parkinson, Dr. Wood requested that the results of the second pump test be disregarded for purposes of deciding this contested case. (Testimony of Dr. Wood)

63. Dr. Wood set up a model to evaluate the potential impacts to neighboring wells. He 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; (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; (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). (Exhibit A9)

64. Using the assumptions described above, Dr. Wood predicted 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.

65. Dr. Wood's drawdown estimate is conservative. Parkinson Farms is unlikely to divert the additional cfs for the full irrigation season. Water district records suggest the maximum number of days per year the Parkinson Well has been used is about 145 days. (See Exhibit IDWR3) In addition, the transfer approval limits the additional diversion rate from the Parkinson Well to 3.17 cfs (the transfer of water right 34-2490 is denied).

66. Dr. Wood's model was based on a total diversion volume of 1,460 acre-feet (4.00 cfs x 184 days x 1.9835). However, the expected total diversion volume, given the reductions described above, will be about 910 acre-feet (3.17 cfs x 145 days x 1.9835).

67. 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. (Exhibit A9, page 6) The second model predicted the drawdown would be 17 feet at the Parkinson Well and the drawdown at a distance of ¼ mile from the well would be just over 4 feet. (Id.)

68. 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." (Exhibit P12, page 1)

69. Dr. Brockway derived a transmissivity value for the local aquifer using specific capacity estimates for 17 nearby wells. (Exhibit P12, pages 8-9) Dr. Brockway calculated the average transmissivity in the area to be 49,800 ft^2/day. (Id.)

70. 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." (Exhibit P12, page 9) Dr. Brockway agreed with Dr. Wood's use of aquifer or no-flow boundaries. (Id. at page 10) Dr. Brockway also assumed the same value for storativity as was used by Dr. Wood (0.12). (Testimony of Dr. Brockway)

71. 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. (Id. at pages 8-12)

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 first hearing, the parties stipulated that the review criteria relating to the local economy of the watershed and to a change in beneficial use 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 Ground Water Rights

4. 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 . . ."

5. Reasonable pumping levels have not been established in the Big Lost River Basin. Therefore, the reasonableness of projected drawdown in neighboring wells resulting from a proposed transfer will be evaluated on a case-by-case basis.

6. Dr. Brockway and Dr. Wood predict the drawdown at the McDonald well (located ¼ mile to the east of the Parkinson Well), caused by the diversion of an additional 4.00 cfs from the Parkinson Well, could be as much as 4 feet. The Brockway and Wood projections are based on the assumption that the additional 4.00 cfs will be diverted at the Parkinson Well for the entire irrigation season.

7. The actual drawdown at the McDonald well will be less than predicted because it is unlikely that Parkinson will divert water for the entire authorized irrigation season. The actual drawdown will also be less than predicted because the total amount transferred is limited to 3.17 cfs, the combined diversion rate authorized by rights 34-4008 and 34-2497. Water right 34-2490 has been excluded from the transfer approval. The drawdown projected to occur at neighboring wells as a result of this transfer is reasonable.

8. 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)

9. The water rights being transferred into the Parkinson Well (34-2497 and 34-4008) carry priority dates of 1966 and 1967. In the event that water rights in the Big Lost River Aquifer are curtailed in the future on the basis of priority, or that reasonable pumping levels are established, the additional 3.17 cfs being transferred to the Parkinson Well must be assigned a priority date matching the date of this transfer approval to protect other water users from injury.

10. Protestant Kirby Jensen argues that the Department should evaluate injury between ground water rights by the same standard used to evaluate injury between surface water rights. Mr. Jensen argues that *any* diminishment of existing ground water levels resulting from a proposed change in ground water point of diversion equates to injury and violates Idaho Code § 42-222. Mr. Jensen also argues that, because the Big Lost River Aquifer has a hydraulic gradient, by moving its ground water point of diversion up-gradient, Parkinson will be taking water away from (or diminishing the water supply for) the ground water users between the existing points of diversion and the proposed point of diversion.

11. To adopt the injury evaluation standard proposed by Mr. Jensen would render Idaho Code § 42-226 meaningless and would block virtually all ground water transfers in the state of Idaho. Any time a ground water point of diversion is changed it naturally results in a lowering of the water table in the area of the proposed point of diversion.

12. Drawdown impacts to ground water rights 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 injury standard proposed by Mr. Jensen.

13. 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 level 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.

14. 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.

15. 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. In this case, none of the protestants own or operate domestic wells that would qualify for protection under *Parker v. Wallentine*.

16. There is not sufficient information in the administrative record to make a determination 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. If any of these domestic wells do still exist, there was no evidence presented relating to the pumping capacity or current pumping levels in the wells.

17. Water right 34-2490 cannot be included in Transfer Approval 77610 because its point of diversion, by decree, is not within the Big Lost River Aquifer. To allow a ground water right that has been judicially separated from the Big Lost River Aquifer to be transferred into the aquifer creates a new depletion to the aquifer and would result in injury to water rights existing within the aquifer, including Parkinson's other ground water rights.

Injury to Surface Water Rights

18. The evidence in the administrative record suggests two ways in which surface users could be impacted by the proposed transfer. First, the protestants argue that the proposed change will reduce the existence of rising water in the basin. Second, the protestants argue that the proposed change will lower the water table in certain areas of the Big Lost River, increasing leakage from the bottom of the Big Lost River channel, and reducing the amount of water available to fill existing water rights from the Big Lost River. These two types of impact are evaluated separately.

Rising Waters

19. The findings of fact define the term "rising water." Evidence indicates that leakage from the Big Lost River channel between Moore and Arco is the primary source of rising water.

20. Rule 30.01 of the Water Distribution Rules for Water District 34 (IDAPA 37.03.12) authorizes the watermaster to divert the entire flow of the Big Lost River through the Eastside Canal when certain conditions are met, rather than allowing the river to flow in its natural channel between Moore and Arco. Senior Big Lost River water rights in the Arco area are conveyed through the Eastside Canal. (Testimony of Jim Rindfleisch)

21. Water District 34 records show that water is only allowed to flow in the natural river channel between Moore and Arco during high flow events and during times when irrigation demand is low or non-existent. Outside of high flow events, on average, river water is conveyed by the Eastside Canal during about 80% of the irrigation season. (Testimony of Jim Rindfleisch)

22. Because the primary source of rising water is leakage from the Big Lost River channel between Moore and Arco, the existence of rising water is almost entirely dependent on high flows in the Big Lost River and operation under rule 30.01. Approval of the proposed transfer will have no effect on the occurrence of high flow events or on basin-wide irrigation demand. Given the frequent use of the Eastside Canal for conveyance of river water, the hearing officer concludes that approval of the transfer will have no appreciable effect on rising water.

Reduction of Big Lost River Flows

23. The second surface water injury concern relates to diminishing the flow in the Big Lost River upstream of Moore. The protestants argue that pumping additional water from the proposed well will lower the water table in the Moore area, causing the river to become more disconnected

from the aquifer. This will have the effect of moving the area of communication between the aquifer and the river farther upstream, increasing the losses from the bottom of the river channel, and reducing the amount of water available to satisfy senior water rights from the Big Lost River.

24. Because the Big Lost River is now generally disconnected from the regional aquifer downstream of the Darlington Sinks (located about 11 miles north of the proposed Parkinson Well), Parkinson's impact on the river/aquifer connection will be negligible. The cone of depression caused by the additional pumping will only extend about 1.6 miles. (Exhibit P12, page 31)

25. It is unlikely that the river/aquifer connection between Darlington and Moore will be reestablished until the Department curtails some ground water pumping in the basin. "[A]ctive management of groundwater depletions would be a necessary component of any reestablishment of a hydrologic connection [between the aquifer and the river]." (Exhibit P15, page 5)

26. The Department has not taken any curtailment action in the last 15 years to address the impacts of ground water pumping on the flows in the Big Lost River. If, at some point in the future, the Department determines that ground water curtailment is needed to protect surface water flows, the advancement of Parkinson's priority date is sufficient to ensure that the 3.17 cfs of additional water described in this transfer is one of the first diversions curtailed.

27. Although the likelihood of impact on Big Lost River flows is remote, there are two ways that any impact to the Big Lost River is mitigated. First, the Water Distribution Rules for Water District 34 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 Rule 50, IDAPA 37.03.12) Mitigation under Rule 50 has never been provided by the ground water users in the basin. (See Exhibit PK33 and PK34)

28. The second, and more important, mitigation for surface water depletions comes through Parkinson's use of the Eastside Canal for delivery of the transferred water rights. Rule 30.01(f) of the Water Distribution Rules for Water District 34 describes how losses (or shrink) in the Eastside Canal should be allocated:

> Conveyance losses in the Eastside Canal, <u>when considered to be the river channel</u>, shall be proportioned between <u>the river flow</u>, the diversions from the Eastside and pumps that inject ground water into the Eastside Canal. The proportioning will be based upon the ratio of total Eastside diversion and injected ground water to the total inflow to the canal. (IDAPA 37.03.12.30.01(f) (emphasis added))

29. Parkinson is currently charged shrink for its use of the Eastside Canal to convey its existing water rights. Parkinson will also be charged shrink to convey the transferred water through the Eastside Canal. The actual losses from the canal will likely not be increased to any significant degree through the addition of the transferred water rights. (Exhibit P16, page 9)

30. Therefore, the water charged to Parkinson for shrink will result in a reduced shrink for all other water in the Eastside Canal, including natural flow water rights diverted through the canal under Rule 30.01. Adding the transferred water to the Eastside Canal, during time periods when the Eastside Canal is used instead of the river channel, will increase the amount of water available to water rights on the Big Lost River.

Available Water Supply

31. The Remand Order asks the hearing officer to consider availability of ground water in the proposed area. Availability of water is not an element of review for transfer applications. (Idaho Code § 42-222) Review of available water supply is an element of review for new appropriations. (Idaho Code § 42-203A(5)) Mr. Parkinson testified that there is ground water available at the Parkinson Well and that the yield from the well is excellent.

32. Although the protestants attempt to characterize the pending transfer application as a new appropriation, it is not. Parkinson has valid, decreed rights authorizing the diversion of ground water from the Big Lost River Aquifer.

Enlargement of Water Rights

33. 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.

34. During the initial 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 because the area was being mined for gravel by the State of Idaho. (See Exhibit IDWR4)

35. 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))

36. 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) protects water rights 34-4008 or 34-2497 from forfeiture during the gravel extraction time period.

Conservation of Water Resources

37. The transfer application is consistent with the conservation of water resources within the state of Idaho. The conveyance and irrigation practices proposed in the transfer application are consistent with the standard irrigation practices employed in the Big Lost River Basin.

Local Public Interest

38. 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))

39. The Remand Order included four specific questions supposedly relating to the local public interest. Most of the questions are actually questions of injury to other water rights and are addressed above. In addition, on page 4 of the Remand Order, the Director states a concern that approving the pending transfer will lead to an exodus of ground water rights up-gradient in the Big Lost River Valley.

Question 1: Is ground water unavailable at the location of the existing points of diversion?

40. The Department generally does not require a transfer applicant to demonstrate that existing diversion equipment/structures are insufficient or that there is a lack of water at the current points of diversion. The Department water right records contain scores of approved transfers adding or changing points of diversion where the existing points of diversion were sufficient to satisfy the respective water rights.

41. The Department should not adopt "insufficiency of existing diversion systems" as a requirement under the local public interest. To do so would restrict water users in their efforts to improve the efficiency of their diversion systems.

Question 2: 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?

42. See the discussion on rising water and reduction of Big Lost River flows above. Evidence in the administrative record indicates that the Big Lost River Aquifer is now generally disconnected from the Big Lost River downstream of the Darlington Sinks. Evidence also indicates that basin-wide ground water pumping has contributed, in part, to the disconnection. Dr. Brockway states that the disconnection can only be fully addressed through management of ground water pumping.

43. Given the current state of the aquifer, the change proposed by Parkinson will have very little effect on the connection between the river and the aquifer. If the Department curtails ground

water pumping in the future, the advancement of Parkinson's priority date for the transferred 3.17 cfs will ensure that the transferred water is some of the first water curtailed.

Question 3: 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?

44. Recharge occurring in Big Lost River Basin is authorized under water rights 34-7571 and 34-7573, held in the name of Water District No. 34. Both of these water rights have 1995 priority dates, which means water can only be diverted for recharge when the water supply in the basin exceeds the demand under senior irrigation water rights.

45. As stated above, since 1987 there has been a significant change in the amount of flow entering the lower Big Lost River Basin from the upper basin (as measured at the Big Lost River below Mackay Reservoir stream gage). Less water entering the lower basin equates to less water available for managed ground water recharge. Consequently, the amount of recharge occurring in recent years has been limited. (See Exhibit IDWR10, pages 16-17)

46. The recharge efforts taking place since 2000 have not restored aquifer levels to historic levels. In fact, the most recent measurement of one of the monitoring wells in the basin (04N 26E 26DCD1), located about 4 miles south of the Parkinson Well, shows that ground water levels are still about 20 feet below historical equilibrium levels. Although managed recharge efforts may improve the water table in certain localized areas, it is unlikely, given the recent basin-wide water supply, that managed recharge alone will be sufficient to restore the connection between the ground water and surface water in the Big Lost River.

Question 4: Is it in the local public interest to increase risk to junior water users of a delivery call that could result in curtailment?

47. Parkinson currently diverts water from the Big Lost River Aquifer. Pumping under the Parkinson rights already has an impact on water levels within the aquifer. According to the analysis prepared by Dr. Brockway, the amount of water associated with this transfer only constitutes ½ of 1% of the total ground water rights within the Big Lost River Valley. (Exhibit P12, page 7)

48. It is unfair to require a transfer applicant to present evidence relating to the "risk" of a future delivery call. To do so would make a transfer applicant accountable for all of the ground water diversion (legal and illegal) occurring in a basin.

49. If a curtailment of ground water occurs in the future, other ground water users in the basin are fully protected, because the additional water transferred to the Parkinson Well in this transfer is assigned a 2014 priority date and will likely be the first ground water use curtailed.

50. In spite of requests to establish reasonable pumping levels in the Big Lost River Valley, the Department has declined to do so. (See Kirby Jensen Letter and IDWR Response in the 2012

Water District 34 Records) Idaho Code § 42-226 gives the Department the authority to establish, of its own initiative, reasonable pumping levels to protect senior ground water appropriators. Such action could reduce or eliminate any risk of a delivery call within Basin 34.

Additional Question: Is it in the local public interest to allow water users in Basin 34 to "continue to move ground water points of diversion farther upstream in the Big Lost River Basin." (Remand Order, page 4)

51. The Department approved a nearly-identical transfer in 2009 (Transfer No. 75394). (Exhibit IDWR2) In the years following that transfer approval, there have only been two transfers seeking to move ground water points of diversion up-gradient within the basin. There has not been a collective movement of ground water diversions up the valley.

52. Parkinson presented evidence that the transferred water rights will continue to be used for agricultural purposes, the primary use of ground water in the local community. It is in the local public interest for irrigators within the Big Lost River Valley to make adjustments to their water rights and diversion structures to realize the beneficial use under their water rights. It is also in the local public interest for irrigators within the valley to improve the efficiency of their diversion systems. Parkinson satisfied its burden of proof for the local public interest element.

Ground Water Moratorium

53. 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)

54. Protestant Kirby Jensen argues that the additional ground water point of diversion proposed in the Parkinson transfer application is equivalent to a new appropriation in the local area of the proposed point of diversion. Using Mr. Jensen's approach, in every transfer proposing to change a ground water point of diversion, it would be possible to define a small enough geographic area within which the proposed point of diversion could be considered a new appropriation. This would have the effect of blocking all ground water transfers within the Moratorium area which is inconsistent with the plain language of the Moratorium.

55. 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. (See also Idaho Code § 42-237 ("[W]ithdrawal of waters from the same ground water supply at another location in lieu of withdrawal at the original location shall be considered a change in point of diversion."))

Summary

56. Parkinson has satisfied 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 issued in conjunction with this order 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 7th day of January, 2014.

James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of January 2014, I mailed a true and correct copy, certified and postage prepaid, of the foregoing SECOND PRELIMINARY ORDER APPROVING APPLICATION FOR TRANSFER to the person(s) listed below:

Sharla Cox
Administrative Assistant

US MAIL - CERTIFIED
RE: Second Preliminary Order Approving Application for Transfer 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.