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JAN 17 2017

DEPT OF WATER RESOURCES
SOUTHERN REGION

1 William A. Parsons
2 PARSONS, SMITH, STONE, LOVELAND
3 & SHIRLEY, LLP
4 137 West 13th Street
5 P.O. Box 910
6 Burley, Idaho 83318
7 (208)878-8382 - Phone
8 (208)878-0146 - Fax
9 Idaho State Bar #849
10 Attorneys for Applicant
11 (Merriman/Montgomery79943PostHrgBrief.doc)

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JAN 26 2017

Department of Water Resources
Eastern Region

12
13 BEFORE THE DEPARTMENT OF WATER RESOURCES
14 OF THE STATE OF IDAHO
15

16 IN THE MATTER OF TRANSFER)
17 NO. 79943)

) POST HEARING BRIEF OF APPLICANT

18 IN THE NAME OF:)
19 ALBION 12 INVESTMENTS LLC)
20

21 Albion 12 Investments, LLC, ("Albion 12") submits its Post Hearing Brief on the
22 Application to Transfer Water Right No. 45-14284.

23 The issue of nonuse for multiple years has been resolved by a Partial Summary Judgment.

24 Protestant, Earl Warthen, through his counsel, has stipulated that the question of injury is
25 not now his contention.
26

Protestants, King, Smyer & Smyer, still contend injury. While they were not involved in

1 the Summary Judgment, they offered no evidence on their behalf as to the multiple years of nonuse
2 constituting an enlargement.

3 Water Right No. 45-14284 was adjudicated on April 7, 2010 as a Supplemental Water
4 Right and as such, constitutes a valid Water Right for purposes of this proceeding.
5

6 AUTHORITY

7 The authority for transfer of the Supplemental Water Right is found in the Processing
8 Policies and Procedures of the Department of Water Resources dated December 21, 2009, and the
9 primary relevant provisions are found in Sections 5(d)(3), (4) and (5), which (3) and (5) are
10 applicable to this case as a change of the point of diversion of a Supplemental Water Right.
11

12 The applicable provisions are: (3) **** "however, the place of use for a supplemental
13 irrigation right may be changed for continued use a supplemental irrigation right a different place
14 of use without by definition, enlarging the original right or the supplemental right proposed for
15 transfer, so long as the primary right at the original and proposed place of use provide comparable
16 water supplies. In other words, 'use of the supplemental right at the proposed place of use cannot
17 materially exceed the supplemental right at the current place of use.'"
18

19 (5)***** "for such changes, information regarding the historic availability or reliability of
20 supply of rights be supplemented (primary rights) both before and after the proposed change is
21 presumed to provide a reasonable basis to establish historic use under the supplemental right
22 proposed for transfer."
23

24 EVIDENCE AND ARGUMENT

25 There is a preponderance of evidence proving that the right to be transferred has a more
26 reliable right as its proposed primary place of use than the place from which it is sought to be
transferred. This is evident by the testimony of Erick Powell, whose outstanding qualifications are

1 set forth in Exhibit No. 3 and the Exhibits that he prepared to render his opinion all are based upon
2 factual data and not upon speculation and conjecture.

3
4 Erick Powell has used the official records of the Idaho Department of Water Resources as
5 reported by the Water Master over the years and he uses his familiarity with the Albion area to
6 supplement his opinion on those records. His conclusion is as evidenced by Exhibit No. 30 is that
7 the water at the new proposed place of use is substantially more reliable than the place from which
8 it is being transferred. He uses soil comparison of the areas by Exhibit No. 22 to support his
9 opinion.

10
11 In making those charts, he has used the official records of the department as the foundation
12 of his opinion. There is no reliable evidence rebutting his opinion. The Water Master, Don
13 Gunderson, has attempted to rebut the official records. His attempted rebuttal even states that some
14 of the data that he has may be back in his office and that he merely prepared the chart for purpose
15 of the litigation. A comparison of his records uses some of the same data that Erick Powell for the
16 amount of water used each year by Albion 12 and Montgomery. By his testimony he is essentially
17 contradicting his own official records that he turned into the Idaho Department of Water Resources
18 while doing his job as a Water Master.

19
20 A close examination of Exhibit No. 8 through Exhibit No. 14, taken together with Exhibit
21 No. 19, show graphically the reliability of the water at the proposed new place of use versus the
22 existing place of use. There is simply no other reliable evidence admitted at the hearing that in any
23 way contradicts the analysis compiled by Erick Powell from official records of the department.
24 That evidence conclusively shows the primary right at the original and proposed place of use
25 provide comparable water supplies and in fact, the water supply at the new proposed place of use
26 is more reliable than at the original place of use. The water used at the proposed place of use

1 exceeds the original place of use by substantial quantities as summarized on Exhibit No. 19
2 prepared from the Water Master records.

3 The evidence recognizes that the supplemental permit will be for 67 acres and there will be
4 no enlargement of the acreage if the supplemental right is used, nor will there be any other changes
5 except POD.
6

7 Erick Powell's opinion on no injury to Protestants, King and Smyer, is illustrated on
8 Exhibit No. 27 with data compiled pursuant to the Thesis Treatise. The Thesis Treatise is Exhibit
9 No. 28. He has also utilized the well logs in the area based on Exhibit No. 24. The Protestants
10 offered no scientific evidence or opinion of qualified experts to rebut the analysis of Erick Powell.
11 Their evidence was merely a "concern" and a desire not to have any more well drilling or change
12 of places of use in Albion Valley.
13

14 As to the "concern" of the Protestants, the "concern" does not withstand the evidence
15 produced by Erick Powell in Exhibit 24 just before the well driller logs, being the colored pictures,
16 charts and Burnham Map.
17

18 Exhibit No. 102 offered by Protestant King is not relevant to these proceedings because it
19 deals with a change in the nature of use. There is no request by Albion 12 to change the nature of
20 use. Albion 12 seeks to change the Supplemental Right, with its limitations as approved in the
21 Decree, to a different place of use as a Supplemental Right but without any change in the nature of
22 use or increase in the volume to be used as a Supplemental Right. The letter written to some
23 legislators twelve years ago on a topic that is not subject to this hearing is irrelevant.
24

25 Exhibit No. 101 prepared by Don Gunderson is filled with inaccuracies. One will notice
26 that at the heading it says log by "month" and yet all of the data comes from years. The numbers
on L1 are the same numbers as on Exhibit No. 19 from the years 2007 through 2013 and they are

1 by year. They are the same numbers used by Erick Powell on his summary of Exhibit No. 19 and
2 Exhibit No. 15 while not on the Exhibit No. 9 chart the same number for 2014 appears on Exhibit
3 No. 15 for Albion Ranch. What Don Gunderson is attempting to do is contradict his official
4 records filed with the Idaho Department of Water Resources. The Exhibit says in part "the
5 problem that I see is L1 was using the total cfs that was delivered and not just WD 45-0284B."
6 That contradicts his official records that were filed for the several years. This is evidence that
7 should be disregarded as it is not proof of anything and there appear to be other writings that he
8 had that weren't part of his official record and what those are we don't know and will not know
9 but the conclusive evidence of the record shows the amount of cfs used by Albion 12 to
10 substantiate that the source of water at the new location is more reliable than at the old location.
11 The Exhibit should be totally disregarded.
12

13
14 A number of the other Exhibits submitted and prepared by Erick Powell demonstrate the
15 basis of his opinion and while some of the Exhibits may not justify making comment on in this
16 brief; nevertheless the Hearing Officer should consider those Exhibits as the foundation for the
17 expertise of Erick Powell.
18

19 In summary the evidence offered by Protestants does not rebut the evidence of Albion 12
20 because it is without any factual or scientific evidence as it is all speculation, conjecture, without
21 foundation and personal concerns.
22

23 The other Exhibit that should be considered is Exhibit No. 20, the comments by Jim
24 Bitzenburg as to the requirements for the approval of a transfer and he indicates from his
25 examination that there is no inconsistency with the criteria in Idaho Code § 42-222 preventing
26 processing of the Application. And while the processing of the Application is one analysis
nevertheless the evidence produced by Albion 12 concerning the issues necessary to approve the

1 transfer have been fully proved and there is no just reason for the denial based upon the competent
2 evidence.

3
4 **CONCLUSION**

5 The Application for transfer of Water Right No. 45-14284 to Albion 12 should be
6 approved because:

- 7 1. There will be no injury to any of the Protestants.
- 8 2. The transfer will not enlarge the use of the water as it will continue to be a
9 supplemental right to a primary right that is more reliable than the primary right from which the
10 supplemental right is transferred from.
- 11 3. There are no other reasons provided by law that prevent the transfer and the
12 transfer is in compliance with existing Idaho Department of Water Resource's regulation and the
13 Statutes of the State of Idaho.

14
15 DATED this 13 day of January 2017.

16
17 PARSONS, SMITH, STONE, LOVELAND
18 & SHIRLEY, LLP

19 

20 William A. Parsons
21 Attorneys for Applicant
22 137 West 13th Street
23 Box 910
24 Burley, ID 83318
25
26

CERTIFICATE OF MAILING & EMAILING

I HEREBY CERTIFY that on the 13 day of January 2017, I caused a true and correct copy of the foregoing POST HEARING BRIEF OF APPLICANT to be served upon the following person(s) in the following manner:

James Cefalo X Email
Idaho Department of Water Resources
650 Addison Avenue West, Suite 500
Twin Falls, ID 83301-5858
james.cefalo@idwr.idaho.gov

Charles Honsinger X Email
P.O. Box 517
Boise, ID 83701-0517
honsingerlaw@gmail.com

Earl L. Warthen X United States Mail
1047 S. Hwy 77
Albion, ID 83311-9714

Christopher J. King X United States Mail
P.O. Box 54
Albion, ID 83311-0054

Kevin Smyer X United States Mail
P.O. Box 482
Albion, ID 83311-0482

Normal L. Smyer X United States Mail
76 S Hwy 77
Declo, ID 83323

**PARSONS, SMITH, STONE, LOVELAND
& SHIRLEY, LLP**



William A. Parsons
Attorneys for Applicant
137 West 13th Street
Box 910
Burley, ID 83318

PARSONS, SMITH, STONE, LOVELAND & SHIRLEY, LLP

ATTORNEYS AT LAW

137 WEST 13TH STREET

P.O. Box 910

BURLEY, IDAHO 83318

TELEPHONE

(208) 878-8382

FAX NO.

(208) 878-0146

WILLIAM A. PARSONS

RICHARD K. SMITH

RANDOLPH C. STONE

LANCE A. LOVELAND

DAVID F. SHIRLEY

JASON R. NAESS

SCOTT B. LINDSTROM

January 13, 2017

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JAN 17 2017

DEPT OF WATER RESOURCES
SOUTHERN REGION

James Cefalo
Idaho Department of Water Resources
650 Addison Ave. W., Suite 500
Twin Falls, ID 33301-5358

**RE: Albion 12 Investments – Transfer No. 79943
Our File No. 13744.150010**

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JAN 26 2017

Department of Water Resources
Eastern Region

Dear Mr. Cefalo:

Enclosed, for your information, is the Post Hearing Brief of Applicant in regards to the above-entitled matter.

Thank you for your courtesies. Should you have any questions please contact me.

Very truly yours,

**PARSONS, SMITH, STONE, LOVELAND
& SHIRLEY, LLP**

Mailed without signature to avoid delay

William A. Parsons

WAP/sw

Enc.