

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR) TRANSFER NO. 79943 IN THE NAME OF) <u>ALBION 12 INVESTMENTS, LLC</u>)	PRELIMINARY ORDER APPROVING TRANSFER
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PROCEDURAL HISTORY

On March 30, 2015, Albion 12 Investments, LLC ("Albion 12") filed Application for Transfer No. 79943 with the Idaho Department of Water Resources ("Department"). The Department published notice of the application on May 7 and 14, 2015. Protests were filed by James Wahlgren, H. Lee Jolley, Kevin Smyer, Norman Smyer, Christopher King, and Earl Lavell Warthen.

Albion 12 filed an amended transfer application on March 3, 2016, changing the location of the proposed points of diversion. The Department published notice of the amended application on April 7 and 14, 2016. No additional protests were filed.

James Wahlgren withdrew his protest on April 14, 2016. On December 6, 2016, the hearing officer issued a *Default Order*, dismissing H. Lee Jolley as a party to the contested case for failure to participate in any of the pre-hearing or status conferences.

In August 2016, Albion 12 and Warthen, through their attorneys, asked the hearing officer to establish a schedule for pre-hearing motions. The two parties wanted to file summary judgment motions on the issue of enlargement. On August 31, 2016, the hearing officer issued an *Order Establishing Schedule for Pre-Hearing Motions*.

On September 9, 2016, Albion 12 and Warthen filed a joint *Stipulation of Facts for Purposes of Summary Judgment*. On September 21, 2016, Albion 12 and Warthen, through their attorneys, filed opposing motions for summary judgment.

On October 11, 2016, the hearing officer issued an *Order Denying Motions for Summary Judgment* ("SJ Order"), which addressed certain arguments related to forfeiture and enlargement. The SJ Order was issued as an interlocutory order and may be appealed upon the issuance of this preliminary order.

The parties requested an administrative hearing be held to decide the contested matter. The Department conducted a hearing on December 8, 2016, in Burley, Idaho. Albion 12 was represented by attorney William Parsons. Earl Warthen was represented by attorney Charles Honsinger. Kevin Smyer, Norman Smyer and Christopher King were present at the hearing and represented themselves. Don Gunderson, watermaster for Water District 45F was also present and testified on behalf of Warthen.

During the hearing, Exhibits 2-30 and 101 were accepted into the record without objection. Exhibit 102 was admitted into the record over an objection from Albion 12, who argued the exhibit was not relevant. Exhibits 1 and 103 were not offered. During the hearing, the parties discovered that Exhibit 14 (2013 Water District 45-F Measurement Log) was missing three pages. Because the document is already part of the Department's measurement records, the hearing officer took official notice of the document, thereby adding the missing pages to the record. The parties did not object to the missing pages being added to the record.

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

FINDINGS OF FACT

1. Application 79943 proposes to change the points of diversion and place of use for ground water right 45-14284. The proposed points of diversion and place of use are located approximately four miles southeast of the existing points of diversion and place of use.
2. Application 79943 included a copy of a document titled "Terms of Proposed Water Right Transfer" which is a contract for Albion 12 to purchase water right 45-14284 from the current water right owner, George Montgomery, if Application 79943 is approved.
3. Water right 45-7090, the parent right for water right 45-14284, was licensed by the Department on April 4, 1983. Water right 45-14284 has not been diverted for irrigation use since the 1983 irrigation season.
4. The Snake River Basin Adjudication ("SRBA") Court issued a partial decree for water right 45-14284 on April 7, 2010. The April 2010 partial decree contained an error in the quantity. The SRBA Court issued an amended partial decree for water right 45-14284 on May 13, 2010.
5. Water right 45-14284 bears a priority date of February 26, 1972 and authorizes the diversion of 1.31 cfs from ground water, an annual diversion volume of 268 acre-feet, and the irrigation of 67 acres.
6. The partial decree for water right 45-14284 included the following conditions:

The right holder shall make full beneficial use of all surface water rights available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right to those times when the surface water supply is not available or the surface water supply is not reasonably sufficient to irrigate the place of use authorized under this right.

If the surface water right(s) appurtenant to the place of use is abandoned, forfeited, sold, transferred, leased or used on any other place of use, this right to divert ground water shall not be used without an approved transfer pursuant to

Section 42-222, Idaho Code, or approval of the Department if a transfer is not required.

Rights 45-14288, 45-14284, 45-10912, and 45-14286 when combined shall not exceed the irrigation of 67.0 acres.

This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands herein [described].

7. Water rights 45-10912, 45-14286 and 45-14288 are appurtenant to all or a portion of the existing 67-acre place of use for water right 45-14284.

8. Water right 45-10912 bears a priority date of March 1, 1965 and authorizes the diversion of 0.60 cfs from springs and the irrigation of 29.9 acres.

9. Water right 45-14286 bears a priority date of July 1, 1876 and authorizes the diversion of 1.30 cfs from Marsh Creek and the irrigation of 67 acres.

10. Water right 45-14288 bears a priority date of March 31, 1888 and authorizes the storage of 24.9 acre-feet in Lake Cleveland, which is tributary to Marsh Creek. Lake Cleveland is located approximately two miles from the Marsh Creek channel. Testimony of Don Gunderson.

11. Water District 45-F includes Marsh Creek, Howell Creek, Lake Cleveland, and other creeks and streams in the Albion basin. Ex. 7. Don Gunderson is the current watermaster for Water District 45-F and has been the watermaster since at least 2006. *Id.*

12. Delivery records from Water District 45-F indicate, between 2006 and 2014, water stored in Lake Cleveland under water right 45-14288 was only released for use in 2012. Exs. 7-15. The water released from Lake Cleveland in 2012 was not used at the authorized place of use for water right 45-14288. Testimony of Don Gunderson.

13. Conveying water from Lake Cleveland to Marsh Creek requires a significant amount of ditch maintenance. Testimony of Don Gunderson. There are substantial ditch losses between Lake Cleveland and the point of injection on Marsh Creek. *Id.* Gunderson estimates approximately $\frac{3}{4}$ of the water released from Lake Cleveland is lost in the conveyance to Marsh Creek. *Id.*

14. If water right 45-14288 (from Lake Cleveland) were used to supplement water right 45-14286 (from Marsh Creek) after water right 45-14286 is curtailed, the 24.9 acre-feet of storage water would last 9.7 days, assuming no conveyance losses.¹ Accounting for the significant conveyance losses between Lake Cleveland and Marsh Creek, water right 45-14288 would only provide 2.4 additional days of water.² Water right 45-14288 has not been used to supplement water

¹ Diverting 1.30 cfs (the rate authorized by water right 45-14286) for 9.7 days equates to a diversion volume of 24.9 acre-feet. $[1.30 \text{ cfs} \times 9.7 \text{ days} \times 1.9835 \text{ af/cfs-day} = 24.9 \text{ af}]$

² The watermaster estimates only about 25% of water released from Lake Cleveland makes it to the Marsh Creek injection point. 25% of 24.9 acre-feet is 6.2 acre-feet. Diverting 1.30 cfs (the rate authorized by water right 45-14286) for 2.4 days equates to a diversion volume of 6.2 acre-feet. $[1.30 \text{ cfs} \times 2.4 \text{ days} \times 1.9835 \text{ af/cfs-day} = 6.2 \text{ af}]$

right 45-14286 for many years and, because of conveyance losses, could only contribute a small amount of water to the existing place of use. Testimony of Don Gunderson.

15. Application 79943 proposes to unstack (disassociate) ground water right 45-14284 from surface water rights 45-10912, 45-14286 and 45-14288. Application 79943 proposes to stack (combine) ground water right 45-14284 with 67 acres of surface water right 45-284B at the proposed place of use.

16. Water right 45-284B bears a priority date of April 1, 1875 and authorizes the diversion of 1.50 cfs from Marsh Creek and the irrigation of 90 acres within a 480.2-acre place of use.

17. Application 79943 proposes to limit water right 45-14284 to 67 acres of irrigation within a 480.2-acre permissible place of use.

18. Water right 45-14286 at the existing place of use authorizes the diversion of 1.30 cfs and the irrigation of 67 acres (0.0194 cfs/acre). Water right 45-284B at the proposed place of use authorizes the diversion of 1.50 cfs and the irrigation of 90 acres (0.0167 cfs/acre).

19. Water rights on Marsh Creek and Howell Creek are regulated against the same priority date. Testimony of Don Gunderson. Although the primary water source in the basin is Marsh Creek, in some years, Howell Creek has a higher flow rate than Marsh Creek. Ex. 16 at 1. The most senior rights in Water District 45-F are downstream of the place where Howell Creek flows into Marsh Creek. Testimony of Don Gunderson. When downstream senior water right holders call for water, junior water rights on Howell Creek and Marsh Creek are curtailed based on the same priority date. *Id.*

20. The Albion basin aquifer is an alluvial aquifer made up of heterogeneous layers of clay, sand, gravel, cobble, and boulders. Ex. 23 at 3. Although the aquifer is generally unconfined, clay layers can cause localized perched water tables throughout the valley. *Id.* at 3-4.

21. Currently, there are very few ground water irrigation rights within the Albion Valley. Ex. 23 at 4. Monitoring wells in the valley show that ground water pumping may cause seasonal fluctuations in aquifer levels, but pumping has not resulted in long-term aquifer decline. *Id.* at 5.

22. The proposed points of diversion (two new ground water wells) will be located on the south boundary of the Albion 12 property, within 500 feet of the Howell Creek Channel. Ex. 29.

23. The closest domestic wells, not located on the Albion 12 property, are located approximately one mile north of the proposed points of diversion.

24. Albion 12 hired Erick Powell of Brockway Engineering PLLC to evaluate the impact on water levels in nearby domestic wells if water right 45-14284 were pumped from the proposed well sites. Powell relied on aquifer parameters set forth in his 2014 Report *Geologic and Hydrogeologic Summary for Proposed Recharge Project near Albion, Idaho* ("2014 Report") to complete his drawdown analysis. Testimony of Erick Powell. In the 2014 Report, Powell estimated the hydraulic conductivity of the local aquifer by calculating the specific capacity of wells located

within three miles of the Albion 12 property, using pump test data listed on well driller reports. Exs. 23-24 and 26; Testimony of Erick Powell.

25. Assuming a hydraulic conductivity of 8.3 feet/day and a storativity coefficient of 0.15, Powell estimates that diverting 1.31 cfs from the proposed wells for 156 days will result in a drawdown of 2.4 feet at a distance of 2,000 feet from the proposed wells and no drawdown at a distance of 5,850 feet. Ex. 28. Powell's analysis was intended to show the drawdown that would occur if water right 45-14284 were diverted for the full irrigation season (156 days). Testimony of Erick Powell.

26. There are springs which arise within 1.5 miles of the proposed points of diversion. These springs are formed by water becoming trapped on clay lenses. Ex. 23 at 7-8. These springs are the primary source of water for water rights owned by protestants Norman Smyer, Kevin Smyer and Earl Warthen. Most of these springs are located between $\frac{1}{2}$ and $\frac{3}{4}$ miles from the proposed points of diversion. Testimony of Kevin Smyer.

27. The ground surface elevation at the proposed points of diversion is approximately 5,300 feet. IDWR Topography/Hydrography Data. The ground surface elevation at Howell Creek $\frac{3}{4}$ of a mile north of the proposed points of diversion is approximately 5,070 feet. *Id.*

28. The aquifer gradient in the area of the proposed points of diversion is approximately 300 feet of change in elevation per mile. *See* Ex. 24, Groundwater Gradient Map. The well driller's report for a domestic well drilled by Albion 12 in 2008, located approximately $\frac{1}{3}$ of a mile north of the proposed points of diversion, lists a static water level of 261 feet below ground surface. Ex. 24, Well Tag 0050424.

29. Kevin Smyer owns water right 45-14081 which bears a priority date of March 18, 1910, and authorizes the diversion of 0.14 cfs from a spring for the irrigation of 6.8 acres. The spring described in water right 45-14081 is located approximately 1.25 miles (6,600 feet) from the proposed points of diversion.

30. The existing and proposed points of diversion for water right 45-14284 are located within Water District 140, an active water district which administers ground water diversions in the Albion Valley. On June 25, 2009, the Department issued an order requiring measuring devices to be installed on existing and new ground water diversions within Water District 140.

EVALUATION CRITERIA

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.³

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

ANALYSIS

Validity of Water Right 45-14284

Idaho Code § 42-222(2) states, in part: “All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated.” For every water right included in a transfer application, the Department must verify that the portion of the water right being changed has not been forfeited through nonuse. *See Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). Forfeiture must be established by clear and convincing evidence. *Id.* at 389; 647 P.2d at 1261.

Idaho Courts have held: “Once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of Idaho Code § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to a partial decree.” *In Re SRBA*, Case No. 39576, *Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue*, Subcase Nos. 36-02708, et al. (Fifth Jud. Dist Ct. 1999).

Water right 45-14284 was pending in the SRBA until April 7, 2010, the date a partial decree was issued for the right. Therefore, the forfeiture provisions of Idaho Code § 42-222(2) were tolled for water right 45-14284 until April 2010.

Application 79943 was filed on March 30, 2015, less than five years after the issuance of the partial decree. Albion 12 has diligently pursued Application 79943 since the application was filed. At this time, the Department does not have clear and convincing evidence of forfeiture. Therefore, water right 45-14284 is a valid water right and Application 79943 should be evaluated under the criteria set forth in Idaho Code § 42-222.⁴

³ Prior to the hearing, the parties stipulated that the review criteria related to conservation of water resources and effect on the local economy are not at issue in this contested case. The parties also stipulated that the local public interest review criterion is only at issue to the extent injury and enlargement concerns may affect the local aquifer.

⁴ Protestants Warthen and King have stipulated that the validity of water right 45-14284 (forfeiture) is not at issue in this contested case. See Warthen’s *Response to Albion 12 LLC’s Motion for Summary Judgment*, page 2; Testimony of Christopher King.

Injury to Other Water Rights

Application 79943 proposes to move the points of diversion for water right 45-14284 approximately four miles to the southeast. Protestants raised concerns about impacts to domestic wells and springs in the area of the proposed points of diversion.

The closest domestic wells, not owned by Albion 12, are located approximately one mile north of the proposed points of diversion. Albion 12's consultant, Erick Powell, provided a drawdown analysis which showed that diversion of 1.31 cfs from the proposed wells for 156 days would result in little or no drawdown at a distance of one mile. The methods and equations used by Powell are acceptable.

Powell's calculations are conservative to the extent they are based on a pumping period of 156 days. Water right 45-14284 includes an annual volume limit of 268 acre-feet. If water right 45-14284 were diverted continuously at the full authorized diversion rate (1.31 cfs), the annual diversion volume (268 acre-feet) would be reached in 103 days.⁵ In other words, water right 45-14284 could never be diverted at the full authorized rate (1.31 cfs) for 156 days. The actual impacts to nearby ground water wells will be less than the impacts estimated by Powell.

The evidence available to the Department at this time indicates the changes proposed in Application 79943 will not injure other ground water rights.

There are springs located between $\frac{1}{2}$ and $\frac{3}{4}$ miles north of the proposed points of diversion. The protestants stated a concern that the proposed wells could intercept ground water that is the source of flow for the springs.

According to the drawdown analysis completed by Powell, there will be some drawdown effects at a distance of 0.5 miles (2,000 feet) and could be some drawdown effects at a distance of 0.75 miles as a result of pumping at the proposed points of diversion.⁶ Even small amounts of drawdown can substantially affect the flow from springs.

The ground surface elevation at the proposed points of diversion is about 5,300 feet. The ground surface elevation of Howell Creek at a location 0.75 miles north of the proposed points of diversion is about 5,070 feet, 230 feet lower in elevation than the ground surface elevation at the proposed well sites. The elevation of the regional aquifer also drops by roughly the same amount across the same distance. *See* Ex. 24, Groundwater Gradient Map.

Albion 12 intends to divert from the regional aquifer, not from the perched aquifer strata that produce spring flows. Testimony of Erick Powell. Albion 12 is willing to maintain unperforated well casing to a certain depth to prevent interference with perched aquifer strata, but did not identify a depth that would prevent such interference. *Id.* Therefore, the hearing officer must determine what depth of unperforated pipe will provide adequate protection to nearby springs.

⁵ 1.31 cfs x 103 days x 1.9835 af/cfs-day = 268 af.

⁶ Powell did not calculate the impacts at a distance of 0.75 miles (3,960 feet). He only calculated drawdown effects at a distance of 2,000 feet and 5,850 feet.

The well driller's report for the Albion 12 domestic well, completed in 2008, listed a static water level of 261 feet. Ex. 24. This well was completed to a depth of 415 feet below ground surface and intercepted the regional aquifer. *Id.* Because the ground surface elevation and aquifer surface elevation follow a similar gradient, Albion 12 should expect a static water level of approximately 260 feet below ground surface at the proposed wells.

Given the evidence available to the Department at this time, the transfer approval must prohibit perforations in the casing of the proposed wells from the ground surface to a depth of 250 feet. 250 feet is deep enough to be below the absolute elevation of the springs located within 0.75 miles, yet shallow enough to allow Albion 12 to access the water-bearing zones of the regional aquifer. This restriction will prevent Albion 12 from intercepting the perched aquifer strata forming the source of the springs. If water right 45-14284 is conditioned to prohibit perforations in the proposed wells between 0 and 250 feet, the proposed changes will not injure the water rights from springs within 0.75 miles of the proposed points of diversion.

According to Powell's drawdown analysis, the spring described under Kevin Smyer's water right 45-14081 (located 6,600 feet north of the proposed points of diversion) is far enough away from the proposed points of diversion that pumping from the wells will have no drawdown effects on the spring.

This injury evaluation assumes that the proposed wells will be constructed in the exact locations described on Application 79943. On August 15, 2016, Albion 12 and Warthen entered into a pre-hearing stipulation. Albion 12 agreed that the proposed points of diversion would be located within 100 feet of the south boundary of the SENW and SWNW of Section 21, T12S, R25E. In exchange, Warthen agreed not to present any evidence related to the injury criterion of Idaho Code § 42-222 at hearing. To prevent injury to other water rights, water right 45-14284 should be conditioned to require the proposed wells to be constructed within 100 feet of the south boundary of the SENW and SWNW, Section 21, T12S, R25E.

Enlargement of Water Rights

In September 2016, Albion 12 and Warthen filed opposing motions for summary judgment on the issue of enlargement. The other parties did not participate in the summary judgment process. Both motions for summary judgement were denied. *See* SJ Order. The analysis and reasoning of the SJ Order will not be restated as part of this order. However, a couple of provisions from the SJ Order are key to the enlargement evaluation:

Use of a supplemental water right after multiple years of non-use does not, by itself, constitute enlargement of the water right. The proposed transfer may result in an enlargement of water right 45-14284 if the primary water rights at the proposed place of use are less reliable than the primary rights at the existing place of use.

Enlargement of a supplemental right is evaluated based on the reliability of the primary water rights at the existing place of use and at the proposed place of use. Although the extent of diversion occurring at the existing place of use under a

supplemental right may be helpful in understanding the reliability of the primary water right at the existing place of use, the diversion (or non-diversion) of the supplemental water right is not the sole factor in determining the transfer value of the supplemental right.

SJ Order at 3-4.

Water right 45-14284 includes a condition requiring the right holder to make full beneficial use of the surface water rights available before diverting any water under water right 45-14284. Therefore, the amount of water diverted under water right 45-14284 is directly linked to the reliability of the underlying surface water rights (primary rights). The Department must determine whether the primary rights at the proposed place of use are as reliable as or more reliable than the primary rights at the existing place of use for water right 45-14284.

Albion 12 contends the primary rights at the proposed place of use are more reliable than the water rights at the existing place of use. To support its contention, Albion 12 offered documents prepared by Erick Powell summarizing some of the delivery records for Water District 45-F. Powell analyzed the delivery records for two ditches: (1) the Albion 12 Ditch (which provides surface water to the proposed place of use), and (2) the Montgomery Ditches (which provide surface water to the existing place of use).⁷ Exs. 7-19 and 30. Albion 12 argues that in recent years more surface water per acre has been delivered throughout the irrigation season to the Albion 12 Ditch than the Montgomery Ditches, meaning the Albion 12 primary rights are more reliable than the Montgomery primary rights.

Don Gunderson, watermaster for Water District 45-F, testified that the delivery records for the Albion 12 Ditch are not an accurate representation of the reliability of the surface water supply at the proposed place of use. According to Gunderson, the Albion 12 Ditch is used to carry more water rights than just 45-284B. Gunderson suggests that Albion 12 has, in the past, rotated its water rights (including 45-284B) with neighboring property owners. The graphs summarizing monthly surface water deliveries, prepared by Powell, also suggest that additional water has been delivered through the Albion 12 Ditch during certain portions of the irrigation season.⁸

Given the testimony of the watermaster and the graphs prepared by Powell, the delivery records for the Albion 12 Ditch are not an accurate representation of the reliability of the primary water right at the proposed place of use (45-284B). The reliability analysis can be simplified. Gunderson testified that water rights on Marsh Creek and Howell Creek are regulated against the same priority date. The most senior rights in Water District 45-F are downstream of the place where Howell Creek flows into Marsh Creek and downstream of the existing and proposed places of use. Therefore, if a downstream senior water right holder calls for water, junior water rights on

⁷ Powell's analysis assumed that only water rights 45-10912, 45-14286 and 45-14288 (when used) are diverted through the Montgomery Ditches and only water right 45-284B is diverted through the Albion 12 Ditch.

⁸ Water right 45-284B authorizes the diversion of 1.50 cfs and the irrigation of 90 acres. If 1.50 cfs were diverted continuously throughout an entire month (30 days), the total monthly diversion would be 45 cfs-days (1.50 cfs x 30 days). If this were reported on a per acre basis, the total monthly diversion would be 0.50 cfs-days/acre (45 cfs-days / 90 acres). Between 2006 and 2014, the monthly delivery to the Albion 12 Ditch (as reported by the watermaster) regularly exceeds 0.50 cfs-days/acre, suggesting that additional water or additional water rights were delivered through the Albion 12 Ditch.

Marsh Creek and Howell Creek are curtailed. The priority date set by the watermaster for curtailment is the same for Howell Creek and Marsh Creek.

Because water right 45-284B (the primary right at the proposed place of use) bears a more senior priority date than water right 45-14286 (the primary right at the existing place of use), and because both rights are curtailed based on water calls by the same downstream senior water rights, water right 45-284B is more reliable than water right 45-14286.

The existing place of use has two additional sources of surface water which are not available at the proposed place of use. Water right 45-10912 authorizes diversion from springs arising on the existing place of use. This water right, however, bears a junior priority date and would be curtailed earlier than the other water rights on the property. Water right 45-14288 authorizes water storage in Lake Cleveland. This storage water could be used to extend the irrigation season, improving the reliability of surface water supplies at the existing place of use. However, the small amount of storage, in combination with the significant conveyance losses between Lake Cleveland and the existing place of use, limit the usefulness of the storage water. For purposes of this order, the benefits of the storage water from Lake Cleveland are considered minimal when compared with the amount of surface water available under water right 45-14286.

The primary water right at the existing place of use (45-14286) authorizes a diversion rate of 0.0194 cfs/acre. The primary water right at the proposed place of use (45-284B) authorizes a diversion rate of 0.0167 cfs/acre. Generally, new irrigation rights are limited to a diversion rate of 0.02 cfs per acre. *See* Idaho Code § 42-202(6). Water right 45-14284, through its conditions, authorizes the right holder to divert ground water to provide a total water supply up to 0.02 cfs/acre for the 67 acres authorized by the water right.

The primary right at the proposed place of use authorizes less rate per acre than the primary right at the existing place of use. If Albion 12 uses water right 45-14284 to make up for this difference in rate per acre, it would be an enlargement. In order to prevent enlargement of water right 45-14284, water rights 45-284B and 45-14284 when used in combination cannot supply more than 1.12 cfs for the irrigation of 67 acres (0.0167 cfs/acre). This limitation only applies when surface water and ground water are diverted at the same time. Once water right 45-284B is totally curtailed, water right 45-14284 can be diverted at its full authorized rate (1.31 cfs).

Conservation of Water Resources

There is no evidence in the record that the proposed changes would be inconsistent with the conservation of water resources in the state of Idaho.

Effect on the Local Economy

Albion 12 is not proposing to move its proposed place of use outside of the local watershed. Therefore, this review criterion does not pertain to Application 79943.

Local Public Interest

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)). There is no evidence in the record suggesting that the proposed changes will negatively affect the interests of the local community in the public water resource.

Measurement and Administration

In his Post Hearing Brief, Warthen raises an issue that was not discussed in great detail at the hearing, but should nevertheless be addressed in this order. Warthen argues: “[Water right 45-14284] is to be diverted and injected into a large integrated irrigation system diverting several other water rights and that irrigates a large place of use, it is imperative that the diversion and use of the supplemental water right is closely monitored . . .” Warthen’s *Post Hearing Brief*, page 3. “The ability to pump the supplemental water right into such an integrated system provides the opportunity to illegally use the supplemental water right on lands other than that to which they are appurtenant, and to use the supplemental water right at times during which the ‘primary’ water right is available for use.” *Id.*

Water right 45-284B is currently used in combination with ten other water rights⁹ to irrigate 399.2 acres on the Albion 12 property.¹⁰ Currently, the only other ground water irrigation right on the Albion 12 property is water right 45-14451, which authorizes the irrigation of 21.2 acres. Water right 45-14284 will be used in an integrated irrigation system that carries other water rights owned by Albion 12. Testimony of Erick Powell. Without adequate measuring devices and monitoring, there is a danger that water right 45-14284 will be used on more than 67 acres or will be used to supplement water rights other than 45-284B.

Most of the surface water rights used to irrigate the 399.2 acres described above are junior to April 1, 1875 (the priority date of water right 45-284B). Once the April 1, 1875 priority date is curtailed by the watermaster, only three water rights will still be available to Albion 12: (1) The transferred water right (45-14284), (2) Ground water right 45-14451 which is limited to the irrigation of 21.2 acres, and (3) Water right 45-517D which bears a priority date of August 31, 1874 and authorizes the diversion of 0.20 cfs from Spring Creek for the irrigation of 120 acres.

⁹ 45-275 (11/1/1883, Springs), 45-285 (4/1/1878, Howell Creek), 45-327D (3/1/1881, Howell Creek), 45-517D (8/31/1874, Spring Creek), 45-523A (4/30/1885, Waste Water), 45-13589 (3/18/1910, Springs), 45-14449 (4/1/1875, Howell Creek), 45-14450 (9/1/1880, Howell Creek), 45-14451 (7/26/1961, Ground Water), and 45-14452 (4/12/1892, Howell Creek).

¹⁰ On August 15, 2016, Albion 12 filed Application for Transfer No. 81125, proposing to combine the ten water rights with thirteen other water rights to create a 1699.2 permissible place of use. The twenty-three rights, when combined, would be used to irrigate 1,131.7 acres. Because water right 45-14284 is being added to the 399.2 acre combined place of use, the combined limit conditions of the ten rights should be updated to include water right 45-14284. Rather than update the conditions for the ten water rights in this transfer approval, the conditions for the ten rights will simply be updated as part of Transfer Approval 81125.

Water right 45-14451 is limited to the irrigation of 21.2 acres within a 480.2-acre permissible place of use. Water is diverted from an existing well located in the SWSESE of Section 16, T12S, R25E. It is not clear whether water right 45-14451 is pumped into the same integrated irrigation system which will be used to convey water right 45-14284.

To prevent enlargement of ground water right 45-14284, Albion 12 must delineate the 67 acres to be irrigated in any given year. Because ground water right 45-14451 will also be diverted late in the irrigation season, after most of Albion 12's surface water rights are curtailed, it is also important to identify the 21.2 acres which will be irrigated under water right 45-14451.¹¹ If the acres irrigated with these two ground water rights are clearly defined, it will be easier for a watermaster to verify that the elements of the water rights are not exceeded.

Assuming there is sufficient water in Spring Creek, it appears water right 45-517D (priority date August 31, 1874) is available through most of the irrigation season. *See Exs. 7-15.* The diversion rate for water right 45-517D is very small given the number of irrigated acres. Assuming the standard rate per acre (0.02 cfs/acre), described in Idaho Code § 42-202(6), water right 45-517D would only be sufficient to irrigate 10 acres. Watermaster records suggest that Albion 12 has regularly exceeded the authorized diversion rate of water right 45-517D. For example, in August 2013, Albion 12 diverted 12.75 cfs-days under water right 45-517D. This is twice as much water as would have been available if Albion 12 had been limited to a diversion rate of 0.20 cfs.¹²

Water right 45-517D presents a challenge in the administration of water right 45-14284. It is not clear from the record whether water right 45-517D is diverted into the same integrated irrigation system which will be used to convey water right 45-14284. If the two rights are conveyed through the same irrigation system, it may be difficult to decipher which acres are irrigated with water right 45-14284 and which acres are irrigated with water right 45-517D. If the watermaster for Water District 140 is concerned that water right 45-14284 is being used improperly, the watermaster could require Albion 12 to install a data logger on the measuring devices for water right 45-14284. This would allow the watermaster to review the daily delivery totals to ensure that they match the irrigation practices occurring on the Albion 12 property.

The following conditions should be added to water right 45-14284 and will provide the Department, Water District 45-F, and Water District 140 adequate tools to measure, monitor and regulate the water right:

This right is limited to the irrigation of 67 acres within the authorized place of use in a single irrigation season.

¹¹ Water right 45-14451 is not proposed to be changed through Application 79943. Application 81125, which is currently pending before the Department, does include water right 45-14451. A condition requiring Albion 12 to identify the 21.2 acres irrigated under water right 45-14451 should be included in Transfer Approval 81125.

¹² If water right 45-517D were diverted in full for the entire month of August, it would only amount to 6.2 cfs-days (0.2 cfs x 31 days = 6.2 cfs-days).

Rights 45-284B and 45-14284 when combined shall not exceed the irrigation of 90 acres. The places of use for these two rights overlap by 67 acres. When rights 45-284B and 45-14284 are used in combination, the total maximum diversion rate shall not exceed 1.12 cfs to irrigate the 67-acre shared place of use.

This right is limited to the irrigation of a specific 67.0 acres within the 480.2 acre place of use authorized by this right in a single irrigation season. The specific 67.0 acres to be irrigated by the right holder shall be identified prior to use by submittal of a land list and a representative electronic shape file or by submittal of a land list and a map sufficiently detailed to allow creation of an electronic shape file to be associated with this right in the geographic information system component of the water rights database maintained by the department. Before changing the 67.0 acres to be irrigated within the 480.2 acre place of use, the right holder shall submit a new land list and representative electronic shape file or map to the Department prior to the irrigation season in which the change will occur.

Water right 45-14284 shall only be diverted during times when the April 1, 1875 priority date is partially or fully curtailed on Howell Creek.

Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 140.

Upon specific notification of the Department, the right holder shall install and maintain data loggers to record water usage information at the authorized point(s) of diversion in accordance with Department specifications.

Prior to the diversion and use of water under Transfer approval 79943, the right holder shall install and maintain acceptable measuring device(s) at the authorized point(s) of diversion in accordance with Department specifications, or shall obtain an approved variance from the Department to determine the amount of water diverted from power records or to maintain an existing measuring device.

The right holder shall make full beneficial use of all surface water rights available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right to those times when the surface water supply is not available or the surface water supply is not reasonably sufficient to irrigate the place of use authorized under this right.

If the surface water right(s) appurtenant to the place of use is abandoned, forfeited, sold, transferred, leased or used on any other place of use, this right to divert ground water shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department if a transfer is not required.

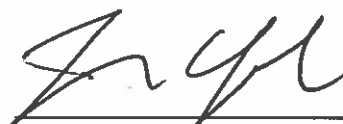
CONCLUSIONS OF LAW

Albion 12 has satisfied its burden of proof for the review criteria set forth in Idaho Code § 42-222 and Transfer 79943 should be approved. Conditions must be added to water right 45-14284 to prevent injury to existing water rights, to prevent enlargement of water right 45-14284, and to facilitate measurement, monitoring, and regulation of water rights 45-14284.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 79943 in the name of Albion 12 Investments, LLC is APPROVED as described in Transfer Approval 79943 issued in conjunction with this order.

Dated this 3rd day of February 2017.

A handwritten signature in dark ink, appearing to read 'J. Cefalo', is written over a horizontal line.

James Cefalo
Water Resource Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February 2017, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

**Document Served: Preliminary Order Approving Transfer (79943)
Transfer Approval 79943**

Albion 12 Investments LLC
Mike Merriman
7595 E McDonald Dr Ste 130
Scottsdale AS 85250-6081

Honsinger Law PLLC
Charlie Honsinger
PO Box 517
Boise ID 83701-0517

Brockway Engineering PLLC
c/o Erick Powell
2016 N Washington St Ste 4
Twin Falls ID 83301-3082

Christopher J. King
940 S Hwy 77
PO Box 54
Albion Id 83311-0054

Parsons Smith & Stone
William A. Parsons
PO Box 910
Burley ID 83318-0910

Kevin Smyer
PO Box 482
Albion ID 83311-0482

Norman L. Smyer
76 S Hwy 77
Declo ID 83323

Courtesy copies sent via regular mail to:

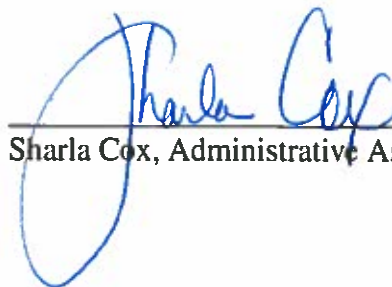
Earl L Warthen
1047 S Hwy 77
Albion ID 83311-9714

Don Gunderson
Water District 45-F
1047 E 1000 S
Albion ID 83311-0125

James Wahlgren
PO Box 73
Albion ID 83311-0073

Jaxon Higgs
Water District 140
355 W 500 S
Burley, ID 83318

H Lee Jolley
PO Box 21
Albion ID 83311-0021


Sharla Cox, Administrative Assistant

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.