

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>)	ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT
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On August 31, 2016, Bill Parsons, attorney for Applicant Albion 12 Investments, LLC (“Albion 12”), and Charles Honsinger, attorney for Protestant Earl Warthen (“Warthen”), contacted the hearing officer about scheduling pre-hearing motions. Specifically, the attorneys wanted to file motions for summary judgment on the question of whether the proposed transfer would result in an enlargement of water right 45-14284. The scheduling order issued by the hearing officer on July 14, 2016 (*Order Authorizing Discovery and Setting Disclosure Deadlines*) did not address pre-hearing motions.

The Department’s Rules of Procedure (IDAPA 37.01.01) do not describe a distinct process to be used for motions for summary judgment. Pre-hearing motions are governed by Rules 260 and 565 of the Department’s Rules of Procedure. Pursuant to these rules, all pre-hearing motions must clearly state the relief sought by the parties and the controlling law upon which the motions are based. Responses must be filed within 14 days of the filing of the original motion. The hearing officer issued an *Order Establishing Schedule for Pre-Hearing Motions* on August 31, 2016.

On September 21, 2016, Albion 12 and Warthen filed opposing motions for summary judgment on the question of enlargement. Albion 12 argued that the proposed transfer does not constitute an impermissible enlargement of water right 45-14284 and that the hearing should go forward as scheduled. Warthen argued that the transfer, if approved, would result in an enlargement of water right 45-14284 and, therefore, the transfer application should be denied. Warthen filed his response brief on October 5, 2016. Albion 12 filed its response brief on October 7, 2016, after the hearing officer approved an extension of the response deadline.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222 sets forth the criteria for evaluating 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. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.

FINDING OF FACTS

The following facts were included in a *Stipulation of Facts for Purposes of Summary Judgment*, filed jointly by Albion 12 and Warthen on September 9, 2016:

1. Water right no. 45-7090, the parent right for water right no. 45-14284, was licensed by the Idaho Department of Water Resources on April 4, 1983. The license was based upon a Field Report completed by IDWR's Gary Funderburg on September 26, 1979.
2. Water right no. 45-14284 was decreed in the Snake River Basin Adjudication on April 7, 2010 pursuant to [an] Order of Partial Decree. The basis of the decree was approved transfer no. 75528 issued by the Idaho Department of Water Resources on June 24, 2009.
3. The evidence establishes that water right no. 45-14284 has not been used for any purposes since the end of the 1983 irrigation season, but was previously used for irrigation.

The following facts are taken from the water right records of the Department:

4. Water right 45-14284 is a supplemental ground water right. The partial decree for water right 45-14284 included the following condition(s):

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.

ANALYSIS

Protestant Warthen contends, if Albion 12 transfers water right 45-14284 to the proposed place of use and begins to divert water after more than 30 years of non-use of the right, it would constitute an enlargement of the right. As discussed below, as long as there has been an annual demand for supplemental water, resuming use of a supplemental water right after a period of non-use is a question of forfeiture and resumption rather than enlargement.

Administrator's Memorandum Transfer Processing No. 24 (December 21, 2009) explains how the Department evaluates enlargement when an applicant proposes transferring a supplemental irrigation water right:

[T]he place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies. In other words, use of the supplemental right at the proposed place of use cannot materially exceed use of the supplemental right at the current 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.

If an applicant can demonstrate that the primary water rights at the proposed place of use are as reliable as or more reliable than the primary rights at the existing place of use, a supplemental water right can be transferred to the proposed place of use without violating the prohibition against enlargement. Non-use of a supplemental water right for an extended period of time, in spite of a demand for the supplemental water, becomes a question of forfeiture rather than enlargement.

In his response brief, Protestant Warthen acknowledges that "there has been no forfeiture of [water right 45-14284] prior to the filing of the relevant transfer application." *Response to Albion 12 LLC's Motion for Summary Judgment*, page 2. The other protestants to the pending application raised the issue of forfeiture in their protests, but did not participate in the motions for summary judgment regarding enlargement. Therefore, the other protestants may choose to present evidence on the issue of forfeiture at hearing.

Protestant Warthen relies heavily on *Barron v. IDWR* to support his argument that the proposed transfer will result in an enlargement of water right 45-14284. The Idaho Supreme Court provided the following guidance on enlargement in *Barron*: "Idaho law prohibits any transfer [] resulting in an enlargement of the water right above its historical beneficial use. Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use." *Barron v. Idaho Dept. of Water Resources*, 135, Idaho 414, 420 (Idaho, 2001). The language from *Barron* quoted above can be restated in the form of a question: Will more water be diverted or consumed at the proposed place of use to accomplish the same beneficial use occurring at the existing place of use?

Warthen argues that "there will be an enlargement in use because this water right is proposed to be diverted and used upon the lands to where it is to be transferred, whereas it has not been diverted at all for the past 33 years. This proposed use will certainly 'increase the

amount of water diverted or consumed’ as the Idaho Supreme Court defined the term ‘enlargement’ in *Barron*.” Warthen’s *Motion for Summary Judgment*, page 3.

Warthen applies the *Barron* decision too narrowly. In this case, the beneficial use in question is irrigation. The water right in question is a supplemental ground water right. Therefore, the amount of water diverted or consumed to accomplish the beneficial use of irrigation is the amount of water needed to irrigate the place of use, which cannot otherwise be supplied by the underlying primary surface water right. Enlargement occurs if more water will be diverted or consumed at the proposed place of use than would be diverted or consumed at the existing place of use to accomplish the proposed beneficial use of irrigation. For a supplemental ground water right, the question of enlargement is centered on the reliability of the primary surface water rights at the existing and proposed place of use.

Idaho law does not require a water user to divert his irrigation water right every year. In any given year, a water user can choose to fallow his field and not divert his water right. If, in the following year, the water user decides to farm again and diverts his water right in full, the continuation of use does not constitute an enlargement of the water right. Just as a water user can change from growing barley one year to growing corn (a more-consumptive crop) the next year without enlarging the water right, a farmer can also go from fallowing his ground (non-use) to growing a crop without enlarging the water right.

The same principles hold true for supplemental water rights. A water user may choose to not divert a supplemental water right in a given year, even though there is a demand for supplemental water (the primary right is curtailed in the middle of the irrigation season). If, in a subsequent year, the water user chooses to divert the supplemental right, the continuation of use does not constitute an enlargement. Non-use of a supplemental water right for more than five years, in spite of an annual demand for supplemental water, could result in forfeiture of the supplemental water right. Non-use of a supplemental water right is a question of forfeiture rather than enlargement.

CONCLUSIONS OF LAW

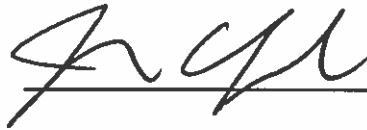
Use of a supplemental water right after multiple years of non-use does not, by itself, constitute enlargement of the water right. The proposed transfer may result in an enlargement of water right 45-14284 if the primary water rights at the proposed place of use are less reliable than the primary rights at the existing place of use. This is a question of fact. The parties have not yet been given an opportunity to present evidence on the reliability of the primary water rights at the existing and proposed places of use for water right 45-14284 and should be provided that opportunity in a hearing. Therefore, neither of the motions for summary judgment should be approved.

ORDER

IT IS HEREBY ORDERED that the motions for summary judgment filed by Albion 12 and Warthen are DENIED. The parties will be allowed to present evidence at the hearing relating to the question of enlargement. Evidence relating to the question of enlargement should address the reliability of the primary surface water rights at the existing place of use and proposed place of use for water right 45-14284.

This order is an Interlocutory Order as defined in Rule 710 of the Department Rules of Procedure (IDAPA 37.01.01).

Dated this 11th day of October, 2016.

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

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of October, 2016, 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 to the following:

Document Served: **Order Denying Motions for Summary Judgment**

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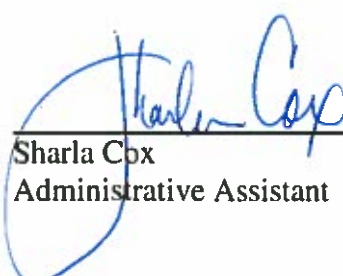
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