

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

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NOTES:

Transfer No. 79943 – Albion 12 Investments, LLC
Response to Earl Warthen's Motion for Summary Judgment

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DEPT OF WATER RESOURCES
SOUTHERN REGION

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER
NO. 79943

RESPONSE TO EARL WARTHEN'S
MOTION FOR SUMMARY
JUDGMENT

IN THE NAME OF:
ALBION 12 INVESTMENTS LLC

ALBION 12 ("APPLICANT") responds to the Brief of the Protestant, Earl Warthen, for Summary Judgment by the following:

1. The reliance upon *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 is misplaced because in that case the court held that if the Water Right was moved to another tract which result that the two rights would irrigate more than 311 acres then there is an enlargement of the Water Right. The facts also, in that

1 case, are distinguishable from this case in several particulars. In the *Barron* case the
2 license place of use historically had been irrigated to some extent by ground water right
3 37-07295 (supplemental right). *Barron* took surface right 37-02801 subject to the
4 ground water rights utilization. This case before the Department is to move a
5 supplemental irrigation right for continued use as a supplemental right at a different
6 place of use without enlarging the original right or the supplemental right proposed for
7 transfer so long as the primary rights of the original and proposed places of use provide
8 comparable water supplies. In other words, use of the supplemental right at the
9 proposed place of use cannot materially exceed the supplemental right at the current
10 place of use. In *Barron* there would be an increase in acres. Such is not the case before
11 the IDWR today.
12

13
14 2. The transfer of the point of diversion of Water Right No. 45-14284, a
15 copy of which is attached to this Response, clearly provides the limitation on the use of
16 the water and authority to so use it.

17
18 3. The Memo of Jim Bitzenburg of the IDWR staff provided in 2016 in part
19 as to the application for transfer application:

20 "Enlargement of Use – None anticipated. Application has enclosed
21 documentation in the Application which supports the move to a more
22 reliable surface water Rights from less reliable surface water rights."

23 This case is strictly moving of a supplemental right and does not involve the
24 primary right as it now exists. In *Barron* the evidence was bad and *Barron* was trying to
25 mix two applications, a primary right and a supplemental right, which would be the
26 enlargement.

4. Transfer Processing provides at 5(d) (5) in part:

"For such changes information regarding the historic ability or reliability of supply of the rights being supplemented (primary rights) both before and after the proposed is presumed to provide reasonable bases to establish historic use under the supplemental right proposed for transfer."

In the Administrative Bulletin No. 24 Transfer Processing it provides at 5d(3):

"However the 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 an original right or the supplemental right proposed to for transfer so long as the primary rights or the original and proposed place of use provide comparable water supplies. In other words, use of the supplemental right at the proposed place of use cannot materially exceed the supplemental right at the current place of use."

There are no definitions within the departmental procedures that address lapse of time as an enlargement. The important thing to address is that the supplemental water right is authorized by a Decree of the court in the IDWR adjudication. The Applicant seeks to use the authorized right consistent with departmental procedures.

5. As was pointed out in the original Brief of Applicant, this supplemental right sought to be transferred is a supplemental right and was authorized by Decree in the adjudication. If it was authorized, it certainly can be used consistent with the provisions of the administrative transfer processing policies and procedures of the Department.

6. Non-use under an authorized license is not an enlargement. In addition, this Right is a supplemental right and it's possible that it would not be used at all depending upon the results of the use of the primary right. If a landowner used a

1 supplemental right contrary to its terms to stop time it would be in violation of the right.

2 It must be used as supplemental when needed.

3 Summary Judgment for Applicant should be granted.

4
5 DATED this 17th day of October 2016.

6 PARSONS, SMITH, STONE, LOVELAND
7 & SHIRLEY, LLP

8
9 

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15 CERTIFICATE OF MAILING

16 I hereby certify that on the 17th day of October 2016, I mailed by regular
17 mail, and/or faxed and mailed, a copy of the foregoing to the following:

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EXHIBIT A

Close

IDAHO DEPARTMENT OF WATER RESOURCES Water Right Report

10/5/2016

WATER RIGHT NO. 45-14284

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	GEORGE A MONTGOMERY
Current Owner	GWEN MONTGOMERY
	937 S 900 E
	ALBION, ID 83311
	(208)673-6644

Priority Date: 02/26/1972
Basis: Decreed
Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
IRRIGATION	03/15	11/15	1.31 CFS	268 AFA
Total Diversion			1.31 CFS	

Location of Point(s) of Diversion:

GROUND WATER	NWSENW	Sec. 12	Township 12S	Range 24E	CASSIA County
GROUND WATER	SWSENW	Sec. 12	Township 12S	Range 24E	CASSIA County

Place(s) of use:

Place of Use Legal Description: IRRIGATION CASSIA County

EXHIBIT A

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
12S	24E	12		NWNE	28									
				NENW	10.5		SENE	28.5						

Total Acres: 67

Conditions of Approval:

1. C18 This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
2. 046 Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
3. This right is a split from former right 45-7090 .
4. 213 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.
5. 104 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.
6. X35 Rights 45-14288, 45-14284, 45-10912, and 45-14286 when combined shall not exceed the irrigation of 67.0 acres.
7. 065 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.
8. R64 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 above.
9. T08 Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
10. This right is a split from former right 45-14248 .
11. T07 The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
12. 214 Prior to the diversion and use of water under Transfer approval 75528, 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 ~~EXEMPT~~ to maintain an existing measuring device.
13. R05

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.

Dates:

Licensed Date:

Decreed Date: 04/07/2010

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

Water Supply Bank Enrollment Date Removed:

Application Received Date:

Protest Deadline Date:

Number of Protests: 0

Other Information:

State or Federal: S

Owner Name Connector:

Water District Number: 140

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Civil Case Number:

Old Case Number:

Decree Plaintiff:

Decree Defendant:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close

EXHIBIT A