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TO		DEPT OF WATER RESOURCES
COMPANY		SOUTHERN REGION
FAXNUMBER	12087363037	
FROM	Honsinger Law, PLLC	
DATE	2016-10-05 13:42:55 GMT	
RE	Transfer No. 79943 in the name of Albion 12 Investments, LLC	

COVER MESSAGE

Please find attached the following documents relevant to the above referenced matter:

1. Transmittal letter
2. Response to Albion 12 LLC's Motion for Summary Judgment

Please contact me immediately with any concerns or questions

Charles L. Honsinger
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Honsinger Law, PLLC
Charles L. Honsinger
(208) 863-6106

October 5, 2016

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DEPT OF WATER RESOURCES
SOUTHERN REGION

Transmitted by Facsimile

Idaho Department of Water Resources
Southern Regional Office
650 Addison Avenue West, Suite 500
Twin Falls, ID 83301-5858
Fax: (208)-736-3037

Re: Transfer No. 79943 in the name of Albion 12 Investments, LLC

Dear sir or madam:

Attached to this correspondence please find the following document to be filed in the above-referenced matter:

Response to Albion 12 LLC's Motion for Summary Judgment.

Please file the document in the case and send back to me by either facsimile or e-mail a copy of the document date-stamped as "received." Both my fax number and e-mail address are below. Additionally, please make sure that the hearing officer, Mr. James Cefalo, receives a copy of the document.

Thank you, and please contact me with any questions or concerns.

Sincerely,



Charles L. Honsinger

enclosures

cc: Client

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OCT 05 2016

DEPT OF WATER RESOURCES
SOUTHERN REGION

CHARLES L. HONSINGER (ISB # 5240)
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Attorney for Protestant Earl Warthen

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER	)	RESPONSE TO ALBION 12 LLC'S
NO. 79943	)	MOTION FOR SUMMARY JUDGMENT
IN THE NAME OF :	)	
ALBION 12 INVESTMENTS LLC	)	
_____	)	

COMES NOW Protestant Earl Warthen, by and through his counsel of record, Charles L. Honsinger, and, pursuant to IDAPA 37.01.01.260, IDAPA 37.01.01.565, Rule 56 of the Idaho Rules of Civil Procedure, and the Hearing Officer's summary judgment scheduling order, hereby files this *Response* to the *Motion for Summary Judgment* filed by Albion 12, LLC on September 21, 2016. This *Response* is supported by the record herein.

DISCUSSION

Albion 12, LLC (hereinafter "Albion 12") discusses the definition of the word "enlargement" from *Webster's International Dictionary 2nd Edition*, and concludes that the transfer proposed by Albion 12 does not constitute an enlargement as defined by the dictionary. However, as discussed in Warthen's *Brief in Support of Motion for Summary Judgment*, the Idaho Supreme Court gives guidance as to the meaning of "enlargement" of water rights. The Court states that "[e]nlargement 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, 18 P.3d 219, 225 (2001). This meaning of “enlargement” under Idaho law is different than that postulated by Albion 12, where it attempts to establish that only an increase in “the terms of the license” would constitute an enlargement.¹ In fact, the Court’s definition of “enlargement” absolutely encompasses the proposed transfer by Albion 12 where the proposed use would “increase the amount of water diverted or consumed” to much more than the historical use of the water right. There is simply no reasonable argument to the contrary.

As to any concern regarding forfeiture, Warthen agrees with Albion 12 that there has been no forfeiture of this water right prior to the filing of the relevant transfer application. In fact, the water right can continue to be used as authorized at its current place of use and current point of diversion. The fact that it has not been forfeited, however, does not mean that the proposed transfer does not constitute an enlargement.

Albion 12 argues that IDWR’s Water Management Staff Report of December 21, 2009 (referred to as *Transfer Processing Administrator’s Memorandum No. 24* in Warthen’s Brief) provides that “the place of use of a supplemental irrigation right may be changed for a continued use as a supplemental irrigation right at a different place of use without by definition enlarging the original right of the supplemental right proposed for the transfer so long as the primary right of the original and proposed places of use provide comparable water supplies.” *Albion 12 Motion for Summary Judgment*, pp. 3-4. Albion 12 does not discuss the remaining portion of the very paragraph it quotes from that same IDWR Report. Immediately following the language quoted by Albion 12, that paragraph concludes: “[i]n other words, use of the supplemental right

¹Notably, Albion 12 does not discuss *Barron* in its *Motion for Summary Judgment*.

at the proposed place of use can not materially exceed use of the supplemental right at the current place of use." *Transfer Processing Administrator's Memorandum No. 24*, pp. 28-29. It is very clear that the intent of the language of this paragraph is to prevent increased use of the supplemental right - which is exactly what will occur if Albion 12 is permitted to transfer this water right.

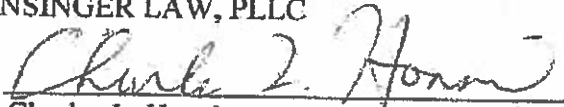
Albion 12 also does not discuss other portions of that same IDWR Report that undercut its argument that its proposed transfer does not constitute an enlargement. The document states that "[f]or an application for transfer seeking to change the place of use under a supplemental water right for use in conjunction with a different primary right, the historic extent of beneficial use under the right must not be enlarged." *Id.*, p. 29.

Quite simply, it is obvious that under both Supreme Court precedent and IDWR policy, the agency is to examine the substance of the proposed use under an application to transfer a supplemental right to a new place of use (to be used with a new primary water right), and determine if the beneficial use will in fact be increased, not only whether it will only in theory not be increased as Albion 12 urges. When the agency looks at actual proposed use, the conclusion is inescapable that there will be an enlargement, and that the transfer application must be denied for that reason.

DATED this 5th day of October, 2016

HONSINGER LAW, PLLC

By:


Charles L. Honsinger
Attorneys for Protestant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served via U.S. Mail on the following on this 5th day of October, 2016:

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