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(Merriman/Montgomery79943SummaryJudgmentMotion.doc)

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DEPT OF WATER RESOURCES  
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DEPT OF WATER RESOURCES  
SOUTHERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER  
NO. 79943

MOTION FOR SUMMARY  
JUDGMENT

IN THE NAME OF:  
ALBION 12 INVESTMENTS LLC

ALBION 12 INVESTMENTS LLC ("ALBION 12") moves for Summary

Judgment as follows:

1. **FACTS:** The facts are by Stipulation of Albion 12 and Protestant, Earl Warthen.

1           2.     **ALLOWANCE FOR FILING MOTION:** The Motion is filed by  
2  
3 Albion 12 pursuant to authority of James Cefalo, Hearing Officer, in his Order of August  
4 31, 2016.

5           3.     **APPLICABLE STATUTE:** *Idaho Code § 42-222(1)* as to whether there  
6 is an enlargement of the right on the proposed transfer.

7           4.     **RELIEF SOUGHT:** The Hearing Officer determined that the nonuse of  
8 a supplemental right for the stipulated time does not preclude the transfer of the  
9 supplemental Water Right 45-14284 and does not constitute an enlargement of the rights  
10 under the License and Decree.

11  
12                   **AUTHORITY IN SUPPORT OF THE MOTION**

13                           **AUTHORITY**

14           The applicable statute is *Idaho Code § 42-2-222(1)* for changing the point of  
15 diversion and the requirements that must be met for such change. The only requirement  
16 in the statute that is subject to this adjudication is:

17                   “The change does not constitute an enlargement of the use of the original  
18 right.”

19           Enlargement is not defined in the statute nor generally defined in any of the water code  
20 that can be identified as is applicable to this case.

21           The terms “enlarge” or “enlargement” are defined in *Webster’s International*  
22 *Dictionary 2<sup>nd</sup> Edition* as:

23           The term “enlarge” means to make larger, to increase in quantity or dimensions  
24 to extend in limits to magnify.  
25  
26

1 The term "enlargement" means act or instance of enlarging, a state of being  
2 enlarged and increase to bulk or extend, augmentation, expansion, extension. *Webster's*  
3 *International Dictionary 2<sup>nd</sup> Edition*.  
4

5 Enlargement is an action word and does not include a mere lapse of time. The  
6 License and Decree that is in question will remain with its terms and conditions subject  
7 only to the change of the point of diversion. It does not increase the volume, availability  
8 or any other term that would change the terms of the License that was decreed on April  
9 7, 2010, pursuant to the Partial Decree attached to the Stipulation of Facts supporting  
10 this Motion for Summary Judgment.  
11

12 The issue of time is found in *Idaho Code* § 42-222(2) where a Water Right can  
13 be lost or forfeited by a failure for a term of five (5) years to apply to beneficial use for  
14 which it was appropriated. As stipulated the Order was entered on April 7, 2010, and  
15 there were no objections to the Decree prior to its entry as can be seen from the Order  
16 attached to the Stipulation of Facts. If the Protestants had thought that the rights sought  
17 to be transferred had been lost, through the lapse of time, they could have objected to the  
18 Partial Decree. The Partial Decree notes there were no objections.  
19

20 In an applicable case as this, time is mentioned in *Idaho Code* § 42-222(2) where  
21 the failure to use water for five (5) years may result in a forfeiture. In this case the  
22 Decree of the court was April 7, 2010. The Application for Change of Diversion was  
23 filed in the five (5) years and so there is not any forfeiture. Additionally, in the  
24 Department's Water Management Staff Report dated December 21, 2009, it provides in  
25 5.d(3) "or the place of use of a supplemental irrigation right may be changed for a  
26 continued use as a supplemental irrigation right at a different place of use without by

1 definition enlarging the original right of the supplemental right proposed for transfer so  
2 long as the primary rights of the original and proposed places of use provide comparable  
3 water supplies.” In other words, the use of the supplemental right at the proposed place  
4 of use cannot materially exceed the allowed use of the supplemental right at the current  
5 place of use. Time limits are not specified in the departmental memorandum and as the  
6 other criteria in *Idaho Code* § 42-222(1) provide and time has no legal basis for  
7 enlargement.  
8

9         The record and the Stipulation show that there is no change in the quantity of the  
10 Permit to use as supplemental water and otherwise no inconsistency with the License  
11 and Decree and the Application for Transfer other than the place of use. Time is not a  
12 factor to disapprove the transfer. As Jim Bitzenburg stated in evaluation of information  
13 submitted for the transfer on “enlargement” none is foreseen or anticipated. Also there  
14 is no inconsistency with *Idaho Code* § 42-222 that prevents the processing of the  
15 Application.  
16

17         The Application is for a transfer of the place of use of a supplemental Water  
18 Right. To apply time as a criteria for denying the Application would be equivalent to  
19 rule that you have to use the supplemental Right or lose it. This is contrary as to what a  
20 supplemental is and would violate the terms of the License and Decree.  
21

22         **WHEREFORE** Albion 12 requests that the Hearing Officer grant its Motion for  
23 Summary Judgment.

24         **ALBION 12 REQUESTS ORAL ARGUMENT.**  
25  
26

1 DATED this 21 day of September 2016.

2 PARSONS, SMITH, STONE, LOVELAND  
3 & SHIRLEY, LLP

4  
5 

6 William A. Parsons  
7 Attorneys for Applicant  
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11 CERTIFICATE OF MAILING

12 I hereby certify that on the 21 day of September 2016, I mailed, and/or  
13 faxed, a copy of the foregoing to the following:

14 Charlie Honsinger  
15 Honsinger Law PLLC Fax No. 208-908-6085  
16 Box 517  
17 Boise, ID 83701-0517

18 Idaho Department of Water Resources  
19 650 Addison Avenue West, Suite 500  
20 Twin Falls, ID 83301-5858 Fax No. 208-736-3037

21 Erick Powell  
22 Brockway Engineering, PLLC  
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September 21, 2016

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DEPT OF WATER RESOURCES  
SOUTHERN REGION

Idaho Department of Water Resources  
650 Addison Ave. W., Suite 500  
Twin Falls, ID 83301-5858

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

Gentlemen:

Enclosed, for your information, is the Motion for Summary Judgment for Albion 12 Investments, LLC in regards to the above-entitled matter.

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.