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TO

COMPANY

FAXNUMBER 12087363037

FROM Honsinger Law, PLLC

DATE 2016-09-21 13:41:40 GMT

RE TransferNo.79943

COVER MESSAGE

Please See Attached documents

Charles L. Honsinger
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RECEIVED**SEP 21 2016****DEPT OF WATER RESOURCES
SOUTHERN REGION**

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

September 21, 2016

RECEIVED

SEP 21 2016

**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:

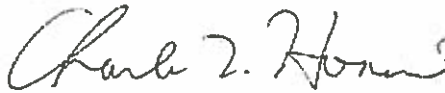
Attached to this correspondence please find the following two documents to be filed in the above-referenced matter:

1. Motion for Summary Judgment
2. Brief in Support of Motion for Summary Judgment.

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

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

Sincerely,



Charles L. Honsinger

enclosures

cc: Client

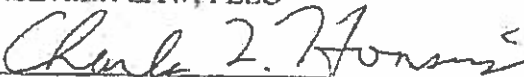
DEPT OF WATER RESOURCES
SOUTHERN REGION

MOTION FOR SUMMARY JUDGMENT

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 and Rule 56 of the Idaho Rules of Civil Procedure and IDAPA, hereby moves the Hearing Officer in this matter to grant Summary Judgment to Warthen on the issue of whether the transfer proposed by Albion 12 Investments, LLC constitutes an enlargement of the water right(s) proposed to be transferred. The grounds for this *Motion* are that there are no genuine disputes as to any material fact, and that judgment should be granted to Warthen as a matter of law as further discussed in Warthen's *Brief in Support of Motion for Summary Judgment* lodged contemporaneously herewith. This *Motion* is supported by the *Stipulation of Facts for Purposes of Summary Judgment* filed by the parties on September 7, 2016. A hearing is requested so that the parties may have an opportunity to rebut any information disclosed in the parties' respective responsive briefs due 14 days after the filing of their respective *Motions for Summary Judgment*.

DATED this 21st day of September, 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 21st day of September, 2016:

H Lee Jolley
P.O. Box 21
Albion, ID 83311

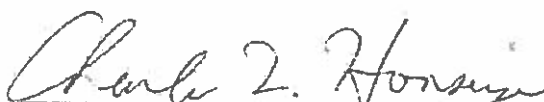
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SEP 21 2016

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SOUTHERN REGION

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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	)	BRIEF IN SUPPORT OF MOTION FOR
NO. 79943	)	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 hereby submits this Brief in Support of Motion for Summary Judgment. Warthen files his Motion for Summary Judgment contemporaneously herewith, and requests that a hearing be held to offer the parties the opportunity to rebut any material that may appear in the parties' responsive briefs, which are due 14 days after the joint filing of Motions for Summary Judgment on September 21, 2016. This *Brief* is supported by the *Stipulation of Facts for Purposes of Summary Judgment* filed by the parties on September 7, 2016.

FACTS

Albion 12 Investments, LLC filed its Application for Transfer of Water Right No. 45-14284 on March 30, 2015 proposing to change the points of diversion and place of use from its current location to a location closer to Warthen's own points of diversion. Warthen protested the transfer application, concerned that approval of the transfer would constitute an enlargement of

the water right. Other parties protested as well, and the case proceeded towards hearing.

Water right no. 45-7090, the parent for water right no. 45-14284, was licensed by the Idaho Department of Water Resources on April 4, 1983. Water right no. 45-14284 was partially decreed in the Snake River Basin Adjudication District Court on April 7, 2010 as a “supplemental” ground water right. That is, water right no. 45-14284 may only be diverted at times when the surface water supply appurtenant to the same decreed place of use is unavailable or is insufficient to irrigate the place of use authorized under water right no. 45-14284. The “supplemental” nature of the water right was carried over from the original parent right 45-7090 to 45-14284. The evidence establishes that water right no. 45-14284 has not been used for any purpose since the 1983 irrigation season, although it was used for irrigation prior to that time.

ARGUMENT

IRCP 56(a) provides that an adjudicative body “must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” In Idaho, summary judgment is appropriate if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Grazer v. Jones*, 154 Idaho 58, 64, 294 P.3d 184, 190 (2013) (discussing previous version of I.R.C.P. 56¹).

In this case, Warthen seeks summary judgment because there are no material issues of

¹ On April 27, 2016, the Idaho Rules of Civil Procedure were amended, effective July 1, 2016, including Rule 56, the rule governing Summary Judgment. While the language of Rule 56 was modified, it still contains the statement that “court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law”. I.R.C.P. 56(a). Please see I.R.C.P. 56(c) of the previous iteration of the rules to compare: “The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c) (Amended effective July 1, 2016)

fact regarding the non-use of water right no. 45-14284 for at least the past 33 years, and because a change in point of diversion and place of use to a location where the water right will be used will constitute an expansion or enlargement under the law.

I.C. §42-222 provides in relevant part that with respect to a transfer application such as that at issue in this case:

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, [and] the change does not constitute an enlargement in use of the original right.

I.C. §42-222 (underlined emphasis added). The Idaho Supreme Court has given some guidance regarding enlargement or expansion by holding that “Idaho law prohibits any transfer from resulting in an enlargement of the water right above its historical beneficial use. *See* I.C.

42-222(1). 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, 18 P.3d 219, 225 (2001). In this case, 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, supra*.

The Idaho Department of Water Resources also provides guidance regarding how it determines what constitutes an enlargement pursuant to a transfer application under I.C. §42-222. In *Transfer Processing Administrator’s Memorandum No. 24* issued by Jeff Peppersack to Water Management Division Staff on December 21, 2009, the department is instructed to determine

whether a proposed transfer will enlarge the use of water under the rights proposed to be transferred. *Transfer Processing Administrator's Memorandum No. 24*, p. 28. "Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive water rights), exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer." *Id.*

Transfer Processing Administrator's Memorandum No. 24 specifically addresses stacked water rights. Water rights, such as 45-14284 and the surface water right appurtenant to its current place of use are "'stacked' when two or more water rights . . . are used for the same use and overlie the same place of use." *Id.*, p. 28. Use of a supplemental right, such as 45-14284 "at the proposed place of use can not materially exceed use of the supplemental right at the current place of use." *Id.*, pp. 28 -29 (underlined emphasis added). In this case, it is quite obvious that unless no use occurs at the proposed place of use, the use of water right no. 45-14284 will materially exceed its use at the current place of use.

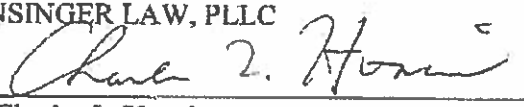
Transfer Processing Administrator's Memorandum No. 24 goes on to address the exact situation before the Hearing Officer as this transfer application is being processed. "For an application for transfer seeking to change the place of use under a supplemental water right for use in conjunction with a different primary right, the historic extent of beneficial use under the right must not be enlarged." *Id.*, p. 29. There is simply no question that in this case the beneficial use proposed under Albion 12's transfer application will far exceed the non-existent 33-year historical beneficial use of this water right. As such, it constitutes an enlargement, and cannot be approved pursuant to I.C. §42-222.

SUMMARY

The Albion 12 transfer application proposes beneficial use of water right 45-14284 from a new point of diversion and at a new place of use that far exceeds the historical beneficial use of the water right - which beneficial use is for all intents and purposes exactly none. Such a new beneficial use constitutes an enlargement in violation of I.C. §42-222 as is discussed in *Barron v. Idaho Department of Water Resources, supra* and *Transfer Processing Administrator's Memorandum No. 24, supra*. There is no material issue of fact regarding the non-use of water right no. 45-14284 for the last 33 years. Because any increase in the beneficial use of water right no. 45-14284 constitutes an enlargement as defined by the Idaho Supreme Court and IDWR, Warthen is entitled to judgment as a matter of law. Accordingly, Warthen respectfully requests that the hearing officer grant summary judgment and determine the proposed transfer is an enlargement and, as such, simply cannot be approved.

DATED this 21st day of September, 2016

HONSINGER LAW, PLLC

By: 

Charles L. Honsinger
Attorneys for Protestant

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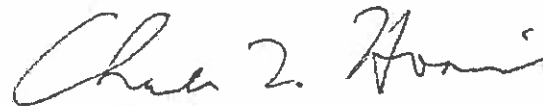
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