

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION )	
FOR PERMIT OF WATER RIGHT NO. )	
45-14456 IN THE NAME OF ALBION )	
12 INVESTMENTS, LLC )	<b>PRELIMINARY ORDER</b>
_____ )	

This matter is before the Idaho Department of Water Resources ("Department") in the form of a protested application for permit to appropriate the public waters of the State of Idaho. The hearing officer, based upon his understanding of the law and the facts in this matter, makes the following Findings of Fact, Conclusions of Law and Preliminary Order:

**PROCEDURAL BACKGROUND**

1. On April 7, 2014, Albion 12 Investments, LLC ("applicant") initiated Application for Permit No. **45-14456** ("application") through its consultant, Brockway Engineering PLLC. The application proposed the following elements:

Source:	Howell Creek tributary of Marsh Creek
Use and rate of diversion:	2.0 cubic feet per second (cfs) for Ground Water Recharge
Total rate of diversion:	2.0 cfs
Points of diversion:	Existing headgate and measuring device located within the SWSENW Section 21, T12S, R25E, B.M. in Cassia County <sup>1</sup>
Season of use:	January 1 to December 31
Place of use:	SWNW and SENW Section 21, T12S, R25E.
Remarks:	Using existing diversion and delivery system to provide recharge water, when water is available, to recharge the aquifer.

2. Transmittal letter indicates water will be placed into recharge basins to be constructed on applicant's property.

3. The Department published notice of the application on May 1<sup>st</sup> and 8<sup>th</sup>,

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1. The quarter-quarter notation of "1/4" has been omitted from all legal descriptions throughout this order for ease of reference.

2014. Timely protests of the application were filed by the Lower Snake River Aquifer Recharge District ("LSRARD") and by Earl Warthen ("Warthen").

4. On October 1, 2014, and on January 15, 2015, the Department conducted pre-hearing conferences that did not resolve the protests.

5. On March 19, 2015, LSRARD, through its attorney Travis Thompson, filed a withdrawal of protest stipulating that any approval of application include the following conditions:

- Water diverted under this right shall not be used to irrigate lands as a means to achieve recharge.

- Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting or monitoring requirements administered by the Department of Environmental Quality and/or the Department of Agriculture.

6. On May 28, 2015, the Department conducted a formal hearing in the matter. All remaining parties were present at the hearing. The applicant was represented by attorney William A. Parsons. Warthen represented himself.

7. Exhibits pre-marked, offered and admitted as part of the record are as follows:

**APPLICANT'S:**

Exhibit 1	Site map showing distance to neighbors ( aerial photo background)
Exhibit 2	Site map showing ground water gradient (orthoquad background)
Exhibit 3	Powell report of "Geologic and Hydrogeologic Summary for Proposed Recharge Project near Albion, Idaho"
Exhibit 4	CV for Erick Powell
Exhibit 6	Deposition of Earl Warthen (taken 3/11/2015)

**PROTESTANT'S:**

Exhibit B	Government Plat Map of T12S, R25E
Exhibit E	Albion 7.5 minute quad map
Exhibit F	Conner Creek 7.5 minute quad map
Exhibit G	Aerial photograph of recharge site
Exhibit I	Soil Maps of Site with Soil Unit Description

## **FINDINGS OF FACT**

1. The purpose of application 45-14456 is to provide a water right for the diversion of water from Howell Creek for ground water recharge by the applicant on applicant's lands.
2. Marsh Creek and its tributaries (including Howell Creek) are administered by the watermaster of Water District 45F.
3. The Marsh Creek drainage is tributary to the Snake River upstream of Milner Dam and is not within the trust water area associated with the Eastern Snake Plain aquifer.
4. The watermaster of Water District 45F, Don Gunderson, does not oppose approval of the application if the water right is conditioned as follows:
  - The season of use is limited to November 1 to March 1
  - The use is limited to 0.8 cfs to 1.0 cfs due to existing rights below the proposed point of diversion
  - During winter months Howell Creek flows vary from 1.5 cfs to 3 cfs and need at least 1.0 cfs to maintain a creek flow to prevent snow drifting into channel causing channel breaching and flooding
5. At the site of the project Howell Creek generally flows to the north. Howell Creek flows into Marsh Creek approximately 5 miles below the project site.
6. At the site of the project the ground water generally flows to the north perpendicular to the contours of the land. Ground water generally flows in the same direction as Howell Creek.
7. The soil down gradient of the recharge site is predominantly Kovich silt loam, 0 to 3 percent slopes, with depth to water table about 12 to 36 inches.
8. Warthen operates a ground water recharge project diverting water from Howell Creek 3/4 mile down gradient of applicant's proposed recharge site under water right 45-14194 from November 1<sup>st</sup> to March 31<sup>st</sup>. This site is approximately 2/3 mile up-gradient or above the field identified above as experiencing saturation problems.
9. Warthen attempts to manage his recharge project to lessen saturation problems in his fields.
10. Warthen operates a hydropower plant diverting water from Howell Creek under water right 45-7642 from September 15<sup>th</sup> to April 15<sup>th</sup>. The right is diverted at the site of his recharge project and is limited to 1.23 cfs. Additionally Warthen is required to bypass 0.20 cfs down Howell Creek at the point of diversion.

11. Right 45-7642 is subordinated to all future rights other than hydropower.
12. Right 45-7642 is conditioned as being subject to diversion of water under water rights for irrigation purposes diverted during the non-irrigation season provided the use is in compliance with applicable law, and the ground will absorb the water. This condition appears to be an attempt to acknowledge some sort of historical ground water recharge effort above the power site.
13. The standard irrigation season at the project site is April 1<sup>st</sup> to October 31<sup>st</sup>.
14. Other recharge projects including Warthen's have a season of use of November 1<sup>st</sup> to March 31<sup>st</sup>.
15. The headgate at the proposed point of diversion already exist but the recharge basins have not been constructed.

### **STANDARD FOR DECISION**

Water right applications are processed under Idaho Code § 42-203A(5) which provides, in part, that:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in Section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

A water right applicant bears the burden of proof for the factors set forth in Section 42-203A(5), Idaho Code.

The criteria for evaluating the factors listed above is described in IDAPA 37.03.08.45 (Water Appropriation Rule 45).

## **ANALYSIS**

Warthen's concerns regarding the application include:

- possible elevation of water table on Warthen's fields due to applicant's recharge project causing or exacerbating saturation of Warthen's fields. (field of concern located NENW Section 16, T12S, R25E)
- injury to Warthen's hydropower use
- possible clogging of Howell Creek with snow or ice which would cause flooding and injury caused by the reduced flow in Howell Creek

The applicant testified that water has been diverted for ground water recharge in the past on the applicant's land but location is not clear in the record.

The applicant's expert witness, Dr. Powell, testified that the proposed project would have little or no effect on the fields where Warthen experiences high water table problems. He concludes the problems are likely a result of seepage from Howell Creek, excess irrigation from agricultural practices in the immediate area, or Warthen's own recharge project. Furthermore, historical recharge efforts (Irrigation during the non-irrigation season) have caused no recorded problems or damages to land or property.

Warthen's experience managing his own recharge project should not be discounted. Warthen's management practices include reducing his diversion rate when he believes the soil profile is saturated. Applicant's recharge site is directly up-gradient of Warthen's property. The applicant's recharge site is directly up-gradient of soils with a relatively shallow water table that are on the applicant's property and which extends onto Warthen's property. Director should retain jurisdiction to require monitoring of recharge if determined necessary.

The Dr. Powell report anticipates that recharge water will typically be available during the non-irrigation season, specifically the early spring and late fall. Dr. Powell's expert opinion is that water is also available during high water or flood events and would provide opportunity to recharge even when other senior rights are being called for in the future. The applicant acknowledges that numerous senior water rights exist for irrigation and other uses during the irrigation season and other uses during the non-irrigation season for storage and ground water recharge that are deliverable downstream of the project. The applicant expects the right to be regulated by priority.

Regulation of recharge diversions by the watermaster should provide adequate control to avoid injury to other water right holders. The watermaster's efforts must be compensated as provided in Section 42-605A, Idaho Code.

Use of water under this permit should be limited to the non-irrigation season to facilitate regulation by the watermaster, be consistent with other recharge projects in the area and assure use is not for irrigation.

Warthen does not dispute that applicant has the financial resources to complete the project. Warthen concurs that the applicant would develop the project and that water has been diverted for ground water recharge in the past. Warthen concurs that ground water recharge is in the public interest if managed properly to avoid injury to neighbor's property.

The applicant has demonstrated it is desirous and capable of properly managing uses that are consistent with local public interest.

The Department agrees with the stipulated conditions for withdrawal of LSRARD's protest and have incorporated the conditions into the approval.

The record supports issuance of a permit to provide the applicant opportunity to conduct ground water recharge in a manner that would be regulated and monitored by the watermaster.

### **CONCLUSIONS OF LAW**

1.     Conservation of Water     The applicant has satisfied its burden of persuasion by demonstrating that the proposed use is consistent with the conservation of water within the state of Idaho. Recharge is recognized pursuant to Section 42-234, Idaho Code, as a means to achieve conservation of water resources.

2.     Financial Resources     The applicant has satisfied its burden of persuasion by demonstrating that it has sufficient financial resources with which to complete the work involved.

3.     Injury to Water Rights     The applicant has satisfied its burden of persuasion by demonstrating that the proposed use will not reduce the quantity of water under existing water rights since the use would be subject to deliver by the watermaster of Water District 45F.

4.     Sufficiency of Water Supply     The applicant has satisfied its burden of persuasion by demonstrating that the water supply itself is sufficient for the purpose for which it is sought to be appropriated.

5.     Application Made in Good Faith     The applicant has satisfied its burden of persuasion by demonstrating that the application is made in good faith.

6.     Local Public Interest     The applicant has satisfied its burden of persuasion by demonstrating that the purpose for which it is sought to be appropriated is in the local public interest.

## ORDER

IT IS THEREFORE, hereby ORDERED that Application for Permit 45-14456 is **APPROVED**, with certain conditions to protect the public interest as described on the following draft permit:

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**DRAFT\*\*\***

State of Idaho  
Department of Water Resources  
**Permit to Appropriate Water**  
NO. 45-14456

Priority: April 07, 2014

Maximum Diversion Rate: 2.00 CFS

This is to certify, that ALBION 12 INVESTMENTS LLC  
7595 E MC DONALD DR STE 130  
SCOTTSDALE AZ 85250

has applied for a permit to appropriate water from:

**Source:** HOWELL CREEK

**Tributary:** MARSH CREEK

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>
GROUND WATER RECHARGE	11/01 to 03/31	2.00 CFS

**LOCATION OF POINT(S) OF DIVERSION:**

HOWELL CREEK SW1/4SE1/4NW1/4 Sec. 21, Twp 12S, Rge 25E, B.M.  
CASSIA County

**PLACE OF USE:** GROUND WATER RECHARGE

Twp	Rge	Sec	NE				NW				SW				SE				
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
12S	25E	21							X	X									

**CONDITIONS OF APPROVAL**

1. Proof of application of water to beneficial use shall be submitted on or before **July 01, 2020**.
2. Subject to all prior water rights.
3. Use of water under this right shall be non-consumptive for the purpose of Section 42-605A, Idaho Code; however, the right shall be curtailed as necessary to fill non-subordinated senior priority water rights.
4. 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. 45F.
5. The watermaster may adjust or curtail delivery as necessary to prevent Howell Creek from freezing over to prevent flooding during periods of freezing weather. The watermaster may maintain up to



1.0 cfs bypass flow to prevent freezing.

6. Use of this right shall be managed to limit overland flow to within the trenches or ponds constructed for recharge purposes and to prevent overland flow of water directly back to Howell Creek.
7. Water diverted under this right shall not be used to directly irrigate lands as a means to achieve recharge.
8. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting or monitoring requirements administered by the Department of Environmental Quality or the Department of Agriculture.
9. Pursuant to Section 42-234(4), Idaho Code, to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge. The Director may require installation of monitoring wells and development of a monitoring plan in the future as necessary to prevent elevated ground water table injury to other property owners.
10. Pursuant to Section 42-234(3), Idaho Code, the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
11. Approval of this permit does not constitute approval by the Idaho Water Resource Board as may be required pursuant to Section 42-1737, Idaho Code.
12. The right holder shall maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works.
13. The right holder shall record the daily quantity of water diverted for ground water recharge and shall report the diversion data for the prior calendar year to the Department by February 1 each year. Reporting shall occur in the manner specified by the Department, consistent with Section 42-701, Idaho Code. To facilitate this reporting requirement, the right holder shall install and maintain a totalizing measuring device approved by the Department at each point of diversion and at each point where water is delivered from the conveyance system into a designated recharge site.
14. This right is not an authorization for the described recharge effort to be used as mitigation or credit for any other purpose. The sufficiency of the recharge effort authorized under this right for mitigation or credit for some other purpose may be determined by the Department upon proper submission of a mitigation plan pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources, a mitigation plan to offset depletion in association with a water right application, a Management Program pursuant to Idaho Code Section 42-1416B, or any other proposal to utilize credit for the recharge effort.
15. This right shall be junior and subordinate to future water rights authorizing the diversion and use of water from Marsh Creek and its tributaries, including ground water, for consumptive uses, except that this right shall not be subordinate to future water rights for ground water recharge uses.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code.

**\*\*\*Authority to divert water is not authorized until this preliminary order becomes final.**

Signed this 26<sup>th</sup> day of June, 2015.

  
ALLEN D. MERRITT, P.E.  
Hearing Officer