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Attorneys for Petitioners

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI**

JAMES WHITTAKER, an individual, and
WHITTAKER TWO DOT RANCH LLC, an
Idaho limited liability company,

Petitioners,

v.

THE IDAHO DEPARTMENT OF WATER
RESOURCES, an administrative agency of the
State of Idaho,

Respondent.

Case No. CV30-21-0304

Fee Category L.3.a – \$221.00

**NOTICE OF APPEAL AND PETITION
FOR JUDICIAL REVIEW OF FINAL
AGENCY ACTION**

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 84441 IN THE NAME OF
BRUCE AND GLENDA MCCONNELL

Wildman (SRBA), Eric J.

Petitioners James Whittaker and Whittaker Two Dot Ranch LLC (the “Petitioners”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby file this *Notice of Appeal and Petition for Judicial Review of Final Agency Action* challenging a final decision by the Idaho Department of Water Resources (“IDWR” or “Department”), pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

STATEMENT OF THE CASE

1. This matter concerns IDWR Director Gary Spackman's *Order on Exceptions; Final Order Approving Transfer* (dated November 2, 2021) (the "Order") which upheld two decisions issued in a contested case before IDWR by Hearing Officer James Cefalo in the above-entitled matter (the *Preliminary Order Denying Petitions for Reconsideration* and *Order Denying Petition to Re-Open Hearing and Petition for Site Visit* both dated June 21, 2021).
2. This is a civil action pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279 seeking judicial review of the Order.
3. The *Order* is a final order of the Department because it was issued by the agency head. IDAPA 37.01.01.740.01.
4. Pursuant to Idaho Code §§ 67-5270 and 67-5273, the Petitioners may petition for judicial review within twenty-eight (28) days of issuance of the *Order*, Idaho Code § 67-5273(2), which in this matter is on or before November 30, 2021. *See also* IDAPA 37.01.01.740.02.d.
5. The *Order* is the subject of this *Notice of Appeal and Petition for Judicial Review of Final Agency Action*.

JURISDICTION AND VENUE

6. This petition is authorized by Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.
7. This Court has jurisdiction and venue over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5272, as the party seeking review of the *Order* resides in Lemhi County.

Additionally, the Lemhi County is the county in which the water rights¹ that are the subject of the agency action are located. *See also* IDAPA 37.01.01.791.01.

8. Pursuant to the Idaho Supreme Court's Administrative Order issued on December 9, 2009, "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The Snake River Basin Adjudication District Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. Petitioners have attached a copy of the Snake River Basin Adjudication District Court's *Notice of Reassignment* form for the convenience of the clerk.
9. The *Order* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

I.R.C.P 84(c) INFORMATION

10. **Name of Agency For Which Judicial Review is Sought:** Idaho Department of Water Resources, an executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 E. Front Street, Boise, Ada County, Idaho 83720.
11. **Title of the District Court to Which the Petition is Taken:** In the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Lemhi.
12. **Case Caption and Action for Which Judicial Review is Sought:** In the Matter of Application for Transfer No. 84441 in the Name of Bruce and Glenda McConnell.

¹ Water Right Nos. 74-361, 74-362, 74-363, 74-364, 74-365, 74-367, and 74-368. Water rights are real property rights. *See* Idaho Code § 55-101.

13. **Hearing Recording:** A hearing was held in this matter on April 21-22, 2021. A recording of the hearing was made. The recording is in the possession of the Idaho Department of Water Resources, 322 E. Front St. Ste. 648, Boise, Idaho 83702.
14. **Statement of Issues for Judicial Review:** An initial list of the statement of issues for judicial review are:
 - a. Whether the *Order* violates some or all of the provisions of Idaho Code § 67-5279(3).
 - b. Whether the director erred by adopting an injury evaluation standard for water right transfers based on a past stream channel location as opposed to the current stream channel location.
 - c. Whether the director erred by expanding the legal definition of “confluence” to include the mapped location of a former confluence location as opposed to the actual, current physical location of where a tributary stream flows into another stream.
 - d. Whether the director erred in the *Order* by not following IDAPA 37.03.07.010.12, an adopted Idaho administrative rule specific to IDWR, which provides that “[t]he channel referred to is that which exists at the present time, regardless of where the channel may have been located in the past.”
 - e. Whether the director erred by concluding that Whittaker’s exercise of WR 74-157 was “unauthorized” despite the Idaho Supreme Court case of *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956).
 - f. Whether the director erred in reaching a conclusion unsupported by testimony, either live or through submission of an expert report, from a stream geomorphologist or engineer or other expert opining that the volume of water coming down Stroud Creek

- would be sufficient to naturally move the current physical Stroud Creek stream channel confluence from its current location back to the mapped confluence location.
- g. Whether the Director erred by failing to follow the holding and principles contained in the Idaho Supreme Court case of *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960) concerning replacement of a natural stream channel with an artificial channel.
 - h. Whether the Director erred by not including a subordination condition on McConnell's water rights in the approval of transfer no. 84441.
 - i. Whether the Director erred by concluding that the equitable doctrine of laches is inapplicable in this matter.
 - j. Whether the district court should apply the equitable doctrine of laches in this matter.
 - k. Whether the Director erred by not granting Petitioners' motion to re-open the hearing in this matter.
 - l. Whether the Director erred by not granting Petitioners' motion for a site visit.
 - m. Whether the *Order* violated a substantial right or substantial rights of the Petitioners.
15. **Designation as to Whether a Transcript is Requested:** A hearing transcript is being requested in this matter.
16. **Attorney Certification:** I, Robert L. Harris, counsel for the Petitioners, certify that (1) service of this petition has been made upon the Department; (2) at the recommendation of the agency, M&M Court Reporting in Boise will prepare the transcript and has been mailed the estimated fee of three thousand five hundred dollars (\$3,500.00) for preparation of the transcript; and (3) that the agency has been paid the estimated fee for preparation of the record after I contacted Garrick Baxter of the Department, who provided an estimate of twenty dollars (\$20.00), which I then paid by hand-delivering a check for the estimated

amount to the Eastern Region Office of IDWR at 900 N. Skyline Dr. Ste. A, Idaho Falls,
Idaho 83402 on November 30, 2021.

Dated this 30th day of November 2021.



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November 2021, I served a copy of the following described pleading or document on the parties listed below by the indicated method.

Document Served: NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

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