

**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,

and

BRUCE and GLENDA MCCONNELL,

Intervenors.

Case No. CV-30-21-0304

**PETITIONERS'
OPENING BRIEF**

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

PETITIONERS' OPENING BRIEF

Judicial Review of the *Order on Exceptions; Final Order Approving Transfer*
(dated November 2, 2021)

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James Whittaker and Whittaker Two Dot Ranch LLC (collectively “Petitioners” or “Whittaker”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Petitioners’ Opening Brief*.

I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal concerns water right transfer application 84441 (the “Transfer” or simply “84441”) filed by Bruce and Glenda McConnell (collectively “McConnell”) and involves “important legal and policy issues that require careful consideration . . .” R. 339, 342. Hence the appeal to this court. While there are several issues raised on appeal, the issues primarily center on the Department’s injury and enlargement analysis and decision to approve 84441 based on the location of a historic confluence of two stream channels rather than based on the currently existing and undisputed confluence location. Without relief from this Court, McConnell will potentially have administrative access to water from a tributary stream and its tributary water supplies (including the springs that yield water to Whittaker’s Water Right No. 74-157) that McConnell previously did not have, which is a clear form of injury under Idaho law.

Among others, Whittaker is a protestant to 84441. R. 76-78. Whittaker seeks judicial review of Idaho Department of Water Resources’ (“IDWR” or “Department”) Director Gary Spackman’s *Order on Exceptions; Final Order Approving Transfer* (dated November 2, 2021) (the “Order”), R. 346-351, which upheld three decisions issued in a contested case before Hearing Officer James Cefalo (the “Hearing Officer”) in the above-entitled matter: (1) the *Preliminary Order Approving Transfer* (the “Preliminary Order”) (R. 182-212); (2) *Order Denying Petitions for Reconsideration* (“Reconsideration Order”) (R. 271-283); and (3) and *Order Denying Petition to Re-open Hearing and Petition for Site Visit* (the “Hearing Order”) (R. 266-269). The *Order*

was issued by Director Spackman after Whittaker filed *Exceptions to Preliminary Order Approving Transfer, Order Denying Petition to Re-Open Hearing, and Petition for Site Visit* (the “*Exceptions*”). R. 284-331.

As stated at the hearing and in prior briefing, and reiterated here, Whittaker would not object to the approval of 84441 if a subordination condition were in place subordinating the use of McConnell’s Lower Diversion to Whittaker’s Water Right No. 74-157 (“WR 74-157”). The Hearing Officer approved 84441 with a subordination condition for Steven Johnson’s water right, WR 74-1831, which is appropriate; but the Hearing Officer did not include a similar subordination condition to protect WR 74-157, nor to any of the other existing water rights which divert from Stroud Creek. There are both legal and factual errors contained in the *Order* that violate provisions of Idaho Code § 67–5279(3). Upon review, this Court should either remand 84441 with instructions to approve it with a subordination condition to protect Whittaker’s WR 74-157 or remand the matter for further proceedings consistent with the Court’s decision.

B. Course of Proceedings.

The application for 84441 was submitted on October 5, 2020. R. 41-44. It was protested by Whittaker, David R. Tomchak, Smith 2P Ranch, Steven Johnson, and Rosalie Ericsson. R. 182. A pre-hearing conference was held on February 9, 2021, and an administrative hearing was held on April 21-22, 2021. *Id.* The *Preliminary Order* was issued on May 18, 2021. R. 195. On June 1, 2021, both Whittaker and Johnson filed timely petitions for reconsideration. R. 223, 231-261. The *Reconsideration Order*, which denied these petitions for reconsideration, was issued on June 21, 2021. R. 280. Whittaker also filed a petition to re-open the administrative record to offer additional evidence relative to the issue of the historic confluence of Stroud Creek with Lee Creek

issue and for the Hearing Officer to visit sites at issue in the contested case. R. 224-230. The Hearing Officer denied this petition in the *Hearing Order*.

Whittaker timely filed its *Exceptions* with the Director on July 6, 2021, which sought review by the Director of the *Preliminary Order*, the *Reconsideration Order*, and the *Hearing Order*. R. 284-331. The Director twice extended the deadline to issue his *Order* because the *Exceptions* “raise[d] important legal and policy issues that require careful consideration and extensive legal research and analysis of the record.” R. 339, 342. As a result, additional time was needed “to conduct the necessary research and conduct an exhaustive evaluation of the issues prior to issuance of a final order.” R. 342. The Director’s three-page *Order* was issued on November 2, 2021. The *Order* contains very little additional analysis and affirmed the holdings of the *Preliminary Order*. Whittaker timely filed a *Notice of Appeal and Petition for Judicial Review of Final Agency Action* on November 30, 2021. R. 352-359.

C. Statement of Facts.

The following facts from the Idaho Supreme Court case of *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956) describe the alterations made to the Stroud Creek drainage decades ago:

The trial court found that in the year 1932, respondents entered into an oral contract with appellants’ predecessors (and other interested parties), to whom water had been decreed by the July 1, 1912 decree, whereby the point of diversion of waters of the Left Fork of Lee Creek, decreed to and used upon lands, including the lands now occupied by appellants, situate northerly and below all of respondents’ lands, was changed from a point situate on the main channel of Lee Creek to a point situate on the Left Fork thereof near the Southwest corner of Section 31, Township 16 North, Range 25 E.B.M., which point of diversion is situate about one and one-fourth miles southwesterly and above the West Springs; and whereby, in consideration of a grant by John Whittaker, father of respondent Floyd Whittaker, of a right of way for a ditch over certain of the John Whittaker lands (over Lots 4 and 3 and SE 1/4 of the NE 1/4, Sec. 31, Twp. 16 N., R. 25 E.B.M.) through which to convey from such point of diversion on the Left Fork, to the Right Fork of Lee Creek the said decreed waters. The other parties, including appellants’ predecessors, permitted respondents to remove a flume which had been used continuously since some time prior to the entry of the July 1, 1912 decree to

transmit the waters of the West Springs across the Left Fork at a point situate in the described quarter section where the springs are situate, and to substitute in place of said flume an earthen dam where the flume theretofore had been, *thereby to capture all waters found flowing in the creek at that place.*

The court further found that pursuant to said contract the dam was constructed, maintained and used by respondents at all times since 1932 continuously and without interruption until the year 1954 when, at appellants' instance, the water master cut the dam, which allowed the waters to flow down the channel but nevertheless into a diversion ditch of respondents situate some 650 feet below and northeasterly from said dam.

Whittaker v. Kauer, 78 Idaho at 97, 298 P.2d at 747.

Additionally, Whittaker generally agrees with most of the findings of fact contained in the *Preliminary Order*. R. 182-188. Rather than re-word or present an entirely new set of facts than those in the *Preliminary Order*, Whittaker provides these same facts from the *Preliminary Order's* Findings of Fact. Those facts that appear to be undisputed from Whittaker's perspective are set forth without underlining, while disputed fact statements (prepared by Whittaker) different from the *Preliminary Order* are underlined, and facts that do not appear to be relevant on appeal (*i.e.*, water right lists for protestants that have not appealed) are omitted as noted. These facts should adequately provide the Court with an understanding of this matter. Any additional facts supported by evidence in the record are added in the argument section of this brief as necessary.

Preliminary Order Findings of Fact

1. Application 84441 proposes to add a point of diversion to seven water rights owned by McConnell. The authorized source for all seven water rights is Lee Creek. The seven water rights (hereinafter "McConnell Rights") describe the following elements:

Right No.	Priority Date	Uses	Period of Use	Rate (cfs)	Irrigated Acres	Combined Acres
74-361	5/12/1883	Irrigation	3/15 – 11/15	1.18	211.7	211.7
		Stockwater	1/1 – 12/31	0.02	N/A	
74-362	5/1/1906	Irrigation	3/15 – 11/15	4.10	211.7	46.1
74-363	5/12/1883	Irrigation	3/15 – 11/15	1.00	46.1	
74-364	6/1/1900	Irrigation	3/15 – 11/15	1.30	46.1	268.8
74-365	5/12/1883	Irrigation	3/15 – 11/15	1.20	20.8	
74-367	5/12/1883	Irrigation	3/15 – 11/15	0.60	268.8	268.8
74-368	11/5/1909	Irrigation	3/15 – 11/15	5.80	268.8	
Totals:				15.20	547.4	

2. On September 9, 2020, McConnell filed Application for Transfer 84367, proposing to correct the legal description for the only authorized point of diversion (“Upper Diversion”) on the McConnell Rights. McConnell asserted that the partial decrees for the McConnell Rights issued in the Snake River Basin Adjudication (“SRBA”) contained an error in the legal description for the Upper Diversion.

3. After reviewing the documents provided by McConnell, the Department determined that the SRBA partial decrees for the McConnell Rights included an erroneous legal description for the Upper Diversion. Ex. 7. Because there was compelling evidence of an error and because there were no water rights or tributary streams between the erroneous point of diversion and the corrected point of diversion, the Department processed Application for Transfer 84367 without public notice. *Id.* The Department approved Transfer 84367 on October 8, 2020. Ex. 6.

4. The Upper Diversion is the only existing, authorized point of diversion for the McConnell Rights and is located in the NENE, Section 30, T16N, R25E. Ex. 1 at Appendix B. The point of diversion (“Lower Diversion”) proposed to be added to the McConnell Rights is located in the SWSW, Section 20, T16N, R25E, approximately 1,600 feet downstream of the Upper Diversion. *Id.* at 8, Figure 1.

5. The Lower Diversion has been in place and used since at least 1986. Ex. 1 at 11-12 and Figure 7 (aerial imagery from 1986 shows Lower Diversion); Testimony of Bruce McConnell (confirming Lower Diversion was in place when he purchased the property in 1993).

6. The Department curtailed the Lower Diversion in August 2020 after it discovered that the Lower Diversion was not listed as an authorized point of diversion on the McConnell Rights. Testimony of Bruce McConnell; Ex. 4.

7. The ditch conveying water from the Upper Diversion currently has a capacity of approximately 2.5-4.0 cfs. Ex. 1 at 7. The ditch conveying water from the Lower Diversion currently has a capacity of approximately 12 cfs. *Id.*

8. The two main ditches used to convey the McConnell Rights were once supplied from a single point of diversion, located in the vicinity of the Upper Diversion. Ex. 1 at 11-13. During that time period, the common ditch split into two ditches approximately 500 feet downstream of the single point of diversion. *Id.* Since at least 1986, the eastern ditch has been supplied water from a separate, downstream point of diversion (the Lower Diversion). *Id.*

9. The Upper Diversion is not currently equipped with a lockable, controllable headgate. Ex. 1 at 9. A lockable, controllable headgate must be installed at the Upper Diversion prior to use in the 2021 irrigation season. Ex. 4.

10. “The Lee Creek system forms from runoff originating from the north and east facing slopes of the Lemhi Range.” Ex. 1 at 13. Lee Creek is tributary to the Lemhi River. *Id.*

11. Lee Creek is comprised of four tributary streams (Everson Creek, Stroud Creek, Porcupine Creek and Right Fork of Lee Creek). Ex. 1 at 13-14, Figure 9. Everson Creek and Stroud Creek flow together shortly after the streams leave the national forest. *Id.* This combined creek is designated as Stroud Creek on a United States Geological Survey (“USGS”) Map, but is also known as Left Fork of Lee Creek. *Id.* The USGS map also indicates that Porcupine Creek flows into Lee Creek approximately one-half mile upstream of the Upper Diversion. The USGS map contains the label of “Lee Creek” for this creek, even though a branch of Lee Creek has been referred to as the Right Fork of Lee Creek.¹

12. Stroud Creek is a tributary of Lee Creek. Ex. 1 at 14, Figure 9; Ex 154. The main channel of Lee Creek begins where Right Fork of Lee Creek and Stroud Creek join together. *Id.*

13. Several maps indicate that the historic confluence of Stroud Creek and Lee Creek was located near the southwest corner of the SENE of Section 30, T16N, R25E, approximately one-quarter mile upstream of the Upper Diversion. It is disputed whether the maps depicting this historic confluence are correct or not. It is undisputed that the current confluence of these streams—where water from Stroud Creek enters the Lee Creek Channel—is in the SWSW of Section 20, T16N, T16N, R25E. Testimony of Bruce McConnell, Merritt Udy, Jordan Whittaker, James Whittaker, and David Tomchak.

14. James Whittaker holds the following water rights on Stroud Creek (Left Fork of Lee Creek):

Right No.	Priority Date	Uses	Period of Use	Rate (cfs)	Acres
74-369	5/12/1883	Irrigation	3/15 – 11/15	2.40	275.4
74-1136	6/28/1912	Irrigation	3/15 – 11/15	2.00	102.6
74-15788	12/31/1982	Irrigation	3/15 – 11/15	1.97	308.0
Combined Limits:				4.40	686

15. Water rights 74-369, 74-1136 and 74-15788 currently authorize only one point of diversion on Stroud Creek. This diversion (hereinafter “Whittaker Diversion”), is located in the SENE, Section 31, T1 6N, R25E. Ex. 1 at Appendix G; Ex. 153 at Figure 11.

16. The natural channel or ditch nature of water channels below the Whittaker Diversion was at issue at the hearing in this contested case, and the Hearing Officer found that “the current flow path of Stroud Creek water through the Whittaker Two Dot Ranch property does not constitute the natural channel of Stroud Creek.” R.186. This is because of the changes to the Stroud Creek system described in *Whittaker v. Kauer*. Originally the earthen dam placed where the flume had originally been located did “capture all waters found flowing in the creek at that place.” *Whittaker v. Kauer*, 78 Idaho at 97, 298 P.2d at 747. Whether the West Springs ditch and berm today constitutes a diversion of water (where it was held in this matter the natural channel of Stroud Creek at this location no longer currently exists) is a disputed fact.

¹ See Tr. p. 168, LL. 3-9 (Testimony of Scott King); R. 597. Given the USGS labels, Whittaker will use the labels “Lee Creek” and “Stroud Creek” in this brief to reference these channels.

17. Water rights 74-369, 74-1136 and 74-15788 are limited to a total combined diversion rate of 4.40 cfs from Stroud Creek at the Whittaker Diversion. Ex. 1 at Appendix G. Prior to 2014, if the flow in Stroud Creek exceeded 4.40 cfs (or 2.40 cfs when water rights junior to May 12, 1883 were curtailed) at the Whittaker Diversion, the excess flows in Stroud Creek were diverted through the Kauer Ditch located upstream of the Whittaker Diversion to satisfy downstream rights on Lee Creek as described in *Whittaker v. Kauer*. After 2014, excess flows present at the Whittaker Diversion now disperse through a series of water channels and man-made channels where such flows eventually flow into one of Whittaker's main ditches (the Floyd J. Whittaker Ditch). Testimony of Jordan Whittaker, James Whittaker, and David Tomchak.

18. The West Springs Ditch is a deep, excavated ditch, running from west to east. Testimony of James Whittaker (describing excavation of the ditch); Ex. 154; Ex. 153 (ditch is four to five feet wide and three to four feet deep). The West Springs Ditch was constructed to capture and convey the flow from the West Springs as described in the *Whittaker v. Kauer* case. Ex. 154. The berm was constructed within the original Stroud Creek natural channel upon which the West Springs Ditch is located as described in the *Whittaker v. Kauer* case.

19. Today the West Springs Ditch collects water present below the Whittaker Diversion where no natural Stroud Creek channel exists. Testimony of Merritt Udy. The West Springs Ditch is located approximately 2,000 feet downstream of the Whittaker Diversion.

20. The West Springs Ditch is not currently equipped with a lockable, controlling works as it collects spring water and directs it to the Floyd J. Whittaker ditch as described in *Whittaker v. Kauer*.

21. All of the water directed by the West Springs Ditch is directed to the east, where it joins another irrigation ditch maintained by Whittaker. Ex. 153 at Figure 11; Ex. 154. This combined ditch is used to convey water over a divide ridge which separates the Stroud Creek drainage from the Big Eightmile Creek drainage. Ex. 154; Testimony of Contor.

22. At the dividing ridge between the drainages, up until 2020, Whittaker maintained a control structure, known as the hilltop splitter, which sent water into a ditch heading northeast for irrigation use by Whittaker or in a separate direction into the remnants of an old deteriorated ditch known as the Bohan or Bohannan Ditch (hereinafter "Bohan Ditch") from which water would subsequent disperse (due to its deteriorated and unmaintained state) into several small channels and eventually into a channel that runs parallel to the Lee Creek channel until the channel merges with Lee Creek. Testimony of Jordan Whittaker; Testimony of Bryce Contor.

23. The Bohan Ditch, as depicted on the 1954 map, is difficult to locate today as it has not been used for decades and is not maintained. Based on the 1954 map, the Bohan Ditch runs east below the West Springs berm. Ex. 154; Ex. 153 at Figures 20 and 21. A remnant portion of the Bohan Ditch carries the water released by Whittaker at the location of the hilltop splitter for a short distance before water flows out of this remnant portion. Testimony of Bryce Contor.

24. The original natural channel of Stroud Creek below the Whittaker Diversion is no longer present. Below the West Springs Ditch, it is disputed as to how a lower channel that parallels Lee Creek should be categorized. It is undisputed that the channel exists. The section of the Stroud Creek drainage below the Whittaker Diversion down to the lower channel has been altered through modifications to the drainage as described in the 1956 case of *Whittaker v. Kauer*. The lower channel generally has water present in it and is identified by many as Stroud Creek. Testimony of Merritt Udy.²

26. The current flow path of Stroud Creek water through the Whittaker Two Dot Ranch property does not constitute the natural channel of Stroud Creek.³

27. Omitted (redundant; see finding of fact 14).

28. Omitted (describing protestant Ericcson's water right).

29. Water rights 74-369 and 74-370 include the following condition:

When the flow of water in Lee Creek is insufficient to supply all rights under the 5-12-1883 date of priority, right 74-369 and right 74-370 shall not be pro-rated with any rights on Lee Creek with that priority date.

30. Water right 74-1831, held by Johnson, bears a priority date of June 28, 1912 and authorizes the diversion of 0.24 cfs from Lee Creek for the irrigation of 12 acres. Ex. 1 at Appendix D. The only authorized point of diversion for water right 74-1831 is located in the NWNWNW, Section 29, T16N, R25E, between the Upper Diversion and Lower Diversion. *Id.* at 15.

31. Water rights in the Lee Creek drainage are administered by Water District 74Z. Merritt Udy is the current watermaster for Water District 74Z. Water District 74Z is a sub-district of Water District 170. At the time of hearing, Cindy Yenter was the watermaster for Water District 170.

32-35. Omitted (describing water rights of protestants not parties to this appeal).

² Tr. p. 272, LL. 2-18; p. 280, LL. 9 through p. 282 LL. 7; Tr. p. 287, LL. 11-14.

³ While the issue of whether the water channels through the Whittaker Two Dot Ranch property are properly considered to be ditches or the natural channel of Stroud Creek was originally raised as an issue on appeal, it is no longer being asserted by Whittaker as an issue on appeal. Creek channels can lose their character as a natural watercourse if certain conditions are met. *See, Dayley v. City of Burley*, 96 Idaho 101, 103, 805 P.2d 1073, 1075 (1974) (Idaho Supreme Court affirmed a finding that a creek bed no longer constituted a natural watercourse in a circumstance where no regular, non-surface waters had flowed down the creek bed since construction of a dam years earlier, some portions of the creek bed been filled, and some portions of the creek bed were farmed or even had homes built on the creek bed).

36. Prior to 2014, during times of scarcity, junior water rights on Stroud Creek and Everson Creek located upstream of the Kauer Ditch heading were curtailed by the watermaster for Water District 74Z to supply water to be delivered through the Kauer Ditch to downstream senior water rights on Lee Creek. The Kauer Ditch has not been used since. In 2020, Cindy Yenter directed water deliveries of Stroud Creek water to occur below the Whittaker Diversion through Whittaker's ditches to the hilltop split and spilled in an effort to satisfy McConnell's water rights. This was done until an investigation by Yenter revealed that the Lower Diversion was not an authorized point of diversion under McConnell's water rights and that it was below the confluence of Stroud Creek and the Right Fork of Lee Creek. R. 513-514. McConnell subsequently filed 84441.

II. ISSUES PRESENTED ON APPEAL

1. Whether the *Order* properly rejected the Hearing Officer's attempt to recast the historic confluence of two streams as the confluence of those streams.
2. Whether, as a matter of law, it is proper for an injury and enlargement analysis to be based upon the historic confluence of two stream channels, or whether the injury and enlargement analysis must be based upon the confluence of those stream channels.
3. Whether the Department's determination that Whittaker's use of water in the Stroud Creek drainage after 2014 (when Whittaker's use was alleged to be "unauthorized") caused the change from the historic confluence to the confluence is supported by evidence in the record, or whether any such actions were undertaken by man prior to 2014 (beginning in the early 1900s as described in the Idaho Supreme Court decision of *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956)) as supported by evidence and testimony in the record.
4. Whether the presence of certain structures and natural features testified to at the hearing supports a finding that the historic confluence of Stroud Creek and Lee Creek was not at the mapped location and whether, upon review, the Court should reverse the Department's reliance on maps and instead rely upon witness testimony of these physical features.
5. Whether the Department erred by not applying the equitable doctrine of laches and whether the Court should now apply this equitable doctrine.

6. In the alternative to the above, whether the Court should grant Whittaker's *Petition to Re-open Hearing and Petition for Site Visit*.
7. Whether the Department's actions have prejudiced Whittaker's substantial rights.

III. APPLICABLE LEGAL STANDARD

The applicable standard of review before this Court has previously been well explained by the Idaho Supreme Court:

In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act ("IDAPA"), "we review the decision of the district court to determine whether it correctly decided the issues presented to it." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). However, we review the agency record independently of the district court's decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)).

Idaho Code section 67–5279(3) provides that the district court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67–5279(3); *Clear Springs Foods*, 150 Idaho at 796, 252 P.3d at 77. Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67–5279(4). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67–5279(3).

N. Snake Ground Water Dist. v. Idaho Dep't of Water Res., 160 Idaho 518, 522, 376 P.3d 722, 726 (2016). As to legal questions, a reviewing court exercises de novo review. *Eden v. State (In re SRBA Case No. 39576)*, 164 Idaho 241, 248, 429 P.3d 129, 136 (2018) (“We exercise de novo review over legal questions.”).

IV. LEGAL ARGUMENT

A. The *Order* properly rejected the Hearing Officer’s attempt to recast the historic confluence of two streams as the confluence of those streams.

A threshold matter is an important definitional clarification. In the Hearing Officer’s written decisions in this contested case, he engaged in word inflation to recast the **historic confluence** of two creeks as the **confluence** of those stream channels even though it is undisputed that the historic confluence and present-day confluence of the streams at issue in this matter are at different locations:

The question presented to the hearing officer is whether the confluence continues to exist at the same location today. The hearing officer concluded that the confluence of Stroud Creek and Right Fork of Lee Creek continues to be located upstream of McConnell’s Upper Diversion.

R. 227. In addition to several of Whittaker’s witnesses, even the applicant Bruce McConnell testified that the confluence of Stroud Creek and Lee Creek is located downstream of the Upper Diversion, as well as the historic confluence depicted on various maps of these creeks. Tr. p. 70, LL. 1-16.

Citing to this testimony in Whittaker’s *Petition for Reconsideration* that the locations of these features are undisputed, the Hearing Officer refused to label the current confluence of these creeks as the confluence, but instead, called the confluence the location where water is “released into Lee Creek at a location downstream of McConnell’s Upper Diversion.”:

This is not an accurate summary of the evidence in the record. The *Preliminary*

Order correctly summarizes the evidence in the record relied on by the hearing officer. Stroud Creek water, diverted by Whittaker at the West Springs Ditch without a water right, is released into Lee Creek at a location downstream of McConnell’s Upper Diversion.

R. 278. The *Hearing Order* provides similarly:

The *Preliminary Order* does not state that the confluence was changed by Whittaker or any other person. To the contrary, the *Preliminary Order* states that the confluence has not changed and continues to be at the location shown on the 1989 USGS Map and the 1954 Engineer’s Map.

Hearing Order at 2; see R. 191 (“The confluence in the SWSENE of Section 30 is not active.”⁴).

While the Director did not reverse the Hearing Officer’s holdings upon review of the *Exceptions*, the Director did correctly describe and label the confluence in the SWSENE of Section 30 as the “historic confluence” of Stroud Creek and Lee Creek (the Right Fork of Lee Creek) in his *Order*, and not as the “confluence” of these creeks:

As a result of the hearing officer's conclusions related to the **historic** Stroud Creek stream channel, the hearing officer concluded the **historic** confluence of Stroud Creek and Right Fork of Lee Creek is located upstream of McConnell's current, approved Upper Diversion. *Preliminary Order* at 8-9; *Order Denying*

⁴ We have not found any legal or definitional support for the concept of an “inactive confluence” of streams as even the dictionary definition of confluence contemplates a current, not past, situation. Merriam-Webster defines confluence in the context of streams to be:

a: the flowing together of two or more streams

A complex lacework of waterways formed by the *confluence* of the Sacramento and San Joaquin rivers, the delta is the state's major water source ...

— Robert B. Gunnison

Confluences are a basic building block of river networks on all scales.

— Chris Paola

b: the place of meeting of two streams... quaint Carbondale is set at the *confluence* of the Crystal and Roaring Fork Rivers.

— *National Geographic*

c: the stream or body formed by the junction of two or more streams : a combined flood

... and eventually chose, disastrously, the only place in Assam where it was impossible for tea to thrive, being regularly drowned by the *confluence* of two huge rivers, a more suitable terrain for rice.

— Christian Lamb

<https://www.merriam-webster.com/dictionary/confluence>. There is nothing in this definition that defines a confluence as the location of the flowing together of two or more streams *in the past*. A confluence is the *current* location of the flowing together of two or more streams.

Petitions for Reconsideration at 7. “The 1989 USGS Map and 1954 Map show the Stroud Creek channel extending from the West Springs Ditch area north to a confluence located upstream of McConnell's Upper Diversion.” *Order Denying Petitions for Reconsideration* at 7. The hearing officer reasonably relied on maps in the record showing the confluence as it would be without Whittaker's unauthorized diversion. For purposes of this contested case and the approval of Transfer No. 84441, the **historic** confluence of Stroud Creek and Right Fork of Lee Creek is in the southwest corner of the SENE of Section 30, T1 6N, R25E.

Because McConnell's authorized point of diversion and proposed point of diversion are downstream of the **historic** confluence of Stroud Creek and Right Fork of Lee Creek, approval of the new point of diversion will not injure Whittaker's water rights.

R. 347-348 (bolding added). The Director used the correct terminology—“historic confluence” rather than simply “confluence”—in the *Order*, which refuses to adopt the Hearing Officer's attempt at word inflation. The former location of the confluence⁵ of two stream channels is not the confluence of those streams. The confluence of streams is where water from the tributary is currently flowing into the other creek.

This clarification is important because the *Order* makes the Department's decision in this matter clear—the Director held that the Department can base its Idaho Code § 42-222 injury and enlargement analysis on the location of a **historic** (former) confluence of two streams that has changed over time, and not the actual, current confluence of those streams. This is critical because, in the context of an injury and enlargement analysis, there is no dispute that adding a point of diversion below the confluence of a tributary stream which gives McConnell administrative access to water from that tributary stream is an injury to Whittaker's water right and an enlargement of McConnell's rights. This was even acknowledged by the Hearing Officer:

If the confluence is downstream of the Upper Diversion (the only existing point of diversion on the McConnell Rights), then adding a point of diversion downstream of the confluence could result in injury to junior water rights on Stroud Creek and enlargement of the McConnell Rights.

⁵ The historic confluence was also referred to as the “mapped confluence” at times during the hearing. Tr. p. 131, LL. 11-19; p. 393, LL. 12-15.

R. 188; *see also* Tr. p. 168 L. 10 through p. 169 L. 10 (Testimony of McConnell expert Scott King). The first principle listed in Idaho Code § 42-222(1) concerning evaluation of a transfer application is that “no other water rights are injured thereby.” This phrase does not limit the injury to only senior water rights—the “no-injury” rule protects juniors as well. “Injury will result where a change makes a junior appropriator subject to a priority to which the junior was not previously subject . . .” A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 IDAHO L. REV. 249, 254 (1990).

With this important clarification, as addressed below, the Department’s determination that injury and enlargement review can be based on the historic confluence location of two streams is legal error that merits reversal or modification of the *Order*. These analyses must be based on the current location of the confluence of the two streams. As used in this brief, and consistent with language from the Director’s *Order*, Whittaker will use the correct term “historic confluence” to reference the location depicted on several maps in the SENE of Section 30, T16N, R25E “approximately one-quarter mile upstream of the Upper Diversion.” R. 184. Use of the term “confluence” herein is a reference to the current location where Stroud Creek water flows into the Right Fork of Lee Creek in the SWSW of Section 20, T16N, R25E, below the Upper Diversion.

B. As a matter of law, it is not proper for an injury and enlargement analysis to be based upon the historic confluence of two stream channels. The injury and enlargement analysis must be based upon the confluence of those stream channels.

Rather than evaluating injury and enlargement based on the confluence of Stroud Creek with the Right Fork of Lee Creek, the Department based its injury evaluation on where certain (and conflicting) evidence of where the Stroud Creek stream channel and its historic confluence with the Right Fork of Lee Creek is depicted on a USGS Map and a 1954 engineer’s map. Based on this faulty premise, the Hearing Officer focused on what he described as “whether this site [the

historic confluence] represents the natural confluence of Stroud Creek and the Right Fork of Lee Creek.” R. 188.

There are both legal and factual issues with the Hearing Officer’s conclusion. The legal issues are addressed in this section. The factual issues are addressed in the following section.

Prior to the hearing, it was unknown whether the location of the confluence location would be in dispute. Cindy Yenter, the Watermaster from Water District 170, did not fully acknowledge this fact in her August 6, 2020 letter that came out of the 2020 water distribution matter between McConnell and Whittaker. R. 755-756 (“Based on the investigation conducted yesterday, **it appears** that water from Stroud Creek **may** flow into Lee Creek below McConnell’s authorized point of diversion.” (emphasis added)). This language—use of “it appears” and “may”—is not definitive and suggests that the matter was still open for dispute at the hearing.

After the date listed in Yenter’s letter, it was unknown to Whittaker whether Yenter, McConnell, or both, conducted any further investigation on this issue or reached a different conclusion. They did not. The fact is undisputed that the confluence of Stroud Creek with Lee Creek is *below* the Upper Diversion. As described by Bruce McConnell:

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1 Mr. Bromley, I believe I heard you say that Stroud
2 Creek comes into Lee Creek above both of your diversion
3 points.
4 Did I understand your testimony correctly?
5 A. I don't think -- Stroud Creek comes in kind
6 of in between them, you know, and -- at present day.
7 You know, what -- what -- I have never -- I had never
8 spent that much time in that creek until last summer.
9 So yeah, at the present time Stroud Creek comes in real
10 close, comes in below my upper diversion.
11 Q. And is that based upon your own
12 observation?
13 A. Yes, that's what -- yeah.
14 Q. So you would agree that right now it comes
15 in below your upper diversion point?
16 A. Yes.

Tr. p. 70 LL. 1-16. Others agreed with Bruce McConnell's testimony. Tr. p. 272, LL. 2-18; p. 280, LL. 9 through p. 282, LL. 7 (Testimony of Merritt Udy); Tr. p. 330, L. 17 through p. 331, L. 2 (Testimony of Jordan Whittaker); Tr. 551, L. 4 through L. 20 (Testimony of David Tomchak).

Based on this unrefutable fact of where the confluence is located, the injury to Whittaker is clear under well-established legal principles in Idaho that the Department did not apply.

Whittaker's 74-157 is junior to McConnell's rights that he seeks to amend under 84441. Adding a point of diversion below the confluence of a tributary stream which gives McConnell administrative access to water from that tributary stream is clearly an injury to Whittaker's water right and an enlargement of McConnell's rights. With the confluence of Stroud Creek and the Right Fork of Lee Creek established, the injury and enlargement is evident, and the remedy that the Department should have employed is to subordinate McConnell's use of the Lower Diversion to Whittaker's WR 74-157, just like what the Department did for Steven Johnson's water right. The Department refused to do so. Instead, to circumvent a finding of what is clearly injury to Whittaker, the Hearing Officer introduced—and the Director affirmed—use of the historic confluence of the two streams as the baseline for the injury evaluation of 84441.

As a matter of law, it is not proper for an injury and enlargement analysis to be based upon the historic confluence of stream channels rather than the confluence of those stream channels. This is evident in relevant Idaho administrative rules and statutes. Evaluation of injury and enlargement based on the *past* location of the channel introduced an unprecedented standard unanticipated by Whittaker because it has no statutory, rule, case law, or contested case basis of which Whittaker or his representatives are aware. Our review of Idaho finds leads to the opposite conclusion—the confluence location must be used for an injury and enlargement evaluation.

It seems self-evident that the injury and enlargement evaluation of a *present* transfer application such as 84441 must be based on *present* conditions, not past conditions or where the channel might have been located if the historic diversion and use of water was done differently. This principle of present-day evaluation was selectively applied by the Hearing Officer in other aspects of this contested case, such as his analysis of the validity of the McConnell water rights:

There is no presumption that a transfer application should be approved simply because an unauthorized point of diversion has been in place and used for many years. The Department must evaluate the proposed changes against the existing elements of the water right. In this case, the Department must evaluate Application 84441 as though an entirely new point of diversion will be added to the McConnell Rights.

R. 192.

Further, there is nothing in the plain language of Idaho Code § 42-222 which provides or even suggests that past circumstances can serve as a basis for injury evaluation. Language from a 1929 Idaho Supreme Court decision supports this as it held the following in relation to proposals to amend water rights:

[W]e now declare and determine the rule, generally applicable, to be that junior appropriators **have a vested right to a continuance of the conditions existing on the stream at and subsequent to the time they made their appropriations**, and that no proposed change in place of use or diversion will be permitted when it will injuriously affect such established rights.

Crockett v. Jones, 47 Idaho 497, 504, 277 P. 550, 552 (1929) (emphasis added). This Idaho Supreme Court decision was not addressed by the Department. Whittaker has a vested right to continuance of the conditions existing on [Stroud Creek] at **and subsequent** to the time Whittaker's 74-157 was appropriated.

When it comes to stream channels and how they are located and evaluated, IDWR's own Stream Channel Alteration Rules include a sentence directly addressing the question of where the legally recognized channel is located:

The channel referred to is that which **exists at the present time, regardless of where the channel may have been located in the past.**

IDAPA 37.03.07.010.12 (emphasis added). This rule is specific, concise, and precisely on point.

Other Idaho law relative to stream channels also supports Whittaker’s position, even if the change in confluence location was caused by artificial means. The Idaho Supreme Court has clearly held that “[a] stream does not lose the attributes of a water course merely because a part of its channel may have been artificially created.” *Poole v. Olaveson*, 82 Idaho 496, 503, 356 P.2d 61, 65 (1960) (citing to 1 KINNEY ON IRRIGATION AND WATER RIGHTS, p. 489). The use of the altered Spring Creek channel in *Poole* was for drainage water from a church’s irrigation, and while the persons who constructed the artificial drainage channel near where Spring Creek’s natural channel ran sought to enjoin the church from discharging wastewater into the channel, the Idaho Supreme Court held:

I.C. § 42-101 provides that “the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed.” Substitution of the artificial drainage channel for the natural channel of Spring Creek did not affect the rights of users of the waters of the Creek to the use of its water course to drain away waste waters arising from use of waters of the Creek.

Id. Accordingly, even if the change in confluence location was caused by artificial means, such as changes in the watershed or diversion and use of water, the resulting new confluence is the legally recognized confluence.

In addition to *Poole*, other authority supports the established principle that a stream channel does not lose the attributes of a watercourse because a part of its channel may have been artificially created or influenced. *See, e.g., Scranton-Pascagoula Realty Co. v. Pascagoula*, 157 Miss. 498, 508, 128 So. 73, 75 (1930) (“By the great weight of authority, however, and especially after the period of prescription has run, that which was at first an artificial channel will become a watercourse when for all the prescriptive years it has taken the place, and has served principally in

lieu, of the original channel. “A stream does not lose the attributes of a watercourse by the fact that a part of its channel may have been artificially created. The straightening of a crooked watercourse in order to facilitate the flow and avoid the flooding of bordering lands is not uncommon. To divert the course so long as the change has been and remains permanent, whatever may have been the particular purpose to be served, eventuates in a similar legal result.”); *Chowchilla Farms, Inc. v. Martin*, 219 Cal. 1, 14, 25 P.2d 435, 440 (1933) (“Such waters, thus forming a watercourse and flowing with regularity from year to year, although the channel may be dry for the major portion of each year, are a proper subject of appropriation, and where such waters did not originally collect and flow down the channel, if through the instrumentality of man they have been made to do so and, through years of so flowing have acquired a permanent character as the natural drainage of the watershed, the original manner of the creation of the stream is immaterial; it is a ‘watercourse’ with all the attributes of one wholly natural.”); *Binning v. Miller*, 55 Wyo. 451, 475-76, 102 P.2d 54, 63 (1940) (“In *City of Reading v. Althouse*, 93 Pa. 400, the court among other things stated: ‘And so in *Sutcliffe v. Booth*, 32 L. L. Q. B. 136 it was held, per Wightman, J., that a watercourse, though artificial, may have been originally made under such circumstances, and have been so used as to give all the rights that the riparian proprietors would have had, had it been a natural stream.’ Of like import is the case of *Nittall v. Branwell*, Law Rep. 2 Exch. 1, in which Channel, B., says ‘I see no reason why the law applicable to ordinary running streams, should not be applicable to such a stream as this, for it is a natural flow or stream of water, though flowing in an artificial channel. While we are not altogether satisfied on the point, we think we should hold that the water running in the stream was, commencing at least with 1936, subject to appropriation.’); *Smith v. Los Angeles*, 66 Cal. App. 2d 562, 579, 153 P.2d 69, 78 (1944) “A watercourse does not lose its character as such by reason of the fact that it is improved by

deepening or is artificially controlled, nor because it is used as a conduit to carry other waters. Again, the character of a watercourse is not changed by the fact that a pond is created by a dam. *Nor does a watercourse lose its character as such because all the water has been diverted therefrom, no matter for how long a period, -- although such diversion may deprive lower riparians of their rights, -- nor by reason of the fact that the water has all been dammed at a place far up the stream. . . .*” (italics in original).

Based on the foregoing, it is legal error for the Hearing Officer to hold that:

If the natural channel were reestablished between the Whittaker Diversion and the West Springs Ditch, the West Springs Ditch were flumed over Stroud Creek, and the remnants of the old Bohan Ditch were filled in, the hearing officer is not persuaded that the confluence of Stroud Creek and Right Fork of Lee Creek would be located downstream of the Upper Diversion.

R. 191. The Department’s injury and enlargement analysis *must* consider the present conditions on Stroud Creek for purposes of an injury analysis, not based upon speculation about what past circumstances on the creek systems may have been if the authorized historic use was different. As a matter of law, it is reversible error for the Department’s injury and enlargement analysis of 84441 to be based on the location of the historic confluence of Stroud Creek and Lee Creek rather than the undisputed location of the confluence of these creeks existing today.

C. The Department’s determination that Whittaker’s use of water in the Stroud Creek drainage after 2014 (when Whittaker’s use was alleged to be “unauthorized”) is what caused the change from the historic confluence to the confluence is not supported by evidence in the record. Rather, any such actions were undertaken by man before 2014 (beginning in the early 1900s as described in the Idaho Supreme Court decision of *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956)) as supported by evidence and testimony in the record.

In the *Preliminary Order*, the Hearing Officer held the following:

Stroud Creek no longer flows in its natural channel between the West Springs Ditch and the confluence with Lee Creek. Ex. 151 at 6-7. This section of the Stroud

Creek drainage has been dewatered as a result of **Whittaker's unauthorized diversion** of Stroud Creek into the West Springs Ditch.

...

In the absence of an existing, clearly-defined and unmanipulated Stroud Creek natural channel, the hearing officer must rely on the best evidence available for where the natural channel would exist were it not for the **unauthorized diversion and channel alterations occurring on the Whittaker Two Dot Ranch property**.

R. 186 (emphasis added). There is no language in these quotes from the Hearing Officer that defines the timeframe within which the diversion and use of water in the Stroud Creek drainage by Whittaker and/or its predecessors was “unauthorized.” Without any described timeframe, the Hearing Officer’s language can only imply that the use of water in the Stroud Creek drainage by Whittaker and/or its predecessors was always “unauthorized,” dating back to the early 1900s.

When this issue was raised on reconsideration, the Hearing Officer clarified his *Preliminary Order* language by stating that the *Preliminary Order* **does not** determine whether Whittaker’s historical pre-SRBA (before 2014) use was unauthorized:

The *Preliminary Order* does not determine whether Whittaker's historical (pre-SRBA) diversion of Stroud Creek water at the West Springs Ditch was authorized. Nor does it state that Whittaker's actions resulting from the *Whittaker v. Kauer* case were unauthorized.

R. 278. With this clarification, there is a specified timeframe that the Hearing Officer described, and it is after 2014 (post-SRBA) when Whittaker’s use was alleged to be unauthorized. As to the pre-2014 diversions and watershed changes, the Hearing Officer was clear—he did not determine that “Whittaker’s actions resulting from the *Whittaker v. Kauer* case were unauthorized.” *Id.*

This specified timeframe is supported by additional language from the *Reconsideration Order* which adds the clarifying word “current” and “currently,” R. 227, to the claim of an unauthorized diversion, meaning post-2014 activity by Whittaker. This analysis, including the post-2014 timeframe, was affirmed by the Director in the *Order* as there is no contrary indication

otherwise. R. 347 (“The hearing officer reasonably relied on maps in the record showing the confluence as it would be without Whittaker’s unauthorized diversion.”).

The critical factual issue is therefore whether any changes were made to the Stroud Creek drainage or whether there were changes in the diversion, distribution, and use of water in 2014 or after by Whittaker that changed the historic confluence location to the confluence location. There is no evidence in the record of any such changes.

The alterations to the Stroud Creek drainage (*i.e.*, the construction of the berm that replaced the flume, distribution of water based on agreement *Whittaker v. Kauer*, including use of the Kauer Ditch, etc.) that may have led to the change in location from the historic confluence to the confluence were accomplished long before 2014 and were authorized as described in *Whittaker v. Kauer* (issued in 1956). Stated another way, while we maintain that IDWR cannot base its injury analysis on past conditions as a matter of law, as set forth above, if IDWR is going to do so based on alleged unauthorized actions by a water user, the Hearing Officer held that the unauthorized use occurred after 2014. This means that there must be evidence in the record that the change to the confluence locations was accomplished because of activities that occurred *after* 2014 (the year the Department held the use became unauthorized).

There is no evidence that the construction of the dam on the Stroud Creek channel or other changes to the Stroud Creek drainage to effectuate the diversion and use of water through the Kauer Ditch were accomplished in 2014 or after, that the confluence of the streams changed after 2014 or after, and/or that Whittaker undertook activities after 2014 that altered the watershed and changed the confluence location. Evidence in the record is precisely the opposite. The changes to the Stroud Creek drainage are documented in the 1956 *Whittaker v. Kauer* opinion. This case is still good law and has not been overruled. In this case, the Idaho Supreme Court described the

situation as found by the trial court on the Whittaker property and even that it was the watermaster's actions of breaching the West Springs Ditch berm (that previously replaced a flume) to provide water to Kauer that led to the litigation. McConnell now seeks this same water. Here is the entire description of the arrangement the Idaho Supreme Court determined the parties agreed to and the changes to the Stroud Creek watershed associated with that arrangement:

The trial court found that in the year 1932, respondents entered into an oral contract with appellants' predecessors (and other interested parties), to whom water had been decreed by the July 1, 1912 decree, whereby the point of diversion of waters of the Left Fork of Lee Creek, decreed to and used upon lands, including the lands now occupied by appellants, situate northerly and below all of respondents' lands, was changed from a point situate on the main channel of Lee Creek to a point situate on the Left Fork thereof near the Southwest corner of Section 31, Township 16 North, Range 25 E.B.M., which point of diversion is situate about one and one-fourth miles southwesterly and above the West Springs; and whereby, in consideration of a grant by John Whittaker, father of respondent Floyd Whittaker, of a right of way for a ditch over certain of the John Whittaker lands (over Lots 4 and 3 and SE 1/4 of the NE 1/4, Sec. 31, Twp. 16 N., R. 25 E.B.M.) through which to convey from such point of diversion on the Left Fork, to the Right Fork of Lee Creek the said decreed waters. **The other parties, including appellants' predecessors, permitted respondents to remove a flume which had been used continuously since some time prior to the entry of the July 1, 1912 decree to transmit the waters of the West Springs across the Left Fork at a point situate in the described quarter section where the springs are situate, and to substitute in place of said flume an earthen dam where the flume theretofore had been, thereby to capture all waters found flowing in the creek at that place.**

The court further found that pursuant to said contract the dam was constructed, maintained and used by respondents at all times since 1932 continuously and without interruption until the year 1954 when, at appellants' instance, the water master cut the dam, which allowed the waters to flow down the channel but nevertheless into a diversion ditch of respondents situate some 650 feet below and northeasterly from said dam.

Whittaker, 78 Idaho at 97, 298 P.2d at 747 (emphasis added).

Based on the foregoing facts, the Idaho Supreme Court—specifically referencing the flow from West Springs and the “damming of the Left Fork by respondents”—held:

The conclusion is inescapable also, that appellants' predecessors had knowledge of respondents' use of the waters of the West Springs, inasmuch as

appellants' predecessors consented to the damming of the Left Fork by respondents at the place where, since prior to or about the year 1912, the flume had conveyed the waters of the springs across the Left Fork; also that, beginning with the year 1932 and continuously ever since for some 22 years, until during the year 1954, appellants' predecessors knew that respondents, without interruption or molestation, had used the waters of the springs pursuant to the status which resulted upon consummation of the contract which the trial court set out in its findings.

Under the facts and circumstances as related, respondents' right to the use of the waters of the West Springs, though they be public waters, must be held to have been abandoned by appellants' predecessors; *St. John Irrigating Co. v. Danforth*, 50 Idaho 513, 298 P. 365; *Chill v. Jarvis*, 50 Idaho 531, 298 P. 373; *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475; and such right must be held to have been acquired by respondents by appropriation and application to beneficial use. I.C. § 42-101; I.C. § 42-103; *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373; *Maher v. Gentry*, 67 Idaho 559, 186 P.2d 870. A finding, if made by the trial court, that the waters of the West Springs are public waters, would not change such result nor affect the trial court's decree.

Id. at 98-99, 298 P.2d at 748.

As described, when the Kauer Ditch was in use beginning in 1932, the Whittaker Diversion on Stroud Creek was the last diversion on Stroud Creek as the flows used by upstream users, flows turned down the Kauer Ditch, and flows diverted at the Whittaker Diversion dried up the creek channel for most of the irrigation season. Whittaker's water rights were regulated by state-employed watermasters along with other water rights with points of diversion located upstream on Stroud Creek. When the water flows were sufficient to fill all the existing water rights on Stroud Creek, high water was generally distributed equally among the water users. This means that the only water left in Stroud Creek by the time it reached the Whittaker Diversion was generally the amount necessary for Whittaker's authorized rights (WRs 74-369, 74-1136, and 74-15788) leaving no need or legal requirement to bypass any water past the Whittaker Diversion into what was once the Stroud Creek channel. This changed the hydrology of the Stroud Creek drainage.

Further down the drainage, following the construction of the Kauer Ditch in 1932, the West Springs Ditch (the spring collection ditch) was dug on Whittaker's private property to more

efficiently collect and channel the West Springs water to the Floyd J. Whittaker Ditch for delivery to Whittaker's place of use under WR 74-157. Prior to 1932, a flume was used to convey the water from West Springs over the Stroud Creek channel. After McConnell's water was moved to the Kauer Ditch by their predecessors-in-interest pursuant to agreement, the flume across the Stroud Creek channel was unnecessary since there was little or no Stroud Creek water left to flow through that section of Whittaker's property. Even in the *Preliminary Order*, the Hearing Officer clearly acknowledges this evidence:

The record includes evidence that, between 1932 and 2014, McConnell or their predecessors in interest diverted water from Stroud Creek through a ditch known as the Kauer Ditch, located approximately one mile upstream of the Whittaker Diversion. . . . When the Kauer Ditch was in use, Whittakers did not bypass any water in Stroud Creek, leading to the significant changes in the path of Stroud Creek through the Whittaker property.

R. 191 (fn. 9); Tr. p. 514, L. 25 through p. 515, L. 13 (Testimony of Shanna Foster); Tr. p. 538, L. 9 through p. 539, L. 4 (Testimony of David Tomchak).

It should also be noted that there has never been a determination that the alterations to the Stroud Creek drainage in the early 1900s were "unauthorized." The Idaho Supreme Court decision described these changes (proven at trial before the district court) in detail, and certainly the Idaho Supreme Court would not authorize something that was illegal, or at a minimum, one would anticipate at least a mention the work was unlawful or unauthorized.⁶

Testimony at the hearing from several of the witnesses is clear about their personal observation of the features of the modified Stroud Creek system and that there were no recent modifications. For example, David Tomchak testified about his observations in walking the entirety of the Stroud Creek drainage and did not see evidence of recent disturbance:

⁶ And even if it could be considered un under today's current stream channel alteration laws and rules, the work was done prior to enactment of the Stream Protection Act (Idaho Code § 42-3801 *et seq.*) and this act does not apply to actions taken before its enactment in 1971. *Randall v. Ganz*, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975).

1 having lived there since 1977 until present, what you
 2 see. And you've -- and you've walked down from the top
 3 to the bottom.

4 But you weren't there prior to 1977;
 5 correct?

6 A. That's correct.

7 Q. And so you can't give an opinion on what
 8 boots on the ground would have shown prior to that
 9 time?

10 A. I didn't live there, so -- I'm just giving
 11 my opinion based upon if something was disturbed or
 12 whatever, as in somebody had been digging something
 13 within the last few years, I mean even where James went
 14 in and put the two culverts in years ago, I can't
 15 remember the exact date that he testified he'd done
 16 that, but you can tell that that's been disturbed. And
 17 there wasn't nothing that's been disturbed. So you
 18 could tell where James disturbed that, but you can't
 19 tell anything else that's been disturbed.

20 So it's been a hundred years or -- a long
 21 time. But I wasn't here. I wasn't alive. But that
 22 hasn't been messed with down through that channel,
 23 besides --

Tr. p. 576, LL. 10-23; Tr. 590, L. 6 through p. 591, L. 1. (testimony from Tomchak of fine silt in the area below the Whittaker Diversion); *see also* Tr. p. 311, LL. 5-14. (testimony of Jordan Whitaker and that the historic administration was in place when Cal Whittaker was the watermaster); Tr. p. 372, LL. 20-24 (testimony of James Whittaker that water was delivered as described in *Whittaker v. Kauer* during his time on the property (exceeding 45 years)). As described by all these witnesses, water was administered as described by the Idaho Supreme Court and there was no evidence of recent changes in the Stroud Creek drainage.

As additional evidence of the state of the Stroud Creek watershed, in 2020, when water was no longer diverted down the Kauer Ditch, and as requested of the watermaster Cindy Yenter, additional water was turned past the Whittaker Diversion, and the result was described by the Hearing Officer as follows: “Contor observed that Whittaker’s ‘private ditch was unable to contain the increased flows resulting from the imposition of also conveying McConnell’s rights.’” R. 274. This is further direct evidence that the system’s hydrology had long been changed prior to 2014 as the increased flow of water in 2020 overtopped the existing channels and caused erosion damage.

Accordingly, the general lack of Stroud Creek water below the Whittaker Diversion is not and has not been caused by Whittaker's supposed "unauthorized diversion of Stroud Creek" water occurring **after 2014**, but instead, any changes to the confluence location could only have been caused by the movement of McConnell's water by his predecessors to the Kauer Ditch in 1932 and the other changes to the Stroud Creek watershed described in *Whittaker v. Kauer*. It is undisputed that the Kauer Ditch is a long-established ditch as it was clearly described in *Whittaker v. Kauer*, was known to IDWR, and even has an IDWR identification tag on it as documented in the year 2000. R. 679-680 (IDWR agent Tim Luke noting IDWR identification tag no. A0011439 on the Kauer Diversion during 6/15/2000 field visit); *See also* R. 748-749 (1954 Map showing Kauer Ditch and other features in the Stroud Creek drainage).

It is also important to note that at the time of the *Whittaker v. Kauer* decision in 1956, the water right decrees of McConnell's predecessors did not describe the Kauer Ditch as an authorized point of diversion, even though the agreement started around 1912, but the agreement was still upheld by the Idaho Supreme Court with no direction or discussion about whether Kauer's water rights had been amended or needed to be amended to formalize the trading of water. In the past, the standards for describing and documenting water rights, the use of water, and water exchanging or trading were much less formal than they are today, which is a stated primary reason for adjudication proceedings for water rights in Idaho. *See* Idaho Code § 42-1427 ("The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and courts have made this original description of a water right more specific by the addition of other elements."). But given the current position of the Department, that the *Whittaker v. Kauer* decision must be described on the SRBA partial decree for Whittaker's 74-157 (and it currently is

not), R. 510-512, James Whittaker was caught assuming that the historical administration documented in the *Whittaker v. Kauer* decision would not change and if that decision needed to be documented in the partial decree, if at all, IDWR would have recommended it correctly. IDWR was aware, or at a minimum should have been aware, of the Idaho Supreme Court decision, and Whittaker never did anything to hide it.

IDWR's position concerning administration of Whittaker's WR 74-157 post-SRBA is different now than it was previously, R. 755-756, and given this change, it is unsurprising that Whittaker wishes WR 74-157 was described with the additional detail of the *Whittaker v. Kauer* decision⁷ as it would likely have avoided the current dispute and all that comes with a contested case and ensuing litigation. Until 2020, water was administered and delivered under WR 74-157 to Whittaker without incident consistent with the agreement that began over a century ago. The lack of reference to the *Whittaker v. Kauer* decision in the affected water rights (McConnell's and Whittaker's WR 74-157) is also compounded by the fact that McConnell did not file his SRBA claims until 2014, when McConnell filed late claims after Whittaker's WR 74-157 received a partial decree in April of 2012. Tr. p. 443 LL. 6-10. What is clear is that McConnell intends to call for delivery of spring water if 84441 is approved. Tr. p. 72, LL. 3-8. If the *Order* is upheld, it is likely to be used as a basis upon which to change the historic diversion and administration of water has been followed in the Stroud Creek drainage that had been in place for over a century.⁸

⁷ There also appears to have been a clerical error with how the claim for WR 74-157 was received and processed by IDWR. The Lemhi Adjudication described WR 74-157 as tributary to "sinks." However, in the SRBA, the "tributary to" designation was likely added by an IDWR agent who described Stroud Creek instead of "sinks." This error was not noticed by Whittaker upon review. While Whittaker hopes the issue concerning subordination can be resolved in this appeal, if it is not, it may become necessary to file a motion before the SRBA to correct the error.

⁸ In *Whittaker v. Kauer*, the Idaho Supreme Court provided additional reasons for its holding, including (1) that Kauer had abandoned their right to public water from West Springs; and (2) that water from West Springs is "private water." *Whittaker*, 78 Idaho at 98-99, 298 P.2d at 748. These additional holdings are likely to be raised in response to IDWR in response to administration of WR 74-157 contrary to how it was administered historically.

Finally, on this point, it cannot be asserted that Whittaker's diversion of water before 2014 was unauthorized because Stroud Creek is within a long-established functioning water district, Water District 74Z, and it is the watermaster's governmental duty to distribute water, not Whittaker's, as provided under Idaho Code § 42-602. The Idaho Supreme Court confirmed the Director's governmental authority under this statute concerning matters of priority administration and water distribution in the case of *In re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 336 P.3d 792 (2014). Given IDWR's sole and exclusive governmental authority to regulate diversions during priority administration, Idaho statutes allows the Director to create "water districts" staffed with state-employed watermasters and deputy watermasters. When this is done, "[e]ach water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the **essential governmental function** of distribution of water among appropriators." Idaho Code § 42-604 (emphasis added); *see also Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969) (The watermaster is not the agent of the water company or water user, but is a ministerial officer.). Water District 74Z is one such water district that was created to assist the Director in his responsibilities, and it is an active water district with an active watermaster (the current watermaster is Merritt Udy, who testified at the hearing).

In short, even if the Department has discretion to base an injury analysis on the historic confluence location, there is no factual basis upon which to base his conclusion under the stated basis that the change in confluence location was caused by post-2014 unauthorized water diversions by Whittaker. The hydraulic changes to the Stroud Creek drainage were in place long before 2014. This portion of the *Order* is therefore not based on evidence in the record, in violation of Idaho Code § § 67-5279(3)(d), and must be reversed.

D. The presence of certain structures and natural features testified to at the hearing supports a finding that the historic confluence of Stroud Creek and was not at the mapped location. Upon review, the Court should reverse the Department’s reliance on maps and instead rely upon witness testimony of these physical features.

As set forth above, there is no evidence in the record that supports the Hearing Officer’s determination that Whittaker engaged in stream channel alterations or changed the historic diversion and delivery of Stroud Creek water in 2014 or thereafter. Changes to the Stroud Creek watershed occurred long before 2014. Further, under Idaho law, regardless of the cause of a change in confluence location (natural or influenced by man), the resulting confluence is the legally recognized stream channel location where an injury and enlargement analysis must be based upon. In addition, based on evidence in the record, the Department should have relied upon testimony about the natural features and location of culverts rather than maps.

With increased access to high quality aerial photos today, and the continued use and refinement of GIS, there should be little dispute that maps based on aerial photos and GIS technology have become increasingly accurate over time. However, maps generated in the past—including USGS maps and the 1954 map, both of which were generated based on an aerial photo—were generated by the mapmaker with some level of subjectivity, and consequently, a chance for inaccuracies. For example, it is particularly challenging to delineate stream channels located within thick vegetation based on an aerial photo. *See* Tr. p. 158 L. 21 through p. 161 L. 19, 162 LL. 3-17 (question and answer exchange between Whittaker’s counsel and Scott King about locating the actual stream channels at issue in this matter based on aerial photos); *see also* <https://www.usgs.gov/faqs/i-found-error-map-how-can-i-report-it-and-when-will-you-fix-it> (last visited April 14, 2022) and <https://www.usgs.gov/faqs/how-accurate-are-us-topo-maps-and-why-dont-they-have-accuracy-statement> (“Regardless of actual accuracy, USGS maps and geospatial products are intended for general reference and are not authoritative or official for navigation or

for any regulatory purpose.”) (last visited April 14, 2022).

Because maps are primarily intended for general reference, it is more reliable to rely upon witness testimony of those familiar with this area. All the witnesses, including Steven Johnson, owner of property where the historic confluence is depicted, testified of the two channels that parallel each other near the historic confluence, that water does not go back and forth between them, and the presence of culverts on the channels evidencing the channels’ historic location. Tr. p. 603, LL. 20-24 and Tr. p. 272, LL. 2-18; Tr. p. 280, L. 9 through p. 282, L. 7 and Tr. p. 343 LL. 3-24 (Merritt Udy); Tr. p. 551, LL. 4 through LL. 20 (David Tomchak); Tr. p. 376, L. 10 through L. 23; Tr. p. 379, L. 15 through p. 380, L. 4 (James Whittaker, who installed the culverts).

We recognize the review standards of factual determinations applicable to a reviewing court. standard in Idaho that a reviewing court. *See A & B Irrigation Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). However, substantial evidence is “relevant evidence that a reasonable mind might accept to support a conclusion.” *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009). In this case, it is more reasonable to rely upon the witness testimony than maps. In addition to the arguments provided above, and if necessary in the event the above arguments are not found availing to the Court, the Court should reverse the Department’s findings that the historic confluence was once at the location depicted on the above-referenced maps.

E. The Department erred by not applying the equitable doctrine of laches and the Court should now apply this equitable doctrine.

The equitable doctrine of laches has been applied in water cases, and in addition to the arguments raised above, should be applied here. Indeed, it is more appropriate for this Court to apply it than an administrative agency given existing precedent. In *Devil Creek Ranch v. Cedar*

Mesa Reservoir & Canal Co., 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994), the Idaho Supreme Court held:

This Court has previously held that when owners of water rights who, with full knowledge of all the facts, have long acquiesced in the water rights claimed by another party so that the party had incurred indebtedness on the strength of title to the water, the owners may be estopped by laches from questioning the rights claimed, even if the claimed rights were originally questionable. *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994) (citing *Johnson v. Strong Arm Reservoir Irrigation Dist.*, 82 Idaho 478, 486-487, 356 P.2d 67, 72 (1960); *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 408-409, 66 P.2d 115, 117 (1937)).

Id. In the *Hillcrest Irrigation District* case cited to by the *Devil Creek Ranch* court, the Idaho Supreme Court held:

Long and continuous knowing acquiescence in an other's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim. In *Ryan v. Woodin*, *supra*, the just and fair rule is stated as follows: Courts of equity do not favor antiquated and stale demands and refuse to interfere where there has been gross laches in commencing the proper action or long acquiescence in the assertion of adverse rights. Here the change of point of diversion and use, whether regular and legal or not, was actually accomplished and thereafter used and enjoyed adversely.

Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist., 57 Idaho 403, 412, 66 P.2d 115, 118 (1937) (citing to *Ryan v. Woodin*, 9 Idaho 525, 75 P. 261; *Oylear v. Oylear*, 35 Idaho 732, 208 P. 857; *Smith v. Faris-Kesl Const. Co., Ltd.*, 27 Idaho 407, 426, 150 P. 25; *Just v. Idaho Canal etc. Co., Ltd.*, 16 Idaho 639, 653, 102 P. 381, 133 Am. St. 140.)). In *Hillcrest Irrigation District*, the elements of long and knowing acquiescence, as well as reliance to the injury of the claimant were clearly present.

The doctrine of laches is well described in *Sears v. Berryman*, 101 Idaho 843, 848, 623 P.2d 455, 460 (1981): "The doctrine of laches is a creation of equity and is a species of equitable estoppel. Long and continuous knowing acquiescence in another's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim."

In courts of law, as opposed to courts of equity, the principle of laches is embodied in statutes of limitation. *See, e.g.*, Idaho Code §§ 5-216, 5-217, and 5-219. The elements of laches are:

- (1) defendant's invasion of plaintiff's rights;
- (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit;
- (3) lack of knowledge by the defendant that plaintiff would assert his rights; and
- (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Sherman Storage, LLC v. Glob. Signal Acquisitions II, LLC, 159 Idaho 331, 337, 360 P.3d 340, 346 (2015) (citing *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002)). Further, “[b]ecause the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to **all surrounding circumstances and acts of the parties.**” *Id.* (emphasis added).

All the elements of laches are present here and the Director should have applied laches when requested below. On appeal, this Court should reverse the Director's decision not to apply laches, or the Court should apply laches on its own. Accordingly, even if the Court first affirms the Department in spite of Whittaker's legal positions described above, laches should be applied.

The Department concluded that but for Whittaker's unauthorized diversion of water, the confluence of Stroud Creek with Lee Creek would be above the Upper Diversion which has deprived McConnell of water. From at latest 1993, when McConnell purchased their property, until initiation of this proceeding, McConnell delayed asserting the administration of the water rights they now seek if 84441 is approved, as well as asserting the stream confluence issue. McConnell was aware they had water rights because they received water and used it, and based on testimony at the hearing, Bruce McConnell has been an active participant in Water District 74Z meetings, which has very few water users, and even served on the board of Water District 74Z.

Tr. p. 27, LL. 7-22. Further, McConnell was late to file claims in the SRBA, and did not file claims until after Whittaker's WR 74-157 received its partial decree in 2012. Tr. p. 443 LL. 6-10. The fact that McConnell had to file late claims is further evidence that he neglected to reasonably investigate and understand his water rights. McConnell's late claims were filed over 20 years after the property was purchased in 1993. Had McConnell asserted their rights earlier, and not delayed until now, the disputes in this matter would have been addressed within the SRBA proceeding, not after Whittaker received his partial decree for WR 74-157. This delay of almost 30 years since McConnell purchased the property to assert rights is far beyond all of Idaho's statutes of limitation.

McConnell had the opportunity to understand and question water distribution relative to this water rights, particularly use of the Kauer Ditch, which was used when he bought his property in 1993 up until 2014. Given the holding of *Whittaker v. Kauer*, Whittaker lacked knowledge that McConnell would ever assert his rights against Whittaker's WR 74-157. And even if the Department's determination that Whittaker's historical use was unauthorized is upheld by this Court, the use by Whittaker was actually accomplished and used adversely, which is consistent with the holding of *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 412, 66 P.2d 115, 118 (1937), where "the change of point of diversion and use, whether regular and legal or not, was actually accomplished and thereafter used and enjoyed adversely."

Finally, as explained above, Whittaker's WR 74-157 is junior to the water rights McConnell seeks to amend under 84441. Adding a point of diversion below the confluence of a tributary stream which gives McConnell administrative access to water from that tributary stream is clearly an injury to Whittaker's water rights unless this action is barred or mitigated with a subordination provision. Further, if the *Order* is upheld in its entirety, there remain several legal issues that are likely to lead to further disputes, including whether there is an illegal diversion at

the berm location where it has been determined no natural channel of Stroud Creek exists and whether the Department can force Whittaker to make changes to the private ditch system located on its property, and/or whether clerical or other errors on Whittaker's WR 74-157 can be corrected. Depending on the outcome of these potential disputes, it is possible that there may be disruption and alteration of the Stroud Creek drainage, which has been in place since the early 1900s. In short, the situation before the Court is precisely the situation that merits application of the equitable doctrine of laches in light of all surrounding circumstances and acts of the parties.

Despite the foregoing, the Hearing Officer declined to apply the doctrine of laches. R. 279. The Hearing Officer elected to consider 2014 as the starting point for the possible application of this doctrine, but even with this timeframe, the time period is longer than Idaho's current longest statute of limitation for judgments (6 years). Idaho Code § 5-215(1). McConnell's water rights as decreed in the SRBA are virtually the same as their rights decreed in the Lemhi Adjudication, and when he purchased the property in 1993, he certainly knew he had water rights and could have investigated what elements they contained and how water was delivered to his property. With an active watermaster in Water District 74Z, McConnell could have simply asked the watermaster or Whittaker at any of the water district meetings he actively participated in. The Court should determine that the laches time period as against McConnell began in 1993, not 2014, which clearly meets the "long and continuous knowing acquiescence" requirement of laches.

Additionally, the Hearing Officer incorrectly explains that the application of laches would require McConnell to divert their water at the Kauer Ditch. *Id.* That is simply not the case—laches is not a doctrine that forces another to affirmatively act (such as using the Kauer Ditch), rather, it is a doctrine that prevents a party from asserting action (such as preventing McConnell from asserting their water rights against WR 74-157, which is what Whittaker is requesting). "The

doctrine of laches is a creation of equity and is a species of equitable estoppel. Long and continuous knowing acquiescence in another's use and enjoyment of a property or privilege **may preclude one from subsequently asserting his claim.**" *Sears v. Berryman*, 101 Idaho 843, 848, 623 P.2d 455, 460 (1981) (emphasis added). The Court should hold that McConnell must be prevented by laches from asserting his rights against WR 74-157.

F. In the alternative to the above, the Court should grant Whittaker's *Petition to Re-open Hearing and Petition for Site Visit*.

If the Court elects to uphold the *Order*, then the Court should re-open the hearing that Whittaker sought to re-open for the limited purpose of taking additional evidence relating to the confluence of Stroud Creek and Lee Creek that formed the major basis for the Department's decisions. The Hearing Officer denied the motion and characterized the motion as one where Whittaker's motivation was essentially to fine-tune testimony or make an additional point, R. 268, which the Director affirmed. R. 348. This is not correct. The basis for the motion was to provide evidence in response to the adoption of a new injury and enlargement evaluation standard. As described above, the Department's injury and enlargement analysis was based on the historic confluence location. The Department also determined that it was Whittaker's alleged unauthorized actions after 2014 that changed the confluence from the historic confluence to its current location below McConnell's Upper Diversion.

As explained above, the injury and enlargement evaluation standard based on the *past* location of a stream channel's historic confluence introduced an evaluation standard unanticipated by Whittaker because it has no statutory, rule, case law, or contested case basis of which Whittaker or his representatives are aware. Such an analysis based on the historic confluence as opposed to the confluence is unprecedented within the Department or the State of Idaho, which could have far-reaching effects given the past alterations of stream channels throughout the State. The issue

was not raised in any of the prehearing conferences or at the end of the hearing because Whittaker believed that the Hearing Officer would apply an evidentiary standard consistent with Idaho stream channel law and IDWR administrative rules discussed above. The Hearing Officer instead concluded as he did and based his injury and enlargement evaluation on the historic confluence rather than the confluence.

If this new standard is going to be adopted, it is important that all the facts are considered. Whittaker should be able to present evidence concerning that issue, and specifically, whether the change in confluence was caused by natural processes or by the actions of others upstream of the Upper Diversion as the Department maintains Whittaker caused the change in confluence of the streams with post-2014 unauthorized diversion of water. There are indications that the Lee Creek stream channel was shifted to stay further west in association with construction and use of a certain historic ditch located upstream of the Upper Diversion, a ditch that is depicted on a 1970 Lemhi Adjudication Map contained in Scott King's report at Figure 12. R. 313 (figure 12).

Additionally, the hearing was held in mid-April with expert report disclosure deadlines prior to that time when snow was still on the ground at relevant locations. With no snow, the hearing should be re-opened to allow for introduction of evidence on the narrow issue of the historic confluence. If granted, this will allow the parties and their experts to view these features, prepare reports as may be necessary, and with the hearing reconvened, cross-examine such witnesses. It is not anticipated that the reconvened hearing will take more than a day.

For all the above reasons, the Court should reverse the Department's decision to deny Whittaker's request for an additional hearing date pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. This rule provides the following:

Further Action After a Non-Jury Trial. On a motion for new trial in an action tried without a jury, the court may open the judgment, if one has been

entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Idaho Rule of Civil Procedure 59(a)(3). Where the hearing in this matter was tried without a jury, this rule allows the Court to “open the judgment ... [and] take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.” *Id.* The Idaho Court of Appeals has concluded “that when a judge is sitting without a jury, he or she may reopen a case to hear additional evidence, prior to final judgment, regardless of the enumerated restrictions in I.R.C.P. 59(a).” *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 991, 993, 812 P.2d 298, 300 (Ct. App. 1990), *aff'd*, 119 Idaho 967, 812 P.2d 274 (1991).

Finally, and in addition to the petition to re-open the hearing, the case should be remanded for the Hearing Officer to visit the historic confluence area pursuant to Rule 43(f)(2) of the Idaho Rules of Civil Procedure. Actual view of the historic confluence area and any other features testified to in this matter will surely aid the Department on remand with the evaluation of evidence in this matter.

G. The Department’s actions have prejudiced Whittaker’s substantial rights.

Having established that the *Order* violates provisions of Idaho Code § 67-5279(3), Whittaker must also demonstrate that at least one of its substantial rights have been prejudiced. Idaho Code § 67-5279(4). On the question of substantial rights, the Idaho Supreme Court has explained:

‘This Court has not yet attempted to articulate any universal rules to govern whether a petitioner’s substantial rights are being violated under I.C. § 67–5279(4).’ *Hawkins v. Bonneville Cnty. Bd. of Comm’rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011). Instead, this determination is made on a case-by-case basis.

Two Jinn, Inc. v. Idaho Dep’t of Ins., 154 Idaho 1, 5, 293 P.3d 150, 154 (2013). In general, property rights, such as water rights, are substantial rights. *See Terrazas v. Blaine Cty. ex rel. Bd. of*

Comm'rs, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009). There is also a substantial right to have a governing board “properly adjudicate their applications by applying correct legal standards”. *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232–33, 254 P.3d 1224, 1228–29 (2011). The Idaho Supreme Court held that “[t]his Court has not articulated a bright line test governing whether a petitioner’s substantial rights have been violated, however, we have held that such rights were harmed when: (1) property values are impacted; or (2) the variance will interfere with the use and enjoyment of property. *Hungate v. Bonner Cty.*, 166 Idaho 388, 458 P.3d 966, 972 (2020) (internal citations omitted).

Whittaker’s WR 74-157 is a water right, and “[w]hen one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law.” *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). The *Order* has impacted a substantial right of Whittaker as it may open the door for administration of WR 74-157 in manner different than its administration for over a century. Water from the springs described in WR 74-157 were first flumed over Stroud Creek, was not subject to calls for water from other rights on Lee Creek, and later also delivered through the West Springs Ditch for use by Whittaker’s predecessors-in-interest. For over a century, this spring water has not been subject to administration with downstream Lee Creek rights. To allow this to change violates Whittaker’s substantial rights as it diminishes the value of WR 74-157 and will interference with its use of WR 74-157 for irrigation of Whittaker’s property. The Transfer should be approved, but with an appropriate subordination provision protecting WR 74-157.

V. CONCLUSION

For the reasons set forth above, this Court should reverse the *Order* and remand the matter back to the Department with instructions to approve 84441 in to authorize McConnell's use of the Lower Diversion, but with an additional condition of approval to subordinate McConnell's use of Lower Diversion to Whitaker's WR 74-157 just like the Department did for Steven Johnson's water right (Water Right No. 74-1831). Alternatively, the Court should reverse the Department's decision not to re-open the hearing and for a site visit and remand the matter to the Hearing Officer for further proceedings consistent with the Court's opinion.

Respectfully submitted this 14th day of April, 2022.



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2022, one true and correct electronic copy of *Petitioners' Opening Brief* was served via iCourt electronic service, pursuant to the Idaho Rules for Electronic Filing and Service, and email on the following:

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