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5/12/2022 4:04 PM
Seventh Judicial District, Lemhi County
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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, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, an administrative agency of the State of Idaho, Respondent, and BRUCE AND GLENDA MCCONNELL, Intervenor.	Case No. CV-30-21-0304
IN THE MATTER OF APPLICATION FOR TRANSFER 84441 IN THE NAME OF BRUCE AND GLENDA MCCONNELL	

MCCONNELL RESPONSE BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary Spackman, Director

Honorable Eric J. Wildman, Presiding

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I. INTRODUCTION

James Whittaker and Whittaker Two Dot Ranch, LLC (collectively referred to hereafter as "Whittaker"), in an attempt to sanction their illegal diversion of water tributary to Lee Creek ask the Court to overturn the sound reasoning of hearing officer James Cefalo ("Hearing Officer") and the Director of the Idaho Department of Water Resources ("Director," "Department," or "IDWR") who approved Transfer No. 84441 ("Transfer"). The Transfer was filed by Bruce and Glenda McConnell ("McConnell") to add an existing point of diversion at a location on Lee Creek, known as the Lower Diversion, downstream of Whittaker. Based on the record, the Court should affirm the Department's approval of the Transfer, as approval will not injure existing water rights in the Lee Creek drainage, let alone Whittaker.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

Prior to discussion of the Transfer and the arguments presented on judicial review by Whittaker, it is important that the Court understand how this proceeding began. This matter came to IDWR through legal argument by Whittaker in 2020 that Whittaker's water right no. 74-157 ("WR 74-157") – a right that is junior to the McConnell water rights ("McConnell Rights") that were the subject of the Transfer[2] – should be administered ahead of the McConnell Rights by virtue of an "agreement" that is referenced nowhere on the water rights of the parties, is not recorded in Lemhi County, and was therefore unknown to McConnell until this action was commenced.

[1] McConnell joins in and concurs with the arguments made by the Department in its response brief.

[2] WR 74-157 bears a priority date of 4/1/1916, making it "junior to the [McConnell] water rights . . . ." *Opening Brief* at 34. The McConnell Rights are: 74-361 (5/12/1883), 74-362 (5/1/1906), 74-363 (5/12/1883), 74-364 (6/1/1900), 74-365 (5/12/1883), 74-367 (5/12/1883), and 74-368 (11/5/1909).

A. This Matter Was Commenced By An IDWR Enforcement Action Against Whittaker Then McConnell

On August 6, 2020, McConnell received a letter ("August 6 Letter") from Cindy Yenter, Watermaster for Water District No. 170, stating:

> [A]n unauthorized diversion on Lee Creek is being used to make diversions under all or part of water rights 74-361, 74-362, 74-363, 74-364, 74-365, 74-367 and 74-368. These rights authorize a single point of diversion. An investigation by the watermasters of WD74Z and WD170 found two diversions along Lee Creek serving your property. Only the upper diversion is associated with the above water rights. The lower diversion, found within SWSW Section 20, 16N 25E, must be closed immediately.
>
> In accordance with our phone call this morning, you have agreed to close the lower diversion and direct available flow to the upper ditch only.

Ex. 4; R. 506.[3]

In a separate letter from Watermaster Yenter to Merritt Udy, Watermaster for Water District No. 74Z, Mr. Udy was told: "Mr. McConnell has agreed to verbally close the diversion, and has been instructed in writing to complete closure no later than Friday, August 7, 2020." Ex. 5; R. 507.

A reason for the action against McConnell was due to a separate enforcement proceeding IDWR was taking against Whittaker for failure to install measuring devices and control works on the springs that supply WR 74-157. Ex. 20; R. 583. WR 74-157, which is tributary to Lee Creek, Ex. 14, is upstream and junior to the McConnell Rights, Ex. 1, Fig. 10; R. 374 (map showing diversions within the Lee Creek basin); Ex. 1, Apdx. A; R. 381-88 (summary of water rights within the Lee Creek basin).

In a June 23, 2020 letter ("June 23 Letter"), Watermaster Yenter reminded Whittaker of IDWR's September 28, 2018 "*Final Order in the Matter of Requiring Controlling Works and*

[3] Cites to exhibits will be both to the exhibit and to the specific page in the record where the exhibit is located.

Measuring Devices on Surface and Ground Water Diversions (Measurement Order) for the entire Lemhi River Basin, including tributary streams. The deadline for compliance with the Measurement Order was prior to the 2019 irrigation season for all irrigation diversions." Ex. 20; R. 583. "Both springs are tributaries to Lee Creek under water right 74-157, and required to be administered in priority with Lee Creek water rights. The watermaster must have adequate control of the diversions, including the ability to close the ditches and allow the spring flows to return to Lee Creek when the right is not in priority." *Id*.

Shortly after receipt, Whittaker made legal arguments against the June 23 Letter's contents in correspondence with IDWR:

> [I]t fails to recognize the Idaho Supreme Court's decision upholding the district court's decision that, as to West Springs, it is *res judicata* [pursuant to the *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956)] that Bruce and Glenda McConnell (the successors-in-interest to the Kauer Ranch), the senior right holders on Lee Creek, by agreement allow Whittaker to capture and use the water that McConnell would otherwise be entitled to (by virtue of their senior priority dates) from West Springs [WR 74-157]. This is because McConnell has abandoned any right to such West Springs water, irrespective of whether the waters from the West Springs are public or private. Additionally, the letter's conclusion necessarily implicates easement law, as the water from West Springs flows into Whittaker's private ditch and McConnell has no right to use this particular ditch or other Whittaker ditches.

Ex. 3 at 2; R. 504 (email from R. Harris to G. Baxter dated 7/16/2020) (emphasis in original).

IDWR disagreed with Whittaker "that water right 74-157 should be administered separately." Ex. 3 at 1; R. 503 (email from G. Baxter to R. Harris dated 7/28/2020). IDWR went on to say:

> In your email, you discuss what the *Whittaker v. Kauer* court described as an oral contract between Whittaker and Kauer on how the water would be delivered. . . . . The problem is that any such agreement is not reflected in the current water right decrees. . . . . The SRBA partial decrees for the McConnell water rights list their point of diversion as being downstream from the Whittaker water rights, not upstream as you suggest they should be. . . . . The SRBA Final Unified Decree superseded all prior water rights decrees within the Snake River Basin water system. Whittaker's suggestion that the Department must administer the rights

> inconsistent with the decrees represents an impermissible collateral attack on the partial decrees.
>
> . . . .
>
> In your email, you also allege that McConnell is using the Whittaker's ditches to receive his water. It is the Department's understanding that that (sic) McConnell is diverting his water from Lee Creek, not the Floyd J. Whittaker ditch.

Id. (internal citations omitted) (emphasis added).

Thus, it was after this back and forth between IDWR and Whittaker that Watermaster Yenter sent her August 6 Letter to McConnell, informing of the illegal use of the Lower Diversion and the need to curtail. As testified to by Mr. McConnell, he timely complied with Watermaster Yenter's request, curtailing water use at the Lower Diversion. Tr. p. 35, lns. 3-16.[4]

As also testified to at the hearing by Mr. McConnell, he began to take the necessary steps to bring the Lower Diversion into compliance by filing a transfer with IDWR. Tr. p. 35, lns. 17 – 25, p. 36, lns. 1 – 6. On September 9, 2020, prior to filing the transfer to add the Lower Diversion as an authorized point of diversion, McConnell first filed a transfer, numbered 84367, to correct a legal description error as to the Upper Diversion. *Preliminary Order* at 2, ¶¶ 2-4; R. 183.[5] The Upper Diversion transfer was approved by IDWR on October 8, 2020, with the diversion now correctly described as T16N, R25E, Section 30, NENE. *Id*. at 2, ¶ 3-4. In IDWR's evaluation of this transfer, it was found the McConnell water rights were valid, with full irrigation of the place of use. Ex. 7; R. 531.

[4] For purposes of consistency, all transcript citations will be to the bate-stamp page, which is different from the actual transcript page. For instance, bate-stamp page number 35 is transcript page number 33.

[5] The *Preliminary Order* (May 18, 2021) is located in the record at page numbers 182-215. The brief will cite both the *Preliminary Order*'s specific page number and the record page number.

Next, on October 5, 2020, McConnell filed the Transfer with IDWR to add the Lower Diversion in T16N, R25E, Section 20, SWSW. Ex. 8; R. 532. It this Transfer that was protested by Whittaker that went to hearing on April 21-22, 2021. *Preliminary Order* at 1; R. 182.

It must be noted that McConnell has taken every step to timely comply with all requests made by IDWR to bring their water rights into compliance. Conversely, Whittaker ignores the *Final Order in the Matter of Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversions* that required measuring devices and control works be installed prior to the 2019 irrigation season and advances erroneous legal arguments in the face of SRBA partial decrees that WR 74-157 should be separately administered from the McConnell Rights, resulting in Whittaker taking water out-of-priority to the detriment of McConnell.

B. McConnell Must Use Both The Upper Diversion And Lower Diversion To Irrigate The Entire Ranch

McConnell runs a cow-calf operation with approximately 200 head, Tr. p. 30, lns. 18 – 25, diverting water from Lee Creek for flood irrigation of pasture, Tr. p. 30, lns. 9 – 16, under a suite of water rights that were partially decreed in 2014 by the SRBA district court for irrigation of 547.4 acres with a total combined diversion rate of 15.2 cfs. *Preliminary Order* at 1, ¶ 1; R. 182; Ex. 9 and R. 545-53 (compilation of the McConnell SRBA partial decrees).

When McConnell bought the property in 1993, Ex. 22; R. 584, the delivery system was shown to him by Darrell Nef, with the system including both the Upper Diversion and Lower Diversion (collectively the "Diversions"), Tr. p. 32, lns. 5 – 25, p. 33, lns. 1 – 25, p. 34, lns. 1 – 2; *Preliminary Order* at 2, ¶ 5; R. 183. Mr. Nef's knowledge of the property dated to approximately 1949, with McConnell diverting water the same way as it was shown to him by Mr. Nef. Tr. p. 32, lns. 8 – 25, Tr. p. 33, ln. 1. The carrying capacity of the Upper Diversion is approximately 2.5 – 4.0 cfs, while the carrying capacity of the Lower Diversion is approximately

12 cfs. *Preliminary Order* at 3, ¶ 7; R. 185. The Lower Diversion is "approximately 1,600 feet downstream of the Upper Diversion" and "has been in place and used since at least 1986." *Preliminary Order* at 2, ¶ 4-5; R. 183. As testified to by Mr. McConnell, both the Upper Diversion and the Lower Diversion are required to irrigate the entire ranch. Tr. p. 33, lns. 3 – 5. If the Transfer is not approved, McConnell will have to take historically irrigated acres out of production. Tr. p. 33, lns. 6 – 9.

As testified to by Mr. McConnell, it was not until the 2020 enforcement action that he was made aware of *Whittaker v. Kauer* or the purported "agreement" described by Whittaker in his counsel's email to IDWR. Tr. p. 37, lns. 3 – 6. Furthermore, as explained by Mr. McConnell, there is no mention of any "agreement" in the McConnell *Warranty Deed*, Ex. 22; R. 584, *Policy of Title Insurance*, Ex 23; R. 586, or Water Rights, Ex. 9; R. 545-53. Tr. p. 37, lns. 7 – 25, p. 38, lns. 1 – 22.

C. The Transfer Was Required To Authorize The Historic Diversion Of Water And Was Deemed Approvable By Watermaster Yenter

As found by IDWR, and consistent with Mr. McConnell's testimony and what was shown to him by Mr. Nef, the "Lower Diversion has been in place since at least 1986." *Preliminary Order* at 2, ¶ 5; R. 183. Thus, because the Lower Diversion predated commencement of the SRBA, it could have been claimed in the adjudication as an accomplished transfer, I.C. § 42-1425, yet it was not. Consequently, due to completion of the SRBA, McConnell was required to file the Transfer with IDWR to add the historic Lower Diversion.

On November 24, 2020, Watermaster Yenter submitted her comments to the Transfer, agreeing it was approvable: "The second diversion proposed by applicant has been in use for at least several decades, as evidenced by aerial images and even the USGS topo map. . . . . WD170 does not object to the approval of this transfer adding a point of diversion. Both the

existing and new POD are required to be controlled and measured pursuant to the Basin 74 measurement order." Ex. 10; R. 554.

D. While The McConnell Transfer Was Being Considered By IDWR, Whittaker Filed A Transfer To Remove Lee Creek As Tributary To WR 74-157, Which Was Protested By McConnell, And Objected To By Watermaster Yenter

On November 6, 2020, and in an attempt to circumvent McConnell in a different way, Whittaker filed Transfer No. 84508 to remove Lee Creek as tributary to WR 74-157: "This transfer proposes to update the identified tributary. This water right utilizes water from the identified source of Springs to extinction. The source, Springs does not naturally flow into a tributary water stream." Ex. 15 at 2, Part 1 A, ln. 3; R. 562. The transfer was protested by McConnell. Ex. 16; R. 575-78.

On November 24, 2020, Watermaster Yenter provided her comments, objecting to the transfer: "WD170 objects to the removal of the tributary designation entirely. Correct tributary designations are essential in proper administration of water rights from common or hydraulically connected sources. 74-157 was decreed in both the Lemhi Adjudication and the SRBA as tributary to Lee Creek, and was not decreed as a separately administered right. Right holder cannot now claim exclusive use of the spring waters or leverage administration of the right simply by changing the tributary designation." Ex. 17 at 1; R. 579 (emphasis added).

On February 8, 2021, the transfer was withdrawn by Whittaker. Exs. 18, 19. The next day, the prehearing conference took place in the contested matter that is at issue in this proceeding.

E. The Hearing Officer Correctly Approved The Transfer Because It Will Not Cause Injury To Existing Water Rights

Over the course of two days in April, 2021, the Hearing Officer took in testimony and evidence, culminating in his May 18, 2021 decision to approve the Transfer. As found by the

Hearing Officer, Lee Creek is formed at the confluence of Stroud Creek and the Right Fork of Lee Creek (hereinafter "the Confluence"). "Stroud Creek is a tributary of Lee Creek. The main channel of Lee Creek begins where Right Fork of Lee Creek and Stroud Creek join together." *Preliminary Order* at 3, ¶ 12; R. 185. The Confluence is located above McConnell as "shown on the 1954 [Engineer's] map and [1989] USGS Map, at a location upstream of the [McConnell] Upper Diversion." *Preliminary Order* at 11; R. 193.

Well upstream of the Confluence, Whittaker constructed an illegal diversion, known as the West Springs Ditch that intercepts Stroud Creek water that should otherwise flow downstream to McConnell: "Whittaker diverts water from Stroud Creek at two locations. One location is the Whittaker Diversion . . . . The other location is the [downstream from the Whittaker Diversion] where Stroud Creek is intercepted by a ditch known as the West Springs Ditch." *Preliminary Order* at 4, ¶ 16; R. 186. "The West Springs Ditch is a deep, excavated ditch, running from west to east across the Stroud Creek channel." *Preliminary Order* at 4, ¶ 18; R. 186. "The West Springs Ditch captures all of the water flowing in Stroud Creek at that location." *Preliminary Order* at 5, ¶ 19; R. 187. Through construction of the West Springs Ditch, Stroud Creek has been "been dewatered as a result of Whittaker's unauthorized diversion of Stroud Creek into the West Springs Ditch." *Preliminary Order* at 5, ¶ 24; 187.

Based on these facts, and understanding the legal concept of injury, the Hearing Officer determined the Transfer should be approved. First, the Hearing Officer concluded the McConnell Rights were "valid . . . and have not been lost or forfeited through non-use." *Preliminary Order* at 11; 193. Second, the Hearing Officer concluded approval of the Transfer would not injure existing water rights on Stroud Creek: "Adding a second point of diversion approximately 1,600 feet downstream of the Upper Diversion does not change the relationship

between the McConnell Rights and junior water rights on Stroud Creek. Bruce McConnell testified that he cannot capture all of the flow available at the Upper Diversion and that the creek remains active and flowing between the Upper Diversion and Lower Diversion. Adding the Lower Diversion as an authorized point of diversion to the McConnell Rights will not increase the burden on upstream junior water rights." *Id*. Third, as to water rights from Stroud Creek, the Hearing Officer concluded if injury had been caused, it was not from McConnell, but rather due to Whittaker's illegal diversion of Stroud Creek: "The upstream junior water right holders, Tomchak and Foster/Ayers, have been injured by the manipulation and dewatering of the Stroud Creek channel between the Whittaker Diversion and Lee Creek. . . . . The changes proposed in [the Transfer] will not increase or exacerbate the injury to junior water rights caused by Whittaker's unauthorized diversion of Stroud Creek at the West Springs Ditch" *Preliminary Order* at 12; R. 194. Thus, the Hearing Officer approved the Transfer.

F. The Hearing Officer Correctly Denied Whittaker's Petition For Reconsideration And Post-Hearing Attempts To Re-Open The Hearing And For A Site Visit

On June, 1, 2021, and dissatisfied with the Hearing Officer's decision, Whittaker petitioned for reconsideration of the *Preliminary Order*, citing numerous flaws. R. 224-53. On June 21, 2021, the Hearing Officer denied Whittaker's request for reconsideration. *Order Denying Petition for Reconsideration*.[6]

Also on June 1, 2021, Whittaker petitioned to re-open the hearing and for a site visit to further probe the Confluence, R. 217-22, which was opposed by McConnell on the basis that "the Confluence was known, understood, and probed at the hearing. Whittaker was represented

[6] The *Order Denying Petitions for Reconsideration* (June 21, 2021) is located in the record at page numbers R. 264-76. The brief will cite both the *Order Denying Petitions for Reconsideration*'s specific page number and the record page number.

at the hearing by a well-known water attorney and expert witness. Whittaker cannot now reasonably claim the hearing should be re-opened to further investigate the issue of the Confluence." R. 256. On June 21, 2021, the Hearing Officer agreed with McConnell, concluding that the hearing would not be re-opened:

> In this case, the disputed location of the confluence of Stroud Creek and Right Fork of Lee Creek was before the parties prior to the hearing. . . . . All of the parties had an opportunity to ask for additional time to prepare for the hearing or to conduct site visits and investigations prior to the hearing. Whittaker never requested additional time to conduct investigation of the confluence prior to the hearing. . . . . In order to achieve a just, speedy and economical decision, however, the time for offering evidence into the administrative record must be fixed. Whittaker has not presented a persuasive justification to re-open the record.

Order Denying Petition to Re-Open Hearing and Petition for Site Visit at 3; R. 262.[7]

G. The Director Affirmed The Hearing Officer Thereby Approving The Transfer

On July 6, 2021, Whittaker filed exceptions with the Director. R. 277-324. On November 2, 2021, the Director affirmed the sound reasoning of the Hearing Officer on all points. *Order on Exceptions; Final Order Approving Transfer* ("Final Order").[8] As to the location of the Confluence, the Director agreed it is located upstream of the McConnell Upper Diversion, as shown in maps: "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, T16N,

[7] The *Order Denying Petition to Re-Open Hearing and Petition for Site Visit* (June 21, 2021) is located in the record at page numbers 259-63. The brief will cite both the *Order Denying Petition to Re-Open Hearing and Petition for Site Visit*'s specific page number and the record page number.

[8] The *Order on Exceptions; Final Order Approving Transfer* (November 2, 2021) is located in the record at page numbers 339-41. The brief will cite both the *Order on Exceptions; Final Order Approving Transfer*'s specific page number and the record page number.

R25E." *Final Order* at 2; R. 341 (emphasis added). As to the Hearing Officer's injury analysis, the Director also agreed: "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." *Final Order* at 3; R. 342 (emphasis added).

III. ISSUES PRESENTED ON REVIEW

McConnell reframes the issues on review as follows:

1. Substantial competent evidence supports the Department's conclusion that the Confluence is located above the McConnell Diversions.

2. Based on the SRBA partial decrees, the Department properly concluded the Transfer will provide downstream Lee Creek water users, including McConnell, access to no more water than was historically available.

3. The Department properly relied on water right elements in the SRBA as opposed to statements involving water that were made in *Whittaker v. Kauer* and not brought forward into the Lemhi Adjudication and the SRBA.

4. Whittaker's unlawful diversion of Stroud Creek at the West Springs Ditch deprives McConnell of the lawful use of water.

5. The Department properly concluded the equitable doctrine of laches did not bar approval of the Transfer

6. The Department properly denied Whittaker's post-hearing request to re-open the hearing and for a site visit; and

7. The Department's approval of the Transfer did not violate Whittaker's substantial rights.

As an issue on review, McConnell asks for an award of attorney fees pursuant to I.C. § 12-117.

IV. STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). "When reviewing the decision of a district court acting in its appellate capacity under the Idaho Administrative Procedure Act, 'we review the decision of the district court to determine whether it correctly decided the issues presented to it.' However, we review the agency record independently of the district court's decision.' *Rangen, Inc. v. Idaho Dep't of Water Res.*, 160 Idaho 251, 255, 371 P.3d 305, 309 (2016) (quoting *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011)). Furthermore, '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.' *Id*. (quoting *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012)). We review questions of law de novo. *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011)." *City of Blackfoot v. Spackman*, 162 Idaho 302, 305-306, 396 P.3d 1184, 1187-88 (2017). The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). "The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Urrutia v. Blaine County, ex rel. Bd. of Comm's,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The court shall affirm the agency decision unless the court 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); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron* at 417, 18 P.3d at 222. "A strong presumption of validity favors an agency's actions." *Chisholm v. Idaho Dept. of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005).

V. ARGUMENT

At the heart of Whittaker's appeal is whether this Court can or should substitute its judgment as to what proper findings of facts should be that were decided below by the Hearing Officer who sat in the matter, heard the testimony, took in the evidence, and carefully drew factual conclusions from the testimony and documentary evidence entered in the record. As set forth below, the Department's approval of the Transfer is based on factual determinations supported by substantial competent evidence and the conclusions derived therefrom are fully supported and lawful.

A. Substantial Competent Evidence Supports The Department's Conclusion That The Confluence Is Located Above The McConnell Diversions

The central issue on review is Whittaker's assertion that IDWR erred in finding that the Confluence is located above the McConnell Diversions. As will be explained, substantial competent evidence supports the Department's decision, which Whittaker cannot overcome.

While acknowledging that the Department located the Confluence above the McConnell Diversions, Whittaker confuses the Court by stating the Director on the one hand "rejected the Hearing Officer's attempt to recast the historic confluence of two streams as the confluence of those streams[,]" *Opening Brief* at 11, yet on the other hand concedes "the Director did not reverse the Hearing Officer's holdings . . . ." *Id*. at 12. To be clear, the Director did not reverse the Hearing Officer – on any point – as the Final Order expressly adopted and incorporated all of the Hearing Officer's decisions: "IT IS HEREBY ORDERED the hearing officer's *Preliminary Order Approving Transfer, Order Denying Petitions for Reconsideration* and *Order Denying Petition to Re-Open Hearing and Petition for Site-Visit* are hereby adopted and incorporated into this order." *Final Order* at 3; R. 342 (emphasis added).

Ignoring the decision that there is one Confluence, located above the McConnell Diversions, Whittaker attempts to argue there are two confluences: "[the] historic (former) confluence . . . [and] the actual, current confluence of those streams." *Opening Brief* at 13 (emphasis added); *see also Opening Brief* at 16 ("Evaluation of injury and enlargement based on the *past* location of the channel introduced an unprecedented standard unanticipated by Whittaker . . . .") (emphasis in original). This past/present, historic/current argument was previously raised by Whittaker, understood by the Department, and rejected. Not only did IDWR find "the confluence was previously located upstream of McConnell's Upper Diversion . . . [but it] continues to be located upstream of McConnell's Upper Diversion." *Order Denying Pet. Recon* at 7; R. 271 (emphasis added).

The factual decision of the Department, locating the Confluence above the McConnell Diversions, was thoroughly probed at the hearing, with the issue well understood. Through

testimony and a century's worth of mapping, the record supports the Department's conclusion that the Confluence is located today at the same place it was in the past, to wit:

- *1884 Government Land Office Plat Map*
  - Locates the "[C]onfluence at the south boundary of the southeast quarter of the northeast quarter of section 30. That's exactly consistent with what the [1989] USGS quad map here says."
    - Tr. p. 676, lns. 4-7 (testimony of Scott King, expert witness for McConnell)[9] (emphasis added)

- *1954 Engineer's Map*, Ex. 1 at 16, Fig. 11; R. 375[10]
  - Locates the Confluence well upstream of the McConnell Diversions
    - James Whittaker testified on cross-examination that the 1954 Engineer's Map is accurate: "I've looked that over pretty thoroughly, and it's accurate today."
      - Tr. p. 390, lns. 16-17 (emphasis added)

- *Engineer's Certificate Associated with 1954 Engineer's Map*, Ex. 155; R. 742
  - The1954 Engineer's Map was made by "a survey by me on Oct. 1 and 2, 1954 and from a tracing I made of the Aerial Photograph in the County Assessor's Office at Salmon, Idaho. The aerial photograph was dated Aug. 1946." Emphasis added.

- *1970 Lemhi Adjudication Map*, Ex. 1 at 17, Fig. 12; R. 376
  - Locates the Confluence well upstream of the McConnell Diversions

- *1989 USGS Quad Map*, Ex. 1 at 15, Fig. 10; R. 374
  - Locates the Confluence well upstream of the McConnell Diversions
    - "Figure 9 and Figure 10 which clearly depict the lower point of diversion located at least ½ mile downstream of the Left and Right Fork Confluences." Ex. 1 at 16; R. 375 (emphasis added).
  - Area of the Confluence was labeled by a surveyor
    - "So then that will take me to this quad map. And if I look at this confluence – and I got to get really close and take my glasses off and look there, but there's an 'X' right there along the roadway, and there's numbers that say '6531.' It's a survey mark. There were surveyors there, and they probably placed a marker. And that marker at that elevation is right next to the confluence." Tr. p. 676, lns. 16-25 (testimony of Scott King, expert witness for McConnell) (emphasis added)

[9] The parties stipulated that Mr. King is an expert witness and was qualified by the Department as such. Tr. p. 98, lns. 1-20; *see also* Ex. 2; R. 499 (Mr. King's CV).

[10] For ease of comparison, Figures 10 (1989 USGS Map), 11 (1954 Engineer's Map), and 12 (1970 Lemhi Adjudication Map) from Mr. King's expert report are reproduced as attachments at the end of the brief.

Whittaker asks the Court to view the 1954 Engineer's Map – a map commissioned by Whittaker's father[11] that Whittaker caused to be put into evidence – and the 1989 USGS Map with skepticism: "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." *Opening Brief* at 30. As to inaccuracies, Whittaker clearly testified based on personal knowledge that the 1954 Engineer's Map is "accurate today," with the map locating the Confluence above the Upper Diversion. Tr. p. 390, lns. 16-17. As testified to by Scott King, the 1989 USGS Map was not based purely on an "aerial photo," as Whittaker would have the Court believe; rather, there was a "survey" with a survey "marker at that elevation [] right next to the confluence . . . [meaning] [t]here were surveyors there." Tr. p. 676, lns. 16-25. Furthermore, and despite Whittaker's statement to the contrary, the 1954 Engineer's Map also relied on a "survey." Ex. 155; R. 742. That there were multiple surveys done helps explain why each map locates the Confluence above the Upper Diversion, yet the maps differ in their conclusion as to the distance between the Confluence and Upper Diversion. The difference in physical distances between the Confluence and Upper Diversion demonstrates that the mapmakers did not simply copy each other's work, lending further credibility to the maps and the overall weight given to them by the Hearing Officer. *Compare* Ex. 1 at 15, Fig. 10; R. 374 (1989 USGS Map) *with* Ex. 1 at 16, Fig. 11; R. 375 (1954 Engineer's Map) *and* Ex. 1 at 17, Fig. 12; R. 376 (1970 Lemhi Adjudication Map).

Whittaker also asks that the Court ignore the factual conclusions drawn from the maps and simply rely on other testimony: "In this case, it is more reasonable to rely upon the witness testimony than maps." *Opening Brief* at 31. Taken in the best light, the testimony cited by

[11] Tr. p. 387, lns. 2-5.

Whittaker is conflicting, to which Whittaker asks this Court assign different weight. However, asking for the Court to assign different weight to evidence considered by the Department goes directly against the standard of review. I.C. § 67-5279(1) (the court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact"); *Urrutia* at 357, 2 P.3d at 742 ("agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence"). Indeed, in determining locations, and not surprisingly, the Supreme Court has found the type of maps relied on by the Department are substantial evidence. *See Sopatyk v. Lemhi County*, 151 Idaho 809, 814-15, 264 P.3d 916, 921-22 (2011); *Halvorson v. N. Latah County Highway Dist.*, 151 Idaho 196, 202-03, 264 P.3d 497, 503-04 (2011).

The Confluence, as established by the great weight of evidence in the record and concluded by IDWR is above the McConnell Diversions. Yet Whittaker attempts to persuade the Court there is meaning to the year 2014 as it relates to the Confluence: "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." *Opening Brief* at 20 (emphasis in original). When it comes to the Confluence, there is no significance to 2014. Indeed, this point is confirmed in the Opening Brief on pages 7-9 where Whittaker adds findings of fact to the *Preliminary Order* to manufacture an argument around 2014. Just because Whittaker would evaluate the evidence differently does not create a reviewable or reversible fact.

In summary, the century's worth of mapping and testimony are significant, substantial, competent, and supported by the record. The Department's decision that the Confluence is above the McConnell Diversions should be affirmed.

B. In Addition, Based On SRBA Partial Decrees, The Department Properly Concluded The Transfer Will Provide Downstream Lee Creek Water Users, Including McConnell, Access To No More Water Than Was Historically Available

Because the evidence establishes that the Confluence is above the McConnell Diversions, and despite what Whittaker argues, *Opening Brief* at 16 ("the injury and enlargement is evident"), injury to upstream water users is not physically possible: "The confluence of Stroud Creek and Right Fork of Lee Creek is located upstream of the Upper Diversion. Therefore, the water rights on Stroud Creek and its tributaries are diverted upstream of the Upper Diversion and are already subject to the McConnell Rights (except for water rights 74-369 and 74-370 as noted above). Adding a second point of diversion approximately 1,600 feet downstream of the Upper Diversion does not change the relationship between the McConnell Rights and junior water rights on Stroud Creek." *Preliminary Order* at 11; R. 193 (emphasis added). Moreover, as will be explained below, the Department's conclusion that the Confluence is located above the McConnell Diversions, that injury will not result to upstream water users, that approval of the Transfer will provide McConnell administrative access to no more water than was historically available, and that enlargement will not result is supported by partial decrees issued in the SRBA.

1. Water Right Nos. 74-369 and 74-370 Establish The McConnell Diversions Are Downstream From And Cannot Cause Injury To Whittaker

The water rights upstream of the McConnell Diversions that relate to the issue today are water right nos. 74-157, 74-369, and 74-370. As to water right nos. 74-369 and 74-370 – which Whittaker does not address in his *Opening Brief* – each bears a priority date of May 12, 1883. Water right nos. 74-369 and 74-370 are owned by Whittaker and Rosalie Ericsson, respectively, and are diverted upstream from McConnell on Left Fork of Lee Creek/Stroud Creek.

Preliminary Order at 6, ¶¶ 27, 28; R. 188; *see also* Ex. 1 at 15, Fig. 10; R. 374 (map locating water right nos. 74-369 and 74-370 in relation to McConnell). McConnell owns water right nos. 74-361, 74-363, 74-365, and 74-367 that share the same priority date as water right nos. 74-369 and 74-370.

Water right nos. 74-369 and 74-370, as partially decreed in the SRBA, include the following administrative 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.

Preliminary Order at 6, ¶ 29; R. 188.

As correctly found by the Hearing Officer: "The only water rights in the Lee Creek drainage which bear a priority date of May 12, 1883 are water right 74-369 (held by James Whittaker), water right 74-370 (held by Ericsson) and water rights 74-361, 74-363, 74-365 and 74-367 (held by McConnell and diverted at the Upper Diversion)." *Preliminary Order* at 9, ¶ 5; R. 191.

The administrative condition that was partially decreed in the SRBA and put on the face of water right nos. 74-369 and 74-370 was not created out of thin air; rather, it was contained in the 1912 *Reddington v. Bohannon* decree, R. 612-13, and carried forward into the Lemhi Adjudication, R. 626-27, and then into SRBA.

Absent this condition, and in times of shortage, the downstream McConnell May 12, 1883 water rights – right nos. 74-361, 74-363, 74-365, and 74-367 – would be pro-rated with the upstream Whittaker and Ericsson May 12, 1883 water rights. Tr. p. 184, lns. 7-11 (testimony of Scott King regarding the condition).

As explained by the Hearing Officer, the administrative condition on the face of water right nos. 74-369 and 74-370 only makes sense if the upstream Whittaker and Ericsson water rights were connected with the downstream McConnell 1883 water rights by way of the Confluence: "The condition protecting water rights 74-369 and 74-370 from proration with other May 12, 1883 water rights only makes sense if Stroud Creek could be used to satisfy water rights 74-361, 74-363, 74-365 and 74-367. If the confluence of Stroud Creek and Right Fork of Lee Creek were downstream of the Upper Diversion, there would be no need for the condition because water rights 74-361, 74-363, 74-365 and 74-367 would have had no way to access water in Stroud Creek." *Preliminary Order* at 9, ¶ 5; R. 191 (footnote omitted) (emphasis added); *see also* Tr. p. 185, lns. 4 – 25, p. 186, lns. 1 – 5 (testimony of Scott King explaining there would not be "any purpose" for the administrative condition if the Confluence was below the McConnell Diversions).

Ignoring the administrative condition and the reasoning of IDWR to support its factual determinations and conclusions, Whittaker argues, incorrectly: "Without relief from this Court, McConnell will potentially have administrative access to water from a tributary stream and its tributary water supplies [] that McConnell previously did not have, which is a clear form of injury under Idaho law." *Opening Brief* at 1; *see also Opening Brief* at 34 ("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 injury to Whittaker's water rights unless this action is barred or mitigated with a subordination provision.").

To the contrary, if the Department and this Court were to ignore the condition, it would render the condition meaningless, which was not the outcome of the SRBA and the adjudications that came before it. *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 806-07, 367 P.3d

193, 201-02 (2016). Clearly, the partial decrees and administrative condition shows McConnell and McConnell's predecessors, since at least the 1912 *Reddington* decree, had access to water from Stroud Creek.

2. Water Right No. 74-157 Also Establishes The McConnell Diversions Are Downstream From And Cannot Cause Injury To Whittaker

While Whittaker does not address the pro-rating condition in water right nos. 74-369 and 74-370, he goes to great lengths to persuade the Court that "[a]dding a point of diversion below the confluence of a tributary stream which gives McConnell administrative access to water from a tributary stream is clearly an injury to Whittaker' water right [74-157] and an enlargement of McConnell's rights." *Opening Brief* at 16. Whittaker's argument is unavailing and contradicted in four points by the very documents he relies on.

First, the SRBA partial decree for WR 74-157 lists an April 1, 1916 priority date, making it junior to the McConnell Rights. Ex. 14; R. 560. In Idaho, senior rights are entitled to water ahead of junior rights. Idaho Const. Art. XV, § 3.

Second, the SRBA partial decree for WR 74-157 describes a source of "Springs" tributary to "Lee Creek." Ex. 14; R. 560. These elements make WR 74-157 subject to administration by all downstream, senior water rights, including the McConnell Rights. Despite this plain language, Whittaker argues the tributary element is in error: "There 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.'" *Opening Brief* at 28, fn. 7. The record contradicts Whittaker's claims. In the Lemhi Adjudication, WR 74-157 was described with a source of "Springs" tributary to "Lee Creek." Ex. 11; R. 555 (Lemhi Adjudication abstract); Ex. 17 at 1; R. 579 ("74-157 was decreed

in . . . the Lemhi Adjudication . . . as tributary to Lee Creek"). In the SRBA, WR 74-157 was claimed, reviewed by Whittaker, and partially decreed with a source of "Springs" tributary to "Lee Creek." Ex. 12; R. 556-58 (SRBA claim); Ex. 13; R. 559 (Notice of Error); Ex. 14; R. 560 (SRBA Partial Decree).

During the SRBA, Whittaker was represented by experienced water counsel, as noted in the Subcase Summary Report for WR 74-157. On May 7, 2011, the *Special Master's Report and Recommendation* ("SMRR") was issued, listing the source for WR 74-157 as "Springs" tributary to "Lee Creek." The *Certificate of Mailing* shows the SMRR was mailed to Whittaker's counsel. If the elements were improperly described, Whittaker or his counsel could have taken issue with the SMRR through procedures outlined in *Administrative Order 1* ("A.O.1"). When the SRBA district court issued its Partial Decree for WR 74-157 on April 3, 2012, the *Certificate of Mailing* also shows it was mailed to Whittaker's counsel. If the Partial Decree for WR 74-157 was in error, A.O.1 provided mechanisms to take issue with the judgment, and the Idaho Appellate Rules provided further procedures to bring the matter to the Supreme Court, yet no actions were taken. Thus, the Partial Decree for WR 74-157 is final.[12]

Third, and because WR 74-157 is tributary to Lee Creek and junior to downstream rights, it should come as no surprise that Whittaker's family, in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956),[13] entered into an oral agreement with Kauer to prevent him from calling on the "private waters" of WR 74-157. 78 Idaho at 97, 298 P.2d at 747. "The primary issue in [*Whittaker v. Kauer*] was whether Kauer . . . could call for water from certain springs [water

[12] Whittaker clearly understands the binding nature of the Partial Decree for WR 74-157, as evidenced by his attempt to remove Lee Creek as tributary to WR 74-157 when he filed Transfer No. 84508 with IDWR, Ex. 15; R. 561, which he later withdrew, Ex. 18; R. 581, after a protest was filed by McConnell, Ex. 16; R. 575, and an objection was lodged by Watermaster Yenter, Ex. 17; R. 579.

[13] The decision in *Whittaker v. Kauer* will be addressed more fully below in Section V. C.

right no. 74-157] arising on Whittaker's property and flowing into Stroud Creek. . . . ." *Preliminary Order* at 8, ¶ 4 (emphasis added). "If the confluence of Stroud Creek and Right Fork of Lee Creek were downstream of the Upper Diversion in 1956, there would be no reason for Kauer to make a call for the spring water arising on the Whittaker property and flowing into Stroud Creek." *Id*. (emphasis added). "The only way the *Kauer v. Whittaker* case makes sense is if the confluence of Stroud Creek and Right Fork of Lee Creek were located upstream of the Upper Diversion." *Id*. (emphasis added).

Fourth, and standing in stark contrast with the pro-rating language from the *Reddington* decree that was carried forward into the Lemhi Adjudication and the SRBA, none of the language from *Whittaker v. Kauer* – indeed no reference to the case – is found in the SRBA. Because of this, any statements involving water that were made in *Whittaker v. Kauer* – such as describing the source of WR 74-157 as "private waters" or subordinating downstream Lee Creek rights – were "superseded" by the SRBA partial decrees and the SRBA's 2014 *Final Unified Decree*. *Final Unified Decree* at 12, ¶ 11.

Thus, the evidence in the record shows that approval of the Transfer will put McConnell in no better position and the upstream juniors in no worse position, meaning the Department was correct when it found no injury will occur to Whittaker, or will the McConnell Rights be enlarged because no more water will be diverted nor applied to more acres than were partially decreed and since beneficially used. *Preliminary Order* at 12-13; R. 194-95.

C. The Department Properly Relied On Water Right Elements In The SRBA As Opposed To Statements Involving Water That Were Made In Whittaker v. Kauer And Not Brought Forward Into The Lemhi Adjudication And The SRBA

Whittaker goes to great lengths to argue that statements about water that were made in the Supreme Court's decision in *Whittaker v. Kauer* were improperly ignored by the Department

and show it erred when it approved the Transfer. Because these statements in *Whittaker v. Kauer* were neither memorialized in the Lemhi Adjudication nor in the SRBA – both of which post-date the Court's 1956 decision in *Whittaker v. Kauer* – the Department properly disregarded those aspects of the case.

As explained previously, in 1956, the Supreme Court issued its decision in *Whittaker v. Kauer*. The case references the 1912 *Reddington* decree, contains descriptions of water rights owned at the time by Whittaker and Kauer, a reference to a feature known as the Kauer Ditch, and an oral method of administration between WR 74-157 and the Kauer water rights.

In the Lemhi Adjudication, and as to the Kauer Ditch, the McConnell Rights were claimed and decreed without the Kauer Ditch described as a point of diversion. R. 614-28. As to WR 74-157, it was described with a source of "Springs" tributary to "Lee Creek." Ex. 11; R. 555; Ex. 17 at 1; R. 579. Thus, Whittaker had every opportunity during the pendency of the Lemhi Adjudication to ensure his rights and the rights of any and all other claimants in the Lemhi Adjudication were properly described.

Identically in the SRBA, the Kauer Ditch was not described as a point of diversion for the McConnell Rights, Ex. 9, and as to WR 74-157, the source was described as "Springs" tributary to "Lee Creek," Exs. 12-14; R. 556-60, with the results binding. *Mullinix v. Kilgore's Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015) (application of *res judicata* to SRBA partial decrees). Therefore, IDWR correctly found: "The partial decrees did not identify the Kauer Ditch as an authorized point of diversion" *Order Denying Petition for Reconsideration* at 9 (emphasis added). Because the Kauer Ditch was not found to be a point of diversion in two general stream adjudications, any statement that *Whittaker v. Kauer* controls as to the Kauer Ditch and the Department erred by not reading the Kauer Ditch into the McConnell

Rights is unsupported by law. *City of Blackfoot* at 307, 396 P.3d at 1189 (arguing for IDWR to add language in a transfer proceeding to water rights that was not contained in the SRBA partial decree is "an impermissible collateral attack on the partial decree"); *see also McInturff v. Shippy*, 165 Idaho 489, 495, 447 P.3d 937, 943 (2019) ("We have previously barred collateral attacks because of their ability to create uncertainty and to undermine water adjudication. . . . . After all, '[f]inality in water rights is essential.' *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998).").

According to the *Opening Brief*: "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." *Opening Brief* at 28 (emphasis added). As a claimant, the burden was on Whittaker to bring issues to light, such as reviewing his claims, reviewing the claims of others, and filing objections if claims were not properly described. I.C. § 42-1411(5). Moreover, to the extent an oral agreement between Whittaker and Kauer existed for distribution of water rights between those parties that differed from the elements of the water rights, the agreement should have been brought to light for consideration and possible recommendation by the Director. I.C. § 42-1411A(2)(j) (the report of the director shall contain "[s]uch remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director"). The SRBA partial decrees are therefore "binding" and elements and other provisions necessary for administration of rights cannot now be added or subtracted by Whittaker through review of the Department's approval of the Transfer. *First Sec. Corp. v. Belle Ranch, LLC*, 165

Idaho 733, 741, 451 P.3d 446, 454 (2019) ("Further, those partial decrees were incorporated into the SRBA's Final Unified Decree, which is binding against all persons.") (internal quotations removed).

In conclusion, at no point during the decades upon decades that spanned the Lemhi Adjudication and the SRBA was the Kauer Ditch described as a point of diversion or was an oral agreement made between Whittaker and Kauer brought into either of the general stream adjudications. Because of this, any import of the statements relied on by Whittaker in *Whittaker v. Kauer* were "superseded" by what was actually decreed the SRBA. *Final Unified Decree* at 12, ¶ 11. Consequently, if the Department did what Whittaker asked it to do in this Transfer proceeding by reading terms into SRBA partial decrees, the result would have been an impermissible "collateral attack." *Shippy* at 495, 447 P.3d at 943; *City of Blackfoot* at 307, 396 P.3d at 1189. Thus, the Department properly ignored arguments made by Whittaker involving statements made in *Whittaker v. Kauer*.

D. Whittaker's Unlawful Diversion Of Stroud Creek And Springs Tributary To Lee Creek At The West Springs Ditch Deprives McConnell Of Lawful Use Of Water

Whittaker argues incorrectly that the Department erred when it approved the Transfer because approval will injure Whittaker, when, in fact, the opposite is true – Whittaker's unlawful diversion of Stroud Creek and springs tributary to Lee Creek into the West Springs Ditch is depriving McConnell of his rightful use water. Consistent with the Supreme Court's decision in *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966), a case with remarkably similar facts, the Department properly saw through Whittaker's illegal use of water and dewatering of Stroud Creek when it approved the Transfer.

In Whittaker's protest arguing against the Transfer, it was unequivocally stated: "[T]he only way to convey McConnell's water . . . would be through my ranch's PRIVATE ditch systems. Under no circumstances will I allow another water user to deliver his/her water through my private ditches." R. 77 (capitalization in original) (emphasis added).

The main Whittaker ditch discussed in the hearing was the "West Springs Ditch." "The West Springs Ditch is a deep, excavated ditch, running from west to east across the Stroud Creek channel. The West Springs Ditch was constructed to capture the flow from a number of springs in the area. There is a man-made berm running along the north side of the ditch which prevents any flow in Stroud Creek from continuing to the north (downstream) past the ditch." *Preliminary Order* at 4, ¶ 18; R. 186 (internal citations removed) (emphasis added). "The West Springs Ditch captures all of the water flowing in Stroud Creek at that location. Currently, there is no . . . flume, siphon or culvert that would allow [Stroud Creek] to pass under or over the [West Springs Ditch]. The intersection of the West Springs Ditch and Stroud Creek is located approximately 2000 feet downstream of the Whittaker Diversion." *Preliminary Order* at 5, ¶ 19; R. 187 (internal citations removed) (emphasis added). "The West Springs Ditch is not currently equipped with a lockable, controlling works which would allow the watermaster to curtail the diversion of Stroud Creek into the West Springs Ditch." *Preliminary Order* at 5, ¶ 20; R. 187 (emphasis added). "All of the water captured and diverted by the West Springs Ditch, including Stroud Creek water, is conveyed to the east, where it joins another irrigation ditch maintained by Whittaker." *Preliminary Order* at 5, ¶ 21; R. 187 (internal citations removed). "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." *Preliminary Order* at 5, ¶ 24; R. 187 (internal citations removed) (emphasis added). Thus, Whittaker indisputably captures all of Stroud Creek

and springs in the West Springs Ditch, dewatering the drainage, and depriving McConnell of the benefit of water flowing into Lee Creek.

By discussing his ditch system and what is and is not a natural channel, Whittaker attempts to distract the Court from remembering that: (1) Stroud Creek and the springs that feed it are – as a matter of fact and law – tributary to Lee Creek; (2) Whittaker is not entitled to divert Stroud Creek at the West Springs Ditch; (3) Whittaker has dewatered Stroud Creek through his actions; and (4) none of Whittaker's rights in the Stroud Creek drainage are senior to McConnell. By diverting Stroud Creek and springs tributary to Stroud Creek into his private ditches, Whittaker has leapfrogged the priority doctrine, taking water from McConnell, contrary to the Supreme Court's decision in *Martiny*.[14]

In *Martiny*, senior rights from Spring Creek, located in Lemhi County, were owned by Martiny, with Wells holding a junior right:

> Spring Creek traverses a marshy, swampy area and is fed by springs on both sides. Mr. Wells' ditch also extends from the southeast to northwest and lies between Spring Creek and the bluff roughly parallel to the creek . . . . The ditch draws water from springs upstream from [Martiny's] point of diversion of Spring Creek. Defendant Wells has no other diversion from Spring Creek.
>
> The controlling issue presented on this appeal is whether the water from the springs, along the upper side of the Wells ditch, which flows into the ditch, is tributary to Spring Creek. Wells contends that the water diverted by his ditch is not tributary to Spring Creek; that it is percolating water from the swampy, marshy area traversed by the ditch; that he and his predecessors had "continuously, notoriously, adversely, and under claim of right" recovered and used such water since 1900. He also alleged that if the water taken by means of his ditch were not recovered and used by him, it would be wasted.
>
> . . . .

[14] On pages 17 and 18 of his *Opening Brief*, Whittaker cites *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929), *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960), and the Department's Stream Channel Alteration Rules for the proposition that he is entitled maintenance of conditions as they once existed. Those citations and the reliance Whittaker places on them miss the point. Simply put, Whittaker's water rights as decreed in both the Lemhi Adjudication and SRBA do not allow him to divert Stroud Creek at the West Springs Ditch and dewater Stroud Creek to the detriment of downstream seniors, including McConnell.

> In the absence of the Wells ditch, water from the springs above the ditch would follow the natural swales and, except for the part lost by evaporation or percolation in the swampy areas, would flow into Spring Creek.

Martiny at 216-17, 419 P.2d at 471-72 (emphasis added).

Here, and as explained previously, the SRBA determined both as a matter of fact and law that Stroud Creek and springs that feed Stroud Creek are tributary to Lee Creek and that none of Whittaker's rights that are tributary to Lee Creek are senior to McConnell. Through his actions, and like Wells, Whittaker has intercepted Stroud Creek and springs tributary to Lee Creek into the West Springs Ditch, preventing the flow of water to McConnell. If Whittaker's ditches were properly regulated as they have been ordered by IDWR with Whittaker ignoring the requirements of the Department, water would flow into Lee Creek for McConnell's benefit. *See* Ex. 20; R. 583 (Watermaster Yenter's June 23 Letter ordering Whittaker to comply with IDWR's September 28, 2018 "*Final Order in the Matter of Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversions* (Measurement Order) for the entire Lemhi River Basin, including tributary streams. The deadline for compliance with the Measurement Order was prior to the 2019 irrigation season for all irrigation diversions. . . . . The watermaster must have adequate control of the diversions, including the ability to close the ditches and allow the spring flows to return to Lee Creek when the right is not in priority."). Thus, the Department properly found approval of the Transfer cannot injure Whittaker because it is Whittaker who is injuring McConnell, as well as junior water users upstream of him through his illegal diversion of water. *Preliminary Order* at 12; R. 194 ("The upstream junior water right holders, Tomchak and Foster/Ayers, have been injured by the manipulation and dewatering of the Stroud Creek channel between the Whittaker Diversion and Lee Creek. . . . . The changes proposed in [the

Transfer] will not increase or exacerbate the injury to junior water rights caused by Whittaker's unauthorized diversion of Stroud Creek at the West Springs Ditch").

Therefore, consistent with *Martiny*, Whittaker is legally required to pass water downstream to McConnell, with the Department correctly finding approval of the Transfer will not injure Whittaker.

E. The Department Properly Concluded The Equitable Doctrine Of Laches Did Not Bar Approval Of The Transfer

On reconsideration to the Hearing Officer, and now on review to the Court, Whittaker argues the "equitable doctrine of laches" should have been applied by IDWR to result in denial of the Transfer. The Department rejected this argument and the Court should too.

Whittaker predominantly relies on decisions from adjudications that pre-date the SRBA, such as *Hillcrest Irr. Dist. v. Nampa Meridian Irr. Dist.* 57 Idaho 403, 66 P.2d 115 (1937). Cases like *Hillcrest* are suspect because they were not general stream adjudications that post-dated the SRBA.

The one water law case cited by Whittaker that cites modern adjudication statutes and post-dates commencement of the SRBA is *Devil Creek Ranch v. Cedar Mesa Res. and Canal Co.*, 126 Idaho 202, 879 P.2d 1135 (1994). However, the holding in *Devil Creek Ranch* prevents Whittaker from the very relief he seeks, as only the SRBA – and not the Department – has subject matter jurisdiction to entertain the claim:

> The second issue requiring resolution is whether Devil Creek Ranch's 1915 right, whatever it is, must be reduced, barred, or otherwise limited by Cedar Mesa's affirmative defenses of estoppel and/or laches.
>
> . . . .
>
> Devil Creek Ranch argues that these remaining issues should be litigated in the district court.

. . . .

> Because this controversy concerns an adjudication of a right to the use of water in the Snake River Basin, for which a general adjudication has commenced, only the SRBA district court has the subject matter jurisdiction to adjudicate water rights asserted in this case. Therefore, the district court properly dismissed the remaining issues in this case for lack of subject matter jurisdiction.

Id. at 206, 879 P.2d at 1139 (emphasis added).

According to the Department: "Any arguments related to equitable remedies . . . should have been raised in the SRBA." *Order Denying Petitions for Reconsideration* at 9; R. 273 (emphasis added). The Department's rationale is consistent with *Devil Creek Ranch* and should be accepted.

Even if the Department had jurisdiction to entertain the equitable defense, insufficient time has passed for the doctrine to apply against McConnell. As correctly found by the Department: "The Snake River Basin Adjudication ('SRBA') court issued partial decrees for the McConnell water rights (74-361 through 74-365, 74-367 and 74-368) on August 13, 2014. . . . . McConnell has only had reason to investigate the flow of Stroud Creek through the Whittaker Two Dot Ranch property and the confluence of Stroud Creek and Right Fork of Lee Creek since 2104." *Order Denying Petitions for Reconsideration* at 9; R. 273. Indeed, the SRBA's *Final Unified Decree* supports the Hearing Officer's decision that the correct time to start the clock on claims against the McConnell partial decrees is the date they were issued, not before as advocated by Whittaker. *See Final Unified Decree* at 12, ¶ 14 ("The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court and not from the date of this Final Unified Decree.") (emphasis added).

With the passage of more than six years since the partial decrees were issued, Whittaker argues the equitable doctrine of laches applies against McConnell, citing I.C. § 5-215(1) for the proposition that "the time period is longer than Idaho's current longest statute of limitation for judgments (6 years)." *Opening Brief* at 35. Because the McConnell partial decrees are judgments of the SRBA, the Department did not have the authority to alter/amend/modify the SRBA district court's decisions. If Whittaker intends to take on partial decrees, whether his or McConnell's, *Opening Brief* at 28, fn. 7 ("There also appears to be a clerical error with how the claim for WR 74-157 was received and processed by IDWR. . . . . 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 issue."), the forum for doing so is in the SRBA, not through an IDWR transfer proceeding. *See Eden v. State*, 164 Idaho 241, 429 P.3d 129 (2018) (explaining process for challenging and setting aside judgments of the SRBA court).

If the Court finds a statute of limitation does apply against the McConnell Rights, the time period has yet to run. Water rights are real property, I.C. § 55-101(1), thus, any statute of limitation must concern real property. With twenty-year statutes of limitation applying to real property, the time has yet to expire on the McConnell Rights, which were issued in 2014. *See e.g.* I.C. § 5-203 (20 years to recover against real property); I.C. § 5-206 (20 years for constructive possession of real property); I.C. § 5-207 (20 years for possession of real property under written claim of title). With the partial decrees issued in 2014, and as correctly found by the Department: "Six or seven years does not constitute 'long and continuous knowing acquiescence' as required by the equitable doctrine of laches." *Order Denying Petitions for Reconsideration* at 9; R. 273.

Finally, Whittaker's claimed assertion of "adverse[]" use of water against McConnell is barred by law. As testified to at the hearing, Lee Creek and its tributaries are within the boundaries of Water District No. 74Z. Tr. p. 68, lns. 16-19 (Water District No. 74Z has been formed since at least 1994); Tr. p. 268, lns. 17-25, p. 269, lns. 1-7 (introductory testimony from current Water District No. 74Z Watermaster Merritt Udy); *see also Opening Brief* at 29 (Water District No. 74Z is "a long-established functioning water district"). Adverse possession of water rights is a legal impossibility in an organized water district: "[N]o water user within such district can adversely possess the right of any other water user." I.C. § 42-607 (emphasis added). Moreover, since Whittaker believes he possess water differently than his rights were partially decreed in the SRBA, and to the extent a remedy exists, it is before the SRBA, not on judicial review of a final agency action of the Department: "An action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for purposes of determining such adverse claim, provided that all actions to adjudicate water rights . . . against other water users shall be brought under the provisions of chapter 14, title 42, Idaho Code." *First Security* at 742, 451 P.3d at 455 (citing I.C. § 6-401) (emphasis added).

F. The Department Properly Denied Whittaker's Post-Hearing Request To Re-Open The Hearing And For a Site Visit

As an "alternative" argument, and citing I.R.C.P. 43(f)(2) and I.R.C.P. 59(a)(3), Whittaker asks the Court to reverse the Department's decision that the record was closed and to re-open the proceeding to take "additional evidence relating to the confluence of Stroud Creek and Lee Creek . . . ." *Opening Brief* at 36. The decision to re-open a hearing and consider additional evidence is committed to the trier of fact's sound discretion. *Lebow v. Commercial Tire, Inc.*, 157 Idaho 379, 383-84, 336 P.3d 786, 790-91 (2014). Whittaker cannot reasonably

claim the Department abused its discretion by denying the request to re-open the hearing to further investigate the Confluence.

At the close of the hearing, the Hearing Officer asked the parties if "there's anything else that needs to go on the record . . . ." Tr. p. 685, lns. 8 – 9 (emphasis added). "Hearing nothing, seeing nothing, then the record for this case is closed." *Id*. lns. 10 – 11 (emphasis added). On June 1, 2021, after reviewing the *Preliminary Order* approving the Transfer, Whittaker filed a *Petition to Re-Open Hearing and Petition for Site Visit and Memorandum in Support* ("Petition"), relying on the same Civil Rules he cites today. R. 220-21. Upon review of the Petition, and in an exercise of his discretion, the Hearing Officer denied the requested relief, explaining:

> The question presented to the hearing officer by the *Petition* is whether the disputed location of the [C]onfluence . . . was properly before the parties prior to the end of the hearing, when the hearing officer closed the record. . . . . The expert report prepared by Scott King and disclosed by McConnell prior to the hearing included a paragraph describing the [C]onfluence at a location upstream of the Upper Diversion, as shown on the 1989 USGS Map and the 1954 Engineer's Map. Ex. 1 at 16-17. The King report describes the water rights in the Stroud Creek drainage and states: 'Because the McConnell points of diversion are downstream, no change in water administration will occur with these rights if the Application is approved.' *Id*. at 18. The parties offered testimony during the hearing about the current path of water through the Whittaker property and the location of the [C]onfluence . . . .
>
> The hearing officer issued a Notice of Hearing and Scheduling Order on February 19, 2021. The dates set forth in the scheduling order were agreed to by all of the parties, including Whittaker, during a pre-hearing conference on February 9, 2021. The Department conducted a status conference on March 16, 2021. Whittaker did not raise any concerns about snow on the ground or access to the streams or the confluence during that conference. Expert reports were exchanged on March 26, 2021. The Department conducted a status conference on April 14, 2021. After having time to review the expert report prepared by Scott King, Whittaker did not request additional time to conduct site inspections or investigate the disputed confluence. After two full days of testimony, including lengthy testimony about the Stroud Creek channel and the historical [C]onfluence . . ., Whittaker did not ask to keep the administrative record open for additional evidence. Whittaker did not question the adequacy of the administrative record until after the *Preliminary Order* was issued.

> Rule 52 of the Department's Rules of Procedure (IDAPA 37.01.01) states that the rules "will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency." Administrative records are never perfect. In most cases there are relevant documents and testimony that could have been offered at hearing but weren't. Witnesses reflect on testimony offered and realize that they could have made an additional point. Expert witnesses reflect on reports and realize that they could have conducted additional inspections or tests or included additional analyses in their reports. Such omissions and regrets, however, are not sufficient justification to re-open an administrative record. To re-open the record under such circumstances would lead to never-ending cases, where non-prevailing parties continue to ask for more time to collect additional evidence to bolster their cases. Such a result would not constitute just, speedy or economical disposition of contested cases.

Order Denying Petition to Re-Open Hearing and Petition for Site Visit at 2-3; R. 261-62.

First, Whittaker relies on I.R.C.P. 43(f) as a basis for a site visit. Assuming for the sake of argument that the rule applies in this proceeding, the opportunity for a site visit must be made before the record is closed: "During a trial, the court may order that the court or jury may view any property, place, item, or circumstance relevant to the action." I.R.C.P. 43(f) (emphasis added). As explained by the Hearing Officer, Whittaker did not avail himself of this opportunity during the hearing; thus, the relief was properly denied. *See Noble v. Kootenai County*, 148 Idaho 937, 942, 231 P.3d 1034, 1039 (2010) ("At the conclusion of the hearing . . . the Board chose to leave the hearing open . . . to receive additional information . . . and [] to allow the Board's observations made during the site visit to be included within the record of proceedings.") (emphasis added).

Second, Whittaker relies on I.R.C.P. 59(a)(3) as a basis to re-open the hearing, claiming the matter should be re-opened to allow for additional evidence to be taken into the record. Also assuming for the sake of argument that the rule applies, the decision to grant or deny the request is discretionary: "On motion for a new trial . . . 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." I.R.C.P. 59(a)(3) (emphasis added). "On appeal, we review a trial court's decision to grant or deny a new trial for an abuse of discretion, and we will not disturb that decision absent a manifest abuse of this discretion." *Lanham v. Idaho Power Co.*, 130 Idaho 486, 497-98, 943 P.2d 912, 923-24 (1997) (emphasis added). "The test for determining whether the court has abused its discretion consists of three inquiries: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the court reached its decision through an exercise of reason." *Id*.

Here, and as stated in the above-cited portion from the *Order Denying Petition to Re-Open Hearing and Petition for Site Visit*, the Hearing Officer clearly understood he: (1) was being asked to use his discretion; (2) acted within the boundaries of his discretion when he identified all of the opportunities that Whittaker had to probe and re-probe the Confluence; and (3) acted through an exercise of reason when he concluded that, while no administrative record is perfect, Whittaker had every chance to develop more of a record regarding the Confluence if he had so chosen. Clearly, the Hearing Officer did not manifestly abuse his discretion in denying Whittaker's petition to re-open the hearing.

G. The Department's Approval Of The Transfer Did Not Violate Whittaker's Substantial Rights

Whittaker incredulously claims approval of the Transfer violated his substantial rights, *Opening Brief* at 38, despite the fact that the water right he claims will be injured by the Transfer – WR 74-157 – is junior to the McConnell Rights, is upstream from the McConnell Rights, is tributary to Lee Creek, which is the source of the McConnell Rights, and contains no reference to *Whittaker v. Kauer*. The Department correctly recognized that approval of the Transfer will not

cause injury to Whittaker. The Court should therefore find that since the Final Order was made upon lawful procedure, Whittaker's substantial rights have not been violated.

VI. WHETHER MCCONNELL IS ENTITLED TO AN AWARD OF ATTORNEY FEES

As an issue on review, McConnell requests an award of attorney fees pursuant to I.C. § 12-117, as this action involves as adverse parties Whittaker ("a person") and the Department ("a state agency"). The Court "shall award the prevailing party reasonable attorney's fees . . . if it finds that the nonprevailing party acted without a reasonable basis in fact or law." I.C. § 12-117. Here, Whittaker has acted without a reasonable basis in at least three ways, most notably: (1) Whittaker merely asks the Court to reweigh and second guess evidence on the issue of the Confluence in direct contravention of the standard of review; (2) Whittaker argues his private ditches that intercept Stroud Creek and springs that are tributary to Lee Creek are entitled to take water ahead of McConnell; and (3) Whittaker asks the Court to read statements from *Whittaker v. Kauer* into SRBA partial decrees despite the fact that no such statements are contained in any of the partial decrees at issue.

First, as to the issue of the Confluence, Whittaker merely asks the Court to reweigh and second guess a century's worth of maps, testimony, and conditions in SRBA partial decrees in order to reverse the Department's decision when it located the Confluence above the McConnell Diversions. Whittaker's request is in direct contravention of the standard of review and constitutes acting without a reasonable basis I.C. § 67-5279(1) (the court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact"); *Urrutia* at 357, 2 P.3d at 742 ("agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence"); *Chisholm* at 164, 125 P.3d at 520 ("When conflicting evidence is presented, the agency's finding are binding on this Court as long as they are

supported by substantial and competent evidence, regardless of whether we might have reached a different conclusion."). Asking the Court to "reweigh" and "second guess" evidence is cause for an award of attorney fees pursuant to I.C. § 12-117. *State v. Grathol*, 158 Idaho 38, 54-55, 343 P.3d 480, 496-97 (2015).

Second, as to Whittaker's ditches that intercept Stroud Creek and springs tributary to Lee Creek and prevent water from reaching McConnell, Whittaker's actions and arguments go directly against the Court's decision in *Martiny*. Said decision is settled precedent with remarkably similar facts and prevents Whittaker from arguing, without a reasonable basis, that he can intercept and take water that is tributary to Lee Creek ahead of and to the detriment of McConnell.

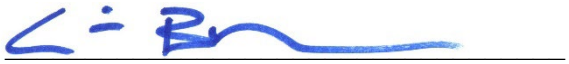
Third, as to statements made in *Whittaker v. Kauer* regarding the Kauer Ditch and separate administration of WR 74-157, the Department correctly determined that none of the statements Whittaker relies on in the case were incorporated into the SRBA partial decrees that are at issue in the proceeding. Asking the Court to read statements from *Whittaker v. Kauer* into SRBA partial decrees during a transfer proceeding, when no such statements are contained in any of the partial decrees at issue, is a collateral attack, going directly against the Court's decision in *City of Blackfoot*. There, "[t]he City attempt[ed] to argue that recharge, although not contained in the purpose of use element is an authorized use of 181C." *City of Blackfoot* at 307, 396 P.3d at 1189 (emphasis added). In affirming the district court and reciting its rationale, the Supreme Court stated: "If the City believed recharge should be authorized under water right 01-181C, this [transfer] proceeding is not the proper time or place to raise that argument." *Id*. (emphasis added). "Allowing the City to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that

process." *Id*. at 308, 396 P.3d at 1190 (emphasis added). When moved for an award of attorney fees on appeal by intervenor-respondent Surface Water Coalition that was made "pursuant to section 12-117(1)," the Court awarded fees. *Id*. at 310, 396 P.3d at 1192. McConnell respectfully requests that the Court do the same in this proceeding.

VII. CONCLUSION

Based on the foregoing the Department's decision to approve the Transfer should be affirmed. Substantial, competent evidence supports the Department's finding that the Confluence is located above the McConnell Diversions. Moreover, the Department correctly declined Whittaker's repeated requests to read terms into the SRBA partial decrees that are at issue in this proceeding as unlawful collateral attacks, properly denied Whittaker's motion to re-open the hearing and for a site visit, and correctly denied Whittaker's request to apply the equitable doctrine of laches, none of which prejudiced Whittaker's substantial rights. Lastly, because Whittaker has pursued this action without a reasonable basis in fact or law, an award of attorney fees is proper pursuant to I.C. § 12-117.

DATED this 12th day of May, 2022.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2022, I served a true and correct copy of the foregoing document on the parties to this action via iCourt:

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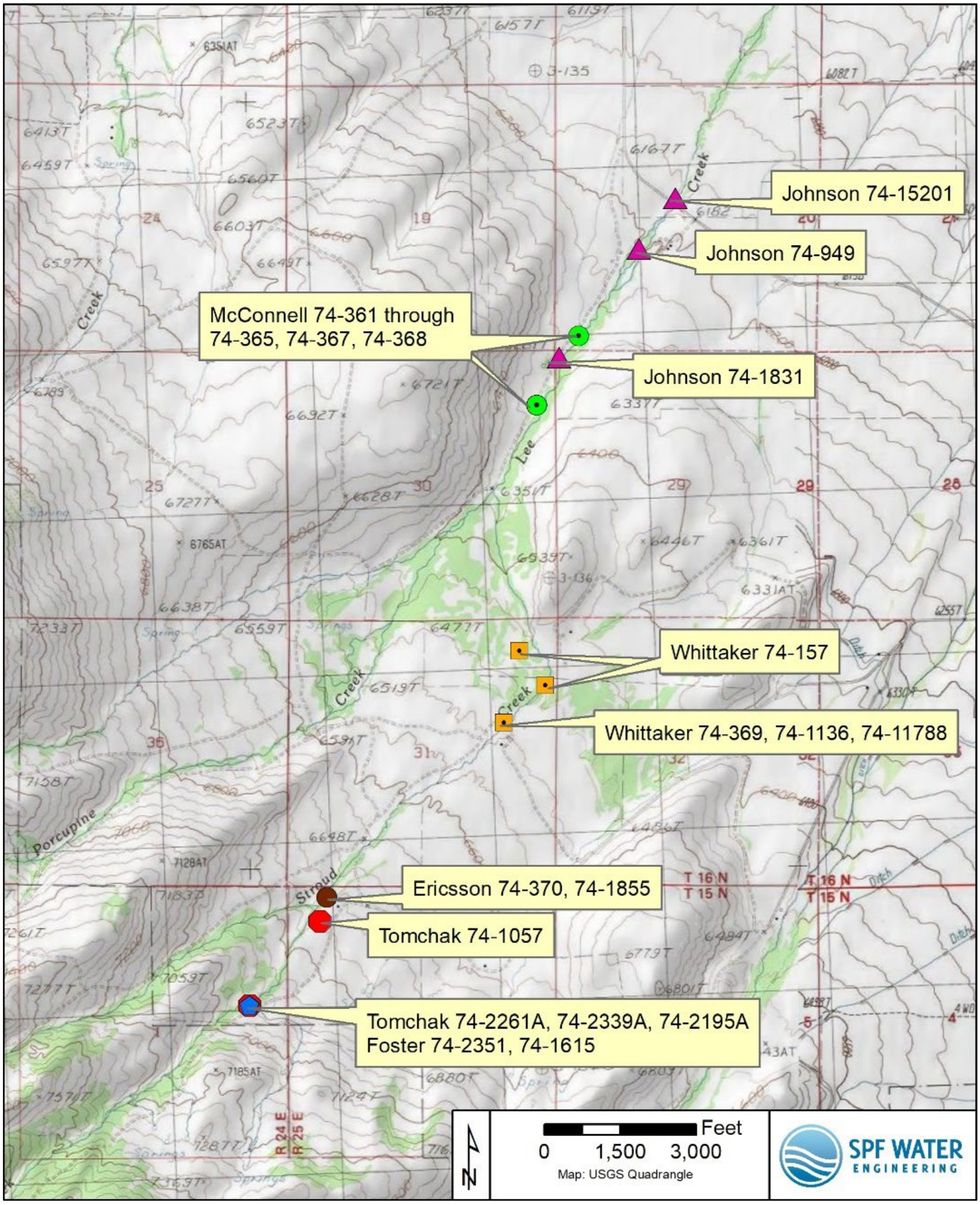
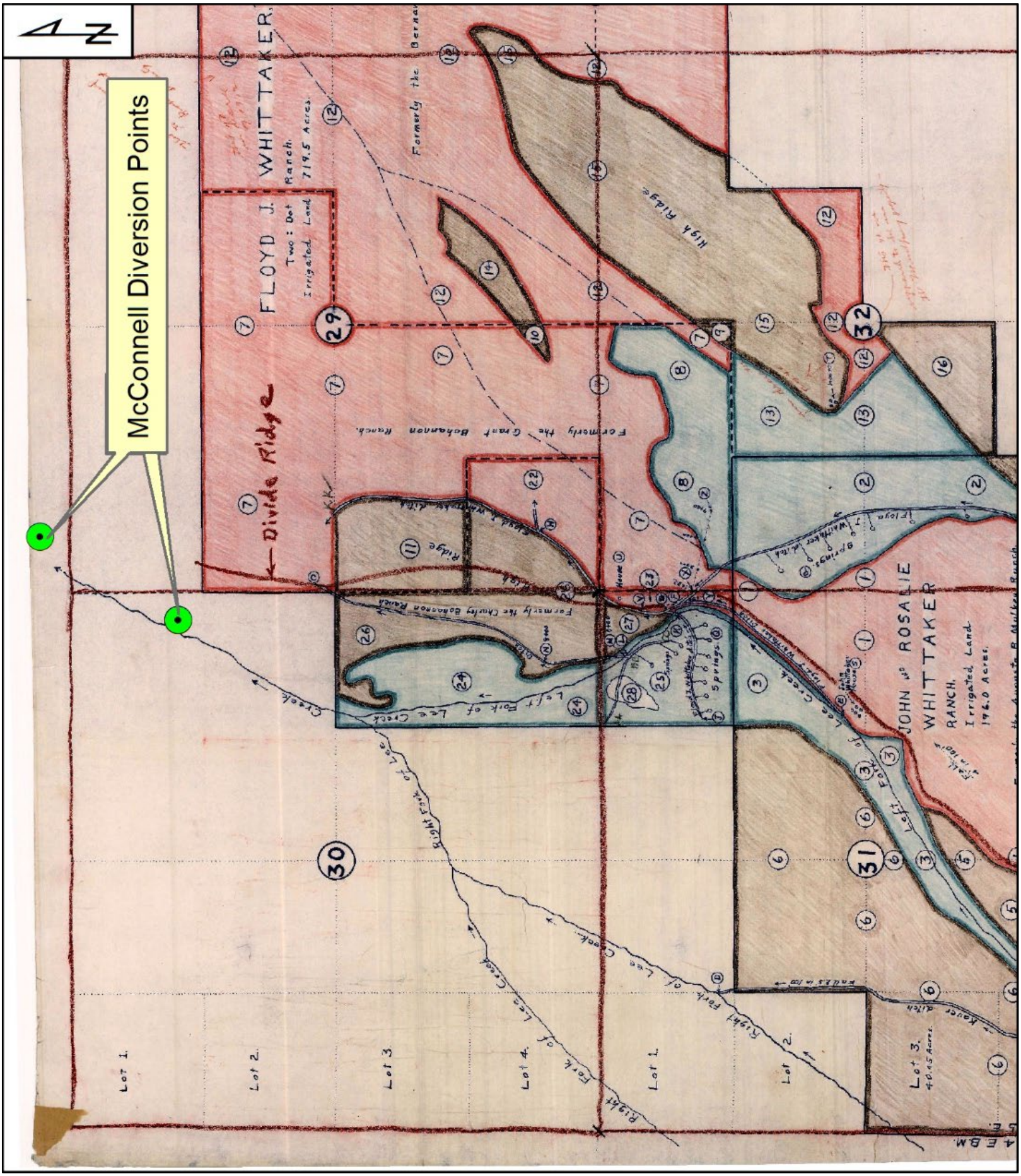
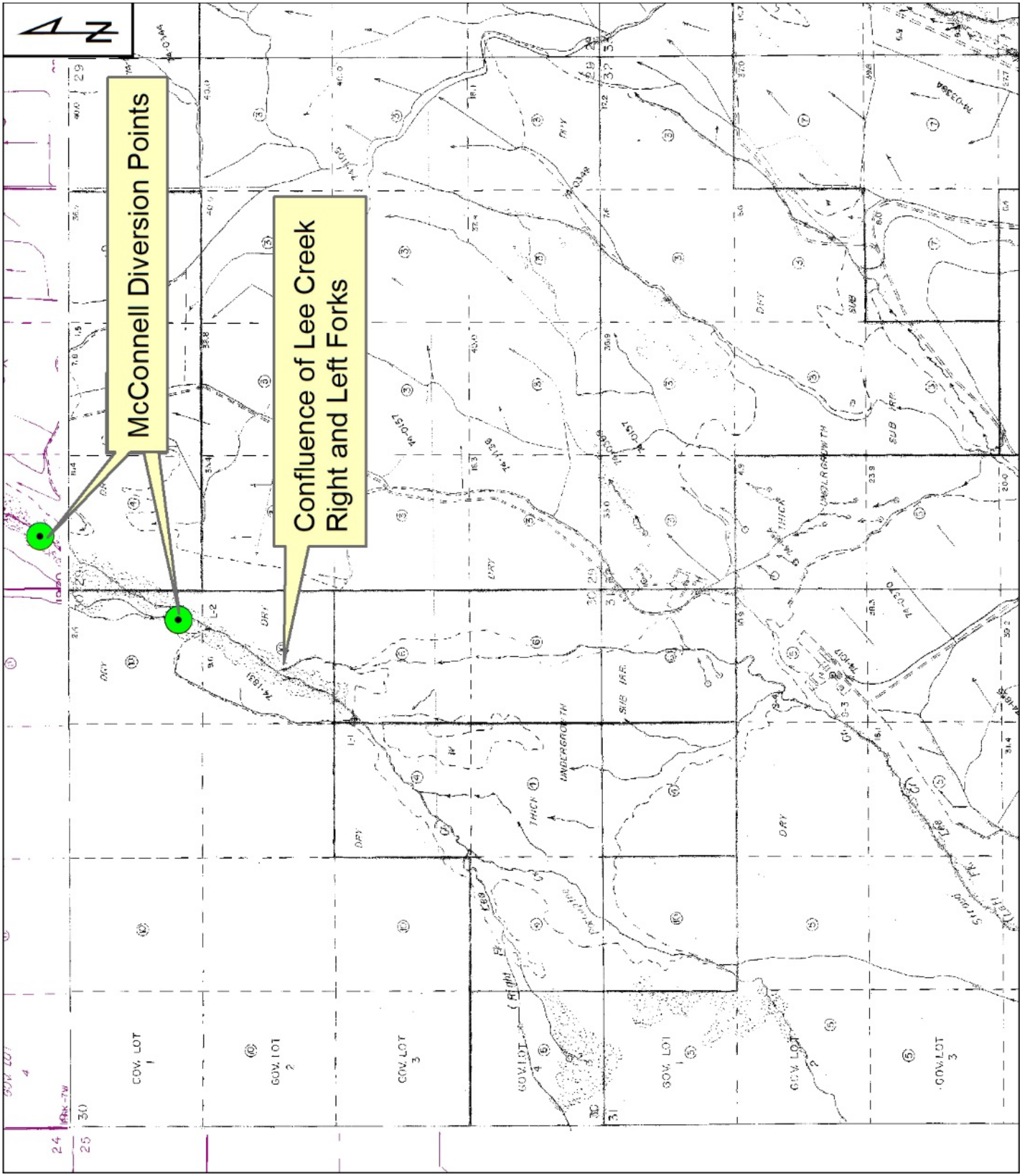


Ex. 1 at 15, Fig. 10; R. 374 (1989 USGS Map)



Ex. 1 at 16, Fig. 11; R. 375 (1954 Engineer's Map)



Ex. 1 at 17, Fig. 12; R. 376 (1970 Lemhi Adjudication Map)