

**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. CV30-21-304

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

RESPONDENT'S BRIEF

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

LAWRENCE G. WASDEN
ATTORNEY GENERAL

DARRELL G. EARLY
Chief of Natural Resources Division

GARRICK BAXTER, ISB No. 6301
MARK CECCHINI-BEAVER, ISB No. 9297
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
mark.cecchini-beaver@idwr.idaho.gov

Attorneys for Respondent

Chris M Bromley, ISB No. 6530
Candice McHugh, ISB No. 5908
McHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

*Attorneys for Intervenors Bruce and Glenda
McConnell*

Robert L. Harris, ISB No. 7018
Luke H. Marchant, ISB No. 7944
**HOLDEN, KIDWELL, HAHN
& CRAPO, P.L.L.C.**
P.O. Box 50130
Idaho Falls, ID 83405
rharris@holdenlegal.com
lmarchant@holdenlegal.com
efiling@holdenlegal.com

*Attorneys for Petitioners James Whittaker
and Whittaker Two Dot Ranch LLC*

TABLE OF CONTENTS

| | |
|---|----|
| I. STATEMENT OF THE CASE..... | 1 |
| A. Nature of the Case..... | 1 |
| B. Statement of Facts..... | 3 |
| C. Procedural Background..... | 4 |
| 1. The 1912 Decree..... | 4 |
| 2. Whittaker v. Kauer..... | 5 |
| 3. The SRBA Decrees..... | 7 |
| 4. Post-decree Administration of Lee Creek Water Rights..... | 8 |
| 5. 2020 Transfer Applications..... | 10 |
| 6. Administrative Proceedings on Transfer 84441 | 11 |
| II. ISSUES PRESENTED FOR REVIEW | 12 |
| III. STANDARD OF REVIEW | 13 |
| IV. ARGUMENT | 14 |
| A. Substantial Evidence Supports the Hearing Officer’s Finding That the Confluence is Upstream of McConnell’s Upper Diversion. | 14 |
| 1. Whittaker’s map, the Whittaker case, Whittaker’s water rights, and other substantial evidence support the finding that the confluence is upstream of McConnell’s Upper Diversion..... | 16 |
| 2. Whittaker’s water rights, Whittaker’s expert, and other substantial evidence support the finding that Whittaker’s unauthorized diversion of Stroud Creek into the West Springs Ditch causes Stroud Creek water to enter Lee Creek downstream of the confluence. | 21 |
| 3. Whittaker’s arguments do not overcome the substantial evidence supporting the Hearing Officer’s findings..... | 23 |
| B. There Was No Error in Basing the Injury and Enlargement Analyses on the Findings of Fact Instead of the Un-decreed Historical Practices Described in <i>Whittaker</i> | 24 |
| C. The Conclusions of Law on Injury and Enlargement Are Consistent with the Findings of Fact. | 29 |
| D. Whittaker’s Assertion of Laches Against McConnell Does Not Bind the Department and Lacks Merit. | 32 |
| V. CONCLUSION..... | 37 |

TABLE OF CASES AND AUTHORITIES

Cases

| | |
|--|----------------|
| <i>Binning v. Miller</i> , 102 P.2d 54 (Wyo. 1940) | 29 |
| <i>Byrd v. Bd. of Land Comm’rs</i> , — Idaho —, 505 P.3d 708 (2022) | 23 |
| <i>Chisholm v. Idaho Dep’t of Water Res.</i> , 142 Idaho 159, 125 P.3d 515 (2005) | 14, 16, 21, 24 |
| <i>Chowchilla Farms, Inc. v. Martin</i> , 25 P.2d 435 (Cal. 1933) | 28 |
| <i>City of Blackfoot v. Spackman</i> , 162 Idaho 302, 396 P.3d 1184 (2017) | 14 |
| <i>Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.</i> , 126 Idaho 202, 879 P.2d 1135 (1994)..... | 34, 35 |
| <i>Fragnella v. Petrovich</i> , 153 Idaho 266, 281 P.3d 103 (2012) | 22 |
| <i>Frizzell v. DeYoung</i> , 167 Idaho 801, 477 P.3d 236 (2020)..... | 24 |
| <i>Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.</i> , 57 Idaho 403, 66 P.2d 115 (1937)..... | 34 |
| <i>In re Idaho Dep’t of Water Res. Am. Final Order Creating Water Dist. No. 170</i> , 148 Idaho 200, 220 P.3d 318 (2009)..... | 24 |
| <i>Poole v. Olaveson</i> , 82 Idaho 496, 356 P.2d 61 (1960) | 27, 28 |
| <i>Rangen, Inc. v. Idaho Dep’t of Water Res.</i> , 159 Idaho 798, 367 P.3d 193 (2016) | 13, 24, 25, 31 |
| <i>Rangen, Inc. v. Idaho Dep’t of Water Res.</i> , 160 Idaho 251, 371 P.3d 305 (2016) | 33 |
| <i>Scranton-Pascagoula Realty Co. v. Pascagoula</i> , 128 So. 73 (Miss. 1930)..... | 28 |
| <i>Sears v. Berryman</i> , 101 Idaho 843, 623 P.2d 455 (1981)..... | 34 |
| <i>Smith v. L.A.</i> , 153 P.2d 69 (Cal. Dist. Ct. App. 1944) | 27, 29 |
| <i>Spencer v. Jameson</i> , 147 Idaho 497, 211 P.3d 106 (2009)..... | 34 |
| <i>Sword v. Sweet</i> , 140 Idaho 242, 92 P.3d 492 (2004) | 36 |
| <i>Tanner Lane Ranch, LLLP v. Idaho Dep’t of Water Res.</i> , No. CV 2017-458 (Bingham Cnty. Dist. Ct. Sept. 14, 2017)..... | 33, 36 |
| <i>Thomas v. Arkoosh Produce, Inc.</i> , 137 Idaho 352, 48 P.3d 1241 (2002) | 36 |
| <i>Whittaker v. Kauer</i> , 78 Idaho 94, 298 P.2d 745 (1956) | passim |

Statutes

| | |
|---------------------------|--------|
| Idaho Code § 42-1413..... | 24 |
| Idaho Code § 42-222..... | passim |
| Idaho Code § 42-3802..... | 25 |
| Idaho Code § 42-607..... | 35 |
| Idaho Code § 67-5277..... | 13 |
| Idaho Code § 67-5279..... | passim |

Rules

| | |
|---------------------------------------|----|
| Idaho Rule of Civil Procedure 1 | 32 |
| IDAPA 37.01.01.051 | 32 |
| IDAPA 37.03.07.000 | 25 |
| IDAPA 38.03.07.010.15 | 25 |

I. STATEMENT OF THE CASE

A. Nature of the Case

This is a judicial review proceeding under the Idaho Administrative Procedure Act (“APA”), Idaho Code §§ 67-5201 *et seq.* Petitioners James Whittaker and Whittaker Two Dot Ranch, LLC (collectively “Whittaker”) appeal the *Order on Exceptions; Final Order Approving Transfer* (“*Final Order*”) issued by Gary Spackman, the Director of Respondent the Idaho Department of Water Resources (“Department”). Whittaker’s appeal stems from the Director’s conditional approval of Transfer No. 84441. The transfer authorizes Intervenors Bruce and Glenda McConnell (collectively, “McConnell”) to divert from Lee Creek, a tributary of the Lemhi River, at a second point of diversion (“Lower Diversion”) located downstream of their authorized diversion point (“Upper Diversion”).

The pivotal issue in this case is factual: Where is the confluence of Stroud Creek with the Right Fork of Lee Creek relative to the Upper Diversion? As the Director recognized, “[t]he location of the confluence—whether above or below McConnell’s [Upper Diversion]—will affect how other Stroud and Lee Creek water rights may be administered in priority.” R. 340. Based on the extensive documentary record and testimony during a two-day hearing, Hearing Officer James Cefalo found that the confluence lies upstream of the Upper Diversion. This finding of fact was integral to the legal conclusions that authorizing the Lower Diversion would not injure other water rights or enlarge McConnell’s water rights. In the *Final Order*, the Director denied Whittaker’s exceptions to the Hearing Officer’s orders, adopted the Hearing Officer’s findings of fact and conclusions of law as final, and approved McConnell’s transfer

application subject to conditions specified by the Hearing Officer. R. 339–41.

Whittaker contends the confluence lies between the Upper Diversion and the Lower Diversion and, therefore, the transfer approval would injure Whittaker’s junior water right 74-157 and enlarge McConnell’s rights. Specifically, Whittaker disagrees with the Director’s reliance on substantial evidence in the record— “including evidence presented by Whittaker’s own expert—to conclude Stroud Creek would flow from the point of interception to the historic confluence but for the interception of Stroud Creek by Whittaker’s West Springs Ditch.” R. 340 (citing R. 186, 267, 596–97).

The hearing officer concluded the stream channel of Stroud Channel has been intercepted by Whittaker’s West Spring Ditch. This unauthorized diversion has dewatered the historic Stroud Creek stream channel. But for Whittaker’s unauthorized diversion at the West Springs Ditch, Stroud Creek would contain continuously flowing water in-season and result in water flowing into Lee Creek above McConnell’s authorized [Upper] diversion.

Id. (citing R. 267). Having found that the confluence is upstream of the Upper Diversion, the Hearing Officer reasoned that authorizing the Lower Diversion will not increase the burden on upstream junior rights or augment the sources available to satisfy McConnell’s rights. R. 192–94. Thus, authorizing the Lower Diversion would not injure other water rights or enlarge McConnell’s water rights. And, because the other criteria in Idaho Code § 42-222(1) were satisfied, the Director properly approved Transfer No. 84441.

Whittaker’s appeal depends on this Court either accepting that inapplicable law controls the outcome or reweighing the evidence in violation of Idaho Code § 67-5279(1). It is the Director’s responsibility to find the facts necessary to determine if a transfer should be approved

under the criteria set forth in Idaho Code § 42-222(1). Here, substantial evidence in the record supports the factual findings as to the location of Stroud Creek’s confluence with Lee Creek and the legal conclusions based on those underlying factual determinations. The APA therefore requires this Court to affirm the *Final Order*.

B. Statement of Facts

The Department disagrees with Whittaker’s Statement of Facts. Despite conceding that “Whittaker generally agrees with most of the findings of fact contained in the *Preliminary Order*,” Whittaker presents what is styled as the “***Preliminary Order Findings of Fact***.” Opening Br. at 4 (bold in original). But Whittaker’s version of the findings contains pages of underlined text, representing “disputed fact statements (prepared by Whittaker) different from the *Preliminary Order*.” *Id.* Whittaker’s underlined text modifies certain findings, completely rewrites others, and may create confusion as to what are the Hearing Officer’s actual findings of fact. To be clear, the Hearing Officer’s findings, which the Director adopted in full, are in the record at pages 183 through 188. As detailed in the Argument below, those findings are supported by substantial evidence, much of it introduced at hearing by Whittaker.

Indeed, Whittaker’s Statement of Facts begins with a block quote from *Whittaker v. Kauer*, describing the condition of the Stroud Creek drainage decades ago. Opening Br. at 3 (quoting *Whittaker v. Kauer*, 78 Idaho 94, 97, 298 P.2d 745, 747 (1956)). The Supreme Court’s decision states that Whittaker’s predecessors built an earthen dam across Stroud Creek (also called the Left Fork of Lee Creek), the watermaster cut the dam in 1954 to deliver water downstream “at the instance” of McConnell’s predecessor, and a channel capable of carrying

flow existed below the dam. *Whittaker*, 78 Idaho at 97, 298 P.2d at 747. Those facts, as the Hearing Officer observed, only make sense “if the confluence of Stroud Creek and Right Fork of Lee Creek were located upstream of [McConnell’s] Upper Diversion.” R. 189. *Whittaker*, therefore, “confirms that Kauer, McConnell’s predecessor in interest, had access to water from Stroud Creek” at the Upper Diversion, as the Hearing Officer found. R. 184.

C. Procedural Background

The transfer at issue here is one of several recent administrative matters involving McConnell’s and Whittaker’s water rights in the Lee Creek drainage. Preceding those administrative matters, is a series of judicial proceedings involving McConnell and Whittaker or their predecessors in interest, including the 1912 decree of Lee Creek water rights, the Idaho Supreme Court’s 1956 decision in *Whittaker v. Kauer*, and the Snake River Basin Adjudication (“SRBA”). These administrative and judicial proceedings provide important context for this case.

1. The 1912 Decree

Water rights in the Lee Creek drainage were first decreed in 1912 by the Lemhi County district court. *Reddington v. Bohannon* (Lemhi Cnty. Dist. Ct. Idaho July 1, 1912), *available at* R. 610–13. The decree includes rights now held by McConnell and Whittaker.¹ The decree identifies “Lee Creek” as the source for most of the rights now held by McConnell (74-361

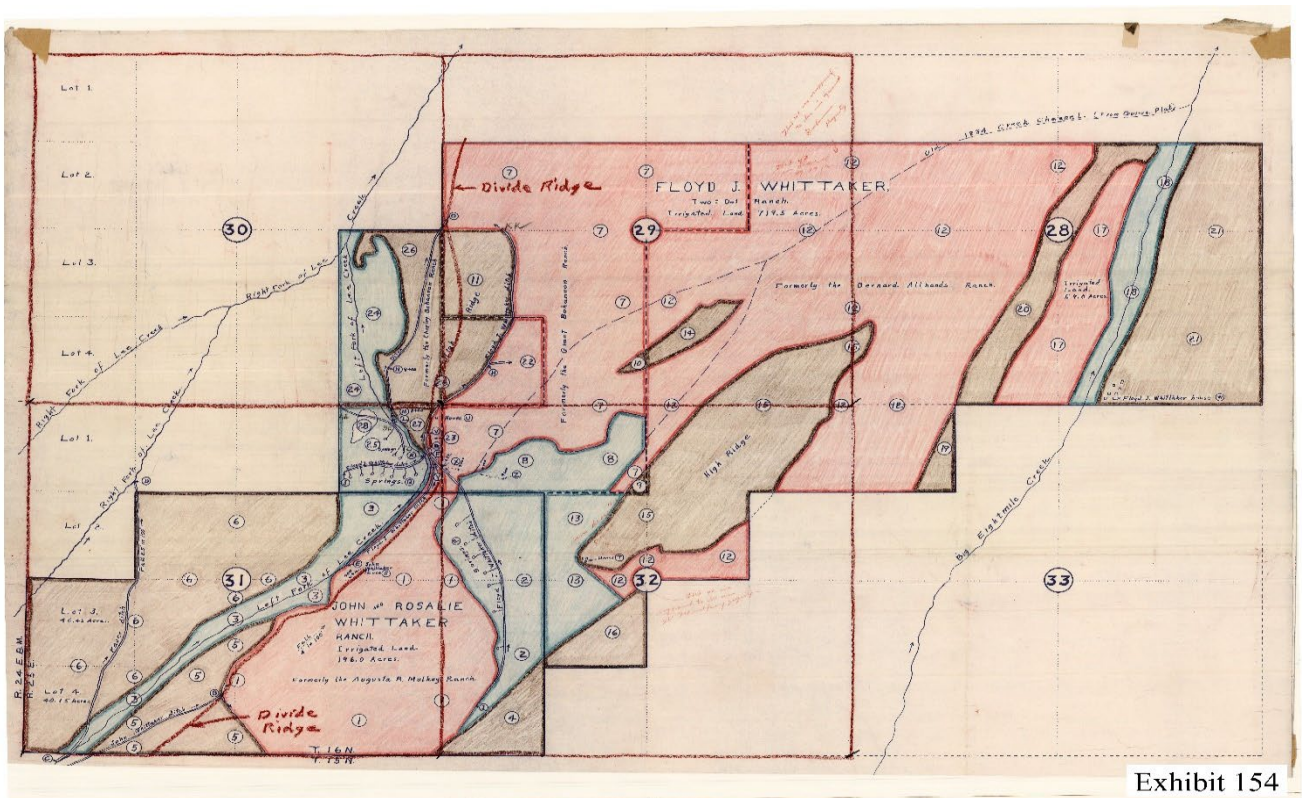
¹ The 1912 decree did not refer to the water rights by number. However, there is no dispute as to the water right numbers that correspond to the rights in the 1912 decree. Consistent with the Hearing Officer’s discussion of the 1912 decree, the water right numbers are used here for ease of reference. *See* R. 185 n.4.

through 74-365), except that the decree identifies the source for 74-367 as the “Left Fork of said Lee Creek” (also called Stroud Creek) and the source for 74-368 as the “Right Fork of said Lee Creek.” R. 610–11. The decree further identifies the Left Fork of Lee Creek as the source for 74-369, now held by Whittaker. R. 612. This 1912 decree also was the origin of a special “pro rata” condition that still exists on Whittaker’s 74-369. *See* R. 612–13. Under the condition, when the flow of Lee Creek falls below the amount decreed to rights now numbered 74-369 and 74-370, the holders of those two rights are entitled to “pro-rate the waters of said Left Fork of Lee Creek [i.e., Stroud Creek] flowing therein above their points of diversion, according to the respective amounts of water herein decreed to them.” R. 612. In addition, the holders of those two rights, “shall not be obliged to pro-rate with any other parties to this action, whose right of appropriation is of equal priority therewith, in case the flow of the waters of said Left Fork shall be insufficient” to supply all rights with a May 12, 1883 priority date. R. 613. Other than 74-369 and 74-370, the only rights in the Lee Creek drainage with a May 12, 1883 priority date—74-361, 74-363, 74-365, and 74-367—are now held by McConnell. R. 383–88.

2. *Whittaker v. Kauer*

In the 1950s, Whittaker’s and McConnell’s predecessors in interest litigated a private quiet title action over water emanating from springs in the Lee Creek drainage. The district court’s decree is in the record at page 747, and the Idaho Supreme Court’s opinion affirming the district court is *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956). Whittaker’s predecessors hired an engineer to prepare a map of the Lee Creek drainage for use in the litigation. R. 741–42

(map and legend); Tr. 387:2–5 (James Whittaker).² Whittaker presented this 1954 “Engineer’s Map” as evidence in this transfer proceeding, and it proved to be a significant piece of evidence as to the location of Stroud Creek’s confluence with Lee Creek. *See generally* R. 184–86 (*Preliminary Order Findings of Fact*), 189–91 (*Preliminary Order confluence analysis*). The Engineer’s Map is reproduced below, and a higher resolution version is in the record.



Whittaker addressed disputes over water from “two separate groups of springs” (known as the West Springs and the East Springs) and a 1932 “oral contract” between *Whittaker’s* and

² Throughout this brief, citations to the transcript refer to the Bates-stamp page number and not the page number on the transcript document itself. For example, Bates-stamp page number 387 is transcript page 385.

McConnell’s predecessors. *Whittaker*, 78 Idaho at 95–97, 298 P.2d at 746–47. Under the oral contract, Whittaker’s predecessors allowed McConnell’s predecessors to divert their 1912-decreed water from Stroud Creek,³ inject it into the Right Fork of Lee Creek, and convey it down the main channel of Lee Creek to their lands. *Id.* at 97, 298 P.3d at 747. The ditch conveying the water between Stroud Creek and the Right Fork of Lee Creek is known as the “Kauer Ditch.” In exchange, Whittaker’s predecessors were “permitted . . . 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” Stroud Creek, “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.*” *Id.* The parties’ dispute arose “when at [McConnell’s predecessors’] instance, the water master cut the dam, which allowed the waters to flow down the channel” *Id.* The Supreme Court affirmed the district court’s decision to “quiet[] title in [Whittaker’s predecessors] to the beneficial use of 80 miners inches of water of the West Springs.” *Id.* at 99, 298 P.2d at 748.

3. The SRBA Decrees

Today, McConnell and Whittaker both hold water rights in the Lee Creek drainage that were decreed in the SRBA. McConnell’s decreed rights are summarized in the record at page 383, and Whittaker’s are summarized at page 388. Neither McConnell’s nor Whittaker’s SRBA

³ The decision refers to Stroud Creek as the “Left Fork of Lee Creek” or the “Left Fork.” Consistent with all parties’ usage throughout this transfer proceeding, this brief refers to Stroud Creek on the understanding that name is synonymous with the “Left Fork of Lee Creek.”

decrees mention or contain any condition based on the *Whittaker* case. R. 545–53 (McConnell), 475–98 (Whittaker). In particular, the decree for Whittaker’s 74-157, which authorizes the diversion of up to 3.2 cfs from “Springs” tributary to “Lee Creek” with an April 1, 1916 priority date, does not authorize any diversion from Stroud Creek (or the Left Fork of Lee Creek), nor does it include any language suggesting the right should be administered separately from other water rights in the Lee Creek system. R. 560; *see also* R. 556–559 (SRBA claim and Notice of Error Reply, agreeing “no changes need to be made”). By contrast, the “pro rata” condition on Whittaker’s 74-369 was carried forward from the 1912 Decree through the SRBA. R. 480–81. The *Final Unified Decree* entered in the SRBA includes all McConnell’s and Whittaker’s water rights at issue in this case and, except for later administrative changes, “is conclusive as to the nature and extent” of those rights. Final Unified Decree, *In re SRBA*, No. 39576, at 9–15 (Twin Falls Cnty. Dist. Ct. Idaho Aug. 26, 2014).

4. *Post-decree Administration of Lee Creek Water Rights*

The Lee Creek drainage is part of Water District 74Z, which also encompasses the adjacent Big Eight Mile Creek drainage. In turn, Water District 74Z is a subdistrict within Water District 170. At and before the time of the administrative hearing in 2021, Cindy Yenter was watermaster for Water District 170, and Merritt Udy was watermaster for Water District 74Z.

In the summer of 2020, a dispute arose over the watermaster’s efforts to administer Lee Creek water rights in accordance with their decrees. The Department, in a September 2018 order, had previously required suitable measuring devices and controlling works to be installed on diversion throughout the Lemhi Basin, including the Lee Creek drainage, by the beginning of the

2019 irrigation season. In June of 2020, watermaster Yenter issued a letter to James and Jordan Whittaker, reminding them of the requirement to install and maintain measuring devices and controlling works on both the East and West Springs, so the watermaster could administer 74-157 in priority with other Lee Creek rights. R. 583. Whittaker’s counsel responded to the letter in July, asserting 74-157 should be administered separately from other Lee Creek rights based on the holding in *Whittaker v. Kauer*. R. 503–05. The Department disagreed with that assertion (and still does), *id.*, but followed up with further investigation of and efforts to address diversion practices in the Lee Creek system.

For example, on August 6, 2020, watermaster Yenter issued a letter to McConnell explaining, among other compliance requirements, that McConnell’s Lower Diversion “must be closed immediately” because it was not authorized under any water right. R. 506. Watermaster Yenter issued further instructions to watermaster Udy on the same day. R. 507–08. Specifically, Yenter directed Udy to confirm McConnell had closed the Lower Diversion and perform measurements and other actions to determine if water from Stroud Creek could reach McConnell’s Upper Diversion. *Id.* This investigation became necessary because the Department had determined in 2014 that McConnell was not authorized to continue the historical practice of conveying Stroud Creek water to the Right Fork of Lee Creek via the Kauer Ditch, as described in the *Whittaker* case. Tr. 258:19–259:5 (Yenter). Udy testified that he carried out Yenter’s instructions, explaining that he “sent the 74-157 west spring to McConnell” and “then 24 hours later it showed up in McConnell’s lower diversion” but the “upper diversion didn’t seem to be affected.” Tr. 275:4–9. Udy also explained that he had to find and manipulate a “board headgate”

on Whittaker’s property to send the water down what he initially called “the Stroud channel,” Tr. 278:5–22, but later admitted it was “hard to say . . . what was the original channel or not” because Whittaker’s West Springs collection ditch (“West Springs Ditch”) “looks like it’s been there forever.” Tr. 285:6–9.

5. 2020 Transfer Applications

The transfer at issue in this case is one of three filed by either McConnell or Whittaker after August 2020. First, in September 2020, McConnell applied for Transfer 84367, seeking to correct the legal description for McConnell’s Upper Diversion, which was incorrectly described in the SRBA. R. 15–40. The Department approved 84367 on October 8, 2020. *See* R. 183 (citing R. 507–30).

Second, in October 2020, McConnell applied for Transfer 84441, the transfer at issue in this case. McConnell’s application requested authorization to divert certain Lee Creek water rights at the Lower Diversion in addition to the authorized Upper Diversion. R. 532–44. Whittaker and others timely protested the transfer application. R. 76–78, 81–93, 96–98, 100–105.

Third, while Transfer 84441 was pending, James Whittaker in November 2020, applied for Transfer 84508. R. 561–68. This transfer proposed to remove “Lee Creek” as the identified tributary on Whittaker’s springs right 74-157, claiming the “Springs do not naturally flow into a tributary water stream” and that the “water right utilizes water from the identified source of Springs to extinction.” R. 562. McConnell protested the application, R. 575–76, and watermaster Yenter objected to approving the transfer as proposed. R. 579–80. According to Yenter, the East Spring source for 74-157 would, absent development, “sink long before reaching a named

tributary” but the West Spring source “is clearly tributary to Stroud Creek.” R. 579. Yenter’s comments also describe how the West Springs Ditch alters the Stroud Creek channel “so that all flows of both Stroud Creek and the West Springs flow to” Whittaker’s “ditches,” which had been “recently modified . . . so that flows may be bypassed back to lower Stroud Creek.” *Id.*

Whittaker’s counsel withdrew Transfer 84508 in February 2021. R. 581.

6. *Administrative Proceedings on Transfer 84441*

Meanwhile, the contested case for Transfer 84441 proceeded to hearing. The Department held a two-day administrative hearing on April 21 and 22, 2021. McConnell and Whittaker were represented by counsel throughout the proceedings. The Hearing Officer heard testimony from Bruce McConnell, the transfer applicant and Lee Creek water right holder; Scott King, McConnell’s expert witness; Cindy Yenter, the Water District 170 watermaster at the time; Merritt Udy, the Water District 74Z watermaster; Jordan Whittaker, manager of protestant Whittaker Two Dot Ranch, LLC; protestant James Whittaker, Jordan’s father and Stroud Creek water right holder; Bryce Contor, Whittaker’s expert witness; and other witnesses who live or lived in the Lee Creek drainage. R. 181. In addition to the witness testimony, over 40 exhibits were admitted into evidence at the hearing. R. 177–79.

On May 18, 2021, the hearing officer issued a *Preliminary Order* conditionally approving Transfer 84441. R. 182–215. On June 1, 2021, Whittaker and another protestant separately filed petitions for reconsideration. R. 216, 224. Whittaker also filed a *Petition to Re-Open Hearing and Petition for Site Visit*. On June 10, 2021, McConnell filed an *Opposition to Whittaker Petitioner to Re-Open Hearing and Petition for Site Visit and Memorandum in Support*;

Opposition to Declaration of Bryce Contor. On June 21, 2021, the hearing officer issued an *Order Denying Petitions for Reconsideration*, R. 264–73, and an *Order Denying Petition to Re-Open Hearing and Petition for Site Visit*. R. 259–62. On July 6, 2021, Whittaker filed a *Petition for the Director to Review Preliminary Order Approving Transfer, Order Denying Petition to Re-Open Hearing, and Petition for Site Visit* accompanied by *Exceptions to Preliminary Order Approving Transfer, Order Denying Petition to Re-Open Hearing, and Petition for Site Visit*.

On November 2, 2021, the Director issued the *Final Order*. R. 339–341. The Director adopted and incorporated by reference the hearing officer’s *Preliminary Order, Order Denying Petitions for Reconsideration, and Order Denying Petition for Re-Open Hearing and Petition for Site-Visit*. The Director approved Application 84441, subject to the conditions set forth in Transfer Approval 84441 issued in conjunction with the *Preliminary Order Approving Transfer*.⁴ *Id.* Whittaker timely petitioned this Court for judicial review.

II. ISSUES PRESENTED FOR REVIEW

The Department’s formulation of the issues presented is as follows:

1. Whether the findings of fact as to the location of Stroud Creek’s confluence with the Right Fork of Lee Creek are supported by substantial evidence in the record.
2. Whether substantial evidence supports the finding that Whittaker’s diversion of Stroud

⁴ To address potential injury to other rights, the Department conditioned the transfer approval by (1) subordinating the diversion of water at McConnell’s Lower Diversion to water right 74-1831, which diverts from Lee Creek between the Upper and Lower Diversions; (2) requiring the Upper and Lower Diversions to be equipped with lockable controlling works and proper measuring devices; and (3) requiring the measuring device for the Upper Diversion to be moved to a site within 1,000 feet of the headgate. R. 195 (*Preliminary Order Approving Transfer*), 341 (*Final Order* incorporating conditions set forth in the *Preliminary Order*).

Creek water at the West Springs Ditch is not authorized by a water right.

3. Whether Whittaker's water rights would be injured when the transfer does not change the administrative burden on water rights junior to McConnell.

4. Whether McConnell's water rights would be enlarged when the transfer does not augment the water sources legally available to satisfy those rights.

5. Whether Whittaker's substantial rights were prejudiced by a transfer approval that does not violate the criteria in Idaho Code § 42-222(1).

6. Whether Whittaker is entitled to a site visit or reopened hearing.

7. Whether Whittaker's assertion of laches against McConnell precludes the Director from approving a transfer that otherwise satisfies the criteria set out in Idaho Code § 42-222(1).

III. STANDARD OF REVIEW

Judicial review of the *Final Order* is governed by the APA, Idaho Code §§ 67-5201 *et seq.* The APA requires judicial review of an agency decision to be based on the record created before the agency. Idaho Code § 67-5277. The party challenging the agency decision must show the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 804, 367 P.3d 193, 199 (2016). The Court must affirm the agency decision unless the Court finds 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. Idaho Code § 67-

5279(3). If the agency action is not affirmed, it must be set aside, in whole or in part, and remanded for further proceedings as necessary. *Id.*

This Court exercises free review over questions of law. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). However, the “court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Idaho Code § 67-5279(1). Even “[w]hen conflicting evidence is presented, the agency’s findings are binding on this Court as long as they are supported by substantial and competent evidence.” *Chisholm v. Idaho Dep’t of Water Res.*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005). Findings supported by substantial evidence are binding “regardless of whether [the Court] might have reached a different conclusion.” *Id.*

IV. ARGUMENT

The *Final Order* must be affirmed because the legal conclusions challenged here are consistent with applicable law and findings of fact supported by substantial evidence. Whittaker’s appeal, in contrast, depends on this Court applying inapplicable law or reweighing the evidence based on factual contentions considered and rejected by the Hearing Officer. For the reasons that follow, this Court should reject Whittaker’s arguments.

A. Substantial Evidence Supports the Hearing Officer’s Finding That the Confluence is Upstream of McConnell’s Upper Diversion.

The determination of injury and enlargement for Transfer 84441 depends on the location of McConnell’s Upper Diversion relative to Stroud Creek’s confluence with the Right Fork of Lee Creek. The Hearing Officer recognized the importance of this question of fact: “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.” R. 188. Contrary to Whittaker’s assertions about “undisputed” facts, the hearing testimony presented conflicting accounts of the confluence location. After weighing all the evidence, the Hearing Officer determined that the confluence is upstream of McConnell’s Upper Diversion in the following key findings:

13. In the past, the confluence of Stroud Creek and Right Fork of 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. Ex.24 [R. 590] (USGS Map shows confluence at that location); Ex. 154 [R. 741] (1954 map prepared by Milton Christensen, a professional engineer, shows confluence at that location); Ex. 1 at 72-13, Figure 8 [R. 371–72] (1970 Lemhi Adjudication map shows only one diversion, the Upper Diversion, in existence at the time the map was prepared); Ex. 156 [R. 743–46] (1956 Idaho Supreme Court decision, *Whittaker v. Kauer*, confirms that Kauer, McConnell's predecessor in interest, had access to water from Stroud Creek); Ex. 1 at Appendix C [R. 419–21] and G [R. 480–82] (water rights 74-369 and 74-370, which are diverted from Stroud Creek, include conditions about administration of those rights in relationship to the other 1883 rights in the Lee Creek drainage, which are held by McConnell and are diverted at the Upper Diversion); Ex. 151 at Attachment, Exhibit A [R. 610–13] (1912 Decree distinguishes between water rights diverted from Right Fork of Lee Creek, Stroud Creek (Left Fork of Lee Creek) and Lee Creek and describes Lee Creek as the authorized source for five of the seven McConnell Rights).

R. 184 (internal footnotes omitted).

16. Whittaker diverts water from Stroud Creek at two locations. One location is the Whittaker Diversion, the authorized point of diversion for water rights 74-369, 74-1136, 14-15788. The other location is the point where Stroud Creek is intercepted by a ditch known as the West Springs Ditch. Ex. 154 [R. 741].

R. 185.

24. 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 [R. 596–97]. 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.

25. The Stroud Creek channel has been altered or bypassed between the Whittaker Diversion and the confluence with Lee Creek, a distance of approximately one mile. Testimony of Jordan Whittaker [Tr. 324:19–326:21, 327:12–329:4, 331:2–16]; Ex. 154 [R. 741].

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.

R. 186. The crux of this judicial review proceeding is whether “substantial evidence on the record as a whole” supports these key findings. Idaho Code § 67-5279(3)(d).

Substantial evidence is a well-developed concept in Idaho law. It is “relevant evidence, that a reasonable mind might accept to support a conclusion.” *Chisholm*, 142 Idaho at 164, 125 P.3d at 520. It is “less than a preponderance of evidence, but more than a mere scintilla.” *Id.* The evidence “need not be uncontradicted” *Id.* Nor does the evidence “need to necessarily lead to a certain conclusion.” *Id.* Rather, “it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.” The Hearing Officer’s findings meet this standard and thus are “binding on this Court.” *Id.*

1. *Whittaker’s map, the Whittaker case, Whittaker’s water rights, and other substantial evidence support the finding that the confluence is upstream of McConnell’s Upper Diversion.*

The Hearing Officer determined the confluence is where Stroud Creek naturally flowed, and naturally would flow, into Lee Creek but for Whittaker’s unauthorized diversion of Stroud Creek at the West Springs Ditch. Far more than a mere scintilla of evidence in the record supports the Hearing Officer’s findings. First, multiple maps in the record depict the confluence

upstream of the Upper Diversion. R. 373–76, 590, 661, 741. As Whittaker emphasizes, other evidence suggests an alternative, unmapped confluence between McConnell’s diversions, where Stroud Creek water can enter Lee Creek *if released* from Whittaker’s ditches. The Hearing Officer recognized and addressed in detail Whittaker’s competing viewpoint in the *Order Denying Petitions for Reconsideration* (R. 264–73), which the Director adopted in full.⁵ But the record Whittaker helped to develop weighed in favor of the mapped confluence instead of the unmapped point where Whittaker’s ditches can discharge Stroud Creek water. Indeed, the *Whittaker* case that features so prominently in Whittaker’s presentation virtually compels the conclusion that the confluence is where the Hearing Officer found it.

James Whittaker testified that his father commissioned an engineer to prepare a map that was used in the litigation culminating in the Supreme Court’s *Whittaker* decision. Tr. 387:2–5 (discussing R. 741–42). This 1954 Engineer’s Map includes a legend, which states the map was based on a survey and tracing over an aerial photo dated August 1946. R. 742. As the Hearing Officer observed, the Engineer’s Map “identifies the Stroud Creek channel downstream of the West Springs Ditch as an active, existing creek channel rather than an old creek channel.” R. 189. According to James Whittaker, who spent his lifetime in the area depicted on the map and “looked [the map] over pretty thoroughly,” the Engineer’s Map is “accurate today.”⁶ Tr. 390:16–

⁵ Contrary to statements in Whittaker’s *Opening Brief*, the Director did not “reject” or otherwise modify any of the Hearing Officer’s findings of fact or conclusions of law. Rather, the Director’s *Final Order* “adopted as final” all of the Hearing Officer’s “findings of fact and conclusions of law.” R. 341.

⁶ In response to questions from McConnell’s counsel about the confluence location depicted on the Engineer’s Map,

19. The map is consistent with the Idaho Supreme Court’s 1956 *Whittaker* decision, as well.

The *Whittaker* decision quieted title to “80 miners inches of the waters of West Springs” in favor of Whittaker’s predecessors in interest and against McConnell’s. 78 Idaho at 95, 298 P.2d at 746. This private quiet title action was not a general stream adjudication and did not quiet title to water from any other source. Even so, the case confirms that McConnell’s predecessors had access to Stroud Creek water.

Whittaker mentions that the waters of the West Springs had been flumed “across” Stroud Creek “continuously since some time prior to the entry of the July 1, 1912 decree.” *Id.* at 97, 298 P.2d at 747. Moreover, the decision speaks of the watermaster “cut[ting] the dam” that replaced the flume, “which allowed the waters to flow down the channel” of Stroud Creek. *Id.* The watermaster did this “at the instance” of Kauer, McConnell’s predecessor. *Id.* As the Hearing Officer noted, the record contains evidence that, at the time of the *Whittaker* litigation, Kauer diverted from Lee Creek at a point near the present-day Upper Diversion. R. 189 (citing R. 371–72) (McConnell’s expert report). Kauer would have had no reason to ask the watermaster to cut the dam or litigate a claim to the West Springs if the spring water flowed down Stroud Creek and into Lee Creek below Kauer’s diversion. The “only way” *Whittaker* “makes sense is if the confluence of Stroud Creek and Right Fork of Lee Creek were located upstream of the Upper Diversion.” R. 189.

Whittaker is also noteworthy because it describes changes to the Stroud Creek drainage

Mr. Whittaker later testified “[t]hat part of this map’s not correct,” speculating the engineer who certified it “probably weren’t too careful about what happened at that point in time.” Tr. 397:7–22.

resulting from the historical use of the Kauer Ditch.⁷⁸ Idaho at 97, 298 P.2d at 747 (discussing the “oral contract” involving use of the Kauer Ditch). When the Kauer Ditch was in use from 1932 to 2014, McConnell’s share of Stroud Creek water was conveyed westward to Porcupine Creek, a tributary of Right Fork of Lee Creek, at a point upstream of Whittaker’s diversions. R. 741, *see also* Tr. 342:24–343:1 (Jordan Whittaker) (“Prior to 2015 all the water that came down there just went to us, because the Kauer Ditch was in existence.”). Now that the Kauer Ditch is closed, McConnell’s share of Stroud Creek water flows down Stroud Creek and past Whittaker’s diversions. That is, until Stroud Creek arrives at Whittaker’s West Springs Ditch, where the dam was built in 1932 “*to capture all waters found flowing in the creek at that place.*” *Whittaker*, 78 Idaho at 97, 298 P.2d at 747 (emphasis in original). Thus, “Whittaker has been accustomed to diverting all of the water in Stroud Creek at their property for many years, regardless of the limiting elements on their water rights.” R. 191 n.9. But there is a fundamental problem with relying on the historical delivery practices described in *Whittaker*: They are not authorized by the parties’ decreed water rights.

The decreed water rights do, however, support the Hearing Officer’s findings on the confluence location. For instance, the “pro rata” condition on Whittaker’s 74-369 dates back to the 1912 Decree and shows that McConnell’s predecessors had access to Stroud Creek water at the Upper Diversion—before the Kauer Ditch was built in 1932. As decreed in the SRBA, the condition on 74-369 states in relevant part:

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.

R. 481; *see also* R. R. 612–13 (1912 Decree). Aside from 74-369 and 74-370, the only rights in the entire Lee Creek system with May 12, 1883 priority dates are held by McConnell. R. 383–88. The “pro rata” condition would have been unnecessary if McConnell’s rights diverted at a point upstream from the Stroud Creek confluence. Like the *Whittaker* case, the condition “only makes sense if Stroud Creek could be used to satisfy” McConnell’s 1883 water rights. R. 190.

That inference has additional support in the sources the 1912 Decree identifies for McConnell’s rights. The 1912 Decree identifies “Lee Creek” as the authorized source for most of McConnell’s rights (74-361, 74-362, 74-363, and 74-365). R. 610–11. Yet the 1912 Decree distinguishes between the “Right Fork of said Lee Creek” and the “Left Fork of said Lee Creek” (i.e., Stroud Creek) in other rights such as 74-367 and 74-368. R. 611. Lee Creek begins at the Right Fork’s confluence with Stroud Creek. R. 741. The significance of this was not lost on the Hearing Officer: “If the confluence were downstream of the point of diversion for [McConnell’s “Lee Creek”] rights, the source for the rights would likely have been identified as Right Fork of Lee Creek.” R. 190.

The Hearing Officer did not, as Whittaker claims, simply rely on maps. Rather, the Hearing Officer synthesized a dense historical record to make findings supported by multiple, substantial lines of evidence. To be sure, multiple maps—all of which consistently located the confluence upstream from the Upper Diversion—feature prominently in the Hearing Officer’s findings. *E.g.*, R. 374–76. The maps’ consistency is striking, considering, as Whittaker notes, that maps have tended to “become increasingly accurate over time.” Opening Br. at 30. Even more striking is the maps’ consistency with other evidence in the record—the 1912 Decree, the

Whittaker case, witness testimony, and the SRBA decrees—indicating that Stroud Creek water was available at the Upper Diversion. All of this is “relevant evidence that a reasonable mind might accept to support a conclusion.” *Chisholm*, 142 Idaho at 164, 125 P.3d at 520. Because the findings as to the confluence location are supported by substantial evidence, they are binding on this Court. *Id.*

2. *Whittaker’s water rights, Whittaker’s expert, and other substantial evidence support the finding that Whittaker’s unauthorized diversion of Stroud Creek into the West Springs Ditch causes Stroud Creek water to enter Lee Creek downstream of the confluence.*

The finding that the lower reach of Stroud Creek “has been dewatered as a result of Whittaker’s unauthorized diversion of Stroud Creek into the West Springs Ditch” is also supported by substantial evidence. R. 186. Nevertheless, Whittaker argues the Department “should have relied upon testimony” about an alternative, unmapped confluence location between McConnell’s Upper and Lower Diversions. Opening Br. at 30. This location happens to be where the Stroud Creek water diverted into Whittaker’s ditches can, *if released*, drain back into Lee Creek. In other words, Whittaker asserts that his interception of Stroud Creek at the West Springs Ditch has shifted Stroud Creek out of its natural channel, into Whittaker’s ditches, and, if released from the ditches, into a channel along the extreme eastern edge of the Stroud Creek drainage. Or, as the Director put it in the *Final Order*, “Stroud Creek would flow from the point of interception to the historic confluence *but for* the interception of Stroud Creek by Whittaker’s West Springs Ditch.” R. 340 (emphasis added).

The Director’s characterization illuminates a critical point obscured by Whittaker’s

various legal arguments: “the issue of causation is generally a question of fact for the” factfinder. *Fragnella v. Petrovich*, 153 Idaho 266, 272, 281 P.3d 103, 109 (2012). Although an exception exists when causation is not subject to reasonable dispute, *id.*, the cause of the unmapped confluence was anything but undisputed. *E.g.*, Tr. 249:13–14 (Mr. Harris) (“There’s obviously an issue in this case over where these channels come together.”). It is true that several witnesses testified about an unmapped channel carrying flow into Lee Creek downstream of McConnell’s Upper Diversion. Some of these witnesses opined that this channel was Stroud Creek. Tr. 332:17–333:2 (Jordan Whittaker), Tr. 597:4–20 (David R. Tomchak). Others, such as watermasters Udy and Yenter, were less certain. Tr. 235:22–236:15 (Yenter), 289:25–290:10 (Udy). Even Whittaker’s expert was uncertain whether Whittaker’s ditch system releases water into the natural channel of Stroud Creek, vaguely characterizing the point of injection as “a stream channel.” Tr. 528:13–18; *see also* R. 703–04 (expert report tracing water flow through Whittaker’s “private ditch”). The Hearing Officer had to resolve this conflicting testimony about what was causing water from the Stroud Creek drainage to enter Lee Creek downstream of the mapped confluence.

The key to deciding that question of fact is found in Whittaker’s water rights—or, more precisely, what is absent from those rights. It is undisputed that no water right authorizes Whittaker to divert from Stroud Creek at the West Springs Ditch, or any other point downstream from the Whittaker Diversion.⁷ The unauthorized diversion, coupled with a lack of required

⁷ The Hearing Officer described the Whittaker Diversion as the authorized point of diversion for rights 74-369, 74-1136, and 74-15788, “located in the SENE, Section 31, T1 6N, R25E.” R. 185.

measuring devices and controlling works on the West Springs Ditch, makes the delivery of Stroud Creek water past the ditch “virtually guesswork.” Tr. 387:23 (James Whittaker). Indeed, watermaster Udy explained how, in the summer of 2020, he had to “figure[] out” why his adjustments at the Whittaker Diversion were not delivering water to McConnell. Tr. 272:4–273:9. After walking below the Whittaker Diversion, Udy discovered the water “all makes a turn toward 74-157” (Whittaker’s spring right), and “from 74-157 you can turn it down to Bruce” McConnell. *Id.* Whittaker’s expert testimony and reports confirm Stroud Creek water diverted by the West Springs Ditch flows east of the natural channel in Whittaker’s ditches until it reaches a point, known as the hilltop splitter, where it could be sent down the remnants of another ditch toward the unmapped confluence with Lee Creek. R. 186 (citing Tr. 461:13–546:23 (Contor); R. 596–97, 599, 727, 736–37, 741). Substantial evidence supports the findings that the unmapped confluence would not be active but for Whittaker’s unauthorized diversion of Stroud Creek at the West Springs Ditch.

3. *Whittaker’s arguments do not overcome the substantial evidence supporting the Hearing Officer’s findings.*

Emphasizing semantics, various witnesses’ conflicting testimony, and historical diversion practices, Whittaker seeks to have this Court reweigh the evidence. But this judicial review proceeding is not an opportunity for de novo factfinding—the Court “cannot reweigh evidence on questions of fact.” *Byrd v. Bd. of Land Comm’rs*, — Idaho —, 505 P.3d 708, 714 (2022). The APA instead “requires that the agency order be upheld by a reviewing court unless that order is ‘not supported by substantial evidence on the record as a whole.’” *In re Idaho Dep’t of Water*

Res. Am. Final Order Creating Water Dist. No. 170, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting Idaho Code § 67-5279(3)(d)).

Accordingly, and contrary to Whittaker’s semantic arguments about the “historic” confluence, it does not matter how the various administrative orders labeled the mapped and unmapped confluences. *See Frizzell v. DeYoung*, 167 Idaho 801, 806, 477 P.3d 236, 241 (2020) (An alleged “[e]rror that does not affect a substantial right is considered harmless and is disregarded.”). It does not matter that witness testimony was inconsistent or uncertain as to the location of the confluence relative to the Upper Diversion. *See Chisholm*, 142 Idaho at 164, 125 P.3d at 520 (Substantial evidence “need not be uncontradicted” or “lead to a certain conclusion.”). Nor does it matter when Whittaker’s unauthorized diversion of Stroud Creek at the West Springs Ditch began. *See Rangen*, 159 Idaho at 806–07, 367 P.3d at 201–02 (describing arguments seeking recognition of un-decreed historical practices as an “impermissible collateral attack on the decrees”). What matters is that substantial evidence supports the findings that the confluence is upstream of the Upper Diversion, the Whittaker ditch system is not the natural channel of Stroud Creek, and the unmapped confluence would not be active but for the unauthorized diversion of Stroud Creek into the Whittaker ditch system.

B. There Was No Error in Basing the Injury and Enlargement Analyses on the Findings of Fact Instead of the Un-decreed Historical Practices Described in *Whittaker*.

It was not legal error to base the injury and enlargement analyses on the Hearing Officer’s findings of fact as to Stroud Creek’s confluence with Lee Creek. In contrast, it would have been error to, as Whittaker advocates, base the analysis on un-decreed historical diversion

practices. *See id.* To accept Whittaker’s argument, one must ignore the fact that Whittaker’s unauthorized diversion causes Stroud Creek water to enter Lee Creek downstream of the confluence and McConnell’s Upper Diversion. Doing so also would violate the Department’s duty to administer Lee Creek water rights by distributing water in accordance with their final SRBA decrees. *See* Idaho Code § 42-1413(2).

The SRBA decrees do not reflect the historical diversion practices described in *Whittaker*. Not only does McConnell lack a right to divert Stroud Creek into the Kauer Ditch, Whittaker has no right to dewater Stroud Creek at the West Springs Ditch. The decrees in the record—running from the 1912 Decree (R. 610–13) through the SRBA (summarized at R. 381–88)—consistently show that the “pro rata” condition on 74-369 and 74-370 is the only special limitation on McConnell’s access to Stroud Creek water in priority. The significance of this arrangement was not lost on the Hearing Officer: “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 [McConnell’s water rights] would have had no way to access water in Stroud Creek.” R. 190. Thus, basing the injury and enlargement analysis on the unmapped confluence location would award Whittaker a windfall that his decreed rights do not allow.

Against these principles, Whittaker argues inapplicable administrative rules and unpersuasive caselaw. For example, the Stream Channel Alteration Rules exist only to “specify procedures for processing and considering applications for stream channel alterations under the provisions of Title 42, Chapter 38, Idaho Code.” IDAPA 37.03.07.000. Accordingly, those rules are expressly inapplicable to this transfer proceeding under Idaho Code § 42-222. Applicability

aside, the rules' definition of a "stream channel" is limited to "natural" water courses and thus excludes Whittaker's man-made ditches. IDAPA 38.03.07.010.15. The statutory definition of "stream channel" bolsters this reading, as it expressly excludes the "[d]itches, canals, laterals, and drains" comprising Whittaker's ditch system. Idaho Code § 42-3802(d). Even if the Stream Channel Alteration Rules applied, Whittaker's ditches still would not qualify as stream channels.

Whittaker's selective reading of the "generally applicable" rule announced in *Crockett v. Jones*, 47 Idaho 497, 504, 277 P. 550, 552 (1929), likewise misses important context. Notably, the respondents seeking to transfer their point of diversion were the prevailing parties in *Crockett*. 47 Idaho at 504, 277 P. at 552. On appeal from the trial court's finding that the transfer would not augment the respondents' water supply, the Supreme Court noted the "only issue presented . . . is the correctness of these findings of fact." *Id.* at 502, 277 P. 551. Even in 1929, the Court said it was "too well settled to permit of the citation of authority, that this court will not reverse the judgment of [the factfinder] on a disputed issue of fact, based upon conflicting evidence." *Id.* The Court then articulated another principle that remains good law today: "The right to change the place of diversion and use of water depends upon and must be controlled by the facts of each particular case, and no inflexible rule applicable to all situations can be laid down." *Id.* at 504, 277 P. 552.

With this context, *Crockett* is instructive not because it articulates a rule of law that was ignored here, but because it affirms that the issue of injury in a transfer proceeding presents a question of fact subject to limited appellate review. Moreover, the Court described the issue as whether the transfer will "injuriously affect" junior appropriators' "established rights," *id.*, which

is no different than the injury analysis that Idaho Code § 42-222(1) requires today. Here, Whittaker’s established water rights do not authorize the historical practices described in *Whittaker* or the dewatering of Stroud Creek at the West Springs Ditch. Nothing in *Crockett* suggests such un-decreed practices control the injury analysis.

Whittaker also argues caselaw supports the bizarre conclusion that an appropriator can compel legal recognition of a new stream channel merely by diverting the original stream into a private ditch—in this case, without a water right authorizing the diversion and regardless of the effect on other appropriators’ rights. Citing *Poole v. Olaveson*, 82 Idaho 496, 503, 356 P.2d 61, 65 (1960), Whittaker claims a new “legally recognized confluence” can be created “even if the change in confluence location was caused by artificial means, such as changes in the watershed or diversion and use of water.” Opening Br. at 18. The breathtaking implications likely explain why one of Whittaker’s out-of-state cases rejects such a broad rule emphatically:

‘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. . . .’

Smith v. L.A., 153 P.2d 69, 78 (Cal. Dist. Ct. App. 1944) (quoting 25 Cal.Jur. § 38) (emphasis in original). Contrary to Whittaker’s position, this passage indicates the mapped confluence remains the confluence regardless of the changes wrought by Whittaker’s damming and unauthorized diversion of Stroud Creek.

Further, and as the Hearing Officer held, *Poole* is not on point. R. 268–70. The issue in *Poole* was whether a church had the right to discharge its irrigation waste water into a creek that had been straightened by other appropriators. The Idaho Supreme Court held the channel modifications did not deprive the church of its right to use the creek for drainage purposes. *Poole*, 82 Idaho at 503, 356 P.2d at 65. In other words, a water user’s modifications to an existing watercourse does not give them the right to exclude others. Just like the losing party in *Poole*, Whittaker seeks to exclude others from using a modified water course. But *Poole* indicates Whittaker cannot do so because a “stream does not lose the attributes of a water course merely because a part of its channel may have been artificially created,” or in this case dewatered by a ditch. *Id.* To the extent *Poole* applies at all, it undermines Whittaker’s case.

Whittaker’s reliance on a string of out-of-state cases from the 1930s and ‘40s is equally unpersuasive. Opening Br. at 18–20. Whittaker claims various statements of law in these cases show it was legal error for the Hearing Officer to explain he was “not persuaded that the confluence of Stroud Creek and Right Fork of Lee Creek would be located downstream of the Upper Diversion” but for Whittaker’s unauthorized diversion of Stroud Creek at the West Springs Ditch. *Id.* at 20 (quoting R. 191). Like *Poole*, which cites some of these cases, the out-of-state decisions are off point. *Scranton-Pascagoula Realty Co. v. Pascagoula*, 128 So. 73, 74–76 (Miss. 1930) (reinstating an injunction against a city’s construction of a storm drain because the city violated Mississippi’s statutory prerequisites for altering a “water course”); *Chowchilla Farms, Inc. v. Martin*, 25 P.2d 435 (Cal. 1933) (holding California’s doctrine of riparian rights may be applied to artificial channels); *Binning v. Miller*, 102 P.2d 54, 63 (Wyo. 1940) (holding

that seepage from irrigated land was subject to appropriation under Wyoming law once it was “running in the stream”); *Smith*, 153 P.2d 69 (holding California law provides a cause of action for damages from the flooding of an altered river channel). Whatever these cases stand for today in their respective jurisdictions, they do not suggest that Idaho law allows a party to block the exercise of downstream water rights by dewatering a stream at an unauthorized diversion.

Whittaker’s case depends on that proposition, but Whittaker provides no authority to support it.

C. The Conclusions of Law on Injury and Enlargement Are Consistent with the Findings of Fact.

The Department and Whittaker agree that the injury and enlargement analyses for Transfer 84441 must be based on *current* conditions. The disagreement—on the current location of the confluence—is factual. Whittaker’s view of the facts does not control because substantial evidence supports the Hearing Officer’s findings, including:

Currently, Whittaker diverts all of the flow in Stroud Creek at the West Springs Ditch without a water right. Currently, because of Whittaker's unauthorized diversion, no Stroud Creek water flows past the West Springs Ditch. Currently, Whittaker injects unused Stroud Creek water into the remnants of the Bohan Ditch, an old ditch running to the east of the Stroud Creek channel.

R. 270 (*Order Denying Reconsideration*); *see also* R. 185–86 (*Preliminary Order*). These findings reflect the current conditions in the Lee Creek drainage documented in the record. It was therefore appropriate to analyze injury and enlargement based on those findings. *See Crockett*, 47 Idaho at 504, 277 P. at 552 (explaining the right to transfer a point of diversion “depends upon and must be controlled by the facts of each particular case”).

Because the confluence of Stroud Creek and Right Fork Lee Creek is upstream of the

Upper Diversion, the injury analysis begins with the premise that water rights on Stroud Creek and its tributaries generally “are diverted upstream of the Upper Diversion and are already subject to the McConnell Rights.” R. 192. The only exception, the Hearing Officer noted, is for the two Stroud Creek rights covered by the “pro rata” condition. *Id.* Accordingly, authorizing McConnell’s Lower Diversion will not increase the administrative burden on junior rights in Stroud Creek. In other words, McConnell’s rights always had access to Stroud Creek water in priority at the Upper Diversion, so the Lower Diversion creates no additional burden on junior rights in Stroud Creek. The injury analysis is straightforward once the relevant facts are established.

The Hearing Officer nonetheless provided a detailed explanation in response to Whittaker’s concerns about injury to 74-157, the 1916-priority right authorizing the diversion of 3.2 cfs from springs tributary to Lee Creek. R. 193. Whittaker claimed, as he does now, that McConnell’s senior rights in Lee Creek are subordinate to 74-157 due to the Supreme Court’s *Whittaker* decision. However, the Hearing Officer declined to rule on what, if any, protection *Whittaker* provides in the event of a delivery call. The Hearing Officer instead returned to the pivotal fact: “Because the confluence of Stroud Creek and Right Fork of Lee Creek is upstream of the Upper Diversion, the proposal to add the Lower Diversion to the McConnell Rights will not change the physical (spatial) relationship between the McConnell Rights and water right 74-157.” *Id.* The spatial relationship is all that matters because 74-157, unlike Whittaker’s 74-369, has no condition modifying its legal relationship to downstream senior rights. It follows that 74-157 will not be subject to a priority to which it was not previously subject. The Hearing Officer’s

no-injury conclusion is sound because it is based on findings of fact supported by substantial evidence.

The Hearing Officer's enlargement analysis is likewise consistent with the facts established through substantial evidence in the record. R. 194. Again, the location of the confluence and the cause of the unmapped confluence are the pivotal facts. And, again, the analysis is straightforward once those facts are established. Because Stroud Creek and the Right Fork of Lee Creek were both available to satisfy McConnell's rights at the Upper Diversion, adding the Lower Diversion some 1,600 feet down Lee Creek will not augment McConnell's water supply. Given the facts found, the no-enlargement conclusion also is correct.

Approving Transfer 84441, therefore, did not prejudice Whittaker's substantial rights. At bottom, Whittaker's case revolves around an alleged entitlement to historical diversion practices that are not reflected in Whittaker's or any other water user's SRBA-decreed rights. Yet the decreed rights are "conclusive as to the nature and extent of all water rights in the adjudicated water system." *Rangen*, 159 Idaho at 805, 367 P.3d at 200 (quoting Idaho Code § 42-1420(1)). Indeed, the historical practice perhaps most important to Whittaker's theory—delivery of McConnell's Stroud Creek water via the Kauer Ditch—has been discontinued because it is not authorized by McConnell's decreed rights. Nor is the diversion of Stroud Creek at the West Springs Ditch authorized by Whittaker's decreed rights. Those historical practices are not rights, let alone "substantial rights" within the meaning of Idaho Code § 67-5279(4). *See id.* at 806, 367 P.3d at 201 (agreeing that arguments based on un-decreed historical practices amount to "an impermissible collateral attack on the decrees"). Whittaker cannot be heard to complain about

prejudice to un-decreed historical diversion practices.

In these circumstances, the APA requires this Court to affirm the *Final Order*. Idaho Code § 67-5279(3)–(4). Thus, Whittaker’s requests for a site visit and a new hearing must be rejected. In fact, the Hearing Officer already considered and rejected the same requests for sound reasons. R. 259–61. Chief among those reasons was the parties’ knowledge, *before the hearing*, that the confluence location would be important and disputed. *Id.* at 261; *see also* Tr. 249:13–14 (Mr. Harris) (“There’s obviously an issue in this case over where these channels come together.”). Moreover, the Hearing Officer noted Whittaker never requested more time before the hearing despite ample “opportunity to ask for additional time to prepare for the hearing or to conduct site visits and investigations prior to the hearing.” R. 261. It was only after the two-day hearing and the issuance of a *Preliminary Order* in McConnell’s favor that Whittaker requested a site visit or a lengthier hearing. These requests, as the Hearing Officer observed, are not consistent with the just, speedy, and economical resolution of cases required by not only the Department’s procedural rules, but also the first Idaho Rule of Civil Procedure. I.R.C.P. 1; IDAPA 37.01.01.051 (codified as Rule 52 at the time of the hearing). When the agency’s findings of fact are supported by substantial evidence and its conclusions of law are consistent with applicable law and the facts found, or if no prejudice to a substantial right results from the agency action, the APA requires this Court to affirm.

D. Whittaker’s Assertion of Laches Against McConnell Does Not Bind the Department and Lacks Merit.

In a last-ditch appeal to equity, Whittaker argues the Department should have rejected

Transfer 84441 based on the species of equitable estoppel known as laches. Perhaps aware of how novel it would have been for an administrative agency to apply the equitable doctrine of laches in a statutory proceeding, Whittaker offers that it would be “more appropriate” for the Court to do so in this APA judicial review proceeding. Opening Br. at 31. First, this argument fails to recognize that the APA limits this Court’s options to either affirming or setting aside and remanding the agency action based on an evaluation of five enumerated factors. Idaho Code § 67-5279(3). The factors allow the court to set aside and remand agency action if, among other grounds, the action violates constitutional, statutory, or procedural *law*. *Id.* The abuse of discretion factor likewise depends on an assessment the agency’s discretionary action against the *law* controlling the agency’s discretion. *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 160 Idaho 251, 256, 371 P.3d 305, 310 (2016). But the APA does not authorize the Court to set aside and remand an agency action based on laches or any other equitable doctrine. That is doubly true where, as here, the agency’s statutory authority does not authorize it to consider or apply equitable doctrine.

This Court has been skeptical of appeals to equity in APA judicial review proceedings. *Tanner Lane Ranch, LLLP v. Idaho Dep’t of Water Res.*, No. CV-2017-458, slip op. at 9–10 (Bingham Cnty. Dist. Ct. Sept. 14, 2017).⁸ The Court’s reasoning in *Tanner Lane* applies equally here. Idaho Code § 42-222 is the statutory basis for the underlying administrative proceeding, and it expressly enumerates the criteria for approving a water right transfer. The

⁸ Available at <http://srba.state.id.us/Images/2017-09/0080056xx00045.pdf>

statute calls for the Director “examine all the evidence and available information” to decide if a proposed transfer will violate the enumerated criteria. Idaho Code § 42-222(1). To the extent Whittaker argues that the Director should have applied laches, § 42-222(1) does not grant the Director equitable powers or include equitable doctrines in the decision criteria. Further, the APA indicates an agency may not award equitable relief when the governing statute provides no such authority. *Id.* § 67-5279(3)(a)–(b). Where, as here, the governing statute “provides a comprehensive regulatory scheme” and “exclusive remedies for a given statutory violation,” the “Court will not allow equity to interfere.” *Spencer v. Jameson*, 147 Idaho 497, 506–07, 211 P.3d 106, 115–16 (2009).

Whittaker’s brief does not explain how laches fits into the statutory scheme for this judicial review proceeding or the underlying contested case. Instead, Whittaker points to various cases addressing laches arguments in contexts distinct from this statutory proceeding. *E.g.*, *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994) (holding the case was a “private water rights adjudication” and “properly dismissed . . . for lack of subject matter jurisdiction” due to the SRBA); *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981) (reversing and remanding the trial court’s application of laches in a private water rights adjudication); *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 66 P.2d 115 (1937) (applying laches in a private quiet title action). Only one of these cases was decided since the SRBA commenced, and there the Court held “only the SRBA district court has the subject matter jurisdiction to adjudicate” limitations on a water right due to laches. *Devil Creek*, 126 Idaho at 206, 879 P.2d at 1139. Moreover, these were all private quiet title

actions, involving an assertion of laches against a party claiming title to the disputed water rights. This case, wherein the Director approved an application to transfer decreed water rights under statutory criteria, is a different matter entirely.

Nevertheless, Whittaker asserts laches because “McConnell”—not the Director or the Department—“delayed asserting the administration of the water rights they now seek if 84441 is approved, as well as asserting the stream confluence issue.” Opening Br. at 33. The Director and Department cannot be estopped on this basis. Moreover, McConnell is not claiming water rights but instead using the statutory process for transferring water rights previously decreed in the SRBA. Any claim of laches vis-à-vis McConnell’s water rights should have been asserted in the court that decreed those rights, as the Hearing Officer properly recognized. R. 272; *see also Devil Creek*, 126 Idaho at 206, 879 P.2d at 1139. And, to the extent Whittaker claims he acquired a right to continue those historical practices through “adverse” use within Water District 74Z, that claim is foreclosed by statute. Idaho Code § 42-607 (“As long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user.”). Here, the proceedings are limited to the evaluation of McConnell’s transfer application against the criteria in Idaho Code § 42-222(1). That is why, as the Hearing Officer twice explained, the “question of whether water right 74-157 is subject to a delivery call by McConnell is beyond the scope of this contested case.” R. 193, 273.

In addition, the historical practices Whittaker seeks to protect—including Whittaker’s diversion of Stroud Creek at the West Springs Ditch without a water right—has no basis in the

parties' decrees. Whittaker did not include the historical practices in his SRBA claim for 74-157 and agreed the right should be decreed accordingly. R. 556–59. Perhaps recognizing this, Whittaker briefly pursued transfer 84508, which sought to remove the decree's language designating the springs serving 74-157 as "Tributary" to "Lee Creek" and to memorialize a right to use the springs "to extinction." R. 562–68. However, Whittaker chose to withdraw the transfer application after McConnell protested and watermaster Yenter objected. R. 575–76 (McConnell protest), 579–80 (Yenter objection), 581 (withdrawal). Accustomed to his un-decreed diversion practices, Whittaker now asks this Court to grant through equity that which he did not acquire through proper legal means. But equitable relief is not available to those who, "in light of all the circumstances," come to the Court with "unclean hands." *Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004); *see also Tanner Lane*, slip op. at 10. Consistent with *Tanner Lane*, this Court should hold equitable relief is not available to Whittaker for all the reasons just mentioned.

Even if this Court finds it necessary to review Whittaker's equitable argument on the merits, the Hearing Officer had ample factual basis for concluding Whittaker did not prove laches. "Whether or not a party is guilty of laches is a question of fact." *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002). The Hearing Officer explained that McConnell's rights were decreed in the SRBA in 2014. R. 272. McConnell's use of the Kauer Ditch, as described in *Whittaker*, was not authorized in those decrees and ended in 2014. *Id.* Recognizing these facts, the Hearing Officer reasoned that the intervening "[s]ix or seven years"—when McConnell had reason to investigate the flow of water through Whittaker's property on lower Stroud Creek—was not, as a matter of fact, a sufficiently "long and

continuous knowing acquiescence” to constitute laches. *Id.* Thus, substantial evidence in the record supports the conclusion that laches does not bar approval of Transfer 84441.

V. CONCLUSION

Substantial evidence supports the Director’s findings of fact, including the finding that the confluence of Stroud Creek and Lee Creek lies upstream of McConnell’s Upper Diversion. The legal conclusions necessary to approve the transfer and authorize McConnell to use the Lower Diversion all flow from that pivotal fact. Whittaker has not identified a legal error and Whittaker’s substantial rights have not been prejudiced. For these and other reasons stated above, this Court should affirm the *Final Order*.

DATED this 12th day of May 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



MARK CECCHINI-BEAVER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May 2022, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

Robert L. Harris
Luke H. Marchant
rharris@holdenlegal.com
lmarchant@holdenlegal.com
efiling@holdenlegal.com

Candice McHugh
Christopher Bromley
cmchugh@mchughbromley.com
cbromley@mchughbromley.com



MARK CECCHINI-BEAVER
Deputy Attorney General
Idaho Department of Water Resources