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Attorneys for Plaintiff

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

THE IDAHO DEPARTMENT OF  
WATER RESOURCES,

Plaintiff,

vs.

FLOYD JAMES WHITTAKER and  
JORDAN WHITTAKER, as individuals;  
WHITTAKER TWO DOT RANCH, LLC,  
an Idaho limited liability company; and  
WHITTAKER TWO DOT LAND, LLC,  
an Idaho limited liability company,

Defendants.

CV30-22-0169

Case No. \_\_\_\_\_

**AFFIDAVIT OF DAVID T.  
GRAYBILL**

STATE OF IDAHO )  
 ) ss.  
COUNTY OF ADA )

I, David T. Graybill, being first duly sworn upon oath, depose and state as follows:

1. I am over the age of eighteen (18) years and I make this affidavit based upon my own personal knowledge regarding the matters addressed herein.
2. I am currently the Technical Hydrologist and Watermaster of the Upper Salmon River Basin Water District 170 (“WD170”) for the Idaho Department of Water Resources (IDWR). I am based out of IDWR’s Salmon Office, 102 S. Warpath, Salmon, ID 83467-4435. I have served in this capacity since July 2021.
3. I have a Bachelor of Science in environmental science, physical science, and hydrogeology from the University of Idaho. I have a Master of Science in soil and land resources from the University of Idaho.
4. Prior to my current positions as a Technical Hydrologist and a Watermaster for IDWR, I was employed by IDWR as a Water Resource Agent and later a Senior Water Resource Agent in Twin Falls, Idaho.
5. From April 2020 to October 2021, I was the Assistant Watermaster for the Thousand Springs Area Water District 130.
6. As the Watermaster for the Upper Salmon River Basin, I provide oversight and support for the 18 sub-water districts in the Upper Salmon Basin. I conduct compliance investigations and provide local support to IDWR programs including water rights and stream channel and ground water protection.
7. Merritt Udy is the watermaster for Big Eight Mile and Lee Creeks Water District 74Z (“WD74Z”). WD74Z is a subdistrict of WD170.

8. On January 14, 2022, watermaster Udy and I received a letter on behalf of Bruce and Glenda McConnell asking for the priority delivery of their water rights. A true and accurate copy of the January 14, 2022 Letter Re: Priority Delivery of McConnell Water Rights is attached to this Affidavit as “**Exhibit 1.**”

9. On January 25, 2022, watermaster Udy and I received a follow-up letter on behalf of the McConnells correcting an omission to water right numbers owned by the McConnells. A true and accurate copy of the January 25, 2022 Letter Re: Priority Delivery of McConnell Water Rights is attached to this Affidavit as “**Exhibit 2.**”

10. The McConnells were seeking delivery of water rights in the Lee Creek drainage of Lemhi County, Idaho. Stroud Creek, sometimes called Left Fork Lee Creek, is a tributary to Lee Creek. Lee Creek is a tributary to the Lemhi River. The Lee Creek Drainage is in WD74Z.

11. On April 6, 2022, watermaster Udy and I conducted a field investigation at the Whittaker Two Dot Ranch in Lemhi County. The goal of the field investigation was to understand if and how the Stroud Creek drainage had been altered to prevent Stroud Creek and West Springs water from connecting with Lee Creek and to check the compliance status of measurement devices and control requirements.

12. During the field investigation, I observed that Stroud Creek had an obvious and defined stream channel above Ericsson’s Corral, where two headgates are located. The headgate to the northeast, the Whittaker ditch diversion, leads to a measuring device. The ditch runs north down the drainage and can either go via a ditch split to the west and commingle with “West Springs” water and enter a pressurized irrigation and pivot in the west field, or it can go to the east and commingle with “East Springs” water and enter the

pressurized irrigation system and east field pivot. Water can also bypass the pressurized irrigation systems and flood irrigate the Whittakers' west or east fields.

13. The second headgate ("In-stream Headgate") at the Ericsson's Corral is in the Stroud Creek channel leading northwest for 400 feet before entering an area of very thick vegetation growth. At the time of the site visit, there was no water in the channel below the In-stream Headgate because the In-stream Headgate was closed.

14. The In-stream Headgate creates an undue burden on the watermaster to regulate the water into the Whittakers' ditch system.

15. Approximately 700 feet from where Stroud Creek enters the thick vegetation there is a four-foot-wide by four-foot-deep trench ("West Springs Ditch") spanning a quarter mile across nearly the entire Stroud Creek drainage. It was obvious to me that much of the water that may flow down the Stroud drainage either on the surface or near the subsurface would get intercepted by this large and deep trench. Following the trench east, I observed that it connects with the ditch system described in paragraph 13 above. During the field investigation, I observed water collecting in the West Springs Ditch and ultimately flowing into the Whittakers' fields.

16. The West Springs and water right no. 74-157 lacks an approved measuring device and adequate control works.

17. Approximately 400 feet down the Stroud Creek Drainage from the West Springs Ditch, I observed water subbing up out of the ground. I followed this flow down the drainage and found that the flow rate continued to gain. By 200 feet past the subbing point, the water was flowing at an estimated 1 cubic foot per second (cfs) and continued to gain all the way to connecting with Lee Creek.

18. During the site visit, I confirmed that the West Springs Ditch lacked control structures required by WD74Z and IDWR. I also found that the East Springs Ditch lacked adequate control and measurement.

19. It is my opinion that adequate control structures would allow water to be delivered down the Stroud Creek drainage to Lee Creek to users with senior priority water rights, like the McConnells.

20. It is my opinion that two headgates, one to stop water from flowing in from the West Springs Ditch to the larger ditch system, and a headgate to allow water to flow out of the West Springs Ditch and down the Stroud Creek drainage, would be adequate to meet the control requirements of WD74Z and IDWR.

21. It is also my opinion that the installation of a measuring device that measures all water in the West Springs Ditch would ensure that Stroud Creek water that is diverted at Ericsson's Corral could be measured separately than water diverted from the West Springs.

22. I completed a Field Investigation – Narrative in Enforcement Case No. E2022-2813. This was for a field investigation at the Two Dot Ranch located in T16NR25E Sections 30 and 31 in Lemhi County. A true and accurate copy of the April 6, 2022 Field Investigation Narrative of David Graybill is attached to this Affidavit as “**Exhibit 3.**”

23. In discussions with watermaster Udy, he informed me that he had tried to send water in 2021 down the Stroud Creek channel below Ericsson's Corral. He explained that the water did not reach Lee Creek but was instead largely intercepted by the Whittakers' ditch system.

24. On May 18, 2022, watermaster Udy and I visited Whittaker Two Dot Ranch to determine the compliance status and found that there had not been any changes or visible attempts by the Whittakers to get into compliance.

25. On June 4, 2022, watermaster Udy and I visited the Whittaker Two Dot Ranch and found the Whittakers were still not in compliance.

26. On June 9, 2022, I sent an email to Rob Whitney, Water Distribution Section Manager for IDWR. This email details the June 4, 2022 visit to Whittaker Two Dot Ranch, in particular a conversation with James and Jordan Whittaker about their ditch system and the water that watermaster Udy and I wanted to send down the Stroud channel to the McConnells. A true and accurate copy of the June 9, 2022 Email Re: McConnell Water Delivery/Futile Call Determination June 4<sup>th</sup> 2022 Memo is attached to this Affidavit as "Exhibit 4."

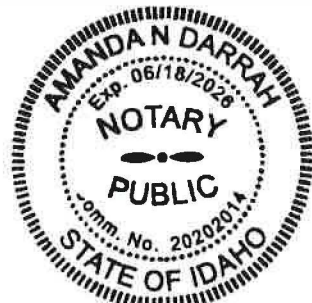
I certify and declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 14<sup>th</sup> day of July 2022.



DAVID T. GRAYBILL  
Technical Hydrologist  
Idaho Department of Water Resources

SUBSCRIBED AND SWORN before me this 14<sup>th</sup> day of July 2022.



  
NOTARY PUBLIC FOR IDAHO  
Commission Expires: 6/18/2024

**M<sup>C</sup>HUGH BROMLEY**  
ATTORNEYS AT LAW, PLLC

RECEIVED  
JAN 27 2022  
DEPT OF WATER RESOURCES  
SALMON OFFICE

Candice M. McHugh  
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(208) 287-0991

Chris M. Bromley  
cbromley@mchughbromley.com

January 14, 2022

David Graybill  
IDWR Salmon Field Office  
102 S. Warpath  
Salmon, ID 83467-4435

Merritt Udy  
PO Box 145  
Leadore, ID 83464-0145

Re: Priority Delivery of McConnell Water Rights

Dear David and Merritt:

On behalf of Bruce and Glenda McConnell, please consider this letter as a request for delivery of water right nos. 74-361, 74-362, 74-363, 74-364, 74-367, and 74-368, in priority, as to junior water rights in the Lee Creek drainage. This request for priority delivery includes, but is not limited to, the junior water rights identified in James Cefalo's *Preliminary Order* approving Transfer No. 84441 in the name of Bruce and Glenda McConnell (May 18, 2021), as affirmed by Director Gary Spackman in his *Order on Exceptions; Final Order Approving Transfer* (November 2, 2021).

Sincerely,



Chris M. Bromley

M<sup>C</sup>HUGH  BROMLEY  
ATTORNEYS AT LAW, PLLC

RECEIVED  
JAN 27 2022  
DEPT OF WATER RESOURCES  
SALMON OFFICE

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Chris M. Bromley  
cbromley@mchughbromley.com

January 25, 2022

David Graybill  
IDWR Salmon Field Office  
102 S. Warpath  
Salmon, ID 83467-4435

Merritt Udy  
PO Box 145  
Leadore, ID 83464-0145

Re: Priority Delivery of McConnell Water Rights

Dear David and Merritt:

On January 14, 2022, I sent a letter to both of you on behalf of Bruce and Glenda McConnell, asking for priority delivery of the McConnell irrigation water rights as to junior water rights in the Lee Creek drainage, including but not limited to the junior water rights identified in James Cefalo's *Preliminary Order* approving Transfer No. 84441 in the name of Bruce and Glenda McConnell (May 18, 2021), as affirmed by Director Gary Spackman in his *Order on Exceptions; Final Order Approving Transfer* (November 2, 2021).

In the January 14, 2022 letter, I listed the McConnell water rights as: 74-361, 74-362, 74-363, 74-364, 74-367, and 74-368. I was recently made aware that this list of water rights inadvertently omitted water right no. 74-365. The omission of water right no. 74-365 was unintentional. Water right no. 74-365 should be included in the list of McConnell water rights for priority delivery.

Please consider this letter as a correction to the January 14, 2022 letter.

Sincerely,



Chris M. Bromley



## Field Investigation – Narrative

**Investigator:** David Graybill

**Date:** 04/06/2022

**Enforcement Case No:** E2022-2813

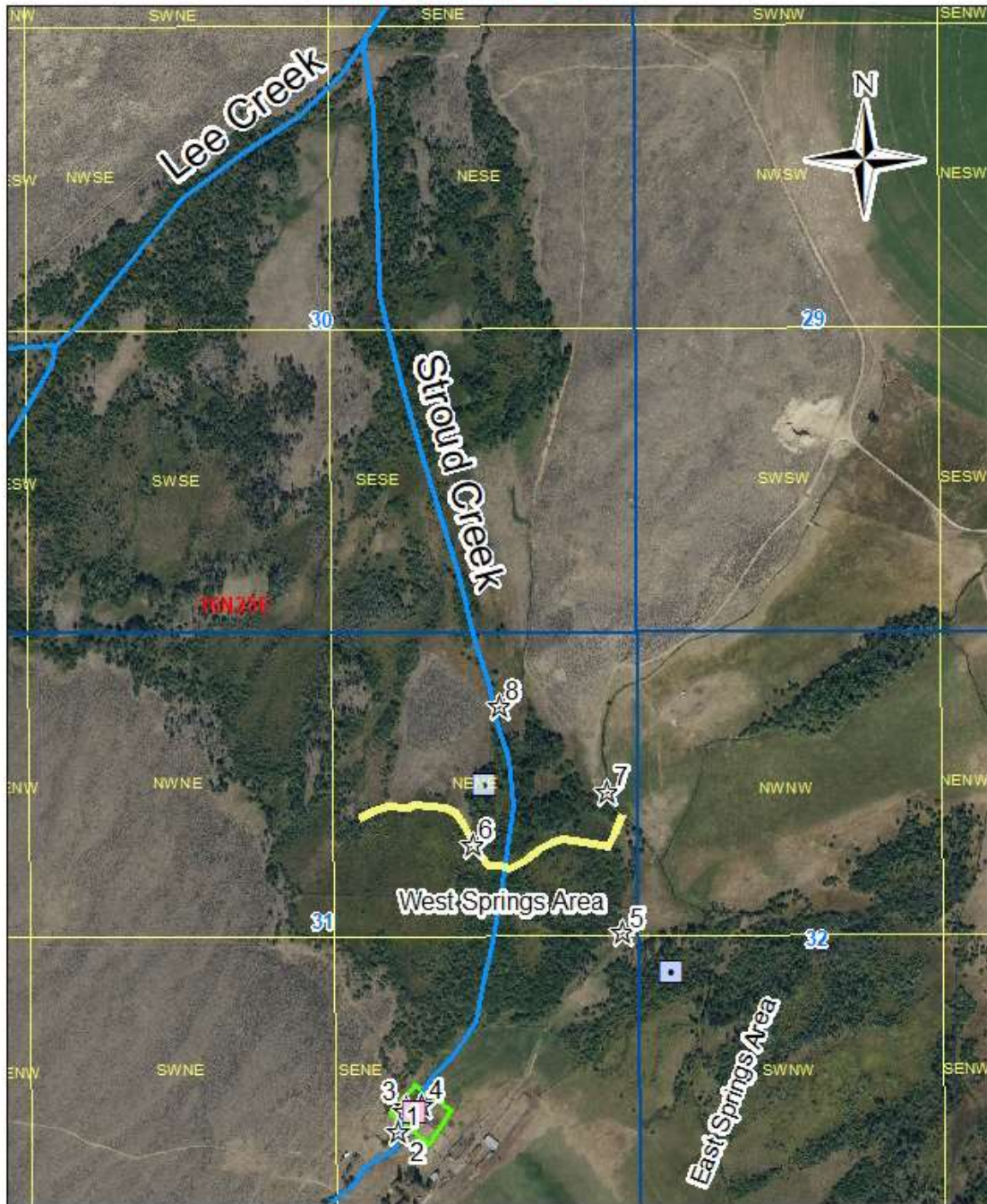
April 2022, Department staff and WD74Z watermaster conducted a field investigation at the Two Dot Ranch located in T16NR25E Sections 30, and 31 in Lemhi County. The goal of the field investigation was to understand if and how the Stroud Cr drainage had been altered to prevent Stroud Cr and West Springs water from connecting with Lee Cr and to check the compliance status of measurement and control requirements. The field investigation started at Whittaker's "upper diversion" located near the Ericsson corral and progressed down the Stroud Cr drainage ending at the confluence with Lee Cr. The investigation findings are as follows. Stroud Cr is clearly identified above the Ericsson Corral (Picture 1) at which point two headgates are located (Picture 2). The east headgate controls water flowing into a ditch system, "the ditch headgate", while the west headgate controls water flowing into the Stroud Cr channel, the "in-stream headgate". The in-stream top-down headgate prevents excess water in the system from flowing down Stroud Cr and must be removed, or if needed for control, it can be replaced with a bottom-up control design.

Immediately downstream of the ditch headgate is the ditch heading north and the ditch weir (Picture 4). The ditch weir and headgate meet Department standards. The ditch heads north to the "ditch split" (Picture 5) where water can flow east to commingle with the east springs water and then to the pivot or it can continue north and commingle with the west springs water and head to a different pivot. Immediately downstream of the in-stream headgate is the Stroud Cr Channel (Picture 3) heading NE towards the "west springs area" (see map). The West Springs Area is comprised of nearly flat topography, willows, thick vegetation, and marsh like conditions and the hydrology is dynamic including both subsurface and surface flow, water likely channelizes during periods of high flow. The Stroud Cr drainage through the west springs area is likely in similar condition and function as it was before land development up to the "west springs ditch" (Picture 6). The west springs ditch traverses nearly the entire Stroud Cr drainage collecting and diverting water from both Stroud Cr and the west springs before heading east to the POU. This diversion does not have any control or measurement, control at this diversion is critical for the priority delivery of Stroud Cr and west springs water. Adequate control of the diversion will be difficult as the west springs ditch acts as a 0.25-mile-wide diversion and simply placing a headgate in the ditch likely will not result in adequate control of the diversion.

In 2021 Department staff instructed the 74Z watermaster to deliver west springs water in priority to a water user down stream on Lee Cr. By placing a metal plate in front of an 18" cipoletti weir (Picture 7) located in Whittaker's ditch the watermaster was able to deliver the water west in a return flow ditch back into the Stroud Cr drainage. During the site visit department staff observed recent earth work (Picture 7) that resulted in a complete block of the return flow ditch eliminating any path for the diverted water to be returned to the Stroud Cr drainage. As department staff continued to work down the drainage from the west springs ditch they observed that there was not any water flowing down the drainage past the ditch. However, 425 ft down gradient of the west springs ditch water was observed to be subbing up and flowing and gaining water as it moved down the drainage and by 625 feet past the west springs ditch, Stroud Cr had re-channelized and was flowing at a rate of near 1 cfs (Picture 8) and continued to gain flow all the way to the confluence with Lee Creek.

# Whittaker Two Dot (E2022-2813)

Twp 16N Rge 25E



- ☆ Picture Location
- West Springs Ditch
- ▭ Ericsson Corral
- Water Right 74-157 PODs
- Water Rights 74-369, 74-1136, and 74-15788 POD

## Field Investigation – Photo Report



### Picture 1

Site Identification/Details:  
Stroud Creek Upstream of Ericsson Corral

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Date Taken: 4/6/2022

GPS Location or other Location Information:  
Lat. 44; 40; 26.9040000000093 Long 113; 31;  
23.9808000000194

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#### Comments:

This north facing photo shows a stretch of Stroud Creek above the Ericsson corral. The stream stretch from the headwaters to the Ericsson corral is not disputed as the natural stream channel.

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### Picture 2

Site Identification/Details:  
Ericsson Corral/ Whittaker Upper Diversion

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Date Taken: 04/06/2022

GPS Location or other Location Information:  
Lat. 44; 40; 26.9040000000093 Long 113; 31;  
23.9808000000194

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#### Comments:

This north facing photo shows the old in-stream headgate on the west/left side of the photo and Whittaker's ditch diversion on the east/right side of the photo. The in-channel headgate on Stroud Creek is not suitable because it limits the amount of natural flow that can pass down the Stroud Creek drainage depending on gate position. Whittaker's headgate is adequate.

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**Picture 3**

Site Identification/Details:  
Stroud Creek historic channel immediately  
downstream of the Ericsson Corral

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Date Taken: 04/07/2022

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GPS Location or other Location Information:  
Lat. 44; 40; 26.9040000000093 Long 113; 31;  
23.9808000000194

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Comments:  
This north facing photo shows a defined stream  
channel that is heading North East towards the  
West Springs Area. Stroud Cr is an easily  
identifiable stream upstream of Ericssons corral  
where it collects in a pool held back by the 2  
headgates. Water can either continue down the  
Stroud drainage or be diverted into Whittakers  
private ditch system.

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**Picture 4**

Site Identification/Details:  
Whittaker ditch immediately downstream of the  
Ericsson Corral.

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Date Taken: 04/06/2022

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GPS Location or other Location Information:  
Lat. 44; 40; 26.9040000000093 Long 113; 31;  
23.9808000000194

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Comments:  
This south facing photo shows Whittakers private  
ditch and measurement weir. At the time of the  
site visit Whittaker was diverting all the Stroud  
Creek water with priority water rights. The  
measuring device meets Department standards.

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**Picture 5**

Site Identification/Details:  
Whittaker ditch split

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Date Taken: 04/06/2022

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GPS Location or other Location Information:  
Lat. 44; 40; 35.4550790000068, Long 113; 31;  
10.509238999977

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Comments:  
Whittaker ditch splitting point can send water east to connect with East Spring Ditch or send it north to connect with West Springs Ditch. If the water goes north it will comingle with west springs water before being passing over an 18" Cipolletti weir. This measurement location is not adequate because there is no way to distinguish between Stroud Cr and West Springs water using it.

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**Picture 6**

Site Identification/Details:  
West springs ditch

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Date Taken: 04/06/2022

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GPS Location or other Location Information:  
Lat. 44: 401: 39.3751190000038, Long 113; 31;  
19.748638999977

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Comments:  
Ditch that traverses across the Stroud creek drainage. This ditch captures both West Springs water and Stroud creek water.

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**Picture 7**

Site Identification/Details:  
Whittaker Ditch Blockage Disconnecting the  
System from Lee Creek Photo Point

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Date Taken: 04/06/2022

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GPS Location or other Location Information:  
Lat. 44; 40; 45.2096399999865, Long 113; 31;  
17.870519999996

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Comments:  
Recent earth work that results in the capture of  
Stroud Cr. and West springs water. This location is  
where Merritt Udy was able to deliver West  
springs water to Bruce McConnel. Due to the  
recent blockage all water collected in the west  
springs ditch including Stroud Cr. water get  
diverted to the east side of a hill and can not reach  
Lee Cr.

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**Picture 8**

Site Identification/Details:  
Stroud drainage subbed water

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Date Taken: 04/06/2022

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GPS Location or other Location Information:  
Lat. 44; 40; 45.2096399999865, Long 113; 31;  
17.870519999996

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Comments:  
Near 425 ft North and down gradient of the west  
springs ditch water was subbing from the ground  
and gained as department staff followed it down  
the drainage. After 200 ft the water had collected  
into a defined flow of near 1 cfs that continued to  
gain and flow in a channel down the drainage until  
connecting with Lee Cr.

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## Graybill, David

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**From:** Graybill, David  
**Sent:** Thursday, June 9, 2022 1:06 PM  
**To:** Whitney, Rob  
**Subject:** McConnell water delivery/futile call determination June 4th 2022 memo

Rob,

I visited Stroud Cr. on Saturday 6/4/2022 with Merritt Udy to attempt to deliver McConnells priority water by delivering Stroud Cr. water down past the Ericsson corral into the relic stream channel. Jordan and James Whittaker happened to be at the west springs area when we arrived. They asked what we were doing, and I told them we were sending water down the Stroud Channel to deliver McConnell his water and were going to document where the water ended up. Both Jordan and James both confirmed what the Department and Merritt Udy believed would happen by saying *that the water will undoubtedly end up right where we were standing at the west springs ditch and into their pressurized irrigation system*. Both Jordan and James pointed at the point that the water would enter the irrigation system which they had just turned the pump on to. They both pointed at the irrigation bubbler and stated that *any water that you send down will go into the west springs ditch and right into this irrigation bubbler*. They also instructed me to not send any of McConnells water into their ditch system and that they did not authorize their private ditch system to be used to deliver McConnell any water.

After the conversation with the Whittakers, we decided to delay the plan. There were several confounding variables that made the futile call exercise problematic. With the small amount of deliverable water in the system (1.2 CFS), fluctuating temperatures, ongoing rainstorm, and the Whittakers diverting all their 74-369 Stroud Cr water to the west springs ditch we decided it would be better to wait until a later time to perform the exercise and that we may need additional legal counsel to ensure that we are collecting evidence correctly. Also, after my conversation with the Whittakers it seemed that their clear admission that any water that was sent down the relic Stroud channel on the west side of the Corral would go right into the west springs ditch and into their irrigation system was adequate supporting evidence that it would do so.

David Graybill  
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Water District 170 Watermaster  
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