

LAWRENCE G. WARDEN
ATTORNEY GENERAL

DARRELL G. EARLY
Chief of Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
LACEY RAMMELL-O'BRIEN, ISB No. 8201
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
lacey.rammell-obrien@idwr.idaho.gov
mark.cecchini-beaver@idwr.idaho.gov

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. _____

COMPLAINT

Fee Category: AA
Filing Fee: Exempt

Thompson, Stevan H.

Plaintiff, the Idaho Department of Water Resources (“the Department”), through the
Office of the Idaho Attorney General, makes this complaint and claim for relief against

Defendants Floyd James Whittaker, Jordan Whittaker, Whittaker Two Dot Ranch LLC, and Whittaker Two Dot Land LLC, asserting and alleging as follows:

NATURE OF ACTION

1. The Department initiates this action pursuant to Idaho Code §§ 42-1701B and 42-701 for the Defendants' failure to install and maintain suitable controlling works and measuring devices in violation of the Department's order to do so. Defendants' failure to install suitable controlling works and measuring devices interferes with the administration of water in accordance with Idaho's prior appropriation doctrine and impairs the Department's ability to deliver water to a senior water user. The Department seeks an order of the Court requiring Defendants to install suitable controlling works and measuring devices. The Department also seeks civil penalties against Defendants.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to Idaho Code §§ 42-1701B(5)(a) and 1-705.

3. This Court has personal jurisdiction over the Defendants pursuant to Idaho Code § 5-514 because, upon information and belief, the Defendants are transacting or have transacted business within the State of Idaho and the wrongful acts and omissions giving rise to this cause of action occurred within the State of Idaho.

4. Venue is proper in the District Court of the Seventh Judicial District, State of Idaho, in and for Lemhi County, pursuant to Idaho Code §§ 42-1701B(5)(a) and 5-404, because Defendants reside in Lemhi County, and the violations, acts, and omissions alleged herein occurred and the action arose in Lemhi County, Idaho.

PARTIES

5. Plaintiff, the Idaho Department of Water Resources, is an executive department established under the laws of the state of Idaho, pursuant to Idaho Code § 42-1701, with its primary state office located in Ada County, Idaho at 322 E. Front St., Boise, ID 83720.

6. The Department is authorized by Idaho Code §§ 42-1701B and 42-1805(9) to file suit by and through the Idaho Attorney General to compel compliance with the provisions of Title 42, Idaho Code, and seek civil penalties.

7. Defendant, Floyd James Whittaker, is an individual, who, upon information and belief, owns certain water rights at issue in this matter. These water rights were decreed in the Snake River Basin Adjudication and bear water right numbers 74-15788, 74-369, 74-1136, and 74-157.

8. Defendant, Whittaker Two Dot Land, LLC, is an Idaho limited liability company, with its principal address located in Lemhi County, Idaho, at 83 Big Eight Mile Rd., Leadore, ID 83464-0240.

9. According to tax parcel data available to the Department, Defendant Whittaker Two Dot Land, LLC is the listed owner of the parcels of land where water rights listed above are put to use.

10. Upon information and belief, Defendant Floyd James Whittaker is the Manager of Whittaker Two Dot Land, LLC, and Defendant Jordan Whittaker is a member of Whittaker Two Dot Land, LLC.

11. Defendant, Whittaker Two Dot Ranch LLC, is an Idaho limited liability company, with its principal address located in Lemhi County, Idaho at 83 Big 8 Mile Rd., Leadore, ID 83464.

12. Upon information and belief, Jordan Whittaker is an individual, and the manager of Whittaker Two Dot Ranch, LLC. Upon information and belief, Jordan Whittaker manages day-to-day operations at the ranch.

13. Upon information and belief, Whittaker Two Dot Ranch, LLC uses and benefits from the water diverted under water rights owned by Defendant Floyd James Whittaker.

FACTS

14. This Complaint is supported by the contemporaneously filed Affidavit of David T. Graybill, Affidavit of Merritt D. Udy, and Declaration of Lacey B. Rammell-O'Brien. The Affidavits and Declaration, as well as their respective exhibits, are incorporated by reference herein.

The Lee Creek Drainage

15. Stroud Creek is a creek in Lemhi County. It is a tributary to Lee Creek. Stroud Creek is sometimes referred to as Left Fork Lee Creek.

16. Stroud Creek flows approximately north to its confluence with Lee Creek.

17. Lee Creek is a tributary to the Lemhi River.

18. The Department has divided the State of Idaho into over 50 administrative basins in order to coordinate water management activities. The Lee Creek drainage, including Stroud Creek, is part of Administrative Basin 74.

19. The Lee Creek drainage, including Stroud Creek, is part of Water District 74Z (“WD74Z”).

20. Merritt Udy is the current watermaster for WD74Z.

21. Water District 74Z is a subdistrict of Water District 170 (“WD170”).

22. David Graybill is the current watermaster for WD170.

23. Pursuant to Idaho Code § 42-602, watermaster Graybill and watermaster Udy are responsible for the distribution of water within WD74Z.

24. Pursuant to Idaho Code § 42-602, the Director of the Department is responsible for supervising the watermasters.

Defendant Floyd James Whittaker’s Water Rights in the Lee Creek Drainage

25. Water rights in the Lee Creek Drainage were adjudicated in the Snake River Basin Adjudication (“SRBA”).

26. The SRBA is a general stream adjudication filed in the Fifth District Court in Twin Falls, Idaho.

27. On January 23, 2009, the presiding judge of the SRBA issued a Partial Decree for water right no. 74-15788 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 1.97 cubic feet per second (“cfs”) for irrigation out of Stroud Creek, tributary to Lee Creek in Lemhi County. Water right no. 74-15788 has a priority date of 12/31/1982. A copy of the Partial Decree is incorporated by reference herein and attached as Exhibit 1 to the Rammell-O’Brien Declaration.

28. On February 19, 2009, the presiding judge of the SRBA issued a Partial Decree for water right no. 74-369 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 2.40 cfs for irrigation out of Left

Fork Lee Creek, tributary to Lee Creek in Lemhi County. Water right no. 74-369 has a priority date of 05/12/1883. A copy of the Partial Decree is incorporated by reference herein and attached as Exhibit 2 to the Rammell-O'Brien Declaration.

29. On February 19, 2009, the presiding judge of SRBA issued a Partial Decree for water right no. 74-1136 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 2 cfs for irrigation out of Left Fork Lee Creek, tributary to Lee Creek. Water right no. 74-1136 has a priority date of 06/28/1912. A copy of the Partial Decree is incorporated by reference herein and attached as Exhibit 3 to the Rammell-O'Brien Declaration.

30. On April 4, 2012, the presiding judge of the SRBA issued a Partial Decree for water right no. 74-157 to F. James Whittaker and Paula J. Whittaker, PO Box 240, Leadore, ID 83464, for 3.2 cfs for irrigation and stockwater from springs tributary to Lee Creek in Lemhi County. Water right no. 74-157 has a priority date of 4/1/1916. These springs are referred to herein as the "East Springs" and "West Springs." A copy of the Partial Decree is incorporated by reference herein and attached as Exhibit 4 to the Rammell-O'Brien Declaration.

31. The Final Unified Decree for the SRBA was entered by the presiding SRBA District Judge, Eric Wildman, on August 26, 2014.¹ The Decree is conclusive as to the nature and extent of the water rights listed in paragraphs 27 through 30 of this Complaint. *See* I.C. § 42-1420(1).

¹ Final Unified Decree, *In re SRBA*, No. 39576 (Twin Falls Cnty. Dist. Ct. Idaho Aug. 26, 2014), <http://srba.idaho.gov/Images/2014-08/0039576XX09020.pdf>.

32. The Department has not received a change of ownership for water right nos. 74-15788, 74-369, 74-1136, or 74-157.

The Department's Final Order In re Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversions in Administrative Basin 74

33. On September 28, 2018, the Department issued its Final Order *In re Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversions in Administrative Basin 74*. A copy of the Final Order is incorporated by reference herein and attached as Exhibit 12 to the Rammell-O'Brien Declaration.

34. The Final Order requires the installation of measuring devices and controlling works on water diversions in the Lemhi River Basin prior to the start of the 2019 irrigation season.

35. The Final Order was issued pursuant to Idaho Code § 42-701. It applies to all surface and ground water rights within Administrative Basin 74, except domestic, stockwater, and in-stream stockwater rights or uses as defined by Idaho Code §§ 42-111, 42-1401A(11), and 42-113.

36. The Final Order establishes a procedure for users in Administrative Basin 74 to file a written request for variance from the requirement to install measuring devices. A written request for variance was required to be received by the WD170 watermaster by December 1, 2018.

37. The Final Order establishes a procedure for users in Administrative Basin 74 to request an extension if they could not comply with the measuring device installation deadline. Any request for extension was required to be received by the WD170 watermaster by December 1, 2018.

38. On September 28, 2018, a copy of the Final Order was served by United States mail, postage prepaid and properly addressed, on F. James and Paula J. Whittaker, 83 Big Eight Mile Rd., P.O. Box 240, Leadore, ID 83464.

39. The watermaster for WD170 did not receive a written request for variance from Defendants by December 1, 2018.

40. The watermaster for WD170 did not receive a written request for extension from Defendants by December 1, 2018.

41. On June 23, 2020, the Department sent a letter to Floyd James Whittaker and Jordan Whittaker notifying them of the requirements of the Final Order, including the requirement to install lockable headgates and controlling works on each point of diversion. The letter required Floyd James Whittaker and Jordan Whittaker to install and maintain suitable and lockable controlling works on both the East and West Springs within thirty days of June 23, 2020. A copy of the June 23, 2020 Letter Re: Notice of Requirement to Install Controlling Works and Measuring Devices – West and East Springs, Water Right No. 74-157 is incorporated by reference herein and attached as Exhibit 13 to the Rammell-O'Brien Declaration.

42. On April 21, 2022, the Department sent Defendant Floyd James Whittaker a letter, with copies sent to Defendant Jordan Whittaker and Defendant Whittaker Two Dot Land, again notifying them of the requirements of the Final Order, including the requirement to install on each point of diversion lockable headgates and controlling works. This letter specifically directed Defendants to install suitable headgates or controlling works at or near both diversion points authorized by water right 74-157. This letter also stated that failure to comply with its requirements may cause the Department to initiate

enforcement action and seek injunctive relief. A copy of the April 21, 2022 Letter Re: Cease and Desist Unauthorized Diversion of Stroud Creek (aka Left Fork of Lee Creek) Waters (E2022-2813) is incorporated by reference herein and attached as Exhibit 14 to the Rammell-O'Brien Declaration.

Whittaker Diversions

43. Water right nos. 74-369, 74-1136, and 74-15788 share a point of diversion in T16N R25E S31 SENE in Lemhi County. This diversion is referred to herein as the "Whittaker Diversion."

44. Stroud Creek flows in a definite channel until it reaches the Whittaker Diversion, where two headgates are located.

45. One headgate is located on the northeast side of the channel and regulates the amount of water delivered down Defendants' ditch ("Ditch Headgate").

46. The second headgate is located on the northwest side of the channel and controls the flow of Stroud Creek downstream of the Whittaker Diversion ("In-stream Headgate"). The In-stream Headgate is a top-down style headgate. The current design of the In-stream Headgate does not allow water in excess of that decreed to Defendant Floyd James Whittaker to pass down the Stroud Creek drainage. The current design of the In-stream Headgate allows Defendants to divert more water than they are decreed to divert.

47. An open-top check structure in the stream channel would allow high water to pass down the Stroud Creek drainage and would help ensure that Defendants are not diverting water in excess of the decreed water rights.

48. The In-stream Headgate is not a suitable headgate and controlling works within the meaning of Idaho Code § 42-701(1).

East and West Springs Diversions

49. Water right no. 74-157 has two points of diversion in Lemhi County. One point of diversion is in T16N R25E S31 NENE and is known as the “West Springs.” The second point of diversion is in T16N R25E S32 SWNW and is known as the “East Springs.”

50. Both East Springs and West Springs are listed as tributary to Lee Creek on the face of the Decree for water right no. 74-157.

51. A feature known as the “East Springs Ditch” captures water from the East Springs. The East Springs Ditch conveys water approximately north into Defendants’ irrigation ditch system.

52. There is no suitable headgate and controlling works to regulate the flow from the East Springs Ditch into Defendants’ irrigation ditch system.

53. There is not a suitable measuring device for the East Springs Ditch. The device currently in place is a contracted weir and is submerged. The location of the current contracted weir does not have enough of a fall to avoid the submerged condition.

54. The lack of suitable headgates and controlling works on the East Springs Ditch prevents the watermasters from regulating the water diverted in accordance with the prior appropriation doctrine.

55. A feature known as the “West Springs Ditch” captures water from the West Springs. The West Springs Ditch is an approximately four-foot-wide by four-foot-deep trench running approximately west to east for approximately one quarter mile.

56. The West Springs Ditch is located approximately 1,100 feet downstream from the In-stream Headgate at the Whittaker Diversion.

57. There are no suitable headgates and controlling works on the West Springs Ditch.

58. There is not a suitable measuring device for the West Springs Ditch. The Department requires a measuring device south of where the West Springs Ditch enters the Ditch, so that the watermaster may take separate accounting of Stroud Creek water and West Springs water. Alternatively, a measuring device could be installed directly in the West Springs Ditch so that the respective Stroud Creek and West Springs water could be measured prior to commingling.

59. The lack of suitable headgates and controlling works on the West Springs Ditch prevents the watermasters from regulating the water diverted in accordance with the prior appropriation doctrine.

60. The lack of suitable measuring devices for the East Springs Ditch prevents the watermasters from determining the amount of water that may be diverted in accordance with water right no. 74-157.

61. The lack of suitable measuring devices for the West Springs Ditch prevents the watermasters from determining the amount of water that may be diverted in accordance with water right no. 74-157.

62. Defendants' failure to install and maintain suitable headgates, control structures and measurement devices prevents water from Stroud Creek, the East Springs, and West Springs from being delivered down the Stroud Creek drainage to senior priority water users on Lee Creek.

The Department's Efforts to Administer Lee Creek Water Rights and Diversions

63. On January 14th and 25th, 2022, watermasters Graybill and Udy received a letter on behalf of Bruce and Glenda McConnell asking for the priority delivery of water rights 74-361, 74-362, 74-363, 74-364, 74-365, 74-367, and 74-368. A copy of these letters are incorporated by reference herein and attached as Exhibits 1 and 2 to the Graybill Affidavit.

64. Partial decrees were issued in the SRBA for the water rights belonging to the McConnells. Copies of the McConnells' partial decrees are incorporated by reference herein and attached as Exhibits 5–11 to the Rammell-O'Brien Declaration.

65. Defendant Floyd James Whittaker's water right no. 74-369 shares a date of priority with the McConnells' water rights nos. 74-361, 74-363, 74-365, and 74-367. The shared date of priority is 05/12/1883.

66. The McConnells' water right nos. 74-362, 74-364, and 74-368 are senior in priority to Defendant Floyd James Whittaker's water right nos. 74-157, 74-1136, and 74-15788. In chronological date of priority, the water rights are as follows: McConnell water right no. 74-364 (priority date 06/01/1900), McConnell water right no. 74-362 (priority date 05/01/1906), McConnell water right no. 74-368 (priority date 11/05/1909), Whittaker water right no. 74-1136 (priority date 06/28/1912), Whittaker water right no. 74-157 (priority date 04/01/1916), and Whittaker water right no. 74-15788 (priority date 12/31/1982).

67. On April 06, 2022, watermasters Graybill and Udy conducted a field investigation at the Whittaker Two Dot Ranch located in Lemhi County. The purpose of the field investigation was to: 1) determine if the Stroud Creek drainage through Whittaker

Two Dot Land had been altered to prevent Stroud Creek and springs water from connecting with Lee Creek; 2) evaluate how Stroud Creek water could be delivered to Bruce and Glenda McConnell; and 3) determine the compliance status of related measurement and control mandates for water right nos. 74-369, 74-1136, 74-15788 and 74-157. A copy of the Field Investigation – Narrative is incorporated by reference herein and attached as Exhibit 3 to the Graybill Affidavit.

68. Watermasters Graybill and Udy concluded that the Defendants are prohibiting the delivery of Stroud Creek and spring water to the McConnells due to a lack of adequate headgates or controlling works and measuring devices, particularly at the West Springs ditch. Graybill Aff. ¶¶ 14, 18–20; Udy Aff. ¶ 10.

69. As discussed in paragraph 42 above, on April 21, 2022, the Department notified Defendants by letter of the requirements and applicability to diversions under water right no. 74-157. Defendants were given a compliance deadline of May 5, 2022.

70. On May 18, 2022, watermasters Udy and Graybill visited Whittaker Two Dot Ranch to verify the compliance status on the ranch. They found that Defendants had not made any changes or visible attempts to comply with the Department’s directives. Graybill Aff. ¶ 24; Udy Aff. ¶ 11.

71. On June 4, 2022, watermasters Udy and Graybill again visited the Two Dot Ranch and found the Defendants not in compliance with the Department’s directives. Graybill Aff. ¶ 25; Udy Aff. ¶ 12.

72. Defendants’ compliance with Idaho Code § 42-701 is necessary for the administration and distribution of water in the Lee Creek Drainage by watermasters Udy and Graybill on behalf of WD74Z and WD170.

COUNT I

(Failure to Maintain a Suitable Headgate and Controlling Works at the Whittaker Diversion, Idaho Code § 42-701)

73. The allegations of all preceding paragraphs of this Complaint are hereby incorporated by reference as though fully set forth herein.

74. Article XV § 3 of the Idaho Constitution and Idaho Code § 42-106 establish the foundation of Idaho's prior appropriation doctrine.

75. Article XV § 3 of the Idaho Constitution states, inter alia: "Priority of appropriation shall give the better right as between those using the water."

76. Idaho Code § 42-106 states: "As between appropriators, the first in time is the first in right."

77. Idaho Code § 42-602 states: "The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine."

78. Idaho Code § 42-602 further states: "The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director."

79. Idaho Code § 42-701(1) states: "The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where

the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point. Each such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of water resources.”

80. Idaho Code § 42-701(3) states: “Any appropriator or user of the public waters of the state of Idaho that neglects or refuses to construct or maintain such headgates, controlling works, or measuring devices, or has not executed an agreement in lieu of a measuring device as provided in subsection (2) of this section, upon receiving ten (10) days’ notice from the director of the department of water resources within which to begin and diligently pursue to completion the construction or installation of the required device or devices or to begin and diligently pursue to completion a remedy to such defects as exist in accordance with said notice, then the director of the department of water resources ... may take action pursuant to section 42-1701B, Idaho Code, to enforce the requirement to construct, install or maintain such devices.”

81. The Whittaker Diversion is the authorized point of diversion for water right nos. 74-369, 74-1136, and 74-15788.

82. The Whittaker Diversion is not an authorized point of diversion for water right no. 74-157.

83. Defendants' current In-stream Headgate at the Whittaker Diversion prevents water from passing down the Stroud Creek drainage and allows Defendants to divert water in excess of their decreed water rights.

84. The In-stream Headgate is preventing the administration and delivery of water by watermasters Udy and Graybill to downstream senior users on the Lee Creek Drainage as required by Idaho's prior appropriation doctrine.

85. The In-Stream Headgate is not a suitable controlling works and is not being maintained to the satisfaction of the Director in compliance with Idaho Code § 42-701.

86. The In-stream Headgate must be completely removed from the stream channel and replaced with controlling works of a type suitable to the Director. To wit: an open-top check structure in the stream channel that would allow water to pass down the Stroud Creek drainage.

87. The Department is entitled to an order of the Court requiring the Defendants to install and maintain to the satisfaction of the Director a suitable open-top check structure at the location of the current In-stream Headgate.

88. Idaho Code § 42-1701B(6)(a) states: "Any person determined in a judicial civil enforcement action to have substantially violated any designated provision of title 42, Idaho Code, or any rule promulgated pursuant to that title, shall be liable for a civil penalty not to exceed ten thousand dollars (\$10,000) per violation or one hundred fifty dollars (\$150) per day for a continuing violation, whichever is greater."

89. The Department is entitled to a civil penalty in the amount of \$10,000.00 for this violation of Idaho Code § 42-701, or \$150.00 per day for a continuing violation of Idaho Code § 42-701, whichever is greater, as authorized by Idaho Code § 42-1701B(6)(a).

90. The Department has incurred and will incur costs, expenses, and attorney fees in the prosecution of the violation alleged above. The Department is entitled to recover reasonable expenses, costs, and attorney fees pursuant to Idaho Code § 12-117.

COUNT II

(Failure to Install Headgate and Controlling Works at the West Springs Ditch, Idaho Code § 42-701)

91. The allegations in all preceding paragraphs of this Complaint are hereby incorporated by reference as though fully set forth herein.

92. In the Final Order, the Director of the Department required the installation and maintenance of suitable, lockable headgates and controlling works in WD74Z.

93. Idaho Code § 42-701 and the Final Order require the owners of affected water rights to install and maintain on each point of diversion lockable headgates and controlling works to the satisfaction of the Director.

94. The Final Order requires owners of irrigation rights, including water right no. 74-157, to comply by the start of the 2019 irrigation season.

95. The Final Order applies to all of Defendant Floyd James Whittaker's water rights, including water right no. 74-157.

96. Defendant Floyd James Whittaker was provided a copy of the Final Order. Both Defendant Floyd James Whittaker and Defendant Jordan Whittaker were provided with subsequent notices of the requirements of the order as previously alleged herein.

97. Defendants have not complied with the Director's Final Order and are not in compliance with Idaho Code § 42-701 because they have not maintained to the satisfaction of the Director of the Department suitable headgates and controlling works on the West Springs Ditch.

98. Pursuant to Idaho Code § 42-1701B(5), the Department is entitled to an order from the Court compelling Defendants to construct, install or maintain suitable, lockable headgates and controlling works to the satisfaction of Director on the West Springs Ditch.

99. The Department is entitled to a civil penalty in the amount of \$10,000.00 for this violation of Idaho Code § 42-701, or \$150.00 per day for a continuing violation of Idaho Code § 42-701, whichever is greater, as authorized by Idaho Code § 42-1701B(6)(a).

100. The Department has incurred and will incur costs, expenses, and attorney fees in the prosecution of the violation alleged above. The Department is entitled to recover reasonable expenses, costs, and attorney fees pursuant to Idaho Code § 12-117.

COUNT III

(Failure to Install Headgate and Controlling Works at the East Springs Ditch, Idaho Code § 42-701)

101. The allegations in all preceding paragraphs of this Complaint are hereby incorporated by reference as though fully set forth herein.

102. Defendant Floyd James Whittaker has not complied with the Director's Final Order and is not in compliance with Idaho Code § 42-701 because he has not installed lockable headgates and controlling works on the East Springs Ditch.

103. Pursuant to Idaho Code § 42-1701B(5), the Department is entitled to an order from the Court compelling Defendants to construct, install or maintain suitable,

lockable headgate and controlling works to the satisfaction of the Director on the East Springs Ditch.

104. The Department is entitled to a civil penalty in the amount of \$10,000.00 for this violation of Idaho Code § 42-701, or \$150.00 per day for a continuing violation of Idaho Code § 42-701, whichever is greater, as authorized by Idaho Code § 42-1701B(6)(a).

105. The Department has incurred and will incur costs, expenses, and attorney fees in the prosecution of the violation alleged above. The Department is entitled to recover reasonable expenses, costs, and attorney fees pursuant to Idaho Code § 12-117.

COUNT IV

(Failure to Install Measurement Device for the West Springs Ditch, Idaho Code § 42-701)

106. The allegations in all preceding paragraphs of this Complaint are hereby incorporated by reference as though fully set forth herein.

107. The Director of the Department is required to distribute water in water districts in accordance with the prior appropriation doctrine. I.C. § 42-602.

108. The Director of the Department is statutorily empowered with the direction and control of the distribution of water from all natural water systems within water districts to canals, ditches, pumps, and other facilities. *Id.* Distribution within water districts shall be accomplished by watermasters under the supervision of the Director. *Id.*

109. The Director of the Department is authorized by law to order the installation and maintenance of approved measuring devices consistent with the purposes of Idaho Code § 42-701. I.C. § 42-237a.h.

110. Idaho Code § 42-701(1) authorizes the Director to require installation and maintenance of suitable, lockable headgates and controlling works, and measuring devices at the point where the water is diverted.

111. Defendants are not in compliance with Idaho Code § 42-701 because they have not installed a measurement device on the West Springs Ditch.

112. Pursuant to Idaho Code § 42-1701B(5), the Department is entitled to an order from the Court compelling Defendants to construct, install or maintain a suitable measuring device at such point as is most practical on the West Springs Ditch to the satisfaction of the Director.

113. The Department is entitled to a civil penalty in the amount of \$10,000.00 for this violation of Idaho Code § 42-701, or \$150.00 per day for a continuing violation of Idaho Code § 42-701, whichever is greater, as authorized by Idaho Code § 42-1701B(6)(a).

114. The Department has incurred and will incur costs, expenses, and attorney fees in the prosecution of the violation alleged above. The Department is entitled to recover reasonable expenses, costs, and attorney fees pursuant to Idaho Code § 12-117.

COUNT V

(Failure to Install Measurement Device for the East Springs Ditch, Idaho Code § 42-701)

115. The allegations in all preceding paragraphs of this Complaint are hereby incorporated by reference as though fully set forth herein.

116. Defendants are not in compliance with Idaho Code § 42-701 because they have not installed a measurement device on the East Springs Ditch.

117. Pursuant to Idaho Code § 42-1701B(5), the Department is entitled to an order from the Court compelling Defendants to construct, install or maintain a suitable measuring device at such point as is most practical on the East Springs Ditch to the satisfaction of the Director.

118. The Department is entitled to a civil penalty in the amount of \$10,000.00 for this violation of Idaho Code § 42-701, or \$150.00 per day for a continuing violation of Idaho Code § 42-701, whichever is greater, as authorized by Idaho Code § 42-1701B(6)(a).

119. The Department has incurred and will incur costs, expenses, and attorney fees in the prosecution of the violation alleged above. The Department is entitled to recover reasonable expenses, costs, and attorney fees pursuant to Idaho Code § 12-117.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Court grant the following relief:

120. Issue an order as authorized by Idaho Code §§ 42-1701B(5)(a) and 42-701 requiring the Defendants to either remove or modify the current In-stream Headgate at the Whittaker Diversion on Stroud Creek and replace it with a suitable open-top check structure to the satisfaction of the Director and approved by the Department.

121. Issue an order requiring the Defendants to install suitable headgates or controlling works to the satisfaction of Director, at locations approved by the Department, at or near both diversion points authorized by water right no. 74-157.

122. Issue an order requiring the Defendants to install suitable measuring devices to the satisfaction of the Director, at locations approved by the Department, at or near both diversion points authorized by water right no. 74-157.

123. Assess against the Defendants statutory penalties as authorized by Idaho Code § 42-1701B(6) in an amount of up to \$10,000.00 for each separate violation of Idaho Code § 42-701 or up to \$150.00 per day for each continuing violation of Idaho Code § 42-701 alleged in this Complaint, whichever is greater. In the event of default, the Department is entitled to civil penalties of \$50,000.00.

124. Award attorney fees, costs, and reasonable expenses pursuant to Idaho Code § 12-117 and Idaho Rule of Civil Procedure 54. In the event of default, the Department has incurred costs, expenses, and attorney fees in the amount of \$3,000.00.

125. Grant other such relief as the Court deems equitable and just.

Dated this 15th day of July 2022.



LACEY RAMMELL-O'BRIEN
Deputy Attorney General
Idaho Department of Water Resources

Attorney for Plaintiff