

Robert L. Harris (ISB No. 7018)
Luke H. Marchant (ISB No. 7944)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
Email: rharris@holdenlegal.com
lmarchant@holdenlegal.com
Court Service: efiling@holdenlegal.com

Attorneys for Defendants

**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,

v.

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.

Case No. CV30-22-0169

**DECLARATION OF ROBERT L.
HARRIS IN SUPPORT OF MOTION
TO DISMISS**

I, Robert L. Harris, state that the following is made on my personal knowledge, and that I would so testify in open court if called upon to do so.

1. I am over the age of eighteen (18) and am competent to testify to the matters contained herein.

2. I am a member of Holden, Kidwell, Hahn & Crapo, P.L.L.C. (“HKHC”), representing Floyd James Whittaker, Jordan Whittaker, Whittaker Two Dot Ranch, LLC, and Whittaker Two Dot Land, LLC in the above-entitled matter.
3. Attached at Exhibit 1 is a true and correct copy of the *Memorandum Decision and Order* issued in Lemhi County Case No. CV30-21-304 on July 18, 2022.
4. Attached at Exhibit 2 is a true and correct copy of the *Judgment* issued in Lemhi County Case No. CV30-21-304 on July 18, 2022.
5. Attached at Exhibit 3 is a true and correct copy of the “1954 map” which is part of the record on appeal in Lemhi County Case No. CV30-21-304.
6. Attached at Exhibit 4 is a true and correct copy of the *Preliminary Order Approving Transfer* issued in the contested administrative proceeding that is the subject of Lemhi County Case No. CV30-21-304.
7. Attached at Exhibit 5 is a true and correct copy of the of the *Order Denying Petitions for Reconsideration* issued in the contested administrative proceeding that is the subject of Lemhi County Case No. CV30-21-304.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct. Idaho R. Civ. P. 2.7; Idaho Code § 9-1406.

August 2, 2022



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2022, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated.

Document Served: DECLARATION OF ROBERT L. HARRIS IN SUPPORT OF MOTION TO DISMISS

Attorneys and/or Individuals Served:

Garrick Baxter Lacey Rammell-O'Brien Mark Cecchini-Beaver Deputy Attorney General IDAHO DEPARTMENT OF WATER RESOURCES P. O. Box 83720 Boise, ID 83720-0098 garrick.baxter@idwr.idaho.gov lacey.rammell-obrien@idwr.idaho.gov mark.cecchini-beaver@idwr.idaho.gov	<input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> FedEx Delivery <input checked="" type="checkbox"/> iCourt
--	--



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for the Defendants

Exhibit 1

**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)	Case No. CV30-21-304
WHITTAKER TWO DOT RANCH LLC, an)	
Idaho limited liability company,)	MEMORANDUM DECISION
)	AND ORDER
Petitioners,)	
)	
vs.)	
)	
)	
THE IDAHO DEPARTMENT OF WATER)	
RESOURCES, an administrative agency of the)	
State of Idaho,)	
)	
Respondent,)	
)	
and)	
)	
BRUCE AND GLENDA MCCONNELL,)	
)	
Intervenors.)	
_____)	
)	
IN THE MATTER OF APPLICATION FOR)	
TRANSFER NO. 84441 IN THE NAME OF)	
BRUCE AND GLENDA MCCONNELL)	
_____)	

**I.
BACKGROUND**

This matter concerns an application to transfer water rights filed by Bruce and Glenda McConnell. R., 41-44. The McConnells own seven water rights authorizing the diversion of water from Lee Creek for irrigation purposes. *Id.* at 47-60. The water rights authorize a single point of diversion on Lee Creek which will be referred to herein as the “Upper Diversion.” *Id.* In addition to the Upper Diversion, the McConnells have historically diverted water from a

second point of diversion on Lee Creek located approximately 1,600 feet downstream of the Upper Diversion. *Id.* at 42. The Court will refer to the second point of diversion as the “Lower Diversion.” Diversion of water at the Lower Diversion is unauthorized under the McConnells’ water rights. *Id.* at 47-60; 506. In 2020, the McConnells were subject to a Department enforcement action whereby the local watermaster directed them to cease diversions at the Lower Diversion on the basis they were unauthorized. *Id.* at 47-60; 506. The McConnells acquiesced. *Id.* The McConnells thereafter filed the subject transfer application seeking to add the Lower Diversion as an additional authorized point of diversion under each of their water rights. *Id.* at 41-44.

James Whittaker and Whittaker Two Dot Ranch LLC (collectively “Whittaker”) protested the application.¹ *Id.* at 76 & 100. Whittaker holds water rights authorizing the diversion of water from Stroud Creek, a tributary to Lee Creek, as well as from certain unnamed springs tributary to Lee Creek for irrigation purposes.² *Id.* at 487-495. An administrative hearing on the application was held before the Department on April 21 and 22, 2021. *Tr.*, at 3. Department employee James Cefalo acted as hearing officer. *Id.* The hearing officer issued a *Preliminary Order* approving the transfer subject to certain conditions. *R.*, 182. Whittaker sought reconsideration. *Id.* at 223. The hearing officer issued an *Order* denying the *Petition for Reconsideration* on June 21, 2021. *Id.* at 271. Whittaker also petitioned to re-open the administrative record to take additional evidence. *Id.* at 244. The hearing officer denied the request on June 21, 2021. *Id.* at 266. Whittaker then filed *Exceptions* to the *Preliminary Order* with the Director. *Id.* at 284. The Director issued his *Final Order* approving the transfer subject to certain conditions on November 2, 2021.³ *Id.* at 348. Whittaker filed a *Petition* seeking judicial review of the *Final Order* on November 30, 2021. The *Petition* asserts the *Final Order* is contrary to law and requests that it be set aside and remanded. The McConnells were

¹ The application to transfer was also protested by David Tomchak, Smith 2P Ranch, Steven Johnson, and Rosalie Ericsson. *R.*, 81-93, 96-98, 102-103, 104-105. While those protestants participated in the underlying administrative proceeding, they are not parties to this judicial review proceeding.

² Stroud Creek is also known as the Left Fork of Lee Creek.

³ The conditions imposed by the hearing officer, and subsequently the Director, on the transfer approval are not at issue in this proceeding. They include a requirement that the Upper Diversion and Lower Diversion be “equipped with lockable controlling works and proper measuring devices.” *R.*, 195. They also include the requirement that the “diversion of water at the Lower Diversion is subordinated to water right 74-1831.” *Id.* Water right 74-1831 is held by Steven Johnson, who is not a party to this proceeding.

subsequently permitted to appear as Intervenors. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petition* was held before the Court on June 16, 2022.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency’s decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency’s decision. *Payette River Property Owners Assn. v. Board of Comm’rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

An application to transfer is evaluated against the criteria set forth in Idaho Code § 42-222(1). The Director shall approve an application for transfer, in whole, in part, or upon conditions, provided:

[N]o other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code

I.C. § 42-222(1). At issue is whether water right 74-157 held by Whittaker will be injured as a result of the proposed transfer. The Director found it will not. R., 346. Whittaker challenges that finding on judicial review.

A. The Director's finding that the proposed transfer will not injure water right 74-157 is set aside and remanded.

The McConnells own seven water rights that are the subject of the transfer application.⁴ Those rights authorize the McConnells to divert 15.2 cfs from Lee Creek at the Upper Diversion for the irrigation of 547.4 acres. All seven rights are located downstream from, and are senior in priority to, Whittaker water right 74-157. Water right 74-157 authorizes the diversion of 3.2 cfs from certain unnamed springs tributary to Lee Creek for irrigation and stockwater purposes. *Id.* at 484. Whittaker argues that approval of the proposed transfer will result in injury on the basis it will give the McConnells administrative access to water right 74-157 which it did not previously have.

i. History of Lee Creek and its tributaries.

Consideration of injury requires a review of the history of Lee Creek and its tributaries. Stroud Creek is a tributary of Lee Creek. Historically, Stroud Creek flowed into Lee Creek at a point located upstream of the McConnells' Upper Diversion. That changed in 1932, when an earthen structure was constructed by Whittaker's predecessor that captures the entire flow of Stroud Creek. That earthen structure is now known as the "West Springs Ditch." As a result of the West Springs Ditch, the historic flow of Stroud Creek was altered. Stroud Creek water which once flowed into Lee Creek above the McConnells' Upper Diversion now flows via the West Springs Ditch into Lee Creek at a location below that diversion.

That the flow of Stroud Creek was altered in 1932 was recognized by the Idaho Supreme Court in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956). In that case, the Court reviewed Lee Creek and its tributaries. The review was done in the context of a quiet title action brought by Floyd Whittaker and his wife against the McConnells' predecessors-in-interest (ie., John and Fern Kauer) and the local watermaster. In that case, the local watermaster cut the West Springs Ditch in 1954 at the insistence of the McConnells' predecessors to provide them delivery of

⁴ The seven rights are 74-361, 74-362, 74-363, 74-364, 74-365, 74-367, & 74-368.

certain spring waters via the historic flow of Stroud Creek. *Whittaker*, 78 Idaho at 98, 298 P.2d at 747. When the watermaster cut the West Springs Ditch he temporarily restored the historic flow of water past the Ditch, which was then diverted “some 650 feet below” by the McConnells’ predecessors. *Id.* Whittaker’s predecessor sued the watermaster and the McConnells’ predecessors in a quiet title action to determine ownership of the disputed waters. *Id.* at 95, 298 P.2d at 746.

In the course of its decision, the Court reviewed the history of the West Springs Ditch and its alteration of the flow of Stroud Creek. It found the West Springs Ditch was constructed in 1932 to alter the flow of Stroud Creek pursuant to agreement of the parties:

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

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

The court further found that pursuant to such contract the ditch referred to was constructed in and upon the right of way granted therefor over the aforementioned John Whittaker lands and that the ditch has been used continuously by appellants’ predecessors and by appellants (and other interested parties) ever since the year 1932, without interference, for the conveyance of said decreed waters from [Stroud Creek] to the Right Fork, and then down to and through the main channel of Lee

Creek, to the lands now owned by appellants, to which the waters were decreed by the July 1, 1912 decree

Id. at 97-98, 298 P.2d at 747 (emphasis in original). The Court's decision establishes that the McConnells' predecessors agreed to alter the flow of Shroud Creek via the construction of the West Springs Ditch. *Id.* In exchange, the McConnells' predecessors acquired a right of way for a ditch to traverse Whittaker's land conveying water from Stroud Creek to the Right Fork of Lee Creek. *Id.* That ditch, which was constructed in 1932, is now known as the "Kauer Ditch."

The Court ultimately quieted title in the disputed water to Whittaker's predecessors, in effect concluding that the watermaster erred in cutting the West Springs Ditch. *Id.* at 99, 298 P.2d at 748. In so doing, the Court again emphasized the agreement of the parties:

The findings of the trial court, hereinbefore referred to, show that the waters of the West Springs have been used by respondents' predecessors and by respondents continuously since some time prior to the entry of the July 1, 1912 decree; also that commencing with the year 1932, pursuant to and upon consummation of the contract referred to, the predecessors of appellants allowed respondents to capture all the waters of [Stroud Creek] found flowing in the Creek at the place where, pursuant to the contract respondents constructed said dam below appellants' newly designated upstream point of diversion, and such waters so captured by respondents included the waters of the West Springs.

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

Id. at 98, 298 P.2d at 747-748.

As a result of the 1932 agreement and the Court's decision in *Whittaker*, the West Springs Ditch remains in place today and continues to alter the flow of Stroud Creek as it has done since 1932.⁵ The result is that Stroud Creek flows into Lee Creek below the McConnells' Upper Diversion. With respect to the Kauer Ditch, the McConnells and their predecessors enjoyed use of that ditch from 1932 until 2014. R., 191. That the McConnells' use of the Kauer

⁵ With the exception of the brief span of time when the local watermaster cut the ditch in 1954.

Ditch ceased in 2014 was not the result of any action taken by Whittaker. Rather, the McConnells were subject to a Department enforcement action in 2014 whereby the local watermaster directed them to cease Kauer Ditch diversions on the basis they were unauthorized.⁶ The McConnells acquiesced and ceased diversions via the Kauer Ditch in 2014.

ii. The record establishes that Stroud Creek presently flows into Lee Creek below the McConnells' Upper Diversion.

Injury to water right 74-157 turns on whether Stroud Creek flows into Lee Creek upstream or downstream of the McConnells' Upper Diversion. R., 188. If Stroud Creek flows into Lee Creek upstream of the Upper Diversion, then adding a second point of diversion at the Lower Diversion will have no impact upon the administrative relationship between the McConnells' senior water rights and Whittaker water right 74-157. Therefore, there would be no injury. However, if Stroud Creek flows into Lee Creek downstream of the Upper Diversion, then the administrative relationship between the McConnells' senior water rights and Whittaker water right 74-157 will be changed as a result of the proposed transfer. In that scenario, the transfer will provide the McConnells with administrative access to water right 74-157 which they did not previously have. Namely, the transfer will allow them to use their senior rights to call water right 74-157 in times of shortage, resulting in injury to water right 74-157.

The record establishes that Stroud Creek presently flows into Lee Creek below the McConnells' Upper Diversion. Jordan Whittaker, David Tomchak, and the current watermaster for Water District 74Z, Merritt Udy, all testified that Stroud Creek flows into Lee Creek below the Upper Diversion. *Tr.*, 332-333; 597; 281. Bruce McConnell likewise testified that Stroud Creek flows into Lee Creek below the Upper Diversion:

Q: Okay. In your -- the questioning from Mr. Bromley, I believe I heard you say that Stroud Creek comes into Lee Creek above both your diversion points. Did I understand your testimony correctly?

A: I don't think -- Stroud Creek comes in kind of in between them, you know, and -- at present day. You know, what -- what -- I have never -- I had never spent that much time in that creek until last summer. So year, at the present time Stroud Creek comes in real close, comes in below my upper diversion.

⁶ This enforcement action as well as a second enforcement action against the McConnells will be addressed further herein.

Q: And is that based upon your own observation?

A: Yes, that's what -- yeah.

Q: So you would agree that right now it comes in below your upper diversion point?

A: Yes.

Tr., 72. Therefore, the present flow of Stroud Creek is undisputed – it flows into Lee Creek below the McConnells' Upper Diversion. That such is the case is consistent with the Idaho Supreme Court's decision in *Whittaker*, wherein the Court found that the West Springs Ditch has altered the flow of Stroud Creek since 1932. It is also consistent with the 1932 agreement relied upon in *Whittaker*, wherein the McConnells' predecessors agreed to alter the flow of Stroud Creek via construction of the West Springs Ditch.

The Director recognizes that Stroud Creek presently flows into Lee Creek below the McConnells' Upper Diversion. Notwithstanding, he does not base his injury analysis on that reality. Instead, he bases his analysis on the conception that Stroud Creek would presently flow into Lee Creek above the Upper Diversion but for the construction of the West Springs Ditch:

The hearing officer concluded the stream channel of Stroud Creek has been intercepted by Whittaker's West Springs Ditch. This unauthorized diversion has dewatered the historic Stroud Creek stream channel. But for the 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 diversion.

R., 347.

The Director's finding in this respect is based on circumstances that do not exist. The West Springs Ditch has altered the flow of Stroud Creek since 1932.⁷ The McConnells'

⁷ The Director implies the West Springs Ditch is unauthorized. Whittaker disagrees and maintains that the West Springs Ditch is an authorized alteration to the flow of Stroud Creek. As far as the Court is aware, there has never been a determination that the 1932 alteration of the flow of Stroud Creek via the West Springs Ditch is unauthorized. The record establishes the West Springs Ditch has been in place since 1932 and has altered the flow of Stroud Creek continuously since that time, save a brief period of time in 1954 when the local watermaster cut the Ditch. In *Whittaker*, the Court in effect held the watermaster erred in cutting the West Springs Ditch and relied upon the parties' agreement to alter the flow of Stroud Creek in making its decision. The Court in that case did not find the West Springs Ditch to be unauthorized. The Court also notes that although the Department commenced enforcement actions against the McConnells with respect to the Kauer Ditch and the Lower Diversion, no such enforcement action has been commenced by the Department in relation to the West Springs Ditch. To the contrary, the record establishes the West Springs Ditch remains in place today and continues to alter the flow of Stroud Creek

predecessors agreed to that alteration pursuant to the 1932 agreement. Their agreement was given in exchange for a right of way to locate the Kauer Ditch on land owned by Whittaker. The effect of the 1932 agreement was that the McConnells' predecessors gave up the ability to have water delivered to their senior rights via the historic flow of Stroud Creek. In exchange, they acquired the ability to have water delivered to their senior rights via two alternative routes. First, water could and was delivered to those rights via the Kauer Ditch. This occurred from 1932 until 2014. Second, water could and was delivered to those rights via the altered flow of Stroud Creek by way of their Lower Diversion. This occurred until 2020. Under this agreed upon arrangement, the priority of the McConnells' senior rights was protected via these two alternative routes, despite the alterations to the flow of Stroud Creek resulting from the West Springs Ditch.

As a result of the way the McConnells claimed their water rights in the Snake River Basin Adjudication ("SRBA"), they lost the ability to have water delivered via these two alternative routes. This is because the McConnells failed to claim the Kauer Ditch and/or the Lower Diversion as authorized points of diversions for their water rights in that adjudication. Instead, they claimed, and their water rights were decreed with, the Upper Diversion as the sole authorized point of diversion. As a result, the McConnells were subject to two Department enforcement actions whereby the local watermaster directed them to cease diversions at both the Lower Diversion and at the Kauer Ditch based on determinations those diversions were unauthorized. The McConnells did not challenge those determinations.

The Court finds that based on the circumstances as they exist following the SRBA, the proposed transfer would injure Whittaker's water right 74-157. It would permit the McConnells to have administrative access to that right; access they otherwise lack as a result of their failure to claim the Kauer Ditch and/or the Lower Diversion in the SRBA and the resulting enforcement actions by the Department. Whittaker should not be required to restore the original flow of Stroud Creek, thereby causing significant disruption to a system that has been in place since 1932 based on the agreement of the McConnells' predecessors, because the McConnells failed to claim the two alternative routes of delivery in the SRBA. As noted by the Court in *Whittaker*, "it is inescapable" that the McConnells' predecessors had knowledge of, and consented to, the

as it has for 90 years. At oral argument, in response to questioning by the Court, counsel responded that Whittaker received a notice of violation for failure to have a measuring device for springs flowing into the West Springs Ditch. However, no violation has issued related to the authorization of the West Springs Ditch. The Court notes that legal status of the West Springs Ditch is not before the Court in this proceeding.

alteration of the flow of Stroud Creek via the West Springs Ditch. *Whittaker*, 78 Idaho at 98, 298 P.2d at 748. The record also establishes that for 90 years neither the McConnells, nor their predecessors, have asserted any claim regarding the legal validity of the 1932 alteration of Stroud Creek. It follows the *Final Order* must be set aside and remanded for further proceedings. In so remanding, the Court notes that any injury to Whittaker water right 74-147 can be addressed by a subordination condition subordinating the use of the McConnells' Lower Diversion to that right.

iii. The SRBA did not supercede the 1932 agreement as to the alteration of the flow of Stroud Creek.

The McConnells argue that the 1932 agreement was superceded by the SRBA. The Court disagrees. The McConnells rely on *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017). In that case, the City of Blackfoot relied upon an agreement between it and other water users to argue that its decreed water right authorized the diversion of water for recharge purposes. *Id.* at 308-309, 396 P.3d at 1190-1191. The Idaho Supreme Court disagreed, holding that the plain language of the subject decree did not include recharge as an authorized use under the purpose of use element. *Id.* The Court held that to allow the referenced agreement “to enlarge or otherwise alter the clearly decreed elements of” the water right would constitute an impermissible collateral attack on the decree. *Id.* Further, that if the City of Blackfoot believed recharge should have been authorized under the right, it was required to raise that issue in the SRBA. *Id.*

The 1932 agreement is distinguishable from the agreement addressed in *City of Blackfoot*. While the agreement in *City of Blackfoot* addressed a defining element of the water right (i.e., purpose of use), the 1932 agreement is an agreement to alter the flow of Stroud Creek. The flow of Stroud Creek is not an element of a water right. As such, issues related to the flow of Stroud Creek were not raised or addressed in the SRBA. Therefore, the Court finds that the SRBA did not supercede the 1932 agreement as to the accord to alter the flow of Stroud Creek.

iv. The Court need not reach Whittaker's equity arguments.

Whittaker argues that equity should apply to preclude the McConnells from taking a position in this proceeding inconsistent with the previous agreement by their predecessors to

alter the flow of Stroud Creek. Since the Court finds the *Final Order* must be set aside and remanded for the reasons set forth above, it need not reach the issue of equity.

v. Prejudice to substantial rights.

Water rights are substantial rights as they are real property rights under Idaho law. I.C. § 55-101. The *Final Order* prejudices Whittaker's substantial rights in water right 74-157 by providing the McConnells administrative access to that right which they lacked without the proposed transfer. Any prejudice to Whittaker's substantial rights can be addressed on remand by a subordination condition subordinating the use of the McConnells' Lower Diversion to water right 74-157.

B. Attorney fees.

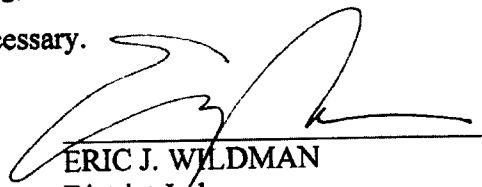
The McConnells seek an award of attorney fees under Idaho Code § 12-117(1). That code section provides for fees to the prevailing party where the Court finds "that the nonprevailing party acted without a reasonable basis in fact or law." The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the McConnells are not a prevailing party on appeal. Therefore, an award of attorney fees under Idaho Code § 12-117 is unwarranted.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the *Final Order* is set aside and remanded for further proceedings as necessary.

Dated July 18, 2022


ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

Gary Spackman
Director – Idaho Department of Water
Resources
PO Box 83720
Boise ID 83720-0093
gary.spackman@idwr.idaho.gov

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
 By personal delivery

Garrick Baxter
Mark Cecchini-Beaver
The Idaho Department of Water Resources
PO Box 83720
Boise ID 83720-0098
Garrick.baxter@idwr.idaho.gov
Mark.cecchini-beaver@idwr.idaho.gov

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
 By personal delivery

Chris Bromely
Candice McHugh
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise ID 83702
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
 By personal delivery

Robert Harris
Luke Marchant
Holden, Kidwell, Hahn & Crap, PLLC
PO Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls ID 83405
rharris@holdenlega.com
lmarchant@holdenlegal.com

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
 By personal delivery

Dated: 7/18/2022 04:32 PM

Clerk of the Court

By Jana Eagle
Deputy Clerk

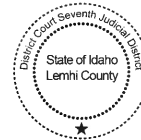


Exhibit 2

**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) Case No. CV30-21-304
WHITTAKER TWO DOT RANCH LLC, an)
Idaho limited liability company,) **JUDGMENT**

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER)
RESOURCES, an administrative agency of the)
State of Idaho,)

Respondent,

and

BRUCE AND GLENDA MCCONNELL,

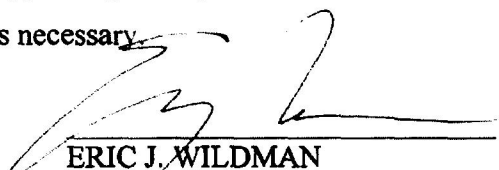
Intervenors.

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

JUDGMENT IS ENTERED AS FOLLOWS:

The Respondent's *Final Order Approving Transfer* dated November 2, 2021, is set aside and remanded for further proceedings as necessary.

Dated July 18, 2022


ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

Gary Spackman
Director – Idaho Department of Water
Resources
PO Box 83720
Boise ID 83720-0093
gary.spackman@idwr.idaho.gov

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
 By personal delivery

Garrick Baxter
Mark Cecchini-Beaver
The Idaho Department of Water Resources
PO Box 83720
Boise ID 83720-0098
Garrick.baxter@idwr.idaho.gov
Mark.cecchini-beaver@idwr.idaho.gov

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
 By personal delivery

Chris Bromely
Candice McHugh
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise ID 83702
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
 By personal delivery

Robert Harris
Luke Marchant
Holden, Kidwell, Hahn & Crap, PLLC
PO Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls ID 83405
rharris@holdenlega.com
lmarchant@holdenlegal.com

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
 By personal delivery

Dated: 7/18/2022 04:33 PM

Clerk of the Court

By *Jana Eagle*
Deputy Clerk

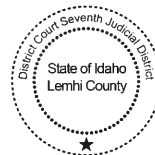
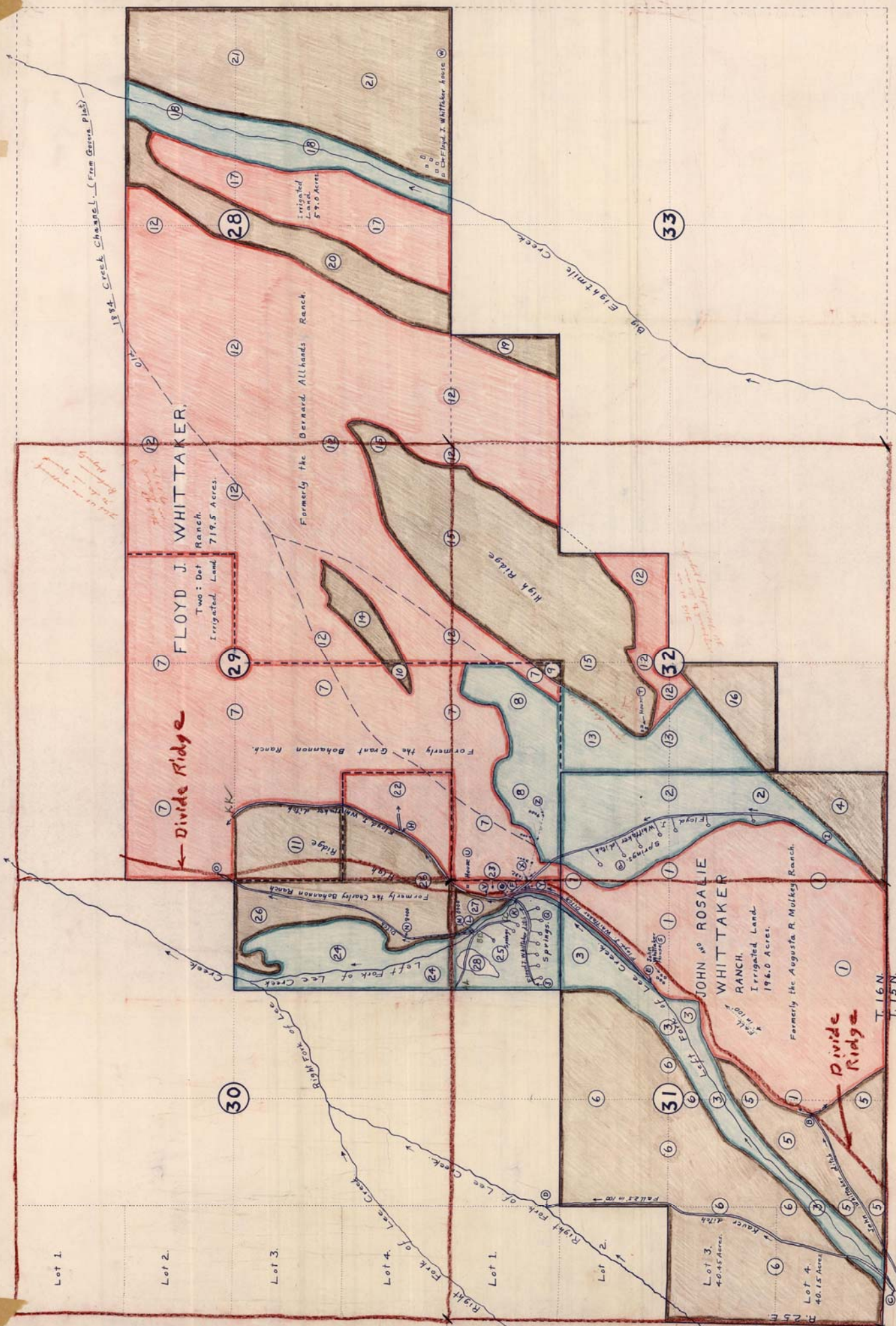


Exhibit 3



100' = 1 inch

DETAILS OF SPECIAL POINTS, ZONES AND THEIR LOCATIONS.

Point	Top of Zone	Sub-division	Point description
A	6	15N	1825-1826 Head of John Whittaker ditch.
B	31	15N	1825-1825 Corner John Whittaker ditch and land.
C	4	15N	1825-1825 Head of Kasser ditch.
D	31	15N	1825-1825 Corner Right Fork of Lee Creek.
E	31	15N	1825-1825 Head of Floyd J. Whittaker ditch.
F	31	15N	1825-1825 Corner of Floyd J. Whittaker ditch, corner with the main ditch.
G	31	15N	1825-1825 West.
H	29	15N	1825-1825 Park of J. J. Whittaker main ditch.
I	32	15N	1825-1825 Head of East Sprague ditch.
J	31	15N	1825-1825 Head of West.
K	31	15N	1825-1825 Ditch head corner of Floyd J. Whittaker ditch.
L	31	15N	1825-1825 Where north fence was located.
M	30	15N	1825-1825 North end of old fence location.
N	30	15N	1825-1825 North end of land under 5th zone.
O	29	15N	1825-1825 East Springs.
P	32	15N	1825-1825 West Springs.
Q	31	15N	1825-1825 John Whittaker house.
R	4	15N	1825-1825 John Whittaker house.
S	31	15N	1825-1825 Floyd J. Whittaker lake house.
T	32	15N	1825-1825.
U	31	15N	1825-1825 South of Ridge 5th zone.
V	31	15N	1825-1825.
W	28	15N	1825-1825 Floyd J. Whittaker house, corner.
X	32	15N	1825-1825 Land on upper corner point F.
Y	31	15N	1825-1825 East end of levels taken.
Z	32	15N	1825-1825 East end of levels taken.

All the above are in R. 25 E. N.

Note:
 Section 6,
 Township 4,
 Range 25 E.,
 is unsurveyed land.

FLOYD J. WHITTAKER & JOHN WHITTAKER RANCHES, and its classification in the five groups:

Year of Survey	The John Whittaker Ranch	The Flood J. Whittaker Ranch	Formerly the Grand Bohannon	Formerly East and Grand Alllands	Formerly the Charles Bohannon
1	184				
2	65				
3	30				
4	23				
5	1159				
6	1276				
7	248				
8	36				
9	115				
10	4382				
11	360				
12	4382				
13	315				
14	182				
15	182				
16	28				
17	27				
18	8				
19	8				
20	41				
21	465				
22	87				
23	87				
24	465				
25	87				
26	87				
27	87				
28	25				
TOTALS	1760	1159	2486	360	4382
GROUP	1	2	3	4	5
TOTALS	560.6	320.0	629.0	291.0	1660.0

WATER RIGHTS:
 John B. Redding Creek, 600 feet of Lee Creek, Dated May 15th, 1883.
 205 acres of Lee Creek, Dated May 1st, 1904.
 Cora. Redding's: 50 inches of Lee Creek, Dated May 12th, 1883.
 65 inches of Lee Creek, Dated June 1st, 1890.
 Julie E. Redding's: 95 inches of Lee Creek, Dated May 15th, 1883.
 70 inches of Lee Creek, Dated June 1st, 1900.
 James R. Schoonover: 30 inches of Left Fork Lee Creek, Dated May 12th, 1883.
 280 inches of Right Fork Lee Creek, Dated Nov. 28th, 1899.
 Grant Bohannon: 120 inches of Left Fork Lee Creek, Dated May 12th, 1883.
 Augustus R. McElroy: 200 inches of Left Fork Lee Creek, Dated May 12th, 1883.

MAP OF FLOYD J. WHITTAKER AND JOHN WHITTAKER RANCHES IN LEMHI COUNTY, IDAHO. SHOWING THEIR WATER RIGHTS FROM THE LEFT FORK OF LEE CREEK, THE ACRES OF EACH TRACT, AND THE DITCH PROFILE LEVELS TAKEN. IN SECTIONS 28 TO 33 T. 16 N., R. 25 E. OF BOISE MERIDIAN.

LEGEND:
 (1) Tract numbers.
 (A) Point or Zone numbers.
 Irrigated Land.
 Grazing Land.
 Waste Land.
 Houses and other bldgs.
 Springs.
 Creeks.
 Ditches.
 Old Creek channel in 1884.
 Property Boundary (Present).
 Formerly Property Lines.
 Quarter and Lot Lines.
 Line of Levels Taken.
 Present water, out 2, 1924.
 Profiles.
 Profile from (1) to (4) Ditch.
 Profile from (5) to (8) Ditch.
 Profile from (9) to (12) Ditch.
 Profile from (13) to (16) Ditch.

Engineers' Certificate:
 The above plat was made by me from a survey made by me from 1924 to 1925 and from a bearing of made of the Aerial Photograph in the County Assessor's Office at Salmon, Idaho, in 1924. The survey was of the twenty-eight tracts, were platted therefrom a base map from which this plat was made. The above plat is a true and correct representation of the knowledge and belief of me.
 E. White Clerk
 Registered Professional Engineer, No. 44
 Idaho, Oct. 12, 1922.

Exhibit 4

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 84441)	PRELIMINARY ORDER
IN THE NAME OF)	APPROVING TRANSFER
<u>BRUCE AND GLENDA MCCONNELL)</u>	

On October 5, 2020, Bruce and Glenda McConnell (“McConnell”) filed Application for Transfer 84441 (“Application 84441”) with the Idaho Department of Water Resources (“Department”). Application 84441 was protested by James Whittaker and Whittaker Two Dot Ranch LLC (collectively “Whittaker”¹), David R. Tomchak (“Tomchak”), Smith 2P Ranch, Steven Johnson (“Johnson”), and Rosalie Ericsson (“Ericsson”). The Department conducted a pre-hearing conference on February 9, 2021. During the conference, the parties requested that an administrative hearing be held to decide the contested case.

The Department conducted an administrative hearing on April 21 and 22, 2021 in Salmon, Idaho. McConnell was represented by attorney Chris Bromley. Tomchak was represented by attorney Kipp Manwaring. Whittaker was represented by attorney Rob Harris. Smith 2P Ranch was represented by Shanna Foster. Johnson represented himself. Ericsson did not attend the hearing.

Exhibits 1-20 and 22-24 offered by McConnell, Exhibits 151-161 offered by Whittaker, and Exhibits 301-312 offered by Tomchak were admitted into the administrative record. Exhibit 21 was not offered by McConnell. Protestants Smith 2P Ranch and Johnson did not offer any exhibits into the record. McConnell called Bruce McConnell, Scott King (expert) and Cindy Yenter as witnesses. Whittaker called Merritt Udy, Jordan Whittaker, Larry Borstelmann, James Whittaker and Bryce Contor (expert) as witnesses. Tomchak called David A. Tomchak and David R. Tomchak as witnesses. Shanna Foster testified on behalf of Smith 2P Ranch and Johnson testified on his own behalf.

On April 9, 2021, McConnell filed a *Motion in Limine and/or Motion to Strike* (“Motion”) proposing to exclude certain exhibits offered by Whittaker and to prevent Whittaker’s witnesses from testifying about certain topics. On April 12, 2021, Tomchak filed a *Notice Joining in Part McConnell’s Motion in Limine*. On April 20, Whittaker filed a *Memorandum in Opposition to McConnell Motion in Limine and/or Motion to Strike*. The hearing officer denied the *Motion* on the record at the beginning of the hearing.

¹ Protestants James Whittaker and Whittaker Two Dot Ranch were represented by attorney Rob Harris in this contested case. As such, they provided evidence and argument jointly. This order uses “Whittaker” to refer to the two parties collectively, and uses the names James Whittaker, Jordan Whittaker or Whittaker Two Dot Ranch when the collective reference would not be accurate.

After carefully considering the evidence in the record, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

11. Lee Creek is comprised of four tributary streams (Everson Creek, Stroud Creek, Porcupine Creek and Right Fork of Lee Creek). Ex. 1 at 13-14, Figure 9. Everson Creek and Stroud Creek flow together shortly after the streams leave the national forest. *Id.* This combined creek is designated as Stroud Creek on a United States Geological Survey (“USGS”) Map², but is also known as Left Fork of Lee Creek.³ *Id.* Porcupine Creek flows into Right Fork of Lee Creek approximately one-half mile upstream of the Upper Diversion. *Id.*

Confluence of Stroud Creek and Right Fork of Lee Creek

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

13. 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 (USGS Map shows confluence at that location); Ex. 154 (1954 map prepared by Milton Christensen, a professional engineer, shows confluence at that location); Ex. 1 at 12-13, Figure 8 (1970 Lemhi Adjudication map shows only one diversion, the Upper Diversion, in existence at the time the map was prepared); Ex. 156 (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 and G (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

² Stroud Creek Quadrangle, Lemhi County, Idaho, 7.5 Minute Series (Topographic), edited in 1989 based on aerial photographs taken in 1985 and field checked in 1986. This order refers to this 1989 map as the “USGS Map.”

³ Consistent with the USGS Map, this order refers to Left Fork of Lee Creek as “Stroud Creek.”

by McConnell and are diverted at the Upper Diversion); Ex. 151 at Attachment, Exhibit A (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 Rights⁴).

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

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

15. Water rights 74-369, 74-1136 and 74-15788 currently authorize only one point of diversion on Stroud Creek. This diversion (hereinafter “Whittaker Diversion”), is located in the SENE, Section 31, T16N, R25E. Ex. 1 at Appendix G; Ex. 153 at Figure 11.

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, 74-15788. The other location is the point where Stroud Creek is intercepted by a ditch known as the West Springs Ditch. Ex. 154.

17. Water rights 74-369, 74-1136 and 74-15788 are limited to a total combined diversion rate of 4.40 cfs from Stroud Creek at the Whittaker Diversion. Ex. 1 at Appendix G. If the flow in Stroud Creek exceeds 4.40 cfs (or 2.40 cfs when water rights junior to May 12, 1883 are curtailed), the excess flow in Stroud Creek bypasses the Whittaker Diversion. Ex. 153 at Figure 12 (showing Stroud Creek water flowing past the Whittaker Diversion); Testimony of Contor (confirming that Stroud Creek water bypasses the Whittaker Diversion). The water rights held by Whittaker do not authorize any diversion from Stroud Creek downstream of the Whittaker Diversion.

18. The West Springs Ditch is a deep, excavated ditch, running from west to east across the Stroud Creek channel. Testimony of James Whittaker (describing excavation of the ditch); Ex. 154; Ex. 153 (ditch is four to five feet wide and three to four feet deep). The West Springs Ditch was constructed to capture the flow from a number of springs in the area. Ex. 154. There is a man-made berm running along the north side of the ditch which prevents any flow in Stroud Creek from continuing to the north (downstream) past the ditch. Testimony of Jordan Whittaker, Contor, and David R. Tomchak; Ex. 151 at 7 (“From 1932 through July 2020 and presumably through the present there has not been a physical channel or means for flow in Stroud Creek (Left Fork) to proceed downstream beyond the West Springs Ditch . . .”).

⁴ The 1912 Decree for Lee Creek identified the source of water right 74-367 as Left Fork of Lee Creek and the source for water right 74-368 as Right Fork of Lee Creek. The authorized source for water rights 74-367 and 74-368 was identified as Lee Creek in later decrees. Ex. 151 at Appendix, *Proposed Finding of Water Rights in the Lemhi River Basin*. The 1912 Decree did not assign or refer to water rights by number. For ease of reference, this order uses the current water right numbers to refer to the relevant water rights.

19. The West Springs Ditch captures all of the water flowing in Stroud Creek at that location. Ex. 156, *Whittaker v. Kauer*, 78 Idaho at 97, 298 P.2d at 747. Currently, there is “no . . . flume, siphon or culvert that would allow [Stroud Creek] to pass under or over the [West Springs Ditch].” Ex. 153 at 4. The intersection of the West Springs Ditch and Stroud Creek is located approximately 2000 feet downstream of the Whittaker Diversion. Ex. 154.

20. The West Springs Ditch is not currently equipped with a lockable, controlling works which would allow the watermaster to curtail the diversion of Stroud Creek into the West Springs Ditch. Ex. 20; Testimony of Yenter.

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

22. At the divide ridge between the drainages, Whittaker maintains a control structure, known as the hilltop splitter, which can send water into a ditch heading northeast for irrigation use by Whittaker or into a ditch running north toward Lee Creek. Testimony of Jordan Whittaker and Contor. Water released by Whittaker at the hilltop splitter is conveyed in a man-made channel for approximately 500 feet and is then injected into an old ditch, known as the Bohan or Bohannan Ditch (hereinafter “Bohan Ditch”). Testimony of Contor; Ex. 153 at Figure 11; Ex. 151 at 9 (“When [Stroud Creek] flows are discharged from Whittaker’s ditch, they first enter the remnants of an old ditch identified . . . as the ‘Bohan’ ditch . . .”); Ex. 154.

23. The Bohan Ditch runs east of the Stroud Creek channel. Ex. 154; Ex. 153 at Figures 20 and 21 (the Bohan Ditch, which carries the water released by Whittaker, is located approximately 120 feet east of the Stroud Creek channel). The Bohan Ditch generally runs to the north-northeast, whereas the Stroud Creek channel generally runs to the north-northwest. Ex. 154; Ex. 153 at Figure 20.

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. 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; Ex. 154.

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.

27. Water right 74-369, held by James Whittaker, bears a priority date of May 12, 1883 and authorizes the diversion of 2.40 cfs from Stroud Creek (Left Fork of Lee Creek) for the irrigation of 275.4 acres. Ex. 1 at Appendix G. The only authorized point of diversion for water right 74-369 is the Whittaker Diversion. *Id.*

28. Water right 74-370, held by Ericsson, bears a priority date of May 12, 1883 and authorizes the diversion of 4.00 cfs from Stroud Creek (Left Fork of Lee Creek) for the irrigation of 186 acres. Ex. 1 at Appendix C. The authorized point of diversion for water right 74-370 is located approximately one mile upstream of the Whittaker Diversion. *Id.* at 15, Figure 10.

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

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

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

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

32. Tomchak holds the following irrigation water rights on Everson Creek:

Right No.	Priority Date	Uses	Period of Use	Rate (cfs)	Acres
74-2195A	12/11/1915	Irrigation	3/15 – 11/15	1.40	65
74-2261A	12/21/1941	Irrigation	3/15 – 11/15	1.00	65
74-2339A	12/21/1941	Irrigation	3/15 – 11/15	1.00	65
Combined Limits:				2.40	65

33. Shanna Foster and Jennifer Ayers (who are in the process of forming Smith 2P Ranch) hold the following water rights on Everson Creek:

Right No.	Priority Date	Uses	Period of Use	Rate (cfs)	Acres
74-1615	4/1/1919	Irrigation	3/15 – 11/15	2.43	121.4
		Stockwater	1/1 – 12/31	0.02	
74-2351	1/9/1963	Irrigation	3/15 – 11/15	0.55	27.3
Totals:				3.00	148.7

34. The Tomchak and Foster/Ayers irrigation rights are diverted from a common point of diversion on Everson Creek, located approximately 3,000 feet upstream of the confluence of Everson Creek and Stroud Creek. Ex. 1 at 15, Figure 10.

35. The irrigation rights held by Tomchak and Foster/Ayers (74-2195A, 74-2261A, 74-2339A, 74-1615 and 74-2351) are junior to the McConnell Rights.

36. During times of scarcity, junior water rights on Stroud Creek and Everson Creek are curtailed by the watermaster for Water District 74Z to supply water to downstream senior water rights. Testimony of Udy and David R. Tomchak.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications and states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. . . . In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth.

ANALYSIS

Confluence of Stroud Creek and Right Fork of Lee Creek

Currently, water released from the Whittaker ditch system flows into Lee Creek below McConnell's Upper Diversion. The hearing officer must determine whether this site represents the natural confluence of Stroud Creek and Right Fork of Lee Creek. This determination is critical in the evaluation of whether the changes proposed in Application 84441 will result in injury or enlargement. 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. If, on the other hand, the confluence is upstream of the Upper Diversion, then adding the Lower Diversion to the McConnell Rights will have little effect on junior water rights on Stroud Creek, the administration of water rights in Water District 74Z, or the amount of water available to satisfy the McConnell Rights.

The parties clearly recognize that the location of the confluence of Stroud Creek and Right Fork of Lee Creek is the critical question of fact in this contested case. The parties offered reports, photos and extensive testimony about the current path of water through the Stroud Creek drainage. McConnell asserts that the Department should evaluate Application 84441 based on the confluence shown on the USGS Map, upstream of the Upper Diversion. The protestants, however, contend that the current flow path through the Whittaker ditch system has become the natural channel of Stroud Creek and that the Department should recognize the current return flow site (located downstream of the Upper Diversion) as the natural confluence.

The record contains substantial, compelling evidence that the confluence of Stroud Creek and Right Fork of Lee Creek was once located near the southwest corner of the SENE of Section 30, T16N, R25E, upstream of McConnell's Upper Diversion:

1. The USGS Map shows the confluence in the SWSENE of Section 30. Ex. 24. The USGS Map was prepared in 1989 but was based on aerial imagery from 1985 and was field checked in 1986. *Id.*
2. A map prepared in 1954 by Milton Christensen, a professional engineer, shows the confluence at the same approximate location as the USGS Map. Ex. 154. The 1954 map was based on an aerial photo from August 1946. Ex. 155. According to Christensen's notes, he created the map by tracing lines over the 1946 aerial photo. *Id.* Christensen identifies the Stroud Creek channel downstream of the West Springs Ditch as an active, existing creek channel rather than an old creek channel. Ex. 154; Ex. 155.
3. A map prepared around 1970 for the Lemhi River Basin Adjudication shows that the McConnell Rights used to be diverted from a single point of diversion located at or near the Upper Diversion. Ex. 1 at 12-13 and Figure 8. The Lower Diversion did not exist at that time. *Id.* Although the portion of the map included in the record for this contested case does not extend to the SWSENE of Section 30, the map does not show any stream joining Lee Creek immediately downstream of the Upper Diversion. *Id.*
4. In 1956, the Idaho Supreme Court issued its decision in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956). The primary issue in the case was whether Kauer, McConnell's predecessor in interest, could call for water from certain springs arising on Whittaker's property and flowing into Stroud Creek. Ex. 156. At the time, the McConnell Rights were diverted at a point near the Upper Diversion. Ex. 1 at 12-13 and Figure 8. If the confluence of Stroud Creek and Right Fork of Lee Creek were downstream of the Upper Diversion in 1956, there would be no reason for Kauer to make a call for the spring water arising on the Whittaker property and flowing into Stroud Creek. The only way the *Kauer v. Whittaker* case makes sense is if the confluence of Stroud Creek and Right Fork of Lee Creek were located upstream of the Upper Diversion.

5. Water rights 74-369 and 74-370 authorize the diversion of water from Stroud Creek (Left Fork of Lee Creek) and include the following condition:

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

The only water rights in the Lee Creek drainage which bear a priority date of May 12, 1883 are water right 74-369 (held by James Whittaker), water right 74-370 (held by Ericsson) and water rights 74-361, 74-363, 74-365 and 74-367 (held by McConnell and diverted at the Upper Diversion). The condition protecting water rights 74-369 and 74-370 from proration with other May 12, 1883 water rights only makes sense if Stroud Creek could be used to satisfy water rights 74-361, 74-363, 74-365 and 74-367.⁶ If the confluence of Stroud Creek and Right Fork of Lee Creek were downstream of the Upper Diversion, there would be no need for the condition because water rights 74-361, 74-363, 74-365 and 74-367 would have had no way to access water in Stroud Creek.

6. The 1912 Decree for Lee Creek (*Reddington v. Bohannon et al.*) identifies Right Fork of Lee Creek, Stroud Creek (Left Fork of Lee Creek), and Lee Creek as distinct sources on various water rights. The decree identifies Lee Creek as the authorized source for most of the water rights now held by McConnell (74-361, 74-362, 74-363 and 74-365), suggesting that these rights were diverted downstream of the confluence of Stroud Creek and Right Fork of Lee Creek. If the confluence were downstream of the point of diversion for these rights, the source for the rights would likely have been identified as Right Fork of Lee Creek. The 1954 map prepared by Christensen also identifies the source for the McConnell Rights as Lee Creek, but clearly identifies the creeks upstream of the confluence as the Right Fork and Left Fork of Lee Creek, suggesting that the McConnell Rights were diverted downstream of the confluence. Ex. 154; Ex. 155.

⁵ The 1912 Decree for Lee Creek described the same protection for water rights 74-369 and 74-370. Ex. 151 at Appendix (Exhibit A) (“It is further ordered that [the owners of water rights 74-369 and 74-370] shall not be obliged to pro-rate with any other parties to this action, whose right of appropriation is of equal priority therewith, in the case the flow of the waters of the said Left Fork shall be of insufficient quantity to supply all rights, under date of May 12th, 1883.”). In 1912, water right 74-367 was diverted from Stroud Creek (Left Fork of Lee Creek). One could argue that the proration language only applied to water rights 74-367, 74-369 and 74-370. The language protecting water rights 74-369 and 74-370 from proration, however, applied when Stroud Creek was insufficient to satisfy “all rights, under date of May 12th, 1883,” not just the Stroud Creek rights, suggesting that all rights bearing that priority date had access to water in Stroud Creek. The 1912 Decree did not assign or refer to water rights by number. For ease of reference, this order uses the current water right numbers to refer to the relevant water rights.

⁶ The protestants may argue that the protection against proration was only needed because water rights 74-361, 74-363, 74-365 and 74-367 were once diverted from Stroud Creek through the Kauer Ditch, located on Stroud Creek approximately one mile upstream of the Whittaker Diversion. The 1912 Decree, however, included the protection against proration before the Kauer Ditch was constructed. The Kauer Ditch was constructed around 1932. *Kauer v. Whittaker*, 78 Idaho at 97, 298 P.2d at 747.

The confluence in the SWSENE of Section 30 is not active. Currently, without a water right authorizing the diversion of Stroud Creek at the West Springs Ditch⁷, Whittaker diverts all of the Stroud Creek water bypassing the Whittaker Diversion into the West Springs Ditch and conveys that water to the eastern-most edge of the Stroud Creek drainage. Ex. 154 (water in West Springs Ditch conveyed east to the divide ridge which separates the Stroud Creek drainage from the Big Eightmile Creek drainage). In recent years, when Whittaker has been required to bypass water to satisfy the McConnell Rights, Whittaker has injected water from the Whittaker ditch system into the Bohan Ditch, an old ditch which once diverted water from Stroud Creek to the eastern side of the Stroud Creek drainage. Ex. 151 at 9; Ex 154. It is not surprising that the Stroud Creek water diverted and then released by Whittaker flows into Lee Creek approximately one-half mile northeast of the confluence shown on the USGS Map. If the natural channel were reestablished between the Whittaker Diversion and the West Springs Ditch, the West Springs Ditch were flumed over Stroud Creek⁸, and the remnants of the old Bohan Ditch were filled in, the hearing officer is not persuaded that the confluence of Stroud Creek and Right Fork of Lee Creek would be located downstream of the Upper Diversion.

Whittaker argues that the water course through the Whittaker Two Dot Ranch property has been in place for so long it now constitutes the natural channel of Stroud Creek. The hearing officer rejects this argument. The current water course through the Whittaker property is not the natural channel of Stroud Creek. It is a series of ditches and man-made channels.⁹ Jordan Whittaker testified that the Stroud Creek channel has been altered or bypassed beginning at the Whittaker Diversion and extending to the north end of the Whittaker Two Dot Ranch property. Contor agreed that Stroud Creek water is conveyed in man-made channels and ditches through the Whittaker Two Dot Ranch property, beginning in the area of the Whittaker Diversion. Ex. 153 at Figure 11.

The hearing officer cannot overlook the fact that Whittaker diverts the entire flow of Stroud Creek through the West Springs Ditch, without a water right authorizing the diversion, pushes that water to the eastern-most edge of the basin, then releases the water into an old ditch channel headed to the northeast. In the absence of an existing, clearly-defined and un-manipulated Stroud Creek natural channel, the hearing officer must rely on the best evidence available for where the natural channel would exist were it not for the unauthorized diversion

⁷ The West Springs Ditch, maintained by Whittaker, captures and diverts Stroud Creek water. Whittaker's Stroud Creek water rights do not identify the West Springs Ditch as an authorized point of diversion. This contested case is not the proper forum to address the unauthorized diversion of Stroud Creek occurring at the West Springs Ditch. The hearing officer will defer to Water District 74Z, Water District 170 and the Department's compliance section to determine how to address the unauthorized diversion.

⁸ Water in the West Springs Ditch was once flumed across the Stroud Creek channel. Ex. 156, *Whittaker v. Kauer*, 78 Idaho at 97, 298 P.2d at 747 (in 1932, a flume was removed "which had been used continuously since some time prior to the entry of the July 1, 1912 decree to transmit the waters of the West Springs across the Left Fork . . .").

⁹ The record includes evidence that, between 1932 and 2014, McConnell or their predecessors in interest diverted water from Stroud Creek through a ditch known as the Kauer Ditch, located approximately one mile upstream of the Whittaker Diversion. When the Kauer Ditch was in use, Whittaker would capture and use all of the water flowing in Stroud Creek at the Whittaker Diversion. Ex. 151 at Appendix, 6/15/2000 inspection of Whittaker Diversion ("generally no control, ditch takes all of creek"). 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. When the Kauer Ditch was in use, the Whittakers did not bypass any water in Stroud Creek, leading to the significant changes in the path of Stroud Creek water through the Whittaker property.

and channel alterations occurring on the Whittaker Two Dot Ranch property. The best evidence available is the 1954 map prepared by Milton Christensen and the USGS Map. These maps identify the confluence of Stroud Creek and Right Fork of Lee Creek upstream of the Upper Diversion. For purposes of this order, the hearing officer will rely on the confluence shown on the 1954 map and USGS Map, at a location upstream of the Upper Diversion.

Validity of McConnell Rights

The McConnell Rights currently describe only one point of diversion: the Upper Diversion. The Upper Diversion does not have the capacity to convey the entire flow rate described on the McConnell Rights. Evidence in the record, however, confirms that McConnell has diverted all of the water available under their Lee Creek water rights, albeit from an unauthorized point of diversion. McConnell has demonstrated that the water rights included in Application 84441 are valid water rights and have not been lost or forfeited through non-use.

McConnell notes that the Lower Diversion has been in use since at least 1993 and was “inadvertently omitted from water right claims filed in the [SRBA].” Ex. 1 at 1. There is no presumption that a transfer application should be approved simply because an unauthorized point of diversion has been in place and used for many years. The Department must evaluate the proposed changes against the existing elements of the water right. In this case, the Department must evaluate Application 84441 as though an entirely new point of diversion will be added to the McConnell Rights.

Injury to Existing Water Rights

The confluence of Stroud Creek and Right Fork of Lee Creek is located upstream of the Upper Diversion. Therefore, the water rights on Stroud Creek and its tributaries are diverted upstream of the Upper Diversion and are already subject to the McConnell Rights (except for water rights 74-369 and 74-370 as noted above). Adding a second point of diversion approximately 1,600 feet downstream of the Upper Diversion does not change the relationship between the McConnell Rights and junior water rights on Stroud Creek. Bruce McConnell testified that he cannot capture all of the flow available at the Upper Diversion and that the creek remains active and flowing between the Upper Diversion and the Lower Diversion. Adding the Lower Diversion as an authorized point of diversion to the McConnell Rights will not increase the burden on upstream junior water rights.

The upstream junior water right holders, Tomchak and Foster/Ayers, have been injured by the manipulation and dewatering of the Stroud Creek channel between the Whittaker Diversion and Lee Creek. Tomchak and Foster/Ayers are often curtailed to provide water to downstream senior water rights, including the McConnell Rights. Testimony of Udy. Instead of a direct delivery of water to McConnell through the Stroud Creek natural channel, the water taken from Tomchak and Foster/Ayers is diverted by Whittaker at the West Springs Ditch (without a water right) and routed through a series of ditches and man-made channels on the Whittaker property before being injected into the Lee Creek channel. Testimony of Udy (confirming that curtailing Tomchak and Foster/Ayers in 2020 did not result in a direct delivery to McConnell because Whittaker diverts all of the water in Stroud Creek at the West Springs

Ditch). The changes proposed in Application 84441 will not increase or exacerbate the injury to junior water rights caused by Whittaker's unauthorized diversion of Stroud Creek at the West Springs Ditch.

James Whittaker holds water right 74-157 which bears a priority date of April 1, 1916 and authorizes the diversion of 3.20 cfs from Springs tributary to Lee Creek for the irrigation of 291 acres. Ex. 1 at Appendix G. Whittaker contends that McConnell is barred from making a call for water against water right 74-157. Whittaker relies on the 1956 Idaho Supreme Court decision, *Whittaker v. Kauer*, and characterizes that decision as a private subordination agreement (subordinating the McConnell Rights to water right 74-157). The question of whether water right 74-157 is subject to a delivery call by McConnell is beyond the scope of this contested case. 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. The Department and the watermasters for Water Districts 74Z and 170 can determine which junior water rights should be curtailed to satisfy the McConnell Rights if McConnell makes a call for water in the future.

Whittaker also contends that the McConnell Rights will have to be delivered through Whittaker's private ditches in order for Stroud Creek water to make it to the Lower Diversion. Ex. 151 at 9. Whittaker's ditches do not have the capacity to carry the McConnell Rights and have been damaged as a result of carrying McConnell's Stroud Creek water in recent years. *Id.* The McConnell Rights do not describe the Whittaker Diversion or the West Springs Ditch as authorized points of diversion. Application 84441 does not propose to add the Whittaker Diversion or the West Springs Ditch as authorized points of diversion. As noted above, Whittaker is not authorized to divert any water from Stroud Creek below the Whittaker Diversion. Therefore, any negative impacts to Whittaker's ditch system are caused by Whittaker's own unauthorized diversion of Stroud Creek.

The changes proposed in Application 84441 could affect water rights with points of diversion between the Upper Diversion and the Lower Diversion. Water right 74-1831 is the only water right with an authorized point of diversion between the Upper Diversion and the Lower Diversion. Water right 74-1831 bears a priority date of June 28, 1912 and is junior to the McConnell Rights. Johnson testified that water right 74-1831 has not been used for many years because it is a junior right and is rarely available. The changes proposed in Application 84441 will move senior rights downstream of the diversion for water right 74-1831, making water right 74-1831 subject to the senior rights. This change could reduce the quantity of water available to satisfy water right 74-1831. To protect against injury to water right 74-1831, the McConnell Rights must be subordinated to water right 74-1831 when they are diverted at the Lower Diversion. The following condition should be added to the McConnell Rights:

Diversion and use of this right from the point of diversion located in the SWSW of Section 20, T16N, R25E shall be junior and subordinate to water right 74-1831 at its current point of diversion in the NWNWNW of Section 29, T16N, R25E.

Enlargement

The confluence of Stroud Creek and Right Fork of Lee Creek is located upstream of the Upper Diversion. Therefore, both Stroud Creek and Right Fork of Lee Creek have been available to satisfy the McConnell Rights. The addition of the Lower Diversion does not augment the water sources available to satisfy the McConnell Rights. The changes proposed in Application 84441 will not result in an enlargement in use under the McConnell Rights.

Conservation of Water Resources

The changes proposed in Application 84441 will not increase the conveyance losses for the water rights included in the application. Water will continue to be used for flood irrigation of the authorized places of use, a practice that is common in the Lemhi River drainage. Testimony of Bruce McConnell. The changes proposed in Application 84441 are consistent with the conservation of water resources within the state of Idaho.

Local Public Interest

Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). It is in the local public interest to improve the efficiency and reliability of irrigation infrastructure. The addition of the Lower Diversion will allow McConnell to better manage their water supplies. Testimony of Bruce McConnell. The changes proposed in Application 84441 are in the local public interest.

Headgates and Measuring Devices

McConnell’s diversions from Lee Creek (Upper Diversion and Lower Diversion) are not equipped with lockable, adjustable headgates, which are essential to allow the watermaster of Water District 74Z to perform his duties. All water users in the Lemhi River drainage are required to maintain lockable controlling works at irrigation points of diversion. Prior to diversion of water under Transfer 84441, McConnell must install lockable controlling works at both of the diversions from Lee Creek.

Evidence presented at hearing indicates that the measuring device for the Upper Diversion is located approximately one-half mile downstream of the diversion. Ex. 1 at 9; Testimony of David R. Tomchak. Having a measuring device one-half mile downstream of the diversion imposes an unreasonable burden on upstream junior water right holders, who may be curtailed to satisfy the McConnell Rights. Any losses in the ditch between the point of diversion and the measuring device come out of the water supply used to fill junior water rights. In order to minimize the losses occurring in the ditch upstream of the measuring device, the measuring device for the Upper Diversion ditch must be moved to a location within 1,000 feet of the point of diversion. McConnell should work with the watermaster for Water District 74Z to find a location on the Upper Diversion ditch that is ideal for measurement, but is also easily accessible for the watermaster.

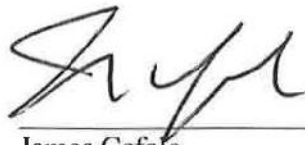
CONCLUSIONS OF LAW

McConnell has demonstrated that the changes proposed in Application 84441 will not enlarge the use under the McConnell rights, are consistent with the conservation of water resources within the state of Idaho and are in the local public interest. McConnell has also demonstrated that the proposed changes will not injure existing water rights as long as the diversion of water at the Lower Diversion is subordinated to water right 74-1831. In order to facilitate proper administration of the McConnell Rights and to protect junior water rights, the McConnell Rights should not be diverted until the Upper Diversion and Lower Diversion are equipped with lockable controlling works and proper measuring devices. Further, the Upper Diversion should not be used until its measuring device is moved to a site within 1,000 feet of the headgate.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 84441 in the name of Bruce and Glenda McConnell is APPROVED subject to the conditions set forth in Transfer Approval 84441 issued in conjunction with this order.

Dated this 18th day of May 2021.



James Cefalo
Hearing Officer

Exhibit 5

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 84441)	ORDER DENYING PETITIONS
IN THE NAME OF)	FOR RECONSIDERATION
<u>BRUCE AND GLENDA MCCONNELL)</u>	

On October 5, 2020, Bruce and Glenda McConnell (“McConnell”) filed Application for Transfer 84441 (“Application 84441”) with the Idaho Department of Water Resources (“Department”). Application 84441 was protested by James Whittaker and Whittaker Two Dot Ranch LLC (collectively “Whittaker”), David R. Tomchak, Smith 2P Ranch, Steven Johnson (“Johnson”), and Rosalie Ericsson. The Department conducted an administrative hearing on April 21 and 22, 2021 in Salmon, Idaho.

On May 18, 2021, the hearing officer for the Department issued a *Preliminary Order Approving Transfer* (“Preliminary Order”). On June 1, 2021, Whittaker filed a timely *Petition for Reconsideration* (“Whittaker Petition”). Also on June 1, 2021, Johnson filed a timely *Petition for Reconsideration* (“Johnson Petition”). Johnson did not send a copy of the *Johnson Petition* to all of the parties. The hearing officer emailed a copy of the *Johnson Petition* to all of the parties on June 3, 2021.

Whittaker Petition

The *Preliminary Order* included the following findings of fact:

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.

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, 74-15788. The other location is the point where Stroud Creek is intercepted by a ditch known as the West Springs Ditch.

17. Water rights 74-369, 74-1136 and 74-15788 are limited to a total combined diversion rate of 4.40 cfs from Stroud Creek at the Whittaker Diversion. If the flow in Stroud Creek exceeds 4.40 cfs (or 2.40 cfs when water rights junior to May 12, 1883 are curtailed), the excess flow in Stroud Creek bypasses the Whittaker Diversion. The water rights held by Whittaker do not authorize any diversion from Stroud Creek downstream of the Whittaker Diversion.

18. The West Springs Ditch is a deep, excavated ditch, running from west to east across the Stroud Creek channel. The West Springs Ditch was constructed to capture the flow from a number of springs in the area. There is a man-made berm running along the north side of the ditch which prevents any flow in Stroud Creek from continuing to the north (downstream) past the ditch.

19. The West Springs Ditch captures all of the water flowing in Stroud Creek at that location. Currently, there is “no . . . flume, siphon or culvert that would allow [Stroud Creek] to pass under or over the [West Springs Ditch].” The intersection of the West Springs Ditch and Stroud Creek is located approximately 2000 feet downstream of the Whittaker Diversion.

21. All of the water captured and diverted by the West Springs Ditch, including Stroud Creek water, is conveyed to the east, where it joins another irrigation ditch maintained by Whittaker. This combined ditch is used to convey water over a divide ridge which separates the Stroud Creek drainage from the Big Eightmile Creek drainage.

22. At the divide ridge between the drainages, Whittaker maintains a control structure, known as the hilltop splitter, which can send water into a ditch heading northeast for irrigation use by Whittaker or into a ditch running north toward Lee Creek. Water released by Whittaker at the hilltop splitter is conveyed in a man-made channel for approximately 500 feet and is then injected into an old ditch, known as the Bohan or Bohannan Ditch (hereinafter “Bohan Ditch”).

23. The Bohan Ditch runs east of the Stroud Creek channel. The Bohan Ditch generally runs to the north-northeast, whereas the Stroud Creek channel generally runs to the north-northwest.

24. Stroud Creek no longer flows in its natural channel between the West Springs Ditch and the confluence with Lee Creek. 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.

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.

Preliminary Order at 3-5 (citations omitted).

These findings of fact included extensive citations to the documents and testimony contained in the record, with many citations to the evidence offered by Whittaker. Whittaker challenges these findings and asserts that the current path of water through the Whittaker Two

Dot Ranch property is the natural channel of Stroud Creek. Further, Whittaker asserts that the confluence of Stroud Creek and Right Fork of Lee Creek is now located downstream of McConnell's Upper Diversion.

Stream Channel Alteration Rules

Whittaker argues that the Department's Stream Channel Alteration Rules ("SCA Rules") (IDAPA 37.03.07) require the hearing officer to recognize the current path of water through the Whittaker ditch system as the existing natural channel of Stroud Creek. *Whittaker Petition* at 5-6. Whittaker cites Rule 10.12, which defines the term "stream channel" as:

A natural water course of perceptible extent with definite beds and banks which confines and conducts continuously flowing water. The channel referred to is that which exists at the present time, regardless of where the channel may have been located at any time in the past. For the purposes of these rules only, the beds of lakes and reservoir pool areas are not considered to be stream channels.

IDAPA 37.03.07.010.12.

Under the SCA Rules, the Department's review of stream channel alterations is limited to the current location of a stream channel, regardless of where the channel may have existed in the past. The Stream Channel Protection Act (Chapter 38, Title 42, Idaho Code) forms the statutory basis for the Department's SCA Rules and provides a different definition for the term "stream channel":

"Stream channel" means a natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water. Ditches, canals, laterals and drains that are constructed and used for irrigation or drainage purposes are not stream channels.

Idaho Code § 42-3802(d) (emphasis added).¹

The West Springs Ditch was originally constructed to convey water for irrigation. *Whittaker Petition* at 21-22. It continues to be used to divert and convey water for irrigation use. *Id.* Neither the West Springs Ditch, the Floyd J Whittaker Ditch, nor any of the other ditches diverting water from Stroud Creek or its tributaries for irrigation use qualify as stream channels under the Stream Channel Protection Act. In addition to Idaho Code § 42-3802(d), the SCA Rules (IDAPA 37.03.07) support the hearing officer's determination that the Whittaker ditch system is not the Stroud Creek channel. As noted in the definitions above, a stream channel confines and conducts "continuously flowing water." The SCA Rules (IDAPA 37.03.07) define the term "continuously flowing water" as follows:

¹ The current definition for "stream channel" set forth in Rule 10.12 of the SCA Rules is the same definition found in the 1993 version of the rules. The second sentence (underlined portion) of Section 42-3802(d) was added to the statutory definition of "stream channel" in 2004.

A sufficient flow of water that could provide for migration and movement of fish, and excludes those reaches of streams which, in their natural state, normally go dry at the location of the proposed alteration. IDWR will assume, subject to information to the contrary, that the USGS quadrangle maps accurately depict whether a stream reach is continuously flowing, at the location of the proposed alteration. Such exclusion does not apply to minor flood channels that are a part of a stream which is continuously flowing in the reach where the alteration is located. Also, such exclusion does not apply to streams which may be dry as a result of upstream diversion or storage of water.

IDAPA 37.03.07.010.04

If not for the West Springs Ditch, which cuts across the Stroud Creek channel, and diversion by upstream water rights, the Stroud Creek channel downstream of the West Springs Ditch would have continuously flowing water. In other words, the Stroud Creek channel below the West Springs Ditch is dry as a result of upstream diversions and the diversion of Stroud Creek into the West Springs Ditch.

Whittaker contends that the hearing officer's reliance on a 1989 USGS quadrangle map to determine the location of the Stroud Creek natural channel is "unprecedented," will have "far-reaching implications" and will "create uncertainty in transfer proceedings." *Whittaker Petition* at 6, 19. The *Preliminary Order* is consistent with the Stream Channel Protection Act and the SCA Rules. It recognizes the channel depicted on the USGS Map below the West Springs Ditch as the current Stroud Creek channel, in spite of the dewatering of the channel by the West Springs Ditch. In contrast, Whittaker proposes classifying the West Springs Ditch and the Floyd J Whittaker Ditch as the current Stroud Creek stream channel, which is in direct conflict with Idaho Code § 42-3802(d).

Whittaker Ditches

For purposes of this contested case, Whittaker seeks to characterize various ditches on the Whittaker Two Dot Ranch property as man-made stream channels rather than ditches. Whittaker's arguments on this point are not persuasive and are inconsistent with the expert reports prepared by Bryce Contor and offered into the evidentiary record by Whittaker.

Contor identifies the intersection of Stroud Creek and the West Springs Ditch as a point of diversion. Ex. 151 at 6-7 ("From 1932 through July 2020 and presumably through the present there has not been a physical channel or means for flow in Stroud Creek (Left Fork) to proceed downstream beyond the West Springs Ditch except to be diverted and conveyed in a private ditch") (emphasis added). "The private ditches that convey water under [water right 74-157] currently also are being used to convey [Stroud Creek] water past the collector ditches, bypassing locations where the historical channels of [Stroud Creek] probably existed." Ex. 153 at 1. Contor observed that Whittaker's "private ditch was unable to contain the increased flows resulting from the imposition of also conveying McConnell's rights." Ex. 151 at 9; Ex. 153 at 10. Further, "[w]hen McConnell's flows are discharged from Whittaker's ditch, they first enter the remnants of an older ditch identified . . . as the 'Bohan' ditch . . ." *Id.* at 9-10. "That ditch

too is inadequate to contain the flows and it and the surrounding rangeland area also are being eroded and damaged by the new flow regime.” *Id.* at 10. Contor concluded that “[Application 84441] would indirectly injure Whittaker[] by requiring them to divert McConnell’s rights through an unauthorized [point of diversion], convey them in their own private ditch and inject them into Stroud Creek” *Id.*

The following passages are taken from one of the expert reports prepared by Contor and are based on his field observations from July 2020. They describe the current path of water from just above the West Springs Ditch to the point where water is injected into the Bohan Ditch:

. . . From walking the bank of the [West Springs Ditch], I visually estimate that the ditch is four to five feet wide and incised three to four feet deep. The gradient is very flat and flow velocity is low. The engineer’s map seems to indicate the channel of Lee Creek crossing the collection ditch from the West Springs near letter K, but I saw no indication of any kind of flume, siphon or culvert that would allow the creek to pass under or over the ditch.

From the West Springs collector ditch, the ditch proceeds to a hilltop distribution point with a three-foot Cipoletti weir and control gate that could convey water to the north-northwest, and a six-foot Cipoletti weir that delivers water down the hill into a ditch that proceeds to the north-northwest. The control gate was closed on July 3 and all water was passing over the six-foot weir and down the hill.

At the bottom of the hill, flow enters a ditch that connects with another collector ditch, known locally as the “Bohan Ditch,” near Waypoint 36. I walked upstream along the Bohan Ditch until I encountered its intersection with and capture of the original channel. There is no control structure or bypass capacity, no indication of earth work or disturbance for many years, and no indication of flow down the original channel beyond the Bohan Ditch for many years. It appears that historically the Bohan Ditch would have captured any flow from upstream, including any Lee Creek flow that had not been captured by the West Springs collector ditch.

Ex. 153 at 4.

Whittaker argues: “The characterization of the channel that currently conveys Stroud Creek water as the ‘Whittaker ditch system’ is legally and factually inaccurate” *Whittaker Petition* at 5. This argument is not persuasive. The characterization of the channel as the “Whittaker ditch system” is factually accurate and is consistent with the expert reports prepared for and offered by Whittaker.

Poole v. Olaveson

Whittaker argues: “The water course running through the Whittaker Two Dot Ranch property is now the natural channel of Stroud Creek, even if it was artificially created, because it replaced the channel that previously existed” *Whittaker Petition* at 9. According to

Whittaker, “[t]he current path of Stroud Creek . . . may not be in the *original* natural stream channel, but such path is now the legal natural channel of Stroud Creek.” *Id.* at 14 (italics in original). To support their argument, Whittaker cites an Idaho Supreme Court decision, *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

The facts from *Poole* differ from the facts presented in this contested case. In *Poole*, the Spring Creek channel near Menan, Idaho had been straightened in a number of sections to eliminate meanders in the creek channel and to facilitate the drainage of farm ground bordering the creek channel. *Poole*, 82 Idaho at 500, 356 P.2d at 63. The revised channels were not constructed to capture Spring Creek water for irrigation use or any other use. *Id.* Rather, the channels were constructed to more efficiently pass Spring Creek water through the properties. *Id.* Respondent Olaveson sought to discharge waste water into one of the straightened sections of Spring Creek. *Id.*, 82 Idaho at 501, 356 P.2d at 64. The Idaho Supreme Court recognized the straightened sections of Spring Creek as the existing natural channel of the creek and confirmed Olaveson’s right to discharge waste water into the straightened sections of the creek. *Id.*, 82 Idaho at 504-505, 356 P.2d at 65-66.

In this case, the Stroud Creek channel wasn’t altered to remove meanders or facilitate drainage. According to the evidence presented by Whittaker, the West Springs Ditch was constructed to capture spring water arising on the west side of Stroud Creek for irrigation use. Originally, the water from the West Springs complex was flumed across the Stroud Creek channel. After the flume failed, the West Springs Ditch was reconstructed to capture Stroud Creek water for irrigation use. Whittaker continues to divert spring water and Stroud Creek water through the West Springs Ditch for irrigation use.

Whittaker contends that the continuous diversion of a creek through an irrigation ditch can convert the irrigation ditch into the natural channel for purposes of water right administration. Whittaker has not identified any statute or case law that would support such a proposition. As noted above, for purposes of the Stream Channel Protection Act, a ditch that was constructed and is used for irrigation is not a stream channel. The definition of “stream channel” set forth in Idaho Code § 42-3802(d), however, may be limited to the application and enforcement of Chapter 38, Title 42, Idaho Code. *See Smith v. King Creek Grazing Assn.*, 105 Idaho 644, 648, 671 P.2d 1107, 1111 (1983) (noting that the definition of “stream channel” used in Idaho Code § 42-3802 is more restrictive than other definitions). It does not necessarily extend to other areas of water law. The Idaho Supreme Court has adopted a definition of the term “watercourse” to address other water-related disputes. For example, in a case addressing the riparian rights of landowners along a natural slough channel that was used to convey water for irrigation, the Idaho Supreme Court defined the term “watercourse” as follows:

[A] watercourse is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 488, 101 P. 1059, 1061 (1909). This same definition was used by the court in a decision about drainage servitudes. *Smith v. King Creek Grazing Assn.*, 105 Idaho 644, 647, 671 P.2d 1107, 1110 (1983).

Although the definition of “watercourse” adopted by the Idaho Supreme Court is broad enough to include water flowing in ditches, there are significant differences between ditches and natural channels under Idaho law. For example, Idaho Code § 42-101 states that the waters of the state, when flowing in their natural channels, are subject to appropriation. In contrast, water flowing in a ditch, when lawfully diverted, is the property of the appropriator and is not subject to appropriation. Idaho Code § 42-110. The Idaho Supreme Court rejected a proposal to appropriate water by diverting water from another’s ditch. *Frost v. Penfold*, 44 Idaho 651, 656 258 P. 534, 535 (1927). Idaho Code § 42-602 distinguishes between natural water sources and the ditches diverting therefrom. Chapter 12, Title 42, Idaho Code sets forth the standards for maintaining ditches. These maintenance requirements do not apply to natural channels.

Whittaker seeks to blur the line between ditches and natural channels, arguing that a ditch may be converted into a natural channel over time if a diversion is constructed in a way that captures the entire flow of a creek. Given the significant differences between natural channels and ditches under Title 42, Idaho Code, the hearing officer is not persuaded that a ditch, which is actively used to convey and deliver water for irrigation, can be characterized as a natural channel. The current path of water through the Whittaker ditch system is not the natural channel of Stroud Creek.

Evaluation of Transfers Based on Past Conditions

Whittaker argues that the *Preliminary Order* is speculative because it evaluates Application 84441 under stream channel conditions that no longer exist. *Whittaker Petition* at 7-8. Whittaker takes issue with the use of the phrases “was once located” and “in the past” to describe the location of the confluence of Stroud Creek and Right Fork of Lee Creek. *Id.* at 3, 5. Whittaker contends that the “injury analysis must consider the present conditions on Stroud Creek.” *Id.* at 8.

The phrases “was once located” and “in the past” are an accurate description of the evidence in the record related to the confluence of Stroud Creek and Right Fork of Lee Creek. The *Preliminary Order* identifies substantial and compelling evidence that the confluence was previously located upstream of McConnell’s Upper Diversion. The question presented to the hearing officer is whether the confluence continues to exist at the same location today. The hearing officer concluded that the confluence of Stroud Creek and Right Fork of Lee Creek continues to be located upstream of McConnell’s Upper Diversion. The hearing officer reached this conclusion by evaluating the current conditions in the Stroud Creek drainage. 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. The 1989 USGS Map and 1954 Map show the Stroud Creek channel extending from the West Springs Ditch area north to a confluence located upstream of McConnell’s Upper Diversion. It is not

speculative or arbitrary to rely on these two historical maps, which both depict the confluence of Stroud Creek and Right Fork of Lee Creek in the southwest corner of the SENE of Section 30, T16N, R25E.

Whittaker argues: “The fact is undisputed that the current physical confluence of Stroud Creek with the Right Fork of Lee Creek is below [McConnell’s] Upper Diversion.” *Whittaker Petition* at 4. This is not an accurate summary of the evidence in the record. The *Preliminary Order* correctly summarizes the evidence in the record relied on by the hearing officer. Stroud Creek water, diverted by Whittaker at the West Springs Ditch without a water right, is released into Lee Creek at a location downstream of McConnell’s Upper Diversion.

Unauthorized Diversion at West Springs Ditch

The *Preliminary Order* does not determine whether Whittaker’s historical (pre-SRBA) diversion of Stroud Creek water at the West Springs Ditch was authorized. Nor does it state that Whittaker’s actions resulting from the *Whittaker v. Kauer* case were unauthorized. The *Preliminary Order* acknowledges that, prior to 2014, Whittaker diverted and used the entire flow of Stroud Creek, but did not determine whether that diversion was within the limits of the relevant water rights. Whittaker’s construction and use of the West Springs Ditch to divert Stroud Creek water may have been consistent with the elements of the relevant water rights in the past. Currently, however, Whittaker’s Stroud Creek water rights do not identify the West Springs Ditch, or any other ditch downstream of the Whittaker Diversion, as an authorized point of diversion. Evidence in the record confirms that Stroud Creek water flows past the Whittaker Diversion. The West Springs Ditch captures any Stroud Creek water bypassing the Whittaker Diversion. The *Preliminary Order* properly characterizes Whittaker’s diversion of Stroud Creek at the West Springs Ditch as an “unauthorized” diversion of Stroud Creek water. The *Preliminary Order* does not determine whether Whittaker’s diversion of water from the West Springs complex or East Springs complex are consistent with the elements of water right 74-157.

Unauthorized Stream Channel Alteration

Whittaker provided evidence and testimony that the Stroud Creek channel has been altered between the Whittaker Diversion and the West Springs Ditch. The *Preliminary Order* does not determine whether the stream channel alterations occurring on the Whittaker property were authorized at the time they occurred.

Intersection of Stroud Creek and West Springs Ditch

Whittaker contends that Stroud Creek is not actually captured by the West Springs Ditch, but instead flows into another man-made channel running from south to north. *Whittaker Petition* at 15. The man-made channel then intersects with the West Springs Ditch. *Id.* This error, if one exists, is inconsequential. Regardless of whether Stroud Creek water is first captured by the West Springs Ditch or some other man-made channel before intersecting with the West Springs Ditch, Whittaker does not have a right to divert Stroud Creek water downstream of the Whittaker Diversion. The expert reports prepared by Whittaker’s expert witness, Bryce Contor, referred to the ditch running from west to east, which prevents Stroud

Creek from continuing to flow to the north, as the West Springs Ditch. Ex. 151 at 5, 7. Bryce Contor also observed that the West Springs Ditch captures any flow remaining in Stroud Creek. Ex. 153 at 4, 11 (“private ditch system now mingles the flow from the West Spring with flow from [Stroud Creek]”). The *Preliminary Order* adopted the ditch names used by Contor. The term “West Springs Ditch,” as used in the *Preliminary Order*, refers to the ditch extending from the West Springs complex on the west to the hilltop splitter on the east.

Source of Water for Bohan Ditch

None of the findings of fact in the *Preliminary Order* identify the source of water diverted through the Bohan Ditch when it was used for irrigation. The Analysis section of the order, however, states that the Bohan Ditch was once used to convey Stroud Creek water. *Preliminary Order* at 10. This statement was based on an expert report offered by Whittaker. According to Whittaker’s expert, Bryce Contor, “the Bohan Ditch would have captured any flow from upstream including any [Stroud Creek] flow that had not been captured by the [West Springs Ditch].” Ex. 153 at 4. The *Whittaker Petition* notes that the Bohan Ditch was once used to convey spring water arising on the west side of Stroud Creek. *Whittaker Petition* at 16-18; Exs. 154 and 155. Based on the 1954 Engineer’s Map, spring water was once flumed over the Stroud Creek channel for delivery to lands on the east side of the creek. Exs. 154 and 155. The error identified by Whittaker, if one exists, is minor. It does not change the hearing officer’s analysis or the outcome of the case.

Equitable Doctrine of Laches

Whittaker provides a thorough summary of the equitable doctrine of laches and establishes that the doctrine has been applied in water rights cases in the past. It is not clear, however, how the equitable doctrine of laches applies to this contested case. Whittaker argues that McConnell has delayed asserting that the current site where Stroud Creek water is released into Lee Creek is different from the historical location of the confluence of Stroud Creek and Right Fork of Lee Creek. *Whittaker Petition* at 27.

Prior to 2014, the McConnell water rights were diverted through the Kauer Ditch, located approximately one mile upstream of the Whittaker Diversion. Water diverted through the Kauer Ditch was injected into the Right Fork of Lee Creek upstream of the historical confluence of Stroud Creek and Right Fork of Lee Creek. When the Kauer Ditch was in use, McConnell had no reason to investigate the flow of Stroud Creek through the Whittaker property. The Snake River Basin Adjudication (“SRBA”) court issued partial decrees for the McConnell water rights (74-361 through 74-365, 74-367 and 74-368) on August 13, 2014. The partial decrees did not identify the Kauer Ditch as an authorized point of diversion. Consequently, McConnell stopped diverting water through the Kauer Ditch after the partial decrees were issued. Any arguments related to equitable remedies, requiring McConnell to continue to divert their water rights at the Kauer Ditch should have been raised in the SRBA. McConnell has only had reason to investigate the flow of Stroud Creek through the Whittaker Two Dot Ranch property and the confluence of Stroud Creek and Right Fork of Lee Creek since 2014. Six or seven years does not constitute “long and continuous knowing acquiescence” as required by the equitable doctrine of laches.

Whittaker also asserts the equitable doctrine of laches to prevent McConnell from making a water call against water right 74-157. *Whittaker Petition* at 27. As noted in the *Preliminary Order*, the approval of Application 84441 does not change the legal relationship between water right 74-157 and McConnell's water rights. The authorized point(s) of diversion for the McConnell water rights have been and will continue to be located downstream of water right 74-157. The determination of whether McConnell can make a delivery call against water right 74-157 is not essential to the outcome of this contested case. Whittaker can raise their arguments about how the equitable doctrine of laches applies to a delivery call against water right 74-157 if and when McConnell makes a delivery call under their senior water rights.

Johnson Petition

The *Johnson Petition* does not identify any erroneous facts in the *Preliminary Order*. It simply restates the injury concerns expressed in the original protest filed by Johnson. Johnson's injury concerns were already considered by the hearing officer. McConnell's Upper Diversion is located downstream of the confluence of Stroud Creek and Right Fork of Lee Creek. The points of diversion for Johnson's water rights 74-949 and 74-15201 are located downstream of the Upper Diversion. The points of diversion for Johnson's water rights 74-949 and 74-15201 are also located downstream of the McConnell's proposed Lower Diversion. Transfer 84441 does not change the spatial or legal relationship between the McConnell water rights and water rights 74-949 and 74-15201. The *Johnson Petition* does not raise any new facts or arguments and does not warrant an amendment of the *Preliminary Order*.

ORDER

IT IS HEREBY ORDERED that *Whittaker Petition* and *Johnson Petition* are DENIED.

Dated this 21st day of June 2021.



James Cefalo
Hearing Officer