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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

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Floyd James Whittaker, Jordan Whittaker, Whittaker Two Dot Ranch, LLC, and Whittaker Two Dot Land, LLC (collectively “Defendants”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., submit this *Memorandum in Support of Motion to Dismiss*. This memorandum supports Defendants’ *Motion to Dismiss* filed pursuant to Idaho Rules of Civil Procedure 12(b)(8). As requested in the *Motion to Dismiss*, Defendants move this Court to dismiss

the *Complaint* (“Complaint”) filed by the Idaho Department of Water Resources (“IDWR”, “Department”, or “Plaintiff”) in its entirety. This motion and associated memorandum are supported by the *Declaration of Robert L. Harris in Support of Motion to Dismiss* (“Harris Declaration”) submitted contemporaneously herewith.

I. LEGAL STANDARD

A defendant may, by motion, demonstrate that a complaint must be dismissed because there is “another action pending between the same parties for the same cause.” Idaho R. Civ. P. 12(b)(8). Concerning a motion filed under this specific rule:

“Two tests govern the determination of whether a lawsuit should proceed where a similar lawsuit is pending in another court. First, the court should consider whether the other case has gone to judgment, in which event the doctrines of claim preclusion and issue preclusion may bar additional litigation.” *Klaue*, 133 Idaho at 440, 988 P.2d at 214 (citation omitted).

...

“The second test is whether the court, although not barred from deciding the case, should nevertheless refrain from deciding it.” *Id.*

Johnson v. Johnson, 147 Idaho 912, 917, 216 P.3d 1284, 1289 (2009); *see also, Frantz v. Hawley Troxell Ennis & Hawley LLP*, 161 Idaho 60, 65, 383 P.3d 1230, 1235 (2016) (dismissal is appropriate under I.R.C.P. 12(b)(8) when there is “another action pending between the same parties for the same cause.”).

The determination of whether a trial court should dismiss a case is discretionary. *Johnson*, 147 Idaho at 917, 216 P.3d at 1289 (“A trial court's determination under I.R.C.P. 12(b)(8) whether to proceed with an action where a similar case is pending in another court is discretionary.” (quoting *Klaue v. Hern*, 133 Idaho 437, 439, 988 P.2d 211, 213, (1999)).

II. FACTUAL BACKGROUND

This lawsuit concerns a water law matter. It involves a unique set of background facts currently subject to pending litigation commenced in 2021 in Lemhi County District court before

Judge Eric Wildman of the Fifth Judicial District of the State of Idaho. It is before Judge Wildman by reassignment because of the Idaho Supreme Court’s Administrative Order issued on December 9, 2009, which provides that “all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District.” Judge Wildman is generally referred to as Idaho’s “water judge” and the adjudication court over which he presides as Idaho’s “water court.” See <http://www.srba.state.id.us/> (Idaho Water Adjudications website with Judge Wildman described as the Presiding Judge of Idaho Water Adjudications under Adjudication Court Staff).

The case pending before Judge Wildman is Lemhi County Case No. CV30-21-304. It is a judicial review proceeding of an underlying administrative appeal filed pursuant to Idaho Code § 67-5270(3). The case concerns an appeal of IDWR Director Gary Spackman’s *Order on Exceptions; Final Order Approving Transfer* (dated November 2, 2021) (the “Order”) which upheld two decisions issued in a contested case for a water rights transfer before the Department (filed by Bruce and Glenda McConnell) by IDWR Hearing Officer James Cefalo (the *Preliminary Order Denying Petitions for Reconsideration* and *Order Denying Petition to Re-Open Hearing and Petition for Site Visit* both dated June 21, 2021). In addition to the docket found in iCourt, a docket of the pleadings filed in this case is found on the Idaho Water Adjudications court website here: <http://www.srba.state.id.us/LEMHI00304.htm>.

To avoid any confusion between the two Lemhi County cases referred to herein, Case No. CV30-21-340 before Judge Eric J. Wildman is referred to herein as the “Wildman Matter,” and Case No. CV30-22-0169 before Judge Stevan A. Thompson is referred to herein as the “Thompson Matter.”

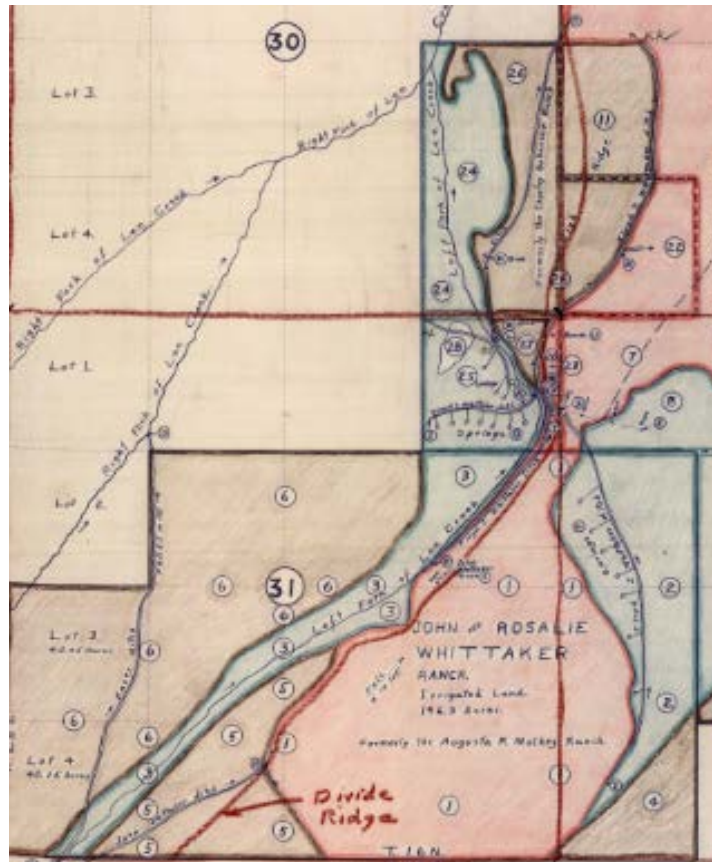
Judge Wildman issued a *Memorandum Decision and Order* and associated *Judgment* on July 18, 2022, copies of which are attached for the convenience of the court to the *Harris Declaration* as Exhibit 1 and Exhibit 2, respectively.¹ Oral argument was held in the Wildman Matter on June 16, 2022. *Memorandum Decision and Order* at 3. As described in these documents, Judge Wildman set aside the IDWR Director’s *Order* and remanded the matter for further proceedings because the *Order*—which approved McConnell’s transfer application—was contrary to Idaho law as it would injure Whittaker’s water right, Water Right No. 74-157 (hereinafter “74-157”). This water right authorizes Whittaker to divert up to 3.2 cfs from two spring complexes known as “West Springs” and “East Springs.”

Judge Wildman was clear in his *Memorandum Decision and Order* that “[a]ny 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.” *Memorandum Decision and Order* at 11. The Department’s *Order* actually did subordinate use of the McConnells’ Lower Diversion to another water right owned by Steven Johnson (Water Right No. 74-1831), but unfairly did not similarly subordinate such use by McConnell to Whittaker’s 74-157. In its decisions, the Department attempted to introduce new law and analysis that Judge Wildman aptly described as a “conception . . . based on circumstances that do not exist.” *Id.* at 8. Judge Wildman was correct; nevertheless, perhaps sensing that its arguments were not persuasive before Judge Wildman, IDWR decided to pursue a new strategy and proceed on another legal front by initiating the Thompson Matter on July 15, 2022, while the Wildman Matter was under advisement and before the *Memorandum Decision and Order* was issued on July 18, 2022.

¹ As of the date filing of this pleading, no motion for reconsideration has been filed in response to the *Memorandum Decision and Judgement*, and as such, the 14-day window for filing such a motion has now passed.

In the Department's crosshairs is a holding from an Idaho Supreme Court decision that has not been overruled, *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956). The Department actions evidence a clear intent to disrupt the historic plumbing in place in the Stroud Creek drainage. The Floyd J. Whittaker in this Idaho Supreme Court case is a direct ancestor to the Floyd J. Whittaker in both the Wildman Matter and Thompson Matter. The Kauers in this same case (John and Fern Kauer) are predecessors in interest to the property now owned by Bruce and Glenda McConnell.

In very broad terms, this 1956 case upheld the legality of an agreement to alter the historic flow of Stroud Creek by constructing the West Springs Ditch (to capture spring water under Whittaker's 74-157 that originally crossed the Stroud Creek channel through an above-ground flume) across the Stroud Creek channel to convey spring water and excess Stroud Creek water in exchange for an easement to construct the "Kauer Ditch" that diverts water from Stroud Creek upstream of the West Springs Ditch and delivers the water into Lee Creek, the stream where Kauer's water rights are authorized to divert. This agreement was also upheld and respected in the Wildman Matter. *Memorandum Decision and Order* at 6. A map generated in 1954 at the time of the original dispute depicting the features at issue is contained in the record of the Wildman Matter, is attached to the *Harris Declaration* as Exhibit 3, but with the relevant map portion and map legend provided here:



DETAILS OF SPECIAL POINTS,
BOUNDS AND THEIR LOCATIONS

Point	Top	Dist.	Point description
A	171	200-200	Point of intersection of the
B	171	200-200	Point of intersection of the
C	171	200-200	Point of intersection of the
D	171	200-200	Point of intersection of the
E	171	200-200	Point of intersection of the
F	171	200-200	Point of intersection of the
G	171	200-200	Point of intersection of the
H	171	200-200	Point of intersection of the
I	171	200-200	Point of intersection of the
J	171	200-200	Point of intersection of the
K	171	200-200	Point of intersection of the
L	171	200-200	Point of intersection of the
M	171	200-200	Point of intersection of the
N	171	200-200	Point of intersection of the
O	171	200-200	Point of intersection of the
P	171	200-200	Point of intersection of the
Q	171	200-200	Point of intersection of the
R	171	200-200	Point of intersection of the
S	171	200-200	Point of intersection of the
T	171	200-200	Point of intersection of the
U	171	200-200	Point of intersection of the
V	171	200-200	Point of intersection of the
W	171	200-200	Point of intersection of the
X	171	200-200	Point of intersection of the
Y	171	200-200	Point of intersection of the
Z	171	200-200	Point of intersection of the

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The *Memorandum Decision and Order* sets out what Judge Wildman deemed to be the critical facts and Defendants urge this Court to carefully review this decision for purposes of understanding the same unique factual background to the Thompson Matter. But one point bears emphasis. For reasons not explained by the McConnells at the IDWR hearing, they did not claim the Kauer Ditch as an authorized point of diversion for their water rights in the Snake River Basin Adjudication (*Memorandum Decision and Order* at 9), and as a result, the Kauer Ditch was shut down by IDWR in 2014. The McConnells also did not attempt to add the Kauer Ditch as an authorized point of diversion in the transfer before IDWR at issue in the Wildman Matter. Instead, the McConnells evidently believed they were not bound by the agreement made by their predecessors and could attempt to undo the natural changes that occurred to the Stroud Creek drainage that have been in place for 90 years as a result of that agreement. Judge Wildman rejected those arguments made by both IDWR and McConnell on appeal. *Memorandum Decision and Order* at 9-10 (agreement entered by Kauer’s predecessor was binding on Kauer, and therefore, binding on McConnell; “. . . 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.”).

Concerning the Kauer Ditch, Judge Wildman was clear: “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 Ditch ceased in 2014 was not the result of any action taken by Whittaker.**” *Memorandum Decision and Order* at 6-7 (emphasis added).

In addition to the foregoing, and for purposes of better understanding the Thompson Matter, as part of the underlying administrative case, the IDWR Hearing Officer held that the channel below the “Whittaker Diversion” is no longer the Stroud Creek channel, but a private

ditch. *Preliminary Order Approving Transfer* at 10 (attached to *Harris Declaration* as Exhibit 4) (“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 offer rejects this argument. The current water course through the Whittaker property is not the natural channel of Stroud Creek.”). There is a wooden structure (described and depicted in photographs in more detail below) defined by Hearing Officer Cefalo as the “Whittaker Diversion” which is located upstream of the West Springs Ditch, downstream of the Kauer Ditch, and it currently directs water to a pipeline intake for three of Whittaker’s other water rights (74-369, 74-1136, and 74-15788). *Id.* at 4 (¶15). Excess Stroud Creek water present at the wooden structure proceeds through, around, or over the wooden structure down into an overgrown willow area where such water disperses and either sinks and feeds area springs or is captured by the West Springs Ditch. There is no longer a stream channel at this location because of the historic use of the Kauer Ditch where extra water was diverted at the Kauer Ditch for injection into Lee Creek and only water necessary to fill Whittaker’s rights at the wooden structure was turned downstream. There were, of course, times when excess flows would go around, through, or over the wooden structure, and Whittaker’s right to the capture of this water in the West Springs Ditch (in addition to flows emanating from West Springs) is clear as described in the *Whittaker v. Kauer* decision:

The trial court found that in the year 1932, respondents entered into an oral contract with appellants’ predecessors (and other interested parties), to whom water had been decreed by the July 1, 1912 decree, whereby the point of diversion of waters of the Left Fork of Lee 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 the Left Fork thereof 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 (over Lots 4

and 3 and SE 1/4 of the NE 1/4, Sec. 31, Twp. 16 N., R. 25 E.B.M.) through which to convey from such point of diversion on the Left Fork, 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.

Whittaker v. Kauer, 78 Idaho at 97, 298 P.2d at 747 (italics in original, bolding and underline added).

The emphasized portion of the above quote is critical to this matter, was included in Judge Wildman's *Memorandum Decision and Order* at page 5, and bears emphasis here. In exchange for the easement for the Kauer Ditch, the Whittakers obtained the right to "**capture all the water found flowing in the creek at that place.**" This includes water emanating from West Springs collecting in the West Springs Ditch as well as reach gains to Whittaker's private ditch system coming from flows from Stroud Creek in excess of what Whittaker directed through its headgate next to the wooden structure.

This right to collect **both** West Springs water and Stroud Creek water was emphasized a second time in another part of the *Whittaker v. Kauer* opinion:

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 Creek²] 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 the Left Fork 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 747-48.

Whittaker initially challenged IDWR's legal characterization of these channel features but did not pursue the issue on appeal (*Petitioners' Opening Brief* at 8, fn. 3, available at <http://www.srba.state.id.us/Images/AdminApp/CV30-21-304/021-Brief.pdf>), and nothing in Judge Wildman's *Memorandum Decision and Order* changes that conclusion. In fact, Judge Wildman could not have been clearer as to whether Whittaker should be required to do anything to the altered watershed:

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.

Memorandum Decision and Order at 9 (emphasis added).

Judge Wildman has determined the legal status of the interests involved in this water dispute and rejected an attempt to cause "significant disruption" to the Stroud Creek watershed. A judgement has been issued in the Wildman Matter, but the matter is within the 42-day appeal

² The opinion refers to Stroud Creek as the "Left Fork" as over time, Stroud Creek has also been referred to as the Left Fork of Lee Creek.

period to file an appeal to the Idaho Supreme Court. Consequently, the Wildman Matter could be appealed.

Yet, despite the pending nature of the Wildman Matter, the Department has initiated the Thompson Matter. In so doing, the Department is attempting to cause “significant disruption” to the Stroud Creek watershed through a different legal proceeding. With affidavits from Bruce McConnell (the transfer applicant in the Wildman Matter), the local watermaster (Merritt Udy), another IDWR official (David Graybill), and one of IDWR’s attorneys in tow, IDWR seeks to recast this water dispute into a measuring device and controlling diversion works matter. This attempt should be rejected by this Court because of what has already been decided in the Wildman Matter. As part of its consideration of the Thompson Matter and this *Motion to Dismiss*, when argued by IDWR that a controlling works (headgate) and/or measuring device is necessary **in this unique case**, the Court should ask: “For what purpose?” In each instance raised by IDWR, there is no reasonable or legitimate purpose for such devices. And if this Court were to allow IDWR’s *Complaint* in the Thompson Matter to proceed (including an associated *Motion for Preliminary Injunction*), it could lead to inconsistent judgements between the cases. This Court should dismiss the *Complaint* in its entirety pursuant to I.R.C.P. 12(b)(8) and award attorney fees to Whittaker pursuant to Idaho Code § 12-117.

III. ARGUMENT

A. The Wildman Matter and Thompson Matter involve the same parties.

The first requirement for a case to be dismissed pursuant to I.R.C.P. 12(b)(8) is that both matters involve the same parties. The Wildman Matter involves two named parties: James Whittaker and Whittaker Two Dot Ranch, LLC. The Thompson Matter involves this same individual and entity. Accordingly, the first requirement under Rule 12(b)(8) is met.

B. The Wildman Matter and Thompson Matter are similar. Further, under either test, this Court should refrain from deciding this case and should dismiss the Complaint in its entirety.

The second requirement under I.R.C.P. 12(b)(8) is that the actions involve similar matters, and if so, one of two tests are applied. As described above, this requirement is met if there is a “similar” lawsuit pending in another court:

Two tests govern the determination of whether a lawsuit should proceed where a **similar** lawsuit is pending in another court.

Johnson v. Johnson, 147 Idaho 912, 917, 216 P.3d 1284, 1289 (2009) (emphasis added).

There should be little question that the Wildman Matter and Thompson Matter center on the same water dispute. Both center on the legal consequences of the agreement originally described in *Whittaker v. Kauer*. This is self-evident because of the participation of Bruce McConnell in both matters. In this case, the McConnells believed they are entitled to delivery of excess Stroud Creek water through the West Springs Ditch despite his decision to not pursue authorization of the Kauer Ditch as an authorized point of diversion for his water rights consistent with the agreement his predecessors agreed to and is binding on them. Mr. McConnell’s affidavit in the Thompson Matter is based on IDWR’s *Order* that did not protect Whittaker’s 74-157 through a subordination provision, but that decision has now been reversed by Judge Wildman specifically because it did not protect Whittaker’s WR 74-157 from McConnell’s ability to call for water at the Lower Diversion in a way that did not exist before the transfer was filed. In other words, based on the plain language of the *Complaint*, the Department’s primary motivation is filing the *Complaint* on July 15, 2022 (supported by McConnell’s affidavit) is to deliver water to McConnell’s Lower Diversion, but that ability is now subordinate to Whittaker’s 74-157 as described in the *Memorandum Decision and Order* issued on July 18, 2022.

We anticipate that IDWR will argue that it clearly has authority to require diversion works and measuring devices as a general matter throughout the state, and that a decision in the Thompson Matter holding otherwise will be an affront to its vast statutory authority to require such devices. But the facts in this matter are not general—they are unique and specific—and a holding in Whittaker’s favor will have no precedential effect on IDWR’s ability to generally require such devices in other parts of the state.

In summary form, IDWR alleges in the Thompson Matter that Whittaker should have to undertake five specific actions, which are:

1. Replace what IDWR refers to as a “headgate and controlling works” at the wooden in-stream structure (referred to by Hearing Officer Cefalo as the “Whittaker Diversion”) with an “open-top check structure.” *Complaint* at 14, 16.
2. Install a headgate and controlling works at the West Springs Ditch. *Complaint* at 17.
3. Install a measuring device for the West Springs Ditch. *Complaint* at 19.
4. Install a headgate and controlling works at the East Springs Ditch. *Complaint* at 18.
5. Install a measuring device on the East Springs Ditch. *Complaint* at 20.

As set forth below, given the holding described in the *Memorandum Decision and Order* issued by Judge Wildman, the legal relationship between Whittaker and other water users has already been addressed. Based on those principles, there is no reasonable or logical rationale to force Whittaker to install these devices. Each of IDWR’s alleged five required actions are addressed below.

As to the first item, the current set up at the Whittaker Diversion is depicted in this photo from a report included in the *Declaration of Lacey B. Rammell-O-Brien at Exhibit 15, p. 7*:



Picture 2

Site Identification/Details:

Ericsson Corral/ Whittaker Upper Diversion

Date Taken: 04/06/2022

GPS Location or other Location Information:

Lat. 44; 40; 26.9040000000093 Long 113; 31;

23.9808000000194

Comments:

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

The green headgate depicted in the photo directs water to part of Whittaker's private ditch system into what is now a pipeline intake and is "adequate" according to IDWR's notes above (and we note there is a measuring device (a weir) on the ditch system downstream from the green headgate not depicted but has been determined to be adequate). It is the wooden structure depicted in the photo that IDWR alleges is improper, which is referred to in several documents as the in-stream headgate or the wooden headgate.

However, this structure does not serve as a headgate, but serves as a check structure to force water through the green headgate. Any excess flows in Stroud Creek that Whittaker is not entitled to under its water rights at this location will go over, around, or (if opened) under the wooden structure (which has a slide structure) and into the beginning of Whittaker's private ditch system as decreed by Hearing Officer James Cefalo, a conclusion which has not been altered on appeal. The Hearing Officer was clear on the nature of this channel below the wooden structure,

and even when asked to reconsider his initial decision on the nature of what is below the wooden structure, he held:

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.

Order Denying Petitions for Reconsideration at 4 (Harris Declaration at Exhibit 5).

Consequently, there is no need to change the wooden structure, or put a measuring device on it given the holdings in the Wildman Matter. Flows that make it past this diversion go into what IDWR has described as “nearly flat topography, willows, thick vegetation, and marsh like conditions and the hydrology is dynamic including both subsurface and surface flow, . . .” *Rammell-O’Brien Declaration* at Ex. 15 (page 5 of investigative report). Consistent with the *Whittaker v. Kauer* decision, as explained in Judge Wildman’s *Memorandum Decision and Order*, this excess Stroud Creek water—which used to be diverted through the Kauer Ditch until that ended in 2014—now runs downhill and either sinks in the ground to feed area springs or is captured as reach gains in the West Springs Ditch for Whittaker’s use. This Stroud Creek water is effectively natural reach gain to Whittaker’s ditch system. Again, this right has already been decided in 1956, and affirmed in the Wildman Matter. In exchange for the easement for the Kauer Ditch, the Whittakers had the right to “*capture all the water found flowing in the creek at that place.*” *Whittaker v. Kauer*, 78 Idaho at 97, 298 P.2d at 747 (italics in original; bolding and underlining added).³

³ IDWR suggests in the *Complaint* that because of limits placed on water rights, the control structures and headgates are necessary. But this is not a typical water rights case given the *Whittaker v. Kauer* agreement. The agreement remains in force, and if IDWR wants to bypass the West Springs Ditch, there is an existing facility to do so in the Kauer Ditch. If IDWR or others choose not to use this facility, that is not Whittaker’s fault and the decision to instead allow excess Stroud Creek water to proceed down the Stroud Creek drainage where it may be captured by the West Springs Ditch as natural gains to this existing system was not Whittaker’s decision.

However, to fit its narrative of the issues raised in the Thompson Matter, IDWR has repeatedly asserted through its investigative agents that the Stroud Creek channel is present immediately below the wooden structure, a claim that is simply false given Hearing Officer Cefalo's decisions as described above. It is not the Stroud Creek channel—it is Whittaker's private ditch system. In the April 21, 2022 letter from IDWR agent Rob Whitney to James Whittaker, it claims that the "Department's field observations confirm that **the Stroud Creek channel exists above and below the Whittaker in-channel headgate.**" *Rammell-O'Brien Declaration* at Ex. 14, p. 2 (emphasis added); *see also id.* at Exhibit 15, page 5 (David Graybill Report: "**Immediately downstream of the in-stream headgate is the Stroud Cr Channel.**") (emphasis added). But IDWR cannot ignore the binding effects of a judgement in a legal proceeding where an appointed Hearing Officer directly addressed the question of the nature of these channels, and the matter was not challenged on appeal before Judge Wildman.

Based on the *Memorandum Decision and Order*, there is no legitimate or reasonable purpose to change the wooden structure because of the holdings in the Wildman Matter. More to the point for purposes of this *Motion to Dismiss*, as described above, there are two tests for a court to consider when considering a Rule 12(b)(8) motion:

First, the court should consider whether the other case has gone to judgment, in which event the doctrines of claim preclusion and issue preclusion may bar additional litigation." *Klaue*, 133 Idaho at 440, 988 P.2d at 214 (citation omitted).

...

"The second test is whether the court, although not barred from deciding the case, should nevertheless refrain from deciding it." *Id.*

As to the first test, the Wildman Matter has gone to judgment, *Harris Declaration* at Exhibit 2, and therefore, this Court should dismiss the *Complaint*. As to the second test, even if not barred from the deciding the Thompson Matter, this Court should nevertheless refrain from

deciding this matter because it could lead to inconsistent judgments on a dispute where Judge Wildman has already addressed the relevant issues.

Moving on to the matters associated with the West Springs Ditch asserted by IDWR in the Thompson Matter, IDWR claims that a headgate and measuring device are needed on the West Springs Ditch. The West Springs Ditch collects water and conveys it across the Stroud Creek drainage. It is part of Whittaker's ditch system. This system has been in place for 90 years, and Judge Wildman has already held that:

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.

Memorandum Decision and Order at 9 (emphasis added). Included within the "significant disruption" is a requirement to install a headgate where there is no discrete point where water enters the ditch (because it collects water throughout its length).

More to the point, it appears that IDWR's end goal all along has been to require Whittaker to spill the excess Stroud Creek water **that used to be diverted through the Kauer Ditch** down the drainage as controlled by a headgate forced to be installed by IDWR in the West Springs Ditch and then to use some sort of measuring regime to measure the excess flows in Stroud Creek near the wooden in-stream structure and match that measurement at a headgate further down the West Springs Ditch to spill down the Stroud Creek drainage. However, the Idaho Supreme Court already described and upheld the right to capture the West Springs Water under WR 74-157 as well as **"capture all the water found flowing in the creek at that place."**

Again, it was not Whittaker's decision to not claim the Kauer Ditch as an authorized point of diversion that would have sent these flows down to Lee Creek and bypassed the West Springs Ditch. It was McConnell's decision. And yet, IDWR is trying to place a burden entirely on

Defendants to deliver this water through an area that has not historically taken this water. IDWR's attempt to make this matter all about Whittaker is not fair or reasonable. If IDWR truly wants this excess Stroud Creek water to bypass spring water emanating from West Springs, the answer is that it can be diverted through the Kauer Ditch. IDWR should focus its energy on encouraging McConnell to add this ditch as an authorized point of diversion.⁴ Just because McConnell does not want to use the Kauer Ditch does not mean that Defendants should have to change the watershed plumbing that has been place for 90 years. In this case, where Whittaker has the right to water collected in the West Springs Ditch, described in *Whittaker v. Kauer* and confirmed in the Wildman Matter, a headgate and measuring device on the West Springs ditch is not necessary because it serves no function based on the legal rights already decided in *Whittaker v. Kauer* and the Wildman Matter.

As to these issues asserted in the Thompson Matter, it should be dismissed because of the pending Wildman Matter. And yet, for the record, Whittaker does have a measuring device (a weir) on the West Springs Ditch as it exits the Stroud Creek drainage right before a pump intake as depicted on this IDWR photo:

⁴ As has been stated in all of the pending litigation, Defendants would not object to or adversely protest use of the Kauer Ditch for delivery of Stroud Creek water.



Picture 7

Site Identification/Details:

Whittaker Ditch Blockage Disconnecting the
System from Lee Creek Photo Point

Date Taken: 04/06/2022

GPS Location or other Location Information:

Lat. 44; 40; 45.2096399999865, Long 113; 31;
17.870519999996

Comments:

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

Rammell-O'Brien Declaration at Exhibit 15, page 10.

In sum, the original agreement summarized in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956) allows for the West Springs Ditch to “capture of **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 water of the West Springs.**” *Whittaker*, 78 Idaho at 98, 298 P.2d at 747-48 (emphasis added). The alterations to the flow of Stroud Creek and the effects of these alterations were upheld in the Wildman Matter, and that “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.” *Id.* at 9. Further, Judge Wildman determined “[t]hat the McConnells’ use of the Kauer Ditch ceased in 2014 was not the result of any action taken by Whittaker.” *Id.* at 6-7. Based on the decisions in the Wildman Matter, there is not any legal requirement to spill excess Stroud Creek water (that bypasses the wooden structure) from the West Springs Ditch to proceed down the Stroud Creek drainage. IDWR’s attempts to seek such action from Defendants in a separate

legal proceeding (the Thompson Matter) when the 1932 agreement was affirmed in the Wildman Matter should be dismissed.

And it is perhaps also worth noting that even without any spill of Stroud Creek water, there is approximately 1 cfs of gains further down the drainage where the Stroud Creek channel reconstitutes below the West Springs Ditch, which is more than enough to satisfy Steven Johnson’s senior 74-1831 water right of 0.24 cfs *even if* his right is entitled to call for water from West Springs Ditch:⁵



Picture 8

Site Identification/Details:
Stroud drainage subbed water

Date Taken: 04/06/2022

GPS Location or other Location Information:
Lat. 44; 40; 45.2096399999865, Long 113; 31;
17.8705199999996

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

Rammell-O’Brien Declaration at Exhibit 15, page 10.

Like the application of the two tests to the wooden in-stream structure component of the *Complaint*, as to the first test, the Wildman Matter has gone to judgment, *Harris Declaration* at Exhibit 2, and therefore, this Court should dismiss the *Complaint*. As to the second test, even if

⁵ McConnell’s Lower Diversion is downstream of Johnson’s point of diversion, but as described herein, use of this diversion is subordinate to Whittaker’s 74-157 and other legal rights under the 1932 agreement. Any water gaining to lower Stroud Creek not diverted by Johnson will be diverted by McConnell at the Lower Diversion.

not barred from the deciding the case, this Court should nevertheless refrain from deciding this matter because it could lead to inconsistent judgments on a dispute where Judge Wildman addressed the relevant issues.

Finally, as to the East Springs Ditch, like the West Springs Ditch, there is no reasonable or legitimate need for a headgate to divert flows from the East Springs Complex to other users or to measure those flows given the holdings described in the *Memorandum Decision and Order* discussed above. Even so, and for the record, there is a weir that IDWR indicates is submerged, *Complaint* at 10, but this is easily remedied with maintenance *even if* a measuring device was required.

Like the application of the two tests to the wooden in-stream structure and West Springs Ditch components of the *Complaint*, as to the first test, the Wildman Matter has gone to judgment, *Harris Declaration* at Ex. 2, and therefore, this Court should dismiss the *Complaint*. As to the second test, even if not barred from the deciding the case, this Court should nevertheless refrain from deciding this matter because it could lead to inconsistent judgments on a dispute where Judge Wildman addressed the relevant issues.

In short, the Thompson Matter involves matters addressed by Judge Wildman in the Wildman Matter. This Court should not allow the Thompson Matter to continue because the Wildman Matter has gone to judgement. Additionally, and/or alternatively, this Court should refrain from deciding the Thompson Matter for the reasons set forth above and dismiss the *Complaint* in its entirety pursuant to I.R.C.P. 12(b)(8).

C. Defendants are entitled to an award of attorney fees under Idaho Code § 12-117.

In responding to this *Complaint*, Defendants request an award of attorney fees pursuant to Idaho Code § 12-117, as this action involves as adverse individuals/entities and the Department (a

state agency). In such a case, “the Court shall award the prevailing party reasonable attorney’s fees . . . if it finds that the nonprevailing party acted without a reasonable basis in law or fact.” Idaho Code § 12-117.

As an initial matter, there should be no dispute that Idaho Code § 12-117 is potentially applicable here, as even the Department’s *Complaint* alleges a right to recover fees under this statute. *Complaint* at 22. As to Idaho Code § 12-117, the Idaho Supreme Court has returned to the standard where “[t]he reasonableness of a challenge to an agency’s conclusions of law, when considering fees under section 12-117(1), turns on the substance of the nonprevailing party’s legal arguments.” *3G AG Ltd. Liab. Co. v. Idaho Dep’t of Water Res.*, 509 P.3d 1180, 1195 (2022).

In this Thompson Matter, the Department’s position is not reasonable. IDWR attempts to recast the unique situation with the Stroud Creek drainage as a typical measuring device and headgate situation, and it is not. There is a unique and site-specific agreement concerning flow in the Stroud Creek drainage that has already been addressed by Judge Wildman in the Wildman Matter. An attempt by a governmental agency to exercise raw executive power in the Thompson Matter for no legitimate reason or benefit is not reasonable, particularly where the exercise of such power is based on premises that are demonstrably false (i.e., asserting that the nature of the channel below the in-stream wooden check structure is the Stroud Creek channel when an IDWR hearing officer held it is a private ditch system) or have already been clearly addressed by the Idaho Supreme Court in 1956 and Idaho’s water judge only weeks ago. Whittaker’s ancestor fought this fight when the watermaster in 1954 breached the berm where the West Springs Ditch is located; James Whittaker had to appeal an incorrect decision by IDWR to protect the 90-year-old agreement in the Wildman Matter; and now Defendants are subject to yet another attempt to strip them of their adjudicated legal rights by an Idaho administrative agency. These actions must stop at some

point, and an award of attorney fees in this matter would serve as a deterrent from future attempts to take away these rights. For all these reasons, this Court should award attorney fees to Defendants pursuant to Idaho Code § 12-117.

IV. CONCLUSION

For the reasons set forth above, this Court should dismiss the Complaint in its entirety pursuant to I.R.C.P. 12(b)(8), and order an award of attorney fees against the Department for initiating this matter.

Dated this 2nd day of August 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: MEMORANDUM 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
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Attorneys for the Defendants