LAWRENCE G. WASDEN
ATTORNEY GENERAL

DARRELL G. EARLY
Chief of Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
LACEY RAMMELL-O'BRIEN, ISB No. 8201
MARK CECCHINI-BEAVER, ISB No. 9297
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
lacey.rammell-obrien@idwr.idaho.gov
mark.cecchini-beaver@idwr.idaho.gov

Attorneys for Plaintiff

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

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Plaintiff,

vs.

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

Defendants.

Case No. CV30-22-0169

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, the Idaho Department of Water Resources, through its counsel of record, pursuant to I.R.C.P. 7(b)(3)(B), submits Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss and Second Declaration of Lacey B. Rammell-O'Brien. This Memorandum is also supported by the Declaration of Lacey B. Rammell-O'Brien, Affidavit of David T. Graybill, and Affidavit of Merritt D. Udy, filed with this Court on July 15, 2022.

INTRODUCTION

Floyd James Whittaker, Jordan Whittaker, Whittaker Two Dot Ranch, LLC, and Whittaker Two Dot Land, LLC (collectively "Defendants") attempt to conflate the case before this Court with an administrative proceeding on judicial review under I.R.C.P. 84(c) before the Snake River Basin Adjudication (SRBA) District Court. While Defendants' Memorandum in Support of Motion to Dismiss, the District Court's Memorandum Decision and Order[1] in *Whittaker v. Idaho Department of Water Resources*, No. CV30-21-304 (Lemhi Cnty. Dist. Ct. Idaho July 18, 2022),[2] and the quiet title decision in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956), may provide this Court with some interesting local history, it is nevertheless legally unrelated to the subject action before this Court. The action before this Court involves only the Defendants' failure to comply with their statutory obligations as water users under the Idaho Code. The Department's action before this Court—specifically asking this Court for an order requiring the Defendants to remove or modify the current In-stream Headgate at the Whittaker Diversion on Stroud Creek and

[1] Attached as Exhibit 1 to the Declaration of Robert L. Harris in Support of Motion to Dismiss, filed with this Court on August 2, 2022.
[2] In accordance with I.A.R. 14(a), the time limit to appeal this decision does not run until August 29, 2022.

install suitable controlling works and measuring devices at locations approved by the Department—differs completely as a cause of action from the administrative proceeding on judicial review before the SRBA District Court. In the case before the SRBA District Court, the issue was whether the approval of the McConnells' application for transfer would result in injury to the Whittakers' water right no. 74-157. Harris Decl. Ex. 1, at 4. Whether the Defendants have failed to meet their statutory obligations to install and maintain controlling works and measuring devices was neither at issue nor adjudicated in the administrative proceeding on appeal before the SRBA District Court. The only subject matter the two cases have in common is Lee Creek itself. The Department respectfully requests that this Court deny Defendants' Motion to Dismiss.

STANDARD OF REVIEW

Defendants have filed their Motion to Strike pursuant to I.R.C.P. 12(b)(8), which provides for dismissal on the basis of "another action pending between the same parties for the same cause." "A district court's decision to exercise jurisdiction and proceed with an action even though a similar action is pending in another court is reviewed for abuse of discretion." *Slavens v. Slavens*, 161 Idaho 198, 201, 384 P.3d 962, 965 (2016) (citing *Klaue v. Hern*, 133 Idaho 437, 439, 988 P.2d 211, 213 (1999)). "In deciding whether to exercise jurisdiction over a case when there is another action pending between the same parties for the same cause, a trial court must evaluate the identity of the real parties in interest and the degree to which the claims or issues are similar." *Klaue v. Hern*, 133 Idaho at 440, 988 P.2d at 214 (quoting *Diet Ctr., Inc. v. Basford*, 124 Idaho 20, 22–23, 855 P.2d 481, 483–84 (Ct. App. 1993)).

ARGUMENT

To succeed on a I.R.C.P. 12(b)(8) motion to dismiss the instant case, Defendants must demonstrate that there is another action pending between the *same* parties for the *same* cause of action. If they can establish that, then it is at the discretion of this Court to determine whether to proceed with the case or dismiss it. The Defendants have failed to demonstrate that there is another action pending between the same parties for the same cause, because the judicial review proceeding before the SRBA District Court concerns issues raised by (Floyd) James Whittaker and Whittaker Two Dot Ranch, LLC on an appeal unrelated to the matter before this Court.

A. The instant case and the administrative proceeding on judicial review before the SRBA District Court do not involve the same cause of action.

The Department's cause of action against Defendants in the instant case stems from its statutory authority under Idaho Code § 42-701. This statute covers the "installation and maintenance of controlling works and measuring devices by water appropriators." I.C. § 42-701; *see* Complaint. The installation and maintenance of controlling works and measuring devices, or the failure to do so, was not before the SRBA District Court on judicial review. *See* Harris Decl. Ex. 1.

Defendants argue that I.R.C.P. 12(b)(8) requires only a "similar" cause of action by citing to language in *Johnson v. Johnson*, 147 Idaho 912, 917, 216 P.3d 1284, 1289 (2009). Mem. in Supp. of Mot. to Dismiss at 2, 12, 16. Defendants argue that the administrative appeal proceeding before the SRBA District Court and the instant case "center on the legal consequences of the agreement originally described in *Whittaker v. Kauer*." *Id.* at 12. Defendants argue that the Department's "primary motivation" in filing its Complaint is to specifically deliver water to the McConnells. *Id.* Defendants argue that the facts

surrounding their use of water on Stroud Creek are so "unique and specific" as to remove them from Department's authority to require diversion works and measuring devices. *Id.* at 13.

I.R.C.P. 12(b)(8) requires "the same cause." Not an "adjacent" cause, not a "comparable" cause, and not a "similar" cause. Defendants argue that the standard is not the "same" cause of action, but rather a "similar" cause of action based on language used in case law. Mem. in Supp. of Mot. to Dismiss at 2, 12. The language cited by the Idaho Supreme Court in *Klaue v. Hern* specifically requires that "[t]he trial court is to consider whether the court in which the matter already is pending is *in a position to determine the whole controversy and to settle all the rights of the parties*." 133 Idaho at 440, 988 P.2d at 214 (1999) (quoting *Diet Ctr., Inc. v. Basford*, 124 Idaho 20, 22–23, 855 P.2d 481, 483–84 (Ct. App. 1993)). The administrative appeal proceeding before the SRBA District Court did not determine any part of the controversy currently before this Court. The Department acknowledges that there is geographic overlap in the SRBA District Court appeal and the instant case, insofar as Defendants divert water from sources in the Lee Creek drainage. Independent of the SRBA District Court's Memorandum Decision and Order, the Defendants are required by Idaho Code § 42-701 to maintain suitable controlling works and measuring devices at their diversion points.

As alleged in the Complaint, the identified structures are not of suitable design, or are not present at all. It bears repeating that Idaho Code § 42-701(1) requires appropriators or users of any public waters of the state of Idaho to "maintain to the satisfaction of the director of the [D]epartment [] suitable headgates and controlling works at the point where the water is diverted." This law has been on the books in Idaho since 1899 and was last

amended in 1998. Nothing required in the statute is new or unforeseen as relates to Defendants' obligations to install and maintain suitable controlling works and measuring devices near their points of diversion. As is detailed in the Plaintiff's Complaint and Memorandum in Support of Plaintiff's Motion for Mandatory Preliminary Injunction, Defendants have been told on multiple occasions that their diversions are not in compliance with the requirements of Idaho Code § 42-701 and the Department's 2018 Final Order. *See* Rammell-O'Brien Decl. Exs. 12–14. The Department has sent several letters to Defendants on the topic of the unsuitable and missing controlling works and measuring devices at or near their diversion points on Stroud Creek. *Id*. The watermasters for Water District 74Z and Water District 170 have made trips out to the points of diversion and places of use associated with the water rights pertinent to this litigation. *See* Graybill Aff. ¶¶ 11, 22–26; Udy Aff. ¶¶ 6–7, 11–13. Defendants were repeatedly warned that if they did not install suitable works as required by Idaho Code § 42-701, the Department would pursue litigation to that end. *See* Rammell-O'Brien Decl. Exs. 12–14.

Defendants allege that this case is all about getting water to the McConnells. Mem. in Supp. of Mot. to Dismiss at 12. It is not. The McConnells are not the only water users downstream from Defendants in the Lee Creek drainage. There are other water users downstream, and one of them has a water right that is senior to water right no. 74-157. On August 14, 2007, the SRBA District Court issued an Order of Partial Decree for Water Right: 74-1831 to the Johnsons' predecessors-in-interest. 2d Rammell-O'Brien Decl. Ex. 1. On April 30, 2019, a Notice of Change in Water Right Ownership for water right no. 74-1831 was submitted to the Department, listing the new owners of water right no. 74-1831 as Steven Johnson and Susan Johnson. *Id.* Ex. 2. The source of the water right is

Lee Creek tributary to the Lemhi River, and entitles the owner to .24 cfs for irrigation. Water right no. 74-1831 has a priority date of 06/28/1912. The priority date for Floyd James and Paula Whittakers' water right no. 74-157 is 04/01/1916, Rammell-O'Brien Decl. at 3, almost four years junior to water right no. 74-1831. The point of diversion for 74-1831 is downstream from the point of diversion for 74-157. *See* Rammell-O'Brien Decl. Ex. 4; 2d Rammell-O'Brien Decl. Ex. 1. Without suitable measuring devices and controlling works on the Springs Ditches, the Department does not know if the Defendants are taking more than the 3.2 cfs they are entitled to take from the Springs, or if they are sending any water in excess of the 3.2 cfs they are entitled to take downstream to other users, including the Johnsons.

The installation of suitable controlling works and measuring devices is required by Idaho Code § 42-701, a statute that was not at issue in the administrative appeal proceeding before the SRBA District Court. As addressed above, the instant case is an enforcement action to correct the Defendants' failure to comply with Idaho Code § 42-701, despite the Department's 2018 Final Order and several requests from multiple watermasters to do so. Defendants are entitled to divert the amounts of water decreed to them by the Court. They are not, however, entitled to more than their decreed amounts. The presence of the downstream senior and junior users on Lee Creek necessarily requires that the watermasters responsible for administering and delivering water in the Lee Creek Drainage know how much water is being diverted by the Defendants for their own use. Defendants' argument that "there is no reasonable or logical rationale to force Whittaker to install these devices" is both factually and legally incorrect. Mem. in Supp. of Mot. to Dismiss at 13.

Defendants have failed to demonstrate that the cause of action in the administrative appeal proceeding before the SRBA District Court and the cause of action in the instant case are the same as required for dismissal under I.R.C.P. 12(b)(8).

B. The instant case and the administrative proceeding on judicial review before the SRBA District Court do not involve the same parties.

Defendants argue that because two of the four Defendants to the instant case—Floyd James Whittaker and Two Dot Ranch, LLC—were protestants and are petitioners in the administrative appeal proceeding before the SRBA District Court, the instant case should be dismissed in its entirety. Mem. in Supp. of Mot. to Dismiss at 11.

The Department recognizes that there is some overlap in the players of both the SRBA District Court appeal and the instant case. That does not, however, equate to the "same parties" as contemplated by I.R.C.P. 12(b)(8). First and most obvious, the McConnells are not a party to this action. The Department filed with this Court a declaration from Bruce McConnell detailing the injuries his ranching operation would suffer should his water right not be administered. This is supporting evidence for the benefit of the Court's understanding and does not elevate the McConnells to party status in the instant case. Second, Jordan Whittaker and Whittaker Two Dot Land, LLC were not parties to the administrative proceeding before the Department or the judicial review before the SRBA District Court.

Defendants have failed to demonstrate that the same parties are involved in the instant case and the case before the SRBA District Court as required for dismissal under I.R.C.P. 12(b)(8).

C. The two tests identified in *Klaue* are not applicable.

Defendants cite to language in *Johnson v. Johnson* in support of their Motion to Dismiss the instant case pursuant to I.R.C.P. 12(b)(8). Mem. in Supp. of Mot. to Dismiss at 2, 12, 16. The Idaho Supreme Court in *Johnson* was citing to the two tests established in *Klaue v. Hern*. *Johnson v. Johnson*, 147 Idaho at 917, 216 P.3d at 1289. However, the Court does not need to reach the two tests established by the *Klaue* case because the administrative appeal proceeding before the SRBA District Court and the instant case are so distinct as to not implicate I.R.C.P. 12(b)(8) at all.

Before reaching the two tests provided in the *Klaue* case, the Court must examine whether the two pending lawsuits are the same. Then, the Court in *Klaue* directs the Court to first "consider whether the other case has gone to judgment, in which event the doctrines of claim preclusion and issue preclusion may bar additional litigation. . . . The second test is whether the court, although not barred from deciding the case, should nevertheless refrain from deciding it." *Klaue v. Hern*, 133 Idaho at 440, 988 P.2d at 214. *Klaue* involved a probate action, filed in Idaho by the child of a decedent, regarding the decedent's estate, and a suit for declaratory judgement, filed in Washington State by a shareholder of a close corporation, regarding ownership of the decedent's stock. *Id.* at 438–39, 988 P.2d at 212–13. In *Klaue*, the Idaho Supreme Court concluded that the district court had dismissed the Idaho action in error, noting "[t]he Washington probate court is not in a position to determine the whole controversy and to settle all the rights of the parties." *Id*. at 440, 988 P.2d at 214.

In their Memorandum in Support of Motion to Dismiss, Defendants rely heavily on the Court's language in *Johnson v. Johnson*. The facts in *Johnson* revolve around a

married couple, one of whom filed divorce and child custody proceedings in New York State, and the other who filed divorce and child custody proceedings in the State of Idaho. 147 Idaho 912, 915, 216 P.3d 1284, 1287 (2009). It was largely an issue over which state had personal jurisdiction over the parties. In *Johnson*, the overlap between actions is clear—same married couple seeking the same divorce and custody over the same children. Neither the facts nor the legal analysis in the *Johnson* case are relevant to either the judicial review action before the SRBA District Court or the instant case before this Court.

This is a situation more like *Klaue v. Hern* than it is *Johnson v. Johnson.* The administrative appeal proceeding before the SRBA District Court was pursued and decided on completely different issues and grounds than the instant case. The McConnell transfer application was an administrative proceeding held pursuant to Idaho Code § 42-222 and the Idaho Administrative Rules, involving a final order of the Department. Judicial review of a final order of the Department is governed by IDAPA and is considered pursuant to authority found in Idaho Code §§ 42-1701(A)(4), 67-5270, and 67-5279. The instant case is a compliance proceeding filed pursuant to authority in Idaho Code §§ 42-1701B, 42-701, and 42-602. The SRBA District Court's judgment in *Whittaker v. Idaho Department of Water Resources* has no bearing on whether the Defendants have failed to install suitable measuring devices and controlling works as required by statute. It did not settle the rights of all parties to this instant case. Likewise, there is no threat to inconsistent outcomes between this Court and the decision of the SRBA District Court. Therefore, this Court should consider this instant case, within its own jurisdiction, as a separate matter unrelated to the administrative appeal proceeding before the SRBA District Court.

This Court must deny Defendants' Motion to Dismiss because they have failed to meet the requirements of I.R.C.P. 12(b)(8), and as such, cannot meet the requirements of the two tests as established in *Klaue*.

D. The instant case does not seek the restoration of the original flow of Stroud Creek.

Defendants argue that the Department's Complaint in this case is an attempt to require them to "restore the original flow of Stroud Creek." Mem. in Supp. of Mot. to Dismiss at 17. The Department notes that Defendants fail to cite to any portion of the Complaint that seeks such an action or outcome. The Complaint alleges simply that Defendants must replace the In-stream Headgate, install suitable controlling works and suitable measuring device on the East Springs Ditch, and install suitable controlling works and suitable measuring device on the West Springs Ditch. Notably absent is any action by the Department seeking to restore the original flow of Stroud Creek. The Department has identified a water user down drainage with a right senior (and not subordinate) to water right no. 74-157 by almost four years, who would be entitled to the delivery of their water before Floyd James and Paula Whittaker would be entitled to theirs. Beyond the Johnsons' water right, Defendants are only entitled to the amount in the decree with the rest required to go downstream toward satisfying subordinate water rights. Defendants' assertion that without controlling works and measuring devices, the West Springs Ditch produces "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" may be sometimes true. Mem. in Supp. of Mot. to Dismiss at 20. It may not be. The point illustrated here is that without the suitable, statutorily required measuring devices, no one knows how much water is in the West Springs Ditch at any given time, including Defendants. Defendants' refusal to

install statutorily required controlling works and measuring devices is thwarting the local watermasters' ability to do the job they are required to do—deliver water in priority. An order from this Court requiring Defendants to comply with Idaho Code § 42-701 would result in local watermasters being able to complete their obligations to account for and deliver water as required by Idaho Code § 42-602.

Defendants argue that the submerged condition of the weir in the East Springs Ditch "could be easily remedied." Mem. in Supp. of Mot. to Dismiss at 21. The weir in the East Springs Ditch has historically been submerged at its current location, has not been approved by the Department, and must be evaluated for replacement. Complaint ¶ 53.

The Department is not seeking an order from this Court requiring the Defendants to restore the original flow of Stroud Creek. The Defendants' argument on this topic is neither accurate nor relevant to this proceeding. It likewise offers no support as to why the instant case should be dismissed pursuant to I.R.C.P. 12(b)(8).

E. Defendants are not entitled to attorney fees.

Idaho Code § 12-117 states, in relevant part, that the Court "shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law."

Defendants claim that they are entitled to attorney fees under Idaho Code § 12-117 because an award of attorney fees would serve as a deterrent to the Department in exercising its statutory obligations. *See* Mem. in Supp. of Mot. to Dismiss at 23. Defendants hinge their argument on a quiet title action to which Defendants' "ancestor" was a party, and the administrative proceeding on judicial review before the SRBA District

Court. Past legal involvements are not grounds for an award of attorney fees under Idaho Code § 12-117.

The statute requires that the nonprevailing party acted without reasonable basis in fact or law. There is no dispute that the Department is required by Idaho Code § 42-602 to "distribute water in water districts in accordance with the prior appropriation doctrine." There is no dispute that the Director of the Department has "direction and control of the distribution of water from all natural water sources within a water district." I.C. § 42-602. There is no dispute that the "appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted." I.C. § 42-701(1). There is no dispute that Idaho Code § 42-701 requires each appropriator to "construct and maintain, when required by the director of the department of water resources, a rating flume of other measuring device at such point as is most practical . . . for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted." *Id.* These statutes, drafted and passed by the Idaho Legislature, constitute more than sufficient legal basis for the Department's Complaint in this matter. These statutes combine with the abject failure of Defendants to bring their diversions into compliance to establish the factual basis for the Department's Complaint in this matter.

Curiously, Defendants argue that their situation is too "unique" to be subject to the Department's authority. *See* Mem. in Supp. of Mot. to Dismiss at 13. Appropriators shirking their obligations to install and maintain controlling works and measuring devices is prevalent enough that the Legislature specifically empowered the Department to bring an

action in district court, for exactly the reasons presented by Defendants' failure to comply with Idaho Code § 42-701(1). Idaho Code § 42-701(3) states: "Any appropriator or user of the public waters of the state of Idaho that neglects or refuses to construct or maintain such headgates, controlling works, or measuring devices, . . . then the director of the department of water resources . . . may take action pursuant to section 42-1701B, Idaho Code, to enforce the requirement to construct, install or maintain such devices." The Department is acting pursuant to its statutory authority in bringing the instant case before this Court for resolution.

Because the Department has brought this action on both factual and legal rational grounds, Defendants are not entitled to an award of attorney fees under Idaho Code § 12-117.

F. The Department is entitled to an award of attorney fees.

The Department is entitled to an award of attorney fees because Defendants have brought their motion to dismiss pursuant to I.R.C.P. 12(b)(8), which the Department has demonstrated does not apply to the instant case. As discussed above, Idaho Code § 12-117 states that the Court "shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law." The Defendants filed their motion to dismiss pursuant to I.R.C.P. 12(b)(8) without a reasonable basis in fact or law. Defendants have stretched what little similarity might be present between the administrative appeal proceeding before the SRBA District Court and the instant case beyond credibility. The Department respectfully requests attorney fees related to Defendants' Motion to Dismiss pursuant to Idaho Code § 12-117.

CONCLUSION

The issues decided by the SRBA District Court are not part of the action before this Court. The administrative proceeding involves different parties, different issues, and different causes. Whether the Defendants are complying with the statutory requirements of Idaho Code § 42-701 was neither raised nor adjudicated in the Department's administrative proceeding or the subsequent judicial review before the SRBA District Court. By not complying with the requirements of Idaho Code § 42-701(1), the Defendants are preventing the Department from fulfilling its clear legal duty to administer water to all users on the Stroud and Lee Creek drainage. Defendants should be held to the same requirements as every other appropriator in Administrative Basin 74 subject to the Department's 2018 Final Order. The Department respectfully asks the Court to deny Defendants' Motion to Dismiss pursuant to I.R.C.P. 12(b)(8), as well as deny the Defendants' request for attorney fees pursuant to Idaho Code § 12-117. The Department requests that the Court grant an award of attorney fees to the Department pursuant to Idaho Code § 12-117.

Dated the 9th day of August 2022.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of August 2022, I caused to be served a true and correct copy of the foregoing *Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss*, via iCourt E-File and Serve, upon the following:

Robert L. Harris
Luke H. Marchant
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
efiling@holdenlegal.com

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