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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

**REPLY 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 *Reply 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) and is in response to *Plaintiff’s Memorandum in Opposition to*

Defendants’ Motion to Dismiss filed on August 9, 2022 (“IDWR Response”), by the Idaho Department of Water Resources (“IDWR”, “Department”, or “Plaintiff”). As requested in the *Motion to Dismiss*, Defendants moved this Court to dismiss the *Complaint* (“Complaint”) filed by the Department. This reply is supported by the pleadings and declarations previously submitted in this matter, including those specifically relating to this *Motion to Dismiss* and those associated with the Department’s *Motion for Mandatory Preliminary Injunction*.

As described below, the *IDWR Response* does not provide persuasive argument and/or authority for this Court to deny *Defendants’ Motion to Dismiss*.

I. ARGUMENT

A. **IDWR’s attempts to ignore and/or minimize Judge Wildman’s *Memorandum Decision and Order* and the Idaho Supreme Court case of *Whittaker v. Kauer* are without merit.**

Surprisingly, in response to arguments made in support of *Defendants’ Motion to Dismiss*, IDWR dismissively asserts that Judge Wildman’s *Memorandum Decision and Order* issued in the Wildman matter and the *Whittaker v. Kauer* case merely provides “this Court with some interesting local history, . . .” *IDWR Response* at 2. Rather than directly respond to Defendants’ arguments from these legal authorities, or attempt to wrestle with those arguments, the Department merely claims that they are “unrelated to the subject action before this Court.” *Id.* In IDWR’s view, “[t]he only subject matter the two cases [the Wildman Matter and Thompson Matter] have in common is Lee Creek itself,” *Id.* at 3, and that these cases “have no bearing on whether the Defendants have failed to install suitable measuring devices and controlling works as required by statute.” *Id.* at 10 (emphasis added).

Because of the critically important principles contained in the *Memorandum Decision and Order* issued in the Wildman Matter and the *Whittaker v. Kauer* Idaho Supreme Court, it is

understandable why IDWR is dismissive of these legal authorities. It is only argument it can make. But it is not persuasive.

How do these specific holdings apply to the Thompson Matter? The *IDWR Response* argues that “Defendants are not entitled to divert the amounts of water decreed to them by the Court. They are not, however, entitled to more than their decreed amounts.” *IDWR Response* at 7. In other words, IDWR is asserting that if there is more than 3.2 cfs of water in the West Springs Ditch (which could be (1) only West Springs and East Springs water; or (2) a mix of West Springs water and East Springs Water and excess flows originating from Stroud Creek not diverted at the Kauer Ditch), then Whittaker must somehow direct the water above 3.2 cfs back down the Stroud Creek drainage. That can only be done if a headgate installed on the West Springs Ditch.

Is Whittaker required to turn flows in excess of 3.2 cfs down the Stroud Creek drainage as IDWR asserts? No. We know this because of Judge Wildman’s *Memorandum Decision and Order* and the *Whittaker v. Kauer* case. As previously explained in the factual background of Defendants’ *Memorandum in Support of Motion to Dismiss*, in exchange for the easement for the Kauer Ditch, the Whittakers obtained the right “**to thereby capture all the water found flowing in the creek at that place.**” *Memorandum Decision and Order* at 5. There is no ambiguity here. The “all” includes water emanating from West Springs collecting in the West Springs Ditch, East Springs water that also flows into this ditch, as well as reach gains to Whittaker’s private ditch system coming from flows from Stroud Creek in excess of what Whittaker directs through its green headgate next to the wooden structure (located upstream from the West Springs Ditch).

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 Creek¹] 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.

The bottom line is that in the Thompson matter, IDWR seeks to make it Whittaker's obligation to install infrastructure to direct water found in Whittaker's private ditch system in excess of 3.2 cfs back to the natural supply when it was not Whittaker's decision to no longer use the Kauer Ditch, a facility that was constructed to direct Stroud Creek flow around the West and East Springs water:

Beyond the Johnsons' water right [Water Right No. 74-1831 discussed in further detail below], Defendants are only entitled to the amount in the decree with the rest required to go downstream toward satisfying subordinate water rights.

IDWR Response at 11.

Should it be Whittaker's obligation to install infrastructure to direct water found in Whittaker's private ditch system back in excess of 3.2 cfs back to the natural supply? Judge Wildman clearly held no:

¹ 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.

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). In the *IDWR Response*, IDWR claims that it is not trying to restore the original flow of Stroud Creek, further claims that “Defendants fail to cite to any portion the Complaint that seeks such an action or outcome,” but then admits that it is seeking “suitable controlling works” on the West Springs ditch to be utilized because of the requirement for water “to go downstream toward satisfying subordinate water rights.” *IDWR Response* 11.

But the only way to get water “downstream toward satisfying subordinate water rights,” which IDWR claims must be done, is to restore the ability to flow water down the Stroud Creek drainage like it was before the Kauer Ditch was constructed. That ability can only be accomplished if Whittaker is forced to install a headgate on its West Springs Ditch to turn water back down the Stroud Creek drainage, but if this is required, it would cause “significant disruption to a system that has been in place since 1932.” *Id.* This is directly contrary to Judge Wildman’s holding. IDWR devotes an entire section of its brief to this issue claiming that “[t]he instant case does not seek the restoration of the original flow of Stroud Creek.” *IDWR Response* at 11-12. However, in substance, IDWR precisely seeks what it claims it is not seeking—IDWR wants to mandate that Whittaker install a headgate to direct water back down the Stroud Creek drainage from Whittaker’s West Springs Ditch in order to restore the original flow of Stroud Creek. This is contrary to Judge Wildman’s *Memorandum Decision and Order* and precisely why IDWR’s *Complaint* must be dismissed.

It is also worth emphasizing at this point that, as stated in prior briefing, and through the legal proceedings associated with the Wildman Matter, Defendants would not object to or

adversely protest use of the Kauer Ditch for delivery of excess Stroud Creek water. *Memorandum in Support of Motion to Dismiss* at 18 (fn.4). The reason there may be excess flows in Whittaker's private ditch system from Stroud Creek is not because of actions Whittaker has taken, rather, they are the result of inaction by McConnell to add the Kauer Ditch as an authorized point of diversion to bypass the excess Stroud Creek flows around the West and East Springs complex. Whittaker only wants its spring water and wants the original agreement followed. If Whittaker took a position otherwise and also wanted the extra Stroud Creek water (that should go down the Kauer Ditch), then Whittaker would oppose any effort of McConnell to add the Kauer Ditch as an authorized point of diversion. Whittaker has not and will not oppose efforts to reauthorize use of the Kauer Ditch to get Stroud Creek water around the West Springs and East Springs complex. Today, Whittaker at times can benefit from enhanced spring flows and additional water in the West Springs Ditch because of the excess Stroud Creek water making its way down the drainage as opposed to being diverted at the Kauer Ditch. But Whittaker is not taking the action to divert this water into the West Springs Ditch system—the water is present because of the inaction of others, and Whittaker has no obligation to cause significant disruption to the plumbing that has long been in place.²

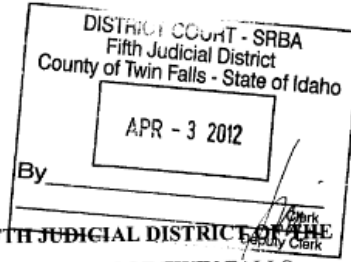
It is evident that IDWR is attempting to make this situation like most water diversion situations in Idaho, but it simply is not. There is an Idaho Supreme Court judgment in *Whittaker v. Kauer*, upheld by Judge Wildman, that makes this a unique case, and it is unreasonable for IDWR to continually ignore the power of Idaho's courts and instead assert “[c]uriously, Defendants argue that their situation is too ‘unique’ to be subject to the Department’s authority.”

² *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.”).

IDWR Response at 13. But it is the courts that say what the law is, not the Department. *See, 3G AG Ltd. Liab. Co. v. Idaho Dep't of Water Res.*, 509 P.3d 1180, 1195 (2022) (“Discouraging litigants from challenging the legal conclusions of an executive agency necessarily stunts our power to effectuate *de novo* review and determine what the law is with finality. *See Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”)).

As stated above, the *IDWR Response* argues that “Defendants are not entitled to divert the amounts of water decreed to them by the Court. They are not, however, entitled to more than their decreed amounts.” *IDWR Response* at 7. IDWR’s use of the word “decreed” asserts that Whittaker is only entitled to what is allowed by what is described on a water right, but decreed must also mean what has been decreed by Idaho’s courts and Whittaker has the legal rights decreed to it in *Whittaker v. Kauer*, which was confirmed by Judge Wildman.

Idaho’s courts can confer rights on parties given unique circumstances. For example, prior courts decreed to users in the Lemhi River Basin the right to divert “high flows” *without a water right*, despite Idaho law that provides that water rights are required to be obtained in Idaho through the appropriation process for a water user to be entitled to water. Idaho Code § 42-103 (“The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.”). This ability was even confirmed in the Snake River Basin Adjudication by (who else) Idaho’s water judge, Eric Wildman, with the decree of general provisions that allow for this:



**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA)	PARTIAL DECREE PURSUANT TO
)	I.R.C.P. 54(b) FOR GENERAL
Case No. 39576)	PROVISIONS IN BASIN 74
)	
)	
)	

The following general provisions are hereby decreed to be applicable to water rights in Basin 74:

The following water rights from the following sources of water in Basin 74 shall be administered separately from all other water rights in Basin 74 in accordance with the prior appropriation doctrine as established by Idaho law:

1. Agency Creek and tributaries;
2. Alder Creek and tributaries;
3. Basin Creek (including McNutt & Schwartz) and tributaries;
4. Bohannon Creek and tributaries;
5. Bull Creek and tributaries;
6. Canyon Creek (Junction Creek) and tributaries;
7. Eightmile Creek (Big & Little) and tributaries;
8. Geertson Creek and tributaries;
9. Hawley Creek and tributaries;
10. Haynes Creek and tributaries;
11. Jake Canyon Creek and tributaries;
12. Kirtley Creek and tributaries;
13. Lee Creek and tributaries;
14. Mill Creek and tributaries;
15. Pattee Creek and tributaries;
16. Peterson Creek and tributaries;
17. Pratt Creek and tributaries;
18. Sandy Creek and tributaries;
19. Sawmill Creek (Little) and tributaries;
20. Texas Creek and tributaries;

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
GENERAL PROVISIONS IN BASIN 74
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21. Timber Creek (Big & Little) and tributaries;
22. Walter Creek and tributaries;
23. Warm Springs Creek (near Pratt Creek) and tributaries;
24. Wimpey Creek and tributaries;
25. Withington Creek and tributaries;
26. Yearian Creek and tributaries; and
27. Zeph and Swartz Creeks and tributaries.

Future appropriations of water on the above streams are not considered to be subject to prior downstream rights on the Lemhi River proper. Future appropriations of water on any other water source or stream in the Lemhi River Basin, however, are considered to be tributary to the Lemhi River for purposes of distribution.

The following water rights from the following sources of water in Basin 74 shall be administered separately from all other water rights in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law:

Water Right No.	Source
None	None


Except as otherwise specified above, all water rights within Basin 74 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

The following general provision shall govern the use of "High Flow" surface water for irrigation use within the Lemhi Basin:

The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

- (a) the waters so diverted are applied to beneficial use.
- (b) existing decreed rights and future appropriations of water are first satisfied.

Dated: April 3, 2012


 ERIC J. WILDMAN
 Presiding Judge
 Snake River Basin Adjudication

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
 GENERAL PROVISIONS IN BASIN 74
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- 2 -

Available at http://www.srba.state.id.us/FinalDecreeAtt3_01.HTM (click on link for "Partial Decree for General Provisions in Basin 74"). IDWR is very aware of the Basin 74 General Provisions.

Stated another way, Idaho's courts granted a right to divert water without the need to have a water right, even though an Idaho statute requires what must be held in order to have water delivered to a water user. And yet, as IDWR argues in this matter, IDWR has a statutory duty to

administer water rights through priority administration (*see Complaint* at 14 (citing to Idaho Code §§ 42-106, 42-602)). Does this mean IDWR does not allow water users to divert “high flows” under the Basin 74 General Provisions? No, because courts have granted these select water users this right.

Similarly, in this matter, as to Whittaker’s use of water in the Stroud Creek drainage, multiple courts have decreed Whittaker’s specific legal rights, and even though they are not typical, there is no dispute they are present. IDWR’s attempts to fit a square peg in a round hole is not persuasive. IDWR’s attempts to circumvent Idaho law and label *Whittaker v. Kauer* and Judge Wildman’s *Memorandum Decision and Order* as mere “interesting local history” is unavailing and unreasonable. These legal authorities have decreed Whittaker certain rights that are squarely challenged in the Thompson matter, which is why IDWR’s *Complaint* must be dismissed.

B. Steven Johnson’s Water Right No. 74-1831 is being satisfied.

Now that Judge Wildman has determined that McConnells’ water rights must be subordinated to Whittaker’s 74-157 to prevent injury,³ IDWR turns to another water user—Steven Johnson—as a justification to require significant modifications to Whittaker’s system. Johnson is the owner of Water Right No. 74-1831. IDWR argues that “[w]ithout 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.” *Response* at 7.

³ IDWR asserts that this matter is not “all about getting water to the McConnells.” *Response* at 6.

Whittaker has already addressed IDWR's general arguments whether Whittaker is legally obligated to install a device to spill water back into the Stroud Creek drainage above. It has already been determined 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). The only way to get water “downstream toward satisfying subordinate water rights,” which IDWR claims must be done, is to restore the ability to flow water down the Stroud Creek drainage like it was before the Kauer Ditch was constructed. That ability can only be accomplished if Whittaker is forced to install a headgate on its ditch to turn water back down the Stroud Creek drainage, but if this is required, it would cause “significant disruption to a system that has been in place since 1932.” *Id.* This is directly contrary to Judge Wildman's holding. IDWR devotes an entire section of its brief to this issue claiming that “[t]he instant case does not seek the restoration of the original flow of Stroud Creek.” *IDWR Response* at 11-12. However, in substance, IDWR precisely seeks what it claims it is not—IDWR wants to mandate that Whittaker install a headgate to direct water back down the Stroud Creek drainage from Whittaker's West Springs Ditch in order to restore the original flow of Stroud Creek. This is contrary to Judge Wildman's *Memorandum Decision and Order* and precisely why IDWR's *Complaint* must be dismissed.

In terms of the specific argument relative to possible injury to Mr. Johnson, IDWR is attempting to generate a crisis where there is none. IDWR's own evidence submitted in this matter confirms that Mr. Johnson is receiving sufficient water to satisfy his water right. Even without any spill of Stroud Creek water past the West Springs Ditch, 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:⁴



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 10.⁵

The presence of this flow was confirmed by Whittaker’s consultant, Bryce Contor. *See, Declaration of Bryce A. Contor (“Contor Declaration”)*. Without any excess Stroud Creek at the Whittaker Headgate (the wooden in-stream headgate), there is approximately 0.9 cfs of water in Stroud Creek (as measured by Bryce Contor) of reach gains to Stroud Creek at a location below the West Springs Ditch. *Contor Report* at 9. This flow is “nearly four times the quantity of water needed to satisfy this right [74-1831 for 0.24 cfs] at face value. *Id.* at 15. IDWR’s observation in

⁴ 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.

⁵ In another section of the *IDWR Response*, IDWR claims that Defendants assertion that “the West Springs Ditch” produces more than enough water to satisfy Johnson is the source of water. This is not accurate. The source of those reach gains is from springs and seeps below the West Springs ditch.

April (before runoff) and Contor's observation in July (after runoff) are remarkably consistent, which means that the reach gains to lower Stroud Creek are consistent, and water is already consistently available to Johnson's 74-1831.

Accordingly, Johnson (a senior user) is not being deprived of water. As previously described, McConnell's Lower Diversion is downstream of Johnson's point of diversion, but as described, 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. There are no other senior users that can be impacted. IDWR's arguments otherwise are without merit, and Defendants' *Motion to Dismiss* should be granted.

C. IDWR's arguments relative to whether the standards for I.R.C.P. 12(b)(8) have been met in order to dismiss this matter are unavailing.

IDWR asserts several arguments concerning the application of the facts of the Thompson Matter to I.R.C.P. 12(b)(8). None of these arguments are availing.

First, IDWR argues that because the Thompson Matter arises out of Idaho Code § 42-701, it cannot be related to the Wildman Matter, which is a judicial review proceeding. *IDWR Response* at 4. However, simply because two matters are commenced under separate types of legal proceedings or circumstances does not mean they cannot be "for the same cause." The plain language of I.R.C.P. 12(b)(8) simply provides for "another action pending" and provides no limits as to how those actions can arise. Under IDWR's interpretation, the only time Rule 12(b)(8) would apply is if, for example, a divorce proceeding is filed in one county of Idaho in state court and a second divorce proceeding is filed in another county of Idaho in state court. This is a much too narrow reading of this rule, and one that is inconsistent with Idaho case law.

In *Frantz v. Hawley Troxell Ennis & Hawley LLP*, 161 Idaho 60, 383 P.3d 1230 (2016), the district court dismissed Frantz' complaint on two grounds, including that dismissal was appropriate under I.R.C.P. 12(b)(8) because there was another action pending between the same parties for the same cause. The Idaho Supreme Court affirmed the district court's dismissal. There was one case pending in *state court* before First Judicial District of the State of Idaho and before *federal bankruptcy court*. *Id.* at 63, 383 P.3d at 1233. The issue raised in both proceedings is whether there was an attorney-client relationship. The district court "concluded that claim preclusion and issue preclusion would both apply here but for the lack of a final judgment from the bankruptcy court appearing in the record. Instead, the court concluded that the issue of Hawley Troxell's alleged legal malpractice was a matter properly pending before the bankruptcy court." *Id.*

The district court applied I.R.C.P. 12(b)(8), and the Idaho Supreme Court affirmed. One case arose out of a federal court case, and the other a state court case, and even there, a dismissal under I.R.C.P. 12(b)(8) was proper. IDWR's attempts to restrict the applicability of I.R.C.P. 12(b)(8) is without merit. Like the legal malpractice question in the *Frantz* case, it is the substance of the issue pending before the courts that is controlling, not the jurisdiction or type of case the issue arises out of. 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*. As such, this Court has authority to dismiss the *Complaint* pursuant to I.R.C.P. 12(b)(8).

IDWR next argues that in order for I.R.C.P. 12(b)(8) to be granted, the matters must be the same, not similar. *Response* at 5. However, in this case, whether labeled as the same or similar, the legal consequences of the agreement originally described in *Whittaker v. Kauer* concern the

same matter and Judge Wildman was in a position to settle all of the rights of the parties. As previously described, Judge Wildman determined 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). The only way to get water “downstream toward satisfying subordinate water rights,” which IDWR claims must be done in the Thompson Matter, is to restore the ability to flow water down the Stroud Creek drainage like it was before the Kauer Ditch was constructed. That ability can only be accomplished if Whittaker is forced to install a headgate on its ditch to turn water back down the Stroud Creek drainage, but if this is required, it would cause “significant disruption to a system that has been in place since 1932.” *Id.* This is directly contrary to Judge Wildman’s holding, which means that the matters are the same. IDWR devotes an entire section of its brief to this issue claiming that “[t]he instant case does not seek the restoration of the original flow of Stroud Creek.” *IDWR Response* at 11-12. However, in substance, IDWR precisely seeks what it claims it is not—IDWR wants to mandate that Whittaker install a headgate to direct water back down the Stroud Creek drainage from Whittaker’s West Springs Ditch in order to restore the original flow of Stroud Creek. This is contrary to the holdings in Judge Wildman’s *Memorandum Decision and Order*, just like the bankruptcy court’s determination concerning Hawley Troxell’s alleged malpractice pending before the bankruptcy court and why the issue could not be raised in a separate state court proceeding. IDWR’s arguments on this point are unavailing.

IDWR next claims that the Thompson Matter and Wildman Matter do not involve the same parties. *IDWR Response* at 8. IDWR claims that the “same parties” standard means that there can only be those parties involved, not additional parties. *Id.* This is the case even though “[t]he

Department recognizes that there is some overlap in the players of both the SRBA District Court appeal and the instant case.” *Id.*

IDWR’s arguments are without merit and are again contrary to *Frantz*. In *Frantz*, the bankruptcy proceeding involved as a party the bankruptcy trustee where a bank filed a claim against the estate in an adversary proceeding. *Frantz*, 161 Idaho at 62, 383 P.3d at 1232. The state court case did not include the bankruptcy trustee as a party, and furthermore, even the law firm (Hawley Troxell) was not a party in the bankruptcy proceeding, but represented a party, while the law firm was a party in the state court proceeding. Neither the district court, nor the Idaho Supreme Court, held this was an issue. In the Thompson matter, IDWR is a party and so is James Whittaker (along with other Whittaker individuals and entities). In the Wildman Matter, IDWR is a party and so is James Whittaker. It is the presence of these parties that satisfies the same parties standard. The presence of other parties in this matter does not preclude this court’s consideration of Defendants’ *Motion to Dismiss*. IDWR’s arguments otherwise are unavailing.

IDWR next asserts that the two tests identified in the *Johnson v. Johnson* case (which cite to *Klaue v. Hern*) are not applicable to this matter. *IDWR Response* at 9. The Department explains the factual backgrounds of the Johnson and Klaue cases, but those specific facts have no bearing on this Court’s analysis. Whittaker maintains its arguments set forth in its initial memorandum.

The primary argument from the Department on this issue seems to be that “[t]he administrative appeal proceeding before the SRBA District Court and pursued and decided on completely different issues and grounds than the instant case.” *Id.* at 10. However, as described above, the nature of how these cases arose is not determinative.

Further, in this argument section, IDWR asserts the following:

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.

Id. We 100% disagree. As we have explained many, many times, but it bears repeating here, as to the agreement described in *Whittaker v. Kauer*, Judge Wildman determined 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). The only way to get water “downstream toward satisfying subordinate water rights,” which IDWR claims must be done in the Thompson Matter, is to restore the ability to flow water down the Stroud Creek drainage like it was before the Kauer Ditch was constructed. That ability can only be accomplished if Whittaker is forced to install a headgate on its ditch to turn water back down the Stroud Creek drainage, but if this is required, it would cause “significant disruption to a system that has been in place since 1932.” *Id.* This is directly contrary to Judge Wildman's holding, which means that the matters are the same. IDWR devotes an entire section of its brief to this issue claiming that “[t]he instant case does not seek the restoration of the original flow of Stroud Creek.” *IDWR Response* at 11-12. However, in substance, IDWR precisely seeks what it claims it is not—IDWR wants to mandate that Whittaker install a headgate to direct water back down the Stroud Creek drainage from Whittaker's West Springs Ditch in order to restore the original flow of Stroud Creek. This is contrary to the holdings in Judge Wildman's *Memorandum Decision and Order*, a case that absolutely has bearing on whether Whittaker must install the headgate and take other measures IDWR wants to restore the flow of Stroud Creek water down the Stroud Creek drainage below the West Springs Ditch. IDWR's argument that it has no bearing with without merit as there is a threat of inconsistent

outcomes. *See id* at 10 (“Likewise, there is no threat to inconsistent outcomes between this court and the decision of the SRBA District Court.”).

D. The Department’s claims that Whittaker is attempting to “remove them from [the] Department’s authority to require diversion works and measuring devices” is without merit.

In this matter, IDWR claims “Defendants argue that the facts surrounding their use of water on Stroud Creek are so ‘unique and specific’ as to remove them from [the] Department’s authority to require diversion works and measuring devices.” *IDWR Response* at 5. This is an unfair overstatement.

As explained in prior briefing, in the *Contor Report*, and the *Objection to Motion for Mandatory Preliminary Injunction*, Whittaker has installed headgates and measuring devices where clearly necessary. To make a blanket assertion like the Department has insinuating that Defendants have no diversion works or measuring devices and seek to challenge IDWR’s authority as a general matter to require measuring devices and controlling works is unfair and simply contrary to the facts. The issue in this litigation is whether, given Judge Wildman’s *Memorandum Decision and Order* and the *Whittaker v. Kauer* case, are there changes/additions to the water system that need to be made where IDWR has generally asked for them to be made. Whittaker’s expert has opined that Whittaker is in compliance as described in the *Contor Report*. Defendants are not seeking a determination that they should receive a blanket exemption from Idaho law for them. What Defendants are doing is defending their rights decreed by Judge Wildman and the Idaho Supreme Court, which is that Defendants are not required to make certain alterations to their ditch system that IDWR wants to force them to make that significantly disrupts their system

because the Kauer Ditch is no longer being used.⁶ The Department's hyperbole is not useful, and in any event, does not change how this Court should approach Defendants' *Motion to Dismiss*.

E. The Department's factual claim that there is no measuring device such that "the Department does not know if the Defendants are taking more than the 3.2 cfs they are entitled to take from the Springs" is not true.

Related to the immediately preceding section, and while not directly relevant to the question of whether this Court should grant Defendants' *Motion to Dismiss*, IDWR claims that there is no measuring device such that "the Department does not know if the Defendants are taking more than the 3.2 cfs they are entitled to take from the Springs." *IDWR Response* at 7. This is demonstrably not true.

Whittaker has provided evidence in this matter of the water flowing from the springs associated with Water Right No. 74-157, as measured on July 25, 2022, by Whittaker's expert, Bryce Contor. *Contor Declaration* at 2 (¶2). He measured flows of 1.00 cfs at a weir of the type IDWR approves which is located just before Whittaker's pump intake on the West Springs Ditch. This measuring device has been in place for some time. Here is a photo from the *Contor Report* of the weir:

⁶ It is critical to note here that relative to the "in-stream wooden headgate," which is, in reality, a check structure as described by Bryce Contor, IDWR has not challenged or even addressed in the *IDWR Response* what Hearing Officer Cefalo held that the channel below this feature is part of Whittaker's private ditch system and is not the natural channel of Stroud Creek. This particular issue is therefore undisputed.



Photo 7. Cipolletti weir at Point G. The camera is facing approximately east.

Contor Report at 7.

For the record, this 1.00 cfs amount measured by Contor is less than the 3.2 cfs authorized under Whittaker’s 74-157. Accordingly, there is no extra water to turn down the Stroud Creek drainage for McConnell or other water users *even if* Whittaker was required to do so under priority administration (which Whittaker is not). *See also, Objection to Motion for Mandatory Preliminary Injunction* at 16. While not critical for purposes of the *Motion to Dismiss*, it is nevertheless important to set the record straight.

F. This Court should grant Defendants’ request for attorney fees and deny IDWR’s request for attorney fees.

Defendants have requested 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 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, particularly when considering the arguments made in the *IDWR Response*. IDWR asserts that Judge Wildman’s *Memorandum Decision and Order* issued in the Wildman matter and the *Whittaker v. Kauer* case merely provides “this Court with some interesting local history, . . .” *Response* at 2. These arguments are consistent with 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. Judge Wildman determined 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). The only way to get water “downstream toward satisfying subordinate water rights,” which IDWR claims must be done in the Thompson Matter, is to restore the ability to flow water down the Stroud Creek drainage like it was before the Kauer Ditch was constructed. That ability can only be accomplished if Whittaker is forced to install a headgate on its ditch to turn water back down the Stroud Creek drainage, but if this is required, it would cause “significant disruption to a system that has been in place since 1932.” *Id.* This is directly contrary to Judge Wildman’s holding, which means that the matters are the same.

Further, IDWR’s arguments concerning the elements of I.R.C.P. 12(b)(8) are unpersuasive and not reasonable, as set forth above. For all these reasons, this Court should award attorney fees to Defendants pursuant to Idaho Code § 12-117.

Additionally, this Court should deny IDWR's request for fees. IDWR claims that the "Defendants filed their motion to dismiss pursuant to I.R.C.P. 12(b)(8) without a reasonable basis in law or fact. Defendants have stretched what little similarity might be present between the administrative appeal proceeding for the SRBA District Court and the instant case beyond credibility." *IDWR Response* at 14. However, as described above, these cases are much more significant than IDWR claims. Defendants' positions are reasonable, and as a result, IDWR's request for fees should be denied.

II. 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. The Court should deny IDWR's request for fees.

Dated this 12th day of August 2022.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 12th 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: REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Attorneys and/or Individuals Served:

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