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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

**ANSWER AND DEMAND FOR  
JURY TRIAL**

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., answer the *Complaint* filed by the Plaintiff, the Idaho Department of Water Resources ("IDWR" or "Department"), as follows:

## **GENERAL RESPONSE**

Defendants deny each and every allegation of the *Complaint* except as expressly admitted herein.

## **SPECIFIC RESPONSES**

### **NATURE OF ACTION**

1. Answering Paragraph 1, this paragraph contains a mixed statement of factual and legal allegations that describe the Department's view of the nature of this action and therefore, merits no response, but to the extent one is required, Defendants deny.

### **JURISDICTION AND VENUE**

2. Answering Paragraph 2, Defendants admit the Court has subject matter jurisdiction over this action, but deny that they have committed any wrongful acts that warrant this cause of action brought by the Department.

3. Answering Paragraph 3, Defendants admit to personal jurisdiction, but deny that they have committed any wrongful acts and omissions giving rise to this cause of action.

4. Answering Paragraph 4, Defendants admit venue is proper, but deny that any violations, acts, and/or omissions have occurred.

### **PARTIES**

5. Answering Paragraph 5, Defendants admit.

6. Answering Paragraph 6, this paragraph merits no response as there are no factual allegations and the cited statutes speak for themselves.

7. Answering Paragraph 7, Defendants admit.

8. Answering Paragraph 8, Defendants admit.

9. Answering Paragraph 9, Defendants admit.
10. Answering Paragraph 10, Defendants admit.
11. Answering Paragraph 11, Defendants admit.
12. Answering Paragraph 12, Defendants admit.
13. Answering Paragraph 13, Defendants admit.

### **FACTS**

14. Answering Paragraph 14, this paragraph only identifies certain affidavits in support of the *Complaint*, contains no factual allegations, and therefore merits no response.

#### **The Lee Creek Drainage**

15. Answering Paragraph 15, Defendants admit that Stroud Creek is a creek in Lemhi County. Defendants deny that Stroud Creek is currently a tributary to Lee Creek as it has been determined by an administrative decision of the Department that portions of the Stroud Creek stream channel no longer exist. Defendants admit that Stroud Creek has historically, at times, been referred to as the Left Fork of Lee Creek.

16. Answering Paragraph 16, Defendants deny.

17. Answering Paragraph 17, Defendants admit.

18. Answering the first sentence of Paragraph 18, Defendants are without sufficient knowledge to admit or deny, and therefore deny the same. Answering the second sentence of Paragraph 18, Defendants admit.

19. Answering Paragraph 19, Defendants admit.

20. Answering Paragraph 20, Defendants admit.

21. Answering Paragraph 21, Defendants admit.

22. Answering Paragraph 22, Defendants admit.

23. Answering Paragraph 23, the cited statute speaks for itself and merits no response. To the extent a response is required, Defendants deny.

24. Answering Paragraph 24, the cited statute speaks for itself and merits no response. To the extent a response is required, Defendants deny.

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

25. Answering Paragraph 25, Defendants admit.

26. Answering Paragraph 26, Defendants admit.

27. Answering Paragraph 27, Defendants admit.

28. Answering Paragraph 28, Defendants admit.

29. Answering Paragraph 29, Defendants admit.

30. Answering Paragraph 30, Defendants admit.

31. Answering Paragraph 31, the Final Unified Decree for the SRBA and the cited statute in this paragraph speak for themselves, and as a result, this paragraph merits no response.

32. Answering Paragraph 32, Defendants are without sufficient knowledge to either admit or deny and therefore deny the same.

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

33. Answering Paragraph 33, Defendants admit.

34. Answering Paragraph 34, the Final Order speaks for itself, and the Department's characterization of the referenced Final Order is incomplete, therefore, Defendants deny.

35. Answering Paragraph 35, the Final Order speaks for itself, and this paragraph merits no response. To the extent a response is required, Defendants deny.

36. Answering Paragraph 36, the Final Order speaks for itself, and this paragraph merits no response. To the extent a response is required, Defendants deny.

37. Answering Paragraph 37, the Final Order speaks for itself, and this paragraph merits no response.

38. Answering Paragraph 38, Defendants admit.

39. Answering Paragraph 39, Defendants admit no variance request has been filed, but affirmatively allege that they are in compliance with the Final Order because of applicable Idaho law and that no variance from the Department was necessary.

40. Answering Paragraph 40, Defendants admit no request for extension has been filed, but affirmatively allege that they are in compliance with the Final Order because of applicable Idaho law and that no extension from the Department was necessary.

41. Answering Paragraph 41, Defendants admit the letter was sent, that it is attached to the referenced affidavit, but as to the content of the letter, it speaks for itself, and therefore this paragraph merits no response. To the extent a response is required, Defendants deny.

42. Answering Paragraph 42, Defendants admit the letter was sent, that is attached to the referenced affidavit, but as to the content of the letter, it speaks for itself, and therefore this paragraph merits no response. To the extent a response is required, Defendants deny.

### **Whittaker Diversions**

43. Answering Paragraph 43, Defendants admit, but in terms of the defined term the Department uses to describe this headgate, such description merits no response.

44. Answering Paragraph 44, to the extent that this paragraph calls for a legal conclusion as to what a stream channel consists of, Defendants deny. As to this paragraph's use of the term "definite channel," as generally understood by the regulated public, including Defendants, Defendants admit.

45. Answering Paragraph 45, Defendants admit that one of the headgates is located on the northeast side of the channel (also generally referred to as “the Green Headgate”) and admit that this regulates the amount of water diverted through the Whittaker diversion. Defendants affirmatively allege that the amount of water diverted through the Green Headgate is also regulated and controlled by use of the In-stream Headgate described in Paragraph 46 as a check structure.

46. Answering Paragraph 46, Defendants admit that there is a second wooden headgate on the northwest side of the channel that serves as a check structure and deny the remaining portions of Paragraph 46.

47. Answering Paragraph 47, Defendants are without knowledge to either admit or deny and therefore denies the same. Defendants affirmatively allege that the In-stream headgate (as defined by the Department) in its current state allows high water to bypass this headgate.

48. Answering Paragraph 48, Defendants deny.

### **East and West Springs Diversions**

49. Answering Paragraph 49, Defendants admit that WR 74-157 has two described points of diversion. The remaining sentences of Paragraph 49 are confusing as they refer to the points of diversion as source names only, and therefore Defendants deny.

50. Answering Paragraph 50, this sentence is confusing, and therefore Defendants deny. Defendants acknowledge that the decree for WR 74-157 describes the source of water of this right as “springs” and the tributary designation as “Lee Creek.”

51. Answering Paragraph 51, Defendants admit.

52. Answering Paragraph 52, Defendants deny, as this paragraph presumes that a headgate and controlling works on a spring channel are required. An agent of the Idaho Department of

Water Resources, Cindy Yenter, performed a site visit and told Defendants that no headgate or controlling works are required.

53. Answering Paragraph 53, Defendants deny.

54. Answering Paragraph 54, Defendants deny.

55. Answering Paragraph 55, Defendants admit the existence of the West Springs Ditch but deny the remainder of this paragraph as the width and depth of the West Springs Ditch is variable.

56. Answering Paragraph 56, the term “downstream” is undefined, and therefore Defendants deny the same. Defendants affirmatively allege that IDWR hearing officer James Cefalo determined that there is no Stroud Creek stream channel at the location of the West Springs Ditch, and consequently, no ancillary rights associated with the stream channel.

57. Answering Paragraph 57, Defendants deny, and affirmatively allege that there is a Cipolletti weir that is an approved device and has been used for water measurement at the “hilltop” location. Defendants affirmatively allege that the remaining portions of this paragraph fail to take into account the holding of the Idaho Supreme Court Case *Whittaker v. Kauer*, 78 Idaho 94, 298P.2d 745 (1956) as well as the District Court’s *Memorandum Decision Order* issued by Judge Eric Wildman on July 18, 2022.

58. Answering Paragraph 58, Defendants deny, and affirmatively allege that there is a Cipolletti weir that is an approved device and has been used for water measurement at the “hilltop” location. Defendants affirmatively allege that the remaining portions of this paragraph fail to take into account the holding of the Idaho Supreme Court Case *Whittaker v. Kauer*, 78 Idaho 94, 298P.2d 745 (1956) as well as the District Court’s *Memorandum Decision Order* issued by Judge Eric Wildman on July 18, 2022.

59. Answering Paragraph 59, Defendants deny, and affirmatively allege that the physical and legal situation concerning West Springs and East Springs water is not regulated under general prior appropriation principles given the *Whittaker v. Kauer* decision and Judge Wildman's *Memorandum Decision and Order*.

60. Answering Paragraph 60, Defendants deny, and affirmatively allege that the physical and legal situation concerning West Springs and East Springs water is not regulated under general prior appropriation principles given the *Whittaker v. Kauer* decision and Judge Wildman's *Memorandum Decision and Order*.

61. Answering Paragraph 61, Defendants deny, and affirmatively allege that the physical and legal situation concerning West Springs and East Springs water is not regulated under general prior appropriation principles given the *Whittaker v. Kauer* decision and Judge Wildman's *Memorandum Decision and Order*.

62. Answering Paragraph 62, Defendants deny, and affirmatively allege that the physical and legal situation concerning West Springs and East Springs water is not regulated under general prior appropriation principles given the *Whittaker v. Kauer* decision and Judge Wildman's *Memorandum Decision and Order*.

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

63. Answering Paragraph 63, this paragraph merits no response as the referenced letters speak for themselves.

64. Answering Paragraph 64, this paragraph merits no response as the referenced letters speak for themselves. Specifically, as to the water rights of McConnell, Defendants affirmatively allege that the physical and legal situation concerning West Springs and East Springs water and the McConnell water rights described in this paragraph is not regulated



under general prior appropriation principles given the *Whittaker v. Kauer* decision and Judge Wildman's *Memorandum Decision and Order*. Under the holdings of these decisions, McConnell has not suffered and cannot suffer injury.

65. Answering Paragraph 65, this paragraph merits no response as the water rights speak for themselves. Specifically, as to the water rights of McConnell, Defendants affirmatively allege that the physical and legal situation concerning West Springs and East Springs water and the McConnell water rights described in this paragraph is not regulated under general prior appropriation principles given the *Whittaker v. Kauer* decision and Judge Wildman's *Memorandum Decision and Order*. Under the holdings of these decisions, McConnell has not suffered and cannot suffer injury.

66. Answering Paragraph 66, this paragraph merits no response as the water rights speak for themselves. Specifically, as to the water rights of McConnell, Defendants affirmatively allege that the physical and legal situation concerning West Springs and East Springs water and the McConnell water rights described in this paragraph is not regulated under general prior appropriation principles given the *Whittaker v. Kauer* decision and Judge Wildman's *Memorandum Decision and Order*. Under the holdings of these decisions, McConnell has not suffered and cannot suffer injury.

67. Answering Paragraph 67, Defendants are without knowledge to either admit or deny, and therefore deny the same.

68. Answering Paragraph 68, this paragraph merits no response as the affidavits speak for themselves. To the extent a response is required, Defendants deny.

69. Answering Paragraph 69, Defendants admit that they were provided notice by the Department.

70. Answering Paragraph 70, this paragraph merits no response as the affidavits speak for themselves.

71. Answering Paragraph 71, this paragraph merits no response as the affidavits speak for themselves.

72. Answering Paragraph 72, Defendants deny any implication that they are out of compliance with Idaho law given the unique circumstances and prior court decisions associated with the administration and distribution of water associated with Stroud Creek and WR 74-157.

### **COUNT I**

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

73. Answering Paragraph 73, Defendants incorporate their responses to the preceding paragraphs.

74. Answering Paragraph 74, Defendants admit, but affirmatively allege that other applicable law, including court decisions inform Idaho's prior appropriation doctrine and, in Defendants' particular situation, prior Idaho Supreme Court and district court decisions, have established the rights and obligations of the parties involved as general prior appropriation principles are altered just like other prior appropriation principles within the Lemhi River Basin (*i.e.* the separate streams and high flows general provisions).

75. Answering Paragraph 75, Defendants admit.

76. Answering Paragraph 76, Defendants admit.

77. Answering Paragraph 77, Defendants admit.

78. Answering Paragraph 78, Defendants admit.

79. Answering Paragraph 79, Defendants admit.

80. Answering Paragraph 80, Defendants admit.
81. Answering Paragraph 81, Defendants admit.
82. Answering Paragraph 82, Defendants admit.
83. Answering Paragraph 83, Defendants deny.
84. Answering Paragraph 84, Defendants deny.
85. Answering Paragraph 85, Defendants deny.
86. Answering Paragraph 86, Defendants deny.
87. Answering Paragraph 87, Defendants deny.
88. Answering Paragraph 88, Defendants admit.
89. Answering Paragraph 89, Defendants deny.
90. Answering Paragraph 90, Defendants deny.

## **COUNT II**

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

91. Answering Paragraph 91, Defendants incorporate their responses to the preceding paragraphs.
92. Answering Paragraph 92, this paragraph merits no response as the Final Order speaks for itself. To the extent a response is required, Defendants deny.
93. Answering Paragraph 93, this paragraph merits no response as the Final Order speaks for itself. To the extent a response is required, Defendants deny
94. Answering Paragraph 94, this paragraph merits no response as the Final Order speaks for itself. To the extent a response is required, Defendants deny.
95. Answering Paragraph 95, Defendants admit that the Final Order applies to Defendants' water rights but specifically denies that it applies to WR 74-157 to the extent that the Final

Order, an administrative action, is inconsistent with *Whittaker v. Kauer* and Judge Wildman's *Memorandum Decision and Order* as both of those decisions properly classify the general situation surrounding WR 74-157 as a contractual and water facility issue. Defendants affirmatively allege that any water users affected by these prior decisions utilized the facility upstream of the Whittaker diversion, known as the Kauer Ditch, and their failure to perfect the ability to use that ditch in accordance with the *Whittaker v. Kauer* case does not provide grounds for the Department's commencement of this lawsuit.

96. Answering Paragraph 96, Defendants admit they were provided copies of the Final Order.

97. Answering Paragraph 97, Defendants deny.

98. Answering Paragraph 98, Defendants deny.

99. Answering Paragraph 99, Defendants deny.

100. Answering Paragraph 100, Defendants deny.

### **COUNT III**

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

101. Answering Paragraph 101, Defendants incorporate their responses to the preceding paragraphs.

102. Answering Paragraph 102, Defendants deny, and affirmatively allege that an agent of the Department, Cindy Yenter, inspected and determined that no headgate or controlling works was required on the East Springs Ditch as is the typical case with water used from springs with relatively minor discharges.

103. Answering Paragraph 103, Defendants deny.

104. Answering Paragraph 104, Defendants deny.

105. Answering Paragraph 105, Defendants deny.

**COUNT IV**

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

106. Answering Paragraph 106, Defendants incorporate their responses to the preceding paragraphs.

107. Answering Paragraph 107, Defendants deny to the extent this allegation infers that Defendants have done or are doing anything that is not authorized by prior court decisions given the unique circumstances surrounding their use of water under WR 74-157. As a general matter, not necessarily applicable here, Defendants admit that the law in Idaho is distribution of water in accordance with the prior appropriation doctrine, but the application of this doctrine is informed by prior court decisions that may affect this doctrine in specific circumstances.

108. Answering Paragraph 108, this paragraph purports to summarize provisions of Idaho Code § 42-602, which statute speaks for itself, and therefore Defendants deny to the extent this allegation infers that Defendants have done or are doing anything that is not authorized by prior court decisions given the unique circumstances surrounding their use of water under WR 74-157.

109. Answering Paragraph 109, this paragraph purports to summarize the provisions of certain Idaho statutes. The cited statutes speak for themselves, and therefore, Defendants deny to the extent this allegation infers that Defendants have done or are doing anything that is not authorized by prior court decisions given the unique circumstances surrounding their use of water under WR 74-157.

110. Answering Paragraph 110, this paragraph purports to summarize the provisions of certain Idaho statutes. The cited statutes speak for themselves, and therefore, Defendants deny

to the extent this allegation infers that Defendants have done or are doing anything that is not authorized by prior court decisions given the unique circumstances surrounding their use of water under WR 74-157.

111. Answering Paragraph 111, Defendants deny.

112. Answering Paragraph 112, Defendants deny.

113. Answering Paragraph 113, Defendants deny.

114. Answering Paragraph 114, Defendants deny.

### **COUNT V**

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

115. Answering Paragraph 115, Defendants incorporate their responses to the preceding paragraphs.

116. Answering Paragraph 116, Defendants deny, and affirmatively allege that there is a weir on the East Springs Ditch that is currently functioning. Defendants further affirmatively allege that an agent of the Department, Cindy Yenter, visited the site and made a determination that the system was in compliance and that no further action from Defendants was necessary.

117. Answering Paragraph 117, Defendants deny.

118. Answering Paragraph 118, Defendants deny.

119. Answering Paragraph 119, Defendants deny.

### **PRAYER FOR RELIEF**

120. Answering Paragraph 120, Defendants deny that the Department is entitled to the relief summarized therein.

121. Answering Paragraph 121, Defendants deny that the Department is entitled to the relief summarized therein.

122. Answering Paragraph 122, Defendants deny that the Department is entitled to the relief summarized therein.

123. Answering Paragraph 123, Defendants deny that the Department is entitled to the relief summarized therein.

124. Answering Paragraph 124, Defendants deny that the Department is entitled to the relief summarized therein.

125. Answering Paragraph 125, Defendants deny that the Department is entitled to the relief summarized therein.

### **DEMAND FOR JURY TRIAL**

Defendants demand trial by jury as to all issues triable to a jury in this action.

### **RELIEF REQUESTED BE DEFENDANTS**

WHEREFORE, Defendants pray for the following relief:

- A. That the *Complaint* be dismissed;
- B. That the Court award reasonable costs and attorney fees to Defendants in defending this action pursuant to Idaho Code §§ 12-117, 120, 12-121, 12-123, and/or Idaho Rule of Civil Procedure 54 and other applicable Idaho law.
- C. For such other and further relief as the Court deems just and appropriate.

Dated this 21<sup>st</sup> day of November, 2022.



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



**CERTIFICATE OF SERVICE**

I hereby certify that on this **21st** day of November, 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:** ANSWER AND DEMAND FOR JURY TRIAL

**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 <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:lacey.rammell-obrien@idwr.idaho.gov">lacey.rammell-obrien@idwr.idaho.gov</a> <a href="mailto:mark.cecchini-beaver@idwr.idaho.gov">mark.cecchini-beaver@idwr.idaho.gov</a>	<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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