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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

**DEFENDANTS' PRE-TRIAL
MEMORANDUM**

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 *Defendants' Pre-Trial Memorandum* as described in the *Court Trial Scheduling Order* dated October 24, 2022 (the "Scheduling Order"). *Defendants' Pre-Trial Memorandum* is being filed separately.

(A) Index of Exhibits

Defendants' Exhibit No.	Exhibit Description	Stipulation for Admissibility?	Legal Grounds for Objection
1	<i>Whittaker v. Kauer</i> District Court Judgment (May 9, 1955)		
2	<i>Whittaker v. Kauer</i> , 78 Idaho 94, 298 P.2d 745 (1956)		
3	Engineer Map (prepared in 1954)		
4	Engineer Map Legend		
5	Illustrative Map (prepared by counsel)		
6	Expert Report Prepared by Bryce Contor ("Whittaker Measuring Device and Diversion Report" dated August 3, 2022).		
7	<i>Preliminary Order Approving Transfer</i> , Transfer No. 84441, May 18, 2021		
8	<i>Order Denying Petitions for Reconsideration</i> , Transfer No. 84441, June 21, 2021		
9	<i>Order on Exceptions; Final Order Approving Transfer</i> , Transfer No. 84441, November 2, 2021		
10	<i>Whittaker v. IDWR</i> , Lemhi County Case No. CV-30-21-0304, <i>Petitioners' Opening Brief</i> , April 14, 2022		
11	<i>Whittaker v. IDWR</i> , Lemhi County Case No. CV-30-21-0304, <i>Memorandum Decision and Order</i> , July 18, 2022.		
12	<i>Whittaker v. IDWR</i> summary (from IDWR's website, https://idwr.idaho.gov/legal-actions/district-court-actions/whittaker-v-idwr/)		
13	Expert Report Prepared by Bryce Contor ("Field Observation of 'East Springs' Water Source of Idaho Water Right 74-157, Lemhi County, Idaho) July 17, 2020		
14	Expert Report Prepared by Bryce Contor ("Field Observation of Lee Creek, a Ditch Known Locally as 'Kauer Ditch,' and the 'West Springs' Water Source of Idaho Water Right 74-157, Lemhi County, Idaho) July 20, 2020		
15	Snake River Basin Adjudication Partial Decree for Water Right No. 74-157		
16	Video Recording of Prior Field Visit of East Springs Weir		
17	Water District 74Z 2023 Annual Meeting Minutes		
18	Watermaster Instructions, dated April 27, 2023 (letter from Tim Luke)		
19	Water District 74Z 2023 Annual Report		
20	Water District 74Z 2023 Annual Report		
21	Letter from Cindy Yenter to Bruce and Glenda McConnell; Closure of Unauthorized Diversion; August 5, 2020		

The parties have not stipulated to the admissibility of the above exhibits as of the date of submission of this pre-trial memorandum, and at this time, Defendants do not know what grounds for objection Plaintiff may have, although most of the documents are public records and court documents. Defendants reserve the right to use any of the Plaintiff's exhibits and to introduce rebuttal exhibits to Plaintiff's exhibits as necessary. Defendants also reserve the right to update and fine tune Exhibit 5 (the illustrative map) and substitute an updated map.

(B) Depositions or Discovery Responses.

At this time, Defendants have no intention to offer deposition testimony or discovery responses in lieu of live testimony. Provided however, Defendants reserve the right to do so as impeachment, if necessary.

(C) Summary of Documentary Evidence Supporting Damages Sought by the Parties.

Statutory damages are being sought under Idaho Code § 42-1701B(6), but the total amount being sought by Plaintiff is unknown.

(D) Defendants' Witnesses

Witness	Witness Address
Jordan Whittaker	c/o Robert L. Harris, P.O. Box 50130, Idaho Falls, ID 83402
James Whittaker	c/o Robert L. Harris, P.O. Box 50130, Idaho Falls, ID 83402
Bryce Contor (expert)	482 Constitution Way, Suite 303, Idaho Falls, ID 83402
Cindy Yenter	662 Highway 93 N., Carmen, ID 83462
Merritt Udy	P.O. Box 145, Leadore, ID 83464
David Graybill	102 S. Warpath, Salmon, ID 83476-4435
David R. Tomchak	1476 Lee Creek Rd., Leadore, ID 83464
Shanna Foster	213 Grady Road, Leadore, ID 83464
Steven Johnson	1019 Lee Creek Road, Leadore, ID 83464

(E) Factual Summary of the Case.

Plaintiff IDWR and Defendants have differing views of the nature of this case, and consequently, differing views on the important facts of this the case.

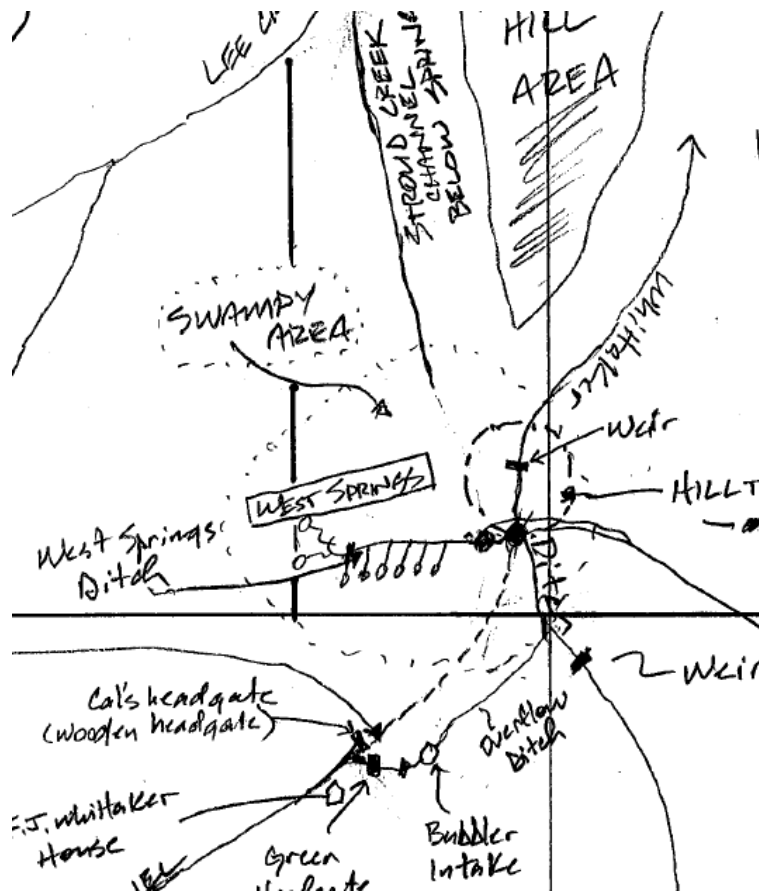
IDWR categorizes this case simply as a “controlling works and measuring device” and claims that Defendants do not comply with a final order requiring controlling works and measuring devices on water diversions in Administrative Basin 74. However, this is not a typical “controlling works and measuring device” case. Fifth Judicial District Court Judge Eric J. Wildman (the Idaho Water Adjudications Judge) held that water distribution associated with Defendants’ Water Right No. 74-157 is subject to a 1932 agreement to alter the flow of Stroud Creek, which was originally upheld by the Idaho Supreme Court case of *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956) *Memorandum Decision and Order*, Case No. CV30-21-304, July 18, 2022 at 6 (“As a result of the Court’s decision in *Whittaker*, the West Springs Ditch remains in place today and continues to alter the flow of Stroud Creek as it has done since 1932.”). This agreement isolated water from “West Springs” and “East Springs” for Whittaker’s WR 74-157 for 3.2 cfs of water in exchange for an easement to use the Kauer Ditch, a ditch located up Stroud Creek drainage to divert water from Stroud Creek into Lee Creek for downstream water rights currently owned by Bruce and Glenda McConnell. The West Springs and East Springs water is collected in a ditch called the “West Springs Ditch” that is, and has historically been, equipped with an approved measurement weir that measures the collective flow from East Springs and West Springs. Whittaker has never received a notice of violation or unauthorized water use for diverting more than 3.2 cfs for use on their properties. Nor is there any record, to our knowledge, that more than 3.2 cfs was measured at the weir in violation of the water right. Accordingly, there is no practical or legal need for a lockable controlling device at this location.

What appears to have changed the peaceful administration of water for the water system at issue in this case is the decision from a senior downstream water user, the McConnells, to seek water from West/East Springs and or demand delivery of water to their water rights (which are

senior to WR 74-157 and other users that divert from Stroud Creek upstream). The McConnells have elected to not use the Kauer Ditch—which was part of the agreement to alter the flow of Stroud Creek—to bypass the springs complex and have their Stroud Creek water injected into Lee Creek. As described by Judge Wildman: “With respect to the Kauer Ditch, the McConnells and their predecessors enjoyed use of that ditch from 1932 until 2014. **That the McConnells’ use of the Kauer Ditch ceased in 2014 was not the result of any action taken by Whittaker.** Rather, the McConnells were subject to a Department enforcement action in 2014 whereby the local watermaster directed them to cease Kauer Ditch diversions on the basis they were unauthorized.” *Id.* at 6-7 (emphasis added). In other words, the McConnells did not take any action to formally authorize use of the Kauer Ditch, and based on past representations, do not want to use it.

This lawsuit was filed only days before Judge Wildman’s decision discussed above was issued, and as far as we know, is the only civil case brought against a water user in Lemhi County despite the presence of non-compliance on other water systems (where IDWR has instead chosen to work with those users).

IDWR has never explained why it wants a controlling structure on the West Springs Ditch given that (1) there has never been an issue with measuring water at that location until now; (2) that water from the East/West Springs complex is subject to an “agreement to alter the flow of Stroud Creek” and is not a typical situation where a lockable controlling device is necessary; and (3) that there is no legal issue remaining that Stroud Creek’s channels are now disconnected into an upper channel and lower channel because the former channel section below the Whittaker wooden headgate and where the Stroud Creek channel reforms down the drainage (the area represented with the dashed line on this map) no longer exists:



It therefore appears that through this action IDWR is seeking to recreate a stream channel section where there is not one, and in order to do so, use the Whittaker Ditch System to deliver Stroud Creek water through this ditch system to then spill down the drainage once it is diverted back out of the Whittaker Ditch System at the controlling headgate to proceed down to the McConnells and other downstream water users with senior water rights. As a result, the requirement to install a lockable controlling structure appears to merely be pretext and has nothing to do with water delivery and administration of Whittaker's WR 74-157. IDWR has not indicated

or represented that the controlling works on the West Springs Ditch would only be used to control diversion and use of spring water and not be used to deliver Stroud Creek water.

Further, that the area below the Whittaker Diversion (the wooden headgate) is not a stream channel has been adjudicated and is not subject to appeal. From IDWR's administrative decision below before it went to Judge Wildman:

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

Order Denying Petitions for Reconsideration, Transfer No. 84441, June 21, 2021, at 3.

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

Order Denying Petitions for Reconsideration, Transfer No. 84441, June 21, 2021, at 7.

While the Hearing Officer's determination was originally appealed to Judge Wildman by Whittaker, it was abandoned on appeal:

³ While the issue of whether the water channels through the Whittaker Two Dot Ranch property are properly considered to be ditches or the natural channel of Stroud Creek was originally raised as an issue on appeal, it is no longer being asserted by Whittaker as an issue on appeal. Creek channels can lose their character as a natural watercourse if certain conditions are met. *See, Dayley v. City of Burley*, 96 Idaho 101, 103, 805 P.2d 1073, 1075 (1974) (Idaho Supreme Court affirmed a finding that a creek bed no longer constituted a natural watercourse in a circumstance where no regular, non-surface waters had flowed down the creek bed since construction of a dam years earlier, some portions of the creek bed been filled, and some portions of the creek bed were farmed or even had homes built on the creek bed).

Petitioners' Opening Brief at 8 (*available at* <http://www.srba.state.id.us/Images/AdminApp/CV30-21-304/021-Brief.pdf>).

Relative to a measuring device on East Springs, there remains a dispute as to whether it is adequate, and relative to the “Wooden Headgate,” there remains a dispute as to whether this is a check structure or a headgate that is subject to the measurement order.

(F) Settlement and Mediation.

The parties engaged Special Master Brigette Bilyeu to serve as mediator in this matter on February 23, 2023. The parties negotiated in good faith at the mediation but did not reach resolution. The parties have engaged in further negotiations after the formal mediation, in good faith, but have not reached resolution in this matter as of the date of submission of this *Defendants’ Pre-Trial Memorandum*.

(G) Answers or Supplemental Answers to Interrogatories.

As of the date of *Defendants’ Pre-Trial Memorandum*, neither side has provided answers to interrogatories propounded to either side. This is because the deadline for providing such answers is not due until August 14, 2023, the date of the Pre-Trial Conference scheduled in this matter.

(H) Admissions or Stipulations of the Parties.

As of the date of *Defendants’ Pre-Trial Memorandum*, there are no admissions or stipulations between the parties.

(I) Amendments to Pleadings/Abandoned Issues of Law.

As of the date of *Defendants’ Pre-Trial Memorandum*, there have been no amendment of pleadings and no abandoned issues of law.

(J) Issues of Fact and Law Which Remain to be Litigated.

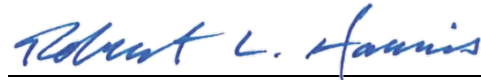
The issues of fact and law that remain to be litigated are (1) whether the unique situation involving WR 74-157 and the “agreement to alter the flow of Stroud Creek” obviates the need for a controlling device at the West Springs Ditch where there is a measuring device at that location and no record of water measurements that exceed the 3.2 cfs authorized under WR 74-157; (2) whether the wooden headgate is a check structure or a headgate and whether the measurement order is even applicable; and (3) whether the weir installed on East Springs satisfies the

measurement order. Further, it may be an open question whether the Plaintiff agrees with the decision that the Stroud Creek channel, below the Whittaker Diversion and to where the Stroud Creek channel begins again (below the West Springs Ditch), no longer exists.

(K) Anticipated Motions in Limine and Orders to Expedite Trial.

As of the date of *Defendants' Pre-Trial Memorandum*, Defendants do not anticipate any motions in limine and/or orders to expedite trial, however, Defendants have not yet received Plaintiff's discovery responses.

Dated this 7th day of August 2023.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2023, I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated below.

DOCUMENT SERVED: *Defendants' Pre-Trial Memorandum*

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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