

RAÚL R. LABRADOR
ATTORNEY GENERAL

SCOTT L. CAMPBELL
Chief of Energy and Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
LACEY RAMMELL-O'BRIEN, ISB No. 8201
DAVID S. PERKINS, ISB No. 4381
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
david.perkins@ag.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 PRE-TRIAL
MEMORANDUM**

Plaintiff, the Idaho Department of Water Resources (the “Department”), through its counsel of record, submits the following *Plaintiff’s Pre-Trial Memorandum* pursuant Idaho Rule of Civil Procedure 16(c)(1) and the *Court Trial Scheduling Order* issued on October 24, 2022.

a. Index of All Exhibits.

To date, the parties have not exchanged, stipulated to admissibility of, nor raised objections to any trial exhibits. The Department may use ArcGIS and/or Google Earth for illustrative purposes.

1. The Department’s *Final Order, In re Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversions in Administrative Basin 74*, issued September 28, 2018, and attachments.
2. The Department’s *Water Measurement Guidelines*, Version 7.c (2009).
3. The Department’s *Minimum Acceptable Standards and Requirements for Open Channel and Closed Conduit Measuring Devices* (2023).
4. The Department’s *Preliminary Order Approving Transfer, In re Application For Transfer No. 84441 In the Name of Bruce and Glenda McConnell*, issued May 18, 2021.
5. The Department’s *Field Investigation* by David Graybill, Enforcement Case No. E2022-2813, issued April 5, 2022.
6. The Department’s *Watermaster Handbook*, issued May 2013.
7. The Department’s *Order on Exceptions; Final Order Approving Transfer, In The Matter of Application For Transfer No. 84441 In The Name of Bruce and Glenda McConnell*, issued November 2, 2021.
8. Memorandum Decision and Order, *Whittaker v. Idaho Dep’t of Water Res.*, No. CV30-21-304 (Lemhi Cnty. Dist. Ct. Idaho July 18, 2022).
9. Defendants’ discovery responses once they are provided to Plaintiff.

Maps generated from GIS and other publicly available software.

10. Lee Creek Water Distribution Map used in hearing held August 16, 2022
11. West Springs Return Flow Path Map 1
12. West Springs Return Flow Path Map 2
13. West Springs Return Flow Path Map 3
14. West Springs Return Flow Path Map 4

15. East Spring Map 1
16. East Spring Map 2

Snake River Basin Adjudication (SRBA) documents.

17. SRBA *Final Unified Decree*, issued August 26, 2014. (The Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987, with some exceptions not applicable to this litigation.)
18. Water Right No. 74-15788. (SRBA Partial Decree, issued January 23, 2009 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 1.97 cubic feet per second (“cfs”) for irrigation out of Stroud Creek, tributary to Lee Creek in Lemhi County. Water right no. 74-15788 has a priority date of 12/31/1982.)
19. Water Right No. 74-369. (SRBA Partial Decree issued February 19, 2009 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 2.40 cfs for irrigation out of Left Fork Lee Creek, tributary to Lee Creek in Lemhi County. Water right no. 74-369 has a priority date of 05/12/1883.)
20. Water Right No. 74-1136. (SRBA Partial Decree issued February 19, 2009 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 2 cfs for irrigation out of Left Fork Lee Creek, tributary to Lee Creek. Water right no. 74-1136 has a priority date of 06/28/1912.)
21. Water Right No. 74-157. (SRBA Partial Decree issued April 4, 2012 to F. James Whittaker and Paula J. Whittaker, PO Box 240, Leadore, ID 83464, for 3.2 cfs for irrigation and stockwater from springs tributary to Lee Creek in Lemhi County. Water right no. 74-157 has a priority date of 4/1/1916.)

Photos of locations around Lee Creek Drainage.

22. East Springs Weir 2
23. East Weir Field Visit Photo 1, August 1, 2023.
24. East Weir Field Visit Photo 2, August 1, 2023.

Videos of locations around Lee Creek Drainage.

25. 20220406_152421.mp4, video of ditch running to West Springs showing end of Spring catch, diversion point of 74-157 and earthwork, April 6, 2022.

26. 20220406_154529.mp4, video of Stroud Creek at Ericsson Corral, April 6, 2022.
27. 20220406_154724.mp4, video of channel below In-Stream Wooden Headgate in relation to Whittaker Ditch, April 6, 2022.
28. 20220406_170358.mp4, video of confluence of Stroud Creek with Defendants' ditches that collect Springs water, April 6, 2022.
29. 20220406_172712.mp4, video of Stroud Creek Photo Point and earthwork, April 6, 2022.
30. 20220406_175125.mp4, video of weir below the Springs Ditch and earthwork, April 6, 2022.
31. Ericsson Corral.mp4, video of Ericsson Corral and two headgates, April 6, 2022.

b. Whether Depositions, Admissions, Interrogatory Responses, or Other Discovery Responses Will Be Used in Lieu of Live Testimony.

The response to this is currently pending the results of discovery. The Department intends to use depositions and discovery responses in conjunction with live testimony presented at trial. Deposition transcripts will be used if any live witness is unavailable at trial.

c. Summary of Documentary Evidence Supporting Damages.

This case involves requiring the Defendants to comply with state water law. However, the Department is looking for penalties pursuant to Idaho Code § 42-1701B(6)(a), which states: "Any person determined in a judicial civil enforcement action to have substantially violated any designated provision of title 42, Idaho Code, or any rule promulgated pursuant to that title, shall be liable for a civil penalty not to exceed ten thousand dollars (\$10,000) per violation or one hundred fifty dollars (\$150) per day for a continuing violation, whichever is greater." Damages will be supported by a determination of Defendants' violation of Idaho Code § 42-701 and the 2018 Final Order. The statute only requires a determination of substantive violation for the Department to qualify for damages.

d. Names and Addresses of Trial Witnesses.

1. Rob Whitney, Water Distribution Section Manager, Idaho Department of Water Resources
 - i. Idaho Department of Water Resources State Office, 322 E. Front St. Ste. 648, Boise, ID 83702-7371.

- ii. Plaintiff's Expert Witness, disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i) on May 16, 2023.
2. David Graybill, Technical Hydrologist and Watermaster for Water District 170, Idaho Department of Water Resources
 - i. Idaho Department of Water Resources Salmon Field Office, 1301 Main St., Salmon, ID 83467.
 - ii. Plaintiff's Expert Witness, disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i) on May 16, 2023.
 - iii. Plaintiff's Expert Rebuttal Witness, disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i) on July 14, 2023.
3. Merritt Udy, Watermaster for Water District 74Z, Idaho Department of Water Resources
 - i. P.O. Box 87, Leadore, ID 83464
 - ii. Plaintiff's Expert Rebuttal Witness, disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i) on July 14, 2023.
4. F. James Whittaker
 - i. 83 Big 8 Mile Rd., Leadore, ID 83464
 - ii. Defendant.
5. Jordan Whittaker
 - i. 83 Big 8 Mile Rd., Leadore, ID 83464
 - ii. Defendant.
6. Bryce Contor, Principal Hydrologist, Rocky Mountain Environmental Associates, Inc.
 - i. 5223 Steele Avenue, P.O. Box 94, Iona, ID 83427
 - ii. Defendants' Expert Witness, disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i) on June 15, 2023.

e. Factual Nature of the Case.

The dispute between the parties has two sources. The first is the Lee Creek Drainage in Lemhi County. Defendants' points of diversion are on Left Fork Lee Creek (also called Stroud Creek), a heavily modified system located in Water District 74Z. Water District 74Z is within Administrative Basin 74.

The second is the September 28, 2018 *Final Order of the Department In re Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversions in Administrative Basin 74* ("Final Order"). The Final Order requires that diversions in Basin 74 be brought into compliance by the start of the 2019 irrigation

season. Defendants made no effort to comply. To be compliant with the Final Order, Defendants would need to have installed suitable controlling works and measuring devices at their points of diversion as identified by the Department.

Department staff investigated and identified the Defendants' lack of compliance when a downstream user—the McConnells—made a call for delivery. The watermasters were unable to deliver water without the required controlling works. The priority of the McConnells' water rights were considered by Judge Wildman in his July 18, 2022 *Memorandum Decision and Order*, Case No. CV30-21-304 (Lemhi County), which is currently on appeal to the Idaho Supreme Court, Docket No. 50000, with oral argument scheduled for August 23, 2023.

The priority of the McConnells' water rights in relation to the Defendants' water rights are in flux, but the SRBA decrees issued to Defendants are not. By law, the Defendants are entitled only to the water quantities claimed and decreed by the SRBA Court.

The Department seeks: 1) the installation of a suitable control work at the current In-Stream (or “wooden”) Headgate location at the Whittaker Diversion / Ericsson Corral, specifically of a design that allows excess water in the system to flow past Defendants' diversion points for Water Right Nos. 74-369, 74-1136, and 74-15788; and 2) the installation of suitable headgates or controlling works and measuring devices at or near diversion points authorized by Water Right No. 74-157 (“the Springs”).

The installation of a lockable headgate near the Springs diversion point for Water Right No. 74-157 would also require a spill for excess water to flow down drainage. This was previously accomplished using the existing Cipolletti weir and a flat plate, but was not lockable as required by the Final Order.

It is the Department's position that the Defendants' refusal to replace the In-Stream Headgate, install suitable measuring devices in the east springs ditch, and install suitable controlling works and measuring devices around the west springs ditch is in violation of Idaho Code § 42-701, as well as preventing the Department's watermasters from properly administering water on the Lee Creek drainage pursuant to Idaho Code § 42-602.

f. Status of Settlement Discussions.

The parties met for mediation on February 23, 2023, in Idaho Falls. Special Master Brigitte Bilyeu of the Idaho Water Court traveled to facilitate the mediation. As of August 7, 2023, no agreements have been reached but counsel continue to discuss settlement in good faith.

g. Rule 33 Answers.

The parties continue to engage in written discovery. To date, no party has submitted answers to interrogatories under Rule 33 of the Idaho Rules of Civil Procedure. With its notice of service of discovery responses, Plaintiff will include a statement that all answers or supplemental answers to interrogatories under Rule 33 of the Idaho Rules of Civil Procedure reflect facts known to the date service. Discovery responses will be potential exhibits at trial.

h. Agreed-Upon Admissions or Stipulations.

The parties have not agreed to any stipulations of admissions at this time.

i. Amendments to Pleadings and Issues Abandoned.

The Department is willing to modify the requirement to install a headgate and controlling work at the East Springs Ditch. The Department continues to require a measuring device on the East Springs Ditch as asserted in Count V.

1. Count III—Failure to Install Headgate and Controlling Works at the East Springs Ditch. The Department is modifying the issue of the headgate and controlling works at the East Springs Ditch. Additional research and discovery has allowed Department staff to determine that the East Springs does not need an independent controlling work as long as a suitable measuring device is in place.

j. Remaining Issues for Trial and Relevant Legal Authorities.

The Department continues to seek the installation or modification of structures at the Defendants' points of diversion on Left Fork Lee Creek consistent with the *Complaint* filed July 15, 2022. There is significant legal overlap between the four remaining counts sought by the Department, with details as indicated below.

1. Count I—Failure to Maintain a Suitable Headgate and Controlling Works at the Whittaker Diversion. The Department seeks a modification of the current In-Stream, or Wooden, Headgate (or “check structure”) located at the Whittaker Diversion, sometimes called the Ericsson Corral. The entire design of the In-Stream Headgate is problematic and not approved by the Department. The current design of the In-Stream Headgate requires frequent manual modifications by the Water District 74Z Watermaster. To resolve the issues caused by the design of the In-Stream Headgate, Defendants must reenforce the bottom of the structure and enable top-down adjustment to allow excess water to spill around to the other side, as opposed to sending all water through the Green Headgate and into

Defendants' ditch system. The Department relies on the following legal authorities:

- i. Idaho State Constitution, Article XV § 3
 - ii. Idaho Code § 42-701
 - iii. Idaho Code § 42-201
 - iv. Idaho Code § 42-106
 - v. Idaho Code § 42-602
 - vi. Idaho Code § 42-604
 - vii. Idaho Code § 42-1701B
 - viii. Idaho Code § 12-117 (reasonable expenses, costs, and attorney fees)
 - ix. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).
 - x. Final Order, *In re Requiring Controlling Works & Measuring Devices on Surface & Ground Water Diversions in Admin. Basin 74* (Idaho Dep't of Water Res. Sep. 28, 2018), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/2018/20180928-Final-Order-Requiring-Measuring-Devices-Basin-74.pdf>.
 - xi. Idaho Dep't of Water Res. Water Measurement Guidelines, Version 7.c (2009), <https://idwr.idaho.gov/wp-content/uploads/sites/2/water-measurement/IDWR-Water-Measurement-Reporting-Guidelines.pdf>.
 - xii. Idaho Dep't of Water Res., Minimum Acceptable Standards and Requirements for Open Channel and Closed Conduit Measuring Devices (2023), <https://idwr.idaho.gov/wp-content/uploads/sites/2/water-measurement/MinAcceptStandards-MeasDevices-2023Update.pdf>.
2. Count II—Failure to Install Headgate and Controlling Works at the West Springs Ditch. The West Springs Ditch does not and has not had a lockable headgate / controlling works. In the past, the Watermaster was able to slip a flat piece of metal into the existing Cipolletti weir to stop up water flow, allowing it to move down a now-filled in bypass channel. Without the spill allowing excess flow to move downstream, the Defendants are able to take the full flow of the Springs, possibly in excess of their decreed 3.2 cfs. While it was possible to block flow using the Cipolletti weir, it was never lockable as required by the 2018 Final Order. The Department seeks the installation of a lockable headgate of a design that allows the watermaster to control flow of the Springs below the West Springs Ditch as well as a spill to allow excess to flow away from Defendants' ditch toward Lee Creek. The Department relies on the following legal authorities:

- i. Idaho State Constitution, Article XV § 3
 - ii. Idaho Code § 42-701
 - iii. Idaho Code § 42-201
 - iv. Idaho Code § 42-106
 - v. Idaho Code § 42-602
 - vi. Idaho Code § 42-604
 - vii. Idaho Code § 42-1701B
 - viii. Idaho Code § 12-117 (reasonable expenses, costs, and attorney fees)
 - ix. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).
 - x. Final Order, *In re Requiring Controlling Works & Measuring Devices on Surface & Ground Water Diversions in Admin. Basin 74* (Idaho Dep't of Water Res. Sep. 28, 2018), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/2018/20180928-Final-Order-Requiring-Measuring-Devices-Basin-74.pdf>.
 - xi. Idaho Dep't of Water Res. Water Measurement Guidelines, Version 7.c (2009), <https://idwr.idaho.gov/wp-content/uploads/sites/2/water-measurement/IDWR-Water-Measurement-Reporting-Guidelines.pdf>.
 - xii. Idaho Dep't of Water Res., Minimum Acceptable Standards and Requirements for Open Channel and Closed Conduit Measuring Devices (2023), <https://idwr.idaho.gov/wp-content/uploads/sites/2/water-measurement/MinAcceptStandards-MeasDevices-2023Update.pdf>.
3. Count IV—Failure to Install Measurement Device for West Springs Ditch. The current Cipolletti weir present at the diversion point for the Springs is too low to serve the measuring function necessary to ensure proper administration of water from the Springs to the Defendants. The Defendants must create a structure that allows the Watermaster to accurately measure the flows of the Springs where they reconnect with Left Fork Lee Creek. The measuring device must be placed such that it works in tandem with the headgate and bypass channel.
- i. Idaho State Constitution, Article XV § 3
 - ii. Idaho Code § 42-701
 - iii. Idaho Code § 42-201
 - iv. Idaho Code § 42-106
 - v. Idaho Code § 42-602

- vi. Idaho Code § 42-604
 - vii. Idaho Code § 42-237a.h
 - viii. Idaho Code § 42-1701B
 - ix. Idaho Code § 12-117 (reasonable expenses, costs, and attorney fees)
 - x. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).
 - xi. Final Order, *In re Requiring Controlling Works & Measuring Devices on Surface & Ground Water Diversions in Admin. Basin 74* (Idaho Dep't of Water Res. Sep. 28, 2018), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/2018/20180928-Final-Order-Requiring-Measuring-Devices-Basin-74.pdf>.
 - xii. Idaho Dep't of Water Res. Water Measurement Guidelines, Version 7.c (2009), <https://idwr.idaho.gov/wp-content/uploads/sites/2/water-measurement/IDWR-Water-Measurement-Reporting-Guidelines.pdf>.
 - xiii. Idaho Dep't of Water Res., Minimum Acceptable Standards and Requirements for Open Channel and Closed Conduit Measuring Devices (2023), <https://idwr.idaho.gov/wp-content/uploads/sites/2/water-measurement/MinAcceptStandards-MeasDevices-2023Update.pdf>.
4. Count V—Failure to Install Measurement Device for the East Springs Ditch. There is currently a Cipolletti weir located on the East Springs Ditch. At the time of the Complaint, it was submerged and non-functional. In August 2022, Defendant Jordan Whittaker cleaned up the East Springs Ditch Cipolletti weir and alleged it was functional. The Department notes that while a Cipolletti weir is a design often accepted by it, the current location of the Cipolletti weir is too flat for the measuring device to be considered functional. The Department seeks either a relocation of the Cipolletti weir to an area with “fall” such that the design would be functional, or in the alternative, that the Defendants construct a flume structure more appropriate for a flat area. The Department relies on the following legal authorities:
- i. Idaho State Constitution, Article XV § 3
 - ii. Idaho Code § 42-701
 - iii. Idaho Code § 42-201
 - iv. Idaho Code § 42-106
 - v. Idaho Code § 42-602
 - vi. Idaho Code § 42-604


- vii. Idaho Code § 42-237a.h
- viii. Idaho Code § 42-1701B
- ix. Idaho Code § 12-117 (reasonable expenses, costs, and attorney fees)
- x. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).
- xi. Final Order, *In re Requiring Controlling Works & Measuring Devices on Surface & Ground Water Diversions in Admin. Basin 74* (Idaho Dep't of Water Res. Sep. 28, 2018), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/2018/20180928-Final-Order-Requiring-Measuring-Devices-Basin-74.pdf>.
- xii. Idaho Dep't of Water Res. Water Measurement Guidelines, Version 7.c (2009), <https://idwr.idaho.gov/wp-content/uploads/sites/2/water-measurement/IDWR-Water-Measurement-Reporting-Guidelines.pdf>.
- xiii. Idaho Dep't of Water Res., Minimum Acceptable Standards and Requirements for Open Channel and Closed Conduit Measuring Devices (2023), <https://idwr.idaho.gov/wp-content/uploads/sites/2/water-measurement/MinAcceptStandards-MeasDevices-2023Update.pdf>.

k. Anticipated Motions in Limine.

Discovery in this matter is not yet complete. The Department is in the process of determining what motions of limine it will file pursuant to the *Court Trial Scheduling Order*.

DATED this 7th day of August 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL


LACEY RAMMELL-O'BRIEN
Deputy Attorney General

CERTIFICATE OF SERVICE

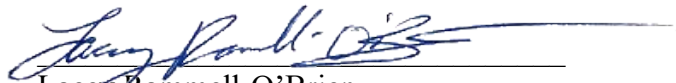
I HEREBY CERTIFY that on this 7th day of August 2023, I caused to be served a true and correct copy of the foregoing *Plaintiff's Pre-Trial Memorandum*, via iCourt E-File and Serve, upon the following:

Robert L. Harris

Luke H. Marchant

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

efiling@holdenlegal.com



Lacey Rammell-O'Brien
Deputy Attorney General