

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 84441)	PRELIMINARY ORDER
IN THE NAME OF)	APPROVING TRANSFER
<u>BRUCE AND GLENDA MCCONNELL</u>)	

On October 5, 2020, Bruce and Glenda McConnell (“McConnell”) filed Application for Transfer 84441 (“Application 84441”) with the Idaho Department of Water Resources (“Department”). Application 84441 was protested by James Whittaker and Whittaker Two Dot Ranch LLC (collectively “Whittaker”¹), David R. Tomchak (“Tomchak”), Smith 2P Ranch, Steven Johnson (“Johnson”), and Rosalie Ericsson (“Ericsson”). The Department conducted a pre-hearing conference on February 9, 2021. During the conference, the parties requested that an administrative hearing be held to decide the contested case.

The Department conducted an administrative hearing on April 21 and 22, 2021 in Salmon, Idaho. McConnell was represented by attorney Chris Bromley. Tomchak was represented by attorney Kipp Manwaring. Whittaker was represented by attorney Rob Harris. Smith 2P Ranch was represented by Shanna Foster. Johnson represented himself. Ericsson did not attend the hearing.

Exhibits 1-20 and 22-24 offered by McConnell, Exhibits 151-161 offered by Whittaker, and Exhibits 301-312 offered by Tomchak were admitted into the administrative record. Exhibit 21 was not offered by McConnell. Protestants Smith 2P Ranch and Johnson did not offer any exhibits into the record. McConnell called Bruce McConnell, Scott King (expert) and Cindy Yenter as witnesses. Whittaker called Merritt Udy, Jordan Whittaker, Larry Borstelman, James Whittaker and Bryce Contor (expert) as witnesses. Tomchak called David A. Tomchak and David R. Tomchak as witnesses. Shanna Foster testified on behalf of Smith 2P Ranch and Johnson testified on his own behalf.

On April 9, 2021, McConnell filed a *Motion in Limine and/or Motion to Strike* (“Motion”) proposing to exclude certain exhibits offered by Whittaker and to prevent Whittaker’s witnesses from testifying about certain topics. On April 12, 2021, Tomchak filed a *Notice Joining in Part McConnell’s Motion in Limine*. On April 20, Whittaker filed a *Memorandum in Opposition to McConnell Motion in Limine and/or Motion to Strike*. The hearing officer denied the *Motion* on the record at the beginning of the hearing.

¹ Protestants James Whittaker and Whittaker Two Dot Ranch were represented by attorney Rob Harris in this contested case. As such, they provided evidence and argument jointly. This order uses “Whittaker” to refer to the two parties collectively, and uses the names James Whittaker, Jordan Whittaker or Whittaker Two Dot Ranch when the collective reference would not be accurate.

After carefully considering the evidence in the record, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 84441 proposes to add a point of diversion to seven water rights owned by McConnell. The authorized source for all seven water rights is Lee Creek. The seven water rights (hereinafter “McConnell Rights”) describe the following elements:

Right No.	Priority Date	Uses	Period of Use	Rate (cfs)	Irrigated Acres	Combined Acres
74-361	5/12/1883	Irrigation	3/15 – 11/15	1.18	211.7	211.7
		Stockwater	1/1 – 12/31	0.02	N/A	
74-362	5/1/1906	Irrigation	3/15 – 11/15	4.10	211.7	46.1
74-363	5/12/1883	Irrigation	3/15 – 11/15	1.00	46.1	
74-364	6/1/1900	Irrigation	3/15 – 11/15	1.30	46.1	268.8
74-365	5/12/1883	Irrigation	3/15 – 11/15	1.20	20.8	
74-367	5/12/1883	Irrigation	3/15 – 11/15	0.60	268.8	268.8
74-368	11/5/1909	Irrigation	3/15 – 11/15	5.80	268.8	
Totals:				15.20	547.4	

2. On September 9, 2020, McConnell filed Application for Transfer 84367, proposing to correct the legal description for the only authorized point of diversion (“Upper Diversion”) on the McConnell Rights. McConnell asserted that the partial decrees for the McConnell Rights issued in the Snake River Basin Adjudication (“SRBA”) contained an error in the legal description for the Upper Diversion.

3. After reviewing the documents provided by McConnell, the Department determined that the SRBA partial decrees for the McConnell Rights included an erroneous legal description for the Upper Diversion. Ex. 7. Because there was compelling evidence of an error and because there were no water rights or tributary streams between the erroneous point of diversion and the corrected point of diversion, the Department processed Application for Transfer 84367 without public notice. *Id.* The Department approved Transfer 84367 on October 8, 2020. Ex. 6.

4. The Upper Diversion is the only existing, authorized point of diversion for the McConnell Rights and is located in the NENE, Section 30, T16N, R25E. Ex. 1 at Appendix B. The point of diversion (“Lower Diversion”) proposed to be added to the McConnell Rights is located in the SWSW, Section 20, T16N, R25E, approximately 1,600 feet downstream of the Upper Diversion. *Id.* at 8, Figure 1.

5. The Lower Diversion has been in place and used since at least 1986. Ex. 1 at 11-12 and Figure 7 (aerial imagery from 1986 shows Lower Diversion); Testimony of Bruce McConnell (confirming Lower Diversion was in place when he purchased the property in 1993).

6. The Department curtailed the Lower Diversion in August 2020 after it discovered that the Lower Diversion was not listed as an authorized point of diversion on the McConnell Rights. Testimony of Bruce McConnell; Ex. 4.

7. The ditch conveying water from the Upper Diversion currently has a capacity of approximately 2.5 – 4.0 cfs. Ex. 1 at 7. The ditch conveying water from the Lower Diversion currently has a capacity of approximately 12 cfs. *Id.*

8. The two main ditches used to convey the McConnell Rights were once supplied from a single point of diversion, located in the vicinity of the Upper Diversion. Ex. 1 at 11-13. During that time period, the common ditch split into two ditches approximately 500 feet downstream of the single point of diversion. *Id.* Since at least 1986, the eastern ditch has been supplied water from a separate, downstream point of diversion (the Lower Diversion). *Id.*

9. The Upper Diversion is not currently equipped with a lockable, controllable headgate. Ex. 1 at 9. A lockable, controllable headgate must be installed at the Upper Diversion prior to use in the 2021 irrigation season. Ex. 4.

10. “The Lee Creek system forms from runoff originating from the north and east facing slopes of the Lemhi Range.” Ex. 1 at 13. Lee Creek is tributary to the Lemhi River. *Id.*

11. Lee Creek is comprised of four tributary streams (Everson Creek, Stroud Creek, Porcupine Creek and Right Fork of Lee Creek). Ex. 1 at 13-14, Figure 9. Everson Creek and Stroud Creek flow together shortly after the streams leave the national forest. *Id.* This combined creek is designated as Stroud Creek on a United States Geological Survey (“USGS”) Map², but is also known as Left Fork of Lee Creek.³ *Id.* Porcupine Creek flows into Right Fork of Lee Creek approximately one-half mile upstream of the Upper Diversion. *Id.*

Confluence of Stroud Creek and Right Fork of Lee Creek

12. Stroud Creek is a tributary of Lee Creek. Ex. 1 at 14, Figure 9; Ex 154. The main channel of Lee Creek begins where Right Fork of Lee Creek and Stroud Creek join together. *Id.*

13. In the past, the confluence of Stroud Creek and Right Fork of Lee Creek was located near the southwest corner of the SENE of Section 30, T16N, R25E, approximately one-quarter mile upstream of the Upper Diversion. Ex. 24 (USGS Map shows confluence at that location); Ex. 154 (1954 map prepared by Milton Christensen, a professional engineer, shows confluence at that location); Ex. 1 at 12-13, Figure 8 (1970 Lemhi Adjudication map shows only one diversion, the Upper Diversion, in existence at the time the map was prepared); Ex. 156 (1956 Idaho Supreme Court decision, *Whittaker v. Kauer*, confirms that Kauer, McConnell’s predecessor in interest, had access to water from Stroud Creek); Ex. 1 at Appendix C and G (water rights 74-369 and 74-370, which are diverted from Stroud Creek, include conditions about administration of those rights in relationship to the other 1883 rights in the Lee Creek drainage, which are held

² Stroud Creek Quadrangle, Lemhi County, Idaho, 7.5 Minute Series (Topographic), edited in 1989 based on aerial photographs taken in 1985 and field checked in 1986. This order refers to this 1989 map as the “USGS Map.”

³ Consistent with the USGS Map, this order refers to Left Fork of Lee Creek as “Stroud Creek.”

by McConnell and are diverted at the Upper Diversion); Ex. 151 at Attachment, Exhibit A (1912 Decree distinguishes between water rights diverted from Right Fork of Lee Creek, Stroud Creek (Left Fork of Lee Creek) and Lee Creek and describes Lee Creek as the authorized source for five of the seven McConnell Rights⁴).

14. James Whittaker holds the following water rights on Stroud Creek (Left Fork of Lee Creek):

Right No.	Priority Date	Uses	Period of Use	Rate (cfs)	Acres
74-369	5/12/1883	Irrigation	3/15 – 11/15	2.40	275.4
74-1136	6/28/1912	Irrigation	3/15 – 11/15	2.00	102.6
74-15788	12/31/1982	Irrigation	3/15 – 11/15	1.97	308.0
Combined Limits:				4.40	686

15. Water rights 74-369, 74-1136 and 74-15788 currently authorize only one point of diversion on Stroud Creek. This diversion (hereinafter “Whittaker Diversion”), is located in the SENE, Section 31, T16N, R25E. Ex. 1 at Appendix G; Ex. 153 at Figure 11.

16. Whittaker diverts water from Stroud Creek at two locations. One location is the Whittaker Diversion, the authorized point of diversion for water rights 74-369, 74-1136, 74-15788. The other location is the point where Stroud Creek is intercepted by a ditch known as the West Springs Ditch. Ex. 154.

17. Water rights 74-369, 74-1136 and 74-15788 are limited to a total combined diversion rate of 4.40 cfs from Stroud Creek at the Whittaker Diversion. Ex. 1 at Appendix G. If the flow in Stroud Creek exceeds 4.40 cfs (or 2.40 cfs when water rights junior to May 12, 1883 are curtailed), the excess flow in Stroud Creek bypasses the Whittaker Diversion. Ex. 153 at Figure 12 (showing Stroud Creek water flowing past the Whittaker Diversion); Testimony of Contor (confirming that Stroud Creek water bypasses the Whittaker Diversion). The water rights held by Whittaker do not authorize any diversion from Stroud Creek downstream of the Whittaker Diversion.

18. The West Springs Ditch is a deep, excavated ditch, running from west to east across the Stroud Creek channel. Testimony of James Whittaker (describing excavation of the ditch); Ex. 154; Ex. 153 (ditch is four to five feet wide and three to four feet deep). The West Springs Ditch was constructed to capture the flow from a number of springs in the area. Ex. 154. There is a man-made berm running along the north side of the ditch which prevents any flow in Stroud Creek from continuing to the north (downstream) past the ditch. Testimony of Jordan Whittaker, Contor, and David R. Tomchak; Ex. 151 at 7 (“From 1932 through July 2020 and presumably through the present there has not been a physical channel or means for flow in Stroud Creek (Left Fork) to proceed downstream beyond the West Springs Ditch . . .”).

⁴ The 1912 Decree for Lee Creek identified the source of water right 74-367 as Left Fork of Lee Creek and the source for water right 74-368 as Right Fork of Lee Creek. The authorized source for water rights 74-367 and 74-368 was identified as Lee Creek in later decrees. Ex. 151 at Appendix, *Proposed Finding of Water Rights in the Lemhi River Basin*. The 1912 Decree did not assign or refer to water rights by number. For ease of reference, this order uses the current water right numbers to refer to the relevant water rights.

19. The West Springs Ditch captures all of the water flowing in Stroud Creek at that location. Ex. 156, *Whittaker v. Kauer*, 78 Idaho at 97, 298 P.2d at 747. Currently, there is “no . . . flume, siphon or culvert that would allow [Stroud Creek] to pass under or over the [West Springs Ditch].” Ex. 153 at 4. The intersection of the West Springs Ditch and Stroud Creek is located approximately 2000 feet downstream of the Whittaker Diversion. Ex. 154.

20. The West Springs Ditch is not currently equipped with a lockable, controlling works which would allow the watermaster to curtail the diversion of Stroud Creek into the West Springs Ditch. Ex. 20; Testimony of Yenter.

21. All of the water captured and diverted by the West Springs Ditch, including Stroud Creek water, is conveyed to the east, where it joins another irrigation ditch maintained by Whittaker. Ex. 153 at Figure 11; Ex. 154. This combined ditch is used to convey water over a divide ridge which separates the Stroud Creek drainage from the Big Eightmile Creek drainage. Ex. 154; Testimony of Contor.

22. At the divide ridge between the drainages, Whittaker maintains a control structure, known as the hilltop splitter, which can send water into a ditch heading northeast for irrigation use by Whittaker or into a ditch running north toward Lee Creek. Testimony of Jordan Whittaker and Contor. Water released by Whittaker at the hilltop splitter is conveyed in a man-made channel for approximately 500 feet and is then injected into an old ditch, known as the Bohan or Bohannan Ditch (hereinafter “Bohan Ditch”). Testimony of Contor; Ex. 153 at Figure 11; Ex. 151 at 9 (“When [Stroud Creek] flows are discharged from Whittaker’s ditch, they first enter the remnants of an old ditch identified . . . as the ‘Bohan’ ditch”); Ex. 154.

23. The Bohan Ditch runs east of the Stroud Creek channel. Ex. 154; Ex. 153 at Figures 20 and 21 (the Bohan Ditch, which carries the water released by Whittaker, is located approximately 120 feet east of the Stroud Creek channel). The Bohan Ditch generally runs to the north-northeast, whereas the Stroud Creek channel generally runs to the north-northwest. Ex. 154; Ex. 153 at Figure 20.

24. Stroud Creek no longer flows in its natural channel between the West Springs Ditch and the confluence with Lee Creek. Ex. 151 at 6-7. This section of the Stroud Creek drainage has been dewatered as a result of Whittaker’s unauthorized diversion of Stroud Creek into the West Springs Ditch.

25. The Stroud Creek channel has been altered or bypassed between the Whittaker Diversion and the confluence with Lee Creek, a distance of approximately one mile. Testimony of Jordan Whittaker; Ex. 154.

26. The current flow path of Stroud Creek water through the Whittaker Two Dot Ranch property does not constitute the natural channel of Stroud Creek.

27. Water right 74-369, held by James Whittaker, bears a priority date of May 12, 1883 and authorizes the diversion of 2.40 cfs from Stroud Creek (Left Fork of Lee Creek) for the irrigation of 275.4 acres. Ex. 1 at Appendix G. The only authorized point of diversion for water right 74-369 is the Whittaker Diversion. *Id.*

28. Water right 74-370, held by Ericsson, bears a priority date of May 12, 1883 and authorizes the diversion of 4.00 cfs from Stroud Creek (Left Fork of Lee Creek) for the irrigation of 186 acres. Ex. 1 at Appendix C. The authorized point of diversion for water right 74-370 is located approximately one mile upstream of the Whittaker Diversion. *Id.* at 15, Figure 10.

29. Water rights 74-369 and 74-370 include the following condition:

When the flow of water in Lee Creek is insufficient to supply all rights under the 5-12-1883 date of priority, right 74-369 and right 74-370 shall not be pro-rated with any rights on Lee Creek with that priority date.

30. Water right 74-1831, held by Johnson, bears a priority date of June, 28, 1912 and authorizes the diversion of 0.24 cfs from Lee Creek for the irrigation of 12 acres. Ex. 1 at Appendix D. The only authorized point of diversion for water right 74-1831 is located in the NWNWNW, Section 29, T16N, R25E, between the Upper Diversion and Lower Diversion. *Id.* at 15.

31. Water rights in the Lee Creek drainage are administered by Water District 74Z. Merritt Udy is the current watermaster for Water District 74Z. Water District 74Z is a sub-district of Water District 170. Cindy Yenter is the current watermaster for Water District 170.

32. Tomchak holds the following irrigation water rights on Everson Creek:

Right No.	Priority Date	Uses	Period of Use	Rate (cfs)	Acres
74-2195A	12/11/1915	Irrigation	3/15 – 11/15	1.40	65
74-2261A	12/21/1941	Irrigation	3/15 – 11/15	1.00	65
74-2339A	12/21/1941	Irrigation	3/15 – 11/15	1.00	65
Combined Limits:				2.40	65

33. Shanna Foster and Jennifer Ayers (who are in the process of forming Smith 2P Ranch) hold the following water rights on Everson Creek:

Right No.	Priority Date	Uses	Period of Use	Rate (cfs)	Acres
74-1615	4/1/1919	Irrigation	3/15 – 11/15	2.43	121.4
		Stockwater	1/1 – 12/31	0.02	
74-2351	1/9/1963	Irrigation	3/15 – 11/15	0.55	27.3
Totals:				3.00	148.7

34. The Tomchak and Foster/Ayers irrigation rights are diverted from a common point of diversion on Everson Creek, located approximately 3,000 feet upstream of the confluence of Everson Creek and Stroud Creek. Ex. 1 at 15, Figure 10.

35. The irrigation rights held by Tomchak and Foster/Ayers (74-2195A, 74-2261A, 74-2339A, 74-1615 and 74-2351) are junior to the McConnell Rights.

36. During times of scarcity, junior water rights on Stroud Creek and Everson Creek are curtailed by the watermaster for Water District 74Z to supply water to downstream senior water rights. Testimony of Udy and David R. Tomchak.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications and states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. . . . In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth.

ANALYSIS

Confluence of Stroud Creek and Right Fork of Lee Creek

Currently, water released from the Whittaker ditch system flows into Lee Creek below McConnell's Upper Diversion. The hearing officer must determine whether this site represents the natural confluence of Stroud Creek and Right Fork of Lee Creek. This determination is critical in the evaluation of whether the changes proposed in Application 84441 will result in injury or enlargement. If the confluence is downstream of the Upper Diversion (the only existing point of diversion on the McConnell Rights), then adding a point of diversion downstream of the confluence could result in injury to junior water rights on Stroud Creek and enlargement of the McConnell Rights. If, on the other hand, the confluence is upstream of the Upper Diversion, then adding the Lower Diversion to the McConnell Rights will have little effect on junior water rights on Stroud Creek, the administration of water rights in Water District 74Z, or the amount of water available to satisfy the McConnell Rights.

The parties clearly recognize that the location of the confluence of Stroud Creek and Right Fork of Lee Creek is the critical question of fact in this contested case. The parties offered reports, photos and extensive testimony about the current path of water through the Stroud Creek drainage. McConnell asserts that the Department should evaluate Application 84441 based on the confluence shown on the USGS Map, upstream of the Upper Diversion. The protestants, however, contend that the current flow path through the Whittaker ditch system has become the natural channel of Stroud Creek and that the Department should recognize the current return flow site (located downstream of the Upper Diversion) as the natural confluence.

The record contains substantial, compelling evidence that the confluence of Stroud Creek and Right Fork of Lee Creek was once located near the southwest corner of the SENE of Section 30, T16N, R25E, upstream of McConnell's Upper Diversion:

1. The USGS Map shows the confluence in the SWSENE of Section 30. Ex. 24. The USGS Map was prepared in 1989 but was based on aerial imagery from 1985 and was field checked in 1986. *Id.*
2. A map prepared in 1954 by Milton Christensen, a professional engineer, shows the confluence at the same approximate location as the USGS Map. Ex. 154. The 1954 map was based on an aerial photo from August 1946. Ex. 155. According to Christensen's notes, he created the map by tracing lines over the 1946 aerial photo. *Id.* Christensen identifies the Stroud Creek channel downstream of the West Springs Ditch as an active, existing creek channel rather than an old creek channel. Ex. 154; Ex. 155.
3. A map prepared around 1970 for the Lemhi River Basin Adjudication shows that the McConnell Rights used to be diverted from a single point of diversion located at or near the Upper Diversion. Ex. 1 at 12-13 and Figure 8. The Lower Diversion did not exist at that time. *Id.* Although the portion of the map included in the record for this contested case does not extend to the SWSENE of Section 30, the map does not show any stream joining Lee Creek immediately downstream of the Upper Diversion. *Id.*
4. In 1956, the Idaho Supreme Court issued its decision in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956). The primary issue in the case was whether Kauer, McConnell's predecessor in interest, could call for water from certain springs arising on Whittaker's property and flowing into Stroud Creek. Ex. 156. At the time, the McConnell Rights were diverted at a point near the Upper Diversion. Ex. 1 at 12-13 and Figure 8. If the confluence of Stroud Creek and Right Fork of Lee Creek were downstream of the Upper Diversion in 1956, there would be no reason for Kauer to make a call for the spring water arising on the Whittaker property and flowing into Stroud Creek. The only way the *Kauer v. Whittaker* case makes sense is if the confluence of Stroud Creek and Right Fork of Lee Creek were located upstream of the Upper Diversion.

5. Water rights 74-369 and 74-370 authorize the diversion of water from Stroud Creek (Left Fork of Lee Creek) and include the following condition:

When the flow of water in Lee Creek is insufficient to supply all rights under the 5-12-1883 date of priority, right 74-369 and right 74-370 shall not be pro-rated with any rights on Lee Creek with that priority date.⁵

The only water rights in the Lee Creek drainage which bear a priority date of May 12, 1883 are water right 74-369 (held by James Whittaker), water right 74-370 (held by Ericsson) and water rights 74-361, 74-363, 74-365 and 74-367 (held by McConnell and diverted at the Upper Diversion). The condition protecting water rights 74-369 and 74-370 from proration with other May 12, 1883 water rights only makes sense if Stroud Creek could be used to satisfy water rights 74-361, 74-363, 74-365 and 74-367.⁶ If the confluence of Stroud Creek and Right Fork of Lee Creek were downstream of the Upper Diversion, there would be no need for the condition because water rights 74-361, 74-363, 74-365 and 74-367 would have had no way to access water in Stroud Creek.

6. The 1912 Decree for Lee Creek (*Reddington v. Bohannon et al.*) identifies Right Fork of Lee Creek, Stroud Creek (Left Fork of Lee Creek), and Lee Creek as distinct sources on various water rights. The decree identifies Lee Creek as the authorized source for most of the water rights now held by McConnell (74-361, 74-362, 74-363 and 74-365), suggesting that these rights were diverted downstream of the confluence of Stroud Creek and Right Fork of Lee Creek. If the confluence were downstream of the point of diversion for these rights, the source for the rights would likely have been identified as Right Fork of Lee Creek. The 1954 map prepared by Christensen also identifies the source for the McConnell Rights as Lee Creek, but clearly identifies the creeks upstream of the confluence as the Right Fork and Left Fork of Lee Creek, suggesting that the McConnell Rights were diverted downstream of the confluence. Ex. 154; Ex. 155.

⁵ The 1912 Decree for Lee Creek described the same protection for water rights 74-369 and 74-370. Ex. 151 at Appendix (Exhibit A) (“It is further ordered that [the owners of water rights 74-369 and 74-370] shall not be obliged to pro-rate with any other parties to this action, whose right of appropriation is of equal priority therewith, in the case the flow of the waters of the said Left Fork shall be of insufficient quantity to supply all rights, under date of May 12th, 1883.”). In 1912, water right 74-367 was diverted from Stroud Creek (Left Fork of Lee Creek). One could argue that the proration language only applied to water rights 74-367, 74-369 and 74-370. The language protecting water rights 74-369 and 74-370 from proration, however, applied when Stroud Creek was insufficient to satisfy “all rights, under date of May 12th, 1883,” not just the Stroud Creek rights, suggesting that all rights bearing that priority date had access to water in Stroud Creek. The 1912 Decree did not assign or refer to water rights by number. For ease of reference, this order uses the current water right numbers to refer to the relevant water rights.

⁶ The protestants may argue that the protection against proration was only needed because water rights 74-361, 74-363, 74-365 and 74-367 were once diverted from Stroud Creek through the Kauer Ditch, located on Stroud Creek approximately one mile upstream of the Whittaker Diversion. The 1912 Decree, however, included the protection against proration before the Kauer Ditch was constructed. The Kauer Ditch was constructed around 1932. *Kauer v. Whittaker*, 78 Idaho at 97, 298 P.2d at 747.

The confluence in the SWSENE of Section 30 is not active. Currently, without a water right authorizing the diversion of Stroud Creek at the West Springs Ditch⁷, Whittaker diverts all of the Stroud Creek water bypassing the Whittaker Diversion into the West Springs Ditch and conveys that water to the eastern-most edge of the Stroud Creek drainage. Ex. 154 (water in West Springs Ditch conveyed east to the divide ridge which separates the Stroud Creek drainage from the Big Eightmile Creek drainage). In recent years, when Whittaker has been required to bypass water to satisfy the McConnell Rights, Whittaker has injected water from the Whittaker ditch system into the Bohan Ditch, an old ditch which once diverted water from Stroud Creek to the eastern side of the Stroud Creek drainage. Ex. 151 at 9; Ex 154. It is not surprising that the Stroud Creek water diverted and then released by Whittaker flows into Lee Creek approximately one-half mile northeast of the confluence shown on the USGS Map. If the natural channel were reestablished between the Whittaker Diversion and the West Springs Ditch, the West Springs Ditch were flumed over Stroud Creek⁸, and the remnants of the old Bohan Ditch were filled in, the hearing officer is not persuaded that the confluence of Stroud Creek and Right Fork of Lee Creek would be located downstream of the Upper Diversion.

Whittaker argues that the water course through the Whittaker Two Dot Ranch property has been in place for so long it now constitutes the natural channel of Stroud Creek. The hearing officer rejects this argument. The current water course through the Whittaker property is not the natural channel of Stroud Creek. It is a series of ditches and man-made channels.⁹ Jordan Whittaker testified that the Stroud Creek channel has been altered or bypassed beginning at the Whittaker Diversion and extending to the north end of the Whittaker Two Dot Ranch property. Contor agreed that Stroud Creek water is conveyed in man-made channels and ditches through the Whittaker Two Dot Ranch property, beginning in the area of the Whittaker Diversion. Ex. 153 at Figure 11.

The hearing officer cannot overlook the fact that Whittaker diverts the entire flow of Stroud Creek through the West Springs Ditch, without a water right authorizing the diversion, pushes that water to the eastern-most edge of the basin, then releases the water into an old ditch channel headed to the northeast. In the absence of an existing, clearly-defined and un-manipulated Stroud Creek natural channel, the hearing officer must rely on the best evidence available for where the natural channel would exist were it not for the unauthorized diversion

⁷ The West Springs Ditch, maintained by Whittaker, captures and diverts Stroud Creek water. Whittaker's Stroud Creek water rights do not identify the West Springs Ditch as an authorized point of diversion. This contested case is not the proper forum to address the unauthorized diversion of Stroud Creek occurring at the West Springs Ditch. The hearing officer will defer to Water District 74Z, Water District 170 and the Department's compliance section to determine how to address the unauthorized diversion.

⁸ Water in the West Springs Ditch was once flumed across the Stroud Creek channel. Ex. 156, *Whittaker v. Kauer*, 78 Idaho at 97, 298 P.2d at 747 (in 1932, a flume was removed "which had been used continuously since some time prior to the entry of the July 1, 1912 decree to transmit the waters of the West Springs across the Left Fork . . .").

⁹ The record includes evidence that, between 1932 and 2014, McConnell or their predecessors in interest diverted water from Stroud Creek through a ditch known as the Kauer Ditch, located approximately one mile upstream of the Whittaker Diversion. When the Kauer Ditch was in use, Whittaker would capture and use all of the water flowing in Stroud Creek at the Whittaker Diversion. Ex. 151 at Appendix, 6/15/2000 inspection of Whittaker Diversion ("generally no control, ditch takes all of creek"). Whittaker has been accustomed to diverting all of the water in Stroud Creek at their property for many years, regardless of the limiting elements on their water rights. When the Kauer Ditch was in use, the Whittakers did not bypass any water in Stroud Creek, leading to the significant changes in the path of Stroud Creek water through the Whittaker property.

and channel alterations occurring on the Whittaker Two Dot Ranch property. The best evidence available is the 1954 map prepared by Milton Christensen and the USGS Map. These maps identify the confluence of Stroud Creek and Right Fork of Lee Creek upstream of the Upper Diversion. For purposes of this order, the hearing officer will rely on the confluence shown on the 1954 map and USGS Map, at a location upstream of the Upper Diversion.

Validity of McConnell Rights

The McConnell Rights currently describe only one point of diversion: the Upper Diversion. The Upper Diversion does not have the capacity to convey the entire flow rate described on the McConnell Rights. Evidence in the record, however, confirms that McConnell has diverted all of the water available under their Lee Creek water rights, albeit from an unauthorized point of diversion. McConnell has demonstrated that the water rights included in Application 84441 are valid water rights and have not been lost or forfeited through non-use.

McConnell notes that the Lower Diversion has been in use since at least 1993 and was “inadvertently omitted from water right claims filed in the [SRBA].” Ex. 1 at 1. There is no presumption that a transfer application should be approved simply because an unauthorized point of diversion has been in place and used for many years. The Department must evaluate the proposed changes against the existing elements of the water right. In this case, the Department must evaluate Application 84441 as though an entirely new point of diversion will be added to the McConnell Rights.

Injury to Existing Water Rights

The confluence of Stroud Creek and Right Fork of Lee Creek is located upstream of the Upper Diversion. Therefore, the water rights on Stroud Creek and its tributaries are diverted upstream of the Upper Diversion and are already subject to the McConnell Rights (except for water rights 74-369 and 74-370 as noted above). Adding a second point of diversion approximately 1,600 feet downstream of the Upper Diversion does not change the relationship between the McConnell Rights and junior water rights on Stroud Creek. Bruce McConnell testified that he cannot capture all of the flow available at the Upper Diversion and that the creek remains active and flowing between the Upper Diversion and the Lower Diversion. Adding the Lower Diversion as an authorized point of diversion to the McConnell Rights will not increase the burden on upstream junior water rights.

The upstream junior water right holders, Tomchak and Foster/Ayers, have been injured by the manipulation and dewatering of the Stroud Creek channel between the Whittaker Diversion and Lee Creek. Tomchak and Foster/Ayers are often curtailed to provide water to downstream senior water rights, including the McConnell Rights. Testimony of Udy. Instead of a direct delivery of water to McConnell through the Stroud Creek natural channel, the water taken from Tomchak and Foster/Ayers is diverted by Whittaker at the West Springs Ditch (without a water right) and routed through a series of ditches and man-made channels on the Whittaker property before being injected into the Lee Creek channel. Testimony of Udy (confirming that curtailing Tomchak and Foster/Ayers in 2020 did not result in a direct delivery to McConnell because Whittaker diverts all of the water in Stroud Creek at the West Springs

Ditch). The changes proposed in Application 84441 will not increase or exacerbate the injury to junior water rights caused by Whittaker's unauthorized diversion of Stroud Creek at the West Springs Ditch.

James Whittaker holds water right 74-157 which bears a priority date of April 1, 1916 and authorizes the diversion of 3.20 cfs from Springs tributary to Lee Creek for the irrigation of 291 acres. Ex. 1 at Appendix G. Whittaker contends that McConnell is barred from making a call for water against water right 74-157. Whittaker relies on the 1956 Idaho Supreme Court decision, *Whittaker v. Kauer*, and characterizes that decision as a private subordination agreement (subordinating the McConnell Rights to water right 74-157). The question of whether water right 74-157 is subject to a delivery call by McConnell is beyond the scope of this contested case. Because the confluence of Stroud Creek and Right Fork of Lee Creek is upstream of the Upper Diversion, the proposal to add the Lower Diversion to the McConnell Rights will not change the physical (spatial) relationship between the McConnell Rights and water right 74-157. The Department and the watermasters for Water Districts 74Z and 170 can determine which junior water rights should be curtailed to satisfy the McConnell Rights if McConnell makes a call for water in the future.

Whittaker also contends that the McConnell Rights will have to be delivered through Whittaker's private ditches in order for Stroud Creek water to make it to the Lower Diversion. Ex. 151 at 9. Whittaker's ditches do not have the capacity to carry the McConnell Rights and have been damaged as a result of carrying McConnell's Stroud Creek water in recent years. *Id.* The McConnell Rights do not describe the Whittaker Diversion or the West Springs Ditch as authorized points of diversion. Application 84441 does not propose to add the Whittaker Diversion or the West Springs Ditch as authorized points of diversion. As noted above, Whittaker is not authorized to divert any water from Stroud Creek below the Whittaker Diversion. Therefore, any negative impacts to Whittaker's ditch system are caused by Whittaker's own unauthorized diversion of Stroud Creek.

The changes proposed in Application 84441 could affect water rights with points of diversion between the Upper Diversion and the Lower Diversion. Water right 74-1831 is the only water right with an authorized point of diversion between the Upper Diversion and the Lower Diversion. Water right 74-1831 bears a priority date of June 28, 1912 and is junior to the McConnell Rights. Johnson testified that water right 74-1831 has not been used for many years because it is a junior right and is rarely available. The changes proposed in Application 84441 will move senior rights downstream of the diversion for water right 74-1831, making water right 74-1831 subject to the senior rights. This change could reduce the quantity of water available to satisfy water right 74-1831. To protect against injury to water right 74-1831, the McConnell Rights must be subordinated to water right 74-1831 when they are diverted at the Lower Diversion. The following condition should be added to the McConnell Rights:

Diversion and use of this right from the point of diversion located in the SWSW of Section 20, T16N, R25E shall be junior and subordinate to water right 74-1831 at its current point of diversion in the NWNWNW of Section 29, T16N, R25E.

Enlargement

The confluence of Stroud Creek and Right Fork of Lee Creek is located upstream of the Upper Diversion. Therefore, both Stroud Creek and Right Fork of Lee Creek have been available to satisfy the McConnell Rights. The addition of the Lower Diversion does not augment the water sources available to satisfy the McConnell Rights. The changes proposed in Application 84441 will not result in an enlargement is use under the McConnell Rights.

Conservation of Water Resources

The changes proposed in Application 84441 will not increase the conveyance losses for the water rights included in the application. Water will continue to be used for flood irrigation of the authorized places of use, a practice that is common in the Lemhi River drainage. Testimony of Bruce McConnell. The changes proposed in Application 84441 are consistent with the conservation of water resources within the state of Idaho.

Local Public Interest

Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). It is in the local public interest to improve the efficiency and reliability of irrigation infrastructure. The addition of the Lower Diversion will allow McConnell to better manage their water supplies. Testimony of Bruce McConnell. The changes proposed in Application 84441 are in the local public interest.

Headgates and Measuring Devices

McConnell’s diversions from Lee Creek (Upper Diversion and Lower Diversion) are not equipped with lockable, adjustable headgates, which are essential to allow the watermaster of Water District 74Z to perform his duties. All water users in the Lemhi River drainage are required to maintain lockable controlling works at irrigation points of diversion. Prior to diversion of water under Transfer 84441, McConnell must install lockable controlling works at both of the diversions from Lee Creek.

Evidence presented at hearing indicates that the measuring device for the Upper Diversion is located approximately one-half mile downstream of the diversion. Ex. 1 at 9; Testimony of David R. Tomchak. Having a measuring device one-half mile downstream of the diversion imposes an unreasonable burden on upstream junior water right holders, who may be curtailed to satisfy the McConnell Rights. Any losses in the ditch between the point of diversion and the measuring device come out of the water supply used to fill junior water rights. In order to minimize the losses occurring in the ditch upstream of the measuring device, the measuring device for the Upper Diversion ditch must be moved to a location within 1,000 feet of the point of diversion. McConnell should work with the watermaster for Water District 74Z to find a location on the Upper Diversion ditch that is ideal for measurement, but is also easily accessible for the watermaster.

CONCLUSIONS OF LAW

McConnell has demonstrated that the changes proposed in Application 84441 will not enlarge the use under the McConnell rights, are consistent with the conservation of water resources within the state of Idaho and are in the local public interest. McConnell has also demonstrated that the proposed changes will not injure existing water rights as long as the diversion of water at the Lower Diversion is subordinated to water right 74-1831. In order to facilitate proper administration of the McConnell Rights and to protect junior water rights, the McConnell Rights should not be diverted until the Upper Diversion and Lower Diversion are equipped with lockable controlling works and proper measuring devices. Further, the Upper Diversion should not be used until its measuring device is moved to a site within 1,000 feet of the headgate.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 84441 in the name of Bruce and Glenda McConnell is APPROVED subject to the conditions set forth in Transfer Approval 84441 issued in conjunction with this order.

Dated this 18th day of May 2021.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Preliminary Order Approving Transfer (84441)

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GLENDA MC CONNELL
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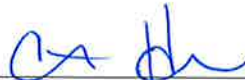
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Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.