Robert L. Harris, Esq. (ISB # 7018)
rharris@holdenlegal.com
Luke H. Marchant, Esq. (ISB # 7944)
lmarchant@holdenlegal.com
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for James Whittaker and Whittaker Two Dot Ranch LLC

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER 84441 IN THE NAME OF BRUCE AND GLENDA MCCONNELL	**WHITTAKER'S PETITION FOR RECONSIDERATION**

Protestants James Whittaker and Whittaker Two Dot Ranch LLC (collectively "Whittaker"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., submit this *Petition for Reconsideration*.

This petition is submitted pursuant to the *Explanatory Information to Accompany a Preliminary Order*, the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), and Rule 11.2(b) of the Idaho Rules of Civil Procedure. Whittaker requests reconsideration of the Hearing Officer's *Preliminary Order Approving Transfer* dated May 18, 2021 issued in the above-entitled matter (the "*Preliminary Order*").

The *Preliminary Order* was issued as part of the contested case pending before the Idaho Department of Water Resources ("IDWR" or "Department") on McConnell's transfer application

84441 (the "Transfer" or simply "84441"). James Cefalo is the designated hearing officer (the "Hearing Officer").

As stated above, a party in this proceeding has a right to petition the Hearing Officer for reconsideration within 14 days of the issuance of a preliminary order, which in this case is on or before June 1, 2021. Therefore, *Whittaker's Petition for Reconsideration* is timely.

Even though this is not a petition for judicial review to a reviewing court, the applicable standard of review of an IDWR decision before the Idaho Supreme Court was previously well summarized by the Idaho Supreme Court, and the principles and standards described therein are important considerations by the Hearing Officer in his decision at the agency level:

> In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act ("IDAPA"), "we review the decision of the district court to determine whether it correctly decided the issues presented to it." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). However, we review the agency record independently of the district court's decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)).
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> Idaho Code section 67–5279(3) provides that the district court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67–5279(3); *Clear Springs Foods*, 150 Idaho at 796, 252 P.3d at 77. Even if

> one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67–5279(4). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67–5279(3).

N. Snake Ground Water Dist. v. Idaho Dep't of Water Res., 160 Idaho 518, 522, 376 P.3d 722, 726 (2016).

As to legal questions, a reviewing court exercises de novo review. *Eden v. State* (In re SRBA Case No. 39576), 164 Idaho 241, 248, 429 P.3d 129, 136 (2018) ("We exercise de novo review over legal questions.").

As explained at the hearing, Whittaker does not object to the approval of 84441 if a subordination condition is in place for use of McConnell's lower diversion to Whittaker's WR 74-157. The Hearing Officer approved 84441 with a subordination condition for Steven Johnson's water right, WR 74-1831, which is appropriate, but the Hearing Officer did not include a similar subordination condition to WR 74-157, nor to any of the other existing water rights which divert from Stroud Creek. [1] There are both factual and legal errors contained in the *Preliminary Order* which are addressed below. The purpose of *Whittaker's Petition for Reconsideration* is to provide the Hearing Officer an opportunity to correct these errors.

I. ARGUMENT.

A. The Hearing Officer incorrectly adopted an unlawful injury evaluation for water right transfers and failed to correctly apply Idaho law concerning stream channels.

This section addresses two significant and interrelated legal errors made the Hearing Officer. Rather than evaluating injury based on the *current* location of both the Stroud Creek channel and the confluence of Stroud Creek with the Right Fork of Lee Creek, the Hearing Officer

[1] Whittaker would also be in favor of subordination conditions for the water rights owned by other Stroud Creek water users.

based his injury evaluation on where certain (and conflicting) evidence of where the stream channel and its confluence may have been *in the past*. Based on this faulty premise, the Hearing Officer focused on finding facts to support this position: "The hearing officer must determine whether this site [the current confluence] represents the natural confluence of Stroud Creek and the Right Fork of Lee Creek. This determination is critical in the evaluation of whether the changes proposed will result in injury and enlargement." *Preliminary Order* at 7.

The evidence at the hearing is undisputed that the current confluence of Stroud Creek is below McConnell's Upper Diversion. Even the applicant Bruce McConnell testified that this was the case. Testimony of Bruce McConnell. Prior to the hearing, however, it was unknown whether the location of this confluence would be in dispute at the time of the hearing. Cindy Yenter, the Watermaster from Water District 170, did not fully acknowledge this fact in her August 6, 2020 letter that came out of the 2020 water distribution matter between McConnell and Whittaker. Exhibit 158 at 1 ("Based on the investigation conducted yesterday, **it appears** that water from Stroud Creek **may** flow into Lee Creek below McConnell's authorized point of diversion." (emphasis added)). This language—use of "it appears" and "may"—is not definitive and suggests that the matter was still open for investigation.

After the date listed in this letter, it was unknown to Whittaker whether Yenter, McConnell, or in conjunction with each other, conducted any further investigation on this issue or reached a different conclusion. They evidently did not. The fact is undisputed that the current physical confluence of Stroud Creek with the Right Fork of Lee Creek is *below* the Upper Diversion. Without any conflicting evidence on this point, it seems self-evident that the Hearing Officer could

only conclude as follows: "Currently, water released from the Whittaker ditch system flows into Lee Creek below McConnell's Upper Diversion."[2] *Preliminary Order* at 7.

Based on this established fact, the injury to Whittaker is clear. The first principle listed in Idaho Code § 42-222(1) is that "no other water rights are injured thereby." This phrase does not limit the injury to only senior water rights—the "no-injury" rule protects juniors as well. "Injury will result where a change makes a junior appropriator subject to a priority to which the junior was not previously subject . . ." A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 IDAHO L. REV. 249, 254 (1990).

Whittaker's 74-157 is junior to McConnell's rights that he seeks to amend under 84441. Adding a point of diversion below the confluence of a tributary stream which gives McConnell administrative access to water from that tributary stream is clearly an injury to Whittaker's water right. With the current physical confluence of Stroud Creek and the Right Fork of Lee Creek established, the injury is clear, and the remedy that the Hearing Officer should have employed is to subordinate McConnell's use of the Lower Diversion to Whittaker's 74-157 similar to what was done for Steven Johnson. Yet the Hearing Officer refused to do so.

Instead, the Hearing Officer's injury analysis focused on where the confluence of Lee Creek "was once located." *Preliminary Order* at 8. Given the transfer and stream channel law described below, including the definition of "stream channel" under IDWR's own IDAPA rules ("The channel referred to is **that which exists at the present time, regardless of where the channel may have been located in the past.**" IDAPA 37.03.07.010.12 (emphasis added)), evaluation of injury based on the *past* location of the channel was completely unanticipated by

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[2] The characterization of the channel that currently conveys Stroud Creek water as the "Whittaker ditch system" is legally and factually inaccurate, as described further in this brief.

Whittaker. To the best of our knowledge, such an analysis based on the past location of a stream channel is unprecedented within the Department or any reported case.

Nevertheless, to bolster this position, the Hearing Officer accuses Whittaker of "unauthorized diversion and channel alterations occurring on the Whittaker Two Dot Ranch property." *Id.* at 10-11. Not only is this statement pejorative, but it is incorrect, as there is nothing in the Idaho Supreme Court case of *Whittaker v. Kauer* which suggests in any way that what Whittaker's actions were unauthorized, and indeed, the case holds the opposite—that the arrangement between Whittaker and McConnell's predecessors was valid and lawful.

The Hearing Officer was also arbitrary and capricious in use of the *Whittaker v. Kauer* as the Hearing Officer cites to this case several times for facts and principles believed support the *Preliminary Order*, and yet ignores it for others, such as the question of whether Whittaker's diversion of water and construction of the irrigation system was unauthorized. This will be addressed in further detail in the following section of this brief, but for purposes of this first section, it is mentioned because it appears to serve as a basis for the Hearing Officer to ultimately find and conclude as follows:

> If the natural channel were reestablished between the Whittaker Diversion and the West Springs Ditch, the West Springs Ditch were flumed over Stroud Creek, 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.
>
> . . .
>
> In the absence of an existing, clearly-defined, and unmanipulated Stroud Creek natural channel, the hearing officer must rely on the best evidence available for where the natural channel would exist if it were not for the unauthorized diversion and channel alterations occurring on the Whittaker Two Dot Ranch property.

Preliminary Order at 10-11.

These findings and conclusions are based on sheer speculation. They are not based on any—let alone substantial—evidence the record, which violates the review criteria of Idaho Code § 67-5279(3). There was no testimony, either live or through submission of an expert report, from a stream geomorphologist or engineer or other expert opining that the volume of water coming down Stroud Creek would be sufficient to naturally move the Stroud Creek stream channel confluence from its current location back to where the Hearing Officer concludes it originally was in Section 30.

Nevertheless, based on the foregoing, the Hearing Officer made a finding of fact that is simply and verifiably untrue:

> The confluence of Stroud Creek and Right Fork of Lee Creek is located **upstream** of the Upper Diversion.

Preliminary Order at 11 (emphasis added). This is contrary with a prior and undisputed finding in the *Preliminary Order*: "Currently, water released from the Whittaker ditch system flows into Lee Creek **below** McConnell's Upper Diversion." *Preliminary Order* at 7 (emphasis added).

Evident in the Hearing Officer's analysis is the idea that an injury analysis can be based on evidence or speculation as to what *past* circumstances may have looked like (such as an un-manipulated stream channel) prior to submission of a transfer application. There is nothing in the plain language of Idaho Code § 42-222 which provides or even suggests that this can be done. Furthermore, in 1929, the Idaho Supreme Court held the following in relation to proposals to amend water rights:

> [W]e now declare and determine the rule, generally applicable, to be that junior appropriators **have a vested right to a continuance of the conditions existing on the stream at and subsequent to the time they made their appropriations**, and that no proposed change in place of use or diversion will be permitted when it will injuriously affect such established rights.

Crockett v. Jones, 47 Idaho 497, 504, 277 P. 550, 552 (1929) (emphasis added). Accordingly, Whittaker has a "vested right to continuance of the conditions existing on [Stroud Creek] at **and subsequent** to the time" Whittaker's 74-157 was appropriated. Not only is the Hearing Officer without authority to consider or speculate about what past circumstances on the creek systems may have been, but his injury analysis *must* consider the present conditions on Stroud Creek for purposes of his injury analysis. It is Whittaker's vested right to have the current conditions considered and it is reversible error for the Hearing Officer to conclude otherwise. Without amendment of the *Preliminary Order*, the injury to Whittaker's 74-157 is now present because of the approval of 84441 without protective conditions. See *City of Pocatello v. State (In re SRBA Case No. 39576)*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) ("Specifically, injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case a discrete region of the aquifer) and priority administration is sought. Even though the priority administration may occur at some point in the future, **injury to the priority date occurs at the time the accomplished transfer is approved**.") (emphasis added).

That leads to the second significant issue with the *Preliminary Order*, and that is the nature of the physical channel that exists below the Whittaker Diversion on Stroud Creek. The Hearing Officer holds that manipulated or altered stream channels are no longer natural stream channels, but private ditches. *Preliminary Order* at 10 ("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 offer rejects this argument. The current water course

through the Whittaker property is not the natural channel of Stroud Creek."). If not corrected, this decision could have far-reaching implications as irrigation development in Idaho has resulted in the manipulation, channelization, and/or alteration of perhaps every stream water is diverted out of for irrigation. Based on the Hearing Officer's logic, in a transfer proceeding, the burden will be on water users to prove what conditions were like rather than on what is simply there now. It also leads to a result where there is a natural channel above the Whittaker Diversion, and a natural channel below the Bohan Ditch, but not in between.

The water course running through the Whittaker Two Dot Ranch property is now the natural channel of Stroud Creek, even if it was artificially created, because it replaced the channel that previously existed and water still flows through this watercourse down to the current confluence with the Right Fork of Stroud Creek. The testimony of David Tomchak on this question was persuasive as he took an entire day to walk the entire length of Stroud Creek, including below the Whittaker diversion, all the way down to the current confluence of the creeks. He was able to follow and clearly identify a water channel through the Whittaker Two Dot Ranch LLC property all the way down to the current confluence of Stroud Creek and the Right Fork of Lee Creek. Testimony of David Tomchak (Day 2, Recording 2, at approximately 49:00 through 1:01).

The Idaho Supreme Court has clearly held that "[a] stream does not lose the attributes of a water course merely because a part of its channel may have been artificially created." *Poole v. Olaveson*, 82 Idaho 496, 503, 356 P.2d 61, 65 (1960) (citing to 1 KINNEY ON IRRIGATION AND WATER RIGHTS, p. 489). The use of the altered Spring Creek channel in *Poole* was for drainage water from a church's irrigation, and while the persons who constructed the artificial drainage

channel near where Spring Creek's natural channel ran sought to enjoin the church from discharging wastewater into the channel , the Idaho Supreme Court held:

> I.C. § 42-101 provides that "the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed." Substitution of the artificial drainage channel for the natural channel of Spring Creek did not affect the rights of users of the waters of the Creek to the use of its water course to drain away waste waters arising from use of waters of the Creek.

Id. Similarly, substitution of an artificial system on Stroud Creek did not affect the rights of users of water from that creek. As described in the following section, while water delivery may have been affected by the Idaho Supreme Court's decision to uphold an exchange agreement in *Whittaker v. Kauer*, that doesn't change the nature of the water course running through the Whittaker Two Dot Ranch LLC property. If there was a natural channel there once, and water still flows down what replaced it, it is a natural water course, with all the rights Idaho law provides to such a channel.

Even the administrative rules on stream channel alterations binding on IDWR are clear on this point that a stream channel is what exists at the present time, not in the past. The very definition of a "stream channel" is "[t]he channel referred to is **that which exists at the present time, regardless of where the channel may have been located in the past.**" IDAPA 37.03.07.010.12 (emphasis added).

Despite being aware of the *Poole* case, and presumably the IDAPA stream channel alteration rules binding on the Department, the Hearing Officer summarily states that Whittaker's position is rejected without citation to any legal authority in support of such a position. *Preliminary Order* at 10. Instead, the Hearing Officer focused on the water system plumbing below the Whittaker Diversion and appears to improperly place weight on the labels provided to

these channels spoken by Jordan Whittaker and the label of "man-made channels" used by Whittaker's expert, Bryce Contor, in one of his exhibits. *Id.*

The legal status of the channel is defined by law, not the labels placed on the channel, or how the channel was created. As described above, just because a channel is man-made does not automatically make it a ditch. In this matter, the labels ascribed to these water courses do not change the nature of these water courses. The characteristics (substance) of the water course is controlling. As described in *Poole*, substitution of the artificial channel for the natural channel did not change its nature from a water course to a ditch. The artificial and channelized water course which carries water in excess of what can be diverted at the Whittaker Diversion is now, as a legal matter, the legal channel of Stroud Creek even if it was originally artificially created.

In addition to *Poole*, other authority supports this established principle. *See*, e.g., *Scranton-Pascagoula Realty Co. v. Pascagoula*, 157 Miss. 498, 508, 128 So. 73, 75 (1930) ("By the great weight of authority, however, and especially after the period of prescription has run, that which was at first an artificial channel will become a watercourse when for all the prescriptive years it has taken the place, and has served principally in lieu, of the original channel. "A stream does not lose the attributes of a watercourse by the fact that a part of its channel may have been artificially created. The straightening of a crooked watercourse in order to facilitate the flow and avoid the flooding of bordering lands is not uncommon. To divert the course so long as the change has been and remains permanent, whatever may have been the particular purpose to be served, eventuates in a similar legal result."); *Chowchilla Farms, Inc. v. Martin*, 219 Cal. 1, 14, 25 P.2d 435, 440 (1933) ("Such waters, thus forming a watercourse and flowing with regularity from year to year, although the channel may be dry for the major portion of each year, are a proper subject of appropriation, and where such waters did not originally collect and flow down the channel, if

through the instrumentality of man they have been made to do so and, through years of so flowing have acquired a permanent character as the natural drainage of the watershed, the original manner of the creation of the stream is immaterial; it is a 'watercourse' with all the attributes of one wholly natural." *Chowchilla Farms, Inc. v. Martin*, 219 Cal. 1, 14, 25 P.2d 435, 440 (1933): *Binning v. Miller*, 55 Wyo. 451, 475-76, 102 P.2d 54, 63 (1940) ("In *City of Reading v. Althouse*, 93 Pa. 400, the court among other things stated: "And so in Sutclife v. Booth, 32 L. L. Q. B. 136 it was held, per Wightman, J., that a watercourse, though artificial, may have been originally made under such circumstances, and have been so used as to give all the rights that the riparian proprietors would have had, had it been a natural stream. Of like import is the case of *Nittall v. Branwell*, Law Rep. 2 Exch. 1, in which Channel, B., says 'I see no reason why the law applicable to ordinary running streams, should not be applicable to such a stream as this, for it is a natural flow or stream of water, though flowing in an artificial channel. While we are not altogether satisfied on the point, we think we should hold that the water running in the stream was, commencing at least with 1936, subject to appropriation."); *Smith v. Los Angeles*, 66 Cal. App. 2d 562, 579, 153 P.2d 69, 78 (1944) "A watercourse does not lose its character as such by reason of the fact that it is improved by deepening or is artificially controlled, nor because it is used as a conduit to carry other waters. Again, the character of a watercourse is not changed by the fact that a pond is created by a dam. *Nor does a watercourse lose its character as such because all the water has been diverted therefrom, no matter for how long a period*, -- although such diversion may deprive lower riparians of their rights, -- nor by reason of the fact that the water has all been dammed at a place far up the stream. . . ." *Smith v. Los Angeles*, 66 Cal. App. 2d 562, 579, 153 P.2d 69, 78 (1944) (italics in original).

In addition to the foregoing, the Hearing Officer has failed to acknowledge Idaho law that a stream channel must have a bed and banks and substantial indications of the existence of a stream, which is ordinarily moving water. The Idaho Supreme Court has defined a natural watercourse to be:

> [A] stream of water flowing in a definite channel, having a bed and sides or banks and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream which is ordinarily a moving body of water.

Burgess v. Salmon River Canal Co., Ltd., 119 Idaho 299, 305, 805 P.2d 1223, 1229 (1990). No evidence was provided at the hearing on this matter of a "definite channel" connecting Stroud Creek and the Right Fork of Lee Creek within Section 30. The opposite is true, as there was testimony of culverts in place near this alleged confluence—actual on-the-ground features—originally placed there in the 1960s memorializing the long-established location of these features based on the undisputed testimony of James Whittaker. Accordingly, even if the original channel crossed the current elevated area —which elevated area was explained by James Whittaker, Jordan Whittaker, David Tomchak, and Steven Johnson (the owner of the property where this is at)—between the channels of Stroud Creek and the Right Fork of Lee Creek as they currently parallel each other originally existed, it does not now. And creek beds can lose their character as a natural watercourse if certain conditions are met. In *Dayley v. City of Burley*, 96 Idaho 101, 103, 805 P.2d 1073, 1075 (1974), the 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. The key is whether there is water present for at least a part of the time and a bed and

banks making up the actual channel. There was and is water coming down Stroud Creek at its current channel location as evidenced by a culvert on Stroud Creek near the alleged confluence (otherwise, there would be no need for a culvert), but there is no evidence of a bed and banks or water flowing from Stroud Creek to the Right Fork of Lee Creek through the elevated area between the channels in Section 30. Any connection in Section 30 that may have existed no longer exists, and is therefore, not the channel because the channel is "that which exists at the present time, regardless of where the channel may have been located in the past." IDAPA 37.03.07.010.12.

There is also generally water from Stroud Creek that flows into the Left Fork of Lee Creek at its current confluence. As documented by the 2020 letter from Cindy Yenter, "it appears that water from Stroud Creek may flow into Lee Creek below McConnell's authorized point of diversion." Exhibit 158 at 1.

Based on the foregoing, it is both factually and legally incorrect to hold that "[t]he current path of Stroud Creek water through the Whittaker Two Dot Ranch property does not constitute the natural channel of Stroud Creek" and that "[t]he confluence of Stroud Creek and Right Fork of Lee Creek is located upstream of the Upper Diversion." *Preliminary Order* at 5, 11. The current path of Stroud Creek water through the Whittaker Two Dot Ranch property may not be in the *original* natural stream channel, but such path is now the *legal* natural channel of Stroud Creek.

Additionally, on this stream channel issue, the Hearing Officer asserts that Whittaker has engaged in illegal behavior—the "unauthorized diversion and channel alterations occurring on the Whittaker Two Dot Ranch property," *Id.* at 10-11—which suggests that his decision would be different if there was a natural change to the confluence of Stroud Creek and Right Fork of Lee Creek. However, none of the authorities cited above make a distinction that the new artificial channel is not the legal stream channel if the original alteration of the stream was unauthorized.

More critically, however, nothing Whittaker has done has been adjudicated to be illegal in any court case or other administrative proceeding. Further, nothing that Whittaker's predecessors did to alter the Stroud Creek channel was illegal at that the time they did it. The Idaho Supreme Court decision of *Whittaker v. Kauer* describes the system in detail, and certainly the Court would not condone something that was illegal, or at a minimum, would at least mention whether the work was illegal. And even if it could be considered illegal under today's current stream channel alteration laws and rules, the work was done prior to enactment of the Stream Protection Act (Idaho Code § 42-3801 *et seq.*) and this act does not apply to actions taken before its enactment in 1971. *Randall v. Ganz*, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975).

Further, the West Springs Ditch is not a diversion on Stroud Creek as it conveys only water from these springs into what was once an artificial channel that is would now the legally recognized channel of Stroud Creek, as described by David Tomchak. It is therefore not accurate to refer to the second location listed in finding of fact no. 16, as a Stroud Creek diversion because it is not diverting Stroud Creek water. West Springs water joins Stroud Creek water in the current channel of Stroud Creek (labeled as the Floyd J. Whittaker ditch coming from East Springs) above where the West Springs Ditch flows into this channel, as explained at the hearing through the testimony of Jordan Whittaker.

Related to the West Springs Ditch, at page 10, footnote 9 of the *Preliminary Order*, it states "Whittaker has become 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 significant changes in the path of Stroud Creek water through the Whittaker property." This is misleading and incorrect. When the Kauer Ditch was in use, the Whittaker Diversion on Stroud Creek was the

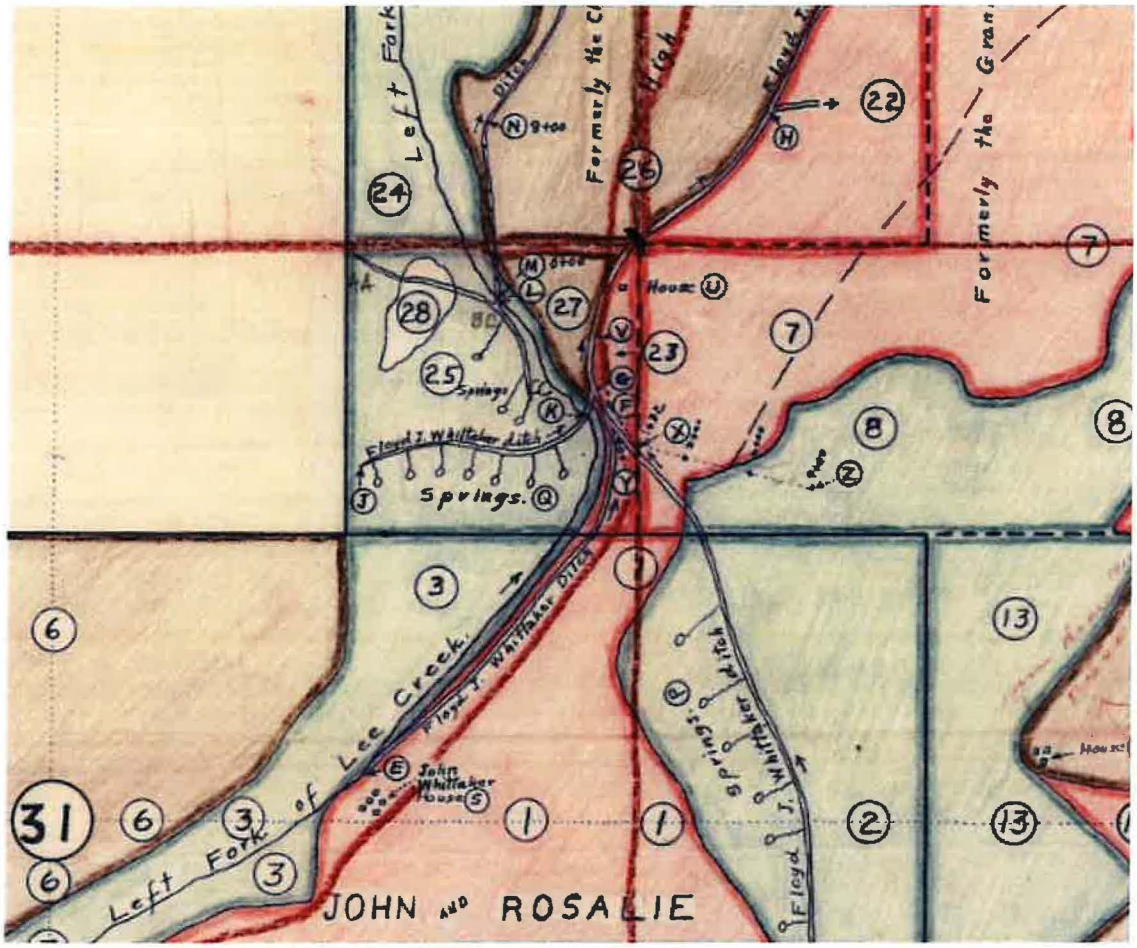
last diversion on Stroud Creek as the flows used by upstream users, flows turned down the Kauer Ditch, and flows diverted at the Whittaker Diversion dried up the creek. Whittaker's water rights were regulated by the Water District 74Z watermasters along with other higher diversions on Stroud Creek, since they took their water out above. When the water flows were sufficient to fill all the existing water rights on Stroud Creek, high water was generally distributed equally among the water users. This means that the only water left in Stroud Creek by the time it reached the Whittaker Diversion was the amount necessary for Whittaker's authorized rights (WRs 74-369, 74-1136, and 74-15788), generally leaving no need or legal requirement to bypass any water in Stroud Creek.

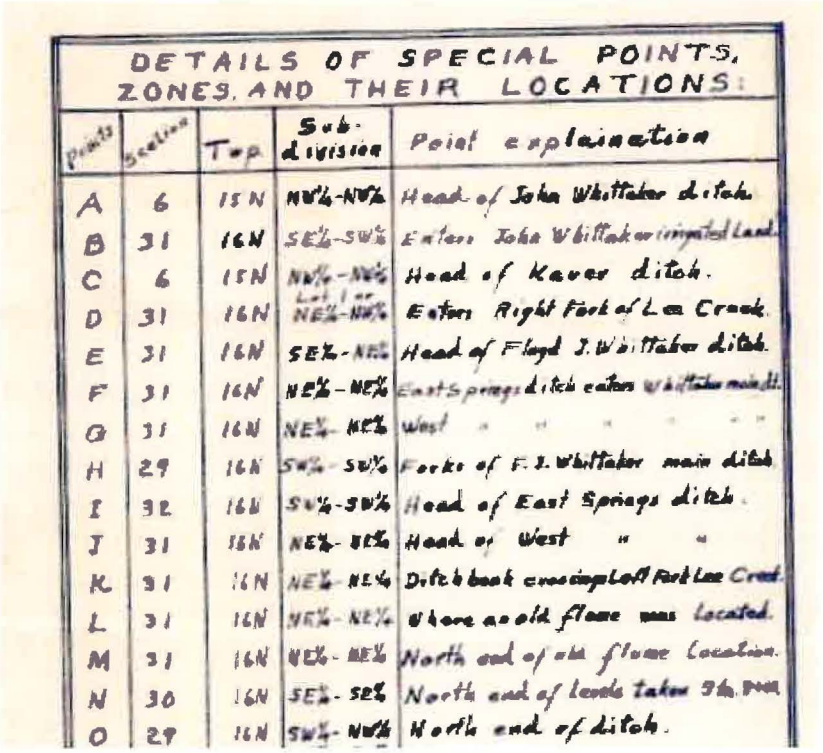
On this incorrect characterization of Whittaker's water use, the Hearing Officer goes further, and even asserts that Whittaker is causing upstream juniors injury:

> In recent years, when Whittaker has been required to bypass water to satisfy the McConnell Rights, Whittaker has injected water form the Whittaker ditch system into the Bohan Ditch, an old ditch which once diverted water from Stroud Creek to the western side of the Stroud Creek drainage.
> . . .
> 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. 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 diversiof of Stroud Creek water at the West Springs Ditch.

Preliminary Order at 11-12. We disagree with these findings and conclusions. First, the Bohan ditch was historically used to convey West Springs water to an irrigation place of use, not Stroud

Creek water. The flume across the Stroud Creek channel which was in existence prior to 1932 was located at the same location (see Figure 2-1954 Engineer's Map Letter M) where Stroud Creek water now leaves the ditch, which indicates the channel below the Bohan ditch has not been modified:





DETAILS OF SPECIAL POINTS, ZONES, AND THEIR LOCATIONS:

Point	Section	Twp.	Sub-division	Point explanation
A	6	15N	NW¼-NW¼	Head of John Whittaker ditch.
B	31	16N	SE¼-SW¼	Enters John Whittaker irrigated land.
C	6	15N	NW¼-NE¼	Head of Kauer ditch.
D	31	16N	Lot 1 or NE¼-NW¼	Enters Right Fork of Lee Creek.
E	31	16N	SE¼-NE¼	Head of Floyd J. Whittaker ditch.
F	31	16N	NE¼-NE¼	East Springs ditch enters Whittaker main ditch.
G	31	16N	NE¼-NE¼	West " " " " " "
H	29	16N	SW¼-SW¼	Forks of F. J. Whittaker main ditch.
I	32	16N	SW¼-SW¼	Head of East Springs ditch.
J	31	16N	NE¼-SE¼	Head of West " "
K	31	16N	NE¼-NE¼	Ditch bank crossing Left Fork Lee Creek.
L	31	16N	NE¼-NE¼	Where an old flume was located.
M	31	16N	NE¼-NE¼	North end of old flume location.
N	30	16N	SE¼-SE¼	North end of levels taken 9th Point
O	29	16N	SW¼-NW¼	North end of ditch.

Exhibits 154 and 155.

Second, as described above, the West Springs Ditch is not diverting Stroud Creek water—it is carrying West Springs Water to what was once an artificial channel that is now the legally recognized Stroud Creek channel. Third, until 2014, the Kauer Ditch was used in this drainage, and the upstream juniors were curtailed to provide water down that ditch, not through the Whittaker Two Dot Ranch LLC property. Fourth, it is simply false that the upstream juniors were curtailed in 2020 during the futile call determination requested by Cindy Yenter in August of that year. Rather, it was curtailment of Whittaker's use of water from West Springs that was performed to determine futile call.

In paragraph 1 on page 12 of the *Preliminary Order* it states that "the question of whether water right 74-157 is subject to a delivery call by McConnell is beyond the scope of this contested case." But whether or not McConnell's have the right to call for the water from the West Springs

is certainly within the scope of this contested case since this new, approved Lower Diversion would allow McConnell's to call for water which has historically not been available to them.

In short, Whittaker resents the implication that they were somehow receiving more water than they were entitled to simply because they were the last diversion on the creek when all the water was measured, administered, and recorded by a state-employed watermaster. *See* discussion of water districts below. In the State of Idaho, it is not an uncommon practice for a stream channel to be dewatered at the lowest point of diversion.

For the reasons set forth above, the Hearing Officer should reconsider the intertwined findings of fact and conclusions of law relating to evaluation of injury as of the time the transfer application is filed and in accordance with Idaho stream channel law. Without amendment, this decision will have far-reaching implications as it will create uncertainty in transfer proceedings as to when injury is evaluated and, potentially, the past location of stream channels. Ultimately, this should lead to a revised *Preliminary Order* that subordinates McConnell's use of the Lower Diversion to Whittaker's 74-157.

B. Whittaker's historic diversion and use of 74-157 was not "unauthorized". It was specifically described in *Whittaker v. Kauer*, referenced in subsequent claims by Whittaker in the Lemhi Adjudication and the SRBA, and the administration of this right is performed by a state-employed watermaster (Water District 74Z), not by Whittaker.

The Hearing Officer accuses Whittaker of "unauthorized diversion and channel alterations occurring on the Whittaker Two Dot Ranch property." *Id.* at 10-11. There is no qualifying language to this accusation, and Whittaker has not performed any recent channel alterations or changed the historic location of the features running through the Whittaker Two Dot Ranch LLC Property. We can therefore only interpret this allegation as a reference to past diversion of water

and channel alterations. If the Hearing Officer meant otherwise, he can clarify in response to this petition, but we are left to respond to the plain language of the *Preliminary Order*.

Whittaker's historic use of water on Stroud Creek is authorized because of the Idaho Supreme Court case of *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956), which is a valid Idaho case that has not been overruled. In this case, the Idaho Supreme Court described the setup on the Whittaker property and even that it was the watermaster's actions of breaching the West Springs Ditch berm (that previously replaced a flume) that led to the litigation. Here is the entire description of the arrangement the parties agreed to:

> The trial court found that in the year 1932, respondents entered into an oral contract with appellants' predecessors (and other interested parties), to whom water had been decreed by the July 1, 1912 decree, whereby the point of diversion of waters of the Left Fork of Lee Creek, decreed to and used upon lands, including the lands now occupied by appellants, situate northerly and below all of respondents' lands, was changed from a point situate on the main channel of Lee Creek to a point situate on the Left Fork thereof near the Southwest corner of Section 31, Township 16 North, Range 25 E.B.M., which point of diversion is situate about one and one-fourth miles southwesterly and above the West Springs; and whereby, in consideration of a grant by John Whittaker, father of respondent Floyd Whittaker, of a right of way for a ditch over certain of the John Whittaker lands (over Lots 4 and 3 and SE 1/4 of the NE 1/4, Sec. 31, Twp. 16 N., R. 25 E.B.M.) through which to convey from such point of diversion on the Left Fork, to the Right Fork of Lee Creek the said decreed waters. **The other parties, including appellants' predecessors, permitted respondents to remove a flume 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 at a point situate in the described quarter section where the springs are situate, and to substitute in place of said flume an earthen dam where the flume theretofore had been, *thereby to capture all waters found flowing in the creek at that place*.**
>
> The court further found that pursuant to said contract the dam was constructed, maintained and used by respondents at all times since 1932 continuously and without interruption until the year 1954 when, at appellants' instance, the water master cut the dam, which allowed the waters to flow down the channel but nevertheless into a diversion ditch of respondents situate some 650 feet below and northeasterly from said dam.

Whittaker v. Kauer, 78 Idaho at 97, 298 P.2d at 747 (emphasis added).

Based on the foregoing facts, the Court—specifically referencing the flow from West Springs and the "damming of the Left Fork by respondents"—held as follows:

> The conclusion is inescapable also, that appellants' predecessors had knowledge of respondents' use of the waters of the West Springs, inasmuch as appellants' predecessors consented to the damming of the Left Fork by respondents at the place where, since prior to or about the year 1912, the flume had conveyed the waters of the springs across the Left Fork; also that, beginning with the year 1932 and continuously ever since for some 22 years, until during the year 1954, appellants' predecessors knew that respondents, without interruption or molestation, had used the waters of the springs pursuant to the status which resulted upon consummation of the contract which the trial court set out in its findings.
>
> Under the facts and circumstances as related, respondents' right to the use of the waters of the West Springs, though they be public waters, must be held to have been abandoned by appellants' predecessors; St. John Irrigating Co. v. Danforth, 50 Idaho 513, 298 P. 365; Chill v. Jarvis, 50 Idaho 531, 298 P. 373; Graham v. Leek, 65 Idaho 279, 144 P.2d 475; and such right must be held to have been acquired by respondents by appropriation and application to beneficial use. I.C. § 42–101; I.C. § 42–103; Jones v. McIntire, 60 Idaho 338, 91 P.2d 373; Maher v. Gentry, 67 Idaho 559, 186 P.2d 870. A finding, if made by the trial court, that the waters of the West Springs are public waters, would not change such result nor affect the trial court's decree.

Id. at 98-99, 298 P.2d at 748.

As described, in 1932, McConnell's predecessors constructed and changed their conveyance of Stroud water through the Kauer Ditch which lies upstream from this portion of the original Stroud Creek channel. Most of the time, there was very little water left to flow through this section of the original Stroud Creek channel after all the other water rights were filled on Stroud Creek, which in essence dewatered this section of the Stroud Creek channel. Following the construction of the Kauer Ditch in 1932, the West Springs Ditch—which is a collection ditch—was dug on Whittaker's private property to more efficiently collect and channel the West Springs water to Whittaker's place of use. Prior to 1932, a flume was constructed to divert the water from the West Springs over the Stroud Creek channel. After McConnell's water was moved to the Kauer Ditch by their predecessors, the flume across the Stroud Creek channel was unnecessary

since there was little or no Stroud Creek water left to flow through that section of property. Accordingly, the general lack of Stroud Creek water is not and has not been caused by Whittaker's "unauthorized diversion of Stroud Creek," but rather by the movement of McConnell's water by his predecessors to the Kauer Ditch in 1932. The Kauer Ditch was known to IDWR as its heading has an IDWR identification tag on it.

It is also worth noting that at the time of the *Whittaker* decision in 1954, McConnell's predecessor's water right decrees did not describe the Kauer Ditch as an authorized point of diversion, even though the agreement started around 1912, but the agreement was still upheld by the Idaho Supreme Court with no direction or discussion about whether Kauer's water rights had been amended or needed to be amended. In those days, the standards for describing water rights and use of water were less formal than they are today. And given the current position of the Department, that the *Whittaker v. Kauer* decision must be noted on the SRBA partial decree for Whittaker's 74-157, James Whittaker—a man who is now ____ years old—was caught assuming that the historical administration documented in the *Whittkaer v. Kauer* decision would not change and that however that decision needed to be documented in the partial decree, if at all, IDWR would recommend it correctly. IDWR was aware, or at a minimum should have been aware, of the Idaho Supreme Court decision, and Whittaker never did anything to hide it.

IDWR's position concerning administration of Whittaker's 74-157 is different today than it was before, and given this position, it is unsurprising that Whittaker wished 74-157 was described with the additional detail of the *Whittaker v. Kauer* decision as it would likely avoid the current dispute and all that comes with contested cases and litigation. Until 2020, water was administered and delivered under 74-157 to Whittaker without incident consistent with this agreement that began over a century ago. To state that the use of water and the changes on the

Whittaker Two Dot Ranch property was unauthorized ignores portions of the plain language of the *Whittaker v. Kauer* decision. The Hearing Officer selectively acknowledge portions of this decision in the *Preliminary Order* and ignore others, particularly those that give context to why the water was used as it was on the Whittaker Two Dot Ranch property.[3]

In addition to the foregoing, however, Whittaker's use water from 74-157 was not illegal because it is within a functioning water district, Water District 74Z, and it is the watermaster's governmental duty to distribute water, not Whittaker's. Again, it is not particularly clear why the Hearing Officer has accused Whittaker of unauthorized water use and unauthorized stream channel alterations and why this bears on the ultimate decision, but it is necessary to respond in full to these allegations.

Idaho Code § 42-602 (with our emphasis) provides:

> The **director of the department of water resources shall** have direction and control of the distribution of water from **all natural water sources** within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.
>
> The **director of the department of water resources shall** distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

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[3] As previously briefed to the Hearing Officer, Whittaker's position is that the agreement with Kauer and its successors described in *Whittaker v. Kauer*, 78 Idaho 94, 98, 298 P.2d 745, 747-48 (1956), is not an agreement that the Hearing Officer can enforce, rule upon, or affect with a written decision. This is a private agreement that the Idaho Department of Water Resources does not enforce as between the parties, as described in *City of Blackfoot v. Spackman*, 162 Idaho 302 (2017). In Whittaker's view, irrespective of what the decreed water right elements provide, the agreement memorialized and described in the *Whittaker v. Kauer* case described above does not relieve the parties of their contractual obligations. Water users can agree (contract) to water distribution arrangements, such as rotation of water, and such agreements are enforceable. *See, e.g., State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039 (1911). Nothing argued in this brief is intended to waive or abrogate any other legal actions Whittaker may have no choice to take, such as an action in district court or before the SRBA court, concerning the *Whittaker v. Kauer* decision and WR 74-157.

The Idaho Supreme Court confirmed the Director's governmental authority under this statute concerning matters of priority administration and water distribution in the case of *In re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to 'Refill', Under Priority, Space Vacated for Flood Control)*, Nos. 40974 and 40975, [CITE] (Aug. 4, 2014). Given IDWR's sole and exclusive governmental authority to regulate diversions during priority administration, Idaho statutes also gives IDWR the tools necessary to accomplish that task. Idaho Code § 42-603 allows the director to promulgate water distribution rules and Idaho Code § 42-604 allows the Director to create "water districts" staffed with state-employed watermasters and deputy watermasters.

When this is done, "[e]ach water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the **essential governmental function** of distribution of water among appropriators." Idaho Code § 42-604 (emphasis added); see also *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969) (The watermaster is not the agent of the water company or water user, but is a ministerial officer.).

Water District 74Z is one such water district that was created to assist the Director in his responsibilities, and it is an active water district with an active watermaster (the current watermaster is Merritt Udy, who testified at the hearing).

In short, Whittaker's use of water and the stream channel alterations previously made were not unauthorized, rather, they are described in a reported opinion of the Idaho Supreme Court. That decision did not require Floyd J. Whittaker to amend his water rights in any way, and water is distributed on Stroud Creek by a state-employed watermaster. Further, the Stream Channel Protection Act was not enacted at the time. There have been no recent changes to Whittaker's system as it was described in the Idaho Supreme Court opinion. To refer to Whittaker's water use

and the construction of irrigation infrastructure as unauthorized is simply not accurate and it fails to provide proper context to the situation. At best, there is disagreement over whether Whittaker's 74-157 should be administered as described in *Whittaker v. Kauer* or whether the lack of reference to this decision in the partial decree for 74-157 is controlling. But most importantly, as described above, whether Whittaker's actions were unauthorized or not does not change the law or standards that the Hearing Officer must follow concerning evaluation of injury and the nature of stream channels that have been altered or replaced with originally artificial channels. It is clear that the Hearing Officer's conclusion that Whittaker's actions are unauthorized permeates his findings and conclusions in the *Preliminary Order*, and upon reconsideration, he should amend the *Preliminary Order* to be consistent with Idaho law on when injury is evaluated and that a stream channel exists where it does "at the present time, regardless of where the channel may have been located in the past." IDAPA 37.03.07.010.12. Properly evaluated, the Hearing Officer should amend the *Preliminary Order* and subordinate McConnell's use of the Lower Diversion to Whittaker's 74-157.

C. In addition to the foregoing, the Hearing Officer should apply the equitable doctrine of laches.

The equitable doctrine of laches has been applied in water cases, and in addition to the foregoing, should be applied here. In *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994), the Idaho Supreme Court held:

> This Court has previously held that when owners of water rights who, with full knowledge of all the facts, have long acquiesced in the water rights claimed by another party so that the party had incurred indebtedness on the strength of title to the water, the owners may be estopped by laches from questioning the rights claimed, even if the claimed rights were originally questionable. *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994) (citing *Johnson v. Strong Arm Reservoir Irrigation Dist.,* 82 Idaho 478, 486-487, 356 P.2d 67, 72 (1960); *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 408-409, 66 P.2d 115, 117 (1937)).

Id. In the *Hillcrest Irrigation District* case cited to by the *Devil Creek Ranch* court, the Idaho Supreme Court held:

> Long and continuous knowing acquiescence in an other's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim. In *Ryan v. Woodin, supra,* the just and fair rule is stated as follows: Courts of equity do not favor antiquated and stale demands and refuse to interfere where there has been gross laches in commencing the proper action or long acquiescence in the assertion of adverse rights. Here the change of point of diversion and use, whether regular and legal or not, was actually accomplished and thereafter used and enjoyed adversely.

Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist., 57 Idaho 403, 412, 66 P.2d 115, 118 (1937) (citing to *Ryan v. Woodin,* 9 Idaho 525, 75 P. 261; *Oylear v. Oylear,* 35 Idaho 732, 208 P. 857; *Smith v. Faris-Kesl Const. Co., Ltd.,* 27 Idaho 407, 426, 150 P. 25; *Just v. Idaho Canal etc. Co., Ltd.,* 16 Idaho 639, 653, 102 P. 381, 133 Am. St. 140.)). In *Hillcrest Irrigation Dist.*, the elements of long and knowing acquiescence, as well as reliance to the injury of the claimant were clearly present.

The doctrine of laches is well described in *Sears v. Berryman*, 101 Idaho 843, 848, 623 P.2d 455, 460 (1981): "The doctrine of laches is a creation of equity and is a species of equitable estoppel. Long and continuous knowing acquiescence in another's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim."

In courts of law, as opposed to courts of equity, the principle of laches is embodied in statutes of limitation. See, e.g, Idaho Code §§ 5-216, 5-217, and 5-219. The elements of laches are:

> (1) defendant's invasion of plaintiff's rights;
> (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit;
> (3) lack of knowledge by the defendant that plaintiff would assert his rights; and
> (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Sherman Storage, LLC v. Glob. Signal Acquisitions II, LLC, 159 Idaho 331, 337, 360 P.3d 340, 346 (2015) (citing *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002)). Further, "[b]ecause the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to all surrounding circumstances and acts of the parties."

All the elements of laches are present. The Hearing Officer has concluded that but for Whittaker's unauthorized diversion of water and stream channel alterations, the confluence of Stroud Creek with the Right Fork of Lee Creek would be above the Upper Diversion which has deprived McConnell of water. Until initiation of this proceeding, McConnell has delayed asserting their both administration of their water rights they now week through 84441 or that the current Stroud Creek confluence is not at its historical location since 1993 when the property was purchased by McConnell. McConnell was aware of his water rights and their distribution, as based on testimony at the hearing, he has been an active participant in Water District 74Z meetings, which has few water users. This delay of almost 30 years since McConnell purchased the property is well beyond all of Idaho's statute of limitations.

Further, McConnell had the opportunity to understand and question water distribution relative to this water rights, particularly use of the Kauer Ditch, which was used up to 2014. Given the holding of *Whittaker v. Kauer*, Whittaker lacked knowledge that McConnell would ever assert his rights against Whittaker's 74-157. And even if Whittaker's use was not legal, as the Hearing Officer goes to great lengths to assert, the use by Whittaker was actually accomplished, and consistent with the holding of *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 412, 66 P.2d 115, 118 (1937), "the change of point of diversion and use, whether regular and legal or not, was actually accomplished and thereafter used and enjoyed adversely."

Finally, as explained above, Whittaker's 74-157 is junior to McConnell's rights he seeks to amend under 84441. Adding a point of diversion below the confluence of a tributary stream which gives McConnell administrative access to water from that tributary stream is clearly an injury to Whittaker's water rights unless this action is barred or mitigated with a subordination provision.

Accordingly, and in addition to and/or in the alternative to the arguments raised herein, the Hearing Officer should apply the equitable doctrine of laches.

D. In the alternative to the foregoing, the Hearing Officer should rely upon on-the-ground features and testimony rather than maps, the preparation of which necessarily includes a measure of subjectivity.

The Hearing Officer should revise the *Preliminary Order* based on the foregoing authority. In the event the Hearing Officer does not, in the alternative, the Hearing Officer should reconsider his heavy reliance upon maps (the USGS map and the 1954 map) relative to finding that the historic confluence of Stroud Creek and the Right Fork of Lee Creek was in Section 30. Google Earth was used to aid testimony at the hearing, and James Whittaker testified that he placed culverts at the Right Fork of Lee Creek and Stroud Creek locations. These features memorialize the location of the features. Conversely, both the USGS map and the 1954 map were based on subjective interpretation of aerial photos. As testified at the hearing, there is a rise between the Right Fork of Lee Creek and Stroud Creek where they parallel one another. Given the riparian vegetation present at this location, it is certainly possible to conclude that the streams combine in Section 30. Accordingly, upon reconsideration, the Hearing Officer should accord more weight to these on-the-ground features rather than the maps.

II. CONCLUSION.

For the reasons set forth above, the Hearing Officer should reconsider the *Preliminary Order*, and approve the transfer with a subordination provision in McConnell's water rights to Whittaker's 74-157 just like the Hearing Officer included for Steven Johnson's 74-1831.

Submitted this 1st day of June, 2021.

Robert L. Harris

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

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2021, 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(s) indicated.

DOCUMENT SERVED: WHITTAKER'S PETITION FOR RECONSIDERATION

HAND DELIVERY AND EMAIL TO: **James Cefalo**
Hearing Officer, Idaho Department of Water Resources
900 North Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Chris M. Bromley MCHUGH BROMLEY PLLC 380 S. 4th St., Ste. 103 Boise, ID 83702 cbromley@mchughbromley.com	☒ Mail ☐ Hand Delivery ☐ Facsimile ☒ Email
Rosalie Ericssson 3738 E. 38 N. Rigby, ID 83442-5621 bericsson@depatco.com	☒ Mail ☐ Hand Delivery ☐ Facsimile ☒ Email
Steven L. Johnson 1019 Lee Creek Rd Leadore, ID 83464-5011 Stevenjohnson01056@gmail.com	☒ Mail ☐ Hand Delivery ☐ Facsimile ☒ Email
SMITH 2P RANCH c/o Shanna Foster 213 Grady Rd. Leadore, ID 83464 shanudy@yahoo.com	☒ Mail ☐ Hand Delivery ☐ Facsimile ☒ Email
Kipp Manwaring Manwaring Law Office, P.A 2677 East 17th St., Suite 600 Idaho Falls, ID 83406 kipp@manwaringlaw.com	☒ Mail ☐ Hand Delivery ☐ Facsimile ☒ Email

James A. Whittaker
P O Box 240
Leadore, ID 83464
fjwhitt@yahoo.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Email

WHITTAKER TWO DOT RANCH LLC
P O Box 177
Leadore, ID 83464-0240
twodotirrigation@gmail.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Email

Robert L. Harris

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

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