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	**EXCEPTIONS TO PRELIMINARY ORDER APPROVING TRANSFER, ORDER DENYING PETITION TO RE-OPEN HEARING, AND PETITION FOR SITE VISIT**

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., hereby submits these *Exceptions to Preliminary Order Approving Transfer, Order Denying Petition to Re-open Hearing, and Petition for Site Visit.* This petition is in response to both the original *Preliminary Order Approving Transfer* issued on May 18, 2021 (the "*Preliminary Order*"), as well as the *Order Denying Petitions for Reconsideration* ("*Reconsideration Order*") and *Order Denying Petition to Re-open Hearing and Petition for Site Visit* (the "*Hearing Order*") both of which were issued on June 21, 2021.

The *Preliminary Order*, *Reconsideration Order*, and *Hearing Order* were 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 was the designated hearing officer (the "Hearing Officer").

I. STANDARD OF REVIEW

This petition is submitted pursuant to the *Explanatory Information to Accompany an Order Denying Petition for Reconsideration*, the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), [1] I.R.C.P 59(a)(3), and I.R.C.P. 43(f)(2).

The *Preliminary Order* is a preliminary order as defined in Rule 730.01 because it was "issued by a person other than agency head . . . ," which will become a final order of the agency "unless reviewed by the agency head (or the agency's head's designee) pursuant to Section 67-5245, Idaho Code." The Hearing Officer is a person other than the agency head, and therefore, because it is a preliminary order, it is subject to an appeal within the agency to the agency head. Whittaker elected to file a petition for reconsideration with the Hearing Officer, which is permitted pursuant to Rule 730.02.a. The exceptions petition must be filed with the Department within fourteen days (14) after the service date of a denial of a petition for reconsideration (Idaho Code § 67-5245(3) and IDAPA 37.01.01.730.), which, in this case, is no later than 5:00 p.m. on July 5, 2021. However, because July 5, 2021 falls on the date of a legal holiday (the observed date of the Fourth of July holiday), filing must occur "on the first day following that is not Saturday, Sunday

[1] Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

or a legal holiday[,], which is no later than 5:00 p.m. on July 6, 2021. IDAPA 37.01.01.056; *see also* I.R.C.P. 2.2 and Idaho Code § 73-109.[2]

Idaho Code § 67-5245(7) provides that the Director is not bound by the fact-finding and analysis of the Hearing Officer in the *Preliminary Order*. The Director "shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing." In other words, the Director's review is akin to a *de novo* review in a court setting. "The term 'de novo' generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction." *Knight v. Department of Ins., State of Idaho*, 119 Idaho 591, 593, 808 P.2d 1336,1338 (Idaho App. 1991) (quoting *Beker Industries, Inc. v. Georgetown Irrigation District*, 101 Idaho 187, 190, 610 P.2d 546, 549 (1980)). According, with the filing of exceptions, the Hearing Officer's *Preliminary Order* and *Hearing Order* are not reviewed under an abuse of discretion standard.

In reviewing the evidence presented at the hearing in this matter, "[t]he agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Idaho Code § 67-5251; Rule 600. The Director may therefore step into the shoes of the Hearing Officer and make factual findings and legal conclusions as though he was the hearing officer in the first place. The Director may further "schedule oral argument in the matter before issuing a final order[,]" and may also "remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order." Rule 730.01.d.

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[2] On July 1, 2021, counsel for Whittaker confirmed with Garrick Baxter, Deputy Attorney General for the Department, that IDWR was scheduled to be closed on July 5, 2021, to observe the Fourth of July, and consequently the deadline for Whittaker's exceptions would be July 6, 2021.

Opposing parties "shall have fourteen (14) days to respond to any party's appeal within the agency." *Id.*

In addition, "[t]he agency head (or designee) may review the preliminary order on its own motion." IDAPA 37.01.01.730.01.c. As of the date of submission of these exceptions, the Director has not provided notice of a motion to review the *Preliminary Order*, *Reconsideration Order*, or *Hearing Order* on his own.

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 Director 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)).
>
> 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. [3] There are both factual and legal errors contained in the *Preliminary Order* which are addressed below that the Director should not adopt upon review. The Director should either approve 84441 with a subordination condition for Whittaker's WR 74-157 and other Stroud Creek rights, or remand the matter for further proceedings as set forth herein.

II. 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. Upon review, the Director should not adopt these evaluation standards.

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

This section addresses two significant and interrelated legal errors made by the Hearing Officer that he failed to correct upon reconsideration. Rather than evaluating injury based on the *current* location of both the Stroud Creek channel and the current physical confluence of Stroud Creek with the Right Fork of Lee Creek, the Hearing Officer based his injury evaluation on where certain (and conflicting) evidence of where the stream channel and its confluence is depicted as a "mapped confluence"[4] on a USGS Map and a 1954 engineer's map. 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 mapped 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 physical confluence of Stroud Creek is below McConnell's Upper Diversion. Even the applicant Bruce McConnell testified of this fact. Testimony of Bruce McConnell (Day 1 Recording 1 at 1:19:30-:1:20:10). Prior to the hearing, however, it was unknown whether the location of the current physical 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.

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4 Day 2 Recording 1 at 50:41-50:43 (Question from Chris Bromley).

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.

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. 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. After finding that "[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[,]" *Id.* at 3, and that the "confluence in the SWSENE of Section 30 is not active," *Id.* at 10, the Hearing Officer held "[t]he confluence of Stroud Creek and Right Fork

of Lee creek is located upstream of the Upper Diversion." *Id.* at 11. The Hearing Officer later described his holding as follows:

> The question presented to the hearing officer is whether the confluence continues to exist at the same location today. The hearing officer concluded that the confluence of Stroud Creek and Right Fork of Lee Creek continues to be located upstream of McConnell's Upper Diversion [at the mapped confluence].

Reconsideration Order at 7.

> The *Preliminary Order* does not state that the confluence was changed by Whittaker or any other person. To the contrary, the *Preliminary Order* states that the confluence has not changed and continues to be at the location shown on the 1989 USGS Map and the 1954 Engineer's Map.

Hearing Order at 2.

Stated another way, the Hearing Officer has introduced the concept of an "inactive confluence" of streams at the location of the mapped confluence, and then evaluated injury on that basis. We believe this is legal error.

We have not found any legal or definitional support for the concept of an "inactive confluence" of streams as even the dictionary definition of confluence contemplates a current, not past, situation. Merriam-Webster defines confluence in the context of streams to be:

> **2** **a:** the flowing together of two or more streams
> A complex lacework of waterways formed by the *confluence* of the Sacramento and San Joaquin rivers, the delta is the state's major water source …
> — Robert B. Gunnison
> *Confluences* are a basic building block of river networks on all scales.
> — Chris Paola
> **b:** the place of meeting of two streams… quaint Carbondale is set at the *confluence* of the Crystal and Roaring Fork Rivers.
> — *National Geographic*
> **c:** the stream or body formed by the junction of two or more streams : a combined flood

> … and eventually chose, disastrously, the only place in Assam where it was impossible for tea to thrive, being regularly drowned by the *confluence* of two huge rivers, a more suitable terrain for rice.
> — Christian Lamb

https://www.merriam-webster.com/dictionary/confluence. There is nothing in this definition that defines a confluence as the location of the flowing together of two or more streams *in the past*. A confluence is the *current* location of the flowing together of two or more streams. Stated another way, a mapped location of a confluence, regardless if it existed in the past, is not a confluence.

Idaho's stream channel law is consistent with this definition and the principle that a current physical confluence of two streams is the legal confluence. IDWR's own Stream Channel Alteration Rules include a sentence addressing this very issue in the definition of "stream channel":

> 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)).

Based on this existing Idaho law, evaluation of injury based on the *past* location of the channel introduced an evaluation standard unanticipated by Whittaker because it has no statutory, rule, case law, or contested case basis of which Whittaker or his representatives are aware. To the best of our knowledge, such an analysis based on a mapped confluence as opposed to an actual confluence of streams 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. On reconsideration, the Hearing Officer appears to pull back from his initial position by stating that the *Preliminary Order* does not determine whether Whittaker's historical use was authorized, *Reconsideration Order* at 8, but the Hearing Officer did not amend

the actual language from the *Preliminary Order* and maintains that the "*Preliminary Order* properly characterizes Whittaker's diversion of Stroud Creek at the Wet Springs Ditch as an 'unauthorized' diversion of Stroud Creek water." *Id.* Accordingly, this claim needs to be addressed.

The Hearing Officer's statement 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.
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> . . .
>
> 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 current physical Stroud Creek stream channel confluence from its current location back to the mapped confluence.

Further, the Hearing Officer committed legal error by concluding that the mapped confluence is the legal confluence of Stroud Creek and the Right Fork of Lee Creek for purposes of injury evaluation. See, e.g., *Preliminary Order* at 11. Whittaker's position is that the current physical confluence is the only "confluence" of these streams and that injury must be evaluated based on present-day conditions. The Director should decline to adopt the Hearing Officer's position upon review.

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 reversal 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).

The second significant issue with the *Preliminary Order* concerns 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 will 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 and other beneficial uses. Based on the Hearing Officer's logic, in a transfer proceeding where a proposal is made to change diversion locations on a stream with tributary streams, the burden will be on water users to prove what conditions were like previously rather than on what is simply there now. It also leads to a result where there is a disjointed natural channel, such as here, where the Hearing Officer's analysis results in a situation where there is a stream channel above the Whittaker Diversion, and a natural channel below the Bohannon Ditch, but not in between.

There is a distinction between a ditch that merely carries diverted water away from a natural supply and a ditch that replaces a natural stream channel. 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 Hearing Officer refuses to acknowledge this distinction, and the Director should reverse upon review.

The water course running through the Whittaker Two Dot Ranch property through which undiverted Stroud Creek water flows is now the natural channel of Stroud Creek, even if portions of it were originally artificially created, because it replaced the channel that previously existed and water still flows through this watercourse down to the current physical confluence with the Right Fork of Stroud Creek. The testimony of David Tomchak (who has lived on his property adjacent to Stroud Creek for decades) 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 physical confluence of the creeks. He was able to follow and clearly identify a course for water to proceed 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 1:01:00). For reasons that are not clear, the Hearing Officer does not rely upon or cite from Tomchak's testimony of the current existing state of the pathway for undiverted Stroud Creek water through the Whittaker property and down to the actual physical confluence.

As to the physical conditions that exist, the Stroud Creek natural channel above the Whittaker Diversion (depicted on Exhibit 159) has remained relatively unaltered. But at the location where the Whittaker Diversion diverts water into a short ditch that takes water to a pipeline intake under several of Whittaker's other water rights (74-369, 74-1136, and 74-15788), there can be, and often is, excess water that is not diverted into the Whittaker pipeline intake. A verified pathway exists, today, for this undiverted water to continue flowing downhill through a path that has formed over time to its current physical confluence with the Right Fork of Lee Creek. Based on *Poole*, it does not matter if this pathway, or portions of it, were artificially created. The excess flows that continue past the Whittaker Diversion and continue through a well-defined single channel created through natural processes (water flowing downhill) to where it flows into a treed area. In this area, Mr. Tomachak described that there is a channel through this area even though the area is overgrown and wet. Eventually, the undiverted water flows into a ditch (the Floyd J. Whittaker ditch) for a short distance. Testimony of David Tomchak (Day 2, Recording 2, at 55:22 through 56:44: ". . . they flow together there for one little section but that's the only spot where they flow together, but other than that, its definite that it's a streambed."). This is just upstream from the hilltop split where these excess flows join water from the West Springs Ditch and continue down to the hilltop split where excess water (water that Whittaker is not entitled to direct towards his irrigation system) is directed at the split to continue further down the Stroud Creek drainage to its confluence with the Right Fork of Lee Creek. Below the split, David Tomchak testified: "Q:

Did you see a clearly demarked stream channel? A: It is." *Id.* at 56:40 through 56:53. Bryce Contor also explained what he observed of the path of undiverted water continuing past the hillstop split:

> So what I saw is that going down the hill there is a defined channel that looked like a newer construction that's been riprapped to prevent erosion and then at the bottom of the hill the flow is, looks like sort of a self-eroded channel, and it goes maybe 3, 4, 5 hundred feet mostly north northwest and then it intersects an older historical ditch, and that ditch for a short distance captures the entire flow, but as that flow moves towards the northwest, the ditch isn't large enough, and so the flow spills out of that ditch and it has cut several erosional channels across a meadow and then eventually coalesces into a location that looks like it was probably one of the historical channels or the historical channel of Stroud Creek.

Testimony of Bryce Contor (Day 2 Recording 1 at 22:45-24:00). There was no contrary testimony from the applicant of the physical conditions of Stroud Creek provided by Tomchak and Contor. In our view, the evidence at hearing about the physical conditions existing on the ground was clear and undisputed. It is the legal classifications of portions of the system that are in dispute.

However, based on the Hearing Officer's holding, the water pathway just below the Whittaker Diversion (the diversion that directs water to the pipeline intake) is not a legal stream channel, but Whittaker's private ditch system. Based on this logic, however, and the provisions of Idaho Code § 42-110,[5] all water that enters into this private ditch system would be Whittaker's, even water that exceeds what Whittaker is entitled to under its water rights.

The Hearing Officer's logic is flawed, and yet, there is no explanation or discussion of this important issue of what the legal status is of the excess undiverted water that goes past the

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[5] 42-110. RIGHT TO DIVERT WATER. The proprietors of any ditch, canal or conduit, or other works for the diversion and carriage of water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any valid claim, permit, license or decree of court, shall be entitled to such quantity measured at the point of diversion, subject, however, to all prior rights. Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator.

Whittaker Diversion in the *Preliminary Order* and *Reconsideration Order*. Instead, the Hearing Officer focused on the West Springs Ditch—the berm and ditch that replaced an old flume[6] that conveyed spring water from West Springs across the drainage to Floyd J. Whittaker ditch where this water could be directed at the hilltop split to Whittaker's irrigation system, or spilled back down the Stroud Creek drainage where water continues through a channel to its current confluence with the Right Fork of Lee Creek. Importantly, however, the West Springs berm and ditch does not divert water—it does not direct it anywhere and water does not pond up behind it. The West Springs Ditch is located on top of it as part of the system that developed West Springs and it only collects water from West Springs, not from Stroud Creek. The West Springs water joins the undiverted Stroud Creek water upstream of the hilltop split.

When this error was brought to the Hearing Officer's attention, he simply concluded that the "error, if one exists, is inconsequential. Regardless of whether Stroud Creek water is first captured by the West Springs Ditch or some other man-made channel before intersecting with the West Springs Ditch, Whittaker does not have a right to divert Stroud Creek water downstream of the Whittaker Diversion." *Reconsideration Order* at 8. But this underscores Whittaker's point—the undiverted water below the Whittaker Diversion continues down and is *not* diverted by the West Springs berm and the undiverted Stroud water has a pathway down to the actual physical confluence with the Right Fork of Lee Creek. Both the Whittaker Diversion and the hilltop splitter are capable of being adjusted by the watermaster to allow the undiverted Stroud Creek water to flow down to the actual physical confluence of Stroud Creek and the Right Fork of Lee

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[6] The area crossed by the flume is lower in elevation than where the West Springs water flows into the Floyd J. Whittaker Ditch. Based on this evidence, it appears that the area crossed by the flume (and replaced by the berm) was the original location of the Stroud Creek channel, but because the system has been altered and used as it has for over a century, there is no precise evidence of where the original channel was located before irrigation development occurred.

Creek. That pathway is now the natural stream channel of Stroud Creek—what was once there has now been altered by man, not unlike other water systems in Idaho, but that manipulation did not cause this section of the Stroud Creek stream channel to go away.

Stated another way, the Hearing Officer asserts that Whittaker is illegally diverting water. But if asked to stop the illegal diversion of water, where is the illegal diversion happening, and what could Whittaker do to stop the illegal diversion of water? David Tomchak testified that there is already a clear path for water to naturally flow down the Stroud Creek drainage. This testimony was not disputed by the applicant, and yet, the Hearing Officer held:

> If not for the West Springs Ditch, which cuts across the Stroud Creek channel, and diversion by upstream water rights, the Stroud Creek channel downstream of the West Springs Ditch would have continuously flowing water. In other words, the Stroud Creek channel below the West Springs Ditch is dry as a result of upstream diversions and the diversion of Stroud Creek into the West Springs Ditch.

Reconsideration Order at 4. This conclusion is not supported by the record in this matter. It is contrary to the only evidence presented in this matter, which is the testimony of Tomchak and Jordan Whittaker described herein.

The law in Idaho is 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 does not 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 watercourse, with all the rights Idaho law provides to such a channel.

IDWR's administrative rules on stream channel alterations, which are binding on IDWR, embody this same principle. IDAPA 37.03.07.010.12 ("The channel referred to is that which exists at the present time, regardless of where the channel may have been located in the past.") (emphasis added).

Despite being aware of the *Poole* case, and presumably the IDAPA stream channel alteration rules binding on the Department, the Hearing Officer has 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.

As Contor explained, as to his 2020 reports, "I was asked to describe the condition of various channels as they existed as of last summer and give to give my opinion as to what their capacities were." Testimony of Bryce Contor (Day 2, Recording 2, at 9:52 through 10:05). Those reports are found at Exhibits 152 and 153. 74-157 diverts water from "East Springs" and "West Springs" and understanding flows from those springs and their connection to Stroud Creek was the main point of these reports. But these reports also described the various features that convey water through the Whittaker property, and they were introduced into the hearing for 84441 because of this relevant information. In fact, the applicant moved to have almost the entirety of these reports excluded through a pretrial *motion in limine* because they were not specifically prepared in response to 84441, a motion that was ultimately denied. Contor was not asked to offer an opinion on the legal status of the various channels he observed, but to document what he observed.

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 excess water that is not 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 the established principle that a stream channel does not lose the attributes of a watercourse because a part of its channel may have been artificially created. *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 at the mapped confluence location. The opposite is true, as there was testimony of culverts in place near the mapped confluence location—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 mapped 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 at the mapped confluence location. Any connection at the mapped conveyance location 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 undiverted 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 junior water users 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 diversion 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. See Exhibits 154 and 155.

Second, as described above, the West Springs Ditch is not diverting Stroud Creek water—it is carrying West Springs Water where it can be used by Whittaker or returned to the Stroud Creek drainage at the hilltop split. 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 incorrect 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. Exhibit 158.

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 disagrees the implication that they were somehow receiving more water than they were entitled to simply because they were the last diversion on Stroud 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.

In response to the above legal authority, the Hearing Officer maintains that his legal analysis was correct. The Hearing Officer cites to Idaho Code § 42-3802(d), one of the statutes under Idaho Stream Channel Protection Act (the enabling statute for IDAPA 37.03.07.010.12 which provides that "[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."). This statute, with the Hearing Officer's emphasis, provides:

> (d) "Stream channel" means a natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water. Ditches, canals, laterals and drains that are constructed and used for irrigation or drainage purposes are not stream channels.

Reconsideration Order at 3. Based on his reading of this statute, and his categorization of the channels that convey water through the Stroud Creek drainage below the Whittaker Diversion (which diverts water under WRs 74-369, 74-1136, and 74-15788) as ditches, the Hearing Officer concluded: "Whittaker proposes classifying the West Springs ditch and the Floyd J. Whittaker

Ditch as the current Stroud Creek channel, which is in direct conflict with Idaho Code § 42-3802(d)." *Reconsideration Order* at 4.

The Hearing Officer's interpretation and application of this statute is not correct. The second sentence of Idaho Code § 42-3802(d) is not controlling in this matter because the channelization and alteration of the Stroud Creek channel is not addressed with this statutory language. This language makes express what the law already provided, which is that typical ditches, canals, and laterals that do not replace a stream channel or straighten a stream channel are not "stream channels," but are structures governed by Idaho ditch law. See, e.g., Idaho Code §§ 42-1102, 42-1202 (describing the rights of ditch "owners"). This language does not provide that constructed channels that replace a stream channel or straighten a stream channel do not become the new stream channel.

In a footnote, the Hearing Officer notes that the underlined portion of Idaho Code § 42-3802(d) was not added until 2004, but that the prior statutory definition was the same as that found in Rule 10.12 of the Stream Channel Alteration Rules. *Reconsideration Order* at 3 (fn. 1). Inclusion of this footnote by the Hearing Officer suggests that the Hearing Officer believes the amendment resolved a conflict between the rule and statute—otherwise, there is no need to point out this statutory change in the footnote.

However, this footnote fails to acknowledge that the most critical sentence of the administrative rule that supports Whittaker's position—that "[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"—was not in the statutory definition and was not changed with the 2004 amendment. Accordingly, the footnote's suggestion that is that, as to this second sentence of the rule, the rule

conflicts with the statute. It does not. The first sentence of the administrative rule and the first sentence of pre-2004 statutory definition was the same:

> SECTION 2. That Section 42-3802, Idaho Code, be, and the same is hereby amended to read as follows:
>
> 42-3802. DEFINITIONS. Whenever used in this act, the term:
> (a) "Person" means any individual, partnership, company, corporation, municipality, county, state or federal agency, or other entity proposing to alter a stream channel.
> (b) "Alter" means to obstruct, diminish, destroy, alter, modify, relocate, or change the natural existing shape or direction of water flow of any stream channel within or below the mean high watermark thereof.
> (c) "Board" means the Idaho water resource board.
> (d) "Stream channel" means a natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water. Ditches, canals, laterals and drains that are constructed and used for irrigation or drainage purposes are not stream channels.

2004 Idaho Session Laws, Chapter 191, at 601, available at https://legislature.idaho.gov/wp-content/uploads/sessionlaws/sessionlaws_vol1_2004.pdf. There is nothing in the Session Laws that suggests that the Legislature abrogated the second sentence of IDAPA 37.03.07.10.12, or *Poole*, or the principles espoused by these authorities. Any suggestion that the 2004 amendment to Idaho Code § 42-3802(d) did this is not supported by the Session Laws.

The Hearing Officer's suggestion also implicates administrative rule interpretation, which under Idaho law, is engaged in the same way as statutory interpretation. "Administrative rules are interpreted the same way as statutes." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 160 Idaho 251, 256, 371 P.3d 305, 310 (2016) (quoting *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011). Accordingly:

when considering an administrative rule,

> "[I]nterpretation begins with the literal language of the [rule]. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The [rule] should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the [rule] so that none will be void,

> superfluous, or redundant. When the [rule's] language is unambiguous ... the Court need not consider rules of statutory construction.
>
> *Estate of Stahl v. Idaho State Tax Comm'n*, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017) (quoting State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011)). Further, "[t]he determination of the meaning of [an administrative rule] and its application is a matter of law over which this [C]ourt exercises free review." *Woodburn v. Manco Prods., Inc.*, 137 Idaho 502, 504, 50 P.3d 997, 999 (2002).

Idaho Power Co. v. Tidwell, 164 Idaho 571, 574, 434 P.3d 175, 178 (2018), reh'g denied (Feb. 22, 2019) (brackets in original, footnote omitted).

In describing the interpretation of IDAPA Rules, the Idaho Supreme Court has explained that such interpretation is patterned after statutory construction and provided this guidance:

> IDAPA rules and regulations are traditionally afforded the same effect of law as statutes. *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County,* 136 Idaho 809, 813, 41 P.3d 237, 241 (2001). The legal weight attributed to Board of Education policies has never been fully articulated. Statutory language is to be given its plain, obvious and rational meaning. *Grand Canyon Dories v. Idaho State Tax Comm'n,* 124 Idaho 1, 3, 855 P.2d 462, 463 (1993). **Where two statutes apply to the same subject matter they are to be construed consistent with one another where possible, otherwise the more specific statute will govern**. *Id.* at 3, 855 P.2d at 463; *State v. Barnes,* 133 Idaho 378, 382, 987 P.2d 290, 292 (1999).
>
> It is appropriate to use rules of statutory construction in interpreting the Board policy. Statutory language is to be interpreted based on its plain meaning. *Grand Canyon Dories,* 124 Idaho at 3, 855 P.2d at 463. Where statutory language is clear and unambiguous, statutory construction is unnecessary and the court need only apply the statute. *Kootenai Elec. Coop., Inc. v. Washington Water Power Co.,* 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995). Ambiguity is not established based solely upon differing interpretations. *Rim View Trout Co. v. Higginson,* 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

Huyett v. Idaho State Univ., 140 Idaho 904, 908-9, 104 P.3d 946, 950-11 (2004) (emphasis added); see also *Eller v. Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 168 (2019) ("A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general." Thus, "where two statutes appear to apply to the same case

or subject matter, the specific statute will control over the more general statute.") (internal citations omitted).

The rule and statute can be read consistent with one another, as described above, and the more specific language from Rule 10.12 controls. The language from Idaho Code § 42-3802(d) emphasized by the Hearing Officer is not controlling in this matter because the channelization and alteration of the Stroud Creek channel is not addressed with the above-emphasized language from statute. Typical ditches, canals, and laterals that do not replace a stream channel or straighten a stream channel are clearly not "stream channels." Constructed channels that replace a stream channel or straighten a stream channel become the new stream channel under Idaho law. "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 statutory amendment to Idaho Code § 42-3802(d) did not overrule *Poole* either explicitly or implicitly.

Furthermore, Whittkaer has never asserted that the West Springs Ditch is the current Stroud Creek stream channel. *Reconsideration Order* at 4 ("In contrast, Whittaker proposes classifying the West Springs Ditch and the Floyd J. Whittaker Ditch as the current Stroud Creek stream channel, . . ."). As explained herein, water from West Springs is in its own ditch that transports water to a location just above the hilltop split where it joins undiverted Stroud Creek water in what is now the stream channel of Stroud Creek.

Despite all the foregoing, and in response to Whittaker's arguments from *Poole*, the Hearing Officer held that the facts of *Poole* are distinguishable from the facts present here, *Reconsideration Order* at 6, but whether or not a stream channel is altered to convey irrigation water or wastewater is a distinction without a difference. The key point is what the nature of the

artificial watercourse is when it replaces a stream channel. The Director should not adopt the Hearing Officer's decision on this issue, and should adhere to the holding of *Poole*, which is that "[a] stream does not lose the attributes of a water course merely because a part of its channel may have been artificially created" and that "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." *Poole v. Olaveson*, 82 Idaho 496, 503, 356 P.2d 61, 65 (1960) (citing to 1 KINNEY ON IRRIGATION AND WATER RIGHTS, p. 489).

In further support of his position, the Hearing Officer offers a definition of "watercourse" from a 1909 case that is virtually identical to the definition provided from the 1990 *Burgess* case quoted *supra* and suggests that "[t]he definition of 'stream channel' set forth in Idaho Code § 42-3802(d), however, may be limited to the application and enforcement of Chapter 38, Title 42, Idaho Code. *Preliminary Order* at 6-7. The Hearing Officer asserts that this definition "is broad enough to include water flowing through ditches," and that "Whittaker seeks to blur the line between ditches and natural channels, arguing that ditch may be converted into a natural channel over time if a diversion is constructed in a way that captures the entire flow of the creek." *Id.* at 7. However, none of these authorities address replacement or alteration of an original stream channel, nor do they overrule, abrogate, or even discuss *Poole*. Further, the Stream Channel Alteration Rules are administered by IDWR, the same administrative agency that processes transfer applications, and as a result, IDWR is bound by this rule and the principles it espouses.

Third, by rule, the "continuous flow" requirement posited by the Hearing Officer does not apply to streams that are dry "as a result of upstream diversion or storage of water." IDAPA 37.03.07.010.04. As explained herein, the pre-2014 water administration regime did not require

water to go past the hilltop split because the Kauer Ditch was in use. But this diversion of water did not change the legal status of the stream channel below the hilltop split. It is also worth noting that this very rule is cited by the Hearing Officer to bolster the incorrect conclusion that the West Springs Ditch is a major reason why the Stroud Creek channel is dry, why the mapped confluence is no longer the actual physical confluence, and why he can use the mapped confluence for purposes of his injury analysis. *Reconsideration Order* at 4; *Preliminary Order* at 11-12. Even if the historic administration of water in Stroud Creek described in the *Whittaker v. Kauer* case left the lower part of the Stroud Creek channel dry, that did not eliminate the stream channel by rule. And finally, on this point, at a minimum, Rule 10.12 of these rules is certainly persuasive authority on the question of the current location of a stream channel (and not the former location) that should be adopted by the Director.

For the reasons set forth herein, the Director should reverse the Hearing Officer and issue an order consistent with the correct evaluation of injury standard (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, make the issue of the past location of stream channels a relevant consideration in transfer proceedings. Ultimately, this should lead to a revised 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 maintains that Whittaker has engaged in the "unauthorized diversion and channel alterations occurring on the Whittaker Two Dot Ranch property." *Id.* at 10-11. On

reconsideration, the Hearing Officer appears to pull back from this initial position by stating that the *Preliminary Order* does not determine whether Whittaker's historical use was authorized, *Reconsideration Order* at 8, but he did not amend the actual language from the *Preliminary Order* and maintains that the "*Preliminary Order* properly characterizes Whittaker's diversion of Stroud Creek at the Wet Springs Ditch as an 'unauthorized' diversion of Stroud Creek water." *Id.* Accordingly, this claim still needs to be addressed before the Director.

Because 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, the Hearing Officer's language must be a reference to past diversion of water and channel alterations.

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 spring collection ditch—was dug on Whittaker's private property to more efficiently collect and channel the West Springs water to the Floyd J. Whittaker to Whittaker's place of use under 74-157. 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 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 acknowledged 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.[7]

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

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[7] 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.

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.

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*, 157 Idaho 385 (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. And to continue to assert that the West Springs Ditch and berm are "unauthorized", *Reconsideration Order* at 8, continues to contrary to the record as the berm does not divert undiverted Stroud Creek water as described herein. 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 review, the Director should issue an order that is 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 Director 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 Director 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 physical Stroud Creek confluence is not at its mapped 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 when he bought his property in 1993 up until 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 believes, 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.

Despite the foregoing, the Hearing Officer declined to apply the doctrine of laches. *Reconsideration Order* at 9. The Hearing Officer elected to consider 2014 as the starting point for the possible application of this doctrine, but even with this timeframe, the time period is longer than Idaho's current longest statute of limitation for judgments (6 years). Idaho Code § 5-215(1). McConnell's water rights decreed in the SRBA are virtually the same as their rights decreed in the Lemhi Adjudication, and when he purchased the property in 1993, he certainly knew he had water rights and could have investigated what elements they contained and how water was delivered to

his property. The Director should consider the laches time period to begin in 1993, which clearly meets the "long and continuous knowing acquiescence" requirement of laches.

Additionally, the Hearing Officer incorrectly explains that the application of laches would require McConnell to divert their water at the Kauer Ditch. *Id.* That is simply not the case—laches is not a doctrine that forces another to affirmatively take action (such as using the Kauer Ditch), rather, it is a doctrine that prevents a party from asserting action (such as preventing McConnnell from asserting their water rights against 74-157, which is what Whittaker is requesting). "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." *Sears v. Berryman*, 101 Idaho 843, 848, 623 P.2d 455, 460 (1981) (emphasis added). The Director should hold that McConnell must be prevented by laches from asserting his right against 74-157 and others who divert water from Stroud Creek.

D. In the alternative to the above, the Director should grant Whittaker's Petition to Re-open Hearing and Petition for Site Visit.

If the Director elects to adopt the Hearing Officer's legal conclusions, then the Director should re-open the hearing Whittaker requested to re-open the hearing for the limited purpose of taking additional evidence relating to the confluence of Stroud Creek and Lee Creek that formed the major basis for the Hearing Officer's decision in the *Preliminary Order*. The Hearing Officer denied the motion and characterized the motion as one where Whittaker's motivation was to fine-tune testimony or make an additional point. *Hearing Order* at 3. This is not accurate. The basis for the motion was to provide evidence is response to the adoption of a new injury evaluation standard. The Hearing Officer's injury analysis focused on where the confluence of Lee Creek

"was once located." *Preliminary Order* at 8. The *Preliminary Order* also provides that it was Whittaker's actions that have changed the confluence from its current location below McConnell's Upper Diversion. *Preliminary Order* at 10-11. The Hearing Officer went so far as to hold 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.
>
> . . .
>
> The confluence of Stroud Creek and Right Fork of Lee Creek is located **upstream** of the Upper Diversion.

Preliminary Order at 10-11 (emphasis added).

As explained above, based on this existing Idaho law, evaluation of injury based on the *past* location of the channel introduced an evaluation standard unanticipated by Whittaker because it has no statutory, rule, case law, or contested case basis of which Whittaker or his representatives are aware. To the best of our knowledge, such an analysis based on a mapped confluence as opposed to an actual confluence of streams is unprecedented within the Department or any reported case law. That is why the issue was not raised in any of the prehearing conferences or at the end of the hearing—Whittaker believed that the Hearing Officer would apply an evidentiary standard consistent with Idaho stream channel law and IDWR administrative rules. The Hearing Officer instead concluded as he did above and based his injury evaluation on the mapped confluence rather than the actual physical confluence.

If this new standard is going to be adopted, it is important that all the facts are considered. Whittaker should be able to present evidence concerning that issue, and specifically, whether the change in confluence was caused by the actions of others as the Hearing Officer claims Whittaker caused the change in confluence of the streams. As described below, there is compelling evidence that the stream channel was shifted in order to stay further west in association with construction and use of a certain historic ditch located upstream of the Upper Diversion, a ditch that is depicted on a 1970 Lemhi Adjudication Map in Scott King's report at Figure 12. Exhibit 1 at 17.

Based on Jordan Whittaker's observations, he asked Bryce Contor to visit the property. Mr. Contor visited this area in the morning of June 1, 2021, where he took photographs and documented the features associated with this historic ditch and the Right Fork of Lee Creek as depicted and described on *Declaration of Bryce Contor*. Based upon his observations, it appears that a berm was placed in the stream channel that shifted it to the west which would have moved the channel away from the location where Stroud Creek turns and parallels the Right Fork of Lee Creek. This was apparently done in conjunction with construction of the historic ditch. Based on Mr. Contor's view of the topography of the area, it appears that more investigation is warranted.

The hearing was held in mid-April with expert report disclosure deadlines prior to that time when snow was still on the ground. With the snow now gone, the hearing should be re-opened to allow for introduction of evidence on the narrow issue of whether other work caused changes in the Right Fork of Lee Creek. This will allow the parties and their experts to view these features, prepare reports as may be necessary, and with the hearing reconvened, cross-examine such witnesses. It is not anticipated that the reconvened hearing will take more than a day.

For all the above reasons, the Director should grant Whittaker's request for an additional hearing date pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. This rule provides the following:

> (3) Further Action After a Non-Jury Trial. On a motion for new trial in an action tried without a jury, the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Idaho Rule of Civil Procedure 59(a)(3). Where the hearing in this matter was tried without a jury, this rule allows the Hearing Officer to "open the judgment ... [and] take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." *Id.* The Idaho Court of Appeals has concluded "that when a judge is sitting without a jury, he or she may reopen a case to hear additional evidence, prior to final judgment, regardless of the enumerated restrictions in I.R.C.P. 59(a)." *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 991, 993, 812 P.2d 298, 300 (Ct. App. 1990), *aff'd*, 119 Idaho 967, 812 P.2d 274 (1991). This leaves the matter of re-opening the hearing for the limited purpose requested herein to the Director's discretion. *Id.*

Finally, and in addition to the petition to re-open the hearing, the Director or Hearing Officer should visit the mapped confluence area pursuant to Rule 43(f)(2) of the Idaho Rules of Civil Procedure. Actual view of the mapped confluence area and any other features testified to will aid the Director, or Hearing Officer on remand, with the evaluation of evidence in this matter.

III. CONCLUSION.

For the reasons set forth above, the Director should decline to adopt the findings and conclusions contained in the *Preliminary Order*. There are both factual and legal errors contained in the *Preliminary Order* which are addressed below that the Director should not adopt upon

review. The Director should either approve 84441 with a subordination condition for Whittaker's WR 74-157 and other Stroud Creek rights or remand the matter for further proceedings as set forth herein.

Submitted this 6th day of July, 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 6th day of July, 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: **EXCEPTIONS TO PRELIMINARY ORDER APPROVING TRANSFER, ORDER DENYING PETITION TO RE-OPEN HEARING, AND PETITION FOR SITE VISIT**

ORIGINAL VIA FIRST-CLASS MAIL AND EMAIL TO:

Gary Spackman
Megan Jenkins, Administrative Assistant
Idaho Department of Water Resources
P O Box 83720
Boise, ID 83720-0098
Gary.Spackman@idwr.idaho.gov
Megan.Jenkins@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 Ericsson 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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