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Attorneys for Bruce and Glenda McConnell

**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

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

COMES NOW Bruce and Glenda McConnell (“McConnell”), by and through their attorney of record, Chris M. Bromley of the firm McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.730.02.c files this *Response to Whittaker Exceptions to Preliminary Order Approving Transfer, Order Denying Petition to Re-Open Hearing, and Petition for Site Visit* (“Response”) with the Director of the Idaho Department of Water Resources (“IDWR,” “Department,” or “Director”).

I. INTRODUCTION

Through exceptions, James Whittaker and Whittaker Two Dot Ranch, LLC (collectively referred to hereafter as “Whittaker”) asks the Director to overturn the sound reasoning of the

Hearing Officer that approval of the McConnell transfer, which seeks to add a second point of diversion that has been present since at least 1986, will not cause injury to existing water rights in the Lee Creek drainage. The reasoning of the Hearing Officer is based on findings of fact that are supported by the record and application of law to those facts. The arguments presented by Whittaker to the Hearing Officer were well understood through the hearing process, on reconsideration, and through Whittaker's request to re-open the hearing. Whittaker presents nothing that has not already been thoroughly reviewed by the Hearing Officer. Based on the record, the Hearing Officer correctly determined approval of the McConnell transfer will not injure existing water rights. The Director should do the same.

II. FACTUAL AND PROCEDURAL BACKGROUND

Prior to discussion of the transfer, it is important to remember how this proceeding started.

A. This Matter Was Commenced By An IDWR Enforcement Action Against Whittaker Then McConnell

On August 6, 2020, Bruce and Glenda McConnell received a letter ("August 6 Letter") from Cindy Yenter, Watermaster for Water District No. 170, informing them:

[A]n unauthorized diversion on Lee Creek is being used to make diversions under all or part of water rights 74-361, 74-362, 74-363, 74-364, 74-365, 74-367 and 74-368. These rights authorize a single point of diversion. An investigation by the watermasters of WD74Z and WD170 found two diversions along Lee Creek serving your property. Only the upper diversion is associated with the above water rights. The lower diversion, found within SWSW Section 20, 16N 25E, must be closed immediately.

In accordance with our phone call this morning, you have agreed to close the lower diversion and direct available flow to the upper ditch only.

Ex. 4.

In a separate letter from Watermaster Yenter to Merritt Udy, Watermaster for Water District No. 74Z, he was told: “Mr. McConnell has agreed to verbally close the diversion, and has been instructed in writing to complete closure no later than Friday, August 7, 2020.” Ex. 5.

A reason for the action against McConnell was due to a separate enforcement proceeding IDWR was taking against Whittaker for failure to install measuring devices and control works on the spring that supplies water right no. 74-157. Ex. 20. Water right no. 74-157, which is tributary to Lee Creek, Ex. 14, is upstream and junior to all of the McConnell water rights, Ex. 1, Fig. 10 (map showing diversions within the Lee Creek basin); Ex. 1, Apdx. A (summary of water rights within the Lee Creek basin).

In a June 23, 2020 letter (“June 23 Letter”), Watermaster Yenter informed Whittaker of IDWR’s “*Final Order in the Matter of Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversions* (Measurement Order) for the entire Lemhi River Basin, including tributary streams. The deadline for compliance with the Measurement Order was prior to the 2019 irrigation season for all irrigation diversions.” *Id.*

Shortly after receipt, Whittaker argued against the June 23 Letter’s contents in correspondence with IDWR:

[I]t fails to recognize the Idaho Supreme Court’s decision upholding the district court’s decision that, as to West Springs, it is *res judicata* [pursuant to the *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956)] that Bruce and Glenda McConnell (the successors-in-interest to the Kauer Ranch), the senior right holders on Lee Creek, by agreement allow Whittaker to capture and use the water that McConnell would otherwise be entitled to (by virtue of their senior priority dates) from West Springs. This is because McConnell have abandoned any right to such West Springs water, irrespective of whether the waters from the West Springs are public or private. Additionally, the letter’s conclusion necessarily implicates easement law, as the water from West Springs flows into Whittaker’s private ditch and McConnell has no right to use this particular ditch or other Whittaker ditches.

Ex. 3 at 3 (email from R. Harris to G. Baxter dated 7/16/2020) (emphasis in original).

IDWR disagreed with the conclusion reached by Whittaker “that water right 74-157 should be administered separately.” *Id.* at 1 (email from G. Baxter to R. Harris dated 7/28/2020).

IDWR went on to say:

In your email, you discuss what the *Whittaker v. Kauer* court described as an oral contract between Whittaker and Kauer on how the water would be delivered. The problem is that any such agreement is not reflected in the current water right decrees. The SRBA partial decrees for the McConnell water rights list their point of diversion as being downstream from the Whittaker water rights, not upstream as you suggest they should be. . . . The SRBA Final Unified Decree superseded all prior water rights decrees within the Snake River Basin water system. Whittaker’s suggestion that the Department must administer the rights inconsistent with the decrees represents an impermissible collateral attack on the partial decrees.

In your email, you also allege that McConnell is using the Whittaker’s ditches to receive his water. It is the Department’s understanding that that (sic) McConnell is diverting his water from Lee Creek, not the Floyd J. Whittaker ditch.

Id. at 2 (internal citations omitted) (emphasis added).

Thus, it was after this back and forth between IDWR and Whittaker that Watermaster Yenter sent her August 6 Letter to McConnell, informing them of the illegal use of the Lower Diversion and need to curtail. As testified to at the hearing by Mr. McConnell, he timely complied with Watermaster Yenter’s request. Test. of B. McConnell.

Also as testified to at the hearing by Mr. McConnell, he began to take the necessary steps to bring the Lower Ditch into compliance by filing a transfer with IDWR. Test. of B. McConnell. On September 9, 2020, prior to filing the transfer to add the Lower Diversion as an authorized point of diversion, McConnell first filed a transfer, numbered 84367, to correct a legal description error as to the Upper Diversion. *Preliminary Order* at 2, ¶¶ 2-4. The Upper Diversion transfer was approved by IDWR on October 8, 2020, with the diversion now correctly described as T16N, R25E, Section 30, NENE. *Id.* at 2, ¶ 3-4. In IDWR’s evaluation of this

transfer, it was found the McConnell water rights were valid, with full irrigation of the place of use. Ex. 7.

Next, on October 5, 2020, McConnell filed a transfer with IDWR to add the Lower Diversion in T16N, R25E, Section 20, SWSW. Ex. 8. It was this transfer, numbered 84441, that was protested by Whittaker and other parties that went to hearing on April 21-22, 2021.

Preliminary Order at 1.

B. McConnell Must Use Both The Upper Diversion And Lower Diversion To Irrigate All Acres Within The Ranch

McConnell diverts water from Lee Creek under a suite of water rights that were partially decreed by the SRBA in 2014 for irrigation of 547.4 acres with 15.2 cfs. *Preliminary Order* at 1, ¶ 1; Ex. 9 (compilation of the McConnell SRBA partial decrees). McConnell purchased the ranch in 1993. Ex. 22. As testified to at the hearing by Mr. McConnell, it was not until the 2020 enforcement action that he was made aware of *Whittaker v. Kauer* or the purported “agreement” described by counsel for Whittaker in his email to IDWR. Test. B. McConnell. Furthermore, as testified to at the hearing by Mr. McConnell, there is no mention of any “agreement” in the *Policy of Title Insurance* associated with McConnell’s purchase of the property. Ex. 23; Test. B. McConnell.

When McConnell bought the property in 1993, the delivery system was shown to them by Darrell Nef, which included both the Upper Diversion and Lower Diversion. Test. B. McConnell; *Preliminary Order* at 2, ¶ 5. The carrying capacity of the Upper Diversion is approximately 2.5 – 4.0 cfs, while the carrying capacity of the Lower Diversion is approximately 12 cfs. *Preliminary Order* at 3, ¶ 7. The Lower Diversion is “approximately 1,600 feet downstream of the Upper Diversion” and “has been in place and used since at least 1986.” *Id.* at

2, ¶ 4-5. As testified to at the hearing by Mr. McConnell, both diversions are required to irrigate all acres within the property. Test. B. McConnell.

C. The Lower Diversion Transfer Was Required To Authorize The Historic Diversion Of Water And Was Deemed Approvable By Watermaster Yenter

As established by the Hearing Officer, the “Lower Diversion has been in place since at least 1986.” *Preliminary Order* at 2, ¶ 5. Thus, because the Lower Diversion predated commencement of the SRBA, it could have been claimed in the adjudication as an accomplished transfer, I.C. § 42-1425, yet it was not. Consequently, due to completion of the SRBA, McConnell was required to file a transfer with IDWR to add the historic Lower Diversion.

On November 24, 2020, Watermaster Yenter submitted her comments as to the Lower Diversion transfer, agreeing it was approvable: “The second diversion proposed by applicant has been in use for at least several decades, as evidenced by aerial images and even the USGS topo map. . . . WD170 does not object to the approval of this transfer adding a point of diversion. Both the existing and new POD are required to be controlled and measured pursuant to the Basin 74 measurement order.” Ex. 10.

D. While The McConnell Lower Diversion Transfer Was Being Considered By IDWR, Whittaker Filed A Transfer To Remove Lee Creek As Tributary To Water Right No. 74-157, Which Was Protested By McConnell, And Objected To By Watermaster Yenter

On November 6, 2020, Whittaker filed Transfer No. 84508 with IDWR to remove Lee Creek as tributary to water right no. 74-157. Ex. 15. “This transfer proposes to update the identified tributary. This water right utilizes water from the identified source of Springs to extinction. The source, Springs does not naturally flow into a tributary water stream.” *Id.* at 2, Part 1A, ln. 3. The transfer was protested by McConnell. Ex. 16.

On November 24, 2020, Watermaster Yenter provided her comments, objecting to the transfer: “WD170 objects to the removal of the tributary designation entirely. Correct tributary designations are essential in proper administration of water rights from common or hydraulically connected sources. 74-157 was decreed in both the Lemhi Adjudication and the SRBA as tributary to Lee Creek, and was not decreed as a separately administered right. Right holder cannot now claim exclusive use of the spring waters or leverage administration of the right simply by changing the tributary designation.” Ex. 17 (emphasis added).¹

On February 8, 2021, the transfer was withdrawn by Whittaker. Exs. 18, 19. The next day, February 9, 2021, the prehearing conference took place in the contested matter that is at issue in this proceeding.

III. RESPONSES TO WHITTAKER’S ARGUMENTS

A. The Hearing Officer Correctly Found As A Matter Of Fact And Law That Approval Of The McConnell Transfer Will Not Injure Upstream Water Rights

Whittaker’s main exception with approval of the McConnell transfer is the Hearing Officer’s assessment that the confluence of Stroud Creek/Left Fork of Lee Creek with the Right Fork of Lee Creek is located where it is mapped: “Rather than evaluating injury based on the *current* location of both the Stroud Creek channel and the current physical confluence of Stroud Creek with 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’ on a USGS Map and a 1954 engineer’s map.” *Whittaker Exceptions Brief*

¹ The Lemhi Adjudication identified water right no. 74-157 as tributary to Lee Creek. Ex. 11. Water right no. 74-157 was claimed in the SRBA as tributary to Lee Creek, Ex. 12, with no disagreement by Whittaker as to IDWR’s recommendation that the proper tributary designation was Lee Creek, Ex. 13. The SRBA partial decree for water right no. 74-157 lists Lee Creek as the tributary. Ex. 14. As testified to at the hearing by Watermaster Yenter, water right no. 74-157 does not appear in the Basin 74 general provisions as separately administered. Test. C. Yenter. Despite predating both, no reference to *Whittaker v. Kauer* is mentioned in either the Lemhi Adjudication or SRBA documents. See Exs. 11-14.

at 6 (emphasis in original). Whittaker is wrong. Not only did the Hearing Officer correctly find “the confluence was previously located upstream of McConnell’s Upper Diversion . . . [but it] continues to be located upstream of McConnell’s Upper Diversion.” *Order Denying Petitions for Reconsideration* at 7 (emphasis added).

There was significant inquiry into the location of the confluence at the hearing, with the issue well understood by the parties. Through maps and testimony, the Hearing Officer found the confluence is located today at the same place it was located in the past, to wit:

- 1884 Government Land Office Plat Map, Test. S. King, Day 2, end of hearing rebuttal (2:18 – 2:50)
 - Locates the confluence at “the south boundary of the southeast quarter of the northeast quarter of section 30. That’s exactly consistent with what the [1989] USGS quad map here says.”
- 1954 Engineer’s Map, Ex. 1, Fig. 11
 - Locates the confluence well upstream of both McConnell points of diversion
 - The 1954 Engineer’s Map was commissioned by James Whittaker’s father during the dispute with the Kauers, Test. Ja. Whittaker, Day 1, evening
- Engineer’s Certificate Associated with 1954 Engineer’s Map, Ex. 155
 - Affirms map was made by “a survey by [E. Milton Christensen, registered professional engineer] on Oct. 1 and 2, 1954 and from a tracing I made of the Aerial Photograph in the County Assessor’s Office at Salmon, Idaho. The aerial photograph was dated Aug. 1946.” Emphasis added.
- Testimony of James Whittaker
 - Installed culverts near the downstream boundary of his family’s private property in the general vicinity of the confluence in an effort to make the area drier for sheep to cross. Test. Ja. Whittaker, Day 1, evening. *See also Whittaker Exceptions Brief* at 21 (“culverts in place near the mapped confluence location”).
- 1970 Lemhi Adjudication Map, Ex. 1, Fig. 12
 - Locates the confluence well upstream of both McConnell points of diversion
- 1989 USGS Quad Map, Ex. 1, Fig. 10
 - Locates the confluence well upstream of both McConnell points of diversion
 - Test. S. King, Day 2, end of hearing rebuttal regarding survey marker in 1989 USGS Quad Map (3:26 – 4:24):

- “There is an X right there along the roadway. And there’s numbers that say 6531. It’s a survey mark. There were surveyors there and they probably placed a marker. And that marker, that elevation is right next to the confluence. . . . So the surveyors in 1884 placed it there, and that wasn’t from imagery, that was from surveyors out there on the ground. And that’s consistent with that map and some surveyor that placed a mark at that spot.”

As stated by the Hearing Officer: “The best evidence available is the 1954 map prepared by Milton Christensen and the USGS Map. These maps identify the confluence of Stroud Creek and Right Fork of Lee Creek upstream of the Upper Diversion. For purposes of this order, the hearing officer will rely on the confluence shown on the 1954 map and the USGS Map, at a location upstream of the Upper Diversion.” *Preliminary Order* at 10 (emphasis added).

Based on the evidence, the Hearing Officer correctly concluded:

The *Preliminary Order* identifies substantial and compelling evidence that the confluence was previously located upstream of McConnell’s Upper Diversion. 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. The hearing officer reached this conclusion by evaluating current conditions in the Stroud Creek drainage. Currently, Whittaker diverts all of the flow in Stroud Creek at the West Springs Ditch without a water right. Currently, because of Whittaker’s unauthorized diversion, no Stroud Creek water flows past the West Springs Ditch. Currently, Whittaker injects unused Stroud Creek water into the remnants of the Bohan Ditch, an old ditch running to the east of the Stroud Creek channel. The 1989 USGS Map and 1954 Map show the Stroud Creek channel extending from the West Springs Ditch area north to a confluence located upstream of McConnell’s Upper Diversion. It is not speculative or arbitrary to rely on these two historical maps, which both depict the confluence of Stroud Creek and Right Fork of Lee Creek in the southwest corner of the SENE of Section 30, T16N, R25E.

Order Denying Petitions for Reconsideration at 7-8 (emphasis added).

On page 11 of the Exceptions Brief, Whittaker cites *Crockett v. Jones* for the proposition that juniors “have a vested right to 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.” *Whittaker Exceptions Brief* at 11 (citing *Crockett v. Jones*, 47 Idaho 497, 504, 277 P. 550, 552 (1929)) (emphasis in original). However, this rule is only “generally applicable . . . and must be controlled by the facts of each particular case, and no inflexible rule applicable to all situations can be laid down.” *Crockett* at 504, 277 P. at 552 (emphasis added). Indeed, if the rule of law were not flexible, the dissent’s point of view would have prevailed: “Therefore the change in the point of diversion should not be allowed.” *Id.* at 506-07, 277 P. at 552 (J. Givens, J. Lee dissenting) (emphasis added). The majority, however, approved the transfer, allowing the senior to move water five miles upstream, despite changes to Rock Creek that occurred after the junior made his appropriation.

Here, the particular facts and circumstances similarly support the Hearing Officer’s conclusion that no injury will result to junior water rights that are upstream from the confluence. First, as a matter of fact, the confluence was and “continues to be . . . in the southwest corner of the SENE of Section 30, T16N, R25E.” *Order Denying Petitions for Reconsideration* at 7-8. Therefore, the confluence is upstream of the McConnell diversions.

Second, as a matter of law, there have been no changes that would otherwise alter the relationship between McConnell’s downstream senior water rights and upstream junior water rights. Four of the water rights owned by McConnell that are at issue in the proceeding bear a May 12, 1883 priority date: 74-361, 74-363, 74-365, and 74-367. *Preliminary Order* at 2, ¶ 1. Upstream of McConnell are water rights held by Whittaker, 74-369, and Rosalie Ericsson, 74-370, also bearing priority dates of May 12, 1883. *Id.* at 6, ¶ 27-28. Water right nos. 74-369 and 74-370, as partially decreed in the SRBA, include the following administrative condition: “When the flow of water in Lee Creek is insufficient to supply all rights under the 5-12-1883 date of

priority, right 74-369 and right 74-370 shall not be pro-rated with any rights on Lee Creek with that priority date.” *Id.* at 6, ¶ 29. As found by the Hearing Officer, “The only water rights in the Lee Creek drainage which bear a priority date of May 12, 1883” are those rights owned by McConnell, Whittaker, and Ericsson. *Id.* at 9, ¶ 5.

The administrative condition that was partially decreed in the SRBA and put on the face of water right nos. 74-369 and 74-370 was not created out of thin air; rather, it was contained in and carried forward from the 1912 *Reddington v. Bohannon* decree. *Id.* at 9, fn. 5.² Absent this condition, and in times of shortage, the downstream McConnell May 12, 1883 water rights would be pro-rated with the upstream Whittaker and Ericsson May 12, 1883 water rights.

As explained by the Hearing Officer, the condition does not make sense if the upstream Whittaker and Ericsson water rights were not connected to the McConnell water rights by way of Lee Creek: “The condition protecting water rights 74-369 and 74-370 from proration with other May 12, 1883 water rights only makes sense if Stroud Creek could be used to satisfy water rights 74-361, 74-362, 74-363, 74-365 and 74-367.[] If the confluence of Stroud Creek and Right Fork of Lee Creek were downstream of the Upper Diversion, there would be no need for the condition because water rights 74-361, 74-362, 74-363, 74-365 and 74-367 would have had no way to access water in Stroud Creek.” *Id.* at 9, ¶ 5.

As to Whittaker’s water right no. 74-157, it bears a priority date of April 4, 1916, Ex. 14, making it junior to all of McConnell’s water rights, Ex. 1, Apdx. A (summary of McConnell’s water rights within the Lee Creek basin); Ex. 9 (McConnell SRBA partial decrees). Due to water right no. 74-157 being junior to McConnell’s downstream senior water rights from Lee Creek, the McConnell rights can call on 74-157 in times of shortage. If, however, the confluence of the

² That the language from the *Reddington* decree was carried forward into the SRBA, and as will be explained below in Section C, stands in stark contrast to the language in *Whittaker v. Kauer* that was not.

Stroud Creek/Left Fork of Lee Creek and Right Fork of Lee Creek comes in below McConnell, the case of *Whittaker v. Kauer* would have served no purpose: “The only way the *Kauer v. Whittaker* case makes sense is if the confluence of Stroud Creek and Right Fork of Lee Creek were located upstream of the Upper Diversion.” *Preliminary Order* at 8, ¶ 4. “The primary issue in the case was whether Kauer, McConnell’s predecessor in interest, could call for water from certain springs [water right no. 74-157] arising on Whittaker’s property and flowing into Stroud Creek. . . . If the confluence of Stroud Creek and Right Fork of Lee Creek were downstream of the Upper Diversion in 1956, there would be no reason for Kauer to make a call for the spring water arising on the Whittaker property and flowing into Stroud Creek.” *Id.*

Thus, the objective evidence in the record shows both from a factual and legal standpoint that approval of the transfer will put McConnell in no better position and the upstream juniors in no worse position, meaning injury will not occur through approval of the transfer.

B. Water That Flows Past The Whittaker Diversion Is Conveyed Through Whittaker’s System Of Private Ditches Not The Natural Channel Of Stroud Creek/Left Fork Of Lee Creek

Whittaker spends twenty pages arguing, in various ways, that the Hearing Officer erred when he concluded the natural channel of Stroud Creek/Left Fork of Lee Creek does not “exist 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 1 (‘Whittaker argues that the water course through the Whittaker Two Dot Ranch property has been in place for so long now it constitutes the natural channel of Stroud Creek. The hearing officer rejects this argument. The current water course through the Whittaker property is not the natural channel of Stroud Creek.’).” *Whittaker Exceptions Brief* at 12. *See also id.* at 23 (“The current path of undiverted Stroud Creek water through the Whittaker Two

Dot Ranch property may not be the *original* natural stream channel, but such path is now the *legal* natural stream channel of Stroud Creek.”) (emphasis in original).

As correctly found by the Hearing Officer, “The current path of water through the Whittaker ditch system is not the natural channel of Stroud Creek.” *Order Denying Petitions for Reconsideration* at 7 (emphasis added). This finding was arrived at by the Hearing Officer based on the evidence before him, which included Whittaker’s own expert reports that traced the path of water, and not the natural channel of Stroud Creek/Left Fork of Lee Creek, through Whittaker’s “private ditches.” Ex. 153 at 4; *Order Denying Petitions for Reconsideration* at 4. “Whittaker seeks to characterize various ditches on the Whittaker Two Dot Ranch property as man-made stream channels rather than ditches. Whittaker’s arguments on this point are not persuasive and are inconsistent with the expert reports prepared by Bryce Contor and offered into the evidentiary record by Whittaker.” *Order Denying Petitions for Reconsideration* at 4.

At the Whittaker farmstead diversion, water flows into the Whittaker property. *Preliminary Order* at 4. After the farmstead diversion, more water is intercepted by the “West Springs collector ditch . . .” with water then proceeding to the “hilltop distribution point.” *Order Denying Petitions for Reconsideration* at 4. “The West Springs Ditch is a deep, excavated ditch, running from west to east across the Stroud Creek channel.” *Preliminary Order* at 4. “The engineer’s map seems to indicate the channel of Lee Creek crossing the collection ditch from the West Springs near the letter K, but I saw no indication of any kind of flume, siphon or culvert that would allow the creek to pass under or over the ditch.” *Order Denying Petitions for Reconsideration* at 5 (citing Ex. 153 at 4). “The West Springs Ditch is not currently equipped with a lockable, controlling works which would allow the watermaster to curtail the diversion of Stroud Creek into the West Springs Ditch.” *Preliminary Order* at 5.

After the West Springs Ditch, water then proceeds to the “hilltop distribution point.” *Order Denying Petitions for Reconsideration* at 4. From the hilltop distribution point, water that is sent into the Lee Creek drainage, as opposed to the Big Eightmile drainage, then enters the “Bohan Ditch.” *Preliminary Order* at 5. Water that is sent into the Big Eightmile drainage is not tributary to Lee Creek and cannot be used by anyone within the Lee Creek drainage. *See Preliminary Order* at 5 (“This combined ditch is used to convey water over to a divide ridge which separates the Stroud Creek drainage from the Big Eightmile Creek drainage.”). “It appears that historically the Bohan Ditch would have captured any flows from upstream, including any Lee Creek flow that had not been captured by the West Springs collector ditch.” *Order Denying Petitions for Reconsideration* at 5 (citing Ex. 153 at 4). “Stroud Creek no longer flows in its natural channel between the West Springs Ditch and the confluence with Lee Creek. Ex. 151 at 6-7. This section of the Stroud Creek drainage has been dewatered as a result of Whittaker’s unauthorized diversion of Stroud Creek into the West Springs Ditch.” *Preliminary Order* at 5. “The Stroud Creek channel has been altered or bypassed between the Whittaker Diversion and the confluence with Lee Creek, a distance of approximately one mile.” *Id.* “The current flow path of Stroud Creek water through the Whittaker Two Dot Ranch property does not constitute the natural channel of Stroud Creek.” *Id.* (emphasis added).

That the Hearing Officer made these findings based on the record and Whittaker’s expert reports is further consistent with Whittaker’s own use of the phrase “private ditches.” On November 6, 2022, the Department received a *Notice of Protest* filed by Whittaker Two Dot Ranch, LLC against the McConnell transfer. In the protest, Whittaker could not more clearly state that the water course through his property is his own private ditch system and in no way represents the natural channel of Stroud Creek/Left Fork of Lee Creek. “[T]he only way to

convey McConnell's water . . . to his new point of diversion would be through my ranch's PRIVATE ditch systems. Under no circumstances will I allow another water user to deliver his/her water through my private ditches." Capitalization in original, emphasis added.

While stating in the protest that the ditch system is PRIVATE and therefore unusable by McConnell, Whittaker now argues in briefing, citing *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960), that the ditch system has become the natural channel of Stroud Creek/Left Fork of Lee Creek. The Hearing Officer understood this inherent inconsistency: "Whittaker seeks to blur the line between ditches and natural channels . . ." *Order Denying Petitions for Reconsideration* at 7 (emphasis added). Whittaker cannot have it both ways. Thus, the Hearing Officer's rejection of Whittaker's application of *Poole* is entirely consistent with the record: "The current path of water through the Whittaker ditch system is not the natural channel of Stroud Creek." *Id.* (emphasis added).

Whittaker next cites the Department's Stream Channel Alteration Rules ("SCA Rules"), IDAPA 37.03.07.010.12, arguing: "The channel referred to is that which exists at the present time, regardless of where the channel may have been located in the past." *Whittaker Exceptions Brief* at 18 (emphasis in original) (citing IDAPA 37.03.07.010.12). The Hearing Officer correctly disposed of the argument, referring Whittaker back to the definition of "stream channel" in Chapter 38, Title 42, Idaho Code:

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

Order Denying Petitions for Reconsideration at 3 (citing I.C. § 42-3802(d) (emphasis in original)).

Because ditches are categorically not “stream channels under the Stream Channel Protection Act . . . the Whittaker ditch system is not the Stroud Creek channel.” *Order Denying Petitions for Reconsideration* at 3 (emphasis added). While the “stream channel” definition in IDAPA 37.03.07.010.12 does omit the second sentence contained in I.C. § 42-3802(d), interpretation of an administrative rule must be consistent with the statutes that enabled it: “[A]dministrative rules are invalid which do not carry into effect the legislature’s intent as revealed by existing statutory law, and which are not reasonably related to the purpose of the enabling legislation.” *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (emphasis added). While Whittaker asks the Department to include ditches in the SCA Rules’ definition of stream channel, *see Whittaker Exceptions Brief* at 27-32, such interpretation runs counter to *Donnelly Club* and would render the definition of stream channel in the SCA Rules invalid. If Whittaker’s interpretation is followed, it would produce an “absurd result nullify[ing] legislative intent,” *State v. Doe*, 147 Idaho 326, 329, 208 P.3d 730, 733 (2009), that defines stream channel as something other than is written in the plain language of I.C. § 42-3802(d).

C. *Whittaker v. Kauer* Was Not Carried Forward Into The SRBA, Thus, By Operation Of The *Final Unified Decree*, The Decision Is Inapplicable

Since at least the middle of July 2020, Ex. 3, Whittaker has made the same unavailing arguments he makes today in an attempt to convince the Department of the applicability of the Supreme Court’s decision in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956). As explained previously through Exhibit 3, the Department informed Whittaker that if the decision applied, its holdings needed to be carried forward into the SRBA, which they were not: “The Department has reviewed the case *Whittaker v. Kauer* and disagrees with your interpretation of the case. The *Whittaker v. Kauer* court expressly affirmed the district court’s decree off 80 miner’s inches of water from the West Springs to Whittaker. *Whittaker v. Kauer*, 78 Idaho at 99,

298 P.2d at 748. . . . In your email, you discuss what the *Whittaker v. Kauer* court described as an oral contract between Whittaker and Kauer on how the water would be delivered. . . . The problem is that any such agreement is not reflected in the current water right decrees.” Ex. 3 at 2 (emphasis added).

The Department’s interpretation of the inapplicability of *Whittaker v. Kauer* is supported by the plain language of the SRBA *Final Unified Decree*: “All prior water right decrees and general provisions within the Snake River Basin water system are superseded by this Final Unified Decree except as expressly provided otherwise by partial decree or general provision of this Court.” *Final Unified Decree* at 12, ¶ 11 (Aug. 26, 2014) (emphasis added). Because Whittaker’s family was an actual party to the case, he knew full well the holdings of the decision. Moreover, as a party to the SRBA through the filing of claims, the *Final Unified Decree* is “binding” on Whittaker. *Id.* at 11, ¶ 8.

If Whittaker believed the case were important, he should have carried the decision forward into the SRBA and cannot now claim surprise: “James Whittaker was caught assuming that the historical administration documented in *Whittaker 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.” *Whittaker Exceptions Brief* at 35 (emphasis added).³

When the SRBA *Final Unified Decree* was being formulated, a steering committee was created “to discuss the form and content of the final unified decree.” Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho Law Rev. 53, 205 (2016).

³ If Whittaker is correct that surprise and/or excuse is a defense, then the same defense should apply equally to McConnell. McConnell had every reason to believe IDWR would correctly recommend the lower diversion, as it was in use since at least 1986, making it ripe to add as an accomplished transfer. I.C. § 42-1425. Because the lower diversion was not added as an accomplished transfer, McConnell has been forced to expend time and resources in an administrative hearing to make legal a historic diversion. If Whittaker desires to incorporate *Whittaker v. Kauer* back into the SRBA, the forum for doing so is not in front of IDWR, but rather through the adjudication court.

Whittaker had every opportunity to review the recommendations of the committee, as all of its recommendations were filed in SRBA Subcase No. 00-92099. On January 30, 2012, the SRBA district court entered its *Order Re: Proposed Final Unified Decree and Adopting Proposed Procedures and Deadlines* in SRBA Subcase No. 00-92099. “The SRBA Court’s Proposed Final Unified Decree was served on the parties and became subject to challenge.” *Id.* at 206. Whittaker’s attorney for water right 74-157 was Scott Campbell,⁴ whose firm was actively involved in challenging the Proposed Final Unified Decree.⁵ The SRBA Court’s *Proposed Final Unified Decree* contained language that was nearly identical to the language found in paragraph 11, page 12 of the *Final Unified Decree*, making it ripe for challenge by Whittaker, yet none was brought. When the *Final Unified Decree* itself was issued, Whittaker had every opportunity to challenge or appeal, yet he did not. Whittaker is now foreclosed from arguing the applicability of *Whittaker v. Kauer* because he failed to carry the decision forward into the SRBA. *First Security Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 740-44, 451 P.3d 446, 453-57 (parties to the SRBA who could have brought issues during the pendency of the adjudication are now foreclosed).

In an attempt to work around this failure, Whittaker argues the decision is instead “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).” *Whittaker Exceptions Brief* at 36, fn. 7 (emphasis added). However, the holding in *City of Blackfoot* does not apply here where no water right of Whittaker or McConnell references any sort of agreement.

⁴ See *SRBA Subcase Summary Report* for 74-157, 5/8/2007, notice of appearance f/b Scott Campbell for Paula and James Whittaker.

⁵ See *SRBA Subcase Summary Report* for 00-92099, 4/3/2012, *Opening Brief in Support of Notice of Challenge* filed by Scott Campbell and Andy Waldera with the firm Moffatt, Thomas, Barrett, Rock & Fields Chtd.

In *City of Blackfoot*, water right no. 01-181C was partially decreed in the name of the City of Blackfoot. In the partial decree, specific language was included stating: “[T]he use and diversion of water is subject to ‘additional conditions and limitations contained in a settlement agreement’” *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017) (emphasis added). Based on the language on the face of the partial decree, the Court stated the agreement was binding on the parties to the agreement, which did not include the Department: “As such, the Director is not bound by the Settlement Agreement and has no duty to enforce the Settlement Agreement. This is made clear by the language incorporating the Settlement Agreement into the other provisions element of 181C” *Id.* at 309, 396 P.3d at 1191.

Here, none of the McConnell water rights or the Whittaker water rights reference an agreement, let alone a private agreement, because no agreement exists between the parties. As testified to at the hearing by Mr. McConnell, it was not until the 2020 enforcement action that he was made aware of the *Whittaker v. Kauer* case or the purported “agreement” described by Whittaker. Test. B. McConnell. This is not surprising given that the decision was issued in 1956, some thirty-seven years before McConnell moved to Idaho, and some sixty-four years before McConnell was made aware of the decision to which he was not party. Furthermore, as testified to at the hearing by Mr. McConnell, there is no mention of any “agreement” in the *Policy of Title Insurance* associated with McConnell’s purchase of the property. Ex. 23; Test. B. McConnell. “The purpose of title insurance is to protect a transference of real estate from the possibility of a loss through defects that may cloud the title. One of the reasonable expectations of a policyholder who purchases title insurance is to be protected against the defects in his title which appear of record.” *Brown’s Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 115 Idaho

56, 62, 764 P.2d 423, 429 (1988) (citing 9 Appleman, Insurance Law and Practice § 5201, pp. 8-9 (1981)). If a private agreement did exist that was clearly unknown to McConnell and not disclosed in the title insurance as of record in Lemhi County, it was incumbent on Whittaker to include something on the face of the partial decrees referencing it, yet he did not, rendering *Whittaker v. Kauer* inapplicable by operation of the *Final Unified Decree*.

D. The Equitable Doctrine of Laches Could Only Have Been Addressed In The Snake River Basin Adjudication; In The Alternative, Insufficient Time Has Passed For The Doctrine To Be Applied Against McConnell

Whittaker claims the equitable doctrine of laches should be used to prevent the transfer that was approved by the Hearing Officer. In support, Whittaker predominantly relies on decisions from private adjudications that pre-date the SRBA, such as *Hillcrest Irr. Dist. v. Nampa Meridian Irr. Dist.* 57 Idaho 403, 66 P.2d 115 (1937). Cases that pre-date the SRBA are inherently suspect, as the State of Idaho had yet to commence the general adjudication of the Snake River Basin. The one water law case cited by Whittaker that post-dates commencement of the SRBA is *Devil Creek Ranch v. Cedar Mesa Res. and Canal Co.*, 126 Idaho 202, 879 P.2d 1135 (1994). However, the holding of *Devil Creek Ranch* prevents Whittaker from the very relief he seeks, as only the SRBA has subject matter jurisdiction to entertain the claim:

The second issue requiring resolution is whether Devil Creek Ranch's 1915 right, whatever it is, must be reduced, barred, or otherwise limited by Cedar Mesa's affirmative defenses of estoppel and/or laches.

.....
Devil Creek Ranch argues that these remaining issues should be litigated in the district court.

.....
The Idaho legislature intended to prevent private adjudications of claimed water rights to the water system for which a general adjudication has been commenced or completed. *Id.*; I.C. § 42-1404(1) (1986 & Supp. 1994). Because this controversy concerns an adjudication of a right to the use of water in the Snake River Basin, for which a general adjudication has commenced, only the SRBA district court has the subject matter jurisdiction to adjudicate water rights asserted in this case.

Therefore, the district court properly dismissed the remaining issues in this case for lack of subject matter jurisdiction.

Id. at 206, 879 P.2d at 1139 (emphasis added).

Had Whittaker intended for water right no. 74-157, to be administered differently than the priority date, source, tributary, and administrative conditions (lack thereof) that were claimed, recommended, and partially decreed in the SRBA, Exs. 15-17, the time to have raised the equitable defense of laches against any and all water users was in the SRBA: “Any arguments related to equitable remedies . . . should have been raised in the SRBA.” *Order Denying Petitions for Reconsideration* at 9 (emphasis added). The Hearing Officer’s rationale is consistent with *Devil Creek Ranch* and should be accepted.

In the alternative, even if the Department has jurisdiction to entertain the equitable defense, insufficient time has passed for the doctrine to apply against McConnell. As correctly found by the Hearing Officer, “The Snake River Basin Adjudication (‘SRBA’) court issued partial decrees for the McConnell water rights (74-361 through 74-365, 74-367 and 74-368) on August 13, 2014. . . . McConnell has only had reason to investigate the flow of Stroud Creek through the Whittaker Two Dot Ranch property and the confluence of Stroud Creek and Right Fork of Lee Creek since 2104.” *Order Denying Petitions for Reconsideration* at 9. Indeed, the SRBA’s *Final Unified Decree* supports the Hearing Officer’s decision that the correct time to start the clock on claims against the McConnell partial decrees is the date they were issued, not before as advocated by Whittaker. *See Final Unified Decree* at 12, ¶ 14 (“The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court and not from the date of this Final Unified Decree.”) (emphasis added); 52 Idaho Law Rev. at 92-93 (explaining tolling of forfeiture while SRBA claims were pending and until partial decrees were issued).

With the passage of more than six years since the partial decrees were issued, Whittaker argues the equitable doctrine of laches applies against McConnell, citing I.C. § 5-215(1) for the proposition that “the time period is longer than Idaho’s current longest statute of limitation for judgments (6 years).” *Whittaker Exceptions Brief* at 41. Because the McConnell partial decrees are judgments of the SRBA, the Department does not have the authority to alter/amend/modify the SRBA district court’s decisions. If Whittaker intends to take on partial decrees, whether his or McConnell’s, the forum for doing so is in the SRBA, not through an IDWR transfer proceeding. *Eden v. State*, 164 Idaho 241, 429 P.3d 129 (2018) (explaining process for challenging and setting aside judgments of the SRBA court).

Finally, if Whittaker intends to assert a statute of limitation against the McConnell partial decrees, the time period has yet to run. Water rights are real property, I.C. § 55-101(1), thus, any statute of limitation must concern real property. With twenty-year statutes of limitation applying to real property, the time has yet to expire on the McConnell partial decrees, which were issued in 2014. *See e.g.* I.C. § 5-203 (20 years to recover against real property); I.C. § 5-206 (20 years for constructive possession of real property); I.C. § 5-207 (20 years for possession of real property under written claim of title). As correctly found by the Hearing Officer: “Six or seven years does not constitute ‘long and continuous knowing acquiescence’ as required by the equitable doctrine of laches.” *Order Denying Petitions for Reconsideration* at 9.

E. The Hearing Officer Correctly Denied Whittaker’s Petition To Re-Open The Hearing And Petition For Site Visit

Finally, Whittaker asks the Director to grant Whittaker’s petition to re-open the hearing and for a site visit. When this same request was reviewed by the Hearing Officer, it was denied, due to the Hearing Officer’s position that, if granted, it would lead to a never-ending cycle of hearings, contrary to the stated policy in IDAPA 37.01.01.052:

The question presented to the hearing officer by the *Petition* is whether the disputed location of the confluence of Stroud Creek and Right Fork of Lee Creek was properly before the parties prior to the end of the hearing, when the hearing officer closed the record. The expert report prepared by Scott King and disclosed by McConnell prior to the hearing included a paragraph describing the confluence at a location upstream of the Upper Diversion, as shown on the 1989 USGS Map and the 1954 Engineer’s Map. Ex. 1 at 16-17. The King report describes the water rights in the Stroud Creek drainage and states: “Because the McConnell points of diversion are downstream, no change in water administration will occur with these rights if the Application is approved.” *Id.* at 18. The parties offered testimony during the hearing about the current path of water through the Whittaker property and the location of the confluence of Stroud Creek and Right Fork of Lee Creek.

The hearing officer issued a Notice of Hearing and Scheduling Order on February 19, 2021. The dates set forth in the scheduling order were agreed to by the parties, including Whittaker, during a pre-hearing conference on February 9, 2021. The Department conducted a status conference on March 16, 2021. Whittaker did not raise any concerns about snow on the ground or access to the streams or the confluence during that conference. Expert reports were exchanged on March 26, 2021. The Department conducted a status conference on April 14, 2021. After having time to review the expert report prepared by Scott King, Whittaker did not request additional time to conduct site inspections or investigate the disputed confluence. After two full days of testimony, including length testimony about the Stroud Creek channel and the historical confluence of Stroud Creek and Right Fork of Lee Creek, Whittaker did not ask to keep the administrative record open for additional evidence. Whittaker did not question the adequacy of the administrative record until after the *Preliminary Order* was issued.

....

Rule 52 of the Department’s Rules of Procedure (IDAPA 37.01.01) states that the rules “will be liberally construed to secure just, speedy and economical determinations of all issues presented to the agency.” To reopen the record under such circumstances would lead to never-ending cases, where non-prevailing parties continue to ask for more time to collect additional evidence to bolster their cases. Such a result would not constitute just, speedy or economical disposition of contested cases.

Order Denying Petition to Re-Open Hearing and Petition for Site Visit at 2-3 (emphasis added).

The decision to re-open a hearing and consider additional evidence is committed to the trier of fact’s sound discretion. *Lebow v. Commercial Tire, Inc.*, 157 Idaho 379, 383-84, 336 P.3d 786, 790-91 (2014). Here, the Hearing Officer clearly understood the law by citing IDAPA

37.01.01.052, applied the law to the facts, and through an exercise of discretion, properly denied Whittaker's attempt to re-open the hearing and request for a site visit. The Director should do the same.

IV. CONCLUSION

Based on the foregoing, the Hearing Officer correctly analyzed the facts and applied the law to the facts in reaching the conclusion that the McConnell transfer should be approved because it will not injure existing water rights. On exceptions, Whittaker has offered nothing more that should convince the Director otherwise. The McConnell transfer should be approved.

DATED this 20th day of July, 2021.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 2021, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below:

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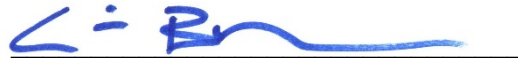
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