

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

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 84441 IN THE NAME OF
BRUCE AND GLENDA MCCONNELL

ORDER ON EXCEPTIONS; FINAL
ORDER APPROVING TRANSFER

BACKGROUND

On October 5, 2020, Bruce and Glenda McConnell (“McConnell”) filed Application for Transfer 84441 (“Application 84441”) with the Idaho Department of Water Resources (“Department”). Application 84441 was protested by James Whittaker and Whittaker Two Dot Ranch LLC (collectively, “Whittaker”), David R. Tomchak (“Tomchak”), Smith 2P Ranch, Steven Johnson (“Johnson”), and Rosalie Ericsson (“Ericsson”).

The Department conducted an administrative hearing on April 21 and 22, 2021. On May 18, 2021, the hearing officer issued the *Preliminary Order Approving Transfer* (“Preliminary Order”).

On June 1, 2021, both Johnson and Whittaker filed timely petitions for reconsideration with the hearing officer. Whittaker also filed a *Petition to Re-Open Hearing and Petition for Site Visit and Memorandum in Support* (“Whittaker Petition to Re-Open”).

On June 10, 2021, McConnell filed an *Opposition to Whittaker Petition to Re-Open Hearing and Petition for Site Visit and Memorandum in Support; Opposition to Declaration of Bryce Contor*.

On June 21, 2021, the hearing officer issued an *Order Denying Petitions for Reconsideration* (“Order on Reconsideration”) and an *Order Denying Petition to Re-Open Hearing and Petition for Site Visit*.

On July 6, 2021, Whittaker filed a *Petition for the Director to Review Preliminary Order Approving Transfer, Order Denying Petition to Re-Open Hearing, and Petition for Site Visit* accompanied by *Exceptions to Preliminary Order Approving Transfer, Order Denying Petition to Re-Open Hearing, and Petition for Site Visit* (collectively, “Whittaker Exceptions”).

On July 20, 2021, McConnell filed the *McConnell Response to Whittaker Opening Brief on Exceptions*.

EXCEPTIONS

After careful consideration of the record, the Director concludes Transfer Application No. 84441 should be approved, as conditioned by the hearing officer in the Preliminary Order. Whittaker’s Exceptions are denied.

Whittaker's Exceptions present substantially the same arguments as those argued before the hearing officer on reconsideration. The Director is unpersuaded by Whittaker's attempts to replace relevant, substantial, and competent record evidence relied on by the hearing officer in the *Preliminary Order*, the *Order Denying Petitions for Reconsideration*, and the *Order Denying Petition to Re-Open Hearing and Petition for Site-Visit*.

The hearing officer concluded the stream channel of Stroud Creek has been intercepted by Whittaker's West Springs Ditch. This unauthorized diversion has dewatered the historic Stroud Creek stream channel. But for Whittaker's unauthorized diversion at the West Springs Ditch, Stroud Creek would contain continuously flowing water in-season and result in water flowing into Lee Creek above McConnell's authorized diversion. *Order Denying Petitions for Reconsideration* at 4.

Whittaker argues the Whittaker's man-made irrigation system is now the natural Stroud Creek stream channel. *Whittaker Exceptions* at 12–32. As the hearing officer observed, this outcome is both contrary to fact and law. *Order Denying Petitions for Reconsideration* at 2–7; and Ex. 153 at 4.

The hearing officer relied on substantial evidence in the record—including evidence presented by Whittaker's own expert—to conclude Stroud Creek would flow from the point of interception to the historic confluence but for the interception of Stroud Creek by Whittaker's West Springs Ditch. *Preliminary Order* at 5; *Order Denying Petitions for Reconsideration* at 4; Ex. 151 at 6–7.

Whittaker also argues the confluence of Stroud Creek and Right Fork of Lee Creek must be based on the *current* confluence created because of his unauthorized diversion of Stroud Creek water. *Whittaker Exceptions* at 6–12.

The Director agrees with the hearing officer that determining the confluence of Stroud Creek and Right Fork of Lee Creek “is critical in the evaluation of whether the changes proposed will result in injury or enlargement.” *Preliminary Order* at 7. The location of the confluence—whether above or below McConnell's currently approved point of diversion—will affect how other Stroud and Lee Creek water rights may be administered in priority.

As a result of the hearing officer's conclusions related to the historic Stroud Creek stream channel, the hearing officer concluded the historic confluence of Stroud Creek and Right Fork of Lee Creek is located *upstream* of McConnell's current, approved Upper Diversion. *Preliminary Order* at 8–9; *Order Denying Petitions for Reconsideration* at 7. “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.” *Order Denying Petitions for Reconsideration* at 7. The hearing officer reasonably relied on maps in the record showing the confluence as it would be without Whittaker's unauthorized diversion. For purposes of this contested case and the approval of Transfer No. 84441, the historic confluence of Stroud Creek and Right Fork of Lee Creek is in the southwest corner of the SENE of Section 30, T16N, R25E.

Because McConnell's authorized point of diversion and proposed point of diversion are downstream of the historic confluence of Stroud Creek and Right Fork of Lee Creek, approval of the new point of diversion will not injure Whittaker's water rights.

The Director agrees with the hearing officer that the equitable doctrine of laches is inapplicable in this case. *Order Denying Petitions for Reconsideration* at 9–10.

Finally, Whittaker argues the record should be re-opened to allow additional evidence related to the Stroud Creek stream channel and confluence with Right Fork of Lee Creek. *Whittaker's Exceptions* at 42–45. The Director is persuaded by the hearing officer's analysis in the *Order Denying Petition to Re-Open Hearing and Petition for Site-Visit*. Whittaker was aware the above-described natural stream channel and confluence issues were relevant to the contested case from at least February 2021 through the hearing in late April 2021. *Order Denying Petition to Re-Open Hearing and Petition for Site-Visit* at 3. Whittaker's request is untimely. Location of the confluence should have been established by field investigations prior to the hearing, or, at the least, field investigations should have been requested during the hearing. The time for offering evidence into the administrative record has passed. The record will not be re-opened, and approval of a site visit is denied.

Based on the above discussion, the Director concludes the findings of fact and conclusions of law contained in the hearing officer's *Preliminary Order Approving Transfer*, *Order Denying Petitions for Reconsideration* and *Order Denying Petition to Re-Open Hearing and Petition for Site-Visit* should be adopted as final.

ORDER

IT IS HEREBY ORDERED the hearing officer's *Preliminary Order Approving Transfer*, *Order Denying Petitions for Reconsideration* and *Order Denying Petition to Re-Open Hearing and Petition for Site-Visit* are hereby adopted and incorporated into this order.

IT IS FURTHER ORDERED that Application for Transfer 84441 in the name of Bruce and Glenda McConnell is APPROVED subject to the conditions set forth in Transfer Approval 84441 issued in conjunction with the *Preliminary Order Approving Transfer*.

Dated this 2nd day of November 2021.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November 2021, I served a true and correct copy of the *Order on Exceptions; Final Order Approving Transfer* to the following parties via U.S. Mail and by email:

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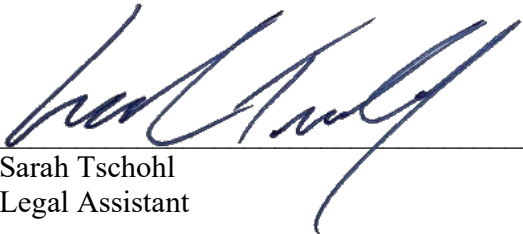
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Sarah Tschohl
Legal Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.