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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

**PETITION TO
RE-OPEN HEARING AND PETITION
FOR SITE VISIT AND MEMORANDUM
IN SUPPORT**

Protestants James Whittaker and Whittaker Two Dot Ranch LLC (collectively "Whittaker"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., submit this *Petition to Re-Open Hearing and Petition for Site Visit and Memorandum in Support*.

This petition is being filed for consideration in conjunction with *Whittaker's Petition for Reconsideration*.

This petition relates to *Preliminary Order Approving Transfer* dated May 18, 2021 issued in the above-entitled matter (the "Preliminary Order"). The *Preliminary Order* was issued as part of the contested case pending before the Idaho Department of Water Resources ("IDWR" or

“Department”) on McConnell’s transfer application 84441 (the “Transfer” or simply “84441”). James Cefalo is the designated hearing officer (the “Hearing Officer”).

I. Petition to Re-Open Hearing.

Whittaker requests to re-open the hearing for the limited purpose of taking 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’s injury analysis focused on where the confluence of Lee Creek “was once located.” *Preliminary Order* at 8.

The *Preliminary Order* 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 even goes 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).

Given the transfer and stream channel law described in *Whittaker’s Petition for Reconsideration*, including the definition of “stream channel” under IDWR’s own IDAPA rules (“The channel referred to is **that which exists at the present time, regardless of where the channel may have been located in the past.**” IDAPA 37.03.07.010.12 (emphasis added)),

evaluation of injury based on the *past* location of the channel was completely unanticipated by Whittaker. To the best of our knowledge, such an analysis based on the past location of a stream is unprecedented.

Because of the unprecedented nature of this decision, it is important that all the facts are considered, particularly in response to the Hearing Officer's determination that the change in location of the confluence of Stroud Creek and the Right Fork of Lee Creek was caused by Whittaker.

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 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.

After receiving the *Preliminary Order*, and considering whether the natural confluence could have been in Section 30, Jordan Whittaker—in consultation with Bryce Contor—has examined the Right Fork of Lee Creek upstream of the Section 30 diversion and discovered alterations to the stream associated with another 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.

As the parties are aware, 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, Whittaker requests 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 hearing officer's discretion. *Id.*

II. Petition for Site Visit.

In addition to the *Petition to Re-Open Hearing*, Whittaker requests that the Hearing Officer visit the Section 30 area pursuant to Rule 43(f)(2) of the Idaho Rules of Civil Procedure. Actual view of the Section 30 confluence area and any other features testified to will aid the Hearing Officer's evaluation of evidence and consideration of *Whittaker's Petition for Reconsideration*.

III. CONCLUSION.

For the above reasons, the Hearing Officer should re-open the hearing for the limited purpose of taking evidence on the matters described herein pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. Additionally, Foster hereby requests that the Hearing Officer personally visit the Section 30 area pursuant to Rule 43(f)(2) of the Idaho Rules of Civil Procedure.

DATED this 1st day of June, 2021.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2021, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: PETITION TO RE-OPEN HEARING AND PETITION FOR
SITE VISIT AND MEMORANDUM IN SUPPORT

HAND DELIVERY

AND EMAIL TO: James Cefalo
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