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Department of Water Resources
Eastern Region

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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

**OPPOSITION TO WHITTAKER
PETITION TO RE-OPEN HEARING
AND PETITION FOR SITE VISIT AND
MEMORANDUM IN SUPPORT;
OPPOSITION TO DECLARATION OF
BRYCE CONTOR**

COMES NOW Bruce and Glenda McConnell ("McConnell"), by and through their attorney of record, and file this *Opposition to Whittaker Petition to Re-Open Hearing and Petition for Site Visit and Memorandum in Support; Opposition to Declaration of Bryce Contor*.

I. INTRODUCTION

On June 1, 2021, counsel for James Whittaker and Whittaker Two Dot Ranch, LLC ("Whittaker") filed a *Petition to Re-Open Hearing and Petition for Site Visit and Memorandum in Support* ("Petition"). The Petition asks the hearing officer to: (1) re-open the hearing; and (2) have a site visit, all in order to further evaluate the "confluence of Stroud Creek and Lee Creek

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that formed the major basis of the Hearing Officer's decision in the *Preliminary Order*."

Petition at 2. The *Declaration of Bryce Contor* ("Contor Declaration") was filed in support.

II. ARGUMENT

The location of the "confluence of Stroud Creek and Right Fork of Lee Creek" ("Confluence") was an issue at the two-day hearing, which took place on April 21-22, 2021, in Salmon, Idaho. *Preliminary Order Approving Transfer* at 3. McConnell caused to be prepared the expert report of Scott King, SPF Water Engineering ("King Expert Report"), which, pursuant to the *Scheduling Order*, was served on the parties, including Whittaker, on March 26, 2021. The King Expert Report was introduced and admitted into evidence at the hearing as Exhibit 1. Exhibit 1, pages 12-17, located and discussed the Confluence. Mr. King, who was qualified as an "expert," testified to the location of the Confluence and was subject to cross-examination by all parties. *Preliminary Order Approving Transfer* at 1. The hearing concluded on April 22, 2021, with the record closed.

In support of the Petition, Whittaker filed the June 1, 2021 *Declaration of Bryce Contor* ("Contor Declaration"). The Contor Declaration explains a "June 1, 2021 . . . site visit" performed by Mr. Contor. *Contor Declaration* at 1. Mr. Contor was qualified as an "expert" at the hearing. *Preliminary Order Approving Transfer* at 1. Photographs and statements were included in the Contor Declaration purporting to show features within the drainage, including the Confluence, and discussion thereof.

The issue of the Confluence was known, understood, and probed at the hearing. Whittaker was represented at the hearing by a well-known water attorney and expert witness. Whittaker cannot now reasonably claim the hearing should be re-opened to further investigate the issue of the Confluence.

While, the Contor Declaration may serve to bolster the Petition, it can also be construed as an attempt to add expert testimony and evidence to an already closed record. While it would be one thing for Whittaker to file the Petition asserting the reasons for rehearing, the filing of the Contor Declaration shows an attempted extra step to add expert testimony and evidence to the record that was closed on April 22, 2021. The hearing officer is “restricted to and must decide the case *on the record*.” *Rivera v. Johnston*, 71 Idaho 70, 75, 225 P.2d 858, 860 (1950) (emphasis in original). In reviewing the Commission's decision, this Court reviews the Commission's order with the record that was before the Commission. *See Carey v. Lafferty*, 59 Idaho 578, 583, 86 P.2d 168, 170 (1938) (stating parties are bound by the record they make in the trial court).” *Shubert v. Macy's West, Inc.*, 158 Idaho 92, 98, 343 P.3d 1099, 1105 (2015). *See also* I.C. § 67-5248; IDAPA 37.01.01.712 (“Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.”). The Contor Declaration was filed approximately six weeks after the record was closed, cannot be considered, and/or should be stricken from the record as untimely.

III. CONCLUSION

Based on the foregoing, the Petition should be denied, and the June 1, 2021 Contor Declaration should not be considered and/or stricken from the record as untimely.

DATED this 7th day of June, 2021.


Chris M. Bromley
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June, 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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