

**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 DENYING PETITION TO
RE-OPEN HEARING AND PETITION
FOR SITE VISIT**

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

On June 1, 2021, Whittaker filed a *Petition to Re-Open Hearing and Petition for Site Visit and Memorandum in Support* (“Petition”). The *Petition* was accompanied by a document titled *Declaration of Bryce A. Contor* (“Declaration”). On June 7, 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*.

Whittaker asks the hearing officer to re-open the administrative record for this case to give the parties time to conduct additional field investigations and to offer additional evidence into the record related to the location of the confluence of Stroud Creek and Right Fork of Lee Creek. *Petition* at 2. According to Whittaker, the additional hearing “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.” *Id.* at 4. Whittaker notes that “the hearing was held in mid-April with expert report disclosure deadlines prior to that time when the snow was still on the ground.” *Id.* at 4. “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.” *Id.*

Application 84441 proposes to add a point of diversion (Lower Diversion) to the McConnell water rights. The proposed point of diversion is located approximately 1,600 feet downstream of the existing point of diversion (Upper Diversion) for the rights. The location of the confluence of Stroud Creek and Right Fork of Lee Creek was an important factor in the review of Application 84441. The protestants, including Whittaker, argued that the confluence is located downstream of the Upper Diversion. The hearing officer determined that the confluence is located in the southwest corner of the SENE of Section 30, T16N, R25E, upstream of McConnell’s Upper Diversion, consistent with the 1989 USGS Map and a 1954 Engineer’s Map.

Preliminary Order at 10-11. Because the confluence is upstream of McConnell's Upper Diversion, the hearing officer concluded that the water users on Stroud Creek would not be injured by the proposed change. *Id.* at 11-12.

The *Petition* includes the following statements:

The *Preliminary Order* provides that it was Whittaker's actions that have changed the confluence from its current location below McConnell's Upper Diversion.

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.

Petition at 2-3 (emphasis added).

These statements mischaracterize the findings of fact, analysis and conclusions set forth in the *Preliminary Order*. 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. Whittaker argues that the Stroud Creek stream channel follows a different path than that depicted on the 1989 USGS Map, and now includes portions of the Whittaker ditch system. The *Preliminary Order* rejected the argument that the Whittaker ditch system now constitutes the Stroud Creek channel. Whittaker's unauthorized diversion of Stroud Creek into the West Springs Ditch has dewatered the creek channel below the West Springs Ditch. In the absence of an active Stroud Creek channel below the West Springs Ditch, the hearing officer relied on the channel and confluence shown on the 1989 USGS Map and the 1954 Engineer's Map to decide the contested case.

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 protest filed by Tomchak states: "McConnell's bottom ditch [Lower Diversion] is located after Everson Creek [Stroud Creek] feeds into Lee Creek and is currently dammed forcing most of the water from Everson Creek/Lee Creek's empty channel into their lower ditch. All of this takes place approximately ½ mile downstream of McConnell's water rights [Upper Diversion]." 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 all of 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 lengthy 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 determination of all issues presented to the agency.” Administrative records are never perfect. In most cases there are relevant documents and testimony that could have been offered at hearing but weren’t. Witnesses reflect on testimony offered and realize that they could have made an additional point. Expert witnesses reflect on reports and realize that they could have conducted additional inspections or tests or included additional analyses in their reports. Such omissions and regrets, however, are not sufficient justification to re-open an administrative record. To re-open 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.

In this case, the disputed location of the confluence of Stroud Creek and Right Fork of Lee Creek was before the parties prior to the hearing. There was a clear factual disagreement between the Tomchak protest and the King expert report regarding the location of the confluence. All of the parties had an opportunity to ask for additional time to prepare for the hearing or to conduct site visits and investigations prior to the hearing. Whittaker never requested additional time to conduct investigation of the confluence prior to the hearing. According to the *Petition*, Bryce Contor conducted additional investigation after the hearing was held and discovered relevant information that could have been included in the administrative record for this case. In order to achieve a just, speedy and economical decision, however, the time for offering evidence into the administrative record must be fixed. Whittaker has not presented a persuasive justification to re-open the record.

ORDER

IT IS HEREBY ORDERED that Whittaker's *Petition* is DENIED. The additional evidence presented in the *Petition* and the *Declaration* has not been admitted into the administrative record for this case and, therefore, cannot be considered by the hearing officer.

Dated this 21st day of June 2021.

A handwritten signature in black ink, appearing to read 'J. Cefalo', written over a horizontal line.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of June 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Order Denying Petition to Re-Open Hearing and Petition for Site Visit

BRUCE MC CONNELL
GLENDA MC CONNELL
100 COTTOM LN
LEADORE, ID 83464

ROSALIE ERICSSON
3738 E 38 N
RIGBY, ID 83442-5621

JAMES A WHITTAKER
PO BOX 240
LEADORE, ID 83464

STEVEN L JOHNSON
1019 LEE CREEK RD
LEADORE, ID 83464-5011

SMITH 2P RANCH
C/O SHANNA FOSTER
213 GRADY RD
LEADORE, ID 83464

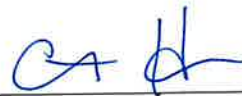
DAVID R TOMCHAK
1476 LEE CREEK RD
LEADORE, ID 83464-5007

WHITTAKER TWO DOT RANCH LLC
PO BOX 177
LEADORE, ID 83464-0240

CHRIS M BROMLEY
MC HUGH BROMLEY PLLC
380 S 4TH ST STE 103
BOISE, ID 83702

ROB HARRIS
HOLDEN KIDWELL HAHN & CRAPO
1000 RIVERWALK DR, SUITE 200
PO BOX 50130
IDAHO FALLS, ID 83405-0130

KIPP MANWARING
2677 E 17TH ST
IDAHO FALLS, ID 83406



Christina Henman
Administrative Assistant