

RECEIVED

APR 20 2021

Department of Water Resources
Eastern Region

Robert L. Harris, Esq. (ISB #7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
rharris@holdenlegal.com

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

**WHITTAKER AND WHITTAKER TWO
DOT RANCH LLC'S MEMORANDUM
IN OPPOSITION TO MCCONNELL
MOTION IN LIMINE AND/OR MOTION
TO STRIKE**

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. hereby submit this *Memorandum in Opposition to McConnell Motion in Limine and/or Motion to Strike*. This memorandum is submitted in response to *McConnell Motion in Limine and/or Motion to Strike* (the "Motion") and the memorandum in support ("Memorandum") filed on April 9, 2021. Another protestant to this matter, David Tomchak, filed *Tomchak's Notice Joining In Part McConnells' Motion in Limine* ("Tomchak Notice") on April 12, 2021.

The *Motion* concerns 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").

Rule 565 of the Rules of Procedure of the Idaho Department of Water Resources (found at

IDAPA 37.01.01) allows fourteen days for a response to a prehearing motion, which the *Motion* is, unless there is showing of good cause to shorten the response time. No good cause argument was made in the *Motion*, and therefore, a response to the motion is due after the scheduled hearing occurs. At a status conference held on April 14, 2021, it was determined that the *Motion* would be taken up at the start of the hearing. However, in the interest of efficiency at the hearing, Whittaker has elected to file this response prior to commencement of the hearing.

For the reasons set forth below, the *Motion* should be denied.

I. ARGUMENT.

A. McConnell's motion is not based on the correct legal standard found in IDWR's procedural rules, which specifically provide that the Idaho Rules of Evidence do not bind the Hearing Officer.

This above-entitled matter is a contested case before the Department. It is not a civil case pending before an Idaho district court. McConnell argues for the application of relevance principles from the Idaho Rules of Evidence, citing to Idaho cases applying the Idaho Rules of Evidence on relevance, and quoting from the Rules of Evidence themselves. But the Rules of Evidence do not bind the Hearing Officer—the Rules of Procedure of the Idaho Department of Water Resources do. These rules are found at IDAPA 37.01.01.¹

As set forth in Section E below, the materials that McConnell seeks to exclude meet the relevance standards found in the Idaho Rules of Evidence. But even if they do not, Rule 001.02 of the Department's procedural rules provide that "[t]his chapter contains the rules of procedure that govern contested case proceedings before the Department of Water Resources . . ." Rule 600 contains its own evaluation of evidence standard that applies to the Hearing Officer:

¹ Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

600. RULES OF EVIDENCE -- EVALUATION OF EVIDENCE (RULE 600).

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence. (3-20-20)T

Several points from this rule are pertinent. First, it expressly provides that the Hearing Officer is not bound by the Idaho Rules of Evidence. Where the *Motion* is based solely on the Idaho Rules of Evidence, which do not bind the Hearing Officer, the *Motion* should be denied on that basis alone.

Second, "[e]vidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." McConnell's attempts to exclude the information in Contor's reports is an attempt to frustrate a complete development of the record. Not only do these reports contain information that meets the Rule 600 standard, but they also contain information and evidence that will be beneficial for the Hearing Officer in rendering a decision in this matter as further described below.

Third, even if the evidence is irrelevant, the Hearing Officer is not mandated to exclude it. Rule 600 states that he "may" exclude it, which is a permissible standard. Not all evidence admitted in a hearing is utilized by a hearing officer to render a decision, but that does not mean it should be excluded before the hearing even starts. That is the entire point of a hearing—to collect evidence and information and then decide whether that information and evidence, when lined up with applicable legal authority, impacts or informs the Hearing Officer's decision. It is unknown to an applicant, protestant, or even a hearing officer what evidence may bear on a hearing officer's decision, and it is precisely for this reason that Department's rules provide a relaxed evidentiary standard for accepting evidence when compared to Idaho court proceedings.

And that relaxed evidentiary standard is the fourth point. In IDWR contested cases, the standard is that “evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.” For example, while the Idaho Rules of Evidence preclude hearsay, the IDWR procedural rules do not. A hearing officer may allow for the introduction of this evidence, even though the fact that it is hearsay may go to the *weight* of the evidence in the hearing officer’s consideration. But it is still of a type commonly relied upon by prudent persons, and for that reason, such evidence—even if prohibited by the Idaho Rules of Evidence—is admissible in an IDWR contested case. Contor’s reports meet Rule 600’s evidentiary standard.

Fifth and finally, Rule 600 provides that the “agency’s experience, technical competence and specialized knowledge may be used in the evaluation of evidence.” The Hearing Officer in this case has participated as a hearing officer in dozens of contested cases, including perhaps a dozen involving clients represented by Whittaker’s counsel. He clearly understands the matters he is to decide under Idaho Code § 42-222 and what evidence bears on each of the 42-222 criteria. Contor’s reports are not lengthy, and the attachments are primarily historical water right documents mostly found in IDWR’s backfiles. The Hearing Officer can filter through the information in Contor’s reports, and utilizing his experience, competence, and knowledge, determine whether the information bears on his decision or not.

In short, the Idaho Rules of Evidence do not bind the Hearing Officer, and as the only stated basis for the motion, McConnell is arguing for the application of an inapplicable legal standard to this proceeding. Based on the plain language of Rule 600 alone, the *Motion* must be denied. Furthermore, given the remaining language found in Rule 600, the *Motion* should be denied.

B. The plain language of Idaho Code § 42-222 allows a hearing officer to “examine all the evidence and available information.”

In this proceeding, McConnell is the applicant and Whittaker is a protestant. As an applicant seeking to amend a water right, he has the burden to prove all of the Idaho Code § 42-222 criteria (with the protestant sharing the local public interest burden of proof) as summarized in this standard IDWR letter:

ISSUES

Applications for transfer are filed for the purpose of changing a point of diversion, purpose of use, period of use or nature of use of all or part of a licensed, decreed or statutory water right. Section 42-222, Idaho Code, identifies the following potential issues that the department can consider in connection with an application for transfer:

1. Will the proposed transfer reduce the quantity of water under existing Water Rights?
2. Will the proposed transfer constitute an enlargement in use of the original right?
3. Will the proposed transfer be contrary to the conservation of water resources within the State of Idaho?
4. Will the proposed transfer conflict with the local public interest, where local public interest is defined as interests that the people in the area directly affected by a proposed water use and its potential effects on the public water source?
5. Will the proposed transfer adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates?
6. If the proposed transfer is for a municipal use, is it necessary to provide reasonably anticipated future needs for a municipal service area and is the planning horizon consistent with Sections 42-222 and 42-202B, Idaho Code?
7. Will the proposed transfer change the nature of use from an agricultural use, and would such a change significantly affect the agricultural base of the local area?

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, 3, 5, 6, 7, 8, and 9 above and must provide evidence for the department to evaluate these criteria.

The initial burden of proof on issue 4, if applicable, lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for these issues.

When a transfer applicant files a transfer, he or she opens the water right(s) described in the transfer to scrutiny on virtually all fronts, to the point that even water right forfeiture and abandonment can be adjudicated by an IDWR hearing officer because that is part and parcel to an

examination of “all evidence of whether the proposed transfer will injury other water rights” as described by the Idaho Supreme Court:

[T]he director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. . . . **The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right**, and evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited, is probative as to whether that transfer would injury other water rights.

Jenkins, v. State, Dep’t of Resources, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (emphasis added); see also *Sagewillow, Inc. v. Idaho Dep’t of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) (“[a]ny claim that the water right had been abandoned or forfeited in whole or in part by nonuse would be an issue raised either by the Department or a third party. Ordinarily, issues of forfeiture or abandonment are not adjudicated in a transfer proceeding, although they can be.”).

The bolding language from *Jenkins* is taken directly from Idaho Code § 42-222—the Hearing Officer is required to “examine all the evidence and available information.” (emphasis and underling added).

Contor’s reports are part of “all of the evidence and available information” and should be admitted at the hearing. McConnell asserts that “Whittaker is precluded from offering this evidence due to the fact that the SRBA partial decree for 74-157 does not describe the source as ‘East Springs’ and expressly lists the tributary as Lee Creek.” *Memorandum* at 3. In this contested case, McConnell is arguing that the Hearing Officer can only consider evidence contained on Whittaker’s partial decree for 74-157 in relation to Whittaker’s injury claims. However, arguments along the same lines were recently rejected by Judge Wildman in an appeal from a decision from Hearing Officer Cefalo. *Duffin v. IDWR*, Bingham County Case No. CV-06-20-1467 (docket available at <http://www.srba.state.id.us/A0080066XX.HTM>). In this case, Judge Wildman

addressed arguments that Hearing Officer Cefalo was precluded from looking at use of water (more specifically, lack of use of water) from Aberdeen-Springfield Canal Company shares that shared a place of use with a ground water right, WR 35-7667, even though there was no specific reference to Aberdeen-Springfield Canal Company (“ASCC”) water entitlements in the license for WR 35-7667 and water rights subject to the transfer did list any of ASCC’s decreed water rights. Judge Wildman held:

Idaho Code § 42-222(1) creates an affirmative duty on the part of the Director to “examine all the evidence and available information” when evaluating a proposed transfer. The Idaho Supreme Court has recognized this duty, stating: “the director, in deciding whether to approve the transfer, is statutorily required to examine all the available evidence and information.”⁶ *Barron*, 135 Idaho 414, 421, 18 P.3d 219, 226 (2001). In this case, that evidence and information includes the fact that the existing place of use is served by an overlapping water right. Therefore, the Court finds the Duffins’ argument to be contrary to the plain language of the ground water right itself, the plain language of Idaho Code § 42-222(1), and controlling case law. It follows the hearing officer did not err in considering the ASCC shares in his evaluation of the proposed transfer.

Memorandum Decision and Order, Case No. CV06-20-1467, at 8 (February 22, 2021). The current law in Idaho on this point is that the “plain language of Idaho Code § 42-222(1)” *requires* the Hearing Officer to “examine all the available evidence and information.” That evidence—not contained within the four corners of the water right description in a partial decree or license—included historic water supply and water use information. Contor’s reports provide precisely the same type of information and are within the spectrum of “all the available evidence and information” applicable to this matter. As explained in more detail below, but briefly stated here, Contor’s reports provide information on the watershed that McConnell’s rights are in, and on Whittaker’s water supply, water diversion structures, and water diversion practices that could be directly affected in the Hearing Officer approves this transfer (which proposes to add a diversion

point below the confluence of a tributary stream) without subordination or other limiting conditions.

Because the current state of Idaho law authorizes the Hearing Officer to consider evidence and information outside of the printed words on a partial decree, under both the plain language of Idaho Code § 42-222 and applicable Idaho cases, decree interpretation does not end the evidentiary inquiry in a transfer proceeding as McConnell advocates. The Hearing Officer not only should deny the *Motion*, but he should accept Contor's reports into evidence and consider the information in those reports in this matter. That does not mean this evidence has to rule the day in the Hearing Officer's forthcoming written decision in order to be admitted, but it certainly should be accepted into evidence and considered.

C. McConnell misapprehends the legal effect of accepting evidence into the record in a current contested case relative to a future contested case.

By including Contor's reports as part of their exhibits, McConnell accuses Whittaker of "attempting to backdoor the transfer process" and "padding the record for a future proceeding involving the Kauer Ditch." *Memorandum* at 3, 5. However, McConnell cites to not legal authority or IDAPA rule which provides that evidence introduced in one contested case is automatically admissible in a subsequent contested case before the Department. This is perhaps because no such legal authority or rule exists of which we are aware.

If Whittaker files a transfer application in the future, the determination of whether evidence submitted in this contested case for 84441 is admissible is subject to the issues present in the future contested case. The future hearing officer will decide if the evidence meets the standards of Rule 600 before it is admitted. Based on IDWR's procedural rules, there is no way to "backdoor" the transfer process or "pad" a record for a future transfer proceeding. McConnell's arguments have no merit.

D. Expert reports that are admissible in a contested case do not have to be prepared specifically for the contested case.

As an additional basis for McConnell's position to exclude Contor's reports, McConnell argues that "nowhere in the East Springs Report is there a discussion of McConnell, their water rights, or the transfer factors outlined in Idaho Code § 42-222 with a resulting opinion concerning injury[.]" and as a result, "the East Springs Report is non-responsive as to the question of injury." *Memorandum* at 4. Similar arguments were made for the West Springs Report. *Id.* at 5. The logical basis for McConnell's arguments is that only reports prepared specifically for the instant contested case are admissible. This argument advocates an extremely narrow view of admissible evidence that is contrary to Rule 600 and the plain language of Idaho Code § 42-222, as described above. (The current law in Idaho on this point is that the "plain language of Idaho Code § 42-222(1) is *required* to "examine **all** the available evidence and information." (emphasis added)). This narrow view of admissible expert information and/or reports has not been adopted by IDWR. Two recent examples from contested cases in Lemhi County confirm this.

First, in a proceeding involving application for permit no. 74-16187 (filed by Kurt and Janet Bird), the Hearing Officer relied extensively on a 2004 U.S. Bureau of Reclamation study titled *Instream Flow Assessment Big Timber Creek, Idaho* (referred to as the "USBR Study" in that proceeding), which summarized the results of a flow characterization study for Big Timber Creek where 74-16187 sought to appropriate water. *Order on Exceptions; Final Order* at 15-16, *In the Matter of Application for Permit No. 74-16187 in the Name of Kurt W. Bird or Janet E. Bird* (May 21, 2020). Based on information from the USBR Study, the Hearing Officer included an 18 cfs bypass flow condition on 74-16187 in order to approve the application with conditions, even though the protestants to this application wanted the application denied entirely.

The USBR Study was prepared in 2004, approximately 16 years before the hearing on Bird's application for 74-16187, and yet, not only was the USBR Study admissible, but it contained information and evidence the Hearing Officer relied upon to craft conditions limiting the exercise of 74-16187. Under McConnell's logic, this report would have been excluded because, to paraphrase McConnell, nowhere in the USBR Study is there a discussion of Whittaker's permit, his water rights, or the other factors outlined in Idaho Code § 42-203A(5) with a resulting opinion concerning injury." In the Bird matter, the Director did not adopt McConnell's narrow view. In the written decision after exceptions were filed, the Director held: "The Director determines the USBR Study is reliable, convincing scientific evidence establishing flow rates necessary to maintain anadromous fishery values in various reaches of Big Timber Creek." *Id.* at 4.

Second, on February 25, 2021, the Hearing Officer issued a *Preliminary Order Denying Application* for application for permit no. 74-16229 (in the name of Boyd Foster). 74-16229 sought to appropriate groundwater. Relative to the injury to water rights and local public interest criteria, the Hearing Officer primarily relied on three technical hydrologic documents: (1) Sherl L. Chapman Report from 1976—*Lemhi River Basin Geology and Hydrogeology and Irrigation Efficiency* (the "Chapman Report"); (2) *Hydrologic Consideration for the Proposed Finding of Water Rights in the Lemhi River Basin, Idaho* (Haws, et al., April 8, 1977) (the "Dye Test Report"); and (3) *Surface-Water/Ground-Water Relations in the Lemhi River Basin, East-Central Idaho*, United States Geological Survey, Mary M. Donato, 1998 (the "USGS Report").

These reports were not prepared specifically for Foster's application, but nevertheless, they were not only admissible, but they were relied upon and utilized by the Hearing Officer to establish the physical interaction between ground water and surface water flows, which served as a factual basis to deny the application. *Preliminary Order Denying Application* at 4, 6-7. This information

was relied upon even though the primary reason for preparation of the Dye Test Report and Chapman Report was to justify a higher “duty of water” in the proposed findings of fact for the Lemhi Decree. And, relative to the USGS Report, the most recent of the hydrologic reports relied upon in the Foster matter, the Hearing Officer still relied upon it even though the report itself acknowledged that more information was needed. (“Although this study gives some insight as to the complex interactions of ground and surface water in the basin, understanding the hydrologic system is still incomplete. Additional work, including geophysical studies to explore the three-dimensional shape of the aquifer, is needed.”). USGS Report at 19.

Just like the USBR Study in Bird, these three reports in the Foster matter were not prepared to address a future water right application proceeding, or to make an injury or non-injury determination. Rather, these studies contained information that the Hearing Officer gleaned from them to establish facts necessary for his evaluation to the pending contested case. This is the standard that IDWR has adopted, which is contrary to what McConnell is advocating for. Expert reports in a contested case do not have to be prepared specifically for the pending contested case to be admissible. Contor’s reports will be discussed in further detail below, but briefly, his East Springs and West Springs reports were prepared in response to a water right administrative matter in 2020 involving 74-157 which were provided to IDWR. Whittaker’s protest in this matter is to protect 74-157 from injury. They contain information and evidence that bear on the this contested case, even though they were not prepared specifically for it. This is entirely consistent with Rule 600. The Hearing Officer should reject McConnell’s narrow view of expert reports as it is contrary to Rule 600 and IDWR precedent.

E. Contor's Reports meet the relevancy standards of the Idaho Rules of Evidence.

In addition to, and/or in the alternative to the above, Contor's Reports meet the relevancy standards of the Idaho Rules of Evidence. The reports contain information on the Stroud Creek watershed and the diversion and delivery system of one of the protestants (Whittaker). These reports were generated in specific response to McConnell's demand for administration in 2020 that led to filing of not only the transfer at issue in this case, 84441, but a prior transfer by McConnell (transfer no. 84367) as well. The pending contested case is for a transfer, not a water right administration proceeding, but the historic administration of 74-157 on Stroud Creek relative to McConnell's water rights on Lee Creek is relevant to these proceedings because it informs an injury evaluation. McConnell even includes exhibits from this 2020 dispute as part of his exhibits. See Exhibits 3-5.

The Idaho Code § 42-222 evaluation criteria are incorporated from Idaho Code § 42-203A(5), the water right application statute. IDAPA 37.03.08 contains rules on new water right permit applications, and Rule 045 contains the following evaluation criteria for injury to existing water rights:

045. EVALUATION CRITERIA (RULE 45).

01. Criteria for Evaluating All Applications to Appropriate Water. The Director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions. (3-20-20)T

a. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if: (3-20-20)T

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less. (3-20-20)T

In this case, McConnell's proposed transfer has the potential to reduce the quantity of water available to Whittaker's 74-157 below "the historical amount beneficially used by the water right holder." Contor's springs reports describe Whittaker's diversion and delivery system that diverts

their water for beneficial use and describes how the water was distributed (including information on past diversion through the Kauer ditch), which is clearly relevant to the evaluation of injury. And remember, we are only talking about the *admissibility* of this evidence at this stage, not the persuasiveness or weight it will be given by the Hearing Officer. We recognize that the parties likely disagree on how this information should be utilized and whether it matters in relation to what is described in the relevant water rights, but that disagreement over the applicable law and how the facts should be applied is not grounds to deny Whittaker the ability to introduce evidence in support its protests in the first place. This is a transfer proceeding, and the nature of a transfer opens the rights proposed for amendment in the transfer to scrutiny of its historic use in relation to other water users. The fact that McConnell, nor his predecessors, have called for water for over a century from Whittaker's 74-157 until 2020 is certainly relevant to 84441 under the Idaho Rules of Evidence.

Additionally, based on the exhibits submitted by McConnell, it is further evident that a major issue in this case is where the current channel and confluence of Stroud Creek is in relation to McConnell's current point of diversion in Section 30. *See* Exhibits 1, 10, and 24. Based on the exhibits submitted by McConnell, including his expert report, they are relying upon USGS maps that depict the confluence upstream. Whittaker and others will testify that the current confluence is actually below McConnell's Section 30 diversion. Creek channels are natural and they can move because of natural processes, and it is critically relevant to have evidence presented on the issue of the channel's location and confluence. Contor's West Springs report contains his observations of where the original creek channel may have been through the Whittaker property below West Springs, and he concludes that prior to human intervention, the stream likely alternated between flowing northwest (above the confluence) and flowing northeast (below the confluence),

depending on the natural reworking of channels and depositions of materials each spring. Exhibit 153 at 11.

This information is relevant to this question because we anticipate that it will be argued that the Hearing Officer must rely upon historic maps rather than the current location of the creek to determine where the confluence is. Stroud Creek either migrated on its own (as Contor's report concludes), or what started as an artificially created channel became the stream channel. Our view is that the current channel is the legally recognized stream channel. If the channel that used to discharge water above McConnell's diversion is no longer there, then there is no longer a natural watercourse. In *Dayley v. City of Burley*, 96 Idaho 101, 805 P.2d 1073 (1974), the Idaho Supreme Court affirmed a finding that a creek bed no longer constituted a natural watercourse in a circumstance where no regular, non-surface waters had flowed down the creek bed. *Id.* at 103, 805 P.2d at 1075. Accordingly, even if the stream channel used to come in above McConnell's Section 30 diversion, it is no longer there, and is no longer a legally recognized watercourse.

Additionally, if the stream flow now goes through what was once could be an artificial channel and joins Lee Creek below the Section 30 diversion, this has now become the legally recognized stream channel because "[a] stream does not lose the attributes of a water course merely because a part of its channel may have been artificially created." *Poole v. Olaveson*, 82 Idaho 496, 503, 356 P.2d 61, 65 (1960) (citing to 1 KINNEY ON IRRIGATION AND WATER RIGHTS, p. 489; *Hornor v. City of Baxter Springs*, 116 Kan. 288, 226 P. 779; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 P. 147, 26 L.R.A. 425; *Scranton-Pascagoula Realty Co. v. City of Pascagoula*, 157 Miss. 498, 128 So. 73; *Chowchilla Farms v. Martin*, 219 Cal. 1, 25 P.2d 435).

Allowing a water user to move a diversion below the confluence of another tributary where he could call for water from junior water rights that the user didn't have the right to call for

previously is a classic example of injury to existing water rights. Not only is the hydrology of the Stroud Creek drainage and the historic diversion and utilization of water admissible and relevant to these proceedings, but we submit it is critical information. Information on these issues is in Contor's reports, which is relevant to the question of injury, and they should not be denied admission. This information can be used as a basis to either deny the transfer or approve the transfer upon conditions, including that McConnell's use of water under his water rights is subordinate to 74-157 and other water rights as a hearing officer may approve a transfer with conditions that would otherwise injure existing water rights. *See* Idaho Code § 42-222 ("The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, . . ."). Further, inclusion of such a condition would avoid future litigation over the Whittaker/Kauer agreement in district court, which is in the local public interest under Idaho Code § 42-222.

In addition to the foregoing, Tomchak argues in his pleading in support of the *Motion* that "diversion of water through the Kauer Ditch is not an issue in this proceeding." *Tomchak Notice* at 1. To respond to this statement, some clarification of Whittaker's position on the Kauer Ditch is necessary.

Whittaker's position is that the agreement with Kauer and its successors described in *Whittaker v. Kauer*, 78 Idaho 94, 98, 298 P.2d 745, 747-48 (1956), is not an agreement that the Hearing Officer can enforce, rule upon, or affect with his written decision. This is 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). In Whittaker's view, irrespective of what the decreed water right elements provide, the agreement memorialized and

described in the *Whittaker v. Kauer* case described above does not relieve the parties of their contractual obligations. Water users can agree (contract) to water distribution arrangements, such as rotation of water, and such agreements are enforceable. *See, e.g., State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039 (1911).

At the time of the *Whittaker* decision in 1954, McConnell's predecessor's water right decrees did not describe the Kauer Ditch as an authorized point of diversion, even though the agreement started in approximately 1912, but the agreement was still upheld by the Idaho Supreme Court with no direction or discussion about whether Kauer's water rights had or needed to be amended. Even in the Lemhi Adjudication, McConnell's predecessor's water rights did not claim the Kauer Ditch as a point of diversion or reference the agreement, and neither did McConnell's claims in the SRBA. But water was administered and delivered under 74-157 to Whittaker without incident consistent with this agreement that began over a century ago. It is Whittaker's position that McConnell and Whittaker remain bound by the contractual agreement, but any enforcement or dispute over that agreement must occur in district court, not in this water right transfer contested case.

Accordingly, in response to Tomchak's position, as described above, Whittaker's position is that the history of water distribution on Stroud Creek is relevant to these proceedings. To that extent, historic use of the Kauer Ditch *is* a topic of discussion at the hearing.

However, this *does not* mean that the Hearing Officer in this proceeding can, for example, (1) enforce the contract and force McConnell to divert water through the Kauer Ditch; (2) force McConnell to file a transfer or other filing to authorize use of the Kauer Ditch; or (3) declare that an easement exists for the Kauer Ditch. Whittaker is not asking the Hearing Officer to do any of these things. On these points, we agree with Tomchak that these matters are *not* at issue.

Whittaker's position is that this matter can be decided strictly on grounds of injury to existing water rights and local public interest. As described above, understanding the background of the Whittaker/Kauer agreement is relevant to this injury determination, and the information in Contor's reports on the Kauer ditch from Contor and from other sources (such as Tim Luke) are relevant and admissible.

Finally, the *Motion* requests the exclusion of striking of pages 1-8 of Contor's injury report (Exhibit 151) which addresses the question of whether 84441 was filed to correct an error in the SRBA process. But McConnell's own expert report alleges that 84441 was filed because "[t]he point of diversion was inadvertently omitted from water right claims filed in the Snake River Basin Adjudication (SRBA)." Exhibit 1 at 1. We presume 84441 is being characterized this way to downplay the significance of the transfer, and Whittaker has every right to seek admission of evidence related to that characterization. Ultimately this issue may not be critical to the Hearing Officer's decision in this matter, but again, we are at the *admissibility* stage of these proceedings. McConnell seeks to exclude directly responsive evidence from Whittaker on relevance grounds when McConnell evidence makes it relevant. McConnell's position on this issue is without merit. The entirety of Contor's injury report should be admitted, with one correction. The first 1/3 page of page 2 of Contor's injury report describes that one of the stated purposes of Transfer 84441 was that it was filed pursuant to Idaho Code § 42-221.O.8. The inclusion of this statement is the result of poor communication from Whittaker's counsel to Contor, as it was McConnell's *prior* transfer (84367) that was submitted on that basis, not 84441. The application documents speak for themselves, and 84441 was not submitted pursuant to Idaho Code § 42-221.O.8. We apologize for this error and leave it up the Hearing Officer on whether he elects to remove language on this point from the expert report or acknowledge the error on the record at the start of the hearing. As

to all other portions of this report, however, they are relevant and should not be excluded from the record in this matter.

II. CONCLUSION.

For the reasons set forth above, the *Motion* should be denied.

DATED this 20th day of April, 2021.

A handwritten signature in cursive script, reading "Robert L. Harris", positioned above a horizontal line.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 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: **WHITTAKER AND WHITTAKER TWO DOT RANCH
LLC'S MEMORANDUM IN OPPOSITION TO
MCCONNELL MOTION IN LIMINE AND/OR MOTION TO
STRIKE**

EMAIL TO: **James Cefalo**
Hearing Officer, Idaho Department of Water Resources
900 North Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Chris M. Bromley
MCHUGH BROMLEY PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cbromley@mchughbromley.com

☒ Mail
☐ Hand Delivery
☐ Facsimile
☒ Email

Rosalie Ericsson
3738 E. 38 N.
Rigby, ID 83442-5621
bericsson@depatco.com

☒ Mail
☐ Hand Delivery
☐ Facsimile
☐ Email

Steven L. Johnson
1019 Lee Creek Rd
Leadore, ID 83464-5011
Stevenjohnson01056@gmail.com

☒ Mail
☐ Hand Delivery
☐ Facsimile
☐ Email

SMITH 2P RANCH
c/o Shanna Foster
213 Grady Rd.
Leadore, ID 83464
shanudy@yahoo.com

☒ Mail
☐ Hand Delivery
☐ Facsimile
☐ Email

Kipp Manwaring
Manwaring Law Office, P.A

☐ Mail

2677 East 17th St., Suite 600
Idaho Falls, ID 83406
kipp@manwaringlaw.com

☐ Hand Delivery
☐ Facsimile
☒ Email

James A. Whittaker
P O Box 240
Leadore, ID 83464
fjwhitt@yahoo.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Email

WHITTAKER TWO DOT RANCH LLC
P O Box 177
Leadore, ID 83464-0240
twodotirrigation@gmail.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Email



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

G:\WPDATA\RLH\14100 Whittaker, James\06 Springs Matter\Hearing Documents\Whittaker Response Motions.docx