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Department of Water Resources
Eastern Region

CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
MCHUGH BROMLEY, PLLC
Attorneys at Law
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

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

**MCCONNELL MOTION
IN LIMINE AND/OR MOTION
TO STRIKE**

COMES NOW Bruce and Glenda McConnell ("McConnell") by and through their counsel of record, and pursuant to IDAPA 37.01.01.260, IDAPA 37.01.01.565, IDAPA 37.01.01.600, IRE 401, IRE 402, IRE 702, and IRE 704, hereby files this *Memorandum in Support* of McConnell's *Motion in Limine and/or Motion to Strike* as it relates to the three reports filed on behalf of James Whittaker and Whittaker Two Dot Ranch, LLC ("Whittaker"), identified as Exhibit Nos. 151, 152, and 153. Contemporaneously filed herewith is a Memorandum in Support. Oral argument is requested pursuant to IDAPA 37.01.01.563.

DATED this 9th day of April, 2021.



Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Bruce and Glenda McConnell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April, 2021, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by U.S. Mail and electronic mail:

James Cefalo Idaho Dept. of Water Res. 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718	Rosalie Ericsson 3738 E. 38 N. Rigby, ID 83442-5621	Rob Harris Holden Kidwell P.O. Box 50130 Idaho Falls, ID 83405-0130
Steven L. Johnson 1019 Lee Creek Rd. Leadore, ID 83464-5011	Smith 2P Ranch c/o Shanna Foster 213 Grady Rd. Leadore, ID 83464	Kipp L. Manwaring Manwaring Law Office 2677 E. 17 th St., Ste. 600 Idaho Falls, ID 83406


Chris. M. Bromley

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COMES NOW Bruce and Glenda McConnell ("McConnell") by and through their counsel of record, and hereby file this *Memorandum in Support of McConnell's Motion in Limine and/or Motion to Strike* ("Motion") as it relates to the three reports filed on behalf of James Whittaker and Whittaker Two Dot Ranch, LLC ("Whittaker"), identified as Exhibit Nos. 151, 152, 153. The Motion is filed to prevent Whittaker and/or his experts from testifying or proffering evidence concerning: (1) the tributary associated with water right no. 74-157 as anything other than Lee Creek, *see* Exhibit 152; (2) the use of what is referred to as the Kauer Ditch, *see* Exhibit 153; and (3) that the McConnell transfer was filed pursuant to I.C. § 42-221.O.8, *see* Exhibit 151 at 1-8. As such, Exhibits 152 and 153 should be stricken in their entirety, and pages 1-8 of Exhibit 151 should be stricken as well.

I. STANDARD OF REVIEW

A motion in limine is a request for a protective order to limit or exclude evidence at trial and applies only prospectively, the purpose of this type of motion is to avoid injection into trial matters which are irrelevant, inadmissible and prejudicial. *State v. Wallmuller*, 125 Idaho 196, 198, 868 P.2d 524, 526 (Ct. App. 1994). A decision to grant or deny a motion in limine is left to the broad discretion of the trial court. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005). Similarly, the trial court is afforded broad discretion in admitting expert evidence and its judgment will not be disturbed on appeal absent a clear abuse of that discretion. *Chapman v. Chapman*, 147 Idaho 756, 760, 215 P.3d 476, 480 (2009); *Polk v. Larrabee*, 135 Idaho 303, 314, 17 P.3d 247, 258 (2000).

“When a ‘trial court is being asked to admit or to strike evidence, the initial question . . . [is]: Is the evidence relevant?’ *State v. Hocker*, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct.App. 1989). ‘Evidence that tends to prove the existence of a fact of consequence in the action, and has any tendency to make the existence of a fact more probable than it would be without the evidence, is relevant.’ *Id.* ; I.R.E 401. ‘All relevant evidence is admissible . . . [e]vidence which is not relevant is not admissible.’ I.R.E. 402. Relevant evidence can be excluded ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . . waste of time, or needless presentation of cumulative evidence.’ I.R.E. 403.” *Elliott v. Murdock*, 161 Idaho 281, 287, 385 P.3d 459, 465 (2016).

II. ARGUMENT

On April 7, 2021, and pursuant to the Hearing Officer’s *Notice of Hearing and Scheduling Order* (February 19, 2021), counsel for Whittaker filed *Whittaker Witness and Exhibit List* (“Whittaker Exhibit List”). Based on review of the Whittaker Exhibit List,

McConnell seeks to strike Exhibit Nos. 152 and 153 in their entirety, and pages 1-8 of Exhibit No. 151, and to prevent Whittaker and/or his experts from testifying as to the contents.

A. Ex. 152 -- Water Right 74-157 Is Tributary To Lee Creek

Exhibit 152 is a report signed by Bryce Contor titled *Field Observation of "East Springs" Water Source of Idaho Water Right 74-157, Lemhi County Idaho* ("East Springs Report"). The East Springs Report purports to establish:

Idaho Water right 74-157 is decree in the Snake River Basin Adjudication with a water source of "Springs" tributary to "Lee Creek." Physically, the springs are configured in two groups, known by the water-right holder as the "East Springs" and the "West Springs." . . . This report summarizes my findings that if not diverted, the water from the East Springs would flow to the northeast and would not contribute to the flows in Lee Creek.

East Springs Report at 1 (emphasis added).

In late 2020, Whittaker attempted to remove the tributary designation to water right 74-157 by filing T. 84508. Exhibit 15. The transfer was protested by McConnell, Exhibit 16, and withdrawn by Whittaker on February 8, 2021, Exhibit 18. On February 18, 2021, IDWR acknowledged Whittaker's withdrawal. Exhibit 19.

Having withdrawn the transfer from consideration, Whittaker is now attempting to backdoor the transfer process by seeking to introduce evidence into this proceeding, in the form of the East Springs Report, to establish "East Springs" is not tributary to Lee Creek. 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. Exhibit 14. Whittaker is bound by the plain language of his SRBA partial decree which clearly lists the source of water right 74-157 as nothing more than "Springs" tributary to "Lee Creek." *Id.* "[T]his Court utilizes the same rules of interpretation applicable to contracts. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree

from the plain and ordinary meaning of its words.” *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) (internal citations omitted). To the extent Whittaker wishes to change the tributary designation, he should either a motion with the SRBA court or another transfer application with IDWR so that notice is given to all water users of Whittaker’s intentions and how alteration of water right 74-157 may injure existing water rights.

Moreover, 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. Therefore, the East Springs Report is non-responsive as to the question of injury. Proffering evidence of water right 74-157 not being tributary to Lee Creek through Exhibit 152 is entirely irrelevant, inadmissible, and should be stricken from this proceeding involving T. 84441. Mr. Contor should further be limited in testimony to concerns of injury as it relates to the transfer at hand, not padding the record for a future proceeding with IDWR and/or a district court involving the tributary source of water right 74-157.

B. Ex. 153 -- The Transfer At Hand Does Not Involve The Kauer Ditch

Exhibit 153 is a report signed by Bryce Contor titled *Field Observation of Lee Creek, a Ditch Known Locally as “Kauer Ditch,” and the “West Springs” Water Source of Idaho Water Right 74-157, Lemhi County Idaho* (“Kauer Ditch Report”). The Kauer Ditch Report purports to establish that the Kauer Ditch was historically used for conveyance of water: “I conclude that for decades, the Kauer Ditch had been diverting much or most of Lee Creek flows during high-flow periods.” *Kauer Ditch Report* at 12.

The transfer at issue in this proceeding seeks to add a point of diversion from Lee Creek in T. 16 N., R. 25 E., S. 20, SWSW. Exhibit 8 at 1. By its express terms, the transfer at hand does not involve the Kauer Ditch. Any testimony elicited from Mr. Contor should be limited to

the standards associated with Idaho Code § 42-222, none of which include why an applicant for transfer chose not to include a point of diversion.

Identical to the flaws with Exhibit 152, nowhere in the Kauer Ditch 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. Therefore, the Kauer Ditch Report is non-responsive as to the question of injury. Proffering evidence of “use” or “non-use” of the Kauer Ditch through Exhibit 153 is entirely irrelevant, inadmissible, and should be stricken from this proceeding involving T. 84441. Mr. Contor should be limited in testimony to concerns of injury as it relates to the transfer at hand, not padding the record for a future proceeding involving the Kauer Ditch.

C. Ex. 151 – The Transfer At Hand Was Not Filed Pursuant To I.C. § 42-221.O.8

Exhibit 151 is a report signed by Bryce Contor and Roger Warner titled *Injury Analysis of Application for Transfer of Water Right – Point(s) of Diversion 84441* (“Injury Report”).

When contrasted with Exhibit 152 and Exhibit 153, pages 8-11 of the Injury Report clearly show Whittaker understands the factors associated with I.C. § 42-222, applies those factors to the transfer at hand, with a resulting opinion that approval of T. 84441 will injure Whittaker’s water rights. While McConnell stringently disagrees that injury will result, *see* Exhibit 1, the majority of pages 8-11 of the Injury Report constitute the type of evidence that can be considered by the Hearing Officer.

Where the Injury Report goes clearly amiss, however, is in its belief that T. 84441 was filed pursuant to “Idaho Code § 42-221.O.8.” *Injury Report* at 2. Whittaker is simply wrong. Had the transfer been filed pursuant to that statute, a fee of \$350.00 would have been received by IDWR for the seven (7) water rights that are the subject of the transfer. I.C. § 42-221.O.8 (“the

total filing fee shall be \$50.00 per water right) (emphasis added).¹ With a filing fee of \$1,700 paid by McConnell, the transfer was definitively not filed pursuant to I.C. § 42-221.O.8.² Therefore, pages 1-8 of the Injury Report are irrelevant, inadmissible, and should be stricken from this proceeding involving T. 84441. Mr. Contor and/or Mr. Warner should be further prevented from testifying as to pages 1-8 of the Injury Report due to the fact that those pages are premised on an incorrect conclusion that the transfer was filed pursuant to I.C. § 42-221.O.8 when it most certainly was not.

III. CONCLUSION

Based on the foregoing, Exhibit 152 and Exhibit 153 are irrelevant and inadmissible in their entirety and should be stricken from the record, and Mr. Contor should be prevented from testifying to their contents. Pages 1-8 of Exhibit 151 are similarly irrelevant and inadmissible, with Mr. Contor and/or Mr. Warner prevented from testifying to the contents of those pages.

DATED this 9th day of April, 2021.



Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Bruce and Glenda McConnell

¹ T. 84441 was filed as to seven (7) of McConnell's water rights: 74-361, 74-362, 74-364, 74-365, 74-367, and 74-368. Had the transfer been filed pursuant to I.C. § 42-221.O.8, the filing fee would have been \$350.00 (7 water rights x \$50 per water right).

² The IDWR fee schedule for transfers is located here: [Fee Schedules: Application for Transfer or Exchange Fee Schedule | 42-221 | idwr.idaho.gov](https://www.idwr.idaho.gov/IDWR/IDWR%20Fees/IDWR%20Fees%20Schedule%2042-221.pdf). A filing fee of \$1,700.00 was paid because the cumulative diversion rate of the seven rights that are the subject of the transfer is 15.2 cfs. Exhibit 8 at 1, line 4.

CERTIFICATE OF SERVICE

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