

second point of diversion on Lee Creek located approximately 1,600 feet downstream of the Upper Diversion. *Id.* at 42. The Court will refer to the second point of diversion as the “Lower Diversion.” Diversion of water at the Lower Diversion is unauthorized under the McConnells’ water rights. *Id.* at 47-60; 506. In 2020, the McConnells were subject to a Department enforcement action whereby the local watermaster directed them to cease diversions at the Lower Diversion on the basis they were unauthorized. *Id.* at 47-60; 506. The McConnells acquiesced. *Id.* The McConnells thereafter filed the subject transfer application seeking to add the Lower Diversion as an additional authorized point of diversion under each of their water rights. *Id.* at 41-44.

James Whittaker and Whittaker Two Dot Ranch LLC (collectively “Whittaker”) protested the application.¹ *Id.* at 76 & 100. Whittaker holds water rights authorizing the diversion of water from Stroud Creek, a tributary to Lee Creek, as well as from certain unnamed springs tributary to Lee Creek for irrigation purposes.² *Id.* at 487-495. An administrative hearing on the application was held before the Department on April 21 and 22, 2021. *Tr.*, at 3. Department employee James Cefalo acted as hearing officer. *Id.* The hearing officer issued a *Preliminary Order* approving the transfer subject to certain conditions. *R.*, 182. Whittaker sought reconsideration. *Id.* at 223. The hearing officer issued an *Order* denying the *Petition for Reconsideration* on June 21, 2021. *Id.* at 271. Whittaker also petitioned to re-open the administrative record to take additional evidence. *Id.* at 244. The hearing officer denied the request on June 21, 2021. *Id.* at 266. Whittaker then filed *Exceptions* to the *Preliminary Order* with the Director. *Id.* at 284. The Director issued his *Final Order* approving the transfer subject to certain conditions on November 2, 2021.³ *Id.* at 348. Whittaker filed a *Petition* seeking judicial review of the *Final Order* on November 30, 2021. The *Petition* asserts the *Final Order* is contrary to law and requests that it be set aside and remanded. The McConnells were

¹ The application to transfer was also protested by David Tomchak, Smith 2P Ranch, Steven Johnson, and Rosalie Ericsson. *R.*, 81-93, 96-98, 102-103, 104-105. While those protestants participated in the underlying administrative proceeding, they are not parties to this judicial review proceeding.

² Stroud Creek is also known as the Left Fork of Lee Creek.

³ The conditions imposed by the hearing officer, and subsequently the Director, on the transfer approval are not at issue in this proceeding. They include a requirement that the Upper Diversion and Lower Diversion be “equipped with lockable controlling works and proper measuring devices.” *R.*, 195. They also include the requirement that the “diversion of water at the Lower Diversion is subordinated to water right 74-1831.” *Id.* Water right 74-1831 is held by Steven Johnson, who is not a party to this proceeding.

subsequently permitted to appear as Intervenors. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petition* was held before the Court on June 16, 2022.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency’s decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency’s decision. *Payette River Property Owners Assn. v. Board of Comm’rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

An application to transfer is evaluated against the criteria set forth in Idaho Code § 42-222(1). The Director shall approve an application for transfer, in whole, in part, or upon conditions, provided:

[N]o other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code

I.C. § 42-222(1). At issue is whether water right 74-157 held by Whittaker will be injured as a result of the proposed transfer. The Director found it will not. R., 346. Whittaker challenges that finding on judicial review.

A. The Director's finding that the proposed transfer will not injure water right 74-157 is set aside and remanded.

The McConnells own seven water rights that are the subject of the transfer application.⁴ Those rights authorize the McConnells to divert 15.2 cfs from Lee Creek at the Upper Diversion for the irrigation of 547.4 acres. All seven rights are located downstream from, and are senior in priority to, Whittaker water right 74-157. Water right 74-157 authorizes the diversion of 3.2 cfs from certain unnamed springs tributary to Lee Creek for irrigation and stockwater purposes. *Id.* at 484. Whittaker argues that approval of the proposed transfer will result in injury on the basis it will give the McConnells administrative access to water right 74-157 which it did not previously have.

i. History of Lee Creek and its tributaries.

Consideration of injury requires a review of the history of Lee Creek and its tributaries. Stroud Creek is a tributary of Lee Creek. Historically, Stroud Creek flowed into Lee Creek at a point located upstream of the McConnells' Upper Diversion. That changed in 1932, when an earthen structure was constructed by Whittaker's predecessor that captures the entire flow of Stroud Creek. That earthen structure is now known as the "West Springs Ditch." As a result of the West Springs Ditch, the historic flow of Stroud Creek was altered. Stroud Creek water which once flowed into Lee Creek above the McConnells' Upper Diversion now flows via the West Springs Ditch into Lee Creek at a location below that diversion.

That the flow of Stroud Creek was altered in 1932 was recognized by the Idaho Supreme Court in *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956). In that case, the Court reviewed Lee Creek and its tributaries. The review was done in the context of a quiet title action brought by Floyd Whittaker and his wife against the McConnells' predecessors-in-interest (ie., John and Fern Kauer) and the local watermaster. In that case, the local watermaster cut the West Springs Ditch in 1954 at the insistence of the McConnells' predecessors to provide them delivery of

⁴ The seven rights are 74-361, 74-362, 74-363, 74-364, 74-365, 74-367, & 74-368.

certain spring waters via the historic flow of Stroud Creek. *Whittaker*, 78 Idaho at 98, 298 P.2d at 747. When the watermaster cut the West Springs Ditch he temporarily restored the historic flow of water past the Ditch, which was then diverted “some 650 feet below” by the McConnells’ predecessors. *Id.* Whittaker’s predecessor sued the watermaster and the McConnells’ predecessors in a quiet title action to determine ownership of the disputed waters. *Id.* at 95, 298 P.2d at 746.

In the course of its decision, the Court reviewed the history of the West Springs Ditch and its alteration of the flow of Stroud Creek. It found the West Springs Ditch was constructed in 1932 to alter the flow of Stroud Creek pursuant to agreement of the parties:

The trial court found that in the year 1932, respondents entered into an oral contract with appellants’ predecessors (and other interested parties) . . . whereby the point of diversion of waters of [Stroud Creek], decreed to and used upon lands, including the lands now occupied by appellants, situate northerly and below all of respondents’ lands, was changed from a point situate on the main channel of Lee Creek to a point situate on [Stroud Creek] near the Southwest corner of Section 31, Township 16 North, Range 25 E.B.M., which point of diversion is situate about one and one-fourth miles southwesterly and above the West Springs; and whereby, in consideration of a grant by John Whittaker, father of respondent Floyd Whittaker, of a right of way for a ditch over certain of the John Whittaker lands . . . through which to convey from such point of diversion on [Stroud Creek] to the Right Fork of Lee Creek the said decreed waters. The other parties, including appellants’ predecessors, permitted respondents to remove a flume which had been used continuously since some time prior to the entry of the July 1, 1912 decree to transmit the waters of the West Springs across the Left Fork at a point situate in the described quarter section where the springs are situate, and to substitute in place of said flume an earthen dam where the flume theretofore had been, *thereby to capture all waters found flowing in the creek at that place.*

The court further found that pursuant to said contract the dam was constructed, maintained and used by respondents at all times since 1932 continuously and without interruption until the year 1954 when, at appellants’ instance, the water master cut the dam, which allowed the waters to flow down the channel but nevertheless into a diversion ditch of respondents situate some 650 feet below and northeasterly from said dam.

The court further found that pursuant to such contract the ditch referred to was constructed in and upon the right of way granted therefor over the aforementioned John Whittaker lands and that the ditch has been used continuously by appellants’ predecessors and by appellants (and other interested parties) ever since the year 1932, without interference, for the conveyance of said decreed waters from [Stroud Creek] to the Right Fork, and then down to and through the main channel of Lee

Creek, to the lands now owned by appellants, to which the waters were decreed by the July 1, 1912 decree

Id. at 97-98, 298 P.2d at 747 (emphasis in original). The Court's decision establishes that the McConnells' predecessors agreed to alter the flow of Shroud Creek via the construction of the West Springs Ditch. *Id.* In exchange, the McConnells' predecessors acquired a right of way for a ditch to traverse Whittaker's land conveying water from Stroud Creek to the Right Fork of Lee Creek. *Id.* That ditch, which was constructed in 1932, is now known as the "Kauer Ditch."

The Court ultimately quieted title in the disputed water to Whittaker's predecessors, in effect concluding that the watermaster erred in cutting the West Springs Ditch. *Id.* at 99, 298 P.2d at 748. In so doing, the Court again emphasized the agreement of the parties:

The findings of the trial court, hereinbefore referred to, show that the waters of the West Springs have been used by respondents' predecessors and by respondents continuously since some time prior to the entry of the July 1, 1912 decree; also that commencing with the year 1932, pursuant to and upon consummation of the contract referred to, the predecessors of appellants allowed respondents to capture all the waters of [Stroud Creek] found flowing in the Creek at the place where, pursuant to the contract respondents constructed said dam below appellants' newly designated upstream point of diversion, and such waters so captured by respondents included the waters of the West Springs.

The conclusion is inescapable also, that appellants' predecessors had knowledge of respondents' use of the waters of the West Springs, inasmuch as appellants' predecessors consented to the damming of [Stroud Creek] by respondents at the place where, since prior to or about the year 1912, the flume had conveyed the waters of the springs across the Left Fork; also that, beginning with the year 1932 and continuously ever since for some 22 years, until during the year 1954, appellants' predecessors knew that respondents, without interruption or molestation, had used the waters of the springs pursuant to the status which resulted upon consummation of the contract which the trial court set out in its findings.

Id. at 98, 298 P.2d at 747-748.

As a result of the 1932 agreement and the Court's decision in *Whittaker*, the West Springs Ditch remains in place today and continues to alter the flow of Stroud Creek as it has done since 1932.⁵ The result is that Stroud Creek flows into Lee Creek below the McConnells' Upper Diversion. With respect to the Kauer Ditch, the McConnells and their predecessors enjoyed use of that ditch from 1932 until 2014. R., 191. That the McConnells' use of the Kauer

⁵ With the exception of the brief span of time when the local watermaster cut the ditch in 1954.

Ditch ceased in 2014 was not the result of any action taken by Whittaker. Rather, the McConnells were subject to a Department enforcement action in 2014 whereby the local watermaster directed them to cease Kauer Ditch diversions on the basis they were unauthorized.⁶ The McConnells acquiesced and ceased diversions via the Kauer Ditch in 2014.

ii. The record establishes that Stroud Creek presently flows into Lee Creek below the McConnells' Upper Diversion.

Injury to water right 74-157 turns on whether Stroud Creek flows into Lee Creek upstream or downstream of the McConnells' Upper Diversion. R., 188. If Stroud Creek flows into Lee Creek upstream of the Upper Diversion, then adding a second point of diversion at the Lower Diversion will have no impact upon the administrative relationship between the McConnells' senior water rights and Whittaker water right 74-157. Therefore, there would be no injury. However, if Stroud Creek flows into Lee Creek downstream of the Upper Diversion, then the administrative relationship between the McConnells' senior water rights and Whittaker water right 74-157 will be changed as a result of the proposed transfer. In that scenario, the transfer will provide the McConnells with administrative access to water right 74-157 which they did not previously have. Namely, the transfer will allow them to use their senior rights to call water right 74-157 in times of shortage, resulting in injury to water right 74-157.

The record establishes that Stroud Creek presently flows into Lee Creek below the McConnells' Upper Diversion. Jordan Whittaker, David Tomchak, and the current watermaster for Water District 74Z, Merritt Udy, all testified that Stroud Creek flows into Lee Creek below the Upper Diversion. *Tr.*, 332-333; 597; 281. Bruce McConnell likewise testified that Stroud Creek flows into Lee Creek below the Upper Diversion:

Q: Okay. In your -- the questioning from Mr. Bromley, I believe I heard you say that Stroud Creek comes into Lee Creek above both your diversion points. Did I understand your testimony correctly?

A: I don't think -- Stroud Creek comes in kind of in between them, you know, and -- at present day. You know, what -- what -- I have never -- I had never spent that much time in that creek until last summer. So year, at the present time Stroud Creek comes in real close, comes in below my upper diversion.

⁶ This enforcement action as well as a second enforcement action against the McConnells will be addressed further herein.

Q: And is that based upon your own observation?

A: Yes, that's what -- yeah.

Q: So you would agree that right now it comes in below your upper diversion point?

A: Yes.

Tr., 72. Therefore, the present flow of Stroud Creek is undisputed – it flows into Lee Creek below the McConnells' Upper Diversion. That such is the case is consistent with the Idaho Supreme Court's decision in *Whittaker*, wherein the Court found that the West Springs Ditch has altered the flow of Stroud Creek since 1932. It is also consistent with the 1932 agreement relied upon in *Whittaker*, wherein the McConnells' predecessors agreed to alter the flow of Stroud Creek via construction of the West Springs Ditch.

The Director recognizes that Stroud Creek presently flows into Lee Creek below the McConnells' Upper Diversion. Notwithstanding, he does not base his injury analysis on that reality. Instead, he bases his analysis on the conception that Stroud Creek would presently flow into Lee Creek above the Upper Diversion but for the construction of the West Springs Ditch:

The hearing officer concluded the stream channel of Stroud Creek has been intercepted by Whittaker's West Springs Ditch. This unauthorized diversion has dewatered the historic Stroud Creek stream channel. But for the Whittaker's unauthorized diversion at the West Springs Ditch, Stroud Creek would contain continuously flowing water in-season and result in water flowing into Lee Creek above McConnell's authorized diversion.

R., 347.

The Director's finding in this respect is based on circumstances that do not exist. The West Springs Ditch has altered the flow of Stroud Creek since 1932.⁷ The McConnells'

⁷ The Director implies the West Springs Ditch is unauthorized. Whittaker disagrees and maintains that the West Springs Ditch is an authorized alteration to the flow of Stroud Creek. As far as the Court is aware, there has never been a determination that the 1932 alteration of the flow of Stroud Creek via the West Springs Ditch is unauthorized. The record establishes the West Springs Ditch has been in place since 1932 and has altered the flow of Stroud Creek continuously since that time, save a brief period of time in 1954 when the local watermaster cut the Ditch. In *Whittaker*, the Court in effect held the watermaster erred in cutting the West Springs Ditch and relied upon the parties' agreement to alter the flow of Stroud Creek in making its decision. The Court in that case did not find the West Springs Ditch to be unauthorized. The Court also notes that although the Department commenced enforcement actions against the McConnells with respect to the Kauer Ditch and the Lower Diversion, no such enforcement action has been commenced by the Department in relation to the West Springs Ditch. To the contrary, the record establishes the West Springs Ditch remains in place today and continues to alter the flow of Stroud Creek

predecessors agreed to that alteration pursuant to the 1932 agreement. Their agreement was given in exchange for a right of way to locate the Kauer Ditch on land owned by Whittaker. The effect of the 1932 agreement was that the McConnells' predecessors gave up the ability to have water delivered to their senior rights via the historic flow of Stroud Creek. In exchange, they acquired the ability to have water delivered to their senior rights via two alternative routes. First, water could and was delivered to those rights via the Kauer Ditch. This occurred from 1932 until 2014. Second, water could and was delivered to those rights via the altered flow of Stroud Creek by way of their Lower Diversion. This occurred until 2020. Under this agreed upon arrangement, the priority of the McConnells' senior rights was protected via these two alternative routes, despite the alterations to the flow of Stroud Creek resulting from the West Springs Ditch.

As a result of the way the McConnells claimed their water rights in the Snake River Basin Adjudication ("SRBA"), they lost the ability to have water delivered via these two alternative routes. This is because the McConnells failed to claim the Kauer Ditch and/or the Lower Diversion as authorized points of diversions for their water rights in that adjudication. Instead, they claimed, and their water rights were decreed with, the Upper Diversion as the sole authorized point of diversion. As a result, the McConnells were subject to two Department enforcement actions whereby the local watermaster directed them to cease diversions at both the Lower Diversion and at the Kauer Ditch based on determinations those diversions were unauthorized. The McConnells did not challenge those determinations.

The Court finds that based on the circumstances as they exist following the SRBA, the proposed transfer would injure Whittaker's water right 74-157. It would permit the McConnells to have administrative access to that right; access they otherwise lack as a result of their failure to claim the Kauer Ditch and/or the Lower Diversion in the SRBA and the resulting enforcement actions by the Department. Whittaker should not be required to restore the original flow of Stroud Creek, thereby causing significant disruption to a system that has been in place since 1932 based on the agreement of the McConnells' predecessors, because the McConnells failed to claim the two alternative routes of delivery in the SRBA. As noted by the Court in *Whittaker*, "it is inescapable" that the McConnells' predecessors had knowledge of, and consented to, the

as it has for 90 years. At oral argument, in response to questioning by the Court, counsel responded that Whittaker received a notice of violation for failure to have a measuring device for springs flowing into the West Springs Ditch. However, no violation has issued related to the authorization of the West Springs Ditch. The Court notes that legal status of the West Springs Ditch is not before the Court in this proceeding.

alteration of the flow of Stroud Creek via the West Springs Ditch. *Whittaker*, 78 Idaho at 98, 298 P.2d at 748. The record also establishes that for 90 years neither the McConnells, nor their predecessors, have asserted any claim regarding the legal validity of the 1932 alteration of Stroud Creek. It follows the *Final Order* must be set aside and remanded for further proceedings. In so remanding, the Court notes that any injury to Whittaker water right 74-147 can be addressed by a subordination condition subordinating the use of the McConnells' Lower Diversion to that right.

iii. The SRBA did not supercede the 1932 agreement as to the alteration of the flow of Stroud Creek.

The McConnells argue that the 1932 agreement was superceded by the SRBA. The Court disagrees. The McConnells rely on *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017). In that case, the City of Blackfoot relied upon an agreement between it and other water users to argue that its decreed water right authorized the diversion of water for recharge purposes. *Id.* at 308-309, 396 P.3d at 1190-1191. The Idaho Supreme Court disagreed, holding that the plain language of the subject decree did not include recharge as an authorized use under the purpose of use element. *Id.* The Court held that to allow the referenced agreement “to enlarge or otherwise alter the clearly decreed elements of” the water right would constitute an impermissible collateral attack on the decree. *Id.* Further, that if the City of Blackfoot believed recharge should have been authorized under the right, it was required to raise that issue in the SRBA. *Id.*

The 1932 agreement is distinguishable from the agreement addressed in *City of Blackfoot*. While the agreement in *City of Blackfoot* addressed a defining element of the water right (i.e., purpose of use), the 1932 agreement is an agreement to alter the flow of Stroud Creek. The flow of Stroud Creek is not an element of a water right. As such, issues related to the flow of Stroud Creek were not raised or addressed in the SRBA. Therefore, the Court finds that the SRBA did not supercede the 1932 agreement as to the accord to alter the flow of Stroud Creek.

iv. The Court need not reach Whittaker's equity arguments.

Whittaker argues that equity should apply to preclude the McConnells from taking a position in this proceeding inconsistent with the previous agreement by their predecessors to

alter the flow of Stroud Creek. Since the Court finds the *Final Order* must be set aside and remanded for the reasons set forth above, it need not reach the issue of equity.

v. Prejudice to substantial rights.

Water rights are substantial rights as they are real property rights under Idaho law. I.C. § 55-101. The *Final Order* prejudices Whittaker's substantial rights in water right 74-157 by providing the McConnells administrative access to that right which they lacked without the proposed transfer. Any prejudice to Whittaker's substantial rights can be addressed on remand by a subordination condition subordinating the use of the McConnells' Lower Diversion to water right 74-157.

B. Attorney fees.

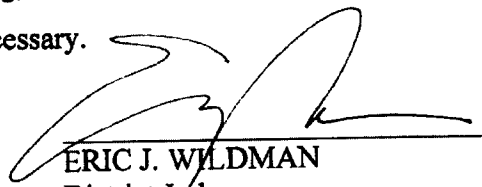
The McConnells seek an award of attorney fees under Idaho Code § 12-117(1). That code section provides for fees to the prevailing party where the Court finds "that the nonprevailing party acted without a reasonable basis in fact or law." The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the McConnells are not a prevailing party on appeal. Therefore, an award of attorney fees under Idaho Code § 12-117 is unwarranted.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the *Final Order* is set aside and remanded for further proceedings as necessary.

Dated July 18, 2022


ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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Clerk of the Court



By Jana Eagle
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Dated: 7/18/2022 04:32 PM