

SUMMARY STATEMENT

Whittaker v. Idaho Department of Water Resources
Docket No. 50000-2022

The Idaho Supreme Court reversed the district court's memorandum decision setting aside the Idaho Department of Water Resources' ("IDWR") order approving a water right transfer application.

Bruce and Glenda McConnell filed a water right transfer application with the IDWR, seeking a second point of diversion on Lee Creek. James Whittaker and Whittaker Two Dot Ranch LLC (collectively "Whittaker"), the McConnells' upstream neighbor, opposed the application. Whittaker argued the transfer would injure them by giving the McConnells administrative access to Whittaker's water right 74-157.

An IDWR hearing officer determined that the critical question in determining whether the transfer would injure Whittaker's water right was the location of the confluence of Stroud Creek and Porcupine Creek, two tributary streams that flow together to form Lee Creek. The hearing officer determined the historic confluence of Stroud Creek and Porcupine Creek has been dry since 1932 due to an unauthorized diversion of Stroud Creek by Whittaker's West Springs Ditch. The hearing officer additionally found that the diversion by the West Springs Ditch resulted in the modern confluence of Stroud Creek and Porcupine Creek being located downstream of the historic confluence. Because the West Springs Ditch was an unauthorized diversion, the hearing officer used the historic confluence to determine the transfer would not injure Whittaker and approved the transfer application. The IDWR Director then issued a final order approving the application. Whittaker thereafter filed a petition for judicial review.

The district court set aside the decision and remanded the matter for further proceedings, holding that the Director erred by using the historic confluence instead of the modern confluence to evaluate the transfer application. The district court concluded that the legality of the diversion by the West Springs Ditch was not at issue before the Director. Relying on the Idaho Supreme Court's 1956 decision in *Whittaker v. Kauer*, the district court concluded that the flow of Stroud Creek was altered by an agreement between the McConnells' predecessor and Whittaker's predecessor to construct the West Springs Ditch. 78 Idaho 94, 97, 298 P.2d 745, 747 (1956). The district court concluded that the alteration of the stream flow was not an element of Whittaker's water right and therefore the agreement was not superseded by the Snake River Basin Adjudication. Consequently, the district court held that the transfer application could only be approved subject to a condition subordinating the use of the McConnells' point of diversion to Whittaker's water right.

The McConnells appealed, arguing that the district court erred by substituting its own findings of fact concerning the modern confluence. Additionally, the McConnells argued that the West Springs Ditch is an unauthorized diversion that Whittaker failed to claim in the Snake River Basin Adjudication and therefore the historic confluence is the proper confluence to use for the injury analysis.

The Idaho Supreme Court held that the district court erred in using the modern confluence for the injury analysis and reversed the district court's decision. The Court held that (1) the district court did not substitute its own factual findings for those of the agency because the determination of which confluence to use in the injury analysis is a question of law; (2) the West Springs Ditch is a diversion of Stroud Creek rather than an alteration of the flow of Stroud Creek; and (3) the

West Springs Ditch is an unauthorized diversion because it was not claimed in the Snake River Basin Adjudication and therefore the historic confluence is the proper confluence to use for the injury analysis.

This summary constitutes no part of the opinion of the Court, but has been prepared by court staff for the convenience of the public.