

LAWRENCE G. WASDEN
ATTORNEY GENERAL

DARRELL G. EARLY
Chief of Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
LACEY RAMMELL-O'BRIEN, ISB No. 8201
MARK CECCHINI-BEAVER, ISB No. 9297
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
lacey.rammell-obrien@idwr.idaho.gov
mark.cecchini-beaver@idwr.idaho.gov

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI**

THE IDAHO DEPARTMENT OF
WATER RESOURCES,

Plaintiff,

vs.

FLOYD JAMES WHITTAKER and
JORDAN WHITTAKER, as individuals;
WHITTAKER TWO DOT RANCH, LLC,
an Idaho limited liability company; and
WHITTAKER TWO DOT LAND, LLC,
an Idaho limited liability company,

Defendants.

CV30-22-0169
Case No. _____

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
MANDATORY PRELIMINARY
INJUNCTION**

Plaintiff, the Idaho Department of Water Resources (the "Department"), through its
counsel of record, submits the following Memorandum in Support of Plaintiff's Motion for

Mandatory Preliminary Injunction pursuant to I.R.C.P. 65 and 7(b). This Motion is supported by the contemporaneously filed Affidavit of David T. Graybill, Affidavit of Merritt D. Udy, Declaration of Bruce McConnell, and Declaration of Lacey B. Rammell-O'Brien.

I. INTRODUCTION

The Department moves for a mandatory preliminary injunction requiring the Defendants to remove or modify the current In-stream Headgate at the Whittaker Diversion on Stroud Creek and replace with an open-top check structure determined suitable by the Director, at a location approved by the Department, as well as install suitable controlling works and measuring devices to the satisfaction of the Director, at locations approved by the Department, at or near the diversion points authorized by water right 74-157, in accordance with Idaho Code § 42-701.

II. STANDARD OF REVIEW

In accordance with Idaho Rule of Civil Procedure 65(e)(1), grounds for a preliminary injunction include: “when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.” The court may issue a preliminary injunction only on notice to the adverse party. I.R.C.P. 65(a)(1). A mandatory preliminary injunction “is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.” *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997) (citing *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984)). “The granting or refusal of an injunction is a matter resting largely in the trial court's

discretion.” *Munden v. Bannock Cnty.*, 169 Idaho 818, 504 P.3d 354, 363 (2022) (quoting *Conley v. Whittlesey*, 133 Idaho 265, 273, 985 P.2d 1127, 1135 (1999)).

III. BACKGROUND

This matter concerns water rights in the Stroud Creek drainage in Lemhi County. Stroud Creek is tributary to Lee Creek, which is a tributary to the Lemhi River. Stroud Creek is sometimes referred to as Left Fork Lee Creek. Stroud Creek flows approximately north to its confluence with Lee Creek. The Lee Creek drainage, including Stroud Creek, is part of Administrative Basin 74. The Lee Creek drainage, including Stroud Creek, is part of Water District 74Z (“WD74Z”). Merritt Udy is the current watermaster for WD74Z. WD74Z is a subdistrict of Water District 170 (“WD170”). David Graybill is the current watermaster for WD170. Pursuant to Idaho Code § 42-602, watermaster Graybill and watermaster Udy are responsible for the distribution of water within WD74Z and the Director of the Department is responsible for supervising the watermasters.

Water rights in the Lee Creek Drainage were adjudicated in the Snake River Basin Adjudication (“SRBA”). The SRBA is a general stream adjudication filed in the Fifth District Court in Twin Falls, Idaho. Defendant Floyd James Whittaker is the owner of four decreed water rights relevant to this Motion: 74-15788, 74-369, 74-1136, 74-157:

- On January 23, 2009, the presiding judge of the SRBA issued a Partial Decree for water right no. 74-15788 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 1.97 cubic feet per second (“cfs”) for irrigation out of Stroud Creek, tributary to Lee Creek in Lemhi County. Water right no. 74-15788 has a priority date of 12/31/1982. Rammell-O’Brien Decl. Ex. 1.

- On February 19, 2009, the presiding judge of the SRBA issued a Partial Decree for water right no. 74-369 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 2.40 cfs for irrigation out of Left Fork Lee Creek, tributary to Lee Creek in Lemhi County. Water right no. 74-369 has a priority date of 05/12/1883. Rammell-O'Brien Decl. Ex. 2.
- Also on February 19, 2009, the presiding judge of SRBA issued a Partial Decree for water right no. 74-1136 to F. James Whittaker and Paula J. Whittaker, 83 Big Eight Mile Rd., PO Box 240, Leadore, ID 83464, for 2 cfs for irrigation out of Left Fork Lee Creek, tributary to Lee Creek. Water right no. 74-1136 has a priority date of 06/28/1912. Rammell-O'Brien Decl. Ex. 3.
- On April 4, 2012, the presiding judge of the SRBA issued a Partial Decree for water right no. 74-157 to F. James Whittaker and Paula J. Whittaker, PO Box 240, Leadore, ID 83464, for 3.2 cfs for irrigation and stockwater from springs tributary to Lee Creek in Lemhi County. Water right no. 74-157 has a priority date of 4/1/1916. Rammell-O'Brien Decl. Ex. 4.

The Final Unified Decree for the SRBA was entered by the presiding SRBA District Judge, Eric Wildman, on August 26, 2014. The Decree is conclusive as to the nature and extent of the water rights listed above. I.C. § 42-1420(1).

Defendant Whittaker Two Dot Land, LLC is the listed owner of the parcels of land where the above-listed water rights are put to use. Defendant Floyd James Whittaker is the manager of Two Dot Land, LLC, and Defendant Jordan Whittaker is a member of Two Dot Land, LLC. Defendant Jordan Whittaker is the manager of Defendant Whittaker Two Dot Ranch, LLC, and largely manages the day-to-day operations at the ranch. Whittaker

Two Dot Ranch, LLC uses and benefits from the water diverted under water rights owned by Defendant Floyd James Whittaker.

The Department has filed a Complaint seeking an order from the Court requiring the Defendants to either remove or modify the current In-stream Headgate at the Whittaker Diversion on Stroud Creek and replace it with an open-top check structure determined suitable to the Director and approved by the Department, as well as install suitable controlling works and measuring devices to the satisfaction of the Director, at locations approved by the Department, at or near the diversion points authorized by water right 74-157, in accordance with Idaho Code § 42-701. The Complaint also seeks civil penalties against any and all Defendants and an award of attorney fees, costs, and reasonable expenses.

IV. ARGUMENT

A. A mandatory preliminary injunction is justified under the circumstances and the nature of the relief sought.

A preliminary injunction can take the form of either a prohibitory injunction or a mandatory injunction. 42 Am. Jur. 2d *Injunctions* § 9 (2022). A prohibitory injunction is an “injunction that forbids or restrains an act.” *Injunction*, *Black's Law Dictionary* (11th ed. 2019). This is the most common type of injunction. *Id.* A mandatory injunction is “An injunction that orders an affirmative act or mandates a specified course of conduct.” *Id.*

While the plain language of Idaho Rule of Civil Procedure 65(a)(1) uses prohibitory terms, the Idaho Supreme Court has recognized the appropriateness of mandatory injunctions. Under the standard recognized by the Idaho Supreme Court in *Brady v. City of Homedale* and *Harris v. Cassia County*, a preliminary mandatory

injunction may be granted in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal. 130 Idaho at 572, 944 P.2d at 707; 106 Idaho at 518, 681 P.2d at 993. Therefore, to receive a preliminary mandatory injunction in this case, the Department must establish that it has a clear right to require the Defendants to remove, modify, and install controlling works and measuring devices at or near their points of diversion, as well as establish that irreparable injury will follow if the Defendants are not compelled to remove, modify, and install controlling works and measuring devices at or near the points of diversion identified in the Complaint.

B. The Department is entitled to a mandatory preliminary injunction against the Defendants because the Department has a very clear right and obligation to administer the public waters of the state and has the very clear right to require Defendants to install and maintain controlling works and measuring devices.

The Department has a very clear right to administer water in priority to users, with authority stemming from the Idaho Constitution and confirmed throughout the Idaho Statutes. Article XV § 3 of the Idaho Constitution and Idaho Code § 42-106 establish the foundation of Idaho’s prior appropriation doctrine. Article XV § 3 of the Idaho Constitution states that “[p]riority of appropriation shall give the better right as between those using the water.” Idaho Code § 42-106 states that “[a]s between appropriators, the first in time is first in right.” Idaho Code § 42-602 requires that “[t]he director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine.” The Director has a “clear legal duty” to distribute water pursuant to Idaho Code § 42-602. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), abrogated on other grounds by *Rincover v. State, Dep’t of Fin., Sec. Bureau*, 132 Idaho 547, 976 P.2d 473 (1999) (abrogating the standard of review for an award of attorney fees).

Idaho Code § 42-701(1) requires all appropriators or users of any public waters of the state of Idaho to maintain to the satisfaction of the director suitable headgates and controlling works at the point where the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge and shall also be of such construction as to regulate the flow of water at the diversion point. I.C. § 42-701(1). Each appropriator shall construct and maintain, when required by the Director of the Department, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or Department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water. *Id.* Plans for such headgates, rating flumes or other measuring devices shall be approved by the Department. *Id.*

On September 28, 2018, the Department issued its Final Order *In re Requiring Controlling Works and Measuring Devices on Surface and Ground Water Diversion in Administrative Basin 74*. Rammell-O'Brien Decl. Ex. 12. The Final Order requires the installation of measuring devices and controlling works on water diversions in the Lemhi River Basin prior to the commencement of the 2019 irrigation season. Its authority is grounded in Idaho Code § 42-701. The Final Order applies to all water rights in Administrative Basin 74, including the four water rights decreed to Defendant Floyd James Whittaker. A copy of the Final Order was served by United States Mail on F. James and Paula Whittaker at the mailing address on their decrees. Rammell-O'Brien Decl. ¶ 6.

On June 23, 2020, the Department sent a letter to Jordan Whittaker and F. James Whittaker summarizing a June 10, 2020 meeting between Defendant Jordan Whittaker and watermaster Udy to discuss the installation of controlling works and measuring devices on points of diversion owned by Defendant Floyd James Whittaker. Rammell-O'Brien Decl. Ex. 13. The letter stated that "[t]he watermaster must have adequate control of the diversions, including the ability to close the ditches and allow the spring flows to return to Lee Creek when the right is not in priority." *Id.* The letter concluded, "Pursuant to Idaho Code § 42-701 and the Lemhi Basin Measurement Order, you are hereby required to install and maintain suitable and lockable controlling works, and standard measuring devices on both the East and West springs within 30 days of the date of this letter." *Id.*

On April 6, 2022, watermaster Graybill and watermaster Udy conducted a field examination and found that controlling works and standard measuring devices had not been installed as required. Graybill Aff. ¶¶ 11–18, Ex. 3; Udy Aff. ¶¶ 6–8.

On April 21, 2022, the Department sent a letter to James Whittaker, with copies sent to Defendant Jordan Whittaker and Defendant Whittaker Two Dot Land, summarizing the findings of the field examination as well as the requirements of the Final Order. Rammell-O'Brien Decl. Ex. 14. The letter documents direct communication about the issue with Defendant Jordan Whittaker. *Id.* The letter outlines three actions required of the Defendants by the Department:

1. Cease diverting the waters of Stroud Creek below the authorized diversion point for water rights 74-369, 74-1136, and 74-15788, near the Ericsson corral. The Department's field observations confirm that the Stroud Creek channel exists above and below the Whittaker in-channel headgate.

- 2. Remove or modify the in-channel headgate noted in no.1 above to allow all Stroud Creek water in excess of authorized diversions under water rights 74-369, 74-1136, and 74-15788, to flow downstream to the confluence with Lee Creek.** An open-top check structure in Stroud Creek, designed to direct water through the new headgate on the existing ditch may be determined suitable.
- 3. Install suitable headgates or controlling works and measuring devices at or near both diversion points authorized by water right 74-157. The WD74Z watermaster must have the ability to deliver spring waters, tributary to Lee Creek, downstream to satisfy senior water rights.**

Id. (emphasis added) (italics omitted). The letter provides until May 5, 2022, for the Defendants to comply with these three requirements. *Id.*

On May 18, 2022, watermaster Udy and watermaster Graybill visited Defendant Two Dot Ranch and found there had not been any changes or visible attempts by Defendants to get into compliance. Graybill Aff. ¶ 24; Udy Aff. ¶ 11. On June 4, 2022, watermaster Udy and watermaster Graybill visited Defendant Two Dot Ranch and again found that there had not been any changes or visible attempts by Defendants to get into compliance. Graybill Aff. ¶ 25, Udy Aff. ¶ 12. At that time, watermasters Graybill and Udy had a conversation with both Floyd James Whittaker and Jordan Whittaker about their ditch system. Graybill Aff. ¶ 26.

As discussed above, the Department has authority under the Idaho Constitution and the Idaho Code to administer water rights and Idaho Code § 42-701 gives authority to the Department to require the installation and maintenance of controlling works and measuring devices. Idaho Code § 42-701 requires appropriators or users of any public waters within the state of Idaho to install and maintain appropriate controlling works and measuring devices.

The In-stream Headgate is located on the northwest side of the channel and controls the flow of Stroud Creek downstream of the Whittaker Diversion. Graybill Aff. ¶¶ 13–14. The design of the In-stream Headgate creates an undue burden on the watermaster to regulate the water into the Defendants’ ditch system. Graybill Aff. Ex. 14. The West Springs Ditch and the East Springs Ditch still do not have suitable controlling works and measuring devices. Graybill Aff. ¶ 18. Suitable controlling works are those that meet the satisfaction of the Director. I.C. § 42-701(1). Suitable measuring devices are those that assist the watermaster or Department in determining the amount of water that may be diverted. *Id.*

Defendants have been given multiple warnings that they needed to remove the In-stream Headgate, install works, and generally bring their diversions into compliance with the statute and the Director’s Final Order. They have repeatedly failed to meet their obligations as appropriators and users of public waters in Administrative Basin 74. Defendants’ refusal to comply with the statute and the Director’s Final Order is interfering with the Department’s clear and undisputable statutory charge to distribute the water according to prior appropriation.

C. The Department is entitled to a mandatory preliminary injunction against the Defendants because Defendants are causing irreparable injury to the Department and to senior water users on the Lee Creek drainage.

A mandatory preliminary injunction against Defendants is appropriate in this case because the Department is statutorily required to deliver and administer water in accordance with the prior appropriation doctrine. When water cannot be delivered in priority, those users with senior rights suffer injury. As the Idaho Supreme Court stated, “Priority in time is an essential part of western water law and to diminish one's priority

works an undeniable injury to that water right holder.” *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (quoting *Jenkins v. Idaho Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982)).

The Department is statutorily charged with the enforcement of actions to remedy designated violations. I.C. § 42-1701B(1). The Director is authorized to seek a preliminary or permanent injunction, or both, to restrain “any person from violating or attempting to violate: (a) Those provisions of law relating to all aspects of the appropriation of water, distribution of water, headgates and measuring devices.” Idaho Code § 42-1805(9). “The object of injunctive relief is to prevent injury, threatened and probable to result, unless interrupted.” *Gem State Roofing, Inc. v. United Components, Inc.*, 168 Idaho 820, 834, 488 P.3d 488, 502 (2021) (quoting *Miller v. Ririe Joint Sch. Dist. No. 252*, 132 Idaho 385, 388, 973 P.2d 156, 159 (1999)). “Further, ‘injunctive relief looks to the future, and is designed to deter rather than punish[.]’” *Id.* (quoting *Wright & Miller, Federal Practice and Procedure: Civil* § 2942 (footnotes omitted in original)).

The Department encourages voluntary compliance, which it promotes through education and outreach on laws and rules pertaining to the Department’s programs. When trying to determine if a formal action is required, the Department considers factors like severity of the violations and previous warnings to the user about the violations. The Department is indisputably authorized to require the proper installation and maintenance of suitable devices as is deemed necessary for the proper administration of water.

In *Musser v. Higginson*, the Idaho Supreme Court stated in no uncertain terms that “[t]he director’s duty pursuant to Idaho Code § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director’s discretion, the director

has the duty to distribute water.” 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), *abrogated on other grounds by Rincover v. State, Dep't of Fin., Sec. Bureau*, 132 Idaho 547, 976 P.2d 473 (1999). In the *Musser* case, the plaintiffs demanded delivery of their water from their watermaster. *Id.*, 125 Idaho at 394, 871 P.2d at 811. The watermaster relayed the demand to Director Higginson, who denied the demand for water. *Id.* A month later, the plaintiffs made a similar demand on the director, who denied on the grounds that “the director is not authorized to direct the watermaster to conjunctively administer ground and surface water within Water District 36A short of a formal hydrologic determination that such conjunctive management is appropriate.” *Id.* The plaintiffs then sought a writ of mandate to compel the director to deliver their full decreed water rights and to control the distribution of water from the aquifer according to priority date. *Id.* On a motion to dismiss, the trial court concluded that the director and the Department owes the plaintiffs “a clear legal duty to distribute water under the prior appropriation doctrine” and issued a writ of mandate compelling the director to comply with Idaho Code § 42-602. *Id.* On appeal, the Idaho Supreme Court affirmed the trial court’s writ of mandate compelling the director to immediately comply with Idaho Code § 42-602. The Idaho Supreme Court concluded that the “director’s duty to distribute water pursuant to this statute is a clear legal duty”. *Id.*, 125 Idaho at 395, 871 P.2d at 812.

Here, the Defendants are preventing the Director from executing his duty to deliver water in accordance with the prior appropriation doctrine. It causes irreparable harm to the Department because it undermines the Department’s efforts to fairly and efficiently administer water to all users in the State and prevents the Director from meeting his constitutional and statutory obligations. To allow Defendants to continue to disregard their

obligations under the Idaho Code and the Idaho Constitution sends a message to other users that the administration of water by the Department is secondary to the unilateral personal opinions of a particular user. The issuance of a mandatory preliminary injunction against the Defendants prevents irreparable injury to the Department by serving as a deterrent to other users who might otherwise act in violation of Idaho law.

There is a quantity of water in the channel that exceeds the quantity of water Defendants are entitled to divert. The unsuitable design of the In-stream Headgate interferes and prevents the Department's administration of water to other users on the drainage. Watermaster Udy has stated that he tried to send water in 2021 down the Stroud Creek drainage below Ericsson's Corral and that the water did not reach Lee Creek and was largely intercepted by the Whittakers' ditch system. Graybill Aff. ¶ 23; Udy Aff ¶ 9. The In-stream Headgate creates an irreparable injury to the watermasters' clear legal duty to regulate the water flowing into Defendant's ditch system. Graybill Aff. ¶ 14. Likewise, the West Springs Ditch is capturing Stroud Creek water that should be delivered to senior users in priority. The Defendants are prohibiting the delivery of Stroud Creek and spring water to senior users due to a lack of adequate headgates or controlling works and measuring devices, particularly at the West Springs Ditch. Udy Aff. ¶ 10. The East Springs Ditch does not have a suitable measuring device or means to control the water. Graybill Aff. ¶ 18. Taken together, the Defendants' failure to comply with their statutory obligations has created the impossible task for the watermaster to get water downstream to users with rights senior to the Defendants without suitable control structures and measuring devices.

One example of such injury is to Bruce and Glenda McConnell, who have reached out to the Department multiple times in their attempts have their water delivered to them according to their priority dates. Graybill Aff. Exs. 1–2; Rammell-O’Brien Decl. Ex. 15. The McConnells’ water rights were also decreed by the Court in the SRBA. McConnell Decl. ¶ 5; Rammell-O’Brien Decl. ¶ 4. The water rights appurtenant to their ranch are nos. 74-361 (priority date 05/12/1883), 74-362 (priority date 05/01/1906), 74-363 (priority date 05/12/1883), 74-364 (priority date 06/01/1900), 74-365 (05/12/1883), 74-367 (priority date 05/12/1883), and 74-368 (priority date 11/05/1909). *Id.* The water rights decreed to the McConnells are senior to all but one of the Defendants’ water rights at issue in this action.¹ Rammell-O’Brien Decl. Exs. 5–11. These senior rights are being intercepted by the Defendants. McConnell Decl. ¶ 9. Because they are downstream of the Defendants’ diversions on the mainstem of Lee Creek, the McConnells’ delivery needs are not being met. *Id.*

This year, the McConnells were forced to reduce their herd size from 200 to 84 cow/calf pairs due to their senior water rights not being delivered to them. McConnell Decl. ¶ 4. They were not able to apply fertilizer to all their fields this year because of the lack of water being delivered down Lee Creek. *Id.* ¶ 12. This has diminished the amount of hay they could have grown and cut from an estimated 250 tons of hay to 140 tons of hay. *Id.* Likewise, the McConnells could not irrigate all of their pastures, nor could they rent pasture to others to use. *Id.* ¶ 13. If they are not able to receive their water on time,

¹ Defendants’ water right no. 74-369 shares a date of priority with the McConnells’ water right nos. 74-361, 74-363, 74-365, and 74-367. The shared date of priority is 05/12/1883.

they will lose the crops they irrigate, lose feed for their cattle, and risk their entire ranching operation. *Id.* ¶ 15.

Under Idaho law, Defendants are not allowed to use the public waters of the State except in accordance with the laws of the State. I.C. § 42-201(2). Defendants are not allowed to divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so. *Id.* Senior users, like the McConnells, are entitled to receive their decreed water rights delivered in priority. It is untenable to ask the McConnells to go without water for the remainder of the summer and autumn months when Defendants could fix the problem by installing the works already required by Idaho Code § 42-701 and the Final Order.


V. CONCLUSION

The Department's right to administer the public waters of the State of Idaho according to its Constitutional and statutory charge is very clear. For a watermaster to not be able to deliver water in priority causes real, irreparable injury with serious consequences for the Department and senior users. In this case, Defendants have been given multiple opportunities to comply with their undisputed obligations found in Idaho Code § 42-701 and have repeatedly failed to do so. Defendants' ongoing statutory violations are severe and are actively harming other users on the Lee Creek drainage.

For the foregoing reasons, Plaintiff respectfully requests that the Court issue a mandatory preliminary injunction requiring Defendants remove or modify the current In-stream Headgate at the Whittaker Diversion on Stroud Creek and replace it with an open-top check structure determined suitable by the Director, at a location approved by the Department, as well as install suitable controlling works and measuring devices to the

satisfaction of the Director, at locations approved by the Department, at or near the diversion points authorized by water right 74-157, in accordance with Idaho Code § 42-701.

Dated the 15th day of July 2022.


LACEY RAMMELL-O'BRIEN
Deputy Attorney General
Idaho Department of Water Resources