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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, v. 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.	Case No. CV30-22-0169 **OBJECTION TO MOTION FOR MANDATORY PRELIMINARY INJUNCTION**

Floyd James Whittaker, Jordan Whittaker, Whittaker Two Dot Ranch, LLC, and Whittaker Two Dot Land, LLC (collectively "Defendants"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., submit this *Objection to Motion for Mandatory Preliminary Injunction* pursuant to Rules 65 and 7(b)(3)(B) of the Idaho Rules of Civil Procedure. This objection is in response to the Idaho Department of Water Resources' ("Department," "IDWR",

or "Plaintiff") *Motion for Mandatory Preliminary Injunction* (the "*Motion*") and *Memorandum in Support of Plaintiff's Motion for Mandatory Preliminary Injunction* ("*Memorandum in Support*") filed on July 15, 2022. A hearing on the motion is scheduled for August 16, 2022, at 2:00 p.m. This motion and associated memorandum are supported by the *Declaration of Bryce A. Contor* ("*Contor Declaration*") submitted contemporaneously herewith.

I. LEGAL STANDARD

IDWR's *Motion* is based on I.R.C.P. 65 and asks for a preliminary injunction. *Motion* at 2. However, the substance of the Motion is to *compel* action from Whittaker, action typically sought through a writ of mandamus filed under Idaho Code § 7-302, not to *prohibit* actions by Whittaker, which is typically sought through a preliminary injunction. Instead, IDWR styles its preliminary injunction as a "mandatory preliminary injunction" that compels action. However, as discussed below, Idaho does not recognize preliminary injunctions that compel action, and IDWR's citation to the cases of *Brady v. City of Homedale*, 130 Idaho 569, 944 P.2d 704 (1997) and *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984) are unpersuasive.

Concerning preliminary injunctions, "[t]he granting or refusal of an injunction is a matter resting largely in the trial court's discretion." *Munden v. Bannock Cty.*, 504 P.3d 354, 363 (2022) (quoting *Conley v. Whittlesey*, 133 Idaho 265, 273, 985 P.2d 1127, 1135 (1999); *see also Brady v. City of Homedale*, 130 Idaho 569, 572-73, 944 P.2d 704, 707-08 (1997) (citing to *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984) ("Whether to grant or deny a preliminary injunction is a matter for the discretion of the trial court."). Under Idaho law, "[a] 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.'" *Munden*, 504 P.3d at 365 (quoting *Brady*, 130 Idaho at 572, 944 P.2d at 707).

"One who seeks an injunction has the burden of proving a right thereto, . . ." *Harris*, 106 Idaho at 518, 681 P.2d at 993. Further, "[t]he substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt. *Id*. (quoting *First National Bank & Trust Co. v. Federal Reserve Bank*, 495 F.Supp. 154 (W.D. Mich. 1980). "Preliminary injunctions are designed to protect clearly established rights from imminent or continuous violation during litigation." *Gem State Roofing, Inc. v. United Components, Inc.*, 168 Idaho 820, 834, 488 P.3d 488, 502 (2021). Concerning preliminary injunctions, the plain language of I.R.C.P. 65 is to prohibit acts, not compel acts. This is evident in the five described cases described in I.R.C.P. 65(e).

Finally, movants in litigation that seek a preliminary injunction are generally required to give security if a preliminary injunction is issued under I.R.C.P. 65(e). However, the Department is exempt from this requirement to give security under this rule as a political subdivision of the State of Idaho, and as a result, the Court should exercise additional caution when considering the Department's *Motion*.

II. FACTUAL BACKGROUND

The following factual background concerning this case is set forth in the factual background section of *Defendants' Memorandum in Support of Motion to Dismiss* at 2-11, but is repeated here.

This lawsuit concerns a water law matter. It involves a unique set of background facts currently subject to pending litigation commenced in 2021 in Lemhi County District court before Judge Eric Wildman of the Fifth Judicial District of the State of Idaho. It is before Judge Wildman by reassignment because of the Idaho Supreme Court's Administrative Order issued on December 9, 2009, which provides that "all petitions for judicial review of any decision regarding

administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." Judge Wildman is generally referred to as Idaho's "water judge" and the adjudication court over which he presides as Idaho's "water court." *See* http://www.srba.state.id.us/ (Idaho Water Adjudications website with Judge Wildman described as the Presiding Judge of Idaho Water Adjudications under Adjudication Court Staff).

The case pending before Judge Wildman is Lemhi County Case No. CV30-21-304. It is a judicial review proceeding of an underlying administrative appeal filed pursuant to Idaho Code § 67-5270(3). The case concerns an appeal of IDWR Director Gary Spackman's *Order on Exceptions; Final Order Approving Transfer* (dated November 2, 2021) (the "*Order*") which upheld two decisions issued in a contested case for a water rights transfer before the Department (filed by Bruce and Glenda McConnell) by IDWR Hearing Officer James Cefalo (the *Preliminary Order Denying Petitions for Reconsideration* and *Order Denying Petition to Re-Open Hearing and Petition for Site Visit* both dated June 21, 2021). In addition to the docket found in iCourt, a docket of the pleadings filed in this case is found on the Idaho Water Adjudications court website here: http://www.srba.state.id.us/LEMHI00304.htm.

To avoid any confusion between the two Lemhi County cases referred to herein, Case No. CV30-21-340 before Judge Eric J. Wildman is referred to herein as the "Wildman Matter," and Case No. CV30-22-0169 before Judge Stevan A. Thompson is referred to herein as the "Thompson Matter."

Judge Wildman issued a *Memorandum Decision and Order* and associated *Judgment* on July 18, 2022, copies of which are attached for the convenience of the court to the *Harris Declaration* as Exhibit 1 and Exhibit 2, respectively. Oral argument was held in the Wildman

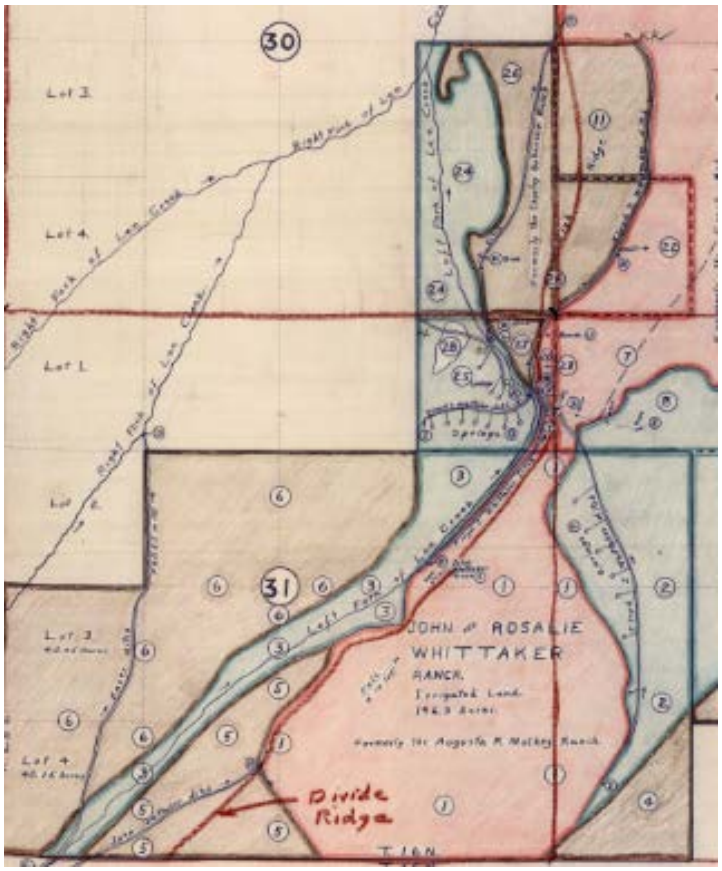
Matter on June 16, 2022. *Memorandum Decision and Order* at 3. As described in these documents, Judge Wildman set aside the IDWR Director's *Order* and remanded the matter for further proceedings because the *Order*—which approved McConnell's transfer application—was contrary to Idaho law as it would injure Whittaker's water right, Water Right No. 74-157 (hereinafter "74-157"). This water right authorizes Whittaker to divert up to 3.2 cfs from two spring complexes known as "West Springs" and "East Springs."

Judge Wildman was clear in his *Memorandum Decision and Order* that "[a]ny 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." *Memorandum Decision and Order* at 11. The Department's *Order* actually did subordinate use of the McConnells' Lower Diversion to another water right owned by Steven Johnson (Water Right No. 74-1831), but unfairly did not similarly subordinate such use by McConnell to Whittaker's 74-157. In its decisions, the Department attempted to introduce new law and analysis that Judge Wildman aptly described as a "conception . . . based on circumstances that do not exist." *Id*. at 8. Judge Wildman was correct; nevertheless, perhaps sensing that its arguments were not persuasive before Judge Wildman, IDWR decided to pursue a new strategy and proceed on another legal front by initiating the Thompson Matter on July 15, 2022, while the Wildman Matter was under advisement and before the *Memorandum Decision and Order* was issued on July 18, 2022.

In the Department's crosshairs is a holding from an Idaho Supreme Court decision that has not been overruled, *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956). The Department actions evidence a clear intent to disrupt the historic plumbing in place in the Stroud Creek drainage. The Floyd J. Whittaker in this Idaho Supreme Court case is a direct ancestor to the Floyd J. Whittaker

in both the Wildman Matter and Thompson Matter. The Kauers in this same case (John and Fern Kauer) are predecessors in interest to the property now owned by Bruce and Glenda McConnell.

In very broad terms, this 1956 case upheld the legality of an agreement to alter the historic flow of Stroud Creek by constructing the West Springs Ditch (to capture spring water under Whittaker's 74-157 that originally crossed the Stroud Creek channel through an above-ground flume) across the Stroud Creek channel to convey spring water and excess Stroud Creek water in exchange for an easement to construct the "Kauer Ditch" that diverts water from Stroud Creek upstream of the West Springs Ditch and delivers the water into Lee Creek, the stream where Kauer's water rights are authorized to divert. This agreement was also upheld and respected in the Wildman Matter. *Memorandum Decision and Order* at 6. A map generated in 1954 at the time of the original dispute depicting the features at issue is contained in the record of the Wildman Matter, is attached to the *Harris Declaration* as Exhibit 3, but with the relevant map portion and map legend provided here:


30
Lot 3
Lot 4
Lot 1
Lot 2
31
Lot 3
Lot 4
JOHN & ROSALIE
WHITTAKER
RANCH
Divide
Ridge
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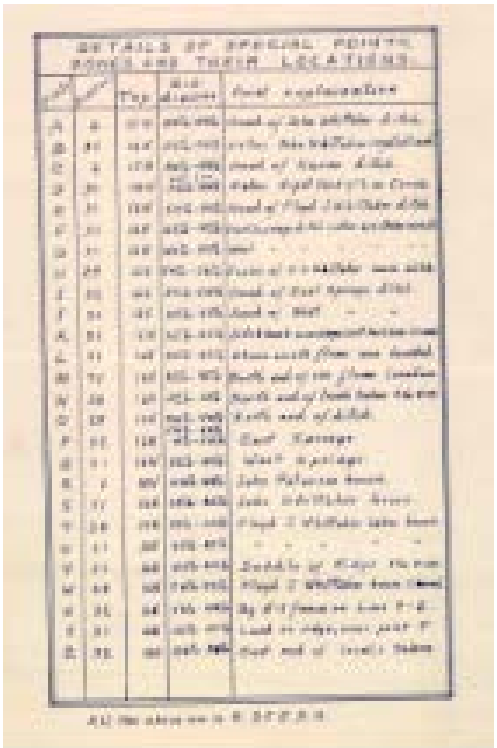
DETAILS OF SPECIAL POINTS
BOUNDS AND THEIR LOCATIONS

The *Memorandum Decision and Order* sets out what Judge Wildman deemed to be the critical facts and Defendants urge this Court to carefully review this decision for purposes of understanding the same unique factual background to the Thompson Matter. But one point bears emphasis. For reasons not explained by the McConnells at the IDWR hearing, they did not claim the Kauer Ditch as an authorized point of diversion for their water rights in the Snake River Basin Adjudication (*Memorandum Decision and Order* at 9), and as a result, the Kauer Ditch was shut down by IDWR in 2014. The McConnells also did not attempt to add the Kauer Ditch as an authorized point of diversion in the transfer before IDWR at issue in the Wildman Matter. Instead, the McConnells evidently believed they were not bound by the agreement made by their predecessors and could attempt to undo the natural changes that occurred to the Stroud Creek drainage that have been in place for 90 years as a result of that agreement. Judge Wildman rejected those arguments made by both IDWR and McConnell on appeal. *Memorandum Decision and Order* at 9-10 (agreement entered by Kauer's predecessor was binding on Kauer, and therefore, binding on McConnell; " . . . 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.").

Concerning the Kauer Ditch, Judge Wildman was clear: "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 Ditch ceased in 2014 was not the result of any action taken by Whittaker**." *Memorandum Decision and Order* at 6-7 (emphasis added).

In addition to the foregoing, and for purposes of better understanding the Thompson Matter, as part of the underlying administrative case, the IDWR Hearing Officer held that the channel below the "Whittaker Diversion" is no longer the Stroud Creek channel, but a private

ditch. *Preliminary Order Approving Transfer* at 10 (attached to *Harris Declaration* as Exhibit 4) ("Whittaker argues that the water course through the Whittaker Two Dot Ranch property has been in place for so long it now constitutes the natural channel of Stroud Creek. The hearing offer rejects this argument. The current water course through the Whittaker property is not the natural channel of Stroud Creek."). There is a wooden structure (described and depicted in photographs in more detail below) defined by Hearing Officer Cefalo as the "Whittaker Diversion" which is located upstream of the West Springs Ditch, downstream of the Kauer Ditch, and it currently directs water to a pipeline intake for three of Whittaker's other water rights (74-369, 74-1136, and 74-15788). *Id*. at 4 (¶15). Excess Stroud Creek water present at the wooden structure proceeds through, around, or over the wooden structure down into an overgrown willow area where such water disperses and either sinks and feeds area springs or is captured by the West Springs Ditch. There is no longer a stream channel at this location because of the historic use of the Kauer Ditch where extra water was diverted at the Kauer Ditch for injection into Lee Creek and only water necessary to fill Whittaker's rights at the wooden structure was turned downstream There were, of course, times when excess flows would go around, through, or over the wooden structure, and Whittaker's right to the capture of this water in the West Springs Ditch (in addition to flows emanating from West Springs) is clear as described in the *Whittaker v. Kauer* decision:

> The trial court found that in the year 1932, respondents entered into an oral contract with appellants' predecessors (and other interested parties), to whom water had been decreed by the July 1, 1912 decree, whereby the point of diversion of waters of the Left Fork of Lee 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 the Left Fork thereof 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 (over Lots 4

> and 3 and SE 1/4 of the NE 1/4, Sec. 31, Twp. 16 N., R. 25 E.B.M.) through which to convey from such point of diversion on the Left Fork, 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.

Whittaker v. Kauer, 78 Idaho at 97, 298 P.2d at 747 (italics in original, bolding and underline added).

The emphasized portion of the above quote is critical to this matter, was included in Judge Wildman's *Memorandum Decision and Order* at page 5, and bears emphasis here. In exchange for the easement for the Kauer Ditch, the Whittakers obtained the right to "**capture all the water found flowing in the creek at that place**." This includes water emanating from West Springs collecting in the West Springs Ditch as well as reach gains to Whittaker's private ditch system coming from flows from Stroud Creek in excess of what Whittaker directed through its headgate next to the wooden structure.

This right to collect **both** West Springs water and Stroud Creek water was emphasized a second time in another part of the *Whittaker v. Kauer* opinion:

> 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 <u>all the waters of [Stroud Creek[1]] found flowing in the Creek at the place where, pursuant to the contract respondents constructed said dam</u> below appellants' newly designated upstream point of diversion, and <u>such waters so captured by respondents included the waters of the West Springs</u>.**
>
> 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 the Left Fork 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 747-48.

Whittaker initially challenged IDWR's legal characterization of these channel features but did not pursue the issue on appeal (*Petitioners' Opening Brief* at 8, fn. 3, available at http://www.srba.state.id.us/Images/AdminApp/CV30-21-304/021-Brief.pdf), and nothing in Judge Wildman's *Memorandum Decision and Order* changes that conclusion. In fact, Judge Wildman could not have been clearer as to whether Whittaker should be required to do anything to the altered watershed:

> **Whittaker <u>should not be required</u> 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.

Memorandum Decision and Order at 9 (emphasis added).

Judge Wildman has determined the legal status of the interests involved in this water dispute and rejected an attempt to cause "significant disruption" to the Stroud Creek watershed. A judgement has been issued in the Wildman Matter, but the matter is within the 42-day appeal

[1] The opinion refers to Stroud Creek as the "Left Fork" as over time, Stroud Creek has also been referred to as the Left Fork of Lee Creek.

period to file an appeal to the Idaho Supreme Court. Consequently, the Wildman Matter could still be appealed.

III. ARGUMENT

Despite the pending nature of the Wildman Matter, the Department initiated the Thompson Matter on July 15, 2022. In so doing, the Department is attempting to cause "significant disruption" to the Stroud Creek watershed through a different legal proceeding. As asserted in separate pleadings, Defendants' position is that this Court should dismiss the *Complaint* in its entirety pursuant to I.R.C.P. 12(b)(8) and award attorney fees to Whittaker pursuant to Idaho Code § 12-117. Defendants incorporate by reference the arguments included in its *Memorandum in Support of Motion to Dismiss*, and further assert the following in opposition to the Department's *Motion* wherein it seeks a "mandatory preliminary injunction."

A. The Department's *Motion* seeks affirmative action in the nature of a writ of mandamus that is not properly considered under the preliminary injunction standard contained in I.R.C.P. 65.

The *Motion* seeks a preliminary injunction forcing the following affirmative actions by Whittaker:

> to remove or modify the current In-stream Headgate at the Whittaker Diversion on Stroud Creek and replace it with a suitable, 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 74-1576, in accordance with Idaho Code § 42-701.

Motion at 2.

Based on the plain language of what the Department seeks in its *Motion* (before the matter goes to trial), it is in the nature of a writ of mandamus, not a preliminary injunction. The standard for the issuance of a writ of mandamus is set forth in Idaho Code § 7-302, not I.R.C.P 65. Concerning a writ of mandamus:

> It may be issued by any court except a justice's or probate court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and the enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person. I.C. Section 7-302. A writ of mandamus will not lie unless the party seeking the writ has a clear right to have done that which the petitioner seeks and unless it is a clear legal duty of the officer to so act. *Freeman v. McQuade*, 80 Idaho 387, 331 P.2d 263 (1958); *Fitzpatrick v. Welch*, 96 Idaho 280, 527 P.2d 313 (1974).

Brady, 130 Idaho at 571, 944 P.2d at 706.

Based primarily on a definition from Black's Law Dictionary, the Department claims that Idaho law allows for a type of preliminary injunction that forces action rather than prohibits it—what the Department calls a "mandatory preliminary injunction." *Memorandum in Support* at 5. The Department seemingly recognizes the possible weakness in its position based on the plain language of Rule 65: "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." *Id*. The Idaho Supreme Court precedent the Department argues supports affirmative actions under the preliminary injunction standard is "recognized by the Idaho Supreme Court in *Brady v. City of Homedale* and *Harris v. Cassia County*" and that "a preliminary mandatory may be granted in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Id*. at 5-6.

However, a review of these cases reveals that they were addressing typical preliminary injunctions—actions seeking prohibition of behavior rather than mandating behavior. In fact, the cases IDWR claims supports its legal basis of a "mandatory preliminary injunction" do not support its legal position. Indeed, these cases involve requests for *both* a preliminary injunction prohibiting behavior *and* mandamus relief compelling action. In the *Harris* case, the appellants sought "(2) injunctive relief enjoining the respondents from terminating county aid to the appellants because

the indigent fund for Cassia County has been depleted; and (3) mandamus relief requiring the respondents to continue to provide aid for the appellants." *Harris v. Cassia Cty.*, 106 Idaho 513, 514, 681 P.2d 988, 994 (1984).

In the *Brady* case, the property owner plaintiff sought review of an order from district court which denied the property owner a writ of mandamus *and* a preliminary injunction, both of which were sought after the city granted a school to build a bus barn near the property owner. *Brady v. City of Homedale*, 130 Idaho 569, 570-71, 944 P.2d 704, 705-06 (1997). The Idaho Supreme Court affirmed the district court's denial of a writ of mandamus. *Id*. at 571-72, 944 P.2d at 706-07. The standard for issuing a writ of mandamus described in this section of Defendants' brief set forth above is taken from the *Brady* case.

IDWR has conflated the writ of mandamus components of these cases to also apply to preliminary injunctions. They are separate legal actions with discrete, separate purposes. There are no Idaho cases identified by IDWR supporting the concept of a "mandatory preliminary injunction." It is unclear why IDWR is pursuing a preliminary injunction instead of a writ of mandamus. In any event, this Court should deny the Department's *Motion* as it seeks actions compelled by a writ of mandamus, not a preliminary injunction. It is not Defendants' responsibility to argue against what the Department could have filed or should have filed. Accordingly, this Court should deny the Department's *Motion* because it has been filed under the incorrect legal authority as Idaho law does not recognize a "mandatory preliminary injunction." *See also, Brinton v. Steele*, 19 Idaho 71, 112 P. 319 (1910); *Fischer v. Davis*, 19 Idaho 501, 116 P. 412 (1911); *Beem v. Davis*, 31 Idaho 730, 175 P. 959 (1918) (An injunction is a writ to restrain a contemplated act and not a writ commanding a person to do a certain act).

Finally, the plain language of Rule 65 indicates that a preliminary injunction is meant to prohibit actions. For example, I.R.C.P. 65(a)(1) uses prohibitory terms, a fact even recognized by IDWR: "While the plain language of Idaho Rule of Civil Procedure 65(a)(1) uses prohibitory terms, . . ." *Memorandum in Support* at 5. I.R.C.P. 65(a)(1) provides that a preliminary injunction can be issued for "restraining the commission or continuance of the acts complained of." This plain language should be given effect by this court. *See, Ward v. State*, 166 Idaho 330, 331, 458 P.3d 199, 200 (2020); *see also, Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001) ("The language of the rule, like the language of a statute, should be given its plain, obvious and rational meaning."). The plain language of I.R.C.P. 65 does not support IDWR's *Motion*, and for this additional reason, the *Motion* must be denied.

B. In the alternative, the Department's *Motion* should be denied because it cannot meet the requirements of a preliminary injunction.

1. There is no possibility of irreparable harm to McConnell or IDWR.

Under Idaho law, "[a] 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.'" *Munden*, 504 P.3d at 365 (quoting *Brady*, 130 Idaho at 572, 944 P.2d at 707). IDWR argues that there will be irreparable harm to it as an administrative agency and to another water user, Bruce McConnell (who submitted a declaration in this matter), if the mandatory preliminary injunction is not granted.

Concerning Mr. McConnell, the decision in the Wildman Matter was issued three days after the Department's *Motion* was filed. In the Wildman Matter, Judge Wildman was clear in his *Memorandum Decision and Order* that "[a]ny 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." *Memorandum Decision and Order* at 11. Accordingly, there is no irreparable harm to McConnell—his ability to call for water at his lower diversion is

now subordinate to Whittaker's 74-157 based Judge Wildman's *Memorandum Decision and Order*.

Additionally, Whittaker has provided evidence of the water flowing from the springs associated with Water Right No. 74-157, as measured on July 25, 2022, by Whittaker's expert, Bryce Contor. *Contor Declaration* at 2 (¶2). He measured flows of 1.00 cfs, which is less than the 3.2 cfs authorized under Whittaker's 74-157. Accordingly, there is no extra water to turn down the Stroud Creek drainage for McConnell *even if* Whittaker was required to do so under priority administration (which Whittaker is not).

IDWR also mentions other "senior water users" it indicates it needs to protect, but the only other senior water user downstream with a diversion near the McConnells Lower Diversion is a diversion owned by Steven Johnson where he diverts water under Water Right No. 74-1831 at a location just upstream from McConnell's Lower Diversion. McConnell's use of the Lower Diversion is subordinated to Mr. Johnson as IDWR Hearing Officer James Cefalo held:

> The changes proposed in Application 84441 could affect water rights with points of diversion between the Upper Diversion and the Lower Diversion. Water right 74-1831 is the only water right with an authorized point of diversion between the Upper Diversion and the Lower Diversion. Water right 74-1831 bears a priority date of June 28, 1912 and is junior to the McConnell Rights. Johnson testified that water right 74-1831 has not been used for many years because it is a junior right and is rarely available. The changes proposed in Application 84441 will move senior rights downstream of the diversion for water right 74-1831, making water right 74-1831 subject to the senior rights. This change could reduce the quantity of water available to satisfy water right 74-1831. To protect against injury to water right 74-1831, the McConnell Rights must be subordinated to water right 74-1831 when they are diverted at the Lower Diversion. The following condition should be added to the McConnell Rights:
>
> > Diversion and use of this right from the point of diversion located in the SWSW of Section 20, T16N, R25E shall be junior and subordinate to water right 74-1831 at its current point of diversion in the NWNWNW of Section 29, T16N, R25E.

Declaration of Robert L. Harris in Support of Motion to Dismiss at Exhibit 4 (p. 12). On July 25, 2022, Bryce Contor measured the flow in Stroud Creek with reach gains that occurs below the West Springs Ditch that is available for diversion and use by Johnson, and the amount measured

was 0.9 cfs (plus or minus 25%). *Contor Report* at 9. This flow is "nearly four times the quantity of water needed to satisfy this right [74-1831 for 0.24 cfs] at face value. *Id*. at 15.

Accordingly, there is no irreparable harm currently existing to Mr. Johnson, another senior water user located downstream of the West Springs Ditch. And, any additional water in Stroud Creek not diverted by Mr. Johnson will be diverted by the McConnells at the Lower Diversion given the senior status of McConnells' water rights authorized to divert at the Lower Diversion relative to any other downstream rights. As a result, no water is left in Lee Creek below the Lower Diversion, and there are no other senior water users that could be irreparably harmed. IDWR's *Motion* must therefore be denied because there is no irreparable harm to the McConnells, Steven Johnson, or to any other water user.

IDWR also alleges that it, as an administrative agency, will be irreparably harmed if a mandatory preliminary injunction is not granted. *Memorandum in Support* at 10. IDWR claims that its ability to deliver water to seniors in priority will suffer, and that it is "indisputably authorized to require the proper installation and maintenance of suitable devices as is deemed necessary for the proper administration of water." *Id*. at 11(emphasis added).

The Department's claim of irreparable injury to it, as an administrative agency, is without merit. This is a unique case, and even the Department must yield to decisions from Idaho's courts, both the Idaho Supreme Court and the *Memorandum Decision and Order* issued in the Wildman Matter. As described above, Judge Wildman was clear:

> **Whittaker <u>should not be required</u> 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.

Memorandum Decision and Order at 9 (emphasis added).

Contrary to assertions otherwise, this case is unique and is not an affront to IDWR's authority. As described above, no senior water users are being unlawfully deprived of water that would subject IDWR to any sort of claim of not performing its duties. In addition to the other reasons set forth above, this Court should deny IDWR's *Motion* as there is no presence of irreparable harm to the Department.

2. A preliminary injunction is improper because this matter involves water rights and water distribution matters which are sufficiently complex and not free from doubt, and as a result, IDWR cannot prove a substantial likelihood of success.

"One who seeks an injunction has the burden of proving a right thereto, . . ." *Harris*, 106 Idaho at 518, 681 P.2d at 993. Further, "[t]he substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt. *Id*. (quoting *First National Bank & Trust Co. v. Federal Reserve Bank*, 495 F.Supp. 154 (W.D. Mich. 1980).

The Department claims that Whittaker is not complying with Idaho Code § 42-701, but this is a matter of dispute that is not free from doubt at this stage of the litigation. As described in the Contor's report, as an expert, he concludes that Whittaker is either in compliance as to each location described by the Department, or that the purported compliance IDWR seeks is not physically possible. *Contor Declaration* at Exhibit 1 (hereinafter, the "Contor Report"), p. 10-12. Accordingly, IDWR cannot prove a substantial likelihood of success and their *Motion* must be denied.

Further, IDWR's authority under Chapter 7 of Title 42 of the Idaho Code is not absolute—it cannot order installation of controlling works and measuring devices that serve no purpose. Indeed, IDWR acknowledges that it is "indisputably authorized to require the proper installation and maintenance of suitable devices **as is deemed necessary for the proper administration of**

water." *Memorandum in Support* at 11 (emphasis added). As argued above and in Whittaker's *Motion to Dismiss*, the actions demanded from the Department are not necessary to administer water **in this unique case**. Even though this is a disputed matter by the Department, we do not believe it should be. There is no reasonable or logical rationale to force Whittaker to install these devices. For these additional reasons, a preliminary injunction is improper. This matter involves water rights and water distribution matters which are sufficiently complex and not free from doubt, and as a result, IDWR cannot prove a substantial likelihood of success in this case. IDWR's *Motion* must be denied.

3. IDWR's *Motion* is based on an incorrect factual basis concerning the nature of the channel below the Whittaker Headgate, which IDWR claims is the natural channel of Stroud Creek.

IDWR's *Complaint* and *Motion* is based on an alleged fact that is simply untrue. IDWR has repeatedly asserted through its investigative agents that the Stroud Creek channel is present immediately below the wooden structure (the in-stream headgate, or "Whittaker Headgate" as defined by IDWR Hearing Officer James Cefalo), a claim that is simply not true given Hearing Officer Cefalo's decisions as described in the fact section above. It is not the Stroud Creek channel below the Whittaker Headgate—it is Whittaker's private ditch system. In the April 21, 2022 letter from IDWR agent Rob Whitney to James Whittaker included in the record in this matter, it claims that the "Department's field observations confirm that **the Stroud Creek channel exists above <u>and below</u> the Whittaker in-channel headgate**." *Rammell-O'Brien Declaration* at Ex. 14, p. 2 (emphasis added); *see also id.* at Exhibit 15, page 5 (David Graybill Report: "**Immediately <u>downstream</u> of the in-stream headgate is the Stroud Cr Channel**.") (emphasis added). But IDWR cannot ignore the binding effects of a judgement in a legal proceeding where an appointed Hearing Officer directly addressed the question of the nature of these channels, and the matter was

not challenged on appeal before Judge Wildman. The Hearing Officer was clear on the nature of this channel below the wooden structure, and even when asked to reconsider his initial decision on the nature of what is below the wooden structure, he held:

> For purposes of this contested case, Whittaker seeks to characterize various ditches on the Whittaker Two Dot Ranch property as man-made stream channels rather than ditches. Whittaker's arguments on this point are not persuasive and are inconsistent with the expert reports prepared by Bryce Contor and offered into the evidentiary record by Whittaker.

Order Denying Petitions for Reconsideration at 4 (*Harris Declaration* at Exhibit 5).

Because IDWR's *Motion* is based on a demonstrably incorrect factual basis concerning the nature of the channel below the Whittaker Headgate, which IDWR claims is the natural channel of Stroud Creek, the *Motion* should be denied, particularly at this stage of the litigation.

C. Defendants are entitled to an award of attorney fees under Idaho Code § 12-117.

Should the Court deny the *Motion*, Whittaker requests an award of attorney fees pursuant to Idaho Code § 12-117, as this action involves as adverse individuals/entities and the Department (a state agency). In such a case, "the Court shall award the prevailing party reasonable attorney's fees . . . if it finds that the nonprevailing party acted without a reasonable basis in law or fact." Idaho Code § 12-117.

As an initial matter, there should be no dispute that Idaho Code § 12-117 is potentially applicable here, as even the Department's *Complaint* alleges a right to recover fees under this statute. *Complaint* at 22. As to Idaho Code § 12-117, the Idaho Supreme Court has returned to the standard where "[t]he reasonableness of a challenge to an agency's conclusions of law, when considering fees under section 12-117(1), turns on the substance of the nonprevailing party's legal arguments." *3G AG Ltd. Liab. Co. v. Idaho Dep't of Water Res.*, 509 P.3d 1180, 1195 (2022).

As to the *Motion*, the Department's position is not reasonable. IDWR attempts to recast the unique situation with the Stroud Creek drainage as a typical measuring device and headgate situation, and it is not. There is a unique and site-specific agreement concerning flow in the Stroud Creek drainage that has already been addressed by Judge Wildman in the Wildman Matter.

Further, the actions IDWR demands are not "necessary for the proper administration of water," *Memorandum in Support* at 11, in this unique case. Without such necessity, this matter is not proper, particularly where the exercise of such power is based on premises that are demonstrably false (i.e., asserting that the nature of the channel below the in-stream wooden check structure is the Stroud Creek channel when an IDWR hearing officer held it is a private ditch system) or have already been clearly addressed by the Idaho Supreme Court in 1956 and Idaho's water judge on July 18, 2022. For these reasons, this Court should award attorney fees to Whittaker pursuant to Idaho Code § 12-117.

IV. CONCLUSION

For all the reasons set forth above, the Department's Motion must be denied. The Department seeks an order forcing actions by Whittaker through an incorrect rule instead of a writ of mandamus; there is no presence of irreparable harm to McConnell, other water users, or the Department; this matter involves water rights and water distribution matters which are sufficiently complex and not free from doubt, and as a result, IDWR cannot prove a substantial likelihood of success; and IDWR's *Motion* is based upon a fact claim that is simply untrue. Additionally, the Court should issue an award of fees pursuant to Idaho Code § 12-117.

Dated this 9th day of August 2022.

Robert L. Harris

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

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2022, 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 indicated.

Document Served: OBJECTION TO MOTION FOR MANDATORY PRELIMINARY INJUNCTION

Attorneys and/or Individuals Served:

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