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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,

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.

Case No. CV30-22-0169

PLAINTIFF'S REPLY TO DEFENDANTS' OBJECTION TO MOTION FOR MANDATORY PRELIMINARY INJUNCTION

The Idaho Department of Water Resources ("Department"), pursuant to I.R.C.P. 7(b)(3)(C), submits Plaintiff's Reply to Defendants' Objection to Motion for Mandatory Preliminary Injunction ("Reply"). This Reply is supported by the Second Declaration of Lacey B. Rammell-O'Brien, filed with this Court on August 9, 2022, and the Declaration of Lacey B. Rammell-O'Brien, Affidavit of Merritt D. Udy, and Affidavit of David T. Graybill, filed with this Court on July 15, 2022. To the extent that Defendants' Objection to Motion for Mandatory Preliminary Injunction ("Objection") uses the same arguments and allegations contained in their Motion to Dismiss and Memorandum in Support of Motion to Dismiss, the Department incorporates all analysis and authorities cited in its Memorandum in Opposition to Defendants' Motion to Dismiss ("Opposition Memorandum").

INTRODUCTION

The Department has a statutory obligation to administer the public waters of the State of Idaho, including the waters of Stroud and Lee Creeks in Administrative Basin 74. On September 28, 2018, the Department issued its Final Order ("2018 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 2018 Final Order was delivered to Floyd James Whittaker. *Id.* On June 23, 2022 and April 21, 2022, the Department sent letters to Defendants informing them of their obligation to comply with the 2018 Final Order. *Id*. Ex. 13–14. The April 21, 2022 letter specifically warned Defendants that if they did not replace the In-stream Headgate with an open-top check structure and install suitable controlling works and measuring devices at the diversion points for water right no. 74-157, the Department may initiate legal proceedings. *Id*. Ex.

14. Defendants ignored these notices. The Department's only remaining path forward is the instant case before this Court, along with its motion for mandatory preliminary injunction, requiring Defendants to install the works without further delay. Appropriators on the Lee Creek drainage are currently in their irrigation season. Defendants' refusal to comply with Idaho Code § 42-701 is injuring down-drainage water users and preventing watermasters from complying with their statutory duties. The downstream water users must timely receive their water, and a mandatory preliminary injunction is how that can happen.

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)).

ARGUMENT

One who seeks an injunction has the burden of proving a right thereto. *Harris v. Cassia Cnty.*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984) (citing *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 405 P.2d 634 (1965)). The Department's right to require appropriators to have controlling works and measuring devices installed is established in Idaho Code § 42-701. Throughout their filings, Defendants have notably not attacked the statutory authority of the Department to require suitable controlling works and measuring devices. Defendants instead argue that their situation is "unique" from other appropriators in Administrative Basin 74, that the controlling works and measuring devices are "not necessary" to administer the water in Administrative Basin 74, and that the Department's rationale behind requiring the controlling works and measuring devices is not "reasonable." Obj. at 18. Defendants are not special appropriators who are not required to comply with Idaho Code. The Department has met its burden to establish a very clear right to require Defendants bring their diversions into compliance pursuant to the 2018 Final Order, as well as the irreparable injury that will follow if they do not, and is therefore entitled to a mandatory preliminary injunction to that end.

A. The Department's Motion is properly brought under Rule 65(e)(1).

The Department appropriately filed its Motion for Mandatory Preliminary Injunction in this matter. 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 "[a]n injunction that orders an affirmative act or mandates a specified course of conduct." *Id*.

Defendants argue that the plain language of I.R.C.P. 65 is to prohibit acts and not compel them. Obj. at 3. Defendants attack the cases that support the Department's position that a mandatory preliminary injunction can order an affirmative act, as opposed to only restraining one. *Id.* at 13. In *Harris v. Cassia County*, appellants requested a "preliminary injunction to restrain the respondents from terminating county aid to the appellants" due to the depletion of the indigent fund. 106 Idaho 513, 517, 681 P.2d 988, 992 (1984). This double negative— restraining Cassia County from terminating county aid—results in an affirmative act. Had the Court granted the preliminary injunction in the *Harris* case, the outcome would have been an order of the Court that Cassia County continue to pay county aid to the appellants. While that was not the ultimate conclusion of the Court in *Harris*, it is appropriate for the Department to pursue the same, as "the right is very clear and it appears that irreparable injury will flow from its refusal." *Id.*, 106 Idaho at 518, 681 P.2d at 993.

Furthermore, mandatory preliminary injunctions have been recognized by the federal courts. In *Chalk v. U.S. Dist. Court. Cent. Dist. Of California*, 840 F.2d 701 (9th Cir. 1988), the Ninth Circuit Court concluded that the petitioner was entitled to a mandatory preliminary injunction ordering the defendants to restore him to his former duties as a teacher. While disfavored, they are an appropriate type of relief to be sought and granted when the complainant's right to the relief is clear. 42 Am. Jur. 2d *Temporary or Preliminary Injunctions—Mandatory Injunctions* § 10 (2022) (citing *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197 (4th

Cir. 2019), cert. denied, 2019 WL 4923505 (U.S. 2019); *Brown v. Pacifica Foundation, Inc.*, 34 Cal. App. 5th 915, 246 Cal. Rptr. 3d 822 (1st Dist. 2019); *Purcell v. Milton Hershey School Alumni Ass'n*, 884 A.2d 372, 202 Ed. Law Rep. 702 (Pa. Commw. Ct. 2005); *King v. Grand Chapter of Rhode Island Order of Eastern Star*, 919 A.2d 991 (R.I. 2007)).

B. A writ of mandamus is an inappropriate action under the facts of the instant case.

Defendants argue that the Department should have sought "a writ of mandamus, not a preliminary injunction" and that the "standard for the issuance of a writ of mandamus is set forth in Idaho Code § 7-302, not I.R.C.P. 65." Obj. at 12. Despite Defendants' assertions to the contrary, a writ of mandamus action is inappropriate before this Court.

I.R.C.P. 74(a)(1) and Idaho Code § 7-302 address actions for a writ of mandate:

> A writ of mandate is an order issued by the court to any inferior court, corporation, board, or person that: (A) compels the performance of an act which a party has a duty to perform as a result of an office, trust or station; or (B) compels the admission of a party to the use and the enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior court, corporation, board or person.

I.R.C.P. 74(a)(1). A writ of mandamus is not an action appropriately brought by a state agency against a private individual. The Idaho Supreme Court has held that "mandamus is the proper remedy for one seeking to require a public officer to carry out a clearly mandated, non-discretionary ministerial act." *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 523, 387 P.3d 761, 776 (2015) (citing *Cowles Publ'g Co. v. Magistrate Court*, 118 Idaho 753, 760, 800 P.2d 640, 647 (1990)).

In *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), plaintiffs sought a writ of mandate to compel Department Director Higginson to distribute water pursuant to Idaho Code § 42-602. Mem. in Supp. of Mot. for Prelim. Inj. at 11–12. This is a correct application of a writ of mandamus. The Court determined that Director Higginson had a duty *as a result of his office* to distribute water pursuant to statute and was not doing so.

It would have been inappropriate for the Department to bring a writ of mandamus action in this matter for two reasons. First, Defendants do not have a duty to perform "as a result of an office, trust or station." They are private irrigators diverting water for their own uses. Second, the Department does not seek to compel "the admission of a party to the use and the enjoyment of a right or office to which he is entitled." This portion of the statute and Rule 74(a)(1) are irrelevant to the facts in the instant case, where Defendants are required by statute to install controlling works and measuring devices by Idaho Code § 42-701(1). The Department has statutory authority to pursue enforcement of the installation of such devices. I.C. § 42-701(3). Defendants are violating a statutory requirement, which is impacting other water users down-drainage and impacting the Department's ability to account for, administer, and deliver water in the Lee Creek drainage.

C. <u>The Department has a very clear right and obligation to administer water in the state of Idaho and a very clear right to require Defendants to install and maintain controlling works and measuring devices.</u>

Defendants argue that the Department cannot prove a substantial likelihood of success in this matter, and that its authority to order installation of controlling works and measuring devices is not absolute if the installation of such devices serves "no purpose." Obj. at 18. The Department has a very clear right to require Defendants to install and

maintain controlling works and measuring devices at their points of diversion. This is established without reservation in Idaho Code § 42-701.

Idaho Code § 42-701(1) requires that "The appropriators or users of any public waters of the State of Idaho *shall* maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted." I.C. § 42-701(1) (emphasis added). "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." *Id*. "Each appropriator *shall* construct and maintain, when required by the director of the department of water resources, 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*.

The statute says what it says. 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*. Each appropriator shall construct measuring devices when required by the Director. *Id.* The only modifying language in the statute is that the installation point will be at "such point as is most practical." *Id*.

While the Department encourages voluntary compliance amongst appropriators as to laws and rules pertaining to the Department's programs and is willing to work with

appropriators to meet requirements under these laws and rules, it is ultimately the Director who decides what is suitable and what is not under Idaho Code § 42-701(1). The conclusion to be drawn from Mr. Contor's report is that Defendants do not need to take additional action. Contor Decl. Ex. 1 at 12. It is not surprising that Mr. Contor, who is a paid consultant for Defendants, suggests that Defendants have already met or are unable to meet the requirements of the April 21, 2022 letter from the Department. While Mr. Contor may have an opinion about the status of Defendants' compliance with Idaho Code § 42-701, ultimately it is not for Mr. Contor or Defendants to decide whether the controlling works and measuring devices are suitable. The watermasters, whose only interest is to ensure that all water users are getting water to which they are legally entitled, believe Defendants need to bring their diversions and measuring devices into compliance with Idaho Code § 42-701. The watermasters need to know how much water is in Lee and Stroud Creeks. The current watermasters of Water District 170 and Water District 74Z have said this. Graybill Aff. ¶¶ 18–21; Udy Aff. ¶ 10. Without measuring devices, this is not possible. A one-time measurement by Mr. Contor does not assist with the on-going administration of water throughout the irrigation season.

The plain language of Idaho Code § 42-701 is not discretionary, permissive, or subject to the opinions of the appropriators of the public waters of the State of Idaho. The plain language of Idaho Code § 42-701 is mandatory. For this reason, the Department has carried its burden to show that it has a very clear right to require Defendants to install the works and measuring devices.

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

Defendants misconstrue the Department's intent in bringing the instant matter before this Court by alleging that Defendants cannot cause injury because there is "no possibility of irreparable harm to McConnell." Obj. at 15. The injury being caused by Defendants' refusal to bring their diversions into compliance with Idaho Code § 42-701 and the 2018 Final Order goes beyond the McConnells. The Department is statutorily required to deliver and administer water in accordance with the prior appropriation doctrine to all users of Idaho's public waters.

Defendants argue that there is no extra water to turn down the Stroud Creek drainage. Obj. at 16. They also argue that the Johnson's right will be satisfied without the required infrastructure in place. *Id.* at 16–17. They allege that there will be no injury to other water users on the Lee Creek drainage. *Id.* at 17. Finally, Defendants argue that their "case is unique and is not an affront to IDWR's authority." *Id.* at 18.

As is discussed in the Department's Memorandum in Opposition to Defendants' Motion to Dismiss, there are more users on the Lee Creek drainage than just the McConnells. The additional senior users in the Lee Creek drainage, Steven and Susan Johnson, own water right no. 74-1831 that is four years senior to Floyd James Whittaker's water right no. 74-157. 2d Rammell-O'Brien Decl. Exs. 1–2. Also, Defendants are not entitled to divert more water than is decreed to them. Any additional water not allocated must proceed downstream to meet the needs of additional users. Mr. Contor's one-time measurement of Stroud and Lee Creeks and opinion does not replace the ongoing utility of a suitably installed measuring device for the "purpose of assisting the watermaster or

department in determining the amount of water that may be diverted." I.C. § 42-701(1). Until the Department is able to measure the water in Stroud and Lee Creeks, measure how much water Defendants are diverting from the system, and administer water so that downstream water users get the water they are entitled to as required by law, Defendants continue to injure the Department's ability to fulfill its obligations under Idaho Law.

E. Defendants are not entitled to an award of attorney fees under Idaho Code § 12-117.

Idaho Code § 12-117 states, in relevant part, that the Court "shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law."

Defendants claim that they are entitled to attorney fees under Idaho Code § 12-117 because the Department's position is not reasonable. Obj. at 21. Defendants argue that their "unique and site-specific agreement concerning flow in the Stroud Creek drainage" has already been addressed in the administrative proceeding in the Snake River Basin Adjudication ("SRBA") District Court, and that the "demands are not necessary for the proper administration of water . . . in this unique case." *Id.*

The factual and legal grounds for bringing the Department's Motion for Preliminary Injunction are sufficient for this Court to deny Defendants' request for attorney fees even if the Court should decide to deny the Department's motion. There is no dispute that the Department is required by Idaho Code § 42-602 to "distribute water in water districts in accordance with the prior appropriation doctrine." There is no dispute that the Director of the Department has "direction and control of the distribution of water from all natural water sources within a water district." I.C. § 42-602. There is no dispute that the "appropriators or users of any public waters of the state of Idaho shall maintain to

the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted." I.C. § 42-701(1). There is no dispute that Idaho Code § 42-701(1) requires each appropriator to "construct and maintain, when required by the director of the department of water resources, a rating flume of other measuring device at such point as is most practical . . . for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted." These statutes, drafted and passed by the Idaho Legislature, constitute more than sufficient legal basis for the Department's Motion for Mandatory Preliminary Injunction. These statutes combine with the failure of Defendants to bring their diversions into compliance, despite multiple notices by the Department, to establish the factual basis for the Department's Motion for Mandatory Preliminary Injunction.

Because the Department has brought this action on a rational basis grounded in both law and fact, Defendants are not entitled to an award of attorney fees under Idaho Code § 12-117.

CONCLUSION

The only issue before this Court on the Motion for Mandatory Preliminary Injunction is whether the Department is entitled to an order from this Court requiring Defendants to finally bring their diversions into compliance with Idaho Code § 42-701 and the 2018 Final Order. Despite Defendants' repetition to this Court that the administrative proceeding before the SRBA Court and the instant case are the same, they are not. By not complying with the requirements of Idaho Code § 42-701(1), Defendants are preventing the Department from fulfilling its clear legal duty to administer water to all users on the Stroud and Lee Creek drainage. The Department respectfully asks the Court to grant its

Motion for Mandatory Preliminary Injunction and appropriately deny Defendants' request for attorney fees pursuant to Idaho Code § 12-117.

Dated the 12th day of August 2022.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August 2022, I caused to be served a true and correct copy of the foregoing *Plaintiff's Reply to Defendants' Objection to Motion for Mandatory Preliminary Injunction*, via iCourt E-File and Serve, upon the following:

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