

**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

**ORDER RE: MOTION FOR
MANDATORY PRELIMINARY
INJUNCTION AND MOTION TO
DISMISS**

I. INTRODUCTION

This matter came before the Court on August 15, 2022 pursuant to Plaintiff's Motion for Mandatory Preliminary Injunction under I.R.C.P. 65 and Defendant's Motion to Dismiss under I.R.C.P. 12(b)(8). At the hearing the Court took these matters under advisement, and hereby finds as follows:

II. LEGAL STANDARD

"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 v. Bannock Cnty.*, 169 Idaho 818, 829, 504 P.3d 354, 365 (2022) (quoting *Brady v. City of Homedale*, 130 Idaho 569, 573, 944 P.2d 704, 707 (1994)) (internal quotations omitted). In relevant part to this motion, an injunction may issue:

- (1) 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 time or perpetually;
- (2) when it appears by the complaint of affidavit that *the commission or continuance of some act* during the litigation would produce waste, or great or irreparable injury to the plaintiff.

I.R.C.P. 65(e)(1)-(2) (emphasis added). However, “[t]he granting or refusal of an injunction is a matter resting largely in the trial court’s discretion.” *Munden v. Bannock Cnty.*, 169 Idaho 818, 827, 504 P.3d 354, 363 (2022) (quoting *Conley v. Whittlesey*, 133 Idaho 265, 273, 985 P.2d 1127, 1135 (1999)).

The Court may dismiss an action where there is “another action pending between the same parties for the same cause.” I.R.C.P. 12(b)(8). Specifically,

[t]wo tests govern the determination of whether a lawsuit should proceed where a similar lawsuit is pending in another court. First, the court should consider whether the other case has gone to judgment, in which event the doctrines of claim preclusion and issue preclusion may bar additional litigation. . . . The second test is whether the court, although not barred from deciding the case, should nevertheless refrain from deciding it.

Johnson v. Johnson, 147 Idaho 912, 917, 216 P.3d 1284, 1289 (2009) (quoting *Klau v. Hern*, 133 Idaho 437, 440, 988 P.2d 211, 214 (1999)) (internal quotations and citations omitted). The determination of whether a dismissal is warranted under I.R.C.P. 12(b)(8) is discretionary for the trial court. *Id.*

III. BACKGROUND

This lawsuit concerns a water law matter and the Idaho Department of Water Resources’ (“IDWR”) ability to enforce its order for suitable headgates and measuring devices at specific diversions owned by Defendants (hereinafter collectively referred to as “the Whittakers”). Accordingly, the parties in this case have a fairly extensive history of involvement with each other in other cases where the water rights involved here have been adjudicated. Most recently, the

Whittakers filed a petition for judicial review of an IDWR decision which impacted the administration of the Whittakers' water rights. Pursuant to the Idaho Supreme Court's Administrative Order issued on December 9, 2009, that petition for judicial review was reassigned to Judge Wildman in Lemhi County Case CV30-21-0304. Although Judge Wildman issued a Judgment in that case on July 18, 2022, an appeal was recently filed on August 26, 2022. Those water rights with administration at issue in the petition for judicial review are also involved in this civil enforcement action.

On September 28, 2018, IDWR issued a final order (2018 Final Order) requiring the installation of measuring devices and controlling works, pursuant to I.C. § 42-701, on water diversions in the Lemhi River Basin prior to the 2019 irrigation season. This order included four water rights owned by the Whittakers. It does not appear that this 2018 Final Order was subject to a petition for judicial review, at least as it pertains to the Whittakers. From that time, there have been multiple conversations between the Whittakers and representatives of IDWR, typically a watermaster, about the installation of headgates and measuring devices with conflicting testimony about the ultimate conclusion reached in those conversations.

IDWR claims that irreparable harm will potentially come to the McConnells, the owners of senior water rights with diversions in close proximity to the Whittakers' diversions, if the Whittakers do not install the required headgates and measuring devices. The water rights owned by the McConnells are senior to all but one of the Whittakers' water rights, but the locations of the McConnells' diversions appears to be the largest dispute between the parties underlying this civil enforcement action. Previously, IDWR granted a transfer application from the McConnells to allow their use of a diversion downstream from the Whittakers' diversions at issue in this civil enforcement action. That IDWR transfer decision is the one that was subject to the judicial review

before Judge Wildman in CV30-21-0304 previously mentioned. Judge Wildman's decision in that judicial review vacated IDWR's decision to grant the McConnells' transfer application.¹

IDWR claims to have given multiple warnings to the Whittakers to remove the In-stream Headgate, install works, and generally bring their diversions into compliance with I.C. § 42-701 and the 2018 Final Order. Since the Whittakers have not complied, IDWR filed this suit for civil enforcement and is now seeking a mandatory preliminary injunction. In its motion, IDWR has asked the Court to require the Whittakers

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 Director, as well as 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.

Motion for Mandatory Preliminary Injunction, July 15, 2022, at 2. At the hearing on this matter, IDWR merely requested the Court order the Whittakers to come to the table to discuss options for practicality and potential placement of these structures, works, and devices that IDWR is asking be installed. However, due to the factual overlap with the judicial review case before Judge Wildman, the Whittakers have asked the Court to dismiss this case under I.R.C.P. 12(b)(8).

IV. ANALYSIS

A. Plaintiff's Motion for Mandatory Preliminary Injunction

As a novel issue for the Court, IDWR is requesting a *mandatory* preliminary injunction which is asking the Court to order the Whittakers to take some affirmative action. The Whittakers have argued that such a thing is not contemplated in I.R.C.P. 65 which contains only clear prohibitory language for when an injunction may issue. It does appear from the plain language of

¹ The McConnells are the party who have appealed Judge Wildman's decision in the judicial review case.

Rule 65 that it is framed at prohibiting or “*restraining the commission or continuance of the acts complained of*” instead of requiring action. I.R.C.P. 65(e)(1) (emphasis added). An injunction may issue when “the *commission or continuance of some act . . . would produce waste,*” or “the defendant is doing, threatening, procuring or *allowing to be done, or is about to do, some act*” or “the defendant *is about to remove or to dispose* of the defendant’s property.” I.R.C.P. 65(e)(2)-(4) (emphasis added). Each of these grounds for an injunction contain language about restraining, preventing, or prohibiting some act by the defendant, not about requiring them to take an affirmative action before they can put on their full case. Although there could be some manipulation to the phrasing of the Order to appear to comply with the spirit of these grounds under Rule 65, the result of forcing a defendant to take action, particularly when it would disrupt the status quo, does not appear to be proper for a preliminary injunction.

Even if the Court were willing to frame the Order in such a manner to appear to comply with the Rule, it does not seem warranted in this case. Although IDWR does have an obligation to ensure the water rights are distributed in accordance with Idaho law and also has the authority and a very clear right to require the installation of such devices as they have required here, there does not appear to be any great or irreparable harm at this time.

Even if the McConnells have authorized diversions downstream from the Whittakers, it appears the harm that may have occurred to them has already occurred at this point. The McConnells have already reduced their herd size, only applied limited amounts of fertilizer which will only allow for a partial cutting of hay, and did not rent out certain pastures for this season. These harms do not appear to be something that an injunction could remedy for this season as these harms have already occurred. Even the watermasters who testified during the hearing on this matter testified that they did not believe there would be any great or irreparable harm at this time. With

this, the Court does not believe granting a mandatory preliminary injunction is a proper exercise of discretion at this time.

B. Defendants' Motion to Dismiss

There has been a judgment rendered in the judicial review case before Judge Wildman; however, it does not appear that the issues of claim preclusion or issue preclusion bar this civil enforcement action. Judge Wildman reviewed IDWR's decision to grant a transfer application for one of the McConnells' diversions. This necessarily involved discussion of the impact of that transfer on the Whittakers' water rights. The civil enforcement action before this Court is only determining whether or not the Whittakers have "substantially violated" IDWR's 2018 Final Order which was issued for compliance with I.C. § 42-701. I.C. § 42-1701B(5)(a). If the Whittakers have substantially violated it, then they "shall be liable for a civil penalty not to exceed ten thousand dollars per violation or one hundred fifty dollars per day for a continuing violation, whichever is greater." I.C. § 42-1701B(6)(a). Judge Wildman's decision did not address the issue of headgates, measuring works, and controlling devices as it was not part of the controversy before him, merely the propriety of IDWR's decision to grant the McConnells' transfer application. Without overlap in the issues or claims in the two cases, there is no issue or claim preclusion to apply to bar this matter.

Even if the Court is not barred from deciding the case, it may still dismiss it if the Court "should nevertheless refrain from deciding it." *Johnson*, 147 Idaho at 917, 216 P.3d at 1289. There is significant factual overlap with the history of this matter and the judicial review before Judge Wildman. That history feeds into the interactions between the parties and the motivations or justifications for certain actions; however, that shared background alone is not sufficient to warrant exercising discretion to reach such an extraordinary outcome. This civil enforcement action is

properly before this Court as it is “the district court in and for the county in which the alleged violation occurred.” I.C. § 42-1701B(5)(a). If this Court were to dismiss the civil enforcement action, it would leave IDWR without a mechanism to enforce the 2018 Final Order.

The Whittakers have argued that allowing this civil enforcement action to proceed could lead to different holdings between this case and the judicial review before Judge Wildman. However, since Judge Wildman was not considering the impact of headgates, measuring devices, or controlling works or IDWR’s authority to order such things, it does not appear that adverse holdings could be reached. Judge Wildman did reason that the historic flow of the area at issue here should not have to be disrupted by a change with the McConnells’ diversions, but there is nothing before this Court to indicate that the devices IDWR has properly ordered under I.C. § 42-701 would cause the disruption he wisely cautioned against.

It is not the role of this Court in a civil enforcement action to decide whether IDWR erred in issuing the 2018 Final Order without consideration to prior cases as the Whittakers argues it did. This is not a judicial review proceeding to review whether the 2018 Final Order is proper. This Court’s role in this case is limited to whether the Whittakers have substantially violated I.C. § 42-701 by not complying with the 2018 Final Order.

V. CONCLUSION

Accordingly, Plaintiff’s Motion for Mandatory Preliminary Injunction and Defendants’ Motion to Dismiss are both hereby DENIED.

IT IS SO ORDERED.

Dated 8/31/2022 3:42:34 PM


Stevan H. Thompson, District Judge

