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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. LAURENT COMTE, an individual; and PANTHERC, LLC, an Idaho limited liability company, Defendants.	**OBJECTION AND OPPOSITION TO MOTION FOR MANDATORY PRELIMINARY INJUNCTION** Case No. CV30-23-0191 Judge Stevan H. Thompson

Defendants Laurent Comte ("Comte") and PantherC, LLC ("PantherC") (collectively, "Defendants") submit this Objection and Opposition to the Motion for Mandatory Preliminary Injunction filed by The Idaho Department of Water Resources ("Plaintiff") on August 17, 2023 ("PI Motion"). A hearing on the Motion is scheduled for October 5, 2023 at 4 p.m. ("PI Hearing").

PREFERRED DISPOSITION OF THE MOTION AND SUPPORTING GROUNDS

Plaintiff's PI Motion should be denied for several reasons. First, Plaintiff failed to comply with Idaho Code § 42-1701B by prematurely filing its Complaint and Motion only 17 days after PantherC received Plaintiff's Notice of Violation ("NOV") on July 31, 2023. Once the director commenced an administrative enforcement action under Section 42-1701B, the statute required the director to wait 56 days before commencing a civil enforcement action. In this case, Plaintiff had to wait until at least September 25, 2023 to file its Complaint. On this basis alone, the Complaint should be dismissed and the Motion should be denied.

Second, Plaintiff's Motion seeks a "mandatory preliminary injunction" to compel Defendants to undertake affirmative actions to restore portions of Panther Creek. But Idaho law does not allow this type of injunction. This Court ruled previously against Plaintiff on this issue, namely that, a preliminary injunction under Idaho Rule of Civil Procedure 65 may *prohibit* action but not *compel* action.

Third, there is no reason for a preliminary injunction because Defendants have reasonably cooperated with Plaintiff. Defendants have allowed numerous site visits and drone flyovers and restored portions of Panther Creek. Defendants also have met with Plaintiff several times, presented proposals, and intend to continue to cooperate and negotiate with Plaintiff in good faith.

Fourth, Plaintiff has not demonstrated an irreparable injury that is required for an injunction. Defendants are restrained already by Plaintiff's Cease and Desist Order, and despite

visiting PantherC's Farm (defined below) on numerous occasions and being intimately familiar with the purported issues thereon, **Plaintiff waited nearly two months to file the Complaint and Motion**. Plaintiff's delay demonstrates that there is no irreparable harm.

For these reasons, the Court should dismiss the Complaint and deny the Motion.

STATEMENT OF FACTS

1. PantherC owns 88 acres of real property in Lemhi County, Idaho, 18N 18E Sec 3 NESW, NWSE and Sec 10 NWNE ("Farm"). Affidavit of David T. Graybill, filed contemporaneously with the PI Motion, ¶ 8. Under Idaho law, PantherC also is the owner of the appurtenant water right 75-14226 ("Water Right").

2. On or about June 22, 2023, Plaintiff and other government officials were allowed to visit the Farm and issued Defendants a Cease and Desist Order. *Id.*, ¶¶ 9, 10 ("Mr. Comte then gave us permission to walk the property and perform our investigation."), 14.

3. Plaintiff has not alleged Defendants violated the Cease and Desist Order that is still in place. *See generally* Complaint and PI Motion.

4. On or about June 23, 2023, Plaintiff returned with other government officials to further inspect the Farm with PantherC's consent and "determined that it was necessary to immediately open one of the earthen dams to allow 10-15% of the flow to return into Panther Creek, resulting in rewatering and reconnecting some flow." *Id.*, ¶ 16.

5. Under Plaintiff's "supervision and guidance", and as instructed by Plaintiff and other government officials, PantherC "remove[d] a portion of the earthen coffer dam to return some flow." *Id.*

6. PantherC's "mitigation effort worked successfully, and [Plaintiff] confirmed that the flow had been reestablished for the bottom .25 miles of the dewatered reach of Panther Creek." *Id*.

7. On or about July 7, 2023, government officials visited the Farm with PantherC's consent to collect aerial drone imagery. *Id*., ¶ 17.

8. On or about July 11, 2023, with PantherC's consent for the visit, Plaintiff and other government officials visited the Farm to develop Plaintiff's proposed restoration plan. *Id.*, ¶ 18.

9. Pursuant to Idaho Code § 42-1701B, Plaintiff served PantherC the NOV, via certified mail, regarding the Farm, which PantherC received July 31, 2023.

10. The relevant sections of Idaho Code § 42-1701B are as follows:

> (2) Notice. When the director commences an administrative enforcement action the notice of violation shall be served upon the alleged violator in person or by certified mail . . . .
>
> (3) Response. . . . If a recipient of a notice of violation contacts the department within fourteen (14) days of the receipt of the notice, the recipient shall be entitled to a compliance conference. The conference shall be held within twenty-one (21) days of the receipt of the notice unless a later date is agreed upon between the parties. **If a compliance conference is not requested, the director may proceed with a civil enforcement action as provided in this section**.
>
> (4) Compliance conference and consent order. The compliance conference shall provide an opportunity for the recipient of a notice of violation to explain the circumstance of the alleged violation and, where appropriate, to present a proposal for remedying the damage caused by the violation and assuring future compliance. If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. **The consent order shall be effective immediately upon signing by both parties and shall preclude a civil enforcement action for the same alleged violation**. If a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and other relief as authorized by law. **If the parties cannot agree to a**

> **consent order within fifty-six (56) days after the receipt of the notice of violation**, or if the recipient does not request a compliance conference, **the director may commence and prosecute a civil enforcement action in the district court in accordance with this section**.
>
> (5) Civil enforcement actions.
> (a) . . . The director shall not be required to prosecute an administrative enforcement action before initiating a civil enforcement action.

(Emphasis added).

11. After PantherC received the NOV on July 31, 2023, it requested a compliance conference on August 11, 2023.

12. Plaintiff and PantherC held a compliance conference on August 29, 2023 and September 1, 2023.

13. Pursuant to subsection (4), PantherC made a proposal to Plaintiff on September 1, 2023 to reach a consent order.

14. Plaintiff rejected PantherC's proposal on September 12, 2023.

15. On August 17, 2023—only 17 days after PantherC received the NOV and six days after PantherC requested a compliance conference—Plaintiff prematurely filed its Complaint and Plaintiff's PI Motion. *See* Docket.

16. Plaintiff served Defendants on August 24, 2023. *Id*.

17. The Court set a hearing on Plaintiff's Motion for October 5, 2023. *Id*.

18. On September 12, 2023, Defendants retained the undersigned counsel, Brad Cahoon, to defend them in this matter. (*See* Declaration of Brad Cahoon ("Cahoon Dec."), attached hereto as **Exhibit 1**, ¶ 2). On September 12, 2023, Mr. Cahoon contacted Plaintiff's counsel, Meghan Carter, requesting that Plaintiff stipulate to move the PI Hearing. *Id*. Mr. Cahoon made this request on behalf of Defendants because Mr. Cahoon is scheduled to be out of the

country on October 5, 2023, and due to Defendants needing additional time to retain experts to address the affidavits submitted by Plaintiff in support of its Motion. *Id*. Plaintiff's counsel responded that Plaintiff may be willing to move the PI Hearing to the following week based on the Court's availability; however, the earliest date the Court had available at the time was October 30, 2023. *Id*. On September 19, 2023, counsel for the Parties met and conferred via Zoom to discuss rescheduling the PI Hearing, among other things. *Id*. Plaintiff refused to stipulate to move the PI Hearing to October 30, 2023. *Id*.

ARGUMENT

I. THE PRELIMINARY INJUNCTION MOTION SHOULD BE DISMISSED.

A. Plaintiff's Complaint is Premature and Violates Idaho Law.

Plaintiff's Preliminary Injunction Motion should be dismissed because Plaintiff failed to comply with Idaho Code § 42-1701B and prematurely filed its Complaint. Plaintiff's Complaint makes it clear that it is being brought under Idaho Code §§ 42-1701B, 42-3809, and 42-3803. (Compl., ¶ 1). But subsection (4) of § 42-1701B expressly provides that "if the parties cannot agree to a consent order within fifty-six (56) days after the receipt of the notice of violation, or if the recipient does not request a compliance conference, the director may commence and prosecute a civil enforcement action in the district court in accordance with this section." Idaho Code § 42-1701B(4).[1] And subsection (4) also makes clear that if a consent order is entered, it "shall be effective immediately . . . and shall preclude a civil enforcement action for the same alleged violation." Stated differently, if a notice of violation is served and a compliance conference is requested, then the director must wait 56 days before commencing a civil enforcement action.

[1] It should be noted that Idaho Code § 42-3809 expressly states that "the director may commence an administrative enforcement action by issuing a written notice of violation, in accordance with the provisions of 42-1701B, Idaho Code".

Here, the following facts are undisputed: (1) Plaintiff served the NOV via certified mail on PantherC, which was received July 31, 2023; (2) PantherC requested a compliance conference on August 11, 2023; and (3) Plaintiff held a compliance conference with PantherC on August 29, 2023 and September 1, 2023. Accordingly, because Plaintiff elected to commence an "administrative enforcement action" under Idaho Code § 42-1701B by serving the NOV, it was required to comply with the entirety of the statute and wait until at least September 25, 2023—56 days from July 31—to commence a "civil enforcement action." However, Plaintiff filed its Complaint and PI Motion on August 17, 2023—only 17 days after PantherC received the NOV. Thus, Plaintiff's filing of the Complaint and PI Motion was premature and violates Idaho law. The PI Motion should therefore be denied.

B. The Court Should Reject Plaintiff's Improper Reading of the Statute.

The plain language of Idaho Code § 42-1701B makes it clear that the director has the option of choosing either an administrative enforcement action or a civil enforcement action, but not both at the same time. During the Parties' Zoom meeting on September 19, 2023, PantherC pointed out Plaintiff's failure to comply with Idaho Code § 42-1701B, but indicated it would not move to dismiss on those grounds if Plaintiff would stipulate to reschedule the PI Hearing. But counsel for Plaintiff argued that Plaintiff was not required to wait 56 days from when PantherC received the NOV, citing to subsection (5): "The director shall not be required to prosecute an administrative enforcement action before initiating a civil enforcement action."

The problem with Plaintiff's misinterpretation is that it renders subsection (4) entirely meaningless. It is well settled that statutory provisions "should not be read in isolation, but must be interpreted in the context of the entire document. . . . It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or

redundant." *Darrow v. White*, 531 P.3d 1169, 1177 (Idaho 2023) (cleaned up). "It is incumbent upon [the court] to interpret a statute in a manner that will not nullify it, and it is not to be presumed that the legislature performed an idle act of enacting a superfluous statute." *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990). If Plaintiff could file its Complaint any time it wanted to, then what is the purpose of subsection (4)'s requirement that the director wait 56 days after serving the NOV before filing a complaint? The Plaintiff's reading of the statute renders subsection (4) meaningless and nullifies the 56-day waiting period.

What subsection (5) actually states is that the director is not required to invoke the statute by serving a notice of violation, and can instead go directly to court with a civil enforcement action. In other words, Plaintiff could have filed its Complaint prior to serving the NOV. However, that is not what happened here. Because Plaintiff selected an "administrative enforcement action" by serving the NOV on PantherC, Plaintiff triggered Idaho Code § 42-1701B and had to wait 56 days to commence a civil action. Under a plain reading of the statute, Plaintiff is not entitled to parallel tracks of an administrative enforcement action and a civil enforcement action. For this reason, Plaintiff's Complaint is premature, service thereof on Defendants was invalid, and the PI Motion should be denied.

II. PLAINTIFF IS NOT ENTITLED TO THE REQUESTED INJUNCTION.

Plaintiff's Motion seeks a "mandatory preliminary injunction" under Idaho Rule of Civil Procedure 65(e)(1)-(2) that would require Defendants to undertake affirmative actions to restore portions of Panther Creek. But this Court previously ruled against Plaintiff in a separate case which requested a similar injunction. This type of injunction is not contemplated by Rule 65(e)(1)-(2), which states:

(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 or affidavit that *the commission or continuance of some act* during the litigation would produce waste, or great or irreparable injury to the plaintiff. (Emphasis added).

The plain language of this Rule allows an injunction to be entered to restrain, prevent or prohibit a defendant's action, not to require a defendant to take action. Notably, this Court previously ruled against Plaintiff in *The Idaho Department of Water Resources v. Floyd James Whittaker et al.*, Case No. CV30-22-0169, when it ruled:

> It does appear from the plain language of 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.

See Order Re: Motion for Mandatory Preliminary Injunction and Motion to Dismiss (attached hereto as **Exhibit 2**), at 4-5.

There is no reason for this Court to depart from its prior ruling in the *Whittaker* case, and Plaintiff did not cite to or distinguish this case in its PI Motion, despite being a party in the *Whittaker* case. As the Court correctly ruled, Rule 65 does not allow for an affirmative mandatory injunction as requested by Plaintiff in its PI Motion. Plaintiff's failure to follow the statute's timetable and judicial economy require denial of the PI Motion to allow the parties time to resolve this matter on their own or in further litigation **after** Defendants have time to retain experts and have them engage with Plaintiff's experts. For these reasons, the PI Motion should be denied.

III. INJUNCTIVE RELIEF IS UNNECESSARY.

There is no reason for the Court to enter the requested injunction. Defendants reasonably cooperated with Plaintiff, accommodated its immediate request to restore some stream flows to Plaintiff's satisfaction, and was timely and responsive. *See* Statement of Facts ¶¶, 2-8, above. Defendants have allowed numerous site visits and drone flyovers all at Plaintiff's request. Defendants also have conferenced with Plaintiff several times and proposed a plan to resolve this matter.

Moreover, undersigned counsel opened a dialogue with Plaintiff's counsel and expressed Defendants' desire to have their experts work with Plaintiff and its experts to find a reasonable resolution. Defendants intend to continue to cooperate with Plaintiff in good faith. There is no need for an injunction. The PI Motion should be denied.

IV. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE HARM.

Even if the Complaint were procedurally proper and Idaho law allowed affirmative mandatory injunctions, Plaintiff failed to demonstrate irreparable harm due to its own inaction all of which demonstrates Plaintiff's PI Motion should be denied. 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 v. Bannock Cnty.*, 169 Idaho 818, 829, 504 P.3d 354, 365 (2022) (cleaned up) (emphasis added). Moreover, any "**delay in seeking injunctive relief can imply a lack of urgency and irreparable harm, and weighs against the propriety of such relief**." *Rencher v. Wells Fargo Bank*, 2015 WL 845576, at *2 (D. Idaho Feb. 25, 2015) (emphasis added); *see also Herrick v. Potandon Produce, LLC*, 2016 WL 778355 *4 (D. Idaho Feb. 26, 2016) (plaintiff failed to show irreparable harm because, among other factors, plaintiff waited several months before attempting to enjoin defendant); *Garcia v. Google, Inc*., 786 F.3d

733, 746 (9th Cir. 2015) ("plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm, and in such cases, the length of time for delay need not be great.").

This case is just like the cited cases. Despite visiting and flying drones over the Farm on numerous occasions and being intimately aware of the purported issues thereon, Plaintiff waited nearly two months from the date it issued the Cease and Desist to file the Complaint and the PI Motion. Plaintiff's delays show there is no urgency or irreparable harm. Apparently, Plaintiff offers no allegation that Defendants violated the Plaintiff's Cease and Desist Order that prevents further activity on the Farm. Defendants' counsel is retaining experts who will be able to engage with Plaintiff's experts to try to find a resolution of this matter. The PI Motion should be denied.

CONCLUSION

For all of the foregoing reasons, the Court should deny Plaintiff's PI Motion.[2]

DATED this 21st day of September 2023.

DENTONS DURHAM JONES PINEGAR P.C.

/s/ *Bradley R. Cahoon*
Bradley R. Cahoon
J. Mark Gibb
Cole P. Crowther
Tyler R. Cahoon

Attorneys for Defendants

[2] In light of Defendants' recent retention of undersigned counsel, Defendants reserve the right to supplement this Objection and Opposition with affidavits opposing the affidavits submitted with the PI Motion.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 21st day of September 2023, via Idaho District Court electronic filing system upon the following people:

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EXHIBIT 1

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Attorneys for Defendants

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. LAURENT COMTE, an individual; and PANTHERC, LLC, an Idaho limited liability company, Defendants.	**DECLARATION OF BRADLEY R. CAHOON IN SUPPORT OF OBJECTION AND OPPOSITION TO MOTION FOR MANDATORY PRELIMINARY INJUNCTION** Case No. CV30-23-0191 Judge Stevan H. Thompson

I, Bradley R. Cahoon, hereby state and declare as follows:

1. I am a shareholder attorney at Dentons Durham Jones Pinegar P.C. and licensed to practice law in Idaho. My Idaho bar license number is 8558. I am lead counsel for Defendants Laurent Comte and PantherC, LLC in this case. I am competent to testify to the matters set forth in this Declaration. All facts alleged herein are based upon my personal knowledge. If called upon to do so, I could and would testify to these facts.

2. On September 12, 2023, Defendants retained me to defend them in this matter. On that same day, I contacted Plaintiff's counsel, Meghan Carter, requesting that Plaintiff stipulate to move the October 5, 2023 Preliminary Injunction Motion Hearing (PI Hearing). I made this request on behalf of Defendants because I am scheduled to be out of the country on October 5, 2023, and Defendants need additional time to retain experts to address the affidavits submitted by Plaintiff in support of its Preliminary Injunction Motion. Plaintiff's counsel responded that Plaintiff may be willing to move the PI Hearing to the following week based on the Court's availability; however, the earliest date the Court had available at the time was October 30, 2023. On September 19, 2023, counsel for the Parties met and conferred via Zoom to discuss rescheduling the PI Hearing, among other things. Plaintiff refused to stipulate to move the PI Hearing to October 30, 2023 or a later date.

I hereby declare under criminal penalty that the foregoing information is true and correct, to the best of my knowledge, recollection and belief.

Dated September 21, 2023.

DENTONS DURHAM JONES PINEGAR P.C.

/s/ *Bradley R. Cahoon*
Bradley R. Cahoon

EXHIBIT 2

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

CERTIFICATE OF SERVICE

I hereby certify that on this 8/31/2022 04:11 PM, I did send a true and correct copy of the forgoing document upon the parties listed below by email through iCourt.

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