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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.

LAURENT COMTE, an individual; and
PANTHERC, LLC, an Idaho limited
liability company,

Defendants.

Case No. CV30-23-0191

**REPLY TO OBJECTION AND
OPPOSITION TO MOTION FOR
MANDATORY PRELIMINARY
INJUNCTION**

BACKGROUND

Plaintiff, the Idaho Department of Water Resources (“Department”), filed a *Motion for Mandatory Preliminary Injunction* on August 17, 2023 (“*PI Motion*”). The motion was filed due to the Defendants’ excavation and vegetation removal activities in and around Panther Creek.

The *PI Motion* asks the Court to require the Defendants to enact a short-term remediation plan

(“Temporary Plan”) to stabilize Panther Creek before winter weather sets in to avoid further significant damage to the Creek through winter and from spring runoff. *Mem. in Supp. of Pl.’s Mot. for Mandatory Prelim. Inj.* at 12–13.

The Defendants filed an *Objection and Opposition to Motion for Mandatory Preliminary Injunction* (“*Objection*”) on September 21, 2023.¹ The Department files this reply in response to Defendant’s *Objection*.

ARGUMENT

I. The Department’s *Complaint* and request for injunction are not premature.

The Defendants argue that the Department’s *PI Motion* should be dismissed because the Department “failed to comply with Idaho Code § 42-1701B and prematurely filed its *Complaint*.” *Objection* at 6. The Defendants cite Subsection 4 of Idaho Code § 42-1701B which states, “[i]f 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”

While it is true the Department did not wait fifty-six days after the Defendants received the notice of violation to file this action, the Defendants ignore Idaho Code § 42-1701B(5)(c).

That section states:

“If the person who is the subject of the notice of violation fails to cease and desist the activity or activities constituting the alleged violation within the time limits set in the notice of violation, the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the administrative enforcement action.”

¹ The Defendants repeatedly mention dismissal and generally allude to a request for the Court to dismiss the *Complaint* and *PI Motion*. However, “a request for a court order must be made by motion.” I.R.C.P. 7(b)(1). Such motion “must (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for the relief sought including the number of the applicable civil rule, if any; [and] (C) state the relief sought.” *Id.* The Defendants’ *Objection* does not equate to a motion for dismissal and should not be treated as such.

The plain language of the statute makes clear that the Department can seek injunctive relief “pending the outcome of the administrative enforcement action.” That is what is being done here.

The Department, cognizant of the ongoing and imminent harm to Panther Creek and its aquatic life, required the Defendants to complete the Temporary Plan by September 7, 2023. *Graybill Aff.*, Ex. 4. On August 11, 2023, Mr. Comte communicated to the Department that he did not agree with the notice of violation. *Graybill Aff.*, Ex. 5. After informing Mr. Comte the Department intended to seek injunctive relief if Mr. Comte did not agree to complete the Temporary Plan, Mr. Comte communicated that he did not agree with the Temporary Plan. *Golart Aff.*, Ex. 1.

Because the Defendants stated they would not complete the Temporary Plan by September 7, 2023, the Department filed its *Complaint* and *PI Motion*. The Department’s actions followed the plain language of Idaho Code § 42-1701B(5)(c). Panther Creek, within the PantherC, LLC property, is unstable and losing material which is adversely affecting the Creek by decreasing water quality and affecting aquatic habitat beyond the PantherC property. *Richards Aff.* ¶¶ 13–17. This section of Panther Creek supports steelhead trout (*Oncorhynchus mykiss*) and bull trout (*Salvelinus confluentus*) and is designated as critical habitat for Endangered Species Act (“ESA”) listed Chinook salmon (*Oncorhynchus tshawytscha*), steelhead, and bull trout, respectively. *Richards Aff.* ¶ 6. Mr. Comte’s excavation and vegetation removal activities resulted in the realignment of approximately 4800 feet (0.9 miles) of Panther Creek, the obliteration and severance of crucial riparian and wetland habitats, the release of extensive amount of sediment, and the dewatering of critical ESA-listed fish habitat and entrainment of ESA listed fish species. *Richards Aff.* ¶ 11. Panther Creek needs to be stabilized

before winter sets in. *Id.* ¶¶ 18, 20. A mandatory preliminary injunction is required since the Defendants have indicated they will not implement the Temporary Plan. The Department requesting injunctive relief pending the outcome of the administrative enforcement action is not premature pursuant to Idaho Code § 42-1701B(5).

Even if the Court is persuaded the Department filed suit too early (which the Department does not concede), as of this filing, more than fifty-six days have passed since the Defendants received the notice of violation. The Defendants have not demonstrated how any of their substantial rights have been harmed. In fact, the Defendants do not even discuss their rights in this matter. Mr. Comte was informed on August 15, 2023, that the Department intended to seek injunctive relief if Mr. Comte didn't immediately agree to complete the Temporary Plan. *Golart Aff.*, Ex. 1. The Defendants were served notice of the Department's *Complaint* and *PI Motion* pursuant to the rules of civil procedure and have had time to obtain counsel. If the Department had filed its *Complaint* on September 25 (56 days after receipt of the notice of violation) instead of August 17, the matter would be before the Court now in substantially the same disposition.

The Defendants' substantial rights were not affected by the timing of the Department's complaint. Idaho Rule of Civil Procedure 61 states, "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." To the extent the Department filed suit prematurely, that filing is now harmless error. Thus, the Court should not deny the Department's *PI Motion* without first reviewing the merits.

II. The Department is entitled to a mandatory preliminary injunction.

The Defendants argue that the type of injunction sought by the Department "is not contemplated by Rule 65(e)(1)-(2)" and should therefore be denied. *Objection* at 8. Rule 65(e) states in relevant part:

A preliminary injunction may be granted in the following cases:

- (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 period 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;

I.R.C.P. 65(e)(1)–(2). The Idaho Supreme Court has held the two subsections should be read in the conjunctive such that “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.” *Planned Parenthood Great Nw. v. State*, 532 P.3d 801, 805 (Idaho 2022) (internal quotations omitted) (citation omitted). As explained in the Department’s memorandum in support of its *PI Motion*, the Idaho Supreme Court has recognized the validity of a mandatory preliminary injunction. *Farm Serv., Inc. v. U. S. Steel Corp.*, 90 Idaho 570, 587, 414 P.2d 898, 907 (1966); *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984); *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997); *Citizens Against Range Expansion v. Idaho Fish and Game Dep’t*, 153 Idaho 630, 289 P.3d 32 (2012). The Department’s right to require Defendants to enact the Temporary Plan and remediate the channelized portion of Panther Creek is clear *and* irreparable injury to Panther Creek will flow from a refusal of the injunction.

Defendants also argue that the Department is not entitled to a mandatory preliminary injunction in this case because the Court has previously denied a request for mandatory preliminary injunction in an unrelated case. *Objection* at 8. The application of Rule 65 to a party’s request for preliminary injunction necessarily requires the Court to review the motion before it with a careful eye to the facts, and the disposition of the motion is within the Court’s discretion. “The granting or refusal of an injunction is 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)).

As the Court is aware, *IDWR v. Whittaker* presented a “novel issue for the Court” when asked to consider a mandatory preliminary injunction. *Order Re: Mot. for Mand. Prelim. Inj. & Mot. to Dismiss* at 4, No. CV30-22-0169 (Lemhi Cnty. Dist. Ct. Aug. 31, 2022). Defendants overstate the conclusion of the Court in *Whittaker* in their argument that “rule 65 does not allow for an affirmative mandatory injunction.” *Objection* at 9. The Court clearly stated that “[e]ven 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*.” *Order Re: Mot. for Mand. Prelim. Inj. & Mot. to Dismiss* at 5, No. CV30-22-0169 (Lemhi Cnty. Dist. Ct. Aug. 31, 2022) (emphasis added). The Court then engaged in a fact-specific analysis that relied heavily on the outcome that the injunction requested by the Department would not prevent harm “that may have occurred to [the McConnells] already at this point.” *Id.* The Court clearly indicated that it did not believe “granting a mandatory preliminary injunction [was] a proper exercise of discretion at [that] time.” *Id.* at 6. This is not a finding that a mandatory preliminary injunction is never appropriate, only that the Court did not believe the particular circumstances of the motion for mandatory preliminary injunction in *IDWR v. Whittaker* justified the exercise of its discretion to grant one.

The holding of the Court in *IDWR v. Whittaker* does not apply to the facts in this case. The harms caused by the Defendants’ excavation and plant removal activities are ongoing, whereas the Court concluded that the harms to the McConnells had already occurred. The ongoing harms caused by the Defendants are as follows:

- Mr. Comte’s channel excavation “disconnected large segments of the original channel, resulting in dewatering and stranding of fish in the few remaining pools of water.” *Richards Aff.* ¶ 8.

- The presence of “significant and ongoing trench edge sloughing and trench bank erosion likely resulting in increased sedimentation and water turbidity downstream.” *Graybill Aff.* ¶ 15.
- “Without immediate stabilization, spring flows will cause extreme scouring events leading to further and significant degradation of resources.” *Id.* ¶ 21.
- Mr. Comte has constructed an earthen dam diverting all water from Panther Creek into the man-made excavated channel. *Id.* at Ex. 1, Photo 1.
- Mr. Comte has caused the “obliteration and severance of crucial riparian and wetland habitats.” *Richards Aff.* ¶ 11.
- The excavation has created “release of extensive amount of sediment” into the stream and downstream areas. *Id.*
- “The sediment plume generated from the illegal excavation activities flowed downstream resulting in significant water quality degradation.” *Id.* ¶ 13.
- Increased bank erosion due to the “instability of the newly excavated realigned channel.” *Id.* ¶ 15.
- The area is documented to be “extremely unstable” and “will continue to lose substrate material via sluffing of banks and ongoing scouring,” resulting in a “net loss of material” as the water moves down drainage. *Id.* ¶ 16.
- The excavated channel could alter the water table in the area. *Id.* ¶ 17.

To summarize, Mr. Comte’s activities will cause compounding damage to the stream channel through erosion, floodplain disconnection, increased turbidity, increased sedimentation leading to a decrease or loss of habitat for aquatic species, water table alteration, and changing hydrologic processes. Mr. Richards asserts that “Mr. Comte’s excavation work presents such a significant harm if not stabilized before winter” that the area must be stabilized outside of the in-water work window for 2023. *Richards Aff.* ¶ 20.

Granting the Department’s motion for preliminary injunction against Defendants would not be a departure from the Court’s prior ruling. The facts and circumstances of *IDWR v. Whittaker* are unrelated to the facts and circumstances of the instant case. The ongoing damage caused by Defendants’ actions must be remedied quickly via the enactment of the Temporary Plan, and a mandatory preliminary injunction is the appropriate avenue to address those harms.

III. The Department has demonstrated a clear right to injunctive relief and Panther Creek will suffer irreparable injury without that relief.

Defendants also argue that the Department “waited nearly two months from the date it issued the Cease and Desist to file the Complaint” and that this delay “show[s] there is no urgency or irreparable harm.” *Objection* at 11. Defendants cite to *Rencher v. Wells Fargo Bank, N.A.*, No. 4:14-CV-00341-BLW, 2015 WL 845576, at *2 (D. Idaho Feb. 25, 2015) in support of their argument that “delay in seeking injunctive relief can imply a lack of urgency and irreparable harm, and weighs against the propriety of such relief.” *Objection* at 10. In *Rencher*, the party seeking the injunction waited three years before filing for emergency relief from foreclosure. This is distinguishable from this case, where the Department filed its *Complaint* and *PI Motion* within 58 days (one month and 28 days) of learning of the excavation work being done by Mr. Comte, and 56 days (one month and 26 days) after issuing the cease and desist letter.

The Department did not delay in its efforts to address Defendants’ injury to Panther Creek. Department and other natural resource agency employees visited the PantherC property on June 22 to investigate the complaint, on June 23 to survey the extent of the damage to Panther Creek, and on July 11 to develop a short-term remediation plan to stabilize the area before winter. *Graybill Aff.* ¶¶ 9, 15, 18. In addition, National Marine Fisheries and Idaho Governor’s Office of Species Conservation employees visited the PantherC property on July 7, to take aerial drone imagery. *Id.* ¶ 17. All of these activities were performed with Mr. Comte’s permission and presence. *Id.* ¶¶ 10, 15, 18. On July 26, the Department issued the notice of violation which contained the Temporary Plan.

The evidence demonstrates that the Department was diligently investigating the unpermitted excavation and vegetation removal and it was developing the Temporary Plan.

Given Mr. Comte’s involvement in the process, the Department had reason to believe Mr. Comte would implement the Temporary Plan. However, the Department was prepared if that was not the case, and two days after receiving confirmation from Mr. Comte that he would not implement the Temporary Plan, the Department filed its *Complaint* and *PI Motion*. The Department conducted an investigation, developed a plan, and compiled and filed suit just shy of two months from discovering Defendants’ unpermitted activity. That is not delay, that is urgency.

IV. Injunctive relief is necessary.

Defendants state that injunctive relief is not necessary because “Defendants intend to continue to cooperate with Plaintiff in good faith” “to have [Defendants’] experts work with Plaintiff and its experts to find a reasonable resolution.” *Objection* at 10. This argument indicates the Defendants do not understand the purpose and significance of the Temporary Plan.

The Temporary Plan is just that—temporary. It is designed to *stabilize* the PantherC property and Panther Creek. *Richards Aff.* ¶ 18. It is not a long-term permanent solution to the unpermitted excavation and grubbing performed by Mr. Comte. The Temporary Plan stabilization will ensure the PantherC property does not lose additional significant quantities of material, it will ensure the downstream habitat will survive spring runoff, and it will provide time for the parties in this case to develop a long-term solution.

Delay will only result in additional harms to Panther Creek, which is a critical habitat for ESA listed Chinook salmon, steelhead, and bull trout. The Temporary Plan must be instituted to enable the parties to reach a permanent, reasonable resolution. Without stabilization, the PantherC property and Panther Creek will suffer extreme harm that will take more time, money, and effort to remedy, reducing the likelihood of reaching a resolution between the parties. *See Richards Aff.* ¶¶ 16, 17. Meanwhile, habitat will degrade, macroinvertebrates will die or

diminish, and without habitat and food, fish will die. *Id.* at ¶¶ 14, 17. Winter is imminently near, threatening to cut off the option for stabilization.² Time is of the essence and the work needs to be completed before winter sets in.

CONCLUSION

The Department has described the ongoing, irreparable injury to Panther Creek as a result of Mr. Comte's unauthorized excavation work. The *Affidavit of David T. Graybill* and *Affidavit of Jeffery E. Richards* clearly describe the compounding damage to the stream channel through erosion, floodplains disconnection, increased turbidity, increased sedimentation leading to a decrease or loss of habitat for aquatic species, water table alteration, and changing hydrologic processes. Notably, the Defendants provide no argument as to a lack of injury, or even attempt to minimize the injury, Mr. Comte directly caused to Panther Creek. They argue only that the Department should be denied its attempts to commence remediation because it moved too fast or should have moved faster. The Department respectfully requests that the Court issue a mandatory preliminary injunction requiring Defendants to enact the Temporary Plan.

Dated October 3, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



MEGHAN M. CARTER
Deputy Attorney General

² The National Weather Service predicts low temperatures around 37° F this week in Salmon, Idaho. *Current Conditions at Salmon PM2.5 (A2410)*, National Weather Service, <https://forecast.weather.gov/MapClick.php?lat=45.17673000000008&lon=-113.89678999999995> (last visited Oct. 3, 2023). Further, according to the National Centers for Environmental Information, the probability of significant freezing in Salmon, Idaho increases each day into October. *See Summary of Annual Normals 2006-2020* (Station: SALMON-KSRA, ID USC00108080), National Centers for Environmental Information (Oct. 3, 2023) (attached to this reply as Exhibit 1).

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on October 3, 2023, I caused to be served a true and correct copy of the foregoing *Reply to Objection and Opposition to Motion for Mandatory Preliminary Injunction* via iCourt E-File and Serve, upon the following:

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Summary of Annual Normals 2006-2020

Generated on 10/03/2023

Current Location: Elev: 3953 ft. Lat: 45.1731° N Lon: 113.8856° W
 Station: **SALMON-KSRA, ID US USC00108080**

Freeze Data									
Spring Freeze Dates (Month/Day)									
Temp (F)	Probability of later date in spring (through Jul 31) than indicated(*)								
	.10	.20	.30	.40	.50	.60	.70	.80	.90
36	06/20	06/16	06/12	06/09	06/05	06/01	05/28	05/22	05/16
32	05/28	05/21	05/17	05/15	05/13	05/10	05/07	05/05	05/02
28	05/12	05/08	05/05	05/03	05/01	04/30	04/27	04/22	04/17
24	05/02	04/29	04/24	04/20	04/16	04/13	04/09	04/04	03/31
20	04/17	04/09	04/04	03/31	03/28	03/22	03/17	03/12	03/08
16	03/25	03/18	03/13	03/11	03/08	03/05	03/03	02/28	02/22
Fall Freeze Dates (Month/Day)									
Temp (F)	Probability of earlier date in fall (beginning Aug 1) than indicated(*)								
	.10	.20	.30	.40	.50	.60	.70	.80	.90
36	09/03	09/06	09/10	09/12	09/15	09/17	09/20	09/23	09/28
32	09/16	09/20	09/23	09/26	09/28	10/01	10/03	10/06	10/11
28	09/29	10/02	10/04	10/07	10/10	10/13	10/16	10/20	10/25
24	10/07	10/11	10/15	10/18	10/22	10/25	10/29	11/01	11/05
20	10/16	10/21	10/26	10/30	11/02	11/05	11/08	11/12	11/18
16	10/25	11/01	11/06	11/10	11/14	11/17	11/20	11/23	11/27
Freeze Free Period									
Temp (F)	Probability of longer than indicated freeze free period (Days)								
	.10	.20	.30	.40	.50	.60	.70	.80	.90
36	125.0	118.0	112.0	108.0	103.0	98.0	93.0	88.0	82.0
32	156.0	149.0	144.0	140.0	137.0	133.0	130.0	125.0	118.0
28	182.0	176.0	170.0	166.0	162.0	157.0	154.0	149.0	145.0
24	210.0	204.0	198.0	193.0	188.0	184.0	180.0	173.0	166.0
20	242.0	235.0	230.0	225.0	221.0	215.0	210.0	203.0	192.0
16	268.0	262.0	257.0	252.0	248.0	242.0	237.0	231.0	223.0

-9999: Data not available

* Probability of observing a temperature as cold or colder than the indicated threshold, later in the spring or earlier in the fall than the indicated date

blank: missing or insufficient data