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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.

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S PROPOSED "ORDER
GRANTING MOTION FOR
PRELIMINARY INJUNCTION"**

Case No. CV30-23-0191
Judge Stevan H. Thompson

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Defendants Laurent Comte (“Comte”) and PantherC, LLC (“PantherC”) (collectively, “Defendants”) respond to Plaintiff’s modified proposed Order Granting Motion for Preliminary Injunction filed on October 9, 2023 (“Order”), as follows:

First, Defendants have agreed to have their experts meet on PantherC’s farm with Plaintiff and the United State Environmental Protection Agency on October 26, 2023 to attempt to resolve this matter. There is no need for the Court to enter the proposed Order at this time. The parties on their own may be able to resolve this matter on October 26th.

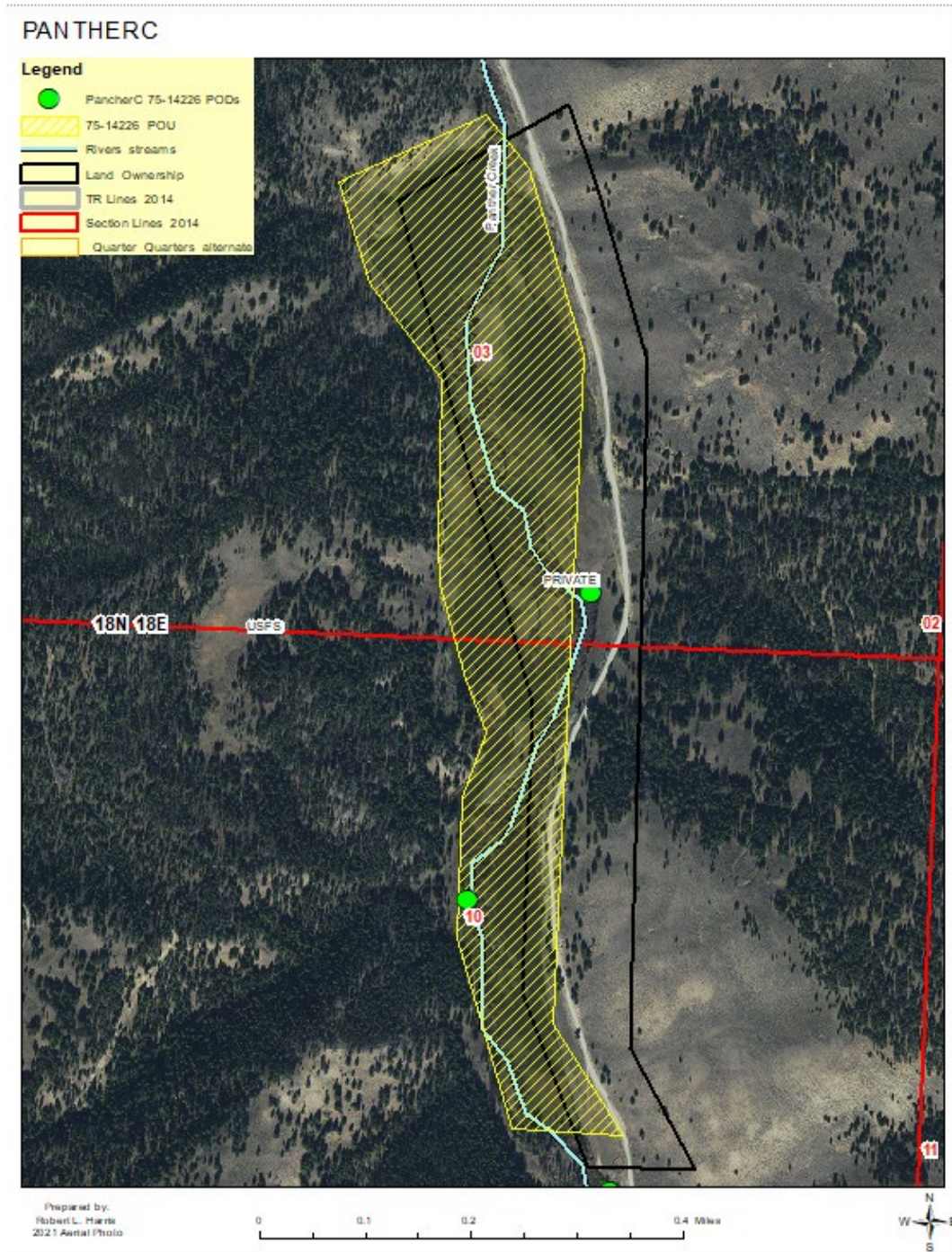
Second, Defendants are disappointed that the exigent circumstances of this case have not afforded them the opportunity to share with the Court the reasons for undertaking the flood protection activities on the farm in June 2023. Mr. Comte is a French farmer who speaks English but believes that language barriers have caused Plaintiff to misunderstand him. Defendants’ dream of farming and preserving the legacy of generations of farmers appears to conflict with the government’s interests in creating flood conditions such that no farming is possible (the way the land was when it was settled and farming began over a century ago).

With limited ability to do so given the hurried nature of this proceeding, the Court should understand Defendants’ primary purpose for constructing the ditch on the farm was to drain the flood water caused by beaver dam analogs constructed on Panther Creek to divert and spread water out with the intent to attempt to create wetlands). The flood control measures were necessary in order to farm the land. PantherC owns Water Right No. 75-14226, which was decreed in the Snake River Basin Adjudication, and authorizes the diversion of 1.4 cfs of water from points of diversion on Panther Creek for the irrigation of seventy (70) acres of the 88 acres of the farm. The locations

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of the points of diversion and place of use with GIS data obtained from Plaintiff's website is depicted here:



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If the Court issues the Order as proposed by Plaintiff, the Court risks setting a dangerous precedent given the clear statutory rights vested in holders of water rights to use their rights for authorized purposes on their private property. As depicted above, the area within which Plaintiff seeks substantial work is entirely contained within Defendants' authorized water right place of use. Even the Stream Channel Act's promulgated administrative rules exempt work performed within a stream channel if it is associated with obstruction or inference with delivery of water under a valid water right, which PantherC possesses:

03. Cleaning, Maintenance, Construction or Repair Work. No permit is required of a water user or his agent to clean, maintain, construct, or repair any diversion structure, canal, ditch, or lateral or to remove any obstruction from a stream channel which is interfering with the delivery of any water under a valid existing water right or water right permit. (3-18-22)

04. Removal of Debris. No permit is required for removal of debris from a stream channel provided that no equipment will be working in the channel and all material removed will be disposed of at some point outside the channel where it cannot again reenter the channel. (3-18-22)

IDAPA 37.03.07.025.03-04 (available at <https://adminrules.idaho.gov/rules/current/37/370307.pdf>).

Stated another way, the matter at hand is not as the Court may have initially understood when it wondered at the hearing on Plaintiff's motion for injunctive relief why Defendants did what Plaintiff alleges. Defendants have not had a full ability to present their case, depriving them of due process, but with limited time to respond, provides the foregoing as an initial attempt to answer the Court's questions. There are reasons and legal justifications for why Defendants acted as alleged. At this point, however, there remains much in dispute, particularly concerning PantherC's rights as a private landowner to drain its land for cultivation and growing crops.

Third, in a meeting at his office in Salmon on Thursday August 31, 2023, Mr. David Graybill, Technical Hydrologist and Watermaster of the Upper Salmon River Basin Water District 170 of Idaho Department of Water Resources strongly advised Defendants that they will never be

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allowed to farm their land, and Defendants should sell the farm to a conservancy group like Western Rivers Conservancy.

Fourth, Defendants disagree with Plaintiff's unsupported contention in the proposed Order that the farm contains wetlands. *See* Plaintiff's Proposed Panther Creek Short-Term Remediation Plan, at 1 ("This crossing shall be selected to reduce inputs of fine sediment entering the historic channel of Panther Creek and avoid *sensitive wetland areas*." (emphasis added)); *Id.* at 4 ("Salvage *wetland* sod wherever possible") (emphasis added). Identifying wetlands is a complex scientific analysis requiring experts. Plaintiff has not presented *any evidence* of wetlands on the farm. The law is that for land to be a wetland the government must show that the land has three features: hydrophytic vegetation, hydric soils, *and* wetland hydrology. *See Corps of Engineers Wetlands Delineation Manual* (Jan. 1987), pp. 12-34; *see also Rapanos v. United States*, 547 U.S. 715, 761 (2006) (BREYER, J., dissenting) ("(1) prevalence of plant species . . . ; (2) hydric soil . . . ; *and* (3) wetland hydrology." (citation omitted) (emphasis added)); *see also Sackett v. Env't Prot. Agency*, 598 U.S. 651, 664–65 (2023)) ("‘wetlands’ is a technical term encompassing ‘those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.’") (quoting 40 C.F.R. § 230.3(t)).

The state expert affidavits contain no evidence whatsoever of plant species, wetland hydrology or hydric soils on the farm. To the contrary, based on recent preliminary site investigations, the land area in question has no wetland hydrology or hydric soils. Defendants expect to verify this more fully in the future.

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Fifth, the affidavits of Mr. David Graybill, particularly paragraphs 14, 17, 21 and Exhibit 4, and Mr. Jeffery E. Richards, especially paragraphs 6, 9, 11-15, 17, 18, 20, and the proposed Panther Creek Short-Term Remediation Plan attached to the proposed Order, all lack foundation, contain hearsay, are speculative and conclusory and do not support a finding of wetlands on the farm.

Sixth, as recognized by the Court and Defendants, the proposed Order would grant Plaintiff all of its relief requested. The proposed Order does not afford Defendants due process protection or accommodate their right to farm their land and use their water rights to irrigate the land. The proposed Order gives no opportunity for Defendants to retain experts to investigate the farm conditions and to review and comment on the proposed Order.

Seventh, the proposed Order is substantially and impermissibly vague; for example, the Preliminary Items provide: “The following is a list of preliminary items *that shall be considered and implemented prior to commencing work*. 1. The remediation plan shall be implemented as proposed. *Any variation shall be approved by the agency representatives on site to ensure project objectives are achieved.*” Similar, indefiniteness and ambiguities exist in paragraphs 4-8 of the Preliminary Items. This language is deficient for a court order granting injunctive relief; the order must be clear on its face to avoid a question as to what conduct is prohibited or required.

Actions Required to Meet Objectives Table 1-2 and the attendant chart have the same deficiencies. Action “Plug Ditch and Natural Revetment” provides: “Install locally acquired willow stakes 6 feet in length between the trees. *Willows should be prepared on site following recommendations by the onsite agency.*” There is no description of willow sizes (diameter, length, how freshly harvested, etc.), and this ambiguity is subject to the interpretation of the onsite agency.

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This Action also fails to specify how to “install” a conifer tree and whether boulders will be necessary to prevent trees from washing away.

Further, Action “Rehabilitate Historic Channel and Banks – MUST BE COMPLETED PRIOR TO REWATERING OF HISTORIC CHANNEL” provides: “In locations where the historic channel were excavated, place fill back into the channel to narrow the stream and create complexity (pools and riffles). Substantial field fitting will be necessary for this action and shall be supervised by on-site agency representative.” The complexity requires a specialized plan that includes width/depth ratio at each riffle/pool segment, location of the thalweg, slope range, sinuosity, entrenchment ratio, bank full width, velocity, and estimated backfill discharge. This specificity is lacking from the proposed Order. Also, what does “substantial field fitting” mean? This should not be subject to the interpretation of the onsite agency.

Furthermore, Action “Stabilize Disturbed Areas, Cap, Seed, and Mulch” provides: “Smooth disturbed soils to more a [sic] natural contour, matching existing grade.” The phrase “more natural contour” is unclear, and there are no diagrams, engineered drawings or plans to guide this action.

This ambiguity demonstrates that the proposed Order is written in a deficient manner so that Defendants cannot perform independently as court orders require. Finally, the Remediation Plan is deemed to be “short term” but has no clear endpoint as is needed for an injunction.

Eighth, the proposed Order contains inaccurate factual statements. For example, Action ““Rehabilitate Historic Channel and Banks –MUST BE COMPLETED PRIOR TO REWATERING OF HISTORIC CHANNEL” states: “In locations where the historic channel were excavated, place fill back into the channel to narrow the stream and create complexity (pools and

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riffles).” Defendants did not conduct excavation activities in the original Panther Creek, and based on preliminary site visits, complexity still exists in the original Panther Creek.

Ninth, the proposed Order is excessive and superfluous. For example, Action “Plug Ditch with Natural Revetment” contains five items that must be completed before returning water from the new channel to the original Panther Creek. But based on preliminary site visits, none of these items are necessary to return flow back to Panther Creek.

Tenth, the maps and aerial diagrams in the proposed Order lack basic and necessary measurements, distances, dimensions, specificity, etc. The proposed Order lacks minimum details for work below the ordinary high-water mark of a perennial stream channel: (i) plan view of project with dimensions (length, width in feet), (ii) section views of alteration work/activity with dimensions, (iii) approximate location of the ordinary high-water mark, (iv) stream water flow direction, and (v) a compass north direction.

Eleventh, the proposed Order requires that Defendants undertake actions *beyond* the banks of Panther Creek, but Plaintiff *has no* jurisdiction beyond Panther Creek and should not be entitled to relief outside of its jurisdiction. *See* Idaho Statute § 42-3801 (“The legislature of the state of Idaho hereby declares that the public health, safety and welfare requires that ***the stream channels*** of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. No alteration of ***any stream channel*** shall hereafter be made unless approval therefor has been given as provided in this act.” (emphasis added)). In particular, Idaho Code § 42-3802(d) expressly provides the following:

“Stream channel” means a natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water. ***Ditches***,

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canals, laterals and drains that are constructed and used for irrigation or drainage purposes are not stream channels.

Idaho Code § 42-3802(d) (emphasis added). The plain language of Idaho’s Stream Channel Act (Idaho Code § 42-3801 *et seq.*) is strictly limited to stream channels that, by definition, do not include “[d]itches, canals, laterals and drains that are constructed and used for irrigation or drainage purposes are not stream channels.”

The proposed Order requires work in the new “ditch” and on uplands, not just within the Panther Creek stream channel. Accordingly, Plaintiff has no jurisdiction whatsoever when it comes to irrigation and/or drainage ditches, a position it has consistently held in the past and maintains to this day as evidenced by Plaintiff’s website:

Complaints

Please contact an IDWR office if you have questions about a potential violation associated with one of IDWR’s management programs.

NOTE: Complaints that are civil or criminal in nature may not be within IDWR’s jurisdiction. The following are examples of non-jurisdictional issues:

- Trespass, rights-of-way, and easement issues
- Conveyance issues down ditches, laterals, or pipelines that are beyond the water right point of diversion such as blocked ditches, poorly maintained ditches, change of ditches, and flooding, etc.
- Property damage due to irrigation/water use management practices
- Irrigation District or Canal/Ditch Company issues including delivery disputes, inadequate delivery of ditch shares, ditch interference, and rotation problems, etc.

<https://idwr.idaho.gov/water-rights/compliance-enforcement/> (last visited October 12, 2013).

Plaintiff, as an administrative agency, has no authority other than that given to it by the Legislature. *See Wash. Water Power Co. v. Kootenai Env’tl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). “Administrative agencies are ‘creature[s] of statute’ and, therefore, are ‘limited to the power and authority granted [them] by the Legislature.’” *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (quoting *Welch v. Del Monte Corp.*, 128

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Idaho 513, 514, 915 P.2d 1371, 1372 (1996)). Such authority “is primary and exclusive in the absence of a clearly manifested expression to the contrary.” *Roberts v. Idaho Trans. Dep’t*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991). An agency “may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.” *Id.*

An administrative agency “exercises limited jurisdiction, and nothing is presumed in favor of its jurisdiction.” *Henderson*, 147 Idaho at 632, 213 P.3d at 722; *see also United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977). An agency’s authority and jurisdiction are “dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves....” *Wash. Water Power Co.*, 99 Idaho at 879, 591 P.2d at 126. If the provisions of governing rules or statutes are not met and complied with, no authority or jurisdiction exists. *Id.* (citing *Arrow Transp. Co. v. Idaho Pub. Util. Comm’n*, 85 Idaho 307, 379 P.2d 422 (1963)). Acts taken by an agency without statutory authority or jurisdiction are void and must be set aside. *See Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27; *A&B Irrigation Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012); Idaho Code § 67-5279(2)(a)-(b).

In short, Plaintiff’s attempts to vest itself in the proposed Order with additional authority and jurisdiction clearly beyond the scope of its limited executive authorities as an administrative agency of Idaho.

Twelfth, movants in litigation that seek a preliminary injunction are generally required to give security if a preliminary injunction is issued under I.R.C.P. 65(e). However, Plaintiff is exempt from this requirement to give security under this rule as a political subdivision of the State of Idaho, and as a result, Defendants are at significant risk of not having available access to funds

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to compensate Defendants if it is ultimately determined that an injunction is improper. Accordingly, the Court should exercise extreme caution as it considers Plaintiff's request for injunctive relief.

Without waiving, and expressly reserving, their claims and defenses in this action and any subsequent action, notwithstanding the foregoing response, Defendants agree to have their experts meet on PantherC's farm with Plaintiff and the United States Environmental Protection Agency on October 26, 2023 to attempt to begin to resolve this matter. Defendants urge the Court not to enter Plaintiff's proposed Order for the reasons outlined above. If the Court is inclined to enter a preliminary injunction order against Defendants, Defendants request that the Court remove all references to wetlands, allow for Defendants' right to farm their land and use their water rights and diversion points on Panther Creek, modify the other deficient language identified above, and insert specificity where needed as outlined above.

DATED this 12th day of October 2023.

DENTONS DURHAM JONES PINEGAR P.C.

/s/ Bradley R. Cahoon

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J. Mark Gibb

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Attorneys for Defendants

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 12th day of October 2023, via Idaho

District Court electronic filing system upon the following people:

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