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**IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, ARKANSAS
CIVIL DIVISION**

FRIENDS OF LAKE ERLING ASSOCIATION

PLAINTIFF

v.

Case No. CV-2016-16-1

THE AGREED FOUNDATION D/B/A
AMERICAN GAMEBIRD RESEARCH EDUCATION AND
DEVELOPMENT FOUNDATION, INC.

DEFENDANT

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiff seeks a preliminary injunction restoring the rights of its members and the public at large to the unrestricted right of access to and use of Lake Erling.

I. UNDISPUTED FACTS

1. Plaintiff is a non-profit corporation organized under the laws of the State of Arkansas. Its members own property adjacent to or under Lake Erling.
2. The membership of the Friends of Lake Erling Association consists of individuals who either own real property adjacent to Lake Erling or rent property adjacent to Lake Erling and have, in the past, enjoyed the unrestricted right to boat, hunt, fish, and engage in recreational activities on Lake Erling.
3. Until recently, Plaintiff's members have had unrestricted access to Lake Erling for recreation, hunting, fishing, boating and to otherwise use the waters of Lake Erling in any lawful manner they chose since it was opened in 1956.
4. Defendant is attempting to deny Plaintiff's members their unrestricted right to use Lake Erling.
5. International Paper Company ("IP") constructed the 7,100 acre Lake Erling in 1956 as a source of water for its nearby mill. Some of the land underneath Lake Erling is owned by

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the federal government. As a result, the United States of America and IP entered into an “Act of Exchange” on June 23, 1952. *See*, Exhibit 1 to Plaintiff’s Complaint.

6. In the Act of Exchange, IP granted the government a flowage easement over IP-owned land within the Bayou Bodcau Reservoir Project¹ in Louisiana in exchange for the right to flood the government-owned land under the to-be-constructed Lake Erling in Lafayette County, Arkansas.

7. In the Act of Exchange, the USA and IP stipulated that “an industrial water supply reservoir to be constructed by International Paper Company within the upper limits of Bayou Bodcau Reservoir is necessary and feasible and will not interfere with the construction, operation and maintenance of the said Bayou Bodcau Reservoir Project, and plans therefor have been approved by the Chief of Engineers, Department of the Army.” Act of Exchange, p. 1–2. As part of the agreement, IP granted the government flowage easements “over all of its remaining lands and property in Bossier and Webster Parishes, Louisiana, and in Lafayette County, Arkansas.” *Id.*, p. 2. The flowage easement was given to the USA in consideration of the USA conveying to IP a perpetual easement over the land owned by the government under what would become Lake Erling “for its construction of a dam and reservoir to supply fresh water for industrial purposes.” *Id.*, p. 2.

8. The government’s conveyance to IP, however, came with reservations and conditions. The USA retained the right, for example, to develop and maintain the lands “for

¹ The Act of Exchange references the Bayou Bodcau *Reservoir* Project. For purposes of this proceeding and any reading of the Act of Exchange, it is crucial to not confuse the Bayou Bodcau Reservoir Project, which holds no permanent pool of water, with Lake Erling, also a “reservoir” that was created by damming Bayou Bodcau. The Bayou Bodcau Reservoir Project is a flood control system in Louisiana constructed by the Corp of Engineers pursuant to the FLOOD CONTROL ACT OF 1936, PUB. L. NO. 738, H.R.8455, 74TH CONGRESS, § 5, AT 1576.

flood control and related purposes as set forth in Section 4 of the Act of Congress approved 22 December 1944, as amended by Section of the Act of 24 July 1946, . . .” Section 4 of the Flood Control Act of 1944 authorized the federal government to partner with private entities like IP and other “local interests” “to construct, maintain, and operate public park and recreational facilities [as] water resource development projects under the control of the Department of the Army.” FLOOD CONTROL ACT OF 1944, AS AMENDED ON JULY 24, 1946, PUB. L. NO. 534, 78TH CONGRESS, §4. Under Section 4, the “water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use . . .” *See*, Exhibit 2 to Plaintiff’s Complaint.

9. Under the Act of Exchange, IP expressly agreed to maintain public access to Lake Erling: “That International Paper Company shall permit access by the public across its lands to the waters of the Bayou Bodcau Reservoir, and to the lands owned by the United States of America, over routes to be agreed upon between International Paper Company and duly authorized representatives of the United States.” Act of Exchange, p. 6.

10. Under the Act of Exchange, the United States reserved the right to approve “any material changes to the plans, design, and location, including future alterations or changes, of the dam and reservoir to be constructed by International Paper Company.” Act of Exchange, p. 7.

11. IP expressly agreed that it would maintain Lake Erling for the use and benefit of the public: “It is understood and agreed that International Paper Company shall place no restrictions upon the public use of the water area of the industrial water supply reservoir located on its lands either for flood control, recreational, wild life, or fishing and hunting purposes; and

that it will permit and grant access over its lands adjoining the water area over and through routes to be agreed upon and designated by the Company and the United States.” Act of Exchange, p. 7.

12. From the time of its agreement in the Act of Exchange in June 1952 until November 1, 2013, IP allowed unfettered public access to Lake Erling. Governor Orval Faubus addressed a crowd of more than 1000 people at the dedication of “Arkansas’ newest lake.” *See*, Exhibit 3 to Plaintiff’s Complaint. In his speech, Governor Faubus applauded International Paper’s “attitude of neighborliness” and “cited the company for its cooperation with the State of Arkansas, and for its development and making the lake available to the public.” International Paper constructed a sign at what IP labeled the “Lake Erling Park” with designated barbecue pits, boat landings, picnic tables, and camping areas. *Id.*

13. With the cooperation of IP, the Arkansas Game and Fish Commission has from time to time stocked Lake Erling with gamefish and otherwise maintained Lake Erling as a public resource. *See*, Exhibit 4 to Plaintiff’s Complaint.

14. Upon information and belief, IP conveyed its interest in the land underneath Lake Erling to Defendant in an Assignment and Assumption Agreement and Special Warranty Deed, attached as Exhibit 5 and Exhibit 6 to Plaintiff’s Complaint. In both the Assignment Agreement and accompanying Deed, Defendant expressly agreed to perform all of IP’s duties and obligations under the Act of Exchange, including the duty to maintain Lake Erling, its dam for flood control, and the right of the public to access 100% of Lake Erling.

15. Almost immediately upon acquiring its interest in Lake Erling, AGRED began its attempts to block or restrict public access to the lake, including filing multiple lawsuits against owners of real property adjoining Lake Erling. AGRED has asserted that it is entitled to charge

an annual use fee and require that the public first obtain a permit from AGRED before accessing Lake Erling.

16. AGRED recently erected signs at Lake Erling Park stating as follows: “Starting March 2016 Vehicles will be towed at owner’s expense for not displaying the AGRED Foundation Boat & Trailer decals for motorized boats. Decals must be affixed to front left of boat and on the left side of boat trailer tongue.” See, Exhibit 7 to Plaintiff’s Complaint.

17. According to its website, AGRED is a “non-profit organization that now privately owns Lake Erling, located in beautiful Lafayette County, Arkansas.” AGRED’s intent is clear: “By popular demand from lakefront property owners on Lake Erling, it is our pleasure to announce that we have now introduced a mandatory boat decal system, and have decided on a price of \$35.00 per decal.” See, Exhibit 8 to Plaintiff’s Complaint.

II. ARGUMENT

A. *Standard for Preliminary Injunction.*

In determining whether to issue a preliminary injunction, two factors must be considered: (1) whether irreparable harm will result in the absence of an injunction, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *Manila Sch. Dist. No. 15 v. Wagner*, 356 Ark. 149, 153, 148 S.W.3d 244 (2004) (citing *AJ & K Operating Co., Inc. v. Smith*, 355 Ark. 510, 140 S.W.3d 475 (2004); *Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 42 S.W.3d 453 (2001)). Arkansas courts do not distinguish between temporary restraining orders pursuant to Ark. R. Civ. P. 65, and preliminary injunctions. See *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 173-174, 72 S.W.3d 95 (2002) (holding that the courts treat temporary restraining orders the same as preliminary injunctions). Regarding the likelihood of success on the merits, the Arkansas Supreme Court has held: “Of course, in order to justify a grant of

preliminary injunctive relief, a plaintiff must establish that it will likely prevail on the merits at trial.” *W.E. Long Co. v. Holsum Baking Co.*, 307 Ark. 345, 351, 820 S.W.2d 440 (1991) (citing *Smith v. American Trucking Ass’n*, 300 Ark. 594, 781 S.W.2d 3 (1989)). The test for determining the likelihood of success on the merits is whether there is a reasonable probability of success in the litigation. Such a showing “is a benchmark for issuing a preliminary injunction.” *Custom Microsystems, supra*, 344 Ark. at 542.

B. Likelihood of Success on the Merits

The documents attached to Plaintiff’s Complaint establish that there is a reasonable likelihood (if not certainty) of success on the merits. The agreement between IP and the United States that allowed IP to construct Lake Erling guaranteed the public access to Lake Erling for all purposes. Since the Lake opened and until AGRED accepted an assignment of IP’s obligations, the public has enjoyed the unrestricted right to use Lake Erling for all purposes. The State of Arkansas stocked and managed the fishery in Lake Erling. No restrictions or requirements on the public’s right to use Lake Erling were ever imposed by IP. Defendant assumed the obligations of IP to allow this unrestricted access. Attempting to charge the public for access to Lake Erling is a restriction on the public’s use of the Lake. Plaintiff will prevail on the merits.

C. Irreparable Harm

Absent a preliminary injunction, Plaintiff and its members will suffer irreparable harm. For almost 60 years, Plaintiff’s members and the general public have enjoyed the benefits of the Act of Exchange and specifically the agreement that IP “shall permit access by the public across its lands to the waters of the Bayou Bodcau Reservoir, and to the lands owned by the United States of America, over routes to be agreed upon between International Paper Company and duly

authorized representatives of the United States” and that there will be “no restrictions upon the public use of the water area of the industrial water supply reservoir located on its lands either for flood control, recreational, wild life, or fishing and hunting purposes.” Exhibit 1 to Plaintiff’s Complaint. Defendant assumed IP’s obligations under the Act of Exchange in the Assignment Agreement. Exhibit 5 to Plaintiff’s Complaint. Defendant is violating its obligations under the Act of Exchange by attempting to charge the public for rights granted to the public under the Act of Exchange.

In *Jones v. Wood Family Limited Partnership*, 95 Ark. App. 326, 236 S.W.3d 573 (2006), homeowners in a subdivision partially blocked public access to property owned by the plaintiff. The trial court issued an injunction requiring defendants to remove the impediment. On appeal, appellants argued that partially obstructing the public’s access did not constitute irreparable harm. The court rejected this argument and held that:

Appellants have placed an obstruction in the middle of a public road; and, while the obstruction does not blockade the road in its entirety, it impedes appellee’s recognized property right to use the road as access to its property. *See Wright, supra*. Moreover, we believe that obstructing a public road, especially where it interferes with ingress and egress, constitutes irreparable harm justifying the issuance of an injunction. **Money cannot restore the landowner’s property right nor measure the value of using of a public road.** *See generally United Food & Comm’l Workers, Int’l Union, supra* (holding that harm is usually considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law). We further note that appellee’s right to use this public road was not diminished by the existence of alternative means of ingress and egress. *See Wright, supra; see also Tweedy v. Counts*, 73 Ark. App. 163, 40 S.W.3d 328 (2001). (emphasis added).

95 Ark. App. at 332-333.

Defendant is prohibiting the public unrestricted access by charging Plaintiff’s members for the right to use Lake Erling in contravention to the rights granted the public under the Act of Exchange. Money cannot restore this right, nor measure the value of the

right to use Lake Erling as the public has for decades. As such, the requirement to show irreparable harm is met.

III. CONCLUSION

For the reasons stated herein, Plaintiff is entitled to a preliminary injunction that prohibits defendant from restricting Plaintiff's members or the general public access to Lake Erling, and for all other relief to which it is entitled.

Respectfully submitted,

BY: 

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