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Attorney for Plaintiff

Yee-Wallace, Cynthia

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN HASTINGS, Jr.,
Plaintiff,

vs.

THE STATE OF IDAHO DEPARTMENT
OF WATER RESOURCES, a Political
Subdivision of the STATE OF IDAHO

Defendant.

Case No. CV01-21-17825

**ACTION FOR DECLARATORY
JUDGMENT**

COMES NOW the above-named Plaintiff, by and through his attorney of record, J. Kahle Becker, and Pursuant to IRCP 57, I.C. 67-5278(3), and I.C. 10-1201 *et seq* for causes of action against the Defendant, complains and alleges as follows:

I.

PARTIES

1. Plaintiff John Hastings, Jr. is an individual, who at all times relevant to this action owned real property in Blaine County, Idaho.
2. Defendant Idaho Department of Water Resources is a political subdivision of the State of Idaho with its principal place of business at Idaho Water Center, 322 E Front St. Ste. 648, Boise ID 83702-7371.

II.

JURISDICTION AND VENUE

3. This Court has subject matter and personal jurisdiction over this action pursuant to and by virtue of Idaho Code § 67-5278, Article V, Section 20, of the Idaho Constitution, Idaho Code §§ 1-705 and 10-1201 and other applicable laws and rules.
4. Venue is proper in Ada County pursuant to and by virtue of Idaho Code § 67-5272(1) (b), § 5-404, and other applicable laws and rules.

III.

ACTION FOR DECLARATORY RELIEF

5. Plaintiff restates and realleges the preceding paragraphs and incorporates them herein by reference as though fully set forth.
6. Plaintiff owns real property along the Big Wood River, upstream of its confluence with Warm Springs Creek. The subject property also immediately upstream of the bridge for Warm Springs Road.
7. There were extremely high runoff events in the spring and summer of 2017 that led to flooding in the Wood River valley.
8. Acting governor Brad Little declared a state of emergency in Blaine County due to these events. <https://ioem.idaho.gov/wp-content/uploads/sites/57/2017/05/FLOODING-MAY-ID-04-LEVEL-1-STATE-DECLARATION.pdf>.
9. President Donald Trump also signed a disaster declaration as to the flooding in Blaine County. https://www.mtexpress.com/news/blaine_county/trump-signs-

disaster-declaration-for-county/article_eca08bca-8d0a-11e7-9dd9-3b8965bbb412.html

10. On July 25, 2017, as the River continued to erode, with 8-15 feet of riverbank washing away overnight, and with concerns as to what might happen to the bank and Bridge if something was not immediately done, Plaintiff met with Brittany Skelton, Senior Planner with the City of Ketchum, and Ketchum's Fire Chief, Mr. Elle to look at the property.
11. Pursuant to the holding in *Aldape v. Akins*, 105 Idaho 254, 256, 668 P.2d 130, 132, 1983 Ida. App. LEXIS 238, *2, the avulsive event which occurred on Plaintiff's property in 2017, leaves property lines unchanged. Furthermore, "a riparian owner of land abutting upon a stream, whether navigable or non-navigable, has the right to place such barriers as will prevent his land from being overflowed or damaged by the stream, and for the purpose of keeping the same within its natural channel." *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 478, 406 P.2d 113, 117, 1965 Ida. LEXIS 389, *13.
12. Verbal emergency approval was given by the City to protect the bank in an effort to protect the Bridge.
13. Also, at the time Plaintiff believed he had existing permitting in place through IDWR and United States Army Corps of Engineers ("USACE") in Permit No. S37-20362.
14. Through the efforts of a contractor, rock armoring was placed on the bank of the Warm Springs Properties. The rock armoring successfully stabilized the bank, protecting the property and the Bridge.

15. Due to the holding in *Aldape v. Akins* the rock armoring appears to have been placed entirely on what was once private upland property. *See also* I.C. 58-1203(2)(c) (Exempting the protection or exercise of private property rights within the state of Idaho from the Public Trust Doctrine).
16. On July 31, 2017, the City issued a written permit, stating additional stream bank approvals were needed from the Department and USACE. Upon receipt of the written approval from the City, and learning that the Permit No. S37-20362 had expired, Plaintiff immediately ceased work on the bank.
17. On August 25, 2017, a representative from Brockway Engineering, who was hired by Plaintiff, spoke on the phone with Aaron Golart, IDWR, and Rob Brochu, USACE, about the property, and the need for additional permitting. Mr. Brochu told Mr. Latham that no civil penalties would be imposed by USACE if a Joint Application for Permits was filed. The representative from Brockway Engineering told Mr. Golart and Mr. Brochu an application would be filed.
18. On August 30, 2017, a representative from Brockway Engineering sent an emergency application to USACE & Defendant.
19. On September 7, 2017, a representative from Brockway Engineering emailed Mr. Golart at IDWR and the City of Ketchum as to the status of the emergency application.
20. On September 12, 2017, Brockway Engineering received a Notice of Violation from Defendant.
21. A compliance conference was held on October 3, 2017.

22. Despite repeated phone calls and emails from Plaintiff's attorney to IDWR over the course of months, it was not until January 12, 2018 that the draft Consent Order was received.
23. On January 26, 2018, Plaintiff and his attorney met with Mr. Golart, Ms. Palmer, and others from IDWR to review and then sign the Consent Order. This was the first time Plaintiff had seen the Consent Order. *See* Exhibit A.
24. The terms relevant to this action are:
- 1) By **February 15, 2018**, Respondent shall pay a civil penalty in the amount of \$10,000 and submit a Joint Application for Permit ("application") to the Department that proposes a plan to restore the streambank at the subject lands. The restoration plan must be designed to reduce further erosion and help restore more functional riverine conditions and include the following minimum requirements:
 - a. Bioengineering treatments to incorporate large woody material along the streambank (e.g. root wad engineering log jam and brush or tree revetment)
 - b. A planting plan to help re-establish a native riparian buffer between the Big Wood River and the upland parcel at the subject lands.
 - 2) Respondent shall comply with the terms and conditions of any permit the Department issues subsequent to the submittal of an acceptable application and restoration plan pursuant to Order paragraph no. 1.
 - 3) Respondent shall contact the Department immediately after completing the restoration plan at the subject lands. The Department shall inspect the completed work within 14 days after notification of completion to determine if the work meets the criteria and conditions of the restoration plan.
 - 4) The Department agrees to refund Respondent \$7,500 of the civil penalty if the Respondent successfully completes the restoration plan by **December 31, 2018**, and meets the requirements of Order paragraph 1-3. If there are circumstances beyond the control of Respondent, he will contact the Department by November 30, 2018, **to request an extension of the deadline stated above.**
 - 5) Upon execution of this agreement, the Department's receipt of the agreed civil penalty described above, and full compliance with the

terms contained herein, NOV no. E2017-1236 will be considered resolved. (Emphasis added).

25. On February 14, 2018, Brockway Engineering filed a *Restoration Plan and Bank Stabilization Project for 1200 Warm Springs, Ketchum, Idaho* (“Restoration Plan”), in response to the January 26, 2018 Consent Order.
26. While preparing the Restoration Plan, Plaintiff’s engineer had phone calls with Mr. Golart to seek his input. Unfortunately, with every plan proposed by Plaintiff’s engineer, all of which were in full compliance with the terms of the Consent Order, Mr. Golart found items he did not like, with the imposition of new and additional terms.
27. A Revised Plan was filed with the Department on March 22, 2018.
28. This plan was still unacceptable to Mr. Golart and Defendant.
29. Following several calls and meetings, October 30, 2018, and thinking there was an end in sight, Brockway Engineering filed the Second Revised Plan with the Department.
30. The Second Revised Plan was in full compliance with the Consent Order.
31. On November 2, 2018 Mr. Golart granted an extension, stating in an email to Plaintiff’s attorney, “With respect to the time extension you have requested, IDWR is willing to grant the request to extend the time to complete construction on the restoration until **March 15, 2019.**” (Emphasis added.)
32. However, the actual terms of the Consent Order were not modified, nor was a new consent order signed.
33. Once again Mr. Golart raised new concerns about the application.

34. On December 14, 2018, Brockway Engineering filed a third revised restoration plan (“Third Revised Plan”) with the Department, incorporating Mr. Golart’s newest concerns.
35. The Third Revised Plan was in full compliance with the Consent Order.
36. Following additional correspondence with Defendant, on March 15, 2019, the Joint Application was filed by Brockway Engineering.
37. On May 14, 2019, USACE issued its approval of the Joint Application.
38. On May 17, 2019, the Department issued a *Conditional Approval of Joint Application for Permits (S37-20565) in the matter of Consent Order and Agreement and of Notice of Violation No. E2017-1236 Big Wood River – 1200 Warm Springs Road Violation* (“Conditional Approval”).
39. The Conditional Approval agreed the Third Revised Plan and Joint Application met the requirements of the Consent Order.
40. However, coming as a complete surprise were the inclusion of thirteen (13) “Special Conditions” which had never previously been discussed.
41. These new terms appear to be inconsistent with Idaho Code § 42-3803(c).
42. On **May 21, 2019**, a *Petition for Hearing* (“Petition”) was mailed to the Idaho Water Resource Board, objecting to aspects of the Conditional Approval that were inconsistent with the Consent Order. *See* Exhibit B.
43. That objection stated: Certain requirements contained in Letter **are inconsistent with the Consent Order and the agreement that led to the filing of the Restoration Plan**. As stated in the Letter, “If you object to the decision issuing

this permit with the above conditions, you have 15 days in which to notify this office in writing that you request a formal hearing on the matter. (Emphasis added).

44. No action has been taken on the Conditional Approval since this time.
45. Defendant will not allow Plaintiff to simply remove the rock he caused to be placed.
46. Defendant will not permit Plaintiff to allow the rock he caused to be placed to remain undisturbed.
47. Defendant will not simply accept payment from Plaintiff so that Defendant can undertake the restoration work it purports to desire at Plaintiff's reasonable expense.
48. Rather, the Department has now threatened to commence both an administrative and/or district court enforcement action threatening to seek specific performance of work by Plaintiff on land the State may not own, as well as attorney's fees.
49. However, there is a two-year statute of limitations contained in I.C. 42-3809.
50. Plaintiff contends the statute of limitations for Defendant to bring either an enforcement action, either administratively or in district court, expired no later than **May 21, 2021**.
51. This action seeks a declaration as to the applicability of the two-year statute of limitations contained in I.C. 42-3809 with respect to the subject Consent Order and the underlying conduct.

52. One complicating factor rendering the completion of the work demanded by IDWR overly burdensome is the existence of a recorded deed clouding the title to the bed and banks of the Big Wood River adjacent to Plaintiff's property.
53. The deed dates back to a claim made by the late Ernest Hemingway. That purported interest was then transferred to the Nature Conservancy.
54. The present alleged owner of this section of the Big Wood River, as successor in interest, is the Ketchum Community Library Association, Inc.
55. This conflicting claim of ownership has resulted in conflicting requirements from IDWR and the City of Ketchum, the latter of which requires the consent of the party purporting to own the beds and banks of the Big Wood River.
56. To date, that consent has come with a request that Plaintiff indemnify the private party who claims an ownership interest in what appears to be state property, i.e. the beds and banks of the Big Wood River.
57. The Big Wood River has been adjudicated as navigable, and consequently subject to State regulation, downstream of the confluence of Warm Springs Creek. *Campion v. Simpson*, 104 Idaho 413, 659 P.2d 766 (1983).
58. The subject property is upstream of this confluence, along the Big Wood River.
59. However, Defendant and/or the State of Idaho declines to clear title to land which it would seem to own. See I.C. 36-901, 36-907, 58-1201, 73-116, and *Southern Idaho Fish and Game Association v. Picabo Livestock, Inc.* 96 Idaho 360, 528 P.2d 1295 (1974).

60. This places Plaintiff in the precarious position of picking which conflicting claim of ownership to the beds and banks of the Big Wood River is valid.
61. For example, The May 17, 2019 permit issued to Mr. Hastings states:
- 1) This permit does not constitute any of the following:
 - a) An easement or right-of-way to trespass or work upon property belonging to others...
62. These competing claims of ownership, combined with Defendant's ever shifting desires for its preferred restoration methodology, has cost Plaintiff a significant amount of money and seems to have no end in sight.
63. The Department contends the Consent Order constitutes a contract between Plaintiff and Defendant.
64. As permitted by Idaho Code 10-1203 "a contract may be construed either before or after there has been a breach thereof" in an action for declaratory judgment.
65. Defendant further contends the 5-year Statute of Limitations contained in I.C. 5-216, for actions upon written contracts, applies to its ability to bring an enforcement action.
66. However, the plain language of I.C. 5-216 states: "Within five (5) years: An action upon any contract, obligation or liability founded upon an instrument in writing. The limitations prescribed by this section shall never apply to actions in the name or for the benefit of the state and shall never be asserted nor interposed as a defense to any action in the name or for the benefit of the state although such limitations may have become fully operative as a defense prior to the adoption of this amendment."

67. As permitted by I.C. 10-1203, this action seeks a determination as to the applicability of the two-year statute of limitations contained in I.C. 42-3809 as it relates to Plaintiff's alleged violation of the Stream Protection Act (Chapter 38, Title 42, Idaho Code) as well as Plaintiff's alleged violation of the January 26, 2018 Consent Order.
68. Likewise, the threatened application of an enforcement action pursuant to IDAPA 37.03.07.045.02 impairs and interferes with Plaintiff's rights and privileges.
69. As permitted by I.C. 67-5278, Plaintiff seeks a declaration that the Department no longer has the right to pursue an enforcement action against Plaintiff due to the application of the two-year statute of limitations contained in I.C. 42-3809.
70. This is a proper matter to be determined by declaratory judgment pursuant to Idaho Code §§ 10-1201 through 10-1217, I.C. 67-5278, and IRCP 57.

V.

PRAYER

WHEREFORE, Plaintiff prays that the Court enter judgment against the Defendant as follows:

1. For an Order declaring the applicable statute of limitations for Defendant to bring an enforcement action, either administratively or in district court, is two years, pursuant to I.C. 42-3809;
2. For an Order declaring the statute of limitations to bring either an administrative or district court enforcement action against Plaintiff, for the allegations of alteration of the channel of the Big Wood River in 2017, has expired;
3. For an Order declaring the statute of limitations to bring either an administrative or

district court an enforcement action against Plaintiff for any violation of the January 26, 2018 Consent Order has expired.

4. For an Order declaring the statute of limitations for the Department to bring either an administrative or district court enforcement action against Plaintiff, for any violations of the Stream Protection Act, expired no later than May 21, 2021;
5. Alternatively, if the Statute of Limitations in I.C. 42-3809 has not expired, for a Declaration as to Plaintiffs rights and obligations under the Consent Order with respect to any obligation to conduct restoration activities on the subject properties.
6. For reasonable costs of suit pursuant to I.C. 10-1210, 12-117, and IRCP 54(d);
7. For such other and further relief as the Court deems just and proper.

DATED this 15th day of November, 2021.

LAW OFFICES OF J. KAHLE BECKER

By: _____ /s/ J. Kahle Becker
J. KAHLE BECKER
Attorney for Plaintiff

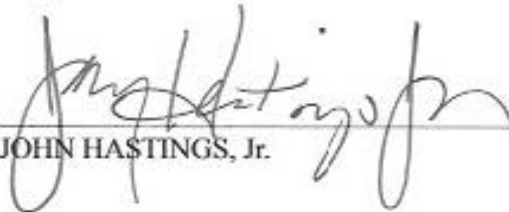
VERIFICATION

STATE OF IDAHO)
 :ss
County of Ada)

JOHN HASTINGS, Jr. . after being first duly sworn, deposes and says as follows:

That he is the Plaintiff in the foregoing ACTION FOR DECLARATORY JUDGMENT, that he has read the foregoing and believes the facts stated therein are true based upon his own information and belief.

IN WITNESS WHEREOF, Plaintiff has set its hand and seal the day and year first above written



JOHN HASTINGS, Jr.

SUBSCRIBED AND SWORN to before me this 10 day of NOVEMBER 2021.



Notary Public for Idaho
Residing at: Boise
Commission expires 12/15/2025

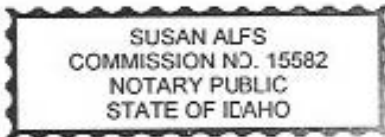


EXHIBIT A

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO
CONSENT ORDER AND AGREEMENT**

**RECEIVED
JAN 26 2018
DEPARTMENT OF
WATER RESOURCES**

In the Matter of Notice of Violation (“NOV”) No. E2017-1236
dated September 11, 2017, issued to John Hastings Jr. (“Respondent”)

BACKGROUND

- 1) Respondent owns land adjacent to the Big Wood River located within the SW¼SE¼ of Section 12, Township 04 North, Range 17 East in Blaine County, Idaho. Respondent’s property is specifically known as 1200 Warm Springs Rd in Ketchum, Idaho.
- 2) Respondent states that on July 25, 2017, the city of Ketchum gave him verbal permission to commence stream channel stabilization work at the subject land. Respondent states that he began work on July 27, 2017.
- 3) On July 31, 2017, the city of Ketchum (city) signed an Emergency Stream Bank Stabilization Permit to authorize Respondent to stabilize 200 feet of the southerly portion of the streambank at 1200 Warm Springs Rd as Project #17-085 (“subject lands”). However, Condition 9b of Project #17-085 states that:

The approval is subject to any additional conditions as required by the Idaho Department of Water Resources and the U.S. Army Corps of Engineers; where an outside agency’s conditions or standards are more stringent than the city’s, the outside agency’s conditions or standards apply.

- 4) On July 31, 2107, Respondent states that he ceased work at the subject lands.
- 5) On August 30, 2017, Respondent’s consultant submitted an Emergency Permit Application to Alter a Stream Channel (“emergency application”) to the Idaho Department of Water Resources (“Department”) on behalf of Respondent. The application included photographs with the emergency application showing stream channel alterations had taken place at the subject lands. The consultant also stated that they would be “submitting a Joint Application for Permits to formalize the emergency work that was done without IDWR approval...”
- 6) The Department did not find any current record that authorized the alteration at the subject lands.
- 7) On September 7, 2017, the Department inspected the subject lands. The Department determined that Respondent caused rock-fill below the ordinary high water mark of the Big Wood River. The Department thereby concluded that Respondent had altered the Big Wood River without the required stream alteration permit.
- 8) On September 11, 2017, the Department sent an NOV to Respondent for altering a stream channel without the required approval and permit from the Department.
- 9) On September 14, 2017, Respondent’s counsel contacted the Department to request a compliance conference.

- 10) On October 3, 2017, the Department held a compliance conference concerning the NOV. Respondent confirmed that he altered the stream channel without a permit from the Department.

APPLICABLE LAW

- 1) Idaho Code §§ 42-3801 and 42-3803a require that no alteration of any stream channel be made without approval of the Department. See also I.C. § 42-3802; IDAPA 37.03.07.010.
- 2) Idaho Code § 42-3809(2) allows the Department to initiate an administrative enforcement action for violation(s) of Idaho Code, Chapter 38, Title 42. The enforcement action must be in accordance with Idaho Code § 42-1701B.
- 3) Idaho Code § 42-1701B allows the Department to seek civil penalties and other redress pursuant to an NOV and to execute a consent order, formalizing an agreement between the Department and the alleged violator to remedy any damages and assure future compliance.
- 4) Idaho Code § 42-1701B(6) provides for civil penalties up to ten thousand dollars (\$10,000) for violating provision(s) of the Stream Protection Act or administrative rules promulgated pursuant thereto.

TERMS OF AGREEMENT AND ORDER

- 1) By February 15, 2018, Respondent shall pay a civil penalty in the amount of \$10,000 and submit a Joint Application for Permit (“application”) to the Department that proposes a plan to restore the streambank at the subject lands. The restoration plan must be designed to reduce further erosion and help restore more functional riverine conditions and include the following minimum requirements:
 - a. bioengineering treatments to incorporate large woody material along the streambank (e.g. root wad engineered log jam and brush or tree revetment)
 - b. a planting plan to help re-establish a native riparian buffer between the Big Wood River and the upland parcel at the subject lands.
- 2) Respondent shall comply with the terms and conditions of any permit the Department issues subsequent to the submittal of an acceptable application and restoration plan pursuant to Order paragraph no. 1.
- 3) Respondent shall contact the Department immediately after completing the restoration plan at the subject lands. The Department shall inspect the completed work within 14 days after notification of completion to determine if the work meets the criteria and conditions of the restoration plan.
- 4) The Department agrees to refund Respondent \$7,500 of the civil penalty if the Respondent successfully completes the restoration plan by December 31, 2018, and meets the requirements of Order paragraphs 1-3. If there are circumstances beyond the control of Respondent, he will contact the Department by November 30, 2018, to request an extension of the deadline stated above.

- 5) Upon execution of this agreement, the Department's receipt of the agreed civil penalty described above, and full compliance with the terms contained herein, NOV no. E2017-1236 will be considered resolved.

Dated this 26th day of January, 2018

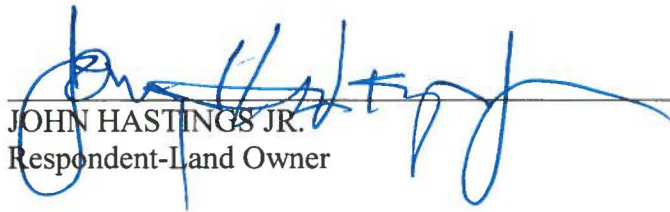


CHERIE PALMER
Water Compliance Bureau

CONSENT

Respondent accepts fully the terms and conditions of this Order. These terms shall become effective upon execution by the parties. Respondent waives any right to contest this Order and consents to the issue hereof.

Dated this 26TH day of JANUARY, 2018



JOHN HASTINGS JR.
Respondent-Land Owner

EXHIBIT B

CHRIS M. BROMLEY
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CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
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Attorneys for Petitioners

BEFORE THE IDAHO WATER RESOURCE BOARD

IN THE MATTER OF CONDITIONAL
APPROVAL OF JOINT APPLICATION
FOR PERMITS (S37-20565)

PETITION FOR HEARING

COMES NOW Embassy Auditoriums, Inc. and John Hastings, Jr. (“Petitioners”), by and through their attorneys of record, McHugh Bromley, PLLC, pursuant to IDAPA 37.01.01 *et seq.*, IDAPA 37.03.07 *et seq.*, I.C. § 42-1701A(3), I.C. § 42-3801 *et seq.*, Chapter 52, Title 67, Idaho Code, and hereby files this Petition for Hearing.

This Petition for Hearing is filed in response to a letter dated May 17, 2019 (“Letter”), whereby the State Coordinator of the Stream Protection Program approved, with conditions, the Petitioners’ *Joint Application for Permit* (“Joint Application”) received by the Idaho Department of Water Resources on March 15, 2019. Related to the Joint Application is a *Consent Order*, issued on January 26, 2018, and a *Restoration Plan and Bank Stabilization Project for 1200 Warm Springs, Ketchum, Idaho* stamped by Petitioners’ engineer on December 26, 2018 (“Restoration Plan”).

Certain requirements contained in Letter are inconsistent with the Consent Order and the agreement that led to the filing of the Restoration Plan. As stated in the Letter, “If you object to the decision issuing this permit with the above conditions, you have 15 days in which to notify this office in writing that you request a formal hearing on the matter. If an objection has not been received within 15 days, the decision will be final under the provisions of IDAPA 37.03.07.70 (Rule 70).” *Letter* at 5.

Pursuant to the above-cited authority, Petitioners hereby request a hearing to contest the requirements of the Letter.

In order to avoid unnecessary delay and litigation, and pursuant to IDAPA 37.01.01.100, Petitioners, its engineer, and attorneys are available and would be willing to participate in an informal meeting to discuss resolution of this matter.

DATED this 21st day of May, 2019.



Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2019, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

IDAHO WATER RESOURCE BOARD
P.O. BOX 83720
BOISE, ID 83720-0098

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-Mail



Chris M. Bromley