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**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/Counterdefendant,

vs.

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

Defendant/Counterclaimant.

Case No. CV01-21-17825

**RESPONSE TO DEFENDANT'S  
CROSS MOTION FOR  
SUMMARY JUDGMENT**

COMES NOW the above-named Plaintiff/Counterdefendant, by and through his attorney of record, J. Kahle Becker, Defendant/Counterclaimant Idaho Department of Water Resources ("IDWR") having filed both a response to Plaintiff's *Motion for Summary Judgment* as well as its own *Cross Motion for Summary Judgment*, Plaintiff files his response thereto as follows.<sup>1</sup>

**1. Plaintiff Violated the the Consent Order When He did not Complete Construction by a March 15, 2019 Deadline Imposed by Defendant.**

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<sup>1</sup> Defendant has attempted to improperly introduce additional documents into the record in violation of numerous stipulations of the parties to have this portion of the case decided based on a stipulated factual record without the need for a jury trial. In so doing, Defendant has improperly invoked IRE 201. Accordingly, Plaintiff has filed a *Motion to Strike and Objection to Defendant's Request to Take Judicial Notice*, a *Memorandum in Support*, a *Declaration of Counsel*, as well as a *Motion to Continue – In the Alternative* simultaneously herewith.

Defendant asserts a cause of action on the Consent Order accrues when a party does not comply with the terms of the consent order. *See* I.C. § 42-1701B (“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.”). (Emphasis added). This is one permissive precondition which may precede an enforcement action. However, in actuality, there is also a lower threshold for the Department to initiate an enforcement action.

The Department can commence an enforcement action based on allegations of a violation of title 42, when IDWR reasonably ought to have had knowledge of an alleged violation of any rule, permit, or order:

Provided however, that no civil or administrative proceeding may be brought to recover for a violation of any provision of this chapter or a violation of any rule, permit or order issued or promulgated pursuant to this chapter more than two (2) years after the director **had knowledge or ought reasonably to have had knowledge of the violation**. Idaho Code § 42-3809. (Emphasis added).

The director **may initiate a civil enforcement action** through the attorney general as provided in this section. Civil enforcement actions shall be commenced and prosecuted in the district court in and for the county in which the alleged violation occurred, and **may be brought against any person who is alleged to have substantially violated any provision of title 42**, Idaho Code, or any rule promulgated pursuant to that title. 42-1701B(5)(a). (Emphasis added).

The primary disagreement in this case centers on the date upon which IDWR was placed on notice that its cause of action accrued. First, Defendant seeks to have the Court focus on the plain language of the original consent order which contains, what Defendant characterizes as, a “financial incentive deadline” of December 2018.

This latter-day characterization of the initial December 31, 2018 deadline as a mere “financial incentive deadline” conflicts with the plain language of the original consent

order, which characterizes it as simply a “deadline.”

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. *Consent Order* at 2 attached to *First Am. Action for Decl’ry J.* as Ex. A.

However, more importantly, Defendant does not address the existence of Defendant’s drop-dead project completion deadline of March 15, 2019. Defendant stipulated as follows:

13. On November 2, 2018, the Department’s Stream Channel Coordinator, Aaron Golart, granted an extension stating in an email to Plaintiff’s former attorney Chris Bromley, “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.**” *Stipulation on Facts for Motion Practice Re: Statute of Limitations.* (Emphasis added).

Defendant now appears to ignore this project completion deadline by inaccurately informing the Court as follows:

Furthermore, the Consent Order **does not have a specified time for full performance.** “Where no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance.” *Curzon v. Wells Cargo, Inc.*, 86 Idaho 38, 43, 382 P.2d 906, 908 (1963). *Defendant’s Memorandum* at 6. (Emphasis added).

Defendant’s latter-day assertions about a deadline, Defendant itself imposed, cannot undo the factual record Defendant stipulated to.

An “[o]ral stipulation[] of the parties in the presence of the court [is] generally held to be binding [on the parties], especially when acted upon or entered on the court records.” *Kohring v. Robertson*, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002). So, although the court is not bound by the parties’ stipulations to certain facts or evidence, **the parties are so bound and are not in a position to later challenge those facts or**

**evidence.** See *Ratliff v. Ratliff*, 129 Idaho 422, 425, 925 P.2d 1121, 1124 (1996).  
*Firmage v. Snow*, 158 Idaho 343, 348, 347 P.3d 191, 196, 2015 Ida. LEXIS 97, \*10 (Emphasis added).

Furthermore, pursuant to the holding in *Curzon v. Wells Cargo, Inc.* Defendant relies upon, the reasonable timeframe and circumstances surrounding Plaintiff's completion of his performance of a restoration plan, for a violation which occurred in July of 2017, was established by Defendant to be March 15, 2019.

There is no dispute Plaintiff missed this March 15, 2019 deadline, nor is there any dispute Defendant neglected to file an enforcement action as counterclaim herein until December 21, 2021. This deadline, and the failure of Defendant to file an enforcement action within 2 years following it, i.e., before March 15, 2021, should be dispositive of the I.C. § 42-3809 statute of limitations issue.

**2. The Statute of Limitations was Also Triggered When Plaintiff Filed His Request for a Hearing in May of 2019.**

IDWR on one hand asserts the two-year Statute of Limitations contained in I.C. § 42-3809 began to run on November 15, 2021, the date Mr. Hastings filed the *Action for Declaratory Judgment* in this matter. See *Defendant's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* at 2, "Introduction." ("*Defendant's Memorandum*"). Defendant makes this assertion because it contends that is the first date which Plaintiff gave notice that he no longer intended to comply with the terms of the Consent Order. Again, Defendant ignores the permissive nature of its judicial enforcement action authorizing statutes.

This assertion also places Defendant on the horns of a dilemma. Defendant has

inexplicitly juxtaposed Plaintiff's foray into two adjudicatory forums. In so doing, Defendant has arbitrarily assigned a higher degree of culpability to Plaintiff seeking relief in an Idaho Constitution Article V judicial setting than it does with respect to Plaintiff filing a Petition for Hearing in an Article IV administrative setting.

First, there can be no dispute Plaintiff was within his legal rights to file this declaratory judgment action. Idaho Supreme Court precedent on the purpose of the Declaratory Judgment Act, to construe the rights and obligations of parties, is well established.

We note at the outset that an insurer may adjudicate its liability under a policy prior to a trial of a personal injury action and therefore that declaratory judgment was properly sought here. *Farm Bureau Mut. Ins. Co. of Idaho v. Hmelevsky*, 97 Idaho 46, 539 P.2d 598 (1975); *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 365 P.2d 824 (1961); 22 Am.Jur.2d Declaratory Judgments § 46 (1965); 18 G. Couch, Encyclopedia of Insurance Law § 74.145 (2d ed. 1968); 142 A.L.R. 8, 69 (1943).  
*Unigard Ins. Group v. Royal Globe Ins. Co.*, 100 Idaho 123, 125, 594 P.2d 633, 635, 1979 Ida. LEXIS 408, \*4

In fact, the Idaho Supreme Court has held that parties may utilize the declaratory judgment act to determine whether a statute of limitations has run.

The Act authorizes courts to declare rights, status, and other legal relations:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree. I.C. § 10-1201.

The stated purpose of the Act is ". . . to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." I.C. § 10-1212. The Act expressly provides that it is remedial

and is to be liberally construed and administered. *Id.* The Act also provides that it is to be interpreted to effectuate a goal of uniformity with the state and federal laws that govern declaratory judgments:

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of these [those] states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. I.C. § 10-1215.

The Act itself does not contain an express statute of limitations. This makes sense since the Act does not create any new substantive rights, but rather, authorizes a form of relief. "The [Act] does not *create* any new rights, statuses, or legal relations. It applies only where such rights, statuses, or legal relations *already exist*." *Brooksby v. Geico Gen. Ins. Co.*, 153 Idaho 546, 548, 286 P.3d 182, 184 (2012) (emphasis original), *abrogated on other grounds by Tucker v. State*, 162 Idaho 11,18, 394 P.3d 54, 61 (2017) (holding Idaho Rule of Civil Procedure 12(b)(1) governs justiciability challenges, not Rule 12(b)(6))....

Recognizing that a claim for declaratory judgment depends on existing substantive rights, courts examine the underlying substance of the claim to determine the applicable statute of limitations. The United States Court of Appeals for the Second Circuit held in *Luckenbach S. S. Co. v. United States* that limitations periods under the Federal Declaratory Judgment Act depend on the substantive claim, not the remedy:

Declaratory relief is a mere procedural device by which various types of substantive claims may be vindicated. There are no statutes which provide that declaratory relief will be barred after a certain period of time. Limitations periods are applicable not to the form of relief but to the claim on which the relief is based. 312 F.2d 545, 548 (2d Cir. 1963).

*Sommer v. Misty Valley, LLC*, 2021 Ida. LEXIS 190, \*12-15, 2021 WL 6017844.

On the other hand, Defendant contends, “[a]sserting the legal right to have a hearing is not and cannot be a breach of the Consent Order.” *Defendant’s Memorandum* at 5. IDWR’s rationale is that because Plaintiff was exercising his rights to file his Petition for Hearing, that did not place IDWR on reasonable notice of an alleged violation of the terms of the Consent Order. Rather, Defendant would have the Court conclude IDWR

could reasonably believe Plaintiff would someday get around to going through a hearing, a potential appeal to the district court pursuant to IRCP 84, an appeal to the Idaho Supreme Court, and possibly a remand thereafter, followed by completion of construction of the restoration project, within a reasonable time. To support its position that a delay of two years and seven months was reasonable, Defendant now asserts:

While the actions Mr. Hastings cites did not accrue a cause of action, a cause of action *did* accrue when Mr. Hastings' filed his *Action for Declaratory Judgment* on November 15, 2021. Until the *Action for Declaratory Judgment*, the Department reasonably believed Mr. Hastings was participating in the process to get resolution on the Permit and complete the required restoration. *Defendant's Memorandum* at 6.

Thus, Defendant contends Plaintiff was within his rights to initiate an administrative proceeding, whereby an administrative hearing officer (selected by IDWR) would decide whether IDWR was complying with the terms of a Consent Order IDWR drafted. Yet IDWR paradoxically asserts Plaintiff violated the Consent Order by seeking to have a judge decide the parties rights and obligations with respect to that same Consent Order, as authorized by the Declaratory Judgment Act. The distinction between seeking a judicial, as opposed to an administrative, adjudication triggering a violation of a Consent Order is not explained by Defendant. From Plaintiff's perspective, both should have placed Defendant on notice that the clock was running on an enforcement action due to Plaintiff's refusal to complete a restoration project on terms proposed by Defendant.

Plaintiff filed a formal objection to the permit with IDWR on May 21, 2019 and sought an administrative hearing. *See Petition for Hearing* attached as Exhibit B to *First Amended Action for Declaratory Judgment* and *Stipulation on Facts for Motion Practice Re: Statute of Limitations* ¶ 13, 14, & 15. When viewed in light of the March 15, 2019 deadline IDWR had imposed for Plaintiff to "complete construction of the restoration

work,” this objection should have placed IDWR on notice that Plaintiff had violated the terms of the Consent Order. *See Stipulation on Facts for Motion Practice Re: Statute of Limitations* ¶ 13. Specifically, Plaintiff’s objection to the addition of thirteen new terms to a permit, should have placed a reasonable person on notice that Plaintiff did not intend to move forward with the restoration project on terms required by Defendant. *See Idaho Code* § 42-3809.

Furthermore, Plaintiff’s formal objection was contrary to the second term of the Consent Order which stated:

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 1. January 26, 2019 Consent Order attached as Exhibit A to *First Amended Action for Declaratory Judgment*. (Emphasis added).

The Petition for Hearing filed on May 21, 2019 should have triggered the running of the two-year statute of limitations in I.C. § 42-3809 for the Department to commence an I.C. § 42-3809 enforcement action because Plaintiff indicated he would not so comply. However, Defendant asserts a red herring argument in an attempt to excuse its delay in filing an enforcement action:

Further, despite Mr. Hastings’ implications, any limitation on Mr. Hastings’ rights to a hearing in the Consent Order would be void. *See I.C. § 29-110(1)* (“Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho.”). *Defendant’s Memorandum* at 5.

Plaintiff does not contend he contractually waived a jurisdictional requirement or venue to object to the terms of any permit IDWR may issue. Rather, Plaintiff contends his Petition for Hearing should have placed IDWR on notice that he had no intention of





**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26<sup>th</sup> day of April, 2022, I caused to be served the foregoing *Response to Defendant's Cross Motion for Summary Judgment* to the following persons:

Meghan Carter and Garrick Baxter  
Attorney for Defendant,  
Idaho Department of Water Resources

via I-Court/Odyssey

/s/ J. Kahle Becker  
J. KAHLE BECKER  
Attorney for the Plaintiff/Counterdefendant