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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

**DEFENDANT'S REPLY BRIEF ON
CROSS-MOTION FOR SUMMARY
JUDGMENT**

Defendant/Counterclaimant, the State of Idaho Department of Water Resources
("Department"), through its counsel of record, pursuant to I.R.C.P. 56(b)(2) submits
Defendant's Reply Brief on Cross-Motion for Summary Judgment.

ARGUMENT

At issue in this case is whether the Department is statutorily barred from enforcing the January 26, 2018 Consent Order and Agreement (“Consent Order”) between the Department and Plaintiff, John Hastings Jr.’s (“Mr. Hastings”). *See* First Am. Action for Decl’y J. ex. A. “A cause of action accrues and the statute of limitations begins to run when a cause of action exists.” *Lido Van & Storage, Inc. v. Kuck*, 110 Idaho 939, 942, 719 P.2d 1199, 1202 (1986). A cause of action exists “[i]f a party does not comply with the terms of the consent order. . .” Idaho Code § 42-1701B(4). Further, “no civil or administrative proceeding may be brought to recover for a violation [of a consent order] . . . more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation.” Idaho Code § 42-3809. Accordingly, a cause of action exists when a party is in “violation” of a consent order.

The parties disagree which events evidence a violation of the Consent Order.¹ The relevant terms of the Consent Order are terms two and four. Term two of the Consent Order states:

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.

Consent Order at 2. Term four of the Consent Order states:

¹ “The date for when a cause of action accrues may be a question of fact or law. If no disputed issues of material fact exist, when a cause of action accrues is a question of law for determination by this Court.” *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 142, 75 P.3d 194, 196 (2003) (citations omitted). As in this matter, when neither party disputes the facts of a case the Court exercises free review over whether a lawsuit was filed within the statute of limitations. *C & G, Inc.*, 139 Idaho at 142–43, 75 P.3d at 196–97 (“Neither party disputes the facts of this case. Therefore, whether C & G filed its inverse condemnation lawsuit within the statute of limitations is a question of law over which this Court exercises free review.”).

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.

Id.

A. Requesting a hearing on the Permit is not a violation of the Consent Order.

Mr. Hastings claims he violated term two when he objected to certain conditions and requested a hearing on Stream Channel Alteration Permit (S37-20565) (“Permit”). Mem. Supp. Mot. for Summ. J. at 11 [hereinafter Plaintiff’s SJM Memo]; Resp. to Def.’s Cross Mot. for Summ. J. at 8 [hereinafter Response Memo]. Mr. Hastings is statutorily authorized to request a hearing and the Idaho Water Resource Board (“IWRB”) is statutorily obligated to provide him one. Idaho Code § 42-3805; Def.’s Mem. Supp. of Cross-Mot. for Summ. J. & Opp’n to Pl.’s Mot. for Summ. J. at 5 [hereinafter Defendant’s SJM Memo]. Because of this, the terms of the Permit are not final until: 1) the IWRB has issued a final order pursuant to the Idaho Administrative Procedure Act (Chapter 52, Title 67, Idaho Code) and the rules of procedure adopted by the IWRB (IDAPA 37.01.01.); and 2) Mr. Hastings has either pursued judicial review of the final order or accepted the IWRB’s decision. Therefore, Mr. Hastings did not violate the Consent Order by asking for a hearing on the Permit.

Mr. Hastings further argues his objection and request for hearing placed the Department “on notice that [he] did not intend to move forward with the restoration project on terms required by [the Department].” *Response Memo* at 8. However, Mr. Hastings’ language does not show an intent not to comply with the Consent Order or the eventual

terms of the Permit. Mr. Hastings' *Petition for Hearing* states "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." *First Am. Action for Decl'y J. ex. B* at 2. Mr. Hastings exercising his right to further explore the terms of the Permit in no way placed the Department "on notice that [he] did not intend to move forward with the restoration project on terms required by [the Department]." *Response Memo* at 8. Therefore, Mr. Hastings' request for hearing cannot have been a violation of the Consent Order which triggered the running of the statute of limitations.

B. The Consent Order does not have a restoration completion deadline.

Mr. Hastings claims term four of the Consent Order contains a deadline to complete restoration. *Response Memo* at 2–3. The first sentence of term four states the Department will refund a portion of the civil penalty if Mr. Hastings completes restoration by December 31, 2018. *First Am. Action for Decl'ry J. ex. A* at 2. The second sentence of term four states Mr. Hastings may request an extension of "the deadline stated above" if there are circumstances beyond his control. *Id.* "The deadline stated above" refers to the refund deadline. Mr. Hastings, however, only focuses on the word "deadline" in the second sentence and argues that it "is simply a 'deadline'" not a financial incentive deadline. *Response Memo* at 2–3. This reading of term four ignores the actual words of the second sentence and the plain meaning of the term as a whole.

To further support his argument that term four has a restoration deadline, Mr. Hastings cites paragraph 13 of the parties' February 8, 2022 *Stipulation of Facts for*

Motion Practice Re: Statute of Limitations (“Facts”) and states that the Department established a “drop-dead project completion deadline of March 15, 2019.” *Response Memo* at 3. Paragraph 13 of the Facts quotes an email from the Department to Mr. Hastings’ counsel and states: “[w]ith 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.” While it is not expressly written what time extension is being referenced, it is logical to conclude his extension refers to the financial incentive deadline discussed in term four of the Consent Order. No other deadline was established between the parties and Mr. Hastings does not point to such a deadline in the record before the court. Additionally, it would have been unreasonable for the Department to expect Mr. Hastings to fully complete restoration by March 15, 2019, when it did not issue the Permit authorizing said restoration until May 17, 2019. *See Facts* ¶ 18; Def.’s Opp’n to Pl.’s Mot. to Strike & Continue in Alternative attach. at 1. To conclude March 15, 2019, was a “drop-dead project completion deadline” would completely ignore the processes and legal framework the parties were and are operating under.

Mr. Hastings did not violate the Consent Order by not completing the restoration required in the Consent Order by March 15, 2019. Without a violation of the Consent Order the Department had no cause of action and the statute of limitations did not begin to run.

C. Mr. Hastings’ *Action for Declaratory Judgment* shows an intent not to complete restoration.

For statute of limitations purposes, Mr. Hastings argues there is no distinction between seeking administrative review of the Permit and filing an action for declaratory

judgment based on the Consent Order. *Response Memo* at 6–7. As discussed above, Mr. Hastings’ request for a hearing on the Permit was not a violation of the Consent Order. However, Mr. Hastings’ *Action for Declaratory Judgment* indicates that Mr. Hastings does not think he should complete the restoration agreed to in the Consent Order. That assertion is made repeatedly in Mr. Hastings’ arguments that he has already violated the Consent Order and therefore the Department shouldn’t be allowed to make him comply with the Consent Order.

Mr. Hastings’ assertions show an intent to violate the Consent Order by not completing the restoration. That showing of intent to violate the Consent Order is what accrues a cause of action to the Department. Even Mr. Hastings agrees his *Action for Declaratory Judgment* accrues a cause of action to the Department. *Response Memo* at 7 (“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.”).

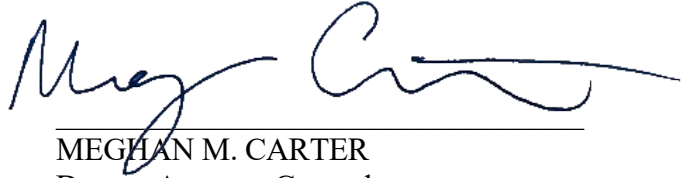
CONCLUSION

Mr. Hastings’ *Action for Declaratory Judgment*, filed on November 15, 2021, is the first event to accrue a cause of action to the Department on the Consent Order. Therefore, the Court should deny Mr. Hastings’ motion for summary judgment and instead grant the Department’s cross-motion for summary judgment.

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DATED this 6th day of May 2022.

A handwritten signature in black ink, appearing to read "Meghan M. Carter". The signature is fluid and cursive, with a long horizontal stroke at the end.

MEGHAN M. CARTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May 2022, I caused to be served a true and correct copy of the foregoing *Defendant's Reply Brief on Cross-Motion for Summary Judgment* via iCourt E-File and Serve, upon the following:

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*Attorney for Plaintiff/Counterdefendant
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