

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

John Hastings  
Plaintiff,  
vs.  
Idaho Department of Water  
Resources  
Defendant.

Case No. CV01-21-17825  
Order Denying Motion to Strike and  
Granting in Part Motion to Continue

On April 26, 2022, Plaintiff/Counterdefendant John Hastings, Jr. filed a Motion to Strike and Objection to Defendant Idaho Department of Water Resources (“Department”) Request to Take Judicial Notice,<sup>1</sup> or an alternative Motion to Continue.<sup>2</sup> Both hearings were noticed for hearing on May 10, 2022, which was the time scheduled for the hearing on the cross-motions for summary judgment that were already filed in this case. The Department filed a combined opposition to the motions.<sup>3</sup>

**I. DECISION WITHOUT HEARING**

Idaho Rule of Civil Procedure 7(b)(3)(F) states:

If oral argument has been requested on any motion, the court may deny oral argument by written or oral notice from the court at least 1 day prior to the hearing. The court may limit oral argument at any time.

This Court has reviewed the matters filed by the parties and the Court provides this notice that the Court is denying oral argument on Hastings’ Motion to Strike and Objection to Defendant’s Request to Take Judicial Notice, and the alternative Motion to Continue. The Court finds it can rule on the record. Accordingly, the Court will not hear oral argument on these motions on May 10, 2022.

<sup>1</sup> Motion to Strike and Objection to Defendant’s Request to take Judicial Notice, filed Apr. 26, 2022

<sup>2</sup> Motion to Continue—Filed in the Alternative, filed Apr. 26, 2022.

<sup>3</sup> Defendant’s Opposition to Plaintiff’s Motion to Strike and Motion to Continue in the Alternative, filed May 3, 2022.



## II. PROCEDURAL HISTORY

On December 6, 2021, Plaintiff John Hasting filed a first Amended Action for Declaratory Judgment against the Defendant/Counterclaimant Idaho Department of Water Resources (“Department”).<sup>4</sup> The Department filed an Answer and Counterclaim.<sup>5</sup> Hastings filed an Answer to the Counterclaim.<sup>6</sup> None of the pleadings are verified.

Both parties filed a Joint Motion to Bifurcate Issues that requested a court order bifurcating the issue of the statute of limitations for trial to permit that issue to be heard first and separately from a trial on the remaining issues.<sup>7</sup> The parties stipulated that, if the Court ordered a bifurcation of the issues, “the parties have agreed on a set of stipulated facts relevant to the statute of limitations issue and will file the same within 30 days of such an order and will simultaneously waive their rights to a court or jury trial on the Idaho Code § 42-3809 statute of limitations issue.”<sup>8</sup>

On February 8, 2022, the Court issued a bench decision that granted the stipulated request for bifurcation of the issues. The same day, the parties filed the Stipulation of Facts for Motion Practice re: Statute of Limitations.<sup>9</sup>

Hastings then filed on March 8, 2022 a Motion for Summary Judgment<sup>10</sup> with a supporting memorandum.<sup>11</sup> The parties then filed joint motion and stipulation for an extension of time for the responsive deadlines on summary judgment and for the summary judgment hearing.<sup>12</sup>

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<sup>4</sup> First Amended Action for Declaratory Judgment, filed Dec. 6, 2021.

<sup>5</sup> Defendant’s Answer to First Amended Action for Declaratory Judgment and Counterclaim, filed Dec. 21, 2021 (the Counterclaim requests “an Order of specific performance directing Hastings to comply with the terms of the Consent Order.”).

<sup>6</sup> Answer to Counterclaim, filed Dec. 29, 2021.

<sup>7</sup> Stipulation and Joint Motion to Bifurcate Issues and Request for Briefing Schedule and Oral Argument (“Stipulation”), filed Feb. 4, 2022.

<sup>8</sup> Stipulation, p. 2.

<sup>9</sup> Stipulation of Facts for Motion Practice Re: Statute of Limitations (“Fact”), filed Feb. 8, 2022.

<sup>10</sup> Motion for Summary Judgment (“Pl’s Motion”), filed Mar. 8, 2022.

<sup>11</sup> Memorandum in Support of Motion for Summary Judgment (“Pl’s Memo”), filed Mar. 8, 2022.

<sup>12</sup> Stipulation and Joint Motion for An Extension of Time to File Briefs and to Vacate and Reset Hearing, filed Mar. 28, 2022.



On April 5, 2022, the Department filed a Cross-Motion for Summary Judgment,<sup>13</sup> with a statement of facts<sup>14</sup> and memorandum<sup>15</sup> in support that opposes Hastings's motion for summary judgment. In the Department's statement of facts, the Department requests "the Court take judicial notice of Stream Channel Alteration Permit (S37-20565) ("Permit") referenced in ¶¶ 18 and 19 of the Facts" and the Department attached a copy of the Permit.<sup>16</sup> On April 7, 2022, the parties filed a second stipulation and joint motion for extension of time<sup>17</sup> to extend deadlines for Hastings to file his response to the Department's summary judgment filings and to file the reply briefing under Idaho Rule of Civil Procedure 7(b)(3). Consistent with that stipulation, Hastings filed a response to the Department's motion for summary judgment on April 26, 2022.<sup>18</sup>

However, on the same day, Hastings objected to the Defendant's request for judicial notice and also moved to strike,<sup>19</sup> with supporting memorandum,<sup>20</sup> and also filed his alternative motion that requests the Court continue the summary judgment hearings if the Court does not grant the motion to strike.<sup>21</sup> Hastings filed a declaration of Counsel (Kahle Becker) in support of both motions.<sup>22</sup> The Department opposes Hastings' motions.<sup>23</sup>

The Court finds it must decide these motions before it can hear or reach a decision on the issue of the statute of limitations at summary judgment.

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<sup>13</sup> Defendant's Cross-Motion for Summary Judgment ("Def's Motion"), filed Apr. 5, 2022.

<sup>14</sup> Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Def's Facts"), filed Apr. 5, 2022.

<sup>15</sup> Defendant's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Def's Memo"), filed Apr. 5, 2022.

<sup>16</sup> Def's Facts, p. 2.

<sup>17</sup> Second Stipulation and Joint Motion for An Extension of Time to File Briefs and to Vacate and Reset Hearing, filed Apr. 7, 2022.

<sup>18</sup> Response to Defendant's Cross Motion for Summary Judgment, filed Apr. 27, 2022.

<sup>19</sup> Motion to Strike and Objection to Defendant's Request to take Judicial Notice, filed Apr. 26, 2022

<sup>20</sup> Memorandum in Support of Motion to Strike and Objection to Defendant's Request to Take Judicial Notice ("Pl's Strike Memo"), filed Apr. 26, 2022.

<sup>21</sup> Motion to Continue—Filed in the Alternative, filed Apr. 26, 2022.

<sup>22</sup> Declaration of Counsel ("Becker Dec"), filed Apr. 26, 2022.

<sup>23</sup> Defendant's Opposition to Plaintiff's Motion to Strike and Motion to Continue in the Alternative, filed May 3, 2022.



### III. MOTION TO STRIKE

The Department requests the Court take judicial notice of the Permit, pursuant to Idaho Code § 9-101(3), Idaho Rule of Civil Procedure 44, and Idaho Rule of Evidence 201.<sup>24</sup> Hastings objects pursuant to Idaho Rules of Evidence 802 and 901(b)(7), and Idaho Rule of Civil Procedure 56(c)(2).<sup>25</sup>

The Court will not strike the documents from the record and it also will not strike any reference thereto in the Department's briefing. A complete record is important so the Court will only remove a document or reference if it is "redundant, immaterial, impertinent, or scandalous." Instead, to the extent the Court declines to take judicial notice, the Court will simply note that it will not consider evidence, noting its reasoning, and then not consider such information when it reaches its decision at summary judgment.

First, the Court does not find it can disregard relevant facts at summary judgment and the Court also cannot decline to consider documents that are properly judicially noticed just because the matter judicially noticed is outside of the stipulated facts filed by the parties. In the Court's review, the Department is not making any argument in contravention of the stipulated facts but instead requests the Court consider additional facts in the permit referenced in the Stipulated Facts but a permit that was not actually attached to or incorporated in that stipulation. Whether the Department's Motion for Judicial Notice violates the Stipulation to Bifurcate Trial does not bind the Court to ignore such request at summary judgment.

The Stipulated Facts filed by the parties references the Permit, which states in relevant part:

17. A Joint Application for Permits based on a Third Revised Plan was submitted to the Department on March 15, 2019 on behalf of Mr. Hastings.

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<sup>24</sup> Def's Facts, p. 2, FN 1.

<sup>25</sup> Pl's Strike Memo, p. 1. Hastings also indicated its objection was pursuant to Idaho Rule of Evidence 201(e). Idaho Rule of Evidence 201(e) provides, "On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard." So, the Court finds this rule was cited as support of Hastings bringing the motion objecting to judicial notice but is not substantively relevant to the Court's decision on whether judicial notice of the permit is appropriate. Therefore, the Court will not consider it further.



18. On May 17, 2019, the Department issued its Conditional Approval of Joint Application for Permits (S37-20565) (“Conditional Approval”).

19. On May 21, 2019, a Petition for Hearing (“Petition”) was mailed to and received by the Idaho Water Resource Board, on behalf of Mr. Hastings, by his former attorney Chris Bromley, objecting to aspects of the Conditional Approval that Mr. Hastings contends were inconsistent with the terms of the Consent Order. A true and correct copy of the Petition is attached as Exhibit B to the First Amended Action for Declaratory Judgment.<sup>26</sup>

The Court finds the above reference to the Permit is insufficient to incorporate the entirety of the Permit into the parties’ Stipulated Facts. However, it does show the Plaintiff was on notice of the Permit and that the parties identified that the Permit is pertinent to this action and any request for summary judgment on the statute of limitations.

Idaho Code § 9-101(3) permits courts to take judicial notice of public and private official acts of the executive departments of Idaho. Idaho Rule of Civil Procedure 44(a) requires the court to take judicial notice as required by law. Idaho Rule of Evidence 201(b)(2) states the court may judicially notice a fact “that is not subject to reasonable dispute because it... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”

The Court finds that the Permit is an official document of the Department that was issued pursuant to the Department’s authority in Chapter 38, Title 42, of Idaho Code, and that it is appropriate for judicial notice under Idaho Code § 9-101(3). Further, the Court finds the Permit is proper for judicial notice under Idaho Rule of Evidence 201 since it is not subject to reasonable dispute that this is the Permit referenced by the parties and it is “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” The Court finds the Department is an accurate source of Permits issued by the Department.

Idaho Rule of evidence 901(b)(7) states:

Evidence About Public Records. Evidence that [satisfies the requirement for admissibility]:

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<sup>26</sup> Stipulated Facts, ¶¶ 17-18.



(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

The Department states: “The Permit is an official document of the Department, issued pursuant to the Department’s authorities in Chapter 38, Title 42, of Idaho Code.” The Court finds this is sufficient to meet the requirements for admissibility under Rule 901.

Finally, the Plaintiff argues the Permit contains inadmissible hearsay under Idaho Rule of Evidence 802. The Court finds that the Permit may contain hearsay, but that the accuracy of the document as a Permit issued by the Idaho Department of Water Resources is not in question, so it is still properly judicially noticed. To the extent the Permit contains hearsay, that is an issue of reliability of the statements contained in the document, not whether the document itself is an actual representation of the Permit in this case. Therefore, the Court DENIES the Motion to Strike.

The Court ORDERS that it will take judicial notice of the Permit and consider the Permit when reaching a decision at summary judgment related to the statute of limitations.

#### **IV. MOTION TO CONTINUE**

Plaintiff requests to conduct limited discovery about matters in the thirty-two pages of documents attached to the Department’s statement of facts (the Permit) as they relate to the applicability of the statute of limitations found in Idaho Code § 42-3809.<sup>27</sup> Hastings specifically requests the opportunity to conduct deposition and expert witness discovery on these documents.<sup>28</sup>

In this case, the Court does not find the Department submitted the Permit as evidence as proof of matters related to the damages of the riverbed or needed restoration. Instead, the Permit was submitted as evidence of the dates for the expiration of the Permit, that Plaintiff was informed he was entitled to request a hearing on any objections to the Permit pursuant to administrative rules, and that any hearing

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<sup>27</sup> Becker Dec, ¶ 32.

<sup>28</sup> Becker Dec, ¶ 31.



request was therefore not a violation of the Consent Order.<sup>29</sup> These arguments rely on the Permit's language that references administrative rules. This is not a complex factual argument. Instead, it relies on the application of administrative rules and statutes. So, the Plaintiff has failed to specifically show how additional discovery will aid Plaintiff in addressing the statute of limitations and how it applies to the dates outlined in the Permit. Still, the Court finds Plaintiff was provided insufficient notice in the Stipulated Facts alone that the Department would include the entire Permit for consideration at summary judgment since the Permit was referenced but not directly incorporated or attached (which is especially true since other referenced documents, such as the Consent Agreement, were expressly incorporated). To that end, in the interest of fairness to the Plaintiff, the Court will GRANT IN PART the Motion to Continue to allow the Plaintiff additional time to respond to the motion for summary judgment given this Court's order taking judicial notice of the permit.

#### **V. REQUEST FOR ATTORNEY'S FEES**

Hastings states that if the Court does not order fees on its own initiative pursuant to Rule 11(c)(3), then Hastings requests he be provided the opportunity to file a Motion pursuant to Idaho Rule of Civil Procedure 11(c)(2) that seeks an order directing the Department to pay for the costs and legal fees associated with the limited discovery.

Rule 11(c) requires the Court to impose sanctions if it determines that Rule 11(b) has been violated. Rule 11(b) states:

By presenting to the court a pleading, written motion, or other paper, whether by signing, filing, or submitting, or later advocating it, an attorney

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<sup>29</sup> See Def's Memo, pp. 4–6:

Mr. Hastings also claims he violated the Consent Order by objecting to the terms of Stream Channel Alteration Permit (S37-20565) ("Permit") and requesting a hearing. Memo at 10–11. The Consent Order states Mr. Hastings "shall comply with the terms and conditions of any permit the Department issues subsequent to the submittal of an acceptable application and restoration plan." Consent Order at 2.... The plain language of the Consent Order merely requires a permit application, which by law allows for a hearing on any subsequent permit.

Mr. Hasting's request for hearing on the Permit, therefore, cannot be a violation of the Consent Order. The Permit was issued pursuant to Idaho Code § 42-3805. Permit at 1. In addition to providing the Department authority to issue a stream channel alteration permit, Idaho Code § 42-3805 allows the applicant to request a hearing before the Idaho Water Resource Board in accordance with Chapter 52, Title 67, of Idaho Code....



or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

The Court does not find that the Departments filings related to these motions warrant sanctions under Rule 11(b). The Department's arguments referencing a Permit noted but not directly incorporated into the Stipulated Facts is not a sanctionable offense. The Plaintiff was on notice of the Permit before summary judgment was filed (in fact, was aware before the filing of the Complaint in this case) and knew the Permit is relevant to arguments about the statute of limitations. So, the reference to the Permit was not presented for any improper purpose. Therefore, the Court will not award fees as a sanction under Rule 11(c).

## **VI. CONCLUSION**

Based on the foregoing, the Court **DENIES** Plaintiff/Counterdefendant John Hastings, Jr.'s Motion to Strike and Objection to Defendant's Request to Take Judicial Notice, filed April 26, 2022.

The Court **ORDERS** that it will take judicial notice of the Permit and consider the Permit when reaching a decision at summary judgment related to the statute of limitations.

The Court **GRANTS IN PART** the alternative Motion to Continue.

The Court **VACATES** the summary judgment hearing set on May 10, 2022, at 4:00 p.m. and resets the hearing to **June 7, 2022 at 4:00 p.m.**





The Court also sets the following deadlines:

Plaintiff/Counterdefendant must file any supplemental response to the Defendant/Counterclaimant's motion for summary judgment by **May 31, 2022**.

Defendant/Counterclaimant then has until **June 1, 2022** to file any reply brief.

Because the supplemental briefing was allowed only related to facts and legal arguments about the judicially-noticed Permit, the Court limits the additional briefing to **10-pages**, including addressing relevant facts.

IT IS ORDERED 5/5/2022 5:23:57 PM

  
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Lynn Norton  
District Judge

**CERTIFICATE OF SERVICE**

I certify that on this day I served a copy of the attached to:

Jacob Kahle Becker	kahle@kahlebeckerlaw.com	<input checked="" type="checkbox"/> E-mail
Garrick L. Baxter	garrick.baxter@idwr.idaho.gov	<input checked="" type="checkbox"/> E-mail
Meghan M. Carter	meghan.carter@idwr.idaho.gov	<input checked="" type="checkbox"/> E-mail

Dated: 05/ 9 /2022

Phil McGrane  
Clerk of the Court

By:   
Deputy Clerk 5/9/2022 9:36:50 AM

