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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 **SUPPLEMENTAL 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 supplemental response thereto as follows.[1]

1) IDWR has Attempted to Cloud the Record with Extraneous Documentation to Shift the Court's Attention from a Project Completion Deadline IDWR Imposed and Stipulated to.

IDWR has sought to distance itself from a hard and fast project completion deadline

[1] Defendant has introduced additional documents into the record in what Plaintiff contends is a violation of numerous stipulations of the parties to have this portion of the case decided based on a stipulated limited factual record, without the need for a jury trial. This Supplemental brief is filed pursuant to the Court's May 5, 2022 *Order Denying Motion to Strike and Granting in Part Motion to Continue*.

of March 15, 2019. *See Stipulation of Facts for Motion Practice Re: Statute of Limitations Issue* at 3, ¶ 13 and *First Amended Action for Declaratory Judgment* at 6, ¶ 31.[2] Additionally, IDWR acknowledged this project completion deadline in its *Answer to First Amended Action for Declaratory Judgment and Counterclaim* at 7, ¶ 31.

> 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."
> *First Amended Action for Declaratory Judgment* at 6, ¶ 31.

> 31. The Department admits the allegations in paragraph 31.
> *Answer to First Amended Action for Declaratory Judgment and Counterclaim* at 7, ¶ 31.

Instead of recognizing 1) March 15, 2019 was a deadline IDWR imposed on Mr. Hastings, and 2) the fact that IDWR entered into a stipulation and filed an Answer confirming the same project completion deadline, IDWR has now sought to shift the narrative by asking the Court to focus on irrelevant dates and a mischaracterization of a separate time limit in the original Consent Order.

IDWR has not provided admissible evidence to refute the existence of the March 15, 2019 project completion deadline it imposed. Rather, IDWR speculates about what might have occurred, or what could have occurred, subsequent to IDWR imposing this deadline on Mr. Hastings. This speculation is not evidence which can be considered by the Court. 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.

IDWR now seeks to shift the Court's focus off of the March 15, 2019 project

[2] Plaintiff has verified the *First Amended Action for Declaratory Judgment* as well as his *Answer to Counterclaim*. Additionally, Plaintiff had previously verified his *Action for Declaratory Judgment* which referenced all facts relevant to the issue of the application of the Statute of Limitations.

completion deadline by pointing to a strained reading of one portion of one sentence in the Consent Order. IDWR directs the Court to focus on the bolded portion of paragraph 4 of the Consent Order:

> 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. (Emphasis added).

IDWR's briefing ignores the portion of paragraph 4 of the Consent Order, following the word "and." IDWR's position that December 31, 2018 is merely a "financial incentive deadline," ignores the Consent Order's reference to completion of items 1-3 listed directly before the above quoted item 4. *See* Consent Order attached to *First Am. Action for Decl'ry J.* as Ex. A. Those three paragraphs require actual construction to take place. ("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.") Id. The completion deadline in paragraph 4 refers to construction in compliance with the restoration plan, as specified in paragraph 3, which Plaintiff had submitted at least 4 of. *See Stipulation of Facts for Motion Practice Re: Statute of Limitations* ¶ 7-12,16-17. The terms of the permit, issued subsequent to the submission of the restoration plan, are irrelevant, with respect to altering the deadlines reflected in the Consent Order and Mr. Golart's email.

The reason any dates in the permit unilaterally generated by IDWR are irrelevant to the analysis of the Statute of Limitations issue is because the Consent Order contemplates

the granting of a single extension, if Mr. Hastings requested it, by November 30, 2018.

> 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.

The word "extension" is not plural. The parties stipulated that this request, for a single extension, was made on behalf of Mr. Hastings and that the single extension authorized in the Consent Order was then granted:

> 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 of Facts for Motion Practice Re: Statute of Limitations Issue* at 3, ¶ 13. (Emphasis added).

This single extension of the project completion deadline interpretation of the Consent Order is confirmed by paragraph 15 of the *Stipulation of Facts for Motion Practice Re: Statute of Limitations Issue*, which provides:

> 15. The Department contends an amended or new consent order was not required because **the Department considered Mr. Golart's email an official extension of the construction deadline in the Consent Order.**

IDWR's latter day assertions and rebranding of its deadlines with arguments from counsel are not admissible evidence which would provide the Court a factual or legal basis to disregard the stipulated record that a project completion deadline was missed in May of 2019. This is the event which triggered the running of the Statue of Limitations.

2) The Court's Decision to Have a More Complete Record, by Taking IRE 201 Judicial Notice of a Permit, Comes at the Expense of Plaintiff's Ability to Develop his Own Record.

The Court's decision to grant IDWR's request to take judicial notice now places Plaintiff in a position the parties sought to avoid when they entered into their stipulations to have a bifurcated case decided on a stipulated factual record. Specifically, the Court

has permitted IDWR the ability to augment the stipulated record, while simultaneously denying Plaintiff the ability to develop his own record, through discovery.

The introduction of a Permit into the judicial record appears to be an attempt by IDWR to introduce parol evidence of certain dates, which IDWR now seems to contend it was permitted to unilaterally extend the project completion date, regardless of the terms of the Consent Order. It appears IDWR views the deadline expressed in the Consent Order, as well as the limitation of a single extension referenced therein, as ambiguous terms which call for the consideration of parol evidence. Aside from being improper, due to the lack of ambiguity, this procedure is highly prejudicial to Plaintiff.

To date, IDWR has not explicitly sought to characterize any term in the Consent Order as ambiguous. However, its introduction of a permit into the record is clearly an attempt to paint its perception of the term "deadline" as accurate, while denying Plaintiff the ability to conduct discovery or introduce evidence to bolster Plaintiff's interpretation of the term.

> "Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if an ambiguity exists." *Matter of Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995) (emphasis added). If a document is plain and unambiguous, the intention of the parties must be ascertained from the document, and evidence extrinsic to the document is not admissible to ascertain intent. *See Currie v. Walkinshaw*, 113 Idaho 586,589, 746 P.2d 1045, 1048 (Ct. App. 1987). Furthermore, parol evidence is not admissible to vary, contradict, or enlarge the terms of a written instrument, or to vary or alter the legal effect of the terms used in the instrument.
> *Steel Farms, Inc. v. Croft & Reed, Inc*., 154 Idaho 259,267,297 P.3d 222, 230 (2012).
>
> "The plain language of a contract, if unambiguous, is controlling .... For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term, or it must be nonsensical." *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259,266,297 P.3d 222,229 (2012).

Plaintiff believes the existence of the project completion deadline is established by the plain language of the Consent Order, the stipulation, and IDWR's *Answer* to the allegations in the *First Amended Action for Declaratory Judgment*. The same would hold true for the single extension of the project completion deadline. Unfortunately, the Court's decision to preclude Plaintiff from conducting discovery on issues related to the application of the Statute of Limitations has prejudiced Plaintiff's ability to respond to IDWR's *Cross Motion for Summary Judgment* and has raised material issues of disputed facts.

Plaintiff believes he should be able to conduct discovery on issues of:

1) The authority of IDWR employee Aaron Golart to apparently unilaterally attempt to amend the Consent Order.

> …If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. The consent order shall be effective immediately upon signing by both parties and shall preclude a civil enforcement action for the same alleged violation. 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…." I.C. 42-1701B(4). (Emphasis added).

2) The knowledge of Director of IDWR of the alleged amendment. Id.

3) Whether any consideration for the alleged modification of the Order was provided by Plaintiff. "Both contracts and contract modifications generally must be supported by consideration." *Wash. Fed. Sav. v. Van Engelen*, 153 Idaho 648, 654, 289 P.3d 50, 56, 2012 Ida. LEXIS 222, *9.

4) Issues related to the credibility of Aaron Golart in light of his self

> authentication of a document which he apparently prepared and certified for purposes of taking IRE 201 judicial notice. "The credibility of an affiant furnishing direct evidence is put at issue by other, circumstantial evidence, the credibility issue should not be resolved on summary judgment. Credibility determinations are best made when the trier of fact has an opportunity to observe the demeanor of the witnesses." *Blackmon v. Zufelt*, 108 Idaho 469, 471, 700 P.2d 91, 93, 1985 Ida. App. LEXIS 612, *4-5. Compare to *Stipulation of Facts for Motion Practice Re: Statute ff Limitations* ¶ 7-12 and *First Amended Action for Declaratory Judgment* ¶ 17-20.

5) The intent of the parties for parole evidence/contract interpretation.

If the Court is inclined to review the contents of the Permit, it took judicial notice of, to interpret the meaning of the term "deadline" or "extension" stated in the Consent Order, then Plaintiff must be provided the opportunity to provide his own parol evidence regarding his interpretation of the words "deadline" and "an extension." To the extent this argument calls for a reconsideration of the Court's decision on Plaintiff's IRCP 56(d) *Motion to Continue*, the Court is invited to do so. A *Motion for Reconsideration* is filed concurrently herewith.

3) IDWR's Reply Brief Confirms There is a Lower Threshold for the Initiation of an Enforcement Action than IDWR Initially Requested.

IDWR now asserts its enforcement action accrued when Plaintiff filed his action for declaratory judgment:

> 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.**
>
> *Defendant's Reply Brief on Cross-Motion for Summary Judgment* at 6. (Emphasis added.)

Defendant had originally asserted that 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. IDWR now seems to acknowledge this lower threshold with its arguments about Plaintiff's "intent."

If, as IDWR now contends, an intent to violate a Consent Order is the event which triggers the accruing of an enforcing action, then summary judgment in favor of Plaintiff is warranted. The Consent Order provided:

> 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 that is the date which Plaintiff indicated he did not have an intent to comply with the Order or Permit.

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).

Plaintiff's missing of the March 15, 2019 project completion deadline combined with his Petition for Hearing should have placed IDWR on reasonable notice that Plaintiff did not intend to comply with the terms of the Consent Order no later than May of 2019.

Alternatively, material issues of fact appear to exist, regarding 1) the date which Plaintiff formed his intent to violate the terms of the Consent Order and 2) the date which IDWR should reasonably have had knowledge of Plaintiff's intent. Summary judgment is appropriate only when the pleadings, depositions, affidavits, and admissions on file show that there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. IRCP 56(c). When faced with a summary judgment motion, "the non-moving party is entitled to have all inferences from the record viewed in his favor." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). The Court should infer Plaintiff's intent, not to comply based on the Petition for Hearing as well as his missing the March `15, 2019 construction completion deadline, and deny

IDWR's Cross Motion for Summary Judgment.

CONCLUSION

There is no dispute Plaintiff missed the March 15, 2019 project completion 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.

WHEREFORE, Plaintiff/Counterdefendant prays the Court deny Defendant's *Cross-Motion for Summary Judgment* and Grant *Plaintiff's Motion for Summary Judgment*.

DATED this 24th day of May, 2022.

LAW OFFICES OF J. KAHLE BECKER

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _25th_ day of May, 2022, I caused to be served the foregoing *Supplemental 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