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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 SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF OPPOSITION TO MOTION FOR RECONSIDERATION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant/Counterclaimant, the State of Idaho Department of Water Resources ("Department"), through its counsel of record, in accordance with the Court's May 9, 2022 *Order Denying Motion to Strike and Granting in Part Motion to Continue*, submits

Defendant's Supplemental Reply Brief in Support of Opposition to Motion for Reconsideration and Defendant's Cross-Motion for Summary Judgment.

ARGUMENT

A. The plain language of the parties' Consent Order does not establish a final project completion deadline, but a financial incentive deadline.

The Consent Order is the controlling document in this matter. It established the parties' agreement to resolve the Notice of Violation issued to the Defendant, John Hastings, Jr. ("Mr. Hastings"). The Consent Order has five terms of agreement. First Am. Action for Decl'ry J. ex. A at 2–3. The first term establishes a deadline for Mr. Hastings to pay a civil penalty and submit a Joint Application for Permit. *Id*. at 2. The second term states Mr. Hastings will comply with the terms and conditions of any permit issued. *Id*. The third term specifies when Mr. Hastings should notify the Department of completed restoration work and when the Department will inspect the work. *Id*. The fourth term, the term at issue here, states the Department will refund a portion of the civil penalty if Mr. Hastings "successfully completes the restoration plan by December 31, 2018, and meets the requirement of Order paragraphs 1-3." *Id*. Further, the fourth term provided Mr. Hastings the option of requesting an extension of the December 31, 2018 deadline. The fifth term specifies that upon receipt of the civil penalty and "full compliance with the terms contained herein , [sic] NOV no. E2017-1236 will be considered resolved." *Id*. at 3.

If the language of a contract "is plain and unambiguous, interpretation is a matter of law, and [the] Court will give the contract as a whole its plain meaning." *Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 528, 272 P.3d 491, 500 (2012). Taken as a whole, the plain language of the Consent Order does not establish a deadline for Mr.

Hastings to complete the restoration work required. The plain language of the Consent Order does establish: there is a deadline to pay a penalty and submit a restoration plan; there is a financial incentive deadline for Mr. Hastings to receive a refund of a portion of the civil penalty; and only after Mr. Hastings has fully complied with the terms of the Consent Order will the Notice of Violation "be considered resolved."

Mr. Hastings avers the Department acknowledged a "hard and fast" project completion deadline in the parties' *Stipulation of Facts for Motion Practice Re: Statute of Limitations Issue* and in its *Answer to First Amended Action for Declaratory Judgment and Counterclaim* by acknowledging an email granting a request to extend the time to complete construction. Suppl. Resp. to Def.'s Cross Mot. for Summ. J.at 1–2 [hereinafter Supplemental Response]. The Department agrees that the email exists and that the parties' stipulation of facts accurately represents its language. However, the Department disagrees that the email acknowledges a "hard and fast" project completion deadline because a plain reading of the Consent Order does not indicate there was any such deadline to acknowledge. Instead, a plain reading of the Consent Order indicates that the email granted an extension to the financial incentive deadline, since the financial incentive deadline is the only deadline in the Consent Order related to construction.

B. The Department's request that the Court take judicial notice of the Permit was to further establish the legal framework under which the Permit was issued, and does not create the need for additional discovery.

"When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113

(2012). In a motion for reconsideration, the moving party has the burden to draw the Court's attention to any evidence the movant is relying upon when requesting reconsideration. *See Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006) ("This opinion does not state that a trial court cannot reconsider its own interlocutory orders for facial errors or errors of law; rather, it places the burden on the moving party to draw to the trial court's attention any new evidence that the movant may be relying upon.").

In his Supplemental Response, Mr. Hastings claims the Court's decision to not allow him to conduct additional discovery has prejudiced him and that he should be allowed to conduct discovery "related to the application of the Statute of Limitations." *Supplemental Response* at 6; *see* Mot. for Recons. at 2. Mr. Hastings wants to conduct discovery in response to the Court taking judicial notice of the Permit, in order to provide parol evidence related to what he claims is a Department employee unilaterally amending the Consent Order. *See Supplemental Response* at 4–7.

"When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). In a motion for reconsideration, the moving party has the burden to draw the Court's attention to any evidence the movant is relying upon when requesting reconsideration. *See Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006) ("This opinion does not state that a trial court cannot reconsider its own interlocutory orders for facial errors or errors of law; rather, it places the burden on the

moving party to draw to the trial court's attention any new evidence that the movant may be relying upon.").

In its *Order Denying Motion to Strike and Granting in Part Motion to Continue* issued in this matter, the Court noted that the Permit shows "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." Order Den. Mot. to Strike & Grant. In Part Mot. to Continue at 5. Mr. Hastings now claims discovery is essential because "[t]he 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." *Supplemental Response* at 5. This is the only argument Mr. Hastings provides to support his motion for reconsideration. The Department references the Permit only to emphasize the authority under which the Department issued the Permit and to show Mr. Hastings was informed of his right to request a hearing on the Permit. Def.'s Mem. Supp. of Cross-Mot. for Summ. J. & Opp'n to Pl.'s Mot. for Summ. J. at 5. The Department does not cite to the Permit as a means of interpreting the Consent Order. As discussed above, the Consent Order is unambiguous, and no parol evidence is needed to determine its meaning. The Court should not overturn its *Order Denying Motion to Strike and Granting in Part Motion to Continue* to grant Mr. Hastings the opportunity to conduct additional discovery.

Mr. Hastings also questions the credibility of the Department's certification that the Permit was accurate and complete by employee Aaron Golart. *Supplemental Response* at

7. In his filings, Mr. Hastings points to nothing in the record that supports his allegation that Aaron Golart was not credible when certifying the Permit. A mere conclusory allegation against Mr. Golart's credibility does not negate the Court's finding that the Permit "is not subject to reasonable dispute" and "the Department is an accurate source of Permits issued by the Department." Order Den. Mot. to Strike & Grant. in Part Mot. to Continue at 5. Without more, Mr. Hastings' assertion that Mr. Golart's certification of the Permit lacks credibility is merely a statement of his opinion.

Mr. Hastings has failed to demonstrate that he is entitled to discovery on issues related to the application of the Statute of Limitations in this matter, and his *Motion for Reconsideration of Motion to Continue – Filed in the Alternative* should be denied.

C. Requesting a statutorily authorized Petition for Hearing does not equate to demonstrating intent to violate the Consent Order.

Mr. Hastings claims an intent to violate the Consent Order is enough to trigger a cause of action for the Department and thus the running of the statute of limitations. *Supplemental Response* at 8. This is an inaccurate description of the legal standard.

Idaho Code § 42-3809 provides the Department the authority to commence an administrative enforcement action for violations of Title 42, Chapter 38 and issue a notice of violation ("NOV") in accordance with Idaho Code § 42-1701B. Idaho Code § 42-1701B provides the Department the authority to issue a NOV and resolve it through a consent order. "If a party does not comply with the terms of a consent order," the Department may seek "specific performance of the consent order and other relief as authorized by law." Idaho Code § 42-1701B(4). "Provided however, that no civil or administrative proceeding may be brought to recover for a violation of any provision of

[Title 42, Chapter 38] or a violation of any rule, permit or order issued or promulgated pursuant to [Title 42, Chapter 38] more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation." Idaho Code § 42-3809.

Read together, these statutory provisions mean that the Department accrues a cause of action on a consent order when there has been a violation of the consent order. However, the Department may not pursue that cause of action more than two years after the Department had or ought to reasonably have had knowledge of the violation. As previously established, the Consent Order in this matter does not have a specified time for full performance. The Idaho Supreme Court has specified that "[w]here 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).

Mr. Hastings is statutorily empowered to request a hearing on the Permit. Mr. Hastings chose to request a hearing on the Permit pursuant to the statute. Mr. Hastings now argues that his request for a hearing "should have placed IDWR on reasonable notice that Plaintiff did not intend to comply with the terms of the Consent Order…." *Supplemental Response* at 9. For the Department to have been on reasonable notice that Mr. Hastings intended to violate the Consent Order, that intent needed to be conveyed to the Department. Without a fixed time for performance, an intent not to comply with the Consent Order logically would be an anticipatory repudiation. An anticipatory repudiation is "a statement by the obligor to the obligee indicating that the obligor will commit a

breach that would of itself give the obligee a claim for damages for total breach." *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho*, 166 Idaho 132, 146–47, 456 P.3d 201, 215–16 (2019) (internal quotes and citations omitted). To anticipatorily repudiate an agreement there must be a showing "sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." *Id*. at 147, 456 P.3d 201, 216 (internal quotes and citations omitted). A mere request for a hearing as procedurally contemplated in statute does not rise to the level of anticipatory repudiation.

Mr. Hastings' *Petition for Hearing* on the Permit states "[i]n 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 told the Department he was willing to discuss resolution. Therefore, Mr. Hastings' *Petition for Hearing* was not "sufficiently positive to be reasonably interpreted" as an intent not to comply with the terms of the Consent Order. However, the Department has reasonably interpreted Mr. Hastings' assertions in his *Action for Declaratory Judgment* as assertions that Mr. Hastings does not intend to comply with the Consent Order. As such, a cause of action accrued to the Department on November 15, 2021.

CONCLUSION

Discovery on the Permit is unnecessary, and the Court should deny Mr. Hastings' motion for reconsideration. Additionally, 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 *Defendant's Cross-Motion for Summary Judgment*.

DATED this 1st day of June 2022.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June 2022, I caused to be served a true and correct copy of the foregoing *Defendant's Supplemental Reply Brief in Support of Opposition to Motion for Reconsideration and Defendant's Cross-Motion for Summary Judgment* via iCourt E-File and Serve, upon the following:

J. KAHLE BECKER **Attorney at Law** 223 N. 6th St., Suite 325 Boise, Idaho 83702 kahle@kahlebeckerlaw.com *Attorney for Plaintiff/Counterdefendant John Hastings*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ iCourt E-File and Serve

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