

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

MEMORANDUM DECISION AND
ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

Plaintiff's Motion for Summary Judgment, filed March 8, 2022, Defendant's Cross-Motion for Summary Judgment, filed April 5, 2022, and Plaintiff's Motion for Reconsideration of Motion to Continue—Filed in the Alternative, filed May 25, 2022, came before the Court for hearing on July 25, 2022.

Appearances: J. Kahle Becker for Plaintiff
Meghan M. Carter for Defendant

On November 15, 2021, Plaintiff John Hastings ("Hastings") filed an Action for Declaratory Judgment against The State of Idaho Department of Water Resources ("Department"). Shortly thereafter on November 19, 2021, the Department initiated an administrative proceeding naming Hastings as a party.¹ On December 6, 2021 Hastings filed an Amended Action for Declaratory Judgment, alleging that the Department no longer has the right to pursue an enforcement action against Hastings (either by an administrative or district court action) because of the two (2) year statute of limitations pursuant to I.C. 42-3809.² Hastings also alleges the Department unlawfully initiated an administrative proceeding against Hastings "In the Matter of Application for Stream Channel Alteration Permit No. S37-20565."³ In the alternative, if the statute of limitations has not expired, then Hastings seeks the Court's declaratory judgment about Hastings's

¹ First Amended Action for Declaratory Judgment, filed Dec. 6, 2021.

² *Id.*

³ *Id.*



rights and obligations with respect to any obligation to conduct restoration activities on the subject properties under the Consent Order.⁴

On December 21, 2021, the Department filed an Answer to First Amended Action for Declaratory Judgment and Counterclaim. The Department's Counterclaim asks the District Court to order specific performance pursuant to Idaho Code §§ 42-1701B(4) and 42-3809 and to require Hastings to comply with the terms of the January 26, 2018 Consent Order and Agreement ("Consent Order"). Hastings filed an Answer to the Counterclaim.⁵ None of the pleadings are verified.

The Court issued a bench decision granting the parties stipulated request for bifurcation of the issues⁶ on February 8, 2022. The Court bifurcated the issue of the statute of limitations to be heard separately before any trial on all remaining issues. The parties stipulated that if the Court bifurcated 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."⁷ The Stipulation of Facts for Motion Practice re: Statute of Limitations was filed February 8, 2022.⁸

On March 8, 2022, the Plaintiff filed a Motion for Summary Judgment⁹ with a supporting memorandum¹⁰ asking the court to grant his Action for Declaratory Judgment and dismiss the Department's Counterclaim since the action for Hastings' failure to act pursuant to the terms of the Consent Agreement was not brought within the two-year statute of limitations.¹¹

⁴ *Id.*

⁵ Answer to Counterclaim, filed Dec. 29, 2021.

⁶ Stipulation and Joint Motion to Bifurcate Issues and Request for Briefing Schedule and Oral Argument ("Stipulation"), filed Feb. 4, 2022.

⁷ Stipulation, p. 2.

⁸ Stipulation of Facts for Motion Practice Re: Statute of Limitations ("Fact"), filed Feb. 8, 2022.

⁹ Motion for Summary Judgment ("Pl's Motion"), filed Mar. 8, 2022.

¹⁰ Memorandum in Support of Motion for Summary Judgment ("Pl's Memo"), filed Mar. 8, 2022.

¹¹ The parties stipulated to extend responsive deadlines and to delay the hearing. Stipulation and Joint Motion for An Extension of Time to File Briefs and to Vacate and Reset Hearing, filed Mar. 28, 2022. Then, they again stipulated to another delay. Second Stipulation and Joint Motion for An Extension of Time to File Briefs and to Vacate and Reset Hearing, filed Apr. 7, 2022.



On April 5, 2022, the Department filed a Cross-Motion for Summary Judgment,¹² and a statement of facts¹³ and memorandum in support¹⁴ of the Department's motion and opposing Hastings' motion. The Department asserts that it is not time barred from enforcing the January 26, 2018 Consent Order since the cause of action accrued on November 15, 2021 when Hastings filed this Action for Declaratory Judgment. The Department also asserts that the statute of limitation does not bar its Counterclaim.¹⁵ In its statement of facts, the Department requested the Court take judicial notice of Stream Channel Alteration Permit (S37-20565) ("Permit") referenced in paragraphs 18 and 19 of the Facts and then attached a copy of the Permit.¹⁶

Plaintiff responded to the Department's Motion for Summary Judgment on April 26, 2022.¹⁷ Defendant replied.¹⁸

Hastings also filed two additional motions: a Motion to Strike and Objection to Defendant's Request to Take Judicial Notice¹⁹ with supporting memorandum;²⁰ and an alternative motion asking to delay the summary judgment hearings if the Court does not grant the motion to strike.²¹ A Declaration of Counsel (Kahle Becker) was filed in support of both motions.²²

¹² Defendant's Cross-Motion for Summary Judgment ("Def's Motion"), filed Apr. 5, 2022.

¹³ 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.

¹⁴ 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.

¹⁵ Defendant's Cross-Motion for Summary Judgment, filed Apr. 5, 2022; Defendant's Memorandum In Support Of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, filed Apr. 5, 2022. The Department seeks an order of specific performance pursuant to Idaho Code §§ 42-1701B(4) and 42-3809 requiring Hastings to comply with the terms of the Jan. 26, 2018 Consent Order. See First Am. Action for Declaratory J., Ex. A. and Defendant's Answer to First Amended Action for Declaratory Judgment and Counterclaim.

¹⁶ Def's Facts, p. 2.

¹⁷ Response to Defendant's Cross Motion for Summary Judgment ("Pl's Response"), filed Apr. 26, 2022.

¹⁸ Defendant's Reply Brief on Cross-Motion for Summary Judgment ("Def's Reply"), filed May 6, 2022.

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

²⁰ 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.

²¹ Motion to Continue—Filed in the Alternative, filed Apr. 26, 2022.



Since the Court had to reach decisions on whether it would take judicial notice and if any continuance was required, on May 9, 2022, the Court entered an order that (1) denied the motion to strike; (2) ordered it would take judicial notice of the permit for purposes of summary judgment; (3) granted in part the motion to continue but denied a continuance to allow Hastings to complete additional discovery.

A briefing schedule was entered that allowed Plaintiff to file a supplemental response to the Department's motion for summary judgment and allowed the Department to file a supplemental reply. Hastings' supplemental response²³ with a supporting verification from Plaintiff swears he read the Amended Action for Declaratory Judgment and the Answer to Counterclaim and believes the facts stated therein are true based upon his own information and belief."²⁴

Plaintiff also filed a motion to reconsider²⁵ the Court's decision denying a further continuance so Plaintiff an conduct limited discovery on the matters identified in the Supplemental Response to Defendant's Cross Motion for Summary Judgment.²⁶ The Department opposed reconsideration²⁷ and filed a combined brief in opposition to reconsideration and as a supplemental reply in summary judgment.²⁸

DENIAL OF RECONSIDERATION

The Plaintiff filed a Motion for Reconsideration asking that Plaintiff be allowed to conduct limited discovery on matters identified on pages four through seven of his Supplemental Response to Defendant's Cross Motion for Summary Judgment. Again, the Court notes Plaintiff has still not served any discovery requests, even since the

²² Declaration of Counsel ("Becker Dec"), filed Apr. 26, 2022.

²³ Supplemental Response to Defendant's Cross Motion for Summary Judgment ("Pl's Supp. Response"), filed May 25, 2022.

²⁴ Verification, filed May 25, 2022 (serving as verification of the Amened Action for Declaratory Judgment); Verification, filed May 25, 2022 (serving as verification of the Answer to Counterclaim).

²⁵ Motion for Reconsideration of Motion to Continue—Filed in the Alternative ("Pl's Reconsider), filed May 25, 2022.

²⁶ *Id.*

²⁷ Opposition to Motion for Reconsideration ("Def's Reconsideration), filed June 1, 2022.

²⁸ Defendant's Supplemental Reply brief in Support of Opposition to Motion for Reconsideration and Defendant's Cross-Motion for Summary Judgment ("Def's Supp. Reply"), filed June 1, 2022.



Court's denial of this issue on May 9, 2022. The Court took judicial notice of the Permit without interpreting its words "deadline" or "extension." At the hearing, the Plaintiff did not contest that the Permit attached to the Defendant's Statement of Facts is a true and correct Conditional Permit issued after the joint application was filed on March 15, 2019. So, the Court only considers the Permit to the extent it addresses whether the filing of the Petition for Hearing triggered the statute of limitations.

The Court finds that Mr. Golart's amendment extending the Consent Agreement by email does not control the Court's determination about when the statute of limitations was triggered. Therefore, the Court does not find there is a credibility determination to be made by the Court since the Court merely considers the plain language of the Permit for its decision about the statute of limitations. So, the Motion for Reconsideration is **DENIED**.

Because the Court heard oral arguments on the motions for summary judgment on July 25, 2022 without any additional delay for discovery and the Court has denied the Plaintiff's request for reconsideration of the decision denying a delay for discovery, the Court finds the parties' cross motions for summary judgment are properly before the Court for consideration as part of this memorandum decision.

FACTUAL BACKGROUND

This case involves a dispute about the Plaintiff's alleged violation of the Stream Channel Alteration Act²⁹ and the statute of limitations in Idaho Code § 42-3809. The following facts are taken from the parties' stipulated facts and their incorporated documents, and from the Court taking judicial notice of the Conditional Permit referenced in those stipulated facts.

On September 11, 2017, as authorized under Idaho Code §§ 42-1701B and 42-3809(2), the Department issued a Notice of Violation and Order to Cease and Desist the Unauthorized Alteration of the Big Wood River ("NOV")³⁰ to John Hastings, Jr., for his alleged "removal of riparian vegetation and the discharge of fill material below the mean

²⁹ Stream Protection Act, Chapter 38, Title 42, Idaho Code

³⁰ Stip. Fact ¶ 2; Answer/Counterclaim, Exhibit 2.



high-water mark of the Big Wood River” which allegedly occurred without a permit from the Department.³¹

A compliance conference was held October 3, 2017.³²

On January 26, 2018, Mr. Hastings and the Department entered into a Consent Order and Agreement (“Consent Order”) as authorized by Idaho Code § 42-1701B.³³ The Consent Order set out the following “Terms of Agreement and Order”:

1. By February 15, 2018, Respondent shall pay a civil penalty in the amount of \$10,000 and submit a Joint Application for Permit (“application”) to the Department that proposes a plan to restore the streambank at the subject lands. The restoration plan must be designed to reduce further erosion and help restore more functional riverine conditions and include the following minimum requirements:
 - i. bioengineering treatments to incorporate large woody material along the streambank (e. g. root wad engineered log jam and brush or tree revetment)
 - ii. a planting plan to help re-establish a native riparian buffer between the Big Wood River and the upland parcel at the subject lands.
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 no. 1.
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.
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.

³¹ Stip. Fact ¶ 2.

³² Stip. Fact ¶ 3.

³³ Stip. Fact, ¶ 4.



5. Upon execution of this agreement, the Department's receipt of the agreed civil penalty described above, and full compliance with the terms contained herein, NOV no. E2017-1236 will be considered resolved.

Mr. Hastings paid the \$10,000 civil penalty contemplated in the Consent Order on February 13, 2018.³⁴ None of the civil penalty has been refunded to Hastings.³⁵

On February 14, 2018, Brockway Engineering filed, on behalf of Hastings, a *Restoration Plan and Bank Stabilization Project for 1200 Warm Springs, Ketchum, Idaho* as required by the Consent Order.³⁶ The Department rejected this plan.³⁷ A revised plan was then filed by Brockway Engineering, on behalf of Hastings, on March 22, 2018.³⁸ This revised plan was also rejected by the Department.³⁹ A second revised plan was then filed by Brockway Engineering, on behalf of Hastings, on October 30, 2018.⁴⁰ This second revised plan was also rejected by the Department. All of these plans were rejected by the Department contending that they did not comply with the terms of the Consent Order.⁴¹

Hastings disputes the Department's findings that each plan was not in compliance. Hastings asserts that each plan did comply with the terms of the Consent Order.⁴²

An extension to March 15, 2019 to complete construction on the restoration was granted by an e-mail sent on November 2, 2018 by the Department's Stream Channel Coordinator, Aaron Golart, to Plaintiff's former attorney, Chris Bromley. The e-mail reads, "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

³⁴ Stip. Fact, ¶ 5.

³⁵ Stip. Fact, ¶ 6.

³⁶ Stip. Fact, ¶ 7.

³⁷ Stip. Fact, ¶ 8.

³⁸ Stip. Fact, ¶ 9.

³⁹ Stip. Fact, ¶ 10.

⁴⁰ Stip. Fact, ¶ 11.

⁴¹ Stip. Fact, ¶ 12.

⁴² Stip. Fact, ¶ 8, 10, 12.



15, 2019.”⁴³ The actual terms of the Consent Order were not modified and no new consent order was signed.⁴⁴ The Department contends that it considered Mr. Golart’s email an official extension of the construction deadline in the Consent Order so no amended or new consent order was not required to be executed.⁴⁵

Brockway Engineering, on behalf of Hastings, filed a third revised restoration plan (“Third Revised Plan”) on December 14, 2018.⁴⁶ A Joint Application for Permits was then submitted on behalf of Hastings to the Department on March 15, 2019 that was based on this third revised plan.⁴⁷

A Conditional Approval of Joint Application for Permits (S37-20565) (“Conditional Approval” or “Conditional Permit”) was issued by the Department on May 17, 2019⁴⁸ that would expire on March 15, 2020. It contained the following language:

IDWR is permitting the proposal subject to the above conditions in this permit, and not the entire proposal as submitted. Failure to adhere to conditions as set forth herein can result in an enforcement action pursuant to Section 42-3809, Idaho Code.

If you object to the decision issuing this permit with the above conditions, you have 15 days in which to notify this office in writing that you request a formal hearing on the matter. If an objection has not been received within 15 days, the decision will be final under the provisions of IDAPA 37.03.07.70 (Rule 70).

Chris Bromley (Hastings’ former attorney) on behalf of Hastings mailed on May 21, 2019 a *Petition for Hearing* (“Petition”) received by the Idaho Water Resource Board that objected to aspects of the Conditional Approval that Hastings contended were inconsistent with the terms of the Consent Order.⁴⁹

⁴³ Stip. Fact, ¶ 13.

⁴⁴ Stip. Fact, ¶ 14.

⁴⁵ Stip. Fact, ¶ 15.

⁴⁶ Stip. Fact, ¶ 16.

⁴⁷ Stip. Fact, ¶ 17.

⁴⁸ Stip. Fact, ¶ 18.

⁴⁹ Stip. Fact, ¶ 19.



As of the time this litigation was filed in District Court on November 15, 2021, Hastings had not at any time commenced restoration of the streambank as contemplated by the Consent Order.⁵⁰

LEGAL STANDARD

Summary judgment may be entered only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The Court “liberally construes the facts and existing record in favor of the non-moving party” in making such determination. *Hall v. Forsloff*, 124 Idaho 771, 773, 864 P.2d 609, 611 (1993). “If reasonable people could reach different conclusions or inferences from the evidence, the motion must be denied.” *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). Moreover, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment.” *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001) (citations omitted).

The moving party bears the initial burden of proving the absence of a genuine issue of material fact, and then the burden shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of material fact. See *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (1994). When the nonmoving party bears the burden of proving an element at trial, the moving party may establish a lack of genuine issue of material fact by establishing the lack of evidence supporting the element. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

A party opposing a motion for summary judgment “may not rest upon mere allegations in the pleadings but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Gagnon v. W. Bldg. Maint., Inc.*, 155 Idaho 112, 114, 306 P.3d 197, 199 (2013). Such evidence may consist of affidavits or depositions, but “the Court will consider only that material . . . which is based upon personal knowledge and which would be admissible at trial.” *Harris v. State, Dep’t of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). If the evidence reveals no disputed issues of material fact, then only a question of law remains on which the court may then enter

⁵⁰ Stip. Fact, ¶ 20.



summary judgment as a matter of law. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 445, 65 P.3d 184, 186 (2003).

It is important to note that “[c]ross-motions for summary judgment do not change the applicable standard of review” and “[t]he fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact.” *Miller v. Idaho State Patrol*, 150 Idaho 856, 863, 252 P.3d 1274, 1281 (2011). So, although, the Department’s brief includes the standard for summary judgment for a court trial, the Plaintiff filed a Demand for Jury Trial on December 23, 2021. Therefore, the Court cannot make the most reasonable inferences in this case but rather must view the facts in favor of the non-moving party when reaching decisions on the motions.

ANALYSIS

This is a case of first impression regarding the applicability of the two-year statute of limitations contained in Idaho Code § 42-3809. The Court currently is considering only the narrow issue of the statute of limitations in this case.⁵¹

“The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.” IDAHO CODE § 73-113. The plain language of § 42-3809 states in pertinent part:

When the director of the department of water resources determines that any person is in substantial violation of any provision of this chapter or any rule, permit, certificate, condition of approval or order issued or promulgated pursuant to this chapter, the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. 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.

⁵¹ Upon stipulation of the parties, the Court ordered a bifurcation of these proceedings to resolve the statute of limitations issue first. *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument*, filed Feb. 2, 2022.



“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 on a consent order accrues when a party does not comply with the terms of the consent order. See IDAHO CODE § 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.”). Under § 42-1701, the director of the Department has the discretionary authority to pursue a civil action to remedy a violation of any permit or order. The director, through the attorney general, may bring a civil enforcement action in the district court “against any person who is alleged to have substantially violated any provision of title 42.” IDAHO CODE § 42-1701(B)(5)(a). So, Idaho Code § 42-3809 requires the Department to bring a claim for any substantial violation of any permit or condition of approval within two years of the violation.

Hastings argues his failure to meet the March 15, 2019 extension of the deadline in the Consent Order (which originally commanded completion by December 31, 2018) was a violation of the Consent Order that placed the Department on notice of his non-compliance. So, Hastings argues the two-year statute of limitations to bring an enforcement action began to run on March 15, 2019; so, the Department’s last day to file a claim for violation of the Consent Order under Idaho Code § 42-3809 was March 15, 2021.

In the alternative, Hastings argues that his filing on May 21, 2019 of the *Petition for Hearing* contesting the terms of the Conditional Permit placed the Department on notice that he did not intend to comply with the Consent Order. So, in the alternative, the Department’s deadline to file an enforcement action under Idaho Code § 42-3809 was May 21, 2021.

The Department asserts that the plain language of the January 26, 2018 Consent Order did not set a construction deadline. So, the Department argues the earliest time upon which this cause of action accrued was November 15, 2021, when Hastings filed this Action for Declaratory Judgment before the District Court. Meaning, the statute of limitations has not yet run so the statute of limitations does not bar its Counterclaim filed in this litigation.



1. Terms of the Consent Order

Based on the parties' arguments, the Court finds the issue is whether Hastings violated the plain language of the Consent Order by (1) failing to complete construction by the Department's extended deadline of March 19, 2021, or by (2) filing the *Petition for Hearing* on May 21, 2019 that expressed his disagreement with the terms of the Conditional Permit.

a. Construction Deadline

The Consent Order states in Term of Agreement and Order Four:

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.⁵²

Hastings argues this section of the Consent Order imposed a December 31, 2018 construction deadline which only allowed one extension since it includes the singular term "an extension." Hastings argues the construction deadline was subsequently extended by the Department to March 15, 2019 by Aaron Golart's November 2, 2018 email to Hastings's former attorney.

Golart's email states: "With respect to the time extension you have requested, the Department is willing to grant the request to extend the time to complete construction on the restoration until March 15, 2019."

Hastings argues that this email was the singular extension authorized by the express terms of the Consent Order in Term 4 and that no other extensions to the construction deadline were allowed under the terms of the Consent Order. Hastings then argues that the Department was on notice that Hastings failed to comply with Term 4 of the Consent Order on March 19, 2019 so the statute of limitations began to run that day. Under Hastings' reading, the statute of limitations ran on March 19, 2021 so this matter must be dismissed.

⁵² *Consent Order*, p. 2 (attached to *First Am. Action for Decl'ry J.* as Ex. A).



The Department argues Golart's e-mail extension related only to the deadline in Term Four of the Consent Order to create a condition for Hastings to be eligible for a \$7,500 refund from the Department if he completed the job by the set December 31, 2018 deadline. But there was not a specifically-stated deadline to complete the construction in the Consent Order.

This Court agrees with the Department's reading of Term 4 of the Consent Order. Although Term 4 imposed a "deadline" of December 31, 2018, the unambiguous meaning of Term 4 was not a deadline to complete the overall project. Both the Consent Order and Golart's e-mail use the word "deadline." However, the Consent Order was not conditioned upon a set construction completion deadline. Instead, whether Hastings received a partial refund of his civil penalty was conditioned upon whether he completed construction by the express deadline of December 31, 2018, or then by the singular extension granted by Golart to March 19, 2019.

The Court finds the Consent Order's plain, unambiguous language does not impose a construction completion date. Term 4 of the Consent Order only provided a financial incentive of a \$7,500 refund from the Department if the construction was completed by the December 31, 2018 deadline in the Consent Order, or by the singular extension granted by Golart to March 19, 2019. This financial incentive in exchange for the benefit of completion did not invoke a mandatory date for completion of performance to comply with the Consent Order. The Court's conclusion is further supported when reading the Terms of Agreement and Order as a whole. The Consent order sets out five terms of agreement: (1) requiring Hastings to pay a penalty and to submit a Joint Application for Permit to the Department for restoration of the streambank; (2) requiring Hastings to comply with the terms and conditions of any permit issued by the Department; (3) requiring Hastings to inform the Department on completion of the restoration; (4) requiring the Department to refund a portion of the civil fine and setting a deadline and a singular possible extension; and (5) providing that compliance with the terms will resolve the Notice of Violation. The Court finds that the requirement to submit plans, apply for a permit, and comply with all terms and conditions of any permit show that the Consent Order was not the only or final document setting the terms and conditions of the construction and restoration.



The plain language of the Permit and Hastings' Application for Permit also contradict Hastings' theory that the construction deadline was March 15, 2019, or of his alternative theory that it was May 21, 2019.

The Consent Order requires Hastings to "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 no. 1".⁵³ This required a subsequent application and restoration plan to be submitted by Hastings and that the application and restoration plan must be approved by the Department in order to comply with the Consent Order.

Hastings actually submitted a restoration plan on February 14, 2018, that was then revised three times over the following ten months, before the Department granted the Conditional Approval.⁵⁴ Hastings next filed his Joint Application for Permits to complete the restoration work⁵⁵ that states the "proposed completion date of all components of the project is December 31, 2019."⁵⁶ So, Hastings' Application for Permits contradicts Hastings' assertion in his briefing that March 15, 2019 was the construction competition deadline that placed the Department on notice of Hastings' violation of the Consent Order.

The Court finds that Hastings' failure to complete the construction by March 15, 2019 was not a violation of the Consent Order that triggered the running of the two-year statute of limitations deadline in Idaho Code § 42-3809. So, the Court DENIES summary judgment for Hastings and GRANTS summary judgment for the Department by finding the statute of limitations did not preclude enforcement of the Consent Order after March 15, 2021.

b. In the Alternative, Petition for Hearing on the Permit

In the alternative, Hastings argues that the Department was reasonably placed on notice of Plaintiff's violation of the Consent Order by Plaintiff's Petition of Hearing

⁵³ *Consent Order* at 2.

⁵⁴ Stip Facts, ¶¶ 7-12.

⁵⁵ Stip Facts, ¶ 17.

⁵⁶ Dept's Facts, Exhibit A.



mailed to the Department on May 21, 2019 that was a formal objection to the Conditional Permit's terms and sought an administrative hearing on this issue.

Term 2 of the Consent Order states: "Respondent [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 pursuant to Order paragraph no. 1." Plaintiff argues that his filing of the formal objection to the Conditional Permit indicated he would not comply with the terms of the Conditional Permit so it triggered the beginning of the two-year statute of limitations.

The Permit stated in relevant part:

IDWR is permitting the proposal subject to the above conditions in this permit, and not the entire proposal as submitted. Failure to adhere to conditions as set forth herein can result in an enforcement action pursuant to Section 42-3809, Idaho Code.

If you object to the decision issuing this permit with the above conditions, you have 15 days in which to notify this office in writing that you request a formal hearing on the matter. If an objection has not been received within 15 days, the decision will be final under the provisions of IDAPA 37.03.07.70 (Rule 70).

(emphasis in original). The Conditional Permit acknowledged that failure to comply with the terms could be a violation of Idaho Code § 42-3809. But the Permit also notified Hastings that he had the right to object to the terms of the Conditional Permit under the regulatory rule. The Court is not persuaded that Hastings waived his right to request a hearing on the Conditional Permit by signing the Consent Order or by Hastings' argument that petitioning for such hearing is to be interpreted as a violation of the Consent Order triggering a cause of action for enforcement under Idaho Code § 42-3809.

The Court finds that Hastings's use of an appeal right provided for by regulatory rule to object to certain terms of the Conditional Permit was not a violation of the Consent Order.

The Consent Order requires Hastings to comply with any terms from any Permit pursuant to "Order paragraph no. 1." Paragraph No. 1. required that Hastings must "submit a Joint Application for Permit to the Department." The Conditional Permit was issued based upon the plans submitted on March 15, 2019 which were approved by the Department. The Petition for Hearing only put the Department on notice that Hastings



disagreed with certain terms outlined in the Approval but that Petition did not put the Department on notice that Hastings was refusing to complete construction or comply with the Consent Order. It was reasonable for the Department to interpret Hastings' request for a hearing as an attempt to resolve disputes between Hastings and the Department so that Hastings could comply with the Consent Order.

The Court finds the Petition for Hearing did not violate Term 2 of the Consent Order since Hastings exercised his right to a hearing according to the terms of the Permit and as provided by the Department's administrative rules. Since it was not a violation of the Consent Order it could not trigger the beginning of the two-year statute of limitations. So, the Court DENIES Hastings's alternative basis for summary judgment and GRANTS summary judgment for the Department by finding the statute of limitations did not preclude enforcement of the Consent Order after May 21, 2021.

c. When the Department reasonably "ought to have known" of Hastings' violation of the Consent Order

The Department can bring an enforcement action under Idaho Code § 42-3809 "two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation."

Hastings submitted his original restoration plan on February 14, 2018,⁵⁷ a revised plan on March 22, 2018,⁵⁸ and a second revised plan on October 30, 2018⁵⁹ that were all rejected by the Department for noncompliance with the terms of the Consent Order.⁶⁰ Hastings' continuing efforts to submit complying plans, including his third revision submitted in December 2018,⁶¹ all demonstrate Hastings's attempts to comply with the Consent Order. The final Joint Application for Permits based on that Third Revised Plan and was submitted to the Department on March 15, 2019 and set a proposed

⁵⁷ Stip. Fact, ¶ 7.

⁵⁸ Stip. Fact, ¶ 9.

⁵⁹ Stip. Fact, ¶ 11.

⁶⁰ Stip. Fact, ¶ 12.

⁶¹ Stip. Facts, ¶¶ 4-13. The Department rejected Hastings's first restoration plan and twice rejected revised plans, stating these plans were not "in compliance with the terms of the Consent Order." Stip. Facts, ¶¶ 7-12. The Department conditionally approved Hastings Joint Application for Permits and the third revised plan on May 17, 2019 even though Hastings had filed his Petition for Hearing on March 21, 2019.



construction completion deadline of December 31, 2019. The Conditional Permit issued by the Department on May 17, 2019 expired March 15, 2020. Since the plain language of both the Application and the Conditional Permit extended past both March 2019 and May 2019 timeframes, then the Department could not have reasonably been on notice that Hastings' Petition for Hearing in March 2019 was a violation of the Consent Order. That Petition did not inform the Department that Hastings intended to abandon the construction. In fact, that Petition demonstrated efforts by Hastings to amend the Conditional Permit to permit performance.

No hearing date was set and no hearing was held on the Petition for Hearing on the Conditional Permit before Hastings filed this action for declaratory judgment in the District Court.

Under these circumstances, the Department would not "reasonably ought to have known" that Hastings had violated the Consent Order or was refusing to complete the construction under the Consent Order and his subsequent Application for Permit.

When viewing the Consent Order, Application for Permits and Restoration Plan, and Conditional Permit together and viewing the facts in favor of the Plaintiff based on the shifting requirement to show a genuine issue of material fact on the cross-motions for summary judgment, the Court finds that the only reasonable interpretation of the facts viewed in a light most favorable to Hastings sets the earliest possible date that the Department "ought to have reasonably known" that Hastings violated the Consent Order was December 31, 2019, the "proposed completion date" that Hastings listed in his Application for Permits.

Using December 31, 2019 as the construction deadline and therefore the date when the Department should have reasonably been on notice that Hastings had not complied with the Consent Order triggering the two-year statute of limitations to file an enforcement action pursuant to I.C. § 42-3809, the Department had until December 31, 2021 to file an enforcement action. The Department filed its enforcement action as a Counterclaim in this case on December 21, 2021. Therefore, the Department's enforcement action was timely filed so the statute of limitations under Idaho Code § 42-3809 does not require dismissal of the Counterclaim at summary judgment. Therefore, the Court



GRANTS summary judgment for the Department and DENIES summary judgment for the PLAINTIFF.

CONCLUSION

Based on the foregoing analysis, the Court finds the Department timely filed its enforcement action under Idaho Code § 42-3809 within the two-year statute of limitations. Therefore, Plaintiff's Motion for Summary Judgment, filed March 8, 2022, is **DENIED**. Defendant's Cross-Motion for Summary Judgment, filed April 5, 2022, is **GRANTED**.

IT IS SO ORDERED. 8/24/2022 11:17:18 AM



Lynn Norton
District Judge

CERTIFICATE OF SERVICE

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

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Phil McGrane
Clerk of the Court

Dated: 08/24/2022

By: Janine Korsen
Deputy Clerk

