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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN HASTINGS, Jr., Plaintiff/Counterdefendant/Appellant, vs. THE STATE OF IDAHO DEPARTMENT OF WATER RESOURCES, a Political Subdivision of the STATE OF IDAHO Defendant/Counterclaimant/Respondent.	Supreme Court Docket No. 50273-2022 Appeal from Ada Count Case No. CV01-21-17825 **APPELLANT'S BRIEF**

APPELLANT'S BRIEF

Appeal from District Court of the Fourth Judicial District for Ada County
HONORABLE LYNN NORTON
presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a novel question regarding the District Court's granting of summary judgment in favor of the Defendant, Idaho Department of Water Resources ("IDWR"), on the applicability of the statute of limitations found in Idaho Code § 42-3809. This Court has never interpreted the application of the two-year statute of limitations found therein. Idaho Code § 42-3809 allows IDWR to commence an enforcement action after the date the director had knowledge or ought reasonably to have had knowledge of a substantial violation of any rule permit or order. Here, Plaintiff/Appellant John Hastings contends IDWR created a deadline for compliance with a Consent Order, which Appellant contends expired without action from Defendant IDWR, in the Spring of 2019. Appellant contends IDWR was placed on notice of his violation of the Consent Order based Appellant's failure to meet a March 15, 2019 stream restoration construction completion deadline imposed by IDWR's Stream Channel Coordinator.

Additionally, Appellant provided notice that he objected to a permit, issued by IDWR, pursuant to the terms of the Consent Order, in May of 2019, because IDWR included 13 terms and conditions which had never been previously discussed with Appellant. This objection was made by Appellant despite a commitment he made in the Consent Order to comply with the terms and conditions of any permit issued by IDWR.

Despite being made aware of Appellant's lack of compliance with the terms of the Consent Order as well as his formal objection to the Permit issued pursuant

thereto, IDWR took no action to enforce or otherwise remedy the violation(s) of the Consent Order, until it filed its enforcement action as a counterclaim herein. IDWR's Counterclaim was filed approximately two years and seven months later, on December 21, 2021. IDWR did so under the authority granted in Idaho Code § 42-3809, the exact same statute containing the aforementioned two-year statute of limitations.

Therefore, Appellant contends IDWR missed the statute of limitations to bring an enforcement action by approximately 7 months. Consequently, Appellant contends the District Court erred in not dismissing IDRW's enforcement action by denying Appellant's *Motion Summary Judgment*. Appellant contends the District Court erred by instead granting IDWR's *Cross Motion for Summary Judgment* and in so doing, relied upon evidence improperly submitted by IDWR. This appeal followed the entry of a partial judgment, requested by stipulation of the parties, pursuant to IRCP 54(b).

B. Course of Proceedings

The parties largely attempted to work cooperatively in order to streamline this case of first impression. Therefore, there are numerous references to stipulations, which will become relevant for arguments made in Section II. D. of this Brief. The *Stipulation on Facts for Motion Practice Re: Statute of Limitations* (ROA 126-129) provides the relevant procedural history regarding the administrative actions taken by IDWR in response to Mr. Hastings' attempts to save his property during the 2017 flood, prior to litigation before the District Court. (ROA 126-129) The *Stipulation* provides in pertinent part (with references to the ROA added where appropriate):

> 2. 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 Alternation of the Big Wood River ("NOV") to John Hastings Jr., for alleged "removal of riparian vegetation and the discharge of fill material below the mean high-water mark of the Big Wood River" which allegedly occurred without a permit from the Department. A true and correct copy of the NOV is attached as Exhibit 2 to *Defendant's Answer to First Amended Action for Declaratory Judgment and Counterclaim*. (ROA 98-99)

3. A compliance conference was held October 3, 2017.

4. 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. A true and correct copy of the Consent Order is attached as Exhibit A to the *First Amended Action for Declaratory Judgment* Plaintiff filed in this matter. (ROA 55-57)

5. Pursuant to the Consent Order, Mr. Hastings paid $10,000 to the Department on February 13, 2018.

6. The Department has not refunded any portion of the $10,000 to Mr. Hastings.

7. On February 14, 2018, Brockway Engineering filed a *Restoration Plan and Bank Stabilization Project for 1200 Warm Springs, Ketchum, Idaho*, on behalf of Mr. Hastings, in response to the January 26, 2018 Consent Order.

8. The Department rejected this plan and contends it was not in compliance with the terms of the Consent Order. Mr. Hastings disputes this and asserts his plan was compliant with terms of the Consent Order.

9. A revised plan was filed with the Department on behalf of Mr. Hastings by Brockway Engineering on March 22, 2018.

10. The Department rejected this revised plan and contends it was not in compliance with the terms of the Consent Order. Mr. Hastings disputes this and asserts his revised plan was compliant with the terms of the Consent Order.

11. On October 30, 2018, Brockway Engineering filed a second revised plan with the Department on behalf of Mr. Hastings.

12. The Department rejected this revised plan and contends it was not in compliance with the terms of the Consent Order. Mr. Hastings disputes this and asserts his second revised plan was compliant with the terms of the Consent Order.

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."

14. The actual terms of the Consent Order were not modified, nor was a new consent order signed.

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.

16. On December 14, 2018, Brockway Engineering filed a third revised restoration plan ("Third Revised Plan") on behalf of Mr. Hastings.

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.

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*. (ROA 59-61)

20. Mr. Hastings has not commenced restoration of the streambank, as contemplated by the Consent Order, from the date it was signed through time this litigation was filed on November 15, 2021. (ROA 126-129)

This case did not begin as an administrative appeal pursuant to IRCP 84. Rather, pursuant to Idaho Code § 10-1203 and 67-5278, Plaintiff filed his *Action for Declaratory Judgment*, seeking a judicial interpretation of the application of the statute of limitations contained in I.C. § 42-3809 to the facts of his situation with IDWR. Plaintiff filed this case on November 15, 2021. (ROA 7-27) The Department then initiated an administrative proceeding naming Mr. Hastings as a party on November 19, 2021. *See* (verified) *First Amended Action for Declaratory Judgment* at 11, ¶ 71. (ROA 49) This caused Plaintiff to file his *First Amended Action for Declaratory Judgment* on December 6, 2021, as permitted by to IRCP 15(a), prior to IDWR filing a responsive pleading. (ROA 39-61 and ROA 300 for verification)[1].

IDWR filed its *Defendant's Answer to First Amended Action for Declaratory Judgment and Counterclaim* on December 21, 2021 – which was unverified. (ROA 78-

[1] IDRW appears to have at least temporarily abandoned its administrative proceedings. Regardless, those proceedings are irrelevant to the issues in the present narrow appeal.

101) The Counterclaim was an Enforcement Action, pursuant to I.C. § 42-3809, seeking specific performance of the January 26, 2018 Consent Order. Id. Mr. Hastings, as a Counterdefendant, timely demanded a jury trial (ROA 102-104), filed his Answer to IDWR's *Counterclaim* (ROA 106-115) and verified it. (ROA 301).

Both parties saw the primary issue in this case as a novel dispute regarding the application of the two-year Statute of Limitations contained in I.C. § 42-3809. Consequently, the parties decided to work cooperatively to present this case in an efficient manner and potentially reduce the need for complex discovery and a trial altogether. The parties entered into two primary stipulations for this purpose.

The first stipulation, dated February 4, 2022, was also a jointly filed *Motion* titled *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument*. (ROA 121-122) That stipulation provided:

> The parties, through their undersigned attorneys of record, in accordance with I.R.C.P. Rule 7 and 42(b), hereby stipulate and agree to move the Court for an order bifurcating the trial of this case so that the issue of the statute of limitations is heard separately and prior to a trial on the remaining issues in this matter.
>
> The parties believe that it is the economic interest of the parties and the court to rule on the applicability of the two-year statute of limitations contained in Idaho Code § 42-3809 to this matter before moving forward with a trial on the other issues. Thereafter, should either party decide to appeal the Court's decision on the applicability of the two-year statute of limitations contained in Idaho Code § 42-3809, the parties agree the Court can issue an IRCP 54(b) Certificate of Partial Judgment as to its ruling. In the event of an appeal, all other matters would be stayed pending a decision on said appeal.
>
> The parties do not desire oral argument on this joint motion to bifurcate issues.
>
> In the event the court agrees to issue an order bifurcating issues in this matter, 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 wave their rights to a court or jury trial on the Idaho Code § 42-3809 statute of limitations issue.
>
> Further, the parties request a briefing schedule and oral argument,

> on the issue of the applicability of the two-year statute of limitation contained in Idaho Code § 42-3809, be scheduled during the February 8, 2022 scheduling conference already set in this matter.

The Court then entered a Scheduling Order approving the handling of the case as proposed by the parties' stipulation. (ROA 131). Thereafter, the parties submitted their set of stipulated facts relevant to the statute of limitations issue, as contemplated by the *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument*. (ROA 121-122) That second Stipulation is titled *Stipulation on Facts for Motion Practice Re: Statute of Limitations* and was quoted nearly in its entirety above at pages 2-4 of this Brief. (ROA 126-129)

In accordance with the parties' stipulations to seek a decision on the limited issue of the application of the statute of limitations found in I.C. § 42-3809, based on a stipulated set of facts, Plaintiff filed his *Motion for Summary Judgment* (ROA 132-135) and *Memorandum in Support*. (ROA 136-150). As was contemplated by the parties' Stipulations and Joint Motion, no additional affidavits or declarations were submitted by Plaintiff when filing his *Motion for Summary Judgment*.

IDWR however, sought to introduce extraneous evidence, beyond the record previously stipulated to by the parties, in support of its own *Cross Motion for Summary Judgment*. (ROA 154-156). Over Plaintiff's objections, IDWR introduced the records beyond the parties' stipulation by filing *Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* – which attached 32 pages of new documents into the record (ROA 157-195). Specifically, 6 pages of the documents were a permit issued by IDWR on May 17, 2019 and 26 pages of charts, maps, photos, engineering studies and regulations.

(ROA 165-195). The documents were attached without an affidavit or declaration. Instead, IDWR asked the Court to take judicial notice of the records pursuant to IRE 201, Idaho Code § 9-101(3), and IRCP 44. (ROA 158).

IDWR's introduction of these records caused Plaintiff to file a *Motion to Strike and Objection to Defendant's Request to Take Judicial Notice*. (ROA 211-230). Additionally, since Plaintiff and IDWR had stipulated to present a narrow case and avoid the cost and expense of discovery, only to subsequently have IDWR disregard these stipulations, Plaintiff filed a *Motion to Continue*, pursuant to IRCP 56(d) – in the Alternative. Plaintiff did so in order to permit Plaintiff the opportunity to conduct limited discovery regarding the contents of these records as to the issue of the application of the Statute of Limitations contained in I.C. § 42-3809. IDWR filed its *Opposition to Plaintiff's Motion to Strike and Motion to Continue -in the Alternative.* (ROA 259 - 265)

The Court issued its *Order Vacating and Resetting Hearing* (ROA 266) on May 6, 2022 – which vacated the May 10, 2022 hearing Plaintiff had requested on its *Motion to Strike and Objection to Defendant's Request to Take Judicial Notice.* (*See* ROA 247-248) The *Order Vacating and Resetting Hearing* surprisingly stated:

> Because the supplemental briefing was allowed by the Order Denying Motion to Strike and Granting in Part Motion to Continue is only related to facts and legal arguments about the judicially—noticed Permit, the Court limits any supplemental briefing to 10-pages, including addressing relevant facts.

However, at this point, the Court had yet to issue its *Order Denying Motion to Strike and Granting in Part Motion to Continue*. More importantly, Plaintiff had yet to submit its Reply briefs on either his *Motion to Continue* or his *Motion to Strike*. *See* IRCP 7(b)(3)(C) (allowing the Movant the opportunity to file a Reply Brief). The Court then

issued its *Order Denying Motion to Strike and Granting in Part Motion to Continue* (ROA 275 – 283) on May 9, 2022, which denied Plaintiff the opportunity to present oral argument in Reply to IDWR's *Opposition to Plaintiff's Motion to Strike and Motion to Continue -in the Alternative. See Order* at ROA 275.

The District Court relied upon Idaho Code § 9-101(3) in its decision to take judicial notice of the 32 pages of documents IDWR introduced in disregard of the parties' stipulations. In so doing, the Court concluded it was not bound by the parties' stipulations when considering a request for summary judgment. (ROA 278) The Court did not address Plaintiff's position that doing so prejudiced Plaintiff's constitutional right to a jury trial, which had been waived, based on representations by IDWR – which IDWR subsequently disregarded. The Court then granted in part Plaintiff's request for a continuance, not to conduct the discovery he requested, but only to provide additional time to provide a response, not to exceed 10 pages, to IDWR's *Cross Motion for Summary Judgment*. (ROA 280-281, 283 and SROA 12).

Plaintiff immediately sought reconsideration of the Court's denial of the bulk of the relief Plaintiff had requested in the *Motion to Continue* – i.e. the opportunity to conduct discovery focused on the application of the statute of limitations found in I.C. § 42-3809. (ROA 284-285). The briefing in support of the *Motion to Reconsider* was included in the 10-page response to IDWR's *Cross Motion for Summary Judgment* Plaintiff was permitted to file when the District Court granted, in part, Plaintiff's *Motion to Continue*. (ROA 287 – 296).

The District Court ultimately granted IDWR's *Cross Motion for Summary Judgment* and denied Plaintiff's request for reconsideration of his *Motion to Continue* as

well as Plaintiff's own *Motion for Summary Judgment*. (SROA 1-26). The Court, having taken judicial notice of the 32 pages of documents IDWR had cited to in its Statement of Facts, asserted it only did so to the extent those documents addressed whether Plaintiff's filing of the *Petition for Hearing* triggered the statute of limitations. (SROA 13). Yet Plaintiff was denied the opportunity to conduct discovery related to these documents and other issues their introduction to the record raised. More importantly, no relief was provided for Plaintiff's waiver of his right to a jury trial, based on what ended up being misrepresentations made by IDWR in inducing Plaintiff to enter into several stipulations.

The District Court then concluded the Consent Order's plain, unambiguous language did not impose any construction completion date. (SROA 21). Instead, the District Court held the requirement in the Consent Order to submit plans, apply for a permit, and comply with all terms and conditions of any permit; showed that the Consent Order was not the only or final document setting the terms and conditions of the construction and restoration. (SROA 21). The District Court instead relied upon parol evidence such as dates set forth in the 32 pages of documents supplied by IDWR in its request to take Judicial Notice. In granting IDWR's *Cross Motion for Summary Judgment*, the District Court found that the only reasonable interpretation of the facts, viewed in a light most favorable to Plaintiff, set the earliest possible date that the Department "ought to have reasonably known" that Hastings violated the Consent Order was December 31, 2019, which was allegedly the "proposed completion date" that Plaintiff's engineer appears to have included in the third application for permits. (SROA 24-25). Therefore, the District Court granted IDWR's Cross Motion for Summary

Judgment, concluding IDWR timely filed its Idaho Code § 42-3809 enforcement action as a Counterclaim herein on December 21, 2021.

Thereafter, consistent with the *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument*, the parties jointly filed their *Stipulation for Entry of Partial Judgment*. (ROA 321-323). The Court then entered an IRCP 54(b) *Partial Judgment* on October 3, 2022. (ROA 334-335) Plaintiff timely filed his *Notice of Appeal*. (ROA 338-356). However, due to a minor technicality in the format of the certification required in IRCP 54(b) (*See* Appendix B) which was utilized by the District Court, the appeal was temporarily dismissed. (ROA 360) The District Court immediately entered an *Amended Partial Judgment* with a proper IRCP 54(b) certification. (ROA 357-359) The Appeal was reinstated by this Court. (ROA 361) An *Amended Notice of Appeal* was timely filed thereafter. (ROA 362 – 381).

C. Statement of Facts

The factual history of this case is interesting in that this section of the Big Wood River has a cloud on its title created by the late Ernest Hemingway. (ROA 47 ¶ 53). The factual background below provides insight into why this process became complicated, resulting in delays, as Appellant was whipsawed between conflicting directives from governmental agencies.

Appellant's *Action for Declaratory Judgment* as well as his *First Amended Action for Declaratory Judgment*, are verified (ROA 19 and 300). Therefore, due to the fact this appeal arises from the granting of summary judgment pursuant to IRCP 56, Appellant's factual allegations will be cited to in the factual history below. IDWR's *Defendant's*

Answer to First Amended Action for Declaratory Judgment and Counterclaim, on the other hand, is unverified. Appellant's *Answer to Counterclaim* is verified. (ROA 301). Thus, all of Appellant's factual assertions are verified. Other than the stipulated facts discussed above, IDWR's only factual evidence utilized to support its *Cross Motion for Summary Judgment* comes from the Court's granting of its request to take judicial notice of 32 pages of documents, in disregard of IDWR's stipulations to present a limited factual record, which was made in exchange for Appellant's wavier of his right to a jury trial on this limited issue.

Appellant owns real property along the Big Wood River, upstream of its confluence with Warm Springs Creek. (ROA 40) The subject property is also immediately upstream of the bridge for Warm Springs Road. Id. There were extremely high runoff events in the spring and summer of 2017 that led to widespread flooding in the Wood River valley. Then acting governor Brad Little declared a state of emergency in Blaine County due to these events. https://ioem.idaho.gov/wp-content/uploads/sites/57/2017/05/FLOODING-MAY-ID-04-LEVEL-1-STATE-DECLARATION.pdf. Likewise, then President Donald Trump also signed a disaster declaration as to the flooding in Blaine County. https://www.mtexpress.com/news/blaine_county/trump-signs-disaster-declaration-for-county/article_eca08bca-8d0a-11e7-9dd9-3b8965bbb412.html. Id.

On July 25, 2017, as the Big Wood River continued to erode, with 8-15 feet of riverbank washing away overnight, and with concerns as to what might happen to the bank and Warm Springs Bridge if something was not immediately done, Plaintiff met with the Senior Planner with the City of Ketchum, and Ketchum's Fire Chief to look at the property. (ROA 41) Verbal emergency approval was given by the City to protect the

bank in an effort to protect the Bridge. Also, at the time Plaintiff believed he had existing permitting in place through IDWR and United States Army Corps of Engineers ("USACE") in Permit No. S37-20362. Id. Through the efforts of a contractor, rock armoring was placed on the bank of the Warm Springs Properties. (ROA 41) The rock armoring successfully stabilized the bank, protecting the property and the Bridge. Id.[2]

On July 31, 2017, the City issued a written permit, stating additional stream bank approvals were needed from the Department and USACE. (ROA 42) Upon receipt of the written approval from the City and learning that the Permit No. S37-20362 had expired, Plaintiff immediately ceased work on the bank. Id.

On August 25, 2017, a representative from Brockway Engineering, who was hired by Appellant, spoke on the phone with Aaron Golart, IDWR, and a representative of the United States Army Corps of Engineers (USACE), about the property, and the need for additional permitting. Id. The USACE representative told Appellant's engineer that no civil penalties would be imposed by USACE if a Joint Application for Permits was filed. Id. The representative from Brockway Engineering told Mr. Golart and the USACE an application would be filed. Id. Therefore, on August 30, 2017, a representative from Brockway Engineering sent an emergency application to USACE and IDWR. Id.

On September 7, 2017, a representative from Brockway Engineering emailed Mr. Golart at IDWR and the City of Ketchum as to the status of the emergency application.

[2] Though not at issue in the present appeal, due to the holding in *Aldape v. Akins*, 105 Idaho 254, 256, 668 P.2d 130, 132, 1983 Ida. App. LEXIS 238, *2 (property lines remain unchanged following an avulsive event) the rock armoring appears to have been placed almost entirely on what was once private upland property. *See also* I.C. 58-1203(2)(c) (Exempting the protection or exercise of private property rights within the state of Idaho from the Public Trust Doctrine). *See also Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 478, 406 P.2d 113, 117, 1965 Ida. LEXIS 389, *13 ("a riparian owner of land abutting upon a stream, whether navigable or non-navigable, has the right to place such barriers as will prevent his land from being overflowed or damaged by the stream, and for the purpose of keeping the same within its natural channel.")

Id. On September 12, 2017, Brockway Engineering received a Notice of Violation from IDWR. Id. A compliance conference was held on October 3, 2017. Id. However, despite repeated phone calls and emails from Plaintiff's former attorney to IDWR over the course of months, it was not until January 12, 2018 that the draft Consent Order was received. (ROA 43)

On January 26, 2018, Appellant and his former attorney met with Mr. Golart and others from IDWR, including their legal counsel, to review and then sign the Consent Order. (ROA 43) This was the first time Plaintiff had seen the Consent Order. Id.

The terms of the Consent Order relevant to this action are:

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:
    a. Bioengineering treatments to incorporate large woody material along the streambank (e.g. root wad engineering log jam and brush or tree revetment)
    b. 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 paragraph 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**.

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. (ROA 43-44, Emphasis added, *see also* Consent Order at ROA 55-57).

On February 14, 2018, Brockway Engineering filed a *Restoration Plan and Bank Stabilization Project for 1200 Warm Springs, Ketchum, Idaho* ("Restoration Plan"), in response to the January 26, 2018 Consent Order. (ROA 44) While preparing the Restoration Plan, Plaintiff's engineer had phone calls with Mr. Golart to seek his input. Id. Unfortunately, with every plan proposed by Plaintiff's engineer, all of which were in full compliance with the terms of the Consent Order, Mr. Golart found items he did not like, with the imposition of new and additional terms. Id. A Revised Plan was filed with IDWR on March 22, 2018. Id. This plan was still unacceptable to Mr. Golart and IDWR. Id.

Following several calls and meetings, October 30, 2018, and thinking there was an end in sight, Brockway Engineering filed the Second Revised Plan with the Department. (ROA 44) The Second Revised Plan was in full compliance with the Consent Order. Id. On November 2, 2018 Mr. Golart granted an extension, stating in an email to Appellant's former 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**." Id (Emphasis added).

However, the actual terms of the Consent Order were not modified, nor was a new consent order signed. Id. Once again Mr. Golart raised new concerns about the application. Id. On December 14, 2018, Brockway Engineering filed a third revised

restoration plan ("Third Revised Plan") with the Department, incorporating Mr. Golart's newest concerns. (ROA 45) The Third Revised Plan was in full compliance with the Consent Order. Id. Following additional correspondence with Defendant, on March 15, 2019, the Joint Application was filed by Brockway Engineering. Id On May 14, 2019, USACE issued its approval of the Joint Application. Id. On May 17, 2019, the Department issued a *Conditional Approval of Joint Application for Permits (S37-20565) in the matter of Consent Order and Agreement and of Notice of Violation No. E2017-1236 Big Wood River – 1200 Warm Springs Road Violation* ("Conditional Approval"). Id.

The Conditional Approval agreed the Third Revised Plan and Joint Application met the requirements of the Consent Order. Id. However, coming as a complete surprise to Appellant were the inclusion of thirteen (13) "Special Conditions" which had never previously been discussed. Id. These new terms appeared to be inconsistent with Idaho Code § 42-3803(c). Id.

On May 21, 2019, a *Petition for Hearing* ("Petition") was mailed to the Idaho Water Resource Board by Appellant's prior counsel, objecting to aspects of the Conditional Approval that were inconsistent with the Consent Order. (ROA 45, *See also Petition* at ROA 59-61). That objection stated: Certain requirements contained in Letter are inconsistent with the Consent Order and the agreement that led to the filing of the Restoration Plan. As stated in the Letter, "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. Id. Thereafter, for well over two years, no action was taken on the Conditional Approval and no other construction took place prior

to Appellant's filing of his *Action for Declaratory Judgment* on November 15, 2021.[3] (ROA 46 and 129)

One complicating factor, rendering the completion of the work demanded by IDWR overly burdensome, is the existence of a recorded deed clouding the title to the bed and banks of the Big Wood River adjacent to Plaintiff's property. (ROA 47) The deed dates back to a claim made by the late Ernest Hemingway. Id. That purported interest was then transferred to the Nature Conservancy. Id. The present alleged owner of this section of the Big Wood River, as successor in interest, is the Ketchum Community Library Association, Inc. Id.

This conflicting claim of ownership has resulted in conflicting requirements from IDWR and the City of Ketchum, the latter of which requires the consent of the party purporting to own the beds and banks of the Big Wood River – prior to Appellant commencing restoration work. Id. To date, that consent has come with a request that Plaintiff indemnify the private party who claims an ownership interest in what appears to be state property, i.e. the beds and banks of the Big Wood River.[4] Id.

[3] Though not directly at issue in this appeal, it is noteworthy that IDWR will not allow Plaintiff to simply remove the rock he caused to be placed. (ROA 46). Likewise, IDWR will not permit Plaintiff to allow the rock he caused to be placed to remain undisturbed. Id. Nor will IDWR simply accept payment from Appellant so that IDWR can undertake the restoration work it purports to desire at Appellant's reasonable expense. Id. Appellant acted reasonably but when faced with an unreasonable governmental agency, he had no choice but to seek judicial relief.

[4] Though not at issue in this appeal, the Big Wood River has been adjudicated as navigable, and consequently subject to State regulation, downstream of the confluence of Warm Springs Creek. *Campion v. Simpson*, 104 Idaho 413, 659 P.2d 766 (1983). The subject property is just upstream of this confluence, along the Big Wood River. However, despite a public trust obligation to do so, IDWR and/or the State of Idaho declined to clear title to land which it would seem to own. *See* I.C. 36-901, 36-907, 58-1201,73-116, and *Southern Idaho Fish and Game Association v. Picabo Livestock, Inc*. 96 Idaho 360, 528 P.2d 1295 (1974).

This places Plaintiff in the precarious position of picking which conflicting claim of ownership to the beds and banks of the Big Wood River is valid. For example, The May 17, 2019 permit issued to Appellant states:

> 1) This permit does not constitute any of the following:
> a) An easement or right-of-way to trespass or work upon property belonging to others… (ROA 48)

These competing claims of ownership, combined with IDWR's ever shifting desires for its preferred restoration methodology, had cost Appellant a significant amount of money and seemed to have no end in sight. Id. Therefore on November 15, 2021 Appellant filed suit pursuant to Idaho Code 10-1203 and I.C. 67-5278 seeking a determination as to the applicability of the two-year statute of limitations contained in I.C. 42-3809 as it relates to his alleged violation of the Stream Protection Act (Chapter 38, Title 42, Idaho Code) as well as his alleged violation of the January 26, 2018 Consent Order.

II. ARGUMENT

A. Standard of Review

The District Court correctly articulated the standard of review applicable when it is faced with cross motions for summary judgment, as follows:

> 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 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. (SROA 9-10).

The standard of review applicable to the District Court's decision to take judicial notice of 32 pages of records submitted by IDWR in disregard of the parties' Stipulations is an abuse of discretion standard. "Whether a district court erred in taking or not taking judicial notice is an evidentiary question we review under the abuse of discretion standard." *Bass v. Esslinger*, 2023 Ida. LEXIS 22, *9.

B. Appellant's Failure to Complete Construction by A Deadline Imposed by IDWR Triggered the Running of the Two-Year Statute of Limitations in Idaho Code § 42-3809.

This is a case of first impression on the applicability of the two-year statute of limitations contained in Idaho Code § 42-3809. IDWR alleges in its (unverified) Counterclaim:

> 1. The Department seeks an order of specific performance pursuant to Idaho Code§§ 42-1701B(4)[5] and 42-3809 requiring Hastings to comply with the terms of the January, 26, 2018 Consent Order and Agreement ("Consent Order"). *See* First Am. Action for Declaratory J., Ex. A. (ROA 92)

IDWR also asserted "…[t]he Consent Order does not have a specified time for full performance." (ROA 201)

Therefore, the starting point for the analysis of when the two-year Statute of Limitations contained in I.C. § 42-3809 began to run must be based on caselaw interpreting the time for performance of a contract with no expiration date. "Where 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). Appellant contends a contract entered into in early 2018, based on events which occurred in the summer of 2017, could and should have been performed by the spring of 2019[6] – a date confirmed by IDWR.

Idaho Code § 42-3809 provides:

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[5] Idaho Code 42-1701B(4) provides the authority for IDWR to enter into Consent Orders, such as the Order at the center of this dispute.

[6] A factual dispute exists as to who is to blame for the lack of performance by the deadline imposed by IDWR. (ROA 127-129)

> 42-3809. ENFORCEMENT PROCEDURE — INJUNCTIVE RELIEF. The director of the department of water resources is hereby vested with the power and authority to enforce the provisions of this chapter and rules and regulations promulgated pursuant to it. 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 <u>order</u> 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 <u>or order</u> issued or promulgated pursuant to this chapter more than two (2) years after the director had knowledge <u>or ought reasonably to have had knowledge</u> of the violation.** The director shall have authority and it shall be his duty to seek a temporary injunction from the appropriate district court to restrain a person from altering a stream channel until approval therefor has been obtained by the person as provided in this act. (Emphasis added)

As this is a case of first impression, cases interpreting the "discovery" component of the analogous I.C. § 5-218(4) and in cases interpreting other statutes of limitation, such as I.C. § 5-216 are instructive for purposes of this analysis.

The "subject matter" and "circumstances" giving rise to the original Notice of Violation occurred in the summer of 2017, i.e. over 4 years prior to IDWR's initiation of the instant Enforcement Action in late December 2021. *See Curzon Supra.* A suit to address violations of any applicable rules or statutes which Appellant allegedly violated in 2017 would clearly be time barred. But the lapse of over 4 years between the alleged wrongful action of Appellant and the initiation of IDWR's enforcement action are factors relevant to the "situation of the parties, and the circumstances attending the performance." *See Curzon, Supra*.

However, after delays occasioned solely by IDWR, IDWR and Appellant entered into a Consent Order in January 2018, as permitted by I.C. 42-1701B(4), to attempt to

resolve the alleged 2017 violations. Idaho Code § 42-1701B(4) states:

> 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.

Thus, the 2017 alleged violations were subsumed into the January 2018 Consent Order and deadlines and statutes of limitation were reset.

Therefore, the January 26, 2018 Consent Order is the "order" to focus on for purposes of the analysis of when IDWR "had knowledge or ought reasonably to have had knowledge of the 'substantial' violation" of the "order" in the context of I.C. § 42-3809. The provision containing the deadline in the January 26, 2018 Consent Order states:

> 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 paragraph 1-3. If there are circumstances beyond the control of Respondent, he will contact the Department by November 30, 2018**, to request <u>an extension</u> of the deadline stated above**. (ROA 56)

IDWR and Plaintiff went back and forth on the details of the restoration plan for an extended period of time. (ROA 127-129) That delay resulted in IDWR providing the following single extension contemplated by the plain language of the Consent Order:

> 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 <u>complete construction</u> on the restoration until March 15, 2019**." (ROA 128)(Emphasis added).

IDWR stipulated that it considered this email to be an official extension of the construction deadline as contemplated in the Consent Order. Id. IDWR also stipulated:

> 20. Mr. Hastings has not commenced restoration of the streambank, as contemplated by the Consent Order, from the date it was signed through time this litigation was filed on November 15, 2021. Id.

In light of the nature of this Appeal, arising from the granting of IDWR's *Cross Motion for Summary Judgment*, the binding effect of stipulations of the parties cannot be overstated. These facts are binding on the parties and should have resulted in the granting of summary judgment in favor of Appellant.

> An "[o]ral stipulation[] of the parties in the presence of the court [is] generally held to be binding [on the parties], especially when acted upon or entered on the court records." *Kohring v. Robertson*, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002). So, although the court is not bound by the parties' stipulations to certain facts or evidence, **the parties are so bound and are not in a position to later challenge those facts or evidence.** *See Ratliff v. Ratliff*, 129 Idaho 422, 425, 925 P.2d 1121, 1124 (1996).
> *Firmage v. Snow*, 158 Idaho 343, 348, 347 P.3d 191, 196, 2015 Ida. LEXIS 97, *10 (Emphasis added).

IDWR set a deadline for completion of construction and then subsequently stipulated to the authenticity, accuracy, and binding nature of that construction completion deadline.

Appellant's inability to complete the restoration of the streambank by March 15, 2019 should have put IDWR on notice of a "substantial violation" of the Consent Order, as extended by IDWR through Mr. Golart's November 2, 2018 email. This Court's interpretation of the discovery rule in I.C. § 5-218(4) is instructive as to when a party is placed on constructive knowledge of the existence of a claim.

> I.C. § 5-218(4) contains a two-year statute of limitations for fraud claims. In *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991), the Court recently addressed this aspect of I.C. § 5-218(4) and held that the statute does not begin to run until the plaintiff knew or reasonably should have known of the facts constituting the fraud. The Court explained that "discovery," as used in the statute, means the point in time when the plaintiff had actual or constructive knowledge of the facts constituting the fraud and that application of I.C. § 5-218(4) does not depend on when the plaintiff should have been aware that something was wrong. *Id.* at 773,

> 820 P.2d at 368. The Court held that when the plaintiff discovered the fraud is a question of fact for the jury and that summary judgment on this issue was only appropriate if there is no factual dispute about when this discovery occurred. *Id.*
> *Jones v. Kootenai County Title Ins. Co*., 125 Idaho 607, 615, 873 P.2d 861, 869, 1994 Ida. LEXIS 55, *20-21

Similarly, when interpreting a prior version of I.C. § 5-218(4) this Court held: "…knowledge of such facts as would put them upon inquiry is equivalent to knowledge of the fraud." *Williams v. Shrope*, 30 Idaho 746, 748, 168 P. 162, 162, 1917 Ida. LEXIS 110, *5

Missing the March 15, 2019 construction completion deadline should have put IDWR on notice that Appellant would not comply with the terms of the Consent Order; i.e. that Appellant "substantially violated" the Consent Order. Meriam Webster defines the word "substantial" as "being largely but not wholly that which is specified." https://www.merriam-webster.com/dictionary/substantial. A complete violation of the Consent Order is not necessary to trigger IDWR's enforcement authority under the plain language of I.C. § 42-3809. IDWR could easily have acted on Appellant's "substantial violation" of the Consent Order in the Spring of 2019 but it elected not to.

Likewise, IDWR has not plead the affirmative defense of equitable tolling or equitable estoppel. *See* (ROA 91)

> "The only non-statutory bar to a statute of limitation defense in Idaho is the doctrine of equitable estoppel." *J.R. Simplot Co. v. Chemetics Int'l, Inc*., 126 Idaho 532, 534, 887 P.2d 1039, 1041 (1994). The elements of equitable estoppel are as follows:
>
> > (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or

> from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice. *Id*.
>
> Equitable estoppel does not eliminate, toll, or extend the statute of limitations. *Ferro v. Society of Saint Pius X*, 143 Idaho 538, 540, 149 P.3d 813, 815 (2006). It merely bars a party from [asserting the statute of limitations as a defense for a reasonable time after the party asserting estoppel discovers or reasonably could have discovered the truth. *City of McCall v. Buxton*, 146 Idaho 656, 663-664, 201 P.3d 629, 636-637, 2009 Ida. LEXIS 10, *23-24

Therefore, since IDWR has not claimed that it relied upon Appellant's March 15, 2019 Application to support an affirmative defense of equitable estoppel, according to the plain language of I.C. § 42-3809, IDWR should have filed an enforcement action on or before March 15, 2021, i.e. two years after the March 15, 2019 construction completion deadline was missed. Instead IDWR inexcusably waited until December 2021 to file an I.C. § 42-3809 enforcement action. This delay of 7 months is fatal to IDWR's position and should have resulted in a dismissal of its Enforcement Action Counterclaim as well as the granting of Appellant's *Motion for Summary Judgment*. Alternatively, as will be discussed in Section II E of this Brief below, the Court should have denied summary judgment to both parties due to a disputed factual issues created by IDWR's introduction of records outside of the parties' stipulations.

C. IDWR was Also Placed on Reasonable Notice of Appellant's Substantial Violation of the Terms of the Consent Order When Appellant Objected to the Terms of the Permit IDWR Issued

In May of 2019 IDWR finally approved the fourth river restoration plan submitted by Appellant's engineer. However, coming as a complete surprise to Appellant were the inclusion of 13 special conditions which had not been previously discussed and which were contrary to representations made by IDWR when it induced Appellant to enter into the Consent Order. (ROA 59-61). Appellant filed a formal objection to the permit with

IDWR on Mary 21, 2019 and sought an administrative hearing. Id. IDWR however, never initiated the hearing until 4 days after Appellant filed this lawsuit in the fall of 2021. (ROA 49 ¶ 71)

When viewed in light of the March 15, 2019 deadline IDWR had imposed for Plaintiff to "complete construction of the restoration work," this objection should also have placed IDWR on notice that Plaintiff had "substantially violated" the terms of the Consent Order. *See* ROA 128 ¶ 13. Specifically, with the addition of these 13 new terms to the permit, Appellant did not intend to move forward with the restoration project on terms required by IDWR. This formal objection was contrary to the second term of the Consent Order which stated:

> 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. (ROA 56) (Emphasis added).

When viewed in the context of Appellant having already missed the March 15, 2019 construction completion deadline, this Objection 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. Instead, the Department waited two years and 7 months to file its I.C. § 42-3809 enforcement action on December 21, 2021. (ROA 91-96)

Cases interpreting I.C. § 5-216[7], as to when an action for breach of contract arose for purposes of determining the commencement of the 5-year statute of limitations contained therein, hold that the period begins to run as soon as the right to institute a

[7] While this case is akin to determining when an action for breach of contract arose, I.C. § 5-216, by its own terms, does not apply to actions in the name of or for the benefit of the state. Similarly, the general three year statute of limitations contained in I.C. § 5-218(1) for actions upon liabilities created by statute does not apply because I.C. § 42-3809 is more specific and imposes its own 2 year limitations period. *See Beale v. State*, 139 Idaho 356, 358-359, 79 P.3d 715, 717-718, (2003 Ida.)

lawsuit arises.

> Like in Idaho, Pennsylvania holds that the running of the limitations period starts when a cause of action arises:
>
> *"Unless a statute provides otherwise, the statute of limitations begins to run at the time when a complete cause or right of action accrues or arises, which occurs as soon as the right to institute and maintain a suit arises."*
> . . .
> Therefore, applying these general contract principles to the enforcement of an insured's UM/UIM claim, the statute of limitations would begin to run when the insured's cause of action accrued, i.e., when the insurer is alleged to have breached its duty under the insurance contract.
>
> (quoting 54 C.J.S. *Limitations of Actions*, § 81). *Klein v. Farmers Ins. Co*., 165 Idaho 832, 835-836, 453 P.3d 266, 269-270, 2019 Ida. LEXIS 211, *12, 2019 WL 6315012

Here, IDWR's enforcement cause of action accrued once the March 15, 2019 construction completion deadline expired as well as upon receipt Appellant's May 21, 2019 Petition for Hearing, objecting to the inclusion of 13 new terms. These were "substantial violations" of the Consent Order, which is the statutorily defined trigger for a right of action to arise under I.C. § 42-3809.

Similarly, cases interpreting the discovery rule under I.C. § 5-218(4) (and earlier versions of it) have held:

> "Against an express and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the cestui." (Perry on Trusts, sec. 863; Jones v. Henderson, 149 Ind. 461, 49 N.E. 443; 13 Am. & Eng. Ency. of Law, 688; 5 Pomeroy's Eq. Jur., sec. 28.)
>
> *Olympia Mining & Milling Co. v. Kerns*, 24 Idaho 481, 486, 135 P. 255, 256, 1913 Ida. LEXIS 172, *4

Here, Appellant repudiated the Consent Order when he filed his Petition for Hearing with IDWR on Mary 21, 2019. IDWR had actual knowledge of the breach on this date.

More recently, this Court analyzed the discovery rule in I.C. § 5-218(4) and held:

> As noted in I.C. § 5-218, the statute does not begin to run in fraud cases "until the discovery" of the fraud. However, actual knowledge of the fraud will be inferred if the allegedly aggrieved party could have discovered it by the exercise of due diligence. It is unnecessary to consider the issue of whether or not there was any fraud (actual or constructive) in this case. If there was any fraud it could have been discovered in the exercise of reasonable diligence at the time it was alleged to have been committed.
>
> The reasoning of the Washington Supreme Court in *Davis v. Harrison* is applicable in this case:
>
> > "We hold that this action was barred by the three year statute of limitations, whether appellants had actual knowledge of the various transactions or not, for the reason that the facts were open and appeared upon the records of the corporation, subject to inspection by stockholders. If the stockholders failed to examine the corporate records, they must have been negligent and careless of their own interests. The means of knowledge were open to them and means of knowledge are equivalent to actual knowledge."
>
> In the present case the intervenors-appellants represent a group who were stockholders in Nancy Lee Mines, Inc. at the time of Assessment Sales 9A and 10A. From the record it appears that these stockholders were notified of the assessments and of the subsequent assessment sales. The exhibits show that written notices of the assessments and sale upon non-payment were mailed to the last known post office addresses of each and every stockholder of record of the corporation. Notice concerning the assessments was also given by publication. Intervenors-appellants had access to the corporate records by authority of I.C. § 30-144
>
> *Nancy Lee Mines v. Harrison*, 95 Idaho 546, 547-548, 511 P.2d 828, 829-830, 1973 Ida. LEXIS 308, *4-6.

Here, IDWR could have filed an enforcement action 1) when the March 15, 2019 deadline IDWR had imposed for Appellant to "complete construction of the restoration work" lapsed or 2) when Appellant gave notice that he objected to the terms of the permit, instead of simply "comply[ing] with the terms and conditions" thereof. IDWR's initiation of an administrative proceeding naming Appellant as a party on November 19, 2021 dispels any notion that further action was required from Appellant to jump start the administrative track, following the filing of his May 2019 Petition for Hearing. *See*

(verified) *First Amended Action for Declaratory Judgment* at 11, ¶ 71. (ROA 49) These actions, or inaction, by Appellant should have put a reasonable person on notice of the existence of a claim under I.C. § 42-3809 for a "substantial violation" of the Consent Order.

Likewise, as in *Klein v. Farmers Ins. Co*., IDWR had grounds to initiate an administrative enforcement action upon receipt of the Petition for Hearing. IDWR could have immediately proceeded on an administrative enforcement track, once it was initiated by Appellant's Petition for Hearing. *See* I.C. § 42-1701A(3), I.C. § 42-3805, and IDAPA 37.03.07.070. Specifically, once in the administrative track, IDWR could have taken the action authorized under IDAPA 37.03.07.045.02:

> 02. Failure to Comply with Stream Protection Act. Failure to comply with any of the provisions of the Stream Protection Act (Chapter 38, Title 42, Idaho Code), may result in issuance of an Idaho uniform citation and/ or the cancellation of any permit by the Director without further notice and the pursuit in a court of competent jurisdiction, such civil or criminal remedies as may be appropriate and provided by law. The Director may allow reasonable time for an applicant to complete stabilization and restoration work.

Yet IDWR did not schedule an administrative hearing until November 19, 2021. (ROA 49 ¶ 71) The Enforcement action was initiated over a month later as a counterclaim herein. (ROA 91-96) Both proceedings were well over the two years prescribed in I.C. § 42-3809.

D. The District Court Erred when it took Judicial Notice of Parol Evidence in Violation of the Parties' Stipulations

Idaho Rule of Civil Procedure 56(c)(1)(A) is clear, the only facts which should have been considered by the District Court when ruling on the parties' cross motions for summary judgment are 1) verified pleadings and 2) facts the parties' stipulated to. With

regard to the admissibility of stipulated facts, this Court in *Fisher v. Fisher* held:

> Recitals in a Judgment or Decree should correctly reflect the evidence and the **stipulations of the parties**, for **they are presumed to be true and correct**. *Argabrite v. Argabrite*, 56 Cal.App. 650, 206 P. 81; Miera v. Samons, 31 N.M. 599, 248 P. 1096; *Benton v. Benton*, 211 Ala. 43, 99 So. 300; *Melchers v. Bertolido*, 118 Misc. 196, 192 N.Y.S. 781.
>
> Both **Trial Courts and Appellate Courts are bound by the facts set forth in Stipulations with respect to matters which may be validly stipulated**. *Andrews v. Moore*, 14 Idaho 465, 94 P. 579; *Capital National Bank of Sacramento v. Smith*, 62 Cal.App.2d 328, 144 P.2d 665; *Wilson v. Mattei*, 84 Cal.App. 567, 258 P. 453; *Posey v. Abraham*, 165 Okl. 140, 25 P.2d 287; *Wellman v. Forster*, 46 Cal.App. 359, 189 P. 128.
>
> The Court **may not enter Judgment not authorized by the terms of such Stipulation**. *Mishkind v. Superior Court in and for Fresno County*, 81 Cal.App.2d 360, 183 P.2d 915; *Town of Fox Lake v. Town of Trenton*, 244 Wis. 412, 12 N.W.2d 679; *Snider v. Smith*, 88 Ark. 541, 115 S.W. 679.
> *Fisher v. Fisher*, 84 Idaho 303, 305, 371 P.2d 847, 848, 1962 Ida. LEXIS 213, *1 (Emphasis added).

This Court's holding in *Fisher* precluded the District Court from entering a Judgment in favor of IDWR based on facts introduced in violation of the stipulations of the parties. Doing so required the Court to rely upon parol evidence, introduced by IDWR, in contravention of its stipulations. Not only did the District Court improperly admit IDWR's evidence in contravention of the parties' stipulations, it had no evidentiary basis to do so because IDWR never claimed that the Consent Order was ambiguous in any way.

> Interpretation of unambiguous language in a contract is a question of law. *Shawver*, 140 Idaho at 361, 93 P.3d at 692. Interpretation of an ambiguous contract is a question of fact. *Id*. Whether a contract is ambiguous is a question of law. *Id*.
> *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396, 2007 Ida. LEXIS 193, *7-8
>
> Here, the parties entered into several contracts, a Consent Order and two

stipulations which are relevant and unambiguous.

> "A stipulation is a contract. The enforceability of an oral stipulation is determined by contract principles." *Id*. (quoting *Olson v. Idaho Dept. of Water Res.*, 105 Idaho 98, 100, 666 P.2d 188, 190 (1983)(citation omitted)). *Kirk v. Ford Motor Co*., 141 Idaho 697, 703, 116 P.3d 27, 33, 2005 Ida. LEXIS 112, *14-15

The Parties stipulated as to the existence and legal effect of the single extension contemplated by the Consent Order." (ROA 128)(Emphasis added). The March 15, 2019 construction completion deadline was clear and unambiguous. Yet IDWR improperly sought to admit parol evidence to contradict this contractual term. The District Court erred in considering this parol evidence, denying Appellant the opportunity to rebut it, and not striking it from the record.

> Under the parol evidence rule, when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract. *Simons v. Simons*, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000). Parol evidence, however, is admissible to establish "any fact that does not vary, alter, or contradict the terms of the instrument or the legal effect of the terms used." 29A Am. Jur. 2d Evidence § 1106 (1994); *accord* Restatement (Second) of Contracts § 218 (1979).
> *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396, 2007 Ida. LEXIS 193, *8-10

IDWR never asserted that the *Stipulation on Facts for Motion Practice Re: Statute of Limitations* was an improper attempt by the parties to establish a fact which was explicitly referenced in the Consent Order; i.e. the date eventually given for the single extension contemplated therein. Nor did IDWR assert that the terms "construction completion deadline" or "March 15, 2019" in the *Stipulation on Facts for Motion Practice Re: Statute of Limitations* were ambiguous. With no ambiguity alleged, the intention of the parties should have been ascertained from the 4 corners of the

Stipulation.

> "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).

There can only be one interpretation of the March 15, 2019 "construction completion deadline" where the parties also acknowledged by stipulation Appellant had not even begun any construction required by the Consent Order. IDWR simply sought to vary, contradict, and enlarge a construction completion deadline it stipulated to the accuracy of, through the improper introduction of parol evidence.

Likewise, IDWR has not provided any justification which would excuse its breach of these Stipulations. This Court held in *Seward v. Musick Auction, LLC* that a Court can look at the intent of the parties when entering into a stipulation by looking at the surrounding facts:

> "[o]ral stipulations of the parties in the presence of the court are generally held to be binding, especially when acted upon or entered on the court records. . . ." *Kohring v. Roberts*, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002) (citation omitted). "Whether the parties to an oral agreement or stipulation become bound prior to the drafting and execution of a contemplated formal writing is largely a question of intent." *Id.* **The intent of the parties to contract is determined by the surrounding facts and**

> **circumstances**. *Bosen*, 144 Idaho at 614, 167 P.3d at 751. **The best evidence to support the parties' intent to contract is to look at the words of counsel and their clients.** *First Sec. Bank of Idaho v. Hansen*, 107 Idaho 472, 477, 690 P.2d 927, 932 (1984).
>
> *Seward v. Musick Auction, LLC*, 164 Idaho 149, 159, 426 P.3d 1249, 1259, 2018 Ida. LEXIS 179, *24-25, 2018 WL 4472732 (Emphasis added).

A review of the email correspondence between counsel for Appellant and IDWR confirms the intention of the parties was to have the controversy surrounding the statute of limitations in Idaho Code § 42-3809 resolved based on a stipulated set of facts. For example, the following email exchange reflects some of the context underpinning the Stipulations of the parties:

> February 3, 2022 email sent at 2:09 p.m. from Attorney for Appellant to counsel for IDWR:
>
> Meghan,
>
> Assuming the Court enters an order bifurcating this case, it appears we are in agreement on a stipulation for the operative facts each of us deem necessary for resolution of motion practice on the applicability of the statute of limitations found in I.C. 42-3809. I have attached the final version of that proposed stipulation. Based on our last call, each of us has indicated we will sign this second stipulation, assuming the Court grants our joint motion to bifurcate. Please confirm your understanding of the same.
>
> Response from IDWR's Attorney, February 3, 2022 at 2:15 p.m.
>
> Kahle,
> IDWR will sign off on the Stipulation of Facts once the Court grants our joint motion to bifurcate. I will get the Stipulation and Motion filed by tomorrow.
> Meghan
> (ROA 222) *See also Declaration of Counsel* (ROA 237-246) for the complete mental impressions of Appellant's counsel when entering into the Stipulations with IDWR. (IDWR did not submit its own Declaration of Counsel or otherwise contradict the statements of Appellant's counsel as to the intentions of the parties when entering into the Stipulations) and (ROA 205 *Second Stipulation and Joint Motion for an Extension of Time*

> *to File Briefs and to Vacate and Reset Hearing* – further confirming the intent of the parties to have the case decided based on a stipulated set of facts).

This Court, in *Firmage v. Snow*, *supra* has rejected the latter-day change of heart IDWR engaged in. ("…the parties are so bound and are not in a position to later challenge those facts or evidence.") *Firmage v. Snow*, 158 Idaho 343, 348, 347 P.3d 191, 196, 2015 Ida. LEXIS 97, *10

Additionally, the doctrine of judicial estoppel precludes IDWR from flip flopping on facts it had previously stipulated to. This doctrine was recently discussed by this Court, with citations to US Supreme Court precedent, in *Safaris Unlimited, LLC v. Jones*.

> Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *McCallister v. Dixon*, 154 Idaho 891, 894, 303 P.3d 578, 581 (2013). Judicial estoppel is intended "to protect 'the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding.'" *Id.* (quoting *A & J Const. Co. v. Wood*, 141 Idaho 682, 685, 116 P.3d 12, 15 (2005)). The United States Supreme Court has highlighted several factors to inform a court on whether to apply judicial estoppel in a particular case: (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether the party has succeeded in persuading a court to accept the party's earlier position, "so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled," and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). *Safaris Unlimited, LLC v. Jones*, 501 P.3d 334, 340, 2021 Ida. LEXIS 183, *8, 2021 WL 5750612

Here, IDWR derived an unfair advantage by taking an inconsistent position. IDWR succeeded in persuading the District Court to grant summary judgment in its favor. IDWR shielded its witnesses from depositions and other intrusive forms of discovery to gain a tactical advantage over Appellant. IDWR also convinced Appellant to waive his

constitutional right to a jury trial on the issue of the statute of limitations found in I.C. § 42-3809. Therefore, whether by Affidavit or a creative use of IRE 201, IDWR cannot renege on its prior stipulations and Joint Motion to have a key portion of this case decided based on a stipulated set of facts.

The 32 pages attached to *Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* (ROA 157 – 195) should have been stricken from the record.

> A party moving for summary judgment must support any defenses by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials." I.R.C.P. 56(c)(1)(A). The court must consider all cited materials in the motion for summary judgment but "it may [also] consider other materials in the record." I.R.C.P. 56(c)(3). If a party disagrees with any materials cited, the party may object that the material is not admissible. I.R.C.P. 56(c)(2).
> *Lola L. Cazier Revocable Trust v. Cazier*, 167 Idaho 109, 118, 468 P.3d 239, 248, 2020 Ida. LEXIS 148, *17.

Here, the 32 pages IDWR attached to its Statement of Facts may or may not have been admissible under normal evidentiary standards to support or oppose a Motion for Summary Judgment. However, in light of the parties' explicit decision to have this portion of the case decided on a narrow set of stipulated facts, the material is inadmissible and should have been stricken. Failing to do so, prejudiced Appellant's ability to develop his own factual record as well as his constitutional right to have this factual dispute resolved by a jury of his peers.

Additionally, when IDWR asked the Court to take judicial notice of the 32 pages of documents attached to its *Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment*

(ROA 157 – 195), IDWR failed to specify which specific adjudicative facts it was asking the Court to take judicial notice of. This conduct is contrary to a recent holding of this Court in *Bass v. Esslinger*.

> In *Rome v. State*, a jury had convicted the defendant of aiding and abetting a burglary. 164 Idaho at 410. The defendant requested judicial notice of seven items, including "The Clerk's Record on Appeal" from his direct appeal, the court's complete file from his underlying criminal case, and the "court file" in another criminal case. *Id.* at 414. None of his requests asserted that they pertained to adjudicative facts, and most of them failed to specify what the district court was supposed to take notice of. *Id.* at 415. This Court considered what standard to use in reviewing the district court's decision and whether the defendant met the specificity requirements in his requests. *Id.* In considering the specificity requirements, we explained that "[p]roviding the 'necessary information' means supplying the court with a specific reference to the adjudicative fact or facts contained in the designated record, exhibit, or transcript that is relevant to the cause of action or specific claim before the court." *Id.* at 414.
>
> In this case, the Esslingers have failed to specify what adjudicative facts would have been relevant to the cause of action. They highlighted that the case file they requested notice of was "very small," and that "literally, every one of the six (6) pleadings in this file is relevant to the Esslingers' case and should have been available for them to use and argue in the defense against summary judgment." The district court, in making its decision, considered the decree from the Quiet Title Litigation, along with Peggy Marek's explanation of the case in her declaration. The Esslingers do not explain what, if any, additional substance the district court would have gleaned had it considered the rest of the record. Instead, they maintained that Peggy Marek's assertion that she owned the disputed land, the caption and paragraphs naming the parties involved in the Quiet Title Litigation that do not include the Basses, and the other documents are "of relevance," but do not explain why.
>
> Similar to *Rome v. State*, the specificity burden has not been met here. It is not enough to simply claim that documents are relevant; the party requesting judicial notice must articulate the specific adjudicative facts to be taken notice of and reference to an entire case file is not sufficient. Thus, the district court did not abuse its discretion in concluding that the Esslingers did not properly request judicial notice. *Bass v. Esslinger*, 2023 Ida. LEXIS 22, *10-12

Here, IDWR did not meet its specificity burden when it asked the District Court to take judicial notice of 32 pages of records. Instead, once IDWR filed these documents into the record, there was an open question as to what exactly IDWR sought to have the court take judicial notice of and for what purpose. (ROA 157-160)[8]. The end result was the District Court's own determination as to what adjudicative facts it derived from the 32 pages of records were relevant and for what purpose. (ROA 280 and SROA 13).

If this Court concludes the District Court properly exercised its discretion when it took judicial notice of the 32 pages of records IDWR introduced in violation of the parties' stipulations, then Appellant must have a remedy at law for giving up its right to discovery and a jury trial, while receiving nothing in return. In essence, IDWR breached a contract to present the case on a stipulated set of facts. *See Kirk v. Ford Supra.*

Therefore, if this Court affirms the decision of the District Court, then Appellant may be compelled to institute a separate action against IDWR for breach of the parties' stipulations. For the sake of conserving judicial resources, the preferable outcome is for a strict performance of the Stipulations, which would necessitate a remand requiring the District Court to adhere to the parties' stipulations. Alternatively, the contractual remedy of recission may be employed. This would require a remand so that the parties could engage in the discovery Appellant desired in order to remove the existence of disputed issues of material fact discussed in the following section of this Brief.

[8] IDWR also improperly cited to unverified allegations in its *Answer* in its *Statement of Facts* utilized in support of its *Cross Motion for Summary Judgment*. (ROA 160)

E. The District Court Erred when it denied Appellant's IRCP 56(d) Motion to Continue, Prohibited Appellant from Conducting Discovery, and Determined No Material Disputed Issues of Fact Existed.

The District Court's decision to grant IDWR's request to take judicial notice placed Appellant 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. 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). Here, Appellant was precluded from introducing (and conducting) depositions and affidavits because Appellant adhered to the stipulations of the parties. The District Court granted IDWR the unilateral ability to augment the stipulated record, while simultaneously denying Plaintiff the ability to develop his own record, through discovery. Appellant utilized the only mechanism available to him to delay a decision on IDWR's Cross Motion for Summary Judgment, the filing of a Motion to Continue pursuant to IRCP 56(d).

The District Court's decision to preclude Appellant from conducting discovery on issues related to the application of the Statute of Limitations prejudiced his ability to respond to IDWR's *Cross Motion for Summary Judgment* and has raised material issues of disputed facts as to the date IDWR was placed on notice of Appellant's substantial violation of the Consent Order.

Once IDWR introduced facts beyond the stipulated record, Appellant should have been granted the opportunity to conduct discovery on several issues which could have led to the discovery of admissible evidence on the issue of the date upon which IDWR had

knowledge of a substantial violation of the Consent Order. Some areas of discovery Appellant would have pursued, had he not been denied the opportunity to do so, include:

1) The authority of IDWR employee Aaron Golart to apparently unilaterally attempt to amend the Consent Order and extend the construction completion deadline.

> …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 Appellant. “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 and bias of Aaron Golart in light of his self authentication of a document which he apparently prepared and certified for purposes of a request for the District Court to take IRE 201 judicial notice, his singling out of Appellant for a Notice of Violation while granting after the fact permits to other flooded property owners up and down the river, and his unreasonable conduct thereafter. “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 (ROA 126-129) and verified *First Amended Action for Declaratory Judgment* ¶ 17-20 (ROA 42)

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

6) Whether Appellant's numerous submissions of restoration plans complied with the terms of the Consent Order, therefore triggering an earlier running of the Statute of Limitations. (ROA 127-128)

7) Why IDWR waited until the 4th restoration plan was submitted to provide Appellant notice of the 13 new conditions it purported to require in its permit.

8) Whether IDWR wrongfully induced Appellant to sign the Consent Order by falsely representing that it would take the necessary steps to clear title to this section of the Big Wood River, prior to requiring Appellant to commence restoration work.

9) How long it would reasonably take to complete construction once IDWR issued its permit.

10) Whether IDWR could have moved forward on an administrative enforcement track immediately upon receipt of Appellant's Petition for Hearing.

11) The point in time when IDWR had actual or constructive knowledge of the substantial violation of the Consent Order, as originally drafted or as extended by Arron Golart.

In this case, Appellant specifically objected to hearing IDWR's *Cross Motion for Summary Judgment* pursuant to IRCP 56(d). The District Court's rationale for denying Appellant's Motion (without providing Appellant the opportunity to submit a Reply Brief or present oral argument in violation of IRCP 7(b)(3)(C)) incorrectly asserted Appellant

had failed to set any depositions. (SROA 12-13) This *ipse dixit* assertion ignores the fact that Appellant was contractually bound by the parties' stipulations not to schedule depositions or engage in further discovery efforts. Yet, the District Court declined to delay ruling on IDWR's *Cross Motion for Summary Judgment* in order to allow Appellant to conduct the discovery necessitated by the introduction of extraneous records by IDWR.

The existence of disputed material issues of fact, established in part by the verified pleadings of Appellant, and which were well within the scope of discovery permitted under IRCP 26(b)(1)(A), should have prevented the District Court from entering Summary Judgment in favor of IDWR.

III. CONCLUSION

Appellant sought to protect private property from erosion caused by a massive flooding event in 2017, as authorized in *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 478, 406 P.2d 113, 117, 1965 Ida. LEXIS 389, *13 and I.C. 58-1203(2)(c). He did so in consultation with and at the direction of the local authorities due to a risk of failure to the Warm Springs Bridge just downstream of his property. IDWR represented that an after the fact permit would be summarily issued, as was done for property owners up and down the Big Wood River who suffered similar damage to their property as a result of the same flood. Instead, IDWR singled out Appellant for a Notice of Violation and dragged him around for years through a bureaucratic morass. Thereafter, IDWR refused to accept reasonable settlement proposals which would have allowed IDWR to simply conduct the river restoration work it desired on its own, at Appellant's reasonable expense.

Once in Court, IDWR entered into stipulations to induce Appellant to waive his

constitutional right to a jury trial, only to subsequently disregard those stipulations. Thereafter Appellant was denied his right of due process to conduct discovery. However, in this overwhelming and unjustified use of governmental resources, IDWR apparently lost track of its own self-imposed deadlines and the applicable statute of limitations. Therefore, the final step to put this matter to rest is a remand with instructions to enter a Judgment informing IDWR that its years of harassment of Appellant must now come to a close.

/s/ J. Kahle Becker_____
J. KAHLE BECKER
Attorney for the
Appellant/Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _12th_ day of April, 2023, I caused to be served the foregoing *Appellant's Brief* on the following persons:

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via I-Court/Odyssey

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