J. KAHLE BECKER (ISB # 7408)
Attorney at Law
223 N. 6th St., Suite 325
Boise, Idaho 83702
Phone: (208) 345-5183
Fax: (208) 906-8663
Email: kahle@kahlebeckerlaw.com
Attorney for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN HASTINGS, Jr., Plaintiff/Counterdefendant, vs. THE STATE OF IDAHO DEPARTMENT OF WATER RESOURCES, a Political Subdivision of the STATE OF IDAHO Defendant/Counterclaimant.	Case No. CV01-21-17825 **MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND OBJECTION TO DEFENDANT'S REQUEST TO TAKE JUDICIAL NOTICE**

COMES NOW the above-named Plaintiff/Counterdefendant, by and through his attorney of record, J. Kahle Becker, Defendant/Counterclaimant Idaho Department of Water Resources ("IDWR") having filed certain documents into the record in violation of several stipulations and a Joint Motion of the parties in an attempt to oppose Plaintiff's *Motion for Summary Judgmen*t and in support of IDWR's *Cross Motion for Summary Judgment*, Plaintiff now Objects pursuant to IRE 201(e), IRE 802, 901(b)(7), and IRCP 56(c)(2) and Moves to Strike those documents and any reference to the contents thereof pursuant to IRCP 12(f)(2) as follows.

PROCEDURAL HISTORY

Both parties see 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.[1] The parties entered into two 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*. 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. (Emphasis added.)

The Court then entered a Scheduling Order on February 8, 2022 approving the parties

[1] In the unlikely event the Court admits the records 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*, Plaintiff has simultaneously filed a *Motion to Continue*, pursuant to IRCP 56(d) – in the Alternative, 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. In light of IDWR's later day change of heart, Plaintiff believes interim cost shifting is warranted.

stipulation. 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*. That second Stipulation is titled *Stipulation on Facts for Motion Practice Re: Statute of Limitations* and was filed on February 8, 2022.

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* on March 8, 2022. 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*.

On March 28, 2022 I was contacted by IDWR's legal counsel, Meghan Carter, to request that I enter a stipulation to extend the time for IDWR to file its Response to Plaintiff's *Motion for Summary Judgment*. *See Declaration of Counsel*. For the first time, I was informed IDWR now sought to disregard the terms of the parties' stipulations and wanted to introduce certain documents into the record through an affidavit, in support of its opposition to Plaintiff's *Motion for Summary Judgment*. I informed Ms. Carter I was amenable to allowing IDWR an extension of time as a matter of professional courtesy, however I did not agree to allow IDWR to introduce new evidence at this stage. Consequently, IDWR amended the stipulation it originally proposed, which sought permission for IDWR to file supporting affidavits along with its Response Brief, so that there was no reference to affidavits. *See* Exhibit A to *Declaration of Counsel* and March 28, 2022 *Stipulation and Joint Motion for an Extension of Time to File Briefs and to*

Vacate and Reset Hearing.

Undeterred by its prior stipulations, IDWR then tried another avenue to introduce the records 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 records. The records were attached without an affidavit or declaration. Defendant instead contends the Court should take judicial notice of not only the attached records, but the contents thereof.

Upon receipt of the Statement of Facts, I contacted Ms. Carter and informed her that this turn of events necessitated I file several motions related to what I perceive as an improper attempt to circumvent the parties' joint motion and stipulations. Thereafter the parties once again agreed to extend the date for the hearing on the two opposing Motions for Summary Judgment and set a new briefing schedule.

The parties submitted a *Second Stipulation and Joint Motion for an Extension of Time to File Briefs and to Vacate and Reset Hearing* on April 7, 2022. That Stipulation and Joint Motion provided in pertinent part:

> On April 5, 2022, Defendant IDWR filed a *Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment*, a *Statement of Facts in Support of Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment*, and a *Memorandum in Support* thereof. In addition to a Reply to Defendant's Summary Judgment Motion/Opposition, Plaintiff desires to file a Motion to Strike and a Motion in Opposition to Defendant's request for this Court to take Judicial Notice of certain records, pursuant to IRE 201(e), as well as a motion in the alternative for limited discovery pursuant to IRCP 56(d). **While these motions may be supported by Declarations of Counsel, as contemplated by the parties' *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* and *Stipulation of Facts for Motion Practice re: Statute of Limitations,* neither party will introduce extraneous facts in support of the limited issue before the court regarding the applicability of the Statute of Limitations found in**

Idaho Code § 42-3809. (Emphasis added).

Thus, IDWR once again confirmed the understanding of the parties underlying the intent and purpose of the original stipulations which bifurcated this case so that the applicability of the Statute of Limitations in I.C. § 42-3809 could be decided on a stipulated set of facts.

The Court entered an *Order Granting Second Joint Motion for an Extension of Time to File Briefs and to Vacate and Reset Hearing* on April 13, 2022. That Order further reinforced the intent of the parties, as expressed in earlier stipulations and the Joint Motion, by stating "Neither party will introduce extraneous facts in support of the limited issue before the court regarding the applicability of the Statute of Limitations found in Idaho Code § 42-3 809."

LEGAL ARGUMENT

1. The Stipulations of the Parties are Binding.

This case presents a novel yet straightforward issue regarding the application of the statute of limitations in Idaho Code § 42-3809. However, there are other aspects of the case which raise interesting constitutional and factual questions related to the rights of a private upland property owner to protect highly valuable river front property during a flood, which was declared a state and national emergency. This right of a private upland owner was discussed by the Idaho Supreme Court in *Milbert v. Carl Carbon, Inc.*

> "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." *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 478, 406 P.2d 113, 117, 1965 Ida. LEXIS 389, *13.

Adjudication of this issue requires complex expert witness analysis regarding the location

of the Ordinary High Watermark as it existed prior to the 2017 flood at issue in this case. The reason being, pursuant to the holding in *Aldape v. Akins*, 105 Idaho 254, 256, 668 P.2d 130, 132, 1983 Ida. App. LEXIS 238, *2, an avulsive event, such as that which occurred on Plaintiff's property in 2017, leaves property lines unchanged. Plaintiff contends most, if not all, of the rock armoring appears to have been placed 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). To further complicate the matter, adjudication of this second issue likely requires extensive briefing on issues created by a cloud on the title of this section of the Big Wood River created by Ernest Hemingway. *See First Amended Action for Declaratory Judgment* at p.9-10 ¶ 52-61. It may very well be that the entire riverbed is private property, resulting in the application of the I.C. 58-1203(2)(c) statutory bar to IDWR's enforcement action counterclaim.

Resolution of the controversy surrounding the statute of limitations in Idaho Code § 42-3809 in Plaintiff's favor would be dispositive as to all claims at issue in this case. Therefore, the parties worked cooperatively to first bifurcate the case and second, to agree on a stipulated set of facts so as to enable the Court to decide that matter based on briefing alone and avoid a trial. These stipulations and the Joint Motion were carefully drafted between counsel for the respective parties so as to avoid the need for complex and expensive discovery efforts and to reach a judicial determination as quickly and efficiently as possible. Additionally, since the application of the statute of limitations in Idaho Code § 42-3809 had never been decided by the Idaho Supreme Court, the parties agreed this issue could be appealed pursuant to an IRCP 54(b) certificate. *See Stipulation*

and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument at 2. The stipulation therefore had the added benefit of keeping the judicial record as narrow as possible, which reduced the costs to both parties, should either side determine an appeal was warranted. Furthermore, Plaintiff waived his constitutionally protected right to have at least a portion of his case adjudicated by a jury trial. *Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* ¶ 4.

Defendant now apparently has buyer's remorse. Defendant now seeks to disregard the prior stipulations and Joint Motion of the parties in a way that allows IDWR to pad the record with complex factual assertions, while denying Plaintiff the ability to conduct discovery into those assertions, and to have the case decided by a jury of Plaintiff's peers. IDWR's position is contradicted by the holdings of numerous Idaho Supreme Court decisions regarding the binding nature of stipulations. For example, the 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).

It is unclear as to whether IDWR is now disregarding the stipulations it entered into. However, playing fast and loose with a lopsided request to take judicial notice pursuant to IRE 201 appears to be a creative way to for Defendant to seek to avoid the use of affidavits, which its counsel previously agreed, in no uncertain terms, were improper attempts to pad the record with extraneous facts. The Idaho Supreme 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).

In addition to the plain language of the parties' stipulations and Joint Motion, a review of the email correspondence attached as Exhibit A to the *Declaration of Counsel* 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 Plaintiff to counsel for Defendant:

> 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
> Exhibit A to *Declaration of Counsel*.

The intentions of the parties, when drafting the original stipulations to present the portion of the case addressing the statute of limitations in I.C. § 42-3809, based on a stipulated set of facts, was further confirmed when IDWR first sought an extension to file its response to Plaintiff's *Motion for Summary Judgment*. IDWR originally presented a proposed stipulation to extend the briefing deadlines which sought to permit IDWR to file affidavits. Plaintiff's counsel rejected this proposal due to the parties' prior stipulations and since Plaintiff filed his *Motion for Summary Judgment* without having taken depositions and without submitting facts beyond those already found in the record stipulated by the parties. Thereafter, IDWR agreed to remove the word "Affidavit" from the March 28, 2022 *Stipulation and Joint Motion for an Extension of Time to File Briefs and to Vacate and Reset Hearing. See* Exhibit A to *Declaration of Counsel* and March 28, 2022 *Stipulation and Joint Motion for an Extension of Time to File Briefs and to Vacate and Reset Hearing*. Additional details of the communications leading up to the

multiple stipulations of the parties are included as Exhibit A to the *Declaration of Counsel* as well as the *Declaration* itself.

Now, IDWR finds itself in a position of seeking to challenge its prior factual assertions by seeking to introduce 32 pages of highly complex extraneous evidence. The Idaho Supreme Court, in *Firmage v. Snow*, has rejected this type of flip flopping by a party:

> 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).

Additionally, the doctrine of judicial estoppel should preclude IDWR from a latter-day change of heart. This doctrine was recently discussed by the Idaho Supreme 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 has shielded its witnesses from depositions and other intrusive forms of discovery to gain a tactical advantage. IDWR also convinced Plaintiff 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* must be 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 be 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 be stricken.

2. The Records Defendant Seeks to Introduce Are Not Adjudicative Facts and Are Therefore Not Admissible Pursuant to IRE 201.

IDWR acknowledges it now disregards the prior stipulations of the parties with a request for the Court to take judicial notice of 32 pages of charts, photographs, and scientific assertions which are more appropriately characterized as an expert witness opinion. IDWR now contends:

> The Department and Plaintiff John Hastings Jr.'s ("Mr. Hastings") filed a stipulated statement of facts in this case on February 8, 2022. Stip. Facts for Mot. Prac. Re: Statute Limits. at 1 [hereinafter Facts]. **In addition**, pursuant to Idaho Code § 9-101(3), I.R.C.P. 44, and I.R.E. 201, the Department requests the Court take judicial notice of Stream Channel Alteration Permit (S37-20565) ("Permit") referenced in ¶¶ 18 and 19 of the Facts.
> *Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 2.* (Emphasis added).

While Plaintiff contends the 32 pages of records should be stricken based on the prior stipulations of the parties, the records should also be stricken because they are not "adjudicative facts," within the scope of IRE 201, and because they do not meet other evidentiary standards governing the admission of evidence at the summary judgment stage. The standard of review for a Court in analyzing a decision on whether to take judicial notice was pronounced in *Newman v. State*.

> A court's decision to take judicial notice of an adjudicative fact is a determination that is evidentiary in nature and is governed by the Idaho Rules of Evidence. *See* I.R.E. 201. We review lower court decisions admitting or excluding evidence under the abuse of discretion standard. *Dachlet v. State*, 136 Idaho 752, 755, 40 P.3d 110, 113 (2002). In reviewing a trial court's exercise of discretion we consider whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with applicable legal standards; and (3) reached its decision by an exercise of reason. *Id*. at 756, 40 P.3d at 114. *Newman v. State*, 149 Idaho 225, 226, 233 P.3d 156, 157, 2010 Ida. App. LEXIS 6, *3-4

The 32 pages of charts, mathematical calculations, surveys, hydrogeomorphological analysis, arboricultural hypotheses, engineering plans, and photographs are simply not the type of adjudicative facts contemplated by IRE 201. The Idaho Supreme Court has clarified the term "adjudicative facts" found in IRE 201 in *Wooden v. Martin.*

> Adjudicative facts may be judicially noticed by the court or upon request under Idaho Rule of Evidence 201. I.R.E. 201(c), (d). Rule 201 makes mandatory judicial notice of "records, exhibits, or transcripts from the court file in the same or a separate case" where a party requests such notice and supplies the requisite information. I.R.E. 201(d). **However, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."** I.R.E. 201(b). As the district court found, the commentary of Federal Rule of Evidence 201—the federal counterpart of the Idaho rule—is enlightening in this regard. F.R.E. 201. The commentary states that **"[a] high degree of indisputability is the essential prerequisite"** and that "the tradition has been one of caution in requiring that the matter be **beyond reasonable controversy**." F.R.E. 201, note to subdivision (a); F.R.E. 201, note to subdivision (b).
>
> Here, the documents admitted in the guardianship/conservatorship proceeding—while perhaps relied upon by the court in that proceeding to some extent—cannot be said to be free from reasonable dispute. As the district court found, "[t]here is no indication these documents are capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned." Further, the documents constitute hearsay opinions of individuals regarding Conway's capacity and hearsay-within-hearsay declarations of Conway herself, to which no hearsay exception applies. **Even sworn trial or deposition testimony from a prior case is inadmissible unless the declarant is unavailable and the party against whom the testimony is now offered had an opportunity and similar motive to cross-examine the declarant. I.R.E. 804(b)(1).** The out-of-court declarations sought to be admitted here—medical professionals' and social workers' reports and affidavits—were never even tested in a prior proceeding, let alone one in which Martin had a similar motive as the present case.
>
> *Wooden v. Martin (In re Conway)*, 152 Idaho 933, 942-943, 277 P.3d 380, 389-390, 2012 Ida. LEXIS 108, *23-25, 2012 WL 1434148. (Emphasis added).

Like the documents in *Wooden*, the 32 pages of scientific analysis IDWR seeks to introduce have not been tested in a prior proceeding, contain hearsay on hearsay, and expert witness opinion - which lacks the foundational requirements of IRE 702, 703, and 705 and which evaded the scrutiny on cross examination by sidestepping the disclosures required by IRCP 26(b)(4)(A). Furthermore, while IDWR claims that the 32 pages of records it seeks to introduce are a publicly available document, the fact that the documents in *Wooden* were utilized in a prior proceeding, and presumably publicly available, was not persuasive.

The Supreme Court further clarified the stringent requirement that a district court can only take judicial notice of "adjudicative facts" in *Newman v. State*.

> Documents maintained by the state bar are not "generally known within the territorial jurisdiction of the trial court" under I.R.E. 201(b)(1), nor are they "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" under I.R.E. 201(b)(2) because a court does not have access to those documents. Unlike court records, local laws, ordinances, and other facts that are easily accessible and available to the trial court (facts for which judicial notice is plainly contemplated by I.R.E. 201(c) and (d)), bar misconduct records are not readily available to the trial court. In this case, counsel for Newman at the evidentiary hearing acknowledged that the bar documents were not available to the trial court:
>
> > THE COURT: Do I have the right to go into the records of the bar counsel and go see what's there?
> > [COUNSEL]: No, Your Honor. …
>
> Therefore, because such documents were not accessible to the district court, they were not capable of accurate and ready determination under I.R.E. 201(b).
>
> **Further, documents generally should be placed in evidence through the ordinary avenues specified by the rules of evidence**. This is done by laying an appropriate foundation to demonstrate the documents' authenticity and relevance. In the case of nonconfidential state bar records, this could have been accomplished by, for example, following I.R.E.

> 901(b)(7) or 902(4)[2]. However, the documents at issue in this case are photocopies of confidential bar misconduct records that were not properly authenticated. The photocopies do not contain any mark indicating that they are certified or otherwise authentic copies of original documents. **Merely placing such photocopies in front of a trial court on counsel's unsworn representation that they constitute copies of bar records is not sufficient to allow the court to determine the copies' authenticity and take judicial notice of them**. Further, it is not the duty of the court to contact the state bar to determine whether the provided documents constitute accurate copies of the originals maintained by that office. Indeed, the district court stated that it did not have "sufficient information" to determine if the copies of the bar records met the I.R.E. 201(b) standard. **Rule 201(b) is not a mechanism by which a party may make an end run around normal foundational requirements for the introduction of documents**.
>
> *Newman v. State*, 149 Idaho 225, 227-228, 233 P.3d 156, 158-159, 2010 Ida. App. LEXIS 6, *6-8 (Emphasis added).

IDWR laid no foundation whatsoever for the 32 pages of documents it seeks to introduce. Yet IDWR asks the Court to take judicial notice of not only their existence but the infallibility of the entirety of their contents. Not only does this request violate the stipulations of the parties, it disregards numerous basic evidentiary safeguards, and years of Supreme Court precedent. IDWR's request must be denied.

WHEREFORE, Plaintiff/Counterdefendant prays the Court Strike the 32 pages of records attached to *Defendant's Statement of Facts in Support of Cross-Motion for*

[2] Here, the documents, IDWR asks this court to take judicial notice of, are purportedly certified as official governmental records, allegedly pursuant to IRE 902(4) and I.C. 9-101(3), by Aaron Golart - IDWR's Stream Channel Coordinator. Mr., Golart also happens to be the primary witness from IDWR, who Plaintiff contends deliberately drug out the permit application process following a misrepresentation as to the Departments willingness to grant an after the fact stream channel alteration permit. *See Stipulation on Facts for Motion Practice Re: Statute of Limitations* ¶ 13 & 15. Thus, IDWR takes the position that its star witness is elevated to the status of an infallible self-authenticating super witness. Were the Court to accept IDWR's position, a state witness would be free to sit at his desk, generate a document, contend the entirety of its contents are factually accurate and cannot questioned, then self-authenticate that same document as an official governmental record, and introduce it into evidence without regard to the prior stipulations of the parties or the need for a sworn affidavit. Left unsaid in this assertion, but explicitly implied, is that Mr. Hastings is relegated to the status of a second-class party and witness who is denied those same loopholes in the normal evidentiary standards governing the introduction of evidence. This contention by IDWR raises serious equal protection concerns. *See* U.S. Const. 14th Amendment Section 1 and Idaho Const. Article 1 Sec. 2.

Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment as well as any reference to the contents thereof in *Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment*, *Defendant's Cross-Motion for Summary Judgment*, and *Defendant's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment*.

DATED this 26th day of April, 2022.

LAW OFFICES OF J. KAHLE BECKER

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _26th_ day of April, 2022, I caused to be served the foregoing *Memorandum in Support of Motion to Strike and Objection to Defendant's Request to Take Judicial Notice* to the following persons:

Meghan Carter and Garrick Baxter — via I-Court/Odyssey
Attorney for Defendant,
Idaho Department of Water Resources

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