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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STRIDER CONSTRUCTION CO. INC., Plaintiff, vs. IDAHO WATER RESOURCE BOARD, Defendant.	Case No. CV01-22-10932 PLAINTIFF'S MEMORANDUM IN OPPOSTION TO DEFENDANT'S MOTION TO ORDER RETURN OF STATE PROPERTY

I. INTRODUCTION

The "Motion to Order Return of State Property" filed by Defendant Idaho Water Resource Board ("IWRB") lodges serious, libelous allegations against Plaintiff Strider Construction Co., Inc. ("Strider") including that Strider "stole" a piece of old J-seal "without IWRB's knowledge or consent" and that the removal of the J-seal was "improper" and "illegal." Strider is offended by IWRB's spurious allegations, which are not only baseless but in fact are directly belied by IWRB's own records and the Parties' Contract.

Notably, IWRB's motion is supported only by a declaration from its counsel, who not only lacks any personal knowledge regarding the Project but apparently did not review the Parties' Contract or IWRB's own project records before filing a motion containing unfounded accusations of theft against Strider. Had IWRB's counsel spoken to IWRB representatives or reviewed IWRB's project records, including the Parties' Contract, it would have been obvious that—contrary to what is alleged in IWRB's motion—(1) the Contract provides the J-Seal material is waste to be removed and disposed of by Strider,[1] (2) while it was working on the project Strider cut off a sample of the old J-seal waste that was sitting in a dumpster onsite,[2] (3) Strider took the sample for the purpose of showing IWRB representatives during site visits (well before there was any litigation),[3] (4) IWRB was well-aware that Strider had retained the sample,[4] (5) Strider showed the sample to various IWRB representatives on multiple occasions,[5] (6) IWRB never objected to Strider having the sample,[6] and (7) IWRB never asked for its own sample of the waste material (if it had, Strider would have obliged).[7] The serious misrepresentations in IWRB's motion rise to the level of warranting sanctions under I.R.C.P. 11, and Strider intends to seek such sanctions and pursue other appropriate remedies if IWRB does not promptly retract and/or correct its unfounded allegations of theft, dishonesty and other misrepresentations.[8]

Instead of properly grounding its motion in facts and appropriate law, IWRB relies on unsupported and false premises. IWRB seeks the "return of state property" but does not bother to

[1] Declaration of Tim Yedinak ("Yedinak Decl.") at ¶ 3 and Exhibit A.
[2] *Id.* at ¶ 5.
[3] *Id.* at ¶¶ 5-6.
[4] *Id.* at Exhibit B.
[5] *Id.* at ¶¶ 5-6 and Exhibit B.
[6] *Id.* at ¶ 7.
[7] *Id.* at ¶ 8.
[8] In Strider's view Defendant's Motion contains actionable libel.

explain how the old J-seal material is "state property" rather than abandoned trash, which IWRB hired Strider to remove and dispose of. It is beyond the pale for IWRB to hire Strider to remove and dispose of old J-seal material and then accuse Strider of "theft" for performing its contract. The Court should deny IWRB's wholly unjustified motion. IWRB can and should proceed under the discovery rules to obtain access to the sample of old J-seal in Strider's possession.

II. STATEMENT OF FACTS

In August 2020, Strider entered into a construction contract (the "Contract") with Idaho Water Resource Board to perform improvements to the Priest Lake Outlet Dam (the "Project"). The scope of work set out in the Contract included Strider's removal and disposal of old J-seals surrounding the dam's Tainter gates and the fabrication and installation of new J-seals.[9]

There was approximately 300 linear feet of old J-seal material to remove from around the dam's 11 Tainter gates.[10] Strider performed this work in accordance with the Contract Documents[11] and placed the old J-seal waste in an onsite dumpster for disposal offsite. At some point during construction, after roughly half of the gates had their J-seals removed and replaced, IWRB raised concerns that a couple of gates were leaking and that the new J-seals were not performing as IWRB had expected.[12] This issue was discussed many times during project meetings and site visits with Strider confirming that the new J-Seals were fabricated and installed precisely as specified in the Contract Documents.[13]

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[9] Yedinak Decl. at Ex. A, Contract Specification 01 20 00 Section 1.03(B)(13).
[10] Yedinak Decl. at ¶ 3.
[11] Strider also objects to and disputes any contention by IWRB and its counsel that Strider's work was in any way "non-conforming." Though IWRB's counsel improperly cites to Defendant's Answer as "fact," such unsupported contentions are inaccurate and materially misrepresent the issues to this Court. Tellingly, neither the Motion nor the Answer provide any reference, nor can they, to a contract provision that Strider failed to meet.
[12] Yedinak Decl. at ¶ 4.
[13] *Id.*

During one such discussion, Strider's Project Manager Tim Yedinak decided to go to the dumpster sitting at the project site and cut a sample from the old J-seal waste material and compare it with a piece of the new J-seal in order to physically show IWRB representatives on site that the new seals had been fabricated to match the old ones.[14] Mr. Yedinak made no secret of this sample and on multiple occasions he showed it to IWRB representatives.[15]

IWRB's own internal records obtained by Strider in discovery plainly confirms that Mr. Yedinak showed IWRB the sample.[16] Site visit notes emailed from Doug Jones to Michelle Richman, (both are Idaho Department of Water Resources ("IDWR") Northern Region Managers)[17] documented a March 24, 2022 site visit and stated:

> On March 24 I visited Priest Lake Dam at the invitation of Michelle Richman for the purpose of observing the gate seals and state of the structure at the close of Season 2 construction. Michelle could not attend and requested I share with her my impressions based on Strider's discussions of the work completed to date.
>
> I arrived a little after 9 AM and rendezvoused with Bob Stutz, Roy Peckham, Adam Frederick, Emily Barnes, and Keith (David Evans Assoc) in Kokanee Park.
>
> . . .
>
> **The group then proceeded to the Strider office trailer to meet with Tim Yednak** [sic]. Tim summarized the gate problem and challenges encountered during installation. **He had samples of the old and new seal material on hand with sufficient lengths to display the bolt holes cut through the material**.[18]

Mr. Jones' notes were further circulated via email among various IDWR employees, including Mike Morrison and Adam Frederick. In the internal IWRB email thread, on March 25, 2022, Ms.

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[14] *Id.* at ¶ 5. For the Court's reference, a photograph of the old seal sample and new seal sample is provided at Exhibit C to the Yedinak Declaration.
[15] *Id.* at ¶ 7.
[16] *Id.* at Exhibit B.
[17] The Idaho Water Resource Board is a part of Idaho Department of Water Resources. While it was IWRB that executed the Contract, various other individuals from IDWR were involved in the administration of the Contract on behalf of IWRB.
[18] Yedinak Decl. at Exhibit B, p. 2.

Richman wrote to her colleagues "I think it would be valuable for us to have the samples of the old J seal material and the new J seal material for comparison."[19] Despite this comment, IWRB apparently did not collect a sample of the old J-seal. And, though IWRB internally discussed asking Strider's Tim Yedinak for a sample of the old J-seal material, no one actually asked him for samples of either the old J-seal or the new J-seal.[20]

More than four months later, on July 27, 2022, Strider issued a notice of termination to IWRB terminating the Contract based on IWRB's continued Stop Work Order that precluded the work from progressing and continued failure to pay for work performed. Strider demobilized from the site and the sample that had been in the onsite trailer was taken to Strider's office in Wenatchee, Washington.[21]

On July 29, 2022, Strider filed the instant litigation against IWRB alleging IWRB breached the Contract, failed to pay for work performed, and that Strider was entitled to terminate the Contract.[22] IWRB filed its Answer and Counterclaim on August 23, 2022, in which IWRB alleges, among other things, that the new J-seals installed by Strider do not seal properly and that Strider breached the Contract by failing to correct the leaky Tainter gates.[23] Strider disputes these allegations, and IWRB fails to identify any Contract provision by which Strider failed to comply. Strider fully complied with all Contract requirements.

Strider and IWRB have since exchanged and responded to Interrogatories and Requests for Production. **IWRB's Interrogatories and Requests for Production did not ask about physical evidence, including J-seal samples, or request access to them.**

On March 29, 2023, counsel for Strider and IWRB engaged in a meet and confer discovery conference (the parties had previously exchanged correspondence in which each expressed

[19] *Id.*
[20] Yedinak Decl. at ¶ 8.
[21] *Id.* at ¶ 9.
[22] *See* Plaintiff's Complaint.
[23] *See* Defendant's Answer and Counterclaim.

dissatisfaction with certain discovery responses from the other).[24] Prior to the conference, counsel for IWRB emailed counsel for Strider asking whether Strider had any J-seal samples.[25] Out of professional courtesy, counsel for Strider informed counsel for IWRB during the conference that Strider did indeed have a small sample of the old J-seal material and the new J-seal and stated that the samples could be made available for IWRB's inspection and testing pursuant to a request for production.[26] IWRB's counsel expressed concern over finding agreement on the specific time and place for inspection and testing, but did not indicate that the seal samples had been "stolen" or were "state property" that needed to be given to IWRB outside of the discovery process.[27]

After the conference, IWRB's counsel emailed Strider's counsel demanding that Strider mail the sample of old J-seal to IWRB counsel's office.[28] Strider's counsel responded asking why IWRB believed it was state property[29] and expressed that Strider was not comfortable mailing the only sample of the old J-seal due to risk of loss or damage.[30] IWRB's counsel provided no explanation for the position that the sample is state property and continued to insist that Strider mail the sample to IWRB's counsel, threatening of motion practice if Strider did not agree to its demands made outside of the scope of formal discovery. IWRB's counsel created a bizarre false dichotomy under which either IWRB would be forced to go to Strider's office in Washington to inspect the sample or Strider would mail the sample to IWRB and then Strider could make a discovery request to IWRB to inspect it.[31]

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[24] Declaration of Kristina Southwell ("Southwell Decl.") at ¶ 2.
[25] *Id.* at ¶ 3.
[26] *Id.* at ¶ 4.
[27] *Id.* at ¶ 5 and Exhibit A, p. 6.
[28] Southwell Decl. at Exhibit A, p. 7.
[29] *Id.* at p. 5.
[30] *Id.* at p. 3.
[31] *Id.* at p. 4-5. IWRB's counsel wrote "we want to inspect the j-seals, and shouldn't have to travel to Strider's business in WA" despite Strider never stating that the only place for inspection would be Strider's office. And IWRB's counsel stated that after Strider mailed the sample to IWRB "we'll certainly continue to retain it and make it available for further inspection by your client/expert."

Strider, relying on the Contract and common sense, explained that the old J-seal was not state property because IWRB had hired Strider to remove and dispose of the old J-seals – clear action demonstrating IWRB was relinquishing its possession and ownership of the old J-seals.[32] Strider's counsel invited IWRB to make a discovery request under I.R.C.P 34 to inspect and test the sample, then the Parties could make mutually agreeable arrangements for IWRB to have access to the sample of old J-seal.[33] Instead of following Strider's suggestion, IWRB's counsel sent a list of questions about the J-seal sample to Strider's counsel.[34] In response, Strider's counsel stated that IWRB's questions could be answered in the discovery process and were better directed at the fact witnesses rather than counsel.[35]

Unfortunately, despite Strider's best efforts and reasonable positions, IWRB has chosen to file this unwarranted and unsupported Motion asking the Court to condone IWRB's refusal to engage in the discovery process. IWRB makes no argument explaining how the sample of old J-seal waste is "state property" and has made no effort to issue discovery related to the old J-seal sample. For those reasons, its requested relief—an order directing Strider to "return" the J-Seal sample and answer IWRB's questions about the sample outside of discovery—should be denied.

III. ARGUMENT AND AUTHORITY

A. This is a Discovery Dispute - IWRB's Motion And "Remedy" Cannot Be Reconciled.

As an initial matter, IWRB's Motion fails by its very premise. IWRB's Motion relies solely on the Court's authority "to sanction a party that seeks to introduce improperly obtained evidence" and to "regulat[e] the use of information obtained by a party independent of the discovery process."[36] Neither of those situations are applicable here or pertinent to IWRB's request. Rather,

[32] *Id.* at p. 4.
[33] *Id.* at p. 2.
[34] *Id.* at p. 1.
[35] *Id.*
[36] Defendant's Motion at p. 5.

IWRB, well aware that a portion of J-seal material was kept by Strider during the course of construction, (a) failed to issue any discovery request related to the material and (b) refused Strider's proposal to IWRB to inspect the material at an agreeable time and place. Instead, IWRB demands that Strider be forced to "return" the J-Seal material without any authority for such proposition or safeguards of the material and that Strider be forced to answer discovery-type questions that IWRB has emailed to counsel outside of discovery. This litigation has not reached the stage where either party is attempting to introduce the J-Seal material as "evidence" nor is IWRB asserting either party should be precluded from introducing it as is contemplated by the caselaw relied upon by IWRB.

Rather, IWRB states emphatically that "the property is indisputably evidence at the very center of this case."[37] This waste material, part and parcel of the construction Project,[38] is being properly stored, maintained, and disclosed as part of the discovery process. In turn, however, IWRB is doing exactly what it is accusing Strider of doing: attempting to circumvent the discovery process. If IWRB would like to inspect the material, it may do so. Strider has no objection to that and, in fact, made that offer to IWRB. If IWRB seeks to ask additional interrogatories, it must comply with the Court Rules for that process. IWRB has not done so. The "authority" IWRB is relying on (exclusion of evidence) cannot be reconciled with the "remedy" it is seeking (possession of material and responses to additional questions)[39] nor do such common discovery issues warrant

[37] Defendant's Motion at p. 7.
[38] Under IWRB's reasoning, however, any document, email or note created during the Project would somehow be "improperly obtained outside of discovery" and the Parties would be precluded from its use.
[39] IWRB also has the ability to seek such questions in a deposition. No depositions have been requested by IWRB.

the vitriol and spurious allegations included by IWRB. The only Party engaging in gamesmanship and unnecessarily driving up the Parties' costs is IWRB, and such conduct should not be rewarded.

B. The Sample of Old J-Seal Is Not State Property

Beyond the fatal flaws above, IWRB's Motion also fails factually. IWRB's motion, seeking "return" of the J-Seal, is premised on its assertion that the sample of old J-seal is "state property," yet IWRB neglects to actually support that bedrock premise with any authority. When an owner disposes of property its ownership interest is severed. The undisputed facts are that IWRB contracted with Strider for work including "removal and disposal of existing J-Seals":[40]

> 13. Replace J-Seals
>
> a. Measurement: Per bay (BAY).
>
> b. Description: Work under this item shall include all materials, supplies, equipment, and labor required for removal and disposal of existing J-Seals and fabricating, installing, and installation of new J-Seals in all 11 bays as described in these Technical Specifications and as indicated in the Contract Drawings.
>
> c. Payment: Per bay (BAY).

The dictionary definition of "disposal" is "the act of getting rid of something, especially by throwing it away."[41] Thus, the Contract, requiring "removal *and disposal*," specifies the old J-seal material is waste or trash.[42] Certainly, the specification does *not* indicate that IWRB intended to retain ownership of the old J-seal material or that Strider was somehow supposed to send all of the Project's waste material to IWRB or its counsel's offices. Such an assertion is absurd. The material is waste.

[40] Yedinak Decl. at Exhibit A; Declaration of Jennifer Reinhardt-Tessmer In Support of Defendant's Motion at ¶ 5.
[41] https://dictionary.cambridge.org/us/dictionary/english/disposal
[42] The Contract does not specify any specific method for disposal (e.g. it does not require that Strider take all material to a landfill).

IWRB cites *no* authority that the removed J-Seal is "state property." Instead, IWRB doubles down that Strider "stole it from the State" and provides the conclusory argument that the fact the J-Seals were waste "lends no support to Strider's position."[43] But waste is abandoned property that any taker can claim possession and ownership over. 25 Am. Jur. Proof of Facts 2d 685 (Originally published in 1981) ("Abandoned property becomes subject to appropriation by the first taker or finder who reduces it to possession. That person thereupon acquires all right, title, and interest in the property as against both the former owner and the person on whose land it was left.").

Black's Law Dictionary defines "abandoned property" as "Property that the owner voluntarily surrenders, relinquishes, or disclaims."[44] In reference to property rights, Idaho courts have defined abandonment as requiring "a clear, unequivocal, and decisive act" demonstrating "relinquishment of a right by the owner thereof without any regard to future possession by himself or any other person." *Galvin v. City of Middleton*, 164 Idaho 642, 646, 434 P.3d 817 (2019), quoting *Mortensen v. Berian*, 163 Idaho 47, 51, 408 P.3d 45 (2017). Similarly, Idaho courts, in the context of Fourth Amendment search and seizure cases, have often stated "abandonment occurs through words, acts, and other objective facts indicating that the defendant voluntarily discarded, left behind, or otherwise relinquished his or her interest in his or her property" and that a party has no privacy interest in abandoned property. *Stark v. State*, 171 Idaho 541, 524 P.3d 43, 47 (2023); *State v. Porter*, 170 Idaho 391, 398, 511 P.3d 273, 280 (Idaho Ct. App. 2022), *review denied* (June 27, 2022).

[43] Defendant's Motion at p. 7.
[44] PROPERTY, Black's Law Dictionary (11th ed. 2019)

A party cannot wrongfully possess property that has been abandoned by the owner. *See Sanchez v. Melendrez*, 934 F. Supp. 2d 1325, 1332 (D.N.M. 2013) ("abandoned property does not belong to anyone and may legally be appropriated by the first taker"); *Hunt v. DePuy Orthopaedics, Inc.*, 729 F. Supp. 2d 231, 232 (D.D.C. 2010) ("a defendant cannot wrongfully withhold property that the plaintiff has abandoned").

Here, IWRB agrees that it contracted for the removal and disposal of the old J-seals. Nevertheless, IWRB's counsel misleadingly states that "Upon initiation of this litigation, IWRB was unable to locate the J-seals changed out by Plaintiff," implying that the old J-seals should have remained on the project site.[45] This is false. The Contract called for total replacement of the J-seals. Strider was hired to remove and dispose of the old J-seal material and fabricate and install new J-seals on the Tainter gates. Performing the Contract work, as Strider did, would necessarily cause all old J-seal material to be removed and disposed from the project site, yet IWRB feigns shock at this expected outcome in order to suit its false narrative portraying Strider as some sneaky thief engaging in gamesmanship and misconduct. In reality, it is IWRB's motion that violates IWRB's duty of candor to this Court.

IWRB also fails to articulate how it is possible that IWRB still intended to retain full ownership interest over the old J-seal material despite contracting for its removal *and disposal* and despite IWRB's participation in meetings and discussions where IWRB was well aware of Strider retaining a portion of the material so that the Parties can inspect it. IWRB, in fact, even discussed internally requesting a sample *from Strider* of the very same material.[46] Now, IWRB states "the property is indisputably evidence at the very center of this case."[47] Had Strider taken all the J-

[45] Defendant's Motion at p. 4.
[46] Yedinak Decl. at Exhibit B, p. 2.
[47] Defendant's Motion at p. 7.

seal waste to the landfill, neither Party would have the ability to inspect it. Strider, instead, preserved a sample of the material and properly disclosed it as part of the discovery process.

There is no basis for IWRB'S Motion, and the inescapable conclusion is that this is an argument concocted by IWRB's counsel for improper purpose: to avoid engaging in discovery and to malign and disparage Strider before this Court.

C. Strider's J-Seal Sample Was Not Improperly or Unfairly Obtained

IWRB wrongly asserts that the sample of old J-seal is evidence improperly obtained outside of discovery and that Strider deliberately and surreptitiously circumvented discovery. As discussed above, Strider has repeatedly urged IWRB to follow the discovery process. For reasons unknown to Strider, IWRB has refused. Now, IWRB implies that Strider deliberately took the J-seal sample for purposes of this litigation, ignoring that the sample of old J-seal was taken while Strider was still working onsite, with IWRB's knowledge, and well before litigation was contemplated.

As discussed above, the cases cited and relied on by IWRB are federal cases outside of Idaho and concern challenges to a party's ability to use specific evidence obtained outside of discovery. But, again, IWRB's motion is not seeking an order excluding the J-seal evidence. Rather, IWRB is seeking an order directing Strider to give the evidence to IWRB outside of the discovery process, without any reasoning or authority, but presumably so IWRB can use the material in litigation. Even ignoring that none of the authorities involve the relief that IWRB seeks, a review of the cases shows there are significant factual distinctions:

- ***Fayemi v. Hambrecht & Quist***, is an employment discrimination case in which the plaintiff was terminated from his employment and later returned to the office over the weekend to obtain confidential company information from a floppy disk secured in his supervisor's desk drawer. 174 F.R.D. 319, 321 (S.D.N.Y. 1997). The Court found that plaintiff's actions were not innocent, that the confidential information had been improperly taken from the employer, and that the appropriate sanction was to preclude plaintiff from using the improperly obtained evidence. *Id.* at 324-26.

- ***Lahr v. Fulbright & Jaworski, L.L.P.***,is another employment case in which the plaintiff received materials outside of discovery from a former employee of the defendant company. 3:94-CV-0981-D, 1996 WL 34393321, at *1 (N.D. Tex. July 10, 1996). The former employee had copied her supervisor's private notes while still employed by defendant. *Id.* at *2. She did this without her supervisor's permission or knowledge. *Id.* After she left her employment with defendant she provided the copied notes to plaintiff without defendant's knowledge. *Id.* The Court ruled that the notes had been deceptively copied by the employee and improperly obtained by plaintiff. *Id.* The Court excluded the use of the evidence. *Id.* at *4-5.

- ***In re Shell Oil Refinery***, a class action case arising out of an explosion at a refinery, the plaintiff's legal committee received Shell documents from a current Shell employee after suit had been filed and outside of the discovery process. 143 F.R.D. 105 (E.D. La. 1992), amended at 144 F.R.D. 73 (E.D. La. 1992). Plaintiff did not notify Shell that one of its employees had sent Shell documents to plaintiff unprompted, but through depositions and discovery responses Shell figured out there must have been leaked documents. The Court found that plaintiff violated "fair play" by receiving the Shell documents outside of discovery and not disclosing the fact to Shell. *Id.* at 108. The Court ordered that plaintiff provide copies of all documents to Shell and that plaintiff could not use any of the improperly obtained documents (that were not otherwise provided in discovery or publicly available) and further ordered that plaintiff not engage in any ex parte contact with current Shell employees. *Id.* at 109.

Common to all the above cases relied on by IWRB is that the evidence at issue was obtained by one party under circumstances where the other party had no knowledge or opportunity to object, and the information and the methods by which it was obtained were not properly disclosed. In *Fayemi* and *Lahr* employees furtively took confidential company information from secured locations without authority or permission. In *Shell* the plaintiff received information from defendant's employee outside of the channels of discovery and did not inform defendant. The circumstances in those cases led the courts to conclude that the information was obtained "unfairly" since the other party was essentially in the dark and, therefore, the information was excluded.

In contrast, all Parties have been and are aware Strider retained a portion of the old J-Seal material. IWRB witnesses were aware that Strider took a sample during the work on the project, IWRB's own records document the fact of Strider having a sample,[48] and Strider's counsel told IWRB's counsel that the sample taken during the work on the project remained in Strider's possession.[49] Strider did not furtively obtain the sample of old J-seal from IWRB's offices or a secured location, but rather openly took the sample from the dumpster at the project site during construction.[50] Strider openly and repeatedly showed the sample to IWRB's representatives during site visits.[51] The sample was not taken for the purposes of litigation or in an effort to circumvent discovery (indeed IWRB had not asserted claims against Strider at the time the sample was taken) and litigation did not commence until months later. Further, Strider immediately disclosed its possession of the J-seal once raised and offered the opportunity to inspect the material consistent with the Court Rules.[52] There is no correlation to the cases cited by IWRB, factually or legally.

Moreover, IWRB was aware that Strider had a sample of the old J-seal long before litigation started and never protested or objected.[53] IWRB, at the time, did not object to Strider's possession of the material or allege "theft."[54] Rather, an entire dumpster of the old J-seal material sat at the project site for some time and was equally accessible to IWRB and Strider. IWRB could have taken its own sample from the dumpster or asked Strider to provide it with a sample (as IWRB discussed internally).[55] In hindsight, IWRB apparently regrets not getting its own sample from the

[48] Yedinak Decl. at Exhibit B.
[49] Southwell Decl. at ¶ 4.
[50] Yedinak Decl. at ¶ ¶ 5, 7.
[51] *Id.* at ¶¶ 5-6.
[52] Southwell Decl. at Exhibit A.
[53] Yedinak Decl. at Exhibit B.
[54] *Id.* at ¶ 7.
[55] *Id.* at ¶ 8.

dumpster before its contents were sent to the landfill, but that does not transform Strider into a thief or bad actor. Nor does it leave IWRB at a disadvantage in this litigation – IWRB may access Strider's sample by making a discovery request under I.R.C.P. 34.

D. Discovery Rules Govern IWRB's Access to the J-seal Sample in Strider's Possession

IWRB fervently argues that Strider is circumventing the discovery process, but in reality Strider has repeatedly directed IWRB to use the discovery process to obtain access to the sample of the old J-seal and get answers to questions about it. Having established above that the sample of old J-seal is *not* state property and that Strider is *not* in wrongful possession of the sample, this matter becomes a straightforward situation where a party wants access to physical evidence in the possession, custody, and control of another party. That situation is governed by I.R.C.P. 34 which provides:

> A party may serve on any other party a request within the scope of Rule 26(b):
>
> (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
>
> . . .
>
> (B) any designated tangible things

The rule also provides that the procedure for making a request requires that the party "must describe with reasonable particularity each item or category of items to be inspected" and "must specify a reasonable time, place, and manner for the inspection and for performing the related acts." I.R.C.P. 34(b)(1)(A)-(B). It is undisputed that IWRB has not made any such request related to the J-seal sample, despite Strider's explicit invitation to do so.[56]

[56] Southwell Decl. at Exhibit A, p. 2.

Instead, IWRB demanded that Strider mail the old J-seal sample to IWRB and emailed Strider's counsel questions seeking factual information about the seal.[57] Strider responded appropriately, stating it was not comfortable mailing the only sample of old J-seal to IWRB and had no obligation to do so, especially when no discovery request had been made. Strider also asked that IWRB use discovery directed at the party / witnesses to get answers to its factual questions rather than emailing counsel.[58] It is not appropriate to demand that counsel for Strider provide factual information about the old J-seal sample—those facts can and should be obtained directly from witnesses through depositions.

IV. CONCLUSION

IWRB requests (i) Strider be ordered to return state property—with no authority for such demand or indication as to what IWRB will do with this material, and (ii) that despite the fact that IWRB has issued **no** such discovery request, that Strider be ordered to answer questions emailed to Strider's counsel. IWRB not only fails to meet its burden to show it is entitled to the relief it seeks, it fails to provide support for even the most basic premises in its motion and makes gross and disparaging misrepresentations to this Court. The sample of old J-seal is physical material that is not state property, and IWRB is not entitled to gain possession of it outside of the designated process set out in I.R.C.P. 34. Finally, IWRB's unfounded accusations of theft and spurious and deceitful approach to this Motion should not be condoned. For the above reasons, the Court should deny IWRB's motion.

/ /

[57] *Id.* at p. 1.
[58] *Id.* at p. 1.

DATED: This 2nd day of June, 2023.

AHLERS CRESSMAN & SLEIGHT PLLC

By: /s/ *Lindsay Watkins*
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LAW OFFICE OF JOHN H. GUIN, PLLC

By: */s/ John H. Guin*
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2023, a true and correct copy of the within and foregoing instrument was served upon:

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Attorney for Defendant Idaho Water Resource Board

[ ] Via U.S. Mail
[ ] Via Legal Messenger
[ ] Via Federal Express
[ ] Via Facsimile
[✖] **Via iCourt E-File and Serve**

DATED: This 2nd day of June, 2023.

/s/ John H. Guin
John H. Guin