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DEPARTMENT OF
WATER RESOURCES

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re CSRBA	)	Subcase Nos.: 95-16445 & 95-18409
	)	
Case No. 49576	)	BRIAN FARLEY'S REPLY BRIEF
	)	ON CHALLENGE
	)	
	)	

COMES NOW, Brian T. Farley, claimant and objector in the above-referenced subcases, by and through undersigned counsel of record, and pursuant to the Court's *Challenge Scheduling Order* and *CSRBA Amended Administrative Order 1* ("AO1"), Section 18, hereby submits this *Reply Brief on Challenge* in the above-captioned subcases.¹ This reply addresses arguments raised in the *Response to Brian Farley's Opening Brief on Challenge* ("Gideon Br.") filed on behalf of Arthur & Katherine Gideon ("Gideons") on October 31, 2024. For the reasons set forth in the *Opening Brief* ("Op. Br.") and those stated herein, Mr. Farley submits that the Presiding Judge should reverse and remand the Special Master's decisions accordingly.

¹ This *Reply* is filed on November 12, 2024 as the 10-day deadline for filing fell on Sunday November 10, 2024 (10 days after the response deadline, AO1 §18e.2), and the Court is closed for Veteran's Day Monday November 11, 2024. See I.R.C.P. 2.2(a)(1)(C).

INTRODUCTION

The Gideons oppose Mr. Farley's challenge to the Special Master's decisions in these consolidated subcases. Similar to the Special Master and the Idaho Department of Water Resources ("IDWR" or "Department"), the Gideons overlook a plethora of facts and information leading up to Mr. Farley's formal amended claim in 2019, as well as the fact that a person has the right to dispossess real property interests. The Gideons brush off the statutory amended claim process as if it was meaningless in terms of what a claimant pursues before the CSRBA Court. Moreover, avoiding the legal defense and question of abandonment, the Gideons mischaracterize Mr. Farley's actions as an attempt to "concentrate" and "consolidate" water right 95-16445. The facts show that Mr. Farley legally abandoned a portion of water right 95-16445 the moment his intent to not use that right on Parcel I merged with his actual non-use of water. The Gideons cannot escape these facts so it not surprising they seek to distract and divert the Presiding Judge to terms more compatible with their arguments about Mr. Farley's actions.

Next, the Gideons misstate Idaho's merger doctrine in support of the Special Master's erroneous decision that the warranty deed at issue was unambiguous. Although the Special Master plainly recognized the deed was "uncertain," he refused to evaluate the parties' intent and instead mistakenly relied upon the real estate agreement's "integration" clause to support that exclusion. This mistaken interpretation of Idaho law should be reversed and the subcases should be remanded to determine what portions of any water rights passed with the conveyance of the property. Finally, the Gideons dispute Idaho's beneficial use doctrine and the adjudication code's requirement that the Court determine the "nature and extent" of the domestic water rights at issue. Relying upon the statutory maximum volume as if it was a defined property right at this point, the Gideons ask this Court to refrain from examining the actual amount of water they need

and can put to beneficial use at their home. Idaho law and the very purpose of this adjudication demand otherwise. At a minimum, if the Presiding Judge upholds the Special Master's recommendation, then the subcases should be remanded to ensure the water rights are split proportionately consistent with the premise required by the Idaho Supreme Court (i.e. *Crow* and *Silverstein*). In other words, the Gideons cannot receive an undefined "appurtenance" greater than the amount of property that was conveyed and contrary to the proportionate share of the property that Mr. Farley retained. Regardless of the type of water use, the canon of construction in interpreting the deed and how it relates to water rights, requires a proportionate split.

For the reasons set forth below, Mr. Farley respectfully requests the Presiding Judge to reverse and remand the Special Master's recommended decisions accordingly.

ARGUMENT

I. The Presiding Judge Should Address the Standard of Review of a Special Master's Recommended Summary Judgment Decision in the CSRBA in Light of the Idaho Supreme Court's *Dorsey* Decision.

A key issue on challenge is how the Presiding Judge (District Court) reviews a recommended decision from the Special Master given the recent instructions by the Idaho Supreme Court in *Dorsey v. Dorsey*, 172 Idaho 667, 535 P.3d 1040 (2023). The issue deserves particular attention here as the Special Master did not hold a fact-finding trial, but instead recommended Mr. Farley's objection to claim 95-18409 be resolved as a matter of law on summary judgment.

The Gideons note that "[e]vidence is 'substantial and competent' if a reasonable mind would accept and rely upon it when determining whether a disputed point of fact has been proven." *Gideon Br.* at 2. This statement does not apply here as the Special Master concluded there are no disputed issues of material fact and recommended summary judgment. Mr. Farley

contests the Gideons' claimed review and asserts summary judgment was improper. Moreover, the Special Master did not resolve "disputed issues of fact," as their argument implies.

The Idaho Rules of Civil Procedure require the special master to "prepare and file a report of the matters submitted by the court, and, if required to make findings of fact and conclusions of law, the master must separately state them in the report." I.R.C.P. 53(j) (emphasis added). Rather than separately state any "findings of fact" the Special Master outlined a combined "procedural and factual background" in his recommended summary judgment decision. *See SJ Decision* at 2-5. The Idaho Supreme Court has found that "[a] finding of fact is a determination of a fact supported by the evidence in the record." *Searle v. Searle*, 162 Idaho 839, 846, 405 P.3d 1180, 1187 (2017) (quoting *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 77, 156 P.3d 573, 578 (2007), citing BLACK'S LAW DICTIONARY 284 (2d Pocket ed. 2001)).

A statement that merely recites portions of the record which could be used in support of a finding is not a finding of fact. *Id.* Notably, in *Crown Point*, the Supreme Court explained that a finding of fact is a determination of a fact by the court or agency which fact is averred by one party and denied by the other and this determination must be founded on the evidence in the case. *See* 144 Idaho at 77; 156 P.3d at 578. The findings of fact there were only "recitations of evidence which could be used to support a finding without an affirmative statement that the agency is finding the fact testified to." *Id.* at 78, 156 P.3d at 579. Here, rather than making separate findings of fact as required, the Special Master generally described certain facts affiliated with the background of the case.

Further, the Special Master had no basis to resolve disputed issues of fact on summary judgment. First, a court can only grant summary judgment if the movant shows that there is no

genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law. *See* I.R.C.P 56(a). The rules fail to mention what a special master must do on summary judgment because arguably special masters are not supposed to rule on summary judgment. If there are no disputed facts and no findings of fact from a special master, there is nothing for a court to review. “The problem with the decision before us is that in the absence of explicit findings of fact and conclusions of law, the reasoning behind the Council’s decision is an amorphous target.” *See McElhaney v. City of Moab*, 423 P.3d 1284, 1291 (Utah 2017). The very nature of summary judgment necessitates that there should not be resolved “findings of fact” to review, because findings of fact based on conflicting evidence are determinations after a fact is averred by one party and denied by the other. *See Crown Point*, 144 Idaho at 77, 156 P.3d at 578 (emphasis added). Findings of fact are unnecessary if, per the summary judgment standard of I.R.C.P. 56(a), no genuine dispute as to any material fact exists.

For actions tried without a jury, the Rule 53(j) standard of review provides:

In an action to be tried without a jury the court must accept the master's findings of fact unless clearly erroneous. Within 14 days after being served with notice of the filing of the report any party may file and serve on the other parties written objections to the report. Any party may file a motion for action on the report. The court, after hearing, may adopt, modify or reject the report in whole or in part, may receive further evidence, or may resubmit the matter to the master with instructions.

I.R.C.P. 53(j) (emphasis added).

This review is particularly necessary since the Special Master only recommended summary judgment, leaving no findings of fact for the Presiding Judge to review. A court cannot comport with I.R.C.P. 53(j) and “accept the master’s findings of fact unless clearly erroneous” if there are no findings of fact in the first place. Were the court to do as the Gideons suggest and

defer completely to the Special Master, the Court would be deferring based on no findings of fact and insufficient information, thereby undermining the oversight that I.R.C.P. 53(j) requires.

Gideon also contends that the *Dorsey* case does not allow the District Court to conduct a more detailed review of the Special Master's report than what an appellate court could utilize and that such a reading of *Dorsey* is inconsistent with Rule 53(j). *Dorsey* does in fact support both Rule 53(j) and the assertion that a district court review of a special master can be more searching than that of an appellate court. The Court in *Dorsey* held: "[t]his procedure comports with the interpretation of the federal counterpart of Idaho Rule of Civil Procedure 53... that a Rule 53(f) review may be more searching than the review that an appellate court makes of a trial court... The district court is required to 'make its own careful review' of the record to determine whether the recommendations of a special master are clearly erroneous." 535 P.3d at 1053. Further, the district court's review is not limited to the parties' objections to the special master's report. *See id.* The district court has a heightened obligation to review a special master's report as compared to its review of a magistrate court's findings of fact on an appeal. *See id.* Finally, "[t]he appointment of a master does not displace the district court's role as the ultimate trier of fact." *Id.*

It cannot be overstated that the situation before the Court is not an appellate review. The present review is not that of a post-trial review, but instead a recommended decision on summary judgment. Therefore, each case that states that a court must defer to the special master's decision if it is supported by substantial and competent evidence is irrelevant in this situation because the context is entirely different where the Special Master did not resolve disputed issues of fact at trial. On page 4 of the *Response*, the Gideons wrongly suggest that "the reviewing court views the evidence in the light most favorable to the prevailing party," citing *In Re SRBA Case No.*

39576, Subcase No. 02-200, (2012). Both cases cited by the SRBA Court as the source of that quote (*Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, (Idaho Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151, 153 (Idaho Ct. App. 1996)) can be differentiated from the present situation because they were both appeals—cases where a court was reviewing the matter post-trial. This situation is entirely different—a court reviewing a special master’s recommended determination on summary judgment without resolved findings of fact to review. Other cases cited by Gideons tell the same story. On page 4 of their brief the Gideons cite several cases in support of reviewing findings of fact under the “clearly erroneous” and “substantial and competent” standard. (Troutt Order, *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974) and *Evans v. Hara’s Inc.*, 123 Idaho 473, 849 P.2d 934 (1993); 55-10288B Order; and the Whitted Order).

Again, all four cases can be distinguished from the present case because each was a post-hearing case where there had been a trial or similar tribunal with resulting findings of fact from the special master for a judge to review. In contrast, the case at hand is a recommended summary judgment decision and no trial has been held to resolve conflicting evidence. As such, there are no findings of fact a judge could scrutinize for being “clearly erroneous” or “substantial and competent.” Further, without a hearing or trial on the merits, such deference to a special master would be inappropriate.

De novo review of a special master’s report is further buttressed by *In Re SRBA Case No. 39576, Subcase No. 02-200*, (5th Dist. Idaho 2012), wherein the court stated that “The special master’s conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive...this permits the district court to adopt the master’s conclusions of

law only to the extent they correctly state the law...a reviewing court's standard of review of the special master's conclusions of the law is one of free review." *Id.* at 4.

Resolved findings of fact are not at issue on this challenge since this matter has only been reviewed on summary judgment at this point—only conclusions of law were at issue and per *Dorsey* and the cited SRBA decision in subcase 02-200, it is clear that freer review is allowed to a district court over a special master's report and conclusions of law than that of an appellate court. In accordance with Rule 53(j) and the cases cited above, a court may adopt, modify, or reject a report from a special master in whole or in part, may receive further evidence, or may resubmit the matter to the master with instructions.

In summary, the Presiding Judge should address the requirement of Rule 53 in light of *Dorsey* and determine whether or not the Special Master's recommended summary judgment decision can stand based upon a complete and de novo review of the record. Where the Court is ultimate decisionmaker any proposed review related to an appellate standard is not appropriate and should be rejected.

II. Farley Had the Right to Amend Water Right Claim 95-16445 and Dispossess the Domestic/Stockwater Use on Parcel I.

The Gideons support the Special Master's mistaken decision that Farley did not extinguish or dispossess that portion of water right 95-16445 previously used on Parcel I (domestic/stockwater) prior to 2017. *See Gideon Br.* at 5-9. The Gideons claim Farley could only: 1) expressly sever and withhold the water right from the Gideon transaction; 2) complete a transfer under section 42-222, or 3) amend the claim without the Gideons filing a competing claim. *See id.* at 6-7. The Gideons' arguments overlook the facts submitted in response to their motion for summary judgment and how the Special Master wrongly decided unresolved issues of

fact regarding what water right, if any, passed with the conveyance of the property. The Court should reject their arguments accordingly.

First, the Gideons erroneously suggest that Farley did not properly sever and withhold a portion of water right 95-16445 prior to the conveyance of the property to the Gideons. Whether there was any water right to sever and withhold in the first place is a question of fact that turns upon Farley's actions prior to the property conveyance. The Gideons gloss over what Mr. Farley did in the months leading up to the sale, the abandonment of water right 95-16445 on Parcel I, the resulting amended claim, and the director's reports acknowledging the same. Regarding the parties' intent as to what water rights would pass with the property, that is a disputed genuine issue of material fact that cannot be resolved on summary judgment. Mr. Farley submitted extensive documents and testimony in his declarations, and the Gideons provided none, relying solely upon the real estate purchase and sale agreement. *See generally, Op. Br.* at 7-11. When reasonable persons can draw different conclusions from conflicting facts and inferences, summary judgment must be denied. *See Alcala v. Verbruggen Palletizing Solutions, Inc.*, 172 Idaho 188, 531 P.3d 1085, 1110 (2023).

Next, although Mr. Farley did not complete and file an application for transfer form pursuant to section 42-222, IDWR represented that what he was doing with the amended claim process had the same effect. The agency gave Mr. Farley a document describing his water right as he intended to claim and titled "Application for Transfer of Water Right Part 2A Report for Claim No. 95-16445."² *See Ex. F, Farley Dec.* (2/23/24). Any reasonable person would not

² Similar to other missing documents and facts, IDWR's 706 Report does not disclose this transfer report document that was provided to Mr. Farley. Whether this was intentional or not is unknown. Further, contrary to the Gideons' claim, IDWR's failure to disclose all of its documents and records as part of the 706 Report was not a "determination" of material facts in the spirit of a court decision, rather it was a piecemeal incomplete picture of what occurred during the claim process. Moreover, the information supplied with Mr. Farley's declarations rebut the prima facie weight that would be given to IDWR's recommendations in these subcases. *See I.C. § 42-1411(5).*

suspect otherwise, after all, the adjudication was the process for defining the water right, there was no reason for Mr. Farley to file anything else with IDWR. *Compare Sagewillow, Inc. v. Idaho Dept. of Water of Resources*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) (Court concluding equitable estoppel did not apply because there was no false representation or material concealment by IDWR). Given IDWR's representations and the timing of the transfer report in the context of the amended claim filing there are questions of fact as to the agency's actions and Mr. Farley's reliance upon those in defining his water rights.

Finally, the Gideons' claim about the status of the CSRBA disregards the disputed issues of fact regarding Farley's abandonment of a portion of 95-16445 (what was claimed in 95-18409) and his amended claim that was accepted and reported by IDWR in February 2019. If the facts do not support the existence of water right 95-18409 then it does not matter about the timing of the adjudication including that no final unified decree has been issued. Further, the Gideons ignore the legal effect of section 42-1409A and how Farley's amended claim "superseded" the original notice of claim. *See e.g. Allied Bank Bonds, Inc. v. County of Kootenai*, 151 Idaho 405, 411, 258 P.3d 340, 346 (2011); *Falck Northern California Corp. v. Scott Griffith Collaborative Solutions, LLC*, 25 F.4th 763, 765 (9th Cir. 2022) ("The amended complaint made the First Amended Complaint no longer operative . . . an amended complaint super[s]edes the original complaint and renders it without legal effect"). There is no question that the so-called "unclaimed" portion of 95-16445 was purposely dispossessed by Farley through his amended claim. The Gideons, like the Special Master, believe that only a decree of disallowance would allow Mr. Farley to relinquish that portion of the water right. *See Gideon Br.* at 7. Again, there is nothing in the notice of error reply form that required Mr. Farley to request "disallowance" of the portion of the right he was no longer claiming. *See Opening Br.* at 10.

Although the Special Master faulted Mr. Farley for not making such a claim, this “after-the-fact” justification does not change Mr. Farley’s proper amendment of the original water right claim and the fact IDWR recommended it accordingly.

At a minimum, there is a question of fact as to the abandonment of a portion of water right 95-16445 and whether or not it existed after Mr. Farley discontinued its use with the congruent intent to no longer use the right on Parcel I. Either way, the timing of the adjudication does not justify the Special Master’s decision and the Gideons’ arguments in support.

III. The Gideons’ Attempt to Redefine Mr. Farley’s Abandonment as “Concentration and Consolidation” Should be Rejected.

The Gideons attempt to reframe Farley’s abandonment defense as a purported “concentration and consolidation” of water right 95-16445. *See Gideon Br.* at 10-12. The Gideons do not challenge the elements of common law abandonment which are the meeting or “confluence” of: 1) intent; and 2) actual relinquishment or surrender of the water right. *See Sears v. Berryman*, 101 Idaho 843, 847, 623 P.2d 455, 459 (1981); *see also, Carlsbad Irr. Dist. v. D’Antonio*, 544 P.3d 276, 290 (N.M. Ct. App. 2023).

Mr. Farley demonstrated both an intent to abandon that portion of water right 95-16445 on Parcel I coupled with the actual non-use or surrender of that water right in 2017. *See Op. Br.* at 13. The Gideons dispute Mr. Farley’s intent by arguing (without competing facts) that he “lacked the requisite intent” and that “his actions . . . defeat the possibility.” *Gideon Br.* at 10. They mischaracterize what occurred in 2018 and 2019, and ignore the fact water right 95-17752 was claimed for the home and Parcel I.³ If the real question is Mr. Farley’s intent as to any water right for the Lower Well, then that disputed issue of material fact can only be resolved through a

³ The Gideons continue to mistakenly rely upon the statutory maximum (up to 13,000 gpd) as a defined quantity that replaces actual historic beneficial use. *See Gideon Br.* at 11-12.

trial on the merits, not on summary judgment. The Gideons failed to produce any evidence of intent that would support their theory, instead they mischaracterize the arguments set forth in prior briefing as defining Mr. Farley's intent.⁴ *See id.* Arguments of counsel do not displace conflicting testimony and evidence that must be weighed at trial. *See e.g. Roberts v. Jensen*, 167 Idaho 838, 850-51, 477 P.3d 892, 904-05 (2020) (J. Moeller, dissenting) (“ . . . if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. . . . More importantly, because the evidence in the record is clearly in conflict, it must still be viewed in a light most favorable to Roberts [non-movant] regardless of who the trier-of-fact is. The evidence, when properly illuminated in such a light, simply demands that the matter be tried”).

Finally, where questions of intent are central to determining a defense, such as the common law doctrine of abandonment in the instant case, summary judgment must be denied. *See Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 873-74; 993 P.2d 1197, 1204-05 (1999). Since the Special Master wrongly decided issues of intent on summary judgment and ignored Mr. Farley's evidence, the Presiding Judge should reject the Gideons' arguments on this issue. As explained above and in the *Opening Brief*, Mr. Farley's abandonment defense warranted a trial on the merits and the Presiding Judge should reverse the Special Master accordingly.

⁴ The fact Mr. Farley amended his claim to continue the stockwater use on Parcel S does not mean he could not abandon the domestic and stockwater use on Parcel I (i.e. a portion of the water right). Yet that is the argument the Gideons make, that it was simply an “all or nothing” exercise. *See Gideon Br.* at 10-11 (Gideons' counsel uses the terms “consolidate”, “change”, “rearrange”, or “concentrate” as a replacement for Farley's abandonment of the portion of water right 95-16445). Contrary to the Gideons' theory, Farley would not have retained the entirety of water right 95-16445 as he amended his claim and abandoned all uses on Parcel I. The statutory 13,000 gpd maximum is not an actual entitlement as the Court knows each partial decree includes a remark stating it is not a determination of historical beneficial use. *See e.g.* Attch. R to 706 Report (partial decree for 95-17752 “the quantity of water for this water right is not a determination of historical beneficial use”).

IV. The Warranty Deed is Ambiguous, and the Gideons Misinterpret Idaho's Merger Doctrine.

The Warranty Deed is either ambiguous, in which case the REPSA *and* all facts and circumstances should have been considered, or the Warranty Deed is unambiguous, and the Special Master should not have considered the REPSA, according to the merger doctrine. The Gideons claim that the Warranty Deed is “boiler plate” but “is not ambiguous,” yet the REPSA was considered by the Special Master in reaching his decision. *Gideon Br.* at 13; *SJ Decision* at 13-14. If indeed the Warranty Deed was unambiguous, then the merger doctrine applies and dictates that an unambiguous deed forecloses considering another agreement—the courts must look to the deed alone, therefore the REPSA should not have been considered at all. *See Camp Easton Forever, Inc. v. Inland Northwest Council Boys Scouts of America*, 156 Idaho 893, 900, 332 P.3d 805, 812 (2014). The Gideons conveniently quote the Special Master's determination that the Warranty Deed was unambiguous: “just to be as clear as possible, this Special Master concludes that the Warranty Deed is not ambiguous.” *Gidon Br.* at 15 quoting *MAA Order* at 8-9. As such, according to the Special Masters's own words—the consideration of the REPSA violated the merger doctrine if the Warranty Deed is unambiguous.

Regardless, the Special Master seemed to go beyond the Warranty Deed itself to determine what was conveyed, but then refused to look at any evidence beyond the REPSA's language. That approach is not compliant with the law. If the deed is unambiguous, then merger occurred and considering the REPSA is beyond the terms of the Warranty Deed and contrary to the proper canons of construction. However, if the deed is ambiguous, as Mr. Farley's *Opening Brief* explains, then the Special Master had an obligation to consider all facts and circumstances, not just the REPSA. *See Op. Br.* at 15-19.

The merger doctrine establishes that the terms of the REPSA are merged into the deed, and the language in the deed controls as interpreted by *all* the surrounding circumstances. “The acceptance of a deed to premises generally is considered as a merger of the agreements of an antecedent contract into the terms of the deed, and any claim for relief must be based on the covenant or agreements contained in the deed, not the covenants or agreements contained in the prior agreement.” *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 382, 414 P.2d 879, 884 (1966) (emphasis added). Where the REPSA and deed cover the same subject matter, “the terms of the REPSA merge[] into the deed, and *only the deed’s language should be considered* by [the] Court.” *Sells v. Robinson*, 141 Idaho 767, 772, 118 P.3d 99, 104 (2005), *holding modified by Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010).

The Special Master looked outside the deed, but then stopped at the REPSA by erroneously finding the “integration” clause controlling. The Gideons quote the SRBA *Wilkerson Order* stating that “a warranty deed that is silent as to water rights but that includes an unqualified general appurtenance clause—as is the case in this matter—conveys all water rights appurtenant to the land conveyed by operation of Idaho Code Section 42-220 at a minimum.”) *Gideon Br.* at 15, n. 11. While the quote states the obvious, it also entirely avoids the crux of the issue: what was appurtenant to the property purchased by the Gideons? As explained in the *Opening Brief*, there is a genuine issue of material fact regarding what portion of water right 95-16445, if any, was appurtenant to Parcel I at the time of the real estate transaction. *See Op. Br.* at 6-19. Therefore, the Special Master wrongly decided the subcases on summary judgment as he admittedly noted the deed was “uncertain” and that the water rights were not specifically defined.

The Gideons go on to further display a gross misunderstanding of the merger doctrine by claiming that, “Farley seeks to rewrite and relitigate the terms of the parties’ deal upon learning the failed legal effect of his 2018-2019 amended claim shuffling. To do so violates the plain, unambiguous, and fully-integrated terms of the Farley-Gideon REPSA, and the plain and unambiguous terms of the Warranty Deed.” *Gideon Br.* at 16. The entire paragraph demonstrates a misunderstanding of Idaho’s merger doctrine. Contrary to the Gideons’ theory, Mr. Farley could not “violate the REPSA” (except for provisions which survive the closing) after the agreement is complete and the property passed by deed. It simply is not legally possible under the merger doctrine.

The Warranty Deed is ambiguous, or else the Parties would know exactly what was appurtenant in this transaction. If a deed's language is ambiguous, the parties’ intent becomes a question of fact settled by a trier of fact. *Camp Easton*, 156 Idaho at 900; 332 P.3d at 812. The trier of fact must consider all the surrounding facts and circumstances and view the deed as a whole and in its entirety. *See id.* A deed is ambiguous when its language is reasonably subject to conflicting interpretations. A deed is *not* ambiguous merely because the parties present differing interpretations to the court. *See id.* Instead, “conflicting interpretations may arise when a phrase lends itself, without contortion, to a number of inconsistent meanings.” *Id.* quoting *Porter*, 146 Idaho at 404, 195 P.3d at 1217.

It is undisputed that the deed conveyed property “with its appurtenances,” but the term “appurtenances is ambiguous, undefined, and can and has led to a number of inconsistent meanings” given the context and underlying facts in these subcases. Therefore, the Special Master was obligated to look at all relevant evidence to determine its meaning, not just the REPSA. For this reason the Special Master’s decision should be reversed and remanded.

V. The Court Has a Statutory Duty to Determine Actual Beneficial Use and Whether the Gideons Can Lawfully Use “Two” Exempt Domestic Water Rights.

A decree in a general stream adjudication like the CSRBA is binding on all water users and identifies the quantity a water right holder can put to beneficial use. *See* I.C. § 42-1420; *Clear Springs Foods v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2011); *Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 150-51, 408 P.3d 899, 905-06 (2018). Beneficial use is a measure and limit upon the extent of a water right. *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2012); *see also*, I.C. §§ 42-101; 104. There is no question that the CSRBA Court must address actual beneficial use in the context of resolving objections to water right claims in the adjudication.

The Gideons gloss over Farley’s argument regarding the unlawful beneficial use of two exempt domestic water rights on the unsupported claim that the Upper Well and water right 95-17752 are “functionally useless.”⁵ *Gideon Br.* at 19. First, how is water right 95-17752 “useless”?⁶ Whether there is, or potentially could be, any water to use in the Upper Well today is unknown.⁷ The Gideons have come forth with no facts that would prove that claim as of today

⁵ Contrary to the Gideons’ timing argument, Farley plainly challenged their ability to beneficially use two exempt domestic water rights in opposition to their motion for summary judgment. *See Farley Opp. Br.* at 17-18 (2/23/24) (citing section 42-226 and “the Gideons cannot ‘beneficially use’ use ‘two’ exempt domestic water rights”). Further, the CSRBA Court is charged with issuing a partial decree “determining the nature and extent of the water right which is the subject of the objection. . .” *See* I.C. § 42-1412(6). That statutory duty cannot be disregarded.

⁶ If the Court accepts the Gideons’ argument regarding water right 95-17752 based upon the status of the well, then water right 95-16445 is equally “useless” as the Lower Well collapsed in the spring of 2023. *See* Ex. I to *Farley Dec.* (2/23/24)(July 6, 2023 Declaration describing condition of Lower Well). Contrary to the Gideons’ insinuations, a water right does not guarantee an amount of water. Water levels in wells typically rise or lower depending on the time of year and particular hydrologic conditions.

⁷ The Gideons failed to have a well test performed as provided by the REPSA. *See* Attch. S to IDWR Report, Order at 20 (“the Court noted that the REPSA allowed for a well productivity test and Gideons failed to take advantage of the same”); *see also*, *Waldera Aff.* (1/30/24), Ex. A, Tr. 106:1-7.

November 12, 2024; no documents, no declarations, no tangible evidence, nothing.⁸ Instead, they rely upon the proceedings before Judge Christensen claiming it is “essentially a dry well.”

On the other hand, Mr. Farley produced evidence in these subcases that the Upper Well produced water and was the sole source of water for the home between 2017-19.⁹ *See Farley Dec.* at 3, 8 (2/23/24) (“I shut the water off from the Lower Well in 2017 so that the sole source of water for the home, Parcels I and S was provided from the Upper Well...At the time the agreement was executed, Parcel I was not receiving any water from the Lower Well. . .”). Whether the Upper Well can be deepened, enlarged, or replaced to produce water for water right 95-17752 is an outstanding question that is not resolved by the earlier first district court litigation.¹⁰

The Gideons make much of the authorized domestic statutory volume as if it represented a decreed entitlement. *See Gideon Br.* at 20-22. Although section 42-111(a) allows a domestic use for a home “not in excess of thirteen thousand (13,000) gallons per day,” the statute would not replace the decisions from the adjudication court and a decree that determines the “historic beneficial use” of a lesser quantity. Moreover, IDWR’s “combined use” remarks do not answer that question either. Instead, those remarks leave the underlying beneficial use determinations unresolved. The fact the Court typically does not make that determination for a domestic claim

⁸ The Gideons’ counsel did represent in February 2020 that “The productivity of the Lower Well and the Upper Well is not the problem.” *See* Addendum A (emphasis added). As noted on the first page, the letter was admitted as Exhibit HHH in the first district case (*Gideon et ux. v. Farley et al.*, Case No. CV28-20-2706). Mr. Farley requests the Court take judicial notice of the excerpts of this exhibit from that case pursuant to I.R.E. 201.

⁹ Further, prior to the Lower Well’s existence the Upper Well was the sole source of water for all domestic and stockwater uses on all of Mr. Farley’s parcels between 1994 and 1999.

¹⁰ The Gideons’ assertion that Farley filed water right claim 95-17752 “knowing that the Upper Well was functionally useless” has no support in the record and is contrary to the facts and everything Mr. Farley did with IDWR concerning his water right claims between 2018 and 2019. Again, the Gideons continue to characterize Mr. Farley’s “intent” without the benefit of a trial and actual testimony. Such arguments should be rejected outright. The Gideons essentially seek to “try” this case by briefing rather than have the CSRBA Court weigh the actual evidence and testimony.

does not mean that it cannot when the quantity is put at issue, such as in these subcases. Just the opposite, the adjudication statutes require the Court to make that decision.

Indeed, if the Court were to simply issue partial decrees with its standard remark on the three water rights in question (95-16445, 95-17752, and 95-18409), it would only delay the inevitable fight as to who has a right to what quantity to a later date before a watermaster or IDWR. Contrary to the Gideons' insinuations, the parties are not simply entitled to 13,000 gpd regardless of the other user's needs. Moreover, just listing the standard remark without more would be contrary to section 42-1412 requiring the Court to "determine the nature and extent" of water rights at issue by objection.

In sum, since the Gideons cannot beneficially use water under two exempt domestic water rights, the Court should reverse the Special Master and remand the subcase for a determination of historical beneficial use.

VI. If Farley Conveyed an Unidentified Portion of 95-16445 to the Gideons by Deed, then Idaho Supreme Court Precedent Requires a Proportionate Split According to the Property Transferred.

The Gideons challenge the timing and merits of Farley's alternative "proportional split" argument. *See Gideon Br.* at 22-25. Yet, the Gideons raised the issue before the Special Master in advocating for its partial application. The Gideons seek to have the benefit of the *Crow* decision as to effect of the property transfer for part of a water right, but not the result as to how to calculate that split. *See Gideons' Reply* at 13 (3/4/24) ("Report-recommended Right Nos. 95-16445 and 95-18409 are nothing more than the parties' shares of former base (unified title) Right No. 95-16445 (total volume of 13,000 gpd) consistent with *Crow v. Carlson . . .*"). The Gideons cannot have it both ways.

Moreover, as to this stage of the subcases, contrary to the Gideons' claim, the Presiding Judge conducts a de novo review of a Special Master's conclusions of law. *See Dorsey*, 535 P.3d at 1050. The Special Master made a legal conclusion that the water right passed with the conveyance of the property to the Gideons. *See SJ Decision* at 13 ("Both the REPSA and the Warranty Deed expressly state that the land is being conveyed with appurtenances"). Because the deed did not specify how much of the water right was being conveyed, the Special Master should have considered what Idaho law requires in such situations. Mr. Farley addressed this requirement in the alternative in the motion to alter or amend and there is no rule prohibiting its consideration by the Presiding Judge where no judgment has been entered and no "findings of fact" were made.¹¹

As to the merits, the Gideons do not dispute the legal concept of a "proportionate split" of a water right when property is conveyed without specifying otherwise, they just allege it can't apply to any other type of water rights except an irrigation right. *See Gideon Br.* at 23. The Special Master found that a portion of water right 95-16445 "was appurtenant to the real property conveyed from Mr. Farley to the Gideons and therefore passed pursuant to the appurtenancy clause in the Warranty Deed." *SJ Decision* at 11. If this recommended decision is upheld then the question is what exact quantity of the water right was conveyed? The way the Idaho Supreme Court has addressed this question is by evaluating the property sold and retained.

¹¹ The Gideons' reliance upon Rules 52 and 59 is misplaced given the state of these proceedings where the Special Master granted summary judgment and this Court has free review over that decision. This is not a proceeding where the Court has entered a final judgment and Farley has moved to amend that judgment. Rule 53, not 52, governs the Presiding Judge's review. *See Dorsey*, 535 P.3d at 1053 ("[G]iven our jurisprudence, along with guidance from analogous federal procedure, we draw a distinction between Idaho Rules of Civil Procedure 52 and 53"). To the extent the *Facility Volume* decision misstates the law, *Dorsey* should govern the present standard of review in general stream adjudications like the CSRBA. The Special Master's failure to address the legal argument does not mean that the Presiding Judge should as well. *See I.R.C.P.* 53.

For the first time on challenge, the Gideons go even further and suggest “Farley is not entitled to any portion of the Gideon’s 13,000 gpd domestic use entitlement.” *Id.* at 25. In support, the Gideons wrongly suggest that the domestic water right’s quantity is “tied to the dwelling home” alone. *Id.* at 24. In short, the Gideons claim they can use 13,000 gpd in their house without regard to any other uses, including Farley’s recommended stockwater use on Parcel S.¹² To the contrary, section 42-111(1)(a) describes a “domestic” use as water for “homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land.” In other words, the quantity for an exempt domestic water right is not just “tied to the dwelling home.” In this case, the decreed quantities for the authorized uses, domestic and stockwater, can be split based upon the property to which the water right was appurtenant to originally and how that property was conveyed. This is what is required by operation of the deed under the Supreme Court’s *Crow* and *Silverstein* precedent.¹³

Although those cases addressed irrigation water rights, there is no reason to limit the legal premise where a deed conveys a portion of the property with a portion of an appurtenant water right without specifying that quantity. Other types of uses can be conveyed pursuant to the same legal premise by operation of a deed that does not identify the quantity of the water right and the Court can identify how to calculate that split accordingly. Mr. Farley respectfully requests the Presiding Judge to accept his argument accordingly.

¹² The Gideons’ present argument is directly opposite to what they stipulated to on summary judgment. See *Memorandum in Support of Motion for Summary Judgment* at 15 (1/30/24) (“for the sake of completeness, Gideon does not object to the reciprocal decree of Claim No. 95-16445 as recommended in IDWR’s Report for purposes of closing these consolidated subcases (Nos. 95-16445 and 95-18409) out”).

¹³ The Gideons retreat from their prior reliance upon *Crow* claiming it “was less than precise.” *Gideon Br.* at 25. The Gideons cannot argue a premise before the Court, have the Court accept that premise which the Special Master did, and now argue it doesn’t apply in the same case. That’s the very definition of judicial estoppel. See *Smith v. U.S.R.V. Properties, LC*, 141 Idaho 800, 118 P.3d 127, 132 (2005).

CONCLUSION

A real property owner has the legal right to dispose of that property freely without restriction. *See O'Connor v. City of Moscow*, 69 Idaho 37, 42, 202 P.2d 401, 404 (1949) (“the unrestricted right of use, enjoyment and disposal”); *see e.g. Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 454 (Mich. 2020) (the “right to private property is a sacred right; . . . it was the old fundamental law, springing from the original frame and constitution of the realm”). The Special Master’s decision and the Gideons’ argument would undo that right despite the actions and intent of Mr. Farley regarding his property and water rights. Disputed issues of fact, including the parties’ intent, could not properly be resolved on summary judgment. Even if the Court affirms the recommended decision, Idaho law requires a proportionate split under established Supreme Court precedent. Mr. Farley submits the Special Master erred in his underlying decisions and that the Presiding Judge should reverse and remand accordingly.

DATED this 12th day of November, 2024.

MARTEN LAW LLP



Travis L. Thompson

Attorneys for Claimant/Objector Brian T. Farley

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 2024, I served true and correct copies of the foregoing **BRIAN FARLEY'S REPLY BRIEF ON CHALLENGE** by the method indicated below, and addressed to the following:

Clerk of the Court
CSRBA
253 3rd Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☐ U.S. Mail, postage prepaid
☒ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☐ Email

Andy Waldera
Sawtooth Law Office
1101 W. River St., Suite 110
Boise, Idaho 83702

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email

Director of IDWR
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☐ Email

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☐ Email

United States Dept. of Justice
Environment & Natural Resources Division
1290 West Myrtle Street, Suite 500
Boise, Idaho 83702

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☐ Email

Michael G. Schmidt
Lukins & Annis, PS
601 E. Front Ave., Suite 303
Coeur d'Alene, Idaho 83814

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail
☒ Email



Travis L. Thompson

Addendum

A

February 27, 2020

VIA E-MAIL

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Re: Final Demand Letter
I.R.E. 408 Settlement Communication
Art and Kathy Gideon / Brian Farley

Dear Mr. Bissell:

This Firm now represents Art and Kathy Gideon with respect to their purchase of real property located at 23452 N. Derting Road, Hayden, Idaho (the "Property"). I have reviewed your December 5, 2019 letter to the Gideons' former attorney Annie Harris, wherein you, on behalf of your client Brian Farley, rejected the Gideons' demands. Contrary to your letter, the facts of this matter demonstrate that Brian Farley intentionally misrepresented the source of water to the Property for the purpose of inducing the Gideons to purchase the Property. In reliance on Mr. Farley's misrepresentation, the Gideons agreed to purchase the Property. After the Gideons agreed to purchase the Property, and after deadlines for inspection of the property, title, and disclosures had passed, Mr. Farley recorded restrictive covenants in an effort to deprive the Gideons of the Property's primary water source, and to take for himself numerous easement rights, rights to payment, rights to control use of utilities, rights to restrict use of the Gideons' appurtenant property rights, divestment of drain field rights, and limitations on use of wells.

Based upon the facts and legal authority set forth below, **the Gideons hereby demand that Mr. Farley immediately rescind the restrictive covenants he recorded against the Property, grant the Gideons an express and exclusive easement to the lower well consistent with his written and oral representations to the Gideons, and pay the Gideons the sum of \$25,000 for the damages and attorney fees incurred by them to date.**

The Gideons further demand that Mr. Farley immediately cease and desist from interfering with the Gideons' sole and exclusive rights to the lower well, including but not limited any further development on his property that purports to rely on water from the lower well.

If Mr. Farley refuses the Gideons' demands, the Gideons intend to file a lawsuit against him to invalidate the restrictive covenants. In connection with that lawsuit, they will also seek monetary

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Finally, in your December 5, 2019 letter, you take issue with the fact that the Gideons did not have a water quality/production test performed on the Lower Well and the Upper Well. Your argument misses the point and does not preclude the Gideons' fraud claim. The productivity of the Lower Well and the Upper Well is not the problem.² The problem is that Mr. Farley represented that the Property had a private water system and that the private water system consisted of the Upper Well and the Lower Well. That representation was false. A productivity test would not have disclosed the existence of the First Amended CC&Rs, nor would it have put the Gideons on notice of Mr. Farley's false representation.

In summary, Mr. Farley's misrepresentations induced the Gideons to purchase the Property. Having induced the Gideons to purchase the Property and in furtherance of his fraud, Mr. Farley recorded the First Amended CC&Rs thereby turning the Lower Well into a shared well. In essence, Mr. Farley contracted to sell the proverbial "bundle of sticks" that real property represents, the Gideons agreed to purchase that specific bundle of sticks, then he secretly took sticks from the bundle to benefit himself. Because the First Amended CC&Rs are a product of Mr. Farley's fraud, the First Amended CC&Rs are void and unenforceable as against the Gideons.

3. The Original and First Amended CC&Rs are void because Mr. Farley lacked the authority to amend the Pleasant View CC&Rs.

Idaho courts recognize the validity of covenants restricting the use of private property. *Nordstrom v. Guindon*, 135 Idaho 343, 345, 17 P.3d 287, 290 (2000). When interpreting a restrictive covenant, the courts use the same rules of construction that are applied to contracts. *Id.* However, courts will not extend by implication any restriction not clearly expressed because restrictive covenants are in derogation of the common law right to use land for all lawful purposes. *Thomas v. Campbell*, 107 Idaho 398 404, 690 P.2d 333, 339 (1984). Doubts are to be resolved in favor of the free use of land. *Id.*

Here, the Pleasant View CC&Rs have governed the Property since approximately 1979. In 2019, the Pleasant View CC&Rs could only be revoked or amended with the approval of not less than two-thirds of the tract owners *Amended and Restated Declaration and Establishment of Conditions, Reservations and Restrictions for Pleasant View Ranch Estates Site Development*, Art. V(C). One-week prior to closing, Mr. Farley recorded the First Amended CC&Rs against the Property without first obtaining approval of not less than two-thirds of the Pleasant View

² Well productivity tests in May would not have been particularly helpful in any event because the ground is saturated at that time of year, and productivity tests do not address property rights or the impact that an undisclosed shared well agreement would have on the use of the water.