

RECEIVED

JAN 31 2024

DEPT. OF WATER RESOURCES

Andrew J. Waldera, ISB No. 6608
SAWTOOTH LAW OFFICES, PLLC
1101 W. River Street, Suite 110
Boise, ID 83702
T (208) 629-7447
F (208) 629-7559
E andy@sawtoothlaw.com

Attorneys for Arthur V. and Katherine M. Gideon

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
Case No. 49576

Consolidated Subcase Nos.
95-16445 (Farley) and
95-18409 (Gideon)

**MEMORANDUM IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT REGARDING
CLAIM NO. 95-18409**

Claimants Arthur and Katherine Gideon (collectively “Gideon”), by and through undersigned counsel of record and pursuant to *Amended CSRBA Administrative Order 1—Rules of Procedure* (Mar. 4, 2015) (“AO1”), Sections 1(a) and 1(b), Idaho Rule of Civil Procedure (“Rule”) 56, and the Court’s *Scheduling Order* (Nov. 17, 2023), hereby submit this memorandum in support of their *Motion for Summary Judgment Regarding Claim No. 95-18409* (“Motion”) in the above-captioned subcases.

**I.
INTRODUCTION AND RELEVANT PROCUEDURAL HISTORY**

As the Court is aware, the parties’ pending claims stem from a June 2019 residential real estate transaction between Gideon and Brian Farley (“Farley”). Farley sold Gideon his former

residence and approximately 10 acres of land known as 23452 N. Derting Road, Hayden, Idaho (“Gideon Property”), which property prior to sale was part of larger contiguous landholdings owned by Farley.

The Gideon Property was historically supplied domestic and stockwater from a groundwater well known by the parties in these subcases as the “Lower Well” located on a portion of the remaining Farley property. A dispute arose between the parties as part of their real estate transaction regarding ownership, and their respective uses, of the Lower Well. That dispute is being litigated as Kootenai County Case No. CV28-20-2706 (“Property Purchase Litigation”), the ultimate outcome of which is dependent upon this Court’s determination of the parties’ respective water right entitlements developed (or not) in the Lower Well.

For procedural reasons, the Idaho Department of Water Resources (“IDWR”) recommended to Gideon and to this Court in Subcase No. 95-16445 that Gideon file a competing late notice of claim sourced from the Lower Well, rather than proceeding based upon their pending objection in Subcase No. 95-16445 alone. Gideon filed their *Standard Form 4 Motion to File Late Notice of Claim* (95-18407) on January 31, 2023. The Court granted Gideon’s motion from the bench on April 18, 2023 (written Order entered April 19, 2023), and referred the claim to the Idaho Department of Water Resources (“IDWR”) for investigation and recommendation.

Farley objected to IDWR’s Gideon late claim recommendation, asserting that the water right should not exist. Ultimately, the parties and the Court requested that IDWR compile and issue IRE 706 Reports (Supplemental Director’s Reports Under AO1, § 11(a)) for the Farley and Gideon claims (95-16445 and 95-18407, respectively). IDWR did so, issuing its *Supplemental Director’s Report Re: Subcase Nos. 95-16445 & 95-18409* on September 21, 2023 (“Report”).

The Report recommended both claims sourced from the Lower Well, essentially as claimed, with additional combined use remarks to ensure that the combined use of the parties' water rights on their respective properties (for purposes of this matter, 95-16445 (Farley) and 95-17752 (Gideon), and 95-18409 (Gideon)) complied with the 13,000 gallon per day limitation imposed by Idaho Code Section 42-111. Report, pp. 13-15.

The parties participated in Court-ordered mediation on December 15, 2023. Special Master Bilyeu served as the mediator. While the parties made some progress, they failed to reach a water right settlement whereby each exits the CSRBA with their respective water rights as recommended by IDWR's Report. Absent a *Standard Form 5*-based stipulated settlement at this time, Gideon files this Motion seeking to have Claim No. 95-18409 adjudicated short of trial so that the issues remaining in the Property Purchase Litigation can be fully and finally resolved by Judge Christensen if/as necessary once the water right-related piece of Judge Christensen's "'chicken or egg' conundrum" is resolved by the exclusive jurisdiction of this Court.

The focus of the Gideon Motion and this memorandum is Gideon's request that the Court adjudicate and decree Claim No. 95-18409 as recommended in IDWR's Report. But, to the extent that the Court is curious, Gideon remains willing and agreeable to stipulating to the adjudication and decree of Claim No. 95-16445 as recommended in IDWR's Report as well. Consequently, Gideon sees no reason why a trial should be necessary (or desirable) in these subcases.

II. STATEMENT OF UNDIPUTED FACTS

1. In 1994, Farley constructed a residence located at what is commonly known as 23452 N. Derting Road in Hayden Idaho. The residential parcel is known as "Parcel I" in the Property Purchase Litigation, and that nomenclature has largely carried over into these

proceedings. For purposes of IDWR's Report, Parcel I is identified as Kootenai County RPN 52N03W094700. *See Affidavit of Andrew J. Waldera in Support of Motion for Summary Judgment Re Claim No. 95-18409* ("Waldera Aff."), Ex. A ("Tr.") at 461:16-19, 573:18-22, 580:3-5; *see also*, Report, pp. 3-4.¹

2. Also in 1994, Farley (through contractors) drilled two domestic wells on Parcel I. The first well produced some water, but was not used long because it collapsed while contractors attempted to slip line the first casing with a smaller inner casing. Tr. 574:10-575:16. A second well was then drilled, the so-called "Upper Well," and plumbed to a 3,000 gallon cistern located near the residence constructed on Parcel I. Tr. 575:17-576:2, 577:4-10. While the Upper Well yielded water, its yield was low and effectively unusable—producing only 0.5-1.0 gallons per minute ("gpm"). Report, Ex. K; *see also*, Tr. (Jody Barden) 297:13-20, 304:4-7, and Report, Ex. S ("Christensen MDO"), pp. 3 and 20.

3. Over time, Farley grew concerned that the Upper Well might fail because of what, at the time, was thought to be a broken liner within it, and subsurface instability noted with the collapse of the first 1994 well. Tr. 461:3-11, 577:24-581:4; *see also*, Christensen MDO, p. 3. These concerns caused Farley to drill the so-called "Lower Well" approximately 1,800-2,000 feet downhill from (south of) the home in 1999, connecting it to the cistern located on Parcel I. Tr. 461:3-19, 497:4-9, 581:9-11, 582:10-17; *see also*, Christensen MDO, p. 3. The Lower Well was better-producing than the Upper Well, but still a low yield well at 2-3 gpm. Report, Ex. B; *see also*, Tr. (Jody Barden) 299:2-10, 300:2-8, and Christensen MDO, p. 20.

¹ Unless identified otherwise, all "Tr." references cited herein refer to the sworn and court reporter-certified Property Purchase Litigation trial testimony of Brian Farley.

4. The Lower Well is the water source of the parties' pending CSRBA claims, having been plumbed to the same cistern located on Parcel I as the Upper Well. The Lower Well "replaced" the Upper Well, and became the "sole" and "only" source of domestic and stockwater on Parcel I from 1999 to at least 2017, in part because the Upper Well pump was removed and installed in the Lower Well; therefore, water could no longer be pumped from the Upper Well into the Parcel I cistern at all. Report, pp. 4-5, including Ex. D; *see also*, Tr. 461:16-462:1, 497:4-23, 581:17-25, 584:11-14, 603:10-12, 715:2-9 (upon completion of the Lower Well, Farley effectively "abandoned" Upper Well use for at least "18 years"), and (Jody Barden) 300:15-22. While the parties dispute whether the Lower Well was turned off and no longer served Parcel I starting in or about July 2017, it is undisputed that the Lower Well again served at least the "vast bulk of [Parcel I's] water supply" beginning shortly prior to the June 7, 2019 closing of the parties' purchase and sale transaction, and continued that way post-closing going forward. Christensen MDO, pp. 4-5, 12; *see also*, Tr. 465:24-466:13, 691:13-20, 697:25-698:8.

5. For adjudication claiming purposes, Farley first claimed what IDWR now recommends as Claim Nos. 95-16445 and 95-18409 on July 16, 2009. Report, pp. 4-5; and Ex. D (the "2009 Claim"). The 2009 Claim identified the Lower Well as the source of water for Parcel I, plumbed through 2,000 feet of poly pipe to the 3,000 gallon cistern on Parcel I, and further plumbed to, in part, "my residence." *Id.* Consistent with Farley's trial testimony above, the 2009 Claim stated that the Lower Well effectively "replaced" the two previous 1994 wells that "went dry." *Id.* This "dry" Upper Well fact is further confirmed by the trial testimony of well pump contractor Jody Barden (Tr. 304:4-7); the Upper Well driller log (Report, Ex. K); and Judge Christensen's MDO (pp. 12, 20). In January 2019, however, and after making the decision

that he was going to market and sell his home and Parcel I, Farley filed an amended adjudication claim. Report, p. 6; and Ex. J (the “2019 Amended Claim”). The 2019 Amended Claim removed the Lower Well supply and use of water on the Parcel I portion of the place of use originally claimed in the 2009 Claim. Report, p. 6.

6. Though the 2019 Amended Claim made the foregoing purpose and place of use clerical changes, plumbing and water use on the ground remained consistent with that as described in the 2009 Claim (*i.e.*, water diverted from the Lower Well continued to flow to the cistern for use on Parcel I—the Gideon Property; as Farley acknowledged during the June 2022 Property Purchase Litigation trial: “To this day, [the Gideons are] basically the sole user of that water.” *See, e.g.*, Tr. 465:13-466:13; 470:12-13; 476:14-477:13; 600:9-601:1; 691:13-692:20.²

7. From a purchase and sale transaction standpoint, Gideon and Farley entered into an RE-21 Real Estate Purchase and Sale Agreement, dated April 28, 2019 (“PSA”). Waldera Aff., Ex. C. Among other things, the PSA contained no water-right-related withholdings or exclusions (*see, e.g.*, Section 5(B)). *Id.* To the contrary, Section 7 of the PSA expressly provided that: “Any and all water rights including but not limited to water systems, wells, springs, lakes, streams, ponds, rivers, ditches, ditch rights, and the like, if any, appurtenant to the PROPERTY and owned by SELLER are included in and are a part of the sale of this PROPERTY . . . unless otherwise agreed to by the parties in writing.” *Id.*

² Unfortunately, this ongoing use ended on or about April 11, 2023, when the Gideon cistern stopped receiving water from the Lower Well and they were informed that the Lower Well had been damaged and/or collapsed. Waldera Aff., Ex. B. While Gideon has attempted some inspection of the Lower Well, those attempts were met with resistance. Consequently, the ongoing function, integrity, and repairability of the Lower Well remains an open question, at least from Gideon’s perspective. Questions over the ongoing viability of the Lower Well do not alter the conclusions of the Report or this Court’s analysis of the same, but the information is provided as additional factual context arising after the testimony received during the June 2022 Property Purchase Litigation trial.

8. The parties' transaction closed on or about June 7, 2019. Tr. 470:12-13; *see also*, Report, Ex. N (Warranty Deed). Consistent with the PSA, the controlling Warranty Deed contained no water right-related withholdings or exclusions. Report, Ex. N. Instead, the deed expressly conveyed Parcel I to Gideon "with its appurtenances" without qualification. Report, Ex. N. On this point, Farley agrees that there was no other written, signed agreement between the parties suggesting a withholding or severance of any water rights sourced from the Lower Well appurtenant to the Gideon Property (Parcel I). Tr. 701:23-702:14. At most, only the 2019 Amended Claim exists. Tr. 701:14-22.³

9. As noted above, IDWR recommended the parties' respective claims in its September 2023 Report. Report, pp. 9-15.

III. ARGUMENT

A. Summary Judgment Standard—Bench Trial Setting

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007). Rule 56(e) provides that the non-moving party may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial. *Id.*

³ As discussed below in Section III.C, Farley did attempt to control Lower Well use on the Gideon Property via the recording of an amended declaration of conditions, covenants and restrictions ("CC&Rs"). But the CC&Rs are of no legal force or effect against Parcel I (the Gideon Property).

When considering whether the evidence in the record shows that there is no genuine issue of material fact, the trial court must liberally construe the facts and draw all reasonable inferences in favor of the non-moving party. If the evidence reveals no disputed issues of material fact, then only questions of law remain. *Golub v. Kirk-Scott, Ltd., et al.*, 157 Idaho 966, 970, 342 P.3d 893, 897 (2015).

In addition to the foregoing, and in this bench trial setting (*see* IDAHO CODE § 42-1412(5)), the Court is afforded greater latitude and discretion to decide this matter on summary judgment. In a traditional jury trial setting, summary judgment should be denied where reasonable men can draw different conclusions from conflicting evidentiary inferences. *See, e.g., Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). However, in a bench trial setting such as this one, summary judgment is appropriate despite the possibility of conflicting inferences because the Court alone is responsible for resolving any conflicting inferences as the ultimate trier of fact; it is up to the Court, in the absence of a jury, to arrive at the most probable inferences in the face of any potentially conflicting facts. *See, e.g., Intermountain Eye & Laser Centers, PLLC v. Mark Miller, M.D.*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005) (citing and applying *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 93 P.3d 685 (2004)). The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences. *Shawver*, 140 Idaho at 361, 93 P.3d at 692.

B. Evidentiary Weight of IDWR's Report and Farley's Resulting Burden

The Report constitutes *prima facie* evidence of the Gideon water right sourced from the Lower Well that is to be decreed by the CSRBA Court as reported and recommended absent the filing of objections by others in the CSRBA. IDAHO CODE § 42-1411(4). This is because the Report is the product of the Director's (IDWR's) investigation of the applicable water system—

the procurement and review of the factual information necessary to “evaluate the extent and nature of each water right for which a notice of claim under state law has been filed.” IDAHO CODE § 42-1410.

Upon issuance of the Report, a claimant’s ultimate burden of persuasion ends unless the claimant further seeks the decree of water right elements deviating from those recommended in the Report. IDAHO CODE § 42-1411(5). As noted in Section I above, Gideon seeks the adjudication and decree of Claim No. 95-18409 as recommended in the Report. Therefore, the full weight of evidentiary burden now falls squarely on Farley to rebut the Report in a manner demonstrating that recommended Right No. 95-18409 “should not exist” as stated in his objection. *Id.*

C. This Matter is a Simple One of Diversion and Beneficial Use in the Absence of Severance

It is undisputed that water sourced from the Lower Well was, from 1999 to at least July of 2017, the “sole source” of water used for domestic and livestock purposes on the Gideon Property. *See, e.g.*, Tr. 461:20-462:1 (water from the Lower Well did not supplement supply on the Gideon Property, the Lower Well was the “sole source”). The Lower Well was “physically connected” to the water system serving the Gideon Property during this this time period, including at and after closing on June 7, 2019. Tr. 476:6-477:13 (“The lower well was connected to the cistern since 1999 . . . intended to be part of the water system to benefit the Gideons as of closing . . . connected to [the water system] prior to closing . . . [and] as it is today”); *see also, id.* at 691:13-692:20 (“To this day [June 2022], [the Gideons are] basically the sole user of that water.”); *see also*, Waldera Aff., Ex. B (demonstrating ongoing Gideon use of the Lower Well post-closing up to at least April 11, 2023).

The Lower Well was drilled in 1999 because two prior wells on the Gideon Property (including the Upper Well) were effectively dry. *See, e.g.*, 2009 Claim; *see also*, Tr. 494:16-497:23 (The Upper Well was “fracked” in an effort to “try to get more water production,” but was ultimately “replaced” by the Lower Well, which became the “sole source of water” on the Gideon Property).

At the outset of the parties’ real estate transaction, Farley intended that the Lower Well be used for the benefit of the Gideon Property, and he represented that it would continue to serve the Gideon parcel as part of the parties’ real estate transaction. *See, e.g.*, Tr. 466:12-13 (“The lower well was part of the deal? Yes, it was part of the deal”); 477:4-13 (The Lower Well was physically connected to what would become the Gideon Property and it would continue to “benefit” that property as of closing); 600:17-601:1 and 650:4-8 (the Lower Well remained connected to the future Gideon Property because when “contemplating selling,” Farley decided that the Lower Well would be “an additional source of water for Parcel I”—“an inducement to a buyer”).

But, Farley erroneously believed that he could continue to own and control the entirety of the Lower Well and the water rights sourced therefrom (95-16445 and 95-18409) by operation of: (a) contract (a unilaterally Farley-commissioned, but later Kootenai County District Court-voided, amended declaration of covenants, conditions, and restrictions containing Lower Well-based ownership and water-sharing provisions); and (b) his 2019 Amended Claim. *See, e.g.*, Tr. 650:4-655:7 (Farley recorded amended CC&Rs on May 31, 2019, approximately 8 days prior to closing, providing Parcel I priority use of the Lower Well by abating any Farley competing use of the same on his remaining landholdings until Parcel I’s domestic needs were met and “excess” water was available, if any); 477:4-17 (Farley asserting that he provided Gideon with a

“contractual right with the shared use and benefit [of the Lower Well], but no water right”); and 626:21-631:6 (Farley believed that he withheld what is now recommended as Right No. 95-18409 through the notice of error reply process under the recommendation of his prior 2009 Claim, and then the later submission of his 2019 Amended Claim). Ultimately, Judge Christensen voided the amended CC&Rs as applied to Parcel I as an undisclosed encumbrance arising after the parties’ execution of the PSA and, therefore, violating the parties’ PSA. Waldera Aff., Ex. D, pp. 15-16, and 22.

While Farley presumed that he could control water right development and perfection from the Lower Well as a matter of contract and adjudication claim amendment in 2019, that water right development and perfection ripening into a real property right appurtenant to the Gideon Property occurred outside, long prior to, and irrespective of, any contract or adjudication claim form. Instead, Claim No. 95-18409 (recommended by IDWR now as Right No. 95-18409) arose and was perfected as a matter of the Idaho Constitution coupled with operation of applicable statute. And, this pathway of water right development and perfection is dispositive in this matter—Right No. 95-18409 immediately vested and perfected in 1999, becoming an appurtenance to the Gideon Property (Parcel I). *See, e.g., State ex rel. Tappan v. Smith*, 92 Idaho 451, 455, 444 P.2d 412, 416 (1968) (reiterating that physical diversion from a natural source, coupled with application of the water diverted to a recognized beneficial use satisfies the constitutional method of appropriation), and IDAHO CODE §§ 42-227 and 42-111 (Section 42-227 plainly providing: “The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229 . . . [and] [r]ights to ground water for such domestic purposes may be acquired by [mere] withdrawal and use.”); *see also*, the Report.

Farley's diversion and beneficial use of the Lower Well was the "sole" and "only" source of water supply on the Gideon Property (Parcel I) from at least 1999 through 2017 (and June 2019 and beyond, post-closing). This diversion and use perfected a water right (95-18409) appurtenant to the now-Gideon property. Farley could only legally retain or modify the same via: (a) express withholding and deed-based severance, and (b) application for transfer under Idaho Code Section 42-222. *See, e.g., Joyce Livestock Co. v. United States*, 144 Idaho 1, 13-14, 156 P.3d 502, 514-515 (2007) ("A water right appurtenant to real property is conveyed with the real property unless it is expressly reserved or the parties clearly intended that the conveyance not include the water right . . . the inquiry is not whether there is evidence indicating that the grantor intended to convey the water rights with the land. Rather, the inquiry is whether the water rights were expressly reserved in the deed conveying the land or whether there is clear evidence that the parties intended that the grantor would reserve them."); *see also*, IDAHO CODE § 42-222(1) (emphasis added) ("Any person entitled to the use of water . . . by claims to water rights by reason of diversion and application to a beneficial use . . . who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right *shall* first make application to the department of water resources for approval of such change such application *shall* be upon forms furnished by the department . . .").

Here, it is undisputed that there was no PSA or deed-related water right withholding or severance. Waldera Aff., Ex. C; *see also*, Report, including Ex. N. It is likewise undisputed that there was no other documented water right withholding and severance-related meeting of the minds between Farley and Gideon because: (a) Farley did not inform Gideon of his 2019 Amended Claim; and (b) Gideon did not have actual or constructive knowledge of the late-recorded (May 31, 2019) amended CC&Rs that Judge Christensen voided therefor.

Tr. 698:17-699:9 (“ . . . I did not tell [the Gideons] that I had changed my water rights and reserved them the way they were reserved for myself”), 700:15-20 (“ . . . I did not tell them that there was no water [from the Lower Well] - - that I changed the water rights, that’s correct”), and 701:23-702:14 (no other written withholding/severance agreements between the parties exist); *see also*, Waldera Aff., Ex. D, p. 16 (Farley recorded the amended CC&Rs without disclosure or update to Gideon in violation of the parties’ PSA). And, it is further undisputed that no Section 42-222-based transfer application was ever filed either. Tr. 701:23-702:14 (no other writings exist).

While there was Farley’s 2019 Amended Claim, that document, alone, is not capable of whitewashing the two decades’-worth (1999-2019—and more) of diversion and use of Lower Well water on Parcel I. The Idaho Constitution and Idaho Code Section 42-227 already perfected and fixed the real property right and appurtenance.⁴ And, finally, the tardy amended CC&Rs are of no legal force or effect either given Judge Christensen’s order voiding the same as applied to Parcel I (the Gideon property). Waldera Aff., Ex. D, pp. 15-16, and 22.

During the Gideon late claim motion proceedings, Judge Wildman presciently spoke to many of the foregoing issues, albeit within the context of a comparatively less comprehensive

⁴ Gideon appreciates that, as a general matter, the constitutional method of appropriation (mere diversion from a natural source and application to a beneficial use) was superseded by the administrative application for permit process concerning groundwater appropriations in 1961. *See*, IDAHO CODE § 42-229; *see also*, *State ex rel. Tappan v. Smith*, 92 Idaho 451, 456, 444 P.2d 412, 417 (1968). However, Idaho Code Sections 42-227 and 42-111(a), consistent with Idaho Code Section 42-201(1)’s “acquired and confirmed under the provisions of this chapter” language, codify the ongoing use and availability of the constitutional method of appropriation for domestic uses (which uses also includes livestock watering) up to the overall quantity of 13,000 gallons per day. *See also*, and *accord* IDAHO CODE § 42-227 (expressly exempting the 1999 Lower Well from the otherwise mandatory administrative application for permit process: “[t]he excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement of section 42-229, Idaho Code . . .”).

record. *See* (really listen), April 18, 2023 hearing audio on Gideon’s *Standard Form 4 Motion to File Late Notice of Claim* (95-18407) (“Hearing Audio”) at 33:36-41:11.⁵

For example, and while evaluating the meritorious claim criterion under the Rule 55 standard applicable to Gideon’s late claim motion, Judge Wildman appreciated the likely self-perfecting and appurtenance-fixing nature of Claim No. 95-18409 upon Farley’s diversion of water from the Lower Well and its use on Parcel I from 1999 forward. Hearing Audio, 39:20-40:12 (counsel quoting as closely as possible: “The Court evaluates the elements of the water right at the time the right came into existence, including the purpose of use and place of use . . . arguably the elements of the water right included water supplied to the Gideon property.”).

Judge Wildman also foreshadowed the question of severance, if any, of the otherwise appurtenant water right. *Id.*, 40:12-40:32. And, Judge Wildman also noted that though Farley filed his 2019 Amended Claim, there was no prior decree modifying the water right elements documented and claimed in his prior 2009 Claim—claimed under Farley’s unified property ownership as the prior water right elements were developed and “originally established.” *Id.*, 40:33-41:10.

While Judge Wildman’s April 2023 meritorious claim criterion evaluation comments from the bench do not rise to the level of a judgment as a matter of law, they did presumably

⁵ Gideon requests that this Court take judicial notice of the April 18, 2023 Hearing Audio under Idaho Rule of Evidence (“IRE”) 201(c)(2). IRE 201(d) provides that courts may take judicial notice at any stage of the proceeding. And, the Hearing Audio is subject to judicial notice because the facts contained within it can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned consistent with IRE 201(b)(2)—namely this Court’s records and file in this subcase (95-18409) as provided in IRE 201(c)(2).

guide, at least somewhat, IDWR's subsequent investigation and resulting Report issued in September 2023 recommending the decree of Claim No. 95-18409 going forward.

In short, and in the absence of deed-based severance, Farley's development and use of the Lower Well on what is now the Gideon property (Parcel I) controls. That physical diversion of water from its natural source (groundwater), coupled with the application of the water diverted to legally-recognized beneficial uses of domestic and stockwater use, satisfied the constitutional (*i.e.*, beneficial use) method of appropriation for water rights statutorily exempt from IDWR's otherwise mandatory application for permit process under Idaho Code Sections 42-227 and 42-111(a).

What Farley believed, thought, or did in 2019 (the January 2019 Amended Claim and the May 31, 2019 amended CC&Rs), does not unilaterally undo the real property rights perfected and fixed prior to 2019 on the Gideon Property from 1999 through 2017 (and beyond based on Gideon Lower Well use from June 2019 until at least April 2023). There was no statutorily-compliant application for water right transfer under Idaho Code Section 42-222, and there was no deed-based withholding and severance; instead, Gideon obtained the former Farley property together with "its appurtenances" without qualification or reservation of anything water right-related. Report, including Ex. N.

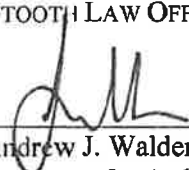
IV. CONCLUSION

Based on the foregoing, Gideon respectfully submits that no disputed material issues of fact exist, and that summary judgment is appropriate in this matter. As a consequence, Gideon respectfully requests that Claim No. 95-18409 be decreed as recommended in IDWR's Report. And finally, 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.

DATED this 30th day of January, 2024.

SAWTOOTH LAW OFFICES, PLLC

By 

Andrew J. Waldera
Attorneys for Arthur V. and Katherine M.
Gideon

CERTIFICATE OF SERVICE

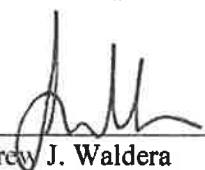
I HEREBY CERTIFY that on this 30th day of January, 2024, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT REGARDING CLAIM NO. 95-18409** to be served by the method indicated below, and addressed to the following:

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ iCourt/Email

Travis L. Thompson
163 Second Avenue West
P.O. Box 63
Twin Falls, ID 83303-0063

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ iCourt/Email



Andrew J. Waldera