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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

Case No. 49576

)  
) Subcase Nos. 95-16445 and 95-18409  
)  
) **RESPONSE IN OPPOSITION TO**  
) **CLAIMANT GIDEONS' MOTION**  
) **FOR SUMMARY JUDGMENT**  
) **REGARDING CLAIM NO. 95-18409**  
)

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COMES NOW, Claimant/Objector BRIAN T. FARLEY ("Farley"), by and through counsel of record, Marten Law LLP, pursuant to CSRBA Amended Administrative Order #1 ("AO1") and the Idaho Rules of Civil Procedure, and hereby submits this response to the *Motion for Summary Judgment Regarding Claim No. 95-18409* filed by Claimants Arthur & Katherine Gideon ("Gideons") on January 30, 2024. This response is supported by the *Declaration of Brian T. Farley* ("Farley Dec."), the *Declaration of Travis L. Thompson* ("Thompson Dec."), and the respective exhibits attached to each. Mr. Farley's response is further supported by the points and authorities set forth below.

## **INTRODUCTION**

The subject of this litigation concerns Mr. Farley's water right claims and actions that he took prior to selling certain property to the Gideons in the summer of 2019. As detailed below, Mr. Farley filed amended water right claims in January 2019 that specified a domestic well (the Upper Well) and use for the home and parcel later purchased by the Gideons, and a separate well (the Lower Well) and stockwater use for the property that Mr. Farley retained. Through the amended claim process initiated with IDWR in the summer of 2018, months before listing the property for sale, Mr. Farley understood that he was retaining or transferring any water rights from the Lower Well for his sole use on property that he was keeping, Parcels S and T. Moreover, by filing the amended claims several months prior to the Gideons' offer and eventual purchase of Parcel I, Farley demonstrated his clear intent that the water right for the property he retained was not appurtenant to the parcel and home the Gideons purchased.

Consequently, there is a genuine issue of material fact as to whether any water right associated with the Lower Well was conveyed to the Gideons with their purchase, and summary judgment should be denied. Moreover, as a matter of sound public water policy, there is no basis for a homeowner to hold "two" exempt domestic water rights for the same property and home. Since the Gideons already possess decreed water right 95-17752, there is no need for a second exempt domestic water right, which would only constitute an impermissible "waste" of the State's groundwater resources. Therefore, the Special Master should take evidence on that issue at trial as well.

For the reasons set forth below, Mr. Farley respectfully requests the Court to deny the Gideons' motion for summary judgment.

## FACTUAL BACKGROUND

Certain underlying facts are found in Judge Christensen’s *Memorandum Decision and Order Re: Bench Trial* in Case No. CV28-20-2706 (First Jud. Dist., Kootenai County Dist. Ct., Oct. 21, 2022) (hereinafter “Order”). *See* Ex. F to *Waldera Aff.* In short, Brian Farley owned four contiguous parcels in Kootenai County (Parcels I, S, T, and V). *See* Order at 2-3. Mr. Farley built a home on Parcel I in 1994 and drilled a well on that property known as the “Upper Well.” *Id.* The Upper Well was connected to a 3,000 gallon cistern that delivered water to the home. *See id.* Mr. Farley drilled a second well (“Lower Well”) on Parcel V in 1999. *See Farley Dec.* at 2, ¶ 6. The Lower Well was connected to a hydrant for stockwater use on Parcel T and continued on to a connection to the cistern. Mr. Farley later installed a separate line from the cistern to provide stockwater from a hydrant on Parcel S as well. *See id.*

In 2009 Mr. Farley filed a single water right claim for the Lower Well for domestic, stockwater, and irrigation purposes. *See* Attachment D to IDWR Report. Mr. Farley used water from the Lower Well on all parcels he owned between 1999 and 2017. *See id.* However, in 2017 Mr. Farley began using water from the Upper Well on Parcel I, and also shut off water from the Lower Well at that time until June of 2019. *See Farley Dec.* at 3, ¶¶ 7-10.

Starting in early 2018, Mr. Farley began efforts to clarify the water rights associated with his four parcels in preparation for a future sale of Parcel I and the home. In May 2018, he notified IDWR that its Preliminary Recommendation for Claim No. 95-16445 erroneously included Parcel I as part of the Place of Use. *See Farley Dec.* at 4, ¶¶ 12-13, *see also* Exs. B and C to *Farley Dec.* He also created a record of his understanding of the rights upon IDWR’s revision—that the Lower Well’s Place of Use was Parcels S and T only, and that the Upper Well was reserved for Parcel I. *See Farley Dec.* at 4-5, ¶¶ 12-18. During a meeting with IDWR agent

Dawn Lenon later that summer to discuss the clearest and most efficient way to separate the water rights. Ms. Lenon provided Mr. Farley a completed Notice of Claim form, however, it turned out that she mislabeled the place of use and listed it as the same quarter quarter as the Lower Well). *See Farley Dec.* at 5, ¶ 18; Ex. E. Still, Mr. Farley left the meeting with the impression that IDWR was processing the amended claim, and that the matter was resolved. *See id.* Mr. Farley then listed Parcel I for sale in November 2018. *See id.*, ¶ 19; *see also*, Ex. D to *Thompson Dec.*

In January 2019, after several months passed without communication from IDWR, Mr. Farley met with a different IDWR agent (Kaila Savage) concerning the status of the claims. *See Farley Dec.* at 5-6, ¶¶ 22-24. On January 25, 2019 Ms. Savage typed up and Mr. Farley signed and filed an amended water right claim and a new water right claim to properly reflect the intended water rights for the various parcels: 1) 95-16445 for the Lower Well for stockwater use on Parcels S and T only; and 2) 95-17752 for the Upper Well for domestic and stockwater use on Parcel I only. *See id.*; Attachments. J & K to IDWR Report.

On January 28, 2019, Mr. Farley received a letter from IDWR enclosing a Revised Preliminary Recommendation for his prior Claim No. 95-16445, a Preliminary Recommendation for his new Claim No. 95-17752, and a water right report noting “Application for Transfer of Water Right Part 2A Report for Claim No. 95-16445.” *See Farley Dec.* at 6, ¶ 26, Ex. F. With this document IDWR represented, and Mr. Farley understood, that he was accomplishing a transfer of any water rights associated with the Lower Well solely for his retained use on Parcels S and T. *See id.* at 7, ¶ 28. Mr. Farley received a letter from IDWR informing him that the recommendations for his water right claims had been reported to the CSRBA District Court as represented. *See id.* at 8, ¶ 27.

On April 26, 2019, Mr. Farley toured Parcel I with the Gideons' real estate agent Patti Ellis. *See Farley Dec.* at 7, ¶ 29. During this tour, Mr. Farley informed her that Parcel I was serviced by the Upper Well and there was another well on Parcel V which would be designated as a shared well after Meckel Engineering completed the boundary line adjustment, and Mr. Farley's attorney at the time, Michael Reagan, completed and recorded the First Amended Covenants, Conditions and Restrictions ("Amended CC&Rs"). *See id.* On April 27, 2019, the Gideons provided Mr. Farley with a signed Purchase and Sale Agreement for the property, which he accepted, with conditions, on April 29, 2019. *See id.* at 7-8, ¶¶ 30-31.

On May 3, 2019, Mr. Farley and Mr. Gideon inspected the property together. *See Farley Dec.* at 7-8, ¶ 31. Mr. Farley "told Mr. Gideon that the well he was purchasing (the Upper Well) was located in the hayfield behind the garage." *Id.* Mr. Farley "also advised that a shared well (the Lower Well) was located at the bottom of the hill" and "did not tell [Mr. Gideon] that the Lower Well, its rights, the pipeline, panel, and pump was to be sold to them as part of the purchase of the home and Parcel I." *Id.* During this time, Parcel I was not receiving any water from the Lower Well because Mr. Farley had turned off the valve between the Lower Well and the cistern. *See Farley Dec.* at 3, ¶ 10.

Mr. Farley then had the Amended CC&Rs that affected Parcel I recorded. *See Farley Dec.* at 8, ¶ 32; Ex. H. The Amended CC&Rs provided that Parcel I would have access to water from the Lower Well as a "shared use and benefit" and a priority use "[i]n the event there is insufficient supply" for all parcels.<sup>1</sup> *See id.*, ¶ 33, Ex. H. Mary Spridgeon, the escrow officer,

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<sup>1</sup> Although Mr. Farley attempted to provide a shared use through the Amended CC&Rs as a benefit to the Gideons' property, he could not have legally provided water to the Gideons from the Lower Well as the place of use was not authorized on water right 95-16445. *See Waldera Aff.*, Ex. A, Tr. 635:5 ("It was basically a gift of free water"). *See* I.C. § 42-351(1) ("It is unlawful for any person . . . to divert or use water not in conformance with a valid water right"). That mistake did not replace his intentions regarding the water rights when selling his property.

informed the Gideons of the Amended CC&Rs prior to and at closing, and Mr. Gideon advised her to proceed with the closing, though the Gideons later had the Amended CC&Rs voided. *See id.*, ¶ 32.

### STANDARD OF REVIEW

“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.” *Lockheed Martin Corp. v. Idaho State Tax Comm’n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006). When an action will be tried before a court without a jury, the court may draw probable inferences arising from the undisputed evidentiary facts. *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009) (citing *Banner Life Insurance Co. v. Mark Wallace Dixon Irrevocable Trust*, 147 Idaho 117, 124, 206 P.3d 481, 488 (2009)). However, the court may not make conclusive findings with regard to issues upon which the parties submitted conflicting evidence. *See Williams v. Computer Res., Inc.*, 123 Idaho 671, 673, 851 P.2d 967, 969 (1993) (holding that the trial court was not permitted to draw inferences regarding the parties’ intent when the parties submitted conflicting evidence on the issue); *Ashby v. Hubbard*, 100 Idaho 67, 70, 593 P.2d 402, 405 (1979) (holding that a question involving the “intention expressed by the acts and statements of the parties” was a factual question for the jury). Nor is the court permitted to judge the credibility of the affiants. *See Baxter v. Craney*, 135 Idaho 166, 172, 16 P.3d 263, 269 (2000) (“[I]t is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage when credibility can be tested in court before the trier of fact.”); *Argyle v. Slemeker*, 107 Idaho 668, 670, 691 P.2d 1283, 1285 (same).

If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009) (citing *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 778, 215 P.3d 494, 498 (2009)). Finally, conflicting evidentiary facts must still be viewed in favor of the nonmoving party. *Id.* (citing *Banner Life Insurance Co.*, 147 Idaho at 124, 206 P.3d at 488).

## **ARGUMENT**

### **I. The Director's Report Does Not Relieve the Gideons of Their Burden of Persuasion.**

Although the Director's Report "constitute[s] prima facie evidence of the nature and extent of the water rights acquired under state law," each claimant still "has the ultimate burden of persuasion for each element of a water right." I.C. 42-1411(4), (5). The Supreme Court explained in *State v. Hagerman Water Rights Owners, Inc.*, that the prima facie status contained in section 42-1411 "constituted a rebuttable evidentiary presumption." 130 Idaho 736, 745, 947 P.2d 409, 418 (1997). After pointing out that Idaho Rule of Evidence 301 governs presumptions in civil cases, the Court reasoned that "when an evidentiary presumption arises it shifts only the burden of production. When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *Id.* Furthermore, "the Director's Report is prima facie evidence and the facts contained therein are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut the presumption." *Id.* "Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant." *Id.* at 746, 947 P.2d at 419; *see also McCray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2001). Thus,

once an objector adduces evidence to rebut the presumption, the “presumption disappears” and the claimants “retain their burden of persuasion.” *Id.* at 745, 947 P.2d at 418.

The declarations of Brian Farley and Travis Thompson and the attached exhibits rebut the presumption of the Director’s Report for water right claim 95-18409. Notably, the IDWR 706 Report does not contain important documentation and facts surrounding Mr. Farley’s process to amend water right claim 95-16445 for the Lower Well and the separate claim 95-17752 for the Upper Well. Mr. Farley’s meetings with IDWR agents in 2018 and 2019, along with documents they provided to Mr. Farley, are critical for understanding the process and intent Mr. Farley expressed with respect to the water rights. Much of this information was not included in IDWR’s 706 Report and demonstrates there are issues of fact to be addressed at trial. As such, the Special Master should proceed to hear the case at trial and should deny the Gideons’ summary judgment motion accordingly.

## **II. Mr. Farley Intended to Segregate and Retain Water Rights to the Lower Well for Property he Retained.**

The thrust of the Gideons’ motion is the argument is that a water right from the Lower Well for Parcel I and the home was perfected in 1999 and that Farley did not retain or withhold any water rights when they purchased the property in 2019. *See generally, Gideons’ Memo.* at 9-12. However, the Gideons completely overlook the actions Mr. Farley undertook in 2018 and 2019 concerning the amended claim process, months before the Gideons were even in the picture, and his intent to retain any and all water rights to the Lower Well for his sole use on property that he retained.<sup>2</sup> At a minimum, the question of intent is a genuine issue of material fact that defeats summary judgment.

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<sup>2</sup> Much of this information was not included in IDWR’s 706 Report.

The Gideons claim that Mr. Farley could only legally retain or modify his water right to the Lower Well by “express withholding and deed-based severance” or “an application for transfer under Idaho Code Section 42-222.” *Gideons’ Memo.* at 12. As to the first point the Gideons overlook an exception to the deed based reservation set forth by the Idaho Supreme Court in *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007).

In *Joyce*, the Idaho Supreme Court examined the issue of private stockwater rights appropriated on federal land. The SRBA district court found that Joyce Livestock’s predecessor perfected an instream stockwater right on federal land and that the United States did not. *See* 144 Idaho at 5, 156 P.3d at 506. The SRBA court further concluded that the priority date for Joyce’s water right would be April 26, 1935. *See id.* On appeal, the Court found the following:

The district court held that predecessors of Joyce Livestock had stockwater rights on federal land that were appurtenant to their deeded properties. The court also held that whether those appurtenant water rights passed with the land when it was conveyed depended upon the intent of the grantor. With respect to proof of that intent, the court stated, “Intent is evidenced by the terms of the instrument conveying the land, or, when the instrument is silent or ambiguous, then by other facts and circumstances surrounding the conveyance.” The district court then conducted an analysis of the documents in the record to determine whether the grantors intended to convey appurtenant water rights with the land when the water rights were not mentioned in the deeds. In doing so, the district court erred.

Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention “appurtenances.” *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990); *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933). Thus, 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. There is nothing in the record indicating that any of Joyce Livestock’s predecessors in interest intended to reserve their water rights on public land when they conveyed their ranches. Therefore, the conveyances of the land included the appurtenant water rights.

*Joyce Livestock Co.*, 144 Idaho at 14, 156 P.3d at 515 (emphasis added).

Based upon the above holding, although a water right may not be expressly reserved in a deed, it can still be withheld where there is clear evidence the grantor intended to reserve the same. *See also, Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65, 66 (1933) (“a water right passes with the realty to which it is appurtenant unless there is intention to the contrary”) (emphasis added). Here, Mr. Farley, the predecessor owner, intended to reserve the “stockwater” water right to the Lower Well for his sole use on Parcels S & T. Mr. Farley began this process months before he listed the property, and well over a year before the Gideons made their offer to purchase.

First, Mr. Farley recommissioned the Upper Well when he made the decision to sell his home in 2017. *See Farley Dec.* at 2, ¶ 7. Mr. Farley had a new pump installed, along with electrical and water lines, and new controls in his basement. *See id.* at 3, ¶ 9-10. He further had a ball valve installed on the waterline from the Lower Well to be able to shut off water to the cistern. Later in February 2018, IDWR sent Mr. Farley a preliminary recommendation and notice of error sheet for water right claim 95-16445. *See IDWR Report* at 5, Attachment E to IDWR Report. Mr. Farley returned the notice of error reply identifying his clear intent for the water right to only have a “stockwater” purpose of use on his Parcels S & T only. *See Attachment F to IDWR Report* (“(B) Place of use is Parcel #52N03W09500 Only”). Mr. Farley’s intent is corroborated by his personal notes that further set out his intentions and understandings for the water right for the Lower Well and how the place of use was for “S & T.” *See Ex. B to Farley Dec.* Mr. Farley noted that he intended to “eliminate this place of use” referring to the “home at 23452” “because using original well in hayfield” (reference to the Upper Well). *See Ex. C to Farley Dec.* Again, this was all documented approximately a year before the Gideons even made an offer to purchase the home and Parcel I.

Next, Mr. Farley made several visits and discussed his notice of error reply and intended claim for the Upper Well (domestic use for his home and Parcel I) with Dawn Lenon at IDWR's Coeur d'Alene office in June and July 2018. *See Farley Dec.* at 4, ¶¶ 15-18. Ms. Lenon helped Mr. Farley complete a notice of claim form on IDWR's computer system (claim form dated 6/22/18) that effected the changes for water right 95-16445 and identifying Parcels S and T as the sole place of use for the water right to the Lower Well. *See Ex. E to Farley Dec.* It was Mr. Farley's understanding that when Ms. Lenon entered the information for the claim that was all he needed to do. *See Farley Dec.* at 5, ¶ 18.

Mr. Farley did not hear back from IDWR for several months, not until January 18, 2019 when he met with another IDWR agent, Kaila Savage. *See Farley Dec.* at 5, ¶ 20. It was at that time that Mr. Farley learned that the place of use for water right 95-16445 had not been changed and nothing had happened with his intended Upper Well water right claim since the summer of 2018. *See id.* Mr. Farley met with Ms. Savage again on January 25, 2019 where she typed up the amended claim for 95-16445 and the separate claim 95-17752 for the Upper Well. Mr. Farley signed and filed these claims that day. *See id.* at 5-6, ¶ 22-24; Attachment K to IDWR Report. At this time Mr. Farley understood the following:

24. My intention in amending and separating the claims for the Lower Well and Upper Well was to have the Upper Well and any associated water right for Parcel I, and the Lower Well for stockwater use only for Parcels S and T. Ms. Savage advised that these changes could be made and that they would effectuate my intention. Based upon these representations, I believed I was changing the Place of Use for Claim No. 95-16445 to Parcels S and T exclusively.

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26. About a month later, I received a letter from IDWR dated February 25, 2019 informing me that the recommendations for my water right claims had been reported to the Water Court.

27. At this point I believed my intentions regarding my water right claims had been accomplished based upon representations and what I had received from IDWR, including the transfer report. It was my understanding that Lower Well and its water right 95-16445 was transferred for stockwater use only on Parcels S and T, and that the Upper Well and water right 95-17752 was for domestic and stockwater use only on Parcel I.

*Farley Dec.* at 6-7.

All of the above occurred months before the Gideons even made their offer to purchase the home and Parcel I from Mr. Farley. *See Farley Dec.* at 7, ¶ 29. The “intent” of Mr. Farley is clear and shows that he intended to reserve the water right from the Lower Well (95-16445) for his sole stockwater use on Parcels S & T. This is corroborated by Mr. Farley’s realtor who testified that the listing only included reference to “one well” and that the “lower well was never part of anything we did in the listing or any of the discussions.” *See Waldera Aff.*, Ex. A, Tr. 373:23-24. Mr. Farley’s property disclosure form, signed November 20, 2018, also identified a singular “well” as the water supply for the property he was selling. *See Ex. D to Thompson Dec.*, Disclosure Form at 3. Although he later decided to share water from the Lower Well pursuant to the Amended CC&Rs, the same were voided at the Gideons’ request in the first district lawsuit. *See Waldera Aff.*, Ex. D.

Based upon the criteria set forth in *Joyce*, the Court should deny the Gideon’s motion for summary judgment. Contrary to the Gideons’ argument, at a minimum there is a genuine issue of material fact regarding Mr. Farley’s intent to reserve the water rights from the Lower Well for his sole use on property (Parcels S and T) that he was retaining irrespective of the purchase and sale agreement and deed. *See Gideons’ Memo.* at 12 (argument regarding PSA or deed-related withholding or severance). At a minimum, the question of intent is a matter to be evaluated at trial and cannot be decided on summary judgment. *See e.g. Walter E. Wilhite Rev. Living Trust v. Northwest Yearly Meeting Pension Fund*, 128 Idaho 539, 548, 916 P.2d 1264, 1273 (1996)

(“drawing all reasonable inferences and conclusions in its favor, we find that a genuine issue of material fact exists as to Walter Wilhite’s intent when he placed the documents into the first escrow”); *Armand v. Opportunity Management Co., Inc.*, 141 Idaho 709, 715, 117 P.3d 123, 129 (2005) (district court’s order granting summary judgment reversed where genuine issues of material fact existed as to whether owners made an offer indicating their “intent” to privately dedicate a lot for use as beach access); *see also, Brown v. Greenheart*, 157 Idaho 156, 159, 335 P.3d 1, 4 (2014) (“[Sellers] informed their real estate agent that they did not intend to transfer their water rights to the 60 acres [listed for sale].”)

The Gideons mistakenly argue there was no intent to reserve the Lower Well water right 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.” *Gideons’ Memo.* at 12. The Gideons misunderstand the legal effect of an amended water right claim and the CSRBA Court’s approved docket sheet notice procedure. Moreover, the Gideons’ claimed lack notice of either the water right claims or the Amended CC&Rs does not affect Mr. Farley’s intent with respect to his water right claims.

First, Mr. Farley did not have any obligation to notify the Gideons because they were not even potential buyers at the time the claims were filed over the course of the summer of 2018 and January 2019. In other words, how would Mr. Farley notify people he didn’t even know at that time? Further, it was the Gideons that had the obligation to investigate any water rights with the property they were purchasing.

In the representation agreement the Gideons agreed that their broker/realtor was not providing any advice on “water rights” and that the agreement recommended they “seek expert assistance for advice on such matters.” *See Ex. A to Thompson Dec.* The Gideons admitted they

never sought the assistance of an expert to investigate the water rights with property or have the Upper Well tested prior to closing. *See Waldera Aff.*, Ex. A, Tr. 106:1-7; *see also* Ex. S to IDWR Report, Order at 20 (“the Court notes that the REPSA allowed for a well productivity test and Gideons failed to take advantage of the same”). The lack of due diligence on the Gideons part in purchasing the property cannot be held against Mr. Farley, particularly with the statutory notice process of the water right claims in the CSRBA.

Second, any potential claimants are deemed to have legal notice under the CSRBA Court’s docket sheet procedure. The Director’s reports for amended water right claim 95-16445 to the Lower Well and water right claim 95-17752 to the Upper Well were filed with the Court on February 26, 2019. *See* Attachment L to IDWR Report; *see also* Exhibit B to *Thompson Dec.*<sup>3</sup> The Director’s Reports were then published on the CSRBA Court’s docket sheet on March 7, 2019 (Ex. C to *Thompson Dec.*), which is sufficient legal notice under the law and the Court’s procedural rules. *See* I.C. §§ 42-1409, 1409A, 1411(6); *see Amended CSRBA Administrative Order No. 1* (AO1) Section 7 (Docket Sheet Procedure); *see also, LU Ranching Co. v. United States*, 138 Idaho 606, 608-610, 67 P.3d 85, 87-90 (2002) (upholding constitutionality of Idaho’s notice procedures in general stream adjudications).

In summary, Mr. Farley clearly intended that any water rights associated with the Lower Well would be retained for his sole use on Parcels S and T. At a minimum, pursuant to the standard in *Joyce*, there is a genuine issue of material fact as to “intent” that warrants denial of the Gideons’ motion for summary judgment.

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<sup>3</sup> IDWR’s “Notice” filed with the Court explains: “If you want to review someone else’s water right, you need to look at the complete Director’s Report which is available at the CSRBA courthouse in Twin Falls and at the locations listed at the end of this notice.” *Notice* at 2, Ex. B to *Thompson Dec.* Those locations included IDWR’s northern regional office and the Kootenai County Courthouse, both located in Coeur d’Alene that were readily accessible by the Gideons. *Notice* at 5, Ex. B to *Thompson Dec.*

### **III. Mr. Farley's Actions Show a Clear Intent to Abandon any Water Right from the Lower Well for Parcel I and the Home.**

Apart from meeting the standard in *Joyce* regarding a clear intent to reserve the water right, Mr. Farley's actions, including the amended claim process, are also sufficient to meet Idaho's standard of "abandonment" regarding any claim that Gideons make to a water right from the Lower Well. Based upon the work with IDWR over the summer of 2018 and winter of 2019, Mr. Farley completed his amended claim for 95-16445 and the new claim for 95-17752. These actions effected an "abandonment" of any water right from the Lower Well for use on Parcel I.

Abandonment of a water right requires, concurrently, (1) an intent to give up the right, and (2) an actual relinquishment or surrender of the right. *See Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976); *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). "Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a per se abandonment." *Jenkins*, 103 Idaho at 388-89, 647 P.2d at 1260-61. "Such intent may be evidenced by non-use for a substantial period of time, but mere non-use is not a per se abandonment." *Gilbert*, 97 Idaho at 738. Intent to abandon is a question of fact to be decided by the trier of fact. *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982) (citing *Sears v. Berryman*, 101 Idaho 843 (1981)). Under these circumstances, summary judgment is not appropriate to evaluate "intent" and whether or not Mr. Farley actually abandoned that part of the water right from the Lower Well used on Parcel I and at the home.

In this case Mr. Farley's actions beginning in 2018 evidence a clear intent to "give up the right" or abandon any water right from the Lower Well for use at the home and on Parcel I. First, Mr. Farley's Notice of Error Reply for the preliminary recommendation for water right 95-16445 demonstrates his intent to only use the water right for stockwater purposes on his Parcels

S and T. *See* Ex. B to *Farley Dec.* Mr. Farley made specific notes at the time that “this is the 300’ well on V that used to go to our home @ 23542. I eliminated this place of use within this error reply because using original well in hayfield” (reference to Upper Well). *See id.* (emphasis added).

Further, in Mr. Farley’s table of various water right claims dated “051218”, he noted that water right claim 95-16445 eliminated any right to the home parcel “94700.” *See* Ex. C to *Farley Dec.* Further, at this time, Mr. Farley had discontinued any use of water from the Lower Well, as the Upper Well had been recommissioned and was the sole source of water for Parcel I and the home. *See Farley Dec.* at 3, ¶¶ 7-10.

Mr. Farley met with IDWR staff in the summer of 2018 and further communicated his clear intent to have any water right to the Lower Well retained for his sole use on Parcels S and T. Mr. Farley also asked Dawn Lenon what he needed to do to claim the water right for the Upper Well at that time. *See* Ex. E to *Farley Dec.* She indicated he could file an amendment to the existing claim 95-16445. *See Farley Dec.* at 5, ¶ 18. Ms. Lenon also provided Mr. Farley a completed Notice of Claim form that intended to accomplish the amendment (although the place of use was mislabeled as the same quarter quarter as the Lower Well). *See* Ex. E to *Farley Dec.* Mr. Farley understood that IDWR had entered the information and that was all that was needed to do to carry out his intent. *See id.*

In January 2019 Mr. Farley met with Kaila Savage at IDWR and discovered that the place of use for claim 95-16445 had not yet been changed and nothing had happened on the Upper Well claim. *See Farley Dec.* at 5, ¶ 21. Mr. Farley went in to the IDWR office and where Ms. Savage typed up both the amended claim for the Lower Well (95-16445) and the new claim for the Upper Well (95-17752), which he signed. *See id.* at 5-6, ¶ 23-24. These actions,

including signing verified water right claims, signaled a clear intent to remove any water right from the Lower Well for any purpose on Parcel I. The Director issued his reports a month later acknowledging Mr. Farley's intent. *See* Attachments L and M to IDWR Report.

Moreover, Ms. Savage provided Mr. Farley with a water right report noting "Application for Transfer of Water Right Part 2A Report for Claim No. 95-16445". *See* Ex. F to *Farley Dec.* With this document in hand Mr. Farley believed his intentions regarding his water right claims had been accomplished. *See Farley Dec.* at 7, ¶ 28. The "transfer" document further effected the intent to "abandon" any water rights from the Lower Well for use on Parcel I as it shows Mr. Farley eliminated that right. As stated in the document, it shows a transfer that any reasonable person could rely upon. At a minimum, the actions by IDWR and was represented was actually occurring through the amendment process need to be examined.

The above evidence shows Mr. Farley's intent to "abandon" any water rights from the Lower Well for use on Parcel I and the home. The court can further deny the Gideons' summary judgment motion on this basis as well.

#### **IV. Established State Policy Demonstrates Water Users Should only be Allowed One Exempt Domestic Water Right and Well.**

The Gideons' motion can be denied on equitable grounds as well.<sup>4</sup> The State of Idaho has the following policies with respect to its groundwater resources:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined . . .

I.C. § 42-226.

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<sup>4</sup> The CSRBA District Court is a court of original jurisdiction "both at law and in equity." *See* Idaho Const. Art V, § 20.

It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

I.C. § 42-231.

In *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909), we stated, “The theory of the law is that the public waters of this state shall be subjected to the highest and greatest duty.” In *Farmers’ Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481, 483 (1909), we phrased it, “Economy must be required and demanded in the use and application of water.” In *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960), we expressed the same concept by stating, “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.”

*Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011).

Against this backdrop, Idaho Code section 42-227 provides: “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 . . . Rights to ground water for such domestic purposes may be acquired by withdrawal and use.” The code defines “domestic” purposes as “[t]he use of water for homes . . . if the total use is not in excess of thirteen thousand (13,000) gallons per day . . .” I.C. § 42-111. The domestic use statute goes on to state: “Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself com within the definition of a domestic use or purpose under this section.” I.C. § 42-111(3). Taken together, the above policies can be applied in a manner that guards against multiple exempt wells being drilled for purposes of a single domestic water right. In this case, Mr. Farley’s actions of filing separate water right claims for the Upper and Lower Wells protect against “wasteful” use of the water resources as the Gideons cannot “beneficially” use “two” exempt domestic water rights.

In this case the Gideons already hold a decreed water right for an exempt domestic and stockwater use on Parcel I. *See* Attachment R to IDWR Report. This water right can satisfy the entirety of the Gideons' beneficial use of domestic water at their home. Consequently, there is no demonstrated need to obtain a "second" exempt domestic water right from the Lower Well. Stated another way, the policies of the State guard against a single user drilling multiple "exempt" domestic wells to satisfy a single domestic use. By holding a water right for their domestic use, the Gideons cannot beneficially use water from a second water right. The Court should refrain from issuing multiple water rights that would constitute a "waste" of the state's groundwater resources. Mr. Farley's actions conform with the above state policies and, at a minimum, create a genuine issue of material fact that warrants denial of their summary judgment motion.

### **CONCLUSION**

For the reasons set forth above Mr. Farley respectfully requests the Court to deny the Gideons' *Motion for Summary Judgment*.

DATED this 23<sup>rd</sup> day of February, 2024.

**MARTEN LAW LLP**



Travis L. Thompson

*Attorneys for Claimant/Respondent Brian T. Farley*

## CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of February, 2024, I served true and correct copies of the foregoing **RESPONSE IN OPPOSITION TO CLAIMANT GIDEONS' MOTION FOR SUMMARY JUDGMENT REGARDING CLAIM NO. 95-18409** by the method indicated below, and addressed to the following:

Clerk of the Court  
CSRBA  
253 3<sup>rd</sup> 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

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☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail  
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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  
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☐ Email

United States Dept. of Justice  
Environment & Natural Resources Division  
550 W Fort Street, MSC 033  
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Travis L. Thompson