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DISTRICT COURT - CSRBA Fifth Judicial District County of Twin Falls - State of Idaho	
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By _____	Clerk
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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 and 95-18409
	)
Case No. 49576	) MEMORANDUM DECISION AND
	) ORDER ON GIDEONS' MOTION FOR
	) SUMMARY JUDGMENT
	)
	) SPECIAL MASTER'S REPORT AND
	) RECOMMENDATION
	)

Summary of Ruling: The Gideons' *Motion for Summary Judgment* should be granted, and the CSRBA District Court should decree both above-captioned water right claims as recommended by the Director of the Idaho Department of Water Resources (IDWR). There are no genuine issues of material fact that: 1) Mr. Farley did not transfer the place of use off of the land he sold to the Gideons prior to the real estate transaction; 2) Mr. Farley did not abandon his water right for the land sold to the Gideons prior to the real estate transaction; 3) the subject water right was conveyed to the Gideons as an appurtenance to the land sold to them by Mr. Farley, and evidence of Mr. Farley's assertion that he did not intend to convey the water right is inadmissible under both the Real Estate Purchase and Sale Agreement (REPSA) and the parol evidence rule; 4) evidence that Mr. Farley himself did not intend to convey the subject water right to the Gideons does not provide the required "clear evidence" that the parties intended the water right would be withheld by the grantor, and taking further evidence at trial of Mr. Farley's unilateral intent could not possibly provide clear evidence of the parties' bilateral intent. Neither Idaho law nor the policy of the State of Idaho prevents the Gideons' single domestic water use (as defined by I.C. § 42-111) from being fulfilled by two separate water rights from two separate wells. There are no genuine issues of material fact regarding the Gideons' domestic and stockwater uses from two wells that would preclude summary judgment.

I. APPEARANCES

Andrew J. Waldera, Sawtooth Law Offices, PLLC, for Arthur V. and Katherine M. Gideon.

Travis L. Thompson and Abigail R. Bitzenburg, Marten Law LLP, for Brian T. Farley.

II. PROCEDURAL AND FACTUAL BACKGROUND

The above-captioned subcases involve a dispute over whether the water right claimed by the Gideons (95-18409) was in existence at the time of closing of the real estate transaction (in June 2019) wherein Mr. Farley conveyed to the Gideons a certain parcel of land (herein referred to as “Parcel I”), and if said water right was in existence, was it conveyed to the Gideons as an appurtenance to Parcel I. Water right claim 95-18409, as recommended by IDWR in the *Supplemental Director’s Report Regarding Subcase Nos. 95-16445 & 95-18409* (Sept. 21, 2023) (“*Director’s Report*”), is a split portion of water right 95-16445.

Water right 95-16445 was created by Mr. Farley in 1999 through his actions of drilling a well, diverting groundwater, and putting it to beneficial use. The well drilled by Mr. Farley in 1999 is referred to herein as the “Lower Well” and is located on property owned by Mr. Farley referred to herein as “Parcel V.” As originally developed, the place of use for water right 95-16445 consisted of three contiguous parcels of land owned by Mr. Farley and referred to throughout these proceedings as Parcels I, S, and T¹. Regarding the purposes of use for 95-16445, Mr. Farley had previously (in 1994) constructed a residence² on Parcel I. In 1999, when Mr. Farley drilled the Lower Well, he connected it to the system of pipes and cistern that serviced the residence on Parcel I, and through his beneficial use in connection with that residence he established domestic

¹ In the Map attached to the *Director’s Report*, Parcel I is identified as Kootenai County RPN 52N03W094700 and referred to therein as the “Gideon Property.” Parcel T is identified as Kootenai County RPN 52N03W095000 and referred to therein as the “Farley North Property.” Parcel S is not identified on the Map. The parcel where the well is located (Parcel V) is identified as 52N03W097100 and referred to in the *Director’s Report* as the “Farley South Property.”

² The residence constructed by and occupied by Mr. Farley beginning in 1994 was originally serviced by a well located on Parcel I known as the “Upper Well.” On January 20, 2021, the CSRBA District Court issued a *Partial Decree* for water right 95-17752 for this Upper Well.

and stockwater purposes of use on Parcel I. As to the purpose of use on Parcels S³ and T, Mr. Farley provided water for his livestock and thereby established a stockwater purpose of use. There is no claimed place of use for water right 95-16445 on Parcel V.

In 2019, the Gideons purchased Parcel I, together with the residence located thereon, from Mr. Farley. The Gideons seek summary judgement that the subject water right (95-18409) was conveyed to them as an appurtenance to the real property that they purchased from Mr. Farley. For purposes of resisting summary judgment, Mr. Farley alternatively argues: 1) that the portion of parent right 95-16445 (reported as 95-18409) for domestic and stockwater uses on Parcel I had been, prior to closing, transferred off of Parcel I and concentrated on Mr. Farley's remaining Parcels S and T; 2) that he had abandoned the water right for Parcel I prior to closing; and 3) that even if the water right for Parcel I existed at the time of closing, he intended to withhold it from being conveyed to the Gideons. An additional argument Mr. Farley makes is that the Gideons should not be allowed to utilize two water rights from two separate wells to satisfy their domestic and stockwater uses. Mr. Farley argues that there are genuine issues of material fact regarding these assertions and therefore a trial must be held.

As stated above, one of Mr. Farley's arguments is that at the time of closing, the subject water right no longer had a place of use or a domestic / stockwater purpose of use on the land he conveyed to the Gideons. Specifically, Mr. Farley argues that the actions he took before the Department in rearranging his water right claims (including filing a *Notice of Error Reply* to omit Parcel I, filing an *Amended Claim* for 95-16445 to omit Parcel I, and filing a new claim for the Upper Well), coupled with his stated and inferred intentions, created a situation where the entirety of water right 95-16445 was transferred⁴

³ In section 9 ("Description of place of use") of the July 16, 2009, *Notice of Claim* filed by Mr. Farley for water right 95-16445 (*Director's Report*, Attachment D), he only lists 52N03W094700 (Parcel I) and 52N03W095000 (Parcel T) as the parcel numbers for the place of use. The 2009 *Claim* does not list any parcel numbers that might be associated with Parcel S. In section 9 of the January 25, 2018, *Amended Notice of Claim* (*Director's Report*, Attachment J), no POU parcel numbers are listed. So, while the record in these proceedings contain multiple mentions regarding stockwater use on Parcel S, the claims filed for 95-16445 do not specifically mention Parcel S as a place of use, and the *Director's Report* does not specifically recommend Parcel S as a POU.

⁴ In the parlance of Idaho water law, the word "transfer" is typically associated with the process set forth in Idaho Code § 42-222 to formally change an element of a water right. Mr. Farley is not using this word to refer to the statutory procedure.

to (perhaps “concentrated on” is a better phrase) Parcels S⁵ and T. Under this theory, the place of use on Parcel I, and the associated domestic and stockwater purposes of use, had been eliminated from Parcel I and transferred for use on Parcels S and T prior to closing; and therefore, such portion of 95-16445 could not have passed to the Gideons as an appurtenance to the real property. Mr. Farley seeks to prove this theory at trial and hence asserts that it cannot be decided via summary judgement.

Another argument that Mr. Farley makes is that the actions he took before the Department together with evidence of his intent show that he abandoned the Parcel I portion of water right 95-16445 together with the Parcel I domestic and stockwater purposes of use thereon. Under this legal theory, the Parcel I portion of the subject water right could not have passed to the Gideons as an appurtenance because it ceased to exist prior to closing. Again, Mr. Farley argues that the question of whether he abandoned the subject water right is a question of his intent, and factual findings regarding such intent must be made at trial.

Another of Mr. Farley’s arguments is that even if the actions he took prior to the sale did not cause an abandonment, and also did not transfer or concentrate the entirety of water right 95-16445 onto Parcels S and T, those same actions (i.e. *Notice of Error Reply*, the *Amended Claim* for the Lower Well, and the new claim for the Upper Well) demonstrate his intent (together with other evidence) to withhold from transfer to the Gideons (and retain ownership by Mr. Farley) the portion of water right 95-16445 that authorizes domestic and stockwater uses on Parcel I. Under this legal theory, the water right for domestic and stockwater uses on Parcel I was not eliminated, but rather it continued to exist after closing, with ownership being retained by Mr. Farley. Mr. Farley asserts that there are genuine issues of material fact regarding whether the subject water right was retained by him as opposed to being conveyed to the Gideons as an appurtenance to the real property. Mr. Farley argues that whether the subject water right was conveyed as an appurtenance is a question of intent, and factual findings regarding such intent cannot be made via summary judgment.

⁵ The *Notice of Error Reply*, dated May 16, 2018, states that the POU is 52N03W09S000 “only” (i.e. Parcel T). It does not list Parcel S.

Lastly, Mr. Farley makes a plea in equity that the CSRBA District Court should not confirm any right of the Gideons to divert and use water from the Lower Well. Under this plea, Mr. Farley is essentially asking that even if: 1) the subject water right was not transferred to (concentrated on) Parcels S and T prior to closing; and 2) the subject water right was not abandoned prior to closing; and 3) the subject water right would have otherwise been transferred to the Gideons at the time of closing, the CSRBA District Court should invoke its equitable power to deny the Gideons' ownership of the water right. Mr. Farley asserts that the Upper Well is able to satisfy the entirety of the Gideons' domestic water need, and therefore any additional use of water by the Gideons from the Lower Well would be wasteful rather than beneficial. Mr. Farley asserts that he should be given the opportunity to present evidence on this issue at trial.

III. ISSUE PRESENTED

The overarching issue in these subcases is: Are the Gideons entitled to a judgment as a matter of law that a split portion of water right 95-16445 (which is now reported by the Director as water right 95-18409) was conveyed from Mr. Farley to the Gideons as an appurtenance to the real property conveyed via the Warranty Deed recorded on June 10, 2019 (*Director's Report*, Attachment N), with the consequence that water right claim 95-18409 should be decreed by the CSRBA Court with the elements as recommended in the *Director's Report*? In order to determine the answer to this issue, the following subsidiary issues must be resolved.

A. Prior to closing, did Mr. Farley modify (i.e. transfer) water right 95-16445 so as to eliminate its place of use, and its domestic and stockwater purposes of use, on the real property subsequently conveyed by Mr. Farley to the Gideons (i.e. Parcel I)?

B. Prior to closing, did Mr. Farley abandon the portion of water right 95-16445 that was previously established to provide domestic and stockwater uses for the residence and land subsequently conveyed by Mr. Farley to the Gideons (i.e. Parcel I)?

C. In the execution and delivery of the Warranty Deed (which states that it is conveying the described real property “with its appurtenances”) from Mr. Farley to the Gideons, did Mr. Farley withhold or reserve from conveyance to the Gideons the portion of water right 95-16445 that is now reported by the Director as 95-18409?

D. Should the Gideons’ *Motion for Summary Judgment* be denied so as to allow Mr. Farley to present evidence at trial that it would be a violation of the policy of the State of Idaho and a waste of water resources for the Gideons’ domestic and stockwater uses to be fulfilled by two separate groundwater rights from two separate wells?

IV. STANDARD OF REVIEW

In their *Memorandum in Support of Motion for Summary Judgment Regarding Claim No. 95-18409*, the Gideons correctly set forth the applicable standard of review to be used in analyzing a motion for summary judgement in a bench trial setting. This Special Master adopts the Gideons’ statement thereof.

V. ANALYSIS

A. Prior to closing, did Mr. Farley modify (i.e. transfer) water right 95-16445 so as to eliminate its place of use, and its domestic and stockwater purposes of use, on the real property subsequently conveyed by Mr. Farley to the Gideons (i.e. Parcel I)?

It is undisputed that the elements of water right 95-16445, as originally established through Mr. Farley’s actions of diverting water from the Lower Well and applying it to beneficial use, included domestic and stockwater purposes of use for the residence and land that is currently owned by the Gideons. It was Mr. Farley who caused the Lower Well to be drilled, and it was Mr. Farley’s diversion and beneficial use of water from that well that established water right 95-16445. It is also undisputed that, as originally developed by Mr. Farley, the elements of water right 95-16445 included domestic and stockwater uses on Parcel I.

The Gideons assert that at the time of closing, the portion of water right 95-16445 that Mr. Farley established for domestic and stockwater uses for the residence and land

that they purchased from Mr. Farley (said portion now known as recommended water right 95-18409), was in existence, had not been extinguished, was owned by Mr. Farley, and therefore was conveyed to the Gideons via the appurtenancy clause of the Warranty Deed.

Mr. Farley asserts that the various processes and actions he undertook to amend and rearrange his water right claims (including filing an *Amended Claim* for water right 95-16445 that omits Parcel I, a *Notice of Error Reply* for 95-16445 that omits Parcel I, and a new claim for 95-17752), all of which occurred before the real estate transaction closed, resulted in the portion of water right 95-16445 previously established for domestic and stockwater uses on Parcel I being transferred to (again “concentrated on”) Parcels S and T, thereby eliminating said portion from Parcel I. In other words, Mr. Farley asserts that the subject portion of 95-16445 could not have passed to the Gideons via the Warranty Deed because said portion had been previously eliminated and/or transferred away. In his *Declaration* at p. 6, ¶ 25, Mr. Farley states that his intention and understanding in the actions he took regarding the amendment of his claim for 95-16645 (and his filing of a separate claim for the Upper Well, 95-17752) were that Parcel I would be “eliminate[d]” as a place of use from the Lower Well water right claim. *Farley Dec.* at 6, ¶ 25.

What Mr. Farley’s argument fails to identify is a legal mechanism or theory whereby the amendment of a claim to remove a portion of a place of use, and the corresponding purpose(s) of use associated with that place, somehow works to contemporaneously extinguish the water right for that previously claimed place and purpose(s). This Special Master understands that in a general water adjudication such as the CSRBA, the District Court will eventually issue a final unified decree, and it will provide that all unclaimed water rights (with possibly some exceptions) will be decreed as disallowed. However, this Special Master is unaware of any legal authority that would result in a water right (or portion thereof) that was claimed and then subsequently unclaimed to become non-existent at the time of the unclaiming. In the absence of some legal theory under which the intent of the person doing the unclaiming is relevant, Mr. Farley’s intentions or understandings that the various activities he undertook before the

Department culminated in the portion of the Lower Well water right being transferred off of, and eliminated from, Parcel I, are immaterial.

In accordance with the foregoing, this Special Master concludes, as a matter of law, that the *Amended Notice of Claim* filed by Mr. Farley that omitted the place of use and domestic / stockwater purposes of use for Parcel I (together with the other filings such as the *Notice of Error Reply* and the new claim for the Upper Well) did not have the effect of contemporaneously eliminating such uses from the water right or transferring such uses elsewhere. The amended claim simply resulted in the Parcel I place of use and the associated purposes of use being unclaimed. This Special Master further concludes, based upon the undisputed facts in the record in these subcases, that Mr. Farley was still the owner of said unclaimed portion of water right 95-16445 after the amended claim (and other documents) were filed with the Department.

B. Prior to closing, did Mr. Farley abandon the portion of water right 95-16445 that was previously established to provide domestic and stockwater uses for the residence and land subsequently conveyed by Mr. Farley to the Gideons (i.e. Parcel I)?

Before addressing this issue, this Special Master would like to take note of the rather peculiar procedural posture regarding the manner that this issue has been presented. The abandonment issue is presented for the first time in Mr. Farley's *Response*, at p. 15. Therein, Mr. Farley asserts that the evidence in the record demonstrates his clear intent to abandon any portion of the water right from the Lower Well for use at the residence or land constituting Parcel I. *Id.* at 15, 17. Mr. Farley further asserts that the evidence of abandonment recited in his *Response* at pages 15-17 provides a basis to deny the Gideons' summary judgment motion. The peculiarities, in this Special Master's opinion, are twofold: One, if Mr. Farley is correct that there is sufficient undisputed evidence in the record to demonstrate abandonment, is he not moving for summary judgement on this issue? And secondly, if there is insufficient undisputed material evidence in the record to determine whether there was or was not an abandonment, what remaining facts would remain to be determined at trial? In other words, if the Gideons' motion for summary judgement were to be denied based upon this

“abandonment” issue, as is desired by Mr. Farley, what facts would remain to be proved, given that Mr. Farley asserts in his *Response* that the record already contains sufficient undisputed evidence to determine abandonment?

Now on to the substance. Mr. Farley asserts that the evidence in the record, and recited in his *Response* at pages 15-17, shows that he had a clear intent to abandon the portion of water right 95-16445 that he previously established for use on Parcel I. Mr. Farley correctly recites the basic law in Idaho regarding the abandonment of a water right, with the addition as pointed out in the Gideons’ *Reply* that abandonment is disfavored in the law. *Reply* at p. 23, citing *Graham v. Leek*, 65 Idaho 279, 288, 144 P.2d 475, 479 (1943).

Abandonment is a question of intent, and intent is a question of fact. In the typical case regarding abandonment, it is a competing water user who is attempting to prove that some other water right holder intended to abandon. Under such typical cases, the law in Idaho requires such intent to be proved by clear and convincing evidence of unequivocal acts. *Jenkins v. State, Dep’t of Water Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (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.”) (citing *Sears v. Berryman*, 101 Idaho 843 (1981)). The act (or really “non-act”) of not using the water is insufficient, by itself, to demonstrate intent to abandon. Stated differently, non-use of water under the water right that is alleged to be abandoned is a necessary but not sufficient condition for a finding of intent to abandon.⁶

Regarding the use or non-use of water on Parcel I from the Lower Well subsequent to the time that Mr. Farley claims to have abandoned the Parcel I portion of water right 95-16445, the undisputed facts in the record show that water from the Lower Well continued to be conveyed to the 3,000-gallon cistern for use on Parcel I during the time period from before closing until April 2023. *See eg.*, *Memorandum Decision and Order*, p. 5, FOF 19 (lodged Oct. 26, 2022) (“19. Mr. Farley turned the water on from

⁶It should be noted that Mr. Farley’s claim that he abandoned his own water right is unusual in that the typical case is one where a competing water user is asserting abandonment by another user on the source.

the Lower Well to the cistern sometime after Gideons entered into the RESPA but before closing. The Property was now being served by both the Lower and Upper Wells.”).

As stated above, non-use of water under the water right that is alleged to be abandoned is a necessary condition of abandonment. Mr. Farley cannot assert that he abandoned the Parcel I portion of the water right from the Lower Well, while simultaneously facilitating the use and delivery of water from the Lower Well to Parcel I. Accordingly, as a matter of law, Mr. Farley’s claimed abandonment fails. Without the necessary component of non-use, Mr. Farley’s intent regarding abandonment, and the evidence showing such intent, are immaterial and irrelevant. In accordance with the foregoing, this Special Master concludes that Mr. Farley did not abandon the portion of water right 95-16445 that authorized domestic and stockwater purposes of use on the land he sold to the Gideons.

C. In the execution and delivery of the Warranty Deed (which states that it is conveying the described real property “with its appurtenances”) from Mr. Farley to the Gideons, did Mr. Farley withhold or reserve from conveyance to the Gideons the portion of water right 95-16445 that is now reported by the Director as 95-18409?

There are two sub-issues regarding whether Mr. Farley’s stated intent of non-conveyance presents any genuine issues of material fact that would preclude summary judgment. The first sub-issue is whether evidence of Mr. Farley’s intent would be admissible or whether it would be precluded under the integration / merger clause of the REPSA and /or the parol evidence rule. The second sub-issue is whether Mr. Farley’s stated unilateral intent of non-conveyance provides the requisite “clear evidence” of the parties’ bilateral intent of non-conveyance.

1) Does the evidence presented by Mr. Farley regarding his intent of non-conveyance comply with I.R.C.P. 56(c)(4), which requires that an affidavit used to support or oppose a motion must “set out facts that would be admissible in evidence”?

It is undisputed that water right 95-16445, as originally established by Mr. Farley in 1999, included domestic and stockwater purposes of use on the place of use known as Parcel I. Mr. Farley asserts that his actions in rearranging his water rights before closing, and the intent evidenced thereby, demonstrate that he did not intend to transfer the subject water right to the Gideons as an appurtenance to the real property. Mr. Farley argues that factual findings regarding his intent cannot be derived from the record on summary judgment and therefore this matter needs to proceed to trial. The result of Mr. Farley's legal theory would be that the subject water right continued to exist after closing and that he retained ownership thereof.

The Gideons argue, on the other hand, that the subject water right 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. Specifically, the Gideons argue that the subject water right passed as an appurtenance because: 1) it existed at the time of the real estate transaction; 2) there was unity of title in the grantor (i.e. Mr. Farley was the owner of both the land and the water right); 3) the water right had an authorized place and purpose of use on the land so conveyed; and 4) there is no admissible and clear evidence that the parties to the real estate transaction intended that the water right would be reserved by Mr. Farley.

Regarding the question of whether the subject water right was in existence at the time of the real estate transaction, as set forth in the preceding sections, the water right for domestic and stockwater uses on Parcel I had not been abandoned, nor had it been transferred off Parcel I. Regarding the question of whether there was unity of title in Mr. Farley at the time of the real estate transaction, again as set forth above, Mr. Farley was the owner of the unclaimed portion of the water right at the time of closing. Regarding the question of whether the subject water right had an authorized place of use on the land conveyed to the Gideons, the place of use on Parcel I, as it was originally established by Mr. Farley in 1999, had not been abandoned, transferred, or otherwise eliminated prior to the closing of the real estate transaction.

Which leaves the remaining question of whether there exists admissible evidence that the parties to the real estate transaction intended the water right would be retained by

Mr. Farley. In his sworn *Declaration*, Mr. Farley states: “I had no intent to sell the Lower Well or any water rights from that well to the Gideons.” *Farley Dec.* p. 8, ¶ 31. The analysis of whether this statement from Mr. Farley (together with the evidence he points to as demonstrating his intent, i.e. filing the *Amended Notice of Claim* etc.) should be considered on summary judgment starts with I.R.C.P. 56(c)(4), which states: “An affidavit used to support or oppose a motion must be made on personal knowledge, *set out facts that would be admissible in evidence*, and show that the affiant or declarant is competent to testify on the matters stated.” I.R.C.P. 56(c)(4) (*emphasis added*).

The Warranty Deed that conveyed the subject real property from Mr. Farley to the Gideons states that the real property is being conveyed “with its appurtenances.” A non-specific appurtenancy clause such as this would convey water rights and other incorporeal hereditaments such as easements. Because the Warranty Deed does not specifically state what appurtenances, if any, are being conveyed, it becomes necessary to look outside of the four corners of the Deed itself for the purpose of identifying said appurtenances. In *Benninger v. Derifield*, 142 Idaho 486, 129 P.3d 1235 (2006), the Idaho Supreme Court stated that such uncertainties should be cleared up by ascertaining the intention of the parties by looking at the deed, the attendant circumstances, the subject matter, and the situation of the parties at the time the deed was executed. *Id.*, at 489.

As set forth in the preceding sections herein, the attendant circumstances at the time of the real estate transactions were that: 1) the water right for domestic and stockwater uses on Parcel I was in existence and had not been previously transferred or abandoned; and 2) it was owned by the grantor, Mr. Farley. Additionally, the *Director's Report*, which is statutorily designated as *prima facie* evidence of the nature and extent of water rights acquired under state law, concludes that water right 95-18409 is a valid water right now owned by the Gideons. Since Mr. Farley's two “pre-transaction” legal theories (i.e. transfer and abandonment) have herein been found to be invalid, the only legal theory remaining wherein the intent of the parties would be relevant is the theory that, contemporaneously with the conveyance of the land, Mr. Farley did not convey the existing water right for Parcel I from the Lower Well to the Gideons for the reason that the parties lacked the intent to do so.

In examining the situation at the time of the real estate transaction, at the moment before closing, the subject water right was appurtenant to the land. The Warranty Deed, signed by Mr. Farley, states that he is conveying appurtenances. The REPSA expressly included in the transaction “any and all water rights including but not limited to water systems, wells . . . appurtenant to the PROPERTY . . . unless otherwise agreed to by the parties in writing.” REPSA § 7. It is undisputed that there were no other written and signed agreements between the parties regarding the withholding of any water rights. The REPSA also includes an integration/merger clause providing that the REPSA is the “entire agreement” between the parties that could only be changed via a subsequent “written agreement signed by each of the parties.” RESPA § 40.

In this subcase, it is an academic exercise to note that the Warranty Deed, on its face, does not identify the appurtenances which it purports to convey. As a practical (rather than academic) matter, there is no uncertainty regarding what water right is at issue (i.e. a water right from the Lower Well for domestic and stockwater uses on Parcel I). It is not necessary to resort to extra-deed evidence to clear up any uncertainty regarding what water right is at issue, nor is there a dispute about the particular elements thereof. Rather the dispute is whether the water right was or was not conveyed. Mr. Farley argues that in order to answer this question, it is necessary to factually determine his intent, which cannot be accomplished in a summary judgment proceeding. In his *Response*, Mr. Farley correctly sets forth Idaho law holding that questions regarding intent and credibility need to be made in a trial setting. *Response*, p. 6, citing *Williams v. Computer Res., Inc.*, 123 Idaho 671, 673, 851 P.2d 967, 969 (1993); *Ashby v. Hubbard*, 100 Idaho 67, 70, 593 P.2d 402, 405 (1979); *Baxter v. Craney*, 135 Idaho 166, 172, 16 P.3d 263, 269 (2000).

The Gideons argue that Mr. Farley’s unilateral statements of his intent, and any inferences of intent that can be made from his actions (including amending his claim to 95-16445, filing a new claim for 95-17752, and his *Notice of Error Reply*), cannot be considered to contradict, vary, alter, add to, or detract from the terms of the REPSA. *Reply* at 12. This Special Master agrees with the Gideons. Both the REPSA and the Warranty Deed expressly state that the land is being conveyed with its appurtenances.

The entirety of the agreement between the parties was contained within the REPSA, which, by its terms, could only be modified by a written agreement signed by the parties. Accordingly, Mr. Farley's statements regarding his intent to not convey the appurtenant water right would be inadmissible under the terms of the REPSA and the parol evidence rule. Because evidence of Mr. Farley's intent would not be admissible, it does not create a genuine issue of material fact that would preclude deciding this matter on summary judgment.

2) Does the evidence presented by Mr. Farley regarding his intent of non-conveyance comply with the requirement stated by the Idaho Supreme Court in the *Joyce Livestock* decision that appurtenant water rights pass with the land unless it is clearly shown that the parties intended that the grantor would reserve them?

In order for Mr. Farley to defeat the Gideons' motion for summary judgement, he would need to show that there are genuine issues of material fact regarding the parties' intent that the water right would not pass to the Gideons as an appurtenance, despite the fact that the Warranty Deed expressly states that appurtenances were included. Mr. Farley asserts that his intention is the controlling factor as to whether the subject water right was conveyed to the Gideons as an appurtenance, or whether said water right was retained by Mr. Farley. The Gideons assert that Mr. Farley does not need an opportunity at trial to provide further proof of his intent because Mr. Farley's intent is not the controlling factor; rather it is the parties' intent that matters, not the unilateral intent of one of the parties.

In *Joyce Livestock Co., v. United States*, 144 Idaho 1, 156 P.3d 592 (2007), the Idaho Supreme Court stated: "Unless [appurtenant water rights] 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" *Joyce Livestock Co.*, 144 Idaho at 14, 156 P.3d at 515. The Gideons correctly assert that this standard "requires clear evidence of the *bilateral intent* of the parties that the grantor would reserve and sever the subject water right(s)." *Reply* at p. 14 (emphasis in original).

Regarding whether the record in these subcases contains any evidence of the bilateral intent of the parties, the Gideons assert that “there is no evidence, let alone “clear” evidence, that Farley and the Gideons (the ‘parties’ -plural- ‘to the transaction’) intended that Farley (the grantor) would sever and retain what is now Right No. 95-18409.” *Reply* at 17. The Gideons’ assertion in this regard is correct – there is no evidence in the record of bilateral intent.

Mr. Farley resists summary judgment by asserting that “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.” *Response* at p. 12. Mr. Farley goes on to correctly state that “the question of intent is a matter to be evaluated at trial and cannot be decided on summary judgment.” *Id.* (citations omitted). However, because the relevant intent is that “of the parties,” it would serve no purpose to afford Mr. Farley an opportunity at trial to provide further evidence of his unilateral intent. As quoted above, Mr. Farley is not seeking an opportunity to provide evidence of the bilateral intent of the parties, rather he wishes to engage in further fact-finding regarding his unilateral intent. Whatever quantum of proof of his unilateral intent that Mr. Farley might be able to provide, it will never, by itself, provide proof of the bilateral intent of the parties. Bilateral proof of intent is what is required, which is not what Mr. Farley is seeking to provide at trial; hence there is no genuine issue of material fact to be tried.

D. Should the Gideons’ *Motion for Summary Judgment* be denied so as to allow Mr. Farley to present evidence at trial that it would be a violation of the policy of the State of Idaho and a waste of water resources for the Gideons’ domestic and stockwater uses to be fulfilled by two separate groundwater rights from two separate wells?

It appears from the briefing and oral argument on summary judgment that there are three subparts that need to be addressed regarding Mr. Farley’s plea for equitable relief. The first subpart is the question of whether the CSRBA Presiding Judge definitively ruled on the issue of whether Idaho law prevents a single domestic use (that falls within the statutory definition) from being fulfilled by two separate groundwater

rights from two separate wells? In other words, has the issue already been addressed and is now “law of the case”? The second subpart requires a direct answer to this question, in the event that the Presiding Judge’s ruling on the matter can be revisited. And finally, irrespective of the answers to the preceding questions, should Mr. Farley be allowed to present evidence at trial to demonstrate that it would be inequitable for the Gideons to have two water rights from two separate wells to service one domestic use.

As to whether the “two-wells” question has already been answered, the Gideons assert that Judge Wildman disposed of this issue in his ruling (from the bench⁷) at the April 18, 2023, hearing on the Gideons’ motion to file late notice of claim for water right 95-18409. Mr. Farley asserts that because the late claim proceeding was being reviewed under the standards of I.R.C.P. 55(c), the Judge’s ruling on the matter was in the context of determining whether the Gideons had presented a meritorious position on an issue that could be revisited in further proceedings. This Special Master agrees with the Gideons. The CSRBA Presiding Judge fully and finally rejected Mr. Farley’s theory that Idaho law prohibits a single domestic use from being serviced by multiple wells.

In the event Mr. Farley is correct in his assertion that Judge Wildman’s ruling can be revisited at this time, it becomes necessary to analyze the relevant statutory language of I.C. § 42-111(3), which states:

(3) 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 come within the definition of a domestic use or purpose under this section*. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to chapter 2, title 42, Idaho Code.

I.C. § 42-111(3) (emphasis added). For this statutory provision to be applicable to prohibit the Gideons from using two wells to satisfy their domestic use, said “domestic use” would have to fall outside of the definition of domestic use, as defined in subsection

⁷ The Gideons ask that this Special Master take judicial notice of the audio recording of that hearing under I.R.E. 201. Judicial notice is taken, and the audio recording has been heard.

(1) of the statute. Subsection (1)(a) of the statute states, in relevant part, that domestic use means: “(a) The use of water for homes . . . livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day.” *Id.*

The Gideons’ water use, as it is defined and limited under the parameters and combined use limitations of 95-18409 and 95-17752, falls within the statutory definition of domestic use. Because such use falls within the statutory definition of domestic use, the above-quoted prohibition against multiple water rights does not apply.

The last subpart is the question of whether Mr. Farley should be provided with an opportunity to present evidence at trial to demonstrate that it would be inequitable for the Gideons to have two water rights from two separate wells to service one domestic use. Mr. Farley asserts that the Gideons’ use of two wells to satisfy their domestic use presents genuine issues of material fact that precludes deciding the issue on summary judgement.

Under Rule 56(e), Mr. Farley is required to properly support an assertion of fact. I.R.C.P. 56(e). In their *Memo*, the Gideons point out that “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.” *Memo* at p. 7, citing *Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007). Mr. Farley has not met this requirement regarding his “two wells” theory, and therefore his request for the denial of the Gideons’ summary judgement motion on these grounds is denied.

VI. REPORT AND RECOMMENDATION

Based upon the undisputed material facts in the record regarding water right claim 95-18409, this Special Master concludes that the Gideons have met their burden to show that there are no genuine disputes as to any material facts, and therefore the Gideons are entitled to judgment as a matter of law. Specifically, as matters of law, this Special Master concludes that: 1) Mr. Farley did not, prior to closing, eliminate the domestic and stockwater purposes of use on the “Parcel I” place of use; 2) Mr. Farley did not, prior to

closing, abandon the domestic and stockwater purposes of use on the “Parcel I” place of use; and 3) At the time of closing, Mr. Farley was the owner of the existing but unclaimed portion of water right 95-16445 that was for domestic and stockwater purposes of use on Parcel I. Because there was unity of title between the land and the existing but unclaimed water right, said water right was appurtenant to the land and therefore was conveyed to the Gideons via the Warranty Deed. There is no admissible and clear evidence that the parties intended otherwise.

Therefore, IT IS RECOMMENDED that the CSRBA District Court **grant** the Gideons’ *Motion for Summary Judgment Regarding Claim No. 95-18409* by means of issuing a **partial decree** for water right 95-18409 with the elements as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*.

As to water right claim 95-16445, in the Gideons’ *Memo*, they state that they are “willing and agreeable to stipulate to the adjudication and decree of Claim No. 95-16445 as recommended in IDWR’s Report” *Memo* at p. 3. Accordingly, IT IS RECOMMENDED that the CSRBA District Court issue a **partial decree** for water right 95-16445 with the elements as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*.

Dated March 19, 2024



THEODORE R. BOOTH
Special Master
Coeur d’Alene-Spokane River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON GIDEONS' MOTION FOR SUMMARY JUDGMENT; SPECIAL MASTER'S RECOMMENDATION was mailed on March 20, 2024, with sufficient first-class postage to the following:

ARTHUR V & KATHERINE M GIDEON
ARTHUR V GIDEON
KATHERINE M GIDEON

Represented by:
ANDREW J WALDERA
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

ARTHUR V & KATHERINE M GIDEON

Represented by:
MICHAEL G SCHMIDT
601 E FRONT AVE, STE 303
COEUR D'ALENE, ID 83814
Phone: 208-667-0517

BRIAN T FARLEY

Represented by:
TRAVIS L THOMPSON
163 SECOND AVE W
PO BOX 63
TWIN FALLS, ID 83303-0063
Phone: 208-733-0700

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098