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DEPT. OF WATER RESOURCES

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

In Re CSRBA	Subcase Nos. 95-16445 & 95-18409
Case No. 49576	**MOTION TO ALTER OR AMEND SPECIAL MASTER'S MEMORANDUM DECISION / REPORT & RECOMMENDATION**

COMES NOW, the claimant/objector Brian T. Farley ("Farley"), by and through his attorneys of record, and pursuant to *CSRBA Amended Administrative Order No. 1* ("AO1") Rule 18 hereby submits the foregoing *Motion to Alter or Amend Special Master's Memorandum Decision / Report & Recommendation.* Farley's motion is further supported by the *Declaration of Brian T. Farley* ("*Farley Dec.*"), the *Declaration of Travis L. Thompson* ("*Thompson Dec.*"), and the exhibits attached thereto, as well as any and all previous filings in these subcases.

For the reasons set forth below, Farley requests the Special Master to reconsider and amend the *Memorandum Decision and Order on Gideons' Motion for Summary Judgment* ("*Decision*") issued on March 19, 2024, require IDWR to follow the docket sheet procedure for its proposed new recommendations for water right nos. 95-16445 and 95-18409, and reset the matter for the previously scheduled trial on the merits.

INTRODUCTION

Farley requests reconsideration and amendment of the following rulings in the Special Master's *Decision*:

1. The finding (based upon ex-parte discussions with IDWR following the summary judgment oral argument) that Parcel S is not part of Kootenai County parcel identification no. 52N03W095000 owned by Brian Farley.

2. Failing to require any and all changes to IDWR's recommendations to water right nos. 95-16445 and 95-18409 to follow the docket sheet notice procedure for an amended director's report.

3. The finding that Farley had no legal right to extinguish a portion of his own property right (i.e. domestic/stock water right from the Lower Well on Parcel I).

4. The finding that Farley could not amend his water right claim 95-16445 and eliminate domestic and stockwater use on Parcel I as allowed by Idaho law.

5. The finding that the Gideons could beneficially use two exempt domestic water rights (95-17752 and 95-18409).

6. The finding that Farley did not abandon the domestic and stockwater water right from the Lower Well on Parcel I.

7. The finding that Farley is precluded from putting on admissible evidence of intent regarding what water rights were intended to be conveyed in the ambiguous deed because of the integration clause in the real estate purchase and sale agreement with the Gideons.

8. Alternatively, if the domestic/stockwater right on Parcel I could not be eliminated or abandoned, then the Special Master should proportionately divide the water right and its uses pursuant to the doctrine set forth in *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984) and *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990).

The points and authorities supporting the above issues are set forth below. Farley requests the Special Master to reconsider and amend the *Decision* and require IDWR to follow the docket sheet procedure for any "supplemental" or amended director's report for proposed changes to its recommendations that have not been previously disclosed to the parties. The procedural and substantive errors should be corrected by granting Farley's present motion.

ARGUMENT

I. IDWR Failed to Follow Idaho Law for Recommended Changes to Water Right Nos. 95-16445 and 95-18409 / The Special Master Should Amend the *Decision* to Recognize Parcel S as part of RP52N03W095000 and part of the Authorized Place of Use for Water Right No. 95-16445.

The discussion concerning parcels and the claimed place of use for water right 95-16445 should be amended and clarified. *See Decision* at 2, n. 1; at 3, n. 3; at 4, n. 4. Moreover, any changes to IDWR's recommendations that did not follow the CSRBA Court's docket sheet notice procedure and are based upon ex parte discussions with IDWR agents should be set aside. First, it is troubling how the Special Master's erroneous findings on this issue arose procedurally. The conclusion that Parcel S is not mentioned as a "place of use" appears to be derived from an email and phone conversation(s) between the Special Master and Craig Saxton (IDWR) that occurred sometime after oral argument on the summary judgment motion was held on March 4, 2024. *See Thompson Dec.* The CSRBA subcase summary report for water right 95-16445 lists an email string between the Special Master and Craig Saxton dated March 14, 2014, wherein Mr. Saxton proposes to "change" IDWR's recommendations for water right nos. 95-16445 and 95-18409 without any prior notice to the parties. *See* Ex. A to *Thompson Dec.* Apart from the Parcel S discussion, Mr. Saxon notes other "changes" to the water right recommendations that were "**NOT** mentioned in the 706 report." (emphasis in original); *see* Ex. A to *Thompson Dec.*

Farley was only made aware of this email when counsel accessed the CSRBA's website on March 21, 2024. *See Farley Dec.* at 2, ¶ 7; *Thompson Dec*. The sua sponte changes to IDWR's recommendations did not follow Idaho law and the Court's procedural rules. *See* I.C. § 42-1411 ("(6) . . . The director shall also serve on each claimant or the claimant's attorney whose water right is listed in the director's report a notice of filing of the director's report.") (emphasis added); *CSRBA AO1* Rule 5 ("if an Amended Director's Report is required under these Rules or is otherwise filed by IDWR, the Amended Director's Report shall be docketed in the Subcases indicating the type of amendment made and will appear on the Docket Sheet.") (emphasis added).

IDWR's proposed changes to the water right recommendations, without notice to Farley or in compliance with the CSRBA docket sheet procedure, plainly violate the above statute and rule, as well as Farley's constitutional right to due process. *See* U.S Const. amend. XIV; Idaho Const. art. 1, § 13; *South Valley Ground Water Dist. v. IDWR*, __ Idaho __; 2024 WL 136840 at *30 (Idaho 2024) ("Procedural due process requires that there be some process to ensure that an individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions"); *State v. Doe*, 147 Idaho 542, 546, 211 P.3d 787, 791 (Ct. App. 2009) ("notice must be provided at a time which allows the person to reasonably be prepared to address the issue") (emphasis added); *see also*, *In re Jerome County Bd. of Com'rs*, 153 Idaho 298, 311, 281 P.3d 1076, 1089 (2012) ("When a relevant statute requires specific notice and hearing requirements for a possible effect of a zoning law on property rights, or in some instances merely where a body gives such notice and hearing, the action is said the be quasi-judicial in nature . . . The notice and hearing thus becomes necessary for due process, and such requirements may not be dispensed with").

Since IDWR provided no notice of the proposed changes to Farley, the de facto "amended" director's report violated Idaho law and the Court's rules and is void as a matter of law. At a minimum, the Special Master must reconsider the *Decision* and report and recommendation and require IDWR to follow the docket sheet notice procedure to provide Farley with proper notice and an opportunity to address IDWR's proposed changes to its recommendations.

Further, apart from the procedural error, the information that IDWR provided to the Special Master was substantively wrong as Parcel S is part of the place of use for water right no. 95-16445. First, the adjudication code requires a "notice of claim" form to include a "legal description of the place of use." I.C. § 42-1409(1)(h). The IDWR claim form includes "Parcel (PIN)" numbers in addition to the quarter quarter description, however those numbers are not included on a partial decree but may show up as "explanatory material" in IDWR's file. Mr. Farley filed his original claim on July 16, 2009 and listed the following legal description for his claimed stockwater use: Township 52N, Range 03W, Section 9, SENW and SESW. *See* 706 Report, Attch. D. He also listed the following parcel numbers: 52N03W094700, 52N03W095000. IDWR issued a preliminary recommendation on February 9, 2018 listing the stockwater use in the SENW and NESW. *See* 706 Report, Attch. E. The parcel numbers show up in the "explanatory material" of that preliminary recommendation. *Id.* Mr. Farley filed his *Notice of Error Reply* on May 16, 2018 stating the "place of use is Parcel #52N03W095000 only." *See* 706 Report, Attch. F (emphasis added). The parcel identification number ending in "95000" covers three separate quarter quarters: SENW, NESW, and SESW. *See* 706 Report, Attch. V.

After further meetings and filings with IDWR, Mr. Farley filed his amended notice of claim on January 25, 2019. *See* 706 Report, Attch. J. In that amended claim, the place of use for stockwater purposes is listed as the NESW. *See id.* The parcel number is identified as "Kootenai." *Id.* Mr. Farley had additional correspondence with IDWR agent Kaila Savage about the place of use and how the new preliminary recommendation had listed the parcel numbers incorrectly for the point of diversion and place of use. *See Farley Dec. in Support of Response to Summary Judgment Motion* at 6-7, Ex. G. The new Director's Report for amended claim 95-16445 was issued on February 25, 2019 and listed the place of use as "NESW" but still the incorrect parcel number in the explanatory material as "52N03W097100." 706 Report, Attch. L. Again, parcel identification number 52N03W095000 covers three separate 40-acre quarter quarter legal descriptions, which are the SENW, NESW, and SESW. *See* 706 Report, Attch V; *see also, Farley Dec.*

Mr. Farley owns Parcels S and T which are both located in the NESW, as well as the SENW and SESW. *See* 706 Report, Attch. V; *see also, Farley Dec.* The location of the parcels is identified by the Kootenai County Assessor's office. *See* Ex. B to *Thompson Dec.* (Gideon's Trial Ex. 14). The parcels are also identified on the survey that was completed to adjust the boundary lines. *See* Ex. C to *Thompson Dec.* (Farley Trial Ex. T). Together, the parcels are described by the County under a single Parcel ID (PIN): "52N03W095000." *See* Ex. D to *Thompson Dec.* (Kootenai County Assessor Information).

Mr. Farley later purchased other parcels in the subdivision apart from Parcels I, S, T, and V. *See Farley Dec.* He sold property known as "Parcel U" to Mark Cruson and Sharon Herlin on June 10, 2022. *See* Ex. E to *Thompson Dec.* (Kootenai County Assessor Information); *see also, Farley Dec.* This property is described by Parcel ID (PIN): "52N03W095300." *Id.* This

property is located contiguous to the west and south of Mr. Farley's property, Parcels S and T. *See Farley Dec.*

The Special Master's discussion of the various parcels is confusing in that it is reliant upon parcel numbers and the fact that the claims "do not specifically mention Parcel S as a place of use." *Decision* at 3, n. 3. As noted above, the statutory claim form requirement identifies a legal description, which has been listed as NESW. That quarter quarter covers the bulk of Parcels S and T, but Farley's property under these parcels also includes certain land in the SENW and SESW. The parcel ID number of 52N03W09500 does cover Parcel S as well as the three quarter quarters referenced above. Further, the parcel ID number was identified in the 706 Report (despite IDWR's incorrect assumption that it was not covered later). *See* 706 Report, Attch. V. At a minimum the correct quarter quarters covered by the parcel identification number should be reflected in IDWR's recommendation.

The Special Master's *Decision* appears to be influenced by the fact that the Department provided additional information after the Gideons' motion for summary judgment was briefed and argued that Farley did not have an opportunity to address. *See Thompson Dec.* The Special Master notes that "Parcel S is not identified on the map" attached to the Director's Report (Attch. V to 706 Report). But again, that is not the standard for a claim form or the legally described place of use. The Special Master also mistakenly claims that any references to RP52N03W095000 in claim documents and notice of error do not include "Parcel S." *See Decision* at 3, n. 3. This is wrong as explained above. Moreover, the mistake is presumably based upon an email from Craig Saxton dated March 14, 2024. *See* Ex. A to *Thompson Dec.* In that email Mr. Saxton wrongly claims that Parcel S "is now owned by Mark Cruson." *See id.* Further, Mr. Saxton wrongly claims that "Farley sold that parcel to Gideon on 6/10/22." *Id.*

(emphasis added). Notably, unlike water right 95-16445 and Parcel I, Mr. Farley did not amend water rights 95-16444 and 95-09252 because he did intend to convey those rights in the purchase and sale agreement of the property to Mr. Cruson and Ms. Herlin. *See Farley Dec.* Mr. Farley sold that property (Parcel U) to Mr. Cruson and Ms. Herlin on June 10, 2022 and that property is identified as RP52N03W095300. *See* Ex. E to *Thompson Dec.*

Further, contrary to the statements in the *Decision*, Mr. Farley continues to own Parcels S and T which are identified as RP52N03W095000. *See* Ex. D to *Thompson Dec.* Corroborating this public document information from Kootenai County is Mr. Farley's testimony on this issue in the first district litigation:

> Q. [BY MR. BISSELL] Okay. And then we see the one on the right, halfway down it ends in 5000. What parcel's that?
>
> A. [BY MR. FARLEY] That's one parcel number for two parcels, **parcels S and T.**

Tr. p. 625:19-22 (emphasis added); Ex. F to *Thompson Dec.*

> Q. And then – 5000, that's which parcel?
>
> A. S and T.

Tr. p. 626:9-10; Ex. F to *Thompson Dec.*

> Q. [BY MR. SCHMIDT] I want to talk about the hydrant that you have run – or the waterline that you've run from the cistern to parcel T below Derting Road, which used to be parcel S. Do you know what I'm talking about?
>
> A. [BY MR. FARLEY] No.
>
> Q. Okay. The hydrant that a lock was put on and then removed.
>
> A. That's still parcel S.
>
> Q. Okay. That is still parcel S, okay.
>
> A. That's correct.

Q. Okay, So that line, the line that runs from the cistern to parcel S, do we know what we're talking about?

A. Yes.

Tr. p. 704:6-19 (emphasis added); Ex. F to *Thompson Dec.*

Judge Christensen recognized the same in his *Memorandum Decision and Order*: "5. IN 2009, Farley claimed a water right for domestic, stockwater, and irrigation purposes with the Lower Well as the point of diversion for Parcels I, S, and T. Farley later amends this claim of water right in 2019, changing the point of use to just Parcels S and T." 706 Report, Attch. S (*Memorandum Decision* at 3) (emphasis added).

Those parcels are partly described in the place of use for recommended water right 95-16445 that lists the place of use as: "T52N R03W NESW, Kootenai County, Idaho." *See* 706 Report at 12; Attch. L. Again, a full review of the IDWR map shows that the complete place of use for parcel identification no. RP52N03W095000 shows that it covers portions of the SENW and SESW as well. 706 Report, Attch. V. Any parcel number reference in IDWR's "explanatory conditions" for water right 95-16445 should therefore continue to list Parcels S and T as associated with the water right's place of use.

Apart from violating the statute and rule referenced above, it was error for the Special Master to receive unsworn testimony from IDWR without giving the parties a chance to cross-examine or address it before issuing the decision on the Gideons' summary judgment motion. The briefing was all submitted and the motion was heard on March 4, 2024. IDWR's email was sent over ten (10) days later without any notice to the parties. *See Farley Dec.*, *Thompson Dec.* The proposed changes to IDWR's recommendations were not served on the parties. *See id.* Nothing in Idaho's adjudication code or the Court's administrative procedures allows the Department to submit additional ex parte evidence without notice to the parties, and then allow

that information to be used in the Court's decision. Just the opposite, procedural due process and *CSRBA AO1* Rule 11(g) requires the Department to "serve" any supplemental director's report "on each Party and shall file the report with the Court." The Special Master received this erroneous information and used it in his decision without Farley having an opportunity to address and respond to it. For this reason, the Court should grant Farley's motion and amend the decision and recommendation for water right 95-16445 accordingly.

At a minimum, any changes to IDWR's recommendations that would constitute a "supplemental" director's report must follow the Court's docket sheet procedure. The Special Master should alter and amend the *Decision* accordingly.

II. The Special Master Should Amend the *Decision* Concluding that Farley Had No Right to Amend Water Right Claim 95-16445 as Farley Had the Right and the Evidence Shows he Intended to Retain All Water Rights to the Lower Well for the Parcels He Continued to Own.

The Special Master concluded that Farley's "omission" of the place of use and domestic / stockwater purpose of use for Parcel I "did not have the effect of contemporaneously eliminating such uses from the water right or transferring such uses elsewhere." *Decision* at 8. In other words, the Special Master's finding gives no effect to a claimant's legal right to amend a water right claim in the adjudication as well as the right to eliminate or extinguish a property right interest if the owner so chooses. *See* I.C. § 42-1409A.

First, Farley did not simply "omit" the domestic and stockwater use on Parcel I when he amended his claim in 2019, he purposely did so as he filed a separate water right claim for that property from the Upper Well (95-17752). *See generally, Response to Motion for Summary Judgment*. Idaho law allows a claimant to file an "amendment" of the notice of claim in the adjudication. *See* I.C. § 42-1409A. The Special Master's decision effectively nullifies that statutory right by concluding Farley had no right to amend his claim the way he did. The uses

were not simply "unclaimed," they were purposely extinguished or moved by Farley's amendment. Notably, IDWR provided Mr. Farley with a Part 2A "transfer" water right report that Farley believed completed what he intended to do with the Lower Well water rights, i.e. retain for his sole use on his property. *See Declaration of Brian T. Farley in Support of Response in Opposition to Summary Judgment Motion* at 6; Ex. F (filed 2/23/24) (hereinafter referred to as "*Farley Opp. Dec.*").

In essence, Farley no longer wanted to use any domestic/stockwater from the Lower Well on Parcel I as he intended to sell that property with its own water source and water right (i.e. Upper Well and water right claim 95-17752). *See id.* at 6, ¶ 25. The Gideons argued that Farley did not retain or withhold any water rights when they purchased their parcel in 2019. *See generally, Gideons' Memo* at 9-12. That assumption overlooks the many actions Farley undertook to disclaim the use of water right no. 95-16445 on Parcel I. *See generally, Farley Opp. Dec.* Mr. Farley clearly had the intent to keep any and all water rights to the Lower Well for his exclusive use on the property he retained, as evidenced by all of his actions taken in 2018 and 2019 for his amended claim process—actions undertaken months before the Gideons entered the scene or were even known to Farley. At the least, a question of intent and a genuine issue of material fact are present that necessitate fact finding and a trial on the merits.

Following efforts made by Mr. Farley to amend his claims, he received a letter from IDWR enclosing a Revised Preliminary Recommendation for his claims acknowledging the transfers he had made. *See Farley Opp. Dec.* at 6, ¶ 26. As presented by that document from IDWR, Mr. Farley understood that he successfully accomplished the transfer of any water rights associated with the Lower Well solely for his retained use on Parcels S and T and that claim no. 95-16445 was no longer valid for use on Parcel I. *See id.* at 7, ¶ 28. Further, Mr. Farley received

a letter from IDWR informing him that the recommendations for his water right claims were reported to the CSRBA District Court, as represented. *See id.* at 8, ¶ 27. Through the actions taken by Mr. Farley to disclaim use, Mr. Farley displayed intent to relinquish any use of the domestic and stockwater uses under claim no. 95-16445 on Parcel I and actually relinquished that right, as confirmed through his communications with IDWR, IDWR's explicit confirmation that the transfers had been reported, and his discontinuation of use of the claim on Parcel I at that time.

Due to his clear intent and subsequent relinquishment, refusal to acknowledge Mr. Farley's voluntary transfer of his water right is in direct contravention to basic rules of property right ownership and Idaho water law. Water rights are real property, according to Idaho Code § 55-101. Real property is a constitutionally protected interest covered by the Fifth Amendment that establishes the freedom to buy, sell, and utilize property, buttressed by the long-recognized "bundle of property rights" concept that acknowledges the right of disposition for property owners. "The right of a property owner to dispose of his or her property on terms that he or she chooses has come to be recognized as a separate stick in the bundle of rights called property." *See e.g., Nelsen v. Nelsen*, 170 Idaho 102, 133; 1508 P.3d 301, 332 (2022). If an individual is barred from dispossessing their property right, in this case a water right through the amended claim process, they do not truly have a full property right.

Therefore, by failing to recognize Mr. Farley's voluntary relinquishment of his right to use Claim No. 95-16445 on Parcel I, a "stick" in Mr. Farley's property right bundle is forcefully removed and basic property rights are flagrantly ignored because Mr. Farley is forced to keep a right that he does not want. Beyond the contravention of property rights, failure to recognize Mr. Farley's relinquishment of claim no. 95-16445 violates Idaho Code's requirement that water be

beneficially applied. The Gideons already hold a decreed domestic water right no. 95-17752 for Parcel I. The Gideons therefore have no need for a second exempt domestic water right. As a matter of public water policy, holding two exempt domestic water rights for the same property and home would constitute an impermissible waste of the state's groundwater resources and flies in the face of beneficial use. Water must be beneficially applied, pursuant to section 42-104 and the doctrine of beneficial use. *See IGWA v. IDWR*, 160 Idaho 119, 129, 369 P.3d 897, 907 (2016) ("The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate"). The CSRBA Court is charged with decreeing a water right based upon beneficial use. *See* I.C. § 42-1412(6) ("shall enter a partial decree determining the nature and extent of the water right").

Restricting the property rights of an individual to sell, abandon, or fail to claim their water right in an adjudication would lead to water being unnecessarily applied, thereby causing non-beneficial use, or abandonment. The person who is entitled to use of water or owns land to which water is made appurtenant by a decree of the court or provisions of the constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water in whole or in part on the land receiving the benefit of those rights. *See* I.C. § 42-108. This section of Idaho Code is violated by the refusal to recognize Mr. Farley's voluntary relinquishment of use of his claim on Parcel I—essentially a refusal to allow Mr. Farley his established right to relinquish his property. The Special Master's decision fails to recognize this statutory right that Farley had.

By filing amended claims several months before the Gideons' offer and their eventual purchase of Parcel I, Farley demonstrated clear intent that the water right for the property he retained was not appurtenant to Parcel I and the home the Gideons purchased. Due to the clear

intent shown by Farley's actions, a genuine issue of material fact exists as to whether any water right associated with the Lower Well was conveyed to the Gideons with their purchase. Mr. Farley had no obligation to inform the Gideons of the change in his water right claims because they were not even potential buyers at the time. Rather, it was the Gideons who bore the obligation to investigate any water rights associated with the property they were purchasing.

Case law further supports this contention in the Idaho Supreme Court case *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007). Based on the *Joyce* 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). As explained above, Mr. Farley's intent is clearly outlined in the series of actions taken to segregate Lower Well water and use it on his retained property, avoiding the need for reservation of Farley's water right on the deed. Within the unique context of an adjudication, as is occurring where the Farley and Gideon properties sit, Mr. Farley had another method through which he could have given up his right on Parcel I. Within an adjudication, an individual has the freedom to sell or abandon property during adjudication by filing an amended claim. *See* I.C. § 42-1409A.

Any claimant may file suit…from any water system for which an adjudication has not started or is not complete. Idaho Code § 42-1404. This section uses the permissive word "may" to express that no user is required to file a water right in an adjudication. Logic dictates that, as long as rights are filed for by the end of the adjudication, nothing prevents their sale, transfer, or abandonment during the course of the adjudication. IDWR's Frequently Asked Questions webpage responds to the question "what happens if I don't file a claim?" as follows: if an

adjudication claim is required for your water use, failure to file that claim before the final decree will result in a determination that the water right no longer exists. In other words, an adjudication is another way to give up a water right without it being noted on a deed.

Mr. Farley displayed a clear intent that any water rights associated with the Lower Well be retained for his exclusive use on Parcels S and T. He discontinued use of the right on Parcel I between 2017 and 2019 and received an acknowledgement from IDWR that such changes were reflected on the Part 2A transfer report that its agents gave him. *See Farley Opp. Dec.* at 6, ¶ 26.

In sum, nothing required Farley to claim a domestic/stockwater use on Parcel I and he had a statutory right to amend his claim and extinguish any uses on that property as he chose. At the least, genuine issues of material fact are present, necessitating a trial on the merits and precluding summary judgment.

III. Farley Abandoned the Portion of Water Right 95-16445 That Had Been Established to Provide Domestic and Stockwater uses for Parcel I from the Lower Well.

The Special Master erred by holding that Farley had not abandoned the water right from the Lower Well for Parcel I and the residence because the water right was successfully abandoned in 2017, well before the Gideons entered into the REPSA and received the property by conveyance of the deed.[1] *See Decision* at 9. The Special Master erred by focusing on the fact that water from the Lower Well continued to be conveyed to the cistern for use on Parcel I "during the time period from before closing until April 2023."[2] *Id.* The right was abandoned

[1] The Special Master makes note that the "abandonment issue is presented for the first time in Mr. Farley's *Response*" and that it is "unusual." *See Decision* at 8, at 9, n. 6. The subcases were set for trial and discovery was ongoing during the time the summary judgment motion was heard, accordingly the timing of presenting this defense should not have any bearing on its validity. Moreover, even if it is "unusual" that does not mean it should be denied if the requisite elements are met. The Special Master should alter and amend his findings on this issue.

[2] The facts concerning the "permissive" use of water from the Lower Well from late spring 2019 until the spring of 2023 are described in the *Farley Opp. Dec.* and page 9, ¶ 36 and Exhibit I (Mr. Farley's July 6, 2023 declaration in the first district case at page 5, ¶ 21); *see also, Thompson Dec.*, Ex. G (emails from Mr. Farley's counsel to the

when Farley discontinued the use from the Lower Well to Parcel I in 2017 coupled with the intent to no longer have a water right from the Lower Well for that property (i.e. entire claim amendment process). *See generally, Farley Opp. Dec.* The moment in time when Farley discontinued the use with the intent to abandon is all that is required under Idaho law.

There are two types of "abandonment" in Idaho water law, statutory forfeiture and common law abandonment. *Gilbert v. Smith*, 97 Idaho 735, 738 (1976). If a water rights holder fails to use a water right for five consecutive years, the right is forfeited and lost. *Id.* This concept of forfeiture, which is time-based, is distinct and wholly separate from common law abandonment, which is intent-based.

Common law abandonment occurs when there is a "concurrence of an intention to abandon" a water right with and "the actual relinquishment" of the water right. *Id.* (citations omitted). There is no length of time necessary for common-law abandonment to occur; the "essential element" is intent. *Id.* "'The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete.'" *Chill v. Jarvis*, 50 Idaho 531, (1931) (emphasis added). Intent "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 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)).

At summary judgment, the trial court "must liberally construe the facts, and draw all reasonable inferences in favor of the non-moving party." *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 685, 365 P.3d 1033, 1039 (2016). The Special Master ignored this directive and assumed that Mr. Farley did not relinquish his

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Gideon's counsel in 2021 and 2022 regarding his permissive use of water from the Lower Well pending the first district litigation, which is still ongoing).

water rights in the Lower Well for Parcel I despite his Declaration indicating both an intent to abandon and an actual relinquishment of use. *Farley Opp. Dec.* at 3-5, ¶¶ 7-18. The two elements for abandonment were met and the *Decision* erroneously discounted this fact by focusing instead on water being provided from 2019-2023. On summary judgment, the court cannot ignore the facts alleged by the non-moving party. Mr. Farley clearly states that he shut off the water from the Lower Well in 2017 which is an actual relinquishment. *Id.* The *Decision* should therefore be amended to deny summary judgment on this issue alone.

Mr. Farley also set out facts demonstrating his intent to abandon which completes the abandonment. Specifically, Mr. Farley's intent to abandon is indicated by the facts that he, among other things: 1) actually shut off water from the Lower Well to the cistern for the residence in 2017; 2) filed the Notice of Error Reply which indicated that he "wished to change the water right…purpose [for the Lower Well] to stockwater only, and the place of use to Parcels S and T only; 3) delivered a Change of Ownership Form to IDWR and sought to amend the Upper Well Claim to include the residential use; and 4) continued communication with IDWR to ensure the claims were amended to reflect a residential use for the Upper Well and stockwater use only for the Lower Well. *See Farley Opp. Dec.* at 3-6, ¶¶ 7-25. These and other facts indicating Mr. Farley's intent are set forth more fully in Mr. Farley's *Response in Opposition to Gideons' Motion for Summary Judgment* at 15-17, and are incorporated herein by reference. To the extent that the Gideons dispute these facts, the issue should be resolved at trial, not on a motion for summary judgment.

Therefore, the Special Master should not have looked at a later-in-time use to establish that there had been no abandonment in 2017, but should have construed the facts in Mr. Farley's favor and determined whether there was a dispute as to material facts concerning the

relinquishment and intent to abandon the water rights. Because there is a genuine dispute between Mr. Farley and the Gideons on this issue, the Special Master should not have granted summary judgment, but reserved the issue for a trial on the merits. Mr. Farley asks for the *Decision* to be amended to deny summary judgement because Mr. Farley successfully abandoned the water right to the Lower Well for residential use on Parcel I.

IV. Because the Warranty Deed is Ambiguous as to What "Appurtenances" are Included, the Special Master Should Have Examined All Facts and Circumstances, not just the REPSA to Determine if There was a Genuine Issue of Material Fact that Would be Admissible in Evidence.

It is undisputed that the Warranty Deed granted to the Gideons conveyed the property "with its appurtenances;" however, the term "appurtenance" is ambiguous and undefined. *See generally Memorandum Decision and Order Granting Motion for Summary Judgment* at (SRBA Subcase Nos. 63-31194A and 63-31194B) (July 8, 2009) (concluding that it was uncertain and a question of fact which water rights passed with the property by only reference to the phrase "appurtenant to").

First, if the water right was either extinguished or transferred by the amended claim, or abandoned prior to the closing date as set forth above in Section III, the water right could not have been conveyed as an appurtenance to the property because there was nothing to convey. As discussed above, the Special Master improperly concluded that the water right was neither transferred nor abandoned prior to closing. If the right was successfully extinguished or transferred, it was not appurtenant and could not have been conveyed. If the right was completely abandoned, the right no longer existed and could not have been conveyed. The *Decision* should therefore be modified to deny Gideons' *Motion for Summary Judgment* so that the factual disputes underlying the amended claim and abandonment issues can be resolved at trial.

Second, even if the water right was not successfully extinguished or changed by the amended claim, there was a genuine dispute of material fact as to the intention of the parties and the Special Master did not properly consider all of the facts and circumstances. The Special Master summarily looked at the Warranty Deed which conveyed appurtenances and the REPSA which included in the transaction "any and all water rights…appurtenant to the PROPERTY…unless otherwise agreed to by the parties in writing." *Decision*, at 13; REPSA § 7. The Special Master then erred by relying solely on the REPSA's integration clause as controlling and finding that the "entirety of the agreement between the parties was contained in the REPSA which, by its terms, could only be modified by a written agreement signed by the parties."[3] *Id.* at 14. The Special Master improperly relied on the REPSA as the controlling document to define appurtenances even though the REPSA had merged into the deed and the deed's language is controlling.

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

[3] Even without the merger doctrine, the Special Master appears to have overlooked the fact that there was a subsequent signed writing which modified the REPSA—the deed.

Because the merger doctrine applies and the deed is ambiguous, the Special Master should have looked to the intention of the parties, which is a fact specific inquiry. *See id.* at 773 (noting that the Court must consider all the surrounding facts and circumstances to construe an ambiguous term and give effect to the intent of the parties). The Special Master failed to consider all "surrounding facts and circumstances" to determine the parties' intent and stopped at the language in the REPSA alone. This failure to consider all the facts is an error that should be corrected.

"If a deed's language is ambiguous, the parties' intent becomes a question of fact settled by a trier of fact." *Camp Easton Forever, Inc. v. Inland Nw. Council Boy Scouts of Am.*, 156 Idaho 893, 899–900, 332 P.3d 805, 811–12 (2014) (citing *Hoch v. Vance*, 155 Idaho 636, 639, 315 P.3d 824, 827 (2013). To give effect to the intent of the parties, "the contract or other writing must be viewed as a whole and in its entirety." *Sells v. Robinson*, 141 Idaho 767, 773, 118 P.3d 99, 105 (2005), *holding modified by Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010) (citing *Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000)). "The Court *must* consider *all* of the surrounding facts and circumstances. *Id.* (citing *Bumgarner v. Bumgarner*, 124 Idaho 629, 637, 862 P.2d 321, 329 (Ct. App. 1993). Where the parties claim a difference of intent, the trier of fact weighs the credibility of the witnesses and their conflicting testimony. *See Sells*, 141 Idaho at 773, 118 P.3d at 105.

As the Special Master noted, "the Warranty Deed does not specifically state what appurtenances, if any, are being conveyed" and that it was "necessary to look outside the four corners of the Deed itself for the purpose of identifying said appurtenances." *Decision* at 12.

The question, properly framed, is what appurtenances did Farley actually intend to convey with the broad and undefined term in the deed. Mr. Farley made clear that his intention

was only to include the Upper Well and its associated water rights. *Farley Dec.* at 8, ¶¶ 31-32. Further Mr. Farley indicated that discussions of wells and well yield during the sale only covered the Upper Well. *Id.* The Special Master improperly ignored the steps taken by Mr. Farley to amend the water right claim, the statements made by Mr. Farley to the Gideons, what was listed in the sale, and other facts presented.

The Gideons did not present facts of what their intent was, but instead improperly relied on language of the REPSA and its integration clause. *See Gideons' Reply in Support of Motion for Summary Judgment*, at 7-13. To the extent the Gideons claim an intent different from Mr. Farley's, these disputed facts should be resolved at trial where the credibility of witnesses can be evaluated by the trier of fact.

V. Alternatively, the Special Master Erred in Not Splitting the Rights Proportionately According to Property Ownership Pursuant to Well-Established Precedent.

In the alternative, if the Special Master does not grant Farley's requested relief set forth above, then the Special Master should modify the recommended water rights based on a proportionate split according to the property ownership legal premise set forth by the Idaho Supreme Court in *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984) and *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990).

In *Crow*, the plaintiffs sought to quiet title to certain water rights in Fox Creek near Victor, Idaho. 107 Idaho at 464, 690 P.2d at 919. The trial court found that the appropriator of a water right could use it on the land for which it was appropriated or on other lands, and that the water right was essentially a personal right. The Supreme Court reversed and found that the water right "at issue herein was appropriated for the lands in Sections 26 and 27, as described in the Rexburg decree." 107 Idaho at 466, 690 P.2d at 921. The Court further instructed the trial court to divide the water right on remand as follows:

> The trial court is instructed to divide the water between the Crow and Gordon properties, in proportion to the share that each represents of the property described as belonging to Byrne in the Rexburg decree. As we held in *Hunt v. Bremer*, 47 Idaho 490, 493, 276 P. 964, 965 (1929), "A division of a tract of land to which water is appurtenant, without segregating or reserving the water right, works a division of such water right in proportion as the land is divided," *citing Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911).

107 Idaho at 467, 690 P.2d at 922.

The proportionate split of water rights according to the land divided was later approved in *Silverstein v. Carlson* as well. In that case, the Court explained:

> Although there are distinctions between the circumstances here and the circumstances in *Crow* and in the cases upon which *Crow* relied, we conclude that the method approved in these decisions is applicable to the allocation here. The Court in *Crow* cited *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911), which dealt with the allocation of water rights that had been acquired for 80 acres. Twenty of those acres were conveyed without reference to the water rights that accompanied the conveyance. . . . Therefore it is logical that the Rexburg Decree awarded the water rights to Foster's predecessor in interest from three sources for use on five parcels in proportion to the number of acres in each parcel. This leads us to the same proportional method of allocating the water rights in the Rexburg Decree awarded to Foster's predecessor in interest as the method specified in *Crow*. Although our rationale is different, the result is the same.

118 Idaho at 460-61, 797 P.2d at 860-61.

Here, the Special Master concludes that Farley was the owner of water right 95-16445 in its entirety prior to conveying Parcel I to the Gideons in 2019. *See Decision* at 8, 17-18. The Special Master also found that the deed conveyed the property with its appurtenances, including that portion of water right no. 95-16445 now represented by water right claim 95-18409. *See Decision* at 17-18. Since the deed did not identify what portion of the water right was being conveyed, pursuant to the Supreme Court's proportionate spilt method set forth above, the Court

should divide the water rights for domestic and stockwater purposes as follows: Farley 63% (to be identified under 95-16445) and Gideons 37% (to be identified under 95-18409).[4]

After all, Farley owns 18.37 acres identified by parcel identification no. 52N03W95000 and Gideons own 10.88 acres identified by parcel identification no. 52N03W94700. *See* Ex. B to *Thompson Dec.* (acres listed on the "after" map accompanying Victoria Williamson's letter to Katherine Gideon dated January 2, 2020). Applying the proportionate split allocation method based upon property ownership, the Special Master should alter and amend the recommendations accordingly so that Farley receives 63% of the stockwater/domestic water right and Gideons receive 37% of the same right. At a minimum there is a disputed genuine issue of material fact that should be determined at trail rather than through IDWR's new recommendations that have not proceeded through the docket sheet procedure.

CONCLUSION

For the reasons set forth above Farley requests the Special Master to alter and amend the *Memorandum Decision and Order on Gideons' Motion for Summary Judgment* and the *Special Master's Report and Recommendation* accordingly.

DATED this 29th day of April, 2024.

MARTEN LAW LLP

Travis L. Thompson

Attorneys for Claimant/Objector Brian T. Farley

[4] The percentage split is arrived by taking the total acreage of the Farley and Gideon properties, 29.25 acres and dividing that by the number of acres each party owns; Farley 18.37 and Gideons 10.88).

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2024, I served true and correct copies of the foregoing **MOTION TO ALTER OR AMEND** by the method indicated below, and addressed to the following:

Clerk of the Court CSRBA 253 3rd Ave. North P.O. Box 2707 Twin Falls, Idaho 83303-2707	____ U.S. Mail, postage prepaid _x_ Hand Delivery ____ Facsimile ____ Overnight Mail ____ Email
Andy Waldera Sawtooth Law Office 1101 W. River St., Suite 110 Boise, Idaho 83702 andy@sawtoothlaw.com	_x_ U.S. Mail, postage prepaid ____ Hand Delivery ____ Facsimile ____ Overnight Mail _x_ Email
Director of IDWR Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098	_x_ U.S. Mail, postage prepaid ____ Hand Delivery ____ Facsimile ____ Overnight Mail ____ Email
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 83720 Boise, Idaho 83720-0010	_x_ U.S. Mail, postage prepaid ____ Hand Delivery ____ Facsimile ____ Overnight Mail ____ Email
United States Dept. of Justice Environment & Natural Resources Division 550 W Fort Street, MSC 033 Boise, Idaho 83724	_x_ U.S. Mail, postage prepaid ____ Hand Delivery ____ Facsimile ____ Overnight Mail ____ Email

Travis L. Thompson