

RECEIVED

AUG 26 2024

DEPARTMENT OF
WATER RESOURCES

Travis L. Thompson, ISB #6168
Abby R. Bitzenburg, ISB #12198
Bryce M. Brown, ISB #12310
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Facsimile: (208) 735-2444
Email: tthompson@martenlaw.com
abitzenburg@martenlaw.com
bbrown@martenlaw.com

Attorneys for Claimant/Objector Brian T. Farley

**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 & 95-18409
)
) **BRIAN FARLEY'S NOTICE OF**
) **CHALLENGE**
)
)
)

COMES NOW, Brian T. Farley ("Farley"), claimant and objector in the above-referenced subcases, by and through undersigned counsel of record, and pursuant to CSRBA *Amended Administrative Order 1* ("AO1"), Section 18, hereby submits this *Notice of Challenge* in the above-captioned subcases. Farley challenges the Special Master's March 19, 2024 *Memorandum Decision and Order on Gideons' Motion for Summary Judgment* ("SJ Decision") and the August 9, 2024 *Order Granting in Part and Denying in Part Farley's Motion to Alter or Amend* ("AA Order").

The subject of this litigation concerns Mr. Farley's water right claims, his actions and intent, that all occurred prior to selling certain property to Arthur and Katherine Gideon ("Gideons") in the summer of 2019. The subcases concern Mr. Farley's legal rights as a private water right claimant in the CSRBA, his specific actions and decision to abandon a portion of a domestic/stock right, and the interpretation of an ambiguous warranty deed. At their heart, the subcases involve genuine issues of material fact that cannot be decided on summary judgment and must proceed to trial. Alternatively, if the Special Master's legal ruling on the Gideons' summary judgment motion is upheld, this challenge addresses whether the water right (95-18409) should be recommended consistent with the property split allocation method approved and required by the Idaho Supreme Court. Either way, the Special Master's decision must be corrected and either remanded or reversed by the Presiding Judge.

FACTUAL & PROCEDURAL BACKGROUND

Brian Farley purchased a development consisting of four contiguous parcels lettered "I," "S," "T," and "V" in Kootenai County in 1992. Mr. Farley built a home and drilled a well ("Upper Well") on Parcel I in 1994. The Upper Well was connected to a 3,000 gallon cistern (located on Parcel I) that delivered water to the home. Mr. Farley drilled a second well ("Lower Well") on Parcel V in 1999. The Lower Well was connected to a hydrant for stockwater use on Parcel T and continued on to the cistern located on Parcel I. Mr. Farley also installed a separate line from the cistern on Parcel I to provide stockwater from a hydrant on Parcel S.

In 2009 Mr. Farley filed water right claim 95-16445 for domestic, stockwater, and irrigation purposes. Mr. Farley used water from the Lower Well on his property (Parcels I, S, and T) between 1999 and 2017. In 2017 Mr. Farley began only using water from Upper Well on Parcels I and S, and shut off the water from the Lower Well. In early 2018 Mr. Farley initiated

efforts to clarify and identify the water rights associated with his four parcels in preparation for a future sale of Parcel I and the home. Later that year, Mr. Farley listed his home and Parcel I for sale. Throughout 2018 and early 2019 Mr. Farley had several communications and meetings with IDWR adjudication staff. Farley documented his intent through the formal *Notice of Error Reply* process, an amended water right claim for 95-16445, and a separate claim specifically for Parcel I from the Upper Well through water right claim 95-17752. The Director issued final director's reports in February 2019 that accurately represented Mr. Farley's contemplated water use and intent for the water rights associated with his property.

Farley and the Gideons entered into a Purchase and Sale Agreement for the home and Parcel I on April 29, 2019. Mr. Farley also completed the *First Amended Covenants, Conditions and Restrictions* that identified the Lower Well as a "shared use and benefit" and priority use for Parcel I in the event of insufficient supply for all four parcels. The Amended CC&Rs were recorded and provided to the Gideons' escrow officer prior to closing. Mr. Farley also turned the water back on from the Lower Well before closing in early June (in compliance with the Amended CC&Rs and to use water from 95-16445 on Parcel S for stockwater purposes).

Over a year following IDWR's recommendation for water right 95-16445 in February 2019, the Gideons were granted leave to file a late objection in September 2020. *See Bench Order Granting Motion to File Late Objection*. The subcase was then stayed until the fall of 2022 while separate litigation concerning the property sale continued in the Kootenai County District Court. *See Order Staying Litigation* (Oct. 15, 2020); *Bench Order Lifting Stay* (Nov. 29, 2022). The Gideons were next granted leave to file a late notice of water right claim (95-18409). *See Order Granting Motion for Late Claim* (Apr. 19, 2023). The Director's report for water right 95-18409 was issued on May 22, 2023 and Farley filed a timely objection on June 20, 2023.

IDWR issued a 706 Report for both water rights 95-16445 and 95-18409 on September 21, 2023. Following an unsuccessful mandatory settlement conference, Special Master Booth issued a trial scheduling order on November 17, 2023. The Gideons filed a motion for summary judgment which was heard on March 11, 2024.

Following the oral argument, Special Master Booth received inaccurate ex parte property information and expert witness testimony from IDWR. That information was not disclosed to any party or formally published in any amended director's report. Special Master Booth issued the summary judgment decision on March 19, 2024, and Farley filed a timely motion to alter or amend on April 29, 2024. Special Master Booth heard the motion on July 23, 2024, and issued the order granting the motion in part, and denying the motion in part on August 9, 2024. Farley is filing the present notice of challenge in response to these decisions.

ISSUES CHALLENGED

Farley agrees with the Special Master's correction of the erroneous expert evidence received from IDWR and his resulting decision that Parcel S was not part of the place of use for water right 95-16445. *See* AA Order at 1-2. However, Farley challenges the Special Master's decision to recommend water right 95-18409 and deny Farley's objection to the same on summary judgment. It is Farley's position that the Special Master wrongly decided genuine issues of material fact, as well as questions of intent, through the SJ Decision and as further highlighted in AA Order. Farley asserts the Special Master erred in SJ Decision and AA Order through the following issues:

1. The finding that Farley did not extinguish a portion of his own property right (i.e. domestic/stock water right from the Lower Well on Parcel I) through the amended claim process.
2. 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.

3. The finding that the Gideons could beneficially use two exempt domestic water rights (95-17752 and 95-18409). The Special Master further erred by not determining the quantity that could be beneficially used under 95-18409.
4. The finding that Farley did not abandon the domestic and stockwater water right from the Lower Well on Parcel I.
5. 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.
6. The finding that an “uncertain” warranty deed in these subcases is also “unambiguous” under Idaho law.
7. The findings related to the above erroneously resolving disputed issues of material fact on summary judgment.
8. Alternatively, if the domestic/stockwater right on Parcel I could not be eliminated or abandoned, then the Special Master failed to 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).

TRANSCRIPTS

Farley requests that transcripts of the following hearings in the above-referenced subcases be lodged with the Court for purposes of this *Notice of Challenge*:

Monday March 11, 2024	10:00 a.m.	Gideons’ Motion for Summary Judgment ¹
-----------------------	------------	---

Tuesday July 23, 2024	1:30 p.m.	Farley’s Motion to Alter or Amend ²
-----------------------	-----------	--

Farley has contacted the CSRBA Court Reporter and will pay the estimated transcript fee for the hearing on his motion to alter or amend once the invoice is submitted by the Court Reporter.

¹ The transcript for this hearing has already been prepared pursuant to Farley’s earlier request and the fee for this transcript has been paid to the Court Reporter.

² Farley’s counsel has requested that a transcript be prepared for this hearing. Based upon conversations with the Deputy Clerk (Diana Delaney) and the Court Reporter (Sabrina Vasquez), we have been advised to pay the fee directly to Ms. Vasquez once the transcript is complete. As such, no estimated fee is being submitted with this *Notice of Challenge*.

DATED this 23rd day of August, 2024.

MARTEN LAW LLP

A handwritten signature in cursive script, reading "Abby R. Bitzenburg".

Travis L. Thompson
Abby R. Bitzenburg

Attorneys for Brian T. Farley

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2024, I served true and correct copies of the foregoing **BRIAN FARLEY'S NOTICE OF CHALLENGE** by the method indicated below, and addressed to the following:

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

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

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

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

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

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

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

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

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

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

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

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

Sabrina Vasquez
25 Northridge Way
Jerome, Idaho 83338

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



Abby R. Bitzenburg