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DEPARTMENT OF
WATER RESOURCES

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

In Re CSRBA	)	Subcase Nos.: 95-16445 & 95-18409
	)	
Case No. 49576	)	BRIAN FARLEY'S OPENING
	)	BRIEF ON CHALLENGE
	)	
	)	

COMES NOW, Brian T. Farley, claimant and objector in the above-referenced subcases, by and through undersigned counsel of record, and pursuant to the Court's *Challenge Scheduling Order* and *CSRBA Amended Administrative Order 1* ("AO1"), Section 18, hereby submits this *Opening Brief on Challenge* in the above-captioned subcases. Mr. Farley challenges the Special Master's *Memorandum Decision and Order on Gideons' Motion for Summary Judgment* (March 19, 2024) ("SJ Decision") and the *Order Granting in Part and Denying in Part Farley's Motion to Alter or Amend* (Aug. 9, 2024) ("AA Order"). This opening brief is further supported by the prior briefing and declarations and attached exhibits filed in these subcases.¹

¹ 1) *Response in Opposition to Claimant Gideons' Motion for Summary Judgment* (Feb. 23, 2024) ("SJ Resp."); 2) *Declaration of Brian T. Farley in Support of Response et al.* (Feb. 23, 2024) ("Farley Dec."); 3) *Declaration of Travis L. Thompson in Support of Response et al.* (Feb. 23, 2024) ("Thompson Dec."); 4) *Second Declaration of Travis L. Thompson in Support of Response et al.* (Mar. 12, 2024); 5) *Motion to Alter or Amend Special Master's Memorandum Decision et al.* (Apr. 29, 2024); 6) *Declaration of Brian T. Farley in Support of Motion to Alter or Amend* (Apr. 29, 2024); 7) *Declaration of Travis L. Thompson in Support of Motion to Alter or Amend* (Apr. 29,

INTRODUCTION

This case presents a unique fact pattern involving a property owner, various parcels, two exempt domestic groundwater rights, and the owner's amendment of a water right claim and his right to sell a parcel with its own separate well and water right. Statutory exempt domestic water rights exist through the act of drilling a well and using the water. No application process takes place before IDWR and there is no water right number. Citizens simply drill a well and use the water for domestic purposes. In this case the assigned water right number and the claimed elements for the Lower Well didn't exist on paper until Mr. Farley filed the original water right claim 95-16445 in 2009. Several years later, when Mr. Farley decided to sell his residence and Parcel I, he amended the claim and filed a separate water right claim for the Upper Well (95-17752). As the owner of such property, Mr. Farley had a legal right to claim his water rights as he desired without restriction. He also had the right to dispossess any such portions.

IDWR approved Mr. Farley's changes and recommended the same to the CSRBA Court in February 2019. Mr. Farley did not "omit" or forget to claim a portion of water right 95-16445 for Parcel I, he specifically identified the rights as intended for the property he was selling and that which he was retaining. Nobody at IDWR told Mr. Farley he was doing something wrong or that he was leaving something on the table for another person to claim later in the adjudication. Just the opposite, several agents assisted Mr. Farley to carry out his specific intent, and ultimately the Director's Reports matched what Mr. Farley represented to the agency.

Years after Mr. Farley decided to sell his residence and Parcel I, and months after IDWR made the above-referenced recommendations to the CSRBA Court, Arthur and Katherine Gideon ("Gideons") entered the scene and made an offer to purchase the property. Although the

2024); 8) *Brian Farley's Notice of Challenge* (Aug. 23, 2024); 7) *Transcript of Summary Judgment Hearing* (Mar. 11, 2024); and 8) *Transcript of Motion to Alter or Amend Hearing* ("MAA Trans.") (July 23, 2024).

Gideons purchased Parcel I and the home in the late spring of 2019, the deed did not identify the water right they were purchasing, it simply referenced “with appurtenances.” Had the Gideons properly completed their due diligence, a review of the CSRBA’s publicly available docket sheet, along with the Director’s Reports, would have revealed precisely which water right (95-17752) was being sold with the singular “well” (Upper Well) that was located on the property. Moreover, the Upper Well alone was providing water to the home at the time when the real estate purchase agreement was signed.

Despite these facts and intent, the Special Master concluded as a matter of law that the deed’s terms “with appurtenances” included an unidentified portion of water right 95-16445 that Mr. Farley had previously extinguished and abandoned. The Special Master reached this conclusion by ignoring substantial testimony and documents provided by Mr. Farley describing the events related to the water right claims between 2018 and 2019.²

Mr. Farley submits the Special Master erred on summary judgment on several key points. First, he wrongly resolved disputed issues of “intent” as a matter of law without conducting a fact finding trial. Second, he misinterpreted Idaho’s abandonment doctrine by failing to recognize what Mr. Farley accomplished with the domestic/stock use for Parcel I from the Lower Well in 2017-2019. Third, he erred by concluding the Gideons could beneficially use two exempt domestic water rights. Finally, and in the alternative, if the Gideons acquired a portion of water right 95-16445 by reason of their property purchase, then the Special Master erred in not recommending a split of the water right in proportion to the property Mr. Farley sold and retained. For the reasons set forth below, Mr. Farley requests the Court to reverse the Special Master on challenge accordingly.

² IDWR’s 706 Report is similarly silent on this information developed by its own agents over several months.

STANDARD OF REVIEW

Idaho Rule of Civil Procedure 53 governs the appointment and standard of review of special master decisions. *See* AO1 1.a. On challenge, this Court “may adopt, modify or reject” the Special Master’s recommendation “in whole or in part”, receive further evidence, or “may resubmit the matter to the master with instructions.” AO1 § 1.a; I.R.C.P. 53(j).

With respect to the facts, the Idaho Supreme Court recently instructed that a “district court’s review of the record requires more demanding scrutiny of the special master’s findings that was employed to determine whether the special master’s recommendations are supported by competent and substantial evidence.” *See Dorsey v. Dorsey*, 172 Idaho 667, 535 P.3d 1040, 1052 (2023). The Court further noted that a district court “*does not* act as an appellate court when reviewing the record to determine whether the recommendations of a special master are clearly erroneous” and that a court must “conduct an ‘independent’ and ‘careful review’ of the record in addition to objections brought to its attention by counsel.” *See id.* at 1053-54 (emphasis in original). In the context of a summary judgment decision, the Court reiterated that a district court must perform its own analysis and cannot simply adopt the special master’s recommendation. *See id.* at 1060. Finally, the Supreme Court emphasized that that the appointment of a master “does not displace the district court’s role as the ultimate trier of fact.” *See id.* “Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Lockheed Martin Corp. v. Idaho State Tax Comm’n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006). Still, “motions for summary judgment should be granted with caution.” *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985).

When an action will be tried before a court without a jury, the court may draw probable inferences arising from the undisputed evidentiary facts. *See Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009). However, the court may not make conclusive findings with regard to issues upon which the parties submitted conflicting evidence. *See Williams v. Computer Res., Inc.*, 123 Idaho 671, 673, 851 P.2d 967, 969 (1993) (holding that the trial court was not permitted to draw inferences regarding the parties' intent when the parties submitted conflicting evidence on the issue); *Ashby v. Hubbard*, 100 Idaho 67, 70, 593 P.2d 402, 405 (1979) (holding that a question involving the "intention expressed by the acts and statements of the parties" was a factual question for the jury).

Issues of "intent" present questions of fact that cannot be resolved on summary judgment. *See Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 873-74; 993 P.2d 1197, 1204-05 (1999). The Court of Appeals has instructed that "if the pleadings, admissions, depositions and affidavits raise any question of credibility or witnesses or weight of the evidence, the motion for summary judgment should be denied." *Altman v. Arndt*, 109 Idaho 2187, 221, 706 P.2d 107, 110 (Ct. App. 1985). Finally, a trial court is not permitted to judge the credibility of the affiants on summary judgment. *See Baxter v. Craney*, 135 Idaho 166, 172, 16 P.3d 263, 269 (2000) ("[I]t is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage when credibility can be tested in court before the trier of fact."); *see also, Land O'Lakes v. Bray*, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (2003).

If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009) (citing *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 778, 215 P.3d 494, 498 (2009)).

ARGUMENT

I. The Special Master Erred in Failing to Recognize Mr. Farley's Amended Claim Pursuant to I.C. § 42-1409A and his Legal Right to Extinguish Portions of Water Right 95-16445.

A primary issue on challenge is the Special Master's failure to acknowledge Mr. Farley's right to amend his original water right claim #95-16445 and discontinue certain uses on Parcel I, and whether or not genuine issues of material fact existed to preclude summary judgment on that issue. The Special Master made the following findings on summary judgment and on the motion to alter or amend that should be reversed:

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 the place, somehow works to contemporaneously extinguish the water right for that previously claimed place and purpose(s).

SJ Decision at 7.

The **Order** simply holds that based on the undisputed facts in the record, and as a matter of law, Mr. Farley did not eliminate / extinguish the portion of his water right that he previously established for domestic and stockwater use on Parcel I.

AA Order at 3 (emphasis in original).

The above findings ignore the extensive facts submitted by Mr. Farley in response to the Gideons' *Motion for Summary Judgment*.³ See *SJ Resp.* at 10-14. The facts surrounding Mr. Farley's amended water right claim, including specifically his intent, as well as the separate domestic water right claim (95-17752) for the Upper Well on Parcel I, all defeat the Special Master's conclusory findings on summary judgment.

³ Mr. Farley submitted the following evidence in opposition to the Gideons' motion. See *Declaration of Brian T. Farley in Support of Response in Opposition et al.* (Feb. 23, 2024) and attached exhibits; *Declaration of Travis L. Thompson in Support of Response in Opposition et al.* (Feb. 23, 2024) and attached exhibits; *Second Declaration of Travis L. Thompson in Support of Response in Opposition et al.* (March 12, 2024).

Although Mr. Farley owned a home and large contiguous tract of property (approximately 40 acres) identified as Parcels I, S, T, and V since 1992, he decided to sell the home and Parcel I (10.88 acres) in 2017. *See SJ Resp.* at 10. He recommissioned the Upper Well with a new pump and electrical controls and installed a ball valve on the waterline from the Lower Well to the common cistern. *See id.* In early 2018 Mr. Farley received IDWR's preliminary recommendation and notice of error reply form for water right claim 95-16445. *See IDWR Report* at 5; Attch. E. Mr. Farley returned the form in May, identifying his clear intent for the water right to only have a "stockwater" purpose of use on Parcels S & T only, parcels that he was retaining, as they were not listed for sale. *See id.*, Attch. F. Mr. Farley made notes memorializing his intent for the water right from the Lower Well and how the place of use was for "S & T." *See Ex. B to Farley Dec.* Mr. Farley intended to "eliminate the place of use" referring to the "home at 23452" on Parcel I since at that time he was "using original well in hayfield" [reference to the Upper Well]. *See Ex. C to Farley Dec.* All of this was documented over a year prior to the Gideons making an offer to purchase the home and Parcel I.

In addition to Mr. Farley's notes and the notice of error form, he made several personal visits to IDWR in the summer of 2018 to discuss his intent for water right 95-16445 and filing a separate water right claim for the Upper Well. *See SJ Resp.* at 11. Mr. Farley met with IDWR agent Dawn Lenon who personally entered the information on IDWR's computer system (claim form dated 6/22/18) to make the changes for water right 95-16445. *See Ex. E to Farley Dec.* IDWR's actions and representations left Mr. Farley with the understanding that was all he needed to do with respect to the water right 95-16445 and a claim for the Upper Well. *See Farley Dec.* at 5.

Mr. Farley did not hear back from IDWR until January of 2019, when a second IDWR agent (Kaila Savage) informed him that the place of use on 95-16445 had not been changed and nothing had happened with the Upper Well claim. *See Farley Dec.* at 5. After working on the changes, Mr. Farley met with her and signed an amended claim for 95-16445 and a separate claim for water right 95-17752. *See id.* at 5-6; *see also*, IDWR Report, Attchs. J, K. Mr. Farley testified that he “intended to eliminate Parcel I from the Lower Well water right claim and only have that parcel associated with a water right claim from the Upper Well.” *See Farley Dec.* at 6.

On January 28, 2019, Mr. Farley received a letter from IDWR with the following enclosed: 1) a Revised Preliminary Recommendation for 95-16445; 2) a Preliminary Recommendation for 95-17752; and 3) a water right report noting “Application for Transfer of Water Right Part 2A Report for Claim No. 95-16445.”⁴ *See Farley Dec.* at 6. IDWR then filed Director’s Reports with the CSRBA Court on February 26, 2019 with the same elements and representations, i.e. water right 95-16445 for the Lower Well for stockwater use on Parcels S and T only, and water right 95-17752 for the Upper Well for domestic and stockwater use on Parcel I only. *See* IDWR Report, Attchs. L and M. The Director’s Report appeared on the Court’s March docket sheet, providing legal notice to the general public and any affected claimants. *See* Exs. B and C, *Thompson Dec.* (Feb. 23, 2024).

IDWR’s 706 Report disregards and is completely void of any information and background concerning its interactions with Mr. Farley between the spring of 2018 and 2019.⁵

⁴ The Gideons and the Special Master attempt to minimize the importance of this document since it is not a formal transfer application filed pursuant to section 42-222(2). However, what is a lay person supposed to believe when the agency makes formal representations and provides a document that has the term “transfer” on it, particularly when it follows the person’s request?

⁵ The Special Master appeared to rely upon the prima facie evidence standard given to the Director’s Report for 95-18409 to further justify his position, yet he ignored the evidence and extensive background submitted by Mr. Farley in opposition, which supported his objection that rebutted the evidentiary presumption. *See* SJ Decision at 12. IDWR’s attempted ex parte changes to the recommendations following the summary judgment hearing, without

Instead, the report simply recites the fact that the agency received an amended claim for 95-16445 and IDWR submitted the Director's Report as claimed. *See* IDWR Report at 6. The report makes a similar notation for water right 95-17752, i.e. a claim was filed and that a Director's Report was issued. *See id.* at 7. The legal effect of an amended claim and what Mr. Farley intended to convey with the sale of Parcel I was missed by the Special Master and should be reversed on challenge. By discounting the information and documents leading up to the February 2019 Director's Report, the Special Master overlooked the actions of Mr. Farley with respect to his property and the associated water rights related to the Upper and Lower Wells.

Instead, the Special Master justifies his decision on the theory of what Mr. Farley didn't do. In the AA Order the Special Master concluded:

Mr. Farley's *Amended Notice of Claim* did not specifically plead for a decree of disallowance of the Parcel I portion of his claim. Mr. Farley mistakenly believed that his goal of eliminating / extinguishing said portion of his water right was completed upon his filing of his *Amended Notice of Claim* which omitted domestic and stockwater use on Parcel I. It was not.

AA Order at 4 (emphasis in original).

Idaho Code § 42-1409A expressly allows a claimant to "amend a notice of claim . . . at any time prior to the final date for filing notices of claim." *See e.g. Allied Bail Bonds, Inc. v. County of Kootenai*, 151 Idaho 405, 411, 258 P.3d 340, 346 (2011) ("The doctrine of *functus officio*, on the other hand, holds that an amended complaint supersedes prior complaints such that all subsequent pleadings must be based upon the contents of the amended complaint") (emphasis added); *Wilson v. Wilson*, 81 Idaho 375, 378 , 341 P.2d 894, 895 (1959) ("The respondent, in filing the second amended complaint, abandoned the cause of action of the original complaint")

formal notice to any party or following the required docket sheet procedure, casts further doubt on the 706 Report and its accuracy. *See Farley Motion to Alter or Amend* at 3-10.

(emphasis added). Nothing in Idaho law forces a property owner to continue to possess something that he or she wishes to dispossess.

Contrary to the Special Master's inference, IDWR's amended claim form does not include any specific provision for a claimant "to plead for a decree of disallowance" for elements not being claimed, i.e. a purpose of use or place of use. Similar to an amended complaint as described in *Allied Bail Bonds, Inc.* and *Wilson*, Mr. Farley's 2018 amended claim "superseded" the original 2009 claim and all further actions should have proceeded on the merits of the amended claim. Moreover, with respect to a statutory "beneficial use" domestic and stockwater right, there is no reason for a claimant to ask the court to formally "disallow" such unclaimed portions that had not been previously licensed by IDWR or decreed by a court. Yet, that is what the Special Master's decision requires.⁶

Further, Idaho law protects a person's right to buy, sell, use, and dispossess real property. *See* Idaho Const. Art I, § 1; I.C. § 55-103 ("... any person, whether citizen or alien, may take, hold and dispose of property, real and personal") (emphasis added); *see also*, *Nelsen v. Nelsen*, 170 Idaho 102, 133; 1508 P.3d 301, 332 (2022) ("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 sticks called property"); *O'Connor v. City of Moscow*, 69 Idaho 37, 42, 202 P.2d 401, 404 (1949) ("Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal"). A water right is just such a real property right. *See* I.C. § 55-101; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011) ("In Idaho, water rights are real property").

⁶ *See* AA Order at 4, n. 1. Contrary to the Special Master's theory, there is no place to "assert" disallowance on an amended notice of claim form and pursue "an uncontested partial decree of such disallowance."

Mr. Farley's actions leading up to the listing and eventual sale of his home and Parcel I plainly demonstrate his desire to extinguish any water right from the Lower Well for Parcel I. Notably, when he listed the property in November 2018, Mr. Farley disclosed a singular "well" on the property condition disclosure form. *See Ex. D to Thompson Dec.* Mr. Farley's realtor testified that the property listing only included reference to "one well" and that the "lower well" was never part of anything we did in the listing or any of the discussions." *See Waldera Aff.* (Jan. 31, 2024), Ex. A, Tr. 373:23-24. The listing occurred just prior to the Director's Reports being issued in February 2019 and at a time when the only water source for the home and Parcel I was the Upper Well. *See Farley Dec.* at 2-3. All of this took place months before the Gideons arrived and made an offer to purchase the property in April 2019. Furthermore, with the formal recommendations for the amended claim 95-16445 and the separate claim 95-17752, there was nothing more for Mr. Farley to do as everything was in order as intended:

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

* * *

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

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

Farley Dec. at 5-6 (Feb. 23, 2024).

The Special Master's decisions completely discount Mr. Farley's actions and renders them a nullity. Instead, the Special Master wrongly concludes the domestic use on Parcel I was simply "omitted" or "unclaimed" as if Mr. Farley wanted to make a water right available to some future claimant contrary to his formal adjudication filings and what he accomplished over several months with IDWR.

Whereas a water right holder does not have an obligation to claim all aspects of a water right, and has a statutory right to dispossess real property, at a minimum, the Special Master should have denied summary judgment on the matter and proceeded to a trial on the merits. For the reasons set forth above the Presiding Judge should reverse the Special Master's decision accordingly.

II. The Special Master Erred by Failing to Recognize Mr. Farley's Abandonment of a Portion of Water Right 95-16445.

An additional error in the AA Order is the Special Master's mishandling and misinterpretation of Idaho's abandonment doctrine based on the facts of this case. The Special Master acknowledged that "[a]bandonment is a question of intent, and intent is a question of fact." *See* SJ Decision at 9. Nonetheless the Special Master concluded that since water was turned back on from the Lower Well in the spring of 2019 therefore Mr. Farley could not show the "necessary component of non-use" and the claim failed. *See id.* at 10; *see also* AA Order at 6. The Special Master's ruling misinterprets the abandonment doctrine in the context of what Mr. Farley did in 2017-18 and therefore his decision should be reversed and remanded for a trial on the merits.

Abandonment is a common law doctrine in Idaho involving the occurrence of: "(1) an intent to abandon and (2) an actual relinquishment or surrender of the water right." *See Sears v. Berryman*, 101 Idaho 843, 847, 623 P.2d 455, 459 (1981); *Gilbert v. Smith*, 97 Idaho 735, 738,

552 P.2d 1220, 1223 (1976).⁷ The New Mexico Court of Appeals has similarly described abandonment as “the confluence of both intention and act.” *See Carlsbad Irr. Dist. v. D’Antonio*, 544 P.3d 276, 290 (N.M. Ct. App. 2023).

There is no length of time necessary for common-law abandonment to occur; the “essential element” is intent. *See Gilbert*, 97 Idaho at 738, 552 P.2d at 1223. ““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). The focus is on the moment in time, or what is aptly described as the “confluence” of action and intent, not what did or did not occur later in time.

Here, Mr. Farley accomplished the following which shows an intent to “abandon” or “relinquish” the domestic and stockwater right from the Lower Well on Parcel I. First, Mr. Farley recommissioned the Upper Well in 2017 in preparation to sell the home and Parcel I. *See Farley Dec.* at 3. Mr. Farley also shut the water off from the Lower Well at this time. *See id.* In May 2018, Mr. Farley filed the Notice of Error Reply with IDWR 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.” *Id.* at 4. In his contemporaneous notes, Mr. Farley documented that he “eliminated” Parcel I and the home from water right claim 95-16445.⁸ Mr. Farley then worked with IDWR agents for the next seven months (June 2018 to January 2019) to finalize an amended claim for water right 95-16445 and a separate claim 95-17752. The amended claim for 95-16445 formally “removed” or “relinquished” the domestic and stockwater

⁷ 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)).

⁸ The reference to “94700 = 23452” is the Kootenai County parcel number for Parcel I and the home address for the residence, 23452 N. Derting Rd. *See Ex. C to Farley Dec.*

use on Parcel I. Mr. Farley's declaration unequivocally states that he "intended to eliminate Parcel I from the Lower Well water right claim and only have that parcel associated with a water right claim from the Upper Well." *See Farley Dec.* at 6.

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."⁹ SJ Decision at 9. Further, the Special Master erred by finding there was no "permanent cessation of use of the water" and that "the water that thereby flowed from the Lower Well to the cistern for use on Parcel I was water diverted pursuant to Mr. Farley's valid and unabandoned water right 95-16445."¹⁰ *Id.* First, Mr. Farley's actions and water right filings directly contradict the Special Master's conclusion. There was no intent or lawful delivery of water right 95-16445 to Parcel I after it was abandoned. Although Mr. Farley purported to share water in times of shortage pursuant to the Amended CC&Rs, that permissive use did not change the actual water right claims before IDWR and the CSRBA Court where the domestic and stockwater claim on Parcel I had been abandoned.¹¹

At a minimum the Special Master erred in resolving admitted questions of intent on summary judgment. *See Carl H. Christensen Family Trust*, 133 Idaho at 873-74; 993 P.2d at

⁹ The Special Master ignored the fact that Mr. Farley had the right and ability to deliver his stockwater use from the Lower Well through the cistern to Parcel S.

¹⁰ 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 Dec.* at 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 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).

¹¹ Judicial estoppel prevents the Gideons from relying upon those covenants in this proceeding when they had the same voided in the First District Court litigation. *See Smith v. U.S.R.V. Properties, LC*, 141 Idaho 800, 118 P.3d 127, 132 (2005) ("Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position").

1204-05. The Special Master speculated on Mr. Farley's intent regarding the ball valve on the water line from the Lower Well, and the reasons for water being turned back on in the spring of 2019. *See* AA Order at 7.

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.¹² Mr. Farley requests that the AA Order and SJ Decision be reversed accordingly.

III. The Special Master Erred in Finding the Warranty Deed to be Unambiguous and Failing to Consider all Circumstances Regarding the Conveyance.

The Special Master erroneously found the warranty deed at issue to be unambiguous and that Mr. Farley conveyed a portion of water right 95-16445 to the Gideons in the spring of 2019. The Special Master made contradictory findings on this issue. Despite finding the deed to be "uncertain," he still concluded the deed is not ambiguous. *See* AA Order at 8. Further, the Special Master concluded: "An ambiguity yields uncertainty because, by definition an ambiguity is subject to being understood in two or more possible ways. Silence can yield uncertainty, but not for the same reason as ambiguity." AA Order at 8-9. In essence, despite finding the deed's "with appurtenances" language to be "uncertain," he nonetheless concluded the deed was not ambiguous. *Compare* SJ Decision at 12 ("Because the Warranty Deed does not specifically state what appurtenances, if any, are being conveyed, it becomes necessary to look outside the four corners of the Deed itself for the purpose of identifying said appurtenances") *with* AA Order at 8 ("The Warranty Deed is not subject to more than one interpretation (i.e. it is not ambiguous), and therefore there is no need to examine extrinsic evidence to ascertain the intent of the parties").¹³

¹² *See* MAA Tran. 31:8-18 (Gideons' counsel arguing Mr. Farley's "intent is highly debatable and questionable").

¹³ Although the Special Master admitted it was necessary to look outside the four corners of the "uncertain" deed, he erroneously limited that review to looking out "one corner," i.e. to the real estate purchase and sale agreement only.

First, on summary judgment, the Special Master wrongly excluded evidence regarding what was intended on the theory that it was precluded by the terms of the underlying purchase and sale agreement (“REPSA”) and the parole evidence rule. *See* SJ Decision at 14. While it is undisputed that the deed conveyed the property “with its appurtenances;” the term “appurtenance” in this case is ambiguous and undefined.¹⁴ As such, the Special Master had an obligation to look at all relevant evidence to determine its meaning.

First, 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 not extinguished by the amended claim or abandoned prior to closing. If the right was successfully eliminated as intended by Mr. Farley, then it was not an existing “appurtenance” that could have been conveyed in the spring of 2019. Further, if the right was completely abandoned as to Parcel I, then the water right no longer existed and could not have been conveyed. The AA Order and SJ Decision should therefore be modified to deny the Gideons’ motion so that any 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 regarding the conveyance. The Special Master wrongly limited his review to the REPSA which included the following language: “any and all water rights...appurtenant to the PROPERTY...unless

Once it became necessary to review information outside the deed, the Special Master had an obligation to look at all facts and circumstances, not just a single document.

¹⁴ *See generally Memorandum Decision and Order Granting Motion for Summary Judgment* at 10 (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”).

otherwise agreed to by the parties in writing.” SJ Decision at 13. 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.”¹⁵ *Id.* at 14.

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) (emphasis added). 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). The Special Master looked outside the deed, but then stopped at the REPSA by erroneously finding its “integration” clause as controlling.

Because the merger doctrine applies and the deed is ambiguous, the Special Master should have examined the intention of the parties, which similar to abandonment, is a fact specific inquiry. *See Sells*, 141 Idaho at 773, 118 P.3d at 105 (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

¹⁵ 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.

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*, 141 Idaho at 773, 118 P.3d at 105. “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.” SJ 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. The Gideons, by contrast, have not offered any evidence as to their intent. 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 relied solely on language of the REPSA and its integration clause. *See Gideons' Reply in Support of Motion for Summary Judgment*, at 7-13. Again, this evidence cannot be used to exclude other relevant evidence as to intent given the merger doctrine. 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. The Special Master erred in not addressing all of the issues and circumstances surrounding the conveyance of Parcel I and what water rights were intended to pass with the property. The Presiding Judge should reverse and remand accordingly.

IV. The Special Master Erred in Recommending Two Exempt Domestic Water Rights for the Gideons Without Defining the Historic Beneficial Use.

The consequences of the Special Master's decisions, and by accepting IDWR's revised recommendations without the benefit of a fact-finding trial, is that the Gideons will receive partial decrees for two statutory exempt domestic water rights. Regardless of the proposed combined use remark, his decision flies in the face of Idaho water law and the requirement that water users are limited to actual beneficial use of their water rights.

First, the Gideons already hold a decreed domestic water right no. 95-17752 for Parcel I. *See* Attch. R to IDWR Report. 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").

Next, the Special Master erred by accepting IDWR's recommended water rights for 95-16445 and 18409 without making a factual determination of historical beneficial use. 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"). IDWR partly relied upon historic information by recommending a diversion rate of 0.02 cfs instead of 0.04 cfs for water right claim 95-18409.¹⁶ *See* IDWR Report at 12. IDWR also included a "combined use" remark limiting all claims to 13,000 gpd. *See id.* at 13-15. However, IDWR did not specify the volume for each water right. The shared priority and quantity is certain to result in future disputes between the parties and IDWR, one that should be resolved up front in the CSRBA Court.

By recommending two exempt domestic water rights for the Gideons, and not making a determination of historical beneficial use, the Special Master erred pursuant to Idaho law and the Presiding Judge should reverse and remand the subcases accordingly.

V. Alternatively, the Special Master Erred in Not Recommending Water Right 95-16445 to be Split Based Upon Property Ownership.

The Special Master refused to address Mr. Farley's argument in the alternative concerning a proportionate split of water right 95-16445 based upon property ownership and what was conveyed to the Gideons by operation of the deed. *See* AA Order at 9. At the oral argument the Special Master expressed concern about considering the issue. MAA Trans. 24-27. Yet that concern is not a reason to wholesale deny the argument's consideration without any legal analysis whatsoever.

¹⁶ IDWR and the Special Master only looked at part of the historical record to make a recommendation on the diversion rate, but not the beneficial use of volume attributable to the various water rights. The Presiding Judge should remand back for specific findings on beneficial use to comply with Idaho law.

The Special Master erred in his apparent reliance upon the I.R.C.P. 59(e) or 52(b) standard as discussed in the SRBA Court's *Facility Volume* decision. See *id.* at 24-25 ("I went back and looked at this facility volume case..."); see also, *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* at 20-23, SRBA District Court, Subcase Nos. 36-02708 et al. (12/29/99).¹⁷ The Special Master's reliance upon the SRBA Court's decision is misplaced in light of the Idaho Supreme Court's recent decision in *Dorsey v. Dorsey*. In the present case, the Special Master disagreed with the argument on the following basis:

Mr. Farley's new legal theory, if adopted by the CSRBA District Court, could potentially have significant future ramifications that extend beyond the confines of these two subcases, including changing the methods and procedures currently and historically used by IDWR when dealing with divisions of land that have appurtenant domestic or stockwater rights. . . . An issue such as this would be better suited to being raised at an earlier stage of proceeding, with a longer deliberative process. Accordingly, in an exercise of discretion, this Special Master declines to address Mr. Farley's "proportional split" legal theory in these subcases.

AA Order at 9 (citing *Facility Volume*).

First, there is nothing in the record that would show this legal theory would significantly change IDWR "methods and procedures." Even so, if that is required by Idaho Supreme Court precedent, then the Special Master should not reject it because it may create some burdens on the agency. Further, at the oral argument, the Special Master refused to address Mr. Farley's legal theory because he wanted to hear from IDWR. MAA Trans. at 26:16-23. The Special Master confused the idea of IDWR providing some "legal advice" as a prerequisite to analyze the issue. As defined in AO1, IDWR "is an independent expert and technical assistant," not an expert witness that submits legal advice. AO1 11.g.1. Although IDWR's counsel opined that it was the

¹⁷ Decision available on SRBA Court's website: www.srba.state.id.us (Presiding Judge Documents).

“department’s position that a proportional split” would not be appropriate for “these types of domestic water rights,” there was no official supplemental 706 Report filed with the Court, and no evidence was provided in the form of a declaration of a sworn witness. Accordingly, there was no “expert opinion” offered on the subject and IDWR’s “legal advice” on the issue has no relevance. The Special Master erred in using that reason to not consider Mr. Farley’s alternative legal theory.

Next, this is not about Mr. Farley seeking to introduce “new evidence” or have a second trial. Rather, the alternative argument was properly raised after the Special Master granted summary judgment and recommended the water rights being split by reason of the conveyance of property from Mr. Farley to the Gideons. When that decision was made, the consequences of that analysis supports Mr. Farley’s alternative argument. The Gideons cannot have it both ways. They cannot claim the “with appurtenances” language in the deed gave them a water right and then further define what that water right is contrary to the property that was purchased. As described below, Idaho precedent provides guidance on how a water right should be split based upon a property sale if it is not defined in the agreement or the deed.

Moreover, as held in *Dorsey*, the Presiding Judge is not constrained to accept the Special Master’s recommendation on this issue, and instead, must perform a searching and careful review as the ultimate trier of fact:

The district court is required to “make its own careful review” of the record to determine whether the recommendations of the special master are clearly erroneous. . . . The district court’s review is not limited to the parties’ objections to the special master’s report. The district court has a heightened obligation to review a special master’s report as compared to its review of a magistrate court’s findings of fact on appeal. . . . However, as explained by Wright and Miller and Idaho’s jurisprudence, the district court *does not* act as an appellate court when reviewing the record to determine whether the recommendations of a special master are clearly erroneous.

535 P.3d at 1053-54 (emphasis in original).

If the Presiding Judge does not grant Farley's requested relief set forth above in Sections I-IV, then the recommended water rights 95-16445 and 95-18409 should be modified based upon 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).

Procedurally, Mr. Farley amended water right claim 95-16445 in 2018 whereby he eliminated claimed uses on Parcel I. The Special Master's decision on summary judgment concluded Mr. Farley could not make such an amendment and that he had to convey the "unclaimed" portion to the Gideons in the spring of 2019 by reason of the term "appurtenances" on the Warranty Deed. If that is correct, which was not established until the Special Master made his recommendation in March 2024, then the Presiding Judge should address how the original water right 95-16445 was established when it was appurtenant to all parcels owned by Mr. Farley and that it should be split based upon property ownership following the conveyance. The record contains sufficient evidence on the parcel sizes that would support how the water right should be split. See Attch. S to IDWR Report (*Memo Decision* at 2 "The Gideons purchased an approximate 10 acre parcel") Ex. H to *Farley Dec.* (Ex. A to the Amended CC&Rs is a legal description for revised Parcel "I" "containing 10.88 Acres, more or less"; Ex. B for revised Parcels "S" & "Y" combined "containing 7.130 Acres, more or less; and Ex. C for revised Parcel "T" "containing 11.24 Acres, more or less"); see also, Ex. B to *Thompson Declaration of Motion to Alter or Amend* (Apr. 29, 2024).

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 (emphasis added).

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 concluded that Farley was the owner of water right 95-16445 in its entirety prior to conveying Parcel I to the Gideons in 2019. *See* SJ 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 id.*

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 split method set forth above, the Presiding Judge 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).¹⁸

Although the Special Master did not appear to appreciate the alternative legal argument or Idaho Supreme Court precedent, it was no valid reason to reject it without any meaningful legal analysis. The Presiding Judge should carefully review the record and address this alternative legal argument on its merits. If Mr. Farley's preceding issues on challenge are not adopted, he respectfully requests the Presiding Judge to apply the proportionate split method previously approved by the Idaho Supreme Court.

CONCLUSION

Although the subcases involve exempt domestic uses, they are nonetheless important to the parties and warrant careful scrutiny and analysis. The Special Master's legal conclusions misinterpret governing Idaho law, and he wrongly resolved issues of intent on summary judgment. For the reasons set forth above, Mr. Farley respectfully requests the Presiding Judge grant the relief on challenge and reverse and remand the subcases accordingly.

DATED this 18th day of October, 2024.

MARTEN LAW LLP



Travis L. Thompson
Attorneys for Brian T. Farley

¹⁸ The percentage split is quantified 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). *See supra* at 23. *See* Ex. B to *Thompson Dec.* (Apr. 29, 2024) (acres listed on the "after" map accompanying Victoria Williamson's letter to Katherine Gideon dated January 2, 2020) The same acreages are identified in the parcel legal description exhibits (A-C) to the Amended CC&Rs submitted with the *Farley Declaration* (Ex. H) (Feb. 23, 2024).

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2024, I served true and correct copies of the foregoing **BRIAN FARLEY'S OPENING BRIEF ON CHALLENGE** by the method indicated below, and addressed to the following:

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