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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA Case No. 49576	Consolidated Subcase Nos. 95-16445 (Farley) and 95-18409 (Gideon) **RESPONSE TO FARLEY'S MOTION TO ALTER OR AMEND SPECIAL MASTER'S MEMORANDUM DECISION / REPORT & RECOMMENDATION**

Arthur and Katherine Gideon ("Gideon" or the "Gideons"), by and through undersigned counsel of record and pursuant to the Special Master's *Notice Setting Hearing on Motion to Alter or Amend* (May 9, 2024), as amended by the parties' *Stipulation to Move Hearing on Motion to Alter or Amend* (Jun. 24, 2024), hereby submit this response to Brian T. Farley's ("Farley") *Motion to Alter or Amend Special Master's Memorandum Decision / Report & Recommendation* (Apr. 29, 2024) ("MAA"). Gideon opposes Farley's MAA based on the record in these consolidated subcases and the points and authorities recited herein; the Special Master should uphold his *Memorandum Decision and Order on Gideons' Motion for Summary Judgment; Special Master's Report and Recommendation* (Mar. 19, 2024) ("Order").

A. Applicable Legal Standard

Though *Amended CSRBA Administrative Order 1 Rules of Procedure* (Mar. 4, 2015) ("AO1") § 18 styles this motion as one to "alter or amend," it is in substance a motion to reconsider an interlocutory order of the Special Master. This is because the Special Master's Order (and recommendation) is just that: a "recommendation" to the Presiding Judge leading to subsequent entry of a final appealable judgment (a "partial decree"). *See* AO1 §§ 18-19. Therefore, the standards governing motions seeking reconsideration of interlocutory orders provided in Idaho Rule of Civil Procedure 11.2(b) (formerly Rule 11(a)(2)(B)) govern.[1]

A party moving for reconsideration under Rule 11.2(b) is permitted to present new or additional evidence in support, but is not required to do so. *See, e.g., Johnson v. Lambros*, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006). When new or additional evidence is presented on reconsideration the court should consider the same as it bears on the correctness of the interlocutory order. *See, e.g., Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

In the context of prior summary judgment proceedings however, whether a trial court chooses to consider new or additional evidence at the reconsideration stage is left to its discretion. *Summerfield v. St. Lukes McCall, Ltd.*, 169 Idaho 221, 232-234, 494 P.3d 769, 780-782 (2021). This is because Rule 11.2(b) "is not designed to allow parties to bypass timing rules or fail to conduct due diligence prior to a court's ruling." *Id.*, 169 Idaho at 228, 494 P.3d at 776, *quoting Ciccarello v. Davies*, 166 Idaho 153, 456 P.3d 519 (2019). The primary purpose of a Rule 11.2(b)-

[1] Rule 59(e) provides for motions to "alter or amend," but applies to efforts seeking to alter or amend final appealable judgments, as opposed to interlocutory orders. As noted above, the Special Master's recommendation is not a final appealable partial decree.

based motion for reconsideration is to provide opportunity for the correction or errors of law or fact short of appeal. *See, e.g., Lambros, supra; see also, Ciccarello, supra.*

The decision to grant or deny a motion for reconsideration is left to the sound discretion of the trial court. *See, e.g., Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 749, 215 P.3d 457, 469 (2009). A trial court acts within its discretion when it: (1) correctly perceives the issue as one of discretion; (2) acts within the outer boundaries of its discretion consistent with applicable legal standards; and (3) reached its decision by an exercise of reason. *Id.*

B. Gideon Does Not Object to the Substance of Farley's "Parcel S" Requests Insofar as They Implicate the Recommended Decree of Right No. 95-16445 Only

Admittedly, Gideon is confused by the energy and ink (MAA, pp. 3-10) Farley spends seeking a result where (regarding Right No. 95-16445): (a) "the correct quarter quarters covered by the parcel identification number [52N03W09500] should be reflected in IDWR's recommendation" (MAA, p. 7); (b) "[a]ny 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" (MAA, p. 9); and (c) "the Court should grant Farley's motion and amend the decision and recommendation for water right 95-16445 accordingly" (MAA, p. 10).

As the Special Master is aware, "explanatory material" is not an element of a water right and it does not control or upset the information otherwise used to populate the necessary elements of a water right in a partial decree. *See* I.C. §§ 42-1412(6), and 42-1411(1), (2), and (4). Thus, references to Parcels "I," "S," and/or "T," or Kootenai County RPNs are inconsequential.

Provided that Farley merely seeks inclusion of portions of land still owned by him in the SENW and SESW of Section 9, Township 52N, Range 03W, in addition to that located in the NESW, as place of use under Right No. 95-16445 without any other adjustment or modification of the Order's recommendation of Right No. 95-18409 (with the exception of the arguments

contained in Sections II-V of his MAA), Gideon has no objection. As stated repeatedly, Gideon seeks no more than they are entitled to under Right No. 95-18409—Farley is free to pursue the decree of Right No. 95-16445 as he, IDWR, and the Court deem appropriate pursuant to applicable law. *See, e.g., Memorandum in Support of Motion for Summary Judgment Re Claim No. 95-18409* (Jan. 30, 2024) ("SJ Memo"), pp. 15-16.

C. The Special Master Correctly Ordered Gideon Ownership of Right No. 95-18409 as Recommended by IDWR

1. Farley's Various Filings With IDWR Did Not Work a Valid Water Right Transfer, Nor Was There Any Severance and Withholding—Farley's Intent and Understandings Alone Remain Legally Insufficient and Immaterial

Farley largely recycles the contents of his prior *Response in Opposition to Claimant Gideons' Motion for Summary Judgment Re Claim No. 95-18409* (Feb. 23, 2024) ("SJ Opposition"), requesting that the Special Master second-guess himself at this stage of the proceedings regarding the outcome and disposition of Right No. 95-18409. The Special Master should refuse to do so for the myriad of unrebutted facts and arguments contained in Gideon's SJ Memo and their subsequent *Reply in Support of Motion for Summary Judgment Re Claim No. 95-18409* (Mar. 4, 2024) ("SJ Reply"), the contents of which are incorporated by reference herein.

As was the case then, what Farley himself, alone and unilaterally thought, felt, believed or understood does not matter (*see, e.g.*, MAA, pp. 11-12 ("Farley no longer wanted"; "Farley clearly had the intent"; "Farley understood"; "Due to [Farley's] clear intent"; etc.)—only the ***bilateral intent and understandings <u>of the parties</u>*** matters. SJ Reply, Section C.2 (pp. 13-18).[2] Moreover,

[2] Even if Farley's unilateral intent mattered, evidence of his true intent is best established by his actions on the ground—actions that do not square with his arguments now or during the prior summary judgment proceedings. SJ Reply, pp. 20-27.

Farley misconstrues the Special Master's Order to manufacture arguments and conflicts that do not exist.

So far as Gideon can decipher, Section II of Farley's MAA asserts that the Special Master's Order "forced [him] to keep a water right that he does not want" in derogation of Idaho Code Section 55-101 and the Fifth Amendment of the United States Constitution. MAA, p. 12. Farley contends that the Order infringes on his rights to dispose of his property on terms that he chooses—including the right to abandon what is now Right No. 95-18409 under Idaho Code Section 42-108. MAA, p. 13. It seems that Farley contends, perhaps, that the Special Master's Order works an unreasonable restraint upon the alienation of property, or that the Order somehow contains a prohibition. The Order does no such thing.

What the Order actually states is that Farley "fails to identify [ ] a legal mechanism or theory ***whereby the amendment of a claim*** . . . somehow works to contemporaneously extinguish the water right"; that the Special Master "is unaware of any legal authority that would result in a water right (or a portion thereof) that was claimed and then subsequently unclaimed to become non-existent at the time of unclaiming"; that while Farley thought he had "transferred" the right (95-18409) off of the Gideon's property and consolidated it wholly on his remaining property, the CSRBA claims amendment process alone is not sufficient to do so. Order, pp. 6-8 (emphasis added). The Order does not say that Farley could not do what he now alleges he intended; rather the Order merely points out, as Gideon argued, that Farley did not legally/effectively do what he purportedly thought he did through the claim amendment process. *See, e.g.*, SJ Memo, pp. 10-15, and SJ Reply, pp. 7-22.

Farley impermissibly ignores the fully perfected, vested, ***and appurtenant*** water right Right No. 95-18409 was upon its diversion and application to beneficial use (domestic and

stockwater uses) on Parcel I beginning in 1999 by operation of Idaho Code Sections 42-227 and 42-111. *See, e.g.*, SJ Memo, pp. 10-13; SJ Reply, pp. 7-11. Once perfected and made appurtenant to what is now the Gideon property (*see, e.g.*, Idaho Code Sections 42-220 and 42-101), Farley's options to "dispose" of his water right in a manner consolidating 95-18409 on his remaining-owned property were limited to the mechanisms available by law: (a) a viable water right transfer under Idaho Code Section 42-222 or 42-1425; or (b) express, ***bilaterally intended and understood*** deed-based severance and withholding. Even Farley's chosen MAA citation to Idaho Code Section 42-108 reaches this (the Gideons' asserted) result:

> "The person entitled to the use of water or owning any land to which the water has been made appurtenant . . . under the [among other means] . . . statutes of this state, may change the point of diversion, period or use, or nature of use, and/or ***may voluntarily abandon the use of such water*** in whole or in part ***on the land which is receiving the benefit of the same and transfer the same to other lands . . . Any person desiring to make such change . . . shall make application for change with the department of water resources under the provisions of section 42-222*** . . . no person shall be authorized to change . . . unless he has first applied for and received approval of the department of water resources under the provisions of section, 42-222, Idaho Code."

Id. (Emphasis added).[3]

The Special Master did not "refuse to acknowledge Mr. Farley's voluntary transfer of his water right" (MAA, p. 12). To the contrary, the Special Master fully understood Farley's assertion

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[3] Farley conveniently and impermissibly reads the "voluntarily abandon" portion of the statute in isolation. To what end may one "voluntarily abandon" the use of such water in whole or in part on the land receiving the benefit of the same? Answer: To (based on the statute's use of the conjunctive "and") transfer the use of the water "to other lands," provided that the water rights of others are not injured thereby; ***and further provided that one comply with the mandatory process of Section 42-222 to do so.*** Farley's selective reading of Section 42-108 violates applicable rules of statutory construction. *See, e.g., In re Estate of Melton*, 163 Idaho 158, 162-163, 408 P.3d 913, 917-918 (2018) (citations omitted) (statutory provisions are not "read in isolation, but must be interpreted in the context of the entire document"; consequently, statutes are "considered as a whole, and words should be given their plain, usual, and ordinary meanings.").

and legal position. Order, p. 7 ("Mr. Farley asserts that the various processes and actions he undertook to amend and rearrange his water right claims . . . resulted in the portion of water right 95-16445 previously established for domestic and stockwater uses on Parcel I being transferred to (again 'concentrated on') Parcels S and T, thereby eliminating said portion from Parcel I."). The Order does not say that Farley cannot (or could not) "concentrate" Right No. 95-18409 on his remaining property pre-closing of the Gideon transaction, only that Farley did not do it through available and effective legal mechanisms to do so—that Farley's chosen mechanism (amended CSRBA claim procedure) did not, itself, legally suffice with respect to the appurtenant "previously established" domestic and stockwater uses on the Gideon Property.[4]

As the Special Master correctly noted, in the absence of a valid water right transfer and/or conclusion of the CSRBA (the filing of a final unified decree), Farley simply left Parcel I-appurtenant Right No. 95-18409 unclaimed. *Accord* Order, pp. 7-8, and SJ Reply, pp. 7-11. Farley owned only one residence in the applicable water right place of use—that which he sold to the Gideons. SJ Reply, pp. 7-9. Consequently, Farley had no further domestic use need or opportunity

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[4] This is, again, where Farley's unilateral intention assertions fall flat. Even assuming *arguendo* one ignores Farley's incongruous actions on the ground and prior trial testimony (SJ Reply, pp. 20-27), Farley's blaming of IDWR staff (agents Lenon and Savage) and his own ignorance of the legal effect (or lack thereof) of what he was doing is no excuse. SJ Opposition, pp. 3-4; 11-12; 16-17.

As Farley noted in his *Opposition to Gideons' Motion to File Late Notice of Claim* (Mar. 15, 2023): "IDWR's role is that of the court's independent expert, not the Gideons' counsel . . . This attempt to scapegoat the agency does not pass muster . . . Blaming IDWR for failure on the part of the Gideons, their counsel, or both is improper. ***The informal advice of a disinterested regulator does not cure the responsibility which was incumbent upon the Gideons and their counsel.***" *Id.*, pp. 9-11 (emphasis added). According to Mr. Farley himself, his self-inflicted mistake of law provides him no refuge. *Id.*, p. 11, *citing Washington Fed. Sav. And Loan Ass'n v. Transamerica Premier Ins. Co.*, 124 Idaho 913, 917, 865 P.2d 1004, 1008 (Ct. App. 1993) ("The record suggests two possibilities: either Mr. Forbes did not read the Idaho statute or he misinterpreted it. Either scenario presents a[n] [inexcusable] mistake of law.").

on his remaining property—his 2019 Amended Claim simply left that portion of the 2009 Claimed water right unclaimed because it was previously perfected and vested by operation of Idaho Code Sections 42-227, 42-111, and 42-1411(2)(h) in March of 1999. Right No. 95-18409 was, therefore, ripe and available for Gideon claiming.[5]

Moreover, the parties' REPSA provided the voluntarily-agreed upon terms under which Farley freely negotiated the disposition of Right No. 95-18409. There was no unreasonable restraint on alienation or other property disposition prohibition present here. To the contrary, Mr. Farley received the tidy sum of $895,000 for the conveyance of the Gideon property with all (not some) of its "appurtenances," including, without limitation, "any and all water rights including but not limited to water systems, wells . . . appurtenant to the PROPERTY . . . unless otherwise agreed to by the parties in writing." (more on this in Section C.3, below). *Affidavit of Andrew J. Waldera*

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[5]Once again, Farley's own MAA makes this final unified decree entry timing point clear in Gideon's favor in this "unique" adjudication setting. MAA, pp. 14-15 (emphasis added) ("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.").

There is no final unified CSRBA decree yet; therefore, Right No. 95-18409 remained ripe for claim "before the [entry of] the final decree." Gideon noted this final decree-driven temporal bookend (SJ Reply, p. 12 ("Farley never transferred the domestic water use to other land, ***and no decree has yet entered*** fully and finally adjudicating (fixing) the elements of amended claim 95-16445 or otherwise disallowing Right No. 95-18409")); the Special Master noted the same (Order, pp. 7-8 ("This Special Master understands that in a general water adjudication such as the CSRBA, the District Court ***will eventually issue a final unified decree***, and it will provide that all unclaimed water rights . . . will be decreed as disallowed"); and, more importantly, Presiding Judge Wildman noted the same (SJ Memo, p. 14 (Judge Wildman noting during the late claim motion hearing that though Farley filed his 2019 Amended Claim, there was no prior final decree modifying the water right elements based on that amended claim; rather the Court's review continued to focus upon the pertinent water right elements as historically developed and "originally established.")).

in Support of Motion for Summary Judgment Re Claim No. 95-18409 (Jan. 30, 2024) ("Waldera Aff."), Ex. C (PSA) at §§ 2, 7, and 40; *see also*, Report, Att. N (Warranty Deed).

Finally, Farley's assertions that Idaho law precludes Gideon ownership of a "second exempt domestic water right," and his ongoing and known incomplete citation to *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933) are frivolous. MAA, pp. 13-14. Presiding Judge Wildman already disposed of the second exempt domestic water right argument, and the Special Master agreed. SJ Reply, pp. 27-33; *see also*, Order, pp. 15-17. Farley's assertion that the Gideons "have no need" for the second exempt domestic water right sourced from the Lower Well is particularly baseless and insulting given Farley's lies and misrepresentations regarding the water supply for the Gideon Property, including the productivity of the functionally useless Upper Well source of Right No. 95-17752. *Id.*, pp. 27-29. To recycle arguments is one thing; but to recycle arguments contrary to judicially-found facts in the context of the parties' prior Property Litigation is deceptive.

And, Farley's ongoing contention that *Bothwell* stands for the proposition that his unilateral intent of severance and withholding is legally sufficient to defeat the Gideon's claim to, and now ownership of, Right No. 95-18409 is specious and devoid of credibility. Gideon took great care in demonstrating the error of Farley's *Bothwell* citation. SJ Reply, pp. 13-22. The Special Master agreed with Gideon, and yet the incomplete citation remains unsupported by any new argument or additional authority. Order, pp. 14-15.

2. Farley Did Not Abandon Any Portion of the 13,000 gpd Block of Water Comprising Right Nos. 95-16445 and 95-18409—Attempts to Concentrate and Consolidate the Water on His Remaining Property Are Not Abandonment

While Gideon tried to give Farley some benefit of the doubt on his latent abandonment assertions (SJ Reply, pp. 22-23 pointing out that the diametrically-opposed arguments of severance and withholding versus abandonment are incongruous at best and spiteful at worst), these ongoing

abandonment arguments are all the more non-sensical and spiteful now. Farley ignores the summary judgment facts and arguments of Gideon and now the findings of the Special Master. Worse, Farley does not even meet the requirements of the legal standards presented in his own MAA.

Hanging himself with his MAA first, one need look no further than Farley's citation to *Chill v. Jarvis*, 50 Idaho 531, 537, 298 P. 373, 375 (1931) (MAA, p. 16) and his Notice of Error Reply citation (MAA, p. 17). Farley does not, and cannot, meet his own *Chill*-based "relinquishment of possession" abandonment requirement. He cannot meet this requirement because he had no intention whatsoever of relinquishing possession and use of the 13,000 gpd block of water at issue under his 2009 Claim, now split into Right Nos. 95-16445 and 95-18409. His Notice of Error Reply says it all: Farley merely "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." MAA, p. 17 (emphasis added). Farley's own arguments make clear that he relinquished nothing. Absent the Gideons' Claim No. 95-18409, Farley would have retained the entirety of the 13,000 gpd claimed in his 2009 Claim for use on his remaining property—"***changing***" a water right's purpose and place of use is not abandonment.[6]

There is nothing magic or dispositive of Farley's alleged 2017 water line ball valve installation and use either. So what if Farley allegedly ***and temporarily*** stopped use of Lower Well

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[6] The Idaho Supreme Court sourced Farley's cited statement—"The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete"—from the Oregon case *Wimer et al. v. Simmons et al.*, 27 Ore. 1, 39 P. 6 (1895). *Chill*, 50 Idaho at 537, 298 P. at 375. This discrete timing statement Farley relies on is an incomplete statement of the Oregon Supreme Court's explanation of what water right abandonment is: "a forsaking or desertion of [the right], operat[ing] as a relinquishment thereof." *Wimer et al.*, 27 Ore. at 12, 39 P. at 9. Again, Farley forsook and deserted nothing—he merely attempted, as the Special Matter correctly noted, to "rearrange" and "concentrate" the 13,000 gpd block of water at issue on his remaining Parcels S and T. Order, pp. 3-4, and 7.

water on Parcel I (the Gideon property) for a brief period of time? By his own hand, he restored that flow and domestic use of water on Parcel I pre-closing in June 2019, which flow and use continued until at least April 2023. SJ Reply, p. 24. And, his post-2017 ball valve installation actions prove beyond doubt that that physical act alone (ball valve installation and alleged use) bore no contemporaneous (2017) intent, let alone clear and convincing evidence of intent, to abandon the 13,000 gpd block of water at issue.[7] For if it had, for if Farley ***also*** clearly and unequivocally intended to abandon that 13,000 gpd block of water when installing the ball valve in 2017, he would have had no reason to: (a) submit his Notice of Error Reply and related correspondence in May 2018; (b) complete a Notice of Change of Ownership form in June of 2018; (c) meet with IDWR staff during the remainder of 2018; or (d) follow up with IDWR staff in early 2019, culminating in the filing of his 2019 Amended Claim. MAA, p. 17; *see also, Declaration of Brian T. Farley in Support of Response in Opposition to Gideons' Motion for Summary Judgment* (Feb. 23, 2024) ("Farley Dec."), ¶¶ 13-27.

If Farley abandoned (forsook, deserted, relinquished, renounced, quit—choose any synonymous verb and the Idaho jurisprudence using it) the 13,000 gpd block of water embodied by his 2009 Claim filed under his unity of property title, then why is he here in these consolidated subcase proceedings? Where is his evidence of ongoing/perpetual non-use ***and*** intent to abandon on his Parcels S and T? *See, e.g.*, Order, pp. 9-10. There would be no viable 2019 Amended Claim. There would be no viable Gideon Claim No. 95-18409. There would be no ***expert*** IDWR Rule 706

[7] Again, water right abandonment is disfavored under the law and, as a consequence, abandonment requires clear and convincing evidence of contemporaneous: (a) intent; and (b) decisive physical acts furthering that corresponding intent. SJ Reply, p. 23. Mere non-use alone is insufficient. *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982). And here, there was no non-use as a threshold matter—Farley, at most, merely changed the location and purpose of use for a brief period of time.

Report because there would be nothing to recommend to either party—the 13,000 gpd block of water at issue would not exist. Mere non-use on Parcel I alone for a brief period of time is not enough.

Farley is correct in at least one regard—there are no disputed issues of material fact on this issue. His actions and prior sworn testimony are what they are. *See, e.g.*, SJ Reply, pp. 22-27. By his own, MAA-reiterated admission, Farley merely sought ***"to change the water right*** . . . purpose [for the Lower Well] to stockwater only, and the place of use to Parcels S and T only." MAA, p. 17. Farley absolutely had no (nor has any) intent, let alone taken any physical actions to abandon that "water right" (the same 13,000 gpd block of water comprising Right Nos. 95-16445 and 95-18409). "Change," "rearrange," "consolidate," "concentrate," and "abandon" are very different things. With abandonment, there is nothing left to change, rearrange, consolidate, or concentrate.

3. The Warranty Deed is Not Ambiguous

Farley attempts to manufacture disputed issues of material fact sufficient to defeat summary judgment on the basis that the parties' Warranty Deed is ambiguous. MAA, pp. 18-21. Farley then criticizes Gideon and the Special Master for failing to examine all attendant facts and circumstances of the parties' intent during their real estate transaction. *Id.*, pp. 19-21. Gideon did not contend, nor do they concede here, that the Warranty Deed is ambiguous. And, the Special Master reached no such conclusion either.

Gideon asserted that given Farley's unity of title, and by operation of Idaho Code Sections 42-227, 42-111, 42-220, and 42-101, among other cited authorities, what is now Right No. 95-18409 was an undisputed legal "appurtenance" conveyed to Gideon under the plain (albeit boilerplate) "appurtenances" language of the Warranty Deed. SJ Reply, pp. 9-10; *see also, Hunt v. Bremer*, 47 Idaho 490, 493, 276 P. 964, 965 (1929) (absent "any clause or stipulation" of reservation or withholding, a deed conveying land "together with appurtenances" conveys or

"transfer[s] all water rights appurtenant thereto at the time of its execution"). There could be no other result: (a) based on the facts of the development and use of the Lower Well beginning in March 1999 (SJ Reply, pp. 7-9); (b) in the absence of a valid water right transfer (SJ Reply, p. 12; 18, including Note 4); and (c) in the absence of valid water right severance and withholding by Farley (SJ Reply, pp. 13-22). *See also*, SJ Memo, pp. 9-15, and SJ Reply, p. 11 (emphasis added) ("***[W]hile the generic terms or phrases 'appurtenances' or 'appurtenant to' can give rise to ambiguities*** under certain circumstances, ***those circumstances do not exist here*** because: (a) there was unity of title when [Right No. 95-18409] came into existence; and (b) the 'domestic' purpose can only exist on Parcel No. 94700 [Parcel I] where the home is located.").

Gideon subsequently relied upon the parties' REPSA in the alternative, "***[a]ssuming arguendo*** that the Court does not find the 'appurtenance' question conclusively answered by operation of Idaho Code Sections 42-220 and 42-101 in this unity of title case . . ." SJ Reply, pp. 10-12 (emphasis added). In other words, even if there was a deed-based ambiguity, the parties' REPSA was dispositive and resulted in the same ultimate outcome—that Right No. 95-18409 is owned by Gidon (an end result further supported by IDWR acting as the Court's independent technical expert under Idaho Code Sections 42-1401B, 42-1410(1), and 42-1412(4)).

As Gideon understands it, the Special Master held the same. The Warranty Deed's "non-specific appurtenancy clause . . . would convey water rights and other incorporeal hereditaments such as easements." Order, p. 12. The Special Master found it a merely "academic exercise to note that the Warranty Deed, on its face, [did] not identify the appurtenances [ ] it purport[ed] to convey . . . because as a practical [ ] matter, ***there is no uncertainty regarding what water right is at issue*** (*i.e.* a water right from the Lower Well for domestic and stockwater uses on Parcel I). *Id.*, p. 13. Consequently, the Special Master ultimately concluded that: "***It is not necessary to resort to extra-***

deed evidence to clear up any uncertainty regarding what water right is at issue, nor is there a dispute about the particular elements thereof. Rather, the dispute is whether the water right was or was not conveyed." *Id.* (Emphasis added). In other words, there was no question that Right No. 95-18409 was a legal "appurtenance" to the Gideon property, and there was equally no question that the Warranty Deed conveyed all "appurtenances" without limitation or qualification. Ultimately, the remaining issue addressed by the Special Master boiled down to whether Farley's unilateral assertions of his latent and self-serving intent in these proceedings met the requirements of the *Joyce* exception—which they did not. SJ Reply, pp. 13-22; *see also*, Order, pp. 13-15. And, they still do not here at this MAA stage.

Further, even if the Special Master found the Warranty Deed ambiguous triggering the need to consult extrinsic evidence to resolve any perceived ambiguity, he correctly limited the scope of available (*i.e.*, admissible) extrinsic evidence of the parties' intent to the REPSA. Order, pp. 13-14. This is because both the REPSA and the Warranty Deed (each of them) consistently and without conflict provided that the Gideon property was being conveyed with its appurtenances. The REPSA was a fully integrated agreement, signed by both parties, that could only be modified by a subsequent signed writing by the parties—a subsequently mutually signed writing that does not exist. SJ Reply, pp. 11-12; Order, pp. 13-14; *see also*, Tr. 701:14-702:14 (no other writings between the parties exist).

The REPSA and the Warranty Deed objectively and impartially speak for themselves. The parol evidence rule precludes the parties from selectively re-writing the REPSA and the Warranty Deed through later self-serving assertions when they later come to realize that their attempted sleight-of-hand water right reformation shell games fail to work as planned. *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005) (an integrated contract is complete on its face and cannot

be modified parol evidence of one party's subjective intent); *see also, AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 165, 307 P.3d 176, 182 (2013) (in integrated contracts, the parties' intent "must be determined solely from the language of the agreement"), and *Caldwell Land and Cattle, LLC v. Johnson Thermal Sys.*, 165 Idaho 787, 806, 452 P.3d 809, 828 (2019) (citations omitted) ("[W]hile intent of the parties may inform the interpretation of a contract, it does not allow a court to rewrite its terms"; courts do not possess the roving power to rewrite contracts).[8]

Finally, Farley erroneously contends that: "[t]he Gideons did not present facts of what their intent was, but instead improperly relied on language of the REPSA and its integration clause." MAA, p. 21. As discussed immediately above and confirmed by the Special Master, the REPSA ***is the best and only admissible evidence of the Gideon's intent*** with respect the conveyance and ownership of Right No. 95-18409. There is nothing "improper" about Gideon relying on the fully-integrated, arm's-length-negotiated, and fully/mutually-executed agreement between the parties on the matter. Just like Farley, the Gideons bound themselves to its terms absent a separate, subsequent signed writing by the parties that does not exist. The Gideons can no more alter or vary the REPSA's terms than Farley can. Section 7 plainly provides the Gideons' understanding and intent that they were to receive all appurtenant water rights, wells and water systems providing water to Parcel I as part of the Farley-Gideon transaction.

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[8]As Judge Christensen expressly found, Farley repeatedly: "stray[ed] from honesty in fact"; made "misleading and false statements"; and "misrepresented the water supply for the Property." MDO, pp. 3-4, 8, 12-13, and 20. Farley's undisclosed water right filings and amendments were a "material change" to the parties' transaction, and Farley knew that the Upper Well was "essentially a dry well" and "greatly deficient" with the Gideon property being "reliant on the Lower Well for the vast bulk of its water supply." *Id.* In sum, these matters and Farley's filings were "vital" to the parties' transaction, and Farley "misrepresented the fact that the Lower Well was to be shared" as opposed to belonging to Gideon alone. *Id.*, p. 21, and *compare and accord* Tr. 698:17-699:9 (" . . . I did not tell [the Gideons] that I had changed my water rights and reserved them the way they were reserved for myself") and 700:15-20 (" . . . I did not tell them that there was no water [from the Lower Well] - - that I changed the water rights, that's correct").

Of course, the Gideon's intent is different from Farley's—or they would not be in these proceedings. And, Judge Christensen already weighed witness credibility concerning the parties' real estate transaction during the Property Purchase Litigation trial in June 2022 concluding that Farley ***lied*** to and ***mislead*** the Gideons in several material respects. There is no ground to re-plow on these issues, and there is no need for the Special Master to re-open and second-guess the findings of Judge Christensen founded upon nearly 743 pages of trial testimony and over 100 admitted trial exhibits. *See, e.g.*, Waldera Aff., Ex. A.

Be that as it may, and to further dispel the erroneous Gideon intent assertion raised by Farley, the Gideons absolutely intended that they receive and own all water rights, wells, and other improvements appurtenant to Parcel I (what is now the Gideon property). *See*, Waldera Aff. (Jan. 30, 2024), Ex. C (PSA); *see also*, Exhibit A attached, hereto (Tr. at 22:23-24:21; 27:6-30:3 (Art Gideon testifying regarding that his understanding of the water supply system for the property (well(s), water rights, cistern, "et cetera") was a private system belonging to the Gideons "that was for [their] personal use only," which was important because the Gideons "didn't want to have to go through the problems that come up with having to deal with a shared well," and that Farley did not disclose or inform them otherwise), and Tr. at 195:22-197:9 (Kathy Gideon testifying that the intent of the transaction was just as REPSA Section 7 plainly provided—that Gideon was receiving "the water rights to the wells that were supplying water to the property that were coming into the cistern" absent disclosure or assertion from Farley otherwise)).[9]

[9]Gideon requests that the Special Master take judicial notice of Exhibit A attached hereto under Idaho Rule of Evidence ("IRE") 201(c)(2). IRE 201(d) provides that courts may take judicial notice at any stage of the proceeding. Exhibit A hereto is subject to judicial notice because the facts contained within it can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned consistent with IRE 201(b)(2)—namely the certified trial transcript of sworn testimony from the Property Purchase Litigation. Gideon only seeks judicial notice to the extent the Special Master finds these facts relevant as raised in Farley's MAA. These

D. Farley's Proportionality Contention—Though Creative—Fails As a Matter of Law

In the alternative, and in a creative attempt to circumvent IDWR water right conditioning consistent with the Idaho Constitution's domestic use preference, Farley suggests that the 13,000 gpd block of water comprising Right Nos. 95-16445 and 95-18409 be split proportionately between himself and the Gideons based on their respective landholdings under the original place of use of the 2009 Claim (18.37 acres, or 63% to Farley and 10.88 acres, or 37% to Gideon). MAA, pp. 21-23. Farley's proposal finds no support in applicable law.[10]

As discussed in the Gideons' SJ Reply, IDWR was careful crafting combined use limitations applicable to the overall 13,000 gpd block of water at issue. SJ Reply, pp. 25-26, including Note 14. Those combined use limitations protect against enlargement and also, importantly, recognize and protect the Gideons' superior domestic use entitlement of that block of water. *Id*, p. 26, *citing and quoting* Report p. 14 (emphasis in original) ("The below conditions would still allow claim No. 95-16445 to divert up to 13,000 gpd ***if*** water right No. 95-17752 was diverting the full 13,000 gpd for domestic use only"). Because Farley knows (and knew all along as Judge Christensen found) that the Upper Well source of Right No. 95-17752 is dry and

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additional facts bear on the correctness and implications of Farley's assertions, and are raised for the limited purpose of directly rebutting the same.

As noted, Gideon believes that the parties' REPSA controls this issue, but Farley apparently does not. To the extent that the Special Master feels the need to look beyond the REPSA—which he should not—taking judicial notice of Exhibit A attached hereto is allowed at the Special Master's discretion under the Rule 11.2(b) standard. *Summerfield v. St. Lukes McCall, Ltd.*, 169 Idaho 221, 232-234, 494 P.3d 769, 780-782 (2021).

[10] It is not lost on Gideon that Farley seeks a proportionate share of the "stockwater/domestic water right." This characterization of the "base" right (2009 Claim 95-16445) is telling because Farley concedes that Right Nos. 95-16445 and 95-18409 are comprised of the same 13,000 gpd block of water—a block of water that Farley neither intended to, nor did, ever abandon for if he did there would be nothing left to proportionally split.

functionally useless, Farley likewise knows that the "if" contingency contained in the water right combined use limitations will not trip, and that he will have little to no use of the Lower Well going forward. Hence, Farley's proportionate split proposal.[11]

Farley's acreage-based water right split proposal fails, however, because it negates: (a) the superior domestic use preference contained in Article XV, Section 3 of the Idaho Constitution (in times of shortage "those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose"); and (b) the statutory domestic use quantity entitlement of 13,000 gpd expressly provided under Idaho Code Section 42-111. Farley's proposal also fails because it finds no support the so-called "well-established precedent" he cites in the form of *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984) and *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990).

Crow and *Silverstein* offer no support to Farley's proposal because the "tract division"-based water right apportionment discussed therein arose, and is used in the context of, ***irrigation*** water right rights, ***not the domestic and stockwater use-based water rights at issue in this case.*** *See, e.g., Crow*, 107 Idaho at 463-465, 690 P.2d at 918-920 (addressing the division and priority of irrigation water right entitlements from Fox Creek under the 1910 Rexburg Decree); *see also, Silverstein*, 118 Idaho at 461, 797 P.2d at 861 (apportioning irrigation water rights using the *Crow* method). It appears that the Idaho Supreme Court first used this ***irrigation water right split method*** in *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911) (addressing the split ownership of irrigation-

[11] The actual productivity of the Lower Well further exacerbates the situation given its relatively meager yield of only 2-3 gpm, or somewhere between 2,880 and 3,420 gpd over the course of a 1,440 minute (24 hour) day. Report, Att. S (Christensen MDO), pp. 12 and 20 (Farley "represented" to the Gideons that the Lower Well produced 5 gpm; while pump contractor Jody Barden testified that the yield was no more than 2-3 gpm. Even Farley's inflated 5 gpm yield falls well short of the 13,000 gpd statutory domestic entitlement, coming in at 7,200 gpd).

based water rights appurtenant to an original 80-acre tract, relying on the prior California precedent in *Senior v. Anderson*, 138 Cal. 716, 72 P. 349 (1903)). And, this method has been used in the context of ***irrigation water right apportionment*** consistently since. *See, Crow* and *Silverstein*, above; *see also, Hunt v. Bremer*, 47 Idaho 490, 492, 276 P. 964, 964 (1929) (also concerning the apportionment of irrigation water entitlements under contract).

Undersigned counsel, like Farley apparently, finds no precedent in which domestic or stockwater rights were split under the irrigation-related, acreage-based method Farley proposes. And, it does not surprise undersigned counsel that no such precedent seemingly exists because of the constitutional and statutory provisions cited above, and because of the well-settled principle that the Legislature is presumed to know the law at the time of a statutory enactment or amendment. *See, e.g., Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982). In other words, and despite the forgoing irrigation water right proportionality principle, the Idaho Legislature expressly prescribed various quantities of water right entitlement based on types of use irrespective of landmass owned for place use purposes. "Domestic" use under Idaho Code Section 42-111 authorizes the use of water for homes, livestock, "and for any other purpose in connection therewith" (including the irrigation of up to one-half acre of land) up to 13,000 gpd no matter if one lives on 1 acre or 1,000 acres—the domestic use quantity of water applies equally across the board.

The Legislature has spoken, and Idaho Code Section 42-111 expressly and specifically governs the water quantity question under the Gideons' domestic use. *See, e.g., Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 895, 265 P.3d 502, 508 (2011) (courts enforce statutes as written based on their plain language, the courts do not have the authority to revise statutes); *see also, Valiant Idaho, LLC v. JV, LLC*, 164 Idaho 280, 289, 429 P.3d 168, 177 (2018) (as between

the general quantity and duty of one miner's inch per acre of irrigation water codified at Idaho Code Section 42-220 and the 13,000 gpd authorized under Idaho Code Section 42-111, Section 42-111 prevails in the context of domestic use under the "basic tenet of statutory construction [ ] that the more specific statute or section addressing the issue controls"). IDWR understands and agrees with this statutory domestic quantity entitlement, and the constitutional domestic use preference—which is why it took care in crafting its combined use limitation remarks. Report, pp. 13-15.[12]

There is no basis upon which Farley is entitled to any portion of the Gideon's 13,000 gpd domestic use entitlement. Holding otherwise would eviscerate the constitutional domestic use preference and eviscerate the plain language of Idaho Code Sections 42-227 and 42-111.

E. Conclusion

Gideon respectfully requests that the Special Master uphold his Order (and resultant recommendation) with respect to Gideon Right No. 95-18409. Farley's present arguments are no more valid now than they were during the summary judgment stage. Worse, what is not merely recycled and duplicative, and that which comprises new and additional legal authority, is even more strained and incomplete in its presentation.

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[12] Gideon acknowledges their prior citation to *Crow* for the proposition that 2009 Claim "base" right 95-16445 should be "shared" accordingly. SJ Reply, p. 13. In retrospect, the citation was less than precise. The purpose of the citation was to split the "base" right between the parties based on their respective uses of the water (*i.e.*, to separate out the Gideon's domestic use entitlement upon their purchase of the one and only home where that use was developed, perfected, and perpetuated by Farley under his unity of title). This intention is made clear by Gideon's stated agreement with IDWR's Report findings (Reply, pp. 13, 25-26, and 33) and their domestic use contentions under Idaho Code Section 42-227 and 42-111 (SJ Reply, pp. 29-33—Gideon "seek[s] only the single, aggregate volume of 13,000 gpd that is allowed them under Idaho Code Sections 42-227 and 42-111(a) . . . IDWR acted and recommended accordingly via the use of combined use limitations . . . Gideon suggested such an approach on their Late Claim Reply, and IDWR took that approach several months later in its Report").

Farley's ongoing (and attempted) sleight-of-hand should not be rewarded. As stated in the Gideon's SJ Reply and reiterated here: "Farley's IDWR/adjudication claim paper-based shell games did not match the truth and reality of his actions on the ground, nor his representations to Gideon . . . the Department was not fooled, and this Court should not be either." SJ Reply, pp. 23-26.

DATED this 16th day of July, 2024.

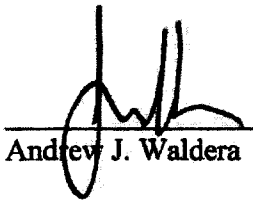
SAWTOOTH LAW OFFICES, PLLC

By _____
Andrew J. Waldera
Attorneys for Arthur V. and Katherine M. Gideon

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2024, I caused a true and correct copy of the foregoing **RESPONSE TO FARLEY'S MOTION TO ALTER OR AMEND SPECIAL MASTER'S MEMORANDUM DECISION / REPORT & RECOMMENDATION** to be served 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, ID 83303-2707	( ) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile ( ) iCourt/Email
Travis L. Thompson 163 Second Avenue West P.O. Box 63 Twin Falls, ID 83303-0063 E tthompson@martenlaw.com	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (x) iCourt/Email
Director Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile ( ) iCourt/Email
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 83720 Boise, ID 83720-0010	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile ( ) iCourt/Email
United States Dept. of Justice Environment & Natural Resources Division 550 W Fort Street, MSC 033 Boise, ID 83724	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile ( ) iCourt/Email



Andrew J. Waldera

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

--oOo--

ARTHUR V. GIDEON and KATHERINE M. GIDEON, husband and wife,

Plaintiff,

vs.) Case No. CV28-20-2706

BRIAN T. FARLEY and PAMELA FARLEY, husband and wife,

Defendant.

Court Trial

AT: Kootenai County, Coeur d'Alene, Idaho

ON: June 6, 2022 - June 9, 2022

BEFORE: Honorable Richard S. Christensen, District Judge

APPEARANCES:

For the Plaintiff: Lukins & Annis, P.S.
By: Michael G. Schmidt, Esq.
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June 6, 2022, 9:00 a.m.

PROCEEDINGS

03:06:32 THE COURT: This is the time set for the matter of Gideon versus Farley, CV28-20-2706. Are the parties ready to proceed?

08:59:36 MR. BISSELL: Yes, your Honor.

08:59:37 MR. SCHMIDT: Yes, your Honor.

08:59:38 THE COURT: Very well. The Court notes the presence of counsel. And are both your clients here?

08:59:40 MR. SCHMIDT: Yes, your Honor.

08:59:41 MR. BISSELL: Yes, your Honor.

08:59:42 THE COURT: All right. Great. And the presence of the parties. We had some discussions about time and what the status of the day will look like. We will take a break at 10:30 and then my note, probably a break -- there will be a 20-minute break and then a break about 1:10, and then we'll proceed in that fashion throughout the week.

09:00:19 The Court has decided on a 60/40 split on a time and the Court will use the clock on the computer in front of me as the time. With that, does either party have any -- anything to take up prior to that?

09:00:23 MR. SCHMIDT: Our exhibits, do you want to handle the --

09:00:25 MR. BISSELL: There was another exhibit too,

your Honor, or -- if you go through them, we can talk about them when we get there.

09:01:03 THE COURT: Okay. We'll do that. The Court is thankful for the parties getting together and taking a look at the exhibits and seeing what we can -- what they could agree to; therefore, the Court will put on the record what exhibits were stipulated to.

09:01:28 In taking up the plaintiffs' exhibit list first, it is number 1 -- and I want the parties to note an objection or state if that's not what they meant. Just interrupt, is what I'm saying, as we go through these. Stipulating to one, two, five --

09:01:43 MR. BISSELL: Were three and four also, your Honor, we're going to do because that's what we were talking about?

09:01:46 THE COURT: Okay.

09:01:47 MR. BISSELL: We are going to 3L and 4 and O and E, all of those together, we're fine with three and four coming in too.

09:02:20 THE COURT: All right. Mr. Schmidt.

09:02:21 MR. SCHMIDT: Okay. Great. Thank you.

09:02:22 THE COURT: So three, four, five, six, seven, eight, ten, 14. There was -- some of these you listed, Mr. Bissell, with -- you had stipulated if the date is established. I'm not allowing those in right now,

A. **Okay.**
Q. Do you recognize what those pictures are?
A. **These were part of the listing showing the properties and what it looked like.**
Q. So where are you when you're reviewing this listing? Are you in Idaho or in Ohio?
A. **I'm in Ohio.**
Q. Okay. So did you make a determination as to whether or not you wanted to view the property or purchase the property or...
A. **Yes, we did.**
Q. Okay. And what did you determine?
A. **My wife and I decided to come out and view the property. It looked favorable.**
Q. Okay. Okay. Did you enter into any agreement before you left Ohio to go view the property?
A. **We signed a preliminary document that we wanted to purchase the property upon the examination and viewing of the property.**
Q. Okay. If you'd turn, please, to Plaintiffs' Exhibit No. 3.
A. **Yes.**
Q. And defense counsel and I have discussed Plaintiffs' Exhibit 3 as missing initials, but that we've already stipulated to admission of Exhibit I and

L. I'm not sure if we stipulated to Exhibit 3.
We did?
MR. BISSELL: We did.
THE COURT: Yes.
MR. SCHMIDT: Q. So acknowledging that it's missing the signatures, what is Exhibit 3?
A. **This was the seller's disclosure showing what was going with the property and what wasn't going with the property.**
Q. And how was it that you received this document, if you recall?
A. **How did we receive it?**
Q. Yes.
A. **It was -- I believe it was emailed to us, to my wife.**
Q. And you stated that you made some sort of offer before coming, some sort of contingent offer. What were the contingencies of that offer, if you recall?
A. **Well, basically we wanted to come out and view the property and see that it was as was described in the listing.**
Q. So looking at Seller's Property Condition Disclosure Form that is Plaintiffs' Exhibit No. 3, did anything in that Disclosure Form turn out not to be

true?
A. **Well, yes, the water rights on here. The listing said that it was a private system, nonshared, and the water rights went with the property.**
Q. Could you please turn to Bates number Gideon 2019 of Exhibit 3. It's the second to the last page.
A. **Yes.**
Q. Okay. Up at the top there, it discloses the water source and types section.
A. **Yes.**
Q. Can you see that? And you see where it says, "Domestic water provided by"?
A. **Yes.**
Q. And what's checked there?
A. **It says private system, well system, et cetera.**
Q. And for the landscape water and the irrigation water, what is that provided by, according to the disclosure?
A. **It's also the landscaping and the irrigation also provided by the private system.**
Q. And there's some other remarks there. Would you mind reading what those say?
A. **It says, "Well 3,000-gallon buried concrete reservoir."**

Q. And then on the next line, where it says, "Shared well and shared well agreement," what does the disclosure indicate?
A. **It says "no" to shared well; and it says "no" to shared well agreement.**
Q. Was it important to you to have a private system rather than a shared system?
A. **Yes. I didn't want to have --**
Q. Hold on a second. Why was it important?
A. **Yes. Well, we didn't want to have to go through the problems that come up with having to deal with a shared well.**
Q. And what did you understand private system well cistern, et cetera, what did you understand that to mean?
MR. BISSELL: Objection. Calls for hearsay.
THE COURT: Overruled.
MR. SCHMIDT: Q. Go ahead and answer.
A. **Well, I thought it meant that the system was a private system that belonged to me that was for our personal use only.**
Q. And lower down you'll see some bold where it says, "Other Disclosures" section. And I'll read it for you. Two lines below it, do you see where it says, "Has property been surveyed since you owned it?"

A. Yes.
Q. Okay. And what did this disclosure tell you about whether it had been surveyed?
A. It said the property had not been surveyed.
Q. If it had been surveyed, would that be important for you to know?
A. Well, yes, because it would give me the exact boundary lines of the property so I know exactly what I was getting.
Q. If you'll turn to Exhibit 4, please.
A. Yes.
Q. Do you recognize that document?
A. This was the Real Estate Purchase Agreement.
Q. And if you'll turn to the last page where it says, "RE-11 Addendum." Is that part of your agreement as well?
A. Yes.
Q. Four has been admitted, so I won't move to admit it. So you entered into the Purchase and Sale Agreement, Exhibit 4. What did you do then?
A. We made the offer and waited for Mr. Farley to come back and accept it.
Q. And I think we're to that point, so Exhibit 4 got -- did that get signed by both parties?
A. Yes, it did.

Q. Okay. Did you make arrangements to view the property?
A. Yes, I did.
Q. Okay. Who went to view the property?
A. Well, my wife and I were originally going to go together, but her mother got put in the hospital so she had to stay, so I drove up by myself. I drove out on the 1st and 2nd. I viewed the property on the 3rd of May.
Q. Okay. And when you drove up to the property, who was there?
A. I went up -- Patty Ellis took me up to the property, and when I was there, Mr. Farley and his realtor were there.
Q. And who's his realtor?
A. Who is the realtor?
Q. For Mr. Farley.
A. Rob Elder, is it?
Q. Rob Elder?
A. Yes.
Q. And did you have any discussions with Mr. Farley or Mr. Elder?
A. When we viewed the property, I asked Mr. --
Q. Well, first of all, did you have discussions with Mr. Farley?

A. Oh, yes, I did.
Q. And did you have discussions with Mr. Elder?
A. I had discussions with Mr. Farley. Mr. Elder pretty much was just there. He commented occasionally, but the conversations were mainly with Mr. Farley.
Q. Did you have any conversations with Mr. Farley about the water system?
A. Yes, I did.
Q. And what did he tell you about the water system?
A. Well, I asked him what the output of the system was because it wasn't listed in the listing. Mr. Farley told me that the system had two wells attached to it. The upper well was right directly behind the home. It produced 2 gallons a minute, and that there was a second well attached to the system that was down the hill on another piece of property that produced 5 gallons a minute.
I told Mr. Farley that was a little bit lower than I was used to, that my wells in Ohio had been 15 gallons per minute. He advised me that I would never get that kind of volume up on the mountain where the house was, that he had lived there for 25 years and he had had more than adequate water and never had any water problems through the entire 25 years.

Q. So he talked about an upper well and a lower well; is that correct?
A. That's correct.
Q. Okay. Did he indicate that those were yours, that that was going to be included in the transaction?
A. Yes. He said that the system had two wells attached to it and that was the production.
Q. If you'll turn to Plaintiffs' Exhibit 5, please.
A. Yes.
Q. Do you recognize Exhibit 5?
A. This was the second --
Q. We'll take this in order. Do you recognize it first?
A. Oh, yes, I do.
Q. Okay. And what is it?
A. This is an email from Rob Elder giving us confirmation on the wells and the septic system.
Q. Okay. And what's the date of the email?
A. The date of the email is May 17th.
Q. And what information was provided for you to review?
A. Well, they provided the repair orders, and on the well systems, both wells, and the septic system.
Q. You say both wells. You're talking about the

upper well and the lower well repairs?

A. That's correct.

Q. And was anything stated to you at this point in time that the lower well and its water rights, that anything was going to be withheld at closing?

A. No. The invoices showed that – you know, what we had asked for confirmation on the well system, and that everything was working properly. And he provided the invoices showing that the upper well and the lower well both had new pumps put in it, and they were both working properly, and that the septic system had been worked on recently within the last few years and new pumps put in it. There was nothing marked out of it or to indicate that any part of the systems wasn't going with the house.

Q. And did you have any discussions about water rights that you recall?

A. No. The listing had indicated the water rights went with the wells.

Q. But in terms of the discussions with Mr. Farley, at any point in time prior to closing, did you have any discussions with him about withholding water rights?

A. No. No, there was no discussion about withholding any water rights.

Q. Did he mention anything about having changed water rights associated with the wells?

A. No.

Q. Did you have a physical inspection for the property?

A. I didn't walk the property lines, no.

Q. Okay.

A. I observed the property from the yard where we were – I was looking at the property.

Q. So we're going to talk about the boundaries in just a second.

A. Okay.

Q. But I'm wondering about, like, did you hire a professional inspector?

A. Oh, yes. We – I had to hire two.

Q. Okay. Tell me about the first inspector that you hired.

A. Well, the first inspector was a gentleman that had inspected a home for us previously in 2018, so we – Patty Ellis did all the arrangements for it. She called him and had him come out to the house. There appeared to be some problem because Mr. Farley ran the inspector off.

Q. So with your first inspector –

MR. BISSELL: Objection. That calls for

hearsay, your Honor. Move to strike that answer.

THE COURT: Sustained.

MR. SCHMIDT: Q. So did your first inspector complete an inspection?

A. No, he did not.

Q. Did you have to hire a second inspector?

A. Yes. Patty Ellis called and told me what had happened, and she was going to have to find the second one. She hired a second company to do the inspections.

Q. If you'll turn, please, to Exhibit 7.

A. Yes.

Q. Do you recognize that document?

A. This was the home inspection agreement.

Q. And did you enter into an agreement with the second home inspector?

A. Yes.

Q. And he was the home inspector?

A. This was – it was called Top to Bottom Home Inspections.

Q. And did the home inspector complete an inspection?

A. He completed it as far as he could.

Q. If you'll turn to Plaintiffs' Exhibit 8. What is Plaintiffs' Exhibit 8?

A. Eight is the home inspection done by Top to

Bottom.

Q. Did your home inspector inspect the well systems?

A. No, he did not.

Q. If you'll turn, please, to Exhibit No. 9.

A. Yes.

Q. What is Exhibit No. 9?

A. Nine was a list of things that we asked to be repaired on the property before we went into a final contract on it.

Q. And who did you provide Exhibit 9 to?

MR. BISSELL: Your Honor, we do not – before I have testimony in this exhibit, it needs to get admitted and we object to it. It's hearsay.

THE COURT: I think he's asking some foundation questions here.

MR. BISSELL: Okay.

THE COURT: Overruled. Go ahead.

THE WITNESS: It was submitted – we sent it to our realtor, who sent it to Mr. Farley's realtor. I assume Mr. Farley got it.

MR. SCHMIDT: Q. Okay. And in terms of – in terms of these descriptions here, are those – did you write that down?

A. Yes. I wrote them down and they were

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MR. SCHMIDT: We would agree -- if we can admit Exhibit 24 and acknowledge on the record that there are overlapping portions of Exhibit 24 in Exhibit GG, and so we would agree to use Exhibit 24 and agree that the dates indicated on GG are accurate.

MR. BISSELL: I don't have an objection to that.

THE COURT: All right. Let's go with that. So Exhibit 24, I don't believe, has been admitted.

MR. BISSELL: No.

THE COURT: Are you moving for admission?

MR. SCHMIDT: Motion to admit Exhibit 24 as described incorporating the dates from GG.

(Plaintiffs' Exhibit 24 offered.)

MR. BISSELL: No objection.

THE COURT: All right. Exhibit 24 will be admitted.

(Plaintiffs' Exhibit 24 admitted.)

THE COURT: Go ahead.

MR. SCHMIDT: Q. If you'll look to the July 2, 2019, text from Mr. Farley to you, Kathy, that's Farley 224 Bates number.

A. So I'm on GG now, correct? I don't have the other book.

Q. Sure. Look to GG. That's fine.

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A. Okay.

THE COURT: What happened to Plaintiffs' exhibits book? Do you have the original there, Mr. Schmidt?

MR. SCHMIDT: My apologies.

Q. All right. Do you have Plaintiffs' exhibit book turned to Exhibit 24 now?

A. Yes.

Q. And turn to exhibit -- or the page Farley 224, please.

A. Okay.

Q. And could you describe what your conversation was here on this page?

A. I sent a message to Brian and said that the pump house is overflowed. The water is 1 to 2 inches around the cement collar. Levels of water in the reservoir is -- should be "are" -- couple inches from the top. No water sounds. Have more loads of clothes to wash.

Q. Okay. How long after closing was this?

A. I have to look because there's not a date on my page or the page before. Maybe -- July 2nd, 2019, is on 222. I don't see any date on 223.

Q. So was this in the summer of 2019 after you closed?

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A. Correct.

Q. Okay. And what's the first -- what was his response with respect to the quantity of water for the wells, plural?

A. He states, "Yes, those wells have always produced more than enough water," and then there's lots of emojis. "Good problem to have."

Q. And with respect to wells there in plural, was it your understanding that you had a right to the water from the two wells?

A. Yes. Because he's telling me to go down to the lower well pump house to reset the breaker.

Q. Okay. And did you do that?

A. No. I -- water -- I washed some more clothes and I -- he said if you need to go down, the floats that turn them on and off are set so the water should stop coming in right about where the white PVC valve is. On the other hand," it says, "if you run the sprinklers tonight on the regular setting that will pump it down quite a bit." And that's what I did when I washed my clothes.

Q. And if you'll turn to paragraph 7 of the Purchase and Sale Agreement, which is Exhibit 4.

A. Four.

Q. Exhibit 4, yes. If you could review

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paragraph 7, I want to ask you some questions about that.

A. Okay.

Q. What did you interpret this paragraph to mean with respect to the private well system that was mentioned in the listing and disclosure?

A. That -- exactly what it states, that "any and all water rights, including, but not limited to, water systems, wells, springs, lakes, streams, ponds, rivers, ditches, ditch rights, and the like, if any, appurtenant to the property and owned by the seller are included in and part of the sale of this property and are not leased or encumbered unless otherwise agreed to by the parties in writing."

Q. Did that lead you to believe anything with respect to the water rights and infrastructure that you were receiving?

A. We -- yes.

Q. And what?

A. That we were getting the water rights to the wells that were supplying water to the property that were coming into the cistern.

Q. And were they coming into the cistern when you closed on the property?

A. Yes.

Q. And is there anything else that led you to believe that you were receiving the water rights to the two wells?

A. There was no disclosure that we weren't and so we assumed that we were.

Q. Did Mr. Farley ever notify you that just a few months earlier he had filed an amended water right associated with the lower well?

A. No.

Q. If he had disclosed that to you, would that have made a difference?

A. Yes.

Q. Why would that have made a difference?

A. Because we wanted to have the water rights associated with the property so we had control of the -- it's like having a shared well. If you don't have the water rights, you don't have the control of who's going to use the water and how much they're going to use and when they're going to stop.

Q. And that word appurtenant to the property and owned by seller, what did that mean to you?

A. To me appurtenant means a part of, so it's like something that's connected to, that's connected to, that's connected to. It's just...

Q. And was the lower well connected to the water

system, the private water system?

A. Yes.

Q. If you'll turn to Exhibit 5, please.

A. Yeah.

Q. Do you recognize that document?

A. Yes, I do.

Q. And what -- in what context was that sent?

A. Art had inquired about the upkeep of the well and septic system, and Patty was our realtor, had contacted Rob and Rob, in turn, sent the invoices for the improvements and investments Brian had made in the well and septic system recently, and then Patty got them and emailed them to us and we reviewed them.

Q. Was there anything about the well records that led you to believe you were getting an interest in the lower well?

A. We received the items just as highlighted. There was nothing redacted, nothing was crossed out. There wasn't a message from Rob saying you can review these invoices but disregard the lower well because you're not getting it. Everything that was highlighted from lower well pump has the dead short, and you pulled it and he installed a new one, and then he talks more on the upper well. It just keeps going and nothing -- nothing led us to believe that we weren't getting both

the upper well and the lower well as part of our system.

Q. If you'll turn to Exhibit 6, please.

A. Okay.

Q. Do you recognize Exhibit 6?

A. Yes.

Q. And what is that?

A. It is -- it's the -- I think it's called like the owners policy. It's something where you receive from First American Title after we placed our offer and we had five days to review it.

Q. And did you object to anything on the title during those -- that period of time?

A. Yes and no. There were some things that were on here that needed to be removed and there was also -- we were expecting something about boundary line adjustments on here. The items 21 and 22 weren't related to anything that we needed to be aware of or included in, but we needed to have a thing on property boundary adjustment that he had made.

Q. And so with respect to items 21 and 22, you're referring to the deeds of trust?

A. Correct, on Gideon 001211.

Q. And who was the grantor of those deeds of trust?

A. Brian and Pamela Farley, husband and wife for

both of them.

Q. It says Pamela Farley. Are you -- strike that.

And at some point in time, as Mr. Gideon testified, a physical inspection was performed?

A. Correct.

Q. You disagree with anything that your husband testified to?

A. No. My mom was hospitalized on the day before we were to leave and I had -- they told me that she was failing, and I needed to find hospice care, and so that was to me more important than looking at a house.

Q. If you'll turn to Exhibit 9, please. What is Exhibit 9?

A. It is -- I think it is a list of items that needed to be addressed that were written by Art and I, and the page numbers were requested to be in conjunction with whatever the home inspection page, I'll call them findings, were, and so he just -- we just listed them, typed it up, and it was sent.

Q. And so you're referring to the home inspection on Exhibit 8?

A. It was the one by Dale, yes.

Q. And were the items listed fixed as requested?

A. For the most part, yes.

MR. SCHMIDT: July 29, 28, 27ish is fine. It's a long transcript, so I think it will take a couple of weeks. Assuming we get the transcript July 9th, 30 days from today gives me two and a half weeks.

THE COURT: The last --

MR. SCHMIDT: Let's --

THE COURT: How about just have them August 1st, or is that too far?

MR. SCHMIDT: That works.

THE COURT: Okay. So your opening, closing due August 1st. Fourteen days after that or do you need more, Mr. Bissell?

MR. BISSELL: I think that will probably work. I just want to double check something. Yeah, I can do that.

THE COURT: What day is that?

MR. BISSELL: This would be the 15th, your Honor.

THE COURT: And what day of the week is that?

MR. BISSELL: Oh, it's Monday.

THE COURT: Okay. Yes. Ten days afterwards?

MR. SCHMIDT: Yes.

THE COURT: Okay. So August 25th. All right. And as stated, brief length is 40 pages. That includes front to back, everything. And those briefs must be

double-spaced, just according to the Supreme Court standards contained in the Idaho Appellate Rules as to margins and otherwise.

MR. BISSELL: Your Honor, may I ask? So is the plaintiff -- they get two 40-page briefs?

THE COURT: Well, I'll give them 25 on the closing and the rebuttal closing.

All right. Anything else, gentlemen?

MR. BISSELL: What about findings of fact? How do you want to handle that?

THE COURT: Oh, they are separate from the closings. So just as long as they're findings of fact, I'll take a look at them. See how they are.

MR. BISSELL: What about the timing of those, your Honor?

THE COURT: Oh, August 1st.

MR. BISSELL: For both; is that -- okay.

THE COURT: Yeah.

MR. BISSELL: So make sure I have this right, your Honor. Just make sure I'm clear. Plaintiff's brief due August 1st, Defendant's brief August 14th --

THE COURT: 15th.

MR. BISSELL: 15th, yeah. Thanks for the extra day. Would have been Sunday. Defendant's rebuttal closing August -- or Plaintiffs' -- August

25th, and findings of fact from both parties due August 1st?

THE COURT: Correct.

MR. BISSELL: Got it. Thank you.

THE COURT: Recitations to the record are appreciated.

MR. BISSELL: Got it.

THE COURT: All right. Thank you, gentlemen.

MR. SCHMIDT: Thank you.

MR. BISSELL: Thank you, your Honor.

THE COURT: With that, we're in recess.

(Matter adjourned.)

STATE OF IDAHO)
) SS: REPORTER'S CERTIFICATE
COUNTY OF KOOTENAI)

I, Keri Veare, a notary public and duly certified court reporter in and for the State of Idaho, DO HEREBY CERTIFY:

That the foregoing proceedings was taken on the date and at the time and place herein stated;

That the foregoing is a true and correct transcription, to the best of my ability, of my shorthand notes taken down at said time and place in the above-entitled litigation;

I FURTHER CERTIFY that I am not related to any of the parties or attorneys to this litigation and have no interest in the outcome of said litigation.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 11th day of June, 2022.

KERI VEARE, CSR 675, CRR, RPR
Official Court Reporter

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TO: Kootenai County Clerk

ARTHUR V. GIDEON and KATHERINE M. GIDEON, husband and wife, Plaintiff, vs. BRIAN T. FARLEY and PAMELA FARLEY, husband and wife, Defendant.	Case No. CV28-20-2706

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on **June 11, 2022**, I efiled an Original Transcript entitled **"COURT TRIAL,"** held **June 6, 2022**, to June 9, 2022, totaling **748 pages**, for the above-referenced matter with the clerk.

A Certified Copy has been emailed to:
LUKINS & ANNIS, P.S.
Campbell & Bissell

Keri Veare

Keri Veare, Court Reporter/Transcriber

cc: Counsel of Record, via email