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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) **GIDEON RESPONSE TO FARLEY'S MOTION TO DISALLOW PETITION FOR COSTS AND FEES**

Arthur and Katherine Gideon ("Gideon"), by and through undersigned counsel of record and pursuant to Idaho Rules of Civil Procedure 54(d)(5) and 7(b)(3)(B), and the Court's *Order Granting Stipulated Motion to Vacate and Reset Hearing* (Mar. 17, 2025), hereby submit this response to *Brian Farley's Motion to Disallow Gideons' Verified Petition for Costs and Attorney Fees* (Feb. 20, 2025) ("Motion"). For the reasons and authorities discussed herein, Gideon respectfully requests that the Court deny Farley's Motion in its entirety, and award them the $112,805.85 requested and supported in Gideon's *Verified Petition for Costs and Attorney Fees* (Feb. 6, 2025) ("Petition").

A. Preliminary Note

Gideon incorporates, by this reference herein, the entirety of their Petition and the points and authorities contained therein.

B. Farley's Procedural Arguments Elevate Form Over Substance and Ignore the Result of the "Main Issue" of the Litigation

As anticipated in Gideon's Petition (p. 5), Farley claims that this litigation was, at worst for him, a "split decision"—that he also prevailed to an extent sufficient to defeat Gideon's Petition. Motion, pp. 8-9. Gideon does not dispute that Farley exited the adjudication with Water Right No. 95-16445. But Farley's victory claims ring hollow and superficial because Gideon did not oppose Farley receiving his portion of base claim/right 95-16445. Petition, p. 3, Note 2.

Gideon repeatedly and expressly represented to Farley and the Court their willingness to quickly "stipulate[e] to the adjudication and decree of Claim No. 95-16445 as recommended in IDWR's [Supplemental] Report for purposes of closing these consolidated subcases (Nos. 95-16445 and 95-18409) out . . . Gideon has no objection . . . Gideon's focus remains the ultimate recommendation and decree of Right No. 95-18409." *Id.* Had Farley done as Gideon quickly and repeatedly offered, he would not be staring down the barrel of a $112,805.85 cost and fee request—the magnitude of the amount would have been far less and is a product of his own creation. Petition, pp. 7-8; *see also*, *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 754, 53 P.3d 330, 337 (2002) (the non-prevailing party may suffer an award of fees and costs even where a claim or defense is initially meritorious, but is later rendered frivolous, unreasonable, or without foundation by subsequent events or information developed during the litigation). This Court should not allow Farley to manufacture "victory" out of an undisputed issue.

As noted in Gideon's Petition, the question before the Court is not whether one prevailed on one or more individual claims, but rather who succeeded on the "main issue" of the action.

Thorton v. Pandrea, 161 Idaho 301, 315, 385 P.3d 856, 870 (2016), *citing Hobson Fabricating Corp. v. SE/Z Constr., LLC*, 154 Idaho 45, 49, 294 P.3 171, 175 (2012). This, therefore, begs the question of what was the "main issue" of this action?

The answer is simple no matter where you look—whether to the proceedings in Subcase No. 95-16445 prior to the inception of Subcase No. 95-18409, or to the proceedings in Subcase No. 95-18409 alone. Gideon sought no more than their appurtenant share of base (2009) Claim No. 95-16445 upon their purchase of the former Farley home and related Parcel I acreage—the "described [ ] water right elements that were removed from [Farley's] claim no. 95-1644[5] when it was amended on January 25, 2019." *Memorandum Decision and Order of Partial Decrees* (Jan. 24, 2025) ("Challenge Order"), p. 3.

Farley understandably attempts to obfuscate the result of the "main issue" in this action by reaching back into Subcase No. 95-16445 prior to the inception of Subcase No. 95-18409 because there is no credible argument supporting any Farley "victory" in Subcase No. 95-18409. But attempting to manufacture "victory" in the context of Subcase No. 95-16445 is no more credible either, notwithstanding the fact that Gideon's cost and fees request is rooted in the expenses incurred in litigating Subcase No. 95-18409 only.

Gideon entered Subcase No. 95-16445 because they "purchased the property located at 23452 N. Derting Road, Hayden, Idaho from Brian T. Farley on about June 7, 2019" and because the Gideon-purchased property was "associated with parcel no. 52N03W094700." *Motion to File Late Objection* (Jul. 23, 2020). Parcel "[ ] 94700" was included as place of use in the original 2009 base claim, but was removed in the 2019 amended claim. *Compare Supplemental Director's Report* (Sept. 21, 2023), Attachments D and J; *see also*, Challenge Order, p. 3. Based on this purchase, Gideon (correctly) asserted that the place of use of Claim No. 95-16445 should

include Parcel "[ ] 94700" because "Water Right no. 95-16445 has historically provided and presently provides domestic and stockwater to parcel no. 52N03W094700 [, and that] [t]his historical and present use is not reflected in the director's report." *Standard Form 1 Objection* (Sept. 8, 2020) ("Objection"), pp. 2-3. As a consequence, Gideon contended that their property (Parcel "[ ] 94700") should be included on the water right, and that they should own the water right as a product of their property purchase. *Id.*

It is true that Gideon initially asserted that Right No. 95-16445 should "belong[ ]" to them, and that Farley was "not entitled to" the water right. Objection, pp. 2-3. However, those early sole ownership assertions were based on express representations from Farley during the purchase and sale dealings that the Lower Well and water therefrom would continue to serve the Gideon property—that there was no "shared well" as part of the deal, and that the well and the water sourced therefrom would continue to be used for the "sole" use and benefit of the Gideon property. *Id*; *see also, Reply in Support of Gideon Standard Form 4 Motion to File Late Notice of Claim (Replying to Farley's Response in Opposition)* (Mar. 30, 2023), pp. 10-11, and Note 5; *Memorandum in Support of Motion for Summary Judgment Re Claim No. 95-18409* (Jan. 30, 2024), pp. 9-10; and *Claimant Gideons' Reply in Support of Motion for Summary Judgment Re Claim No. 95-18409* (Mar. 4, 2024) ("SJ Reply"), pp. 24-25 (third, seventh, and eighth bullets).

Though Farley asserts that he prevailed at least in part in this matter, the truth is that Gideon's "sole ownership" assertion was never substantively litigated in the CSRBA. This is because: (a) Subcase No. 95-16445 was quickly stayed upon Gideon's entry into the subcase (Gideon's late objection motion was granted September 8, 2020, and the subcase was stayed from October 15, 2020 until November 29, 2022 with nothing but scheduling and status conferences occurring between November 29, 2022 and January 31, 2023); and (b) substantive

litigation of the pertinent water right issues resumed upon Gideon's *Motion for Late Claim* (Jan. 31, 2023) initiating Subcase No. 95-18409, during which late claim proceedings Gideon expressly (and only) sought "the real property right appurtenant to the Gideon property" by operation of Idaho Code Sections 42-227 and 42-111—that which Farley could only otherwise retain by either express, deed-based severance and withholding or legally effectual water right transfer under Idaho Code Section 42-222. *Reply in Support of Gideon Standard Form 4 Motion to File Late Notice of Claim* (Mar. 30, 2023), pp. 9-10.

Gideon made clear from the outset that "[t]hey merely seek an outcome where they gain access to, and continuing use of, the only producing well serving their property and home since 1999." *Reply in Support of Gideon Standard Form 4 Motion to File Late Notice of Claim* (Mar. 30, 2023), p. 12. What was not acceptable was an outcome where Farley could whitewash and avoid the "development, plumbing, and use of the Lower Well on the Gideon Property since [Farley] drilled it in 1999." *Id.* And Gideon constantly reiterated this "Farley should get his water right too" position throughout. *See, e.g.*, Petition, p. 3, Note 2. Farley deserves no credit for "prevailing" upon an unchallenged issue.

Conversely, what was Farley's ultimate position—his litigation-driven and desired outcome of these proceedings? "This water right should not exist." *See Standard Form 1 Objection* (Subcase No. 95-18409) (Jun. 30, 2023); *see also, Response in Opposition to Claimant Gideons' Motion to File Late Notice of Claim* (Mar. 15, 2023); *Response in Opposition to Claimant Gideons' Motion for Summary Judgment Regarding Claim No. 95-18409* (Feb. 23, 2024); *Motion to Alter or Amend Special Master's Memorandum Decision / Report & Recommendation* (Apr. 29, 2024); *Brian Farley's Notice of Challenge* (Aug. 23, 2024); *Brian*

Farley's Opening Brief on Challenge (Oct. 18, 2024); and *Brian Farley's Reply Brief on Challenge* (Nov. 12, 2024).

The "main issue" of the action remains straightforward and simple. Farley sought to cut Gideon out of any portion of the 13,000 gpd block of water he initially claimed for domestic and stockwater purposes under his unity of title in base claim 95-16445 on July 16, 2009. Farley's 2019 claim amendment makes that attempted result clear. Farley's contentions in Subcase No. 95-18409 subsequently doubled down and made that attempted result painfully and expensively clear. The "main issue" in this action was whether Farley kept all of the water with Gideon receiving none whatsoever, or whether Gideon received the portion of 2009 Claim No. 95-16445 historically developed, used, perfected, and appurtenant to the property they now own. The substantively-litigated outcome is indisputable: Gideon exited this action with the water right appurtenant to the property they now own despite Farley's extensive and expensive efforts to prevent that result from happening. Farley did not prevail in part; rather he lost all that he litigated to keep to himself, and himself alone.

C. The Warranty Deed Did Not Merge the Entirety of the REPSA Out of Existence; Gideon Did Not Attack the Warranty Deed, Farley Did

Contrary to Farley assertions otherwise, Gideon's pending cost and fee request very much is a matter (an entitlement) of contract that is not controlled or affected by the parties' Warranty Deed. Motion, pp. 10-13. This is because Gideon's cost and fee request is: (a) unrelated to, and does not upset or conflict with, the deed's conveyance of title, possession, quantity, or the emblements of the land at issue; and (b) not a standalone affirmative "claim" for relief under applicable law.

With respect to (a), and as explained by the Idaho Supreme Court nearly a century ago, there is a "***well-recognized exception***" to the general rule of merger. "Where the covenants in the contract do not relate to the conveyance but are collateral to and independent of the conveyance, they are not merged in the deed in so far as the deed is only part performance of the contract." *Christiansen v. Intermountain Ass'n of Credit Men*, 46 Idaho 394, 398, 267 P. 1074, 1075 (1928). "***[T]he covenant, in order to be deemed collateral and independent***, so as not to be destroyed by the execution of the deed, ***must not look to or be connected with the title, possession, quantity, or emblements of the land*** which is the subject of the contract" because if the covenant at issue is related thereto the deed "will operate as an extinguishment of it." *Id.*, 46 Idaho at 398-399, 267 P. at 1075 (emphasis added).

This "***well-recognized exception***" was reiterated more recently by the Idaho Supreme Court in *Fuller v. Callister*, 150 Idaho 848, 252 P.3d 1266 (2011). Therein, the Court stated: "[W]here a deed constitutes only part performance of an executory contract for the conveyance of land, leaving other matters to future performance, [the deed] does not constitute the entire contract, and ***stipulations as to future matters are not merged therein.***" *Fuller*, 150 Idaho at 854, 252 P.3d at 1272 (emphasis added), *quoting* A.G. Shepard, Annotation, *Deed as Superseding, or Merging, Provisions of Antecedent Contract Imposing Obligations Upon the Vendor*, 84 A.L.R. 1008 (1933) (the "Shepard Annotation"); and further citing *Christiansen* above.

The *Fuller* Court's reliance on the Shepard Annotation-explained "exception" to the general rule is not a one-off. The Idaho Supreme Court in *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 414 P.2d 879 (1966) cited *Cont'l Life Ins. Co. v. Smith*, 41 N.M. 82, 64 P.2d 377 (1936) as "a good explanation of th[e] [general merger] rule and [its] exception." *Jolley*, 90

Idaho at 382-383, 414 P.2d at 884-885. That New Mexico Supreme Court case, in turn, relied on the Shepard Annotation which the *Jolly* Court further cited independently as "other [pertinent] authority" before citing back to Idaho authority again (*Christiansen*, above). *Jolley*, 90 Idaho at 383, 414 P.2d at 885.

For its part, the 1933 Shepard Annotation provides, in pertinent part:

> "***A deed is a mere transfer of the title***, a delivery so to speak of the subject matter of the contract. It is ***an act of but one of the parties***, made pursuant to a previous contract either in parol or in writing. ***It is not to be supposed that the whole contract between the parties is incorporated in the deed made by the grantor*** in pursuance of, or as the consummation of, a contract for the sale of land . . . ***The instrument of conveyance may be complete for its purpose, which is to declare and prove the fact of conveyance; yet very naturally and commonly it is but a part execution of a prior contract*** . . ."

Shepard Annotation, at § I (emphasis added). In sum, the merger doctrine is not nearly as sweeping and complete as Farley suggests (and would like) it to be.

Regarding (b), it is well-settled that Gideon's cost and fee request is not a standalone affirmative "claim" for relief under the law. *See, e.g., Estate of Holland v. Metro. Prop. & Cas. Ins. Co.*, 153 Idaho 94, 100-101, 279 P.3d 80, 86-87 (2012) (there is no "cause of action" for attorney fees under Idaho law; rather "attorney fees are simply costs awarded incident to prevailing on a cause of action"); *see also, Straub v. Smith*, 145 Idaho 65, 69-70, 175 P.3d 754, 758-759 (2007) (a right to recover attorney fees is not a claim for relief included in a pleading; "costs and attorney fees are collateral issues which do not go to the merits of an action). Farley, therefore, mistakenly treats Gideon's cost and fee request as a "claim for relief" under the deed. Motion, p. 13. This is incorrect; one cannot request fees as costs absent prior success upon the underlying legal claims giving rise to the contractual and/or statutory right/entitlement to do so under Rule 54.

These concepts were most recently discussed at the Idaho appellate level in *Yates v. Hull Farms, Inc.*, ___ Idaho ___, 563 P.3d 1246, 2025 Ida. App. LEXIS 3 (2025). In *Yates*, and after noting that attorney fee requests are not "claims for relief" as a threshold matter, the Idaho Court of Appeals held that the attorney fee entitlement provision of the parties' underlying purchase and sale agreement survived merger under the deed because the fee request arose under the agreement and not the deed, and because the contract-based fee entitlement fell within the "***well-recognized exception***" discussed above (i.e., the PSA-based fee entitlement was a collateral stipulation that was not a claim touching or upsetting the title, possession, quantity, or the emblements of the land at issue). *Yates v. Hull Farms, Inc.*, ___ Idaho ___, 563 P.3d 1246, 2025 Ida. App. LEXIS 3 at *10-13.[1]

Farley acknowledges the merger "exception," but merely pays lip service to it. Motion, p. 12.[2] Gideon's water right claim did not implicate title to, possession of, quantity of, or the emblements of ***the land at issue***. And, Gideon's water right claim was not advanced in any way, shape, or form to upset or undermine the conveyance of the land under the deed. Doing so would have been foreclosed by the merger doctrine. *See, e.g., Fuller*, 150 Idaho at 853, 252 P.3d at

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[1] Farley's reliance on *Rose v. Martino*, __ Idaho __, 562 P.3d 972 (2025) is misplaced and inapplicable here because the dispute triggering the cost and fee request under the antecedent land sale contract in *Rose* directly concerned title to, possession of, and the quantity of land ultimately conveyed by the parties' deed therein in light of a boundary line adjustment agreement executed prior to the conveyance. *Rose*, ___ Idaho at ___, 562 P.3d at 977-978. Therefore, is not surprising that the doctrine of merger prevailed to extinguish the attorney fee request under the antecedent contract consistent with *Christiansen* above.

[2] *See also*, Motion, p. 11 (where Farley, before acknowledging the exception, blanketly asserts that "A party that has accepted a deed cannot bring a claim under a real estate purchase agreement and therefore cannot recover fees under that agreement, despite the agreement's fee provision."). Does the "***well recognized exception***" exist, or does it not? Farley's chosen case law authority (*Fuller*) certainly says that the exception exists.

1271, *quoting Sells v. Robinson*, 141 Idaho 767, 772, 118 P.3d 99, 104 (2005) (merger extinguishing claims under the antecedent contract that would "vary, change, or alter the agreement in the deed itself . . . a prior contract covering the same subject matter cannot be shown as against the provisions of the deed.").

Instead, Gideon's water right claim was advanced and litigation ensued defending and enforcing the "appurtenances" language contained in the deed ***consistent with*** the provisions of the REPSA. In other words, Gideon did not (and is not) trying to use the REPSA "against the provisions in the deed." To the contrary, Gideon invoked the plain language of the deed, together with Idaho Code Sections 42-101, 42-220, 42-111, and 42-227, and REPSA Section 7 to combat ***Farley attempts*** to undermine the plain "appurtenances" language of the deed; to combat Farley's attempts to create ambiguity allowing use of his latent, unilateral and subjective intent to rewrite the parties' transaction; Farley's attempts to interfere with the plain language of the deed and REPSA. *Response to Brian Farley's Opening Brief on Challenge* (Oct. 31, 2024), pp. 14-17, including Notes 13 and 14 (the Warranty deed "was not a 'written agreement signed by the parties' (plural) . . . And, regardless, this is not an issue because ethe Warranty Deed conveyed all appurtenances . . . [t]he two instruments operated entirely consistent with one another—there is no ambiguity whatsoever to address.").

Moreover, the REPSA fee provision (Section 29) is a broad contingent future obligation springing if litigation ensues; a deterrent-based form of additional mutual consideration under the contract (hopefully) protecting both parties from legal challenges attempting to upset the parties' transaction. It is a future promise to pay attorney fees to the prevailing party should litigation

ensue.[3] In this context, "[where] the portion of the contract sought to be enforced does not alter, change, or vary any of the provisions of the deed . . .[i]t relates rather to a consideration or inducement leading to the contract itself. A contract for deed antedates the execution of the deed, and may and often does contain many provisions which the execution of the deed neither adds to nor takes away." Shepard Annotation, § IV.a. "[W]here a deed constitutes part performance of an executory contract for the conveyance of land, leaving other matters for future performance, it does not constitute the entire contract, and stipulations as to future matters are not merged therein." *Id.*, § IV.b.1; *see also*, *Fuller*, 150 Idaho at 854, 252 P.3d at 1272.

Rule 54, coupled with REPSA's attorney fee provision, is designed to protect (or at least reimburse) against these very post-closing legal challenges. Nothing in REPSA Section 29 contains a temporal, pre-closing timing limitation. And Rule 54 authorizes an award of costs (and fees as costs) as a matter of right under statute or contract. As discussed above, Farley's execution and delivery of the Warranty Deed was the act of "but one party" conveying title "to the land" at issue. It was "merely the performance of the [REPSA] provisions relative to transfer of title"; something presented "in the ordinary form, contain[ing] only the ordinary covenants, convey[ing] the title to the land purchased, but [ ] not deal[ing] with or attempt[ing] to deal with the collateral agreement by which [Gideon] secured rights in controversy—rights essential to the full enjoyment of the thing conveyed." Shepard Annotation, § IV.a.

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[3] The provision's language broadly addresses the initiation "***or defen[se]***" of "***any . . . legal action[s] or proceedings . . . in any way connected*** with this Agreement." REPSA, § 29 (emphasis added). That Gideon's defense against Farley's attempts to attack the deed in this matter (contrary to the deed's plain "appurtenances" language, and contrary to the plain and unambiguous water right conveyance terms of REPSA Section 7) is "in any way connected with" the REPSA is an indisputable, foregone conclusion.

Whether Water Right No. 95-18409 was an appurtenance "to the land" conveyed by the subject Warranty Deed was a separate question ***raised by Farley*** that in no way implicated or upset Gideon's title to or possession of the underlying land, or the quantity (acreage) of land conveyed.[4] Further, "appurtenances" are not "emblements" of land.

Because the water rights-related question was unrelated to, and does not upset, conveyance of title, possession, quantity, or the emblements of the land at issue, that question and the fee provision of the REPSA applying to the litigation over that question are collateral to, and independent of, the land title conveyance itself—immune from merger by operation of the Warranty Deed in this matter. Said differently, the outcome of these CSRBA proceedings would not (and could not) change Gideon's ongoing title to, and possession of, the approximately 10 acres conveyed by the deed. No matter whether Gideon obtained Water Right 95-18409, or failed to obtain Water Right No. 95-18409 through these proceedings, Gideon's ongoing ownership of the "dirt" remains exactly the same. *See* Note 4, *quoting Sanderson*, above. [5]

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[4] An "appurtenance" is not the land itself. Rather, an "appurtenance" is "something else"—a "thing" that is "by right used with the land for its benefit." *See, e.g., McKay v. Walker*, 160 Idaho 148, 153, 369 P.3d 926, 931 (2016). Gideon does not dispute that water rights are a form of real property right under Idaho law. *See, e.g.*, Idaho Code § 55-101. But there can be no dispute that water rights are not "land" and that they are separate, and severable from the underlying land under legally-compliant circumstances. *Sanderson v. Salmon River Canal Co.*, 34 Idaho 145, 160, 199 P. 999, 1003 (1921) (emphasis added) ("One who has appropriated water and beneficially used it has a right to the use of the water ***independent of his ownership of the land***."); *see also, Joyce Livestock Co. v. United States*, 144 Idaho 1, 13-14, 156 P.3d 502, 514-515 (2007) ("A water right appurtenant to real property is conveyed with the real property unless it is expressly reserved or the parties clearly intended that the conveyance not include the water right").

[5] As a matter of public policy, it is not difficult to understand why title, possession, quantity, and emblements of the land should merge into the deed in most instances. In the case of most purchase and sale agreements, the parties typically agree upon a pre-closing title review and approval process that is mandated by the agreement, meaning the buyer approves of title if he fails to object before a specified deadline, and becomes contractually required to close the

Finally, Gideon fails to understand how this Court's prior decision in Subcase Nos. 63-31194A and 63-31194B (the "Sundance Subcases") is "hardly analogous" to the subcases in this matter. Motion, pp. 13-14. Farley postured both his 2019 amended claim in Subcase No. 95-16445 and his objection in Subcase No. 95-18409 as a Farley take and keep all proposition—an all or nothing approach whereby Gideon receive nothing; no part of original (2009) claim no. 95-16445 whatsoever.

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transaction or face breach of contract claims after the deadline passes. The policy reason for this is that a purchaser should not be permitted to complain about a cloud or encumbrance that exists on title where it (1) was documented in the title commitment, or (2) where it was fully disclosed such that it could have been objected to prior to closing. By not objecting to a known or disclosed defect in title, a buyer essentially "waives" the protection afforded by the title review terms. In Idaho, waiver is defined as "a voluntary, intentional relinquishment of a known right or advantage ... [which] will not be inferred from the parties' conduct absent a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel." *Pocatello Hos., LLC v. Qual Ridge Medical Investor, LLC*, 156 Idaho 709, 719 (2014) (internal quotes and citations omitted). This argument finds support in *Fuller v. Callister*, 150 Idaho 848, 854 (2011), where the court explained:

> In all cases where there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a performance, the true question must be ***whether the parties have intentionally surrendered those stipulations***. The evidence of that intention may exist in or out of the deed. ***If plainly expressed in the very terms of the deed, it will be decisive***. If not so expressed, the question is open to other evidence; and in the absence of any proof on the subject there is no presumption that either party, in giving or accepting a conveyance, intended to give up the benefit of covenants of which the conveyance was not a performance or satisfaction.

Id. (emphasis added).

Application of the merger doctrine to the Gideons' ***request for fees*** would be inappropriate for several reasons, including: (1) there is no evidence or indication that the parties intentionally surrendered the benefit of the attorney fee provision through delivery and acceptance of the deed; (2) the right to recover fees exists independent of the deed, which does not speak to attorney fees at all (nor do they typically); and (3) again, Claim No. 95-18409 does not touch title, possession, quantity or emblements of the land issue.

As discussed at length in Section B above, Farley did not litigate for the split water right outcome of these proceedings (Gideon receiving their rightful portion of the 2009 base claim and Farley receiving the remainder). Just because Farley exited the adjudication with Water Right No. 95-16445 does not mean that he prevailed or was successful. Moreover, and as pointed out by both IDWR and Gideon, Farley's use of 95-16445 is subordinate to Gideon's use of the 13,000 gpd block of water sourced from the Lower Well for domestic purposes and only available to Farley "*if*" the upper well (which is dry and useless) under Right No. 95-17752 produces a meaningful quantity of water. *Claimant Gideons' Reply in Support of Motion for Summary Judgment Re Claim No. 95-18409* (Mar. 4, 2024), pp.25-26, including Note 14; *see also, Response to Farley's Motion to Altern or Amend Special Master's Memorandum Decision / Report & Recommendation* (Jul. 16, 2024), pp. 17-18, including Note 11. So, in a practical sense, Farley did take nothing from these proceedings as was the McKay outcome in the Sundance Subcases.[6]

Likewise, Farley's characterization of the *Special Master's Report and Recommendation Re Sundance Investments Ltd. Partnership's Request for Attorney Fees* (May 17, 2010) ("Fee Decision") is not entirely accurate. Farley seemingly suggests that the Special Master's decision

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[6] Note 11 from Gideon's *Response to Farley's Motion to Altern or Amend Special Master's Memorandum Decision / Report & Recommendation* (Jul. 16, 2024) makes this practical, Farley-obtained-nothing point clear:

> 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).

was hierarchical with respect to the bases on which he awarded costs and fees to Sundance. Motion, p. 14 (suggesting that the Special Master's decision centered on the commercial transaction provisions of Idaho Code Section 12-120(3)). Just because the Special Master discussed and analyzed the commercial transaction basis under Idaho Code Section 12-120(3) before discussing and analyzing the viability of Sundance's fee request under the parties' purchase and sale agreement does not mean that one basis of fee entitlement trumped the other.

Instead, the Special Master discussed and analyzed each basis of fee award entitlement in separately-dedicated, multi-page sections of his Fee Decision (Section III.C dedicated to the commercial transaction basis, and Section III.D dedicated to the purchase and sale agreement basis). Fee Decision, pp. 5-9. And, he made clear that Sundance was entitled to its fee award "pursuant to ***both*** I.C. § 12-120(3) and pursuant to the Purchase and Sale Agreement"-- ***"[b]oth of these bas[e]s are very straightforward in their application in these subcases.***" *Id.*, p. 9 (emphasis added). With respect to the agreement-based entitlement in particular, the Special Master noted "[t]he record underlying this final judgment shows that the determination of ownership of the water right was derived from the written Purchase and Sale Agreement." The Court held likewise in this proceeding. *Memorandum Decision and Order of Partial Decrees* (Jan. 24, 2025), pp. 10-11 (holding as separate, but consistent, "matter[s] of law" that: (a) the plain language of the Warranty Deed conveyed Water Right No. 95-18409 to Gideon as an "appurtenance"; and (b) Section 7 of the parties' REPSA did the same).

As discussed in Note 1 above, Farley's suggestion that the Special Master's purchase and sale agreement "basis" for awarding Sundance its costs and fees against McKay (approved and adopted by this Court) in the Sundance Subcases should be disregarded as contrary to the Idaho Supreme Court's decision in *Rose* (Motion, p. 14) is unavailing. The legal claims and challenges

in *Rose* went directly to the heart of title to, possession of, and the quantity of land ultimately conveyed by the deed in that case. It is no surprise that the merger doctrine applied in *Rose*. But here, Gideon defended the deed as consistent with the REPSA. And, again, no matter the outcome of these water right adjudication proceedings, Gideon would still own title to the land conveyed by the deed. This matter simply does not involve claims or disputes over "the title, possession, quantity, or emblements of the land" which was the subject of the antecedent REPSA.

D. In Addition to Contract, The Court is Within Its Discretion to Award Gideon Their Fees as Costs Under Idaho Code Section 12-121

Gideon and Farley agree that awarding fees as costs under the baseless and frivolousness standard of Idaho Code Section 12-121 is a high bar. *Compare* Petition, pp. 9-10 and Motion, pp. 15-16. But Gideon (based on the record in this matter, including that imported from the parties' Kootenai County district court proceedings) disagrees that they missed the "forest" for the "trees." Motion, p. 16. Farley's arguments in Subcase No. 95-18409 did not contain simple, isolated mistakes or miscues lost in the translation of several hundreds of pages of trial transcripts and exhibits. Rather, Farley's arguments established a pattern of misquotation, selective quotation, failure to satisfy the most basic elements of a claim, and refusal to head-on address discrepancies and failings when expressly pointed out. In other words, Farley's "trees" propagated the "forest" giving rise to Gideon's Section 12-121-based fee request.[7]

[7] Gideon freely acknowledges Farley's right to exercise and exhaust the procedural challenges afforded him at the late claim, summary judgment, alter or amend, and challenge stages of these proceedings. What Gideon disagrees with is the equally-inferable abuse of process viewed through the lens of Farley's "kitchen sink" arguments "supported" by incomplete renditions of applicable fact and law in several documented instances. Again, there is a

Gideon will not belabor the examples raised in their Petition—they are only ***some*** examples. Petition, pp. 10-13. But Farley raises others in his Motion that deserve some attention. Motion, pp. 16-18.

Subcase No. 95-18409 ***was*** a "garden variety" water right claim based on, and by simple operation of: (a) the straightforward development and use of the Lower Well on the Gideon property beginning in 1999 under Farley's unity of title; (b) Section 7 of the REPSA; (c) the plain "appurtenances" language of the Warranty Deed; and (d) Idaho Code Sections 42-227, 42-111, 42-101, and 42-220. Farley's unilateral, latent, self-serving, ***but consistently INCONSISTENT*** "intent" over the parties' property purchase and sale transaction mattered not (and was repeatedly controverted by substantial portions of the record in this matter). *See, e.g.*, SJ Reply, pp. 22-27. ***Farley, not Gideon, took this "garden variety" beneficial use water right claim and continually contorted it to support whatever arguments he threw at the wall trying to kill Right No. 95-18409.*** *See Memorandum Decision and Order of Partial Decrees* (Jan. 24, 2025) ("Order"), *generally*.

Farley's invocation of Idaho Code Section 42-1420 and his historical beneficial use contentions are no more reasonable or applicable. *Compare*, Motion, p. 17 and *Response to Brian Farley's Opening Brief on Challenge* (Oct. 31, 2024) ("Challenge Response"), pp. 19-22; 24-25. Idaho Code Section 42-111's 13,000 gpd entitlement (the more specific statute addressing the domestic use question) plainly fills the field under the most basic tenets of statutory construction as evidenced by this Court's hundreds, if not thousands, of *de minimis* domestic and

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difference between leaving no stone unturned and dragging the other side over broken glass at every turn. Petition, pp. 7-8, 13.

stockwater use partial decrees issued. Challenge Response, pp. 19-22, 24-25; *see also*, Challenge Order, pp. 11-12.

The doctrine of abandonment was not "fairly raised" (Motion, pp. 17-18); rather those arguments were specious for the reasons already discussed in Gideon's Petition. Petition, pp. 10-11; *see also*, Challenge Response, pp. 10-12 and SJ Reply, pp. 22-27. Farley plainly explained that he was keeping the entirety of the 13,000 gpd block of water under his 2009 base claim (95-16445) for himself—"his retained use"; "for his exclusive use on the property he retained"—without abandoning a drop of that water. *Id.*; *see also*, Challenge Order, pp. 6-9.

And, Farley's untimely proportionate water right split arguments (Motion, p. 18) . . . the list goes on. *See* Challenge Response, pp. 22-25; Challenge Order, pp. 12-14. Though it is worth noting that there would be nothing to "split" had the 13,000 gpd block of water at issue been "abandoned" as Farley asserts.

Finally, Farley's Motion expands upon the latest example of his consistently ***INCONSISTENT*** ways via his merger doctrine arguments. Motion, pp. 10-15. Farley spent dozens of pages of briefing trying to convince the Court that the Warranty Deed was not dispositive on the question of water right conveyance—that the deed was incomplete and ambiguous and, therefore, did not merge his subjective intent and other parol evidence he cited out of existence. But now, for purposes of Gideon's Petition, the deed ***is*** dispositive?

According to Farley, Gideon has no fee request recourse for reimbursement under the REPSA—reimbursement for fending off ***Farley's, not Gideon's,*** challenges to the deed—because Gideon is merged out of that position. So, to be clear, Farley's arguments and contentions were not merged out by operation of the deed, but Gideon's are?

E. Gideon's Requested Fees Are Reasonable

Farley challenges the reasonableness of Gideon's fees request/calculation. Motion, pp. 18-22. Gideon agrees that the prevailing party is only entitled to a "reasonable" fee consistent with the plain language of Section 29 of the REPSA, and consistent with the plain language of Rule 54(e)(1) and Idaho Code Section 12-121. But, Farley glosses over the REPSA-based contractual entitlement presumably because he believes his merger contentions carry the day—which they do not. As noted in Gideon's Petition, Rule 54(e)(1) authorizes an award of fees as costs pursuant to statute or contract and, when awarded under contract, the more restrictive factors of Rule 54(e)(3) do not apply. Petition, pp. 5-6; 13-14, including Note 6. Regardless, both the REPSA (contractual basis) and Section 12-121 (the statutory basis) require the Court's analysis of what is, ultimately, a "reasonable" fee.

Farley takes issue with Mr. Schmidt's: (a) hourly rate, citing his lack of water right matters expertise; and (b) seeming duplication of work. Motion, p. 20-21. With respect to Mr. Schmidt's hourly rate, recall that Gideon's Petition cited two bases of rate-related data—the Idaho Supreme Court Order attached as Exhibit B thereto, and the "[r]ates of consulted colleagues" (which ranged between $350 and $475 per hour). Petition, p. 15. At a minimum, Exhibit B to the Petition demonstrates that upwards of $350 per hour is/has been considered reasonable, and an hourly rate of $385 falls squarely within the consulted colleagues bookends. Just because Mr. Waldera's rate is under-market does not necessarily mean that Mr. Schmidt's rate is unreasonably above-market.

Regarding Farley's expertise and duplicative work criticisms, he fails to account for the fact that neither Mr. Waldera nor Mr. Thompson are primary counsel regarding the parties' property transaction disputes, rather Mr. Schmidt and Mr. Bissell are. It is not unreasonable for

Mr. Waldera to coordinate and request assistance from Mr. Schmidt given his superior knowledge of the parties' Kootenai County proceedings, including a 4-day bench trial in June of 2022 consisting of over 700 pages of trial testimony and the admission of dozens of exhibits (not to mention the discovery and litigation leading up to the June 2022 bench trial). *See, e.g., Affidavit of Andrew J. Waldera in Support of Motion for Summary Judgment Re Claim No. 95-18409* (Jan. 30, 2024), Ex. A (trial transcript pp. 1-6).

These CSRBA proceedings are a direct outgrowth of that Kootenai County proceeding. *Affidavit of Andrew J. Waldera in Support of Gideon's Standard Form 4 Motion to File Late Notice of Claim* (Jan. 31, 2023), Ex. F (Judge Christensen *Memorandum Decision and Order Re: Bench Trial* (Oct. 21, 2022), pp. 10-11 (citing the "'chicken or egg' conundrum" posed by the incomplete CSRBA proceedings). Mr. Thompson undoubtedly consulted with Mr. Bissell, at least to some extent. *See, e.g., Declaration of Michael S. Bissell in Support of Response in Opposition to Claimant Gideons' Motion to File Late Notice of Claim* (Mar. 15, 2023). In other words, neither Mr. Waldera nor Mr. Thompson were previously involved in the parties' larger litigation, and both should be expected to lean on primary counsel to create efficiencies and maintain (i.e., not crosscut) bigger picture litigation claims and strategies in the still-ongoing Kootenai County proceedings.

That the Gideons "chose" to file their competing late claim (95-18409) without any Farley overlay is specious. Motion, p. 21 ("The Gideons' choice to file the late water right claim is not something that should be held against Mr. Farley."). Late Claim No. 95-18409, and all of the litigation related thereto, would not exist but for Farley's strenuous attempts preclude Gideon from obtaining any of the water appurtenant to their property under 2009 base claim no. 95-16445. And, Farley's citation to Right No. 95-17752 is all the more disingenuous and insulting

because it is well known, understood, ***and judicially-confirmed that the Upper Well source of that water right is functionally dry, useless, and "greatly deficient."*** *Compare* Motion, p. 21 and SJ Reply, Note 14, pp. 27-29, and Note 15.[8]

Last, Farley incorrectly states that each (he and Gideon) "prevailed on their own claim." True that Farley exited this adjudication with Right No. 95-16445. But, as discussed at length in Gideon's Petition (pp. 2-5) and Section B above, Farley in no way "prevailed" in his marked and consistent attempts to keep the entirety of 2009 base claim 95-16445 to himself with Gideon taking nothing therefrom. Gideon did not try to withhold 2019 Amended Claim 95-16445 from Farley; rather Gideon only sought, and had to fight tooth and nail for, what was rightly theirs under what is now Right No. 95-18409. Despite what Farley might tell us, the sky is not pink, and the Earth is not flat.

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[8] And contrary to Farley's criticism that Gideon should have replaced the Upper Well, he and this Court know full well that they tried to do so, but without success. *See Reply in Support of Gideon Standard Form 4 Motion to File Late Notice of Claim (Replying to Farley's Response in Opposition)* (Mar. 30, 2023), p. 2, including Note 1 (Gideon commissioned two holes of an aggregate depth of approximately ***2,640 feet*** at the combined cost of $79,848.51). How many times must Gideon and this Court endure Farley's half-truths and disingenuous assertions?

Judge Christensen took note of Farley's "stray[ing] from honesty in fact," and that he "misrepresented the water supply" for the now-Gideon property to his (attempted) material advantage. *Id.*, p. 15, Note 5; *see also, id.*, p. 11 ("Indeed, Farley knew that the Upper Well was not producing and that the [Gideon] Property was reliant on the Lower Well for the vast bulk of its water supply . . . Farley had a duty to disclose . . . Farley also knew that Gideons did not know that the Upper Well was greatly deficient."). But Farley's use of Right No. 95-17752 and the Upper Well as a shield in these matters persists (Motion, p. 21) while conveniently omitting these judicially-confirmed facts. Farley, himself, informed from the beginning that he drilled the Lower Well in 1999 because the Upper Well (and another on his former property) were/had gone "dry." *Supplemental Director's Report* (Sept. 21, 2023), Attachment D (original 2009 base claim).

F. Conclusion and Continuing Reservation of Right to Supplement

For the foregoing, Gideon renews their request for their reasonable attorney fees as costs in this matter consistent with their Petition. The Court is well within its discretion to make such an award pursuant to contract (the parties' REPSA), or as a matter of statute under Idaho Code Section 12-121 because Gideon, not Farley, is the prevailing party in this matter.

Should this Court do so (award Gideon their fees as costs pursuant to Rule 54), Gideon will supplement their Petition accordingly to address this post-judgment litigation consistent with applicable precedent. *See, e.g., Beco Constr. Co., Inc. v. J-U-B Engineers Inc.*, 149 Idaho 294, 298, 233 P.3d 1216, 1220 (2010) ("[W]e hold today that courts may award reasonable attorney fees incurred in connection with the effort to secure a reasonable amount of attorney fees."), *overruled on other grounds by Keybank Nat'l Ass'n v. PAL I, LLC*, 155 Idaho 287, 311 P.3d 299 (2013); *see also, Med. Recovery Servs., LLC v. Siler*, 162 Idaho 30, 36, 394 P.3d 73, 79 (2017) (quoting with approval and applying *Beco Constr. Co.*); and *Lettunich v. Lettunich*, 145 Idaho 746, 752, 185 P.3d 248, 264 (2008) (where one has a legal right to recover fees as the prevailing party in an action, "litigation over the amount of the attorney fee award is also part of the legal action for which [one] is entitled to an award of attorney fees").

DATED this 10th day of April, 2025.

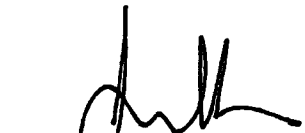
SAWTOOTH LAW OFFICES, PLLC

By _____
Andrew J. Waldera

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of April, 2025, I caused a true and correct copy of the foregoing **GIDEON RESPONSE TO FARLEY'S MOTION TO DISALLOW PETITION FOR COSTS AND FEES** 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 Fax: (208) 736-2121	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (x) Facsimile ( ) iCourt/Email
Travis L. Thompson 163 Second Avenue West P.O. Box 63 Twin Falls, ID 83303-0063 E tthompson@martenlaw.com	( ) 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



Andrew J. Waldera