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Supreme Court Docket No. 41265
Blaine County Dist. Ct. Docket No. CV 2010-842

IN THE SUPREME COURT OF THE STATE OF IDAHO

BIG WOOD RANCH, LLC,

Plaintiff-Counterdefendant-Appellant,

vs.

WATER USERS' ASSOCIATION OF THE BROADFORD SLOUGH
AND ROCKWELL BYPASS LATERAL DITCHES, INC.,

Defendant-Counterclaimant-Respondent.

APPELLANT BIG WOOD RANCH, LLC'S OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District for Blaine County
Honorable Robert J. Elgee, District Judge presiding

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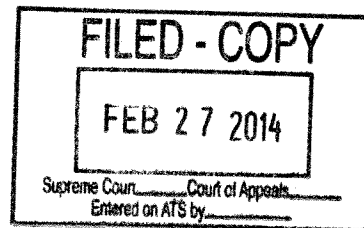

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TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Statement of Facts 3

C. Summary of Relevant Proceedings 8

II. ISSUES PRESENTED ON APPEAL 13

III. STANDARD OF REVIEW 14

A. Review of the District Court's Summary Judgment Decision and Its Trial Findings and Conclusions 14

B. Review of the District Court's Decision Denying in Part BWR's Rule 59(e) Motion to Alter or Amend Judgment 16

IV. ARGUMENT 16

A. The District Court Erred in Concluding The Association Formation is Valid Under Idaho Code § 42-1301 16

1. The Broadford Slough is a natural arm of the Big Wood River, not a manmade canal or ditch. 20

2. Even assuming *arguendo* that the Broadford Slough is a canal, the Association's maintenance of such a canal does not provide grounds for forming a lateral ditch water users' association under Section 42-1301, which is expressly limited to maintenance of lateral ditches 28

3. The District Court failed to find that three or more parties take their water from a common point of diversion in a canal or reservoir as required by statute 30

4. Because the Rockwell Bypass Saved Water Rights Owners are judicially mandated to maintain the Rockwell Bypass, the Association cannot take on that responsibility in an attempt to justify charging BWR assessments under Section 42-1301 for its maintenance of the Bypass 31

TABLE OF CONTENTS

Page

5. A finding in favor of the Association will complicate and interfere with the State's administration of water rights--a result that should be avoided 33

B. No Evidence Exists Of An Express Contract Between the Parties 35

C. Insufficient Evidence Exists to Support The Conclusion That Dues Are Owed Based Upon Theories of Unjust Enrichment or Quantum Meruit 40

D. If It Prevails on Appeal, BWR Is Entitled To An Award Of Attorney's Fees and Costs On Appeal 45

V. CONCLUSION 47

TABLE OF AUTHORITIES

Page

CASES

Andre v. Morrow,
106 Idaho 455, 680 P.2d 1355 (1984) 32

Bailey v. Ness,
109 Idaho 495, 708 P.2d 900 (1985) 37, 38

Barry v. Pacific West Construc. Inc.,
140 Idaho 827, 103 P.3d 440 (2004) 39

Brown v. Caldwell Sch. Dist. No. 132,
127 Idaho 112, 898 P.2d 43 (1995) 37

Burgess v. Salmon River Canal Co.,
119 Idaho 299, 805 P.2d 1223 (1991) 20

Cheung v. Pena,
143 Idaho 30, 137 P.3d 417 (2006) 42

Cuevas v. Barraza,
152 Idaho 890, 277 P.3d 337 (2012) 32

Dayley v. City of Burley,
96 Idaho 101, 524 P.2d 1073 (1974) 21, 22, 23

Erickson v. Flynn,
138 Idaho 430, 64 P.3d 959 (Ct. App. 2003) 44, 45, 46, 47

Farmers Nat'l Bank v. Shirey,
126 Idaho 63, 878 P.2d 762 (1994) 46

Friel v. Boise City Housing Auth.,
126 Idaho 484, 887 P.2d 29 (1995) 14

Gillette v. Storm Circle Ranch,
101 Idaho 663, 619 P.2d 1116 (1980) 45

Great Plains Equip., Inc. v. Northwest Pipeline Corp.,
136 Idaho 466, 36 P.3d 218 (2001) 46

TABLE OF AUTHORITIES

Page

Hale v. McCammon Ditch Co.,
72 Idaho 478, 244 P.2d 151 (1952)....15, 17

Hettinga v. Sybrandy,
126 Idaho 467, 886 P.2d 772 (1994)....41

Lawrence v. Jones,
124 Idaho 748, 864 P.2d 194 (Ct. App. 1993)....39

Loosli v. Heseman,
66 Idaho 469, 162 P.2d 393 (1945)....20

Marshall v. Blair,
130 Idaho 675, 946 P.2d 975 (1997)....15

O'Shea v. High Mark Dev., LLC,
153 Idaho 119, 280 P.3d 146 (2012)....46

Peavey v. Pellandini,
97 Idaho 655, 551 P.2d 610 (1976)....44

Riverside Dev. Co. v. Ritchie,
103 Idaho 515, 650 P.2d 657 (1982)....15

Robinson v. Bateman-Hall, Inc.,
139 Idaho 207, 76 P.3d 951 (2003)....30

Slaathaug v. Allstate Insur. Co.,
132 Idaho 705, 979 P.2d 107 (1999)....16

Smith v. King Creek Grazing Assoc.,
105 Idaho 644, 671 P.2d 1107 (Ct. App. 1983)....22, 23, 24, 25

Teton Peaks Inv. Co. v. Ohme,
146 Idaho 394, 195 P.3d 1207 (2008)....41, 43

Wright v. Willer,
111 Idaho 474, 725 P.2d 179 (1986)....30

TABLE OF AUTHORITIES

Page

STATUTES

Idaho Code § 12-120(3) 14, 45, 46, 47

Idaho Code § 42-101 26

Idaho Code § 42-602 26

Idaho Code § 42-604 27

Idaho Code § 42-901 9

Idaho Code § 42-910 9

Idaho Code § 42-1206 27

Idaho Code § 42-1301 .... passim

Idaho Code § 42-1302 29

Idaho Code § 42-1303 .... 8, 29

Idaho Code § 42-1304 8

OTHER AUTHORITIES

42 C.J.S. *Implied Contracts* § 27 (2013) 42

Idaho Rule of Civil Procedure 52(a) 15

Idaho Appellate Rule 17(e)(1) 13

Idaho Rule of Civil Procedure 59(e) 12, 16

I. STATEMENT OF THE CASE

A. Nature of the Case

This action involves a claim by Respondent, Water Users' Association of the Broadford Slough and Rockwell Bypass Lateral Ditches, Inc. ("Association"), that Appellant, Big Wood Ranch, LLC ("BWR"), failed to pay dues allegedly owed to the Association for the Association's maintenance of the Broadford Slough and Rockwell Bypass, which are conduits for the delivery of surface water to property owned by BWR and some of its neighbors. The Association claims that, by virtue of maintaining and operating diversion works on the Broadford Slough and Rockwell Bypass, it was responsible for delivery of BWR's surface water during the years 2006 through 2012, thus, BWR must compensate the Association for its services by paying Association dues.

BWR has refused to pay any Association dues on the basis that the Association is not validly formed under Idaho Code § 42-1301 *et seq.*, the statutory scheme governing formation of lateral ditch water users' associations. BWR commenced this action to obtain a declaration that the Association is not validly formed and, thus, has no right to seek dues under Section 42-1301 *et seq.* BWR successfully moved to have a separate collections action the Association filed against it in small claims court consolidated with this action.

BWR's position is that the Association's alleged maintenance of the Broadford Slough does not provide a basis for the Association to act under Section 42-1301 because the Slough is a natural waterway, and Section 42-1301 is inapplicable because it only applies to artificial waterways (specifically, laterals or ditches). BWR's position is also that the Association's

alleged maintenance of the Rockwell Bypass (which is separate and distinct from the Slough) is not a basis for the Association to act under Section 42-1301 because, although the Bypass is an artificial waterway, maintenance of the Bypass has been judicially decreed to be the responsibility of other water rights owners, who do not include BWR. Because it has been judicially determined that other water rights owners are responsible for maintenance of the Rockwell Bypass, the Association cannot rely upon its maintenance of the Bypass to justify its assessment of dues against BWR under the auspice of Section 42-1301.

Alternatively, even assuming *arguendo* that the Association is validly formed, BWR owes no dues because it opted out of membership in the Association when BWR made it clear to the Association that it had no intention of paying any Association dues when BWR first learned of the Association and its attempt to issue assessments.

The Association filed a counterclaim also seeking, *inter alia*, a declaration of the parties' respective rights and obligations under Idaho Code § 42-1301 *et seq.* In its Counterclaim, the Association contends that BWR is an Association member simply by virtue of BWR purchasing its Property and accepting delivery of surface water from the Association. It contends that BWR is delinquent in paying assessments issued for 2006 through 2012 in the sum of $7,550.

After cross motions were filed for summary judgment on the issue of whether the Association is validly formed, the District Court granted summary judgment to the Association, declaring that the Association is validly formed and authorized to act accordingly. A bench trial was held to resolve several issues, including: (1) whether BWR could, and did in fact, "opt out" of membership in the Association; (2) whether BWR made an express request, via its authorized

agent, for water to be delivered by the Association to BWR's Property; (3) whether it was the Association (as opposed to someone else) who was responsible for delivery of BWR's surface water, thereby conferring a benefit on BWR that BWR must pay for; and (4) assuming it was the Association who delivered BWR's water, what amount is due and owing by BWR for the Association's delivery of this water.

After the bench trial, the District Court entered written Findings of Fact and Conclusions of Law and a Judgment in the Association's favor in the amount of $9,500, representing the amount of delinquent assessments, plus statutory penalties and interest. BWR filed a timely motion to alter or amend the judgment, which was granted in part, but the amendments made did not change the overall relief granted to the Association, which is a money judgment in the amount of unpaid assessments, penalties, interest and the Association's attorney's fees and costs.

BWR appeals the District Court's summary judgment ruling that the Association is validly formed on the grounds that said ruling is premised on an erroneous legal conclusion that the Broadford Slough is a "canal" (or artificial waterway), rather than a natural waterway for purposes of Section 42-1301. BWR also appeals the District Court's alternative grounds for granting judgment to the Association, specifically, its erroneous conclusions that: (1) an express contract existed between the parties for the delivery of water; or alternatively, (2) the doctrines of unjust enrichment and/or quantum meruit apply, requiring that BWR pay the Association for the services it rendered in delivering BWR's water.

B. Statement of Facts

The Association was formed in May 2002. Its Articles of Incorporation ("Articles") indicate it was formed pursuant to Idaho Code, Title 30, Chapter 3 (the Idaho Non-Profit Corporations Act) and Idaho Code, Title 42, Chapter 13 (Lateral Ditch Water Users' Associations) for the purpose of transacting "any lawful activity, including, without limitation, the ownership, operation and maintenance of the Broadford Slough and Rockwell Bypass lateral ditches located in Blaine County, Idaho." Clerk's Record ("R.") Vol. II, pp. 206-7, Art. V. According to one of the Association's founders and current secretary/treasurer, Marc Reinemann, the primary impetus for formation of the Association was the lack of surface water available from the Rockwell Bypass in 2001 to satisfy water rights held by landowner, Spence Eccles, for his property known as Window Rock Ranch, which is located several miles downstream from BWR's property. Trial transcript ("Supp'l Tr."), 47:9-50:5.[1]

The Articles also provide that Association membership shall be evidenced by certificates of membership. R. Vol. II, p. 206, Art. II & p. 207, Art. VI. Yet, no certificates of membership were issued to BWR, or to any other alleged members, until after this lawsuit was filed. R. Vol. II, p. 222 (Reinemann Depo., 38:18-39:17). BWR has never consented, verbally or in writing, to be an Association member. Supp'l Tr., 291:10-13; R. Vol. II, 217:9-12.

Despite references to the contrary made in the Articles of Incorporation, it is undisputed that the Association does not own any surface water rights, property rights, easements rights or

[1] The following convention is used to cite to, for example, lines 10 through 15 on page 208 of the Clerk's Record or Reporter's Transcript: 208:10-15.

otherwise in the Broadford Slough or the Rockwell Bypass, nor did the Association construct the Slough or Bypass. R. Vol. II, 215:20-24 & 216:6-7.

In or about July 2006, BWR paid valuable consideration for the purchase of certain real property known as 303 Broadford Road, Bellevue, Idaho (the "Property"). Included in the rights associated with ownership of the Property are certain surface water rights to water that has, for decades, been conveyed to the Property via the Rockwell Bypass. None of the transaction documents related to purchase (e.g., the warranty deed or title report) identified or made any reference to the Association. R. Vol. II, pp. 227-247.[2] BWR had no notice of the existence of the Association when it purchased the Property in 2006, and did not become aware of the Association's existence until approximately 2009.[3] Supp'l Tr., 287:22-289:4.[4]

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[2] This is because, as the Association openly admits, it deliberately chose not to record evidence of its existence when it formed in 2002 because it was unclear to its founders whether the Association was legally valid pursuant to Idaho Code § 42-1301 *et seq.* Supp'l Tr., 102; 10-21. In fact, even at the time of trial, nothing had been recorded to provide notice of the Association's existence. *Id.*

[3] The exact date is in dispute. The Association claims it sent its first invoice to BWR in late 2007, but admits initially having trouble locating BWR by mail. Supp'l Tr., 100:25-101:7 & 375:11-15.

The Rockwell Bypass, which the Association purportedly maintains, is an artificial waterway constructed in approximately 1936 by Irvin Rockwell in order to develop Big Wood River surface water rights. R. Vol. II, pp. 248-52. The Big Wood River developed water rights--also referred to by the parties here as the "Rockwell Bypass Saved Water Rights" [5]--were gained through construction of the Bypass and were first recognized in a 1949 court order entered in *Rockwell v. Coffin*, filed in the Fourth Judicial District of the State of Idaho, Blaine County ("*Rockwell* decree"). *Id.* at pp. 248-62.

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[4] Based on BWR's lack of notice, BWR argued below that it was a bona fide purchaser against whom the Association could not assert a claim to recover Association dues. Pl's Trial Memo. filed 11/8/12, pp. 9-12, included in augmentation to Clerk's Record pursuant to Court's 2/10/14 Order. The District Court rejected this argument, R. Vol. II, pp. 398-99 (FF # 20), on the basis that, even in the absence of notice, actions subsequently taken by the parties following BWR's purchase support a finding that BWR is liable to pay Association dues based upon the alternate theories of an express contract, unjust enrichment, quantum meruit or Section 42-1301. *Id.* at p. 401 (CL #3). As explained below, because none of these legal theories are supported by the record, this Court should conclude that BWR's status as a bona fide purchaser is yet another reason to set aside the Association's judgment.

[5] The terms "saved" and "developed" water rights are used synonymously. The individuals who own the Rockwell Bypass Saved Water Rights are referred to herein as the "Rockwell Bypass Saved Water Rights Owners."

The *Rockwell* decree includes a provision requiring the plaintiffs in that case to "maintain … said Rockwell By-Pass from the entrance thereof at the entrance crib therefor to its discharge into the Broadford Slough Stream." R. Vol. II, p. 262, ¶ V. Water rights with a *Rockwell* decree genesis include a condition of approval that states "Rockwell By-Pass owners must maintain the by-pass for the entire length of the by-pass capable of carrying 17.36 cfs of water during the irrigation season." R. Vol. II, 216:25-217:3. Thus, owners of the Rockwell Bypass Saved Water Rights decreed in the *Rockwell* decree have a continuing obligation to maintain the Rockwell Bypass in this manner. R. Vol. II, p. 224 (Reinemann Depo., 48:21-49:1) & p. 262. This condition of approval was recently confirmed in the Snake River Basin Adjudication ("SRBA"). Supp'l Tr., 31:10-19, 43:7-16, 193:10-197:19; R. Vol. II, p. 450 (Pl's admitted trial exhibits marked "BWR-5" through "BWR-11," consisting of certified copies of SRBA Partial Decrees for the Rockwell Bypass Saved Water Rights, Water Right No. 37-833D, No. 37-833F, No. 37-833H, No. 37-833K, No. 37-833P, No. 37-833Q, and No. 37-833R).

BWR's surface water rights, in contrast, do not trace their origin to the *Rockwell* decree and do not include a condition of approval requiring maintenance of the Rockwell Bypass. R. Vol. II, 217:5-8. BWR's surface water rights, unlike the Rockwell Bypass Saved Water Rights, have priority dates that date back to 1882 and 1891. R. Vol. II, 214:19-21 & pp. 306-08, 310. Long before the Association was formed in 2002, water was being delivered to BWR via the Rockwell Bypass. Supp'l Tr., 141:12-15 & 149:19-150:10. Even prior to construction of the Rockwell Bypass in or about 1937, water was being delivered to BWR. R. Vol. II, 214:19-21 & pp. 306-08, 310.

In late 2008/early 2009, several years after BWR purchased its Property, BWR received its first invoice from the Association. Supp'l Tr., 287:22-289:4. BWR refused to pay the invoice, in part, because BWR was already paying annual dues to Water District No. 37 for the delivery of its surface water rights. Supp'l Tr., 291:10-13 & 292:10-17 & 294:6-22. Signage on BWR's headgate, as well as the Rockwell Bypass headgate, indicate that they are under the authority of the Water District watermaster, or Idaho Department of Water Resources. Supp'l Tr., 94:15-24. After BWR refused to pay the Association's invoices, the Association brought a small claims action against BWR, which was consolidated with this action. R. Vol. I, pp. 16-20.

C. Summary of Relevant Proceedings

On November 5, 2010, BWR commenced this action, seeking a declaration regarding the rights and obligations of the parties, including a declaration that the Association has not complied with Idaho Code § 42-1301 *et seq.* in either its formation or operations, thus, BWR is under no obligation to pay any past, present or future Association dues. R. Vol. I, pp. 11-15. On December 20, 2011, the Association filed its Answer and Counterclaim, asserting four claims: (1) Count I, seeking a declaration that the Association is validly formed and has authority to act pursuant to Idaho Code § 42-1301 for the purposes of delivering surface irrigation water rights from the point of diversion at the headgate on the Big Wood River through the Broadford Slough and Rockwell Bypass to water users in the Association, (R. Vol. I, p. 24, ¶¶ 7-8, Prayer for Relief, ¶ 1); (2) Count II, seeking an alternative declaration that the land owners who receive surface water through the Rockwell Bypass are obligated to the Association consistent with the general provisions of Idaho Code § 42-1301 *et seq.* (*id.* at p. 24, ¶¶ 9-10, Prayer for Relief, ¶ 2);

(3) Count III, seeking an alternative declaration that the Association has authority to collect assessments from BWR pursuant to Idaho Code § 42-910, and the ability to act as a ditch company pursuant to Idaho Code § 42-901 *et seq.* (*id.* at p. 24, ¶¶ 11-13, Prayer for Relief, ¶ 3); and (4) Count IV, asserting an unspecified cause of action for the recovery of assessments due from BWR in the amount of $7,550 arising from the Association's furnishing of water to BWR's property via the Slough and Bypass, which the Association claimed it repaired, improved and maintained during 2006 forward. *Id.* at p. 25, ¶¶ 14-18, Prayer for Relief, ¶ 4. On January 9, 2012, BWR filed an Answer to the Counterclaim. R. Vol. I, pp. 30-35. On April 12, 2012, the Association filed a notice waiving all affirmative defenses asserted in its Answer. R. Vol. I, pp. 36-37.

On April 23, 2012, the parties filed cross motions for summary judgment. R. Vol. I, pp. 38-39, 197-199. On May 21, 2012, a hearing was held on the parties' cross motions for summary judgment. Following oral argument, the District Court ruled from the bench, granting summary judgment in favor of the Association on Count I of the Association's Counterclaim, and denying BWR's motion for summary judgment in its entirety. 5/21/12 Summ. Jdg. Transcript ("Tr."), pp. 1-29.

In its oral summary judgment ruling, the District Court made no mention of the Association's claim in Count III of its Counterclaim, presumably, because that count addresses a separate statutory scheme, Idaho Code § 42-901 *et seq.*, as an alternative basis for finding that the Association is validly formed, and because the District Court found that the Association is validly formed under Section 42-1301, it was unnecessary to rule on Count III.

With respect to Count IV of the Association's Counterclaim, the District Court concluded that disputed issues of fact remained as to whether the Association was entitled to recover assessments due and owing from BWR based on a contract theory, or alternatively, a theory of quantum meruit or unjust enrichment. Tr., pp. 15-16, 22. Specifically, the District Court concluded that disputed factual issues remained regarding whether "there [was] a contract relationship [between the parties arising from] . . . a request for [] service[s]" and, specifically, whether: (1) the individual who had requested delivery of water to BWR's property (Archie Bouttier) was an authorized agent of BWR sufficient to bind BWR under a contract theory to pay the Association for delivery of water received, Tr., pp. 21-22; (2) assuming Mr. Bouttier was not BWR's authorized agent, whether BWR nonetheless ratified the actions of Mr. Bouttier by accepting the benefits associated with receipt of its water, *id.* at p. 22; (3) whether the Association, versus some other third party, such as the Idaho Department of Water Resources ("IDWR"), was responsible for delivery of BWR's surface water, *id.* at pp. 22-23; and (4) assuming it was the Association that delivered BWR's surface water, what amount, if any, remains due and owing to the Association by BWR in the form of unpaid Association dues. *Id.* at pp. 21, 23-25. According to the District Court, many of these disputed factual questions related to another primary question for trial, which was whether a party like BWR can "opt out" of membership in a lateral ditch water users' association, or whether, simply by receiving the benefit of an association's maintenance of a lateral ditch and receiving water via the ditch, the recipient of said water is automatically deemed a member of the association, and thereby

obligated to pay for the association's services in the form of dues or assessments. *Id.* at pp. 21-22.

On June 19, 2012, the District Court entered a written Order on Cross Motions for Summary Judgment memorializing its oral rulings made on May 21, 2012. R. Vol. II, pp. 378-79. In its June 19 order, the District Court confirmed that summary judgment was granted in favor of the Association with respect to Count I of its Counterclaim and declared that: (1) the Association is validly formed and has continuing authority to act pursuant to Idaho Code § 42-1301 *et seq.*, and (2) "the Broadford Slough ditch is a canal for purposes of water right delivery pursuant to Idaho Code § 42-1301 *et seq.*" *Id.* (emphasis added). No finding or conclusion was made by the District Court regarding the existence of any lateral ditch maintained by the Association. The District Court also stated in its June 19 order that a legal question exists over whether BWR is a member of the Association, and it concluded that remaining for future hearing is "the issue of the amount of assessments or charges, if any, owing to the [Association] by [BWR]." *Id.*

These issues, and those noted above, were tried before the District Court, without a jury, on November 13, 2012, December 18, 2012, and January 4, 2013. Supp'l Tr., pp. 1-431. On February 28, 2013, the District Court entered its written Findings of Fact and Conclusions of Law and a Judgment in favor of the Association. R. Vol. II, pp. 391-406.

With respect to its legal conclusions, the District Court concluded:

1) The Broadford Slough is a "canal" for purposes of establishing a lateral ditch water user's association under Section 42-1301, and the distinction between a "canal" and a

"ditch" is irrelevant for purposes of Idaho Code § 42-1301 *et seq.*, R. Vol. II, pp. 399-400 (CL#1)); and

2) BWR is obligated to pay past due assessments to the Association based upon either of the following: (i) the applicable statute, Idaho Code § 42-1301 *et seq.*; (ii) an express contract that existed between the parties for the Association to deliver water to BWR's Property; or (iii) the doctrines of unjust enrichment or quantum meruit. *Id.* at p. 401 (CL#3).[6]

The District Court's February 28 Judgment provides that: (1) BWR's Complaint is dismissed with prejudice; (2) the Association is validly formed and has continuing authority to act pursuant to Idaho Code § 42-1301 *et seq.*; and (3) judgment is entered against BWR in favor of the Association in the total amount of $9,500, together with a 10% penalty added to each delinquent assessment, plus interest. *Id.* at pp. 404-05.

On March 14, 2013, BWR filed a timely Rule 59(e) motion to alter or amend the judgment, arguing that the District Court committed numerous legal and factual errors in rendering its February 28 Judgment. R. Vol. II, pp. 425-26 & Pl's Memo. in Supp. of Motion to Alter/Amend Judgment filed 3/28/13 included in augmentation to Clerk's Record pursuant to Court's 2/21/14 Order. The District Court granted in part and denied in part BWR's post-trial motion on June 13, 2013, and later on June 18, 2013, by issuing two separate orders, and simultaneously entering amended judgments that reflected amendments to a few of the District

[6] The specific factual findings made by the District Court, which are the subject of this appeal, are identified in more detail in the relevant sections below.

Court's factual findings. R. Vol. II, pp. 434-42. The District Court ultimately left untouched the crux of its original Judgment in favor of the Association, which provides that the Association is validly formed, it is authorized to act in the manner that it has, and that BWR owes $9,500 in delinquent assessments, penalties, interest and attorney's fees and costs to the Association. R. Vol. II, pp. 404-05.

On July 30, 2013, BWR filed a Notice of Appeal from the Court's Second Amended Judgment entered on June 18, 2013. R. Vol. II, pp. 443-46. In this appeal, BWR seeks review, pursuant to Idaho Appellate Rule 17(e)(1), of the District Court's previously entered interlocutory orders, specifically, the District Court's findings and conclusions entered in the summary judgment proceedings on May 21, 2012 and June 19, 2012, and the District Court's subsequent Findings of Fact and Conclusions of Law entered on February 28, 2013, following trial.

II. ISSUES PRESENTED ON APPEAL

The following issues (including all sub issues contained therein) are presented for appeal:

1) Whether the District Court erred in concluding that the Association is validly formed pursuant to Idaho Code § 42-1301, based on its determination that the Broadford Slough is a "canal" sufficient to trigger application of Section 42-1301;

2) Whether the District Court erred in concluding that the Rockwell Bypass Saved Water Rights Owners are not solely responsible for maintaining the Rockwell Bypass, despite the clear language to the contrary contained in the 1949 *Rockwell* decree;

3) Whether the District Court erred in concluding that BWR is obligated to pay the Association for delinquent assessments made to BWR based upon the alternative grounds of (i) an express contract, (ii) unjust enrichment or (iii) quantum meruit; and

4) Whether BWR is entitled to an award of attorney's fees on appeal pursuant to Idaho Code § 12-120(3), in the event it is the prevailing party in this appeal.

III. STANDARD OF REVIEW

A. Review of the District Court's Summary Judgment Decision and Its Trial Findings and Conclusions

BWR appeals both the District Court's oral rulings and subsequent Order entered on June 19, 2012, regarding the parties' cross motions for summary judgment, and the factual findings and legal conclusions the District Court made following trial. The standard applied by an appellate court when reviewing a district court's summary judgment ruling is the same as that applied by the district court when ruling on a summary judgment motion. The appellate court must "liberally construe[] the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor." *Friel v. Boise City Housing Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1995). If the evidence presented reveals no disputed issues of material fact, "what remains is a question of law, over which this Court exercises free review." *Id.*

When the district court is the trier of fact, however, the district court, when ruling on a summary judgment motion, must view conflicting evidentiary facts in favor of the non-moving party, but is not necessarily required to draw inferences from uncontroverted facts in the non-

moving party's favor. Instead, the district court can draw those inferences which it deems most probable. *See Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519-20, 650 P.2d 657, 661-62 (1982). When reviewing a district court's summary judgment ruling under these circumstances, the appellate court need only determine whether the record on review is sufficient to justify the district court's factual findings. *Id.* at 520, 650 P.2d at 662.

When reviewing mixed questions of law and fact, generally, the appellate court will not set aside findings of fact, unless they are clearly erroneous. I.R.C.P. 52(a). "Thus, if a district court's findings of fact are supported by substantial and competent, although conflicting, evidence, this Court will not disturb those findings." *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997). This is true because the appellate court must give "due regard to the district court's special opportunity to judge the credibility of the witnesses who personally appeared before the [district] court." *Id.* However, when a district court makes factual findings based on documentary evidence only (as was here during the summary judgment proceedings), the appellate court is free to examine and weigh the same documentary evidence that was before the district court and may review the district court's factual findings *de novo*. *See Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151, 157 (1952).

When reviewing a district court's conclusions of law, the appellate court exercises free review. *Marshall*, 130 Idaho at 679, 946 P.2d at 979. When reviewing a mixed question of law and fact, the appellate court must determine whether the district court properly applied the correct legal principles to the facts found by the district court. *Id.* at 680, 946 P.2d at 980.

B. Review of the District Court's Decision Denying In Part BWR's Rule 59(e) Motion to Alter or Amend Judgment

BWR also appeals the District Court's partial denial of its Rule 59(e) motion to alter or amend the February 28 Judgment. This Court reviews an order denying a Rule 59(e) motion to alter or amend for an abuse of discretion, and will not disturb the order on appeal so long as it concludes that the district court recognized the matter as one of discretion, it acted within the outer boundaries of its discretion, and it reached its conclusions through an exercise of reason. *Slaathaug v. Allstate Insur. Co.*, 132 Idaho 705, 707, 979 P.2d 107, 109 (1999). A trial court, however, acts outside the boundaries of its discretion if it refuses to alter or amend its factual findings that are not supported by substantial and competent evidence. *See id.* at 707-08, 979 P.2d at 109-10 (lower court did not abuse its discretion in denying Rule 59(e) motion where sufficient evidence existed to support damage award).

IV. ARGUMENT

A. The District Court Erred in Concluding the Association's Formation is Valid Under Idaho Code § 42-1301.

The District Court's determination that the Association is a lateral ditch water users' association validly formed pursuant to Section 42-1301 is based on factual and legal errors and, thus, should be overturned. Whether the Association is validly formed pursuant to Section 42-1301 is a mixed question of fact and law. In answering this question, the District Court relied on factual findings it made orally on May 21, 2012, following a hearing on the parties' cross motions for summary judgment. As previously noted, when a district court makes factual findings based on documentary evidence only, this Court is free to examine and weigh the same

documentary evidence before the district court and review the district court's factual findings *de novo*. *Hale,* 72 Idaho at 488, 244 P.2d at 157. This Court need not give deference to the district court's factual findings; instead, it can make its own findings by according whatever weight it deems appropriate to the documentary evidence that was before the district court. Because this Court also freely reviews questions of law, no deference is owed to the District Court's summary judgment decision, rather this Court may reach its own factual and legal conclusions as if it were reviewing the record in the first instance.

Section 42-1301 provides, in relevant part, as follows:

> Where three (3) or more parties take water from same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users' association known as "Water Users' Association of Lateral or Laterals." . . . . Such association shall organize by the election of a chairman, vice-chairman and secretary-treasurer, which officers shall also constitute the board of directors of such association . . . . Such association at the annual meeting shall also elect a manager of said lateral or laterals to be known as "lateral manager" for the succeeding season and shall fix the compensation of said manager, and of all officers. Such association may adopt such rules and regulations for the management of said lateral or laterals or distributing ditches and the delivery of water therefrom as they deem best, and may, by majority vote, if it be deemed for the best interests of the association, combine one or more laterals and abandon laterals not in use, and do any and all things not in conflict with the provisions of this chapter or the laws of this state wherein the best interests of the association will be furthered.

I.C. § 42-1301.

The first sentence in this Section sets forth the criteria for forming a lateral ditch water users' association. It provides that a lateral ditch water users' association must be comprised of "three (3) or more parties [who] take water from the **same canal or reservoir** at the same point

to be conveyed to their respective premises [via] . . . **a lateral or distributing ditch**." I.C. § 42-1301 (emphasis added). Thus, to satisfy the requirements in Section 42-1301, there must be:

> (1) three or more parties
> (2) who take water from the same canal or reservoir
> (3) at the same diversion point
> (4) which is then conveyed via a lateral or distributing ditch to the parties' respective premises.

The statutory scheme embodied in Section 42-1301 *et seq.* is clearly intended to govern the maintenance and operation of lateral ditches; hence the title "Lateral Ditch Water Users' Associations" for Chapter 13, Title 42 of the Idaho Code.

The primary dispute here centers on whether the second and fourth statutory elements listed above are met. The District Court committed several errors in concluding that they are.

In the summary judgment proceedings, the District Court based its conclusion in this regard on the following:

> (1) all of the water received by the Association members comes from the same or common point of diversion which is located where the water is diverted from Big Wood River into the Broadford Slough, Tr., pp. 8, 10-11, 25-26;
>
> (2) the Broadford Slough is a "canal" (or artificial waterway) sufficient to trigger application of Section 42-1301, *id.* at pp. 11, 20, 23; and
>
> (3) for years, the Association has actively maintained the Broadford Slough and Rockwell Bypass, *id.* at pp. 10, 19-20.[7]

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[7] The parties concede that the Rockwell Bypass is a manmade ditch and the water that flows therein is water that is diverted out of a headgate on the Broadford Slough. They also concede that the Broadford Slough and Rockwell Bypass are used for delivery of surface water

Only after the bench trial did the District Court conclude that the Association is authorized to charge BWR and others for maintenance of the Rockwell Bypass, as well as for maintenance of the Broadford Slough. R. Vol. II, p. 397 (FF#16) & pp. 400-01 (CL#2). Each of these findings and conclusions are plagued with error and should be set aside.

First, the conclusion that the Broadford Slough is a "canal" sufficient to trigger Section 42-1301 is not supported by the summary judgment evidence presented. Further, even if this conclusion were accurate, such a conclusion does not support the ultimate conclusion that the Association has satisfied the requirements of Section 42-1301 in forming a lateral ditch water users association. If the Broadford Slough is, in fact, a "canal," that means nothing in the present context because Section 42-1301 only applies to "laterals" or "ditches," not "canals." Absent a finding that the Association rightfully performed maintenance on a "lateral" or "ditch," there can be no valid basis for concluding that a lateral ditch water users association has been formed under Section 42-1301.

Second, as previously noted, substantial evidence existed during the summary judgment proceedings that indicates that the Broadford Slough is a natural waterway, not a canal or ditch.

Third, the District Court's finding that the common point of diversion for at least three or more of the Association members' water rights is located in the Big Wood River and that that finding somehow satisfies the first three required elements for establishing a lateral ditch water

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for BWR and other neighboring property owners, which originates from the Big Wood River. R. Vol. I, pp. 41, 52.

user's association under Section 42-1301 is not supported by either the law or the facts. Both parties, and the District Court, acknowledge that the Big Wood River is not a "canal" or a "reservoir," but rather a natural watercourse. As a natural watercourse, the fact that the common point of diversion here is located in the Big Wood River does not satisfy the statutory requirement that three or more parties must take their water from the same "canal" or "reservoir." *See* I.C. § 42-1301.

Fourth, the evidence establishes that the only "lateral" or "ditch" involved in conveyance of BWR's surface water is the Rockwell Bypass. Yet, the District Court never made a finding or conclusion during the summary judgment stage concerning whether the Association is authorized to maintain the Rockwell Bypass and charge BWR and others for doing so. The clear language set forth in the prior 1949 *Rockwell* decree suggests the contrary. For all these reasons, the conclusion that the Association's formation is valid under Section 42-1301 *et seq.* is erroneous and must be set aside.

1. The Broadford Slough is a natural arm of the Big Wood River, not a manmade canal or ditch.

Idaho courts have routinely defined a "natural watercourse" as follows:

> [T]he essential characteristics of a water course are: A channel, consisting of a well-defined bed and banks, and a current of water. . . . [It's] a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

Loosli v. Heseman, 66 Idaho 469, 481, 162 P.2d 393, 398 (1945); *Burgess v. Salmon River Canal Co.,* 119 Idaho 299, 305, 805 P.2d 1223, 1229 (1991). The District Court and the parties'

witnesses all acknowledge that the visual characteristics of the Broadford Slough clearly indicate that, at one point, the Broadford Slough was a natural stream. Tr., p. 12:9-11 (District Court noted that "[n]o one would ever build a canal that looks like the aerial photographs of the Broadford Slough. At some point it may have been a natural stream."))[8]; R. Vol. I, p. 83 (T. Blau aff., ¶ 4) ("Prior to the installation of the headgate on the Big Wood River, the channel of the Broadford Slough was regarded as a natural channel."); R. Vol. II, pp. 268-69 (3/21/11 email from former Deputy Director of the IDWR, Allen Merritt, stating that "the Broadford Slough is an arm of the Big Wood River" . . . "[i]t is not a lateral ditch"). It is undisputed that the Broadford Slough consists of a channel with a well-defined bed and banks, in which, at times, a body of moving water flows--water that is not the result of extraordinary causes, but which originates from the Big Wood River--that is then discharged back into the Big Wood River at a point downstream from the Rockwell Bypass. Tr., pp. 12-13; R. Vol. I, pp. 174-75 (S. King aff., ¶ 5) (describing characteristics of Broadford Slough as a natural stream).

The Association contends that, while the Slough may have been a natural stream in the past, it was converted into an artificial waterway when a headgate (the Broadford Slough headgate, and prior to that a dike) was built at the top of the Slough where the water from the Big Wood River flows into the Slough. R. Vol. I, pp. 42-43. The Association has relied upon *Dayley v. City of Burley*, 96 Idaho 101, 524 P.2d 1073 (1974), to argue the general proposition that once a dam or dam-like device is built on a natural stream that chokes off the regular flow of

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[8] For aerial photographs of the Slough and Bypass, see R. Vol. II, pp. 264-67.

water, the waterway loses its natural character and becomes an artificial waterway. *Id.* The District Court apparently agreed with the Association, noting that although the presence of the Broadford Slough headgate is not determinative, in its opinion, the existence of the headgate is a factor that supports the conclusion that the Slough is a canal, where, during certain times of the year, little to no water flows through the Slough. Tr., 18:11-22.

The flaw in this argument is that, not only are the facts in *Dayley* distinguishable from the facts here, but no Idaho court has ever held that the construction of a dam or dam-like device that restricts the regular flow of water in a natural waterway, *ipso facto*, converts the waterway into an artificial waterway.[9] The result reached in *Smith v. King Creek Grazing Assoc.*, 105 Idaho 644, 671 P.2d 1107 (Ct. App. 1983), undermines such a notion. The issue in *King Creek* was "whether a channel which contains storm water and annual runoff, *but not year-round flow*, represents a [natural] 'watercourse.'" *Id.* at 648, 671 P.2d at 1111 (emphasis added). Noting that Idaho's definition of a natural watercourse does not require a constant stream of water to find the presence of a natural watercourse, the court in *King Creek* answered this question in the affirmative, stating: "In our view, a regular seasonal flow, together with storm flows, is sufficient to establish a [natural] 'watercourse.'" *Id.*

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[9] If the presence of a manmade device that controls water flow in a particular waterway is the litmus test for an artificial waterway, most, if not all, waterways in the State of Idaho would be considered an artificial waterway, which is clearly not the case.

Here, it is undisputed that, while during the irrigation season little to no water may flow down certain portions of the upper section of the Broadford Slough when it is diverted into the Rockwell Bypass[10] to guarantee delivery of water to various water rights holders in the area, during other times of the year, there is a constant flow of water in the Slough--water which originates from the Big Wood River. Tr., 18:11-22; R. Vol. I, pp. 41-45, 55, 58-59. Based on *King Creek*, this regular seasonal flow in the Broadford Slough, combined with the other notable traits of a natural watercourse highlighted above, supports the conclusion that the Broadford Slough is a natural watercourse.

The court's decision in *King Creek* is also notable because it distinguished *Dayley*, the opinion the Association and the District Court relied upon to erroneously conclude that the Broadford Slough is a canal. In *Dayley*, the Idaho Supreme Court upheld a finding that no natural watercourse remained after a dam had been built on a stream. However, as the *King Creek* court pointed out, the court in *Dayley* reached that conclusion because the old stream channel at issue in *Dayley* did not carry runoff water originating below the dam; rather, the area below the dam was flat and the ground "would absorb all the water from the melting snows and from rain storms"--a situation generally not characteristic of a natural watercourse. 105 Idaho at 648, 671 P.2d at 1111. The court in *King Creek* noted that, unlike the channel in *Dayley*, the natural channel in *King Creek* did carry annual runoff, as well as storm water, and for that reason, it was considered a natural watercourse. *Id.* Similar to the channel in *King Creek*, the

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[10] Once the water reaches the end of the Rockwell Bypass, it is returned to the Broadford

channel below the Broadford Slough headgate, when the headgate is not closed off for purposes of diverting water into the Rockwell Bypass during irrigation season, does carry water, *albeit* seasonal, that originates from the Big Wood River and flows down the Slough (which has a well-defined bed and banks) and eventually discharges back into the Big Wood River at a point downstream from the Rockwell Bypass. R. Vol. I, pp. 174-75 (S. King aff., ¶ 5); R. Vol. II, pp. 268-89 (3/21/11 email from A. Merritt stating Broadford Slough is an arm of the Big Wood River). As in *King Creek*, this Court should conclude that the Broadford Slough is a natural watercourse.

The other primary factor the District Court relied upon to conclude that the Broadford Slough is a canal is its conclusion that everyone, with the exception of BWR, seems to consider the Slough as a canal; therefore, it must be a canal. Tr., 14:3-20. The flaw in this reasoning is that it is based upon the opinions of various lay witnesses not qualified to give such opinions. Although the District Court relied upon the declarations of several of the Association's witnesses in this regard, neither the Association, nor the District Court, made any attempt to explain why the sworn statements of these individuals are entitled to any particular weight on this issue. Tr., 8:1-11:12 & 14:3-15:19. The District Court appeared to give great weight to the opinion of the Association's affiant, Terry Blau, a former IDWR employee who administered stream channel alterations on natural channels in the IDWR's Stream Channel Protection Program. Tr., pp. 8-9; R. Vol. I, p. 82 (T. Blau aff., ¶ 2). In his affidavit the Association submitted in support of its summary judgment motion, Mr. Blau averred that, although the Broadford Slough used to be

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Slough.

regarded as a natural channel, once a dike, and later the Broadford Slough headgate, was installed on the Slough, the IDWR no longer regarded the top half of the Broadford Slough (the portion at issue here) as a natural stream for purposes of regulation under the Stream Channel Alteration statutes. R. Vol. I, p. 83 (T. Blau aff., ¶¶ 4-5). The District Court went so far as to conclude that the IDWR has "adopted a *policy* through Mr. Blau" that the Broadford Slough is not a natural stream. Tr., 9:6-7 (emphasis added).

The problem with relying on Mr. Blau's statements in this regard is that his opinion regarding the nature of the Broadford Slough is likely based upon the wrong legal definition of a natural watercourse. As the court in *King Creek* pointed out, the Idaho case law definition of a natural watercourse does not require a constant flow of water; whereas, the more restrictive definition of a "stream channel" governed by Idaho's Stream Protection Act, I.C. § 42-3802, does contain a constant flow requirement. 105 Idaho at 648, 671 P.2d at 1111. With this in mind, it makes sense that individuals in the IDWR's Stream Channel Protection Program may not have regarded the Broadford Slough as a natural stream, because their actions are governed by a more restrictive definition of what constitutes a natural stream.

A more reliable opinion regarding the nature of the Broadford Slough is that of Mr. Merritt, the former Deputy Director of the IDWR. It is undisputed that when the Association sought IDWR's opinion regarding whether the Broadford Slough is a ditch or canal versus a natural waterway for purposes of determining its status under Section 42-1301, Mr. Merritt expressly stated that, in his role as Deputy Director of the IDWR, he considered the Broadford Slough as a natural arm of the Big Wood River. In fact, he specifically stated that the Broadford

Slough is a natural stream and not a lateral ditch. R. Vol. II, pp. 268-69 (3/21/11 email from IDWR representative, A. Merritt). The District Court made no mention of Mr. Merritt's statements in this regard when reaching its conclusion that the Broadford Slough is a canal. It also made no effort to explain why these statements by Mr. Merritt should be disregarded or accorded no weight.

The IDWR's opinion (as expressed by Mr. Merritt) is particularly significant, given that it is the IDWR who is charged by statute to supervise and apportion water in Idaho's natural waterways. *See* I.C. § 42-101 ("All the water of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purposes, ..."); I.C. § 42-602 (providing that the "director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom").

Because the Broadford Slough is a natural watercourse, the Association has no legal right to charge for the maintenance and operation of this body of water, over which the IDWR has exclusive responsibility. In the summary judgment proceedings, the District Court found that the IDWR had essentially acquiesced in the Association's right to maintain the Broadford Slough by failing to object to the Association's maintenance of the Slough over the years. Tr., p. 20. However, even if the IDWR did, in fact, consent or acquiesce to the Association taking on the IDWR's role in maintaining the Slough, this factor is not sufficient to trigger application of

Section 42-1301, which by its express terms applies only to lateral ditches, not natural waterways. If an exception to the requirements of Section 42-1301 is to be carved out for those instances when the IDWR wishes to defer its responsibilities to a third party, such as the Association, then only the Legislature has the authority to enact such an exception. It has not done so here.[11]

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[11] Pursuant to statute, the IDWR (typically acting through a watermaster) administers decreed water rights from natural watercourses by establishing water districts pursuant to Idaho Code § 42-604, and assessing dues to respective water rights holders to cover the water district's expenses in delivering water rights. It is undisputed that BWR owns 1882 and 1891 priority date decreed water rights and that the BWR Property is located within Water District 37. It is also undisputed that, prior to formation of the Association in 2002, Water District 37 delivered BWR's surface water. The unrefuted evidence at trial indicates that the Association allegedly took over Water District 37's activities in delivering BWR's water. Supp'l Tr., 199:12-200:11. The Association claims it was forced to form and take over these responsibilities when Spence Eccles, owner of the Window Rock Ranch, failed to receive delivery of his water. However, Water District 37 has a statutory right to assess users of common irrigation conduits for its maintenance activities pursuant to Idaho Code § 42-1206. Indeed, it is undisputed that, at the time of trial, BWR was current in paying its water assessments to Water District 37. Supp'l Tr., 205:8-11. As is the case with the IDWR, there is nothing in the Idaho Code that suggests that a

Finally, the Association has relied upon certain vague language in the 1949 *Rockwell* decree to argue that the court in that case already determined that the Broadford Slough is a canal or ditch. A review of the *Rockwell* decree, however, makes it clear that the court in that case was not confronted with the issue of whether the Broadford Slough is a natural or artificial waterway. Thus, the decree does not serve as binding precedent for this issue. Further, there is simply nothing in the decree that would indicate with any certainty that the words "canals and ditches leading from said Big Wood River" as referenced in Paragraph VIII of the Findings of Fact and Conclusions of Law in said decree (upon which the Association relies as support for its argument), R. Vol. II, p. 344, is meant to be a reference to the Broadford Slough and/or Rockwell Bypass. Instead, the language in Paragraph VIII relied upon by the Association is too general in nature to support such a conclusion without engaging in speculation. The Broadford Slough and Rockwell Bypass are but two of several watercourses leading from the Big Wood River. In addition, other provisions of the decree that specifically refer to the Broadford Slough refer to it as a "slough," "stream," or "swamp," all of which have connotations of a natural watercourse. R. Vol. II, pp. 248-49. Based on the foregoing, this Court should conclude that the Broadford Slough is a natural watercourse.

2. Even assuming *arguendo* that the Broadford Slough is a canal, the Association's maintenance of such a canal does not provide grounds for forming a lateral ditch water users' association under Section 42-1301, which is expressly limited to maintenance of lateral ditches.

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water district tasked with maintaining and appropriating water rights from a natural watercourse can shift its statutory responsibilities to a third party of its choosing.

Section 42-1301 *et seq.*, by its express terms, pertains only to the maintenance and operation of laterals and distributing ditches, not canals. *See* I.C. § 42-1303, expressly referring to "[l]ateral ditches" and providing that an association organized under Section 42-1301 *et seq.* "shall make an examination of the **lateral or distributing ditch or ditches**, and make an estimate as to the cost of the necessary repairs and improvements therein, and the maintenance thereof" for purposes of determining the amount of assessments the association may charge its members for delivery of their water. *Id.* (emphasis added). Section 42-1301 also clearly makes a distinction between "canals" and "ditches" by expressly referring to a "canal" or "reservoir" as the body of water from where the common point of diversion must take place, and a "ditch" as the body of water that must serve as the ultimate conduit for delivering water to the respective members' premises. Thus, the activity expressly permitted under Section 42-1301 *et seq.* is the maintenance and operation of lateral ditches, not canals.[12] Consequently, the District Court's

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[12] Section 42-1301 is the only section in Chapter 13 that uses the term "canal." The remaining sections in Chapter 13 all refer exclusively to laterals or ditches. *See, e.g.,* I.C. §§ 42-1302 (referring to "lateral manager"), -1303 (referring to "lateral manager" having the authority to examine and maintain "lateral or distributing ditch or ditches"), -1305, -1306 and -1308 (referring to laterals, ditches and lateral managers only). These other sections of Chapter 13 do not refer to, for example, a "canal manager" having the authority to examine and maintain "canals."

finding that the Broadford Slough is a canal, without more, provides no support for its ultimate conclusion that the Association is validly formed under Section 42-1301.

In its Findings of Fact and Conclusions of Law, the District Court concluded that the terms "ditch" and "canal" are used interchangeably in Title 42 (specifically, Chapters 9, 12 and 13) of the Idaho Code; thus, there is no substantive distinction between them. R. Vol. II, p. 398 (FF#20) & pp. 399-400 (CL#1). However, a review of Chapter 13, Title 42 of the Idaho Code does not support this conclusion. If such were the case, there would be no need for the Legislature to have used different terms in the first sentence of Section 42-1301. Under standard cannons of statutory interpretation, this Court must presume that there was a reason the Legislature used different terms in this context. To conclude otherwise would render the use of these different terms superfluous and meaningless. It is well-established that "[s]tatutes must be read to give effect to every word, clause and sentence." *Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986) (internal citation omitted). The Court's role is to "appl[y] the plain and ordinary meaning of the terms and, where possible, every word, clause and sentence should be given effect." *Robinson v. Bateman-Hall, Inc.*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). This Court should conclude that, for purposes of Chapter 13, Title 42 of the Idaho Code (specifically, Section 42-1301), the terms "canal" and "ditch" are not synonymous.

3. The District Court failed to find that three or more parties take their water from a common point of diversion in a canal or reservoir as required by statute.

Pursuant to Section 42-1301, the District Court was required to find that at least three or more parties take their water from the same point of diversion located in a "canal" or "reservoir."

See I.C. § 42-1301. Here, the District Court found that the common point of diversion for the Association members' surface water is in the Big Wood River. Tr., 11:22-24. However, both parties, and the District Court, concede that the Big Wood River is neither a canal nor a reservoir, but rather a natural watercourse. R. Vol. II, 213:24-26 & p. 398 (FF#20) (referring to Big Wood River as "natural water course"). Because there is no finding or conclusion made below that the criteria set forth in elements 1 through 3 of the list of statutory criteria found in Section 42-1301 for forming a lateral ditch water user's association has been satisfied, this Court should overturn the District Court's conclusion that the Association is validly formed under Section 42-1301.

4. Because the Rockwell Bypass Saved Water Rights Owners are judicially mandated to maintain the Rockwell Bypass, the Association cannot take on that responsibility in an attempt to justify charging BWR assessments under Section 42-1301 for its maintenance of the Bypass.

The 1949 *Rockwell* decree identifies that the Rockwell Bypass Saved Water Rights Owners are responsible for maintaining the Rockwell Bypass. The Association's claim that others, including BWR, who are undisputedly not Rockwell Bypass Saved Water Rights Owners, are also responsible for maintenance of the Rockwell Bypass is in direct conflict with the *Rockwell* decree and, thus, should be rejected.

The *Rockwell* decree states that the plaintiffs in that case must "maintain . . . said Rockwell Bypass from the entrance thereof at the entrance crib therefore to its discharge into the Broadford Slough stream." R. Vol. II, p. 262, ¶ V. Water rights with a *Rockwell* decree genesis include a condition of approval that states that "Rockwell By-Pass owners must maintain the by-

pass for the entire length of the by-pass capable of carrying 17.36 cfs of water during the irrigation season." R. Vol. II, 216:25-217:4. Thus, the Rockwell Bypass Saved Water Rights Owners have a continuing obligation to maintain the Bypass pursuant to this decree. R. Vol. II, p. 224 (Reinemann Depo., 48:21-49:1). BWR's surface water rights do not trace their origin to the *Rockwell* decree and do not include a condition of approval that requires maintenance of the Bypass. R. Vol. II, 217:5-8.

Because it has been judicially decreed that the Rockwell Bypass Saved Water Rights Owners must maintain the Rockwell Bypass, the Association has no authority to assess dues or seek contribution for maintenance of the Bypass from anyone other than the Rockwell Bypass Saved Water Rights Owners. BWR is not a Rockwell Bypass Saved Water Rights Owners; thus, the Association has no authority to assess BWR for maintenance of the Rockwell Bypass.

The Association successfully urged the District Court to conclude otherwise and hold that BWR is responsible for maintenance of the Bypass without putting the *Rockwell* decree at issue. This is a classic example of an impermissible collateral attack on an existing decree. "A collateral attack is an attempt to impeach a decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying the decree or enjoining its execution." *Andre v. Morrow*, 106 Idaho 455, 467, 680 P.2d 1355, 1367 (1984). Generally, "final judgments, *whether right or wrong,* are not subject to collateral attack." *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012) (emphasis in the original).

The Association's collateral attack on the *Rockwell* decree is particularly concerning given that the Association and its alleged members recently had the opportunity to raise the issue

of responsibility for maintenance of the Bypass in the Snake River Basin Adjudication ("SRBA"), but failed to do so. The SRBA court confirmed the condition of approval placed on the Rockwell Bypass Saved Water Rights Owners' water rights that requires them (and only them) to maintain the Bypass. Supp'l Tr., 31:10-19; 43:7-16; 193:10-197:19; R. Vol. II, p. 450 (Pl's admitted trial exhibits marked "BWR-5" through "BWR-11," consisting of certified copies of SRBA Partial Decrees for the Rockwell Bypass Saved Water Rights, Water Right No. 37-833D, No. 37-833F, No. 37-833H, No. 37-833K, No. 37-833P, No. 37-833Q, and No. 37-833R); *see also* Supp'l Tr., pp. 94-95 (Association officer, Reinemann, conceded that Association took no action in SRBA to challenge confirmation of the conditions of approval attached to the Rockwell Bypass Saved Water Rights). Idaho courts have now spoken at least twice (once in the 1949 decree and more recently in the SRBA) to the issue of who is required to maintain the Bypass. Neither the Association, nor the District Court, has provided any valid reason for why these prior court decrees should be altered, modified, or worse yet, ignored.

In light of these prior judicial determinations, neither of which have been properly challenged and, therefore, remain valid and binding, this Court should conclude that the Association has no legal authority to charge BWR for maintenance of the Bypass, nor can it rely upon its alleged maintenance of the Bypass to justify its formation under Section 42-1301.

5. A finding in favor of the Association will complicate and interfere with the State's administration of water rights--a result that should be avoided.

The administration of water rights is complicated enough, and this Court will undoubtedly complicate it further if it rules in favor of the Association as it relates to who is

responsible for maintenance of the Rockwell Bypass. A ruling in favor of the Association will disrupt, dilute, undermine and call into question the continuing validity of the *Rockwell* decree and the condition of approval placed on the Rockwell Bypass Saved Water Rights in the SRBA.

The Rockwell Bypass Saved Water Rights cannot be delivered unless the Bypass is properly maintained per the terms of the *Rockwell* decree. Thus, maintenance of the Bypass is inexplicably tied to the ability to exercise the Rockwell Bypass Saved Water Rights. In contrast, this is not the case for BWR's water rights. If this Court finds that other water users, such as BWR, are required to maintain or contribute to the maintenance of the Bypass, and that maintenance does not occur or the required flow is not maintained, IDWR will not know whether it is authorized to deliver the Rockwell Bypass Saved Water Rights.

Notably, there is no evidence in the record that the Association approached the Rockwell Bypass Saved Water Rights Owners about maintenance issues with the Bypass before the Association formed in 2002. That would have been the obvious first course of action—request maintenance from those that are legally required to maintain the Bypass. When it appeared that the lack of Bypass maintenance was adversely affecting the delivery of Spence Eccles' Window Rock Ranch's water rights, Mr. Eccles or his agent should have approached the Rockwell Bypass Saved Water Rights Owners and asked them to maintain the Bypass. There is no evidence that was done. Alternatively, Mr. Eccles could have contacted the IDWR and requested that water not be delivered to the Rockwell Bypass Saved Water Rights Owners until the Bypass was capable of carrying 17.36 cfs. Instead, he and/or his agents formed the Association, which now seeks to hold other water users responsible for what is clearly the responsibility of the Rockwell

Bypass Saved Water Rights Owners. To the extent this Court is concerned about a "free rider" problem, which the Association has repeatedly alleged in this case, R. Vol. II, p. 400 (CL#1), BWR is not the free rider—the free riders are the Rockwell Bypass Saved Water Rights Owners.[13] For all of the foregoing reasons, the Court should overturn the conclusion that the Association's formation is valid under Section 42-1301 and, thus, may assess dues to BWR.

B. No Evidence Exists Of An Express Contract Between the Parties.

As an alternative to Section 42-1301 being a basis to justify the Association's collection actions, the District Court found that the Association has a right to recover dues from BWR based on an express contract that exists between the parties for the delivery of water. R. Vol. II, p. 401 (CL#3). Here, the District Court found:

(1) BWR's predecessor gave a certain Archie Bouttier express authority to operate the BWR Property for agricultural purposes, including authority to call for delivery by the Association of surface water to irrigate the property, R. Vol. II, pp. 393-94 (FF#8);

(2) shortly after Marc Richards, the sole managing member of BWR, purchased the BWR Property in 2006, Mr. Richards told Mr. Bouttier to continue to operate the BWR Property just as he had done for BWR's predecessor, *id.* at p. 394 (FF#11);

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[13] Arguably, other "free riders" are those water rights owners in the area who the Association has admittedly chosen not to assess dues against, despite the fact that they likewise take water from the Broadford Slough and/or Rockwell Bypass. Supp'l Tr., 62:14-16 (Association's officer conceded there are some people who have "yet to join" the Association).

(3) this instruction by Mr. Richards to Mr. Bouttier "constituted either express or apparent authority for [Mr.] Bouttier to call upon the Association for the . . . delivery of surface water rights appurtenant to the [BWR Property]," *id.*; and

(4) Mr. Bouttier regularly called upon the Association to obtain delivery of BWR's surface water from 2007 through 2011, which the Association provided, *id.* at p. 394 (FF#11) & p. 395 (FF#13).[14]

Insufficient evidence exists, however, to support the finding that Mr. Bouttier had express or apparent authority to call for the delivery of BWR's water from the Association. There is also insufficient evidence that BWR expressly requested that the Association deliver its water, or that it assented to the Association's delivery of its water. As explained below, the evidence is to the contrary. In the absence of evidence of BWR's assent here, no evidentiary basis exists to support the finding that an express contract existed between the parties for the delivery of water. Additionally, even assuming *arguendo* that Mr. Bouttier was authorized to act as BWR's agent (which BWR denies), no evidence exists that the parties (BWR acting through its alleged agent,

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[14] The District Court also initially found that BWR's counsel had called the Association to request delivery of BWR's water rights in 2012, R. Vol. II, p. 394 (FF#11), but later it amended this finding because the trial evidence established that counsel's request has been made to Water District 37, not the Association. R. Vol. II, p. 434; Pl's Memo. in Supp. of Mot. to Amend/Alter Judgment, p. 4, Section III.C, included in augmentation to Clerk's Record pursuant to Court's 2/21/14 Order.

Mr. Bouttier) ever had a conversation wherein they agreed upon the materials terms of an alleged contract for the delivery of water. With no evidence of a "meeting of the minds" in this regard, the finding that a binding contract for delivery of water existed is erroneous.

An agency relationship can be established under a theory of either express authority, implied authority or apparent authority.

> Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal's name. Implied authority refers to that authority 'which is necessary, usual, and proper to accomplish or perform' the express authority delegated to the agent by the principal. Apparent authority . . . is created when the *principal* 'voluntarily places an agent in such a position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, is justified in believing that the agent is acting pursuant to existing authority.' *Apparent authority cannot be created by the acts and statements of the agent alone.*

Bailey v. Ness, 109 Idaho 495, 497-98, 708 P.2d 900, 902-03 (1985) (second emphasis added) (internal citations omitted). "The burden of establishing an agency relationship is on the party asserting it." *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 117, 898 P.2d 43, 48 (1995).

Here, there is no evidence that BWR's managing member, Mr. Richards, told Mr. Bouttier that he was authorized to make requests to the Association, on BWR's behalf, to deliver BWR's water. To the contrary, the evidence establishes that Mr. Richards was aware that Mr. Bouttier used the BWR Property to graze his horses--something BWR's predecessor in interest had allowed--and that Mr. Richards simply told Mr. Bouttier that he could continue to do so, even though BWR now owned the Property. Supp'l Tr., 149:19-150:13 & 154:2-155:18 & 286:8-287:21. Indeed, there is no evidence that Messrs. Richards and Bouttier ever discussed the

Association's existence, let alone delivery of water by the Association. Instead, according to the testimony of both of these individuals, the discussions between them were very limited and far from detailed or concrete on any specific matter. *Id.* Further, the act of grazing horses does not necessarily involve or relate to making a request that water be delivered to the Property. At the most, the evidence demonstrates that Mr. Bouttier had express authority to graze horses on the Property, not to request the delivery of water from the Association, or anyone else by that matter.

With respect to apparent authority, such authority only exists if a reasonable person, conversant with the business of water rights owners exercising their water rights, in this case, would have been justified in believing that Mr. Bouttier, given his position in openly grazing his horses on the BWR property, also had the authority to request delivery of BWR's water. *See Bailey,* 109 Idaho at 497-98, 708 P.2d at 902-03. Given the evidence presented, as outlined below, a reasonable person would not have been justified in drawing such a conclusion.

Even assuming the truth of the Association's only witness on this issue--Marc Reinemann, the Association's secretary/treasurer--the trial evidence demonstrates that, as soon as BWR became aware of the Association's existence and attempt to assess dues against BWR, BWR's principal, Mr. Richards, promptly conveyed his skepticism to Mr. Reinemann about whether the Association was authorized to charge BWR dues, especially given that water had been delivered to the BWR Property for years, and Mr. Richards understood BWR paid assessments to Water District 37 for this service. Supp'l Tr., 95:18-102:8 & 287:22-292:17. Although Mr. Reinemann testified that he tried to educate Mr. Richards on the true nature of how water was conveyed to BWR's Property, Mr. Reinemann also testified that he knew BWR had

refused to pay any assessments to the Association, despite the fact that the Association had issued several invoices to BWR. Supp'l Tr., 101:17-102:8. This evidence suggests that, at a minimum, the Association was on notice that BWR objected to the Association's claimed right to collect dues from BWR. It also undermines any finding that it was reasonable for the Association to believe BWR had given Mr. Bouttier authority to request that the Association deliver BWR's water. Thus, the finding that Mr. Bouttier had apparent authority is error.

As for evidence suggesting the existence of a binding contract, the Association was required to prove that there was an offer and acceptance of all material contract terms sufficient for the trier of fact to determine, based on the agreed material terms, that a contract existed. *See Lawrence v. Jones*, 124 Idaho 748, 751-52, 864 P.2d 194, 197-98 (Ct. App. 1993). The Association bore the burden of proving that there was a "meeting of the minds" between itself and BWR regarding the material terms of an agreement to deliver water. *See Barry v. Pacific West Construc. Inc.*, 140 Idaho 827, 831, 103 P.3d 440, 444 (2004) ("In order for a contract to be formed there must be a meeting of the minds. . . . The 'meeting of the minds' must occur on all material terms to the contract.").

The Association wholly failed to meet it burden in this regard. No evidence exists that BWR, or its alleged agent, Mr. Bouttier, and the Association ever discussed and agreed upon any terms that would have been material to a contract for the delivery of water. For example, there is no evidence that the parties discussed how much water should be delivered or how or when it should be delivered. No evidence exists that the parties discussed how much BWR would pay for delivery of its water rights by the Association, or how long such a contractual arrangement

would exist. These are all critical terms of a contract (price, duration, quantity, etc.), yet there is no evidence that any of these terms were discussed, let alone that there was a "meeting of the minds" on these terms. Accordingly, the finding that an express contract for the delivery of water existed is error.[15]

C. Insufficient Evidence Exists to Support The Conclusion That Dues Are Owed Based Upon Theories of Unjust Enrichment or Quantum Meruit.

At trial, BWR presented evidence that it had received no benefit from the Association that it was not already receiving long before the Association was formed in 2002. In this regard, the evidence indicates that the BWR Property had been receiving delivery of its decreed Big Wood River water rights for over 100 years. Supp'l Tr., 97:8-18. The undisputed evidence also

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[15] In its February 28 written Findings of Fact, the District Court also found that BWR's membership in the Association, and all its obligations attendant thereto, arose by virtue of the fact that Association membership is "appurtenant to the ownership of any state water right entitled to be conveyed through either the Broadford Slough or the Rockwell Bypass." R. Vol. II, p. 393 (FF#5). This finding is based on language contained in the Association's Articles of Incorporation, which states that membership in the Association is tied to ownership of any water right entitled to be conveyed via the Broadford Slough or Rockwell Bypass. Should this Court conclude that the Association is not validly formed under Section 42-1301, however, these Articles of Incorporation should have no legal significance or relevance in determining whether the Association is entitled to any recover from BWR.

demonstrates that, before formation of the Association in 2002, Water District No. 37 had been delivering BWR's water. As previously explained, the Association is essentially attempting to unilaterally assume the duties that Water District No. 37 is statutorily obligated to provide. However, it has identified no legal basis for doing so. Because BWR received no benefit that it was not already receiving, because it was only an incidental beneficiary of the Association's maintenance work, and because the record is void of evidence sufficient to support a claim of unjust enrichment or quantum meruit, the conclusion that the alternative theories of unjust enrichment and quantum meruit support entry of judgment in favor of the Association is error.

The elements of an unjust enrichment claim are that "(1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit." *Teton Peaks Inv. Co. v. Ohme,* 146 Idaho 394, 398, 195 P.3d 1207, 1211 (2008). Unjust enrichment will not apply in the instance of an officious intermeddler. *Id.* "The officious intermeddler rule essentially provides that a mere volunteer who, *without request therefor*, [sic] confers a benefit upon another is not entitled to restitution. This rule exists to protect persons who have had unsolicited 'benefits' thrust upon them.'" *Id.* (alternation in original) (quotation omitted) (emphasis added). Recovery for unjust enrichment is also not available if the benefits received by the defendant were created incidentally by the plaintiff in pursuit of his own financial advantage. *Hettinga v. Sybrandy,* 126 Idaho 467, 471, 886 P.2d 772, 776 (1994). Thus, if the defendant is only an incidental beneficiary of the plaintiff's actions, no claim for unjust enrichment will lie. *Id.* In contrast, "[t]he doctrine of quantum meruit permits a party to

recover the reasonable value of services rendered or materials provided on the basis of an implied promise to pay." *Cheung v. Pena,* 143 Idaho 30, 35, 137 P.3d 417, 422 (2006).

The Association's unjust enrichment claim fails for numerous reasons. First, it fails because the Association did not demonstrate that it provided a benefit to BWR that BWR had not already been receiving for decades. It also fails because BWR was not the intended beneficiary of the Association's alleged services. Specifically, as the evidence reveals, any benefits to BWR were incidental and occurred in pursuit of the interests and financial advantage of Spence Eccles (another Association member who initiated formation of the Association). Supp'l Tr., 47:9-50:5. The evidence specifically reveals that the Association was formed because Mr. Eccles' property, Window Rock Ranch, was not receiving its water due to the failure of the Rockwell Bypass Saved Water Rights Owners to properly maintain the Rockwell Bypass, as they are required to do under the *Rockwell* decree. *Id.* The fact that BWR was not an intended beneficiary is also underscored by the fact that the Association did not issue a certificate of membership to BWR until after this lawsuit was filed, almost a decade after its formation, R. Vol. II, p. 222 (Reinemann Depo., 38:18-39:17), nor did the Association send BWR's predecessor any invoices for water assessments for years following its formation. R. Vol. II, 216:13-20.[16] Additionally,

[16] Another requirement for an unjust enrichment claim is proof that the plaintiff rendered his services under circumstances that indicate he had a reasonable expectation to be paid for them. *See* 42 C.J.S. *Implied Contracts* § 27 (2013). Here, there is no evidence that the Association rendered its maintenance services with a reasonable expectation that BWR or others

should this Court agree that insufficient evidence exists to support the finding that Mr. Bouttier acted as BWR's agent authorized to request the delivery of BWR's water, it should also conclude that insufficient evidence exists to support a finding that BWR made a request to the Association to deliver its water. Absent evidence of a request by BWR, the evidence demonstrates, at the very least, that the Association was an "officious intermeddler," in which case it is not entitled to recover under a theory of unjust enrichment. *See Teton Peaks Inv. Co.*, 146 Idaho at 398, 195 P.3d at 1211.

Furthermore, application of the theories of unjust enrichment or quantum meruit is not legally justified based on the record presented. The District Court's award of past due assessments essentially amounts to breach of contract damages--the award represents the amount

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would pay for them. Rather, the evidence is to the contrary. For example, the trial evidence demonstrates that, even when the Association finally did provide BWR with an invoice for past due assessments in 2008 (several years after its formation in 2002), BWR refused to pay them and has never paid them. Supp'l Tr., 292:10-17. Even more telling is the Association's own admission that, it was not until the present lawsuit was filed and the District Court entered its summary judgment order concluding that the Association is validly formed under Section 42-1301, did the Association believe or understand that it had a purported right to recover payment from BWR, or any of its members, for its maintenance work. Supp'l Tr., 102:10-103:11. All of this evidence undercuts any finding that the Association had a reasonable expectation that, at the time it rendered its maintenance services, BWR or others would pay for the services.

that would have been due to the Association if BWR had not breached its alleged contract with the Association for the delivery of water. However, Idaho courts have made it clear that damages for unjust enrichment or quantum meruit claims are not the same as breach of contract damages. *See Erickson v. Flynn*, 138 Idaho 430, 435, 64 P.3d 959, 964 (Ct. App. 2003) (rejecting lower court's monetary award to plaintiff based on theories of unjust enrichment or quantum meruit where the measure of damages utilized by the lower court constituted breach of contract damages, but no evidence existed of an enforceable contract).

As the court explained in *Erickson*, "[u]njust enrichment and quantum meruit are related theories of liability, but carry different measures of recovery." *Id.* at 434, 64 P.3d at 963. For example, an "[u]njust enrichment theory allows recovery where the defendant has received a benefit from the plaintiff and it would be inequitable to allow the defendant to retain the benefit without compensating the plaintiff for its value." *Id.* Here, "[t]he defendant must make recompense only for that amount of the benefit that would be unjust for the defendant to retain." *Id.* "For a quantum meruit claim, on the other hand, the measure of recovery is the reasonable value of the services rendered or of goods received, regardless of whether the defendant was enriched." *Id.* at 434-35, 64 P.3d at 963-64. The measure of recovery for a quantum meruit claim is an objective measure that is proven by evidence demonstrating the nature of the work and the customary rate of pay for such work in the community at the time the work was performed. *See Peavey v. Pellandini*, 97 Idaho 655, 659, 551 P.2d 610, 614 (1976).

In the instant action, even assuming *arguendo* that BWR received a "benefit," there is absolutely no evidence of the value of that benefit. In other words, there is no evidence of how

much BWR was "enriched" by having its surface water delivered to its Property. The District Court simply awarded a judgment in favor of the Association for the amount of past due assessments, which is akin to breach of contract damages. The District Court also relied on the testimony of several Association witnesses who opined, without any explanation, that they believed BWR had received a "benefit" from the Association's maintenance work. Supp'l Tr., 121:16-122:1 & 162:12-15; R. Vol. II, p. 397 (FF#17). This conclusory testimony, without more, is inadequate under Idaho law to support an unjust enrichment claim. *See Erickson*, 138 Idaho at 434, 64 P.3d at 963 (requiring proof of the value of the benefit received); *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 667, 619 P.2d 1116, 1120 (1980) ("Unjust enrichment is an equitable doctrine and is inapplicable where the plaintiff in an action fails to provide the proof necessary to establish the value of the benefit conferred upon the defendant."). Similarly, there is no evidence of what the reasonable value of the Association's maintenance services were at the time said services were rendered. In other words, the Association failed to present any evidence of the customary rate of pay for such work in the surrounding community at the time the services were rendered. In the absence of such evidence, insufficient evidence exists to support a quantum meruit or unjust enrichment claim.

D. If It Prevails On Appeal, BWR Is Entitled To An Award Of Attorney's Fees and Costs On Appeal.

Should BWR prevail in this appeal, BWR is entitled to an award of its attorney's fees and costs incurred on appeal pursuant to Idaho Code § 12-120(3) and Id. App. R. 40(a). Section 12-120(3) provides for the award of attorney's fees to the prevailing party in any civil action in

which the gravamen of the action involves a commercial transaction, or a claim is made seeking recovery on a contract for services. I.C. § 12-120(3); *see Great Plains Equip., Inc. v. Northwest Pipeline Corp.,* 136 Idaho 466, 471, 36 P.3d 218, 223 (2001).

Here, the gravamen of this lawsuit is whether the Association is validly formed as a lateral ditch water users' association and, as a result, has the authority to assess dues to water users who receive the benefit of the Association's activities in maintaining, repairing and operating lateral ditches as conduits for the water users' irrigation water. The act of maintaining, repairing and operating lateral ditches in order to deliver water to property owners is a commercial service in the same way a utility company provides a service to its consumers when it provides electricity. For the purposes of Section 12-120(3), it matters not whether this Court ultimately concludes that the Association was not validly formed and, hence, had no right to assess BWR dues for its alleged services. Rather, when determining whether Section 12-120(3) applies, the focus is on what is alleged in the four corners of the complaint, and if a party alleges a commercial transaction--or alleges a contract for services (despite the fact that a subsequent determination may be made that no such contract existed)--those allegations alone are sufficient to trigger application of Section 12-120(3). *See O'Shea v. High Mark Dev., LLC,* 153 Idaho 119, 132, 280 P.3d 146, 159 (2012); *Farmers Nat'l Bank v. Shirey,* 126 Idaho 63, 73, 878 P.2d 762, 772 (1994). Section 12-120(3) also applies when a quasi-contract claim is alleged, as an alternative to an express contract claim, when both claims are based on the same facts and the alleged transaction is commercial in nature, as is the case here. *See Erickson v. Flynn,* 138 Idaho 430, 437, 64 P.3d 959, 966 (Ct. App. 2003).

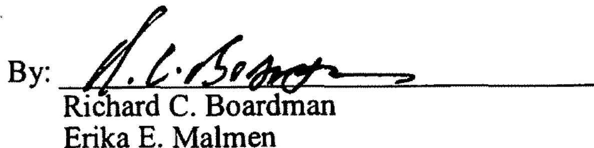
Here, the Association has alleged, as the gravamen of its Counterclaim, a commercial transaction, and has also alleged, in the alternative, an express or implied contract for services. These allegations trigger application of Section 12-120(3), and assuming BWR prevails on appeal, it is entitled to an award of its attorney's fees incurred on appeal pursuant to Section 12-120(3). *See Erickson*, 138 Idaho at 438, 64 P.3d at 967 (Section 12-120(3) mandates an award of attorney's fees on appeal to the prevailing party on appeal). Should the Court vacate the judgment entered below, BWR, as the prevailing party on appeal, is also entitled to recover its costs incurred on appeal as a matter of right pursuant to Id. App. R. 40(a).

V. CONCLUSION

Based on the foregoing, the Court should vacate the judgment entered in favor of the Association and remand the case directing the District Court to grant BWR's request for declaratory relief sought in this matter. This Court should also grant BWR an award of its reasonable attorney's fees and costs incurred in pursuing this appeal.

Respectfully submitted this 27 day of February, 2014.

PERKINS COIE LLP

By: 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 27, 2014, I served a true and correct copy of the foregoing upon the following individuals, pursuant to I.A.R. 34 and 34.1:

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