

4-9-2014

# Big Wood Ranch, LLC v. Water Users' Ass'n of Broadford Slough and Rockwell Bypass Lateral Ditches, Inc. Respondent's Brief Dckt. 41265

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

BIG WOOD RANCH, LLC, )  
)  
Plaintiff/Counterdefendant, )  
Appellant, )  
)  
v. )  
)  
WATER USERS' ASSOCIATION OF )  
THE BROADFORD SLOUGH AND )  
ROCKWELL BYPASS LATERAL )  
DITCHES, INC., )  
)  
Defendant/Counterclaimant, )  
Respondent. )  
\_\_\_\_\_ )

**Supreme Court Docket No. 41265**

Blaine County Case No. CV 2010-842

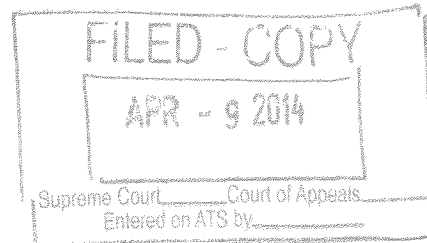
**RESPONDENT'S BRIEF**

\_\_\_\_\_  
Appeal from the District Court of the Fifth Judicial District  
of the State of Idaho, in and for Blaine County  
\_\_\_\_\_

Honorable Robert J. Elgee, District Judge, Presiding  
\_\_\_\_\_

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1  
2 I. STATEMENT OF THE CASE

3 A. **Nature of the Case**

4 The Respondent, Water Users' Association of the Broadford Slough and Rockwell Bypass  
5 Lateral Ditches, Inc. ("Association"), is incorporated in Idaho for purposes of delivering its  
6 members' water rights from the Big Wood River. The Association maintains the diversion works  
7 and ditches of the Broadford Slough and the Rockwell Bypass, and charges assessments for those  
8 functions pursuant to statutory provisions of the Idaho Code. When the Appellant, Big Wood  
9 Ranch, LLC ("BWR"), failed to pay its assessment, the Association commenced a small claims  
10 action seeking to recover the amounts claimed to be due and owing by BWR. BWR thereafter  
11 filed a declaratory judgment action seeking the court's determination that the Association was not  
12 validly formed under the statute, and was therefore not entitled to impose assessments. The  
13 Association counterclaimed for declaratory relief relative to the validity of its formation, and the  
14 recovery of its unpaid assessments.  
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17 B. **The Course of the Proceedings.**

18 The Association generally agrees with BWR's recitation of the proceedings in this  
19 matter with the following noted exceptions and observations. This matter actually commenced  
20 with BWR's Motion to Transfer and Consolidate Small Claims Case as a result of a magistrate  
21 case that had been commenced by the Association. R., Vol. 1, pp. 16-20.  
22

23 With regard to the statement that the trial was conducted "on November 13, 2012,  
24 December 18, 2012, and January 4, 2013," trial certainly commenced on November 13, 2012,  
25 albeit with the proclaimed "awkward situation" of BWR's failure to attend the trial it demanded  
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1  
2 despite having been expressly advised by its counsel of the trial date. Tr., p. 13, LL. 23-25. The  
3 sole and managing member of BWR, Marc Richards, was in Hawaii. Tr., p. 14, L. 11.

4 The trial was continued until December 18, 2012, but Mr. Richards failed to appear in  
5 court for a second time because he was again in Hawaii. Tr., p. 253, LL. 14-25; p. 254, LL. 1-  
6 25; p. 255, LL. 1-22. As a result of Mr. Richards' failure to appear for the trial a second time,  
7 the court ordered him to pay the Association's costs and attorney fees for time involved in  
8 preparation and travel. Tr., p. 263, LL. 2-12. The trial finally concluded on January 4, 2013,  
9 when Mr. Richards decided he would participate.

10  
11 Following the trial, the court granted judgment to the Association for delinquent  
12 assessments in the amount of \$9,500, together with a statutory penalty of ten percent (10%)  
13 added to each such delinquent assessment, together with interest on the total amount due at the  
14 rate of ten percent (10%) per annum pursuant to Idaho Code § 42-1304. R., Vol. 2, pp. 404-05.  
15 An Amended Judgment was subsequently entered in which the Association was awarded costs  
16 as a matter of right in the amount of \$2,209.19, and attorney fees in the amount of \$67,075  
17 pursuant to Idaho Code § 42-1307. R., Vol. 2, pp. 437-38.

18  
19 **C. Statement of the Facts.**

20 The Association was formed pursuant to Idaho Code § 42-1301, *et seq.* Articles of  
21 Incorporation of the Association were filed with the Idaho Secretary of State on May 3, 2002. The  
22 Bylaws of the Association had previously been adopted on April 16, 2002, after notice had been  
23 provided to the owners of water rights on the Broadford Slough and the Rockwell Bypass. A list  
24 of those original individuals who formed the Association is attached as Exhibit "D" to the  
25  
26

1 Affidavit of Marc Reinemann. R., Vol. 1, pp. 128-9. BWR has admitted in its discovery responses  
2 that the Rockwell Bypass is a man-made ditch. (See Exhibit "A" to the Affidavit of Gary D.  
3 Slette. R., Vol. 1, p. 64.) The Rockwell Bypass was constructed as a result of a judicial decree for  
4 purposes of "saving" water. (See *Irvin E. Rockwell v. Mans Coffin* decree dated August 25, 1949,  
5 and recorded in Book 12 of Judgments, page 115, Blaine County, Idaho, attached to the Affidavit  
6 of Gary D. Slette as Exhibit "B" [hereinafter the "Rockwell Decree"]. R., Vol. 1, pp. 67-81.) The  
7 water rights delivered by the Association are first diverted out of the Big Wood River into the  
8 Broadford Slough ditch. That water is subsequently diverted out of that ditch approximately a half  
9 mile downstream at the Rockwell Bypass headgate. (See Affidavit of District 37 Watermaster  
10 Kevin Lakey at R., Vol. 1, p. 115 at ¶ 7; *see also* Affidavit of Brian Brochette at R., Vol. 1, p. 132  
11 at ¶ 6. With regard to the half mile separation between the river and the Rockwell Bypass  
12 headgate, *see* Tr., p. 56, LL. 1-8 and Tr., p. 244, LL. 2-8, LL. 12-14.) There is no disagreement  
13 that the Rockwell Bypass is a man-made ditch and that the surface irrigation water that flows  
14 therein is first diverted out of the river and through a headgate on the Broadford Slough. See  
15 Appellant's Opening Brief at pp. 18-19 at fn. 7. BWR's surface water rights are diverted out of the  
16 Rockwell Bypass.

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20 In 2006, BWR purchased its property on Broadford Road near Bellevue, Idaho. *See*  
21 Deposition of Marc Richards. R., Vol. 1, p. 328 at ¶ 6, LL. 20-23. Marc Richards is the sole  
22 member and managing member of BWR. *Id.* at ¶ 7, LL. 1-5. BWR's property was previously  
23 owned by Jann Wenner ("Wenner"). *Id.* at p. 10, LL. 22-23. Wenner was one of the original  
24 members of the Association as identified on Exhibit "D" to the Affidavit of Marc Reinemann. R.,  
25  
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1  
2 Vol. 1, p. 128-9. Wenner had paid the Association's invoices for water delivery when he owned  
3 the property. R., Vol. 2, p. 394 at ¶ 9. The total acreage that BWR purchased from Wenner is 117  
4 acres. *Id.* at p. 39, LL. 23-25 and p. 40, L. 1. BWR paid Five Million Dollars (\$5,000,000) for its  
5 property. *Id.* at p. 40, LL. 17-18. Richards purchased the \$5,000,000 property sight unseen, and  
6 admitted that he never inspected the property prior to its purchase. *Id.* at p. 14, LL. 21-23.  
7 Richards further admitted that he did nothing with regard to analyzing the water rights on the  
8 property or the delivery system prior to that purchase. *Id.* at p. 15, LL. 19-25; p. 16, LL. 1-2. *See*  
9 *also* Tr., p. 306, LL. 17-25; p. 307, LL. 1-4; and p. 311, LL. 3-8. In the court's Findings of Fact  
10 and Conclusions of Law following the trial in this matter, the court stated the following in Finding  
11 of Fact No. 10:

12  
13           Marc Richards ("Richards") is the sole member and the managing  
14 member of Big Wood Ranch. Big Wood Ranch purchased its  
15 property and water rights from Wenner for Five Million Dollars  
16 (\$5,000,000) in 2006, sight unseen. The Purchase and Sale  
17 Agreement (Plaintiff's Exhibit 40) contained a provision expressly  
18 advising Big Wood Ranch to seek advice regarding the validity,  
19 quality and quantity of any water right acquired with the real estate it  
20 purchased. It also provided that, "Buyer must verify same during the  
inspection period." Neither Plaintiff nor Richards ever researched or  
verified any issues pertaining to the property's water rights, or their  
means of conveyance or delivery, prior to the time that Big Wood  
Ranch purchased the property.

21 R., Vol. 2, p. 394.

22           Because Jann Wenner lived in New York, Wenner had authorized Robert "Archie"  
23 Bouttier, another original Association member, to irrigate and farm the property for him. R., Vol.  
24 2, pp. 393-94 at ¶ 8. After BWR purchased the property, Marc Richards met with Bouttier and  
25 advised him to continue doing what he had been doing for Wenner with regard to the property. R.,  
26

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2 Vol. 2, p. 394 at ¶ 11. As a result of the active irrigation and grazing of the property, Marc  
3 Richards personally claimed an agricultural tax exemption from Blaine County based on irrigated  
4 farming and grazing. R., Vol. 2, p. 399 at ¶ 23. When the Association sent invoices to BWR for  
5 charges related to the delivery of BWR's irrigation water, BWR refused to pay the same.

6 The focus of BWR's Complaint and arguments to the district court centered on the  
7 allegation that the Broadford Slough was a natural stream, and that, therefore, the Association had  
8 not been validly formed for purposes of providing delivery of irrigation water rights as a lateral  
9 ditch water users' association. The Association disagreed with BWR's contention which led to the  
10 trial that was conducted in this case.  
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II. ADDITIONAL ISSUE ON APPEAL

1. Should the Association be awarded its costs and attorney fees on appeal pursuant to Idaho Code §§ 42-1307, 12-120(1), 12-120(3), 12-121, and I.A.R. Rules 40 and 41?

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III. ARGUMENT

**A. The Association was validly formed for purposes of maintaining the water delivery system of its members.**

In his Affidavit, Marc Reinemann, the secretary-treasurer of the Association, described the operation of the water delivery system as follows:

12. The Association operates the Rockwell Bypass ditch and the Broadford Slough ditch as a single unified lateral ditch system for the water users whose water is transported by those ditches. All of the irrigation waters are diverted at one point on the Broadford Slough where the Rockwell Bypass headgate is located, and such water is transported in ditches for delivery to the respective places of use as identified in water rights.

Stipulation to Augment Record dated March 17, 2014, Exh. A at ¶ 12. The water for all of the water users in the Association is diverted out of the Big Wood River into a ditch known as the Broadford Slough and then subsequently diverted into the Rockwell Bypass. In referring to Plaintiff's Exhibit No. 41 at the trial, he described the ditch that comes off the Big Wood River which is controlled by the Broadford Slough headgate. Tr., p. 55, LL. 1-23. According to Brian Brockette, the Association's lateral ditch manager, the Broadford Slough headgate is 250-300 yards below the point where the water is diverted out of the Big Wood River. Tr., p. 243, LL. 9-16. From the point where water is taken out of the river, the Rockwell Bypass headgate is located approximately one-half mile down the Broadford Slough channel. Tr., p. 56, LL. 1-8. Brockette concurred with the estimated ditch length between the Big Wood River and the Rockwell Bypass headgate. Tr., p. 244, LL. 2-8. The water is then conveyed down the Rockwell Bypass and distributed to the water right holders' respective premises.

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2 As specifically found by the district court, the channels of the Broadford Slough and the  
3 Rockwell Bypass were subject to silt accumulation, downed trees and beaver dams. R., Vol. 2,  
4 p. 395 at ¶ 14. In order to facilitate irrigation water diversion into the slough ditch, it was  
5 necessary to do work within the stream channel of the Big Wood River. This was because of the  
6 sand and gravel accretions and river debris that accumulated at the entrance to the ditch that  
7 leads to the headgate on the Broadford Slough. *Id.* The court found, after hearing the relevant  
8 testimony, that without such maintenance activities being performed by the Association, the  
9 members' water rights would be incapable of being diverted, conveyed or delivered in periods  
10 of low river flow during the irrigation season. *Id.* Dr. Charles E. Brockway stated in his  
11 Affidavit that man-made flow obstructions and beaver dams impeded flow in the Broadford  
12 Slough which prevented authorized diversions of irrigation rights. R., Vol. 1, p. 103 at ¶ 6.  
13 Brian Brochette, the Association's lateral ditch manager, attested to the work that was required  
14 to be accomplished. An example of the debris that caused problems for the Association can be  
15 found in his Affidavit. R., Vol. 1, pp. 134-135. An example of the work that had to be done in  
16 the channel of the Big Wood River is also attached to his Affidavit. R., Vol. 1, pp. 136-139.

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19 Robert "Archie" Bouttier testified that prior to the formation of the Association, he  
20 owned a backhoe, and that if there was a beaver dam blocking a ditch, he would respond to a  
21 phone call and remove the beaver dam. Tr., p. 152, LL. 1-4. However, that informal approach to  
22 the provision of system maintenance proved to be insufficient. Marc Reinemann, the  
23 secretary/treasurer of the Association, testified that a majority of the work that is required to be  
24 done by the Association annually occurs above the Rockwell Bypass headgate in the Broadford  
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2 Slough ditch. Tr., p. 79, LL. 2-6. Reinemann testified that Brian Brockette had been employed  
3 by the Association as the lateral ditch manager. Tr., p. 87, LL. 18-24. He described the duties of  
4 Brockette as being responsible to make certain that both the Rockwell Bypass and the  
5 Broadford Slough were capable of conveying water in response to calls from water users to turn  
6 in their water. Tr., p. 88, LL. 11-23. In addition to doing repairs and debris removal from the  
7 channels, he was also responsible for removal of beavers that created problems for water  
8 delivery. Tr., p. 88, LL. 24-25; p. 89, LL. 1-12. Reinemann also testified that Brockette had  
9 been appointed a Deputy Watermaster for District 37 to allow him authority to go on property  
10 belonging to others where the Broadford Slough passed, but where those individuals were not  
11 water right holders. Tr., p. 90, LL. 15-24. Reinemann testified that if the work that related to the  
12 Association's expenditures above the Rockwell Bypass headgate wasn't performed, there would  
13 be no water flow into the Rockwell Bypass. Tr., p. 107, LL. 18-25; p. 108, LL. 1-3. He further  
14 testified that if beaver dams plugged the Broadford Slough above the bypass, flooding would  
15 occur. Tr., p. 108, LL. 4-7.

18 Kevin Lakey, the District 37 Watermaster, testified that neither the IDWR nor Water  
19 District 37 had any responsibility for delivering irrigation water below the Broadford Slough  
20 and Rockwell Bypass headgates. Tr., p. 190, LL. 2-15. He testified that Water District No. 37  
21 did not pay Brockette anything for his role as a Deputy Watermaster. Tr., p. 198, LL. 22-24.  
22 Brian Brockette had been appointed as a Deputy Watermaster to prevent claims of trespass. Tr.,  
23 p. 205, LL. 21-24. Brian Brockette confirmed that his appointment as a Deputy Watermaster  
24 was to prevent claims of trespassing by non-members of the Association. Tr., p. 232, LL. 1-7.  
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2 The need for the Association's formation was apparent, because without an organized  
3 effort, the ability to deliver water was going to be severely impacted. As observed by Dr.  
4 Brockway, the water users on the Broadford Slough and the Rockwell Bypass had become  
5 increasingly concerned about the creation of aesthetic ponds and other flow obstructions that  
6 had prevented water users from obtaining their decreed diversion rates. R., Vol. 1, p. 103 at ¶ 6.  
7 The informal arrangement whereby Robert Bouttier had previously used his backhoe to remove  
8 a beaver dam or an obstruction of one sort or another was no longer a viable long-term solution.  
9 As the court observed in its findings, someone had to perform the routine and regular  
10 maintenance of work within the stream channel of the Big Wood River in accordance with  
11 Idaho Code § 42-3806. R., Vol. 2, p. 395 at ¶ 14. It was apparent that something needed to be  
12 done, and the group of water users identified by Mr. Reinemann in his Affidavit banded  
13 together to form the Association.  
14

15  
16 **B. Idaho Code § 42-1301.**

17 BWR's main contention is that the court erred when it concluded that the Broadford  
18 Slough was a "canal", i.e., not a natural watercourse, for purposes of meeting the statutory  
19 requirements of Idaho Code § 42-1301. In parsing the words of the statute, BWR contends that  
20 the characterization of the slough's channel as a "canal" meant that it was not a "lateral" or a  
21 "ditch." The district court expressly found that the terms "ditch" and "canal" are synonymous  
22 with one another. R., Vol. 2, p. 398 at ¶ 20. At trial, the Association observed that numerous  
23 Idaho statutes group ditches, canals or other conduits into a single category. *See, e.g.*, Idaho  
24 Code §§ 42-1102, 42-1104, 42-1106, 42-1108, 42-1201, 42-1202, and 42-1203. The  
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1  
2 Association argued that BWR's argument over the terminology was a distinction without a  
3 difference for purposes of compliance with Idaho Code § 42-1301.

4 **C. The issue of Broadford Slough not being a natural stream was already decided in**  
5 **the Rockwell Decree.**

6 The characterization of the Broadford Slough as not being a natural channel appears to  
7 have been addressed in the Findings of Fact and Conclusions of Law contained in the Rockwell  
8 Decree in 1949. In those Findings, District Judge Glennon stated:  
9

10 VIII

11 That from the time said waters were first put to beneficial use  
12 by the plaintiff herein, the same have been **diverted from Big Wood**  
13 **River through canals and ditches leading from said Big Wood**  
14 **River** to the lands described in paragraphs IV and V hereof, and  
15 were diverted from said river by and through the defendant  
16 Watermaster and at the special request of the plaintiff herein, and  
17 that the defendant, on his own behalf and the appropriators of the  
18 waters of Big Wood River have recognized plaintiff's right in and to  
19 the waters hereinbefore set forth, and the right of Plaintiff's use  
20 thereof, and have consented and acquiesced therein.

21 (Emphasis added). *Id.* at VIII. The only way the water identified in the Rockwell Decree gets to its  
22 place of use is by a diversion out of the river "through canals and ditches leading from said Big  
23 Wood River." The diversion of water from the Big Wood River into the Broadford Slough is  
24 consistent with the observations of long-time Bellevue area residents who attested to the prior  
25 existence of a wooden headgate structure on the Big Wood River in the 1950's at the point where  
26 the Broadford Slough ditch begins. Because the issue was already decided in the Rockwell  
Decree, the court's judgment in favor of the Association on this issue was appropriate.



1  
2 **D. The evidence in the record supported the district court's grant of summary judgment.**

3 The Association contends that the evidence it submitted in the form of various Affidavits  
4 substantiated that the Broadford Slough is not a natural stream, and that the Association had been  
5 validly formed to conduct its activities as a water delivery organization. *See* R., Vol. 1, pp. 82-  
6 171. Assuming, *arguendo*, that the Broadford Slough was a natural stream at some unknown time  
7 in history, the holding of the Idaho Supreme Court in *Dayley v. City of Burley*, 96 Idaho 101, 524  
8 P.2d 1073 (1974) is instructive on the issue asserted by BWR in this action. In *Dayley, supra*, the  
9 City of Burley sought to discharge surface waters into Goose Creek. The Court noted that while  
10 Goose Creek was formerly a natural stream, a dam had been constructed across the stream near  
11 Oakley. The Court affirmed the trial court's finding that the Goose Creek channel had been so  
12 altered so as to have lost its character as a natural channel. The same is true in the instant case.  
13

14 According to the Affidavit of Ed Cameron, the point at which water was diverted out of  
15 the Big Wood River into the Broadford Slough in the 1950's was regulated by a wooden headgate  
16 that he personally observed. R., Vol. 1, p. 143 at ¶ 4. Some time in the 1950's or 1960's, a flood  
17 event occurred that destroyed the wooden headgate. *Id.* Thereafter, the Army Corps of Engineers  
18 constructed a levee across the banks of the Big Wood River and installed a new headgate. *Id.* at ¶  
19 5. *See also*, Affidavit of Kevin Lakey which evidenced the existence of a lockable and  
20 controllable headgate on the ditch. R., Vol. 1, p. 115 at ¶ 5.  
21

22 The Affidavit of long-time Bellevue resident, Leroy Lewis, attested to the fact that the  
23 slough was previously dried up during the winter months to prevent flooding in the Broadford  
24 area. R., Vol. 1, p. 109 at ¶ 5. He had personally observed the old original headgate, and he knew  
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1  
2 the Broadford Slough was controlled by that headgate because no water was allowed to flow  
3 down the Broadford Slough ditch during the winter. *Id.*

4 The Affidavit of Lee Peterson, the former Water Master for Water Districts 37 and 37M,  
5 acknowledged the existence of a lockable headgate, and the IDWR's posture that the Broadford  
6 Slough and the Rockwell Bypass were regarded as ditches used for the delivery of water rights.  
7 R., Vol. 1, p. 106 at ¶ 5. Although work within the ditch system had to be undertaken from time to  
8 time to keep water flowing to permit delivery of the water rights, Peterson attested to the fact that  
9 he was unaware that any stream channel alteration permits had ever been sought or required from  
10 the IDWR for such purposes. *Id.* at ¶ 6.

11  
12 The Affidavit of Terry Blau presents more compelling evidence that the upper sections of  
13 the Broadford Slough above the Rockwell Bypass was not regarded as natural streams. R., Vol. 1,  
14 pp. 82-84. Mr. Blau was employed by the IDWR for 35 years, and he administered the Stream  
15 Channel Protection Program. *Id.* at ¶ 2. He administered that program for the IDWR on natural  
16 channels in Blaine County. *Id.* at ¶ 2. He attested to his familiarity with both the Broadford Slough  
17 and the Rockwell Bypass, and the lockable headgate device for the Broadford Slough. *Id.* at ¶ 3.  
18 Importantly, Mr. Blau further attested to the fact that during his 35-year employment with the  
19 IDWR, the area of the Broadford Slough where water was diverted out of the Big Wood River  
20 was not considered to be a natural stream. *Id.* at ¶ 5.

21  
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23 The Affidavit of Kevin Lakey attests to his current role as the Water Master for Districts  
24 37 and 37M in Blaine County. R., Vol. 1, p. 115 at ¶ 3. In that capacity, he was familiar with  
25 water right administration on the Big Wood River, the Broadford Slough and the Rockwell  
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1  
2 Bypass. From a review of the IDWR records, he was able to ascertain that the Army Corps of  
3 Engineers constructed a levee on the Big Wood River at the point where the Broadford Slough  
4 ditch had its origin. *Id.* at ¶ 5. He was also aware that a lockable and controllable headgate was  
5 installed to regulate irrigation diversions. *Id.* Paragraph 7 of his Affidavit reads as follows:

6  
7 7. During the irrigation season, all irrigation water  
8 rights that are delivered through the Bypass are diverted from the  
9 River, and the volume of such rights is controlled by means of the  
10 headgate on the Slough. Another headgate is located immediately  
11 below the Slough headgate, and serves as the diversion point for  
12 the Bypass. An irrigation check structure is located immediately  
13 adjacent to the Bypass headgate as shown in the photograph  
14 attached hereto as Exhibit "A". During the irrigation season, boards  
15 are placed in that structure so that no flow is allowed to go down  
16 the Slough, and all water diverted out of the River must flow down  
17 the Bypass for water right delivery.

18 *Id.* The photograph attached as Exhibit "A" to his Affidavit depicts conditions as they exist during  
19 the entire irrigation season when no water is permitted to run down the Broadford Slough ditch,  
20 with all water diverted out of the Big Wood River necessarily flowing down the Rockwell Bypass  
21 for delivery to Association members. R., Vol. 1, p. 117. Mr. Lakey attested to the substantial  
22 amount of work that has been done and the improvements that have been made by the Association  
23 on both the Broadford Slough and the Rockwell Bypass ditches. R., Vol. 1, p. 115 at ¶ 8. Mr.  
24 Lakey acknowledged that the Association's role in managing the delivery of water rights on the  
25 Broadford Slough and the Rockwell Bypass had made administration of those water rights much  
26 simpler for the IDWR. *Id.* at ¶ 9.

Dr. Charles Brockway attested to the formation of the Association for the purpose of  
addressing flow obstructions such as man-made ponds that were preventing senior water right

1  
2 users from obtaining their decreed water rights. R., Vol. 1, p. 103 at ¶ 6. Beaver dams also  
3 impeded the flow of water in the Broadford Slough which prevented authorized diversions. *Id.*

4 Brian Brockette is the lateral manager for the Association and is a duly appointed Deputy  
5 Water Master for the IDWR. In his Affidavit, Mr. Brockette attested to the significant work that  
6 has been done by the Association in maintaining the ditches of the Broadford Slough and the  
7 Rockwell Bypass to facilitate water right delivery. R., Vol. 1, p. 132 at ¶ 4. Numerous  
8 photographs he took are attached to his Affidavit, and he detailed what those photographs  
9 represent. Additionally, he attached an exhibit to his Affidavit which is a copy of a United States  
10 Geological Service map from 1986 that shows a blue line emanating from the Big Wood River,  
11 and generally following the Broadford Road right-of-way. R., Vol. 1, p. 170. The ditch that runs  
12 alongside the Broadford Road is the man-made Rockwell Bypass ditch. No other ditch or stream  
13 channel is depicted lying to the west of the Rockwell Bypass. Portions of the Broadford Slough  
14 ditch below the Rockwell Bypass headgate are located to the west of the Rockwell Bypass  
15 channel.  
16  
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18 In sum, there is no historical evidence that tended to indicate that the Broadford Slough is  
19 a natural stream. As indicated by Dr. Brockway in his Affidavit, it has been his experience that  
20 channels equipped with lockable and controllable headgates to control water diversions are  
21 considered by the State of Idaho to be canals. R., Vol. 1, p. 103 at ¶ 4. The evidence from long-  
22 time residents of the Bellevue area show that a wooden headgate existed on the river as early as  
23 the 1950's. Lacking any evidence that would allow BWR to meet its burden of proof, the district  
24 court reached the conclusion that the Broadford Slough ditch was not a natural channel even if it  
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1  
2 once was. Even if the Broadford Slough had been proven by clear and convincing evidence to  
3 have been a natural channel at the dawn of civilization, the Idaho Supreme Court's holding in  
4 *Dayley, supra*, would support the Association's position. Certainly, there is no moving body of  
5 water or current in the Broadford Slough during the entire irrigation season, a finding which was  
6 required to constitute a natural water course in *Loosli v. Heseman*, 66 Idaho 469, 481, 162 P.2d  
7 393 (1945). See also *Burgess v. Salmon River Canal Co. Ltd.*, 119 Idaho 299, 805 P.2d 1223  
8 (1991). In *Burgess*, the Court found that the Salmon Falls dam had impeded the flow of the creek,  
9 but that 25 cfs of seepage continued to flow through the abutments of the dam into the original  
10 channel. As a result, the channel met the criteria of a natural water course because water  
11 continually flowed in the channel. Kevin Lakey's Affidavit clearly establishes that during the  
12 irrigation season, checkboards placed in the Broadford Slough allow no water to pass down the  
13 ditch, with all water being diverted into the Rockwell Bypass for irrigation water right delivery.  
14 R., Vol. 1, p. 115 at ¶ 7. The Affidavit of Leroy Lewis attested to the fact that the Broadford  
15 Slough was dried up in the winter months to prevent flooding. R., Vol. 1, p. 108 at ¶ 5.

16  
17  
18 This case bears certain similarities to the Court's decision in *Independent Irrigation Co.*  
19 *Ltd. v. Baldwin*, 43 Idaho 371, 252 P. 489 (1926). In that case, Independent Irrigation Company  
20 filed suit against the water master for attempting to prevent the diversion and use of water by the  
21 Company. The Company claimed an entitlement to use of the water without interference by the  
22 water master, because they had constructed "a tight and permanent dam maintained by them,  
23 across the slough." The appellants had been using the water in the slough and the natural springs  
24 that arose in the slough. The Court stated:  
25  
26

1  
2 The evidence further shows that from the date of the construction of  
3 the dam by appellants Scott Slough ceased to be a tributary of Snake  
4 River.

5 43 Idaho at 376. Not unlike the case of *Independent Irrigation Co.*, *supra*, the facts of the instant  
6 case show that a tight and permanent dike or levee was constructed by the Army Corps of  
7 Engineers, and has operated for more than fifty (50) years. The only water that came into the  
8 Broadford Slough ditch from that point is water that has been diverted from the Big Wood River  
9 through the ditch to the Broadford Slough headgate. The fact that water may rise into the slough  
10 downstream through springs does not change the characterization of the ditch. It is not a natural  
11 channel, and the Association is entitled to continue to operate, repair and maintain its ditches  
12 pursuant to the statutes governing lateral ditch water users' associations. More than 100 years ago,  
13 the California Supreme Court considered a party's claim that a levee placed across a slough did  
14 not change the character of the slough's channel from being a natural watercourse. The Court in  
15 *Lamb v. Reclamation District No. 108*, 73 Cal. 125, 14 P. 625 (1887), rejected that claim.  
16

17 The Sacramento River is a large navigable stream, having its  
18 sources near the boundary line between the states of Oregon and  
19 California, and running for several hundred miles through the  
20 northern and central parts of the latter state to the bay of San  
21 Francisco. In times of high water it frequently overflows its banks. A  
22 great deal of the adjoining land is lower than the banks of the stream;  
23 and at times of overflow the surplus water runs down to and over  
24 such land, where it remains until it evaporates, or, later in the season  
25 when the river is at a lower stage, runs back into the stream. The  
26 water at some places pours over the entire bank in continuous sheets  
for considerable distances, but more commonly finds its way out  
through the lower parts, or depressions, of the banks, which of  
course have gradually been worn down deeper and wider by the  
action of the water. These short depressions by which the water gets  
through the banks into the lower lands beyond are called sloughs;  
and Wilkins Slough, mentioned in the complaint, is quite a large

1  
2 depression of that character, and affords means of escape during  
3 overflows for a considerable quantity of water. The lands thus  
4 overflowed, and for the protection of which respondent claims the  
5 right to maintain said levee, are a part of that large body of swamp  
6 and overflowed land acquired by California from the United States  
7 by virtue of the act of Congress of September 28, 1850, generally  
8 known as the Arkansas act.

9  
10 73 Cal. at 126. Continuing, the Court stated:

11 Counsel for appellant contends that Wilkins Slough is  
12 within the legal definition of a "watercourse," and argues for the  
13 application here of the doctrine that one land-owner on a  
14 watercourse cannot dam it so as to flood the land of his neighbor  
15 above. But in the first place, appellant is not a riparian owner upon  
16 Wilkins Slough. His land is two miles away, and divided from it by  
17 a large navigable river. He has no interest in whatever rights land-  
18 owners on Wilkins Slough, if there were any, might have as  
19 between themselves. In the second place, we do not think that  
20 Wilkins Slough, as between appellant and respondent at least, is to  
21 be treated as a watercourse within the legal meaning of that word.  
22 It occasionally happens that a river, in its course from its source to  
23 its mouth, divides into two main, permanent channels, each  
24 carrying continuously a large part, if not a moiety, of its waters at  
25 all stages, and either uniting with the other at a lower point, or  
26 continuing to the sea, leaving a delta between the two. But there is  
nothing here resembling that condition. Wilkins Slough is not a  
channel or fork, continuously carrying a large part, or any part, of  
the waters of the Sacramento River. It carries no water at all except  
"in times of flood," and then the amount which it carries, when  
compared with the volume of water in the river, is insignificant. In  
fact, it has no original water of its own at all, but is simply a  
conduit by which occasionally some of the floodwater of the river  
escapes into the lower lands adjoining. This same office is  
performed by every other low place along the bank; and every  
other part of the levee could be removed as a nuisance if that part  
of it which is at Wilkins Slough can be so removed. Upon this  
point we cannot distinguish the case at bar from the case of *S. & B.  
Turnpike Co. v. Green*, 99 Ind. 205, where it was held that plaintiff  
could protect his land from overflow of the Big Blue River by  
erecting a levee on its bank at a place where there was "a  
*depression* washed out across the lands of plaintiff," and where,

1  
2 "when there was a rise in said river, the water passed out over said  
3 lands of plaintiff," although it caused a greater overflow on the  
4 premises of defendant, to its damage.

5 (Emphasis in original). 73 Cal. at 134-35.

6 Whether or not Idaho would embrace the California Court's logic in *Lamb*, it appears  
7 that Idaho case law is supportive of the district court's finding in this case. BWR has cited  
8 *Loosli, supra*, a case which relied on *Hutchinson v. Watson Slough Ditch Co., Ltd.*, 16 Idaho  
9 484, 101 P. 1059 (1909) in order to reach its decision. In *Hutchinson, supra*, this Court stated:

10 "Watson slough is now and at all times herein mentioned  
11 and from time immemorial has been a natural watercourse,  
12 diverting water from the Snake river, on the west side thereof, and  
13 two and one-half miles southwest of Blackfoot, in Bingham  
14 County Idaho, and flowing through the said described land of the  
15 plaintiff, and on in a general southwesterly direction, emptying its  
16 waters into the said Snake river, the said watercourse being about  
17 seven or eight miles in length."

18 There was a sharp conflict in the evidence as to the natural  
19 character of Watson slough, -- **as to whether or not it had always**  
20 **carried a stream of water or whether it was dry during certain**  
21 **seasons of the year.** It must be conceded, however, that much of  
22 the evidence sustains the contention that it is a natural watercourse  
23 and **has from time immemorial carried a constant stream of**  
24 **water.** The court found in favor of this contention. It being  
25 conceded by both parties that the court entertained the correct view  
26 of the law as to what constitutes a watercourse, it necessarily  
follows that the court, in arriving at his conclusions of fact,  
necessarily did so in view and understanding of the correct  
principle of law. The presumption is strongly in favor of the  
correctness of the court's finding of fact on that question. Under the  
well-established rule with reference to findings based on  
conflicting evidence, we must sustain the finding on this  
proposition.

(Emphasis added). 16 Idaho at 488-89. The Court is urged to recall the testimony of Kevin



1  
2 Lakey that no water flows down the Broadford Slough during the irrigation season because it  
3 was all diverted into the Rockwell Bypass. R., Vol. 1, p. 115 at ¶ 7. Additionally, Leroy Lewis  
4 attested to the fact that the Broadford Slough had been dried up in the winter months to prevent  
5 flooding in the Bellevue area. R., Vol. 1, p. 108 at ¶ 5.

6  
7 The Court will recall the district court's finding in this case that if the Association did  
8 not undertake work in the channel of the Big Wood River to remove accumulated debris and  
9 silt during low flow periods, no water would ever get into the Broadford Slough. Only at a point  
10 below where the Rockwell Bypass rejoined the Broadford Slough channel was it considered to  
11 have "original water" of its own that resulted in the IDWR characterizing that portion of the  
12 Broadford Slough channel as a natural watercourse.

13  
14 If anyone would have known how the Idaho Department of Water Resources had  
15 characterized the Broadford Slough as not being a natural stream, it would had to have been  
16 Terry Blau, the Stream Channel Protection Program Administrator. During his 35 years of  
17 employment with the IDWR, he was aware that the segment of the Broadford Slough beginning  
18 at the confluence of the Big Wood River was not regarded as a natural stream until a point  
19 below where the Rockwell Bypass rejoined the slough, and became a gaining reach. R., Vol. 1,  
20 p. 83 at ¶ 5. It was only after that point that the IDWR regarded the channel as a natural stream.  
21 *Id.* Were that not the case, it is apparent that any construction activities in the upper reach of the  
22 slough would have been regulated by the IDWR.

23  
24 Mr. Blau, who submitted an Affidavit under oath, stated as follows:

25  
26 During the time of my employment with the IDWR, and in my role  
as the Stream Channel Protection Specialist, the segment of the

1  
2 Ditch beginning at the confluence of the Big Wood River was not  
3 regarded as a natural stream until a point below where the  
4 Rockwell By-pass rejoined the slough and became a gaining reach.  
5 At that point, the IDWR regarded the channel as a natural stream  
6 for purposes of regulation under the Stream Channel Alteration  
7 statutes.

8 R., Vol. 1, p. 83 at ¶ 5.

9 In BWR's opening Brief, as in the trial of this matter, BWR suggested that the  
10 Association does not have any legal right to charge for the maintenance and operation of the  
11 Broadford Slough ditch "over which the IDWR has exclusive responsibility." BWR's Opening  
12 Brief at p. 26. Kevin Lakey, the District 37 Watermaster, was careful to explain that the  
13 IDWR's responsibility for delivery of irrigation water did not include any responsibility beyond  
14 diverting water into the Broadford Slough. Tr., p. 190, LL. 1-16. He testified that the IDWR had  
15 no repair or maintenance responsibility for either the Broadford Slough or the Rockwell Bypass  
16 channels. Tr., p. 198, LL. 3-10. It is clear that there is nothing in law or practice that obligates  
17 the IDWR to maintain this or any other irrigation delivery system. Lakey testified that he was  
18 aware that the Association had conducted substantial work on the ditches and the headgates,  
19 and that the Association's management of the water rights delivery on the slough and bypass  
20 made administration simpler for the IDWR. R., Vol. 1, p. 115 at ¶¶ 8-9. As the court observed,  
21 without such maintenance activities being performed on those ditches, surface water rights  
22 would be incapable of being diverted, conveyed or delivered. R., Vol. 2, p. 396 at ¶ 14. The  
23 court also specifically found that the administrative functions of Water District No. 37 ceased at  
24 the point where water is diverted out of the Big Wood River into the channel leading to the  
25 Broadford Slough headgate. R., Vol. 2, p. 398 at ¶ 18. Finally, the court found that neither  
26

1  
2 Water District No. 37 nor the IDWR does any maintenance or repair to the ditches of the  
3 Broadford Slough or the Rockwell Bypass. *Id.* Even if the Broadford Slough was once a natural  
4 channel, it is apparent that it is not today. Mr. Lakey responded to a question posed by Judge  
5 Elgee, and informed him that when the Broadford Slough headgate was closed, water would  
6 simply back up to the level of the river and stay in the river. Tr., p. 215, LL. 20-24.

7  
8 **E. More than three parties take their water from a common point of diversion.**

9 BWR has asserted that the court failed to make a finding that three or more parties take  
10 their water from a common point of diversion. However, the court did find that all Association  
11 members' surface water is diverted at the same point in the Big Wood River into the ditch that  
12 leads to the Broadford Slough headgate. The court specifically found that all of the water  
13 diverted from the Big Wood River into the Broadford Slough ditch is ultimately diverted into  
14 the Rockwell Bypass. R., Vol. 2, p. 397 at ¶ 16. Because the membership roster of the  
15 Association clearly includes more than three parties, and because the court found that all waters  
16 diverted for the water right owners was necessarily diverted at the same point on the river into  
17 the Broadford Slough ditch, the Association contends that BWR's arguments in this regard are  
18 devoid of merit.

19  
20 **F. The Rockwell Bypass.**

21 BWR contends that the Rockwell Decree mandates the saved water right holders to  
22 exclusively maintain the Rockwell Bypass. However, as the court specifically found,  
23

24 There is nothing in the Rockwell Decree that provides that the  
25 saved water right owners have an exclusive obligation to maintain  
26 the Rockwell Bypass for the benefit of other users.

1  
2 R., Vol. 2, p. 397 at ¶ 16. As observed by the district court, there are many water users besides  
3 the saved water right owners whose water rights are transported via the Rockwell Bypass. There  
4 is nothing that mandated that the half-dozen or so saved water right owners had to get out with  
5 a pick and shovel to maintain the bypass to the exclusion of other downstream water users  
6 whose water rights were transported in the Rockwell Bypass channel. More importantly, the  
7 court acknowledged that there was nothing in the Rockwell Decree that mandated the saved  
8 water right owners to maintain the first half-mile of the Broadford Slough ditch between the  
9 Big Wood River and the Rockwell Bypass headgate. If that work wasn't legitimately performed  
10 by the Association, then no one, including the saved water right owners, would be able to have  
11 their water rights delivered. The court concluded that there was more maintenance required to  
12 deliver BWR's water than just the maintenance work to be performed on the Rockwell Bypass  
13 itself, and there was no *exclusive* obligation on the part of the Rockwell Bypass saved water  
14 right owners to maintain the Bypass when many other water users utilized the same delivery  
15 system. R., Vol. 2, p. 401 ¶ 2.  
16  
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18 **G. Affirming the district court's decision will not interfere or complicate the state's**  
19 **administration of water rights.**

20 At page 33 of BWR's opening Brief, BWR asserts, *ipse dixit*, that affirming the district  
21 court's decision will complicate and interfere with the state's administration of water rights. It is  
22 interesting to note that the Association had conducted its maintenance activities for a decade  
23 before BWR made this assertion. It is even more interesting for this Court to note what Kevin  
24 Lakey stated in his Affidavit regarding the very issue now raised by BWR:  
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2 The Association's management of the delivery of water  
3 rights on the Slough and the Bypass have made the administration  
4 of those water rights much simpler for the IDWR to administer.

5 R., Vol. 1, p. 115 at ¶ 9.

6 **H. BWR was not a bona fide purchaser.**

7 Although not raised as an issue on appeal, BWR has obliquely referred to its arguments  
8 to the district court that it was a bona fide purchaser ("BFP") without notice of the role of the  
9 Association. *See* BWR's Opening Brief at p. 6, fn. 4. Given the possibility that BWR may again  
10 refer to this argument in its Reply Brief, the Association feels compelled to address it here.

11 For someone who casually paid Five Million Dollars (\$5,000,000) for a piece of  
12 property **sight unseen**, it is indeed curious for BWR to have made the BFP allegation. The  
13 district court certainly did not buy into that argument, and it specifically found that BWR never  
14 researched or verified any issues pertaining to the property's water rights, or their means of  
15 conveyance or delivery, despite the express terms of the Purchase and Sale Agreement. R., Vol.  
16 2, p. 394 at ¶ 10. The relevant inspection contingency and water right verification language is  
17 contained in the Wenner/BWR Purchase and Sale Agreement. R., Vol. 2, p. 227. Additionally,  
18 BWR's policy of title insurance contained an exception to insurance coverage which excludes:  
19

20 Any facts, rights, interests or claims which are not shown by the  
21 public records but which could be ascertained by an inspection of  
22 the land or by making inquiry of a person in possession thereof.

23 R., Vol. 2, p. 242 at ¶ 2.

24 The district court observed that there was nothing inconsistent with the Association's  
25 Bylaws and its ability to assess BWR for the delivery of its water under the relevant statutes  
26

1  
2 regardless of BWR's claim that it was a bona fide purchaser. R., Vol. 2, p. 398 at ¶ 20. It is  
3 apparent that the district court's reference to BWR as a "free rider" was all too appropriate in  
4 this case.

5 The district court was careful to consider the Purchase and Sale Agreement (Plaintiff's  
6 Exhibit No. 40) with regard to the verification of water right issues during BWR's inspection  
7 period prior to closing of the transaction. This Court is urged to recall that Marc Richards  
8 testified that he did nothing insofar as an inspection or analysis of issues related to water rights  
9 for the property. He acknowledged that he made absolutely no inquiry of anyone with regard to  
10 any of these issues. In *Imig v. McDonald*, 77 Idaho 314, 291 P.2d 852 (1955), the Idaho  
11 Supreme Court commented upon BFP status in the context of a property purchaser, and stated  
12 as follows:  
13

14 It seems to us from the facts that the respondents failed to  
15 exercise due diligence and to avail themselves of information  
16 easily obtainable and to which their attention had been directed,  
17 and they cannot now claim to be bona fide purchasers. (Citations  
omitted).

18 77 Idaho at 319. The holding in that case applies equally to the facts of this case. After being  
19 charged with verifying issues regarding water rights on the property, Richards simply ignored  
20 the contract, and proceeded to purchase the property for \$5,000,000 without making so much as  
21 an inquiry of anyone regarding the water rights appurtenant to the property, or the manner in  
22 which they were delivered. If there ever was a situation where someone assumed the risk of a  
23 lack of inquiry or knowledge, this case presents a compelling example.

24 In *Adams v. Anderson*, 142 Idaho 208, 127 P.3d 111 (2005), this Court made a similar  
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2 observation:

3 A bona fide purchaser is one who, at the time of the purchase, paid  
4 valuable consideration without actual or constructive notice of any  
5 outstanding adverse rights of another. (Citation omitted).  
6 Additionally, a person is not a bona fide purchaser if he purchased  
the property with sufficient knowledge to put a reasonably prudent  
person on inquiry.

7 142 Idaho at 213. Given the language in the Purchase and Sale Agreement, it is certainly clear  
8 that BWR was charged with sufficient knowledge to put it on inquiry as to issues pertaining to  
9 water rights. The fact that Richards testified in both his deposition and during the trial of this  
10 matter that he elected not to do so deprives him of BFP status. Tr., p. 306, LL. 17-25; p. 307,  
11 LL. 1-4; p. 311, LL. 3-8 and LL. 23-25.

12  
13 **I. Robert "Archie" Bouttier possessed both actual and apparent authority to call for**  
14 **the delivery of BWR's water.**

15 Mr. Bouttier was an original Association member who farmed the property that is now  
16 owned by BWR. He had resided in the area since the mid-1970's. Tr., p. 146, LL. 19-25. He had  
17 been familiar with the BWR property since the early seventies. Tr., p. 148, LL. 5-8. At the trial  
18 of this matter, he described in great detail the relationship that he had with Jann Wenner, the  
19 former owner of BWR's property. As a result of an arrangement with Wenner, Bouttier testified  
20 that he maintained and irrigated Wenner's property on an annual basis starting sometime in  
21 1996 or 1997. Tr., pp. 148-150. Following Mr. Wenner's sale of the property to BWR, Mr.  
22 Bouttier described his initial meeting with Marc Richards, BWR's sole member. Although he  
23 offered to show Mr. Richards around the property, Bouttier explained that Richards wasn't  
24 interested in doing that. Tr., p. 154, LL. 12-15. After informing Richards what he had been  
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2 doing on the property, Bouttier testified, "And he [Richards] said, well, you can just keep on  
3 doing what you did with Jann, it looks fine to me." *Id.* at LL. 17-19. Specifically with regard to  
4 the water, the following colloquy occurred between BWR's attorney and Mr. Bouttier:

5 Q. Fair enough. And you never got to the subject of how the  
6 water is delivered to the property?

7 A. I asked him if he wanted to go up and I'll show him that  
8 stuff, and he didn't want to see it.

9 Tr., p. 155, LL. 3-7. Finally, Mr. Bouttier testified that between 2006 and 2011, he personally  
10 called for the delivery of irrigation water from the Association. Tr., p. 156, LL. 10-14. Mr.  
11 Richards confirmed to Mr. Bouttier that he had purchased Jann Wenner's property sight unseen.  
12 Tr., p. 161, LL. 18-20. In the court's Findings of Fact, the court found that Bouttier had either  
13 express or apparent authority to call upon the Association for the conveyance and delivery of  
14 surface water rights appurtenant to BWR's property. R., Vol. 2, p. 394 at ¶ 11. It is abundantly  
15 clear that after having heard the testimony of both Mr. Bouttier and Mr. Richards, the court  
16 believed the testimony of Mr. Bouttier. *See* last sentence of Finding of Fact No. 8, R., Vol. 2, p.  
17 394. The court found that BWR was a member of the Association, and that it received a benefit  
18 from the Association's activities. R., Vol. 2, p. 397 at ¶ 17. The court found that a benefit had  
19 been conferred on BWR by the Association which benefit was not an incidental benefit. *Id.* The  
20 court found that BWR was aware of that benefit by virtue of its knowledge that its property had  
21 been irrigated. *Id.* The court found that the Association had rendered such benefit with the  
22 expectation that it would be paid in accordance with the applicable statutes. *Id.* Finally, the  
23 court found that even if not pled, the parties implicitly tried the issues of unjust enrichment  
24 and/or *quantum meruit* in the trial of this matter consistent with with IRCP Rule 15(b). *Id.*  
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2 One final comment is warranted with respect to BWR's assertion that it knew little, if  
3 anything, regarding the irrigating, farming and grazing activities that took place on its property.  
4 This Court should view Mr. Richards' assertions in this regard with some degree of skepticism  
5 and incredulity. Mr. Richards was asked to explain how he could have obtained an agricultural  
6 tax exemption (Exhibit No. 536) which indicated that BWR's property was operated on a crop  
7 share basis. Richards acknowledged that, "Archie Bouttier was taking the hay and the alfalfa off  
8 the property, and had his horses there eating it." Tr., p. 321, LL. 6-7. When asked if Archie  
9 Bouttier was the one who was irrigating BWR's property, Mr. Richards responded, "I would  
10 assume so." Tr., p. 321, L. 22. Exhibit No. 537 admitted into evidence was a second Blaine  
11 County agricultural tax exemption form. In that document, Mr. Richards testified that he had  
12 checked the box to indicate that the property was "owner-operated." Tr., p. 324, LL. 16-25. As  
13 part of obtaining the agricultural tax exemption, Richards had advised Blaine County that he  
14 had planted 35 or more acres of oat hay during the previous year. When questioned about that  
15 supposed activity, he testified that although that is what he had written there, he really hadn't  
16 planted anything. Tr., p. 325, LL. 1-6. His representation to Blaine County was simply untrue.  
17 Despite having purchased a \$5,000,000 piece of property in a sight unseen condition, the  
18 testimony of Mr. Richards made it clear that he had little, if any, knowledge as to what actually  
19 took place on his property. Many of his answers at trial were simply "I don't know," or "I don't  
20 recall." *See, e.g.*, Tr., p. 326-330.  
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23

24 It became very apparent, and the court specifically found, that the elements of both  
25 unjust enrichment and *quantum meruit* were clearly satisfied. BWR received a benefit from the  
26

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2 Association with regard to the maintenance of the irrigation water delivery system, and the  
3 actual delivery of irrigation water to BWR's property. Contrary to BWR's arguments, there is no  
4 basis, statutory or otherwise, that would allow an Association member to opt out of  
5 membership in the Association, and then to later opt in. *See* Finding of Fact No. 19 at R., Vol.  
6 2, p. 398 at ¶ 19.

7  
8 The district court found that the Association conferred a substantial benefit upon BWR's  
9 property and that the Association's assessments were proper and correctly calculated based  
10 upon the statutory provisions. *See* Finding of Fact Nos. 17, 20, 21, and 22. R., Vol. 2, pp. 397-  
11 399. The court found that neither the IDWR nor Water District No. 37 provided any product or  
12 service to BWR or to the other members of the Association beyond the diversion of water out  
13 of the Big Wood River. R., Vol. 2, p. 398 at ¶ 18. The court found that the administrative  
14 functions of Water District No. 37 cease at the point where water is diverted out of the Big  
15 Wood River into the channel leading to the Broadford Slough headgate. *Id.* Neither Water  
16 District No. 37 nor the IDWR do any maintenance or repair on the Broadford Slough or the  
17 Rockwell Bypass. *Id.*

18  
19 It seems evident that BWR was more interested in being a "free rider" insofar as the  
20 Association was concerned, and despite having spent \$5,000,000 to purchase its property, Mr.  
21 Richards was not about to pay annual assessments for the delivery of the irrigation water, even  
22 though they amounted to less than \$1,300 per year. This Court should reject the arguments  
23 made by BWR, and should affirm the Findings and Conclusions of the district court.  
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#### IV. ATTORNEY FEES ON APPEAL

The Association asserts that attorney fees are warranted in this case pursuant to Idaho Code § 42-1307. That section reads:

42-1307. Action for assessment – Attorneys' fees. – In case any assessment, as herein provided for is due and unpaid the association may sue to collect the same, in the name of its secretary-treasurer as such, in any court of competent jurisdiction, and in addition to the amount due including all penalties and interest, and all costs incurred in said action, may collect a reasonable attorneys' fee in such action to be fixed by the court.

Just as the district court found that the Association was entitled to recover its costs and attorney fees below, this Court should arrive at a similar conclusion on appeal.

The Association also contends that Idaho Code §§ 12-120(1) and (3) provide an additional basis for an award of costs and attorney fees in this case. The amount sought to be recovered by the Association was clearly less than \$25,000, and BWR acknowledged that it had received the written invoices from the Association for payment of delinquent assessments. Tr., p. 28, LL. 2-18. Idaho Code § 12-120(3) affords a prevailing party the right to recover fees on an open account for services in a commercial transaction.

Finally, the Association believes that costs and fees should appropriately be awarded under Idaho Code § 12-121, and Idaho Appellate Rules 40 and 41. The Association contends that BWR's appeal, not unlike its case below, was brought and defended frivolously, unreasonably, and without foundation.

Under any or all of the statutory provisions enumerated above, an award of costs and fees to the Association would be appropriate.

1  
2 V. CONCLUSION

3 The Association was validly formed by three or more parties who take water from the  
4 same point where it is diverted out of the Big Wood River into the ditch leading to the Broadford  
5 Slough headgate. The Association agrees with the district court that the terms "ditch" and "canal"  
6 are synonymous with one another for purposes of Title 42 of the Idaho Code. All of the  
7 Association members' irrigation water is diverted from the Big Wood River at the same point, and  
8 is then conveyed via a ditch to the members' respective properties.  
9

10 The Association was formed out of necessity in order to insure that necessary maintenance  
11 and repair work was done within the channels of the Broadford Slough and the Rockwell Bypass.  
12 Additionally, the district court recognized the necessity of undertaking work with mechanized  
13 equipment in the channel of the Big Wood River in order to allow water to be diverted into the  
14 ditch that led to the Broadford Slough headgate. Without undertaking that work, the court found  
15 that no water rights could be delivered during low flow periods because of the build-up of debris,  
16 silt and rock. Nothing in the Rockwell Decree obligated the saved water right owners to venture  
17 above the Rockwell Bypass headgate to do any work in the Big Wood River, or in the half-mile  
18 ditch leading from the river to the Broadford Slough headgate.  
19

20 Marc Richards expressly authorized Robert "Archie" Bouttier to run BWR's property just  
21 as he had done in previous years for Jann Wenner. In doing so, Bouttier necessarily had to call  
22 upon the Association for the delivery of the irrigation water rights appurtenant to BWR's property.  
23 Mr. Richards' rationale as to why he should be a "free rider" was never clearly articulated as found  
24 by the district court.  
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2 Richards testified repeatedly that although Big Wood Ranch  
3 received surface water every year, Big Wood Ranch received no  
4 benefit. Nor does Richards believe that he receives any benefit by the  
5 efforts of the Association, or anyone else, to maintain the stream  
6 between the main channel of the Big Wood River and the Broadford  
7 Slough headgate.

8 R., Vol. 2, p. 397 at ¶ 17. The Association contends that Richards' position was always one of  
9 pure obstinacy, and that there never was any legal basis or foundation for BWR's claims made in  
10 the Complaint, or in its defense of the Association's Counterclaim.

11 The decision of the district court should be affirmed, and costs and attorney fees should be  
12 awarded to the Association. In 1927, the Idaho legislature provided a mechanism that allowed  
13 water users to unite to form an organization such as this Association. The legislature recognized  
14 the need for such cooperative efforts at that time, and the efforts of the Association in conducting  
15 those activities ninety years later should not be thwarted today.

16 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of April, 2014.

17 ROBERTSON &, SLETTE, PLLC

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19 BY:  \_\_\_\_\_

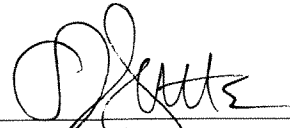
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9<sup>th</sup> day of April, 2014, he caused two (2) true and correct copies of the foregoing instrument to be served upon the following persons in the following manner:

Patrick J. Miller	<input type="checkbox"/>	Hand Deliver
Givens Pursley	<input checked="" type="checkbox"/>	U.S. Mail
601 W. Bannock St.	<input type="checkbox"/>	Overnight Courier
Boise, ID 83701-2720	<input type="checkbox"/>	Facsimile Transmission - 208-388-1300
	<input type="checkbox"/>	Email <a href="mailto:pjm@givenpursley.com">pjm@givenpursley.com</a>



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Gary D. Slette