2-15-2018

Mulberry v. Burns Concrete, Inc. Appellant's Brief Dckt. 45184

IN THE SUPREME COURT OF THE STATE OF IDAHO

NORA A. MULBERRY and TN PROPERTIES LLC, an Idaho limited liability company,

Plaintiffs-Respondents,

v.

BURNS CONCRETE, INC., an Idaho corporation, and COVE DEVELOPMENT COMPANY, LLP, an Idaho limited liability partnership,

Defendants-Appellants.

Supreme Court Docket No. 45184-2017

Bonneville County Case No. CV-2016-3413

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County,
the Honorable Dane H. Watkins, Jr., District Judge, Presiding.

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I. STATEMENT OF THE CASE

A. Summary Of The Case.

This is an unusual appeal because the judgment being appealed – which was prepared by Plaintiffs and has not been appealed by them – grants *Defendants/Appellants* the very relief requested in their answer: that Plaintiffs' complaint be dismissed with prejudice. Thus, neither Defendants nor Plaintiffs contest the terms of the judgment under appeal, although Defendants do contest the award of attorney fees and costs to Plaintiffs, whose complaint was dismissed with prejudice.

Yet this appeal was taken by Defendants not only to overturn the award of fees and costs to Plaintiffs, but in order to avoid additional litigation in the district court and appeals in this Court, to also overturn the district court's ruling on which its determination that Plaintiffs prevailed in this lawsuit is based: that the Undivided Right of First Refusal to Acquire Interest in Real Property attached hereto as **Exhibit A** (the "ROFR") was "extinguished" upon its assignment by one of the two Defendants to the other. In this regard, the district court's ruling that the ROFR was extinguished is erroneous for at least the following three independent reasons:

- The ROFR is an unambiguous stand-alone contract that is reasonably interpreted as being assignable without resort to parol evidence.
- Even if the assignment of the ROFR were a nullity, that would not affect the validity of the ROFR between the contracting parties.

- The ROFR is not appurtenant to a separate parcel of a real property that was sold by the grantors of the ROFR to its named beneficiary.

B. Summary Of The Proceedings In The District Court.

Plaintiffs filed their verified complaint initiating this civil action on June 29, 2016. [R, p. 2.] Defendants filed a joint answer to the complaint on July 22, 2016. [R, p. 2.] No amended or other pleadings were filed by any party to this lawsuit.

Plaintiffs moved for the entry of partial summary judgment on August 22, 2016 [R, p. 3], a month after the answer was filed and without any party propounding discovery, and the motion was heard on September 22, 2016 [R, p. 3]. By its Memorandum Decision and Order Re: Motion for Partial Summary Judgment, filed November 10, 2016 ("*1st MSJ Decision*"), the district court granted Plaintiffs summary judgment, holding, in part, that "[t]he ROFR was extinguished when Canyon Cove [Development Company, LLP] assigned the ROFR and conveyed its interest in the neighboring property to Burns [Concrete, Inc.]" [R, pp. 47 & 61.]

Because neither Plaintiffs nor Defendants had previously raised or addressed the question of whether the ROFR might have been "extinguished" upon its assignment to Burns Concrete, Inc., Defendants presented the legal authorities establishing why the ROFR was not extinguished upon its assignment by a motion for reconsideration filed December 30, 2016. [R, p. 4.] The district court denied Defendants' motion by the court's Memorandum Decision and Order Re: Motion for Reconsideration, filed March 20, 2017 ("*2nd MSJ Decision*"), again holding that "Canyon Cove's rights under the ROFR have been extinguished." [R, pp. 73 & 92.]

Plaintiffs then moved to dismiss all of their remaining claims by motion filed April 25, 2017 [R, p. 5], which was granted by the district court's order dismissing, with prejudice, Plaintiffs' remaining claims as moot filed April 27, 2017 [R, p. 94]. Also on April 27, 2017, the district court entered its Judgment, ordering that "all pending matters in the above entitled case are hereby dismissed, with prejudice." [R, p. 96.]

Defendants filed their notice of appeal on June 5, 2017 [R, p. 98], under and pursuant to I.A.R. 11(a)(1) with respect to an appeal from a final judgment and within the 42-day period required by I.A.R. 14(a).

Notwithstanding entry of the district court's order and Judgment dismissing all of Plaintiffs' claims with prejudice, Plaintiffs moved for an award of their costs and attorney fees on May 10, 2017 [R, p. 5], with the district court granting Plaintiffs their attorney fees and costs by the court's Memorandum Decision and Order Re: Attorney Fees and Costs, filed July 27, 2017 [R, pp. 102 & 112].

Finally, on August 2, 2017, Defendants filed their Amended Notice of Appeal to designate within the scope of this appeal the district court's grant of attorney fees and costs to Plaintiffs and to include copies of the district court's Judgment and Order granting attorney fees and costs. [R, p. 115-33.]

No appeal or cross-appeal of the Judgment was filed by Plaintiffs.

C. Summary Of The Facts.[1]

(i) Parties.

1. Plaintiff Nora A. Mulberry ("Mulberry") is a resident of Bonneville Country and the sole owner of Plaintiff TN Properties LLC ("TN Properties"), an Idaho limited liability company. *Complaint*[2] ¶ 1 [R, p. 8]; *Answer*[3] ¶ 1 [R, p. 35].

2. Defendant Burns Concrete, Inc. ("Burns Concrete"), an Idaho corporation, has its principal place of business in Bonneville County. *Complaint* ¶ 3 [R, p. 9]; *Answer* ¶ 1 [R, p. 35].

3. Defendant Canyon Cove Development Company, LLP ("Canyon Cove"), an Idaho limited liability partnership, also has its principal place of business in Bonneville County. *Complaint* ¶ 4 [R, p. 9]; *Answer* ¶ 1 [R, p. 35].

(ii) Jurisdiction and Venue.

4. Jurisdiction exists in the district court under Idaho Code Sections 10-1201, et seq. *Complaint* ¶ 6 [R, p. 9]; *Answer* ¶ 1 [R, p. 35].

5. Venue exists in Bonneville County. *Complaint* ¶ 5 [R, p. 9]; *Answer* ¶ 1 [R, p. 35].

(iii) Material Terms of the ROFR.

6. The terms of the ROFR include the following material provisions:

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[1] Hereinafter referred to as *Facts*.

[2] Verified Complaint for Declaratory Judgment, filed June 29, 2016 ("*Complaint*") [R, pp. 8-34].

[3] Answer, filed July 22, 2016 ("*Answer*") [R, pp. 35-40].

> For adequate consideration, Sellers hereby grant to the Buyer a right of first refusal to acquire the Sellers' undivided interest in and to the real property hereafter described on the same terms, conditions, and provisions as the Sellers might intend to sell and convey said interest to any third person hereafter.
>
> Should the Sellers hereafter intend to sell in good faith and convey said premises they will first offer the same to the Buyer by a written notice containing all of the terms, conditions, and provisions by which they intend to sell in good faith the same to said third person. Buyer shall then have five (5) days from the date such notice is received to accept or refuse said offer.
>
> Should the Buyer decline the offer, and the sale to the third party, for any reason not occur, then this option of first refusal should then be renewed and shall apply to any subsequent sale to a third party.
>
> * * *
>
> This option agreement may be recorded in Bonneville County, Idaho. Thereafter, Sellers may record a notice in Bonneville County, Idaho, showing the date on which they gave their notice to Buyers, in order to give record notice of the beginning of the stated notice time period.

Complaint Ex. 5 at ¶¶ 1-4 (emphasis added) [R, p. 27]. Thus, the ROFR is a stand-alone contract that does not refer to any other transaction or property, states that it is based on adequate consideration, provides for its renewal or continuation in the event the encumbered property is not sold, and provides for notices to be given through recordation in the real property records – which together establish that the ROFR was intended to bind both Mulberry and her property.

(iv) General Allegations.

7. On or about January 26, 1999, Mulberry and her now deceased husband, Theodore E. Mulberry, entered into a purchase and sale agreement (the "PSA") for the sale of

certain Bonneville County real property to Canyon Cove (the "Purchased Property"). *Complaint* ¶ 9 and Ex. 3 [R, pp. 9 & 17-19]; *Answer* ¶ 1 [R, p. 35].

8. The terms of the PSA were amended by an addendum entered into at the closing on the Purchased Property held March 18, 1999, which addendum provided for, among other things, the grant of the ROFR with respect to certain additional Bonneville County real property then owned by Mulberry and her now deceased husband (the "ROFR Property"). *Complaint* ¶ 10 and Ex. 4 [R, pp. 9 & 20-25]; *Answer* ¶ 2 [R, pp. 35-36].

9. The ROFR was also entered into on March 18, 1999, by Mulberry and her now deceased husband, as the defined "Sellers" of the ROFR Property, and Canyon Cove, as the defined "Buyer" of the ROFR Property. *Complaint* ¶¶ 10-11 and Ex. 5 [R, pp. 9-10 & 26-30]; *Answer* ¶ 2 [R, pp. 35-36].

10. The ROFR was recorded by the Bonneville County Recorder on March 19, 1999, thereby encumbering the ROFR Property. *Complaint* ¶ 11 and Ex. 5 [R, pp. 10 & 27]; *Answer* ¶ 3 [R, p. 36].

11. On March 30, 1999, Canyon Cover assigned its interest in the ROFR and a farm lease with respect to the Purchased Property to Burns Concrete. *Complaint* ¶ 12 and Ex. 6 [R, pp. 10 & 31-34]; *Answer* ¶ 4 [R, p. 36].

12. Canyon Cove also conveyed the Purchased Property to Burns Concrete by deed executed March 30, 1999, and subsequently recorded by the Bonneville County Recorder. *2d*

Burns Aff.[4] ¶ 2 and Ex. A [R, pp. 63-64 & 67-69]. Thus, Burns Concrete acquired from Canyon Cove the Purchased Property, the landlord's interest in the farm lease of the Purchased Property, and the ROFR by instruments executed on March 30, 1999. *Id.* ¶¶ 2-3 [R, pp. 63-64].

13. Burns Concrete's president, Kirk Burns, established the following undisputed facts concerning the location, condition, and current and prospective uses of both the Purchased Property and ROFR Property:

> The Purchased Property is located between and adjacent to two additional parcels (one 50 acres and the other 35 acres) owned by Burns Concrete, with all of the Purchased Property being on the north side of 81st South (Cotton Road) in Bonneville County and with four residential properties constructed along 81st South lying between it and the Purchased Property.
>
> The ROFR Property is located across the road from Burns Concrete's 50-acre parcel on the south side of 81st South and to the west of the Purchased Property. Thus, not only is the ROFR Property not in any manner adjacent or physically "connected" to (nor directly across the road from) the Purchased Property, but the two properties share no common irrigation system or other utilities, have no common means of ingress or egress, and are subject to no common easements or restrictions by which one of the properties benefits the other. For these reasons, there is no requirement for or benefit in the consistent use of the two properties, whether for farming, residential development, mining of aggregate materials, or otherwise.
>
> For the foregoing reasons, neither the value nor the use of the Purchased Property (or, for that matter, any of Burns Concrete's additional acreage) would in any manner be enhanced by Burns Concrete's ownership of the ROFR Property, nor would the Purchased Property otherwise be benefitted by common ownership of it and the ROFR Property.

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[4] Second Affidavit of Kirk Burns, filed February 15, 2017 ("*2d Burns Aff.*) [R, pp. 63-72].

2d Burns Aff. ¶¶ 4-7 (emphasis in original) [R, pp. 64-65].

14. By deed recorded by the Bonneville County Recorder on August 17, 2005, Mulberry and her now deceased husband conveyed the ROFR Property to their wholly owned limited liability company, TN Properties, *Complaint* ¶¶ 1 & 8 and Ex. 1 [R, pp. 8-9 & 13-14]; *Answer* ¶ 1 [R, p. 35].

15. At no time did either Canyon Cove or Burns Concrete receive written notice by anybody that either of them might purchase the ROFR Property. *Wilkins Aff.*[5] ¶¶ 1 & 3 [R, pp. 44-45]; *1st Burns Aff.*[6] ¶¶ 1 & 3 [R, pp. 41-42].

II. ISSUES PRESENTED ON APPEAL

1. Did the district court err in ruling that the ROFR was "extinguished" upon its assignment by Canyon Cove to Burns Concrete?

2. Did the district court err in ruling that Plaintiffs were the prevailing parties and awarding them their attorney fees and costs?

3. Are Defendants entitled to recover their attorney fees incurred on appeal pursuant to Idaho Code Section 12-120(3) and I.A.R. 41?

III. LEGAL STANDARDS

As provided by I.A.R. 17(e)(1), the appeal of a final judgment or order "shall be deemed to include, and present an appeal: (A) All interlocutory judgments and orders entered prior to the judgment, order or decree appealed from, and . . . (C) All interlocutory or final judgments and

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[5] Affidavit of Linda Wilkins, filed September 8, 2016 ("*Wilkins Aff.*") [R, pp. 44-46].

[6] Affidavit of Kirk Burns, filed September 8, 2016 ("*1st Burns Aff.*") [R, pp. 41-43].

orders entered after the judgment or order appealed from except [for certain inapplicable orders]." Further, this Court established in *In re Estate of Keeven*, 110 Idaho 452, 716, P.2d 1224 (1986):

> If there is a final appealable order in a case and appeal is properly taken from that order, then all other orders which would otherwise not be appealable may be considered by this Court. Therefore, on remand, the trial court can be correctly advised on the law as it relates to all the issues of the case. Otherwise, much judicial time and resources may be wasted because the parties might have to take another appeal in order to test those same interlocutory orders which this Court could have decided when it decided the final appealable orders in the first appeal.

Id. at 456-57, 716 P.2d 1228-29.

Summary judgment is an appropriate remedy if the nonmoving party's "pleadings, affidavits, and discovery documents . . . , read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002) (citing I.R.C.P. 56(c)). The Court must construe the evidence liberally and draw all reasonable inferences in favor of the nonmoving party. *Hei v. Holzer*, 139 Idaho 81, 84-85, 73 P.3d 94, 97-98 (2003). If the facts, with inferences favorable to the nonmoving party, are such that reasonable persons could reach differing conclusions, summary judgment is not available. *Hayward v. Jack's Pharmacy Inc.*, 141 Idaho 622, 625, 115 P.3d 713, 716 (2005). The moving party bears the initial burden of proving the absence of a genuine issue of material fact. *Id.*

The present dispute arises out of the legal effect of the ROFR. The applicable standards with respect to this Court's construction of the ROFR are set forth in *Knipe Land Company v. Robertson*, 151 Idaho 449, 259 P.3d 595 (2011), as follows:

> As provided by this Court in *Potlatch Education Ass'n v. Potlach School District No. 285*:
>
> > When interpreting a contract, this Court begins with the document's language. In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical. Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.
>
> Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review. Where a legal instrument is found to be unambiguous the legal effect must be decided by the district court as a matter of law; it is only when that instrument is found to be ambiguous that evidence as to the meaning of that instrument may be submitted to the finder of fact. "[E]vidence of custom or usage may not be introduced to vary or contradict the terms of a plain and unambiguous contract. . . ."

Knipe Land Co., *id.* at 454-55, 259 P.3d at 600-01 (emphasis added) (internal and concluding citations omitted).

None of the parties asserted during this dispute that the ROFR is ambiguous and not subject to construction as a matter of a law. *See also 1st MSJ Decision* 12 ("The language of the

ROFR is plain and unambiguous.") [R, p. 58]. *But cf. 2nd MSJ Decision* 17 ("Because the ROFR does not clearly indicate whether the parties intended the right to be appurtenant to the Purchased Property or in gross, the ROFR is ambiguous as to that issue.") [R, p. 90].

Finally, to the extent the interpretation of the Judgment is at issue, its interpretation "is generally subject to the same rules applicable to construction of contracts." *McKoon v. Hathaway*, 146 Idaho 106, 109, 190 P.3d 925, 928 (Ct. App. 2008) (citations omitted).

IV. ARGUMENT

A. The ROFR Remains A "Live" Contract Irrespective Of Whether It Constitutes An Appurtenant Option Agreement Or A Personal Contract.

As its terms expressly provide, the ROFR was labeled by its parties to be an "option agreement" and intended to be recorded by the county recorder, *Facts* ¶ 6, and thereupon encumber the ROFR Property. Further, relying on multiple sections in the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000) [hereinafter *Restatement (Third)*] the district court held the ROFR to be a servitude on the ROFR Property that ran with the land.[7] *2nd MSJ Decision* 12 ("the burden placed on Plaintiffs' property runs with the land") [R, p. 85]; *id.* at 14 ("the ROFR in this case runs with the land and is a servitude.") [R, p. 87].

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[7] Defendants do not contest this holding by the district court because the contracting parties treated the ROFR as running with the ROFR Property by characterizing the ROFR as an "option agreement," rather than as a personal contract or a preemptive right, by recording the ROFR against the ROFR Property, and by providing for the recording of notices given under the ROFR. *Facts* ¶ 6. However, in reaching this holding the district court missed the particular point Defendants argued below: that the ROFR was not a servitude on the *Purchased Property* and didn't run with *that* land.

Notwithstanding the district court's holding the ROFR was a servitude on the ROFR Property that ran with the land and the court's reliance on, and quotation of, *Restatement (Third)* § 1.5(3) ("'Personal' means that a servitude benefit or burden is not transferable and does not run with the land" (emphasis added)) in support of its holding,[8] the district court also held that the ROFR was personal and could not be assigned to Burns Concrete. *1st MSJ Decision* 12 ("a declaratory judgment that the ROFR was personal to the parties and cannot benefit Burns Concrete should be granted.") [R, p. 58]. Defendants therefore submit that the district court's error in holding the ROFR has been "extinguished" is at least partly the result of confusion over the meaning and legal effect of the terms "appurtenant," "in gross," and "personal."

Because Defendants have found no Idaho precedent articulating the relationship between "appurtenant," "in gross," and "personal" as they may relate to a right of first refusal with respect to the purchase of land, Defendants will summarize these three concepts below utilizing the same principal authority relied upon by both Plaintiffs and the district court, the *Restatement (Third)*. Before doing so, however, Defendants respectfully submit that there are but the following three alternative possibilities here in play, none of which support the conclusion that the ROFR was extinguished by its assignment to Burns Concrete:

- If the ROFR is not "personal" to Canyon Cove, then Burns Concrete may exercise the ROFR irrespective of whether it is "appurtenant" to the Purchased Property, which Burns Concrete owns.

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[8] See 2nd MSJ Decision 11 [R, p. 84].

- If the ROFR is "personal" to Canyon Cove but not "appurtenant" to the Purchased Property, then Canyon Cove may exercise the ROFR if either (a) Canyon Cove's attempted assignment of the ROFR was void, or (b) if it was effective, Burns Concrete assigns the ROFR back to Canyon Cove by the deadline for its exercise.[9]
- If the ROFR is both "personal" to Canyon Cove and "appurtenant" to the Purchased Property, then Canyon Cove may exercise the ROFR if both (a) Canyon Cove's attempted assignment of the ROFR was void or, if it was effective, Burns Concrete assigns the ROFR back to Canyon Cove by the deadline for the ROFR's exercise, and (b) Canyon Cove reacquires the Purchased Property by the deadline for the ROFR's exercise.

In sum, irrespective of whether the ROFR is held to be personal to Canyon Cove or appurtenant to the Purchased Property, it may yet be exercised in accordance with each of its express and implied terms. And that the ROFR is not "extinguished" under such circumstances is made manifest by the fact that there is but one known state or federal opinion deciding that a legal contract may be held void while it may yet be exercised in accordance with all of its applicable terms – an outlier opinion discussed and distinguished in part A(iv) below that the district court itself ruled was "insufficient to conclude that a personal ROFR is extinguished upon its invalid assignment." *2nd MSJ Decision* 7 [R, p. 80].

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[9] I.e., within five days of Canyon Cove's receipt of written notice of the intended sale of the ROFR Property. *Facts* ¶ 6.

(i) The Definitions of and Relations Between "Appurtenant," "In Gross," and "Personal" as Adopted by the Restatement.

The *Restatement (Third)* defines the terms "appurtenant," "in gross," and "personal" as follows:

> (1) "Appurtenant" means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land. The right to enjoyment of an easement or profit, or to receive the performance of a covenant that can be held only by the owner or occupier of a particular unit or parcel, is an appurtenant benefit. A burden that obligates the owner or occupier of a particular unit or parcel in that person's capacity as owner or occupier is an appurtenant burden.
>
> (2) "In gross" means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.
>
> (3) "Personal" means that a servitude benefit or burden is not transferable and does not run with land. Whether appurtenant or in gross, a servitude benefit or burden may be personal.

Restatement (Third) § 1.5 (emphasis added).

The relation between servitudes that are appurtenant, run with the land, and personal is explained in the comments to the foregoing section:

> *Relation between appurtenant, running with land, and personal.* Only appurtenant benefits and burdens run with land, but the terms are not synonymous. Running with land means that the benefit or burden passes automatically to successors; appurtenant means that the benefit can be used only in conjunction with ownership or occupancy of a particular parcel of land, or that only the owner or occupier of a particular parcel is liable for failure to perform a servitude obligation. Appurtenant benefits and burdens ordinarily run with land, but they may be made personal to particular owners or occupiers of the land.

Restatement (Third) § 1.5 cmt. a (emphasis added). *See also id.* § 1.1(1)(a) ("Running with land means that the right or obligation passes automatically to successive owners . . .").

Or by the lexicon of the *Restatement (Third)*, a servitude that is personal and not transferable cannot run with the land because servitudes that run with the land pass automatically to successors in interest. Finally, and in addition to quoting the foregoing provisions and comment to the *Restatement (Third)* § 1.5 (albeit with different portions emphasized), the district court correctly noted that comment a to *Restatement (Third)* § 3.3 expressly provides that the rule stated in the section "applies to options and rights of first refusal with respect to the purchase of land . . . ." *2d MSJ Decision* 11-12 [R, pp. 84-85].

Accordingly, if this Court adopts the principles articulated in the foregoing provisions of the *Restatement (Third)* – and Defendants have found no Idaho precedent that conflicts with these general principles – then the ROFR here at issue should *not* be held to be a "personal" servitude if, as the district court held, it runs with the land.

(ii) The ROFR Is Not Appurtenant to the Purchased Property.

The undisputed facts in this case establish that the ROFR was entered into 19 years ago and recorded against the ROFR Property, *Facts* ¶¶ 9-10; and that shortly thereafter Burns Concrete acquired from Canyon Cove the Purchased Property, the landlord's interest in the farm lease of the Purchased Property, and the ROFR, *Facts* ¶¶ 11-12. The undisputed facts further establish the following:

- That the Purchased Property is located between and adjacent to two additional parcels (one 50 acres and the other 35 acres) owned by Burns Concrete, with all

of the Purchased Property being *on the north side of 81st South* in Bonneville County and with four residential properties constructed along 81st South lying between the road and the Purchased Property. *Facts* ¶ 13.

- That the ROFR Property is located across the road from Burns Concrete's 50-acre parcel *on the south side of 81st South* and to the west of the Purchased Property. *Id.*
- That not only is the ROFR Property not in any manner adjacent or physically "connected" to (nor directly across the road from) the Purchased Property, but the two properties share no common irrigation system or other utilities, have no common means of ingress or egress, and are subject to no common easements or restrictions by which one of the properties benefits the other – and for these reasons, there is no requirement for or benefit in the consistent use of the two properties, whether for farming, residential development, mining of aggregate materials, or otherwise. *Id.*
- And that for all the foregoing reasons, neither the value nor the use of the Purchased Property (or, for that matter, any of Burns Concrete's additional acreage) would in any manner be enhanced by Burns Concrete's ownership of the ROFR Property, nor would the Purchased Property otherwise be benefitted by common ownership of it and the ROFR Property. *Id.*

Notwithstanding the foregoing uncontested facts, however, and without any other relevant facts pending before the district court, it held as follows:

> Looking at the Restatement of Property – Servitudes[10] reinforces a finding that the ROFR was appurtenant to the Purchased Property. Though the properties are not contiguous, the proximity between the Purchased Property and the ROFR Property, makes the use of the ROFR Property arguably more useful to the owner of the Purchased Property than to an independent party who does not own nearby property. While there may be room for doubt as to whether Canyon Cove or Burns might retain greater use of the ROFR Property after Canyon Cove's conveyance of the Purchased Property to Burns, such doubt is resolved in favor of construing the ROFR as being appurtenant.

2nd MSJ Decision 18 (citations omitted) [R, p. 91].

There appears to be no opinion by either of Idaho's appellate courts expressly deciding when a right of first refusal will be deemed "appurtenant" or, conversely, "in gross." However, this Court has resorted to Idaho's law applicable to easements in deciding whether other rights related to property are one or the other. *See, e.g., Joyce Livestock Co. v. United States of America*, 144 Idaho 1, 13, 156 P.3d 502, 514 (2007) ("we reasoned by analogy from appurtenant easements, holding that water rights and easements were sufficiently similar to have the relevant law applicable to appurtenant easements apply to appurtenant water rights."). *See also Oakley*

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[10] The established rule in Idaho with respect to unadopted provisions of the Restatement was quoted and followed by this Court in *Asbury Park, LLC v. Greenbriar Estate Homeowners' Association, Inc.*, 152 Idaho 338, 271 P.3d 1194 (2012):

> "The Restatement is not law unless it has been adopted by this Court." *Estate of Skvorak v. Sec. Union Title Ins. Co.*, 140 Idaho 16, 22, 89 P.3d 856, 862 (2004). "This Court will not adopt a Restatement provision if it is inconsistent with Idaho precedent, a different formulation resolved the issue, or the issue can be resolved by current Idaho law." *Id.*

Asbury Park, 152 Idaho at 345, 271 P.3d at 1201.

Valley Stone, Inc. v. Alastra, 110 Idaho 265, 268, 715 P.2d 935, 938 (1985) (comparing and contrasting easements and profits a prendre, which "may be either appurtenant or in gross.").

As explained in *Abbott v. Nampa School District No. 131*, 119 Idaho 544, 808 P.2d 1289 (1991):

> The difference between an easement appurtenant and an easement "in gross" is summed up as follows:
>
> > An easement . . . "appurtenant" is one whose benefits serve a parcel of land. More exactly, it serves the owner of that land in a way that cannot be separated from his rights in the land. It in fact becomes a right in that land and, as we shall see, passes with the title. Typical examples of easements appurtenant are walkways, driveways, and utility lines across Blackacre, leading to adjoining or nearby Whiteacre.
> >
> > Easements . . . "in gross" are those whose benefits serve their holder only personally, not in connection with his ownership or use of any specific parcel of land. . . . Examples are easements for utilities held by utility companies, street easements, and railroad easements.

Abbott, id. at 550, 808 P.2d at 1295 (emphasis added) (citation omitted).

The requirement that an easement appurtenant serves an owner of land "in a way that cannot be separated from his rights in the land" is more fully explained in *Hoch v. Vance*, 155 Idaho 636, 315 P.3d 824 (2013):

> The Vances argue that the district court erred in finding that the easement Cridlebaugh reserved was an appurtenant easement because it does not benefit the dominant estate. There are two general types of easements: easements appurtenant and easements in gross. *Hodgins v. Sales*, 139 Idaho 225, 230, 76 P.3d 969, 974

(2003). This Court has explained the difference between these two types of easements as follows:

> An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate. Essentially, an easement appurtenant serves the owner of the dominant estate in a way that cannot be separated from his rights in the land. When an appurtenant easement is created, it becomes fixed as an appurtenance to the real property, which is subject to the prescriptive use and may be claimed by a successor in interest. In contrast, an easement in gross benefits the holder of the easement personally, without connection to the ownership or use of a specific parcel of land. Thus, easements in gross do not attach to property. In cases of doubt, Idaho courts presume the easement is appurtenant.

Id. (internal citations omitted).

> At the time Cridlebaugh reserved an easement over the upper road to the Hoch property, he was the owner of the Hoch property. The easement gave him access to his property. Thus, the easement's benefit to Cridlebaugh was directly connected to his ownership or use of what is now the Hoch property. The district court did not err in holding that this easement was an appurtenant easement.

Hoch, 155 Idaho at 639-40, 315 P.3d at 827-28 (emphasis added).

Therefore, the ROFR Property here at issue cannot possibly be appurtenant to the Purchased Property under existing Idaho precedent because the ROFR Property is neither adjacent to nor in any manner connected to the use of the Purchased Property. Or stated in the language of *Abbott* and *Hoch*, the ROFR Property does not serve the owner of the Purchased Property in a way that cannot be separated from the owner's rights in the Purchased Property. *See also Consolidation Coal Co. v. Mutchman*, 565 N.E.2d 1074, 1083-84 (Ind. Ct. App. 1990)

(analogizing from the law of easements to support its holding that right of first refusal included in subject mineral deeds "can only be interpreted as a right in gross as it expressly states it is given to the grantee, and it is not essentially necessary; nor does it benefit the mineral estate.").

Moreover, the opinion adopting and applying the *Restatement (Third)* on which the district court applies, *Nature Conservancy of Wisconsin, Inc. v. Altnau*, 756 N.W.2d 641 (Wis. Ct. App. 2008), was based on the Wisconsin court's finding that the right of first refusal there at issue "is particularly beneficial to a party owning one of the contiguous parcels, giving such an owner the option to preserve his or her hunting rights in the adjoining land." *Id.* at 648 (emphasis added). The foregoing finding is, of course, wholly inconsistent with the undisputed facts in this lawsuit summarized above.

Finally, it should be noted the court in *Nature Conservancy* did not hold that either the right of first refusal there at issue was "extinguished" or the rights of the assignors of the right (defendants Eugene and Marion McEssay) to defendant Altnau were "extinguished" as a result of the assignment, but merely that "[b]ecause the right of first refusal is appurtenant to land not owned by Altnau, he does not hold the right . . . ." *Id.* Indeed, the rights of the assignors of the right of first refusal (the McEssays, who continued as additional defendants in the litigation) were not decided in the opinion. Accordingly, the opinion in *Nature Conservancy* provides no support for the proposition that Canyon Cove's rights under the ROFR here at issue were extinguished by its assignment to Burns Concrete.

(iii) Legal Principles Applicable to Rights of First Refusal and Their Assignment.

The general characteristics of rights of first refusal are summarized in *American Jurisprudence, Second* as follows:

> A right of first refusal creates a preemptive right in property, and it is the right to buy before or ahead of others. A "preemptive-right contract" is an agreement containing all the essential elements of a contract, the provisions of which give to the prospective purchaser the right to buy upon specified terms but only if the vendor decides to sell. It does not give to the pre-emptioner the power to compel an unwilling owner to sell and, therefore, is distinguishable from an ordinary option.
>
> The right of first refusal limits a property owner's right to dispose freely of his or her property by compelling the property owner to offer it first to the party who has the first right to buy. The right of first refusal is in essence a "dormant option" to buy or lease property, which ripens into an option once an owner manifests a willingness to accept a good-faith offer.

77 AM. JUR. 2D *Vendor and Purchaser* § 30 (Feb. 2018 update) (emphasis added) (footnotes omitted). "The vast majority of courts and commentators have held that rights of first refusal, which are commonly known as 'preemptive rights,' are interests in property and not merely contract rights." *Ferrero Constr. Co. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1139 (Ct. App. Md. 1988) (citation omitted). This Court appears to stand firmly in the majority camp. *Nicholson v. Coeur d'Alene Placer Mining Corp.*, 161 Idaho 877, 882-83, 392 P.3d 1218, 1223-24 (2017) (applying the requirement for a precise legal description imposed by the statute of frauds to a right of first refusal for the purchase of land); *Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n, Inc.*, 105 Idaho 509, 511-12, 670 P.2d 1294, 1296-97 (1983) (holding that "a preemptive right of first refusal . . . does not violate the absolute power of alienation of real property.").

The law with respect to the assignment of conditional rights is summarized as follows in the RESTATEMENT (SECOND) OF CONTRACTS (1981) [hereinafter "*Restatement (Second)*"]:

> The fact that a right is created by an option contract or is conditional on the performance of a return promise or is otherwise conditional does not prevent its assignment before the condition occurs.

Restatement (Second) § 320 (1981). Section 320 of the *Restatement (Second)* has been adopted by both of Idaho's appellate courts. *Bonanza Motors, Inc., v. Webb*, 104 Idaho 234, 236, 657 P.2d 1102, 1104 (Ct. App. 1983) ("An assignment properly may relate to a conditional right which is adequately identified." (citing *Restatement (Second)* § 320)); *J.R. Simplot Co. v. W. Heritage Ins. Co.*, 132 Idaho 582, 585, 977 P.2d 196, 199 (1999) (quoting *Bonanza Motors*).

Even so, and as explained in the comments to Section 320, certain conditional rights cannot be "effectively" assigned. *Restatement (Second)* § 320 cmt. a ("Of course the assignment may be ineffective if it materially varies the obligor's duty. . . . See § 317."[11] (emphasis added)). Or as stated in the comments to Section 317, assignments that violate public policy may be

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[11] *Restatement (Second)* § 317(2) provides, in relevant part, as follows:

> A contractual right can be assigned unless
>
> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
>
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds or public policy, or
>
> (c) assignment is validly precluded by contract.

"inoperative." *Restatement (Second)* § 317 cmt. e ("The rules for promises and other terms of an agreement stated in Chapter 8 apply by analogy in determining whether an assignment is inoperative on grounds of public policy under paragraph (2)(b) of this Section." (emphasis added)). The illustrations set forth in Section 317 demonstrating various inoperative assignments also describe them as being "ineffective." *See Restatement (Second)* § 317 illus. 7, 8 & 9. Thus, as the law is summarized in *Corpus Juris Secondum*:

> Generally, an assignment is valid if it does not violate any statute, public policy, or constitutional provision, but it is invalid if it violates express or implied statutory prohibitions or is contrary to public policy. Statutory modifications may lend validity to an assignment that would be void against public policy at common law.

6A C.J.S. *Assignments* § 70 (Feb. 2018 update) (emphasis added) (footnotes omitted).

But although the foregoing secondary authorities and the numerous judicial opinions on which they are grounded clearly establish that an assignment of conditional or other rights may be ineffective, inoperative, invalid, or void, not even the outlier opinion discussed and distinguished in part A(iv) below held that such an assignment in and of itself "extinguished" the underlying rights that were subject to the failed assignment. Furthermore, this Court's precedent establishes that Canyon Coves' assignment of the ROFR to Burns Concrete did not "extinguish" it.

In *Noeske v. Hiebert*, 94 Idaho 143, 483 P.2d 674 (1970), plaintiff Noeske entered into conditional sales contracts with non-party "Amos," including a third conditional sales contract (the "third contract") that prohibited Amos from "selling, assigning or transferring any rights

under the contract" or the property he was purchasing. *Id.* at 145, 483 P.2d at 676. A few months later Amos assigned the third contract to defendant Hiebert without obtaining Noeske's "consent to this assignment, either directly or constructively. . . ." *Id.* at 146, 483 P.2d at 677. And in consideration for such assignment, Hiebert released a chattel mortgage against property subject to other conditional sales contracts, which property Noeske later repossessed. *Id.* at 148, 483 P.2d at 679.

Based on the district court's determination that the assignment was void, Hiebert claimed "that a failure of consideration on the part of Amos occurred which resulted in the revival of the chattel mortgage." *Id.* This Court held as follows in rejecting Hiebert's claim:

> [I]t cannot successfully be argued that a failure of consideration on the part of Amos occurred which resulted in the revival of the chattel mortgage. The third contract provided that Amos could not assign his rights under the contract without the consent of Noeske, and since no consent was given by Noeske, the assignment was void as between Noeske and Hiebert, the latter obtaining no rights to or under the third contract. The prohibition of an assignment was for the benefit of the vendor, Noeske, however, and it in no way affected the validity of the assignment as between Amos and Hiebert, subject, of course, to Noeske's interest in enforcing the prohibition.

Id. (multiple internal and concluding citations omitted).

Or as otherwise stated, Hiebert received consideration for the release of his chattel mortgage because Amos's rights under the third contract were not "extinguished" by his assignment to Hiebert. Therefore, as the ratio decidendi for this Court's foregoing holding and the multiple supporting authorities cited by the Court establish, not even an assignment in direct contravention of a contractual prohibition on assignments renders the underlying contractual

rights extinguished in the absence of an express contractual, statutory, or constitutional provision requiring such a result.[12]

A review of the ROFR confirms that it contains no prohibition or even limitation on its assignment by any party. Nor have Plaintiffs or the district court asserted that any statutory or constitutional provision dictates that the ROFR was voided by its assignment. Accordingly, and contrary to the district court's holding, Canyon Cove's assignment to Burns Concrete did not "extinguish" all rights under the ROFR, even if the assignment were held on public-policy grounds to be ineffective, inoperative, invalid, or void.

(iv) Discussion and Analysis of Known Adverse Authority.

Defendants submit as an initial matter that but one known opinion of any state or federal court has ever held that a right of first refusal is "extinguished" upon the named beneficiary's

---

[12] *See also Restatement (Second)* § 322(2), which provides as follows:

> A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,
>
> * * *
>
> (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;
>
> (c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.

(Emphasis added.) Needless to say, if an invalid assignment extinguishes the underlying contractual rights, there would be no right that an assignor could assign and there would be no duty remaining for an obligor to discharge.

(a) invalid assignment of the right to a third party, or (b) invalid assignment of the right to a third party in conjunction with conveying other appurtenant property to the third party. Nevertheless, Defendants direct this Court's attention to the following cautionary statement in *American Jurisprudence, Second*:

Caution:

> The right of first refusal may be considered a personal contract, and as such, when a right of first refusal is conveyed simultaneously with a parcel, the subsequent assignment and exercise of the right of first refusal may be void as the right of first refusal does not run with the land, but rather is personal to the grantee, and thus is extinguished when the property is conveyed.

6 AM. JUR.2D *Assignments* § 40 (Feb. 2018 update) (emphasis added) (footnotes omitted). Thus, the foregoing cautionary statement both warns that a subsequent *assignment and exercise* of a right of first refusal "may be void" and that a right of first refusal may itself be "extinguished when the property is conveyed." The cautionary statement cites a single authority in support of its warning: *Sniezyk v. Stocker*, 729 N.Y.S.2d 264 (N.Y. Sup. 2001), which has never been cited by an appellate court.

In *Sniezyk*, Stocker had conveyed a parcel of land to non-party Michele Coons and granted her a right of first refusal on an adjoining parcel. Coons later conveyed both the parcel she purchased and her right of first refusal to Sniezyk. A few years later Stocker entered into a contract to sell to "Iaia" a portion of the property subject to the right of first refusal and then gave Sniezyk notice of the proposed sale before later renouncing the notice on the ground of mistake, whereupon Sniezyk filed suit to enforce the right of first refusal he obtained from Coons. *Id.*

The trial court decided the dispute in favor of the contract purchaser, holding as follows:

> Iaia contends that the right of first refusal was personal to Coons and the subsequent assignment and exercise of the right of first refusal are void. The court agrees. Iaia refers to *Adler v. Simpson*, 203 A.D.2d 691, 610 N.Y.S.2d 351 (3rd Dep't 1994). Both here and in Adler, a parcel and a right of first refusal were conveyed simultaneously. As the Third Department described *Adler*, the deed conveying the land "clearly intended such conveyance to be binding upon [the grantee] and his successors and assigns. The right of first refusal, executed on that same date, did not include such language and, had the parties intended that result, such could have been accomplished by the inclusion of appropriate language." *Id.* at 692, 610 N.Y.S.2d 351.

Sniezyk, 729 N.Y.S.2d at 264-65 (emphasis added). The court therefore clearly held that both the attempted assignment of the right of first refusal by Coons and the attempted exercise of the right by Sniezyk were "void," thereby deciding the dispute over whether Sniezyk as the assignee of the right of first refusal obtained any enforceable legal rights.

But after holding the attempted assignment and exercise were void, the court went on to explain its holding as follows:

> Here, the land was conveyed to Coons "and assigns forever". Deed, Iaia Exhibit A. The right of first refusal was conveyed to Coons alone. By its language, it did not run with the land, but rather was personal to her, and was extinguished when she conveyed the property to plaintiffs.[13] See *Adler*, supra.

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[13] Because the court had already held that "the right of first refusal was personal to Coons and the subsequent assignment and exercise of the right of first refusal are void[,]" the court's subsequent statement that the right of first refusal "was extinguished when [Coons] conveyed the property to plaintiffs[]" is mere dictum and not controlling. *See, e.g., State v. Taylor*, 157 Idaho 369, 371, 336 P.3d 302, 304 (Ct. App. 2014).

Sniezyk, id. at 265 (emphasis added). Thus, the sole support given by the court for its ruling that the right of first refusal was "extinguished when [Coons] conveyed the property to plaintiffs" was a reference to the opinion in *Adler v. Simpson*.

The decision in *Adler*, however, had nothing to do with whether the right of first refusal there at issue was extinguished when its named beneficiary conveyed the right and additional property owned by the beneficiary to another party. Rather, the question decided in *Adler* was whether the right of first refusal survived the death of the grantor of the right. For as the court there explains:

> In finding that the right of first refusal could not be deemed to have run with the land because it would have been violative of the Rule Against Perpetuities and the only reasonable construction consistent with EPTL 9-1.3 must be that the parties intended it to be a personal agreement, binding on themselves only and not their successors and assigns, we find, as did County Court, that the first refusal agreement was personal to Bedell and was extinguished upon his death.

Adler, 610 N.Y.S.2d at 354 (emphasis added).

Yet as logical as it may be that a "personal agreement" is "extinguished" upon the death of one of the persons making the agreement, the opinion in *Adler* includes not a word explaining why a "personal agreement" might also be "extinguished" if one of the parties to the agreement attempts to make a "void" assignment of the agreement, as was done in *Sniezyk v. Stocker*. Indeed, there is absolutely nothing presented by the opinion in *Adler* that supports the conclusion in *Sniezyk* that the right of first refusal there at issue "was extinguished when [Coons] conveyed the property to plaintiffs." Or in a nutshell, the sole authority cited by the court in *Sniezyk* for its

ruling that the right of first refusal there at issue was "extinguished when [Coons] conveyed the property to plaintiffs" provides no support for the ruling.

Nor was the question of what rights were retained by the named beneficiary of the right of first refusal after she attempted her "void" assignment even before the court in *Sniezyk*, as Coons was not a party to that litigation. Accordingly, the opinion in *Sniezyk* simply does not decide the question of whether all rights under the ROFR at issue in this lawsuit were extinguished when Canyon Cove assigned the ROFR and conveyed its interest in the Purchased Property to Burns Concrete. Indeed, and as previously noted, the district court itself ruled that *Sniezyk* was "insufficient to conclude that a personal ROFR is extinguished upon its invalid assignment." *2nd MSJ Decision* 7 [R, p. 80].

(v) Summary of ROFR Argument.

The law in Idaho relating to the treatment of a right of first refusal for the purchase of land as being a personal contract or servitude, or as being appurtenant to real property, or as running with the land has not been addressed by either of Idaho's appellate courts. But no matter whether this Court determines the ROFR to be personal to Canyon Cove and/or appurtenant to the Purchased Property, the ROFR may yet be exercised in accordance with each of its expressed and implied terms if and when notice is given by Plaintiffs of their intent to sell the ROFR Property. And for this elemental reason, this Court should reverse the district court's ruling that the ROFR was "extinguished" by Canyon Cove's assignment to Burns Concrete.

B. The Award Of Plaintiffs' Attorney Fees And Costs Should Be Reversed.

Notwithstanding the district court's Judgment dismissing Plaintiffs' claims with prejudice, the court ruled that Plaintiffs were the prevailing parties in this lawsuit because the "Court granted summary judgment to the Plaintiffs, holding that the ROFR was extinguished when Canyon Cove assigned it to Burns." Memorandum Decision and Order Re: Attorney Fees and Costs, filed July 27, 2017 ("*Order on Fees & Costs*"), 6 [R, p. 108]. But in the event this Court reverses the district court's determination that the ROFR was extinguished, Defendants will clearly be the "prevailing party," as such term is contemplated under I.R.C.P. 54(d)(1)(B) and 54(e)(1). In such event, both the district court's determination that Plaintiffs were the prevailing parties and its award of Plaintiffs' attorney fees and costs should also be reversed.

C. Defendants Are Entitled To Their Attorney Fees Incurred On Appeal.

As the district court found, "[t]he parties agree that this case revolves around a commercial transaction," entitling the prevailing parties to attorney fees under Idaho Code Section 12-120(3). *Order on Fees & Costs* 8 [R, p. 110]. *See also Complaint* 4 at ¶ 16 [R, p. 11]; *Answer* 4 at ¶ 14 [R, p. 38]. Accordingly, in the event this Court reverses the district court's determinations that the ROFR was extinguished and that Plaintiffs were the prevailing parties in the trial court, together with the award of Plaintiffs' attorney fees and costs, Defendants should be awarded their attorney fees incurred in prosecuting this appeal, as provided by Idaho Code Section 12-120(3) and I.A.R. 41. *O'Shea v. High Mark Dev., LLC*, 153 Idaho 119, 132, 280 P.3d 146, 159 (2012) (holding the prevailing party on appeal is entitled to an award of attorney fees under 12-120(3) "where the action is one to recover in a commercial transaction").

V. CONCLUSION

For the reasons discussed above, Defendants request this Court to reverse the district court's determination that the ROFR was extinguished and that Plaintiffs were the prevailing parties in the proceedings below, together with the award of attorney fees and costs to Plaintiffs, and to award Defendants their attorney fees and costs on appeal.

DATED this 15th day of February 2018.

PARSONS BEHLE & LATIMER

By _____
Robert B. Burns
Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February 2018, I caused two true and correct copies of the foregoing **APPELLANTS' BRIEF** to be served by the method indicated below and addressed to the following:

Donald F. Carey
Lindsey R. Romankiw
Carey Romankiw, PLLC
980 Pier View Drive, Suite B
Idaho Falls, Idaho 83402-2913
Fax: (208) 525-8813

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Delivery
☐ Email: dfc@careyromankiw.com
lrr@careyromankiw.com

Robert B. Burns

BONNEVILLE COUNTY RECORDER
991908 MAR19'99 AM1006

BCT T-14896
991908

UNDIVIDED RIGHT OF FIRST REFUSAL TO ACQUIRE INTEREST IN REAL PROPERTY

This Right of First Refusal is made and entered into as of the 18 day of March, 1999, by and between Theodore E. Mulberry and Nora A. Mulberry, husband and wife, as Sellers, and Canyon Cove Development Company, LLP, as Buyers.

WITNESSETH

1. For adequate consideration, Sellers hereby grant to the Buyer a right of first refusal to acquire the Sellers' undivided interest in and to the real property hereafter described on the same terms, conditions, and provisions as the Sellers might intend to sell and convey said interest to any third person hereafter.

2. Should the Sellers hereafter intend to sell in good faith and convey said premises they will first offer the same to the Buyer by a written notice containing all of the terms, conditions, and provisions by which they intend to sell in good faith the same to said third person. Buyer shall then have five (5) days from the date such notice is received to accept or refuse said offer.

3. Should the Buyer decline the offer, and the sale to the third party, for any reason not occur, then this option of first refusal should then be renewed and shall apply to any subsequent sale to a third party.

4. Shall Buyer fail or refuse to accept any such offer within their time limit stated, then any interest of Buyer in the subject property shall cease and terminate as to the sale to the intended third party should it occur. This option agreement may be recorded in Bonneville County, Idaho. Thereafter, Sellers may record a notice in Bonneville County, Idaho, showing the date on which they gave their notice to Buyers, in order to give record notice of the beginning of the stated notice time period.

5. The real property to which this option of first refusal applies is located in Bonneville County and is described as follows:

Sellers' right, title and interest in and to:

Beginning at a point 25 feet West and 1776.28 feet South of the Northeast corner of Section 15, in Township 1 North, Range 37 East of the Boise Meridian, thence continuing South paralleling the East line of said Section 15, 888.72 feet, more or less, to the

EXHIBIT A

Southeast corner of the N.E. 1/4 of said Section 15; thence West 2895 feet to a point in the East line of the Oregon Short Line Railroad right of way, thence Northeasterly along said right of way line 1024.6 feet, thence in an Easterly direction 2483.7 feet to the place of beginning. ALSO: Beginning at a point 25 feet South and 25 feet West of the Northeast corner of Section 15, Township 1 North, Range 37 East of the Boise Meridian; thence South 1751.28 feet, paralleling Section line between Sections 14 and 15, thence right angles to said Section line and West 2483.7 feet to a point in the East line of the Oregon Short Line Railroad right of way; thence Northeasterly along said right of way line 2091 feet; thence East and parallel to North line of Section 15, 1496 feet to the place of beginning.

SUBJECT TO:

a. General taxes for the year 1999 and all subsequent years.

b. These premises are situated within the boundaries of the Idaho Irrigation District and are subject to the assessments thereof for the year 1999 and all subsequent years.

c. All easements and rights-of-way of record or those appearing on the land which affect the described property.

d. Patent reservations, mineral, oil, gravel, and other reservations, all building codes, laws, and zoning ordinances affecting the described premises.

Dated this 18 date of March, 1999.

Theodore E. Mulberry

Theodore E. Mulberry

Nora A. Mulberry

Nora A. Mulberry

CANYON COVE DEVELOPMENT
COMPANY, LLP

By: _____
Linda Wilkins, Managing Partner

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 18th day of March, 1999, before me, the undersigned, a notary public in and for said State, personally appeared Theodore E. Mulberry and Nora A. Mulberry, husband and wife, known or identified to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

_____
Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 1/28/2003

(seal)

NOTARY PUBLIC
LENORE J. KATRI
STATE OF IDAHO
My Commission Expires

INSTRUMENT NO. 99 1908
DATE 3-19-99
INST. CODE 998
IMAGED PGS 4
FEE 12-
STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss
I hereby certify that the within instrument was recorded.
Ronald Longmore,
County Recorder
By _____ Deputy
Request of

STATE OF IDAHO)
)ss.
County of Bonneville)

On the 18th day of March, 1999, before me the undersigned, a notary public in and for said State, personally appeared Linda Wilkins, known or identified to me to be one of the partners in the partnership of Canyon Cove Development Company, LLP, and the partner or one of the partners who subscribed said partnership name to the foregoing instrument, and acknowledged to me that she executed the same in said partnership name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 1/28/2003

(seal)

G:\WPDATA\GLM\1700\CANCOV.RFR:as

NOTARY PUBLIC
LENORE J. KATRI
STATE OF IDAHO
Residing at Idaho Falls, Idaho
My Commission Expires Jan 28 2003