

IN THE SUPREME COURT OF THE STATE OF IDAHO

**EAGLE CREEK IRRIGATION
COMPANY, INC., an Idaho corporation,**)

Supreme Court No. 45675

Plaintiff/Appellant,)

vs.)

**A.C. & C.E. INVESTMENTS, INC., a
California corporation,**)

Defendant/Respondent.)

**A.C. & C.E. INVESTMENTS, INC., a
California corporation,**)

Counter-claimant,)

vs.)

**EAGLE CREEK IRRIGATION
COMPANY, INC., an Idaho corporation,
JOHN DOES 1-100 and ENTITIES A-Z,**)

Counter-defendant.)

APPELLANT’S BRIEF

**Appeal from the District Court of the Fifth Judicial District for Blaine County
The Honorable Jonathan Brody, District Judge presiding.**

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STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is an appeal from the district court's November 15, 2017 Judgment (the "Judgment") which held that when AC&CE Investments, Inc. ("AC&CE") "acquired title to its fifteen acres, ownership of fifteen shares of stock in Eagle Creek Irrigation Company, Inc. ("Eagle Creek") passed with it as an appurtenance." Clerk's Augmented Record on Appeal ("R."), p. 478. This appeal presents a purely legal issue. The issue is whether over 100 years of precedent holding shares in an irrigation company are not an appurtenance to real property owned by the shareholder should be overturned without a legislative enactment.

AC&CE acquired the fifteen acres of land and improvements (the "Property") at a Trustee's sale on or around September 8, 2011 for a price substantially below fair market value. It is well known that Trustee's sales only convey the interest that the beneficiary has in the property, whatever that interest may or may not be and no warranties of title are given to the buyer. Nevertheless, immediately after the Trustee's sale, AC&CE contended that it received 15 shares of Eagle Creek stock ("15 Shares") with its purchase of the Property.

Contrary to its contention, AC&CE could not have received any of the Shares through the Trustee's deed because the Shares were not appurtenant to the Property. This appeal involves a water right owned by Eagle Creek which owns no real property. Eagle Creek's water must, however, be applied within a permitted place of use approved by the Idaho Department of Water Resources ("IDWR"). The Property lies within Eagle Creek's permitted place of use. Accordingly, AC&CE's interest in Eagle Creek's water right is derived from ownership of shares

in Eagle Creek. Eagle Creek is a nonprofit corporation formed under the Idaho Nonprofit Corporation Act. It is not a corporation formed under the Carey Act. This is an important distinction because shares of stock in Carey Act companies are by statute appurtenant to the real property owned by the shareholder whereas shares in non-Carey Act companies are not appurtenant to real property; instead, they are personal property. Although the district court was required to apply the law applicable to non-Carey Act irrigation companies, it disregarded that law without providing any reason or analysis. Instead of following existing precedent, the district court relied upon inapplicable law in reaching its decision on the ownership of the 15 Shares.

Whether the 15 Shares are appurtenant to the Property is a pure question of law, which this Court may determine. At one level this case involves a question of whether precedent dating back to 1899 holding shares of stock in a water company are not appurtenant to real property remains the law of the state. From a broader perspective the case involves a question of the power of the district court to overturn existing precedent without legislative authority. The policy issue raised by this appeal is whether a trial judge can supplant the judgment of the people's representatives for their own.

B. COURSE OF THE PROCEEDINGS BELOW AND DISPOSITION.

On November 25, 2013, Eagle Creek filed a three count Complaint seeking (1) a declaration that the 15 Shares have been forfeited, the certificates evidencing the same may be cancelled, the 15 Shares are treasury stock which Eagle Creek may sell and that AC&CE does not have any right to divert or use Eagle Creek's water rights; (2) a temporary restraining order,

preliminary injunction and permanent injunction restraining AC&CE and its agents, employees, attorneys, representatives and all persons in active concert or participation with it from taking any action to divert or use water belonging to Eagle Creek from Eagle Creek's irrigation system to the Property; and (3) a temporary restraining order, preliminary injunction and permanent injunction restraining AC&CE from diverting and using Eagle Creek's water rights until AC&CE complies with Eagle Creek's policy and lines the ditch on AC&CE's property. R., p. 22. AC&CE answered raising several defenses and asserted a counterclaim which included the following four counts: (1) quiet title to the 15 Shares in AC&CE's favor; (2) breach of fiduciary duty; (3) injunctive relief; (4) conversion; and (5) attorney fees. R., p. 65. Thereafter, Eagle Creek filed an amended complaint which added a fourth count seeking damages. R., p. 163.

After conducting discovery, Eagle Creek moved for summary judgment on February 3, 2015 requesting that the district court declare it the owner of the 15 Shares. R., p. 263. Thereafter, on February 13, 2015, AC&CE filed a cross-motion for summary judgment which also requested that it be declared the owner of the 15 Shares. R., p. 353. On May 21, 2015, Judge Brody denied Eagle Creek's motion for summary judgment and granted AC&CE's summary judgment in part, and denied it in part. Specifically, Judge Brody granted summary judgment in favor of AC&CE as to the ownership of the 15 Shares stating:

[W]hen AC&CE acquired title to its fifteen acres, ownership of fifteen shares of stock in Eagle Creek passed with it as an appurtenance. Because the water right is appurtenant to the land, AC&CE received the right to water when it acquired the fifteen acres from the foreclosure sale. However, this right is not unqualified.

R., Aug. p. 6. In doing so, Judge Brody framed the "central issue before the Court on summary

judgment [as] whether water rights are appurtenant to the land [AC&CE] acquired.” R., Aug. pp. 3-4. However, this is a misstatement of the actual issue in this case, which is whether the 15 Shares were conveyed with the Property. In reaching his conclusion, Judge Brody relied upon *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687 (1917) and stated:

[W]ith respect to shares of stock that represent rights to water, the law in Idaho maintains that ‘[s]uch shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence.’

R. Aug., p. 5. Judge Brody claimed that “Idaho case law has been inconsistent” on the issue of whether shares of stock in an irrigation company are personal or real property and that the *Ireton* and *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007) decisions “are more recent, and therefore, this Court finds they are more persuasive and apply here.” R. Aug., p. 5. Judge Brody was able to reach his conclusion only by: (1) ignoring the controlling precedent specifically applicable to non-Carey Act companies as forth in *Wells v. Price*, 6 Idaho 490, 56 P.266 (1899) and *Watson v. Molden*, 10 Idaho 570, 79 P. 503 (1905); (2) misapplying the holding in *Ireton* to the facts of this case; and (3) incorrectly relying upon the *Joyce Livestock* case.

Idaho case law has not been inconsistent on this issue. Rather, it is the facts of the cases that have differed, providing for different results. Therefore, it was incorrect to simply rely upon the result in the most recent decisions. Instead, Judge Brody was required to rely upon the Idaho Supreme Court cases which are on point and, therefore, controlling.

On November 15, 2017, the Judgment in the case was rendered which granted AC&CE

ownership of the 15 Shares. R., p. 478. Thereafter, Eagle Creek timely filed a notice of appeal pursuant to Idaho Rule of Civil Procedure 84, appealing the district court's Judgment with respect to ownership of the 15 Shares. R., p. 482. The matter regarding ownership of the 15 Shares is now properly before this Court on appeal.

C. STATEMENT OF FACTS.

Eagle Creek Irrigation Company, Inc.

Eagle Creek is a mutual non-profit irrigation company, *i.e.* a non-Carey Act Company, organized under the provisions of Chapter 1, Title 30, Idaho Code. R., p. 174. Importantly, the incorporators did not elect to form Eagle Creek as a Carey Act Company.¹ When Eagle Creek was formed the organizers and property owners severed the water rights from the real property to which the water rights were appurtenant and exchanged the water rights for shares of stock in Eagle Creek. R., p. 247. Since its inception, Eagle Creek has continuously operated with the shares not being appurtenant to the real property of its shareholders. R., p. 243. Property owners within its permissible place of use must apply for a transfer of shares of Eagle Creek stock before a property owner is entitled to use Eagle Creek's water. Currently, Eagle Creek owns Idaho Water Right No. A37-00863 ("Water Right") which it uses to provide irrigation water to its shareholders. R., p. 242. Eagle Creek's ownership of the Water Right was successfully adjudicated as part of the Snake River Basin water rights adjudication.

¹ Carey Act companies are a specific type of mutual irrigation company that are formed pursuant to the Idaho Code which provides that the state will contract with a for-profit "construction company" which will obtain water rights in its own name and then build an irrigation project and thereafter sell stock in a successor "operating company" to settlers of land. IDAHO CODES §§ 42-2001 – 42-2044. Thereafter, the "operating company" provides water to its stockholders on a per-share basis in return for an assessment.

Significantly, the SRBA’s Order of Partial Decree dated July 29, 2011 (“SRBA Order”) states that the Water Right is “limited to the irrigation of 143.9 acres within the boundary of the Eagle Creek Irrigation Company.” R., p. 253-258. Yet, more specifically, the IDWR’s Water Right Report states that the Water Right is “limited to the irrigation of 131 acres within the boundary of Eagle Creek Irrigation Company” and that, to implement the mitigation requirement, 12.9 acres within Eagle Creek will no longer be irrigated and, instead, will be dedicated to mitigation to prevent injury to senior water right holders. R., pp. 249-251. Added together, the 131 irrigation acres and 12.9 mitigation acres equals the 143.9 acres decreed under the SRBA Order. Importantly, however, the Water Right’s permissible place of use (*i.e.* the total acreage within the boundary of Eagle Creek), as defined by the IDWR, is more than 143.9 acres – it is approximately 194 acres.² R., pp. 260-262. Thus, the Water Right is appurtenant to the land identified as the permissible place of use but not all of the land within the permissible place of use can be irrigated at any time.

Article VI Section 4 of Eagle Creek’s Articles of Incorporation (“Articles”) state that “[t]he corporation will hold all water rights acquired in Trust and operate the system for the distribution of water primarily for the benefit of the lands to which said water rights are to be appurtenant.” R., p. 176. Eagle Creek’s capital stock consists of 230 shares (“Shares”). *Id.* Article VI Section 2 of the Articles state that Shares may only be purchased by an owner of

² Map “A” in Exhibit D to the Affidavit of Everett Davis depicts the permissible place of use and states that it equals 189 acres. R., p. 260. NOTE: Map “A” does not include a piece of property that is now included in Eagle Creek and which totals approximately 5 acres. Thus, including the approximate five (5) acre parcel in the 189 acres makes the permissible place of use approximately 194 acres.

property in the immediate vicinity of Eagle Creek's irrigation system and that Eagle Creek must be able to make delivery of its water, for domestic or irrigation purposes, to the property within its service area which is located approximately six miles north of Ketchum, ID. *Id.*

Furthermore, pursuant to Article VI Section 3 of the Articles, property owners within the service area are only allowed to purchase one Share for every acre of land to which water will be delivered by Eagle Creek and each such shareholder shall be entitled to their appropriate share of the water by virtue of their proportionate stock interest. *Id.* But, because the Eagle Creek service area is approximately 194 acres, not all of the service area is irrigated at any one time. R., pp. 260-262. Eagle Creek, acting through its board of directors and officers, manages the distribution of its water rights, including the land to be irrigated, for the benefit of shareholders. Since the formation of Eagle Creek, its Shares have been transferred among property owners within Eagle Creek's service area leaving some land owners without any Shares, or rights to Eagle Creek's water. R., p. 243.

Consistent with the Articles, Eagle Creek's By-laws ("By-laws") also provide that Shares are only transferable to owners of property within the service area. R., pp. 182-191.

Additionally, the By-laws require prior approval of the Board of Directors ("Board") before any Shares may be transferred. Specifically, the By-laws state in Article XI as follows:

Section 1. Certificates. Each stockholder shall be entitled to a certificate of stock executed by the President, or in his absence or inability to act, by the Vice President, and Secretary or Assistant Secretary of the corporation, certifying the number of shares owned by him in this corporation. Certificates of stock shall be of such design as the Board of Directors may adopt.

Section 2. Transfer Of Stock. Shares of stock may be transferred by the registered holders thereof or by their attorneys, legally constituted, or by their legal representatives by the surrender and delivery of the said certificate and assignment of said certificate and the shares of stock represented thereby in writing. Old certificates shall be surrendered and cancelled before new certificates in lieu thereof shall be issued.

R., p. 189. Notably, not all of Eagle Creek's shareholders received their shares via transfer when they purchased their land; instead, several shareholders purchased their shares after they bought their land. On January 7, 1991, Eagle Creek's By-laws were amended ("Amended By-laws") to add Section 3 to Article II which states:

Section 3. Forfeiture of Stock. In the event a stockholder shall sell the real property to which the corporation has been making water delivery, and such stockholder shall fail to apply to transfer his shares of the Company within sixty (60) days of the date of such transfer, the stock held by such shareholder shall be deemed cancelled and shall revert to the Company as treasury stock, which stock may thereafter be sold by the Company for the Company's benefit. In the event the stockholder who sold such real property without transferring the stock provides for an assignment of the stock in a contract or sale agreement with the new purchaser, the Company shall consider such reference as an application to transfer the shares of stock previously held by the selling stockholder. The stock record pertaining to the shares of the selling stockholder shall be marked "Cancelled", and a new certificate issued to the transferee upon approval of the transfer by the Board of Directors.

R., pp. 192-194.

The Disputed 15 Shares of Eagle Creek Stock

Lee P. and Nancy K. Enright (collectively, "Enrights") were the owners of the Property until the Trustee's sale on approximately September 8, 2011. R., p. 400. The Property totals fifteen (15) acres and is commonly known as 81, 83 and 85 Eagle Creek Road, Blaine County, Idaho. *Id.* When the Enrights acquired the Property, Eagle Creek issued to them the 15 Shares

evidenced by certificates numbered 50, 51 and 52. R., p. 243. On or about July 12, 2006, the Enrights granted Bank of America the lien of a deed of trust on the Property (“Deed of Trust”) which did not expressly grant a security interest or otherwise encumber any water rights or the 15 Shares in Eagle Creek. R., pp. 208-227. The Deed of Trust which described the Property and included appurtenances was foreclosed upon which resulted in the Trustee’s sale of the Property to AC&CE and the delivery of a Trustee’s Deed on September 8, 2011. R., pp. 236-240. Notably, the Enrights did not apply to the Board at any time after the sale to transfer *any* of the 15 Shares to AC&CE or anyone else, as required by the By-laws. R., p. 243. Therefore, pursuant to Article II Section 3 of the Amended By-laws, the 15 Shares were forfeited and reverted to Eagle Creek as treasury stock.

Nevertheless, AC&CE began claiming a right to the 15 Shares and started using Eagle Creek’s water to irrigate the Property on approximately September 8, 2011 even though it had no authority or permission to do so. *Id.* To avoid the diminution in value of its Water Right and the 15 Shares, Eagle Creek filed the Complaint against AC&CE. As set forth above, on May 21, 2015, the district court issued the Decision which granted summary judgment in favor of AC&CE as to ownership of the 15 Shares. The district court based its Decision on *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687 (1917) and *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007) simply because both decisions “are more recent, and therefore, this Court finds they are more persuasive and apply.” R. Aug., p. 5. However, in doing so, the district court misapplied the law set forth in the *Ireton* case and disregarded valid case law that

specifically addressed shares of stock in non-Carey Act irrigation companies without providing any reason as to why that case law does not apply to this case.

Thereafter, on November 15, 2017, the trial to resolve the remaining issues in this case was scheduled to begin. On that day, however, the parties reached a settlement as to all the remaining issues. Accordingly, the trial was vacated, and the district court issued the Judgment which memorialized the Judge's Decision regarding the ownership of the 15 Shares. For the reasons set forth herein, Eagle Creek now seeks a reversal of the district court's Judgment regarding the ownership of the 15 Shares.

ISSUES PRESENTED ON APPEAL

Whether the district court erred by finding that AC&CE acquired title to the 15 Shares of stock in Eagle Creek when it acquired title to the Property.

ARGUMENT

A. STANDARD OF REVIEW.

In this case, the district court found as a matter of law that AC&CE acquired the 15 Shares when it acquired title to the Property. This finding was a conclusion of law, of which the Court exercises free review to determine whether the district court correctly stated the applicable law and whether the legal conclusions are sustained by the facts found. *Bumgarner v. Bumgarner*, 124 Idaho 629, 637, 862 P.2d 321, 329 (Idaho Ct. App. 1993); *Conley v. Whittlesey*, 133 Idaho 265, 269, 985 P.2d 1127, 1131 (1999). As set forth below, since the district court failed to apply the proper law to the facts in this case its Judgment should be reversed.

B. THE DISTRICT COURT ERRED IN GRANTING AC&CE OWNERSHIP OF THE 15 SHARES BECAUSE THE SHARES WERE NOT APPURTENANT TO THE PROPERTY.

The district court erred in declaring that ownership of the 15 Shares belonged to AC&CE because the 15 Shares were not appurtenant to the Property. Thus, ownership of the 15 Shares did not transfer to AC&CE with its purchase of the Property conveyed by the Trustee's Deed. Eagle Creek acknowledges that water rights are real property and become appurtenant to land and transfer with the conveyance of such land unless expressly reserved. *Koon v. Empey*, 40 Idaho 6, 231 P. 1097, 1099 (1924). And, generally, when said land is conveyed by a deed that describes the land and includes the expression "together with the appurtenances," the deed not only conveys the land but also the appurtenant water rights unless there is a specific reservation of the water rights. *Id.* The case at hand, however, does not include a conveyance of land with a water right that was appurtenant to the Property. Instead, the Water Right in this case was appurtenant to Eagle Creek's permissible place of use (*i.e.*, the total acreage within the boundary of Eagle Creek), totaling approximately 194 acres. *R.*, pp. 260-262. This is the only reasonable construction of the term "lands" as used in Eagle Creek's Articles referencing where the Water Right is appurtenant. *R.*, p. 176.

The practical reasons for the Water Right being appurtenant to the entire permissible place of use instead of to individual properties located within the boundary are that it allows the Board to allocate water anywhere, at any time and in any quantity, consistent with its fiduciary obligation to shareholders. Additionally, it grants the Board flexibility to adjust areas irrigated based on numerous criteria, including the amount of water available in any irrigation season and

a property owner's need for and use of the water. Given the foregoing, there was no factual basis for the district court's contrary conclusion that the Water Right was appurtenant to the Property.

While the Water Right in this case is appurtenant to Eagle Creek's entire permissible place of use, a property owner's right to receive a distribution of Eagle Creek's Water Right is signified by shares of stock in the irrigation company. It is well settled that shares of stock are personal property. *State v. Dunlap*, 28 Idaho 784, 156 P. 1141, 1145-46 (1916); 11 FLETCHER CYC. CORP. § 5096 *Shares of Stock as Property*; 18 C.J.S. CORPORATIONS § 193 *Shares as Property*.

The question as to whether or not water rights represented by shares of stock in mutual corporations were appurtenant to certain tracts of land, and, therefore, whether or not the title to the same passed with a sale of the land, without there being a formal transfer of the stock on the books of the company has arisen in a number of cases. The general rule of law in this regard is that such water rights represented by shares of stock are not appurtenant to the land of the owner of the shares, and a conveyance of the land only, does not carry with it such shares of stock.

3 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* § 1484 at 2666 (2d. ed. 1912). In fact, early case law in Idaho specifically recognized that shares of stock in irrigation companies were personal property and not appurtenant to the land. *Wells v. Price*, 6 Idaho 490, 56 P.266 (1899); *Watson v. Molden*, 10 Idaho 570, 79 P. 503 (1905).

For instance, the question presented to the Idaho Supreme Court in the *Wells* case was:

Did the plaintiffs, by purchase at execution sale of the lands mentioned in the complaint, acquire with said lands, and as appurtenant thereto, the shares of stock owned by the execution defendants in that certain corporation known as the South Field Irrigation Company?

Id. at 266. The defendants in that case and their neighbors constructed a canal by which water

was diverted from a creek and delivered to their lands for irrigation. *Id.* The parties who constructed the canal “organized a corporation, designated in their articles of incorporation as the Upper South Field Company, and issued shares of capital stock to the said joint owners, in proportion to the quantity of interest each owned in said canal and the waters conveyed therein.” *Id.* Although the plaintiffs contended that the shares of stock were appurtenant to the lands and passed with said land pursuant to the execution sale, the Court rejected that argument stating, “[t]he subjection of shares of stock in a corporation to the payment of a debt must, when done by legal process, be done in a manner prescribed by the statutes,” which did not occur. *Id.* Accordingly, the Court specifically held that “shares of stock in an irrigation corporation are not appurtenant to the land owned by the owner of such shares, even though such land be irrigated by water from a canal owned by such corporation.” *Id.* at 267.

Similar to the *Wells* case, the *Watson* case involved shares of stock in the People’s Canal and Irrigation Company and “[a]ll that defendant attempted to sell, or that plaintiff believed he purchased, was so many shares of stock in a canal company, which passes by assignment and delivery. This being true, the property sold was only personal property.” 79 P. at 507. Although the seller argued that the “transfer was only verbal and not in writing” and therefore could not convey real property, the Court distinguished the cases that the seller relied upon by observing that while Idaho cases hold that a ditch and water right are real property, none of the cases that the seller relied upon “involved stock representing water in a canal company.” *Id.* In doing so, the Court referred to the holding in the *Wells* case stating that “an attachment of land upon which water was being used from a certain irrigating ditch, the defendant owning certain shares of stock

in the corporation owning the ditch, the ditch or canal did not include the shares or stock.” *Id.* The Court went on to cite the relevant corporate statute in concluding “[w]henver the capital stock of any corporation is divided into shares and certificates therefore are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate.” *Id.*

The Court’s rationale in *Wells* and *Watson* makes sense because the relationship between irrigation companies and shareholders “is that of contract, and the rights and duties of both parties grow out of the contract implied in a subscription for stock, and construed by the provision of their charters, or articles of incorporation.” Kinney, *Irrigation and Water Rights* § 1482. Irrigation companies may adopt “such rules and regulations not in violation of law governing the distribution and use of the water furnished among their shareholders as are equitable and reasonable under the circumstances of the case.” *Id.* at § 1488. As such, a shareholder’s ownership and what flexibility that ownership affords depends upon the terms of the irrigation company’s contract with the shareholder. The terms of an irrigation company’s contract with its shareholders depends on the type of irrigation company.

In Idaho, there are two types of irrigation companies: (1) Carey Act companies; and (2) non-Carey Act companies. Carey Act companies are governed by the terms and conditions set forth in the Reclamation of Carey Act Lands, which was enacted in 1894. IDAHO CODE §§ 42-2001 through 42-2044. The purpose of the Carey Act was “to allow individuals and entities to band together to finance the construction of irrigation projects.” John A. Rosholt, *The Carey Act*, 53 *ADVOCATE* 24, 24 (2010). Under this Act, “states could apply for as much as one million

acres of public land which the states were to sell, oversee and administer to guarantee the irrigation of that land.” Lonie Boens, *Aberdeen-Springfield Canal Company v. Peiper: Interpreting Idaho’s Forfeiture Statute as Applied to Carey Act Company*, 5 GREAT PLAINS NAT. RESOURCES J. 237, 239 (2001).

In this context, the state enters into contracts with for-profit “construction companies” which obtain water rights in their own name and then build irrigation projects and sell stock in its successor “operating company” to settlers. The construction company’s contracts with settlers involve a “sale or contract of the water right to the [settlor, which] shall be a dedication of the water to the land to which the same is applied and the water right so dedicated shall be a part of and relate to the water right belonging to the said system of canals.” *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105, 1107 (1931). “It was clearly the intention of the Legislature, as well as the construction company, that the individual contract holder or settlor should be the owner of the water right upon the completion of the construction works.” *Id.* at 1108. In fact, Idaho Code § 42-2025 specifically provides that all water rights acquired under the Carey Act “shall attach to and become appurtenant to the land as soon as title passes from the United States to the state.” Thereafter, a Carey Act company’s shareholder can transfer the ‘water right’ appurtenant to his land to other lands within the same Carey Act system only under the procedure provided in IDAHO CODES §§ 42-2501 through 42-2509.

Importantly, the legislature did not enact any similar statute governing the appurtenance of water rights owned by *non*-Carey Act companies. The Legislature’s decision to limit the scope of the Reclamation of Carey Act Lands to corporations formed under the Carey Act cannot

be ignored. Absent applicable statutory mandate, courts must look to the governing documents of non-Carey Act companies to determine whether a water right is appurtenant to land belonging to a shareholder. *See Twin Lakes Village Prop. Ass'n., Inc. v. Crowley*, 124 Idaho 132, 135, 857 P.2d 611, 614 (1992) (corporate documents govern the conduct of corporate affairs).

Here, in reliance on the early common law as pronounced in the *Wells* and *Watson* decisions, Eagle Creek was created as a non-Carey Act company and has conducted itself as an ordinary non-profit corporation since its incorporation. *R.*, pp. 174-180. It is undisputed that the Water Right is the only decreed water right pertinent to this case and it is owned solely by Eagle Creek. Ownership of the Water Right is not held by the individual property owners serviced by the Water Right because when Eagle Creek was formed the property owners severed the water rights from the real property to which the water rights were appurtenant and exchanged the water rights for shares of stock in Eagle Creek. *R.*, p. 247.

While Eagle Creek holds legal title to its Water Right, its relationship with its shareholders is governed by its Articles, By-laws and general nonprofit corporate law. Those instruments and that law establish that Eagle Creek's Shares are not appurtenant to the land owned by the shareholder. Specifically, Article VI Section 6 of the Articles states that Shares are not transferable except when the transfer is approved by the Board. *R.*, p. 177. Consistent with the Articles, Article II Section 2 of the By-laws requires prior approval from the Board before any Shares may be transferred. *R.*, p. 182. Furthermore, the amendment to the By-laws states that if a shareholder sells his property, "to which the corporation has been making water delivery," the shareholder must "apply to transfer his [S]hares of the Company within sixty (60)

days of the date of such transfer” or the Shares “shall be deemed cancelled and shall revert to the Company as treasury stock, which stock may thereafter be sold by the Company for the Company’s benefit.” *Id.* Based on the express language in Eagle Creek’s governing documents, the 15 Shares could not automatically transfer to any purchaser of the Property and there could be no expectation that the 15 Shares were appurtenant to the Property.

Eagle Creek’s ability to determine whether its Shares are to be treated as an appurtenance is supported by the *Ireton* case. 30 Idaho 310, 164 P. 687 (1917). Although the district court applied the *Ireton* case to its analysis, it misapplied the law because that case did not hold that shares of stock *automatically* “pass with title to the land thus making them appurtenant to that land,” as stated in the Decision. R., Aug. p. 6. Instead, *Ireton* held that the terms in a contract between an irrigation company and its shareholders control. The landowner in *Ireton* entered into a contract with a Carey Act company to purchase shares of stock in the irrigation company. Thereafter, the landowner granted two liens on his land. One lien – which specifically included the landowner’s water right – was granted in favor of a mortgagee. The other lien was granted in favor of the Carey Act company. Although the land was not Carey Act land, the Carey Act company sold its water right to the landowner and permitted it to be applied to a beneficial use and to become appurtenant to the land at issue in that case. The private contract between the landowner and the Carey Act company included terms which were “as near as may be” identical to the terms in a contract for the purchase “of water rights under the Carey Act” and specifically stated that the water right was to be made appurtenant to the land. The contract, by its terms, expressly incorporated the provisions of the Carey Act. *Id.* at 689. Additionally, the landowner

also agreed to convey, assign and transfer the shares of stock purchased in the Carey Act company as security for the payment for the water rights. *Id.*

Under these facts, the shares of stock issued to the landowner were merely incidental to the water right, which was owned by the stockholder himself. As a result, the Court referred to the shares that the landowner owned as “muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence.” *Id.* Notably, the Court did not refer to *all* irrigation corporation shares as muniments of title, only the shares owned by the landowner in the *Ireton* case. In determining whether the shares in that case were appurtenant to the land, the Court relied on the terms of the landowner’s contract with the irrigation company, not general water law principles. When interpreted in this manner, Idaho case law is not conflicting.

Furthermore, the facts of the *Ireton* case – which involved a Carey Act corporation’s sale of water rights to the landowner – are clearly distinguishable from those in *Wells* and *Watson*, where shares evidencing a right to use a proportionate share of the irrigation company’s water right were issued to the landowners. Nevertheless, the *Ireton* case supports the proposition that shares of stock in a non-Carey Act company cannot be made appurtenant by fiat of the court – they may only become appurtenant via contract between the parties. The district court failed to recognize this critical distinction in the case law concluding that the holding in *Ireton* applies to the broad class of “shares of stock that represent rights to water,” rather than those shares of stock that are merely incidental to water rights sold by a Carey Act irrigation corporation and therefore owned by the landowners. R., Aug. p. 5.

Notably, a corporation's ability to determine appurtenancy via contract is not exclusive to Idaho. For instance, in California the legislature enacted a statute that specifically states:

Any corporation organized for or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes may provide . . . in its articles or bylaws that water shall be sold, distributed, supplied, or delivered only to owners of its shares and that the shares shall be appurtenant to certain land when the same are described in the certificate issued therefore.

CAL. CORP. CODE § 14300 (2012). Accordingly, the court in the *Palo Verde Land & Water Co. v. Edwards* case held that shares of stock in an irrigation company were personal property because the incorporators did not provide in their by-laws that such shares were appurtenant to the land. 254 P. 922 (Cal. Ct. App. 1927).

The district court also improperly relied upon the *Joyce Livestock* case in reaching its decision because that case did not involve any shares of stock in an irrigation corporation – it only involved competing claims between the United States and Joyce Livestock Co. for instream stock water rights used on federal lands. 144 Idaho 1, 156 P.3d 502 (2007). That case simply reaffirmed the long-standing common law that water rights are real property appurtenant to land and conveyed with the land unless expressly excluded in the deed. That is not directly an issue in the case at hand. In contrast, both the *Wells* and *Watson* cases are directly on point as they both involved irrigation companies and provided that while the water right was owned by the corporation and appurtenant to designated lands within the irrigation corporation's service area, the shares of stock evidencing a right to use a portion of the corporation's water right were personal property. 6 Idaho 490, 56 P. 266 (1899); 10 Idaho 570, 79 P. 503 (1905). Thus, the

shares could only be conveyed consistent with the applicable corporate statutes. *Id.* Since neither the *Wells* nor the *Watson* case has been reversed or overturned, the district court was required to apply them as precedent. *Greenough v. Farm Bureau Mutual Ins. Co.*, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006) (“When there is controlling precedent on questions of Idaho law ‘the rule of stare decisis dictates that we follow it, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.’”). The district court erred by disregarding this requirement.

This conclusion is supported by the fact that if Eagle Creek had intended for the 15 Shares to be treated as an appurtenance to the Property then it would have chosen to be organized under the Carey Act or, at the very least, it would have drafted its Articles and Bylaws to incorporate provisions regarding whether its shares were appurtenant to the shareholder’s land like those in the Carey Act. Eagle Creek could have included a provision such as the one in the By-laws reviewed in *Brown v. Portneuf-Marsh Valley Irr. Co.*, which states “each certificate of stock issued shall contain a description of the lands to be irrigated, and that the shares and water rights evidenced thereby shall forever be dedicated and inseparably appurtenant to the land.” 299 F. 338, 347, 347–48 (D. Idaho 1924). However, Eagle Creek chose not to do this.

Instead, pursuant to its Articles and By-laws, Eagle Creek delivered water to the Property prior to the Trustee’s sale based on the Enrights’ ownership of the 15 Shares. Significantly, neither the Enrights, Bank of America nor AC&CE ever applied to the Board to have *any* of the 15 Shares transferred to AC&CE after the Trustee’s sale. R., p. 400. Therefore, pursuant to Article II Section 3 of the Amended By-laws, the 15 Shares were forfeited and reverted to Eagle

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 31, 2018 he/she caused a true and correct copy of the foregoing instrument to be served on the following persons by the means indicated:

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