Electronically Filed
8/28/2018 2:23 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiff/Appellant,

v.

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

Defendants/Respondents.

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

Counter-claimant,

v.

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

Counter-defendants.

Supreme Court No. 45675

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District for Blaine County

the Honorable Jonathan Brody, District Judge, Presiding

Christopher M. Bromley, ISB No. 6530
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cbromley@mchughbromley.com

David M. Penny, ISB No. 3631
Cosho Humphrey, LLP
1501 S. Tyrell Ln.
P.O. Box 9518
Boise, ID 83701-2527
Telephone: (208) 344-7811
Facsimile: (208) 338-3290
dpenny@cosholaw.com

Attorneys for Respondent

Edward A. Lawson, ISB No. 2440
Heather E. O'Leary, ISB No. 8693
Lawson Laski Clark & Pogue, PLLC
675 Sun Valley Rd., Ste. A
P.O. Box 3301
Ketchum, ID 83340
Telephone: (208) 725-0055
Facsimile: (208) 725-0076
eal@lawsonlaski.com
heo@lawsonlaski.com

Attorneys for Appellant

TABLE OF CONTENTS

I. TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

II. STATEMENT OF THE CASE

A. Nature Of The Case

This case involves an appeal filed by the Eagle Creek Irrigation Company ("ECIC"), a mutual irrigation company, against the district court's May 21, 2015, *Memorandum Decision on Cross Motions for Summary Judgment* ("Memorandum Decision")[1] and related *Judgment* with attached *Settlement Agreement*. In the Memorandum Decision, the court held as a matter of law that A.C. & C.E. Investments, Inc. ("AC&CE"), when it became the owner of 15 acres of real property (the "15 acres") to which Eagle Creek water was historically delivered, that AC&CE acquired the right to use 15 inches of water from Eagle Creek (the "15 inches"), as represented by 15 shares of stock in ECIC (the "15 shares").

B. Course Of The Proceedings

ECIC brought this action when it moved the district court on summary judgment to decide whether AC&CE's purchase of the 15 acres entitled it to an appurtenant water right, represented by the 15 shares. In its *Memorandum Decision*, the district court disagreed: "when A.C. & C.E. acquired title to its fifteen acres, ownership of fifteen shares of stock in Eagle Creek passed with it as appurtenance." *Memorandum Decision* at 6. The *Memorandum Decision* left open, for trial, "disputed material facts over Eagle Creek's bylaws and other policies . . . and the Court makes its ruling as to the appurtenance of the water right only." *Id*. At trial, the parties stipulated to the admission of certain exhibits. Aug. R. at 478-514. After opening arguments, counsel for AC&CE and counsel for ECIC entered into a *Settlement Agreement* that resolved the questions left open in the *Memorandum Decision*. Aug. R. at 490. Pertinent to this appeal, the

[1] The Memorandum Decision was unintentionally omitted from the original record, then later added to the record through this Court's *Order Granting Stipulation to Augment Clerk's Record and Denying Request to Suspend Briefing Deadline* (July 12, 2018). All citations to the Memorandum Decision will be directly to the Memorandum Decision document and particular page number.

Settlement Agreement established ECIC "shall forthwith issue" the 15 shares to AC&CE. *Id*. ECIC lived up to its bargain, with AC&CE in possession of the 15 shares. A *Judgment* was entered on November 15, 2017, incorporating as an attachment the *Settlement Agreement*. Aug. R. at 487-90. ECIC does not state it is challenging the *Settlement Agreement* it willingly entered into with AC&CE. Therefore, the only issue to decide herein is whether the district court properly found the 15 inches are appurtenant to the 15 acres as represented by the 15 shares.

C. Statement Of Facts

1. The Eagle Creek Irrigation Company

ECIC is a mutual irrigation company, located in Blaine County, and incorporated on March 7, 1973 with the Idaho Secretary of State. Aug. R. at 29, 36. ECIC owns no real property, App. Br. at 3, and pays no property taxes, Aug. R. at 72, 156. Consistent with ECIC's corporate documents and meeting minutes, it was always the intention that ECIC shares would remain appurtenant to the land of its shareholders. According to its 1973 Articles of Incorporation ("Articles"), ECIC was formed:

> To associate its stockholders together <u>for their mutual benefit</u>, and to that end to construct, maintain, and operate a private water system for the distribution of water <u>for domestic and irrigation purposes</u> to its shareholders; to engage in any activity related thereto, including but not limited to, the acquisition of water by appropriation, drilling, pumping or purchase; to buy, sell, hold, own, acquire, control, operate and maintain a distribution system; to purchase, install, operate, and maintain all dams, ditches, canals and all other associated equipment necessary to the construction, maintenance and operation of said irrigation and water distribution system.

Id. at 30 (emphasis added). *See also id.* at 32 ("organized on a non-profit basis for the mutual benefit of its shareholders").

In order to obtain water from ECIC, the company stated: "this corporation shall admit as stockholders <u>only such persons, groups of persons, organizations or corporation who own property in the immediate vicinity of the irrigation system and to which property the corporation</u>

can make delivery of water for domestic or irrigation purposes under the contemplated distribution system of the corporation." *Id*. at 32 (emphasis added). *See also id.* at 38. "Persons who meet the[se] provisions . . . shall be entitled to subscribe to and purchase shares of stock of the corporation as provided in the corporation's By-Laws." *Id*. at 32-33. Critically, as to any water rights acquired by ECIC: "The corporation will hold all water rights in Trust, and operate the system for the distribution of water primarily for the benefit of the lands to which said water rights are appurtenant." *Id*. at 32. (emphasis added).

Consistent with its Articles, contemporaneous Bylaws were created. *Id*. at 38-46. Among other things, the Bylaws recited many portions of the Articles, and also set forth the more day-to-day requirements of operation, as well as establishing the roles of the officers and directors, the need to keep records, and the necessity of annual meetings and elections. *Id*.

With the powers described in the Articles and Bylaws, on October 26, 1973, ECIC purchased a water right by Warranty Deed from John S. Feldhusen and Gladys L. Feldhusen, diverted from Eagle Creek:

> Ninety Per Cent (90%) of the waters of Eagle Creek decreed to Sellers' predecessor, i.e. 207 inches, which said Decree was entered in that certain action between Arthur J. Winslow, Plaintiff vs. S.H. Chapman, Water Master, Defendant, dated August 22, 1923, and was recorded August 25, 1923, in Book 9 of Judgments at page 501, in the office of the County Recorder of Blaine County, State of Idaho, wherein 230 miner's inches of the water of Eagle Creek; Subject at all times to Grantee paying its proportionate cost of maintenance of the by-pass irrigation ditches and irrigation works and the making of necessary improvements thereof.

Id. at 247 (emphasis added).[2] John S. Feldhusen was an original incorporator of ECIC. *Id*. at 34.

[2] ECIC purchased the water right from Feldhusen for $5,175. Pltf. Ex. 9 at 2. One share of water in ECIC was sold for $50 per miner's inch. *Id*. In Idaho, one miner's inch of water is the standard amount of water needed to irrigate one acre of land. *Reno v. Richards*, 32 Idaho 1, 16, 178 P. 81, 86 (1918). One miner's inch of water is the equivalent of 0.02 cfs. I.C. § 42-202(6) ("no . . . more than one (1) cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated"); I.C. § 42-220 ("one second foot of water for each fifty (50) acres of land so irrigated"). The conveyance of 207 inches of water converts to a diversion rate of 4.14 cfs. With ECIC issuing one share of stock for one inch of water, the Bylaws reflect that ECIC could issue up to 207 shares of stock. Aug. R. at 38. One share of stock is therefore the equivalent of 0.02 cfs, which is the necessary amount of

As clearly evidenced by ECIC's Articles of Incorporation, the water right from Feldhusen is a Trust asset of the corporation, to be used for the benefit of ECIC's shareholders, becoming a real property appurtenance through beneficial use by ECIC's shareholders.

2. The 15 Acres and 15 Shares of Stock in ECIC that Represent the Right to Divert 15 Inches of Water from Eagle Creek at AC&CE's Property

The real property at issue is the 15 acres and the 15 shares that represent the right to divert 15 inches from Eagle Creek. In 1970, three years before ECIC was formed and acquired its 207 inches of water from Feldhusen, the 15 acres was conveyed from the Feldhusen Farm Company (lots 17, 18 and 19), "with their appurtenances," to William and Patricia Woolway ("Woolway").[3] Aug. R. at 284-291. In 1974, Woolway conveyed the 15 acres to Glenn Olbum and Carolyn T. Olbum, along with their appurtenances and with specific reference to ECIC shares. *Id*. at 293-299.

After a series of additional conveyances that included appurtenances, *id*. at 301-306, the 15 acres was eventually conveyed from Harald F. Jonassen and Flora S.W. Kung-Jonassen ("Jonassen") to L.P. Enright and Nancy K. Enright ("Enright"), *id*. at 307-308. The 15 shares that were owned by Enright, which evidence the right to divert 15 inches of water from Eagle Creek, are evidenced certificates 50, 51, and 52. *Id*. at 332-334. These certificates state on their

water to irrigate one acre of land. I.C. § 42-202(6); I.C. § 42-220; *Reno*. The 15 inches of water that AC&CE is entitled to divert from Eagle Creek converts to a diversion rate of 0.30 cfs. Def. Ex. S at 4, ¶ 9 ("The 0.30 cfs of water for which the application was filed is represented by fifteen (15) shares of stock issued to the applicant by ECIC. Each share of stock represents one miner's inch of water . . . from Eagle Creek.").

[3] Olbum, by purchasing land with appurtenances prior to the Feldhusen conveyance to ECIC of 90% of the waters of Eagle Creek (207 inches), Aug. R. at 247, meant Olbum owned a water right from Eagle Creek that was separate and apart from ECIC. At some point, and as will be discussed later in this brief, this water right was given up by AC&CE's predecessors to ECIC in sole reliance of the 15 shares. ECIC later amended its claim in the Snake River Basin Adjudication, increasing the quantity to 4.60 cfs (230 inches). Def. Ex. BB. Two-hundred and thirty (230) inches is what was originally decreed to Arthur J. Winslow and later owned by Feldhusen, yet ECIC only bought 207 inches from Feldhusen. *Id*. at 247. The 4.60 cfs is made up of Water Right 37-863E (4.56 cfs for irrigation purposes) and Water Right 37-863F (0.04 cfs for aesthetic and recreation purposes of use). *Id*. at 487.

face that each "share entitles the owner to receive .02 of a cubic foot of water per second of time per acre or one Miner's inch when available from the waters of Eagle Creek." *Id*.

As recognized by the Idaho Department of Water Resources ("IDWR"), Enright put 15 inches of water from Eagle Creek to beneficial use on the 15 acres, as represented by the 15 shares. Def. Ex. S[4] & T[5].

On July 12, 2006, Enright executed a Deed of Trust in favor of Bank of America for the 15 acres, "together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property." *Memorandum Decision* at 3. Bank of America eventually foreclosed on the Deed of Trust, with the 15 acres and "all of the real property" conveyed to AC&CE on September 8, 2011. Aug. R. at 361-62. Immediately thereafter, on September 22, 2011, counsel for AC&CE contacted ECIC regarding the 15 shares. Aug. R. at 149; *id*. at 432.

3. ECIC And The Snake River Basin Adjudication

On November 19, 1987, the Snake River Basin Adjudication ("SRBA") was commenced. *City of Pocatello v. Idaho*, 152 Idaho 830, 833, 275 P.3d 845, 848 (2012). Any uses from surface water and ground water tributary to the Snake River were required to be claimed. In 1988, an SRBA claim was filed by Jonassen for 0.30 cfs[6] from Eagle Creek for irrigation of 15

[4] IDWR recognized beneficial use on the 15 acres with 15 inches of water represented by the 15 shares, yet questioned whether ECIC owned 207 inches or 230 inches. "ECIC is the successor-in-interest to all or a portion of decreed water right 37-00863. The 0.30 cfs of water for which the [Enright] application was filed is represented by fifteen (15) shares of stock issued to the applicant by ECIC. Each share of stock represents one miner's inch of water when it is available from Eagle Creek. The by-laws of ECIC provide that during times of water shortage, water will be distributed on a pro rata basis according to the number of shares held." Def. Ex. S at 4, ¶ 9 (emphasis added).

[5] IDWR issued a *Transfer of Water Right, Water Right No. 37-00863B*, recognizing Enright's ability to divert and beneficially use 0.30 cfs of water from Eagle Creek for irrigation of 15 acres. Def. Ex. T. ECIC was bound by the transfer: "The applicant and ECIC have reached an agreement by which the company agrees to the additional point of diversion proposed . . . ." Def. Ex. S. at 4, ¶ 11.

[6] The diversion rate 0.30 cfs is the mathematical equivalent of 15 miner's inches of water. *See supra* footnote 2.

acres, with the claim later changed to reflect the name and address of Enright. *Def. Ex. R.* The claim was numbered 37-863B ("WR 37-863B"), with a point of diversion located at T5N, R17E, S14, NENE. *Id.* In a letter from Enright's attorney, it was explained, "At the time of the Adjudication filing deadline for Blaine County (October 26, 1988), the Company had not filed a claim and no one seemed to be preparing to do so. Accordingly, we filed claims for the Jonassens' shares. The Company subsequently filed its claim (A37-00863, which incorrectly claims the entire right of 4.6 cfs). The remainder of this letter contains confidential material. LPE." Def. Ex. Q at 2 (emphasis added).[7]

On February 15, 2005, Enright was sent a letter from ECIC, written by the same attorney who assisted Jonassen and Enright in filing their claims in the SRBA, asking Enright to quitclaim any interest they might have in WR 37-863B. Def. Ex. U. ECIC's attorney specifically stated, however, "You will, of course, continue to rely on your 15 shares of stock in the Company to receive water out of Eagle Creek to irrigate your property." *Id.* On March 8, 2005, and "for value received," Enright executed a quitclaim deed on behalf of ECIC as to "all their right, title and interest in and to Water Right No. 37-863B." Pltf. Ex. 48.

On December 19, 2006, IDWR received from ECIC an amended claim to SRBA subcase no. 37-863E. Def. Ex. AA. The amended claim was signed by ECIC's attorney who negotiated the Quitclaim deed with Enright. *Def. Ex. BB* at 3. The amendment was particularly significant in two respects. First, the amendment made specific reference to the legal descriptions of the individual places of use of its shareholders in Table 1,[8] and their individual points of diversion in

[7] It seems likely the reference to the "incorrect[] claim[]" to 4.6 cfs was due to ECIC having only purchased 4.14 cfs (207 inches) from Feldhusen, not 4.60 cfs (230 inches).

[8] The amendment increased the number of irrigated acres from "129.3." Pltf. Ex. 37 at 2, to "143.9," Def. Ex. BB at 2, ln. 10. The place of use amendment was described as necessary in order to include the 14 acres and associated 14 shares owned by Robert Steven. Pltf. Ex. 39 at 1 (2008 ECIC annual meeting minutes); Def. Ex. AA at 1.

Table 2. *Id*. at 2. The place of use for the 15 acres is legally described as the "15.45" acres in the NENE of Section 14, with a point of diversion described as "EC-2[,] NENE Sec 14[,] Enright." *Id*. at 2; Def. Ex. BB at 1, ln. 4, at 2, ln. 6. Second, ECIC's engineer prepared an "aerial photo analysis [of] the irrigated area in each 40 acre tract" to specifically show the lands within ECIC that were claimed. Def. Ex. AA at 1. The 15 acres is located in the far northeastern corner of the ECIC boundary, is the most upstream privately owned parcel within the ECIC service area, and was specifically claimed by ECIC in the SRBA. Def. Ex. BB at 4; Aug. R. at 494.[9]

On October 12, 2010, the SRBA district court issued a *Final Order Disallowing Water Right Claims*, which included the claim to WR 37-863B, as well as other "splits" of the original water right no. 37-863, then fully claimed in the SRBA by ECIC. Def. Ex. V (with specific reference to water right nos. 37-863A, 37-863B, 37-863C, and 37-863D).

On July 29, 2011, the SRBA district court issued an *Order of Partial Decree for Irrigation Delivery Entity Using Digital Boundary Description; I.C. §§ 42-202B(2), 42-219(2), 42-1411(2)(h)* as to water right no. 37-863E ("WR 37-863E") in the name of Eagle Creek Irrigation Company, which included the following, pertinent elements:

Source:	Eagle Creek
Priority Date:	10/06/1902
Quantity:	4.56 cfs
Place of Use:	143.9 acres[10]

Pltf. Ex. 49 at 4.

---

[9] The record was corrected to include a color version of the map, which is located at page 494 of the Augmented Record.

[10] ECIC claims in its Statement of Facts that WR 37-863E allows irrigation within a "permissible place of use . . . [that] is approximately 194 acres." App. Br. at 8; *see also* App. Br. at 13. The permissible place of use issue will be discussed below by AC&CE. However, as a statement of fact, it is simply incorrect to claim the SRBA partial decree for WR 37-863E references a place of use for anything other than irrigation of 143.9 acres.

4. Course of the Proceedings Over the 15 Shares

As stated above, AC&CE became owner of the property on September 8, 2011. According to ECIC, on approximately September 8, 2011, AC&CE "began claiming a right to the 15 Shares and started using Eagle Creek" to irrigate the 15 acres. App. Br. at 11. On September 22, 2011, the law firm representing AC&CE began corresponding with ECIC as to the 15 shares: "At that time, my paralegal Sharon Strickland contacted Mr. Sadler requesting transfer of the shares to [AC&CE]'s name." Aug. R. at 149; Aug. R. at 432 (email dated September 22, 2011 summarizing Ms. Strickland's conversation with ECIC). AC&CE's attorney also had a meeting with ECIC in June 2012, which was followed up with a letter dated August 28, 2012, wherein AC&CE continued to ask ECIC what it needed to do as a shareholder. *Id*. Therefore, since acquiring the property, AC&CE has diverted water and put it to beneficial use on the 15 acres.

On November 25, 2013, and purportedly to "avoid the diminution in value of its Water Rights and the 15 shares, Eagle Creek filed a complaint against AC&CE." Aug. R. at 413. Cross motions for summary judgment were later filed as to ownership of the 15 shares.

On May 21, 2015, the district court ruled in favor of AC&CE. According to the court, when ECIC purchased the water right from Feldhusen, it acquired the right "in trust . . . for the benefit of its shareholders. Upon organization, Eagle Creek issued shares of stock in the company to the landowners – one share per acre of land." *Memorandum Decision* at 2 (emphasis added). "Eagle Creek then sold shares in its company to the landowners – shares, which represent the right to water." *Id*. at 6 (emphasis added). Since purchasing the 15 acres, AC&CE "has been diverting water for the benefit of its land." *Id*. at 2 (emphasis added). The "central issue before the Court on summary judgment is whether the water rights are appurtenant to the

land [AC&CE] acquired." *Id*. at 3. Principally relying on the Court's decision in *Ireton v. Idaho Irr. Co*, 30 Idaho 310, 164 P. 687 (1917), the court ruled:

> [W]hile this court has held shares in an irrigation company to be personal property (Watson v. Molden, 10 Idaho, 570, 79 Pac. 503) the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right. Such shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence.

Id.

> Pursuant to *Ireton*, such shares of stock pass with title to the land thus making them appurtenant to that land. Therefore, when A.C. & C.E. 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, A.C. & C.E. received the right to water when it acquired the fifteen acres from the foreclosure sale. However, this right is not unqualified.

Memorandum Decision at 5-6 (emphasis added).

At trial on November 15, 2017 as to the issues not disposed of through the Memorandum Decision, the parties stipulated to the admission of numerous exhibits, Aug. R. 478-86, presented opening statements, then entered into a *Settlement Agreement* ("Agreement") which was incorporated into a *Judgment*, *id.* at 487-90. Pertinent to this proceeding, the Agreement established that "ECIC shall forthwith issue fifteen (15) shares of stock to A.C. & C.E., dated 9/8/2011, with no restrictive legends on the shares, and shall be issued in the same form as if issued on 9/8/2011." *Id*. Consistent with the Agreement, ECIC issued the 15 shares to AC&CE, with AC&CE in possession of the same. The Agreement also recognized the court's *Memorandum Decision* "shall be entered as a final, appealable judgment." *Id*. According to the *Judgment*: "When A.C. & C.E. Investments, Inc. acquired title to its fifteen acres, ownership of

the fifteen shares of stock in Eagle Creek passed with it as an appurtenance. Because the water right is appurtenant to the land, A.C. & C.E. received the right to water when it acquired the fifteen acres." Aug. R. at 487. ECIC has not stated it is challenging the *Settlement Agreement*.

III. ISSUE PRESENTED ON APPEAL AND ADDITIONAL ISSUE ON APPEAL

A. AC&CE Reframes The Issue On Appeal

AC&CE reframes the issue on appeal as follows: Was the district court correct in holding that when AC&CE purchased the 15 acres it acquired an appurtenant water right to 15 inches of water from Eagle Creek as represented by the 15 shares?

B. Whether AC&CE Is Entitled To An Award Of Costs And Attorney's Fees On Appeal

Pursuant to I.C. § 12-121, I.C. § 42-914, I.A.R. 35(b)(5), I.A.R. 40, and I.A.R. 41, AC&CE raises as an issue on appeal: Whether AC&CE is entitled to an award of costs and attorney's fees on appeal?

IV. ARGUMENT

AC&CE owns 15 acres that it irrigates with 15 inches of water from Eagle Creek, and is in possession of the 15 shares that represent the right to irrigate. The record conclusively shows the 15 acres have been irrigated by AC&CE and its predecessors. Through diversion and application to a beneficial use, the 15 inches, represented by the 15 shares, became appurtenant to the 15 acres. Therefore, as properly recognized by the district court, when AC&CE acquired the 15 acres, it also obtained an appurtenant right to divert 15 inches of water from Eagle Creek for beneficial use, as represented by the 15 shares.

ECIC argues it was legally incorrect for the district court to reach this conclusion. Ignoring its own Articles of Incorporation, Bylaws, and meeting minutes, ECIC effectively rests its argument on an interpretation of three cases, all of which the district court analyzed in

arriving at its decision: *Wells v. Price*, 6 Idaho 490, 56 P. 266 (1899); *Watson v. Molden*, 10 Idaho 570, 79 P. 503 (1905); and *Ireton* . Based on these cases, and combined with the fact that ECIC is a "*non*-Carey Act" company – a fact with which AC&CE agrees – leads ECIC to its incorrect conclusion that this Court should reverse. App. Br. at 19 (emphasis in original). ECIC goes on to claim that while there are requirements in Title 42, Chapter 21, Idaho Code as to Carey Act companies, there are no principles of Idaho water law, other than ECIC's own corporate documents, to guide these proceedings: "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." App. Br. at 17-18. ECIC ignores Idaho's Constitution, Title 42, Chapter 9, Idaho Code, and the body of case law growing out of the same in reaching its conclusion. The district court decision on summary judgment and associated *Judgment* should be affirmed.

A. Based On The Court's Decisions in *Bagley v. Thomason*, The 15 Shares Are Appurtenant To The 15 Acres

To affirm the district court's decision that the 15 shares are appurtenant to the 15 acres, this Court simply needs to review its recent decisions in *Bagley v. Thomason*. *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 974 (2010) (hereinafter "*Bagley I*"); *Bagley v. Thomason and Liberty Park Irr. Co.*, 149 Idaho 806, 241 P.3d 979 (2010) (hereinafter "*Bagley II*"); *Bagley v. Thomason*, 155 Idaho 193, 307 P.3d 1219 (2013) (hereinafter "*Bagley III*"). The *Bagley* decisions are not addressed by ECIC. The outcome in the *Bagley* decisions conclusively establishes that when AC&CE bought the 15 acres it acquired an appurtenant water right, represented by the 15 shares.

There, Terrence Bagley and John Bagley ("Bagleys") bought real property, together with their appurtenances, from Marilynn and Byron Thomason ("Thomasons"). After buying the real property, Bagleys reconveyed the property back to Thomasons. "The agreement to reconvey specified that Bagleys would convey the property back to the Thomasons upon repayment of the debt plus interest by January 2008. The agreement also specified that if the Thomasons failed to repay the debt, the Agreement to Reconvey would be nullified and the Bagleys would retain the property." *Bagley III* at 195, 307 P.3d at 1221. "Bagleys also agreed that Marilynn Thomason could continue to farm and maintain the property." *Bagley I* at 801, 241 P.3d at 974. The water used to irrigate the property was represented by "52 shares of water" in the "Liberty Park Irrigation Company." *Id*. at 807, 241 P.3d at 980. Thomasons did not repay the debt.

After the debt was left unsatisfied, "a dispute arose regarding ownership of the property. Bagleys filed a lawsuit for quiet title and obtained a judgment quieting their title in the land. The judgment also provided that Bagleys owned the water rights appurtenant to the land." *Bagley II* at 806-07, 241 P.3d at 979-80. In *Bagley I*, the Court affirmed the district court's decision quieting title to Bagleys in the land and appurtenant "water shares." *Bagley I* at 803, 241 P.3d at 976.

Despite the fact that Bagleys owned the property and appurtenant water rights represented by the 52 shares in the Liberty Park Irrigation Company ("LPIC"), Bagleys were forced to bring a declaratory action against Thomasons and LPIC on three bases: (1) Thomasons "refused to deliver" the shares; (2) Thomasons "were attempting to sell" the shares; and (3) LPIC "refused to issue new water shares to the Bagleys." *Id*. at 807, 241 P.3d at 980. "The district court granted Bagleys' motion and entered a judgment decreeing that Bagleys were the owners of the 52 shares . . . ." *Id*. Because the litigation was pursued frivolously, the district court

awarded Bagleys their costs and attorney's fees pursuant to I.C. § 12-121. On appeal in *Bagley II*, the district court's decision that Bagleys owned the 52 shares in LPIC and were entitled to an award of attorney's fees was affirmed. *Id*. at 808, 241 P.3d at 981.

Here, when AC&CE purchased the 15 acres with appurtenances on September 8, 2011, it entered into immediate discussions with ECIC as to the 15 shares. Pltf. Ex. 61l; Aug. R. at 432. However, like LPIC before it, ECIC refused, instead choosing to file a complaint with the district court for purposes of taking AC&CE's appurtenant water right. Not only did ECIC refuse to issue the 15 shares, but even before the district court could issue its May 21, 2015 *Memorandum Decision*, ECIC entered into negotiations with Enright to purchase the 15 shares, Aug. R. at 400, with an agreement reached on February 24, 2015 to buy the 15 shares for $1,500, Aug. R. at 404-06.[11]

In light of *Bagley*, and with no citation thereto, it is striking that ECIC and Enright would take nearly identical actions to Thomasons and LPIC, with ECIC arguing to this Court on appeal that the 15 shares are personal property and did not transfer with the 15 acres as an appurtenance. Based on *Bagley*, the district court must be affirmed in its decision that when AC&CE purchased the 15 acres it acquired an appurtenant water right as represented by the 15 shares.

[11] Of course this was illegal. Only owners of property in the immediate vicinity of Eagle Creek who can take delivery of the water are entitled to be ECIC shareholders. Aug. R. at 32. As of July 12, 2006, when Enright entered into the Deed of Trust with Bank of America, Enright no longer owned the 15 acres. *Memorandum Decision* at 3. Enright was no longer an ECIC shareholder and could not sell the 15 shares. Moreover, the 2015 actions of Enright and ECIC are entirely inconsistent with their own statements made in 2009 when the 15 acres were for sale. On June 11, 2009, Enright stated the 15 shares were appurtenant to the 15 acres: "We have one inch water rights per acre for a total of 15 inches (15 shares). The water rights go with the land." Def. Ex. E. On June 12, 2009, Enright's belief was confirmed by ECIC's attorney: "Enright's summary is accurate . . . ." Def. Ex. F. In this appeal, ECIC is taking the exact opposite position it previously represented as to the appurtenance of the 15 inches to the 15 acres.

B. Idaho's Constitution Prevents ECIC From Taking AC&CE's Water Rights

Given ECIC did not cite the *Bagley* decisions it must believe they do not apply or are distinguishable. However, ECIC cannot dodge the protections afforded to AC&CE by the Constitution, which ECIC also fails to cite. It is a fundamental principle of Idaho water law that in order for a water right to exist, it must be diverted and put to beneficial use. Idaho Const. art XV, § 3. It is undisputed ECIC "owns no real property" upon which to divert and apply water to beneficial use, App. Br. at 3, pays no property taxes, Aug. R. at 72, 156, and that AC&CE has continued to divert and put water to beneficial use on the 15 acres, Aug. R. at 243. This relationship between an irrigation company and its shareholder, and the continuing, guaranteed right to water that flows therefrom, is specifically addressed by Idaho's Constitution. Sections 1, 4, and 5 to Article XV of Idaho's Constitution state:

> Section 1. Use of waters a public use. The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.
>
> . . . .
>
> Section 4. Continuing rights to water guaranteed. Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.
>
> Section 5. Priorities and limitations on use. Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section

> of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Idaho Const. art XV, § 1, § 4, § 5 (emphasis added).

It is undisputed that ECIC organized itself as a non-profit mutual irrigation company. Aug. R. at 29, 36. As a company, ECIC purchased a right to water from Feldhusen. *Id*. at 247. The water right was acquired "in Trust," for the benefit of its shareholders. *Id*. at 32 (emphasis added). In order to obtain water, "this corporation shall admit as stockholders only such persons, groups of persons, organizations or corporation who own property in the immediate vicinity of the irrigation system and to which property the corporation can make delivery of water for domestic or irrigation purposes under the contemplated distribution system of the corporation." *Id*. at 32 (emphasis added); *see also id.* at 38. "Persons who meet the[se] provisions . . . shall be entitled to subscribe to and purchase shares of stock of the corporation as provided in the corporation's By-Laws." *Id*. at 32-33.

The waters from Eagle Creek, which were partially decreed in the SRBA as water right no. 37-863E for irrigation purposes, Pltf. Ex. 49, with its shareholders entitled to divert the water that was sold to them by ECIC, Aug. R. at 32; Pltf. Exs. 9, 10 (discussing sale of shares). Therefore, sections 4 and 5 govern the relationship between ECIC and its shareholders: "The constitutional convention, accordingly, inserted sections 4 and 5, in article 15, of the Constitution, for the purpose of defining the duties of ditch and canal owners . . . and to point out the respective rights and priorities of the users of such waters." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 807, 252 P.3d 71, 88 (2011).

Inclusion of sections 4 and 5 into Article XV of Idaho's Constitution was no accident. The reason for these sections was to ensure a shareholder's continuing, guaranteed right to water. Just as the Court did in its 2011 decision in *Clear Springs*, it is helpful to review the statements made by the framers of our Constitution, relative to these sections:

> The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from the natural stream.
>
> . . . .
>
> And so sec. 4 is dealing chiefly with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities as between water users and consumers who have settled under these ditches and canals and who expect to receive the water under a "sale, rental or distribution thereof." The two sections must therefore be read and construed together.
>
> The effect of these two sections of the constitution was discussed somewhat by the members of the constitutional convention. Mr. Gray and Mr. Hampton both protested that they did not understand the purpose of the committee in drafting sections 4 and 5, and that they did not understand the meaning intended to be conveyed thereby. The president of the convention, Mr. Claggett, on the other hand, seemed to have a very clear understanding of the provisions and was the only one who spoke in favor of their adoption, and his discussion and explanation seems to have been accepted by the majority of the convention as they voted down the amendments presented by Gray, Hampton and Poe, and adopted the provisions as they now stand. We quote the following as a part of the debate and proceeding had in this connection:
>
> > Mr. Claggett: I will state to the committee that the heart of this bill lies in sections 4 and 5 as a practical measure. This portion of section 4 amounts to this: that whenever these canal owners--if the gentleman will see, "for agricultural purposes under a sale, rental or distribution thereof,"--whenever one of these large canals is taken out for the purpose of selling, renting or distributing water, or the appropriation is made hereafter for that purpose, and that after that has once been done, inasmuch as priorities will immediately spring up along the line of that canal, even before the canal is located; for instance, if a company should start in here to take a large quantity of water out to supply a given section of country, and should appropriate or give notice to the world that they were appropriating it for

> agricultural purposes "under a sale, rental or distribution thereof," then immediately, just as soon as the ditch was surveyed, people would come in and begin to locate farms and improve them right along the line of that ditch; and therefore it is necessary in order to protect them, inasmuch as they have spent this money in settling there under a promise, which was made by the company, that the water should be used for agricultural purposes, that the water should not be allowed to be diverted from that purpose and applied to the running of manufactories or anything else of that sort.
>
> Mr. Gray: Suppose he won't pay for it.
>
> Mr. Claggett: It is dedicated to the use, and when it has once been sold to any one particular party in one year, then he shall have the right to demand it annually thereafter upon paying for it. . . .
>
> Mr. Claggett: Mr. Chairman, both of these sections apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are "appropriated or used for agricultural purposes under a sale rental or distribution." The first section protects the person who comes in, by making it "an exclusive dedication" to agricultural uses after it has been so appropriated and so used.

Mellen v. Great Western Beet Sugar Co., 21 Idaho 353, 359-61, 122 P. 30, ___ (1912) (emphasis added); *see also Clear Springs* at 806-07, 252 P.3d at 87-88 *citing Mellen.*

ECIC marketed and sold irrigation water it placed into the corporation "in Trust" for the benefit of the owners of land who could receive water from Eagle Creek. Aug. R. at 32. (emphasis added); *see also* Pltf. Exs. 9, 10 (discussing sale of shares); *see also* Def. Ex. p. 4, ¶ 9 (IDWR administrative order discussing the 15 shares as it relates to the 15 acres: "The 0.30 cfs of water for which the application was filed is represented by fifteen (15) shares of stock issue to the applicant by ECIC."). Through this transaction, the water of Eagle Creek became "appurtenant" to the lands of the property owners who bought shares of stock in ECIC and put that water to beneficial use. Aug. R. at 32. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 114, 157 P.3d 600, 608 (2007) ("the beneficial users have an interest that is stronger than a mere contractual expectancy"). ECIC is bound by the Constitution. As recognized by the

district court and not appealed by ECIC, water has been put to beneficial use on the 15 acres. *Memorandum Decision* at 2. Thus, consistent with the Constitution and confirmed by *Pioneer*, AC&CE received the protection of a continuing, guaranteed right to water for the 15 acres. What Mr. Claggett was fearful of, and specifically guarding against, is borne out in this proceeding through the actions of ECIC.

C. Idaho Code §§ 42-914 And 42-915 Also Operate To Prevent ECIC From Taking The Water Rights Appurtenant To The 15 Acres

The consumer protections afforded to AC&CE through the Constitution are incorporated into I.C. §§ 42-914, -915:

> Whenever any waters have been or shall be appropriated or used for agricultural or domestic purposes under a sale, rental or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use upon the tract of land for which such appropriation or use has been secured, and, whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns, shall not thereafter be deprived of the annual use of the same when needed for agricultural or domestic purposes upon the tract of land for which such appropriation or use has been secured, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use as may be prescribed by law.

I.C. § 42-914 (emphasis added)

> When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon; but the owner of said tract of land, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such reasonable regulations as may be agreed upon, or as may from time to time be imposed by law. And said payment for said water right shall be a release of any bond or mortgage upon the canal property of the person or company from whom such right is purchased or their successors or assigns, to the amount of such water right thus purchased and paid for, and said person or company from whom such water right is purchased shall furnish to the party or parties

> purchasing such right a release, or a good and sufficient bond for a release, from said mortgage or bonded indebtedness to the amount of the water right thus purchased.

I.C. § 42-915 (emphasis added).

"The provisions of the constitution and the sections of the statutes . . . have peculiar application to persons or corporations organized for the purpose of appropriating water for sale, rental, or distribution . . . ." *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 308, 216 P. 250, 251 (1923) (emphasis added).

Consistent with the plain language of these statutes, *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011) (statutes are given their plain meaning), the right to water for the 15 acres became perpetual and forever appurtenant to the property once the water was put to beneficial use by AC&CE's predecessors, with AC&CE continuing to put the water to beneficial use. *Memorandum Decision* at 2; *Pioneer* at 114, 157 P.3d at 608. Thus, ECIC has no legal basis upon which to deprive AC&CE of this right to water for the 15 acres. *Hewitt v. The Great Western Beet Sugar Co.*, 20 Idaho 235, 245, 118 P. 296, ___ (1911) ("This section [referencing § 3292, now codified as I.C. § 42-915] is plain, and clearly provides that when payment is made upon a perpetual water right, the water right shall remain a part of the tract of land for which the same was purchased . . . .") (emphasis added).

D. ECIC Misconstrues The Court's Decisions In *Wells, Watson,* And *Ireton*

Ignoring the Constitution and Idaho Code, ECIC asks the Court to simply base its ruling on an examination of a few sentences from prior decisions of the Court in *Wells, Watson,* and *Ireton,* together with the fact that ECIC is a non-Carey Act company. As will be explained, none of these cases, nor the fact that ECIC is a non-Carey Act company, can affect the district court's

conclusion that AC&CE when it purchased the 15 acres it acquired an appurtenant water right to 15 inches, as evidenced by the 15 shares.

In *Wells*, it was questioned: "Did the plaintiffs, by purchase at execution sale of the lands mentioned in the complaint, acquire with said lands, as an appurtenance thereto, the shares of stock owned by the execution defendants in that certain corporation known as the Upper South Field Irrigation Company?" *Wells* at 491, 56 P. at ___ (emphasis added). In framing the issue, counsel for the appellant asked: "The sole and only question is, Can the lands of the plaintiff, the successor in interest of Francis Wilcox, be deprived, without his consent or the consent of his predecessor in interest, of the waters which had been used upon them for a period of at least fourteen years? . . . . It involves simply a construction of section 4, article 15 of our constitution." *Id*. at 490, 56 P. at ___ (emphasis added). Counsel for the respondent asked: "What interest has a stockholder in the corporate property? How may it be attached?" *Id*. In examining the facts before it, the Court agreed with the respondent, viewing the case as a simple matter of corporate law as it related to the satisfaction of a debt through an execution sale, never addressing the Constitution or Idaho water law: "The subjection of shares of stock in a corporation to the payment of a debt must, when done by legal process, be done in the manner prescribed by the statutes. The complaint in this case at bar shows that the statutory procedure was not followed. 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 492, 56 P. at ___ (emphasis added). By ignoring bedrock principles of Idaho water law, which were squarely before it, it must be concluded that *Wells* only applies in matters involving the satisfaction of a debt through an execution sale. This case does not involve that question.

ECIC next relies on *Watson*. There, the Court was asked to examine an inducement to purchase 14 shares of stock in "the People's Canal and Irrigation Company . . . ." *Watson* at 573. Notably, it was explained: "That it is not practicable to conduct water from the People's Canal and Irrigation Company to any portion of said lands, for the reason that there is no ditch or canal leading from said main canal to said lands . . . ." *Id*. at 575, 79 P. at ___. Due to the fact that no water could be diverted, let alone put to beneficial use, the shares were simply personal property, with the Court citing to *Wells* for its conclusion: "All that can be said in support of appellant's contention is that after purchasing the stock of the canal company, completing a lateral ditch and turning the water into the ditch (under the above decisions) would make the ditch – hence the water – real estate. All 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. That being true the property sold was only personal property." *Id*. at 583, 79 P. at ___ (emphasis added). The Court recognized the inherent need for diversion and beneficial use to evidence a right to water. The right to water was absent in that case, due to the fact that no water could be delivered to the lands. This led the Court to the correctly conclude that a paper stock certificate in a canal that cannot deliver water for beneficial use does not evidence an appurtenant real property right.

Lastly, ECIC relies upon *Ireton* – which it claims the district court misapplied – to support its position that AC&CE did not acquire an appurtenant water right to the 15 acres as evidenced by the 15 shares: "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 the land,' as stated in the Decision. Aug. R. p. 6. Instead, *Ireton* held that the terms in a contract between an irrigation company and its

shareholders control." App. Br. at 19 (emphasis in original). As was already explained through the Constitution and Idaho Code §§ 42-914, 42-915, and as will be explained in the context of *Ireton*, ECIC is incorrect.

In *Ireton*, the Court was deciding "the relative priority of the liens of the appellant and respondent upon the water right in question . . . ." *Ireton* at 314, 164 P. at ___. Thus, appellant "failed and neglected to give notice of its claim to security, as by law provided, and cannot be heard to complain that the law recognizes as prior and superior the lien of an innocent mortgagee whose conveyance, though subsequent in point of date and execution, is first recorded." *Id*. at 317, 164 P. at ___. Despite the issue before it, the Court cited Idaho Const. art. XV, § 4, *id*. at 315, 164 P. at ___, and took the occasion to clarify any misunderstandings with its prior decision in *Watson*, and by extension *Wells*:

> While shares of stock in an ordinary corporation, organized for profit, are personal property (sec. 2747, Rev. Codes; *State v. Dunlap*, 28 Idaho 784, and cases therein cited on page 802, 156 P. 1141), and while this court has held shares in an irrigation company to be personal property (*Watson v. Molden*, 10 Idaho 570, 79 P. 503), the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right. Such shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence. (*In re Thomas' Estate*, 147 Cal. 236, 81 P. 539; *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 P. 619, L. R. A. 1915D, 292.)

Id. at 317, 164 P. at ___ (emphasis added).

Despite ECIC's claim to the contrary, the district court did not misapply *Ireton*.[12] While the precise issue before the Court in *Ireton* was the priority of liens, the decision is dispositive to

[12] ECIC cites a 1912 treatise written by Clesson S. Kinney to support its position that the 15 shares did not pass as an appurtenance to AC&CE. There, Kinney is quoted as saying, "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." App. Br. at 14 citing 3 Clesson S. Kinney,

the legal issue in this case and supports the district court's ruling that AC&CE's 15 acres have an appurtenant water right of 15 inches as evidenced by the 15 shares, which "are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence." *Id*. at 317, 164 P. at ___; *see also Memorandum Decision* at 5-6. To hold otherwise would render meaningless the protections afforded to AC&CE in Idaho Const. art. XV, §§ 4, 5 and I.C. §§ 42-914, -915. *State ex rel. Evans v. Click*, 102 Idaho 443, 448, 631 P.2d 614, 619 (1981) ("the legislature is presumed not to have enacted a meaningless statute").

E. The Carey Act Is Irrelevant When It Comes To Fundamental Principles Of Idaho Water Law And Appurtenancy Of Water Rights

ECIC believes *Ireton* is distinguishable, due to the fact that the water that was originally diverted from the natural stream to the lands of the shareholder was through the effort of a "Carey Act company." App. Br. at 19. ECIC goes on to claim, with citation to its Articles of Incorporation: "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 inception. R., pp. 174-180." App. Br. at 18; *see also* App Br. at 7 ("Importantly, the incorporators did not elect to form Eagle Creek as a Carey Act Company."). The distinction between Carey and non-Carey Act corporations is irrelevant when it comes to fundamental principles of Idaho water law and the outcome that the

---

A Treatise on the Law of Irrigation and Water Rights § 1484 at 2666 [sic] (2d. ed. 1912) (emphasis added). What ECIC fails to explain is that Kinney's treatise was published in 1912, which is five years before this Court's 1917 decision in *Ireton*. Whatever general rule of law may have been developed in other states has no bearing when it comes to this Court's decision and *Ireton*. Moreover, ECIC's citation on page 14 of its opening brief to the "personal property" rule established *State v. Dunlap*, 28 Idaho 784, 156 P. 1141, 1145-46 (1916) and assorted corporate treatises do not apply here. In *Dunlap*, the Court had before it shares of stock in a railroad company, not shares of stock in a non-profit mutual irrigation company. The Court in *Ireton* makes clear the general laws regarding "shares of stock in ordinary corporations, organized for profit" do not apply to shares of stock in mutual irrigation companies. *Ireton* at 317, 164 P. at ___. Shares of stock in "a mutual irrigation company, not organized for profit but for the convenience of its members . . . for use upon their lands . . . is but incidental to ownership of a water right. Such shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence." *Id*.

15 acres carry with them a 15-inch appurtenant water right represented by the 15 shares. This is due to the fact that the Constitution applies to all companies who act on behalf of their shareholders who beneficially use water for irrigation purposes. Idaho Const. art XV, § 4; *Pioneer* at 114, 157 P.3d at 608.

The Carey Act of 1894 was federal legislation intended to bring desert lands out of the public domain through the beneficial use of water: "To aid the public-land States in the reclamation of the desert lands . . . binding the United States to donate, grant, and patent to the State free of cost . . . such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, required of citizens who may enter under the desert-land law . . . ." 43 U.S.C. § 641. By statute, the State of Idaho "accept[ed] the conditions" of the Carey Act in 1895. I.C. § 42-2001.

Here, the record shows the water right sold by Feldhusen to ECIC was originally decreed by the Blaine County district court in *Winslow v. Chapman* (Aug. 22, 1923). Aug. R. at 247. Companies wishing to appropriate water rights under the Carey Act, as will be discussed below, were required to follow the application and permit method of appropriation through IDWR. I.C. § 42-2005. Moreover, at least as of 1970 – three years before ECIC was incorporated – the 15 acres were privately owned, when Feldhusen Farm Company conveyed the same to Woolway, with appurtenances. Aug. R. at 284-91. Because the water right itself was decreed by a court, and the 15 acres were not coming out of the federal domain for patent when ECIC was formed, means the Carey Act could never have applied. It is simply incorrect for ECIC to claim it considered whether to form or not form under the Carey Act.

ECIC then argues Idaho law treats non-Carey Act water rights differently from Carey Act water rights, with particular emphasis on their appurtenancy:

> 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." . . . . Importantly, the legislature did not enact any similar statute governing the appurtenance of water right owned by *non*-Carey Act Lands to corporations formed under the Carey Act cannot be ignored.

App. Br. at 17 (italics in original).

ECIC ignores Idaho Code to reach this conclusion, demonstrating that *Ireton* applies regardless of the type of water provider at issue.[13] When the Carey Act was accepted, persons desiring to take advantage of providing a water supply to desert lands coming out of the federal domain were required to appropriate water consistent with Idaho law: "The person . . . shall have filed with the department [of water resources] an application for a permit to appropriate water for the reclamation of the lands described in his request." I.C. § 42-2005 (emphasis added); *see also State v. Twin Falls Land & Water Co.*, 37 Idaho 73, 85, 217 P. 252, ___ (1923) ("All contracts made pursuant to Carey Act law, either state or federal, must be construed in harmony with such acts and all other general laws relevant to the appropriation and use of water.") (emphasis added). It is well established that federal law defers to state law as to water rights. *Federal Power Comm. v. Oregon*, 349 U.S. 435, 448 (1955) (Desert Land Act "severed, for purposes of

[13] The decision in *Ireton* does not stand on its own, nor does it only apply to Carey Act companies. The legal outcome, that shareholders possess an appurtenant water right has been followed by this Court in cases involving myriad non-Carey Act irrigation entities. *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 545, 381 P.2d 440, 449 (1963) ("The [irrigation] district holds title to the water rights in trust for the landowners. The landowners, to whose lands the water has become dedicated by application thereon to a beneficial use, have acquired the statutes and rights of distributees under Const., Art. 15, §§ 4 and 5."); *Paddock v. Clark*, 22 Idaho 498, 511, 126 P. 1053, 1058 (1912) ("that water [from the New York canal] applied to [a shareholder's] land for a beneficial use in the cultivation and development of the same becomes appurtenant to the land, and where such land is conveyed, that the water right appurtenant thereto passes with the conveyance of the land . . . ."); *Farmers' Co-Operative Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 459, 94 P. 761, 763 (1908) (use of water from a co-operative ditch company "once [] sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes, becomes a perpetual right subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use.") (internal quotation omitted); *Bardsly v. Boise Irr. And Land Co.*, 8 Idaho 155, 160, 67 P. 428, 430 (1901) (use of water from a ditch company "secures to everyone who has rented water from the owner of a canal for the purposes mentioned in said section of the right to rent from year to year, and makes the act of such rental a dedication.").

private acquisition, soil and water rights on public lands, and provided that such water rights were to be acquired in the manner provided by the law of the location") (emphasis added);[14] *see also Arizona v. California*, 373 U.S. 546, 589 (1963) (Reclamation Act providing "state water law would control in the appropriation and later distribution of the water"). Under Idaho's application and permit system, diversion of water to a beneficial use is required. I.C. § 42-201; I.C. § 42-202. If diversion and beneficial use are present, a license will issue. I.C. § 42-219.

As to the precise question of appurtenancy, and upon issuance of a license, "all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, land for which the right of use is granted." I.C. § 42-220 (emphasis added). That an Idaho water right is appurtenant to the land upon which it is beneficially used is simply restated in Idaho's adoption of the Carey Act, with the only modification that the right does not become appurtenant upon beneficial use, but rather upon passage of title from the United States: "water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the state." I.C. § 42-2025 (emphasis added).

ECIC is clearly wrong when it concludes Idaho Code does not have a "statutory mandate" on the question of appurtenancy when it comes to irrigation companies not organized through the Carey Act. App. Br. at 18. The 15 shares are therefore appurtenant to AC&CE's 15 acres.

[14] "[A]n act of Congress of August 18, 1894, known as the 'Carey act' . . . making a conditional grant of certain lands in the arid land states classified as desert lands under the national desert land act . . . to be patented to the several states under certain conditions . . . which said act had theretofore been accepted by the legislature of the state of Idaho by the act of 1899 . . . ." *Pierson v. Loveland*, 16 Idaho 628, 630-31, 102 P. 340, 341 (1909) (emphasis added).

F. Idaho's "Permissible Place Of Use" Statutes Contradict ECIC's Argument That The 15 Inches Are Dissociated From The 15 Acres

Ignoring its own Articles of Incorporation, Bylaws, and Idaho law, ECIC argues that the SRBA partial decree for WR 37-863E sanctioned the dissociation of water from the 15 acres. "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 [37-863E] 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" used in Eagle Creek's Articles referencing where the Water Right is appurtenant." App. Br. at 13. What ECIC appears to be arguing is the permissible place of use ("PPU") referenced in the SRBA partial decree for WR 37-863E was intentionally claimed by ECIC in the adjudication as an expression of its Articles of Incorporation that dissociated land from water. As explained above, the Articles of Incorporation did not sever water from the lands of ECIC's shareholders who put the water to actual beneficial use. To argue that the PPU is a recent interpretation of this principle is an unlawful attempt to cast ambiguity upon WR 37-863E and completely ignores how the right was partially decreed in the SRBA.

According to this Court: "Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. . . . Interpreting an ambiguous term is an issue of fact." *In re Distribution of Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.)*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (hereinafter *Rangen*). Here, WR 37-863E is clear on its face, meaning it is not ambiguous. In the place of use element ("POU") for WR 37-863E, "143.9" acres can be irrigated. Pltf. Ex. 49 at 4. Since water is only appurtenant to lands that receive it, I.C. § 42-219, and only 143.9 acres are identified as the POU, ECIC's argument that

something greater than 143.9 acres have an appurtenant water right is factually and legally incorrect. As will be explained in the next section, ECIC expressly claimed the 15 acres within the 143.9-acre POU. Def. Ex. AA; Def. Ex. BB.

ECIC attempts to add a layer of ambiguity by pointing to the PPU that is allowed through WR 37-863E. The PPU concept is contained in the textual description of the POU element: "This right is limited to the irrigation of 143.9 acres within the boundary of the Eagle Creek Irrigation Company . . . . The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h)." *Id*. (emphasis added). The plain language of the PPU does not support ECIC's argument that AC&CE's 15 acres are not entitled to the continued delivery of 15 inches of water from Eagle Creek as represented by the 15 shares.

Idaho Code § 42-202B(2) states:

> "Digital boundary" means the boundary encompassing and defining an area consisting of or incorporating the place of use or permissible place of use for a water right prepared and maintained by the department of water resources using a geographic information system in conformance with the national standard for spatial data accuracy or succeeding standard.

I.C. § 42-202B(2) (emphasis added).

Idaho Code § 42-1411(2)(h) states:

> a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except that the place of use may be described using a general description in the manner provided under section 42-219, Idaho Code, which may consist of a digital boundary as defined in section 42-202B, Idaho Code, if the irrigation project would qualify to be so described under section 42-219, Idaho Code[.]

I.C. § 42-1411 (emphasis added).

Idaho Code § 42-219 states:

(2) If such use is for irrigation, such license shall give a description, by legal subdivisions, of the land which is irrigated by such water, except that the general description of a place of use described in accordance with subsection (5) or (6) of this section may be described using a digital boundary, as defined in section 42-202B, Idaho Code.

. . . .

(6) For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder. For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights.

(7) Subject to other governing law, the location of the acreage irrigated within a generally described place of use, as defined in accordance with subsections (5) and (6) of this section and as filed with the department pursuant to section 43-323, Idaho Code, may be changed without approval under the provisions of section 42-222, Idaho Code. However, the change shall not result in an increase in either the rate of flow diverted or in the total number of acres irrigated under the water right and shall cause no injury to other water rights. If the holder of any water right seeks to challenge such a change, the challenge may only be brought as an action initiating a contested case before the department, pursuant to the administrative procedure act, chapter 52, title 67, Idaho Code. Nothing in this section shall be construed to grant, deny or otherwise affect an irrigation district's authority to deliver water to areas outside the boundaries of such district.

I.C. §§ 42-219(2), (6), (7) (emphasis added).

The PPU for WR 37-863E does nothing more than allow the beneficial users of the right – the shareholders – to move their water, as represented by the shares, within the boundary of ECIC. The PPU does not allow ECIC to deprive its shareholders of the ability to use their water right, evidenced by their shares. It is the shareholders who divert and use the water on the land they irrigate. To claim WR 37-863E is "appurtenant to Eagle Creek's permissible place of use (*i.e.*, the total acreage within the boundary of Eagle Creek), totaling approximately 194 acres" contradicts the plain language of the right itself and the requirements in I.C. §§ 42-202B(2), -

219(6), -219(7), and -1411(2)(h).[15] ECIC does not own the land, and thus, does not decide where the water is put to beneficial use.

In addition to being consistent with the plain meaning of the statutes, AC&CE's understanding of the PPU is not without foundation. Sitting in his capacity as a district judge in Camas County, the Honorable Eric J. Wildman recently reviewed the PPU as it related to the appurtenancy of shares in an irrigation company. *Cash v. Cash*, Fifth Jud. Dist., Camas County, Case No. CV-2016-02, *Order Denying Petitioner's Motion for Reconsideration* (Oct. 13, 2017) (hereinafter "*Cash*").[16] While possibly unusual to cite a district court decision in a response brief to this Court on appeal, the fact must not be lost that Judge Wildman, since 2009, has been the presiding judge of the SRBA; and, from 1999 until his appointment to the bench in 2009, Judge Wildman was the staff attorney for the SRBA. Idaho State Bar Water Law Section ed., *Through the Waters – An Oral History of the Snake River Basin Adjudication* 8 (2014). Clearly, Judge Wildman has experience and insight into the laws governing the adjudication, making his views persuasive. Based on *Cash*, ECIC's attempted argument regarding the PPU is inconsistent with Idaho law.[17]

In *Cash*, Judge Wildman was reviewing an ownership dispute between Philip Cash and Judy Cash over 280 shares of stock "in the Twin Lakes Reservoir & Irrigation Company . . . ."

[15] These sections of Title 42, Idaho Code were enacted some thirty years after ECIC incorporated itself in 1973; thus, ECIC's incorporators could not have been thinking about a PPU in the context of the "lands" referred to in the Articles of Incorporation. Idaho Code § 42-1411 was added in 1986, but the ability to claim a digital boundary in subsection (2)(h) was not added until 2002. 1986 Idaho Sess. Laws 558; 2002 Idaho Sess. Laws 874. Idaho Code § 42-202B was added in 1996, but the language allowing for a digital boundary in subsection (2) was not added until 2002. 1996 Idaho Sess. Laws 967; 2002 Idaho Sess. Laws 870. Idaho Code § 42-219 was amended in 1998 to allow for irrigation organizations under 25,000 acres with 5 or more users to give a general lands description as the place of use, but the language allowing for a digital boundary in subsection (2) with cross-reference to subsection (6) was not added until 2002. 1998 Idaho Sess. Laws 1065; 2002 Idaho Sess. Laws 871-72. ECIC would have to have been clairvoyant in 1973 to know what the Legislature would do in 2002.

[16] The *Cash* decision is included as an addendum to this brief.

[17] It is worth noting that Judge Wildman issued the SRBA partial decree for WR 37-863E. Pltf. Ex. 49 at 2, 5.

Cash at 1. In the SRBA, Twin Lakes Reservoir & Irrigation Company ("Twin Lakes") was partially decreed water right no. 37-13120. *Id*. at 2. As to its POU, Twin Lakes' shareholders were able to irrigate 4,544 acres within a PPU of approximately 7,960 acres. *Id*. at 4. In the litigation, Judy claimed, based on a 2002 quitclaim deed from Philip conveying to her half the real property, she was entitled to half of the Twin Lakes shares, due to the fact that her half of the property was located within the Twin Lakes PPU. Citing *Ireton*, Judge Wildman agreed that shares of stock in an irrigation company "convey with the land on which they are used." *Id*. at 3. However, Judge Wildman disagreed with Judy's PPU argument, linking his conclusion to the evidence showing Judy had never beneficially used the shares on her half of the land, resulting in no real property appurtenance:

> It is thus the Petitioner's position that she is entitled to half of the shares since the decreed place of use identified in water right number 37-12120 encompasses approximately "200 acres of Judy Cash's property and 200 acres of Phil Cash's property." The Court disagrees.
>
> The Idaho legislature has passed special laws regarding entities like the Twin Lakes Reservoir & Irrigation Company that deliver and supply irrigation water to water users. For instance, it has directed that water right licenses and decrees issued to such entities need not describe the place of use in the same manner of other irrigation water rights. I.C. §§ 42-219(2), (5) & (6), 42-1412(6) & 42-1411(2). On the one hand, a typical irrigation water right must include a legal description of the place of use setting forth "the number of irrigated acres within each forty (40) acre subdivision." I.C. §§ 42-1412(6) & 42-1411(2). The acres specified in such a legal description must have been actually irrigated. The use of water authorized under a typical irrigation right is thus tied to the acreage identified in the place of use.
>
> On the other hand, water rights issued to a qualifying delivery entities may include a place of use that describes the entities' service area with a "digital boundary."[] I.C. §§ 42-219(2), (5) & (6), 42-1412(6) & 42-1411(2). A digital boundary is "the boundary encompassing and defining an area consisting of or incorporating the place of use *or a permissible place of use* for a water right . . . using a geographic information system in conformance with the national standard for spatial data accuracy or succeeding standard." I.C. § 42-202B(2) (emphasis added). Thus, although water rights issued to qualifying delivery entities may identify the total number of permissible acres that *may* be irrigated within the applicable service area, they do not identify which acres are actually irrigated within that service area. In

> this respect, they differ from a typical irrigation water right which identifies the acres that are actually irrigated. The delivery entity and its shareholders may move shares, and the water represented by those shares, around within the place of use without going through an Idaho Code § 42-222 transfer proceeding so long as the delivery entity's regulations for such movements are complied with.
>
> The Petitioner's argument that all acres in the service area of the Twin Lakes Reservoir & Irrigation Company have appurtenant shares associated with them is practically unworkable and legally incorrect. It is common for the total service area of a delivery entity to include far more acreage than can be irrigated under the associated water right. Such is the case here. The water right on which the Petitioner relies allows up to 4,533 acres within the service area to be irrigated. However, the service area of the Twin Lakes Reservoir & Irrigation Company is approximately 7,960 acres, which is far larger than 4,544 acres. Rather, to determine whether shares are conveyed with a particular piece of land, the Court looks to whether the shares were historically used to irrigate that land. Further, it is not uncommon for a shareholder who holds other water rights to lease his unused shares to another water user within the service area. As a result, the shares may have never been applied in part or in total to the lands owned by the shareholder. It follows that the Petitioners' [sic] argument that she is entitled to the 140 shares simply because the land she acquired is located within the place of use identified in water right number 37-13120 must be denied.
>
> . . . .
>
> In his decision, Judge Elgee properly reviewed the record to determine where the 280 shares have historically been used. He determined that no portion of the shares have been applied to the property that was acquired by the Petitioner in 2002. As a result, he found the Petitioner had no lawful claim to any of the shares.

Cash at 3-5 (internal footnotes omitted) (italics in original) (emphasis added).

Here, there is no dispute the 15 acres are located within the ECIC POU/PPU. Aug. R. at 494. Furthermore, there is no dispute the 15 acres have been historically irrigated by AC&CE and its predecessors with 15 inches from Eagle Creek. *Memorandum Decision* at 2. Therefore, consistent with *Cash*, and because the Eagle Creek water, represented by the 15 shares, has been and continues to be put to beneficial use on the 15 acres, AC&CE acquired an appurtenant right when it purchased the property.

G. ECIC's Own Actions During The Snake River Basin Adjudication Eliminate Any Ambiguity That The 15 Shares Are Appurtenant To the 15 Acres

To the extent any ambiguity remains as to the meaning of the 143.9-acre POU and associated PPU, it is resolved through ECIC's own actions in the SRBA. *Rangen* at 807, 367 P.3d at 202 ("Interpreting an ambiguous term is an issue of fact."). On December 19, 2006, IDWR received from ECIC an amended claim to SRBA subcase no. 37-863E ("2006 Amended Claim"), increasing the POU from 129.3 acres to 143.9 acres. Def. Ex. AA.[18] The 2006 Amended Claim was signed by ECIC's attorney, acknowledging "the statements contained in the foregoing document are true and correct." Def. Ex. BB at 3 (emphasis added).

The 2006 Amended Claim plainly shows ECIC was precisely claiming the 143.9 acres "owned by the shareholders," *id*. at 2, ln. 14, with specific reference to each irrigated property in Table 1, and their shareholders' points of diversion in Table 2, Def. Ex. AA at 2. Particular to the 15 acres at issue in this proceeding, they are described as the "15.45" acres in the NENE of Section 14, with a point of diversion described as "EC-2[,] NENE Sec 14[,] Enright." *Id*. at 2; *Def. Ex. BB* at p. 1, ln. 4, at p. 2, ln. 10. No PPU was claimed by ECIC. *See* Def. Ex. AA and BB.

If Table 1 and Table 2 were somehow unclear, ECIC's engineer prepared an "aerial photo analysis [of] the irrigated area in each 40 acre tract" to show the lands within ECIC that were claimed. Def. Ex. AA at 1. The aerial analysis was enclosed with the amended claim. *Id*. at 3 ("Enclosure: Shp. File Claim 37-863E"). The 15 acres are located in the far northeastern corner

[18] The amendment increased the number of irrigated acres from "129.3," Pltf. Ex. 37 at 2, to "143.9," Def. Ex. BB at 2, ln. 10. The place of use amendment was described as necessary in order to include the 14 acres and associated "14 shares of Robert Steven." Pltf. Ex. 39 at 1. *See also* Def. Ex. AA at 1 ("[I]n 2002 the amended claim did not include the land that is irrigated by Eagle Creek Irrigation Co. shares and held by Robert G. Stevens. Mr. Stevens owns 14 shares in the Eagle Creek Irrigation Co. This land has historically been serviced by the Eagle Creek Irrigation Co. irrigation system and should be included under water right 37-863E.").

of the ECIC boundary, is the most upstream privately owned parcel within the ECIC service area, and specifically claimed by ECIC in the SRBA. Def. Ex. BB at 4; Aug. R. at 494.[19] The 143.9 acres is what was partially decreed in the SRBA to WR 37-863E as the POU, Pltf. Ex. 49 at 4 ("Place of Use: 143.9 acres total"), and is clearly within the PPU, *compare* Aug. R. at 494 (ECIC Shp. File Claim) *with* Pltf. Ex. 49 at 3 ("Water Service Area Boundary for Eagle Creek Irrigation Co."). For ECIC to argue the 15 acres do not have an appurtenant water right directly contradicts the 2006 Amended Claim in the SRBA and the partial decree for WR 37-863E. By filing the 2006 Amended Claim, ECIC represented to the SRBA that the claim was "true and correct." For ECIC to now argue against the 2006 Amended Claim goes directly against the statements made in the SRBA and cannot stand.[20]

H. ECIC's Articles Of Incorporation, Bylaws, And Meeting Minutes All Show Water Was Sold As An Appurtenance To The Land Of Its Shareholders

By choosing to organize itself as a non-Carey Act company – a choice that was never available – ECIC argues it knowingly created a different class of water rights, ones that are not appurtenant to the lands upon which the water is beneficially used: "Absent applicable statutory mandate, courts must look to the governing documents of non-Carey Act companies to determine

[19] The record was corrected to include a color version of the map, which is located at page 494 of the Augmented Record.

[20] Moreover, arguing otherwise shows clear self-dealing. In the SRBA, and as explained previously in this brief, "duplicate" claims were filed by ECIC shareholders for their right to water from Eagle Creek. Pltf. Ex. 33. AC&CE's predecessors filed WR 37-863B in the SRBA for the 15 inches of water represented by the 15 shares that are appurtenant to the 15 acres. The reason for the duplicate claim was ECIC's failure to file any claim in the SRBA, which was later remedied. Def. Ex. Q. ECIC then directed its attorney to address the duplicate claims. Pltf. Ex. 33. At least as to Enright, an AC&CE predecessor, a quitclaim deed was obtained by ECIC's attorney as to any interest Enright had in WR 37-863B. Pltf. Ex. 48. In consideration for signing the quitclaim deed, ECIC expressly represented: "You will, of course, continue to rely on your 15 shares of stock in the Company to receive water out of Eagle Creek to irrigate your property." Def. Ex. U (emphasis added). WR 37-863B, along with the other duplicate claims, were then decreed disallowed order by the SRBA district court in 2010. Def. Ex. V. With disallowance of the duplicate claims, ECIC holds the only partial decree from the SRBA for water from Eagle Creek. To now claim there is no appurtenant water right to the 15 acres, and that AC&CE can no longer "rely on [the] 15 shares of stock in the Company" is contrary to the bargain ECIC struck to remove WR 37-863B from the SRBA.

whether a water right is appurtenant to land belonging to a shareholder." App. Br. at 18. "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. . . . . Since its inception, Eagle Creek has continuously operated with shares not being appurtenant to the real property of its shareholders. R., p. 243." App. Br. at 7.[21]

As a mutual irrigation company, ECIC was entitled to enact rules and regulations. "As is the case with other water corporations, mutual corporations may also 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." *Gasser v. Garden Water Co.*, 81 Idaho 421, 426, 346 P.2d 592, 594 (1959) (emphasis added). The Constitution, Idaho Code, case law, and ECIC's actions in the SRBA expressly tied water to the land of its shareholders as a real property appurtenance. For ECIC to argue its Articles of Incorporation or Bylaws state otherwise violates Idaho water law. However, even accepting ECIC's argument as true, there is no language in those documents stating that shares do not evidence a right to water, or that the right to water is not appurtenant to the actual lands that receive the water.

ECIC's Articles of Incorporation, dated March 7, 1973, Aug. R. at 36, state it was organized in order to "associate its stockholders together for their mutual benefit, and to that end to construct, maintain, and operate a private water system for the distribution of water for domestic and irrigation purposes to its shareholders . . . ." *Id*. at 30 (emphasis added). "[O]nly

[21] ECIC's citation to "R., p. 243" is to the *Affidavit of Everett Davis*. Mr. Davis is the president and a shareholder in ECIC. Aug. R. at 241. In the affidavit, Mr. Davis never makes a statement resembling the proposition claimed on page 7 of Appellant's Brief.

such persons, groups of persons, organizations or corporation who own property in the immediate vicinity of the irrigation system and to which property the corporation can make delivery of water for domestic or irrigation purposes under the contemplated distribution system of the corporation." *Id*. at 32 (emphasis added). *See also id.* at 38. "Persons who meet the[se] provisions . . . shall be entitled to subscribe to and purchase shares of stock of the corporation as provided in the corporation's By-Laws." *Id*. at 32 (emphasis added) *See also id.* at 38. "The corporation will hold all water rights in Trust, and operate the system for the distribution of water primarily for the benefit of the lands to which said water rights are appurtenant." *Id*. at 32 (emphasis added). Adoption of the original Bylaws, dated March 7, 1973, did nothing to alter these terms. *Id*. at 38-46. Since the only class of persons who could subscribe to ECIC were owners of land who could be served with water makes clear the only lands to which a water right could be appurtenant were the lands of the individual shareholders who put the water to actual beneficial use, with the water right held "in Trust" by ECIC for the "mutual benefit" of the shareholders. That ECIC never addresses the requirement of holding the water "in Trust" for the benefit of the shareholders should be fatal to its argument.

To the extent ECIC believes there is room for interpretation against the plain meaning of its original Articles and Bylaws, ECIC's contemporaneous meeting minutes show ECIC was selling water that would be appurtenant to the lands of its shareholders. At the August 23, 1973 special meeting, the minutes show ECIC purchased 207 inches of water from Feldhusen for the price of $5,175. Pltf. Ex. 9 at 2. As explained in the minutes, only those "owners having land accessible" were offered to purchase water. *Id*. (emphasis added). The minutes further show those persons who met the criteria of owning land were sold "water . . . for Fifty Dollars ($50.00) per inch, Twenty-five Dollars ($25.00) of said amount going to reimburse the corporation for the

purchase of said water from John S. Feldhusen and the additional $25.00 per inch to be used for improvements and maintenance of the water system . . . ." *Id*. (emphasis added). Land owners who became shareholders "want[ed] and need[ed] their water." Pltf. Ex. 11 (emphasis added). Therefore, the only lands to which a water right could become appurtenant were the lands of its shareholders who put the water to actual beneficial use, with the price per inch used to reimburse ECIC for purchasing the water right from Feldhusen, as well as for improvements and maintenance of the system.[22]

Arguing that AC&CE does not have a water right that is appurtenant to its 15 acres is in violation of Idaho law, contradicts the plain language of the Articles of Incorporation, the Bylaws, and the meeting minutes explaining ECIC's actions.

I. ECIC's Argument Regarding The 1991 Resolution Is Waived Or Moot

Lastly, despite AC&CE having actual possession of the 15 shares, ECIC argues the 15 shares were forfeited, or "reverted to Eagle Creek as treasury stock" due to a 2015 private agreement with Enright. App. Br. at 23. This issue has been waived or is moot. An issue is waived "if an appellant does not assert his assignments of error with particularity . . . and support his position with sufficient authority, these assignments of error are too indefinite to be heard by the Court." *Guzman v. Piercy*, 155 Idaho 928, 935, 318 P.3d 918, 925 (2014). An "issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect

[22] The same can be said from the meeting minutes during the pendency of the SRBA and ECIC's claim to WR 37-863E. In the 1999 meeting, shareholders were "reminde[d] of the value of their water rights." Pltf. Ex. 26 (emphasis added). In the 2001 meeting minutes, and in response to the ECIC claim filed in the SRBA, it was stated: "All shareholders will need to use their water and document such use, photos with dates." Pltf. Ex. 32 at 1 (emphasis added). In 2003, the need for shareholders to put their water to beneficial on their lands was reiterated: "Resumption of use on all claimed irrigation acres will be a big factor in determining IDWR's recommendation on the water right to the [SRBA] court. Each shareholder should document water use with dated photos and narrative." Pltf. Ex. 35 at 2 (emphasis added). Clearly, in order to support the claim to WR 37-863E, water from Eagle Creek, represented by shares in ECIC, was being put to beneficial use on the lands owned by the shareholders.

upon the outcome." *Idaho Property Owners Ass'n., Inc. v. Syringa Gen. Hosp. Dist.*, 119 Idaho 309, 315, 805 P.2d 1233, 1239 (1991).

Here, after opening arguments at the November 15, 2017 trial, ECIC and AC&CE entered into a *Settlement Agreement*. To settle the litigation, "ECIC shall forthwith issue fifteen (15) shares of stock to A.C. & C.E., dated 9/8/2011, with no restrictive legends on the shares, and shall be issued in the same form as if issued on 9/8/2011." Aug. R. at 490 (emphasis added). September 8, 2011 corresponds with the date AC&CE purchased the 15 acres. *Id*. at 361-62. In consideration for issuance of the 15 shares, AC&CE agreed to be "bound by the 1993 Enright Agreement," "to line" certain sections of ditch on the 15 acres based on certain conditions, and to "pay the outstanding assessment of $750." *Id*. at 490. ECIC agreed it would not "levy any assessments against A.C. & C.E. for the attorney fees and costs as a result of this litigation." *Id*. The *Settlement Agreement* was attached and incorporated with specific reference thereto in the district court's *Judgment*. *Id*. at 487-90. By failing to cite any law to support the legal validity of the 1991 Resolution, *Gasser* at 426, 346 P.2d at 594 (mutual water companies are entitled to enact "rules and regulations not in violation of law"), and without discussing ECIC's issuance of the 15 shares and AC&CE's possession of the same, the issue has been waived. Alternatively, because ECIC kept its end of the bargain and issued the 15 shares with AC&CE in possession of the same, there is no justiciable controversy regarding the 1991 Resolution, rendering the issue moot.

Even if the issue has been preserved, ECIC's claim that the 15 shares were forfeited is simply incorrect. ECIC claims its original Bylaws were amended in 1991 through resolution ("1991 Resolution"). The 1991 Resolution declared a forfeiture of stock if "such stockholder shall fail to apply to transfer his shares of the Company within sixty (60) days of the date 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." App. Br. at 13. ECIC cites the 1991 Resolution for the proposition that the 15 shares were forfeited when "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 . . . the 15 Shares were forfeited and reverted to Eagle Creek as treasury stock." App. Br. at 22-23 (emphasis in original).

Here, ECIC, by its own admission, was an improperly formed corporation when it purportedly enacted the 1991 Resolution, resulting in a provision that could not have been put into force and effect. On October 27, 2000, ECIC received a letter from a shareholder's attorney regarding difficulty with ECIC, asking:

> When were the current directors elected by the shareholders? Please provide me with copies of the minutes or any other record of that shareholder meeting.
>
> . . . .
>
> As specifically provided in Article VI, Section 4 of its Articles of Incorporation, the Company holds its water rights "in Trust" for the benefit of the shareholders. As you well know, the shares of stock owned by each stockholder represents an extremely valuable asset and the directors and officers of the Company are duty bound to protect and preserve that asset. Furthermore, they must do so pursuant to proper corporate procedures. Mr. Friedman hereby demands that a meeting of the shareholders be properly noticed and held as soon as possible to elect directors and discuss the current status of the Company's water right and how it should be best use in the future for the benefit of all of the shareholders.

Pltf. Ex. 78 at 1-2 (emphasis added).

On November 1, 2000, an attorney representing ECIC responded, agreeing ECIC had been improperly constituted for the past 27 years and could not take any actions to affect the shareholders:

> On behalf of Eagle Creek Irrigation Company, I have reviewed correspondence from you relative to the Friedman water transfer. In your most recent letter dated October 27, 2000, you asserted that the "board" was improperly constituted because there has been no shareholders' meeting conducted pursuant to the Company's By-laws at which board members and officials are elected. After review the By-laws, I am inclined to agree with your analysis regarding the composition of the board and election of officers. My review of the Company's minutes indicates that the last shareholders' meeting took place in 1973, and that "board" members have been somehow designated throughout the previous twenty-seven (27) years to conduct business of the Company.
>
> You have demanded that no action be taken by the Company on [Friedman] Transfer No. 5748 until a shareholders' meeting is conducted. I believe that request to be appropriate in light of the foregoing, and have advised Everett Davis, the acting "President" of the board, to refrain from taking any action. It is also my belief that the pending application signed by Mr. Davis as secretary of the Company is flawed based upon the argument that you have asserted in your letter regarding the invalidity of "elected" board members. Until such time as authority as granted to a properly constituted board, it doesn't seem that there is anyone who can act on behalf of the Company to affect its property rights, i.e., a transfer of its water right.

Def. Ex. B at 1 (emphasis added).

Without a validly elected board from 1973 until at least some time after the November 1, 2000 letter, the 1991 Resolution fails as a matter of law and cannot be used against AC&CE and its predecessors to declare a forfeiture.[23]

Lastly, even assuming for the sake of argument the 1991 Resolution was validly enacted, it could not affect the 15 shares, due to the fact that the shares passed as an appurtenance with the 15 acres, *Bagley I* at 803, 241 P.3d at 976; *Bagley II* at 808, 241 P.3d at 981, and are in

[23] ECIC holds WR 37-863E "in Trust" for its shareholders. Aug. R. at 32 (emphasis added). As trustee of WR 37-863E, ECIC must be extremely careful in claiming forfeiture. Without shareholders who own land that can take delivery of WR 37-863E and put the water to beneficial use, the water right itself is subject to forfeiture. I.C. § 42-222(2). "It is true, as intimated by this court in *Hard v. Boise City Irr. Co.*, 9 Idaho 589, 76 P. 331, 65 L.R.A. 407, that the appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without water consumers. In other words, it takes the water user, applying the water to a beneficial purpose, to enable a ditch company that has appropriated waters for sale, rental or distribution, to continue the diversion of the water. If it should cease to have water consumers or users, and cease to apply the water to a beneficial use, its right to divert the water would cease." *Farmers Co-Operative* at 458, 94 P. at 763 (emphasis added). When ECIC prevents its shareholders from diverting water, it arguably loses any defense to forfeiture that exists under Idaho law. I.C. § 42-223(7). Allowing any portion of this trust asset to be forfeited would be in violation of its duty as trustee.

AC&CE's physical possession. Any restriction preventing the transfer of the 15 shares as appurtenant to the 15 acres is illegal and cannot stand as a matter of law. *Gasser* at 426, 346 P.2d at 594; *see also Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 954, 812 P.2d 253, 261 (1991) ("the law abhors a forfeiture and all intendments are against a forfeiture").

J. As A Matter Of Public Policy The 15 Shares That Represent The Right To Divert 15 Inches Are Appurtenant To The 15 Acres

ECIC "owns no real property," App. Br. at 3, yet claims it has a right to forfeit AC&CE's right to use water on the 15 acres, evidenced by the 15 shares, despite the fact that the record conclusively shows the 15 inches has historically and continues to be put to beneficial use. In Idaho it is "a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law." *Albrethsen v. Wood River Land Co.,* 40 Idaho 49, 60, 231 P. 418, 422 (1924). The reason for this public policy is rooted in the fact that Idaho is a prior appropriation state, mandating diversion and actual beneficial of water use in order to sustain a water right. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007). AC&CE is the only party in this case who can divert and put water to beneficial use; thus, preserving the continued use of WR 37-863E. Mr. Claggett, recognizing the public policy implications of allowing entities like ECIC to unilaterally revoke their shareholders' right to water, insisted on inclusion of Idaho Const. art. XV, §§ 4, 5, with the Legislature enacting I.C. §§ 42-914, 42-915. These provisions of Idaho law ensure a consumer's guaranteed right to water once the water has been put to beneficial use. If ECIC were to prevail, it would turn these principles on their head, allowing irrigation companies to pull the water rights out from under the feet of their shareholders. Shareholders' water rights would become a commodity that can be sold to the highest bidder, leaving dry historically irrigated lands. This is not the policy of the State of Idaho.

K. AC&CE Is Entitled To An Award Of Its Costs And Attorney's Fees On Appeal

AC&CE raises as an issue on appeal its claim for an award of costs on appeal pursuant to I.A.R 40, and a claim for an award of attorney's fees on appeal pursuant to I.A.R. 41. AC&CE believes that this Court will ultimately affirm the decision of the district court making AC&CE the prevailing party on appeal. Idaho Code § 12-121 allows a prevailing party to obtain an award of attorney's fees if "the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.C. § 12-121. An additional basis for support in an award of AC&CE's costs and attorney's fees is found in I.C. § 42-914: "Any person, association or corporation violating any of the provisions of this section, shall be liable for all damage to any party or parties injured thereby, which damage shall be determined by the proper court." "An award of attorney fees on appeal pursuant to I.C. § 12-121 is proper only where this Court is left with the abiding belief that the appeal was 'brought or pursued frivolously, unreasonably, and without foundation.' Where an appeal turns on questions of law, an award of attorney fees under [I.C. 12-121] is proper if the law is well-settled and the appellant has made no substantial showing that the district court misapplied the law." *Electrical Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 828, 41 P.3d 242, 256 (2001) (internal citations omitted).

Here, the law is well-settled. ECIC ignores the Court's decisions in *Bagley*, the Idaho Constitution, Idaho Code, Idaho case law interpreting the same, its own Articles of Incorporation, Bylaws, meeting minutes, the way in with WR 37-863E was claimed in the SRBA, the plain language of the SRBA partial decree, and the *Settlement Agreement* in order to advance this appeal. AC&CE has demonstrated, through this analysis, that there is no basis upon which ECIC can stand in its argument that the district court erred in deciding that, when AC&CE purchased the 15 acres it acquired a 15-inch appurtenant water right, represented by the 15

shares. Therefore, this appeal has been pursued frivolously, unreasonably or without foundation. I.C. § 12-121. By having to defend its water rights against the very company that holds WR 37-863E "in Trust," Aug. R. at 32 (emphasis added), AC&CE's reasonable costs and attorney's fees on appeal should awarded against ECIC. I.C. § 42-914.

V. CONCLUSION

The decision of the district court, which is correct in its findings of fact and conclusions of the law, must be affirmed. ECIC's formative documents, including its meeting minutes, demonstrate ECIC holds bare legal title in WR 37-863E "in Trust" for the benefit of its shareholders. Because only the shareholders own land upon which WR 37-863E can be put to beneficial use, the water right is appurtenant to their land, which includes AC&CE's 15 acres. As explained by the Constitution, Idaho Code, and this Court's prior decisions, once the 15 inches was put to beneficial use on the 15 acres, it became appurtenant, with ECIC prevented from disrupting AC&CE's continuing, guaranteed right to water. Any argument that the 15 shares could have been forfeited is directly opposed to Idaho law, or has been waived and/or is moot. Based on the foregoing, the district court should be affirmed, and AC&CE should be entitled to an award of attorney's fees due to ECIC's frivolous pursuit of this appeal.

RESPECTFULLY SUBMITTED THIS 28th day of August, 2018.

MCHUGH BROMLEY, PLLC

/s/ Chris M. Bromley
Chris M. Bromley
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August, 2018, I served a true and correct copy of the foregoing document upon the following persons via the method indicated below:

Ed Lawson
James R. Laski
Heather E. O'Leary
Lawson Laski Clark & Pogue, PLLC
675 Sun Valley Rd., Ste. A
P.O. Box 3301
Ketchum, ID 83340
eal@lawsonlaski.com
heo@lawsonlaski.com

[X] iCourt E-file – Electronic Service

David M. Penny
Cosho Humphrey, LLP
1501 S. Tyrell Ln.
P.O. Box 9518
Boise, ID 83701-2527
dpenny@cosholaw.com

[X] iCourt E-file – Electronic Service

/s/ Chris M. Bromley
CHRIS M. BROMLEY

ADDENDUM

Cash v. Cash, Fifth Jud. Dist., Camas County, Case No. CV-2016-02, *Order Denying Petitioner's Motion for Reconsideration* (Oct. 13, 2017)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CAMAS

JUDY CASH, an unmarried woman, Petitioner, vs. PHILIP CASH and DEBRA CASH, husband and wife, and Does 1-5, unknown persons who may claim interest, Respondents.	Case No: CV-2016-02 **ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION**

I.
BACKGROUND

1. On January 26, 2017, Judge Elgee entered *Findings of Fact and Conclusions of Law* in this matter. On May 23, 2017, Judge Elgee entered *Amended Findings of Fact and Conclusions of Law Re: Ownership of Twin Lakes Reservoir & Irrigation Company Shares*. The facts set forth in the two *Findings of Fact* are incorporated herein by reference and will not be repeated. In his *Amended Findings*, Judge Elgee held that Respondent Philip Cash is the sole owner of 280 shares of stock in the Twin Lakes Reservoir & Irrigation Company issued in his name.

2. On August 9, 2017, the Petitioner filed a *Motion* asking the Court to reconsider Judge Elgee's determination with respect to the ownership of the shares.

3. Then, on August 17, 2017, the case was reassigned to this Court following Judge Elgee's retirement.

4. The Respondents oppose the Petitioner's *Motion*. A hearing on the *Motion* was held before the Court on September 29, 2017.

II.
ANALYSIS

This proceeding involves a dispute over the ownership of shares of stock in the Twin Lakes Reservoir & Irrigation Company held by Respondent Philip Cash. Judge Elgee held that Philip Cash is the sole owner of the shares and the water delivered pursuant to those shares. In so holding, Judge Elgee relied upon evidence showing that none of the shares had been applied to the property that was conveyed to the Petitioner in 2002. As a result, he determined that the Petitioner has no lawful claim to the shares or the water represented by the shares. The Petitioner now asks this Court to reconsider Judge Elgee's holding based on new evidence not presented at trial. The new evidence includes a *Partial Decree* issued to the Twin Lakes Reservoir & Irrigation Company in the Snake River Basin Adjudication ("SRBA"). It also includes the *Affidavit of Alonzo Leavell*, who leased the subject property from 1999-2002. Based on this new evidence, the Petitioner asserts she is entitled to 140 of the 280 shares found to be owned by Philip Cash.[1] For the reasons set forth herein, the Court disagrees and denies the Petitioner's *Motion*.

A. The *Partial Decree* does not entitle the Petitioner to 140 shares.

On March 3, 2009, the SBRA District Court issued a *Partial Decree* for water right number 37-13120 to the Twin Lakes Reservoir & Irrigation Company. It permits the Company to divert 60 cfs and/or 19,280 acre feet annually from McKinney Creek for irrigation and irrigation storage purposes. The place of use associated with the water right is defined as the area served by the Company. Although the Company is the holder of the water right, it is its shareholders that ultimately put water under the right to beneficial use. The shareholders' rights to use water are represented by shares of stock. With respect to the Twin Lakes Reservoir & Irrigation Company, one share does not entitle a shareholder to the delivery of a defined quantity of water. Rather, it entitles the shareholder to a pro-rata share of the water that is available in

[1] In her *Motion*, the Petitioner requests on reconsideration "that the 280 shares be divided equally between Petitioner and Counterclaimant." *Petitioner's Motion for Reconsideration*, p.7.

Mormon Reservoir. Thus, the Company does not deliver a set amount of water each year per share. In some years very little or no water is delivered per share due to lack of water supply in Mormon Reservoir.

Phillip Cash acquired stock for 280 shares in the Twin Lakes Reservoir & Irrigation Company in 1998. All 280 shares were issued to Philip Cash in his name. The 2002 quitclaim deed conveying the subject property to the Petitioner is silent as to the shares. Although shares in a delivery entity are not water rights themselves, but rather are personal property, the Idaho Supreme Court has directed they nonetheless convey with the land on which they are used. *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 317, 164 P 687, 689 (1917). It is thus the Petitioner's position that she is entitled to half of the shares since the decreed place of use identified in water right number 37-13120 encompasses approximately "200 acres of Judy Cash's property and 200 acres of Phil Cash's property." The Court disagrees.

The Idaho legislature has passed special laws regarding entities like the Twin Lakes Reservoir & Irrigation Company that deliver and supply irrigation water to water users. For instance, it has directed that water right licenses and decrees issued to such entities need not describe the place of use in the same manner required of other irrigation water rights. I.C. §§ 42-219(2), (5) & (6), 42-1412(6) & 42-1411(2). On the one hand, a typical irrigation water right must include a legal description of the place of use setting forth "the number of irrigated acres within each forty (40) acre subdivision." I.C. §§ 42-1412(6) & 42-1411(2). The acres specified in such a legal description must have been actually irrigated. The use of water authorized under a typical irrigation right is thus tied to the acreage identified in the place of use. Irrigation may not be moved to other acreage under the right without first successfully completing an Idaho Code § 42-222 transfer proceeding.

On the other hand, water rights issued to qualifying delivery entities may include a place of use that describes the entities' service area with a "digital boundary."[2] I.C. §§ 42-219(2), (5) & (6), 42-1412(6) & 42-1411(2). A digital boundary is "the boundary encompassing and defining an area consisting of or incorporating the place of use *or permissible place of use* for a water right . . . using a geographic information system in conformance with the national standard

[2] A digital boundary is "the boundary encompassing and defining an area consisting of or incorporating the place of use or permissible place of use for a water right prepared and maintained by the department of water resources using a geographic information system in conformance with the national standard for spatial data accuracy or succeeding standard." I.C. § 42-202B(2).

for spatial data accuracy or succeeding standard." I.C. § 42-202B(2) (emphasis added). Thus, although water rights issued to qualifying delivery entities may identify the total number of permissible acres that *may* be irrigated within the applicable service area, they do not identify which acres are actually irrigated within that service area. In this respect, they differ from a typical irrigation water right which identifies the acres that are actually irrigated. The delivery entity and its shareholders may move shares, and the water represented by those shares, around within the place of use without going through an Idaho Code § 42-222 transfer proceeding so long as the delivery entity's regulations for such movements are complied with.

The Petitioner's argument that all acres in the service area of the Twin Lakes Reservoir & Irrigation Company have appurtenant shares associated with them is practically unworkable and legally incorrect. It is common for the total service area of a delivery entity to include far more acreage than can be irrigated under the associated water right. Such is the case here. The water right on which the Petitioner relies allows up to 4,533 acres within the service area to be irrigated. However, the service area of the Twin Lakes Reservoir & Irrigation Company is approximately 7,960 acres, which is far larger than 4,544 acres.[3] Rather, to determine whether shares are conveyed with a particular piece of land, the Court looks to whether the shares were historically used to irrigate that land.[4] Further, it is not uncommon for a shareholder who holds other water rights to lease his unused shares to another water user within the service area. As a result, the shares may have never been applied in part or in total to the lands owned by the shareholder. It follows that the Petitioners' argument that she is entitled to 140 shares simply because the land she acquired is located within the place of use identified in water right number 37-13120 must be denied.

[3] To say that shares convey with land whether that land was historically irrigated or not, just because it is located within the service area of the delivery entity, would result in the diminishment and dilution of the ability to properly irrigate land within the service area.

[4] It is common for a delivery entity to restrict where a shareholder may use the water represented by his shares. This can occur when the delivery entity identifies in the shares themselves the acreage that may be irrigated by those shares. In such cases, the shares convey with the land identified within the shares. However, this is not a practice followed by the Twin Lakes Reservoir & Irrigation Company. The Company allows its shareholders to determine where to use the shares within the service area, and the shares themselves do not identify the acreage where they can be used.

B. The *Affidavit of Alonzo Leavell* does not entitle the Petitioner to 140 shares.

In his decision, Judge Elgee properly reviewed the record to determine where the 280 shares have historically been used. He determined that no portion of the shares have been applied to the property that was acquired by the Petitioner in 2002. As a result, he found the Petitioner had no lawful claim to any of the shares. The Petitioner now presents the Court with new evidence in the form of the *Affidavit of Alonzo Leavell*, which she asserts establishes that in 2002 a portion of the shares were used on some of the acres she acquired.

In his *Affidavit*, Alonzo Leavell testifies that "during the year 2002, the property was *partially irrigated* with water from Mormon Reservoir pursuant to shares of the Twin Lakes Reservoir & Irrigation Co., owned by Phil Cash." The affiant provides no further details. There is no assertion as to how many shares out of the 280 were used for this purpose. Nor is there an assertion as to how many acres were irrigated with those shares or for how long. Indeed, although the Petitioner asks for 140 shares on reconsideration, neither she nor Mr. Leavell assert that 140 shares were used to irrigate property she acquired in 2002. Given the paucity of information and detail provided to the Court, it cannot find grounds on which to disturb Judge Elgee's prior ruling. The Court therefore finds that the Petitioner has failed to carry her burden as the moving party and holds that her *Motion for Reconsideration* must be denied. *See e.g. Johnson v. Lambros*. 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct.App. 2006) (holding that a movant pursuing a motion has the burden of bringing forth new information on which the court could change its previous ruling).

III.
ORDER

Therefore, IT IS ORDERED that the Petitioner's *Motion for Reconsideration* **is hereby denied.**

Dated October 13, 2017

ERIC J. WILDMAN
District Judge

Certificate of Service

I HEREBY CERTIFY that on this 13th day of October, 2017, a true and correct copy of the foregoing ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION was delivered to:

Travis L. Thompson
Baker Rosholt & Simpson
P.O. Box 63
Twin Falls, Idaho 83303-0063

___ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
X Telecopy - e-mail

Daniel R. Beck
Fuller & Beck Law Offices
P.O. Box
Idaho Falls, Idaho 83405-0935

___ U.S. Mail, Postage Prepaid
___ Hand Delivered
___ Overnight Mail
X Telecopy e-mail

S. Weston
Deputy Clerk