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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

EAGLE CREEK IRRIGATION COMPANY, INC., an Idaho corporation, **Plaintiff/Appellant,** **vs.** **A.C. & C.E. INVESTMENTS, INC., a California corporation,** **Defendant/Respondent.** **A.C. & C.E. INVESTMENTS, INC., a California corporation,** **Counter-claimant,** **vs.** **EAGLE CREEK IRRIGATION COMPANY, INC., an Idaho corporation, JOHN DOES 1-100 and ENTITIES A-Z,** **Counter-defendant.**	**Supreme Court No. 45675**

APPELLANT'S REPLY BRIEF

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

The Honorable Jonathan Brody, District Judge presiding.

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II. INTRODUCTION

AC&CE Investments, Inc. ("AC&CE") chose not to address Eagle Creek Irrigation Company, Inc.'s ("Eagle Creek") appeal of the trial court decision. Instead, AC&CE restated the issues on appeal and constructed an argument designed to obfuscate. AC&CE's construct is based on theories not raised in the trial court, based on facts and evidence not in the record and reliant on an unpublished and uncitable lower court decision as well as constitutional and public policy theories not previously raised. AC&CE's argument is also internally contradictory to basic tenants of contract and corporate law.

III. ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

A. THE ISSUE ON APPEAL IS WHETHER THE 15 SHARES WERE APPURTENANT TO THE PROPERTY AND TRANSFERRED TO AC&CE WHEN IT ACQUIRED THE PROPERTY.

In its brief, AC&CE improperly reframes the issue on appeal to be whether "the district court [was] 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." Respondent's Brief, p. 10. This is an obfuscation of the issue appealed. The issue that this Court is being asked to determine on appeal is: whether the disputed fifteen (15) shares of Eagle Creek stock (the "15 Shares") were appurtenant to the real property (the "Property") that AC&CE purchased at the Trustee's Sale on or around September 8, 2011. This was the only issue addressed by the trial court. AC&CE argues, without authority or explanation, if the water is appurtenant to the Property the shares must also be appurtenant. As set forth herein, there is a long list of cases in Idaho directly on-point, none of which have been overturned, that expressly

establish that shares of stock in non-Carey Act irrigation companies are personal property and not appurtenant to the land unless expressly so-stated in the irrigation company's written policies. Such shares represent a shareholder's right to use a non-Carey Act irrigation company's water, which is different from ownership of the water right. The right to use water, however, is not unrestricted. Instead, it is subject to the irrigation company's reasonable rules and regulations. This law has been consistently applied for decades and is applicable to the case at hand. Thus, this appeal turns on whether the district court erred in applying Carey Act rules to a non-Carey Act company.

B. NON-CAREY ACT COMPANIES ARE DIFFERENT THAN CAREY ACT COMPANIES.

It should be observed that non-Carey Act companies are different than Carey Act companies. While both types of companies are engaged in the business of storing and/or transporting irrigation water for use by their shareholders, the legislature and Idaho courts distinguish the two types of companies. Specifically, Carey Act companies are recognized as unique creatures in the law that exist by virtue of 43 U.S.C. § 641 and the acceptance of this federal act by the State of Idaho in 1895. IDAHO CODE § 42-2001. In fact, three separate chapters of the Idaho Code are dedicated and apply only to Carey Act companies. *See* Title 42, Chapters 20, 21 and 22 of the Idaho Code. These chapters of the Idaho Code authorized private companies from outside of Idaho to come into the state and construct irrigation systems, thereby profiting from the sale of water. As set forth in Eagle Creek's opening brief, the state enters into contracts with these "construction companies" who, thereafter, sell water rights to landowners.

As recognized by the Court in the *Leland v. Twin Falls Canal Co.* case,

> The contract of the construction company with the state, concerning the water rights appropriated by it for the lands to be reclaimed and settled, provides: 'The sale or contract of the water right to the purchaser shall be a dedication of the water to the land to which the same is applied and the water right so dedicated shall be a part of and relate to the water right belonging to the said system of canals.'

51 Idaho 204, 3 P.2d 1105, 1107 (1931). The appurtenancy of these water rights is codified in Idaho Code § 42-4025 in the Reclamation of Carey Act Lands. Thus, "the company sells and the purchaser buys a water right dedicated to his land." *Id*. In reaching this conclusion, the Court stated:

> It was clearly the intention of the Legislature, as well as the construction company, that the individual contract holder or settlor should be the owner of the water right upon completion of the construction works.

Id. at 1108. Accordingly, shares in a Carey Act company represent the water right sold to and beneficially owned by the landowner. Significantly, the legislature and Idaho courts have only applied this principle to Carey Act companies created under the Reclamation of Carey Act Land, not non-Carey Act companies. With respect to non-Carey Act companies, no similar statute or law exists to establish the appurtenancy of its shares to the land owned by a shareholder.

C. IDAHO CASE LAW ESTABLISHES THAT SHARES OF STOCK IN NON-CAREY ACT IRRIGATION COMPANIES ARE PERSONAL PROPERTY AND NOT APPURTENANT TO LAND.

Even though Idaho courts have consistently distinguished non-Carey Act companies from Carey Act companies, the district court ignored this distinction in rendering its decision. While the district court specifically acknowledged that it was aware of the line of cases standing for the

proposition that shares of stock in non-Carey Act companies are personal property and not appurtenant to land, it then admitted that it was confused as to the state of the law. As a result, it chose to apply the *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) and *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P.687 (1917) cases because they "are more recent, and therefore, this Court finds they are more persuasive and apply here." Clerk's Augmented Record on Appeal ("R."), Aug. R., p. 5, n. 1.

However, the *Joyce* case is not relevant to this appeal because it does not involve water shares in either a Carey Act or non-Carey Act company. Instead, that case simply reaffirmed the long-standing principal that water rights are real property appurtenant to land which pass with deeds unless expressly reserved. Thus, there was no need to discuss or consider that case. Additionally, as explained below, the district court misinterpreted and misapplied the *Ireton* case. The district court's confusion did not relieve it from its obligation to follow the cases precedent which hold that shares of stock in non-Carey Act companies are personal property and are not conveyed with the land as an appurtenance.

Wells v. Price

For instance, the Court in *Wells v. Price*, 6 Idaho 490, 56 P. 266 (1899) held that shares of stock in an irrigation company did not transfer with land as an appurtenance when the land was sold at an execution sale. The Court made that ruling despite the fact that the land had historically been irrigated by water from the corporation's canal, because the proper procedure to seize the shares and subject them to the satisfaction of the defendant's debts had not been followed.

AC&CE attempts to reframe the holding in *Wells* by stating the issue of appurtenancy is resolved by relying on Section 4 of Article 15 of the Idaho Constitution. Respondent's Brief, p. 20. A&CE quoted the following language from the summary of the appellant's argument contained in the Court's opinion:

> 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 have 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 respondent asked: "What interest has a stockholder in the corporate property? How may it be attached?" *Id*.

Id., p. 20. In fact, the Court rejected that the issue was controlled solely by the Constitution as suggested by the appellant in that case but rather relied on the statutory procedure for transferring shares. Furthermore, AC&CE's reframing of the issue in that case does nothing to change the fact that the Court held that the shares were "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." *Wells*, 6 Idaho __, 56 P. 267.

Watson v. Molden

In *Watson v. Molden*, 10 Idaho 570, 79 P. 503 (1905), which was decided more than one hundred years ago, the Court again held that shares in a mutual irrigation company are personal property. Specifically, the Court held that "[w]henever the capital stock of any corporation is divided into shares and certificates therefore are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate." *Id*. at __, 79 P. 507. Although

AC&CE asserted that the Court's conclusion was solely "[d]ue to the fact that no water could be diverted, let alone put to a beneficial use," that assertion is simply incorrect. Respondent's Brief, p. 21.

Indeed, AC&CE's whole argument is based on its mischaracterization of the following quote:

> 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 __.

Watson, 10 Idaho at __, 79 P. at 504. The foregoing quote, however, was not an actual explanation of the facts and circumstances in the *Watson* case. Instead, the foregoing quote was simply one of the plaintiff's allegations in his complaint, which turned out to be false. Indeed, the defendant admitted in his answer, it was "feasible and practicable to conduct water upon and irrigate every acre and smallest legal subdivision of said 240 acres from the ditches and canals which are established in that locality." *Id.* at __, 79 P. at 505. Thus, the Court's holding that shares of stock in non-Carey Act companies are personal property applies even if water is used to irrigate the land.

Ireton v. Idaho Irr. Co.

Even *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687 (1917), which the district court relied on, recognizes the principle that shares in an irrigation company are not appurtenant to real property. In that case, the Court recognized that shares are only treated as an appurtenance in the context of Carey Act companies or when parties enter into contracts virtually identical to the

terms of a Carey Act company. Although the company in that case was not a Carey Act company, the Court recognized that "by the terms of the contract between the state and [the irrigation company], and of that between [the irrigation company] and [the landowner], the water right was dedicated, and made appurtenant to the land involved herein and none other." *Id.* at 688. The Court further recognized the parties' right to designate the appurtenancy of shares by contractual agreement by stating:

> It is apparent that under the terms of this contract appellant is in no better position than it would have been, had the land been embraced within a Carey Act entry. By the terms of this contract the land, so far as it could be, and the water rights and certificates of stock, were conveyed, or agreed to be conveyed, by way of mortgage, to secure the payment of the sums due to [the irrigation company] from [the landowner].

Id. at 689. Furthermore, the Court determined that "[t]he land in question was not Carey Act land, but was acquired by [the landowner] under the desert land laws of the United States and is adjacent to the Carey Act segregation of [the Carey Act company] and capable of being irrigated only by its system." *Id*. at 688. Based on the contract between the parties and the fact that the Court was treating the water as if it was developed under the Carey Act, *Ireton* reaffirmed the current law that Carey Act water is considered a real property right which is considered an appurtenance.

Despite AC&CE's contrary assertion, the Idaho Supreme Court has continued to distinguish Carey Act companies from non-Carey Act companies since its ruling in *Ireton*. For instance, in *Application of Johnston v. Pleasant Valley Irr. Co., Ltd.*, the Court stated:

> [T]he origin and purpose of Carey Act companies are distinct from those of ordinary water corporations. They are the result of statutory and contractual

> relations between the Federal Government, the State of Idaho, and the construction companies, providing for the permanent reclamation of arid land belonging originally to the Federal Government. They have been generally recognized by the statutes and by the court as forming a distinct class of water corporations.

69 Idaho 139, 145, 204 P.2d 434, 438 (1949).

Likewise, in *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933), the Court clearly recognized the distinction between Carey Act and non-Carey Act companies. In fact, while citing to *Ireton*, the Court in *Bothwell* reiterated that water rights purchased through the Carey Act are real property while shares held in non-Carey Act companies are personal property and not an appurtenance. *Id*.

In this case, there is no dispute that Eagle Creek is a non-Carey Act company. Indeed, the district court properly recognized that "Eagle Creek's water right was severed from the individual parcels of real property by means of the warranty deed granting it the rights to water over its serviceable area." R., Aug. p. 6. Thus, Judge Brody's analysis in this case was headed down the right path until he held that *Ireton* applies to <u>all</u> irrigation companies instead of recognizing that the decision in *Ireton* was based on the terms of the parties' contract, which was virtually identical to the terms of a Carey Act company contract. This misinterpretation renders Judge Brody's conclusion that "such shares of stock pass with title to the land thus making them appurtenant to that land" incorrect. To hold otherwise would mean that non-Carey Act irrigation companies' shares would be taken from the companies and affixed to certain real property even

though these companies, including Eagle Creek,[1] were the parties that were decreed the right to the water in the Snake River Basin Adjudication ("SRBA"). This result would render companies like Eagle Creek meaningless and ineffective because they would not have control over who owned the shares or where, when and how the water that is represented by the shares is applied. Such control is extremely important because non-Carey Act companies, generally, have permissible places of use that are larger than the allowable irrigable acres. Consequently, the exact purpose of non-Carey Act irrigation companies – to protect their water – would be impossible.

Cash v. Cash

AC&CE improperly cites to *Cash v. Cash*, an uncitable and unpublished lower court decision. No. CV-2016-02 (Oct. 13, 2017) (order denying petitioner's motion for reconsideration). Though the reference is inappropriate, Judge Wildman's legal analysis as set forth in that case actually supports Eagle Creek's position. The decision in that case, while relying on *Ireton,* supports the determination that the ownership of the shares, and the water represented by them, remains with the irrigation company, pursuant to its reasonable rules and regulations. Paraphrasing the analysis, Judge Wildman, states:

> The Idaho legislature has passed special laws regarding irrigation companies, such as Eagle Creek, that deliver and supply irrigation water to

[1] In its brief, AC&CE attempts to create ambiguity regarding Eagle Creek's claim in the SRBA by referring to Defendant's Exhibits Q, U, V, AA and BB as well as Plaintiff's Exhibits 33 and 49 and alleging that Eagle Creek never claimed a permissible place of use. Respondent's Brief, pp. 33-34. AC&CE's reliance on these documents, however, is inappropriate because they are not part of the Clerk's Augmented Record. Furthermore, the district court did not adjudicate the alleged discrepancy in Eagle Creek's actions during the SRBA or its permissible place of use. While Eagle Creek does not believe this to be relevant to the issue on appeal, if the Court disagrees, then the case must be remanded to the district court to address these issues.

> their shareholders. 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 water rights. I.C. §§ 42-219(2), (5) & (6); 42-1412(6) and 42-1411(2). As such, water rights for qualifying delivery entities may include a place of use that describes the company's service area within a digital boundary "encompassing and defining an area consisting of or incorporating the place of use or *permissible place of use* for a water right . . .." I.C. 42-202B(2) (*emphasis added*). Thus, water rights issued to qualifying irrigation companies, such as Eagle Creek, may identify the total number of permissible acres that may be irrigated within the applicable service area. In this sense, they differ from typical irrigation rights which identify the acres actually irrigated, to which they are appurtenant.

The delivery company and its shareholders, following their internal rules and regulations, may move the shares, and the water represented by those shares, around within the place of use without going through the Idaho Code § 42-222 transfer proceedings. In his order, Judge Wildman also noted in footnote 4, which is inexplicitly omitted from AC&CE's analysis of the case, that:

> 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 and 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.**

Id., n.4 (*emphasis added*). Similar to the Company relying on Carey Act rules governing conveyance of shares in *Ireton*, Judge Wildman relied on the Company's internal rules in *Cash* to conclude that the owner of the shares, Philip Cash, had the right to convey them as his personal property. Thus, he concluded that simply because a person owned land within a permissible place of use, they were not necessarily entitled to a share of water that could be

applied within that permissible place of use. Rather, the shares transfer based on the rules of the company, and since Philip Cash owned the shares in his name, used the water associated with the shares, and conveyed them in accordance with the Company's rules, the transfer was valid.

The Bagley Decisions are Distinguishable.

AC&CE chastises Eagle Creek for not citing to the *Bagley* decisions[2] and boldly but incorrectly asserts the *Bagley* decisions conclusively establish that when AC&CE bought the Property it acquired the appurtenant water right represented by the 15 Shares. Initially, it must be observed that neither party cited to or relied upon the *Bagley* decisions in moving for or opposing summary judgment below. Eagle Creek did not cite the *Bagley* decisions in its opening brief as they are clearly distinguishable from the instant case and offer no pertinent analysis.

The *Bagley* decisions are unhelpful because they involved water rights appurtenant to land owned by the *Bagleys* and conveyed by warranty deed to Thomason who was obligated to reconvey the land and appurtenant water rights following a default on the purchase contract. Thus, the decisions involved settled law that unless appurtenant water rights are expressly reserved in the deed they are conveyed with the land even if appurtenances are not mentioned. *Joyce Livestock Co. v United States*, 144 Idaho 1, 14, 156 P3d 502 (2007). That principle is neither disputed by Eagle Creek nor applicable to the instant case. In this case, the subject water rights were transferred separately from the underlying land by Feldhusen's conveyance to Eagle Creek in 1973. R., p. 247. At the time of AC&CE's purchase of the Property, the water was no

[2] The *Bagley* decisions include: *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972 (2010) ("*Bagley I*"); *Bagley v. Thomason*, 149 Idaho 806, 241 P.3d 979 (2010) ("*Bagley II*"); *Bagley v. Thomason*, 155 Idaho 193, 307 P.3d 1219 (2013) ("*Bagley III*").

longer appurtenant to the land. *Fed. Land Bank of Spokane v. Union Cent. Life Ins. Co*., 54 Idaho 161, 29 P. 2d 1009, 1011 (1934) (*quoting In re Rice*, 50 Idaho 660, 299 P. 664 (1931)).

AC&CE incorrectly describes the holding in *Bagley I* as affirming the district court decision quieting title to the Bagleys in the land and appurtenant "water shares." Respondent's Brief p. 12. No such language exists in that decision. *Bagley I* simply did not include any holding involving "water shares." It involved and held only that the term "bare land" had "nothing to do with water rights and therefore the district court did not err in quieting title in the water rights appurtenant to the real property." *Id.* at 803.

In *Bagley II* the trial court, without analysis, granted a motion for summary judgment opposed by Thomason but apparently unopposed by Liberty Park Irrigation Company, decreeing the Bagleys were the owners of 52 shares of stock in the "Irrigation District." The appeal by Thomason, not Liberty Park, raised only issues of jurisdiction, standing and the propriety of an award of attorneys' fees. The court noted there was a requirement for company approval of a transfer of shares but gave no explanation how that was waived or fulfilled. A review of the *Bagley II* decision offers no help in understanding why Liberty Park was obligated to deliver the new shares to Bagley, except that Liberty Park apparently did not oppose the Court ordering it to do so.

The *Bagley III* decision was an appeal from a motion for summary judgment on the pleadings based on questions of standing, subject matter jurisdiction and equal protection. It offers no insight into why shares in Eagle Creek are appurtenant to the Property purchased by

AC&CE. Finally, none of the *Bagley* cases provided any analysis of Liberty Park's policy requiring consent prior to transferring its shares.

D. BANK OF AMERICA'S LIEN DID NOT INCLUDE THE 15 SHARES.

The district court did not address specific issues with respect to the nature of the lien of its deed of trust ("Deed of Trust") on the Property. However, in order for the Trustee's Deed (Trustee's Deed") to have conveyed the 15 Shares to AC&CE, the Deed of Trust must have expressly encumbered the 15 Shares. In this case, the Deed of Trust did not identify either Eagle Creek's water right (the "Water Right") or the 15 Shares as part of collateral. Instead, it only included "all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property." R., p. 210. As set forth above, because of the prior severance of the water rights from the real property within the Eagle Creek service area, the Water Right was not appurtenant to the Property and the appurtenance referenced in the Deed of Trust, therefore, did not include the Water Right.

In contrast, the Personal Line of Credit Deed of Trust that Bank of America granted to the Enright's on April 2, 2007[3] included "appurtenances now or later in any way appertaining to the Property; all royalties, mineral, oil and gas rights and profits derived from or in any way connected with the Property; *all water and ditch rights*, however evidenced, used in or appurtenant to the Property." R., p. 229 (*emphasis added*). This contrast in language evidences the fact that Bank of America and the Enrights knew how to grant a security interest in water

[3] This deed of trust was foreclosed out pursuant to the Trustee's Sale on or around September 8, 2011. *See* R., pp. 203-240.

rights. Accordingly, if the Deed of Trust was intended to include water and ditch rights it would have expressly stated so. By implication, therefore, the Deed of Trust did not include the grant of a security interest in *any* water right, including Eagle Creek's Water Right, or the 15 Shares.

Moreover, if the Deed of Trust had encumbered water rights then Bank of America should have filed a Notice of Security Interest with the Idaho Department of Water Resources pursuant to Idaho Code § 42-248(6). That statute allows persons with security interests to be notified of any change in ownership or proposed amendment, transfer or modification of the water right. No security interest has ever been granted to Bank of America, or anyone else, for Eagle Creek's Water Right. Had Bank of America intended to obtain a security interest in the Water Right it would have discovered the necessity of having Eagle Creek, as owner of the Water Right, grant the security interest.

Finally, if Bank of America had sought to perfect a security interest in the 15 Shares it would have taken possession of the 15 Shares and obtained a stock power from the Enrights. IDAHO CODE § 28-9-313. Bank of America, however, did no such thing. Based on the foregoing, it is clear that the security interests granted in the Deed of Trust did not include either the Water Right or the 15 Shares. As a result, the Trustee's Deed did not convey to AC&CE any of Eagle Creek's water or the rights to the water evidenced by the 15 Shares.

E. AC&CE'S CONSTITUTIONAL AND PUBLIC POLICY BASED THEORIES WERE NOT RAISED BELOW AND MUST NOT BE CONSIDERED NOW.

The long-standing rule of the Supreme Court is that it will not consider issues that are raised for the first time on appeal. *Taylor v. Taylor*, 163 Idaho 910, 422 P.3d 1116 (2018)

(public policy argument not considered because it was raised for first time on appeal); *Gordon v. Hedrick*, 159 Idaho 604, 364 P.3d 951 (2015) (Supreme Court generally will not consider constitutional issues raised for first time on appeal). *See also Doe v. Doe*, 160 Idaho 854, 38 P.3d 175 (2016); *Obenchain v. McAlvain Const., Inc.*, 143 Idaho 56, 137 P.3d 443 (2006); and *Wolford v Montee*, 161 Idaho 432, 387 P.3d 100 (2016).

In this case, AC&CE has for the first time raised constitutional and public policy theories which were not presented to the trial court. Specifically, the arguments raised in paragraph B (Constitutional argument) and paragraph J (public policy argument) of Section IV of AC&CE's Brief were not presented below and should not be considered now. A review of AC&CE's opposition to Eagle Creek's Motion for Summary Judgment clearly reveals these theories or arguments were not presented to the trial court. R., p. 377. What was argued is the principle that water rights are an appurtenance included in the conveyance of land unless evidence shows the grantor did not intend to convey the water rights. R., p. 385. In fact, Idaho Code § 42-1402 is cited as the codification of the rule. R., p. 386. Also raised was that Eagle Creek's restrictions on the transferability of stock are unlawful. R., p. 393. At no time did AC&CE present its constitutional and public policy arguments to the trial court.

F. EVEN IF THE COURT CONSIDERS AC&CE'S CONSTITUTIONAL AND PUBLIC POLICY ARGUMENTS, THEY MISCONSTURE THE LAW.

Even assuming, *arguendo*, that AC&CE's constitutional and public policy arguments are properly raised for the first time on appeal, they misconstrue the law because (1) parties may contractually change their constitutional rights; (2) corporations are treated the same as a natural

person; and (3) the Idaho Constitution and Idaho Code only provide a right to use water subject to an irrigation company's rules and regulations.

1. Parties May Enter into Contracts that Change Their Constitutional Rights.

The freedom to contract is protected by both the United States and Idaho Constitutions. *See e.g.* U.S. CONST. amend. XIV[4] and IDAHO CONST. art. I, §§ 1,[5] 2[6] and 13.[7] "Freedom of contract is a fundamental concept underlying the law of contracts and is an essential element of the free enterprise system." *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 499, 465 P.2d 107, 110 (1970). In fact, parties have a right to "make contractual provisions among themselves and the courts will not limit this freedom to contract except under certain situations, such as the provision being against public policy, made under fraud, duress, and other considerations where the court in a legal proceeding has before it the unreasonableness of the contract provision." 16B AM.JUR.2D CONSTITUTIONAL LAW § 641 *Generally*. Notably, "'[c]ourts will not lend themselves to striking down a contract, otherwise valid, simply because the vicissitudes of time proved it to be a 'bad' bargain for one of the parties.'" *Northwest*

[4] No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[5] "All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." IDAHO CONST. art I, § 1.

[6] "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature." IDAHO CONST. art I, § 2.

[7] "No person shall . . . be deprived of life, liberty or property without due process of law." IDAHO CONST. art I, § 13.

Pipeline Corp. v. Forrest Weaver Farm, Inc., 103 Idaho 180, 183, 646 P.2d 422, 425 (1982) (*quoting Kleinheider v. Phillips Pipeline Co.*, 528 F.2d 837, 842 (8th Cir. 1976)).

Here, Eagle Creek's shareholders had the power by acquiring shares to contractually waive their constitutional right to water because the contract at issue was not an adhesion contract, nor was it made under fraud or duress. The "contract" being Eagle Creek's governing documents. Specifically, its Articles of Incorporation ("Articles"), By-laws and amendments thereto, which were adopted by Eagle Creek's shareholders. Furthermore, none of the landowners within Eagle Creek's permissible place of use were required to acquire shares and thereby contract with Eagle Creek. Instead, every landowner had the ability to determine whether he or she wanted to acquire shares and contract with Eagle Creek to use its water and some chose not to do so.

2. A Corporation is Equivalent to a Person.

Black's Law Dictionary defines a "corporation" as:

> An entity (usu. a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; a group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it.

(10th ed. 2014). Although a corporation is not, in reality, a "person," the law treats it as if it were by "process of fiction, or by regarding it as an artificial person distinct and separate from its individual shareholders . . . It is an artificial person created by law for certain specific purposes, the extent of whose existence, powers and liberties is fixed by its charter." 1 FLETCHER CYC.

CORP. § 7 *Attributes of a Corporation–Artificial or Juridical Personality*. Given the foregoing, Eagle Creek should be treated as a person that has the legal power to exercise the powers granted to it pursuant to its corporate charter, which includes implementing rules and regulations regarding use of its water.

3. The Idaho Constitution and Idaho Code Only Provide a Right to Use Water Subject to an Irrigation Company's Rules and Regulations.

In its brief, AC&CE confuses the right to "use" water, as provided by Sections 4 and 5[8] of Article XV of the Idaho Constitution and Idaho Codes §§ 42-914 and 42-915,[9] with "ownership" of the water. This is an important distinction. Indeed, the Court has previously held that "[t]he appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company." *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 918 (1935). In fact:

> One who acquires the right to use water from an appropriator, which right was initiated by appropriation under section 1, art. 15 'for sale, rental or distribution, is not the owner of the appropriation and does not acquire the rights of an appropriator, **but he simply acquires the rights of a user and consumer, <u>as distributee of the water</u> under section 4 and 5, art. 15, of the Constitution.**

Id. at 919. In fact, shareholders "possess no water right which they can assert as against any other appropriator; their rights are acquired from the district [or company] which is the

[8] AC&CE's reliance on Section 5 of Article XV of the Idaho Code is misplaced because that section addresses priority of use, which is not one of the issues in this appeal.

[9] AC&CE's reliance on Idaho Code § 42-915 is also misplaced as that statute is not applicable to this case since title has not been affected by any "subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon."

appropriator and owner and it is the district's [or company's] business to protect the appropriation and defend it in any litigation cases." *Id*.

Both Section 4 of Article XV of the Idaho Constitution[10] and Idaho Code § 42-914[11] address a shareholder's right to **use** an irrigation company's water in the context of complying with an irrigation company's rules and regulations. Specifically, the Court has recognized:

> [A] mutual irrigation corporation[ ] has the right to make reasonable rules and regulations governing the use of its system and the distribution of water to its shareholders. 3 Kinney on Irrigation and Water Rights, Second Edition, 2674, § 1488, the general rule is laid down as follows:
>
> 'Power of corporations to make 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).

> It is recognized that a stockholder in a mutual irrigation corporation has a right peculiar to such corporations in that he may have distributed to him

[10] Article XV, Section 4 specifically provides: "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." (*emphasis added*).

[11] Idaho Code § 42-914 provides: "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 had 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." (*emphasis added*).

> and use his proportionate share of the waters belonging to or distributed by such corporation. However, such a corporation has the usual rights pertaining to corporations with reference to the handling of its affairs and in dealing with its stockholders.

Application of Johnston v. Pleasant Valley Irr. Co., Ltd., 69 Idaho 139, 144, 204 P.2d 434, 437 (1949) (*emphasis added*). Given the foregoing, shareholders have a right of distribution, subject to abiding by the "usual rights pertaining to the corporations with reference to handling its affairs." *Id*. The "affairs" of a delivery company include insuring that its shareholders follow rules and regulations with respect to the company's attempts to efficiently distribute water.

In *Gasser*, the Court upheld an irrigation company's requirement that its shareholders make an application to the company for water and agree in writing to indemnify the company from damages resulting from water flooding or damaging its canal system before the shareholder was entitled to use water during the winter. 81 Idaho 421. The Court upheld this restriction despite the fact that the irrigation company had "permitted water to flow in its canals during the winter months and that [the aggrieved shareholder] had used such water for domestic purposes for more than thirty-years." *Id*. at 426. The Court added "A restriction on such flow by the stockholders of the Company is not unreasonable if necessary to protect the Company and its canal system from damages and is intended to serve the best interests of a majority of the stockholders." *Id*. at 427.

Although AC&CE cited to the *Gasser* case several times in its brief, it never acknowledged that irrigation companies have the authority to enact rules and regulations which limit their shareholders' use of water. Respondent's Brief, pp. 35, 38, 41. Certainly, AC&CE

had a duty to apprise the Court of this right since it is vital to the issue at hand. *See also Application of Johnston*, 69 Idaho 139 (court held that mutual irrigation corporation had a right to refuse to consent to shareholder's proposed change in point of diversion and place of use).

While Eagle Creek acknowledges that *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 and *Mellen v. Great W. Beet Sugar Co.*, 21 Idaho 353, 122 P. 30 (1912), which AC&CE relies upon, provide the basic principles of Sections 4 and 5 of Article XV of the Idaho Constitution, neither of those cases is applicable to the case at hand because neither of those cases included a contract between a mutual irrigation company and its shareholders which set forth rules and regulations regarding delivery of water. In fact, the Court in the *Clear Springs* case held that neither Section 4 nor Section 5 was applicable because the water users in that case directly appropriated water from their respective water sources – they did not procure a water right under a sale, rental or distribution. 150 Idaho at 806.

Although the *Mellen* case came within the purview of Sections 4 and 5 of the Constitution, the contract between the mutual irrigation company and shareholders in that case did not "describe the extent of the perpetual water right to be received" nor did the contract include any rules or regulations regarding use. 21 Idaho at 354. Instead, that case dealt with the priority of use between shareholders who surrendered and released all of their right, title and interest in certain water to the irrigation company in exchange for the right to use that water versus shareholders who simply purchased shares of stock in the company.[12]

[12] Furthermore, AC&CE's reference to *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) for the proposition that "beneficial users have an interest that is stronger than a mere contractual expectancy" is misleading

This case does not relate to priority, as addressed in Section 5. Instead, it deals with Eagle Creek's rules and regulations regarding use of its water. While Article VI, Section 4 of Eagle Creek's Articles state that the corporation will hold all water rights in trust for the benefit of its shareholders, a landowner must first become a shareholder before he is entitled to shares of stock in Eagle Creek and thereby have a right to use its water. R., p. 32. AC&CE not only failed to acknowledge this important prerequisite, but it also failed to acknowledge Eagle Creek's requirement in Article VI, Section 6 of its Articles and Article II of its By-laws that prior approval of its board of directors (the "Board") is required before any shares may be transferred to a landowner within its service area. R., pp. 33, 38. These are reasonable restrictions on transferability enabling Eagle Creek to operate. Thus, simply owning land within Eagle Creek's service area does not guarantee a person the right to use Eagle Creek's water, regardless of whether water was historically used on the land.

Instead, a landowner, such as AC&CE, is required to abide by Eagle Creek's rules and regulations *before* it is entitled to a transfer of Shares. It is important to recognize that Eagle Creek is not alleging that AC&CE has no ability to use its water. Instead, AC&CE was simply required to comply with the transfer requirements set forth in Eagle Creek's Articles and By-laws. Accepting AC&CE's argument that any piece of land that was historically entitled to water has an unequivocal right to the continued use of that water ignores the express language in Section 4 of Article XV of the Constitution and Idaho Code § 42-914 which allows irrigation

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as the next sentence in that case specifically acknowledges that Section 4 of Article XV of the Idaho Constitution provides that the right to water may be limited by a water user's consent. Respondent's Brief, p. 17.

companies to restrict use.

Since AC&CE's predecessors, the Enrights, acquired stock in Eagle Creek they clearly consented to the transfer terms and conditions found in Eagle Creek's Articles and By-laws. *Hobbs v. Twin Falls Canal Co.*, 24 Idaho 380, 383, 133 P. 899, 902 (1913). Any interpretation otherwise would circumvent the fundamental principles of corporate law which allow corporations to enter into binding contracts with their shareholders. 12B FLETCHER CYC. CORP. § 5737 *Contracts between shareholder and corporation–In general*. Moreover, if land that was historically entitled to water has a guaranteed continued use of the water with no limitation, then there would be no reason to create an irrigation company. Nor would there be any reason to have an irrigation company hold the water in trust for its shareholders. Not only does AC&CE's position contradict established law but it is also not logical or reasonable.

Notably, Judge Brody implicitly recognized Eagle Creek's right to enact rules and regulations by stating:

> It is possible that AC&E needs to abide by certain policies as shareholders of Eagle Creek. It appears that there may be disputed material facts over Eagle Creek's bylaws and other policies.

R., Aug. p. 6. Despite stating the foregoing, Judge Brody never ruled on whether Eagle Creek's By-laws and other policies regarding the transfer of its shares were reasonable and, thereby, enforceable. *Gasser*, 81 Idaho 421. Thus, this case must be remanded to the district court to determine the reasonableness of Eagle Creek's rules and regulations.

G. AC&CE HAS NOT COMPLIED WITH THE TRANSFER REQUIREMENTS IN EAGLE CREEK'S BY-LAWS.

Nevertheless, assuming, *arguendo*, that Eagle Creek's rules and regulations regarding the transfers of its Shares are reasonable and enforceable, AC&CE has not complied with the transfer requirements because no request to transfer the 15 Shares was ever made to the Board. Article VI, Section 6 of the Articles and Article II of Eagle Creek's By-laws require prior approval from the Board before Shares may be transferred. R., pp. 33, 38.

There are two ways to apply to the Board for approval of a transfer. First, pursuant to Article II, Section 3 of the By-laws, if a shareholder intends to transfer his Shares with the conveyance of his property, then he may apply for a transfer to the Board within sixty (60) days of the property conveyance, otherwise the Shares will be deemed cancelled and revert to Eagle Creek as treasury stock. R., p. 84. Or, if a shareholder sells his property without applying for a transfer of his Shares, a transfer may still be facilitated if "the stockholder who sold such real property without transferring the stock provides for an assignment of the stock in a contract or sale agreement with the new purchaser." *Id*. In that situation, such contract or sale agreement with the new purchaser shall be deemed an application to transfer the Shares.

In this case, neither method of application was undertaken. Neither the Enrights, AC&CE nor Bank of America, within sixty (60) days of the Trustee's Sale or anytime thereafter, applied to have any of the 15 Shares transferred. Likewise, AC&CE has not provided any contract or sale agreement from the Enrights that provided for an assignment of the 15 Shares. Instead, AC&CE has only provided the Trustee's Deed which simply evidenced the transfer of

the Property from the Trustee to AC&CE without the 15 Shares. Therefore, neither method of application in Article II, Section 3 of the By-laws has been fulfilled. Consequently, AC&CE has not complied with the requirements to transfer the 15 Shares.

H. WHETHER THE 15 SHARES WERE FORFEITED OR REVERTED TO EAGLE CREEK AS TREASURY STOCK ARE NOT MOOT ISSUES.

AC&CE asserts for the first time on appeal that the issues regarding whether the 15 Shares were forfeited or reverted to Eagle Creek as treasury stock are moot. In general, "[a]n issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851, 119 P.3d 624, 626 (2005) (*citing State v. Rogers*, 140 Idaho 223, 91 P.3d 1127 (2004)). Idaho recognizes three exceptions to the mootness doctrine: "(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest." *Id.* at 851-52.

The issue is not moot because the 15 Shares were delivered as a result of the trial court ruling that AC&CE was entitled to the 15 Shares reasoning the shares were appurtenant to the land acquired by Trustee's Deed. The delivery of those 15 Shares was subject to Eagle Creek's right to appeal the decision of the trial court. The settlement agreement does not contain any waiver of the right of appeal. Instead, it acknowledges the decision is final and appealable and thereby anticipates the appeal.

Finally, the issue, even if otherwise moot, is reviewable because it qualifies for an exception. Beginning with the third exception to the mootness doctrine, the issues presented on appeal raise concerns of substantial public interest. Stated succinctly, there is substantial public interest in a definitive ruling from this Court regarding whether or not shares in a non-Carey Act irrigation company are appurtenant to and transferable with a particular parcel of land to which water has been historically applied without regard to restrictions on transfer of the shares, or whether they are personal property not appurtenant to or transferable with said parcels and subject to transfer restrictions. Under the second exception, a court may consider the merits of an otherwise moot issue when the challenged conduct is capable of repetition and likely to evade judicial review. The conduct at issue in this case is the transfer of shares issued by Eagle Creek without compliance with the requirements of its governing documents, including the 1991 Resolution. Eagle Creek currently has 201 shares issued and outstanding held by seventeen (17) shareholders. It is likely many of the shareholders will at some point transfer, encumber or sell their parcel of land to which Eagle Creek's water is delivered without notice to or approval by Eagle Creek of the transfer, encumbrance or sale. Additionally, there are other irrigation companies in the same or similar position as Eagle Creek. Thus, there is a continuing substantial risk of a repetition of the challenged conduct.

I. AC&CE'S REQUEST FOR ATTORNEYS' FEES SHOULD BE DENIED.

AC&CE seeks an award of reasonable attorneys' fees and costs under Idaho Code § 12-121. Under Idaho Code § 12-121, an award of fees on appeal can only be awarded if the appeal was brought or defended frivolously, unreasonably, or without foundation. Here, Eagle Creek

had a good faith basis in bringing its appeal which raises a unique question of whether a purchaser at a trustee's sale acquires title to shares of stock in a non-Carey Act irrigation company when it acquires title to real property by virtue of a trustee's deed. The trial court expressly admitted confusion regarding the state of the law. Since this issue has not previously been addressed by Idaho courts, Eagle Creek's appeal was not frivolous, unreasonable or without foundation.

AC&CE also asks for fees and costs under Idaho Code § 42-914. That statute, however, does not provide for the recovery of attorneys' fees or costs. Instead, it only allows recovery of *damages* to an injured party. Since Idaho Code § 42-914, as set forth in Section F(3), *infra*, is a substantial re-enactment of Section 4 of Article XV of the Idaho Constitution, it allows Eagle Creek to enact rules and regulations regarding use of its water. And, since Eagle Creek's shareholders did, in fact, consent to its rules and regulations, there can be no damages attributable to Eagle Creek for requiring AC&CE to comply with those rules and regulations. Even if the court disagrees and finds that AC&CE has incurred damages, it is still not entitled to its attorneys' fees or costs because attorneys' fees are generally only allowed as "damages" if they are incurred outside of the litigation against the party in which the award is sought. *Holladay v. Lindsay*, 143 Idaho 767, 772, 152 P.3d 638, 643 (Idaho Ct. App. 2006). Since AC&CE has not made any assertion that its attorneys' fees or costs were incurred outside of this litigation, they cannot be recovered as damages.

Finally, AC&CE seeks an award of costs pursuant to Idaho Appellate Rule 40(a) and an award of attorneys' fees pursuant to Idaho Appellate Rule 41. Idaho Appellate Rule 40, however

only allows recovery of costs to the prevailing party on appeal. For the reasons set forth above, the district court's Judgment regarding ownership of the 15 Shares must be reversed or the case must be remanded to the district court. Either way, AC&CE cannot be the prevailing party. Moreover, AC&CE is not entitled to an award of its fees under Idaho Appellate Rule 41 because Eagle Creek did not appeal this matter frivolously, unreasonably or without foundation. *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005) (attorney's fees not allowed under Idaho Appellate Rule 41 because case was not frivolous, unreasonable or unmeritorious as it presented difficult and previously unresolved issues regarding whether irrigation district could enlarge its ground water permits to irrigate additional acreage).

IV. CONCLUSION

For the foregoing reasons, Eagle Creek respectfully requests that this Court either (1) reverse the district court's Judgment regarding ownership of the 15 Shares by declaring Eagle Creek as the rightful owner of said shares; or (2) remand the case to the district court with direction to consider the issues raised for the first time on appeal and those involving restrictions on transfer of shares in an irrigation company.

RESPECTFULLY SUBMITTED THIS 3rd day of October, 2018.

LAWSON LASKI CLARK & POGUE, PLLC

By /s/ Edward A. Lawson
Edward A. Lawson
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 3, 2018 he/she caused a true and correct copy of the foregoing instrument to be served on the following persons by the means indicated:

David M. Penny COSHO HUMPHREY, LLP 1501 S. TYRELL LANE P.O. Box 9518 Boise, ID 83701-2527 dpenny@cosholaw.com	_____ U.S. Mail, Postage Prepaid _____ Hand Delivered _____ Overnight Mail ____ Fax: (208) 343-8869 ____ Email __x__ i-Court E-File Electronic Service
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__/s/ Heather E. O'Leary_____
Heather E. O'Leary