

RECEIVED  
FEB 09 2015  
DEPARTMENT OF  
WATER RESOURCES

1 R.C. Stone  
2 Jason R. Naess  
3 **PARSONS, SMITH, STONE,**  
4 **LOVELAND & SHIRLEY, LLP**  
5 137 West 13<sup>th</sup> Street  
6 P.O. Box 910  
7 Burley, Idaho 83318  
8 (208)878-8382 - Phone  
9 (208)878-0146 – Fax  
10 Idaho State Bar #1890  
11 Idaho State Bar #8407  
12 Attorneys for Plaintiff

13 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
14 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

15 -----  
16 D.LEVANS BANK,  
17  
18 Plaintiff,

Case No. CV OC 1317406

19 vs.

20 BALLENTYNE DITCH COMPANY,  
21 LIMITED; THOMAS MECHAM RICKS;  
22 GARY SPACKMAN, IN HIS OFFICIAL  
23 CAPACITY AS DIRECTOR OF THE  
24 IDAHO DEPARTMENT OF WATER  
25 RESOURCES; IDAHO DEPARTMENT  
26 OF WATER RESOURCES; AARON  
RICKS, DIRECTOR OF BALLENTYNE  
DITCH COMPANY; SHAUN BOWMAN,  
DIRECTOR OF BALLENTYNE DITCH  
COMPANY; JOE KING, DIRECTOR  
OF BALLENTYNE DITCH COMPANY;  
STEVE SNEAD, DIRECTOR  
OF BALLENTYNE DITCH COMPANY

RESPONSE BRIEF TO  
THOMAS M. RICKS' MOTION  
FOR SUMMARY JUDGMENT

Defendants.

27 COMES NOW, Plaintiff, D.L. Evans Bank, which hereby submits the following  
28 Response Brief to Thomas M. Ricks' Motion for Summary Judgment.

PARSONS, SMITH, STONE, LOVELAND & SHIRLEY, LLP  
LAWYERS  
BURLEY, IDAHO

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**INTRODUCTION**

Thomas M. Ricks (“Ricks”) has moved for Summary Judgment on five issues, asserting that, as a matter of law (1) the water rights diverted by the Ballentyne Ditch Company, Ltd. (“Ballentyne”), from the Boise River are real property; (2) shares of stock in Ballentyne are personal property; (3) the Trustee’s Deed and Correction Trustee’s Deed could only convey personal property; (4) no security interest attached or was perfected by D.L. Evans as to Ricks’ shares of stock in Ballentyne; and (5) D.L. Evans cannot compel Ballentyne to transfer shares of stock owned by Ricks to the bank.

As a general premise for his motion, Ricks argues that D.L. Evans has plead a share of stock is a ““real property’ ‘water right.’” *Memorandum in Support of Thomas M. Ricks’ Motion for Summary Judgment* (“Ricks Memorandum”) at 4 (citing to Amended Complaint at 4-5). D.L. Evans’ Amended Complaint does not make the allegation that a share of stock is a ““real property’ ‘water right.’” Rather, it alleges the Correction Trustee’s Deed resulting from a January 2013, foreclosure sale transferred real property, including the water rights that are appurtenant to the conveyed land, to D.L. Evans. *See Amended Complaint* at 4-5. While Ricks would like to characterize this case as a dispute over personal property shares of stock, it is a case regarding the transfer and delivery of water and water rights, and resort to the law governing the same is warranted. In reviewing that law, Ricks’ Motion for Summary Judgment should be denied.

**STANDARD OF REVIEW**

If the pleadings, depositions, affidavits, and admissions on file show there is a genuine issue as to any material fact and the moving party is not entitled to a judgment as a matter of law, summary judgment is not appropriate. *See Idaho Rule Civ. P. 56(c)*;

1 *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69, 205 P.3d 1203, 1205 (Idaho  
2 2009). Disputed facts are to be construed, and all reasonable inferences that can be drawn  
3 from the record are to be drawn, in favor of the non-moving party. *Farm Credit Bank of*  
4 *Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (Idaho 1994). If the  
5 evidence could lead to different conclusions or conflicting inferences by reasonable people,  
6 a summary judgment motion must be denied. *Id.*

8 **ARGUMENT**

9 **I. The Only Water Rights in This Proceeding Are Diverted By Ballentne And**  
10 **Are Real Property.**

11 D.L. Evans does not dispute that the water rights in this case are diverted by  
12 Ballentyne, or that the rights are real property. However, the rights are appurtenant to land  
13 owned by individuals who have beneficially applied the water within Ballentyne's  
14 boundaries.

15 A. While Ballentyne Diverts the Water Rights in this Case, and Ballentyne's Name  
16 is on the SRBA Decree, the Landowners within Ballentyne's Boundaries are  
17 Entitled to the Use of the Water.

18 All water flowing in its natural channel within the boundaries of the State of Idaho  
19 is property of the State. Idaho Code § 42-101; *Poole v. Olaveson*, 82 Idaho 496, 502, 356  
20 P.2d 61, 64 (Idaho 1960). As such, the State has a duty to supervise the appropriation and  
21 allotment of the water to those diverting the water from its natural channels and using it for  
22 a "beneficial purpose." Idaho Code § 42-101. A right to the use of the State's waters, or a  
23 water right, is statutorily recognized, though is not considered a property right in itself. *Id.*  
24 Rather, such rights "become the complement of, or one of the appurtenances of, the land or  
25 other thing to which, through necessity, said water is being applied." *Id.*; *Hard v. Boise*  
26 *City Irr. & Land Co.*, 9 Idaho 589, 76 P. 331, 332 (Idaho 1904). The right does not exist

1 without land to which the water right is appurtenant. Idaho Code § 42-101. Once water  
2 has been beneficially applied to, and become an appurtenance of, land, the right to use that  
3 water is statutorily protected in the landowner, and is to never be denied or prevented  
4 except upon the failure of the user to pay the ordinary charges or assessments imposed to  
5 cover the expenses of the delivery of the water. Idaho Code § 42-101.  
6

7 Historically, a water right could be created by one of two methods: the  
8 “constitutional” method or the statutory method. *A & B Irr. Dist. v. State of Idaho*, 157  
9 Idaho 385, 336 P.3d 792, 796 (Idaho 2014) (quoting *United States v. Pioneer Irr. Dist.*,  
10 144 Idaho 106, 110, 157 P.3d 600, 604 (Idaho 2007)). Under either, a valid right does not  
11 exist unless or until the appropriator has applied the water represented by the right to a  
12 beneficial use. *Id.* In addition, if water is no longer applied to a beneficial use, the right to  
13 use the water may be forfeited. Idaho Code § 42-222; *Jenkins v. Idaho Dept. of Water*  
14 *Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (Idaho 1982). Thus, a critical characteristic  
15 of any water right owner is they must be able to apply the water represented by the right to  
16 a beneficial use.  
17

18 Where water is delivered by a mutual irrigation company, such as a ditch company,  
19 wherein the water users also own the company, the water users own the water right. *See*  
20 *Farmers’ Coop. Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 457-59, 94 P. 761, 763  
21 (Idaho 1908). A mutual irrigation company is a non-profit corporation established for  
22 “convenience of [the corporation’s] members in the management of the irrigation system  
23 and in the distribution to them of water for use upon their lands in proportion to their  
24 respective interests” in the corporation. *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687,  
25 689 (Idaho 1917). The corporation is owned by stockholders, who are landowners within  
26

1 the corporation's boundaries, and the stock represents water rights made appurtenant to the  
2 landowner-stockholders' land. *Id.*; see also, e.g., *Twin Falls Canal Co. v. Shippen*, 46  
3 Idaho 787, 271 P. 578 (Idaho 1928). In such a case, "the appropriation of waters carried in  
4 the ditch" and the perpetual "right to the use of such water," are owned by the same  
5 individuals. See *Farmers' Coop. Ditch Co.*, 94 P. at 763 ("As to some of those ditches the  
6 appropriators were also the users of the water. They owned the water right and used the  
7 water on their own lands. . . . The right to the use of such water, after having 'once been  
8 sold, rented, or distributed to any person who has settled upon or improved land for  
9 agricultural purposes,' becomes a perpetual right, subject to defeat only by failure to pay  
10 annual water rents and comply with the lawful requirements as to the conditions of the  
11 use."). In other words, under a mutual irrigation company, the owners of land to which  
12 water has been applied own the water rights appropriated by the company because they  
13 also own the company.

14  
15  
16 A determination that a landowner who is delivered water through a mutual  
17 irrigation company owns the right to the use of that water is consistent with Idaho's  
18 statutes regarding the delivery of water, which provide:

19  
20 Whenever any waters have been or shall be appropriated or used for  
21 agricultural or domestic purposes under a sale, rental or distribution thereof,  
22 such sale, rental or distribution shall be deemed an exclusive dedication to  
23 such use upon the tract of land for which such appropriation or use has been  
24 secured, and, whenever such waters so dedicated shall have once been sold,  
25 rented or distributed to any person who has settled upon or improved land  
26 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.

1  
2 Idaho Code § 42-914. Once a mutual irrigation company distributes water to a user, the  
3 water is exclusively dedicated to the land upon which the water is used. *Id.* The right to  
4 use that water shall not be deprived the person using the water on the land, his heirs,  
5 executors, administrators, successors, or assigns, *id.*, and is to “forever remain a part of  
6 said tract of land, and the title to the use of said water can never be affected in any way by  
7 any subsequent transfer of the canal or ditch property or by any foreclosure or any bond,  
8 mortgage or lien thereon.” Idaho Code § 42-915.  
9

10 To facilitate a mutual irrigation company’s management and delivery of water, a  
11 water right representing water delivered by the company may be licensed or decreed in the  
12 company’s name with a general place of use description matching the company’s  
13 boundaries. *See* Idaho Code 42-219(6). Placing the right in the company’s name,  
14 however, does not change that the water right is “appurtenant to the land to which the  
15 water represented thereby has been beneficially applied.” *See Ireton*, 164 P. at 688; *see*  
16 *also* Idaho Code § 42-1402 (“The right confirmed by such decree or allotment shall be  
17 appurtenant to and shall become a part of the land on which the water is used, and such  
18 right will pass with the conveyance of such land.”). Likewise, this arrangement of  
19 convenience does not alter the ability of a stockholder-water user-landowner to sell and  
20 mortgage his water right independently from all other stockholders. *See id.* at 688-89; *see*  
21 *also In re Johnson*, 50 Idaho 573, 579, 300 P. 492, 494 (Idaho 1931) (“And, where a ditch  
22 is used in common for the conveyance of water for two appropriations, each owner may  
23 sell or abandon his right to the ditch, separate from the other [citations]; the same right  
24 belongs to a stockholder in a mutual ditch company [citation].”).  
25  
26

1           Finally, Idaho’s statute regarding changes in a water right’s point of diversion,  
2 place of use, period of use, or nature of use further illustrates that the party entitled to use  
3 and control a water right is separate from the corporation that delivers the water. A water  
4 right is defined in terms of the priority, amount, season of use, purpose of use, point of  
5 diversion, and place of use of the water represented by the right. *A & B Irr. Dist.*, 336 P.3d  
6 at 796. Those elements may be changed if the water rights of others are not injured  
7 thereby. Idaho Code § 42-108. However, “if the right to the use of such water, or the use  
8 of the diversion works or irrigation system is represented by shares of stock in a  
9 corporation . . . no change in the point of diversion, place of use, period of use, or nature of  
10 use of such water shall be made or allowed without the consent of such corporation.” *Id.*

11           The person statutorily entitled to make a change to a water right’s elements, is the  
12 person “entitled to the use of water or owning any land to which water has been made  
13 appurtenant.” *Id.* And, the legislature specifically identified that person as separate and  
14 distinct from the corporation whose shares represent the right to the use of such water. *Id.*  
15 If the right to control and use the water was owned by mutual irrigation corporations,  
16 instead of by the water’s beneficial users or landowners, the language requiring a  
17 corporation to approve requested changes would be superfluous. *Id.* A statute is to be  
18 interpreted so that none of its words will be void, superfluous, or redundant. *Verska v. St.*  
19 *Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 897, 265 P.3d 502, 510 (Idaho 2011).

20           Ballentyne was “not formed for profit, but for the mutual operation of said canal  
21 and irrigating system and for its better maintenance and conduct.” *King Affidavit*, Exhibit  
22 A at Article VIII. Put differently, Ballentyne was established as a mutual irrigation  
23 company. Consistent with such, the corporation was established with stockholders who  
24  
25  
26

1 were landowners within the corporation's boundaries, and the corporation's stock  
2 represented water rights applied, and made appurtenant to, the landowner-stockholders'  
3 land. *Id.* at Article VI. In addition, the stock itself was appurtenant to the land it  
4 represented, and could not be transferred to another absent a transfer of the land. *Id.*  
5 Because the company was owned by its landowners, and the landowners beneficially  
6 applied the water appropriated to the company for distribution through the Ballentyne  
7 ditch, the landowners own the water rights appurtenant to their land. Once the water was  
8 distributed to, and beneficially used by, the landowners, the water right became an  
9 appurtenance of their land.  
10

11  
12 The land foreclosed on by D.L. Evans has been historically irrigated by water  
13 delivered through the Ballentyne water delivery system. *See Answer of Thomas M. Ricks*  
14 *to D.L. Evans Complaint*, ¶ 8. When Ricks provided the land to D.L. Evans as security for  
15 its loan, the land had appurtenant water rights. *See Ricks Affidavit*, Exhibit 5.  
16

17 The SRBA process, through which, among other things, water rights have been  
18 decreed in the names of mutual irrigation companies, has not changed the nature of water  
19 rights ownership as between mutual irrigation companies and the owners of land irrigated  
20 by water delivered through the companies. Rather, since the SRBA process began, the  
21 Idaho Supreme Court has, if anything, clarified the relationship between irrigation entities  
22 and the beneficial users of water. In *United States v. Pioneer Irrigation District*, 144 Idaho  
23 106, 157 P.3d 600 (Idaho 2007), the Supreme Court provides:  
24

25 There are several phrases used in the Idaho Constitution and the Idaho  
26 Code that signify that the beneficial users have an interest that is stronger  
than mere contractual expectancy. The Idaho Constitution provides that  
when water is appropriated or used for agricultural purposes, "such person  
. . . shall not thereafter, without his consent, be deprived of the annual use  
of the same." IDAHO CONSTITUTION art. XV § 4. This notion of a

1 perpetual right is reiterated in the Idaho Code, which states, the “right to  
2 continue the beneficial use of such waters shall never be denied nor  
3 prevented for any cause other than the failure . . . to pay the ordinary  
4 charges or assessments.” I.C. § 42-220. Idaho Code § 42-915 uses the  
5 word “title” and provides that once a water right becomes appurtenant to  
6 the land, title to the use of the water can never be affected by transfers of  
7 the ditch, canal, or by foreclosure.

8 157 P.3d at 608 (ellipses in original).

9 The role of irrigation entities is to act on behalf of those who have applied the water  
10 delivered by the entities to beneficial use. *Id.* at 609. While the name of another  
11 organization may appear in the “Name” and “Address” sections of a SRBA partial decree,  
12 “as a matter of Idaho constitutional and statutory law[,] title to the use of the water is held  
13 by the consumers or users of the water. The irrigation organizations act on behalf of the  
14 consumers or users to administer the use of the water for the landowners.” *Id.*

15 The SRBA decree in this case is in the name of Ballentyne. The right to use the  
16 water delivered by Ballentyne, however, is held by the landowners who have beneficially  
17 applied the water to their properties within Ballentyne’s boundaries. Ballentyne merely  
18 acts on behalf of the landowners to administer the delivery of the water and to manage the  
19 delivery system. The land D.L. Evans received through the foreclosure process is located  
20 within Ballentyne’s districts and is covered by the SRBA decrees in Ballentyne’s name.

21 *Answer of Defendant Ballentyne Ditch Company* ¶ 4. The SRBA, and any partial or final  
22 decree issued thereunder, did not provide Ballentyne the ability to deny water to land to  
23 which the water has become appurtenant.

24 B. The Water Rights Appurtenant to Ricks’ Land Are Real Property and Were  
25 Conveyed to D.L. Evans.

26 If water has been applied to a beneficial use and a water right is created, the water  
right is real property, and is appurtenant to the land upon which the water represented by

1 the water right is beneficially used. Idaho Const. art. XV § 4; Idaho Code §§ 42-101, 55-  
2 101; *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 79 (Idaho  
3 2011). Such a right can be conveyed by the owner to another. *Hard*, 76 P. at 332. As real  
4 property, ownership of water rights must be conveyed in the same manner, or subject to the  
5 same restrictions and protections as other real property. *See Olson v. Idaho Dept. of Water*  
6 *Res.*, 105 Idaho 98, 100-01, 666 P.2d 188, 190-91 (Idaho 1983); *Gard v. Thompson*, 21  
7 Idaho 485, 123 P. 497, 502 (Idaho 1912).

9 Water rights can be conveyed separate and apart from land, but this “may only be  
10 done where such was the intention of the parties to the conveyance.” *Molony v. Davis*, 40  
11 Idaho 443, 233 P. 1000, 1001 (Idaho 1925). If the intent of the parties is not to convey land  
12 separate from its appurtenant water rights, the water rights are conveyed with the land even  
13 if not mentioned in the deed. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 13, 156  
14 P.3d 502, 514 (Idaho 2007). And, such occurs even when the deed does not mention  
15 “appurtenances.” *Id.* at 515. The only time appurtenant water rights are not conveyed  
16 with a conveyance of land is where such rights are expressly reserved from conveyance in a  
17 deed or it is clearly shown the parties intended the grantor would reserve them. *Id.*

19 As security for his loan from D.L. Evans, Ricks provided D.L. Evans a Deed of  
20 Trust that included, among other property interests, “water, water rights and ditch rights  
21 (including stock and utilities with ditch or irrigation rights).” *Ricks Affidavit*, Exhibit 5.  
22 D.L. Evans foreclosed on that Deed of Trust in January 2013. *Id.* ¶¶ 12-14. The Trustee’s  
23 Deed from the resulting foreclosure sale did not identify water rights or other  
24 “appurtenances.” *Id.*, Exhibit 10. At the same time, the deed did not expressly reserve the  
25 water rights or other appurtenances from the conveyance. *Id.* The foreclosed on Deed of  
26

1 Trust specifically covered water and water rights, and indicates the parties' intent was that  
2 such rights would be conveyed under any foreclosure. *Id.*, Exhibit 5. When the foreclosure  
3 trustee conveyed the land covered by the Deed of Trust to D.L. Evans, the legal  
4 consequence was that it also conveyed the land's appurtenances, including water rights.  
5

6 **II. Shares of Stock in Ballentyne are Muniments of Title Evidencing Water**  
7 **Rights, and are Transferred with the Water They Represent.**

8 While shares of stock in an ordinary, for-profit corporation are personal property,  
9 where a mutual irrigation company has been established for the convenience of its  
10 members in the management of the irrigation system and the distribution of water,  
11 ownership of shares of stock in such a corporation is incidental to ownership of a water  
12 right. *Ireton*, 164 P. at 689. "Such shares are muniments of title to the water right, are  
13 inseparable from it, and ownership of them passes with the title which they evidence." *Id.*;  
14 *see also Andrews v. N. Side Canal Co.*, 52 Idaho 117, 12 P.2d 263, 269 (Idaho 1932)  
15 (quoting *Ireton*, 164 P. at 689) and *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d  
16 1105, 1108 (Idaho 1931) (quoting *Ireton*, 164 P. at 689).  
17

18 Ricks points to *Watson v. Moldon*, 10 Idaho 570, 79 P. 503 (1905), and a case that  
19 *Watson* cites, *Wells v. Price*, 6 Idaho 490, 56 P. 266 (1899), for the premise that shares of  
20 stock in an irrigation corporation are not appurtenant to land owned by the owner of such  
21 shares. *Ricks Memorandum* at 6-7. Twelve years after deciding *Watson*, however, the  
22 Idaho Supreme Court strayed from the premise quoted by Ricks. *Ireton*, 164 P. at 689.  
23 Instead, the Court propounded a new standard:  
24

25 [W]hile this court has held shares in an irrigation company to be personal  
26 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

1 and in the distribution to them of water for use upon their lands in  
2 proportion to their respective interests, ownership of shares of stock in the  
3 corporation is but incidental to ownership of a water right. Such shares are  
4 muniments of title to the water right, are inseparable from it, and ownership  
of them passes with the title which they evidence.

5 *Id.* (citation in original).

6 Ballentyne is a non-profit mutual irrigation company established for the  
7 convenience of its members. *King Affidavit*, Exhibit A at Article VIII. Its shares are thus  
8 but muniments of title to the water rights of the corporation's landowners, and ownership  
9 of the shares passes with title to the water rights evidenced by the shares. Ballentyne seems  
10 to have recognized this principle in other issuances of stock certificates. *See Squire*  
11 *Affidavit* ¶¶ 2-4. For example, when D.L. Evans foreclosed on other property within  
12 Ballentyne's boundaries, not previously owned by Ricks, all D.L. Evans was required to do  
13 in order to obtain the stock certificates representing the water rights appurtenant to the  
14 foreclosed on land was to present to Ballentyne the trustee's deed conveying the land to  
15 D.L. Evans. *Id.* ¶¶ 3-4.

17 In this case, the shares associated with the foreclosed on property passed to D.L.  
18 Evans when the water rights appurtenant to the foreclosed on property passed to D.L.  
19 Evans.

20  
21 **III. The Correction Trustee's Deed Could Convey Real Property and Its**  
22 **Appurtenances.**

23 A trustee's deed can only convey real property. *Spencer v. Jameson*, 147 Idaho  
24 497, 502, 211 P.3d 106, 111 (Idaho 2009). Water rights and other appurtenances are  
25 statutorily defined as real property. Idaho Code § 55-101. As such, "that which is land,  
26 affixed to the land, or appurtenant to the land" is conveyed under a trustee's deed.  
*Spencer*, 211 P.3 at 111. Appurtenances are conveyed even if the deed does not mention a

1 conveyance of “appurtenances,” unless there is an express reservation of the same from the  
2 deed. *Joyce Livestock Co.*, 156 P.3d at 514.

3  
4 The Idaho Supreme Court has determined that shares in a non-profit mutual  
5 irrigation corporation represent appurtenant water rights, and nothing more. *Ireton*, 164 P.  
6 at 689. Because of that, such shares are not personal property, but are akin to a real  
7 property appurtenance, following the transfer of the water rights represented by the shares.  
8 *Ireton*, 164 P. at 689.

9 The Correction Trustee’s Deed conveyed to D.L. Evans the land and appurtenances  
10 Ricks had pledged to it as security for his loan from D.L. Evans. Those appurtenances  
11 included the water rights used by Ricks on his property, and the shares in Ballentyne  
12 representing those water rights were transferred to D.L. Evans by operation of law.

13  
14 **IV. Because the Shares in Ballentyne were Shares in a Mutual Irrigation**  
15 **Corporation, the Deed of Trust Pledging the Foreclosed-on Land and**  
16 **Appurtenances to D.L. Evans as Security was Sufficient to Provide D.L. Evans**  
17 **a Security Interest in the Shares.**

18 Shares in Ballentyne are muniments of title to the water rights administered by  
19 Ballentyne, and ownership of the shares passes with the water rights which they evidence.  
20 *See Ireton*, 164 P. at 689. As such, all D.L. Evans had to do to perfect an interest in the  
21 shares was to perfect an interest in the water rights. If the water rights were transferred to  
22 D.L. Evans, the shares in Ballentyne would be transferred also. *See id.*

23 Ricks provided D.L. Evans a Deed of Trust, by which he did:

24 irrevocably grant, bargain, sell, and convey in trust, with power of sale, to  
25 Trustee for the benefit of the Lender as Beneficiary, all of Grantor’s right,  
26 title, and interest in and to the following described real property, together  
with all existing or subsequently erected or affixed buildings, improvements  
and fixtures; all easements, rights of way, and appurtenances; all water,  
water rights and ditch rights (including stock in utilities with ditch or  
irrigation rights); and all other rights, royalties and profits relating to the

1 real property, including without limitation all minerals, oil, gas, geothermal  
2 and similar matters, (the "Real Property") located in Ada County, State of  
3 Idaho:

4 See Exhibit "A", which is attached to this Deed of Trust and made a part of  
5 this Deed of Trust as if fully set forth herein.

6 *Ricks Affidavit*, Exhibit 5. If Ricks defaulted on his obligations to D.L. Evans, it could  
7 foreclose on the Deed of Trust, including, among other things, the water rights appurtenant  
8 to the land securing Ricks' loan through the Deed of Trust. *Id.*

9 D.L. Evans was not required to do anything more than obtain the Deed of Trust  
10 from Ricks in order to secure its interest in the water rights, and thus the Ballentyne shares  
11 evidencing and following the water rights, appurtenant to the land included in the Deed of  
12 Trust.

13 **V. The Shares in Ballentyne Were Transferred to D.L. Evans as a Result of the**  
14 **Foreclosure Sale, and Ballentyne Should Put the Same in D.L. Evans' Name.**

15 Ricks defaulted on his obligations to D.L. Evans. *See Ricks Affidavit* ¶¶ 12-14.

16 D.L. Evans foreclosed, and received the land, and its appurtenances, through a subsequent  
17 foreclosure sale in January 2013. *Id.* ¶¶ 12-14, Exhibit 10; *Joyce Livestock Co.*, 156 P.3d at  
18 514. The shares of Ballentyne followed the transfer of water rights to D.L. Evans pursuant  
19 to the Correction Trustee's Deed. *Iretton*, 164 P. at 689. And, the legal consequence of the  
20 foreclosure is that D.L. Evans owns the shares in Ballentyne representing the water and  
21 water rights appurtenant to its land. Ballentyne should update its books and records to  
22 reflect the same, and, because it will not, the Court should compel Ballentyne to do so.

23 **CONCLUSION**

24  
25 The water rights at issue in this case are real property, and were transferred to D.L.  
26 Evans pursuant to the January 2013, foreclosure sale. With the conveyance of land as a

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

result of that foreclosure sale, D.L. Evans also received the water rights appurtenant to the conveyed land. Shares in a mutual irrigation company are muniments of title of the water rights delivered to landowners by the company, and follow the water rights when such are transferred. All that D.L. Evans needed to secure the shares in Ballentyne was the Deed of Trust securing the transfer of water rights to it in the case of foreclosure. D.L. Evans received that security from Ricks, and foreclosed on the Deed of Trust. Through the subsequent foreclosure sale, D.L. Evans received the pledged land, water rights, and the associated shares in Ballentyne. Summary Judgment for Ricks is not appropriate as a matter of law.

DATED this 5<sup>th</sup> day of February, 2015.

**PARSONS, SMITH, STONE,  
LOVELAND & SHIRLEY, LLP**

  
Jason R. Naess  
Attorneys for D.L. Evans Bank

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF DELIVERY**

I hereby certify that on the 5<sup>th</sup> day of February, 2015, I served a copy of the foregoing RESPONSE BRIEF TO THOMAS M. RICKS' MOTION FOR SUMMARY JUDGMENT upon the following named person(s) in the manner listed below:

- |                                     |              |                       |
|-------------------------------------|--------------|-----------------------|
| S. Bryce Farris                     | <u>  x  </u> | U.S. Mail             |
| SAWTOOTH LAW OFFICE, PLLC           | <u>    </u>  | Via Facsimile         |
| P.O. Box 7985                       | <u>    </u>  | Via Overnight Carrier |
| Boise, Idaho 83707                  | <u>    </u>  | Via Hand Delivery     |
| <br>                                |              |                       |
| Chris Bromley                       | <u>  x  </u> | U.S. Mail             |
| McHugh Bromley, PLLC                | <u>    </u>  | Via Facsimile         |
| 380 S 4 <sup>th</sup> St., Ste 103  | <u>    </u>  | Via Overnight Carrier |
| Boise, Idaho 83702                  | <u>    </u>  | Via Hand Delivery     |
| <br>                                |              |                       |
| John Homan                          | <u>  x  </u> | U.S. Mail             |
| Idaho Department of Water Resources | <u>    </u>  | Via Facsimile         |
| P.O. Box 83720-0098                 | <u>    </u>  | Via Overnight Carrier |
| Boise, Idaho 83720                  | <u>    </u>  | Via Hand Delivery     |

**PARSONS, SMITH, STONE,  
LOVELAND & SHIRLEY, LLP**

  
\_\_\_\_\_  
Jason R. Naess  
Attorneys for D.L. Evans Bank