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9 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
10 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

12 -----  
13 D.LEVANS BANK, )  
14 Plaintiff, )

15 vs. )

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

Defendants. )

Case No. CV OC 1317406

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

1 COMES NOW the Plaintiff, D.L. Evans Bank, pursuant to the December 22, 2014,  
2 Order Governing Further Proceedings, and in preparation for the March 18, 2015, Pretrial  
3 Conference, and hereby submits the following Findings of Fact and Conclusions of Law.

4  
5 **FINDINGS OF FACT**

6 **I. The Ballentyne Ditch Co., Ltd.**

7 1. The Ballentyne Ditch Company, Ltd. (“Ballentyne”), was formed by filing  
8 Articles of Incorporation on April 15, 1910. *Articles of Inc. (1910)*.

9 2. As described in the Articles, the purpose of Ballentyne was to “take over,  
10 own, hold, conduct, and manage that certain irrigating ditch, commonly known as the  
11 Ballentyne Ditch.” *Id.* at Article II.

12 3. Ballentyne’s Articles established a five member board of directors which  
13 was to exercise the corporation’s corporate powers. *Id.* at Article V.

14 4. Article VI of Ballentyne’s 1910 Articles of Incorporation provided for the  
15 issuance of capital stock and provided that the stock would be:

16  
17 incident to and appurtenant to the lands lying under and heretofore  
18 irrigated by means of said canal, and none of said capital stock  
19 shall be transferred, or transferrable upon the books of the  
20 corporation without a transfer of the lands to which the same is  
21 appurtenant and any other person than the owner of such lands,  
22 holding such stock, or any of it, shall be deemed to hold the same  
23 as trustee to the use and benefit of of (sic) the owner of said lands.

24 *Id.* at Article VI.

25 5. Article VI further provided that the stock certificates were to “describe the  
26 lands to which the [stock is] appurtenant,” and defined what land could have appurtenant  
Ballentyne stock by identifying the lands irrigated by the Ballentyne Ditch. *Id.*

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6. As stated in Article VIII of the 1910 Articles of Incorporation, the corporation was “not formed for profit, but for the mutual operation of said canal and irrigating system and for its better maintenance and conduct.” *Id.*

7. In 1929, Ballentyne amended its Articles with a new Article VI. *Amended Articles of Inc. (1929)*. Amended Article VI continued to provide that shares in the corporation were:

inseparably attached the right to the use of an equal and proportionate part of the waters of said canal available for the irrigation of the lands thereunder, and only such amounts of said capital stock shall be issued as shall be inseparably attached and appurtenant to the lands lying under and irrigated by means of said canal.

*Id.* Stock certificates were still to describe the lands “to which the same are appurtenant.”

*Id.*

8. In 1947, Ballentyne adopted Bylaws. The Bylaws established the duties of the corporation’s board of directors, which include, among others, holding directors’ meetings; overseeing personnel matters; “manag[ing] and control[ing] the affairs and business of the corporation . . . not inconsistent with the Laws of the State of Idaho;” and causing stock certificates to be issued to stockholders, which certificates are to represent the stockholders respective interests in the corporation. *Ballentyne Bylaws* at Art. III.

9. As to the stock certificates, the Bylaws provide:

Certificates of stock shall be of such form and device as the Board of Directors may adopt, and such certificates shall be signed by the President or Vice-President and attested by the Secretary, with the corporate seal, and express on their face their number, date of issuance, number of shares for which, and person or persons to whom issued.

1 *Id.* at Art. VI. The description of stock certificates in the Bylaws contains no reference to  
2 land within the corporation’s boundaries or water delivered or managed by the corporation.

3  
4 *See id.*

5 10. The Bylaws also describe the manner in which Board of Directors’  
6 meetings are to be held, and indicate that all questions considered by the directors shall be  
7 decided by a majority vote of the directors present, “given orally.” *Id.* at Art. XI. In other  
8 words, such meetings are to be held in person.

9 11. In 1948, the Articles of Incorporation were again amended. *Amended*  
10 *Articles of Inc. (1948)*. At that time, Article VI was amended to read: “This corporation  
11 shall have a total authorized capital stock of 10,000 divided into 1,000 shares of the par  
12 value of (\$10.00) per share.” *Id.* From that time forward, Ballentyne’s Articles no longer  
13 related ownership of stock to the ownership of land served by the common ditch nor  
14 delivery of water to such lands.

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16 **II. D.L. Evans Bank’s Transactions with Thomas Ricks.**

17 12. Thomas Ricks (“Ricks”) obtained a loan from D.L. Evans Bank (“D.L.  
18 Evans”) in 2008. In exchange for the loan, Ricks entered a Deed of Trust with the Bank  
19 (the “Deed of Trust”), securing the loan with property owned by Ricks within Ballentyne’s  
20 boundaries.

21 13. Ricks’ Deed of Trust with D.L. Evans provides that Ricks did:

22  
23 irrevocably grant, bargain, sell, and convey in trust, with power of  
24 sale, to Trustee for the benefit of the Lender as Beneficiary, all of  
25 Grantor’s right, title, and interest in and to the following described  
26 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 real property,

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

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

6 14. When Ricks defaulted on the loan, D.L. Evans foreclosed on the Deed of  
7 Trust, and purchased the property at the foreclosure sale. The Trustee’s Deed issued as a  
8 result of the foreclosure sale indicated it conveyed the two parcels of land included in the  
9 Deed of Trust, but did not mention water rights or other appurtenances.

10 15. The foreclosed-on parcels are within Ballentyne’s boundaries, and are  
11 covered by Snake River Basin Adjudication (“SRBA”) decrees in Ballentyne’s name.

12 **III. Post-sale Communication Regarding Water Rights and the Foreclosed on**  
13 **Land.**

14 16. After the foreclosure sale, D.L. Evans contacted Shaun Bowman  
15 (“Bowman”), a director of Ballentyne, and inquired whether Ballentyne was “over the  
16 water rights for [the foreclosed on] properties.” *Dustin Smith email to Shaun Bowman,*  
17 *March 19, 2013.*

18 17. Joe King (“King”), another director of Ballentyne, then contacted Ricks, a  
19 third director of Ballentyne, by email, copying Bowman, and indicated that D.L. Evans had  
20 contacted Ballentyne regarding the “water right” for the properties previously owned by  
21 Ricks. *Joe King email to Thomas Ricks, March 22, 2013* (“The DL Evans Bank has  
22 contacted us regarding water right (sic) for properties that you previously owned.”). King  
23 indicated Ballentyne had responded to D.L. Evans that it was “over” the water rights. *Id.*  
24 King then asked Ricks whether he, Ricks, had “any plans to not transfer these water shares  
25 to the bank.” *Id.*  
26

1           18.     Ricks responded to King, by email, that “[t]here will not be any transfer of  
2 water rights by me,” and that there had been prior discussions among them “that water  
3 rights in the Ballentyne Ditch Co. are personal peroperty (sic) and are not attached to the  
4 real property.” *Thomas Ricks email to Joe King*, March 22, 2013. Ricks stated “DL Evans  
5 Bank et. al. are now owners of real property that does not have any water rights in an  
6 irrigation comapny (sic),” and threatened to sue Ballentyne if it transferred any “water  
7 rights.” *Id.*

9           19.     King replied to Ricks’ email, again copying Bowman, and reiterated Ricks’  
10 position was “no transfer of water without a court order,” and that he would pass the same  
11 on to D.L. Evans. *Joe King email to Thomas Ricks*, March 23, 2013. King indicated he  
12 was “pretty sure” Ricks wanted to retain “[his] water,” but felt he needed to ask Ricks so  
13 that he fulfilled his perceived responsibilities to Ballentyne, which he described as to  
14 “manage the Ballentyne Ditch business in accordance with directions from the Board and  
15 the rules/regulations/laws that govern issues like water rights.” *Id.*

17           20.     The other directors later ratified the decision to deny delivery of water to  
18 D.L. Evans when they subsequently deliberated, by email, whether to allow the delivery of  
19 water from other sources to D.L. Evans’ land. In the deliberations, the directors referred to  
20 D.L. Evans’ property as a “dry farm.” *See Aaron Ricks email to Joe King*, April 13, 2013  
21 (“[T]his farmer knew he was leasing a dry farm.”).

23           21.     Prior to the foreclosure, the land was irrigated by Ricks with water  
24 delivered through the Ballentyne system.

25           22.     All assessments for the delivery of water were paid prior to the foreclosure.  
26

1           23.     In March and April, 2013, a representative from D.L. Evans contacted  
2 Bowman, indicating D.L. Evans was ready and willing to pay for the delivery of water to  
3 D.L. Evans' land.  
4

5           24.     After Ballentyne communicated to D.L. Evans that it would not deliver  
6 water that had been historically appurtenant to, and had been delivered to, the foreclosed-  
7 on land, D.L. Evans sent Ballentyne a series of letters, requesting an explanation for its  
8 denial of the delivery of water and water rights. At the time, Ricks was in a chapter 11  
9 bankruptcy case, and, as the communication progressed, D.L. Evans clarified, in response  
10 to the potential automatic stay in Ricks' bankruptcy regarding shares in Ballentyne, that all  
11 D.L. Evans was asking for was Ballentyne's position regarding the delivery of water and  
12 water rights. *Id.*  
13

14 **IV.   Ballentyne Stock Certificates.**

15           25.     Ricks and Ballentyne have produced a document that appears to represent  
16 either seventy one or (71.5) shares of the "capital stock" of Ballentyne. While the  
17 document contains Ricks' name, it is not signed by Ballentyne's President, attested to by  
18 Ballentyne's Secretary, and does not bear Ballentyne's corporate seal as required by  
19 Ballentyne's Bylaws to be a stock certificate. *See Ballentyne Bylaws* at Art. VI. The  
20 unsigned stock certificate appears to bear an issuance date of May 21, "1008." Ricks has  
21 "sworn upon oath" that the unsigned certificate is "a true and correct copy of a share of  
22 stock, owned by [him], in Ballentyne." *See Affidavit of Thomas M. Ricks in Support of*  
23 *Thomas M. Ricks' Motion for Summary Judgment*, ¶ 6.  
24

25           26.     Ricks has produced a second document also purporting to be the certificate  
26 representing his shares of Ballentyne stock. The second version bears an issuance date of

1 May 21, "2008," and is signed by the then President. Ballentyne's Treasurer in 2008,  
2 signed the certificate as Secretary. In addition to the different dates and signatures, there  
3 are differences with the alignment of filled-in text between the unsigned and signed  
4 certificates; though both certificates have been presented as being the same certificate, and  
5 as representing Ricks' shares of stock in Ballentyne.  
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7 27. In June 2013, Ballentyne provided D.L. Evans a stock certificate  
8 presumably representing the water appurtenant to four and a half acres of land within  
9 Ballentyne's boundaries. D.L. Evans received that land through a separate foreclosure sale  
10 not involving the other parties to this case. Ballentyne did not require a surrender of the  
11 previous stock certificate for the four and a half acres prior to issuing the new certificate to  
12 D.L. Evans. All that D.L. Evans was required to do to obtain the stock certificate was to  
13 present to Ballentyne the trustee's deed conveying the foreclosed on land to D.L. Evans.  
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15 **V. Communication With IDWR Regarding Delivery of Water.**

16 28. In May 2013, D.L. Evans filed a Petition with IDWR, quoting Idaho Code §  
17 42-907, and requesting IDWR make a determination that Ballentyne was required to  
18 deliver appurtenant water to the properties D.L. Evans received from the January 2013,  
19 foreclosure. In June 2013, IDWR responded to D.L. Evans' Petition with a document  
20 titled "Preliminary Order." IDWR recognized D.L. Evans request for IDWR's intervention  
21 pursuant to Idaho Code § 42-907, and then stated:  
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23 The delivery of the water under Idaho Code §§ 42-901 et seq. is  
24 established under the terms of a private contract between the  
25 company and the consumer. If there is a dispute between the  
26 parties as to the ownership or the right to use or delivery of water  
under the contract, the aggrieved party must commence an action  
in district court. The Department lacks jurisdiction to adjudicate  
disputes involving private contracts. The construction and  
enforcement of contract rights is a matter which lies in the

1 jurisdiction of the courts and not the state administrative agency.  
2 This is true even when the subject matter of the contract coincides  
3 generally with the expertise of the agency. The Department's role  
4 under Idaho Code § 42-907 is limited to identifying the quantity of  
5 water to be delivered or measuring the water actually delivered in  
6 the event of a dispute. The appropriate forum to request a  
7 determination as to whether Ballentyne Ditch Co., Ltd. is required  
8 to deliver the water to the properties in question is district court.

9 IDWR dismissed D.L. Evans' Petition because "the Department does not have the  
10 authority to grant the relief sought by the Petitioner."

11 29. D.L. Evans is not aware of IDWR taking any further action regarding the  
12 delivery of water to the foreclosed-on property.

13 **VI. D.L. Evans' Post-Foreclosure Attempts to Lease the Foreclosed-on Property**

14 30. In the spring of 2013, D.L. Evans entered a Farm Lease Agreement with  
15 Blue Diamond Turf, LLC ("Blue Diamond"), to lease the foreclosed-on property for  
16 farming purposes (the "2013 Lease"). D.L. Evans was to have received \$4,800.00 under  
17 the lease. Blue Diamond began making preparations and farming-related improvements to  
18 the foreclosed-on property.

19 31. In 2013, Ada County requested D.L. Evans document its eligibility for an  
20 agricultural exemption on the foreclosed-on parcels. With the 2013 Lease in place, D.L.  
21 Evans filed for a determination that it was eligible for the exemption.

22 32. Both D.L. Evans and Blue Diamond, through its member Josh Janicek,  
23 contacted Ballentyne regarding the delivery of water to the foreclosed-on property, and  
24 were informed Ballentyne would not deliver water to the property.

25 33. When the parties to the lease learned water would not be delivered, D.L.  
26 Evans was forced to break the contract with Blue Diamond in May 2013. As a remedy for  
the breach, Blue Diamond accepted a payment from D.L. Evans of \$1,500.00 to reimburse

1 Blue Diamond for its costs associated with the groundwork done on the foreclosed-on  
2 property.

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4 34. Later in 2013, Blue Diamond saw there was enough growth on the property  
5 to cut, and contacted D.L. Evans. D.L. Evans agreed to allow Blue Diamond cut the  
6 growth and to keep the proceeds from the harvested crop as further damages for the  
7 contract breach.

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9 35. In the spring of 2014, seeing that a crop was able to be harvested on the  
10 property in 2013, Blue Diamond approached D.L. Evans again, requesting another Farm  
11 Lease Agreement (the "2014 Lease"). The 2014 Lease covered the period of March 25,  
12 2014, to November 1, 2014, and, to allocate the risk associated with water-related issues,  
13 was structured such that Blue Diamond would pay D.L. Evans a minimal base rent of  
14 \$337.00 for the contract term, but, if it was able to get a sufficient wheat crop (3,000  
15 bushels), Blue Diamond was to pay D.L. Evans an additional \$1,325.00.

16  
17 36. Ada County again requested D.L. Evans to document its eligibility for an  
18 agricultural exemption on the property in 2014. D.L. Evans filed for a determination that it  
19 was eligible for the exemption with the 2014 Lease. The foreclosed-on property includes a  
20 4.8-acre parcel and a 31-acre parcel. Blue Diamond was only interested in leasing the 31-  
21 acre parcel, and D.L. Evans has not been able to maintain the agricultural exemption on the  
22 4.8-acre parcel without water to support the growth of crops. The impact of the loss of the  
23 exemption on the taxes associated with the 4.8-acre parcel is unknown at this time.

24  
25 37. Blue Diamond reached the yield levels established in the 2014 Lease, and  
26 D.L. Evans received \$1,662.00 under the lease.

1           38.     In the fall of 2014, D.L. Evans and Blue Diamond began discussing a Farm  
2 Lease Agreement for 2015 (the “2015 Lease”). The 2015 Lease includes a rent amount of  
3 \$4,500.00, but also grants Blue Diamond a credit against rent for the cost of renting and  
4 delivering water to the property. To date, the 2015 Lease has not been signed.  
5

6 **VII.   D.L. Evans’ Post-Foreclosure Attempts to Sell the Foreclosed-on Property**

7           39.     After the foreclosure on the property, D.L. Evans attempted to market and  
8 sell the foreclosed-on parcels.

9           40.     In February 2013, Bella Tierra LLC approached D.L. Evans with a proposal  
10 to purchase the foreclosed-on properties for a purchase price of \$1,650,000.00. The  
11 proposed contract price was low, and D.L. Evans decided to not execute the proposed  
12 contract.  
13

14           41.     In October 2013, D.L. Evans entered a real property purchase and sale  
15 agreement with Land Associates LLC for the purchase of the approximately 35 foreclosed-  
16 on acres (the “Land Associates Contract”). The purchase price in the Land Associates  
17 Contract was \$2,327,000.00 (approximately \$65,000.00 per acre), and the contract gave  
18 Land Associates a forty-five day review period during which it could terminate the  
19 contract.  
20

21           42.     On December 6, 2013, Land Associates sent D.L. Evans a letter, indicating  
22 it had conducted due diligence and feasibility studies on the property. The letter  
23 specifically indicated: “There are multiple issues on the property to include the water  
24 rights and ongoing litigation with Thomas Ricks and Ballentyne Ditch Company to  
25 recognize the water shares to go with the property.” Because of those issues, Land  
26

1 Associates notified D.L. Evans Bank it determined the project was not feasible without  
2 different terms, and it terminated the contract.

3  
4 42. On December 9, 2013, Land Associates sent D.L. Evans a second letter, and  
5 stated that, while it was cancelling the initial Land Associates Contract, it was prepared to  
6 re-write the agreement at \$55,000 per acre. D.L. Evans was not willing to sell the property  
7 for the lower price.

8 43. In March 2014, D.L. Evans determined it would not actively market the  
9 property due to the difficulties and uncertainty created by the water rights dispute and the  
10 problems lack of water had caused in earlier purchase contracts.

11 **VIII. Appraised Value**

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13 44. In September 2014, D.L. Evans secured an appraisal to compare the value  
14 of the property with and without water. The appraiser determined the parcels' value to be  
15 approximately \$1,790,000.00 with irrigation water. Without irrigation water, the appraiser  
16 determined the parcels' value to be approximately \$1,665,000.00.

17 **IX. Other Persons' Experiences With Ballentyne**

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19 45. It is expected the Court will hear evidence from other persons during the  
20 trial on this matter, including John Wood and Marianne Deshozo. Both of those persons  
21 own, or have owned, properties formerly owned by Ricks within Ballentyne's boundaries,  
22 and have had interactions with Ballentyne and its directors in attempting to receive water  
23 or shares of Ballentyne in relation to their properties. It is anticipated their testimony will  
24 indicate and support a finding of a pattern of behavior by Ballentyne and its directors that  
25 differs depending on who previously owned transferred property within Ballentyne's  
26

1 boundaries, the method by which the new owner obtained property, and the relationship  
2 between the new owner and Ricks.

3  
4 **CONCLUSIONS OF LAW**

5 **I. Legal Issues Related to Water and Water Rights.**

6 **A. The landowners within Ballentyne’s boundaries are entitled to the use of**  
7 **historically applied water.**

8 1. All water flowing in its natural channel within the boundaries of the State of  
9 Idaho is property of the State. Idaho Code § 42-101; *Poole v. Olaveson*, 82 Idaho 496,  
10 502, 356 P.2d 61, 64 (Idaho 1960). As such, the State has a duty to supervise the  
11 appropriation and allotment of the water to those diverting the water from its natural  
12 channels and using it for a “beneficial purpose.” Idaho Code § 42-101.

13 2. A right to the use of the State’s waters, or a water right, is statutorily  
14 recognized, though is not considered a property right in itself. *Id.* Rather, such rights  
15 “become the complement of, or one of the appurtenances of, the land or other thing to  
16 which, through necessity, said water is being applied.” *Id.*; *Hard v. Boise City Irr. & Land*  
17 *Co.*, 9 Idaho 589, 76 P. 331, 332 (Idaho 1904). The right does not exist without land to  
18 which the water right is appurtenant. Idaho Code § 42-101.

19 3. Historically, a water right could be created by one of two methods: the  
20 “constitutional” method or the statutory method. *A & B Irr. Dist. v. State of Idaho*, 157  
21 Idaho 385, 336 P.3d 792, 796 (Idaho 2014) (quoting *United States v. Pioneer Irr. Dist.*,  
22 144 Idaho 106, 110, 157 P.3d 600, 604 (Idaho 2007)).  
23  
24

25 Under the constitutional method of appropriation, appropriation is  
26 completed upon application of the water to the beneficial use for  
which the water is appropriated. When following the constitutional  
method, one must depend upon actual appropriation, that is to say,  
actual diversion and application to beneficial use. Under the

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statutory method of appropriation, the appropriation is not complete and a license will not issue until there is proof of application to beneficial use for the purpose for which it was originally intended. Under either the constitutional or statutory method of appropriation, the appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho

*Id.*

4. If water is no longer applied to a beneficial use, the right to use the water may be forfeited. Idaho Code § 42-222; *Jenkins v. Idaho Dept. of Water Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (Idaho 1982). A critical characteristic of any water right owner is they must be able to apply the water represented by the right to a beneficial use. *See* Idaho Code § 42-222.

5. Once water has been beneficially applied to, and become an appurtenance of, land, the right to use that water is statutorily protected in the landowner, and is to never be denied or prevented except upon the failure of the user to pay the ordinary charges or assessments imposed to cover the expenses of the delivery of the water. Idaho Code § 42-101.

6. Idaho's statutes regarding the delivery of water provide:

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.

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Idaho Code § 42-914. This statute does not protect the rights of those to whom water has been “appropriated” or those who have “used” water, but protects “any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of” water that has been appropriated or used for agricultural or domestic purposes under a sale, rental, or distribution of water. *Id.* Once a mutual irrigation company distributes water to land, the water is exclusively dedicated to the land, and the right to use that water shall not be deprived the person settling on or improving the land with the view of receiving the continued benefit of the water, his heirs, executors, administrators, successors, or assigns. *Id.* Rather, the water is to “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 lien thereon.” Idaho Code § 42-915.

7. The language of Idaho Code § 42-914, regarding the delivery of water, is consistent with, and tracks, the language of Idaho’s Constitution, which provides:

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.

Idaho Const. Art. XV, § 4.

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8. To facilitate a mutual irrigation company’s management and delivery of water, a water right representing water delivered by the company may be licensed or decreed in the company’s name with a general place of use description matching the company’s boundaries, though the water is dedicated for use upon specific properties within the company’s boundaries. *See* Idaho Code 42-219(6). Placing the right in the company’s name does not change that the water right is “appurtenant to the land to which the water represented thereby has been beneficially applied.” *See Ireton*, 164 P. at 688; *see also* Idaho Code § 42-1402 (“The right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which the water is used, and such right will pass with the conveyance of such land.”).

9. A stockholder-water user-landowner may sell and mortgage his water right independently from all other stockholders. *See id.* at 688-89; *see also In re Johnson*, 50 Idaho 573, 579, 300 P. 492, 494 (Idaho 1931) (“And, where a ditch is used in common for the conveyance of water for two appropriations, each owner may sell or abandon his right to the ditch, separate from the other; the same right belongs to a stockholder in a mutual ditch company.”) (citations omitted).

10. The party entitled to use and control a water right is separate from the corporation that delivers the water. A water right is defined in terms of the priority, amount, season of use, purpose of use, point of diversion, and place of use of the water represented by the right. *A & B Irr. Dist.*, 336 P.3d at 796. Those elements may be changed if the water rights of others are not injured thereby. Idaho Code § 42-108. However, “if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation . . . no change in the

1 point of diversion, place of use, period of use, or nature of use of such water shall be made  
2 or allowed without the consent of such corporation.” *Id.* The person statutorily entitled to  
3 make a change to a water right’s elements, is the person “entitled to the use of water or  
4 owning any land to which water has been made appurtenant.” Idaho Code § 42-108. And,  
5 the legislature specifically identified that person as separate and distinct from the  
6 corporation whose shares represent the right to the use of such water. *Id.* If the right to  
7 control and use the water were owned by mutual irrigation corporations, instead of by the  
8 water’s beneficial users or landowners, the language requiring a corporation to approve  
9 requested changes would be superfluous. *Id.* A statute is to be interpreted so that none of  
10 its words will be void, superfluous, or redundant. *Verska v. St. Alphonsus Reg’l Med. Ctr.*,  
11 151 Idaho 889, 897, 265 P.3d 502, 510 (Idaho 2011).

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14 11. A mutual irrigation company is a non-profit corporation established for  
15 “convenience of [the corporation’s] members in the management of the irrigation system  
16 and in the distribution to them of water for use upon their lands in proportion to their  
17 respective interests” in the corporation. *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687,  
18 689 (Idaho 1917). The corporation is owned by stockholders, who are landowners within  
19 the corporation’s boundaries, and the stock represents water rights made appurtenant to the  
20 landowner-stockholders’ land. *Id.*; see also, e.g., *Twin Falls Canal Co. v. Shippen*, 46  
21 Idaho 787, 271 P. 578 (Idaho 1928).

22  
23 Ballentyne was “not formed for profit, but for the mutual operation of said canal and  
24 irrigating system and for its better maintenance and conduct.” *Ballentyne Articles of Inc.*  
25 (1910) at Article VIII. Put differently, Ballentyne was established as a mutual irrigation  
26 company. Consistent with such, the corporation was established with stockholders who

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. *See* Idaho Const. Art. XV, § 4; Idaho Code §§ 42-914, 42-915.  
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12 12. The SRBA process, through which, among other things, water rights have  
13 been decreed in the names of mutual irrigation companies, has not changed the nature of  
14 water rights ownership as between mutual irrigation companies and the owners of land  
15 irrigated by water delivered through the companies. Rather, since the SRBA process  
16 began, the Idaho Supreme Court has, if anything, clarified the relationship between  
17 irrigation entities and the beneficial users of water. In *United States v. Pioneer Irrigation*  
18 *District*, 144 Idaho 106, 157 P.3d 600 (Idaho 2007), the Supreme Court provides:  
19

20 There are several phrases used in the Idaho Constitution and the  
21 Idaho Code that signify that the beneficial users have an interest  
22 that is stronger than mere contractual expectancy. The Idaho  
23 Constitution provides that when water is appropriated or used for  
24 agricultural purposes, "such person . . . shall not thereafter, without  
25 his consent, be deprived of the annual use of the same." IDAHO  
26 CONSTITUTION art. XV § 4. This notion of a perpetual right is  
reiterated in the Idaho Code, which states, the "right to continue  
the beneficial use of such waters shall never be denied nor  
prevented for any cause other than the failure . . . to pay the  
ordinary charges or assessments." I.C. § 42-220. Idaho Code §  
42-915 uses the word "title" and provides that once a water right  
becomes appurtenant to the land, title to the use of the water can  
never be affected by transfers of the ditch, canal, or by foreclosure.

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

13. The role of irrigation entities is to act on behalf of those who have applied the water delivered by the entities to beneficial use. *Pioneer Irr. Dist.*, 157 P.3d at 609. While the name of another organization may appear in the “Name” and “Address” sections of a SRBA partial decree, “as a matter of Idaho constitutional and statutory law[,] title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners.” *Id.* That language was included in a remark added to the particular water right at issue in the *Pioneer Irrigation District* case. *See id.* However, the Supreme Court indicated the remark “reflect[ed] this Court’s analysis” of the law regarding Idaho water and water rights, and is applicable to the analysis in this case. *See id.*

14. The SRBA decree in this case is in the name of Ballentyne. The right to use the water delivered by Ballentyne, however, is held by the landowners who have beneficially applied the water to their properties within Ballentyne’s boundaries. Ballentyne merely acts on behalf of the landowners to administer the delivery of the water and to manage the delivery system.

15. The land foreclosed on by D.L. Evans has been historically irrigated by water delivered through the Ballentyne water delivery system. When Ricks provided the land to D.L. Evans as security for its loan, the land had appurtenant water rights.

16. The land D.L. Evans received through the foreclosure process is located within Ballentyne’s district and is covered by the SRBA decrees in Ballentyne’s name. The SRBA, and any partial or final decree issued thereunder, did not provide Ballentyne the ability to deny water to land to which the water has become appurtenant.

1 B. The water rights or the right to use water, which are appurtenant to the  
2 foreclosed-on land, are real property, or the appurtenances to real property, and  
3 were conveyed to D.L. Evans.

4 17. If water has been applied to a beneficial use and a water right is created, the  
5 water right is real property, and is appurtenant to the land upon which the water represented  
6 by the water right is beneficially used. Idaho Const. Art. XV, § 4; Idaho Code §§ 42-101,  
7 55-101; *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 79 (Idaho  
8 2011). Such a right can be conveyed by the owner to another. *Hard*, 76 P. at 332.

9 18. As real property, ownership of water rights must be conveyed in the same  
10 manner, or subject to the same restrictions and protections, as other real property. *See*  
11 *Olson v. Idaho Dept. of Water Res.*, 105 Idaho 98, 100-01, 666 P.2d 188, 190-91 (Idaho  
12 1983); *Gard v. Thompson*, 21 Idaho 485, 123 P. 497, 502 (Idaho 1912).

13 19. Water rights can be conveyed separate and apart from land, but this “may  
14 only be done where such was the intention of the parties to the conveyance.” *Molony v.*  
15 *Davis*, 40 Idaho 443, 233 P. 1000, 1001 (Idaho 1925). If the intent of the parties is not to  
16 convey land separate from its appurtenant water rights, the water rights are conveyed with  
17 the land even if not mentioned in the deed. *Joyce Livestock Co. v. United States*, 144 Idaho  
18 1, 13, 156 P.3d 502, 514 (Idaho 2007). And, such occurs even when the deed does not  
19 mention “appurtenances.” *Id.* at 515. The only time appurtenant water rights are not  
20 conveyed with a conveyance of land is where such rights are expressly reserved from  
21 conveyance in a deed or it is clearly shown the parties intended the grantor would reserve  
22 them. *Id.*

23 20. As security for his loan from D.L. Evans, Ricks provided D.L. Evans a Deed  
24 of Trust that included, among other property interests, “water, water rights and ditch rights  
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1 (including stock and utilities with ditch or irrigation rights).” D.L. Evans foreclosed on that  
2 Deed of Trust in January 2013. The Trustee’s Deed from the resulting foreclosure sale did  
3 not identify water rights or other “appurtenances.” At the same time, the deed did not  
4 expressly reserve the water rights or other appurtenances from the conveyance.  
5

6 21. If the Court determines there was not a water right appurtenant to the land  
7 foreclosed on by D.L. Evans, and that such could not have been conveyed to D.L. Evans  
8 through the Trustee’s Deed, water had been sold, rented, or distributed, and then used on  
9 the land for domestic or agricultural purposes. *See* Idaho Code §§ 42-914, 42-915. As  
10 such, neither Ricks nor his heirs, executors, administrators, successors, or assigns to the  
11 property were to be denied the continued use of the water on the property, and the perpetual  
12 right to the use of the water was to remain a part of the land. Idaho Const. Art. XV, § 4;  
13 Idaho Code §§ 42-914, 42-915. In other words, even if a water right was not appurtenant  
14 to the land, a “right to the use of water necessary to irrigate” the land was an appurtenance  
15 to the land, and was transferred to D.L. Evans via the Trustee’s Deed. Idaho Code § 42-  
16 915.  
17

18 22. The foreclosed on Deed of Trust specifically covered water and water rights,  
19 and indicates the parties’ intent was that such rights would be conveyed under any  
20 foreclosure. When the foreclosure trustee conveyed the land covered by the Deed of Trust  
21 to D.L. Evans, the legal consequence was that it also conveyed the land’s appurtenances,  
22 including water rights or the right to use water on the land.  
23

24 C. Shares of stock in Ballentyne are muniments of title evidencing water rights,  
25 and are transferred with the water they represent.

26 23. While shares of stock in an ordinary, for-profit corporation are personal  
property, where a mutual irrigation company has been established for the convenience of

1 its members in the management of the irrigation system and the distribution of water,  
2 ownership of shares of stock in such a corporation is incidental to ownership of a water  
3 right. *Ireton*, 164 P. at 689. “Such shares are muniments of title to the water right, are  
4 inseparable from it, and ownership of them passes with the title which they evidence.” *Id.*;  
5 *see also Andrews v. N. Side Canal Co.*, 52 Idaho 117, 12 P.2d 263, 269 (Idaho 1932)  
6 (quoting *Ireton*, 164 P. at 689) and *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d  
7 1105, 1108 (Idaho 1931) (quoting *Ireton*, 164 P. at 689).

9         24. In *Ireton*, in deciding shares in a mutual irrigation company are incidental to  
10 ownership of a water right, the shares are muniments of title to the water right, the shares  
11 are inseparable from the water right, and that ownership of the shares passes with the title  
12 which they evidence, the Idaho Supreme Court relied on case law analyzing stock  
13 ownership in non-profit irrigation companies created pursuant to state law, like *Ballentyne*.  
14 *See Ireton*, 164 P. at 689 (citing *In re Thomas' Estate*, 147 Cal. 236, 81 Pac. 539 (Cal.  
15 1905); *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 Pac. 619 (Wash. 1915). The  
16 language and analysis included in *Ireton* was not specific to Carey Act companies, but was  
17 applicable to “mutual irrigation company[ies].” *Id.* The law analyzed and relied on in  
18 *Ireton* was also not specific to Carey Act companies, but analyzed irrigation companies  
19 similar to *Ballentyne*, and the language in *Ireton* is applicable to *Ballentyne*. *Id.*

22         25. *Ballentyne* is a non-profit mutual irrigation company established for the  
23 convenience of its members. *Ballentyne Articles of Inc. (1910)* at Article VIII. Its shares  
24 are muniments of title to the water rights of the corporation’s landowners, and ownership of  
25 the shares passes with title to the water rights evidenced by the shares.  
26

1           26.     Ballentyne seems to have recognized that shares of stock in Ballentyne  
2 follow the properties to which water has been distributed when transferring stock  
3 certificates in other instances. For example, when D.L. Evans foreclosed on other property  
4 within Ballentyne's boundaries, not previously owned by Ricks, all D.L. Evans was  
5 required to do in order to obtain the stock certificates representing the water rights  
6 appurtenant to the foreclosed on land was to present to Ballentyne the trustee's deed  
7 conveying the land to D.L. Evans.

9           27.     At this point, if stock in Ballentyne is not deemed to be a muniment of title  
10 to the water distributed to the property owners in Ballentyne's boundaries, it is unclear  
11 what stock in Ballentyne represents, or how it relates to water or water delivery. In 1948,  
12 Ballentyne amended its Articles to remove all language relating to the company's stock to  
13 water, or referencing the stock's or water's appurtenancy to land within Ballentyne's  
14 boundaries.

16           28.     At the same time, a non-profit corporation's Articles of Incorporation cannot  
17 be inconsistent with state law. Idaho Code § 30-3-17. State law indicates that the stock in  
18 Ballentyne is a muniment of title of the water rights distributed by Ballentyne, and any  
19 amendment to the Articles of Incorporation inconsistent with that provision is invalid. *See*  
20 *Ireton*, 164 P. at 689; Idaho Code § 30-3-17.

22           29.     In 1947, the year prior to amending its Articles to remove references to  
23 stock's association with water and appurtenancy, Ballentyne adopted Bylaws that include  
24 references to the corporate stock of Ballentyne, and indicated that stock certificates were to  
25 represent the stockholders' respective interests in the corporation. Ballentyne's Bylaws did  
26 not relate stock to water or to ground within Ballentyne's boundaries, but, rather, indicated

1 stock could be transferred simply by endorsing a stock certificate. At the time, however,  
2 Ballentyne's Articles provided shares in the corporation were:

3  
4 inseparably attached the right to the use of an equal and  
5 proportionate part of the waters of said canal available for the  
6 irrigation of the lands thereunder, and only such amounts of said  
7 capital stock shall be issued as shall be inseparably attached and  
8 appurtenant to the lands lying under and irrigated by means of said  
9 canal.

10 *Amended Articles of Inc. (1929)*. Also, stock certificates were to describe the lands "to  
11 which the same are appurtenant." *Id.* The bylaws of a non-profit corporation may only  
12 contain provisions "that [are] not inconsistent with law or the articles of incorporation."  
13 Idaho Code § 30-3-21. The attempted creation of Bylaws, to the extent the Bylaws were  
14 inconsistent with the Articles and Idaho law, was invalid. Ballentyne's Bylaws regarding  
15 stock transfers are invalid, and there is nothing in the remaining Bylaws indicating stock is  
16 anything other than a muniment of title to the water delivered to the land within  
17 Ballentyne's boundaries, including the foreclosed-on land.

18 D. The Correction Trustee's Deed convey real property and its appurtenances to  
19 D.L. Evans.

20 31. A trustee's deed can only convey real property. *Spencer v. Jameson*, 147  
21 Idaho 497, 502, 211 P.3d 106, 111 (Idaho 2009). Water rights and other appurtenances are  
22 statutorily defined as real property. Idaho Code § 55-101. As such, "that which is land,  
23 affixed to the land, or appurtenant to the land" is conveyed under a trustee's deed.  
24 *Spencer*, 211 P.3 at 111. Appurtenances are conveyed even if the deed does not mention a  
25 conveyance of "appurtenances," unless there is an express reservation of the same from the  
26 deed. *Joyce Livestock Co.*, 156 P.3d at 514.

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

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

13           E. Because the shares in Ballentyne were shares in a mutual irrigation corporation,  
14 the Deed of Trust pledging the foreclosed-on land and appurtenances to D.L.  
15 Evans as security was sufficient to provide D.L. Evans a security interest in the  
16 shares.

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

23           35. 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  
25 sale, to Trustee for the benefit of the Lender as Beneficiary, all of  
26 Grantor's right, 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

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

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

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

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

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14 F. The shares in Ballentyne were transferred to D.L. Evans as a result of the  
15 foreclosure sale, and Ballentyne should put the same in D.L. Evans' name.

16 37. Ricks defaulted on his obligations to D.L. Evans. D.L. Evans foreclosed,  
17 and received the land, and its appurtenances, through a subsequent foreclosure sale in  
18 January 2013. *See Joyce Livestock Co.*, 156 P.3d at 514. The shares of Ballentyne  
19 followed the transfer of water rights to D.L. Evans pursuant to the Correction Trustee's  
20 Deed. *See Ireton*, 164 P. at 689. The legal consequence of the foreclosure is that D.L.  
21 Evans owns the shares in Ballentyne representing the water and water rights appurtenant to  
22 its land. Ballentyne should update its books and records to reflect the same, and, because it  
23 will not, the Court should compel Ballentyne to do so.

24  
25 **II. Liability of Ballentyne and its Directors, Including Ricks.**

26 A. Idaho Code § 30-3-80 provides that Ballentyne's directors are liable to D.L.  
Evans.

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38. Non-profit directors may be “liable to the corporation, any member, or any other person for any action taken or not taken as a director,” if the director did not act in compliance with Idaho Code § 30-3-80. Idaho Code § 30-3-80(4). Idaho Code § 30-3-80 requires a non-profit director to discharge his duties as a director: (a) in good faith; (b) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (c) in a manner the director reasonably believes to be in the corporation’s best interests. Idaho Code § 30-3-80(1). In discharging his duties, a non-profit director is entitled to rely on information, opinions, reports, or statements, if such are prepared or presented by certain, specified individuals, including legal counsel and committees to which the director is not a member. Idaho Code § 30-3-80(2). A director may also rely on a statement of an officer of the non-profit corporation so long as the director “reasonably believes [the officer] to be reliable and competent in the matters presented.” *Id.*

39. The decision to deny D.L. Evans its appurtenant water was not made or ratified in good faith or with the care an ordinarily prudent person in the position of a director would exercise under similar circumstances. The decision was made based on an incorrect understanding of the law and without consulting legal counsel. The only person the directors relied on in making their decision was Ricks who provided his opinion that water rights are personal property. While Ricks may have been an officer of Ballentyne at the time he offered his opinion, there is nothing that would lead a director to reasonably believe Ricks was reliable and competent in issues regarding water and water rights. Rather, when Ricks provided the directors his opinion, the directors knew D.L. Evans obtained its land from Ricks, and that Ricks considered the water to belong to him. In

1 other words, the directors knew Ricks had a conflict of interest. Rather than questioning  
2 Ricks' motives, or seeking legal counsel, the other directors, upon Ricks' threatening to sue  
3 them, decided to simply follow his wishes. The resulting decision was in Ricks', not  
4 Ballentyne's, best interests, and was not made in good faith or with care as directors  
5 looking out for the best interests of Ballentyne.  
6

7 40. The Directors did not rely on language in Ballentyne's Bylaws regarding the  
8 transfer of stock certificates in making their decision to deny water to D.L. Evans. The  
9 language of the Directors' email communications indicates they were considering delivery  
10 of "water" and "water rights," not shares of stock. The language in Ballentyne's Bylaws  
11 regarding stock certificates was inconsistent with the language in its Articles at the time the  
12 Bylaws were adopted, and should not have been relied upon by the Directors as the basis  
13 for their decision. Also, the certificate held by Ricks appears it may not have been properly  
14 issued, and any decision regarding the same based on the language on the stock certificate  
15 was not in good faith.  
16

17 41. Ballentyne's Bylaws require decisions by its Board of Directors to be made  
18 by oral vote of a majority of the directors present at a meeting. *Ballentyne's Bylaws* at Art.  
19 XI. The decision to deny the delivery of water to D.L. Evans was not made at a meeting,  
20 but was made via an email discussion between a few of the Directors. Based on that email  
21 discussion, and the premise propounded by Ricks "that water rights in the Ballentyne Ditch  
22 Co. are personal property and are not attached to the real property," the directors decided  
23 there would be "no transfer of water" to D.L. Evans. While only three directors, Bowman,  
24 Ricks, and King, were involved in making the decision to deny D.L. Evans the delivery of  
25 its water, the other directors learned of the decision and ratified the same.  
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1           42.     Ballentyne's Bylaws call for decisions of the Board of Directors to be made  
2 at meetings of the directors, and an ordinarily prudent person would not have made or  
3 ratified the decision to deny a landowner a significant property right like water without  
4 seeking legal counsel and putting the decision before the Board of Directors for  
5 deliberation and a vote. The directors chose not to do so, and denied D.L. Evans its water  
6 because another director, Ricks, told them water rights are personal property, and that  
7 Ballentyne should not deliver the same to D.L. Evans. The choice to make their decision  
8 without following the meeting formalities identified in Ballentyne's Bylaws, particularly  
9 considering that the only source of information relied on in arriving at the decision was  
10 from a party with a conflict of interest, was not made in good faith or with the care of an  
11 ordinarily prudent person in a similar position under the circumstances.  
12

13           43.     Ricks, in particular, is liable to D.L. Evans pursuant to Idaho Code § 30-3-  
14 80. While the other directors can claim they relied on Ricks' statements in arriving at their  
15 decisions, Ricks can make no such claim. He has a conflict of interest in this matter, and  
16 an ordinarily prudent person with a similar conflict of interest would not have participated  
17 in the decision-making process, or attempted to influence his fellow board members to  
18 decide in a manner consistent with his position rather than in the corporation's best  
19 interests. Ricks' decision, knowing of his conflict of interest, was not in good faith. In his  
20 communication with the other directors, he attempted to gain their compliance with his  
21 position against D.L. Evans by indicating that if the other directors decided to provide D.L.  
22 Evans with water, he would sue them.  
23

24           44.     Ballentyne and the directors are required to ensure delivery of water to D.L.  
25 Evans land, and have not done so. Idaho Code §§ 42-914 and 42-915 require that, once  
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1 water has been distributed and used upon a tract of land, the landowner has "title" to the  
2 water, and use of the water shall not thereafter be deprived to the landowner, his heirs,  
3 executors, administrators, successors, or assigns. Idaho Code §§ 42-914, 42-915. All  
4 assessments for the use and delivery of water were paid by Ricks before the foreclosure,  
5 and D.L. Evans has offered to pay the assessments since, if Ballentyne would deliver the  
6 water. Ballentyne violated Idaho Code §§ 42-914 and 42-915 when it deprived D.L. Evans  
7 the use and delivery of water to its land. Ballentyne delivered water to Ricks when he  
8 owned the land. Because of that delivery, Ballentyne cannot now deprive Ricks' successor,  
9 D.L. Evans, the delivery of the water. *See* Idaho Code §§ 42-914, 42-915

10  
11 45. D.L. Evans has requested an order directing Ballentyne to deliver water to  
12 D.L. Evans. Ballentyne and the directors are required by statute and the Idaho Constitution  
13 to deliver water to D.L. Evans, and the decision of whether to deliver that water is not  
14 discretionary in Ballentyne or the directors. *See* Idaho Const. Art. XV, § 4; Idaho Code §§  
15 42-914, 42-915. D.L. Evans has a clear right to the delivery of its water, and Ballentyne  
16 and the directors have a clear duty to see that the water is delivered, and the Court should  
17 enter an order determining D.L. Evans is entitled to the delivery of water and directing  
18 Ballentyne and the directors to deliver the water. *See* Idaho Code § 10-1201 *et seq.*

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21 46. Ballentyne's and the directors' denial of the delivery of water to D.L.  
22 Evans' land has injured D.L. Evans. The lack of water to the foreclosed-on property has  
23 devalued the land. Without water, the value of D.L. Evans' property is at least \$125,000.00  
24 less than it would be with water. D.L. Evans had the property under contract for sale at  
25 \$2,300,000.00 with water. Due to difficulties caused by the non-delivery of water, and the  
26 litigation regarding water shares, the purchaser terminated that contract, though indicated it

1 would purchase the property without an assurance of water for approximately \$375,000.00  
2 less than it would purchase the property for with water. These damages are caused by  
3 Ballentyne's and its directors' decision to deny D.L. Evans the delivery of its water.  
4

5 47. D.L. Evans has not been able to lease the land for farming due to the lack of  
6 water. In 2013, D.L. Evans lost a farming lease for \$4,800.00, and had to pay \$1,500.00  
7 when it was forced to breach a farm lease with a tenant due to being unable to provide the  
8 tenant with water. Also, due to the lack of water, D.L. Evans has lost an agricultural  
9 exemption on one of its parcels, and is in danger of losing a similar exemption on the other  
10 parcel.  
11

12 B. Ballentyne's directors are not provided immunity by Idaho Code § 6-1605.

13 48. Idaho Code § 6-1605 provides a director serving a non-profit corporation  
14 without compensation personal immunity from civil liability arising out of his conduct as a  
15 director only "if such conduct is within the course and scope of the duties and functions of  
16 the individual . . . director . . . and at the direction of the corporation . . . ." The immunity  
17 provided by Idaho Code § 6-1605 does not extend to acts or omissions not in good faith.  
18 Idaho Code § 6-1605(d).  
19

20 49. Ballentyne's directors' actions in denying D.L. Evans its appurtenant water  
21 were not in good faith, and were outside the course and scope of the duties and functions of  
22 the Directors. Per Ballentyne's Bylaws, its directors are to manage and control the affairs  
23 and business of the corporation in a manner consistent with the laws of the State of Idaho.  
24 *Ballentyne's Bylaws* at Art. III. The directors' decision to deny D.L. Evans its water was  
25 based on a statement by Ricks, who had a conflict of interest, that water rights in  
26 Ballentyne's boundaries are personal property and are not appurtenant to land. *Id.*, Exhibit

1 J. That statement is inconsistent with Idaho law. *See* Idaho Code §§ 42-101, 55-101  
2 (indicating water rights are real property and are appurtenant to land).

3  
4 50. In addition, in making decisions, the directors are supposed to vote at formal  
5 meetings. *Id.* at Art. XI. The directors decided, and ratified, the decision to deny D.L.  
6 Evans its appurtenant water through email communications.

7 51. Ricks' conduct was especially not in good faith due to his participation in  
8 the decision-making process, and his attempts to influence and threaten his co-directors  
9 into making a decision benefitting himself, though he knew he had a conflict of interest in  
10 regards to the decision to be made.

11 52. By deciding to manage and control the affairs and business of Ballentyne by  
12 email, rather than by voting at a meeting as required by Ballentyne's Bylaws, and by doing  
13 so in a manner inconsistent with Idaho law, the directors were not acting in good faith,  
14 and were acting beyond the course and scope of their functions and duties as directors. As  
15 such, the immunity offered by Idaho Code § 6-1605 does not extend to the directors.

16  
17 C. Ballentyne's and its directors' decision to deny D.L. Evans the delivery of water  
18 was negligent.

19 53. The elements of negligence are: (1) a duty, recognized by law, requiring a  
20 defendant to conform to a certain standard of conduct; (2) a breach of the duty; (3) a causal  
21 connection between the defendant's conduct and the resulting injuries; and (4) actual loss  
22 or damage. *Brooks v. Logan*, 127 Idaho 484, 489, 903 P.2d 73, 78 (Idaho 1995).

23  
24 54. Statutes may define a standard of care owed, and violations of such statutes  
25 may constitute negligence *per se*. *O'Guin v. Bingham County*, 142 Idaho 49, 52, 122 P.3d  
26 308, 311 (Idaho 2005). If a Court adopts a statute as the standard of conduct of a  
reasonable man, the effect of establishing negligence *per se* through violation of the statute

1 is to conclusively establish the first two elements of a cause of action in negligence. *Id.* To  
2 replace a common law duty of care with a duty established by a statute, the following  
3 elements must exist: (1) the statute must clearly define the required standard of conduct;  
4 (2) the statute must have been intended to prevent the type of harm the defendant's act or  
5 omission caused; (3) the plaintiff must be a member of the class of persons the statute or  
6 regulation was designed to protect; and (4) the violation must have been the proximate  
7 cause of the injury. *Id.*

9           55. Idaho Code § 42-901 *et seq.*, and particularly Idaho Code §§ 42-914 and 42-  
10 915, establish a duty owed by water delivery systems that, once a property has been  
11 delivered water through a delivery system, the system must continue to deliver water to the  
12 property owner, and his successors, for use on the property. The duty or standard of  
13 conduct required by the statutes is the continued delivery of water to property owners that  
14 have settled upon or improved property that has received water through sale, rental, or  
15 distribution, when the property owner has settled upon or improved the land with a view  
16 towards the continued use of water upon the property. *See* Idaho Code § 42-914. The  
17 harm sought to be prevented by the water delivery statutes is the withholding or non-  
18 delivery of water to property owners, or their successors, where water has been delivered to  
19 the property in the past. When Ballentyne and its directors denied the delivery of water to  
20 D.L. Evans, they harmed D.L. Evans through the withholding of water; which was the very  
21 harm sought to be prevented by the statutes. The statutes are meant to prevent parties that  
22 have settled upon or improved land with an eye towards the benefit of continued water use  
23 from being denied the delivery of water. D.L. Evans settled upon or improved the  
24 foreclosed-on land with a view towards to benefit of continued water use, and leased the  
25  
26

1 property to be farmed with the expectation that water would be delivered. Ballentyne's and  
2 its directors' denial of D.L. Evans' water was the direct cause of harm suffered by D.L.  
3 Evans as a result of the non-delivery of water. The elements of negligence per se are met;  
4 Ballentyne and the directors had a duty to see that water was delivered to D.L. Evans' land,  
5 and they breached that duty.

7 56. Ballentyne's and the directors' denial of the delivery of water to D.L.  
8 Evans' land has caused D.L. Evans' injury. D.L. Evans has not been able to sell the land  
9 for its value with water, and the lack of water has devalued the land. In addition, D.L.  
10 Evans has not been able to lease the land for farming due to the lack of water. As a result,  
11 D.L. Evans has lost an agricultural exemption on one of its parcels, and is in danger of  
12 losing a similar exemption on the other parcel. These damages are directly caused by  
13 Ballentyne's and its directors' decision to deny D.L. Evans the delivery of its water.

15 57. The denial of water has injured D.L. Evans. Without water, the value of  
16 D.L. Evans' property is at least \$125,000.00 less than it would be with water. D.L. Evans  
17 had the property under contract for sale at \$2,300,000.00 with water. Due to difficulties  
18 caused by the non-delivery of water, and the litigation regarding water shares, the  
19 purchaser terminated the purchase contract, though indicated it would purchase the  
20 property without an assurance of water for approximately \$375,000.00 less than it would  
21 pay for the property with water. In addition, D.L. Evans lost a farming lease for \$4,800.00,  
22 and had to pay \$1,500.00 when it was forced to breach a farm lease with a tenant due to  
23 being unable to provide the tenant with water.

25 D. Ballentyne's and its directors' actions in denying D.L. Evans its appurtenant  
26 water were ultra vires.

1           58.     Ultra vires actions are those that exceed the discretion or authority of an  
2 organization. *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 779, 215 P.3d 494,  
3 499 (Idaho 2009); *Boise Dev. Co. v. Boise City*, 30 Idaho 675, 167 P. 1032, 1034 (Idaho  
4 1917).

5  
6           59.     Ballentyne’s Bylaws require its operations to be managed and controlled  
7 consistent with Idaho law. The decision to deny D.L. Evans the appurtenant water it was  
8 entitled delivery of pursuant to Idaho law was beyond the discretion and authority of the  
9 corporation, and was ultra vires. Ballentyne and the Directors should be found liable to  
10 D.L. Evans for acting beyond the scope of their corporate authority and denying D.L.  
11 Evans its water.

12  
13           60.     Ballentyne and its directors should be compelled to comply with their duties  
14 to deliver water, consistent with Idaho law.

15 **III.    Liability of IDWR.**

16           A. IDWR has a statutory duty to ensure Ballentyne’s compliance with the law  
17 relating to the distribution of water.

18           61.     Among the statutory duties of the director of the Idaho Department of  
19 Water Resources (IDWR) is:

20                   [t]o seek a preliminary or permanent injunction, or both, or a  
21 temporary restraining order restraining any person from violating  
22 or attempting to violate (a) those provisions of law relating to all  
23 aspects of the appropriation of water, distribution of water,  
headgates and measuring devices; or (b) the administrative or  
judicial orders entered in accordance with the provisions of law.

24 Idaho Code § 42-1805(9). The legislature has imposed a duty on IDWR to ensure  
25 compliance with the law relating to “all aspects” of water distribution. *Id.* Also, once a  
26 final decree has been entered in the SRBA process, IDWR’s director is to administer the

1 water rights under the decree in accordance with Title 42 of the Idaho Code. Idaho Code §  
2 42-1413(2).

3  
4 62. Idaho Code, Title 42, Chapter 9 sets forth the law relating to distribution of  
5 water to consumers. Among those provisions is a requirement that, once water has been  
6 distributed and used upon a tract of land, the landowner has “title” to the water, and use of  
7 the water shall not thereafter be deprived to the landowner, his heirs, executors,  
8 administrators, successors, or assigns. Idaho Code §§ 42-914, 42-915. This is consistent  
9 with the Idaho Constitution. *See* Idaho Const. Art. XV, § 4.

10  
11 63. All assessments for the use and delivery of water to the foreclosed-on  
12 property were paid by Ricks before the foreclosure, and D.L. Evans has offered to pay the  
13 assessments since, if Ballentyne would deliver the water. Ballentyne violated Idaho Code  
14 §§ 42-914 and 42-915 when it deprived D.L. Evans the use and delivery of water to its  
15 land. Ballentyne delivered water to Ricks when he owned the land. Because of that  
16 delivery, Ballentyne cannot now deprive Ricks’ successor, D.L. Evans, the delivery of the  
17 water. *See* Idaho Code §§ 42-914, 42-915.

18  
19 64. Under Idaho Code §§ 42-1805(9) and 42-1413(2), IDWR has an affirmative  
20 duty to seek an injunction or restraining order preventing Ballentyne from denying D.L.  
21 Evans the delivery of its water, but has done nothing to stem Ballentyne’s violation of the  
22 law. IDWR’s duty is ongoing, and it continues to breach its duty until it seeks  
23 Ballentyne’s compliance with the law.

24  
25 65. D.L. Evans has requested a writ of mandamus compelling the director of  
26 IDWR to fulfill his statutory duties to ensure the law regarding water delivery is followed  
and to seek enforcement of Idaho’s water distribution statutes. A writ of mandamus is

1 appropriate if the party seeking the writ has a clear right to have done that which it seeks,  
2 and if the party against whom the writ is sought has a clear duty to act. *See* Idaho Code §  
3 7-302; *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (Idaho 1997).  
4

5 66. Idaho Code § 42-1805 provides that the requirement of seeking a  
6 preliminary or permanent injunction, or both, or a temporary restraining order against a  
7 person violating or attempting to violate a provision of the law relating to the distribution  
8 of water is one of the IDWR's director's "duties." Idaho Code § 42-1805(9). The  
9 legislature did not leave the decision of whether to seek such injunctions or orders to the  
10 director's discretion. D.L. Evans has a clear right to have the director of IDWR seek such  
11 an injunction or order, and the director of IDWR has a clear legal duty to so act. A writ of  
12 mandamus compelling the director of IDWR to seek a preliminary or permanent injunction  
13 or a temporary restraining order against Ballentyne is appropriate. In addition, Idaho Code  
14 § 42-907 provides that, in cases of dispute regarding the delivery of water, "the matter  
15 shall be referred to the department of water resources." Landowners having difficulty  
16 receiving delivery of their water are to look to IDWR for relief. Idaho Code § 42-907.  
17 Idaho Code § 42-907 designates IDWR as the entity with a duty to resolve a dispute  
18 between water users, and does not designate another party as the arbiter, or indicate IDWR  
19 is merely to assist a third party in arriving at a decision. *Id.*  
20

21  
22 67. D.L. Evans approached IDWR, requesting it to fulfill its statutory duty  
23 under Idaho Code § 42-907 and make a determination as to the delivery of water. Instead  
24 of making such a determination, however, IDWR simply indicated it was not going to do  
25 anything because IDWR believed "[t]he Department lacks jurisdiction" and "[t]he  
26

1 appropriate forum to request a determination as to whether Ballentyne Ditch Co., Ltd. is  
2 required to deliver the water to the properties in question is district court.”

3  
4 68. IDWR should be compelled, by a writ of mandamus or other order, to either  
5 decide the issue of water delivery, or to seek court enforcement of the law regarding water  
6 delivery.

7 B. The Court can determine the owner of a decreed water right.

8 69. The SRBA process was a general adjudication and judicial determination of  
9 the extent and priority of the rights of all persons to use water from the Snake River Basin  
10 drainage, and is conclusive as to the nature of all rights to the use of water in that system.  
11 *See* Idaho Code § 42-1401A(5). As a result of the general adjudication process, a final  
12 decree was entered. The consequence of a final decree is that the decree is “conclusive as  
13 to the nature and extent of all water rights in the adjudicated water system.” Idaho Code §  
14 42-1420.

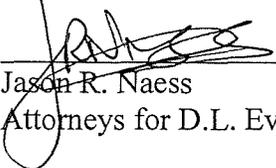
15  
16 70. Water rights are defined in terms of the priority, amount, season of use,  
17 purpose of use, point of diversion, and place of use of the water represented by the right. *A*  
18 *& B Irr. Dist.*, 336 P.3d at 796. Ownership is not an element defining a water right. *See*  
19 *id.* No statutory approval process is required to convey a water right to a new owner. *See*  
20 *Olson*, 666 P.2d at 190-91; *Gard*, 123 P. at 502. Rather, water rights, as real property, are  
21 subject to the same conveyance requirements as other real property. *See Olson*, 666 P.2d  
22 at 190-91. A party cannot change a water right’s elements without the right first going  
23 through an administrative process. Idaho Code § 42-108. Nothing in the SRBA final  
24 decree, however, prohibits this Court from determining the ownership of a decreed water  
25 right.  
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71. If the Court determines that, due to Ballentyne's non-compliance with the Idaho Constitution and Idaho water delivery statutes, the landowners should be the record owners of the water rights delivered to the landowners' property, the Court has the ability to do so. If the Court adopts this approach, each owner would likely need to go through the administrative process identified in Idaho Code § 42-108 to specify the amount of water and the place of use to the specific parcels upon which the water is delivered and used.

DATED this 18<sup>th</sup> day of March, 2015.

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

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18<sup>th</sup> day of March, 2015, I caused a true and correct copy of the Findings of Fact and Conclusions of Law to be served upon the following person(s) in the following manner:

S. Bryce Farris	___	U.S. Mail
SAWTOOTH LAW OFFICE, PLLC	___	Via Facsimile (208) 629-7559
P.O. Box 7985	___	Via Overnight Carrier
Boise, Idaho 83707	<u>  x  </u>	Via Hand Delivery
Chris Bromley	___	U.S. Mail
McHugh Bromley, PLLC	___	Via Facsimile (208) 287-0864
380 S 4 <sup>th</sup> St., Ste 103	___	Via Overnight Carrier
Boise, Idaho 83702	<u>  x  </u>	Via Hand Delivery
John Homan	___	U.S. Mail
Idaho Department of Water Resources	___	Via Facsimile (208) 287-6700
P.O. Box 83720-0098	___	Via Overnight Carrier
Boise, Idaho 83720	<u>  x  </u>	Via Hand Delivery

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