



*Affidavit of Chris M. Bromley*, and *Affidavit of Thomas M. Ricks*, filed contemporaneously herewith.

## I. PROCEDURAL BACKGROUND

On September 25, 2013, D.L. Evans Bank (“Bank”) commenced this lawsuit by filing a *Complaint*, which it later amended on July 28, 2014. *Statement of Facts in Support of Thomas M. Ricks’ Motion for Summary Judgment* at 5, ¶ 12 (hereinafter referred to as “*Ricks’ Statement of Facts*”). In the *Amended Complaint*, filed on July 28, 2014, *id.*, the Bank alleged shares of stock held by Ricks in the Ballentyne Ditch Company, Ltd. (“Ballentyne”) are “water rights” that were “transferred [to the Bank] as an appurtenance to the land” the Bank acquired from Ricks in a non-judicial foreclosure, as described in the Bank’s Trustee’s Deed, *Amended Complaint* at 5.

The Bank prayed for relief against Ricks as follows:

[A] declaratory judgment that it is entitled to the use and delivery of the water appurtenant to its property and the stock in Ballentyne pledged to it by Ricks, and transferred to it pursuant to the Trustee’s Deed;

....

[A] declaratory judgment that Plaintiff is entitled to delivery of water by Ballentyne;

....

[A]n order directing Ballentyne to deliver water to Plaintiff and to transfer to Plaintiff the Ballentyne stock associated with the water transferred to Plaintiff under the Trustee’s Deed; and

....

[M]onetary damages in the amount of \$500,000.00 from Ballentyne; Ricks individually and as a Director of Ballentyne; and Shaun Bowman, Aaron Ricks, Joe King, and Steve Snead, as Directors of Ballentyne.

*Amended Complaint* at 11-12.

## II. ISSUES PRESENTED

In accordance with I.R.C.P. 56, and as to the *Amended Complaint* filed by D.L. Evans Bank on July 28, 2014, Ricks moves for summary judgment on the following issues:

1. Whether, as a Matter of Law, the Water Rights Diverted by the Ballentyne Ditch Company from the Boise River Company are Real Property?
2. Whether, as a Matter of Law, Shares of Stock in the Ballentyne Ditch Company are Personal Property?
3. Whether, as a Matter of Law, the Trustee's Deed and Correction Trustee's Deed could Convey Personal Property?
4. Whether, as a Matter of Law, a Security Interest Attached or was Perfected by the Bank as to Ricks' Shares of Stock in the Ballentyne Ditch Company?
5. Whether, as a Matter of Law, D.L. Evans Bank can Compel Ballentyne Ditch Company to Transfer Shares of Stock Owned by Thomas M. Ricks to the Bank?

## III. STANDARD OF REVIEW

Summary judgment is proper if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). “If the evidence reveals no disputed issues of material fact, then summary judgment should be granted.” *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 718-19, 918 P.2d 583, 587-88 (1996). In making this determination, “all disputed facts are liberally construed in favor of the non-moving party.” *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). “The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case . . . .” *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

#### IV. ARGUMENT

This is not a water rights case. The Bank wants to make this a water rights case because the only interest the Bank acquired was in Ricks' real property.<sup>1</sup> By failing to attach or perfect a security interest in Ricks' shares of stock in Ballentyne, the Bank has forced the parties into this Court to defend against the Bank's baseless legal theory that Ricks' shares of stock in Ballentyne are real property. Because shares of stock in Ballentyne are Ricks' personal property, and the Bank's only interest is in Ricks' real property, the Bank can take nothing from its *Amended Complaint*, and judgment should be granted to Ricks as a matter of law.

**A. As a Matter of Law, The Only Water Rights In This Proceedings Are Diverted By Ballentyne Ditch Company From The Boise River And Are Real Property**

In its *Amended Complaint*, the Bank states that Ricks holds shares of stock in Ballentyne, then concludes a share of stock is a "real property" "water right." *Amended Complaint* at 4-5. The Bank's argument fails as a matter of law. The only water rights in this proceeding are owned by Ballentyne and diverted from the Boise River.

In Idaho, a water right is acquired by "divert[ing]" water from a "natural stream" and applying that water to a "beneficial use." Idaho Const. Art. XV § 3; *see also* I.C. §§ 42-101, 42-103, 42-104. Irrigation is recognized in Idaho as a beneficial use. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 38, 147 P. 1073, 1077 (1915). If the requirements of perfecting a water right are met, a water right is obtained. I.C. § 42-201. A perfected water right is a real property right. I.C. § 55-101(1).

On November 19, 1987, the Snake River Basin Adjudication ("SRBA") was commenced. I.C. § 42-1406A (uncodified); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 795, 252

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<sup>1</sup> United States Bankruptcy Judge Terry L. Myers recently stated any interest the Bank does have is "unsecured." *Ricks' Statement of Facts* at 5, ¶ 13.

P.3d 71, 76 (2011); *Ricks' Statement of Facts* at 5, ¶ 14. Water rights existing prior to the commencement of the SRBA were required to be claimed in the adjudication. *Ricks' Statement of Facts* at 5, ¶ 15. If a water right was required to be claimed in the SRBA, and was not, the water right was no longer recognized. *Id.* On August 26, 2014, the Honorable Eric. J. Wildman entered the SRBA *Final Unified Decree*, completing the adjudication. *Id.* at 5 ¶ 14.

Ballentyne diverts water from the Boise River – a natural stream – for irrigation purposes. *Ricks' Statement of Facts* at 2-3. Ballentyne is located in Ada County. *Id.* at 5, ¶ 15. Ada County is located wholly within the boundaries of the SRBA. *Id.* Because its water rights pre-dated commencement of the SRBA, Ballentyne was required to file claims and receive decrees for its water rights. *Id.* at 2, ¶ 2. Ballentyne complied with the law, receiving decrees from the SRBA district court for its water rights. *Id.* Because Ballentyne's water rights were decreed in the SRBA, the rights owned by Ballentyne are real property, I.C. § 55-101, and are appurtenant to the place of use described in the SRBA decrees, I.C. § 42-1402.<sup>2</sup> *Ricks Statement of Facts* at 2, ¶ 2. There is absolutely no mention in these SRBA decrees of an owner other than Ballentyne. The place of use decreed to Ballentyne in SRBA is described in general terms by a map, not by quarter-quarter legal descriptions or tracts of land owned by shareholders. *Id.*

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<sup>2</sup> The place of use for Ballentyne is not described by quarter-quarter legal descriptions. Instead, Ballentyne received a “digital boundary” place of use, consistent with I.C. §§ 42-202B(2) and 42-1411(2)(h). Ballentyne's place of use is described in its SRBA decrees, as follows: “This Right is Limited to the Irrigation of 741 Acres within the Boundary of Ballentyne Ditch Company. The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.” *Ricks' Statement of Facts* at 2.

**B. As a Matter of Law, Shares of Stock in the Ballentyne Ditch Company are Personal Property**

In order to use water from Ballentyne’s system of canals, laterals, and ditches, a person must hold shares of stock, issued by Ballentyne. *Ricks’ Statement of Facts* at 3, ¶ 4. Before water may be used by its shareholders, and in accordance with its SRBA decrees and Idaho Code, Ballentyne must divert water from the Boise River. *Id.* at 3, ¶ 3. Once water is diverted by Ballentyne from the Boise River, the water is conveyed into Ballentyne’s system of canals, laterals, and ditches. *Id.* Only after the water has been diverted from the Boise River by Ballentyne, can the shareholders take water from Ballentyne’s system of canals, laterals, and ditches. *Id.* Thus, as a matter of law, Ballentyne’s shareholders do not “divert” water from a “natural stream.” Idaho Const. Art. XV § 3; I.C. § 42-101. Rather, shareholders take water as shareholders of a corporation that owns and diverts water rights. *Ricks’ Statement of Facts* at 2, ¶¶ 3-4. Consequently, and despite the Bank’s argument to the contrary, the certificated shares in Ballentyne do not divert water from a natural stream, are not water rights, and are therefore not real property. Idaho Const. Art. XV § 3; I.C. § 42-101; I.C. § 55-101. This is plainly consistent with Ballentyne’s SRBA decrees, and plainly consistent with the fact that shareholders in Ballentyne do not own water right decrees from the SRBA.

The conclusion that certificated shares of stock in Ballentyne are personal property is consistent with the long-held rule in the State of Idaho. *Watson v. Molden*, 10 Idaho 570, 79 P. 503 (1905); *Wells v. Price*, 6 Idaho 490, 56 P. 266 (1899). In *Wells*, appellant acquired land by a sheriff’s deed, which was located in the Upper South Field Irrigation Company (“Company”). *Wells* at 491, 56 P. at \_\_\_\_\_. Appellant argued the shares of stock in the Company were appurtenant to the land and passed to it by the sheriff’s deed. The Idaho Supreme Court disagreed: “Shares of stock in an irrigation corporation are not appurtenant to the land owned by

the owner of such shares.” *Id.* at 493, 56 P. at \_\_\_\_ (emphasis added). The holding in *Wells* was followed six years later in *Watson*. Shares of stock in an irrigation company “pass[] by assignment and delivery. This being true, the property sold was only personal property.” *Watson* at 583, 79 P. at \_\_\_\_ (emphasis added).

Here, the Constitution, Idaho Code, case law, and Ballentyne’s SRBA decrees all run contrary to the Bank’s theory that shares of stock in Ballentyne are real property water rights. Therefore, this Court should rule, as matter of law, that Ricks’ shares of stock in Ballentyne are his personal property.

**C. As a Matter of Law, the Trustee’s Deed and Correction Trustee’s Deed Could Only Convey Real Property**

The Bank acquired the property described in the Amended Complaint first by a Trustee’s Deed, then by a Correction Trustee’s Deed. *Ricks’ Statement of Facts* at 4, ¶ 9. Because of the Trustee’s Deed and Correction Trustee’s Deed, the Bank asserts it is entitled to Ricks’ shares of stock. *Amended Complaint* at 5 (“Plaintiff approached Ballentyne, and requested delivery of water appurtenant to the land transferred pursuant to the Trustee’s Deed.”). The Bank is precluded, as a matter of law, from compelling the “transfer to Plaintiff the Ballentyne stock associated with the water transferred to Plaintiff under the Trustee’s Deed.” *Amended Complaint* at 11. *See* I.C. § 45-1502(3); *Spencer v. Jameson*, 147 Idaho 497, 211 P.3d 106 (2009).

In *Spencer*, promissory notes were executed by Spencer in favor of Davidson Trust. Davidson Trust secured the promissory notes by deeds of trust in Spencer’s real property, which “also included title to a 1981 Skyline mobile home, VIN # 01910302P.” *Spencer* at 500, 211 P.3d at 109. When Spencer defaulted, a non-judicial foreclosure sale occurred. “Davidson Trust submitted the highest bid and was given a Trustee’s Deed to Parcels Nos. 1, 2, and 3 and title to the 1981 Skyline mobile home.” *Id.* An issue on appeal was whether Davidson Trust actually

obtained the 1981 Skyline mobile home, which Spencer argued was personal property.

According to the Court, “a deed of trust, by definition, is limited to the conveyance of real property, I.C. § 45-1502(3). Thus, we must determine whether at the time of the sale the 1981 Skyline mobile home was converted to real property and, therefore, was property transferred to the trustee for purposes of non-judicial foreclosure under I.C. § 45-1503; or whether the mobile home remained personal property, in which case the mobile home was not subject to foreclosure under the statute.” *Id.* at 501, 211 P.3d at 110 (emphasis added). Finding that the 1981 Skyline mobile home had been converted to a fixture, the Court held the mobile home was real property within the definition of I.C. § 55-101, and “properly transferred to the trustee for purposes of non-judicial foreclosure under I.C. § 45-1503.” *Id.* at 502, 211 P.3d at 111.

Here, it is undisputed that Ricks executed a Promissory Note, which was secured by the Bank with a Deed of Trust. *Ricks’ Statement of Facts* at 3, ¶¶ 6-7. It is undisputed that a subsequent non-judicial foreclosure sale occurred. *Id.* at 4, ¶ 8. It is undisputed that, at the foreclosure sale, the Bank was the highest bidder and obtained a Trustee’s Deed to the property, which was replaced by a Correction Trustee’s Deed. *Id.* at 4, ¶ 9. By law, the Bank could only obtain real property by the Trustee’s Deed and Correction Trustee’s Deed; therefore, the Bank obtained none of Ricks’ personal property. I.C. §§ 45-1502(3); *Spencer* at 501, 211 P.3d at 110. Because shares of stock in Ballentyne are personal property, *Watson, supra; Wells, supra*, it was legally impossible for the Bank to acquire Ricks’ shares by the Trustee’s Deed and Correction Trustee’s Deed.

**D. As a Matter of Law, No Security Interest Attached or was Perfected by the Bank as to Ricks’ Shares of Stock in the Ballentyne Ditch Company**

Ricks’ shares of stock in Ballentyne are his personal property, *Watson, supra; Wells, supra*; therefore, the only way the Bank could have obtained a consensual security interest in



Ricks' shares of stock was to obtain a security agreement from Ricks in accordance with I.C. §§ 28-9-101 *et seq.* In addition, even if the Bank somehow obtained an unknown security agreement granting the Bank a security interest in the shares of stock, the undisputed facts show the Bank took no steps to perfect a security interest in any of Ricks' personal property, much less the shares of stock.

One way the Bank could have obtained a security interest in Ricks' personal property would have been to obtain a "security agreement." I.C. § 28-1-102(74). A security agreement would have allowed the Bank's security interest to attach to Ricks' personal property if "value was given," I.C. § 28-9-203(b)(1), if Ricks had "rights in the collateral," I.C. § 28-9-203(b)(2), if Ricks "authenticated a security agreement," I.C. § 28-9-203(b)(3)(A). In order to perfect the security interest, the Bank needed to file a Uniform Commercial Code ("UCC-1") "financing statement" with the Idaho Secretary of State, I.C. § 28-9-501, or take physical "possession" of the shares of stock, I.C. §§ 28-9-203(b)(3)(B), 28-9-313, neither of which occurred.

Here, Ricks was not asked by the Bank to sign a security agreement relating to his shares of stock, nor did the Bank enter into a security agreement with Ricks. *Ricks' Statement of Facts* at 4, ¶ 10. While Ricks did execute a Deed of Trust, "a deed of trust, by definition, is limited to the conveyance of real property, I.C. § 45-1502(3)." *Spencer* at 501, 211 P.3d at 110 (emphasis added). Even assuming, purely for the sake of argument, that the deed of trust could be used as a surrogate for a security agreement, the Bank failed to perfect a security interest. While Ricks had rights to the shares of stock, and it could be argued that value was given and the Deed of Trust was authenticated, the Bank neither filed a UCC-1 financing statement with the Idaho Secretary of State, nor took possession of the shares of stock. *Ricks' Statement of Facts* at 5, ¶ 11. By failing to file a UCC-1 financing statement or take possession of the shares of stock, any

assumption that the Deed of Trust was a security agreement is irrelevant, as the Bank never perfected a security interest in Ricks' shares of stock.

Additionally, it is undisputed that the Bank never took possession of Ricks' shares of stock in Ballentyne. *Ricks' Statement of Facts* at 4, ¶ 10. Ricks has maintained possession of his shares of stock at all times relevant to these proceedings, and continues to maintain possession of his shares of stock. *Id.* at 3, ¶ 5.

By failing to take possession of Ricks' shares of stock in Ballentyne, and by failing to perfect a security interest in Ricks' shares of stock by filing a UCC-1 financing statement with the Idaho Secretary of State, the Bank is legally barred from any interest in Ricks' shares.

**E. As a Matter of Law, D.L. Evans Bank Cannot Compel Ballentyne Ditch Company to Transfer Shares of Stock Owned by Thomas M. Ricks to the Bank**

In its *Amended Complaint*, the Bank prays for an “order directing Ballentyne to deliver water to Plaintiff and to transfer to Plaintiff the Ballentyne stock associated with the water transferred to Plaintiff under the Trustee’s Deed[.]” *Amended Complaint* at 11. Because Ballentyne’s Bylaws expressly prevent a forced transfer of Ricks’ shares of stock, the Bank’s requested relief fails as a matter of law.

Articles of incorporation and bylaws are “corporate documents.” *Twin Lakes Village Property Ass’n, Inc. v. Crowley*, 124 Idaho 132, 135, 857 P.2d 611, 614 (1993). “Because corporate documents are equivalent to contracts among the members of the association, the normal rules governing the interpretation of contracts apply.” *Id.* “The determination of a contract’s meaning and legal effect is a question of law when the contract is clear and unambiguous.” *Id.*

Ballentyne is governed by Articles of Incorporation, as amended, and Bylaws. *Ricks' Statement of Facts* at 6, ¶ 16. While Ballentyne’s Articles of Incorporation are silent on the

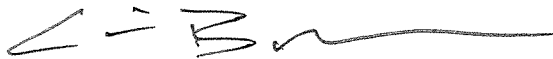
transfer of stock, its Bylaws clearly and unambiguously prohibit the forced transfer of shares of stock: “[N]o transfer shall be valid as against the corporation until surrender of the certificate of stock and the entry of such transfer on the books of the corporation . . . .” *Exhibit 2* to the *Ricks Affidavit* (citing Bylaws, Article VII) (emphasis added). It is undisputed that Ricks has maintained possession of his shares of stock in Ballentyne at all times relevant to these proceedings, maintains current possession of his shares, and has never surrendered his stock. *Ricks’ Statement of Facts* at 3, ¶ 5. Because Ricks has not surrendered his stock, Ballentyne is prohibited, by its Bylaws, from transferring Ricks’ shares of stock to the Bank. Therefore, the Bank is precluded, as a matter of law, from obtaining its requested relief.

## VI. CONCLUSION

In this case, there are no genuine issues of material fact in dispute. Based on the undisputed facts, and as a matter of law, shares of stock in Ballentyne are personal property, not real property. As such, by the Deed of Trust, Trustee’s Deed, and Correction Trustee’s Deed, the Bank took nothing more than Ricks’ land. By failing to take possession of Ricks’ shares of stock in Ballentyne, and by failing to perfect a security interest in Ricks’ shares of stock by filing a UCC-1 financing statement, let alone taking possession of the stock, the Bank is legally barred from any interest in Ricks’ shares. Moreover, pursuant to Ballentyne’s Articles of Incorporation and Bylaws, the Bank cannot compel Ballentyne to transfer shares of stock owned by Ricks to the Bank.

Respectfully submitted this 23<sup>rd</sup> day of January, 2015.

MCHUGH BROMLEY, PLLC



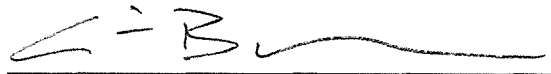
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CHRIS M. BROMLEY  
*Attorneys for Thomas M. Ricks*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 23<sup>rd</sup> day of January, 2015, a true and correct copy of the foregoing document was served as follows:

Jason R. Naess Parsons Smith Stone Loveland & Shirley, LLP PO Box 910 Burley, ID 83318	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Delivery
John Homan Idaho Department of Water Resources PO Box 83720-0098 Boise, ID 83720	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Delivery
S. Bryce Farris Sawtooth Law Offices, PLLC PO Box 7985 Boise, ID 83707	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Delivery



CHRIS M. BROMLEY