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FEB 10 2015
DEPARTMENT OF
WATER RESOURCES

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

D.LEVANS BANK,)	Case No. CV OC 1317406
)	
Plaintiff,)	
)	
vs.)	
)	
BALLENTYNE DITCH COMPANY,)	RESPONSE BRIEF TO THE
LIMITED; THOMAS MECHAM RICKS;)	IDAHO DEPARTMENT OF
GARY SPACKMAN, IN HIS OFFICIAL)	WATER RESOURCES' MOTION
CAPACITY AS DIRECTOR OF THE)	FOR SUMMARY JUDGMENT
IDAHO DEPARTMENT OF WATER)	
RESOURCES; IDAHO DEPARTMENT)	
OF WATER RESOURCES; AARON)	
RICKS, DIRECTOR OF BALLENTYNE)	
DITCH COMPANY; SHAUN BOWMAN,)	
DIRECTOR OF BALLENTYNE DITCH)	
COMPANY; JOE KING, DIRECTOR)	
OF BALLENTYNE DITCH COMPANY;)	
STEVE SNEAD, DIRECTOR)	
OF BALLENTYNE DITCH COMPANY)	
)	
Defendants.)	
)	

1 COMES NOW, Plaintiff, D.L. Evans Bank, which hereby submits the following
2 Response Brief to the Idaho Department of Water Resources' ("IDWR") Motion for
3 Summary Judgment.
4

5 **INTRODUCTION**

6 IDWR has moved for dismissal via a Motion for Summary Judgment, claiming it
7 should be dismissed because, as a matter of law, (1) IDWR has no statutory duty to deliver
8 water to D.L. Evans; (2) IDWR does not have the authority to alter the elements of
9 partially decreed water rights; and (3) D.L. Evans did not seek review of a document
10 IDWR has called an "order."

11 IDWR's position as to its statutory duties appears to be that, because an SRBA
12 decree is issued in a mutual irrigation company's name, the landowners served by the
13 company no longer have any right to the use of appurtenant and beneficially applied water.
14 IDWR refuses to acknowledge it has responsibility to ensure water delivery to landowners,
15 and asserts its duty stops when water reaches a point of diversion. A review of Idaho law,
16 however, shows that landowner-water users are entitled to the continued use and delivery
17 of water to their land, and IDWR has a duty to ensure that such water is delivered.
18

19 Much of IDWR's brief is aimed at one of the alternative forms of relief requested
20 by D.L. Evans in its Amended Complaint. IDWR argues neither it nor the Court have
21 authority to grant D.L. Evans its requested relief, which includes a change in the
22 designated ownership of water rights in Ballentyne's name to the names of the landowners
23 who beneficially use the water. Water rights' elements may be changed. Water rights'
24 ownership, which is not an element defining a right, may also be changed. The partial and
25 final decrees issued by the SRBA court do not permanently establish water rights'
26

1 ownership, did not make ownership unchangeable, and do not prevent this Court from later
2 specifying the rights' owners. Also, D.L. Evans' change in ownership relief is sought in
3 the alternative, and the Court can simply grant D.L. Evans' other requested relief and
4 compel IDWR to comply with its statutory duties. Either way, IDWR should not be
5 dismissed from this lawsuit.
6

7 Lastly, IDWR asserts it should not be held to its duties because D.L. Evans is
8 somehow legally bound by a document IDWR has called an "order." The document is not
9 an order, does not impact the relief sought in this lawsuit, and IDWR should not be
10 dismissed because of the document's existence.
11

12 Because D.L. Evans is entitled to the use and delivery of water to its land;
13 Ballentyne has not delivered the same; IDWR has a statutory duty to ensure the water's
14 delivery, but has not done so; and D.L. Evans is not prohibited from requesting the Court
15 to ensure IDWR fulfills its statutory duties, IDWR's motion to dismiss should be denied.
16

17 STANDARD OF REVIEW

18 If the pleadings, depositions, affidavits, and admissions on file show there is a
19 genuine issue as to any material fact and the moving party is not entitled to a judgment as a
20 matter of law, summary judgment is not appropriate. *See* Idaho Rule Civ. P. 56(c);
21 *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69, 205 P.3d 1203, 1205 (Idaho
22 2009). Disputed facts are to be construed, and all reasonable inferences that can be drawn
23 from the record are to be drawn, in favor of the non-moving party. *Farm Credit Bank of*
24 *Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (Idaho 1994). If the
25 evidence could lead to different conclusions or conflicting inferences by reasonable people,
26 a summary judgment motion must be denied. *Id.*

1
2 ARGUMENT

3 **I. IDWR has a Statutory Duty to Ensure Delivery of Water to D.L. Evans.**

4 IDWR asserts that its “jurisdictional authority” over water ends once it is delivered
5 from its natural course to a point of diversion. Idaho’s statutes provide otherwise. D.L.
6 Evans is entitled to the use and delivery of water appurtenant to its land, and IDWR has a
7 statutory duty to ensure the water is delivered.

8 **A. Landowners Who Have Used and Beneficially Applied Water to Their Land are**
9 **Entitled to the Continued Use of the Water.**

10 All water flowing in its natural channel within the boundaries of the State of Idaho
11 is property of the State. Idaho Code § 42-101; *Poole v. Olaveson*, 82 Idaho 496, 502, 356
12 P.2d 61, 64 (Idaho 1960). As such, the State has a duty to supervise the appropriation and
13 allotment of the water to those diverting the water from its natural channels and using it for
14 a “beneficial purpose.” Idaho Code § 42-101. A right to the use of the State’s waters, or a
15 water right, is statutorily recognized, though is not considered a property right in itself. *Id.*
16 Rather, such rights “become the complement of, or one of the appurtenances of, the land or
17 other thing to which, through necessity, said water is being applied.” *Id.*; *Hard v. Boise*
18 *City Irr. & Land Co.*, 9 Idaho 589, 76 P. 331, 332 (Idaho 1904). The right does not exist
19 without land to which the water right is appurtenant. Idaho Code § 42-101. Once water
20 has been beneficially applied to, and become an appurtenance of, land, the right to use that
21 water is statutorily protected in the landowner, and is to never be denied or prevented
22 except upon the failure of the user to pay the ordinary charges or assessments imposed to
23 cover the expenses of the delivery of the water. Idaho Code § 42-101.

24
25
26 Historically, a water right could be created by one of two methods: the
“constitutional” method or the statutory method. *A & B Irr. Dist. v. State of Idaho*, 157

1 Idaho 385, 336 P.3d 792, 796 (Idaho 2014) (quoting *United States v. Pioneer Irr. Dist.*,
2 144 Idaho 106, 110, 157 P.3d 600, 604 (Idaho 2007)). Under either, a valid right does not
3 exist unless or until the appropriator has applied the water represented by the right to a
4 beneficial use. *Id.* In addition, if water is no longer applied to a beneficial use, the right to
5 use the water may be forfeited. Idaho Code § 42-222; *Jenkins v. Idaho Dept. of Water*
6 *Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (Idaho 1982). Thus, a critical characteristic
7 of any water right owner is they must be able to apply the water represented by the right to
8 a beneficial use.
9

10 Where water is delivered by a mutual irrigation company, such as a ditch company,
11 wherein the water users also own the company, the water users own the water right. *See*
12 *Farmers' Coop. Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 457-59, 94 P. 761, 763
13 (Idaho 1908). A mutual irrigation company is a non-profit corporation established for
14 "convenience of [the corporation's] members in the management of the irrigation system
15 and in the distribution to them of water for use upon their lands in proportion to their
16 respective interests" in the corporation. *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687,
17 689 (Idaho 1917). The corporation is owned by stockholders, who are landowners within
18 the corporation's boundaries, and the stock represents water rights made appurtenant to the
19 landowner-stockholders' land. *Id.*; *see also, e.g., Twin Falls Canal Co. v. Shippen*, 46
20 Idaho 787, 271 P. 578 (Idaho 1928). In such a case, "the appropriation of waters carried in
21 the ditch" and the perpetual "right to the use of such water," are owned by the same
22 individuals. *See Farmers' Coop. Ditch Co.*, 94 P. at 763 ("As to some of those ditches the
23 appropriators were also the users of the water. They owned the water right and used the
24 water on their own lands. . . . The right to the use of such water, after having 'once been
25
26

1 sold, rented, or distributed to any person who has settled upon or improved land for
2 agricultural purposes,' becomes a perpetual right, subject to defeat only by failure to pay
3 annual water rents and comply with the lawful requirements as to the conditions of the
4 use.”). In other words, under a mutual irrigation company, the owners of land to which
5 water has been applied own the water rights appropriated by the company because they
6 also own the company.
7

8 A determination that a landowner who is delivered water through a mutual
9 irrigation company owns the right to the use of that water is consistent with Idaho’s
10 statutes regarding the delivery of water, which provide:
11

12 Whenever any waters have been or shall be appropriated or used for
13 agricultural or domestic purposes under a sale, rental or distribution thereof,
14 such sale, rental or distribution shall be deemed an exclusive dedication to
15 such use upon the tract of land for which such appropriation or use has been
16 secured, and, whenever such waters so dedicated shall have once been sold,
17 rented or distributed to any person who has settled upon or improved land
18 for agricultural purposes with the view of receiving the benefit of such
19 water under such dedication, such person, his heirs, executors,
20 administrators, successors or assigns, shall not thereafter be deprived of the
21 annual use of the same when needed for agricultural or domestic purposes
22 upon the tract of land for which such appropriation or use has been secured,
23 or to irrigate the land so settled upon or improved, upon payment therefor,
24 and compliance with such equitable terms and conditions as to the quantity
25 used and times of use as may be prescribed by law.
26

Idaho Code § 42-914. Once a mutual irrigation company distributes water to a user, the
water is exclusively dedicated to the land upon which the water is used. *Id.* The right to
use that water shall not be deprived the person using the water on the land, his heirs,
executors, administrators, successors, or assigns, *id.*, and 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.

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

16
17
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19 Finally, Idaho's statute regarding changes in a water right's point of diversion,
20 place of use, period of use, or nature of use further illustrates that the party entitled to use
21 and control a water right is separate from the corporation that delivers the water. A water
22 right is defined in terms of the priority, amount, season of use, purpose of use, point of
23 diversion, and place of use of the water represented by the right. *A & B Irr. Dist.*, 336 P.3d
24 at 796. Those elements may be changed if the water rights of others are not injured
25 thereby. Idaho Code § 42-108. However, "if the right to the use of such water, or the use
26 of the diversion works or irrigation system is represented by shares of stock in a

1 corporation . . . no change in the point of diversion, place of use, period of use, or nature of
2 use of such water shall be made or allowed without the consent of such corporation.” *Id.*

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

13
14 B. Post-SRBA Decree Cases Have Reiterated and Reinforced Water Users’ Rights to
15 Water, Even When Another Entity is Named as the “Owner” in the Decree.

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

23
24 There are several phrases used in the Idaho Constitution and the Idaho
25 Code that signify that the beneficial users have an interest that is stronger
26 than mere contractual expectancy. The Idaho Constitution provides that
when water is appropriated or used for agricultural purposes, “such person
. . . shall not thereafter, without his consent, be deprived of the annual use
of the same.” IDAHO CONSTITUTION art. XV § 4. This notion of a
perpetual right is reiterated in the Idaho Code, which states, the “right to

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

5 157 P.3d at 608 (ellipses in original).

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

12
13 C. Ballentyne is Required to Deliver Appurtenant Water to the Landowners Within Its
14 Boundaries.

15 Ballentyne was “not formed for profit, but for the mutual operation of said canal
16 and irrigating system and for its better maintenance and conduct.” *King Affidavit*, Exhibit
17 A at Article VIII. Put differently, Ballentyne was established as a mutual irrigation
18 company. Consistent with such, the corporation was established with stockholders who
19 were landowners within the corporation’s boundaries, and the corporation’s stock
20 represented water rights applied, and made appurtenant to, the landowner-stockholders’
21 land. *Id.* at Article VI. In addition, the stock itself was appurtenant to the land it
22 represented, and could not be transferred to another absent a transfer of the land. *Id.*
23 Because the company was owned by its landowners, and the landowners beneficially
24 applied the water appropriated to the company for distribution through the Ballentyne
25 ditch, the landowners own the water rights appurtenant to their land. Once the water was
26

1 distributed to, and beneficially used by, the landowners, the water right became an
2 appurtenance of their land.

3
4 The SRBA decree in this case is in the name of Ballentyne. The right to use the
5 water delivered by Ballentyne, however, is held by the landowners who have beneficially
6 applied the water to their properties within Ballentyne's boundaries. See Idaho Code § 42-
7 1402. Ballentyne merely acts on behalf of the landowners to administer the delivery of the
8 appurtenant water and to manage the delivery system.

9
10 D. D.L. Evans Owns Land Within Ballentyne's Boundaries and is Entitled to the Use
and Delivery of Appurtenant Water.

11 If water has been applied to a beneficial use and a water right is created, the water
12 right is real property, and is appurtenant to the land upon which the water represented by
13 the water right is beneficially used. Idaho Const. art. XV § 4; Idaho Code §§ 42-101, 55-
14 101; *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 79 (Idaho
15 2011). Such a right can be conveyed by the owner to another. *Hard*, 76 P. at 332. As real
16 property, ownership of water rights must be conveyed in the same manner, or subject to the
17 same restrictions and protections, as other real property. See *Olson v. Idaho Dept. of Water*
18 *Res.*, 105 Idaho 98, 100-01, 666 P.2d 188, 190-91 (Idaho 1983); *Gard v. Thompson*, 21
19 Idaho 485, 123 P. 497, 502 (Idaho 1912).

20
21 Water rights can be conveyed separate and apart from land, but this "may only be
22 done where such was the intention of the parties to the conveyance." *Molony v. Davis*, 40
23 Idaho 443, 233 P. 1000, 1001 (Idaho 1925). If the intent of the parties is not to convey land
24 separate from its appurtenant water rights, the water rights are conveyed with the land even
25 if not mentioned in the deed. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 13, 156
26 P.3d 502, 514 (Idaho 2007). And, such occurs even when the deed does not mention

1 “appurtenances.” *Id.* at 515. The only time appurtenant water rights are not conveyed
2 with a conveyance of land is where such rights are expressly reserved from conveyance in a
3 deed or it is clearly shown the parties intended the grantor would reserve them. *Id.*
4

5 As security for his loan from D.L. Evans, Ricks provided D.L. Evans a Deed of
6 Trust that included, among other property interests, “water, water rights and ditch rights
7 (including stock and utilities with ditch or irrigation rights).” *Ricks Affidavit*, Exhibit 5.
8 D.L. Evans foreclosed on that Deed of Trust in January 2013. *Id.* ¶¶ 12-14. The land D.L.
9 Evans received through the foreclosure process is located within Ballentyne’s boundaries
10 and is covered by the SRBA decrees in Ballentyne’s name. *Answer of Defendant*
11 *Ballentyne Ditch Company* ¶ 4. As such, the land has appurtenant water rights.
12

13 The Trustee’s Deed from the January 2013, foreclosure sale did not identify water
14 rights or other “appurtenances.” *Id.*, Exhibit 10. At the same time, the deed did not
15 expressly reserve the water rights or other appurtenances from the conveyance. *Id.* The
16 foreclosed on Deed of Trust, however, specifically included water and water rights, and
17 indicates the parties’ intent was that such rights would be conveyed under any foreclosure.
18 *See id.*, Exhibit 5. Because the Trustee’s Deed does not reserve the appurtenant water
19 rights for Ricks, and because the Deed of Trust indicates the parties’ intent was that such
20 were security for Ricks’ loan, when the foreclosure trustee conveyed the land covered by
21 the Deed of Trust to D.L. Evans, the legal consequence was that the trustee also conveyed
22 the land’s appurtenances, including water rights.
23

24 E. IDWR Has a Statutory Duty to Ensure Ballentyne’s Compliance with the Law
25 Relating to the Distribution of Water.

26 IDWR argues it has no statutory duty to ensure water is delivered anywhere other
than the point where it is diverted from its natural source. To support this contention,

1 IDWR points to Idaho Code § 42-101, which indicates IDWR has a duty to supervise the
2 appropriation and allotment of water, and Idaho Code § 42-602, which provides IDWR's
3 director has control of the distribution of water from all natural water sources to the ditches
4 and other facilities diverting water from the natural sources. Based on the language of
5 those two statutes, IDWR asserts it has no responsibility to "manage delivery" of water
6 from a ditch, and that the two cited statutes encompass "the responsibility" of IDWR.
7 Rather, the cited statutes state *some of the* responsibilities of IDWR.
8

9 Among the other statutory duties of IDWR's director is:

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

16 Idaho Code § 42-1805(9). While IDWR asserts its jurisdictional authority ends once water
17 is delivered to a point of diversion, the legislature has imposed a duty on IDWR to ensure
18 compliance with the law relating to "all aspects" of water distribution. *Id.* Also, once a
19 final decree has been entered, IDWR's director is to administer the water rights under the
20 decree in accordance with Title 42 of the Idaho Code. Idaho Code § 42-1413(2).

21 Idaho Code, Title 42, Chapter 9 sets forth the law relating to distribution of water to
22 consumers. Among those provisions is a requirement that, once water has been distributed
23 and used upon a tract of land, the landowner has "title" to the water, and use of the water
24 shall not thereafter be deprived to the landowner, his heirs, executors, administrators,
25 successors, or assigns. Idaho Code §§ 42-914, 42-915. Ballentyne violated Idaho Code §§
26 42-914 and 42-915 when it deprived D.L. Evans the use and delivery of water to its land.
Ballentyne delivered water to Ricks when he owned the land. *See Answer of Thomas M.*

1 *Ricks to D.L. Evans Complaint* ¶ 8. And, because of that delivery, Ballentyne cannot now
2 deprive Ricks' successor, D.L. Evans, the delivery of the water. Idaho Code §§ 42-914,
3 42-915. All assessments for the use and delivery of the water were paid by Ricks before
4 the foreclosure, and D.L. Evans has offered to pay the assessments since, if Ballentyne
5 would deliver the water. *See Answer of Defendant Thomas M. Ricks to Amended*
6 *Complaint* ¶ 29, *and Squire Affidavit* ¶1. Under Idaho Code §§ 42-1805(9) and 42-
7 1413(2), IDWR has an affirmative duty to seek an injunction or restraining order
8 preventing Ballentyne from denying D.L. Evans the delivery of its water, but has done
9 nothing to stem Ballentyne's violation of the law. IDWR's duty is ongoing. It continues
10 to breach its duty until it seeks Ballentyne's compliance with the law.

11
12
13 Idaho Code § 42-907 provides that, in cases of dispute regarding the delivery of
14 water, "the matter shall be referred to the department of water resources." Landowners
15 having difficulty receiving delivery of their water are to look to IDWR for relief. Idaho
16 Code § 42-907. While IDWR contends Idaho Code § 42-907 does nothing more than
17 require it to "aid" in resolving delivery disputes, that is not what the language of the statute
18 says. *See id.* Rather, it designates IDWR as the entity with a duty to resolve the dispute,
19 and does not designate another party as the arbiter. *Id.*

20
21 IDWR has several statutory duties beyond just seeing water to a point of diversion,
22 and IDWR's request for dismissal based on an asserted lack of a statutory duty is not
23 appropriate.

24 **II. The Court Can Determine the Owner of a Decreed Water Right.**

25 IDWR next argues the SRBA water right decrees prevent the Court from granting
26 D.L. Evans its alternative requested relief of placing rights in the names of the landowner-

1 water users instead of Ballentyne. The SRBA process was a general adjudication and
2 judicial determination of the extent and priority of the rights of all persons to use water
3 from the Snake River Basin drainage, and is conclusive as to the nature of all rights to the
4 use of water in that system. See Idaho Code § 42-1401A(5). As a result of the general
5 adjudication process, a final decree was entered. See *Affidavit of Chris M. Bromley in*
6 *Support of Thomas M. Ricks' Motion for Summary Judgment* (“Bromley Summary
7 Judgment Affidavit”) ¶ 4, Exhibit 2. The consequence of a final decree is that the decree is
8 “conclusive as to the nature and extent of all water rights in the adjudicated water system.”
9 Idaho Code § 42-1420.

12 Water rights are defined in terms of the priority, amount, season of use, purpose of
13 use, point of diversion, and place of use of the water represented by the right. *A & B Irr.*
14 *Dist.*, 336 P.3d at 796. IDWR claims it “does not have the authority to alter the elements of
15 partially decreed water rights.” *IDWR Memorandum in Support of Motion to Dismiss*
16 (“IDWR Memorandum”) at 7. Yet, Idaho Code § 42-108 provides a process through which
17 a person owning “land to which water has been made appurtenant . . . by a decree of the
18 court” can change a water right’s elements, and specifically requires such an individual to
19 utilize an IDWR administered process to do so.

21 At the same time, ownership is not an element defining a water right. See *A & B*
22 *Irr. Dist.*, 336 P.3d at 796. No statutory approval process is required to convey a water
23 right to a new owner.¹ See *Olson*, 666 P.2d at 190-91; *Gard*, 123 P. at 502. Rather, water
24 rights, as real property, are subject to the same conveyance requirements as other real
25 property. See *Olson*, 666 P.2d at 190-91. Thus, while a court could not change a water
26

¹ As a practical matter, however, any party attempting to purchase or sell a water right separately from its appurtenant property would be unwise to do so without making the purchase and conveyance contingent on approval of an application for a change in the right’s place of use under Idaho Code §§ 42-108 and 42-222.

1 right's elements without the right first going through an administrative process, nothing in
2 the SRBA final decree prohibits this Court from determining the ownership of a decreed
3 water right. The general adjudication process determined the nature and extent of water
4 rights, but did not permanently establish the rights' ownership or make ownership
5 unchangeable.

7 Even if IDWR were correct, and the Court were, for some reason, prohibited from
8 making a determination as to water rights' ownership because of the entry of the final
9 decree, D.L. Evans' request that the Court specify the rights' ownership is sought in the
10 alternative. The Court can always simply compel IDWR to comply with its statutory
11 duties, and IDWR's dismissal based on SRBA decrees is not appropriate.

13 **III. The IDWR-labeled "Order" Does Not Prevent This Court from Granting D.L.
14 Evans' Relief.**

15 IDWR asserts that, because D.L. Evans did not appeal a document it has called a
16 Preliminary Order (the "Self-Styled Order"), the Court cannot now provide D.L. Evans any
17 relief or compel IDWR to fulfill its statutory duties. Yet, the Self-Styled Order was not an
18 appealable document. Rather, it simply indicated IDWR was not going to do anything in
19 response to a petition submitted by D.L. Evans because IDWR believed "[t]he Department
20 lacks jurisdiction" and "[t]he appropriate forum to request a determination as to whether
21 Ballentyne Ditch Co., Ltd. is required to deliver the water to the properties in question is
22 district court." *Bromley Venue Change Affidavit*, Exhibit E.

24 A document is not an order merely because an administrative agency states it is.
25 *Erickson v. Idaho Bd. of Regulation of Prof'l Eng'rs and Prof'l Land Surveyors*, 146 Idaho
26 853, 854, 203 P.3d 1251, 1253 (Idaho 2009). A written instrument's real character is
determined by its substance and contents, not its title. *Williams v. State Bd. of Real Estate*

1 *Appraisers*, 148 Idaho 675, 677, 239 P.3d 780, 782 (Idaho 2010). An “order” is “an
2 agency action of particular applicability that determines the legal rights, duties, privileges,
3 immunities, or other legal interests of one (1) or more specific persons.” Idaho Code § 67-
4 5201(12). To determine if a particular agency action is an order requires a two-step
5 analysis, asking first: “Has the legislature granted the agency the authority to determine
6 the particular issue?” *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968
7 (Idaho 2009). And, second: “Does the agency decision on the issue determine ‘the legal
8 rights, duties, privileges, immunities, or other legal interests’ of one or more persons?” *Id.*

9
10 In this case, the first prong is met. Idaho Code § 42-907, which was the subject of
11 IDWR’s consideration, indicates that, in a water delivery dispute, the matter “shall be
12 referred to the department of water resources.” The legislature granted IDWR the
13 authority to determine water delivery disputes, and directs parties to such disputes to
14 IDWR. Idaho Code § 42-907. Interestingly, though IDWR wishes D.L. Evans to be
15 bound by the Self-Styled Order, it denies it has the authority to resolve the issue of water
16 delivery. *See Bromley Venue Change Affidavit*, Exhibit E, and *IDWR Memorandum* at 5.
17 *See also Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 112, 73 P.3d 721,
18 726 (Idaho 2003) (“If an agency does not have the authority to resolve a particular issue,
19 then the agency cannot determine a party's legal rights, duties, privileges, immunities, or
20 other legal interests regarding that issue.”).

21
22 While the first prong is likely met, the second prong is not. *See Bromley Venue*
23 *Change Affidavit*, Exhibit E. IDWR indicated it would not consider D.L. Evans’ request
24 regarding a water delivery. *Id.* As such, IDWR did not determine D.L. Evans’ legal
25 rights, duties, privileges, or other legal interests, and no order issued. *See* Idaho Code §
26

1 67-5240; *Lochsa Falls, L.L.C.*, 207 P.3d at 968-70. D.L. Evans’ is not bound by the Self-
2 Styled Order simply because IDWR titled it an “order.”

3
4 Four other factors weigh in favor of finding the Self-Styled Order does not preclude
5 D.L. Evans from receiving relief from this Court. First, the Self-Styled Order only
6 addresses IDWR’s duties under Idaho Code § 42-907. IDWR has other statutory duties
7 implicated in this case, including duties under Idaho Code § 42-1805(9) and 42-1413(2).

8 Second, IDWR’s duty to ensure proper distribution and delivery of water is
9 ongoing. Among others, IDWR has a continuing affirmative duty to seek an injunction or
10 restraining order against Ballentyne to prevent it from denying D.L. Evans the delivery of
11 its water. *See* Idaho Code § 42-1805(9). Whatever effect the Self-Styled Order may have
12 had, it did not relieve IDWR from complying with its duties going forward.

13
14 Third, D.L. Evans has done exactly what IDWR suggested it should: seek relief in
15 district court. *See Bromley Venue Change Affidavit*, Exhibit E. Only, IDWR now
16 complains because, while D.L. Evans has done just as instructed, part of the relief D.L.
17 Evans seeks is IDWR’s required fulfillment of its statutory duties.

18
19 Fourth, D.L. Evans has no other option for relief but to seek this Court’s
20 intervention. In spite of its statutory duties to see water rights are administered according
21 to Title 42 of the Idaho Code, IDWR has relinquished the governance and oversight of
22 water distribution to mutual irrigation companies. *See IDWR Memorandum* at 4-5 (“Once
23 the water is delivered to the water right holder at the point of diversion, water masters do
24 not supervise or monitor how the water is used or how it is distributed to others within the
25 authorized place of use.”). Because IDWR refuses to ensure the law is complied with or to
26 oversee water delivery, D.L. Evans and other injured parties have nowhere to turn for relief

1 except the district court. D.L. Evans attempted to look to IDWR for help regarding the
2 delivery of its water pursuant to Idaho Code § 42-907, and was told IDWR would not
3 consider D.L. Evans' request. *See Bromley Venue Change Affidavit*, Exhibit E. In the
4 interests of justice, and because IDWR has acted outside its authority in relinquishing
5 control and oversight over water delivery to mutual irrigation companies, relief by this
6 Court is both appropriate and necessary.

8 The existence of the Self-Styled Order does not prevent this Court from granting
9 the requested relief, and IDWR's dismissal based on its existence is not warranted.

10 **CONCLUSION**

11 The water rights in this case are in Ballentyne's name, but are appurtenant to land
12 owned by the landowners within Ballentyne's boundaries. Those landowners, including
13 D.L. Evans, are entitled to delivery of their appurtenant water pursuant to Idaho law.
14 IDWR has statutory duties to ensure Ballentyne's compliance with the laws of the State
15 pertaining to water distribution, including laws requiring delivery of appurtenant water, but
16 has chosen not to fulfill those duties. D.L. Evans' request that the Court compel IDWR to
17 fulfill its statutory duties is appropriate. The Court also has the ability to make
18 determinations as to water rights' ownership, and D.L. Evans' alternatively requested relief
19 involving a change in water rights ownership is not prevented by SRBA decrees. Finally,
20 IDWR's Self-Styled Order does not prevent the Court from granting D.L. Evans its
21 requested relief. Dismissal of IDWR from this action is not appropriate.

22
23 DATED this 7th day of February, 2015.

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CERTIFICATE OF DELIVERY

I hereby certify that on the 7th day of February, 2015, I served a copy of the foregoing RESPONSE BRIEF TO THE IDAHO DEPARTMENT OF WATER RESOURCES' MOTION FOR SUMMARY JUDGMENT upon the following named person(s) in the manner listed below:

S. Bryce Farris	<input checked="" type="checkbox"/>	U.S. Mail
SAWTOOTH LAW OFFICE, PLLC	<input type="checkbox"/>	Via Facsimile
P.O. Box 7985	<input type="checkbox"/>	Via Overnight Carrier
Boise, Idaho 83707	<input type="checkbox"/>	Via Hand Delivery
Chris Bromley	<input checked="" type="checkbox"/>	U.S. Mail
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