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COMES NOW, Plaintiff, D.L. Evans Bank, which hereby submits the following Statement of Facts in support of its Response Brief to Ballentyne Ditch Company’s Motion for Summary Judgment.

STATEMENT OF FACTS

A. The Ballentyne Ditch Co., Ltd.

The Ballentyne Ditch Company, Ltd. (“Ballentyne”), was formed by filing Articles of Incorporation on April 15, 1910. *Affidavit of Joe King in Support of Motion for Summary Judgment* (“King Affidavit”) ¶ 3, Exhibit A. As described in the Articles, the purpose of Ballentyne was to “take over, own, hold, conduct, and manage that certain irrigating ditch, commonly known as the Ballentyne Ditch.” *King Affidavit*, Exhibit A at Article II. Ballentyne’s Articles established a five member board of directors which was to exercise the corporation’s corporate powers. *Id.* at Article V. Article VI provided for the issuance of capital stock and provided that the stock would be:

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

Id. Article VI further provided that the stock certificates were to “describe the lands to which the same are appurtenant,” and defined what land could have appurtenant Ballentyne stock by identifying the lands irrigated by the Ballentyne Ditch. *Id.* As stated in Article VIII, 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.*

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In 1924 or 1929,¹ Ballentyne amended its Articles with a new Article VI. *King Affidavit*, Exhibit B. 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.

In 1948, the Articles were again amended. *King Affidavit*, Exhibit C. At that time, Article VI was amended to read: “This corporation shall have a total authorized capital stock of 10,000 divided into 1,000 shares of the par value of (\$10.00) per share.” *Id.* From that time forward, Ballentyne’s Articles no longer related ownership of stock to the ownership of land served by the common ditch nor delivery of water to such lands. *See King Affidavit* ¶ 3.

B. Transactions with Thomas Ricks.

Thomas Ricks (“Ricks”) obtained a loan from D.L. Evans Bank (“D.L. Evans”) in 2008. *Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks’ Motion for Summary Judgment* (“Ricks Affidavit”) ¶7. In exchange for the loan, Ricks entered a Deed of Trust with the Bank (the “Deed of Trust”), securing the loan with property owned by Ricks within Ballentyne’s boundaries. *See Ricks Affidavit*, Exhibit 5. The Deed of Trust provides that Ricks did:

irrevocably grant, bargain, sell, and convey in trust, with power of sale, to Trustee for the benefit of the Lender as Beneficiary, all of Grantor’s right,

¹ The Amended Articles appear to refer to both years, with the number “4” written over by a “9” in several locations. *See King Affidavit*, Exhibit B.

1 title, and interest in and to the following described real property, together
2 with all existing or subsequently erected or affixed buildings, improvements
3 and fixtures; all easements, rights of way, and appurtenances; all water,
4 water rights and ditch rights (including stock in utilities with ditch or
5 irrigation rights); and all other rights, royalties and profits relating to the
6 real property, including without limitation all minerals, oil, gas, geothermal
7 and similar matters, (the “Real Property”) located in Ada County, State of
8 Idaho:

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

11 *Ricks Affidavit*, Exhibit 5. When Ricks defaulted on the loan, D.L. Evans foreclosed on the
12 Deed of Trust, and purchased the property at the foreclosure sale. *Id.* ¶¶ 12-14, Exhibit 10.
13 The Trustee’s Deed issued as a result of the foreclosure sale indicated it conveyed the two
14 parcels of land included in the Deed of Trust, but did not mention water rights or other
15 appurtenances. *Id.*, Exhibit 10.

16 The foreclosed on parcels are within Ballentyne’s boundaries, and are covered by
17 the SRBA decrees in Ballentyne’s name. *Answer of Defendant Ballentyne Ditch Company*
18 *and Complaint for Interpleader* ¶ 4 (indicating “[w]ith respect to the allegations contained
19 in paragraphs (sic) 9 of the Plaintiff’s Complaint, the Ditch Company admits the
20 allegations contained therein.” Paragraph 9 of the referred to Complaint provided: “The
21 parcels have historically been irrigated by appurtenant water rights in the name of
22 Ballentyne, and are located within Ballentyne’s boundaries.”); *see also King Affidavit*,
23 Exhibit G (each of the decrees indicate the water right is limited to the irrigation of 741
24 acres within the boundary of Ballentyne).

25 **C. Post-sale Communication Regarding Water Rights and the Foreclosed-on**
26 **Land.**

In March and April, 2013, D.L. Evans’ representative contacted Ballentyne,
indicating D.L. Evans was ready and willing to pay for the delivery of water to D.L.

1 Evans' land. *Affidavit of Robert Squire in Support of D.L. Evans' Response Brief to*
2 *Motions for Summary Judgment* ("Squire Affidavit") ¶1.

3
4 In May 2013, D.L. Evans filed a Petition with IDWR, quoting Idaho Code § 42-
5 907, and requesting IDWR make a determination that Ballentyne was required to deliver
6 appurtenant water to the properties D.L. Evans received from the January 2013,
7 foreclosure. *Affidavit of Chris M. Bromley in Support of Defendant Thomas M. Ricks'*
8 *Motion and Memorandum for Change of Venue* ("Bromley Venue Change Affidavit"),
9 Exhibit D. In June 2013, IDWR responded to D.L. Evans' Petition with a document titled
10 "Preliminary Order." *Id.*, Exhibit E. IDWR recognized D.L. Evans request for IDWR's
11 intervention pursuant to Idaho Code § 42-907, and then stated:
12

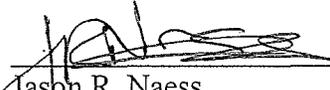
13 The delivery of the water under Idaho Code §§ 42-901 et seq. is established
14 under the terms of a private contract between the company and the
15 consumer. If there is a dispute between the parties as to the ownership or
16 the right to use or delivery of water under the contract, the aggrieved party
17 must commence an action in district court. The Department lacks
18 jurisdiction to adjudicate disputes involving private contracts. The
19 construction and enforcement of contract rights is a matter which lies in the
20 jurisdiction of the courts and not the state administrative agency. This is
21 true even when the subject matter of the contract coincides generally with
22 the expertise of the agency. The Department's role under Idaho Code § 42-
23 907 is limited to identifying the quantity of water to be delivered or
24 measuring the water actually delivered in the event of a dispute. The
25 appropriate forum to request a determination as to whether Ballentyne Ditch
26 Co., Ltd. is required to deliver the water to the properties in question is
district court.

22 *Id.* IDWR dismissed D.L. Evans' Petition because "the Department does not have the
23 authority to grant the relief sought by the Petitioner." *Id.*

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25 DATED this 7th day of February, 2015.

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



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

CERTIFICATE OF DELIVERY

I hereby certify that on the 7th day of February, 2015, I served a copy of the foregoing STATEMENT OF FACTS IN SUPPORT OF D.L. EVANS' RESPONSE BRIEF TO IDWR'S 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
McHugh Bromley, PLLC	<input type="checkbox"/>	Via Facsimile
380 S 4 th St., Ste 103	<input type="checkbox"/>	Via Overnight Carrier
Boise, Idaho 83702	<input type="checkbox"/>	Via Hand Delivery
John Homan	<input checked="" type="checkbox"/>	U.S. Mail
Idaho Department of Water Resources	<input type="checkbox"/>	Via Facsimile
P.O. Box 83720-0098	<input type="checkbox"/>	Via Overnight Carrier
Boise, Idaho 83720	<input type="checkbox"/>	Via Hand Delivery

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