



*Granting Motion to Shorten Time Pursuant to I.R.C.P. 56(C)*, this Reply brief is filed with the Court on February 12, 2015. This *Reply* is supported by the *Affidavit of Chris M. Bromley in Support of Thomas M. Ricks' Reply Brief to D.L. Evans Response* (“Bromley Affidavit”) filed contemporaneously herewith.

## I. ARGUMENT

At its root, the Bank relies on a line of cases decided by the Idaho Supreme Court, leading the Bank to argue that Ricks’ shares of stock<sup>1</sup> in the Ballentyne Ditch Company, Ltd. (“Ballentyne”) are real property appurtenances that passed to the Bank when it foreclosed on Ricks’ land. The Bank’s reliance is misplaced. Every case cited by the Bank in support of its position turns on the critical fact that the Court had before it corporations formed in accordance with federal legislation known as the Carey Act. Because Ballentyne is not a Carey Act corporation, every case relied upon by the Bank in its *Response* is inapplicable. Due to this fundamental error, Ricks is entitled to judgment as a matter of law on each issue raised in his *Motion for Summary Judgment*.

### A. Because Ballentyne Ditch Company Is Not A Carey Act Corporation, Ricks’ Shares Of Stock Are His Personal Property

The Bank’s *Response* is predicated on distinguishing the line of Idaho Supreme Court cases cited by Ricks – *Watson v. Molden*, 10 Idaho 570, 79 P. 503 (1905); *Wells v. Price*, 6 Idaho 490, 56 P. 266 (1899) – from the line of cases advocated by the Bank – *Andrews v. N. Side Canal Co.*, 52 Idaho 117, 12 P.2d 263 (1932); *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d

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<sup>1</sup> Ricks’ stock certificate that was included in the *Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks’ Motion for Summary Judgment*, filed with this Court on January 23, 2015, did not include the second page of the certificate. Exhibit 3 to the *Affidavit of Chris M. Bromley in Support of Thomas M. Ricks’ Reply to D.L. Evans’ Response*, filed contemporaneously herewith, is a complete copy of Ricks’ stock certificate, and was provided to the Bank in *Thomas M. Ricks’ Responses to Plaintiff’s First Set of Interrogatories and Requests for Production of Documents to Thomas M. Ricks*.

1105 (1931); *In re Johnson*, 50 Idaho 573, 300 P. 492 (1931); *Twin Falls Canal Co. v. Shippen*, 46 Idaho 787, 271 P. 578 (1928); *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687 (1917). In its *Response*, the Bank primarily argues:

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

[W]hile this court has held shares in an irrigation company to be personal property (*Watson v. Molden*, 10 Idaho 570, 79 Pac. 503) the fact must not be lost sight of that a water right is, heretofore shown, real estate . . . . Such shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence.

*Response* at 11-12 (citing *Ireton*, 164 P. at 689) (emphasis added).<sup>2</sup>

Nothing was “strayed from” in *Watson* and *Wells*. While not acknowledged or discussed by the Bank, the “water right . . . heretofore shown” in *Ireton* was a water right and appurtenant share of stock formed in accordance with federal legislation known as the “Carey Act.” *Ireton* at 313, 164 P. at \_\_\_\_\_. As will be explained below, *Ireton et al.* do not apply in this case because Ballentyne is not a Carey Act corporation. *Bromley Affidavit* at 2, ¶ 2. Because of this, and as controlled by *Watson* and *Wells*, shares of stock in Ballentyne are Ricks’ personal property.

#### **i. The Carey Act**

The Carey Act of 1894 is federal legislation that allowed for “the reclamation of the desert lands . . . binding the United States to donate, grant, and patent to the State free of cost . . .

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<sup>2</sup> The Bank also attempts to rely on I.C. § 42-914 and I.C. § 42-915 to support its ownership of Ricks’ shares of stock. Chapter 9, Title 42, Idaho Code addresses “distribution” of water, not ownership. The Bank’s citation to I.C. § 42-14102 – an adjudication statute – is misplaced as it relates to the water rights decreed to Ballentyne in the SRBA.

such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, required of citizens who may enter under the desert-land law . . . .” 43 U.S.C. § 641. *See also Exhibit 1 to the Bromley Affidavit, The History and Development and Current Status of the Carey Act in Idaho* at 1 (explaining background of the Carey Act). States were required to “file a map of the said land to be irrigated . . . and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of water to be used for irrigation and reclamation.” 43 U.S.C. § 641. “As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior . . . patents shall be issued to the State or its assigns for said lands so reclaimed and settled . . . .” *Id.* Importantly, if the lands were not irrigated within a certain period of time, the lands would be “restore[d] to the public domain . . . .” *Id.* Thus, if the irrigation requirements of the Carey Act were not met, lands patented to private settlers would revert back to the United States.

**ii. The State of Idaho Accepted the Carey Act in 1895, Making Shares of Water Rights in Carey Act Corporations an Appurtenance of Land**

By statute, the State of Idaho “accept[ed] the conditions” of the Carey Act in 1895. I.C. § 42-2001. “To implement the Carey Act three contracts were contemplated. The first would be between the federal government and the state which proposed the project. The second would be between the state and the construction company, and the third contract would be between the construction company and the settlers of the project.” *Exhibit 1 to the Bromley Affidavit, The History and Development and Current Status of the Carey Act in Idaho* at 3. Therefore, a statutory scheme was set up by the State to contract with companies seeking to develop water rights for Carey Act lands. Unlike ordinary operating companies, the statutes accepting the

Carey Act in Idaho are replete with the requirement that shares of stock in Carey Act corporations are water rights that are appurtenant to land:

“[W]hich contract shall contain . . . the amount of water per acre . . . the price and terms per acre at which such works and perpetual water rights shall be sold to settlers . . .”

I.C. § 42-2009 (emphasis added).

“[T]he department of water resources shall have the right to enter an order forbidding said parties from making any further or additional sales of water rights or of shares of stock in any company representing or evidencing water rights . . .”

*Id.* (emphasis added).

“Immediately upon the withdrawal of any land for the state by the department of the interior, and the inauguration of work by the contractor, it shall be the duty of the director of the department of water resources, by publication . . . to give notice . . . [of] the contract price at which settlers can purchase water rights or shares in such works . . . .

I.C. § 42-2013.

“Within one (1) year after any person, company, or persons, association or incorporated company authorized to construct irrigation works under the provisions of this chapter . . . shall appear before the director of the department of water resources . . . and make final proof of reclamation . . . which such proof shall embrace evidence that he is the owner of shares in the works which entitle him to a water right for his entire tract . . .”

I.C. § 42-2019 (emphasis added).

“The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land . . .”

I.C. § 42-2025 (emphasis added).

Liens, rights of redemption, and foreclosure of Carey Act water rights were provided for by law. I.C. §§ 42-2026 – 2035. Additionally, a set of statutes were enacted to govern transfers of Carey Act water rights from one shareholder to another. I.C. §§ 42-2501 – 2509.

**iii. Decisions Construing the Carey Act, such as *Ireton*, Hold that Shares of Stock in Carey Act Companies are Appurtenant to Land**

The Bank relies on a series of Carey Act cases to reach its conclusion that shares of stock are real property and appurtenant to land. *Andrews v. N. Side Canal Co.*, 52 Idaho 117, 12 P.2d 263 (1932); *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931); *In re Johnson*, 50 Idaho 573, 300 P. 492 (1931); *Twin Falls Canal Co. v. Shippen*, 46 Idaho 787, 271 P. 578 (1928); *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687 (1917). Consistent with Idaho Code, each case cited by the Bank examines Carey Act corporations, with the same conclusion: shares of stock in Carey Act corporations are appurtenant to land. Because Ballentyne is not a Carey Act corporation, the decisions cited by the Bank do not apply.

**iv. *Watson and Wells Control the Outcome of this Case***

Contrary to the Bank's position, the Court's decision in *Ireton* did not "stray[] from" its decisions in *Wells* and *Watson* and "propound a new standard." *Response* at 11. Rather, *Wells* and *Watson* are harmonious with *Ireton et al.* As stated above, the Carey Act was enacted in 1894, and accepted by the state of Idaho in 1895. After the Carey Act was accepted by Idaho, the Supreme Court issued its decisions in *Wells* (1899) and *Watson* (1905). The Supreme Court knew it did not have a Carey Act corporation before it when it held, "Shares of stock in an irrigation corporation are not appurtenant to the land owned by the owner of such shares." *Wells* at 493, 56 P. at 267 (emphasis added). The Court also knew it did not have a Carey Act corporation before it when it followed its holding in *Wells*, stating 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 507 (emphasis added).

Moreover, the appurtenance reasoning articulated in *Ireton* appears to have first been developed by the Court in *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643,

653, 150 P. 336, 340 (1915) (“If as soon as an entryman makes a contract for the purchase of water from a [Carey Act] construction company to irrigate his land the water becomes an inseparable appurtenant to such land . . . .”) (emphasis added). The decision in *Twin Falls North Side* was written by Chief Justice Sullivan. *Id.* at 646, 150 P. at 337. Because Justice Sullivan also participated in the Court’s decisions in *Wells* and *Watson*, it is unreasonable for the Bank to assert the Court somehow overruled itself by extending *Ireton* to non-Carey Act companies like Ballentyne.

The Court’s rationale in *Wells* and *Watson* applies to non-Cary Act companies like Ballentyne; while the Court’s rationale in *Ireton et al.* applies to Carey Act corporations. Therefore, because Ballentyne is not a Carey Act corporation, Ricks’ shares of stock are not appurtenances to the land foreclosed on by the Bank, and remain Ricks’ personal property.

**B. The Bank Does Not Contest That Ballentyne’s Water Rights At Issue In This Proceeding Were Decreed In The SRBA And Authorize Ballentyne To Divert Water From The Boise River**

The water rights at issue in this proceeding were decreed to Ballentyne in the Snake River Basin Adjudication (“SRBA”). *Affidavit of Chris M. Bromley in Support of Thomas M. Ricks’ Motion for Summary Judgment* at 2, ¶ 2 (“Attached hereto as **Exhibit 1** are true and correct copies of the partial decrees, including a map of the place of use, issued by the Snake River Basin Adjudication District Court to Ballentyne.”); *see also Statement of Facts in Support of Thomas M. Ricks’ Motion for Summary Judgment* at 2, ¶ 2 (“Ballentyne was issued decrees from the SRBA district court . . . .”). The decreed source of Ballentyne’s SRBA water rights is the Boise River, under water right nos. 63-00195, 63-00198AA, 63-00258A, 63-00260B, 63-00264, 63-00285, and 63-31808. *Affidavit of Chris M. Bromley in Support of Thomas M. Ricks’ Motion for Summary Judgment* at 2, ¶ 3; *see also Statement of Facts in Support of Thomas M.*

*Ricks' Motion for Summary Judgment* at 2, ¶ 2. The Bank does not contest these statements, and agrees that “the water rights at issue are diverted by Ballentyne . . . .” *Response Brief to Thomas M. Ricks' Motion for Summary Judgment* at 3.

**C. *United States v. Pioneer Irrig. Dist. Does Not Apply In This Case***

Citing *United States v. Pioneer Irrig. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Bank seems to argue that, even though the “‘Name’ and ‘Address’ sections” of Ballentyne’s SRBA partial decrees do not reference Ballentyne’s shareholders, *Pioneer* vests the Bank with a real property ownership in Ballentyne’s water rights. *Response* at 9. Much like the decisions in *Ireton et al.* were based on the Idaho’s acceptance of the Carey Act, the result in *Pioneer* turns on the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*, and federal contracts arising thereunder.

“The Reclamation Act of 1902 set in motion a massive program to provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid land in many Western States.” *Pioneer* at 109, 157 P.3d at 603. In Idaho, the United States Bureau of Reclamation (“BOR”) built numerous dams and reservoirs, including a series of three large reservoirs on the Boise River, known as the “Boise Project.” *Id.* at 108, 157 P.3d at 602.<sup>3</sup> Following State law, BOR obtained water rights from the Idaho Department of Water Resources (“IDWR”) for the Boise Project. *Id.* at 110, 157 P.3d at 604. “Thereafter, the United States and the irrigation districts entered into contracts that provide for the repayment to the United States for the costs of constructing the federal facilities and the continuing operation and maintenance costs. There is no dispute that the irrigation districts have fully repaid the construction costs, except for Lucky Peak, and they have paid for development of the stored water.” *Id.*

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<sup>3</sup> The reservoirs that make up the Boise Project are Anderson Ranch, Arrowrock, and Lucky Peak.

In the SRBA, claims for the storage water rights were filed by BOR, as well as contract holders in the Boise Project. *Id.* at 108, 157 P.3d at 602. IDWR “recommended that the water rights be in the name of the BOR and that the claims filed by the irrigation entities be disallowed. The irrigation entities filed several objections to IDWR’s recommendations.” *Id.* On summary judgment, the presiding judge of the SRBA held, “the United States has nominal legal title to the Boise Project water rights and the irrigation entities hold equitable title in trust for their landowners.” *Id.* Effectively reaching the same conclusion of the SRBA, the Supreme Court crafted a different remark that, on remand to the SRBA, now appears on the face of BOR storage water rights in the Boise Project. *Id.* at 115, 157 P.3d at 609; *Exhibit 2 to the Bromley Affidavit.* In reaching its decision, the Court thoroughly analyzed and placed significant emphasis on the Reclamation Act of 1902, the federal contracts entered into by the contract holders with BOR, and the United States Supreme Court decisions construing the Reclamation Act and federal contracts.

Unlike the irrigation entities in *Pioneer* that filed separate claims in the SRBA for storage water in the Boise Project, the shareholders in Ballentyne did not file SRBA claims. Unlike in *Pioneer*, the Bank’s “hook” to Ricks’ shares is the purported interest it derived from the Deed of Trust and Trustee’s Deed, *Statement of Facts in Support of D.L. Evans’ Response Brief to Thomas M. Ricks’ Motion for Summary Judgment* at 4-5, not federal law and federal contract. Also, unlike *Pioneer*, the Bank claims ownership of Ricks’ shares in Ballentyne’s SRBA water right nos. 63-00195, 63-00198AA, 63-00258A, 63-00260B, 63-00264, 63-00285, and 63-31808. *Affidavit of Chris M. Bromley in Support of Thomas M. Ricks’ Motion for Summary Judgment* at 2, ¶ 3; *see also Statement of Facts in Support of Thomas M. Ricks’ Motion for Summary Judgment* at 2, ¶ 2. Ballentyne’s SRBA water rights are for water from the Boise River, not for

storage water from BOR reservoirs. *Id.* Lastly, unlike BOR’s SRBA storage water rights, Ballentyne’s SRBA water rights have no remarks stating anyone other than Ballentyne owns its water rights.

Because there are no limiting or clarifying remarks in Ballentyne’s SRBA decrees as to ownership, Ballentyne’s SRBA decrees are unambiguous and entitled to their plain meaning. “We apply the same rules of interpretation to a[n] [SRBA] decree that we apply to contracts.” *A&B Irrig. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). “In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.” *C&G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001). Thus, the result in *Pioneer* has no application in this case and should be disregarded.

**D. Ballentyne’s Articles Of Incorporation, Amendments Thereto, And Bylaws Govern The Use Of It System And Distribution Of Water To Its Shareholders**

The “use” of shares in Ballentyne are governed by its articles of incorporation, amendments thereto, and bylaws. As a matter of law, Ballentyne is entitled “to make reasonable rules and regulations governing the use of its system and the distribution of water to its shareholders.” *Gasser v. Garden Water Co.*, 81 Idaho 421, 426, 346 P.2d 592, 594 (1959). Ballentyne’s Articles of incorporation, amendments thereto, and bylaws are Ballentyne’s “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.*

By contract, Ballentyne's Articles of Incorporation, as amended, expressly state that stock is not appurtenant to any lands. *Statement of Facts in Support of D.L. Evans' Response Brief to Thomas M. Ricks' Motion for Summary Judgment* at 3. Ballentyne's shares of stock do not list particular lands to which the shares must be applied. *Exhibit 3* to the *Bromley Affidavit*. Ballentyne's SRBA decrees define the place of use for the water rights diverted by Ballentyne from the Boise River. *Statement of Facts in Support of Thomas M. Ricks' Motion for Summary Judgment* at 2, ¶ 2. Only shareholders in Ballentyne may use water that Ballentyne diverts from the Boise River. *Id.* at 3, ¶ 4. Ballentyne's bylaws explain it will not transfer stock from a shareholder without "surrender of the certificate and entry of such transfer on the books of the corporation . . . ." *Exhibit 2* to the *Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment* at 5. There has been no surrender of stock by Ricks.

**E. The Bank Does Not Contest Ricks' Argument That If Share Of Stock In Ballentyne Are Personal Property, Then The Bank Has No Ownership Interest In Said Shares**

There is no argument from the Bank that, if the shares of stock owned by Ricks are personal property, then the Bank has no ownership interest. The Bank agrees with Ricks, "A trustee's deed can only convey real property. *Spencer v. Jameson*, 147 Idaho 497, 502, 211 P.3d 106, 111 (Idaho 2009)." *Response* at 12. The Bank has therefore waived any argument contrary to Ricks' position that the Bank, as a matter of law, could not obtain Ricks' personal property.

**F. The Bank Cannot Compel Transfer Ricks' Shares of Stock**

The Bank argues the Court can "compel" the transfer of Ricks' shares of stock because his "shares of Ballentyne followed the transfer of water rights to D.L. Evans pursuant to the Correction Trustee's Deed. *Ireton*, 164 P. at 689. And the legal consequence of the foreclosure is that D.L. Evans owns the shares in Ballentyne representing the water and water rights appurtenant to its land." *Response* at 14. As stated above, shares of stock in Ballentyne are

Ricks' personal property, not appurtenances to land. *Wells; Watson*. Moreover, Ballentyne's Bylaws prohibit the forced transfer of shares of stock. 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. *See Memorandum in Support of Thomas M. Ricks' Motion for Summary Judgment* at 8-10.

## II. CONCLUSION

Ballentyne is not a Carey Act corporation. Therefore, none of the cases cited by the Bank in support of its legal theory apply. Consistent with *Watson* and *Wells*, Ricks' shares of stock in Ballentyne are his personal property and did not pass to the Bank as an appurtenance of the land foreclosed on by the Bank. In light of the above, Ricks is entitled to judgment as a matter of law on each issue asserted in his *Motion for Summary Judgment*.

Respectfully submitted this 12<sup>th</sup> day of February, 2015.

MCHUGH BROMLEY, PLLC



CHRIS M. BROMLEY

*Attorneys for Thomas M. Ricks*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12<sup>th</sup> day of February, 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 checked="" type="checkbox"/> Email
John Homan Idaho Department of Water Resources PO Box 83720-0098 Boise, ID 83720	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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