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the Idaho 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.L. EVANS BANK,

Plaintiff,

vs.

BALLENTYNE DITCH COMPANY,
LIMITED; THOMAS MECHAM RICKS,
GARY SPACKMAN, IN HIS OFFICIAL
CAPACITY AS THE DIRECTOR OF THE
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,

Case No. CV-OC-2013-17406

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Defendants.

The Director (“Director”) of the Idaho Department of Water Resources (“IDWR”) and IDWR move this Court to be dismissed from this case pursuant to I.R.C.P. 12(b)(6) on the grounds that Plaintiff D.L. Evans Bank (“D.L. Evans”) has failed to state a claim upon which relief can be granted against IDWR.

The true issue presented to the Court in this case is a narrow and uncomplicated one: Whether, when D.L. Evans entered into a promissory note with Defendant Thomas Mecham Ricks (“Ricks”), that promissory note secured an interest in shares in Ballentyne Ditch Company, Limited (“Ballentyne”). Surprisingly, instead of arguing the merits of this issue, D.L. Evans seeks to pull IDWR into its dispute with Ricks by coming up with confounding legal theories on water law and water right administration. D.L. Evans asks this Court to compel IDWR to ignore water right decrees issued by the Snake River Basin Adjudication (“SRBA”) Court and ignore well established Idaho water law and require that Ballentyne deliver water to D.L. Evans. *Amended Complaint* ¶¶ 58, 66. The Court must dismiss IDWR as a party to this proceeding because IDWR has no authority to overturn water right decrees issued by the SRBA Court and IDWR has no authority to compel Ballentyne to delivery water to D.L. Evans. Moreover, the arguments raised by D.L. Evans that the water rights issued by the SRBA Court in the name of Ballentyne are contrary to Idaho law should have been raised in the SRBA and cannot be raised before this Court to collaterally attack the decrees. Additionally, IDWR must be dismissed because D.L. Evans did not appropriately pursue judicial review of the IDWR order dismissing D.L. Evans’ petition requesting IDWR action issued *In the Matter of the Petition*

Requesting a Determination of the Right to Use Water Under Shares of the Ballentyne Ditch Co. Ltd.

BACKGROUND

In 2008, D.L. Evans Bank entered into a promissory note with Defendant Thomas Mecham Ricks (“Ricks”), which was secured by a deed of trust. *Amended Complaint* ¶¶ 11 & 12. Ricks defaulted on the promissory note and D.L. Evans initiated foreclosure proceedings. *Amended Complaint* ¶¶ 16 & 18. D.L. Evans claims the foreclosure of property includes shares in Ballentyne, entitling D.L. Evans to receive water from Ballentyne. *Amended Complaint* ¶ 21. Ricks denies D.L. Evans’ claim. *Answer of Defendant Thomas M. Ricks to Amended Complaint* ¶ 21. Ballentyne refuses to deliver water to the property in question without a court order. *Answer of Defendants’ Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Snead to Amended Complaint and Re-stated Complaint for Interpleader* ¶ 9.

In 2013, D.L. Evans petitioned IDWR to force Ballentyne to deliver water to the foreclosed property. Exhibit D, attached to *Affidavit of Chris M. Bromley in Support of Defendant Thomas M. Ricks’ Motion and Memorandum for Change of Venue* (Sept. 2, 2014) (“Petition”). IDWR issued a preliminary order (“Order”) denying the Petition which became final on June 26, 2013. Exhibit E, attached to *Affidavit of Chris M. Bromley in Support of Defendant Thomas M. Ricks’ Motion and Memorandum for Change of Venue* (Sept. 2, 2014). D.L. Evans commenced this lawsuit on September 25, 2013, and amended its complaint to include IDWR on July 28, 2014.

STANDARD OF REVIEW

Where a motion to dismiss for failure to state a claim upon which relief can be granted is supported by information outside of the pleadings, the motion is treated as a motion for summary

judgment. I.R.C.P. 12(b); *see also Allen v. State ex rel. Dept. of Parks and Recreation*, 136 Idaho 487, 488, 36 P.3d 1275, 1276 (2001). Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c); *see also Indep. Sch. Dist. of Boise City v. Harris Family Ltd. P'ship*, 150 Idaho 583, 587, 249 P.3d 382, 386 (2011) (citing I.R.C.P. 56(c)). In a motion to dismiss pursuant to I.R.C.P. 12(b)(6) and in a summary judgment motion “the non-moving party is entitled to have all inferences from the record viewed in his favor.” *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

ARGUMENT

A. IDWR has no statutory duty to deliver water to D.L. Evans Bank.

IDWR’s jurisdictional authority to control who receives water ends once water is delivered from its natural water course to its point of diversion. Idaho Code § 42-101 states “[a]ll the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment....” In addition, Idaho Code § 42-602 states “[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom.” Both of these statutes indicate the responsibility of IDWR is to ensure delivery of water from *natural* water sources to canals or ditches, not manage delivery of water from a canal or ditch. Once the water is delivered to the water right holder at the point of diversion, water masters do not supervise or monitor how the water is used or how it is distributed to others within the authorized place of

use. *Affidavit of Rex Barrie*, Water Master for Water District 63 ¶ 4. Once the water is diverted from the natural water course, at the point of diversion, Ballentyne acquires control over the water and may use it according to the extent and limit of its water rights.

D.L. Evans cites Idaho Code §§ 42-101, 42-602, and 42-907 in its complaint, claiming those statutory provisions compel IDWR to direct Ballentyne to deliver water to the property in question. While Idaho Code §42-907 allows IDWR to aid in *quantity* disputes between persons receiving water from a ditch and the corporation running the ditch, it does not contemplate that IDWR may decide who has title to the water and, therefore, who should receive the water after it is delivered in accordance with a water right. Per the partial decrees issued in Ballentyne's name, by the SRBA District Court, Ballentyne is the owner of the water rights in question. Exhibit A, attached to *Affidavit of Chris M. Bromley in Support of Defendant Thomas M. Ricks' Motion and Memorandum for Change of Venue* (Sept. 2, 2014). Once Ballentyne receives the water it is entitled under its water rights, Ballentyne uses shares to determine who receives water from its conveyance system.

In response to the argument that ownership has already been decided by the SRBA decrees, D. L. Evans attempts a direct challenge to the decrees by arguing that "Idaho law does not recognize ownership of water independent of ownership of the ground to which it is appurtenant." *Amended Complaint* ¶ 50. This statement is contrary to established Idaho law. It is well established that title to the appropriation of water carried in a ditch operated for distribution of water belongs to the organization owning the ditch and not the water users. *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 458-59, 94 P. 761, 763 (1908) ("The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company."); *see also* Wells A.

Hutchins, *Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 46-48 (1968). Mutual ditch companies like Ballentyne are common not only in Idaho but throughout the west. *See* Vol. 2 Waters and Water Rights § 26.02 (Amy L. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2014). It is common for water rights to be held in the name of the ditch company. *Id.* This legal doctrine is reflected not just in the SRBA decrees for Ballentyne, but also in the water right decrees for other water delivery organizations throughout the state. Just in the Boise River Basin alone, there are over 30 organizations in a similar situation to Ballentyne, with the water rights being held in the name of the water delivery organization. *Affidavit of Elizabeth Anne Cresto* ¶ 4. D.L. Evans' argument that IDWR has acted contrary to its statutory duty is premised on this incorrect statement of law and thus must be rejected by this Court. Furthermore, the Court should be cautious about adopting D.L. Evans' legal theory as doing so would place the ownership of hundreds of water rights for water delivery organizations throughout Idaho into question.

To the extent D.L. Evans is claiming that there has been a post-decree change of ownership of the water rights, IDWR does not have the authority to make a post-decree ownership determination if D.L. Evans wishes to dispute ownership of the water rights in question. Disputes over title to real or personal property can only be raised through a quiet title action, in which a district court has original jurisdiction. Idaho Code § 6-401; *see Rural Kootenai Organization, Inc. v. Board of Com'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999) (District court, not the county, has jurisdiction to determine title to submerged lands.); *see also Bonner Bldg. Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 685, 682 P.2d 635, 638 (Ct. App. 1984) (A district court has jurisdiction in action to quiet title.). IDWR has no role in a quiet title action as it has no interest in who actually owns the water rights.

In conclusion, IDWR only has responsibility to deliver water from natural water courses to the point of diversion of entities holding valid water rights and in this case, the water rights were decreed in the name of Ballentyne, not D.L. Evans. To the extent D.L. Evans is arguing that there has been a post-decree change of ownership, IDWR does not have authority to adjudicate post-decree ownership disputes between water users. Therefore, IDWR has no statutory duty to deliver water to D.L. Evans in this situation.

B. IDWR does not have the authority to alter the elements of partially decreed water rights.

D.L. Evans seeks a mandatory injunction compelling IDWR to “cease recognizing Ballentyne as a valid water delivery system, and . . . remove any water rights from Ballentyne’s name and place the rights in the names of the property owners that have beneficially applied the water to their land.” *Amended Complaint* at 11. This is a direct challenge to the SRBA water right decrees which have become final judgments of the SRBA Court as each decree included a Rule 54(b) certificate. Exhibit A, attached to *Affidavit of Chris M. Bromley in Support of Defendant Thomas M. Ricks’ Motion and Memorandum for Change of Venue* (Sept. 2, 2014). Neither IDWR nor this Court has the authority to grant the relief requested by D.L. Evans. The SRBA Court has already determined that Ballentyne is the valid owner of the water rights at issue here. *Id.* D.L. Evans did not object to this determination in the SRBA. *Affidavit of Meghan Carter in Support of Motion to Dismiss* ¶ 2. D.L. Evans is now barred under the doctrines of res judicata and claim preclusion from collaterally attacking this determination. Idaho Code defines a party to the SRBA as “any person who is a claimant or *any person who is served* or joined.” Idaho Code § 42-1401A(6) (emphasis added). A person is defined broadly to include private entities like D.L. Evans. *See* Idaho Code § 42-1401A(7). D.L. Evans was a party

to the SRBA through notice provided directly to D.L. Evans. *Affidavit of Carter Fritschle* ¶ 5. This notice bound D.L. Evans to decisions of the SRBA District Court. *In Re SRBA Case No. 39576 Final Unified Decree*, 11 (2014) (“This Final Unified Decree is binding against all persons”); see also *Id.* at 9 (“This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin”). The SRBA notice procedures have been affirmed by the Idaho Supreme Court. *Lu Ranching Co. v. United States*, 138 Idaho 606, 67 P.3d 85 (2003). Because D.L. Evans was a party to the adjudication and is bound by its decision, it cannot argue to this Court that IDWR or even this Court should undo or ignore the decrees previously issued by the SRBA District Court.

Furthermore, if D.L. Evans wants to challenge the SRBA decrees, this is not the appropriate venue. The SRBA Court has specifically retained jurisdiction over its Decrees. *Final Unified Decree* at 13. This Court should decline any request by D.L. Evans to assert jurisdiction over the decrees as the SRBA Court has specifically retained jurisdiction and D.L. Evans can seek relief directly from the court that issued the decrees.

Further mandating such a change to already established water rights would not only upset Ballentyne’s water delivery system it would also create a precedent affecting hundreds of rights throughout the state. As discussed above, there are over 30 organizations in a similar situation to Ballentyne’s on the Boise River alone, with the water rights being held in the name of the water delivery organization. *Affidavit of Elizabeth Anne Cresto* ¶ 4. Just because D.L. Evans did not achieve its desired result when foreclosing on Mr. Rick’s property does not mean a system of water rights ownership in Idaho should be upended.

C. D.L. Evans did not appropriately seek review of IDWR's Order denying the Petition.

In 2013 D.L. Evans petitioned IDWR requesting that IDWR force Ballentyne to deliver water to the subject property. *Petition* at 4. In its Order IDWR denied D.L. Evans' Petition stating "The Department lacks jurisdiction to adjudicate disputes involving private contracts." *Order* at 2. D.L. Evans failed to appeal IDWR's Order in accordance with Idaho Code § 67-5270 and I.D.A.P.A 37.01.01.790. Instead of filing such an appeal, D.L. Evans filed a separate lawsuit that initially did not include IDWR. Pursuant to Idaho Code § 67-5273, D.L. Evans had twenty-eight days to file a petition for judicial review once the Order became final on June 26, 2013. The time for filing a petition for judicial review passed by the time D.L. Evans filed this lawsuit in September of 2013 and even more so by the time IDWR was included in the lawsuit in July of 2014. As such the Court does not have jurisdiction to grant D.L. Evans the relief it is seeking.

REQUEST FOR ATTORNEY FEES

D.L. Evans has failed to present meritorious arguments in support of its suit against IDWR and has acted without a reasonable basis in fact and/or law. D.L. Evans misstates Idaho law and asks this Court to take action that it clearly lacks authority to take. The citizens of the State of Idaho should not be required to pay for D.L. Evans' actions that have dragged IDWR into this case based on unsupported legal theories. IDWR therefore requests an award of reasonable attorney's fees and other reasonable expenses pursuant to Idaho Code § 12-117.

CONCLUSION

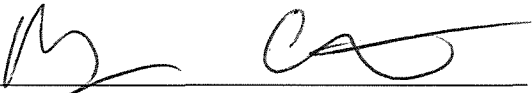
IDWR should be dismissed from this case. There is no legal authority upon which IDWR can address D.L. Evans' claims. D.L. Evans does not own any water rights. IDWR does not maintain authority to deliver water without a water right. In addition, D.L. Evans failed to

properly pursue judicial review of IDWR's Order and should be procedurally barred from including IDWR in this lawsuit. For these reasons IDWR requests that the Court grant its motion to dismiss, or in the alternative, grant summary judgment in IDWR's favor.

RESPECTFULLY SUBMITTED this 26th day of January 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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