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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 BALLENYTINE 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** **IDWR'S REPLY TO D.L. EVANS BANK'S RESPONSE TO IDWR'S MOTION TO DISMISS**

Defendants.

The Director ("Director") of the Idaho Department of Water Resources ("IDWR") and IDWR submit the following reply to the *Response Brief to the Idaho Department of Water Resources' Motion for Summary Judgment*[1] ("Response") filed by D.L. Evans Bank ("DL Evans").

DL Evans' *Amended Complaint* seeks an order from this Court compelling IDWR to take actions which IDWR cannot legally do. IDWR does not have the authority to remove water rights from Ballentyne Ditch Company Ltd.'s ("Ballentyne") name and place them in the name of Ballentyne's patrons nor does it have the authority to cease recognizing Ballentyne as a valid water delivery system. In addition, IDWR has complied with its statutory duties by delivering Ballentyne's decreed water right to Ballentyne's decreed point of diversion and is under no duty to provide DL Evans the relief it requests in its *Amended Complaint*. Accordingly, the Court should dismiss IDWR from this case.

ARGUMENT

A. IDWR cannot resolve legal disputes over ownership of a water right or remove Ballentyne as the owner of its water rights.

When addressing a motion to dismiss for failure to state a claim, the Court must start with the specific requests for relief made in the complaint. Here, DL Evans seeks a mandatory injunction compelling IDWR to "cease recognizing Ballentyne as a valid water delivery system. . . . ." *Amended Complaint* at 11. DL Evans has failed to provide legal authority to support this

[1] IDWR did not file a motion for summary judgment, but filed a motion to dismiss pursuant to I.R.C.P 12(b)(6) on the grounds that D.L. Evans has failed to state a claim upon which relief can be granted.

claim and has in fact has backed away from this claim in its *Response*. DL Evans expressly recognizes Ballentyne as a valid water delivery organization in its *Response*. *Response* at 9 ("The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners . . . . Ballentyne is required to deliver appurtenant water to landowners within its boundaries."). DL Evans has failed to state grounds for the Court to grant the specific relief requested in the *Amended Complaint*.

DL Evans also asks the Court to "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. What DL Evans seeks is not just a mere ownership change but a determination of quantity and place of use for each of Ballentyne's patrons. To grant the relief DL Evans is seeking in its *Amended Complaint* would require a separate adjudication of already decreed water rights and implicate far more parties than DL Evans and Ballentyne. IDWR has no authority to adjudicate rights and the Snake River Basin Adjudication ("SRBA") Court has retained jurisdiction over such proceedings. *See In Re SRBA Case No. 39576 Final Unified Decree,* 13 (2014).

DL Evans claims in its *Response* that "nothing in the SRBA final decree prohibits this Court from determining the ownership of a decreed water right." *Response* at 15. IDWR does not dispute that Idaho Code § 6-401 gives this Court authority to resolve disputes over who owns the shares at issue in this case. However when DL Evans asks the Court to "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," it is not merely seeking to have the Court make a determination over ownership of the shares. This is a direct attack to Ballentyne's SRBA water right decrees. 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). The decrees are binding upon DL Evans. *In Re SRBA Case No. 39576 Final Unified Decree*, 11 (2014). DL Evans does not contest this in its Response. DL Evans cannot now come before this Court and ask the Court to declare the SRBA decrees invalid and to change the ownership of the water rights by arguing they should not have been decreed this way in the first place.[2]

DL Evans cites Idaho Code §42-108 as providing IDWR the authority to alter decreed rights. This statute authorizes IDWR to approve a post-decree change to an element of a water right but also requires that "[a]ny person desiring to make such change ...shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code." As DL Evans did not make an application for change with the department pursuant to Idaho Code § 42-222, this code section has no applicability here.

DL Evans also seems to suggest that Idaho Code § 42-108 authorizes the Director to change the ownership of a water right. Ownership cannot be changed pursuant to Idaho Code § 42-108 (Authorizing a change in "point of diversion, place of use, period of use, or nature of use of water."). Idaho Code § 42-248 addresses notification of changes in ownership of a water right. It provides that "[a]ll persons owning or claiming ownership" of a water right "shall provide notice to the department of water resources of any change in ownership of any part of the water right" that occurs after June 20, 2000. Pursuant to this chapter, the Department receives notice of a change of ownership, but the statute does not authorize the Department to make a legal determination of ownership itself. Disputes over title to real or personal property

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[2] Idaho Code § 6-401 also gives the Court the authority to resolve disputes that arise post-decree over title to a water right. However, by asking the Court to order that IDWR "remove any water rights from Ballentyne's name and place the rights in the names of the property owners," DL Evans is not seeking to have the Court make a determination of a post-decree dispute over title to a water right. It is challenging the very basis for the SRBA water right decree itself.

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.

To support its request to cease recognizing Ballentyne and removing it from the water rights, DL Evans argues that where water is delivered by a ditch company, "the water users own the water right." *Response* at 5. However DL Evans mischaracterizes Idaho case law and cites several cases in its *Response* that show such a statement and request are contrary to Idaho Law.

DL Evans relies upon *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 P. 761 (1908), for the proposition that water users who receive water from a ditch company own the water right. *Response* at 5. DL Evans' selective quoting of the case is misleading. It quotes certain sections as if they apply to ditch companies, when they do not, and omits key language that goes counter to DL Evans argument. DL Evans quotes the case as saying:

> As to some of those ditches the appropriators were also the users of the water. They owned the water right and used the water on their lands . . . . The rights to the use of such water, after having 'once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes,' become a perpetual right, subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use.

Response at 5.

A reading of the entire section shows that the statement that "[t]hey owned the water right" in the second sentence was not addressing ditch companies:

> This action was originally instituted to determine the respective rights and priorities among the various appropriators and diverters of the waters of the Boise river, and the plaintiff only made such parties defendants as had constructed ditches and diverted water from the stream. As to some of those ditches the appropriators were also the users of the water. They owned the water right and used the water on their own lands. Others were co-operative ditch companies, where a number of water users had joined together and constructed a ditch, each one owning a number of shares in the company, which entitled him to a proportionate amount of the water of the canal;

Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 P. 761, 763 (1908) (emphasis added).

As the full quote makes clear, co-operative ditch companies were not included in the reference to "they" in the statement "they owned the water right." In fact *Farmers' Co-op Ditch Co.* later in this section states explicitly that "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*." 14 Idaho 450, 458-59, 94 P. 761, 763 (1908)(emphasis added). *Farmers' Co-op Ditch Co.* does stand for the proposition that a water user has an interest in the water right, but it does not stand for the proposition that the water user "owns" the water right, nor does it lead to the conclusion that the SRBA Court could not have decreed the water right in the name of Ballentyne.[3] It certainly does not require that IDWR "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" as requested by DL Evans.

A similar conclusion was reached in *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935). This case involved an irrigation district that sued the water master, a drainage district and the commissioners of the drainage district over allegations that the water

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[3] Interestingly, DL Evans does cite to the Idaho Supreme Court case *U.S. v. Pioneer Irrigation Dist.* in its Response. *U.S. v. Pioneer Irrigation Dist.* illustrates that water delivery companies may hold title to water on behalf of the water users. 144 Idaho 106, 115, 157 P.3d 600, 609 (2007).

master should not have been delivering water to the drainage district and its patrons. *Id.* at 13, 47 P.2d at 918. The presiding judge issued an order concluding the water master "is unlawfully" distributing water to the drainage district and that the patrons of the district were "necessary and indispensable parties to the action." *Id.* The Idaho Supreme Court reversed the presiding judge's order, finding that the judge's conclusion that the patrons were necessary and indispensable was founded on:

> an erroneous theory which has been advanced from time to time by counsel for some of the ditch and irrigation companies and water users, to the effect that a water user who has acquired his right through "sale, rental or distribution" from a ditch or canal company or an irrigation or drainage district, acquires the rights of an appropriator of the water and is entitled to the same consideration in all litigation involving the original appropriation to which the canal or ditch company or irrigation or drainage district is entitled. Such is not the law and it has never been so held or recognized in this state. The question was mooted in Farmers', etc., D. Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 P. 761, 763, and this court said: '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.

Id.

As with *Farmer's Co-op*, the Court went on to recognize that water users do have an interest in the water and the interest becomes "a perpetual right" once applied to beneficial use, but the Court also recognized that any dispute about delivery is with the ditch company or with other water users. *Id.* at 19, 47 P.2d at 919. ("Any controversy [the water user] may have is with the ditch company from which he receives water, or with other consumers under the ditch over the question of priority of use.") The Court went on to say:

> The consumers possess no water right which they can assert as against any other appropriator; their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises. Yaden v. Gem Irr. Dist., 37 Idaho, 300, 216 P. 250. One who acquires the right to use water from an appropriator, whose right was initiated by appropriation under section 1, art. 15, "for sale, rental or distribution," is not the owner of the appropriation and does not acquire the rights of an

> appropriator, but he simply acquires the rights of a user and consumer, as distributee of the water under sections 4 and 5, art. 15, of the Constitution. His priority of contract is with the appropriator.

Id.

Thus, pursuant to *Nampa & Meridian*, water users receiving water from a ditch company have an interest in the water but any dispute they have regarding that interest is with the ditch company. Important for this case, the Court also emphasized that the appropriate cause of action was not against the water master:

> The defendant water master is only an administrative officer and has no interest in the subject of the litigation; his only duty is to distribute the waters of his district in accordance with the respective rights of appropriators, adjudicated rights having preference over unadjudicated rights and appropriations. The district is a corporation organized under authority of the statute (chapter 25, title 41, I. C. A.) and is the owner of the appropriation; and the landowners in the district, for all practical purposes, sustain the same relation to the corporation that stockholders in a private corporation sustain to the corporation.

Id. at 20 (citations omitted).

Here, the Director is in a similar position as the water master in *Nampa & Meridian*. The Director is as administrative officer who oversees the distribution of water from natural water sources. The Director has no interest in this case as it is a private dispute over shares of stock. DL Evans' complaint is with Defendant Ricks and Ballentyne and does not implicate IDWR.

DL Evans may have some right to water however, its *Amended Complaint* asks the court to compel IDWR to cease recognizing Ballentyne as a valid water delivery system and remove water rights from Ballentyne's name, which is contrary to Idaho law. DL Evans' *Response* tries to get around that by making incorrect assertions. What DL Evans' *Response* does illustrate is that ownership of the shares in Ballentyne is at issue and a determination of ownership of the shares needs to be made. As stated above IDWR has no interest in who actually owns the water rights and cannot offer DL Evans the relief it is seeking.

B. The Director and IDWR have complied with their statutory duties.

In its *Amended Complaint* DL Evans asked the court to compel the Director and IDWR to "comply with their statutory duties" under Idaho Code §§ 42-101, 42-602, 42-907, 42-1805(9). *Id.* at 11. DL Evans in its *Response* states that Ballentyne violated Idaho Code §§ 42-914 and 42-915. *Id.* at 12. In addition DL Evans claims "[u]nder Idaho Code §§ 42-1805(9) and 42-1413(2), IDWR has an affirmative duty to seek an injunction or restraining order preventing Ballentyne from denying DL Evans the delivery of its water . . . ." *Id.* at 13. IDWR has fully complied with its statutory duties.

As explained in IDWR's Memorandum in Support of Motion to Dismiss ("Memorandum"), 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. *See* Idaho Code §§ 42-101 and 42-602. In addition, Idaho Code § 42-1413(2) directs the Director to "administer the water rights by distributing water in accordance with the final decree . . . ." Ballentyne is the owner of the rights in question in the Final Unified Decree. *See* 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). There is no interpretation of the statutes and the decrees that would indicate IDWR should administer Ballentyne's water rights differently than it has been.

Further, Idaho Code § 42-907 allows IDWR to aid in *quantity* disputes between persons receiving water from a ditch and the corporation running the ditch, which IDWR addressed in its Memorandum. This is not a quantity dispute. Even under DL Evans' characterization of the case, it is a dispute over ownership of a water right, not a quantity dispute. DL Evans does not offer an alternative reading of Idaho Code § 42-907, instead it points to Idaho Code §§ 42-1805(9), 42-914 and 42-915 stating these codes sections illustrate other duties that IDWR has not

complied with. Idaho Code § 42-1805(9) authorizes the Director "[t]o seek a preliminary or permanent injunction, or both, or a temporary restraining order restraining any person from violating or attempting to violate (a) those provisions of law relating to all aspects of the appropriation of water, distribution of water, headgates and measuring devices." First, as described above, there has been no violation of the water right, so there are no grounds for an injunction or restraining order. Second, even if there was a violation of the water right, this provision does not mandate the Director seek an injunction or restraining order. It simply authorizes the Director to do so.

DL Evans' attempts to point to Idaho Code §§ 42-914 and 42-915 equally fall flat. Idaho Code § 42-914 expressly provides that "Any person, association or corporation violating any of the provisions of this section, shall be liable for all damage to any party or parties injured thereby, which damage shall be determined by the proper court." This language evidences that a court, not IDWR, is the entity with oversight over disputes related to this section. Idaho Code § 42-915 explains that a consumer's title is not affected by the transfer of a ditch but nothing in this section implicates any duty or responsibility of the Department.

C. D.L. Evans did not appropriately seek review of IDWR's Order under Idaho's Administrative Procedures Act and it is not appropriate to include IDWR as party to this action litigating the same issues.

DL Evans improperly characterizes IDWR's Preliminary Order as a "Self Styled Order" and does not acknowledge that the Preliminary Order was an order issued in a contested case as described under Idaho Code § 67-5240 and IDAPA 37.01.01.152. DL Evans commenced a contested case that resulted in the issuance of the Order when it filed its Petition before IDWR on May 20, 2013. The Preliminary Order was issued in response to the Petition and is an

"Order" under Idaho Code § 67-5201(12) within the definition of a contested case under Idaho Code § 67-5240.

A contested case is defined as "[a] proceeding by an agency ... that may result in the issuance of an order." I.C. § 67–5240. An order is "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." I.C. § 67-5201(12). Although IDWR did not make the determination DL Evans would have liked, it did make a determination that it lacked jurisdiction to adjudicate the property dispute between DL Evans and Ballentyne. Such a decision is necessarily a determination of DL Evans' "legal rights, duties, privileges, immunities or other legal interests." Idaho Code § 67-5201(12). Thus, the proceeding qualified as a contested case that resulted in an order.

DL Evans is incorrect in its assertion that the Preliminary Order is not an appealable document. The agency action taken by IDWR in issuing the Preliminary Order was in conformance with the Idaho Administrative Procedures Act ("IAPA") Idaho Code §§67-5201 to 67-5292. Consistent with Idaho Code §§ 67-5245 and 67-5246, IDWR issued the Preliminary Order with an attachment entitled Explanatory Information to Accompany a Preliminary Order which clearly indicated that the Preliminary Order would become a final order without further action unless a party petitions for reconsideration, files an exception and brief, or requests a hearing. 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). The attachment to the Preliminary Order provided that the final order may be appealed to the district court within 28 days. *Id.* DL Evans opted not to file for reconsideration or request a hearing before the

agency, thereby making the order a final order. Idaho Code § 67-5246. Nor did DL Evans elect to file a petition for judicial review of the final order before the district court.

Instead of filing such an appeal, DL Evans filed a separate lawsuit that initially did not include IDWR. Pursuant to Idaho Code § 67-5273, DL Evans had twenty-eight days to file a petition for judicial review once the Order became final on June 26, 2013. DL Evans amended its complaint and brought up the same issues in this case. The time for filing a petition for judicial review passed by the time DL 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. DL Evans is procedurally barred from pursuing this case against IDWR because of its failure to follow statutorily prescribed methods for relief in Idaho Code § 67-5270 and IDAPA 37.01.01.790. Failure to file a timely petition for judicial review acts as a procedural bar to raising the issue at a later date. *See Erikson v. Idaho Bd. of Registration*, 146 Idaho 852, 203 P.3d 1251 (2009).

DL Evans offers four additional arguments why the Court should ignore the law set out in Idaho Code § 67-5270 and allow DL Evans to sue IDWR in a different law suit on the same issues previously decided. While it may be true DL Evans' Petition only identified IDWR duties under Idaho Code § 42-907, it could have included other legal authority. The relief DL Evans seeks now under Idaho Code §§ 42-1805(9) and 42-1413(2) is the same that was sought under its Petition before IDWR. "D.L. Evans Bank requests a determination by the Department of Idaho Water Resources that the Ballentyne Ditch Company, Ltd, is required to deliver the water appurtenant to the properties transferred to D.L. Evans Bank pursuant to the January 22, 2013, foreclosure." *Petition* at 4.

DL Evans also argues that IDWR maintains ongoing duties to ensure proper water distribution and delivery and should take some type of extraordinary action against Ballentyne at

this time to ensure delivery of its water. While the statutory duty to distribute water remains ongoing, IDWR's duty to distribute water must be in accordance with the final decree and that final decree has not changed. DL Evans makes a third argument that the language in the Preliminary Order suggesting DL Evans seek relief in district court serves as some type of invitation to include IDWR in a lawsuit addressing the underlying contract dispute. DL Evans is correct that the Preliminary order did identify the district court as the appropriate forum to adjudicate the contract dispute, but IDWR did not suggest that it was appropriate or even remotely necessary to include it as a party. Finally, addressing its fourth argument, DL Evans does have other options for relief. It has pending litigation against the other defendants. If DL Evans prevails in its litigation with Defendant Ricks, it will receive its water from defendant Ballentyne and unless the decree is changed IDWR's duties will remain unchanged.

REQUEST FOR ATTORNEY FEES

DL 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. DL 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 DL 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 DL Evans' claims. DL Evans does not own any water rights. IDWR does not

maintain authority to deliver water without a water right. In addition, Dl Evans failed to properly pursue judicial review of IDWR's Order and is procedurally barred from including IDWR in this lawsuit. For these reasons IDWR requests that the Court grant its motion to dismiss.

RESPECTFULLY SUBMITTED this 12th day of February 2015.

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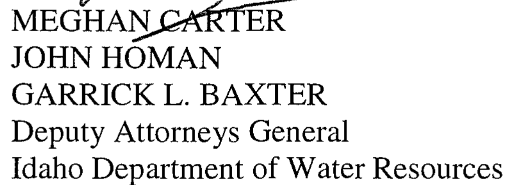

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February 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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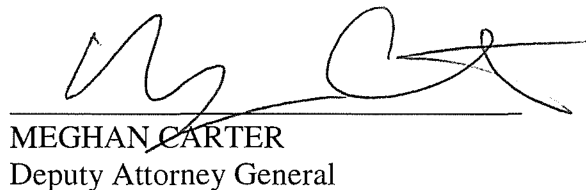

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