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CHRISTOPHER D. RICH, Clerk
By JANINE KOFISEN
DEPUTY

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,

Case No. CV-OC-2013-17406

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 THE BALLENTYNE DITCH
COMPANY; SHAUN BOWMAN,
DIRECTOR OF THE BALLENTYNE
DITCH COMPANY; JOE KIND,
DIRECTOR OF THE BALLENTYNE
DITCH COMPANY; STEVE SNEAD,
DIRECTOR OF THE BALLENTYNE
DITCH COMPANY,

Defendants.

MEMORANDUM DECISION AND ORDER
ON MOTIONS FOR SUMMARY
JUDGMENT

Three motions for summary judgment are before the court for oral argument on February 19, 2015: Thomas M. Ricks' Motion for Summary Judgment was filed Jan. 23, 2015, Defendants' [sic] Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Snead Motion for Summary Judgment was filed Jan. 22, 2015, and Defendants Gary Spackman and Idaho Department of Water Resources Motion to Dismiss was filed Jan. 26, 2015.

Appearances:

Jason Naess for Plaintiff
Chris Bromley for Defendant Thomas Mecham Ricks
S. Bryce Farris for Defendant Ballentyne Ditch Company and its Board
Meghan Carter for Defendants Idaho Department of Water Resources and Gary Spackman

MEMORANDUM DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

FACTS AND PROCEDURAL BACKGROUND

In January, 2008, Defendant Thomas Ricks ("Ricks") executed a promissory note in favor of Plaintiff D.L. Evans Bank ("D.L. Evans"), in the amount of \$1,185,000.00.¹ The debt created by this note was secured by a previously recorded deed of trust.² The deed of trust recorded June 8, 2007 contained the following language:

CONVEYANCE AND GRANT. For valuable consideration, Grantor [Ricks] does hereby irrevocably grant, bargain, sell and convey in trust, with power of sale, to Trustee for the benefit of Lender as Beneficiary [D.L. Evans Bank], all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way and appurtenances; all water rights and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters.³

This language was contained in the original filed deed of trust, and was not altered or amended by the later modifications.⁴ The property subject to the deed of trust is located within the boundaries Ballentyne Ditch Company's ("Ballentyne") service area.⁵

Ballentyne is a non-profit corporation organized under the law of Idaho.⁶ Ballentyne's articles of incorporation were most recently amended in 1960 (with previous amendments in

¹ Amended Complaint, filed July 28, 2014, ¶ 11; Answer of Defendant Thomas M. Ricks to Amended Complaint ("Ricks Answer"), filed Aug. 20, 2014, ¶ 8. See also Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 4.

² Amended Complaint, ¶ 12; Ricks Answer, ¶ 9. See also Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 5.

³ Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 5. The previously recorded deed of trust was modified several times, including in January 2008, related to the execution of the promissory note. Amended Complaint, ¶ 12; Ricks Answer, ¶ 9. See also Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 6 – 8.

⁴ See Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Exs. 6 – 8.

⁵ Defendants' Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Sneed Statement of Facts in Support of Motion for Summary Judgment, filed Jan. 22, 2015, ¶ 8. The Court notes Ballentyne's statement of facts does not cite to a source that establishes this fact. Title Court cannot find any citation by the parties in their briefing establishing that Ricks' property was within the Ballentyne Ditch Company's service area. Such allegation is stated in ¶ 14 of the Amended Complaint but that allegation is denied by all Defendants. See Ricks Answer, ¶ 11; Answer of Defendants' Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Sneed to Amended Complaint and Reinstated Complaint for Interpleader, filed Aug. 22, 2014, ¶ 3; Answer to Complaint, filed Aug. 19, 2014, p. 3. Because no party disputes that the property subject to the deed of trust was inside of the Ballentyne Ditch Company service area, the Court assume this fact to be true for purposes of this summary judgment analysis.

1910, 1929, and 1948), and its bylaws have not been amended since 1947.⁷ The original 1920 articles of incorporation⁸ and 1929 modification of Article VI provided the stock of the corporation was appurtenant to the lands irrigated.⁹ A second amendment of Article VI of the articles of incorporation occurred in 1948. Article VI of the articles of incorporation now reads:

This corporation shall have a total authorized capital stock of \$10,000.00 dividing into one thousand (1,000) shares of the par value of Ten Dollars (\$10.00) per share.¹⁰

The 1947 bylaws contain the following language:

The shares of stock in this Company may be transferred at any time by the owner thereof in person, or by attorney legally constituted or by legal representative, by endorsement on the certificate of stock. But no transfer shall be valid as against the corporation until surrender of the certificate of stock and the entry of such transfer on the books of the corporation; no transfer shall be made while the holder thereof is indebted to the Company, on any account whatever, without the consent of the Board of Directors. No certificate shall be issued until the certificate in lieu of which it is issued shall have been surrendered to the Secretary and cancelled, and the Secretary shall hold the cancelled certificate as a voucher.

Provided, That [sic] upon the adoption of these By-Laws and securing new stock certificates for said company the Secretary is authorized and directed to accept the stock outstanding at the time of the adoption of these By-Laws and issue new stock certificates for the same number of shares as represented by the old stock certificates which are surrendered; and, provided further, that the water represented by the new certificates issued shall not be transferrable from the main ditch or canal of Ballentyne Ditch Company, Limited, without the consent of the Board of Directors or a majority of the stockholders of said Company.¹¹

The Court cannot find that the bylaws contain any directions regarding delivery of water or water rights generally.

⁶ Affidavit of Joe King in Support of Ballentyne Ditch Co. et al's Motion for Summary Judgment, filed Jan. 22, 2015, ¶ 3.

⁷ Id., ¶¶ 3 - 4.

⁸ Id., Ex. A (p. 2).

⁹ Id., Ex. B (pp. 1 - 2).

¹⁰ Id., Ex. C (p. 2). No amendment occurred to this section in 1960. Id., Ex. D.

¹¹ Id., Ex. E (Art. VII).

On December 7, 2007, Ballentyne obtained several decrees through the Snake River Basin Adjudication ("SRBA") to irrigate 741 acres of land within its service area.¹² D.L. Evans never objected to these decrees.¹³

D.L. Evans instituted a non-judicial foreclosure due to Ricks' alleged default.¹⁴ Ricks declared bankruptcy at least twice, one of which is still pending before the United States Bankruptcy Court for the District of Idaho, Case No. 13-00264-TLM.¹⁵ After the property was released from the bankruptcy stay, D.L. Evans obtained title to the property through a trustee's sale and the Trustee's Deed was recorded January 22, 2013 and corrected January 24, 2013.¹⁶ On or before June 7, 2007 Defendant Ricks was issued seventy-one shares in Ballentyne Ditch Company, Limited.¹⁷ The date of the issue is May 21st but the year of the issue is unclear on the certificate or Mr. Ricks' affidavit but it is undisputed that it was before June 7, 2007.¹⁸

Despite D.L. Evans obtaining title to the property in 2013 by Trustee's Deed, Defendant Ricks would not agree to transfer his shares in Ballentyne to D.L. Evans.¹⁹ Because Ricks would not transfer his shares, Ballentyne would not issue new shares to D.L. Evans related to the real property foreclosed upon, nor would Ballentyne deliver water to the property.²⁰

D.L. Evans filed a Complaint on Sep. 25, 2013 against Ballentyne and Ricks. On Jul. 28, 2014, pursuant to leave from the Court, D.L. Evans filed an Amended Complaint against Ricks, Ballentyne and the members of its board,²¹ and the Idaho Department of Water Resources and its

¹² Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, ¶ 6 and Ex. G.

¹³ *Id.*, ¶ 7.

¹⁴ Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, ¶ 12.

¹⁵ Answer of Defendant Thomas M. Ricks to Amended Complaint, filed Aug. 20, 2014, ¶ 14. The bankruptcy stay has been lifted with regard to the claims outlined in this case. See Affidavit of Jason Naess, filed Jul. 17, 2014, Exs. A (p. 16, "The [Bankruptcy] Court concludes the most rational approach is to allow the State Court to adjudicate all aspects of the water right dispute related to both parcels.") and B.

¹⁶ Amended Complaint, filed Jul. 28, 2014, ¶¶ 19 -- 20; Statement of Facts in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, ¶ 9; Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Exs. 9 and 10.

¹⁷ Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, ¶ 15. The certificate has seventy-one in longhand and 71.5 in numerals. Longhand is deemed to govern over numerals in contracts.

¹⁸ *Id.*

¹⁹ Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, ¶ 10.

²⁰ *Id.*, ¶¶ 12 -- 21; Amended Complaint, filed Jul. 28, 2014, ¶¶ 28 -- 29; Answer of Defendants' Ballentyne Ditch Company [et al], filed Aug. 22, 2014, ¶ 9.

²¹ It is unclear from the Amended Complaint whether these individuals are being sued in their directorial capacity or individually.

director, Gary Spackman (collectively "IDWR"). D.L. Evans seeks declaratory relief, and order directing Ballentyne to deliver the water, an injunction and mandamus against IDWR to ensure water is delivered to the foreclosed upon land, and monetary damages against Ricks, Ballentyne and its board.²² All Defendants have answered, and Ballentyne and its board have also sought interpleader to place the shares at issue into the control of the Court until the Court determines whether such shares belong to D.L. Evans or Ricks.²³

All Defendants have filed motions for summary judgment. Ballentyne and its board filed their motion with supporting documentation on Jan. 22, 2015.²⁴ Defendant Ricks filed his motion with supporting documentation on Jan. 23, 2015.²⁵ Defendant IDWR filed a Motion to Dismiss with supporting documentation on Jan. 26, 2015.²⁶ I.R.C.P. 12(b) directs a court, when considering, "matters outside the pleading [which] are presented to and not excluded by the court," to treat a motion to dismiss as a motion for summary judgment. *See also Mast v. Seale*, 106 Idaho 561, 562, 682 P.2d 102, 103 (1984). Even though IDWR calls its motion a "Motion to Dismiss," it sets for the summary judgment standard in its briefing.²⁷ Therefore, the Court will examine IDWR's motion under the summary judgment standard.

Plaintiff filed responsive briefing to Ballentyne's motion for summary judgment on Feb. 5, 2015, Ricks' motion for summary judgment on Feb. 6, 2015, and IDWR's motion for summary judgment on Feb. 10, 2015.²⁸ The Court had previously entered an Order allowing the

²² Amended Complaint, filed Jul. 28, 2014, pp. 11 – 12.

²³ Answer of Defendants' Ballentyne [et al], filed Aug. 22, 2014, pp. 11 – 12.

²⁴ Defendants' Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Sneed Motion for Summary Judgment, filed Jan. 22, 2015; Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015; Defendants' Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Sneed Statement of Facts in Support of Motion for Summary Judgment, filed Jan. 22, 2015; Defendants' Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King, and Steve Sneed Memorandum in Support of Motion for Summary Judgment, filed Jan. 22, 2015.

²⁵ Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015; Statement of Facts in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015; Affidavit of Chris M. Bromley in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015; Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015; Memorandum in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015.

²⁶ Motion to Dismiss, filed Jan. 26, 2015; Affidavit of Carter Frischle, filed Jan. 26, 2015; Affidavit of Elizabeth Anne Cresto, filed Jan. 26, 2015; Affidavit of Rex R. Barrie, filed Jan. 26, 2015; Affidavit of Meghan Carter in Support of Motion to Dismiss, filed Jan. 26, 2015; Statement of Facts in Support of Motion to Dismiss, filed Jan. 26, 2015; Memorandum in Support of Motion to Dismiss, filed Jan. 26, 2015.

²⁷ Memorandum in Support of Motion to Dismiss, filed Jan. 26, 2015, pp. 3 – 4.

²⁸ Response Brief to Ballentyne Ditch Company's Motion for Summary Judgment, filed Feb. 5, 2015; Affidavit of Robert Squire in Support of D.L. Evans' Response Brief to Motions for Summary Judgment, filed Feb. 5, 2015; Response Brief to Thomas M. Ricks' Motion for Summary Judgment, filed Feb. 6, 2015; Statement of

untimely response briefs against Ricks and IDWR.²⁹ Therefore, the Court does not consider the Feb. 6 and Feb. 10 filings untimely.

Reply briefs were filed Feb. 12, 2015.³⁰ Defendant Ricks' reply briefing was accompanied by an affidavit of Chris M. Bromley. This affidavit is untimely under I.R.C.P. 56(c), and there was no provision in the Court's Order shortening time to file untimely affidavits. The Court has discretion to disregard untimely filings. *See Cumis Ins. Soc'y, Inc. v. Massey*, 155 Idaho 942, 946, 318 P.3d 932, 936 (2014); *Arregui v. Gallegos-Main*, 153 Idaho 801, 805, 291 P.3d 1000, 1004 (2012), reh'g denied (June 7, 2012). The purpose of the timing rules related to motion practice is to allow parties adequate time to respond and support their cases. *See Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 5, 981 P.2d 236, 240 (1999); *Matter of Estate of Keeven*, 126 Idaho 290, 296, 882 P.2d 457, 463 (Ct. App. 1994). Because this affidavit is untimely, and does not allow Plaintiff D.L. Evans an adequate opportunity to respond, the Court, in its discretion, will not consider the Feb. 12, 2015 affidavit of Chris Bromley.

Except as stated above, the Court has considered the motions, along with supporting and opposing documentation.

LEGAL STANDARD

Summary judgment is an appropriate remedy if the nonmoving party's "pleadings, affidavits, and discovery documents . . . read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002) (quoting I.R.C.P. 56(c)). The court must construe the evidence liberally and draw all reasonable inferences in favor of the nonmoving party. *Hei v. Holzer*, 139 Idaho 81, 84-85, 73 P.3d 94, 97-

Facts in Support of D.L. Evans' Response Brief to Thomas M. Ricks' Motion for Summary Judgment, filed Feb. 6, 2015; Response Brief to the Idaho Department of Water Resources' Motion for Summary Judgment, filed Feb. 10, 2015; Statement of Facts in Support of D.L. Evans Response Brief to IDWR's Motion for Summary Judgment, filed Feb. 10, 2015.

²⁹ Order Granting Joint Motion to Shorten Time Pursuant to I.R.C.P. 56(c), filed Jan. 28, 2015.

³⁰ Thomas M. Ricks' Reply Brief to D.L. Evans' Response, filed Feb. 12, 2015; Affidavit of Chris M. Bromley in Support of Thomas M. Ricks' Reply Brief to D.L. Evans' Response, filed Feb. 12, 2015; IDWR's Reply to D.L. Evans Bank's Response to IDWR's Motion to Dismiss, filed Feb. 12, 2015; Defendants' Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Sneed Reply Memorandum in Support of Motion for Summary Judgment, filed Feb. 12, 2015. Ballentyne's reply brief was over the page limit allowed by Idaho Fourth Jud. Dist. Loc. R. 8.1.1b. So, the Court therefore did not consider any argument made beyond the 15th page.

MEMORANDUM DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

98 (2003). If the facts, with inferences favorable to the nonmoving party, are such that reasonable persons could reach differing conclusions, summary judgment is not available. *Hayward v. Jack's Pharmacy Inc.*, 141 Idaho 622, 625, 115 P.3d 713, 716 (2005).

The moving party bears the initial burden of proving the absence of a genuine issue of material fact, and then the burden shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of material fact. See *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (1994). When the nonmoving party bears the burden of proving an element at trial, the moving party may establish a lack of genuine issue of material fact by establishing the lack of evidence supporting the element. *Id.* (concluding moving party's burden "may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial"). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Id.* at fn. 2. A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response ... must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. §6(e). Such evidence may consist of affidavits or depositions, but "the Court will consider only that material ... which is based upon personal knowledge and which would be admissible at trial." *Harris v. State Dep't of Health & Welfare*, 123 Idaho 295, 297-98, 847 P.2d 1156, 1158-59 (1992). If the evidence reveals no disputed issues of material fact, then only a question of law remains on which the court may then enter summary judgment as a matter of law. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 445, 65 P.3d 184, 186 (2003).

ANALYSIS

The parties disagree as to the nature of this case. Defendants strenuously argue it is not a water rights case.³¹ Plaintiff D.L. Evans contends this is very much a water rights case.³² The most basic issue in this case involves whether D.L. Evans gets the amount of water that Ricks used to irrigate his land when Ricks owned the property. Because Plaintiff D.L. Evans does not

³¹ Defendants' Ballentyne [et al] Memorandum in Support of Motion for Summary Judgment, filed Jan. 22, 2015, p. 2; Memorandum in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, p. 4.

³² Response Brief to Ballentyne Ditch Company's Motion for Summary Judgment, filed Feb. 5, 2015, p. 4; Response Brief to Thomas M. Ricks' Motion for Summary Judgment, filed Feb. 6, 2015, pp. 3 – 11; Response Brief to the Idaho Department of Water Resources' Motion for Summary Judgment, filed Feb. 10, 2015 (generally).

specifically title the "Counts" in its Amended Complaint, the Court will address issues relevant to the summary judgment motions, instead of specific causes of action. Whatever this case may be, the Court will strive to avoid declaring water rights because there is no purpose served in altering the water rights previously decreed by the SRBA since Ballentyne has not been dissolved as a corporation.

A. Are the Water Rights and/or Stock in Ballentyne Ditch Company, Ltd., Subject to the Deeds of Trust Foreclosed Upon by D.L. Evans Bank?

The Court first addresses whether the water, water rights, and/or stock in Ballentyne Ditch Company, Ltd., is/are appurtenant to the land subject to the D.L. Evans deeds of trust. Such issues are relevant to whether Ricks and/or Ballentyne can obtain summary judgment. Something is "appurtenant" if it is, "Annexed to a more important thing." APPURTENANT, Black's Law Dictionary (10th ed. 2014). Idaho statutes indicate that real property consists of:

1. Lands, possessory rights to land, *ditch and water rights*, and mining claims, both lode and placer.
2. That which is affixed to land.
3. *That which is appurtenant to land.*

Idaho Code § 55-101 (emphasis added). Further, Idaho case law indicates that water rights can be appurtenant to the land to which they are beneficially applied, and also that water rights can be severed from the land. For example, the Supreme Court has stated, "Appellants' decreed water right constitutes real property; such right is appurtenant to appellants' lands to which the water represented thereby has been beneficially applied." *Anderson v. Cummings*, 81 Idaho 327, 335, 340 P.2d 1111, 1115 (1959).³³ The Supreme Court has also stated,

When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor. *One who has acquired a legal water right can only be deprived of it by his voluntary act in conveying it to another, by abandonment, forfeiture under some statute, or by operation of law.* A water right is an independent right and is not a servitude upon some other thing, and is an incorporeal hereditament, being neither tangible nor visible.

³³ See also *Paddock v. Clark*, 22 Idaho 498, 126 P. 1053, 1054 (1913) ("Under the Constitution and statutes, this court has universally held that a water right is real property, and that it is an appurtenance to the land irrigated by the use of such water."); *Koon v. Empey*, 40 Idaho 6, 231 P. 1097, 1098 (1924) ("[T]here can be no question that a water right becomes appurtenant to the land to which it has been applied and upon which the water has been used for irrigation.").

Bennett v. Twin Falls N. Side Land & Water Co., 27 Idaho 643, 150 P. 336, 339 (1915) (emphasis added). There is no question but that a water right can be specifically reserved from a transfer of title to property. For example, in *Paddock v. Clark*, the Idaho Supreme Court stated, regarding one deed,

This language, to our minds, clearly indicates that the water intended to be conveyed is the specific water described in the deed and used in connection with said land, and that in placing said language in the deed the intention of the parties was to limit the water rights conveyed to the specific descriptions given, and that all other and different water rights were excluded from such conveyance. . .

Paddock v. Clark, 22 Idaho 498, 126 P. 1053, 1055 (1912). Similarly, in *Koon v. Empey*, the Supreme Court stated,

Where there is a sale of a certain tract of land by a valid deed and in which, after describing the land, there is the expression, "together with all and singular the appurtenances thereunto belonging and appertaining," or one of similar purport, using the word "appurtenances," unless there is a specific reservation of the water right, which is in fact an appurtenance to the land, the water right will pass with the transfer of the land the same as though it has been specifically mentioned in the deed.

Koon v. Empey, 40 Idaho 6, 231 P. 1097, 1099 (1924).

However, this case is not a simple case where the owner of the water right also owns the property to which the water right was applied. In this case, partial water rights were decreed to Ballentyne in December 2007. At least seven months prior to those decrees, Ricks owned property to which part of the water from these water rights was applied. It is unclear whether Ricks owned the property prior to June 7, 2007 but the first Deed of Trust in his affidavit was executed seven months *before* Ballentyne was decreed partial water rights. All parties agree that Ricks somehow has an interest in the water right decreed to Ballentyne. The difficulty the Court faces is that no party explains how this interest works.

First, the Court faces the issue regarding the deed of trust executed by Ricks. This document specifically indicates, "Grantor [Ricks] does hereby irrevocably grant, bargain, sell and convey in trust, with power of sale, to Trustee for the benefit of Lender as Beneficiary [D.L. Evans Bank], all of Grantor's right, title, and interest in and to . . . all water rights and ditch rights

(including stock in utilities with ditch or irrigation rights)...³⁴ Therefore, all water rights and ditch rights including any stock in utilities with ditch or irrigation rights are subject to the deed of trust. Based on this contractual statement, this language clearly indicates an intent by Ricks and D.L. Evans in June of 2007 that the water rights or any ditch utility rights are tied to the land, and are therefore appurtenant to the land. While Ricks and D.L. Evans modified the deed of trust in January 2008, this portion of the Deed of Trust was never modified.³⁵ The language of the Deed of Trust was unambiguous in June of 2007 and the court must determine the parties' intent at the time of its execution. It means, "Grantor [Ricks] does hereby irrevocably grant, bargain, sell and convey in trust, with power of sale, to Trustee for the benefit of Lender as Beneficiary [D.L. Evans Bank], all of Grantor's right, title, and interest in and to ... all water rights and ditch rights (including stock in utilities with ditch or irrigation rights)...³⁶ Ricks admits that Ballentyne is a "ditch company."³⁷

Ricks attempts to avoid the conclusion that the water is appurtenant by arguing the water rights he enjoys are instead shares in Ballentyne, and therefore are personal property not subject to the deed of trust. The Court agrees that as a general rule, shares in any type of corporation are personal property.³⁸ However, as discussed above, water rights are real property pursuant to Idaho Code § 55-101. Ricks has cited *Wells v. Price*, 6 Idaho 490, 56 P. 266 (1899) and *Watson v. Molden*, 10 Idaho 570, 79 P. 503 (1905), for the proposition that stock in a ditch company is separate personal property. However, the facts in this case differ from the facts in both of those cases. Mr. Ricks made a specific reference of "including stock in utilities with ditch or irrigation rights" in the Deed of Trust. In *Wells*, the Supreme Court specifically noted that the writ of attachment "did not attach the shares of stock held in said corporation..."³⁹ In *Watson*, after discussing whether water rights and water stock were real or personal property, the Supreme Court went on to say, "Upon any theory the defendant has not kept the agreement which he

³⁴ Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 5.

³⁵ Amended Complaint, ¶ 12; Ricks Answer, ¶ 9. See also Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 6—8.

³⁶ Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 5.

³⁷ Ricks Answer, ¶ 38.

³⁸ "Shares of corporate stock are regarded as personal property in the nature of choses in action." 63C Am. Jur. 2d Property § 23.

³⁹ *Wells v. Price*, 6 Idaho at 493-4.

condeded in both by his answer and testimony....⁴⁰ and goes on to discuss fraud upon the "stranger in Idaho, having recently come from Iowa...."⁴¹ Twenty years later, as stated by the Supreme Court in *Koon v. Empey*, "unless there is a specific reservation of the water right, which is in fact an appurtenance to the land, the water right will pass with the transfer of the land the same as though it has been specifically mentioned in the deed." *Koon v. Empey*, 40 Idaho 6, 231 P. 1097, 1099 (1924). There was no specific reservation of the water rights, ditch rights, or the stock in a utility with ditch or irrigation rights in the Deed of Trust in this case. In fact, the language of the Deed of Trust is clear and unambiguous that these rights and stock in any irrigation or ditch utility are transferred by the Deed of Trust. *Spencer v. Jameson*, 147 Idaho 497, 211 P.3d 106 (2009), discusses how an item that once was personal property can be affixed to the land to become real property. As a question of law Ricks does not convince the Court the water rights or ditch rights allegedly represented by those shares constituted personal property that was reserved given the express language of the Deed of Trust and considering the language of Idaho Code § 53-101. *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65, 67 (1933), also agrees that whether it is transferred "depends upon the intention of the grantor, to be gathered from the express terms of the conveyance, or, when the conveyance is silent, from the circumstances."⁴² The express terms of the Deed of Trust were not silent as to water rights or water stock. Therefore, the court must look at the intention of the grantor in the express terms of the Deed of Trust.

Ricks tries to create an ambiguity in the Deed of Trust by reference to the articles of incorporation and bylaws of Ballentyne. Ricks contends the shares on the Ballentyne stock certificate, "authorize the use of water from Ballentyne's system of canals, laterals, and ditches. Only shareholders can use water from Ballentyne's canals, laterals, and ditches."⁴³ However, this allegation is unsupported and conclusory. The most recent version—the 1948 version of Article VI of the articles of incorporation—does not support that reading. The 1948 version of Article VI states only, "This corporation shall have a total authorized capital stock of \$10,000.00

⁴⁰ *Watson v. Molden*, 10 Idaho 573.

⁴¹ *Id.*

⁴² In *Bothwell*, the deed and the writ of attachment were silent as to water or ditch rights.

⁴³ Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, ¶ 4.

dividing into one thousand (1,000) shares of the par value of Ten Dollars (\$10.00) per share.”⁴⁴ These are shares of stock are in Ballentyne Ditch Company whose stated purpose in its articles of incorporation is to “take over, own, hold, conduct and manage that certain irrigating ditch, commonly known as the Ballentyne Ditch...and to hold and own the same, together with all its easements, franchises, rights and appurtenances, subject only to the conditions and restrictions herein set forth.”⁴⁵ The plain language of these documents are unambiguous that the stock certificate is for stock in an irrigation and/or ditch company.

But it is not the plain language of Ballentyne’s documents that govern the dispute between Rickis and D.L. Evans Bank. The document and language at issue that controls their dispute is the Deed of Trust.⁴⁶ The deed in *Koon v. Empey* did not expressly reserve or convey water rights except by use of a general appurtenance clause. The court then looked to the intent of the parties to determine whether water rights were conveyed in the land deed because of the presence of an appurtenance clause. Specifically, the court in *Empey* held it was error for a district court to consider extrinsic evidence to determine the intent of the parties when a deed with an appurtenance clause conveys appurtenant water rights because the appurtenant clause was plain and unambiguous as a matter of law. In *Empey*, the court held:

It is an elementary rule for the construction of deeds, the language of which is plain and unambiguous, that, in the absence of fraud or mistake, the intention of the parties must be ascertained from the instrument itself. Parol evidence is not admissible for such purpose. It is where the language of a deed is ambiguous that the intent of the parties may be ascertained from the surrounding circumstances.

⁴⁴ Affidavit of Joe King in Support of Ballentyne Ditch Co. et al’s Motion for Summary Judgment, filed Jan. 22, 2015, Ex. C (p. 2). While the 1910 and 1929 versions of Article VI of the articles of incorporation directly tied the shares to water and land, those versions are not the articles of incorporation that govern this dispute. Since the language of the 1948 version is not ambiguous, the court does not look at any other document to define its terms.

⁴⁵ Affidavit of Joe King in Support of Ballentyne Ditch Co. et al’s Motion for Summary Judgment, filed Jan. 22, 2015, Ex. A, Art. II. Article II stating the purpose was never amended.

⁴⁶ *Bothwell v. Kaefer*, 53 Idaho 658, 27 P.2d 65, 67 (1933), holding water rights “pass with the land though not mentioned as such or as appurtenances[.] . . . unless it affirmatively appears to the contrary, directly or by implication.” *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007), holding “[u]nless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention ‘appurtenances.’” *Bayley v. Thomason*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007), holding “[u]nless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention ‘appurtenances.’”

[I]n the absence of any reservation to the contrary, a deed to land effects a transfer of such water and water rights as are appurtenant to the land when the conveyance is made, where the deed contains the usual "appurtenance" clause.

Id. at 1090-1099 (citations omitted)(emphasis added).

Fraud or mistake in the deed has not been pled in this case by Ricks as an affirmative defense, cross claim, or counterclaim.⁴⁷ Since the language of the deed is plain and unambiguous, the Court cannot further consider extrinsic evidence as to what was meant by Ricks when he conveyed his water rights and his water stock to the Trustee in June of 2007.

Whether a contract is ambiguous is a question of law. *Cool v. Mountainview Landowners Coop. Ass'n*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2004); *Clark v. St. Paul Property & Liability Ins. Cos.*, 102 Idaho 756, 757, 639 P.2d 454, 455 (1981). Where a document is ambiguous, then evidence as to the meaning of the instrument may be submitted to the finder of fact. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). A contract term is ambiguous when there are two different, reasonable interpretations of the language. *Swanson v. Beco Constr. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). In the absence of ambiguity, a document must be construed by 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).

Reviewing the Deed of Trust:

CONVEYANCE AND GRANT. For valuable consideration, Grantor [Ricks] does hereby irrevocably grant, bargain, sell and convey in trust, with power of sale, to Trustee for the benefit of Lender as Beneficiary [D.L. Evans Bank], all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way and appurtenances; all water rights and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters.⁴⁸

⁴⁷ See generally, Ricks Answer.

⁴⁸ Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 3. The previously recorded deed of trust was modified several times, including in January 2008, related to the execution of the promissory note. Amended Complaint, ¶ 12; Ricks Answer, ¶ 9. See also Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 6 -- 8.

This court finds the language is not ambiguous and its meaning is derived from the plain wording of the deed. Mr. Ricks irrevocably conveyed to the Trustee all right, title and interest in and to all water rights and ditch rights, including stock in utilities with ditch or irrigation rights. This phrase is not ambiguous because there are not two different, reasonable interpretations of the language. While Mr. Ricks wants the court to consider extrinsic evidence to interpret what "rights" and "stock" means, since the deed itself is not ambiguous, the court cannot look to extrinsic evidence to determine the intent of the parties when they entered into the Deed of Trust.

There is no ambiguity in what Mr. Ricks conveyed to the trustee. He conveyed, "all water rights and ditch rights (including stock in utilities with ditch or irrigation rights)." The same rights and stock were conveyed to D.L. Evans Bank with the Trustee's Deed in 2013. Therefore, Mr. Ricks conveyed "all water rights and ditch rights (including stock in utilities with ditch or irrigation rights)" owned by Thomas Ricks to the Trustee on June 7, 2007, when the Deed of Trust was executed. No material issue of fact was proven by Ricks that any of the seventy-one shares in Ballentyne Ditch Company, Limited, was not stock in a utility with ditch or irrigation rights subject to the language of the Deed of Trust or that any portion of that was reserved in the Deed of Trust. Ricks admitted Ballentyne is a ditch company. Ricks unambiguously transferred whatever rights were represented by the seventy-one shares in Ballentyne Ditch Company, Limited, to the Trustee in the Deed of Trust in June 2007. The same was then transferred to D. L. Evans Bank in 2013. While the SRBA decreed water rights to Ballentynes Ditch in the interim, the deed is clear and unambiguous that whatever rights Ricks had in June 2007 were intended to be conveyed. There being no material issue of fact, summary judgment is GRANTED to D.L. Evans Bank on the issue of ownership of seventy-one shares in Ballentyne Ditch Company, Ltd., evidenced in the stock certificate.⁴⁹

⁴⁹ The Court notes D.L. Evans did not move for summary judgment. However, "The district court may grant summary judgment to a non-moving party even if the party has not filed its own motion with the court." *Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 793, 215 P.3d 505, 513 (2009). This does not violate the rules of sua sponte ruling against a party because, "A motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving party runs the risk that the court will find against it, as in this case." *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001). Further, because the issue determined by the Court is the one raised by the parties, there was no need to give, "adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered." *Mason v. Tucker & Associates*, 125 Idaho 429, 432, 871 P.2d 846, 849 (Cl. App. 1994)

B. Are Ballentyne Ditch Company's Water Rights Appurtenant to the Real Property or Subject to the Stock Certificate and Did Ricks Retain Any Separate Water Rights?

While the dispute between Thomas Ricks and D.L. Evans Banks is governed by the language of the Deed of Trust, Ballentyne Ditch Company was not a party to the Deed of Trust. The next question is whether a material issue of fact remains as to the meaning of the stock certificate. The certificate evidences "Seventy One (71.5) shares of the capital stock of Ballentyne Ditch Company, Limited." What did the Trustee convey to D.L. Evans Bank in 2013? Is it just stock or is it part of the water rights owned by Ballentyne Ditch Company, Limited?

The clear language of the 1948 amendment of Article IV effectively disconnected the shares in Ballentyne to actual water rights or to land. The shares themselves do not indicate a connection to water rights, usage, or land.⁵⁰ The bylaws related to Transfers of Stock require the endorsement of the stock certificate to a new owner and that to be recorded on the corporate books. The section of the bylaws related to transfer states "... that the water represented by the new certificates issued shall not be transferrable from the main ditch or canal of Ballentyne Ditch Company, Limited, without the consent of the Board of Directors or a majority of the stockholders of said Company."⁵¹ Ballentyne is entirely correct to follow its bylaws and not issue new certificates to D.L. Evans until Ricks surrenders his certificate and Ballentyne verifies nothing remains owing on Mr. Ricks' account or the Board waives any amount due.⁵² However, such issuance of new stock certificate has no bearing on whether Ballentyne is required to deliver water to the property at issue. Ricks has a stock certificate but he has no stock in the company because it was transferred by the unambiguous language of the Deed of Trust. Ballentyne has the water, but no land to apply it to obtain beneficial use. D.L. Evans has the land and ownership of the stock, but no water. Currently, water is not being beneficially applied to land regardless of ownership of shares of stock or ownership of water rights.

⁵⁰ See Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, Ex. F; Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, Ex. 3.

⁵¹ Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, Ex. E (Art. VII).

⁵² See Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, Ex. E (Art. VII). Mr. Ricks' affidavit states he paid the account balance until 2013. It is now 2015 and there is no information before the court whether there is an amount due.

Here, no party has explained how the water rights work so that the court can make any determination as a matter of law. Absent a connection of corporate shares to water rights, a jury could find that Ballentyne acted injuriously to D.L. Evans by simply allowing the water previously beneficially applied to Ricks' land to pass unused down the stream just because a formality of the bylaws requiring corporate accounting had not been completed.

Because neither the current articles of incorporation or bylaws explain how shares of the corporation and the water rights relate, the Court concludes there is an ambiguity on this issue. The Supreme Court has stated,

Because corporate documents are equivalent to contracts among the members of the association, the normal rules governing the interpretation of contracts apply. The objective in interpreting contracts is to ascertain and give effect to the intent of the parties. The intent of the parties should, if possible, be ascertained from the language of the documents. The determination of a contract's meaning and legal effect is a question of law when the contract is clear and unambiguous.

Twin Lakes Vill. Prop. Ass'n, Inc. v. Crowley, 124 Idaho 132, 135, 857 P.2d 611, 614 (1993). "Whether a contract is ambiguous is a question of law." *Swanson v. Beca Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). "If a contract is found ambiguous, its interpretation is a question of fact." *Bakkar v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005). In this case, the Ballentyne articles of incorporation and bylaws do not clearly indicate how shares are tied to water or how that was effected by the partial water rights decreed in 2007 well after the last amendments to the articles of incorporation or bylaws. The current articles only indicate the shares are tied to par value of \$10.00 and say nothing about water rights. The current bylaws imply that newly issued certificates are in some way tied to water. Mr. Ricks' conclusory allegation that, "only shareholders can use water from Ballentyne's canals, lateral, and ditches," provides no authority for this conclusion other than his declaration.⁵³ While there seems to be an implied agreement among all the parties regarding the relationship between the shares and the water rights, the Court cannot grant summary judgment based on conclusory statements or implied facts. See *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 786, 839 P.2d 1192, 1200 (1992). Ballentyne has not met its burden to show they are entitled to summary judgment as a matter of law because there remains an issue of fact of what D.L. Evans

⁵³ Affidavit of Thomas M. Ricks in Support of Thomas M. Ricks' Motion for Summary Judgment, filed Jan. 23, 2015, ¶ 4.

owns by owning the seventy-one shares of stock. See I.R.C.P. 56(c); *Sanders v. Kima Joint Sch. Dist.*, 125 Idaho 872, 873-74, 876 P.2d 154, 155-56 (Ct. App, 1994). Summary judgment is DENIED regarding whether D.L. Evans Bank's ownership of the stock means D.L. Evans Bank has any ownership interest in Ballentyne Ditch Company's decreed water rights or whether Ballentyne Ditch must deliver water to D.L. Evans Bank.

C. Is Ballentyne's Board Entitled to Summary Judgment?

The Amended Complaint alleges Ballentyne's board acted outside its power, and breached a duty of care by refusing to deliver water to the real property at issue in this case.⁵⁴ D.L. Evans seeks to hold the board members personally liable for the damages caused by failure to deliver the water.⁵⁵ The board contends they are entitled to summary judgment because D.L. Evans has not sufficiently shown the corporate veil can be pierced, and because they are entitled to immunity under Idaho Code § 6-1605.⁵⁶

With regard to the corporate veil arguments,

Piercing the corporate veil is the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts. The theory allows the fact finder to disregard the corporate form, thereby making individuals liable for corporate debts or making corporate assets reachable to satisfy obligations of the individual.

VFP VC v. Dakota Co., 141 Idaho 326, 335, 109 P.3d 714, 723 (2005) (*abrogated on other grounds by Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 329 P.3d 368 (2014)) (citations and quotation marks omitted). The test to determine whether to pierce the corporate veil has been stated as follows:

To warrant casting aside the legal fiction of distinct corporate existence . . . it must also be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person had ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice.

Minich v. Gem State Developers, Inc., 99 Idaho 911, 917, 591 P.2d 1078, 1084 (1979). The question of whether to pierce the corporate veil is an equitable one, and therefore to be made by

⁵⁴ Amended Complaint, filed Jul. 28, 2014, ¶¶ 40 – 44.

⁵⁵ *Id.*

⁵⁶ Defendants' Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Sneed Memorandum in Support of Motion for Summary Judgment, filed Jan. 22, 2015, pp. 9 – 17.

the Court. “[T]he trial court is responsible for determining factual issues that exist with respect to this equitable remedy and for fashioning the equitable remedy.” *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 591, 329 P.3d 368, 373 (2014).

The Court does not view D.L. Evans’ claims as seeking to pierce the corporate veil. Instead, the Court views the claims as attempting to hold the board members directly liable for their own actions, in the manner of a negligence or breach of fiduciary claim.⁵⁷ D.L. Evans responds that the decision to withhold water was not in good faith, subjecting the board to personal liability under Idaho Code § 30-3-80.⁵⁸ This argument is not a factual basis for determining “that the individuality of such corporation and such person has ceased.” Idaho Code § 30-3-80 is a statutory version of the business judgment rule.⁵⁹ Because D.L. Evans fails to provide any evidence of a unity of ownership, the Court finds piercing of the corporate veil is an inappropriate as a form of equitable relief in this case.

However, director liability is different, and not affected by a determination of whether veil piercing applies. Directors are subject to other claims, including various breaches of duties. Thus, the Court will go on to discuss immunity.

With regard to immunity, Idaho Code § 6-1605 states:

In any nonprofit corporation or organization or charitable trust as defined in section 6-1601(6), Idaho Code, officers, directors, and volunteers who serve the nonprofit corporation or organization without compensation and trustees of the charitable trust who serve without compensation shall be personally immune from civil liability arising out of their conduct as an officer, director, trustee or volunteer, if such conduct is within the course and scope of the duties and functions of the individual officer, director, trustee or volunteer and at the direction of the corporation or organization or charitable trust.

Idaho Code § 6-1605(1). Because Bullentyne is non-profit and the directors serve without pay, this section applies to the Bullentyne board.⁶⁰ There are exceptions to this immunity, including for willful and wanton conduct, intentional breach of a fiduciary duty, or for acts or omissions

⁵⁷ However, even if there was a veil piercing request contained within the Complaint, the board has met its burden to show there are no facts which support the conclusion the veil should be pierced.

⁵⁸ Response Brief to Bullentyne Ditch Company’s Motion for Summary Judgment, filed Feb. 5, 2015, pp. 13–15.

⁵⁹ Idaho Code § 30-1-831 contains similar language to § 30-3-80, in that it is a statutory version of the business judgment rule. However, the Court cannot find that either of these sections is intended to actually replace the judicially-created business judgment rule, or supplant the duties owed by a fiduciary. *See Jordan v. Hunter*, 124 Idaho 899, 905, 865 P.2d 990, 996 (Cl. App. 1993) (16, 3).

⁶⁰ Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, ¶¶ 2–3.

not in good faith. Idaho Code § 6-1605(1)(a), (c), and (d). D.L. Evans contends the decision to withhold water was not made in good faith because the decision was made by e-mail votes and later ratification instead of being made by voice vote at a board meeting.⁶¹ The Court agrees that the board's method of determining not to provide water to D.L. Evans through e-mails and later ratifications⁶² is not compliant with Ballentyne's bylaws. The bylaws require, "all questions shall be decided by a majority vote of the directors present, given orally."⁶³ Still, although the procedure was improper, the Court does not find a procedural failing as dispositive that the act was not in good faith.⁶⁴ D.L. Evans' also argues that the decision to withhold water was in part based upon Ricks' threat of suing Ballentyne if they delivered water or issued shares to D.L. Evans.⁶⁵ D.L. Evans argues this created a conflict of interest because Ricks was a board member at the time the comments were made. However, the evidence before the court upon these motions is that D.L. Evans' request for water came through a third party. There is no evidence before the court of any discussion by Ricks or any other board member that the refusal to deliver water was for any improper purpose which would raise the inference of conflict of interest.⁶⁶ Therefore, D.L. Evans has not established any evidence for purposes of summary judgment that the decision was not in good faith.

Next, while D.L. Evans does not specifically address the intentional breach of a duty exception when discussing Idaho Code § 6-1605, D.L. Evans discusses it in the context of a negligence/breach of duty claim.⁶⁷ "In an action for breach of fiduciary duty, the plaintiff bears the burden of proving, first, that the defendant owed him a fiduciary duty, and second, that the latter breached this duty." *Jordan v. Hunter*, 124 Idaho 899, 904, 865 P.2d 990, 995 (Cl. App. 1993). The Supreme Court has summarized this duty:

Corporate directors, as fiduciaries, are bound to exercise the utmost good faith in

⁶¹ Response Brief to Ballentyne Ditch Company's Motion for Summary Judgment, filed Feb. 5, 2015, pp. 15 – 16. There is no allegation of willful or wanton conduct.

⁶² Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, ¶¶ 15 – 18.

⁶³ *Id.*, Ex. E (Art. VIII, § 8).

⁶⁴ The Court also does not accept that following improper procedure took the board outside of the course and scope of their duties, as the decision they were making was directly related to their duties as board members.

⁶⁵ See Response Brief to Ballentyne Ditch Company's Motion for Summary Judgment, filed Feb. 5, 2015, pp. 15 – 16; Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, ¶¶ 10 – 11 and 15.

⁶⁶ Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, ¶¶ 12 – 19 and Ex. L – P.

⁶⁷ See Response Brief to Ballentyne Ditch Company's Motion for Summary Judgment, filed Feb. 5, 2015, pp. 16 – 17.

managing the corporation. More specifically, that the directors of a closely held corporation owe a fiduciary duty to the minority shareholders is well recognized. A corporate officer must not take a business opportunity “which the corporation is financially able to undertake, is, from its nature, in the line of the corporation’s business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation. If an officer personally claims an opportunity belonging to the corporation, the corporation may acquire all of the profits derived from the transaction by the officer.

Jenkins v. Jenkins, 138 Idaho 424, 428, 64 P.3d 953, 957 (2003) (citations and quotation marks omitted, emphasis added). *See also McCann v. McCann*, 152 Idaho 809, 815, 275 P.3d 824, 830 (2012); *Mannos v. Moss*, 143 Idaho 927, 933, 155 P.3d 1166, 1172 (2007). “Officers are agents of the corporation, and, as such, are subject to the usual principles of agency law, including the fiduciary duties of agents. As an agent, an officer owes his principal, the corporation, the fiduciary duties of good faith and fair dealing.” *Jordan*, 124 Idaho at 904-05, 865 P.2d at 995-96.

These rules indicate the duty is owed only to shareholders, other directors, and the corporation itself. It is undisputed that until this court’s ruling earlier in this document, that Ricks’ shares in Ballentyne had not been transferred to D.L. Evans. Therefore, arguably, no duty was owed to Ballentyne. There is evidence from Ballentyne that, “In June 2013, Ballentyne Ditch Company, issued to D.L. Evans a stock certificate representing water rights appurtenant to four and a half acres of land in Ballentyne’s boundaries.”⁶⁸ D.L. Evans obtained those shares in Ballentyne on June 19, 2013 through a separate foreclosure not related to this case.⁶⁹ But the evidence before this court at summary judgment is that the board’s decision not to deliver water to D.L. Evans was issued two months prior—in April 2013.⁷⁰ Whatever duty was owed by the board⁷¹ to its shareholders was not owed to D.L. Evans until June 2013. Therefore, D.L. Evans has not shown that the board breached any duty to D.L. Evans by refusing to deliver water in April 2013, but there is a question of fact as to breach of those duties beginning in June, 2013. Consequently, there remains a material question of fact as to whether the board is immune under

⁶⁸ Affidavit of Robert Squire in Support of D.L. Evans’ Response Brief to Motions for Summary Judgment, filed Feb. 5, 2015, ¶ 3.

⁶⁹ *Id.*, Ex. A.

⁷⁰ Affidavit of Joe King in Support of Motion for Summary Judgment, filed Jan. 22, 2015, ¶¶ 12 – 18 and Exs. L – S.

⁷¹ *See* Idaho Code § 30-3-84.

Idaho Code § 6-1605.⁷² Therefore, the Court cannot determine, as a matter of law, the board is immune or that no duties were breached.⁷³ Because the Court cannot find that immunity applies as a matter of law or that the breach of duty claims fail, the Court DENIES dismissal of the members of the board from this suit.

D. Claims under Idaho Code § 42-912

D.L. Evans mentions Idaho Code § 42-912 in its Amended Complaint.⁷⁴ It is not clear this section applies to this case. The statute says

Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water *under a sale or rental thereof*, shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof; provided, that no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied with the laws in regard to the appropriation of the public waters of this state.

Idaho Code § 42-912 (emphasis added). There is no evidence that Ballentyne sells or rents water through its canals, or that the water previously applied to the property at issues was sold or rented. This law has remained essentially unchanged since it was enacted in 1899. It is clearly designed to protect those who sell/rent water, and those who receive water through sale or rental. Cases discussing the statute indicate that it applies where a person or corporation builds a canal for investment purposes, as opposed to a mutual benefit situation like a non-profit ditch company. “It protects parties who are willing to invest large sums of money in an enterprise that brings slow returns, but very beneficial and really indispensable to the community thus supplied

⁷² To the extent there is a negligence claim alleged in the Amended Complaint, the elements of breach of a fiduciary duty and negligence overlap sufficiently that any question of fact on the breach of a fiduciary duty claim would also preclude summary judgment on a negligence claim.

⁷³ Insofar as D.L. Evans contends the board’s decision not to deliver water was ultra vires, D.L. Evans provides no authority that an ultra vires action subjects the board to personal liability. Idaho Code § 30-3-26 suggests that if there is an ultra vires act, the act may only be challenged against the corporation. Neither of the cases cited by D.L. Evans hold to the contrary. See *Boise Dev. Co. v. Boise City*, 30 Idaho 675, 167 P. 1032, 1034 (1917); *Boise Tower Associates, LLC v. Hogland*, 147 Idaho 774, 779-80, 215 P.3d 494, 499-500 (2009).

⁷⁴ Amended Complaint, filed July 28, 2014, ¶ 32.

with water.” *Shelby v. Farmers’ Co-Op. Ditch Co.*, 10 Idaho 723, 80 P. 222, 226 (1905).⁷⁵ Thus, it is unclear that the “sale or rental” language applies to this case.

Even if the statute did apply, the Court does not agree that the statute creates a private cause of action. When determining whether a statute creates a private cause of action,

[T]he court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

White v. Unigard Mut. Ins. Co., 112 Idaho 94, 101, 730 P.2d 1014, 1021 (1986). The Court looks at whether there is an “indication that the legislature intended to create a private cause of action through the enactment of these statutes.” *Yaakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 176, 923 P.2d 416, 421 (1996). Based on these considerations, the Court does not believe a private cause of action arises out of Idaho Code § 42-912.

In this case, there is no evidence of sale or rental of water. Therefore the Court cannot determine this statute would provide any relief to D.L. Evans, even if it did create a specific cause of action. Though the statute was designed to protect both water venders and purchasers, the Court believes there are already sufficient measures in place to protect both sides should a violation of this statute be alleged, including declaratory judgment actions (being utilized in this case) and injunctive relief. The language of the statute itself does not create a cause of action, nor provide for any specific relief for failure to comply with its requirements.⁷⁶

Alternately, the moving parties have argued there are no facts supporting any cause of action which could arise out of this statute, and Plaintiff has not rebutted this by showing there are facts supporting this cause of action. See *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (1994). Therefore, to the extent there are any claims in the Amended Complaint against Bailentyne or its board arising out of this statute, such claims are dismissed.

⁷⁵ In *Shelby*, the water user, “purchased a perpetual water right,” from the ditch company. *Id.* 80 P. at 224. In another case, there was a sale of water, “evidenced by one share of the capital stock of the North Side Canal Company, Limited, for each acre of land covered by the contract, that each share of stock entitled the holder thereof to a supply of irrigation water at the maximum rate of flow of one-eightieth of a cubic foot of water per acre per second of time. *Reynolds v. N. Side Canal Co.*, 36 Idaho 622, 213 P. 344, 344 (1923).

⁷⁶ Compare with Idaho Code § 42-914, which provides specifically for damages.

E. Claims against IDWR

The allegations against IDWR seem to be contained within Counts IV and V of the Amended Complaint.⁷⁷ D.L. Evans contends IDWR did not comply with its duties under Idaho Code §§ 42-101, 42-602, 42-907, and 42-1805(9) by refusing to order water be delivered to the property at issue.⁷⁸ IDWR argues it had no duty to deliver water to D.L. Evans.⁷⁹

The Court agrees with IDWR that Idaho Code §§ 42-101, 42-602, and 42-907 do not apply to this case. The only duty stated by § 42-101 applies to the State of Idaho as a whole, regarding, “the waters of all natural springs and lakes within the boundaries of the state.” The duty is, “to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose.” The Court does not view this as a duty owed by the State or IDWR to ensure that Ballentyne provides water to a property owner within Ballentyne’s service area who may or may not have a right to use some of Ballentyne’s water. This situation is simply too far removed from the general nature of this statute for any duty contained therein to apply.

As to § 42-602, this section gives the director of IDWR 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.” It does not provide any authority of the director or IDWR over water once it is in the canals, as is the case of the water in Ballentyne’s canals and ditches. Therefore, this code has no applicability to this case.

Idaho Code § 42-907 addresses the appointment of a water manager over any situation where, “two (2) or more parties take water from said ditch, canal or reservoir at the same point.” Under this statute, IDWR only gets involved if there is a dispute as to, “to the quantity of water to be delivered, or the amount actually delivered.” *Id.* The statute places no duty on IDWR or its director to enforce delivery. Therefore, this statute does not create a duty to do or not do anything. Even if it did, the duty is no greater than, and is potentially encompassed by, Idaho Code § 42-1805, which states

In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

...

⁷⁷ Amended Complaint, filed Jul. 28, 2014, ¶¶ 45 – 66.

⁷⁸ *Id.*, ¶ 52 – 57.

⁷⁹ Memorandum in Support of Motion to Dismiss, filed Jan. 26, 2015, pp. 4 – 8.

(9) To 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; or (b) the administrative or judicial orders entered in accordance with the provisions of law.

Idaho Code § 42-1805(9).

Even if these two statutes create a duty to do something, the record shows that D.L. Evans has previously attempted to address, through IDWR, the water dispute with Ballentyne. On May 16, 2013, D.L. Evans petitioned the IDWR to order Ballentyne to deliver water, seeking relief under Idaho Code § 42-907.⁸⁰ IDWR issued a Preliminary Order on June 12, 2013, denying relief and indicating that because this was an issue between private parties, relief must come from the District Court.⁸¹ This order constituted a preliminary order under Idaho Code § 67-5243, and became a final order as provided for in Idaho Code § 67-5245 when D.L. Evans did not request review or reconsideration of the order. After the order became final, D.L. Evans did not appeal the order to the District Court as outlined in the Idaho Administrative Procedure Act, Idaho Code §§ 67-5270 through 67-5279. Whether or not the Court agrees with IDWR's conclusion that IDWR had no authority to order water delivery between disputing private parties under Idaho Code §§ 42-907 or 42-1805, the Court does agree that the proper method of determining whether IDWR had such authority would have been to ask for reconsideration of the preliminary order⁸² or to appeal it.⁸³ Doing nothing and later suing IDWR does not constitute the exhaustion of administrative remedies necessary to obtain judicial review of the decision.⁸⁴

[I]mportant policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

⁸⁰ Affidavit of Chris M. Bromley in Support of Defendant Thomas M. Ricks' Motion and Memorandum for Change of Venue, filed Sep. 2, 2014, Ex. D.

⁸¹ Id., Ex. E.

⁸² See Idaho Code § 67-5243(3).

⁸³ See Idaho Code § 67-5270.

⁸⁴ Idaho Code § 67-5271.

Wanner v. State, Dep't of Transp., 150 Idaho 164, 169, 244 P.3d 1250, 1255 (2011). A majority of the issues D.L. Evans seeks to raise against IDWR are issues that would and should have been resolved through a reconsideration or appeal of the IDWR order.

D.L. Evans does not seek damages against IDWR.⁸⁵ Because the mandamus and injunctive relief sought by D.L. Evans against IDWR would have been addressed through the administrative and related appellate process, the Court is now without jurisdiction to address those issues. *See Erickson v. Idaho Bd. of Registration of Prof'l Engineers & Prof'l Land Surveyors*, 146 Idaho 852, 854, 203 P.3d 1251, 1253 (2009) (*abrogated on other grounds, City of Eagle v. Idaho Dep't of Water Res.*, 150 Idaho 449, 451, 247 P.3d 1037, 1039 (2011)). Summary judgment is GRANTED on all claims against IDWR and its director, Gary Spackman, so they are hereby dismissed.

CONCLUSION

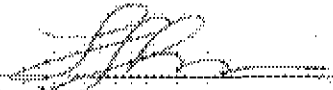
Based on the foregoing,

1. Defendants' Ballentyne Ditch Company, Aaron Ricks, Shaun Bowman, Joe King and Steve Sneed Motion for Summary Judgment (filed Jan. 22, 2015) is DENIED.
2. Thomas M. Ricks' Motion for Summary Judgment (filed Jan. 23, 2015) is DENIED on Whether as a Matter of Law, the Water Rights Diverted by the Ballentyne Ditch Company from the Boise River Company are Real Property.
3. Thomas M. Ricks' Motion for Summary Judgment (filed Jan. 23, 2015) is GRANTED to D.L. Evans Bank on the issues of:
 2. Whether, as a Matter of Law, Shares of Stock in the Ballentyne Ditch Company are Personal Property;
 3. Whether, as a Matter of Law, the Trustee's Deed and Correction Trustee's Deed could Convey Personal Property;
 4. Whether, as a Matter of Law, a Security Interest Attached or was Perfected by the Bank as to Rick's Shares of Stock in the Ballentyne Ditch Company; and
 5. Whether, as a Matter of Law, D.L. Evans Bank can Compel Ballentyne Ditch Company to Transfer Shares of Stock Owned by Thomas M. Ricks to the Bank.

⁸⁵ See Amended Complaint, filed Jul. 28, 2014, ¶¶ 58, 66, and pp. 11 -- 12.

4. IDWR's Motion to Dismiss (filed Jan. 26, 2015) is GRANTED.

ORDERED this 18th day of March, 2015.



Lynn Norton
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of March, 2015, I mailed (served) a true and correct copy of the within instrument to:

Jason R Naess
Attorney at Law
Faxed - 208-878-0146

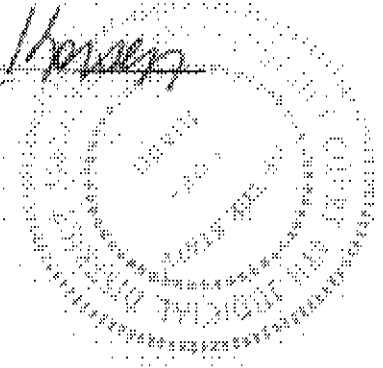
S Bryce Farris
Attorney at Law
Faxed - 208-629-7559

Christopher Michael Bromley
Attorney at Law
Faxed - 208-287-0864

Meghan Carter
Attorney at Law
Faxed - 208-287-6700

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Court Clerk



CERTIFICATE OF MAILING