

Chris M. Bromley, ISB # 6530
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864 (facsimile)
Email: cbromley@mchughbromley.com

Attorney for Defendant Thomas Mecham Ricks

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 DIRECTOR OF THE)
) IDAHO DEPARTMENT OF WATER)
) RESOURCES; AARON RICKS, DIRECTOR)
) OF BALLENTYNE DITCH COMPANY;)
) SHAUN BOWMAN, DIRECTOR OF)
) BALLENTYNE DITCH COMPANY; JOE)
) KING, DIRECTOR OF BALLENTYNE)
) DITCH COMPANY; STEVE SNEAD,)
) DIRECTOR OF BALLENTYNE DITCH)
) COMPANY,)
)
) Defendants.)

Case No.: CV OC 1317406

**THOMAS M. RICKS' PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

COMES NOW the Defendant Thomas M. Ricks ("Ricks"), by and through his counsel of record, Chris M. Bromley of the firm, McHugh Bromley, PLLC, and, consistent with this Court's December 22, 2014 *Order Governing Further Proceedings*, and hereby files Ricks' *Proposed Findings of Fact and Conclusions of Law*.

I. PROPOSED FINDINGS OF FACT

A. The Ballentyne Ditch Company

1. The Ballentyne Ditch Company, Ltd. (“Ballentyne”) is a non-profit corporation, in good standing, with the laws of the State of Idaho. Ballentyne is an ordinary ditch company, not formed under the Carey Act.

2. Ballentyne is governed by Articles of Incorporation, filed with the Idaho Secretary of State in 1910. Ballentyne’s Articles of Incorporation were amended in 1929, 1948, and 1960. Ballentyne’s Bylaws were drafted in 1947 and have not been changed.

3. Since 2004, Ricks has been a shareholder in Ballentyne. At all times relevant to these proceedings, Ricks has maintained possession of his shares of stock. Ricks still maintains possession of his shares of stock in Ballentyne.

B. Ballentyne And The Snake River Basin Adjudication

4. The Snake River Basin Adjudication (“SRBA”) was commenced on November 19, 1987. Ballentyne is located in Eagle, Idaho, which is in Ada County. All of Ada County was located wholly within the boundaries of the SRBA. Other than claims to *deminimis* domestic and stockwater, “all classes of water uses . . . within the water system [must] be adjudicated as part of the Snake River Basin adjudication.” *SRBA Final Unified Decree* at 2, ¶ 4.

5. The only water rights at issue in this proceeding are owned by Ballentyne, and were decreed to Ballentyne in the SRBA, for water from the Boise River under water right nos. 63-00195, 63-00198AA, 63-00258A, 63-00260B, 63-00264, 63-00285, and 63-31808 (“Water Rights”). The decreed place of use for the Water Rights is described by “digital boundary,” as follows: “This Right is Limited to the Irrigation of 741 Acres within the Boundary of Ballentyne

Ditch Company. The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.”

6. After Ballentyne diverts its Water Rights from the Boise River, the water is turned into Ballentyne’s system of canals, laterals, and ditches. Only after water is diverted by Ballentyne from the natural stream, are Ballentyne’s shareholders authorized to use water from Ballentyne’s system of canals, laterals, and ditches. Water diverted from Ballentyne’s system of canals, laterals, and ditches is applied to land within its decreed place of use. Ballentyne’s patrons use water pursuant to a system of schedules and rotations.

7. Shareholders in Ballentyne are issued certificated shares of stock, which authorized 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. The shares of stock do not reference any lands to which the shares of stock are appurtenant.

8. On August 26, 2014, the SRBA *Final Unified Decree* was signed by the Honorable Eric J. Wildman, bringing a close to the adjudication. “This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987” *SRBA Final Unified Decree* at 2, ¶ 4. “All other water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed.” *Id.*

C. Promissory Note, Deed Of Trust, And Trustee’s Deed

9. On or about January 17, 2008, D.L. Evans Bank (“Bank”) entered into a Promissory Note, identified as Note No. 2015302921 (“Promissory Note”), with Ricks.

10. A Deed of Trust was executed, which superseded previous notes executed by Ricks. The Deed of Trust was modified on a number of occasions. In the Deed of Trust, Ricks did:

[I]rrevocably grant, bargain, sell, and convey in trust, with power of sale, to Trustee for the benefit of the Lender as Beneficiary, all of Grantor’s right, 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, 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, (the “Real Property”) located in Ada County, State of Idaho:

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

11. Pursuant to the Deed of Trust, Ricks was required to pay the total obligation due and owing under the Promissory Note on January 5, 2009. Later, Ricks defaulted, and a non-judicial foreclosure was initiated by the Bank.

12. On December 28, 2012, January 4, 2013, and January 11, 2013, a Rescheduled Notice of Trustee’s Sale was published in the Idaho Business Review, noticing the sale of Ricks’ real property, consistent with Idaho Code § 45-1506. The Bank purchased the real property, with a Trustee’s Deed recorded in Ada County on January 22, 2013 as Instrument No. 113008017. A Correction Trustee’s Deed was recorded in Ada County on January 24, 2013 as Instrument No. 113008750. Both the Trustee’s Deed and Correction Trustee’s Deed referred to an Exhibit A, which described two parcels of land.

13. Ricks was never asked by the Bank to sign a security agreement relating to Ricks' shares of stock in Ballentyne, nor has Ricks signed a security agreement in favor of the Bank. The Bank has not filed a Uniform Commercial Code 1 financing statement as to Ricks.

II. PROPOSED CONCLUSIONS OF LAW

A. The Only Water Rights In This Proceedings Are Diverted By Ballentyne From The Boise River And Are Ballentyne's Real Property

1. In Idaho, a water right is acquired by "divert[ing]" water from a "natural stream" and applying that water to a "beneficial use." Idaho Const. Art. XV § 3; *see also* I.C. §§ 42-101, 42-103, 42-104. Irrigation is recognized in Idaho as a beneficial use. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 38, 147 P. 1073, 1077 (1915). If the requirements of perfecting a water right are met, a water right is obtained. I.C. § 42-201. A perfected water right is a real property right. I.C. § 55-101(1).

2. On November 19, 1987, the SRBA was commenced. I.C. § 42-1406A (uncodified); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 795, 252 P.3d 71, 76 (2011); *Ricks' Statement of Facts* at 5, ¶ 14. Water rights existing prior to the commencement of the SRBA were required to be claimed in the adjudication. If a water right was required to be claimed in the SRBA, and was not, the water right was no longer recognized. *Id.* On August 26, 2014, the Honorable Eric. J. Wildman entered the SRBA *Final Unified Decree*, completing the adjudication. *Id.* at 5 ¶ 14.

3. Ballentyne diverts water from the Boise River – a natural stream – for irrigation purposes. Ballentyne is located in Ada County. Ada County is located wholly within the boundaries of the SRBA. Because its water rights pre-dated commencement of the SRBA, Ballentyne was required to file claims and receive decrees for its water rights. Ballentyne complied with the law, receiving decrees from the SRBA district court for the water rights it

diverts from the Boise River: 63-00195, 63-00198AA, 63-00258A, 63-00260B, 63-00264, 63-00285, and 63-31808. Because Ballentyne's water rights were decreed in the SRBA, the rights owned by Ballentyne are real property, I.C. § 55-101, and are appurtenant to the digital boundary place of use described in the SRBA decrees, I.C. § 42-1402.

4. The only water rights at issue in this proceeding – 63-00195, 63-00198AA, 63-00258A, 63-00260B, 63-00264, 63-00285, and 63-31808 – are owned by Ballentyne and are diverted from the Boise River.

B. Shares Of Stock In The Ballentyne Ditch Company Are Personal Property

5. A central question of law in this proceeding is whether Ricks' shares of stock in Ballentyne passed to the Bank as an appurtenance when the Bank acquired Ricks' property pursuant to the Trustee's Deed and Correction Trustee's Deed.

6. It is undisputed that only Ballentyne diverts water from the Boise River, and its shareholders only use water once it is turned into Ballentyne's system of canals, laterals, and ditches. Thus, as a matter of law, Ballentyne's shareholders do not "divert" water from a "natural stream." Idaho Const. Art. XV § 3; I.C. § 42-101. Rather, shareholders take water as shareholders of a corporation that owns and diverts water rights. Consequently, the certificated shares in Ballentyne do not allow shareholders to divert water from a natural stream, are not water rights, and are therefore not real property. Idaho Const. Art. XV § 3; I.C. § 42-101; I.C. § 55-101. This is plainly consistent with Ballentyne's SRBA decrees, and plainly consistent with the fact that shareholders in Ballentyne do not own water right decrees from the SRBA.

7. The conclusion that certificated shares of stock in Ballentyne are personal property is consistent with the long-held rule in the State of Idaho. *Watson v. Molden*, 10 Idaho 570, 79 P. 503 (1905); *Wells v. Price*, 6 Idaho 490, 56 P. 266 (1899). In *Wells*, appellant

acquired land by a sheriff's deed, which was located in the Upper South Field Irrigation Company ("Company"). *Wells* at 491, 56 P. at _____. Appellant argued the shares of stock in the Company were appurtenant to the land and passed to it by the sheriff's deed. The Idaho Supreme Court disagreed: "Shares of stock in an irrigation corporation are not appurtenant to the land owned by the owner of such shares." *Id.* at 493, 56 P. at _____ (emphasis added). The holding in *Wells* was followed six years later in *Watson*. Shares of stock in an irrigation company "pass[] by assignment and delivery. This being true, the property sold was only personal property." *Watson* at 583, 79 P. at _____ (emphasis added).

8. The Bank has attempted to distinguish *Watson* and *Wells* by relying on a separate line of cases decided by the Idaho Supreme Court – *Andrews v. N. Side Canal Co.*, 52 Idaho 117, 12 P.2d 263 (1932); *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931); *In re Johnson*, 50 Idaho 573, 300 P. 492 (1931); *Twin Falls Canal Co. v. Shippen*, 46 Idaho 787, 271 P. 578 (1928); *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687 (1917) – leading the Bank to argue that Ricks' shares of stock are appurtenant to the land the Bank acquired. The Bank's reliance is misplaced. Every case cited by the Bank in support of its position turns on the critical fact that the Court had before it corporations formed in accordance with federal legislation known as the Carey Act. Because Ballentyne is not a Carey Act corporation, every case relied upon by the Bank is inapplicable.

9. The Carey Act of 1894 is federal legislation that allowed for "the reclamation of the desert lands . . . binding the United States to donate, grant, and patent to the State free of cost . . . such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, required of citizens who may enter under the desert-land law . . ." 43 U.S.C. § 641. *See also The History and Development and Current Status of the Carey Act in Idaho* at 1

(explaining background of the Carey Act). States were required to “file a map of the said land to be irrigated . . . and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of water to be used for irrigation and reclamation.” 43 U.S.C. § 641. “As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior . . . patents shall be issued to the State or its assigns for said lands so reclaimed and settled” *Id.* Importantly, if the lands were not irrigated within a certain period of time, the lands would be “restore[d] to the public domain” *Id.* Thus, if the irrigation requirements of the Carey Act were not met, lands patented to private settlers would revert back to the United States.

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

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

I.C. § 42-2009 (emphasis added).

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

Id. (emphasis added).

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

I.C. § 42-2013.

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

I.C. § 42-2019 (emphasis added).

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

I.C. § 42-2025 (emphasis added).

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

12. The Bank relies on a series of Carey Act cases to reach its conclusion that shares of stock are real property and appurtenant to land. *Andrews v. N. Side Canal Co.*, 52 Idaho 117, 12 P.2d 263 (1932); *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931); *In re Johnson*, 50 Idaho 573, 300 P. 492 (1931); *Twin Falls Canal Co. v. Shippen*, 46 Idaho 787, 271 P. 578 (1928); *Iretton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687 (1917) (collectively referred to

herein as “*Ireton et al.*”). Consistent with Idaho Code, each case cited by the Bank examines Carey Act corporations, with the same conclusion: shares of stock in Carey Act corporations are appurtenant to land. Because Ballentyne is not a Carey Act corporation, the decisions cited by the Bank do not apply.

13. Contrary to the Bank’s position, the Court’s decision in *Ireton* did not depart from its decisions in *Wells* and *Watson* and announce a new standard. Rather, *Wells* and *Watson* are harmonious with *Ireton et al.* As stated above, the Carey Act was enacted in 1894, and accepted by the state of Idaho in 1895. After the Carey Act was accepted by Idaho, the Supreme Court issued its decisions in *Wells* (1899) and *Watson* (1905). The Supreme Court knew it did not have a Carey Act corporation before it when it held, “Shares of stock in an irrigation corporation are not appurtenant to the land owned by the owner of such shares.” *Wells* at 493, 56 P. at 267 (emphasis added). The Court also knew it did not have a Carey Act corporation before it when it followed its holding in *Wells*, stating shares of stock in an irrigation company “pass[] by assignment and delivery. This being true, the property sold was only personal property.” *Watson* at 583, 79 P. at 507 (emphasis added).

14. Moreover, the appurtenance reasoning articulated in *Ireton* appears to have first been developed by the Court in *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 653, 150 P. 336, 340 (1915) (“If as soon as an entryman makes a contract for the purchase of water from a [Carey Act] construction company to irrigate his land the water becomes an inseparable appurtenant to such land . . .”) (emphasis added). The decision in *Twin Falls North Side* was written by Chief Justice Sullivan. *Id.* at 646, 150 P. at 337. Because Justice Sullivan also participated in the Court’s decisions in *Wells* and *Watson*, it is unreasonable for the Bank to

assert the Court somehow overruled itself by extending *Ireton* to non-Carey Act companies like Ballentyne.

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

16. The Bank also cites *United States v. Pioneer Irrig. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), for the proposition that, even though the "Name and Address" elements of Ballentyne's SRBA partial decrees do not reference Ballentyne's shareholders, *Pioneer* vests the Bank with a real property ownership in Ballentyne's water rights. Much like the decisions in *Ireton et al.* were based on the Idaho's acceptance of the Carey Act, the result in *Pioneer* turns on the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*, and federal contracts arising thereunder.

17. "The Reclamation Act of 1902 set in motion a massive program to provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid land in many Western States." *Pioneer* at 109, 157 P.3d at 603. In Idaho, the United States Bureau of Reclamation ("BOR") built numerous dams and reservoirs, including a series of three large reservoirs on the Boise River, known as the "Boise Project." *Id.* at 108, 157 P.3d at 602. Following State law, BOR obtained water rights from the Idaho Department of Water Resources ("IDWR") for the Boise Project. *Id.* at 110, 157 P.3d at 604. "Thereafter, the United States and the irrigation districts entered into contracts that provide for the repayment to the United States for the costs of constructing the federal facilities and the continuing operation and maintenance

costs. There is no dispute that the irrigation districts have fully repaid the construction costs, except for Lucky Peak, and they have paid for development of the stored water.” *Id.*

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

19. Unlike the irrigation entities in *Pioneer* that filed separate claims in the SRBA for storage water in the Boise Project, the shareholders in Ballentyne did not file SRBA claims. Unlike in *Pioneer*, the Bank’s “hook” to Ricks’ shares is the purported interest it derived from the Deed of Trust, Trustee’s Deed, and Correction Trustee’s Deed, not federal law and federal contract. Also, unlike *Pioneer*, the Bank claims ownership of Ricks’ shares in Ballentyne’s SRBA water right nos. 63-00195, 63-00198AA, 63-00258A, 63-00260B, 63-00264, 63-00285, and 63-31808. Ballentyne’s SRBA water rights are for water from the Boise River, not for storage water from BOR reservoirs. Lastly, unlike BOR’s SRBA storage water rights,

Ballentyne's SRBA water rights have no remarks stating anyone other than Ballentyne owns its water rights.

20. Because there are no limiting or clarifying remarks in Ballentyne's SRBA decrees as to ownership, Ballentyne's SRBA decrees are unambiguous and entitled to their plain meaning. "We apply the same rules of interpretation to a[n] [SRBA] decree that we apply to contracts." *A&B Irrig. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). "In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *C&G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001). Since the language in *Pioneer* was not put on Ballentyne's Water Rights, the result in *Pioneer* has no application in this case.

21. Here, the Constitution, Idaho Code, case law, and Ballentyne's SRBA decrees all run contrary to the Bank's theory that shares of stock in Ballentyne are real property water rights, or appurtenant to land.

C. Ballentyne's Articles Of Incorporation, As Amended In 1948, Do Not Make Shares Of Stock Appurtenant To Land

22. The use of shares in Ballentyne is governed by its Articles of Incorporation, amendments thereto, and Bylaws. Ballentyne is entitled "to make reasonable rules and regulations governing the use of its system and the distribution of water to its shareholders." *Gasser v. Garden Water Co.*, 81 Idaho 421, 426, 346 P.2d 592, 594 (1959). Ballentyne's Articles of Incorporation, amendments thereto, and Bylaws are Ballentyne's "corporate documents." *Twin Lakes Village Property Ass'n, Inc. v. Crowley*, 124 Idaho 132, 135, 857 P.2d 611, 614 (1993). "Because corporate documents are equivalent to contracts among the members of the association, the normal rules governing the interpretation of contracts apply. 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." *Id.* (internal citations removed).

23. In 1910, Ballentyne filed its Articles of Incorporation. Relevant to this proceeding is Article VI to Ballentyne's Articles of Incorporation, and the amendments thereto. Article VI of the original 1910 Articles of Incorporation states as follows:

The amount of authorized capital stock of this corporation shall be **Five Hundred and Eighty shares** of the par value of Ten and 00/100 Dollars each, which said capital stock shall be **incident to and appurtenant to the lands lying under and heretofore irrigated by means of said canal**, and none of said capital stock shall be transferred, or transferrable upon the books of the corporation without a transfer of the lands to which the same is **appurtenant** and any other person than the owner of such lands, holding such stock, or any of it, **shall be deemed to hold the same as trustee to the use and benefit of the owner of said lands**. The stock certificates, shall describe the lands to which the same are **appurtenant**, which said lands shall include and be included in the following and no other . . . , which lies under and is irrigated from said canal, the same **being Five Hundred Eighty acres**, more or less.

Emphasis added (in bold).

24. By its plain language, the 1910 Articles of Incorporation made shares of stock appurtenant to the 580 acres of land that could be irrigated by water diverted by Ballentyne; and in the event of split ownership of stock and land, the owner of the stock served as trustee to the owner of the land.

25. In 1929, Article VI was amended as follows, as shown in underline and strikeout:

The amount of authorized capital stock of this corporation shall be one thousand ~~Five Hundred and Eighty shares~~ of the par value of ~~\$10.00 Ten and 00/100 Dollars~~ each of; which shares shall be inseparably attached the right to use of an equal and proportionate part of the waters of said canal available for the irrigation of the lands thereunder, and only such amounts of said capital stock shall be issued as shall be **inseparably attached and appurtenant to the lands lying under and irrigated by means of said canal**; ~~said capital stock shall be incident to and appurtenant to the lands lying under and heretofore irrigated by means of said canal,~~ and none of said capital stock shall be transferred, or transferrable, upon the books of the corporation without a transfer of the lands to which the same is appurtenant, and any other person than the owner of such lands, holding such stock, or any of it, shall

be deemed to hold the same as trustee to the use and benefit of the owner of said lands. The stock certificates, shall describe the lands to which the same are appurtenant, ~~which said lands shall include and be included in the following and no other [inserted legal description], which lies under and is irrigated from said canal, the same being Five Hundred Eighty acres, more or less.~~

Emphasis added (in bold).

26. While there were some editorial revisions to the language of the 1910 version of Article VI, the only substantive change made by the 1929 amendment was to increase the number of shares in Ballentyne from 580 to 1,000.

27. In 1948, Article VI was amended as follows, as shown in underline and strikeout, and remains unchanged today:

~~The amount of~~ This corporation shall have a total authorized capital stock of \$10,000.00 divided into one thousand (1,000) ~~this corporation shall be one thousand shares of the par value of \$10.00~~ Ten Dollars (\$10.00) per share. ~~each of which shares shall be inseparably attached the right to use of an equal and proportionate part of the waters of said canal available for the irrigation of the lands thereunder, and only such amounts of said capital stock shall be issued as shall be inseparably attached and appurtenant to the lands lying under and irrigated by means of said canal; and none of said capital stock shall be transferred, or transferrable, upon the books of the corporation without a transfer of the lands to which the same is appurtenant, and any other person than the owner of such lands, holding such stock, or any of it, shall be deemed to hold the same as trustee to the use and benefit of the owner of said lands. The stock certificates, shall describe the lands to which the same are appurtenant.~~

28. By its plain language, and by placing a period after “per share.” the 1948 amendment to Article VI expressly removed any mention of appurtenance of shares in Ballentyne. Furthermore, the 1948 amendment expressly removed the trustee relationship that existed when there was split between the owner of the shares of stock and the owner of land. The 1948 amendment to Article VI remains unchanged today, is entitled to its plain meaning. *Twin Lakes* at 135, 857 P.2d at 614. As such, the 1948 amendment to Article VI means that

Ricks' shares of stock were not acquired by the Bank as an appurtenance to the land, and that Ricks owes no duty to the Bank.

D. The 1947 Bylaws Are Consistent With The Articles Of Incorporation And Amendments Thereto

29. Ballentyne is a non-profit corporation. According to the non-profit code, “bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.” I.C. § 30-3-21(2). The same is also true as to general corporations. *See* I.C. § 30-1-206 (“The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.”)

30. In 1947, one year before it amended Article VI, Ballentyne enacted its Bylaws. The Bylaws remain unchanged today. The Bylaws do not mention whether shares of stock are appurtenant or not appurtenant to land. As a result, the Bylaws are consistent with the Articles of Incorporation and amendments thereto. I.C. § 30-3-21(2).

31. A question at issue in this proceeding is whether the Court can force Ballentyne to transfer Ricks' shares of stock to the Bank. According to Article VII of the Bylaws, shares of stock in Ballentyne “may be transferred at any time by the owner thereof 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.” *1947 Bylaws* at 5 (emphasis added).

32. By its plain language, shares of stock in Ballentyne must be surrendered in order for the transfer to be valid. *Twin Lakes* at 135, 857 P.2d at 614. Because Ricks has not agreed to surrender his shares of stock, the Bank cannot force a transfer of the stock.

E. The Trustee's Deed And Correction Trustee's Deed Could Only Convey Real Property

33. The Bank acquired the property described in the Amended Complaint first by a Trustee's Deed, then by a Correction Trustee's Deed. Because of the Trustee's Deed and Correction Trustee's Deed, the Bank asserts it is entitled to Ricks' shares of stock. As a matter of law, the Bank is precluded from compelling the "transfer to Plaintiff the Ballentyne stock associated with the water transferred to Plaintiff under the Trustee's Deed." *Amended Complaint* at 11. See I.C. § 45-1502(3); *Spencer v. Jameson*, 147 Idaho 497, 211 P.3d 106 (2009).

34. In *Spencer*, promissory notes were executed by Spencer in favor of Davidson Trust. Davidson Trust secured the promissory notes by deeds of trust in Spencer's real property, which "also included title to a 1981 Skyline mobile home, VIN # 01910302P." *Spencer* at 500, 211 P.3d at 109. When Spencer defaulted, a non-judicial foreclosure sale occurred. "Davidson Trust submitted the highest bid and was given a Trustee's Deed to Parcels Nos. 1, 2, and 3 and title to the 1981 Skyline mobile home." *Id.* An issue on appeal was whether Davidson Trust actually obtained the 1981 Skyline mobile home, which Spencer argued was personal property. According to the Court, "a deed of trust, by definition, is limited to the conveyance of real property, I.C. § 45-1502(3). Thus, we must determine whether at the time of the sale the 1981 Skyline mobile home was converted to real property and, therefore, was property transferred to the trustee for purposes of non-judicial foreclosure under I.C. § 45-1503; or whether the mobile home remained personal property, in which case the mobile home was not subject to foreclosure under the statute." *Id.* at 501, 211 P.3d at 110 (emphasis added). Finding that the 1981 Skyline mobile home had been converted to a fixture, the Court held the mobile home was real property within the definition of I.C. § 55-101, and "properly transferred to the trustee for purposes of non-judicial foreclosure under I.C. § 45-1503." *Id.* at 502, 211 P.3d at 111.

35. Here, it is undisputed that Ricks executed a Promissory Note, which was secured by the Bank with a Deed of Trust. It is undisputed that a subsequent non-judicial foreclosure sale occurred. It is undisputed that, at the foreclosure sale, the Bank was the highest bidder and obtained a Trustee's Deed to the property, which was replaced by a Correction Trustee's Deed. By law, the Bank could only obtain real property by the Trustee's Deed and Correction Trustee's Deed; therefore, the Bank obtained none of Ricks' personal property. I.C. §§ 45-1502(3); *Spencer* at 501, 211 P.3d at 110.

36. Because shares of stock in Ballentyne are personal property, *Watson, supra*; *Wells, supra*, it was legally impossible for the Bank to acquire Ricks' shares by the Trustee's Deed and Correction Trustee's Deed. Moreover, the plain language of Article VI of the 1948 amendment to Ballentyne's Articles of Incorporation do not make shares of stock in Ballentyne appurtenant to the land acquired by the Bank, and do not establish a duty upon Ricks to provide the shares to the Bank. The plain language of the Bylaws further prevent the forced transfer of Ricks' shares to the Bank.

F. No Security Interest Attached Or Was Perfected By The Bank As To Ricks' Shares Of Stock In The Ballentyne Ditch Company

37. Because Ricks' shares of stock in Ballentyne are his personal property, the only way the Bank could have obtained a consensual security interest in Ricks' shares of stock was to obtain a security agreement from Ricks in accordance with I.C. §§ 28-9-101 *et seq.* In addition, even if the Bank somehow obtained an unknown security agreement granting the Bank a security interest in the shares of stock, the undisputed facts show the Bank took no steps to perfect a security interest in any of Ricks' personal property, much less the shares of stock.

38. One way the Bank could have obtained a security interest in Ricks' personal property would have been to obtain a "security agreement." I.C. § 28-1-102(74). A security

agreement would have allowed the Bank's security interest to attach to Ricks' personal property if "value was given," I.C. § 28-9-203(b)(1), if Ricks had "rights in the collateral," I.C. § 28-9-203(b)(2), if Ricks "authenticated a security agreement," I.C. § 28-9-203(b)(3)(A). In order to perfect the security interest, the Bank needed to file a Uniform Commercial Code ("UCC-1") "financing statement" with the Idaho Secretary of State, I.C. § 28-9-501, or take physical "possession" of the shares of stock, I.C. §§ 28-9-203(b)(3)(B), 28-9-313, neither of which occurred.

39. Here, Ricks was not asked by the Bank to sign a security agreement relating to his shares of stock, nor did the Bank enter into a security agreement with Ricks. While Ricks did execute a Deed of Trust, "a deed of trust, by definition, is limited to the conveyance of real property, I.C. § 45-1502(3)." *Spencer* at 501, 211 P.3d at 110 (emphasis added). Even assuming, purely for the sake of argument, that the deed of trust could be used as a surrogate for a security agreement, the Bank failed to perfect a security interest. While Ricks had rights to the shares of stock, and it could be argued that value was given and the Deed of Trust was authenticated, the Bank neither filed a UCC-1 financing statement with the Idaho Secretary of State, nor took possession of the shares of stock. By failing to file a UCC-1 financing statement or take possession of the shares of stock, any assumption that the Deed of Trust was a security agreement is irrelevant, as the Bank never perfected a security interest in Ricks' shares of stock.

40. Additionally, it is undisputed that the Bank never took possession of Ricks' shares of stock in Ballentyne. Ricks has maintained possession of his shares of stock at all times relevant to these proceedings, and continues to maintain possession of his shares of stock.

41. By failing to take possession of Ricks' shares of stock in Ballentyne, and by failing to perfect a security interest in Ricks' shares of stock by filing a UCC-1 financing

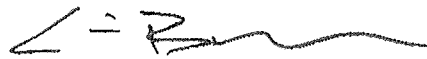
statement with the Idaho Secretary of State, the Bank is legally barred from any interest in Ricks' shares.

III. CONCLUSION

In this case, the only water rights are owned by Ballentyne, which it diverts from the Boise River. Because Ballentyne is an ordinary ditch company, not formed pursuant to the Carey Act, and by the plain meaning of its Articles of Incorporation, as amended, Ricks' shares of stock in Ballentyne are Ricks' personal property, and were not conveyed as an appurtenance to the Bank when it foreclosed on Ricks' land. By failing to take possession of Ricks' shares of stock, and by failing to perfect a security interest in Ricks' shares of stock the Bank is barred from any interest in Ricks' shares. Moreover, Ballentyne's Bylaws prevent the forced transfer of Ricks' shares to the Bank.

Respectfully submitted this 18th day of March, 2015.

MCHUGH BROMLEY, PLLC



CHRIS M. BROMLEY
Attorneys for Thomas M. Ricks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of March, 2015, a true and correct copy of the foregoing document was served as follows:

Jason R. Naess Parsons Smith Stone Loveland & Shirley, LLP PO Box 910 Burley, ID 83318	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Delivery
John Homan Idaho Department of Water Resources PO Box 83720-0098 Boise, ID 83720	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Delivery
S. Bryce Farris Sawtooth Law Offices, PLLC PO Box 7985 Boise, ID 83707	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Delivery



CHRIS M. BROMLEY