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DEPARTMENT OF
WATER RESOURCES

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11 BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

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13 D.L. EVANS BANK,) Case No. _____
14)
15 Petitioner,) PETITION
16 vs.)
17 Ballentyne Ditch Co., Ltd.,)
18 Respondent.)
19)
20 -----

21 COMES NOW Jason R. Naess, representative of D.L. Evans Bank, and Petitions the
22 Idaho Department of Water Resources as follows:

23 FACTS

24 1. On or about January 17, 2008, D.L. Evans Bank entered into a promissory note,
25 identified as Note No. 2015302921, with Thomas M. Ricks in the original amount of
26 \$1,185,000.00. The Note superseded previous notes executed by Mr. Ricks.

2. The indebtedness under the Note was secured by a deed of trust executed and
recorded on June 7, 2007, as Instrument No. 107082317 ("DOT No. 2317"). The deed of trust
PETITION - PAGE 1

1 was modified on September 17, 2007, and further modified on October 23, 2007, and January
2 17, 2008. Copies of the deed of trust and modifications are attached as Exhibit "A" and
3 incorporated by reference.

4
5 3. Per DOT No. 2317, Mr. Ricks irrevocably granted, bargained, sold, and
6 conveyed to the Trustee in Trust, with power of sale, for D.L. Evans Bank's benefit as
7 Beneficiary under the Deed of Trust, all of Mr. Ricks' "right, title, interest in and to the
8 following described real property, together with all existing or subsequently erected or affixed
9 buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all
10 water, water rights and ditch rights (including stock and utilities with ditch or irrigation rights);
11 and all other rights, royalties, and profits relating to the real property, including without
12 limitation all minerals, oil, gas, geothermal and similar matters." The Deed of Trust then
13 referred to an Exhibit "A" which described two parcels of land securing the Deed of Trust.

14
15 4. Pursuant to the Note, Mr. Ricks was required to pay the total obligation due and
16 owing under the Note on January 5, 2009. That obligation was not met.

17
18 5. Subsequent to Mr. Ricks' default under the Note, D.L. Evans Bank initiated
19 foreclosure proceedings.

20 6. After several bankruptcies delayed scheduled foreclosure sales, a foreclosure
21 sale was completed on the two parcels securing DOT No. 2317 on January 22, 2013.

22 7. A Correction Trustee's Deed was recorded with the Ada County Recorder's
23 office on January 24, 2013, as Instrument No. 113008750 (the "Trustee's Deed"). A copy of
24 the Trustee's Deed is attached as Exhibit "B" and is incorporated herein.

25
26 8. The Trustee's Deed provides that the Trustee under DOT No. 2317 bargained,
sold, and conveyed to D.L. Evans Bank "all of the real property situated in the County of Ada
County, State of Idaho, described as follows" and then refers to an Exhibit "A" that describes

1 the two properties securing DOT No. 2317. There is no exception in the Trustee's Deed for
2 water rights or other appurtenances.

3 9. The properties securing DOT No. 2317 have historically been irrigated by
4 appurtenant water rights in the name of the Ballentyne Ditch Company, Ltd ("Ballentyne").
5

6 10. Ballentyne Incorporated in 1910. In 1947, Ballentyne adopted bylaws. The
7 bylaws identify the corporation's stock structure, but do not indicate what amount of water, if
8 any, is represented by each share in the ditch company. Rather, the bylaws appear to be typical
9 corporation bylaws, and not bylaws drafted for a ditch company. There appears to be nothing
10 in the bylaws, or elsewhere, tying water delivery to stock ownership or establishing any criteria
11 whatsoever to water delivery.
12

13 11. After the January 22, 2013, foreclosure transferring the properties to D.L. Evans
14 Bank, the bank approached Ballentyne to request delivery of the water appurtenant to the
15 foreclosed-on properties. Ballentyne refused to deliver the water. D.L. Evans Bank therefore
16 requests a determination that it is entitled to delivery of the water appurtenant to its properties,
17 and that Ballentyne shall deliver the same.
18

19 APPLICABLE LAW

20 1. Idaho Code § 42-905

21 "Any person, association or corporation which may contract to deliver a certain
22 quantity of water to any party or parties, shall deliver the same to such party or parties,
23 together with a reasonable and necessary allowance for loss by evaporation and
24 seepage, at some convenient point on the main ditch, canal or reservoir of said person,
association or corporation, or on any branch or lateral thereof belonging to the owner or
owners of such ditch, canal, or reservoir."

25 2. Idaho Code § 42-907

26 "Where two (2) or more parties take water from said ditch, canal or reservoir at
the same point, to be conveyed to the respective premises for any distance through the
same lateral or distributing ditch, such parties shall, on or before April first of each
year, select some person to have charge during the succeeding season of the distribution

1 of water from such lateral, whose duty it shall be to ascertain and see that the amount of
2 water to which each of the parties interested is entitled is properly apportioned and
3 distributed. It shall be his further duty to see that the said person, association or
4 corporation, contracting to furnish such water shall deliver the amount as provided in
5 Section 42-905, [Idaho Code,] in case of dispute between such person and the said
6 person, association or corporation as to the quantity of water to be delivered, or the
7 amount actually delivered, the matter shall be referred to the department of water
8 resources. The parties entitled to said water shall keep their ditches and laterals in good
9 condition for carrying and distributing the same. In case the parties entitled to the use
10 of water as in this section stated shall neglect or refuse to perform the duties imposed
11 upon them by this section, they shall have no cause for damage against the person,
12 association or corporation furnishing said water for failure to properly furnish and
13 distribute the same.” (emphasis added.)

14 3. “A ditch right in the State of Idaho for conveyance of water is recognized as a
15 property right apart from and independent of the rights to the use of the water conveyed
16 therein. A landowner’s rights in an irrigation canal or ditch are determined by the
17 amount of water which the landowner conveys through the ditch and not by the amount
18 of water which his shares represent in a canal company which controls the flow.”
19 *Ramseyer v. Jamerson*, 78 Idaho 504, 511, 305 P.2d 1088, 1093 (1957) (citations
20 omitted).

21 4. “[I]n this state a ditch right for the conveyance of water is recognized as a
22 property right apart from and independent of the right to the use of the water
23 conveyed therein. Each may be owned, held and conveyed independently of the
24 other.” *Simonson v. Moon*, 72 Idaho 39, 47, 237 P.2d 93, 98 (1951).

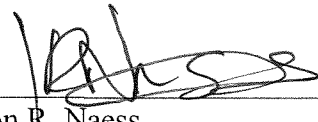
25 RELIEF DESIRED

26 D.L. Evans Bank requests a determination by the Department of Idaho Water
Resources that the Ballentyne Ditch Company, Ltd, is required to deliver the water
appurtenant to the properties transferred to D.L. Evans Bank pursuant to the January 22, 2013,
foreclosure. D.L. Evans Bank’s rights in the water are independent of any ownership interest
in Ballentyne. Not only do the shares in Ballentyne not represent a specific interest in water
pursuant to the ditch company’s bylaws, but “[a] landowner’s rights in an irrigation canal or
ditch are determined by the amount of water which the landowners conveys through the ditch
and not by the amount of water which his shares represent in a canal company which controls
the flow.” *Ramseyer*, 78 Idaho at 511. D.L. Evans Bank’s interest in the water appurtenant to

1 its properties is relative to the water historically provided to the properties, and should be
2 delivered to those properties by Ballentyne.

3 DATED this 16th day of May, 2013.
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6 PARSONS, SMITH, STONE,
7 LOVELAND & SHIRLEY, LLP

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10 Jason R. Naess
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