

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF THE PETITION)
REQUESTING A DETERMINATION)
OF THE RIGHT TO USE WATER)
UNDER SHARES OF THE)
BALLENTYNE DITCH CO., LTD.)
_____)**

PRELIMINARY ORDER

This matter having come before the Department of Water Resources (“IDWR” or “Department”) as a result of a petition filed by D.L. Evans Bank (“Petitioner”) dated May 16, 2013 requesting that the Department determine that Ballentyne Ditch Co., Ltd. (“Ballentyne”) is required to deliver water to properties acquired by the Petitioner pursuant to a foreclosure. The Department received the Petition on May 20, 2013, which did not include a service list or Exhibit A and Exhibit B referenced as attached in the Petition.

BACKGROUND

The Petitioner, D.L. Evans Bank entered into a promissory note with Mr. Thomas Ricks, secured by a Deed of Trust executed on June 7, 2007. Mr. Ricks defaulted on the promissory note on June 5, 2009 and a foreclosure sale was held on January 22, 2013 after which title to the secured lands was conveyed to the Petitioner. Petitioner contends that the Ballentyne water shares previously used by Mr. Ricks to irrigate the foreclosed lands passed to the Bank in the foreclosure sale along with land and other appurtenances. The Petitioner approached Ballentyne to request delivery of the water to the foreclosed lands and Ballentyne refused. Petitioner requests that the Department make a determination that the Petitioner is entitled to use the water and that Ballentyne should deliver the water to the foreclosed lands.

ANALYSIS

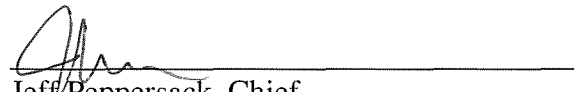
Petitioner, D.L. Evans Bank is a private company engaged in a dispute with a private water delivery provider, Ballentyne Ditch Co., Ltd. over the delivery of water represented by

shares of stock. Petitioner has requested that the Department intervene and make a determination ordering Ballentyne to deliver water to the foreclosed lands. Petitioner cites Idaho Code § 42-907 as authority for the Department to intervene. Idaho Code § 42-907 addresses the appointment of a manager to supervise the delivery of water from lateral ditches and impose certain duties on consumers who divert from the lateral. The delivery of the water under Idaho Code §§ 42-901 et seq. is established under the terms of a private contract between the company and the consumer. If there is a dispute between the parties as to the ownership or the right to use or delivery of water under the contract, the aggrieved party must commence an action in district court. The Department lacks jurisdiction to adjudicate disputes involving private contracts. The construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not the state administrative agency. This is true even when the subject matter of the contract coincides generally with the expertise of the agency. The Department's role under Idaho Code § 42-907 is limited to identifying the quantity of water to be delivered or measuring the water actually delivered in the event of a dispute. The appropriate forum to request a determination as to whether Ballentyne Ditch Co., Ltd. is required to deliver the water to the properties in question is district court.

ORDER

NOW THEREFORE, based upon the foregoing the Petition is dismissed as the Department does not have the authority to grant the relief sought by the Petitioner.

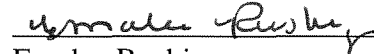
Dated this 12 day of June, 2013.


Jeff Peppersack, Chief
Water Allocation Bureau

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of June, 2013, a true and correct copy of the foregoing Preliminary Order was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

JASON R NAESS
PARSONS SMITH STONE
LOVELAND & SHIRLEY LLP
PO BOX 910
BURLEY ID 83318


Emalee Rushing
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.