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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

)
) SUBCASE NOS. 63-134, 63-132, 63-133,
) 63-134A, 63-134B, 63-186A, 63-186B,
) 63-17205 and 63-31772
)
) HART DAVIS DITCH COMPANY'S
) MEMORANDUM IN SUPPORT OF
) MOTION FOR SUMMARY JUDGMENT
)

The Hart-Davis Ditch Company (Hart-Davis), by and through its counsel of record, Ringert Clark Chartered, and hereby submits this Memorandum in Support of its Motion for Summary Judgment.

I. INTRODUCTION

Hart Davis is a ditch company organized and existing in Eagle, Idaho. One of the shareholders of Hart Davis, the State of Idaho Department of Parks (hereinafter "State"), filed an objection to the ownership of a certain water right on the basis that the State independently owns said water right. The State's objection comes more than eighty years after the formation of the Hart Davis, and after eighty years of the State, or its predecessors, being a shareholder of Hart Davis and paying the assessments of Hart Davis. At no time has the water right ever been in the name of the

COPY

State and the State has continued to be a shareholder of Hart Davis and pay the assessments of Hart Davis without laying claim to the ownership of the water right. In fact, the State did not file a claim in the SRBA as to the ownership of the water right, but instead allowed Hart Davis to file the claim and the State now for the first time objects to the ownership by Hart Davis.

The State's position is essentially that there was no conveyance of the water right from the State's predecessor in interest to Hart Davis when the ditch company was formed and therefore the water right is still independently owned by the State. However, any lack of an express conveyance is rebutted by implied conveyance to the ditch company when Hart Davis was formed and the long standing treatment of the State as a shareholder of Hart Davis, subject to the assessments and rules and regulations of Hart Davis. Additionally, the State's long standing acquiescence to the ownership of the water right by Hart Davis bars the State from claiming ownership under a number of legal doctrines, including, laches, estoppel and waiver/abandonment.

Lastly, there are equitable and other considerations the Court should consider in determining whether the State has an independent ownership interest in the water right, including, the implications of essentially providing that every shareholder has a separate, independent interest in the water rights. This would create an administrative nightmare for IDWR and the SRBA split and divide the water rights so that each shareholder receives an independent interest in the portion of the water right appurtenant to each shareholder's land.

The bottom line is that legally and equitably the water rights should be owned by Hart Davis in trust for its shareholders. This Court should grant the Motion of Hart Davis and deny the State's claim to ownership.

II. BACKGROUND

The Hart Davis Ditch Company is a non-profit ditch company organized and existing under the laws of the State of Idaho. Hart Davis was formed in 1924. The water rights which Hart Davis delivers to its shareholders pre-date the formation of the ditch company. Thus, the water rights were perfected by individual landowners prior to 1924. The priority date for the water right in question, 64-134, goes back to June 1, 1864. In approximately 1924 several landowners agreed to consolidate and commingle their water rights and ditch rights together and to form a ditch company.

According to the State's objection, the State purchased property on Eagle Island for a prison farm in 1929. Since 1929, the State has been a shareholder of Hart Davis and "a stock certificate issued to the State of Idaho by the Hart-Davis Ditch Company for 165 shares which covers the 165 inches of water represented in right number 6." See the Attachment to the State of Idaho's objection. Since 1929, the State has paid yearly assessment to Hart Davis representing the 165 shares owned.

In 1989, Hart Davis filed a notice of claim to ownership of water right 63-134. The State did not file a claim to said water right and there is no indication that the State objected to Hart Davis' claim when it was filed. In December of 2005, IDWR recommended water right no. 63-134 in the name of Hart Davis. In April of 2006, the State filed an objection. However, there is no record prior to 2006 of the State claiming outright ownership of water right no. 63-134.

III. STANDARD OF REVIEW

Summary judgment must be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court liberally construes

the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, a summary judgment motion must be denied. *Stevenson*, 125 Idaho at 272, 869 P.2d at 1367. However, if the evidence reveals no disputed issues of material fact, what remains is a question of law, over which the court exercises free review. *Id.*

IV. ARGUMENT

A. Ditch Company Formation and Ditch Company Law.

A mutual ditch company, such as Hart Davis, is “formed expressly for the purpose of furnishing water to shareholders, not for profit or hire.” *Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975). Many mutual water companies were formed by individual water right holders who pooled assets, incorporated the ditch company and conveyed their water rights to it in return for stock. *See Id.* It therefore follows that the legal title to these rights is in the corporation, **while the equitable title remains in the original owners, or their grantees.** (Emphasis added). Kinney, Clesson S., A Treatise on the Law of Irrigation and Water Rights. Section 1481, p. 2661-62, October 1, 1912. In other words, the ditch company holds the legal title to the property in trust for its respective shareholders, the terms of the trust to be governed by the articles of incorporation, or the by-laws of the same. This is precisely the situation which occurred with the formation of Hart Davis.

The Colorado Supreme Court in *Jacobucci v. District Court*, 541 P.2d 667, 672-73 (Colo. 1975) summarized a mutual ditch corporations ownership interest in the water right(s) used by the

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share holders as follows:

the shares of stock held by the consumers in a mutual ditch corporation represent a specific property interest in a water right. The interest of these shareholders cannot be “defeated or altered by any action of the ditch company or its other shareholders.” *United States v. 508.88 Acres of Land*, U.S. District Ct. (D. Colo. May 8, 1973, Unpublished); *Bent v. Second Extension Water Co.*, 51 Cal. App. 648, 197 P. 657 (1921). While the “naked title may stand in the name of [the mutual ditch corporation], the ditch, reservoir, and water rights are actually owned by the farmers who served thereby.

Through treatise and case law it is clear that the mutual ditch corporations hold title to the water right while the shareholder holds the equitable title. As a result, the State’s desire to be listed as the water right owner is merely an argument of form over substance.

By forming a ditch company, the members or shareholders agree to consolidate or commingle both there ditch rights and water rights into one entity that operates and manages those rights for the benefits of all the shareholders. The State’s predecessor, by joining and forming the ditch company, implicitly agreed to the commingling of the water and ditch rights.

The State’s argument, as Hart Davis understands it, is simply that there is no deed or document specifically conveying the water rights to Hart Davis. Hart Davis does not dispute that there is no deed conveying the water rights to it. On the flip side, there is no deed or document specifically reserving the water right when the ditch company was formed. The State points to an agreement in 1929 whereby a number of landowners divided up the water rights in the area of Hart Davis and Mace Catlin, but said agreement occurred after the formation of Hart Davis and if the water rights were already transferred to the ditch company when it formed, then the individuals may very well have lacked the authority to enter the agreement. The agreement is also telling of the apparent uncertainty as to ownership of the water rights because if the State’s predecessor actually

owned the water right all this time as the State suggests, then there would be no reason to enter an agreement attempting to clarify the ownership. The bottom line is that the State's assertion that there is no deed or document conveying the water rights to Hart Davis is insufficient to meet the State's burden to overturn IDWR's recommendation. The State is attempting to use the absence of proof or evidence when it has the burden to show that IDWR's recommendation is incorrect.

B. The State is Barred from Claiming Ownership by the Doctrines of Laches, Estoppel, Waiver and/or Abandonment.

All of the aforementioned doctrines are applicable in this case. However, the application of any one of these doctrines defeats the State's objection.

1. Laches.

In *Sears v. Berryman*, 101 Idaho 843, 847, 623 P.2d 455, 459 (1981), the court applied the doctrine of laches and stated that:

The doctrine of laches is a creation of equity and is a species of equitable estoppel. "Long and continuous knowing acquiescence in another's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim. However, "(l)apse of time is not alone sufficient to defeat a right on the ground of laches. It must be shown that the (claimant) has been misled, to his injury, by the failure of the (holder of the right) to assert its right earlier."

Id. at 848, 623 P.2d at 460. (citations omitted).

In *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 408-409, 66 P.2d 115, 117 (1937), the court found the existence of the elements of laches and stated that respondents have stood by, with full knowledge of all the facts, for more than twenty years and allowed the appellant to proceed on the theory that it had valid title and a legal right to divert the water, and in the meantime the appellant has incurred large indebtedness on the strength of its title. The "change of

point of diversion and use, whether regular and legal or not, was actually accomplished and thereafter used and enjoyed adversely.” *Id.*

In this case, the first time the State ever made a claim to ownership of the water right was when it filed its objection in April of 2006. Thus, from 1929 to 2006, or seventy seven (77) years, the State knowingly acquiesced in the ownership by Hart Davis. In direct contradiction to claiming ownership, the State acknowledge it was a shareholder and continued to pay the assessments of the Ditch Company for seventy seven years. Lastly, and possibly most telling of the State’s long acquiescence, is the fact that the State never filed a claim to ownership of the water right in the SRBA. This is the same State of Idaho that is in charge of the SRBA. Instead, the State allowed Hart Davis to file a claim, protect the water right, and now two decades later, the State files an objection.

2. Estoppel.

The doctrine of equitable estoppel requires: (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her detriment. *Willig v. State, Dept. of Health & Welfare*, 127 Idaho 259, 899 P.2d 969 (1995).

Further, the doctrine of quasi estoppel is distinguished from equitable estoppel “in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient. The doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with its prior position.” *Id.* at

261, 899 P.2d at 971. (citations omitted).

As previously mentioned, the State sat back and allowed the ownership of this water right to be recognized in the name of Hart Davis for more than seventy years. The State did not file a claim in the SRBA and allowed Hart Davis to file claims to protect the water right. The State as being in charge of the SRBA had knowledge of Hart Davis' claim, which was filed in 1989, and the State as a shareholder of Hart Davis, had knowledge of the claim. It would be inequitable and unconscionable to allow the State to now come in for the first time in 2006 and claim ownership.

3. Waiver and/or Abandonment.

In *Jenkins v. State, Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), the court stated that:

Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right. Forfeiture, on the other hand, is predicated upon the statutory declaration that all rights to use water are lost where the appropriator fails to make beneficial use of the water for a continuous five year period. I.C. § 42-222(2).

Id. at 387, 647 P.2d at 1260 (quoting *Sears v. Berryman*, 101 Idaho 843, 847, 623 P.2d 455, 459 (1981)).

"Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a per se abandonment." *Id.* at 387-388, 647 P.2d at 1260-1261. The court's identify the loss of water right by intent as abandonment. However, while not specifically recognized the doctrine of waiver is similar. "Waiver is a voluntary, intentional relinquishment of a known right or advantage. Waiver is foremost a question of intent." *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 735 P.2d 1047 (Ct.App. 1987). The intention to waive must clearly appear and the doctrine of implied waiver by silence is disfavored. This same

element of intent creates a distinction between implied waiver and estoppel. The distinction between an implied waiver and estoppel is that for a case of implied waiver there must be: some conduct on the part of the person waiving from which it may be inferred that the person waiving intended to waive; in other words, affirmative action on the part of the person waiving indicating an intention to waive some benefit or advantage; whereas, in estoppel a barrier is simply set up regardless of the parties' intentions which precludes one from asserting a right which he would otherwise have but for the matters and things pleaded by the way of estoppel. *Id.* at 739, 735 P.2d at 1050.

In this case, the State or its predecessor joined Hart Davis. By doing so, the State agreed to commingle whatever rights it may have held in the ditch or the water rights. Those rights would then be collectively held by the ditch company for the benefit of its shareholders. There is no dispute that the State has been a shareholder for more than seventy years, paid the assessments of the ditch company for more than seventy years and abandoned or waived its right to outright ownership of the water rights for the past seventy years.

C. Practical Implications of the State's Argument.

Hart Davis' position is that while title to the water right should remain in the name of Hart Davis, the State and the other shareholders continue to hold equitable title. If the State's argument is accepted then each shareholder would own a separate water right for a fraction of the shares represented. The State's position creates several practical implications that the Court should consider as part of its decision.

1. Granting the State's Request Will Wreak Havoc on the Water Users

In *East Jordan Irrigation Co., v. Morgan*, the Utah Supreme Court recognized the chaos that would result if individual shareholders would or could possess the legal right to administer the water

to which they may be entitled by another manner or means than those supplied by the mutual ditch company. *East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310, 315, 218 Utah Adv. Rep. 62 (1993). In that case East Jordan Irrigation Company was appealing the State engineer's decision allowing a shareholder in East Jordan to change the point of diversion of a portion of East Jordan's water without the company's consent. The court noted that allowing the shareholder the right to manage water delivery would ultimately lead to a state of inextricable discord and confusion among the owners of water rights. *Id.* The Utah court reversed the state engineer's decision.

In *Consolidated People's Ditch Co. V. Foothill Ditch Co.*, the California court held that a shareholder does not have the right to change its point of diversion over the objection of the company. *Consolidated People's Ditch Co. V. Foothill Ditch Co.*, 269 P. 915 (Cal. 1928). In *Consolidated*, the court stated that to recognize such a right "would necessarily be to admit the possession of similar rights in each and every stockholder in each of said corporations to go and do likewise, and it is too plain for argument that such an admission would result in a state of inextricable discord and confusion among the owners of water rights of various sorts [all over California]. The creation or threatened danger of such a consequence would of itself supply a sufficient reason for the use of the injunctive processes of the court in the way of its prevention." *Id.* at 921.

Havoc would invariably ensue if every shareholder in the corporation were to attempt to govern the corporate affairs as they relate to the appropriation of waters. Ultimately, water companies, such as Hart Davis, could well be destroyed by complete changes in diversion points or water use.

2. State Can Not Change the Elements of the Water Right if it Injures Others.

Whether the State remains a shareholder with an equitable interest in the water rights or it owns the water rights outright, it still cannot change the elements of the water rights if it injures other shareholders or the ditch company. In other words, even if the State's objection is successful and the State is listed as the owner of portions of the water rights in question, the State cannot change any elements of the water rights appurtenant to its property if those changes would injure the ditch company or any of the other shareholder. Furthermore, Idaho Code § 42-108, in recognizing the mutual ditch company shareholder's dependency upon one another, states:

The person entitled to the use of water or owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of the constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same and transfer the same to other lands, if the water rights of others are not injured by such change in point of diversion, place of use, period of use, or nature of use, provided; **if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation district.** (Emphasis added).

Other jurisdiction, as noted above in *East Jordan* and *Consolidated People's Ditch Co.*, have held that a shareholder does not have the right to change its point of diversion over the objection of the company. Therefore, the State's objection becomes either moot or merely an argument of form over substance because the State's ability to change the elements of the water right is the same regardless of whether it owns the water right outright or the ditch company holds the water right in trust. However, significant detrimental impacts to the administration of the water rights may result.

3. Approving the State's Objection Could Cause a Significant Administrative Burden.

The State is requesting this Court to venture down a very slippery slope. Issuing a water right to each and every member of every ditch company would be a very laborious task that could inundate the IDWR and the SRBA. Hart Davis does not dispute that such a task could not be accomplished by IDWR and the SRBA, but there is no reason to create such an administrative nightmare. Land subdivision and changing ownerships would require numerous and continual administrative actions to transfer water rights and split existing water rights. As the land is subdivided, the number of owners will increase. Increase in owners will result in an increase in administrative demands. Additionally, the frequency of ownership changes will also likely increase. The administrative burden that could result if the state's objection is granted will not improve the distribution or delivery of the water but may have a detrimental impact.

4. State Would Continue to Be Liable for Ditch Maintenance and Operation Assessments

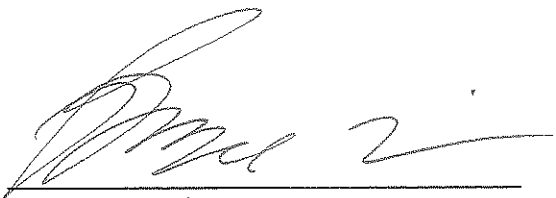
Lastly, if the State's objection is successful, the State would still be liable for ditch maintenance and operation assessments. The State's objection, if successful, would not change the State's obligation to the ditch company, may cause chaos in delivery of water for the ditch company, may cause a significant administrative burden on the regulatory agency and the courts, and will not provide the state with any additional ability to change the elements of the water right.

V. CONCLUSION

For the above stated reasons, Hart Davis respectfully requests that this Court grant its motion for summary judgment and deny the State's objection.

DATED this 13 day of March, 2008.

RINGERT CLARK CHARTERED

By: 
S. Bryce Farris
Attorney for Hart-Davis Ditch Company

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2008, I served a true and correct copy of the foregoing document by U.S. mail, postage pre-paid to the following:

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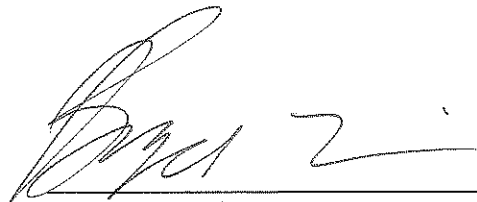
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