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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	)	Subcase Nos. 63-00132, 63-00133, & 63-00134
	)	
	)	STATE OF IDAHO, DEPARTMENT OF PARKS AND
	)	RECREATION'S BRIEF IN SUPPORT OF ITS
Case No. 39576	)	MOTION FOR SUMMARY JUDGMENT
	)	
	)	

COMES NOW the State of Idaho, Department of Parks and Recreation (hereinafter the "IDP&R"), by and through the undersigned deputy attorney general, and submits the STATE OF IDAHO, DEPARTMENT OF PARKS AND RECREATION'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT in accordance with the SECOND SUPPLEMENTAL TRIAL SCHEDULING ORDER entered on December 21, 2007.

I. STATEMENT OF THE CASE

i. The Nature of the Proceedings

This controversy relates to the ownership of water right nos. 63-00132 and 63-00133 delivered by the Mace-Catlin Mutual Ditch Company, Incorporated and of water right no 63-00134 delivered by the Hart-Davis Ditch Company, Incorporated.

ii. Course of the Proceedings

The Idaho Department of Water Resources (hereinafter the "IDWR") issued its Director Report for Basin 63, Part II, on December 14, 2005. The last day for filing objections was April 16, 2006. The IDWR recommended water right nos. 63-00132 and 63-00133 in the name of the Mace-Catlin Ditch Company and water right no. 63-00134 in the name of the Hart-Davis Ditch Company, Inc.

The IDP&R filed an objection to water right no. 63-00132 and claimed ownership of 1.6714 c.f.s. of this water right.

The IDP&R filed an objection to water right no. 63-00133 and claimed ownership of 4.918 c.f.s. of this water right.

The IDP&R filed an objection to water right no. 63-00134 and claimed ownership of 3.3 c.f.s. of this water right.

The district court entered its *Second Amended Trial Scheduling Order* on December 21, 2007, which set the date of March 14, 2008 as the last date for filing motions for summary judgment.

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iii. Statement of Facts

a. The Stewart Decree water rights.

District Court Judge George Stewart of the then Seventh Judicial District of the State of Idaho in and for the County of Canyon signed on January 18, 1906 a decree in *Farmer's Cooperative Ditch Co. v. Riverside Irrigating Dist, et al.*, *aff'd* 14 Idaho 450 91908); *Order Denying Motion for a New Trial rev'd*, 16 Idaho 525 (1909). This decree is commonly referred to as the "Stewart Decree." IDP&R Exhibit 1 is a true and certified copy of the Stewart Decree.¹ Paragraphs V and VI of that decree state as follows:

V.

That the defendants T. C. CATLIN and POLETTE MACE be and they are hereby awarded the use of the waters of Boise River, diverted from a point on the south bank of said river, on Lot 5, Sec. 17, T. 4 N. R. 1 E. B.M. for use on their lands on Eagle Island, Ada County, Idaho, in the following amount from the following dates:

143 inches, from June 1, 1864; and hereby designated as Right No. 5. [63-132]
393 inches, from June 1, 1871; and hereby designated as Right No. 52. [63-133]
And adjudged to pay \$37.52 costs, in addition to the costs incurred by them.

VI.

That the defendant T. C. CATLIN be and hereby is awarded the use of the waters of Boise River, diverted near the center of the NE¼ of Sec. 18, T. 4 N. R. 1 E. B.M. through what is known as the Davis & Hart ditch, for use upon lands lying under said ditch on Eagle Island, Ada County, Idaho, in the following amount from the following date: 165 inches, from June 1, 1864. [63-134]

IDP&R Exhibit 1: Stewart Decree, at 5.

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¹ IDP&R Exhibit 1 was obtained from the IDWR. The IDWR has made notations on State of Idaho Exhibit 1 to identify each water right with the present water right numbering system. Right no. 5 is designated as water right no. 63-00132, Right no. 52 is designated as water right no. 63-00133, and Right no. 6 is designated as water right no. 63-00134.

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b. State of Idaho's acquisition of Stewart Decree Water Rights.

The IDP&R began historical research regarding the ownership of water rights at Eagle Island in 2003. This research began at the state office of the United States Department of the Interior, Bureau of Land Management, (hereinafter the "BLM"). The BLM maintains records concerning the ownership and disposal of public lands in Idaho. These records are shown on a document designated as a Master Title Plat, (hereinafter a "MTP"), for each township, which is normally a square shaped piece of land that is six miles on each side with thirty-six sections of one square mile each. The United States issued "patents" for the disposal of public domain lands. Each MTP illustrates the public lands conveyed by each patent. The IDP&R collected the patents disposing of public lands that were relevant to Eagle Island. For ease of reference, parcel numbers 1 through 14 were assigned to the various patents at Eagle Island. Eagle Island includes portions of Township 4 North, Range 1 East, B.M. and Township 4 North Range 1 West, B.M. Excerpts from the MTP for these two townships were used to designate parcels 1 through 14 and are included as IDP&R Exhibit 2. If a specific parcel such as parcel 6 is later subdivided into two parcels, then those several parcels are labeled as parcels 5.1, 5.2, 5.3 etc. IDP&R Exhibit 3: Affidavit of David J. Barber Dated March 13, 2008, at 2.

The chains of title for parcels 6.1, 6.2, 7.1, 7.2, 8 and 9.1 or the partial chains of title for parcels 2.1, 5.1, 5.2, 5.3, 5.4, and 5.5 are relevant to the ownership of water right nos. 63-00132, 63-00133, and 63-00134 and are compiled in IDP&R Exhibits 3 through 14. The partial chains of title for parcels 2.1, 5.1, 5.2, 5.3, 5.4, and 5.5 are for the period from the date of patent to November 19, 1929. True and correct copies of the patents and deeds that support these chains of title for parcels 2.1, 5.1, 5.2, 5.3, 5.4, 5.5, 6.1, 6.2, 7.1, 7.2, 8 and 9.1 are designated as IDP&R

Exhibits 14 through 41 and Exhibit 46. IDP&R Exhibit 45 is the Affidavit of Charles C. Smith Dated March 13, 2008, which verifies the ownership information contained in IDP&R Exhibits 4 through 15. A review of the chains of title for these parcels confirms that Polette C. Mace was the owner of parcels 2.1, 5.1, 5.2, 5.3, 5.4, and 5.5 on January 18, 1906 and that Truman C. Catlin was the owner of parcels 6.1, 6.2, 7.1, 7.2, 8, and 9 on that same date.² Thus, water right no. 63-00134 was appurtenant to parcels 6.1, 6.2, 7.1, 7.3, 8 and 9 on the date the Stewart Decree was signed. Water right nos. 63-00132 and 63-00133 were appurtenant to parcels 2.1, 5.1, 5.2, 5.3, 5.4, 5.5, 6.1, 6.2, 7.1, 7.3, 8 and 9 on the date the Stewart Decree was signed.

Karl Fischer, Charles P. and Mary Mace, Frank and Josie A. Mace, Benjamin and Grace J. Mace, Wesley and Rosa Mace, Grover and Cora B. Mace, and A. G. and Margaret C. Coker, executed an Agreement on November 19, 1929, which divided water right nos. 63-00132 and 63-00133 among the respective parties and which granted water right no. 63-00134 in its entirety to Karl Fischer. A true and certified copy of this Agreement is designated State of Idaho Exhibit 33. The procedure used to divide water right nos. 63-00132 and 63-00133 between the parties can be derived by an analysis of the acreage that each child of Polette Mace received and of the amount of each water right received. The following table provides that analysis:

Name	Acreage	WR # 5	WR # 52	Total WR In inches	Percentage WR # 5	Percentage WR # 52
Charles Mace	30.08	8.03	22.05	30.08	26.6955%	73.3045%
Frank Mace	40.08	10.7	29.38	40.08	26.6966%	73.3034%
Grover Mace	33.14	8.84	24.3	33.14	26.6747%	73.3253%
Wesley Mace	41.29	11	30.26	41.26	26.6602%	73.3398%
Ben Mace	31.24	8.33	22.91	31.24	26.6645%	73.3355%
A. C. Coker	20	5.35	14.65	20	26.75%	73.25%
Average					26.6903%	73.3097%

² Truman C. Catlin owned all of parcel 9 at the time of his death. IDP&R Exhibit 33: 3/15/1928. Estate of T. C. Catlin to Karl Fischer. Instrument No. 129718. 182/Deeds/389. [SRBA60366]. The subdivision of parcel 9 occurred later. IDP&R Exhibit 45: Affidavit of Charles C. Smith Dated March 13, 2008, at 4.

The Agreement described Mr. Fischer's share of these water rights for use on 493.91 acres as follows:

Water right number	Amount in Inches	Amount in C.F.S.
63-00132	90.75	1.815
63-00133	249.45	4.990
63-00134	165	3.300

On November 20, 1929, Mr. Fisher sold parcels 6.1, 6.2, 7.1, 7.2, 8, and 9 to the State of Idaho. Thus, the State of Idaho is the successor to the water rights described in Mr. Fischer's name in the November 19, 1929 agreement.

c. Transfers of the Fischer Real Property

i. Transfer to the Idaho Department of Fish and Game (hereinafter "IDF&G") for the Eagle Fish Hatchery.

The State of Idaho, Department of Correction, acquired the Fischer real property for a prison farm. IDP&R Exhibit 43: 2/28/1995. Memo from Stanley F. Hamilton, Director of IDL to Philip E. Batt, Governor. On June 11, 1943, Warden Poarch, Budget Director Reading, Secretary of State Curtis, and Fish and Game Commissioners Fiscus and Westcott reached agreement to transfer 32.1 acres of the Fischer real property to the IDF&G for a fish hatchery upon payment of two thousand and two hundred and fifty dollars to the State Penitentiary Fund. IDP&R Exhibit 42: Letter dated February 12, 1953 to Edward Woosley, State Land Commissioner, from State Board of Correction. This transfer of jurisdiction also included a transfer of a portion of the water rights as follows:

Right No. 5 8.40 inches

Right No. 52 23.16 inches
 31.56 inches

IDP&R Exhibit 42: Letter dated February 12, 1953 to Edward Woosley, State Land Commissioner, from State Board of Correction, at 5. Later, the IDF&G transferred the point of

diversion for a portion of these water rights to Seven Suckers Ditch. IDP&R Exhibit 44: Transfer No. 179, Certificate of Change in Point of Diversion of Decreed Water Right.

ii. Transfer to the IDP&R for the Eagle Island State Park.

The prison farm on Eagle Island was declared surplus property, and the State Board of Land Commissioners transferred jurisdiction over the real property to the IDP&R at the January 10, 1978 meeting of the State Board of Land Commissioners. IDP&R Exhibit 43: 2/28/1995. Memo from Stanley F. Hamilton, Director of IDL, to Philip E. Batt, Governor. Later, the State of Idaho, Department of Lands, executed a deed to parcels 6, 7, 8, and a portion of parcel 9 to the IDP&R on February 28, 1992 and a correction deed to the IDP&R on February 8, 1994. IDP&R Exhibit 37: 2/28/1992. IDL to IDP&R. Instrument No. 9215747. [SRBA60635]; IDP&R Exhibit 38: 2/8/1994. IDL to IDP&R. (Correction Deed). Instrument No. 94026232. [SRBA60661].

iii. Transfer by the IDP&R to Ron & Sharon E. Taylor.

The IDP&R granted to Ron Taylor and Sharon E. Taylor, husband and wife, on December 7, 1995 the following water rights from the Stewart Decree:

Together with irrigation water rights in the Mace-Catlin Ditch for 24.60 acres located in the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$, section 18, Township 4N, Range 1E, B.M. (a portion of the water right nos. A63-00133 and A63-00132).

The amount of water right no. 63-00132 apportioned to this land using the average percentage used from the Agreement dated November 19, 1929 would be 6.56 inches or 0.13 c.f.s.; the amount of water right no. 63-00133 apportioned to this land using the average percentage used from the Agreement dated November 19, 1929 would be 18.03 inches or 0.36 c.f.s. The sum of the two amounts would 24.6 inches of water.

The total amount of IDP&R's water rights from the Stewart Decree can be calculated by subtracting the amounts transferred to the IDF&G and to Mr. & Mrs. Ron Taylor. The following table makes these calculations.

Water right number	Amount purchased from Karl Fischer	Amount to IDF&G	Amount to Taylor	Net water Right inches	Net water Right c.f.s.
63-00132	90.75	8.40	6.56	75.79	1.52
63-00133	249.45	23.16	18.03	208.26	4.16
63-00134	165	--	--	165	3.3

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ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when the pleadings, depositions, affidavits, and admissions of records show that there was no genuine issue of material fact. In making that determination of whether an issue of material fact exists, all disputed facts are liberally construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Garner v. Bartshi*, 139 Idaho 430, 432 80 P.3d 1031, 1034 (2003). Substantive law defines as material those factual disputes that affect the outcome. Disputes about irrelevant matters do not defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II. THE EVIDENCE ESTABLISHES THAT IDP&R HOLDS RECORD LEGAL TITLE TO PORTIONS OF WATER RIGHT NOS. 63-00132 AND 63-00133 AND TO ALL OF WATER RIGHT NO. 63-00134.

A. The evidentiary presumption of a recommendation in a Director's Report disappears once a particular element has been rebutted by the evidence.

Idaho Code § 42-1411 sets forth the evidentiary effect of a recommendation in a Director's Report regarding a water right acquired under state law. Idaho Code § 42-1411 states, in part, as follows:

(4). The director shall file the director's report with the district court, and the director's report shall be part of the record. . . . [T]he director's report . . . shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law.

(5) Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right. . . . [A] claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report.

Idaho Code § 42-1411 (emphasis added). The Idaho Supreme Court described the evidentiary consequences of Idaho Code § 42-1411 as follows:

This Court has considered the weight and effect of a director's report. Hagerman Water Right Owners, Inc., 130 Idaho at 736, 947 P.2d at 409 (1997). In Hagerman, the claimants objected to the director's recommendation that the water rights consist of a lesser amount than that claimed. Id. at 738, 947 P.2d at 411. The Court explained that the prima facie status contained in section 42-1411 "constituted a rebuttable evidentiary presumption." Id. at 745, 947 P.2d at 418. The Court then noted that I.R.E. 301 governs presumptions in civil cases. Id. The Court then reasoned that "when an evidentiary presumption arises it shifts only the burden of production. When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." Id. Furthermore, "the Director's Report is *prima facie* evidence and the facts contained therein are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut the presumption." Id. **Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant."**

McCray v. Rosenkrance, 135 Idaho 509, 20 P.3d 693 (2001). Accordingly, the IDP&R must present sufficient evidence to rebut the presumption that Mace-Catlin Ditch Company, Incorporated owns water right nos. 63-00132 and 63-00133 and that Hart-Davis Ditch Company, Incorporated owns water right no. 63-00134, as stated in the director's report for these water rights.

- B. The evidence in this matter establishes that the State of Idaho acquired legal title to portions of water right nos. 63-00132 and 63-00133 and to all of water right no. 63-00134.

The Stewart Decree was signed on January 18, 1906. Paragraphs V and VI of that decree stated as follows:

V

That the defendants T. C. CATLIN and POLETTE MACE be and they are hereby awarded the use of the waters of Boise River, diverted from a point on the south bank of said river, on Lot 5, Sec. 17, T. 4 N. R. 1 E. B.M. for use on their lands on Eagle Island, Ada County, Idaho, in the following amount from the following dates:

143 inches, from June 1, 1864; and hereby designated as Right No. 5. [63-132]
393 inches, from June 1, 1871; and hereby designated as Right No. 52. [63-133]
And adjudged to pay \$37.52 costs, in addition to the costs incurred by them.

VI

That the defendant T. C. CATLIN be and hereby is awarded the use of the waters of Boise River, diverted near the center of the NE¼ of Sec. 18, T. 4 N. R. 1 E. B.M. **through what is known as the Davis & Hart ditch**, for use upon lands lying under said ditch on Eagle Island, Ada County, Idaho, in the following amount from the following date: 165 inches, from June 1, 1864. [63-134]

Statement of Facts, hereinafter "SOF", at 3.

The Estate of T. C. Catlin sold Mr. Catlin's lands on Eagle Island to Karl Fischer on March 15, 1928. On November 19, 1929, Karl Fischer, Charles P. and Mary Mace, Frank and Josie A. Mace, Benjamin and Grace J. Mace, Wesley and Rosa Mace, Grover and Cora B. Mace, and A. G. and Margaret C. Coker, executed an Agreement, which divided water right nos. 63-00132, 63-00133, and 63-00134 among the respective parties. Mr. Fischer's share of these water rights was as follows:

63-00132:	90.75 inches	1.815 c.f.s.
63-00133:	249.45 inches	4.990 c.f.s.
63-00134:	165 inches	<u>3.300 c.f.s.</u>
		10.105 c.f.s.

Mr. Fischer sold the lands that are within EISP to the State of Idaho on November 20, 1929. SOF at. 4-5. Thus, the State of Idaho acquired legal title to the water rights of Karl Fischer described in the Agreement of November 19, 1929 and the evidentiary presumption of the Director's Report is rebutted. The IDP&R is a successor to the following amounts of those water rights after the subtraction the amounts of small transfers to the IDF&G and to Mr. & Mrs. Ron Taylor:

Water right number	Amount in c.f.s.
63-00132	1.52
63-00133	4.16
63-00134	3.3
Total	8.98 c.f.s.

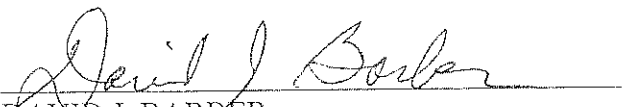
CONCLUSION

The chains of title for the lands within Eagle Island State Park for the period from the date of patent to November 20, 1929 are simple and straight forward. Those chains of title demonstrate that the IDP&R is the legal successor to 8.98 c.f.s of water right nos. 62-00132, 63-00133, and 63-00134. These chains of title rebut the determination of ownership in the Mace-Catlin Mutual Ditch Company, Inc. for water right nos. 63-00132 and 63-00133 and in Hart Davis Ditch Company, Inc. for water right no. 63-00134. Since no deeds transferring these water rights from the State of Idaho to these ditch companies exist, the district court should determine that the IDP&R owns water right numbers 63-00132, 63-00133, and 63-00134.

RESPECTFULLY SUBMITTED this 14th day of March 2008.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO


DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 14th day of March 2008, I caused to be served the original and/or copy of the STATE OF IDAHO, DEPARTMENT OF PARKS AND RECREATION'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT on each of the following persons by the indicated method:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to the following persons:

Special Master Theodore Booth
Snake River Basin Adjudication
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Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: 345-8800
- ☐ Statehouse Mail

Hart-Davis Ditch Company
Represented by:
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RINGERT CLARK
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Boise, ID 83701-2773

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- ☐ Statehouse Mail

Mace Catlin Mutual Ditch Company
Incorporated
Represented by:
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Ron Sali & Ron Sali Properties
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Represented by:
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Boise, ID 83716

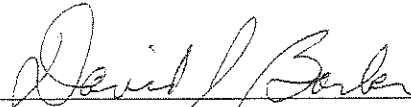
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Chief of Natural Resource Division
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Not Applicable

A handwritten signature in cursive script, appearing to read "David J. Barber", is written over a horizontal line.

DAVID J. BARBER
Deputy Attorney General