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DEPARTMENT OF
WATER RESOURCES

Michael C. Creamer (ISB #4030)
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
mcc@givenspursley.com

*Attorneys for Ron Sali and
Ron Sali Properties, Inc., Profit Sharing Plan*
S:\CLIENTS\441954\Sali Response to Hart-Davis MSI.DOC

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE**

In Re SRBA

Case No. 39576

Subcase Nos. 63-00132, 63-00133,
63-00134, 63-00134A, 63-00134B,
63-00186A, 63-00186B, 63-17205 and
63-31772

**RON SALI'S AND RON SALI
PROPERTIES, INC., PROFIT
SHARING PLAN'S RESPONSE TO
HART-DAVIS DITCH COMPANY'S
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW, Ron. Sali and Ron Sali Properties, Inc., Profit Sharing Plan ("Sali"), by and through their attorneys of record, Givens Pursley LLP, and, pursuant to the Second Supplemental Trial Scheduling Order filed December 31, 2007, hereby file their Response to Hart-Davis Ditch Company's Motion for Summary Judgment.

Sali's response addresses one significant issue raised by Hart-Davis Ditch Company's ("Hart-Davis") memorandum in support of its motion for summary judgment; namely the issue

RON SALI'S AND RON SALI PROPERTIES, INC., PROFIT SHARING PLAN'S RESPONSE TO
HART-DAVIS DITCH COMPANY'S MOTION FOR SUMMARY JUDGMENT - 1

of the extent to which a ditch company can withhold consent to a shareholder's request to change or transfer the shareholder's water right delivered by a mutual ditch and represented by ditch company shares. Hart-Davis is correct that consent from the ditch company is required, but its silence with respect to the grounds for the giving or withholding of consent suggests that Hart-Davis may believe its consent can be withheld unilaterally and arbitrarily. Sali urges the Court to recognize that Idaho statutes requiring a ditch company's consent before a water right holder can change or transfer his water right do not eliminate the requirements that consent cannot be unreasonably withheld and that a shareholder is entitled to transfer his or her water rights provided no other water users are injured.

A long line of Idaho decisions and decisions of other prior appropriation states recognize that the water user served by a canal company or irrigation district who actually places the water to beneficial use is the true owner of the water rights diverted and delivered through a common canal. The most recent confirmation of this in Idaho is the case of *United States of America v. Pioneer Irrig. Dist., et al.*, 144 Idaho 106, 157 P.3d 600 (2007) (as a matter of Idaho constitutional and statutory law, title to the use of the water is held by the consumers or users of the water, and the delivery entity at most serves as the water right owner's trustee).

This right held by the beneficial user of water is a real property right that can be conveyed together with or apart from the land to which it is appurtenant. *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918); *In re: Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). *Robinson* held that the water right can be made appurtenant to other lands so long as the transfer does not injure other appropriators. 61 Idaho at 469. See also, *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930) ("one of the valuable incidents of [a water right] which an owner cannot be deprived is the right

to use it where he will and to change its place of use, providing always that by reason of such change in the place of use the rights of others are not adversely affected.)

Where the water right is represented by shares of stock in a water delivery entity, Idaho Code § 42-108 does require the water delivery organization's consent to the transfer. But this consent authority needs to be read together with the Idaho court's recognition of the inherent right of the water right owner to transfer, provided other water rights are not injured. *Hard v. Boise City Irrig. & Land Co.*, 9 Idaho 589, 76 P. 331 (1904); *In re: Johnson*, 50 Idaho 573, 300 P. 492 (1931); *Colthorp v. Mountain Home Irrig. Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945). An alleged "injury" to a ditch by a transfer is not an injury to a water rights (i.e., increased cost among remaining ditch users for overall operation and maintenance), and is not a recognized injury. See, *In re: Johnson*, 50 Idaho at 579-80 (the ditch right and water right are two separate species of property, ... and there is no injury resulting from the failure of a water right holder to continue using the canal in common with others).

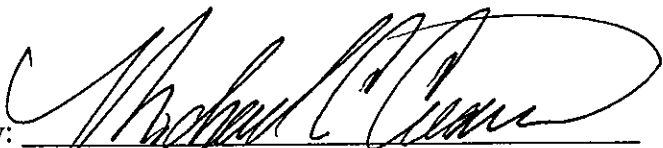
Historically, shareholders in Boise Valley canals were able to move their water rights out of one canal and into another or change their diversion to a private point of diversion with relative ease—a fact that is readily apparent from a review of historical Idaho Department of Water Resources water right and transfer files for the various Boise River canals. This allowed, for example, for early settlers who learned that their bottomlands were too gravelly to be irrigable, to move their rights out of one ditch company system and into another so that the water could be delivered to more productive ground. See e.g., *In re: Robinson, supra* (Supreme Court recognizes right of shareholder in North Side Canal Company to change the place of use of his water right to more productive lands provided no other rights are injured).

Moreover, conditions can almost always be imposed on a transfer by a ditch company to insure that the water rights of other shareholders on the ditch are not injured.¹ One of the most common conditions on such transfers is the requirement that the water right holder leave his or her proportionate share of ditch conveyance losses in the ditch after the transfer. Provided reasonable conditions can be imposed to protect other water rights in the ditch, the ditch company's consent cannot be withheld so as to deprive a shareholder of his or her inherent right of transfer.

In light of the foregoing, Sali would caution that while the Court can recognize a ditch company's statutory right under I.C. § 42-108 to consent to water right transfers by their shareholders, that right cannot be unreasonably exercised. Any order the Court issues on the State's or Hart-Davis' cross-motions for summary judgment should not suggest that a ditch company's consent could be withheld where no injury to other water right owners will occur or where reasonable conditions can be imposed to prevent injury.

DATED this 14th day of April, 2008.

GIVENS PURSLEY LLP

By: 

Michael C. Creamer
Attorneys for Ron Sali and
Ron Sali Properties, Inc., Profit Sharing Plan

¹ Such conditions would be distinct from conditions that IDWR might impose under I.C. § 42-222 to prevent injury to other water right holders who are not shareholders.

Certificate of Service

I hereby certify that on this 14th day of April, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

United States Department of Justice
Environment and Natural Resource Div.
550 W. Fort St., MSC 033
Boise, ID 83724

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Director of IDWR
IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Mace-Catlin Ditch Company
Represented by:
Jon C. Gould
Ringert Clark Chartered
455 S. Third
PO Box 2773
Boise, ID 83701-2773
Fax No.: (208) 342-4657

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Hart-Davis Ditch Company, Inc.
Represented by:
S. Bryce Farris
Ringert Clark Chartered
455 S. Third
PO Box 2773
Boise, ID 83701-2773
Fax No.: (208) 342-4657

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Idaho Department of Parks and Recreation
5657 Warm Springs Avenue
Boise, ID 83716

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

State of Idaho
Represented by:
Natural Resources Div. Chief
Idaho Attorney General's Office
PO Box 44449
Boise, ID 83711-4449

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Lawrence G. Wasden
Clive J. Strong
David J. Barber
Office of the Attorney General
Natural Resources Division
700 W. Jefferson St., 210 Statehouse
PO Box 83720
Boise, ID 83720-0010

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Special Master Ted Booth
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-3707

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile


Michael C. Creamer