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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 RESPONSE TO THE      |
| Case No. 39576 | ) | MOTIONS FOR SUMMARY JUDGMENT BY HART       |
|                | ) | DAVIS DITCH COMPANY AND MACE-CATLIN        |
|                | ) | MUTUAL DITCH COMPANY, INCORPORATED         |

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 RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT BY HART DAVIS DITCH COMPANY AND MACE-CATLIN MUTUAL DITCH COMPANY INCORPORATED in accordance with the SECOND SUPPLEMENTAL TRIAL SCHEDULING ORDER entered on December 21, 2007.

STATE OF IDAHO DEPARTMENT OF PARKS AND RECREATION'S BRIEF  
IN RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT BY HART  
DAVIS DITCH COMPANY AND MACE CATLIN MUTUAL DITCH COMPANY, INCORPORATED

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 (hereinafter “Mace-Catlin”) and of water right no 63-00134 delivered by the Hart-Davis Ditch Company, Incorporated (hereinafter “Hart Davis”).

ii. Additional Course of the Proceedings

Hart Davis filed on March 14, 2008 its *Hart Davis Ditch Company's Motion Of Summary Judgment, Affidavit Of S. Bryce Farris In Support Of Motion For Summary Judgment*, and *Affidavit Of Ron Rippey In Support Of Motion For Summary Judgment*, and lodged *Hart Davis Ditch Company's Memorandum In Support Of Motion For Summary Judgment* (hereinafter “Hart Davis Memo”).

Mace Catlin filed on March 14, 2008 its *Mace-Catlin Mutual Ditch Company's Motion For Summary Judgment, Affidavit of Mel Carlson in Support of Motion for Summary Judgment* and *Affidavit Of Jon C. Gould In Support Of Motion For Summary Judgment*, and lodged *Mace-Catlin Mutual Ditch Company's Memorandum In Support Of Motion For Summary Judgment* on the same date.

The IDP&R filed on March 14, 2008 its *State of Idaho, Department Of Parks And Recreation's Motion For Summary Judgment* and *State Of Idaho's Department Of Parks And Recreation's List Of Exhibits*, and lodged the *State of Idaho, Department Of Parks And Recreation's Brief In Support Of Its Motion For Summary Judgment* on the same date.

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.<sup>1</sup> Paragraphs V, VI, XLIX, and L 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]

...

XLIX

That the defendant MARY G. DAVIS be, and she is hereby awarded the use of the water of the Boise River, diverted at a point about the center of the NE ¼ of

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<sup>1</sup> IDP&R Exhibit 1 was obtained from the Idaho Department of Water Resources (hereinafter "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.

Sec. 18, T. 4 N. R. 1 E. B.M., for use upon lots 3 and 4 and the SW ¼ of Sec. 13, and lots 3 and 4 of Sec. 24 all in T. 4 N. R. 1 W. B.M. in the following amount and from the following date: 220 inches, from June 1, 1872; and hereby designated as Right No. 57. And be adjudged to pay \$15.40 costs in addition to the costs incurred by her. [63-0186]

L.

That the defendant EDWARD N. HART be, and he is hereby awarded the use of the waters of Boise River, diverted at a point about the center of the NE ¼ of Sec. 18, T. 4 N. R. 1 E. B.M., for use upon the following described lands: beginning at SW corner of Sec. 13, T. 4 N. R. 1 W. B.M., and running thence east 517 feet, thence north 3960 feet, thence west 517 feet, thence south to place of beginning; also lots 9, 10, 11 and 12, and E ½ of SE ¼, Sec. 14, all in T. 4 N. R. 1 W. B.M. in the following amount and from the following date; 165 inches, from June 1, 1872; hereby designated as Right No. 58. And be adjudged to pay \$11.55 costs in addition to the cost incurred by him. [63-0187]

IDP&R Exhibit 1: Stewart Decree, at 5 and 21.

b. 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 (\$2,250.<sup>00</sup>) to the State Penitentiary Fund. IDP&R Exhibit 42: Letter dated February 12, 1953 to Edward Wozley, 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 Woozley, 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 in 1945. 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. Development at Eagle Island State Park began in 1983. IDP&R Exhibit 49: *Affidavit of David M. Ricks Dated April 14, 2008*, at 2. Later, the State of Idaho, Department of Lands, (hereinafter "IDL") 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].

c.      The Creation of the Hart Davis Ditch Company, Incorporated.

The Articles of Incorporation of Hart-Davis Ditch were executed on March 10, 1924, by three persons: J. M. Silver, D. W. Shaffer, and John Rader, and the articles stated that the following five persons had each subscribed to one share of stock: J. M. Silver, D. W. Shaffer, John Rader, E.

F. Kunkler, and Thomas Williams. *Affidavit of S. Bryce Farris In Support of Motion for Summary Judgment*, Exhibit A, at 2-3.

d. The Creation of the Mace-Catlin Mutual Ditch Company, Incorporated.

The Mace-Catlin Mutual Ditch Company, Incorporated was created in April 1999 with the execution of the Articles of Incorporation on April 14, 1999 and the filing of those Articles of Incorporation on April 22, 1999 with the Office of the Idaho Secretary of State. *Affidavit of Jon C. Gould In Support Of Motion For Summary Judgment*, Exhibit A. The Articles of Incorporation state in part:

ARTICLE 3: The purposes for which this Corporation is formed are:

1. To purchase, store, distribute and use **water that its shareholders are entitled to by virtue of water rights bestowed upon each shareholder** by the State of Idaho, Department of Water Resources, . . .

*Id.* Exhibit A, at 1. Thus, the express purpose of the Mace-Catlin Mutual Ditch Company, Incorporated is to deliver “the water that its shareholders are entitled to by virtue of water rights bestowed upon each shareholder.” Subsequently, the Mace-Catlin Mutual Ditch Company, Incorporated forfeited its corporate charter on July 8, 2004. IDP&R Exhibit 48: Certificate of Administrative Action of Mace-Catlin Mutual Ditch Company, Incorporated, File Number C128566, dated April 9, 2008.

e. The Absence of a Notice of Claim by the IDP&R for the Eagle Island Water Rights.

The IDP&R did not file during the initial claims taking any notices of claim for the three Eagle Island water rights at issue in this matter. The absence of any notice of claim was caused by several factors. The IDP&R had not developed a comprehensive inventory of its water rights at the time of initial claims taking. The failure to develop a comprehensive inventory was primarily a funding and staffing issue. IDP&R Exhibit 47: *Affidavit Of David J. Barber Dated April 14,*

2008, at 2-5. The comprehensive inventory was completed within the last year. IDP&R Exhibit 49: *Affidavit of David M. Ricks Dated April 14, 2008*, at 2.

Deputy Attorney General Pete Ampe represented the various state agencies in the SRBA during his tenure with the Office of the Idaho Attorney General from March 1997 through May 2001. He had a big job representing the various state agencies, since the State of Idaho is the second largest landowner in the State. During his representation, the review of claims by various state agencies and of director's reports as they were reported to the SRBA were major tasks. This work required Mr. Ampe to prioritize his review and work. Since Basin 63 was not reported until 2006, a review of water rights in Basin 63 would not have received much attention. Consequently, Mr. Ampe never identified the ownership of water rights at Eagle Island for IDP&R as an issue for investigation. *Id.*

Deputy Attorney General David J. Barber was assigned the role of assisting state agencies upon Mr. Ampe's resignation effective May 25, 2001. He identified the ownership of the Eagle Island water rights as an issue that warranted further research. That research continued for a substantial period of time as the scope of the research was expanded several times. Ultimately, almost six hundred deeds were collected from the Ada County Recorder's Office and reviewed. An experienced title examiner was then hired to finish the research. After the IDP&R filed its objection to these water rights, no purpose would have been served by the IDP&R in filing a motion to file late notice of claim when the ownership issue was pending as objections to the three water rights here. Claims of ownership are frequently litigated in the SRBA through an objection. *Id.*

f. The IDP&R Plans for Eagle Island

The IDP&R created a new Master Plan for the Eagle Island State Park in 2006. It recommended the creation of a series of lakes (120 acres) and channels tying together the urban and natural functions of the park. The park will provide for year-round recreation opportunities, with the north portion of the park having the highest concentration of uses and the more auto-dependent uses. IDP&R Exhibit 49: *Affidavit of David M. Ricks Dated April 14, 2008*, at 3. Mr. Ricks identified two concerns for the ditch companies with the ownership of the three water rights in the name of the IDP&R. (1) Would the IDP&R continue to pay the assessments for the operation and maintenance? (2) Would the IDP&R deliver to the Hart Davis ditch water for the water users down ditch from Eagle Island State Park? He stated that the IDP&R intended to continue to pay the assessments, if the Legislature appropriates monies for IDP&R. He also stated that the IDP&R will deliver sufficient water for downstream users. *Id.* at 4.

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## **ARGUMENT**

### **I. INTRODUCTION**

The primary arguments of Hart Davis and Mace Catlin for their respective ownership of these three water rights are that the IDP&R lost these water rights through the doctrines of laches, estoppel, waiver or abandonment. Hart Davis and Mace Catlin then argue that a determination that the IDP&R owns these water rights would create various problems of administration that this court should avoid. The IDP&R will first demonstrate that none of the legal arguments are sufficient to warrant a conclusion that the IDP&R does not own these water rights in the amount claimed. The IDP&R will then address the policy concerns that the ditch companies raise.

### **II. THE STATE OF IDAHO HAS NOT LOST OWNERSHIP OF WATER RIGHT NOS. 63-00132, 63-00133, AND 63-00134 BY THE DOCTRINE OF LACHES.**

“Long and continuous acquiescence in another’s use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim.” This doctrine is referred to as laches. *Hillcrest Irr. Dist. V. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 66 P.2d 115 (1937). The delivery of water by Hart-Davis and Mace-Catlin to the lands owned by the IDP&R and its predecessors and the payment of assessments by the IDP&R and its predecessors to Hart-Davis and Mace-Catlin was not acquiescence in the Hart Davis’ ownership of the water right no. 63-00134 or in the Mace-Catlin’s ownership of water right nos. 63-00132 and 63-00133. Such delivery of water and payment of assessments is equally consistent with ownership of the water right by the entities that receive the water. Stated another way, a ditch company may not have any ownership of the water rights held by its members. The ditch company is only a common delivery mechanism created for the convenience of the entities that receive the water.

The present case is an excellent example of a ditch company delivering water for another. The Stewart Decree described the owner of water right no. 63-00134 as T. C. Catlin and made the following statement about the delivery of that water right to its owner: "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 . . .**" Statement of Facts (hereinafter "SOF")<sup>0</sup> at 3. Thus, the Stewart Decree concluded that the Davis & Hart ditch was only a delivery mechanism for water right no. 63-00134; the owner was T. C. Catlin. The IDP&R is the sole successor to the ownership of water right no. 63-00134 as demonstrated in the *State Of Idaho, Department Of Parks And Recreation's Brief In Support Of Its Motion For Summary Judgment*, at 10-11.

Furthermore, Hart-Davis mischaracterizes the factual record before the District Court in the following statement:

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 assessments of Hart Davis. At no time has the water right ever been in the name of the 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.

*Hart Davis Ditch Company's Memorandum In Support Of Motion For Summary Judgment*, hereinafter "Hart-Davis Memo," at 1-2. Here the State of Idaho has claimed ownership of the water rights that were described in the Agreement dated November 19, 1929, and some of the water rights that were acquired in the Agreement of November 19, 1929 have been held in the name of the State of Idaho. A correct statement of the chronology of events is as follows:

November 20, 1929    State of Idaho, Department of Correction, acquires the Fischer property on Eagle Island for a prison.<sup>2</sup>

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<sup>2</sup> IDP&R Exhibit 36.

|                   |                                                                                                                                                                                                                |
|-------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| June 11, 1943     | State of Idaho, Department of Correction, transfers 32.1 acres of the Eagle Island prison property to the IDF&G for a hatchery. This transfer included a portion of the water rights as follows:               |
|                   | Right No. 5 [63-132]            8.4 inches                                                                                                                                                                     |
|                   | <u>Right No. 52 [63-133]</u> 23.16 inches                                                                                                                                                                      |
|                   | 31.56 inches <sup>3</sup>                                                                                                                                                                                      |
| March 31, 1945    | Idaho Department of Reclamation approves a change in point of diversion for a portion of Right No. 5 and Right No. 52 at the request of the Idaho Department of Fish and Game. <sup>4</sup>                    |
| January 10, 1978  | State Board of Land Commissioners transfers jurisdiction of the remaining Eagle Island prison property to the Idaho Department of Parks and Recreation. <sup>5</sup>                                           |
| February 28, 1992 | IDL executes a deed of the Eagle Island prison property to the IDP&R. <sup>6</sup>                                                                                                                             |
| February 8, 1994  | IDL executes a correction deed of the Eagle Island prison property to the IDP&R. <sup>7</sup>                                                                                                                  |
| December 7, 1995  | IDP&R executes a deed to Ron Taylor and Sharon E. Taylor for 24.6 acres of the Eagle Island prison property and transfers a portion of water right nos. 63-132 and 63-133 to Mr. and Mrs. Taylor. <sup>8</sup> |

This chronology establishes that the State of Idaho, Department of Correction, owned all of the Eagle Island prison property from November 20, 1929 to June 10, 1943. The State of Idaho, Department of Correction, claimed ownership of the water rights it acquired and transferred a small portion of those water rights with 32.1 acres of land to the IDF&G on June 11, 1943. The IDF&G then obtained a transfer of the point of diversion for a portion of its water rights on March 31, 1945. The Idaho Department of Reclamation recognized the validity of the

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<sup>3</sup> IDP&R Exhibit 42.

<sup>4</sup> IDP&R Exhibit 44.

<sup>5</sup> IDP&R Exhibit 43.

<sup>6</sup> IDP&R Exhibit 37.

<sup>7</sup> IDP&R Exhibit 38.

<sup>8</sup> IDP&R Exhibit 46.

ownership in the name of a State of Idaho agency when it approved the transfer. The IDP&R did not get involved until 1978 when the Idaho State Board of Land Commissioners approved a transfer of the remaining Eagle Island prison property to the IDP&R. Therefore, the argument of Hart-Davis quoted above has several mischaracterizations of fact. The State of Idaho, Department of Correction, obviously claimed ownership of the three water rights during its tenancy from 1929 through 1978, and the IDF&G claimed ownership of the water rights transferred to it, as well. Thus, the claim of eighty years of acquiescence is simply incorrect.

The claim to ownership by Mace-Catlin is even weaker. Its articles of incorporation provide that the purpose of the corporation includes the distribution of “water that its shareholders are entitled to by virtue of water rights bestowed upon each shareholder by the State of Idaho . . .” SOF at 6. Thus, Mace-Catlin’s articles recognize the type of ownership of the water rights that the State of Idaho claims here.

Finally, there is an even more fundamental problem with the argument that the IDP&R has lost its ownership of these three water rights by the doctrine of laches. In *Hillcrest Irr. Dist. V. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 66 P.2d 115 (1937) the doctrine of laches is defined as follows: “Long and continuous acquiescence in another’s use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim.” The IDP&R has continued to use water right nos. 63-00132, 63-00133 and 63-00134 on its Eagle Island real property, and the two ditch companies have delivered the water to the IDP&R. Thus, there has not been “another’s use” of this water. The IDP&R is not precluded by the doctrine of laches from making its claim to water right nos. 63-00132, 63-00133, and 63-00134.

**III. THE STATE OF IDAHO HAS NOT LOST OWNERSHIP OF WATER RIGHT NOS. 63-00132, 63-00133, AND 63-00134 BY THE DOCTRINE OF ESTOPPEL.**

In *Willig v. State Department of Health & Welfare*, 127 Idaho 259, 899 P.2d 969 the Idaho Supreme Court stated:

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 be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice. . . . 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 a prior position.

Id. 127 Idaho at 260 899 P.2d at 970 (citations omitted). The IDP&R is aware of no facts that support any of the above elements for equitable estoppel, and the Hart-Davis and Mace-Catlin do not offer any. Thus, the district court can quickly reject any application of the doctrine of equitable estoppel here.

Hart-Davis and Mace-Catlin argue that quasi-estoppel should preclude the IDP&R's claim of ownership. Hart-Davis states:

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 come in for the first time in 2006 and claim ownership.

Hart Davis Memo at 8. There is nothing unconscionable about the IDP&R's claim here. As pointed out earlier, there is no factual basis to support Hart Davis' claim of seventy or eighty years of State acquiescence in Hart Davis or Mace Catlin ownership. Indeed, until Hart Davis and Mace-Catlin filed claims in the SRBA, there was no reason for IDP&R to have knowledge

of an adverse claim of ownership. At all times prior to filing the claim and even today, IDP&R continues to use the water rights now claimed by Hart Davis and Mace-Catlin. Hart Davis and Mace-Catlin were simply viewed as entities to convey “the water rights that its shareholders are entitled to by virtue of water rights bestowed upon each shareholder.”<sup>9</sup> The IDP&R only acquired some possessory interest in 1978 in the Eagle Island prison property. Development at Eagle Island State Park began in 1983. Full fee title did not occur until 1992. SOF, at 5. More importantly, the delivery of water by these organizations to the State of Idaho’s various entities has never been an acquiescence by the State of Idaho in ownership by the ditch companies. Such delivery is equally consistent with ownership of the water rights by the individuals that are a member of the ditch company.

**IV. THE STATE OF IDAHO HAS NOT LOST OWNERSHIP OF WATER RIGHT NOS. 63-00132, 63-00133, AND 63-00134 BY THE DOCTRINE OF WAIVER OR ABANDONMENT.**

“Waiver requires a voluntary, intentional relinquishment of a known right that is relied upon by an adverse party and which alters their position.” *Cowles Publishing Co. v. Kootenai County Board of County Commissioners*, 144 Idaho 259, \_\_\_, 159 P.3d 896, 903 n. 5 (2007). Hart-Davis and Mace-Catlin have offered no evidence to establish a waiver of a claim to these water rights here. The payment of assessments to a ditch company does not constitute “a voluntary, intentional relinquishment of a known right.”

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<sup>9</sup> The Companies’ attempt to make much out of the failure of IDP&R to file a claim in the SRBA. Given the scope of the SRBA and the land ownerships of the State it is not surprising or uncommon for the State to inadvertently overlook a claim. The absence of any notice of claim for Eagle Island was caused by several factors. First, the IDP&R had not developed an inventory of its water rights because of staffing and funding issues at the time. Second Deputy Attorney General Pete Ampe, who assisted state agencies, did not have an opportunity to fully investigate and review the Eagle Island water right situation. Deputy Attorney General David J. Barber identified the ownership issue at Eagle Island and began research that continued for a substantial period of time because of the multiple ownership records. Ultimately, almost six hundred deeds were collected from the Ada County Recorder’s office and reviewed. An experienced title examiner was then hired to finish the research. It is not unusual in the SRBA for ownership issues to arise during an objection as opposed to a claim. SOF at 6-7.

“Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of a water right.” *Jenkins v. State, Dep’t of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982) (quoting *Sears v. Berryman*, 101 Idaho 843, 847, 623 P.2d 455, 459. The payment of assessments to a ditch company does not establish “an intent to abandon” or “an actual relinquishment . . . of a water right.” Indeed, it is impossible to find a relinquishment of ownership given the IDP&R’s continued use of its water at Eagle Island.

**V. THE HART DAVIS DITCH COMPANY HAS NOT ACQUIRED TITLE TO WATER RIGHT NO. 63-00134 BY IMPLIED GRANT.**

Hart Davis makes the following argument:

The State’s position is essentially that there was no conveyance of the water rights 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.

...

By forming a ditch company, the members or shareholders agree to consolidate or commingle both there [sic] 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.

Hart Davis Memo, at 2, 5. Hart Davis has ignored the facts in this argument. The following chronology documents the critical facts:

January 18, 1906: Stewart Decree entered.

T. C. Catlin: Owner of water right no. 63-134, “which was diverted through what is known as the Davis & Hart ditch . . .”

March 10, 1924: Articles of Incorporation for the Hart Davis Ditch Company are executed by J. M. Silver, D. W. Shaffer & John Rader and J. M. Silver, D. W. Shaffer, John Rader, E. F. Kunkler & Thomas Williams each subscribe to one share.

- March 15, 1928: Estate of T. C. Catlin sells the Eagle Island property to Karl Fischer.
- March 15, 1928: Karl Fischer sells a ten acre parcel of the Eagle Island property to A. G. Coker.
- November 19, 1929: Agreement between Karl Fischer, Charles P. & Mary Mace, Frank & Josie Mace, Benjamin & Grace J. Mace, Wesley & Rosa Mace, Grover & Cora B. Mace, and A. G. & Margaret C. Coker regarding water rights.

SOF at 3-4. There is no basis to argue that “[b]y forming a ditch company the members or shareholders agree to consolidate or commingle both there [sic] ditch rights and water rights into one entity . . .” The delivery of water right no. 63-134 through the Davis & Hart ditch to the owner T. C. Catlin was already a matter of record in a court judgment eighteen years before the incorporation of Hart Davis. Furthermore, the Estate of T. C. Catlin did not transfer the land to Karl Fischer until March 15, 1928. Thus, the decreed owner or the decreed owner’s estate owned water right no. 63-134 at the time of incorporation of Hart Davis. Hart Davis has not shown any basis to imply a grant from the decreed water right owner to the newly incorporated Hart Davis Ditch Company in 1924. Finally, the Idaho Department of Reclamation, a predecessor in function of the IDWR, has already recognized the validity of the Agreement of November 19, 1929. Transfer No. 179 in 1945 approved the transfer of the point of diversion for portions of two of the water rights described in the Agreement of November 19, 1929. SOF, at 5. If the Agreement of November 19, 1929 had not been valid, there would have been no basis to approve the point of diversion as described in Transfer No. 179. IDP&R Exhibit 44: Transfer No. 179, Certificate of Change in Point of Diversion of Decreed Water Right. Hart Davis does not own water right no. 63-134 by implied grant.

**VI. THE DETERMINATION THAT THE IDP&R OWNS PORTIONS OF WATER RIGHT NOS. 63-00132, 63-00133, AND ALL OF WATER RIGHT NO. 63-00134 WILL NOT CAUSE ANY OF THE HAVOC PROJECTED BY THE HART DAVIS DITCH COMPANY AND MACE-CATLIN MUTUAL DITCH COMPANY, INCORPORATED.**

**A. Introduction**

Both ditch companies argue that the following adverse consequences will follow if the court determines to adjudicate the water right in the name of IDP&R: (1) granting the State's request will wreak havoc on the water users, (2) the state cannot change the elements of the water right if it injures others, (3) approving the State's objection could cause significant administrative burden; (4) the State would continue to be liable for ditch maintenance and operation assessments. These policy arguments are legally irrelevant to the issue ownership and moreover are without merit.

**B. A decision that the IDP&R owns a portion of water right nos. 63-00132 and 63-00133 and all of water right no. 63-00134 would not cause the other users any problems.**

IDP&R's present plans for Eagle Island State Park are to create a park with a much larger water recreation component with about 120 acres of ponds. While the character of the existing park will change substantially, the impact on the water users within Hart Davis and Mace Catlin will be non-existent. IDP&R will continue to pay its assessments for operation and maintenance of the ditches and diversion structures as it has done in the past. IDP&R will also continue to cooperate with both ditch companies as well. SOF at 7-8. Nonetheless, the IDP&R understands that the IDP&R will need to file an application for transfer under Idaho Code § 42-222 to change the purpose of use for some of its water rights from irrigation to aesthetic storage. Idaho Code § 42-222 precludes any changes that injure other water users.

The potential for problems differs between the two ditch companies. The place of use for Mace-Catlin is generally upstream from Eagle Island State Park. The continued payment of the assessments addresses the concerns of Mace-Catlin. The place of use for Hart Davis is generally down ditch from Eagle Island State Park. Payment of the assessments for operation and maintenance would also apply here. An additional potential concern is whether the changes in Eagle Island State Park would adversely affect the amount of water delivered in the Hart Davis ditch where it leaves Eagle Island. This concern is fully addressed by Idaho law, which precludes a change in use that will cause injury to another water right. IDP&R understands that it has an obligation to deliver the water and intends to do so.

Past history should provide some basis to judge what will happen in the future. Since the State of Idaho acquired the lands on Eagle Island for a prison in 1929, it has dealt with two substantially different legal entities. During this period, Hart Davis has been a corporation organized under the laws of the State of Idaho. In contrast, the water users served by the Mace-Catlin diversion were an unincorporated association of the various water users on that ditch system for most of this period. The articles of incorporation for Mace-Catlin Mutual Ditch Company, Incorporated were filed April 22, 1999, and the Secretary of State administratively dissolved the corporation on July 8, 2004. *Affidavit of Jon C. Gould In Support of Motion For Summary Judgment*, Exhibit A.<sup>10</sup> Accordingly, Mace-Catlin was only in existence as a corporation for just over a five year period. Notwithstanding these technical differences between the two ditch companies, neither company has alleged that the IDP&R has used these differences

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<sup>10</sup> Mace-Catlin states in its Memo as follows: "The Mace-Catlin Ditch Company is a non-profit company organized and existing under the laws of the State of Idaho. Mace-Catlin adopted by-laws in 1960." Mace-Catlin Memo at 3. The IDP&R is unaware of the factual basis for this statement. The articles of incorporation show a date of filing of April 22, 1999. *Affidavit of Jon C. Gould In Support of Motion For Summary Judgment*, Exhibit A. Since the Secretary of State administratively dissolved the Mace-Catlin Mutual Ditch Company, Incorporated on July 8, 2004, the statement that the company is "existing" under the laws of the state of Idaho is no longer correct.

to discriminate in any manner on the two companies. The point is that the IDP&R can effectively deal with either form of organization.

Finally, the determination that the IDP&R is entitled to the water rights it claims in its own name does not effect the other water users in these two ditch companies. The primary water rights adjudicated to Mary G. Davis and Edward N. Hart in the Stewart Decree are water right nos. 63-0186 and 63-0187. The Agreement of November 19, 1929 does not apply to either one of these water rights. The Agreement of November 19, 1929 does apply to all of the remaining Mace-Catlin water rights. The articles of incorporation for Mace-Catlin recognizes that these water rights are individually held when it states that the corporation has the purpose to “distribute and use water its shareholders are entitled to by virtue of water rights bestowed upon each shareholder by the State of Idaho . . .” *Affidavit of Jon C. Gould In Support Of Motion For Summary Judgment*, Exhibit A, at 1. Thus, this determination is not any change for the now defunct corporation. If Mace-Catlin determines to get its corporate charter reinstated, it certainly has time to accomplish that result. After that reinstatement, then the other water users in Mace-Catlin can determine whether it is desirable to pool their water rights in the name of the corporation.

## CONCLUSION

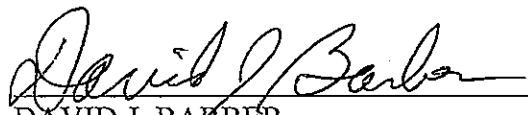
The chains of title for the lands within Eagle Island State Park for the period from the date of patent to November 20, 1929 are simple and straight forward. Those chains of title demonstrate that the IDP&R is the legal successor to 8.98 c.f.s of water right nos. 62-00132, 63-00133, and 63-00134. These 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 April 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 April 2008, I caused to be served the original and/or copy of the STATE OF IDAHO, DEPARTMENT OF PARKS AND RECREATION'S BRIEF IN RESPONSE TO THE MOTIONS FOR SUMMARY JUDGMENT BY HART DAVIS DITCH COMPANY AND MACE-CATLIN MUTUAL DITCH COMPANY, INCORPORATED 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

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- ☐ Statehouse Mail

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Represented by:  
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Boise, ID 83701-2773

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Incorporated  
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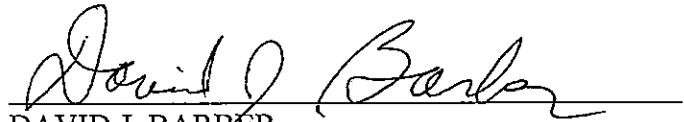
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Not Applicable

A handwritten signature in cursive script, reading "David J. Barber", written over a horizontal line.

DAVID J. BARBER  
Deputy Attorney General