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DEPARTMENT OF
WATER RESOURCES

Attorneys for Mace-Catlin Mutual Ditch Company, Inc.

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
)
) MACE-CATLIN MUTUAL DITCH
) COMPANY'S RESPONSE TO STATE OF
) IDAHO, DEPARTMENT OF PARKS AND
) RECREATION'S BRIEF IN RESPONSE
)
)

COMES NOW Mace-Catlin Mutual Ditch Company (hereinafter "Mace-Catlin"), by and through its counsel of record, Ringert Clark, Chartered, submits to this Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure and pursuant to the Second Supplemental Trial Scheduling Order filed December 21, 2007, its *Reply to State of Idaho, Department of Parks Recreation's Brief In Response to the Motion for Summary Judgment by Hart Davis Ditch Company and Mace-Catlin Mutual ditch Company, Incorporated.*

I. The State Ignores Mace-Catlin's Long Standing Claim of Ownership

The State inaccurately states that "a ditch company may not have any ownership interest of the water rights held by its members." *State of Idaho Department of Parks and Recreation's Brief in*

21

Response to the Motion for Summary Judgment by Hart Davis Ditch Company and Mace-Catlin Mutual Ditch Company, Incorporated (State's Response") at 9. From the turn of the century to the recent Idaho Supreme Court case *United States of America v. Pioneer Irrigation Dist., et al.*, 144 Idaho 106, 113, 157 P.3d 600, 607 (2007), irrigation organizations have been recognized as the owner of water rights for its members. The Idaho Supreme Court recently addressed this very issue in *United States of America v. Pioneer Irrigation Dist., et al.*, 144 Idaho 106, 113, 157 P.3d 600, 607 (2007). The case involved, *inter alia*, the question of whether ownership of the water rights should be listed in the name of the United States Bureau of Reclamation ("BOR"), even though the BOR does not "use the water", or the irrigation entities that have contracts with the BOR for the storage and delivery of storage water. *Id.* at 109. The Court held that "[t]he name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, 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." *Id.* at 115, P.3d at 609. By holding that the BOR owns the water rights at issue, the Court recognized there will not be a reduction of the irrigation entities' rights to use the water as they have for nearly a century, it will merely preserve the status quo. *Id.* In this matter, the State, as the water user, is not harmed by listing the ditch company as the legal owner, because there will not be a reduction of the water user's right to use the water.

The Idaho Supreme Court in *Ireton v. Idaho Irrigation Co., Ltd.*, 30 Idaho 310, 317 (1917) noted that a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for the use upon their lands in proportion to their respective interests. ..." Listing the ditch company as the owner of the water rights originally held by its members is simply a tool for effective management and

administration of the water rights in question and merely preserves the status quo.

Mutual ditch companies, including Mace-Catlin, were formed by individual water right holders who pooled assets, created a ditch company, and conveyed their water rights to it in return for stock. Idaho courts and courts from other prior appropriation states have recognized the purpose and role mutual ditch companies like Mace-Catlin. The shares of stock in a mutual ditch corporation represent the "consumer's interest in the reservoir, canal, and water rights." *Beaty v. Board of County Comm'rs. of Otero County*, 101 Colo. 346, 73 P.2d 982 (1937). As a mutual ditch company, Mace-Catlin is "merely the vehicle by which its owners operate and manage its affairs." See *Billings Ditch Co. v. Industrial Comm'n.*, supra. In *Jacobucci*, the Court noted that "the shares of stock owned by [a mutual ditch company's] shareholders represent a definite and specific water right, as well as a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized." *Jacobucci v. Dist. Court of Jefferson*, 189 Colo. 380, 388, 541 P.2d 667, 672.

Since at least 1960, Mace-Catlin, as an unincorporated ditch company to 1999, and then as Mace-Catlin Mutual Ditch Company, Inc. to present, has claimed ownership of water right nos. 63-132 and 63-133. The State of Idaho, since at least 1960, has paid its annual assessments to Mace-Catlin for the delivery of water under water right nos. 63-132 and 63-133. *Affidavit of Mel Carlson* at 3. Furthermore, the State has been the largest single shareholder in Mace-Catlin and as such has more votes than any other Mace-Catlin shareholder. As a member, the State has enjoyed the right to participate in the management of Mace-Catlin, including voting at regular or special meetings. The State had never questioned Mace-Catlin's claim of ownership of water right nos. 63-132 and 63-133 nor did the State object to Mace-Catlin's filing its Notice of Claim in the SRBA. *Id.* at 4.

II. The State's Acquiescence Prevents It From Now Claiming Ownership

The State argues that the Doctrine of Laches is not applicable to this case because “[t]he IDP&R has continued to use water right nos. 63-132, 63-133, and 63-134 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.” *State’s Response* at 12. However, the issue facing this court is whether Mace-Catlin should be listed on the partial decree as the owner for water right nos. 63-132 and 63-133.

Mace-Catlin supplies water to its members. Mace-Catlin does not use the water. The States’ argument that “there has not been “another’s use” of this water” is irrelevant. The question of use and enjoyment goes merely to the listed ownership on the decree. Since at least 1960, the State has been a member of Mace-Catlin. Since at least 1960, Mace -Catlin has claimed ownership of water right nos. 63-132 and 63-133. In 1989, Mace-Catlin filed it Notice of Claim to water right nos. 63-132 and 653-133 with the SRBA. It was not until 2006, that the State has objected to Mace-Catlin’s claim of ownership. The period from at least 1960 to 2006 represents the State’s long and continuous acquiescence to Mace-Catlin’s claim of ownership of the water rights.

Dating back to at least 1960, Mace-Catlin, then an unincorporated ditch company, claimed ownership of the water rights which provide water to its members. The State, the largest single shareholder in Mace-Catlin, has always paid its assessments to Mace-Catlin. The State had never questioned Mace-Catlin’s claim of ownership until 2006. While the State has continued to use the water, it has also acquiesced to the ditch companies ownership of the water rights in question. Most demonstrative of this, the State, as the largest single shareholder, did not objet with the Board decided to filed a Notice of Claim to water right nos. 63-132 and 63-133 in Mace-Catlin’s name. *Affidavit of*

Mel Carlson at 4.

III. Changing the Status Quo Would Be Unconscionable

The State alleges that its claim to the water rights is not unconscionable. *State's Response* at 13. However, the members of Mace-Catlin have relied and continue to rely upon Mace-Catlin to manage the water rights and deliver the water in a consistent, dependable manner. Granting the State's objection to Mace-Catlin's claim of ownership will fatally compromise the integrity of Mace-Catlin to the detriment of its members. Such a result would be unconscionable.

IV. As a Member of Mace-Catlin the State Waived Its Right of Ownership

The State relies on its "use of the water" to support its position that it has not waived its claim of ownership to the water rights in question. *See State's Response* at 15 ("Indeed, it is impossible to find a relinquishment of ownership given the IDP&R's continued use of its water at Eagle Island."). The State, by becoming a member or shareholder of Mace-Catlin, transferred its water rights to Mace-Catlin for shares of Mace-Catlin stock. The shares represent Mace-Catlin's interest in those water rights. This is true for every member of Mace-Catlin. There is no question that the State is a member of Mace-Catlin. Since at least 1960, the State has been assessed as a member and the State has always paid those assessments. The State has never challenged its status as a member or shareholder in Mace-Catlin. For over 40 years, the State, as the majority shareholder, never challenged Mace-Catlin's claim of ownership of the water rights. Therefore the State has waived or abandoned any claim of ownership to the water rights in question.

V. Implied Grant

The State is a member and shareholder of Mace-Catlin. By becoming a member of Mace-Catlin, the State implicitly agreed to grant nominal legal title to Mace-Catlin. This is true of every

member of Mace-Catlin.

VI. Havoc Will Result

Mace-Catlin currently holds two water rights for approximately twenty parties. If the water rights were to be split so that the listed name reflects the landowner of the land where the water is put to beneficial use then there would be approximately twenty water rights. With each ownership change or property subdivision there would be an administrative process to change the owner and/or further split the water rights.

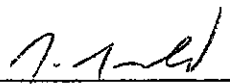
More importantly, Mace-Catlin was formed by individual water right holders who pooled assets, created the ditch company, and conveyed their water rights to it in return for stock so that the asset could be managed and delivered in a reliable manner. The State is seeking to reverse the actions of all the parties that formed Mace-Catlin. The potential for havoc resulting if the State's objection is granted is real.

VII. CONCLUSION

For the foregoing reasons, this Court should deny State of Idaho's Motion for Summary Judgment.

DATED this 23rd day of April, 2008.

RINGERT CLARK, CHARTERED

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 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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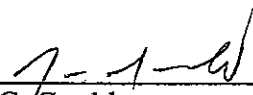
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