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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
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By _____	Clerk
Deputy Clerk	

**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

) Subcases 63-00132, 63-00133, and 63-00134
) (State of Idaho Dept. of Parks &
) Recreation v. Hart-Davis Ditch Company
) and Mace Catlin Mutual Ditch Company)
)
) Related Subcases 63-00134A, 63-00134B,
) 63-00186A, 63-00186B, 63-17205,
) and 63-31772
)
) **MEMORANDUM DECISION AND**
) **ORDER ON CROSS MOTIONS FOR**
) **SUMMARY JUDGMENT**
)
) **REQUEST FOR AMENDED**
) **DIRECTOR'S REPORTS FROM IDWR**
)
) **ORDER VACATING TRIAL AND**
) **SETTING STATUS CONFERENCE**

Summary of Ruling: The State of Idaho Department of Parks and Recreation, or its predecessors-in-interest, have not conveyed the subject water rights to either the Hart-Davis Ditch Co., Inc., or the Mace-Catlin Mutual Ditch Company. The State of Idaho is not estopped to assert ownership of the applicable portion of the water rights.

I. APPEARANCES

S. Bryce Farris, Ringert Clark Chartered, Boise, Idaho, for Hart-Davis Ditch Company, Inc.

Jon C. Gould, Ringert Clark Chartered, Boise, Idaho, for Mace-Catlin Mutual Ditch Company, Inc.

David Barber, Deputy Attorney General, Boise, Idaho, for the State of Idaho, Department of Parks and Recreation.

Michael C. Creamer, Givens Pursley, LLP, Boise, Idaho, for Ron Sali and Ron Sali Properties, Inc., Profit Sharing Plan.

II. PROCEDURAL BACKGROUND

63-132. A notice of claim for water right 63-132 was filed in the SRBA by the Mace-Catlin Ditch Company on August 25, 1989. The *Director's Report*, issued December 14, 2005, recommended water right 63-132 in the name of the Mace-Catlin Ditch Company, with the following elements:

Source:	Boise River
Quantity:	2.692 cfs [134.6 miner's inches]
Priority Date:	June 1, 1864
Point of Diversion:	T04N R01E Section 16 SESWSW
Purpose and Period of Use:	Stockwater, Irrigation 03/01 to 11/15
Place of Use:	Digital Boundary – 546 acres within the boundary of the Mace-Catlin Ditch Company.

Under “explanatory material,” the *Director's Report* states that water right 63-132 is designated as right number 5 in the Stewart Decree.

63-133. A notice of claim for water right 63-133 was filed in the SRBA by the Mace-Catlin Ditch Company on August 25, 1989. The *Director's Report*, issued December 14, 2005, recommended water right 63-133 in the name of the Mace-Catlin Ditch Company, with the following elements:

Source:	Boise River
Quantity:	7.788 cfs [389.4 miner's inches]
Priority Date:	June 1, 1871
Point of Diversion:	T04N R01E Section 16 SESWSW
Purpose and Period of Use:	Irrigation 03/01 to 11/15
Place of Use:	Digital Boundary – 546 acres within the boundary of the Mace-Catlin Ditch Company.

Under “explanatory material,” the *Director’s Report* states that water right 63-133 is designated as right number 52 in the Stewart Decree.

63-134. A notice of claim for water right 63-134 was filed in the SRBA by the Hart-Davis Ditch Co., Inc., on September 11, 1989. The *Director’s Report*, issued December 14, 2005, recommended water right 63-134 in the name of the Hart-Davis Ditch Co., Inc., with the following elements:

Source:	Boise River
Quantity:	3.30 cfs [165 miner’s inches]
Priority Date:	June 1, 1864
Point of Diversion:	T04N R01E Section 17 NWNW
Purpose and Period of Use:	Irrigation 03/01 to 11/15
Place of Use:	Digital Boundary – 498 acres within the boundary of the Hart-Davis Ditch Company.

Under “explanatory material,” the *Director’s Report* states that water right 63-134 is designated as right number 6 in the Stewart Decree.

The Stewart Decree. The *Stewart Decree*, issued by Judge George Stewart on January 18, 1909, *Farmer’s Cooperative Ditch Co. v. Riverside Irrigating Dist., et al.*, *aff’d* 14 Idaho 450 (1908); *Order Denying Motion for a New Trial rev’d*, 16 Idaho 525 (1909), states in Paragraphs V and VI 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. 4N. R. 1 E. B.M., for use on their lands on Eagle Island, Ada County, Idaho, in the following amounts 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 waters of Boise River, diverted near the center of the NE ¼ of Sec. 18, T. 4N. R. 1E. B.M. through what is known as the Davis & Hart ditch, for use upon lands lying under said ditch on Eagle Island, Ada County, in the following amount from the following date: 165 inches, from June 1, 1864. [63-134]
And adjudged to pay \$11.55 costs, in addition to the costs incurred by him.

Objections in the SRBA. On April 21, 2006, the State of Idaho, Department of Parks and Recreation ("IDP&R"), through Deputy Attorney General David Barber, filed an objection to the *Director's Report* for water rights 63-132, 63-133 and 63-134, asserting that the IDP&R is the owner of a portion of Mace-Catlin's claimed rights 63-132 and 63-133, and the owner of all of water right 63-134.

Also on April 21, 2006, Ron Sali and Ron Sali Properties, Inc. Profit Sharing Plan (hereinafter "Ron Sali"), through his attorney Michael C. Creamer, filed an objection to the *Director's Report* for water right 63-134, asserting ownership of 0.825 cfs [41.25 miner's inches] of water right 63-134.¹

Motions for Summary Judgment. On March 14, 2008, the Mace-Catlin Mutual Ditch Company filed its *Motion for Summary Judgment*, together with a memorandum in support thereof, seeking an order dismissing the IDP&R objections in subcases 63-132 and 63-133. Also filed were the affidavits of Jon C. Gould and Mel Carlson. On April 14, 2008, the State of Idaho filed its response brief.

On March 14, 2008, Hart-Davis Ditch Co., Inc. filed its *Motion for Summary Judgment*, together with a memorandum in support thereof, seeking an order dismissing the IDP&R objection in subcase 63-134. Also filed were the affidavits of Ron Rippey and S. Bryce Farris in support thereof. On April 14, 2008, the State of Idaho filed its response brief. On April 14, 2008, Ron Sali and the Ron Sali Properties, Inc., Profit Sharing Plan filed a response to Hart-Davis Ditch Company's *Motion for Summary*

Judgment, which addressed the issue 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 the ditch company.

Also on March 14, 2008, the IDP&R filed its *Motion for Summary Judgment*, together with a memorandum in support thereof, seeking a judgment that IDP&R is the holder of legal title to the following water rights in the following amounts:

- a. water right number 63-132 in the amount of 1.52 cfs.
- b. water right 63-133 in the amount of 4.16 cfs.
- c. water right 63-134 in the amount of 3.3 cfs.

The IDP&R also filed the *State of Idaho Department of Parks and Recreation's List of Exhibits*. On April 11, 2008, the Hart-Davis Ditch Company and the Mace-Catlin Mutual Ditch Company filed response briefs. On April 25, 2008, the IDP&R filed its reply brief.

III. STATEMENT OF FACTS

For purposes of deciding the motions for summary judgment, the record reflects the following undisputed facts:

1. The record in these subcases does not contain any written documents, (i.e. deeds, contracts, minute entries, etc.) that would evidence an express conveyance of the water rights 63-132, 63-133, and 63-134, or any portions thereof, from the IDP&R, or its predecessors-in-interest, to either the Mace-Catlin Mutual Ditch Company or the Hart-Davis Ditch Co., Inc., (hereinafter collectively referred to as "Ditch Companies").

2. The water rights at issue herein were perfected on the following dates: 63-132 on June 1, 1864; 63-133 on June 1, 1871; and 63-134 on June 1, 1864.

3. The water rights at issue herein were decreed in the *Stewart Decree* on January 18, 1906.

¹ Ron Sali also filed claims in the SRBA for the portion of water right 63-134 to which he asserts ownership, as reflected in water right claims 63-134A and 63-134B, which were recommended disallowed for the reason that the rights were recommended to the Hart-Davis Ditch Co., Inc., under water right no. 63-134.

4. On November 20, 1929, the State of Idaho purchased real property from Karl Fischer. The decreed place of use for water rights 63-132, 63-133, and 63-134 includes the land so acquired by the State of Idaho.

5. Water right 63-134 has been delivered to the lands owned by the IDP&R via the water delivery system operated by the Hart-Davis Ditch Company.

6. The IDP&R has paid assessments to the Hart-Davis Ditch Company.

7. Water rights 63-132 and 63-133 have been delivered to the lands owned by the IDP&R via the water delivery system operated by the Mace-Catlin Mutual Ditch Company.

8. The IDP&R has paid assessments to the Mace-Catlin Mutual Ditch Company.

9. The IDP&R did not file a notice of claim in the SRBA for the subject water rights.

10. The Hart-Davis Ditch Company was founded in 1924.

11. The Mace-Catlin Mutual Ditch Company was not incorporated until 1999, but prior to incorporation it had been operating since 1960.

IV. ISSUES PRESENTED

The IDP&R's objection to the *Director's Report* for water right claims 63-132, 63-133, and 63-134 is essentially an action for quiet title. The IDP&R asserts that there has been no express conveyance of the subject water rights to the Ditch Companies, and accordingly the SRBA Court should decree the rights in the name of the IDP&R. The Ditch Companies, on the other hand, raise the following issues:

1. Despite the lack of an express conveyance of the subject water rights, has there been an implied conveyance upon formation of the respective Ditch Company?

2. Is the IDP&R barred from claiming ownership of the water rights through the doctrine of laches?

3. Is the IDP&R estopped to claim ownership by reason of the doctrines of equitable estoppel or quasi estoppel?

4. Has the IDP&R abandoned or waived its water rights?

The *Response* filed by Ron Sali raises an issue regarding 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 company and represented by ditch company shares.

V. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on May 5, 2008. The parties have not requested an opportunity to submit additional briefing, nor does this Special Master require any additional briefing. Therefore, this matter is deemed fully submitted for decision the next business day, or May 6, 2008.

VI. STANDARD OF REVIEW ON SUMMARY JUDGMENT

A motion for summary judgment shall be rendered if 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 judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

In cases where opposing parties both file motions for summary judgment relying on the same facts, issues, and theories, the parties essentially stipulate that there is not

genuine issue of material fact precluding the court from entering summary judgment. *Eastern Idaho Agricultural Credit Assoc. v. Neibaur*, 130 Idaho 623, 626, 944 P.2d 1386, 1389 (1997)(citing *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996)). If however, the parties file cross motions for summary judgment based on different theories, the parties are not considered to have stipulated that there is no genuine issue of material fact. *Id.* (citing *Wells v. Williamson*, 118 Idaho at 40, 794 P.2d at 629).

VII. ANALYSIS

The objections to the *Director's Report* filed by the IDP&R essentially amount to an action for quiet title to portions of water rights 63-132 and 63-133, and all of water right 63-134. The undisputed facts set forth in the affidavits and pleadings on file in these subcases demonstrate that at no point in time did the IDP&R or its predecessors-in-interest convey the subject water rights, or any portions thereof, to either the Hart-Davis Ditch Company or the Mace-Catlin Mutual Ditch Company. The Ditch Companies do not argue that such a conveyance took place, but rather rely on certain equitable doctrines to argue that the IDP&R is now barred from claiming ownership of the water rights. For the reasons set forth herein, this Special Master holds that the applicable portions of the subject water rights have never been conveyed or transferred to the respective Ditch Companies, either expressly or impliedly, and further that equity does not now prevent the IDP&R from asserting its claims in the SRBA. Accordingly, this Special Master finds that the subject water rights should be split and the portions thereof owned by the IDP&R be decreed in its name.

Prior to discussing the Ditch Companies equitable theories, this Special Master makes the following observations that apply to all of the Ditch Companies' equitable theories. The water rights at issue herein predate the creation of both Ditch Companies, both in terms of when the water was appropriated, and in terms of the date they were decreed in the *Stewart Decree*. Prior to the formation of the Hart-Davis Ditch Company in 1924, and prior to the beginning of operations of the Mace-Catlin Ditch Company in 1960, the water rights were privately and separately owned. In the event that the IDP&R or its predecessors-in-interest have received shares of stock in either of these Ditch

Companies, such receipt of stock would have occurred at discrete point(s) in time and would have been pursuant to a contract between the Ditch Company and the shareholder. There can be no question that the shareholder would have given valuable consideration in exchange for shares of stock. With regard to the instant water rights, to the extent that the IDP&R is in fact a shareholder in either Ditch Company, the record does not contain any information about when the shares of stock were issued to the IDP&R or its predecessors-in-interest, nor is there any information regarding the nature of the consideration paid in exchange for the shares of stock.² The point here is that at some point in time when the shares of stock were acquired, there would have been a meeting of the minds between the Ditch Company and the shareholder. To the extent that such a meeting of the minds did not include a conveyance of water rights from the shareholder to the Ditch Company – and there certainly is nothing in the record which suggests that the consideration so paid was a water right – the use of an equitable argument to now supersede the prior contractual relationship of the parties is problematic.

A. The *prima facie* weight of the *Director's Report* is rebutted.

As a preliminary matter, it is necessary to determine whether the *prima facie* weight of the *Director's Report* has been rebutted. The IDP&R did not file claims in the SRBA for the water rights to which it asserts ownership; rather the claims were filed by the respective Ditch Companies, and the IDP&R filed an objection to the name and address element of the *Director's Report*. Therefore, when IDWR conducted its investigation of these water right claims, it had no reason to spend any investigative resources for purposes of determining ownership. Although the *Stewart Decree* has been in the possession of IDWR for many years, information regarding changes of ownership and division of land for the subject water rights has not been provided to IDWR.³

The IDP&R has conducted exhaustive research into its chain of title for the subject land, and has submitted the same to the Court in these proceedings. The chain of

² At oral argument on summary judgment, attorney Michael Creamer pointed out that the most likely consideration paid was the continuing obligation to pay the assessments of the Ditch Companies. This Special Master concurs in this assessment.

³ The statutory requirement found in Idaho Code § 42-228 that water right owners notify the Department of changes in ownership was not enacted until 1996.

title so submitted is perfect and is proven through mesne conveyances from the United States government. *Affidavit of Charles C. Smith*. The instruments in the record show no severance of ownership between the water rights and the land to which the rights are appurtenant.

In accordance with the foregoing, this Special Master finds that the evidentiary presumption of the *Director's Report* has been rebutted with respect to ownership of the subject water rights.

B. There has been no express conveyance of the subject water rights to either the Hart-Davis Ditch Company or the Mace-Catlin Mutual Ditch Company.

In Idaho, a water right is legally treated as an interest in real property and therefore can only be conveyed or transferred in the same manner as real property. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151 (1952)(citing I.C. § 9-503; *Ada County Farmers' Irrigation Co. v. Farmers' Canal Co.*, 5 Idaho 793, 51 P. 990; *Burnham v. Freeman*, 11 Colo. 601, 19 P. 761). Title to real property may be transferred by contract or deed of the owners, adverse possession, condemnation, or operation of law. *Id.* Voluntary transfers of real property are required to be effectuated via written instrument. I.C. § 9-503. In the instant subcases, there is no dispute regarding the non-existence of any writing which would evidence a conveyance of the subject water rights. Neither the IDP&R nor its predecessors-in-interest have ever executed a written instrument of conveyance and delivered the same to either Ditch Company.

It is the contention of the Ditch Companies that the IDP&R or its predecessors-in-interest have impliedly conveyed the subject water rights, and further that the IDP&R is barred from claiming ownership under the doctrines of laches, estoppel, and waiver/abandonment. In support of their arguments, the Ditch Companies argue that ditch company law in Idaho is such that ditch companies are formed for the purpose of conveying water to shareholder, with the individual shareholders pooling their assets and conveying their water rights to the ditch company. The Ditch Companies cite to *Jacobucci v. District Court*, 541 P.2d 667, 671 (Colo. 1975) in support of this proposition. While this Special Master does not doubt that there are likely ditch

companies in Idaho that hold legal title to water rights, there certainly is no hard and fast rule that a ditch company must hold legal title to the water rights which are delivered through its conveyance system. The consideration paid by a shareholder in exchange for shares of stock in a ditch company certainly could be a water right, but such consideration could also be money, labor, easements or rights of way, or the obligation to pay yearly assessments. As stated by the Idaho Supreme Court in *Swank v. Sweetwater Irrigation and Power Company, Ltd.*, 15 Idaho 353, 98 P. 297 (1908): “Ownership of a ditch and the water right for waters to flow through the ditch may, and often do, exist in different parties. The existence of the one right does not necessarily imply the existence of the other right in the same party.” *Id.* at 360 (citing *Ada County Farmers’ Irrigation Co. v. Farmers’ Canal Co.*, 5 Idaho 793, 51 P. 990; *Stocker v. Kirtley*, 6 Idaho 795, 59 P. 891; *Parke v. Boulware*, 7 Idaho 490, 63 P. 1045).

C. There has been no implied conveyance of the subject water rights to either the Hart Davis Ditch Company or the Mace-Catlin Mutual Ditch Company.

The Ditch Companies make the argument that “any lack of an express conveyance is rebutted by implied conveyance to the ditch company when Hart Davis [or Mace Catlin] was formed and the longstanding treatment of the State as a shareholder of Hart Davis [or Mace Catlin], subject to the assessments and rules and regulations of Hart Davis [or Mace Catlin]”. *Hart-Davis Memo in Support at 3*. This argument is premised upon the Ditch Companies’ argument that under the law governing ditch companies, it is the ditch company that owns the water right.

There are several problems with this argument. First, as set forth in the preceding section, there is nothing in Idaho law that requires the shareholders of a ditch company to surrender their water rights to the company, and there are numerous examples in Idaho where the ownership of the ditch and the ownership of the right to the use of the water in the ditch are not vested in the same person or entity. *See e.g. Johnson v. Strong Arm Reservoir Irrigation District*, 82 Idaho 478, 356 P.2d 67 (1960), where the Court recites the following from the trial transcript:

On cross-examination by appellants’ attorney, the witness Kofoed testified:

'A. My understanding from Mr. Johnson's father, Julius Johnson, Shuldberg and George Condie, those old-timers in there, at the time they formed this Strongarm Irrigation district out there, those fellows with the decreed water put their water in the reservoir for their share of stock. The other fellows that got stock in the reservoir furnished the money for doing the work and raising the reservoir,- they did the work and like that for stock in the reservoir. That is why they acquired stock over in Banida, some of those fellows over there.

'Q. Who told you that?

'A. Julius Johnson, William Shuldberg and George Condie.

'Q. They traded their water rights for stock?

'A. Yes, sir.'

Id., at 483-84, 356 P.2d at 70.⁴ Again, in Idaho there are no statutory or common law requirements that the shareholders in a mutual ditch company convey their water rights to such company. Accordingly, the founders of such a company are free to set up a company that owns the water rights, a company that does not own the water rights, and a company that is a hybrid.

Another problem with the Ditch Companies' argument is that there is no common law or statutory doctrine in Idaho that allows an implied conveyance of title to real property. As set forth above, the Statue of Frauds requires such conveyances to be made in writing. I.C. § 9-503.

D. The IDP&R is not barred from claiming ownership of the water rights by the doctrine of laches.

The Ditch Companies argue that the doctrine of laches bars the IDP&R from claiming ownership of the subject water rights, or any portion thereof. For the reasons set forth below, this Special Master holds that the IDP&R is not barred by laches from asserting its claim to ownership.

In *Sears v. Berryman*, 101 Idaho 843, 847, 623 P.2d 455, 459 (1981), the Idaho Supreme Court described the doctrine of laches:

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

⁴ Although the entity had the words "Irrigation District" in its name, the Strongarm Court pointed out that it was really a mutual ditch company.

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 (internal citations omitted).

In their briefing, the Ditch Companies assert the following facts demonstrate the “long and continuous knowing acquiescence” element of laches: 1) the State of Idaho did not claim ownership of the water rights until it filed an objection in April of 2006; 2) the State of Idaho acknowledged it was a shareholder of each Ditch Company and paid assessments thereto; and 3) the State of Idaho did not file a notice of claim in the SRBA to the water rights. Assuming *arguendo* that these facts amount to “long and continued knowing acquiescence,” they do not demonstrate the second required element: reliance to the Ditch Companies’ detriment upon the State’s continued relinquishment of its rights. Accordingly, this Special Master holds that the doctrine of laches does not apply in these subcases.

Additionally, as pointed out by the IDP&R in its *Response Brief*:

The delivery of water by the 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 assessment is equally consistent with ownership of the water right by the entities that receive the water.

State’s Response Brief at 9. This Special Master agrees with the IDP&R. Furthermore, this Special Master disagrees with the Ditch Companies’ assertion that the State’s failure to file a notice of claim supports acquiescence. It is not uncommon for a claimant to fail to timely file a claim to a water right. The SRBA Court employs a commonly used procedure for processing late claims. The State of Idaho cannot be held to a higher standard than that of a private claimant with respect to the timeliness of asserting a claim of ownership. Additionally, addressing ownership through an objection is equally valid to addressing the issue through competing notices of claim.

E. The IDP&R is not estopped to claim ownership by reason of the doctrines of equitable estoppel or quasi estoppel.

The Ditch Companies argue that the IDP&R is estopped to claim ownership of the subject water rights, or any portion thereof by reason of equitable estoppel or quasi-estoppel. For the reasons set forth below, this Special Master holds that the IDP&R is not estopped to assert its claim to ownership.

In *Willig v. State Dept 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 (internal citations omitted). The undisputed facts in the record do not support a theory of equitable estoppel. Specifically, there are no facts in the record showing a false representation or concealment, and no facts showing detrimental reliance. Accordingly, this Special Master holds that the IDP&R is not estopped to assert its claim to ownership of the subject water rights.

Regarding the assertion that quasi-estoppel applies for the reason of unconscionability, this Special Master holds that there is nothing unconscionable about the IDP&R's claim to ownership. There are simply no facts in the record which supports a conclusion that the IDP&R and its predecessors-in-interest have ever done anything that could be considered inconsistent with ownership of the water rights. The water was delivered, through the Ditch Companies, to the respective places of use. The IDP&R and its predecessors-in-interest paid assessments to the Ditch Companies. The IDP&R is now properly asserting its claim in a general stream adjudication. Prior to asserting its claims in the SRBA, the IDP&R was not required to somehow reaffirm its claim of ownership to

the Ditch Companies. Accordingly, this Special Master holds that the IDP&R is not estopped through quasi-estoppel to assert ownership of the subject claims.

F. The IDP&R has not abandoned or waived its water rights.

The Ditch Companies argue that the IDP&R has waived and/or abandoned its water rights. “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). The undisputed facts in the record do not establish waiver of the subject water right claims. The delivery of water through a ditch company and the payment of assessments in no way evidences a voluntary relinquishment of the right.

The elements of abandonment of a water right in Idaho are (1) an intent to abandon and (2) actual relinquishment or surrender of the water right. *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). Abandonments are disfavored. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003). The undisputed facts in the record are that the subject water rights have been continuously used on IDP&R’s place of use, and therefore there has been no actual surrender of the water rights. Additionally, nothing in the record indicates an intent by the IDP&R to abandon its rights.

G. Practical implications of the IDP&R holding legal title.

The Ditch Companies bring up several issues that they assert the Court should consider in deciding ownership: 1) that separate ownership will wreak havoc on the water users; 2) that the IDP&R cannot change the elements of its water rights if such changes would cause injury to other water users; 3) that separate ownership of the water rights will cause a significant administrative burden; and 4) that the IDP&R will still be liable to pay Ditch Company operations and maintenance assessments. Each of these issues is briefly addressed below.

1. The Issue of Havoc. The Ditch Companies argue that havoc would ensue if every shareholder in the corporation were to attempt to govern the corporate affairs, and that the Ditch Companies could well be destroyed by complete changes in diversion points or water use. While pointing out that Idaho Code sections 42-108 and 42-222, as well as the no-injury rule, would apply to any changes sought to be made by any person(s) owning water delivered through either Ditch Company, it is the opinion of this Special Master that the issue of any havoc as foreseen by the Ditch Companies cannot properly be considered in determining ownership. If the IDP&R owns the water rights, then the chips will have to fall where they may. The only possible remedy available in the SRBA to cure potential havoc would be the inclusion of a remark in the partial decree for the water rights pursuant to I.C. § 42-1411(2)(j). The Ditch Companies have not requested any such remark.

2. The Issue of Changes or Transfer of Water Rights. The Ditch Companies argue that even if the IDP&R holds legal title to the water rights, it cannot change the elements of the rights if such a change would injure other water rights. Ron Sali has submitted a brief on this issue, concluding: “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 rights owners will occur or where reasonable conditions can be imposed to prevent injury.”

It is the opinion of this Special Master that the issue 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 is premature. This issue would be properly addressed in an administrative proceeding before IDWR in the event that such a shareholder sought such a transfer. Again, the only possible remedy available in the SRBA regarding such future transfer applications would be a remark in the partial decree pursuant to I.C. § 42-1411(2)(j). No party has requested such a remark.

3. The Issue of Administrative Burden.

The Ditch Companies argue that allowing each and every shareholder to be issued a separate water right, and the ensuing administrative proceedings that would necessarily occur upon subdivision of land, would create an unnecessary burden on IDWR. In the

opinion of this Special Master this issue cannot properly be considered in determining ownership.

4. The Issue of Liability for Operation and Maintenance Assessments.

The Ditch Companies argue that if the IDP&R is the owner of the water rights which it claims, the IDP&R will continue to be liable for Ditch Company assessments. The issue of IDP&R's liability to pay Ditch Company assessment is a matter of the contractual relationship between the parties. This issue is not relevant in determining ownership.

VIII. ORDER

In accordance with the foregoing, the *Motion for Summary Judgment* filed by the IDP&R is **granted**. The *Motion for Summary Judgment* filed by the Hart-Davis Ditch Co., Inc., is **denied**. The *Motion for Summary Judgment* filed by the Mace-Catlin mutual Ditch Company is **denied**.

IX. REQUEST FOR AMENDED DIRECTOR'S REPORTS AND OBJECTION DEADLINES

It is requested that IDWR re-examine water right claims 63-132, 63-133, and 63-134, and issue amended director's reports for these rights in accordance with this *Memorandum Decision* and the file and record herein. Additionally, IDWR may, if necessary, re-examine and issue amended director's reports for any other related water right claims that need to be revised as a result of such additional investigation.

The amended director's reports are due no later than Friday, August 29, 2008. The amended director's reports will be published on the Court's Docket Sheet in September, 2008. **Objections to the amended director's reports shall be filed no later than Monday, September 29, 2008. Responses to objections shall be filed no later than Tuesday, October 14, 2008.**

The currently filed objections in any subcase in which an amended director's report is filed will not survive the filing of the amended director's report. Parties to the

subcases are required to file new objections should that party disagree with the elements of the water rights as recommended by the Department in the amended director's reports.

X. ORDER VACATING TRIAL AND SETTING STATUS CONFERENCE

The pretrial conference previously scheduled for June 30, 2008, and the trial previously scheduled to begin on August 6, 2008 are **vacated**. A status conference will be held on **Tuesday, October 28, 2008, at 9:30 A.M. Mountain Time**. Parties may participate by telephone by dialing 225-383-1099 and when prompted entering the code 675342.

Dated June 4, 2008



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION & ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT; REQUEST FOR AMENDED DIR. RPT; VACATE TRIAL was mailed on June 04, 2008, with sufficient first-class postage to the following:

MACE CATLIN DITCH CO

Represented by:
JON C GOULD
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE, ID 83701

RON SALI

RON SALI & RON SALI PROPERTIES
RON SALI PROPERTIES INC

Represented by:
MICHAEL C CREAMER
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

STATE OF IDAHO DEPARTMENT OF

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

HART-DAVIS DITCH CO INC

Represented by:
S. BRYCE FARRIS
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098

RON SALI PROPERTIES INC

PROFIT SHARING PLAN
100 N 9TH STE 200
BOISE, ID 83702-5700
Phone: 208-344-4224

RON SALI

919 S LINDER RD
EAGLE, ID 83616-5513