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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	)	
Case No. 39576	)	SUBCASE NUMBER 02-00103
	)	
	)	
	)	
	)	MEMORANDUM IN SUPPORT OF MOTION TO
	)	PARTICIPATE
	)	
	)	

COMES NOW, Cottonwood Canal Company (hereinafter referred to as "Cottonwood"),
by and through its attorneys Ringert Law, Chartered, and hereby submits this *Memorandum* in
support of its *Motion to Participate* submitted concurrently herewith. This *Memorandum* is
supported by the *Affidavit of Charles L. Honsinger in Support of Motion to Participate* also
submitted concurrently herewith.

FACTS

Black Mesa Farms, LLC, Don and Brenda Bryant, and Wesley and Christine Wootan
(hereinafter collectively "Black Mesa") filed a claim to water right no. 02-00103 in the SRBA
on April 17, 1991. The claim asserted a beneficial use basis, a May 10, 1965 priority date, an

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8.54 cfs quantity for irrigation purposes, and a 386 irrigated acre place of use. The claim stated that a "FIELD EXAMINATION FOR 02-02209 IDENTIFIED THE LAND CLAIMED HEREIN WAS IRRIGATED AT THE TIME. THIS CLAIM IS TO COVER THE ADDITIONAL PLACE OF USE NOT COVERED IN THE LICENSE ISSUED FOR 02-02209."

On October 31, 2000, Cottonwood filed a *Petition to Correct License* for Water Right no. 02-02209 with the Idaho Department of Water Resources. The Petition sought the addition of 8.0 cfs and 400 irrigated acres to water right no. 02-02209 because such quantity and acreage had not been licensed despite the fact that it had been permitted, and that water had been put to the permitted beneficial use during the permit development period. *Affidavit of Charles L. Honsinger, Ex. A.* On February 13, 2001, Black Mesa filed a *Notice of Protest* to Cottonwood's *Petition to Correct License* stating that "Water Right No. A02-00103 (Beneficial Use) also includes these lands that were filed for adjudication", and requesting that Black Mesa be listed as the water right holder. *Affidavit of Charles L. Honsinger, Ex. B.* On April 27, 2001, Black Mesa filed a *Cross-Petition to Correct License and Petition to Change Ownership of License*, asserting that Cottonwood's argument regarding the addition of 8.0 cfs and 400 acres to licensed water right no. 02-02209 was correct, but arguing that any such corrected portion of the license should be issued in the name of Black Mesa. *Affidavit of Charles L. Honsinger, Ex. C.*

On January 22, 2002, IDWR's hearing officer issued his *Recommended Decision and Order* as to Cottonwood's and Black Mesa's competing petitions to correct licensed water right no. 02-02209. *Affidavit of Charles L. Honsinger, Ex. D.* The hearing officer denied both Cottonwood's *Petition to Correct License* and Black Mesa's *Cross-Petition to Correct License*. On February 12, 2002, Cottonwood timely filed its *Exceptions to Recommended Decision and*

Order contesting the hearing officer's decision not to correct the license. *Affidavit of Charles L. Honsinger*, Exhibit E. On February 26, 2002, Black Mesa filed a *Response* to Cottonwood Canal Company's *Exceptions to Recommended Decision and Order*, agreeing that the license should be amended as discussed by Cottonwood, but arguing that the amended portion of the license should be issued in the name of Black Mesa instead of Cottonwood. *Affidavit of Charles L. Honsinger*, Exhibit F. IDWR did not make a decision or take any action regarding Cottonwood's *Exceptions* for more than eight years.

On January 5, 2006, Cottonwood submitted Notice of Claim no. 02-10300 in the SRBA for a water right that covered the 8.0 cfs and 400 acre portion of water right no. 02-02209 that at the time it was seeking to add to the license for that water right through its *Petition to Correct License*. *Affidavit of Charles L. Honsinger*, Ex. G. IDWR recommended the water right for disallowal for the reason that it had been "[r]ecommended as Right No. 2-103 and 2-2209B" both of which were claimed by Black Mesa. On July 10, 2009, claim to water right no. 02-10300 was decreed as disallowed by the SRBA District Court.¹

On January 10, 2003, Black Mesa amended its SRBA claim to water right no. 02-00103, adding an additional 40 acres to the place of use. *See Affidavit of Charles L. Honsinger*, Exhibit H. Water right no. 02-00103 was recommended in the SRBA by the Director essentially as claimed by Black Mesa. The Special Master issued a *Special Master Report* on July 2, 2009 recommending water right no. 02-00103 for partial decree. Thereafter, in late August of 2009, Black Mesa filed a *Motion to Alter or Amend the Special Master Recommendation for Partial*

¹At the same time as this filing, Cottonwood has submitted a Rule 60(b) Motion for Relief in SRBA subcase no. 02-10300, along with supporting documents. A courtesy copy has been served upon the attorneys for Black Mesa.

Decree, a *Motion to File Amended Notice of Claim*, and a *Motion to File Late Objection* in SRBA subcase no. 02-00103. Black Mesa's *Motions* raised three issues: (1) a request to remove of a combined use remark; (2) a request to include a remark stating that Black Mesa's rights were the only rights that had historically been beneficially used to irrigate lands in Section 12, T6S R12E; and (3) a change in priority date to February 25, 1963 - the same priority date as listed in licensed water right no. 02-02209. *Motion to Alter or Amend the Special Master Recommendation for Partial Decree*. After a hearing, the Special Master granted the *Motions* filed by Black Mesa, and required IDWR to issue an Amended Director's Report.

IDWR filed its *Amended Director's Report* for water right no. 02-00103 on March 1, 2010. The *Amended Director's Report* did not result in the removal of the combined use remark, and did not result in a change of the priority date from that originally recommended by IDWR. On March 23, 2010, Black Mesa filed its objection to the *Amended Director's Report*, objecting to the recommended quantity, priority date, and combined use remark. The objection also stated that irrigation under right no. 02-00103 was "developed under permit no. 30990 with a February 25, 1963 priority date." At the April 1, 2010 SRBA subcase status conference, the court was informed that right no. 02-00103 overlapped with water right no. 02-02209, and that there was a pending IDWR administrative proceeding regarding water right no. 02-02209.

On June 10, 2010, IDWR issued an *Order Designating Jeff Peppersack to Review Recommended Order* in the matter of the *Petition and Cross Petition* to correct licensed water right no. 02-02209. *Affidavit of Charles L. Honsinger*, Exhibit I. On August 12, 2010, IDWR issued its *Final Order Granting Petition to Correct License No. 02-02209; Interlocutory Order Regarding Ownership and Setting Scheduling Conference*. *Affidavit of Charles L. Honsinger*,

Exhibit J. The August 12, 2010 *Order* reversed IDWR's January 22, 2002 *Recommended Decision*, holding that licensed water right no. 02-02209 should be amended to include an additional 8.0 cfs and 400 irrigated acres, and ordering that the issue of ownership of the amended portion of the license would proceed as an interlocutory matter before IDWR. The same day, August 12, 2010, at an SRBA status conference in subcase no. 02-00103, the Special Master set a hearing 7 months later to give IDWR the time to resolve the issue of ownership of the newly licensed portion of water right no. 02-02209. On November 19, 2010, IDWR issued its *Order Denying Petition for Reconsideration and Final Order Regarding Ownership*, holding that the amended portion of licensed water right no. 02-02209 would be issued in the name of Cottonwood. *Affidavit of Charles L. Honsinger*, Exhibit K.

On December 3, 2010, Black Mesa filed its *Petition for Reconsideration of Order Denying Petition for Reconsideration and Final Order Regarding Ownership and Request for Stay* requesting, among other things, a stay of IDWR's November 19, 2010 Order "so as to maintain a genuine status quo concerning "ownership" of the [newly licensed portion of water right no. 02-02209] until an appropriate judicial determination of that issue can be made." *Affidavit of Charles L. Honsinger*, Exhibit L. Finally, on December 22, 2010, IDWR issued its Order Denying Petition for Reconsideration and Request for Stay suggesting that the issues raised by Black Mesa would be better raised before a District Court. *Affidavit of Charles L. Honsinger*, Exhibit M.

ARGUMENT

1. Cottonwood May Participate in Subcase No. 02-00103 as a Matter of Right

Administrative Order 1, Section 10k states that "[a]ny party to the adjudication who is not

a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to*

Participate. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P.

24.” A.O.1 § 10k. Upon timely application, Rule 24 allows intervention in an action as a matter of right

when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

I.R.C.P. 24(a).

Other than the filing of the claimant’s Motion to Alter or Amend, Objection, and Late Claim in the subcase that is the subject of this motion, the only proceedings that have occurred are status and scheduling conferences. No trial schedule has been entered in the subcase. Thus, Cottonwood’s *Motion to Participate* is timely and will not cause prejudice to the party as no discovery and no litigation have been conducted.

The subject of this subcase is a water right claimed by Black Mesa that is based upon the amended portion of licensed water right no. 02-02209 that IDWR recently found should be issued in the name of Cottonwood. Thus, Cottonwood has an interest relating to the water right that is the subject of the subcase to which this *Motion to Participate* is directed. Furthermore, water right no. 02-00103 is currently recommended to Black Mesa contrary to IDWR’s *Order Denying Petition for Reconsideration and Final Order Regarding Ownership* - an Order that was issued during a period of time given by the SRBA District Court to IDWR to actually make the determination of ownership as to the water right claimed by both Cottonwood and Black Mesa. Accordingly, absent participation by Cottonwood, disposition of the subcase in favor of Black

Mesa (a fair likelihood given the present posture of the recommendation of the water right) will certainly impair or impede Cottonwood's ability to protect its interest in the amended portion of licensed water right no. 02-02209. Finally, the only party to this subcase is the claimant - whose interests are in direct conflict with Cottonwood's interests. Accordingly, there is no party to this subcase that can adequately represent Cottonwood's interest.

Because Cottonwood claims an interest in the water right that is the subject of this subcase, because the disposition of this subcase may as a practical matter impair or impede Cottonwood's ability to protect that interest, because Cottonwood's interest is not adequately represented by the existing party, and because both IDWR and Black Mesa have themselves recognized in various filings in the license correction proceeding the necessity of a judicial determination of ownership of the newly licensed portion of water right no. 02-02209, intervention as a matter of right pursuant to I.R.C.P. 24(a) is proper.

2. Cottonwood is Entitled to Intervene Permissively

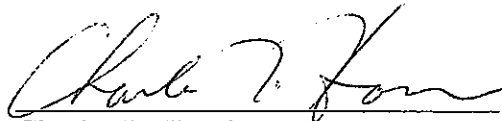
Alternatively, Cottonwood may also intervene in these subcases permissively under I.R.C.P. 24(b). That rule provides that "[u]pon timely application, anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." I.R.C.P. 24(b). Cottonwood has filed at the same time as the submission of this *Motion*, a *Rule 60(b) Motion to Reopen* subcase no. 02-10300 so that it can pursue its claim to the amended portion of water right no. 02-02209 in the SRBA. The fact that the claim that is the subject of this subcase, Cottonwood's SRBA claim no. 02-10300, and Cottonwood's ownership of the amended portion of water right no. 02-02209 in the license correction proceeding have in common is that they all relate to the same water right. Therefore,

permissive intervention pursuant to I.R.C.P. 24(b) is also proper.

SUMMARY

For the reasons discussed hereinabove, Cottonwood respectfully requests that the Special Master grant its *Motion to Participate* in this subcase.

Dated this 6th day of January, 2011.



Charles L. Honsinger

RINGERT CLARK, CHARTERED

CERTIFICATE OF SERVICE

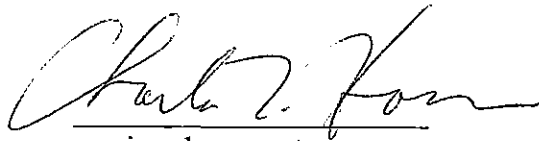
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