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DEPARTMENT OF
WATER RESOURCES

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
RINGERT LAW CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
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Attorneys for Cottonwood Mutual Canal Company

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
	)	
	)	
	)	
	)	
	)	AFFIDAVIT OF CHARLES L. HONSINGER IN
	)	SUPPORT OF MOTION TO PARTICIPATE
	)	
	)	
_____	)	
STATE OF IDAHO	)	
	) ss	
COUNTY OF ADA	)	

CHARLES L. HONSINGER, being first duly sworn upon his oath, deposes and says that:

1. I am the attorney for Cottonwood Mutual Canal Company, the Movant in the above-entitled action, the claimant in Snake River Basin Adjudication subcase no. 02-10300, and the petitioner in the Idaho Department of Water Resources administrative proceeding entitled "In the Matter of Petition to Correct License No. 02-02209 in the Name of Cottonwood Mutual Canal Company; In the Matter of Cross Petition to Correct and Petition to Change Ownership of License No. 02-02209 in the Name of Black Mesa Farms, LLC" (hereinafter "IDWR License

Correction Proceeding”).

2. I make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

3. Attached hereto as Exhibit A is a true and accurate copy of the *Petition to Correct License* filed by the Cottonwood Mutual Canal Company in the IDWR License Correction Proceeding.

4. Attached hereto as Exhibit B is a true and accurate copy of the *Notice of Protest* filed by Black Mesa Farms, LLC to Cottonwood’s *Petition to Correct License* in the IDWR License Correction Proceeding.

5. Attached hereto as Exhibit C is a true and accurate copy of Black Mesa Farms, LLC’s *Cross-Petition to Correct License and Petition to Change Ownership of License* filed in the IDWR License Correction Proceeding.

6. Attached hereto as Exhibit D is a true and accurate copy of the January 22, 2002, *Recommended Decision and Order* issued by the Hearing Officer in IDWR’s License Correction Proceeding.

7. Attached hereto as Exhibit E is a true and accurate copy of Cottonwood’s *Exceptions to Recommended Decision and Order* filed in the IDWR License Correction Proceeding.

8. Attached hereto as Exhibit F is a true and accurate copy of Black Mesa Farms, LLC’s *Response* to Cottonwood’s *Exceptions to Recommended Decision and Order* filed in the IDWR License Correction Proceeding.

9. Attached hereto as Exhibit G is a true and accurate copy of Cottonwood's Notice of Claim to water right no. 02-10300 filed in the Snake River Basin Adjudication.

10. Attached hereto as Exhibit H is a true and accurate copy of Black Mesa's Amended Notice of Claim to water right no. 02-00103 filed in the Snake River Basin Adjudication.

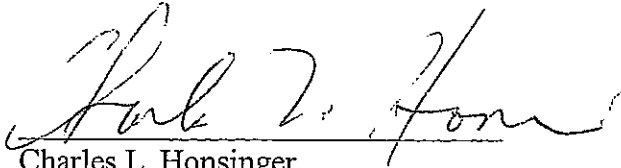
11. Attached hereto as Exhibit I is a true and accurate copy of IDWR's *Order Designating Jeff Peppersack to Review Recommended Order* in the IDWR License Correction Proceeding.

12. Attached hereto as Exhibit J is a true and accurate copy of IDWR's *Final Order Granting Petition to Correct License No. 02-02209; Interlocutory Order Regarding Ownership and Setting Scheduling Conference* in the IDWR License Correction Proceeding.

13. Attached hereto as Exhibit K is a true and accurate copy of IDWR's *Order Denying Petition for Reconsideration and Final Order Regarding Ownership* in the IDWR License Correction Proceeding.

14. Attached hereto as Exhibit L is a true and accurate copy of Black Mesa's *Petition for Reconsideration of Order Denying Petition for Reconsideration and Final Order Regarding Ownership and Request for Stay* in the IDWR License Correction Proceeding.

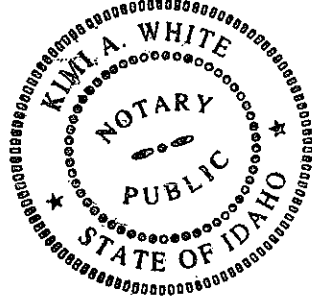
15. Attached hereto as Exhibit M is a true and accurate copy of IDWR's *Order Denying Petition for Reconsideration and Request for Stay* in the IDWR License Correction Proceeding.


Charles L. Honsinger

STATE OF IDAHO)
)ss.
County of ADA)

On this 6th day of January, 2011, before me, the undersigned, a notary public in and for said state, personally appeared Charles L. Honsinger, known to me to be the individual that executed the foregoing affidavit, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.




Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 01/01/16

CERTIFICATE OF SERVICE

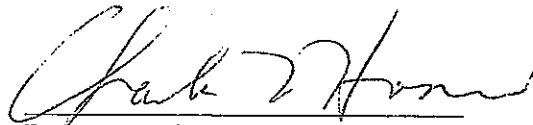
I certify that on the 6th day of January, 2011, I served copies of this document, including all attachments by U.S. Mail and/or hand delivery upon the following:

Mike Creamer
Givens Pursley
P.O. Box 2720
Boise, ID 83701

Wesley and Christine Wootan
P.O. Box 636
Glenns Ferry, ID 83623

Don and Brenda Bryant
P.O. Box 215
Glenns Ferry, ID 83623

Director
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, ID 83720-0098



Person serving documents

Exhibit A

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB #5636)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

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Department of Water Resources

Attorneys for Cottonwood Canal Co.

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF LICENSED WATER
RIGHT NUMBER 02-02209

)
)
) PETITION TO CORRECT LICENSE
)
)
)

COMES NOW, Cottonwood Canal Co. (hereinafter referred to as "the Canal Company"),
by and through its attorneys, Ringert Clark, Chartered, and hereby petitions the Director of the Idaho
Department of Water Resources (hereinafter referred to as "IDWR") to correct the license issued for
water right number 02-02209.

SUMMARY

Water right number 02-02209 was licensed to the Canal Company on February 11, 1970 for
79.70 cfs to irrigate 3,985 acres. The license did not include 400 acres in T06S R10E Section 14 that
had been permitted and put to beneficial use as established by the beneficial use examination and
confirmed by aerial photography, nor did the license include the 8.0 cfs and 1,338.95 AFA necessary
to irrigate those 400 acres. IDWR's records establish no reason for the failure to include the
specified land and water in the license. IDWR should correct this error by amending the license for
water right no. 02-02209 to include an additional 8.0 cfs, an additional 1,338.95 AFA, and an

PETITION TO CORRECT LICENSE - 1

COPY

additional 400 irrigated acres in T06S R10E Section 14.

FACTS

On February 23, 1963, the Canal Company submitted an Application for Permit to Appropriate the Public Waters of the State of Idaho. *See* Exhibit "A". The Application requested permission to appropriate 89.6 cfs of water from the Snake River to irrigate 4,480 acres of lands in Elmore County. Among the specified lands for which the Application was submitted were 400 acres in T06S R10E Section 14, NE ¼, N ½ of SE ¼, N ½ of NW ¼, SENW, and NESW. On March 1, 1963, the application was approved as submitted, and assigned permit number 30990.

On April 25, 1963, the Canal Company submitted an Application for Amendment of the Land List for Permit No. 30990. *See* Exhibit "B". The Application for Amendment included the same 400 acres in T06S R10E Section 14 as described above, and as were approved in the permit. The Application for Amendment was approved as submitted on April 26, 1963. The Notice of Proof of Completion of Works and Application of Water to Beneficial use, published in the Mountain Home News on June 24 and July 25, 1965 also references the same Section 14 lands. *See* Exhibit "C".

The July 29, 1965 Deposition of Otis H. Williams regarding the Proof of Application of Water to Beneficial Use and acting for the holder of the permit, states in response to a request that the deponent name the acres irrigated: "See attached list." *See* Exhibit "D". No list is attached to the Deposition. There is a loose sheet of paper in the Department's files near the deposition which lists all of the lands included on the Permit Application as amended except that it does not contain any of the permitted lands in T06S R10E Section 14. *See* Exhibit "E". Nothing in IDWR's files indicates the source or author of the list. The total acreage of the lands described on Exhibit "E" is

3,985 acres.

The July 29, 1965 Deposition of George R. Lake as a witness to the Proof of Application of Water to Beneficial Use in response to the request that the deponent name the acres irrigated states: "there are 14 320 acre tracts of which nearly all of each is irrigated as per the attached list." *See* Exhibit "F". (Fourteen 320 acre tracts constitutes a total of 4,480 acres). Again, no list is attached to the deposition. However, again there is a loose sheet of paper in the Department's files near the Lake deposition which is an exact copy of the list described above. *See* Exhibit "E". Finally, the July 29, 1965 Deposition of Lawrence Roemer as a witness to the Proof of Application of Water to Beneficial Use lists all of the lands present in the Permit as amended, including those in Section 14. *See* Exhibit "G".

The Beneficial Use Examination Report lists as irrigated all of the Section 14 lands that were present in the permit as amended and specifies a total of 4,480 irrigated acres. *See* Exhibit "H". The map that is part of the Beneficial Use Examination Report shows the Section 14 lands as being within the irrigated area. However, a notation on the map specifies that only 3,985 acres are irrigated. A January 26, 1970 confirmation letter from the field examiner to the Canal Company similarly states that the examination determined that all of the lands described in the permit as amended were irrigated, but also states that only 3,985 acres are irrigated. *See* Exhibit "I".

Despite the fact that the beneficial use examiner found that the Section 14 lands were irrigated, the water right was licensed for only 3,985 acres, and the quantity of water necessary to irrigate those acres at the rate of .02 cfs/acre. *See* Exhibit "J". The acres specified on the license are the same as those listed on the loose sheet of paper in the water right file. *See* Exhibit "E".

In an August 24, 1984 IDWR Memorandum to David Tuthill, Don Shaff concluded that

IDWR should issue an amended license for water right number 02-02209 including the Section 14 lands based upon the facts that the beneficial use examiner found that the Section 14 lands were irrigated, and that aerial photography confirmed this irrigation. *See* Exhibit “K”. In an August 28, 1984 handwritten Inter-Department Memo to Glen Saxton, IDWR’s Dave Tuthill also suggested that IDWR should amend licensed water right number 02-02209 to include the Section 14 lands that had been excluded from the license in error. *See* Exhibit “L”.

On July 18, 1986, the Canal Company submitted an Application for Extension of Time to Avoid Forfeiture for the entire quantity of water licensed under water right number 02-02209. The Application was approved on November 14, 1988. *See* Exhibit “M”. Under the approved Application, beneficial use of the water right was to resume by July 1, 1991.

On March 22, 1991, pursuant to Resolution, the Idaho Water Resource Board accepted a portion of licensed water right number 02-02209 into the Water supply Bank. *See* Exhibit “N”. On May 31, 1991, pursuant to Resolution, the Idaho Water Resource Board accepted a second portion of licensed water right number 02-02209 into the Water supply Bank. *See* Exhibit “O”.

On May 12, 1998, IDWR approved transfer number 5125 implementing a change in point of diversion, place of use and purpose of use of a portion of water right number 02-02209. *See* Exhibit “P”. On August 4, 2000, IDWR approved transfer number 5714 implementing a change in point of diversion and place of use of another portion of water right number 02-02209. *See* Exhibit “Q”.

ANALYSIS

I.C. § 67-5254(1) allows IDWR to issue corrected licenses, after the agency “gives notice and an opportunity for an appropriate contested case.” *Final Order*, In the Matter of License No. 61-07189 in the Name of Magic West (Jan 22, 1999); *See also Preliminary Order Correcting License*, In the Matter of Petition to Correct Water Right License Submitted by Darwin McKay (Feb. 1, 2000).

IDWR has corrected issued licenses after detecting errors in the licensing procedure in at least two previous cases. In its *Final Order* in the Magic West licensing correction case, IDWR increased the licensed volumetric limitation because of IDWR’s error in failing to involve the licensee’s designated representative in the beneficial use field examination, and in subsequent requests for information that IDWR determined would have established beneficial use of 58 afa under the permit, rather than the 12.8 afa that were licensed. *Final Order*, In the Matter of License No. 61-07189 in the Name of Magic West.

Similarly, in its *Preliminary Order* in the Darwin McKay licensing correction case, IDWR removed conditions in the license requiring the water right to be used only in conjunction with appurtenant surface water rights on the grounds that the water right was not developed by the permittee for use in conjunction with surface water, and that the license did “not accurately portray the water use developed by the petitioner in accordance with” the permit. *Preliminary Order Correcting License*, In the Matter of Petition to Correct Water Right License Submitted by Darwin McKay.

The Canal Company’s request to correct license number 02-02209 is consistent with IDWR’s license corrections in both the Magic West and Darwin McKay cases. Here, IDWR erred in that the

license was issued without listing the 400 acres (and the appurtenant quantity of water) in T06S R10E Section 14, NE ¼, N ½ of SE ¼, N ½ of NW ¼, SENW, and NESW that the Canal Company developed under the permit as confirmed by the beneficial use examination, and by aerial photography, according to Don Shaff's August 24, 1984 Memorandum. The Beneficial Use Examination Report found that the water right had been developed such that the permitted acreage in Section 14 was irrigated, and found that the diversion works had a capacity of 90.24 cfs. Despite these findings, handwritten notations in the Beneficial Use Examination Report stated that only 3,985 acres were irrigated, and specified an associated diversion rate of 79.7 cfs (a per acre diversion rate of .02 cfs/acre). However, according to the examiner's findings, those notations should have specified that 4,305 acres were developed pursuant to the permit, and that the associated diversion rate was 86.1 cfs. The Shaff and Tuthill Memoranda establish that IDWR itself has previously recognized the issuance of this license without the Section 14 lands as an error needing correction.

The error was perpetuated in the January 26, 1970 beneficial use examination confirmation letter, and in the license issued to the Cottonwood Canal Company for water right number 02-02209. The error has also been perpetuated in every subsequent filing in IDWR's files, including the Application for Extension of Time to Avoid Forfeiture, the Application to Sell or Lease a Water Right to the Water Supply Bank, Applications for Transfer numbers 5125 and 5714, and the approvals of all of these applications.

Although the reason for the error is unclear, the only document in the file placed below the Beneficial Use Examination Report that does not include the Section 14 lands as part of the description of the lands permitted and intended to be licensed under water right number 02-02209 is the loose list of the irrigated lands' legal descriptions. See Exhibit "E". Therefore, it seems most

likely that, in its beneficial use examination process, IDWR erroneously used that list to calculate the 3,985 irrigated acres specified in the handwritten notations on the Beneficial Use Examination Report, rather than calculating the irrigated acreage based upon the examiner's findings. This conclusion is supported by the conclusions in Don Shaff's August 24, 1984 Memorandum.

Presumably, any change in the Canal Company's intentions or actual beneficial use resulting in the deletion of the Section 14 acres at the time of the beneficial use examination, or between the time of that examination and the issuance of the license would be documented in some manner. No such documentation appears in IDWR's files. In fact, based upon the records in IDWR's water rights files, it is impossible to find any reason for the examiner's finding that only 3,985 acres were developed under the permit other than that the examiner relied upon the land lists that are now loose in the file.

The file for water right number 02-02209 establishes the following facts: (1) the reduction in acreage in the handwritten notations on the Beneficial Use Examination Report was not documented by any correspondence between IDWR and the Canal Company; (2) the beneficial use examiner found that the Section 14 acres were irrigated; (3) 1969 aerial photography confirmed the irrigation of those acres, and; (4) other than the loose land list, all documents in the file up to the date of the beneficial use examination included the Section 14 lands. These facts indicate that the most likely explanation for the specification of only 3,985 irrigated acres in the handwritten notations in the Beneficial Use Examination Report was that the author of the land list made a typographical error by failing to include the Section 14 lands on the list; and that the error was perpetuated by IDWR when the examiner wrote in a total of 3,985 irrigated acres in reliance upon that erroneous land list. This combination resulted in IDWR's failure to include in the license the Section 14 lands its

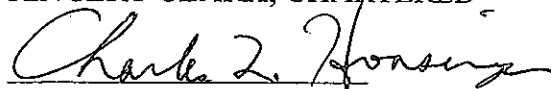
examiner had determined were in fact irrigated, and that were confirmed as irrigated by the 1969 aerial photograph referenced in the August 24, 1984 Shaff Memorandum.

RELIEF REQUESTED

For the reasons discussed above, the Canal Company respectfully requests that IDWR initiate proceedings to issue a corrected license for water right number 02-02209 which properly identifies the lands in T06S R10E Section 14, NE ¼, N ½ of SE ¼, N ½ of NW ¼, SENW, and NESW as irrigated pursuant to the licensed water right, and increases the associated licensed diversion rate and volume by 8.0 cfs and 1,338.95 afa respectively. Finally, the Canal Company also requests that IDWR advise the Idaho Water Resource Board of the license correction, and that IDWR request that the Board increase the quantity of licensed water right number 02-02209 currently in the Water Supply Bank by 8.0 cfs.

Respectfully submitted this 3^{1st} day of October, 2000.

RINGERT CLARK, CHARTERED



Charles L. Honsinger

Attorney for Cottonwood Canal Co..

Exhibit B

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P. 02

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January 26, 1999
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WATER RESOURCES
WESTERN REGION

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

NOTICE OF PROTEST

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FEB 13 2001

Department of Water Resources

This form may be used to file a protest with the department under sections 42-108B, 42-203A, 42-203C, 42-211, 42-222 and 42-224, Idaho Code. The department will also accept a timely protest not completed on this form if it contains the same information.

Petition to change Water Right License No. 02-02209 in the

1. Matter being protested name of Cottonwood Canal Company
2. Name of protestant Black Mesa Farms LLC
3. Protestant's Representative for service (If different than protestant)
Wesley R Wootan and Don J Bryant
4. Service mailing address P O Box 82, Glens Ferry ID 83623
5. Service telephone no. (208) 366-7406 Farm Office (208) 366-7433
6. Basis of protest (including statement of facts and law upon which the protest is based)
Water Right No. A02-00103 (Beneficial Use) also includes these lands that were
filed for adjudication. The current name on these rights is Black Mesa Farms.
Previous name on these rights was Cottonwood Mutual Canal Company.
(additional pages may be attached to describe nature of the protest)
7. What would resolve your protest? Black Mesa Farms LLC should be listed as water right
holders on these water rights because addition of water rights to the license
(02-02209) pertaining to these lands has major consequences to the titled land

owner, which is Black Mesa Farms LLC.
I hereby, acknowledge that if I, or my designated representative, fails to appear at any regularly scheduled conference or hearing in the matter of which I have been notified at the address above, the department may issue a notice of proposed default against me in this matter for failure to appear. I also verify that I have served a copy of this protest upon the applicant.

Signed this 9th day of February, 2001.

Black Mesa Farms LLC

Protestant

Wesley R. Wootan
Protestant's Representative

Exhibit C

Michael C. Creamer ISB #4030
John M. Marshall ISB #5628
GIVENS PURSLEY LLP
277 North Sixth Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
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Attorneys for Black Mesa Farms LLC

BEFORE THE STATE OF IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF LICENSED
WATER RIGHT NUMBER 02-
02209

CROSS-PETITION TO CORRECT
LICENSE AND PETITION TO CHANGE
OWNERSHIP OF LICENSE

This is a petition by Black Mesa Farms LLC (“Black Mesa Farms” or “Black Mesa”) to correct License No. 02-02209 and to issue the corrected portion of the license in the name of Black Mesa Farms (collectively the “Cross-Petition”). This is a cross-petition because the Cottonwood Canal Co. (“Petitioner”) has filed its own Petition to Correct License No. 02-02209 (the “Petition”) on October 31, 2000. Black Mesa Farms and Petitioner both own portions of original license no. 02-02209.¹

Black Mesa Farms agrees with Petitioner that the Idaho Department of Water Resources (the “Department”) should correct license 02-02209 to add 400

¹ Black Mesa Farms owns 02-02209B and Petitioner owns 02-02209A.

acres in section 14 of Township 06S, Range 10E (“Section 14 lands”) and to make a corresponding adjustment in the diversion rate and diversion volume. However, Black Mesa Farms owns and irrigates the Section 14 lands and also owns any appurtenant water rights, including any contested portion of right no. 02-02209, appurtenant to those lands.² The Department should correct license no. 02-02209, and it should issue the corrected license in the name of its rightful owner—Black Mesa Farms.

FACTS AND ANALYSIS

Petitioner has outlined the facts from the Department’s file that justify correction of license no. 02-02209. These facts show that the acres in Section 14 were authorized to be developed, were in fact developed under the permit for right no. 02-02209, were recognized as irrigated in the beneficial use exam, but were inexplicably deleted from the license. Black Mesa Farms does not dispute these facts and incorporates them herein with this reference.

Petitioner, though, has neglected to include those facts demonstrating that it does not own that portion of the license it seeks to correct. The chain of ownership of right 02-02209 has a long history, most of which is in the Department’s file, and most of which does not need to be detailed here. In summary, individual members of the Petitioner developed the approximately 4000 acres authorized by water right 02-02209 on surveyed lands owned by the federal

² Black Mesa has claimed a beneficial use water right in the Snake River Basin Adjudication, identified as no. 02-00103, to cover this same irrigation use in the event the license is not amended.

government and managed by the Bureau of Land Management (“BLM”) pursuant to applications for entry under the Desert Land Act. After protracted litigation, the BLM obtained a final judicial determination that the desert land entries were void, and the BLM, for the federal government, retained ownership of the land and its appurtenant water rights, including license no. 02-02209.

Black Mesa obtained ownership of 4,037 acres and the appurtenant water rights, including water right no. 02-02209, from the BLM via grant of patent no. 11-91-0001 dated October 12, 1990, a copy of which is in the Department’s file. After Black Mesa obtained the land and the appurtenant water rights from the BLM, Black Mesa conveyed 61.30 cfs of right 02-02209 back to Petitioner appurtenant to acres other than the Section 14 lands, keeping 12.8 cfs of the right for itself. A copy of the conveyance document is attached as Exhibit A.³ Because Petitioner never has conceded that the BLM obtained ownership of water right no. 02-02209, Black Mesa Farms secured a Release and Assignment dated December 12, 1990 from Petitioner to ensure clear title to that portion of right no. 02-02209 Black Mesa Farms retained. A copy is attached as Exhibit B.

Significantly, the Release and Assignment from Petitioner to Black Mesa Farms released that portion of water right 02-02209 appurtenant to Section 14 lands. To the extent Petitioner had any interest in right 02-02209 to convey, it

³ Wesley R. and Christine Wootan and Don and Brenda Bryant are the principles of, and the predecessors in interest of, Black Mesa Farms. The transactions referenced herein include transaction by these individual before conveyances to Black Mesa Farms.

conveyed that portion of right 02-02209 appurtenant to Section 14 lands—including any future corrections adding water to irrigate those lands—to Black Mesa Farms.

In sum, if water right 02-02209 is corrected to add Section 14 lands, it is Black Mesa Farms who owns that portion of the license. It acquired this portion of the license outright through the patent from the BLM, it never deeded water appurtenant to Section 14 lands to Petitioner, and it obtained that portion of the license appurtenant to Section 14 lands in the Release and Assignment from Petitioner (to the extent Petitioner had anything to convey). Either way, Petitioner does not own any portion of water right 02-02209 appurtenant to Section 14 lands.

Black Mesa Farms currently irrigates the Section 14 lands and has done so for over a decade since it acquired the property from the BLM. It has filed a beneficial use claim no. 02-00103 to cover these lands in the event the right is not amended. It asks the Department to correct license no. 02-02209 to have its irrigation use legally recognized under a licensed water right. By contrast, Petitioner seeks to add the corrected portion of license 02-02209 to its water bank holdings so that it can profit from a right it does not own and cannot use.

Presumably, under Petitioner's theory, Black Mesa Farms has been irrigating the Section 14 lands as a favor to the Petitioner, would only hold a junior, competing beneficial use claim to irrigate the Section 14 lands and would have to dry up the Section 14 acres once the corrected portion of right 02-02209 was added to the

water bank. The Department should not sanction this slight of hand by the Petitioner intended to acquire a water right they do not own to the detriment of the Black Mesa Farms—the current irrigator and rightful owner of the corrected portion of the license.

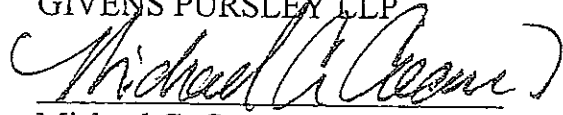
RELIEF REQUESTED

Black Mesa Farms requests that the Department correct license 02-02209 to add 400 acres in the NE 1/4, N 1/2 of SE 1/4, N 1/2 of NW 1/4, SENW and NESW as described in the proof of beneficial use and field examiner's report and to add an additional 8.0 cfs and 1,338.95 AF required to irrigate those lands. Black Mesa Farms also requests that the Department issue that portion of corrected license 02-02209 in the name of Black Mesa Farms and not Cottonwood Canal Co.

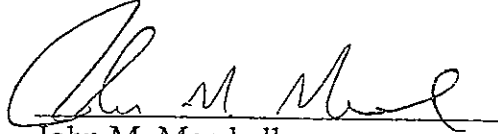
This Cross-Petition raises an ownership dispute over license 02-02209 that may be best left for the Snake River Basin Adjudication ("SRBA court") court. In the event that the Department does not want to resolve the ownership issue, Black Mesa requests that the Department correct the license while specifically reserving the question of ownership for the SRBA.

Respectfully submitted this 27th day of April, 2001

GIVENS PURSLEY LLP

A handwritten signature in cursive script, appearing to read "Michael C. Creamer", written over a horizontal line.

Michael C. Creamer.

A handwritten signature in cursive script, appearing to read "John M. Marshall", written over a horizontal line.

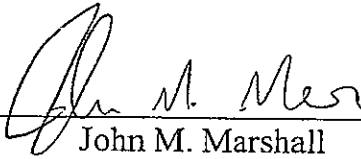
John M. Marshall.

Certificate of Service

I hereby certify that on this 27 day of April, 2001, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Charlie Honsinger
Ringier Clark Chd.
455 S. 3rd St.
Boise, ID 83701

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight
☐ Telecopy



John M. Marshall

Exhibit D

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO)
CORRECT LICENSE NO. 02-02209)
IN THE NAME OF COTTONWOOD)
CANAL COMPANY)

RECOMMENDED DECISION
AND ORDER

IN THE MATTER OF CROSS)
PETITION TO CORRECT AND)
PETITION TO CHANGE OWNERSHIP)
OF LICENSE NO 0202209 IN THE)
NAME OF BLACK MESA FARMS, LLC)

3

STANDARD FOR DECISION

This matter comes before the Idaho Department of Water Resources ("IDWR") on an *Petition to Correct License* dated October 31, 2000, filed by Cottonwood Canal Co. (the "Petitioner") seeking to amend water right license no. 02-02209, issued on February 11, 1970. In response, a *Cross-Petition to Correct License and Petition to Change Ownership of License* was filed by Black Mesa Farms, also seeking amendments to water right license no. 02-02209 (the "Cross-Petition"). The Petition and Cross-Petition request IDWR to modify license no. 02-02209 pursuant to I.C. § 67-5254, which provides, in part, that:

(1) An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license... unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute.

For purposes of this section, a license is "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of authorization required by law, but does not include a license required solely for revenue purposes." I.C. §67-5201(9).

Although the language of I.C. § 67-5254 does not provide a direct authorization to amend a water right license, the language presupposes an agency may modify or amend a license, and then adds the condition that notice and opportunity for a contested case be provided before doing so. IDWR previously used this interpretation of I.C. §67-5254 to authorize the amendment of a water right license. *In the Matter of License No. 61-07189 in the Name of Magic West, Inc.*, Final Order (January 22, 1999); *In the Matter of Petition to Correct Water Right License Submitted by Darwin McKay*, Preliminary Order Correcting License (February 1, 2000).

The authority to amend or modify a water right license under I.C. § 67-5254 is circumscribed by I.C. § 42-220, which provides that a water right license “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right....” IDWR cannot use I.C. § 67-5254 to increase or change the beneficial use described by a water right license. Such an amendment would be an unlawful enlargement of the beneficial use under the licensed priority date. See Fremont-Madison v. Ground Water Approp., 129 Idaho 454, 461 (1996). The time for making such substantive changes in 1970 was through an appeal filed within sixty days of license issuance. I.C. § 42-219 (1967 Supp.); § 42-224 (1948).

Amendments to water right licenses under I.C. § 67-5254 may be issued to correct errors made by IDWR in describing the licensed beneficial use. Such errors may be patent—as when there is an obvious transposition of numbers or two elements of the described beneficial use are obviously contradictory or incompatible.¹ Latent errors may also be corrected where

¹For instance, a right to irrigate 50 acres which is described as using 0.01 cubic feet per second (“cfs”) has a patent error in the description of the beneficial use. This was the case *In the Matter of License No. 61-07189 in the Name of Magic West, Inc.*, Final Order (January 22, 1999) where IDWR erroneously licensed an industrial use for 0.67 cfs,

investigation reveals a licensing provision that does not correctly describe the beneficial use.² In each instance, the license to be amended must have given junior appropriators some notice of the extent of beneficial use under the license. Completely new beneficial uses may not be shoe-horned into a licenses' priority date, under the guise of a license amendment.

The Idaho Department of Water Resources (IDWR), having examined the Petition and the written record, and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Course of Proceedings

1. The *Petition to Correct License* was filed on October 31, 2000, by Petitioner seeking to amend water right license no. 02-02209 to include the irrigation of 400 acres in T. 6 S., R. 10 E, Sec. 14, with an additional 8.0 cfs and 1,338.95 AFA. A filing fee of \$50 from Petitioner was received by IDWR on January 11, 2001. A Notice of Petition to Change Water Right License No. 02-02209 in the Name of Cottonwood Canal Company was published on January 24 and 31, 2001, in the Mountain Home News. A Notice of Protest was filed by Black Mesa Farms, LLC with IDWR on February 13, 2001.

2. Cross-Petitioner filed the *Cross-Petition to Correct License and Petition to Change Ownership of License* with IDWR on April 27, 2001, and also sought to amend water right license no. 02-02209 to include the irrigation of 400 acres in T. 6 S., R. 10 E,

but only 12.9 acre feet per annum (afa). IDWR amended the license to correctly describe the annual volume of the use as 58 afa.

² This was the case *In the Matter of Petition to Correct Water Right License Submitted by Darwin McKay*, Preliminary Order Correcting License (February 1, 2000) where IDWR removed approval conditions requiring the use of appurtenant surface water before using the licensed groundwater right, when information revealed that the right was never used with appurtenant surface water. The change in this case did nothing to change the beneficial use, it simply removed essentially meaningless approval conditions.

Sec. 14, with 8.0 cfs and 1,338.95 AFA, but requested such amended license be issued in the name of Cross-Petitioner.

3. On June 6, 2001, IDWR issued its *Order Authorizing Discovery and Order of Recusal*. On June 19, 2001, IDWR issued its *Order Appointing Hearing Officer*. Following a prehearing conference on July 20, 2001, the Hearing Officer issued a *Prehearing Order* on July 23, 2001, that, among other things, bifurcated the issues in this matter as follows:

Two issues are raised by the Petitions and Cross-Petitions:

1. Whether License No. 02-02209 should be modified to include more acres and an increased quantity of water; and
2. Whether the additional acres and increase quantity of water should be shown on the License as owned by Cottonwood Canal Co. or Black Mesa Farms.

Because *the* second issue need not be decided if IDWR does not modify License No. 02-02209, the parties agreed that the first issue should be processed prior to the second issue. If the Hearing Officer determines that License No. 02-02209 should not be modified, he will issue that decision in the form of a recommended order to the Director of IDWR. If the Hearing Officer determines that License No. 02-02209 should be modified, he will issue that decision in the form of a draft decision to the parties and set an additional prehearing conference to discuss resolution of the second issue.

4. The *Prehearing Order* also provided that the determination of whether License No. 02-02209 should be modified would be made upon a written record and established a schedule for submission of written materials.

5. On July 23, 2001, the Hearing Officer issued a *Request for Submission of IDWR Staff Memorandum*. IDWR responded with its *Response to Request for Submission of IDWR Staff Memorandum* on September 31, 2001. Cross-Petitioner submitted its inappropriately named *Black Mesa's Response to IDWR Staff Memorandum* on October

26, 2001.³ The Petitioner filed its similarly name *Memorandum in Response to IDWR Staff Memorandum* on November 2, 2001, with supporting affidavits.

II. Evidence Considered.

6. IDWR considered the following evidence in making the substantive findings of facts:

- a. Application for Permit to Appropriate the Public Waters of the State of Idaho No. 39069, including map. Approved as Permit No. 30990, and subsequently renumbered 02-2209.
- b. Application for Amendment LAND LIST Permit No. 30990 received April 25, 1963.
- c. State of Idaho Water License no. 30990/02-2209.
- d. Notice of Proof of Completion of Works and Application of Water to Beneficial Use received on June 11, 1965, by the Department of Reclamation, with accompanying letter signed by Otis Williams on behalf of Cottonwood Canal Company.
- e. Letter dated June 15, 1965, from Carl E. Tappan, State Reclamation Engineer, to Cottonwood Canal Company re Permit No. 30990.
- f. Affidavit of Publication received August 3, 1965 by the Department of Publication.

³ This document is inappropriately named because the IDWR staff memorandum is not a pleading to which a "response" is filed. It is a factual memorandum by IDWR staff, akin to an affidavit. IDWR is not a party to this matter, it is the decision-maker.

- g. Deposition of Holder signed by Otis Williams and notarized by Phyllis Butterfield on July 29, 1965.
- h. Deposition of Witness signed by George R. Lake and notarized by Phyllis Butterfield on July 29, 1965.
- i. Deposition of Witness signed by Lawrence Roemer and notarized by Phyllis Butterfield on July 29, 1965.
- j. Letter dated August 4, 1965, from Carl E. Tappan, State Reclamation Engineer to Otis H. Williams, Secretary, Cottonwood Canal Co.
- k. Draft Report of Examiner for Permit No. 30990, and loose map
- l. Letter dated January 26, 1970 from Dorian Clay, Field Examiner, to Cottonwood Canal Company, c/o Wm. A. Anderson..
- m. Memorandum dated August 24, 1984, from D. Shaff to D. Tuthill.
- n. Inter-Department Memo dated August 28, 1984, from Dave Tuthill to Glen Saxton.
- o. Inter-Department Memo dated August 29, 1984, from Dave Tuthill to Don Shaff.
- p. Letter dated December 29, 2000, from Charles L. Honsinger to Glen Saxton, with attachments. (BLM Documents)
- q. Response to Request for Submission of IDWR Staff Memorandum, dated September 13, 2001.
- r. Affidavit of Shelley Keen, dated November 1, 2001.

s. Affidavit of Clifford Smith, dated October 22, 2001.

- what about BCM documents?

III. Permitting and Licensing Process

7. On February 25, 1963, Cottonwood Canal Company filed an Application for Permit to Appropriate the Public Water of the State of Idaho with the Idaho Department of Reclamation. Cottonwood Canal Company was identified as a non-profit corporation. The Idaho Department of Reclamation is a predecessor agency of the current Idaho Department of Water Resources, and will also be referred to as IDWR. That Application was assigned application no. 39069.

8. The Application requested authorization to develop a water right with which to irrigate 4480 acres, with 89.6 cfs of water to be diverted from the Snake River. The Application envisioned the construction of a pumping plant, canals ditches and pipeline over 5 years, and application of the water to the proposed use within an additional 5 years. The land to be irrigated was located in Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Among these lands, 400 acres was identified within Section 14 of Township 6 South, Range 10 East ("Section 14 lands").

9. The Application was approved and a permit issued for the development of this water use on March 1, 1963. The Permit was assigned no. 30990, subsequently renumbered to 02-2209, and required one-fifth of the work to be completed by September 1, 1965, and the remainder was to be completed by September 1, 1968. Beneficial use of all the water to be used under the Permit was required to be made by March 1, 1973.

10. A Notice of Proof of Completion of Works and Application of Water to Beneficial Use was submitted for publication by Otis Williams of the Cottonwood Canal Company on June 11, 1965. The Notice indicated that the place where the water was

used under Permit No. 30990 included the Section 14 lands. The Notice indicated that proof of completion was to be submitted to Phyllis Butterfield, Notary Public, on July 29, 1965, at 10:00 a.m. in Burley Idaho. On June 15, 1965, the State Reclamation Engineer sent three depositions to Cottonwood Canal Company. The first deposition was to be executed by Cottonwood Canal Company, as the "holder" and the other two by two disinterested witnesses. All three were to be submitted on July 29, 1965. The June 15, 1965, letter provided, "It is very important and necessary that each question be answered in detail." (Underscoring in original). The Notice of Proof of Completion of Works and Application of Water to Beneficial Use was published in the Mountain Home News and included reference to the Section 14 lands.

11. The Deposition of Holder for Permit No. 30990, signed by Otis Williams, Secretary of Cottonwood Canal Company, was submitted on July 29, 1965. In its answer to a portion of question 6. "If for irrigation, name each subdivision in which used and number of acres in each subdivision that have actually been irrigated with said water:" the Holder stated "See attached list." A listing of lands which was unattached to the first page of the Holder Deposition, but which was directly behind that page in the file and with staple holes that corresponded to the first page, did not include the Section 14 lands. Total land area listed in the Holder Deposition was 3985 acres.

12. The Deposition of Witness for Permit No. 30990, signed by George R. Lake, the supervisor of irrigators, was submitted on July 29, 1965. In his answer to a portion of question 6: "If for irrigation, give each subdivision in which water has been used and number of acres irrigated in each subdivision:" George Lake stated "there (sic) are 14 320 acre tracts of which nearly all of each is irrigated as per attached list." A listing of lands

which was unattached to the first page of the Lake Deposition, but which was directly behind that page in the file and with staple holes that corresponded to the first page, did not include the Section 14 lands. Total land area listed in the Lake Deposition was 3985 acres.

13. The Deposition of Witness for Permit No. 30990, signed by Lawrence Roemer, farm manager and partial supervisor of irrigators, was submitted on July 29, 1965. In his answer to a portion of question 6: "If for irrigation, give each subdivision in which water has been used and number of acres irrigated in each subdivision:" George Lake stated "irrigation 14 - 320 acre tracts described below" and then there is a listing of lands, including the Section 14 lands. Total land area listed in the Roemer Deposition was 4350 acres, although he also indicates 14 -320 acre tracts as the total land area, which is 4480 acres.

14. On August 4, 1965, the State Reclamation Engineer wrote to the Cottonwood Canal Co. acknowledging the receipt of the Holder, Lake and Roemer Deposition and the affidavit of publication submitted in proof of completion of Permit No. 30990. The letter indicated that before final action could be taken a field examination had to be made by the department.

15. The form for the Report of Examiner requires in paragraph 7 as follows: "List legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact numbers of acres under cultivation in each forty-acre tract. ... (Submit map on attached plat, showing location and details of above description." The Report lists the lands to be irrigated as provided in Permit No. 30990, including the Section 14 lands. It does not list the exact number of acres under cultivation in each forty-acre tract, either in writing or on

the attached map (although the attached map does show some erased pencil figures on some of the "quarter-quarters" that could be irrigated acreages). It does indicate adjacent to the term "Area" the number 3,985 acres, which corresponds to the total number of acres indicated in both the Holder and Lake Depositions. Behind the Report of Examiner in the file is a map of Cottonwood Canal Co.'s proposed place of use with each "quarter-quarter" numbered, with acreage figures written in red. The red figures correspond to the Holder and Lake Depositions which indicated a total of 3985 irrigated acres, and does not include the Section 14 lands. By letter dated January 26, 1970, Field Examiner Dorian Clay indicated that the field examination for Permit 02-2209 found irrigation of 3,985 acres of irrigation within the lands under Permit 02-2209, including lands in Section 14. Mr. Clay found 79.70 cfs of water to be beneficially used. This amount was likely calculated by multiplying the statutory limit of 0.02 cfs per acre by 3,985 acres. The January 26, 1970, then indicated that upon the payment of a fee of \$231.00 a water license would be issued consistent with the findings in the letter.

16. Water Right License No. 30990, issued on February 11, 1970. The License indicated that the proposed works of pumps, motors and sprinkler system with a capacity of 90.24 cfs were completed on May 10, 1965. The License indicates that on July 29, 1965, proof of beneficial use of 13,339.33 acre feet per season with a maximum rate of diversion of 79.70 cfs of Snake River water for irrigation was made to the satisfaction of the State Reclamation Engineer. The place of use was found to include 3,985 acres within Township 6 South, Ranges 10 and 11 East. The described place of use included no land within Section 14 of Township 6 South, Range 10 East. No appeal was filed by the Petitioner regarding the Section 14 lands.

IV. Irrigation of Section 14 Lands.

17. The Section 14 lands were irrigated commencing May 10, 1965, using the irrigation system of the Cottonwood Canal Co.

18. What about the BLM Docs?

CONCLUSIONS OF LAW

Based upon the Findings of Fact, IDWR makes the following Conclusions of Law:

1. IDWR made no error regarding the Section 14 lands in the issuance of License No. 02-02209. The permit holder, Cottonwood Canal Co., did not include those lands in its deposition. IDWR could not issue the license for more acres than submitted by the permit-holder. There is no evidence that Cottonwood Canal Co. ever tried to change its deposition, or amend the attached list of irrigated lands. If Cottonwood Canal Co. disagreed with License No. 02-02209 it could have appealed that license pursuant to I.C. § 42-219 (1967 Supp.); § 42-224 (1948). If there was an error made in the licensing process, it was Petitioner's.

①

2. There is no patent error on the face of License No. 02-02209. The beneficial use described on the face of the license is internally consistent, with adequate instantaneous flow and yearly volume for the number of acres irrigated.

the ben use even is not

3. Neither Petitioner nor Cross-Petitioner have shown a latent error in the description of the beneficial use in License No. 02-02209. The beneficial use described on the face of the license is internally consistent, with adequate instantaneous flow and yearly volume for the number of acres irrigated.

this is the problem for patent error - not latent

4. The Petition and Cross-Petition request that an entirely new beneficial use, 400 acres of irrigation using 8 cfs and 1,338.95 AFA on the Section 14 lands, be licensed

under the February 25, 1963, priority date of License No. 02-02209. Such a modification would constitute an enlargement of the water use under License No. 02-02209 and injure junior water rights.

RECOMMENDED ORDER

Based upon these Findings of Fact and Conclusions of Law the Petition and Cross-Petition are **DENIED**.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3) Idaho Code.

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

- i. The last day a timely petition for reconsideration could have been filed with the hearing officer;

- ii. The service date of a denial of a petition for reconsideration by the hearing officer;
- or
- iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

DATED this 18th day of January, 2002.


PETER R. ANDERSON
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2002, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

CHARLES L. HONSINGER
RINGERT CLARK
PO BOX 2773
BOISE ID 83701

MIKE CREAMER
GIVENS PURLSEY LLP
PO BOX 2720
BOISE ID 83701

WES WOOTEN & DON BRYANT
BLACK MESA FARMS
PO BOX 82
GLENN'S FERRY ID 83623

NORMAN C YOUNG
IDAHO DEPT OF WATER
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1301 N. ORCHARD ST
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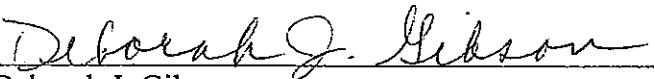

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Exhibit E

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB #5636)
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Attorneys for Cottonwood Canal Co.

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

_____)	
IN THE MATTER OF PETITION TO)	
CORRECT LICENSE NO. 02-02209 IN THE)	
NAME OF COTTONWOOD CANAL)	EXCEPTIONS TO RECOMMENDED
COMPANY)	DECISION AND ORDER
_____)	
IN THE MATTER OF CROSS PETITION TO)	
CORRECT AND PETITION TO CHANGE)	
OWNERSHIP OF LICENSE NO. 02-02209 IN)	
THE NAME OF BLACK MESA FARMS, LLC)	
_____)	

COMES NOW, Cottonwood Canal Co. (hereinafter referred to as "the Canal Company"),
by and through its attorneys, Ringert Clark, Chartered, and hereby submits these Exceptions to the
Recommended Decision and Order entered by the Hearing Officer in the above captioned matter.
These Exceptions are supported by IDWR's file for licensed water right no. 02-02209, IDWR's file
for licensed water right no. 61-07189, and by the record herein.

SUMMARY

The Petition and Cross-Petition in this matter submit that the license for water right number
02-02209, issued to the Cottonwood Canal Company on February 11, 1970 for 79.70 cfs to irrigate
3,985 acres, erroneously failed to include 400 acres in T06S R10E Section 14 (together with the 8.0

cfs and 1,338.95 AFA necessary to irrigate those 400 acres) that had been permitted and on which water had been put to beneficial use prior to the beneficial use examination.

The Hearing Officer, in his January 18, 2002 *Recommended Decision and Order* (hereinafter "*Recommended Decision*"), correctly found that the erroneously omitted lands (the "Section 14 lands") "were irrigated commencing May 10, 1965, using the irrigation system of the Cottonwood Canal Company." *Recommended Decision*, p. 11. Yet, despite this factual finding, the Hearing Officer concluded that the license could not be corrected. The conclusion in the *Recommended Decision* should be reversed for the reasons set forth below.

ARGUMENT

A. IDWR Has an Obligation to Accurately Ascertain the Area Irrigated by a Water Right When Conducting a Beneficial Use Exam

Pursuant to the water right licensing process described in Chapter 2, Title 42, at the time of proof of beneficial use, IDWR has an obligation to "ascertain the area and location of the land irrigated" under the water right that is to be licensed. I.C. §42-1417. The Department must also determine "the quantity of water which has been beneficially applied for irrigation." *Id.* Then, after the beneficial use examination, if "the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue . . . a license confirming such use." I.C. §42-1419. If the use of the water is for irrigation, the license must "give a description by legal subdivisions, of the land which is irrigated by such water." *Id.* Water right licenses may be amended to correct errors made during this process. *Final Order*, In the Matter of License No. 61-07189 in the Name of Magic West, Inc. (Jan. 22, 1999).

B. IDWR Did Not Meet its Obligations Under I.C. §42-1417 When it Conducted the Beneficial Use Exam for Water Right No. 02-02209

In this case, an error was made in the licensing of the water right. As found by the hearing officer, the “Section 14 lands “were irrigated commencing May 10, 1965, using the irrigation system of the Cottonwood Canal Company.” Recommended Decision, p. 11. The beneficial use examiner listed the Section 14 Lands on the Report of Examiner, and outlined the Section 14 Lands on the map attached to the Report of Examiner (a true and accurate copy of the Report of Examiner with the attached map is attached hereto as Exhibit A). Then, without explanation, the examiner listed on the same map an “Area” of 3,985 acres and the number of legal subdivisions as 102, despite the fact that the area outlined on the map includes 4,480 acres and 112 legal subdivisions.¹ The examiner confirmed the irrigation of the Section 14 Lands in a letter to the Cottonwood Canal Company dated January 26, 1970 (a true and accurate copy of which is attached hereto as Exhibit B). However, the January 26, 1970 letter lists as irrigated within the area that included the Section 14 lands only the 3,985 acres specified next to the term “Area” on the map attached to the Report of Examiner.

Despite the facts conclusively establishing both the irrigation of the Section 14 Lands and the examiner’s observation of that irrigation, the license for the water right that was issued on February 11, 1970 completely omitted the Section 14 Lands, together with the associated diversion rate and volume necessary to irrigate those lands. It is possible that the failure to list the Section 14 Lands is a result of IDWR’s reliance on the erroneous land lists that may have been attached to the Depositions of the Holder and one of the witnesses. However, based upon the evidence in the water right file, there is no question that the examiner failed to accurately “ascertain the area and location

¹ Although the legal subdivisions on the map are numbered 1 through 113, the numeral 99 is missing. Thus, there are in fact 112 legal subdivisions outlined, not 113.

of the land irrigated,” and the “quantity of water which has been beneficially applied for irrigation” as the Department is obligated to do under I.C. §42-217. The Director must take this opportunity to correct the clerical error(s) made during the licensing process.

IDWR has addressed the errors in this license before. In a memorandum dated August 24, 1984 (a true and accurate copy of which is attached hereto as Exhibit C), Don Shaff described the facts related to the proof of beneficial use and the subsequent beneficial use examination. Then, Mr. Shaff concluded that IDWR “should issue to the holder an Amended License 02-02209 that includes the 426 acres in Section 14. Mr. Shaff’s suggestion was based on sound reasoning and should be followed by the Director.

C. The Hearing Officer’s *Recommended Decision* Erroneously Concluded that IDWR Made No Error

The *Recommended Decision* correctly analyzes the authority IDWR has to amend a license under I.C. §67-5254 when an error is made in the licensing process. The Findings of Fact in the *Recommended Decision* were also largely accurate. However, the *Recommended Decision* fails both in its analysis and in its Conclusions of Law.

The *Recommended Decision* begins its analysis by distinguishing two types of errors - patent and latent - and relates each to a prior licensing amendment done by IDWR. The decision then incorrectly characterizes IDWR’s decision to amend the Magic West license decision as a correction of a “patent error,” which according to the Hearing Officer, occurs “when there is an obvious transposition of numbers or two elements of the described beneficial use are obviously contradictory or incompatible.” *Recommended Decision*, p. 2. In a footnote, the *Recommended Decision* implies that the error committed by IDWR in the Magic West license was the licensing of a flow rate of .67

cfs, while limiting the volume diverted each year to 12.9 AF. *Id.*, pp. 2 -3.

However, the Final Order issued in the Magic West case states nothing about the relationship between the licensed flow rate of .67 cfs and the volumetric limitation of 12.9 AFA that gives rise to a presumption that the licensed flow rate and volumetric limitation are in fact incompatible and thus constitute a “patent error.” Rather, the error in the Magic West case allowing amendment of the license was the Department’s failure to contact the representative identified by Magic West to accompany the Department during the beneficial use field examination. *Final Order*, In the Matter of License No. 61-07189 in the Name of Magic West, p. 2.

In fact, the record in the Magic West case establishes not only that the decision to amend the license was based upon a different type of error committed by IDWR, but also that the incompatibility between the licensed flow rate and the original volumetric limitation was not a “patent error,” because it was based upon information gathered during the beneficial use field exam. *See* Beneficial Use Field Report for Permit No. 61-07189 (08/04/1987). The information used as the basis for the increase in the volumetric limitation on the amended license in that case was additional information that was presented at the hearing, and was not available in the file at the time of the beneficial use examination. Because the originally licensed volumetric limitation was based upon information gathered during the beneficial use examination, there was not a “patent error” in the license.²

In contrast to the Magic West case, where IDWR amended a license on the basis of evidence

² Although he does not so state in his Recommended Decision, the Hearing Officer in the Cottonwood Canal Company case is perhaps under the mistaken belief that the volumetric limitations placed in IDWR licenses are intended to describe the maximum volume of water that could be diverted under the authorized flow rate during the authorized period of use.

of beneficial use produced after the beneficial use examination; in the Cottonwood Canal Company case, substantial information confirming the beneficial use of water on the Section 14 lands (including the observations of the examiner) was available for review by the beneficial use examiner at the time of the examination. Moreover, in the Magic West situation, the information to prevent the error in the volumetric limitation could not have been readily obtained through the beneficial use examiner's observations³, in this case, the beneficial use examiner could have, should have, and in fact did, observe that the Section 14 Lands were irrigated. Yet, even with this information confirming irrigation of the Section 14 Lands, IDWR still failed to include them in the license.

The failure to license the Section 14 Lands as irrigated is due to a "patent error" present in the Report of Examiner. The examiner found that the Section 14 lands were irrigated, as established by the outlined area on the map and confirmed by the letter of January 26, 1970. However, contrary to IDWR's obligations under I.C. §42-217, the examiner listed only 3,985 acres next to the term "Area" and only 102 40-acre tracts next to the term "Subd." Because the Section 14 Lands were in fact irrigated and were found to be irrigated by the examiner, there should have been 112 subdivisions and 4,480 acres listed on the map attached to the Report of Examiner. As a result of this "patent error" in the licensing process for water right no. 02-02209, IDWR mistakenly failed to license the beneficial use that had been permitted, that was existing at the time of development, and that had been determined to be irrigated by the beneficial use examiner.

Therefore, just as IDWR amended the license in the Magic West case on the basis of an error using evidence produced after the beneficial use examination, so should it correct the Cottonwood

³ It would have been difficult, if not impossible, for the field examiner in the Magic West case to observe the volume used by Magic West at the time of the beneficial use examination.

Canal Company's license on the basis of a substantial oversight using evidence of beneficial use that was both available and confirmed by the examiner, at the time of the beneficial use examination.

The second type of error analyzed by the *Recommended Decision* is a "latent error" which is described as a case when "investigation reveals a licensing provision that does not correctly describe the beneficial use." *Recommended Decision*, p. 3. The example used to further describe a latent error is the Darwin McKay licensing correction case in which conditions requiring the use of appurtenant surface water before using the licensed ground water right were removed because the right had never been used with appurtenant surface water. *Id.* As stated by the Hearing Officer, the correction to the license in that case "did nothing to change the beneficial use." *Id.*

Similarly, in the Cottonwood Canal Company case, a correction to the license will not change the beneficial use of the water right. There is complete agreement between the parties and the Hearing Officer that water right no. 02-02209 was beneficially used on the Section 14 Lands. Thus, just as in the Darwin McKay licensing case, the license for water right no. 02-02209 "does not correctly describe the beneficial use," and as result, should also be corrected.

Finally, contrary to the *Recommended Decision*'s Conclusion of Law, the correction of this license will not result in an entirely new beneficial use under water right no. 02-02209. *See Recommended Decision*, pp. 11-12. Instead, the correction will accurately describe the beneficial use of water that even the *Recommended Decision* found was applied to the Section 14 Lands prior to issuance of the license.

CONCLUSION

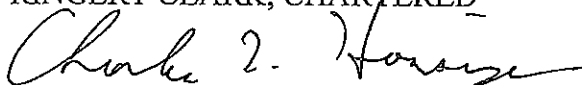
In this case, the Department failed to meet its obligations under I.C. §42-207 to "ascertain the area and location of the land irrigated" and "the quantity of water which has been beneficially

applied for irrigation” pursuant to the water right. The mistakes in the licensing of water right no. 02-02209 to the Cottonwood Canal Company do not differ in any material way from those in the Magic West licensing correction case. In both cases, the beneficial use examiner erred. In the Cottonwood Canal Company case, the error is more obvious than in the Magic West case because the information which could have prevented the clerical error was in the possession of the examiner at the time of the beneficial use examination. However, in both cases the error could have been prevented. Therefore, just as in the Magic West licensing amendment case, the Director should correct this error.

Based upon the record herein, and upon the reasoning set forth above and in Petitioner’s prior briefing, the Director should ignore the Recommended Decision, and determine that the license for water right no. 02-02209 should be amended to include the 400 acres in Section 14 that were omitted, together with the appurtenant quantity of water.

Respectfully submitted this 12th day of February, 2002.

RINGERT CLARK, CHARTERED

A handwritten signature in cursive script, appearing to read "Charles L. Honsinger".

Charles L. Honsinger

Attorney for Cottonwood Canal Co.

CERTIFICATE OF SERVICE

I certify that on the 12th day of February, 2002, I mailed the original and copies of this document, including all attachments to the following:

Mike Creamer
John Marshall
GIVENS PURSLEY, LLP
P.O. Box 2720
Boise, Idaho 83701

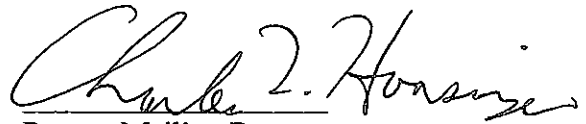

Person Mailing Document

Exhibit F

Michael C. Creamer ISB #4030
John M. Marshall ISB #5628
GIVENS PURSLEY LLP
277 North Sixth Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
S:\Clients\59951\Response to Cottonwood's Exceptions.DOC

Attorneys for Black Mesa Farms LLC

BEFORE THE STATE OF IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF LICENSED
WATER RIGHT NUMBER 02-02209

BLACK MESA'S RESPONSE TO
COTTONWOOD CANAL COMPANY'S
EXCEPTIONS TO RECOMMENDED
DECISION AND ORDER

This is Black Mesa Farms LLC's ("Black Mesa") response to Cottonwood Canal Company's ("Cottonwood") Exceptions To Recommended Decision and Order filed with the Director on February 12, 2002.

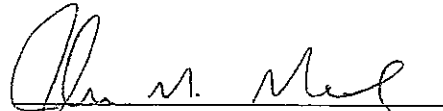
Black Mesa does not contest Cottonwood's argument that license no. 02-02209 should be amended to include lands in Township 6S, Range 10E, Section 14 (the "Section 14 lands"). Indeed, the parties and the Hearing Officer all agree that these lands were irrigated in 1965 prior to the Department's beneficial use licensing exam, and there is no evidence in the record that would suggest that omission of these acres from the license was anything but an oversight. Black Mesa responds simply to point out that if the Director determines that license no. 02-02209 should be amended to include the Section 14 lands, the amended portion of the license must be issued in the name of Black Mesa, not Cottonwood, because Black Mesa owns the Section 14 lands and all appurtenant water rights and is the party who has applied the right to

beneficial use. *See* Black Mesa's Cross-Petition to Amend License and Petition to Change Ownership of License, pages 2-4 (April 27, 2001).

Prior to determining whether license no. 02-02209 should be amended, the Hearing Officer bifurcated the ownership issue for consideration only if the license were amended. If the Director overturns the Recommended Decision and Order, the ownership issue must either be resolved in favor of Black Mesa or remanded to the Hearing Officer for further proceedings.

Respectfully submitted this 26th day of February 2002

GIVENS PURSLEY LLP

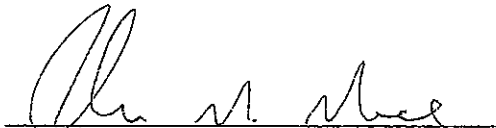

John M. Marshall

Certificate of Service

I hereby certify that on this 20th day of February 2002, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed tot he following:

Charlie Honsinger
Ringert Clark Chtd.
455 S. 3rd St.
Boise, ID 83701

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight
☐ Telecopy



John M. Marshall

Exhibit G

RECEIVED

JAN 3 2007

DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576
Indent. Number 02-10300
Date Received 1-5-06
Receipt Number 0079983

NOTICE OF CLAIM
TO A
WATER RIGHT
ACQUIRED UNDER STATE LAW

Please type or print clearly

1. Name of Claimant(s) Cottonwood Canal Company Phone: (208) 342-4591
Mailing Address c/o Ringert Clark, Chartered, P.O. Box 2773, Boise, ID Zip 83701
2. Date of Priority only (1) per claim) 2/25/1963
3. Source of water supply (a) Snake River
which is tributary to (b) Columbia River
4. a. Location of existing point of diversion is: Township 06S Range 11E Section 9,
1/4 of NW 1/4 SW 1/4, Govt. Lot 6 B.M., County of Elmore
Additional points of diversion if any: _____
b. If instream flow, beginning point of claimed instream flow is:
Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of _____ 1/4,
Govt. Lot _____ B.M., County _____
ending point is: Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of _____ 1/4 of
_____ 1/4, Govt. Lot _____ B.M., County of _____
5. Description of existing diversion works. _____
6. Water is claimed for the following purposes:

	(both dates are inclusive)	(cfs)	(acre feet)
For <u>Irrigation</u>	purposes from <u>4/1</u> to <u>10/31</u>	amount <u>8.0</u>	or <u>1,338.95</u>
7. Total quantity claimed (a) 8.0 (cfs) and/or (b) 1,338.95 (acre feet)
8. Total consumptive use claimed is N/A acre fee per annum.
9. Non-Irrigation uses _____
10. Description of place of use:
a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
b. If water is used for other purposes, place a symbol of use (example: D for Domestic)

Last Name Cottonwood Canal Co. Ident. Number 02-10300

in the corresponding place of use below. See instructions for standard symbols.

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Total
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
6S	10E	14	40	40	40	40	40	40		40	40				40	40			400

Total number of acres irrigated 400

11. In which county (ies) are lands listed above as place of use located? Elmore

12. Do you own the property listed above as place of use? Yes No X

13. Other water rights used:

14. Remarks: Petition to Correct License 02-02209 was filed with IDWR on October 31, 2000. A Recommended Decision was issued by the hearing officer on January 18, 2002. Cottonwood Canal Company filed Exceptions filed to that Recommended Decision on February 12, 2002. No action has ever been taken relative to Cottonwood Canal Company's Exceptions. Cottonwood Canal Company's water right No. 02-10208 (part of original licensed water right no. 02-02209) is to be recommended shortly. So as not to upset the processing of that claim, this claim is being submitted separately and should be assigned a separate water right number.

15. Basis of Claim (check one) Beneficial Use Posted Notice License X Permit
Decree

If applicable provide IDWR Water Right Number 02-02209

Court Case Number Decree Date

Plaintiff vs Defendant

16. Signature (s)

(a) By signing below, I/We acknowledge that I/We have received, read, and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b) I/We do do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing documents are true and correct.

Signature or Claimant (s) Date

 Date

For Organizations: I do solemnly swear or affirm that I am President
Title

of Cottonwood Canal Company, that I have signed the foregoing
Organization

Last Name Cottonwood Canal Co. Ident. Number 02-10300

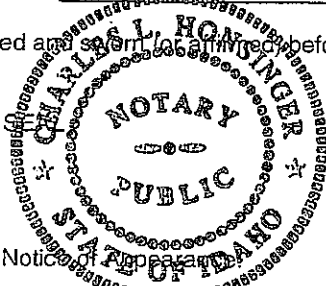
document in the space below as President of Cottonwood Canal Company
Title organization
and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent Daniel Steenson

Title and Organization Daniel V. Steenson, President, Cottonwood Canal Company Date _____

State of Idaho/or _____)
County of Ada _____) SS.

Subscribed and sworn to and affirmed before me this 4th day of January, 2006



Notary Public Charles L. Honsinger
Residing at Boise, IDAHO
My Commission Expires 7/30/2010

16. Notice of Appearance

Notice is hereby given that we, Daniel V. Steenson and/or Charles L. Honsinger will be acting as attorneys at law on behalf of the claimant signing above, and all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature Charles L. Honsinger

Address Ringert Clark, Chartered, P.O. Box 2773, Boise, ID 83701

Date 1/4/06

Exhibit H

RECEIVED
MAR - 7 2003

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, Department of Water Resources
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number 2-103
Date Received: 4/17/1991
Receipt No: C020248
Received By:

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

CHRISTINE W WOOTAN Phone: (208)366-2575
PO BOX 636
GLENN'S FERRY ID USA 83623

BRENDA BRYANT Phone:
GLENN'S FERRY ID USA 83623

BLACK MESA FARMS Phone:
PO BOX 82
GLENN'S FERRY ID USA 83623

WESLEY R WOOTAN Phone: (208)366-2575
PO BOX 636
GLENN'S FERRY ID USA 83623

DON J BRYANT Phone:
GLENN'S FERRY ID USA 83623

2. Date of Priority: 05/10/1965

3. Source: SNAKE RIVER Trib. to: COLUMBIA RIVER

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County	Type
06S	11E	9	NW SW 6	ELMORE	

5. Description of diverting works:

PUMPS, MOTORS, PIPELINES & SPRINKLERS SYSTEM.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
---------	------	----	--------	------------

IRRIGATION

3/15 11/15 8.54

7. Total Quantity Appropriated is:
8.54 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
06S	10E	14	NE	NE	IRRIGATION	39
			NW	NE	IRRIGATION	39
			SW	NE	IRRIGATION	40
			SE	NE	IRRIGATION	40
			NE	NW	IRRIGATION	40
			NW	NW	IRRIGATION	40
			SE	NW	IRRIGATION	40
			NE	SW	IRRIGATION	39
			NE	SE	IRRIGATION	39
			NW	SE	IRRIGATION	30
			SW	NW	IRRIGATION	40
				Total Acres	426	

11. Place of use in counties: ELMORE

12. Do you own the property listed above as place of use? Yes

13. Other Water Rights Used:

14. Remarks:

Claim amended to include 40 acres in SWNW, 06S, 10E, Sec. 14 that were not licensed on permit 2-2389, but were included in original Snake River Adjudication on claim 2-103.

BLACK MESA PROJECT.

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.

ADDRESS CHANGED PER CLAIMANT REQUEST. DB 5/2/2000.

15. Basis of Claim: Beneficial Use

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): _____ Date: _____

_____ Date: _____

For Organizations:

I do solemnly swear or affirm that I am OWNER / Partner of _____

Black Mesa Farms LLC, that I have signed the foregoing
Organization

document in the space below as OWNER / Partner of _____

Black Mesa Farms LLC and that the statements contained in the
Organization

foregoing document are true and correct. Wesley R. Everts
Signature of Authorized Agent

Black Mesa FARMS INC
Title and Organization

Jan 10 2003
Date

State of Idaho)
County of Ada) SS.

Subscribed and sworn (or affirmed) before me this
of Jan 2003

10th day
Lori Graves

Notary Public

Residing at Boise

My commission Expires 6/18/04

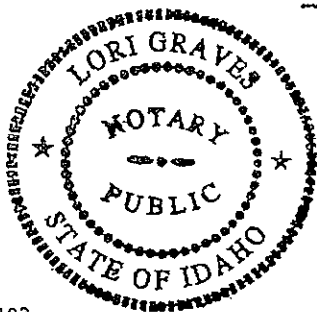


Exhibit I

RECEIVED
JUN 14 2000
Fingert Law Chartered

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO)
CORRECT LICENSE NO. 02-02209)
IN THE NAME OF COTTONWOOD)
CANAL COMPANY)

ORDER DESIGNATING JEFF
PEPPERSACK TO REVIEW
RECOMMENDED ORDER

IN THE MATTER OF CROSS)
PETITION TO CORRECT AND)
PETITION TO CHANGE OWNERSHIP)
OF LICENSE NO 02-02209 IN THE)
NAME OF BLACK MESA FARMS, LLC)

This matter came before the Idaho Department of Water Resources ("IDWR") on a *Petition to Correct License* ("Petition") dated October 31, 2000, filed by Cottonwood Canal Co. ("Cottonwood"). The Petition sought to amend water right license no. 02-02209, issued on February 11, 1970, to include 400 additional acres and 8.0 cfs of water allegedly excluded from the license in error. Black Mesa Farms, LLC ("Black Mesa") filed a *Cross-Petition to Correct License and Petition to Change Ownership of License* ("Cross-Petition"). The Cross-Petition asserted that because Black Mesa owns the acres sought to be added, the amended portion of the license must be issued in the name of Black Mesa.

Following a hearing, an IDWR hearing officer determined that Cottonwood's License could not be corrected to include the excluded acres and water. The hearing officer did not resolve the ownership issue raised by Black Mesa. Cottonwood subsequently filed Exceptions to Recommended Decision and Order with the Director of IDWR, to which Black Mesa filed a Response.

The current interim Director of IDWR is related by marriage to one of the principles of Black Mesa. The Director's wife is a cousin of the wife of Wes Wooten. While this does not rise to the level of a conflict of interest under the Ethics in Government Act, Idaho Code § 58-701 *et seq.*, the Director believes that he should recuse himself from this matter. The Director makes the following order designating a new person to review the preliminary order for this matter:

ORDER

It is hereby **ORDERED**, that Jeff Peppersack, Bureau Chief, Water Allocations Bureau, is designated to review the recommended order in this matter.

It is further **ORDERED**, that pursuant to Idaho Code 67-5245(7), Jeff Peppersack shall have the authority to exercise all the decision-making power of the Director, including the issuance of a final order, in this matter.

DATED this 10th day of June, 2010


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2010, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

Daniel V. Steenson
Charles L. Honsinger
RINGERT CLARK
P. O. Box 2773
Boise, ID 83701-2773

Michael C. Creamer
Michael P. Lawrence
GIVENS PURSLEY LLP
P. O. Box 2720
Boise, ID 83701-2720


Deborah J. Gibson
Administrative Assistant
Idaho Department of Water Resources

Exhibit J

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO)
CORRECT LICENSE NO. 02-02209)
IN THE NAME OF COTTONWOOD)
CANAL COMPANY)
_____)

IN THE MATTER OF CROSS)
PETITION TO CORRECT AND)
PETITION TO CHANGE OWNERSHIP)
OF LICENSE NO. 02-02209 IN THE)
NAME OF BLACK MESA FARMS, LLC)
_____)

FINAL ORDER GRANTING
PETITIONS TO CORRECT LICENSE
NO. 02-02209; INTERLOCUTORY
ORDER REGARDING OWNERSHIP
AND SETTING SCHEDULING
CONFERENCE

INTRODUCTION

This matter came before the Idaho Department of Water Resources (“IDWR” or “Department”) on a *Petition to Correct License* (“Petition”) dated October 31, 2000, filed by Cottonwood Canal Co. (“Cottonwood”). The Petition sought to amend water right license no. 02-02209, issued on February 11, 1970, to include 400 additional acres, 8.0 cfs and 1,338.95 afa of water allegedly excluded from the license in error. Black Mesa Farms LLC (“Black Mesa”) filed a *Cross-Petition to Correct License and Petition to Change Ownership of License* (“Cross-Petition”). The Cross-Petition asserted that because Black Mesa owns the acres sought to be added, the amended portion of the license must be issued in the name of Black Mesa.

Following a hearing, an IDWR hearing officer determined that Cottonwood’s License could not be corrected to include the excluded acres and water. The hearing officer did not resolve the ownership issue raised by Black Mesa. Cottonwood subsequently filed Exceptions to Recommended Decision and Order with IDWR, to which Black Mesa filed a Response. On June 10, 2010, the interim Director of IDWR, Gary Spackman, issued *Order Designating Jeff*

Peppersack to Review Recommended Order. The order authorizes Peppersack to exercise all the decision-making power of the Director in this matter pursuant to Idaho Code § 67-5245(7).

This order determines that water right license no. 02-02209 should be corrected based on the facts in the record but then sets a status conference to discuss the ownership issue.

FINDINGS OF FACT

Permitting And Licensing Process

1. On February 25, 1963, Cottonwood Canal Company filed an Application for Permit to appropriate the Public Water of the State of Idaho ("Application") with IDWR.¹ The Application was assigned number 39069.

2. The Application requested authorization to develop a water right to irrigate 4,480 acres, with 89.60 cfs of water to be diverted from the Snake River. At the time of the application, the 4,480 acres were not owned outright by the irrigators, but were under an application for entry from the United States.

3. The Application envisioned the construction of a pumping plant, canals, ditches and pipeline over 5 years, and application of the water to the proposed use within an additional 5 years. The land to be irrigated was located in Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Among these lands, 400 acres were identified within Section 14 of Township 6 South, Range 10 East ("Section 14 lands").

4. IDWR approved the Application and issued permit no. 30990 ("Permit") for the development of this water use on March 1, 1963. The Permit was subsequently renumbered to 02-2209. The Permit required one-fifth of the work to be completed by September 1, 1965, and

¹ The application was actually filed with the Idaho Department of Reclamation ("IDR"), a predecessor to IDWR and referred to as synonymous with IDWR in this order.

the remainder by September 1, 1968. The Permit required beneficial use of all water used under the Permit to be made by March 1, 1973.

5. On June 11, 1965, IDWR received a Notice of Proof of Completion of Works and Application of Water to Beneficial Use ("Notice of Completion of Works") on behalf of Cottonwood Canal Company for publication. The Notice of Completion of Works stated that Cottonwood Canal Company was diverting 89.60 cfs of water onto 4,480 acres of land within Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Specifically included within the description of the acreage were the Section 14 lands. The Notice of Completion of Works stated that proof of completion was to be submitted no later than July 29, 1965. The Notice of Completion of Works was published in the *Mountain Home News* for four consecutive weeks.

6. On June 15, 1965, the State Reclamation Engineer sent three form depositions to Cottonwood Canal Company. One deposition was to be executed by Cottonwood Canal Company as the "holder." Two other depositions were to be completed by disinterested witnesses. All three depositions were to be submitted by July 29, 1965.

7. The "holder" deposition, signed by Otis Williams, Secretary of Cottonwood Canal Company, was submitted on July 29, 1965. In his answer to a portion of question 6, "If for irrigation, name each subdivision in which used and number of acres in each subdivision that have actually been irrigated with said water[.]" Williams stated, "See attached list." However, a listing of lands that was unattached to the first page of Williams' deposition, but was directly behind Williams' deposition in the file, and with staple holes that appear to correspond to holes on the top corner of the deposition, totaled 3,985 acres. The list of acreage did not include the Section 14 lands.

8. A disinterested person deposition was signed by George R. Lake on July 29, 1965. In his answer to the same portion of question 6, Lake stated, "there are 14 320 acre tracts of which nearly all of each is irrigated as per attached list." Therefore, Lake's deposition stated that nearly 4,480 acres were being irrigated (14 multiplied by 320 equals 4,480). However, a listing of lands that was unattached to the first page of Lake's deposition, but was directly behind Lake's deposition in the file, and with staple holes that appear to correspond to holes on the top corner of the deposition, totaled 3,985 acres. The list of acreage did not include the Section 14 lands.

9. A second disinterested person deposition was signed by Lawrence Roemer on July 29, 1965. In his answer to the same portion of question 6, Roemer stated, "irrigation 14 - 320 acre tracts described below." At the bottom of his deposition, Roemer included a land list of the acres with total acreage counts. The list totals 4,390 acres. Roemer's description of lands specifically included the Section 14 lands.

10. On August 4, 1965, IDWR informed Cottonwood Canal Company that it had received the Williams, Lake, and Roemer depositions, as well as the affidavit of publication submitted in proof of completion of the Permit. The letter indicated that before final action could be taken a field examination had to be made by the Department.

11. The field examination was performed by Dorian Clay. In paragraph 7 of the form for the Report of Examiner ("Report"), the field examiner is required to "[l]ist legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact numbers of acres under cultivation in each forty-acre tract. . . . (Submit map on attached plat, showing location and details of above description.)."

12. In paragraph 7 of the Report, Field Examiner Dorian Clay described the lands irrigated. The Section 14 lands were specifically included within paragraph 7.

13. On the attached map with predrawn section lines, the irrigated boundary and section numbers were drawn in by hand. The map specifically marked acreage within Section 14 as lands being irrigated.

14. Noted in pencil on the attached map was a lands total of 3,985 acres. Just below the acreage total was a water quantity total of 79.70 cfs.

15. Following completion of the Report, Field Examiner Clay sent a letter ("Letter") to Cottonwood Canal Company on January 26, 1970. According to the Letter, the "[q]uantity of water diverted" was 90.24 cfs, however, only 79.70 cfs could "be recognized as beneficially used under Idaho law." The Letter recognized that "[t]he maximum quantity diverted shall not exceed 13,339.33 acre feet per season." The amount of land upon which water could be beneficially used was 3,985 acres. The Section 14 lands were specifically listed as lands upon which water could be beneficially used. Finally, the Letter stated that, if within thirty days, a \$231.00 filing fee was received, "a Water License as described above" would be issued consistent with the findings in the letter.

16. On February 11, 1970, after receipt of a \$231.00 fee, IDWR issued Water Right License No. 30990/02-2209. The License indicated that the proposed works of pumps, motors, and sprinkler system, with a capacity of 90.24 cfs, were completed on May 10, 1965. The License indicated "that on July 29, 1965, proof was made . . . of the beneficial use of 13,339.33 acre feet per season, with a maximum rate of diversion of 79.70 cubic feet per second of the waters of [the] Snake River." The described place of use was: Township 6 South, Range 10 East, sections 1, 2, 11, 12, 13, and 24; Township 6 South, Range 11 East, sections 6, 7, 17, 18,

19, and 20. The amount of land within the place of use was calculated at 3,985 acres. The described place of use did not include the Section 14 lands. No appeal was filed by Cottonwood regarding the exclusion of the Section 14 lands.

17. On August 3, 1981, the Ninth Circuit Court of Appeals upheld a United States District Court decision on summary judgment in favor of the United States, cancelling the entries of the potential entrymen.

18. The United States conveyed the Section 14 lands to Wesley and Christine Wootan on or about October 12, 1990. The Wootans subsequently transferred their interest to the Wootan Bryant Partnership which is now known as Black Mesa Farms, LLC.

CONCLUSIONS OF LAW

Standard Of Review

1. This interlocutory order is subsequent to a recommended order from an IDWR hearing officer recommending denial of Cottonwood's Petition to Correct License.

2. According to Idaho Administrative Code 37.01.01.720, recommended orders are orders issued by a person other than the agency head that will become a final order of the agency only after review of the agency head (or the agency head's designee) pursuant to Section 67-5244, Idaho Code.

3. Idaho Code § 67-5244(3), "Review of recommended orders," states:

(3) The agency head on review of the recommended decision shall exercise all the decision-making power that he would have had if the agency head had presided over the hearing.

4. According to the Idaho Court of Appeals,

Under I.C. § 67-5244, the head of the agency shall exercise all the decision-making power on review of the recommended decision that he or she would have had if the agency head had presided over the hearing. The hearing officer's decision being only advisory, then, the director is free to

affirm the decision or to reverse, reject or alter the findings of the hearing officer and make his own determination. *The ultimate question is whether the director's order is supported by findings of fact which are based exclusively on the evidence in the record and on matters officially noticed in that proceeding.* I.C. § 67- 5248.

Although the director may disagree with the recommended decision, the hearing officer's findings are entitled to weight. The Examiner's decision is part of the record, and the record must be considered as a whole in order to see whether the result is supported by substantial evidence. The agency's departures are vulnerable only if they fail to reflect attentive consideration to the Examiner's decision. Yet in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result, it is the agency's choice that governs. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971).

Northern Frontiers, Inc. v. State ex rel. Cade, 129 Idaho 437, 440, 926 P.2d 213, 216 (Ct. App. 1996) (emphasis added).

5. In this case, both the Petition and Cross-Petition requested that IDWR modify license no. 02-02209 pursuant to I.C. § 67-5254. Idaho Code § 67-5254 provides, in part:

(1) An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license... unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute.

For purposes of this section, a license is "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of authorization required by law, but does not include a license required solely for revenue purposes." I.C. § 67-5201(9).

6. Although the language of I.C. § 67-5254 does not provide direct authorization to amend a water right license, the language presupposes an agency may modify or amend a license, and then adds the condition that notice and opportunity for a contested case be provided before so doing. IDWR has previously used this interpretation of I.C. § 67-5254 to authorize the amendment of a water right license. *See In the Matter of Petition to Correct Water Right License*

Submitted by Darwin McKay, Preliminary Order Correcting License (February 1, 2000); In the Matter of License No. 61-07189 in the Name of Magic West, Inc., Final Order (January 22, 1999).

7. The authority to amend or modify a water right license under I.C. § 67-5254 is circumscribed by I.C. § 42-220, which provides that a water right license “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right. . . .” However, IDWR cannot use I.C. § 67-5254 to increase the beneficial use above the amount developed during the authorized development period for a water right. Such an amendment would be an unlawful enlargement of the beneficial use under the licensed priority date. *See Fremont-Madison v. Ground Water Approp.*, 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996).

8. Amendments to water right licenses under I.C. § 67-5254 may be issued to correct errors made by IDWR in describing the licensed beneficial use.

The License Should Be Amended To Account For The Section 14 Lands

9. In this case, the record demonstrates that on February 25, 1963, Cottonwood Canal Company filed an Application for Permit to Appropriate the Public Water of the State of Idaho.

10. In its Application, Cottonwood sought to irrigate land in Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Cottonwood’s Application specifically requested that it be entitled to irrigate lands within Section 14 of Township 6 South, Range 10 East. The total land to be irrigated was 4,480 acres.

11. On March 1, 1963, Cottonwood's Application was approved and a Permit issued for the development of water. Beneficial use of all of the water to be used under the Permit, which included the Section 14 lands, was required to be made by March 1, 1973.

12. On June 11, 1965, a Notice of Proof of Completion of Works and Application of Water to Beneficial Use was submitted for publication by Otis Williams of the Cottonwood Canal Company. The Notice of Completion of Works indicated that the place of use of the water was the 4,480 acres described in Cottonwood's Application and Permit. The Notice of Completion of Works specifically included the Section 14 lands and was published for four consecutive weeks in the *Mountain Home News*.

13. On June 15, 1965, the State Reclamation Engineer sent three deposition forms to Cottonwood Canal Company. One deposition was to be executed by Cottonwood Canal Company, as the "holder," and the other two by disinterested witnesses. All three depositions were to be submitted by July 29, 1965.

14. The "holder" deposition, signed by Williams, listed the total land irrigated as 3,985 acres. One disinterested person's deposition, signed by George R. Lake, listed the total lands irrigated as nearly 4,480 acres; however, a page that may have been attached to Lake's deposition listed the acreage as 3,985. A second disinterested person's deposition, signed by Lawrence Roemer, listed the total lands irrigated as 4,390 acres. Roemer's description of lands specifically included the Section 14 lands.

15. On August 4, 1965, the State Reclamation Engineer informed Cottonwood of the receipt of the "holder" and disinterested persons depositions, as well as the affidavit of publication submitted as proof of completion of the Permit. The State Engineer's letter indicated that before final action could be taken, a field examination had to be made by IDWR.

16. A field examination was conducted and a Report submitted to IDWR with findings. In the Report, Field Examiner Dorian Clay listed and drew the irrigated lands down to the quarter-quarter. Both the written and drawn descriptions included the Section 14 lands. While the total land irrigated was listed in the Report as 3,985 acres, that total is not consistent with the sum of the quarter-quarter listing or drawn descriptions.

17. By letter, dated January 26, 1970, Field Examiner Clay stated that even though 90.24 cfs had been used for irrigation, only 79.70 cfs could be beneficially used on the requested acreage. The Letter specifically found that Section 14 lands were included within the place of use. The Letter concluded by stating that upon the payment of a \$231.00 filing fee, a water license would be issued consistent with its findings.

18. The \$231.00 filing fee was paid and a Water License was issued on February 11, 1970. The License stated that the proposed works, with a capacity of 90.24 cfs, were completed on May 10, 1965. Thus, as of July 29, 1965, proof of beneficial use was established. The maximum diversion rate, however, was listed as 79.70 cfs from the Snake River and the maximum volume was listed as 13,339.33 acre feet. The place of use was found to include 3,985 acres within Township 6 South, Ranges 10 and 11 East. To the contrary of the Letter, the described place of use did not include any of the Section 14 lands.

19. On October 31, 2000, Cottonwood filed its Petition with IDWR, seeking to amend its License to specifically include the Section 14 lands. Cottonwood also sought 8.0 cfs and 1,338.95 afa. Cottonwood's \$50 filing fee to provide notice of the Petition was received by IDWR on January 11, 2001. A Notice of Petition to Change Water Right License No. 02-02209 in the Name of Cottonwood Canal Company was published in the *Mountain Home News* on January 24 and 31, 2001.

20. The only protest was filed by Black Mesa Farms, LLC with IDWR on February 13, 2001. On April 27, 2001, Black Mesa filed its Cross-Petition with IDWR, seeking to amend water right license no. 02-02209 to include the irrigation of 400 acres in Township 6 South, Range 10 East, Section 14, with 8.0 cfs and 1,338.95 afa. Black Mesa also requested that the amended license be issued in its name.

21. In this case, the Hearing Officer recommended denying Cottonwood's Petition to include the Section 14 lands as places of use under the License. Even though the Hearing Officer's decision must be given weight, substantial evidence exists in the record to support the conclusion that Section 14 lands have been irrigated with water from the Snake River since Cottonwood's irrigation works were completed on May 10, 1965. *Northern Frontiers*, 129 Idaho at 440, 926 P.2d at 216.

22. First, Cottonwood applied for and received a Permit to irrigate 4,480 acres of land, which specifically included the Section 14 lands. Second, no objections were received regarding the publication of the Notice of Completion of Works, which specifically included the Section 14 lands. Third, the Roemer deposition affirmatively stated that the Section 14 lands were being irrigated as of 1965. Fourth, the Report of Examiner and subsequent Letter specifically found that the Section 14 lands had been irrigated since 1965. The Letter stated that if Cottonwood timely paid the appropriate filing fee, which it did, a water right license would be issued in accordance with its findings. Fifth, aerial photography on file with the Department demonstrates that while the Section 14 lands were not irrigated as of 1964, the lands had been

irrigated since at least 1969. A 1974 orthophotoquad on file with the Department indicates that irrigation on the Section 14 lands has occurred since at least that time.²

23. With the exception of the Williams and Lake depositions, the information presented expressly stated that the Section 14 lands were being irrigated under the Permit. In addition, the filing fee was timely paid by Cottonwood, entitling it to a License based on the findings described in the Letter. Because there were numerous sections and thousands of acres described as places of use, it is reasonable to conclude that the Section 14 lands were inadvertently excluded from the License. Furthermore, the only protest received by the Department after Cottonwood filed its Petition to amend its license was on behalf of Black Mesa. However, Black Mesa did not protest the amendment of the license and specifically sought the inclusion of the Section 14 lands in its Cross-Petition. Therefore, based on the facts of this case, an amendment of License to include the Section 14 lands will not enlarge the water right because the Section 14 lands have been irrigated since 1965. I.C. §§ 42-220, 67-5254; *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. As a result, the License should be amended to include the Section 14 lands as a place of use.

The License Should Be Amended To Include The Accompanying Water

24. Next, it must be determined whether the License was erroneous in its finding of quantity. Here, the Hearing Officer recommended denying Cottonwood's Petition to increase quantity under the License by 8 cfs and 1,338.95 afa. Even though the Hearing Officer's decision must be given weight, substantial evidence exists in the record to support the conclusion that quantity should be increased. *Northern Frontiers*, 129 Idaho at 440, 926 P.2d at 216.

² While the 1969 aerial photography and the 1974 orthophotoquad do not conclusively establish that irrigation occurred by 1965, they bolster the evidence provided in the Notice of Completion of Works, the Deposition of Roemer, the Report of the Examiner and the subsequent Letter. If the aerial photography and the orthophotoquad failed to show any evidence of irrigation on the Section 14 lands, this would have been strong evidence against amending the license.

25. In Idaho, “no such license . . . allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated” I.C. § 42-220. One second foot of water is the equivalent of 50 miner’s inches; thus, one miner’s inch is the equivalent of .02 cfs.

26. In this case, the License provided 79.70 cfs for use on 3,985 acres. When acreage (3,985) is divided by quantity (79.70), the License establishes that one cfs is authorized for irrigation of 50 acres of land. Because one cfs is the equivalent of 50 miner’s inches, the License follows Idaho’s general rule authorizing one miner’s inch per acre. *See* I.C. § 42-220. The License also provided an annual volume of 13,339.33 afa for use on 3,985 acres. When quantity (13,339.33 afa) is divided by acreage (3,985), the License established a volume of 3.3474 afa per acre irrigated.

27. However, the License erroneously excluded 400 acres from Section 14, and the record supports the conclusion that the Section 14 lands have been historically irrigated. *See* Permit, Notice of Completion of Works, Roemer deposition, Report of Examiner, Letter, Aerial Photography, and Orthophotoquad. As a result, the amount of water available for irrigation under the License should be increased to allow an inch per acre of irrigation on the Section 14 lands and an appropriate increase in volume for irrigation of those lands. Therefore, quantity available for diversion under the License should be increased by 8cfs and 1338.95 afa.

28. The amendment to the License must not result in an unlawful enlargement of its beneficial use under the licensed priority date. *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. The record establishes that the Section 14 lands have been irrigated with water from the Snake River since 1965. *See* Permit, Notice of Completion of Works, Roemer deposition, Report of Examiner, Letter, Aerial Photography, and Orthophotoquad. No objections were

received in 1965 when Cottonwood claimed in its Notice of Completion of Works that it was diverting 89.60 cfs for use on 4,480 acres (one miner's inch per acre). No substantive objections were received in 2001 after Cottonwood's Notice of Petition to Change Water Right License No. 02-02209 was published in which it sought to include the Section 14 lands, 8.0 cfs and 1338.95 afa. The capacity of Cottonwood's irrigation system, as of May 10, 1965, further supports the conclusion that Cottonwood has not sought to expand its water right. The License currently allows it to divert 79.70 cfs and a total volume of 13,339.33 af for use on 3,985 acres. However, as of May 10, 1965, Cottonwood's irrigation system was capable of diverting 90.24 cfs. A diversion capacity of 90.24 cfs is easily sufficient to divert an additional volume of 1338.95 af during the irrigation season. Indeed, Field Examiner Clay found that 90.24 cfs had been diverted and used on the lands described in the Permit, including the Section 14 lands. Because the water has been historically used on the acres described in the License, including the erroneously excluded Section 14 lands, and no objections were received alleging enlargement, amendment of the License is consistent with Idaho law.

Ownership of New Portion of Water Right No. 02-2209.

Having concluded that the Department should amend the License, the sole remaining issue is ownership of the new portion of the amended license. Cottonwood Canal Company argues the new portion of the amended license should be in its name because the license was originally issued to it. Black Mesa argues the new portion of the amended license should be issued in its name because it now owns and irrigates the Section 14 lands. Before the Department makes any determination as to ownership issues, the Department would like to have briefing from the parties on the ownership issue. The Department will set a status conference to establish a briefing schedule.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Cottonwood's October 31, 2000 Petition to Correct License and Black Mesa's Cross-Petition to Correct License are granted. Substantial evidence demonstrates that the Section 14 lands have been irrigated with water from the Snake River since 1965 when Cottonwood submitted its Notice of Completion of Works. Because amendment of the license will not result in an enlargement of use under the water right, the license shall be amended to allow for the irrigation of 400 acres of land in Section 14 using 8.0 cfs with a volume of 1338.95 afa from the Snake River.

It is further ORDERED that, pursuant to IDAPA 37.01.01.710 and IDAPA 37.01.01.740, the portion of this Order holding that the Department should amend the license is a final order and is subject to review by reconsideration or appeal. However, the issue of ownership still must be addressed. The issue of ownership will proceed forward as an interlocutory issue, separate from the issue of whether the Department should amend the license.

It is further ORDERED, that a scheduling conference is set on September 8, 2010 at 1:30 pm at the Idaho Department of Water Resources located at 322 East Front Street in Boise, Idaho. The parties shall be prepared to discuss a briefing schedule related to the ownership issue.

DATED this 12th day of August, 2010


JEFF PEPPERSACK
BUREAU CHIEF, WATER ALLOCATION
BUREAU

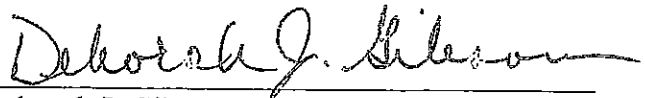
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2010, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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BOISE ID 83701

WES WOOTEN & DON BRYANT
BLACK MESA FARMS
PO BOX 82
GLENN'S FERRY ID 83623

MIKE CREAMER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83701



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Exhibit K

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF PETITION TO)
CORRECT LICENSE NO. 02-02209)
IN THE NAME OF COTTONWOOD)
CANAL COMPANY)
_____)

**ORDER DENYING PETITION FOR
RECONSIDERATION AND
FINAL ORDER REGARDING
OWNERSHIP**

IN THE MATTER OF CROSS)
PETITION TO CORRECT AND)
PETITION TO CHANGE OWNERSHIP)
OF LICENSE NO. 02-02209 IN THE)
NAME OF BLACK MESA FARMS, LLC)
_____)

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INTRODUCTION

This matter came before the Idaho Department of Water Resources (“IDWR” or “Department”) on a *Petition to Correct License* (“Petition”) dated October 31, 2000, filed by Cottonwood Mutual Canal Company (“Cottonwood”). The Petition sought to correct water right license no. 02-02209, issued on February 11, 1970, to include 400 additional acres, 8.0 cfs and 1,338.95 afa of water excluded from the license in error. Black Mesa Farms LLC (“Black Mesa”) filed a *Cross-Petition to Correct License and Petition to Change Ownership of License* (“Cross-Petition”). The Cross-Petition asserted that because Black Mesa owns the acres sought to be added, the corrected portion of the license must be issued in the name of Black Mesa.

Following a hearing, an IDWR hearing officer determined that Cottonwood’s License could not be corrected to include the excluded acres and water. The hearing officer did not resolve the ownership issue raised by Black Mesa. Cottonwood subsequently filed *Exceptions to Recommended Decision and Order* with IDWR, to which Black Mesa filed a Response. On June 10, 2010, the interim Director of IDWR, Gary Spackman, issued *Order Designating Jeff*

Peppersack to Review Recommended Order. The order authorizes Peppersack to exercise all the decision-making power of the Director in this matter pursuant to Idaho Code § 67-5245(7).

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.* The order determined that water right license no. 02-02209 should be corrected based on the facts in the record but did not resolve the issue of ownership.

On August 26, 2010, Black Mesa filed a *Petition for Reconsideration of Final Order Granting Petitions to Correct License No. 02-02209 and for Review of Interlocutory Order Regarding Ownership* (hereafter “*Petition for Reconsideration*”).

On September 8, 2010 IDWR held a scheduling conference on the issue of ownership of the corrected portion of water right license no. 02-02209. At the conference, the parties agreed that in the interest of judicial economy, the issue of ownership should be decided within the context of the *Petition for Reconsideration*.

On September 9, 2010, Black Mesa and Cottonwood submitted a *Stipulation to Deadlines and Record Related to Issue Regarding Ownership*, which set forth an agreed upon briefing schedule.

Briefing now fully submitted and no oral argument requested, IDWR finds, concludes and orders as follows:

FINDINGS OF FACT

1. Cottonwood was originally formed as a nonprofit corporation with the stated purpose of furnishing water to its shareholders. *Articles of Incorporation of Cottonwood Mutual Canal Company* at 3 (dated April 1, 1961).

2. On February 25, 1963, Cottonwood Canal Company filed an Application for Permit to appropriate the Public Waters of the State of Idaho (“Application”) with IDWR.¹ The Application was assigned number 39069.

3. The Application requested authorization to develop a water right to irrigate 4,480 acres, with 89.60 cfs of water to be diverted from the Snake River.

4. At the time of the application, the 4,480 acres were not owned outright by the shareholders, but were under an application for entry from the United States.

5. The land to be irrigated was located in Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Among these lands, 400 acres were identified within Section 14 of Township 6 South, Range 10 East (“Section 14 lands”).

6. IDWR approved the Application and issued permit no. 30990 (“Permit”) for the development of this water use on March 1, 1963. The Permit was subsequently renumbered to 02-2209.

7. On February 11, 1970, IDWR issued Water Right License No. 30990/02-2209 for 79.70 cfs in the name of Cottonwood. The described place of use did not include the Section 14 lands.

8. On August 3, 1981, the Ninth Circuit Court of Appeals upheld a United States District Court decision on summary judgment in favor of the United States, cancelling the entries of the potential entrymen.

9. The United States conveyed the Section 14 lands to Wesley and Christine Wootan on or about October 12, 1990. The Wootans subsequently transferred their interest to the Wootan Bryant Partnership which is now known as Black Mesa Farms, LLC.

¹ The application was actually filed with the Idaho Department of Reclamation (“IDR”), a predecessor to IDWR and referred to as synonymous with IDWR in this order.

10. Based upon the Petition and Cross Petition requesting IDWR correct the license to include the Section 14 lands, IDWR issued its *Final Order Granting Petition To Correct License No. 02-02209; Interlocutory Order Regarding Ownership And Setting Scheduling Conference* on August 12, 2010. The order determined that IDWR should correct the license based on the facts in the record. IDWR determined the license should be corrected to allow for the irrigation of 400 acres of land in Section 14 using 8.0 cfs with a volume of 1338.95 afa from the Snake River.

11. IDWR did not resolve the issue of ownership of the corrected portion of the license but set a conference to discuss a briefing schedule for the ownership issue.

12. Black Mesa filed its *Petition for Reconsideration* on August 26, 2010. In its *Petition for Reconsideration*, Black Mesa requested clarification and addition of certain findings and conclusions and also requested that the Department determine the ownership issue without further briefing.

CONCLUSIONS OF LAW

1. When faced with a question of ownership of a water right, the Department must first evaluate whether it has jurisdiction to determine who holds title to the water right. Cottonwood argues that because the original license was issued in Cottonwood's name, the Department has no choice but to issue the corrected portion of the license in the name of Cottonwood. *Response to Petition for Reconsideration* at 2. Black Mesa counters that the Department should issue the corrected portion of the license in its name because the water right was appurtenant to the Section 14 lands when the desert land entries were voided in 1981, and thus title passed to the Wootans (Black Mesa's predecessor) when the BLM issued the patent for

the Section 14 lands to the Wootans in 1990.² *Black Mesa's Petition for Reconsideration and Review* at 2. At its core, Black Mesa's argument is a request to quiet title to the disputed water right in Black Mesa's name. The fact that the remaining issue is directly linked to a disputed title is significant when evaluating jurisdiction and the proper role of a state agency in ownership determinations. Disputes over title to real property can only be resolved by a quiet title action brought before a district court. Idaho Code § 6-401; *see also Rural Kootenai Organization, Inc. v. Board of Com'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999)(Kootenai County Board of Commissioners lacks jurisdiction to determine who owns title to submerged lands.); *see also Bonner Bldg. Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 685, 682 P.2d 635, 638 (Ct. App. 1984)(A district court has jurisdiction in action to quiet title.). The heart of the ownership dispute here deals with the disputed title to this water right. As such, a district court is the appropriate venue for Black Mesa to bring a challenge to a water right because district courts are vested with the authority to determine attributes of ownership. The Department concludes that the corrected portion of the license should remain in Cottonwood's name given that the original license was issued in Cottonwood's name and because Department is without jurisdiction or authority to quiet title to Black Mesa.

2. The Department's actions in this case, however, should not be interpreted as suggesting that the Department agrees that Cottonwood would prevail in a quiet title action. The Department makes no judgment as to who has the better claim to title.

² Black Mesa also argues that the Snake River Basin Adjudication ("SRBA") proceeding answers the question of title to the corrected portion of the license. The Department agrees with Cottonwood that the SRBA proceedings to date do not prevent the Department from issuing an order correcting the license in Cottonwood's name. The issue of ownership of the corrected portion of the license has not been decided in the SRBA. Moreover, the proceeding in the SRBA related to Black Mesa's water right claim has been put on hold pending resolution of this administrative case and conflicts, if any, can be resolved by the court once title to the corrected portion of the license is determined.

3. The Department finds no reason to alter the findings of fact or conclusions of law related to its *Final Order Granting Petition To Correct License No. 02-02209; Interlocutory Order Regarding Ownership And Setting Scheduling Conference* as requested by Black Mesa in its *Petition for Reconsideration*. The findings of fact and conclusions of law set forth in the order properly relate to the issue of whether the Department should correct the license. The changes sought by Black Mesa are focused on the ownership issue. The requested changes are not necessary as the Department is not deciding the ownership issue.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the corrected portion of the license will remain in the name of Cottonwood.

It is FURTHER ORDERED that Black Mesa's Petition for Reconsideration is DENIED.

DATED this 19th day of November, 2010



JEFF PEPPERSACK
CHIEF, WATER ALLOCATION BUREAU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2010, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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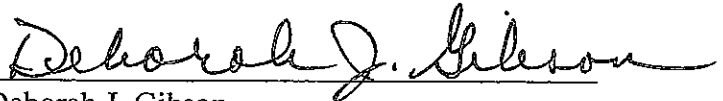

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Exhibit L

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Ringert Law Chartered

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO
CORRECT LICENSE NO. 02-02209 IN
THE NAME OF COTTONWOOD
MUTUAL CANAL COMPANY

IN THE MATTER OF CROSS
PETITION TO CORRECT AND
PETITION TO CHANGE OWNERSHIP
LICENSE NO. 02-02209 IN THE NAME
OF BLACK MESA FARMS LLC

BLACK MESA'S PETITION FOR
RECONSIDERATION OF ORDER
DENYING PETITION FOR
RECONSIDERATION AND FINAL
ORDER REGARDING OWNERSHIP
AND REQUEST FOR STAY

Cross-Petitioner Black Mesa Farms LLC ("Black Mesa Farms" or "Black Mesa"), by and through its counsel of record, Givens Pursley LLP, hereby petitions the Idaho Department of Water Resources ("IDWR" or "Department") to reconsider and revise its November 19, 2010 *Order Denying Petition for Reconsideration and Final Order Regarding Ownership* ("Final Order") to require the Department records to reflect that the Section 14 Water Right be in Black Mesa's name and to include appropriate findings and conclusions based on undisputed evidence in the record. To the extent the Department declines to so reconsider and revise the Final Order, pursuant to IDAPA 37.01.01.780 Black Mesa petitions for an order from the Department staying any correction of License No. 02-02209 in the name of Cottonwood Mutual Canal Company

("Cottonwood") to include the Section 14 Water Right, pending determination of ownership by an appropriate court.

PETITION FOR RECONSIDERATION

Black Mesa requests reconsideration of the Department's decision not to recognize the disputed water right (the "Section 14 Water Right") in Black Mesa's name. The Final Order should conclude that unless and until Cottonwood Mutual Canal Company establishes a claim to the Section 14 Water Right superior to the Black Mesa, who owns the land to which the water right is appurtenant and who has beneficially used the Section 14 Water Right for the past twenty years, the Department will follow its longstanding practice of recognizing that a split of the water right represented by License 02-02209 has occurred. As such, the Section 14 Water Right should be issued to Black Mesa under water right no. 2-103 (which is the number of Black Mesa's SRBA claim for the Section 14 Water Right). Undisputed evidence in the record warrants inclusion of specific findings of fact and conclusions of law with respect to the continued appurtenancy of the Section 14 Water Right to Section 14 and Black Mesa's historical and continued diversion and beneficial use of the Section 14 Water Right on Section 14.

In the Final Order the Department acknowledges Black Mesa's request that certain findings and conclusions be included in the Final Order (Final Order at 4) but determines they are not necessary because the Department is not deciding the ownership issue. Final Order at 6. The Department concludes that it does not have authority to decide ownership. Final Order at 5. However, that is what the Final Order does by placing the amended portion of the license in Cottonwood's name and ruling that "a district court is the appropriate venue for Black Mesa to bring a challenge. . ." to this determination. Final Order at 5 (emphasis added).

This result cannot be reconciled with the fact that the Department routinely determines ownership of water rights and has an established procedure—required by Idaho Code Sections 42-248 and 42-1409(6)—for processing ownership changes when lands with appurtenant water rights change hands, as has occurred in this case. The Final Order ignores Idaho statutes and years of legal precedent holding that a water right confirmed by a license or decree “shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted.” Idaho Code §§ 42-220 and 42-1402; *Russell v. Irish*, 20 Idaho 194, 198-199, 118 P. 501, 502 (1911) (a water right is appurtenant to the land on which it has been used and will pass by conveyance of the land; the conveyance carries with it the appurtenant water right absent a specific reservation in the deed or evidence of clear intent to the contrary).

In accordance with these statutes and case law, the Department routinely has modified its water right records to reflect its determinations of ownership, and its procedure has been to assume that a licensed or decreed water right passes with the land to which it is appurtenant.¹ Absent a reservation or clear contrary intent, whether the entirety of the land is conveyed or only a portion is conveyed and the water right is “split,” the new landowner consistently has been recognized by the Department as the new owner of the appurtenant water right. Without any asserted basis other than that the original License 02-02209 was issued in the name of Cottonwood, and ignoring the undisputed fact that the land to which the Section 14 Water Right always has been appurtenant has changed hands to Black Mesa without any reservation of water rights, the Final Order departs from established Department procedures and practice.

¹See e.g., State of Idaho Department of Water Resources, Instructions for Filing a Notice of Change in Water Right Ownership (“When the conveyance document does not specifically address water rights, it will be assumed that the water rights are to be split proportionate to the amount of land acquired”).

Arguably, the Department's *Final Order Granting Petitions to Correct License No. 02-02209* at 12 ¶ 23 (Aug. 12, 2010) ("Original Final Order") already contains sufficient findings and conclusions to warrant issuing the Section 14 Water Right in Black Mesa's name. The Department finds that Black Mesa owns the Section 14 lands (Original Final Order at 6 ¶ 18) and concludes that "the Section 14 lands have been irrigated since 1965" and "[a]s a result, the License should be amended to include the Section 14 lands as a place of use." Original Final Order at 12 ¶ 23. In short, without expressly saying so, the Department already has determined that the Section 14 Water Right was, is, and always has been appurtenant to Section 14. In accordance with its statutory obligations and its long-standing practices, the Department should issue the corrected portion of License 02-02209 in Black Mesa's name because Black Mesa owns the Section 14 lands to which it is appurtenant.

To make the record clear, and in addition to its request that the Department recognize the Section 14 Water Right in the name of Black Mesa, Black Mesa renews its request that the Department include the following additional findings and/or conclusions in any Final Order:

- License no. 02-02209, as amended, was appurtenant to the lands, including Section 14 lands, conveyed to Black Mesa by Patent No. 11-91-0001.
- In January, 1991, Black Mesa quitclaimed only 61.3 cfs of License No. 02-02209 to Cottonwood.
- By the same instrument, in January, 1991, Black Mesa relinquished all claim to 5.6 cfs of License No. 02-02209 appurtenant to non-patented lands.
- Black Mesa did not convey to Cottonwood any portion of the water rights under License No. 02-02209 appurtenant to the Section 14 lands. That portion of the water right has remained appurtenant to Section 14 lands by virtue of continued application to beneficial use by Black Mesa.
- Cottonwood did not claim the water right represented by the to-be amended portion of License No. 02-02209 in its SRBA claim no. 02-02209A, and the SRBA Court has decreed that claim, and its successor claims, accordingly.

- Cottonwood did claim the water right represented by the amended portion of License No. 02-02209 in its SRBA claim no. 02-10300. The Department recommended and the SRBA Court has decreed that claim as “disallowed.”
- Black Mesa is entitled to have the amended portion of License No. 02-02209 be recognized in its name.

Black Mesa further requests that the Final Order be revised to eliminate its Conclusion of Law No. 1 at page 5 of the Final Order to the effect that Black Mesa has the burden of bringing an action in the courts to challenge the Department’s determination to amend License No. 02-02209 to include the Section 14 Water Rights in Cottonwood’s name.

In the alternative, Black Mesa submits that the Final Order should be revised to simply conclude that the Department is without jurisdiction or authority to determine ownership of the Section 14 Water Right and declines to amend License No. 02-02209 in Cottonwood’s name or recognize the Section 14 Water Right in Black Mesa’s name unless and until one or the other party provides the Department with a determination of ownership by a court with jurisdiction over the subject matter.

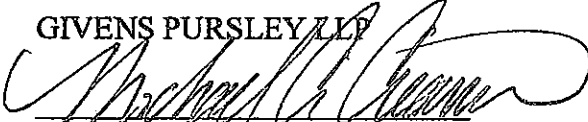
REQUEST FOR STAY

IDAPA 37.01.01.780 provides that “any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final.” If the Department denies Black Mesa’s above request for reconsideration, Black Mesa requests a stay of the Final Order, including any change to License No. 02-02209 to include the Section 14 Water Rights in Cottonwood’s name, so as to maintain a genuine status quo concerning “ownership” of the Section 14 Water Right until an appropriate judicial determination of that issue can be made. As currently postured, the Final Order prejudices Black Mesa with respect to an issue (ownership) that the Department purports not to decide. Neither Black Mesa nor Cottonwood would be prejudiced by a stay inasmuch as this question has been pending now for nearly ten years.

CONCLUSION

In conclusion, the Department always has had the authority, and exercised it, to determine in whose name a water right will be recognized in its records. Where, as here, a portion of a licensed water right has been made appurtenant to lands that have changed ownership, without any specific reservation of the water right or clear evidence of intent that the water right would not remain appurtenant, the Department should follow its standard procedures and practices and amend its records to show the current landowner as the record owner of the water right. Any person attempting to dispute that ownership must provide the Department with conclusive evidence—presumably a deed or court order quieting title. Cottonwood has not done so here, and so the Section 14 Water Right should be recognized by the Department in Black Mesa's name.

Respectfully submitted this 3rd day of December, 2010.

GIVENS PURSLEY LLP

Michael C. Creamer
Attorneys for Black Mesa Farms, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Charles L. Honsinger
Ringert Clark
PO Box 2773
Boise, ID 83701

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight
☐ Telecopy
☐ Email


Michael C. Creamer

Exhibit M

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

RECEIVED

DEC 23 20

Fingert Law Chartered

IN THE MATTER OF PETITION TO)
CORRECT LICENSE NO. 02-02209)
IN THE NAME OF COTTONWOOD)
CANAL COMPANY)
_____)

**ORDER DENYING PETITION FOR
RECONSIDERATION AND
REQUEST FOR STAY**

IN THE MATTER OF CROSS)
PETITION TO CORRECT AND)
PETITION TO CHANGE OWNERSHIP)
OF LICENSE NO. 02-02209 IN THE)
NAME OF BLACK MESA FARMS, LLC)
_____)

This matter comes before the Idaho Department of Water Resources (“IDWR” or “Department”) as *Black Mesa’s Petition for Reconsideration of Order Denying Petition for Reconsideration and Final Order Regarding Ownership and Request for Stay* (“Petition”) dated December 3, 2010, filed by Black Mesa Farms LLC (“Black Mesa”). The Petition seeks reconsideration of the Department’s *Order Denying Petition for Reconsideration and Final Order Regarding Ownership* (“Final Order”) issued on November 19, 2010. The Final Order concluded that disputes over title to real property can only be resolved by a quiet title action brought before a district court. The Final Order also concluded that the corrected portion of license 02-02209 should reflect the name of Cottonwood Canal Co. (“Cottonwood”) given that the original license was issued in Cottonwood’s name and because the Department is without jurisdiction or authority to quiet title to Black Mesa.

In the Petition, Black Mesa requests that the Department revise the Final Order to reflect the ownership of the corrected portion of the license in the name of Black Mesa. Black Mesa

also requests that if the Department declines to revise the Final Order, then the Department should issue an order staying any correction of the license in the name of Cottonwood.

I. Ownership

Black Mesa argues that the Department should reconsider its decision not to issue the corrected license in Black Mesa's name. Black Mesa suggests that "the Department routinely determines ownership of water rights and has an established procedure—required by Idaho Code Section 42-248 and 42-1409(6)—for processing ownership changes when lands with appurtenant water rights change hands..." Petition at 3. While the Department does have a procedure for documenting ownership changes, the Department's records of ownership do not "determine" ownership of water rights as suggested by Black Mesa. The Department's records are simply a depository of water right information. The Department routinely updates its records of ownership of water rights where a notice has been filed along with evidence of conveyance of those water rights. However, if there is a legitimate dispute as to the ownership of a water right (as in this case), the Department does not act as the arbiter of who has the better claim of title. That job rests with district courts through a quiet title action.

Black Mesa also raises arguments about appurtenancy of water rights, suggesting that title to the water right transferred to Black Mesa with sale of the property. Petition at 3-4. These arguments raised by Black Mesa in the Petition are the very arguments that should be raised in a quiet title action before a district court, not before the Department. The Department declines to determine whether the corrected portion of the license is now appurtenant to the land where water has been used by Black Mesa.

Black Mesa also argues that the Final Order decides the ownership issue by placing the corrected portion of the license in the name of Cottonwood. The Department disagrees. The

Department has simply retained the name of the original licensee. The Department previously found that when the license was issued in 1970, the Section 14 lands were incorrectly omitted from the license. *Final Order Granting Petition to Correct License No. 02-02209; Interlocutory Order Regarding Ownership and Setting Scheduling Conference* at 13 (August 12, 2010). The Final Order concludes only that the Department should not change the recorded owner of the license from the way it was listed at the time the license was issued because the Department is without jurisdiction or authority to quiet title to Black Mesa. This does not decide who has the better claim of title now. The Department intentionally made no judgment in the Final Order as to who has the better claim to title. Where there is a legitimate dispute over the current ownership of a water right, the Department lacks jurisdiction to quiet title in either party's name. Idaho Code § 6-401; *see also Rural Kootenai Organization, Inc. v. Board of Com'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999)(Kootenai County Board of Commissioners lacks jurisdiction to determine who owns title to submerged lands.); *see also Bonner Bldg. Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 685, 682 P.2d 635, 638 (Ct. App. 1984)(A district court has jurisdiction in action to quiet title.). There is a significant difference between saying that Cottonwood is the original licensee, as the Department has done in this case, and determining who has the better claim of title now. The Department does not believe that the Final Order identifying Cottonwood as the original licensee prejudices Black Mesa should it seek to have title quieted in its name.

The Petition further requested that the Final Order be revised to eliminate its conclusion that Black Mesa has the burden of bringing an action in the courts to challenge the Department's determination. The Department disagrees with Black Mesa's characterization of the Final Order. The Final Order does not put any burden on Black Mesa that isn't already on a party who seeks

to have title to real property quieted in their name. The Department's order simply points out that instead of asking the Department to determine the ownership of the corrected license, Black Mesa must seek a decision from a district court if it wants title quieted in its name.

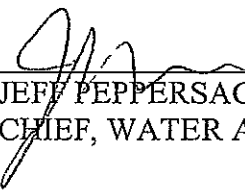
II. Request for Stay

Finally, Black Mesa asks the Department to issue a stay of the Final Order if the Department denies the petition for reconsideration. Black Mesa argues that the Final Order prejudices Black Mesa with respect to the ownership issue. The Department disagrees that the Final Order prejudices Black Mesa's claim of title. As discussed above, the Department's order simply recognizes that the water right was originally in Cottonwood's name and does not speak as to who has the better claim of title now. The Department does not believe that it is necessary for this proceeding to be stayed.

ORDER

Based upon the foregoing, it is hereby ORDERED that the petition for reconsideration and request for stay is DENIED.

DATED this 22 day of December, 2010



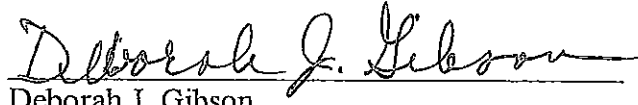
JEFF PEPPERSACK
CHIEF, WATER ALLOCATION BUREAU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2010, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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Deborah J. Gibson
Administrative Assistant
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