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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	
Case No. 39576	)	SUBCASE NUMBERS 02-10300, 02-00103
	)	
	)	
	)	MEMORANDUM IN SUPPORT OF
	)	COTTONWOOD CANAL COMPANY'S
	)	MOTION FOR SUMMARY JUDGMENT
	)	
	)	
	)	

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

SUMMARY

The two water right claims that are the subject of these two subcases are claims to the

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same water right - a portion of licensed right no. 02-02209. However, water right license no. 02-02209 was issued by IDWR on February 11, 1970 without the portion of the right that is at issue in these subcases. Both Cottonwood and Black Mesa Farms LLC submitted competing *Petitions* to correct license no. 02-02209 by adding this portion of the right, thereby initiating an IDWR administrative proceeding before the Idaho Department of Water Resources (hereinafter “IDWR”).

In that administrative proceeding, IDWR issued its *Final Order Granting Petitions to Correct License No. 02-2209; Interlocutory Order Regarding Ownership and Setting Scheduling Conference* on August 12, 2010 (hereinafter “August 12, 2010 *Final Order*”), finding that the license for the right should be amended to provide for the irrigation of an additional 400 acres of land using 8.0 cfs with a volume of 1338.95 afa. *Fritschle Affidavit*, Ex. A, p. 937. However, IDWR did not make a determination as to whether Cottonwood or Black Mesa owned the amended portion of license no. 02-02209 in its August 12, 2010 *Final Order*. Instead, IDWR addressed ownership of the right as an interlocutory issue, separate from the issue of amending the license. *Id.*

In its November 19, 2010 *Order Denying Petition for Reconsideration and Final Order Regarding Ownership*, IDWR concluded that the corrected portion of the license should remain in Cottonwood’s name both because the original license was issued in Cottonwood’s name, and because IDWR believed it was without authority or jurisdiction to quiet title in the amended portion of the water right to Black Mesa. *Id.*, Ex. A, pp. 1030 - 1038. A January 19, 2011 *Petition for Judicial Review* filed by Black Mesa resulted in reassignment of the case to the

SRBA District Court pursuant to the Notice of *Reassignment*. The SRBA District Court subsequently issued its *Order Staying Proceedings* to allow the Special Master in the two subcases at bar to resolve the issues therein. IDWR filed the settled transcript and the record with the SRBA District Court pursuant to I.R.C.P. 84(k).

Cottonwood must be named as the sole owner of the amended part of the licensed water right because Cottonwood applied for the water right, Cottonwood put the water to beneficial use as confirmed by IDWR, the entire right was licensed in Cottonwood's name, and Cottonwood has never conveyed this right to any party, nor otherwise been divested of the same. Black Mesa does not, never has, and could not possibly own the corrected portion of the license because it has never been conveyed to Black Mesa, or otherwise been obtained by Black Mesa. Thus, the corrected portion of the license must remain in the name of Cottonwood, resulting in the decree of water right no. 02-10300 to Cottonwood.

For the same reasoning, Right No. 02-00103 cannot be decreed to Black Mesa. The right is claimed on lands that were irrigated by Cottonwood as of the priority date claimed. Cottonwood never conveyed this claimed right to Black Mesa, and Black Mesa did not otherwise obtain the right through any other process. Thus the right cannot be decreed as owned by Black Mesa.

Right No. 02-10300 should be decreed with a 4.0 afa volumetric limitation for the sake of accuracy and consistency with other portions of licensed water right no. 02-02209.

STANDARDS

1. Summary Judgment Standard

Motions for summary judgment are governed by IRCP 56 which provides in pertinent part that judgment “shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court must liberally construe the facts in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party’s favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). It is only if reasonable people could reach different conclusions or draw conflicting inferences from the evidence, that a summary judgment motion must be denied. *Stevenson*, 125 Idaho at 272, 869 P.2d at 1367.

2. Effect of the Director’s Recommendations

The Director’s Report recommending water right nos. 02-10300 and 02-00103 constitutes prima facie evidence of the nature and extent of those water rights. I.C. § 42-1411(4). The prima facie status accorded the Director’s Report constitutes a rebuttable evidentiary presumption. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 745, 947 P.2d 409 (1997). Once the Director’s Report is rebutted, its presumptive weight disappears, and the facts on which the Director’s Report is based are weighed with all other facts that may be relevant. *Id.*

With respect to the issue involving ownership of water right no. 02-10300, the Director's Report can carry no presumptive weight, because IDWR recommended that right as owned by the two entities involved in litigation over that very issue. At previous hearings, both parties and IDWR have argued that this right can only be owned by one or the other party, not both. Accordingly, the Court should place no weight on the Director's recommendation of ownership of water right no. 02-10300.

FACTS

On February 23, 1963, Cottonwood submitted an Application for Permit to appropriate 89.6 cfs of water from the Snake River to irrigate 4,480 acres of lands in Elmore County including 400 acres in T06S R10E Section 14, NE $\frac{1}{4}$, N $\frac{1}{2}$ of SE $\frac{1}{4}$, N $\frac{1}{2}$ of NW $\frac{1}{4}$, SENW, and NESW. *Fritschle Affidavit*, Exhibit A, pp. 1 - 3. The application was approved as submitted on March 1, 1963. *Id.* Cottonwood submitted its Notice of Proof of Completion of Works and Application of Water to Beneficial Use on June 11, 1965, stating that Cottonwood was diverting and applying water as contemplated in the permit, including the irrigation of the Section 14 lands. *Fritschle Affidavit*, Ex. A, p. 9. Form depositions submitted by Cottonwood on July 29, 1965 confirmed the use of water on the entire authorized place of use, but land lists attached to the depositions failed to include the Section 14 lands. *Id.*, Ex. A, pp. 18 - 25. A field examination conducted by IDWR examiner Dorian Clay confirmed the irrigation of the entirety of the permitted place of use, including the Section 14 lands. *Id.*, Ex. A, pp. 32 - 36.

IDWR issued license No. 02-02209 to Cottonwood on February 11, 1970. *Id.*, Ex. A, p. 38. The license erroneously excluded lands in T06S R10E, Section 14. *Id.*, Ex. A, p. 936. The

license also specified a volumetric limitation of 13,339.33 acre-feet per season for a per-acre seasonal volumetric limitation of 3.35 acre-feet. *Id.*, Ex. A, p. 38.

On November 27, 1972, a Federal Administrative Law Judge canceled the Desert Land Entries for which Cottonwood had appropriated water right no. 02-02209. *Id.*, Ex. A, p. 410. The Interior Board of Land Appeals (“IBLA”) upheld that decision on April 7, 1975. *Id.* After the United States District Court for the District of Idaho upheld IBLA, the 9th Circuit Court of Appeals affirmed the District Court on August 3, 1981. *Id.*, Ex. A, pp. 69 - 78. Throughout this time, Cottonwood had continued to irrigate the lands for which water right no. 02-02209 had been appropriated as evidenced by Cottonwood’s July 31, 1986 Application for Extension of Time to Avoid Forfeiture, which stated that the land to which the water right was appurtenant had been irrigated up until September of 1981. *Id.*, Ex. A, pp. 207- 208. On November 14, 1988, IDWR approved Cottonwood’s Application for Extension of Time. *Id.*

On July 12, 1988, Cottonwood submitted its Application to Sell or Lease water right no. 02-02209 to the Water Bank. *Id.*, Ex. A, pp. 180 - 186. On October 12, 1990, the United States issued a patent to Wesley and Christine Wootan for almost all of the lands for which water right no. 02-02209 was licensed, including the lands in T06S R10E, Section 14 for which, according to IDWR’s *Final Order*, water right no. 02-02209 should have been licensed. *Id.*, Ex. A, p. 937, pp. 949-954. On December 26, 1990, Cottonwood and the Wootans (Black Mesa’s predecessors) executed an Agreement by which Cottonwood agreed to convey its interest in 12.8 cfs of water right 02-02209 “in order to irrigate the acres Wootan . . . acquired from BLM.” *Id.*, Ex. A, pp. 983-997. Also on December 26, 1990, pursuant to a Release and Assignment,

Cottonwood conveyed 12.8 cfs of water right no. 02-02209 to the Wootans. *Id*, Ex. A, pp. 750 - 754. This was the first and only time that Cottonwood conveyed any interest in any portion of water right no. 02-02209 to Black Mesa, its predecessors, or principal(s). Shortly afterwards, pursuant to a January 14, 1991 Release, Assignment and Disclaimer, the Wootan Bryant Partnership (Black Mesa's immediate predecessor in interest) released any interest it may have had in the remainder of licensed water right no. 02-02209. *Id*, Ex. A, pp. 748 - 749. At no point within any of the three documents (the December 26, 1990 Agreement, the December 26, 1990 Release and Assignment, and the January 14, 1991 Release, Assignment and Disclaimer) is any mention made of the conveyance of any additional or other portion of the water right to Wootan.

On March 22, 1991, pursuant to its Resolution, the Idaho Water Resource Board accepted 58.1 cfs of the water right into the water supply bank stating that the question of the "validity of this water right" would "be determined at a later time by the Director." *Id*, Ex. A, p. 263. On May 7, 1991, Black Mesa filed with IDWR its notice of Resumption of Beneficial Use of the 12.8 cfs of water right no. 02-02209 it had obtained from Cottonwood via the December 26, 1990 Release and Assignment. *Id*, Ex. A, p. 277 - 278. Black Mesa did not notify IDWR of its use of any other portion of water right no. 02-02209, including the 8.0 cfs corrected portion of the license it seeks to own pursuant to its SRBA claim to water right no. 02-00103.

On May 31, 1991, pursuant to its Resolution, the Idaho Water Resources Board accepted the remaining licensed (at that time) 8.8 cfs into the Water Supply Bank, again stating that there was "a question as to the validity of this water right" that was to be "determined at a later time by the Director." *Id*, Ex. A, p. 288. Thus, as of that date (May 31, 1991), other than the 12.8 cfs for

which Black Mesa had submitted its notice of Resumption of Beneficial Use, the remainder of water right no. 02-02209 as originally licensed had been accepted into the Water Supply Bank.

On April 8, 1997, the City of Glenns Ferry filed an Application for Transfer of Water Right no. 02-02209, seeking a change in use from irrigation to municipal, and a change in point of diversion for a total of 2.4 cfs of the water right. *Id*, Ex. A, pp. 342 - 348. A Deed to a Water Right conveying 2.4 cfs of water right no. 02-02209 from Cottonwood to the City of Glenns Ferry was attached to the transfer application. *Id*, Ex. A, pp. 350 - 351. The transfer was approved by IDWR on May 12, 1998, confirming the validity of water right no. 02-02209, and confirming Cottonwood's ownership of the entirety of the water right (excluding the 12.8 cfs conveyed to Black Mesa, and the 8.8 cfs claimed by both Cottonwood and the BLM). *Id*, Ex. A, pp. 468 - 469. Subsequent approved transfers provided further confirmation of the water right's validity and Cottonwood's ownership and answered the "questions" raised in the Water Resources Board's Resolutions accepting portions of water right no. 02-02209 into the Water Supply Bank. *See i.e. Id*, Ex. A, pp. 598 - 599,

On April 8, 2008, the SRBA District Court issued a Partial Decree for water right no. 02-10337, decreeing to Cottonwood all of the remaining licensed (at that time) portions of water right no. 02-02209, including the 8.8 cfs that had been claimed by the BLM (but excluding the 12.8 cfs that had previously been conveyed to Black Mesa - for which the court issued a Partial Decree in subcase no. 02-02209 on June 15, 2009). This decree provided for a volumetric limitation on that right of 4.0 acre-feet per annum, matching both IDWR's SRBA recommendation of the right, and its determination of the volumetric field headgate requirement

for the geographical area where right no. 02-02209 was licensed. *See Affidavit of Charles L. Honsinger in Support of Cottonwood Canal Company's Motion for Summary Judgment*, Exs. A, B. Finally, on July 14, 2009, the SRBA District Court issued a Final Order Disallowing Water Right Claims, which included claim no. 02-02209C - the 8.8 cfs portion of water right no. 02-02209 for which the BLM had submitted a claim in the SRBA, thereby confirming Cottonwood as the only owner of licensed water right no. 02-02209 (again excluding only the 12.8 cfs conveyed by Cottonwood to Black Mesa in 1990).

In its August 12, 2010 *Final Order*, IDWR determined that license no. 02-02209, which was issued to Cottonwood, should have included an additional 8.0 cfs to irrigate the Section 14 lands. *Fritschle Affidavit*, Ex. A, p. 937. Additionally, in its November 2, 2010 *Order Denying Petition for Reconsideration and Final Order Regarding Ownership*, IDWR determined that the license was to remain in Cottonwood's name. *Id.*, Ex. A, pp. 1030 - 1038. Thus, according to IDWR, Cottonwood owned an additional 8.0 cfs pursuant to water right no. 02-02209 at licensure. There is no evidence that this 8.0 cfs portion of water right no. 02-02209 was ever conveyed or intended to be conveyed to any party, including either Black Mesa, or its predecessor in the Section 14 lands, the United States Bureau of Land Management, nor is there any evidence that it was ever obtained by any other party, including Black Mesa and its predecessors.

ARGUMENT

1. A Partial Decree of Water Right No. 02-10300 Can Only be Issued to Cottonwood

According to IDWR, the license for water right no. 02-02209 erroneously excluded the

Section 14 lands, and was amended on that basis. IDWR refused to address the issue of ownership of the water right by recommending water right no. 02-10300 in the names of both Cottonwood and Black Mesa. This court must determine that Cottonwood is the legal owner of the corrected portion of water right no. 02-02209 because all evidence leads to the conclusion that Cottonwood has never conveyed title of this portion of the water right to anyone, including Black Mesa or its predecessors.

The facts leading to this conclusion, summarized above, are uncomplicated. Cottonwood applied for the permit to appropriate water right no. 02-02209. Cottonwood developed the permit, beneficially used the permitted water on the developed lands, and submitted proof of beneficial use of the water right. IDWR licensed the water right to Cottonwood. See I.C. §42-220 (“Such 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”). Cottonwood owned the entirety of water right no. 02-02209 at licensure. Because the license should have contained the Section 14 lands and appurtenant diversion rate at licensure, Cottonwood also owned the amended portion of the licensed right. Cottonwood continued to beneficially use the water right until its Desert Entries were canceled in 1981. Cottonwood acted to protect the right from forfeiture by filing an Application for Extension of Time to Avoid Forfeiture, and an Application to Sell or Lease a Water Right to the Water Supply Bank. It has conveyed numerous pieces of its water right to various entities, resulting in the filings of applications for administrative actions with IDWR, all of which have been successfully prosecuted and resulted in changes of ownership of those portions of the water right from

Cottonwood to the newly owning entity. It has owned all portions of the water right since licensure, and, other than conveyances of the water right reflected in filings with IDWR and the 12.8 cfs conveyed to Black Mesa, has never conveyed any other part of the water right to any other party.

Moreover, Idaho case law has addressed a similar situation in which a water right was owned by an appropriator who did not, as is the case with Cottonwood, perfect his ownership of the underlying federal lands. In *Sanderson v. Salmon River Canal Company, Limited*, 34 Idaho 145 (1921), the plaintiff Sanderson brought a mandamus action against defendant Salmon River Canal Company to require the delivery to his lands of water that defendant was obligated to provide under contract. Plaintiff owned stock in the defendant Canal Company entitling him to the delivery of a proportionate part of the water right appropriated by the Canal Company. *Id.*, pp. 154 - 155. The Canal Company argued that because the United States Secretary of the Interior had not patented the lands for which plaintiff was seeking delivery of water, it could not deliver the same. *Id.* p. 159. The Idaho Supreme Court addressed this contention as follows:

The Secretary of the Interior had the power to decide what land should be patented and what should not, but he had no power to divest the plaintiff of his water right. Nor did the State Land Board or State Commissioner of Reclamation have any such power. It is fundamental that no executive officer or board has the power to deprive a party of a vested right to the use of water. (*Speer v. Stephenson*, 16 Idaho 707, 102 P. 365.) To permit this would clearly be depriving him of his property without due process of law. The contention that plaintiff's water right necessarily fails because the government has refused to patent the land is not sound. One who has appropriated water and beneficially used it has a right to the use of the water independent of his ownership of the land. (*Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072.) An owner of a water right by purchase or original appropriation may sell the water right separate and apart from his land. (*Village of Hailey v. Riley*, 14 Idaho 481, 95 P. 686; *Bennett v. Twin Falls etc. Co.*, 27 Idaho 643, 150 P. 336.) C. S., sec. 3018, providing that water rights to all Carey Act

lands shall attach to and become appurtenant to the land as soon as title passes from the United States to the state, does not and cannot have the effect of making the water right an inseparable appurtenance of the land. To give it such effect would be to render it unconstitutional. (*Bennett v. Twin Falls etc. Co., supra.*) It is thus clear that plaintiff has a water right which entitles him to the delivery of water and of which he cannot be divested by the Secretary of the Interior, the State Land Board, or State Commissioner of Reclamation.

Sanderson v. Salmon River Canal Co., 34 Idaho 145, 160-161 (Idaho 1921) (underlined emphases added).

The facts in this case are exactly the same as those in *Sanderson, supra* in that Cottonwood held title to licensed water right no. 02-02209 (including the portion that has now been amended) independent and apart from the issue of whether the lands it was irrigating were patented or not. Just as was the case in *Sanderson, supra*, the fact that those lands were not patented did not result in the divestment of Cottonwood's licensed, vested water right in favor of any party, including Black Mesa and/or its predecessor(s). No evidence or valid legal argument whatsoever exists to the contrary. Accordingly, as a matter of law, the Partial Decree for water right no. 02-10300 must be issued in Cottonwood's name only.

2. Water Right No. 02-00103 Must be Disallowed

The Court must also issue a Partial Decree disallowing Black Mesa's claim to right no. 02-00103. That claim is based upon the alleged beneficial use of water on lands that were being irrigated by Cottonwood pursuant to water right no. 02-02209 at the time of the priority date claimed. See *Fritschle Affidavit*, Ex. A, pp. 18 - 25, pp. 32 - 36. Black Mesa did not own any of this land until 1990, and thus could not have initiated beneficial use of the water on this land as of the priority date claimed. *Id.*, Ex. A, p. 937, pp. 949-954. As discussed hereinabove, other

than the 12.8 cfs conveyed to Black Mesa's predecessor pursuant to the 1990 Release and Assignment, Cottonwood never conveyed any other portion of any water right to Black Mesa. Thus, pursuant to the same reasoning that establishes that water right no. 02-10300 can only be decreed to Cottonwood as the owner, claim to water right no. 02-00103 cannot be decreed to any party, including Black Mesa, and must accordingly be disallowed as a matter of law.

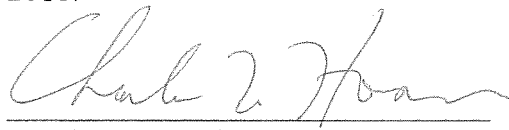
3. The Court Must Decree Right No. 02-10300 With a Volume of 4.0 AFA

Finally, water right no. 02-10300 must be decreed with a total volumetric limitation of 1600 afa rather than the 1338.95 afa recommended. The 1338.95 afa was the amount licensed by IDWR, but does not reflect the beneficial use of the water right as established by IDWR's field headgate requirements for this geographical location. *See Honsinger Affidavit*, Exs. A, B. In fact, IDWR itself corrected this error in the volumetric limitation in its earlier recommendations of portions of licensed water right 02-02209 by recommending the standard field headgate requirement volumetric limitation of 4.0 acre-feet per annum. *See IDWR Directors Report*, Subcase Nos. 02-10337, 02-10338. This Court has confirmed the correction of this error by issuing Partial Decrees in the same subcases providing for a 4.0 acre-feet per annum volumetric limitation. Accordingly, the Special Master should, for the sake of consistency and accuracy, recommend that water right no. 02-10300 be issued with a volumetric per-acre limitation of 4.0 acre-feet per annum, for a total volumetric limitation of 1,600 acre-feet per annum. At a bare minimum, Cottonwood has presented evidence sufficient to overcome the prima facie weight of the Director's recommendation on this issue, and the Court should therefore require further proceedings regarding the same.

SUMMARY

Cottonwood has conclusively established that it was the owner of all portions of licensed water right no. 02-02209 at licensure, including water right no. 02-10300. There is no set of facts under which Black Mesa was either conveyed ownership of water right no. 02-10300, or otherwise obtained ownership of the same. Similarly, there is no set of facts under which Black Mesa could have obtained water right no. 02-00103 either through conveyance by Cottonwood or otherwise. Finally, Cottonwood has established that the recommendation of water right no. 02-10300 is erroneous with respect to the volumetric diversion. Accordingly Cottonwood respectfully requests that: (1) the Special Master grant Summary Judgment to Cottonwood as to all issues herein; (2) recommend that Water Right No. 02-10300 be decreed to Cottonwood as the owner thereof with a volumetric limitation of 4.0 acre-feet per acre; and (3) recommend that Water Right No. 02-00103 be decreed as disallowed.

Dated this 7th day of October, 2011.

A handwritten signature in cursive script, appearing to read "Charles L. Honsinger", written over a horizontal line.

Charles L. Honsinger
RINGERT CLARK, CHARTERED

CERTIFICATE OF SERVICE

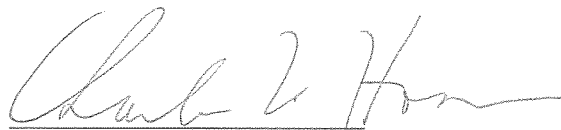
I certify that on the 7th day of September, 2011, I served copies of this document, including all attachments by U.S. Mail and/or Hand Delivery upon the following:

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A handwritten signature in cursive script, appearing to read "Charles V. Horn", written in black ink.

Person serving documents