

Michael C. Creamer [ISB No. 4030]
Michael P. Lawrence [ISB No. 7288]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for Black Mesa Farms, LLC

RECEIVED

OCT 11 2011

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 SRBA

Case No. 39576

Subcase Nos. 2-103 and 2-10300

**MEMORANDUM IN SUPPORT OF
BLACK MESA'S MOTION FOR
SUMMARY JUDGMENT**

Black Mesa Farms LLC ("Black Mesa"), by and through its counsel Givens Pursley LLP, pursuant to I.R.C.P. 56 and the Special Master's July 29, 2011 *Order Granting Motion to Amend Claim and Setting Deadline for Director's Report and Objections, Summary Judgment Schedule, and Trial Setting*, hereby submits this memorandum in support of *Black Mesa's Motion for Summary Judgment* filed contemporaneously herewith. Black Mesa requests that the Special Master determine, as a matter of law, that Black Mesa owns the water rights represented by the corrected portion of license no. 2-2209 (the "Section 14 Water Rights") authorizing diversions of 8.0 cfs of Snake River water to irrigate 400 acres in Section 14, T6S, R10E, B.M., owned by Black Mesa ("Section 14 Lands").

I. INTRODUCTION

The Section 14 Water Rights were claimed by Black Mesa under water right no. 2-103 and by Cottonwood Mutual Canal Company (“Cottonwood”) under water right no. 2-10300.

Each party’s claim is based on permit no. 30990 and the resulting license no. 2-2209.

Cottonwood claims it owns the Section 14 Water Rights because license no. 2-2209 was issued in its name in 1970. However, the fact that Cottonwood’s name was on either the permit or license when they issued is not sufficient to establish its ownership to the water rights today.

Black Mesa should be recognized as the owner of the Section 14 Water Rights because:

- (1) they are, and always have been, appurtenant to the Section 14 Lands that Black Mesa acquired by patent in 1990;
- (2) Black Mesa has put the Section 14 Water Rights to beneficial use in an open, notorious, hostile, exclusive, continuous and uninterrupted manner under a claim of right for the statutory prescription period; and
- (3) Cottonwood’s long and continuous, knowing acquiescence in Black Mesa’s use and enjoyment of the Section 14 Water Rights precludes Cottonwood’s claim to the rights.

In a recently concluded administrative case involving Black Mesa and Cottonwood (the “Administrative Case” discussed in more detail below), the Idaho Department of Water Resources (“IDWR” or “Department”) issued an order correcting license no. 2-2209 to include the Section 14 Water Rights. R. Vol. V, pp. 923-39.¹ However, the Department did not

¹ In this memorandum, citations to the record (i.e. “R. Vol. __, p. __”) refer to the agency record (“Agency Record”) filed with the court in Ada County Case No. CV-OC-2011-1273 (“Judicial Review Case”), which is Black Mesa’s judicial review challenge of the Department’s decision in the Administrative Case described in the text. The Judicial Review Case was reassigned to the SRBA Court pursuant to the Idaho Supreme Court’s July 1, 2010 *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order dated December 9, 2009*, and stayed pending the outcome of these subcases. Because the Agency Record contains many documents pertinent to these subcases and is available to the Special Master, Black Mesa cites to it in this memorandum. The agency record is incorporated by reference in the *Affidavit of Michael P. Lawrence* (“Lawrence Affidavit”) filed contemporaneously herewith.

determine who owns the Section 14 Water Rights in that proceeding. R. Vol. VI, pp. 1034. In these summary judgment proceedings, the parties do not challenge the Department's decision confirming the validity of the Section 14 Water Rights. Rather the single issue in dispute before the Special Master concerns the ownership of the Section 14 Water Rights.

II. FACTUAL BACKGROUND

In 1963, the Department issued permit no. 30990 to Cottonwood for the irrigation of 4,480 acres of federal public lands, including the Section 14 Lands. R. Vol. I, pp. 1-3. In 1965, proof of beneficial use was made, R. Vol. I, p. 9, and in 1970 license no. 2-2209 issued mistakenly omitting the Section 14 Water Rights. R. Vol. I, p. 38.

The federal public lands authorized for irrigation under permit no. 30990 and license no. 2-2209 were to be developed and farmed not by Cottonwood, but rather by its individual members pursuant to applications for entry under the Federal Desert Land Act. R. Vol. III, pp. 398-400. In 1981, however, all of the desert land entries ("DLEs") were canceled by decision of the U.S. Ninth Circuit Court of Appeals, resulting in the DLE lands remaining in BLM ownership.² The BLM apparently allowed the entrymen to retain possession and continue farming the DLE lands while the administrative and judicial appeals were pending, meaning that the entrymen farmed the lands until 1981. R. Vol. I, p. 208 (explanation contained in Cottonwood's Application for Extension of Time to Avoid Forfeiture).

² The DLEs originally were cancelled by the November 27, 1972 decision of a Federal Administrative Law Judge, a decision that was upheld by the Interior Board of Land Appeals on April 7, 1975, whose decision was upheld by the U.S. District Court for the District of Idaho, and the District Court's decision affirmed by the Ninth Circuit Court of Appeals. See R. Vol. I, p. 148 (description of events in *Letter from W. Ringert to D. Tuthill*, p. 2 (Dec. 16, 1986)).

In the late 1980s, Wesley and Christine Wootan³ made an arrangement with the BLM for Black Mesa to farm the canceled DLE lands. R. Vol. II, p. 277 (Black Mesa's Resumption of Beneficial Use); Wootan Affidavit ¶ 34. On October 12, 1990, Patent No. 11-91-0001 ("1990 Patent") was issued to the Wootans conveying to them approximately 4,098 acres of the canceled DLE ground, including 440 acres encompassing the Section 14 Lands together "with all rights, privileges, immunities and appurtenances of whatsoever nature. . . ." R. Vol. VI p. 949-51.⁴ Black Mesa has used the Section 14 Water Rights on the Section 14 Lands (and others within what has become a 3,985 acre permissible place of use) since 1991. Wootan Affidavit ¶¶ 34-37.

In December 1990, Black Mesa entered into an agreement with Cottonwood concerning license no. 2-2209 and the irrigation system used to convey those water rights ("1990 Agreement"). R. Vol. II, pp. 230-44. The 1990 Agreement resolved the parties' respective claims to right no. 2-2209 as it was reflected in the license at the time. It did not address the Section 14 Water Rights. *Id.* The 1990 Agreement recites how Black Mesa (then, the Wootans) acquired the DLE lands by patent "together with certain appurtenances," how Cottonwood "is the holder of record, and claims ownership, of Water License No. 02-2209," how the BLM had previously claimed ownership of the right no. 2-2209 "by virtue of cancellation of the desert land entries," and how Cottonwood and Black Mesa desired to resolve their respective claims to right no. 2-2209 by entering into the 1990 Agreement. *Id.* at 230-31 ¶¶ 1-6. Cottonwood agreed to "transfer and quitclaim to Wootan [its] right, title and interest in and to 12.8 cfs of Water License No. 02-2209," and the Wootans agreed to "transfer and quitclaim all of [their] right, title and

³ Wesley R. and Christine Wootan conveyed the patented lands to the Wootan Bryant Partnership, which is now known as Black Mesa Farms, LLC, of which the Wootans and Don and Brenda Bryant are the principles. In this Memorandum, actions described as involving Black Mesa include actions involving the Wootans and Bryants.

⁴ A revised patent was issued in 2005 "to delete a reservation restricting irrigated farming." R. Vol. VI, pp. 952-54. Wootan Affidavit ¶ 5. There is no difference in the legal description of the land conveyed in the 1990 and 2005 patents, nor is there any difference in the language conveying the land "with all rights, privileges, immunities and appurtenances of whatsoever nature. . . ."

interest in and to 61.30 cfs of Water License No. 02-2209 to Cottonwood.” *Id.* at 231 ¶¶ 8-9. In addition, the Wootans agreed to disclaim in favor of Cottonwood all interest in 5.6 cfs of right no. 2-2209 still claimed by the BLM as appurtenant to land not patented to Black Mesa. *Id.* at 231-32 ¶¶ 3, 9. By the end of January 1991, Cottonwood and Black Mesa had exchanged the quitclaims and releases contemplated in the 1990 Agreement. R. Vol. VI, pp. 955-61. The 1990 Agreement and resulting quitclaims and releases were drafted by Cottonwood’s legal counsel.⁵ Wootan Affidavit ¶ 15.

Cottonwood knew about the Section 14 Water Rights as early as 1984 when Cottonwood amended its 2-2209 claim in the pre-SRBA lower Snake River adjudication⁶ to include the Section 14 Water Rights. Lawrence Affidavit Exs. E and F. At the time, rather than amend the license through an administrative proceeding or through the adjudication of Cottonwood’s 2-2209 claim, the Department decided to deal with the Section 14 Water Rights as a beneficial use claim. Lawrence Affidavit Ex. G. This resulted in the Section 14 Water Rights being assigned claim no. 2-103. Lawrence Affidavit Ex. E. When the SRBA commenced, the lower Snake River adjudication was dismissed without resolving the claims.

In April 1991, Black Mesa filed its SRBA claim no. 2-103 for the Section 14 Water Rights. Wootan Affidavit Ex. F. Cottonwood did not file a SRBA claim for right no. 2-103 and did not challenge Black Mesa’s claim or IDWR’s first two recommendations for 2-103.⁷ In

⁵ Cottonwood was represented at the time by Bill Ringert. The Ringert Clark law firm still represents Cottonwood’s legal counsel. In fact, Cottonwood is run by the firm’s attorneys. See Lawrence Affidavit Ex. D (copy of Cottonwood’s 2011 Annual Report filed with the Idaho Secretary of State).

⁶ The lower Snake River adjudication was Ada County Case No. 73804, which was dismissed on May 30, 1989. R. Vol. II, p. 231 ¶3.

⁷ Cottonwood could have but did not object to Black Mesa’s 2-103 claim. In a January 9, 2007 letter to the Department, Cottonwood’s legal counsel stated that “I received IDWR’s recommendation disallowing Cottonwood’s SRBA claim related to the water at issue in the administrative proceeding, and I have reviewed IDWR’s favorable recommendation for Black Mesa’s claim (2-103) that is apparently related to this water.” R. Vol. IV, pp. 881-882.

September 2011, Cottonwood filed an objection to IDWR's second Amended Director's Report for 2-103.

Cottonwood did not claim the Section 14 Water Rights in the SRBA until 2006 when it filed claim no. 2-10300. Lawrence Affidavit Ex. A. IDWR recommended this claim be "disallowed" because the right had been "Recommended as Right No. 2-103 and 2-2209B."⁸ Lawrence Affidavit Ex. B. Cottonwood did not object to this recommendation. On July 10, 2009, the SRBA Court ordered Cottonwood's claim no. 2-10300 "disallowed with prejudice." Lawrence Affidavit Ex. C. Cottonwood did not challenge this decision until it filed its January 6, 2011 *Rule 60(b) Motion for Relief* in subcase no. 2-10300.

In the meantime, the Administrative Case commenced in 2000 when Cottonwood filed a *Petition to Correct License* with the Department to amend license no. 2-2209 to include the Section 14 Water Rights. R. Vol. IV, pp. 605-41. Black Mesa filed a *Cross-Petition to Correct License and Petition to Change Ownership of License* in which it agreed with Cottonwood that the license should be amended to include the Section 14 Water Rights, but asserted that Black Mesa (not Cottonwood) should be deemed the owner. R. Vol. IV, pp. 741-54.

In 2002, the hearing officer issued a *Recommended Decision and Order*, R. Vol. V, pp. 830-43, and the parties' filed exceptions to the same. R. Vol. V, pp. 858-77. After that, the administrative proceeding sat essentially dormant until 2010 when the Department designated an employee to review the 2002 *Recommended Decision and Order*. R. Vol. V, pp. 920-22. The Department subsequently issued a *Final Order Granting Petitions to Correct License No. 02-02209; Interlocutory Order Regarding Ownership and Setting Scheduling Conference* (the "Final Order"). R. Vol. V, pp. 923-39. The Final Order determined that license no. 2-2209

⁸ 2-2209B is Black Mesa's claim for its 12.8 cfs portion of right no. 2-2209 pursuant to the 1991 Agreement.

should be corrected to include the Section 14 Water Rights, but that additional briefing was required to determine who owns the corrected portion of the license. *Id.*

After Black Mesa and Cottonwood further briefed the ownership issue, the Department concluded that it “is without jurisdiction or authority” to determine ownership because it viewed the issue as “a request to quiet title to the disputed water right.” R. Vol. VI, p. 1034. Instead, the Department found that “a district court is the appropriate venue.” *Id.*

Black Mesa subsequently initiated the Judicial Review Case, *see supra* note 1, which was stayed (at the parties’ suggestion) pending the outcome of the above-captioned subcases. The parties further stipulated that the subcases should be joined and addressed together on cross-motions for summary judgment. Accordingly, Black Mesa is filing this memorandum.

III. ARGUMENT

Black Mesa should be deemed the owner of the Section 14 Water Rights because:

- (1) Black Mesa acquired the Section 14 Water Rights as appurtenances to their patented Section 14 Lands and has applied them to beneficial use;
- (2) Even if Cottonwood could be found to have once owned the Section 14 Water Rights, Black Mesa’s ownership was established through adverse possession by Black Mesa’s diversion, delivery, continuous beneficial use of, and claim to the rights since 1991 which has been actual, open, visible, notorious, continuous and hostile to Cottonwood for the applicable statutory prescriptive period; and/or
- (3) Cottonwood is barred under the doctrines of waiver and/or estoppel from asserting ownership over the Section 14 Water Rights based on its past actions demonstrating an intentional relinquishment of its claims to the Section 14 Water Rights, and Black Mesa’s reasonable and detrimental reliance upon such actions.

A. The Section 14 Water Rights are, and always have been, appurtenant to the Section 14 Lands now owned by Black Mesa.

1. Idaho water law dictates that the Section 14 Water Rights were made appurtenant to the Section 14 Lands upon which they were beneficially used.

In Idaho, water rights are appurtenant to the lands they irrigate. Idaho Code § 42-101 states, in relevant part:

the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied

(Emphasis added.) Idaho Code § 42-220 states, in relevant part:

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; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted.

(Emphasis added.) The Idaho Supreme Court has affirmed this concept repeatedly. *See, e.g., Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959) (“Appellants’ decreed water right constitutes real property; such right is appurtenant to appellants’ lands to which the water represented thereby has been beneficially applied.”); *Follett v. Taylor Brothers*, 77 Idaho 416, 425, 294 P.2d 1088, 1094 (1956) (nearly identical to *Anderson*); *Paddock v. Clark*, 22 Idaho 498, ___, 126 P. 1053, 1054 (1912) (“Under the Constitution and statutes, this court has universally held that a water right is real property, and that it is an appurtenance to the land irrigated by the use of such water.”); *Russell v. Irish*, 20 Idaho 194, 198-99, 118 P. 501, 502 (1911) (“it is well established that a water right is an appurtenance to the land on which it has been used”). A recent Idaho Supreme Court decision cited *Ickes v. Fox*, 300 U.S. 82, 95, 57

S.Ct. 412, 416-17, 81 L.Ed. 525, 530 (1937) to reinforce the proposition that a water right which has been acquired by application to beneficial use to irrigation becomes, by state law, “part and parcel of the land upon which it is applied.” *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 111, 157 P.3d 600, 605 (2007).

There is no dispute that the Section 14 Water Rights were developed on and applied to beneficial use on the Section 14 Lands under license no. 2-2209. Indeed, this was the premise underlying Cottonwood’s 2000 *Petition to Correct License* filed with IDWR. R. Vol. IV, pp. 605-41. In that administrative proceeding, IDWR found that license no. 2-2209 “erroneously excluded 400 acres from Section 14, and the record supports the conclusion that the Section 14 lands have been historically irrigated.” R. Vol. V, p. 935 ¶ 27. IDWR also found that “the Section 14 lands have been irrigated with water from the Snake River since 1965 [which was the year the diversion works were completed and proof of beneficial use filed for permit no. 30990].” *Id.* ¶ 28. Cottonwood did not challenge these findings. In fact, Cottonwood subsequently stated that “the water right was appurtenant to the lands on which it was developed.” R. vol. VI, p. 977. There simply is no dispute that the Section 14 Water Rights were licensed as appurtenances to the Section 14 Lands.

In accordance with federal law, the DLE lands were forfeited to the federal government when the DLEs were canceled in 1981:

the claims or entries . . . shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States.

43 U.S.C. § 329 (emphasis added). The appurtenant water rights as part and parcel of the forfeited lands (including the Section 14 Water Rights) were forfeited as to the United States as well.

We know of no federal or state case addressing what is included in “the lands, and moneys paid therefor” that are forfeited to the federal government when desert land entries are canceled. As far as determining the circumstances by which water rights should be considered appurtenant to “the lands” forfeited, the question arguably is a matter of state law. *See Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 6, 156 P.3d 502, 507 (2007) (“[T]he appropriation of the nonnavigable waters within this State, including those located on federal land, is a matter of state law.”). *See also id.*, quoting *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 161, 55 S.Ct. 725, 730, 79 L.Ed. 1356, 1363 (1935), (“the Desert Land Act ‘simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of [prior] appropriation’”).

The Idaho Supreme Court has interpreted the term “bare land” to include water rights in the context of construing a deed. In a case where the defendants contended that a warranty deed conveying “bare land” did not include appurtenant water rights, the Idaho Supreme Court disagreed, holding:

They [the defendants] do not cite any authority supporting their contention that “bare land” means land without water rights. The term “bare land” means land that does not have improvements constructed upon it. *See The Senator, Inc. v. Ada County, Bd. of Equalization*, 138 Idaho 566, 573, 67 P.3d 45, 52 (2003). The term has nothing to do with water rights, and the district court did not err in quieting [the plaintiff’s] title in the water rights appurtenant to the real property.

Bagley v. Thomason, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010). Following the *Bagley* Court’s holding that “bare land” includes appurtenant water rights, it is reasonable to conclude that the Idaho Supreme Court would interpret “the lands” forfeited to the federal government

upon cancellation of desert land entries to include appurtenant water rights. Accordingly, the Section 14 Water Rights were appurtenant to and included with “the lands” forfeited to the federal government upon cancellation of the DLE’s, which were subsequently conveyed to Black Mesa by the 1990 Patent.

This same result was reached in 1979 by a Department Hearing Officer in a case with very similar facts to this one (i.e. involving water rights developed on canceled desert land entries) and tackling the very same issue (i.e. “whether [a] water right license . . . was appurtenant to the Desert Land Entry voided by the Ninth Circuit Court of Appeals . . .”).⁹ See Lawrence Affidavit Ex. H. In that case, the Hearing Officer determined that water rights developed by the entrymen were appurtenant to the canceled desert land entries and belonged to the federal government when the entries were canceled. *Id.* The Hearing Officer’s conclusion was based on the straightforward application of I.C. § 42-101 and cases outlining the basic rule of appurtenancy cited above, such as *Anderson v. Cummings*, 81 Idaho 327, 335 (1959) and *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911). Black Mesa recognizes that the Hearing Officer’s conclusion in that case is not binding precedent to this Court. Nevertheless, given the lack of case law dealing with the precise question, the case offers useful guidance.

2. *The Section 14 Water Rights were not severed from the Section 14 Lands and they therefore passed to Black Mesa in the 1990 Patent.*

As appurtenances, the Section 14 Water Rights passed with the Section 14 Lands when they were patented to Black Mesa. “It is well established that a water right is an appurtenance to the land on which it has been used and will pass by conveyance of the land.” *Silverstein v. Carlson*, 118 Idaho 456, 460, 797 P.2d 856, 860 (1990) (quoting *Russell v. Irish*, 20 Idaho 194,

⁹ The “Mud Flat” or “Indian Hills” case, as it is frequently referred to, is addressed repeatedly in correspondence from Cottonwood’s legal counsel to IDWR. See, e.g. R. Vol. II, p. 291.

198-99, 118 P. 501, 502 (1911)). A “conveyance would carry with it the water right appurtenant to the land at the time of the conveyance, unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed.” *Id.* (emphasis added.) *See also Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007) (“the inquiry is whether the water rights were expressly reserved in the deed conveying the land or whether there is clear evidence that the parties intended that the grantor would reserve them”).

Here, the 1990 Patent included the Section 14 Lands “with all rights, privileges, immunities and appurtenances of whatsoever nature. . . .” *Id.* at 6 ¶ 18.¹⁰ Cottonwood cannot show that the Section 14 Water Rights were severed, either by reservation or by conveyance, from the Section 14 Lands prior to the 1990 Patent. Accordingly, Black Mesa acquired the Section 14 Water Rights with the 1990 Patent under the longstanding law of the state “that a water right is an appurtenance to the land on which it has been used and will pass by conveyance of the land.” *Silverstein*, 118 Idaho at 460, 797 P.2d at 860; *Russell*, 20 Idaho at 198-99, 118 P. at 502.

3. *Cottonwood’s quitclaim and release to Black Mesa confirms Cottonwood’s understanding that license no. 2-2209 was appurtenant to the DLE lands in 1991.*

Cottonwood concedes that the Section 14 Water Rights were “appurtenant to the lands on which [they] were developed” and that “[t]hose lands were never owned by Cottonwood.” R. vol. V, p. 977. At the same time, Cottonwood has asserted that “whether the water right is appurtenant to the Section 14 lands does not determine its ownership” and “[n]either Black Mesa nor any of its predecessors-in-interest appropriated any portion of water right 02-02209.” *Id.*

¹⁰ The 1990 Patent included the N1/2, NE1/4SW1/4, and N1/2SE1/4 of Section 14 (totaling 440 acres). R. Vol. V, p. 949. The Section 14 Lands listed in amended license 2-2209, and in the Department’s latest recommendations for 2-103 and 2-10300, are in the same Section 14 quarter-quarters.

Despite these incongruent statements, there can be no dispute that Cottonwood considered license no. 2-2209 as appurtenant to Black Mesa's patented lands when Black Mesa acquired title to them, and Cottonwood cannot now argue that the Section 14 Water Rights are not appurtenant to Black Mesa's patented Section 14 Lands.

The quitclaim and release Cottonwood executed in favor of Black Mesa pursuant to the 1990 Agreement demonstrates that Cottonwood believed at the time that license no. 2-2209 was appurtenant to Black Mesa's patented lands. In that instrument, Cottonwood released, assigned and quitclaimed to Black Mesa 12.8 cfs of license no. 2-2209 to "remain appurtenant to" Black Mesa's 4,097.57 patented acres. R. Vol. V, p. 955. "Remain" means "[t]o continue without change of condition, quality, or place." *Webster's II New College Dictionary* at 937 (1995). Thus, this "remain appurtenant to" language shows that Cottonwood believed Black Mesa's 12.8 cfs portion of license no. 2-2209 would continue to be appurtenant to the lands without change of condition, quality, or place. Clearly, if the 2-2209 water rights Cottonwood quitclaimed to Black Mesa were to continue without change of place, Cottonwood must have believed they already were appurtenant to Black Mesa's patented lands.¹¹

This court should not allow Cottonwood to treat the water rights represented by license no. 2-2209 as appurtenant to Black Mesa's patented lands in 1991, but now pretend that the Section 14 Water Rights are not appurtenant to the Section 14 Lands.

4. *Cottonwood's name on license 2-2209 does not mean it owns the Section 14 Water Rights.*

Cottonwood has argued, and presumably will continue to argue, that it owns the Section 14 Water Rights simply because it was named the holder on the original license in 1970.

¹¹ The deed from Black Mesa to Cottonwood states that Black Mesa agreed to "execute transfer forms. . . required for the transfer of all or part of the 61.3 cfs *from the property to which it is appurtenant.*" (Emphasis added). R. Vol. V, p. 960.

However, this argument ignores a fundamental principle of Idaho prior appropriation law governing who can hold a right to the use of the state's waters—namely that a water right is only a right to use the public's water, *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 60, 231 P. 418 (1924) (it is well settled that the right to the use of water can only be claimed where it is applied to a beneficial use), and that any property right in water must be considered and construed with reference to the use to which the water is applied, *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 879, 154 P.3d 433, 450 (2007). *See also Pioneer*, 144 Idaho at 113, 157 P.3d at 607 (a common theme in the U.S. Supreme Court decisions construing western water law is the recognition of the connection between beneficial use of water and ownership rights).

For the last twenty one years, Black Mesa has, at its sole expense and effort, diverted the Section 14 Water Rights to beneficial use on the Black Mesa Property. And a great expense and effort it has been. *See* Wootan Affidavit ¶¶ 26-37. Cottonwood could not have delivered water to the Black Mesa Property or put the Section 14 Water to beneficial use itself. Cottonwood conveyed 26% of the original diversion facilities to Black Mesa in 1991 and subsequently abandoned the balance. *See* 1990 Agreement ¶ 10 and Wootan Affidavit 28-29. Indeed, for at least thirty years, Cottonwood has been unable to do more with the portion of water right 2-2209 that has been decreed to it than hold it unused (but protected from forfeiture in the state's water bank) for speculation and occasional sale and transfer to others. *See, e.g., R. Vol II*, p. 263 (water bank lease acceptance); *Vol. III*, pp. 542-61 (transfer application related to 12.16 cfs conveyance to Simplot trust).

Cottonwood's interest here cannot even rise to that of an appropriator/purveyor such as a canal company or irrigation district that might be found to hold bare legal title or title in trust for its patrons who actually put the water to beneficial use. Cottonwood has no patrons. It manages

no water rights. It neither operates nor maintains delivery facilities. It certainly is not acting like a trustee with respect to Black Mesa who puts the Section 14 Water Rights to beneficial use. *See Pioneer, 144 Idaho at 114, 157 P.3d at 608.*

Given the undisputed facts, the Section 14 Water Rights are appurtenant to the Section 14 Lands and the entity that has placed them to continued beneficial use—Black Mesa— must be found to be the owner of the Section 14 Water Rights as a matter of law.

B. Black Mesa owns the Section 14 Water Rights by adverse possession.

Even if Cottonwood could be found to have once owned the Section 14 Water Rights, Black Mesa's ownership would be established by adverse possession. A water right is a real property interest. IDAHO CONST. art. XV , § 3; I.C. § 55-101(1) (definition of real property); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984); *Anderson*, 81 Idaho at 334, 340 P.2d at 1115. "Title to real estate may be transferred by contract or deed of the owners, adverse possession, or condemnation, or by operation of law." *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151, 157 (1952) (emphasis added).

The Idaho Supreme Court has confirmed that ownership of water rights, like other real property, can be acquired by adverse possession:

To gain title to another's water right by adverse possession or prescriptive use, the adverse claimant must demonstrate that his use was 1) open and notorious; 2) hostile to the claim of the rightful owner; 3) exclusive of the use and needs of the rightful owner; 4) continuous and uninterrupted; 5) under a claim of right; 6) for the period prescribed by statute, *i.e.* five years.

Crow, 107 Idaho at 466, 690 P.2d at 921 (footnote omitted).¹²

Here, all the elements of adverse possession are present. Cottonwood knew the Section 14 Water Rights existed when Black Mesa came into possession and began irrigating the Section

¹² The water rights in question here have never been in a Water District or otherwise distributed by an elected watermaster, and so the protection from adverse possession afforded by Idaho Code § 42-607 is not applicable.

14 Lands. In 1984, Cottonwood amended its claim in the lower Snake River adjudication to include the Section 14 Water Rights, which the Department treated as a separate claim under water right no. 2-103. Lawrence Affidavit Ex. E. Black Mesa acquired the Section 14 Lands by patent in 1990, and in 1991 filed its SRBA claim for the Section 14 Water Rights under water right no. 2-103. Wootan Affidavit Ex. F. Until 2011, Cottonwood never challenged Black Mesa's SRBA claim to 2-103.¹³ Black Mesa has diverted and used the Section 14 Water Rights each irrigation season since 1991. Wootan Affidavit ¶¶ 34-37. Neither Cottonwood nor any other water user has used the Section 14 Water Rights during that time. *Id.* ¶ 44. Cottonwood presumably knew about Black Mesa's use when it began in 1991, but certainly knew about it by the time Cottonwood's legal counsel scheduled and held a meeting with Black Mesa shortly after Black Mesa filed its SRBA claim at which they discussed the Section 14 Water Rights. Wootan Affidavit ¶¶ 22-25. At that meeting, Black Mesa refused Cottonwood's legal counsel's demand that Black Mesa relinquish the Section 14 Water Rights to Cottonwood. *Id.* Based on these facts, even if Cottonwood could be deemed to have owned the Section 14 Water Rights when the Section 14 Lands were patented to Black Mesa, Black Mesa nevertheless has established its right and title to the Section 14 Water Rights through adverse possession.¹⁴

In *Pfleuger v. Hopple*, 66 Idaho 152, 156 P.2d 316 (1945)—a case involving unique facts similar to this case—the Idaho Supreme Court found that title to water rights had been acquired through adverse possession. Specifically, the *Pfleuger* Court held that a claimant adversely possessed his predecessor's water right where the predecessor had not been in possession of the

¹³ Until it filed its January 6, 2011 *Motion to Participate*, Cottonwood did not object or participate in any way in Black Mesa's subcases.

¹⁴ In 2006, the Idaho Legislature changed the requisite prescriptive time period under Idaho Code § 5-210 from 5 to 20 years. *See* 2006 Sess. Law. ch. 158, § 5 (eff. July 1, 2006). Nevertheless, the previously required 5 year period applies to adverse possession claims that ripened prior to the change. Thus, even if Black Mesa's prescriptive period is considered to begin when Cottonwood and Black Mesa met in the early 1990s, the 5 year prescriptive period was complete well before the 2006 statutory amendment.

appurtenant lands and had not used, or needed to use, the water right during the prescriptive period. This is the same situation presented in this case.

In *Pfleuger*, the son of Randolph Pfleuger (who had died in 1928) brought an action against William Hopple to quiet title to water rights previously owned by Randolph. Randolph had contracted with the Twin Falls Land and Water Company in 1921 for the purchase of the water and water rights involved in the case. *Id.* at 154; 156 P.2d at 317. The water rights were used to irrigate some 40 acres of land Randolph possessed under a contract with the State of Idaho. In 1935 (i.e. several years after Randolph died in 1928), the State cancelled the land contract because payments had not been made in accordance with the contract terms. *Id.* Later in 1935, Hopple obtained possession of the land and water shares, and he began using the water in 1936. *Id.* at 156; 156 P.2d at 318.¹⁵ The Court found that Hopple had “the exclusive possession of the land and water right in controversy continuously, openly, notoriously and uninterruptedly for approximately 5 1/2 years,” and ultimately held that he acquired title to the water right by adverse possession. *Id.* at 155; 156 P.2d at 317.

Black Mesa’s situation is just like Hopple’s. Black Mesa’s claim to the Section 14 Water Rights arises through Black Mesa obtaining possession of the lands to which the rights were developed and made appurtenant. As described above, Black Mesa has been in exclusive possession of the Section 14 Lands and Section 14 Water Rights—and has used the rights—continuously, openly, notoriously, uninterruptedly, and under a claim of right for the prescriptive

¹⁵ Prior to Hopple obtaining possession of the land and water shares, the administrator of Randolph’s estate quitclaimed the estate’s interest in the land and assigned the water stock certificate to Hopple. *Id.* at 154; 156 P.2d at 317. It is important to note that the Court’s decision to place ownership of the rights did not rest on these conveyances. The Court explained:

It might be observed here that respondents [Hopple] are not relying upon the quitclaim deed and the assignment of the water certificate, heretofore referred to, to establish their title. The documents were admitted by the court for the purpose only of proof of notice to appellant of the adverse use of the water right.

Id. at 156; 156 P.2d at 318. The Court’s decision, as discussed in the text, was based solely on adverse possession.

period. Cottonwood has been on notice of Black Mesa's adverse use and claim since Black Mesa filed its SRBA claim in 1991. Wootan Affidavit ¶¶ 22-26. Following the Idaho Supreme Court's rule in *Pfleuger*, it must be concluded that, even if Cottonwood owned the appurtenant water rights when the 1990 Patent issued, Black Mesa has acquired title to the Section 14 Water Rights through adverse possession.

Black Mesa is aware of Idaho cases suggesting that, to adversely possess a water right, the adverse user must show that he has used the water during the prescriptive period "when it was actually needed by the prior owner." *See, e.g., Crow*, 107 Idaho at 466, 690 P.2d at 921 (emphasis added). The rationale underlying this rule is that, when there is enough water for everyone, "no occasion ar[ises] for any of the [right-holders] to demand water, *to the exclusion of any other person*, for a period of five consecutive years." *Id.* (emphasis in original). However, this rule can only apply in cases such as *Crow*, where the parties claiming ownership of a right have lands situated such that the disputed right could be used on either, but not on both, parties' lands during an irrigation season. The rule cannot apply in situations where there is only one place of use that both parties claim as the appurtenant land because in such case the adverse party's use of water would never prevent the other user from irrigating the same lands.

This was the situation in *Pfleuger*—Hopple possessed and irrigated the same lands the disputed right originally was developed upon, and there is no indication that Hopple's opponent might or could have used the right on other lands during the prescriptive period. Likewise, in this case, Black Mesa claims the Section 14 Water Rights because it owns and irrigates the Section 14 Lands to which they are appurtenant, and Cottonwood can point to no uses or lands to which the rights might or could have been beneficially applied while Black Mesa has used them. The "actually needed" rule in *Crow* and other cases is not applicable here. The facts show that

Black Mesa's use of the Section 14 Water Rights was adverse and hostile to Cottonwood's asserted claim of ownership. As the *Pfleuger* Court noted, "if the owner fails to look after his interests until the title of the adverse claimant grows into maturity he has no one but himself to blame for the loss of his estate." *Pfleuger*, 66 Idaho at 157; 156 P.2d at 318. *Id.* (quoting 2 C.J. sec. 59, p. 77, 2 C.J.S., Adverse Possession, § 45 p. 558).

C. Cottonwood's claim of ownership to the Section 14 Water Rights fails under the doctrines of waiver and/or estoppel.

The Idaho Supreme Court recently described the related doctrines of waiver and estoppel as follows:

A waiver is a voluntary, intentional relinquishment of a known right or advantage, and the party asserting the waiver must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment. Waiver is foremost a question of intent. A clear intention to waive must be shown before waiver shall be established. Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel.

Knipe Land Co. v. Robertson, 2011 WL 2039635, 8 (2011) ((internal brackets, citations and quotation marks omitted; emphasis added). *See also A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 754, 118 P.3d 78, 86 (2005), *citing Brand S. Corp. v. King*, 102 Idaho 731, 734, 639 P.2d 429, 432 (1981) ("Waiver requires a voluntary, intentional relinquishment of a known right that is relied upon by an adverse party and which alters their position.").

Here, Cottonwood demonstrated its voluntary, intentional relinquishment of the Section 14 Water Rights when it failed to address the Section 14 Water Rights in the 1990 Agreement it drafted and executed. When the 1990 Agreement was executed, Cottonwood had known since at least as early as 1984 that the Section 14 Water Rights existed and should have been included in license no. 2-2209. Lawrence Exs. E, F. Cottonwood also knew at the time that Black Mesa had

acquired title to the Section 14 Lands to which the Section 14 Water Rights were appurtenant. R. Vol. II, pp. 230, 239. Yet despite this knowledge, Cottonwood drafted the 1990 Agreement without any reference to the Section 14 Water Rights, so that it addressed only the license's original 79.7 cfs. License no. 2-2209, of course, now has been corrected to include the Section 14 Water Rights, which arguably creates an ambiguity as to whether the 1990 Agreement was intended to address the parties' respective rights to all of license no. 2-2209. Under the general rule that "written documents, if ambiguous, should be construed against the drafter," *Suchan v. Suchan*, 113 Idaho 102, 108, 741 P.2d 1289, 1295 (1986), and the fact that Cottonwood knew about the Section 14 Water Rights and Black Mesa's acquisition of the Section 14 Lands, Cottonwood's failure to address the Section 14 Water Rights in the 1990 Agreement should be construed against it as a clear and unequivocal act manifesting Cottonwood's intent to waive its claim to the Section 14 Water Rights.

This conclusion is bolstered by Cottonwood's course of conduct following the 1990 Agreement. Cottonwood did not file a claim for right no. 2-103 in the SRBA. Cottonwood did not object to any portion of Black Mesa's 2-103 SRBA claim or the Department's recommendation for 2-103 until September 2011 following the Department's decision in the Administrative Case and issuance of a second Amended Director's Report. *See* Lawrence Affidavit Ex. I. Cottonwood did not file a SRBA claim for the Section 14 Water rights until 2006 (under claim no. 2-10300). Lawrence Affidavit Ex. A. Cottonwood did not object to the Department's recommendation that its claim 2-10300 be disallowed, and did not challenge the SRBA Court's order disallowing its claim until 2011 following the Department's decision in the Administrative Case. In sum, for fifteen years following Black Mesa's acquisition of the Section 14 Lands, its filing of SRBA claim 2-103, and its commencement of use of the Section 14 Water

Rights, Cottonwood did not pursue its own adjudication claim for the Section 14 Water Rights or challenge Black Mesa's. And, when Cottonwood did file a claim in 2006, it allowed it to be recommended and decreed disallowed without timely challenge.

Cottonwood waited 10 years after Black Mesa acquired the Section 14 Lands, and nine years after Black Mesa filed its SRBA claim to 2-103 and began using the Section 14 Water Rights, to file its *Petition to Correct License* in 2000, which was about 16 years after Cottonwood had amended its claim to include the Section 14 Water Rights in the lower Snake River adjudication. These unequivocal actions demonstrate that Cottonwood knew of the existence of the Section 14 Water Rights and intended to waive its claim to them when it failed to address them in the 1990 Agreement, failed to challenge Black Mesa's claim in the SRBA, or timely challenge the SRBA Court's disallowal of Cottonwood's 2-10300 claim.

If Cottonwood's conduct does not amount to the clear and unequivocal acts demonstrating an intent to waive, it nevertheless provides ample basis for estoppel. An analogous case on this point is *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 66 P.2d 115 (1937). In that case, Hillcrest Irrigation District ("Hillcrest") moved its points of diversion upstream through an administrative transfer approval—a change that later was found to injure other water users. *Id.* at 407, 66 P.2d at 116. Roughly twenty years after the transfer was approved and the water right had, in fact, been diverted at the upstream point of diversion, Hillcrest sought a decree quieting title to the water rights by (1) validating the transfer from the original points of diversion to the point upstream, or (2) if the transfer was "irregular or invalid for any cause," determining that Hillcrest owned the rights through prescription, laches, and/or estoppel. *Id.* at 408, 66 P.2d at 116-17. Hillcrest appealed following the trial court's dismissal of the case; other water users, such as Nampa & Meridian Irrigation District, were respondents

on appeal. Ultimately, the Idaho Supreme Court avoided the question of whether the transfer was valid, holding that

[i]t satisfactorily and conclusively appears that, even though appellant's [Hillcrest's] title may have been originally questionable or uncertain, nevertheless respondents have stood by, with full knowledge of all the facts, and for more than twenty years have allowed appellant to proceed on the theory that it had valid title to these water rights and a legal right to have the water diverted from the New York Canal; and in the meanwhile has incurred large indebtedness on the strength of its title and right until now respondents are, and should be, estopped by laches from questioning appellant's title.

Hillcrest, 57 Idaho at 408-09, 66 P.2d at 117.

This is precisely what has happened in this case. Here, for at least the period between 1991 (when Black Mesa began using the Section 14 Water Rights) and 2000 (when Cottonwood filed its *Petition to Correct License*), Cottonwood acquiesced in Black Mesa's use of the Section 14 Water Rights, allowing Black Mesa to proceed on the theory that it had a legal right to divert the rights from the original point of diversion and use them on the Section 14 Lands. The Idaho Supreme Court has held that a party may be estopped from asserting a position contrary to that which they maintained for eight years. *Grover v. Wadsworth*, 147 Idaho 60, 65, 205 P.3d 1196, 1201 (2009). Here, Cottonwood idly stood by for nine years while Black Mesa used the Section 14 Water Rights and after Black Mesa claimed the Section 14 Water Rights in the SRBA; for fifteen years before Cottonwood filed its own SRBA claim for the rights; and for twenty years before it objected to Black Mesa's SRBA claim for the rights. Accordingly, like the respondent water users in the *Hillcrest* case, Cottonwood should be estopped from asserting ownership of the Section 14 Water Rights.

Also like *Hillcrest* in the above case, Black Mesa has incurred substantial expense and made large investments in its irrigation system and farming operations which are built around the full use of its water rights, including the Section 14 Water Rights. Black Mesa has replaced the

large pumps and motors that lift water from the Snake River pumping station, and installed miles of pipelines to distribute the water for irrigation. This has required farm-wide capital investments exceeding \$3,500,000 dollars, direct capital investments related to the Section 14 Lands of over \$400,000 and prorated expenses of over \$1,400,000.00 over the years that Cottonwood stood by with full knowledge of the facts concerning Black Mesa's claim to the Section 14 Water Rights and intent to use them. Wootan Affidavit ¶¶ 25-34.

The *Hillcrest* Court said that such "[l]ong and continuous knowing acquiescence in another's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim." *Hillcrest*, 57 Idaho at 411, 66 P.2d at 118. For the reasons stated above, that rule should apply to Cottonwood in this case.

IV. CONCLUSION

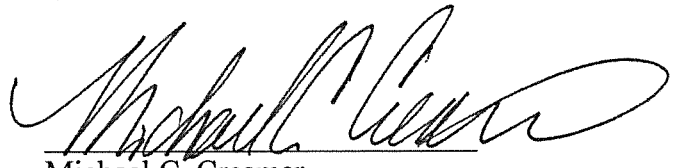
Black Mesa respectfully requests the Court determine that the Section 14 Water Rights should be decreed in Black Mesa's name. The relevant facts established in the Agency Record before the Court in the Judicial Review Case and in the Affidavits filed in support of the instant Motion are undisputed. The Section 14 Water Rights were made appurtenant to the lands Black Mesa acquired by a patent that conveyed it fee title together with appurtenances. Black Mesa has diverted the Section 14 Water Rights to beneficial use since at least 1991. No agreements, orders or other actions have occurred to separate the Section 14 Water Rights from the land. Cottonwood has never placed the water to beneficial use on the Section 14 Lands or elsewhere, and has no ability to do so. Cottonwood has sat on its hands while Black Mesa has made substantial investments in developing the Black Mesa Project in reliance on its title and Cottonwood's acquiescence. The facts require a decision determining Black Mesa's ownership

of the Section 14 Water Rights as a matter of law under one or all of the legal bases set out above.

Black Mesa reserves the right to further challenge other elements of the Department's recommendations in subcases 2-103 and 2-10300 following the outcome of these summary judgment proceedings.

Respectfully submitted this 7th day of October, 2011.

GIVENS PURSLEY LLP

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

Michael C. Creamer

Attorneys for Black Mesa Farms, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October, 2011, Black Mesa Farms, LLC filed and served the foregoing document as indicated below:

ORIGINAL FILED

Clerk of Fifth Judicial District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707
Fax: 208-736-2121

☐ U. S. Mail
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

SERVICE

Director of IDWR
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Chief of Natural Resource Division
Office of the Attorney General
P.O. Box 44449
Boise, ID 83711-4449
Fax: 208-334-2690

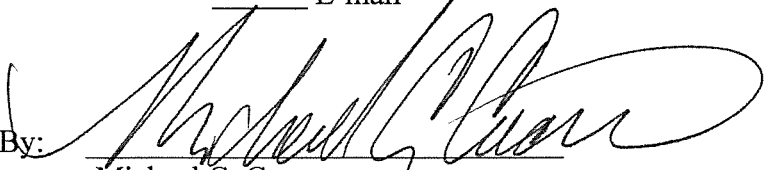
☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

United States Department of Justice
Environment & Nat'l Resource Div
550 West Fort Street, MSC 033
Boise, ID 83724

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Charles L. Honsinger
Daniel V. Steenson
Ringert Law Chartered
PO Box 2773
Boise, ID 83701

☐ U. S. Mail
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

By: 

Michael C. Creamer