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COPY

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

**BLACK MESA'S RESPONSE TO
COTTONWOOD'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 response to Cottonwood Mutual Canal Company's ("Cottonwood") October 7, 2011 *Motion for Summary Judgment* ("Cottonwood's Motion").¹ The Special Master should grant summary judgment in Black Mesa's favor because it is undisputed that Black Mesa owns the lands upon which the Section 14 Water Rights² were

¹ Cottonwood filed a *Memorandum in Support of Cottonwood Canal Company's Motion for Summary Judgment* ("Cottonwood's Memo"), *Affidavit of Carter Fritschle in Support of Cottonwood Canal Company's Motion for Summary Judgment*, and *Affidavit of Charles L. Honsinger in Support of Cottonwood Canal Company's Motion for Summary Judgment* contemporaneously with Cottonwood's Motion.

² This response uses the same defined terms used in Black Mesa's October 7, 2011 *Memorandum in Support of Black Mesa's Motion for Summary Judgment* ("Black Mesa's Memo").

originally developed and made appurtenant, the rights never have been severed from those lands, Black Mesa has put the rights to beneficial use for more than 20 years, Cottonwood has never beneficially used the water, and Cottonwood has no means to deliver the water to beneficial use. Cottonwood points to no facts or law that could establish a claim of ownership to the Section 14 Water Rights paramount to Black Mesa's.

I. ARGUMENT

A. Cottonwood's arguments are not supported by fact or law.

Cottonwood asserts that it should be named owner of the Section 14 Water Rights “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.” Cottonwood's Memo at 3. Cottonwood also argues it is owner under the Idaho Supreme Court's decision in *Sanderson v. Salmon River Canal Company, Limited*, 34 Idaho 145, 199 P. 999 (1921). *Id.* at 11-12. Cottonwood is wrong on both fronts.

1. The entrymen, not Cottonwood, put the Section 14 Water Rights to beneficial use.

Cottonwood applied for the Section 14 Water Rights under permit no. 30990, which became license no. 2-2209. R. Vol. I, pp. 1-3, 38. However, Cottonwood did not put the Section 14 Water Rights (or any portion of the license) to beneficial use—the entrymen did, as Cottonwood has conceded.

It is undisputed that Cottonwood never performed any farming operations on the DLE lands comprising the place of use for license no. 2-2209, including the Section 14 Lands. That is because Cottonwood was formed as a non-profit corporation simply to “construct, or otherwise acquire, maintain, manage, operate, and control an irrigation system to furnish domestic, stock,

and irrigation water therefrom” for use by the entrymen, who were its stockholders. R. Vol. III, pp. 447-48 (Cottonwood’s Articles of Incorporation); R. Vol. I, p. 198 (stating the entrymen were Cottonwood’s original shareholders). Cottonwood has acknowledged that it “established the water right through the beneficial use of its shareholders.” R. Vol. V, p. 977 (Cottonwood’s response to Black Mesa’s *Petition for Reconsideration of Final Order Granting Petition to Correct License No. 02-02209 and for Review of Interlocutory Order Regarding Ownership*).³

In this respect the analysis of the Idaho Supreme Court in *United States v. Pioneer Irrig. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) is instructive. The issue in *Pioneer* was ownership of water rights licensed in the name of the United States, and delivered for irrigation use through facilities owned by the United States or irrigation entities to landowners who put the water to beneficial use. After summarizing the parties’ arguments and several federal decisions, the Idaho Court observed that

A common theme throughout these cases is the recognition of the connection between beneficial use of water and ownership rights. The underlying principle of the state law, which requires application of the water to beneficial use before a water right is perfected, is the same. In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation. *Basinger [v. Taylor]*, 36 Idaho [591,] 598, 211 P. [1085,] 1086-87 [(1922)]; I.C. §§ 42-217 & 42-219. The requirement of beneficial use is repeatedly referred to throughout the Idaho Code. Beneficial use is enmeshed in the nature of a water right

Id. at 111, 157 P.3d at 605. The Court went on to quote Idaho Code § 42-101, which states in part that “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

³ On the same page as the statement quoted in the text, Cottonwood stated “the water right was appurtenant to the lands on which it was developed. Those lands were never owned by Cottonwood.” R. Vol. V, p. 977.

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.” *Id.*

The *Pioneer* Court affirmed the SRBA Court’s decision to decree the water rights developed under the Reclamation Act in the name of the United States even though its title was “nominal” at best. *Id.* at 112, 157 P.3d at 606. The Court further held that the irrigation entities who also claimed ownership of the rights merely “act on behalf of those who have applied the water to beneficial use.” *Id.* at 115, 157 P.3d at 609. To effectuate this holding, the Court ordered inclusion of a remark on the face of the water right decrees confirming that the United States appeared in the name and address section, but “as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water.” *Id.* (emphasis added). The interest of the water users, the Court described as “appurtenant to the lands” and “derived from law.” *Id.*

It is undisputed that Cottonwood does not own the lands to which the Section 14 Water Rights are appurtenant, and it has never beneficially used any water on *any* lands. R. Vol. V, p. 977 (“[T]he water right was appurtenant to the lands on which it was developed. Those lands were never owned by Cottonwood.”) It also is undisputed that Cottonwood has no ability to furnish the Section 14 Water Rights to *any* lands, let alone the Section 14 Lands. Cottonwood abdicated any nominal or equitable interest it might otherwise assert under *Pioneer* when it conveyed a portion of the river pumping station to Black Mesa and abandoned the balance. *See Affidavit of Wesley R. Wootan*, ¶¶ 14, 27-29.

Cottonwood also has conceded that the entrymen, not Cottonwood, had the right to put the water to beneficial use on the DLE lands. In a July 27, 1988 letter to IDWR, Cottonwood’s attorney stated that “the Desert Land Act, under which the water right was initiated, specifically

recognizes that the person conducting water to a tract of desert land for the purpose of claiming it is the person who has the right to the use of that water.” R. Vol. I. p. 189 (emphasis added).⁴ Of course, the persons “claiming” tracts of land under the Desert Land Act were the entrymen, not Cottonwood. These entrymen put the water to beneficial use by farming the DLE lands. R. Vol. IV, pp. 675-76.⁵ Cottonwood merely constructed, and for a time operated, the irrigation system that delivered water to the entrymen for beneficial use.

In summary, there is no merit to Cottonwood’s assertions that it “put the water to beneficial use,” Cottonwood’s Memo at 3, or that Black Mesa’s claim is based upon the beneficial use of water “on lands that were being irrigated by Cottonwood.” Cottonwood’s Memo at 12. The facts and law establishing Black Mesa’s ownership of the Section 14 Water Rights are set forth in Black Mesa’s Memo, and Black Mesa does not repeat them again here.

2. Black Mesa’s ownership is supported by the Sanderson case.

Cottonwood argues that *Sanderson*’s facts are “exactly the same” as the instant matter, and that the case supports Cottonwood’s claim to ownership of the Section 14 Water Rights. Cottonwood’s Memo at 11-12. However, the *Sanderson* case does not support Cottonwood’s

⁴ For this proposition, Cottonwood’s attorney cited 43 U.S.C. § 321, which in relevant part states:

It shall be lawful for any citizen of the United States . . . to file a declaration under oath . . . that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same . . . : Provided, however, That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation

(Emphasis added.)

⁵ The DLE lands actually were farmed through rental agreements with a partnership operated by an entryman and some of the other entrymen’s family members. See R. Vol. I, p. 675. (entryman Otis Williams stating “I am farming it [his DLE] with a group. . . . We have it leased out so that Grigg and Anderson is farming it and I am a partner with Grigg and Anderson, but we have it on a rental basis.”) Grigg and Anderson Farms was a partnership between entryman Golden Grigg, Vaness Anderson (entryman William Anderson’s father), Ray Anderson (entryman Saragene Smith’s father), and Albert Anderson (entryman Thomas Anderson’s father). R. Vol. I, p. 80-81. Entryman Saragene Smith (whose DLE lands included the Section 14 Lands) stated that “it is Grigg and Anderson that is farming it and we have an agreement for a year they farm it, we lease it. Grigg and Anderson are farming the ground and we lease it for a year.” R. Vol. IV, p. 692.

claim of ownership—if anything, it demonstrates that Black Mesa, as the actual user of the water right, has superior title to the Section 14 Water Rights.

In *Sanderson*, the plaintiff was a shareholder in a canal company who complained that the canal company refused to deliver him water. *Sanderson*, 34 Idaho at 154, 199 P. at 1000. The canal company argued that it could not deliver the water because the plaintiff's lands had not been patented by the federal government. *Id.* at 154, 199 P. at 1001. The *Sanderson* Court held that “the plaintiff [i.e. the water user, not the canal company] has a water right which entitles him to the delivery of water” *Sanderson*, 34 Idaho at 161, 199 P. at 1003. Under this rule, Black Mesa—the water user—is entitled to the Section 14 Water Rights.⁶

Cottonwood's reliance on *Sanderson* is misplaced. Cottonwood quotes a lengthy passage from *Sanderson*, emphasizing two statements: “To permit [an executive officer or board to deprive a party a vested right to the use of water] would clearly be depriving [the party] of his property without due process of law;” and “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.” Cottonwood's Memo at 11 (citing *Sanderson*, 34 Idaho at 160-61, 199 P. at 1003). Both of these sentences, however, describe the rights of the water user not the canal company—which like Cottonwood was organized to construct, operate and maintain an irrigation system to furnish water to settlers. This is clear from the first sentence of the text quoted in Cottonwood's Memo, in which the *Sanderson* Court states that the Secretary of Interior “had no power to divest the

⁶ It is worth noting that the defendant canal company in *Sanderson* argued, among other things, as a basis for not delivering water to the lands on which it had been beneficially used, that it was not apparent the plaintiff had succeeded to all the rights of the original stockholder. *Sanderson*, 34 Idaho at 155, 199 P. at 1001. The canal company's argument failed. It makes no difference that Black Mesa itself never held Cottonwood stock because its predecessors-in-interest to the Section 14 Lands did, and Black Mesa owns the lands to which the water rights were made appurtenant. Since Black Mesa has owned the Section 14 Lands, Cottonwood has not exercised any control over the irrigation system used to divert or deliver the Section 14 Water Rights. Black Mesa has operated and maintained the system, and has not paid (or been obligated to) pay assessments to Cottonwood (who has not asked for payment).

plaintiff [i.e. the water user] of his water right.” *Id. Sanderson* thus held that a water user cannot be divested of its water rights by state or federal governments without due process of law, nor can a canal company organized to operate an irrigation system solely for the benefit of others who actually put the water to beneficial use deprive the water user of his water right.⁷

Black Mesa’s paramount title to the Section 14 Water Rights is further supported by statements made by the *Sanderson* Court immediately prior to the text quoted in Cottonwood’s

Memo:

The construction company in making the appropriation and completing the works acted for the settlers and contract holders. “It was clearly the intention of the Legislature, as well as the construction company, that the individual contract holder or settler should be the owner of the water right upon the completion of the construction works.”

[The water user’s] contract with the company and the use of the water upon the land, by himself and predecessors, from 1913 to date, vest in him a water right of equal rank with that of any other entryman.

Id. (citations omitted; emphasis added). In short, *Sanderson* supports Black Mesa’s claim to ownership of the Section 14 Water Rights.

B. Black Mesa conveyed and released only 66.9 cfs to Cottonwood.

Cottonwood’s exposition of facts and its arguments concerning the 1990 Agreement and resulting exchange of quitclaims and releases between Cottonwood and Black Mesa, Cottonwood’s Memo at 6-7 and 12-13, are inaccurate and unpersuasive.

⁷ The *Sanderson* Court described the canal company in that case as “an Idaho corporation operating and managing the Salmon River irrigation system, distributing the water of said system to persons holding water rights under it.” *Id.* 34 Idaho at 154, 199 P. at 1000. It makes no difference that *Sanderson* involved a system organized and built by a Carey Act construction company—by the time of the *Sanderson* lawsuit, it appears the operating company had taken over the system’s management. *Id.* Cottonwood both constructed and operated the irrigation system in this case, putting it in the same position as the defendant canal company in *Sanderson*.

Cottonwood incorrectly asserts that, in the January 14, 1991 *Release, Assignment and Disclaimer* (“1991 Release”) given to Cottonwood, Black Mesa “released any interest it may have had in the remainder of licensed water right no. 02-02209.” Cottonwood’s Memo at 7 (citing R. Vol. IV, pp. 748-49). Actually, the 1991 Release states that the members of Black Mesa “hereby release all claim and hereby quitclaim and assign all of their right, title and interest in and to 61.3 cfs of Water Right No. 02-2209,” and that they “also relinquish any claim to 5.6 cfs of Water Right No. 02-2209 not conveyed by the Bureau of Land Management as part of the [1990 Patent].” R. Vol. IV, p. 748. These specific quantities are all Black Mesa quitclaimed or released in the 1991 Release. In other words, Black Mesa quitclaimed only 61.3 cfs of license no. 2-2209 to Cottonwood, and released its claim to only 5.6 cfs—not “any interest it may have had in the remainder” of the right.⁸

Cottonwood mistakenly believes that it owns the Section 14 Water Rights because “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.” Cottonwood’s Memo at 13. This argument assumes without facts or legal support that Cottonwood already owned all of the water rights appurtenant to the DLE lands when they were patented to Black Mesa in 1990.

⁸ The 66.9 cfs Black Mesa quitclaimed and released in the 1991 Release reflects the same 66.9 cfs that was leased into the Idaho Water Supply Bank by Cottonwood and the BLM. Cottonwood’s Memo at 7 (stating that the Idaho Water Resource Board first accepted 58.1 cfs into the Water Supply Bank, and then an additional 8.8 cfs). Cottonwood did not put the 8.0 cfs of Section 14 Water Rights in the Water Supply Bank—the 66.9 cfs accepted into the Bank represented the portion of license no. 2-2209’s original 79.7 cfs that Black Mesa released and quitclaimed in the 1991 Release.

Black Mesa did not put its 12.8 cfs portion of the originally licensed right no. 2-2209 into the Water Supply Bank, but rather resumed beneficial use and filed a Resumption of Beneficial Use notice with IDWR. R. Vol. II, p. 277. Although Black Mesa also resumed beneficial use of the Section 14 Water Rights upon acquiring title to the Section 14 Lands, Black Mesa did not file a Resumption of Beneficial Use notice for the Section 14 Water Rights because the Section 14 Water Rights were not reflected in the license at the time, and had not been included in the Applications for Extension of Time to Avoid Forfeiture filed by Cottonwood and the BLM. R. Vol. II, pp. 197-208.

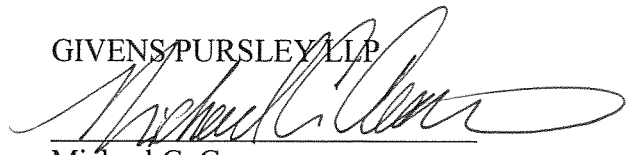
Cottonwood fails to address the underlying issues in this case—whether the water rights were appurtenant to the DLE lands in 1990, whether they passed with the lands when they were patented to Black Mesa, and who has put the Section 14 Water Rights to beneficial use. As discussed herein and in Black Mesa’s Memo, the entrymen’s water rights were appurtenant to the DLE lands when Black Mesa acquired title by patent in 1990, Black Mesa acquired all of the appurtenant water rights (including the Section 14 Water Rights) with the 1990 Patent and never conveyed or released its interest in the Section 14 Water Rights, and Black Mesa has placed the rights to beneficial use ever since. Cottonwood’s ownership is limited to the 66.9 cfs Black Mesa quitclaimed or relinquished in 1991. None of Cottonwood’s arguments to the contrary are supported by law or fact.

II. CONCLUSION

As a matter of Idaho constitutional and statutory law, title to the use of public waters is held by the user of the waters. Although an irrigation entity organized to construct, operate and maintain an irrigation system may make an appropriation of water for the benefit of settlers, use of the water upon the land by the water user vests in him a water right. Black Mesa owns the lands upon which the Section 14 Water Rights were developed and made appurtenant. The rights never have been severed from those lands, and Black Mesa has put the rights to beneficial use for more than 20 years. Black Mesa requests that the Special Master determine, as a matter of law, that Black Mesa owns the Section 14 Water Rights.

Respectfully submitted this 27th day of October, 2011.

GIVENS PURSLEY LLP



Michael C. Creamer

Attorneys for Black Mesa Farms, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2011, Black Mesa Farms, LLC filed and served the foregoing document as indicated below:

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