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DEPARTMENT OF  
WATER RESOURCES

Attorneys for Cottonwood Canal Company

In Re SRBA )  
Case No. 39576 ) SUBCASE NUMBERS 02-10300, 02-00103  
)  
)  
) COTTONWOOD’S RESPONSE TO BLACK  
) MESA’S MOTION FOR SUMMARY  
) JUDGMENT  
)  
)  
)

## SUMMARY

COTTONWOOD'S RESPONSE TO BLACK MESA'S MOTION FOR SUMMARY JUDGMENT - Page 1

*Mesa's Memo*, p. 3. Therefore, Black Mesa must necessarily agree that Cottonwood appropriated The Water Right, put it to beneficial use, and that water right license 02-02209 should have included The Water Right when it was issued to Cottonwood. Thus Black Mesa concedes that Cottonwood owned The Water Right until the desert land entries (hereinafter "DLE") under which Cottonwood occupied the land were canceled. Black Mesa does not dispute that Cottonwood owned The Water Right prior to DLE cancellation; Black Mesa disputes that Cottonwood owns it now. Therefore, the issue on which the Special Master should be focusing is whether and how The Water Right was transferred from ownership by Cottonwood to ownership by Black Mesa - the simple fact is that such transfer never occurred, and ownership remains with Cottonwood.

One of the central problems in *Black Mesa's Memo* is its confusion of this simple issue with attempts to equivocate two separate claims to water: (1) the portion of licensed water right no. 02-02209 claimed by Cottonwood and now recommended in the SRBA as water right no. 02-10300 - The Water Right; and (2) Black Mesa's SRBA claim no. 02-00103 - a water right that Black Mesa claimed with a basis (beneficial use) and priority date different from those of The Water Right. Black Mesa further confuses the issue by blending these two rights into an amorphous, undefined concept it terms the "Section 14 Water Rights." Under Black Mesa's theory, its beneficial use claim to water right no. 02-103 with a 1965 priority date is the same as the claim to The Water Right (the recently licensed portion of water right no. 02-02209 with a 1963 priority date) made by Cottonwood. To untangle this central flaw of *Black Mesa's Memo*, all one needs to do is examine the SRBA claims filed. In 1991 Black Mesa filed a 1991 claim to a water right in the SRBA (02-103) that was based on beneficial use, and had a different priority date (1965) than licensed water

right no. 02-02209. Later, in January, 2003, Black Mesa amended its claim with IDWR to include 40 additional acres in its beneficial use claim, but did not amend either the claimed priority date or the claimed basis. It was not until August 31, 2009 that Black Mesa finally filed a *Motion to Amend Notice of Claim* asserting that its claim to right no. 02-103 was somehow based upon licensed water right no. 02-02209, and that it had the very same priority date as that license. Thus, Black Mesa's claim to ownership of The Water Right is actually very new. Its assertions that it filed a claim to The Water Right in 1991, and has always maintained that claim must therefore be discounted, as must all of the arguments that are based upon those assertions.

*Black Mesa's Memo* argues that this court should determine Black Mesa to be the owner of The Water Right, under three theories. Black Mesa argues that The Water Right was conveyed to it by the United States when it issued a patent to Black Mesa for lands to which The Water Right was appurtenant. Black Mesa could not have obtained the water right through conveyance from the United States because the United States never obtained any portion of licensed water right no. 02-02209, including The Water Right, from Cottonwood.

Black Mesa next argues that it has adversely possessed The Water Right from Cottonwood. However, Black Mesa ignores the settled law that its 1991 filing of a claim in the SRBA tolled the running of the statute of limitation for the establishment of title pursuant to adverse possession - making its claim moot. Black Mesa also erroneously relies upon facts involving its beneficial use claim to water right 02-103 to assert that it has openly, notoriously, hostilely and exclusively used The Water Right - a different right from that actually claimed by Black Mesa. Additionally, Black Mesa erroneously asserts that a period of five years applies to its alleged adverse possession of The

Water Right instead of the statutorily-mandated period of twenty years.

Finally, Black Mesa argues that Cottonwood is prevented by the doctrines of waiver and estoppel from asserting ownership over The Water Right, basing its argument on facts surrounding Cottonwood's failure to object to Black Mesa's own use of and claim to water under SRBA claim no. 02-103 (with a "beneficial use" basis and a 1965 priority date). Cottonwood is already in the case involving the issue of ownership, and therefore its assertions of the same cannot be prevented. Notwithstanding that simple fact, Cottonwood did not dispute Black Mesa's use of water or its claim to the same because the available evidence established that Black Mesa was not using or claiming The Water Right, but was using water pursuant to a completely different claim - no. 02-103.

1. **It is Impossible for Black Mesa to Have Obtained The Water Right by Conveyance**

Black Mesa argues that because The Water Right was "appurtenant" to the Section 14 Lands, they must have passed to the United States when Cottonwood's DLEs were cancelled. *Black Mesa's Memo*, p. 10. Of course, Black Mesa cites to no legal authority for its proposition. In fact, in Idaho, it is well established

that a water right may be transferred separately from the lands on which it has been used, provided that to do so does not prejudice the rights of another water user; and that the right to segregate a water right from the lands to which it may be appurtenant inheres in the right of property and ownership in this state.

*Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 409 (1937).

In this case, as Cottonwood explained in its opening brief, and as is concurred in by Black Mesa, the DLEs for the lands to which The Water Right and the remainder of water right no. 02-02209 were appurtenant were canceled. Black Mesa states that it does not know of any federal or

state case addressing such a situation and attempts to equate the cancellations to the construction of a deed. It accordingly states that “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.” Black Mesa’s Memo, pp. 10 - 11.

Fortunately, as pointed out in Cottonwood’s opening brief, the Idaho Supreme Court has in fact ruled in a case that is exactly on point in this regard. In *Sanderson v. Salmon River Canal Company, Limited*, 34 Idaho 145 (1921), the Court held that an appropriator could not be deprived of his water right despite the fact that the United States had failed to deliver a patent to him for the underlying lands to which the right was appurtenant. The Idaho Supreme Court’s language is very clear:

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 here are no different from those in *Sanderson*. At the time of the DLE cancellations, Cottonwood held title to all portions of water right no. 02-02209 (including The Water

Right). The fact that those lands were not patented did not result in passage of those water rights with or without the land to the United States and subsequently to Black Mesa. The arguments to the contrary set forth by Black Mesa involve the conveyance of land by deed. Here, there was no conveyance and no deed. The fact is that Cottonwood did not own the lands to which The Water Right was appurtenant - instead it was attempting to own them. Thus, water right no. 02-02209 was not appropriated for and developed upon lands that Cottonwood owned and then conveyed back to the BLM. Rather, Cottonwood appropriated the water upon lands it did not own, but hoped to own at some point in the future. When the DLEs were cancelled, the land was not “conveyed” and did not “pass” - it remained in the ownership of the United States. The water right appurtenant to those lands, however, remained in the ownership of its appropriator Cottonwood. See *Sanderson v. Salmon River Canal Co.*, *supra*; see also *First Sec. Bank v. State*, 49 Idaho 740, 746 (Idaho 1930) (“Water may be appropriated for beneficial use on land not owned by the appropriator and this water right becomes the property of the appropriator”).

The purpose of the 1991 Agreement between Cottonwood and Black Mesa, together with the associated Release, Assignment and Disclaimer was to resolve a dispute between Cottonwood and Black Mesa, not to, as argued by Black Mesa affirm the appurtenancy of Black Mesa’s 12.8 cfs to its lands. The simple fact is that the license has always had the lands patented to Black Mesa in 1990 as its listed place of use. This does not in any way affect the fact that ownership of the water right and ownership of the land separate. See *Sanderson v. Salmon River Canal Co.*, *supra*; *First Sec. Bank v. State*, *supra*. Black Mesa’s argument that “appurtenancy” trumps ownership is fallacious, and should be ignored.

Black Mesa argues that the fact that Cottonwood is listed as the license holder is irrelevant and carries no meaning in this dispute. On the contrary, it is a central fact in this dispute - The Water Right is based upon Cottonwood's appropriation of it, and Cottonwood's beneficial use of the same. This is why Cottonwood obtained the license. Because Cottonwood undisputedly owned The Water Right at one time, Black Mesa, under its own argument, must have somehow obtained ownership through Cottonwood's chain of title. Yet, there was no conveyance of the water right to which Black Mesa can point. As discussed above, the law prevents Black Mesa from arguing that ownership of The Water Right transferred to the United States upon Cottonwood's DLE cancellations. Black Mesa's argument is nothing more than a desperate attempt to get around the black letter law of water right ownership.

**2. Adverse Possession of The Water Right did not Occur**

Black Mesa argues that it adversely possessed The Water Right away from Cottonwood by its use of what it terms the "Section 14 Water Rights" over some indeterminate time which allegedly exceeds the five years that Black Mesa asserts is the required period of time without legal citation for the same. Adverse possession of The Water Right simply could not have occurred after 1991 when Black Mesa argues it occurred, because Black Mesa filed a claim to The Water Right in the SRBA, thereby tolling the requisite period of time for adverse possession. Additionally, Black Mesa can not meet the elements of adverse possession because it does not satisfy the necessary requirements of open, notorious, hostile and exclusive use, and because the statutorily required period of possession is twenty years, not five.

A. Black Mesa's 1991 Filing of its SRBA Claim Tolloed the Running of the Statute of Limitation

Black Mesa's adverse possession argument fails before it ever gets started because it filed a claim to The Water Right in the SRBA. The law of the case on this point was set forth by the SRBA District Court in its May 9, 2002 *Memorandum Decision and Order on Challenge*; and, *Order of Partial Decree (Wood v. Troutt)* (hereinafter "*Wood v. Troutt*") in Subcase no. 65-05663B. The court, quoting its prior *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-02708 *et. al.* (December 29, 1999), first held that "A claim to a water right made in the SRBA is essentially akin to a quiet title action." *Wood v. Troutt*, p. 14, fn. 6. The court went on to quote its prior decision at length:

It is a settled legal principle that the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action. In *Smith v. Long*, 76 Idaho 265, 281 P.2d 483 (1955), the Idaho Supreme Court held that : "Defendant's title by adverse possession not having matured at the time this action commenced, plaintiff are entitled to a decree quieting their title as against the claims of the defendants." *Id.* At 494-95, 76 P.2d at 276 - 77. In *Yorba v. Anaheim Union Water Co.*, 259 P. 2d 2 (1953) the California Supreme Court stated: "[O]rdinarily the filing of an action, either by the person asserting a prescriptive right, or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period and the statute will be tolled while the action is actively pending." *Id.* at 5. See also 25 Am. Jur. 2d Easements and Licenses 69 (suit brought by claimant interrupts prescriptive period); 3 Am. Jur. 2d Adverse Possession 127 (effect of suit relates back to date of its commencement, and claimant can acquire no additional advantages by remaining in possession during its pendency). Thus, any period supporting a claim for title by adverse possession or prescription must have accrued prior to the claim being filed.

*Wood v. Troutt*, p. 14, fn. 6 (underlined emphasis added). Thus, Black Mesa's filing of its 1991 SRBA claim tolled the requisite adverse possession period before such period ever started under Black Mesa's version of the facts. The adverse possession argument must simply be dismissed

without further consideration.

B. Black Mesa's Use Was Not Open, Notorious, and Hostile

In the event that Black Mesa's SRBA claim did not toll the running of the adverse possession period, Black Mesa has not established that its use of water was open, notorious and hostile. Adverse possession of water rights occurs when the adverse claimant is able to 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." *Crow v. Carlson*, 107 Idaho 461, 466 (1984). The "period prescribed by statute" is twenty years. I.C. §5-210. "The burden of proving each and every element of adverse possession by clear and satisfactory evidence is upon the party relying upon title by adverse possession." *Hogan v. Blakney*, 73 Idaho 274, 281 (Idaho 1952).

Black Mesa bases its alleged use of The Water Right for purposes of its adverse possession argument upon its use of what it calls the "Section 14 Water Rights" during "each irrigation season since 1991." *Black Mesa's Memo*, p. 16. Black Mesa states that in 1991 it "filed its SRBA claim for the Section 14 water rights under water right no. 2-103." *Id.* Black Mesa's SRBA claim no. 02-103 specifies that it is based upon beneficial use with a priority date of May 10, 1965. Affidavit of Wesley R. Wootan, Ex. F. If Black Mesa were truly claiming The Water Right at that time (and attempting to establish that it was doing so as against Cottonwood's interest therein), it would have asserted that its SRBA claim was based upon licensed water right no. 02-02209, and would have asserted the licensed priority date of February 25, 1963. Thus, as of the filing of its 1991 SRBA claim no. 02-103, despite Black Mesa's argument to the contrary, Cottonwood could not have known

that Black Mesa was making a claim to The Water Right.

Shortly after it filed its SRBA claim, Black Mesa filed with IDWR its May 9, 1991 notice of Resumption of Beneficial Use for 12.8 cfs of water right no. 02-02209. *Fritschle Affidavit*, Ex. A, pp. 277 - 278. There is no mention of any additional water use being resumed under licensed water right no. 02-02209, or under any other claim or right. It is patently obvious from this filing, and from its contemporaneous filing of its SRBA claim to a beneficial use water right with a different priority date, that Black Mesa knew the difference between its claim to a beneficial use right, and the licensed water right. Thus the argument that Cottonwood should be held to have understood that Black Mesa's SRBA claim was in fact a claim to the license for purposes of adverse possession is hypocritical at best.

Black Mesa then goes on to state that Cottonwood certainly knew about Black Mesa's use "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."<sup>1</sup> *Black Mesa's Memo*, p. 16. From both the language of its *Memo*, and Mr. Wootan's affidavit, it is clear that the discussion Black Mesa is referring to was over its SRBA claim no. 02-103 - which continued to be claimed as a "beneficial use" right with a 1965 priority instead of as a "licensed" water right with a 1963 priority date - which would have notified Cottonwood that Black Mesa was making a

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<sup>1</sup> Mr. Wootan's affidavit states that "not long after Black Mesa filed its claim 2-103 in the SRBA," he and Don Bryant "met with Mr. Ringert, his wife and attorney Charles Honsinger at Mr. Ringert's house in Hammett, Idaho." As the Special Master is aware, Mr. Honsinger, current counsel for Cottonwood, moved to Idaho in 1995 and began working for the Idaho Department of Water Resources in February, 1996. Furthermore, Mr. Honsinger did not begin working for Ringert Law until February, 1998, and never attended a meeting in Hammett with Mr. Bryant, Mr. Wootan and Mr. Ringert.

competing claim to The Water Right.

In fact, Cottonwood did not become aware that Black Mesa was asserting a claim to a portion of licensed water right no. 02-02209 in the SRBA until after Black Mesa's August 31, 2009 *Motion to File Amended Notice of Claim*. At that point, Black Mesa finally asserted in the SRBA a priority date of February 25, 1963, and discussed that now for the first time in the SRBA it was asserting water right no. 02-103 should have been licensed with the remainder of water right no. 02-103. *Motion to File Amended Notice of Claim*, Subcase no. 02-103 (Aug. 31, 2009). The granting of Black Mesa's *Motion*, IDWR's subsequent amended recommendation and Black Mesa's objection thereto led to Cottonwood's participation in subcase no. 02-103.

On October 31, 2000, Cottonwood filed its Petition to Correct License initiating the license correction administrative proceeding for water right no. 02-02209. *Affidavit of Carter Fritschle in Support of Cottonwood Canal Company's Motion for Summary Judgment* (hereinafter "*Fritschle Affidavit*"), Ex. A, pp. 605 - 641. This administrative proceeding ultimately culminated in the issuance of the corrected portion of license no. 02-02209 in Cottonwood's name, and indirectly led to IDWR's recommendation of water right no. 02-10300 in the names of both Cottonwood and Black Mesa. Black Mesa filed its Notice of Protest to Cottonwood's Petition to Correct License on February 13, 2001. *Fritschle Affidavit*, Ex. A, pp. 706 - 707. This Notice of Protest states Black Mesa's concern about the effect that the license correction proceeding might have on its beneficial use claim no. 02-103. On April 27, 2001, Black Mesa submitted its Cross-Petition to Correct License and Petition to Change Ownership that asserted, for the first time in any context, that Black Mesa had a competing claim to The Water Right - the portion of right no. 02-02209 that ended up

being added to the license. *Fritschle Affidavit*, Ex. A, pp. 741 - 754.

The facts in this case regarding what water right Black Mesa claimed, and when it claimed such right do not lend themselves to the open, notorious, hostile and exclusive use required under Idaho law and under Black Mesa's adverse possession theory. Black Mesa cites to *Pflueger v. Hopple*, 66 Idaho 152 (1945) as supportive of its case. The adverse possession found in *Pflueger*, *supra*, turned on the issue of whether the plaintiff had notice of the defendants' open and notorious use of water and the underlying land. In that case, the defendants asserted adverse possession against a quiet title action filed by the plaintiff. The defendants had been transferred shares of water stock by the Twin Falls Canal Company, and had been granted a quitclaim deed to the land to which the shares were appurtenant, although they did not rely upon either transaction as proof of ownership during the suit, instead relying solely on the defense of adverse possession. The facts constituting notice of open and notorious use in *Pflueger* were that the defendants went into possession of the water on a specific date pursuant to the issuance of a Canal Company stock certificate, used the water "continuously and adversely", and paid all water maintenance charges and assessments by the canal company. *Pflueger*, *supra*, at 158. The Supreme Court commented that "[w]hether a party has notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact are questions of fact for the court or jury." *Id.*

The facts involving Black Mesa's alleged adverse possession of The Water Right are quite different. Cottonwood had "notice" of the use of water by Black Mesa, but the notice was of the use of a different water right than that owned by Cottonwood - with a different basis and a different

priority date. Thus the use was not adverse as in *Pflueger*. There were no maintenance charges and assessments paid by Black Mesa to use the water, nor was there the transfer of any shares of stock to Black Mesa as in *Pflueger*. Instead, the documents in the record firmly establish that Black Mesa was not claiming any portion of the licensed water right, but rather a different, beneficial use right. Cottonwood acted reasonably under the “prudent man inquiry” standard of *Pflueger*, and Black Mesa cannot be held to have openly, notoriously or adversely used any water against Cottonwood’s interests.

### C. The Required Period of Use is Twenty Years

Black Mesa admits that the Idaho Legislature changed the required period of time of use to establish adverse possession from five to twenty years in 2006. 2006 Sess. Law. ch. 158, §5. However, Black Mesa makes the bald assertion without citation to any legal authority whatsoever that “the previously required 5 year period applies to adverse possession claims that ripened prior to the change.” I.C. §5-210 provides in relevant part that “in no case shall adverse possession be considered established under the provisions of any sections of this code unless it shall be shown that the land has been occupied and claimed for the period of twenty (20) years continuously.” (Underlined emphasis added). An Idaho “statute is viewed as a whole, and the analysis begins with the language of the statute, which is given its plain, usual and ordinary meaning. In determining the ordinary meaning of the statute, effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.” *Twin Lakes Canal Co. v. Choules*, 254 P.3d 1210, 1212 (Idaho 2011). Any interpretation of I.C. §5-210 other than that it requires twenty years of use will result in the meaning of the statute being void, and is impermissible under long-standing Idaho

statutory construction law.

Regardless of the proper period of adverse possession, any right that Black Mesa might have gained through adverse possession is limited to that which it actually used during that period. *See McGlochlin v. Coffin*, 61 Idaho 440 , 445 (“the right gained by prescription is always confined to the right exercised during the full period of time required by statute”). Black Mesa has provided no evidence of the extent of its use during any portion of the statutory period, let alone for the entire period, and accordingly, must be denied summary judgment.

3. **Cottonwood’s Ownership of The Water Right is not Subject to the Doctrines of Waiver or Estoppel**

“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.” *Knipe Land Co. v. Robertson*, 259 P.3d 595, 603 ( 2011). Black Mesa argues that the doctrines of waiver and/or estoppel must apply to Cottonwood to prevent it from asserting ownership over The Water Right. Ownership of The Water Right is the issue in this proceeding, and the SRBA is the forum in which ownership is to be determined. Both parties are asserting ownership of The Water Right. The time to argue that Cottonwood should be prevented by either waiver or estoppel from asserting ownership in this proceeding has already passed - it is asserting ownership in this proceeding.

The Court has already permitted Cottonwood to participate in this issue, with Black Mesa’s agreement - thus the issue of whether Cottonwood can be prevented from asserting ownership in the SRBA has already been decided. In fact, Black Mesa’s argument is undercut by its own actions. In its February 24, 2011 *Response to Cottonwood’s Motion to Participate* in subcase no. 2-103, Black

Mesa stated that it

does not oppose Cottonwood's participation in this subcase because the Idaho Department of Water Resources ("IDWR") recently concluded an administrative proceeding amending the license upon which this claim is based . . . . Cottonwood's participation in this subcase will allow both parties to present their cases concerning ownership.

*Response to Cottonwood's Motion to Participate*, (Feb. 24, 2011) Subcase no. 2-103. Thus, Black Mesa has previously taken its own unequivocal and intentional action to permit Cottonwood to participate in this dispute over ownership of The Water Right. Cottonwood in fact has so participated in this proceeding to determine ownership in reliance upon Black Mesa's agreement that it can do so, putting Black Mesa in the incongruous position of being prevented by the doctrines of waiver and/or estoppel from asserting that Black Mesa should be prevented from asserting ownership. Black Mesa previously agreed that the SRBA was the proper forum in which to determine ownership (which it is) and that Cottonwood should be permitted to present its case regarding ownership (which it is). Black Mesa cannot now make the contrary argument that Cottonwood can't be allowed to establish ownership - its waiver and estoppel arguments should be dismissed for the nonsense that they are.

The facts that allegedly support Black Mesa's waiver and estoppel arguments occurred after Black Mesa filed its 1991 SRBA claim to beneficial use water right no. 02-103. The SRBA Court's analysis of the reasons for tolling the running of an adverse possession statute of limitation applies equally to arguments that a party's lack of action after the filing of a claim in the SRBA by an opposing party must be prevented by waiver and/or estoppel. Once Black Mesa's SRBA claim was filed, it follows that the water right is at issue, and neither the party filing the claim, nor the party

opposing the claim (or eventually opposing the claim) should gain an advantage by allegedly “sitting on their hands” during the pendency of the case. This is exactly the argument for the tolling rule’s application to claims of forfeiture in the SRBA, and to claims of adverse possession in other courts. Thus, once Black Mesa filed its SRBA claim, it could no longer argue that Cottonwood sat on its hands, especially because Cottonwood did take the action in both the administrative proceeding and the SRBA that was required to protect its interest in The Water Right.

Cottonwood can argue, just as has Black Mesa, that neither Black Mesa nor its predecessor ever took any action to assert a claim to any water right appurtenant to the Section 14 Lands between 1981 when Cottonwood’s DLE cancellations took effect and 1991 when Black Mesa filed its beneficial use claim to water right no. 02-103. Just as Black Mesa has argued, Cottonwood can argue that the lack of any action constitutes waiver of Black Mesa’s right to assert ownership over any water right appurtenant to the Section 14 lands. Thus, the argument of waiver applies to the lack of actions by both parties, although, because Black Mesa’s SRBA claim was not to a licensed water right with a 1963 priority, Cottonwood did not have notice that Black Mesa was allegedly asserting ownership over The Water Right.

Black Mesa cites to the case of *Hillcrest Irr. Dist. V. Nampa & Meridian Irr. Dist.* to support its estoppel argument. In that case, Hillcrest’s change in points of diversion upstream was administratively approved, despite the fact the change was found to have injured other water users. *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.* 57 Idaho 403, 407 (1937). Twenty years after transfer approval, during which time, the water rights had been diverted at the new points of diversion, Hillcrest filed a quiet title action to ensure that its diversions could remain in their

approved location. *Id* at 408. The Idaho Supreme Court held that the diversions could remain in place because those opposing the change “stood by, with full knowledge of the facts” for more than 20 years and allowed Hillcrest to use such points of diversion. *Id*.

The facts in *Hillcrest, supra* are much more specific than are those in this case. In *Hillcrest*, the water rights at issue were specifically described in the approved transfer by number and by priority date. The watermaster also referred to the use of the Hillcrest water rights in his report every year. *Id*, at 409. The watermaster also testified that he told the defendant irrigation districts

“that if they were going to prevent the Hillcrest transfer from establishing a prescriptive right, steps should be taken within the five-year period to prevent such transfer of water from the lower end of the river to the upper end.” And that, notwithstanding this warning, they took “no action to prevent it.”

*Id*, at 410. The defendant irrigation districts asserted that the description of the water rights was insufficient to effectuate the transfer. *Id*. The Supreme Court responded as follows:

the description has for more than twenty years [\*411] proven sufficient in practical application to enable the various watermasters to identify it and to make diversion from year to year, so that in practice there has been no controversy or dispute over the particular water rights or appropriations that were intended to be and, in fact, were transferred. Since the description given was sufficient to enable the parties, who had to deal with the property, to accurately identify and locate it, it must be held sufficient for all practical purposes.

*Id*, at 410 - 411 (underlined emphasis added).

In this case, the description of the water right given by Black Mesa when it filed its SRBA claim no. 02-103 was not “sufficient to enable” Cottonwood to “accurately identify” that Black Mesa was allegedly making a claim to The Water Right (which is based on a license and has a priority date of 1963). Instead, Black Mesa’s claim referred to a beneficial use claim with a 1965 priority date. There was no watermaster providing notices or reports of water used as was the case in *Hillcrest*, and

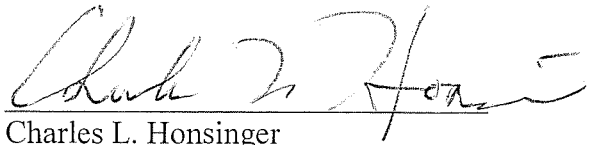
no transfer referencing the specific water rights used on Black Mesa's lands. There are no facts to support a contention that Cottonwood could be charged with the knowledge that Black Mesa was claiming The Water Right, and Black Mesa's estoppel argument fails for that reason.

As a final point regarding Black Mesa's waiver and estoppel arguments, even if the doctrines were applied to prevent Cottonwood's ownership of The Water Right, they do not establish ownership of The Water Right by Black Mesa - such ownership can only be established under Black Mesa's theories of conveyance by the BLM or adverse possession. As has already been established, Black Mesa's ownership of The Water Right under either of these theories is neither legally nor factually supportable.

### **CONCLUSION**

This is a simple case. When the Cottonwood DLEs were cancelled, ownership of The Water Right remained with Cottonwood pursuant to law. All of the remaining arguments and twists and turns that Black Mesa is attempting to take the case through are irrelevant. The Court merely needs to focus upon the fact (to which Black Mesa admits) that Cottonwood owned the water right prior to DLE cancellation and ask itself whether and how The Water Right could have possibly ended up in Black Mesa's name. The law and the facts clearly establish that the answer is it did not, and that the Court must find The Water Right belongs to Cottonwood.

Dated this 28<sup>th</sup> day of October, 2011.

  
Charles L. Honsinger  
RINGERT CLARK, CHARTERED

**CERTIFICATE OF SERVICE**

I certify that on the 28th day of October, 2011, I served copies of this document, including all attachments by U.S. Mail upon the following:

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

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

A handwritten signature in black ink, appearing to read "Charles D. Hoising". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Person serving documents