

11-14

RECEIVED
NOV 15 2011
DEPARTMENT OF
WATER RESOURCES

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

Attorneys for Cottonwood Canal Company

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

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

COMES NOW, Cottonwood Canal Company (hereinafter "Cottonwood"), by and through its attorneys Ringert Law, Chartered, and hereby submits this *Reply to Black Mesa's Response to Cottonwood's Motion for Summary Judgment* (hereinafter "*Black Mesa's Response*") filed on October 28, 2011. This *Reply* is supported by the record herein.

ARGUMENT

Black Mesa's newest argument to separate Cottonwood from its water right is that, because Cottonwood the corporation did not irrigate land, Cottonwood the corporation could not have owned the water right at issue in this case. Black Mesa postulates a theory that has been repeatedly rejected in Idaho: that Cottonwood's shareholders were exclusively capable of holding title to the water right

COPY

because they irrigated and farmed the land. Upon this erroneous premise, Black Mesa argues that the water right became forever affixed to the land, and thus the water right parted company from Cottonwood and its shareholders. In this twisted argument, Black Mesa misrepresents the holding of the *Sanderson* case cited by Cottonwood, and argues that Black Mesa somehow “kept” water right no. 02-10300 (“The Water Right”) when it quitclaimed its interest in the balance of water right no. 02-02209 to Cottonwood.

All of Black Mesa’s arguments are based upon an assumption it simply cannot establish: that Cottonwood (or under Black Mesa’s novel new theory, Cottonwood’s shareholders) somehow conveyed ownership of The Water Right to the United States when the Desert Land Entries were canceled. This is a simple matter of black letter law and chain-of-title analysis. All the Special Master needs to do is analyze whether and how the United States could have obtained title to The Water Right from Cottonwood. The only possible answer is that it did not, and that it therefore could not have thence conveyed it to Black Mesa, making Black Mesa’s claim to any portion of The Water Right null and void.

1. Cottonwood’s Articles of Incorporation Give it Authority to Own The Water Right

Black Mesa quotes from Cottonwood’s Amended Articles of Incorporation in an attempt to illustrate its erroneous point that Cottonwood was merely a custodian of the irrigation system, but did not own any portion of licensed water right no. 02-02209, including The Water Right. *Black Mesa’s Response*, pp. 2-3. Black Mesa neglects to quote the entirety of the relevant passage:

That the nature of the business and the objects and purposes of this corporation shall be as follows:

To construct, or otherwise acquire, maintain, manage, operate, and control an

irrigation system to furnish domestic, stock and irrigation water therefrom to the shareholders of the corporation, exclusively, on lands situate in the State of Idaho; and to do any act or thing necessary or convenient connected therewith for the purposes herein set forth or ancillary or related thereto; to acquire, own, rent, lease, mortgage, and dispose of all kinds of real and personal property; and to enter into, make and perform and carry out contracts of every sort and kind with any person, firm, association or corporation, municipality, body politic, country, territory, district, state and government.

Fritschle Affidavit, Ex. A, p. 443 (underlined emphasis added).

Obviously, the Amended Articles of Incorporation (in language that is exactly the same as in the original Articles of Incorporation) granted authority to Cottonwood to apply for a water right in its name (*Fritschle Affidavit*, Ex. A, p. 1 - 3), submit proof of beneficial use in its name, (*Id.* pp. 18 - 25), and have a water right license issued by IDWR in its name (*Id.* p. 38) (“[s]uch 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.” I.C. §42-220). Additionally, Cottonwood acted at various points in time to protect all portions of the water right from forfeiture, conveyed portions of it to others, and filed applications to change its elements, all without complaint or comment by any of the shareholders or any other party, including IDWR, Black Mesa, and Black Mesa’s predecessors.

2. The Nature of Distributees’ Interests in Water Rights Held by Canal Companies

Black Mesa’s analysis of *United States v. Pioneer Irrig. Dist.*, 144 Idaho 106 (2007) is incomplete and erroneous. The Idaho Supreme Court has conclusively determined the exact nature of the interest of distributees of water rights owned by a distributing entity:

The issue with which we are here confronted is founded on an erroneous theory which has been advanced from time to time by counsel for some of the ditch and irrigation companies and water users, to the effect that a water user who has acquired

his right through "sale, rental or distribution" from a ditch or canal company or an irrigation or drainage district acquires the rights of an appropriator of the water and is entitled to the same consideration in all litigation involving the original appropriation to which the canal or ditch company or irrigation or drainage district is entitled. Such is not the law and it has never been so held or recognized in this state. The question was mooted in *Farmers' etc. D. Co. v. Nampa & Meridian Irr. Dist.*, 14 Idaho 450, 94 P. 761, 763, and this court said:

"The appropriation of waters carried in the ditch operated for sale, rental and distribution of waters does not belong to the water users, but rather to the ditch company. The right to the *use* of such water after having 'once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes,' becomes a perpetual right subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use. (Sec. 3, art. 15 of the Constitution; *Bardsly v. Boise Irr. & Land Co.*, 8 Idaho 155, 67 P. 428; *Wilterding v. Green*, 4 Idaho 773, 45 P. 134.) A decree in favor of a water user from such ditch could not relieve him from any constitutional or statutory requirements, nor could it put him in any better position or condition than he already finds himself. His presence in the action is in no respect essential to the adjudication of the rights of the several appropriators from the stream itself. Any controversy he may have is with the ditch company from which he receives water or with other consumers under the ditch over the question of priority of use."

In the case now before us, Drainage District No. 4 is admittedly the appropriator of the waters which the various land owners within the district are using and to which they have acquired their respective rights through apportionment by the commissioners and actual application to beneficial use. It must be remembered, however, that any question or issue as to the dates and amounts of these allotments and rights of use are issues peculiar to the consumers and the district. The consumers possess no water right which they can assert as against any other appropriator.--their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises. (*Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 216 P. 250.) One who acquires the right to use water from an appropriator, whose right was initiated by appropriation under sec. 1, art. 15, "for sale, rental or distribution," is not the owner of the appropriation and does not acquire the rights of an appropriator but he simply acquires the rights of a user and consumer, as distributee of the water under secs. 4 and 5, art. 15, of the Constitution. His priority of contract is with the appropriator.

Nampa & Meridian Irr. Dist. v. Barclay, 56 Idaho 13, 18 - 19 (1935) (underlined emphasis added).

See also *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927) (Legal title to water rights should be held in the name of the canal company); *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 86 (1999) (Carey Act company is the appropriator of water rights *citing Big Wood Canal Co. v. Chapman, supra*). Thus, the shareholders in Cottonwood, as distributees of a water right owned by Cottonwood, did “not acquire the rights of an appropriator” as Black Mesa asserts, but instead acquired, through the actions of the appropriator, a constitutionally-protected interest that is “subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use.” *Barclay, supra* at 18.

Later, the Idaho Supreme Court, in *United States v. Pioneer Irrig. Dist., supra* (the very same case relied upon by Black Mesa), specifically addressed the holding in *Barclay*, stating that the holding in that case was that “one who ultimately uses the water does not gain title to the water rights.” *Pioneer Irrig. Dist., supra*, at 114 (underlined emphasis added). The *Pioneer Irrig. Dist.* court distinguished between the facts before it and those in *Barclay*, noting that *Barclay* (as in the case at bar) did not address water rights held by the Bureau of Reclamation, or the relationship between Reclamation Act and Idaho water law. *Id.* The Court noted that “a strong argument exists that the framers of the Reclamation Act did not intend to deprive the irrigation entities of an equitable interest in project water rights.” *Id.* The *Pioneer Irrig. Dist.* court went on to address other facts unique to the provision of storage water to irrigation districts by the Bureau of Reclamation pursuant to contract, including that the irrigation districts in that case had entirely paid off construction costs for which they were obligated under their contract. The Court then held that, in order to protect the interests of the irrigation entities from potential contract breaches by the United

States, it was necessary in this situation (involving the Bureau of Reclamation and the Reclamation Act) to recognize an interest in the water rights held by the irrigation entities on behalf of their water users, and provided a remark to be inserted in SRBA Partial Decrees to that effect. *Id.*, at 115. It is important to note that, despite Black Mesa's reliance on *Pioneer Irrig. Dist.* for the proposition that the appropriator does not own the water right, the Idaho Supreme Court in that case held that partial decrees were to be issued listing the United States as the owner of the water rights at issue.

Thus, the holding of *Pioneer Irrig. Dist.*, other than its distinguishment of *Barclay*, does not apply to the facts in this case in the manner asserted by Black Mesa. Moreover, just as was the case in *Barclay*, the irrigation entity in this case, Cottonwood, held and continues to hold title to the water right on behalf of its shareholders, who continue to have the constitutionally-protected rights of distributees pursuant to Article XV, §4 of the Idaho Constitution.

3. Black Mesa Must be Judicially Estopped from Changing Its Theory

Beyond the fact that Black Mesa never explains how, under its novel theory, title to The Water Right was transferred from the shareholders to Black Mesa's predecessor (the United States), Black Mesa is precluded from making this argument by the doctrine of judicial estoppel. "Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Sword v. Sweet*, 140 Idaho 242, 252 (2004).

Black Mesa has previously stated in this case that it does "not challenge the Department's decision confirming the validity of the Section 14 Water Rights." *Black Mesa's Memorandum in Support of Motion for Summary Judgment*, p. 3. The Department, of course, concluded that the

corrected portion of the license should remain in Cottonwood's name both because the original license was issued in Cottonwood's name, and because IDWR believed it was without authority or jurisdiction to quiet title in the amended portion of the water right to Black Mesa. *Affidavit of Carter Fritschle in Support of Cottonwood Canal Company's Motion for Summary Judgment* (hereinafter "*Fritschle Affidavit*"), Ex. A, pp. 1030 - 1038. Now, Black Mesa is apparently revoking its prior statements in the record that it does not challenge IDWR's determination that The Water Right was owned by Cottonwood (at least at the time of licensure), and is now attempting to argue that in fact, The Water Right was owned by the Cottonwood shareholders - a position that is completely unsupported by the record. In fact, neither Cottonwood nor any other party, including Black Mesa and IDWR, in either the SRBA or the administrative licensure correction proceeding, have ever asserted that the Cottonwood shareholders and not Cottonwood itself are the owners of The Water Right. The Court should ignore this radical change in position by Black Mesa, and hold it to its previous arguments, which also have no merit whatsoever

4. **Sanderson Confirms Cottonwood's Ownership**

Black Mesa also argues that *Sanderson v. Salmon River Canal Company, Limited*, 34 Idaho 145 (1921) supports its argument. Again, Black Mesa fails to explain exactly how it obtained title to The Water Right, but, regardless, *Sanderson* does not stand for the "rule", as asserted by Black Mesa that "[i.e. the water user, not the canal company] has a water right which entitles him to the delivery of water." Black Mesa's Response, p. 6. Rather, the case stands for the proposition, as already briefed extensively by Cottonwood, that the cancellation of a Desert Land Entry does not operate to divest an entrymen (or the canal company through which the entrymen accomplished their

appropriation) of their water right.

In addressing the ownership rights of entrymen *vis a vis* the canal company, the *Sanderson* court pointed out that “Plaintiff’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.” *Sanderson*, at 160. As already discussed herein, “consumers possess no water right which they can assert as against any other appropriator,--their rights are acquired from the district which is the appropriator and owner and it is the district’s business to protect the appropriation and defend it in any litigation that arises.” *Nampa & Meridian Irr. Dist. v. Barclay*, *supra* at 19.

5. Black Mesa Released and Assigned Its Interest to Cottonwood

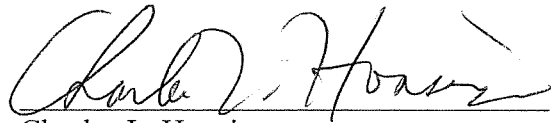
Black Mesa attempts to argue that it did not release and assign its interest in The Water Right when it executed the 1990 *Agreement* and the 1991 *Release, Assignment and Disclaimer*. Black Mesa’s entire argument on this point turns upon its assumption that The Water Right belonged to Black Mesa at that time because “the entrymen’s water rights were appurtenant to the DLE lands when Black Mesa acquired title by patent in 1990.” Black Mesa has never explained how the United States obtained any portion of licensed water right no. 02-02209, including The Water Right, other than that ownership was somehow magically “transferred” in contradiction to the holding of the *Sanderson* case, without any legal support for its “theory.” The simple and obvious facts are that in 1990, Black Mesa and Cottonwood disputed ownership of licensed water right no. 02-02209. Cottonwood conveyed only 12.8 cfs of water right no. 02-02209 to Black Mesa pursuant to its *Release and Assignment*. Black Mesa relinquished all claim to all other portions of licensed water

right no. 02-02209, including The Water Right. It is a simple transaction to analyze, but in the end, it simply does not matter because Black Mesa never owned any portion of The Water Right other than that which was directly conveyed to it by Cottonwood.

CONCLUSION

This is, and always has been, a simple case that involves chain of title analysis. The question the Special Master must answer is whether title to The Water Right remained with Cottonwood pursuant to Idaho Supreme Court precedent, or whether it instead transferred to the United States Bureau of Land Management and thence to Black Mesa contrary to Idaho law. The answer is as simple as the question: under no legal theory could Cottonwood ever have been deprived of The Water Right. Accordingly, Cottonwood respectfully requests that the Special Master issue a recommendation for decree specifying the same.

Dated this 14th day of November, 2011.

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

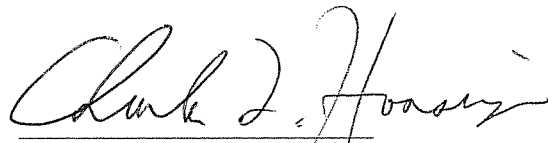
Charles L. Honsinger
Attorney for Cottonwood Canal Company

CERTIFICATE OF SERVICE

I certify that on the 14th day of November, 2011, I served copies of this document, including all attachments by U.S. Mail and/or Hand Delivery upon the following:

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

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


Person serving documents