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DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
NOV 14 2011	
By _____	Clerk
_____	Deputy Clerk

**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 REPLY TO
COTTONWOOD'S RESPONSE TO
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 reply to Cottonwood Mutual Canal Company's ("Cottonwood") October 28, 2011 *Response to Black Mesa's Motion for Summary Judgment* ("Cottonwood's Response"). Cottonwood's arguments are not supported by the record or the law. Accordingly, the Special Master should grant summary judgment in Black Mesa's favor.

I. ARGUMENT

Cottonwood asserts this is "a simple case." Cottonwood's Response at 18. Black Mesa agrees, to the extent that Idaho law mandates that irrigation water rights are appurtenant to the

**BLACK MESA'S REPLY TO COTTONWOOD'S RESPONSE
TO MOTION FOR SUMMARY JUDGMENT**

5995-1_1321929_1

Page 1 of 16

lands upon which they are beneficially used and that, absent some act severing the water rights from the land, they pass to successor landowners who become entitled to put the water to beneficial use. Under this black letter law, the Section 14 Water Rights¹ were made appurtenant to the Section 14 Lands, and, because they were never severed from the Section 14 Lands prior to the 1990 Patent or thereafter by a reservation, a conveyance or an administrative transfer, they remain appurtenant to Section 14 and belong to Black Mesa.

Cottonwood asserts that such basic rules of water law do not apply in this case because its name was on the original license issued over forty years ago. “Name on the license” is the sum total of Cottonwood’s argument because that is the only argument it can make. Its claim of ownership cannot be based on Cottonwood’s beneficial use of water or ownership of appurtenant lands because Cottonwood never put any water to beneficial use and never owned any of the appurtenant lands.

Cottonwood’s complaint of “twists and turns” is of its own making. A prime example is the pretzel logic required to reconcile the record with Cottonwood’s assertion that it never had any idea that Black Mesa was and is asserting ownership of the now-amended portion of license no. 2-2209 by filing SRBA claim no. 2-103 and by putting it to beneficial use. Claim no. 2-103 was created by IDWR in 1984 to benefit Cottonwood in response to Cottonwood’s request that license no. 2-2209 be recognized as including the Section 14 Water Rights. Claim no. 2-103 was set up as a beneficial use right with a 1965 priority (based on the date proof was filed in support of license 2-2209’s issuance) expressly to provide Cottonwood a basis to establish its claim to the water right beneficially used on Section 14 Lands that had been developed in connection with the rest of the license. Because of this fact, Cottonwood now must pretend (and invites all

¹ 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”).

involved in this subcase to join it) that Cottonwood could not have known Black Mesa beneficially used the now-amended portion of the license appurtenant to the Section 14 Lands (i.e. the Section 14 Water Rights) or asserted a claim to it under claim no. 2-103.

Another example, which cuts to the root of its position, is Cottonwood's original assertion in its briefing to IDWR that the DLE lands "were never owned by Cottonwood," and the water rights appurtenant to the DLE lands were "established through the beneficial use of its shareholders." R. Vol. VI, p. 977. Today, to support its claim of ownership in these subcases, Cottonwood states that it "beneficially used the permitted water on the developed lands" and "continued to beneficially use the water right until its Desert Entries were canceled in 1981." Cottonwood's Memo at 10 (emphasis added).² The evidence, of course, shows that Cottonwood never owned the lands and never put any water to beneficial use (the entrymen did).

Notably, Cottonwood supplied no evidence by affidavit or otherwise to contradict the relevant facts in Wes Wootan's affidavit.³ As a result, the conclusion that must be drawn is that Mr. Wootan's testimony stands as undisputed fact.

In large part, Black Mesa's Memo and Black Mesa's October 27, 2011 *Response to Cottonwood's Motion for Summary Judgment* ("Black Mesa's Response") address Cottonwood's arguments. Black Mesa nevertheless includes this discussion to clarify some points of fact and law, and to address inconsistencies and inaccuracies in Cottonwood's portrayal of the relevant facts and law.

² Another permutation—perhaps in anticipation of arguing that it was like the entrymen and not the canal company in *Sanderson v. Salmon River Canal Co.*, *infra*—is Cottonwood's assertion that "[t]he fact is that Cottonwood did not own the lands to which The Water Right was appurtenant – instead it was attempting to own them." Cottonwood's Memo at 6. If it was attempting to own them, it was doing so in direct violation of federal law, which limited desert land entries to persons who were "citizens, or persons who may be entitled to become citizens." 43 U.S.C.A. § 321; 43 C.F.R. 2521.1(a).

³ An exception—although not relevant—is that Mr. Wootan was mistaken regarding the identity of one of the persons present on Cottonwood's behalf at a meeting held at Mr. Ringert's home after Black Mesa filed its claim to 2-103 in the SRBA.

A. Cottonwood had notice Black Mesa was using and asserting a claim of right to the water rights reflected by the amended portion of license no. 2-2209.

A theme permeating Cottonwood's Response is that Cottonwood had no notice that Black Mesa was, since at least 1991, using and asserting a claim to the same water rights that are reflected in the now-amended portion of license no. 2-2209. *See, e.g.*, Cottonwood's Response at 4, 9-12, 16, 17 ("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").

Cottonwood has known since 1984, when it attempted to amend its claim no. 2-2209 to include the Section 14 Water Rights in an earlier adjudication, that claim no. 2-103 is the same water right as the amended portion of license no. 2-2209.⁴ Rather than amend claim no. 2-2209 as Cottonwood had requested then, IDWR created claim no. 2-103 so Cottonwood could claim it in the Ada County adjudication. This is detailed in several IDWR memoranda from 1984 addressing Cottonwood's proposed amendment, as explained in Black Mesa's Memo at 5, and in the Lawrence Affidavit ¶¶ 8-9, to which the memoranda are attached as Exhibits E and F. Cottonwood has known since its inception that claim no. 2-103 is the very same water right, with the same point of diversion, same diversion rate and same place of use as the amended portion of license no. 2-2209, because claim no. 2-103 originally was Cottonwood's claim.

Black Mesa made it clear to Cottonwood not long after acquiring title to the DLE Lands in 1990 that Black Mesa was asserting ownership to the Section 14 Water Rights by putting them to beneficial use and by virtue of it having claimed 2-103 in the SRBA. At a meeting arranged

⁴ The earlier adjudication was Ada County Case No. 73804, which was dismissed on May 30, 1989. R. Vol. II, p. 231 ¶ 3.

by Cottonwood's attorney, Cottonwood demanded Black Mesa relinquish its claim to the Section 14 Water Rights. Black Mesa refused. Wootan Affidavit p. 5 ¶¶ 22-24.

Cottonwood's knowledge is further confirmed by its subsequent statements and actions. For example, in its October 31, 2000 *Petition to Correct License* ("Petition"), Cottonwood attached the 1984 IDWR memoranda cited above. R. Vol. IV, pp. 628-32; *see also* R. Vol. V, p. 873-74 (Aug. 24, 1984 memorandum attached to Cottonwood's *Exceptions to Recommended Decision and Order* filed in the administrative case). Cottonwood repeatedly cited these memoranda in support of its arguments to correct license no. 2-2209. R. Vol. IV, pp. 607-08, 610-12; *see also* R. Vol. V, pp. 824, 827, 861. Although Cottonwood never mentioned in its administrative case briefing that claim no. 2-103 resulted from the 1984 memoranda, it is not reasonable to assume that Cottonwood was unaware of that fact. The last memorandum in that chain (dated August 29, 1984) shows that IDWR decided to proceed by "recommending the additional lands under a beneficial use right." Lawrence Affidavit Ex. G. On the same day, IDWR filed claim no. 2-103 in Cottonwood's name. *Id.* Ex. E.

In 2001, Black Mesa filed (and served on Cottonwood's attorney) a Notice of Protest to Cottonwood's Petition in the administrative case, which stated:

Water Right No. A02-00103 (Beneficial Use) also includes these lands that were filed for adjudication. The current name on these rights is Black Mesa Farms. Previous name on these rights was Cottonwood Mutual Canal Company. . . .

Black Mesa Farms LLC should be listed as water right holder on these water rights because addition of water rights to the license (02-02209) pertaining to these lands has major consequences to the titled land owner, which is Black Mesa Farms LLC.

R. Vol. IV, p. 706-07. Black Mesa subsequently filed a *Cross-Petition to Correct License and Petition to Change Ownership of License* ("Cross-Petition") in the administrative proceeding. R.

Vol. IV, pp. 741-54, in which it stated that claim no. 2-103 was filed as a beneficial use claim “to cover [the Section 14 Lands] in the event the [licensed] right is not amended.” R. Vol. IV, p. 744. These actions by Black Mesa again served notice on Cottonwood that claim no. 2-103 was the same water right as the later-amended portion of license no. 2-2209.

In addition to the documents described above showing Cottonwood’s knowledge that claim no. 2-103 has always been the same water right as the now-amended portion of license no. 2-2209, on January 9, 2008, Cottonwood’s attorney sent a letter to IDWR stating:

I received IDWR’s recommendation disallowing Cottonwood’s SRBA claim related to the water at issue in the administrative proceeding [i.e. claim no. 2-10300⁵], and I have reviewed IDWR’s favorable recommendation for Black Mesa’s claim (2-103) that is apparently related to this water.

R. Vol. Vol. V, p. 881. Black Mesa’s attorneys responded to this letter (copying Cottonwood’s attorney) arguing that the administrative proceeding to correct the license essentially was moot because IDWR had by then recommended right nos. 2-2209 and 2-103 in the SRBA, thereby resolving the issues raised in the administrative proceeding—namely issues of “valid appropriation, continued beneficial use, appurtenancy, ownership.” R. Vol. V, p. 919. Despite this clear evidence that Black Mesa was asserting claim no. 2-103 to be the same right as the now-amended portion of license no. 2-2209, Cottonwood did not challenge the disallowal of its claim no. 2-10300 or the recommendation for claim no. 2-103 to Black Mesa.

In summary, there is no merit to Cottonwood’s assertion that it had no notice of Black Mesa’s claim to the amended portion of license no. 2-2209. Cottonwood has known all along that the amended portion of license no. 2-2209 is the same water right reflected in its 1984 claim no. 2-103 that Black Mesa succeeded to when it acquired the Section 14 Lands in 1990. They

⁵ IDWR recommended Cottonwood’s claim no. 2-10300 be “disallowed” because the right had been “Recommended as Right No. 2-103 and 2-2209B.” Lawrence Affidavit Ex. B.

both represent the same water right Black Mesa has beneficially used for the past 20 years. They represent the same water right Cottonwood's counsel demanded Black Mesa relinquish. They represent the same water right Black Mesa and Cottonwood contested in the administrative case. They represent the same water right that was recommended to Black Mesa under claim no. 2-103 (prior to IDWR's most recent Amended Director's Report). They represent the same water right Cottonwood claimed under right no. 2-10300 that was recommended disallowed nearly six years ago and partially decreed disallowed in 2008. The Special Master should not entertain Cottonwood's feigned ignorance of this fact.

B. Under Idaho law, appurtenancy based on beneficial use determines water right ownership.

Cottonwood frames Black Mesa's argument as "'appurtenancy' trumps ownership." Cottonwood's Response at 6. But this is not accurate. Rather, Black Mesa's argument is that under Idaho law, appurtenancy and actual beneficial use determine ownership. The Section 14 Water Rights, having been put to beneficial use on and made appurtenant to the Section 14 Lands (which is undisputed), and having not been severed from the lands or otherwise lost (which also is undisputed), must have passed to Black Mesa with the 1990 Patent as a matter of law.

Idaho law is straightforward on this point. A water right "shall not be considered as being a property right in itself, but such right shall become a complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied." I.C. § 42-101. A licensed water right "shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted." I.C. § 42-220.

In determining whether water rights passed to a landowner's successors-in-interest, the Idaho Supreme Court in *Joyce Livestock v. U.S.*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007), stated:

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. . . . The deeds executed by [plaintiff's] predecessors conveyed the land and, under the law, any appurtenances including water rights. . . . A separate writing would be required if there had been an attempt to convey the water rights separately.

In *Crow v. Carlson*, 107 Idaho 461, 466, 690 P.2d 916, 921 (1984), the Idaho Supreme Court applied these well-settled concepts in finding that a 1910 decreed water right was still appurtenant to the decreed lands in 1984 where there was no evidence that the right “has at some time been transferred to other property, abandoned, or negated in some other way.” In light of the trial court’s findings that the decreed water right holder never conveyed either the lands or any water right appurtenant thereto, the Court stated that a challenger to the continued validity of the right would have to show that the decreed right holder or his successors “must have lost the [water] right in some other way, such as through adverse possession, prescriptive use, forfeiture, or abandonment.” *Id.* Having found no evidence of any of these, the Court held that the water right belonged to the successor owner of the lands to which the water right was decreed appurtenant. *Id.* at 466-68, 690 P.3d at 921-23.

In short, under Idaho law, unless water rights are somehow lost or severed by reservation or by separate conveyance from the lands to which they are appurtenant, or perhaps administratively transferred to new lands or uses—none of which scenarios are supported by the record here—the rights stay with the land to which they were made appurtenant, pass to successor landowners, and belong to the successor landowners so long as they continue to beneficially use them.

Here, there is no dispute that the Section 14 Water Rights became appurtenant to the Section 14 Lands to which the water was, and has been, applied. R. Vol. V, p. 977 (Cottonwood stating “[T]he water right was appurtenant to the lands on which it was developed. Those lands were never owned by Cottonwood.”); *see also* Cottonwood’s Response at 4 (“the DLEs for the lands to which The Water Right and the remainder of water right no. 02-02209 were appurtenant were canceled.”). Accordingly, the appurtenant rights passed to Black Mesa—the successor, and current, owner of the Section 14 Lands—unless the rights were reserved or separately conveyed at some point prior to Black Mesa taking title by patent in 1990.

Cottonwood points to no evidence—in fact, it does not even make the argument—that the Section 14 Water Rights were severed from the Section 14 Lands by reservation or by separate conveyance prior to Black Mesa’s 1990 Patent, or that they were otherwise negated, lost or transferred. Consequently, the rights must have been appurtenant to the Section 14 Lands when the lands were patented to Black Mesa.

Cottonwood’s claim of ownership is based simply on its name being on the original license no. 2-2209, and its argument that “[h]ere, there was no conveyance and no deed.” Cottonwood’s Response at 6. But there was a conveyance—from the federal government to Black Mesa via the 1990 Patent. R. Vol. V, pp. 949-54. Cottonwood’s argument that there was no conveyance from it to the federal government is immaterial because Cottonwood did not have authority to convey the water rights to anyone until Black Mesa quitclaimed and relinquished its interest to 66.9 cfs in 1991. Cottonwood admits the Section 14 Water Rights were beneficially used on and made appurtenant to the Section 14 Lands, and that Cottonwood never owned any of the DLE Lands, let alone the Section 14 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.”) Cottonwood therefore had no authority to—and never did—sever the Section 14 Water Rights from the Section 14 Lands prior to the 1990 Patent issuance. As a result, the rights passed to Black Mesa with the patented lands to which they were and are appurtenant.

Cottonwood stands in the same shoes as Salmon River Canal Company in *Sanderson*. There, as here, the canal company was organized to operate an irrigation delivery system for the benefit of the entrymen. There, as here, the canal company filed to appropriate water for the benefit of, and on behalf of, the entrymen. There, as here, the canal company attempted to unilaterally strip the water rights off the lands to which they had been made appurtenant when the entry was voided. There, as here, although the water right had been originally issued in the canal company’s name, the person putting the water to beneficial use on the land to which the right was appurtenant had paramount title in the water right. One material difference in the *Sanderson* case is, of course, that the Salmon River Canal Company continued to operate an irrigation delivery system, remained obligated to continue to deliver the water to the lands to which they had been made appurtenant. Here, Cottonwood has relinquished and/or abandoned the delivery system, and abdicated its trust responsibilities together with any concomitant reason for the Section 14 Water Rights to be in its name. Black Mesa has delivered the water to itself for at least twenty years.

C. Even if title to the Section 14 Water Rights did not pass as an appurtenance to the land, the doctrine of adverse possession would support Black Mesa’s claim of ownership.

1. Cottonwood’s theory of the case supports Black Mesa’s adverse possession claim.

As discussed, Cottonwood argues that claim no. 2-103 represents a different water right than the amended portion of license no. 2-2209. At the same time, however, Cottonwood argues that the filing of claim no. 2-103 tolled the clock with respect to Black Mesa’s claim that it

acquired title to the amended portion of license no. 2-2209 through adverse possession.

Cottonwood's Response at 7-8. Cottonwood cannot have it both ways.

If, as Cottonwood argues, claim no. 2-103 is different than the amended portion of license no. 2-2209, then the filing of claim no. 2-103 could not have tolled the adverse possession clock for the amended portion of license no. 2-2209. The only claim that could have tolled the adverse possession clock for the amended portion of license no. 2-2209 is a claim for that right (which Cottonwood argues is not claim no. 2-103).

Under Cottonwood's theory that claim no. 2-103 is a different right, the first SRBA claim for the amended portion of license no. 2-2209 was Cottonwood's 2006 claim no. 2-10300. Lawrence Affidavit Ex. A. Because Black Mesa's adverse use of the Section 14 Water Rights began in 1991, or shortly thereafter, there was ample time for the five-year statutory period to run before the clock was tolled by the 2006 claim filing.

2. The five-year statutory period applies to claims of adverse possession that ripened prior to the statute's amendment.

In 2006, the Idaho Legislature amended I.C. §§ 5-206 and 5-210 by extending the required period for adverse possession from five to twenty years. 2006 Idaho Sess. Laws ch. 158 p. 474-76. The amendment's effective date was July 1, 2006. *Id.*

By law, the five-year statutory period that existed prior to the 2006 amendment governs claims of adverse possession in which the five-year period accrued (i.e. "vested" or "ripened") prior to July 1, 2006. The alternative approach promoted by Cottonwood would apply the post-July 1, 2006 twenty-year period to all claims, even if the five-year period accrued prior to that

date. Cottonwood's approach would result in an impermissible and unintended retroactive application of the statutory amendment.⁶

"A retrospective or retroactive law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 207 P.3d 988 (2009) (quoting 82 C.J.S. Statutes § 407 (1999)).⁷ "No statute is retroactive unless the Legislature expressly declares that it is." *Hill v. American Family Mut. Ins. Co.*, 150 Idaho 619, ___, 249 P.3d 812, 821 (2011); I.C. § 73-101 ("No part of these compiled laws is retroactive, unless expressly so declared."). In *State ex rel. Wasden v. Daicel Chemical Industries, Ltd.*, 141 Idaho 102, 105, 106 P.3d 428, 431 (2005), the Idaho Supreme Court held that the legislature's declaration that an act "shall be in full force and effect on and after July 1, 2000" clearly meant that the act would not be applied retroactively.⁸

⁶ The "in no case" language of the statute that Cottonwood argues as evidencing the Legislature's intent to make the 2006 amendment retroactive, has been in the limitation of actions statute since its first enactment by Idaho's Territorial Legislature in 1881. See Idaho Code of Civil Procedure at 12 (1881).

⁷ A claim of adverse right falls within the categories of "transactions or considerations already past" that a retroactive law might impair. As the Idaho Supreme Court held in *Wood v. Hoglund*, 131 Idaho 700, 703-04, 963 P.2d 383, 386-87 (1998):

Once the five-year period of adverse use has been attained, the prescriptive right to continue the use of the way has been established, *Burnett v. Jayo*, 119 Idaho 1009, 1012, 812 P.2d 316, 319 (Ct. App. 1991), and there is no need to couple or to tack the use by the predecessor to any use by the claimant. When an easement of way by adverse use is thus created, it becomes fixed as an appurtenance to the real property which is subject to the prescriptive use and may be claimed by a successor in interest. *Feldman v. Knapp*, 196 Or. 453, 250 P.2d 92, 103 (1952). This principle is similar to the "ripened title" theory recognized by the Idaho courts in addressing a claim to quieting title gained by adverse possession. *Larson v. Lindsay*, 80 Idaho 242, 250, 327 P.2d 775, 780 (1958).

⁸ By contrast, when it amended adverse possession statute I.C. § 5-210 on April 2, 2001, the Legislature included the following provision which clearly evoked its intent to apply the act retroactively:

An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 2001.

2001 Idaho Sess. Laws ch. 290, § 3 p. 1028. Similarly, when it amended I.C. § 12-117 on March 4, 2010, the Legislature included the following provision making it retroactive:

Similarly, in this case, the 2006 legislation's plain statement "Effective date: July 1, 2006" clearly indicates that the legislature did not intend to apply the amendment retroactively. Accordingly, the statutory amendment is not retroactive, and claims of adverse possession that ripened prior to the amendment's effective date are governed by the five-year period.

3. Black Mesa has used the Section 14 Water Rights to their full extent since 1991.

Cottonwood's assertion that "Black Mesa has provided no evidence of the extent of its use during any portion of the statutory period" simply is wrong. Wes Wootan states that "Black Mesa has continued to divert all of 2-2209B [Black Mesa's portion of license 2-2209 that it did not quitclaim and release to Cottonwood in 1991] and 2-103 to irrigation of the Black Mesa Property every year since filing its SRBA claims [in 1991]." Wootan Affidavit at 5 ¶ 26. Cottonwood has no contrary evidence.

D. Waiver and estoppel apply to Cottonwood.

1. Black Mesa did not waive its waiver and estoppel arguments.

There is no merit to Cottonwood's argument that "[t]he time to argue that Cottonwood should be prevented by either waiver or estoppel from asserting ownership in this proceeding has already passed" because "[t]he Court has already permitted Cottonwood to participate in this issue, with Black Mesa's agreement" Cottonwood's Response at 14. Black Mesa did not waive its waiver and estoppel arguments by acquiescing to Cottonwood's participation in subcase no. 2-103. Rather, Black Mesa's acquiescence merely demonstrates Black Mesa's

An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to May 31, 2009 and shall apply to all cases filed and pending as of June 1, 2009.

2010 Idaho Sess. Laws ch. 29, § 2 p. 50.

**BLACK MESA'S REPLY TO COTTONWOOD'S RESPONSE
TO MOTION FOR SUMMARY JUDGMENT**

5995-1_1321929_1

Page 13 of 16

recognition that the issue of ownership would have to be decided in the SRBA Court because IDWR refrained from deciding the issue in the administrative case.

At the time of Black Mesa's acquiescence, subcase no. 2-103 was the only active subcase in which the Section 14 Water Rights were claimed (Cottonwood's claim no. 2-10300 having been decreed disallowed). As the Special Master will recall, Black Mesa argued that the proper subcase to address the issue of ownership (including arguments based on the doctrine of waiver and/or estoppel) was no. 2-103, and that Cottonwood's subcase no. 2-10300 should not be reopened because, among other things, Cottonwood had failed to diligently prosecute its claim (i.e. had voluntarily relinquished its claim by failing to challenge the recommended or decreed disallowance). *Black Mesa's Response to Cottonwood's Rule 60(b) Motion for Relief* at 4, 6-7 (Feb. 24, 2011). Black Mesa's actions cannot and should not be construed as waiving anything. Black Mesa simply took a position that, once IDWR declined to answer the ownership question, the parties' respective arguments (including those based on waiver and estoppel) should be briefed to the court and decided in the context of subcase 2-103.

2. The facts supporting Black Mesa's waiver and estoppel arguments are properly presented.

Cottonwood incorrectly states that the facts supporting Black Mesa's waiver and estoppel arguments occurred after Black Mesa filed its 2-103 SRBA claim. Cottonwood's Response at 15. Black Mesa's arguments first and foremost are based on Cottonwood's failure to address the Section 14 Water Rights in the 1990 Agreement it drafted. Black Mesa Memo at 19-20. The 1990 Agreement pre-dated Black Mesa's 1991 SRBA claim no. 2-103.

In any case, Cottonwood is wrong in its assertion (made without citation to authority) that claims of waiver and estoppel are "tolled" upon filing an SRBA claim, and that a party's actions (or inaction) subsequent to a filing cannot be considered. Cottonwood's Response at 15-16. By

this reasoning, a party to litigation could not be held to their statements made during the course of litigation. This is not the law in Idaho. *See Peterson v. Shore*, 146 Idaho 476, 197 P.3d 789 (Ct. App. 2008) (discussing the preclusive effect of admissions made by parties during litigation).

As described in Black Mesa's Memo, Cottonwood's course of action and inaction since 1990 concerning the Section 14 Water Rights demonstrates its "long and continuous knowing acquiescence" in Black Mesa's use and enjoyment of the rights. *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 411, 66 P.2d 115, 118 (1937). By contrast, Black Mesa's actions, including its beneficial use of the Section 14 Water Rights, Wootan Affidavit at 5 ¶ 26, investment in farming operations, *id.* at 5-7 ¶¶ 27-33, and its payment of taxes on Section 14 Lands assessed as "irrigated," *id.* at 8 ¶ 43 and Ex. G, demonstrate its reliance and altered position based on Cottonwood's conduct.

Cottonwood maintains that its alleged lack of notice of Black Mesa's use of and claim to the Section 14 Water Rights distinguishes this case from *Hillcrest*. Cottonwood's Response at 17-18. As already discussed, there is no merit to Cottonwood's feigned ignorance that the Section 14 Water Rights existed, or that Black Mesa was putting them to beneficial use since it acquired the Section 14 Lands in 1990.

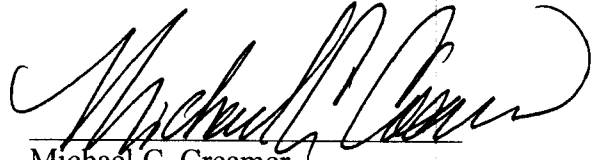
II. CONCLUSION

As Cottonwood states, this is "a simple case." The facts are undisputed: the Section 14 Water Rights were beneficially used upon and made appurtenant to the Section 14 Lands; there is no evidence that the Section 14 Water Rights were severed from the Section 14 Lands or otherwise lost prior to Black Mesa's 1990 Patent; Black Mesa has continued to beneficially use the Section 14 Water Rights since it acquired title by patent. Under Idaho law, Black Mesa

acquired the Section 14 Water Rights as appurtenances to the Section 14 Lands, and should be deemed owner as a matter of law.

Respectfully submitted this 11th day of November, 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