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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JAN 13 2012	
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	)	Subcases 02-103 and 02-10300 (Black Mesa
	)	Farms LLC and Cottonwood Mutual Canal Co.)
Case No. 39576	)	
	)	ORDER ON MOTIONS FOR SUMMARY
_____	)	JUDGMENT

Procedural Background

Claims and Director's Report

02-103 (Black Mesa)

Claim – On July 17, 1989, Black Mesa Farms, Wesley and Christine Wootan and Don and Brenda Bryant (hereinafter "Black Mesa" or "Wootan") filed beneficial use *Notice of Claim* 02-103 in the SRBA for 8.54 cfs from the Snake River to irrigate 386 acres in Elmore County with a priority date of May 10, 1965, stating:

12. Do you own the property listed above as place of use? Yes

....

14. Remarks:

Black Mesa Project.

Field examination for 02-02209 identified the land claimed herein was irrigated at the time. This claim is to cover the additional place of use not covered in the license issued for 02-02209.

Exhibit F to *Affidavit of Wesley R. Wootan*.¹

On October 30, 2009, Black Mesa filed its *Amended Notice of Claim* in subcase 02-103 for the same quantity of water but this time to irrigate 428 acres within a 3,948 acre place of use based on "beneficial use or permit." Under remarks, it stated:

¹ On its *Notices of Claims*, Black Mesa Farms is described as a partnership and Wesley R. Wootan and Don J. Bryant are partners.

This Amended Claim corrects the priority date to be February 25, 1963. This priority date is correct as evidenced by the Beneficial Use Field Examiner's report for licensed water right no. 2-2209. The Field Examiner found that Section 14 lands were irrigated under 2-2209. However, Section 14 lands inexplicably were omitted from the license for 2-2209. This right (2-103) is for the irrigation of Section 14 lands and should have the same priority date as 2-2209 (i.e. February 25, 1963).

Director's Recommendation – The Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, Reporting Area Basin 02* on December 29, 2006. The Director recommended claim 02-103 to Black Mesa for 8.54 cfs to irrigate 428 acres within a 3,948 acre place of use with a priority date of June 11, 1965, based on beneficial use.

02-10300 (Cottonwood)

Claim – On January 5, 2006, Cottonwood Mutual Canal Company (hereinafter "Cottonwood"), filed SRBA *Notice of Claim* 02-10300 for 8 cfs from the Snake River to irrigate 400 acres with a priority date of February 25, 1963, based on license 02-2209.² It stated:

12. Do you own the property listed above as place of use? No

....

14. Remarks:

Petition to correct license 02-02209 was filed with IDWR on October 31, 2000. A recommended decision was issued by the hearing officer on January 18, 2002. Cottonwood Canal Company filed exceptions . . . to that recommended decision on February 12, 2002. No action has ever been taken relative to Cottonwood Canal Company's exceptions. Cottonwood Canal Company's water right no. 02-10208 (part of original licensed water right no. 02-02209) is to be recommended shortly. So as not to upset the processing of that claim, this claim is being submitted separately and should be assigned a separate water right number.

Director's Recommendation – The Director recommended claim 02-10300 be disallowed: "Recommended as right no. 2-103 and 2-2209B."³ After no one objected to the Director's recommendation, former SRBA Presiding Judge John M. Melanson entered a *Final Order Disallowing Water Right Claims* disallowing claim 02-10300 on July 10, 2009.

² On July 29, 2011, Cottonwood was granted leave to amend its claim 02-10300 to a higher amount (from 1,338.95 acre feet to 1,600 acre feet). Its claim 02-10208 was decreed disallowed on April 8, 2008.

³ Water right 02-2209B was partially decreed as an uncontested claim to Black Mesa on June 15, 2009.

Special Master Report

On July 2, 2009, the Special Master entered a **Report** recommending uncontested claim 02-103 to Black Mesa.

Black Mesa's Motion to Alter or Amend

On August 28, 2009, Black Mesa filed a *Motion to Alter or Amend* in subcase 02-103 arguing the recommendation should be changed for three reasons: 1) there should be no combined use remark, 2) Black Mesa's water rights are the only ones used on lands in § 12, T6S, R12E and 3) the priority date should be February 25, 1963. Black Mesa then moved to amend claim 02-103 and file a late *Objection* to quantity, priority date and place of use. Black Mesa's motions were granted on October 29, 2009.

Amended Director's Report

On March 1, 2010, IDWR filed its *Amended Director's Report, Subcase No. 02-103*. This time, the Director recommended claim 02-103 to Black Mesa essentially unchanged but with a slightly earlier priority date (from June 11, 1965, to May 10, 1965) and an additional remark under place of use.

Objection

On March 23, 2010, Black Mesa filed another *Objection* in subcase 02-103 objecting to quantity, priority date and the combined use remark.

Cottonwood's Motion to Participate

On March 7, 2011, Cottonwood's *Motion to Participate* in subcase 02-103 was granted after Black Mesa indicated it would not oppose the *Motion*.

Cottonwood's Motion for Relief

The same date Cottonwood filed its *Motion to Participate* in subcase 02-103, it filed a *Motion for Relief* in subcase 02-10300 seeking to reopen that subcase asking the Court to set aside or modify the **Partial Decree** disallowing the claim under I.R.C.P. 60(b)(6). The reason Cottonwood filed its *Motion for Relief* was because "IDWR has now determined that the water

right license upon which both claims are based must be amended and issued in the name of Cottonwood.”⁴

Cottonwood wrote that in 2000, it filed a *Petition to Correct License* for water right 02-2209 with IDWR seeking the addition of 8 cfs and 400 irrigated acres “because such quantity and acreage had not been licensed despite the fact that it had been permitted, and that water had been put to the permitted beneficial use during the permit development period.” Cottonwood's *Memorandum in Support of Rule 60(b) Motion for Relief*, at 2.

After IDWR’s hearing officer denied the *Petition to Correct License* in 2002, Cottonwood filed its *Exceptions to Recommended Decision and Order*. On August 12, 2010, IDWR issued its *Final Order Granting Petition to Correct License No. 02-02209* holding that license no. 02-2209 should be amended to include an additional 8 cfs and 400 irrigated acres and ordering that the issue of ownership would proceed forward as an interlocutory matter.

IDWR denied Black Mesa's *Petition for Reconsideration* on November 19, 2010, holding that the amended portion of license no. 02-2209 would be issued in Cottonwood's name, "but stating that such issuance was not a determination of ownership, and that such determination would need to be made by a District Court." Cottonwood's *Memorandum*, at 3.

Hearing on Cottonwood's Motion for Relief

A hearing on Cottonwood’s *Motion for Relief* was held by telephone conference on April 14, 2011. Charles L. Honsinger appeared for Cottonwood; Michael P. Lawrence and Michael C. Creamer appeared for Black Mesa; and Garrick L. Baxter appeared for IDWR.

The parties agreed there are now three proceedings in the SRBA essentially claiming the same water right: subcase 02-103, subcase 02-10300 and the *Amended Petition for Judicial Review*. They also agreed both SRBA claims (02-103 and 02-10300) are for the same water right – a portion of license no. 02-2209. The issue is who owns the water right.

⁴ On January 19, 2011, Black Mesa filed its *Amended Petition for Judicial Review* (CV OC 1101273) with the Ada County District Court stating: "The issue in this case is whether IDWR should have issued the amended portion of water license no. 02-02209, representing 8.0 cfs for irrigation of 400 acres owned by Black Mesa in section 14, T06S, R10E, B.M., in the name of Black Mesa rather than in the name of Cottonwood Mutual Canal Co." The *Amended Petition* was reassigned to the SRBA Court (CV-OC-2011-01273). On March 7, 2011, SRBA Presiding Judge Eric J. Wildman stayed the administrative appeal because "the Court finds it is in the best interest of the parties, and the judicial economy of this Court, to stay this proceeding while the parties resolve SRBA subcases 02-103 and 02-10330."

Special Master Report and Recommendation (02-10300)

Following the hearing on Cottonwood's *Motion for Relief*, the Special Master filed a *Report* on April 20, 2011, recommending the *Final Order Disallowing Water Right Claims* disallowing claim 02-10300 be set aside and the matter be referred back to the Special Master for proceedings to determine the ownership element of water rights 02-10300 and 02-103. The Special Master concluded:

The issue of ownership was not resolved in administrative proceedings before IDWR after nearly ten years and the only viable alternative is for the SRBA Court to solve the dilemma. In light of IDWR's decision to change its position on ownership of the license, the matter finally and squarely rests with this Court, either in the context of subcase litigation or the petition for judicial review.

Report, at 3.

Order Setting Aside

On June 1, 2011, the SRBA Presiding Judge entered an *Order Setting Aside Final Order Disallowing Water Right Claim* in subcase 02-10300 and referred the matter to the Special Master "for further proceedings to determine the ownership elements of water right nos. 02-10300 and 02-103."

Amended Claim 02-10300 and Amended Director's Report

On July 29, 2011, Cottonwood's *Motion to Amend* its claim 02-10300 was granted. On August 12, 2011, IDWR filed its *Amended Director's Report, Subcase Nos. 02-103 and 02-10300*. It recommended the two claims as follows:

02-103 – Black Mesa, .54 cfs to irrigate 28 acres within a 3,948 acre place of use from March 15 to November 15 with a priority date of May 10, 1965, based on beneficial use.

02-10300 – Cottonwood **and** Black Mesa, 8 cfs to irrigate 400 acres within a 428 acre place of use from April 1 to October 31 with a priority date of February 25, 1963, based on a license.⁵

⁵ In the "discussion" section of the *Director's Report*, IDWR wrote:

In preparing the new recommendation for water right no. 02-10300, the Department recognized that it needed to change its current recommendation for water right no. 02-103, which is Black Mesa's competing claim to water right no. 02-10300. . . . The Amended Director's Report for 02-103 is necessary to prevent an enlargement and to properly frame the ownership issue for the court.

Objections

Cottonwood

Cottonwood filed its *Objections* to the *Amended Director's Report* on September 7, 2011. It alleged water right 02-103 should not exist and in subcase 02-10300 it objected to name and address ("Black Mesa, LLC and others should be removed as co-owners of water right") and quantity ("Volume should be 1,600 AFY. Comment regarding combined use limitation should be deleted").

Black Mesa

Black Mesa filed its *Objections* on September 9, 2011. In subcase 02-103, it objected to quantity ("8.54 cfs without combined diversion rate limitation"), priority date ("February 25, 1963") and place of use ("Irrigation of 428 acres within a 3948 acre permissible place of use; should not be limited in combination within 2-2209B or 2-10300"). It also alleged water right 02-10300 should not exist.

Motions for Summary Judgment

Black Mesa

Black Mesa filed its *Motion for Summary Judgment* on October 7, 2011, arguing "that Black Mesa owns the water rights represented by the corrected portion of license no. 2-2209 (the "Section 14 Water Rights") authorizing diversions of 8.0 cfs of Snake River water to irrigate 400 acres in Section 14, T6S, R10E, B.M., owned by Black Mesa." *Motion*, at 1.

Black Mesa argued the Section 14 Water Rights were made appurtenant to the former-Desert Land Entries and when Black Mesa acquired the land by patent, the water rights were conveyed as an appurtenance; nothing has been done to separate the water rights from the land; Cottonwood has never beneficially used the water on the Sections 14 Lands or elsewhere and has no ability to do so; and "Cottonwood has sat on its hands while Black Mesa has made substantial investments in developing the Black Mesa Project in reliance on its title and Cottonwood's acquiescence." Black Mesa's *Memorandum in Support of Motion for Summary Judgment*, at 23.

Cottonwood

Cottonwood filed its *Motion for Summary Judgment* the same date as Black Mesa's – October 7, 2011. It wanted water right 02-10300 to be decreed "only in the name of Cottonwood with a per acre annual volumetric limitation of 4.0 acre-feet, and . . . that water right no. 02-00103 does not exist." *Motion*, at 1.

Cottonwood wrote:

Cottonwood has conclusively established that it was the owner of all portions of licensed water right no. 02-02209 at licensure, including water right no. 02-10300. There is no set of facts under which Black Mesa was either conveyed ownership of water right no. 02-10300, or otherwise obtained ownership of the same. Similarly, there is no set of facts under which Black Mesa could have obtained water right no. 02-00103 either through conveyance by Cottonwood or otherwise.

Memorandum in Support of Cottonwood Canal Company's Motion for Summary Judgment, at 14.

Hearing on Motions for Summary Judgment

The hearing on the two *Motions for Summary Judgment* was held on November 17, 2011, at the SRBA Courthouse in Twin Falls, Idaho. Michael C. Creamer appeared for Black Mesa, along with Wesley R. Wootan; Charles L. Honsinger appeared for Cottonwood; and Garrick L. Baxter appeared for IDWR. At the conclusion of arguments, the matter was taken under advisement.

Additional History

The facts behind these conflicting claims are generally not disputed and on the surface the issue is simple – who owns the water right that irrigates certain 400 acres referred to as "Section 14 Lands" or "Section 14 Water Right" in Elmore County.⁶ In its August 12, 2011 *Amended Director's Report*, IDWR updated its recommendations for both 02-103 and 02-10300. In subcase 02-103, it recommended the Section 14 water right to Black Mesa; in subcase 02-10300, IDWR recommended the same Section 14 water right to Black Mesa **and** Cottonwood "to properly frame the ownership issue for the court."

⁶ IDWR included the 400 acre Section 14 Lands within the recommended places of use for both 02-103 and 02-10300. In both subcases, the Section 14 Lands actually total 428 acres, but the parties have elected to describe their competing claims to the Section 14 Water Right as appurtenant to 400 acres.

Prima Facie Weight

Cottonwood argued the Director's recommendation of 02-10300 carries no *prima facie* weight under I.C. § 42-1411(4) because it recommended the same water right to two competing claimants: "At previous hearings, both parties and IDWR have argued that this right can only be owned by one or the other party, not both." Cottonwood's *Memorandum in Support of Cottonwood Canal Company's Motion for Summary Judgment*, at 5.

Desert Land Entries and License No. 02-2209 ⁷

The present dispute between Black Mesa and Cottonwood goes back to 1963, when IDWR issued permit no. 30990/02-2209 to Cottonwood to irrigate 4,480 acres of federal public lands under the Federal Desert Land Act, including the Section 14 Lands in dispute. Two years later, proof of beneficial use was made and on February 11, 1970, IDWR issued license no. 30990/02-2209 to Cottonwood for 79.7 cfs to irrigate 3,985 acres with a priority date of February 25, 1963.⁸ Exhibit B to *Affidavit of Wesley R. Wootan*, filed October 7, 2011, with *Memorandum in Support of Black Mesa's Motion for Summary Judgment*. For some unknown reason, the license omitted the Section 14 Lands.

In 1972, the Desert Land Entries were cancelled and the land remained in BLM ownership, but the BLM allowed the entrymen to retain possession and continue farming the land pending administrative and judicial appeals of the cancellations. Cottonwood continued irrigating and the entrymen continued farming the land until 1981.

BLM Patent

In the late 1980s, the Wootans (Black Mesa) arranged with the BLM for Black Mesa to farm the cancelled Desert Land Entries. On October 12, 1990, 4,097.57 acres of that land was patented to the Wootans, including the Section 14 Lands. Exhibit A to *Affidavit of Wesley R.*

⁷ The following history is gathered from Black Mesa's *Memorandum in Support of Black Mesa's Motion for Summary Judgment*, at 3-7 and Cottonwood's *Memorandum*, at 5-9, plus assorted attachments.

⁸ Black Mesa argued: "The federal public lands authorized for irrigation under permit no. 30990 and license no. 2-2209 were to be developed and farmed not by Cottonwood, but rather by its individual members pursuant to applications for entry under the Federal Desert Land Act." Black Mesa *Memorandum*, at 3. More on that later.

Wootan. Black Mesa has irrigated the Section 14 Lands since 1991, despite the acreage being omitted from license no. 02-2209.

1990 Agreement⁹

On December 15, 1990, Cottonwood, certain "Owners" and Black Mesa signed an Agreement with a number of recitals and operative provisions that have led to confusion.¹⁰ First of all, the Agreement recites that the Wootans acquired certain land by patent from the BLM "together with certain appurtenances thereto, which include the interest claimed by BLM in 74.10 cfs of Water License No. 02-2209."

The second recital is that Cottonwood is the "holder of record" of license no. 02-2209 for 79.7 cfs from the Snake River.

The third recital states: "BLM claimed ownership of Water Right No. 02-2209 by virtue of cancellation of the desert land entries formerly existing on the land [including Section 14 Lands] . . . and filed a formal claim of ownership in a water right adjudication proceeding [in Ada County] . . . which was dismissed on May 30, 1989, and BLM still claims 5.6 cfs of Water Right No. 02-2209."¹¹

Finally, in recitals 4, 5 and 6, Cottonwood wants to resolve its claim to 61.3 cfs of water right 02-2209; Black Mesa wants to "clear Cottonwood's claim for 12.8 cfs of Water Right No. 02-2209 in order to irrigate the acres Wootan has acquired from BLM"; and Cottonwood and the Owners agree "to the transfer to Wootan their claim to 12.8 cfs of Water Right No. 02-2209 and a portion of the irrigation system through which Wootan's 12.8 cfs of water right under Right No. 02-2209 can be delivered." In exchange, Wootan agreed to "transfer and quitclaim" to Cottonwood and the Owners all interest in 61.3 cfs of the water right and "disclaim" in favor of Cottonwood and the Owners all interest in the 5.6 cfs of the water right claimed by the BLM.

⁹ Exhibit C to *Affidavit of Wesley R. Wootan*.

¹⁰ The Agreement was actually signed by 1) Cottonwood, 2) "Owners" [Paul and Luann Hogg, Lefawn Ottley, Saragene Smith and the Ringert Clark law firm] and 3) Wesley and Christine Wootan. Whether some or all of the "Owners" are the former entrymen is not clear.

¹¹ On May 8, 1991, the USDI/BLM filed claim no. 02-2209C in the SRBA for 8.8 cfs to irrigate 440 acres based on a license. The claimed acreage did **not** include the Section 14 Lands. IDWR recommended the BLM's claim be disallowed. When the recommendation was uncontested, the SRBA Court entered a ***Final Order Disallowing*** the claim on July 10, 2009.

In its *Memorandum in Support of Black Mesa's Motion for Summary Judgment*, Black Mesa stated the key source of the dispute currently before the SRBA Court:

The 1990 Agreement resolved the parties' respective claims to right no. 2-2209 as it was reflected in the license at the time. It did not address the Section 14 Water Rights.

Black Mesa's *Memorandum*, at 4.

Discussion

Scope of Order

The parties and IDWR raised various issues in these proceedings beyond the single issue of who owns the amended portion of license 02-2209 – for instance, priority date, quantity, combined use remarks, annual volumetric limitations, duty of water and possible enlargement. Because the Director recommended what is essentially the same water right to two competing claimants, neither of the Director's August 12, 2011 amended recommendations are entitled to *prima facie* weight. That plus the fact that issues beyond ownership were not fully addressed mandates this **Order** be limited solely to who owns the water right that irrigates the Section 14 Lands. Once that single element is determined, the remaining elements can be addressed by IDWR, and maybe the SRBA Court, in later proceedings.

Origin of Section 14 Water Right

We know that license no. 30990/02-2209 (renumbered to 02-2209) was issued to Cottonwood in 1970, and for whatever reason the license omitted 400 permitted acres in Section 14. That necessarily means no right existed to irrigate the Section 14 lands until August 12, 2010, when Water Allocation Bureau Chief Jeff Peppersack entered his *Final Order Granting Petitions to Correct License No. 02-02209*. Mr. Peppersack's *Final Order* provided a comprehensive history of the matter before ordering:

Substantial evidence demonstrates that the Section 14 lands have been irrigated with water from the Snake River since 1965 when Cottonwood submitted its Notice of Completion of Works. Because amendment of the license will not result in an enlargement of use under the water right, the license shall be amended to allow for the irrigation of 400 acres of land in Section 14 using 8.0 cfs with a volume of 1338.95 afa from the Snake River.

....

However, the issue of ownership still must be addressed. The issue of ownership will proceed forward as an interlocutory issue, separate from the issue of whether the Department should amend the license.

Final Order, at 15.

Ownership of License No. 02-2209

When IDWR issued license no. 02-2209 to Cottonwood in 1970, no one contested the ownership. After the BLM cancelled the Desert Land Entries in 1972, no one initiated transfer proceedings with IDWR claiming ownership – not the BLM nor the entrymen and not even Black Mesa after it acquired the land by patent in 1990. Arguments the BLM once owned all or some portion the water right by virtue of its ownership of the land are without merit. *Joyce Livestock Co., v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007). Black Mesa only argued it was the lawful owner of a portion of the water right 29 years after the license was issued when it filed its SRBA claim (1989) and *Cross-Petition to Correct License and Petition to Change Ownership of License* with IDWR (2000).

Black Mesa argued the entrymen, as beneficial users of the water right, were the real owners. But the fact remains Cottonwood remained the legal owner. *Joyce Livestock*. Cottonwood continued irrigating and the entrymen continued farming the land until 1981, pending administrative and judicial appeals of the Desert Land Entries cancellation. After that, Cottonwood retained ownership of the license and made no attempt to transfer the water right to other lands.

Then, in the late 1980s, Black Mesa arranged with the BLM to farm the cancelled Desert Land Entries. The only evidence of record is that Black Mesa did so relying on Cottonwood's water license, the sole legal authorization of record to apply water to most of the lands.

As noted, when the BLM patented the former Desert Land Entries (including the Section 14 Lands) to Black Mesa in 1990, Black Mesa made no effort to transfer ownership of Cottonwood's license into its own name. It should go without saying that Black Mesa could not have acquired a water right from the BLM because there is no credible argument the BLM ever owned the right or no evidence the BLM initiated transfer proceedings through IDWR. In Idaho, the BLM has no authority to issue or transfer water rights.

There is compelling evidence that Black Mesa recognized Cottonwood as the lawful owner of license no. 02-2209 as late as 1989 before it filed its SRBA claim and 1990 when it

signed the 1990 Agreement. In that Agreement, the parties mentioned the BLM claimed some interest in license no. 02-2209 (later disallowed), but its claim did not include the Section 14 Lands. Most importantly, the parties recognized Cottonwood is the "holder of record" of license no. 02-2209 and only then did they agree Cottonwood would transfer to Black Mesa a portion of the water right not including the Section 14 Lands. As noted earlier, Black Mesa agrees even now the 1990 Agreement did **not** address the Section 14 Water Rights.

Cottonwood's Petition to Correct License

Nearly ten years after Cottonwood, the "Owners" and Black Mesa signed the 1990 Agreement, the first action Cottonwood initiated to confirm its ownership of the omitted portion of license no. 02-2209 (Section 14 Lands) was when it filed with IDWR a *Petition to Correct License* on October 31, 2000. In his *Final Order*, Mr. Peppersack wrote: "The petition sought to amend water right license no. 02-02209, issued on February 11, 1970, to include 400 additional acres, 8.0 cfs and 1,338.95 afa of water allegedly excluded from the license in error." *Final Order*, at 1.

Black Mesa did not protest amendment of the license. Black Mesa responded to Cottonwood's *Petition* by filing a *Cross-Petition to Correct License and Petition to Change Ownership of License* asserting that "because Black Mesa owns the acres sought to be added, the amended portion of the license must be issued in the name of Black Mesa." *Final Order*, at 1 and 12. While the the administrative proceedings continued before IDWR, the next action Cottonwood initiated was when it filed SRBA claim 02-10300 on January 5, 2006.

Forfeiture –v- Adverse Possession or Prescriptive Use

Forfeiture

In Idaho, a water right may be lost through nonuse: "All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter. . . ." I.C. § 42-222(2).

But the record in these subcases does not support a claim of forfeiture because water has been continuously and beneficially applied to the licensed acreage, plus the Section 14 Lands. It

was clear from Black Mesa's SRBA claim 02-103 filed in 1989, that Black Mesa sought to adversely possess Cottonwood's license with its 1963 priority date rather than pursue forfeiture where the right reverts to the State.

Adverse Possession or Prescriptive Use

The question then is whether Black Mesa – a junior appropriator – can adversely possess Cottonwood's senior priority. Most prior appropriation states do not allow a water right to be lost through adverse possession or prescriptive use:

Generally. . . rights held by prior appropriation cannot be lost to others by adverse possession. First, private individuals can obtain water rights only by compliance with statutory procedures. . . . Furthermore, rights to use a public resource cannot be adversely possessed. . . . Second, one's use of water cannot be adverse to others because everyone has the right to assume that any water use occurred within the priority system.

David H. Getches, *Water Law in a Nutshell*, 194 (4th ed., Thomson West, 2009).

However, the general rule concerning adverse possession of a water right does not apply in Idaho. Early on, the Idaho Supreme Court established broad guidelines to prove adverse possession or prescriptive use of water rights:

In order to obtain a prescriptive right to the use of water, the use upon which such claim is based must be adverse to the rights of the owner. It must be accompanied by all of the elements necessary to constitute adverse possession and use. The claimant must have used such water continuously, uninterruptedly, and adversely for a period of five years. The use of such water must be an invasion of the rights of the person against whom such right is sought to be established, such as would give a cause of action in favor of the latter. . . . [A] prescriptive right to the use of water cannot be acquired by the use thereof with the consent or permission of the owners, and as under the law of this state it is made a misdemeanor for one who has the right to the use of water to waste it, and the law requires him to permit it to flow down the stream in case his necessities for the time do not require its use, thus it is made by the law difficult to acquire a prescriptive right to the use of water. For, if the law requires the one entitled to the use of water to let others use it in case he may not, for the time, need it, they may have its use under the provisions of the law which commands the consent of the owner.

Hall v. Blackman, 8 Idaho 272, 282, 68 P. 19, 21 (1902); quoted in Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 80 (1968).

Later Supreme Court cases expanded on the proof required to establish adverse possession or prescriptive use of water rights:¹²

To gain title to another's water right by adverse possession or prescriptive use, the adverse claimant must demonstrate that his use was 1) open and notorious; 2) hostile to the claim of the rightful owner; 3) exclusive of the use and needs of the rightful owner; 4) continuous and uninterrupted; 5) under claim of right; 6) for the period prescribed by statute, *i.e.*, five years. The party claiming to have acquired the prescriptive right has the burden of demonstrating that he has satisfied all of the necessary elements. To establish a claim of prescriptive or adverse use, the party claiming to have acquired that right must show that he has used the water during each of the consecutive seasons of a five-year period when it was *actually* needed by the prior owner [citations omitted; emphasis original].

Crow v. Carlson, 107 Idaho 461, 466, 690 P.2d 916, 921 (1984).¹³

Six years after the *Crow* decision, the Idaho Court of Appeals cited *Crow* as controlling and went on to cite language from an even earlier Idaho Supreme Court decision:

[I]n order to constitute adverse possession of water, *the burden is upon the claimant to show that his use of the water deprived the prior appropriators of water at times when such prior appropriators actually needed the water*; the use does not become adverse until it interferes with the use thereof by the prior appropriators, *and therefore proof merely that the claimant used water and claimed the right to use it is no proof whatever of adverse use* [emphasis original].

Boise-Kuna Irr. Dist. v. Gross, 118 Idaho 940, 943, 801 P.2d 1291, 1294 (App., 1990) citing *Sears v. Berryman*, 101 Idaho 843, 846-847, 623 P.2d 455, 458-459 (1981).

Along the way, the Idaho Supreme Court qualified application of the statutory five year requirement, in some instances, to ameliorate harsh results:

The rule seems to be established that the uninterrupted and continuous use for more than the prescriptive period raises a presumption that such use was adverse and under claim of title. *Pfleuger v. Hopple*, 66 Idaho 152, 155, 156 P.2d 316, 317 (1945).

Lapse of time is not alone sufficient to defeat a right on the ground of laches. It must be shown that the defendant has been misled, to his injury, by the failure of the plaintiff to assert its right earlier. *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 443, 319 P.2d 965, 969 (1957).

¹² "The burden is on the claimant of a prescriptive right to prove all of the elements of prescription. And he has the burden of establishing it by evidence reasonably clear and convincing." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 83 (1968).

¹³ The five year statute referred to in *Crow* is I.C. § 5-210. In 2006, a statutory amendment substituted "twenty years" for "five years."

Conclusions of Law

The watershed event in this dispute is the 1990 Agreement. The parties were irrigating the former Desert Land Entries under license no. 02-2209, including the later amended Section 14 Lands, all the while acknowledging Cottonwood was at least the holder of record of the license. Nevertheless, questions of ownership of the license were simmering. The BLM claimed ownership of the water right after it cancelled the Desert Land Entries and filed a claim in an Ada County water right adjudication proceeding. That claim was dismissed in 1989, but the BLM continued to claim a smaller portion (5.6 cfs) of the water right and Cottonwood and the Owners continued to dispute that claim. At the same time, the Owners and Black Mesa each claimed some ownership interest in license no. 02-2209.

As an interim solution, the parties (minus the BLM), negotiated the Agreement. Black Mesa transferred and quitclaimed to Cottonwood and the Owners its interest in 61.3 cfs and disclaimed to them all interest in the 5.6 cfs still claimed by BLM. In return, Cottonwood and the Owners transferred and quitclaimed to Black Mesa 12.8 cfs, plus a portion of the irrigation system to deliver that water. The Agreement resolved the parties' various claims to license no. 02-2209 as it was issued, but left unresolved who owns the water right to irrigate the Section 14 Lands.

As noted earlier, there is no reasonable basis to argue the entrymen or the BLM "owned" the water right simply because it is appurtenant to the land. Cottonwood was the lawful owner of license no. 02-2209 until it transferred and quitclaimed a portion to Black Mesa in 1990, while retaining ownership of the balance. Despite what one or the other parties may have "assumed", Cottonwood could not have transferred the portion of the license covering Section 14 Lands because such right did not then exist.

As discussed before, there is no legal basis to find Cottonwood forfeited its ownership of the license because all along, the parties agreed water has been continuously and beneficially applied to the licensed acreage, plus the Section 14 Lands.

On the issue of adverse possession or prescriptive use urged by Black Mesa, there is no support for the argument. The simple answer is that until Black Mesa filed its claim in the SRBA in 1989, and then filed its *Petition to Change Ownership of License* in 1990, Black Mesa took no overt action to adversely possess all or any portion of the water right. In fact, the 1990 Agreement indicated Black Mesa continued to acknowledge Cottonwood was the holder of

record of the license. There was no evidence of any claim of an adverse possession or prescriptive use being open and notorious, hostile to Cottonwood's claim and exclusive of Cottonwood's use and needs. Lacking proof of those three elements, not to mention continuous and uninterrupted, under claim of right for the five years, there can be no adverse possession or or prescriptive use of Cottonwood's water right.

But more importantly, Black Mesa's claim filing in the SRBA in 1989, and its participation in administrative proceedings before IDWR in 2000, stayed any running of Idaho's five year adverse possession or prescriptive use statute.¹⁴

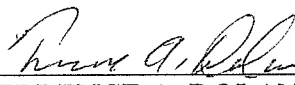
The pleadings and affidavits show that there is no genuine issue as to any material fact and Cottonwood is entitled to a partial summary judgment on the issue of ownership of the amended portion of license no. 02-2209 – Cottonwood is the lawful owner of the water right that irrigates 400 acres referred to the Section 14 Lands.

Order

THEREFORE, IT IS ORDERED that:

1. Cottonwood's *Motion for Summary Judgment* is **granted, in part**, on the issue of ownership of the amended portion of license 02-2209 (subcases 02-103 and 02-10300); and
2. Black Mesa's *Motion for Summary Judgment* on the same issue is **denied**.

DATED January 13, 2012.


TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

¹⁴ See former SRBA Judge R. Barry Wood's December 29, 1999 *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcase 36-2708, in which Judge Wood held that the filing of a claim to a water right in the SRBA is akin to a quiet title action and 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. The decision likewise determined that the filing of an SRBA claim tolled the running of the statutory forfeiture period.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTIONS FOR SUMMARY JUDGMENT was mailed on January 13, 2012, with sufficient first-class postage to the following:

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