

RECEIVED

JAN 27 2012

DEPARTMENT OF
WATER RESOURCES

COPY

Michael C. Creamer [ISB No. 4030]
Michael P. Lawrence [ISB No. 7288]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for Black Mesa Farms, LLC

**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

**MEMORANDUM IN SUPPORT OF
MOTION FOR PERMISSIVE
REVIEW**

Black Mesa Farms LLC (“Black Mesa”), by and through its counsel Givens Pursley LLP, files this memorandum in support of its *Motion for Permissive Review* (“Motion”) filed contemporaneously herewith. Black Mesa seeks review under SRBA Administrative Order 1 (“AO1”) § 9.e and I.A.R. 12 of the Special Master’s January 13, 2012 *Order on Motions for Summary Judgment* (“Order”). Black Mesa respectfully requests the Special Master recommend and forward this matter to the SRBA Presiding Judge for his determination of controlling questions of law including, without limitation, the following:

1. Whether the Section 14 Water Rights were appurtenant to the Section 14 Lands when Black Mesa acquired title to them from the United States by patent in 1990?
2. Whether the cancellation of a desert land entry severs the appurtenancy of a water right that has been beneficially used on and made appurtenant to the lands?

3. Whether the water right represented by the amended portion of license no. 2-2209 did not exist until 2010?
4. Whether, under *U.S. v. Pioneer and Joyce Livestock*, Cottonwood, which was formed to construct, operate and maintain an irrigation system to deliver water for beneficial use by the persons in possession of the land, has better title than Black Mesa to the Section 14 Water Rights where Cottonwood has never possessed land and cannot place the water to beneficial use?
5. Whether Cottonwood demonstrated its voluntary, intentional relinquishment of the Section 14 Water Rights where:
 - a. It did not file a claim to the Section 14 Water Rights in the SRBA until 2006, although it had claimed the Section 14 Water Rights in a prior adjudication in 1984;
 - b. It did not challenge Black Mesa's 1990 SRBA claim to the same water right Cottonwood claimed in 1984;
 - c. It failed to assert its ownership of the Section 14 Water Rights in its 1990 Agreement with Black Mesa;
 - d. It did not file a SRBA claim to the Section 14 Water Rights until 2006;
 - e. It did not challenge the SRBA Court's 2006 disallowal of its 2006 claim;
 - f. It did not object to IDWR's recommendation that the Section 14 Water Right be decreed to Black Mesa until 2010?
6. Whether the Section 14 Water Rights should be decreed to Black Mesa?

STANDARD OF REVIEW

SRBA AO1 1 § 9.e provides:

any party to the subcase may seek permissive review by the Presiding Judge of the Special Master's interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion and on which immediate consideration of the determination may advance the orderly resolution of the litigation following the procedures set forth in I.A.R. 12.

The issues raised herein present controlling questions of law as to which there are obvious differences of opinion. Immediate consideration and ruling by the Presiding Judge would advance the orderly resolution of this case by resolving these questions of law that are fundamental and prerequisite to the issuance of partial decrees in these subcases.

DISCUSSION¹

1. Despite applicable statutory and case law governing the appurtenancy of water rights, the Order fails to address the issue.

The Special Master's Order does not reconcile the undisputed fact that the Section 14 Water Rights were made appurtenant to the Section 14 Lands and never were severed from the lands by conveyance or reservation in a deed with the fact that Cottonwood lacks the means and the lands on which to place the water to beneficial use. The Order simply concludes "[t]here is no reasonable basis to argue the entrymen or the BLM 'owned' the water right simply because it is appurtenant to the land." Order at 15. This ignores a fundamental premise of Idaho water law.

Idaho's statutes and case law clearly state that water rights are appurtenant to the lands they irrigate. I.C. § 42-101 ("the right to the use of any of the public waters . . . shall become the complement of, or one of the appurtenances of, the land or other thing to which, through

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* and November 11, 2011 *Reply to Cottonwood's Response to Motion for Summary Judgment*.

necessity, said water is being applied”), I.C. § 42-220 (“all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted”); *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 111, 157 P.3d 600, 605 (2007), *citing Ickes v. Fox*, 300 U.S. 82, 95, 57 S.Ct. 412, 416-17, 81 L.Ed. 525, 530 (1937) (a water right which has been acquired by application to beneficial use to irrigation becomes, by state law, “part and parcel of the land upon which it is applied”); *Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959) (“Appellants’ decreed water right constitutes real property; such right is appurtenant to appellants’ lands to which the water represented thereby has been beneficially applied.”); *Follett v. Taylor Brothers*, 77 Idaho 416, 425, 294 P.2d 1088, 1094 (1956) (nearly identical to *Anderson*); *Paddock v. Clark*, 22 Idaho 498, ___, 126 P. 1053, 1054 (1912) (“Under the Constitution and statutes, this court has universally held that a water right is real property, and that it is an appurtenance to the land irrigated by the use of such water.”); *Russell v. Irish*, 20 Idaho 194, 198-99, 118 P. 501, 502 (1911) (“it is well established that a water right is an appurtenance to the land on which it has been used . . .”).

Moreover, “[i]t is well established that a water right is an appurtenance to the land on which it has been used and will pass by conveyance of the land.” *Silverstein v. Carlson*, 118 Idaho 456, 460, 797 P.2d 856, 860 (1990) (quoting *Russell v. Irish*, 20 Idaho 194, 198-99, 118 P. 501, 502 (1911)) (emphasis added). A “conveyance would carry with it the water right appurtenant to the land at the time of the conveyance, unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed.” *Id.* (emphasis added.) *See also Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007) (“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”).

As discussed in Black Mesa’s summary judgment briefing, there is no dispute that the Section 14 Water Rights were made appurtenant to the Section 14 Lands upon which they were developed and applied to beneficial use. In addition, there is no evidence that the Section 14 Water Rights were severed from the Section 14 Lands, either by reservation or by conveyance, prior to Black Mesa acquiring title to the lands in 1990 via patent with “appurtenances.”

2. Cancellation of the desert land entries did not sever appurtenant water rights from the Section 14 Lands.

The Order does not address whether the cancellation of the desert land entries in 1981 severed appurtenant water rights from the Section 14 lands. This is the fundamental question in this case because, despite the Order’s failure to mention appurtenancy, there is no dispute that water was applied to beneficial use on and made appurtenant to the Section 14 Lands beginning in 1965. These subcases cannot be resolved without a determination of whether the cancellation of a desert land entry severs the appurtenancy of a water right that has been beneficially used on and made appurtenant to land. *Sanderson v. Salmon River Canal Company, Ltd* holds that a water right appropriated by a delivery entity remains appurtenant to the land on which it is beneficially used, and must be delivered to those lands regardless of whether the land ultimately is patented. *Sanderson*, 34 Idaho at 161, 199 P. at 1003 (1921).

3. Water rights existed and were appurtenant to the Section 14 Lands when Black Mesa acquired title in 1990.

The Order avoids the issue of whether the Section 14 Water Rights passed to Black Mesa as appurtenances with its 1990 patent by finding that “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.” Order at 10. However, this conclusion is not consistent with fact or law.

If the Section 14 Water Rights did not exist until 2010—as found by the Special Master—then IDWR’s amendment of license 2-2209 would have been an unlawful enlargement of the license. In its August 12, 2010 *Final Order Granting Petition to Correct License No. 02-02209; Interlocutory Order Regarding Ownership and Setting Scheduling Conference*, IDWR determined that an amendment to a license “must not result in enlargement of its beneficial use under the licensed priority date.” R. Vol. V, p. 935 ¶ 28 (citing *Fremont-Madison* 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996)). Ultimately, however, IDWR found that no enlargement would occur by amending the license because the “Section 14 lands have been irrigated with water from the Snake River since Cottonwood’s irrigation works were completed on May 10, 1965.” R. Vol. V, p. 933 ¶ 21. In short, water rights appurtenant to the Section 14 Lands have existed since at least as early as 1965 when beneficial use began. Because the water rights made appurtenant to the Section 14 Lands by virtue of beneficial use beginning in 1965 were not severed from the lands prior to Black Mesa’s 1990 patent, those water rights passed to Black Mesa as appurtenances. These subcases cannot be resolved without a determination of whether the water right represented by the amended portion of license no. 2-2209 existed when Black Mesa acquired title in 1990, or did not exist until 2010.

4. The Order is contrary to *Joyce Livestock*’s conclusion that water rights must be appurtenant to land and cannot be held in gross.

The Order cites *Joyce Livestock* for its conclusion that Cottonwood owns the Section 14 Water Rights. Order at 11. However, *Joyce Livestock* does not support that conclusion because Cottonwood does not—and never has—owned any land to which the rights are or could be made appurtenant.

The *Joyce Livestock* Court held that “water rights that ranchers obtained by watering their livestock on federal land were appurtenant to their patented properties.” 144 Idaho at 12, 156 P.3d at 513. In reaching this conclusion, the Court analogized to the law of easements, and discussed the distinction between easements “in gross” and easements “appurtenant.” *Id.* at 13, 156 P.3d at 514. “The primary distinction between an easement in gross and an easement appurtenant is that in the latter there is, and in the former there is not, a dominant estate to which the easement is attached.” *Id.* (quoting *Nelson v. Johnson*, 106 Idaho 385, 387-88, 679 P.2d 662, 664-65 (1984)).

In the Order, the Special Master essentially grants Cottonwood a water right “in gross” since Cottonwood has never owned any land to which the water right could be appurtenant. There is no basis in Idaho law for granting a water right in gross. The very first section of the water code, I.C. § 42-101, states in relevant part:

the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied

Idaho Supreme Court decisions (including some cited above) further demonstrate the fundamental importance of appurtenance in water law. Indeed, in *Joyce Livestock*, the BLM was found to hold no water rights because they were specifically held to be appurtenant to other lands (i.e., the deeded ranch property). 144 Idaho at 12, 156 P.3d at 513. Cottonwood holds no deeded property to which the Section 14 Water Rights could be appurtenant, and therefore, it cannot hold the Section 14 Water Rights.

5. Under *U.S. v. Pioneer*, title to the use of water is held by users of the water, not by the water delivery entity.

The Order's conclusion that "Cottonwood is the lawful owner of the water right that irrigates 400 acres referred to as the Section 14 Lands," Order at 16, is not consistent with the Idaho Supreme Court's holding in *U.S. v. Pioneer*, 144 Idaho 106, 157 P.3d 600 (2007). In *Pioneer*—after a lengthy analysis concerning the relative rights of the federal government, irrigation delivery entities, and actual irrigators to decreed water rights—the Court ordered inclusion of a remark on the face of the water right decrees confirming that the United States appeared in the name and address section, but "as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water." *Id.* The interest of the water users, the Court described as "appurtenant to the lands" and "derived from law." *Id.* The instant Order neither cites nor distinguishes *Pioneer*, despite that decision's emphasis on the relationship between a delivery entity and the persons who use water in the context of ownership.

Here, Black Mesa is the water user whose interest in the Section 14 Water Rights is derived from law and is appurtenant to the Section 14 Lands it owns. Cottonwood, on the other hand, at best could be perceived as an irrigation delivery entity obligated to act on behalf of the users of water. Cottonwood never itself owned or irrigated any land. Cottonwood was formed as a non-profit corporation simply to "construct, or otherwise acquire, maintain, manage, operate, and control an irrigation system to furnish domestic, stock, and irrigation water therefrom" for use by the entrymen, who were its stockholders. R. Vol. III, pp. 447-48 (Cottonwood's Articles of Incorporation); R. Vol. I, p. 198 (stating the entrymen were Cottonwood's original shareholders). Today, however, Cottonwood's interest does not even rise to that of an appropriator/purveyor such as a canal company or irrigation district that might be found to hold bare legal title or title in trust for its patrons who actually put the water to

beneficial use. Cottonwood has no patrons. It manages no water rights. It neither operates nor maintains delivery facilities. In sum, Cottonwood has no use for water rights beyond selling them for profit.

6. Cottonwood's long and continuous knowing acquiescence in Black Mesa's use and enjoyment of the Section 14 Water Rights should preclude it from now asserting ownership.

The Order does not address the significant equities presented by the facts in this case, and whether Cottonwood's claim of ownership to the Section 14 Water Rights is barred under the doctrines of waiver or estoppel. For years Cottonwood sat on its hands while Black Mesa used the Section 14 Water Rights and pursued its claims to the rights in the SRBA.

The first claim to the Section 14 Water Rights (claim no. 2-103) was filed in 1984 by Cottonwood in a different stream adjudication (which was dismissed without resolution). Cottonwood thus knew the Section 14 Water Rights existed when it entered the 1990 Agreement with Black Mesa, but failed to assert ownership to the rights. Black Mesa filed its own claim to 2-103 in the SRBA in 1991 after it acquired patent to the Section 14 Lands, and after executing the 1990 Agreement with Cottonwood. Cottonwood was aware of this. Still, Cottonwood never claimed the Section 14 Water Rights in the SRBA until 2006 (under claim no. 2-10300), never challenged Black Mesa's claim no. 2-103 until 2010, and never challenged the SRBA Court's disallowal of its 2-10300 claim because it had been "[r]ecommended as Right No. 2-103 and 2-2209B"—both Black Mesa's claims. All the while, Black Mesa continued to use the water.

Long before Black Mesa entered the picture, Cottonwood knew about the Section 14 Water Rights, but nevertheless stood by for years while Black Mesa moved forward with its claim to and development of the rights. Cottonwood's acts should bar it from taking a water right now for mere profit when the right has been diligently pursued, developed and beneficially used by Black Mesa. As the Idaho Supreme Court held in *Hillcrest Irr. Dist. v. Nampa &*

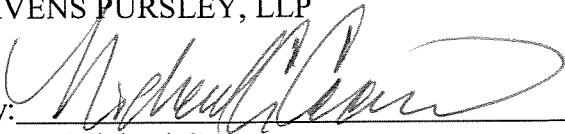
Meridian Irr. Dist., 57 Idaho 403, 411, 66 P.2d 115, 118 (1937), such “[l]ong and continuous knowing acquiescence in another’s use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim.”

CONCLUSION

Because these subcases cannot be resolved without a determination of the above controlling issues, Black Mesa respectfully requests the Special Master recommend and forward this matter to the SRBA Presiding Judge for their determination, and ultimately, for a determination of whether the Section 14 Water Rights should be decreed to Black Mesa.

DATED this 26th day of January, 2012.

GIVENS PURSLEY, LLP

By: 
Michael C. Creamer
Attorneys for Black Mesa Farms LLC