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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 21 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 (Black Mesa Farms LLC) and
	)	02-10300 (Cottonwood Mutual Canal Co.)
	)	
Case No. 39576	)	SPECIAL MASTER REPORT AND
	)	RECOMMENDATION RE: PERMISSIVE
_____	)	REVIEW

FINDINGS OF FACT

Order on Motions for Summary Judgment

On January 13, 2012, the Special Master entered an *Order on Motions for Summary Judgment* in the above two subcases. The Special Master granted Cottonwood's *Motion* in part on the issue of ownership and denied Black Mesa's *Motion* by concluding as a matter of law that Cottonwood is the lawful owner of the amended portion of license no. 02-2209 that irrigates 400 acres referred to as the Section 14 Lands.¹

The *Order* was granted in part because the parties and IDWR raised various issues beyond who owns the amended portion of license 02-2209 (i.e., priority date, quantity, combined use remarks, annual volumetric limitations, duty of water and possible enlargement), but those issues have not yet been fully addressed. It was expected that once ownership is determined, the remaining issues could be addressed by IDWR, and maybe the SRBA Court, in later proceedings.

¹ The 400 acre Section 14 Lands were inadvertently omitted from license no. 30990/02-2209 (re-numbered to 02-2209) when the license was issued to Cottonwood in 1970 even though the 400 acres were permitted and have been irrigated since 1965 when Cottonwood submitted its notice of completion of works.

Motion for Permissive Review

On January 26, 2012, Black Mesa filed its *Motion for Permissive Review* citing six "controlling questions of law," along with its brief arguments on each issue:

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?

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

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?

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

3. Whether the water right represented by the amended portion of license no. 2-2209 did not exist until 2010?

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

4. Whether, under *U.S. v. Pioneer* [*U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007)] and *Joyce Livestock* [*Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007)], 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?

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

² In this section, Black Mesa argued:

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 1964. 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 [emphasis in original].

Black Mesa's *Memorandum in Support of Motion for Permissive Review*, at 5, citing *Sanderson v. Salmon River C. Co., Ltd.*, 34 Idaho 145, 199 P. 999 (1921), as holding "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."

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?

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

6. Whether the Section 14 Water Rights should be decreed to Black Mesa?

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.

Black Mesa's *Memorandum*, at 1-9.

Black Mesa closed its *Memorandum* by requesting that the Special Master recommend and forward the matter to the Presiding Judge "for a determination of whether the Section 14 Water Rights should be decreed to Black Mesa." Black Mesa's *Memorandum*, at 10.

Cottonwood's Response

Cottonwood filed its *Response to Black Mesa Farms' Memorandum in Support of Motion for Permissive Review* on February 16, 2012. It opened by stating it does not generally oppose Black Mesa's request that the SRBA Presiding Judge review the issues determined by the Special Master.

However, it is necessary for purposes of judicial economy that this Court make it clear that any permissive review granted pursuant to Black Mesa's *Motion* is to be treated as a *Notice of Challenge* under AO1 § 13. Any other treatment may result

in the possibility that Black Mesa will attempt to raise the same or similar issues again once the Special Master's Recommendations are issued for these rights. Cottonwood's *Response*, at 2.

Cottonwood added that while it does not oppose Black Mesa's *Motion*, it does not agree with Black Mesa's assertion that there are substantial grounds for difference of opinion on the law or facts. Further, Cottonwood does not waive its right to attorney fees on permissive review.

Hearing

A hearing on Black Mesa's *Motion for Permissive Review* was held at the SRBA Courthouse in Twin Falls, Idaho. Michael C. Creamer appeared for Black Mesa; Charles L. Honsinger appeared for Cottonwood; and Garrick L. Baxter appeared for IDWR.

Black Mesa agreed the sole issue now before the Court was ownership of the Section 14 Water Right and Cottonwood agreed the issue warrants permissive review. Black Mesa also agreed it would not re-litigate the same issue of ownership in its *Amended Petition for Judicial Review* (CV-OC-2011-01273) recently stayed by the SRBA Presiding Judge Eric J. Wildman while the parties litigate subcases 02-103 and 02-10330.

However, at the conclusion of the hearing, Black Mesa announced it might raise the appurtenancy issue in future administrative transfer proceedings if Cottonwood prevails on the issue of ownership and attempts to dry up the Section 14 Lands now owned by Black Mesa. That being said, Cottonwood withdrew its non-opposition to Black Mesa's *Motion for Permissive Review*.

Cottonwood's Notice of Opposition

In light of Black Mesa's comments reserving the issue of appurtenancy of the water right to the Section 14 Lands in later administrative proceedings, Cottonwood filed its *Notice of Opposition to Motion for Permissive Review* on February 28, 2012. It wrote:

Cottonwood believes that the most appropriate procedure in these subcases is for the Special Master to resolve all issues related to the subject water rights, and issue Special Master's Recommendations so that any and all issues can be raised by the parties on Challenge as they so choose, as is contemplated by Administrative Order No. 1.

Cottonwood's *Notice*, at 1.

Black Mesa's Response

Black Mesa filed its *Response to Cottonwood's Notice of Opposition to Motion for Permissive Review* on February 28, 2012. It suggested "the most efficient manner for these subcases to proceed":

[F]or the Presiding Judge to first rule on the issues of law concerning all aspects of the parties' claims of ownership to the disputed water right. The issues on which Black Mesa seeks permissive review are strictly questions of law based on the record, which the Presiding Judge is uniquely situated to determine.

Black Mesa's *Response*, at 1.

Permissive Review

SRBA Administrative Order 1, Rules of Procedure, 9, e, Permissive Review

A Special Master or 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 Special Master shall review the motion and responses and recommend, with findings, whether it should be granted or denied. The motion and the Special Master's recommendation shall be forwarded to the Presiding Judge for determination [emphasis added].

CONCLUSIONS OF LAW

Controlling Question of Law

This dispute between Cottonwood and Black Mesa cannot proceed further without first determining who owns the amended portion of license no. 02-2209 that irrigates 400 acres referred to as the Section 14 Lands in Elmore County. Both parties claim ownership of the water right and Black Mesa owns the land.

Black Mesa argued in support of permissive review of that single legal issue because ownership is a controlling question of law as to which there are substantial grounds for difference of opinion. It also suggested immediate consideration of that issue will advance the orderly resolution of the litigation. Cottonwood first agreed with Black Mesa's *Motion for Permissive Review*, but changed its position when Black Mesa hinted it might raise the issue of appurtenancy in later administrative transfer proceedings if Cottonwood is decreed the owner of the water right.

While Cottonwood is rightfully concerned with having to litigate the ownership issue multiple times in different venues, the role of the SRBA Court in these two subcases is to first decide who owns the water right. The Court cannot foreclose a party from raising the issue later in another forum where the doctrine of *res judicata* will likely be addressed. The Court's sole concern here is whether permissive review of the ownership issue will advance the orderly resolution of these subcases. The Special Master agrees that permissive review of ownership is warranted after which the remaining issues can be resolved in an orderly and deliberate manner.

Grounds for Difference of Opinion

Black Mesa argued the Section 14 Water Right became appurtenant to the Section 14 Lands in 1964 or 1965 when Cottonwood submitted proof of beneficial use and when the Desert Land Entries were cancelled in 1972, the water right remained appurtenant to the land. Therefore, when Black Mesa acquired the land from the BLM in 1990, it acquired the appurtenant water right.

First of all, it is worth recalling that Black Mesa initially filed its *Notice of Claim* 02-103 in the SRBA based on *beneficial use* with a priority date of May 10, 1965. ("Field examination for 02-02209 identified the land claimed herein was irrigated at the time.") Ten years later, Black Mesa filed its *Amended Notice of Claim* 02-103 based on *beneficial use or permit* with a priority date of 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.")

Both Black Mesa's *beneficial use* claim and its amended *beneficial use or permit* claim sought to appropriate essentially the same water applied for by Cottonwood (February 25, 1963), permitted to Cottonwood (March 1, 1963), proved up by Cottonwood (June 11, 1965) and finally licensed to Cottonwood (February 11, 1970). The problem was that the license mistakenly omitted 400 permitted acres, the Section 14 Lands. Simply put, Black Mesa now attempts to gain from IDWR's mistake in not licensing all the permitted land to Cottonwood. It should be apparent Black Mesa could not beneficially appropriate the same water statutorily appropriated by Cottonwood. Legally, there was no water available. Hence, the beneficial use basis of Black Mesa's claim must fail.

It should be understood that Cottonwood appropriated the water as a mutual canal company specifically formed to construct, operate and maintain an irrigation system to deliver

water to land farmed by the entrymen. This was not a federal reclamation project as suggested by Black Mesa's analogous argument that the right was always appurtenant to the land and could never be held in gross as suggested in the *Pioneer* and *Sanderson* cases. Neither is Black Mesa's claim analogous to the *Joyce Livestock* case because Black Mesa's claim is essentially based on a license that was uncontested for 29 years.

When the Desert Lands Entries were cancelled in 1972, the BLM did not succeed to the water right, but rather Cottonwood retained ownership and continued delivering water to the lands while the entrymen continued farming the land. Ownership of the license was not disputed until 1989, and no transfer proceedings were ever initiated. Until that date, the evidence is that Black Mesa and everyone involved relied on Cottonwood's license to divert water from the Snake River.

Cottonwood was the "holder of record" of license no. 02-2209 until the parties signed the 1990 Agreement wherein Cottonwood transferred to Black Mesa a portion of the water right *not* including the Section 14 Lands. The fact that Cottonwood may not have claimed ownership of a Section 14 Water Right in 1990 is of no moment because at that time, all the parties knew a portion of the permitted acreage was mistakenly omitted. In other words, on paper there was no lawful authority to apply water to the Section 14 Lands. No right existed to irrigate the Section 14 Lands until 2010 when IDWR entered its *Final Order* correcting license no. 02-2209.

The facts that Cottonwood did not file its own SRBA claim to the Section 14 Water Right until 2006, and did not object to Black Mesa's claim until 2010, are irrelevant since commencement of the SRBA in 1987, and Cottonwood's *Petition to Correct License* filed with IDWR in 2000, essentially stayed the issue of ownership. The same can be said of Cottonwood's alleged acquiescence in Black Mesa's continuing use of the Section 14 Water Right.

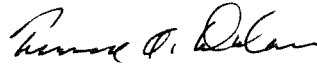
Permissive Review Warranted

It is apparent the issue of ownership of the amended portion of license 02-2209 is a controlling question of law in these subcases; there are substantial grounds for difference of opinion; and immediate consideration of the Special Master's determination may advance the orderly resolution of the litigation.

Recommendation

THEREFORE, IT IS RECOMMENDED that the SRBA Presiding Judge **grant** Black Mesa's *Motion for Permissive Review* of the Special Master determination as a matter of law that Cottonwood is the lawful owner of the amended portion of license no. 02-2209 that irrigates 400 acres referred to as the Section 14 Lands.

DATED March 21, 2012



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER REPORT AND RECOMMENDATION RE: PERMISSIVE REVIEW was mailed on March 21, 2012, with sufficient first-class postage to the following

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