

Keen, Shelley

From: Keen, Shelley
Sent: Monday, February 05, 2018 3:56 PM
To: 'Brian Higgs'
Cc: Luke, Tim
Subject: RE: Cottonwood Water Users Agreement
Attachments: Cottonwood Water Users Agreement.pdf

Brian,

I reviewed the 1995 "Cottonwood Water Agreement" you emailed. For a legal opinion regarding the agreement, including whether the agreement is still in effect, I recommend contacting your attorney. For general answers to your questions from a water administration perspective, see below.

1-Can the agreement allow for stock and domestic uses all year around even though those uses and period are not conditions of right 45-2062?

IDWR expects water rights to be administered according to their decreed or licensed elements, including the season of use and purpose of use. According to the approval document for Transfer 80686, Water Right 45-2062 authorizes the diversion of 70 cfs from Big Cottonwood Creek for irrigation within Oakley Canal Company's service area. An agreement between parties cannot authorize water diversion and use inconsistent with the decree or license. Any change to the authorized purpose of use or season of use would require a transfer or Water Supply Bank rental approved by IDWR.

Some incidental stock watering may occur when cattle drink water that has been diverted for irrigation purposes consistent with the decree or license. Also, pursuant to Idaho Code § 42-113, a water right filing is not required for the in-stream watering of livestock. However, IDWR will not instruct a watermaster to deliver water for in-stream stock watering unless the user has a water right establishing the elements, including priority date, quantity, and place of use.

2- Can water be recharged under 45-2062 as the agreement seems to imply?

As stated in the response to Question 1, any change to a water right's authorized purposes of use would require a transfer or Water Supply Bank rental. In either process, some of the irrigation beneficial use, including authorized acres, would have to be given up to prevent enlargement when the use is changed.

3-What effect does the agreement have on water right 45-7567?

IDWR will look to the water right elements in the partial decree to determine how to administer the right. Item 1 on page 3 of the agreement states that the parties will petition IDWR to "attach this contract to Irrigation District's permit number 45-7567." However, I didn't see any reference to the agreement or any of its provisions on the permit, license, or decree for Right 45-7567. Both the license and the decree post-date the agreement; the parties would have had ample time to seek to include the agreement on either.

IDWR sometimes sees agreements with provisions outside IDWR's statutory purview. In those cases, it may be incumbent upon the parties, rather than IDWR, to enforce the agreement. I recommend consulting your attorney if you need an opinion on whether the parties can still enforce provisions of the agreement.

As always, call or email if you want to talk it over some more.

Regards,

Shelley

Shelley Keen
Water Rights Section Manager
Idaho Department of Water Resources
Shelley.Keen@idwr.idaho.gov
208-287-4947

From: Brian Higgs [mailto:brian@waterwellconsultants.com]
Sent: Friday, February 02, 2018 4:36 PM
To: Keen, Shelley <Shelley.Keen@idwr.idaho.gov>
Subject: Fw: Cottonwood Water Users Agreement

Hi Shelley.

The agreement you cited is a different one. However, thank you for reviewing it.

I have attached the agreement that is in question. I also forwarded the email causing my wonderment.

Thank you.

Brian

From: jaxonhiggs@icloud.com
Sent: Friday, February 02, 2018 4:19 PM
To: 'Brian Higgs'
Subject: FW: Cottonwood Water Users Agreement

From: Don F. Pickett [mailto:donfp@pmt.org]
Sent: Thursday, October 26, 2017 2:58 PM
To: Jaxon Higgs <jaxonhiggs@icloud.com>
Subject: Cottonwood Water Users Agreement

Hello Jaxon,

This email is transmitted in response to your assertion at our SWID meeting today that SWID owns the Cottonwood water rights for water that is injected into the aquifer in that area. I first ask, why would SWID agree to pay annual rent for this water if, at the same time, it claims ownership of this water? Attached is a copy of the Cottonwood Water Users Agreement dated November 8, 1995 to which Southwest Irrigation District is a party. You will notice in Section 5 of this agreement that the parties agree that Oakley Canal

Company has a right to 70 CFS of Cottonwood water (priority date March 10, 1909) for irrigation or domestic purposes, "and further that there may be occasions when Canal Company may not call for water and thereby allow Irrigation District the use of said water for injection purposes at a fee which may be acceptable by the Board of Directors of the Canal Company at its annual meeting or otherwise. Canal Company acknowledges no intent to abandon or forfeit its aforementioned water right, and Irrigation District agrees that so long as this agreement for recharge water is in effect, it shall neither make an adverse claim against Canal Company, nor shall it claim abandonment or forfeiture on the part of Canal Company."

I caution against any person or party reneging on this agreement with a claim of ownership rights to the water that is injected from OCC's water right in express violation of this agreement; otherwise, I suspect that the OCC Board will very quickly terminate all use of its water for SWID injection purposes.

Don



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COTTONWOOD WATER AGREEMENT

RECEIVED
NOV 22 1995

THIS AGREEMENT, made this 8 ^{Burley} of ~~May~~ ^{LEGAL}, 1991, between
DEL ROY MITTON, of Route 1, Oakley, Idaho 83346 ("Mitton") and
OAKLEY CANAL COMPANY, a private Idaho corporation, of P.O. Box
207, Oakley, Idaho 83346 ("Canal Company"), and IDAHO DEPARTMENT
OF FISH & GAME, a body politic duly organized and existing under
the laws of the State of Idaho, of P.O. Box 428, Jerome, Idaho
83338 ("FISH & GAME"), and COTTONWOOD WATER USERS ASSOCIATION, a
private Idaho corporation, of c/o Mike Cranney, Route 1, Oakley,
Idaho 83318 ("Cottonwood Association"), and SOUTHWEST IRRIGATION
DISTRICT, a body politic and corporate duly organized and
existing under the laws of the State of Idaho, of P.O. Box 668,
Burley, Idaho 83318 ("Irrigation District");

W I T N E S S E T H:

WHEREAS, rights in the waters of Big Cottonwood Creek have
been decreed, licensed and permitted as follows:

1. Decree issued on March 19, 1892 entitled A. V. Cauldwell, Jr., et al., v. Anderson, a photocopy of which is attached hereto and incorporated herein by reference as Exhibit A, providing for the diversion of water from the said creek at specified rates for irrigation purposes without any season of use limitations.
2. Decree dated September 20, 1905 entitled Iverson, et al., v. Isachsen, et al., a photocopy of which is attached hereto and incorporated herein by reference as Exhibit B, providing for the diversion of water from said creek at specified rates without limitation as to purpose or season of use.
3. License bearing a priority date of March 10, 1909 issued to Oakley Canal Company, an abstract of which is attached hereto and incorporated herein by

RON F. PICKETT
ATTORNEY AT LAW
ROUTE 1 BOX 80-B
OAKLEY, IDAHO 83346

COTTONWOOD WATER AGREEMENT

THIS AGREEMENT, made this _____ of May, 1995, between DEL ROY MITTON, of Route 1, Oakley, Idaho 83346 ("Mitton") and OAKLEY CANAL COMPANY, a private Idaho corporation, of P.O. Box 207, Oakley, Idaho 83346 ("Canal Company"), and IDAHO DEPARTMENT OF FISH & GAME, a body politic duly organized and existing under the laws of the State of Idaho, of P.O. Box 428, Jerome, Idaho 83338 ("FISH & GAME"), and COTTONWOOD WATER USERS ASSOCIATION, a private Idaho corporation, of c/o Mike Cranney, Route 1, Oakley, Idaho 83318 ("Cottonwood Association"), and SOUTHWEST IRRIGATION DISTRICT, a body politic and corporate duly organized and existing under the laws of the State of Idaho, of P.O. Box 668, Burley, Idaho 83318 ("Irrigation District");

W I T N E S S E T H:

WHEREAS, rights in the waters of Big Cottonwood Creek have been decreed, licensed and permitted as follows:

1. Decree issued on March 19, 1892 entitled A. V. Cauldwell, Jr., et al., v. Anderson, a photocopy of which is attached hereto and incorporated herein by reference as Exhibit A, providing for the diversion of water from the said creek at specified rates for irrigation purposes without any season of use limitations.
2. Decree dated September 20, 1905 entitled Iverson, et al., v. Isachson, et al., a photocopy of which is attached hereto and incorporated herein by reference as Exhibit B, providing for the diversion of water from said creek at specified rates without limitation as to purpose or season of use.
3. License bearing a priority date of March 10, 1909 issued to Oakley Canal Company, an abstract of which is attached hereto and incorporated herein by

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reference as Exhibit C, providing for the diversion of water from said creek at a rate of 70 CFS for irrigation and domestic purposes without season of use limitations.

4. Permit bearing a priority date of February 27, 1985 issued to Southwest Irrigation District, an abstract of which is attached hereto and incorporated herein by reference as Exhibit D, providing for the diversion of water from Big Cottonwood Creek and Big Cedar Canyon at a rate of 30 CFS for groundwater recharge from March 1 to July 10.

said decreed rights having since been conveyed down the chain of title to various owners now comprising Mitton, Fish & Game, and other individuals and businesses organized collectively under the Cottonwood Association; and

WHEREAS, said decreed users have by common practice, long-standing and continuous custom and usage, made it a settled and fixed practice to divert and appropriate their Cottonwood water for irrigation purposes from the date of the thawing of land in the spring, and have judged said use to constitute a beneficial or useful purpose pursuant to their said decrees; and

WHEREAS, said decreed users have by common practice, long-standing and continuous custom and usage, made it a settled and fixed practice to divert and appropriate their Cottonwood water for domestic stockwater and/or culinary purposes throughout the year without limitation as to time of use, and have judged said use to constitute a beneficial or useful purpose pursuant to their decreed and constitutional uses; and

WHEREAS, Fish & Game, Canal Company, and Mitton, and other users comprising the Cottonwood Association have purchased or

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have otherwise acquired property rights in Cottonwood Creek water which have grown up in anticipation of unrestricted time of use limitations for irrigation purposes, provided the said water, in their judgment, is put to beneficial use; and

WHEREAS, the Idaho Department of Water Resources has received protests from Mitton, Canal Company, and Fish & Game against the application of Irrigation District to renew two permits to inject Cottonwood water (numbers 45-W-3 and 45-W-4), said permits having expired on December 1, 1994, as a consequence of perceived infringements on their respective decreed and licensed rights; and

WHEREAS, the aforesaid protestants stipulate and agree to withdraw their said protests in accordance with and on condition of the following terms and conditions:

NOW THEREFORE, in consideration of the foregoing recitals and the mutual promises and covenants, it is mutually agreed by the parties hereto as follows:

1. Agreement as a Condition to Appropriate Water. The parties agree among themselves and hereby petition the Idaho Department of Water Resources to include this contract as a condition on Irrigation District's two injection well permits (numbers 45-W-3 and 45-W-4) and also to attach this contract to Irrigation District's permit number 45-7567, its successors and assigns, and to make it a part thereof, and further to include this contract as a part of any license or decree which may later

issue to Irrigation District, its successors and assigns. Failure of Idaho Department of Water Resources or of any court to subject Irrigation District's water permit, license or decree to the provisions of this agreement shall make this agreement terminable pursuant to the provisions of Paragraph 7 herein.

2. Period of Use for Aquifer Recharge. It is agreed that Irrigation District shall not place a call on Cottonwood water or otherwise divert water from said creek after March 14 except during those rare years in which there is such excess water that no other decreed or licensed user shall desire to divert or appropriate water pursuant to their respective decreed or licensed rights as herein defined.

3. Period of Use for Irrigation. The parties hereto recognize and agree that Cottonwood water may be beneficially used for irrigation from March 15 through October 31, excepting that any successor of the A.V. Cauldwell Jr., J.H. Cauldwell and J.F. Cauldwell water as described in the said Cauldwell v. Anderson decree is restricted therein from April 1 to June 10. The parties further understand that Idaho Department of Water Resources, by attaching this agreement as a condition on the Permit of Irrigation District, shall not at the same time be declaring the position of Idaho Department of Water Resources as to any proper period or season of use.

4. Period of Use for Domestic Purposes. The parties understand and agree that Mitton, Fish & Game, and Arden Cranney,

their successors and assigns, shall be entitled to a flow in the stream throughout the year for stockwater at a rate of 12 gallons per cow per day (or its equivalent for other livestock species) together with a reasonable conveyance loss as shall be determined by Idaho Department of Water Resources or other person agreeable by the parties, and further that they, or any of them, at their option, shall be entitled to divert and use their said domestic share, for stockwater or other domestic purposes, through their head gate rather than from the stream. The parties agree that Fish & Game may seek to transfer its stockwater right, or a portion thereof, from a right to water 500 head of cattle to a wildlife use. It is also agreed that the aforesaid parties, or any of them, shall be entitled to an additional flow of water for culinary purposes existing at the time this agreement is entered into with a sufficient rate of flow, as determined by Idaho Department of Water Resources or other person agreeable among the parties herto, to sustain 13,000 gallons per day in a culinary well at its present depth.

5. Use of Oakley Canal Company Water for Injection. The parties hereby acknowledge that Canal Company has a licensed right to 70 CFS of Cottonwood water for irrigation or domestic purposes without limitation on time of use (subject to Paragraph 3 above), and further that there may be occasions when Canal Company may not call for water and thereby allow Irrigation District the use of said water for injection purposes at a fee

which may be acceptable by the Board of Directors of the Canal Company at its annual meeting or otherwise. Canal Company acknowledges no intent to abandon or forfeit its aforementioned water right, and Irrigation District agrees that so long as this agreement for recharge water is in effect, it shall neither make an adverse claim against Canal Company water, nor shall it claim abandonment or forfeiture on the part of Canal Company.

6. Effect of Legal Proceedings to Determine Water Rights.

If, as a consequence of any legal proceedings including but not limited to Civil Case Number 39576, Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, commonly known as the Snake River Basin Water Rights Adjudication, it is determined that any party hereto shall be entitled to rights or privileges (or shall not be entitled to rights or privileges) consistent with the terms and conditions contained herein, then in such event this agreement shall be amended so as to be reconcilable with the determination of said court.

7. Termination of Agreement. It is agreed by the parties hereto that should Idaho Department of Water Resources or any other federal or state department, bureau or agency determine that this agreement, or any portion hereof, is contrary to public policy or unenforceable against Irrigation District, or further that if any such state or federal department, bureau or agency shall encourage or promote before any state or federal court that this agreement or any portion of this agreement should not be

enforced, adjudged or decreed in accordance with any term or condition of this agreement, that this agreement may be terminated by the unanimous vote of Cottonwood Association, Fish & Game, Mitton and Canal Company, in which event it is agreed that all rights shall return the same as if this agreement was never entered. It is further agreed that should Irrigation District be supportive of any effort to frustrate the purpose and intent of this agreement, or shall otherwise default in any term or condition hereof, that this agreement may be terminated as provided above, which termination shall constitute a failure to satisfy the condition on Irrigation District's Permit to appropriate Cottonwood water.

8. Interpretation of Agreement. It is the intention of the parties hereto that the decreed water right users and Canal Company are entitled under their respective decrees and license to a greater period of use than is contemplated in this agreement, and further that as a consequence thereof Irrigation District may by entering this agreement be enabled to appropriate and divert more water than otherwise would be its rightful claim. It is therefore understood and agreed among the parties hereto that all questions of interpretation of this agreement are intended to be for the benefit of the decreed users and Canal Company and against Irrigation District.

This agreement shall be interpreted so as not to conflict with any bylaws, other existing agreements (including but not

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limited to an agreement dated April 13, 1985 between Cottonwood Association and predecessors of Irrigation District), or with federal or state law, and to the extent that any such conflicts occur which render any provision herein void or unenforceable, the remaining portion of this agreement shall remain in full force and effect.

9. Contractual Effect. The terms of this agreement are intended to be contractual and not mere recitals.

10. Continuation. Unless modified or terminated as hereafter provided, this agreement shall continue in force and effect in perpetuity.

11. Recordation and Filing. This agreement shall be recorded in the office of the County Recorder of Cassia County, Idaho, and shall be binding upon all of the parties and their successors in interest unless modified or terminated as hereafter provided. A copy of this agreement shall also be filed with the Idaho Department of Water Resources.

12. Modification. Unless modified by a court of competent jurisdiction, any modification of this agreement shall be binding only by a written approval of the parties to this agreement, their heirs, successors or assigns, and such written approval shall be acknowledged and filed for record in the office of the County Recorder of Cassia County, Idaho.

IN WITNESS WHEREOF, the parties have entered into this agreement the day and year first above written.

DON F. PICKETT
ATTORNEY AT LAW
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OAKLEY, IDAHO 83346

Del Roy Mitton
DEL ROY MITTON

OAKLEY CANAL COMPANY

By: John R. Martin
John R. Martin, V. P.
Attest: Daren Critchfield
Daren Critchfield, Sec.

IDAHO DEPARTMENT OF FISH & GAME

By: Jerry M. Conley
Jerry M. Conley, Director
Attest: _____

COTTONWOOD WATER USERS ASSOCIATION

By: Mike Cranney
Mike Cranney, Chairman
Attest: Kim Cranney
Kim Cranney, Secretary

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SOUTHWEST IRRIGATION DISTRICT

By: Garr H. Wayment
Garr Wayment, Chairman

Attest: Randy Brown
Randy Brown, Secretary

STATE OF IDAHO)
) ss:
County of Cassia)

On this 14th day of November, in the year 1995, before me, the undersigned, a Notary Public in and for said State, personally appeared DEL ROY MITTON, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Patricia Ann Pickett
Notary Public for Idaho
Residing at: Oakley, Idaho
My Commission Expires: 8/26/98

STATE OF IDAHO)
) ss:
County of Cassia)

On this 15 day of November, in the year 1995, before me, the undersigned, a Notary Public in and for said State, personally appeared JOHN R. MARTIN and DAREN CRITCHFIELD, known to me to be the Vice-President and Secretary of OAKLEY CANAL COMPANY, the corporation that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

Sharon K. Kinsler
Notary Public for Idaho
Residing at: Oakley, Idaho
My Commission Expires: 3/10/2000

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ATTORNEY AT LAW
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