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DISTRICT COURT OF THE STATE OF IDAHO
SIXTH JUDICIAL DISTRICT
POWER COUNTY

ABERDEEN-SPRINGFIELD CANAL COMPANY, an Idaho Corporation; and JEFFREY and CHANA DUFFIN, individually, as stockholders, and as husband and wife, Plaintiffs, vs. IDAHO DEPARTMENT OF WATER RESOURCES, an executive department of the State of Idaho, Defendant, and A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DSITRICT #2, BURLEY IRRIGATION DISTRICT, MINLER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, and TWIN FALLS CANAL COMPANY, Defendant-Interveners.	Case No. CV-2014-165 **PLAINTIFFS' REPLY TO IDWR AND SWC RESPONSES**

Plaintiffs, Aberdeen-Springfield Canal Company ("ASCC") and Jeffrey and Chana Duffin ("Duffins"), by and through their counsel, Randall C. Budge of Racine, Olson, Nye, Budge & Bailey, Chartered, submit this reply brief in opposition to *IDWR's Response to ASCC's Motion for Summary Judgment* and *Surface Water Coalition's Response in Opposition to Plaintiffs' Motion for Summary Judgment* filed March 18, 2014.

I. INTRODUCTION

Many of the arguments in IDWR's and SWC's response briefs were made in their opening briefs filed March 4, 2015, and are addressed in *Plaintiffs' Response in Opposition to IDWR and SWC Motions for Summary Judgment* filed on March 18, 2015. This reply brief clarifies Plaintiffs' position in light of argument made in IDWR's and SWC's response briefs, and highlights the fundamental error in IDWR's assertion that ASCC is not allowed to use existing wells to recover water under I.C. § 42-228.

II. DISCUSSION

A. Any ambiguity in I.C. § 42-228 must be reasonably interpreted to permit canal companies to use recovery wells drilled by their shareholders.

IDWR and SWC again argue that I.C. § 42-228 plainly states that a canal company cannot use a well to recover seepage unless the canal company personally drilled the well. IDWR argues that this is a "clear and unambiguous" requirement that should be followed "even if the result would be absurd."[1] IDWR and SWC suggest that Plaintiffs advocate abandoning I.C. § 42-228's explicit requirements.

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[1] *IDWR's Resp. to ASCC's Mot. for Summ. J.* at 6 (citing *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 896, 265 P.3d 502, 509 (Idaho 2011)).

To be clear, Plaintiffs dispute that I.C. § 42-228 explicitly requires ASCC to both drill and own any recovery well it uses. Plaintiffs believe a simple reading of I.C. § 42-228 allows canal companies and their shareholders to work in tandem to recover groundwater lost in the canal companies' irrigation works for further use on the shareholders' lands, regardless of which of them physically drilled or legally owns the well.[2] Further, that to the extent ambiguities exist in applying I.C. § 42-228 to canal companies and their shareholders, "[s]tatutory constructions 'that would lead to absurd or unreasonably harsh results are disfavored.'"[3] Under this standard, Plaintiffs' interpretation prevails.

While IDWR claims that a recovery well "must be drilled by a canal company,"[4] SWC claims that "wells must be drilled by the owner of the 'irrigation works' and 'water rights.'"[5] Both take issue with Plaintiffs' claim that whether the canal company drilled the well or later acquired it is a distinction without a difference. Their arguments assume that, under I.C. § 42-228, "canal companies, irrigation districts, and other owners of the irrigation works" that "open[]" recovery wells must at the same time be the "parties constructing the wells."[6]

I.C. § 42-228 does not impose this requirement. The statute authorizes "the excavation *and opening* of wells and withdrawal of water therefrom by

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[2] Both ASCC and its shareholders have water rights appurtenant to shareholders' land. *See Pls.' Resp. in Opp. to IDWR and SWC Mots. for Summ. J.* at 14-15. Thus, either a canal company or its shareholder can be the party "constructing the well." I.C. § 42-228.

[3] *Stonebrook Constr., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 932, 277 P.3d 374, 379 (Idaho 2012) (quoting *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004)).

[4] *IDWR's Resp. to ASCC's Mot. for Summ. J.* at 5.

[5] *Surface Water Coalition's Resp. in Opp. to Pls.' Mot. for Summ. J.* at 7.

[6] The party "excavating" a recovery well will logically be the party "constructing the well[]," but the party "opening" a well will not necessarily be the party "constructing the well[]." I.C. § 42-228.

canal companies."[7] This phrase authorizes canal companies to not only *excavate* (drill) wells, but also to *open* wells.

"Statutes must be read to give effect to every word, clause and sentence."[8] Plaintiffs' interpretation gives effect to the word "open" by allowing canal companies to open preexisting wells for use as recovery wells, whereas IDWR's and SWC's interpretation renders it superfluous.

The next reference in I.C. § 42-228 addressing the identity of the parties constructing recovery wells merely states that water can be recovered "for further use on . . . lands to which the established rights of the parties constructing the wells are appurtenant."[9] Nowhere in the text is there a requirement that the party opening the well be the same party that constructed the well. A practical reading of I.C. § 42-228 is that a canal company can open and operate a well constructed and owned by a shareholder so long as the water is used solely to recover the company's water for application to beneficial use on the shareholder's land. Construing the statute this way achieves its purposes because the well recovers water "use[d] on . . . lands to which the established water rights of the part[y] constructing the well[] are appurtenant."[10]

This less obstructive reading of I.C. § 42-228 grants canal companies and its shareholders the ability to work together to recover canal company water. As stated previously, whether a canal company or its shareholder initially drilled the well is "a distinction without a difference when it comes

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[7] I.C. § 42-228 (emphasis added).

[8] *Westerberg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (Idaho 1988) (quoting *Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986)).

[9] I.C. § 42-228.

[10] ASCC has previously established that ASCC shareholders own title to water rights. *Pls.' Resp. in Opp. to IDWR and SWC Mots. for Summ. J.* at 14-15.

to accomplishing the statutory purpose of allowing the recovery of water losses through a [canal company's] conveyance system."[11]

This interpretation also avoids ASCC unnecessary and wasteful construction of duplicative wells when an existing well would work perfectly fine.

B. IDWR's interpretation of I.C. § 42-228 is predicated on the mistaken assertion that ASCC cannot recover its water once it enters a public source.

While IDWR claims the Duffin well violates I.C. § 42-228 simply because it was not drilled by ASCC,[12] much of its reply brief is dedicated to the argument that "once water is comingled with another source, it is no longer subject to being recovered by the original appropriator."[13] IDWR contends that I.C. § 42-228 only allows water to be recovered from "a perched aquifer or confining layers."[14]

IDWR seems to acknowledge that its argument that ASCC cannot use existing wells to recover water only makes sense if I.C. § 42-228 prohibits the recovery of water after it enters the aquifer. Without this restriction, there is no basis for IDWR's argument that ASCC must drill a new well so IDWR has the opportunity to impose restrictions that prevent it from recovering water that enters the aquifer. In other words, if I.C. § 42-228 allows ASCC to recover its water from the aquifer, then it is absurd to construe the statute to require drilling a new well when an existing well would work just as well.

The "inference" that I.C. § 42-228 prohibits the recovery of water from a public aquifer is of IDWR's own making, based on its personal desire to

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[11] *Mem. in Supp. of Pls.' Mot. for Summ. J.* at 15.

[12] *See IDWR's Resp. to ASCC's Mot. for Summ. J.* at 5-6.

[13] *Id.* at 5; *see also id.* at 8-10.

[14] *Id.* at 9-10.

greatly handicap canal companies' ability to recover water. If IDWR can persuade this Court to prohibit the recovery of water from public aquifers under I.C. § 42-228, IDWR will be empowered to effectively prevent ASCC and others from recovering any water at all.

By definition, an "aquifer" is "[a] water-bearing or aquiferous stratum."[15] Even if water that leaks from ASCC's canal system is found in a perched aquifer or confining layers, it is contained in a water-bearing stratum. Thus, *any* water ASCC recovers is withdrawn from an aquifer.

IDWR apparently wishes to distinguish between public aquifers and private aquifers, yet offers no legal support for the distinction. The reality is that all underground water is part of the source "ground water" and as a matter of law is considered hydraulically connected. By contending that ASCC cannot recover water from public aquifers, IDWR aims to prevent ASCC from recovering any water at all.

Critically, IDWR's position contradicts the plain language of I.C. § 42-228 which provides simply for the recovery of "ground water," which is statutorily defined as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving."[16] Had the Legislature intended to limit the recovery of ground water to certain types of aquifers, I.C. § 42-228 needed to contain language to that effect. The lack of any such language, in combination with Legislature's authority to allow the reclamation of water after it mingles with a natural waterway, as found in Idaho Code § 42-105, requires I.C. § 42-228 to be construed to allow the recovery of ground water even after it mingles with an aquifer.[17]

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[15] Oxford English Dictionary, http://www.oed.com/view/Entry/10051?redirectedFrom=aquifer#eid (Mar. 25, 2015).

[16] I.C. § 42-230(a) (emphasis added).

[17] This construction of I.C. § 42-228 comports with the definition of ground water. *See Pls.' Resp. in Opp. to IDWR & SWC Mots. for Summ. J.* at 9-10.

If this Court rejects IDWR's argument that I.C. § 42-228 prohibits the recovery of water after it enters an aquifer, only Plaintiffs' interpretation of the statute—that it allows ASCC to open existing wells to recover water—is reasonable.

C. IDWR acted outside its authority by issuing a notice of violation.

SWC seems to believe that Plaintiffs' are challenging IDWR's approval of a well drilling permit, asserting that since ASCC did not challenge conditions IDWR inserted in a separate permit application proceeding, it "cannot now seek an order from the Court identifying different terms and conditions that would be appropriate on its recovery well permit."[18]

In this action, Plaintiffs seek neither a well permit nor modifications to an existing well permit. They seek a declaratory judgment against IDWR that ASCC is permitted under I.C. § 42-228 to use an existing well to recover water, and that IDWR is precluded from penalizing or preventing the lawful use of the Duffin well as a recovery well. By its own terms, I.C. § 42-228 excepts recovery wells from the statutory requirements that IDWR has power to regulate. Although ASCC is generally required to "exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts," the Idaho Supreme Court recognizes an exception to this rule "when the agency acted outside its authority."[19] By sending notices of violation regarding the Duffin well, IDWR has acted outside its authority, and this case is therefore properly before this Court.

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[18] *Surface Water Coalition's Resp. in Opp. to Pls.' Mot. for Summ. J.* at 6.

[19] *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (Idaho 2004).

III. CONCLUSION

Any ambiguities in I.C. § 42-228 should be resolved by interpreting the statute so as to allow canal companies to work in tandem with their shareholders in opening and operating recovery wells.

While IDWR complains about ASCC's policy that enables it to use existing wells to recover water, this is beside the point. For purpose of summary judgment, IDWR argues that even if ASCC owns the Duffin well, and even if the Duffin well is used solely to recover ASCC water, I.C. § 42-228 requires ASCC to drill a new, separate well. This is unreasonable and absurd, unless IDWR is correct in arguing that I.C. § 42-228 only allows ASCC to recover water that doesn't enter a public aquifer, which, if accepted, would empower IDWR to drive recovery wells out of operation. For the reasons stated herein and in Plaintiffs' prior briefs, this Court should reject that argument.

Idaho Code § 42-228 authorizes ASCC to recover water from the aquifer, and by attempting to prevent ASCC and Duffins from using the Duffin well as a recovery well, IDWR has acted outside its authority. Because no genuine issue of material fact exists concerning authorization of the Duffin well pursuant to I.C. § 42-228, SWC's and IDWR's motions for summary judgment should be denied. Conversely, ASCC's motion for summary judgment should be granted because ASCC and Duffins are entitled to a declaratory judgment as a matter of law.

DATED this 25th day of March, 2015.

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By: Randall C. Budge
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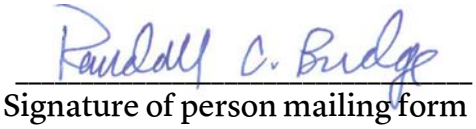
CERTIFICATE OF SERVICE

I certify that on this 25th day of March, 2015, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

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