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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF POWER

ABERDEEN-SPRINGFIELD CANAL  
COMPANY, an Idaho Corporation,  
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.

Case No. CV-2014-165

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT**

COME NOW Plaintiffs, Aberdeen-Springfield Canal Company and Jeffrey and Chana Duffin, by and through their counsel of record, Randall C. Budge of Racine, Olson, Nye, Budge & Bailey, Chartered, and submit this Memorandum in Support of Plaintiffs' Motion for Summary Judgment as follows:

**I. BACKGROUND**

Plaintiff Aberdeen Springfield Canal Company ("ASCC" or "Company") owns and operates (13) wells used to recover water lost through its delivery system. These so-called

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT – Page 1**

“recovery wells” are operated pursuant to I.C. §42-228 to deliver project water to shareholders. At issue in the case is ASCC’s right to operate existing and future recovery wells, which Defendant has challenged.

Plaintiffs Jeff and Chana Duffin (“Duffin”) own and operate approximately 2,800 acres of irrigated farmland in Power and Bingham Counties from which they grow potatoes, beets, and grain crops.<sup>1</sup> Duffin owns 110 shares of water stock in ASCC, used to irrigate a 92.2 acre field<sup>2</sup> located at the end of a lateral where ASCC has historically had difficulty delivering water.<sup>3</sup> Since the 2013 irrigation season, the Company has delivered water to the Duffin property from a recovery well owned and operated by ASCC pursuant to I.C. §42-228.<sup>4</sup> This recovery well is one of thirteen (13) recovery wells owned and operated by ASCC, five (5) of which deliver water directly to shareholders with seven (7) operated to deliver water to the canal system<sup>5</sup>. Since Duffin does not own other water rights to irrigate the property, beginning May 1, 2014, the Defendant Idaho Department of Water Resources (“Department”) issued two Notices of Violation to Duffin asserting he is unlawfully irrigating from the ASCC recovery well and threatened to fine Duffin and lock the headgate on the well.<sup>6</sup> Plaintiffs filed a *Complaint for Declaratory Relief* and a *Motion for Issuance of a Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction* June 6, 2014 in Power County. Judge Dunn issued an *Order Granting Plaintiff’s Motion for Temporary Restraining Order and Order to Show Cause* June 12, 2014. The case was subsequently reassigned to Judge Wildman pursuant to the *Order Regarding Judicial Review*.

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<sup>1</sup> See Duffin Corrected Affidavit at ¶ 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at ¶ 3.

<sup>4</sup> *Id.* at ¶ 4-5.

<sup>5</sup> See Second Affidavit of Steven T. Howser at ¶ 6.

<sup>6</sup> *Id.* at 6.

This case involves a dispute over the interpretation of Idaho Code § 42-228, governing the use of recovery wells. Plaintiffs move for summary judgment on their claim for declaratory relief because there are no genuine issues of material fact for trial and Plaintiffs are entitled to Judgment as a matter of law.

## II. STATEMENT OF FACTS

ASCC holds natural flow water rights in the Snake River, storage water rights in the upper Snake reservoir system and groundwater rights.<sup>7</sup> ASCC delivers irrigation water to its stockholders through a system of approximately 200 miles of canals and laterals extending from its diversion from the Snake River at Rose in Bingham County to its terminus below the American Falls Dam near Neely in Power County.<sup>8</sup> The system provides irrigation water to nearly 62,000 acres of crop land owned by ASCC's stockholders within its authorized place of use.<sup>9</sup> ASCC also owns and operates thirteen recovery wells that are used to recover ASCC surface water that is lost through seepage during delivery.<sup>10</sup> The water from the recovery wells is pumped directly into the delivery system and/or also directly to some shareholders who have ASCC shares appurtenant to their land within the service area.<sup>11</sup> None of ASCC's recovery wells have separate water rights because they are all operated to recover ASCC water that is lost through seepage during delivery, pursuant to I.C. §42-228.<sup>12</sup>

During World War II, the Federal Government commandeered the pumps from the recovery wells<sup>13</sup>. After the War, some of these wells were abandoned and some were taken over

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<sup>7</sup> See Howser Second Affidavit at ¶ 4.

<sup>8</sup> *Id.* at ¶ 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶ 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at ¶ 7.

and operated by shareholders and used to irrigate their lands.<sup>14</sup> After the drought of the 1930's, these wells were used to supplement flows.<sup>15</sup> As is common with large surface water delivery systems, ASCC experienced system capacity limitations during peak irrigation demand.<sup>16</sup> These limitations were especially onerous to shareholders on the ends of canals and laterals.<sup>17</sup> All but one of ASCC's recovery wells were placed on the lower end of the system and at the head of laterals.<sup>18</sup> The lost water ASCC recovers with the recovery wells is a small part of the water ASCC delivers to shareholders as needed for irrigation.<sup>19</sup> ASCC has been using the recovery wells to supplement available water for over eighty years.<sup>20</sup>

Beginning in the late 1950's, some shareholders began securing groundwater rights and drilling their own wells to supplement their ASCC supply during peak irrigation capacity limitations.<sup>21</sup> The Department issued these ground water rights with a notation that they were "supplemental" to the right holders' ASCC shares.<sup>22</sup> By the late 1970's, approximately 100 ground water rights were issued on lands that had ASCC shares, providing irrigation water to approximately 12,000 to 15,000 acres of land that have ASCC shares appurtenant.<sup>23</sup> In 1999, ASCC filed objections to all of these ground water right claims filed in the SRBA, objecting to the source of the water, contending that the water was lost from ASCC's system and consequently these wells were all recovery wells, delivering ASCC's water to its shareholders'

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

lands.<sup>24</sup> When these wells were granted partial decrees, they were all conditioned as “Combined with water from Aberdeen-Springfield Canal Company.”<sup>25</sup>

When ASCC filed water right claims in the SRBA, the purpose of use “recharge for irrigation” was claimed in addition to “irrigation” pursuant to an agreement with the Department to resolve ASCC’s objections to numerous ground water right claims.<sup>26</sup> The additional purpose of “recharge for irrigation” was recommended by the Department but later rejected by the SRBA Court in Case Nos. 01-23B, 01-297, 35-2542 and 35-4246.<sup>27</sup>

ASCC has been using wells to recover delivery losses and to drain water from shareholder’s lands long before I.C. §42-228 was passed in 1951 to recognize and allow the historic practice of constructing and operating recovery wells for the preservation of water.<sup>28</sup>

For over 100 years, ASCC has meticulously measured and documented its daily diversions from the Snake River, deliveries to stockholders, and return spills to the Snake River.<sup>29</sup> ASCC also estimates annual transmission loss.<sup>30</sup> These annual amounts have been part of the General Manager's Annual Report to Stockholders every year since ASCC's incorporation in 1910.<sup>31</sup> For the first 60 years of operation, ASCC's percentage loss ranged between 30% and 40% of total diversion.<sup>32</sup> Beginning in the early 1970's, loss rates began to increase and since the mid 1980's have stabilized, ranging between 55% and 62%.<sup>33</sup> From 1989 to 2013, ASCC's average annual diversion was 319,953 acre feet, average delivery to stock holders was 102,478 acre feet, average return spill was 44,634 acre feet, and average transmission loss 181,624 acre

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at ¶ 9.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at ¶ 10.

<sup>29</sup> *Id.* at ¶ 11.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

feet (57% of total diversion).<sup>34</sup> The quantity of water ASCC pumps from all recovery wells has averaged approximately 500 AF per year, only 0.27% of the average annual losses.<sup>35</sup> The most ever pumped from all recovery wells was approximately 2000 AF per year, only 1.1% of the average annual losses.<sup>36</sup>

ASCC compares their annual diversions and losses with data obtained through sampling ground water elevation in wells within its service area.<sup>37</sup> Regression analysis results in a statistically significant relationship between ASCC's annual diversion and historical mean deviation from depth of surface.<sup>38</sup> From this analysis it is clear that the ground water elevation underlying the ASCC system responds to ASCC's operations.<sup>39</sup>

By analyzing historical well data and data from pressure transducer data-loggers in wells throughout the ASCC system, ASCC can 'track' changes in ground water elevations over time using a technique called 'Kriging'.<sup>40</sup> This data and analysis confirms that there exists a 'mound' of water formed during the irrigation season beneath ASCC's service area.<sup>41</sup> This analysis shows that loss from ASCC's canal system results in substantial and significant increases to ground water elevation throughout the area.<sup>42</sup> Historical well depth of surface data shows that ground water levels peak in mid-August and that there exists distinct patterns in the mounding that roughly correlate with the underlying geology of the area.<sup>43</sup>

In 2012, after the SRBA Court rejected ASCC's effort to establish "recharge for irrigation" as a purpose of use under its water rights as a means of developing credits to protect

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<sup>34</sup> *Id.*

<sup>35</sup> NEED CITE TO SECOND AFFIDAVIT

<sup>36</sup> NEED CITE TO SECOND AFFIDAVIT

<sup>37</sup> Howser Second Affidavit at ¶ 13.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at ¶ 14.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

shareholders who were pumping groundwater, some shareholders who were operating supplemental ground water wells began to demand delivery of their water based on ASCC's shares from the surface water system.<sup>44</sup>In 2013, certain Shareholders submitted applications requesting that ASCC either install a new headgate for direct delivery from the canal system or approve the use of their wells as a headgate to take delivery of ASCC water based on their shares.<sup>45</sup> Some shareholders were allowed to connect to the surface delivery system if there was sufficient capacity and it would not create problems delivering water to other shareholders.<sup>46</sup> Where reconnection would present water delivery problems, other shareholders were given the option to transfer their wells to ASCC to own and operate as a recovery well to serve as the headgate to take water delivery.<sup>47</sup> Upon Board approval, ASCC installed approved measuring devices and took over ownership and operation of the well to deliver water to the shareholder.<sup>48</sup> The well is then given a headgate number and entered into ASCC's records.<sup>49</sup> Water delivered through the well is measured and deducted from the shareholder's allotment.<sup>50</sup>

Since 2012, ASCC has designated 5 wells as recovery headgates.<sup>51</sup> Three of these were operated in 2013 by Jeff Duffin, KBCP, LLC and Lance Funk.<sup>52</sup> In 2014, Jeff Duffin continues to receive water from an ASCC recovery headgate.<sup>53</sup> KBCP, LLC and Lance Funk have reconnected to the surface delivery system.<sup>54</sup> In May 2014 he Department threatened to shut off the recovery well serving Jeff Duffin and disputes that ASCC is entitled to operate recovery

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<sup>44</sup> *Id.* at ¶ 15.

<sup>45</sup> *Id.* at ¶ 16.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at ¶ 17.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

wells pursuant to I.C. §42-228.<sup>55</sup> The purpose of the lawsuit is to determine ASCC's right to operate existing and future recovery wells.<sup>56</sup>

ASCC maintains that it is lawfully entitled to own and operate wells to recover water lost through their delivery system pursuant to Idaho Code § 42-228 and to deliver that water to lands which have ASCC shares appurtenant, to wit: "excavation and opening of wells and the withdrawal of water therefrom by canal companies and other owners of irrigation works for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on the lands to which the established water rights of the parties constructing the wells are appurtenant."<sup>57</sup> ASCC's position is being challenged by the Department herein.

### **III. ISSUE**

Is ASCC lawfully entitled to drill, own and operate recovery wells pursuant to Idaho Code § 42-228 to recover ground water lost through its delivery system for further use by shareholders on lands that are within the authorized place of use to which shares are appurtenant?

### **IV. ANALYSIS UNDER I.R.C.P. 56**

The law is well established in Idaho that summary judgment may be entered "if the pleadings, depositions, and admissions on file, together with affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."<sup>58</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at ¶ 18.

<sup>58</sup> Rule 56 (c); *Figuroa v. Merrick*, 128 Idaho 840, 93 P.2d 360 (Ct. App. 1996); *Olson v. Freeman*, 117 Idaho 706, 791 P.2d 1285 (1990); *Rawson v. United Steelworkers of America*, 111 Idaho 630, 726 P.2d 742 (1986); *Boise Car & Truck v. Waco*, 108 Idaho 780, 702 P.2d 818 (1985).



On a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party.<sup>59</sup> Likewise, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion.<sup>60</sup> The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact.<sup>61</sup> However, the plaintiff's case must be anchored in something more than speculation and a mere scintilla of evidence is not enough to create a genuine issue.<sup>62</sup> Questions of statutory interpretation are questions of law,<sup>63</sup> and therefore meet the summary judgment standard.

## V. ARGUMENT

**(1) I.C. §42-228 is clear and unambiguous and must be interpreted and applied as written. The Department's interpretation is irrelevant and should be given no deference.**

ASCC's use of recovery wells is lawful under I.C. §42-228. There are no genuine issues of material fact in this case, therefore summary judgment must be granted in favor of the Plaintiffs. Idaho Code § 42-228 allows canal companies to operate wells to recover irrigation water lost to the aquifer. The wells in question are all operated by ASCC as recovery wells, within the bounds of I.C. § 42-228. Because ASCC's usage of these wells is legal under the statute, there are no factual issues and summary judgment should be granted.

Idaho Code § 42-228 specifically provides for the use of recovery wells for the "sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights of the parties

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<sup>59</sup> *G.M. Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

<sup>60</sup> *Id.*

<sup>61</sup> *Petrichevich v. Salmon River Canal Company*, 92 Idaho 864, 452 P.2d 362 (1969).

<sup>62</sup> *Id.*

<sup>63</sup> *Carillo v. Boise Tire Co.*, 152 Idaho 741, 748, 274 P. 2d 1256, 1263 (2012) (citing *Dyet v. McKinley*, 139 Idaho 526, 529, 81 P.3d 1236 (2003)).

constructing the wells are appurtenant.” This is precisely how the ground water wells in question are being used by ASCC.<sup>64</sup>

The Idaho Supreme Court has consistently held that the objective of interpreting any statute is determining legislative intent. “The objective in interpreting a resolution, statute, or ordinance is to derive the intent of the legislative body that adopted the act.”<sup>65</sup> Likewise, “When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent.”<sup>66</sup>

In order to make this determination the Court has many tools at its disposal including: the language used in the statute, the policy behind the statute, the purpose of the statute, the legislative history of the statute, and the reasonableness of the parties’ interpretations of the statute.<sup>67</sup> “To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history.”<sup>68</sup>

Even though this Court has many tools to determine legislative intent, the starting point for making a determination must always be the text of the statute itself.<sup>69</sup> This statute states as follows:

The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.

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<sup>64</sup> See *Howser Aff.* at ¶ 6, 10, 18.

<sup>65</sup> *Albee v. Judy*, 136 Idaho 226 (2001).

<sup>66</sup> *In re Doe*, 139 Idaho 1, 2, 72 P.3d 547, 548 (Idaho App. 2003). (Emphasis added).

<sup>67</sup> *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 351, 93 P.3d 680, 682 (2004).

<sup>68</sup> *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (2003).

<sup>69</sup> See Idaho Code Sec. 73-113(1).

“Legislative intent is reflected first and foremost in the language of the statute itself.”<sup>70</sup> “If the words are in common use, they should be given the same meaning in a statute as they have among the people who rely on and uphold the statute.”<sup>71</sup> “The plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results.”<sup>72</sup>

If this Court finds that there is no ambiguity in the plain meaning of the contested statute, then there is no need for the Court to carry on with statutory construction. “Where the meaning of a statute is clear, the Court is confined to follow that meaning and may neither add to nor take away from it by judicial construction.”<sup>73</sup> An unambiguous statute must be applied as written.<sup>74</sup> This is true even if a state agency has interpreted the statute in another way.<sup>75</sup>

Thus, the Court should only engage in statutory construction when the plain language of the statute would lead to an absurd result, the plain meaning of the text is in opposition of an expressly stated intent of the legislature, or there is ambiguity. None of those factors exist here. The statutory language is plain and clear. The Department’s proposed reading of the statute would also lead to an absurd result because ASCC would be deprived of its lawful and vested decreed water rights and water would be wasted in direct contravention of the legislature’s clearly stated purpose.

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<sup>70</sup> *Potlatch Corp. v. U.S.*, 134 Idaho 912, 914, 12 P.3d 1256, 1258 (2000).

<sup>71</sup> *Purco Fleet Services, Inc. v. Idaho State Dept. of Finance*, 140 Idaho 121, 124, 90 P.3d 346, 349 (2004).

<sup>72</sup> *Rahas v. Ver Mett*, 141 Idaho 412, 413, 111 P.3d 97, 99 (2005).

<sup>73</sup> *Credit Bureau of Lewiston-Clarkston, Inc. v. Idaho First National Bank*, 117 Idaho 29, 31, 784 P.2d 885, 887 (1989).

<sup>74</sup> *In re DeHaan*, 275 B.R. 375, 381 (2002).

<sup>75</sup> *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 665 (2003); see also *Hamilton ex rel. Hamilton v. Reeder Flying Service*, 135 Idaho 568, 572, 21 P.3d 890, 894 (2001). (noting that “If the language is unambiguous, an agency’s interpretation contrary to the plain meaning of the statute will not be given deference).

Additionally, the legislative history of I.C. § 42-228 further supports the plain meaning interpretation of the statute. Senate Bill 123 was introduced in the Senate February 10, 1951.<sup>76</sup> The bill passed quickly through both the House and the Senate, without any debate.<sup>77</sup> S.B. 123 was approved March 19, 1951,<sup>78</sup> and the text of the bill reads exactly as the statute does today,<sup>79</sup> except that the final clause regarding well drilling licenses was added in 1970.<sup>80</sup> The fact that there was no debate on the bill, and the relevant language of the bill remains today as it was originally written in 1951, further supports Plaintiffs' interpretation of the statute.

**(2) ASCC is lawfully entitled to drill, own, and use wells to recover ground water lost from the irrigation works pursuant to Idaho Code §42-228.**

Like most canal surface delivery systems, ASCC's delivery system is inefficient with considerable surface water lost through seepage. Based upon the meticulous historical records of water diversions, deliveries, spill, and transmission losses, the Company's calculated losses of surface water through seepage of the ground water have ranged between 55% and 62% since the mid 1980s, an average of 181,624 acre feet per year since 1989. ASCC presently recovers a very small portion averaging 500 acre feet (0.27%) of these losses through the operation of its thirteen recovery wells. Of the thirteen recovery wells, eight pump directly into the canal and laterals to supplement deliveries and five are used to deliver water directly to shareholders. The first of these recovery wells was constructed during the great drought of the 1930s with additional wells drilled in the 1940s, 1950s and 1960s, and the most recent in 2004. On October 15, 2013, the Department issued ASCC Drilling Permit No. 869326 subject to multiple conditions. ASCC's objections to the conditions have not been resolved and this recovery well has not been drilled.

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<sup>76</sup> Idaho Sen J., 31st Sess. 223 (1951).

<sup>77</sup> *Id.* 223-377; Idaho J.H., 31st Sess. 448-542 (1951).

<sup>78</sup> Idaho Sen. J., 31st Sess. 703.

<sup>79</sup> 1951 Idaho Session Laws, ch. 200, § 3, p. 424.

<sup>80</sup> 1970 Idaho Session Laws, ch. 187, § 2, p. 542.

In 2013, ASCC acquired ownership of three wells which were used by the Company as recovery wells to deliver water directly to shareholders Jeff Duffin, KBC Farms, and Lance Funk. These wells were used by the Company to deliver irrigation water to the shareholders in 2013. Recently in 2014 the Department filed civil actions against these shareholders, asserting illegal diversion of water in 2013. These civil actions have been stayed until this case is resolved pursuant to the *Stipulation of Reassignment* dated June 11, 2014. For the 2014 irrigation season, KBC Farms and Lance Funk have ceased taking water from the recovery wells and have moved their headgates back to the canal system. Jeffrey Duffin continued to take delivery of water from the recovery well in 2014 which gave rise to this lawsuit after the Department threatened him with additional civil penalties and to lock off his well.

Idaho Code § 42-228 provides as follows:

42-228. DRILLING AND USE OF WELLS FOR DRAINAGE AND RECOVERY PURPOSES EXCEPTED. The excavation and opening of wells and the withdrawal of water therefrom for the sole purpose of improving or preserving the utility of land by draining them shall not be forbidden or governed by this act, and, likewise, there shall be excepted from the provisions of this act, the excavation and opening of wells and withdrawal of water therefrom by canal companies, irrigations districts, and other owners of irrigation works for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights for the parties constructing the wells are appurtenant; providing that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code.

Pursuant to this statute, no new or additional water right is required, only a drilling permit to construct a recovery well. While the statute allows the canal company to excavate and open wells for drainage and recovery purposes, it does not preclude the ownership and operation of recovery wells that are acquired from others. So long as a well is operated “for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT – Page 13**

on or drainage of lands to which the established water rights for the parties constructing the wells are appurtenant,” the well can lawfully be operated as a recovery well. Even though ASCC recovers a very small part of the water lost to its delivery system, it is clear that the Department is now interpreting the statute in a manner to interfere with the existing recovery wells as well as to prevent future recovery wells from being drilled by imposing unreasonable drilling permit conditions. It is unclear whether the Department will seek to prevent ASCC from operating all of their recovery wells that have been in existence and operated for decades. However, if the Department prevails in its current interpretation of the statute, the logical conclusion is that the Department will use the recovery well statute as shield to prevent new recovery wells, as well as a sword to shut off existing ones.

Recovery wells serve a clear purpose of recovering water loss to the ground for delivery to shareholders and it makes no difference whether that delivery is by pumping into a canal or lateral from which a shareholder pumps, or pumping directly to a shareholder. The only proper criteria for deciding whether the Company can operate a recovery well is its ability to measure, document, and establish the amount of water lost from the delivery system. That amount should be the established ceiling of recoverable water, even though it is unlikely ASCC would substantially expand the amount of water recovered for their existing wells. Anything less, undermines the statutory intent of I.C. § 42-228. The costs and technical requirements necessary to accurately measure losses will naturally preclude most small canal companies from availing themselves from using recovery wells.

Further, the operation of recovery wells is absolutely consistent with long established state policies of maximizing the beneficial use of water resources, promoting efficiencies, and avoiding waste. Certainly, no one would question that these encouraged state policies have been

and will continue to be achieved by such things as the conversion of inefficient flood irrigation to sprinkle irrigation, installing pipelines and lining canals, as well as pumpbacks at the end of delivery systems to recapture waste. The “policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.”<sup>81</sup> It is the policy and the law of this State to require the highest and greatest possible duty from the waters of the State in the interests of agriculture and for useful and beneficial purposes.<sup>82</sup> The operation of recovery wells is yet another of many tools available to efficiently deliver irrigation water and minimize waste. Whether a recovery well owned and operated by the Company is one that it drilled or was acquired from another is irrelevant and a distinction without a difference when it comes to accomplishing the statutory purpose of allowing the recovery of water losses through a conveyance system. IDWR’s apparent attempt to draw a line between the two is a distinction without a difference, attempts to read a restriction into the statutory language that does not exist and is arbitrary and capricious.

In addition, since ASCC is able to carefully monitor ground water levels and establish precisely the quantity of water lost through its delivery system, it should have the full and unrestricted right to operate all existing recovery wells as well as to drill and acquire new ones to fully and efficiently maximize the full and beneficial use of its existing water rights.

IDWR should be permanently enjoined from preventing ASCC’s lawful use of recovery wells, operated for the sole purpose of recovering ground water resulting from irrigation under the Company’s irrigation works, either to pump water in the delivery system or directly to shareholders with appurtenant shares. The Notice of Violation issued by the Department to

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<sup>81</sup> *Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 808 (2011) (Quoting *Pool v. Olaveson*, 82 Idaho 496, 502 (1960)).

<sup>82</sup> *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44 (1915) (Internal cite omitted); see also *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 442 (1957).

Jeffrey Duffin, KBC Farms, and Lance Funk should be stricken as invalid on the basis that these Company shareholders were lawfully irrigating with Company water they were entitled to receive based upon their shares.

Finally, Plaintiffs should be awarded their reasonable attorney fees and costs incurred herein.

## VI. CONCLUSION

Based on the foregoing, there are no genuine issues of material fact for trial and Plaintiffs are entitled to a declaratory judgment as a matter of law. The Court should rule that pursuant to Idaho Code § 42-228 ASCC is lawfully entitled to drill, own and operate wells to recover ground water lost through its delivery system for further use by shareholders on lands that are within the authorized place of use to which shares are appurtenant. Further, that the Department civil action and notices of violation to ASCC shareholders Duffin, KBC Farms, LLC and Fund are invalid.

DATED this 15<sup>th</sup> day of July, 2014.

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

By:  \_\_\_\_\_  
RANDALL C. BUDGE



**CERTIFICATE OF SERVICE**

I certify that on this 15<sup>th</sup> day of July, 2014, the foregoing document was served on the following persons in the manner indicated.

*Randall C. Bridge*

\_\_\_\_\_  
Signature of person mailing form

Clerk of the District Court Snake River Basin Adjudication P.O. Box 2707 253 Third Avenue North Twin Falls, Idaho 83303-2707	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail
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