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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 SURFACE WATER COALITION'S MOTION FOR SUMMARY JUDGMENT

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company (hereafter collectively "Surface Water Coalition," "Coalition" or "SWC"), by and through their attorneys of record, and submit this *Memorandum in*

Support of Motion for Summary Judgment. The motion is also supported by the *Affidavit of Paul L. Arrington* ("*Arrington Aff.*") filed concurrently herewith.

INTRODUCTION

The Plaintiffs' *Complaint for Declaratory Relief; Motion for Issuance of Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction* seeks the following relief:

> A. That Plaintiffs use of the well which is the subject of the Notices of Violation alleged hereinabove, is a duly authorized and lawful use pursuant to Idaho Code § 42-228;
>
> B. That Defendant be precluded from taking any threatened or actual curtailment action preventing Plaintiffs' lawful use of the recovery well as such curtailment action would cause irreparable harm to Duffin's crops.

Complaint at 6. The Plaintiffs would have the Court rule that section 42-228 authorizes the Aberdeen Springfield Canal Company ("ASCC") to acquire wells drilled by other water users and use those wells to recapture water seeping into the ground as it is being delivered through the ASCC delivery system. Plaintiffs rely on Idaho Code § 42-228 to support their demands.

It bears repeating there is no dispute that ASCC can operate a recovery well pursuant to section 42-228 – so long as the proper procedures are followed. Likewise, there is no dispute that the ASCC system is leaky – potentially providing an opportunity for the proper drilling and use of recovery wells. This case is not about ASCC's general authority under section 42-228. This case is about one well – the Duffin Well[1] – and ASCC's attempt to circumvent the plain language of section 42-228 by "controlling" a well drilled by a private party who applied for a private ground water right that was never approved.

[1] The well is referred to as the "Duffin Well" because the well is owned by Jeffery and Chanda Duffin ("Duffin"). *Arrington Aff.* at Ex. R at 69 ll.10-16 (Howser Depo) ("Ownership is not transferred … Control is transferred.").

Section 42-228, however, does not allow such actions. Rather, the law plainly mandates that the driller of a recovery well must (i) be a canal company, irrigation district or other owner of the diversion works, and (ii) own the water rights appurtenant to the land being drained and/or irrigated with the recovered water. In this case, a shareholder, a predecessor to Duffin, drilled the well in question – ASCC did not drill the well. Although Plaintiffs' Complaint implies that ASCC owns the well, it does not, rather it is now owned by Duffin. *Arrington Aff.* at Ex. R at 69 ll.10-16 (Howser Depo) ("Ownership is not transferred … Control is transferred."); *Id.* at Ex. F. In fact, Duffin is not even the owner of all of the 175 acres described in the Complaint, approximately 80 acres are owned by nonparties to the litigation. *Arrington Aff.* at Ex. S at 10, ll.4-9 (Duffin Depo) (approx.. 80 acres owned by LaVerda Barron and Fae Baker); *see also Id.* at Exs. F & N (deed to Duffin Property) and Ex. T (deed to Barron/Baker property). Furthermore, neither Duffin nor Barron/Baker own any water rights appurtenant to the land being drained and/or irrigated with the recovered water in this matter. Rather, at best, they own shares in ASCC, the owner of the canal system. Accordingly, the plain language of the statute prohibits the use of the Duffin well as a recovery well.

Accordingly, the Court should grant the Coalition's cross motion for summary judgment.

STATEMENT OF FACTS

This case stems from actions taken by ASCC following a December 10, 2012 resolution passed by the ASCC Board of Director to address a concern that shareholders who had previously discontinued their surface water deliveries and had been irrigating their properties solely with private ground water would attempt to resume their deliveries of surface water. Apparently concerned with capacity issues in the system, the ASCC Board adopted the following policy:

> **Therefore, be it Resolved** that any call for delivery from the Company's surface water system onto lands which have been previously irrigated exclusively from a well will be required to take delivery through a Recovery Head Gate, and that this head gate will be the existing well serving the property.
>
> **Be it Further Resolved** that the landowner will be required to surrender control of the well to the Company and will be required to pay for a Company approved measuring device to be installed on the headgates.
>
> **Be if Further Resolved** that maintenance of the well and associated equipment (pump, motor, etc.) will be the responsibility of the land owner.

Howser Aff. at Ex. 1. This policy required at least the following:

> 1. Any shareholder desiring to resume surface deliveries would be required to resume those deliveries through the shareholder's well. *Arrington Aff.* at Ex. R at 68, ll.1-20 (Howser Depo) ("This language says that if you call for water onto lands which have previously been irrigated exclusively from a well, all right, that ***you are required to take that delivery -- or your canal water delivery from that well***") (emphasis added). The policy does not allow a shareholder to resume surface deliveries at the head gate that has historically serviced the shareholder's property. *Id.*
>
> 2. The shareholder would "surrender control" only of the well but would retain ownership of the well. *Id.* at Ex. R at 69 ll.10-16 (Howser Depo) ("Ownership is not transferred … Control is transferred."). ASCC would not own the well. *Id.*
>
> 3. The shareholder would be responsible for all costs associated with the measuring device installation and maintenance of the well. *Id.* at 69-71.

Following the passage of this policy, several shareholders sought to resume surface water deliveries and filed requests in 2013. *2nd Howser Aff.* at ¶ 16; *Arrington Aff.* at Ex. R at 71, ll.11-25 (Howser Depo). One of these shareholders was Duffin. *Howser Aff.* at Ex. 2. Located on property owned by Duffin is a well that has been diverting ground water to the Duffin property and property owned by nonparties without a water right since the early 1970's, *Arrington Aff.* at Ex. S at 12-13, although applications for ground water rights were filed and are pending, *id.* at

33, ll.14-16; *see also id.* at Exs. E & M (moratorium documents).[2] Pursuant to the policy, Duffin relinquished "control" (but not ownership) of the well to ASCC and began allegedly diverting recovered ASCC surface water from the Duffin well in 2013. *Id.* at ¶ 6 & Exs. 2 & 3. Plaintiffs have not produced any documents signed by owner of the Barron/Baker property showing that they filed any documents with ASCC concerning the issue.

On May 1, 2014, the Department issued a Notice of Violation to Duffin for the unauthorized use of a well without a water right. *Complaint* at Ex. A. Duffin attempted to explain that the well was a recovery well authorized pursuant to section 42-228. *Id.* at Ex. B. However, the Department rejected Duffin's explanation – ordering Duffin to cease and desist all irrigation deliveries from the Duffin Well. *Id.* at Ex. C.

The following undisputed material facts are not in dispute and prevent ASCC from using the Duffin Well as a recovery well pursuant to section 42-228:

1. ASCC did not drill the Duffin Well, *Complaint* at ¶ VIII ("In 2013, Duffin submitted an application to ASCC to ***transfer their well to the Company***") (emphasis added); *Id.* at Ex. B ("This well has been ***transferred to the Canal Company*** and is owned and operated by them") (emphasis added); *Corrected First Affidavit of Steve Howser* ("*Howser Aff.*") at ¶ 6 (describing the process of transferring the Duffin Well to ASCC); *Id.* at Ex. 1 (ASCC policy providing that "landowner will be required to surrender control of the well to the Company"); *Corrected Second Affidavit of Steven T. Howser* ("*2nd Howser Aff.*") at ¶¶ 16-17 (describing the process of transferring the Duffin Well to ASCC); *Corrected Affidavit of Jeffrey Duffin* ("*Duffin Aff.*") at ¶¶ 6-7 (describing the process of transferring the Duffin Well to ASCC); *Arrington Aff.* at Ex. R at 69 ll.10-16 (Howser Depo) ("Ownership is not transferred … Control is

[2] Although applications for permit were filed in 1992 for water rights 35-8980 and 35-9002, the Applications were never processed due to the 1993 moratorium. *Arrington Aff.* at Exs. C, D, E & M.

transferred."). However, despite the wording of the *Complaint*, ASCC and Duffin admit that ASCC does not own the well – it only "controls" the well; *Id.*; *see also Id.* at Ex. A at 11 ("The many irrigation wells in the area that are operated by ASCC shareholders have become an extension of the ASCC delivery system and allow for the recovery of project water from the recharged ground water system for use on project lands").

2. Duffin does not have a water right authorizing diversions through the Duffin Well. *Complaint* at ¶ VII ("These recovery wells were all drilled pursuant to lawful drilling permits ***and do not have separate water rights as they deliver water owned by ASCC***"); *2nd Howser Aff.* at ¶ 6 ("Two of these recovery wells have separate water rights, the remainder do not …"); *Howser Aff.* at Ex. 2 (Paragraph 5(a) of Duffin's Application shows that there are no private water rights in the Duffin Well); *Id.* at Ex. S *id.* at 33, ll.14-16 (Duffin Depo) (research showed that the ground water right applications were "pending" – not permitted or licensed).

3. As originally permitted, the Duffin Well was drilled as an unpermitted private supplemental irrigation well – ***not*** a canal company recovery well under section 42-228. The Duffin Well was drilled as a supplemental irrigation well in the 1970's. *Howser Aff.* at ¶ 5. Although Plaintiffs lack personal knowledge as to the excavation, opening, drilling or construction of the Duffin Well, *Arrington Aff.* at Exs. O & P (Supplemental Responses by Duffin (O) and ASCC (P) to Coalition Discovery Requests), they admit that the Duffin Well "was not excavated, opened, drilled or constructed pursuant to a well drilling permit issued by the Idaho Department of Water Resources" and was not drilled by ASCC. *Id.* at Exs H & I (Responses by ASCC (H) and Duffin (I) to Request for Admission No. 2); *id.* at Ex. R at 81, ll.5-10 (Howser Depo) ("No, the Company did not drill that well").

In 1992, one of Duffin's predecessors-in-interest, Vern Duffin, filed two Applications for Water Right Permit Nos. 35-8980 and 35-9002 seeking to divert 2.20 cfs and 3.66 cfs, respectively, of ground water for irrigation purposes. *Arrington Aff.* at Ex. C & D. The Applications identified the Duffin Well as the point of diversion and sought to validate the illegal diversions that had occurred from the Duffin Well since it was drilled. *Id.* at Ex. C at 2 ("This well and system was drilled and used since I purchased this ground from by father in 1971. I just overlooked filing on the the [sic] same until now."). Application No. 35-8980 sought to irrigate land owned by Duffin. *Id.* at Ex. C. Application No. 35-9002 sought to irrigate land owned by LaVerda Barron and Fay Baker. *Id.* at Ex. D. The Applications were not processed due to the moratorium on new water rights issued by IDWR. *Id.* at Ex. E (*Moratorium Exemption Questionnaire,* dated June 2, 1992); *id.* at Ex. M (correspondence from IDWR regarding moratorium hold on these applications); *see also id.* at Ex. S at 33, ll.14-16 (Duffin Depo) (applications are still "pending"). In 2002, Vern Duffin assigned the applications to Richard Schelske, *id.* at Ex. F, who subsequently conveyed the Duffin Property to Duffin and assigned the applications to Duffin, in 2011, *id.* at Ex. G.

On July 8, 2013, ASCC filed an *Application for Well Drillers' Permit* with IDWR seeking authority to drill a recovery well pursuant to section 42-228. *Arrington Aff.* at Ex. J. The Director of IDWR issued a permit which included several conditions of approval – including depth and casing requirements for the new recovery well. *Id.* at Ex. K. Although the Coalition filed a petition for hearing on the permit, *id.* at Ex. L, ASCC did not challenge the conditions imposed by the Director and, in fact, began drilling the recovery well pursuant to the Well Drillers' Permit issued by the Director, *id.* at Ex. R at 92-93 (Howser Depo) (discussing drilling

the recovery well). This permit provides an example of terms and conditions that the Director may impose on wells drilled pursuant to section 42-228.

STANDARD OF REVIEW

A motion for summary judgment should be granted if the Court determines that there is no genuine issue of material fact based on the pleadings, depositions, admissions and affidavits, and the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); *see also, e.g., Harris v. State Dept. of Health*, 123 Idaho 295 (1992); *Farmers Insurance Co. v. Brown*, 97 Idaho 380 (1976).

The nonmoving party may not rest upon mere allegations or denials to avoid summary judgment. *McCoy v. Lyons*, 120 Idaho 765, 770 (1991); *Theriault v. A.H. Robbins Co.*, 108 Idaho 303, 306-07 (1985). Likewise, immaterial issues of fact do not preclude the granting of summary judgment. *J.R. Simplot Co. v. Dosen*, 144 Idaho 611 (2006). If the moving party asserts that there is no genuine issue of material fact, the burden shifts to the nonmoving party to "produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact." *McCoy, supra* at 770. Conclusory assertions unsupported by specific facts do not create a genuine issue of material fact. *Mareci v. Coeur d'Alene School Dist. No. 271*, 150 Idaho 740 (2011). Likewise, mere speculation or a scintilla of evidence is not sufficient to create a genuine issue of material fact. *McCoy*, 120 Idaho at 769; *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84 (2000). In the absence of genuine disputed issues of material fact, only questions of law remain, and the Court exercises free review. *Stuard v. Jorgenson*, 150 Idaho 701 (2011).

ARGUMENT

I. The Plain Language of Section 42-228 Prevents ASCC from Acquiring the Duffin Well for Use as a Recovery Well.

Plaintiffs allege that the plain language of section 42-228 supports ASCC's actions in this matter. However, since it is undisputed that ASCC did not construct the Duffin Well and does not own the Duffin Well, it cannot be used as a section 42-228 recovery well. Consequently, as a matter of law, the relief Plaintiffs seek cannot be granted.

The objective of statutory construction is to derive the intent of the legislature. *Kelso v. State Ins. Fund*, 134 Idaho 130, 134 (2000). Statutory interpretation must begin with the literal words of the statute and those words must be given their plain, usual, and ordinary meaning. *Harrison v. Binnion*, 147 Idaho 645, 649 (2009); *State v. Gill*, 150 Idaho 183, 185 (Ct App. 2010) (language of statute is to be given its plain, obvious, and rational meaning). These mandates have been codified in Idaho Law:

> 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.

I.C. § 73-113(1). If the statute is unambiguous, a court must not construe it but must instead follow the law as written. *Harrison*, 147 Idaho at 649. Indeed, "Legislative intent is reflected first and foremost in the language of the statute itself." *Potlatch Corp. v. U.S.*, 134 Idaho 912, 914 (2000). In the end, the "plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results." *Rahas v. Ver Mett*, 141 Idaho 412, 413 (2005).

In this case, the language of the statute is clear and unambiguous – providing three requirements for a valid "recovery well:"

> 42-228. DRILLING AND USE OF WELLS FOR DRAINAGE OR RECOVERY PURPOSES EXCEPTED. ... 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, irrigation 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 of 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.***

(Emphasis added). In other words, a recovery well is not valid unless

> 1. the "excavation and opening" of the recovery well must be done "by canal companies, irrigation districts and other owners of irrigation works," and
>
> 2. the well is "for the ***sole*** purpose of recovering ground water ... for use on or drainage of lands to which the established water rights ***of the parties constructing the wells*** are appurtenant," and
>
> 3. the well must be drilled in compliance with the licensing provisions of section 42-238.

Since none of these requirements are established in this case, the Duffin Well cannot be used as a recovery well under section 42-228.

A. ASCC Did Not Drill the Duffin Well.

Section 42-228 provides that "there shall be excepted from the provisions of this act the excavation and opening of wells and withdrawal of water therefrom by canal companies, irrigation districts, and other owners of irrigation works." In other words, the individual or entity drilling the well must be a canal company, irrigation district or other owner of the irrigation works. This requirement has not been met in this case.

Here, it is undisputed that Duffin's predecessor drilled the Duffin Well. *Arrington Aff.* at Ex. R at 81, ll.5-10 (Howser Depo) ("No, the Company did not drill that well"); *see also id.* at Exs. H & I. Rather, Duffin was required to transfer "control" of the well to ASCC. *See, e.g., Complaint* at ¶ VIII ("In 2013, Duffin submitted an application to ASCC to ***transfer their well to***

the Company") (emphasis added); *Id.* at Ex. B ("This well has been ***transferred to the Canal Company*** and is owned and operated by them") (emphasis added); *Corrected First Affidavit of Steve Howser* ("*Howser Aff.*") at ¶ 6 (describing the process of transferring the Duffin Well to ASCC); *Id.* at Ex. 1 (ASCC policy providing that "landowner will be required to surrender control of the well to the Company"); *Corrected Second Affidavit of Steven T. Howser* ("*2nd Howser Aff.*") at ¶¶ 16-17 (describing the process of transferring the Duffin Well to ASCC); *Duffin Aff.* at ¶¶ 6-7 (describing the process of transferring the Duffin Well to ASCC).

It is further undisputed that the Duffin Well was being used in an effort to recover water leaking from the ASCC "irrigation works." *Arrington Aff.* at Ex. R at 83, ll.9-20 (Howser Depo) ("And it was the Company's contention at that time, prior to that, and still, that those wells are pumping Canal Company water"). The well was not used to recover any water from a private water right. *Complaint* at ¶ VII ("These recovery wells were all drilled pursuant to lawful drilling permits ***and do not have separate water rights as they deliver water owned by ASCC***") (emphasis added).

Since ASCC did not drill the Duffin Well, and since the Well was used to recapture water from the ASCC system, the plain language of section 42-228 prohibits the Duffin Well from being considered as a recovery well.

B. Neither Duffin, Nor His Predecessors in Interest, Own Any Private Water Right(s) Appurtenant to the Land.

Next, section 42-228 provides that a recovery well may be used "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 constructing the wells are appurtenant." This provision requires unity of ownership between the water rights and the

individual/entity drilling the recovery well. In other words, the individual or entity constructing the recovery well must also own the water rights appurtenant to the underlying ground.

Here, it is undisputed that neither Duffin nor his predecessors in interest owned separate water rights diverted from the Duffin Well. *Complaint* at ¶ VII ("These recovery wells were all drilled pursuant to lawful drilling permits ***and do not have separate water rights as they deliver water owned by ASCC***") (emphasis added); *2nd Howser Aff.* at ¶ 6 ("Two of these recovery wells have separate water rights, the remainder do not ..."); *Howser Aff.* at Ex. 2 (Paragraph 5(a) of Duffin's Application shows that there are no private water rights in the Duffin Well); *Id.* at Ex. S *id.* at 33, ll.14-16 (Duffin Depo) (research showed that the ground water right applications were "pending" – not permitted or licensed)..

Although it is true that ASCC holds the water rights in trust for the beneficial use by the individual shareholders, *United State v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007), this does not mean that an ASCC shareholder "owns" the water right sufficient to meet the ownership requirement of section 42-228. Indeed, when shareholders have diverted ground water within the project boundaries of a canal company – such as ASCC – the Snake River Basin Adjudication ("SRBA") has granted separate, private water rights for those diversions and indicated that the private ground water rights are combined with the company deliveries. *Arrington Aff.* at Ex. R at 53-54 (Howser Depo) (Ground water rights within ASCC boundaries were decreed with remark indicating that diversions are "combined" with ASCC water).

Although Duffin, or his predecessor in interest, drilled the Well, ASCC is the owner of the water rights that are appurtenant to the Duffin property. *Howser Aff.* at ¶ 2 (describing ASCC water rights). Since Duffin does not own the water, and since ASCC did not drill the well, the Duffin Well cannot be a recovery well under section 42-228.

C. ASCC Must Comply with the Well Licensing Provisions.

Finally, section 42-228 provides that "the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code." Section 42-238 provides the Director with authority to regulate the drilling of wells in Idaho:

> The director of the department of water resources is hereby vested with the duties relating to the licensing of well drillers and operators of well drilling equipment as provided for in this act so as to protect the ground water resources against waste and contamination.

I.C. § 42-238(1). It further provides that

> It shall be unlawful for any person to drill a well in Idaho, including wells excepted under sections 42-227 and 42-228, Idaho Code, without first complying with the provisions of this chapter.

Id. at § 42-238(2).

In this case, Plaintiffs admit that the Duffin Well "was not excavated, opened, drilled or constructed pursuant to a well drilling permit issued by the Idaho Department of Water Resources." *Arrington Aff.* at Exs. H & I.

The Department has determined that section 42-228 recovery wells require specific conditions unique to their intended purpose – conditions that may not be included on an irrigation well permit. This was made evident in 2013, when the ASCC filed a permit to drill a recovery well. *Arrington Aff.* at Ex. J. In issuing a permit, IDWR identified several unique conditions would be required on the recovery well. *Id.* at Ex. K at 2-4 (listing 26 conditions to which the construction of the recovery well would be subject). Since the Duffin Well was not permitted as a recovery well, it cannot be a recovery well.

II. Plaintiffs Do Not Need to Use a Recovery Well to Deliver Water To Duffin.

Plaintiffs complain that, if they are not permitted to use the Duffin Well as a recovery well, their water rights will be prejudiced. *See generally, Memorandum in Support of Plaintiffs'*

Motion for Issuance of Temporary Restraining Order (Jun. 6, 2014); *Memorandum in Support of Plaintiffs' Motion for Summary Judgment*, at 11 (July 15, 2014). Such dramatic assertions overstate the situation. Indeed, Mr. Howser, ASCC's manager, explained that the Duffin headgate on the J Lateral remains in place. *Id.* at Ex. R at 59 ll.5-6 (Howser Depo) (Duffin headgate was not removed); *see also id.* at 61 ll.3-21 (same). According to Mr. Duffin, all that is required to receive water from ASCC is to put in a pond:

> Q. [MR. ARRINGTON] Have you ever, since you owned the property, received surface water from the Company to your property?
>
> A. [MR. DUFFIN] No.
>
> Q. Is there any reason you couldn't receive surface water today from the Company?
>
> A. No.
>
> Q. The headgates are still there?
>
> A. Yes, there's a headgate there.
>
> Q. There's a headgate?
>
> A. We'd just have to put in a pond.

Id. at Ex. S at 18, ll.14-24 (Duffin Depo). Further,

> Q. [MR. FLETCHER] As I understand your testimony to Mr. Arrington, you do have the ability to, if you decided to install a pond, to divert directly out of the surface water delivery system of Aberdeen-Springfield and then irrigate this property out of that pond; is that correct?
>
> A. Yes.
>
> Q. Is there some reason you've elected not to do that?
>
> A. You know, at this time, just visiting with the Canal Company, it was -- they -- we -- we chose the other way to do it, to operate as a headgate out of the well.

Q. To kind of make this a test case, is that what you're talking about?

A. I don't know specifically.

Q. But, to your knowledge, there would be nothing prohibiting you from doing that, developing a pond, diverting out of the canal, and then irrigating out of the pond?

A. No.

Id. at Ex. S at 35-36 (Duffin Depo).

Plaintiffs would have the Court believe that they are left without options – that using the Duffin Well as a recovery well is their only option to get water to the Duffin property. The testimony shows that such claims are not valid. *See also Arrington Aff.* at Ex. Q (historical notes demonstrating that ASCC can consider enlarging or otherwise improving its system to deliver water to shareholders); *Id.* at Ex. R at 94-95 (Howser Depo) (No known limitation on ASCC enlarging a facility to increase capacity).

CONCLUSION

In order for ground water diversions from a recovery well to be accepted from the water right licensing requirements, the driller of the well must own the "irrigation works" and "water rights." Diversions from any well that does not comply with these requirements are subject to being curtailed as illegal diversions by IDWR – as was properly attempted regarding diversions from the Duffin Well.

Since the statutory mandates are clear, the Court should deny the Plaintiffs' motion for summary judgment and grant the Coalition's motion for summary judgment.

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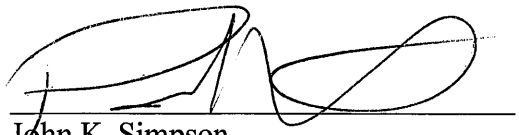
DATED this 4th day of March, 2015.

BARKER ROSHOLT & SIMPSON LLP



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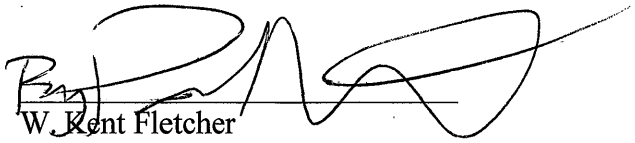

W. Kent Fletcher

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of March, 2015, I served true and correct copies of the foregoing upon the following by the method indicated:

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John Homan
Meghan Carter
Deputys Attorney General
Idaho Department of Water Resources
P.O. Box 83720
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