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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,

and

A&B IRRIGATION DISTRICT, AMERICAN
FALLS RESERVOIR DISTRICT #2,

Case No. CV-2014-165

**IDWR'S MOTION AND
MEMORANDUM IN SUPPORT OF
SUMMARY JUDGMENT**

BURLEY IRRIGATION DISTRICT,
MINIDOKA IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT, NORTH
SIDE CANAL COMPANY AND TWIN
FALLS CANAL COMPANY,

Defendant-Intervenors.

The Idaho Department of Water Resources (“IDWR”) submits this motion and memorandum in support of summary judgment pursuant to I.R.C.P. 56(b).

The issue in this case is what constitutes a valid recovery well pursuant to Idaho Code § 42-228, which recognizes a limited exception from regulation under Idaho’s Ground Water Act for the recovery of certain waters. IDWR is entitled to summary judgment as a matter of law because Aberdeen-Springfield Canal Company’s (“ASCC”) characterization of the well owned and operated by Jeffery and Channa Duffin (“Duffin”) as a recovery well does not fall within the plain language of Idaho Code § 42-228. ASCC argues it can replace surface irrigation water lost from its canal system with ground water pumped, without regulation, directly from the public ground water supply. The statute and case law, however, provide that once water returns to the public supply it is no longer subject to the control of the original appropriator.

BACKGROUND

ASCC’s surface delivery system consists of approximately 200 miles of canals and laterals serving nearly 62,000 acres of land owned by its stockholders within its authorized place of use. *Corrected Second Affidavit of Steven T. Howser* ¶ 5 (Nov. 17, 2014). ASCC asserts that its canals lose over 180,000 acre-feet through transmission loss. *Id.* at ¶ 11. ASCC also experiences capacity limitations in its system during peak irrigation demands and struggles to deliver water to shareholders located at the ends of canals and laterals. *Id.* at ¶ 7.

ASCC filed approximately 120 objections in the SRBA to the source of water for the groundwater rights of its shareholders seeking to have the source designated the same as ASCC's surface water rights. *Corrected Second Affidavit of Steven T. Howser*, ¶ 8; *Memorandum Decision and Order on Challenge*, In Re SRBA 39576, subcase 01-23B et al, at 8 (Apr. 4, 2011) ("Decision Re 01-23B et al"). ASCC considers those rights supplemental to use of ASCC shares. *Corrected Second Affidavit of Steven T. Howser*, ¶ 8. The SRBA Court decreed the 120 ground water rights with a source of ground water. Exhibit A, *Affidavit in Support of Motion for Summary Judgment ("Howser Deposition")* at 63-64.

In 2012, the ASCC Board recognized that ASCC shareholders with private ground water rights could transfer their private ground water rights or cease using ground water and request delivery of surface water from ASCC. *Id.* at 65. Fearing frequent occurrences of such transfers could spark capacity issues and delivery limitations within ASCC's system, ASCC developed a new policy. *Id.* ASCC's new policy provides that a request for delivery of ASCC shares to lands "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." Exhibit 1, *Corrected First Affidavit of Steve Howser* (November 18, 2014). As part of this new policy, ASCC developed a form for shareholders to request such a change. *Howser Deposition* at 79; Exhibit 2, *Corrected First Affidavit of Steve Howser*. An accepted application will transfer control but not ownership of the well to ASCC so it may operate the well as a recovery headgate. *Howser Deposition* at 69.

Duffin owns and rents 175 acres of property within the service area of ASCC. Exhibit B, *Affidavit in Support of Motion for Summary Judgment ("Duffin Deposition")* at 10-11. The Duffin property has historically been irrigated from the Duffin well, which was drilled by Vern

Duffin in the early 1970's. *Duffin Deposition* at 11. Application for permit no. 35-8980 for the Duffin Well was filed with IDWR in 1992 by Vern Duffin, Jeffrey Duffin's father however, no permit was ever issued. Exhibit C, *Affidavit in Support of Motion for Summary Judgment; Duffin Deposition* at 9, 16. Thus, no water right exists authorizing the diversion of ground water to the Duffin property. When Duffin discovered there was no water right associated with the 175 acres Duffin sought to use their shares in ASCC to irrigate the 175 acres. *Duffin Deposition* at 22-23.

Instead of delivering water through its surface water system, ASCC required Duffin to follow its new transfer policy and apply for the Duffin well to become a recovery headgate. Exhibit 2, *Corrected First Affidavit of Steve Howser*. Duffin irrigated in 2013 operating under the recovery headgate policy. *Howser Deposition* at 81. IDWR issued a notice of violation ("NOV") to Duffin on May 1, 2014 for irrigating land from the Duffin well without a valid water right during the 2013 irrigation season. Exhibit A, *Complaint for Declaratory Relief*. Duffin sought the help of ASCC to resolve the NOV. In response to the NOV, Duffin and ASCC argued the Duffin well was being operated as a recovered water well pursuant to Idaho Code § 42-228. Exhibit B, *Complaint for Declaratory Relief*. IDWR disagreed that pumping of ground water from the Duffin well qualifies as a recovery well under Idaho Code § 42-228.

Failing to come to an agreement with IDWR concerning the Duffin Well, on June 6, 2014, ASCC and Duffin filed the *Complaint for Declaratory Relief* ("Complaint") commencing this action. The Complaint seeks validation that the Duffin Well is being operated lawfully under Idaho Code § 42-228. *Complaint* at 6.

STANDARD OF REVIEW

Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled

to judgment as a matter of law. I.R.C.P. 56(c); *see also Indep. Sch. Dist. of Boise City v. Harris Family Ltd. P'ship*, 150 Idaho 583, 587, 249 P.3d 382, 386 (2011) (citing I.R.C.P. 56(c)). In a summary judgment motion “the non-moving party is entitled to have all inferences from the record viewed in his favor.” *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

ARGUMENT

There are no genuine issues of material fact in this case and the question of law presented is a narrow one: whether the Duffin well is a recovered water well authorized pursuant to Idaho Code § 42-228. Contrary to ASCC’s assertions, the Duffin well does not qualify as a recovered water well under the plain language of Idaho Code § 42-228. ASCC glosses over key requirements of Idaho Code § 42-228’s statutory test for recovered water wells. Furthermore, ASCC does not allege that it is recovering only project surface water; rather ASCC assert that it is entitled to divert ground water equal to the amount of its surface water losses. *Corrected Second Affidavit of Steven T. Howser* ¶ 11. This contention is contrary to Idaho law. While a water user is free to recover waste water still within its control, once water is commingled with a public source, it is no longer subject to recovery by the original appropriator. In this case, the waste water has commingled with the groundwater in the Easter Snake Plain Aquifer and is therefore no longer recoverable by ASCC. Once commingled with another source, surface water delivery losses become incidental aquifer recharge. Incidental recharge may not be used as the basis for claim of a separate or expanded water right. Idaho Code § 42-234.

A. The Duffin well is not a recovered water well pursuant to Idaho Code § 42-228.

Interpretation of a statute “must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning.” *Verska v. Saint Alphonsus Reg'l Med.*

Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). If statutory language is unambiguous the Court merely applies the statute as written. *Waters Garbage v. Shoshone County*, 138 Idaho 648, 650, 67 P.3d 1260, 1262 (2003).

The relevant portion of Idaho Code § 42-228 states:

[T]here 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. . . .

A plain reading of Idaho Code § 42-228 shows there are four requirements that must be satisfied for a well to qualify under this statute. One, the well was drilled by a canal company, irrigation district or other owner of irrigation works. Two, the well was drilled for the sole purpose of recovering ground water resulting from irrigation. Three, the ground water needs to be under the irrigation works of the owner. Four, the recovered water must be for further use on lands which have appurtenant water rights owned by the party constructing the well.

The Duffin well fails to meet two of the requirements of § 42-228. The first failed requirement is the well was not drilled for the “sole purpose of recovering ground water resulting from irrigation.” The well was drilled by Vern Duffin in the early 1970’s. Application for Permit 35-8980; *Duffin Deposition* at 11. Vern Duffin’s subsequent attempt to license the Duffin Well for irrigation purposes shows the purpose of drilling the well was not solely to recover water but to establish a water right for irrigation. The well functions to reliably produce enough water to irrigate 175 acres of land. The well was not designed to recover previously applied irrigation water.

ASCC also interprets Idaho Code § 42-228 as an available alternative to recover transmission losses resulting from leaky canals. Idaho Code § 42-228 allows for “recovering”

water “resulting from irrigation under such irrigation works” The ordinary meaning of the terms “recovering” and “resulting from irrigation” anticipates that the water be initially applied to the land for irrigation and subsequently recaptured for use again. Idaho Code § 42-228 does not allow pumping of ground water to replace transmission losses from leaky canals. As such, the Duffin well was not drilled for the “sole purpose of recovering ground water resulting from irrigation.”

The Duffin well also fails in the requirement that the recovered water must be used on the “lands to which the established water rights of the parties constructing the wells are appurtenant.” The Duffin property does not have any appurtenant water rights. Only ASCC has water rights appurtenant to the Duffin property and therefore, according to a plain reading of § 42-228, only ASCC can drill and operate a recovery well on Duffin’s property. In this instance because the Duffin Well was drilled in early 1970’s by the Duffins’ predecessor in interest and not ASCC, the well does not meet the requirements of § 42-228.

B. Recovery wells can recover identifiable irrigation surface water but cannot divert public ground water.

A water user is free to recover waste water but once water is commingled with another source, it is no longer subject to being recovered by the original appropriator. 78 Am. Jur. 2d Waters § 286 (“Water which has escaped or been released from artificial confinement may be recaptured by the owner while it is still on his or her premises and before it reaches a natural watercourse.”); *See Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, 178 (1927) (Water is available to be recovered only if it is “susceptible of being identified.”); *Order on Challenge, In Re SRBA Case No. 39576, Subcase 36-02080 et al.* at 16 (Apr. 25, 2003) (If the original appropriator “relinquishes control of the waste water and the water returns to, and is commingled

with, a natural stream or aquifer prior to being appropriated by a third party” the water is then “considered ‘return flow’ and is subject to appropriation by third parties as part of that tributary body of water.”). This ensures the water right owner recovers no more water than what results from its irrigation and does not enlarge its water rights. Recovery wells must be designed to only recapture the owner’s water resulting from irrigation whereas, wells constructed for water production are designed to maximize the extraction of water from the public aquifer. A recovery well cannot be developed into the public aquifer.

ASCC does not allege that it is recovering only project surface water. Instead it argues that because it can calculate the percentage of surface water lost through seepage from its canals, it is entitled to divert ground water equal to the amount of its surface water losses. *Corrected Second Affidavit of Steven T. Howser* ¶ 11. Extraction of new groundwater from the public aquifer to replace water lost from canal seepage is not permitted under § 42-228 as it is not recovery of the original water used for irrigation. Recovery of water and replacement of water are not synonymous. Recovery of water is not consistent with the acquisition of different water to replace water previously relinquished. Moreover, Idaho Codes expressly recognizes that once commingled with another source, surface water delivery losses become incidental aquifer recharge. Idaho Code § 42-234(5) provides in relevant part:

The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right.

The Legislature expressly prohibited what ASCC is seeking in this case. Incidental recharge may not be used as the basis to expand its water rights.

C. ASCC's policy of converting irrigation ground water wells to recovered water wells is contrary to Idaho Code § 42-228.

An examination of ASCC's policy on recovered water wells is helpful to understand IDWR's broader concerns regarding ASCC's actions. ASCC's transfer policy allows ASCC to assume control of a well drilled for any purpose and treat it as a recovery headgate. ASCC does nothing when it assumes control of an existing well through a transfer to ensure that the only water it is pumping from its recovery wells is water being recovered from irrigation not water from the public ground water supply. ASCC's transfer policy for recovery well headgates illustrates its indifference. The form ASCC asks its patrons to file, in order to transfer a private well to a recovery well, requests no information about the well other than if it has associated water rights. Exhibit 2, *Corrected First Affidavit of Steve Howser* (Nov. 18, 2014). There is no inquiry as to the depth of the well or the well's original purpose. *Howser Deposition* at 75. The transfer policy runs in contravention of the specific requirements in § 42-228 because the statute does not contemplate the transfer of existing water production wells and subsequent conversion to recovery wells. Idaho Code § 42-228 specifically requires the owner of the irrigation works with the appurtenant water rights be the party constructing the recovery well.

In addition, Idaho Code § 42-228 implicitly requires that the hydrologic conditions of the area be considered before drilling a recovery well. The recovery well should be constructed so that only surface water seepage is pumped by the well and not water from the public ground water supply. The presence of a perched aquifer or confining layers are examples of hydrologic conditions that would help to ensure only surface water seepage is being captured. This is not to say ASCC can never establish a recovered water well. In 2013, IDWR issued ASCC a permit to drill a recovery well. IDWR issued the permit with a number of conditions designed to ensure

that ASCC only recover its own water resulting from irrigation and not ground water from the public water supply. Exhibit E, *Affidavit in Support of Motion for Summary Judgment*.

ASCC's policies further blur the lines between recovery water and public ground water supply when ground water rights held by its patrons are considered. The approximately 120 "supplemental" water rights owned by individuals within ASCC's service area contribute to the water ASCC recovers through its recovery wells. ASCC refuses to acknowledge that the SRBA Court already determined the source for these supplemental rights is ground water. *Decision Re 01-23B et al.* ASCC does nothing to distinguish the different sources of water. ASCC offers no evidence the Duffin's diversion pumps water from any source other than ground water. Failing to distinguish the sources of the water allows private irrigation ground water rights to supplement ASCC's surface water rights and the public ground water supply becomes intermingled with ASCC's surface water. ASCC is not permitted to divert ground water under the ground water rights of its shareholders under a guise of recovered water.

Moreover, ASCC's transfer policy does not ensure the wells are being used to only recover surface water resulting from irrigation on the ASCC service area. Conversion of existing ground water production wells to recovery wells does not limit the withdrawal only to the recovery of water resulting from irrigation Idaho Code § 42-228 prescribes. Pumping an existing irrigation well and calling it a recovery well results in depletion of groundwater. Conversion of existing ground water production wells to recovery wells without substantial modification to the design of the wells creates an unregulated free pass into the public aquifer.

Finally, ASCC owns two water rights 35-2543 and 35-4246, operated out of what are commonly known as the Mann and Toevs wells respectively. Exhibit D, *Affidavit in Support of Motion for Summary Judgment; Howser Deposition* at 122. The decreed source for these water

rights is ground water. ASCC also claims to use the Mann and Toevs wells as recovery wells. *Howser Deposition* at 120. ASCC does not attempt to identify the source of water it claims to be recovering as project water or otherwise distinguish the water it diverts through these wells from any private ground water used on lands within the ASCC service area. *Howser Deposition* at 111-112. Like the Duffin well, these wells are being operated inconsistently with § 42-228. ASCC is using the recovery well statute to make up for its inability to supply surface water to all its shareholders and to provide the secondary benefit of protecting the wells from a delivery call against ground water rights. Idaho Code § 42-228 needs to be strictly adhered to so that recovery wells are only used to recover surface water resulting from irrigation and not illegally obtain or replace with new water from the public ground water supply.

CONCLUSION

IDWR is entitled to summary judgment because ASCC's characterization of the well owned and operated by Duffin as a recovery well is contrary to the plain language reading of Idaho Code § 42-228. ASCC believes it may use self styled recovery wells to pump ground water without regard to whether the water is truly being recovered. Instead of incurring the expense to line its canals and maintain its surface system to deliver water to shareholders on the end of laterals, ASCC developed a convenient new policy with an imaginative interpretation of Idaho law that would allow it to pump 180,000 acre feet of ground water to replace its transmission losses. ASCC's approach does not consider the bounds placed by § 42-228 nor Idaho water law in general. ASCC's approach also does not consider how geological conditions in the area might affect what water is recoverable and what water is public ground water.

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DATED this 2nd day of March 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of March 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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