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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 REPLY TO PLAINTIFFS' RESPONSE TO IDWR'S MOTION FOR SUMMARY JUDGMENT

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

Defendants-Intervenors.

The Idaho Department of Water Resources ("IDWR") submits *IDWR's Reply to Plaintiffs' Response to IDWR's Motion for Summary Judgment.*

Aberdeen-Springfield Canal Company ("ASCC") and Jeffrey and Chana Duffin ("the Duffins")[1] challenge IDWR's interpretation of Idaho Code § 42-228 as applied to a ground water well owned by the Duffins. Plaintiffs claim both water applied for irrigation and water leaking from ASCC canals may be recovered under Idaho Code § 42-228 even if the water has commingled with the public aquifer. *Plaintiffs' Response in Opposition to IDWR and SWC Motions for Summary Judgment* at 7-8 ("Response"). Plaintiffs interpretation of Idaho Code § 42-228 ignores the plain language of the statute and seeks to enlarge ASCC's water rights. Idaho Code § 42-228 only authorizes an irrigation entity to recover ground water resulting from irrigation from the irrigation project. It does not authorize an irrigation entity to divert non-project water from a public aquifer. Plaintiffs further argue ASCC does not need to drill its own recovery wells and may instead meet the requirements of Idaho Code § 42-228 by simply acquiring control, not ownership, of wells from irrigators. *Response* at 12, 14. Again these arguments ignore the plain language of Idaho Code § 42-228. ASCC must drill its own recovery wells, not acquire them from irrigators; and must own, not merely control, those wells. For these reasons IDWR requests that this Court grant its *Motion for Summary Judgment.*

[1] ASCC and the Duffins are hereafter referred to collectively as "Plaintiffs."

BACKGROUND

IDWR outlined the factual background of this case in *IDWR's Motion and Memorandum in Support of Summary Judgment* and in *IDWR's Response to ASCC's Motion for Summary Judgment*, both of which are incorporated by reference. Several facts however, should be highlighted. ASCC loses over 180,000 acre-feet in transmission loss from its canal system. *Corrected Second Affidavit of Steven T. Howser* ¶ 5 (Nov. 17, 2014). ASCC claims it is entitled to divert from the Eastern Snake Plain Aquifer ("ESPA") an amount of ground water equal to its full amount of transmission loss. *Id* at ¶ 11. ASCC claims it can do this even though it admits that water has been lost to the ESPA. *Id.*

The Duffins own an unlicensed well drilled for irrigation in the early 1970's. *Duffin Deposition* at 11. When the Duffins sought to have their shares in ASCC delivered in 2013, ASCC implemented its newly created transfer policy and authorized the Duffins to receive their shares from their existing unlicensed irrigation well now described as a recovery headgate. Exhibit 2, *Corrected First Affidavit of Steve Howser.* ASCC claims it delivered the Duffins' surface water shares to them in 2013 via the newly titled recovery headgate. *Duffin Deposition* at 25.

ARGUMENT

Plaintiffs ignore the plain meaning of Idaho Code § 42-228. The overall thrust of Plaintiffs' arguments is that IDWR's plain reading of Idaho Code § 42-228 leads to absurd results. However, none of the results of complying with Idaho Code § 42-228 are absurd but merely inconvenient to ASCC. Furthermore, if a statute is clear and unambiguous the Court does not have the authority to construe it to mean something the statute does not say. *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011).

A. The plain reading of Idaho Code § 42-228 only allows recovery of water used to irrigate lands.

When looking at Idaho Code § 42-228 as a whole it is clear that only water that is initially applied to the land for irrigation may be recovered pursuant to the statute. "To determine the meaning of a statute . . . where possible, every word, clause and sentence should be given effect." *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). When "ground water resulting from," "recovering," and "for further use on" are considered together, it is plain that water leaking from canals is not water that can be recovered under Idaho Code § 42-228. Recovery of water, given its plain and ordinary meaning, entails losing possession of the water initially and regaining possession later. Likewise, ground water resulting from irrigation can only become available for recovery after the actual irrigation has occurred. The final requirement is that water is recoverable "for further use on" appurtenant lands, which limits the recovery only to irrigation water that has already been applied to those lands.

Plaintiffs argue that recovering only water applied to appurtenant land is contrary to Idaho Code § 42-228, referencing the phrase in the statute "under such irrigation works." *Response* at 7. Plaintiffs further argue that "water lost under ASCC's 'irrigation works' means seepage from its canals, laterals, and other conveyance facilities." *Id.* at 8. Plaintiff's interpretation is contrary to the plain and unambiguous language of Idaho Code § 42-228. Plaintiffs simply ignore that § 42-228 must be read as a whole and that a plain reading indicates only irrigation water previously applied to appurtenant land can be recovered. This is true even considering ASCC's definition of its irrigation works. Plaintiffs also argue, without being able to recover canal seepage Idaho Code § 42-228 would become meaningless to canal companies as they would no longer be able to avail themselves of § 42-228. *Id.* This is not true. Canal companies would still be able to recover water, but only after the water is first used to irrigate

appurtenant lands. This recovered water could then be applied to those same lands or other shareholder lands.

Plaintiffs also argue that IDWR's own practice contradicts the amount of water that can be recovered under Idaho Code § 42-228. In 2013, IDWR issued ASCC a drilling permit to construct a recovered water well, which included a number of conditions. *Drilling Permit No. 868128* (April 24, 2013). The conditions were crafted to ensure ASCC only recaptures its own water and does not replace it with different water withdrawn from the public aquifer. Condition no. 13 included a requirement that ASCC measure and limit its recovery of water to no more water than its seepage losses from the "J" lateral. *Id.* When this permit was issued IDWR staff interpreted Idaho Code § 42-228 less restrictively, and did not include additional language preventing ASCC from recovering seepage water leaking from beneath canals. Over the past two years of this case and upon closer examination, IDWR believes the most accurate interpretation of Idaho Code § 42-228 requires that all language within the statute be given its ordinary and intended meaning to limit the recovery of water to only those waters resulting from irrigation applied to appurtenant lands.

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

Plaintiffs argue "[t]he plain language of I.C. § 42-228 does not preclude ASCC from recovering ground water after it enters an aquifer." *Response* at 9. Plaintiffs further argue the scope of Idaho Code § 42-228 should be expanded to allow them to replace its lost water with different water pumped directly from the public aquifer. Idaho Code § 42-228 uses the word "recovering" not replacing. The statute's use of the term "recovering" prevents ASCC from pumping water from the public aquifer. Additionally, "resulting from irrigation" suggests ASCC

can only capture ground water so long as it is there due to irrigation; the source of water that has commingled with the public aquifer cannot be definitively sourced to irrigation. Therefore, once irrigation water has seeped into the ground and commingled with other water in the public aquifer, recovery is no longer possible. This interpretation does not write requirements into Idaho Code § 42-228 as Plaintiffs suggest. *Response* at 9. Rather it gives effect to the plain language of the statute.

ASCC suggests there is a "mound" of water formed during the irrigation season that lies beneath its service area. *Response* at 4. ASCC could recover that water pursuant to Idaho Code § 42-228, if ASCC could establish that this alleged "mound" of water is the exclusive result of ASCC project water, applied as irrigation to appurtenant lands, and has yet to commingle with the public aquifer. If the alleged "mound" of water is formed as the result of irrigation by ASCC as well as other water users in the area or the water has commingled with public aquifer, the water in the "mound" is not recoverable under the provisions of Idaho Code § 42-228.

Further, Plaintiffs point to the definition of ground water in Idaho Code § 42-230(a) and state "[b]y permitting ASCC to recover 'ground water,' I.C. § 42-228 allows ASCC to recover any of its water beneath ground surface." *Response* at 9. Plaintiffs continue that "[t]he gravamen is not whether it has entered an aquifer, but whether it results from ASCC irrigation." *Id.* at 10. While Idaho Code § 42-230(a) has a broad definition of ground water, Idaho Code § 42-228 limits a canal company to "recovering" ground water resulting from irrigation. The broad definition of ground water has no relevance given the statutory limitation. In addition, once project water has commingled with the ground water, the water is no longer recoverable. *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.").

Plaintiffs also argue the decisions in *Sebern v. Moore* and *Order on Challenge* in Subcase 36-2080 do not apply as "I.C. § 42-228 [exempts] recovery wells from the provision of this act." *Response* at 10 (internal citations omitted). However, the common law discussed here applies to Idaho Code § 42-228 since wells qualifying under that statute are only exempt from the provisions of the Ground Water Act. Neither *Sebern v. Moore* nor *Order on Challenge* in Subcase 36-2080 discuss any of the provisions in the Ground Water Act. Plaintiffs further argue that Idaho Code § 42-228 abrogates the common law and authorizes the reclamation of water after it enters the public water supply. *Response* at 10. Plaintiffs are merely trying to cloud the plain language of Idaho Code § 42-228 with this argument. A plain reading of § 42-228 does not allow ASCC to pump water from the common aquifer to replace water seeping from its canals; instead § 42-228 only allows ASCC to recover irrigation water that has been applied to land before it becomes part of the public aquifer.

Plaintiffs' interpretation of Idaho Code § 42-228 would allow ASCC to enlarge its water rights. Idaho Codes expressly recognizes that, once commingled with another source, surface water delivery losses are considered 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. Plaintiffs argue that Idaho Code § 42-234(5) is inapplicable since wells drilled and operated pursuant to § 42-228 are not governed by the Ground Water Act. *Response* at 11. However, § 42-234 was not part of the Ground Water Act when it was passed in 1951. Ground Water Act 1951 Idaho Sess. Laws 422. Idaho Code § 42-234 was enacted in 1978 and was a new section of Chapter 2. 1978 Idaho Sess. Laws 955. None of the subsequent amendments to § 42-234 involve any of the provisions of the Ground Water Act. 1994 Idaho Sess. Laws 1397; 2009 Idaho Sess. Laws 743. Since § 42-234 is not part of the Ground Water Act, § 42-228 is not exempted from §42-234's provisions.

Plaintiffs also argue the drilling permit issued in 2013 to ASCC contradicts IDWR's position that water cannot be recovered once it has commingled with the public aquifer. *Response* at 11. The conditions placed in the drilling permit were specifically designed to prevent ASCC from recovering commingled water. This is evident in Conditions 3-5 which provide for perforated casing above the static water level and capping the bottom of the well. *Drilling Permit No. 868128.* These conditions allow water to flow into the well that has not commingled with the aquifer.

C. A plain reading of Idaho Code § 42-228 requires ASCC to physically drill recovery wells.

Idaho Code § 42-228 requires that an entity seeking to recover water drill its own recovery well for the sole purpose of acting as a recovery well. Plaintiffs argue this interpretation produces "unreasonable results that undermine the clear legislative purpose of I.C. § 42-228." *Response* at 12. 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* 151 Idaho

at 893, 265 P.3d at 506. 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). As stated before, if a statute is clear and unambiguous the Court does not have the authority to construe it to mean something the statute does not say. *Verska* 151 Idaho at 896, 265 P.3d at 509.

Further Plaintiffs claim forcing ASCC to drill recovery wells would produce the absurd result of ASCC drilling an identical well to the Duffin well a few feet away. *Response* at 12. ASCC could not drill a well identical to the Duffin well a few feet away that would satisfy the requirements in Idaho Code § 42-228. One of the reasons the Duffin well does not qualify as a recovery well under § 42-228 is it was drilled as an irrigation production well and pumps water directly from the public aquifer. To drill an identical well would mean the new well also pumps water from the public aquifer. To satisfy Idaho Code § 42-228, a new ASCC recovery well would have to be designed and drilled solely as a recovery well. Conditions like those included in ASCC's 2013 drilling permit would have to be imposed on the well to ensure ASCC is only recovering irrigation water and not commingled water. If ASCC were to simply acquire wells from irrigators it would have all the same problems as the Duffin well in that it would not comply with the requirements of § 42-228. Thus ASCC must drill the wells and it must drill the wells for the sole purpose of recovering irrigation water.

Plaintiffs confuse the language of Idaho Code § 42-228 by arguing if a well is drilled for the sole purpose of recovering irrigation water, "it can later be used for other purposes in addition to recovering water," and thus what controls is how the well is actually used. *Response* at 13. However both why the well was drilled and how the well is being used matter for purposes of § 42-228. If the well is drilled as a recovery well and subsequently used for a

different purpose, the well would no longer qualify as a recovery well. Additionally, if a well is drilled into a public aquifer supply as a production irrigation well it will not comply with § 42-228 as it is not recovering ground water resulting from irrigation of appurtenant lands.

D. ASCC must own not merely control its recovery wells.

Citing *United States v. Pioneer Irrigation District*, Plaintiffs claim "both ASCC and Duffins have ownership to the water rights appurtenant to the Duffin property," and therefore the Duffins may also own a recovery well. *Response* at 14. While *United States v. Pioneer Irrigation District* may recognize that the Duffins have an interest in ASCC's surface water rights, Plaintiffs argument again ignores a plain reading of Idaho Code § 42-228. Idaho Code § 42-228 clearly states "the established water rights;" it does not reference use of water rights. As such ASCC must own the recovery wells it chooses to drill and operate.

CONCLUSION

The Plaintiffs have failed to show ASCC is complying with Idaho Code § 42-228 when drilling, acquiring, or operating recovery wells. In fact Plaintiffs ignore the plain reading of Idaho Code § 42-228 and instead apply some other construction of the statute to suit ASCC's convenience. Ignoring the plain reading of Idaho Code § 42-228 would allow uncontrolled pumping of water from the public aquifer. ASCC must comply with the § 42-228's limitations. IDWR's *Motion for Summary Judgment* should be granted.

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DATED this 25th day of March 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th 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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