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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

REPLY 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 reply in support of the Coalition's *Motion for Summary Judgment*.

INTRODUCTION

It is undisputed that the Court must interpret the recovery well statue based on its plain language. Yet, when the Coalition points the Court to the exact language of the statute, the Plaintiffs accuse the Coalition of being "hyper-technical." In the end, Plaintiffs fail to justify any interpretation of section 42-228 that is not consistent with the plain language of the statute. That statute does not authorize Aberdeen Springfield Canal Company ("ASCC") to simply control one of its shareholder's private irrigation wells for recovery purposes. Instead, the Legislature enacted a statute that establishes specific limitations – including ownership and construction requirements – on the construction and use of a recovery well. Contrary to the Plaintiff's assertions, the Coalition's arguments do not undermine the legislative intent. Rather, the Coalition seeks an order from the Court upholding the plain language of the statute.

SCOPE OF PROCEEDINGS

This case is about one recovery well and ASCC's request for a declaration from the Court that the "control" of a private irrigation well drilled by one of its shareholders for private purposes is a recovery well and complies with the provisions of section 42-228. *See, generally, Complaint for Declaratory Relief.* This case is not about the general authority of ASCC, or any other entity to drill a recovery well and use that well to recover water. Similarly, this case is not about wells belonging to any ASCC shareholders other than Jeffrey and Chana Duffin.

Plaintiffs ask this Court to determine that "IDWR's civil actions and notices of violation to ASCC shareholders Duffins, KBC Farms, LLC and Funk are invalid." *Plaintiffs Resp. Br.* at 18. However, Plaintiffs' *Complaint* does not seek any relief as to any wells drilled by KBC Farms, LLC or Funk and there is no evidence that KBC Farms, LLC or Funk are using a "recovery well." Therefore, no relief can be granted as to those wells.

ARGUMENT

Although it has been laid out repeatedly in the briefing, the language of section 42-228 is important here and bears restatement:

> 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).

When broken down into its various phrases, the legislative intent becomes clear:

1. [L]ikewise, 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***

2. for the sole purpose of recovering ground water resulting from irrigation under such irrigation works

3. for further use on or drainage of lands ***to which the established water rights of the parties constructing the wells are appurtenant***;

4. providing that the drilling of such wells shall be ***subject to the licensing provisions*** of section 42-238, Idaho Code.

Id. (emphasis added).

Through this statute, the legislature authorized a narrow exception to the general rule mandating a permit and license for a new water right. *See* I.C. § 42-229 (mandating the application for permit process for all new ground water rights); *see also* I.C. § 42-227 (narrow exception to permitting obligation granted for domestic wells). Accordingly, the Legislature's intent to provide for the recovery of water must be tempered with the Legislature's equally valid

intent to make the exception to the permitting obligations a narrow one. Although Plaintiffs repeatedly rely on the former Legislative intent, they ignore the latter in an effort to significantly expand the scope of section 42-228. *Plaintiffs Resp. Br.* at 6 ("The legislative purpose of I.C. § 42-228 is clear: to allow canal companies like ASCC to use wells to recover water that leaks out of their canals"); *Plaintiffs Memo* at 15 ("ASCC "should have 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").

The Court's obligation to interpret a statute based on its plain language was confirmed in *A&B Irrigation District v. IDWR*, 154 Idaho 652 (2012). That case involved a final order from the Idaho Department of Water Resources ("Department") in the A&B Irrigation District ("A&B") delivery call. A&B sought reconsideration of the Director's order pursuant to section 67-5246(4), which mandates that the Director "dispose of" a reconsideration request within 21-days "after the filing of the petition." Rather than issue a decision on the merits within 21-days, however, the Director issued an order granting the petition "for the sole purpose of allowing additional time for the Department to respond to the Petition." *Id.* at 653. Considering its petition for reconsideration to be denied,[1] A&B filed a petition for judicial review. *Id.* The Director finally issued a decision on the merits of the petition for reconsideration *after* A&B filed its petition for judicial review. *Id.* The District Court dismissed A&B's appeal.

Like ASCC in this case, the Director argued that strict adherence to the language of section 67-5246 would lead to absurd results and would be "unworkable." *Id.* at 656. In upholding the plain language of the statute, the Court stated:

> IDWR contends that a twenty-one day time limit for deciding a petition for reconsideration would, in some instances, be unworkable and would not allow

[1] Section 67-5246(5)(b) provides that, if a petition for reconsideration is not decided within 21 days, then it is deemed denied.

> it sufficient time to evaluate the issues raised by the petition and to make a thoroughly considered opinion. ***We must apply the statute as written. "If the statute is unwise, the power to correct it resides with the legislature, not the judiciary."***

Id. Concurring with the majority opinion, Justice Jim Jones further provided:

> I reluctantly concur in the Court's Opinion because, in light of the language contained in I.C. § 67-5246(5), I simply can't read I.C. § 67-5246(4) to allow more than 21 days for an agency head to decide a motion for reconsideration on the merits. Were it not for subsection (5), I could accept IDWR's argument that an agency head can dispose of a reconsideration petition by entering an order, within the 21-day period, agreeing to reconsider, but not actually deciding it on the merits within that period, as per IDWR's argument referenced in footnote 2 of the Opinion. ***However, due to the wording of I.C. § 67-5246(5), that argument simply will not wash. It may be that the intent of the drafters was as argued by IDWR but the legislative language was simply inadequate to carry out that intent. Since IDWR's argument is based solely on the legislative language, the Court's Opinion is correct.***

Id. (emphasis added).

The same analysis demands that the Court read the express language of section 42-228 and deny the Plaintiffs' motion for summary judgment. The statute mandates that ASCC drill the well. It does not contemplate that an ASCC shareholder can drill an irrigation well, apply for a water right and then assign "control" of that well to ASCC for use as a recovery well. If ASCC believes the language to be unworkable, it's avenue to correct that language is through the Legislature – not the Court.

I. ASCC Must Drill the Well Used as A Recovery Well.

The Coalition's interpretation of section 42-228 is not contradictory to the legislative intent. Rather, it is consistent with the express wording of the statute. Phrase 1 states:

> [L]ikewise, 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***

As this language makes clear, in order to obtain the benefits of the exception provided under section 42-228, the (i) excavation; ***and*** (ii) opening of wells; ***and*** withdrawal of water therefrom, must be done "by canal companies, irrigation districts and other owners of irrigation works." There is no exception granted for an individual to drill a private well and then transfer the "control" of the well to an irrigation entity, as argued by Plaintiffs. Since the Duffin Well does not meet this requirement, it cannot be used as a recovery well under section 42-228.

Plaintiffs complain that the Coalition's arguments would lead to absurd results because "ASCC could drill a well identical to the Duffin well only a few feet away and use it to recover water." *Plaintiffs Resp. Br.* at 12-13. This argument is unpersuasive and is contradicted by the record. The record establishes that the recovery well would not be "identical" to the Duffin Well and the conditions on the drilling of the well would, in all likelihood, be substantially different than those imposed upon the Duffin Well. For example, ASCC recently obtained authorization from the Department to drill a recovery well. *Arrington Aff.* at Ex. K. The resulting permit included specific limitations – including depth of drilling and casing of the well. *Id.* That recovery well is located near the Duffin Well. *Corrected First Affidavit of Steven Howser* at Ex. 2. The Plaintiffs have made no showing that if ASCC drilled its own recovery well "a few feet away" from the Duffin Well, the ASCC well and the Duffin Well would be "identical."

In enacting the statute, the Legislature intended to allow recovery wells based on certain conditions. The Duffin Well does not meet even the threshold condition of being drilled by ASCC. If ASCC desires a recovery well in the area of the Duffin Well – i.e. "only a few feet away" – then the plain language of the statute mandates that ASCC drill that well.

ASCC's argument that interpreting the statute as written is unreasonable and contrary to the legislative intent is not supported by the history or wording of the statute. In enacting the

statute, the Legislature intended to allow recovery wells only in very limited, specific situations. It must be remembered that the statute grants an exception to the regular permitting requirements and limits the Department's ability to control the use of the wells if the conditions of the statute are met. If a qualified entity meets the statutory criteria, the entity can recover water for uses as allowed by the statute. However, there is no viable argument that can be made based upon the wording of the statute that a private person can drill a private well, apply for a water right, and then retain ownership of the well while transferring "control" to an irrigation entity, and have the entity designate the well as a recovery well under the statute. Plaintiffs' argument fails at the outset – ASCC did not drill the well, as required by the statute.

Phrase 2 mandates that the well drilled pursuant to the protections of section 42-228 be drilled "for the **sole** purpose of **recovering**" water. The language is clear. The record shows that the "sole purpose" of the well, when drilled, was to pump ground water, not recover irrigation project water. *Arrington Aff.* at Exs. C & D. Plaintiffs' argument that somehow the "sole purpose" language can be converted to mean that "their **current** use is solely to recover ASCC water," *Plaintiff Resp. Br.* at 13-14, is contrary to the express wording of the statute and contrary to the record. ASCC admits that it currently uses this well to divert its primary ground water rights while this matter is pending. *Arrington Aff.* at Ex. R (Howser Depo) at 81-82 ("The Canal Company leased a portion of its ground-water rights to be used from that location [i.e. the Duffin Well] to irrigate those lands").

II. The Entity Drilling the Well (i.e. ASCC) Must Also Own the Water Rights being Recovered.

Phrase 3 provides that recovery of water must be "for further use on or drainage of lands ***to which the established water rights of the parties constructing the wells are appurtenant.***" I.C. § 42-228 (emphasis added). Plaintiffs do not dispute the plain language of the statute on this

point. Rather, they accuse the Coalition of being "hyper-technical" in their arguments. The statute speaks for itself and mandates that the recovered water must be used on the lands to which the water rights "of the parties constructing the well" are appurtenant.

Plaintiffs attempt to evade the ownership requirements by pointing the District Court to the Supreme Court's decision in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 108 (2007). There, the Supreme Court held that entities, like ASCC, act on behalf of their water users and that title to the use of the water is held by the water users. Yet, the ownership discussed in *Pioneer* is not ownership sufficient to meet the requirements of section 42-228. Indeed, ASCC does not allow a landowner to simply drill a well and begin diverting ASCC water. As the record shows, ASCC attempts to strictly regulate the use of wells to recover water from its system – mandating that any shareholder must first apply to the Board of Directors and obtain permission from ASCC. *Howser Aff.* at Ex. 2. ASCC will then take "control" of the well and assess the water user for any water diverted from the well. *Arrington Aff.* at Ex. R (Howser Depo.) at 68-69. ASCC's own policies reflect ASCC's understanding that a shareholder cannot simply drill a well and recover ASCC water therefrom.

III. Any Recovery Well Must be Permitted.

Although a water right may not be required for a qualifying recovery well, the well itself must still be permitted. Section 42-228 specifically provides that "the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code." This process is clear – indeed, ASCC previously complied with this obligation by seeking a recovery well permit. *Arrington Aff.* at Ex. K.[2] This requirement evidences an intent on the part of the Legislature to

[2] This provision was added in 1970 – before the Duffin Well was drilled in "the early 1970's." *Arrington Ex.* at S (Duffin Depo. At 11, ll.18-25). Plaintiffs misrepresent the record on this point, concluding that "the Duffin well may have been drilled previously" to 1970. *Plaintiffs Resp.* at 16. Yet, Duffin plainly stated that the well was drilled in "the early 1970's." *Supra.*

ensure that the Department maintains some control over the recovery well process. Even though no water right is required to divert from a recovery well, the well drilling permit itself must be issued in accordance with section 42-238. ASCC's argument conflicts with this requirement. *See Plaintiffs' Memo* at 15 ("ASCC "should have 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"). The Plaintiffs' demand for unfettered use of any well for recovery purposes is not supported by the statute or ASCC's actions and policies.

IV. There is No Argument that a Recovery Well is Limited to Lands For Which ASCC Cannot Deliver Surface Water.

In a confusing argument, Plaintiffs accuse the Coalition of arguing that "the Duffin well cannot be used to recover water because Duffin's land could be irrigated with surface water if ASCC were to install a pond." *Plaintiffs Resp. Br.* at 17. Much like their misreading of the statute, Plaintiffs have misread the Coalition's brief. Indeed, the Coalition never made any such argument. The Coalition merely pointed out that the Plaintiffs' assertions of dramatic harm to ASCC's water rights are overstated given that the undisputed testimony is that ASCC could simply install a pond and open the headgate to deliver Duffin's surface water. *SWC Br.* at Part II. This does not mean that ASCC could not otherwise use a valid recovery well to deliver water to the Duffin property.

CONCLUSION

Since the Duffin Well does not meet the standard set forth in section 42-228 to qualify as a recovery well, the Court should grant the Coalition's motion for summary judgment.

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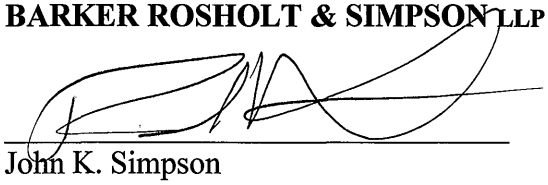
DATED this 25th day of March, 2015.

BARKER ROSHOLT & SIMPSON LLP



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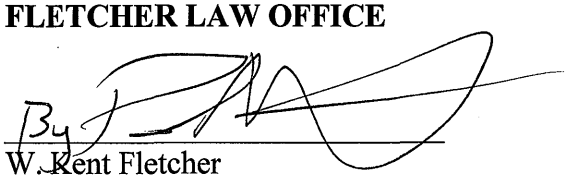

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of March, 2015, I served true and correct copies of the foregoing upon the following by the method indicated:

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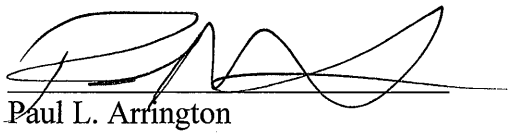

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