

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

ABERDEEN-SPRINGFIELD CANAL)	Case No: CV-2014-165
COMPANY, an Idaho Corporation,)	
JEFFREY and CHANA DUFFIN,)	ORDER ON MOTIONS FOR
individually, as stockholders, and as)	SUMMARY JUDGMENT
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, BURLEY IRRIGATION)	
DISTRICT, MILNER IRRIGATION)	
DISTRICT, MINIDOKA IRRIGATION)	
DISTRICT, NORTH SIDE CANAL)	
COMPANY and TWIN FALLS CANAL)	
COMPANY,)	
)	
Defendant-Intervenors.)	
)	
)	

I.

BACKGROUND

Jeffrey and Chana Duffin (“the Duffins”) own and rent approximately 2,800 acres of irrigated farm land in Power and Bingham Counties. The property is located within the service area of the Aberdeen-Springfield Canal Company (“ASCC”), and the Duffins hold shares of water stock in ASCC. Out of the 2,800 cumulative acres, approximately 175 acres are at issue in this proceeding. These 175 acres will be referred to herein as the “Subject Property.” The Subject Property is located at the end of a lateral where ASCC has historically had difficulty delivering water through its canal system. *Cor. 1st Howser Aff.*, ¶5. In the early 1970s, the Duffins’ predecessor-in-interest excavated and opened a well to irrigate the Subject Property with ground water. *Id.*; *Duffin Depo.*, p.10. In 1992, the predecessor filed two applications for permit with the Idaho Department of Water Resources (“Department”) to appropriate ground water for use in connection with the well. *Arrington Aff.*, Ex.C & D. The applications were not approved due to a moratorium on ground water appropriations in that area of the Snake River Basin. *See e.g., Arrington Aff.*, Ex.E & M. As a result, no water rights exist authorizing the diversion of ground water from the well to irrigate the Subject Property. The Duffins’ predecessors have historically used ground water diverted from the well for that purpose notwithstanding. *Duffin Depo.*, pp.12-13 & 34.

The Duffins acquired the Subject Property in December of 2011. *Id.* at 7. They proceeded to irrigate the Subject Property as had been done historically, with ground water diverted from the well. *Id.* at 13-14. They did so under the assumption that they had a valid water right authorizing such use. *Id.* at 13-14. During this time, the Duffins received no surface water deliveries from ASCC pursuant to their ASCC water shares. *Id.* at 18. In 2013, the Duffins learned there may be an issue with their ability to lawfully divert and use water from the well due to the lack of an existing water right. *Id.* at 23. In an attempt to address the situation the Duffins approached ASCC. *Id.* at 22. They submitted an Application to Change or Add Point of Delivery with ASCC, requesting to use their ASCC water shares to irrigate the Subject Property in place of the ground water that had been used historically. *Cor. 1st Howser Aff.*, Ex.2; *Duffin Depo.*, p.22.

It was ASCC’s policy at the time that if a demand for delivery of ASCC irrigation water was made for a parcel that had previously been irrigated by a well, such as the Subject Property

here, then ASCC would require that parcel to receive its water delivery through that existing well. *Cor. 1st Howser Aff.*, ¶6 & Ex.1. In other words, the applicant would not be able to receive delivery of ASCC irrigation water via its head gate located on the ASCC canal, but rather would have to apply to change the point of delivery from the canal head gate to the existing well. *Id.* The policy was implemented to address concerns regarding capacity issues and delivery limitations within ASCC's canal system. *Cor. 2nd Howser Aff.*, ¶7-8. For various reasons, some ASCC shareholders have chosen to secure private ground water rights to irrigate their lands, and thus have converted away from using their ASCC surface water shares. *Id.* While ASCC has allowed such shareholders to convert back to using their ASCC water shares should they so desire, the policy was implemented to address concerns that frequent occurrences of such conversions could further affect capacity issues and delivery limitations within ASCC's delivery system. *Cor. 2nd Howser Aff.*, ¶16.

The Duffins' request to use ASCC water shares to irrigate the Subject Property was subject to ASCC's policy. Although the request was ultimately approved by ASCC, the Duffins were not permitted to use their canal head gate for the delivery of that water as a condition of approval. *Id.* at ¶6-7 & Ex.2. Rather, they were required to take delivery of their ASCC water via their well, on the theory that the well would be treated as a recovery well under Idaho Code § 42-228 to recover ASCC surface water lost through seepage from its delivery system. *Id.* As another condition of approval, ASCC took over the control, but not ownership, of the well. *Howser Depo.* p.69; *Cor. 1st Howser Aff.*, ¶6. For the 2013 and 2014 water years, the Duffins irrigated the Subject Property with their ASCC water shares as delivered and received via the well. *Cor. 1st Howser Aff.*, ¶6-7.

On May 1, 2014, the Department issued a Notice of Violation to the Duffins. *Complaint*, Ex.A. The Department asserted that the Duffins' diversion and use of water from the well to irrigate the Subject Property in 2013 and 2014 constituted an illegal diversion of water in violation of Idaho Code § 42-351(1). *Id.* The Notice further informed the Duffins that "Department records reveal that the well . . . does not have a valid water right authorizing use." *Id.* The Notice directed the Duffins to cease and desist the diversion, and to pay certain civil penalties associated with the alleged unlawful use. *Id.* The Duffins and ASCC responded that the well "was authorized by and operated under the authority and direction of [ASCC] as a 'recovery well' pursuant to Idaho Code section 42-228," and requested a compliance conference

to address the alleged violation. *Complaint*, Ex.B. The parties were unable to resolve their differences at the compliance conference, and on May 28, 2014, the Department issued another Notice of Violation to the Duffins. *Id.* at Ex.C.

On June 6, 2014, the Plaintiffs filed a *Complaint for Declaratory Relief* against the Department. The *Complaint* seeks a declaration from this Court that the Plaintiffs' use of the well to irrigate the Subject Property is a duly authorized and lawful use pursuant to Idaho Code § 42-228, and is not subject to the regulatory authority of the Department. Further, the Plaintiffs' seek a declaration that the Department be precluded from taking any threatened or actual curtailment action preventing Plaintiffs' diversion of irrigation water via the well. On July 17, 2014, the Plaintiffs filed a *Motion for Summary Judgment*. Cross *Motions for Summary Judgment* were subsequently filed by the Department as well as the Intervenors.¹ The parties briefed the issues raised on summary judgment, and oral argument was held before this Court on April 1, 2015. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or April 2, 2015.

II. ANALYSIS

A. Standard of review.

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56. The burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Id.* When a court considers a motion for summary judgment, all facts are to be liberally construed in favor of the nonmoving party, and the court must draw all reasonable inferences and conclusions in that party's favor. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). However, when an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant summary judgment despite the possibility of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159

¹ On July 18, 2014, this Court entered an *Order* granting a *Motion to Intervene* filed by the 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.

P.3d 870, 874 (2007). The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review. *Borley v. Smith*, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010).

B. The well, and the use of water diverted therefrom in 2013 and 2014, does not fall within the scope of Idaho Code § 42-228.

The Idaho Ground Water Act, I.C. § 42-226, et seq., sets forth rules and regulations governing the appropriation and administration of ground water. With respect to appropriation, the Act directs generally that an individual or entity must follow the application, permit and license procedure of the Department to appropriate, divert and use ground water. I.C. § 42-229. With respect to administration, the Act vests in the Director the power to administer ground water. It directs it is the duty of the Director “to control the appropriation and use of the ground water . . . and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.” I.C. § 42-231. And, that the Director may prohibit or limit the diversion of ground water via a well when such water is not legally available. I.C. § 42-237a.

The Ground Water Act governs most, but not all, ground water use. Various categories of ground water use are specifically exempted from the rules and regulations of the Act. Idaho Code § 42-228 provides one such exception. Pursuant to specified criteria, the statute exempts the following ground water use from the purview of the Act:

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

I.C. § 42-228. The issue before the Court is whether the well at issue in this proceeding, and the use of water diverted therefrom to irrigate the Subject Property in 2013 and 2014, falls within the scope of Idaho Code § 42-228, and is thus exempted from the regulatory authority of the Department under the Act.

There are no material facts in dispute in this matter. Rather, the disagreement in this case concerns the proper interpretation of Idaho Code § 42-228. Under Idaho law, statutory

interpretation “must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.” *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). If the statutory language is unambiguous, “the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction.” *St. Luke's Reg. Med. Ctr. v. Bd. of Comm'rs of Ada County*, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009). A statute is ambiguous where “the meaning is so doubtful or obscure that reasonable minds might be uncertain or disagree as to its meaning.” *BHA Investments, Inc. v. City of Boise*, 138 Idaho 356, 358, 63 P.3d 482, 484 (2003). “However, ambiguity is not established merely because different possible interpretations are presented to a court.” *Id.* Further, “a statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.” *Ada County Prosecuting Attorney v. 2007 Legendary Motorcycle*, 154 Idaho 351, 354, 298 P.3d 245, 248 (2013).

In their *Motions for Summary Judgment*, the Plaintiffs assert that the use of the well to irrigate the Subject Property in 2013 and 2014 falls within the scope of Idaho Code § 42-228, whereas the Department and Intervenors argue that it does not. The Court finds the language of Idaho Code § 42-228 to be plain and unambiguous. The Court further finds, for the reasons set forth below, that the well at issue in this proceeding, and the Duffins' diversion and use of water therefrom for irrigation in 2013 and 2014, does not meet the criteria set forth in the plain and unambiguous language of the statute.

i. The well was not excavated and opened by a canal company, irrigation district or other owner of irrigation works.

The first requirement of Idaho Code § 42-228 is that the well and the water diverted therefrom must be excavated, opened and withdrawn by a canal company, irrigation district or other owner of irrigation works. The undisputed record establishes that the well at issue in this proceeding was excavated and opened by the Duffins' predecessor-in-interest in the early 1970s. *Cor. 1st Howser Aff.*, ¶5; *Duffin Depo.*, p.10. The Duffins' predecessor was not a canal company or irrigation district. And, while the Subject Property was serviced by irrigation works at the time of excavation – specifically, a lateral that is part of the ASCC delivery system – it is undisputed that the Duffins' predecessor was not the owner of those irrigation works. *Corrected*

2nd *Howser Aff.*, ¶5. Since the well at issue was not excavated and opened by a canal company, irrigation district, or other owner of irrigation works, the Court finds that the well and the water withdrawn therefrom does not fall within the scope of Idaho Code § 42-228 as a matter of law.

The Plaintiffs argue that Idaho Code § 42-228 should not be so narrowly construed to require that ASCC actually drill the well in order to satisfy the statute. They assert that as long as ASCC operates the well as a recovery well within its service area, and the well meets the other criteria of the statute, then it should fall within the scope of the statute regardless of who originally excavated and opened the well. The Court finds the Plaintiffs' argument to be contrary to the statute's plain language. Since the language of the statute is unambiguous, this Court must base its decision on the actual wording of the statute. *A&B Irr. Dist., v. Idaho Dept. of Water Resources*, 154 Idaho 652, 655 301 P.3d 1270, 1273 (2012). The actual wording of the statute provides for the "excavation *and* opening of wells *and* withdrawal of water therefrom *by* canal companies, irrigation districts, and other owners of irrigation works. . . ." I.C. § 42-228 (emphasis added). The language used is conjunctive, not disjunctive. Thus, under the circumstances present here, the statute required that the excavation, opening and withdrawal of water from the well be undertaken by ASCC in order to exempt the well and associated water use from the purview of the Ground Water Act.

ii. The well was not excavated and opened for the sole purpose of recovering ground water resulting from irrigation under such irrigation works.

The second requirement of Idaho Code § 42-228 is that the well and the water withdrawn therefrom must be excavated and opened for "the sole purpose of recovering ground water resulting from irrigation under such irrigation works" The Court finds that this requirement has not been met in this case. A review of the applications for permit filed by the Duffins' predecessor establish that the well was not excavated and opened for the sole purpose of recovering irrigation water diverted and lost by ASCC under its surface water rights. *Arrington Aff.*, Ex.C & D. To the contrary, the clear purpose behind the excavation and opening of the well was to acquire a private water right to divert ground water from the Eastern Snake Plain Aquifer ("ESPA") for the irrigation of the Subject Property. This is evidenced by, among other things, the Predecessor's attempt to obtain permits and licenses from the Department to appropriate private ground water rights in his own name. *Id.* Indeed, until 2013 the Duffins believed that

they were irrigating the Subject Property pursuant to just such a private ground water right. *Duffin Depo.*, pp.13-14. Therefore, the record is undisputed that the well was not excavated and opened for the sole purpose of recovering ground water resulting from irrigation under such irrigation works.

Additionally, the record establishes that the well does not recover “ground water resulting from irrigation under such irrigation works.” It is the Plaintiffs’ position that a recovery well under Idaho Code § 42-228 may pump any water located under the ground, notwithstanding its source, so long as they can prove that an equivalent amount of surface water has been lost from ASCC’s delivery system through seepage or other means. The Court finds the Plaintiffs’ argument contrary to the plain language of the statute. The term “Ground Water” is defined by the Act to mean “all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” I.C. § 42-230(a). However, in the plain language of Idaho Code § 42-228, the Legislature expressly identified the source and type of ground water the owner of a recovery well may recover. The statute provides only for “recovering ground water *resulting from irrigation* under such irrigation works.” I.C. § 42-228 (emphasis added). It does not allow for the recovery of ground water resulting from other sources.

The Plaintiffs do not assert, and the record does not support the proposition, that the well at issue here diverts ground water resulting from irrigation. Rather, as stated above, it is the Plaintiffs’ position that Idaho Code § 42-228 enables them to pump from the common ground water supply (i.e., the ESPA) an amount of water equal to that amount of surface water ASCC has lost to seepage. The plain language of the statute allows for the *recovery* of ground water resulting from irrigation, not the *replacement* of water lost to seepage. Allowing for the replacement of lost water may result in injury to third parties. For instance, the record establishes that ASCC maintains approximately 200 miles of canals. *Cor. 1st Howser Aff.*, ¶3. If ASCC could simply replace surface water lost to seepage with any other ground water, it could arguably pump ground water at the end of its 200 mile canal system in replacement of surface water lost at the beginning of its system. Since the water lost at the beginning of the system may not timely reach the area of the aquifer from which the replacement water was taken, other third party ground water pumpers located near the end of the system may suffer injury as a result of the Plaintiffs’ pumping of replacement water. However, the potential for such injuries are

avoided under the plain language of the statute, which only provides for the recovery of ground water identifiable as resulting from irrigation.

The Legislature's decision to limit the recovery of ground water to that identifiable as resulting from irrigation is consistent with case law on the recapture and use of water. As a general rule, seepage water resulting from beneficial use of a water right may be recovered and reused by the original appropriator. *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950). However, "implicit in the reasoning that permits an original appropriator to . . . reclaim waste water . . . is the recognition that the original appropriator is still controlling and beneficially using the water." *Order on Challenge*, SRBA Subcase Nos. 36-02080, et al, pp.15-17 (April 25, 2003), *affirmed in A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005). Where the original appropriator relinquishes control of the seepage water and it returns to, and is commingled with, a natural stream or aquifer, the water loses its original characteristic and it is subject to appropriation by third parties. *See e.g., Id.* ("the situation is different if after the original appropriator relinquishes control of the waste water and the water returns to, and is commingled with, a natural stream or aquifer"); 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"). The plain language of the statute is in harmony with the case law.

Plaintiffs argue that reading the statute as differentiating between the specific ground water previously used to irrigate and the common ground water supply creates an unattainable condition, which effectively eliminates the ability to develop a recovery well. The Plaintiffs assert that once water enters the ground it becomes difficult if not impossible to differentiate between the various sources of the ground water. This Court disagrees. The Department issues well drilling permits for recovery wells. However, conditions are placed on the permits, such as well depth in relation to the static level of the aquifer, to ensure that the water withdrawn from the well is indeed recovered water and not water from the common ground water supply. For example, ASCC previously applied for a drilling permit for a recovery well unrelated to this case whereby the Department imposed such conditions. *See Arrington Aff.*, Ex. K.

a. Recovery of water resulting from transmission losses is within the scope of Idaho Code § 42-228.

The Department also raised the argument that Idaho Code § 42-228 limits recovery wells to recovering only water resulting from irrigation and does not include water resulting from transmission losses. This Court disagrees. Idaho Code § 42-228 authorizes recovery wells “for the sole purpose of recovering ground water resulting from irrigation under such irrigation works. . . .” I. C. § 42-228. ASCC diverts and delivers water to shareholders through a complex system of laterals. As a general proposition, the laterals are integral to the irrigation system and are therefore part of the “irrigation works.” Although the statute does not define the scope of what constitutes “irrigation works,” the term is commonly defined as “artificial man-made conduits which are designed to divert the flow of water to areas where it would otherwise not flow because of the configuration of the land. . . .” <http://legaldictionary.lawin.org/irrigation-works>. The fact that the statute expressly authorizes the recovery of water “under such irrigation works” means that the recovery of “water resulting from irrigation” includes water lost to seepage in the irrigation works. This plain reading of the language is also consistent with case law on the original appropriator’s ability to reuse waste water.

iii. The party that constructed the well did not have an established water right appurtenant to the Subject Property.

The third requirement of the statute requires that the well be excavated and opened, and water withdrawn therefrom, “for further use on . . . lands to which the established water rights of the parties constructing the wells are appurtenant.” The record is clear and undisputed that the party that constructed the well – the Duffins’ predecessor – did not have any established water rights in relation to the Subject Property. *Cor. 1st Howser Aff.*, ¶5; *Duffin Depo.*, pp.10 & 23; *Complaint*, Ex.A; *Arrington Aff.*, Ex.E & M. Therefore, the Court finds that this requirement of the statute has not been met.

iv. The Plaintiffs’ argument that the plain language of the statute is too restrictive and/or procedures an absurd result is unavailing.

The Plaintiffs' argue that the plain language of the statute is too restrictive and/or produces an absurd result in that the use of recovery wells would be too limited under the plain language. The Plaintiffs' argument in this respect is unavailing. The Idaho Supreme Court has directed that courts "must apply the statute as written," and that if a party thinks the plain language of a statute is unwise, "the power to correct it resides with the legislature, not the judiciary." *A&B Irr. Dist., v. Idaho Dept. of Water Resources*, 154 Idaho 652, 656, 301 P.3d 1270, 1274 (2012).

The language of Idaho Code § 42-228 is unambiguous, so a resort to rules of statutory construction is unnecessary. However, one only need look at other exceptions to the Ground Water Act to reach the conclusion that the Legislature intended the recovery well exception be a limited one. For example, in addition to recovery wells, Idaho Code § 42-228 provides an exception to the Act for certain drainage wells. Unlike recovery wells, the only requirement to exempt a drainage well is that it be excavated and opened "for the sole purpose of improving or preserving the utility of land by draining them. . . ." The other limitations, discussed above, included in relation to excepting recovery wells are absent. There is no requirement that a drainage well be excavated and opened by a canal company, irrigation district, or owner of irrigation works. Nor is there a requirement that the individual constructing a drainage well own water rights appurtenant to the land. Likewise, there is no requirement that the withdrawal of water from a drainage well be ground water resulting from irrigation under such irrigation works. Therefore, the Legislature's inclusion of these criteria in the recovery well portion of the statute must, and do, have meaning.

C. Attorney fees.


The Plaintiffs seek an award of attorney fees in this matter. Since they are not prevailing parties, they are not entitled to an award of fees.

III.
ORDER

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Plaintiffs' *Motion for Summary Judgment* **is denied.**
2. The Defendant's *Motion for Summary Judgment* **is granted.**
3. The Defendant-Intervenors' *Motion for Summary Judgment* **is granted.**

Dated April 8, 2015



ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON
MOTIONS FOR SUMMARY JUDGMENT was mailed on April 08, 2015,
with sufficient first-class postage to the following:

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