John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE BIG WOOD GROUND WATER MANAGEMENT AREA	**DECLARATION OF TRAVIS L. THOMPSON IN SUPPORT OF SURFACE WATER COALITION'S RESPONSE IN OPPOSITION TO CITIES' MOTION FOR PARTIAL SUMMARY JUDGMENT**
IN THE MATTER OF APPLICATIONS FOR PERMITS FOR THE DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN	

I, Travis L. Thompson, declare as follows:

1. I am duly licensed to practice law in the State of Idaho, and I am an attorney with the firm of Marten Law LLP. I am over the age of 18 and make this declaration based upon my personal knowledge. I am an attorney representing A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company in this matter.

2. Attached hereto as Exhibit A is a true and correct copy of the *Memorandum Decision and Order* issued in *Riverside Irr. Dist. v. IDWR (In re Reuse Permit No. M-255-01, In the Name of the City of Nampa)*, Third Jud. Dist., Canyon County, Case No. CV14-21-05008, Dec. 28, 2021.

3. Attached hereto as Exhibit B is a true and correct copy of the *Municipal Intervenors Response*, *Riverside Irr. Dist. v. IDWR*, Oct. 4, 2021.

4. Attached hereto as Exhibit C is a true and correct copy of the *City of Nampa Response Brief*, *Riverside Irr. Dist. v. IDWR*, Oct. 8, 2021.

5. Attached hereto as Exhibit D is a true and correct copy of excerpts of the *IDWR Transfer Processing Memorandum No. 24*, December 21, 2009.

I declare under penalty of perjury under the laws of the state of Idaho that the foregoing is true and correct to the best of my knowledge.

RESPECTFULLY submitted this 13th day of September, 2023.

MARTEN LAW LLP

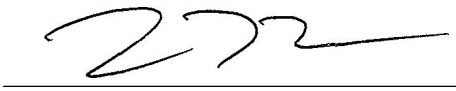
Travis L. Thompson

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2023, I caused to be served a true and correct copy of the foregoing **DECLARATION OF TRAVIS L. THOMPSON** by electronic service to each of the following:

Director Mat Weaver IDWR 322 E Front St Boise, ID 83720-0098 *** service by U.S. Mail and electronic mail file@idwr.idaho.gov mat.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov	Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 S. 4th St., Ste. 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com	Michael P. Lawrence Givens Pursley, LLP P.O. Box 2720 Boise, ID 83701-2720 mpl@givenspursley.com
Jerry R. Rigby Chase T. Hendricks Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com chendricks@rex-law.com	James R. Laski Heather E. O'Leary Lawson Laski Clark, PLLC 675 Sun Valley Road, Suite A P.O. Box 3310 Ketchum, ID 83340 jrl@lawsonlaski.com heo@lawsonlaski.com	Robert L. Harris Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com
Sarah A. Klahn Maximilian Bricker Somach Simmons & Dunn 2033 11th Street Suite 5 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com	Thomas J. Budge Racine Olson PLLP P.O. Box 1391 Pocatello, ID 83204-1391 tj@racineolson.com	Dylan B. Lawrence Varin Thomas LLC 242 N. 8th Street, Suite 220 P.O. Box 1676 Boise, ID 83701-1676 dylan@varinthomas.com
Albert P. Barker 101 S. Capital Blvd. US Bank Plaza, Ste. 305 Boise, ID 83702 abarker@martenlaw.com	Norman M. Semanko Payton G. Hampton Parsons Bahle & Latimer 800 West Main St., Ste. 1300 Boise, ID 83702 nsemanko@parsonsbehle.com phampton@parsonsbehle.com	



Travis L. Thompson

Exhibit A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RIVERSIDE IRRIGATION DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources, Respondents, and CITY OF POCATELLO, PIONEER IRRIGATION DISTRICT, ASSOCIATION OF IDAHO CITIES, CITY OF BOISE, CITY OF JEROME, CITY OF POST FALLS, CITY OF RUPERT, CITY OF NAMPA, CITY OF MERIDIAN, CITY OF CALDWELL, & CITY OF IDAHO FALLS, Intervenors. IN THE MATTER OF REUSE PERMIT NO. M-225-01, IN THE NAME OF THE CITY OF NAMPA	Case No. CV14-21-05008 **MEMORANDUM DECISION AND ORDER**

I.

BACKGROUND

This matter concerns the proposed disposal and application of municipal effluent on lands serviced by Pioneer Irrigation District ("Pioneer"). The facts have been stipulated to by the parties. Nampa owns a water delivery system for potable water ("potable water system"). R., 691. The potable water system is served by groundwater, which Nampa diverts via a system of wells pursuant to municipal water rights.[1] *Id.* at 692. Water delivered by Nampa to its customers via the system generates sewage. *Id.* at 696. The sewage is collected by Nampa and treated by its wastewater treatment plant. *Id.* The treated water leaving the plant will be referred to herein as "effluent." *Id.*

Presently, effluent leaving the wastewater treatment plant is discharged into Indian Creek. *Id.* at 697. Nampa discharges approximately 18.6 cfs of effluent into Indian Creek during the irrigation season, and 17.0 cfs during the non-irrigation season. *Id.* The effluent is comingled in Indian Creek with waste water from other water users as well as other waters of the State. *Id.* at 698. Riverside Irrigation District ("Riverside") holds water rights 63-2279 and 63-2374, which cumulatively authorize it to divert approximately 180 cfs of water from Indian Creek during the irrigation season.[2] *Id.* Nampa's discharge of effluent into Indian Creek occurs upstream of Riverside's point of diversion. *Id.* at 697. During the irrigation season, Riverside typically diverts most, if not all, of the flow of Indian Creek into the Riverside Canal under its water rights, including effluent discharged into the Creek by Nampa. *Id.* at 698.

The water quality of Nampa's discharge of effluent into Indian Creek is governed by National Pollutant Discharge Elimination System Permit No. ID0022063 ("NPDES Permit").[3] *Id.* at 699. The NPDES Permit was issued to Nampa by the Environmental Protection Agency under the Clean Water Act and has an effective date of November 1, 2016. *Id.* It requires Nampa to provide pollution control and treatment of its effluent based on discharge limits prior

[1] A list of the municipal water rights that serve Nampa's potable delivery system is set forth on page 692 of the record.

[2] Water right 63-2279 authorizes Riverside to divert 89.90 cfs from Indian Creek during the irrigation season pursuant to a November 4, 1915, priority date. Water right 63-2374 authorizes Riverside to divert 88.50 cfs from Indian Creek during the irrigation season pursuant to an August 2, 1922, priority date.

[3] A copy of NPDES Permit No. ID0022063 is attached as Appendix A to Exhibit J.

to discharge into Indian Creek. *Id.* at 699. The NPDES Permit contains discharge limits for mercury, total phosphorus, copper, and temperature. *Id.* The NPDES Permit recognizes that Nampa would be unable to immediately comply with the applicable discharge limits set forth therein. *Id.* at 531-532. Therefore, it sets forth a compliance schedule wherein Nampa must meet the applicable discharge limits for mercury, total phosphorus, and copper on September 30, 2026, and for temperature on September 30, 2031. *Id.*

On March 19, 2019, Nampa filed a reuse permit application with the Idaho Department of Environmental Quality. *Id.* at 398. In the application, Nampa identifies a recycled water reuse program for which it seeks a reuse permit. *Id.* The recycled water reuse program is proposed by Nampa as an alternative to meeting the discharge limits required of it under the NPDES Permit. *Id.*; R., 700. It is summarized as follows:

> The City of Nampa (City) is authorized to discharge treated wastewater effluent from the Nampa Wastewater Treatment Plant (WWTP) to Indian Creek under U.S. Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Permit No. ID0022063 (Appendix A). The City is seeking a recycled water reuse permit from the Idaho Department of Environmental Quality authorizing discharge of Class A recycled water from the Nampa WWTP as agricultural and municipal irrigation supply augmentation water to the Phyllis Canal. The discharge will occur annually between approximately May 1 and September 30. Once the water enters the canal it is considered irrigation water and is managed by Pioneer Irrigation District for use downstream from the discharge point. The design flow planned for this discharge is 31 cubic feet per second (cfs). The Phyllis Canal typically conveys irrigation water at a rate of approximately 200 cfs along the reach of the proposed recycled water discharge location.
>
> This preliminary technical report includes background information and a discussion of proposed activities and operations to support the City's requested target effluent limits as described below:
>
> · Class A recycled water concentrations for constituents of concern.
> · 30 mg/L total nitrogen (recycled water use is not groundwater recharge)
> · 0.35 mg/L total phosphorus (TP)
> · No temperature limit
>
> This reuse project is expected to improve water quality in Indian Creek by removing Nampa WWTP discharges to the creek for 5 months out of the year. Compared to the Nampa WWTP NPDES permit conditions, the proposed recycled water reuse permit conditions would achieve a 24 percent average decrease in total phosphorus loading to Indian Creek and a 60 percent average decrease in total nitrogen loading during the proposed period of recycled water discharge to the canal.

> The City and PID have entered into an agreement for receipt and use of Class A recycled water from the City to the Phyllis Canal at flows up to 41 cfs. PID provides irrigation service to approximately 34,000 acres in western Ada County and Canyon County, including the City's pressurized irrigation system. Below the proposed recycled water discharge point, the Phyllis Canal distributes irrigation water to approximately 17,000 acres north and west, ultimately discharging to tributaries of the Riverside Canal in Caldwell and other irrigation facilities west to Greenleaf.
>
> Total nitrogen concentrations (average 1.7 mg/l) are much lower than the proposed recycled water effluent limit of 30 mg/l, and the mixed concentration in the canal would be about 5.5 mg/l under the discharge conditions of this water reuse project. This would benefit agricultural users because the irrigation water has historically been deficient in nitrogen. Because nitrogen fertilizer application is a common practice in this area, the City and PID will cooperate to educate customers in the service area about the increasing total nitrogen levels to avoid over application of total nitrogen that may exceed agronomic uptake rates of crops and landscaped areas in the portion of the PID service area downstream of the recycled water discharge location.

Id. at 427.

Thus, under the proposed recycled water reuse program, Nampa intends to discharge effluent from its wastewater treatment plant into the Phyllis Canal, as opposed to Indian Creek, during the irrigation season. *Id.* The Phyllis Canal is owned and operated by Pioneer. Once the effluent enters the Canal, it will be managed by Pioneer. *Id.* Ultimately, the effluent will be land applied to lands owned by Pioneer's customers for purposes of disposal. *Id.* Because irrigation canals are not considered waters of the state, the Phyllis Canal is not subject to Idaho's water quality standards. *Id.* at 280. "This will allow the City to address [the NPDES Permit] discharge limit[s] to Indian Creek from May through September by treating [its effluent] to standards that are acceptable for irrigation use, but not as stringent as water quality standards applicable to Indian Creek." *Id.*; R., 700.

To facilitate the recycled water reuse program, Nampa and Pioneer entered into a Recycled Water Discharge and Use Agreement ("Reuse Agreement"). *Id.* at 205-212. The Reuse Agreement allows Nampa to discharge up to 41 cfs of effluent into the Phyllis Canal during the irrigation season. In exchange, Pioneer agrees to "handle, manage, and convey [the effluent] as an integrated part of its irrigation operations." *Id* at 208. On January 21, 2020, the

Idaho Department of Environmental Quality issued Reuse Permit No. M-255-01 ("Reuse Permit"), authorizing the recycled water reuse program. *Id.* at 221. As Nampa no longer intends to discharge effluent into Indian Creek during the irrigation season under the Reuse Permit, Riverside will lose the ability to divert that effluent into the Riverside Canal.

On February 24, 2020, Riverside submitted a *Petition for Declaratory Ruling Regarding Need for a Water Right to Divert Water Under Reuse Permit No. M-225-01* ("*Petition for Declaratory Ruling*") to the Idaho Department of Water Resources. R., 1. The *Petition for Declaratory Ruling* sought a ruling as to whether Pioneer needs a water right to divert and use municipal effluent delivered into the Phyllis Canal for irrigation purposes. The Director issued his *Order on Petition for Declaratory Ruling* on May 3, 2021 ("*Final Order*"). In the *Final Order*, the Director held that Nampa, and by extension Pioneer, does not need a water right to dispose of effluent as contemplated in the Reuse Permit under the water right exception set forth in Idaho Code § 42-201(8).

Riverside filed a *Petition* seeking judicial review of the *Final Order*. The *Petition* asserts the *Final Order* is contrary to law and requests the Court set it aside and remand for further proceedings. The Court subsequently entered an *Order* permitting the Intervenors to participate in this proceeding. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petition* was held before the Court on November 10, 2021.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the

petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

A. The Director's determination that Nampa is not required to obtain a water right for the land application of effluent is affirmed.

As a general rule, Idaho law requires that water be diverted and used pursuant to a water right:

> No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

I.C. § 42-201(2). The legislature has identified limited exceptions to this requirement. One exception is set forth in Idaho Code § 42-201(8), which provides as follows:

> Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

I.C. § 42-201(8).

The Court finds the language of Idaho Code § 42-201(8) to be unambiguous. It permits a municipality and/or municipal provider to dispose of effluent without obtaining a water right if such disposal is employed in response to state or federal regulatory requirements. The statute expressly provides that disposal may include the land application of effluent. Further, that such land application may occur on lands not identified as a place of use for an existing irrigation water right if notice is provided to the Department. In this respect, Idaho Code § 42-201(8) does not restrict the land on which qualifying effluent may be disposed.

The Director found the water right exemption in Idaho Code § 42-201(8) applies to Nampa in this case. The Court agrees. The parties are in agreement that Nampa is a "municipality" and "municipal provider" as defined in section 42-202B.[4] R., 691. Therefore, Nampa is a qualifying entity under the statute. The record establishes that Nampa's proposed disposal of effluent into the Phyllis Canal is being employed in response to state or federal regulatory requirements. Specifically, the disposal is employed in response to the discharge limits applicable to Nampa under the NPDES Permit. Last, although the Reuse Permit and Reuse Agreement contemplate land application of effluent outside of the place of use authorized under Nampa's water rights, Idaho Code § 42-201(8) permits such application so long as the Department is notified of the location. The Court therefore finds the plain language of Idaho Code § 42-201(8) to be met as applied to Nampa. It follows that the Director's finding that the water right exemption set forth in Idaho Code § 42-201(8) applies to Nampa must be affirmed.

B. The Director's determination that Pioneer is not required to obtain a water right for the land application of Nampa's effluent is affirmed.

Riverside's primary argument is that the water right exemption in Idaho Code § 42-201(8) does not apply to Pioneer, as Pioneer is not a qualifying entity under the statute. The Director disagreed. He found that Nampa's exemption under the statute extends to Pioneer as a result of its regulatory and contractual relationship with Nampa:

[4] A "municipality" means a city incorporated under section 50-201, Idaho Code, a county, or the state of Idaho acting through a department or institution. I.C. § 42-202B(4). A "municipal provider" means "(a) A municipality that provides water for municipal purposes to its residents and other users withing its service area; . . . ." I.C. § 42-202B(5).

> The Director agrees with Nampa that Nampa and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer. The Reuse Agreement contractually obligates Pioneer to dispose of Nampa's effluent. The Reuse Agreement requires an ongoing relationship between Nampa and Pioneer. Nampa must apprise Pioneer of when it will discharge effluent to Phyllis Canal. Pioneer is obligated to accept up to 41 cfs of effluent from Nampa during the irrigation seasons. Pioneer is obligated to cooperate with Nampa to obtain permits and approvals.
>
> The Reuse Permit further ties Nampa and Pioneer together. DEQ granted Nampa's Reuse Permit based on its analysis of Pioneer's irrigation operations. Pioneer's place of use is included in the area of analysis. Exhibit H at 17-18. The analysis further considered that Nampa's effluent would be "very diluted by the existing irrigation water" and that "nutrient needs of the crops are greater than that provided by the additional nutrient." Exhibit H at 37-38. To ensure water quality of jurisdictional waters, Nampa and Pioneer will install an automated flow control system on 15.0 Lateral so the effluent will not return to jurisdictional waters. Nampa may not have legal control over Pioneer, but both are intimately involved in the process of land applying Nampa's effluent in response to a regulatory requirement. Given the contractual and regulatory ties between Nampa and Pioneer and under the specific set of facts presented here, the Director concludes Subsection 8's exemption applies and it is not necessary for Pioneer to obtain a separate water right to accept water from Nampa and apply that water to land in the Pioneer district boundaries.

R., 1233-1234.

The Court agrees with the Director's finding. Municipalities often act through agents or other contracting entities in carrying out their duties. The legislature has granted municipalities the power to enter into contracts for such purposes. *See e.g.*, I.C. § 50-301 (providing cities may contract and be contracted with). While Idaho Code § 42-201(8) does not explicitly state that a municipality may contract with a third party to accomplish effluent disposal via land application, such statement is unnecessary given that Idaho Code § 50-301 already grants them the power to do so. *See e.g., Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982) (stating "when the legislature considers the amendment of a statute, it has in mind all existing laws"). As the statute contemplates effluent disposal via land application on lands not identified as a place of use for an existing irrigation water right, reading the statute to prohibit a municipality from being able to contract with a third party to accomplish land application would lead to an absurd result. *See e.g., State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004) ("The Court disfavors constructions that would lead to absurd or unreasonably harsh results"). Namely, it would

prohibit a municipality from being able to contract to dispose of effluent on lands outside of its boundaries, despite the statute specifically authorizing it to do so.

In this case, Nampa contracted with Pioneer via the Reuse Agreement to accomplish effluent disposal via land application as contemplated under Idaho Code § 42-201(8). It did so to utilize Pioneer's Phyllis Canal to deliver its effluent to lands within Pioneer's service area for land application disposal. Although Pioneer ultimately accomplishes the effluent disposal via land application within its service area, it does so on behalf of Nampa. In this respect, Pioneer is acting as an extension of Nampa in its effort to land apply its effluent in the manner authorized under Idaho Code § 42-201(8), and enjoys Nampa's statutory ability to accomplish such land application without a water right. Put differently, the "use" at issue is the disposal of effluent by Nampa. The application of the effluent to crops to effectuate the disposal is incidental to the process. Under the statute, Nampa could likewise apply the effluent (or contract for its application) on non-arable land for disposal purposes without a water right. Accordingly, under the circumstances presented, a water right is not necessary nor is Nampa precluded from contracting with a third party for disposal of its effluent. It follows the Director's finding that Pioneer is not required to obtain a water right for the land application of Nampa's effluent is affirmed.

C. The application of effluent on crops is not an enlargement of Nampa's municipal ground water rights.

Riverside argues the application of effluent on crops outside Nampa's authorized service area constitutes an enlargement of Nampa's municipal rights. Riverside asserts the situation in this case is indistinguishable from the facts in *A & B Irrigation District v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005). This Court disagrees.

In *A & B Irrigation District*, A & B held groundwater rights for irrigation. A & B's irrigation practices generated significant quantities of waste water. As a means of disposing of the waste water, A & B used it to irrigate additional acreage not authorized under its groundwater rights. In an effort to avoid the application related conditions of Idaho's enlargement statute, Idaho Code § 42-1426, A & B sought to have its water use decreed as a separate surface water right independent from its groundwater rights. The Idaho Supreme Court

held the waste water did not constitute a separate source or water right. *Id.* at 753, 118 P.2d at 85. The Court held that use of the waste water to irrigate additional acreage constituted an enlargement of A & B's groundwater rights. *Id.*

While similar, the situation in *A & B Irrigation District* is distinguishable as it involved irrigation rights as opposed to municipal rights and did not implicate Idaho Code § 42-201(8).[5] The nature of the beneficial use of a municipal right is such that the right can be fully consumed without engaging in waste or violating a beneficial use duty of water. One of the authorized uses of a municipal water right is sewage conveyance. Absent treatment, unlike unconsumed water associated with other types of water rights, municipal effluent not meeting specified regulatory standards cannot be conveyed back into a water source for beneficial use by other appropriators. Nampa's decrees do not require as a condition that its effluent be treated and nothing in Idaho law pertaining to water right administration requires treatment so as to make effluent available for other appropriators, nor can other appropriators compel a municipal right holder to treat effluent. Statutorily, Idaho Code § 42-201(8) further confirms this principle. Simply put, the failure of a municipal right holder to treat effluent does not result in an increase in the beneficial use authorized by the water right or violate a beneficial use duty of water. Alternatively, a municipal right holder electing to fully treat, recycle and continuously reuse its effluent within the parameters of its water right may do so under principles of recapture and reuse also without increasing beneficial use or violating a duty of water. The nature of the purpose of use of a municipal right is such that the right can be fully consumed without violating a beneficial use duty of water and without exceeding the authorized scope of the water right.

This is not necessarily the same with respect to an irrigation right, which is defined by different parameters. An irrigation right holder also has the right to recapture and reuse wastewater and it must also do so consistent with the elements of its water right and the beneficial use duty of water. However, irrigating additional acreage results in enlargement of the original right beyond what is authorized. Not only is the consumptive use of the water increased but it also impacts other rights on the system in another way. As a general proposition if quantities of irrigation waste water are such that application on additional lands is necessary for its disposal then issues can be raised regarding the duty of water and whether more efficient

[5] Idaho Code § 42-201(8) did not exist at the time.

irrigation practices should be employed.[6] This comes to light in times of shortage when priority administration is being sought. A water right holder seeking regulation of juniors must demonstrate that the water right is being used efficiently and without waste. As a matter of law, an irrigation right holder cannot use the disposal of its waste water as a means for insulating its irrigation practices from such a challenge and at the same time bootstrapping in additional acres under the priority date for the original water right to the detriment of junior priorities.

The disposal of municipal effluent on crops in lieu of treatment does not raise the same issues, nor does it have the same legal impact on other water rights on the system. Effluent production is implicit in purpose of a municipal right and because the right holder is not required to treat the effluent for discharge back into the system, failure to treat the effluent is within the scope of the right and not an enlargement of the right. The effluent is essentially the same as if it were fully consumed and out of the system. It follows that the absence of legal impact to other rights is the same whether applied to crops either in or outside of the service area.

D. The conditions on Nampa's water rights do not prohibit it from exercising the authority granted to in by Idaho Code § 42-201(8).

Riverside argues that conditions in Nampa's water rights provide only for municipal uses and do not permit the type of irrigation use contemplated under the Reuse Permit and Reuse Agreement.[7] The Court has determined that both Nampa and Pioneer are authorized to dispose of effluent via land application without a water right under Idaho Code § 42-201(8) under the facts of this case. Therefore, the conditions set forth in Nampa's municipal water rights are inapplicable, as the subject water use is not occurring under those water rights, but rather is occurring under Idaho Code § 42-201(8). It follows the Director's *Final Order* must be affirmed.

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[6] In *A&B Irrigation District*, the Court noted: "[S]hould A & B find itself in the unique situation of having more excess drain and/or waste water then it can reuse on its appropriated properties, Idaho water law requires the district to diminish its diversion." *A & B Irrigation District*, 141 Idaho at 752, 118 P.3d at 84.

[7] For example, Nampa's municipal water right 63-12474 contains the following condition: "The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigation agricultural use to other land uses but still requiring water to irrigate lawns and landscaping."

E. Substantial rights and constitutionality of Idaho Code § 42-201(8).

Riverside argues its substantial rights are prejudiced by the *Final Order*. It first asserts its property rights in the form of its water rights on Indian Creek (i.e., 63-2279 and 63-2374) are prejudiced because they will receive less water as a result of Nampa's proposed recycled water reuse program. Along this same reasoning, Riverside asserts its water rights are injured by the application of Idaho Code § 42-201(8) in violation of Article XV, § 3 of the Idaho Constitution, which directs that the "priority of appropriation shall give the better right as between those using the water . . . ."

Water rights are real property rights under Idaho law. I.C. § 55-101. It is established that Riverside diverts most, if not all, of Indian Creek flows during the irrigation season, including effluent presently delivered into the Creek by Nampa. R., 698. It is further established that Riverside will lose the ability to divert that effluent under Nampa's proposed recycled water reuse program. *Id.* However, for the reasons set forth herein, the Court holds Riverside has failed to establish (1) prejudice to its water rights, or (2) the unconstitutionality of Idaho Code § 42-201(8) as applied to the facts of this case.

Of significance, the effluent presently delivered by Nampa into Indian Creek is imported waste water. It is imported because it is not originally diverted from Indian Creek, but rather is diverted by Nampa from a separate source (i.e., groundwater) under its municipal water rights.[8] R., 692. When Nampa discharges its effluent into Indian Creek, it artificially augments Indian Creek's natural flow with imported groundwater. The effluent is waste water because it has already been used for municipal purposes and has been recaptured by Nampa in order to treat it prior to delivery to Indian Creek.[9] *Id.* at 696.

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[8] The Court notes that effluent leaving the wastewater treatment plant is "composed primarily of treated sewage deriving from municipal water delivered to Nampa's customers via Nampa's Potable System [i.e., groundwater], but also includes relatively small amounts of treated sewage from properties within Nampa served by private wells, operational water introduced at the WWTP, and infiltration/inflow (groundwater and surface inputs e.g., through manhole covers)." R., 696. It does not appear any of the effluent leaving the wastewater treatment plant is originally diverted from Indian Creek. *Id.*

[9] Although often used, the term "waste water" has not been previously defined by Idaho law. It generally refers to water that is not consumptively used after it is diverted and put to beneficial use by a water user. In an irrigation setting, it can refer to water that is left over after the process of applying it to crops. This would include water that runs off the end of an irrigated field, water that seeps out of canals or reservoirs, or water that percolates into the soil after crop application. In a municipal setting it can refer, as it does here, to effluent produced and collected by a

The law is settled in Idaho that an appropriator "may reclaim 'waste water' which until that point had been used by a junior appropriator." *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 667, 680, 619 P.2d 1130, 1133 (1980). Further, that "[n]o appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former." *Id.* at 681, 619 P.2d at 1134. As Nampa's effluent is imported waste water, which Nampa recaptures after municipal use and maintains control over, Idaho law rejects the contention that Riverside can compel Nampa to continue to discharge that effluent into Indian Creek. *Id.* As Riverside has no legal right or entitlement to the continued delivery of effluent into Indian Creek, it has failed to establish its water rights have been prejudiced or unconstitutionally injured by the Director's *Final Order*.

Riverside next asserts its due process rights have been prejudiced. Idaho's Constitution provides "no person . . . shall be deprived of life, liberty or property without due process of law." Idaho Const. Art. I, § 13. For quasi-judicial proceedings, the Idaho Supreme Court has directed that procedural due process requires that:

> [T[here must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when [a party] is provided with notice and an opportunity to be heard. The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement. Due process is not a concept to be applied rigidly in every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation.

Due process rights are substantial rights under the law. *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010).

The Court finds Riverside was provided meaningful notice and an opportunity to be heard before the Director. Riverside was afforded the opportunity to file its *Petition for Declaratory Ruling*, brief the issues raised in that *Petition*, and submit evidence and stipulated facts before the Director. The Court further finds Riverside does not have a legal right or entitlement to compel delivery of Nampa's effluent into Indian Creek for the reasons discussed above. Where there is no legally cognizable property interest at issue, there can be no due

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municipality after diverting water to municipal use. The terms "effluent" and "waste water" are used interchangeably by the parties. R., 696.

process violation for the alleged deprivation of that property interest. For these reasons, Riverside has failed to establish its due process rights were prejudiced by the Director's *Final Order*. It follows the *Final Order* must be affirmed.

F. Attorney fees.

Pioneer and Nampa seek awards of attorney fees under Idaho Code § 12-117(1). That code section provides for fees to the prevailing party where the Court finds "that the nonprevailing party acted without a reasonable basis in fact or law." The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the issues presented to this Court are largely issues of first impression concerning the interpretation of Idaho Code § 42-201(8). Neither this Court nor the Idaho Supreme Court has previously addressed issues pertaining to the water right exception provided in Idaho Code § 42-201(8). The Court holds that Riverside has presented legitimate questions for this Court to address on those issues of first impression. Therefore, an award of attorney fees under Idaho Code § 12-117 is not warranted.

IV.
ORDER

Therefore, based on the foregoing, IT IS ORDERED that the *Final Order* is hereby affirmed.

Dated December 28, 2021

ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

Gary Spackman Director – Idaho Department of Water Resources PO Box 83720 Boise ID 83720-0093 gary.spackman@idwr.idaho.gov	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery
Garrick Baxter The Idaho Department of Water Resources PO Box 83720 Boise ID 83720-0093 Garrick.baxter@idwr.idaho.gov	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery
Albert P. Barker BARKER ROSHOLT & SIMPSON PO Box 2139 Boise ID 83701-2139 apb@idahowaters.com	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery
Christopher M. Bromley McHUGH BROMLEY, PLLC 380 S 4th Street Ste 103 Boise ID 83702 cbromley@mchughbromley.com	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery
Charles L. Honsinger HONSINGER LAW, PLLC P.O. Box 517 Boise, ID 83701 honsingerlaw@gmail.com	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery
Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 Idaho Falls, ID 83405 efiling@holdenlegal.com	[X] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery

Christopher H. Meyer
GIVENS PURSLEY, LLP
P.O. Box 2720
Boise, ID 83701
chrismeyer@givenspursley.com

[X] By E-mail [ ] By mail
[ ] By fax (number)
[ ] By overnight delivery / FedEx
[ ] By personal delivery

Sarah A. Klahn
SOMACH SIMMONS & DUNN
2033 11th Street, Ste. 5
Boulder, CO 80302
sklahn@somachlaw.com

[X] By E-mail [ ] By mail
[ ] By fax (number)
[ ] By overnight delivery / FedEx
[ ] By personal delivery

Andrew J. Waldera
SAWTOOTH LAW OFFICES, PLLC
1101 W. River Street, Ste. 110
Boise, ID 83702
andy@sawtoothlaw.com

[X] By E-mail [ ] By mail
[ ] By fax (number)
[ ] By overnight delivery / FedEx
[ ] By personal delivery

Candice M. McHugh
MCHUGH BROMLEY, PLLC
380 S. 4th Street, Ste. 103
Boise, ID 83702
cmchugh@mchughbromley.com

[X] By E-mail [ ] By mail
[ ] By fax (number)
[ ] By overnight delivery / FedEx
[ ] By personal delivery

Dated: 12/29/2021 10:13:53 AM

Clerk of the Court
By _____
Deputy Clerk

Exhibit
B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RIVERSIDE IRRIGATION DISTRICT,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources,

Respondents,

and

CITY OF POCATELLO, PIONEER IRRIGATION DISTRICT, ASSOCIATION OF IDAHO CITIES, CITY OF BOISE, CITY OF JEROME, CITY OF POST FALLS, CITY OF RUPERT, CITY OF NAMPA, CITY OF MERIDIAN, CITY OF CALDWELL & CITY OF IDAHO FALLS,

Intervenors.

IN THE MATTER OF REUSE PERMIT NO. M-255-01, IN THE NAME OF THE CITY OF NAMPA

Case No. CV14-21-05008

MUNICIPAL INTERVENORS' RESPONSE TO RIVERSIDE IRRIGATION DISTRICT'S OPENING BRIEF

Chris M. Bromley, ISB No. 6530
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cbromley@mchughbromley.com
Attorneys for Intervenors City of Boise, City of Jerome, City of Post Falls, and City of Rupert

Charles L. Honsinger, ISB No. 5240
HONSINGER LAW, PLLC
PO Box 517
Boise, ID 83701
Telephone: (208) 863-6106
Facsimile: (208) 908-6085
honsingerlaw@gmail.com
Attorneys for Intervenors City of Caldwell and City of Meridian

Sarah A. Klahn
SOMACH SIMMONS & DUNN
2033 11th Street Suite 5
Boulder, Colorado 80302
Telephone: (303) 449-2834
Facsimile: (720) 535-4921
sklahn@somachlaw.com
Attorneys for Intervenor City of Pocatello

Candice M. McHugh
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cmchugh@mchughbromley.com
Attorneys for Intervenor Association of Idaho Cities

Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO, PLLC
PO Box 50130
Idaho Falls, ID 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
rharris@holdenlegal.com
Attorneys for Intervenor City of Idaho Falls

Remaining counsel of record are listed in the certificate of service.

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I. INTRODUCTION

The Cities of Boise, Meridian, Caldwell, Jerome, Post Falls, Rupert, Idaho Falls, Pocatello, and the Association of Idaho Cities, collectively referred to herein as "Municipal Intervenors" hereby file this Response to Riverside Irrigation District's (hereinafter "Riverside") Opening Brief in the above-captioned matter.

Municipal Intervenors join in and concur in the briefs filed by the City of Nampa (hereinafter "Nampa"), Pioneer Irrigation District (hereinafter "Pioneer"),[1] and the Idaho Department of Water Resources (hereinafter "IDWR" or "Department"). For purposes of economy, and because of the detailed responses in the briefs filed by Nampa and Pioneer, Municipal Intervenors will not address every issue raised by Riverside. Municipal Intervenors reserve the right to address any issue raised by Riverside in argument if so desired by the Court.

Municipal Intervenors have intervened in this case to support the conclusion reached by the Director of IDWR in his May 3, 2021 *Order on Petition for Declaratory Ruling* ("*Order*").[2] That conclusion was that pursuant to the exemption in I.C. § 42-201(8) (hereinafter "Subsection 8"), Pioneer is not required to apply for or obtain a water right to accept wastewater effluent discharged by Nampa into Pioneer's Phyllis Canal after such wastewater has been treated within Nampa's publicly owned wastewater treatment plant (hereinafter "WWTP").

The Municipal Intervenors support the *Order* because it is consistent with Idaho law and a contrary conclusion may impact the control and direction that cities are entitled to assert over their own treated wastewater. Each of the Municipal Intervenors either currently discharges their own treated wastewater into facilities owned by outside parties, or may desire to do so in the

[1] Municipal Intervenors are not seeking an award of attorneys' fees.
[2] The *Order* is located in the Agency Record at pages 1230-1237. Hereinafter, all citations to the Order will be to the particular page of the Order.

future. A short summary of the individual Municipal Intervenors' concerns and factual situations follows:

A. City Of Jerome

The City of Jerome treats water at its WWTP that was appropriated by the City and other users, including industry. Since the end of World War II, the City has discharged treated water into the North Side Canal Company's ("NSCC") J8 Canal for beneficial use by NSCC. This is done pursuant to an NPDES permit and a written Agreement for Discharge of Treated Wastewater between Jerome and NSCC. If the *Order* is overturned, NSCC would require a water right to accept water treated by Jerome at its WWTP, thereby upsetting this approximately seventy-five-year relationship, and subjecting Jerome to potential protest by third parties.

B. City Of Boise

The City of Boise currently discharges treated effluent from its Water Renewal Facilities into the Boise River pursuant to its NPDES permit. The City of Boise treats wastewater from multiple providers including the City of Boise's potable water provider Suez, multiple sewer districts, and other private users. The City of Boise is interested in the ability to explore alternatives to discharging its treated effluent to the Boise River, one such alternative being reuse of its treated effluent.

C. City Of Meridian

The City of Meridian discharges most of the effluent treated at its WWTP to Fivemile Creek pursuant to its NPDES permit. Some of that treated effluent is delivered (prior to discharge into Fivemile Creek) to various users, including a park, commercial landscaping, a car wash, and others. While the delivery of effluent to other users is a fraction of the total effluent produced by the City, it intends to continue searching for ways in which to use its treated

effluent. The City's NPDES permit also allows discharge to the Boise River, and the City maintains infrastructure to do the same if desired.

D. City Of Caldwell

The City of Caldwell discharges effluent treated at its WWTP to the Boise River just upstream of the mouth of Indian Creek pursuant to an NPDES permit. Caldwell is interested in finding ways to deliver its treated effluent for use by other entities, including irrigation districts.

E. City Of Post Falls

The City of Post Falls treats water appropriated by the City and other municipal providers at its WWTP, then discharges treated water into the Spokane River below Post Falls dam, pursuant to an NPDES permit, mere miles upriver from the border with the State of Washington. In the future, Post Falls plans to recycle more water than it discharges into the Spokane River.

F. City Of Rupert

The City of Rupert treats water appropriated by the City and other users, including industry, at its WWTP, then land applies the same water onto fields owned and operated by the City during the irrigation season pursuant to an IDEQ Reuse Permit and stores treated water in lagoons during the non-irrigation season pursuant to the same Reuse Permit. Rupert has an agreement with the United States to discharge treated water into the Minidoka Irrigation District canal in the event of an emergency. In the future, Rupert may want to discharge all or some of the water it treats into an irrigation canal.

G. City Of Idaho Falls

The City of Idaho Falls treats water appropriated by the City, other municipal providers, private water purveyors and other users, including industry, at its WWTP, and discharges treated effluent to the Snake River pursuant to an NPDES permit. This single discharge point to the

Snake River is immediately adjacent to the WWTP and upstream of the Gem State Hydroelectric Dam. Idaho Falls does not currently provide treated effluent to any end user but is continuously seeking ways to best manage this resource.

H. City Of Pocatello

The City of Pocatello discharges wastewater from its Water Pollution Control Plant ("WPC") into the Portneuf River. The Pocatello WPC treats wastewater to satisfy permit requirements for secondary treatment, nitrification and phosphorus removal. However, the City anticipates that it will be faced with additional and expensive treatment requirements in the future and has begun to consider land application or other arrangements with nearby water users that would allow it to avoid expensive new treatment technologies.

I. Association Of Idaho Cities

AIC is a non-partisan organization founded in 1947 that represents its city members, both large and small in order to safeguard cities' ability to manage their water rights, water use, and wastewater discharge as necessary to meet the needs of their residents and any applicable laws and regulations. Riverside's arguments here implicate cities' management and use of water rights, water use, and wastewater discharge. Thus, AIC endorses the arguments made in this brief to allow cities to operate as they have historically under applicable Idaho state law.

II. PROCEDURAL HISTORY

This matter comes to the Court following Riverside's petition for judicial review of the *Order* in which the Director ruled against Riverside by holding that Subsection 8 "exempts municipalities from needing a water right to land apply effluent from a publicly owned treatment works employed in response to regulatory requirements." *Order* at 5. Riverside challenges the *Order*, asking the Court to "reverse[]" on a number of legal bases. *Riverside Opening Brief* at

33. Municipal Intervenors support the Director's *Order* as it upholds the exception crafted by the Legislature, codifying common law, that allows cities to lawfully cease wasting of water by disposing of treated effluent from WWTPs in response to state or federal regulatory requirements without a water right.

III. FACTS DEVELOPED IN THE AGENCY PROCEEDING

The facts in this proceeding developed before the agency are fairly straightforward. These facts have been stipulated to by the parties to that proceeding, including Riverside, Nampa, Pioneer, and the Municipal Intervenors.[3]

Nampa is a "municipal water provider" within the meaning of I.C. § 42-202B(5). *SOF*, ¶ 7. Nampa diverts groundwater into its potable water system for delivery to its customers pursuant to its municipal water rights. *SOF*, ¶¶ 8-10. Nampa collects sewage generated by its potable water system customers, treats it in its WWTP, and discharges the treated wastewater into Indian Creek. *SOF*, ¶¶ 23, 27.

Riverside diverts water from Indian Creek downstream from the WWTP into the Riverside Canal pursuant to its water rights that authorize the diversion of approximately 180 cfs therefrom. *SOF*, ¶ 28, 33. Thus, Riverside diverts and uses wastewater discharged by Nampa into Indian Creek. *SOF*, ¶ 30. Notably, this augmentation of Indian Creek (that benefits Riverside) results from Nampa's diversion, use, treatment, and discharge of ground water into Indian Creek pursuant to water rights that were appropriated decades after Riverside's appropriations of its surface water supply from Indian Creek. *SOF*, ¶¶ 9, 33.

Pursuant to a Reuse Permit issued by the Idaho Department of Environmental Quality (hereinafter "IDEQ"), Nampa intends to eliminate the discharge of treated effluent from its

[3] The *Stipulation of Facts* (hereinafter "*SOF*") is located in the Agency Record at pp. 688-712. Hereinafter, all citations to the *SOF* will be to the particular page of the *SOF*.

WWTP into Indian Creek during the irrigation season; however, Nampa will continue this practice outside of the irrigation season. *SOF*, ¶¶ 34, 52; Ex. G.[4] Instead, pursuant to that Reuse Permit and a Reuse Agreement between Nampa and Pioneer, Nampa intends to direct its treated effluent from its WWTP into Pioneer's Phyllis Canal during the irrigation season. *SOF*, ¶¶ 45, 49; Ex. F[5]; Ex. G. Pioneer has not applied for a water right to accept such treated wastewater into the Phyllis Canal. *SOF*, ¶ 35. Water from the Phyllis Canal is delivered by Pioneer to Nampa's non-potable municipal irrigation water delivery systems, and to Pioneer's own agricultural irrigation landowners within Pioneer's authorized place of use, including some within Nampa's area of city impact. *SOF*, ¶¶ 57 – 60.

IV. STANDARD OF REVIEW

When a district court acts in an appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the decision to determine whether it correctly decided the issues. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). However, this Court also reviews the agency record independently of the district court's decision. *Id*. "An agency's factual determinations are binding on the reviewing court, while questions of law are freely reviewed. *Id*." *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 243, 443 P.3d 252, 257 (2019). "Where the district court's order is correct but based upon an erroneous theory, this Court will affirm the order on the correct theory. *Martel v. Bulotti*, 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003)." *Summers v. Cambridge Joint School Dist.*, 139 Idaho 953, 955, 88 P.3d 772, 724 (2004).

"The Court exercises free review over questions of law and matters of statutory interpretation." *Intermountain Real Props., L.L.C. v. Draw, L.L.C.*, 155 Idaho 313, 317–18, 311

[4] Exhibit G is located in the Agency Record at pp. 221-250.
[5] Exhibit F is located in the Agency Record at pp. 205-212.

P.3d 734, 738–39 (2013). "While this Court exercises free review over an agency's conclusions of law, an agency's interpretation of the statutes it administers is due deference if the agency interpretation is reasonable, consistent with the statutes it administers, and supported by rationales favoring deference. *Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n*, 144 Idaho 23, 26, 156 P.3d 524, 527 (2007)." *Elgee v. Ret. Bd. of Pub. Emp. Ret. Sys.*, 169 Idaho 34, 490 P.3d 1142, 1156 (2021); *see also Duncan v. State Bd. of Acct*., 149 Idaho 1, 3, 232 P.3d 322, 324 (2010) (explaining four-prong test for agency deference).

"When reviewing the constitutionality of a statute, this Court exercises free review. To prevail, a challenger must show that the statute is 'unconstitutional as a whole, without any valid application.' This Court makes 'every presumption [ ] in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger." *Citizens Against Range Expansion v. Idaho Fish & Game Dep't*, 153 Idaho 630, 633–34, 289 P.3d 32, 35–36 (2012) (alteration in original) (citing *Idaho Schs. For Equal Educ. Opportunity v. State*, 140 Idaho 586, 590, 97 P.3d 453, 457 (2004)).

V. ARGUMENT

A. Subsection 8 Exempts Pioneer Irrigation District From The Requirement That It Obtain A Water Right For The Wastewater Effluent Discharged Into Its Canal By Nampa

The *Order* determined that Pioneer did not need to comply with I.C. § 42-201(2) and obtain a water right prior to accepting Nampa's wastewater effluent because of the exemption to that subsection provided by Subsection 8. I.C. § 42-201(2) provides in relevant part that in Idaho, a water right is necessary to "divert any water from a natural watercourse or apply water to land." However, an applicable exemption to that mandatory water right requirement is also present in the statute.

That exemption provides in relevant part that

> Notwithstanding the provisions of subsection (2) of this section, a municipality . . . operating a publicly owned treatment works shall not be required to obtain a water right for the . . . disposal of effluent from a publicly owned treatment works . . . where such . . . disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider . . . shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place.

I.C. § 42-201(8).

This exemption in the statute is applicable to Nampa in this case, because under the statute, it is a municipality operating a publicly owned treatment works disposing of effluent pursuant to governmental regulatory requirements via land application. The exemption also applies to Pioneer by extension because the Reuse Agreement contractually obligates Pioneer to accept and land apply the treated effluent. As the *Order* found, "Nampa and Pioneer are so intertwined in this matter, that Subsection 8's exemption applies to Pioneer." *Order* at 4. Despite Riverside's arguments to the contrary, there is nothing with respect to the language of the Reuse Agreement, or with respect to the language of either I.C. § 42-201(2) or Subsection 8 that leads to a conclusion that the Subsection 8 exemption would not be applicable Nampa, and subsequently to Pioneer as Nampa's agent/contracting partner in this case.

B. The Director Correctly Concluded That Pioneer Is Entitled To The Exemption By Virtue Of Its Contractual Relationship With Nampa; Pioneer Is In Fact An Agent With Respect To That Contract

The *Order* approved Nampa and Pioneer's Reuse Agreement, consistent with Subsection 8, finding a water right was not required, because the relationship was grounded in contract. "Given the contractual and regulatory ties between Nampa and Pioneer and under the specific set of facts presented here, the Director concludes Subsection 8's exemption applies and it is not

necessary for Pioneer to obtain a separate water right to accept water from Nampa and apply that water to land in the Pioneer district boundaries." *Order* at 9. Riverside takes repeated shots at this conclusion on two fronts. First, Riverside argues the omission of certain words in Subsection 8 prevents Nampa and Pioneer from entering into a contract for disposal of treated wastewater. Second, Riverside argues the Director erred in failing to void the Reuse Agreement because it was not squarely rooted in the legal principle of agency. Riverside is incorrect on both counts.

As to the first point, Riverside makes an extremely technical and unavailing argument that because Subsection 8 does not use magic words such as "'agent' or 'third party' or 'irrigation district,'" Nampa cannot contract with Pioneer to land apply treated wastewater from the WWTP. *Riverside Opening Brief* at 12. The absence of specific words in the statute does not defeat the authority for cities and irrigation districts to contract with one another for disposal of treated wastewater. "It is axiomatic that when the legislature considers the amendment of a statute, it has in mind all existing law . . . ." *Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982) (emphasis added). The Court will not interpret a rule or statute to create an absurd result. *State v. Heath*, ___ Idaho ___, ___, 485 P.3d 1121, 1124 (2021) ; *State v. Doe*, 167 Idaho 249, 253, 469 P.3d 36, 40 (Ct. App. 2020). "[W]hen choosing between alternative constructions of a statute, this Court presumes that the statute was not enacted to work a hardship or to effect an oppressive result." *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000). To accept Riverside's argument would lead to the absurd result of prohibiting cities and irrigation districts from contracting with one another in order to dispose of treated wastewater outside a city's boundaries, authority that is specifically granted by statute, thereby working a hardship and leading to an oppressive result.

For example, cities and irrigation districts have the power to contract. I.C. § 43-304 (irrigation districts may "make and execute all necessary contracts . . . [and] may enter into contracts for a water supply to be delivered to the canals and works of the district . . . ."); I.C. § 50-301 (cities may "contract and be contracted with"). Moreover, I.C. § 42-202B(6) allows cities, under the umbrella of a municipal water right, to use and dispose of water for "related purposes . . . including those located outside the boundaries of a municipality served by a municipal provider." The contract at issue in this case would allow Nampa to dispose of its treated wastewater into the Phyllis Canal for land application by Pioneer within Pioneer's district boundaries, some of which overlap Nampa's municipal service area, without a water right. Given the underlying authorities of cities and irrigation districts to enter into contracts, the Director's interpretation that Subsection 8 authorizes Nampa and Pioneer to contract for disposal of treated wastewater is reasonable and subject to deference. *Elgee* at 12; *Duncan* at 3, 232 P.3d at 324.

Second, Riverside introduces a red herring by asking the Court to apply the principles of agency to the relationship between Nampa and Pioneer, *see Riverside Opening Brief* at 14-15, despite the fact that agency was not relied on by the Director in the Order. According to the Director:

> The characteristics of agency plainly allow an agent of a Subsection 8 exempted entity to benefit from Subsection 8's exemption. . . . . However, the Reuse Agreement does not give Nampa the right to control Pioneer. . . . . Despite the absence of a formal agency relationship, Subsection 8's exemption may still apply in this case. The Director agrees with Nampa that Nampa and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer. The Reuse Agreement contractually obligates Pioneer to dispose of Nampa's effluent.

Order at 4 (emphasis added).

Therefore, the Director recognizes that principles of agency could allow for a Subsection 8 relationship between a city and an irrigation district, but in the absence of agency, and due to the Reuse Agreement (which he found was a contract), Pioneer was authorized to accept Nampa's treated wastewater without a water right. I.C. §§ 42-202B(6), 43-304, and 50-301. Arguing for the Court to apply agency to this case, when the Director did not, impermissibly expands the scope of review of the *Order*.

To the extent the Court agrees to consider the issue of agency, the arguments made by Nampa and Pioneer demonstrate the *Order* can be affirmed on a different legal theory, *Summers* at 955, 88 P.3d at 724. The Municipal Intervenors specifically adopt and incorporate the agency-related arguments made by Nampa and Pioneer.

C. Nampa's Effluent Retains Its "Treated Wastewater" Status As It Is Discharged Into, And Conveyed Via, The Phyllis Canal All The Way To The Point At Which It Is Used To Irrigate Lands Within Pioneer Irrigation District

Riverside argues that Nampa's treated effluent, once discharged into Pioneer's Phyllis Canal, becomes wastewater subject to appropriation, thereby requiring Pioneer to obtain a water right to land apply that effluent. *Riverside Opening Brief* at 15-16. Riverside states that even though the Phyllis Canal is not a "natural watercourse," the mandatory water right requirement of I.C. § 42-201(2) applies. In support of this argument, Riverside cites to Special Master Booth's *Memorandum Decision and Order on Motion for Summary Judgement* in SRBA Subcase 63-27475 (*Janicek Properties, LLC*) (hereinafter "*Janicek*"). *Riverside Opening Brief* at 16-18. In that case, the Special Master determined whether drain water was public water subject to appropriation. The Special Master held that even though the drain in question was not a "natural watercourse," that the drain water could be appropriated "because waste, seepage and spring waters are subject to appropriation." *Janicek* at 6.

The Special Master's decision in *Janicek* does not help Riverside. First, the case addresses drains, not constructed private canals like the Phyllis Canal. Drains are constructed to collect excess water, not specifically and only to convey water from diversion from a natural source to ultimate use as is the case with constructed canals such as the Phyllis Canal. In fact, the Special Master in *Janicek* addressed this very distinction:

> [D]iversions from the running streams of the state are required to have some type of infrastructure at the point of diversion that is designed to regulate and control the amount of water diverted. In this way, the amount of water diverted is in line with the amount entitled to be diverted under the applicable water right(s), and the conveyance system can be turned off at the end of the applicable period of use. A ditch constructed for the purpose of intercepting and collecting seepage or waste water from the saturated soils, on the other hand, does not and can not have any such infrastructure. Such a ditch does not even have a precise point of diversion. The ditch will collect whatever water drains into it, and there simply is no way to regulate, limit, or shut off the flow of water into the drainage ditch. Because of this inability to regulate and limit the flow of water into the ditch, it is certainly possible that the amount of public water collected in the drain exceeds that which can be beneficially used by the person or entity that constructed the ditch - in terms of quantity, annual volume and period of use. Because any balance of unused water in the drainage ditch is still public water of the state, it is subject to appropriation under the laws of the state.

Janicek at 8.

There are no facts or allegations that the Phyllis Canal was constructed "for the purpose of intercepting and collecting seepage or waste water from the saturated soils." Moreover, unlike the drain ditch in *Janicek*, the Phyllis Canal does have "infrastructure at the point of diversion that is designed to regulate and control the amount of water diverted" and there is a "way to regulate, limit, or shut off the flow of water" into it. Thus, according to the Special Master's own distinction between drain ditches and constructed diversion ditches, the Phyllis Canal is nothing like the drain ditch addressed in *Janicek.* Accordingly, Riverside's attempt to conflate the Phyllis Canal with a "drain ditch" that collects excess "public water of the state" is without merit.

Second, the "waste, seepage, and spring waters" referred to by the Special Master in *Janicek* were not treated as wastewater effluent as is the case with Nampa's discharges into the Phyllis Canal. To say that Nampa's treated effluent changes its character to appropriable water as soon as it is discharged to be properly disposed of makes no sense if taken to its logical conclusion. If, for example, instead of discharging its treated effluent, Nampa contracted with another entity to pump the effluent into trucks to be transported to farmlands for application to the same, then according to Riverside, the trucking entity transporting the effluent would be required to obtain a water right to accept it. This makes absolutely no sense and is completely inconsistent with the exemption in Subsection 8.

In short, Riverside's attempted reliance upon *Janicek* is at best misplaced and should be disregarded.

D. The Conditions On Nampa's Water Rights Do Not Apply To Irrigation Application Of Its Wastewater Effluent

Riverside argues that the conditions in Nampa's water rights provide only for municipal uses and not for the alleged "irrigation" uses contemplated by the Reuse Agreement. Therefore, according to Riverside, Pioneer is violating Nampa's water rights by land applying treated effluent resulting from Nampa's treatment of water diverted pursuant to those water rights. *Riverside's Opening Brief* at 18-22. A couple of points dispose of this somewhat long discussion and argument by Riverside.

First, Riverside's allegation that Nampa's water rights are being used for "irrigation" purposes is simply wrong. Instead, the water collected at Nampa's WWTP is used for "municipal" purposes.[6] Only after this water has been used for municipal purposes, is it

[6] "Municipal purposes" includes "water for residential, commercial, industrial, irrigation of parks and open space, and related purposes." I.C. § 42-202B(6).

collected at Nampa's WWTP for treatment. Thus, the "irrigation use" of Nampa's water rights that Riverside complains about simply does not exist.

Second and more importantly, Nampa is under a legal obligation to treat and dispose of its wastewater effluent, pursuant to its IDEQ Reuse Permit. Subsection 8 was enacted to assist municipal providers such as Nampa in this process. Requiring any entity to file a transfer application to include irrigation as a purpose of use in that provider's municipal water rights prior to land applying the same (whether applied by the municipal provider itself, an agent, or an entity with which it has contracted) would negate the purpose of the exemption provided for in Subsection 8, and would negate the exemption itself. Riverside's argument must be dismissed for the absurd and oppressive results that it would cause. *Heath* at 3; *Mulder* at 57, 14 P.3d at 377; *Doe* at 253, 469 P.3d at 40.

E. The Source Of Nampa's Water Rights Is Irrelevant To The Issue Of Whether Subsection 8's Exemption Applies To Land Application Of Its Wastewater Effluent

Riverside makes an erroneous apples to oranges comparison between Nampa and the A&B Irrigation District in an attempt to defeat the *Order*. According to Riverside, the source of "Nampa's potable water rights is ground water and that Nampa's WWTP treats and discharges ground water," thereby requiring a water right consistent with the Supreme Court's decision in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005). *Riverside Opening Brief* at 22 (emphasis in original). The source of Nampa's water rights is irrelevant, and Riverside is wrong to draw the comparison with *A&B*.

First, while the source of Nampa's municipal water rights is ground water, not all water treated at the WWTP is ground water; thus, Riverside is incorrect if it is implying that all water treated at the WWTP is ground water. *See SOF ¶ 25*.

Second, the holding in *A&B* does not apply in this case. There, the Court was concerned with A&B's application of water that was originally pumped from an aquifer then later captured in drains and applied to 2,363.1 enlargement acres that were not irrigated under the original license that described the place of use as 62,604.3 acres. The Court held to allow A&B to expand its place of use was an illegal enlargement. I.C. § 42-1426(1)(a) ("Persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion . . . .").

Riverside attempts to link *A&B* with the issue here:

> Nampa proposes to supply that ground water to Pioneer for use on 17,000 acres to increase or supplement Pioneer's water supply. SOF ¶¶ 55-56. Because Nampa's effluent remains ground water, it is subject to the law of enlargements and the protection of existing water users. *A&B*, 141 Idaho at 753, 118 P.3d at 85. It was error [for the Director] to ignore this expansion of use of Nampa's water rights.

Riverside Opening Brief at 24 (emphasis added).

What Riverside misses is, unlike the drain water that was appropriated by A&B and applied to new enlargement acres, all of the water Nampa discharged into the Phyllis Canal will first be treated at the Nampa WWTP and then be applied on lands that are covered by existing water rights. Thus, *A&B* stands for the proposition that an irrigator's recapture and reuse of its waste water from drains on new acres requires a water right due to injury that will result from enlargement; yet Subsection 8 instead stands for the proposition that a city's reuse of its treated wastewater – water that would otherwise be wasted through discharge back into a natural channel – does not. Lastly, to the extent the Court's 2005 decision in *A&B* may have ever been construed to apply beyond the context of an irrigator applying recaptured drain water to new acres, the decision was limited by the legislature when it enacted Subsection 8 in 2012. *Doe v.*

Doe, 164 Idaho 482, 485, 432 P.3d 31, 34 (2018) (the legislature may abrogate prior decisions of the Court through subsequent legislation). Through enactment of Subsection 8, the Legislature effectively codified the common law wastewater doctrine by allowing cities to treat wastewater at a WWTP then discharge said water into irrigation canals when land application is undertaken in response to governmental regulation. The common law wastewater doctrine will be discussed next.

F. Riverside Is Not Entitled To Insist On Nampa's Continued Discharge Of Its Wastewater Effluent Into Indian Creek Under Any Legal Analysis

Riverside asks the Court to compel Nampa to continue discharging treated wastewater into Indian Creek in perpetuity, based on Riverside's belief that to allow otherwise results in injury, rendering Subsection 8 unconstitutional, as applied:

> Extending the exemption in Idaho Code § 42-20[1](8) to allow expansion of the water rights to allow Pioneer to apply the water to its land without an injury analysis under Idaho Code § 42-222 transfer would render Idaho Code § 42-20[2](8) unconstitutional *as applied*.
>
> . . . .
>
> Idaho Code § 42-201(8), as Nampa and Pioneer would have it applied here, does not take into account injury to existing water rights or enlargement before allowing municipalities to change the nature of use of their water rights or when providing their water to third parties to use on other lands. Nampa's proposal to discontinue discharge of large quantities of water to Indian Creek during the irrigation season upstream of Riverside's diversion of that same water and to divert that water to another user who has no water right to use that water will enlarge the use and cause injury to Riverside. Idaho Code § 42-201(8)'s failure to address enlargement and potential injury to existing water rights renders its application in this matter unconstitutional.

Riverside Opening Brief at 25-27 (emphasis in original).

As recognized by the Director and briefed by the Municipal Intervenors below,[7] Idaho's common law soundly rejects Riverside's argument that Nampa must continue to waste water into Indian Creek: "Idaho Case law has established that downstream water users cannot compel upstream users to continue wasting water. *Hidden Springs Trout Ranch v. Hagerman Water Users*, 101 Idaho 677, 680-681 (1980). Riverside will be impacted by the proposed use of Nampa's effluent because there will be less water available in Indian Creek without the influx of effluent. However, Riverside is not entitled to Nampa's wastewater." *Order* at 5 (emphasis added). *See also United States v. Haga*, 276 F. 41, 43-44 (D. Idaho 1921); *Application of Boyer*, 73 Idaho 152, 162-63, 248 P.2d 540, 546-47 (1952); *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950); *Crawford v. Inglin*, 44 Idaho 663, 669, 258 P. 541, ___ (1927); *Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, ___ (1927).

Because there is no cognizable right for Riverside to compel Nampa to discharge treated wastewater into Indian Creek, Riverside cannot claim injury and deprivation of a constitutional right. *Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974) (constitutional violations must be cognizable). Because Riverside can show no cognizable right has been violated, Riverside has not carried its burden to show a constitutional violation; thus, the Court should find in favor of the constitutionality of Subsection 8. *Citizens Against Range Expansion* at 633–34, 289 P.3d at 35–36.

G. Riverside's Substantial Rights Have Not Been Violated

Riverside argues violations to: (1) its real property rights to water; and (2) its due process rights. As to Riverside's real property rights to water, and as stated immediately above, Riverside cannot compel Nampa to waste treated effluent into Indian Creek and thus cannot

[7] The common law wastewater doctrine was more fully briefed below by the Municipal Intervenors. R. at 843-45.

claim a deprivation of its real property rights. As to Riverside's due process rights: "[T]he United States Supreme Court has noted, 'The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18, 32 (1976) (internal quotation omitted); *accord Neighbors for a Healthy Gold Fork*, 145 Idaho at 127, 176 P.3d at 132." *Hopkins v. Pneumotech, Inc.*, 152 Idaho 611, 615, 272 P.3d 1242, 1246 (2012). As acknowledged by Riverside, it participated in a hearing before the IDEQ and in the contested case before IDWR, a case it initiated. Riverside's participation in these hearings satisfies due process.

Moreover, Riverside itself provides another basis to dismiss its argument that it has been deprived of its constitutional due process rights. In its *Opening Brief*, Riverside states "procedural due process requires that: ' . . . there must be some process to ensure that the individual is not arbitrarily deprived of <u>his rights</u> in violation of the state or federal constitutions.'" *Riverside Opening Brief* at 31 citing *In re Jerome Cty. Bd. Of Comm'rs*, 153 Idaho 298, 311 (2012) (quoting *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91 (1999)) (emphasis added). Thus, according to Riverside's own argument, to assert a due process violation, it must first show that it has a substantive right of which it has been deprived. Once again, Riverside simply cannot show that it has a right to continued use of Nampa's discharged effluent as discussed above. Accordingly, there is no substantive right to which due process applies, and Riverside's due process arguments must be dismissed.

VI. CONCLUSION

The issue in this case is very simple: does the exemption in Subsection 8 apply such that Pioneer is not required to apply for or obtain a water right to accept the treated effluent that

Nampa discharges into the Phyllis Canal. The resolution is also very simple: for the Subsection 8 exemption to have any meaning or application at all, it should be applied in this case. For this reason and for the reasons discussed above, the Municipal Intervenors hereby respectfully request that this Court uphold the Director's *Order*.

Respectfully submitted this 4th day of October, 2021.

MCHUGH BROMLEY, PLLC

/s/ Chris M. Bromley
Chris M. Bromley, Attorneys for Cities of Boise, Jerome, Post Falls, and Rupert

HONSINGER LAW, PLLC

/s/ Charles L. Honsinger
Charles L. Honsinger, Attorneys for Cities of Caldwell and Meridian

MCHUGH BROMLEY, PLLC

/s/ Candice M. McHugh
Candice M. McHugh, Attorneys for Association of Idaho Cities

SOMACH SIMMONS & DUNN

/s/ Sarah A. Klahn
Sarah A. Klahn, Attorneys for City of Pocatello

HOLDEN KIDWELL HAHN & CRAPO, PLLC

/s/ Robert L. Harris
Robert L. Harris, Attorneys for City of Idaho Falls

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2021, the foregoing was filed, served, and copied as shown below.

Albert P. Barker Sarah W. Higer BARKER ROSHOLT & SIMPSON LLP PO Box 2139 Boise, ID 83701-2139 apb@idahowaters.com swh@idahowaters.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Christopher H. Meyer Charlie S. Basser GIVENS PURSLEY LLP PO Box 2720 Boise, Idaho 83701-2720 chrismeyer@givenspursley.com charliebaser@givenspursley.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Garrick L. Baxter Sean Costello IDAHO DEPT. OF WATER RES. PO Box 83720 Boise, ID 83720-0098 garrick.baxter@idwr.idaho.gov sean.costello@idwr.idaho.gov	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Charles L. Honsinger HONSINGER LAW, PLLC PO Box 517 Boise, ID 83701 honsingerlaw@gmail.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Andrew J. Waldera SAWTOOTH LAW OFFICES, PLLC PO Box 7985 Boise, ID 83707-7985 andy@sawtoothlaw.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt

Robert L. Harris HOLDEN KIDWELL HAHN & CRAPO, PLLC PO Box 50130 Idaho Falls, ID 83405-0130 rharris@holdenlegal.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Candice M. McHugh Chris M. Bromley MCHUGH BROMLEY, PLLC 380 S. 4th St., Ste. 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Sarah A. Klahn SOMACH SIMMONS & DUNN 2033 11th Street Suite 5 Boulder, Colorado 80302 sklahn@somachlaw.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt

/s/ Chris M. Bromley
CHRIS M. BROMLEY

Exhibit C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RIVERSIDE IRRIGATION DISTRICT,

Petitioner,

v.

IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources,

Respondents,

and

CITY OF POCATELLO, PIONEER IRRIGATION DISTRICT, ASSOCIATION OF IDAHO CITIES, CITY OF BOISE, CITY OF JEROME, CITY OF POST FALLS, CITY OF RUPERT, CITY OF NAMPA, CITY OF MERIDIAN, CITY OF CALDWELL & CITY OF IDAHO FALLS,

Intervenors.

IN THE MATTER OF REUSE PERMIT NO. M-225-01, IN THE MATTER OF THE CITY OF NAMPA

Case No.: CV14-21-05008

NAMPA'S RESPONSE BRIEF

Appeal of final agency action by the Idaho Department of Water Resources, Director Gary Spackman, Presiding

Christopher H. Meyer #4461
Charlie S. Baser #10884
GIVENS PURSLEY LLP
601 W Bannock St
PO Box 2720
Boise, ID 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
charliebaser@givenspursley.com
For Intervenor City of Nampa

Garrick L. Baxter #6301
Meghan M. Carter #8863
Sean H. Costello #8743
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720-0098
garrick.baxter@idwr.idaho.gov
sean.costello@idwr.idaho.gov
meghan.carter@idwr.idaho.gov
For Respondents Idaho Department of Water Resources and Gary Spackman

Chris M. Bromley #6530
MCHUGH BROMLEY, PLLC
380 S 4th St, Ste 103
Boise, ID 83702
cbromley@mchughbromley.com
For Intervenors City of Boise, City of Jerome, City of Post Falls, and City of Rupert

Charles L. Honsinger #5240
HONSINGER LAW, PLLC
PO Box 517
Boise, ID 83701
honsingerlaw@gmail.com
For Intervenors City of Meridian and City of Caldwell

Sarah A. Klahn #7928
SOMACH SIMMONS & DUNN
2033 11th St, Ste 5
Boulder, CO 80302
sklahn@somachlaw.com
For Intervenor City of Pocatello

Candice M. McHugh #5809
MCHUGH BROMLEY, PLLC
380 S 4th St, Ste 103
Boise, ID 83702
cmchugh@mchughbromley.com
For Intervenor Association of Idaho Cities

Robert L. Harris #7018
HOLDEN KIDWELL HAHN & CRAPO, PLLC
1000 Riverwalk Dr, Ste 200
PO Box 50130
Idaho Falls, ID 83405-0130
rharris@holdenlegal.com
For Intervenor City of Idaho Falls

Andrew J. Waldera #6608
SAWTOOTH LAW OFFICES, PLLC
1101 W River St, Ste 110
PO Box 7985
Boise, ID 83707-7985
andy@sawtoothlaw.com
For Intervenor Pioneer Irrigation District

Albert P. Barker #2867
Sarah W. Higer #8012
BARKER ROSHOLT & SIMPSON LLP
PO Box 2139
Boise, ID 83701-2139
apb@idahowaters.com
swh@idahowaters.com
For Petitioner Riverside Irrigation District

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STATEMENT OF THE CASE

This is the brief of Intervenor City of Nampa ("**City**" or "**Nampa**") filed in response to the brief ("***Opening Brief***") of Petitioner Riverside Irrigation District ("**Riverside**").[1]

In this appeal, Riverside challenges the declaratory ruling ("***Order***") (R. 1230-1237) issued by Director Spackman ("**Director**") of the Idaho Department of Water Resources ("**IDWR**" or "**Department**") holding that neither Nampa nor Pioneer Irrigation District ("**Pioneer**") are obligated to obtain a water right in order to effectuate Nampa's delivery of effluent to Pioneer for use in Pioneer's irrigation delivery network undertaken in accordance with an environmental permit ("***Reuse Permit***") (R. 221-250) issued by the Idaho Department of Environmental Quality ("**IDEQ**") and a contract with Pioneer known as the *Recycled Water Discharge and Use Agreement* ("***Reuse Agreement***") (R. 205-212). Nampa's undertaking pursuant to the *Reuse Permit* is referred to as its "**Reuse Project**." In addition to Nampa and Pioneer, eight cities and the Association of Idaho Cities have intervened on appeal.[2]

This case turns on questions of law. The parties stipulated to a statement of facts ("**SOF**") (R. 688-713) and to a set of Exhibits A through T. Also before the Court are

[1] References to the Agency Record are shown as "**R.**" Document names are displayed in italics (except when in quotations).

[2] To reduce duplication, Nampa adopts by reference the "Course of the Proceedings" section of *Intervenor-Respondent Pioneer Irrigation District's Response to Petitioner Riverside Irrigation District, Ltd.'s Opening Brief* ("***Pioneer's Brief***"), the "Procedural History," "Facts Developed in the Agency Proceeding," and "Standard of Review" sections of *Municipal Intervenors' Response to Riverside Irrigation District's Opening Brief* ("***Municipal Intervenors' Brief***"), and the "Statement of the Case," "Issues Presented on Appeal," and "Standard of Review" sections in IDWR's *Respondents' Brief* ("***IDWR's Brief***").

undisputed documents set out in Addenda A through G to *Nampa's Response Brief* ("***Response Below***") (R. 909-1061) submitted to IDWR.

The case turns on the applicability of Idaho Code § 42-201(8) ("**Subsection 8**") and its interaction with Idaho Code § 42-201(2) ("**Subsection 2**"). Riverside also contends that if the Director's reading of Subsection 8 is upheld, it is unconstitutional.

Riverside's objective is to force either Pioneer (through a new appropriation) or Nampa (through a transfer) to provide mitigation to Riverside for reducing the supply of effluent that historically has benefitted Riverside.[3] Providing a gallon-for-gallon substitute supply for the effluent no longer dumped in Indian Creek would be monumentally expensive, if not impossible. It would kill the project (and many others across the State), which is exactly what Riverside aims to achieve.

To achieve this result, Riverside proposes a contorted reading of Subsection 8 that is at odds with its plain meaning and its intended purpose. Failing that, it would have the Court declare this exemption from mandatory permitting (and presumably all other exemptions) unconstitutional.

The core of Riverside's argument is that Subsection 8 applies only to named entities, such as cities, and does not exempt irrigation districts, such as Pioneer. The Director recognized

[3] Riverside presumes that if a new appropriation or transfer is required, the applicant will be required to provide mitigation to Riverside in the form of replacement water or otherwise. Nampa is most certainly not of that view. For example, if Pioneer obtained a junior "waste water right" (which it does not need to do) whose source was effluent piped to it by Nampa, it would owe mitigation to no one. But that question is not before the Court, and may never be. Indeed, the whole point of the Legislature's exemption was to render the question moot.

that cities often act through agents or other contracting entities, which are implicitly but necessarily included within the statute's sweep. If the Court upholds that ruling, and finds the statute constitutional, that is the end of the matter. (See section II beginning on page 11.)

However, if the Court were to find that Pioneer's "intertwined" relationship with Nampa does not bring it within the protection of Subsection 8, the Court should uphold the Director's ruling on alternative grounds. Even if there were no Subsection 8, the mandatory permitting requirement in Subsection 2 does not require either Nampa or Pioneer to obtain a new appropriation or a transfer. This is so for two reasons.

First, Nampa is allowed to use and reuse its municipal water to extinction. The Department has long recognized that a city may recapture as influent[4] water initially diverted under its municipal water rights, and that it may dispose of the resulting treated effluent through land application (by itself or through a third party) within its flexible service area. All this may be done pursuant to the City's existing municipal water rights, which are defined to include "related purposes" as part of the municipal use. (See section III beginning on page 27 and section VI.B on page 39.)

Second, Pioneer's acceptance of treated effluent delivered to it by Nampa in a closed system under Nampa's control that never reaches the public water supply is not a diversion or use of water requiring a water right under Subsection 2. (See section IV beginning on page 29.)

[4] Untreated sewage entering a waste water treatment plant ("**WWTP**") is called influent. The treated water leaving the WWTP is called effluent.

As for Riverside's constitutional argument, the Director gave it the short shrift it deserved. No water user has a right to rely on the continued delivery of waste water by another water user. Because Riverside can point to no legal injury resulting from Nampa's reuse program, the statutes that authorize it do not violate Article XV, § 3 nor give rise to a taking or due process violation. (See section VII beginning on page 43.)

Nampa continues to act proactively, investing millions to comply with increasingly stringent environmental requirements, while avoiding the even greater cost of continuing to discharge into Indian Creek.[5] In short, it is doing exactly what the Legislature sought to encourage and facilitate by adopting Subsection 8. Riverside's costly roadblock to that undertaking should be rejected.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Riverside did not include a list of issues presented on appeal in its *Opening Brief*. Nampa concurs with and adopts the list of issues presented in *IDWR's Brief*. In addition, Nampa identifies the following:

1. Whether, as an alternative basis to uphold the Director's decision, Pioneer is Nampa's agent.

2. Whether, as an alternative basis to uphold the Director's decision, Nampa and Pioneer are not in violation of Subsection 2, even if either of them fall outside the protection of Subsection 8.

[5] The cost of water treatment necessary to continue discharge to Indian Creek is estimated to be $210 million. Nampa will be able to reduce this cost with net savings of $20 million through the Reuse Project. SOF, ¶¶ 38-40 (R. 699-700).

ATTORNEY FEES

In addition to the issues above, Nampa seeks an award of costs and attorney fees on appeal pursuant to Idaho Code § 12-117(1). The basis of Nampa's request for attorney fees is set out in section VIII on page 45.

ARGUMENT

I. THRESHOLD ISSUES

A. Standard of review

The Director's *Order* is subject to judicial review under the Idaho Administrative Procedure Act ("**IAPA**"). Idaho Code § 67-5232(3). The standard of review is set out in Idaho Code § 67-5279(3). Interpretation of a statute is a question of law over which the reviewing court exercises free review. *A&B Irr. Dist. v. IDWR*, 154 Idaho 652, 654, 301 P.3d 1270, 1272 (2012).

B. The Director's interpretation of the statute is entitled to deference.

Although courts exercise free review over questions of law, when an agency has interpreted a statute or rule,[6] courts generally defer to reasonable agency interpretations. *Elgee v. Retirement Bd. of PERSI*, 169 Idaho 34, 48, 490 P.3d 1142, 1156 (2021). The agency

[6] The lead cases are *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991) and *Duncan v. State Bd. of Acct.*, 149 Idaho 1, 232 P.3d 322 (2010). *Simplot* concerns a statute, while *Duncan* concerns a rule. However, the applicable tests and framework of analysis are the same.

interpretation is upheld if it is reasonable, unless the agency relied on erroneous facts or law in its decision.[7]

Idaho courts apply a four-pronged test,[8] which is easily met here.[9] Accordingly, there are no "cogent reasons" to justify the Court in rejecting IDWR's interpretation of Subsection 8.

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[7] *Duncan*, 149 Idaho at 4, 232 P.3d at 325; *Simplot*, 120 Idaho at 862, 820 P.2d at 1219; *see*, *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 313, 208 P.3d 289, 295 (2009) (finding an interpretation unreasonable because the Department of Insurance erroneously relied on practices from other states that did not have the same statute as the one enacted in Idaho).

[8] A court must determine whether: "(1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present." *Duncan*, 149 Idaho at 3, 232 P.3d at 324 (citing *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998)). As to the final prong, "there are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation." *Id*.

[9] First, IDWR is responsible for administering Subsection 8. See Idaho Code § 42-201(7) (providing that IDWR has "exclusive authority over the appropriation of the public surface water and ground waters of the state"). Second, an agency's interpretation is understood to be reasonable unless it "is so obscure and doubtful that it is entitled to no weight or consideration." *Simplot*, 120 Idaho at 862, 820 P.2d at 1219; *Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 183, 59 P.3d 983, 988 (2002). Here, IDWR's interpretation that Subsection 8 includes in its exemption parties that contract with municipal providers for the disposal of effluent from public treatment works is not "so obscure and doubtful that it is entitled to no weight or consideration" and is, therefore, reasonable. Third, the language of Subsection 8 does not expressly address whether a water right is needed when a municipality contracts with a third party to land apply the municipality's effluent on land not owned by the municipality. As to the fourth prong, "if the underlying rationales are absent then their absence may present 'cogent reasons' justifying the court in adopting a statutory construction which differs from that of the agency." *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 505, 960 P.2d 185, 188 (1998). When some, but not all, of the rationales underlying the rule exist, "a balancing is necessary because all of the supporting rationales may not be weighted equally." *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 505, 960 P.2d 185, 188 (1998). The presence of some but not all of the five rationales has been found sufficient to support agency deference. *See Canty v. Idaho State Tax*

C. Riverside is not entitled to any relief, because it cannot show that its substantial rights are prejudiced.

Idaho Code § 67-5279(4) requires that the Director's *Order* be affirmed if Riverside is unable to show that its substantial rights have been prejudiced. Riverside contends it meets this test because it will be worse off if Nampa ceases wasting its effluent to Indian Creek during the summer. That may be true, but that does not equate to a "substantial right" within the meaning of section 67-5279(4). A water user cannot be compelled to continue to waste water back to a public water supply.[10] Water users who rely on the discharge of waste water by others do so at peril that the discharge may someday be diminished or eliminated. (Nor does Riverside have any right to compel Nampa or Pioneer to obtain a new water right or to transfer an existing right, in the unjustified hope that Riverside might be able to extract mitigation of some sort.) In other words, the law is settled that being made "worse off" does not mean one's rights are violated when it comes to waste water.[11] Riverside fails to demonstrate why the law should not apply to it.

Comm'n, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002). Most, if not all, of the rationales are present.

[10] *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980); Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

[11] The same is true in other areas of the law. Not every damage that one suffers equates to a violation of one's rights.

> The district court erred to the extent that it considered the building's size and proximity to the McVicarses' property to constitute a nuisance and used that premise to enjoin the building from its current location. Generally, "every man may regulate, improve, and control his own property, may make such erections

To support its contention that practically anything is a "substantial right," Riverside cites cases arising under the Local Land Use Planning Act ("**LLUPA**").[12] *Opening Brief* at 29-30. These LLUPA cases are easily distinguishable. LLUPA creates a substantial network of legal rights for property owners and their neighbors, the violation of which can readily occur when municipal entities act improperly or unfairly in cases involving land use entitlements. But this is a water law case, not a LLUPA case. Idaho's law is unmistakable that those who benefit from the discharge of another's waste water have no "substantial right" (or right of any kind) to complain when that discharge ceases.

Next, Riverside contends the Director denied its substantial rights because "Riverside has been denied even a seat at the table, let alone an ability to present its argument or to be part of the decision-making process." *Opening Brief* at 30. Labeling this a procedural due process violation, Riverside says, "As a result of the Director's *Order*, Riverside has no avenue at IDWR in which to raise the alarm over 18-41 cfs of water being removed from its appropriation." *Opening Brief* at 31. Riverside has been afforded ample opportunity in this very case to raise the alarm over its perceived right to the continued discharge of waste water. The problem is not that

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> as his own judgment, taste, or interest may suggest, and be master of his own without dictation or interference by his neighbors, so long as the use to which he devotes his property is not in violation of the rights of others, however much damage they may sustain therefrom."

McVicars v. Christensen, 156 Idaho 58, 62, 320 P.3d 948, 952 (2014) (emphasis supplied) (quoting *White v. Bernhart*, 41 Idaho 665, 669–70, 241 P. 367, 368 (1925)).

[12] E.g., *Hawkins v. Bonneville County Bd. of Comm'rs*, 151 Idaho 228, 254 P.3d 1224 (2011).

Riverside was deprived of the ability to present evidence or argument. The problem is that what it presented lacks merit.

Because Riverside cannot show that its substantial rights have been prejudiced, this "agency action shall be affirmed." Idaho Code § 67-5279(4). The appeal could be resolved on this point alone.

D. Statutory construction is appropriate if the Court finds any ambiguity in Subsection 2 or 8.

The law regarding statutory construction is well settled in Idaho. Our courts do not resort to statutory construction if the statute is unambiguous. *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 895-86, 265 P.3d 502, 508-09 (2011). "A statute is ambiguous where the language is capable of more than one reasonable construction." *State v. Maybee*, 148 Idaho 520, 528, 224 P.3d 1109, 1117 (2010) (quoting *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003)).

Where a statute is susceptible to more than one plausible interpretation, courts are obligated to employ statutory construction to ascertain the legislative intent. As Chief Justice Bevan said recently:

> If the statute is ambiguous, then we seek to determine the legislative intent. [Citing *Lopez v. State*, 136 Idaho 136, 178, 30 P.3d 952, 956 (quoting *State ex rel. Industrial Commission v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000)).] When doing so, we may examine the language used, the reasonableness of proposed interpretations, and the policy behind the statute. *Id*. Interpretation begins with the literal language of a statute. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1013 (2009). "The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings." *Id*.

Moser v. Rosauers Supermarkets, Inc., 165 Idaho 133, 136, 443 P.3d 147, 150 (2019) (emphasis supplied).

Last month, the Idaho Court of Appeals provided this helpful summary:

> When this Court must engage in statutory construction because an ambiguity exists, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history. *Id*. It is incumbent upon a court to give an ambiguous statute an interpretation which will not render it a nullity. *Id*.

State v. Damiani, 2021 WL 3520973, *2 (Idaho Ct. App.) (Aug. 11, 2021) (emphasis supplied).

Accordingly, if the Court finds that Subsections 2 and 8 leave nothing to interpretation, that is the end of the matter. For example, arguments about policy and legislative intent would be off limits if Subsection 8 expressly stated that any agents or contracting entities of the exempt entities are not exempt from Subsection 2. But it does not say that. Likewise, there would be no need to examine the legislative intent behind Subsection 2 if it expressly stated that anyone who applies water to land must obtain a water right even if that person did not divert the water from the public water supply. But it does not say that.

On the other hand, the Court might determine that the plain and ordinary meaning of those subsections is the opposite of that hypothesized in the preceding paragraph. The Court might find that Subsection 8's identification of exempted parties must include agents and contracting entities, and that Subsection 2's reference to water applied to land must mean water diverted from the public water supply.

If so, that is the end of the matter. But if the Court finds the language of either subsection not perfectly definitive, then further examination of the legislative purpose is appropriate. And that examination takes one to the same place: Nampa and Pioneer need not acquire a water right.

II. IF SUBSECTION 8 APPLIES TO NAMPA AND ITS AGENTS/CONTRACTING ENTITIES, IT IS DISPOSITIVE OF VIRTUALLY THE ENTIRE CASE.

A. Subsection 8's exemption overrides Subsection 2's requirement to obtain a water right.

Riverside pins its case on Subsection 2. This statute is the core of Idaho's mandatory permitting law. It provides:

> No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

Idaho Code § 42-201(2).

Over time, the Legislature has carved out various exceptions to Subsection 2. The one relevant here is Subsection 8, which reads:

> Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any

> change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

Idaho Code § 42-201(8).

If Subsection 8 is constitutional and applicable to Nampa and Pioneer (as the City's agent or contracting entity), it is dispositive. There is no need to address compliance with Subsection 2, or any of the other arguments. Indeed, that finding was the basis of the Director's ruling.

B. The only sensible reading of Subsection 8 is that the exemption encompasses not only the named exempted entities but also those acting on their behalf.

(1) Subsection 8 includes both agents and non-agent contacting entities.

Subsection 8 identifies several types of entities that may dispose of effluent without obtaining a water right. Pioneer is not one of them. This prompts the question, can Nampa employ an agent or other contracting entity, such as Pioneer, to execute its wastewater disposal, and, if so, does the statute exempt both the municipality and its agents and contracting entities from the requirement to obtain a water right?

The Director answered "yes" to both questions. This is the only reasonable reading of the statute. Were it otherwise, the statute would defeat its very purpose, which was to eliminate a costly regulatory hurdle. Riverside's reading of the statute merely shifts the regulatory burden from city to irrigator, thereby rendering the statute useless to most cities and sewer districts. Indeed, it would make the statute inapplicable to the very situation that gave rise to its enactment—the City of McCall's land disposal of effluent which was accomplished through

contract with third-party entities owning farm land outside of the city. (See footnote 28 on page 23.)

The Director was right to reject Riverside's reading of the statute. It is true that the statute does not announce in so many words that "a municipality may employ agents or contractors to accomplish the disposal of effluent." It does not say that because it does not need to be said. It is obvious. The Legislature has granted municipalities the power to enter into contracts in the course of carrying out their municipal responsibilities,[13] and it has granted irrigation districts the power to enter into contracts to secure a sufficient water supply.[14] It is hardly necessary to repeat in every statute authorizing a city to do something that it may, where necessary and appropriate, engage an agent or other contracting entity.

As the Director said, "The characteristics of agency plainly allow an agent of a Subsection 8 exempted entity to benefit from Subsection 8's exemption." *Order* at 4 (R. 1233). The Director found that, as a technical matter, Pioneer was not Nampa's "agent" because "the Reuse Agreement does not give Nampa the right to control Pioneer." *Id*. But this was not fatal, the Director held. The Subsection 8 exemption brings Pioneer within its sweep because "Nampa

[13] Idaho Code § 50-301 ("Cities governed by this act . . . may contract and be contracted with . . . ."). See also, Idaho Code § 31-604(3) (authority of counties); Idaho Code § 31-4906(8) (authority of regional sewer districts).

[14] Idaho Code § 43-304 (Irrigation districts "may enter into contracts for a water supply to be delivered to the canals and works of the district, and do any and every lawful act necessary to be done that sufficient water may be furnished to the lands in the district for irrigation purposes."). In *Bd. of Directors of Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461, 463 (1943), the Court said that entering into contracts "for a water supply" was "one of the most important duties imposed on it."

and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer." *Id*.

The Director is correct that not all contracts create agency relationships. A city may carry out its disposal function under Subsection 8 through independent contractors and other contracting entities that may not, strictly speaking, qualify as agents. The law governing the overlapping relationship between agents and contractors is complex and, thankfully, irrelevant here.[15] This is the reason that Nampa employed the phrase "agent or contracting party" to describe Pioneer.[16] Whether Pioneer meets the definition of agent is not important. What is

[15] See *Business and Commercial Litigation in Fed. Courts 4th* § 113.15 (Control) (2020) for discussion of the difference between a non-agent independent contractor and agent-independent contractors.

[16] Nampa explained:

> The first nine words of Subsection 8 state that this waiver operates "[n]otwithstanding the provisions of subsection (2)." The permitting requirements do not come back into play simply because a city employs an agent or contracting party to effectuate its disposal of effluent." Riverside reads Subsection 8 to say that mandatory permitting requirements are waived only if the city is able to accomplish its disposal without the involvement of any other party. But that is not what the statute stays. The statute does not concern itself with what contractual relationships the city may employ to accomplish the disposal. Instead, the statute broadly declares the city does not need a water right, period, "notwithstanding" Subsection 2. Riverside's suggestion that the Subsection 2 survives the "notwithstanding" command and re-imposes water right requirements on anyone participating with the city is not a credible reading of the statute.
>
> After all, the "notwithstanding" language employed in Subsection 8 is identical to the "notwithstanding" language employed in all of the exemptions (Subsections 3(a), 3(b), 3(c), 8, and 9). If Riverside is correct that Subsection 8 exempts cities and sewer districts but not those applying the effluent to beneficial use,

important is that the entity employed by the city is doing the city's bidding in carrying out the disposal function.

As the Director explained, Nampa and Pioneer are tightly intertwined, irrespective of whether one is the agent of the other.[17] Hence, the exemption applicable to Nampa necessarily

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> then the same problem would occur under Subsection 9. That subsection exempts operators of irrigation canals that have made arrangements for the incidental generation of hydropower. Riverside's parsimonious reading of the "notwithstanding" language would lead to the result that Idaho Power must obtain a water right. That result is just as wrong. The plain and most logical reading of the "notwithstanding" reading is that any agent or contracting party acting in conjunction with the exempted party is also exempted from the mandatory permitting requirement in Subsection 2.

Response Below at 15 (R. 867) (emphasis added).

[17] The *Order* includes this useful summary of the relationship between Nampa and Pioneer:

> Despite absence of a formal agency relationship, Subsection 8's exemption may still apply in this case. The Director agrees with Nampa that Nampa and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer. The Reuse Agreement contractually obligates Pioneer to dispose of Nampa's effluent. The Reuse Agreement requires an ongoing relationship between Nampa and Pioneer. Nampa must apprise Pioneer of when it will discharge effluent to Phyllis Canal. Pioneer is obligated to cooperate with Nampa to obtain permits and approvals.
>
> The Reuse Permit further ties Nampa and Pioneer together. DEQ granted Nampa's Reuse Permit based on its analysis of Pioneer's irrigation operations. Pioneer's place of use is included in the area of analysis. Exhibit H at 17-18 [R. 267-268]. The analysis further considered that Nampa's effluent would be "very diluted by the existing irrigation water" and that "nutrient needs of the crops are greater than that provided by the additional nutrient." Exhibit H at 37-38 [R. 287-288]. To ensure water quality of jurisdictional waters, Nampa and Pioneer will install an automated

encompasses actions undertaken by Nampa with the assistance of Pioneer in implementing of the Reuse Project.

(2) In any event, Pioneer is Nampa's agent.

One could, and perhaps should, stop here. Instead, out of an abundance of caution, Nampa offers an argument in the alternative. If the Court were to reject the Director's broader reading of Subsection 8 and hold that the statute only extends the exemption to true agents, Pioneer can meet that test. Pioneer is Nampa's agent for the specific and limited purpose of accepting its effluent and disposing of it in compliance with the *Reuse Permit* and the *Reuse Agreement*. The reasons are set out below.

At its core, an agent is "[o]ne who is authorized to act for or in place of another; a representative." *Black's Law Dictionary* (1999). "An agent is a person who has been authorized to act on behalf of a principal towards the performance of a specific task or series of tasks." *Humphries v. Becker*, 159 Idaho 728, 735, 336 P.3d 1088, 1095 (2016). There is no doubt that Pioneer is authorized and obligated to reduce its own water intake, to accept Nampa's effluent in lieu thereof, and to facilitate its land application by delivering the effluent to its users.

> flow control system on 15.0 Lateral so the effluent will not return to jurisdictional waters. Exhibit J, at 60 [R. 449]. Nampa may not have legal control over Pioneer, but both are intimately involved in the process of land applying Nampa's effluent in response to a regulatory requirement.

Order at 4-5 (R. 1233-1237).

The only question is whether Nampa meets the requirement of exercising control over the agent. "In addition, where an agency relationship exists, the principal has a right to control the agent." *Humphries*, 159 Idaho at 735-36, 336 P.3d at 1095-96.

How much control is necessary? The answer is, only as much as is required to effectuate the undertaking. This does not necessarily include control over the agent's day-to-day operations.

> Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment.

Restatement (Third) of Agency, § 1.01(c) (2006).[18]

The law of agency operates in a number of contexts. One of them is vicarious liability for the agent's negligence or malfeasance in the course of its day-to-day operations. Not surprisingly, those cases generally hold that, in order to hold the principal liable, the principal must have some degree of control over those day-to-day operations. But control by the principal over the agent's day-to-day operations matters only if those operations are the source of the liability. Here, of course, we are not dealing with vicarious liability arising from Pioneer's misconduct in the course of its day-to-day operations. Accordingly, that line of agency cases—and the whole question of control over Pioneer's day-to-day operations—is not relevant to the interpretation of Subsection 8.

[18] Idaho courts have embraced the *Restatement*. *E.g.*, *Nelson v. Kaufman*, 166 Idaho 270, 278, 458 P.3d 139, 147 (2020); *Humphries v. Becker*, 159 Idaho 728, 735–36, 366 P.3d 1088, 1095–96 (2016).

While control over Pioneer's day-to-day operations need not be established here, control over the things pertinent to the purpose of the agency are essential. That requirement is satisfied here. Nampa is able to dictate to Pioneer how much effluent the City will deliver on any given day, and thereby require Pioneer to make all necessary adjustments in its water supply and canal operations in order to accommodate that delivery and to land apply the City's effluent. In other words, the one thing that matters—Pioneer's acceptance of effluent—is under Nampa's direction and control, pursuant to the express terms of the *Reuse Agreement*. Moreover, section B(3) of the *Reuse Agreement* (R. 208) provides that Nampa may choose not to provide any wastewater at all to Pioneer. In other words, Nampa controls how much water, if any, it will supply to Pioneer.

The law of agency requires us to take one further step into the weeds. To establish agency, the relationship much be one in which the principal would naturally have the ability, if need be, to issue what section 1.01 of the Restatement calls "interim instructions" to the agent[19] (even if that ability is not found in the contract establishing the agency[20]). If the principal issues

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[19] The Restatement lays out the "interim instruction" requirement:

> An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established.

Restatement (Third) of Agency, § 1.01(f)(1) (2006).

[20] The Restatement explains that the contract creating the agency relationship need not provide authority for the principal to issue interim instructions:

> To the extent the parties have created a relationship of agency, however, the principal has a power of control even if the principal has previously agreed with the agent that the principal

interim instructions that go beyond what was authorized by the contract, the agent has a choice. It may comply with the interim instructions or it may resign as agent—with further possible remedies against the principal in either case. (See footnote 20 above.)

Nampa's authority to give interim instructions is both express and implicit. It is expressly laid out in the *Reuse Agreement*, § B(4) (R. 208), which requires Pioneer to cooperate with the City in obtaining permits and approvals from IDEQ. This is an ongoing obligation.[21] It is also found in the *Reuse Agreement*, § A(2)(a) (R. 206), which requires Nampa to forecast estimated flow rates "so that Pioneer can coordinate its canal operations accordingly." In other words, Nampa controls Pioneer's operations by telling Pioneer how much effluent it will deliver. Pioneer must then adjust its operations, including how much water it will divert or take from storage under its own rights, in order to accommodate that delivery. Thus, Nampa provides interim instructions to Pioneer as to how much effluent it will direct to the Phyllis Canal.

> will not give interim instructions to the agent or will not otherwise interfere in the agent's exercise of discretion. However, a principal who has made such an agreement but then subsequently exercises its power of control may breach contractual duties owed to the agent, and the agent may have remedies available for the breach.

Restatement (Third) of Agency, § 1.01(f)(1) (2006).

[21] The *Reuse Agreement* is of indefinite duration. *Reuse Agreement* § C(1) (R. 208). Thus, the cooperation obligation extends beyond securing the initial *Reuse Permit*. The *Reuse Permit* was issued on January 21, 2020 and expires ten years thereafter. In addition to requiring cooperation on future reuse permits, the *Reuse Agreement* contemplates ongoing cooperation under the current *Reuse Permit*. In addition to monitoring and reporting requirements, the current permit contemplates numerous interim approvals by IDEQ (e.g., approval of a plan of operation, Compliance Activity CA-255-02, *Reuse Permit*, p. 8 (R. 228)).

In addition to this explicit authority to issue interim instructions, the power to issue interim instructions is implicit and inherent in the relationship between Nampa and Pioneer, which is founded on Nampa's need to comply with complex and evolving environmental regulatory requirements. The Restatement makes clear that once the agency relationship is established, the principal may issue further interim instructions even beyond what is stated in the contractual relationship between principal and agent. (See footnote 20 on page 18.) It is evident that IDEQ, at some point, could impose additional requirements affecting Pioneer's operations, monitoring, or reporting. In such a case, Nampa would issue interim instructions which Pioneer would be required to follow. If the further instructions were unacceptable to Pioneer and inconsistent with the *Reuse Agreement*, Pioneer would have the right to resign as agent and might even be entitled to compensation or other relief. (See footnote 20 above.) But that does not mean there was never an agency relationship. The Restatement is quite clear on this point. (See the "Illustrations" set out in the Restatement.)

A final prerequisite to an agency relationship is the right to terminate. *Restatement*, §§ 1.01(f)(1). This right is expressly stated in the *Reuse Agreement*.[22]

[22] *Reuse Agreement*, § C(3) (R. 208) authorizes Nampa to terminate upon ten years written notice. Nampa could also terminate earlier, subject to potential damages, under *Reuse Agreement*, § C(9) (R. 209). The fact that an earlier termination would put Nampa in breach of the agreement does not mean there is no agency relationship between them. "A principal has power to revoke an agent's actual authority and the agent has power to renounce it. The power is not extinguished because an agreement between principal and agent states that the agent's actual authority shall be irrevocable or shall not be revoked except under specified circumstances. . . . Exercising the power to revoke or renounce may constitute a breach of contract." *Restatement*, § 3.10, comment a.

In sum, Pioneer meets the legal test of agency. Of course, this whole mind-numbing agency exercise is unnecessary if the Court upholds the Director's finding that Subsection 8 extends not only to agents but to any contracting entity that is intertwined with the undertaking and doing the bidding of the entity undertaking the disposal.

C. The inclusion of the notice requirement in Subsection 8 proves that the statute does not require the farmer or irrigation district to obtain a water right.

Subsection 8 requires the municipal provider or sewer district to notify IDWR if effluent will be applied to lands not already identified as a place of use for an irrigation water right.[23] The notification requirement was added, at the request of IDWR, to assure that the Department would have a record of any new lands that would be brought under irrigation. This was a significant feature of the legislation, repeatedly mentioned in the legislative history.[24] In this

[23] The last two sentences of Subsection 8 state:

> If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

Idaho Code § 42-201(8).

[24] See H.B. 608, Statement of Purpose (R. 965) ("If the land application is to be on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the department of water resources to allow the department to have complete records of where the water is being used."); Memorandum from Ken Harward, Association of Idaho Cities, to Senate Resources & Environment Committee (Mar. 14, 2012) (R. 908) ("In the event that land application is to occur on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the Department of Water Resources to ensure the department is informed about where water is being used."); Senate Resources & Environment Committee (Mar. 16, 2012) (Statement of Mr.

way, if the Department saw irrigated land in aerial photography and found no corresponding water right, notice that the land was covered by land application under Subsection 8 would allow the Department to put the matter to rest.

Here is the key point: There would be no need for the notice requirement if the farmer or irrigation entity receiving the effluent were required to obtain a new water right. Plainly, the purpose of the notice requirement was not to allow IDWR to turn its enforcement attention to the entity receiving the effluent. If that had been the case, notice would have been required for all land application, not just land application "on lands not identified as a place of use for an existing irrigation water right."

Statutes are intended to be read together as a whole.[25] One cannot read the last two sentences of Subsection 8 as anything but confirmation that Subsection 8 lifts mandatory permitting not only for cities and sewer entities, but also those acting as their agents or contractees (i.e., farmers and irrigation districts accepting the effluent).[26]

Meyer) (R. 892) ("Mr. Meyer further pointed out, that if the land application was to be on land which was not already identified as a place of use for an existing water right, notice of the place of use would be provided to the Department of Water Resources. This would allow the Department to have complete records of where the water was to be used.").

[25] *Moser v. Rosauers Supermarkets, Inc.*, 165 Idaho 133, 136, 443 P.3d 147, 150 (2019); *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006); *Union Pacific R.R. Co. v. Bd. of Tax Appeals*, 103 Idaho 808, 811, 654 P.2d 901, 904 (1982).

[26] If the Court looks for Riverside's response to the points presented by Nampa regarding agency law and Subsection 8, it will not find any. Riverside's agency argument is limited to its strictly textual reading of the statute. *Opening Brief*, section V.B, pp. 12-15. In its prior briefing, Nampa provided extensive rebuttal to Riverside's textual argument. *Response Below*, section I.B, I.C, and I.D, pp. 15-20 (R. 867-872); *Nampa's Sur-Reply Brief* section I, pp. 6-8 (R. 1174-1176). Riverside has never seen fit to address Nampa's arguments.

D. Any doubt about the meaning of Subsection 8 is resolved by its legislative history.

Perhaps the plain meaning of Subsection 8 is clear enough without resort to its legislative history. But if there is any ambiguity, the legislative history of Subsection 8[27] leaves no doubt that the statute's purpose was to remove the water right requirement not only for the named exempt entities but also for the farmers or irrigation districts who accepted the effluent for land application.

The legislation was prompted by concerns over whether the City of McCall needed a water right to deliver effluent from its WWTP to farmers under contract with the city.[28] In formal communications between McCall and IDWR, the Department concluded that no water right would be needed so long as McCall's WWTP treated only wastewater derived from the city's municipal water rights.[29] But it turned out, that was not the case. McCall's WWTP accepted substantial quantities of influent from another sewer district serving homes that were not served by McCall's municipal water system. Accordingly, the Department informally advised McCall that a water right likely would be needed to cover that portion of the effluent

[27] H.B. 608, 2012 Idaho Sess. Laws, ch. 218 (codified at Idaho Code §§ 42-201(8), 42-221(P)).

[28] The city's contractual arrangement with farmers is documented in the legislative history of H.B. 608. See, e.g., House State Affairs Committee (Feb. 28, 2012) (Statement of Rep. Stevenson) (*Response Below* at 117 (R. 969)), and Senate Resources & Environment Committee (Mar. 16, 2012) (Statements of Mr. Meyer) (*Response Below* at 129 (R. 981)). It is also documented in a letter in the files of IDWR from Christopher H. Meyer to Garrick L. Baxter, p. 1 (Sept. 16, 2011) (*Response Below* at 200 (R. 1052)).

[29] See letters in the files of IDWR from Garrick L. Baxter to Christopher H. Meyer dated September 7, 2011 and September 19, 2011 (R. 1050, 1054).

derived from non-municipal water rights outside the city. In response, McCall worked with the Department, the Idaho Water Users Association, the Association of Idaho Cities, and other stakeholders to craft legislation to resolve this uncertainty. The result was H.B. 608, which was approved unanimously by both Houses.[30] The legislation was clearly and unambiguously intended to eliminate altogether the need for new water rights when cities engage in programs to deliver effluent to those in a position to put it to beneficial use.[31]

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[30] 2012 Final Daily Data (*Response Below* at 114 (R. 966)).

[31] The following four examples document that the purpose of the legislation was to completely eliminate altogether the requirement to obtain a water right:

> The purpose of this legislation is to clarify that a separate water right is not required for the collection, treatment storage or disposal storage [sic], including land application, of the effluent from publicly owned treatment works. Effluent is water that has already been diverted under an existing right and has not been returned to the waters of the state. If the land application is to be on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the department of water resources to allow the department to have complete records of where the water is being used.

Statement of Purpose (emphasis added) (*Response Below* at 113 (R. 965)).

> Rep. Stevenson presented RS 21325, proposed legislation to clarify that a separate water right is not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works. Rep. Stevenson stated this legislation was brought by the Association of Cities due to a situation that arose in McCall. They were combining wastewater from the city with a sewer district and realized each individual entity did not require a permit, but when combined, there was ambiguity. RS 21325 makes it clear that when you combine these two sources, if a land application is to take place, this will not require a permit.

House State Affairs Committee (Feb. 28, 2012) (Statement of Rep. Stevenson) (emphasis added) (*Response Below* at 117 (R. 969)).

The statements collected in footnote 31, and indeed everything in the legislative history,[32] make clear that the legislation was intended to eliminate the water right requirement across-the-

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> The Association of Idaho Cities strongly supports House Bill 608, which would clarify that a separate water right is not required for the collection, treatment, storage, or disposal of effluent from publicly owned treatment works when wastewater is treated and disposed on behalf of entities that do not have a municipal water right.

Memorandum from Ken Harward, Association of Idaho Cities, to Senate Resources & Environment Committee (Mar. 14, 2012) (emphasis added) (*Response Below* at 128 (R. 980)).

> . . . Mr. Meyer said the purpose of this legislation was to clarify that a separate water right was not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works.
>
> . . .
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> . . . The purpose of this legislation, he said, was to get the water lawyers out of this business and to allow municipalities to spend their dollars and focus their attention on the issue at hand, which was the water quality side of the equation. The Department of Water Resources was involved in drafting this legislation and added some provisions to it . . . .

Senate Resources & Environment Committee (Mar. 16, 2012) (Statement of Mr. Meyer) (emphasis added) (*Response Below* at 130-31 (R. 982-983)).

[32] Riverside also cites the legislative history. Its cherry picking is ineffective. It quotes Lindley Kirkpatrick's statement to the House Resources & Conservation Committee (Mar. 5, 2012) (*Response Below* at 121 (R. 973)). Mr. Kirkpatrick simply said that the legislation established that cities and sewer districts do not need to acquire a new water right. He said nothing to suggest that other entities instead would be required to obtain those new water rights. Riverside also notes Mr. Kirkpatrick said the bill is crafted narrowly. Riverside fails to explain that this was said in the context that the legislation does nothing to lighten environmental requirements. "He said this doesn't change anything about DEQ's reuse tools, it only allows cities to use wastewater on growing crops." *Id.* Perhaps most misleadingly, Riverside quoted Mr. Kirkpatrick's statement that IDWR "has assured the city they can reuse waste water when they have a municipal water right." Riverside fails to explain that this is the reason H.B. 608 was enacted—the City did not have a municipal water right for about half of its effluent. The whole point of the legislation was to make this a non-issue.

board, not to shift the water right burden from the city to the farmer or irrigation district who accepts the effluent.[33]

Indeed, if a complete elimination of the water right requirement was not accomplished by the "notwithstanding" language in Subsection 8, H.B. 608 would not have solved the very problem faced by McCall. As noted above, McCall did not undertake the land application itself. It relied on farmers outside the city to apply the effluent to land. (See footnote 28 at page 21.) If Riverside's reading of Subsection 8 is correct, those farmers would have been required to obtain water rights. The legislative history shows that the role of the farmers was understood by the Legislators and the Department, and no one intended that any new water right would be required. Those farmers and Pioneer stand in the same position. Both were engaged by a city in an undertaking falling within the ambit of Subsection 8. The legislation intended that neither would be obligated to shoulder the very burden the statute was intended to eliminate.

In sum, if any corroboration or clarification of the statute's meaning is needed, the legislative history confirms the legislation's obvious goal. It shows that the only sensible reading of the "notwithstanding" language is to eliminate the water right requirement for the named entities as well as their agents/contracting entities. Riverside should not be allowed to exploit a perceived ambiguity in Subsection 8 to achieve a result opposite of that which was plainly intended.

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[33] Riverside presented the identical misleading use of legislative history in its opening brief to the Department (*Petitioner's Opening Brief*, pp. 26-27; R. 796-797). Nampa responded just as it did above (*Response Below* at 19-20, n.19 (R. 871-872)). It is unfortunate that Riverside repeats the same misleading description of the legislative history to this Court, without responding to (or even acknowledging) the rebuttal provided by Nampa.

III. NAMPA DOES NOT NEED SUBSECTION 8; THE COMMON LAW DOCTRINE OF RECAPTURE AND REUSE AND THE CITY'S FLEXIBLE SERVICE AREA ALLOW IT TO UNDERTAKE THE REUSE PROJECT.

Although Subsection 8 is the straightest route to affirm the Director's *Order*, Nampa does not even need Subsection 8 to prevail in this case. Subsection 8 was created to solve a problem that Nampa does not have. As discussed in the prior section, Subsection 8 was prompted by the City of McCall's water reuse project.

McCall sought the advice of the Department as to whether the City could rely on the common law doctrine of recapture and reuse (as that doctrine applies to municipal providers) and the statutory definition of its expanding municipal service area. R. 1043-1054. The Department initially determined that it did qualify. R. 1054. It was thereafter determined that a substantial portion of McCall's effluent came from sources other than its own municipal water rights, which meant it did not qualify. Accordingly, McCall worked with the Department and stakeholders across the State to craft Subsection 8.

As it turns out, the problem solved by Subsection 8 is a problem that Nampa does not have. Unlike McCall, Nampa accepts no influent from other sewer systems.[34] The common law, coupled with longstanding Department practice, recognize that disposal of "used" municipal water to meet environmental requirements is part and parcel of "municipal use" and does not constitute enlargement. See footnote 45 on page 39. Like McCall, Nampa's water rights have

[34] If the ordinary and unavoidable quantities of non-sewer system water (e.g., stormwater) entering Nampa's WWTP disqualify it from the law of recapture, the same would be true for all cities. That would nullify the entire body of law developed on the subject of reuse of municipal effluent.

an expanding municipal place of use (which, in Nampa's case, can be deemed to include Pioneer's entire delivery area).[35] Alternatively, in an accounting sense, Nampa may be seen as using all of its effluent within its own non-potable irrigation system.[36]

Thus, if need be, Nampa could rely on recapture and reuse of its own municipal water rights even in the absence of Subsection 8. But there is no need to sort all this out. After all, the purpose of Subsection 8 was to render this fascinating subject obsolete to all but legal historians and publishers of water law handbooks.

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[35] In a letter of September 7, 2011, IDWR said McCall's reuse program (involving delivery to farms outside the city) might fall within the definition of "service area" (which was then Idaho Code § 42-202B(6) and is now Idaho Code § 42-202B(9)), but he needed more information: "The Department has questions regarding the process in which the City delivers effluent to lands outside the city limits. A measure of control and supervision is at least implied for a delivery system to be considered a 'common water distribution system.'" R. 1051. McCall provided the following facts:

- McCall mixed its effluent with irrigation water under rights that it did not own (in order to achieve dilution).
- McCall delivered the water (in pipes it owned) to farms that it did not own.
- Those farmers agreed by contract to accept the diluted effluent when delivered to their irrigation systems.

R. 1052.

Based on those facts, IDWR determined that this constituted a sufficient "measure of control" to allow McCall to treat the farms outside the city as part of its service area. Nampa urges that its arrangement providing direct physical delivery of effluent to Pioneer is analogous and provides a similar if not stronger "measure of control."

[36] Nampa's effluent is mixed with other water in the Phyllis Canal. So there is no way of tracing which molecules (effluent or non-effluent) are delivered back to Nampa. But in an accounting sense, Nampa can be seen to take all of its effluent back. Pursuant to the *Title 50 Agreement* between Nampa and Pioneer (Exhibit L (R. 722-726)), Pioneer currently delivers, at peak, more water to Nampa (21.64 cfs) than Nampa will contribute as effluent to the canal upstream of the delivery points (18.6 cfs). See *Response Below* at 47, n.33 (R. 899)).

IV. SUBSECTION 2 DOES NOT REQUIRE PIONEER TO OBTAIN A WATER RIGHT.

A. Pioneer's acceptance of effluent is not a diversion from the public waters of the State.

As the Director noted, if Pioneer (as agent/contracting entity of Nampa) falls within the protection of Subsection 8, there is no need to address Subsection 2. But even without the protection of Subsection 8, Pioneer is not in violation of Subsection 2.

Subsection 2 requires Idaho water users to obtain a water right if they divert and use water from public waters of the State:

> No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

Idaho Code § 42-201(2).

Subsection 2 should be read as a whole and in context. The first sentence establishes the scope of the permitting requirement as applying to "public waters of the state of Idaho." The second sentence employs the term "a natural watercourse." That should be understood as shorthand for public waters of the state of Idaho. It would be most unreasonable to think the permit requirement is limited to natural streams and rivers. Plainly, the requirement to obtain a water right is not limited to those diverting surface water, but includes any public waters. Likewise, the requirement that one must not to "apply water to land" without a water right can only reasonably be understood to apply to public waters. See discussion of this topic, including the legislative history, in Nampa's *Response Below*, section II, pp. 25-30 (R. 877-882).

Pioneer is not diverting or using water from a public water supply. Pioneer has no physical or other control over the means of diversion by which Nampa diverts its ground water. Pioneer simply accepts delivery of water previously diverted by Nampa—water that is now effluent and remains under Nampa's dominion and control. That effluent is not part of the public water supply. Hence, this is no diversion or use of public water by Pioneer within the meaning of Subsection 2.

Pioneer's acceptance of delivery of previously diverted water is no more a diversion of public water than if a person were to accept delivery of a dozen cases of spring water. The spring water was once in the public water supply. And so was Nampa's effluent. At one time, each was diverted from the public water supply, and doing so required a water right. But, once lawfully diverted it remains the property of the appropriator, so long as the water remains under its command and control. "Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator." Idaho Code § 42-110.

Accordingly, a new water right is not required when the diverter delivers previously diverted water to a customer, purchaser, friend, irrigation district, or anyone else. Thus, a person may deliver a bottle of spring water to her neighbor. And a city may deliver potable water to its municipal customers. And a city may deliver treated effluent to an irrigation district. And an irrigation district may deliver water to a landowner. Neither the neighbor, the city, the city's customers, the irrigation district, nor the land owner need obtain a water right to accept such delivery. And none of them is in violation of Subsection 2.

It would be another matter altogether if the original diverter allowed the water (as return flow or waste water) to reach a public water supply (which includes drains—see below). Others may then appropriate that water, and doing so requires a water right. But that has not happened here. The effluent is delivered by pipe, not by stream channel or drain.

B. *Janicek* supports the conclusion that Pioneer is not in violation of Subsection 2.

Riverside pins its Subsection 2 argument in large part on the *Janicek Properties, LLC* case (Case 39576, Subcase 63-27475, Fifth District Court (May 2, 2008) (Theodore R. Booth, Special Master)). *Opening Brief*, pp. 16-18. Alas, the *Janicek* case does not advance Riverside's cause. It defeats it.

Janicek held that when the quantity of waste water accruing to a drain exceeds that needed by those who constructed the drain, the excess water may be appropriated by a landowner whose land the drain crosses. Of course, the junior appropriation is subject to call by the senior and paramount reuse rights of the drain owners (which might expand in the future). That is hardly a startling proposition.

Riverside says that if the landowner was required to obtain a water right from a drain, then Subsection 2 must not be limited to diversions from a "natural watercourse." Yes, and so what? As noted in the prior section, Subsection 2, read a whole, should be understood to require a water right for any diversion and use of water from any public waters of the State, including drains, springs, and aquifers.

Special Master Booth did not explain in his decision why drain water is public water. Perhaps that is because it is obvious. Like the water in streams, lakes, springs, and aquifers, it is

physically and legally accessible by the public. The Purdam drain ran through the Janicek property. The Special Master ruled that the appropriation was not initiated in trespass. *Janicek* at 11-12. If you can physically and without trespass "put a straw in" and take water that no one else owns, then it is public water subject to appropriation.

Far from helping Riverside's argument, *Janicek* does the opposite. It highlights how different the situation is with Nampa's delivery of effluent to Pioneer. No one—not Riverside or anyone else—can lawfully "put a straw" into Nampa's WWTP or the pipe that delivers effluent to Pioneer. That is why it is not public water, and that is why Subsection 2 does not require Pioneer to obtain a water right.[37]

If Riverside's argument were applied in other contexts, the absurd consequences would multiply. If Pioneer is required to obtain a water right to accept delivery of water lawfully owned and physically controlled by Nampa, then the same would go for every municipal water customer of Nampa. Each customer would be required to obtain a water right to accept delivery of municipal water to their home. That is the obviously wrong but unavoidable effect of Riverside's argument. The simple answer is that neither Pioneer nor the municipal water customers are required to obtain a water right, because neither is diverting from the public water supply.

[37] Nampa concurs with and adopts the more detailed discussion of Janicek in *Pioneer's Brief* and *Municipal Intervenors' Brief*, particularly as to the physical differences between a drain and the delivery systems employed here.

C. The words "apply water to land" must be understood to refer to water that was diverted from the public water supply.

On appeal, Riverside repeats verbatim its "disjunctive or" argument that it first presented to the Director:

> Idaho Code § 42-201(2) is not limited only to water withdrawn from a "natural watercourse" as the Intervenors assert. The disjunctive use of the word "or" in this code section extends this requirement to obtain water to any application of water to land. [Citing statutes interpreting the word "or" in other contexts.]

Opening Brief at 16 (cf. *Petitioner's Opening Brief* below, p. 14 (R. 784)).

As Nampa said before (*Response Below* at 28 (R. 880)), there is no question that the statute employs the disjunctive word "or." The question is: What do the words "apply water to land" refer to? The two sentences of Subsection 2 must be read as a whole. That textual context makes clear that the water one may not apply to land without a water right is water that was diverted from the public water supply—which is the whole subject of Subsection 2.

If this reading of the statute is not plain enough on its face, it is made perfectly clear by the legislative history discussed below.

D. Any doubt about the meaning of Subsection 2 is resolved by its legislative history.

Subsection 2 was added in 1986[38] to plug a loophole in Idaho's mandatory permitting statute enacted in 1971.[39] The 1971 legislation established that the only way to obtain a water

[38] H.B. 369, 1986 Idaho Sess. Laws, ch. 313, § 2 (codified at Idaho Code § 42-201(2)) (reproduced in *Response Below* at 58-59 (R. 910-911)).

[39] The permitting process became mandatory for ground water rights in 1963. 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229). The 1971 statute made permitting

right is through the permitting process. But one could still divert and apply water from a public supply to a beneficial use without obtaining a water right. As Director Kenneth Dunn explained:

> The present law states that users must have a permit to appropriate water but it doesn't say it is against the law to appropriate [divert] water without the permit. This legislation makes it clear that no person shall divert water without having a permit to do so.

Minutes, House Resources and Conservation Committee, p. 2 (Jan. 9, 1986) (*Response Below* at 91 (R. 943)).[40]

Subsection 2 plugged that loophole. Subsection 2 established that obtaining a water right was mandatory before diverting and using public waters—subject to various exemptions that were added after 1986.

Riverside's semantic argument about the word "or" in Subsection 2 would disconnect the mandatory permitting process from its inherent link to Idaho's public water supply. That construction should be rejected. As its legislative context makes clear, Subsection 2 does not address water that is not part of Idaho's public waters. The statute does not require a person to obtain a water right to water one's garden with bottled spring water. Nor does it require Pioneer to obtain a water right in order to accept and deliver treated effluent to lands it serves. Neither

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mandatory for all water rights. H.B. 83, 1971 Idaho Sess. Laws, ch. 177 §§ 1 and 2 (codified as amended at Idaho Code §§ 42-103, § 42-201(1)) (reproduced in *Response Below* at 58-59 (R. 910-911)). In 1971, what is now subsection 42-201(1) constituted the entirety of section § 42-201. All the subsections to section 42-201 were added subsequently.

[40] The 1986 amendment adding subsection 42-201(2) was part of a larger piece of legislation aimed at strengthening IDWR enforcement tools with respect to violation of water right conditions, cancellation of forfeited water rights, and preventing uses beyond the scope of a water right.

bottled water nor Nampa's effluent are part of the public water supply. For that reason, neither of these "applications to land" undermines the priority system. Protection of the priority system through the permitting process is the sole purpose of Subsection 2. Accordingly, the phrase "or apply water to land" should be understood to mean water diverted from the public water supply.

V. A TRANSFER OF NAMPA'S WATER RIGHTS IS NOT REQUIRED.

Riverside suggests that even if Subsection 8 exempts Nampa and Pioneer from obtaining a new water right for the application of Nampa's effluent, "the Director should be required to conduct a transfer analysis." *Opening Brief* at 18. Later, Riverside says "the Director should require Pioneer to file a transfer." *Opening Brief* at 20. This does not compute.

First, the Director acts on water right applications that others choose to file. He cannot order someone to file an application.

Second, a person cannot file an application to transfer someone else's water rights. Pioneer cannot transfer Nampa's water rights.

Third, the plain words of the exemption in Subsection 8 includes both appropriation and transfer of water rights. The statute says that a city "shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent." (Emphasis added.) One may "obtain" a water right either through appropriation or by transfer of an existing water right. Entities falling within Subsection 8 (and their agents or contracting entities) are exempt from seeking either an appropriation or a transfer of water rights, because they do not need to "obtain" any water right.

Fourth, even if the statute did not exempt a city from transferring its existing water right, no transfer is required here because no element of Nampa's water rights has changed. Nampa is simply recapturing its own wastewater and applying that water within the confines of its municipal water right.[41]

VI. RIVERSIDE'S RE-HASHED ARGUMENTS ABOUT VIOLATION OF CONDITIONS, ENLARGEMENT, AND THE SOURCE OF NAMPA'S WATER RIGHTS WERE DEBUNKED IN PRIOR BRIEFING AND REMAIN MERITLESS ON APPEAL.

A. "Supplemental use only" conditions in some of Nampa's water rights do not bar the disposal of effluent in the Reuse Program.

Riverside devotes over four pages to a discussion of how the Director's *Order* ignores conditions in Nampa's water rights and thereby allows enlargement of those rights. *Opening Brief* at 18-22. This argument is mooted if the Court finds that the Subsection 8 applies and Nampa is not required to rely on its existing water rights to support the Reuse Project. In any event, Riverside's analysis is wrong.

Riverside never says what conditions in Nampa's water rights it is referring to, except for the reference in its section heading V.D to "conditions precluding the use of its water rights for irrigation when surface water is available." *Opening Brief* at 18. Presumably this refers to

[41] The place of use has not changed, because Nampa has a flexible and expanding municipal service area that includes land receiving effluent served by Pioneer. Nor has the purpose of use changed, because land application required to meet a regulatory requirement falls within the broad definition of municipal use. (See discussion in section III beginning on page 27 and section VI.B on page 39; *Response Below* at 38-48 (R. 890-900).)

standard condition 102 that appears on five of Nampa's 21 municipal ground water rights associated with its potable water system (e.g., No. 63-12474[42]).

There are two answers. First, Nampa's use is not "irrigation"; its use is "disposal." (See footnote 45 on page 39.) Second, Nampa complies with the "supplemental use only" condition at the time of the initial beneficial use. Condition 102 does not preclude subsequent reuse of recaptured ground water for any purpose.

This is well established Departmental policy. As explained to Riverside in Nampa's prior briefing, this very question was raised in 2008 by counsel for Black Rock Utilities, Inc., a municipal water provider in North Idaho.[43]

Counsel asked the Department to confirm the following:

> The condition on Water Right No. 95-9055 prohibiting use of this ground water right for irrigation of land to which surface rights are available does not prohibit land application of treated municipal effluent on such land.

Letter from Christopher H. Meyer to Gary L. Spackman at p. 2 (Sept. 2, 2008) (in the files of Water Right No. 95-9055) (R. 995). In his letter, Black Rock's counsel observed:

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[42] Standard condition 102 reads: "The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping."

[43] Riverside has never addressed Nampa's discussion of the "supplemental use only" condition, which was presented in its *Response Below* at 43 (R. 895) (quoting Memorandum from Mat Weaver to Jeff Peppersack copied to Gary Spackman ("***Review Memo***") (Sept. 23, 2008) at 5 (R. 1012)).

> This provision appears to have been inspired by Idaho Code § 67-6537 enacted in 2005. This statute, which is directed to local land use entities, not IDWR, requires land use applicants under the Local Land Use Planning Act to use surface water as the primary source of supply if it is "reasonably available." It is my understanding that the Department does not view this statute as prohibiting land application of municipal effluent from ground water to land where surface water is available, so long as the ground water was first used for in-house culinary purposes. Accordingly, we trust that the referenced condition is intended to prohibit only the use of this ground water right for direct irrigation, and does not prohibit the environmentally desirable goal of land application of treated effluent.

Id. at 3-4 (R. 996-997).

IDWR's Deputy Director Mat Weaver responded as follows:

> Mr. Meyer is correct in this regard. <u>This condition is speaking to the primary or first use the diverted groundwater is put to.</u> IDWR recognizes Municipal Use as being fully consumptive, as such, once the groundwater has served its initial purpose the Municipal Provider is free to use or reuse the reclaimed water at their discretion.

Review Memo at 5 (R. 1012) (emphasis added).

The Court should defer to the Department's sensible interpretation of its own condition language. Any other interpretation would subvert its purpose and undermine the decades of common law recognition (not to mention Subsection 8) that environmentally sound disposal of effluent is a good thing and fully compatible with the prior appropriation doctrine.

B. Recapture municipal wastewater and disposal of treated effluent is part of the municipal right and not an enlargement.

In the same section V.D of its brief, Riverside complains that the Reuse Project is an enlargement of Nampa's municipal rights. Riverside explores several cases having nothing to do with the subject, while declining to respond to Nampa's rebuttal of this argument.[44]

Simply put, it is well established policy in Idaho, as in all prior appropriation states, that re-capture and reuse or disposal of municipal waste water is part and parcel of the municipal right and not an enlargement thereof.[45] In short, environmentally mandated disposal of effluent

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[44] Riverside has not addressed Nampa's discussion of the common law of municipal reuse set out in its *Response Below*, section III, pp. 30-48 (R. 882-901).

[45] "In the case of municipalities, the majority view is that the proper disposal of effluent from waste treatment facilities comes within the parameters of the beneficial use of a municipal water right." *Application Processing Memorandum No. 61* (Memorandum from Phil Rassier to Norm Young, p. 1 (Sept. 5, 1996) (R. 1059).

"Waste water treatment necessary to meet adopted state water quality requirements is considered by IDWR as part of the use authorized under a municipal right . . . ." Letter from Garrick L. Baxter to Christopher H. Meyer, p. 1 (Sept. 7, 2011) (R. 1050).

"In regards to the land application of treated municipal waters to the Black Rock project I have recognized and addressed two issues: (1) is the use allowed under the municipal use umbrella, and (2) would the land application represent a historical enlargement of actual consumptive use associated with the permit. . . . It therefore can be concluded that land application for the intent of irrigation can and should be allowed for under the general heading of municipal purposes. The second issue deals with the enlargement of the historical consumptive use of the water diverted under the permit. The municipal use is recognized by IDWR as being completely consumptive, in actuality this may or may not be the case. . . . If we consider the Administrator's Application Processing Memorandum No. 61 regarding industrial waste water and take forward the reasoning and direction put forth in that memo and apply it to municipal waste water, then the 'consumptive use' associated with the use can increase (over the historical base line value) up to the amount determined to be consistent with the original water rights as reasonably necessary to meet treatment (land application) requirements. . . . For all these reasons it would seem that <u>any enlargement of the consumptive component of the permit associated with the new practice of land application, can and should be allowed by IDWR</u>." *Review Memo* at 3 (R. 1010) (emphasis supplied).

is considered a "related purpose" within the meaning of municipal use.[46] Accordingly, there is no need to add "irrigation" to Nampa's municipal water rights in order to accomplish the Reuse Project. Riverside has failed even to acknowledge this long-established and consistently applied Departmental policy, much less has it offered a reason why the Court should override it, rather than defer to it.

C. *Rangen* is inapposite.

Riverside continues to cite *Rangen, Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016) and other cases dealing with the finality of decrees. *Rangen* dealt with a water right holder who tried to read more into its water rights than was there. This has no bearing on the case at bar. Neither Nampa nor Pioneer is trying to expand its water rights. Even if Subsection 8

"[T]he Municipal Provider is free to use or reuse the reclaimed water at their discretion." *Review Memo* at 5 (R. 1012).

"[N]ot only is the land application of treated wastewater allowed for under the municipal use general heading, but should be encouraged as a valid and worthwhile conservation effort." *Review Memo* at 6 (R. 1013).

"You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area, and that doing so does not cause legal injury to other water uses. You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use. . . . Finally, you confirmed that these uses would not require a transfer—assuming that the reuse of the effluent was required in order to satisfy environmental requirements." Letter from Christopher H. Meyer to Garrick L. Baxter and Jeff Peppersack, pp. 1-2 (May 24, 2011) (R. 1026-1027) (with edits reflecting changes made by Garrick L. Baxter in his letter of May 26, 2011) (R. 1040-1041).

[46] "Municipal purposes" is defined as "water for residential, commercial, industrial, irrigation of parks and open space, and related purposes . . . ." Idaho Code § 42-202B(6) (emphasis supplied).

did not apply, Nampa is acting within its water rights, and Pioneer does not need a water right in order to accept the gift of effluent lawfully delivered to it by Nampa.[47]

D. *A&B* is inapposite.

Riverside remains preoccupied with the case of *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005), a case involving a claim under the enlargement statute, Idaho Code § 42-1426. Over a number of years, A&B expanded its program of recapturing drain water that it originally diverted as ground water. It used the recaptured water to irrigate lands beyond the place of use of its ground water right. In the SRBA, it obtained beneficial use rights for such uses initiated prior to the 1963 mandatory permitting requirement, and it sought enlargement rights for such uses initiated after 1963. However, A&B was not satisfied with the deal it could get under the enlargement statute. Accordingly, A&B pursued an argument that its enlargement rights should be treated differently because its recaptured water was drain water, not ground water. Under this theory, A&B hoped to avoid the "subordination remark"[48] and to make the enlargement rights not subject to call by other ground water users.[49]

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[47] Riverside simply ignores the briefing below in which Nampa explained why *Rangen* has no relevance here. *Nampa's Sur-Reply Brief* at 25 (R. 1193).

[48] In accordance with *Fremont-Madison Irr. Dist. v. IGWA,* 129 Idaho 454, 926 P.2d 1301 (1996), enlargement rights are issued with a remark subordinating them to all non-enlargement rights existing on the date of enactment of the enlargement statute (April 12, 1994).

[49] The *A&B* decision does not attempt to explain the strategic reasons behind A&B's theories. That must be derived from reading the briefs. Appellant's Opening Brief, 2004 WL 3644031; Ground Water User's Response, 2004 WL 3644033. The latter brief carefully charts the convoluted evolution of A&B's claims and theories.

The Supreme Court said there was more than one way of looking at this. First, the Court noted that drain, waste, or seepage water may be appropriated. Indeed, third parties often make such appropriations of waste water generated by others.

> The source of enlarged acres could be treated as recaptured drain and/or waste water and not ground water. Unfortunately for A & B, treating the water as recaptured drain and/or waste water would not accomplish the purpose it seeks.

A&B, 141 Idaho at 751, 118 P.3d at 83. In other words, A&B could have sought a new, junior-priority appropriation. But an enlargement right may be obtained only for enlargement of an existing right. *Id*.

Alternatively, the Court noted, "A & B may use the water on its original appropriated lots." *A&B*, 141 Idaho at 752, 118 P.3d at 84 (citing the right to reclaim and reuse waste water on the original land). But that did not help A&B either, because its use of the water was on new land.

Accordingly, the Court held that IDWR and the SRBA Court properly viewed A&B's enlargement claims as based on its original ground water right. Accordingly, those claims were approved, subject to the subordination remark.[50]

What does this have to do with Nampa's Reuse Project? Nothing. A&B is not a municipal water provider; A&B needed a new enlargement water right because its application to

[50] Riverside apparently believes that the *A&B* Court subjected the irrigation district's enlargement right to some sort of mitigation analysis. That is not so. It simply imposed the standard subordination remark required under *Fremont-Madison*.

new land fell outside the recapture and reuse doctrine. In contrast, Nampa and Pioneer do not need a new water right. As discussed above:

1. Nampa's reuse of its municipal ground water right for environmental disposal purposes falls within the recapture and reuse doctrine as it applies to municipal providers disposing of wastewater.

2. Doing so is not an enlargement.

3. In any event, Nampa is exempted by Subsection 8.

4. Nampa may rely on its agent/contracting entity, Pioneer, to effectuate its Reuse Program under Subsection 8.

5. Even without Subsection 8, Pioneer does not need a water right, because it is accepting a delivery of private water lawfully controlled by Nampa, which does not constitute a diversion from the public water supply.

6. Perhaps Pioneer could seek a new waste water right sourced in Nampa's delivery of effluent. But, for the reasons above, it is not required to do so.

7. Even if Pioneer did seek a waste water right, it would not be subject to the mitigation discussed *A&B*, which is applicable to enlargement rights, not new appropriations.

In sum, *A&B* has no bearing on this case.

VII. SUBSECTION 8 IS CONSTITUTIONAL.

Riverside pins its constitutional argument on Article XV, § 3.[51] Those words establish that people have a right to obtain a water right under the appropriation system, and that among

[51] "The right to divert and appropriate the unappropriated waters of any natural stream shall never be denied . . . . Priority of appropriation shall give the better right as between those using the water. . . ." Idaho Const. art. XV, § 3

such appropriations, their relative priority shall govern. The Constitution does not prohibit uses of water that are not based on a water right. Indeed, that is why it was necessary for the Legislature to enact the mandatory permitting statutes. Thus, the Legislature may make permitting mandatory or optional as it chooses, without violating the State Constitution.

Subsection 8 is not the only instance in which the Legislature has seen fit to exempt uses of water from the need to obtain a water right. Riverside's argument (that, in order to avoid unconstitutionality, Subsection 8 must be "applied" to require an injury analysis as is done in an appropriation or application proceeding) appears even more ludicrous when considered in the context of the other exemptions contained in Idaho Code § 42-201. If Riverside were right, its argument would require an injury analysis before a bucket of water could be lifted to fight a fire. Idaho Code § 42-201(3)(a). The same goes for domestic wells and stock watering[52]—exemptions that repeatedly have been recognized as proper by our courts.

Riverside contends that subsection 42-201(8) is unconstitutional *as applied* because "Riverside's senior water rights were injured." *Opening Brief* at 25. It is curious to frame this an "as applied" challenge, given that there was nothing particularly unique in how the Director applied Subsection 8. In any event, Riverside does not say how its water rights were injured, and it would be mighty hard to do so given the settled law that one is not entitled to demand that another water user continue to waste water for the benefit of another water user.

[52] Idaho Code §§ 42-111, 42-227 and IDAPA 37.03.08.035.01.b (exempting certain domestic wells). See also Idaho Code § 42-113 and IDAPA 37.03.08.035.01.c (exempting instream stockwatering).

Its argument then grows more perplexing: "Riverside's point is that it is entitled to make its case in a water right transfer or application proceeding, and the Director denied that right." *Opening Brief* at 25. We have just been through a thorough and costly proceeding that generated a record of 1,263 pages. How Riverside can think it was denied an opportunity to "make its case" is beyond Nampa's comprehension.

The Director did not ignore *Fremont-Madison Irr. Dist. v. IGWA*, 129 Idaho 454, 926 P.2d 1301 (1996), as Riverside contends. *Opening Brief* at 26-27. The Director took up Riverside's constitutional argument and rejected it succinctly. "However, Riverside is not entitled to Nampa's wastewater. Without that entitlement, there is no injury to Riverside." *Order* at 5 (R. 1234).

In sum, for the same reasons that Riverside cannot meet the test in Idaho Code §67-5279(4) (see discussion in section I.C beginning on page 7), its constitutional argument comes up short.

VIII. NAMPA IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL.

Nampa seeks costs and attorneys' fees under Idaho Code § 12-117(1)[53] for having to defend this case on appeal. This is a lawsuit between a state agency (IDWR) and a "person" (Riverside), thus bringing this statute into play.[54]

[53] Section 12-117(1) states:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable

Idaho Code § 12-121 does not apply here, because this is a judicial review. However, the courts have construed the standards under the two statutes as being essentially the same. If a party prosecutes a frivolous or baseless appeal, the opposing party is entitled to recover its attorney fees incurred as a result of having to defend against the appeal.

The Idaho Supreme Court has found that appeals are baseless, unreasonable, or frivolous when a non-prevailing party continues to rely on arguments made below without any additional persuasive law or bringing into doubt the existing law on which the lower court based its decision. *See Rangen, Inc. v. IDWR*, 159 Idaho 798, 812, 367 P.3d 193, 207 (2016) (citing *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005)).

Such is the case here. Riverside has presented no new authorities or arguments in support of its positions that differ from their case before the Director. Moreover, Riverside continues to disregard the counterarguments presented below. See, for example, footnotes 26 (on page 22), 33 (on page 26), 43 (on page 36), 44 (on page 36), and 47 (on page 40).

Nampa is mindful that this is a case of first impression. That is the reason that Nampa did not seek attorney fees below. And it may be reason enough to deny an award of attorney fees

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> expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Idaho Code § 12-117(1) (emphasis supplied).

[54] A "political subdivision" is defined as "a city, a county, any taxing district or a health district," Idaho Code § 12-117(6). This definition also ties into the definition of "governmental entity" used in Idaho Code §§ 12-117(4) and 12-117(5)(b). It is Nampa's understanding that Riverside is not a Title 43 irrigation district and hence is not "taxing district." Accordingly, it is a "person," not a "political subdivision." If that is correct, section 12-117(4) does not apply, which would call for an award of fees to the prevailing party.

on appeal. On the other hand, the reason that this is a case of first impression may be that the answer is so obvious. Having had the benefit of extensive briefing by Nampa and the other Intervenors when the matter was before IDWR, and having had the benefit of the Director's *Order* (to which deference should be accorded), a case can be made that this appeal is frivolous. That is a call for the Court. In Nampa's view, however, the City's taxpayers should no longer be required to shoulder this burden. Perhaps it was fair for Riverside to have raised the question with the Director. But appeals like this defeat the purpose of the legislation.[55]

CONCLUSION

For the reasons discussed above, the Director's *Order* should be affirmed. The Director was correct that Subsection 8 exempts Nampa and its agents/contracting entities from the requirement to obtain a new water right. The Director's *Order* could also be upheld on the alternative ground that Nampa and Pioneer would not be required to obtain a new water right even in the absence of Subsection 8. Disposal of wastewater pursuant to environmental regulations constitutes a permissible use encompassed by Nampa's municipal water rights, which include an expanding place of use that may reach beyond the City's limits. Moreover, Pioneer's acceptance of delivery of effluent by Nampa is not a diversion of public water requiring a water right.

[55] "The purpose of this legislation, he said, was to get the water lawyers out of this business and to allow municipalities to spend their dollars and focus their attention on the issue at hand, which was the water quality side of the equation." Senate Resources & Environment Committee, p. 2 (Mar. 16, 2012) (emphasis added) (*Response Below* at 131 (R. 983)).

The Director was right, however, to focus on Subsection 8. Its whole purpose was to eliminate the need for this very debate over these principles of law. Riverside's challenge subverts the legislative purpose of Subsection 8 and seeks an end-run around the well-settled principle that it suffers no legal injury when another water user reduces the supply of waste water. It is because of that very principle that Subsection 8 is constitutional.

Respectfully submitted this 4th day of October , 2021.

GIVENS PURSLEY LLP

By: _____
Christopher H. Meyer

By: _____
Charlie S. Baser

Attorneys for
Intervenor City of Nampa.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October, 2021, the foregoing was filed, served, and copied as follows:

DOCUMENT FILED:

Third Judicial District Court Canyon County Courthouse 1115 Albany St Caldwell, Idaho 83605	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing

SERVICE COPIES TO:

Albert P. Barker Sarah W. Higer BARKER ROSHOLT & SIMPSON LLP PO Box 2139 Boise, ID 83701-2139 apb@idahowaters.com swh@idahowaters.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Gary L. Spackman Director IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 gary.spackman@idwr.idaho.gov	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Garrick L. Baxter Meghan M. Carter Sean H. Costello Deputy Attorneys General IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 garrick.baxter@idwr.idaho.gov meghan.carter@idwr.idaho.gov sean.costello@idwr.idaho.gov	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing

Charles L. Honsinger HONSINGER LAW, PLLC PO Box 517 Boise, ID 83701 honsingerlaw@gmail.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Sarah A. Klahn SOMACH SIMMONS & DUNN 2033 11th St, Ste 5 Boulder, CO 80302 sklahn@somachlaw.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Candice M. McHugh MCHUGH BROMLEY, PLLC 380 S 4th St, Ste 103 Boise, ID 83702 cmchugh@mchughbromley.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Chris M. Bromley MCHUGH BROMLEY, PLLC 380 S 4th St, Ste 103 Boise, ID 83702 cbromley@mchughbromley.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Andrew J. Waldera SAWTOOTH LAW OFFICES, PLLC 1101 W River St, Ste 110 PO Box 7985 Boise, ID 83707-7985 andy@sawtoothlaw.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Robert L. Harris HOLDEN KIDWELL HAHN & CRAPO, PLLC 1000 Riverwalk Dr, Ste 200 PO Box 50130 Idaho Falls, ID 83405-0130 rharris@holdenlegal.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing

COURTESY COPIES:

Mary R. Grant Deputy City Attorney BOISE CITY ATTORNEY'S OFFICE 150 N Capitol Blvd PO Box 500 Boise, ID 83701 mrgrant@cityofboise.org	☐ ☐ ☐ ☒ ☐	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Johanna M. Bell Policy Analyst ASSOCIATION OF IDAHO CITIES 3100 S Vista Ave, Ste 201 Boise, ID 83705-7335 jbell@idahocities.org	☐ ☐ ☐ ☒ ☐	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Robert H. McQuade, Jr. General Counsel ASSOCIATION OF IDAHO CITIES 3100 S Vista Ave, Ste 201 Boise, ID 83705-7335 rmcquade@idahocities.org	☐ ☐ ☐ ☒ ☐	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing

Christopher H. Meyer

Exhibit D

This Guidance Document is not new law but is an agency interpretation of existing law. For more information or to provide input on the document, please contact the Water Rights Section Manager at 208-287-4800. (Feb.2020)

ADMINISTRATOR'S MEMORANDUM

Transfer Processing No. 24

To: Water Management Division Staff

From: Jeff Peppersack

RE: **TRANSFER PROCESSING POLICIES & PROCEDURES**

Date: December 21, 2009

This memorandum supersedes Transfer Processing Memorandum No. 24 dated January 21, 2009.

The purpose of this memorandum is to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law. The revisions to the October 30, 2002 memorandum are provided to recognize statewide application of this memorandum, to clarify the guidance based on updates to statutes and Department policy, and to streamline transfer processing to reduce application processing time and existing application backlogs. These policies and procedures are to be followed until rescinded or amended, or superseded by statute or rule or court decision, to assure that applications are processed efficiently and with consistency.

Regardless of whether or not an application for transfer is protested, Section 42-222, *Idaho Code*, requires that the department evaluate whether there would be injury to other water rights, there would be an enlargement in use of the original right, the proposed use would be a beneficial use, the proposed use would be in the local public interest, the proposed use would be consistent with the conservation of water resources within the State of Idaho, and whether the proposed change would impact the agricultural base of the local area. In the case where the place of use is outside of the watershed or local area where the source of water originates, the department must also evaluate whether the change would adversely impact the local economy of the watershed or local area. The department must also evaluate the validity of the right (or part thereof) being changed and must assure that the applicant owns the right or otherwise has the authority to apply for the transfer.

animal feeding operation, such as a feedlot or dairy, the water use will be considered fully (100 percent) consumptive.

(8) Fish Propagation. An application for transfer, which proposes to increase the number or volume of raceways in a fish propagation facility, will not be presumed to be an enlargement of the water right, unless the diversion rate or annual volume of water diverted are proposed to be increased.

(9) Disposal of Waste Water. An application for transfer filed to provide for the disposal of wastewater, by land application on cultivated fields or other beneficial use disposing of the wastewater, resulting from use of water under non-irrigation uses such as a dairy or other confined animal feeding operation, or "municipal" or "industrial" water rights where the use of water is considered to be fully consumptive, is not considered an enlargement of the commercial, municipal, or industrial water right. While not an enlargement of the water right, such use of wastewater must not injure other water rights (see Application Processing Memorandum No. 61 as revised under Section 1 of this memorandum) and must comply with best management practices required by the Idaho Department of Environmental Quality, the U. S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction.

(10) Enhanced Water Supply. An application for transfer, which proposes to change a point of diversion from a surface water source to a new location where the water available is greater or more reliable, such as moving from the tributary of a stream downstream to the mainstem of the stream, is presumed to enlarge the water right, unless the proposed change is subject to conditions limiting diversion of water at the proposed new point of diversion to times when water is available and in priority at the original point of diversion.

(11) Water Held for Reasonably Anticipated Future Needs. Section 42-222, *Idaho Code*, provides that when a water right, or part thereof, to be changed is held by a municipal provider for municipal purposes, that portion of the right held for reasonably anticipated future needs can not be changed to a new place of use outside the service area of the municipal provider or to a new nature of use. See Section 42-202B, *Idaho Code* for applicable definitions related to municipal water use.

(12) Changing the Purpose of Use for a Water Right to Municipal Purposes. An application for transfer, which proposes to convey an established water right to a municipal provider and change the nature of use to municipal purposes, as defined in Section 42-202B, *Idaho Code*, shall not be approved without limiting the volume of water divertible under the right to the historic consumptive use under the water right prior to the

proposed change. If the proposed transfer involves a surface water right, the transfer shall not be approved without also limiting the right to the historic period of use under the right prior to the proposed change.

(13) Historic Use Recognized for Municipal Purposes. An application for transfer, which proposes to change the nature of use to municipal purposes for a water right established and held by a municipality that lists the purpose(s) of use as some combination of domestic, commercial, industrial, or irrigation, where those uses have historically been essentially for municipal purposes, as defined in Section 42-202B, *Idaho Code*, will not be presumed to be an enlargement of the right and will not require limitation to the historic consumptive use under the right. However, the change will be subject to the annual diversion volume, if specifically stated on the water right license or decree.

(14) Stored Water. Section 42-222(1), *Idaho Code*, provides that a transfer of a water right for the use of stored water for irrigation purposes does not constitute an enlargement in the use of the original water right, even when more acres are irrigated, provided that no other water rights are injured.

(15) Conveyance Losses. An application for transfer, which proposes to change the purpose of use for a portion of a water right covering conveyance losses to a use that would provide for irrigating additional acres, or other additional use, is presumed to be an enlargement of the water right.

(16) Measuring Requirements for Ground Water Diversions in the ESPA and Modeled Tributaries. Any water right transfer authorizing one or more changes to the diversion and use of ground water approved subsequent to the date of this memorandum shall include a condition of approval that requires the installation and maintenance of one or more measuring devices or means of measurement approved by the department. Until and unless changed pursuant to Section 42-701, *Idaho Code*, the following flow meter installation is required for the transferred right prior to diverting and using ground water under the transferred right:

a. One or more magnetic flow meters shall be installed, as required by the department, having an accuracy of 0.5 percent of rate of flow for flow velocities between 0.1 and 33 ft/sec in pipe sizes up to 4 inches in diameter and for flow velocities between 0.1 and 20 ft/sec in pipe sizes greater than 4 inches in diameter;

b. Each magnetic flow meter must be installed and maintained in accordance with the manufacture's specifications and