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DEC 28 2021

CANYON COUNTY CLERK
M. MEYER, DEPUTY CLERK

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 within 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.

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 than 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.

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

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

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

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

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

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

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

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

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

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

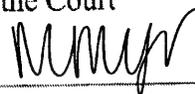
Andrew J. Waldera
SAWTOOTH LAW OFFICES, PLLC
1101 W. River Street, Ste. 110
Boise, ID 83702
andy@sawtoothlaw.com

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

By E-mail By mail
 By fax (number)
 By overnight delivery / FedEx
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