

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF RIVERSIDE'S
PETITION FOR DECLARATORY RULING
REGARDING NEED FOR A WATER
RIGHT TO DIVERT WATER UNDER
REUSE PERMIT NO. M-255-01

Docket No. P-DR-2020-001

**ORDER ON PETITION FOR
DECLARATORY RULING**

BACKGROUND

On February 24, 2020, Riverside Irrigation District (“Riverside”) submitted a *Petition for Declaratory Ruling Regarding Need for a Water Right to Divert Water Under Reuse Permit No. M-255-01* (“Petition”) to the Idaho Department of Water Resources (“Department”). Riverside petitions the Department for a declaratory ruling as to the applicability of Idaho Code § 42-201(2) to Reuse Permit No. M-255-01 (“Reuse Permit”). *Petition* at 3. The Reuse Permit was issued by the Idaho Department of Environmental Quality (“DEQ”) to the City of Nampa (“Nampa”) on January 21, 2020. Under the Reuse Permit, Nampa intends to discharge effluent from its wastewater treatment plant (“wastewater plant”) to Phyllis Canal and Pioneer Irrigation District (“Pioneer”) will use the effluent to supplement Pioneer’s irrigation supply. *Stipulation of Facts by All Parties* (“Facts”) ¶¶ 34, 49, 51.

Riverside seeks a declaratory ruling that:

- 1) Pioneer cannot divert or accept effluent from Nampa or apply Nampa’s effluent to land in Pioneer’s boundaries under the Reuse Permit without first obtaining a water right.
- 2) Any attempt by Pioneer or Nampa to divert water under the Reuse Permit to Pioneer without applying for a water right is in contravention to Idaho law.

Petition at 3.

Petitions to intervene were timely filed by Nampa, Pioneer, and Idaho Power Company. Timely petitions to intervene were also filed by the Association of Idaho Cities, the Hayden Area Regional Sewer Board, and the Cities of Boise, Caldwell, Idaho Falls, Jerome, Meridian, Pocatello, Post Falls, and Rupert.

Pursuant to IDAPA 37.01.01.557, the parties submitted *Stipulation of Facts by All Parties* and *Stipulation Regarding Exhibits A-T and Other Evidence*.¹ This Order adopts the stipulated facts and exhibits as evidence.

¹ The Parties numbered each exhibit starting with the pleadings. This Order will refer to the pagination as set out in

Pioneer is an Irrigation District which owns water rights to irrigate approximately thirty-four thousand acres of land. *Facts* ¶ 1. Some of the land Pioneer serves is located in north and northwest Nampa. *Facts* ¶ 2. Pursuant to an agreement with Nampa, Pioneer delivers water, from Phyllis Canal and its laterals, to Nampa's non-potable irrigation system. *Facts* ¶ 20; Exhibits D, E, and L.

Nampa is an Idaho municipal corporation and is a municipality and municipal provider under Idaho Code § 42-202B. *Facts* ¶¶ 6, 7. Nampa owns and operates two municipal water delivery systems, one for potable water, and one for non-potable irrigation water. *Facts* ¶ 8. Nampa's potable water is exclusively sourced from ground water. *Facts* ¶ 9. Nampa's irrigation delivery system receives water from multiple sources. Approximately sixty percent of the water is sourced from three irrigation districts, one of which is Pioneer. *Facts* ¶ 15. The remaining water is sourced from a combination of surface and ground water rights owned by Nampa. *Facts* ¶ 16.

Sewage generated from residents, businesses, and institutions in Nampa is treated at Nampa's wastewater plant. *Facts* ¶ 23. Currently, Nampa discharges effluent from the wastewater plant to Indian Creek. *Facts* ¶ 27. The discharged effluent is primarily derived from Nampa's potable water system. *Facts* ¶ 25. The water quality of that discharge is regulated by National Pollutant Discharge Elimination System ("NPDES") Permit No. ID0022063. Exhibit J, pp. 132-184. The NPDES Permit establishes a compliance schedule to meet discharge limits for mercury, total phosphorus, copper, and temperature. *Id.* at 141. By September 2026, Nampa must meet the limits for mercury, total phosphorus, and copper. *Id.* at 143. Nampa must meet the temperature limits by September 2031. *Id.* The limitations on total phosphorus and temperature are imposed during the irrigation season. *Id.* at 139, 143.

To meet the NPDES Permit discharge limits, Nampa must upgrade the pollution control systems in the wastewater plant. *Facts* ¶ 38. To reduce the cost of those upgrades, Nampa chose to pursue the Reuse Permit. *Facts* ¶¶ 40-43. To facilitate the Reuse Permit, Nampa and Pioneer entered into a Recycled Water Discharge and Use Agreement ("Reuse Agreement"). Exhibit F. The Reuse Agreement allows Nampa to discharge up to 41 cfs of effluent to Phyllis Canal. *Id.* at 15. In exchange, Pioneer will "handle, manage, and convey [Nampa's effluent] as an integrated part of its irrigation operations." *Id.* at 17. Pioneer also acknowledges that Nampa needs the use of Phyllis Canal for temperature mitigation. *Id.* Pioneer does not have a water right authorizing the use of Nampa's effluent. *Facts* ¶ 35.

Under the Reuse Permit, Nampa will discharge its effluent to Phyllis Canal instead of Indian Creek during the irrigation season. Because irrigation canals are not considered waters of the State, Phyllis Canal is not subject to Idaho's water quality standards. Exhibit H, p. 30. With the proposed upgrades to the wastewater plant, Nampa can treat its sewage to standards established for irrigation but the effluent would not meet the standards for Indian Creek. *Id.* DEQ's analysis of the Reuse Permit application noted that Nampa and Pioneer had sufficiently demonstrated that Nampa's effluent will not return to jurisdictional water of the state. Exhibit H

the pleadings. In addition, the Parties submitted Exhibits A-F and K-T combined in two pleadings. The page numbering in the pleadings are not separated by exhibit. For ease of reference, this Order will refer to the specific exhibit and when referring to a specific page, provide the page number associated with the pleading.

at 32. Nampa and Pioneer accomplished this demonstration by discussing the plan to install an automated flow control system on 15.0 Lateral. *Id.*; Exhibit J, at 60.

Riverside diverts water from Indian Creek downstream of Nampa's discharge point. *Facts* ¶ 33; Exhibit J, p. 127. During the irrigation season, Riverside diverts most of the flow of Indian Creek into the Riverside Canal. *Facts* ¶ 31. Nampa discharging its effluent to Phyllis Canal, instead of Indian Creek, will reduce the flow of water in Indian Creek.

ANALYSIS

A water right is required to “divert any water from a natural watercourse or apply water to land.” Idaho Code § 42-201(2) (“Subsection 2”). However, a municipal provider is not required to obtain a water right for the land application of effluent from a publically owned treatment works, employed in response to regulatory requirements. Idaho Code § 42-201(8) (“Subsection 8”). The question before the Director in this case is 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. Specifically, does Subsection 8 exempt Pioneer from needing to obtain a water right to land apply the effluent discharged into Phyllis Canal by Nampa, in accordance with the Reuse Agreement and Reuse Permit?

The relevant portions of Subsection 8 state:

Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider ... 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.

Riverside offers two overarching arguments that Subsection 8's exemption does not apply in this situation. First, Riverside argues that Subsection 8 only applies to Nampa and not to Pioneer. Second, Riverside argues Pioneer's use of Nampa's effluent constitutes a new diversion and new source of water, implicating Subsection 2. In addition, Riverside argues that, as applied to the Reuse Permit and Reuse Agreement, Subsection 8 is unconstitutional.

Pioneer does not need a water right to land apply Nampa's effluent

Riverside states that “any exemption Nampa may have claimed under subsection (8) evaporates upon discharge to the Phyllis Canal for delivery and use by Pioneer” because Subsection 8 “applies solely to municipalities.” *Petitioner's Opening Brief* at 26. Riverside goes further, arguing Subsection 8 does not mention “extending the exemption to supposed ‘agents’ of the cities.” *Riverside's Reply in Support for Petition for Declaratory Ruling* (“Petitioner's Reply”) at 24. To address whether or not Pioneer needs a water right to land apply Nampa's effluent, the first question to answer is, does Nampa need a water right to land apply its effluent within Pioneer's place of use?

A “statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings,” and “the Court must give effect to all the words and provisions of the

statute so that none will be void, superfluous, or redundant.” *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310 (2009). The plain language of Subsection 8 does not limit land application to the service area of a municipality. It does not restrict the land on which water is used. In fact, land application may occur “on lands not identified as a place of use for an existing irrigation water right.” Therefore, under Subsection 8, Nampa may land apply its effluent on any land, if it informs the Department the land is not a place of use for an existing irrigation water right. This reasoning leads to the conclusion that Nampa may land apply its effluent within Pioneer’s place of use without obtaining a water right.

The next question is whether Pioneer may land apply effluent on Nampa’s behalf without obtaining a water right. Nampa suggests it is employing Pioneer as “an agent or contracting party to effectuate its disposal of effluent.” *Nampa’s Response Brief* at 15. Nampa argues that agents or contractors of exempted entities are also exempt under Subsection 8. *Id.* Riverside argues that Subsection 8’s exemption does not apply to agents of the exempted entities and even if they did, Pioneer is not an agent of Nampa. *Petitioner’s Reply* at 25.

The characteristics of agency plainly allow an agent of a Subsection 8 exempted entity to benefit from Subsection 8’s exemption. “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 (2016). An agency relationship is created when a principal expressly, impliedly, or apparently grants the agent authority to conduct certain actions on the principal’s behalf. *Id.* “In addition, where an agency relationship exists, the principal has a right to control the agent.” *Id.* at 735-736. The Reuse Agreement explicitly addresses that Pioneer will dispose of Nampa’s effluent. However, the Reuse Agreement does not give Nampa the right to control Pioneer. For example, “Pioneer authorizes [Nampa] to discharge up to 41 cfs (annual average) of Recycled Water to the Phyllis Canal each year...” but Nampa must “forecast and provide Pioneer the estimated flow rates” during the irrigation season and coordinate and receive Pioneer’s approval to discharge to Phyllis canal outside the irrigation season. Exhibit F at 15-17. Because Nampa does not have the right to control Pioneer, there is no formal agency relationship.

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 accept up to 41 cfs of effluent from Nampa during the irrigation season. 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. Exhibit J, at 60. 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.

Subsection 2 is not implicated

The majority of its Riversides' briefing explains how Pioneer's use of Nampa's effluent constitutes a new diversion and new source of water, implicating Subsection 2. Accepting Riverside's arguments would ignore the language of Subsection 8. The legislature's inclusion of "notwithstanding," plainly removes Subsection 8 from inclusion in the requirements of Subsection 2. Because Subsection 8 applies in this situation, there is no need to further evaluate Riverside's Subsection 2 arguments.

As applied, Subsection 8 is constitutional

Riverside argues, "[i]f the Director determines that Idaho Code § 42-202(8) applies, and grants Pioneer an exemption under the municipal carveout, Riverside's existing water rights will most certainly be injured, in violation of the Idaho Constitution." *Petitioner's Opening Brief* at 29. 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. Without that entitlement, there is no injury to Riverside. Without injury, there isn't a violation to the constitution.

CONCLUSION

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. The Reuse Agreement and Reuse Permit allow Pioneer to land apply Nampa's effluent under the exemption of Subsection 8. In addition, since Riverside is not entitled to Nampa's wastewater, there is no injury to Riverside's water rights and no constitutional violation.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that Pioneer may accept effluent from Nampa and apply it within Pioneer's boundaries under the Reuse Permit without obtaining a water right.

DATED this 3rd day of May 2021.


GARY SPACKMAN

Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May 2021, I served a true and correct copy of the foregoing document on the following by the method(s) indicated:

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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.