

**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-225-01

Docket No. P-DR-2020-001

**ORDER GRANTING MOTIONS TO
INTERVENE; ORDER
AUTHORIZING EMAIL SERVICE**

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 ("Permit"). *Petition* at 3. The Permit was issued by the Idaho Department of Environmental Quality to the City of Nampa ("Nampa") on January 21, 2020. The Petition alleges that under the Permit, Nampa intends to deliver reuse water to Pioneer Irrigation District ("Pioneer") and that Pioneer intends to supply the reuse water to its patrons. *Id.* at 2.

Riverside seeks a declaratory ruling that:

- 1) Pioneer cannot divert or accept reuse water from Nampa or apply Nampa's reuse water to land in the Pioneer boundaries under the reuse permit without first obtaining a water right.
- 2) Any attempt by Pioneer or Nampa to divert water under the permit to Pioneer without first 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 ("IPC"). Timely petitions to intervene were also filed by the Association of Idaho Cities ("AIC"), the Hayden Area Regional Sewer Board ("Hayden Sewer Board"), and the Cities of

Boise, Caldwell, Idaho Falls, Jerome, Meridian, Pocatello, Post Falls, and Rupert (“Cities”).¹ AIC, Hayden Sewer Board and the Cities will be referred to collectively as “Municipal Intervenor.”

On April 29, 2020, Riverside filed its *Response to Petitions to Intervene* and Nampa filed *City of Nampa’s Opposition to Idaho Power Company’s Petition to Intervene*.

A prehearing conference was held on April 30, 2020. At the conference, potential intervenors requested time to respond to the filings submitted by Riverside and Nampa. The Director ordered that responses be filed with the Department no later than May 14, 2020. *Order Setting Deadline for Responses; Notice of Continued Prehearing Conference* at 1. The Director ordered that no replies be submitted. *Id.*

On May 11, 2020, a *Stipulation Regarding Intervention* (“Stipulation”) was filed by Riverside, Nampa, Pioneer, and the Municipal Intervenor.

On May 13, 2020, Pioneer filed *Pioneer Irrigation District’s Opposition to Idaho Power Company’s Petition to Intervene*. On May 14, 2020, the Cities of Idaho Falls, Pocatello and Rupert filed *Cities of Pocatello, Idaho Falls and Rupert’s Opposition to Idaho Power’s Petition to Intervene* and IPC filed *Idaho Power Company’s Response to Opposition to Idaho Power Company’s Petition to Intervene*.

ANALYSIS OF PETITIONS TO INTERVENE

The Department’s Rule of Procedure 353 states:

If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant’s interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

IDAPA 37.01.01.353.

On March 16, 2020, the Director designated Nampa a respondent in this matter because Nampa is the entity that holds the reuse permit involved in this contested case. *Notice of Prehearing Conference; Order Setting Deadline for Petitions to Intervene* at 1. Because Nampa has been designated a respondent, Nampa’s petition to intervene is moot.

¹ The City of Bellevue filed a petition to intervene but subsequently withdrew its petition.

In its petition to intervene, Pioneer alleges a direct and substantial interest in this proceeding. It states “Pioneer is a partner with Nampa” in the reuse project and has “entered into a formal contract” with Nampa such that Pioneer is “the proposed recipient of the Class A recycled wastewater discharge governed by the Permit.” *Pioneer Irrigation District’s Petition to Intervene* at 4. Pioneer asserts “[t]he relationship between Nampa and Pioneer, and the operational flexibility the Permit project will provide, are unique to Pioneer. They establish not only Pioneer’s direct and substantial interest in this matter, but also the fact that Pioneer’s interests cannot be adequately represented by any other parties to the proceeding.” *Id.* Pioneer also asserts its participation will not unduly broaden the issues because “Pioneer’s issues and anticipated arguments are the issues pending before the Department under Riverside’s Petition.” *Id.* at 6 (emphasis in original). No party opposes Pioneer’s intervention. The Director concludes that Pioneer has a direct and substantial interest in this matter and will not unduly broaden the issues. The Director further concludes that Pioneer’s interests are not adequately represented by existing parties. Accordingly, the Director will grant Pioneer’s petition to intervene.

In their petitions to intervene, the Municipal Intervenors allege a direct and substantial interest in this proceeding and that their participation will not unduly broaden the issues. In its *Response to Petitions to Intervene*, Riverside opposed the Municipal Intervenors’ participation and in the alternative requested that the Municipal Intervenors be required to consolidate their participation in the proceeding. *Response to Petition to Intervene* at 2. However, Riverside, Nampa, Pioneer and the Municipal Intervenors subsequently filed a stipulation wherein they agreed as follows:

1. Riverside withdraws its opposition to the interventions of the [Municipal Intervenors] and agrees that they may participate in the above captioned matter in the manner and on the conditions described below.
2. With respect to any briefing permitted by the hearing officer as to any issue in this proceeding, Nampa shall be able to file a brief, Pioneer shall be able to file a brief, and the Municipal Intervenors shall file no more than two additional briefs collectively. If the Municipal Intervenors or any of them file more than one joint brief, the Municipal Intervenors shall avoid undue duplication of any of the arguments or positions articulated in the Municipal Intervenors’ main brief.
3. In any other proceedings in this matter, including discovery, hearings and arguments, the hearing officer shall establish a process for the Municipal Intervenors to consolidate their positions, activities and presentations to avoid undue duplication and burden on the Petitioner Riverside, the Department and the other parties.
4. The Parties agree to stipulate to essential facts relating to the Nampa and Pioneer reuse project which are necessary for the determination of the issues raised by

Riverside's Petition. Facts specific to the other intervenors' projects or proposed projects will not be included in record as essential facts necessary to resolving issues raised by Riverside's Petition, but specific intervenors may provide examples of the impacts a determination on the essential facts may have on those intervenors.

Stipulation at 2-3.

The Director concludes that the Municipal Intervenors have a direct and substantial interest in this matter. If the Municipal Intervenors comply with the terms of the Stipulation, the Director concludes the Municipal Intervenors will not unduly broaden the issues. The Director further concludes that the Municipal Intervenors' interests are not adequately represented by existing parties. Accordingly, the Director will grant the Municipal Intervenors' petitions to intervene subject to the terms of the Stipulation.

In its petition to intervene, IPC alleges a direct and substantial interest in this proceeding. IPC states it has numerous hydroelectric facilities in the Snake River Basin with water rights to generate power at each of the facilities and a number of these facilities are downstream of the Boise River Basin. *Idaho Power Company Petition to Intervene* at 3. IPC states it has other water rights throughout its service territory which aid in the delivery of electricity and in operations. *Id.* IPC states that many of its water rights are downstream of municipal, industrial and irrigation returns to the water source similar to the discharge described in the Riverside petition. *Id.* IPC states that while the source (Indian Creek) raised in the Riverside petition is not tributary to the Snake River above Swan Falls Dam, similar discharges are present upstream of Swan Falls Dam and may trigger some analysis of the minimum flows pursuant to the Swan Falls Settlement depending upon the outcome of the issues raised in the present proceeding. *Id.* IPC states that a determination of the legal issues described in the petition, or other determinations by the Director, may impact the Company's generation and planning. *Id.*

Nampa, Pioneer and the Cities of Pocatello, Rupert and Idaho Falls oppose IPC's intervention. Nampa asserts IPC's water rights are subordinated and, as a result, IPC "cannot seek curtailment or otherwise limit the exercise of other water rights or uses..." *City of Nampa's Opposition to Idaho Power Company's Petition to Intervene* at 2. Nampa states that if IPC is allowed to intervene, it will have to be determined whether IPC has standing to challenge other water uses that it alleges are injurious to its subordinated water rights. *Id.* Nampa argues that this will unduly broaden the issues in the case. *Id.* at 3. Pioneer similarly argues that IPC's hydropower rights "are subordinate to the exercise of upstream consumptive rights" and thus IPC "has no colorable injury claim to make during this proceeding." *Pioneer Irrigation District's Opposition to Idaho Power Company's Petition to Intervene* at 2. Pioneer argues that IPC fails to explain how its allegations of injury are relevant to a case that is located on a creek without connection to Swan Falls Dam operations or has the minimum stream flow requirement upstream of Swan Falls dam. The Cities of Pocatello, Rupert and Idaho Falls add that IPC fails to describe how a decline in reach gains is injury to IPC or how that alleged injury could be remedied if IPC is allowed to participate. *Cities of Pocatello, Idaho Falls, and Rupert's Opposition to Idaho*

Power's Petition to Intervene at 2. They add that "allowing [IPC] to introduce potential impacts of its operations under the Swan Falls Agreement into this matter would substantially broaden the issues." *Id.*

In IPC's response to the opposition to its intervention, IPC agrees to certain limitations on its participation. IPC states that it agrees to be bound by the conditions of paragraph 4 of the stipulation between Riverside and the Municipal Intervenors. *Idaho Power Company's Response to Opposition to Petition to Intervene* at 2-3. IPC agrees "that facts related to [IPC's] water rights and operations 'will not be included in the record as essential facts.'" *Id.* IPC states that it "does not intend to and will not expand the factual issues beyond those presented in the water rights of [Nampa], the facts surrounding the reuse permit and the facts surrounding Riverside's use of water discharged from [Nampa]." *Id.* at 4. In response to the arguments that IPC's water rights are subordinated, IPC argues that its water rights "still are recognized as a property interest and [IPC] still has a right to protect those interests through participation in these proceedings." *Id.* 3-4.

The wastewater reuse issues presented in this contested case are issues of first impression and could set important precedent for wastewater reuse throughout the state. The importance of these issues is reflected in the fact that municipal entities from every corner of the state are seeking to participate. While most of Idaho Power's water rights are subordinated, not all of their water rights are completely subordinated. *See Idaho Power Water Right No. 2-100.* The Director concludes IPC does have a direct and substantial interest in this matter because the wastewater reuse actions of municipalities downstream from Milner dam (like the City of Jerome) could reduce return flows, which would impact IPC's water rights and operations. So long as IPC complies with paragraph 4 of the Stipulation, the Director concludes IPC will not unduly broaden the issues. The Director further concludes that IPC's interests are not adequately represented by existing parties. Accordingly, the Director will grant IPC's petition to intervene subject to paragraph 4 of the Stipulation.

ANALYSIS OF REQUEST TO SERVE DOCUMENTS ELECTRONICALLY

On May 4, 2020, counsel for Nampa emailed the Director stating that Nampa, Riverside, Pioneer, Idaho Power and the Municipal Intervenors have stipulated to accept service by email rather than by U.S. Mail or other means. Counsel for Nampa requested that the Director issue an Order authorizing the parties to serve documents on each other and file document with the Department by email. The Director agrees to enter an order authorizing the parties to serve each other by email. However, while the parties can serve a courtesy copy on the Department by email, the parties must also serve the Department by U.S. Mail, hand delivery or by fax as allowed under the Department's Rules of Procedure.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the petition to intervene filed by Pioneer is GRANTED.

IT IS FURTHER ORDERED that the petitions to intervene filed by AIC, the Hayden Sewer Board, and the Cities of Boise, Caldwell, Idaho Falls, Jerome, Meridian, Pocatello, Post Falls, and Rupert are GRANTED conditioned upon the terms set forth in the *Stipulation Regarding Intervention*.

IT IS FURTHER ORDERED that the petition to intervene filed by IPC is GRANTED conditioned upon the terms set for in paragraph 4 of the *Stipulation Regarding Intervention*.

IT IS FURTHER ORDERED that the parties can serve documents on each other by email to the email addresses listed on the certificate of service in this order without a copy being served by U.S. mail. If parties wish to change or update their email address for service, they must submit an updated email address to the other parties and the Department. The parties may serve a courtesy copy of any document they file with the Department by email but they must also file the original document with the Department by U.S. Mail, hand delivery or by fax as allowed under the Department's Rules of Procedure.

DATED this 11th day of June 2020.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June 2020, I served a true and correct copy of the foregoing document on the following by the method(s) indicated:

Albert Barker
Barker, Rosholt & Simpson LLP
1010 W. Jefferson, Ste. 102
P.O. Box 2139
Boise, ID 83701-2139
apb@idahowaters.com

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Email

Chris Meyer
Michael Lawrence
Givens Pursley LLP
P.O. Box 2720
601 W Bannock St
Boise, ID 83702
chrismeyer@givenspursley.com
mpl@givenspursley.com

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Email

Chris Bromley
Candice McHugh
McHugh Bromley, PLLC
380 S. 4th Street, Ste 103
Boise, ID 83720
Cbromley@mchughbromley.com
cmchugh@mchughbromley.com

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Email

Sarah Klahn
Somach Simmons & Dunn
2033 11th Street, #5
Boulder, CO 80302
sklahn@somachlaw.com
dthompson@somachlaw.com

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Email

Abigail R. Germaine
Deputy City Attorney
City of Boise
150 N. Capitol Blvd.
P.O. Box 500
Boise, ID 83701
agermaine@cityofboise.org

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Email

Robert L. Harris
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Ste. 200
Idaho Falls, ID 83405
rharris@holdenlegal.com

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Email

Nancy Stricklin
Mason & Stricklin, LLP
P.O. Box 1832
Coeur D'Alene, ID 83816
nancy@mslawid.com

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Email

Andrew Waldera
Sawtooth Law
1101 W. River St. Ste. 100
Boise, ID 83702
andy@sawtoothlaw.com

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☒ Email


Kimberle English