

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

IN THE MATTER OF RIVERSIDE'S        ) Docket No. P-DR-2020-01  
PETITION FOR DECLARATORY         )  
RULING REGARDING NEED FOR A        )  
WATER RIGHT UNDER REUSE         )  
PERMIT NO. M-255-01                )  
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**PETITIONER'S OPENING BRIEF**

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COMES NOW, Riverside Irrigation District Ltd., by and through its attorneys, Barker Rosholt & Simpson LLP, and hereby files this Petitioner's Opening Brief in this matter pursuant to IDAPA 37.01.01.260 and the Director's Amended Scheduling Order.

### **BACKGROUND**

The City of Nampa (Nampa) and Pioneer Irrigation District (Pioneer) have entered into an agreement that purports to authorize Nampa to discharge up to 41 cfs of effluent from its Waste Water Treatment Plant (WWTP) into Pioneer's Phyllis Canal (Reuse Permit). *See* Exhibit F, p. 2<sup>1</sup>. Pioneer is obligated to take this effluent for twenty-five years. *Id.* p.4, ¶ 2. Under the agreement Pioneer will handle, manage and convey the effluent as part of Pioneer's integrated operations. *Id.* p.4, ¶ 3. Neither party sought approval of the Department of Water Resources (IDWR) for the use of this water. Stipulation of Facts ¶ 35 (hereafter SOF).

Nampa filed an application with the Idaho Department of Environmental Quality (IDEQ) for a Reuse Permit to authorize the use of Nampa's water in Pioneer's canal system. IDEQ issued a Reuse Permit authorizing that use as finding that the use would comply with Idaho's water quality rules, but IDEQ recognized it had no authority over the water rights or water use. SOF ¶ 47; Exhibit R. Riverside Irrigation District, Ltd. (Riverside) filed a *Petition for Declaratory Ruling* (Riverside's Petition) on February 24, 2020, requesting a ruling from the Director that Pioneer cannot accept or divert water from Nampa under the Reuse Permit and put that water to beneficial use without a water right. Several municipal entities submitted Petitions to Intervene. Pioneer and Idaho Power also filed motions to intervene. The Director issued an Order Granting Motions to Intervene on June 11, 2020. Subsequently, the Director issued an Amended Scheduling Order setting a briefing schedule and, in compliance with that Order, Riverside now submits this Petitioner's Opening Brief.

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<sup>1</sup> Citations to Exhibits refer to the page number of the Exhibit, not the internal page number where the Exhibit contains multiple documents.

## INTRODUCTION

Fundamentally this case involves a situation where two water users have entered into a private agreement to allocate the use of waters of the State of Idaho between themselves without even seeking review or approval of the Director, even though the Director is charged with the administration and delivery of water in this State. Idaho Code § 42-602, § 42-1706. The Supreme Court has described the Director as having “broad powers to direct and control distribution of waters...” *In re SRBA (Basin-Wide Issue – 17)*, 157 Idaho 385, 393, 336 P. 3d 792, 800 (2014). The obligation to distribute water is a “clear legal duty.” *Id.* Yet, Pioneer and Nampa would remove the Director from any decision regarding delivery of over 40 cfs of water in Water District 63.

Nampa and Pioneer describe this private agreement as a “win-win.” No doubt both Nampa and Pioneer win. Nampa thinks it will save money. Pioneer thinks it will get more water. Nampa finds it easier to comply with its water quality obligations. Pioneer gets more water. This agreement allows for no consideration of how other water users are or may be affected by Nampa providing water to Pioneer. When two water users decide how to divide up the waters of the State without any supervision, there very likely will be losers – both other water users and the authority of the Director.

Nampa and Pioneer’s Reuse Agreement, and IDEQ’s subsequent Reuse Permit, purport to allow Nampa to change its point of discharge of effluent and, importantly here, deliver that water to a water user who has no water right to divert or use that water, resulting in injury to existing water right holders. This Reuse Agreement precludes analysis of injury to other affected water users and includes no procedures for any mitigating conditions, through either a new water right application or a transfer application for the existing water rights. The only state agency that

has reviewed and conditioned this action is IDEQ – an agency that admittedly has no jurisdiction over water rights or water use. Accordingly, Riverside’s Petition asks the Director to issue a declaratory ruling that this private water distribution scheme must be reviewed under Idaho’s water right review process for new or expanded uses. The actions contemplated under the Reuse Permit are not *de minimus* or insignificant. The Reuse Agreement contemplates reducing large amounts of water otherwise available to a senior water user’s water right during irrigation season, and re-diverting that water to supplement or augment the irrigation water supply of another irrigation district that will then apply that “new source” of water to more than 17,000 acres of land, not previously irrigated from this source.

## **STATEMENT OF FACTS**

### **A. Facts relevant to Riverside Irrigation District**

Riverside is a duly organized and operating non-profit corporation with water rights authorizing irrigation up to 10,158 acres within its authorized water right place of use, located primarily west of Greenleaf, Idaho. SOF ¶ 5. Riverside’s place of use is described by a general description in the manner set forth in Idaho Code § 42-219, using a digital boundary as defined in Idaho Code § 42-202B. SOF ¶ 5.

Indian Creek is a primary source of water for Riverside. SOF ¶ 31. During the irrigation season, Riverside typically diverts most, if not all, of the flow of Indian Creek into the Riverside Canal west of Caldwell and just above the mouth of Indian Creek. SOF ¶ 31 & Exhibit H, at 30. Riverside estimates that more than 50 percent of its water supply comes from Indian Creek. SOF ¶ 31. Riverside’s water rights authorize it to divert approximately 180 cfs of water from Indian Creek, under Water Right Nos. 63-2279 and 63-2374. These rights have 1915 and 1922 priority dates. SOF ¶ 33.

Currently, Nampa discharges the effluent from its wastewater treatment plant to Indian Creek where the water is comingled with other waters of the State. SOF ¶ 30. The water in Indian Creek has historically been diverted and put to use by senior downstream water right holders, including Riverside. SOF ¶ 30. If Nampa discharges this water to the Phyllis Canal for use by Pioneer, that water will no longer be available in Indian Creek during the irrigation season (SOF ¶ 34), and Riverside will be harmed by the reduction in flow in Indian Creek.

**B. Facts Relevant to Pioneer Irrigation District**

Pioneer is a duly organized and operating irrigation district with water rights authorizing irrigation of up to 34,204.16 acres of land within its authorized water right place of use. SOF ¶ 1. Pioneer asserts that it has apportioned benefits under Idaho Code § 43-404 of one miner’s inch (0.02 cfs) per acre equally to all the lands in the District. SOF ¶ 1. Pioneer’s place of use is described by a general description in the manner set forth in Idaho Code § 42-219, using a digital boundary as defined in Idaho Code § 42-202B. SOF ¶ 1. The land served by Pioneer includes north and northwest Nampa and much of the City of Caldwell. SOF ¶ 2.

The sources of water for Pioneer’s water rights include the Boise River, Indian Creek, Wilson Drain, Mason Creek Drain, Five Mile Creek Drain, Pipe Gulch Draw Creek/Drain, Elijah Drain, and certain specific groundwater wells. SOF ¶ 4 & Exhibit P. Pioneer does not have a water right to divert or put Nampa’s effluent to use. SOF ¶ 35.

**C. Facts Relevant to Nampa**

**1. Nampa is a Municipality**

Nampa is a duly organized and operating Idaho municipal corporation with a population of approximately 100,000. SOF ¶ 6. Nampa is a “municipality” within the definition of Idaho Code § 42-202B(4) and is a “municipal water provider” within the meaning of Idaho Code § 42-

202B(5). SOF ¶ 7. Nampa owns and operates two separate municipal water delivery systems, one for potable water (“Potable System”) and one for non-potable pressurized irrigation water (“Non-Potable System”). SOF ¶ 8. Nampa has established a municipal irrigation system under Idaho Code Title 50, Chapter 18, to deliver non-potable water. SOF ¶ 19. Nampa has entered into contracts with Pioneer, Nampa & Meridian Irrigation District and Boise-Kuna Irrigation District for delivery of irrigation district water to the municipal irrigation system. *Id.*

## **2. Nampa’s Water Rights**

Nampa’s water rights are divided between water rights for its potable water system and other water rights for its non-potable pressurized irrigation water system. SOF ¶ 8. The water rights at issue here are Nampa’s potable water rights, because those rights are the source of the effluent that Nampa proposes to deliver to Pioneer. SOF ¶ 23, 25.

The Stipulation of Facts makes clear how Nampa’s water rights are decreed or licensed and how they should be administered by the Department. Table 1 lists 18 ground water rights associated with Nampa’s potable water system. SOF ¶ 9. All of Nampa’s potable water supply comes from ground water rights. *Id.* Each of the potable water rights are authorized for “municipal purposes” in accordance with Idaho Code § 42-202B(6). SOF ¶10. The place of use for each of these rights is Nampa’s service area in accordance with Idaho Code § 42-202B(9). SOF ¶ 11. After pumping water from these wells, Nampa delivers potable water from these wells to its potable water customers. SOF ¶ 23. Nampa’s potable water generates sewage that is collected from residents, businesses and institutions in Nampa by Nampa’s sewage system. *Id.* That sewage, or “influent”, is delivered to Nampa’s Wastewater Treatment Plant (WWTP), and the treated water that is discharged from the WWTP is called “effluent.” *Id.* This effluent, also known as wastewater, is what Nampa proposes to discharge to the Phyllis Canal.

Nine of Nampa's potable water rights were decreed in the SRBA. The other nine are licensed post-SRBA rights. As is true with all water rights in the State, all of Nampa's water rights are subject to the conditions of the water rights, either decree or license. SOF ¶ 12. *See also*, Idaho Code § 42-1411(2)(i)(conditions on water rights decrees).

The conditions on the water rights were not included verbatim in the Stipulation of Facts, but the water rights are public records of the Department of the type that the Director typically relies upon in contested case proceedings. *See Documents Officially Noticed, In The Matter of Accounting for Distribution of Water to the Federal Instream Reservoirs in Water District 63*, p.3 (August 19, 2015).

Nampa's potable water rights generally include one of two important conditions. One, the rights are for use in Nampa's potable water system (63-2779, 63-2781, 63-5258, 63-7567, 63-8324, 63-9180, 63-10212). These potable water rights do not authorize use of potable water in the non-potable system, or on Pioneer's land. As seen above, the effluent from Nampa's WWTP is sourced from the water rights for its potable water system. SOF ¶ 25.

The second condition on Nampa's potable water rights that is pertinent here is a condition precluding the use of the water from these rights for irrigation of land that has appurtenant surface water unless, and until, the surface water is not available. This condition appears on the licensed potable water rights. (*See Water Right 63-12474, et al.*) The condition 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.

Water Right 63-12474. This same condition precluding the use of water when there are appurtenant and available water rights on the land also appears on the water rights for Nampa's

non-potable system. *See* Water Right 63- 2449, et al. When this condition appears on water rights it generally is intended to cover water use in the shoulder seasons or when the surface water supply is simply not available. Thus, this condition precludes the use of Nampa's potable water and non-potable water rights on lands of Pioneer, Nampa-Meridian and Boise-Kuna Irrigation Districts unless and until the irrigation districts turn water out of their canals and the surface water is no longer available for delivery by the irrigation districts. The Reuse Application clearly indicates that Nampa and Pioneer do not intend to limit the application of this potable water to the shoulder seasons, but intend to apply it throughout the entire irrigation season. Exhibit J, at 70.

### **3. Nampa's Proposed Discharge to the Phyllis Canal**

At this time, the water used in the potable water system is collected, treated and discharged from Nampa's WWTP to Indian Creek upstream of Riverside's point of diversion on Indian Creek. SOF ¶ 27-28. Under current operations, Nampa discharges approximately 18.6 cfs (6,825 acre-feet) of water to Indian Creek during the 185-day irrigation season and 17.0 cfs (6,069 acre-feet) during the 180-day non-irrigation season. SOF ¶ 29.

Under the Reuse Agreement and Reuse Permit, Nampa intends to eliminate all of its WWTP wastewater discharge to Indian Creek during the irrigation season, while continuing to discharge to Indian Creek during the non-irrigation season. SOF ¶ 34. The Reuse Permit prohibits Pioneer from spilling water back to Indian Creek for water quality reasons. Exhibit G, at 16. To the extent otherwise allowed by Idaho law, Nampa's proposed wastewater discharge to the Phyllis Canal has been approved by IDEQ as meeting Idaho water quality standards. SOF ¶ 45.

In lieu of discharging to Indian Creek, Nampa proposes to discharge at a location on the

Phyllis Canal. SOF ¶ 53. While Nampa has not finalized the exact location of this point of discharge, the location is proposed to be about mid-way in Pioneer’s district boundaries. SOF ¶ 53. Based on the proposed location there are approximately 17,000 acres of Pioneer’s land downstream of the proposed point of discharge to the Phyllis Canal. SOF ¶ 55.

#### **D. The Municipal Irrigation Agreements**

Nampa operates a municipal irrigation system relying on the provisions of Chapter 18, Title 50 of the Idaho Code. SOF ¶ 19. These Code provisions allow Nampa to establish an irrigation system and deliver irrigation water. Idaho Code § 50-1801. A city like Nampa is also expressly authorized to enter into contracts with irrigation districts to act as the agent for the irrigation district to distribute water to lands within the irrigation district boundaries and the city’s municipal irrigation system. Idaho Code § 50-1805.<sup>2</sup>

Nampa has entered into three contracts with irrigation districts to act as their “agent” for delivery of water. SOF ¶ 19. It has contracts with Pioneer, Nampa & Meridian and Boise-Kuna Irrigation Districts. SOF ¶ 19. The current contract with Pioneer is Exhibit L. This contract provides that Pioneer shall deliver water to certain points of delivery, and that the City will deliver water to the persons having the right to receive Pioneer’s water through the City’s municipal irrigation system. *See* Exhibit L, at 9; Idaho Code § 50-1805. Under the contract and Idaho law, Nampa is the agent of Pioneer for delivery of water to Pioneer’s landowners. Nampa is to deliver water to these Pioneer landowners on equal footing with all other Pioneer landowners. Nampa collects assessments from Pioneer’s landowners and remits those assessments to Pioneer. Exhibits

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<sup>2</sup> Idaho Code § 50-1805A allows a city to pool the water rights for delivery, so that the city doesn’t have to have separate delivery systems for each irrigation district’s lands. However, the Act makes clear that the landowner of each district retains his or her status as a district landowner. Under Idaho Code § 50-1805 the landowner can demand delivery in accordance with the water rights appurtenant to his or her land (i.e. the district’s water rights). When delivering district water the City is the “agent” of the District, Idaho Code § 50-1805.

L & M. Nampa has similar agreements with Nampa & Meridian and Boise-Kuna. Exhibits N & O. The persons receiving Pioneer water from Nampa's municipal irrigation system remain Pioneer landowners, and the Nampa-Meridian and Boise-Kuna landowner recipients remain landowners of their respective districts. The persons receiving a water supply from Nampa's non-potable system who are not Pioneer landowners are not transformed by Chapter 50, Title 18, or the contracts, into Pioneer landowners, entitled to Pioneer deliveries.

**E. The Reuse Agreement and Reuse Permit**

The effluent limitations for Nampa's wastewater are currently governed by an NPDES permit issued by EPA under the Clean Water Act because Nampa discharges to Indian Creek. SOF ¶ 36, 41. The primary constituents of concern are total phosphorus and temperature. SOF ¶ 36. A key motivating factor for Nampa's change in discharge to the Phyllis Canal is that IDEQ's water quality standards for manmade waterbodies are more easily attainable than the water quality standards for Indian Creek. SOF ¶ 41.

On March 7, 2018, Nampa and Pioneer entered into a Reuse Agreement whereby Nampa would seek a recycled water reuse permit from IDEQ authorizing Nampa to discharge up to 41 cfs of Class A recycled water to Pioneer's Phyllis Canal as supplemental irrigation water supply. Exhibit F, at 15. The Reuse Agreement expressly memorializes Pioneer's desire "to seasonally receive Recycled Water from the City as a supplemental source of irrigation water supply..." *Id.*, (emphasis added).

The Reuse Agreement authorizes discharge to the Phyllis Canal and use of water by Pioneer's landowners of 41 cfs, larger than the 31 cfs ultimately authorized under the Reuse Permit. Nampa and Pioneer assert that this larger use by Pioneer reflects their longer-term water reuse goals that extend beyond the 25-year time frame of the Reuse Permit. SOF ¶ 49; Exhibit F.

A pre-application conference was held with IDEQ on August 3, 2018 and a draft permit application was received by DEQ on November 5, 2018. Exhibit H, at 10. IDEQ and Nampa met to go over IDEQ's comments on the draft permit application. *Id.* Nampa's formal application, including Brown & Caldwell's Preliminary Technical Report (PTR) was submitted March 21, 2019. Exhibit J. IDEQ staff prepared a formal written analyses of Nampa's application on October 10, 2019. Exhibit H. This report summarized Nampa's proposal and its environmental impacts. *Id.* The draft permit was thereafter released for public comment. Exhibit H, at 10.

During the comment period for the draft permit, Riverside commented to IDEQ that Pioneer had no water right to use the reuse water on land within Pioneer boundaries. SOF ¶ 47; Exhibit Q. IDEQ responded to Riverside's comments by stating that IDEQ does not regulate water rights or have the ability to respond to Riverside's comments concerning water use. SOF ¶ 47; Exhibit R, at 26. IDEQ included a provision in the Reuse Permit acknowledging that Nampa as the permittee is not relieved of its duty to comply with the other state laws and rules. SOF ¶ 47. IDEQ advised Riverside that Nampa has been informed of this concern. Exhibit R, at 26. Pioneer, Nampa and Riverside agree that IDEQ has no authority to authorize diversion or beneficial use of water and that whether a water right is necessary or not is a matter for IDWR. SOF ¶ 47. As a matter of Idaho law, IDEQ has no right or authority to "supersede, abrogate, injure or create rights to store or divert water and apply water to beneficial use..." Idaho Code § 39-104(4).

On January 21, 2020, IDEQ issued Reuse Permit No. M-255-01. The Permit authorizes the Nampa to construct, install, and operate a reuse facility. Under the Reuse Agreement and Reuse Permit, Nampa intends to divert and deliver water to Pioneer through a gift of 31-41cfs of water to Pioneer's Phyllis Canal. In turn, Pioneer intends to use the water supplied to it under this Reuse Permit to deliver water to Pioneer for Pioneer's landowners to apply to beneficial use. See *U.S. v.*

*Pioneer Irrigation District*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007)(irrigators of district put the water to beneficial use).

The primary constituents of concern in Nampa's wastewater are total phosphorus and temperature. It is important to recognize the pollutants of concern, because those pollutants drove the analyses of how the water will be used and spread under the Reuse Permit. With the change in discharge, temperature will no longer be an issue for Nampa because the designated use of the Phyllis Canal, agricultural water supply, does not have a temperature criterion. SOF ¶ 41. Total phosphorus, on the other hand, is still a constituent of concern that must be addressed in Nampa's wastewater discharge, whether to Indian Creek or the Phyllis Canal, but compliance for Clean Water Act purposes is more easily attained through widespread land application (Reuse Permit) than through discharge to Indian Creek.

The Reuse Permit clearly intends that Nampa's effluent will be spread throughout Pioneer's district lands, downstream of the point of discharge in the Phyllis Canal, and not only to land owned by Nampa or Nampa customers. IDEQ's Staff Analysis for "Constituent Loading" relating to total phosphorus, analyzes the concentration of phosphorus in the discharge, the design flow of the 31 cfs discharge and the mixing of that discharge into the 200 cfs of water in the Phyllis Canal. *Exhibit H*, at 37. IDEQ's analysis also factors in "total acreage" and the fact that "nutrient needs of the crops are greater than that provided by the additional nutrient supplied by the recycled water." *Id.*, at 38. IDEQ's analysis echoes Nampa's own Preliminary Technical Report's finding that "Considering the end of the recycled water discharge pipe as the point of compliance and the approximately 17,000 irrigated acres of Pioneer service area downstream from the discharge point, constituent or hydraulic loading is not anticipated to exceed agronomic uptake rates of crops in the Pioneer service

area.” Exhibit J, at 71. IDEQ’s area of analysis shown on Figure 3 to the Staff Analysis. Exhibit H, at 18. (copy attached hereto as Attachment A)

Other examples demonstrate that IDEQ relied on widespread (i.e., 17,000 acres) application of the wastewater, including the Reuse Permit requirement for education regarding fertilizer application to accommodate the increase in nutrients supplied by the wastewater. “Growers of crops and turf grass will be used to providing nutrient needs via fertilizer, so the City and Pioneer will need to educate the public of the benefit of this additional nutrient being provided in the water so the growers can account for this prior to adding fertilizer.” Exhibit H, at 39. IDEQ also analyzed the hydrogeology in the area of the Reuse Application, and determined “Nutrient loading from irrigation with recycled water... shows that nutrient loading will be low and crop uptake of those nutrients will exceed application, so ground water impacts are not expected.” Exhibit H, at 20. IDEQ’s analysis of the Phyllis Canal notes” Under typical operation the demand for water is higher than the water volume available for deliver [sic] by the Phyllis Canal, and the deficiency is typically made up from ground water pumping and irrigation rotation.” Exhibit H, at 31. The extent to which the recycled water is to be land applied led IDEQ to conclude “The City and Pioneer have sufficiently demonstrated in the [preliminary technical report] that the recycled water discharged to the Phyllis Canal will not return to jurisdictional waters of the state” Exhibit H, at 32. IDEQ’s Permit does not require soil monitoring because “Soil monitoring requirements are not recommended for this widespread Class A recycled water use.” Exhibit H, at 48 (emphasis added).

The reality is that IDEQ issued the Reuse Permit based on the premise that Nampa’s wastewater will be delivered and applied to 17,000 acres throughout Pioneer’s district boundaries below the point of discharge on the Phyllis Canal. IDEQ would likely not have been able to issue the Reuse Permit for wastewater application to land if the land area to which the

effluent is applied was not sufficiently large enough to properly process the constituents of concern in the wastewater if discharged into waters of the state or seep into the ground water.

IDEQ's Reuse Permit does not require any of the reuse water to be reused solely by Nampa itself; rather, IDEQ's analysis states the wastewater will be used "for irrigation by the users of [the Phyllis Canal's] network. Exhibit H, at 9. Under IDEQ's Recycled Water Rules, when evaluating an application for a reuse permit, "[s]pecific conditions shall be established in consideration of characteristics specific to a facility." IDAPA 58.01.17.600.01. Such characteristics include "[l]egal considerations relative to land use and water rights." IDAPA 58.01.17.600.01.d.

While IDEQ did not expressly require Nampa or Pioneer to obtain a water right for the use authorized in the Reuse Permit by Pioneer, the Reuse Permit does require Nampa to comply with "all other applicable federal, state, and local laws, statutes, and rules." SOF ¶47. IDEQ's response to Riverside's comments admitted that IDEQ did not believe it had authority to determine whether Nampa or any other entity was required to obtain a water right or not. Exhibit R, at 26. That is now the question for the Director in this proceeding.

## ARGUMENT

### **I. A Water Right is Required for the Diversion and Use of Water Under Idaho Law**

The right to divert and use water in Idaho predates statehood and the Idaho Constitution. "As early as 1881 a statutory procedure for appropriating water was adopted, providing that a person intending to appropriate water should post a notice at the point of diversion and record the same." *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996) (referring to *Hutchins, The Idaho Law of Water Rights*, 5 Idaho L.Rev. 1 (1968). "Diversion is a prerequisite to appropriation of water, along with the application of such water to a beneficial use," *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users*,

*Inc.*, 101 Idaho 677, 679, 619 P.2d 1130, 1132 (1980).

Idaho Code is clear that “[n]o 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)(emphasis added). Idaho § Code 42-201(2) is not limited only to water withdrawn from a “natural watercourse” as Nampa asserts. The disjunctive use of the word “or” in this code section extends this requirement to any application of water to land. “The word ‘or’ ... is ‘[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.’” *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (quoting *Markel Int’l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012)).

A water right is also required for the diversion of groundwater. Idaho Code § 42-230 defines groundwater as “all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” Idaho Code § 42-230 (2003). “Ground water may be appropriated under either a constitutional method or by statutory permit, depending upon the date of beneficial use and diversion.” *A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist.*, 141 Idaho 746, 750, 118 P.3d 78, 82 (2005) (citing *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26, 752 P.2d 625, 628 (Ct.App.1988)). Thus, under Idaho Code and caselaw, it is clear that a water right is required in order to apply water to land, regardless of the source of that water.

Nampa and Pioneer attempt to evade this bedrock principle of Idaho water law by characterizing the proposed new diversion of effluent for beneficial use in the Phyllis Canal as “directing” Nampa’s wastewater. *See Nampa’s Answer to Petition*, at 4, and “Nampa’s

redirection of wastewater for subsequent irrigation reuse...” *Pioneer’s Petition to Intervene*, at 2. Not only is the proposed discharge in fact a new diversion and a new source for Pioneer, under the Reuse Permit, Pioneer intends to “reuse the city’s wastewater for irrigation purposes.” *Id.* In other words, Pioneer expects to divert the water and apply it to beneficial use. Yet, Pioneer admits it “does not hold a water right, nor has it sought a water, that expressly authorizes it to accept wastewater from Nampa pursuant to its Reuse Agreement with Nampa.” SOF ¶ 35.

Pioneer describes itself as a mere “recipient of the Class A recycled wastewater...” *Pioneer’s Petition to Intervene*, at 4 (emphasis added). Yet Pioneer admits it will “benefit through the wastewater input operationally” *Id.* at 5, and that the “wastewater will also serve as a robust and reliable source of water offsetting and mitigating declining drain water sources Pioneer uses to supplement Phyllis Canal flows...” *Id.* See also Exhibit S “Class A recycled wastewater (IDAPA 58.01.17) may be a new source of water...” (emphasis added). Despite Pioneer’s admissions to receipt of a beneficial, robust and reliable new source of water, Pioneer maintains it does not need a water right to take delivery of the water and apply it throughout its boundaries. Pioneer knows it needs a water right to appropriate wastewater. Many of its current water rights are for wastewater from drains, as explained in Exhibit S (“Phyllis and Highline Canals use drain water from Fivemile and Fifteenmile Drains, respectively, to supplement live and storage flows....”) Exhibit S, at 29 of 50. Pioneer is currently applying for new drain wastewater rights from Mason Creek. See Application for water right 63-34644. Pioneer further agrees that a pipeline from Nampa’s WWTP “is not very different” from a feeder canal collecting drain water. Exhibit S, at 29 of 50.

Pioneer acknowledges that “Riverside believes that Nampa’s redirection of wastewater for subsequent irrigation reuse absent a new water right (or water rights) constitutes an illegal

diversion and use of water.” Petition to Intervene. *Id.* at 2. Yet rather than explain why this diversion and application to beneficial use does not require a water right, Pioneer instead explains that Nampa will save money by changing its point of discharge. Whether Nampa saves money or not, that fact does not exempt Pioneer or Nampa from complying with Idaho water law.

The alternative to requiring Pioneer to apply for a new water right as a predicate for Pioneer to apply the water to beneficial use is to require a transfer of Nampa’s potable ground water rights. Water transfers in Idaho are governed by Idaho Code § 42-222. *Barron v. Idaho Dep’t of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Under the Reuse Permit the place, period and nature of use for Nampa’s ground water and resulting effluent will change. Idaho Code § 42- 222 requires a water right transfer because “any person who desires to change the point of diversion or the place, period, or nature of use of the water must apply to the IDWR for approval.” *Barron v. Idaho Dep’t of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001)(referencing I.C. § 42–222(1)). In *Barron*, the Idaho Supreme Court remarked:

In determining whether or not to approve the transfer, the director is instructed to “examine all the evidence and available information,” including the watermaster's recommendation, and to approve the change in whole or in part if “no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and [the change] is the local public interest....”

*Barron v. Idaho Dep’t of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001) (quoting Idaho Code § 42–222(1))(emphasis added). See also *Jenkins v. State Dept. of Water Resources* “[t]he director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights....” *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982).

## II. The Nature and Source of the Water

Determining whether a new water right application or a transfer application is needed here requires an examination of the water rights and then to identify the source of the water proposed to be delivered to Pioneer.

### A. Nampa's Effluent Water Rights are for Municipal Use Only

Beneficial uses must be identified under the purpose of use element of a water right. Idaho Code §§ 42-1411(2)(f), -1412(6); *City of Blackfoot v. Spackman*, 162 Idaho 302, 310, 396 P.3d 1184, 1192 (2017). The water rights for Nampa's effluent are designated for use in Nampa's potable water system and cannot be subsequently applied to Pioneer's land as irrigation water without either a new water right for the beneficial use of irrigation, or an amendment to the existing water rights, accomplished through a transfer. "The sole mechanism for altering, adding, or subtracting from a judicially decreed purpose of use element is through an application for transfer." I.C. § 42-222(1); *City of Blackfoot v. Spackman*, 162 Idaho 302, 310, 396 P.3d 1184, 1192 (2017). Idaho Code § 42-222 applies to any person seeking to change on element of the water right. It applies equally to licensed water rights. *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012).

Nampa and Pioneer appear bent on transforming Nampa's potable water rights into Pioneer's irrigation water rights without undergoing any input or analysis from IDWR. *See, e.g.,* Brown and Caldwell Preliminary Technical Report "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." Exhibit J, at 38. And "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.” *Id.*

In *City of Blackfoot v. Spackman*, the City applied for a groundwater right (27-12261) and proposed to offset the injury resulting from the appropriation with mitigation credit from an existing surface water right (01-181C) through groundwater recharge from seepage. The purpose of use for water right 01-181C allowed for “Irrigation Storage, Irrigation from Storage, Diversion to Storage, Recreation Storage and Irrigation.” *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). The Court ruled that the City of Blackfoot could not change the purpose of use of the water right 01-181C to “recharge” without filing a transfer, stating “Uses must be identified under the purpose of use element of a water right. *Id.* at 310, 396 P. 3d at 1192 (citing Idaho Code §§ 42-1411(2)(f) – 1412(6)). The same logic applies here – Nampa and Pioneer cannot change the purpose of use from Nampa’s potable water system to irrigation of Pioneer lands in contravention of the purpose of use language in the potable water rights, decrees and licenses.

The “Director's Report constitutes prima facie evidence of the nature and extent of water rights acquired under state law. Idaho Code § 42–1411(4)(2003).” *A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist.*, 141 Idaho 746, 750, 118 P.3d 78, 82 (2005). By statute, a “decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.” Idaho Code § 42-1420(1); *City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017). Outside of the adjudication, changes to water rights must be obtained under Idaho Code § 42-222 proceedings. *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 848, 854 (2012).

Whatever agreement may exist between Nampa and Pioneer cannot alter nature of the water rights. “A private settlement agreement cannot define, add, or subtract from the elements of a validly adjudicated water right; it can only limit, condition, or clarify the administration of the right as between the private parties to the agreement.” *City of Blackfoot v. Spackman*, 162 Idaho 302, 308–09, 396 P.3d 1184, 1190–91 (2017). Adjudicated water rights, such as the water rights held by Nampa and Pioneer, are a “judicially decreed property right” that is “binding on the IDWR.” *Id.*, at 309, 1191. The Director “has a clear legal duty to distribute water according to decreed water rights.” *Id.* (internal quotations omitted). As the Idaho Supreme Court held in *City of Blackfoot*, “[t]o allow the Settlement Agreement to enlarge or otherwise alter the clearly decreed elements of [a water right], would allow private parties to alter a judicial decree. Such a result is simply untenable.” *Id.*

In sum, Nampa and Pioneer cannot “redirect” Nampa’s effluent water to lands within Pioneer’s irrigation district boundary under the currently decreed water rights. Idaho law is clear that their proposed action requires either a new water right or a transfer.

#### **B. The Source of Nampa’s Effluent is Groundwater**

The Stipulation of Facts and the discussion of Nampa’s water rights in Section C, 2 of the Statement of Facts above establish beyond doubt that the source of Nampa’s water is ground water and that Nampa’s WWTP treats and discharges ground water. That fact then leads to the question – what is the source of the water that Nampa intends to discharge to Pioneer’s Phyllis Canal? Is that water still ground water, subject to the conditions on the ground water rights? Or is it wastewater? Important in that determination is that Nampa proposes to eliminate the discharge to Indian Creek, a natural waterway and water of the State. SOF ¶ 34. Instead Nampa

intends to discharge that effluent to Pioneer's Phyllis canal, which both Nampa and Pioneer contend is an artificial conveyance, belonging to Pioneer, not Nampa.

The answer to these questions is found in a decision of the Idaho Supreme Court which examined a similar set of facts and circumstances. *A&B Irrigation District v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005). This *A&B* case involved the B unit of the District, which is irrigated from groundwater pumped from the Eastern Snake River Plain Aquifer. A&B collected the run-off from the B unit irrigation in ponds or drains and began using the collected water on an additional 2,363.1 acres. The use of this water was subject to SRBA claims. IDWR determined that the use was an enlargement and recommended subordination under Idaho Code § 42-1426, the Expansion Statute. This recommendation was upheld by the special master and the SRBA court. A&B appealed.

A&B argued that the excess water from irrigation of Unit B was wastewater that comingled with other natural sources, such as precipitation. As a result, A&B claimed the right to recapture this water because it had been transformed into waste or drain water.

The Supreme Court carefully analyzed the water so collected to determine the true source of that water. The Court first noted that it had previously recognized the right to appropriate drain, waste and seepage waters. *A&B*, 141 Idaho at 750, 118 P.3d at 82. The Court acknowledged that it was possible to view the water collected as waste or drain water. *Id.* at 751, 118 P.3d at 83. The Court then held that, if A&B wanted to treat the water as drain or waste water, rather than ground water, A&B would have to apply for a new water right. *Id.* at 752, 118 P.3d at 84. Under the Court's determination in *A&B*, if Pioneer, the entity putting the water to use, wants to treat the effluent as drain or waste water, Pioneer would be required to seek "a new water right for this water source prior to any further use" on Pioneer's lands. *Id.*

Significantly for this proceeding, the Supreme Court did not rest its analysis there. The Court next examined what the consequences would be if the water from the Unit B use was classified as drain or wastewater. The Court concluded that such use would be an expansion of A&B's ground water right requiring subordination to other, junior users. *Id.* It is a rare circumstance where expansion of use does not cause injury. *Id.* The Court quoted the seminal observation from *Jenkins v. Idaho Dept. of Water Resources*, that "priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. Idaho Dept. of Water Resources*, 103 Idaho 384, 388, 647 P. 2d 1256, 1260 (1982). Hence, the Court held that any use of the water collected from Unit B, if treated as ground water, would have to be subordinated to other water rights or that "full mitigation of injury" takes place. *A&B*, 141 Idaho at 753, 118 P.3d at 85.

Finally, in *A&B* the Court "rejects" the logic in *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133, 269 P. 2d 755 (1954), to the extent that *Jensen* would allow treatment of the drain or wastewater as an independent source from its original source. In this case the original source of the effluent is indisputably ground water. The Court in *A&B* held that the collected water there, because it is originated as ground water, remained ground water and use of the water had to be treated subject to the law applicable to enlargements. *A&B*, 141 Idaho at 753, 118 P.3d at 85. The same result obtains here.

*A&B* compels certain conclusions in this proceeding with respect to the scheme that Nampa and Pioneer have agreed upon to use the effluent from Nampa's WWTP in Pioneer's Phyllis Canal. First, the effluent remains ground water. The effluent will no longer be discharged to a creek for diversion, appropriation and beneficial use by other users, as is currently the circumstance with Nampa's discharge to Indian Creek. Instead Nampa proposes to

supply that ground water to Pioneer for use on 17,000 acres to offset Pioneer's declining supply. SOF ¶ 55-56. Because the 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 is also worth noting the Reuse Agreement contemplates an increase in Nampa's discharge, up to 41 cfs, to accommodate future growth. SOF ¶49. If Nampa and Pioneer plan to apply that additional water to land outside of Nampa's service area, i.e., on Pioneer's land, the Reuse Permit would potentially violate Idaho Code. "When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use." Idaho Code § 42-222.

### **C. The Right to Divert Water is Limited to the Source Described in the Water Right**

In *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 804, 367 P.3d 193, 199 (2016), Rangen disputed the Director's conclusion that it was only allowed to divert from the mouth of the Martin-Curren Tunnel rather than what Rangen contended was a larger historical diversion. The Supreme Court began in stating: "By statute, "decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 805, 367 P.3d 193, 200 (2016) (quoting Idaho Code § 42-1420(1)). The Court quoted the Director's determination that:

Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E.... Administration must comport with the unambiguous terms of the SRBA decrees. Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10-acre tract.

*Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho at 806, 367 P.3d at 201. The Supreme Court agreed with the District Court's findings that any dispute Rangen had with its point of diversion should have been resolved in the SRBA. Further, the Supreme Court agreed that "[a]ny interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho at 806, 367 P.3d at 201. As a result, the Court affirmed the District Court's holding that Rangen's decrees limited its diversion to the Martin-Curren Tunnel, and further, within the decreed ten-acre tract. *Id.*

The *Rangen* decision is insightful as to the limitations on the "source" of a water right. Applying *Rangen* to this matter, it is clear that Pioneer and Nampa cannot deliver Nampa's effluent water that is sourced from ground water to Pioneer's Phyllis Canal under Pioneer's current water right decrees because Pioneer does not have either the Nampa WWTP or Nampa's wells identified as the source on any of Pioneer's water rights.

### **III. The Result of the Proposed Reuse Permit is an Illegal Expansion or Enlargement of the Water Right that will Injure Riverside**

In changing the point of discharge for Nampa's WWTP from Indian Creek to the Phyllis Canal, Nampa and Pioneer will effectively create a new point of diversion on the Phyllis Canal and will significantly increase the volume of water delivered to and by the canal to Pioneer's landowners.

"An increase in the volume of water diverted is an enlargement and is not allowed under Idaho Code § 42-1425. However, a water user may seek an enlargement under Idaho Code § 42-1426, subject to the limitations set forth in Idaho Code § 1426. *Fremont-Madison Irr. Dist. Supra*, at 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). Those limitations are (1.) No increase

in the rate of diversion authorized under the original water right, and (2.) That the enlargement will not injure existing water users. *Id.*, at 460, 1307; Idaho Code § 42-1426(2). These limitations “protect other water users from injury to their rights resulting from a recognition of the transfers that are memorialized in the adjudication.” *Id.*, at 458, 1305.

#### **A. Enlargement of Water Right**

An enlargement “may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.” *Fremont-Madison*, 129 Idaho 454, 458, 926 P.2d 1301, 1305. “If a water user seeks an enlargement in the adjudication the request must be pursuant to Section 42–1426 of the Idaho Code which allows the ‘enlargement’ of existing water rights under certain conditions, unlike proceedings under section 42–1425 which do not allow an enlargement.” *Fremont-Madison*, 129 Idaho at 458–59, 926 P.2d at 1305-1306.

The new diversion to the Phyllis Canal in the Reuse Agreement and Reuse Permit clearly seeks to supply a new water source to and increase the rate of diversion into the Phyllis Canal, by as much as 41 cfs. SOF ¶ 49. This proposed action is contrary to Idaho law. As explained by the Court in *Fremont-Madison*, “Section 42–1426 of the Idaho Code does not proscribe enlargements that include an increase in the volume of water diverted, so long as the enlargement does not exceed the rate of diversion originally authorized or injure water rights existing on the date of the enlarged use.” *Fremont-Madison*, 129 Idaho at 460, 926 P.2d at 1307. The application of Nampa’s wastewater to Pioneer’s land, as contemplated in the Reuse Permit, will result in an enlargement of Nampa’s ground water rights to cover 17,000 acres of supplemental water for Pioneer Irrigation District.

## **B. Injury to Riverside**

The limitations imposed by Idaho Code § 42-1425 and 42-1426 and at issue in *Fremont-Madison* speak to the very issue raised by Riverside in this proceeding – injury to Riverside’s existing water rights due to the transfer and enlargement of Nampa’s water rights under the Reuse Permit, without Pioneer having to go through IDWR’s administrative process to analyze potential injury and craft protections for existing water users. As memorialized in the Statement of Facts, during irrigation season when Nampa and Pioneer propose to “redirect” the WWTP discharge from Indian Creek, Riverside currently diverts most, if not all, of the flow of Indian Creek into its canal for delivery of water to members of Riverside Irrigation District. SOF ¶ 31. Riverside has a right to divert approximately 180 cfs of water from Indian Creek. SOF ¶ 33.

The Reuse Agreement and Reuse Permit contemplate a reduction in discharge to Indian Creek ranging up to 41 cfs, a significant reduction to Indian Creek during irrigation season that will most certainly injure Riverside’s downstream water rights. Under Idaho Code § 42-1425 and *Fremont-Madison*, Idaho law requires that before this transfer can occur analysis must be made of the injury to other users, like Riverside and mitigation considered.

## **IV. Pioneer can Only Deliver Water to Pioneer’s Irrigation District Landowners**

As the Idaho Supreme Court held, and as expressly provided by Idaho Code § 43-316, “the title to all property acquired by an irrigation district, including its water rights, is vested in the district and held by the district in trust for, and dedicated and set apart to, the uses and purposes set forth in the law.” *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 141, 269 P.2d 755, 760 (1954), citing *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 216 P. 250; *Colburn v. Wilson*, 23 Idaho 337, 130 P. 381. It therefore follows:

... that any water owned by the district and thus dedicated to the irrigation of lands within the district, cannot be supplied to lands outside the district so long as it is needed for the

proper irrigation of lands within the district. The officers of the district have no power to contract for the delivery or supplying of such water for use outside the district. Any contract attempting to create or impose an obligation on the district to supply or make available any such water for any such purpose is ultra vires and void.

*Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 141, 269 P.2d 755, 760 (1954).

Nampa and Pioneer, in their private reuse agreements leading to the Reuse Permit, set up a contractual relationship relating to the discharge and delivery of water to Nampa's irrigation system and Nampa's non-potable delivery. Under *Jensen*, Pioneer cannot deliver water outside the District, but only to Pioneer landowners. As noted above in Brown and Caldwell's Preliminary Technical Report and IDEQ's Staff Analysis, Pioneer is in fact intending to deliver this water to Pioneer's landowners and must do so to comply with Brown & Caldwell's and IDEQ's analysis of the necessary land area to absorb the pollutants in the effluent. Since Pioneer can only deliver to Pioneer's customers, this arrangement is not a circumstance where Nampa is merely reusing its own water.

#### **V. Idaho Code 42 § 201(8) Does not Apply to Pioneer**

Nampa and Pioneer invoke Idaho Code 42 § 201(8) as a carveout that exempts Pioneer from complying with the requirement of Idaho Code 42 § 201(2) requiring a water right for the application of water to land. Under the Reuse Agreement and Reuse Permit, Pioneer will convey the discharged effluent in its canal to lands within its irrigation district boundaries. Idaho Code 42 § 201(8) applies solely to municipalities, and any exemption Nampa may have claimed under subsection (8) evaporates upon discharge to the Phyllis Canal for delivery and use by Pioneer.

The legislative history supports this narrow application. In testimony before the Idaho House Resources and Conservation Committee, Lindley Kirkpatrick, City of McCall, testified that the bill "will clarify that cities and sewer districts are not required to obtain a water right for distribution of waste water on land." *House Resources & Conservation Committee Minutes*,

March 5, 2012 at 6 (emphasis added). He further testified that IDWR “has assured the city they can reuse waste water when they have a municipal water right” and that “the bill is crafted narrowly.” *Id.* (emphasis added).

No language in Idaho Code § 42-201(8) can be read to apply to Pioneer. The statute explains that the exception is for “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...” Idaho Code § 42-201(8). None of the definitions relating to municipality or municipal use in Idaho Code § 42-202B can be read to apply to Pioneer:

(4) "Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.

(5) "Municipal provider" means:

(a) A municipality that provides water for municipal purposes to its residents and other users within its service area;

(b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or

(c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code.

(6) "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

Idaho Code § 42-202B(4)-(6) (emphasis added). Pioneer also does not qualify under the definition of “sewer district”:

A sewer district is one to provide for sewage disposal and for that purpose any such district shall have power to extend its sewer lines to an appropriate outlet.

A district may be created for a combination of water and sewer purposes, or either of said purposes. A district may be entirely within or entirely without, or partly within and partly without one (1) or more municipalities or counties, and the district may consist of noncontiguous tracts or parcels of property.

Idaho Code § 42- 3202 (emphasis added).

Pioneer is an irrigation district, not a municipality. “Irrigation districts are creatures of the statutes. They are quasi public or municipal corporations, and as such have only such power as is given to them by statute, or such as is necessarily implied.” *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho at 139, 269 P.2d at 758 (1954). The “municipal” nature of an irrigation district is not to be confused with the definition of “municipal” above. Rather, “the irrigation district is a quasi municipal corporation organized for the specific purpose of providing ways and means of irrigating lands within the district and maintaining an irrigation system for that purpose.”

*Colburn v. Wilson*, 23 Idaho 337, 130 P. 381, 381–82 (1913) (emphasis added) (citing *Pioneer Irrigation Dist. v. Walker*, 20 Idaho, 605, 119 Pac. 304; *City of Nampa v. Nampa & Meridian Irri. Dist.*, 19 Idaho, 779, 115 Pac. 979; *Merchants' Nat. Bank v. Escondido Irri. Dist.*, 144 Cal. 329, 77 Pac. 937.).

Furthermore, if Nampa, operating under the Idaho Code § 42-201(8) exemption, sought to deliver its wastewater through Pioneer’s irrigation system, it would also run afoul of the law. “A contract by the board of directors of such a district, giving to others the management or control of any part of the system, and taking that management and control out of the hands of the district board, would be ultra vires and void.” *Colburn v. Wilson*, 23 Idaho 337, 130 P. 381, 382 (1913).

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**VI. Application of Idaho Code § 42-201(8) to Preclude IDWR’s review of the Water Use Agreement Here Would Unconstitutionally Injure Riverside’s Water Rights in Violation of Article XV, § 3 of the Idaho Constitution**

Nampa and Pioneer’s reuse proposal requires the application of Nampa’s ground water rights on Pioneer land, resulting in both an expansion of the decreed and licensed rights and a transfer of the place of use. Extending the exemption in Idaho Code § 42-202(8) to allow expansion of the water rights to allow Pioneer to apply the water to its land without an injury analysis under 42-222 transfer would render Idaho Code § 42-202(8) unconstitutional *as applied*. See *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 870, 154 P.3d 433, 441 (2007)(party need only show that the statute as applied to the party’s conduct is unconstitutional to sustain an as applied challenge.)

Article XV, § 3 of the Idaho Constitution protects existing water rights by providing “[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied...” and that the “[p]riority of appropriations shall give the better right as between those using the water.” If 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.

Any review of the constitutionality of Idaho water statutes should begin with Judge Hurlbutt’s SRBA decision in Basin Wide Issue No. 1, Subcase No. 91-00001. Attachment B. At issue there was the constitutionality of the presumption statute Idaho Code § 42-1416 and the accomplished transfer statute Idaho Code § 42-1416A. The presumption statute purported to establish the validity of certain current water practices and to conform the decree to those practices. The accomplished transfer statute attempted to approve prior changes in points of diversion, place of use, period of use or nature of use. Judge Hurlbutt held these statutes void for

vagueness in large part because it was unclear if the statutes adequately incorporated the substantive criteria of Idaho Code § 4-222 regarding protection from injury, enlargement and the other statutory factors. *Memorandum Decision and Order in Basin-Wide Issue No. 1.*, pp.18, 12 Subcase No. 91-00001 (February 4, 1994).

The Supreme Court detailed the history of the constitutionality of Idaho Code §§ 1416 and 1416A in the *Freemont-Madison* decision.

Expansion of the use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.” Idaho Code § 42-1416(2) (repealed 1994). Section 42-1416 of the Idaho Code was an attempt to provide “amnesty” for illegal expansions. Four years later the legislature enacted an accomplished transfer statute, Idaho Code § 42-1416A, which permitted users who had undertaken transfers of water rights without compliance with the statutory provisions of Idaho Code § 42-222 to have the transfer confirmed in the course of the general SRBA adjudication. Idaho Code § 42-1416A (repealed 1994).

On February 4, 1994, the district court declared the “presumption” statute, Idaho Code § 42-1416, and the “accomplished transfer” statute, Idaho Code § 42-1416A, unconstitutional. In response the legislature repealed Idaho Code §§ 42-1416 and 42-1416A and enacted the “amnesty statutes” at issue in this case.

*Freemont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456-7, 926 P.2d 1301, 1303-4 (1996). The replacement “amnesty statutes”, Idaho Code 42-1425 and Idaho Code 42-1426, were designed to protect the “water uses originally intended to be protected by the ‘presumption’ and ‘accomplished transfer’ statute and ‘significant investments by water users and tax base for local governments by helping to maintain status quo water uses.’” *Id* at 457, 926 P.2d 1304.

The Idaho Supreme Court’s constitutional analysis in *Freemont-Madison* is instructive here. At issue in *Freemont-Madison* was the constitutionality of the “amnesty statutes” Idaho Code § 42-1425 and Idaho Code § 42-1426, that had been enacted to replace Idaho Code §§ 42-

1416 and 42-1416A. Specifically the question was whether “the application of either statute would result in injury to the priority of any other validly established junior water rights.” *In Re SRBA Subcase No. 75-10117 (“Lemhi Gold Trust LLC) Memorandum Decision and Order on Challenge*, at 8 (included here as Attachment B. These statutes allowed the SRBA court to enlarge water rights beyond their initial uses and to decree accomplished transfers under certain conditions.

In *Fremont-Madison*, the Court held that both amnesty statutes were constitutional because they required an injury analysis to be conducted to determine injury to other water rights before granting the amnesty provided in their respective provisions. “Proceeding under section 42–1425 a water user cannot obtain a transfer that constitutes either an enlargement of the water right or otherwise injures water rights existing on the date of the change. Section 42–1425 of the Idaho Code is constitutional as written.” *Id.*, at 458, 1305 (emphasis added); “Section 42–1426 of the Idaho Code is constitutional as written because it provides that an enlargement cannot be allowed that would injure a junior appropriator.” *Id.*, at 460–61, 1307–08 (emphasis added). Therefore, here, Idaho Code § 42-202(8) would be constitutional as applied to the Reuse Agreement, only if it can be read to preclude enlargements that would injure other water users.

Judge Wildman employed the constitutionality analysis in *Fremont-Madison* to reach the conclusion that another Idaho statute, Idaho Code 42-223(11), was unconstitutional because “[u]nlike the statutes analyzed in *Fremont-Madison*, Idaho Code § 42-223(11) contains no express protections to prevent injury to other validly established water rights.” *Lemhi Gold*, at 9. The statute at issue in *Lemhi Gold*, Idaho Code § 42-223(11), would allow resumption of a water right subject to statutory forfeiture to resume use under that right subject to certain requirements. Judge Wildman found that “the express terms of the statute, as applied to the above-captioned

claim, would injure Rabe's water rights by diminishing their priority in violation of Article XV, Section 3 of the Idaho Constitution." *Id.*

Judge Wildman's analysis of Idaho Code § 42-223(11) could lead the conclusion here that Idaho Code § 42-201(8) is unconstitutional on its face, because the statute does not contain an express requirement to account for injury to existing water rights. However, Riverside does not believe it is necessary to go that far, if the Director holds that Pioneer and Nampa must subject this Reuse Agreement to an injury analysis under the lens of a water right proceeding to ensure protection of existing water rights.

Without such a proceeding, the same logic that led Judge Wildman to find Idaho Code 42-223(11) unconstitutional in *Lemhi Gold* applies here. Idaho Code §42-201(8), as Nampa and Pioneer would have it applied here, does not take into account injury to existing water rights before allowing municipalities to change the nature of use of their water rights. Nampa's proposal to discontinue discharge of large quantities of water to Indian Creek during 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 cause injury to Riverside. Idaho Code §42-201(8)'s failure to address potential injury to existing water rights renders its application in this matter unconstitutional.

Riverside need not prove injury-in-fact before raising this concern. In the *City of Pocatello v. Idaho*, the Idaho Supreme Court affirmed the district court's decision that approved IDWR's conditioning of water rights to avoid injury to other water rights. *City of Pocatello v. Idaho*, 152 Idaho 830, 834, 152 P.3d 845, 850 (2012). The City argued that there had to be proof of actual injury before a condition could be included. The Supreme Court stated that Pocatello was "wrong". *Id.* at 835, 152 P.3d at 851. The Court relied on the district court's analysis that:

... injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case a discrete region of the aquifer) and priority administration is sought. Even though the priority administration may occur at some point in the future, injury to the priority date occurs at the time the accomplished transfer is approved.

*City of Pocatello v. Idaho*, 152 Idaho 830, 834, 152 P.3d 845, 850 (2012).

## CONCLUSION

Water is a precious resource. Livelihoods depend on a reliable supply. When two large entities come together and agree between themselves how to apportion this precious resource between themselves how to apportion this precious resource between them, other water uses stand to be injured. Here Nampa and Pioneer have given no thought to other water users, no thought to injury and no thought to the priority doctrine. Their thoughts are directed towards saving money and acquiring new sources of water. While laudable goals, these goals do not give Nampa and Pioneer *carte blanche* to decide when and how water is used in this State.

To the contrary, the primary responsibility for distribution of water in this State was placed on the shoulders of the State engineer (now the Director). *In re SRBA (Basin-Wide Issue 17)*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2104). The Director is required to exercise his specialized expertise to follow the law and distribute water in accordance with the prior appropriation doctrine. Id at 393, 336 P.3d at 800. Nampa and Pioneer's private agreement contemplates no such constraints.

The proper forum to determine whether the Nampa-Pioneer Agreement complies with the Idaho Constitution, Article XV, § 3, Idaho water law, including Idaho Code §§ 42-202(2) and 42-222, and with the terms and conditions of the parties' existing water rights is through either an application for a new water right for this new source of water or through a transfer proceeding

under Idaho Code § 42-222. To hold otherwise is to abrogate the Constitution, Title 42 and the water rights. Without an administrative proceeding to evaluate appropriate conditions to prevent or mitigate injury, Nampa and Pioneer will have successfully usurped the authority of the Director.

Accordingly, Riverside requests that the Director issue an order providing that Nampa and Pioneer shall not implement the contemplated delivery of water to Pioneer with having obtained the necessary approval of a water right or transfer.

DATED this 2<sup>nd</sup> day of October 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of October, 2020, I caused to be served a true and correct copy of the foregoing **Petitioner’s Brief** by the method indicated below, and addressed to each of the following:

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