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DEPARTMENT OF
WATER RESOURCES

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

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

**MUNICIPAL INTERVENORS'
RESPONSE TO PETITIONER'S
OPENING BRIEF**

COME NOW, Intervenor City of Boise, City of Meridian, City of Caldwell, City of Jerome, City of Post Falls, City of Rupert, City of Idaho Falls, City of Pocatello, Association of Idaho Cities, and Hayden Area Regional Sewer Board (hereinafter "Municipal Intervenor") by and through their respective attorneys and hereby submit this Response to Petitioner Riverside Irrigation District's Opening Brief.

I. INTRODUCTION

Riverside Irrigation District (hereinafter "Riverside") submitted a Petition seeking a Declaratory Ruling that Pioneer Irrigation District (hereinafter "Pioneer") is required to obtain a water right from the Idaho Department of Water Resources (hereinafter "IDWR") for Pioneer's

use of treated wastewater¹ discharged into Pioneer's Phyllis Canal by the City of Nampa (hereinafter "Nampa"). Pioneer responded to Riverside's Petition, denying the alleged need for a water right. Nampa and the Municipal Intervenors submitted a joint Petition to Intervene in the proceedings, as did Idaho Power Company. All Petitions to Intervene were granted by the Director pursuant to a Stipulation entered into by all parties. All parties other than Idaho Power Company entered into a Stipulation of Facts (hereinafter "SOF") filed with IDWR, and also stipulated to the admission of exhibits in the proceeding. While not entering into either stipulation, Idaho Power Company does not oppose either the SOF or the admission of exhibits.

II. FACTS

As a "municipal water provider" within the meaning of I.C. § 42-202B(5), Nampa diverts groundwater into its potable water system for delivery to its customers pursuant to municipal water rights that it holds and exercises for that purpose. SOF, ¶¶ 7-10. Nampa collects the sewage generated by its potable water system customers, treats it in its Wastewater Treatment Plant (hereinafter "WWTP"), and currently discharges treated wastewater (together with a relatively small quantity of water collected from other sources including treated wastewater from other providers, operational water introduced by Nampa at its WWTP, and infiltration and inflow into the system) into Indian Creek. SOF, ¶¶ 23, 25, 27.

Riverside diverts water from Indian Creek downstream from the WWTP into the Riverside Canal pursuant to surface water rights it holds authorizing the diversion of approximately 180 cfs. SOF, ¶ 28, 33. Accordingly, Riverside (along with other Indian Creek water right holders with points of diversion downstream from the WWTP) has diverted and put

¹ The term "wastewater" is differentiated from the term "waste water" in this brief. "Wastewater" (without a space) is used by municipalities, sewer districts and governmental entities such as IDEQ and EPA to refer to sewage or effluent. "Waste water" (with a space) is used in water law to refer to water diverted pursuant to a water right but not consumed by the water user.

to use wastewater discharged by Nampa into Indian Creek. SOF, ¶ 30. Notably, this augmentation of Indian Creek (that benefits Riverside) results from Nampa's diversion, use, treatment, and discharge of groundwater into Indian Creek pursuant to water rights that were appropriated decades after Riverside's appropriations of its surface water supply from Indian Creek. SOF, ¶¶ 9, 33. An examination of IDWR's water right records shows Riverside does not hold a waste water right from Indian Creek.

Pursuant to a Reuse Permit issued by the Idaho Department of Environmental Quality (hereinafter "IDEQ"), Nampa intends to eliminate discharging water from its WWTP into Indian Creek during the irrigation season, but will continue this practice outside of the irrigation season. SOF, ¶¶ 34, 52; Ex. G. Instead, pursuant to that Reuse Permit and a Reuse Agreement between Nampa and Pioneer, Nampa intends to direct its treated wastewater from its WWTP into Pioneer's Phyllis Canal during the irrigation season. SOF, ¶¶ 45, 49; Ex. F; Ex. G. Pioneer has not sought a water right to accept such treated wastewater into the Phyllis Canal. SOF, ¶ 35. Water from the Phyllis Canal is delivered by Pioneer to Nampa's non-potable municipal irrigation water delivery systems, and to Pioneer's own agricultural irrigation landowners within Pioneer's authorized place of use, including some within Nampa's area of city impact. SOF, ¶¶ 57 – 60.

Municipal Intervenor Concerns

The Municipal Intervenor are concerned about the potential issuance of an order requiring that Pioneer obtain a water right prior to accepting previously appropriated and subsequently treated wastewater discharged by Nampa. The Municipal Intervenor are concerned because any such order may impact the control and direction they are entitled to assert over their own treated wastewater. Each of the Municipal Intervenor either currently discharges

their own treated wastewater into facilities owned by outside parties, or may desire to do so in the future. A short summary of each Intervenor's concerns and factual situation follows:

A. City of Jerome

The City of Jerome is interested in the outcome of the case because it treats water at its WWTP that was appropriated by the City and other users, including industry. Since the end of World War II, the City has discharged treated water into the North Side Canal Company's ("NSCC") J8 Canal for beneficial use by NSCC. This is done pursuant to an NPDES permit and a written Agreement for Discharge of Treated Wastewater between Jerome and NSCC. Under Riverside's theory of the case, NSCC would require a water right to accept water treated by Jerome at its WWTP, thereby upsetting this approximately seventy-five year relationship for protest by third parties. If this relationship required a water right, and because it has been ongoing since well before either the 1963 or 1971 mandatory permit statutes, the water use could have been claimed in the Snake River Basin Adjudication.

B. City of Boise

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

C. City of Meridian

The City of Meridian discharges most of the effluent treated at its WWTP to Fivemile Creek pursuant to its NPDES permit. Some of that treated effluent is delivered (prior to

discharge into Fivemile Creek) to various users, including a park, commercial landscaping, a car wash, and others. While the delivery of effluent to other users is a fraction of the total effluent produced by the City, it intends to continue searching for ways in which to use its treated effluent. The City's NPDES permit also allows discharge to the Boise River, and the City maintains infrastructure to do the same if desired.

D. City of Caldwell

The City of Caldwell discharges effluent treated at its WWTP to the Boise River just upstream of the mouth of Indian Creek pursuant to an NPDES permit. Caldwell currently does not deliver treated effluent to any end user. It has, however, engaged in discussions with other entities, including Riverside Irrigation District, to find ways in which it can deliver such effluent for use by those entities.

E. City of Post Falls

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

F. City of Rupert

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

In the future, Rupert may want to discharge all or some of the water it treats into an irrigation canal.

G. City of Idaho Falls

The City of Idaho Falls treats water at its WWTP that was appropriated by Idaho Falls, other municipal providers, private water purveyors and other users, including industry, and discharges treated effluent to the Snake River pursuant to an NPDES permit. This single discharge point to the Snake River is immediately adjacent to the WWTP and upstream of the Gem State Hydroelectric Dam. Idaho Falls does not currently provide treated effluent to any end user, but is continuously seeking ways to best manage this resource.

H. City of Pocatello

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

I. Hayden Area Regional Sewer Board

Hayden Area Regional Sewer Board (“HARSB”) is somewhat different than the other intervenors. It was created more than 30 years ago by way of a joint powers agreement between Kootenai County, the City of Hayden and Hayden Lake Sewer District (collectively “Members”). As a publicly owned treatment works, it was created to receive wastewater generated by its Members’ customers, treat that wastewater, and use the effluent and biosolids in

a manner that best serves the Members. No Member is a municipal water provider.

The Members' customers receive their water from various water districts, associations, or private wells. The water provider delivers appropriated water to its customers for use, and the customer provides the resulting wastewater to a Member to collect and delivers to HARSB for treatment and use in the most efficient and cost conservative manner that benefits the Members and their customers.

Currently HARSB land applies the treated effluent to farmland it owns during the summer months, and discharges it to the Spokane River the remainder of the year. HARSB is looking at future options to use the effluent year-round and discontinue delivering it to the river. I.C. § 42-201(8) recognizes that treated waste water effluent is unique and distinctly different from any other water. It expressly exempts publicly owned treatment works ("POTW") and sewer districts that use and manage treated wastewater effluent from the requirement that they obtain a water right for such use.

POTWs and sewer districts frequently are not the original providers of the wastewater they treat or collect. If this case were to result in a water right being required to receive wastewater to manage or to deliver it to another entity in the management of that wastewater effluent, it would invalidate the exception for wastewater effluent carved out by the Legislature and relied on by HARSB and be detrimental to HARSB, its Members, and the Members' customers.

J. Association of Idaho Cities ("AIC")

AIC is a non-partisan organization founded in 1947 that represents its city members, both large and small so as to safeguard cities' ability to manage their water rights, water use and discharge as necessary to meet the needs of their residents and any applicable laws and

regulations. Riverside's arguments here implicate cities' management and use of water rights, water use and discharge. Thus AIC endorses the arguments made in this brief to allow cities to operate as they have historically under applicable Idaho state law.

III. ARGUMENT

Riverside seeks an order from IDWR to require that Pioneer obtain a water right for Nampa's discharge of its treated effluent into the Phyllis Canal. Idaho's legislature has already resolved this issue by enacting I.C. § 42-201(8) -- which provides that public entities operating wastewater treatment plants (such as Nampa in this case) are not required to obtain a water right to dispose of the effluent from their treatment plants. Additionally, Idaho case law establishes that Nampa cannot be compelled to continue to waste appropriated ground water into Indian Creek to Riverside's benefit. Instead of addressing these principles head-on, Riverside makes several arguments (including an irrelevant focus on the source and purpose elements of Nampa's water rights), all of which amount to a refusal to recognize the bedrock legal principle that public entities are entitled to maintain control of their waste water and dispose of it as they see fit within the confines of the law and regulations to which they are subject.

Municipal Intervenor join in and concur in the briefs filed by Nampa and Pioneer. For purposes of economy, and because of the detailed responses in the briefs filed by Nampa and Pioneer, Municipal Intervenor will not address every issue raised by Riverside. Municipal Intervenor reserve the right to address any issue raised by Riverside in argument if so desired by the Director.

A. Cities Have Legislative Authority to Maintain Control Over their Treated Wastewater

To the extent there was any question that Idaho law could be construed to compel a city, municipal provider, sewer district, or regional public entity operating a POTW to continue

wasting water back into a natural channel, that question was put to rest with enactment of Idaho Code § 42-201(8). That statute provides in part as follows:

Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements.

I.C. § 42-201(8).

The statute permits Nampa and other entities who operate WWTPs (such as the Municipal Intervenors) to collect, treat, store and dispose of the effluent from those treatment plants in response to state or federal regulatory requirements without the need to obtain a water right for those purposes. That is exactly what Nampa is doing here. It is simply changing how it manages its wastewater by altering the discharge location of water it is treating at the WWTP. The plain language of the statute is exactly on point and is consistent with the associated legislative history that is discussed at length by Nampa in its response. Accordingly, a water right is not required if Municipal Intervenors (including the City of Nampa in this case) make the conscious decision to cease wasting water, and Riverside cannot compel the continued waste of Nampa's treated effluent into Indian Creek.

Riverside argues that the application of I.C. § 42-201(8) in this case would render that statute unconstitutional as applied. *Petitioner's Opening Brief* at 29. Riverside's argument that the statute is unconstitutional as applied in this case is premised entirely on the assumption that its water rights will be injured. *Id.* at 29-33. However, as discussed below, Riverside has no claim of injury to its water rights because it cannot compel Nampa to continue its discharge of effluent into Indian Creek, nor is it entitled to rely on the continued discharge of that effluent as

part of its Indian Creek water rights.

B. Notwithstanding I.C. § 42-201(2) and Because Pioneer is Acting as Nampa's Agent, No Water Right is Required

As explained in Nampa's brief, Riverside's argument that I.C. § 42-201(2) requires Pioneer to obtain a water right to "divert" or "apply" Nampa's discharged effluent is simply inapplicable because the Idaho legislature intended that statute to address the diversion and subsequent application of that water; not the application of discharged effluent as is the case here. However, even if Riverside is correct that Pioneer "divert[s]" water treated by Nampa from the manmade WWTP into the Phyllis Canal within the meaning of I.C. § 42-201(2), or that Pioneer's subsequent "application" of that treated wastewater to lands within its place of use similarly falls within the meaning of that statute, I.C. § 42-201(8) exempts that "diver[sion]" and "application" from the requirement of I.C. § 42-201(2) that any person diverting water or applying it to any purpose must first obtain a water right.

I.C. § 42-201(8) starts out with the words "[n]otwithstanding the provisions of subsection (2) of this section" Emphasis added. In other words, the statute states that despite the requirement of I.C. § 42-201(2), diverters and users of water must obtain a water right, municipal providers and certain others need not do so when disposing of treated effluent from a WWTP. Black's Law Dictionary 1230 (10th ed. 2014) (ordinary meaning of "notwithstanding" is "in spite of" or "despite").

Additionally, no water right is required because Pioneer is merely acting as Nampa's agent for the disposal of Nampa's treated effluent: water that was previously appropriated, and discussed in the agreement between the two parties. SOF ¶ 49. Much like Riverside has no right to compel Nampa to continue wasting water into Indian Creek, where Pioneer is acting as Nampa's agent, Pioneer obtains no right to water discharged by Nampa from the WWTP into the

Phyllis Canal that requires another water right with IDWR. *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 746 (1930) (“If the water right was initiated by the lessee, the right is the lessee’s property, unless the lessee was acting as the agent of the owner.”).

To the extent Riverside raises questions regarding place of use, Petitioner’s Opening Brief at 5 (“The place of use for each of these rights is Nampa’s service area in accordance with Idaho Code § 42-202B(9). SOF ¶ 11.”), or purpose of use, *Id.* at 17 (“Nampa’s effluent water rights are for municipal use only”), the plain language of I.C. § 42-201(8) resolves the issues:

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

Emphasis added.

Here, water from the WWTP will be land applied on lands that are within the places of use for irrigation water right held by Nampa and/or Pioneer. Nampa’s service area and Pioneer’s place of use overlap in some locations. If any lands are not already described in an existing irrigation water right, the cure is remarkably simple: Nampa can file a standard Notice of Land Application of Effluent form with IDWR.²

In short, no water right is required because of the agency relationship between Nampa and Pioneer, combined with the fact that the requirements of I.C. § 42-201(8) are met, notwithstanding what Riverside cites to in I.C. § 42-201(2).

² (According to that form: “Idaho Code § 42-201(8) requires municipalities, municipal providers, sewer districts and regional public entities operating treatment works to notify the Department when land application of effluent is to take place on land not identified as a place of use for an existing irrigation water right. Also use this form to notify the Department of any change in the location of land application of effluent. Notice shall be provided prior to land application taking place.”)

C. Idaho Waste Water Law Permits Nampa to Maintain Control Over its WWTP Effluent

Riverside's attempt to obtain relief from the Director that would force Nampa – and all entities that treat and discharge effluent heretofore or thereafter – to continue wasting previously appropriated water into a natural channel greatly concerns the Municipal Intervenors. The Legislature's decision to enact I.C. § 42-201(8) was not done in an attempt, as Riverside argues, to injure water right holders, rather it was codification of longstanding waste water principles. That an appropriator of water must continue to waste appropriated water into a natural channel has been soundly rejected in this State:

In point of law the general principle upon which the plaintiff relies is scarcely open to controversy; one who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used.

United States v. Haga, 276 F. 41, 43-44 (D. Idaho 1921) (emphasis added).

Here, and consistent with the decision in *Haga*, the water that is treated by Nampa is within its dominion and control at the WWTP. At the WWTP, Nampa can measure and quantify the water it treats. Instead of wasting water into Indian Creek, and pursuant to the exclusive control the City exercises over its water rights, the water Nampa treats will instead be beneficially used by landowners of Pioneer for irrigation within Pioneer's place of use, many of whom are Nampa and its citizens. SOF ¶¶ 57 – 60. Despite Riverside's argument to the

contrary, what Nampa has already been permitted by IDEQ to accomplish does not require another water right because Idaho law expressly affords Nampa the ability to choose what to do with appropriated water that remains within its control.

To the extent Riverside, as a surface water user, has come to rely on artificially enhanced flows in Indian Creek from ground water that was previously appropriated, then pumped, treated, and intentionally discharged into Indian Creek by Nampa, the past century of precedent prevents Riverside from compelling Nampa to waste previously appropriated water into Indian Creek for Riverside's junior waste water use:

It is axiomatic that no appropriator can compel any other appropriator to continue the waste of water whereby the former may benefit. If respondent, by a different method of irrigation . . . could so utilize his water that it would all be consumed in transpiration and consumptive use . . . and thus no waste water return by seepage or percolation to the river, no other appropriator – from the evidence herein – could complain. . . . The rule that a junior appropriator has the right to a continuation of stream conditions as they were at the time he made his appropriation, could not compel respondent to continue to waste his water . . .

Application of Boyer, 73 Idaho 152, 162-63 (1952) (internal citations removed) (emphasis added). *See also Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681 (1980) (“While the waste of the original appropriator is not to be encouraged, the recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water.”); *Thompson v. Bingham*, 78 Idaho 305, 308 (1956) (“The original appropriator may at any time recapture waste water remaining on his land and apply it to a beneficial use.”); *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222 (1950) (“It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing and able to put it to a beneficial use.”); *Crawford v. Inglin*, 44 Idaho 663, 669 (1927) (“He can use all his water, waste none of it, or apply it on other lands, and thereby prevent its flow into the ditch.”); *Sebern*

v. Moore, 44 Idaho 410, 418 (1927) (“We conclude that surface waste and seepage water may be appropriated . . . subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it”).

Accordingly, despite Riverside’s contrary protestations, by simply changing its discharge point for treated wastewater from its WWTP, Nampa will neither enlarge nor expand its existing water rights. Certainly, Nampa cannot injure Riverside’s senior surface water rights by ceasing discharge of treated, ground water-based wastewater into Indian Creek. If Riverside has come to rely on augmented waste water flows in Indian Creek due to Nampa’s discharge of appropriated ground water, Riverside has no basis upon which to assert injury to its existing surface water rights. Moreover, even if Riverside had a waste water right from Indian Creek – which it does not – there would be no basis for a claim of injury due to the century of precedent that allows Nampa the right to cease wasting previously appropriated water over which it maintains dominion and control.

IV. CONCLUSION

Riverside’s Opening Brief is replete with arguments about why Pioneer must obtain a water right prior to Nampa’s placement of treated effluent from its WWTP into the Phyllis Canal and/or before Pioneer’s subsequent application of that effluent to lands within places of use of water rights held by either Pioneer or Nampa. The singular glaring error in all of Riverside’s arguments is its refusal to recognize that the treated effluent is wastewater that remains under Nampa’s direction and control as it is being put into the Phyllis Canal, and as it is being applied to lands by Pioneer. Riverside’s reliance on wastewater from Nampa is not a valid basis for overturning the established statutory authorization and waste water legal principles discussed herein. Accordingly, the Director should determine that it is completely unnecessary for Pioneer

to obtain a water right to accept Nampa's discharge of treated effluent, or to thereafter apply it to lands within the place of use of water rights held by either Pioneer or Nampa.

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Dated this 30th day of October, 2020



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MUNICIPAL INTERVENORS' RESPONSE TO PETITIONER'S OPENING BRIEF – Page 16

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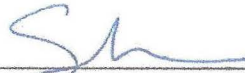
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I HEREBY CERTIFY that on this 30th day of October, 2020, the foregoing was filed, served, and copied as shown below.

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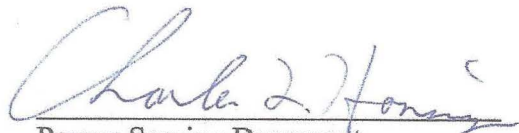
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