**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| IN THE MATTER OF RIVERSIDE'S PETITION FOR DECLARATORY RULING REGARDING NEED FOR A WATER RIGHT TO DIVERT WATER UNDER RESUE PERMIT NO. M-225-01 | Docket No. P-DR-2020-001 |

# INTERVENOR PIONEER IRRIGATION DISTRICT'S RESPONSE TO PETITIONER'S OPENING BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES

**OTHER AUTHORITIES**



**RULES**



**CONSTITUTIONAL PROVISIONS**

Intervenor Pioneer Irrigation District ("Pioneer" or the "District"), by and through undersigned counsel of record and pursuant to the Department's *Amended Scheduling Order* (Sept. 11, 2020), hereby submits this response to Petitioner Riverside Irrigation District, Ltd.'s ("Riverside") *Opening Brief* (Oct. 2, 2020) ("Open").

## I.
## INTRODUCTION

Other than Riverside, Pioneer is the only other party coming at this matter from an irrigation delivery entity perspective. Pioneer does not claim to be expert in matters of municipal water rights. This said, there is no question that municipal water rights law and the greater, more modern flexibility woven within it, have a direct bearing on this matter.

Riverside repeatedly attempts to pound a square peg into a round hole by selectively arguing and superimposing more traditional (and restrictive) irrigation water law principles where they do not apply. Worse, Riverside fails to address the classic wastewater principles that do apply as a general matter to its injury allegations. Riverside cannot have it both ways, and it cannot ignore the express, statutory flexibility provided municipalities like Nampa, particularly in the context of environmental regulatory compliance. For the reasons discussed below, Pioneer does not need a water right to implement the parties' Recycled Water Discharge and Use Agreement, and Pioneer could not obtain and perfect a separate water right even if it wanted to.

## II.
## FACTS

As a signatory to the parties' *Stipulation of Facts by All Parties* (Sept. 11, 2020) ("SOF"), Pioneer finds the facts recited therein relevant to this proceeding and incorporates the same by reference. Rather than duplicate effort with a broad and separate Statement of Facts herein,

Pioneer cites and refers to discrete stipulated facts as needed to further support the arguments discussed below.

## III.
## ARGUMENT

### A. Idaho Code Section 42-201(8) Governs This Matter; Section 42-201(2) Does Not Apply

#### 1. Greater Flexibility Afforded Municipal Water Rights

Municipal-purpose water rights, like those owned by Nampa, are different from and enjoy significantly greater flexibility than the more traditional (and restrictive) irrigation-purpose water rights owned by Pioneer and Riverside. And these differences and their inherent flexibility matter in this proceeding.

For example, "municipal purposes" of use include a variety of potential uses: domestic, commercial, industrial, and irrigation. IDAHO CODE § 42-202B(6). Municipal water rights are afforded unique forfeiture protections (*i.e.*, "planning horizons") and greater quantities than presently needed ("reasonably anticipated future needs") immune from traditional speculation concepts such that municipal providers can "grow into" their water rights under much longer development periods than afforded more traditional water rights. IDAHO CODE § 42-202B(7) and (8) .

Municipal water right places of use are also far more flexible and forgiving. Their "service area" (*i.e.*, place of use) is not fixed; rather it can grow, develop, and evolve over time. IDAHO CODE § 42-202B(9). And, the municipal "service area" can extend far beyond corporate limits or other more traditionally recognized boundaries when, as here, the municipal provider "shares a [larger] common water distribution system" with lands otherwise "located within the corporate limits." *Id*.

Perhaps, the most significant difference between municipal purpose and more traditional irrigation-based water rights is that of authorized/expected degree of consumptive use. Traditional irrigation water rights are limited by the concept of historic consumptive use—the quantity of water used and transpired by crops and vegetation never to return again as tail or operational spill water, or subsurface seepage. Unlike more traditional irrigation water rights, municipal water rights are considered "fully consumptive" with no expectation or requirement of residual returning to the ground or other surface water supply. *See, e.g.*, *Administrator's Memorandum* (Transfer Processing No. 24) (Dec. 21, 2009) ("Transfer Memo No. 24"), p. 31 at § 5.d(9) (characterizing "water under non-irrigation uses such as . . . municipal . . . to be fully consumptive"), *and compare id*., § 5.d(5) (requiring evaluation of "historic beneficial use" and "historic consumptive use" to determine the amount of water available for transfer from a traditional irrigation water right to a different purpose of use).[1]

Pioneer offers no endorsement of, or opinion regarding, the more modern trend of flexibility and growth afforded to municipal purpose water rights; the differences are what they are for better or worse. But, the differences and flexibility exist and they drive the primary legal analysis under Riverside's Petition.

[1] Pioneer appreciates that Transfer Memo No. 24 evaluates water right transfer applications as opposed to addressing the need for, and initial appropriation of, water rights as raised in the context of Riverside's *Petition for Declaratory Ruling Regarding Need For A Water Right To Divert Water Under Reuse Permit No. M-255-01* (Feb. 24, 2020) ("Petition"). However, Idaho Code Sections 42-203A(5) and 42-222(1) governing the review of new applications for water right permits and water right transfer applications, respectively, share virtually identical "injury" evaluation criteria. Consequently, Transfer Memo No. 24 guidance concerning application review for "injury" and "enlargement" is instructive in the context of Riverside's Petition.

### 2. Idaho Code Section 42-201(8) Operates Independent of, and is Unaffected by, Subsection (2)

The differences between municipal purpose water rights and more traditional irrigation purpose rights are further illustrated by Idaho Code Section 42-201(8) in the context of municipal effluent treatment and discharge in response to state or federal environmental regulatory requirements. In pertinent part, subsection (8) provides:

> ***Notwithstanding the provisions of subsection (2) of this section***, a municipality or municipal provider as defined in section 42-202B, Idaho Code . . . shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider . . . 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.

IDAHO CODE § 42-201(8) (emphasis added).

As highlighted by the emphasis above, traditional water right notions and requirements found in Idaho Code Section 42-201(2) are irrelevant to, and have no bearing upon the recycled water project undertaken by Pioneer and Nampa. Subsection (8) is an exception because the plain and ordinary meaning of the unambiguous term "notwithstanding" is: "DESPITE"; "NEVERTHELESS, HOWEVER." *Webster's Collegiate Dictionary*, 10th Ed. (1995); *see also*, *State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015) (citations omitted) (statutory interpretation begins with a statute's plain language, giving the words their "plain, usual, and ordinary meanings"; when the language of the statute is unambiguous, "the legislature's clearly

expressed intent must be given effect"). Consequently, subsection (8) of the statute operates separately and independently of Riverside's reliance on subsection (2).

Having excepted the application of Idaho Code Section 42-201(2) Riverside urges, the remaining inquiries under subsection (8) are: (a) whether Nampa is a "municipality" or a "municipal provider" as defined by Section 42-202B); (b) whether the project involves the "collection, treatment, storage or disposal of effluent from a publicly owned treatment works"; and (c) whether the project, "including land application," is undertaken "in response to state or federal regulatory requirements." The answer to each of the foregoing inquiries is "yes," and the parties have stipulated as much. SOF, ¶¶ 7-9, 23-25, 34, 36-46, and 49-55; *see also,* Ex. H (DEQ Staff Memo), p. 4 (emphasis added) ("The final limits, also presented in the NPDES permit, include temperature limits and phosphorus limits that are effective during the growing season (EPA 2016). ***Because of this***, and for the benefit of PID and City irrigation utility customers, the City is planning to upgrade and increase the water treatment level so that it can be reused during the growing season . . .").

After casting aside the more traditional notions and requirements of Idaho Code Section 42-201(2), the Idaho Legislature authorized significant express flexibility to those, like Nampa, proceeding under subsection (8). Nampa need not apply for a separate water right, and it likewise need not seek a transfer updating any land application place of use. Instead, Nampa merely need submit "notice" to the Department in the event that the proposed land application sites are not "identified as a place of use for an existing water right." *Id*. In other words, ***even if new lands not covered by an existing water right are broken out for land application-related irrigation purposes, no new water right is needed for those new lands***—only mere "notice" need be provided on forms furnished by the Department. This is a significant departure from

traditional water right notions and requirements further demonstrating that the provisions of subsection (2) simply do not apply in this matter.[2]

### 3. Section 42-201(8) Applies to Pioneer by Operation of the Parties' Recycled Water Discharge and Use Agreement

Recognizing that Nampa may unquestionably proceed under Idaho Code Section 42-201(8), Riverside instead attacks Pioneer's ability to proceed under the statute. Open, pp. 26-28. No question that Pioneer is not a "municipality," "municipal provider," "sewer district," or a "regional public entity operating a publicly owned treatment works" under the statute. But, there is equally no question that Nampa is, and that Pioneer and Nampa have entered into a legally binding contract implementing Nampa's authorized activities under the statute. SOF, ¶¶ 7-9, and 49 (including Ex. F). Nampa could not gain access to Pioneer's Phyllis Canal for effluent discharge purposes absent the parties' Reuse Agreement. *See*, *e.g.*, IDAHO CODE §§ 42-1102 and 42-1209 (obligating one to secure "written permission" prior to encroaching upon irrigation facilities). Likewise, Pioneer could not gain access to, or use, the recycled wastewater piped and under Nampa's physical control and dominion absent the parties' Reuse Agreement. *See*, *e.g.*, *Washington Irr. Dist. v. Talboy*, 55 Idaho 382, 389-390, 43 P.2d 943, 946 (1935) (water stored or conveyed in manmade reservoirs and ditches is already appropriated and no longer "public water[ ]" subject to appropriation).

Under the terms of the parties' *Recycled Water Discharge and Use Agreement* (Mar. 7, 2018) ("Reuse Agreement"), Pioneer is obligated to accept upwards of 41 cfs of recycled wastewater and to "grant" Nampa "all necessary licenses and easements" allowing for the

[2] In this instance, notice should not be necessary because the land application taking place under the Nampa Reuse Permit is on lands within District boundaries that already have appurtenant water rights. SOF, ¶¶ 1-4, 54-55, and 58-60. This said, there is nothing precluding Nampa from submitting notice as a courtesy, or should the Department so request.

construction, operation, and maintenance of Nampa's piped discharge to the Phyllis Canal. Ex. F, pp. 3-4. Pioneer was also obligated to "actively cooperate" with Nampa to "obtain all permits and approvals from DEQ" necessary to secure the Reuse Permit. *Id.*, pp. 4. In other words, Nampa would not have secured the Reuse Permit absent Pioneer's support and cooperation (*i.e.*, Pioneer's canal and lateral facilities and landmass). Pioneer also obligated itself to a minimum twenty-five (25) year term under the contract (outside of a limited number of narrow exceptions) owing to Nampa's "substantial up-front costs" and "long term NPDES Permit Compliance requirements." *Id.*, p. 4.

Nampa's Reuse Permit, and DEQ's supporting staff analysis, likewise make clear that Pioneer's obligations under the Reuse Agreement are integral to Nampa securing and implementing the Reuse Permit. Ex. G (Reuse Permit), pp. 7 (identifying Pioneer and the Phyllis Canal as the "method of treatment and reuse"), and 15-16 (incorporating Phyllis Canal operations and flow data into Nampa monitoring and annual reporting requirements); *see also*, Ex. H (DEQ Staff Analysis), pp. 9-10; 19-34 (incorporating the Pioneer service area (Phyllis Canal and related laterals) downstream of the proposed Phyllis Canal discharge point as the "Area of Analysis" for purposes of determining land application-based pollution control efficacy as authorized under the parties' Reuse Agreement). Though Pioneer was not the ultimate Reuse Permit applicant, nor the resultant permittee, Pioneer's Phyllis Canal operations and related deliveries serve as the foundation of the permit—the "method of treatment and reuse" in direct response to Nampa's NPDES Permit-based discharge limits and in furtherance of Nampa's compliance with the same.[3]

[3] The Nampa-Pioneer relationship is like that of Nampa School District No. 131 and Nampa & Meridian Irrigation District ("NMID") in *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 808 P.2d 1289 (1991). Though primarily an easement-based case, NMID entered into

Riverside's interpretation and application of Idaho Code Section 42-201(8) is exceedingly narrow, fails to account for the parties' Reuse Agreement, and frustrates the purpose of the statute leading to an absurd result.[4] If Riverside were correct, and Nampa lacked the ability to contract to implement subsection (8), Nampa would either have to: (a) spend many millions of dollars on closed loop, redundant water distribution infrastructure (*i.e.*, duplicating the already-existing and neighboring water distribution capabilities of Pioneer's Phyllis Canal and laterals); or (b) spend many millions of dollars purchasing sufficient land in fee simple on which it (Nampa) could then land apply its effluent (because, remember, under Riverside's theory, Nampa cannot contract with others to gain access to the landmass necessary to meet its land application needs). Riverside's suggestion that the Legislature teases "municipalit[ies],"

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a contract ("license agreement") with the school district delegating to the school district certain ditch improvement rights and authorities NMID otherwise possessed under Titles 42 and 43, Idaho Code. The Court found NMID's agreement-based delegation proper; the servient landowner (Abbott) could not object to the school district's installation of ditch improvements (cement collar and trach rack) that NMID could otherwise install on its own if it chose to do so. *Id*., 119 Idaho at 550-552, 808 P.2d at 1295-1297.

Here, Nampa could otherwise exercise and wholly internalize its effluent collection and land apply it if it chose to do so. For a variety reasons, including efficiency, wasteful parallel system redundancy, and cost-effectiveness it chose to contract with Pioneer instead. Nampa School District No. 131 exercised Title 42 and 43 authorities not otherwise inherent to it by operation (derivative) of contract with the Title 42 and 43-authorized entity (NMID). Pioneer, likewise, is exercising Section 42-201(8) authorities not otherwise inherent to it by operation (derivative) of contract (the Reuse Agreement) with the subsection (8)-authorized entity (Nampa).

[4] The plain language of Idaho Code Section 42-201(8) does not preclude the Nampa-Pioneer contractual relationship. The statute does not expressly restrict application of the water right exemption to those instances where the land application (*i.e.*, effluent treatment and disposal) is wholly performed, and only occurs on lands owned by the "municipality," "municipal provider," "sewer district," or a "regional public entity operating a publicly owned treatment works." Instead, the statute speaks more broadly in terms of "land application" generally, performed in response to "state or federal regulatory requirements" regardless of end destination.

"municipal provider[s]," "sewer district[s]," and "regional public entit[ies] operating a publicly owned treatment works" with the opportunity to creatively address water pollution control requirements on the front end, only to take away any meaningful opportunity to implement and accomplish those creative solutions via contract with others on the back end is untenable. *See, e.g., David and Marvel Benton Trust v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016) (reviewing tribunals do not read statutes to create an absurd result).[5]

### 4. The Pioneer-Nampa Project is not Without Guiding Precedent on the Water Right/Contractual Relationship Questions—the City of McCall

City of McCall effluent discharge and land application practices, and potential legal authorization infirmities associated with those practices, spurred the enactment of Idaho Code Section 42-201(8).[6] Part of the Department's informal guidance to McCall counsel prior to enactment of subsection (8) considered the mechanism by which McCall implemented its effluent land application activities and the extent to which McCall retained some measure of control over its effluent. Appendix ("App."), *generally*. Ultimately, the McCall effluent was

[5] Even before enactment of Idaho Code Section 42-201(8), the parties' recycled water project under the Reuse Agreement and Reuse Permit was already authorized under Idaho Code Section 42-202B(9) (wherein the "service area" of a municipality is broadly defined to include lands outside corporate limits or other recognized boundaries (*i.e.*, area of impact) in situations where the municipal system shares a "common water distribution system with lands located within the corporate limits"—which is the case here where Pioneer's Phyllis Canal and laterals serve lands both inside and outside of Nampa's corporate limits). SOF, ¶¶ 1-3, 20. Given that subsection (8) was added to Idaho Code Section 42-201 to provide even greater clarity and flexibility concerning the regulatory response to the treatment and disposal of WWTP effluent than what already existed under Section 42-202B(9), makes Riverside's contentions under Section 42-201(8) all the more strained and unavailing.

[6] Pioneer defers to, and incorporates herein, Nampa's arguments, legislative history and informal Department guidance/correspondence regarding the McCall matter. The materials (legislative history concerning the enactment of subsection (8), together with IDWR guidance to McCall counsel regarding the city's land application practices) are subject to Official Notice under Rule 602 (IDAPA 37.01.01.602) because they are official records and communications of the Idaho Legislature and the Department, respectively.

used for irrigation by private landowners located approximately three miles south of the city. *Id*., pp. 9-10. McCall's access to, and use of the irrigation facilities and lands of others was, as is the case in this matter, secured by contract (the "*Three-Way Agreement*" and a series of "*Water User and Supply Agreements*") among the parties involved. *Id*., p. 3, n. 3; pp. 9-10.

Pioneer finds no record that McCall or any of the other contracting parties (Lake Irrigation District and the J-Ditch Pipeline Association) were required to obtain new and separate water rights either as the discharger of the effluent (McCall), or as the recipients of that directed discharge (landowners within Lake Irrigation District and the J-Ditch Pipeline Association members). In line with the "absurd result" discussion above, Riverside's application of subsection (8) similarly undermines the policy and legal guidance offered by the Department under the McCall situation. In fact, Riverside's contentions run entirely contrary to the Department's legal opinions on the matter. App., p. 11.

**5. Riverside Misinterprets Section 42-201(2) Regardless**

Even if Idaho Code Section 42-201(2) had some bearing on this matter—which it does not—Riverside misinterprets and misapplies the statute. Riverside's disjunctive, "or"-based interpretation fails to logically read and apply subsection (2) as a whole. Open, pp. 14-16. And, it fails to read Idaho Code Section 42-201 as a whole (including the express exemption provided by subsection (8)).

With limited exception, Idaho law requires two bedrock principles to perfect a water right (*i.e.*, a legally enforceable real property interest in water): (a) physical diversion from a natural source; and (b) application to end beneficial use. *See, e.g.*, *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). The limited exceptions from the physical diversion requirement are in-stream stock-watering, and instream minimum streamflow rights appropriated by the

Idaho Water Resource Board under Idaho Code Section 42-1501, *et seq. Id*. Neither of these limited exceptions apply here.

Riverside's application of subsection (2) decouples the required physical diversion and end beneficial use requirements from one another, contending that one needs a valid water right authorizing the separate physical acts of: (a) diverting water from a natural watercourse no matter the end destination or use of the water diverted; or (b) applying water to land without consideration of whether it was "diverted" or not. But this statutory interpretation, teasing out and amplifying a single phrase to the exclusion of the remainder of the subsection yields a non-sensical result—one cannot affirmatively "apply water to land" without some preceding physical act of diversion from somewhere beforehand. Consequently, the land application admonition of subsection (2) ties directly to the physical diversion admonition clause present immediately before it. Riverside's argument yields an absurd result. *David and Marvel Benton Trust*, 161 Idaho at 151, 384 P.3d at 398.

To the extent the Department finds ambiguity in subsection (2)'s use of the term "or," the legislative history of the subsection's enactment in 1986 resolves the issue against Riverside, and is consistent with *State v. United States*, above. Pioneer agrees with Nampa's arguments in this regard and incorporates them by reference herein. In sum, the water that cannot be applied to land under subsection (2) is that which is physically diverted from a natural source (or "natural watercourse") without a valid water right as a threshold matter.

In this case, no one is diverting water from a natural source and subsequently applying it to land absent a valid water right to do so. The land application taking place under Idaho Code Section 42-201(8) is authorized by Nampa's duly appropriated municipal, potable groundwater rights on the front end consistent with subsection (2)'s requirements. *See*, *e.g.*, SOF, ¶¶ 6-12.

The question in this proceeding is what later becomes of the back end effluent discharged from the Nampa WWTP. SOF, ¶¶ 23-29, 34.[7]

### 6. Pioneer Cannot Obtain and Perfect a Separate Water Right as Riverside Would Require

As explained above, perfection of a water right under Idaho law requires physical diversion of "unappropriated water" from a natural source and application to a recognized beneficial use. *See, e.g., State v. United States,* above; *see also,* IDAHO CONST. Art. XV, Sec. 3, and IDAHO CODE §§ 42-101, 42-103, and 42-201(2) (each speaking in terms of the "unappropriated" waters of "natural stream[s]," "waters . . . flowing in their natural channels," "rivers, streams, lakes, springs, and subterranean waters or other sources," and "natural watercourse[s]," respectively). In this matter, Pioneer could not obtain and perfect the water right Riverside requires.

Pioneer cannot perfect a valid water right in this matter because the District fails the first bedrock requirement: physical diversion of unappropriated water from a natural source. Riverside can point to no headgate, wellhead, or other physical diversion structure that Pioneer owns, operates or controls under the parties' Reuse Agreement or the Reuse Permit. Put simply,

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[7] Riverside also contends that land application (*i.e.*, irrigation) under the Reuse Agreement and the Reuse Permit violates Nampa Potable System water right conditions concerning the supplemental use of that water for irrigation purposes. Open, pp. 6-7. Riverside is correct that Nampa Potable System water rights cannot be used in the first instance for irrigation purposes under the auspices of "municipal purposes" under Idaho Code Section 42-202B(6). But Nampa is not doing that under the Reuse Agreement or the Reuse Permit. Instead, the water collected at, and discharged from, Nampa's WWTP is that used first for non-irrigation purposes such as domestic, commercial, industrial purposes. SOF, ¶¶ 23 and 25 (municipal irrigation does not generate "sewage" collected and piped to Nampa's WWTP for treatment and disposal). It is the "spent" water residual (WWTP influent and effluent) ***from non-irrigation-related municipal purposes*** that is at issue in this matter. Thus, Nampa is not making any improper front-end irrigation use of its Potable System water in derogation of the water right condition raised by Riverside.

Pioneer is not physically diverting water, and it certainly is not diverting water from a natural source (river, stream, lake, spring, etc.).

Instead, Nampa diverts its Potable System water from the natural source (groundwater). And, the recycled water Pioneer ultimately receives is already appropriated and in the physical control of Nampa through the city's pipeline to the point of discharge into the Phyllis Canal. Pioneer's use of Nampa's recycled water derives solely from the Reuse Agreement (contract), not from any physical act of diversion undertaken or controlled by Pioneer. Moreover, the Reuse Agreement specifically acknowledges that Pioneer's rights to the recycled water are contractual only. Reuse Agreement, p. 4 (Pioneer expressly acknowledging that Nampa is not obligated to, nor guarantees, the discharge of recycled water to the Phyllis Canal).

**B. Riverside Suffers No Legally Cognizable (or Redressable) Injury**

There is no dispute that Riverside benefits from Nampa's historic effluent (*i.e.*, wastewater) discharge to Indian Creek. SOF, ¶¶ 27-31. Pioneer, too, benefits from the wastewater of Nampa and others flowing through its (Pioneer's) Indian Creek and drain-based water right sources. SOF, ¶¶ 4, 56. But that does not mean that Riverside or Pioneer can compel others to continue wasting for their benefit. And, as discussed in Section III.D below, Pioneer's primary benefit under the Reuse Agreement is the off-setting of drain-based declines it is experiencing in the Fivemile Drain system because the wastewater of others upgradient of Pioneer is what it is—fickle and subject to recapture and reuse upstream. Because Riverside cannot compel Nampa to continue wasting water for Riverside's downstream benefit, Riverside suffers no legally cognizable injury from implementation of the Reuse Agreement and the Reuse Permit. Open, p. 25.

### 1. General Wastewater Principles

That downstream water users cannot compel others upstream to waste for their continuing benefit is blackletter law. *See, e.g., Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, 178 (1927) ("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, or to recapture it, so long as he applies it to a beneficial use"); *see also, Crawford v. Inglin*, 44 Idaho 663, 669, 258 P. 541, 543 (1927) ("appellant cannot be required to waste water into the ditch. He can use all his water, waste none of it, or apply it to other lands, and thereby prevent its flow into the ditch."). The Department embeds this principle were appropriate under its standard "waste water" condition:

> The waste water diverted under this right is subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place of use or manner of wasting it, or to recapture it.

*See, e.g.*, Standard Condition of Approval No. 176 (as applied to Water Right Permit No. 63-34627).

This wastewater principle remains unchanged even when downstream water user beneficiaries have used the water for several decades. *See, e.g., Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 179, 157 P.2d 1005, 1007 (1945). Put bluntly: "No appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former . . . 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." *Hidden Springs Trout Ranch v. Hagerman Water Users*, 101 Idaho 677, 680-681, 619 P.2d 1130, 1133-1134 (1980).

At bottom, Riverside acknowledges that Nampa WWTP effluent (*i.e.*, "wastewater") artificially augments Indian Creek flows. SOF, ¶¶ 27-31. In other words, the approximately 18.6 cfs Nampa currently discharges to the creek would not exist or arise in the creek but for Nampa's purposeful discharge to the same. *Id.* Consequently, Riverside cannot perfect any legally-enforceable property right in those artificial wastewater flows and it cannot be injured by any Nampa re-direction of the same to the Phyllis Canal or somewhere else for a legitimate, good faith, beneficial purpose.

At most, Riverside can mount credible arguments only after Nampa relinquishes control of its effluent and that discharge commingles with the flows of Indian Creek. *See, e.g.*, *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 750-752, 118 P.3d 78, 82-84 (2005) (discussing the differences between the sources of water recaptured and the timing of recapture either before or after commingling with other sources). But, that situation does not arise in the context of the Phyllis Canal. Nampa's Potable System groundwater continues to be waste-based "groundwater" under Nampa's exclusive physical possession and control from its WWTP to its piped point of discharge into the Phyllis Canal. Nampa's discharge is not commingled with other flows and it is not "unappropriated" water from a comingled drain-based source as was the case with A&B Irrigation District's practices.

Riverside's water rights entitle it to divert up to 180 cfs of the ***natural flow*** of Indian Creek, or at least the flow of Indian Creek available at its doorstep because those flows (natural or augmented by wastewater) have been commingled and continuing physical control lost by the upstream/upgradient appropriators. But, Riverside is not entitled to compel Nampa to continue wasting for its benefit where Nampa has not relinquished physical control and its effluent has not commingled with other sources of water. Thus, setting aside for the moment the more modern

flexibility afforded municipal water rights, and the additional express authorizations provided under Idaho Code Section 42-201(8), even the well-worn traditional concepts of wastewater and recapture defeat Riverside's claims of injury under the Reuse Agreement and the Reuse Permit.

For the foregoing, Pioneer specifically requests a declaratory ruling that Riverside possesses no legally cognizable injury going forward in the event that Pioneer is required to apply for a water right in order to implement the parties' Reuse Agreement. Riverside does not get to seek a mere advisory opinion in a vacuum. *See, e.g., Miles v Idaho Power Co.,* 116 Idaho 635, 639-641, 778 P.2d 757, 761-763 (1989) (declaratory relief depends upon a justiciable controversy, not a generalized grievance shared by others; a distinct palpable injury that is fairly traceable); *Idaho ex. rel. Andrus v. Kleppe*, 417 F. Supp. 873, 876 (1976), n. 3, *overruled in part on other grounds* by *Andrus v. Idaho*, 445 U.S. 715 (1980) (citation omitted) (declaratory relief must address an actual controversy, not a desire for a mere abstract declaration of law). Riverside's Petition and Open allege injury, and Pioneer is not interested in bifurcating the injury question and reserving it for some later permit application-based contested case waiting in the wings.

**2. There Is No Enlargement**

Riverside's enlargement arguments also fail because there is no enlargement in this matter. Open, pp. 23-25. And, Riverside's reliance on *A&B Irr. Dist.* above is misplaced. *Id.*

There is no enlargement in this matter for a variety of reasons. First, and as discussed above, municipal water rights are considered "fully consumptive." *See, e.g.*, Transfer Memo No. 24, p. 31 at § 5.d(9). One cannot enlarge use of what can be used to extinction as a threshold matter.

Second, there no irrigation of new ground—no breaking out of arid/dry acres that was at issue in *A&B Irr. Dist.* above. *See id.*, 141 Idaho at 751-752, 118 P.3d at 83-84 (discussing A&B's "additional 2,363.1 acres" irrigated beyond reuse on its "appropriated properties" (*i.e.*, its originally wet/irrigated acres under its initial appropriations)). Similar to Riverside's inability to point to any new Pioneer point of diversion from a natural source, Riverside cannot point to any new dry acreage being reclaimed by use of Nampa's recycled wastewater. Instead, Nampa's recycled water is being used within Pioneer's place of use/service area on lands already entitled to delivery and use of irrigation water under Pioneer's water rights. SOF, ¶¶ 1, 14-15, 20.[8] And, this Pioneer-facilitated land application is consistent with Department guidance on the topic.

[8] Pioneer is confused by Section IV of Riverside's Open (pp. 25-26). Pioneer agrees that it cannot deliver water outside its boundaries, or to those who are not otherwise Pioneer landowners. But, Nampa's effluent is being used entirely within Pioneer's boundary and largely being reused by Nampa and its citizens (who are also Pioneer landowners). *See, e.g.*, SOF, ¶¶ 1-3, 15, 17, 19-20, 57-59, and Ex. H, p. 20 (illustrating the Phyllis Canal laterals supplying water to Nampa's Non Potable System and other Nampa citizens not served by Nampa's Non-Potable System; an aggregate of 68 cfs of deliveries from the Phyllis Canal more than doubling Nampa's proposed 31 cfs discharge under the Reuse Permit).

Certainly, Pioneer cannot guarantee that every molecule of water Nampa discharges to the Phyllis Canal will, in fact, be used by Nampa or its citizens. But, conversely, Riverside cannot claim that Nampa and its citizens are not benefitting from the reuse of much, if not all, of the recycled water by virtue of Pioneer's delivery infrastructure and its landowner delivery entitlements because, again, Nampa and many of its citizens are Pioneer landowners. *See, e.g.*, SOF, ¶¶ 1, 17, and 20 (Nampa's Non Potable System delivery entitlement from Pioneer is 59.7 cfs (one miner's inch per 2,985 acres within the District), and its current installed Non Potable System pumping capacity is already 33.3 cfs—26.4 cfs and 2.3 cfs, respectively, ***more*** than contemplated for discharge to the Phyllis Canal under the Reuse Permit. Moreover, Nampa's pumping capacity will only continue to grow as it continues to urbanize and expand its Non Potable System footprint within Pioneer's larger boundary.).

Last, to the extent Riverside somehow suggests Pioneer is performing an *ultra vires* act under the Reuse Agreement, such a suggestion is incorrect. Idaho Code Section 43-304 authorizes Pioneer to, among other things, "enter into contracts for a water supply to be delivered to the canals and works of the district, and do any and every lawful act necessary to be done that sufficient water may be furnished to the lands in the district for irrigation purposes."

Transfer Memo No. 24 at §§ 1, 2 and 5.d(9) (land application of wastewater requires a transfer "when there is not a full, existing water right for irrigation of the place of use receiving wastewater"; conversely, land application of wastewater does not require a transfer "when there is a full existing water right for irrigation [on] the place of use receiving [the] wastewater").

Third, and finally, Idaho Code Section 42-201(8) overrides any potential concerns over traditional notions of increased consumptive use or enlargement. As subsection (8) makes clear, "notwithstanding" these more traditional concerns, municipal providers like Nampa are specifically authorized to implement the land application practices contemplated in the Reuse Agreement and the Reuse Permit in response to environmental regulatory requirements.

The Pioneer-Nampa Project presents no illegal enlargement or expansion of Nampa's existing municipal water rights, and Riverside possesses no legally cognizable property interest (or injury) in the Nampa WWTP effluent anyway.

### C. Riverside's Constitutional Challenges are Misplaced and Beyond the Department's Purview Anyway

Riverside asserts that granting Pioneer use of the "municipal carveout" of Idaho Code Section 42-201(8) would injure Riverside's existing water rights and violate Idaho Constitution Article XV, § 3 in an as-applied manner. Open, pp. 29-33. Riverside confuses what its downstream water rights entitle it to, misapplies Idaho Constitution Article XV, § 3, and seeks relief beyond the purview of the Department.

As explained in Section III.B.1 above, Riverside cannot compel Nampa to continue wasting water into Indian Creek for Riverside's benefit. While Riverside may have a right to divert and use existing Nampa discharges to the creek after Nampa relinquishes its control and dominion over the same, Nampa equally has the right to cease wasting water altogether. Riverside's Indian Creek-sourced surface water rights, like Pioneer's, entitle it to diversion and

use of the natural flow of the creek (including that augmented by the upstream wastewater discharges of others—whether surface or seepage—upon the upstream appropriators' loss of control and commingling of flows). Riverside's Indian Creek-sourced water rights do not include the right to compel access to wastewater generated from a completely different source (groundwater) remaining within Nampa's physical control and dominion.

As Riverside correctly notes, Idaho Constitution Article XV, § 3 provides in pertinent part: "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . ." and the "[p]riority of appropriations shall give the better right as between those using the water." Open, p. 29. But, this constitutional protection does not apply here. Nampa's effluent is not "unappropriated water," and its WWTP and future pipeline to the Phyllis Canal is not a "natural stream." Thus, Riverside's reliance on priority administration under the Idaho Constitution or any corresponding statutes simply does not apply.

Finally, the Department is not the proper forum for addressing Riverside's constitutional arguments no matter how misplaced they are. The ability of the Department to consider constitutional issues is limited. IDAPA 37.01.01.415. If Riverside truly believes that a statute or its application is unconstitutional, it must take those questions up with the judiciary. *Id*.; *see also, Order on Exceptions; Final Order,* In the Matter of Application for Permit No. 63-34348 In the Name of Elmore County, Board of County Commissioners (Aug. 13, 2019), p. 38.

If, on the other hand, the Department is inclined to wade into Riverside's constitutional challenges, a statute is presumed constitutional and all reasonable doubt as to its constitutionality must be resolved in favor of its validity. *Rich v. Williams*, 81 Idaho 311, 316-317, 341 P.2d 432, 435 (1959). The burden of showing unconstitutionality rests with Riverside, and the reviewing

tribunal is obligated to uphold the enactment if such can be accomplished by reasonable construction. *Id*.

As discussed in Section III.A.3 above, the only reasonable construction of Idaho Code Section 42-201(8) is that Pioneer can proceed to land apply Nampa's effluent (exercise by extension Nampa's authority under the statute) by operation of contract (the parties' Reuse Agreement).

### D. The Recycled Water Discharge and Use Agreement Serves Important and Legitimate Purposes

Riverside's disdain for the Nampa-Pioneer project is misplaced. There is nothing surreptitious about the Reuse Agreement or the Reuse Permit; they further no "scheme." Open, pp. 2-3 ("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 . . . this private water distribution scheme must be reviewed under Idaho's water right review process for new or expanded uses.").

Consistent with the bulk of Riverside's arguments, it fails to appreciate (or selectively ignores) that the Nampa-Pioneer recycled water project does not rely on any previously unappropriated "waters of the State." Moreover, there is no hiding of the ball here—Idaho Code Section 42-201(8) does not evade the Department. Instead, subsection (8) expressly includes the Department via the statute's "notice" requirement—notice that "shall be upon forms furnished by the department of water resources and shall provide all required information."

The Reuse Agreement and Reuse Permit do not facilitate a Pioneer water grab either. *See, e.g.*, Petition, ¶ 5 (the Reuse Permit results in a "gift of approximately 20 CFS of water to Pioneer's Phyllis Canal"). Like Riverside, Pioneer relies on wastewater from others as part of its irrigation water supply. SOF, ¶ 4 (referring to Pioneer's Indian Creek and "drain"-sourced water

rights). Unfortunately, Pioneer's drain-based sources, particularly the Fivemile Drain system providing water to the Phyllis Canal upstream of Nampa are declining. SOF, ¶ 56 (discussing Pioneer water right no. 63-21731 and its utility decline from 76.6 cfs on paper to 30-40 cfs in physical water during the latter half of the irrigation season over the last five seasons). The Reuse Agreement and Reuse Permit present Pioneer a reliable and cost-effective opportunity to offset Fivemile Feeder Canal declines and keep Nampa, its citizens, and other Pioneer landowners downstream whole. The Reuse Agreement and Reuse Permit also support the conservation of water resources. Nampa recycled water discharge to the Phyllis Canal will provide operational flexibility to Pioneer, potentially allowing Pioneer to lessen reliance on stored water supplies needed to backfill Fivemile Drain system declines.

The suggestion that Pioneer will selectively horde and spread Nampa's recycled water throughout the District's larger water distribution system on a whim is unfounded and a physical impossibility. Open, pp. 9-13. As discussed above, while some molecules of water will undoubtedly slip by, Nampa and its citizens are the primary delivery recipients (*i.e.*, beneficiaries) of the 15.0 Lateral system, diverting 32 cfs from the Phyllis Canal within a mile downstream of Nampa's proposed canal discharge point. SOF, ¶¶ 57-59; *see also*, Ex. H, pp. 20-21 (DEQ Staff Memo, Figure 10 and Table 4). 15.0 Lateral system diversions (32 cfs) exceed Nampa's Reuse Permit-based inputs (31 cfs) already, and far exceed the current 18.6 cfs Nampa will discharge in the near future (*i.e.*, Nampa discharges will grow into the Reuse Permit; 31 cfs will not be discharged to the Phyllis Canal from Day One). And, as discussed above, additional Nampa and Nampa citizen diversions within the next two miles of the Phyllis Canal add another 36 cfs—diversions in aggregate far outstripping the 41 cfs contemplated in the

parties' Reuse Agreement at full build-out decades into the future. SOF, ¶¶ 57-59; *see also*, Ex. H, pp. 20-21 (DEQ Staff Memo, Figure 10 and Table 4).

Similarly, Riverside erroneously contends that compliance with the Reuse Permit requires Pioneer to cease wasting (or spilling) water from its canal and lateral system back to Indian Creek. Open, p. 7. Riverside's contention is apparently intended to suggest larger ripple effects and broader hydrologic impacts designed to give the Department pause. However, the spill elimination requirement of the Reuse Permit is far less dramatic than Riverside suggests. This is because the Reuse Permit only requires Pioneer to cease spills to the Moses Drain which, while tributary to Indian Creek, only receives minimal operational spills from the 15.0 Lateral system. Ex. G (Reuse Permit), p. 8 (CA-255-02, eliminating spills to Moses Drain); Ex. H (DEQ Staff Memo), p. 23 (describing the 15.0 Lateral spills (North and South branches) as "this spill" to be eliminated); and Ex. J (Nampa Preliminary Technical Report), p. 7-7 and Figure 9 (identifying the "small operational spill" of the 15.0 Lateral system to Moses Drain as the "spill" to be eliminated through Nampa Non Potable System pump station automation and cross-connection). The larger flow of Moses Drain to Indian Creek, as well as other operational spills throughout Pioneer's water distribution system will remain unaffected by implementation of the Reuse Agreement and the Reuse Permit.[9]

[9] It is also worth noting that Nampa's Non Potable System will be the direct beneficiary of the 15.0 North and South Branch Laterals spill elimination because it will be Nampa pump stations used to eliminate the spills in an area where irrigation water shortfalls routinely exist. Ex. J, p. 7-6 (noting local "shortfalls" and use of groundwater wells and "rotation" to address these deficits, as well as describing the 15.0 Lateral system as one of "perpetual challenge" for the Nampa Non Potable System owing to peak usage creating "low water pressures"). This is no boondoggle. Pioneer and Nampa are working together to solve real, existing problems to their mutual benefit.

Pioneer can no more compel others to waste water for its benefit in the Fivemile Drain system (or any of its other drain systems) than Riverside can compel Nampa to waste for its benefit in Indian Creek. Like Riverside, Pioneer would much prefer that the historic status quo concerning wastewater flow regimes upstream and within it remain intact and robust. But that preference is neither realistic nor attainable. Again, there is no "scheme" here. Pioneer and Nampa are simply trying to absorb and evolve with the hydraulic and regulatory trends occurring within and around them as creatively, cost-effectively, and symbiotically as possible.

## IV.
## CONCLUSION

Perhaps out of municipal water right legal regime naiveté, Pioneer fails to understand the substance of Riverside's Petition. That Riverside prefers Indian Creek flows remain augmented by Nampa WWTP discharges is obvious and understandable. But, Idaho Code Section 42-201(8) is clear, as is over a century of general wastewater principle precedent. Pioneer does not need a water right to contractually receive and land apply recycled water from Nampa's WWTP. And, Riverside has no legally protectable interest in Nampa's effluent stream provided Nampa maintains physical control and dominion over the same. This is not a matter involving the appropriation of otherwise unappropriated water from a natural source. Therefore, the permitting regime of Title 42, Chapter 2 does not apply.

DATED this 30th day of October, 2020.

SAWTOOTH LAW OFFICES, PLLC

By _____
Andrew J. Waldera
Attorneys for Pioneer Irrigation District

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2020, I caused a true and correct copy of the foregoing **INTERVENOR PIONEER IRRIGATION DISTRICT'S RESPONSE TO PETITIONER'S OPENING BRIEF** to be served by the method indicated below, and addressed to the following:

| | |
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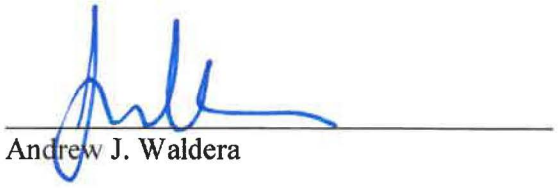

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August 18, 2011

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Garrick:

Thank you for taking my call the other day inquiring as to whether my client, the City of McCall, has authority to land apply water it collects as municipal effluent on lands outside of the city limits under its existing municipal water rights. You suggested that I provide a letter to the Idaho Department of Water Resources ("IDWR" or "Department") setting out the City's understanding of the governing law and seeking confirmation that the City has this authority. This letter is intended to serve that purpose.

The City serves customers within its service area with municipal water rights including the following:

No. 65-10344 (5.13 cfs, 1918 priority, Payette Lake)
No. 65-10345 (2.31 cfs, 1968 priority, Payette Lake)
No. 65-12607 (3.88 cfs, 1983 priority, Payette Lake)
No. 65-13476 (2.23 cfs, 1993 priority, ground water)
No. 65-13796 (6.4 cfs, 1998 priority, ground water)

The Municipal Water Rights Act of 1996 ("1996 Act") defines three categories of municipal provider. The first is "[a] municipality that provides water for municipal purposes to

its residents and other users within its service area." Idaho Code § 42-202B(5)(a). The City plainly meets this definition.

It is a well established principle under the Prior Appropriation Doctrine that an appropriator may recapture water that he or she has applied to beneficial use while it is still under the appropriator's control and re-use that water on lands authorized within the original right. "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 to put it to beneficial use." *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880 (1950). *See also Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980); *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927); and *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952).

This is true even if the re-use reduces the water available to other water users downstream. As Mr. Hutchins noted in his seminal article, an irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

A natural extension of this principle is that cities may recapture their sewage effluent before it reaches a natural water body and may apply that water to additional municipal uses within the original water right. A city's right to recapture and reuse municipal effluent was recognized in *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982). In reaching its decision, the *Reynolds* Court quoted at length from a 1925 decision by the Wyoming Supreme Court directly addressing the right of a city to reuse its wastewater to extinction—in this case by land application. "It is well known that the disposition of sewage is one of the important problems that embarrass municipalities. In order to dispose of it without injury to others, a city may often be confronted with the necessity of choosing between several different plans, and in the selection of the plan to be followed we think it should be permitted to exercise a wide discretion." *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764, 772 (Wyo. 1925). This Wyoming case, in turn, was relied on by the Arizona Supreme Court in reaching a similar conclusion confirming the right to recapture municipal effluent and sell it for cooling water to a nuclear power plant. *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989).

The next question is whether land application is a proper municipal use. The 1996 Act defines municipal purposes broadly:

> "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(6). Although this definition does not expressly identify land application as a municipal purpose, it does include the broad catch-all phrase, "related purposes."

Consistent with this broad definition, the Department's guidance recognizes that land application of effluent may be treated as part of the original water right.[1] This guidance is aimed primarily at land application of industrial effluent. However, the same broad principles would apply to municipal effluent. Indeed, the 2009 guidance expressly references municipal land application, as well as land application of industrial and other effluent. Transfer Processing Memo No. 24, § 5d(9) at 31.

Other parts of the guidance specifically provide that in order to be considered part of the same beneficial use as the underlying water right, the land application must be undertaken to meet mandatory regulatory requirements. "Waste water treatment necessary to meet adopted state water quality requirements will be considered to be part of the use authorized under the industrial right." Application Processing Memo No. 61, § 1 at 3.[2] The City's land application was undertaken as a direct result of compliance obligations under section 402 of the federal Clean Water Act.[3] Accordingly, land application by the City of McCall is a proper municipal purpose encompassed by its municipal water rights.

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[1] Two guidance documents were issued by the Department in 1996. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* (Sept. 5, 1996); Norm Young, IDWR, *Administrator's Memorandum – Application Processing No. 61* ("Application Processing Memo No. 61") (Sept. 27, 1996). This guidance has been modified to some extent by a broader guidance document, *Transfer Processing Policies & Procedures* ("Transfer Processing Memo No. 24") (revised Dec. 21, 2009).

[2] Note that the requirement for a transfer application stated in Application Processing Memo No. 61, § 3 at 3 has been overridden by the more recent guidance in Transfer Processing Memo No. 24, at 3 n.1. Accordingly, no transfer application is required where the land application occurs on lands that were previously cultivated with a full existing water right. Transfer Processing Memo No. 24, § 1 at 3, § 2 at 7, § 3(6)(g)(ii). Such is the case here.

[3] In 1996, the Environmental Protection Agency ("EPA") issued an NPDES permit to the City and the Idaho Department of Environmental Quality ("DEQ") issued a section 401 certification for that permit, both of which imposed a zero discharge limit for phosphorous. The zero discharge was driven by the Cascade Reservoir Watershed Management Plan issued by DEQ on October 1, 1995. This plan was the functional equivalent of a TMDL (total maximum daily load) required by section 303(d) of the Clean Water Act. EPA approved the TMDL in May of 1996. The TMDL requires a 37% reduction in the overall phosphorous load, with the City's load allocation set to zero.

The permit established a compliance schedule for the zero discharge limit. The City filed an administrative appeal of the 401 certification with DEQ. This resulted in the first of four consent orders being issued on July 27, 1998.

The City then went to work on a land application system to achieve the requirements imposed by the permit and the consent orders. This effort resulted in a *Three-Way Agreement* among the City, the Lake Irrigation District (which owns legal title to the water rights used for mixing), and the J-Ditch Pipeline Association (which I believe was responsible for constructing and maintaining the distribution system that leaves the mixing station to deliver enhanced irrigation water to the farmers). The *Three-Way Agreement* contemplated individual contracts between the farmers and the City. A series of 20-year *Water User and Supply Agreements* were executed in 1997, which remain effective through 2016.

The next question is whether the land application may occur beyond McCall's city limits. This is addressed by the 1996 Act which expressly authorizes municipal providers to serve within a flexibly-defined service area. That authority is found in two places.

First, it is noted in the definition of "municipal purposes" quoted above, which states that the municipal purposes include uses "located outside the boundaries of a municipality served by a municipal provider." Idaho Code § 42-202B(6).

Second, the term "service area" is defined by the 1996 Act as follows:

> "Service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

Idaho Code § 42-202B(9) (emphasis supplied). This definition expressly authorizes service outside of a city's service area so long as two conditions are met.

First, the land application must be "within the municipality's established planning area." "Planning area," however, is not a defined term. It is an informal term generally understood to refer to the area used by a city for water rights planning purposes as it plans for current and future water requirements.[4] In other words, the 1996 Act requires that land application outside the city limits must be undertaken as part of a city's long-term water planning effort. Given the long history of development of this project within the context of environmental regulatory requirements (see footnote 3), this condition is satisfied.

Second, in order to satisfy the requirement that "the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits," it should be sufficient to demonstrate that the land application is physically connected via pipeline or other artificial conveyance with the City's wastewater collection and treatment system. For example, it could not be viewed as part of the original water right if the effluent

[4] The term "planning area" in the 1996 Act should not be confused with the city's "area of city impact." The latter is a distinct term meaningful in the context of annexation rules under the Local Land Use Planning Act, Idaho Code § 67-6526.

were placed into a natural stream and diverted later for land application.[5] McCall's treated effluent is completely contained and controlled within a series of pipes or other artificial conveyances from the place where the sewage is captured to the place where it is land applied. It is of no consequence that some or all of these conveyance and delivery systems are owned by others so long as the land application is undertaken pursuant to contract or other agreement with the City. Accordingly, this condition is satisfied as well.

The only other statute potentially bearing on the question of municipal water uses outside of the City's city limits is Idaho Code § 50-323. It provides:

> Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same to the inhabitants of the city; and to do all things necessary to protect the source of water from contamination. The term "domestic water systems" and "domestic water" includes by way of example but not by way of limitation, a public water system providing water at any temperature for space heating or cooling, culinary, sanitary, recreational or therapeutic uses.

Idaho Code § 50-323 (emphasis supplied). This does not impose any limitation. The authorizing clause ("Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems") is not limited to the city limits. Moreover, treatment of municipal effluent through land application would fall under the final clause ("to do all things necessary to protect the source of water from contamination"), which is not limited geographically.

For these reasons, it is my conclusion that the City of McCall is authorized to land apply its captured municipal effluent on lands outside of the city limits, and such use is authorized under the City's existing municipal water rights without need for transfer. This conclusion is premised on my representations to you in this letter that the land application is mandated by environmental requirements, that the lands on which the land application occurs were previously served by full existing water rights, and that the City has authority via contract or otherwise to land apply on these lands.

The City believes that these conclusions are fully consistent with the principles of optimum utilization embodied in Idaho's constitution. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). It is in the public interest to encourage well-designed land application projects that enable cities to meet increasingly strict environmental requirements at

[5] This is consistent with the law elsewhere in the West. In *City of San Marcos v. Texas Comm'n on Envt.l Quality*, 128 S.W.3d (Texas Ct. App. 2004), the Texas Court of Appeals found that the City of San Marcos did not have the right to recapture its wastewater effluent in a river three miles downstream of the sewage treatment plant.

lower cost while promoting water conservation and facilitating additional beneficial use of water. Idaho's water law fully accommodates such undertakings.

As we discussed, I would very much appreciate your review, on behalf of the Department, of the conclusions reached in this letter. I look forward to hearing back from you in that regard. Thank you in advance for the time and effort you, the Acting Director, and others at the Department have invested in this review. It is important to the City to have clarity on these issues.

Sincerely,

Christopher H. Meyer

cc: Gary Spackman
Jeff Peppersack
John Westra
Steve Lester
Lindley Kirkpatrick

CHM:ch

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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 7, 2011

Christopher H. Meyer
Givens Pursley LLP
601 West Bannock St
P.O. Box 2720
Boise, ID 83702

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Chris:

This responds to your letter of August 18, 2011 requesting confirmation that the City of McCall ("City") has authority to land apply its municipal effluent to lands located beyond the city limits but within the City's service area. I have reviewed your letter with staff of the Idaho Department of Water Resources ("IDWR") and am able to confirm that on the issue of whether municipal reuse of waste water comes within the original use of the municipal right, your analysis is consistent with current IDWR policy. Waste water treatment necessary to meet adopted state water quality requirements is considered by IDWR as part of the use authorized under a municipal right so long as the treatment process complies with the best management practices required by the Idaho Department of Environmental Quality, the U.S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction. For new uses of municipal waste water that are not necessary to meet water quality requirements, an application for permit to appropriate water should be filed as required by Idaho Code § 42-202.

One concern raised by IDWR relates to your analysis of the place of use for a municipal provider. As you correctly recognize, the Municipal Water Rights Act of 1996 expressly authorizes municipal providers to serve within a "service area" that may include lands "located outside the boundaries of a municipality served by a municipal provider." Idaho Code § 42-202B(6). The term "service area" is defined by the 1996 Act as follows:

> "Service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common

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> water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

Idaho Code § 42-202B(9) (emphasis supplied).

Under this statute, only if the constructed delivery system for the area outside the city limits shares a common water distribution system with lands located within the corporate limits, may the area outside the city limits be considered part of the city's service area. In the City's case, the Department understands that the City uses a series of privately owned irrigation ditches to transport effluent to lands outside the city limits. The Department has questions regarding the process in which the City delivers effluent to the lands outside the city limits. A measure of control and supervision is at least implied for a delivery system to be considered a "common" water distribution system. The Department does not have a complete understanding of how the effluent is tracked and delivered by the City. In short, the Department would need a better understanding of the City's actual delivery process to be able to answer whether the use of private irrigation ditches by the City would satisfy Idaho Code § 42-202B.

The Department would be happy to meet with you and your clients to discuss this matter further. Let me know if you would like to set up a meeting.

Sincerely,

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources

cc: Gary Spackman
Jeff Peppersack
John Westra
Steve Lester

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September 16, 2011

Garrick L. Baxter
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322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
garrick.baxter@idwr.idaho.gov

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Garrick:

Thank you for your letter of September 7, 2011. I am writing to respond to your request for more information on the delivery system used by the City of McCall for its land application. I have spoken with Peter Borner, the City's Public Works Director. Mr. Borner has confirmed the following facts:

The City owns and operates its wastewater treatment facility near the edge of town. Water is piped from the wastewater treatment facility to another facility known as the mixing station located on leased land approximately three miles south of the City. The City owns, operates, and controls the water treatment facility, the mixing station, and the pipe carrying the water from the water treatment facility to the mixing station.

The purpose of the mixing station is to add irrigation water to dilute the treated effluent from the wastewater treatment plant prior to land application. The irrigation water is provided under other water rights not owned by the City. The diluted effluent is then piped directly to center pivots or other delivery systems on farms under contract with the City for land application. The piping from the mixing station to the farms is owned by irrigation entities and/or the farmers themselves.

It is my understanding that the chief concern of the Department is that the treated effluent be under the physical control and direction of the City or others throughout the delivery process, and that the water not simply be used to augment the water supply of an irrigation district without the ability to determine which land actually receives the effluent. I can assure you that the City's system satisfies this requirement.

Based on this additional information, the City would appreciate receiving confirmation from the Department that its use of its municipal wastewater for land application as described in this letter and my letter of August 18, 2011 is a municipal use falling within the scope of its municipal water rights.

I thank you, Mr. Spackman, Mr. Peppersack, and Mr. Westra for your attention to this inquiry.

Sincerely,

Christopher H. Meyer

cc: Gary Spackman
Jeff Peppersack
John Westra
Steve Lester
Lindley Kirkpatrick
Peter Borner

CHM:js

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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 19, 2011

Christopher H. Meyer
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P.O. Box 2720
Boise, ID 83702

Re: City of McCall - Land application of municipal effluent outside of city limits

Dear Chris:

Thank you for your letter dated September 17, 2011. You letter alleviates the Department's concerns regarding the City of McCall's effluent distribution system. Based upon the representations in your letter, the Department agrees that the lands served outside the City of McCall's corporate limits share a common water distribution system with lands located within the corporate limits. So as long as the City of McCall is land applying its captured municipal effluent as part of a treatment process to meet adopted state water quality requirements (this issue was discussed in my letter to you dated September 7, 2011), the Department agrees that the use (and location) is in conformance with City of McCall's municipal water right.

Sincerely,

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources

cc: Gary Spackman
Jeff Peppersack
John Westra
Steve Lester

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