BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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

RIVERSIDE'S REPLY IN SUPPORT FOR PETITION FOR DECLARATORY RULING

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I. INTRODUCTION

The City of Nampa and Pioneer Irrigation District have hatched a scheme that allows Nampa to avoid some water quality standards during a part of the year by providing effluent to Pioneer that Pioneer will then deliver to 17,000 acres of Pioneer land. Some of these 17,000 acres are in Nampa's service area, but the vast majority are in the City of Caldwell and beyond.

Nampa claims the right to carry out this plan without any IDWR review or approval because of Nampa's privileged status as a municipality. Nampa asserts the terms and conditions of its potable water rights are irrelevant in determining what it can and cannot do with the water. Nampa also claims that the source of the water as ground water is irrelevant. In effect, Nampa claims title to the water to do with as it pleases.

Pioneer claims no special immunity from Idaho water law. It intends to take, manage and convey Nampa's effluent to Pioneer's land owners. It admits taking Nampa's effluent is like diverting any other drain water. Exhibit S, at 29 of 50.[1] Pioneer is not a municipality with a statutory right to reuse effluent for water quality purposes. Rather Pioneer is content to piggy-back and rely on whatever rights Nampa might have.

The other Municipal Intervenors are not in the same boat that Nampa and Pioneer are proposing to build[2]. However, they assure the Department that if the Director green-lights the Nampa-Pioneer scheme, then they may embark on similar ventures in the future. This warning sign is a signal that the Director must carefully examine the water right implications of the Nampa-Pioneer scheme to irrigate Pioneer's land to ensure that it complies with Idaho law and does not

[1] Citations to Exhibits refer to the page number of the Exhibit, not the internal page number of the document where the Exhibit contains multiple documents.

[2] The City of Caldwell claims that it has discussed discharge of effluent to Riverside's canal. Caldwell has never brought such a proposal to the Riverside Board.

usurp State control over the State's water resources. This is important because under Idaho law, control of water in Idaho vests in the State and the State must, in providing for the use of the waters of the State, "equally guard all the various interests involved." Idaho Code § 42-101. Such a careful examination will reveal that Nampa's proposal to gift the effluent to Pioneer requires an appropriate water rights proceeding.

II. RIVERSIDE'S PETITION ASKS THE DIRECTOR TO DETERMINE THAT PIONEER MUST OBTAIN A WATER RIGHT BEFORE ACCEPTING NAMPA'S EFFLUENT

In response to Riverside's Opening Brief outlining the issues of the case, the Intervenors submitted a blizzard of paper and exhibits. None of the exhibits were included among the stipulated exhibits that the parties worked so hard to identify and stipulate to at the beginning of this proceeding.[3] Most of what is said in response to Riverside's Opening Brief and the Petition is devoted to claiming that cities have virtually unlimited control over water they pump, that cities are not constrained by the plain language of their water rights and that cities have complete control over reuse of the water anywhere they chose to send the water. Undoubtedly the Intervenors would like to make cities' rights the focus of this proceeding. However, Riverside petitioned the Department to make two rulings.

> "a. Pioneer cannot divert or accept water from the City or apply any of that water to land in the Pioneer district boundaries under this Reuse Permit without first obtaining a water right.

[3] The *Stipulation Regarding Exhibits A-T and Other Evidence* was submitted to the Department on September 11, 2020. This *Stipulation* recognized that the Parties might want to submit additional facts or information. *Stipulation* p. 4. Accordingly the Parties established a protocol for offering additional information. The *Stipulation* provided that facts or information eligible for notice under IDAPA 37.01.01.602 could be considered by requesting that the hearing officer take judicial notice under IRE 201. *Id.*

Here Intervenors attached 150 pages of information. Yet Intervenors failed to request that the hearing officer take judicial notice and failed to explain how the attachments qualified for judicial notice under IRE 201. For their failing to comply with stipulated procedures and law. Intervenors' attachments should be disregarded

b. Any attempt by Pioneer or the City to divert water under the Permit to Pioneer without applying for a water right is in contravention of Idaho law."

Riverside's Petition for Declaratory Ruling, at. 3 (emphasis added).

Riverside's Petition is directed at the lack of legal authority for Pioneer to divert Nampa's effluent without any IDWR review and supervision.

III. THE UNDISPUTED FACTS SHOW THAT THE REUSE PERMIT REQUIRE PIONEER TO USE NAMPA'S EFFLUENT ON 17,000 ACRES OF PIONEER LAND, MOST OF WHICH IS BEYOND NAMPA'S BOUNDARIES

The facts underlying this petition are not in dispute. Nampa and Pioneer have entered into an agreement entitled a "Recycled Water Discharge and Use Agreement" (Reuse Agreement), dated March 7, 2018. Exhibit F. Under the Reuse Agreement, Nampa agrees to deliver and Pioneer agrees to accept up to 41 cfs of effluent from Nampa's Waste Water Treatment Plant (WWTP) into Pioneer's Phyllis Canal. Nampa proposes to convey this water by pipe directly from its WWTP to Pioneer's Phyllis Canal. From that point of diversion on the canal, Pioneer will deliver the water to Pioneer Irrigation District land owners who have the right to receive water from Pioneer through the Phyllis Canal.[4] Exhibit F. Under Section 4 of the Reuse Agreement, Nampa is responsible for plumbing, and the maintenance of the plumbing, from the Waste Water Treatment Plant to the canal. Exhibit F. There Nampa's plumbing ends. Section B (3) of the Reuse Agreement provides that "Pioneer will handle, manage and convey discharged Recycled Water as an integrated part of its irrigation operations." Exhibit F. Notably the Reuse Agreement provides that it is the entire agreement between Nampa and Pioneer over the receipt and use of the effluent from Nampa's Waste Water Treatment Plant. Exhibit F, Section C (10).

[4] Attached to Riverside's Reply Brief is Attachment A from Riverside's Opening Brief with the addition of boundaries shown in Exhibit K (Map Showing Irrigation Districts within Nampa's Area of City Impact) added for reference.

Thus it is undisputed that Pioneer is in charge of and accepts and maintains control over the effluent once diverted into the Phyllis Canal. The record is clear and the parties do not dispute that the Reuse Permit requires this effluent water to be applied to 17,000 acres of Pioneer land downstream of the point of discharge into the Pioneer's Phyllis Canal.[5] Exhibit J. Indeed, spreading that water over the entire 17,000 acres was an important consideration for the approval of the Reuse Permit. *See* Exhibit J, *Preliminary Technical Report*, Section 4 "Land Application Site." This section describes "the land application site" as "[t]he Pioneer Irrigation District (PID) service area downstream from the proposed recycled water discharge site." *See also* Figure 3 (Area of Analysis). Section 4 refers to the crop types in the area of analysis. Section 9 of the Preliminary Technical Report shows the crop types within Pioneer's 17,000 acres. *Id.* Section 9, at 74 of 259. Nampa's engineers, Brown & Caldwell, also provided mapping showing the flow of water through Pioneer's system, west to Greenleaf (Figure 8 of Exhibit J) and crop coverage in the area of analysis. Figure 12 of Exhibit J. Neither Pioneer nor Nampa disputes the fact that use across the entire 17,000 acres was an important factor in Nampa's application and DEQ's approval of the Reuse Permit.

Another important consideration here that is not disputed by Nampa or Pioneer is the fact that Pioneer intends to use this effluent water as a "supplemental" water supply for its existing irrigation obligations. *Stipulation of Facts* (SOF) 49. Pioneer admits it has no water right for this supplemental water source. *SOF* 35. Nampa does not have any plumbing enabling Nampa to deliver any of this effluent water to the 17,000 acres of Pioneer land. *See* Exhibit F, Section B (3) and Exhibit R, at 4. The land where the reuse water is land applied is served by Pioneer, and

[5] Pioneer has other land in both the City of Nampa and City of Caldwell's impact areas that are served under the Caldwell Highline by the Caldwell Highline Canal. These lands are north of Nampa and north east Caldwell. Exhibit H, p. 29 of 58. But that land is not within the area of land application under the reuse permit. *See* Exhibit H, Figure 3 (attached to Riverside's Opening Brief).

includes "much of the City of Caldwell." *SOF 2*. Nampa does not contend that the land in "much of the City of Caldwell" is within the City of Nampa's service area or that Nampa has the right or ability to supply water within the City of Caldwell city limits or within the City of Caldwell's impact area under Nampa's water rights.[6] Attachment A to Riverside's Opening Brief shows that most of the lands that are to receive Nampa's effluent water are either in the City of Caldwell, its impact area or areas to the west of the City of Caldwell as far as Greenleaf and far beyond any conceivable reach that Nampa might have. *See* Exhibit J, Figure 3. Exhibit K, a map showing Nampa's municipal irrigation system and irrigation districts within Nampa's and Caldwell's areas of impact, also shows the demarcation between Nampa and Caldwell areas of impact. Nampa is hemmed in on the west by Caldwell, on the north by Middleton, on the east by Meridian and on the south by Lake Lowell. Exhibit K. Nampa may be able to expand its service area south of the lake, but that area south of the lake is not within the "land application site" in the Reuse Permit.

DEQ's response to comments from Riverside and the Reuse Permit itself make it clear that Nampa's obligation and its plumbing ends at what DEQ calls "the point of discharge," which is the discharge by Nampa to Pioneer's Phyllis Canal. Nampa must maintain the equipment and the structure up to that point, where Nampa is subject to DEQ inspection and engineering review. After that point of discharge "the water is considered to be irrigation and is no longer regulated by DEQ." Exhibit R, at 4. Having convinced DEQ that the water, once it reaches the canal, is "irrigation water" and no longer Nampa's effluent subject to DEQ regulation, Nampa and Pioneer cannot argue that this water is anything other than Pioneer's irrigation supply. Exhibits D and J both contain Figure 8 of Nampa's application. This Figure 8 shows numerous City of Caldwell diversions from Pioneer's canal. DEQ Staff Analysis describes that use "via the Phyllis Canal", as "use [of] that

[6] Nor does the City of Caldwell as a member of the municipal intervenors group, assert that the City of Nampa has the right to deliver water under Nampa's water rights within the City of Caldwell city limits or its impact area.

water for irrigation by the users of that canal network." Exhibit H (Executive Summary) at 9. DEQ further explains that Nampa will meet Class A requirements "prior to the use of recycled water to augment Phyllis canal irrigation water." *Id*. at 10.

Pioneer then puts the final nail in its coffin. Pioneer agrees that Nampa's control over the effluent ends at the proposed point of discharge in the Phyllis Canal. *Pioneer Response Brief*, at 15. Idaho Code § 42-110 makes it clear that water is the property of the appropriator only so long as the water remains under the appropriator's "physical control." Since, as Pioneer argues, Pioneer assumes control of the effluent once it is in the Phyllis Canal, the water is Pioneer's irrigation water, not Nampa's effluent.

The record could not be more clear. Nampa proposes to deliver effluent to Pioneer, and Pioneer takes control of that water where it enters the Phyllis Canal and delivers that water as an augmentation to Pioneer's water supply which Pioneer then delivers to its landowners under Pioneer's water delivery system. But Pioneer admittedly has no water right for this water supply. And Nampa's water rights don't allow delivery of that water to Pioneer.

IV. PIONEER'S WATER RIGHTS DO NOT IDENTIFY NAMPA'S GROUND WATER OR NAMPA'S WWTP AS A SOURCE OF PIONEER WATER RIGHTS

Pioneer's water rights are listed in Exhibit P. *SOF* 4. The sources for those water rights include the Boise River, Indian Creek, Wilson Drain, Mason Creek Drain, Five Mile Creek Drain, Pipe Gulch Draw Creek Drain, Elijah Drain and certain ground water wells. *Id*. Pioneer's acceptance and delivery of Nampa's effluent throughout Pioneer's downstream district boundaries will result in Pioneer's delivering water for irrigation beneficial use even though Pioneer has no water right identifying Nampa's ground water as the source of that water. None of Pioneer's rights identify Nampa's wells or Nampa's WWTP as a source of water for Pioneer,

and neither Pioneer or Nampa contend they do. Intervenors argue that this failure can be rectified by the filing of a notice form with IDWR. *See e.g. Pioneer's Response Brief*, "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.'" *Pioneer Response Brief*, at 5 (quoting Idaho Code § 42-201(8)).

Whatever notice Nampa is obligated to provide to IDWR does nothing to change Pioneer's water rights. Allowing Pioneer to deliver water to be put to beneficial use by its landowners when Pioneer has no water right for that water, and when none of its water rights includes it as a source, is contrary Idaho law. "One purpose of the SRBA is to establish ... a uniform description for surface water rights, ground water rights and water rights which include storage." *Rangen, Inc. v. Idaho Dep't of Water Res*., 159 Idaho 798, 806, 367 P.3d 193, 201 (2016) (quoting Idaho Code § 42–1427) (internal quotations omitted). "Any interpretation of [the] partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments…." *Id*. Likewise, in *First Security Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 743, 451 P.3d 446, 456 (2019), the Court stated that the legislature directed that decrees must contain all elements of a water right.

The Idaho Supreme Court in *Rangen* rejected Rangen's argument that its decree did not match its "historical use" because accepting that argument would constitute "an impermissible collateral attack on the decrees." *Rangen, Inc. v. Idaho Dep't of Water Res*., 159 Idaho at 798. Therefore, the Supreme Court held that "Rangen's partial decrees entitle it to divert only that water emanating from the Martin–Curren Tunnel and only within the decreed ten-acre tract." *Id.* at 806. In other words, a water user's use of water is strictly limited to the language of the elements in the decrees, including the source of water and the place of use.

There is no dispute, Pioneer's water rights do not authorize Pioneer to deliver this supplemental water. Delivery of the effluent to Pioneer without a water right identifying the source of that water would violate settled law. Under *Rangen*, Pioneer's partial decrees "entitle it to divert" only the sources of water identified in those decrees and only within the place of use of those partial decrees.

V. THE SOURCE OF NAMPA'S EFFLUENT IS GROUND WATER

Nampa's effluent comes from its potable system, and is supplied by Nampa's ground water rights. *SOF* 9; *Nampa's Response Brief*, at 31. Nampa's effluent is primarily treated sewage derived from its ground water rights. Some additional water from outside sources is introduced to the WWTP and becomes part of the effluent discharge. *SOF* 25.

In *A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist*., the Idaho Supreme Court rejected the contention that water sourced from ground water can be somehow "transformed" into "something else as it is collected." *A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist*., 141 Idaho 746, 753, 118 P.3d 78, 85 (2005). "The thrust of A & B's position is that even though water originates as ground water, the water is legally and factually changed once collected in A & B's drainage system." *Id*., at 750. Rejecting this argument, the Court found:

> The water in this case in large part derives from ground water. It can be identified as such from the time it is pumped from the ground until it collects in A & B's ponds and/or drains. It would be anomalous to treat the water as ground water so long as it is pumped directly from the ground to the field but transform it to something else as it is collected. To the extent that the source of appropriated water can be identified, it retains that characterization.

Id.

Applying *A&B* to Nampa's potable water rights, the inescapable outcome is that the water pumped under those water rights remains ground water. It is not transformed into

something else when collected at the waste water treatment plant. As the Court concluded, "[t]o the extent that the source of appropriated water can be identified, it retains that characterization." *Id*. Nampa's potable water rights are collected by Nampa from its sewage collection system with some comingling of additional water. *SOF* 23, 25. The limited comingling of the potable water rights with additional water does not transform the ground water into something else under *A&B*. The end result under the Reuse Agreement and the Reuse Permit is that Pioneer is delivering Nampa's ground water to Pioneer's landowners, which under Idaho law it cannot do without a new water right.

VI. NAMPA'S POTABLE WATER RIGHTS ARE DISTINCT FROM ITS WATER RIGHTS FOR IRRIGATION USE

The Intervenors contend that the nature and scope of Nampa's water rights do not matter. *See e.g. Municipal Intervenor's Response* "… an irrelevant focus on the source and purpose elements of Nampa's water rights…" *Municipal Intervenor's Response Brief* at 8; *see also* "Riverside engages in a seven-page analysis of the nature and scope of Nampa's water rights…. the nature and scope of Nampa's water rights are irrelevant." *Nampa's Response Brief* at 48.

There is no dispute that the water rights for Nampa's potable water supply state that the water is for use in Nampa's potable water system. *See e.g*., water right 63-2779, Condition #1. ("This right is part of the potable water delivery system for the City of Nampa"). Nampa says that this condition describing the right as part of the potable water system only refers to the wells identified in the water right and not to the water right itself. *Nampa Response Brief*, at 50. The fact is that potable water has a clear and unambiguous meaning – "drinking water." *See* IDAPA 37.03.09.010.43. (Definition of potable water as water suitable for human consumption). In other words, the term "potable water" refers to the use to which the water is put – drinking water. *See City of Marshall v. City of Uncertain*, 206 SW 3.d. 97 (Tex 2006) (change from potable

purpose of use to supply industrial use required a hearing to assess effects of change in purpose use.) *See Rosetto Inc. v. US*, 64 F Supp 2.d 1116 (D.N.M. 1999) (right to use potable water does not allow use of water for a heat source).

Nampa's potable water rights are not decreed for pressurized irrigation unlike Nampa's non-potable water rights. *SOF* 8. Nampa has a separate delivery system for its potable water. *SOF* 8. This potable water system is separately supplied by many wells and water rights. *SOF* 9. Nampa's non-potable system is entirely separate. A majority of water for its non-potable system is supplied by irrigation districts. *SOF* 13-16. Nampa's non-potable system supplies pressurized irrigation water. *SOF* 8. Therefore, to supply Nampa's potable water to Pioneer for Pioneer to use as supplemental irrigation water (Exhibit R, at 4) is an expansion of Nampa's potable water rights.

VII. NAMPA'S WATER RIGHTS DEFINE THE PLACE OF USE AS WITHIN NAMPA'S SERVICE AREA

In arguing that Nampa's effluent can be discharged to the Phyllis Canal and subsequently land applied in Pioneer's district boundaries, the Intervenors completely disregard the place of use description in Nampa's potable water rights, which specifies "[p]lace of use is within the service area of the City of Nampa municipal water supply system as provided for under Idaho Law." *See, e.g.*, water right 63-02779 (emphasis added). The plain language of Nampa's potable water rights restricts the place of use to use within Nampa's "municipal water supply system."

It is an even further stretch to propose applying water appropriated under the potable water rights to lands within Pioneer's district boundaries. Pioneer's place of use is not referenced within the four corners of Nampa's potable water right decrees. Nampa and Pioneer argue that the Director can simply ignore this fact because there is crossover between Nampa and Pioneer water users. *SOF* 57-60. That it is simply not the law of water administration in Idaho. Nampa

admits as much in its *Response Brief*, "the obligation to return unused water to the public supply is counterbalanced by the equally important principle that an appropriator may recapture and reuse water previously diverted so long as the reuse occurs within the bounds of the original water right." *Nampa Response Brief*, at 32 (emphasis added). The proposed actions under the Reuse Agreement that take place outside Nampa's service area are clearly not "within the bounds of [Nampa's] original water right." *Id*. *See also Nampa's Response*, "Simply put, water that is lawfully recaptured and beneficially reused within the scope of the original water right is not 'unused' water that must be returned to the common supply." *Nampa's Response Brief*, at 32 (emphasis added). Here there is no dispute that most of the land application area of use is far outside Nampa's boundaries. *See* Exhibit J, Figure 3 and Exhibit K.

VIII. NAMPA PROPOSES EXPANDING ITS WATER RIGHT BY DELIVERING EFFLUENT TO PIONEER FOR USE OUTSIDE NAMPA SERVICE AREA

Nampa acknowledges that, "the right to recapture and reuse waste water does not override other principles of law, such as the rule against enlargement." *Nampa Response Brief*, at 33. Nampa then flips and argues that this rule does not apply to Nampa, contending, without authority, that "the no-enlargement limitation imposes little if any constraint on reuse of municipal rights, which may be used and reused to extinction within a flexible and expanding service area." *Nampa Response Brief*, at 34. But Nampa's "flexible and expanding service area" is not without bounds. Nampa's current area of impact has little, if any, room to expand. *See* Exhibit K. Further, the facts are clear that Pioneer will not use this water exclusively in Nampa's "flexible and expanding service area." Rather Pioneer intends to use it on 17,000 acres of Pioneer land, and most of that land is far outside Nampa's service area.

The Supreme Court's decision in *A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist.*, demonstrates that, under Idaho law, Pioneer's proposed use of Nampa's ground

water collected in the Waste Water Treatment Plant constitutes an enlargement. Nampa's potable water rights undoubtably retain their ground water character. In *A&B*, the Court made it clear that any distinction between waste water and ground water does not provide an end run around the rule against enlargement.

The Court in *A&B* conducted enlargement analysis of the water that A&B had collected, treating that water as both waste water and ground water. Looking first to waste water and the analysis provided in *Jensen v. Boise -Kuna Irrigation Dist.*:

> '… no attempt was made by the directors to obligate the district to deliver or make available to the plaintiffs any of the water or water rights owned by the district, and available, appurtenant *and dedicated to lands within the district*.' [*Jensen*]. at 141, 269 P.2d at 759–60. This finding distinguished between 'dedicated sources,' such as ground water, or the lake water in *Jensen*, and 'seepage or waste waters' which the district granted the Jensens the right to use. *Jensen* is consistent with *Hidden Springs Trout Ranch* and *Sebern* that drain, waste and/or seepage waters may be appropriated.

A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist., 141 Idaho 746, 751, 118 P.3d 78, 83 (2005) (emphasis in *A&B Order*). The Court noted that while the "majority of water used to irrigate A & B's enlarged acres comes from a series of drains that collect excess irrigation water appropriated under water right no. 36–02080, similar to the water at issue in *Jensen*" *A & B*, at 751, 83, a "key factor in determining A & B's enlargement source was where the water originated." *Id*.

The Court acknowledged that, under the "logic of *Jensen*, the source of water for A & B's enlarged acres could be drain and/or waste water", however, "treating the water as recaptured drain and/or waste water would not accomplish the purpose [A&B] seeks." *Id*.

> A & B is not seeking to expand the number of acres it irrigates with original ground water under right no. 36–02080. Rather, it relies on an unappropriated source, that of recaptured drain and/or waste water to irrigate its additional acres. This is in violation of the mandatory water permit requirements. Idaho Code § 42–229 (2003). Treating the

> water as something other than ground water, A & B must seek a new water right for this water source prior to any further use on the 2,363.1 acres.

Id. at 752. *See also FN 1* from the above quote, ("As noted by the district court, the drain and/or waste water does not qualify as a private water source. To use this water, appropriation under the mandatory permit scheme is the only method by which this water can now be put to beneficial use.") *Id*. The result is that A&B could reuse the water on "its original appropriated lots" but not on the new acres without leading to an enlargement. *Id*. The Court then examined the consequence of treating the collected water as A&B's ground water and concluded that allowing A&B to expand the use to irrigate new acres would be an unlawful expansion of A&B's ground water rights. Ultimately the Court held that A&B's water source for this water was its original ground water right. *Id*., at 753.

Pioneer misunderstands the application of *A&B* to Nampa's water use proposal. Pioneer seems to think that comingling of other water with A&B's recaptured ground water was what triggered the Court's decision in A&B. *Pioneer Response Brief*, at 15. That was not the basis for the Court's decision. A&B argued to the Court that the comingling of other waters with the ground water transformed the water into waste water. *A&B*, 141 Idaho at 750, 118 P.3d at 82. While the Court examined both possible sources, it ultimately held that the water remained ground water despite the comingling argument of A&B. *Id*., at 753. Moreover, contrary to Pioneer's claim, (*Pioneer Response Brief*, at. 15) Nampa's effluent, like A&B's collected water, includes water from other comingled sources. *SOF* 25.

Pioneer then claims that there is no irrigation of new ground with Nampa's ground water and that fact distinguishes *A&B* from this case. *Pioneer Response Brief*, at. 17. While there do not appear to be plans to irrigate new ground with new surface water rights under the Reuse

Agreement, the facts are clear that 17,000 acres of Pioneer land will receive a "supplemental" or "augmented" irrigation supply. As in *A&B,* these acres are not covered by Nampa's water right.

Nampa and Pioneer assure the Department that it needn't be bothered at a "molecular" level with where the effluent goes after it is delivered to Pioneer because many Nampa citizens are also Pioneer landowners. *Pioneer Response Brief* at 17, 21; *Nampa Response Brief*, at 46, 48. But of course, where the water goes and how it is used is the very purpose of Idaho's system of water administration. *See e.g*. Idaho Code § 42-101; § 42-201(1). Even so, Intervenors' positions are contradictory. On one hand, Nampa argues that delivery of effluent to Pioneer can be seen as an expansion of its municipal boundaries, suggesting "the Department may view all of Pioneer's district lands as part of Nampa's expanded service area..." *Nampa Response Brief*, at 48. Saying so doesn't make it true. Indeed, Nampa cites no authority to support the claim that it has taken over 17,000 acres of Pioneer's land into its service area. Nampa doesn't claim that its municipal irrigation agreements encompass any of these areas. *See SOF* 19, Exhibits L – O. Certainly nothing in Nampa's water rights suggests this possibility. *See* Section IX below. On the other hand, Nampa asks the Department to pretend that Pioneer is only delivering the effluent back to Nampa within Nampa's current boundaries, "the Department may view the effluent as being applied to Nampa's own customer base. *Id*. Both Nampa and Pioneer admit that there is no way of assuring which molecules (effluent or non-effluent) are delivered to Nampa. *Nampa Response Brief*, at 46-47. *Pioneer Response Brief*, at 17 and 18 (admitting that Pioneer can't guarantee delivery of the water Nampa discharges will go to Nampa citizens). The difficulty with this argument is that it is directly contrary to the terms of the Reuse Permit which anticipates and requires delivery of the water across all 17,000 acres. *See* Exhibit G.

The Department, Nampa advises, should just go along with this cavalier water spreading of Nampa's effluent because "it will save the good citizens and customers of Nampa many millions of dollars." *Nampa Response Brief*, at 11. However, saving money is not one of the criteria for determining when a water right or transfer is necessary. If it were, there would never be a water right or transfer, as they all cost money. The Department should not be so casual with the accounting of water and its lawful distribution. Idaho statutes and case law make it clear that the nature and scope of water rights even municipal water rights do matter. *See City of Pocatello v. Idaho*, 152 Idaho 830, 152 P.3d 845 (2012)*; City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017).

IX. MUNICIPAL USE DOES NOT INCLUDE USE OUTSIDE NAMPA'S SERVICE AREA BOUNDARIES ON PIONEER'S 17,000 ACRES

Nampa asserts that "changes in consumptive use, in themselves, do not require a transfer application." *Nampa Response Brief*, at 38, citing Idaho Code § 42-202B(1). Nampa then claims that because municipal use is "allowed to be 100 percent consumptive, it necessarily follows no transfer is required for reuse of municipal water so long as the reuse occurs within in the broadly-defined bounds of the municipal water right." *Id*. No matter how "broadly-defined" the bounds of Nampa's potable water rights, the rights are defined and the elements in Nampa's water rights do not provide for, or even mention, the agricultural irrigation by Pioneer's land owners. In the *Stipulation of Facts*, Nampa and Pioneer agreed to the following facts:

10. Each of the water rights set out in Table 1[7] above is authorized for "municipal purposes" in accordance with Idaho Code § 42-202B(6).

[7] Table 1 lists Nampa's Ground Water Rights for its Potable System.

11. Each of the water rights set out in Table 1 above has a place of use corresponding to Nampa's expanding service area, in accordance with Idaho Code § 42-202B(9).

12. Each of the water rights set out in Table 1 above is subject to the conditions set forth in the water rights.

SOF 10-12.

"Municipal purposes" is defined in the Idaho Code as:

> '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). Of those "municipal purposes" only "irrigation of parks and open space, and related purposes" mentions "irrigation". But even a "broad" interpretation of that phrase cannot be read to include land application to 17,000 acres most of which are outside of Nampa's service area for agricultural purposes. This is further clarified when Idaho Code § 42-202 B(6) is read together with the companion definition of "municipal provider" which 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) (emphasis added). Service area" is defined as:

> [T]hat 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 added). In broad terms, this definition arguably includes Nampa's "area of impact" but stretching it to include 17,000 acres, most of which are outside its city limits and area of impact goes too far. This is especially true when the definition of "service area" includes limitations requiring it to correspond to the "corporate limits", "other recognized boundaries" and "shares a common water distribution system… within the corporate limits." *Id*. The vast majority of Pioneer's 17,000 acres do not fall within this definition. Additionally, there is no evidence that Nampa's service area or planning area includes the City of Caldwell and/or other areas to the west of Caldwell, where the Reuse Agreement contemplates land application.

The legislative history of Idaho Code § 42-201(8) and the Department's guidance confirm the limitation on reuse to municipal use and to the municipality's service area. In the *May 26, 2011 Letter from Baxter to Meyers*, the Department's counsel made a point of clarifying that reuse had to be to municipal uses:

> First, the Department would like to clarify a subtle but important point. The second paragraph on page one states "You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other uses within its growing service area." It is important to clarify that the use which the effluent can be put must continue to be a municipal use. I believe that this is likely your understanding as well. If so, the term "municipal" should be inserted as follows: "you confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within this growing service area."

May 26, 2011 Letter from G. Baxter to C. Meyers (emphasis in original), reproduced in *Nampa Response Brief* at 183. *See also June 16, 2005 Letter from Strack to Fife RE: Provision of Water and/or Sewer Services by an Idaho Municipality to Out-of-State Government or Private Entities*:

> Service areas must be defined in any water license issued to a municipal provider, and the license must be conditioned "to prohibit any transfer of the place of use outside the service area." Idaho Code § 42-219. Thus, as a general matter, cities may not contract to provide water services to private users who reside outside the city boundaries or outside the service area defined in the city's water right license.

Strack Letter, at 2; reproduced in *Nampa Response Brief* at 171 (emphasis added).

The Intervenors contend that this limitation to municipal uses within Nampa's service area is satisfied because Pioneer delivers surface water to some Nampa residents through its irrigation system, ignoring the fact that, under the Reuse Agreement and the Reuse Permit, the land application area stretches far beyond the boundaries of Nampa's service area. The water Pioneer delivers to its water users (including Nampa residents) is water that Pioneer is obligated to deliver to Pioneer's landowners. Moreover, under the municipal irrigation agreements water delivered to Nampa's municipal irrigation (non-potable) system is non-potable surface water for pressurized irrigation purposes. *SOF* 8, 13, 14.

Nampa and Pioneer propose taking Nampa's potable ground water rights and applying them to lands that are served by Pioneer's water rights. Under *A&B*, this is enlargement, requiring either a new water right or a transfer. Pioneer's use of Nampa's potable ground water rights cannot be subsequently applied to a new beneficial use in a new service area without either a new water right or a transfer application. "Treating this water as something other than ground water, A&B must seek a new water right for this water source prior to any further use on the 2,363.1 acres." *A&B*, 141 Idaho at 751-2.

Intervenors contend, that a "municipal service area grows over time" and can "encompass[] a broad range of uses" *Nampa's Response Brief* at 39. Yet there is no question of fact - Nampa's service area does not and cannot encompass the "land application site" in the DEQ reuse permit. Compare Exhibit K and Exhibit J, Figure 3, and there is no doubt that the land application site covers Caldwell City limits and its impact area. *Id.* Nampa is careful not to mention and avoids asserting that the land in the City of Caldwell's city limits and in Caldwell's impact area is within Nampa's service area. Nor does Nampa show how Nampa can legally supply water in another City or another City's impact area.

The obvious reason Nampa avoids claiming that it has the right to deliver water in the City of Caldwell, or Caldwell's impact area or in unincorporated Canyon County is that Nampa has no authority to act within the boundaries of another city's limits or impact area or the county. Idaho Constitution, Article XII, § 2. *Reardon v. City of Burley*, 140 Idaho 115, 120, 90 P.3d 340, 345 (2004), overruled on other grounds; *City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012)(issue of attorneys fees); *Boise City v. Blaser*, 98 Idaho 789, 791 572 P.2d 892, 894 (1977). ("Generally speaking, to give effect to a county permit within city limits would be to violate the separate sovereignty provisions of Idaho Constitution, Article XII, § 2, and the careful avoidance of any county/city jurisdictional conflict or overlap, which is safeguarded therein."); *Clyde Hess Distributing Co. v. Bonneville County*, 69 Idaho 505, 511, 210 P.2d 798, 801 (1949).

Here Nampa and Pioneer propose to take water from Nampa's potable ground water rights and apply them to lands outside Nampa's service area, within the City of Caldwell and its impact area, and to lands in Canyon County west of Caldwell, all of which are served by Pioneer's water rights. Under *A&B*, this is enlargement, requiring either a new water right or a transfer.

X. WATER CANNOT BE APPLIED TO LAND UNLESS THE SURFACE WATER IS NOT AVAILABLE

Nampa's water rights are clear and unambiguous. They contain conditions of use providing that the water is not to be used for irrigation "except when surface water rights are not available for use." *See* Water Right 63-12474. There is no dispute that Pioneer intends to use the water (effluent) sourced from these water rights for irrigation of land that has Pioneer surface water rights and is served by Pioneer. *SOF* 49. Neither Pioneer nor Nampa assert that Pioneer's surface water rights "are not available for use" on these lands. Under this unambiguous condition, use of this water for irrigation of Pioneer lands served by Pioneer surface water rights

is an expansion of Nampa's water rights.

Nampa argues this is okay, based on an exchange of letters between Nampa's counsel and IDWR over different water rights for Black Rock (95-9055 & 95-9248).[8] Counsel asserts, without citation, that a similar condition in Black Rock's right (95-9055) does not prohibit land application. *Nampa Response Brief* at 143. An IDWR 2008 Internal Review memo acknowledges that the Department's recognition of a municipal right as fully consumptive may not necessarily be true as a matter of fact. *See September 23, 2008 Weaver Memo to Peppersack*, reproduced in *Nampa's Response Brief* at.158-59.

The 2008 Internal Review memo states that the condition regarding use of surface water first speaks only to the primary or first use of the diverted groundwater. *Weaver Memo RE: Review of Permits 95-9055 and 95-9248* reproduced in *Nampa's Response Brief* at 160. The Memo cites no legal or statutory authority for the proposition that this surface water use condition only applies to the first use.[9] The Memo continues by relying on a recognition that the municipal water right is considered fully consumptive. *Id*. But the Memo then admits there is no statute or even an Administrator's Memo that articulates the basis for this recognition. *Id*., at 161 fn. 2. IDWR's letter back to Black Rock's counsel simply states the conclusion that the surface water use condition only applies to the first use, without explanation.

Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. *Rangen Inc. v. IDWR*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (citing *A & B Irr.*

[8] Idaho Code § 67-5250(2) authorizes agencies to index agency guidance memos by subject matter. There is no suggestion that the written communication Nampa has attempted to add to the record are either "agency guidance documents" or that they are indexed by subject matter. Even if you were "indexing of guidance documents does not give that document the force and effect of law or other precedential authority. Id. These letters likewise cannot be construed as precedential or having any legal effect here; and should not be considered in this proceeding.

[9] Neither Mr. Young's Administrator's Processing Memo No. 61 (1996), nor Mr. Rassier's September 5, 1996 Memo to Mr. Young (p. 204-209) even purport to assert that the condition limiting groundwater use when surface water is available does not apply to municipal water rights or that the condition only applies to primary use.

Dist. v. Idaho Dep't Of Water Res., 153 Idaho 500, 523, 284 P.3d 225, 248 (2012)). "Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review." *Id*. (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)). *Rangen* is important here for two points – one that the water right decree must be interpreted under its clear and unambiguous terms, before resorting to any extra-textual interpretation. Second, there was a mechanism to clarify water rights before the SRBA Court. If Nampa, as the water right holder, believed the language required a broader meaning than what is on the face of the decree, it was required to bring that issue to the SRBA Court's attention. Nampa did not do so. To allow a party to "enlarge or alter" the clearly decreed elements of a water right would be to allow the parties to alter a judicial decree. The Supreme Court held that this result is "untenable." *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017).

Rangen thus counsels that Nampa's attempt to modify the language of the water rights decree to provide for a first use/second use distinction does not comply with Idaho law.

XI. A MUNICIPAL WATER RIGHT IS LIMITED TO THE TERMS & CONDITIONS OF THE WATER RIGHTS – NOT AN UNLIMITED RIGHT TO USE WATER FOR ANY REASON ON ANY LAND

Cities are not above the law when it comes to administering their water rights. In *City of Pocatello v. Idaho*, the Idaho Supreme Court upheld the Department's and the District Court's decisions that Pocatello's ground water wells were not alternative points of diversion for its surface water rights. *City of Pocatello*, 152 Idaho 830, 839, 275 P. 3d 845, 854 (2012). In *City of Blackfoot v. Spackman*, the Idaho Supreme Court again limited the city's uses under its water rights to the elements in the water rights. "Water rights are defined by elements." *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017). "Purpose of use is one

of those defining elements." *Id*. Importantly, a "private settlement agreement cannot define, add, or subtract from the elements of a validly adjudicated water right…" *Id*., at 308. Thus, the City of Blackfoot could not use a water permit for ground water recharge where that permit did not include recharge as a beneficial use.

The IDWR guidance that Nampa relies upon, specifically the Weaver Memo and Spackman correspondence, do acknowledge the fully consumptive potential of municipal water rights and the right to reuse of that water if reclaimed and applied to the place of use by the original appropriator and for a purpose identified in the water right. *See September 29, 2008 Spackman Letter* "… the municipal provider may reuse the reclaimed water within its place of use for other purposes that are defined as specific uses of water within the broader municipal purpose." *Spackman Letter*, at 2 (emphasis added), reproduced in *Nampa's Response Brief*, at 163. Since Nampa's water rights do not allow the water to be used for agricultural use on lands outside Nampa's service area, supplying water to Pioneer for that purpose is an enlargement.

XII. IDAHO CODE § 42-201(8) IS CLEAR ON ITS FACE AND DOES NOT APPLY TO PIONEER

"The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Verska v. Saint Alphonsus Reg'l Med. Ctr*., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (quoting *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (internal quotations omitted). The "literal words" of Idaho Code § 42-201(8) unambiguously state "… 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…." Idaho Code § 42 -201 (8)

(emphasis added). It is undisputed that Pioneer is not a municipality. Therefore, under the unambiguous language of Idaho Code § 42-201(8), the exemption provided does not apply to Pioneer.

Here, the Reuse Agreement places Pioneer in charge of delivery of Nampa's effluent after it is discharged to the Phyllis Canal to 17,000 acres in Pioneer's district. Exhibit F, Section B 3. Under Idaho law, Pioneer cannot deliver to any user other than Pioneer users and it has an obligation to its landowners first and foremost. The Idaho Supreme Court made this clear in *Jensen v. Boise-Kuna Irr. Dist.*:

> … any water owned by the district and thus dedicated to the irrigation of lands within the district, cannot be supplied to lands outside the district so long as it is needed for the proper irrigation of lands within the district. The officers of the district have no power to contract for the delivery or supplying of such water for use outside the district. Any contract attempting to create or impose an obligation on the district to supply or make available any such water for any such purpose is ultra vires and void.

Jensen v. Boise-Kuna Irr. Dist., 75 Idaho 133, 141, 269 P.2d 755, 760 (1954). Pioneer claims not to understand the point, but it is simple. Pioneer delivers only to Pioneer landowners. Pioneer cannot deliver to Nampa unless the landowner has a Pioneer right. It cannot deliver to other Nampa users in Nampa's service area.

The legislative history of Idaho Code § 42-201(8) reinforces the conclusion that the exemption was to be "narrowly" applied and only to three types of entities – municipalities, sewer districts and entities operating publicly owned treatment works. The manager for the City of McCall testified "[t]he purpose of this legislation is to clarify that cities and sewer districts are not required to obtain a water right for the treatment – and especially disposal – of wastewater effluent." *March 5, 2012 Testimony of Lindley Kirkpatrick, McCall City Manager before the House*, reproduced in *Nampa's Response Brief* at 154 (emphasis added). In that same testimony,

he assured the House "[t]his proposal simply adds a similar exemption for the land application of treated wastewater by cities and sewer districts." *Id*., (emphasis added).

The City of McCall also provided written testimony that "[t]he purpose of this bill is to clarify that cities and sewer districts are not required to obtain a water right for the treatment and disposal of wastewater effluent." *City of McCall Testimony to the Senate Resources and Environment Committee*, March 14, 2012, reproduced in *Nampa's Response Brief*, at 127 (emphasis added). McCall's written testimony further provided "[w]e have received assurances from the Department of Water Resources that cities and sewer districts can land apply their own effluent…" *Id*., (emphasis added).

Nothing in the legislative history contemplates the exemption would be extended to any other entity that was not a municipality, a sewer district or a publicly owned treatment work. There is no mention of the landowners to which the effluent would be land applied securing a role in the exemption. There is no mention of extending the exemption to supposed "agents" of the cities and sewer districts. To the contrary, the scenarios presented to the legislature involved the cities and sewer districts land applying their effluent, acquired under their water rights, within the scope of those water rights, with the exemption allowing the cities and sewer districts to simultaneously dispose of effluent acquired from outside sources that comingled with their effluent before disposal.

That the original appropriator is the one reusing the water is a constant theme in the case law governing reuse, and in the Department's guidance. *See Sebern v. Moore* "… the waste water appropriation is '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 beneficial use." *Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, 178 (1927).

Intervenors attempt to broaden the exemption to include entities that aren't expressly identified in subsection 8 by calling Pioneer Nampa's "agent." They contends "The plain and most logical reading of the 'notwithstanding' reading is that any agent or contracting party acting in conjunction with the exempted party is also exempted from the mandatory permitting requirement in subsection 2." *Nampa's Response Brief*, at 16. But, that is not what the statute says and, evens so, Pioneer is not Nampa's agent. Under the Reuse Agreement, Nampa turns the water over to Pioneer at the Phyllis diversion point and Pioneer handles, manages and conveys this water as Pioneer sees fit. Exhibit F, Section B 3. Moreover, the water is not Nampa's and under the Reuse Permit, the water is no longer Nampa's and no longer under DEQ supervision once diverted into the canal. *See* Exhibit R. p/4, ("the water is considered to be irrigation water").

There is nothing "plain and most logical" about Nampa's reading of subsection 8 to include third-party agents in the exemption. Not only is there no mention of agents or third-parties in subsection 8, the statutory definitions of "municipal provider" and "sewer district" – which define the holders of the exemption – do not mention agents or third-parties. *See,* Idaho Code § 42-202B and Idaho Code § 42-3202. Nampa's insertion of an "agent or contracting party" into subsection 8 rewrites the statute and violates the black letter law that "[t]he interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho at 893 (2011).

The Intervenors criticize Riverside's reading of the exemption as "parsimonious" and "niggardly" *Nampa* at 16 and 15, and, "exceedingly narrow… leading to an absurd result." *Pioneer* at 8. But the very nature of the exemption was intended to be limited and "narrow." *See March 5, 2012 Testimony of Lindley Kirkpatrick, McCall City Manager before the House,*

reproduced in *Nampa's Response Brief*, at 125. The Intervenors would have the Department allow anyone, by virtue of contract, qualify for an exemption that applies only to a specified class to what is one of the cornerstones of Idaho water law.

The Intervenors' argument about expansively reading this exemption is contrary to how the subsection 8, then a proposed amendment, was presented to the Idaho Legislature:

> We've tried to craft this proposal narrowly to apply to only cities, sewer districts and other publicly owned treatment works.

March 5, 2012 Testimony of Lindley Kirkpatrick, McCall City Manager before the House, reproduced in *Nampa's Response Brief*, at 125 (emphasis added). It may have been a different story if instead the City of McCall and its counsel explained "This is crafted narrowly, but once you pass it, it will apply to any entity who contracts with a city or sewer district, thereby removing the administration of the state's water resources from Department and placing it solidly into the hands of private interests."

Rather than apply a "narrow" interpretation, the Intervenors encourage sending a wrecking ball through Idaho Code § 42-201. *See, e.g., Pioneer's Response Brief*:

> 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.

Pioneer's Response Brief, at 8 (emphasis added). *See also Nampa's Response Brief*, "the statute also contains a sweeping declaration that when a city or sewer district takes action pursuant to subsection 8, the mandatory permitting requirements are set aside." *Nampa's Response Brief*, at

15 (emphasis added). Nampa and Pioneer's "broad" and "sweeping" language is the opposite of the "narrow" language provided in testimony before the Idaho Legislature.

As discussed above, the nature and scope of Nampa's water rights matter because this is the water that Pioneer proposes to apply to beneficial use under the Reuse Agreement. The Intervenors urge the Director to ignore this reality because they claim a "broad" exemption under subsection 8. However, the plain language of subsection 8, the legislative history and the communications with the Department indicate that the source and scope of the water being land applied was the very impetus for the legislation:

> Rep. Stevenson stated this legislation was brought by the Association of Cities due to a situation that arose in McCall. They were combining wastewater from the city with a sewer district and realized each individual entity did not require a permit, but when combined, there was ambiguity. RS 21325 makes it clear that when you combine these two sources, if a land application is to take place, this will not require a permit.

House State Affairs Committee Minutes February 28, 2012, reproduced in *Nampa Response Brief* at 117 (emphasis added).

Representative Stevenson's statement describes the combination of two sources of water prior to land application of treated effluent. The two sources of water referred to in that statement belong to a municipality and sewer district, not an irrigation district. This reflects the opening language in subsection 8, providing the exemption to "… 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…." Idaho Code § 42-201(8).

Nampa insists that "the legislation was intended to eliminate the water right requirement across-the-board, not to shift the water right burden from the city to the farmer or irrigation district who accepts the effluent." *Nampa's Response Brief*, at 19. But the plain language of the

statute makes no mention of farmers or irrigation districts, instead expressly and unambiguously providing the exemption only to cities, sewer districts and publicly owned treatment works.

The long and short of it is, this water is ground water, diverted from Nampa wells and applied to Pioneer's land largely outside of Nampa's municipal boundaries to grow crops. *See Reuse Agreement;* Exhibit G, *Reuse Permit;* Exhibit H, *IDEQ Staff Analysis,* Exhibit J, application and Figure 3. This is quintessential beneficial use of water without a water right.

Here Nampa doesn't propose combining its water with a sewer district. Instead it proposes delivering water to an irrigation district for the irrigation district to manage and deliver. Pioneer is neither a municipality nor a sewer district. Idaho Code § 42-202B. Accordingly, the legislative history does not expand the plain legal meaning of the statute in the way that Nampa and Pioneer advocate.

XIII. PIONEER CANNOT DIVERT OR APPLY WATER TO BENEFICIAL USE WITHOUT A WATER RIGHT UNDER IDAHO CODE § 42-201(2)

Having established that Pioneer does not qualify for the exemption provided in subsection 8, it is clear that Pioneer cannot divert or apply Nampa's effluent to a beneficial use without a water right in accordance with Idaho Code § 42-201(2). The statutory language in Idaho Code § 42-201 is clear on its face. As such, there is no need to interpret or resort to the legislative history. "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *Verska v. Saint Alphonsus Reg'l Med. Ctr*., 151 Idaho at 893 (2011).

The Intervenors dispute Pioneer's need for a water right because the Phyllis Canal is not a "natural watercourse." Numerous examples of references to "natural" water are made in the response briefs. Under Idaho law, "no person shall divert any water from a natural watercourse **or** apply water to land without having obtained a valid water right to do so, or apply it to

purposes for which no valid water right exists." Idaho Code § 42-201(2)(emphasis added). As Riverside demonstrated in its Opening Brief, the disjunctive use of the word "or" in this code section extends this requirement to any application of water to land. "The word 'or' ... is '[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things." *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (quoting *Markel Int'l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012). Intervenors argue that reading Idaho Code § 42-201(2) in the disjunctive is "absurd." *Pioneer Response Brief*, at 11. Yet, if Intervenors interpretation is accepted it would require an amendment to the statute to replace "or" with "and."

If, as Intervenors' argue, Idaho Code § 42-201 applies only to water in "natural watercourses" there could be no appropriation of drain water unless and until it rejoins some "natural watercourse." Clearly this is not the case, which is perhaps why unappropriated water is often referred to as "public water." Indeed, the SRBA proceedings in the *Janicek* case held that water could be appropriated from a constructed drain and that a water right was necessary to appropriate that water. *Janicek Properties, Inc*., Subcase 63-27475 *Memorandum Decision and Order* (May 5, 2008). The Court rejected the claim by BOR and NMID that water could only be diverted from a natural water course. *See also* Idaho Code § 42-107.

Intervenors contend that Nampa's effluent is not "public water" because Nampa never relinquishes control over the water until it discharges it into the Phyllis Canal. Even after discharging to the Phyllis Canal, where the effluent will be comingled with Pioneer's water rights, the Intervenors maintain that it is still "private water" that is not subject to appropriation and therefore, not in need of a water right. But the facts are clear – Nampa relinquishes control

over the water when it leaves Nampa's pipeline, where Pioneer diverts it into the Phyllis Canal. At that point the water is subject to appropriation.

The Municipalities assure the Department "no water right is required because Pioneer is merely acting as Nampa's agent for the disposal of Nampa's treated effluent…" *Municipalities Response Brief*, at 10. This is contrary to previous statements and representations of Pioneer and Nampa. The Reuse Agreement (Exhibit F) expressly memorializes Pioneer's desire "to seasonally receive Recycled Water from the City as a supplemental source of irrigation water supply…" *Id*., (emphasis added). It is disingenuous for any of the Intervenors to admit in one setting that this water will be used as a supplemental source of irrigation water supply, and in another allege this action is merely a "disposal."

Intervenors argue that the discharge of Nampa's waste water through a pipe into the Phyllis Canal is not a diversion. But, as Pioneer previously explained, this set up is really no different from conveying or piping drain water to a canal. Exhibit S ("While a pipeline leading to the Phyllis Canal from the Nampa WWTP may not be a feeder canal diversion from a typical "drain" it's not very different either."). Examples of similar diversions abound. Riverside itself has water rights for diversion of all the flows of the West End Drain. *See* Water Rights 63-1010 and 63-33735. All of the water from the West End Drain runs into the Riverside Canal. Nampa and Pioneer intend to construct the same type of conveyance here that terminates in a diversion at the Phillis Canal.

Pioneer takes the position that there is no "physical diversion of water from a natural source." *Pioneer Response Brief*, at 12. However, the Reuse Agreement clearly envisions the construction of extensive structures in order to deliver this water to Pioneer for subsequent land application by Pioneer. Riverside believes this is sufficient to constitute diversion. Pioneer also

claims that its use of the water is just contractual, "the Reuse Agreement specifically acknowledges that Pioneer's rights to the recycled water are contractual only." *Id.*, at 13. Again, this is contrary to its position in The Reuse Agreement, which expressly memorializes Pioneer's desire "to seasonally receive Recycled Water from the City as a supplemental source of irrigation water supply…" *Id*., (emphasis added).

Nampa asks the Department to go along with the charade that Nampa is really just reusing its own water without relinquishing ownership, and even though this water will be land applied for beneficial use on crops far outside of Nampa's place of use, just pretend the water is being reused within Nampa's boundaries.

Nampa asserts that Idaho Code § 42-201(2) addressed a loophole. *Nampa's Response Brief*, at 29. That may be the case, but the legislative history cited to in Nampa's brief refers to the appropriation of "water" not water in a "natural watercourse." *Id*. ("This legislation makes it clear that no person shall divert water without having a permit to do so."). Nampa then asserts that the legislation was meant to preserve the priority system. *Id*. at 30. This is ironic, given that Nampa proposes to completely undermine the priority system by removing water from Indian Creek that will harm a senior water right user, and to do so without any new water right requirement, any transfer analysis or any injury analysis.

XIV. APPLICATION OF IDAHO CODE § 42-201(8) TO ALLOW PIONEER TO EXPAND THE USE OF NAMPA'S WATER RIGHT WOULD VIOLATE THE IDAHO CONSTITUTION

Riverside's Opening Brief demonstrated that a statute allowing expansion or enlargement of a water right would violate Idaho's constitution, specifically Article XV § 3. *Freemont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc*. 129 Idaho 454, 926 P.2d 1301 (1996), Judge Hurlbutt's decision in Basin Wide Issue No. 1, *Memorandum Decision and Order*,

Subcase 91-00001 (February 4, 1994), and Judge Wildman's Lemhi Gold decision, *Memorandum Decision and Order,* Subcase 75-10117 (November 12, 2014) all make that abundantly clear. No party disputes that legal conclusion.

Riverside's legal argument was simply that expanding Idaho Code § 42-201(8) to allow Pioneer to use Nampa's water rights on Pioneer's land would render § 42-201(8) unconstitutional as applied to this enlargement. *Riverside Opening Brief*, at 29. The Municipality Intervenors did not respond and have waived the right to contend otherwise. Pioneer argues, citing the Director's Elmore County decision in Subcase 63-34348, that the Department cannot rule on constitutional issues. What Pioneer misses is another fundamental legal principle. It is a bedrock rule of statutory construction that whenever possible a statute should be construed to avoid implicating constitutional questions. *City of Idaho Falls v. H-K Contractors, Inc*., 163 Idaho 579, 585 416 P.3d 951, 957 (2018).

Thus, in *H-K Contractors* the Court construed the application of another statute, Idaho Code § 5-216 and resolved its application without running afoul of Idaho's Constitution. *See also Miller v. Idaho State Patrol*, 150 Idaho 856, 864, 252 P.3d 1274, 1282 (2011) ("The general rule of constitutional avoidance encourages courts to interpret statutes so as to avoid unnecessary constitutional questions."); *see also Hill-Vu Mobile Home Park v. City of Pocatello*, 162 Idaho 588, 402 P.3d. 1041, 1047 (2017) ("Whenever an act of the Legislature can be construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts.").

Riverside urges the Director to do the same and limit the expansive interpretation of Idaho Code § 42-201(8) sought by Pioneer and the other Intervenors, and keep the statute within constitutional limits.

Nampa conjures up a parade of horribles, like a challenge to Idaho's firefighting water right exemption, that might be implicated by a wholesale ruling striking all exemptions. However, Riverside did not raise a facial challenge to the applicability of every exemption as Nampa suggests. Riverside's challenge is to expanding 42-201(8) to cover Pioneer, when the statute does not even mention irrigation entities. *See American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 880 154 P.3d 433, 451 (2007)("Where the Rules are not facially invalid, but there is room for challenge on an "as applied" basis if the Rules are not applied in a manner consistent with the Constitution.").

Nampa then reverts to the argument that there can never be any limit on a municipal water right and that a City's right to reuse its water is not "deemed" an enlargement. *Nampa Response Brief*, at 24. Whether or not Nampa can enlarge the consumption of its water right without that enlargement in-fact being "deemed" not to be an enlargement is a question for another day. The constitutional question that Riverside is asking the Director to avoid tripping over is whether Idaho Code § 42-201(8) should be enlarged beyond the narrow application to municipal uses to allow Pioneer to deliver Nampa's ground water to 17,000 acres of Pioneer land that is primarily and significantly beyond and outside Nampa's boundaries. Clearly use of this water as a supplemental irrigation water right, as contemplated by the Reuse Permit, is an expansion or enlargement that must be evaluated in an appropriate water right application or transfer proceeding.

XV. THE DIRECTOR'S AUTHORITY TO ACT ON THIS PETITION IS NOT THWARTED BY INTERVENORS' "WASTE WATER" ARGUMENTS

Intervenors raise two primary complaints about Riverside's Petition that hinge on the notion that the effluent from Nampa's Waste Water Treatment Plant is legally "waste water." They assert that Riverside has no right to Nampa's "waste water" and cannot therefore be injured

by the Nampa-Pioneer Reuse Agreement or the DEQ Reuse Permit. First, as a matter of fact, Riverside relies on Indian Creek for a majority of its water supply. *SOF* 30-31. There is no question that the primary purpose of the Nampa-Pioneer scheme is to diminish the flows in Indian Creek. *SOF* 34. Indeed, under the Reuse Permit, Pioneer is prohibited from spilling into Indian Creek or other waters of the state. Exhibit H, at 46. So, there is no doubt Riverside would be directly affected.

The remainder of Intervenors' legal arguments are foreclosed by the Supreme Court's *A&B* decision. *A&B Irrigation District v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005). As seen above, when A&B collected its ground water after the ground water was used to irrigate fields in A&B's service area, the Court held that the water collected did not lose its characteristic as ground water. *A&B* 141 Idaho at 753, 118 P.3d at 85. Nampa's collection of its ground water at the Waste Water Treatment Plant is the same and remains ground water. *See* discussion in Section V, s*upra*. While prior to *A&B* the water might have been seen as waste water under *Jensen*, the Court in *A&B* made it clear that it is not the way these waters must be treated.

Even if the effluent could be treated as waste water that Nampa has the right to recapture prior to release, *A&B* also makes clear that when the water user seeking to recapture that water expands or enlarges its use, the water user must seek a new authorization for the expanded use. This could be in the form of a new water right or a transfer application. If Intervenors are correct and a claim that a water user is recapturing its waste water is sufficient to foreclose any examination of the water use, then the Court could not have decided *A&B*, because that was exactly the claim A&B made.

In the event of an enlargement or expansion, the Court has said that there are virtually no circumstances where there will not be some injury. *A&B* 141 Idaho at 752, 118 P.3d at 84 (citing *Fremont-Madison v. Idaho Ground Water Appropriators*, 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996)). Riverside is entitled to have the scope and extend of injury examine in a proper water rights proceeding.

Second, Intervenors assert that Riverside's petition requires Nampa to waste water. It does no such thing. Riverside's petition asks the Director to order that Pioneer seek a water right or transfer before diverting Nampa's ground water from Nampa's potable water supply into the Phyllis Canal for beneficial use by Pioneer's landowners on 17,000 acres of land. Nothing in the Petition addresses other methods that Nampa might choose to employ. Nor does the Petition pre-judge the outcome of the Department's analysis of a new water right or transfer application or what measures might be appropriate conditions under the standards of Idaho Code § 42-202, § 42-203A(5) or § 42-222 and IDPA 37.03.08.451 (evaluation criteria). As ground waters are public waters of the Sate, Idaho Code § 42-226, the appropriation and transfer rules are applicable to Nampa's ground water as well.

XVI. CONCLUSION

Riverside's Petition rests on a solid foundation of Idaho water law. Water rights mean what they say. A water right holder cannot unilaterally modify its decreed rights. Enlargement of any of the elements of a water right requires either a new water right or a transfer proceeding. Diverting or applying water to beneficial use requires a water right, The waters of the State belongs to the State and are administered by the State.

Pioneer intends to take Nampa's ground water and apply it to 17,000 acres of Pioneer land. This land is largely far outside Nampa's service area, its city limits and its are of impact.

Nampa asserts that the rule against enlargement doesn't apply to cities generally or Nampa in particular. It claims the conditions on its water rights are irrelevant. Nampa claims ownership of the water. Nampa even claims the right to expand its service area without limit. Logically if the Director agrees with Nampa's precept, Nampa could ship, truck or pipe its ground water to Las Vegas, Phoenix or Los Angeles without any IDWR review.

Riverside's position seeks a narrow ruling – that Pioneer must obtain the right to direct and apply this water to beneficial use before diverting Nampa's ground water into the Phyllis canal. That way the Department can evaluate the impact of this water use in the appropriate proceeding under familiar Idaho standards. Idaho Code § 42-2 303A(5) or § 42-222.

DATED this 20 day of November 2020.

BARKER, ROSHOLT & SIMPSON LLP

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Sarah W. Higer
Attorneys for Riverside Irrigation District Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2020, I caused to be served a true and correct copy of the foregoing **Riverside's Reply in Support for Petition for Declaratory Ruling** by the method indicated below, and addressed to each of the following:

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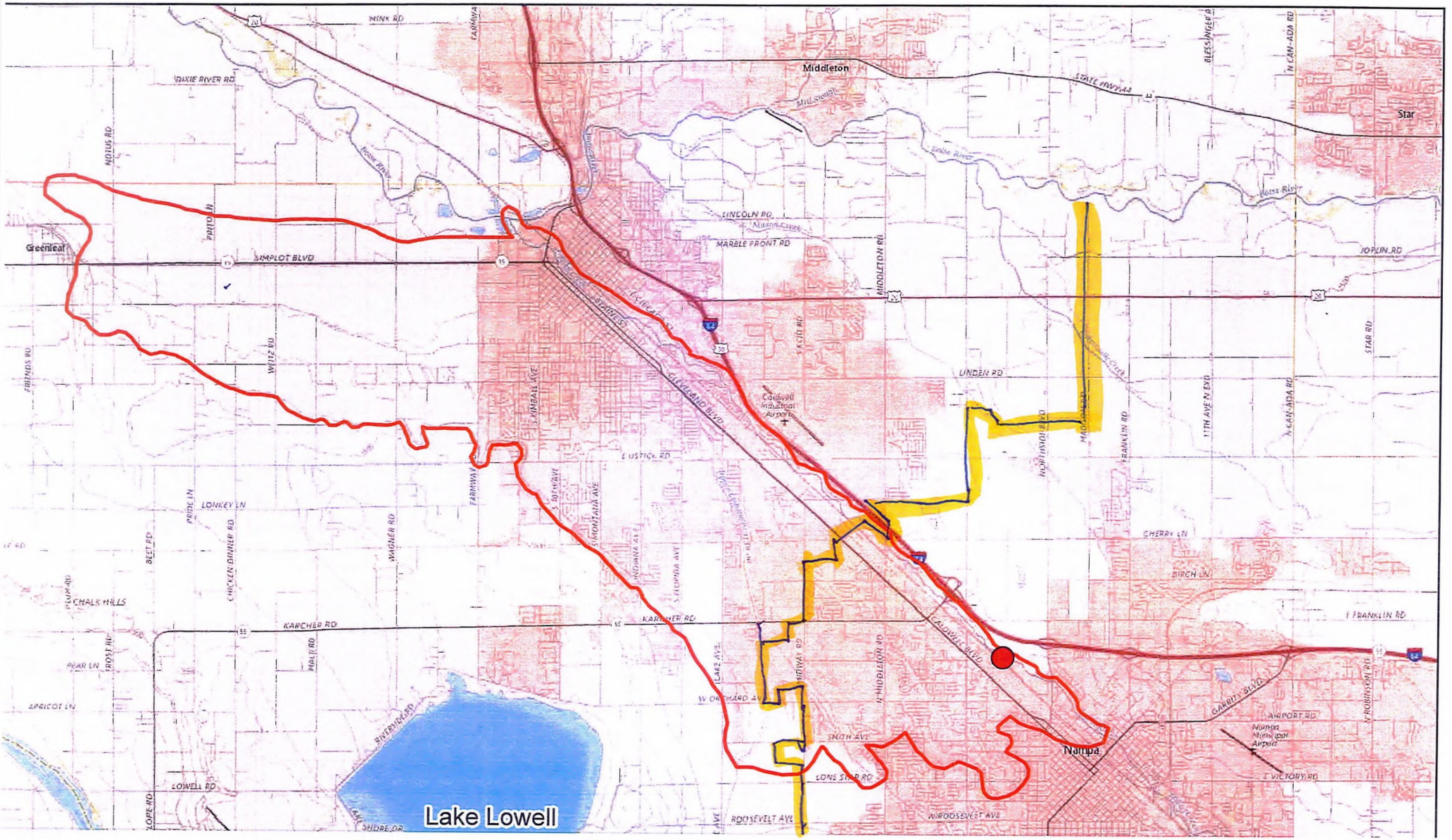
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MINK RD
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LINCOLN RD
MARBLE FRONT RD
MIDDLETON RD
STATE HWY 44
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N CAN-ADA RD
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SACID RD
NORTHSIDE BLVD
FRANKLIN RD
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