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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 **Municipal Intervenors' Sur-Reply Brief**

COMES NOW, Intervenors City of Boise, City of Meridian, City of Caldwell, City of Jerome, City of Post Falls, City of Rupert, City of Idaho Falls, City of Pocatello, Association of Idaho Cities, and Hayden Area Regional Sewer Board ("Municipal Intervenors" or "Cities"), by and through their respective attorneys and submit this Sur-Reply to *Petitioner Riverside's Reply in Support of Petition for Declaratory Ruling* filed on November 20, 2020 ("*Reply*"). The *Reply* responds to *Nampa's Response Brief* ("*Nampa Response*"), *Intervenor Pioneer Irrigation District's Response to Petitioner's Opening Brief* ("*Pioneer Response*"),

and *Municipal Intervenors' Response to Petitioner's Opening Brief* ("*Municipal Intervenor Response*"), all of which were filed on October 30, 2020.

I. SUMMARY OF ARGUMENT

Riverside persists in characterizing Nampa's contract with Pioneer as a "scheme" (*Reply* at 1, 34) and a "charade" (*Id*. at 31). Riverside also asserts that the arguments of Nampa, Pioneer and the Municipal Intervenors are efforts to "completely undermine" the priority system (*id.*) and further encourage "sending a wrecking ball through Idaho Code § 42-201." *Id*. at 26. In casting aspersions[1], Riverside ignores the fact that the Cities take on the increasingly expensive task of treating municipal effluent to state and federal water quality standards, generally without complaint; the legislature made provision for cities to avoid or minimize expensive facility upgrades by allowing cities to divert effluent for land application as a means of effluent disposal without having to obtain a water right. There is nothing particularly fun about undertaking disposal of human waste (flushed down the toilet or sent down the garbage disposal) or other forms of waste, but cities undertake this job without complaint and little acclaim, all the while doing so generally under limited budgets and ever-expanding regulations. Riverside's invidious comparisons are unproductive at best.

It is possible that Riverside's level of animosity towards the positions of Nampa and Municipal Intervenors in this matter arises because its legal arguments have failed to hit the mark. In nearly 80 pages of (largely duplicative) briefing, Riverside's arguments assume the

[1] In response to Caldwell's statement that it has discussed discharge of its effluent to the Riverside Canal, Riverside states that "Caldwell has never brought such a proposal to the Riverside Board." *Reply*. at 1, fn.2. Although Caldwell's discussions with Riverside are irrelevant to the issues raised in this proceeding, the City of Caldwell would like to correct the implication that it misrepresented the facts. While the above-quoted Riverside statement is strictly correct (no formal proposal has been made), it is also true that the City of Caldwell has had discussions regarding effluent discharge to the Riverside Canal with Riverside's Manager, and those discussions are expected to continue.

predicate: that Pioneer's contract for disposal of Nampa's effluent subjects Pioneer to the requirements of Idaho Code § 42-201(2). Riverside's assumptions notwithstanding, the language of Idaho Code § 42-201(8) demonstrates that Nampa's effluent is not a legal supply of water that Riverside is entitled to appropriate from the Phyllis Canal. In authorizing cities to reuse effluent through land application on acres not identified as an existing place of use for an irrigation water right, the legislature has shaped the contours of the municipal right to reuse and, by its terms, excluded municipal effluent from water supplies that appropriators may legally rely on. So, while Riverside may have a historical physical reliance on the discharge of Nampa's effluent into Indian Creek, it cannot claim *injury* if Nampa ceases that discharge, even if Riverside is *impacted*. Full stop. It doesn't matter if Nampa ceases the discharge so that it can put the water to use on land within its service area, or ceases discharge so that it can "gift" the effluent to another water user for uses on their lands, or to enter into a contract for use such as the one it entered into with Pioneer.

At the end of the day, and Riverside's arm-waving notwithstanding, this matter involves Nampa's exercise of its authority to reuse its effluent pursuant to Idaho Code § 42-201(8) by contracting with Pioneer to allow the land application of Nampa's effluent on Pioneer's lands. The response briefs filed by Nampa, Pioneer and the Municipal Intervenors thoroughly address Riverside's original arguments contained in *Petitioner's Opening Brief*. While Riverside's *Reply* doesn't really raise anything new, the Municipal Intervenors have responded to several of Riverside's more absurd arguments. In addition, Municipal Intervenors endorse and incorporate by reference arguments made by Nampa and Pioneer, both in their Response briefs and in their sur-reply briefs.

II. ARGUMENT

A. The idea that cities are "privileged" is a Riverside red herring.

Riverside begins by asserting that Nampa's utilization of a statute written for municipalities (Idaho Code § 42-201(8)) vests Nampa with "privileged status" (*Reply* at 1), which runs afoul of Idaho Code § 42-101's language that the State must "equally guard against all the various interests involved." *Id*. at 2. This position necessarily asserts that all water users are treated with absolute equality under all aspects of Idaho water law, and that cities were the first to receive an accommodation for circumstances that present difficulties to a certain class of the water user community. This is simply not the case. To wit:

- Irrigation districts (including Riverside) have two additional statutory defenses to forfeiture that other water users do not enjoy; Idaho Code § 42-223(7)-(8); *see also* Idaho Code § 42-223(11) (extending another exception to forfeiture to the mining industry);
- As an entity operating a canal, Riverside could install a hydroelectric facility on its canal without getting a water right for this water use, which under general Idaho water law is clearly an enlargement.[2] *Id*. § 42-201(9);

[2] Enlargement is described as an increase or expansion of what the express water rights elements provide for:

> The term "enlargement" has been used to refer to any **increase in the beneficial use to which an existing water right has been applied**, through water conservation and other means. *See* I.C. § 42–1426(1)(a). An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.

Fremont-Madison Irrigation Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (emphasis added).

- Fire fighters do not have to get a water right before putting out a fire. *Id*. § 42-201(3)(a);
- Six specifically defined "forest practices"[3] do not require first obtaining a water right *Id*. § 42-201(3)(b);
- Nor is a water right required to engage in the immediate emergency cleanup of hazardous substances or petroleum. *Id*. § 42-201(3)(c);
- Finally, ground water appropriators are protected only to "reasonable" pumping levels rather than simple priority administration. *Id*. § 42-226.

Riverside can categorize these water users, along with municipalities, as "privileged," but it doesn't invalidate the exceptions to general rules under Title 42 imposed by the legislature to address certain circumstances involving public health and welfare. And while Riverside selectively quotes from Idaho Code § 42-101—"shall equally guard all the various interests involved"—the following sentence in section 101 directs the State "to supervise their appropriation and **allotment** to those diverting the same therefrom for any beneficial purpose" (emphasis added). The state of Idaho has acted well within its bounds to supervise the "allotment" of water to address specific water situations with statutory amendments such as those described above.

[3] Idaho Code § 38-1303(1) defines forest practices. "'Forest practice' means (a) the harvesting of forest tree species; (b) road construction associated with harvesting of forest tree species; (c) reforestation; (d) use of chemicals or fertilizers for the purpose of growing or managing forest tree species; (e) the management of slashings resulting from harvest, management or improvement of forest tree species; or (f) the prompt salvage of dead or dying timber or timber that is threatened by insects, disease, windthrow, fire or extremes of weather."

B. The plain language of Idaho Code § 201(8) describes the contours of the municipal exception and does not foreclose Nampa's contractual relationship with Pioneer.

Riverside argues that "Pioneer is not a municipality with a statutory right to reuse effluent for water quality purposes. Pioneer is content to piggy-back and rely on whatever rights Nampa may have." *Reply* at 1. What Riverside refers to as "piggy-back[ing]" is understood by Cities according to its more traditional terminology—"contracting." Riverside's arguments that put at issue Cities' right to contract with others to carry out certain municipal responsibilities are without legal basis. Cities have an unquestioned right to "contract and be contracted with" under Idaho Code § 50-301 (Corporate and Local Self-Government Powers). Despite this, Riverside argues:

> 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.

Reply at 24.

Pioneer's role is that of an agent of Nampa, by contract, to dispose of pollution, and nothing under Idaho law prohibits this. It is not necessary that Idaho Code § 42-201(8) specifically authorize this arrangement because Idaho municipal law already provides for it.

C. Nampa is authorized to apply its effluent to "any lands" and the Pioneer contract allows it to accomplish that.

Riverside asserts that the Reuse Permit "requires this effluent to be applied to 17,000 acres of Pioneer land downstream of the point of discharge into Pioneer's Phyllis Canal." *Reply* at 4. As a starting point this mischaracterizes the terms of the Reuse Permit, which makes Nampa's effluent *available* for application on Pioneer's 17,000 acres, rather than

requiring that every acre be served. But even if it did, this is no affair of Riverside's—Idaho Code § 201(8) does not restrict the lands upon which Nampa may land apply its effluent. To wit:

> If land application [of Nampa's effluent] 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.

Riverside reads into the statutory language "on lands not identified as a place of use for an existing *municipal irrigation* water right *of the municipal discharger*".

Nampa can dispose of effluent beyond its borders, and Riverside's reliance on *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist. (In re SRBA Case No. 39576)*, 141 Idaho 746, 118 P.3d 78 (2005) ("*A&B*") does not change this result. *A&B* stands for the proposition that an irrigator's recapture and reuse of its **waste water** requires a water right; Idaho Code § 201(8) stands for the proposition that a municipality's reuse of its **wastewater** does not. Moreover, Idaho Code § 201(8) did not limit a municipality's authority to reuse its effluent by contracting with another entity (such as Pioneer) to land apply the effluent.

As a practical matter, and as detailed in Nampa and Pioneer's Response briefs, the amount of effluent that will be discharged by Nampa into the Phyllis Canal is less than the amount of water Nampa takes back for use within its municipal service area. See *Nampa Response*, at 47, fn. 33. Thus, from an accounting standpoint, Nampa is reusing all of its effluent on lands within its jurisdiction. *Id.* Riverside, however, suggests that Pioneer is foreclosed from diverting water from the Phyllis Canal composed of mixed irrigation surface water and treated ground water effluent. *Reply* at 8-9. This argument, like many of Riverside's, is made without resort to legal authority. But Riverside's position, if adopted,

would result in a seismic shift in Idaho water law and require the Department to move from accounting-based administration to molecule identification administration—an impossibility. There is no technology that can determine whether a water molecule present in a canal originated from a surface water source or ground water source and Riverside's arguments on this point should be rejected.[4]

D. A transfer is not required, and even if it was, Riverside could not show injury because it is not entitled to continuation of discharge of Nampa's effluent into Indian Creek.

While Riverside's arguments related to the Nampa-Pioneer contractual relationship dive into many rabbit holes of inquiry, at bottom Riverside rests its arguments on the impact to Riverside from the removal of Nampa's effluent from Indian Creek: according to Riverside, there is "no question that the primary purpose of the Nampa-Pioneer scheme is to

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[4] Further, Idaho Code § 42-105(1) allows water users to turn already-diverted water (such as storage water) into a natural waterway to commingle this water with natural flow water and then downstream reclaim the amount of already-diverted water after due allowance is made for evaporation and seepage. There is no requirement in Idaho for the diverted-water owner to engage in molecule identification administration and "track" his water molecules so that only the storage water molecules are diverted. The fact that individual water molecules cannot be tracked is well-explained in the Water District #1 water accounting manual entitled *Concepts, Practices, and Procedures Used to Distribute Water Within Water District #1, Upper Snake River Basin, Idaho*:

> Net gains and losses in a river reach calculated by the water right accounting are the summed effects of unmeasured tributary inflow, spring inflows, irrigation return flow, evapotranspiration, channel seepage, and any other factor that can influence gains and losses within a river reach. Channel seepage can occur because of porous channel substrate and re-emerge as spring inflows in downstream reaches. Channel seepage and spring inflow can also be affected by groundwater withdrawals and aquifer recharge projects. **The Water District #1 surface water right accounting quantifies only the net gain or loss in a river reach from all these influences but does not segregate or quantify each individual effect**.
>
> The purpose of the Water District #1 surface water right accounting is to compute the available natural flow and storage water in each river reach, measure each reach's surface diversions, and regulate the surface diversions according to their water rights and the actual measured quantities of surface water available each day. **The water right accounting does not segregate or quantify specific reasons for any natural flow net gains or depletions within a river reach after the effects of surface diversions and reservoirs have been removed from the reaches**.

Id. at 18 (emphasis added) (*available at* http://www.waterdistrict1.com/water%20accounting %20manual.pdf).

diminish the flows in Indian Creek," and "there is no doubt Riverside will be directly affected." *Reply* at 34. In this regard, Riverside argues that a transfer is required. *Id*. at 31. But being "affected" is not the standard under Idaho Code § 42-222—the question is one of "injury" and that requires possessing something that is capable of injury. In *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945), the Idaho Supreme Court held:

> And it is further urged that the change injures appellant in this: that appellant would thereby be deprived of the use of the Lockman waste water.
>
> The injury which appellant urges against the right of respondents to change the point of diversion and place of use of the Lockman water is not the kind of an injury that will prevent the making of the change. To prevent a change in the point of diversion and place of use of water, **the injury, if any, must be to a water right**. In the case at bar, it must be kept in mind, appellant does not plead that a change in the point of diversion and place of use of the Lockman water would in any way injure the water or the right to use the water, decreed to the Ake ranch. Undoubtedly, if a change of the point of diversion and place of use of the Lockman water actually injured appellant's use or right to use the water decreed to the Ake ranch, the change could not be made.

Id. at 180-81, 157 P.2d at 1008.

Riverside possesses no right to Nampa's wastewater with either an actual water right or other legal entitlement based on historic use. The starting point for analysis of whether an action will impact another property owner (water rights are defined as real property under Idaho Code § 55-101) is this recognition:

> Generally, "every man may regulate, improve, and control his own property, may make such erections as his own judgment, taste, or interest may suggest, and be master of his own without dictation or interference by his neighbors, so long as the use to which he devotes his property **is not in violation of the rights of others, however much damage they may sustain therefrom**."

McVicars v. Christensen, 156 Idaho 58, 62, 320 P.3d 948, 952 (2014), *as corrected* (Feb. 20, 2014) (quoting *White v. Bernhart*, 41 Idaho 665, 669–70, 241 P. 367, 368 (1925)) (emphasis

added). Stated another way, there may be impacts to an objector like Riverside, but those impacts are not considered injury to others provided that the property owner (Nampa) is acting within its rights. Such is the case here. As thoroughly briefed previously, Riverside has no legal right to Nampa's wastewater. Riverside's arguments otherwise are unpersuasive. The purpose of the Nampa-Pioneer relationship is to dispose of polluted effluent, not impact Riverside's water supply.

III. CONCLUSION

At the end of the day, this case turns on Nampa's authority under Idaho Code § 42-201(8) to reuse its effluent by contracting with Pioneer to land apply within Pioneer's service area. At bottom, Riverside's arguments all rely on Riverside's position that it is entitled to require Nampa to maintain the discharge into Indian Creek to avoid impact to Riverside, unless Pioneer first obtains a water right to put Nampa's effluent to reuse. But under Idaho law, Pioneer is not required to obtain a water right prior to Nampa's placement of treated effluent into Pioneer's system or Pioneer's subsequent application of that effluent to lands within places of use of water rights held by either Pioneer or Nampa. The singular glaring error in all of Riverside's arguments is its failure to recognize that Nampa's treated effluent is *wastewater* that remains under Nampa's dominion and control through its contract with Pioneer to land apply the effluent to Pioneer's service area. Nampa's effluent is not a source of water upon which Riverside can legally rely, even if it formerly profited from the physical supply discharged by Nampa into Indian Creek. Riverside's prior reliance on Nampa's wastewater discharge into Indian Creek from Nampa is not a valid basis to assert injury, nor is it a valid basis to ask the Director to reject the legislature's policy decision enshrined in Idaho Code § 42-201(8). Accordingly, the Director should reject Riverside's request for relief under

its petition for declaratory judgment, and find that it is unnecessary for Pioneer to obtain a water right to accept Nampa's discharge of treated effluent, or to thereafter apply it to lands within the place of use of water rights held by either Pioneer or Nampa.

The Municipal Intervenors do not believe oral argument is necessary, unless the Director would find it helpful.

Dated: December 10, 2020

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