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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 **NAMPA'S SUR-REPLY BRIEF**

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INTRODUCTION

This is the City of Nampa's sur-reply to *Riverside's Reply in Support for Petition for Declaratory Ruling* ("Reply") dated November 20, 2020. Although Idaho Power Company vigorously insisted that it be made a party to these proceedings, it did not file a response brief. Nampa employs the same shorthand definitions set out in footnote 1 of *Nampa's Response Brief* ("Nampa's Response") dated October 30, 2020.[1]

Riverside did nothing in its Reply to advance the ball. It employs circular reasoning that ignores the plain meaning and purpose of the pertinent statutes, Idaho Code §§ 42-201(2) and (8). And it insults Nampa's Reuse Project, calling it a "scheme" to injure Riverside. Reply at 1, 34. This denigration of the City's good efforts reflects the weakness of Riverside's substantive arguments.

There is no scheme here. Dealing with sewage is every municipality's least favorite duty. Cities and sewer districts across Idaho shoulder this responsibility with quiet determination and little praise. Nampa has demonstrated significant leadership on this issue. It would be far easier simply to continue sending its effluent down Indian Creek, thereby subjecting its citizens to the crushing burden of paying for ever more costly treatment facilities. Instead, Nampa has addressed its responsibilities proactively through a Reuse Project fully vetted and approved by IDEQ. This undertaking will satisfy all environmental requirements, save its customers twenty million dollars (SOF ¶¶ 29-30), and put its wastewater to further beneficial use. In doing so, it is

[1] *Errata:* Nampa's Response incorrectly referenced a letter from IDWR dated September 29, 2008 (attached to Nampa's Response as Addendum D, item 3, pp. 162-63). The letter was written by Gary Spackman. Nampa's Response incorrectly referred to the author as Mat Weaver.

living up to the good stewardship that is at the core of the State's water policy. In short, Nampa followed the path envisioned by section 42-201(8).

For some time, Riverside has been the incidental beneficiary of Nampa's sewage. It is entitled to continue to take whatever effluent it finds in Indian Creek, so long as Nampa's current sewage treatment practices continue. But Riverside has no property right in Nampa's effluent. It cannot demand that Nampa construct costly and unnecessary treatment facilities so that the current practice may be continued forever.

To suggest that Nampa has "schemed" to hurt Riverside is an undignified assault on the City's integrity. If there is any "scheme" here, it is Riverside's effort to render section 42-201(8) a nullity.

ARGUMENT

I. THE DIRECTOR NEED LOOK NO FURTHER THAN SECTION 42-201(8).

A. Section 42-201(8) relieves Nampa and its agent, Pioneer, from obtaining a water right.

This matter should begin and end with section 42-201(8), by which the Legislature authorized cities and sewer districts to dispose of their effluent without obtaining a water right. Riverside has only one argument, which it relegates to pages 22-28 of its Reply: It notes that subsection (8) applies only to cities, sewer districts, and the like. Thus, Riverside contends, the statute does not shield Pioneer from a perceived requirement to obtain a water right for what Riverside calls Pioneer's "diversion" of effluent delivered by the City to the Phyllis Canal.

Based on misrepresentations of the legislative history discussed below, Riverside reaches the fallacious conclusion that the statute does not protect entities who accept the effluent and apply it to land:

> 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.

Reply at 24 (emphasis added).

This is wrong. The scenario presented to the Legislature was McCall's situation. As Nampa has pointed out, and as Riverside continues to ignore, McCall did not land apply its effluent on its own farm land. It employed the agency of third-party farmers to land apply the effluent on the farmers' lands. The Legislature was aware of this (as was the Department, which facilitated the legislation). See Nampa's Response at 17, n. 9. Riverside's contention that the legislation did not allow cities to undertake effluent disposal through the agency of others, and that those who accept a city's effluent must themselves obtain a water right for doing so, ignores the record. And it defies common sense.

Riverside then tacks to the argument that, in any event, Pioneer is not Nampa's agent. Riverside contends this is so because Nampa no longer controls the water once it is in Pioneer's hands:

> 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").

Reply at 25.

The simple answer is this: Of course Nampa turns the effluent over to Pioneer. Of course Pioneer takes it from there. That is how Nampa has chosen to dispose of the effluent. Pioneer's job is to deliver surface water, now augmented by treated effluent, to landowners within the district in accordance with its statutory and contractual duties. Pioneer will do so in a manner that IDEQ has determined will protect the environment by preventing phosphate loading. Each party has a job to do. That is how the "agency" works. And that is how the Legislature expected it to work in section 42-201(8), based on McCall's example.

There is nothing casual about this agency. This is not a "here's some water, you take it" pass off. This reuse is accomplished with a combination of physical plumbing, IDEQ approval and oversight, contractual obligations under the Reuse Agreement, and legal entitlements for Nampa to receive water back from Pioneer. The statutory authorities for such agreements need not be restated in section 42-201(8).[2]

B. Riverside misrepresents the legislative history.

Riverside rejects all of this based on the disingenuous argument that the section 42-201(8) exemption was intended to apply "narrowly."[3] For this, it quotes Lindley Kirkpatrick of McCall, whose testimony described the legislation as narrow in scope. Reply at 23-24, 25, 26.

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[2] E.g., Idaho Code § 50-301 (authority of cities to enter into contracts and to perform all functions of local self-government); Idaho Code §§ 50-1801, 50-1805, § 50-1805A (authority to enter into agreements for delivery of irrigation district water); Idaho Code § 43-304 (authority of irrigation districts to enter into contracts for a water supply); Idaho Code § 43-403 (apportionment of benefits to landowners within district).

[3] Riverside's approach to the statute oscillates. On the one hand, it says the Director should stick to the words of the statute. Yet Riverside proceeds to discuss and rely on the legislative history. That legislative history, and other pertinent documents, are attached to Nampa's Response as Addenda A through G. In footnotes 3 and 8 of its Reply, Riverside suggests that the Director should disregard these official documents because they were not included among the stipulated exhibits. This suggestion does not appear to be offered seriously. In its initial brief, Riverside itself cited to and quoted from the same legislative history (Opening

Riverside made the same argument in its opening brief at page 26-27. Riverside now repeats it without bothering to address what Nampa said in footnote 12 on pages 19-20 of Nampa's Response (in which the City carefully explained how Riverside misinterpreted Mr. Kirkpatrick's comments and took them out of context).

As for Mr. Kirkpatrick's statement that the legislation is narrow, let us be clear. There is nothing narrow about section 42-201(8) so far as water rights are concerned. It is a sweeping exemption that was intended to avoid the very litigation that Riverside has now instituted.

Mr. Kirkpatrick's testimony about the statute's narrowness was in the context that it only eliminated the water right requirement, and that it did not eliminate, soften, or change in any way the rigorous environmental requirements administered by IDEQ. "He [Mr. Kirkpatrick] said this doesn't change anything about DEQ's reuse tools, it only allows cities to use wastewater on growing crops." Minutes of House Resources and Conservation Committee (Mar. 5, 2012) (attached to Nampa's Response as Addendum C at 121).

Mr. Kirkpatrick also spoke about the statute's narrowness in the context that the statute does not apply to private industries that generate effluent. Riverside misleadingly quotes only the first sentence of what Mr. Kirkpatrick said. The second sentence provides the context:

> We've tried to craft this proposal narrowly to apply to only cities, sewer districts and other publicly-owned treatment works. We don't want to get tangled up with any industrial users or private environmental remediation efforts.

Lindley Kirkpatrick's statement to the House Resources & Conservation Committee (Mar. 5, 2012) (attached to Nampa's Response as Addendum C, p. 125).

Brief at 26-27). In its Reply, it extensively cites, quotes, and discusses the very documents it says the Director should ignore (Reply at 20, 23-26). Meanwhile, Riverside attached its own marked up exhibit to its Reply, notwithstanding that it, like Nampa's Addenda, were not included among the stipulated exhibits.

II. IDAHO CODE § 42-201(2) DOES NOT APPLY TO PIONEER'S ACCEPTANCE AND USE OF WATER DELIVERED BY NAMPA.

Riverside insists that Idaho Code § 42-201(2) compels Pioneer to obtain a water right. This is wrong for several reasons.

A. Section 42-201(8) operates "notwithstanding" any permitting requirements in 42-201(2).

The first word in section 42-201(8) is "notwithstanding." It tells the reader unmistakably that subsection (8) overrides subsection (2). See discussion in Nampa's Response, section I.B at 15-16. The plain meaning of "notwithstanding" is reinforced by the context and legislative history of subsection (8), which make abundantly clear that the override of subsection (2) applies not just to Nampa, but to those with whom Nampa engages to carry out its effluent disposal. See discussion in Nampa's Response, section I.C at 16-20. Finally, subsection (8)'s notice requirement would make no sense if irrigators and/or irrigation districts receiving a city's effluent were required to obtain a water right. See discussion in Nampa's Response, section I.D at 20-22 and below in section III.B at page 15.

Even if section 42-201(2) were applicable to Pioneer, that subsection does not compel Pioneer to obtain a water right to receive and use effluent delivered to it by Nampa. This is so for the reasons discussed below.

B. The effluent provided to Pioneer is not "public water" subject to appropriation.

As Nampa has explained, a water right is required only when one diverts from a public water supply. See discussion in Nampa's Response, section II.A at 25-28. Riverside fairly observes that references in the statutes to "natural watercourse" should be understood to mean

"public water." Reply at 29.[4] But that does not get Riverside very far.

Surely it is obvious that the effluent Nampa collects in its sewer system is not public water so long as it remains under the City's control. Riverside seemingly concedes this. Reply at 29. Then, in the next breath, Riverside makes its most outrageous argument yet. Astonishingly, Riverside says that it or anyone else may place a pump in the Phyllis Canal and "appropriate" the effluent flowing there:

> 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. <u>At that point the water is subject to appropriation.</u>

Reply at 29-30 (emphasis supplied).

However far the concept of "public water supply" may stretch, it does cover water lawfully placed in an artificial conveyance facility under another person's ownership and control. Accordingly, no water right is required for a city or sewer district to collect influent in a sewer system, no water right is required to convert that influent into treated effluent, and no water right is required for Pioneer to accept and use the "gift" of treated effluent transported to it in a pipe under Nampa's dominion and control.

C. Pioneer's acceptance of effluent from Nampa does not require a water right because there is no point of diversion.

Without authority, Riverside insists on describing the point at which Nampa delivers effluent into the Phyllis Canal as a "point of diversion." Without a diversion, there is no

[4] Both phrases ("public water" and "natural watercourse") are used in section 42-201(8). Riverside and everyone agrees that a water right is required for diversions from drains and ground water, not just "natural watercourses."

requirement to obtain a water right. Idaho Code § 42-201(2); see discussion in Nampa's Response, section II.A at 25-28 and discussion immediately below in section II.D.

Riverside says that it should be called a diversion because Nampa's pipe to the Phillis Canal is no different than piping water from a drain. Reply at 30. Riverside focuses on the wrong end. The pipe may be quite similar. But a drain (from which one may make a lawful appropriation) is not like a sewer system (from which one may not). One may only divert from a public water supply, and there is none here.

D. The word "or" is too slender a reed to support Riverside's argument that section 42-201(2) reaches beyond diversions from public waters.

Riverside urges the Director to ignore the words "public waters" and "natural water courses" in section 42-201(2) because they do not appear after the word "or." Reply at 28-29. The words "water" and "it" appear in the two final clauses of the last sentence, without repetition of the reference to diversion from "public waters" or "natural water courses." Based on this sentence structure, Riverside surmises, the whole thrust of the statute (which was to close a loophole in subsection § 42-201(1)) should be subverted. As Riverside reads subsection (2), the "shall not divert" prohibition is limited to waters from a natural water course (or "public waters" as they are called in the first sentence). But the prohibition against "applying water to land" refers to a broader class of water that includes water not in the public supply such as municipal sewage that has not been released to a natural waterway.

And then there is the third clause: "or apply it to purposes for which no valid water right exists." What does "it" refer to? There are two subjects before the word "it": "water from a natural water course" and "water." The obvious conclusion is that "it" refers to both—because they are one and the same. They both refer to water diverted from a natural water course (i.e., the public water supply).

That simple answer—based on the words of the statute—should dispose of Riverside's "or" argument. The only sensible reading of subsection (2) is that a water right is required only when there is a diversion from the public water supply. Other arguments, based on legislative history, are set out in Nampa's Response, section II.B at 28-30.

III. THERE IS NO BASIS FOR RIVERSIDE'S CONTENTION THAT NAMPA'S EFFLUENT MUST BE USED WITHIN THE CITY'S EXISTING SERVICE AREA.

A. Riverside's argument relies on the false premise that Nampa's effluent must be used within the City of Nampa.

Riverside's case is built on a false premise: the assumption that Nampa cannot provide effluent beyond its municipal borders (or its area of city impact). It pins this assumption on a case that has no such holding: *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist*., 141 Idaho 746, 753, 118 P.3d 78, 85 (2005). Reply, sections V, VIII, and IX at 8-9, 11-19. The *A&B* case does nothing to advance Riverside's argument, other than serve as a red herring. *A&B* is relevant only in that it reiterates the undisputed principle that an appropriator may recapture and reuse water and apply it to beneficial use, but only within the scope of the original water right. *A&B*, 141 Idaho at 752, 118 P.3d at 84.

A&B filed enlargement claims seeking rights to irrigate lands beyond the original place of use. The Court found that A&B could have sought a new appropriation in the collected drain water, but elected not to do so (for the obvious reason that it did not want a junior priority date). Instead A&B sought an enlargement right based on the original appropriation, whose source was ground water.[5]

[5] There is a lot to chew through in the *A&B* case, but its holding is actually pretty simple. The question in the case was: What is the nature of the right that A&B claimed? A&B said it was recapturing and reusing its own water—which it described as waste water. But that argument failed, because the new use was beyond the original place of use. A&B could have sought a new appropriation, which would be an appropriation of waste water. (Just as a third-

Riverside says that *A&B* proves that the effluent collected by Nampa is still ground water. Maybe; maybe not.[6] It does not matter what you call it. The only relevant question is, what can Nampa and Pioneer do with that effluent? *A&B* sheds no light on this question. It does not deal with municipal water rights, nor reuse of effluent.

Where, as in *A&B*, the water user holds an irrigation right, limiting the new use to the scope of the original right is a substantial constraint, because irrigation rights have a fixed place

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party might appropriate some else's waste water.) But A&B was not making a new appropriation; it was making a claim under the amnesty statute. That meant that the claim must be an enlargement of the original right, which, of course, was a ground water right. The enlargement was permissible, but subject to subordination to rights senior to the date of the enlargement statute. All this is fascinating to be sure, but largely irrelevant to the matter now before the Director.

[6] An IDWR guidance memo cites case law saying that effluent is neither ground water nor surface water, but something unique:

> One of the most frequently cited cases is *Arizona Public Service Co. v. Long*, 773 P .2d 988 (Ariz. 1989). In this case, the owners of downstream junior water rights that had historically used the effluent for irrigation following upstream discharge sued the City of Phoenix alleging that the city had no right to contract with a utility for the transport and use of the effluent in the cooling towers of a nuclear power plant. The court upheld the contract, holding that sewage effluent was neither surface water nor ground water, but was simply a noxious byproduct which the city must dispose of without endangering the public health and without violating any federal or state pollution laws. In reaching its decision, the Arizona Court quoted from a much earlier Wyoming decision which upheld the sale by a city of effluent discharged directly into the buyer's ditch, but also held that effluent discharged into a stream became public water subject to appropriation. *Wyoming Hereford Ranch v. Hammond Packing Co*., 236 P.2d 764 (Wy. 1925). The Arizona Public Service case generally holds that cities may put their sewage effluent to any reasonable use that would allow them to maximize their use of the appropriated water and dispose of it in an economically feasible manner. Beck, *Waters and Water Rights*, § 16.04(c)(6) (1991).

Application Processing Memorandum No. 61 (Memorandum from Phil Rassier to Norm Young, pages 1-2 (Sept. 5, 1996) (emphasis added) (attached to Nampa's Response as Addendum G, item 2, p. 207.)

of use. Municipal rights, in contrast, have a flexible place of use. And, of course, the limitation as to place of use (and everything else) was eliminated altogether by Idaho Code § 42-201(8).

Based on the false premise that land application beyond the City limits or area of city impact is somehow a problem, Riverside goes on at length about how the Reuse Permit contemplates that Nampa will be "spreading" its effluent across 17,000 acres of Pioneer Land[7] (Reply at 4) reaching lands "far beyond any conceivable reach that Nampa might have" (Reply at 5) and "far outside Nampa's boundaries" (Reply at 11). Riverside believes this "puts the final nail in [Pioneer's] coffin" (Reply at 6) because "Nampa's current area of impact has little, if any, room to expand (Reply at 11).

Riverside's assumption that providing effluent to lands beyond the City's current service area is Pioneer's death knell is wrong at many levels, as shown below.

B. Land application outside of the City is authorized by 42-201(8).

Section 42-201(8) expressly requires the City to notify IDWR if its effluent will be applied to lands that do not already have a water right. Obviously then, the Legislature contemplated land application by municipalities would occur outside of the city (as was the case in McCall, which prompted the legislation). Likewise, it is evident that the Legislature did not contemplate that a new water right would be obtained for the land newly brought under irrigation with effluent. See Nampa's Response, section I.D at 20-22. This point alone destroys Riverside's premise that subsection (8) does not authorize use of effluent outside of Nampa. Riverside's Reply offers no response.

[7] Of course, Nampa's effluent is insufficient to reach 17,000 acres of land. The important point from IDEQ's perspective is that Pioneer has more than enough of acreage to absorb the increased nutrient load.

C. Even if section 42-201(8) did not resolve the issue, Riverside's outside-the-service-area argument fails.

In short, the answer to Riverside's alarm over lands far from Nampa receiving irrigation water is "so what?" The whole point of Idaho Code § 42-201(8) was to make this a non-issue. But even if that statute did not exist, Nampa should prevail. Three arguments, offered in the alternative, are set out below.

(1) In an accounting sense, Nampa's effluent stays within its existing service area.

One reason this is a non-issue is found in the particular facts of this case. Nampa is entitled to pump, is physically capable of pumping, and (at peak) actually does pump more water from the Phyllis Canal than it contributes to the Phyllis Canal as effluent. See Nampa's Response, at 47, n. 33.

That Pioneer water is then delivered back to Nampa's customers, all of whom are also Pioneer landowners.[8] Thus, in an accounting sense, all the effluent placed in the Phyllis Canal remains within Nampa's municipal service area. See Nampa's Response at 46-47.

Riverside counters that the Reuse Permit does not contemplate all of the effluent going back to Nampa's customers. Reply at 14. That is true. IDEQ is concerned with where the molecules go, because those molecules include pollutants. So it matters to IDEQ that there be plenty of land over which the phosphorous load may be spread. (See footnote 7 at page 15.) But for water right purposes, molecules don't matter; accounting is the key. Just look to the

[8] Riverside acknowledges that "many Nampa customers are also Pioneer landowners." Reply at 14. In fact, it is "all." Nampa does not serve irrigation water to customers within Pioneer's territory who have excluded their lands from Pioneer. Accordingly, Riverside's concern (Reply at 23) that *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 141 (1954) disallows Pioneer from allowing water in the Phyllis Canal to reach non-Pioneer lands served by Nampa is moot.

Department's refill accounting system, to the allocation of storage water among reservoirs, or to the Department's accounting of diversions from various APODs during times of administration.

(2) Nampa's disposal of the effluent (via delivery to Pioneer) is itself a municipal use, which occurs within Nampa's existing service area.

In prior guidance and communications, the Department has been clear and consistent that treatment or other disposal of effluent undertaken in order to comply with environmental regulations falls within the broad definition of permissible "municipal use." A 1996 formal guidance memo, which remains in effect, noted: "In the case of municipalities, the majority view is that the proper disposal of effluent from waste treatment facilities comes within the parameters of the beneficial use of a municipal water right." *Application Processing Memorandum No. 61* (Memorandum from Phil Rassier to Norm Young, pages 1-2 (Sept. 5, 1996) (attached to Nampa's Response as Addendum G, item 2, p. 207.) Other Departmental guidance is collected in the footnote.[9]

[9] A Review Memo, p. 6, dated September 23, 2008 prepared by Mat Weaver and sent to Gary Spackman in connection with the Black Rock project in North Idaho (attached to Nampa's Response as Addendum D, item 2, p. 161) stated: "Based on the discussion in the BACKGROUND section of this memo it seems to me that not only is the land application of treated wastewater allowed for under the municipal use general heading, but should be encouraged as a valid and worth while conservation effort."

"Waste water treatment necessary to meet adopted state water quality requirements is considered by IDWR as part of the use authorized under a municipal right so long as the treatment process complies with the best management practices required by the Idaho Department of Environmental Quality, the U.S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction." Letter from Garrick L. Baxter to Christopher H. Meyer (Sept. 7, 2011) (emphasis added) (attached to Nampa's Response as Addendum F, item 2, p. 198).

Similarly, the Department counseled the City of Nampa on another occasion as follows: "You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area." Letter from Garrick Baxter to Christopher Meyer dated May 26, 2011 (emphasis original) (attached to Nampa's Response as Addendum E, item 3, p. 183). "You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing

Here, the disposal of effluent occurs by way of Nampa delivering it to the Phyllis Canal pursuant to an agreement with Pioneer and a Reuse Permit issued by IDEQ. That municipal use (i.e., disposal) happens at the point of delivery to the canal. Once that delivery is made, the effluent is no longer Nampa's responsibility, and the municipal use is complete.[10]

The point of delivery is within Nampa's existing service area.[11] This moots Riverside's argument that Nampa's service area may not expand to include Pioneer's territory.

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use." Letter from Christopher Meyer to Garrick Baxter and Jeff Peppersack dated May 24, 2011 (attached to Nampa's Response as Addendum E, item 4, p. 188).

A letter from counsel for the City of Nampa to Steven Strack summarized the views stated by Garrick Baxter and Jeff Peppersack in a prior meeting: "It was their view than an infiltration project to meet mandatory water quality requirements would constitute a municipal use of water." Letter from Christopher Meyer to Steven Strack, p. 2, dated May 19, 2011 (attached to Nampa's Response as Addendum E, item 1, p. 167).

Similarly, a letter from counsel for the City of Nampa to Garrick Baxter and Jeff Peppersack Strack stated: "You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use." Letter from Christopher Meyer to Steven Strack, p. 1, dated May 24, 2011 (attached to Nampa's Response as Addendum E, item 4, p. 174).

Mr. Baxter responded to that letter, confirming: "The context of our conversation was the treatment of water by infiltration, not recharge per se." Letter from Garrick Baxter to Christopher Meyer, p. 1, dated May 26, 2011 (attached to Nampa's Response as Addendum E, item 3, p. 183). In other words, using the effluent for recharge—thereby allowing new uses unrelated to the original use—might not be a municipal use. But treatment or other disposal necessitated by the original use is considered part of the municipal use.

[10] Indeed, Riverside appears to acknowledge that Nampa's disposal is complete at the point of delivery:

> 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").

Reply at 25.

[11] SOF ¶ 40; *Reuse Proponents' Submission of Exhibits A-F*, Exhibit C, p. 11 ("Map showing proposed alternatives for discharge of recycled water to Phyllis Canal (Attachment to Reuse Agreement")). This map also appears at the end of Exhibit F, p. 21. By the way, Nampa

(3) Nampa's municipal service area may expand to include the portion of Pioneer's District below the delivery of effluent to the Phyllis Canal.

There is yet another way of looking at this.[12] Rather than viewing the municipal use of Nampa's effluent as occurring within the area served by Nampa's non-potable delivery system, or at the point of delivery to the Phyllis Canal, the use could be seen as occurring throughout Pioneer's territory downstream of the point of delivery. If the Department wishes to approach it that way, that is permissible based on Nampa's expanding service area.

Idaho's water code defines municipal "service area" as follows:

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

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

Riverside mistakenly assumes that the referenced "planning area" means "area of city impact." This is not so.

This point was discussed in a letter seeking the Department's view of this provision in the context of the City of McCall's land application of wastewater outside the city. The upshot is that "planning area" is not a defined term and should be understood to mean long-term planning

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has now selected among the options earlier. It is essentially Option 1A, except the pipe will run on the other side of the Fred Meyer store (the large building under the label "Option 1A").

[12] Riverside complains that it is "disingenuous" for Nampa and its supporters to argue, on the one hand, that Pioneer is Nampa's agent in land application, and, on the other hand, that the delivery of water to Pioneer is merely a disposal. Reply at 30. There is nothing disingenuous about presenting alternative legal theories or ways of looking at this.

undertaken in reference to the City's water supply and management. That would certainly include Nampa's planning with respect to the Reuse Project.

Here is the exchange:

> First, the land application must be "within the municipality's established planning area." "Planning area," however, is not a defined term. It is an informal term generally understood to refer to the area used by a city for water rights planning purposes as it plans for current and future water requirements. [footnote: The term "planning area" in the 1996 Act should not be confused with the city's "area of city impact." The latter is a distinct term meaningful in the context of annexation rules under the Local Land Use Planning Act, Idaho Code § 67-6526.] In other words, the 1996 Act requires that land application outside the city limits must be undertaken as part of a city's long-term water planning effort.

Letter from Christopher Meyer to Garrick Baxter (Aug. 18, 2011) (attached to Nampa's Response as Addendum F, item 1, at 195).

Mr. Baxter replied (following further information submissions):

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

Letter from Garrick Baxter to Christopher Meyer (Sept. 19, 2011) (parentheticals original) (attached to Nampa's Response as Addendum F, item 4, p. 202).

In sum, because Nampa's WWTP will be plumbed directly into the Phyllis Canal, Nampa's service area may expand to encompass all 17,000 acres of lands below the delivery point of effluent to the Phyllis Canal.

Riverside says this cannot happen because that would overlap Caldwell's service area. Reply at 18. But nothing in the water code prohibits overlapping service areas. What is prohibited, at least with respect to RAFN rights, is this: RAFN rights may not be obtained to serve municipal entities that have overlapping and conflicting comprehensive plans. Idaho Code §§ 42-202B(8). That is not happening here.[13] If Nampa's effluent firms up Pioneer water supplies already available to both Caldwell and Nampa, that is a good thing.

The definition of municipal "service area" includes water delivered outside of the city limits "if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits." Idaho Code § 42-202B(9).

In guidance provided to the City of McCall, counsel for the Department initially stated that it did not have enough information to say whether McCall's service area could extend to the lands applying the effluent:

> In the City's case, the Department understands that the City uses a series of privately owned irrigation ditches to transport effluent to lands outside the city limit. The Department has questions regarding the process in which the City delivers effluent to the lands outside the city limits. A measure of control and supervision is at least implied for a delivery system to be considered a "common" water distribution system.

Letter from Garrick Baxter to Christopher Meyer dated September 7, 2011 (emphasis added) (attached to Nampa's Response as Addendum F, item 2, p. 199). McCall's counsel then clarified that the effluent is piped from the treatment plant to a mixing station three miles outside the city and from there to farms under contract with the city. Letter from Christopher Meyer to Garrick

[13] This language from the 1996 Municipal Water Rights Act is aimed at ensuring that municipal entities are not allowed to acquire duplicative future needs water rights as each hopes to serve the same growth areas. That is obviously not happening here. Neither city has comprehensive plans aimed at invading each other's areas of impact; nor would that be allowed under the Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6538.

Baxter dated September 16, 2011, page 1 (attached to Nampa's Response as Addendum F, item 3, p. 200). In response, IDWR's counsel replied that "the Department agrees that the lands served outside the City of McCall's corporate limits share a common water distribution system with lands located within the corporate limits." Letter from Garrick Baxter to Christopher Meyer dated September 19, 2011 (attached to Nampa's Response as Addendum F, item 4, p. 202).

To be fair, the Department's guidance to McCall could be distinguished from Nampa's situation. Unlike McCall, Nampa is not itself delivering the effluent in its own pipes to the headgates of each farm or other user.[14] Instead, it is delivering effluent in its own pipes to Pioneer and then relying on a formal, public agreement with Pioneer to deliver that water to land within Pioneer's boundaries.

Although this is a distinction, Nampa urges it is a distinction without a difference. What is important under section 42-202B(9) is that the water be delivered under physical control without entering public waters, and that it be delivered to land areas that can be precisely described to the Department. The portion of Pioneer's service area downstream of Nampa's effluent delivery point is large but readily describable. That is what matters.

Again, however, section 42-201(8) moots the question. It was enacted to eliminate the need for lawyers to engage in these semantic debates.

[14] McCall explained in its letter to the Department that the effluent will "not simply be used to augment the water supply of an irrigation district without the ability to determine which land actually receives the effluent." Letter from Christopher Meyer to Garrick Baxter dated September 16, 2011, page 2 (attached to Nampa's Response as Addendum F, item 3, p. 201).

IV. NAMPA'S POTABLE SYSTEM WATER RIGHTS ARE PLUMBED INTO THE POTABLE DELIVERY SYSTEM; NOTHING IN THE WATER RIGHTS LIMITS WHERE THE WATER MAY BE USED.

Riverside continues to insist that because Nampa's effluent derives from its potable system water rights, the effluent may not be used within its non-potable system. Reply, section VI at 9-10. This is premised on these words which appear on some of Nampa's water rights: "This right is part of the potable water delivery system for the City of Nampa."

Nampa has long operated two delivery systems, potable and non-potable. In the last decade, Nampa has worked hard, with the cooperation and support of the Department, to integrate its delivery systems in order to make more efficient use of both water and infrastructure. As a result, water from the potable delivery system can and is moved to the non-potable delivery system at the flick of a switch.

Each delivery system is physically connected to specific wells. (Potable system wells are designed differently and are subject to different regulatory standards.) As Nampa's water rights were developed over time in conjunction with specific wells, the associated water right was often labeled depending as being "part of" one delivery system or the other. The wells within each of the two systems are now gradually being converted to APODs—but only within their respective delivery systems. In that sense, and that sense only, the systems remain separate.

None of this is a constraint on where the water may move once it is diverted. As noted, water today moves from the potable delivery system into the non-potable delivery system, with the knowledge and approval of the Department. Much less is there a constraint on where subsequently captured effluent may move. This is clear from the words on the water right. The statement says the right is "part of" the potable system or "part of" the non-potable system. It is

part of that system because those wells are plumbed to that system. It does not say that water diverted under those rights may never be used elsewhere.

The foreign case relied on by Riverside, *City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (Tex. 2006), is telling. Marshall owned municipal water rights far in excess of what it needed. "The record suggests that Marshall was negotiating to sell the [excess] water to a power company and possibly to other industrial users." *Marshall* at 99-100. The case stands for the obvious proposition that when a city changes the nature of use from municipal to industrial, a change is required. Apparently, Texas defines municipal water as potable only. *Marshall* at 99. Idaho, of course, does not. Idaho Code § 42-202B(6). Unlike Marshall, Nampa is not selling off unneeded municipal water to a non-municipal user who instead will divert that water from the ground. Nampa will continue to pump all of its municipal water rights and place them to beneficial use, just as before. Nampa is authorized by common law and by Idaho Code § 42-201(8) to capture its municipal effluent and make further use of that water—or dispose of it in accordance with environmental regulations—as it sees fit. Because of those laws, doing so is not an enlargement or expansion of the municipal right.

V. THE "USE SURFACE WATER FIRST" CONDITION APPLIES ONLY TO THE FIRST USE OF A MUNICIPAL RIGHT.

In its Reply, Riverside repeats its argument that standard "supplemental use" conditions (which require Nampa to use some of its ground water rights only when surface water is unavailable) pose a problem. Reply, section X at 19-21. Nampa already has responded to this. Nampa's Response, section III.D.2.b at 43 (quoting Mat Weaver's Review Memo at 5 (attached to Nampa's Response as Addendum D, item 2, p. 156)).

In its Reply, Riverside does nothing beyond suggesting that Mr. Weaver was wrong in his analysis. He was not.

VI. *RANGEN* IS INAPPOSITE.

Riverside cites *Rangen, Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016), a case dealing with the finality of decrees (holding that a water user may not end-run its water right decree by claiming historical uses inconsistent with the decree). Reply, section IV at 6-8. The case finds no parallel here. Mr. Rangen got into trouble for asserting authority to divert from diversion points not included in the decree. In contrast, the effluent Pioneer receives from Nampa is a not based on a water right. It is, as Riverside says, a gift. Pioneer has no rights to the continuation of that gift (beyond whatever contract rights be found in its agreement with Nampa). Pioneer is not trying to convert that gift into an enforceable water right. Accordingly, there is no "finality of decree" issue here, because there is no decree. *Rangen* simply does not come into play.

The flaw in Riverside's analysis permeates its entire briefing. Riverside repeatedly assumes and asserts that Pioneer needs a water right. Riverside then cites to cases involving people who actually have water rights and try to enlarge them or change their described elements. That has nothing to do with Pioneer's acceptance of a gift of effluent from Nampa—effluent that is not part of the public water supply.

VII. RIVERSIDE'S CONSTITUTIONAL ARGUMENT CONTINUES TO UNRAVEL.

In its Reply, Riverside continues its half-hearted constitutional challenge to Idaho Code § 42-201(8).

First, there is the procedural problem. Nampa pointed out the Director is without power to question a statute's constitutionality. Riverside now suggests that the Director may sidestep that limitation by applying a canon of construction available to courts. Courts, unlike the Director, have the power to decide constitutional questions. Hence, courts may interpret statutes

so as to avoid constitutional frailties they may perceive. The Director's job is simpler—apply the statute, period.

Nampa addressed the merits in Nampa's Response, section I.E at 23-25. Riverside says not to worry about the "parade of horribles" that would follow if the Director rules for Riverside. Worry not, it says, because its constitutional challenge is "as applied" not "facial." Reply at 33. That is a bogus distinction. Riverside's perceived "injury" is no different than any other "injury" that would occur under any application of the statute.

At the end of the day, Riverside's constitutional argument melts away. There is no injury because nothing in our Constitution requires every use of water to occur pursuant to a water right. In other words, the Constitution does not prohibit the Legislature from exempting some water uses from the permitting process. Likewise, Riverside has no protectable property interest by which it may force Nampa to forever send its effluent its way.

At least Nampa thought that was Riverside's constitutional argument. Nampa was giving the benefit of the doubt to Riverside, as it tried to fill in the unarticulated basis of the claim. Nampa did so by tying Riverside's poorly expressed claim to the only constitutional moorings that come to mind: the "right to divert" and "takings." But Riverside says, no thanks. It says it is <u>not</u> alleging an unconstitutional enlargement of Nampa's water right. Rather, it is asking "whether Idaho Code § 42-201(8) should be enlarged." Reply at 33. Whether a statute should be enlarged is a statutory question, not a constitutional one. Frankly, the Reply leaves Nampa wondering what Riverside's constitutional gripe is.

CONCLUSION

The path to obtain a Reuse Permit was neither easy nor inexpensive. The stipulated exhibits and the explanation in Pioneer's sur-reply brief document the meticulous planning

undertaken by Nampa and Pioneer and the exhaustive environmental review undertaken by IDEQ. The Legislature made clear that nothing in the section 42-201(8) exemption lessens that environmental burden. That is as it should be. But that exemption was intended the eliminate the very financial burden that Nampa, Pioneer, and the Municipal Intervenors have shouldered in defending Riverside's flawed challenge.

Riverside's Reply does nothing to repair its flawed analysis. Accordingly, Nampa urges the Director to issue a declaratory ruling stating that neither Nampa nor Pioneer is required to obtain a new water right in order to undertake the Reuse Project.

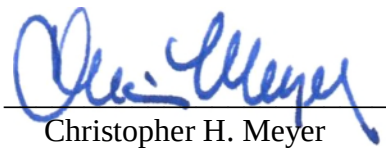
Should the Director disagree and find that a water right is required, Nampa urges the Director to include in his declaratory ruling a statement that if Pioneer were to seek an appropriation of the waste water delivered to it by Nampa, Pioneer would not be required, as a matter of law, to mitigate or otherwise compensate Riverside for any corresponding reduction in Nampa's discharge of that wastewater to Indian Creek. (This point is addressed in the reply brief of Municipal Intervenors.)

ORAL ARGUMENT IS NOT REQUESTED

Nampa does believe oral argument is necessary, unless the Director would find it helpful.

Respectfully submitted this 11th day of December, 2020.

GIVENS PURSLEY LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of December, 2020, the foregoing, together with exhibits or attachments, if any, was filed, served, and copied as shown below.

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