

**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 TO DIVERT WATER UNDER  
RESUE PERMIT NO. M-225-01

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Docket No. P-DR-2020-001

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**INTERVENOR PIONEER IRRIGATION DISTRICT'S  
SUR-REPLY BRIEF**

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## **I. INTRODUCTION**

Intervenor Pioneer Irrigation District (“Pioneer” or “District”) submits this Sur-Reply to Riverside Irrigation District, Ltd.’s (“Riverside”) *Reply in Support for Petition for Declaratory Ruling* (Nov. 20, 2020) (“Reply”) pursuant to the Department’s *Amended Scheduling Order* (Sept. 11, 2020). For the reasons discussed in Pioneer’s *Response to Petitioner’s Opening Brief* (Oct. 30, 2020) (“Pioneer Response”) and those discussed herein, Pioneer need not obtain a water right to implement the Nampa-Pioneer Reuse Agreement and the resultant DEQ-issued Reuse Permit. Riverside’s contentions render Idaho Code Sections 42-202B(9) and 42-201(8) meaningless; contravene well-settled wastewater principles; and Riverside possesses no legally cognizable right in Nampa WWTP effluent entitling it to the relief it seeks in this proceeding.

## **II. ARGUMENT**

### **A. Riverside’s Land Application-Based “Water Spreading” and “Service Area” Arguments Ignore Nampa’s Pioneer-based Delivery Entitlement and Fundamentally Misunderstand the DEQ Reuse Permit and its Supporting Technical Analyses**

Riverside alleges 17,000 acres of “enlargement” and “water spreading” in hopes of manufacturing “per se injury” in an attempt to defeat the Nampa-Pioneer recycled water project. Reply, pp. 3-6; and 10-19. However, Riverside’s arguments ignore Pioneer system plumbing vis-à-vis Nampa deliveries and Nampa water delivery entitlement from Pioneer, and its arguments fundamentally misunderstand the water treatment (land application aspect) of the DEQ Reuse Permit regarding Nampa’s discharge of WWTP effluent to the Phyllis Canal. Riverside’s assertion that 17,000 acres of Pioneer landmass is necessary to effectively treat Nampa’s WWTP effluent and, therefore, requires the “spreading” of Nampa’s WWTP effluent

across 17,000 acres of Pioneer landmass is incorrect and misreads the Reuse Permit and its supporting materials.

**1. Nampa Entitlement to Pioneer Water Delivery and Pioneer's Corresponding Water Delivery System to Those Nampa-Related Lands**

Sensitive to Riverside's enlargement and water spreading "scheme" arguments, but not beholden to them because Idaho Code Sections 42-202B(9) and 42-201(8) provide and hold otherwise, Pioneer nonetheless detailed the legitimate purposes, including Nampa reuse opportunities, of the Reuse Permit and the parties' Reuse Agreement. *See, e.g.*, Pioneer Response, pp. 20-23. Riverside continues ignoring the legal and physical realities of Nampa's Pioneer-based water delivery entitlement and the Phyllis Canal diversion locations supplying that water within the first approximately four miles of canal downstream of the proposed Nampa discharge point.<sup>1</sup>

In terms of Nampa water delivery entitlement from Pioneer, it is undisputed that Nampa's pressurized irrigation Non-Potable System alone irrigates 2,985 acres of Pioneer lands within Nampa's jurisdiction. *Stipulation of Facts by All Parties* (Sept. 11, 2020) ("SOF"), ¶ 20. Beyond that, Pioneer also makes additional gravity-based (*i.e.*, non-pressurized) deliveries to Nampa City (*i.e.*, Nampa-owned properties) locations totaling 116.23 acres. *Id.* And, these two groupings of deliveries to Nampa City are but a subset of a larger universe of additional deliveries Pioneer makes to Nampa citizens and lands that are not presently irrigated from Nampa's Non-Potable System. *Id.*, ¶¶ 57-60. All-told, Pioneer deliveries from the 15.0 Lateral, Hatfield Lateral, Stevens Lateral, Stone Lateral, and McCarthy Lateral serve approximately

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<sup>1</sup> Pioneer appreciates that there are various pipeline discharge routes proposed under the Reuse Permit. *See, e.g.*, Ex. G (Reuse Permit) at p. 30. However, all of the proposed points of discharge to the Phyllis Canal are located upstream of the 15.0 Lateral diversion from the canal. *See, e.g.*, Ex. H (DEQ Staff Memo), p. 20, Fig. 10.

3,400 acres of Pioneer lands overlapping Nampa corporate limits and larger Area of Impact. Ex. H, p. 20 (Fig. 10), and pp. 49-50 (Figs. 14 and 15). In terms of statutory apportioned benefit under Idaho Code Section 43-404, Pioneer's delivery obligations to the aforementioned lands total approximately 60 cfs to Nampa's Non-Potable System; 2.3 cfs to Nampa City properties via gravity-based deliveries; and 68 cfs in total to the 3,400 acres of Nampa and Nampa citizen-related properties lying within Pioneer's boundary. SOF, ¶ 1.

In terms of Pioneer water distribution network serving these approximately 3,400 acres of land in relation to the larger 17,000 acre landmass under the Phyllis Canal downstream of Nampa's proposed WWTP effluent discharge point, Pioneer delivers to those Nampa-related lands from the 15.0, Hatfield, Stevens, Stone, and McCarthy Laterals within the first approximately four miles of the Phyllis Canal downstream of the proposed discharge point. SOF, ¶¶ 58-59; *see also*, Exs. H (DEQ Staff Memo) generally (repeatedly acknowledging future use of the recycled water by "[Nampa] municipal irrigation utility customers" and "Nampa's [or City's] pressurized irrigation system"), at Figure 10 and Table 4 (schematically depicting the distribution systems, including acres served and cfs diverted per lateral facility), and at p. 24 (explaining that the Phyllis Canal flows for another 12 miles past the Wilson Drain crossing, which crossing is immediately upstream of the McCarthy Lateral diversion); and Ex. J (Preliminary Technical Report) at pp. 7-5 thru 7-8 (detailing Pioneer deliveries to Nampa and its citizens from the above-referenced facilities beginning with the 15.0 Lateral to the Midway Park Pump Station just downstream of the McCarthy Lateral—all deliveries occurring within roughly four miles of the proposed WWTP effluent discharge point(s)) and Figures 8 and 9 (depicting these Nampa-related ditch facilities, the location of the lands served by the facilities, and locating

and identifying the Nampa City Non-Potable System pump stations located on the various facilities).

In terms of simple mass balance calculation, Nampa and its citizens divert (or are entitled to divert) over two times the quantity of water from the Phyllis Canal (~68 cfs) than will be discharged to the canal from the WWTP under the Reuse Permit (31 cfs). Even the 41 cfs of WWTP effluent discharge contemplated in the parties' Reuse Agreement, but not yet permitted under the Reuse Permit, is far outstripped by Nampa's 68 cfs delivery entitlement—a quantity of water Pioneer is statutorily obligated to deliver to Nampa and its citizens in accordance with Idaho Code Section 43-404.

Consequently, Riverside's suggestion (or worse, assertion) that Nampa and its citizens will not be the primary (if not sole) beneficiary of the WWTP effluent it discharges to the Phyllis Canal is unsupported, inflammatory rhetoric. This is further demonstrated by the pollutant loading analyses supporting the Reuse Permit discussed immediately below.

**2. Nampa's Discharge to the Phyllis Canal is a Small Fraction of Larger Phyllis Canal Flows, and Nampa's Discharge is Effectively Treated from an Environmental Perspective Within the First 3,300 Acres of Pioneer Deliveries Downstream of the Discharge Point—Which 3,300 Acres are Located Almost Entirely Within Nampa's Jurisdiction**

There is no question that the DEQ Reuse Permit and supporting materials define the "Area of Analysis" and "Land Application Site" under the permit to be the approximately 17,000 acre Pioneer landmass irrigated from the Phyllis Canal downstream of the proposed Nampa WWTP effluent discharge sites. But, there is equally no question that Nampa WWTP effluent treatment (*i.e.*, land application) under the permit is not dependent upon water application to that entire 17,000 acre Pioneer landmass contrary to Riverside's allegations and assertions otherwise. Instead, Riverside fundamentally misunderstands the permit's pollutant loading analysis by losing sight of the fact that the analysis evaluates *total Phyllis Canal flows and preexisting*

***canal background constituent loads cumulatively with Nampa's proposed discharge inputs***

(i.e., the permit analysis does not focus on Nampa discharge loads and land application landmass needs in isolation).

This total flow (as opposed to Nampa-only flow) evaluation is illustrated by Preliminary Technical Report Tables 8-1, 8-2, 8-3, and 8-4 (Ex. J, pp. 8-1 thru 8-4); *see also, id.*, Appendix F. As explained and acknowledged by DEQ, Nampa's proposed discharge to the Phyllis Canal at full build out under the Reuse Permit (31 cfs) will comprise approximately 13% of the canal's typical 200 cfs flow rate at the proposed point of discharge. Ex. H (DEQ Staff Memo), p. 23. The constituent loading of that Nampa flow is then quantified and ***added to*** the existing Phyllis Canal flows and corresponding background constituent loads for purposes of the permit's overall analysis. *Id.*, pp. 26-32 (*see*, particularly, Tables 10, 11, and 12 comparing and contrasting "Background Phyllis Canal Data" with "Estimated Water Quality" and "Estimated Nutrient Loading" following the "Addition of Recycled Water" and "before and after recycled water is added"). Exhibit J (Preliminary Technical Report) Tables 8-1, 8-2, 8-3, and 8-4 demonstrate similarly (Table 8-4 identifies and quantifies Nampa WWTP effluent discharge constituent loading in isolation, while Tables 8-1, 8-2, and 8-3 aggregate water flows and constituent loads (Phyllis flows ***plus*** Nampa discharge flow)).

Preliminary Technical Report Appendix F and Report Table 8-3 further underscore the cumulative nature of the Reuse Permit's constituent loading analysis. Report Appendix F plainly states that the "Total Water Available" evaluated under the constituent loading and land application analysis is:



**Typical volume in the Phyllis Canal at the proposed discharge location**  
**+ Recycled water from the Nampa WWTP**

+ Pumping and inputs from drains and tailwaters of neighboring irrigation districts  
- Losses to groundwater from the bottom of the Phyllis Canal and Laterals  
- Losses to the atmosphere from the water surface in the Phyllis Canal and Laterals  
= **Total Water Available**

Ex. J (Preliminary Technical Report), at Appendix F, p. 5 (emphasis added and emphasis in original). And, Report Table 8-3, note 1 clarifies that Nampa's 31 cfs discharge (13% subset of overall Phyllis Canal flows) viewed in isolation would include "only assumed vegetated percentage of land within the 3,300-acre sample area described above" (*i.e.*, the 3,400 acres of Nampa-related properties lying within Pioneer's boundary served by the 15.0, Hatfield, Stevens, Stone, and McCarthy Laterals). Of course a large landmass is required to "uptake" nutrients from 230+/- cfs of water. But, again, Nampa's flow contribution at build out is only 13% of that total flow. Ex. H, p. 23.

That Nampa's constituent loading viewed in isolation is not a concern requiring land application to a 17,000 acre (or more) landmass is further demonstrated by the groundwater and surface water anti-degradation analyses performed under the permit, together with the Reuse Permit's focus on eliminating operational spills from the 15.0 Lateral system to the Moses Drain only.

Regarding groundwater concerns, DEQ "focused on the area just downstream of where recycled water will be added to the Phyllis Canal." Ex. H, p. 13. In both groundwater evaluations (one where canal flow at the point of WWTP effluent discharge was assumed to parallel groundwater flow, and a more conservative one where the canal flow was assumed to be perpendicular to groundwater flow), groundwater was modeled to slightly *improve* for constituents of concern (N and TDS), ultimately leading to the conclusion that "ground water is not expected to be negatively impacted by the proposed recycled water reuse." *Id.*, p. 16; *see*

*also, id.* (“the proposed recycled water use is protective of ground water”). In other words, Nampa’s WWTP effluent discharge to the Phyllis Canal will dilute groundwater constituent concentrations of concern, not exacerbate them.

Regarding potential surface water pathways of concern, DEQ acknowledged and understood that from a mass balance perspective (as opposed to Riverside’s apparent molecular accounting perspective), all 31 cfs of the Nampa WWTP effluent discharged would be immediately diverted into the 15.0 Lateral system (32 cfs) within one mile of the effluent discharge point. Ex. H, pp. 19-20 (including Table 10). Consequently, the 15.0 Lateral system spill to the Moses Drain became a potential spillway of concern back to jurisdictional waters (Indian Creek). *Id.*, p. 23. To mitigate this risk, the Preliminary Technical Report, DEQ Staff Memo, and the Reuse Permit control/mitigate this potential by eliminating this “small operational spill.” Ex. J (Preliminary Technical Report), p. 7-7 and Figure 9, Nos. 10 and 11, including note “b” (identifying the “small operational spill” of the 15.0 Lateral system to the Moses Drain as the “spill” to be eliminated); Ex. H (DEQ Staff Memo), p. 23 (identifying the 15.0 Lateral system spill as that to be eliminated); and Ex. G (Reuse Permit), p. 8 (CA-255-02, eliminating Pioneer’s operational spill back to Moses Drain).

DEQ’s focus on eliminating spill from the 15.0 Lateral system alone demonstrates the close-in re-diversion and reuse of Nampa’s proposed WWTP effluent discharge. Broader conveyance and use of Nampa’s effluent over a larger 17,000 acre landmass as Riverside contends would have implicated/raised concerns over many more spill pathways than just the 15.0 Lateral spill to the Moses Drain within the first mile of Phyllis Canal downstream of the effluent discharge point.

Finally, because Nampa will be treating to Class A recycled water standards, DEQ had no additional concerns of the immediate suitability of the WWTP effluent for irrigation purposes. This is why the end of Nampa's proposed pipeline at the Phyllis Canal is the Reuse Permit compliance point. Ex. G (Reuse Permit), p. 11 (Section 4.5) ("the requirements herein shall apply to the point where the water is discharged to the Phyllis Canal"); *see also, id.*, p. 14 (Section 5.1.1) (requiring Class A water quality sampling to occur at the point where the water is discharged to either the Phyllis Canal (MU-255-01), or to the proposed industrial reuse loop yet to be built (MU-255-02)) and p. 15 (Section 5.1.2) (requiring flow monitoring at the discharge points to the canal and industrial reuse loop and *upstream* of the canal discharge point); *see also*, Ex. H (DEQ Staff Memo), pp. 29-32 (Section 4.6.3) (explaining that Class A recycled water treated to 30 mg/L total nitrogen, 0.35 mg/L total phosphorus, and 700 mg/L TDS is immediately suitable for irrigation use at these "end of pipe concentration limits" and will not cause environmental degradation upon discharge to the Phyllis Canal in the immediate vicinity, let alone many miles downstream: "In reality, the concentration in the water available for users of the water will change quickly and in the far reaches of the Phyllis Canal will be very different than the values presented here.").

Just because 17,000 acres of Pioneer landmass is *available* downstream of the proposed Nampa discharge points, does not mean that all 17,000 acres are *necessary* to treat the WWTP effluent discharged. Instead, DEQ mass balance-based and diversion accounting-based analyses demonstrate differently.

Riverside's "water spreading" and "service area" arguments are hollow and misinformed. All of Nampa's WWTP effluent discharge to the Phyllis Canal *and more* (68 cfs versus 31 cfs) is rediverted and used on approximately 3,400 acres of land receiving water from the first four

miles of Phyllis Canal downstream of the WWTP effluent discharge point. In fact, all of Nampa's WWTP effluent discharge to the Phyllis Canal *and more* (32 cfs versus 31 cfs) is rediverted and used on approximately 1,600 acres of land receiving water from the 15.0 Lateral system alone approximately one mile downstream of the Nampa WWTP. Contrary to Riverside's assertions otherwise, the WWTP effluent is not being used throughout Caldwell or locations farther west (*e.g.*, Greenleaf). Instead, the Nampa WWTP effluent discharge is going to be reused by Nampa and its citizens, and the Reuse Permit and its supporting analyses embrace and recognize this undisputed fact.

**B. Riverside Cannot Have its Agency Arguments Both Ways; Nampa Can Delegate Section 42-201(8)-Based Effluent Disposal Authorities to Pioneer and Pioneer Can Accept that Delegation**

As discussed in Pioneer's Response, and continued in Riverside's Reply, Riverside spends a great deal of effort attempting to foreclose Pioneer and Nampa from implementing Idaho Code Section 42-201(8) through the parties' Reuse Agreement. *See* Pioneer Response, pp. 6-10 and Riverside Reply, pp. 22-28. Riverside rejects Pioneer and Nampa's agency arguments under their Reuse Agreement (*i.e.*, that Nampa can delegate its effluent disposal authorities under the statute to Pioneer and that Pioneer can, by operation of the Reuse Agreement, serve as a land application agent/extension of Nampa). Riverside Reply, pp. 22-28.

Conversely, Riverside at least implicitly, if not explicitly, embraces an agency relationship between Pioneer and Nampa under the Reuse Agreement for purposes of advancing its erroneous Section 42-201(2)-based arguments. Riverside does so by ascribing to Pioneer Nampa's Potable System wellheads as Pioneer points of diversion for water right permit requirement purposes. Riverside Reply, *e.g.*, at pp. 6-9 (asserting illegal Pioneer use of water where the District "has no water right identifying Nampa's groundwater as the source of that water.")). The crux of Riverside's contention is that the Nampa-Pioneer Reuse Agreement

creates a construct by which Pioneer is effectively diverting and using Nampa-sourced groundwater in absence of a valid water right to do so. *See, e.g., id.*, pp. 3 and 30 (referring to the Nampa WWTP effluent discharge point in the Phyllis Canal as Pioneer’s “point of diversion” and location where “Pioneer diverts [the effluent]” (*i.e.*, “ground water”) for which it does not have a water right), and pp. 6-9 (“THE SOURCE OF NAMPA’S EFFLUENT IS GROUNDWATER”).

As Pioneer explained in its Response, Nampa could not gain access to Pioneer’s Phyllis Canal for discharge purposes but for the parties’ Reuse Agreement. And, Pioneer likewise could not gain access to, or use, Nampa’s WWTP effluent piped directly to the canal but for the parties’ Reuse Agreement. Pioneer Response, p. 6. There is nothing improper with the parties’ contractual arrangement.

The Department has already plowed this ground in the context of the City of McCall years ago (municipal effluent land application through use of the private water distribution infrastructure and private lands of others under contractual agreements between the parties). Pioneer Response, pp. 9-10. Similarly, Nampa possesses the authority to delegate its land application authorities to others, and Pioneer has the authority to accept that delegation and the water that comes with it. *See, e.g., and compare*, IDAHO CODE §§ 50-301 (authorizing cities to “contract and be contracted with” for lawful purposes) and 43-304 (authorizing irrigation districts to do the same, among other actions, so that “sufficient water may be furnished to the lands in the district for irrigation purposes”); *see also, Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 550-552, 808 P.2d 1289, 1297-1297 (1991) (contract-based delegation of authority inherent to one (NMID), but not inherent to another (Nampa School District) is permissible).

Riverside's agency arguments are irreconcilable (Pioneer *is* Nampa's agent for water diversion purposes on the front end, but Pioneer *is not*, and cannot be, Nampa's agent for water quality-related effluent land application purposes under Section 42-201(8) on the back end). And, they are incorrect. While Pioneer is clearly Nampa's agent for land application under Section 42-201(8), Pioneer's back-end acceptance of Nampa's WWTP effluent under the parties' Reuse Agreement does not constitute a Pioneer act of physical diversion from a natural source on the front end because the Reuse Agreement provides Pioneer no property interest in, or measure of management or control over Nampa's Potable Water System. If Nampa pumps and diverts no Potable System groundwater, Pioneer receives nothing. If Nampa pumps and diverts (and the WWTP produces) less than 31 cfs of recycle wastewater effluent, then Pioneer will receive that lesser amount. *See, e.g.*, Ex. F (Reuse Agreement), p. 4 (Section B.3) (City is not obligated to, nor guarantees any delivery of recycled water to Pioneer). Pioneer simply has no say or control over inputs into Nampa's Potable System and its WWTP on the front end; Pioneer performs no physical act of diversion.

**C. Riverside's Reliance on *A&B Irrigation District* Continues its "Round Peg-Square Hole" Problem—Superimposing Traditional and More Restrictive Irrigation Water Right Principles on More Modern and More Flexible Municipal Water Right Uses**

Riverside spills considerable ink trying to bootstrap water right "enlargement" and "per se injury" concepts from *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005), where those concepts simply do not apply either factually or legally. Reply, pp. 8-9, 11-14, and 18.

As explained in Pioneer's Response, there is no water right enlargement resulting from implementation of the parties' Reuse Agreement. Pioneer Response, pp. 16-18. One cannot enlarge the consumptive use of a class of water rights (municipal water rights) that is already

considered wholly consumptive and can be used to extinction. There further is no enlargement of the Nampa Potable System water rights through Pioneer landowner (including Nampa) irrigation use of the effluent sourced from the same because, unlike *A&B*, there is no irrigation of “additional acres” devoid of existing water rights. *Id.* There further is no expansion because there is no increase in the quantity (volume) of groundwater diverted by Nampa into its Potable System on the front end.

Pioneer is confused by, and misunderstands Riverside’s application of *A&B* not because the District misunderstands the holdings of the case, but because Riverside’s reliance on the same is inapposite at most and tortured and convoluted at least. For example, Pioneer concedes the very point Riverside finds so important, that the source of Nampa’s WWTP effluent continues to be groundwater. Pioneer Reply, p. 15 (“Nampa’s Potable System groundwater continues to be waste-based ‘groundwater’ under Nampa’s exclusive physical possession and control from its WWTP to its piped point of discharge into the Phyllis Canal.”). But, there is more to the analysis than the source alone. *Id.*, p. 15 (“Nampa’s discharge is not commingled with other flows and it is not ‘unappropriated’ water from a comingled source as was the case with *A&B* Irrigation District’s practices.”).

Riverside fails to recognize the difference between appropriable wastewater (that which has comingled with other waters after a measure lost physical control) and non-appropriable wastewater effluent (that which has not yet comingled with other waters and that which is still physically controlled in its entirety within a closed, private system). Reply, pp. 28-31. The *A&B* case (and other authorities relied upon by Riverside) applies to, and analyzes the recapture and reuse of comingled and appropriable (*i.e.*, public) wastewater. It does not speak to the implementation of the Nampa-Pioneer Reuse Agreement which involves the affirmatively-

controlled and intentional discharge of private water (WWTP effluent conveyed and discharged through a closed pipeline that has not commingled with other diffuse sources outside of Nampa's physical control and dominion) to another private, non-appropriable water conveyance (the Phyllis Canal) pursuant to contract. *See e.g.*, IDAHO CODE § 42-110 ("Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used or otherwise physically controlled by the appropriator"); *see also*, *Washington Irr. Dist. v. Talboy*, 55 Idaho 382, 389-90, 43 P.2d 943, 946 (1935) (water stored or conveyed in manmade reservoirs and ditches is already appropriated and no longer "public water[ ]" subject to appropriation by others).

The most glaring example of Riverside's confusion in this regard is its statement that upon discharge to the Phyllis Canal, Nampa's WWTP effluent somehow becomes appropriable public water again. Reply, pp. 29-30 ("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."). This is an astonishing assertion. Both because there is no physical act of "diversion" by Pioneer, and because at least some amongst Riverside's leadership and shareholders would certainly disagree that water flowing in the Riverside Canal (a private ditch like Pioneer's Phyllis Canal) is somehow open to appropriation by others.

Regarding the "diversion" point issue in particular, Riverside finally lets slip that discharge to the Phyllis Canal is not an act of physical "diversion" by Pioneer. Rather, the parties' Section 42-201(8)-based Reuse Agreement is based on Pioneer's "acceptance and delivery of Nampa's effluent." Reply, p. 6 (emphasis added).<sup>2</sup>

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<sup>2</sup> Counsel for Pioneer is flattered that Riverside cites his IWUA presentation (Exhibit S) as legal precedent, no matter how out of context the citation is used. Reply, p. 30. Counsel's quotation is correct, Nampa's closed pipeline discharge to the Phyllis Canal is not a diversion



Finally, Riverside's contention that Nampa loses all physical control of its WWTP effluent at the point where that water enters the Phyllis Canal is superficial and incomplete. Reply, pp. 29-30. Pioneer agrees that once Nampa's WWTP effluent enters the Phyllis Canal, the distribution and use of that effluent is left to Pioneer's (not Nampa's) canal operations and management. But, as explained above, Nampa and its citizens are the direct (and primary) beneficiaries of those Pioneer canal operations within the first four (or so) miles of the Phyllis Canal downstream of Nampa's discharge. And, the parties' Reuse Agreement expressly obligates Pioneer to manage the conveyance and use of Nampa's effluent in a manner accomplishing the land application-based environmental regulatory treatment of that water. Ex. F (Reuse Agreement), p. 4 (Section B.3) (Pioneer acknowledging Nampa's need to access the Phyllis Canal "for effluent and temperature mitigation" and obligating Pioneer to "handle, manage and convey" Nampa's WWTP effluent "as in integrated part of [Pioneer's] irrigation operations"); *see also, id.*, (Section C.2) (Obligating Pioneer to a 25-year contract term (barring the occurrence of certain enumerated circumstances) because of Nampa's "long term NPDES Permit compliance requirements"). Pioneer cannot simply spill Nampa's WWTP effluent water

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from a "typical drain." This is, again, because there is no comingling of the WWTP effluent with other diffuse sources of water after relinquishment of physical control as is the case of diversions from a "typical drain." But, "it's not very different either" because it is a form of wastewater that neither Pioneer, nor Riverside, can compel Nampa to waste for their respective benefit but for Pioneer's contractual entitlement under the Reuse Agreement. Pioneer has been consistent and clear on this important point of physical control/diffuse water commingling distinction, while Riverside ignores it altogether. Pioneer Response, pp. 6 (Pioneer could not access or use Nampa's WWTP effluent but for the parties' Reuse Agreement), 12-13 (Pioneer cannot obtain and perfect a water right because it fails the physical diversion from a natural source requirement; rather the water Pioneer receives from Nampa is Nampa's private property—that "already appropriated and in the physical control of Nampa"), and 23 ("Pioneer can no more compel others to waste water for its benefit in the Fivemile Drain system (or any of its other drain systems) than Riverside can compel Nampa to waste for its benefit in Indian Creek.")

from its system prior to its land application-based irrigation use, or otherwise deliver that water to another entity outside its boundaries.

Regardless of its inapposite “source” arguments under *A&B*, Riverside additionally (and mistakenly) places great weight on the condition that Nampa’s Potable System “municipal” purpose water rights cannot be used for irrigation purposes except when surface water rights are not available for the irrigation of the proposed reuse lands. Reply, pp. 19-22. However, Nampa is not violating its applicable water right conditions on the front end. *See, e.g.*, Water Right 63-12474. This is because Nampa is not irrigating with its Potable System water rights until after that water is first used for non-irrigation “municipal” purposes (*e.g.*, potable residential, commercial, industrial uses). The parties already agree that municipal irrigation use water **does not** generate the “sewage” collected and piped to, and treated by, Nampa’s WWTP. SOF, ¶¶ 23-25. Implementation of the Nampa-Pioneer Reuse Agreement and corresponding DEQ Reuse Permit is dependent upon the discharge and land application of the spent Potable System water residual—the Nampa WWTP effluent that has not improperly been used for irrigation purposes prior arrival at the WWTP.

Absent an irrigation use violation on the front end, Riverside contends that Nampa’s Potable System spent residual (that treated and exiting its WWTP) still cannot be used for back end irrigation purposes either. Reply, pp. 20-21. Riverside criticizes Nampa’s prior briefing on the subject stating that there is “no legal or statutory authority for the proposition that [the] surface water use condition only applies to the first [Potable System] use.” *Id.*, p. 20. Again, though Pioneer is by no means an expert in municipal water rights issues, it disagrees with Riverside’s “no legal authority” assertions.

“Municipal” uses of water include the use of water for “residential, commercial, industrial, irrigation of parks and open space, *and related purposes* . . . which a municipal provider *is entitled* or obligated to supply.” IDAHO CODE § 42-202B(6) (emphasis added). Section 42-202B(6) is not an exhaustive or exclusive list of uses. The question then becomes what other “related purposes” might be. It is expressly clear under Section 42-201(8) that one of those “related purposes” is the “collection, treatment, storage or disposal of effluent from a publicly owned treatment works . . . including land application . . . employed in response to state or federal regulatory requirements.” IDAHO CODE § 42-201(8). Nampa is statutorily “entitled” to pursue this land application path, even though it is not “obligated” to do so. For a variety of legitimate reasons already briefed by Nampa and Pioneer, Nampa has chosen to pursue this statutory authority (*i.e.*, “entitlement”).

Riverside then continues to read terms into Section 42-201(8) that do not exist. As noted by Pioneer in its Response (p. 8, including note 4), the statute embraces the Nampa-Pioneer Reuse Agreement construct because it speaks of “land application” generally. The statute does not require that the “land application” in response to “state or federal regulatory requirements” be wholly performed, or accomplished on lands wholly owned by, the “municipality,” “municipal provider,” “sewer district,” or “regional public entity operating a publicly owned treatment works” proceeding under the statute. Thus, Idaho Code Sections 42-202B(6) and 42-201(8) provide plenty of “legal authority” Riverside finds lacking.

To the extent more legal authority needs be brought to bear, the act of land application need not necessarily mean, or include, end “irrigation” use. Nampa could, consistent with Riverside’s irrigation use prohibition, deposit its WWTP effluent on unsown, uncultivated or sterile land, or volcanic ash or gravel to accomplish the environmental treatment benefits of that

land application via soil profile percolation out in the desert south of town. But, that type of “land application” that municipalities are clearly entitled to perform as a “municipal” use under Sections 42-202B(6) and 42-201(8) would be a shame when the spent WWTP effluent could be harnessed and used as a resource promoting meaningful irrigation instead.

Rather than divorcing the act of land application from the additional irrigation benefit that could (and should) be derived as matter of sound public policy, Nampa and Pioneer’s Reuse Agreement and the Reuse Permit promote the conservation of water resources consistent with Idaho Code Sections 42-203A(5)(f) and 42-222(1), and they maximize the beneficial use of the water resource. *See, e.g., Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (“The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.”). The Nampa-Pioneer recycled water project conserves water resources by potentially lessening Pioneer’s reliance on other publicly appropriable water supplies and, hopefully, will conserve some modicum of storage water supply in drought years (though as explained at Pioneer Response pages 20-21, it is more likely that Nampa’s WWTP effluent will result in an offset to Pioneer source declines elsewhere/upstream in the Fivemile Drain system). The Nampa-Pioneer recycled water project promotes the maximum beneficial use of the state’s water resources by land applying spent WWTP effluent for beneficial irrigation purposes as opposed to depositing that water on otherwise unproductive ground—Nampa’s effluent which can already be used to extinction will provide additional irrigation use benefit on its way to that extinction.

Riverside’s “no legal authority” assertions are unfounded. And, they render Idaho Code Sections 42-201(8) and 42-202B(9) meaningless; leading to absurd restrictions and results

contrary to the conservation and maximum beneficial use of the state's water resources. The question of "to what end?" is addressed immediately below.

**D. The Emperor Has No Clothes—Riverside's Focus on Nampa and Pioneer Activities Under the Reuse Agreement Ignores and Deflects Attention Away From Its Own Legally Infirm Motives**

Riverside states: "[T]he primary purpose of the Nampa-Pioneer scheme is to diminish the flows in Indian Creek." Consequently, "there is no doubt Riverside would be directly affected." Reply, p. 34. Riverside makes these assertions without explaining whether or how they are true, or how they implicate any legally cognizable injury to Riverside.

Pioneer will not re-plow the legitimate purposes of the Nampa-Pioneer recycled water project. Pioneer Response, pp. 20-23. Pioneer, likewise, will not reiterate the millions of dollars Nampa citizens (which citizenry includes Pioneer landowners) stand to save, or the wet water benefit they stand to receive. Instead, Pioneer defers to the statements of Nampa and the Municipal Intervenor in these regards, including the public policy and planning choices they implicate. Suffice it to say, there is no "scheme" here, certainly nothing designed to harm the legal entitlements of others, including Riverside no matter how loudly and how often it speaks in such terms.

Riverside's injury allegations are thinner than the pieces of paper comprising this brief. Riverside fails to account for or rebut the general wastewater principles that defeat its conclusory injury allegations. Pioneer Response, pp. 13-18. Worse, Riverside's arguments suggest that Nampa and all other water users, Riverside included, have no control or opportunity in their wastewater—not even that still remaining in their physical control and that which has not been released to commingle with other diffuse sources of water.

Let's not allow ourselves to be fooled into thinking that Riverside is pursuing this water right question as a White Knight for other water users at large. Instead, let's recognize

Riverside’s underlying petition for what it is: an attempt to defeat the Nampa-Pioneer recycled water project with the end goal and practical effect of obligating Nampa to continue wasting water to Indian Creek for Riverside’s benefit—a concept rebuffed by more than a century of Idaho legal precedent.<sup>3</sup>

Nampa’s WWTP effluent flows artificially augment Indian Creek flows. SOF, ¶¶ 27-31. Riverside’s Indian Creek-sourced water rights entitle it to the *natural flow* of the creek, or the augmented flow of the creek after others upstream of it have lost physical control and dominion over those wastewater spills. But, under no circumstances does the natural flow of Indian Creek include the groundwater-sourced water rights Nampa diverts into its Potable Water System until after Nampa freely and affirmatively disposes of that WWTP effluent to Indian Creek. What is Riverside’s “distinct and palpable injury” in this matter, an injury that is not otherwise a “generalized grievance” shared by others? *Miles v. Idaho Power Co.*, 116 Idaho 635, 639-641, 778 P.2d 757, 761-763 (1989).

Riverside’s position is nothing more than a complaint that *it* will no longer get to use and benefit from Nampa’s WWTP effluent while Pioneer will. Nampa’s WWTP effluent will be used for the same irrigation purposes just on different lands. It is this “different lands” result that truly irks and motivates Riverside. Under the Nampa-Pioneer recycled water project, Nampa and its citizens, who are also Pioneer landowners, will finally derive benefit from effluent Nampa used to relinquish to others.

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<sup>3</sup> “Affected” is far different than “legally entitled” or “injured.” Reply, p. 34. Even if Riverside could compel others to continue wasting water for its benefit—which it cannot—the Idaho Legislature expressly ended the possibility of any such entitlement upon enactment of Idaho Code Section 42-201(8) concerning the situation at issue here: the collection, treatment, and land application-based disposal of municipal effluent in response to state or federal regulatory requirements.

Pioneer maintains its request for a declaratory ruling that Riverside possesses no legally cognizable injury going forward in this matter in the event that Pioneer is required to apply for a water right to implement the parties' Reuse Agreement and the Reuse Permit. Riverside cannot seek declaratory relief in a vacuum and Pioneer is not interested in reserving substantive consideration of Riverside's conclusory injury assertions in a subsequent contested case proceeding.

### **III. CONCLUSION**

For the foregoing, Pioneer requests that Riverside's *Petition for Declaratory Ruling* be denied in its entirety on the grounds that Pioneer need not obtain a water right to implement the Nampa-Pioneer Reuse Agreement and the related DEQ Reuse Permit.

Pioneer further requests an affirmative declaration that Riverside possesses no legally cognizable injury even should a water right be required of Pioneer. Riverside cannot compel Nampa to waste water to Indian Creek for Riverside's downstream use and benefit.

Pioneer does not request oral argument in this matter.

DATED this 11<sup>th</sup> day of December, 2020.

SAWTOOTH LAW OFFICES, PLLC

By 

Andrew J. Waldera

Attorneys for Pioneer Irrigation District

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of December, 2020, I caused a true and correct copy of the foregoing **INTERVENOR PIONEER IRRIGATION DISTRICT'S SUR-REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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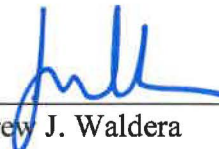
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