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Third Judicial District, Canyon County
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RIVERSIDE IRRIGATION DISTRICT,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources,

Respondents,

IN THE MATTER OF REUSE PERMIT NO. M-255-01, IN THE NAME OF THE CITY OF NAMPA

Case No. CV14-21-05008

PETITIONER'S OPENING BRIEF

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Judicial Review of the Order on Petition for Declaratory Ruling (dated May 3, 2021), entered by Director Gary Spackman of the Idaho Department of Water Resources

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COMES NOW, Riverside Irrigation District Ltd. ("Riverside"), by and through its attorneys, Barker Rosholt & Simpson LLP, and hereby files Petitioner's Opening Brief seeking judicial review of a final agency action of the Director of the Idaho Department of Water Resources pursuant to Idaho Code § 67-5270(3), Idaho Rule of Civil Procedure 84, and the Procedural Order.

I. STATEMENT OF THE CASE

This proceeding arises from an agreement between the City of Nampa ("Nampa" or "City") and Pioneer Irrigation District ("Pioneer") where the City will pipe water from its Waste Water Treatment Plant to Pioneer's Phyllis Canal for delivery to 17,000 acres within Pioneer's Place of Use. Nampa acquired a permit from the Idaho Department of Environmental Quality to allow it to deliver the effluent to Pioneer so that it could be spread over the 17,000 acres.

Riverside filed this civil action pursuant to Idaho Code §§ 67-5270 and 67-5279 seeking judicial review of the Order on Petition for Declaratory Ruling entered by the Director of the Department of Water Resources on May 3, 2021. In the action before the Director, Riverside sought a declaratory ruling that:

1. Pioneer cannot divert or accept effluent from the Nampa or apply Nampa's effluent to land in Pioneer's irrigation district boundaries under the Reuse Permit without first obtaining a water right.

2. Any attempt by Pioneer to divert water to Pioneer land without applying for a water right is in contravention of Idaho law.

II. COURSE OF THE PROCEEDINGS

Riverside filed a petition with the Department of Water Resources on February 4, 2020, seeking a determination that Pioneer is required to obtain a water right before putting 18-40 cfs

of water to beneficial use.[1] The source of the water Pioneer intends to use is water from Nampa's municipal walls, after it is collected in Nampa's Waste Water Treatment Plant ("WWTP"). Pioneer and Nampa intervened in the proceeding, along with representatives of many other municipalities. Nampa, Pioneer, and the other municipalities agreed that no water right was necessary, that they could use their water to "extinction," and that they were free to transfer the water collected in the WWTP to any third party, completely without IDWR supervision.

Riverside, Nampa and Pioneer agreed to an extensive set of Stipulated Facts and stipulated to the admission of documents. These stipulated facts and exhibits primarily relate to Riverside, Pioneer, and Nampa's water rights, Nampa's water treatment and discharge and Pioneer's plan to use Nampa water throughout Pioneer's place of use.

Riverside and the intervenors filed cross-motions for summary judgment, which were fully briefed by December 11, 2020. On May 3, 2021, the Director entered an Order on Petition for Declaratory Ruling.[2] His *Order* stated that Pioneer may accept Nampa's effluent from its WWTP and apply it in Pioneer's boundaries without a water right. *Order* at 5. The Director concluded that Idaho Code § 42-201(8) exempted Pioneer from having to obtain a water right to use Nampa's water. The Director concluded, that even though Pioneer is not an entity listed under that statutory provision, Pioneer is entitled to the exemption because it is "intertwined" with Nampa. The Director cited no authority for this novel "intertwined" statutory interpretation. The Director then concluded that, since Idaho Code § 42-201(8) covered Pioneer, there was no

[1] Riverside also filed an appeal of Nampa's Reuse Permit with IDEQ, but the parties stipulated to dismiss that appeal while preserving Riverside's right to have IDWR rule on the need for a water right permit.

[2] The *Order on Petition for Declaratory Ruling*, from May 3, 2021 is located in the Agency Record, pages 1230-1237. For clarity, the *Order on Petition for Declaratory Ruling*, R. 1230-1237, will be cited as "*Order*" with the corresponding page indicated thereafter.

need to address Idaho Code § 42-201(2)'s requirement for a water right to apply water to a beneficial use. The Director did not address the limits on Nampa's water rights on the use of water under those rights. Finally, the Director concluded, without going through the water right application process, that Riverside is not injured by Pioneer's use and cannot challenge the constitutionality of the Director's interpretation of Idaho Code § 42-201(8) as applied to Pioneer's use.

This appeal followed.

III. LEGAL STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277. The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1).

Idaho Code § 67–5279(3) provides that the district court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67–5279(3). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 13 5 Idaho 414, 417, 18 P.3d 219, 222 (2001).

The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. Even if one of these

conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." Idaho Code § 67–5279(4). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." Idaho Code § 67–5279(3). *Payette River Property Owners Assn. v. Board of Comm 'rs*., 132 Idaho 552, 976 P.2d 477 (1999).

The interpretation of a statute is a question of law. *Idaho Dep't of Health & Welfare v. McCormick*, 153 Idaho 468, 470, 283 P.3d 785, 787 (2012) (citing *State, Dep't of Health and Welfare v. Housel*, 140 Idaho 96, 100, 102, 90 P.3d 321, 325 (2004)).

> "The asserted purpose for enacting the legislation cannot modify its plain meaning. The scope of the legislation can be broader than the primary purpose for enacting it." *Viking Constr., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 191–92, 233 P.3d 118, 122–23 (2010). "If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial." *In re Estate of Miller*, 143 Idaho 565, 567, 149 P.3d 840, 842 (2006). The interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citations omitted).

Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 892–93, 265 P.3d 502, 505–06 (2011).

IV. STATEMENT OF FACTS

Nampa owns and operates two separate municipal water delivery systems, one for potable water ("Potable System") and one for non-potable pressurized irrigation water ("Non-Potable System"). *See* R. 691 (SOF ¶ 8). [3] Nampa's Potable System relies on a system of

[3] The *Stipulation of Facts by All Parties*, and the *Stipulations re Exhibits and other Evidence A-T and K-T*, from September 11, 2020 is located in the Agency Record, pages 676-763. For clarity, *Stipulation of Facts* will be cited as "SOF" with the corresponding paragraph, section, or exhibit indicated thereafter.

municipal wells, owned and operated by Nampa, from which it diverts ground water under the municipal water rights. SOF ¶ 9. Nampa's Potable System is served exclusively by groundwater. *Id*. Each of those water rights is authorized for "municipal purposes" in accordance with Idaho Code § 42-202B(6). SOF ¶ 10. Each of those water rights has a place of use corresponding to Nampa's service area, in accordance with Idaho Code § 42-202B(9). SOF ¶ 11. Each of those water rights is subject to the conditions set forth in the water rights and are subject to the purpose of use, place of use and other conditions set forth in the water rights. SOF ¶¶ 12, 18.

Pioneer delivers surface water to Nampa's Non-Potable System from its Phyllis Canal and laterals. SOF ¶ 20. These deliveries from Pioneer serve 2,985 acres within Nampa's Non-Potable system. *Id*. Boise-Kuna delivers water to Nampa's Non-Potable System for 436.90 acres. SOF ⁋ 21, SOF Ex. N. NMID delivers water to Nampa's Non-Potable System for 4,077.93 acres. SOF ⁋ 21, SOF Ex. O.

Effluent leaving Nampa's wastewater treatment plant is composed primarily of treated sewage derived from municipal water delivered to Nampa's customers via Nampa's Potable System, but also includes relatively small amounts of treated sewage from properties within Nampa served by private wells, operational water introduced at the WWTP, and infiltration/inflow (groundwater and surface inputs, e.g., through manhole covers). SOF ¶ 25. Specifically, of the roughly 18.6 cfs in Nampa's current wastewater stream, *see* SOF ¶ 29, 0.77 cfs comes from properties within Nampa served by private wells, 0.70 cfs is operational water introduced at the WWTP, and 2.62 cfs is infiltration/inflow water. *Id*. The vast majority is from Nampa's municipal wells. *Id.*[4]

[4] Nampa represents that the relative size of the operational water and infiltration/inflow components of its wastewater stream is within the normal or typical range for municipal sewage systems. SOF ¶ 26.

Currently, Nampa discharges approximately 18.6 cfs (6,825 acre-feet) of wastewater from its WWTP to Indian Creek during the 185-day irrigation season and 17.0 cfs (6,069 acre-feet) during the 180-day non-irrigation season. SOF ¶ 29. Wastewater currently discharged by Nampa to Indian Creek is comingled in Indian Creek with waste water from other water users and other waters of the State. SOF ¶ 30. The water in Indian Creek has historically been diverted and put to use by downstream water right holders, including Riverside. *Id.*

During the irrigation season, Riverside typically diverts most, if not all, of the flow of Indian Creek into the Riverside Canal where the canal and the creek intersect. SOF ¶ 31. Riverside estimates that more than 50 percent of its supply comes from Indian Creek. *Id.* Riverside has the right to divert approximately 180 cfs of water from Indian Creek under Water Right Nos. 63-2279 and 63-2374 with 1915 and 1922 priority dates, respectively. SOF ¶ 33. Nampa intends to eliminate all of its WWTP wastewater discharge to Indian Creek during the irrigation season, and intends to continue to discharge to Indian Creek during the non-irrigation season. SOF ¶ 34.

To accomplish this change, Nampa has agreed with Pioneer that Pioneer will accept all of Nampa's WWTP discharges into its Phyllis Canal during the irrigation season. Water historically available to Riverside will be piped to Pioneer for its use. Pioneer does not hold a water right, nor has it sought a water right, that expressly authorizes it to accept Nampa's wastewater. SOF ¶ 35. On March 7, 2018, Nampa and Pioneer entered into a Reuse Agreement whereby Nampa agreed to seek a "reuse" permit from IDEQ authorizing Nampa to discharge up to 41 cfs of Class "A" recycled water to Pioneer's Phyllis Canal <u>as supplemental irrigation water supply</u>. SOF ¶ 49 (emphasis added). On March 19, 2019, Nampa, filed its reuse permit application package with IDEQ. SOF ⁋ 50; SOF Ex. J. IDEQ ultimately approved the application and issued Reuse Permit

No. M-255-01 to Nampa on January 21, 2020. *Id*. Nampa's proposed wastewater discharge to the Phyllis Canal has been approved by Idaho Department of Environmental Quality ("IDEQ") as complying with IDEQ water quality standards pursuant to an IDEQ Reuse Permit. SOF ¶ 45. During the permitting process, Riverside commented to IDEQ that Pioneer had no water right to use Nampa's water on land within Pioneer boundaries. SOF ⁋ 47; SOF Ex. Q. IDEQ responded to Riverside's comments by stating that IDEQ does not regulate water rights or have the ability to respond to Riverside's comments. SOF ⁋ 47; SOF Ex. R. As a matter of Idaho law, IDEQ has no right or authority to "supersede, abrogate, injure or create rights to store or divert water and apply water to beneficial use…" Idaho Code § 39-104(4).

IDEQ included a provision in the Reuse Permit that the permittee is not relieved of its duty to comply with the other state laws and rules. SOF ¶ 47. IDEQ advised Riverside that Nampa had been informed of this concern. SOF ⁋ 47; SOF Ex. Q. The Parties agreed that IDEQ has no authority to authorize diversion or beneficial use of water and that whether a water right is necessary or not was a matter for IDWR to decide. *Id*. In other words, IDEQ's Reuse Permit does not authorize Pioneer's use of water under Idaho water law.

The Reuse Permit authorizes Nampa to discharge to the Phyllis Canal up to 31 cfs of Class A Recycled Water from the Nampa WWTP between May 1 and September 30 each year, subject to obtaining other applicable governmental approvals. SOF ¶ 51. The area below the point of discharge to Pioneer's Phyllis Canal includes approximately 17,000 acres of municipal and agricultural irrigation uses, including a part of Nampa's Non-Potable System. SOF ¶ 55; *see* SOF Ex. H at 17.

The Reuse Permit makes it clear that Nampa's effluent must be spread across 17,000 acres of Pioneer's lands, downstream of the point of discharge to the Phyllis Canal, and not just to land

owned by Nampa or Nampa customers. IDEQ's Staff Analysis for "Constituent Loading" relating to total phosphorus, analyzes the concentration of phosphorus in the discharge, the design flow of the 31 cfs discharge and the mixing of that discharge into the 200 cfs of water in the Phyllis Canal. SOF Ex. H at 37. IDEQ's analysis also factors in "total acreage" where the water is spread and the fact that "nutrient needs of the crops are greater than that provided by the additional nutrient supplied by the recycled water." *Id.* at 38.

The reality is that IDEQ issued the Reuse Permit based on the premise that Nampa's wastewater will be delivered and applied to 17,000 acres throughout Pioneer's district boundaries below the point of discharge on the Phyllis Canal. IDEQ would not have been able to issue the Reuse Permit for wastewater application to land if the land area to which the effluent is applied was not sufficiently large enough to properly process the constituents of concern in the wastewater.

IDEQ's Reuse Permit does not require any of the reuse water to be reused by Nampa itself; rather, IDEQ's analysis states the wastewater will used "for irrigation by the users of [the Phyllis Canal's] network. SOF Ex. H at 9.

V. LEGAL ARGUMENT

A. The Director committed reversible error by interpreting Idaho Code § 42-201(8) as a matter of law to include and authorize water use by Pioneer without a water right, when Pioneer is not a municipality or municipal provider as defined in Idaho Code § 42-202B (4) or (5).

The Director's *Order on Petition for Declaratory Ruling* relies exclusively on Idaho Code § 42-201(8) to exempt Pioneer from complying with the requirement of Idaho Code § 42-201(2) requiring a water right for the application of water to land. Under the Reuse Agreement and Reuse Permit, Pioneer will convey Nampa's discharged effluent in its canal to lands within

Pioneer's boundaries where it will be put to use by Pioneer's landowners. But, Idaho Code § 42-201(8) applies solely to municipalities and sewer districts, and any exemption Nampa may have under Subsection 8 cannot be extended to Pioneer where Pioneer is not an entity that is expressly identified in Subsection 8.

The legislative history does not support the Director's broad, and virtually limitless interpretation of the statute. In testimony before the Idaho House Resources and Conservation Committee, Lindley Kirkpatrick, City of McCall, testified that the bill "will clarify that cities and sewer districts are not required to obtain a water right for distribution of waste water on land." *House Resources & Conservation Committee Minutes*, March 5, 2012 at 6 (emphasis added). Mr. Kirkpatrick further testified that IDWR "has assured the city they can reuse waste water when they have a municipal water right" and that "the bill is crafted narrowly." *Id.* (Emphasis added).

Nothing in Idaho Code § 42-201(8) applies to Pioneer. The statute explains that the exception is for "a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works…" Idaho Code § 42-201(8). None of the definitions relating to municipality or municipal use in Idaho Code § 42-202B apply to Pioneer:

> (4) "Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.
>
> (5) "Municipal provider" means:
>
> (a) A municipality that provides water for municipal purposes to its residents and other users within its service area;
>
> (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or
>
> (c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code.

> (6) "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

Idaho Code § 42-202B(4)-(6) (emphasis added). Pioneer also does not qualify under the definition of "sewer district:"

> A sewer district is one to provide for sewage disposal and for that purpose any such district shall have power to extend its sewer lines to an appropriate outlet.
>
> A district may be created for a combination of water and sewer purposes, or either of said purposes. A district may be entirely within or entirely without, or partly within and partly without one (1) or more municipalities or counties, and the district may consist of noncontiguous tracts or parcels of property.

Idaho Code § 42- 3202 (emphasis added).

The Director does not contend that Pioneer, the entity putting the water to beneficial use, meets any of the statutory definitions under Idaho Code § 42-201(8); nor could he. Neither the Director, nor any of the Intervenors below contend that the statute is ambiguous. In fact, the Director specifically applied the "plain meaning" rule of interpretation of unambiguous statutes to Idaho Code § 42-201(8). *Order* at 3.

Pioneer is an irrigation district, not a municipal provider. "Irrigation districts are creatures of the statutes. They are quasi-public or municipal corporations, and as such have only such power as is given to them by statute, or such as is necessarily implied." *Jensen v. Boise-Kuna Irr. Dist*., 75 Idaho at 139, 269 P.2d at 758 (1954). The "municipal" nature of an irrigation district is not to be confused with the definition of "municipal provider" above. Rather, "the irrigation district is a quasi-municipal corporation organized for the specific purpose of providing ways and means of irrigating lands within the district and maintaining an irrigation system for that purpose." *Colburn v. Wilson*, 23 Idaho 337, 130 P. 381, 381–82 (1913) (emphasis added) (citing

Pioneer Irrigation Dist. v. Walker, 20 Idaho, 605, 119 Pac. 304; *City of Nampa v. Nampa & Meridian Irri. Dist*., 19 Idaho, 779, 115 Pac. 979; *Merchants' Nat. Bank v. Escondido Irri. Dist*., 144 Cal. 329, 77 Pac. 937.).

In *Brizendine v Nampa & Meridian Irrigation District*, the Court refused to include irrigation districts in the list of entities covered by the Idaho Tort Claims Act. The Court first explained:

> An essential element of a municipal or public corporation is a corporate purpose deemed to be for the welfare of the general public-'a public corporation is one that is created for political purposes with political powers to be exercised for purposes connected with the public good in the administration of civil government.' *Fletcher, Cyc Corp s 58 p. 292 (Perm. ed. 1974).* However, an irrigation district's primary purpose is the acquisition and operation of an irrigation system as a business enterprise for the benefit of its shareholders. *Barker v. Wagner*. 96 Idaho 214, 526 P.2d 174 (1974); *Lewiston Orchards Irrig. Dist. v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933). *See, Eldridge v. Black Canyon Irrig. Dist.,* 55 Idaho 443, 43P.2d 1052 (1935); *Stephenson v. Pioneer Irrig. Dist.,* 49 Idaho 189, 288 P. 421 (1930); Idaho Code §§ 43-101, 43-304, 43-404, 43-701.

Brizendine v Nampa & Meridian Irrigation District, 97 Idaho 580, 587, 548 P2d 80, 87 (1976).

The Court then explained:

> Moreover, the legislature specifically included school districts, special improvement or taxing districts, and agencies, authorities, commissions, boards, institutions, hospitals, colleges or universities of the state within the act. Idaho Code § 6-902(1)(2). As the legislature has enumerated both generic categories (instrumentality of the state, municipal corporation, public corporations, etc.) and <u>specific entities and irrigation districts are not included in either, the legislature must have intended not to include irrigation districts within the act</u>.

Id., 97 Idaho at 588, 548 P2d at 88 (emphasis added).[5] The same line of reasoning applies here. Irrigation districts are not identified in the plain language of Idaho Code § 42-201(8) indicating the legislature must have intended not to extend the exemption to them. Because irrigation

[5] It should be noted that the legislature heeded the Court's interpretation and later amended the Idaho Tort Claims Act to cover irrigation districts.

districts are not covered by the statute, that should be the end of the inquiry. Idaho Code § 42-201(8) does not exempt Pioneer from acquiring a new water right for the diversion and beneficial use of Nampa's effluent. If the legislature later choses to include irrigation districts in Idaho Code 42-201(8), that would be another matter entirely.

B. The Director improperly concluded as a matter of fact and law that Pioneer was acting on behalf of the City of Nampa when Pioneer claimed that it would be applying water for the beneficial use of Pioneer's water right users.

Apparently, recognizing the limits of the statute, the Director accepted Nampa's invitation to examine whether Pioneer was covered by the statute as an "agent" of Nampa. "Statutory construction begins with the literal language of the statute." *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005) (citing *D & M Country Estates Homeowners Ass'n v. Romriell*, 138 Idaho 160, 165, 59 P.3d 965, 970 (2002)). The literal language of Subsection 8 provides the exemption to municipalities, municipal providers, sewer districts and regional public utilities operating publicly owned treatment works, no others. The plain language of Subsection 8 does not include "agent" or "third party" or "irrigation district." Idaho Code § 42-201(8).

The Director concluded that the "characteristics of agency plainly allow an agent of a Subsection 8 exempted entity to benefit from Subsection 8's exemption." *Order* at 4 (emphasis in original). Nothing in Subsection 8 makes that statement. The Director provides no reasoning or analysis for why or how he comes to this determination. Where the Idaho Legislature has clearly identified who is covered by a statute, and importantly who qualifies for an exemption, the Director has no authority to expand the list of covered entities.

"Even when addressing an ambiguous statute, the courts 'are not free to rewrite a statute under the guise of statutory construction.'" *Fell v. Fat Smitty's L.L.C.*, 167 Idaho 34, 38, 467

P.3d 398, 402 (2020) (quoting *State v. Doe*, 147 Idaho 326, 329, 208 P.3d 730, 733 (2009)). Further:

> Courts must construe a statute "under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *City of Sandpoint v. Sandpoint Indep. Highway Dist*., 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994). Finally, Idaho has recognized the rule of *expressio unius est exclusio alterius*—"where a constitution or statute specifies certain things, the designation of such things excludes all others." *Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978).

Fell v. Fat Smitty's L.L.C., 167 Idaho 34, 38, 467 P.3d 398, 402 (2020) (citing *Saint Alphonsus Reg'l Med. Ctr*., 159 Idaho at 87, 356 P.3d at 380). Here the legislature is assumed to be aware that an irrigation district is not a municipality, and was aware that irrigation districts and agents were not specified in the statute.

The Director's *Order* does not limit the scope of the statute to the designated entities. He does not apply this important rule of statutory construction to "exclude all others." Instead, he expands the statutory exemption to include others. In fact, after adding "agent" to Subsection 8 (where it does not appear), the Director then expands this new list of exempt entities even further.

Because the Director determined "Nampa does not have the right to control Pioneer, there is no formal agency relationship," the new exemption he created for agents didn't apply. So, he took it a step further and concluded that Subsection 8's exemption extends to Pioneer because, while "Nampa may not have legal control over Pioneer… both are intimately involved in the process of land applying Nampa's effluent…" *Order* at 4-5. Here Nampa's involvement ends at the end of the pipe and Pioneer takes control of the deliveries the water as a "supplemental irrigation supply."

"The existence of an agency relationship is a question of fact, but where the question depends on the construction of a legal instrument, the question becomes one of law." *Am. W. Enterprises, Inc. v. CNH, LLC*, 155 Idaho 746, 753, 316 P.3d 662, 669 (2013) (referencing *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 741, 710 P.2d 647, 651 (1985); *Adkison Corp. v. Am. Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344 (1984)). The Director is correct that Pioneer is not an agent of Nampa. Under Idaho law, the standard for establishing an agency relationship requires one of three actions:

> An agency relationship is created through the actions of the principal who either: (1) expressly grants the agent authority to conduct certain actions on his or her behalf; (2) impliedly grants the agent authority to conduct certain actions which are necessary to complete those actions that were expressly authorized; or (3) apparently grants the agent authority to act through conduct towards a third party indicating that express or implied authority has been granted. *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985). Agency relationships are limited in scope to the express, implied, and apparent authority granted by the principal. Only acts by the agent that are within the scope of the agency relationship affect the principal's legal liability. Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006).

Humphries v. Becker, 159 Idaho 728, 735, 366 P.3d 1088, 1095 (2016) (footnote omitted).

The Director is correct that "control" is elemental in the finding of an agency relationship, "where an agency relationship exists, the principal has a right to control the agent." *Id*. at 736, 366 P.3d at 1096 (emphasis added). Critically, for purposes of this matter, "[w]here a party acts in concert with the principal but is not under his or her control, an agency relationship does not arise." *Id*. (citing *Knutsen v. Cloud*, 142 Idaho 148, 151, 124 P.3d 1024, 1027 (2005)) (emphasis added). That a person or entity "may have benefitted from [the other party's] actions is not enough to create an agency relationship." *Id*. Our Supreme Court has clarified that "[w]hile very similar, acting in concert is not the same as agency under Idaho law. *Id*. The key difference between the two is that an agent is subject to the principal's control, while persons acting in

concert are not necessarily subject to another's control. Idaho Code § 6–803(5) defines acting in concert as: 'pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.'" *Knutsen*, 142 Idaho at 151, 124 P.3d at 1027.

Being "intimately involved", as the Director finds Nampa and Pioneer, is similar to "acting in concert" and under Idaho law is insufficient to create a principal/agent relationship. Given the "narrow" nature of Subsection 8's exemption, as indicated in the legislative history, the Director has no authority under the guise of statutory interpretation to expand the exemption first to "agency" and then to one who is "intimately involved" or even "acting in concert."

Accordingly, the Director erred by expanding the statutory exception to include entities who are not covered by the statute in order to give Pioneer the protection of the Idaho Code § 42-201(8) exemption.

C. The Director committed reversible error by concluding that Pioneer Irrigation District is not required to obtain a water right under Idaho Code § 42-201(2) when Pioneer diverts water without a water right and puts it to beneficial use on Pioneer lands outside the City of Nampa and/or the City of Nampa's Service Area.

The Director acknowledges that "Pioneer does not have a water right authorizing the use of Nampa's effluent." *Order* at 2, citing SOF ⁋ 35. The Director disposed of Riverside's argument that "Pioneer's use of Nampa's effluent qualifies as a new diversion and new source of water, implicating Subsection 2," in one paragraph, because the Director concluded Subsection 8 applies "in this situation." *Order* at 5. Since Idaho Code § 42-201(8) does not apply to Pioneer, the next step is to examine the requirement on Idaho Code § 42-201(2) to obtain a water right before putting new water to beneficial use.

Riverside raised the issue before the Director that the provisions of Idaho Code § 42-201(2) apply to Pioneer's use of Nampa's effluent because the statute provides that "[n]o person

shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists." *See* R. 783-786 (*Petitioner's Opening Brief* at 13-16).[6] Idaho Code § 42-201(2) is not limited only to water withdrawn from a "natural watercourse" as the Intervenors assert. The disjunctive use of the word "or" in this code section extends this requirement to obtain water to any application of water to land. "The word 'or' ... is '[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things." *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (quoting *Markel Int'l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012).

The Intervenors also assert that Idaho Code § 42-201(2) does not apply to Pioneer's "acceptance of effluent" because Nampa's effluent is not "public" water available for appropriation. *See e.g., Nampa's Response Brief*, 26-30;[7] *Pioneer's Response Brief*, 9-12.[8] Intervenors maintain that Nampa's "delivery" and Pioneer's "acceptance" of effluent does not qualify as a "diversion" of water sufficient to satisfy Idaho Code requirements because there is no diversion from a "natural watercourse." The Intervenors' arguments are contrary to Special Master Booth's *Memorandum Decision and Order on Motion for Summary Judgement* in Subcase 63-27475 (*Janicek Properties, LLC*) and are contrary to all the waste water rights in drains decreed thereafter in the SRBA.

[6] *Petitioner's Opening Brief* is located in the Agency Record, pages 767-831. For clarity, *Petitioner's Opening Brief* will be cited as such with the corresponding page indicated thereafter.
[7] *Nampa's Response Brief* is located in the Agency Record, pages 853-1061. For clarity, *Nampa's Response Brief* will be cited as such with the corresponding page indicated thereafter.
[8] *Pioneer's Response Brief* is located in the Agency Record, pages 1062-1101. For clarity, *Pioneer's Response Brief* will be cited as such with the corresponding page indicated thereafter.

In *Janicek*, one of the questions presented to the Special Master was whether drain water was subject to appropriation. Nampa & Meridian Irrigation District ("NMID") and the Bureau of Reclamation ("BOR") argued the drain "is not a natural stream or watercourse, and therefore the water therein is not subject to appropriation." *Janicek Order* at 6 (footnote omitted). Janicek countered that "irrespective of whether the drain is, or is not, a natural watercourse, Janicek's appropriation of water is valid because waste, seepage, and spring waters are subject to appropriation under Idaho Code § 42-107…" *Id*. The Special Master agreed with Janicek that "water in the drain is public water of the state and therefore was subject to being appropriated by Janicek's predecessor-in-interest." *Id*. at 7.

NMID and BOR relied upon the statement in *Sebern v. Moore* that "[w]here there has been no appropriation of waste or seepage water prior to the construction of the drain in which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to appropriation under [Idaho Code § 42-107]. *Sebern*, 44 Idaho 410, 258 P. 176 (1927); *Janicek Order* at 7. Special Master Booth disagreed, instead finding "this statement in *Sebern* is not inconsistent with the holding herein that Janicek has a valid water right with a source of the Purdam Gulch drain." *Id*. He clarified that the "statement simply does not address the situation where the person or entity that constructed the drainage ditch does not beneficially use all of the water so collected, leaving a balance of *water of the state* in the ditch." *Id*. at 8 (emphasis in original).

Further:

> Because of this inability to regulate and limit the flow of water into the ditch, it is certainly possible that the amount of public water collected in the drain exceeds that which can be beneficially used by the person or entity that constructed the ditch – in terms of quantity, annual volume, and period of use. <u>Because any balance of unused water in the drainage ditch is still public water of the state, it is subject to appropriation under the laws of the state</u>.

Id. (emphasis added).

Applying *Janicek* to the water in Nampa's WWTP, whether a source of water is in a "natural watercourse" is immaterial. Moreover, the Reuse Agreement clearly envisions the construction of extensive structures in order to deliver this water to Pioneer for subsequent land application by Pioneer. SOF Ex. F. This is sufficient to constitute diversion of Nampa's water.

Pioneer knows it needs a water right to appropriate wastewater. Many of its current water rights are for wastewater from drains, as explained in *Stipulation of Fact* Exhibit S ("Phyllis and Highline Canals use drain water from Five Mile and Fifteen Mile Drains, respectively, to supplement live and storage flows…."). SOF Ex. S at 29. Pioneer further agrees that a pipeline from Nampa's WWTP "is not very different" from a feeder canal collecting drain water. SOF Ex. S at 29. Accordingly, Pioneer must obtain a water right to apply Nampa's water to Pioneer's lands base on Idaho Code § 42-201(2).

Alternatively, the Director should be required to conduct a transfer analysis under Idaho Code § 42-222. *See* Sections D and E *infra*. The plain language of Subsection 8 states that the municipality or sewer district "shall not be required to obtain a water right," but the plain language says nothing about not requiring a transfer application.

D. The Director committed reversible error by failing to acknowledge that Nampa's water rights contain conditions precluding the use of its water rights for irrigation when surface water is available and failing to acknowledge that surface water is available for the lands where Pioneer intends to apply this water, and whether Pioneer's scheme to place Nampa's water rights on Pioneer's irrigated land as an additional water supply for lands with surface water rights is therefore an enlargement of the water rights.

Even though Riverside raised the question before the Director that Nampa's water rights limited how the water could be used, the Director failed to address or even acknowledge the

conditions on Nampa's water rights. It was error to ignore that fundamental water right issue in the *Order*.

When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) (citing *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012)). If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Id*.

Water rights are defined by elements. *City of Blackfoot*, 162 Idaho at 306, 396 P.3d at 1188 (referencing Idaho Code §§ 42-1411(2)). Purpose of use is one of those defining elements. Idaho Code § 42-1411(2)(f). *City of Blackfoot*, 162 Idaho at 307, 396 P.3d at 1189. In *City of Blackfoot*, the City argued that a reference to a settlement agreement in its water right provided it the right to claim mitigation credit through recharge. The Idaho Supreme Court rejected this position:

> The City attempts to argue that recharge, although not contained in the purpose of use element, is an authorized use of 181C. However, recharge is a statutorily recognized beneficial use. Idaho Code § 42-234(2). As such, it must be included in the purpose of use element before a water right may be used for recharge. See Idaho Code §§ 42-1411(2)(f), -1412(6). And as noted above, recharge is simply not included in 181C's purpose of use element. The City's attempt to argue otherwise is nothing more than an impermissible collateral attack on the partial decree.

City of Blackfoot, 162 Idaho at 307, 396 P.3d at 1189.

The matter before this Court is similar. There is no dispute, Nampa's potable water rights' purpose of use is municipal. SOF ⁋ 10. Yet, by way of the Reuse Agreement, the City of Nampa has entered into a private agreement to provide its potable water for a purpose of use not identified in its potable water rights—irrigation. "The uses of water authorized under the Decree are ascertainable from a simple reading of the purpose of use element." *City of Blackfoot*, 162

Idaho at 308, 396 P.3d at 1190. "A private settlement agreement cannot define, add, or subtract from the elements of a validly adjudicated water right; it can only limit, condition, or clarify the administration of the right as between the private parties to the agreement." *Id.* at 308–09, 396 P.3d at 1190–91.

The Supreme Court further explained that "[b]y statute, decrees entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." *Id.* at 308, 396 P.3d at 1190 (citing Idaho Code § 42-1420(1)) (referencing *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) ("Finality in water rights is essential.")). Due to the finality of the decrees, the Court found "[t]here is no question that an application for transfer is required to change the purpose or nature of use of a water right. Idaho Code § 42-222(1) ("Any person ... who shall desire to change the ... nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change."). *City of Blackfoot*, 162 Idaho at 308, 396 P.3d at 1190.

That same requirement applies to the change in the purpose of use of Nampa's effluent to now include irrigation. In lieu of requiring Pioneer to apply for a water right to "supplement" its irrigation water supply, the Department should require Pioneer to file a transfer in order to analyze enlargement and the potential impacts to other water right holders and the local public interest of this significant change of use for 20-40 cfs. To allow this change in use without undertaking a transfer analysis "is nothing more than an impermissible collateral attack on the partial decree." *Id.* at 308, 396 P.3d at 1190.

As in *City of Blackfoot*, the matter of a private agreement is problematic as the Director has no duty to enforce the agreement or even oversee it. More importantly, the Reuse Agreement potentially enlarges and alters the elements of Nampa's and Pioneer's water rights. "To allow the

Settlement Agreement to enlarge or otherwise alter the clearly decreed elements of 181C, would allow private parties to alter a judicial decree. Such a result is simply untenable." *Id.* at 309, 396 P.3d at 1191 (referencing *Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010) ("An important principle drives this holding—private stipulations cannot circumvent court orders.")).

The Supreme Court's summary paragraph towards the end of its *City of Blackfoot* opinion provides an enlightened overview of the constraints the law places on water right elements:

> In summary, recharge is a beneficial use. Idaho Code § 42-234(2). As such, it must be identified in the purpose of use element. Idaho Code § 42-1412(6). An element may either contain a statement defining the element or incorporate one, but not both. *Id*. 181C's purpose of use element clearly contains a statement listing five uses and recharge is not one of them. The private Settlement Agreement, incorporated in the other provisions element of 181C, cannot alter, add, or subtract from the uses clearly contained in the judicially decreed purpose of use element. The sole mechanism for altering, adding, or subtracting from a judicially decreed purpose of use element is through an application for transfer. Idaho Code § 42-222(1). Accordingly, if the City wishes to use 181C for recharge it must file for a transfer.

City of Blackfoot, 162 Idaho at 310, 396 P.3d at 1192 (footnote omitted). The same should apply in this matter.

In *Rangen, Inc. v. Idaho Dep't of Water Res*., Rangen disputed the Director's conclusion that it was only allowed to divert from the mouth of the Martin-Curren Tunnel rather than what Rangen contended was a larger historical diversion. The Supreme Court began in stating: "By statute, 'decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.'" *Rangen*, 159 Idaho 798, 805, 367 P.3d 193, 200 (2016) (quoting Idaho Code § 42–1420(1)). The Court quoted the Director's determination that:

> Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E.... Administration must comport with the unambiguous terms of the SRBA decrees. Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10–acre tract.

Rangen, 159 Idaho at 806, 367 P.3d at 201. The Supreme Court agreed with this Court that any dispute Rangen had with its point of diversion should have been resolved in the SRBA. Further, the Supreme Court agreed that "[a]ny interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself." *Rangen*, 159 Idaho at 806, 367 P.3d at 201. As a result, the Court affirmed this Court's holding that Rangen's decrees limited its diversion to the Martin-Curren Tunnel, and further, within the decreed ten-acre tract. *Id*.

The *Rangen* decision is insightful as to the limitations on the "source" of a water right. Applying *Rangen* to this matter, it is clear that Pioneer and Nampa cannot deliver Nampa's effluent water that is sourced from ground water to Pioneer's Phyllis Canal under Pioneer's current water right decrees because Pioneer does not have either the Nampa WWTP or Nampa's wells identified as the source on any of Pioneer's water rights.

E. The Director committed reversible error by failing to apply the Supreme Court's holding in *A&B Irrigation District v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005), to recognize that source of the water at issue is ground water.

Nampa's water rights and the undisputed facts establish beyond doubt that the source of Nampa's potable water is ground water and that Nampa's WWTP treats and discharges ground water. In its briefing before the Director, Riverside cited the Supreme Court's decision in *A&B*

Irrigation District v. Aberdeen-American Falls Ground Water District, for two points: (1) If the water is waste water a new permit is needed; and (2) If the water remains ground water, its use is subject to the law of enlargements. A&B collected the run-off from the B unit irrigation in ponds or drains and began using the collected water on an additional 2,363.1 acres. IDWR determined that the use was an enlargement and recommended subordination under Idaho Code § 42-1426, the Expansion Statute. This recommendation was upheld by the special master and the SRBA court. A&B appealed and claimed the right to recapture this water because it had been transformed into waste or drain water.

The Idaho Supreme Court recognized the right to appropriate drain, waste and seepage waters. *A&B*, 141 Idaho at 750, 118 P.3d at 82. The Court acknowledged that it was possible to view the water collected as waste or drain water. *Id*. at 751, 118 P.3d at 83. The Court then held that, if A&B wanted to treat the water as drain or waste water, rather than ground water, A&B would have to apply for a new water right. *Id*. at 752, 118 P.3d at 84. Under the Court's determination in *A&B*, if Pioneer, the entity putting the water to use, wants to treat Nampa's effluent as drain or waste water, Pioneer would be required to seek "a new water right for this water source prior to any further use" on Pioneer's lands. *Id.*

Second, and important for this proceeding, the Supreme Court did not rest its analysis there. The Court then concluded that use on additional land would be an expansion of A&B's ground water right requiring subordination to junior users. *Id*. It is a rare circumstance where expansion of use does not cause injury. *Id.* The Court cited *Jenkins* stating "priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. Idaho Dept. of Water Resources*, 103 Idaho 384, 388, 647 P. 2d 1256, 1260 (1982). Hence, the Court held that any use of the water collected from Unit B, if

treated as ground water, would have to be subordinated to other water rights or that "full mitigation of injury" takes place. *A&B*, 141 Idaho at 753, 118 P.3d at 85.

Finally, in *A&B* the Court "rejects" the logic in *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133, 269 P. 2d 755 (1954), to the extent that *Jensen* would allow treatment of the drain or wastewater as independent from its original source. Here, the original source of Nampa's effluent is indisputably ground water. The Court in *A&B* held that the collected water there, because it is originated as ground water, remained ground water and use of the water on new land had to be treated subject to the law applicable to enlargements. *A&B*, 141 Idaho at 753, 118 P.3d at 85. The same result obtains here, Pioneer wants to use Nampa's water on lands not covered by Nampa's water rights.

Nampa proposes to supply that ground water to Pioneer for use on 17,000 acres to increase or supplement Pioneer's water supply. SOF ¶¶ 55-56. Because Nampa's effluent remains ground water, it is subject to the law of enlargements and the protection of existing water users. *A&B*, 141 Idaho at 753, 118 P.3d at 85. It was error to ignore this expansion of use of Nampa's water rights.

The Director never addressed this critical legal analysis in his Order. In fact, he didn't touch it all. The elements of a water right matter. Judicial decrees of water rights matter. As the Court said in *A&B*, "[t]o the extent that the source of appropriated water can be identified, it retains that characterization." *A&B*, at 750. Here there is no dispute that the source of water that Pioneer is using is ground water pumped under Nampa's water rights.

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F. The Director committed reversible error by concluding that, as applied, Riverside has no standing to contend that the Director's interpretation of Idaho Code § 42-201(2) violates Article XV, § 3 of the Idaho Constitution.

Nampa and Pioneer's reuse proposal requires the application of Nampa's ground water rights on Pioneer land, resulting in both an expansion of the decreed and licensed rights and a transfer of the place of use. Extending the exemption in Idaho Code § 42-202(8) to allow expansion of the water rights to allow Pioneer to apply the water to its land without an injury analysis under Idaho Code § 42-222 transfer would render Idaho Code § 42-202(8) unconstitutional *as applied*. See *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 870, 154 P.3d 433, 441 (2007) (party need only show that the statute as applied to the party's conduct is unconstitutional to sustain an as applied challenge).

Article XV, § 3 of the Idaho Constitution protects existing water rights by providing "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied…" and that the "[p]riority of appropriations shall give the better right as between those using the water." When the Director determined that Idaho Code § 42-202(8) applied, and granted Pioneer statutory exemption that does not exist, Riverside's senior water rights were injured, in violation of the Idaho Constitution. The Director made a finding that Riverside would not be injured however, apparently as a matter of law, and without engaging in any analysis under the Idaho water right processing procedures. Riverside's point is that it is entitled to make its case in a water right transfer or application proceeding, and the Director denied that right.

Judge Hurlbutt's decision in Basin Wide Issue No. 1, Subcase No. 91-00001, held the presumption statute, Idaho Code § 42-1416, and the accomplished transfer statute, Idaho Code § 42-1416A, unconstitutional as void for vagueness in large part because it was unclear if the

statutes adequately incorporated the substantive criteria of Idaho Code § 42-222 regarding protection from injury, enlargement and the other statutory factors. *Memorandum Decision and Order in Basin-Wide Issue No. 1*. at 18 (12 Subcase No. 91-00001 (February 4, 1994)).[9] The same is true here. Those factors are ignored in the Director's Order. The replacement "amnesty statutes," Idaho Code §§ 42-1425 and 42-1426, were designed to protect the "water uses originally intended to be protected by the 'presumption' and 'accomplished transfer' statute and 'significant investments by water users and tax base for local governments by helping to maintain status quo water uses.'" *Id.* at 457, 926 P.2d 1304.

The Supreme Court's constitutional analysis in *Fremont-Madison* is instructive here. At issue in *Freemont-Madison* was the constitutionality of the "amnesty statutes" Idaho Code §§ 42-1425 and 42-1426, that had been enacted to replace Idaho Code §§ 42-1416 and 42-1416A. *See Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456-7, 926 P.2d 1301, 1303-4 (1996). Specifically, the question was whether "the application of either statue would result in injury to the priority of any other validly established junior water rights." *In Re SRBA* Subcase No. 75-10117 ("Lemhi Gold Trust LLC) *Memorandum Decision and Order on Challenge* at 8.[10] These statutes allowed the SRBA court to enlarge water rights beyond their initial uses and to decree accomplished transfers under certain conditions.

In *Fremont-Madison*, the Court held that both amnesty statutes were constitutional <u>because</u> they required an injury analysis to be conducted to determine injury to other water rights

[9] The *Memorandum Decision and Order in Basin-Wide Issue No. 1* is attached as Exhibit B to the *Petitioner's Opening Brief* and is located in the Agency Record at 810-821.
[10] *In Re SRBA Subcase No. 75-10117 Memorandum Decision and Order on Challenge* is attached as Exhibit C to the *Petitioner's Opening Brief* and is located in the Agency Record at 823-831. For clarity, *In Re SRBA Subcase No. 75-10117 Memorandum Decision and Order on Challenge* will be cited as "*Lemhi Gold*" with the corresponding page indicated thereafter.

before granting the amnesty provided in their respective provisions. "Proceeding under section 42–1425 a water user cannot obtain a transfer that constitutes either an enlargement of the water right or otherwise injures water rights existing on the date of the change. Section 42–1425 of the Idaho Code is constitutional as written." *Fremont-Madison*, 129 Idaho at 458, P.2d at 1305 (emphasis added). "Section 42–1426 of the Idaho Code is constitutional as written because it provides that an enlargement cannot be allowed that would injure a junior appropriator." *Id*. 129 Idaho at 460–61, P.2d at 1307–08 (emphasis added). Here, Idaho Code § 42-202(8) would be constitutional as applied to the Reuse Agreement, only if that Statute can be read to preclude enlargements or injury to other water users.

This Court employed the constitutionality analysis in *Fremont-Madison* to reach the conclusion that another Idaho statute, Idaho Code 42-223(11), was unconstitutional because "[u]nlike the statutes analyzed in *Fremont-Madison*, Idaho Code § 42-223(11) contains no express protections to prevent injury to other validly established water rights." *Lemhi Gold* at 9.

This Court's analysis of Idaho Code § 42-223(11) could lead to the conclusion here that Idaho Code § 42-201(8) is unconstitutional on its face, because the statute does not contain an express requirement to account for injury to existing water rights. However, Riverside does not believe it is necessary to go that far, if the Director is required to subject this Reuse Agreement to an enlargement or injury analysis under the lens of a water right or transfer proceeding that would protect existing water rights, examine enlargement and evaluate the local public interest so as to comply with the constitution.

Idaho Code § 42-201(8), as Nampa and Pioneer would have it applied here, does not take into account injury to existing water rights or enlargement before allowing municipalities to change the nature of use of their water rights or when providing their water to third parties to use

on other lands. Nampa's proposal to discontinue discharge of large quantities of water to Indian Creek during irrigation season upstream of Riverside's diversion of that same water and to divert that water to another user who has no water right to use that water will enlarge the use and cause injury to Riverside. Idaho Code §42-201(8)'s failure to address enlargement and potential injury to existing water rights renders its application in this matter unconstitutional.

Riverside need not prove injury-in-fact before raising this concern. In the *City of Pocatello v. Idaho,* the Idaho Supreme Court affirmed the district court's decision that approved IDWR's conditioning of water rights to avoid injury to other water rights. *City of Pocatello v. Idaho*, 152 Idaho 830, 834, 152 P.3d 845, 850 (2012). The City argued that there had to be proof of actual injury before a condition could be included. The Supreme Court stated that Pocatello was "wrong." *Id*. at 835, 152 P.3d at 851. The Court relied on the district court's analysis that:

> … injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case a discrete region of the aquifer) and priority administration is sought. Even though the priority administration may occur at some point in the future, injury to the priority date occurs at the time the accomplished transfer is approved.

City of Pocatello v. Idaho, 152 Idaho at 834, 152 P.3d at 850.

G. The Director's Decision will cause prejudice to Riverside's substantial rights pursuant to Idaho Code § 67-5279(4).

Idaho Code § 67-5279(4) requires that Riverside demonstrate the Director's decision will cause prejudice to Riverside's substantial rights.

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1. Property Right

Water rights are property rights. *Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015). As established in the *Stipulation of Facts*, Riverside diverts most of Indian Creek during the irrigation season. SOF ¶ 31. Riverside's Indian Creek water rights carry priority dates of 1915 and 1922 – these are not waste water rights; these are senior water rights for diversion of surface water from Indian Creek.

The Director's decision, that Subsection 8's exemption for a water right extends to Pioneer, clears the way for Nampa and Pioneer to move forward with the Reuse Agreement, which will reduce the flows in Indian Creek by 18-41 cfs during irrigation season. As the major, downstream diverter on Indian Creek this will undoubtedly cause injury to Riverside in the loss of its ability to divert that water during irrigation season.

The Idaho Supreme Court "has not yet attempted to articulate any universal rules to govern whether a petitioner's substantial rights are being violated under Idaho Code § 67–5279(4)." *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011). "This, in part, is due to the fact that each procedural irregularity, legal error, and discretionary decision is different and can affect the petitioner in varying ways." *Id*., c*ompare Evans v. Bd. of Comm'rs*, 137 Idaho 428, 433, 50 P.3d 443, 448 (2002) (finding no prejudice to substantial rights when a county board visited a proposed use site without notice) *with Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 439, 942 P.2d 557, 563 (1997) (vacating a county board's decision when it made a site visit without notice).

In *Hawkins*, the appellant was challenging a variance granted by the county commissioners. The Idaho Supreme Court observed "Generally, as a procedural matter, all the parties involved in a land-use decision have a substantial right to a reasonably fair decision-

making process. Governing boards owe procedural fairness not just to applicants but also their interested opponents." *Hawkins*, 151 Idaho at 232, 254 P.3d at 1228. The same is true in water right decisions – there can be no doubt that Riverside has an interest in the transfer of Nampa's effluent discharge from Indian Creek to Phyllis Canal.

Yet, with the Director's invocation of Subsection 8's exemption Riverside has been denied even a seat at the table, let alone an ability to present its argument or be part of the decision-making process. The Idaho Supreme Court called this the "the right for all interested parties to have a meaningful opportunity to present evidence to the governing board on salient factual issues." *Id*. at 232-233, 254 P.3d at 1228-1229 (citing *Cnty. Residents Against Pollution from Septage Sludge v. Bonner Cnty.*, 138 Idaho 585, 588–89, 67 P.3d 64, 67–68 (2003); *Sanders Orchard v. Gem Cnty. ex rel. Bd. of Cnty. Comm'rs*, 137 Idaho 695, 702, 52 P.3d 840, 847 (2002)).

A petitioner, such as Riverside, "opposing a permit must be in jeopardy of suffering substantial harm if the project goes forward, such as a reduction in the opponent's land value or interference with his or her use or ownership of the land. *See Price v. Payette Cnty. Bd. of Cnty. Comm'rs*, 131 Idaho 426, 431, 958 P.2d 583, 588 (1998) (vacating a board decision because it could impact property value or the petitioners' use and enjoyment of their land)." *Hawkins*, 151 Idaho at 233, 254 P.3d at 1229. It shouldn't be difficult for this Court to conclude that Riverside will be "in jeopardy of suffering substantial harm if the project goes forward." If this Court overturns the Director's decision, and requires Pioneer to seek either a water right or file a transfer application, Riverside will finally be afforded its seat at the table in discussions that will have a significant impact on Riverside's most valuable property right – water.

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2. Due Process Right

Due process rights are substantial rights. *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010) (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610, 94 S.Ct. 1895, 1901, 40 L.Ed.2d 406, 415 (1974) ("Due process of law guarantees no particular form of procedure; it protects substantial rights.")). For quasi-judicial proceedings, procedural due process requires that:

> … there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when [a party] is provided with notice and an opportunity to be heard. The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement. Due process is not a concept to be applied rigidly in every matter. Rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation.

In re Jerome Cty. Bd. of Comm'rs, 153 Idaho 298, 311, 281 P.3d 1076, 1089 (2012) (quoting *Aberdeen–Springfield Canal Co. v. Peiper,* 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (internal quotations and citations omitted in original)). The Idaho Supreme Court has occasionally found this is satisfied by a public hearing or some opportunity to present evidence before the decision-maker(s). In *Castaneda,* the Idaho Supreme Court held that Boise City did not impair any of the appellants' due process rights when it approved a subdivision plat after a public hearing. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927–28, 950 P.2d 1262, 1266–67.

Riverside did participate in the proceeding before IDEQ and submitted comments on this water right issue. The Parties stipulated that the water rights issue should be presented to IDWR instead. As a result of the Director's Order, Riverside has no avenue at IDWR in which to raise the alarm over 18-41 cfs of water being removed from its appropriation. This includes no transfer analysis under Idaho Code § 42-222 or evaluation to appropriate water under IDAPA 37.3.08.045.01.

Idaho Code § 42-222, the transfer statute, applies where "Any person, entitled to the use of water…who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change." Idaho Code § 42-222(1). This application triggers the duty of the Director to provide notice to "anyone who desires to protest the proposed change…" *Id*. If the Director does not require a transfer analysis as part of a Subsection 8 proceeding, other water right holders face the high possibility of injury to their water rights because of the transfer, with no procedural right to raise the issue or requirement for the Director to conduct an investigation and a hearing. *Id*. Applying Subsection 8 is an end run around the essential duty of the Director:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed

Idaho Code § 42-222 (1). It also shuts the courthouse door to injured water right holders who have a right of judicial review of the Director's decision. *Id*.

Likewise, Subsection 8 provides an end run around the requirements of IDAPA 37.3.08.045.01 which governs the Director's evaluation of all applications to appropriate water. 37.3.08.045.01 requires the Director to evaluate:

- Whether the proposed use will reduce the quantity of water under existing water rights.
- Whether amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights.
- Whether the holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right.
- Whether the project conflicts with the local public interest.

Id.

Riverside clearly meets the definition of "anyone who desires to protest the proposed change…" and has had its due process rights adversely impacted.

V. CONCLUSION

The scheme concocted by Nampa and Pioneer derives from the notion that Nampa has the right under Idaho Code § 42-201(8) to do what it wishes with the ground water it has appropriated without regard to the conditions on its water rights, without regard to enlargement, injury or the local public interest. If Nampa wanted to it could pipe or truck its waste water to Las Vegas under the guise of "reuse." The Director's *Order* frees it to further commoditize its waste water. The scheme also permits Pioneer to stack additional water on its lands without a water right administrative proceeding to examine if Pioneer needs the water, is enlarging the use of Nampa's water rights or injuring any other water user.

Idaho Code § 42-201(8), as a "narrow" exception to the requirement to obtain a water right, cannot be stretched so far.

The Director's Order should be reversed.

DATED this 31st day of August 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August 2021, I caused to be served a true and correct copy of the foregoing **Petitioner's Opening Brief** by the method indicated below, and addressed to each of the following:

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