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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,

and

CITY OF POCATELLO, PIONEER IRRIGATION DISTRICT, ASSOCIATION OF IDAHO CITIES, CITY OF BOISE, CITY OF JEROME, CITY OF POST FALLS, CITY OF RUPERT, CITY OF NAMPA, CITY OF MERIDIAN, CITY OF CALDWELL & CITY OF IDAHO FALLS,

Intervenors.

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

Case No. CV14-21-05008

MUNICIPAL INTERVENORS' RESPONSE TO RIVERSIDE IRRIGATION DISTRICT'S OPENING BRIEF

Chris M. Bromley, ISB No. 6530
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cbromley@mchughbromley.com
Attorneys for Intervenors City of Boise, City of Jerome, City of Post Falls, and City of Rupert

Charles L. Honsinger, ISB No. 5240
HONSINGER LAW, PLLC
PO Box 517
Boise, ID 83701
Telephone: (208) 863-6106
Facsimile: (208) 908-6085
honsingerlaw@gmail.com
Attorneys for Intervenors City of Caldwell and City of Meridian

Sarah A. Klahn
SOMACH SIMMONS & DUNN
2033 11th Street Suite 5
Boulder, Colorado 80302
Telephone: (303) 449-2834
Facsimile: (720) 535-4921
sklahn@somachlaw.com
Attorneys for Intervenor City of Pocatello

Candice M. McHugh
MCHUGH BROMLEY, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cmchugh@mchughbromley.com
Attorneys for Intervenor Association of Idaho Cities

Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO, PLLC
PO Box 50130
Idaho Falls, ID 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
rharris@holdenlegal.com
Attorneys for Intervenor City of Idaho Falls

Remaining counsel of record are listed in the certificate of service.

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I. INTRODUCTION

The Cities of Boise, Meridian, Caldwell, Jerome, Post Falls, Rupert, Idaho Falls, Pocatello, and the Association of Idaho Cities, collectively referred to herein as "Municipal Intervenors" hereby file this Response to Riverside Irrigation District's (hereinafter "Riverside") Opening Brief in the above-captioned matter.

Municipal Intervenors join in and concur in the briefs filed by the City of Nampa (hereinafter "Nampa"), Pioneer Irrigation District (hereinafter "Pioneer"),[1] and the Idaho Department of Water Resources (hereinafter "IDWR" or "Department"). For purposes of economy, and because of the detailed responses in the briefs filed by Nampa and Pioneer, Municipal Intervenors will not address every issue raised by Riverside. Municipal Intervenors reserve the right to address any issue raised by Riverside in argument if so desired by the Court.

Municipal Intervenors have intervened in this case to support the conclusion reached by the Director of IDWR in his May 3, 2021 *Order on Petition for Declaratory Ruling* ("*Order*").[2] That conclusion was that pursuant to the exemption in I.C. § 42-201(8) (hereinafter "Subsection 8"), Pioneer is not required to apply for or obtain a water right to accept wastewater effluent discharged by Nampa into Pioneer's Phyllis Canal after such wastewater has been treated within Nampa's publicly owned wastewater treatment plant (hereinafter "WWTP").

The Municipal Intervenors support the *Order* because it is consistent with Idaho law and a contrary conclusion may impact the control and direction that cities are entitled to assert over their own treated wastewater. Each of the Municipal Intervenors either currently discharges their own treated wastewater into facilities owned by outside parties, or may desire to do so in the

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[1] Municipal Intervenors are not seeking an award of attorneys' fees.

[2] The *Order* is located in the Agency Record at pages 1230-1237. Hereinafter, all citations to the Order will be to the particular page of the Order.

future. A short summary of the individual Municipal Intervenors' concerns and factual situations follows:

A. City Of Jerome

The City of Jerome treats water at its WWTP that was appropriated by the City and other users, including industry. Since the end of World War II, the City has discharged treated water into the North Side Canal Company's ("NSCC") J8 Canal for beneficial use by NSCC. This is done pursuant to an NPDES permit and a written Agreement for Discharge of Treated Wastewater between Jerome and NSCC. If the *Order* is overturned, NSCC would require a water right to accept water treated by Jerome at its WWTP, thereby upsetting this approximately seventy-five-year relationship, and subjecting Jerome to potential protest by third parties.

B. City Of Boise

The City of Boise currently discharges treated effluent from its Water Renewal Facilities into the Boise River pursuant to its NPDES permit. The City of Boise treats wastewater from multiple providers including the City of Boise's potable water provider Suez, multiple sewer districts, and other private users. The City of Boise is interested in the ability to explore alternatives to discharging its treated effluent to the Boise River, one such alternative being reuse of its treated effluent.

C. City Of Meridian

The City of Meridian discharges most of the effluent treated at its WWTP to Fivemile Creek pursuant to its NPDES permit. Some of that treated effluent is delivered (prior to discharge into Fivemile Creek) to various users, including a park, commercial landscaping, a car wash, and others. While the delivery of effluent to other users is a fraction of the total effluent produced by the City, it intends to continue searching for ways in which to use its treated

effluent. The City's NPDES permit also allows discharge to the Boise River, and the City maintains infrastructure to do the same if desired.

D. City Of Caldwell

The City of Caldwell discharges effluent treated at its WWTP to the Boise River just upstream of the mouth of Indian Creek pursuant to an NPDES permit. Caldwell is interested in finding ways to deliver its treated effluent for use by other entities, including irrigation districts.

E. City Of Post Falls

The City of Post Falls treats water appropriated by the City and other municipal providers at its WWTP, then discharges treated water into the Spokane River below Post Falls dam, pursuant to an NPDES permit, mere miles upriver from the border with the State of Washington. In the future, Post Falls plans to recycle more water than it discharges into the Spokane River.

F. City Of Rupert

The City of Rupert treats water appropriated by the City and other users, including industry, at its WWTP, then land applies the same water onto fields owned and operated by the City during the irrigation season pursuant to an IDEQ Reuse Permit and stores treated water in lagoons during the non-irrigation season pursuant to the same Reuse Permit. Rupert has an agreement with the United States to discharge treated water into the Minidoka Irrigation District canal in the event of an emergency. In the future, Rupert may want to discharge all or some of the water it treats into an irrigation canal.

G. City Of Idaho Falls

The City of Idaho Falls treats water appropriated by the City, other municipal providers, private water purveyors and other users, including industry, at its WWTP, and discharges treated effluent to the Snake River pursuant to an NPDES permit. This single discharge point to the

Snake River is immediately adjacent to the WWTP and upstream of the Gem State Hydroelectric Dam. Idaho Falls does not currently provide treated effluent to any end user but is continuously seeking ways to best manage this resource.

H. City Of Pocatello

The City of Pocatello discharges wastewater from its Water Pollution Control Plant ("WPC") into the Portneuf River. The Pocatello WPC treats wastewater to satisfy permit requirements for secondary treatment, nitrification and phosphorus removal. However, the City anticipates that it will be faced with additional and expensive treatment requirements in the future and has begun to consider land application or other arrangements with nearby water users that would allow it to avoid expensive new treatment technologies.

I. Association Of Idaho Cities

AIC is a non-partisan organization founded in 1947 that represents its city members, both large and small in order to safeguard cities' ability to manage their water rights, water use, and wastewater discharge as necessary to meet the needs of their residents and any applicable laws and regulations. Riverside's arguments here implicate cities' management and use of water rights, water use, and wastewater discharge. Thus, AIC endorses the arguments made in this brief to allow cities to operate as they have historically under applicable Idaho state law.

II. PROCEDURAL HISTORY

This matter comes to the Court following Riverside's petition for judicial review of the *Order* in which the Director ruled against Riverside by holding that Subsection 8 "exempts municipalities from needing a water right to land apply effluent from a publicly owned treatment works employed in response to regulatory requirements." *Order* at 5. Riverside challenges the *Order*, asking the Court to "reverse[]" on a number of legal bases. *Riverside Opening Brief* at

33. Municipal Intervenors support the Director's *Order* as it upholds the exception crafted by the Legislature, codifying common law, that allows cities to lawfully cease wasting of water by disposing of treated effluent from WWTPs in response to state or federal regulatory requirements without a water right.

III. FACTS DEVELOPED IN THE AGENCY PROCEEDING

The facts in this proceeding developed before the agency are fairly straightforward. These facts have been stipulated to by the parties to that proceeding, including Riverside, Nampa, Pioneer, and the Municipal Intervenors.[3]

Nampa is a "municipal water provider" within the meaning of I.C. § 42-202B(5). *SOF*, ¶ 7. Nampa diverts groundwater into its potable water system for delivery to its customers pursuant to its municipal water rights. *SOF*, ¶¶ 8-10. Nampa collects sewage generated by its potable water system customers, treats it in its WWTP, and discharges the treated wastewater into Indian Creek. *SOF*, ¶¶ 23, 27.

Riverside diverts water from Indian Creek downstream from the WWTP into the Riverside Canal pursuant to its water rights that authorize the diversion of approximately 180 cfs therefrom. *SOF*, ¶ 28, 33. Thus, Riverside diverts and uses wastewater discharged by Nampa into Indian Creek. *SOF*, ¶ 30. Notably, this augmentation of Indian Creek (that benefits Riverside) results from Nampa's diversion, use, treatment, and discharge of ground water into Indian Creek pursuant to water rights that were appropriated decades after Riverside's appropriations of its surface water supply from Indian Creek. *SOF*, ¶¶ 9, 33.

Pursuant to a Reuse Permit issued by the Idaho Department of Environmental Quality (hereinafter "IDEQ"), Nampa intends to eliminate the discharge of treated effluent from its

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[3] The *Stipulation of Facts* (hereinafter "*SOF*") is located in the Agency Record at pp. 688-712. Hereinafter, all citations to the *SOF* will be to the particular page of the *SOF*.

WWTP into Indian Creek during the irrigation season; however, Nampa will continue this practice outside of the irrigation season. *SOF*, ¶¶ 34, 52; Ex. G.[4] Instead, pursuant to that Reuse Permit and a Reuse Agreement between Nampa and Pioneer, Nampa intends to direct its treated effluent from its WWTP into Pioneer's Phyllis Canal during the irrigation season. *SOF*, ¶¶ 45, 49; Ex. F[5]; Ex. G. Pioneer has not applied for a water right to accept such treated wastewater into the Phyllis Canal. *SOF*, ¶ 35. Water from the Phyllis Canal is delivered by Pioneer to Nampa's non-potable municipal irrigation water delivery systems, and to Pioneer's own agricultural irrigation landowners within Pioneer's authorized place of use, including some within Nampa's area of city impact. *SOF*, ¶¶ 57 – 60.

IV. STANDARD OF REVIEW

When a district court acts in an appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the decision to determine whether it correctly decided the issues. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). However, this Court also reviews the agency record independently of the district court's decision. *Id*. "An agency's factual determinations are binding on the reviewing court, while questions of law are freely reviewed. *Id*." *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 243, 443 P.3d 252, 257 (2019). "Where the district court's order is correct but based upon an erroneous theory, this Court will affirm the order on the correct theory. *Martel v. Bulotti*, 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003)." *Summers v. Cambridge Joint School Dist.*, 139 Idaho 953, 955, 88 P.3d 772, 724 (2004).

"The Court exercises free review over questions of law and matters of statutory interpretation." *Intermountain Real Props., L.L.C. v. Draw, L.L.C.*, 155 Idaho 313, 317–18, 311

[4] Exhibit G is located in the Agency Record at pp. 221-250.
[5] Exhibit F is located in the Agency Record at pp. 205-212.

P.3d 734, 738–39 (2013). "While this Court exercises free review over an agency's conclusions of law, an agency's interpretation of the statutes it administers is due deference if the agency interpretation is reasonable, consistent with the statutes it administers, and supported by rationales favoring deference. *Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n*, 144 Idaho 23, 26, 156 P.3d 524, 527 (2007)." *Elgee v. Ret. Bd. of Pub. Emp. Ret. Sys.*, 169 Idaho 34, 490 P.3d 1142, 1156 (2021); *see also Duncan v. State Bd. of Acct.*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010) (explaining four-prong test for agency deference).

"When reviewing the constitutionality of a statute, this Court exercises free review. To prevail, a challenger must show that the statute is 'unconstitutional as a whole, without any valid application.' This Court makes 'every presumption [ ] in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger." *Citizens Against Range Expansion v. Idaho Fish & Game Dep't*, 153 Idaho 630, 633–34, 289 P.3d 32, 35–36 (2012) (alteration in original) (citing *Idaho Schs. For Equal Educ. Opportunity v. State*, 140 Idaho 586, 590, 97 P.3d 453, 457 (2004)).

V. ARGUMENT

A. Subsection 8 Exempts Pioneer Irrigation District From The Requirement That It Obtain A Water Right For The Wastewater Effluent Discharged Into Its Canal By Nampa

The *Order* determined that Pioneer did not need to comply with I.C. § 42-201(2) and obtain a water right prior to accepting Nampa's wastewater effluent because of the exemption to that subsection provided by Subsection 8. I.C. § 42-201(2) provides in relevant part that in Idaho, a water right is necessary to "divert any water from a natural watercourse or apply water to land." However, an applicable exemption to that mandatory water right requirement is also present in the statute.

That exemption provides in relevant part that

> Notwithstanding the provisions of subsection (2) of this section, a municipality . . . operating a publicly owned treatment works shall not be required to obtain a water right for the . . . disposal of effluent from a publicly owned treatment works . . . where such . . . disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider . . . shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place.

I.C. § 42-201(8).

This exemption in the statute is applicable to Nampa in this case, because under the statute, it is a municipality operating a publicly owned treatment works disposing of effluent pursuant to governmental regulatory requirements via land application. The exemption also applies to Pioneer by extension because the Reuse Agreement contractually obligates Pioneer to accept and land apply the treated effluent. As the *Order* found, "Nampa and Pioneer are so intertwined in this matter, that Subsection 8's exemption applies to Pioneer." *Order* at 4. Despite Riverside's arguments to the contrary, there is nothing with respect to the language of the Reuse Agreement, or with respect to the language of either I.C. § 42-201(2) or Subsection 8 that leads to a conclusion that the Subsection 8 exemption would not be applicable Nampa, and subsequently to Pioneer as Nampa's agent/contracting partner in this case.

B. The Director Correctly Concluded That Pioneer Is Entitled To The Exemption By Virtue Of Its Contractual Relationship With Nampa; Pioneer Is In Fact An Agent With Respect To That Contract

The *Order* approved Nampa and Pioneer's Reuse Agreement, consistent with Subsection 8, finding a water right was not required, because the relationship was grounded in contract. "Given the contractual and regulatory ties between Nampa and Pioneer and under the specific set of facts presented here, the Director concludes Subsection 8's exemption applies and it is not

necessary for Pioneer to obtain a separate water right to accept water from Nampa and apply that water to land in the Pioneer district boundaries." *Order* at 9. Riverside takes repeated shots at this conclusion on two fronts. First, Riverside argues the omission of certain words in Subsection 8 prevents Nampa and Pioneer from entering into a contract for disposal of treated wastewater. Second, Riverside argues the Director erred in failing to void the Reuse Agreement because it was not squarely rooted in the legal principle of agency. Riverside is incorrect on both counts.

As to the first point, Riverside makes an extremely technical and unavailing argument that because Subsection 8 does not use magic words such as "'agent' or 'third party' or 'irrigation district,'" Nampa cannot contract with Pioneer to land apply treated wastewater from the WWTP. *Riverside Opening Brief* at 12. The absence of specific words in the statute does not defeat the authority for cities and irrigation districts to contract with one another for disposal of treated wastewater. "It is axiomatic that when the legislature considers the amendment of a statute, <u>it has in mind all existing law</u> . . . ." *Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982) (emphasis added). The Court will not interpret a rule or statute to create an absurd result. *State v. Heath*, ___ Idaho ___, ___, 485 P.3d 1121, 1124 (2021) ; *State v. Doe*, 167 Idaho 249, 253, 469 P.3d 36, 40 (Ct. App. 2020). "[W]hen choosing between alternative constructions of a statute, this Court presumes that the statute was not enacted to work a hardship or to effect an oppressive result." *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000). To accept Riverside's argument would lead to the absurd result of prohibiting cities and irrigation districts from contracting with one another in order to dispose of treated wastewater outside a city's boundaries, authority that is specifically granted by statute, thereby working a hardship and leading to an oppressive result.

For example, cities and irrigation districts have the power to contract. I.C. § 43-304 (irrigation districts may "make and execute all necessary contracts . . . [and] may enter into contracts for a water supply to be delivered to the canals and works of the district . . . ."); I.C. § 50-301 (cities may "contract and be contracted with"). Moreover, I.C. § 42-202B(6) allows cities, under the umbrella of a municipal water right, to use and dispose of water for "related purposes . . . including those located outside the boundaries of a municipality served by a municipal provider." The contract at issue in this case would allow Nampa to dispose of its treated wastewater into the Phyllis Canal for land application by Pioneer within Pioneer's district boundaries, some of which overlap Nampa's municipal service area, without a water right. Given the underlying authorities of cities and irrigation districts to enter into contracts, the Director's interpretation that Subsection 8 authorizes Nampa and Pioneer to contract for disposal of treated wastewater is reasonable and subject to deference. *Elgee* at 12; *Duncan* at 3, 232 P.3d at 324.

Second, Riverside introduces a red herring by asking the Court to apply the principles of agency to the relationship between Nampa and Pioneer, *see Riverside Opening Brief* at 14-15, despite the fact that agency was not relied on by the Director in the Order. According to the Director:

> The characteristics of agency plainly allow an agent of a Subsection 8 exempted entity to benefit from Subsection 8's exemption. . . . . However, the Reuse Agreement does not give Nampa the right to control Pioneer. . . . . Despite the absence of a formal agency relationship, Subsection 8's exemption may still apply in this case. The Director agrees with Nampa that Nampa and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer. The Reuse Agreement contractually obligates Pioneer to dispose of Nampa's effluent.

Order at 4 (emphasis added).

Therefore, the Director recognizes that principles of agency could allow for a Subsection 8 relationship between a city and an irrigation district, but in the absence of agency, and due to the Reuse Agreement (which he found was a contract), Pioneer was authorized to accept Nampa's treated wastewater without a water right. I.C. §§ 42-202B(6), 43-304, and 50-301. Arguing for the Court to apply agency to this case, when the Director did not, impermissibly expands the scope of review of the *Order*.

To the extent the Court agrees to consider the issue of agency, the arguments made by Nampa and Pioneer demonstrate the *Order* can be affirmed on a different legal theory, *Summers* at 955, 88 P.3d at 724. The Municipal Intervenors specifically adopt and incorporate the agency-related arguments made by Nampa and Pioneer.

C. Nampa's Effluent Retains Its "Treated Wastewater" Status As It Is Discharged Into, And Conveyed Via, The Phyllis Canal All The Way To The Point At Which It Is Used To Irrigate Lands Within Pioneer Irrigation District

Riverside argues that Nampa's treated effluent, once discharged into Pioneer's Phyllis Canal, becomes wastewater subject to appropriation, thereby requiring Pioneer to obtain a water right to land apply that effluent. *Riverside Opening Brief* at 15-16. Riverside states that even though the Phyllis Canal is not a "natural watercourse," the mandatory water right requirement of I.C. § 42-201(2) applies. In support of this argument, Riverside cites to Special Master Booth's *Memorandum Decision and Order on Motion for Summary Judgement* in SRBA Subcase 63-27475 (*Janicek Properties, LLC*) (hereinafter "*Janicek*"). *Riverside Opening Brief* at 16-18. In that case, the Special Master determined whether drain water was public water subject to appropriation. The Special Master held that even though the drain in question was not a "natural watercourse," that the drain water could be appropriated "because waste, seepage and spring waters are subject to appropriation." *Janicek* at 6.

The Special Master's decision in *Janicek* does not help Riverside. First, the case addresses drains, not constructed private canals like the Phyllis Canal. Drains are constructed to collect excess water, not specifically and only to convey water from diversion from a natural source to ultimate use as is the case with constructed canals such as the Phyllis Canal. In fact, the Special Master in *Janicek* addressed this very distinction:

> [D]iversions from the running streams of the state are required to have some type of infrastructure at the point of diversion that is designed to regulate and control the amount of water diverted. In this way, the amount of water diverted is in line with the amount entitled to be diverted under the applicable water right(s), and the conveyance system can be turned off at the end of the applicable period of use. A ditch constructed for the purpose of intercepting and collecting seepage or waste water from the saturated soils, on the other hand, does not and can not have any such infrastructure. Such a ditch does not even have a precise point of diversion. The ditch will collect whatever water drains into it, and there simply is no way to regulate, limit, or shut off the flow of water into the drainage ditch. 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. 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.

Janicek at 8.

There are no facts or allegations that the Phyllis Canal was constructed "for the purpose of intercepting and collecting seepage or waste water from the saturated soils." Moreover, unlike the drain ditch in *Janicek*, the Phyllis Canal does have "infrastructure at the point of diversion that is designed to regulate and control the amount of water diverted" and there is a "way to regulate, limit, or shut off the flow of water" into it. Thus, according to the Special Master's own distinction between drain ditches and constructed diversion ditches, the Phyllis Canal is nothing like the drain ditch addressed in *Janicek.* Accordingly, Riverside's attempt to conflate the Phyllis Canal with a "drain ditch" that collects excess "public water of the state" is without merit.

Second, the "waste, seepage, and spring waters" referred to by the Special Master in *Janicek* were not treated as wastewater effluent as is the case with Nampa's discharges into the Phyllis Canal. To say that Nampa's treated effluent changes its character to appropriable water as soon as it is discharged to be properly disposed of makes no sense if taken to its logical conclusion. If, for example, instead of discharging its treated effluent, Nampa contracted with another entity to pump the effluent into trucks to be transported to farmlands for application to the same, then according to Riverside, the trucking entity transporting the effluent would be required to obtain a water right to accept it. This makes absolutely no sense and is completely inconsistent with the exemption in Subsection 8.

In short, Riverside's attempted reliance upon *Janicek* is at best misplaced and should be disregarded.

D. The Conditions On Nampa's Water Rights Do Not Apply To Irrigation Application Of Its Wastewater Effluent

Riverside argues that the conditions in Nampa's water rights provide only for municipal uses and not for the alleged "irrigation" uses contemplated by the Reuse Agreement. Therefore, according to Riverside, Pioneer is violating Nampa's water rights by land applying treated effluent resulting from Nampa's treatment of water diverted pursuant to those water rights. *Riverside's Opening Brief* at 18-22. A couple of points dispose of this somewhat long discussion and argument by Riverside.

First, Riverside's allegation that Nampa's water rights are being used for "irrigation" purposes is simply wrong. Instead, the water collected at Nampa's WWTP is used for "municipal" purposes.[6] Only after this water has been used for municipal purposes, is it

[6] "Municipal purposes" includes "water for residential, commercial, industrial, irrigation of parks and open space, and related purposes." I.C. § 42-202B(6).

collected at Nampa's WWTP for treatment. Thus, the "irrigation use" of Nampa's water rights that Riverside complains about simply does not exist.

Second and more importantly, Nampa is under a legal obligation to treat and dispose of its wastewater effluent, pursuant to its IDEQ Reuse Permit. Subsection 8 was enacted to assist municipal providers such as Nampa in this process. Requiring any entity to file a transfer application to include irrigation as a purpose of use in that provider's municipal water rights prior to land applying the same (whether applied by the municipal provider itself, an agent, or an entity with which it has contracted) would negate the purpose of the exemption provided for in Subsection 8, and would negate the exemption itself. Riverside's argument must be dismissed for the absurd and oppressive results that it would cause. *Heath* at 3; *Mulder* at 57, 14 P.3d at 377; *Doe* at 253, 469 P.3d at 40.

E. The Source Of Nampa's Water Rights Is Irrelevant To The Issue Of Whether Subsection 8's Exemption Applies To Land Application Of Its Wastewater Effluent

Riverside makes an erroneous apples to oranges comparison between Nampa and the A&B Irrigation District in an attempt to defeat the *Order*. According to Riverside, the source of "Nampa's potable water rights is ground water and that Nampa's WWTP treats and discharges ground water," thereby requiring a water right consistent with the Supreme Court's decision in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005). *Riverside Opening Brief* at 22 (emphasis in original). The source of Nampa's water rights is irrelevant, and Riverside is wrong to draw the comparison with *A&B*.

First, while the source of Nampa's municipal water rights is ground water, not all water treated at the WWTP is ground water; thus, Riverside is incorrect if it is implying that all water treated at the WWTP is ground water. *See SOF ¶ 25*.

Second, the holding in *A&B* does not apply in this case. There, the Court was concerned with A&B's application of water that was originally pumped from an aquifer then later captured in drains and applied to 2,363.1 enlargement acres that were not irrigated under the original license that described the place of use as 62,604.3 acres. The Court held to allow A&B to expand its place of use was an illegal enlargement. I.C. § 42-1426(1)(a) ("Persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion . . . .").

Riverside attempts to link *A&B* with the issue here:

> 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 [for the Director] to ignore this expansion of use of Nampa's water rights.

Riverside Opening Brief at 24 (emphasis added).

What Riverside misses is, unlike the drain water that was appropriated by A&B and applied to new enlargement acres, all of the water Nampa discharged into the Phyllis Canal will first be treated at the Nampa WWTP and then be applied on lands that are covered by existing water rights. Thus, *A&B* stands for the proposition that an irrigator's recapture and reuse of its waste water from drains on new acres requires a water right due to injury that will result from enlargement; yet Subsection 8 instead stands for the proposition that a city's reuse of its treated wastewater – water that would otherwise be wasted through discharge back into a natural channel – does not. Lastly, to the extent the Court's 2005 decision in *A&B* may have ever been construed to apply beyond the context of an irrigator applying recaptured drain water to new acres, the decision was limited by the legislature when it enacted Subsection 8 in 2012. *Doe v.*

Doe, 164 Idaho 482, 485, 432 P.3d 31, 34 (2018) (the legislature may abrogate prior decisions of the Court through subsequent legislation). Through enactment of Subsection 8, the Legislature effectively codified the common law wastewater doctrine by allowing cities to treat wastewater at a WWTP then discharge said water into irrigation canals when land application is undertaken in response to governmental regulation. The common law wastewater doctrine will be discussed next.

F. Riverside Is Not Entitled To Insist On Nampa's Continued Discharge Of Its Wastewater Effluent Into Indian Creek Under Any Legal Analysis

Riverside asks the Court to compel Nampa to continue discharging treated wastewater into Indian Creek in perpetuity, based on Riverside's belief that to allow otherwise results in injury, rendering Subsection 8 unconstitutional, as applied:

> Extending the exemption in Idaho Code § 42-20[1](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 § 42-20[2](8) unconstitutional *as applied*.
>
> . . . .
>
> 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 the 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 Opening Brief at 25-27 (emphasis in original).

As recognized by the Director and briefed by the Municipal Intervenors below,[7] Idaho's common law soundly rejects Riverside's argument that Nampa must continue to waste water into Indian Creek: "Idaho Case law has established that downstream water users cannot compel upstream users to continue wasting water. *Hidden Springs Trout Ranch v. Hagerman Water Users*, 101 Idaho 677, 680-681 (1980). Riverside will be impacted by the proposed use of Nampa's effluent because there will be less water available in Indian Creek without the influx of effluent. However, Riverside is not entitled to Nampa's wastewater." *Order* at 5 (emphasis added). *See also United States v. Haga*, 276 F. 41, 43-44 (D. Idaho 1921); *Application of Boyer*, 73 Idaho 152, 162-63, 248 P.2d 540, 546-47 (1952); *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950); *Crawford v. Inglin*, 44 Idaho 663, 669, 258 P. 541, ___ (1927); *Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, ___ (1927).

Because there is no cognizable right for Riverside to compel Nampa to discharge treated wastewater into Indian Creek, Riverside cannot claim injury and deprivation of a constitutional right. *Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974) (constitutional violations must be cognizable). Because Riverside can show no cognizable right has been violated, Riverside has not carried its burden to show a constitutional violation; thus, the Court should find in favor of the constitutionality of Subsection 8. *Citizens Against Range Expansion* at 633–34, 289 P.3d at 35–36.

G. Riverside's Substantial Rights Have Not Been Violated

Riverside argues violations to: (1) its real property rights to water; and (2) its due process rights. As to Riverside's real property rights to water, and as stated immediately above, Riverside cannot compel Nampa to waste treated effluent into Indian Creek and thus cannot

[7] The common law wastewater doctrine was more fully briefed below by the Municipal Intervenors. R. at 843-45.

claim a deprivation of its real property rights. As to Riverside's due process rights: "[T]he United States Supreme Court has noted, 'The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18, 32 (1976) (internal quotation omitted); *accord Neighbors for a Healthy Gold Fork*, 145 Idaho at 127, 176 P.3d at 132." *Hopkins v. Pneumotech, Inc.*, 152 Idaho 611, 615, 272 P.3d 1242, 1246 (2012). As acknowledged by Riverside, it participated in a hearing before the IDEQ and in the contested case before IDWR, a case it initiated. Riverside's participation in these hearings satisfies due process.

Moreover, Riverside itself provides another basis to dismiss its argument that it has been deprived of its constitutional due process rights. In its *Opening Brief*, Riverside states "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.'" *Riverside Opening Brief* at 31 citing *In re Jerome Cty. Bd. Of Comm'rs*, 153 Idaho 298, 311 (2012) (quoting *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91 (1999)) (emphasis added). Thus, according to Riverside's own argument, to assert a due process violation, it must first show that it has a substantive right of which it has been deprived. Once again, Riverside simply cannot show that it has a right to continued use of Nampa's discharged effluent as discussed above. Accordingly, there is no substantive right to which due process applies, and Riverside's due process arguments must be dismissed.

VI. CONCLUSION

The issue in this case is very simple: does the exemption in Subsection 8 apply such that Pioneer is not required to apply for or obtain a water right to accept the treated effluent that

Nampa discharges into the Phyllis Canal. The resolution is also very simple: for the Subsection 8 exemption to have any meaning or application at all, it should be applied in this case. For this reason and for the reasons discussed above, the Municipal Intervenors hereby respectfully request that this Court uphold the Director's *Order*.

Respectfully submitted this 4th day of October, 2021.

MCHUGH BROMLEY, PLLC

/s/ Chris M. Bromley
Chris M. Bromley, Attorneys for Cities of Boise, Jerome, Post Falls, and Rupert

HONSINGER LAW, PLLC

/s/ Charles L. Honsinger
Charles L. Honsinger, Attorneys for Cities of Caldwell and Meridian

MCHUGH BROMLEY, PLLC

/s/ Candice M. McHugh
Candice M. McHugh, Attorneys for Association of Idaho Cities

SOMACH SIMMONS & DUNN

/s/ Sarah A. Klahn
Sarah A. Klahn, Attorneys for City of Pocatello

HOLDEN KIDWELL HAHN & CRAPO, PLLC

/s/ Robert L. Harris
Robert L. Harris, Attorneys for City of Idaho Falls

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2021, the foregoing was filed, served, and copied as shown below.

Albert P. Barker Sarah W. Higer BARKER ROSHOLT & SIMPSON LLP PO Box 2139 Boise, ID 83701-2139 apb@idahowaters.com swh@idahowaters.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Christopher H. Meyer Charlie S. Basser GIVENS PURSLEY LLP PO Box 2720 Boise, Idaho 83701-2720 chrismeyer@givenspursley.com charliebaser@givenspursley.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Garrick L. Baxter Sean Costello IDAHO DEPT. OF WATER RES. PO Box 83720 Boise, ID 83720-0098 garrick.baxter@idwr.idaho.gov sean.costello@idwr.idaho.gov	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Charles L. Honsinger HONSINGER LAW, PLLC PO Box 517 Boise, ID 83701 honsingerlaw@gmail.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Andrew J. Waldera SAWTOOTH LAW OFFICES, PLLC PO Box 7985 Boise, ID 83707-7985 andy@sawtoothlaw.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt

Robert L. Harris HOLDEN KIDWELL HAHN & CRAPO, PLLC PO Box 50130 Idaho Falls, ID 83405-0130 rharris@holdenlegal.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Candice M. McHugh Chris M. Bromley MCHUGH BROMLEY, PLLC 380 S. 4th St., Ste. 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt
Sarah A. Klahn SOMACH SIMMONS & DUNN 2033 11th Street Suite 5 Boulder, Colorado 80302 sklahn@somachlaw.com	❑ U.S. Mail ❑ Personal Delivery ❑ Facsimile ☑ iCourt

/s/ Chris M. Bromley
CHRIS M. BROMLEY