

**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,

v.

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.

Case No. CV14-21-05008

RESPONDENTS' BRIEF

IN THE MATTER OF REUSE PERMIT
NO. M-225-01, IN THE NAME OF THE
CITY OF NAMPA

RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a judicial review proceeding pursuant to the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 to 67-5292. The Petitioner, Riverside Irrigation District (“Riverside”), challenges the May 3, 2021 *Order on Petition for Declaratory Ruling* (“*Order*”) issued by the Director of the Idaho Department of Water Resources (“Department”). R. 1230. Specifically Riverside challenges the Director’s interpretation of Idaho Code § 42-201(8) (“Subsection 8”) which exempts certain entities from needing a water right to land apply effluent in response to state or federal regulatory requirements.

B. Course of the Proceedings

On February 24, 2020, Riverside submitted a *Petition for Declaratory Ruling Regarding Need for a Water Right to Divert Water Under Reuse Permit No. M-255-01* (“*Petition*”) to the Department. R. 1-4. Riverside’s *Petition* sought a declaratory ruling as to whether Pioneer needs a water right to take the City of Nampa’s (“Nampa”) treated effluent and land apply it pursuant to Reuse Permit No. M-255-01 (“Reuse Permit”) issued by the Idaho Department of Environmental Quality (“DEQ”) to Nampa on January 21, 2020. R. 3. Under the Reuse Permit, Nampa intends to discharge effluent from its wastewater treatment plant (“wastewater plant”) to Phyllis Canal and Pioneer Irrigation District (“Pioneer”) will use the effluent to supplement Pioneer’s irrigation supply. R. 698 ¶ 34, 702 ¶ 49, 703 ¶ 51.

Riverside sought a declaratory ruling that:

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

2) Any attempt by Pioneer or Nampa to divert water under the Reuse Permit to Pioneer without applying for a water right is in contravention to Idaho law.

R. 3.

Petitions to intervene were timely filed by Nampa, Pioneer, Idaho Power Company, the Association of Idaho Cities, the Hayden Area Regional Sewer Board, and the Cities of Boise, Caldwell, Idaho Falls, Jerome, Meridian, Pocatello, Post Falls, and Rupert. R. 32, 37, 43, 46, 51, 57, 63, 70, 77, 81, 85, and 89.

The parties submitted stipulated facts and exhibits in lieu of a hearing, which the Director adopted in his *Order*. R. 1230.

The Director issued his *Order* on May 3, 2021. In the *Order*, the Director concluded that “Pioneer may accept effluent from Nampa and apply it within Pioneer’s boundaries under the Reuse Permit without obtaining a water right.” R. 1234. Riverside filed its petition for judicial review on May 28, 2021.

C. Statement of the Facts

The facts in this case have been stipulated to and are not in dispute. Pioneer is an irrigation district which owns water rights to irrigate approximately thirty-four thousand acres of land. R. 690 ¶ 1. Nampa is an Idaho municipal corporation and is a municipality and municipal provider under Idaho Code § 42-202B. R. 691 ¶¶ 6, 7. Nampa owns and operates two municipal water delivery systems, one for potable water, and one for non-potable irrigation water. *Id.* at ¶ 8. Nampa’s potable water is exclusively sourced from ground water. R. 692 ¶ 9.

Sewage generated from residents, businesses, and institutions in Nampa is treated at Nampa’s wastewater plant. R. 696 ¶ 23. Currently, Nampa discharges effluent from the

wastewater plant to Indian Creek. R. 697 ¶ 27. The discharged effluent is primarily derived from Nampa’s potable water system. R. 696 ¶ 25. The water quality of that discharge is regulated by National Pollutant Discharge Elimination System (“NPDES”) Permit No. ID0022063. R. 521-573. The NPDES Permit establishes a compliance schedule to meet discharge limits for mercury, total phosphorus, copper, and temperature. R. 530. By September 2026, Nampa must meet the limits for mercury, total phosphorus, and copper. R. 532. Nampa must meet the temperature limits by September 2031. *Id.* The limitations on total phosphorus and temperature are imposed during the irrigation season. R.528, 532.

To meet the NPDES Permit discharge limits, Nampa must upgrade the pollution control systems in the wastewater plant. R. 699 ¶ 38. To reduce the cost of those upgrades, Nampa chose to pursue the Reuse Permit. R. 700-701 ¶¶ 40-43. To facilitate the Reuse Permit, Nampa and Pioneer entered into a Recycled Water Discharge and Use Agreement (“Reuse Agreement”). R. 205-212. The Reuse Agreement allows Nampa to discharge up to 41 cfs of effluent to Phyllis Canal. R. 206. In exchange, Pioneer will “handle, manage, and convey [Nampa’s effluent] as an integrated part of its irrigation operations.” R. 208. Pioneer also acknowledges that Nampa needs the use of Phyllis Canal for temperature mitigation. *Id.* Pioneer does not have a water right authorizing the use of Nampa’s effluent. R. 698 ¶ 35.

Under the Reuse Permit, Nampa will discharge its effluent to Phyllis Canal instead of Indian Creek during the irrigation season. Because irrigation canals are not considered waters of the State, Phyllis Canal is not subject to Idaho’s water quality standards. R. 280. With the proposed upgrades to the wastewater plant, Nampa can treat its sewage to

standards established for land application, but the effluent would not meet the standards for Indian Creek. *Id.* DEQ's analysis of the Reuse Permit application noted that Nampa and Pioneer had sufficiently demonstrated that Nampa's effluent will not return to jurisdictional water of the state. R. 282. Nampa and Pioneer accomplished this demonstration by discussing the plan to install an automated flow control system on 15.0 Lateral. *Id.*; R. 449.

Riverside diverts water from Indian Creek downstream of Nampa's discharge point. R. 698 ¶ 33; R. 516. During the irrigation season, Riverside diverts most of the flow of Indian Creek into the Riverside Canal. R. 698 ¶ 31.

II. ISSUES PRESENTED ON APPEAL

Riverside did not include a list of the issues presented on appeal in its opening brief. Riverside's issues presented on appeal can be condensed to the following four issues:

- 1) Whether the Director correctly interpreted Idaho Code § 42-201(8), as a matter of law, to authorize Pioneer Irrigation District to land apply the City of Nampa's effluent without first obtaining a water right.
- 2) Whether Idaho Code § 42-201(8)'s application in this instance means Nampa and Pioneer are not violating water law.
- 3) Whether Riverside's substantial rights were prejudiced by the Director's decision.
- 4) Whether Idaho Code § 42-201(8) is constitutional as applied.

III. STANDARD OF REVIEW

Judicial review of a final decision by the Department is governed by the Idaho Administrative Procedures Act, Idaho Code §§ 67-5201 to 67-5292, and Idaho Code § 42-1701A(4). Courts undertake judicial review of final agency decisions based on the record

created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). Interpretation of a statute is a question of law over which the reviewing court exercises free review. *A&B Irr. Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 654, 301 P.3d 1270, 1272 (2012). The Court must affirm the agency decision unless the Court finds 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); *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 415, 417, 18 P.3d 219, 222 (2001).

Further, even if one of the conditions in Idaho Code § 67-5279(3) are met, the petitioner must show that one of its substantial rights has been prejudiced to be entitled to relief. Idaho Code § 67-5279(4). If the agency action is not affirmed, it may be set aside, in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).

IV. ARGUMENT

A. The Director correctly interpreted Idaho Code § 42-201(8) to authorize Pioneer Irrigation District to land apply the City of Nampa's effluent.

i. Pioneer may land apply Nampa's effluent without a water right.

Idaho Code § 42-201(2) states, “[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.” The Idaho Legislature provided an exception to Idaho Code § 42-201(2)'s water right requirement when it passed Idaho Code § 42-201(8) (“Subsection 8”). Relevant portions

of Subsection 8 state:

Notwithstanding the provisions of subsection (2) of this section, [a municipality, municipal provider, sewer district, or a regional public entity 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 or sewer district 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.

Thus, pursuant to Subsection 8, a municipal provider is not required to obtain a water right for the land application of effluent from a publicly owned treatment works, employed in response to regulatory requirements.

In his *Order*, the Director evaluated Subsection 8, and determined that because of the contractual relationship, through the Reuse Agreement, and the regulatory permit, “Nampa and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer.” R. 1233. To make that determination, the Director evaluated the application of Subsection 8’s exemption to the specific facts of this case.

First, the Director determined Nampa itself could apply its effluent on Pioneer’s place of use under Subsection 8 because “[t]he plain language of Subsection 8 does not limit land application to the service area of a municipality.” R. 1233. Next, the Director determined that an agent of Nampa could land apply Nampa’s effluent without a water right. *Id.* However, the Director did not find an agency relationship between Nampa and Pioneer under agency law due to lack of control. *Id.* Instead, the Director examined the relationship created through the Reuse Agreement and Reuse Permit. *Id.* The Director concluded that “[d]espite the absence of a formal agency relationship, Subsection 8’s

exemption may still apply in this case.” *Id.* The Director determined that the Reuse Agreement “contractually obligates Pioneer to dispose of Nampa’s effluent” and required “an ongoing relationship between Nampa and Pioneer.” *Id.* The Director also determined that the “Reuse Permit further ties Nampa and Pioneer together.” *Id.* Ultimately the Director determined that “both are intimately involved in the process of land applying Nampa's effluent in response to a regulatory requirement,” and Subsection 8’s exemption applied to Pioneer. *Id.* at 1233-1234.

In this appeal, Riverside challenges the Director’s application of Subsection 8’s exemption. Riverside argues that Subsection 8 only applies to entities expressly identified in the statute. *Petitioner’s Opening Brief* (“*Opening Brief*”) at 9. Riverside argues that because Pioneer is not a type of entity expressly identified in the statute, Pioneer must apply for a water right to land apply Nampa’s effluent. *Id.* Riverside argues that “[t]he plain language of Subsection 8 does not include ‘agent’ or ‘third party’ or ‘irrigation district.’” *Id.* at 12 (emphasis removed).

Riverside’s argument, that another entity cannot perform land application for Nampa, is overly narrow and contrary to law. Riverside’s view of Subsection 8 would necessitate that only those entities expressly identified in Subsection 8 could land apply effluent, even within their own boundaries, because “[t]he plain language of Subsection 8 does not include ‘agent’ or ‘third party’ or ‘irrigation district.’” This ignores agency law and the fact that municipalities, sewer districts, and regional public entities operating a publicly owned treatment works are expressly allowed to contract to perform their essential functions. *See* Idaho Code §§ 50-301 (“Cities governed by this act...[may] contract and be contracted with”), 42-3212 (“For and on behalf of the district the board shall have the

following powers. . . to enter into contracts and agreements, cooperative and otherwise, affecting the affairs of the district”), 31-604(3) (“To make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers.”), and 31-4906(8) (“to enter into contracts and agreements”). Riverside’s view of Subsection 8 unreasonably limits the express powers of these entities to contract for their essential functions.

A broader and reasonable view of Subsection 8 is that the exempted entity must be involved with land applying its effluent in some manner. This is why the *Order* starts with an agency analysis. One of the key factors of an agency relationship is that an agency relationship is a fiduciary relationship, where the agent owes the principal “the basic obligations of agency: loyalty and obedience.” *Nelson v. Kaufman*, 166 Idaho 270, 277, 458 P.3d 139, 146 (2020). Further, “[a]n agent is a person who has been authorized to act on behalf of a principal towards the performance of a specific task or series of tasks.” *Humphries v. Becker*, 159 Idaho 728, 735, 366 P.3d 1088, 1095 (2016). An agent has the “power to alter legal relations between the principal and third persons.” *Nelson v. Kaufman*, 166 Idaho at 278, 458 P.3d at 147. Thus, contrary to Riverside’s argument, an agent land applying effluent on behalf of a Subsection 8 covered entity, with obligations of loyalty and obedience and the ability to alter legal relations, is effectively the Subsection 8 entity land applying effluent itself. Therefore, an agent of a Subsection 8 exempted entity can clearly benefit from Subsection 8’s exemption.

While the Director did not find that Nampa and Pioneer have an agency relationship under agency law, he did find enough connections between Nampa and Pioneer that he concluded Subsection 8 applied. The cooperation and contractual

obligations of Nampa and Pioneer show that they are working in concert to land apply Nampa's effluent. This is not a situation where Pioneer gets to take Nampa's effluent and do with it as it wishes without Nampa's further involvement. Nampa is spending a considerable amount of money to connect its wastewater treatment plant to Pioneer's irrigation system; both entities are cooperating to alter part of Pioneer's system to ensure water in the system doesn't return to jurisdictional waters; Pioneer is obligated to take up to 41 cfs of Nampa's effluent and land apply it; Nampa must apprise Pioneer of when it will discharge effluent to Phyllis Canal; Pioneer is obligated to assist Nampa in obtaining permits and approvals; and Nampa's Reuse Permit was granted because of Pioneer's irrigation operations. The Director could make no other conclusion based on the evidence than Nampa was land applying its effluent with the help of Pioneer. This is a situation that squarely fits within Subsection 8's exemption. Pioneer does not need a water right to aid Nampa in land applying Nampa's effluent.

ii. The Director's interpretation of Idaho Code § 42-201(8) should be given deference.

If a statute is unambiguous, the courts follow the plain meaning of the law. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502, 506 (2011). While the Director and the Department believe Subsection 8 is unambiguous and allows Pioneer to aid Nampa in land applying its effluent without need of a water right, if the Court finds otherwise, "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." *Elgee v. Ret. Bd. of Pub. Emp. Ret. Sys. of Idaho*, 169 Idaho 34, 490 P.3d 1142, 1156 (2021).

The Idaho Supreme Court has established a four-prong test to determine if an agency's interpretation of a statute is due deference. *Duncan v. State Bd. of Acct.*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010). The first prong of the test is whether the agency is responsible for administration of the statute at issue. *Id.* This prong is met in this case because the Department has been given "exclusive authority over the appropriation of the public surface and ground waters of the state." Idaho Code § 42-201(7). By such language there is no question that the Department is responsible for administering Subsection 8. Even so, Subsection 8 also specifically mentions the Department:

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 or sewer district 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. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

Idaho Code § 42-201(8).

The second prong of the deference test is whether the agency's construction is reasonable. *Duncan v. State Bd. of Acct.*, 149 Idaho at 3, 232 P.3d at 324. An agency interpretation of a rule or statute is reasonable unless it "is so obscure or doubtful that it is entitled to no weight or consideration." *Duncan v. State Bd. of Acct.*, 149 Idaho at 4, 232 P.3d at 325 (2010) (citing *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 505, 960 P.2d 185, 188 (1998)). The Director's determination that Pioneer does not need a water right to land apply Nampa's effluent was accompanied by a reasoned discussion in the *Order*. The Director first determined an agent could land apply effluent and Subsection 8 would apply. The Director then determined that so long as there is a contractual connection indicating some involvement between the exempted entity and its contractor,

Subsection 8 also applied. Following that reasoning, the Director determined that Nampa and Pioneer had an intertwined relationship and Subsection 8 applied. While some may disagree with the Director, that does not make his reasoned argument “so obscure or doubtful that it is entitled to no weight or consideration.”

The third prong is whether the language of the statute expressly treats the matter at issue. *Duncan v. State Bd. of Acct.*, 149 Idaho 3, 232 P.3d 324. Subsection 8 does not specifically address whether a water right is needed when a municipal provider contracts with a third party to land apply its effluent. Therefore, the Director’s decision meets the third prong.

The fourth prong of the agency deference test is whether any of the rationales underlying agency deference are present. *Id.* “There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation.” *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P. 3d 322, 324 (2010). “If one or more of the rationales underlying the rule are present, and no ‘cogent reason’ exists for denying the agency some deference, the court should afford ‘considerable weight’ to the agency's statutory interpretation.” *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

Since Subsection 8 is a relatively new statute the rationale of repose and legislative acquiescence do not apply here. However, the other three do apply and are present. The Director’s interpretation of Subsection 8 is practical. The Idaho Supreme Court explains that in determining practicality, “statutory language is often of necessity general and

therefore cannot address all of the details necessary for its effective implementation.” *J.R. Simplot Co. v. Idaho State Tax Comm’n*, 120 Idaho at 858, 820 P.2d at 1215. The Director’s interpretation recognizes that a municipal provider may contract with another party to perform some of its essential functions. The Director’s interpretation doesn’t allow the municipal provider to merely hand its effluent over to another party, it requires continued involvement. The Director’s interpretation provides for effective implementation without so narrowly construing Subsection 8’s exemption that it is almost useless.

There can be no question that the Department has expertise in this matter. The Department’s essential functions include issuing water rights and enforcing illegal diversion of water. Determining if a water right is needed easily fits within the Department’s function.

The Supreme Court held “that an agency construction is entitled to additional weight when it is formulated *contemporaneously* with the passage of the statute in question.” *Id.* at 859, 1216 (emphasis in original). Further explaining the rationale of contemporaneous agency interpretation, the Supreme Court said: “[b]ecause an agency may have been keenly aware of pending legislation and may have potentially influenced the shape of the law, a contemporary construction provides a unique window into the legislative intent at the time of enactment.” *Id.* The Department was involved in crafting the language of Subsection 8 and supported its passage. R. 973, 977, 979, 990. The Department’s involvement with Subsection 8 legislation indicates it understood the intended reach of Subsection 8. Therefore, the Director’s view of Subsection 8 fits within the rationale of contemporaneous agency interpretation.

The Department's interpretation of Subsection 8 meets three out of five of the rationales for deference. Therefore, the Department's interpretation of Subsection 8 meets the fourth prong of agency deference test and considerable weight should be given to the Department's interpretation.

In conclusion, because the Department's interpretation of Subsection 8 meets all four prongs of the agency deference test, the Court should give deference to the Department's interpretation of Subsection 8.

B. Idaho Code § 42-201(8)'s application in this instance means neither Nampa nor Pioneer are violating water law.

Riverside makes several arguments about Pioneer's and Nampa's supposed water law violations. Riverside's arguments are merely a way to gain access to water that it is not legally entitled to. *See* discussion below in Section IV.C. First, Riverside argues that if Pioneer is allowed to accept and land apply Nampa's effluent, Pioneer would be diverting and land applying Nampa's wastewater without a water right, in violation of Idaho Code § 42-201(2). *Opening Brief* at 18. The Director and the Department agree with Riverside that, in general, once water is out of the original appropriator's control, it is subject to appropriation. *See Milner Low Lift Irr. Dist. v. Eagen*, 49 Idaho 184, 187, 286 P. 608, 609 (1930). Absent application of Subsection 8, Pioneer would need to file an application for permit if it were diverting Nampa's effluent. However, as discussed above, Subsection 8 applies in this situation as Nampa has entered into an agreement with Pioneer to land apply its effluent, an agreement that functions such that Nampa is land applying its effluent with the assistance of Pioneer. This negates the need for Pioneer to obtain a water right. Subsection 8 states that it applies "[n]otwithstanding the provisions of subsection (2)

of [42-201].” Thus, so long as Subsection 8 applies, there is no violation of Idaho Code § 42-201(2) and Pioneer does not need to file an application for permit.

Second, Riverside argues that Pioneer should be required to file a water right transfer to add Nampa’s wastewater as a source to Pioneer’s irrigation rights, “in order to analyze enlargement and the potential impacts to other water right holders and the local public interest.” *Opening Brief* at 20. Water right transfers are governed by Idaho Code § 42-222 which only allows for changes in “the point of diversion, place of use, period of use or nature of use.” *See City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012). Pioneer could not get a transfer to add Nampa’s wastewater as a source and therefore Riverside’s argument does not apply.

Finally, Riverside argues, through the Reuse Permit and Reuse Agreement, Nampa’s municipal water rights will be put to “a purpose of use not identified in its potable water rights – irrigation.” *Opening Brief* at 19. Riverside goes further, arguing that unless Nampa applies for a water right transfer, the Director is allowing an impermissible collateral attack on Nampa’s partial decrees. *Id.* at 20.

Idaho Code defines municipal purposes as “water for residential, commercial, industrial, irrigation of parks and open space, and related purposes. . . 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(6). Land application of effluent is a “related purpose” as contemplated under municipal purposes because of the regulations imposed on wastewater treatment. Nampa is obligated to treat its effluent to the mandated standards identified in its NPDES permit. R. 521-573, R. 699 ¶ 36. Eliminating effluent discharge to Indian

Creek during the summer will decrease phosphorus and temperature loading which are pollutants that impair Indian Creek and lower Boise River's water quality. R. 398. As a related purpose, land applying Nampa's effluent within Pioneer's service area fits within Nampa's municipal water rights and therefore is not a change in purpose of use. Nampa, through Pioneer, is land applying effluent, not irrigating and a transfer adding irrigation as a purpose of use is not needed.

C. Riverside's substantial rights were not prejudiced by the Director's decision.

In order to prevail in a petition for judicial review Riverside must show its substantial rights were prejudiced. Idaho Code § 67-5279(4). Riverside argues that its substantial rights were prejudiced by the Director's decision since the *Order* reduced the value of Riverside's water rights without "an ability to present its argument or be part of the decision-making process." *Opening Brief* at 30. Riverside discusses two substantial rights it believes have been prejudiced, its property rights and due process. *Id.* at 29-32.

First, Riverside argues that its property rights (that is, its water rights) will suffer "substantial harm if the project goes forward." *Id.* at 30. Riverside complains that "over 18-41 cfs of water [will be] removed from its appropriation." *Id.* at 31. Riverside cites *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 254 P.3d 1224 (2011) and other similar cases in support of its argument that it is owed an opportunity to challenge the impact the proposed project on its water rights via a water right application or transfer proceeding. *Id.* at 29-30.

Riverside's water rights authorize it to divert natural flow from Indian Creek. What Riverside misses with its argument is 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, 619 P.2d 1130, (1980)(Recognizing “that a senior appropriator may reclaim ‘waste water’ which until that point had been used by a junior appropriator.”); *Application of Boyer*, 73 Idaho 152, 162, 248 P.2d 540, 546 (1952)(“It is axiomatic that no appropriator can compel any other appropriator to continue the waste of water whereby the former may benefit.”). So even if Pioneer were required to file an application for permit or if Nampa were required to file a transfer (which they are not as discussed above), Riverside’s complaint about “over 18-41 cfs of water being removed from its appropriation” is not valid ground for claiming injury to its water rights because Riverside is not entitled to demand the continue wasting of Nampa’s effluent into Indian Creek.

In addition, Riverside is not claiming it has a water right sourced from Nampa’s wastewater that will be injured. Instead, Riverside claims “[w]hen the Director determined that Idaho Code § 42-201(8) applied...Riverside’s senior water rights were injured.”

Opening Brief at 25 (emphasis added). These are the senior surface water rights Riverside has in Indian Creek. As Riverside points out, Nampa’s municipal water rights are ground water rights. *Opening Brief* at 22. Nampa’s water rights are junior to Riverside’s water rights. R. 692 ¶ 9; R. 698 ¶ 33. If Riverside really believes that Nampa’s ground water use is injuring Riverside’s senior Indian Creek water rights, the appropriate remedy would be for Riverside to file a delivery call with the Department, seeking to curtail junior water use that affects the amount of water in Indian Creek. Without a substantial right to insist Nampa continue to discharge its effluent to Indian Creek, Riverside’s arguments here fail.

Riverside also argues that its due process rights will suffer harm if it is not allowed to “raise the alarm over 18-41 cfs of water being removed from its appropriation.” *Id.* at

31. Riverside argues Nampa's effluent is being removed from Riverside's appropriation without being able to raise the issue of injury. *Opening Brief* at 31-32.

Due process rights are substantial rights. *Jasso v. Camas Cty.*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011). However, as discussed above, Riverside does not have a legal right to insist Nampa continue to dispose of its wastewater in Indian Creek, thus has no legal right to "raise the alarm" over Nampa no longer wasting water to Indian Creek. Again, without a right to insist Nampa continue its method of discharge, Riverside cannot claim its rights have been prejudiced without an injury analysis.

Because Riverside has failed to show that a substantial right has been prejudiced, this Court must affirm the Director's decision.

D. Idaho Code § 42-201(8) is constitutional as applied.

Riverside argues that application of Section 8's exemption to Nampa's proposed land application of effluent, without an injury analysis, results in an as applied violation of Idaho Constitution Article XV, § 3. *Opening Brief* at 25. Article XV, § 3 protects the right to appropriate the unappropriated waters of the state and the prior appropriation doctrine. Riverside explains its argument further stating Subsection 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." *Id.* at 27 (emphasis removed). The constitutionality of statutes is a question of law. *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457, 926 P.2d 1301, 1304 (1996). "[T]he party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity." *Walsh v. Swapp L., PLLC*, 166 Idaho 629, 641, 462 P.3d 607, 619 (2020).

Riverside argues that “the substantive criteria of Idaho Code § 42-222 regarding protection from injury, enlargement and the other statutory factors” must be considered for Subsection 8 to be constitutional. *Opening Brief* at 26.¹ Riverside also points out that it need not prove injury-in-fact to raise the constitutional concern. *Opening Brief* at 28 (citing *City of Pocatello v. Idaho*, 152 Idaho 830, 152 P.3d 845 (2012)). Riverside cites *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) in support of its argument. *Opening Brief* at 26-27. In *Fremont-Madison*, the Idaho Supreme Court evaluated the constitutionality of Idaho Code §§ 42-1425 and 42-1426, the “amnesty statutes.” The Supreme Court held that the amnesty statutes were constitutional as written because of built in protections preventing injury to other water users. *Fremont-Madison*, 129 Idaho at 458, 460, 926 P.2d at 1305, 1307.

The problem with Riverside’s argument is that land application of effluent performed pursuant to Subsection 8 cannot cause injury to other water users. In the instance of municipalities, municipal use includes “water for residential, commercial, industrial, irrigation of parks and open space, and *related purposes*.” Idaho Code § 42-202B(6)(emphasis added). As discussed above, land application of effluent is a related purpose. Thus, Nampa is not enlarging its water right by land applying its effluent.

Subsection 8 is constitutional even if an entity is land applying effluent without a water right. As discussed above, Idaho Case law has established that downstream water


¹ Riverside cites to Judge Hurlbutt’s decision in the Snake River Basin Adjudication, *Memorandum Decision and Order in Basin-Wide Issue No. 1* (Subcase No. 91-00001) (February 4, 1994) to support its argument. In Basin-Wide Issue No. 1, Judge Hurlbutt held Idaho Code § 42-1416 and 42-1416A were unconstitutional due to vagueness. *Id.* at 15-16, 18-19. However, Riverside is not arguing Subsection 8 is vague but that there must be an injury analysis. Judge Hurlbutt’s analysis in Basin-Wide Issue No. 1 is not applicable in this instance.

users cannot compel upstream users to continue wasting water. *Hidden Springs Trout Ranch v. Hagerman Water Users*, 101 Idaho 677, 680-681, 619 P.2d 1130, (1980). In addition, “surface waste and seepage water may be appropriated. . . subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it,” *Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, 178 (1927). It follows that any change in the place of discharge from a publicly owned treatment works could not injure other water users, because no other water user can prescribe the location of discharge. If application of Subsection 8 cannot cause injury, then an injury analysis is not needed to find Subsection 8 constitutional.

IV. CONCLUSION

Pursuant to Idaho Code § 42-201(8) and through the Reuse Agreement and Reuse Permit, Nampa is land applying its effluent with the assistance of Pioneer. The Director’s interpretation of Idaho Code § 42-201(8) did not prejudice Riverside’s substantial rights since Riverside cannot insist Nampa continue to waste water in a particular manner. In addition, Idaho Code § 42-201(8) does not implicate injury to water rights and is therefore constitutional.

DATED this 4th day of October 2021.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October 2021, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

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