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.

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-225-01, IN THE MATTER OF THE CITY OF NAMPA

Case No.: CV14-21-05008

NAMPA'S RESPONSE BRIEF

Appeal of final agency action by the Idaho Department of Water Resources, Director Gary Spackman, Presiding

Christopher H. Meyer #4461
Charlie S. Baser #10884
GIVENS PURSLEY LLP
601 W Bannock St
PO Box 2720
Boise, ID 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
charliebaser@givenspursley.com
For Intervenor City of Nampa

Garrick L. Baxter #6301
Meghan M. Carter #8863
Sean H. Costello #8743
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720-0098
garrick.baxter@idwr.idaho.gov
sean.costello@idwr.idaho.gov
meghan.carter@idwr.idaho.gov
For Respondents Idaho Department of Water Resources and Gary Spackman

Chris M. Bromley #6530
MCHUGH BROMLEY, PLLC
380 S 4th St, Ste 103
Boise, ID 83702
cbromley@mchughbromley.com
For Intervenors City of Boise, City of Jerome, City of Post Falls, and City of Rupert

Charles L. Honsinger #5240
HONSINGER LAW, PLLC
PO Box 517
Boise, ID 83701
honsingerlaw@gmail.com
For Intervenors City of Meridian and City of Caldwell

Sarah A. Klahn #7928
SOMACH SIMMONS & DUNN
2033 11th St, Ste 5
Boulder, CO 80302
sklahn@somachlaw.com
For Intervenor City of Pocatello

Candice M. McHugh #5809
MCHUGH BROMLEY, PLLC
380 S 4th St, Ste 103
Boise, ID 83702
cmchugh@mchughbromley.com
For Intervenor Association of Idaho Cities

Robert L. Harris #7018
HOLDEN KIDWELL HAHN & CRAPO, PLLC
1000 Riverwalk Dr, Ste 200
PO Box 50130
Idaho Falls, ID 83405-0130
rharris@holdenlegal.com
For Intervenor City of Idaho Falls

Andrew J. Waldera #6608
SAWTOOTH LAW OFFICES, PLLC
1101 W River St, Ste 110
PO Box 7985
Boise, ID 83707-7985
andy@sawtoothlaw.com
For Intervenor Pioneer Irrigation District

Albert P. Barker #2867
Sarah W. Higer #8012
BARKER ROSHOLT & SIMPSON LLP
PO Box 2139
Boise, ID 83701-2139
apb@idahowaters.com
swh@idahowaters.com
For Petitioner Riverside Irrigation District

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF THE CASE

This is the brief of Intervenor City of Nampa ("**City**" or "**Nampa**") filed in response to the brief ("***Opening Brief***") of Petitioner Riverside Irrigation District ("**Riverside**").[1]

In this appeal, Riverside challenges the declaratory ruling ("***Order***") (R. 1230-1237) issued by Director Spackman ("**Director**") of the Idaho Department of Water Resources ("**IDWR**" or "**Department**") holding that neither Nampa nor Pioneer Irrigation District ("**Pioneer**") are obligated to obtain a water right in order to effectuate Nampa's delivery of effluent to Pioneer for use in Pioneer's irrigation delivery network undertaken in accordance with an environmental permit ("***Reuse Permit***") (R. 221-250) issued by the Idaho Department of Environmental Quality ("**IDEQ**") and a contract with Pioneer known as the *Recycled Water Discharge and Use Agreement* ("***Reuse Agreement***") (R. 205-212). Nampa's undertaking pursuant to the *Reuse Permit* is referred to as its "**Reuse Project**." In addition to Nampa and Pioneer, eight cities and the Association of Idaho Cities have intervened on appeal.[2]

This case turns on questions of law. The parties stipulated to a statement of facts ("**SOF**") (R. 688-713) and to a set of Exhibits A through T. Also before the Court are

[1] References to the Agency Record are shown as "**R.**" Document names are displayed in italics (except when in quotations).

[2] To reduce duplication, Nampa adopts by reference the "Course of the Proceedings" section of *Intervenor-Respondent Pioneer Irrigation District's Response to Petitioner Riverside Irrigation District, Ltd.'s Opening Brief* ("***Pioneer's Brief***"), the "Procedural History," "Facts Developed in the Agency Proceeding," and "Standard of Review" sections of *Municipal Intervenors' Response to Riverside Irrigation District's Opening Brief* ("***Municipal Intervenors' Brief***"), and the "Statement of the Case," "Issues Presented on Appeal," and "Standard of Review" sections in IDWR's *Respondents' Brief* ("***IDWR's Brief***").

undisputed documents set out in Addenda A through G to *Nampa's Response Brief* ("***Response Below***") (R. 909-1061) submitted to IDWR.

The case turns on the applicability of Idaho Code § 42-201(8) ("**Subsection 8**") and its interaction with Idaho Code § 42-201(2) ("**Subsection 2**"). Riverside also contends that if the Director's reading of Subsection 8 is upheld, it is unconstitutional.

Riverside's objective is to force either Pioneer (through a new appropriation) or Nampa (through a transfer) to provide mitigation to Riverside for reducing the supply of effluent that historically has benefitted Riverside.[3] Providing a gallon-for-gallon substitute supply for the effluent no longer dumped in Indian Creek would be monumentally expensive, if not impossible. It would kill the project (and many others across the State), which is exactly what Riverside aims to achieve.

To achieve this result, Riverside proposes a contorted reading of Subsection 8 that is at odds with its plain meaning and its intended purpose. Failing that, it would have the Court declare this exemption from mandatory permitting (and presumably all other exemptions) unconstitutional.

The core of Riverside's argument is that Subsection 8 applies only to named entities, such as cities, and does not exempt irrigation districts, such as Pioneer. The Director recognized

[3] Riverside presumes that if a new appropriation or transfer is required, the applicant will be required to provide mitigation to Riverside in the form of replacement water or otherwise. Nampa is most certainly not of that view. For example, if Pioneer obtained a junior "waste water right" (which it does not need to do) whose source was effluent piped to it by Nampa, it would owe mitigation to no one. But that question is not before the Court, and may never be. Indeed, the whole point of the Legislature's exemption was to render the question moot.

that cities often act through agents or other contracting entities, which are implicitly but necessarily included within the statute's sweep. If the Court upholds that ruling, and finds the statute constitutional, that is the end of the matter. (See section II beginning on page 11.)

However, if the Court were to find that Pioneer's "intertwined" relationship with Nampa does not bring it within the protection of Subsection 8, the Court should uphold the Director's ruling on alternative grounds. Even if there were no Subsection 8, the mandatory permitting requirement in Subsection 2 does not require either Nampa or Pioneer to obtain a new appropriation or a transfer. This is so for two reasons.

First, Nampa is allowed to use and reuse its municipal water to extinction. The Department has long recognized that a city may recapture as influent[4] water initially diverted under its municipal water rights, and that it may dispose of the resulting treated effluent through land application (by itself or through a third party) within its flexible service area. All this may be done pursuant to the City's existing municipal water rights, which are defined to include "related purposes" as part of the municipal use. (See section III beginning on page 27 and section VI.B on page 39.)

Second, Pioneer's acceptance of treated effluent delivered to it by Nampa in a closed system under Nampa's control that never reaches the public water supply is not a diversion or use of water requiring a water right under Subsection 2. (See section IV beginning on page 29.)

[4] Untreated sewage entering a waste water treatment plant ("**WWTP**") is called influent. The treated water leaving the WWTP is called effluent.

As for Riverside's constitutional argument, the Director gave it the short shrift it deserved. No water user has a right to rely on the continued delivery of waste water by another water user. Because Riverside can point to no legal injury resulting from Nampa's reuse program, the statutes that authorize it do not violate Article XV, § 3 nor give rise to a taking or due process violation. (See section VII beginning on page 43.)

Nampa continues to act proactively, investing millions to comply with increasingly stringent environmental requirements, while avoiding the even greater cost of continuing to discharge into Indian Creek.[5] In short, it is doing exactly what the Legislature sought to encourage and facilitate by adopting Subsection 8. Riverside's costly roadblock to that undertaking should be rejected.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Riverside did not include a list of issues presented on appeal in its *Opening Brief*. Nampa concurs with and adopts the list of issues presented in *IDWR's Brief*. In addition, Nampa identifies the following:

1. Whether, as an alternative basis to uphold the Director's decision, Pioneer is Nampa's agent.

2. Whether, as an alternative basis to uphold the Director's decision, Nampa and Pioneer are not in violation of Subsection 2, even if either of them fall outside the protection of Subsection 8.

[5] The cost of water treatment necessary to continue discharge to Indian Creek is estimated to be $210 million. Nampa will be able to reduce this cost with net savings of $20 million through the Reuse Project. SOF, ¶¶ 38-40 (R. 699-700).

ATTORNEY FEES

In addition to the issues above, Nampa seeks an award of costs and attorney fees on appeal pursuant to Idaho Code § 12-117(1). The basis of Nampa's request for attorney fees is set out in section VIII on page 45.

ARGUMENT

I. THRESHOLD ISSUES

A. Standard of review

The Director's *Order* is subject to judicial review under the Idaho Administrative Procedure Act ("**IAPA**"). Idaho Code § 67-5232(3). The standard of review is set out in Idaho Code § 67-5279(3). Interpretation of a statute is a question of law over which the reviewing court exercises free review. *A&B Irr. Dist. v. IDWR*, 154 Idaho 652, 654, 301 P.3d 1270, 1272 (2012).

B. The Director's interpretation of the statute is entitled to deference.

Although courts exercise free review over questions of law, when an agency has interpreted a statute or rule,[6] courts generally defer to reasonable agency interpretations. *Elgee v. Retirement Bd. of PERSI*, 169 Idaho 34, 48, 490 P.3d 1142, 1156 (2021). The agency

[6] The lead cases are *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991) and *Duncan v. State Bd. of Acct.*, 149 Idaho 1, 232 P.3d 322 (2010). *Simplot* concerns a statute, while *Duncan* concerns a rule. However, the applicable tests and framework of analysis are the same.

interpretation is upheld if it is reasonable, unless the agency relied on erroneous facts or law in its decision.[7]

Idaho courts apply a four-pronged test,[8] which is easily met here.[9] Accordingly, there are no "cogent reasons" to justify the Court in rejecting IDWR's interpretation of Subsection 8.

---

[7] *Duncan*, 149 Idaho at 4, 232 P.3d at 325; *Simplot*, 120 Idaho at 862, 820 P.2d at 1219; *see*, *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 313, 208 P.3d 289, 295 (2009) (finding an interpretation unreasonable because the Department of Insurance erroneously relied on practices from other states that did not have the same statute as the one enacted in Idaho).

[8] A court must determine whether: "(1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present." *Duncan*, 149 Idaho at 3, 232 P.3d at 324 (citing *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998)). As to the final prong, "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." *Id*.

[9] First, IDWR is responsible for administering Subsection 8. See Idaho Code § 42-201(7) (providing that IDWR has "exclusive authority over the appropriation of the public surface water and ground waters of the state"). Second, an agency's interpretation is understood to be reasonable unless it "is so obscure and doubtful that it is entitled to no weight or consideration." *Simplot*, 120 Idaho at 862, 820 P.2d at 1219; *Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 183, 59 P.3d 983, 988 (2002). Here, IDWR's interpretation that Subsection 8 includes in its exemption parties that contract with municipal providers for the disposal of effluent from public treatment works is not "so obscure and doubtful that it is entitled to no weight or consideration" and is, therefore, reasonable. Third, the language of Subsection 8 does not expressly address whether a water right is needed when a municipality contracts with a third party to land apply the municipality's effluent on land not owned by the municipality. As to the fourth prong, "if the underlying rationales are absent then their absence may present 'cogent reasons' justifying the court in adopting a statutory construction which differs from that of the agency." *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 505, 960 P.2d 185, 188 (1998). When some, but not all, of the rationales underlying the rule exist, "a balancing is necessary because all of the supporting rationales may not be weighted equally." *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 505, 960 P.2d 185, 188 (1998). The presence of some but not all of the five rationales has been found sufficient to support agency deference. *See Canty v. Idaho State Tax*

C. Riverside is not entitled to any relief, because it cannot show that its substantial rights are prejudiced.

Idaho Code § 67-5279(4) requires that the Director's *Order* be affirmed if Riverside is unable to show that its substantial rights have been prejudiced. Riverside contends it meets this test because it will be worse off if Nampa ceases wasting its effluent to Indian Creek during the summer. That may be true, but that does not equate to a "substantial right" within the meaning of section 67-5279(4). A water user cannot be compelled to continue to waste water back to a public water supply.[10] Water users who rely on the discharge of waste water by others do so at peril that the discharge may someday be diminished or eliminated. (Nor does Riverside have any right to compel Nampa or Pioneer to obtain a new water right or to transfer an existing right, in the unjustified hope that Riverside might be able to extract mitigation of some sort.) In other words, the law is settled that being made "worse off" does not mean one's rights are violated when it comes to waste water.[11] Riverside fails to demonstrate why the law should not apply to it.

Comm'n, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002). Most, if not all, of the rationales are present.

[10] *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980); Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

[11] The same is true in other areas of the law. Not every damage that one suffers equates to a violation of one's rights.

> The district court erred to the extent that it considered the building's size and proximity to the McVicarses' property to constitute a nuisance and used that premise to enjoin the building from its current location. Generally, "every man may regulate, improve, and control his own property, may make such erections

To support its contention that practically anything is a "substantial right," Riverside cites cases arising under the Local Land Use Planning Act ("**LLUPA**").[12] *Opening Brief* at 29-30. These LLUPA cases are easily distinguishable. LLUPA creates a substantial network of legal rights for property owners and their neighbors, the violation of which can readily occur when municipal entities act improperly or unfairly in cases involving land use entitlements. But this is a water law case, not a LLUPA case. Idaho's law is unmistakable that those who benefit from the discharge of another's waste water have no "substantial right" (or right of any kind) to complain when that discharge ceases.

Next, Riverside contends the Director denied its substantial rights because "Riverside has been denied even a seat at the table, let alone an ability to present its argument or to be part of the decision-making process." *Opening Brief* at 30. Labeling this a procedural due process violation, Riverside says, "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." *Opening Brief* at 31. Riverside has been afforded ample opportunity in this very case to raise the alarm over its perceived right to the continued discharge of waste water. The problem is not that

---

> as his own judgment, taste, or interest may suggest, and be master of his own without dictation or interference by his neighbors, so long as the use to which he devotes his property is not in violation of the rights of others, however much damage they may sustain therefrom."

McVicars v. Christensen, 156 Idaho 58, 62, 320 P.3d 948, 952 (2014) (emphasis supplied) (quoting *White v. Bernhart*, 41 Idaho 665, 669–70, 241 P. 367, 368 (1925)).

[12] E.g., *Hawkins v. Bonneville County Bd. of Comm'rs*, 151 Idaho 228, 254 P.3d 1224 (2011).

Riverside was deprived of the ability to present evidence or argument. The problem is that what it presented lacks merit.

Because Riverside cannot show that its substantial rights have been prejudiced, this "agency action shall be affirmed." Idaho Code § 67-5279(4). The appeal could be resolved on this point alone.

D. Statutory construction is appropriate if the Court finds any ambiguity in Subsection 2 or 8.

The law regarding statutory construction is well settled in Idaho. Our courts do not resort to statutory construction if the statute is unambiguous. *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 895-86, 265 P.3d 502, 508-09 (2011). "A statute is ambiguous where the language is capable of more than one reasonable construction." *State v. Maybee*, 148 Idaho 520, 528, 224 P.3d 1109, 1117 (2010) (quoting *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003)).

Where a statute is susceptible to more than one plausible interpretation, courts are obligated to employ statutory construction to ascertain the legislative intent. As Chief Justice Bevan said recently:

> If the statute is ambiguous, then we seek to determine the legislative intent. [Citing *Lopez v. State*, 136 Idaho 136, 178, 30 P.3d 952, 956 (quoting *State ex rel. Industrial Commission v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000)).] When doing so, we may examine the language used, the reasonableness of proposed interpretations, and the policy behind the statute. *Id*. Interpretation begins with the literal language of a statute. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1013 (2009). "The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings." *Id*.

Moser v. Rosauers Supermarkets, Inc., 165 Idaho 133, 136, 443 P.3d 147, 150 (2019) (emphasis supplied).

Last month, the Idaho Court of Appeals provided this helpful summary:

> When this Court must engage in statutory construction because an ambiguity exists, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history. *Id*. It is incumbent upon a court to give an ambiguous statute an interpretation which will not render it a nullity. *Id*.

State v. Damiani, 2021 WL 3520973, *2 (Idaho Ct. App.) (Aug. 11, 2021) (emphasis supplied).

Accordingly, if the Court finds that Subsections 2 and 8 leave nothing to interpretation, that is the end of the matter. For example, arguments about policy and legislative intent would be off limits if Subsection 8 expressly stated that any agents or contracting entities of the exempt entities are not exempt from Subsection 2. But it does not say that. Likewise, there would be no need to examine the legislative intent behind Subsection 2 if it expressly stated that anyone who applies water to land must obtain a water right even if that person did not divert the water from the public water supply. But it does not say that.

On the other hand, the Court might determine that the plain and ordinary meaning of those subsections is the opposite of that hypothesized in the preceding paragraph. The Court might find that Subsection 8's identification of exempted parties must include agents and contracting entities, and that Subsection 2's reference to water applied to land must mean water diverted from the public water supply.

If so, that is the end of the matter. But if the Court finds the language of either subsection not perfectly definitive, then further examination of the legislative purpose is appropriate. And that examination takes one to the same place: Nampa and Pioneer need not acquire a water right.

II. IF SUBSECTION 8 APPLIES TO NAMPA AND ITS AGENTS/CONTRACTING ENTITIES, IT IS DISPOSITIVE OF VIRTUALLY THE ENTIRE CASE.

A. Subsection 8's exemption overrides Subsection 2's requirement to obtain a water right.

Riverside pins its case on Subsection 2. This statute is the core of Idaho's mandatory permitting law. It provides:

> No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No 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.

Idaho Code § 42-201(2).

Over time, the Legislature has carved out various exceptions to Subsection 2. The one relevant here is Subsection 8, which reads:

> Notwithstanding the provisions of subsection (2) of this section, 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 shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or 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. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

Idaho Code § 42-201(8).

If Subsection 8 is constitutional and applicable to Nampa and Pioneer (as the City's agent or contracting entity), it is dispositive. There is no need to address compliance with Subsection 2, or any of the other arguments. Indeed, that finding was the basis of the Director's ruling.

B. The only sensible reading of Subsection 8 is that the exemption encompasses not only the named exempted entities but also those acting on their behalf.

(1) Subsection 8 includes both agents and non-agent contacting entities.

Subsection 8 identifies several types of entities that may dispose of effluent without obtaining a water right. Pioneer is not one of them. This prompts the question, can Nampa employ an agent or other contracting entity, such as Pioneer, to execute its wastewater disposal, and, if so, does the statute exempt both the municipality and its agents and contracting entities from the requirement to obtain a water right?

The Director answered "yes" to both questions. This is the only reasonable reading of the statute. Were it otherwise, the statute would defeat its very purpose, which was to eliminate a costly regulatory hurdle. Riverside's reading of the statute merely shifts the regulatory burden from city to irrigator, thereby rendering the statute useless to most cities and sewer districts. Indeed, it would make the statute inapplicable to the very situation that gave rise to its enactment—the City of McCall's land disposal of effluent which was accomplished through

contract with third-party entities owning farm land outside of the city. (See footnote 28 on page 23.)

The Director was right to reject Riverside's reading of the statute. It is true that the statute does not announce in so many words that "a municipality may employ agents or contractors to accomplish the disposal of effluent." It does not say that because it does not need to be said. It is obvious. The Legislature has granted municipalities the power to enter into contracts in the course of carrying out their municipal responsibilities,[13] and it has granted irrigation districts the power to enter into contracts to secure a sufficient water supply.[14] It is hardly necessary to repeat in every statute authorizing a city to do something that it may, where necessary and appropriate, engage an agent or other contracting entity.

As the Director said, "The characteristics of agency plainly allow an agent of a Subsection 8 exempted entity to benefit from Subsection 8's exemption." *Order* at 4 (R. 1233). The Director found that, as a technical matter, Pioneer was not Nampa's "agent" because "the Reuse Agreement does not give Nampa the right to control Pioneer." *Id*. But this was not fatal, the Director held. The Subsection 8 exemption brings Pioneer within its sweep because "Nampa

[13] Idaho Code § 50-301 ("Cities governed by this act . . . may contract and be contracted with . . . ."). See also, Idaho Code § 31-604(3) (authority of counties); Idaho Code § 31-4906(8) (authority of regional sewer districts).

[14] Idaho Code § 43-304 (Irrigation districts "may enter into contracts for a water supply to be delivered to the canals and works of the district, and do any and every lawful act necessary to be done that sufficient water may be furnished to the lands in the district for irrigation purposes."). In *Bd. of Directors of Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461, 463 (1943), the Court said that entering into contracts "for a water supply" was "one of the most important duties imposed on it."

and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer." *Id*.

The Director is correct that not all contracts create agency relationships. A city may carry out its disposal function under Subsection 8 through independent contractors and other contracting entities that may not, strictly speaking, qualify as agents. The law governing the overlapping relationship between agents and contractors is complex and, thankfully, irrelevant here.[15] This is the reason that Nampa employed the phrase "agent or contracting party" to describe Pioneer.[16] Whether Pioneer meets the definition of agent is not important. What is

[15] See *Business and Commercial Litigation in Fed. Courts 4th* § 113.15 (Control) (2020) for discussion of the difference between a non-agent independent contractor and agent-independent contractors.

[16] Nampa explained:

> The first nine words of Subsection 8 state that this waiver operates "[n]otwithstanding the provisions of subsection (2)." The permitting requirements do not come back into play simply because a city employs an agent or contracting party to effectuate its disposal of effluent." Riverside reads Subsection 8 to say that mandatory permitting requirements are waived only if the city is able to accomplish its disposal without the involvement of any other party. But that is not what the statute stays. The statute does not concern itself with what contractual relationships the city may employ to accomplish the disposal. Instead, the statute broadly declares the city does not need a water right, period, "notwithstanding" Subsection 2. Riverside's suggestion that the Subsection 2 survives the "notwithstanding" command and re-imposes water right requirements on anyone participating with the city is not a credible reading of the statute.
>
> After all, the "notwithstanding" language employed in Subsection 8 is identical to the "notwithstanding" language employed in all of the exemptions (Subsections 3(a), 3(b), 3(c), 8, and 9). If Riverside is correct that Subsection 8 exempts cities and sewer districts but not those applying the effluent to beneficial use,

important is that the entity employed by the city is doing the city's bidding in carrying out the disposal function.

As the Director explained, Nampa and Pioneer are tightly intertwined, irrespective of whether one is the agent of the other.[17] Hence, the exemption applicable to Nampa necessarily

---

> then the same problem would occur under Subsection 9. That subsection exempts operators of irrigation canals that have made arrangements for the incidental generation of hydropower. Riverside's parsimonious reading of the "notwithstanding" language would lead to the result that Idaho Power must obtain a water right. That result is just as wrong. The plain and most logical reading of the "notwithstanding" reading is that any agent or contracting party acting in conjunction with the exempted party is also exempted from the mandatory permitting requirement in Subsection 2.

Response Below at 15 (R. 867) (emphasis added).

[17] The *Order* includes this useful summary of the relationship between Nampa and Pioneer:

> Despite 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. The Reuse Agreement requires an ongoing relationship between Nampa and Pioneer. Nampa must apprise Pioneer of when it will discharge effluent to Phyllis Canal. Pioneer is obligated to cooperate with Nampa to obtain permits and approvals.
>
> The Reuse Permit further ties Nampa and Pioneer together. DEQ granted Nampa's Reuse Permit based on its analysis of Pioneer's irrigation operations. Pioneer's place of use is included in the area of analysis. Exhibit H at 17-18 [R. 267-268]. The analysis further considered that Nampa's effluent would be "very diluted by the existing irrigation water" and that "nutrient needs of the crops are greater than that provided by the additional nutrient." Exhibit H at 37-38 [R. 287-288]. To ensure water quality of jurisdictional waters, Nampa and Pioneer will install an automated

encompasses actions undertaken by Nampa with the assistance of Pioneer in implementing of the Reuse Project.

(2) In any event, Pioneer is Nampa's agent.

One could, and perhaps should, stop here. Instead, out of an abundance of caution, Nampa offers an argument in the alternative. If the Court were to reject the Director's broader reading of Subsection 8 and hold that the statute only extends the exemption to true agents, Pioneer can meet that test. Pioneer is Nampa's agent for the specific and limited purpose of accepting its effluent and disposing of it in compliance with the *Reuse Permit* and the *Reuse Agreement*. The reasons are set out below.

At its core, an agent is "[o]ne who is authorized to act for or in place of another; a representative." *Black's Law Dictionary* (1999). "An 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, 336 P.3d 1088, 1095 (2016). There is no doubt that Pioneer is authorized and obligated to reduce its own water intake, to accept Nampa's effluent in lieu thereof, and to facilitate its land application by delivering the effluent to its users.

> flow control system on 15.0 Lateral so the effluent will not return to jurisdictional waters. Exhibit J, at 60 [R. 449]. Nampa may not have legal control over Pioneer, but both are intimately involved in the process of land applying Nampa's effluent in response to a regulatory requirement.

Order at 4-5 (R. 1233-1237).

The only question is whether Nampa meets the requirement of exercising control over the agent. "In addition, where an agency relationship exists, the principal has a right to control the agent." *Humphries*, 159 Idaho at 735-36, 336 P.3d at 1095-96.

How much control is necessary? The answer is, only as much as is required to effectuate the undertaking. This does not necessarily include control over the agent's day-to-day operations.

> Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment.

Restatement (Third) of Agency, § 1.01(c) (2006).[18]

The law of agency operates in a number of contexts. One of them is vicarious liability for the agent's negligence or malfeasance in the course of its day-to-day operations. Not surprisingly, those cases generally hold that, in order to hold the principal liable, the principal must have some degree of control over those day-to-day operations. But control by the principal over the agent's day-to-day operations matters only if those operations are the source of the liability. Here, of course, we are not dealing with vicarious liability arising from Pioneer's misconduct in the course of its day-to-day operations. Accordingly, that line of agency cases—and the whole question of control over Pioneer's day-to-day operations—is not relevant to the interpretation of Subsection 8.

[18] Idaho courts have embraced the *Restatement*. *E.g.*, *Nelson v. Kaufman*, 166 Idaho 270, 278, 458 P.3d 139, 147 (2020); *Humphries v. Becker*, 159 Idaho 728, 735–36, 366 P.3d 1088, 1095–96 (2016).

While control over Pioneer's day-to-day operations need not be established here, control over the things pertinent to the purpose of the agency are essential. That requirement is satisfied here. Nampa is able to dictate to Pioneer how much effluent the City will deliver on any given day, and thereby require Pioneer to make all necessary adjustments in its water supply and canal operations in order to accommodate that delivery and to land apply the City's effluent. In other words, the one thing that matters—Pioneer's acceptance of effluent—is under Nampa's direction and control, pursuant to the express terms of the *Reuse Agreement*. Moreover, section B(3) of the *Reuse Agreement* (R. 208) provides that Nampa may choose not to provide any wastewater at all to Pioneer. In other words, Nampa controls how much water, if any, it will supply to Pioneer.

The law of agency requires us to take one further step into the weeds. To establish agency, the relationship much be one in which the principal would naturally have the ability, if need be, to issue what section 1.01 of the Restatement calls "interim instructions" to the agent[19] (even if that ability is not found in the contract establishing the agency[20]). If the principal issues

---

[19] The Restatement lays out the "interim instruction" requirement:

> An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established.

Restatement (Third) of Agency, § 1.01(f)(1) (2006).

[20] The Restatement explains that the contract creating the agency relationship need not provide authority for the principal to issue interim instructions:

> To the extent the parties have created a relationship of agency, however, the principal has a power of control even if the principal has previously agreed with the agent that the principal

interim instructions that go beyond what was authorized by the contract, the agent has a choice. It may comply with the interim instructions or it may resign as agent—with further possible remedies against the principal in either case. (See footnote 20 above.)

Nampa's authority to give interim instructions is both express and implicit. It is expressly laid out in the *Reuse Agreement*, § B(4) (R. 208), which requires Pioneer to cooperate with the City in obtaining permits and approvals from IDEQ. This is an ongoing obligation.[21] It is also found in the *Reuse Agreement*, § A(2)(a) (R. 206), which requires Nampa to forecast estimated flow rates "so that Pioneer can coordinate its canal operations accordingly." In other words, Nampa controls Pioneer's operations by telling Pioneer how much effluent it will deliver. Pioneer must then adjust its operations, including how much water it will divert or take from storage under its own rights, in order to accommodate that delivery. Thus, Nampa provides interim instructions to Pioneer as to how much effluent it will direct to the Phyllis Canal.

> will not give interim instructions to the agent or will not otherwise interfere in the agent's exercise of discretion. However, a principal who has made such an agreement but then subsequently exercises its power of control may breach contractual duties owed to the agent, and the agent may have remedies available for the breach.

Restatement (Third) of Agency, § 1.01(f)(1) (2006).

[21] The *Reuse Agreement* is of indefinite duration. *Reuse Agreement* § C(1) (R. 208). Thus, the cooperation obligation extends beyond securing the initial *Reuse Permit*. The *Reuse Permit* was issued on January 21, 2020 and expires ten years thereafter. In addition to requiring cooperation on future reuse permits, the *Reuse Agreement* contemplates ongoing cooperation under the current *Reuse Permit*. In addition to monitoring and reporting requirements, the current permit contemplates numerous interim approvals by IDEQ (e.g., approval of a plan of operation, Compliance Activity CA-255-02, *Reuse Permit*, p. 8 (R. 228)).

In addition to this explicit authority to issue interim instructions, the power to issue interim instructions is implicit and inherent in the relationship between Nampa and Pioneer, which is founded on Nampa's need to comply with complex and evolving environmental regulatory requirements. The Restatement makes clear that once the agency relationship is established, the principal may issue further interim instructions even beyond what is stated in the contractual relationship between principal and agent. (See footnote 20 on page 18.) It is evident that IDEQ, at some point, could impose additional requirements affecting Pioneer's operations, monitoring, or reporting. In such a case, Nampa would issue interim instructions which Pioneer would be required to follow. If the further instructions were unacceptable to Pioneer and inconsistent with the *Reuse Agreement*, Pioneer would have the right to resign as agent and might even be entitled to compensation or other relief. (See footnote 20 above.) But that does not mean there was never an agency relationship. The Restatement is quite clear on this point. (See the "Illustrations" set out in the Restatement.)

A final prerequisite to an agency relationship is the right to terminate. *Restatement*, §§ 1.01(f)(1). This right is expressly stated in the *Reuse Agreement*.[22]

[22] *Reuse Agreement*, § C(3) (R. 208) authorizes Nampa to terminate upon ten years written notice. Nampa could also terminate earlier, subject to potential damages, under *Reuse Agreement*, § C(9) (R. 209). The fact that an earlier termination would put Nampa in breach of the agreement does not mean there is no agency relationship between them. "A principal has power to revoke an agent's actual authority and the agent has power to renounce it. The power is not extinguished because an agreement between principal and agent states that the agent's actual authority shall be irrevocable or shall not be revoked except under specified circumstances. . . . Exercising the power to revoke or renounce may constitute a breach of contract." *Restatement*, § 3.10, comment a.

In sum, Pioneer meets the legal test of agency. Of course, this whole mind-numbing agency exercise is unnecessary if the Court upholds the Director's finding that Subsection 8 extends not only to agents but to any contracting entity that is intertwined with the undertaking and doing the bidding of the entity undertaking the disposal.

C. The inclusion of the notice requirement in Subsection 8 proves that the statute does not require the farmer or irrigation district to obtain a water right.

Subsection 8 requires the municipal provider or sewer district to notify IDWR if effluent will be applied to lands not already identified as a place of use for an irrigation water right.[23] The notification requirement was added, at the request of IDWR, to assure that the Department would have a record of any new lands that would be brought under irrigation. This was a significant feature of the legislation, repeatedly mentioned in the legislative history.[24] In this

[23] The last two sentences of Subsection 8 state:

> 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).

[24] See H.B. 608, Statement of Purpose (R. 965) ("If the land application is to be on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the department of water resources to allow the department to have complete records of where the water is being used."); Memorandum from Ken Harward, Association of Idaho Cities, to Senate Resources & Environment Committee (Mar. 14, 2012) (R. 908) ("In the event that land application is to occur on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the Department of Water Resources to ensure the department is informed about where water is being used."); Senate Resources & Environment Committee (Mar. 16, 2012) (Statement of Mr.

way, if the Department saw irrigated land in aerial photography and found no corresponding water right, notice that the land was covered by land application under Subsection 8 would allow the Department to put the matter to rest.

Here is the key point: There would be no need for the notice requirement if the farmer or irrigation entity receiving the effluent were required to obtain a new water right. Plainly, the purpose of the notice requirement was not to allow IDWR to turn its enforcement attention to the entity receiving the effluent. If that had been the case, notice would have been required for all land application, not just land application "on lands not identified as a place of use for an existing irrigation water right."

Statutes are intended to be read together as a whole.[25] One cannot read the last two sentences of Subsection 8 as anything but confirmation that Subsection 8 lifts mandatory permitting not only for cities and sewer entities, but also those acting as their agents or contractees (i.e., farmers and irrigation districts accepting the effluent).[26]

Meyer) (R. 892) ("Mr. Meyer further pointed out, that if the land application was to be on land which was not already identified as a place of use for an existing water right, notice of the place of use would be provided to the Department of Water Resources. This would allow the Department to have complete records of where the water was to be used.").

[25] *Moser v. Rosauers Supermarkets, Inc.*, 165 Idaho 133, 136, 443 P.3d 147, 150 (2019); *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006); *Union Pacific R.R. Co. v. Bd. of Tax Appeals*, 103 Idaho 808, 811, 654 P.2d 901, 904 (1982).

[26] If the Court looks for Riverside's response to the points presented by Nampa regarding agency law and Subsection 8, it will not find any. Riverside's agency argument is limited to its strictly textual reading of the statute. *Opening Brief*, section V.B, pp. 12-15. In its prior briefing, Nampa provided extensive rebuttal to Riverside's textual argument. *Response Below*, section I.B, I.C, and I.D, pp. 15-20 (R. 867-872); *Nampa's Sur-Reply Brief* section I, pp. 6-8 (R. 1174-1176). Riverside has never seen fit to address Nampa's arguments.

D. Any doubt about the meaning of Subsection 8 is resolved by its legislative history.

Perhaps the plain meaning of Subsection 8 is clear enough without resort to its legislative history. But if there is any ambiguity, the legislative history of Subsection 8[27] leaves no doubt that the statute's purpose was to remove the water right requirement not only for the named exempt entities but also for the farmers or irrigation districts who accepted the effluent for land application.

The legislation was prompted by concerns over whether the City of McCall needed a water right to deliver effluent from its WWTP to farmers under contract with the city.[28] In formal communications between McCall and IDWR, the Department concluded that no water right would be needed so long as McCall's WWTP treated only wastewater derived from the city's municipal water rights.[29] But it turned out, that was not the case. McCall's WWTP accepted substantial quantities of influent from another sewer district serving homes that were not served by McCall's municipal water system. Accordingly, the Department informally advised McCall that a water right likely would be needed to cover that portion of the effluent

[27] H.B. 608, 2012 Idaho Sess. Laws, ch. 218 (codified at Idaho Code §§ 42-201(8), 42-221(P)).

[28] The city's contractual arrangement with farmers is documented in the legislative history of H.B. 608. See, e.g., House State Affairs Committee (Feb. 28, 2012) (Statement of Rep. Stevenson) (*Response Below* at 117 (R. 969)), and Senate Resources & Environment Committee (Mar. 16, 2012) (Statements of Mr. Meyer) (*Response Below* at 129 (R. 981)). It is also documented in a letter in the files of IDWR from Christopher H. Meyer to Garrick L. Baxter, p. 1 (Sept. 16, 2011) (*Response Below* at 200 (R. 1052)).

[29] See letters in the files of IDWR from Garrick L. Baxter to Christopher H. Meyer dated September 7, 2011 and September 19, 2011 (R. 1050, 1054).

derived from non-municipal water rights outside the city. In response, McCall worked with the Department, the Idaho Water Users Association, the Association of Idaho Cities, and other stakeholders to craft legislation to resolve this uncertainty. The result was H.B. 608, which was approved unanimously by both Houses.[30] The legislation was clearly and unambiguously intended to eliminate altogether the need for new water rights when cities engage in programs to deliver effluent to those in a position to put it to beneficial use.[31]

---

[30] 2012 Final Daily Data (*Response Below* at 114 (R. 966)).

[31] The following four examples document that the purpose of the legislation was to completely eliminate altogether the requirement to obtain a water right:

> The purpose of this legislation is to clarify that a separate water right is not required for the collection, treatment storage or disposal storage [sic], including land application, of the effluent from publicly owned treatment works. Effluent is water that has already been diverted under an existing right and has not been returned to the waters of the state. If the land application is to be on land for which there is not already identified a place of use for an existing water right, notice of the place of use will be provided to the department of water resources to allow the department to have complete records of where the water is being used.

Statement of Purpose (emphasis added) (*Response Below* at 113 (R. 965)).

> Rep. Stevenson presented RS 21325, proposed legislation to clarify that a separate water right is not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works. Rep. Stevenson stated this legislation was brought by the Association of Cities due to a situation that arose in McCall. They were combining wastewater from the city with a sewer district and realized each individual entity did not require a permit, but when combined, there was ambiguity. RS 21325 makes it clear that when you combine these two sources, if a land application is to take place, this will not require a permit.

House State Affairs Committee (Feb. 28, 2012) (Statement of Rep. Stevenson) (emphasis added) (*Response Below* at 117 (R. 969)).

The statements collected in footnote 31, and indeed everything in the legislative history,[32] make clear that the legislation was intended to eliminate the water right requirement across-the-

---

> The Association of Idaho Cities strongly supports House Bill 608, which would clarify that a separate water right is not required for the collection, treatment, storage, or disposal of effluent from publicly owned treatment works when wastewater is treated and disposed on behalf of entities that do not have a municipal water right.

Memorandum from Ken Harward, Association of Idaho Cities, to Senate Resources & Environment Committee (Mar. 14, 2012) (emphasis added) (*Response Below* at 128 (R. 980)).

> . . . Mr. Meyer said the purpose of this legislation was to clarify that a separate water right was not required for the collection, treatment storage or disposal storage, including land application, of the effluent from publicly owned treatment works.
>
> . . .
>
> . . . The purpose of this legislation, he said, was to get the water lawyers out of this business and to allow municipalities to spend their dollars and focus their attention on the issue at hand, which was the water quality side of the equation. The Department of Water Resources was involved in drafting this legislation and added some provisions to it . . . .

Senate Resources & Environment Committee (Mar. 16, 2012) (Statement of Mr. Meyer) (emphasis added) (*Response Below* at 130-31 (R. 982-983)).

[32] Riverside also cites the legislative history. Its cherry picking is ineffective. It quotes Lindley Kirkpatrick's statement to the House Resources & Conservation Committee (Mar. 5, 2012) (*Response Below* at 121 (R. 973)). Mr. Kirkpatrick simply said that the legislation established that cities and sewer districts do not need to acquire a new water right. He said nothing to suggest that other entities instead would be required to obtain those new water rights. Riverside also notes Mr. Kirkpatrick said the bill is crafted narrowly. Riverside fails to explain that this was said in the context that the legislation does nothing to lighten environmental requirements. "He said this doesn't change anything about DEQ's reuse tools, it only allows cities to use wastewater on growing crops." *Id.* Perhaps most misleadingly, Riverside quoted Mr. Kirkpatrick's statement that IDWR "has assured the city they can reuse waste water when they have a municipal water right." Riverside fails to explain that this is the reason H.B. 608 was enacted—the City did not have a municipal water right for about half of its effluent. The whole point of the legislation was to make this a non-issue.

board, not to shift the water right burden from the city to the farmer or irrigation district who accepts the effluent.[33]

Indeed, if a complete elimination of the water right requirement was not accomplished by the "notwithstanding" language in Subsection 8, H.B. 608 would not have solved the very problem faced by McCall. As noted above, McCall did not undertake the land application itself. It relied on farmers outside the city to apply the effluent to land. (See footnote 28 at page 21.) If Riverside's reading of Subsection 8 is correct, those farmers would have been required to obtain water rights. The legislative history shows that the role of the farmers was understood by the Legislators and the Department, and no one intended that any new water right would be required. Those farmers and Pioneer stand in the same position. Both were engaged by a city in an undertaking falling within the ambit of Subsection 8. The legislation intended that neither would be obligated to shoulder the very burden the statute was intended to eliminate.

In sum, if any corroboration or clarification of the statute's meaning is needed, the legislative history confirms the legislation's obvious goal. It shows that the only sensible reading of the "notwithstanding" language is to eliminate the water right requirement for the named entities as well as their agents/contracting entities. Riverside should not be allowed to exploit a perceived ambiguity in Subsection 8 to achieve a result opposite of that which was plainly intended.

---

[33] Riverside presented the identical misleading use of legislative history in its opening brief to the Department (*Petitioner's Opening Brief*, pp. 26-27; R. 796-797). Nampa responded just as it did above (*Response Below* at 19-20, n.19 (R. 871-872)). It is unfortunate that Riverside repeats the same misleading description of the legislative history to this Court, without responding to (or even acknowledging) the rebuttal provided by Nampa.

III. NAMPA DOES NOT NEED SUBSECTION 8; THE COMMON LAW DOCTRINE OF RECAPTURE AND REUSE AND THE CITY'S FLEXIBLE SERVICE AREA ALLOW IT TO UNDERTAKE THE REUSE PROJECT.

Although Subsection 8 is the straightest route to affirm the Director's *Order*, Nampa does not even need Subsection 8 to prevail in this case. Subsection 8 was created to solve a problem that Nampa does not have. As discussed in the prior section, Subsection 8 was prompted by the City of McCall's water reuse project.

McCall sought the advice of the Department as to whether the City could rely on the common law doctrine of recapture and reuse (as that doctrine applies to municipal providers) and the statutory definition of its expanding municipal service area. R. 1043-1054. The Department initially determined that it did qualify. R. 1054. It was thereafter determined that a substantial portion of McCall's effluent came from sources other than its own municipal water rights, which meant it did not qualify. Accordingly, McCall worked with the Department and stakeholders across the State to craft Subsection 8.

As it turns out, the problem solved by Subsection 8 is a problem that Nampa does not have. Unlike McCall, Nampa accepts no influent from other sewer systems.[34] The common law, coupled with longstanding Department practice, recognize that disposal of "used" municipal water to meet environmental requirements is part and parcel of "municipal use" and does not constitute enlargement. See footnote 45 on page 39. Like McCall, Nampa's water rights have

[34] If the ordinary and unavoidable quantities of non-sewer system water (e.g., stormwater) entering Nampa's WWTP disqualify it from the law of recapture, the same would be true for all cities. That would nullify the entire body of law developed on the subject of reuse of municipal effluent.

an expanding municipal place of use (which, in Nampa's case, can be deemed to include Pioneer's entire delivery area).[35] Alternatively, in an accounting sense, Nampa may be seen as using all of its effluent within its own non-potable irrigation system.[36]

Thus, if need be, Nampa could rely on recapture and reuse of its own municipal water rights even in the absence of Subsection 8. But there is no need to sort all this out. After all, the purpose of Subsection 8 was to render this fascinating subject obsolete to all but legal historians and publishers of water law handbooks.

---

[35] In a letter of September 7, 2011, IDWR said McCall's reuse program (involving delivery to farms outside the city) might fall within the definition of "service area" (which was then Idaho Code § 42-202B(6) and is now Idaho Code § 42-202B(9)), but he needed more information: "The Department has questions regarding the process in which the City delivers effluent to lands outside the city limits. A measure of control and supervision is at least implied for a delivery system to be considered a 'common water distribution system.'" R. 1051. McCall provided the following facts:

- McCall mixed its effluent with irrigation water under rights that it did not own (in order to achieve dilution).
- McCall delivered the water (in pipes it owned) to farms that it did not own.
- Those farmers agreed by contract to accept the diluted effluent when delivered to their irrigation systems.

R. 1052.

Based on those facts, IDWR determined that this constituted a sufficient "measure of control" to allow McCall to treat the farms outside the city as part of its service area. Nampa urges that its arrangement providing direct physical delivery of effluent to Pioneer is analogous and provides a similar if not stronger "measure of control."

[36] Nampa's effluent is mixed with other water in the Phyllis Canal. So there is no way of tracing which molecules (effluent or non-effluent) are delivered back to Nampa. But in an accounting sense, Nampa can be seen to take all of its effluent back. Pursuant to the *Title 50 Agreement* between Nampa and Pioneer (Exhibit L (R. 722-726)), Pioneer currently delivers, at peak, more water to Nampa (21.64 cfs) than Nampa will contribute as effluent to the canal upstream of the delivery points (18.6 cfs). See *Response Below* at 47, n.33 (R. 899)).

IV. SUBSECTION 2 DOES NOT REQUIRE PIONEER TO OBTAIN A WATER RIGHT.

A. Pioneer's acceptance of effluent is not a diversion from the public waters of the State.

As the Director noted, if Pioneer (as agent/contracting entity of Nampa) falls within the protection of Subsection 8, there is no need to address Subsection 2. But even without the protection of Subsection 8, Pioneer is not in violation of Subsection 2.

Subsection 2 requires Idaho water users to obtain a water right if they divert and use water from public waters of the State:

> No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No 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.

Idaho Code § 42-201(2).

Subsection 2 should be read as a whole and in context. The first sentence establishes the scope of the permitting requirement as applying to "public waters of the state of Idaho." The second sentence employs the term "a natural watercourse." That should be understood as shorthand for public waters of the state of Idaho. It would be most unreasonable to think the permit requirement is limited to natural streams and rivers. Plainly, the requirement to obtain a water right is not limited to those diverting surface water, but includes any public waters. Likewise, the requirement that one must not to "apply water to land" without a water right can only reasonably be understood to apply to public waters. See discussion of this topic, including the legislative history, in Nampa's *Response Below*, section II, pp. 25-30 (R. 877-882).

Pioneer is not diverting or using water from a public water supply. Pioneer has no physical or other control over the means of diversion by which Nampa diverts its ground water. Pioneer simply accepts delivery of water previously diverted by Nampa—water that is now effluent and remains under Nampa's dominion and control. That effluent is not part of the public water supply. Hence, this is no diversion or use of public water by Pioneer within the meaning of Subsection 2.

Pioneer's acceptance of delivery of previously diverted water is no more a diversion of public water than if a person were to accept delivery of a dozen cases of spring water. The spring water was once in the public water supply. And so was Nampa's effluent. At one time, each was diverted from the public water supply, and doing so required a water right. But, once lawfully diverted it remains the property of the appropriator, so long as the water remains under its command and control. "Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator." Idaho Code § 42-110.

Accordingly, a new water right is not required when the diverter delivers previously diverted water to a customer, purchaser, friend, irrigation district, or anyone else. Thus, a person may deliver a bottle of spring water to her neighbor. And a city may deliver potable water to its municipal customers. And a city may deliver treated effluent to an irrigation district. And an irrigation district may deliver water to a landowner. Neither the neighbor, the city, the city's customers, the irrigation district, nor the land owner need obtain a water right to accept such delivery. And none of them is in violation of Subsection 2.

It would be another matter altogether if the original diverter allowed the water (as return flow or waste water) to reach a public water supply (which includes drains—see below). Others may then appropriate that water, and doing so requires a water right. But that has not happened here. The effluent is delivered by pipe, not by stream channel or drain.

B. *Janicek* supports the conclusion that Pioneer is not in violation of Subsection 2.

Riverside pins its Subsection 2 argument in large part on the *Janicek Properties, LLC* case (Case 39576, Subcase 63-27475, Fifth District Court (May 2, 2008) (Theodore R. Booth, Special Master)). *Opening Brief*, pp. 16-18. Alas, the *Janicek* case does not advance Riverside's cause. It defeats it.

Janicek held that when the quantity of waste water accruing to a drain exceeds that needed by those who constructed the drain, the excess water may be appropriated by a landowner whose land the drain crosses. Of course, the junior appropriation is subject to call by the senior and paramount reuse rights of the drain owners (which might expand in the future). That is hardly a startling proposition.

Riverside says that if the landowner was required to obtain a water right from a drain, then Subsection 2 must not be limited to diversions from a "natural watercourse." Yes, and so what? As noted in the prior section, Subsection 2, read a whole, should be understood to require a water right for any diversion and use of water from any public waters of the State, including drains, springs, and aquifers.

Special Master Booth did not explain in his decision why drain water is public water. Perhaps that is because it is obvious. Like the water in streams, lakes, springs, and aquifers, it is

physically and legally accessible by the public. The Purdam drain ran through the Janicek property. The Special Master ruled that the appropriation was not initiated in trespass. *Janicek* at 11-12. If you can physically and without trespass "put a straw in" and take water that no one else owns, then it is public water subject to appropriation.

Far from helping Riverside's argument, *Janicek* does the opposite. It highlights how different the situation is with Nampa's delivery of effluent to Pioneer. No one—not Riverside or anyone else—can lawfully "put a straw" into Nampa's WWTP or the pipe that delivers effluent to Pioneer. That is why it is not public water, and that is why Subsection 2 does not require Pioneer to obtain a water right.[37]

If Riverside's argument were applied in other contexts, the absurd consequences would multiply. If Pioneer is required to obtain a water right to accept delivery of water lawfully owned and physically controlled by Nampa, then the same would go for every municipal water customer of Nampa. Each customer would be required to obtain a water right to accept delivery of municipal water to their home. That is the obviously wrong but unavoidable effect of Riverside's argument. The simple answer is that neither Pioneer nor the municipal water customers are required to obtain a water right, because neither is diverting from the public water supply.

[37] Nampa concurs with and adopts the more detailed discussion of Janicek in *Pioneer's Brief* and *Municipal Intervenors' Brief*, particularly as to the physical differences between a drain and the delivery systems employed here.

C. The words "apply water to land" must be understood to refer to water that was diverted from the public water supply.

On appeal, Riverside repeats verbatim its "disjunctive or" argument that it first presented to the Director:

> 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. [Citing statutes interpreting the word "or" in other contexts.]

Opening Brief at 16 (cf. *Petitioner's Opening Brief* below, p. 14 (R. 784)).

As Nampa said before (*Response Below* at 28 (R. 880)), there is no question that the statute employs the disjunctive word "or." The question is: What do the words "apply water to land" refer to? The two sentences of Subsection 2 must be read as a whole. That textual context makes clear that the water one may not apply to land without a water right is water that was diverted from the public water supply—which is the whole subject of Subsection 2.

If this reading of the statute is not plain enough on its face, it is made perfectly clear by the legislative history discussed below.

D. Any doubt about the meaning of Subsection 2 is resolved by its legislative history.

Subsection 2 was added in 1986[38] to plug a loophole in Idaho's mandatory permitting statute enacted in 1971.[39] The 1971 legislation established that the only way to obtain a water

[38] H.B. 369, 1986 Idaho Sess. Laws, ch. 313, § 2 (codified at Idaho Code § 42-201(2)) (reproduced in *Response Below* at 58-59 (R. 910-911)).

[39] The permitting process became mandatory for ground water rights in 1963. 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229). The 1971 statute made permitting

right is through the permitting process. But one could still divert and apply water from a public supply to a beneficial use without obtaining a water right. As Director Kenneth Dunn explained:

> The present law states that users must have a permit to appropriate water but it doesn't say it is against the law to appropriate [divert] water without the permit. This legislation makes it clear that no person shall divert water without having a permit to do so.

Minutes, House Resources and Conservation Committee, p. 2 (Jan. 9, 1986) (*Response Below* at 91 (R. 943)).[40]

Subsection 2 plugged that loophole. Subsection 2 established that obtaining a water right was mandatory before diverting and using public waters—subject to various exemptions that were added after 1986.

Riverside's semantic argument about the word "or" in Subsection 2 would disconnect the mandatory permitting process from its inherent link to Idaho's public water supply. That construction should be rejected. As its legislative context makes clear, Subsection 2 does not address water that is not part of Idaho's public waters. The statute does not require a person to obtain a water right to water one's garden with bottled spring water. Nor does it require Pioneer to obtain a water right in order to accept and deliver treated effluent to lands it serves. Neither

---

mandatory for all water rights. H.B. 83, 1971 Idaho Sess. Laws, ch. 177 §§ 1 and 2 (codified as amended at Idaho Code §§ 42-103, § 42-201(1)) (reproduced in *Response Below* at 58-59 (R. 910-911)). In 1971, what is now subsection 42-201(1) constituted the entirety of section § 42-201. All the subsections to section 42-201 were added subsequently.

[40] The 1986 amendment adding subsection 42-201(2) was part of a larger piece of legislation aimed at strengthening IDWR enforcement tools with respect to violation of water right conditions, cancellation of forfeited water rights, and preventing uses beyond the scope of a water right.

bottled water nor Nampa's effluent are part of the public water supply. For that reason, neither of these "applications to land" undermines the priority system. Protection of the priority system through the permitting process is the sole purpose of Subsection 2. Accordingly, the phrase "or apply water to land" should be understood to mean water diverted from the public water supply.

V. A TRANSFER OF NAMPA'S WATER RIGHTS IS NOT REQUIRED.

Riverside suggests that even if Subsection 8 exempts Nampa and Pioneer from obtaining a new water right for the application of Nampa's effluent, "the Director should be required to conduct a transfer analysis." *Opening Brief* at 18. Later, Riverside says "the Director should require Pioneer to file a transfer." *Opening Brief* at 20. This does not compute.

First, the Director acts on water right applications that others choose to file. He cannot order someone to file an application.

Second, a person cannot file an application to transfer someone else's water rights. Pioneer cannot transfer Nampa's water rights.

Third, the plain words of the exemption in Subsection 8 includes both appropriation and transfer of water rights. The statute says that a city "shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent." (Emphasis added.) One may "obtain" a water right either through appropriation or by transfer of an existing water right. Entities falling within Subsection 8 (and their agents or contracting entities) are exempt from seeking either an appropriation or a transfer of water rights, because they do not need to "obtain" any water right.

Fourth, even if the statute did not exempt a city from transferring its existing water right, no transfer is required here because no element of Nampa's water rights has changed. Nampa is simply recapturing its own wastewater and applying that water within the confines of its municipal water right.[41]

VI. RIVERSIDE'S RE-HASHED ARGUMENTS ABOUT VIOLATION OF CONDITIONS, ENLARGEMENT, AND THE SOURCE OF NAMPA'S WATER RIGHTS WERE DEBUNKED IN PRIOR BRIEFING AND REMAIN MERITLESS ON APPEAL.

A. "Supplemental use only" conditions in some of Nampa's water rights do not bar the disposal of effluent in the Reuse Program.

Riverside devotes over four pages to a discussion of how the Director's *Order* ignores conditions in Nampa's water rights and thereby allows enlargement of those rights. *Opening Brief* at 18-22. This argument is mooted if the Court finds that the Subsection 8 applies and Nampa is not required to rely on its existing water rights to support the Reuse Project. In any event, Riverside's analysis is wrong.

Riverside never says what conditions in Nampa's water rights it is referring to, except for the reference in its section heading V.D to "conditions precluding the use of its water rights for irrigation when surface water is available." *Opening Brief* at 18. Presumably this refers to

[41] The place of use has not changed, because Nampa has a flexible and expanding municipal service area that includes land receiving effluent served by Pioneer. Nor has the purpose of use changed, because land application required to meet a regulatory requirement falls within the broad definition of municipal use. (See discussion in section III beginning on page 27 and section VI.B on page 39; *Response Below* at 38-48 (R. 890-900).)

standard condition 102 that appears on five of Nampa's 21 municipal ground water rights associated with its potable water system (e.g., No. 63-12474[42]).

There are two answers. First, Nampa's use is not "irrigation"; its use is "disposal." (See footnote 45 on page 39.) Second, Nampa complies with the "supplemental use only" condition at the time of the initial beneficial use. Condition 102 does not preclude subsequent reuse of recaptured ground water for any purpose.

This is well established Departmental policy. As explained to Riverside in Nampa's prior briefing, this very question was raised in 2008 by counsel for Black Rock Utilities, Inc., a municipal water provider in North Idaho.[43]

Counsel asked the Department to confirm the following:

> The condition on Water Right No. 95-9055 prohibiting use of this ground water right for irrigation of land to which surface rights are available does not prohibit land application of treated municipal effluent on such land.

Letter from Christopher H. Meyer to Gary L. Spackman at p. 2 (Sept. 2, 2008) (in the files of Water Right No. 95-9055) (R. 995). In his letter, Black Rock's counsel observed:

---

[42] Standard condition 102 reads: "The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping."

[43] Riverside has never addressed Nampa's discussion of the "supplemental use only" condition, which was presented in its *Response Below* at 43 (R. 895) (quoting Memorandum from Mat Weaver to Jeff Peppersack copied to Gary Spackman ("***Review Memo***") (Sept. 23, 2008) at 5 (R. 1012)).

> This provision appears to have been inspired by Idaho Code § 67-6537 enacted in 2005. This statute, which is directed to local land use entities, not IDWR, requires land use applicants under the Local Land Use Planning Act to use surface water as the primary source of supply if it is "reasonably available." It is my understanding that the Department does not view this statute as prohibiting land application of municipal effluent from ground water to land where surface water is available, so long as the ground water was first used for in-house culinary purposes. Accordingly, we trust that the referenced condition is intended to prohibit only the use of this ground water right for direct irrigation, and does not prohibit the environmentally desirable goal of land application of treated effluent.

Id. at 3-4 (R. 996-997).

IDWR's Deputy Director Mat Weaver responded as follows:

> Mr. Meyer is correct in this regard. <u>This condition is speaking to the primary or first use the diverted groundwater is put to.</u> IDWR recognizes Municipal Use as being fully consumptive, as such, once the groundwater has served its initial purpose the Municipal Provider is free to use or reuse the reclaimed water at their discretion.

Review Memo at 5 (R. 1012) (emphasis added).

The Court should defer to the Department's sensible interpretation of its own condition language. Any other interpretation would subvert its purpose and undermine the decades of common law recognition (not to mention Subsection 8) that environmentally sound disposal of effluent is a good thing and fully compatible with the prior appropriation doctrine.

B. Recapture municipal wastewater and disposal of treated effluent is part of the municipal right and not an enlargement.

In the same section V.D of its brief, Riverside complains that the Reuse Project is an enlargement of Nampa's municipal rights. Riverside explores several cases having nothing to do with the subject, while declining to respond to Nampa's rebuttal of this argument.[44]

Simply put, it is well established policy in Idaho, as in all prior appropriation states, that re-capture and reuse or disposal of municipal waste water is part and parcel of the municipal right and not an enlargement thereof.[45] In short, environmentally mandated disposal of effluent

---

[44] Riverside has not addressed Nampa's discussion of the common law of municipal reuse set out in its *Response Below*, section III, pp. 30-48 (R. 882-901).

[45] "In the case of municipalities, the majority view is that the proper disposal of effluent from waste treatment facilities comes within the parameters of the beneficial use of a municipal water right." *Application Processing Memorandum No. 61* (Memorandum from Phil Rassier to Norm Young, p. 1 (Sept. 5, 1996) (R. 1059).

"Waste water treatment necessary to meet adopted state water quality requirements is considered by IDWR as part of the use authorized under a municipal right . . . ." Letter from Garrick L. Baxter to Christopher H. Meyer, p. 1 (Sept. 7, 2011) (R. 1050).

"In regards to the land application of treated municipal waters to the Black Rock project I have recognized and addressed two issues: (1) is the use allowed under the municipal use umbrella, and (2) would the land application represent a historical enlargement of actual consumptive use associated with the permit. . . . It therefore can be concluded that land application for the intent of irrigation can and should be allowed for under the general heading of municipal purposes. The second issue deals with the enlargement of the historical consumptive use of the water diverted under the permit. The municipal use is recognized by IDWR as being completely consumptive, in actuality this may or may not be the case. . . . If we consider the Administrator's Application Processing Memorandum No. 61 regarding industrial waste water and take forward the reasoning and direction put forth in that memo and apply it to municipal waste water, then the 'consumptive use' associated with the use can increase (over the historical base line value) up to the amount determined to be consistent with the original water rights as reasonably necessary to meet treatment (land application) requirements. . . . For all these reasons it would seem that <u>any enlargement of the consumptive component of the permit associated with the new practice of land application, can and should be allowed by IDWR</u>." *Review Memo* at 3 (R. 1010) (emphasis supplied).

is considered a "related purpose" within the meaning of municipal use.[46] Accordingly, there is no need to add "irrigation" to Nampa's municipal water rights in order to accomplish the Reuse Project. Riverside has failed even to acknowledge this long-established and consistently applied Departmental policy, much less has it offered a reason why the Court should override it, rather than defer to it.

C. *Rangen* is inapposite.

Riverside continues to cite *Rangen, Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016) and other cases dealing with the finality of decrees. *Rangen* dealt with a water right holder who tried to read more into its water rights than was there. This has no bearing on the case at bar. Neither Nampa nor Pioneer is trying to expand its water rights. Even if Subsection 8

"[T]he Municipal Provider is free to use or reuse the reclaimed water at their discretion." *Review Memo* at 5 (R. 1012).

"[N]ot only is the land application of treated wastewater allowed for under the municipal use general heading, but should be encouraged as a valid and worthwhile conservation effort." *Review Memo* at 6 (R. 1013).

"You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area, and that doing so does not cause legal injury to other water uses. You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use. . . . Finally, you confirmed that these uses would not require a transfer—assuming that the reuse of the effluent was required in order to satisfy environmental requirements." Letter from Christopher H. Meyer to Garrick L. Baxter and Jeff Peppersack, pp. 1-2 (May 24, 2011) (R. 1026-1027) (with edits reflecting changes made by Garrick L. Baxter in his letter of May 26, 2011) (R. 1040-1041).

[46] "Municipal purposes" is defined as "water for residential, commercial, industrial, irrigation of parks and open space, and related purposes . . . ." Idaho Code § 42-202B(6) (emphasis supplied).

did not apply, Nampa is acting within its water rights, and Pioneer does not need a water right in order to accept the gift of effluent lawfully delivered to it by Nampa.[47]

D. *A&B* is inapposite.

Riverside remains preoccupied with the case of *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005), a case involving a claim under the enlargement statute, Idaho Code § 42-1426. Over a number of years, A&B expanded its program of recapturing drain water that it originally diverted as ground water. It used the recaptured water to irrigate lands beyond the place of use of its ground water right. In the SRBA, it obtained beneficial use rights for such uses initiated prior to the 1963 mandatory permitting requirement, and it sought enlargement rights for such uses initiated after 1963. However, A&B was not satisfied with the deal it could get under the enlargement statute. Accordingly, A&B pursued an argument that its enlargement rights should be treated differently because its recaptured water was drain water, not ground water. Under this theory, A&B hoped to avoid the "subordination remark"[48] and to make the enlargement rights not subject to call by other ground water users.[49]

---

[47] Riverside simply ignores the briefing below in which Nampa explained why *Rangen* has no relevance here. *Nampa's Sur-Reply Brief* at 25 (R. 1193).

[48] In accordance with *Fremont-Madison Irr. Dist. v. IGWA,* 129 Idaho 454, 926 P.2d 1301 (1996), enlargement rights are issued with a remark subordinating them to all non-enlargement rights existing on the date of enactment of the enlargement statute (April 12, 1994).

[49] The *A&B* decision does not attempt to explain the strategic reasons behind A&B's theories. That must be derived from reading the briefs. Appellant's Opening Brief, 2004 WL 3644031; Ground Water User's Response, 2004 WL 3644033. The latter brief carefully charts the convoluted evolution of A&B's claims and theories.

The Supreme Court said there was more than one way of looking at this. First, the Court noted that drain, waste, or seepage water may be appropriated. Indeed, third parties often make such appropriations of waste water generated by others.

> The source of enlarged acres could be treated as recaptured drain and/or waste water and not ground water. Unfortunately for A & B, treating the water as recaptured drain and/or waste water would not accomplish the purpose it seeks.

A&B, 141 Idaho at 751, 118 P.3d at 83. In other words, A&B could have sought a new, junior-priority appropriation. But an enlargement right may be obtained only for enlargement of an existing right. *Id*.

Alternatively, the Court noted, "A & B may use the water on its original appropriated lots." *A&B*, 141 Idaho at 752, 118 P.3d at 84 (citing the right to reclaim and reuse waste water on the original land). But that did not help A&B either, because its use of the water was on new land.

Accordingly, the Court held that IDWR and the SRBA Court properly viewed A&B's enlargement claims as based on its original ground water right. Accordingly, those claims were approved, subject to the subordination remark.[50]

What does this have to do with Nampa's Reuse Project? Nothing. A&B is not a municipal water provider; A&B needed a new enlargement water right because its application to

[50] Riverside apparently believes that the *A&B* Court subjected the irrigation district's enlargement right to some sort of mitigation analysis. That is not so. It simply imposed the standard subordination remark required under *Fremont-Madison*.

new land fell outside the recapture and reuse doctrine. In contrast, Nampa and Pioneer do not need a new water right. As discussed above:

1. Nampa's reuse of its municipal ground water right for environmental disposal purposes falls within the recapture and reuse doctrine as it applies to municipal providers disposing of wastewater.

2. Doing so is not an enlargement.

3. In any event, Nampa is exempted by Subsection 8.

4. Nampa may rely on its agent/contracting entity, Pioneer, to effectuate its Reuse Program under Subsection 8.

5. Even without Subsection 8, Pioneer does not need a water right, because it is accepting a delivery of private water lawfully controlled by Nampa, which does not constitute a diversion from the public water supply.

6. Perhaps Pioneer could seek a new waste water right sourced in Nampa's delivery of effluent. But, for the reasons above, it is not required to do so.

7. Even if Pioneer did seek a waste water right, it would not be subject to the mitigation discussed *A&B*, which is applicable to enlargement rights, not new appropriations.

In sum, *A&B* has no bearing on this case.

VII. SUBSECTION 8 IS CONSTITUTIONAL.

Riverside pins its constitutional argument on Article XV, § 3.[51] Those words establish that people have a right to obtain a water right under the appropriation system, and that among

[51] "The right to divert and appropriate the unappropriated waters of any natural stream shall never be denied . . . . Priority of appropriation shall give the better right as between those using the water. . . ." Idaho Const. art. XV, § 3

such appropriations, their relative priority shall govern. The Constitution does not prohibit uses of water that are not based on a water right. Indeed, that is why it was necessary for the Legislature to enact the mandatory permitting statutes. Thus, the Legislature may make permitting mandatory or optional as it chooses, without violating the State Constitution.

Subsection 8 is not the only instance in which the Legislature has seen fit to exempt uses of water from the need to obtain a water right. Riverside's argument (that, in order to avoid unconstitutionality, Subsection 8 must be "applied" to require an injury analysis as is done in an appropriation or application proceeding) appears even more ludicrous when considered in the context of the other exemptions contained in Idaho Code § 42-201. If Riverside were right, its argument would require an injury analysis before a bucket of water could be lifted to fight a fire. Idaho Code § 42-201(3)(a). The same goes for domestic wells and stock watering[52]—exemptions that repeatedly have been recognized as proper by our courts.

Riverside contends that subsection 42-201(8) is unconstitutional *as applied* because "Riverside's senior water rights were injured." *Opening Brief* at 25. It is curious to frame this an "as applied" challenge, given that there was nothing particularly unique in how the Director applied Subsection 8. In any event, Riverside does not say how its water rights were injured, and it would be mighty hard to do so given the settled law that one is not entitled to demand that another water user continue to waste water for the benefit of another water user.

[52] Idaho Code §§ 42-111, 42-227 and IDAPA 37.03.08.035.01.b (exempting certain domestic wells). See also Idaho Code § 42-113 and IDAPA 37.03.08.035.01.c (exempting instream stockwatering).

Its argument then grows more perplexing: "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." *Opening Brief* at 25. We have just been through a thorough and costly proceeding that generated a record of 1,263 pages. How Riverside can think it was denied an opportunity to "make its case" is beyond Nampa's comprehension.

The Director did not ignore *Fremont-Madison Irr. Dist. v. IGWA*, 129 Idaho 454, 926 P.2d 1301 (1996), as Riverside contends. *Opening Brief* at 26-27. The Director took up Riverside's constitutional argument and rejected it succinctly. "However, Riverside is not entitled to Nampa's wastewater. Without that entitlement, there is no injury to Riverside." *Order* at 5 (R. 1234).

In sum, for the same reasons that Riverside cannot meet the test in Idaho Code §67-5279(4) (see discussion in section I.C beginning on page 7), its constitutional argument comes up short.

VIII. NAMPA IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL.

Nampa seeks costs and attorneys' fees under Idaho Code § 12-117(1)[53] for having to defend this case on appeal. This is a lawsuit between a state agency (IDWR) and a "person" (Riverside), thus bringing this statute into play.[54]

[53] Section 12-117(1) states:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable

Idaho Code § 12-121 does not apply here, because this is a judicial review. However, the courts have construed the standards under the two statutes as being essentially the same. If a party prosecutes a frivolous or baseless appeal, the opposing party is entitled to recover its attorney fees incurred as a result of having to defend against the appeal.

The Idaho Supreme Court has found that appeals are baseless, unreasonable, or frivolous when a non-prevailing party continues to rely on arguments made below without any additional persuasive law or bringing into doubt the existing law on which the lower court based its decision. *See Rangen, Inc. v. IDWR*, 159 Idaho 798, 812, 367 P.3d 193, 207 (2016) (citing *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005)).

Such is the case here. Riverside has presented no new authorities or arguments in support of its positions that differ from their case before the Director. Moreover, Riverside continues to disregard the counterarguments presented below. See, for example, footnotes 26 (on page 22), 33 (on page 26), 43 (on page 36), 44 (on page 36), and 47 (on page 40).

Nampa is mindful that this is a case of first impression. That is the reason that Nampa did not seek attorney fees below. And it may be reason enough to deny an award of attorney fees

---

> expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Idaho Code § 12-117(1) (emphasis supplied).

[54] A "political subdivision" is defined as "a city, a county, any taxing district or a health district," Idaho Code § 12-117(6). This definition also ties into the definition of "governmental entity" used in Idaho Code §§ 12-117(4) and 12-117(5)(b). It is Nampa's understanding that Riverside is not a Title 43 irrigation district and hence is not "taxing district." Accordingly, it is a "person," not a "political subdivision." If that is correct, section 12-117(4) does not apply, which would call for an award of fees to the prevailing party.

on appeal. On the other hand, the reason that this is a case of first impression may be that the answer is so obvious. Having had the benefit of extensive briefing by Nampa and the other Intervenors when the matter was before IDWR, and having had the benefit of the Director's *Order* (to which deference should be accorded), a case can be made that this appeal is frivolous. That is a call for the Court. In Nampa's view, however, the City's taxpayers should no longer be required to shoulder this burden. Perhaps it was fair for Riverside to have raised the question with the Director. But appeals like this defeat the purpose of the legislation.[55]

CONCLUSION

For the reasons discussed above, the Director's *Order* should be affirmed. The Director was correct that Subsection 8 exempts Nampa and its agents/contracting entities from the requirement to obtain a new water right. The Director's *Order* could also be upheld on the alternative ground that Nampa and Pioneer would not be required to obtain a new water right even in the absence of Subsection 8. Disposal of wastewater pursuant to environmental regulations constitutes a permissible use encompassed by Nampa's municipal water rights, which include an expanding place of use that may reach beyond the City's limits. Moreover, Pioneer's acceptance of delivery of effluent by Nampa is not a diversion of public water requiring a water right.

[55] "The purpose of this legislation, he said, was to get the water lawyers out of this business and to allow municipalities to spend their dollars and focus their attention on the issue at hand, which was the water quality side of the equation." Senate Resources & Environment Committee, p. 2 (Mar. 16, 2012) (emphasis added) (*Response Below* at 131 (R. 983)).

The Director was right, however, to focus on Subsection 8. Its whole purpose was to eliminate the need for this very debate over these principles of law. Riverside's challenge subverts the legislative purpose of Subsection 8 and seeks an end-run around the well-settled principle that it suffers no legal injury when another water user reduces the supply of waste water. It is because of that very principle that Subsection 8 is constitutional.

Respectfully submitted this 4th day of October , 2021.

GIVENS PURSLEY LLP

By: _____
Christopher H. Meyer

By: _____
Charlie S. Baser

Attorneys for
Intervenor City of Nampa.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October, 2021, the foregoing was filed, served, and copied as follows:

DOCUMENT FILED:

Third Judicial District Court Canyon County Courthouse 1115 Albany St Caldwell, Idaho 83605	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing

SERVICE COPIES TO:

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 Hand delivered Overnight mail E-mail iCourt e-filing
Gary L. Spackman Director IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 gary.spackman@idwr.idaho.gov	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Garrick L. Baxter Meghan M. Carter Sean H. Costello Deputy Attorneys General IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 garrick.baxter@idwr.idaho.gov meghan.carter@idwr.idaho.gov sean.costello@idwr.idaho.gov	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing

Charles L. Honsinger HONSINGER LAW, PLLC PO Box 517 Boise, ID 83701 honsingerlaw@gmail.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Sarah A. Klahn SOMACH SIMMONS & DUNN 2033 11th St, Ste 5 Boulder, CO 80302 sklahn@somachlaw.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Candice M. McHugh MCHUGH BROMLEY, PLLC 380 S 4th St, Ste 103 Boise, ID 83702 cmchugh@mchughbromley.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Chris M. Bromley MCHUGH BROMLEY, PLLC 380 S 4th St, Ste 103 Boise, ID 83702 cbromley@mchughbromley.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Andrew J. Waldera SAWTOOTH LAW OFFICES, PLLC 1101 W River St, Ste 110 PO Box 7985 Boise, ID 83707-7985 andy@sawtoothlaw.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Robert L. Harris HOLDEN KIDWELL HAHN & CRAPO, PLLC 1000 Riverwalk Dr, Ste 200 PO Box 50130 Idaho Falls, ID 83405-0130 rharris@holdenlegal.com	☐ ☐ ☐ ☐ ☒	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing

COURTESY COPIES:

Mary R. Grant Deputy City Attorney BOISE CITY ATTORNEY'S OFFICE 150 N Capitol Blvd PO Box 500 Boise, ID 83701 mrgrant@cityofboise.org	☐ ☐ ☐ ☒ ☐	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Johanna M. Bell Policy Analyst ASSOCIATION OF IDAHO CITIES 3100 S Vista Ave, Ste 201 Boise, ID 83705-7335 jbell@idahocities.org	☐ ☐ ☐ ☒ ☐	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing
Robert H. McQuade, Jr. General Counsel ASSOCIATION OF IDAHO CITIES 3100 S Vista Ave, Ste 201 Boise, ID 83705-7335 rmcquade@idahocities.org	☐ ☐ ☐ ☒ ☐	U.S. mail Hand delivered Overnight mail E-mail iCourt e-filing

Christopher H. Meyer