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

RIVERSIDE IRRIGATION DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources, Respondents.	Case No. CV14-21-05008
IN THE MATTER OF REUSE PERMIT NO. M-225-01, IN THE NAME OF CITY OF NAMPA	

INTERVENOR-RESPONDENT PIONEER IRRIGATION DISTICT'S RESPONSE TO PETITIONER RIVERSIDE IRRIGATION DISTRICT, LTD.'S OPENING BRIEF

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

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I. STATEMENT OF THE CASE

Pioneer Irrigation District ("Pioneer" or "District") generally agrees with the Statement of the Case advanced by Riverside Irrigation District, Ltd. ("Riverside") with the important exception of Riverside's erroneous assertions that Nampa City ("Nampa") wastewater treatment plant ("WWTP") effluent will as a matter of Pioneer water distribution operations, or must as a point of DEQ permit compliance, be "delivered" or "spread over" 17,000 acres of District lands under the Phyllis Canal located downstream of the treatment plant discharge point to the canal.

The Pioneer-Nampa *Recycled Water Discharge and Use Agreement* operates consistent with Nampa's statutory authorities and available water right exemption under Idaho Code Section 42-201(8), and serves legitimate purposes—there is no "scheme" here. Instead, Riverside merely seeks to compel others (Nampa) to continue wasting water (WWTP effluent) for Riverside's ongoing benefit. Riverside's contentions run contrary to over a century of Idaho legal precedent concerning wastewater principles in general. And, Riverside's contentions ignore the more modern flexibility and opportunity afforded to "municipalities" and "municipal" water rights concerning the disposal of WWTP effluent in response to environmental regulations in particular.

II. COURSE OF THE PROCEEDINGS

Pioneer also generally agrees with the Course of the Proceedings advanced by Riverside minus Riverside's editorial commentary. Riverside filed a *Petition for Declaratory Ruling* with the Idaho Department of Water Resources ("IDWR") on February 4, 2020, seeking determinations that: (a) Pioneer cannot accept Nampa WWTP effluent and apply it to irrigation use on District lands absent first obtaining a water right authorizing such use; and (b) Pioneer

failure to obtain a water right violates applicable Idaho law. R. 1-4. After consideration of significant briefing on the matter (R. 767-1144; 1151-1224), the Director issued his *Order on Petition for Declaratory Ruling* (May 3, 2021) ("Order"). R. 1230-1237. The Order speaks for itself, but ultimately held that: (a) Pioneer does not need a water right as contended by Riverside by operation of Idaho Code Section 42-201(8); (b) any Pioneer failure to first obtain a water right does not violate applicable Idaho law; and (c) Section 42-201(8) is constitutional as applied because downstream water users (Riverside) cannot compel others upstream to continue wasting water for the downstream water user's benefit; therefore Riverside lacks a legally cognizable injury absent any legitimate entitlement to Nampa's WWTP effluent. Riverside seeks judicial review of the Order in this Court. R. 1240-1247.

III. ADDITIONAL ISSUES ON APPEAL

Whether Pioneer is entitled to an award of reasonable attorney fees on appeal pursuant to Idaho Code Section 12-117 because Riverside's petition seeking judicial review of the Director's Order is not reasonably grounded in fact or law. *See* Section VII, below.

IV. STANDARD OF REVIEW

Pioneer largely agrees with Riverside's rendition of the applicable standard of judicial review in this matter, with the exception of Riverside's failure to include the well-settled concept of agency deference confirmed and reaffirmed by the Idaho Supreme Court in *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991). Typically, the interpretation and application of a statute (most notably Idaho Code Section 42-201(8) in this instance) is a question of law over which reviewing courts exercise free review.

However, the traditional standard of free review "is not applicable to agency determinations." *J.R. Simplot Co.*, 120 Idaho at 862, 820 P.2d at 1219. This is because "the courts are not alone in their responsibility to interpret and apply the law . . . numerous executive agencies have been created to help administer the law . . . As a result, this Court has long followed the rule that the construction given to a statute by the executive and administrative officers of the State is entitled to great weight and will be followed by the courts unless there are cogent reasons for holding otherwise." *Id.*, 120 Idaho at 854, 820 P.2d at 1211.

Though the concept of agency deference on questions of statutory construction had waned some over time, the concept "retains continuing validity" in Idaho after review of "extensive case history" on the subject, including that of the United States Supreme Court. *J.R. Simplot Co.*, 120 Idaho at 862, 820 P.2d 1219.

When determining the weight of deference to afford an agency's construction of a statute, reviewing courts apply a four-prong test:

(a) Determination of whether the agency is responsible for administration of the statute at issue;

(b) Determination of whether the agency's construction is reasonable;

(c) Determination of whether the statutory language at issue does not expressly answer the precise question at issue (*i.e.*, determination that there is interpretive gap-filling role for the agency to play); and

(d) Determination of whether any of the rationales supporting deference are present.

J.R. Simplot Co., 120 Idaho at 862, 820 P.2d 1219. The "rationales" supporting deference include: (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. *J.R. Simplot Co.*, 120 Idaho at 858-859, 820 P.2d at 1215-1216.

Under the fourth prong, "[i]f one or more of the rationales underlying the [deference] rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight' to the agency's statutory interpretation." *J.R. Simplot Co.*, 120 Idaho at 862, 820 P.2d 1219. On the other hand, in the absence of the foregoing "justifying rationales for deference," an agency's statutory interpretation is merely "left to its persuasive force." *Id.*, 120 Idaho at 862-863, 820 P.2d 1219-1220.

Additionally, when interpreting and applying a statute courts "examine the language used, the reasonableness of the proposed interpretations and the policy behind the statute, and will give effect to the purpose and intent of the legislature based on the whole act and every word therein, while lending substance and meaning to the provisions." *Mulder v. Liberty Northwest Ins. Co*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) (citations omitted). When choosing between alternative (or competing) constructions of a statute, a reviewing court "presumes that the statute was not enacted to work a hardship or to effect an oppressive result." *Id*. (citations omitted). Consequently, reviewing courts "will not read a statute to create an absurd result." *David and Marvel Benton Trust v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016).[1]

[1] To be clear, if a statute is unambiguous, its plain language is given its "obvious and ***rational*** meaning." *See, e.g.*, *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999) (emphasis added; citation omitted). When ambiguous, hardship and oppressive and absurd results are to be avoided.

V. STATEMENT OF FACTS

As noted by Riverside, the parties cooperatively drafted and submitted an extensive *Stipulation of Facts by All Parties* (Sept. 11, 2020) ("SOF") and related exhibits. R. 688-713 (Facts); 192-212 (Exhibits A-F), 213-250 (Exhibit G), 251-308 (Exhibit H), 309-389 (Exhibit I), 390-648 (Exhibit J), and 714-763 (Exhibits K-T).[2] Pioneer incorporates the entirety of the SOF herein. Rather than duplicate effort with a broad and separate statement here, Pioneer instead cites and refers to discrete facts as necessary to further support the arguments made below.

VI. ARUGMENT

A. The Director Correctly Interpreted and Applied Idaho Code Section 42-201(8) and The Director's Statutory Construction is Entitled to *Simplot* Deference

The Director determined that the Nampa-Pioneer *Recycled Water Discharge and Use Agreement* ("Reuse Agreement") (R. 205-212) comprised sufficient legal relationship between them allowing Pioneer to come under purview of Idaho Code Section 42-201(8), and the land application-based water right exception contained within it, despite the fact that Pioneer is not a "municipality," "municipal provider," "sewer district," or "regional public entity operating a publicly owned treatment works." Order, pp. 3-5.[3] Riverside disagrees, contending that the

[2] Consistent with Riverside, Pioneer will cite to the "SOF" by paragraph number and lettered document exhibit, rather than "R." going forward.

[3] Pioneer has consistently acknowledged that it is not one of the enumerated entities identified in Section 42-201(8). *See, e.g., Intervenor Pioneer Irrigation District's Response to Petitioner's Opening Brief* (Oct. 30, 2020) ("Pioneer Open"), pp. 6-9 (R. 1071-1074); *see also, Intervenor Pioneer Irrigation District's Sur-Reply Brief* (Dec. 11, 2020) ("Sur-Reply"), pp. 9-11 (R. 1211-1213).

Director committed reversible error by doing so. *Petitioner's Opening Brief* ("Pet. Open"), pp. 8-15. The Director reached the right result, and his decision is entitled to *Simplot* deference. Moreover, and as explained in Sections VI.A.3 and VI.B below, Pioneer is not exercising the water right exemption under subsection (8), Nampa is.[4]

1. Deference Owed

The traditional standard of "free review" does not apply to agency determinations regarding statutory construction and application provided that the "four prongs" applied in *J.R. Simplot Co.* above are met. Under the fourth "prong," the more "rationales" supporting deference that are present, the more deference is afforded, and the less likely that "cogent reasons" exist undermining the "considerable weight" of the Director's statutory interpretation in this matter. *J.R. Simplot Co.*, 120 Idaho at 862-863, 820 P.2d at 1219-1220. Agency deference is owed here because all four prongs of the *Simplot* test are met.

As with its SOF citations, Pioneer will cite to the "Reuse Agreement" (R. 205-212) by section number within it rather than "R." going forward.

[4] Whether Pioneer comes under the purview of Idaho Code Section 42-201(8) and the enforcement of traditional wastewater principles are the two drivers of this matter. This is because Riverside concedes at a minimum that: (a) Section 42-201(8) provides an express exemption to the more general water right requirements of Section 42-201(2); (b) Nampa, if acting alone, is entitled to redirect and make use of its WWTP effluent in a manner that avoids ongoing discharge to (and the artificial augmentation of flow in) Indian Creek to Riverside's detriment; and (c) using Nampa WWTP effluent for "irrigation" purposes downstream is appropriate and desirable. *See, e.g.*, Pet. Open, pp. 6; 27-30 (acknowledging Riverside's use of the WWTP augmented flows of Indian Creek for its own irrigation purposes); and pp. 8-15 (noting the "exemption" and "the statutory exemption" Section 42-201(8) provides, taking aim solely at Pioneer's status under the statute rather than contending in any way that Nampa is not a statutorily-enumerated "municipality" or "municipal provider," and begrudgingly acknowledging the "exemption Nampa may have" under the statute).

The first prong is satisfied because there is no dispute that IDWR (and, ultimately, the Director) is the agency responsible for the administration of Idaho Code Section 42-201. *See, e.g.*, 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"); *see also*, IDAHO CODE §§ 42-602, 42-1701, 42-1706, and 42-1805; *see also*, *Marty v. State*, 117 Idaho 133, 146, 786 P.2d 524, 537 (1989) (J. Bakes *dissent*) ("The Idaho Department of Water Resources is part of the executive department of the state government and its director is duly appointed by the Governor in whom is vested the supreme executive power of the state."). Riverside, Nampa, and Pioneer likewise acknowledge as much. *See, e.g.*, Pet. Open, pp. 1-2, including n. 1, and p. 7 (the parties stipulated to dismiss the DEQ appeal because the water right question was/is for IDWR to decide).

The second prong is satisfied because, as discussed in detail in Sections VI.A.2, 3, and 4 below, the Director's determination under the statute is reasonable in light of both the plain language of the statute, the plain language of Idaho Code Sections 42-202B(6) and 42-202B(9), the legislative history underpinning the enactment of Section 42-201(8), and the parties' Reuse Agreement.

The third prong is satisfied because, as discussed detail in Section VI.A.2 below, the statutory language of Section 42-201(8) does not expressly address the precise question raised in relation to Pioneer's participation under the statute. Rather, the statute is written in more general "land application" terms to breed effluent disposal mechanism flexibility.

And, the fourth prong is satisfied because at least four of the five "rationales" supporting deference are present. *See, e.g., Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002) (affording deference when only the first three of the "rationales" are present). IDWR's interpretation (1) is a practical interpretation; (2) the Legislature relied on the Department's testimony and role in drafting subsection (8); (3) IDWR, as the state's administrator of water rights and recognized expert (*see e.g.*, IDAHO CODE §§ 42-602, 42-1401B(1)), has the expertise to interpret Subsection 8; and (5) Subsection (8) was added in 2012 (*see* S.L. 2012, ch. 218, § 1, eff. July 1, 2012) and the agency's formal interpretation was provided in 2020, relatively contemporaneously with the statute at issue (*contrast, Canty*, 138 Idaho at 184, 59 P.3d at 989, where the Court found that an interpretation made in 1996 or 1997 was not contemporaneous with legislation passed in 1961). Consequently, the Director's interpretation and application of Section 42-201(8) is entitled to "considerable weight." *J.R. Simplot Co.*, 120 Idaho at 861-863, 820 P.2d at 1218-1220 (citing, with approval, *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Statutory Silence is Not a Categorical Prohibition and Riverside's Contentions Yield an Absurd and Unsound Result

Riverside's "Pioneer is precluded" argument distills to:

> Nothing in Idaho Code § 42-201(8) applies to Pioneer . . . the plain language of Subsection 8 does not include "agent" or "third party" or "irrigation district" . . . [The Director] does not apply [the] important rule of statutory construction to "exclude all others." Instead, he expands the statutory exemption to include others. In fact, after adding "agent" to Subsection 8 (where it does not appear), the Director then expands this new list of exempt entities even further.

Pet. Open, pp. 9; 12; and 13 (emphasis in original). According to Riverside, statutory silence constitutes a categorical prohibition. This is incorrect, and a conclusion that runs contrary to the second and third prongs of the *Simplot* deference test altogether. If Riverside's categorical prohibition position was correct, the second and third prongs of the *Simplot* deference test—reasonable statutory construction and whether the statutory language leaves interpretive gaps to be filled, respectively—would not exist; there could never be anything for an agency to interpret or apply (*i.e.*, no gaps to fill).

Instead, as the United States Supreme Court stated in *Chevron U.S.A.*, and the Idaho Supreme Court in *J.R. Simplot Co.* quoted and acknowledged with approval: "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *J.R. Simplot Co,* 120 Idaho at 861, 820 P.2d at 1218.

Thus, at worst, statutory silence creates an ambiguity—a gap to be filled by reasonable agency construction and interpretation, or that of the judiciary in the absence of prior agency application.[5] Statutory silence rising to the level of an ambiguity is addressed based on the "language used, the reasonableness of the proposed interpretations and the policy behind the

[5] "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 District*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003). Pioneer does not find Riverside's construction of Idaho Code Section 42-201(8) reasonable because it is "irrational" for reasons discussed herein in derogation of *State v. Burnight* above. But, "at worst" Riverside's construction if deemed reasonable creates an ambiguity which, in this case, is left to agency interpretive gap-filling in the first instance.

statute." *Mulder*, 135 Idaho at 57, 14 P.3d at 377. At bottom, "courts will not read a statute to create an absurd result." *David and Marvel Benton Trust*, 161 Idaho at 151, 384 P.3d at 398. Or, in the parlance of *Mulder*, statutes will not be interpreted "to work a hardship or to effect an oppressive result." *Mulder*, 135 Idaho at 57, 14 P.3d at 377. *See also*, *State v. Heath*, ___ Idaho ___, 485 P.3d 1121, 1124 (2021) (citation omitted) ("[w]e will not interpret a rule in a way that would produce an absurd result") and *State v. Kubat*, 158 Idaho 661, 664, 350 P.3d 1038, 1041 (Ct. App. 2015) (citations omitted) (the same rules of construction applying to statutes apply to the interpretation of rules).

Pioneer agrees that the terms "agent," "third party," and "irrigation district" cannot be found in Section 42-201(8). But, this does not mean that "agents," "third parties," "irrigation districts," or even "contractors" are categorically prohibited from coverage under the statute.

The plain language of Idaho Code Section 42-201(8) does not restrict application of the water right exemption to those instances where the land application activity (*i.e.*, effluent treatment and disposal) is wholly internalized, performed, and only occurs on lands owned by the "municipality," "municipal provider," "sewer district," or a "regional public entity operating a publicly owned treatment works." Instead, the statute speaks more broadly in terms of "land application" generally, performed in response to "state or federal regulatory requirements" regardless of end destination and regardless of who accomplishes the physical activity of end land application. The elegance of this approach (speaking in terms of land application broadly and generally) is that it provides flexibility and a variety of options under which the regulated community can accomplish their land application-based effluent treatment and disposal. So,

while true that "irrigation districts" cannot proceed under the statute in a vacuum, they can where, as here, they proceed at the behest of one of the statutorily enumerated entities (Nampa as both "municipality" and "municipal provider.").

Riverside's categorical prohibition approach is irrational and equally guilty of reading terms into the statute that do not exist. Riverside's interpretation requires one read into the statute non-existent terms dictating that the physical activity of land application must be wholly internalized and performed by a "municipality," "municipal provider," "sewer district," or a "regional public entity operating a publicly owned treatment works." But, the statute contains no such requirement.[6]

Furthermore, Riverside's gap-filling statutory construction, unlike the Director's, is untenable because it frustrates the end purpose of the statute (promoting creative solutions to the very expensive, unfunded mandate of Clean Water Act-based water treatment pollution control) by needlessly working a hardship, and fostering an oppressive or otherwise absurd result in derogation of *Mulder* and *David and Marvel Benton Trust* above. This is because under

[6] Riverside repeatedly does the very thing it criticizes—reading terms into a statute that do not exist—by later contending that the Director must at least conduct a "transfer analysis" under subsection (8) because "the plain language says nothing about not requiring a transfer application." Pet. Open, p. 18 (emphasis in original). Riverside cannot have it both ways, and its transfer-related contention is incorrect because the statute does speak to the issue at least in terms of land application location for IDWR tracking and monitoring. While no additional notice is necessary where effluent land application occurs on lands already located within the place of use of an existing water right, IDWR must receive notice of the location of any newly-irrigated lands on forms furnished by the agency prior to the land application. IDAHO CODE § 42-201(8). Thus, the statute expressly speaks to the issue of IDWR tracking and monitoring, just not under the Section 42-222 rubric Riverside thinks appropriate.

Riverside's approach, Nampa would either have to: (a) spend many millions of dollars on closed loop, redundant water distribution infrastructure (*i.e.*, duplicating the already-existing and neighboring water distribution capabilities of Pioneer's Phyllis Canal and laterals); (b) spend many millions of dollars purchasing sufficient land in fee simple on which it (Nampa) could then land apply its effluent (because, remember, under Riverside's theory, Nampa cannot contract with others to gain access to the landmass necessary to meet its land application needs); or (c) spend many more millions of dollars on WWTP engineering upgrades (filters and chillers primarily). *See, e.g.,* SOF, ¶¶ 36-43.

Riverside's suggestion that the Legislature teases "municipalit[ies]," "municipal provider[s]," "sewer district[s]," and "regional public entit[ies] operating a publicly owned treatment works" with the opportunity to creatively address unfunded water pollution control mandates on the front end, only to take away any meaningful opportunity to implement and accomplish those creative solutions via contract with others on the back end contradicts the very legislative history relied on by Riverside (Pet. Open, p. 9) concerning the enactment of subsection (8) necessary to resolve concerns over land application-based wastewater effluent disposal by the City of McCall.[7] In short, potential water right authorization infirmities

[7] Pioneer defers to, and incorporates herein, Nampa's arguments, legislative history and informal Department guidance/correspondence regarding the McCall matter. The materials (legislative history concerning the enactment of subsection (8), together with IDWR guidance to McCall counsel regarding the city's land application practices) are found at R. 909-1054, as well as R. 1091-1101.

associated with McCall's effluent land application-based disposal practices outside of McCall city limits spurred the enactment of Idaho Code Section 42-201(8) to end all doubt.

Prior to the enactment of subsection (8), IDWR guidance to the city considered the mechanism by which McCall implemented its effluent land application activities and expressed concern, in part, over the extent to which McCall retained an adequate measure of control over its effluent. Ultimately, the McCall effluent was used for irrigation by private landowners located approximately three miles south of the city. R. 1099-1100. McCall's access to, and use of the irrigation facilities and lands of others was, as is the case in this matter, secured by contract (the "*Three-Way Agreement*" and a series of "*Water User and Supply Agreements*") among the parties involved. R. 1093 (n. 3); 1099-1100. IDWR was satisfied by this contract-based approach and the agency actively participated in the proposal, drafting and enactment of subsection (8) accordingly. R. 1101.

During the underlying administrative proceeding in this matter, Pioneer found no record that McCall or any of the other contracting parties (Lake Irrigation District and the J-Ditch Pipeline Association) were required to obtain new and separate water rights either as the discharger of the effluent (McCall), or as the recipients of that directed discharge (landowners within Lake Irrigation District and the J-Ditch Pipeline Association members). Pioneer Open, pp. 9-10 (R. 1211-1212). Riverside never rebutted Pioneer's findings and assertions in this regard. Instead, Riverside's statutory construction contentions run contrary to the Department's McCall-related legal opinions then, and contrary to the Director's statutory interpretation and application determinations now.

Riverside's statutory construction contentions are further undone by Idaho Code Section 42-202B(9) irrespective of subsection (8). The parties' recycled water project under the Reuse Agreement and DEQ's *Reuse Permit M-255-01* (R. 221-250) ("Reuse Permit") was already authorized under Idaho Code Section 42-202B(9), wherein the "service area" of a municipality is broadly defined to include lands outside corporate limits or other recognized boundaries (*i.e.*, area of impact) in situations where the municipal system shares a "common water distribution system with lands located within the corporate limits." This is the case here where Pioneer's Phyllis Canal and laterals serve lands both inside and outside of Nampa's corporate limits, including the delivery of water to Nampa's Non-Potable System. SOF, ¶¶ 1-3, 20, 57-59. Given that subsection (8) was added to Idaho Code Section 42-201 to provide even greater clarity and flexibility concerning the regulatory response to the treatment and disposal of WWTP effluent than what already existed under Section 42-202B(9), makes Riverside's contentions under Section 42-201(8) all the more incorrect.

3. This Situation is a Simple Matter of Contract Well Within the Legal Authority of Nampa and Pioneer—Section 42-201(8) Does Not Require A Traditional Agency Relationship

As discussed in Section VI.A.2 above, Riverside's criticism of the Director's determination that the Nampa-Pioneer Reuse Agreement and Nampa's Reuse Permit sufficiently "intertwines" the entities is misplaced. Section 42-201(8) requires no particular legal relationship mechanism, speaking only of the activity of "land application" generally and dictating nothing regarding the end performance of that task.

The purpose of subsection (8) is to provide a water right exemption ("Notwithstanding the provisions of subsection (2) of this section . . .") to those "operating a publicly owned treatment works" subject to "state or federal regulatory requirements." IDAHO CODE § 42-201(8). Pioneer is exercising no such exemption because Pioneer ***acceptance*** of Nampa WWTP effluent gives rise to no water right that Pioneer can perfect. Likewise, Pioneer is not exercising the exemption because it is not the owner-operator of the pertinent "publicly owned treatment works" subject to "state or federal regulatory requirements"; it is not the NPDES permittee concerning WWTP operations and discharges; and it is not the DEQ permittee either. SOF, ¶¶ 23; 25; 29; 36-47; 50-53; *see also,* Reuse Agreement (R. 210), § C.17, and Reuse Permit (R. 221-250), *generally*. Nampa is the facility owner, operator, and the regulated entity. Pioneer's Phyllis Canal is merely a conduit for achieving the land application effluent disposal option available ***to Nampa*** under Idaho Code Section 42-201(8); the Phyllis Canal is a means to an end.

Riverside is correct: Pioneer is a creature statute authorized to exercise only those powers given it by statute, or necessarily implied therefrom. Pet. Open, p. 10. But, Pioneer and Nampa are legally authorized to enter into the parties' Reuse Agreement. *See*, *e.g.*, and *compare*, IDAHO CODE §§ 50-301 (authorizing cities to "contract and be contracted with" for lawful purposes) and 43-304 (authorizing irrigation districts to do the same, among other actions, so that "sufficient water may be furnished to the lands in the district for irrigation purposes"); *see also, Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 550-552, 808 P.2d 1289, 1297-1297

(1991) (contract-based delegation of authority inherent to one (Title 42 authorizations belonging to NMID), but not inherent to another (Nampa School District No. 131) is permissible).[8]

The impermissible leap of Riverside's logic is its conclusion that ***Pioneer***, by acceptance of Nampa WWTP effluent, is exercising a water right under Idaho Code Section 42-201(8) for which the statutory exemption is necessary. Pioneer is not operating in a vacuum.

Riverside cannot identify any effluent-related point of diversion under Pioneer control and physical operation or management—there is no headgate or wellhead within ***Nampa's*** Potable System that Pioneer manages or controls. For example, and as discussed at pages 12-13 (R. 1077-1078) of Pioneer's Open and pages 9-11 (R. 1211-1213) of Pioneer's Sur-Reply, Pioneer's Phyllis Canal is not a "point of diversion," rather it is a point of "acceptance"—the intersection of where Pioneer's already diverted (and thus private) Phyllis Canal water meets that of Nampa's WWTP pipeline (also already diverted and thus private water, none of which has commingled with any other diffuse sources of water that is otherwise appropriable public water

[8] In the context of irrigation water supply more specifically, municipalities are further authorized to contract with irrigation districts, among other irrigation water delivery entities, in furtherance of their municipal pressurized irrigation systems (*i.e.*, Nampa's Non-Potable System). IDAHO CODE §§ 50-1801, 50-1805, and 50-1834 (all confirming Nampa and Pioneer's ability to "contract" with one another for irrigation supply and distribution purposes); *see also*, SOF, ¶¶ 15, 19-20 (existing contractual relationship between Nampa and Pioneer under Title 50, Chapter 18). Pioneer ***and*** Nampa's authority to contract for purposes of supplying and distributing water is broad: "cities ***and*** irrigation districts . . . are . . . authorized to make, execute and deliver any and all contracts, indentures, deeds and instruments necessary and proper to put sections 50-1801 through 50-1835 into effect . . . and to do any and all things necessary to put into effect and carry out the provisions of sections 50-1801 through 50-1835." IDAHO CODE § 50-1834 (emphasis added). This includes the authorization to cooperatively develop and use by "contract," among other mechanisms, both the "public ***or private waters*** of the state of Idaho." IDAHO CODE § 50-1801 (emphasis added).

of the state). *See, e.g., Washington Irr. Dist. v. Talboy*, 55 Idaho 382, 389-390, 43 P.2d 943, 946 (1935) (water stored or conveyed in manmade reservoirs and ditches is already appropriated and no longer "public water[ ]" subject to appropriation). The parties' Reuse Agreement is necessary because Nampa could not otherwise gain access to Pioneer's Phyllis Canal for effluent discharge purposes (*see, e.g.,* IDAHO CODE §§ 42-1102 and 42-1209 (obligating one to secure "written permission" prior to encroaching upon irrigation facilities)), and Pioneer could not otherwise gain access to Nampa's WWTP effluent (*see, e.g., Washington Irr. Dist.* above; *see also,* IDAHO CODE § 42-110 ("Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used or otherwise physically controlled by the appropriator")).

Instead, determinations concerning the timing, quantity, and control of Nampa wastewater effluent discharge to the Phyllis Canal rest with Nampa. If Nampa pumps and diverts no Potable System groundwater, Pioneer receives nothing. If Nampa pumps and diverts (and the WWTP produces) less than 31 cfs of recycled wastewater effluent, then Pioneer will receive that lesser amount. Finally, if Nampa constructs and wholly internalizes a separate and parallel gray water system in the future Pioneer will, again, receive nothing. *See, e.g.*, SOF, Ex. F (Reuse Agreement; R. 205-212), p. 4 (§ B.3) (City is not obligated to, nor guarantees any delivery of recycled water to Pioneer). In sum, Pioneer simply has no say or control over inputs into Nampa's Potable System and its WWTP on the front end; Pioneer does not perform, nor control, any physical act of diversion from an appropriable source of water. Consequently, Pioneer is not exercising the water right exemption under Section 42-201(8) pursuant to the

Reuse Agreement; rather Nampa is. Pioneer is merely a conduit to end land application of whatever quantity of effluent Nampa discharges to the Phyllis Canal and that function is easily and efficiently accommodated as a function of simple contract.

The Director's sufficiently "intertwined" finding is correct—there need be no traditional/formal agency relationship under Section 42-201(8). Instead, there only need be enough legal relationship (intertwining) between the parties under which Pioneer can serve as a contract service provider (the land applicator of Nampa's WWTP effluent) because it is Nampa, ***not Pioneer***, that is exercising the water right exemption authorized under the statute. In this instance the Reuse Agreement provides Pioneer access to Nampa's private property (its WWTP effluent stream), and the agreement provides Nampa access to Pioneer's private property (the Phyllis Canal and related delivery laterals serving Nampa). Thus, and "[d]espite absence of a formal agency relationship, Subsection 8's exemption may still apply in this case." Order, p. 4. Subsection (8) applies "[g]iven the contractual and regulatory ties between Nampa and Pioneer." *Id*., p. 5.

4. To the Extent an Agency Relationship is Necessary, Pioneer's Obligations Owed in the Reuse Agreement Suffice

To be clear, and as discussed immediately above, Idaho Code Section 42-201(8) does not require a traditional agency relationship between Pioneer and Nampa to effectuate the land application of Nampa's WWTP effluent. Pioneer is not the one exercising any water right exemption provided under the statute; rather it is merely a land application contractor. But, even if an agency relationship were necessary under the statute, Pioneer submits in the alternative that

elements of the parties' Reuse Agreement create a sufficient measure of control and end legal obligation to suffice in forming a limited agency relationship between Nampa and Pioneer.

"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). Pioneer and Nampa clearly check this box under their Reuse Agreement—Pioneer gains access to Nampa's WWTP effluent and agrees to dispose of the same via land application on Nampa's behalf in accordance with Nampa's Reuse Permit (*i.e.*, the performance of the land application "task" in a regulatorily-compliant manner). But, Riverside cites Nampa's lack of control over day-to-day Pioneer operations as fatal to any alleged agency relationship. Pet. Open, pp. 14-15.

This is not a case of vicarious liability, or other tortious or criminal scheme (*see, e.g.*, Riverside's erroneous citation to Idaho Code Section 6-803(5) and *Knutsen's* treatment of the same), and limited agency relationships can exist absent a principal's day-to-day control over an agent. *Nelson v. Kaufman*, 166 Idaho 270, 277, 458 P.3d 139, 146 (2020), *citing Restatement (Second) of Agency*, § 14N (even independent contractors can be considered "agents" when a contractor "is a fiduciary owing the purported principal 'the basic obligations of agency: loyalty and obedience.'"). Pioneer owes Nampa these "basic obligations" concerning the acceptance, conveyance, and Reuse Permit-compliant land application (statutorily and Reuse Permit-compliant "disposal") of Nampa's WWTP effluent.

Under the terms of the parties' Reuse Agreement, Pioneer is obligated to accept upwards of 41 cfs of recycled wastewater and to "grant" Nampa "all necessary licenses and easements"

allowing for the construction, operation, and maintenance of Nampa's piped discharge to the Phyllis Canal. SOF, Ex. F (Reuse Agreement; R. 205-212), §§ B.1 and B.2. Regarding the obligation to accept Nampa's effluent, Pioneer obligates itself to adjust its otherwise typical canal diversion operations to accommodate the forecasted quantities of Nampa effluent (*i.e.*, "so that Pioneer can coordinate its canal operations accordingly"). *Id.*, § A.2.a.

Pioneer is also obligated to "actively cooperate" with Nampa to "obtain all permits and approvals from DEQ" necessary to secure the Reuse Permit. *Id.*, § B.4. And, the parties' Reuse Agreement expressly obligates Pioneer to manage the conveyance and use of Nampa's effluent in a manner accomplishing the land application-based environmental regulatory treatment of that water consistent with Nampa's statutory obligations under Idaho Code Section 42-201(8) (Nampa's "collection, treatment . . . [and] disposal of effluent from a publicly owned treatment works . . . employed in response to state or federal regulatory requirements"). *Id.*, § B.3 (Pioneer acknowledging Nampa's need to access the Phyllis Canal "for effluent and temperature mitigation" and obligating Pioneer to "handle, manage and convey" Nampa's WWTP effluent "as in integrated part of [Pioneer's] irrigation operations"); *see also, id.*, § C.2 (obligating Pioneer to a 25-year contract term (barring the occurrence of certain enumerated circumstances) because of Nampa's "long term NPDES Permit compliance requirements").

Finally, Reuse Agreement Section C.5 requires Pioneer to defend, indemnify, and hold Nampa harmless from any claims arising or resulting from Pioneer's conveyance and land application delivery of Nampa's effluent in the Phyllis Canal, provided that the claims are not related to any Nampa acts or omissions arising prior to discharge to the canal. R. 209. All of the

foregoing Pioneer commitments are ongoing and subject to adjustment over time upon Nampa need or request to do so in order to maintain the viability and efficacy of Nampa's land application-based regulatory response.

Through the Reuse Agreement, Nampa exerts a measure of control, no matter how limited, over various aspects of Pioneer's typical operations (particularly in terms of Pioneer's otherwise routine canal operations (*i.e.*, need to make room) and Pioneer's flow/spill management from its 15.0 Lateral system to avoid a potential pathway back to regulated waters of the United States) to achieve ***Nampa's*** regulatory objectives and obligations. Pioneer is not free to unilaterally do whatever it pleases with Nampa's effluent. Pioneer cannot simply spill Nampa's WWTP effluent water from its system prior to its land application-based irrigation use, or otherwise deliver that water to another entity outside its boundaries absent express modification of the Reuse Agreement and the Reuse Permit. *See* Reuse Agreement (R. 205-212), § C.7 and Reuse Permit (R. 221-250), pp. 7 (identifying Pioneer and the Phyllis Canal as the "method of treatment and reuse"), 15-16 (incorporating Phyllis Canal operations and flow data into Nampa monitoring and annual reporting requirements), and 25 (prohibiting permit modification absent mutual express agreement of DEQ); *see also*, SOF, Ex. H (DEQ Staff Analysis; R. 259-308), pp. 9-10; 19-34 (incorporating the Pioneer service area (Phyllis Canal and related laterals) downstream of the proposed Phyllis Canal discharge point as the "Area of Analysis" for purposes of determining land application-based pollution control efficacy as authorized under the parties' Reuse Agreement).

No matter how slight Nampa's "control" may be, it nevertheless exists as a matter of contractual obligation. Riverside's contentions that Nampa lacks control altogether are factually and legally incorrect.[9]

B. Riverside Also Misconstrues Idaho Code Section 42-201(2) Yielding an Absurd Result

Concluding that Idaho Code Section 42-201(8) does not apply in this case, Riverside proceeds to its "next step": "examin[ing] the requirement o[f] Idaho Code § 42-201(2) to obtain a water right before putting ***new water*** to beneficial use." Pet. Open, p. 15 (emphasis added). However, the Director correctly determined that subsection (8) does apply, and that it comprises an express exception to subsection (2)'s requirements. Order, pp. 3-5. Nonetheless, assuming *arguendo* that Riverside's subsection (8) contentions are correct—which they are not—its subsection (2) arguments are incorrect at a minimum because: (a) Riverside illogically divorces the acts of threshold physical diversion from the subsequent act of applying the water to end beneficial use; and (b) Pioneer "diverts" no water from a natural or otherwise appropriable source of public water under the Reuse Agreement—there is nothing "new" about Nampa's WWTP effluent; it is spent Potable System residual derived from prior diversion and use under Nampa's municipal water rights.

[9] Relatedly, Nampa and Pioneer already operate under an agency relationship between them concerning the supply and distribution of irrigation water. SOF, ¶¶ 15, 19-20 (including Exs. L and M). Under Idaho Code Section 50-1805, Nampa has contractually assumed Pioneer's preexisting and underlying "duty" to distribute irrigation water to those Pioneer landowners under the reach of Nampa's municipal irrigation system entitled to the delivery and use thereof.

Riverside's reading of subsection (2)'s disjunctive "or," and selective amplification of the phrase "apply water to land" in isolation is non-sensical. Pet. Open, pp. 15-16 (emphasis in original). Riverside contends that one needs a valid water right authorizing the separate physical acts of: (a) diverting water from a natural watercourse no matter the end destination or use of the water diverted; ***or*** (b) applying water to land without consideration of whether it was "diverted" or not—either one of which can, according to Riverside's statutory construction, occur in isolation. But, one cannot affirmatively "apply water to land" without some preceding physical act of diversion from somewhere beforehand, otherwise the water would not be available to apply to the land. Consequently, the water right-based land application admonition of subsection (2) ties directly to the physical act of diversion clause present immediately before it.

Riverside's argument impermissibly yields an illogical, irrational, and absurd result. *See Burnight* and *Mulder* above. Understandably, however, it is the only argument Riverside can make under Section 42-201(2) because Pioneer "diverts" no water; rather it only "accepts" delivery of private water from Nampa and disposes of that water by delivering it to those who apply it to the land.

Subsection (2) cannot apply to Pioneer in this instance because perfection of a water right requires, with limited exception: (a) physical diversion from a natural (or appropriable) public water source; and (b) application of the water to end beneficial use. *See, e.g., State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000); *see also*, Idaho Const. Art. XV, Sec. 3, and IDAHO CODE §§ 42-101, 42-103, and 42-201(2) (each speaking in terms of the "unappropriated" waters of "natural stream[s]," "waters . . . flowing in their natural channels,"

"rivers, streams, lakes, springs, and subterranean waters or other sources," and "natural watercourse[s]," respectively).[10] Again, Riverside can point to no headgate, wellhead, or other physical diversion structure that Pioneer owns, operates or controls under the parties' Reuse Agreement or the Reuse Permit.

Instead, ***Nampa diverts*** its Potable System water from the appropriable source (groundwater). The recycled water Pioneer ultimately receives is that already appropriated, used, and remaining in the complete physical control of Nampa through the city's pipeline to the point of discharge into the Phyllis Canal. ***Pioneer's use of Nampa's recycled water derives solely from the Reuse Agreement (contract), not from any physical act of diversion undertaken or controlled by Pioneer***. Accordingly, the Reuse Agreement specifically acknowledges that Pioneer's rights to the recycled water are contractual only. Reuse Agreement (R. 205-212), §§ A.9 and B.3 (Pioneer expressly acknowledging that Nampa is not obligated to, nor guarantees, the discharge of recycled water to the Phyllis Canal).[11]

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[10] The limited exceptions from the physical diversion requirement are in-stream stock-watering, and instream minimum streamflow rights appropriated by the Idaho Water Resource Board under Idaho Code Section 42-1501, *et seq*. *State v. United States*, 134 Idaho at 111, 996 P.2d at 811. Neither of these limited exceptions apply here.

[11] Riverside also contends that land application under the Reuse Agreement and the Reuse Permit violates Nampa Potable System water right conditions concerning the supplemental use of that water for irrigation purposes. Pet. Open, pp. 18-22. Riverside is correct that some Nampa Potable System water rights cannot be used in the first instance for irrigation purposes under the auspices of "municipal purposes" under Idaho Code Section 42-202B(6). But, Nampa is not doing that under the Reuse Agreement or the Reuse Permit. Instead, the water collected at, and discharged from, Nampa's WWTP is that used first for non-irrigation-related municipal purposes such as domestic, commercial, and industrial use. SOF, ¶¶ 23 and 25 (municipal irrigation ***does not*** generate "sewage" collected and piped to Nampa's WWTP for treatment and disposal). It is the "spent" water residual (WWTP influent and effluent) ***from***

C. *Janicek* and *A&B Irrigation District* Are of No Help to Riverside

Riverside's reliance on Special Master Booth's *Memorandum, Decision and Order on Motion for Summary Judgment* (May 2, 2008) ("MDO") in *In Re SRBA Subcase 63-27475* (*Janicek Properties, LLC*) ("*Janicek*"), and *A&B Irrigation District v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) provide it no traction in this matter. Pet. Open, pp. 16-18; 22-24. Instead, Special Master Booth's MDO supports Nampa and Pioneer arguments, and *A&B Irrigation District* is inapposite at most.

The fatal flaws in Riverside's contentions are: (a) its ongoing misconception that ***Pioneer*** is diverting publicly appropriable water or otherwise exercising the water right exemption under Idaho Code Section 42-201(8); and (b) its repeated application of more traditional irrigation-based water right principles to the "municipal" water rights at issue here,

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non-irrigation-related municipal purposes that is at issue in this matter. Thus, Nampa is not making any improper front-end irrigation use of its Potable System water in derogation of the water right condition raised by Riverside.

Further, "municipal" uses of water include the use of water for "residential, commercial, industrial, irrigation of parks and open space, ***and related purposes*** . . . which a municipal provider ***is entitled*** or obligated to supply." IDAHO CODE § 42-202B(6) (emphasis added). Section 42-202B(6) is not an exhaustive or exclusive list of uses. The question then becomes what other "related purposes" might be? It is expressly clear under Section 42-201(8) that one of those "related [municipal] purposes" is the "collection, treatment, storage or disposal of effluent from a publicly owned treatment works . . . including land application . . . employed in response to state or federal regulatory requirements." IDAHO CODE § 42-201(8). Nampa is statutorily "entitled" to pursue this land application path. *See also, Application Processing Memorandum No. 61* (Sept. 5, 1996) (R. 1059) ("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.").

including Nampa's express statutory authorization concerning the "collection, treatment . . . [and] disposal of effluent from a publicly owned treatment works . . . employed in response to state or federal regulatory requirements" under Idaho Code Section 42-201(8). Pioneer is "diverting" nothing, the differences between municipal water rights and more traditional irrigation water rights matter in this proceeding, and neither *Janicek*, nor *A&B Irrigation District* address this situation.

"Municipal purposes" of use include a variety of potential uses: domestic, commercial, industrial, irrigation, and "related purposes." IDAHO CODE § 42-202B(6); *see also*, n. 11 above. Municipal water rights are afforded unique forfeiture protections (*i.e.*, "planning horizons") and greater quantities than presently needed ("reasonably anticipated future needs") that are immune from more traditional speculation concepts such that municipal providers can "grow into" their water rights under much longer development periods than typical water rights. IDAHO CODE § 42-202B(7) and (8).

Municipal water right places of use are also far more flexible and forgiving. Their "service area" (*i.e.*, place of use) is not fixed; rather it can grow, develop, and evolve over time. IDAHO CODE § 42-202B(9). And, the municipal "service area" can extend far beyond corporate limits or other more traditionally recognized boundaries when, as here, the municipal provider "shares a [larger] common water distribution system" with lands otherwise "located within the corporate limits." *Id*.

Perhaps, the most significant difference between municipal purpose and more traditional irrigation-purpose water rights is that of authorized/expected degree of consumptive use.

Traditional irrigation water rights are limited by the concept of historic consumptive use—the quantity of water used and transpired by crops and vegetation never to return again as tail or operational spill water, or subsurface seepage. Unlike more traditional irrigation water rights, municipal water rights are considered "fully consumptive" with no expectation or requirement of residual returning to the ground or other surface water supply. *See, e.g.*, *Administrator's Memorandum* (Transfer Processing No. 24) (Dec. 21, 2009) ("Transfer Memo No. 24"), p. 31 at § 5.d(9) (characterizing "water under non-irrigation uses such as . . . municipal . . . to be fully consumptive"), and *compare id*., § 5.d(5) (requiring evaluation of "historic beneficial use" and "historic consumptive use" to determine the amount of water available for transfer from a traditional irrigation water right to a different purpose of use).[12]

Regardless, Special Master Booth's holdings in *Janicek* do nothing to undermine Nampa's disposal of its WWTP effluent via land application through Pioneer's Phyllis Canal under Idaho Code Section 42-201(8). Instead, his acknowledgement and discussion of the concepts of "private" water, the overarching right of "recapture," and the differences between a "drain ditch" and a "delivery canal" support the Reuse Agreement. MDO, pp 6-9.

[12] Pioneer appreciates that Transfer Memo No. 24 evaluates water right transfer applications as opposed to addressing the need for, and initial appropriation of, water rights as raised in the context of Riverside's *Petition for Declaratory Ruling Regarding Need For A Water Right To Divert Water Under Reuse Permit No. M-255-01* (Feb. 24, 2020). However, Idaho Code Sections 42-203A(5) and 42-222(1) governing the review of new applications for water right permits and water right transfer applications, respectively, share virtually identical "injury" evaluation criteria. Consequently, Transfer Memo No. 24 guidance concerning application review for "injury" and "enlargement" is instructive in the context of Riverside's Petition.

In this case, Nampa's pipeline to the Phyllis Canal is nothing like the "ditch" at issue in *Janicek*—"a ditch constructed for the purpose of intercepting and collecting seepage or waste water from saturated soils . . . [a] ditch [that] will collect whatever water drains into it, and there is simply no way to regulate, limit, or shut off the flow of water into the drainage ditch." MDO, p. 8. To the contrary, Nampa's effluent pipeline is entirely closed, commingles with no other water between the WWTP and the Phyllis Canal, and is entirely regulated and controlled in terms of the flow directed through it; Nampa's pipeline is like a "canal" consistent with Idaho Code Section 42-110 ("the property of [Nampa] while it is lawfully diverted, captured, conveyed, used, and otherwise physically controlled by [Nampa]").[13]

[13] Perhaps the best illustration of Riverside's mistreatment of private versus public water is its prior statement and conclusion that Nampa's effluent discharge becomes public, appropriable water again at the moment it drops from the end of its pipeline into the Phyllis Canal. R. 1134-1135 (Riverside Reply, pp. 29-30) ("But the facts are clear—Nampa relinquishes control over the water when it leaves Nampa's pipeline, where Pioneer diverts it into the Phyllis Canal. At that point the water is subject to appropriation."). This was an astonishing assertion. Both because there is no physical act of "diversion" by Pioneer, and because at least some amongst Riverside's leadership and shareholders would certainly disagree that water flowing in the Riverside Canal (a private ditch like Pioneer's Phyllis Canal) is somehow open to appropriation by others. The assertion also ignores the "canal" based distinction made by Special Master Booth in *Janicek.*

Riverside may attempt to latch onto this discussion as a Pioneer concession of a physical act of "diversion" for water right purposes. But any such temptation is incomplete and incorrect because Pioneer controls nothing with respect to the flow of water received into the Phyllis Canal via the pipeline. Recall that Pioneer must react and make room in the canal necessary to accommodate the flow of effluent Nampa discharges from its WWTP. Pioneer controls no upstream valve, headgate, wellhead or any other water diversion infrastructure. Instead, all such devices are, and remain, entirely under the control of Nampa. As Reuse Agreement Section B.3 makes clear: "the City is not obligated, nor does it guarantee, to provide any Recycled Water flow to Pioneer." Further, any such assertion would run contrary to Riverside's prior, and correct, concession that the parties' Reuse Agreement is based on Pioneer's "***acceptance and***

Riverside fails to recognize the difference between appropriable wastewater (that which has comingled with other waters after lost physical control coupled with a lack of beneficial use need) and non-appropriable wastewater effluent (that which has not yet comingled with other waters, that which is still physically controlled in its entirety within a closed, private system, and that for which a beneficial use need still exists). Nampa's effluent is private, recaptured water because of: (1) its complete control and dominion over the same via discharge to the Phyllis Canal; and (2) the application of that water, in its entirety, to a beneficial use (environmental regulatorily-compliant disposal via land application-based irrigation through the Phyllis Canal under the Reuse Agreement). Under Idaho Code Section 42-201(8), Nampa is not merely "able to beneficially use all of the water so collected" (MDO, p. 9), ***it must use all of the effluent water it treats and collects for land application purposes*** or it fails the effluent "disposal" authorization given it under subsection (8) and the Reuse Permit. In other words, and unlike *Janicek*, there is no unused "balance remaining in the ditch subject to appropriation by others." MDO, p. 9.[14]

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delivery of Nampa's effluent," not Pioneer's "diversion" of water from any appropriable source. R. 1111 (Riverside Reply, p. 6) (emphasis added).

[14] It is true that Pioneer owns a variety of drain-based (sourced) water rights in its water right portfolio, but those water rights like that in *Janicek* are based on the "balance remaining in the ditch" ultimately subject to the ongoing right of recapture by the original appropriators upstream when the original appropriators have the ability and need to do so. As stated before (Sur-Reply (R. 1200-1224), p. 13, including n. 2), Nampa's closed pipeline discharge to the Phyllis Canal is not a diversion from a "typical drain." This is, again, because there is no comingling of the WWTP effluent with other diffuse sources of water after relinquishment of physical control as is the case of diversions from a "typical drain." But, "it's not very different either" because it is a form of wastewater that neither Pioneer, nor Riverside, can compel Nampa to waste for their respective benefit, or that Pioneer can otherwise access but for its contractual

Riverside's misapplication of *Janicek* occurs again under *A&B Irrigation District*—another case examining the appropriability of drain ditch water in the context of a traditional irrigation water right setting. As explained in Pioneer's Open (R. 1062-1101), pp. 15-17 and its Sur-Reply (R. 1200-1224), pp. 11-18, *A&B Irrigation District* is inapposite at best. Pioneer agrees that the source of Nampa's WWTP effluent is, and continues to be, "groundwater." But there is more to the analysis than source alone, and there simply is no enlargement or per se injury in this matter.

There is no impermissible enlargement because municipal water rights are considered "fully consumptive." *See, e.g.*, Transfer Memo No. 24, p. 31 at § 5.d(9). And, "related" municipal purposes under Section 42-202B(6) also include land application-based "disposal of WWTP effluent "employed in response to state or federal regulatory requirements" under Section 42-201(8). One cannot enlarge use of that which can (and in the case of WWTP effluent disposal, must) be used to extinction.

There also is no enlargement because there is no irrigation of new ground—no breaking out of arid/dry acres devoid of an existing water right as was the case in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*. *See id.*, 141 Idaho at 751-752, 118 P.3d at 83-84 (discussing *A&B's* enlarged/"additional 2,363.1 acres" irrigated beyond reuse on its

opportunity under the Reuse Agreement. Pioneer has been consistent and clear on this important point of physical control/diffuse water commingling distinction, while Riverside ignores it altogether.

"appropriated properties" (*i.e.*, its originally wet/irrigated acres under its initial appropriations)).[15]

And finally, Idaho Code Section 42-201(8) overrides any potential concerns over traditional notions of increased consumptive use or enlargement (or expansion). As subsection (8) makes clear, "***notwithstanding***" these more traditional concerns, municipal providers like Nampa are specifically authorized to implement the land application practices contemplated in the Reuse Agreement and the Reuse Permit in response to environmental regulatory requirements. Nampa can even do so by breaking out and irrigating entirely new lands, provided that it first submits notice to IDWR of the location of the newly-irrigated lands. IDAHO CODE § 42-201(8) ("If land application is to take place on lands not identified as a place of use for an existing water right, the municipal provider . . . shall provide the department . . . with notice describing the location of the land application . . . prior to the land application taking place.").

Likewise, there is no "per se injury" under *A&B Irrigation District* because Riverside's water rights only entitle it to divert up to 180 cfs of the ***natural flow*** of Indian Creek (or at least

[15] Similar to Riverside's inability to point to any new Pioneer point of diversion from a natural or otherwise appropriable water source, Riverside cannot point to any new dry acreage being reclaimed by use of Nampa's recycled wastewater. Instead, Nampa's recycled water is being used within Pioneer's place of use/service area on lands already entitled to delivery and use of irrigation water under Pioneer's water rights. SOF, ¶¶ 1, 14-15, 20, and 57-59. This too, is consistent with IDWR guidance on the topic of land application of effluent. Transfer Memo No. 24 at §§ 1, 2, and 5.d(9) (land application of wastewater requires a transfer "when there is not a full, existing water right for irrigation of the place of use receiving wastewater"; conversely, land application of wastewater does not require a transfer "when there is a full existing water right for irrigation [on] the place of use receiving [the] wastewater").

the publicly appropriable flow of Indian Creek augmented by the wastewater discharges of others upstream over which those others relinquished and lost physical control).[16] Absent Nampa relinquishment of control and dominion upon its effluent discharge into Indian Creek or some other drainage, and the effluent commingling with those additional background and diffuse flows, Nampa's effluent remains private water that Riverside cannot compel delivery of for its benefit. *See, e.g., A&B Irr. Dist.*, 141 Idaho at 750-752, 118 P.3d at 82-84 (discussing the differences between the sources of water recaptured and the timing of recapture either before or after commingling with other sources); *see also, Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, 178 (1927) ("surface waste and seepage water may be appropriated . . . subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use"); *see also*, *Crawford v. Inglin*, 44 Idaho 663, 669, 258 P. 541, 543 (1927) ("appellant cannot be required to waste water into the ditch. He can use all his water, waste none of it, or apply it to other lands, and thereby prevent its flow into the ditch.").[17] This blackletter wastewater principle remains unchanged even when

[16] Riverside acknowledges that Nampa WWTP effluent artificially augments Indian Creek flows. SOF, ¶¶ 27-31. The approximately 18.6 cfs Nampa currently discharges to the creek would not exist or arise in the creek but for Nampa's purposeful discharge to the same. *Id*.

[17] The Department embeds this principle where appropriate under its standard "waste water" condition: "The waste water diverted under this right is subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place of use or manner of wasting it, or to recapture it." *See, e.g.,* Standard Condition of Approval No. 176 (as applied to Water Right Permit No. 63-34627).

downstream water user beneficiaries have used the water for several decades. *See, e.g.*, *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 179, 157 P.2d 1005, 1007 (1945).

In sum, "[n]o appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former . . . while the waste of the original appropriator is not to be encouraged, the recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water." *Hidden Springs Trout Ranch v. Hagerman Water Users*, 101 Idaho 677, 680-681, 619 P.2d 1130, 1133-1134 (1980). Idaho Code Section 42-201(8) operates consistent with these traditional wastewater principles because one cannot maintain any legitimate expectation of return flow in a land application effluent disposal context—especially when entirely new/arid lands devoid of any existing prior irrigation water right(s) can be broken out by the land application process under the statute.

Like it or not, municipal water rights and municipal WWTP effluent operate under a different and much more flexible and forgiving regulatory regime than do traditional irrigation water rights and related principles. But, Riverside continually and incorrectly applies traditional irrigation water right principles (*e.g.*, enlargement) where they do not fit at the same time it selectively ignores others (*e.g.*, wastewater) that do.

D. Without a Valid Property Right Entitlement on the Front End There Can be No Injury or Prejudice—Constitutional or Otherwise—on The Back End

The remainder of Riverside's *Opening Brief* asserts that the Director's "no injury" determination (Order, p. 5) violates and prejudices substantial Riverside property and, therefore, Constitutional rights. Pet. Open, pp. 25-33. The Director's holding that Riverside lacks any

legally cognizable injury under basic wastewater principles is correct and, consequently, violates and prejudices nothing.

1. Riverside Does Not Possess, and Cannot Establish, a Vested Property Right in Nampa's WWTP Effluent

Pioneer agrees that water rights are real property rights under Idaho law. Pet. Open, p. 29. Pioneer agrees that Riverside diverts most, if not all, of Indian Creek flows available at the Riverside Canal during the irrigation season. *Id*. Pioneer also agrees that Riverside possesses Indian Creek-sourced water rights bearing priority dates of 1915 and 1922. *Id*. But, Pioneer disagrees that re-direction of Nampa's WWTP effluent from Indian Creek to the Phyllis Canal during the irrigation season will "undoubtedly cause injury to Riverside in the loss of its ability to divert ***that water*** during [the] irrigation season." *Id.* (emphasis added).

Pioneer disagrees because Riverside glosses over what its water rights entitle it to, and what "that water" is. "That water" (Nampa's WWTP effluent) is subterranean groundwater pumped from deep wells comprising Nampa's Potable System with no connection to Indian Creek whatsoever absent the hand of Nampa. SOF, ¶¶ 8-12, 23, 25, 27, 30. "That water," as Riverside correctly acknowledges, is sewage-derived wastewater that artificially augments Indian Creek flows—water that does not arise or otherwise exist in the creek but for Nampa's purposeful discharge to the creek. *Id*. Conversely, Riverside's water rights entitle it to divert up to 180 cfs of the ***natural flow*** of Indian Creek, or at least the flow of Indian Creek available at its doorstep because those flows (natural or augmented by wastewater of others) have been commingled and continuing physical control lost by the upstream/upgradient appropriators.

As discussed in Section VI.C above, wastewater beneficiaries are ultimately subject to the paramount rights of the original appropriator (*i.e.*, Nampa in this case). "***There is no right in a third person to enforce the continuation of waste.***" *See, e.g.*, *Hidden Springs Trout Ranch*, 101 Idaho at 680-681, 619 P.2d at 1133-1134 (emphasis added). And, as discussed above, Nampa is not merely ***able*** to beneficially use all of its WWTP effluent for land application "disposal" purposes during the irrigation season (an expressly recognized beneficial use of water under Section 42-201(8) when "employed in response to state or federal regulatory requirements"), ***it must*** do so or it fails the land application-based effluent disposal option available to it under the statute and its Reuse Permit.

At most, Riverside could mount credible arguments only after Nampa relinquishes control of its effluent and that discharge commingles with the background flows of Indian Creek. *See, e.g., A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho at 750-752, 118 P.3d at 82-84 (discussing the differences between the sources of water recaptured and the timing of recapture either before or after commingling with other sources); *see also*, *Janicek* MDO, pp. 6-9 (examining appropriation in the context of a drain ditch that, like Indian Creek, accepts all flows entering it). But, that situation does not arise in the context of Nampa's pipeline to the Phyllis Canal. Nampa's Potable System groundwater continues to be waste-based "groundwater" under Nampa's exclusive physical possession and control from its WWTP to its piped point of discharge into the Phyllis Canal. Nampa's discharge is controlled and regulated, its piped flow does not commingle with or accept other flows from elsewhere, and it is not

"unappropriated" public water from a comingled drain-based source as was the case in *A&B Irrigation District* and *Janicek* above.

Riverside has no legal right, entitlement, or expectation in "that water." To be sure, Riverside, Pioneer, and other intervening Indian Creek water right holders have historically benefitted from the presence of Nampa's artificial creek flow augmentation over the years, and they all stand to be "affected" from the loss of those augmented flows. But, none of them (Riverside included) have the right to compel the ongoing discharge of "that water" to the creek for any of their respective benefits. *See Sebern, Crawford, Colthorp, Hidden Springs Trout Ranch,* and *Janicek* above.

Riverside's "most valuable property right" is not "water" generally and in the abstract. Pet. Open., p. 30. Rather, Riverside's "most valuable property right" is only that derived from the appropriable public water supply arising naturally or otherwise present in Indian Creek in the discrete quantities and priorities of its water rights as measured against those of others (including Pioneer).

2. Absent a Vested and Legitimate Property Right or Entitlement, There is No Due Process Violation

Both the Federal and Idaho Constitutions contain similar due process clauses providing, essentially, that "no person . . . shall be deprived of life, liberty or property without due process of law." *See, e.g.*, Idaho Const. Art. I, § 13; *see also*, *Maresh v. Dep't of Health & Welfare*, 132 Idaho 221, 226, 970 P.2d 14, 19 (1998). In this matter, Riverside asserts that the Director's Order deprives it of a property right absent due process. Pet. Open, pp. 31-32. But, as discussed

immediately above, Riverside conflates what its legally-protectable property rights (its water rights) in Indian Creek flows are.

Determination of whether any particular right or privilege constitutes a protectable "property interest" is a question of state law. *See, e.g., Maresh,* 132 Idaho at 226, 970 P.2d at 19 (citations omitted). "Determining the existence of a liberty or property interest depends on the 'construction of the relevant statutes,' and the 'nature of the interest at stake.'" *Id*. (citations omitted). Critical here, "a person must have more than a mere abstract need or desire for a benefit in order to have a property interest therein." *Id., citing Board of Regents v. Roth,* 408 U.S. 564 (1972). One "must have more than a unilateral expectation in the benefit . . . [one] must have a 'legitimate claim of entitlement to it.'" *Maresh,* 132 Idaho at 226, 970 P.2d at 19 (citations omitted). Accordingly, "hope is not a property right and the frustration of such a hope does not trigger a right to such a hearing." *Id., quoting Loebeck v. Idaho State Board of Education,* 96 Idaho 459, 461, 530 P.2d 1149, 1151 (1975).

Apologies for belaboring the point, but Riverside's water rights do not entitle it to the flow of water generally. Instead, Riverside's water rights entitle it to divert, in priority and in prescribed quantity, the flow of Indian Creek arising naturally therein, as well as any other public water contained therein at Riverside's point of diversion (public water being any additional flows in the creek attributable to the waste and return flow of others for which those others have no beneficial need and which flow, therefore, those others have relinquished their control and dominion). No question that Riverside has an "abstract need or desire," a "hope," for ongoing use of Nampa's WWTP effluent the same as any other Indian Creek water user, including

Pioneer. But, that "desire," "need," or "hope" is not a protectable property right because Idaho law makes clear that there is no "legitimate claim or entitlement to" the wastewater of others. *See Sebern*, *Crawford*, *Colthorp*, *Hidden Springs Trout Ranch*, and *Janicek* above.

Consequently, and as the Director correctly concluded, where there is no legitimate or legally cognizable property interest at issue, there can be no due process violation. Frustration of "hope" or the "unilateral expectation in a benefit" does not "trigger" due process rights/protections. *Maresh*, 132 Idaho at 226, 970 P.2d at 19 (citations omitted).

3. Absent a Vested and Legitimate Property Right or Entitlement, The Director's Order Must be Affirmed Under Idaho Code Section 67-5279(4)

Idaho Code Section 67-5279(4) provides that the Director's Order "shall be affirmed unless substantial rights of the appellant have been prejudiced." *Id*. Riverside contends that the Director's "no injury" determination has denied it "a seat at the table"; denied it the opportunity to participate "in discussions that will have significant impact on Riverside's most valuable property right—***water***." Pet. Open, p. 30 (emphasis added). Riverside ultimately concludes that the Director's Order left it "no avenue at IDWR in which to raise the alarm over 18-41 cfs of water being removed from ***its appropriation***." *Id*., p. 31 (emphasis added). Riverside's contentions are incorrect as matter of fact and law.

As a factual matter, Riverside has not been denied a seat at the table. Rather, its *Petition for Declaratory Ruling* was the table.

Riverside alleged injury from the beginning, as it was required to do. R. 1-4, ¶¶ 4-6, 13; *see also, e.g., Miles v Idaho Power Co.*, 116 Idaho 635, 639-641, 778 P.2d 757, 761-763 (1989)

(declaratory relief depends upon a justiciable controversy, not a generalized grievance shared by others; a distinct palpable injury that is fairly traceable); *Idaho ex. rel. Andrus v. Kleppe*, 417 F. Supp. 873, 876 (1976), n. 3, *overruled in part on other grounds* by *Andrus v. Idaho*, 445 U.S. 715 (1980) (citation omitted) (declaratory relief must address an actual controversy, not a desire for a mere abstract declaration of law). It then spent many months negotiating and drafting the comprehensive *Stipulation of Facts by All Parties* (Sept. 11, 2020) unpinning this matter. R. 688-713; *see also*, Pet. Open, p. 2 ("Riverside, Nampa, and Pioneer agreed to an extensive set of Stipulated Facts and stipulated to the admission of documents."). Consequently, Riverside had ample "meaningful opportunity to present evidence to the governing board on salient factual issues." *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232-233, 254 P.3d 1224, 1228-1229 (2011). If Riverside felt otherwise, it could have requested bifurcation of any injury question and/or requested a formal hearing rather than resting on the stipulated facts and exhibits in this proceeding.

After Riverside opened the door, Pioneer was not interested in bifurcating the injury question and reserving it for some future proceeding waiting in the wings. Instead, Pioneer put the injury issue squarely before the Director, requesting a competing declaratory ruling that: "Riverside possesses no legally cognizable injury going forward in the event that Pioneer is required to apply for a water right in order to implement the parties' Reuse Agreement [because] Riverside does not get to seek a mere advisory opinion in a vacuum." Pioneer Open (R. 1062-1101), p. 16; *see also*, Sur-Reply (R. 1200-1224), pp. 18-20 ("'Affected' is far different than 'legally entitled' or 'injured' . . . What is Riverside's 'distinct and palpable injury' in this

matter, an injury that is not otherwise a 'generalized grievance' shared by others?"). Any failure to make an evidentiary record on the injury question is Riverside's alone—it was not divested ample opportunity to do so. The problem for Riverside is that it can make no such record for the reasons already discussed in Sections VI.D.1 and 2 above.

As a legal matter, and again, Riverside possesses no "valuable property right" in "water" in general. It only possesses a property right in the flow of Indian Creek arising naturally therein, as well as any other comingling public, appropriable water contained in the creek at Riverside's point of diversion in the quantities and priorities of Riverside's water rights. Nampa's 18-41 cfs of treated WWTP effluent, sourced from a Potable System network of groundwater wells artificially augmenting the flows of the creek is not that, particularly where, as here, Nampa maintains total control and dominion over that effluent upon its discharge into the Phyllis Canal (another private, un-appropriable water conveyance). Riverside's arguments are inherently flawed because it continually ignores the legal scope and parameters of "its appropriation." "Its appropriation" does not include Nampa WWTP effluent that did not exist in 1915 or 1922 as a practical matter, and one cannot compel others to continue wasting for their benefit as a legal matter.

Riverside took us all down this "avenue" of review at IDWR despite its questionable standing to do so. Riverside's problem from the inception of this matter is that it has no legitimate legal entitlement/right "alarm" to raise. So, Pioneer asks again: What is Riverside's "distinct and palpable injury" in this matter; an injury that is not otherwise a "generalized grievance" shared by all other downstream Indian Creek water users including Pioneer, and

shared even more generally by all other drain-based wastewater appropriators ultimately subject to the right of recapture of original appropriators upstream?[18]

The general principles of wastewater use and the right of recapture apply regardless of whether Riverside's water rights contain IDWR's standard wastewater remark. Just because wastewater from Nampa and many others artificially augments the flow of Indian Creek today does not mean those artificial flows will exist tomorrow. ***And none of us, Pioneer and Riverside included, have the legal right to dictate or demand otherwise***.[19]

Because Riverside possesses no legal entitlement (*i.e.*, legally protectable "substantial

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[18] Generalized ownership of (or the right to use) a portion of the appropriable flow of Indian Creek, like the generalized ownership of land in the vicinity of a proposed subdivision, is not sufficient. Riverside must establish evidence of a peculiarized harm born of the Director's Order, not a generalized grievance shared by others similarly situated who merely benefit from the influx Nampa WWTP effluent when that flow is present. *Rural Kootenai Org., v. Bd. of Comm'rs*, 133 Idaho 833, 841, 993 P.2d 596, 604 (1999).

[19] Separate of sufficient property rights or entitlements meriting constitutional protections, Idaho's APA also requires a sufficient showing of harm—"real or potential prejudice" to "substantial rights." *Hawkins*, 151 Idaho at 233, 254 P.3d at 1229. Riverside must "be in jeopardy of suffering substantial harm if the project goes forward." *Id*.

The rights and property interests at issue in *Hawkins* and the cases cited therein were undisputed. The opponents owned neighboring real property; they already held the full bundle of sticks necessary to demonstrate a reduction in property value, or interference with the use or enjoyment of their property if those harms existed. Here, Riverside owns no such undisputed property right in Nampa's WWTP effluent—it holds no stick, let alone a bundle of sticks.

Riverside's actual property rights (its water rights in Indian Creek) do not include "that water"; "its appropriation" does not include "that water." Even Hawkins, who owned the neighboring real property and who, therefore, had sufficient standing and legal relation to make a case if a case could be made, ultimately failed to do so. *Id*. at 151 Idaho 234, 254 P.3d 1230 ("Hawkins has standing to pursue his petition for judicial review, but the petition is dismissed because he has not shown any prejudice to his substantial rights."). The concept of "substantial rights" under the Idaho APA is not nearly as nebulous as Riverside suggests.

rights") in Nampa's WWTP effluent, the Director's Order must be affirmed pursuant to Idaho Code Section 67-5279(4).

E. The Reuse Agreement Serves Legitimate Purposes: There is no "Scheme" and Riverside Misunderstands (if Not Mischaracterizes) the DEQ Permit

There is nothing surreptitious about the Reuse Agreement or the Reuse Permit; they further no "scheme." *See, e.g.*, Pet. Open, p. 33 ("The scheme concocted by Nampa and Pioneer . . . under the guise of 'reuse.'"). Pioneer is not "stacking" water without need, and there is no illegal water spreading either. *Id.*, pp. 33 ("The scheme also permits Pioneer to stack additional water without . . . examin[ing] if Pioneer needs the water . . ."); and 1 ("Nampa acquired a permit from the [DEQ] . . . the deliver effluent to Pioneer so that is could be spread over the 17,000 acres."). Further, Riverside's statements that: "[t]he Reuse Permit makes it clear that Nampa's effluent must be spread across 17,000 acres of Pioneer's lands . . . and not just to land owned by Nampa or Nampa customers" and that the Reuse Permit is "based on the premise that Nampa's wastewater will be delivered and applied to 17,000 acres throughout Pioneer's district boundaries" are patently incorrect.

There is no question that Section 42-201(8) provides Nampa express authorization to land apply the entirety of its WWTP effluent in response to environmental regulation. Thus, the statute already disposes of Riversides pejorative "scheme" remarks. So, too, does Idaho's long-standing policy of minimizing waste and maximizing beneficial use of the water resource. *See, e.g.*, *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) ("The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources."). In

this instance, Nampa could re-direct its effluent away from Indian Creek and dispose of it a variety of ways. It could deposit its WWTP effluent on unsown, uncultivated or sterile land, or volcanic ash or gravel to accomplish the environmental treatment benefits of that land application via soil profile percolation out in the desert south of town. But, that type of "land application" that municipalities are clearly entitled to perform as a "municipal" use under Sections 42-202B(6) and 42-201(8) would be a shame when the spent WWTP effluent could be harnessed and used as a resource promoting meaningful irrigation instead. Under the Reuse Agreement, Nampa's effluent which can already be used to extinction will provide additional irrigation use benefit on its way to that extinction.

The Reuse Agreement and Reuse Permit do not facilitate a Pioneer water grab either. Like Riverside, Pioneer relies on wastewater from others as part of its irrigation water supply. SOF, ¶ 4 (referring to Pioneer's Indian Creek and "drain"-sourced water rights). Unfortunately, Pioneer's drain-based sources, particularly the Fivemile Drain system providing water to the Phyllis Canal upstream of Nampa are declining. SOF, ¶ 56 (discussing Pioneer water right no. 63-21731 and its utility decline from 76.6 cfs on paper to 30-40 cfs in physical water during the latter half of the irrigation season over the last five seasons). The Reuse Agreement and Reuse Permit present Pioneer a reliable and cost-effective opportunity to offset Fivemile Feeder Canal declines and keep Nampa, its citizens, and other Pioneer landowners downstream whole.

The Reuse Agreement and Reuse Permit also support the conservation of water resources. Nampa recycled water discharge to the Phyllis Canal will provide operational flexibility to Pioneer, potentially allowing Pioneer to lessen reliance on stored water supplies

needed to backfill Fivemile Drain system declines.

Riverside's suggestion that Pioneer will selectively horde and spread Nampa's recycled water throughout the District's larger water distribution system on a whim is unfounded and a physical impossibility. While some molecules of water will undoubtedly slip by, Nampa and its citizens are the primary delivery recipients (*i.e.*, beneficiaries) of the WWTP effluent discharged to the Phyllis Canal via Pioneer's 15.0 Lateral system, diverting 32 cfs from the Phyllis Canal within one mile downstream of Nampa's proposed canal discharge point. SOF, ¶¶ 57-59; *see also*, Ex. H (R. 259-308), pp. 20-21 (DEQ Staff Memo, Figure 10 (R. 278) and Table 4 (R. 279)). Pioneer's 15.0 Lateral system diversions (32 cfs) exceed Nampa's Reuse Permit-based inputs (31 cfs) already, and far exceed the current 18.6 cfs Nampa will discharge in the near future (*i.e.*, Nampa discharges will grow into the Reuse Permit; 31 cfs will not be discharged to the Phyllis Canal from Day One). Additional Nampa and Nampa citizen diversions within the next two miles of the Phyllis Canal add another 36 cfs—diversions in aggregate (68 cfs) far outstripping the 41 cfs contemplated in the parties' Reuse Agreement at full build-out decades into the future. SOF, ¶¶ 57-59; *see also*, Ex. H (R. 259-308), pp. 20-21 (DEQ Staff Memo, Figure 10 (R. 278) and Table 4 (R. 279)).[20]

[20] The mechanism for Nampa and Pioneer to seize upon this meaningful opportunity has long-existed. *See, e.g.*, IDAHO CODE §§ 50-1801, 50-1805, and 50-1834 (all confirming Nampa and Pioneer's ability to "contract" with one another for irrigation supply and distribution purposes); *see also,* SOF, ¶¶ 15, 19-20, including Exs. L and M (existing contractual relationship between Nampa and Pioneer under Title 50, Chapter 18). Nampa's WWTP effluent discharge to the Phyllis Canal is, essentially, further fortifying Pioneer's irrigation water supply for Nampa's use and benefit consistent with their existing authorizations under Idaho Code Sections 42-202B(6), 42-202B(9), and Title 50, Chapter 18 independent and irrespective of Section 42-201(8). Section 42-201(8) merely lends yet another layer of authority for each entity

Pioneer has repeatedly, and in great detail, explained the error of Riverside's "scheme"-based water "spreading," "enlargement," and district-at-large water use contentions. Pioneer Open (R. 1062-1101), pp. 17 (n. 8); 20-23; *see also*, Sur-Reply (R. 1200-1224), pp. 1-9. And yet, Riverside's spurious contentions and inflammatory rhetoric persist.

Most egregious is Riverside's persistence is pushing the false narrative that the Reuse Permit ***requires*** disposal of Nampa's effluent across 17,000 acres to achieve successful, and regulatorily-compliant, disposal of its WWTP effluent. Instead, land application-based treatment of Nampa's effluent taken in isolation (31 cfs authorized under the Reuse Permit, which amounts to approximately 13% of total Phyllis Canal flow (230 cfs +/-) at the point of Nampa discharge) requires only ***3,300 acres*** to successfully treat for nutrient management purposes. Sur-Reply (R. 1200-1224), pp. 4-9. And, Nampa and its citizens are direct beneficiaries of that recycled water delivery because they are Pioneer landowners entitled to delivery of up to 68 cfs on 3,400 acres of land served by Pioneer's 15.0, Hatfield, Stevens, Stone, and McCarthy Laterals within the first four miles of Phyllis Canal downstream of the WWTP effluent discharge point. *Id*., pp. 2-9. ***All of Nampa's WWTP effluent discharge*** to the Phyllis Canal ***and more*** (68 cfs versus 31 cfs) is rediverted and used on approximately 3,400 acres of land receiving water from the first four miles of Phyllis Canal downstream of the WWTP effluent discharge point. Moreover, ***all of Nampa's WWTP effluent discharge*** to the Phyllis Canal ***and more*** (32 cfs versus 31 cfs) is rediverted and used on approximately 1,600 acres of land receiving water from

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to continue working cooperatively, efficiently, and cost-effectively to address their shared water supply and distribution needs.

the 15.0 Lateral system alone approximately one mile downstream of the Nampa WWTP. *Id*.

Contrary to Riverside's assertions otherwise, the WWTP effluent is not being used throughout Caldwell or locations farther west (*e.g.*, Greenleaf). Instead, the Nampa WWTP effluent discharge is going to be reused by Nampa and its citizens, and the Reuse Permit and its supporting analyses embrace and recognize this undisputed fact.

Pioneer can no more compel others to waste water for its benefit in the Fivemile Drain system, or any of its other drain systems (including Indian Creek) than Riverside can compel Nampa to continue wasting water for its benefit in Indian Creek. Like Riverside, Pioneer would much prefer that the historic status quo concerning wastewater flow regimes upstream and within its district boundaries remain intact and robust. But that preference is neither realistic nor attainable—opportunity in wastewater is fickle and subject to change. There is no "scheme" here. Pioneer and Nampa are simply trying to absorb and evolve with the hydraulic and regulatory trends occurring within and around them as creatively, cost-effectively, and cooperatively as possible to the real benefit of their overlapping landowners and taxpayers.

VII. ATTORNEY FEES

Pioneer seeks recompense for its attorney fees expended in this matter pursuant to Idaho Code Section 12-117(1). The statute authorizes an award of fees "in any proceeding involving as adverse parties a state agency or a political subdivision and a person . . . if [the court] finds that the non-prevailing party acted without reasonable basis in fact or law." IDAHO CODE § 12-117(1). In this matter, IDWR is a qualifying state agency under Idaho Code Section 67-5201 (satisfying Idaho Code Section 12-117(5)(d)) and Riverside is a "person"—a

corporation and private organization (satisfying Idaho Code Section 12-117(5)(a)). SOF, ¶ 5.

As a general matter, fees are not awarded under the statute against a party who presents "legitimate question[s] for [a] court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). But, appeals can be frivolous and baseless 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 tribunal 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)); *see also, Ada County v. Browning*, ___ Idaho ___, 489 P.3d 443, 449-450 (2021) (recycling the same arguments on appeal as a respondent is proper because those arguments prevailed before).

Pioneer acknowledges that the interpretation and application of Idaho Code Section 42-201(8) is a question of first impression. Pioneer previously refrained from seeking fees before IDWR accordingly. But, Pioneer is troubled by the recycled nature of Riverside's arguments and its doubling down-use of statements and assertions that are false, or that at least have gone wholly unrebutted by Riverside despite having been discussed in detail in voluminous prior briefing by the parties. *See, e.g.*, Section VI.E above. It would be one thing if Riverside meaningfully pivoted or reacted and acknowledged in response. But it is another to ignore and obfuscate as Riverside continues to do.

Riverside's position is nothing more than a complaint that ***it*** will no longer get to use and benefit from Nampa's WWTP effluent while Pioneer will. Riverside seeks to defeat the Nampa-Pioneer recycled water project with the end goal and practical effect of obligating Nampa to

continue wasting water to Indian Creek for Riverside's benefit—a concept rebuffed by more than a century of Idaho legal precedent. And, even if Riverside could compel others to continue wasting water for its benefit—which it cannot—the Idaho Legislature expressly ended that possibility in this context upon enactment of Idaho Code Section 42-201(8): the collection, treatment, and land application-based disposal of municipal effluent in response to state or federal regulatory requirements.

VIII. CONCLUSION

That Riverside prefers Indian Creek flows remain augmented by Nampa WWTP effluent discharge is obvious and understandable. But, Idaho Code Section 42-201(8) is clear, as is over a century of general wastewater principle precedent. Pioneer does not need a water right to contractually receive and land apply recycled water from Nampa's WWTP. And, Riverside has no legally protectable interest in Nampa's effluent stream provided Nampa maintains physical control and dominion over the same. This is not a matter involving the appropriation and use of otherwise unappropriated water from a natural or publicly appropriable source. Therefore, the permitting regime of Title 42, Chapter 2 does not apply, and the Director's Order should be affirmed in its entirety.

DATED this 4th day of October, 2021.

SAWTOOTH LAW OFFICES, PLLC

By _____
Andrew J. Waldera
Attorneys for Intervenor-Respondent
Pioneer Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2021, I caused a true and correct copy of the foregoing **INTERVENOR-RESPONDENT PIONEER IRRIGATION DISTICT'S RESPONSE TO PETITIONER RIVERSIDE IRRIGATION DISTRICT, LTD.'S OPENING BRIEF** to be served by the method indicated below, and addressed to the following:

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