IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RIVERSIDE IRRIGATION DISTRICT,

Petitioner,

vs.

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

Respondents,

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

Case No. CV14-21-05008

PETITIONER'S REPLY BRIEF

PETITIONER'S REPLY 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. Introduction

The City of Nampa (Nampa) has obtained approval from the Department of Environmental Quality (IDEQ) to discharge 31 cfs under the Recycled Water Permit, R. 00227[1], and an agreement to discharge up to 41 cfs of wastewater from its wastewater treatment plant into Pioneer Irrigation District's (Pioneer or PID) Phyllis Canal under the Reuse Agreement, R. 00206. From there Pioneer will comingle that water with all the other water in the canal and deliver the water to its landowners. When Nampa's engineer, Brown and Caldwell, proposed the project to IDEQ, Brown and Caldwell explained that the wastewater would not reach groundwater because it would be taken up by crops in Pioneer's service area below the discharge point, an area covering 17,000 acres. R. 00460. IDEQ's analysis confirmed that was expected to be the case and therefore authorized the discharge to the canal under the "Reuse Permit." *See* Ex. H (R. 00257 – 00308). The irrigated lands below the point of discharge constitute 17,000 acres. R. 00267. "The Area of Analysis is large and therefore mixed in its uses." R. 00284. Figure 8 and Tables 7 – 9, R. 285-6, show the crop types and water of the crops in the 17,000-acre Area of Analysis. Section 4.3.6 of the Staff Analysis examines the crop uptake in the Area of Analysis and concludes that the addition of the pollutants from Nampa's waste water will not exceed the crop nutrient needs in the Area of Analysis. R. 00287 –9. Pioneer and Nampa's suggestions that the area of analysis for the reuse permit involves a smaller, discrete area are simply unsupported in the record.

Riverside Irrigation District (Riverside) petitioned the Director of the Department of Water Resources (Director or IDWR) asking for a declaratory ruling that, before Pioneer could put this water to beneficial use by delivering the water to its landowners who would use it to

[1] References to the Agency Record are shown as "R."

grow crops and irrigate lawns, Pioneer would have to obtain a water right. The Director denied that petition on the grounds that Pioneer was exempt from having to obtain a water right based solely on the provisions of Idaho Code § 42-201(8). R. 01234. In making this ruling the Director relied on the plain language of Idaho Code § 42-201(8). R. 01233. He did not find the statute ambiguous or state that his interpretation required deference to IDWR expertise. He also concluded that Riverside was not injured by this reuse permit and therefore could not claim a violation of the Idaho Constitution in the manner in which the Director construed the statutes. R. 01234.

To reach this result, the Director had to stretch the language of Idaho Code § 42-201(8) to include Pioneer among the entities covered by this statute, when everyone agrees that Pioneer is not included among the listed entities. The Director concluded that the provisions of Idaho Code § 42-201(2) requiring a water right before applying water to land did not apply, solely because of his interpretation of Idaho Code § 42-201(8). In reaching this conclusion, he ignored the conditions on Nampa's water rights limiting when and where and how Nampa could use its groundwater rights.

Fundamentally, this proceeding involves matters of statutory interpretation and interpretation of the elements of Nampa's water rights. Statutory interpretation is primarily entrusted to the courts, "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Nye v. Katsilometes*, 165 Idaho 455, 463, 447 P.3d 903, 911 (2019) (quoting *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803)). Similarly, with respect to the elements and conditions that constitute Nampa's decreed water rights, "Any interpretation of [Nampa's] partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such

interpretations needed to be made in the SRBA itself." *Rangen, Inc. v. IDWR*, 159 Idaho 798, 806, 378 P.3d 193, 201 (2016).

IDWR and Intervenor's arguments in response to Riverside's appeal are inconsistent with the plain and unambiguous language of both of the statutes at issue - Idaho Code § 42-201(8) and Idaho Code § 42-201(2) – and are inconsistent with the conditions on Nampa's water rights. Accordingly, the Director's decision should be reversed.

II. Legal Argument

A. Idaho Code § 42-201(8) is unambiguous and provides that only specific entities are exempt in limited circumstances from obtaining a water right

The Director did not contend that Idaho Code § 42-201(8) is ambiguous. *Department's Brief*, at 9. The Director recognized the fundamental principal that a statute must be interpreted according to its plain meaning. R. 01233. Accordingly, "[t]he interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citations omitted). "We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993); *Verska v. St. Alphonsus Regional Medical Center,* 151 Idaho 889, 893, 265 P.3d 502, 506 (2011).

That a litigant may argue about how to interpret a statute doesn't make the statute ambiguous. Thus:

> An agency construction will not be followed if it contradicts the clear expression of the legislature. *Rim View Trout Co. v. Higginson,* 121 Idaho 819, 824, 828 P.2d 848, 853 (1992). In other words, if the language is unambiguous, an agency's interpretation

> contrary to the plain meaning of the statute will not be given deference. *Id.* at 824, 828 P.2d at 853. If the statutory language is clear and unambiguous, statutory construction is unnecessary and this Court need merely apply the statute. *Kootenai Elec. Coop., Inc. v. Washington Water Power Co.,* 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995). Ambiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous.

Hamilton ex rel. Hamilton v. Reeder Flying Serv., 135 Idaho 568, 572, 21 P.3d 890, 894 (2001) (emphasis added) (citing *Rim View Trout Co.,* 121 Idaho at 823, 828 P.2d at 852).

IDWR is sometimes entitled to some deference, but only if the statute is ambiguous:

> On questions of law the court generally exercises free review, although agencies are sometimes entitled to deference on questions of statutory construction. Because the Commission has been entrusted with administration of the bingo statutes, the Court may defer to its interpretation of the statutes so long as that interpretation is reasonable and not contrary to the express language of the statute. *See J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). Nevertheless, "the ultimate responsibility to construe legislative language to determine the law" rests with the judiciary, and the underlying consideration whether or not such deference is granted is to ascertain and give effect to legislative intent.

Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 144 Idaho 23, 26, 156 P.3d 524, 527 (2007) (citing *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001); *Simplot*, 120 Idaho at 853–54, 820 P.2d at 1210–11).

Here, the Department (and Intervenors) cannot now argue for deference because the Director's order says he is applying the plain meaning of the statute R. 01233. He did not claim to be exercising any particular level of agency expertise. To the contrary, he was reading the statute, but then adding a gloss that isn't there. The Department's new-found argument that the Director is entitled to deference is the attorney general's (and Intervenors') litigation position, not the agency's position when the question was presented to the Director. Hence, the claim of deference is entitled to no deference. As the U.S. Supreme Court recently affirmed, "a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n]

advanced" to "defend past agency action against attack." *Kisor v. Wilkie*, __US__, 139 S.Ct. 2400, 2417 (2019).

B. The Director incorrectly extended Subsection (8) to Pioneer

None of the parties contend that Pioneer is a municipality within the meaning of Idaho Code § 42-202B; nor do they contend that Pioneer holds any water rights for this water that is to be land applied in Pioneer's place of use. No party asserts that irrigation districts, like Pioneer, acting on their own are exempt from subsection (8). Clearly irrigation districts are not entitled to the exemption in subsection (8) under that provision's plain language. Nor are agents or persons or entities working "closely" with municipalities included among the entities listed in the statute who are entitled to rely on subsection (8). No one contends that the statutory language extends that far. But the other parties ask the court to include agents and entities working closely with municipalities. To add those entities is to rewrite the statute. Because Pioneer is not among the entities covered by subsection (8), the Department and the Intervenors are left to advocate for a reading of the statute that is much broader than the language of the statute to encompass entities that are not listed in subsection (8). That is not statutory interpretation, that is rewriting the statute.

"However, the courts 'are not free to rewrite a statute under the guise of statutory construction.'" *Nelson v. Evans*, 166 Idaho 815, 822, 464 P.3d 301, 308 (2020). (quoting ***State v. Doe,*** 147 Idaho 326, 329, 208 P.3d 730, 733 (2009)). The Respondents and Intervenors all completely ignore the rule of statutory construction that provides: "Idaho has recognized the rule of *expressio unius est exclusio alterius*—"where a constitution or statute specifies certain things, the designation of such things excludes all others." *Nelson supra*, quoting ***Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene,*** 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978).

Thus, for example, in *Brizendine v. Nampa & Meridian Irrigation District*, 97 Idaho 580, 588, 548 P.2d 80, 88 (1976), the Court held that where irrigation districts were not included among the entities protected under the tort claims act, "the legislature must have intended not to include irrigation districts within the act." The same conclusion applies here – the legislature intended not to include non-listed entities. Plus, the legislature is charged with knowledge of prior legal precedent, like *Brizendine*, at the time the act was passed. *J&M Cattle Co., LLC v Farmers National Bank*, 156 Idaho 690, 695, 330 P.3d 1048, 1053 (2014).

The Director's order expands the statute to include agents (without any statutory basis), even though he concludes that Pioneer is not Nampa's agent, and then expands subsection (8) beyond agents to anyone who purportedly has "an ongoing relationship" with the municipality. R. 01233-01234. The consequence of this decision is that subsection (8) now extends to anyone who receives municipal water. To the extent that reference to legislative history is appropriate, the legislative history requires a narrow application of subsection (8), "the bill is crafted narrowly." R. 00973. Rather than construing the exemption narrowly as the legislative history indicated the statute should be applied, the Director has interpreted the statute broadly. Indeed, the trigger apparently identified by the Director is anyone "involved" with the City's wastewater. R. 01233. That's a far cry from a "narrow" exemption.

C. Pioneer is not Nampa's agent

The Director correctly concluded that "Because Nampa does not have the right to control Pioneer, there is no formal agency relationship." R. 01233. Riverside agrees with the Director that Pioneer is not Nampa's agent.

Nampa now contends that Pioneer is its agent. *Nampa Response Brief*, pp. 16-21. Yet the documentation of Nampa and Pioneer's relationship does not reflect one of agency. For example,

the Recycled Water Discharge and Use Agreement between Nampa and Pioneer states that "Pioneer will handle, manage and convey the discharged Recycled Water as an integrated part of its irrigation operations." R. 00208. This agreement does not give Nampa the right to control any aspect of Pioneer's operations. It just allows Nampa to divert and discharge water to the Phyllis Canal. There are lots of places where water is discharged to irrigation canals throughout the state, whether by past practice or contract. That fact doesn't render the irrigation district the agent of the discharger. *See* e.g. *Pioneer Irrigation District v. City of Caldwell*, 153 Idaho 593, 288 P.3d 810 (2012) (stormwater discharges).

Nampa cites to *Humphries v Becker,* 159 Idaho 728, 336 P.3d 1088 (2016), for the proposition that Pioneer is Nampa's agent. The Court's decision in *Humphries* does not support Nampa's position. The Court held that "the alleged facts indicate that Allen and Jane acted as independent third parties. That Eileen may have benefitted from their actions is not enough to create an agency relationship." *Id*. at 736, 336 P.3d at 1096. Here, whether Nampa stands to benefit from putting water in the canal is not enough to create an agency relationship either. In fact, the Reuse Agreement explicitly provides "[t]he parties hereto agree that nothing herein contained shall be construed to create a joint venture, partnership, or similar relationship…." R. 00210. One consequence of an agency relationship is that the principal is liable for the torts of the agent in the scope of the agency relationship. *Fisk v. McDonald*, 167 Idaho 870, 895, 477 P.3d 924, 949 (2020). Yet the Reuse Agreement further expressly provides that neither party can subject the other to liability. R. 00210. Thus, neither Nampa nor Pioneer contemplated that they were agents of the other when they entered into this agreement. Only now, when convenient for the purposes of this proceeding, do they argue otherwise.

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D. Pioneer is acting for its own benefit, not on behalf of Nampa

IDWR claims that Riverside is arguing that someone else cannot land apply water for Nampa. *Respondent's Brief*, at 7. That is not Riverside's position. Riverside's position is that if a third party who is not covered by subsection (8) wants to put Nampa's water to beneficial use, that third party has to obtain a water right. Riverside does not contend that Nampa is precluded from contracting with a third party to contract for services. Nampa can clearly contract, but if Nampa does enter into contracts, the contractor must follow the law.

The Department asserts that this "is not a situation where Pioneer gets to take Nampa's effluent and do with it as it wishes without Nampa's further involvement." *Respondent's Brief*, at 9. But that is exactly what is contemplated. Nampa, Pioneer and IDEQ all intend that Nampa's wastewater will be applied by Pioneer as "supplemental irrigation" water. Nampa is the solely identified permittee. *See IDEQ Reuse Permit M-255-01*, at 9. R. 00221. Not only is Pioneer not a permitee, Nampa's application to IDEQ explicitly states "Once the water enters the canal it is considered irrigation water and is used as such downstream from the discharge." R. 00400. This statement indicates that far from having any "control" over Pioneer's use of the wastewater, Nampa and Pioneer consider this wastewater "irrigation" water once it is "accepted" by the Phyllis Canal.

E. Pioneer is required to obtain a water right under Idaho Code § 42-201(2) or, in the alternative, Nampa should file a transfer pursuant to Idaho Code § 42-222

Idaho Code § 42-201(2) applies here. Idaho Code § 42-201(2) contains three distinct requirements for when a water right is required. The three triggers for obtaining a water right user Idaho Code 42-201(2) are:

1. No person shall divert from a natural water course.
2. No person shall apply water to land without a valid water right.
3. No person shall apply the water for a purpose for which there is no valid water right.

As to the first trigger, the Intervenors would end the inquiry there and ignore the rest of subsection (2). The second trigger, that no person shall apply water to land without a valid water right, is exactly what Pioneer and Nampa propose to do under the Reuse Permit. All parties agree that Pioneer has no water right to apply Nampa's wastewater to its 17,000 acres downstream of the injection point. And to the third trigger, no person shall apply the water for a purpose for which there is no valid water right, the conditions that limit Nampa's water rights are implicated. In other words, this requirement relates back to Nampa's original water rights which describe and condition how the ground water is to be diverted and applied. Nampa's ground water rights are not conditioned to be used for largescale supplemental irrigation by Pioneer's shareholders.

IDWR agrees that once water is out of the appropriator's control, it is subject to appropriation. *Respondent's Brief*, at 13. Critically, IDWR agrees with Riverside, in that if subsection (8) cannot be used by Pioneer, Pioneer does have to obtain a water right to use this water. *Id*. As explained above, Nampa, Pioneer and IDEQ, do not envision or require that Nampa will have any "control" over Nampa's appropriated water once it is "accepted" by the Phyllis Canal.

The Director concluded that subsection (2) did not apply because Pioneer was exempt from applying for a water right based on the Director's expansion of the entities covered by subsection (8). As shown above that interpretation is not correct. In contrast to IDWR, the Intervenors argue that no water right is required under subsection (2) regardless of whether subsection (8) applies or not. IDWR does not agree with that position and confirms that the water

use scheme here would require a water right under section (2) if not for section (8). *Respondent's Brief*, at 13.

The Intervenors contended before the Director that subsection (2) only applies to diversions from a natural water course and to no others. They further contended that since Nampa's wastewater pipe and Pioneer's canal are not natural water courses, that is the end of the inquiry. To make this argument they have to ignore the legislature's use of the disjunctive "or" in section 42-210(2). Respondents focus on the first sentence about "public waters" but that one sentence doesn't limit the rest of the statute. The second sentence clearly and unambiguously explains when a water right must be obtained.

"Or" means "Or." "Or" does not mean "and." *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (quoting *Markel Int'l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012). The word "or" is a disjunctive used to express a choice among alternatives. *Id.* By interpreting the statute to read "and" instead of "or" the Intervenors are ignoring this important rule of statutory construction and are rewriting the statute. Pioneer argues that Riverside's interpretation leads to an "absurd" result, but the statute is clear and unambiguous. When the statute is clear the court must follow the law. It cannot set something aside for supposed absurd results, when that is the statutory command. As stated by the Idaho Supreme Court, "we have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011). Moreover, it is not absurd to have state control over the use of water.

Pioneer asserts there is no physical "diversion" of Nampa's water and describes the Phyllis canal as a conduit. *Intervenor-Respondent Pioneer's Response to Petitioner Riverside's*

Opening Brief, at 15, 18. True, but the canal is a conduit that conveys water to lands outside the Nampa service area, outside Nampa's area of impact and within Pioneer's place of use, to include lands in the City of Caldwell and in Caldwell's area of impact. R. 00808; R. 01144. None of this land has a water right for the use of Nampa's water. Nampa lacks day to day control over Pioneer as the plain language of the Reuse Contract shows, Nampa will have no control over the application of its wastewater: "Pioneer will handle, manage and convey discharged Recycled Water as an integrated part of its irrigation operations." R. 00208.

Relatedly, Nampa and Pioneer take the position that subsection (2) doesn't apply because Pioneer doesn't "divert" the water, it merely "accepts" the water. *See e.g. Pioneer's Response Brief* at 19, 20; *Nampa's Response Brief* at 32, 41. Lack of a physical structure does not mean there is no "diversion." For example, Riverside's West End Drain water rights involve an identical situation. *See e.g.*, claim to water right 63-4010 ("West End Drain enters the Riverside Canal without a structure…"). The West End Drain terminates in the Riverside canal. There is no bypass. Riverside takes everything coming down the drain. That's exactly what Pioneer will be doing with the water from Nampa's pipe.

The Intervenors are critical of Riverside's application of Special Master Booth's *Memorandum Decision and Order on Motion for Summary Judgement in Subcase 63-27475* (*Janicek*). Riverside cited *Janicek* because that is the law of the case in the SRBA, as established by the SRBA proceedings. *Janicek* held it doesn't matter whether water is diverted from a "natural water course" or not, a water right can be obtained. Riverside pointed to *Janicek*, to show that the Intervenors' insistence that subsection (2) applied only to a "natural water course" is not supported by the law.

Furthermore, subsection (2) doesn't authorize municipalities to simply turn over municipal water rights to third parties as Nampa argues. *Nampa Response Brief*, at 41.

Alternatively, Nampa should be required to file a transfer application. The Idaho Supreme Court has held that municipalities, like all other water users, are bound by the conditions on their water rights:

> At the request of Pocatello, water right 29–7770 was licensed in 2003 for an irrigation purpose. The Special Master held that because the city had not sought an administrative change in the purpose of the water right and the license granting the water right was issued after the November 19, 1987, deadline in Idaho Code section 42–1425, the purpose of use remained irrigation. In its challenge to the district court, Pocatello argued that the water right should have been issued for a municipal purpose rather than the requested irrigation purpose. The district court held that Pocatello would have to proceed with an administrative transfer proceeding.
>
> On appeal, Pocatello argues that IDWR committed an error in law by issuing the license for the use requested by the city. Idaho Code section 42–108 states, "Any person desiring to make such change of point of diversion, place of use, period of use, or nature of use of water shall make application for change with the department of water resources under the provisions of section 42–222, Idaho Code." Section 17(b)(3) of Administrative Order No. 1 adopted by the SRBA court states, "Claimants seeking a change in their claimed water right under I.C. § 42–222 shall contact IDWR." <u>That is what Pocatello must do to change the purpose of water right 29–7770</u>. The district court did not err in so holding.

City of Pocatello v. Idaho, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) (emphasis added).

The Department's and the Intervenors' positions are also inconsistent with the *City of Blackfoot* case which held the City was required to add recharge to the purpose of use for its water rights in order to use those rights for recharge. *City of Blackfoot v. Spackman*, 162 Idaho 302, 310, 396 P.3d 1184, 1192 (2017). Neither Respondent nor Intervenors respond to this point in their response briefs. It is telling that they advocate for freedom from the conditions on Nampa's water rights, while ignoring the case law holding that municipal users are bound by the conditions on their water rights like anyone else.

The Department takes the position that a water user can't transfer the source of water. *Respondent's Brief*, at 14. However, if Nampa wants to apply water to Pioneer's service area via irrigation, Nampa should be required to file a transfer of the place of and purpose of use. *See City of Blackfoot v. Spackman*, *supra*. Riverside is simply saying that if Nampa chooses to deliver its water to a third party who then intends to irrigate with it, Nampa must go through an application or transfer process that allows all the elements of the water right to be evaluated in order to determine that no other water rights are injured. There must be a process that evaluates water usage. IDEQ admits they have no authority to conduct this evaluation. R. 00739. Consequently, IDEQ issued the Reuse Permit without any analysis of impacts to other water users as it relates to water quantity.

What Riverside is requesting is exactly what the Department said may be necessary in Administrative Memorandum #61 – changing the disposal to a method that involves another beneficial use requires a transfer application:

> If the treatment method for industrial waste water is changed to land application on cultivated fields or any other method that beneficially uses the water, the industrial right must be changed to include the new use. This will require a transfer application to be filed, processed and approved in accordance with Section 42-222, Idaho Code, to include a new location for a waste treatment practice, such as land application, and other conditions of approval that may be necessary to prevent injury to other valid water rights.

Administrative Memorandum #61, R. 01058 (emphasis added). It is undisputed that actions undertaken by Nampa and Pioneer under the Reuse Permit will reduce the flow in Indian Creek during irrigation season. This change must be evaluated to determine if there be will injury to "other valid water rights" or if the transfer complies with the local public interest. *See* Idaho Code § 42-222 and IDAPA 37.03.08.45.03.

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F. Pioneer will not be disposing of Nampa's wastewater, Pioneer will be irrigating

Amazingly, closing its eyes to the facts, and contrary to the record, IDWR takes the position that Pioneer isn't irrigating with Nampa's water, it is merely helping to "dispose" its wastewater. *Respondent's Brief*, at 15. Nonsense. Pioneer will be using Nampa's wastewater to irrigate land within 17,000 acres of its service area below the discharge point into the canal as clearly stated in the DEQ permit. Under Section 4.5 of the DEQ permit, the relevant "allowable uses" is identified as:

> Irrigation Water Supply Augmentation. Recycled water may be discharged to Phyllis Canal during the growing season for irrigation water supply augmentation; the requirements herein shall apply to the recycled water until the point where the water is discharged to the Phyllis Canal.

R. 00231.

Pioneer's intent to "irrigate" with Nampa's discharge is memorialized in its Recycled Water Discharge and Use Agreement with Nampa, "WHEREAS, Pioneer desires to seasonally receive Recycled Water from the City as a supplemental source of irrigation water supply…" R. 00609. That Agreement states that "Pioneer will handle, manage and convey discharged Recycled Water as an integrated part of its irrigation operations." R. 00612.

This is also evident in Nampa's application to IDEQ where it represents its discharge "to the Phyllis Canal removes phosphorus from the Indian Creek and Lower Boise River system and provides an opportunity for the phosphorus to be <u>beneficially used as the irrigation water is applied to crops and lawns throughout the PID service area</u>." R. 00400 (emphasis added). Additionally, Pioneer has previously stated that it needs this water from Nampa for irrigation to offset "declining drain flow sources" from its other wastewater rights. R. 00742.

Likewise, in its application to IDEQ, Nampa explains "Below the proposed recycled water discharge point, the Phyllis Canal distributes *irrigation water* to approximately 17,000

acres north to the Riverside Canal in Caldwell and west to Greenleaf. The City and PID have entered into an agreement for reception and use of Class A recycled water from the City to the Phyllis Canal at flows up to 41 cubic feet per second." *City of Nampa Recycled Water Reuse Application*, R. 00399 (emphasis added).

In the Recycled Water Reuse Permit Application Preliminary Technical Report, the Report explains "Section 8 describes reuse site loading rates and demonstrates that constituents in the recycled water discharged to the canal are not anticipated to exceed crop uptake rates in the areas irrigated by the Phyllis Canal." R. 00455. It further explains "Considering the end of the discharge pipe as the point of compliance and the approximately 17,000 irrigated acres of PID service area downstream from the discharge location, constituent loading is anticipated to exceed agronomic update rates of crops in the PID service area." R. 00460.

IDEQ's Staff Analysis of the Reuse Application states "The City proposes to treat water to Class A recycled water standards during the growing season, from May through September, and, via the Phyllis Canal, use that water for irrigation by the users of that canal network. R. 00259. The IDEQ Staff Analysis further notes "the City will meet all of the Class A requirements in the Recycled Water Rules (IDAPA 58.01.17) prior to use of recycled water to augment Phyllis Canal irrigation water." R. 00260. And that Nampa will be required to educate water users "to insure that the users of the water are aware of the origin of the water, and concept of agronomic rate for applying the Class A recycled water." *Id*. It further finds "The proposed recycled water reuse will be to add Class A quality water to the Phyllis Canal to augment the water supply PID distributes to water users, including City municipal irrigation utility customers." R. 00261.

Critically, the Staff Report states "The aera served below the discharge point is approximately 17,000 acres of municipal and agricultural irrigation users, including Nampa's pressurized irrigation system." R. 00267. Additionally, "The area within the red polygon in Figure 3, referred to as the Area of Analysis, shows the PID service area downstream from the proposed recycled water discharge point with an approximately 1.4-mile buffer of that area. Customers served by PID include the cities of Nampa and Caldwell…." R. 00267. The Report further finds "This water is distributed throughout the Area of Analysis via a system of laterals, ditches, and pumps to agricultural and residential land, and to customers of the Nampa and Caldwell irrigation utilities." R. 00281.

Further, the decrees for some of Nampa's ground water rights contain conditions restricting that use. Alternatively, if "related uses" refers to disposal of wastewater via irrigation, these water rights need to go through some sort of process to document that change and an analysis as to injury to other water rights, and whether the change is in the local public interest.

G. Allowing Pioneer to Irrigate with Nampa's water rights violates the conditions on those water rights that limit how and where the water can be used

As Nampa admits, "standard condition 102 that appears on several of Nampa's municipal ground water rights associated with its potable water system." *Nampa Response Brief*, at 37. That condition reads:

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

Standard condition 102, (e.g., No. 63-12474) (emphasis added). Water rights are defined by elements and purpose of use is one of those elements. *City of Blackfoot v. Spackman*, 162 Idaho

at 306-07, 396 P.3d at 1188-89. Nampa argues that it is not in violation of this condition because 1. It is not irrigating, it is "disposing"; and 2. Nampa is in compliance with this condition because "Condition 102 does not preclude subsequent reuse of recaptured ground water for any purpose." *Id*. If Nampa truly did have the right to use those ground water rights to extinction for any related purpose after the first use (municipal), then that condition is completely unnecessary, and in fact, contrary to the Department's intent.

As explained above, the argument that Pioneer is "disposing" of the water rather than "irrigating" with it is entirely inconsistent with the representations these parties made to the IDEQ and to one another when they entered into the contract for "supplemental irrigation water." R. 00205, R. 00398-00400.

The Intervenors assert that municipal water rights are somehow privileged. However, in *City of Blackfoot* and *City of Pocatello* the Idaho Supreme Court held the Cities' water rights must be construed to follow the water right conditions. *City of Blackfoot v. Spackman*, 162 Idaho 302, 310, 396 P.3d 1184, 1192 (2017); *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012). The Director's order fails to consider that this reuse is outside the scope of the water right conditions which don't allow the ground water rights to be used for irrigation unless the surface water is not available. Here, there is no claim that surface water is not available. In fact, the opposite is true, as Pioneer will be "comingling" Nampa's discharge with its own surface water rights. Nampa even argues that Pioneer has to reduce the flows in its canal to accommodate Nampa's water. *Nampa Response Brief,* at 16. If Nampa can use its municipal water rights to extinction for any "related purpose" why did the Department condition those ground water rights to be used only if surface water is unavailable?

Nampa argues it can spread water wherever it pleases because it has a flexible service area. But Nampa does not have a service area outside its area of impact, inside the city limits of Caldwell or within Caldwell's area of impact. Pioneer and Nampa argue this water spreading is authorized under Idaho Code § 41-202B(9):

> (9) "Service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

Idaho Code §42-202B(9) (emphasis added). Applying the plain meaning of that statute to the facts of the case, this definition is not even close to being applicable to areas outside Nampa's established planning area. Including those areas in Pioneer's place of use that encompass the City of Caldwell, Caldwell's planning area and lands west of Caldwell. Riverside previously demonstrated before the Director that the area where Pioneer is to deliver water is well outside Nampa's service area and even within Caldwell's service area. R. 00808, R. 01144. No party has disputed that fact before the Director or on appeal.

Pioneer repeatedly asserts it will not be using the water on the full 17,000 acres. *Pioneer's Response Brief*, at 1, 42, 45. These assertions are directly contrary to the application for a permit, Nampa's technical analysis, the IDEQ staff analysis and the IDEQ permit, as explained above. For example, the *Recycled Water Reuse Permit Application Preliminary Technical Report*, written by Nampa's consultant, states "Considering the end of the recycled water discharge pipe as the point of compliance and the approximately 17,000 irrigated acres of

PID service area downstream from the discharge point, constituent or hydraulic loading is not anticipated to exceed agronomic uptake rates of crops in the PID service area." R. 00460.

Nampa and Pioneer ask this Court to go along with the charade that a permit issued based on the understanding that the wastewater will be applied to 17,000 acres will in fact be used by Nampa residents, within Nampa's service territory, within the first 3,000 acres of "acceptance" into the Phyllis Canal. Pioneer has no way to limit the conveyance of water it intends to divert from Nampa's pipeline so that the water only goes to 3,000 acres in Nampa's service area. The water is "comingled" and supplies 13% of the water in the Phyllis Canal. R. 00281. The Court should not abide the effort by Nampa and Pioneer to tell IDEQ one thing to obtain the IDEQ permit and tell this Court another to avoid getting an IDWR permit or transfer. Nampa and Pioneer complain that Riverside, in point out these facts to the court is being "molecular." R. 00898, 00900, 01086. In fact, it is Nampa and Pioneer whose molecular analysis limits the molecules of Nampa's wastewater to Nampa's service area, a physical impossibility as IDEQ found, and, as they reluctantly admit.

H. The Supreme Court's holding in *A&B* is directly on point and relevant to this Court's analysis

The *A&B* case holds that a water right retains its original characteristic even after being recaptured. *A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005). As applied to recapture and reuse, the use still must be consistent with the water right conditions, meaning a user can't recapture waste water and use it outside water right's conditions, including the permitted POU. *Id.* The Intervenors take the position that the supplemental use restrictions in *A&B* don't apply to reuse after recapture. This position is in fact contrary to *A&B*. For example, condition 102 states:

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

This condition remains with the water rights after the "initial" use and continues to apply to the water rights even after that use and subsequent collection of the wastewater. While Nampa says that the *A&B* decision is irrelevant because A&B is not a municipality, there is nothing in the *A&B* decision, Idaho law or in Nampa's water rights that exempts municipalities from the conditions on its water rights. In fact, *City of Blackfoot* and *City of Pocatello* hold otherwise.

Nampa and Pioneer's Reuse Agreement will result in an enlargement by allowing Pioneer to irrigate with water on lands that are not covered by Nampa's water rights and by allowing the water to be used as a primary source of supply for Pioneer lands, contrary to the conditions on the water rights. Pioneer contends that there is no enlargement of its water rights because it is not breaking out any new ground or otherwise expanding its irrigated acreage. *Pioneer Response Brief*, at 30. Pioneer misses the point. The enlargement is of Nampa's water rights that are conditioned to be supplemental and for use as potable water supply but after discharge to the Phyllis Canal then become primary use for irrigation purposes, uses not contemplated by Nampa's ground water rights.

Furthermore, IDEQ, Nampa and Pioneer all identified this water as "supplemental irrigation water." Pioneer cannot realistically claim it is not stacking water. That is exactly what it proclaimed to be doing. It is obtaining another source of water, then diverting and applying it to beneficial use. The Reuse Permit and the Director's order will allow, even green light, the use of "supplemental irrigation water" on Pioneer's place of use with water for which it has no water rights.

I. Riverside has standing to challenge the Director's interpretation of Idaho Code § 42-201(2) in violation of Article XV, § 3 of the Idaho Constitution

This legislation is unconstitutional if and only if it allows the transaction of Nampa giving water to Pioneer and Pioneer delivering that water for beneficial use without any injury analysis to other valid water rights. Riverside is not asking the Director to force Nampa to waste water. Riverside is asking the Director conduct an injury and local public interest analysis under either Idaho Code § 42-201(2) or Idaho Code § 42-222. Riverside, as the holder of valid water rights, has standing to make this argument. *Bray v. Pioneer Irr. Dist*., 144 Idaho 116, 118, 157 P.3d 610, 612 (2007). If Pioneer should be required to get a water right or if Nampa should be required to do a transfer application, the general public has an opportunity to participate on injury and on local public interest grounds, even if there is no injury to a water right.

J. The Director's decision will cause injury to Riverside

Riverside is deprived of a procedural mechanism to protest that this use is not in the local public interest or otherwise violates Idaho water law. Riverside explains this deprivation in its *Opening Brief*, at 26-28. Riverside's opportunity to participate in the Reuse Application process with respect to water rights and water law with IDEQ, an agency which self-admittedly has no jurisdiction over water rights, does not afford Riverside protection from procedural or substantive injury.

K. Neither Nampa nor Pioneer are entitled to Attorney's Fees

Nampa and Pioneer request attorney's fees under Idaho Code § 12-117. IDWR does not. The Idaho Supreme Court has ruled that:

> … attorney fees are only appropriate if this Court determines that "the other party acted without a reasonable basis in fact or law." *Burns Holdings*, 147 Idaho at 664, 214 P.3d at 650. When dealing with an issue of first impression, this Court is generally reluctant to find an action unreasonable. *See, e.g., Kootenai Med. Ctr. ex rel. Teresa K. v. Idaho Dep't of Health and Welfare*, 147 Idaho 872, 886, 216 P.3d 630, 644 (2009). Because this Court

> has never addressed whether a local governing body is within its authority to approve two rezones based on a single application, we decline to award attorney fees to Respondents.

Ciszek v. Kootenai Cty. Bd. of Comm'rs, 151 Idaho 123, 135, 254 P.3d 24, 36 (2011)(emphasis added). The same applies here. As both Nampa and Pioneer acknowledge, this is a matter of first impression. *Nampa Response*, at 46-47; *Pioneer Response*, at 47. The Idaho Supreme Court has also declined to award fees where "this case clarified important questions…." *Nemeth v. Shoshone Cty*., 165 Idaho 851, 861, 453 P.3d 844, 854 (2019).

Further, the Idaho Administrative Procedure Act, Idaho Code §§ 67–5201 to 67–5228, which prescribes the manner in which contested administrative cases will be conducted, provides the procedure for administrative review, and authorizes judicial review of final agency orders. *Smith v. Washington Cty. Idaho*, 150 Idaho 388, 391–92, 247 P.3d 615, 618–19 (2010). Because Riverside has a statutory right to appeal, it was reasonable for Riverside to seek judicial review of the Director's order..

This appeal is a matter of statutory construction and the meaning of water rights. Both are matters entrusted to the judiciary and Riverside is entitled to a judicial review of the Director's order. Riverside is not obliged to accept the Director's legal conclusions on matters of statutory construction.

As to the allegations that Riverside has made false statements and/or claims, the only false claims Riverside is accused of making come directly from the record in the IDEQ applications and involve statements made by Intervenors.

III. Conclusion

Riverside respectfully requests the Court to reverse the Director's legal conclusions about the scope of Idaho Code § 42-201(8) and § 42-201(2) as applied to Nampa and Pioneer's scheme to use Nampa's wastewater as an irrigation water source for Pioneer's lands.

DATED this 27th day of October, 2021.

BARKER ROSHOLT & SIMPSON LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October 2021, I caused to be served a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** by the method indicated below, and addressed to each of the following:

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