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Thursday, December 11, 2025

Farmers Union Ditch Company, Ltd.
c/o Sam Rosti, President
via e-mail: farmers.union.ditch@gmail.com

Re: Legal Opinions--Proposed Eagle Sewer District Discharge of Class A Recycled Water to the Farmers Union Canal

Dear Sam (and Board of Directors):

I write in response to the Company's request for a formal legal opinion letter addressing/responding to concerns raised by some within the Company's shareholder base regarding the October 28, 2024, *Recycled Water Discharge and Use Agreement* ("Agreement") between the Company and Eagle Sewer District ("District"). A copy of the Agreement is attached as **Exhibit A** hereto.

The Agreement authorizes the District to discharge up to 8.0 cfs (annual average) of Class A recycled water to the Canal for irrigation reuse within the Company's irrigation water delivery footprint downstream of the Canal intersection with Highway 55 during the "Irrigation Season" (defined in the Agreement as April 1 through October 31). This is a similar arrangement to that previously agreed between the City of Boise and the Company on June 18, 2014 (Class A recycled water discharge to the Canal, but on a larger scale—25.0 cfs versus 8.0 cfs). However, the City of Boise unilaterally terminated that agreement by letter dated August 13, 2021 over the objection of the Company at that time. The Company-District Agreement authorizes discharge to begin as soon as the 2027 irrigation season, but forecasts a more likely start during the 2029 irrigation season.

In hopes of promoting ease in reading and issue tracking, I've organized this opinion letter into a question and answer (Q & A) format below.

What is Class A Recycled Water?

Class A Recycled Water is reclaimed (i.e., "recycled") municipal wastewater filtered, treated, and disinfected under water quality regulatory standards promulgated and administered by the Idaho Department of Environmental Quality ("DEQ"). *See*, IDAPA 58.01.17 (Recycled Water Rules ("Rules"); specifically Rule 601 governing Class A water). Class A Recycled Water is the highest, most treated reuse water classification under Idaho law. For example, the classifications range from Class A down to Class E (which is undisinfected recycled water).

To achieve "Class A" status, the recycled water must be oxidized, filtered, and disinfected to meet the following constituent limits of cleanliness:

> **Total Coliform (bacteria, of which E. coli is a component part):** No more than a median number of 2.2 organisms per 100 milliliters (MPN/100ml) of water sampled over a 7-day period; no more than a single sample maximum of 23 organisms/100 ml; and Class A water requires daily monitoring frequency for bacteria;
>
> **Turbidity:** Turbidity is measure of water clarity (i.e., cloudiness caused by sediment or other suspended solids/matter in the water column). The applicable Class A turbidity standard depends on the form of filtration (sand, granular or cloth media versus membrane filtration). Non-membrane filtration comprises the lesser-treated standard requiring a daily mean not to exceed 2 NTU, with no single sample exceeding 5 NTU. For membrane filtration, the standard is a daily mean not to exceed 0.2 NTU, with no single sample exceeding 0.5 NTU. The turbidity monitoring requirement for Class A water is continuous (i.e., throughout the day as opposed to "daily" which is once per day).
>
> **Total Nitrogen:** For non-groundwater recharge/injection uses (i.e., for use, like here, where the recycled water is not being directly discharged to groundwater), Class A water requires a monthly mean determined from weekly composite sampling not to exceed 30 mg/L.
>
> **pH:** Class A water must range between 6.0 and 9.0 pH as determined by daily grab samples or continuous monitoring of the water.
>
> **BOD5:** BOD5, or five-day biochemical oxygen demand (a measure of dissolved oxygen consumption by microorganisms breaking down organic matter present in water), cannot exceed 10 mg/L for non-groundwater recharge/injection uses measured as a monthly mean determined from weekly composite sampling.

See Rules 601.01 and 602.01.

To be sure, Class A Recycled Water is not drinking water quality. But neither is the raw water flowing in the Boise River, nor the water already flowing in the Canal diverted from the river. In terms of existing Canal water quality comparison, Irrigation Season 2024 monthly Canal water quality samples ranged between 900 and in excess of 1,600 MPN/100ml for Total Coliform

(including measurements of E. coli alone exceeding 300 MPN/100ml); 2.1-3.9 NTU for turbidity; 0.04 -0.24 mg/L for Total Nitrogen; and ND (non-detect) for Total Phosphorus and BOD5.

There is no question that Class A Recycled Water discharged by the District will be far cleaner than the water already flowing in the Canal from a bacteria standpoint. The Class A Recycled Water will also be slightly clearer (less turbid) on average than the water already flowing in the Canal. Conversely, Total Nitrogen levels will increase, as will Total Phosphorus and BOD5 with the introduction of the Class A Recycled Water discharge.

This said, the Canal water will neither be markedly "cleaner" nor "dirtier" resulting from the Class A Recycled Water discharge on balance because of the comparative volumes of the water sources mixing at the proposed point of discharge (8.0 cfs maximum discharge from the District into a Canal already flowing 110 cfs on average at the Highway 55 intersection). The proposed District discharge (7% of Canal flow) is the proverbial drop in the bucket. Therefore, the Class A Recycled Water discharge will not meaningfully move the needle in one direction or another with post-discharge Canal water quality projections ranging between 853-1,517 MPN/100ml Total Coliform (900-1,600+ existing background); 2.1-3.8 NTU Turbidity (2.1-3.9 existing background); 1.6-1.8 mg/L Total Nitrogen (0.04-0.24 existing background); 0.1 mg/L Total Phosphorus (non-detect existing background); and 0.52 mg/L BOD5 (non-detect existing background). Thus, it is disingenuous for anyone to assert that the proposed Class A Recycled Water discharge will meaningfully improve existing Canal water quality, and it is equally disingenuous for anyone to assert that the proposed Class A Recycled Water discharge will meaningfully degrade existing Canal water quality.

However, in an attempt to lend more context in terms of human health-based criteria, Idaho's water quality standards are broken down into "primary contact" recreation (e.g., full body water immersion and anticipated incidental ingestion like swimming) and "secondary contact" recreation (e.g., incidental contact while boating or fishing without anticipated water ingestion). IDAPA 58.01.02.100.02. From a recreational standpoint, bacteria (E. coli) is the main water quality constituent of concern.

The primary contact recreational standard is a geometric mean of 126 MPN/100ml, with a statistical threshold value sample maximum of 410 organisms/100ml. Areas designated as public swimming beaches also share the 126 MPN/100ml geometric mean standard but are further restricted to a single sample maximum limit of 235 organisms/100ml. IDAPA 58.01.02.251.02. From a bacteria standpoint (inclusive of E. coli), Class A Recycled Water is exponentially cleaner than the most restrictive (public swimming beach) primary contact recreation standard (the Class A standard limits are a geometric mean limit of 2.2 MPN/100 ml, and a single sample maximum of 23 organisms/100ml versus the 126 MPN/100ml and 235 organisms/100ml values noted above).

All of this is a long way of demonstrating that Class A Recycled Water is highly regulated and highly polished water. While it is not drinking water, it is very comparable to the raw Boise River water already flowing in the Canal on mass balance, with the exception of bacterial (Total Coliform) content. In terms of Total Coliform, Class A Recycled Water is far cleaner than the water already present in the lower Boise River (i.e., the segment of river downstream of Lucky

Peak Dam) and in the Canal. But again, at 7% of total Canal flow at the point of discharge, the water quality needle moves very little.

In the context of irrigation reuse, what percentage of Canal flow is 8.0 cfs, and what forms of irrigation are allowable using Class A Recycled Water?

As noted above, the District's proposed discharge at future buildout (8.0 cfs) equates to approximately 7% of total, average Canal flow (110 cfs) at the intersection of Highway 55 and the Canal. This is why the proposed discharge will not have a marked effect (positive or negative) in terms of overall water quality in the Canal.

However, because of its highly treated/polished nature, Class A Recycled Water is authorized for irrigation of, among other things: pasture for animals producing milk for human consumption; irrigation of orchards and vineyards during the fruiting season (fruit should be rinsed on harvest); parks, playgrounds, and school yards during periods of use; golf courses; all edible food crops; residential landscaping; commercial campus irrigation. Rule 602.02. It can also be used for groundwater recharge and subsurface injection. *Id*.

As noted above, the Class A standard concerning irrigation uses anticipates and authorizes uses involving contemporaneous human and animal interaction (e.g., pasture irrigation of milk-producing livestock, in-use playgrounds and school grounds, golf courses, and residential landscaping). Class A is the only class of recycled water allowed for use on parks, playgrounds, and school yards while adults and children are present and using the same during the application of the water. Class C, D, and E recycled water cannot be used for such irrigation purposes, and Class B recycled water can only be used for park, playground, and school yard irrigation during periods of non-use (i.e., when adults and children are not present and using the grounds during irrigation application).

The "7% of total, average Canal flow (110 cfs)" regime would only apply during the "Irrigation Season." As noted in Section A.2.b of the Agreement, the parties are also committed to "us[ing] their best and reasonable efforts to pursue and implement non-Irrigation Season discharge to the Canal should the District desire such a discharge." During the non-Irrigation Season the Class A Recycled Water flow would be the only flow in the Canal other than runoff into the Canal from upgradient lands (incidental sheet flow) and locations where storm drains are plumbed to the Canal (of which there are some).

Whether non-Irrigation season discharge to the Canal occurs in the future is an open question. That "off-season" discharge is a different DEQ permitting regime for which there is no application pending before the agency, and that discharge will require the engineering and installation of additional Canal infrastructure to isolate flow to accommodate Canal maintenance. While the Agreement preserves and promotes the concept and exploration of off-season discharge (the pursuit and implementation thereof), such discharge is still ultimately subject to the Company's additional prior ("advance") approval. Consequently, the current District proposal remains Class A Recycled Water discharge during the "Irrigation Season" only as noted in Agreement Section A.2.b (". . . District discharge of Recycled Water to the Canal is restricted to

the Irrigation Season."); *see also*, Section B.2 (" . . . the Company authorizes District to discharge up to 8.0 cfs (annual average) of Recycled Water flow to the Canal each Irrigation Season.").

What happens if there is a District treatment plant upset?

As with any mechanical, engineered process, there is the risk of systems operations faults. The same is true for any municipal wastewater treatment plant operator discharging to the Boise River or its tributaries (e.g., the cities of Boise, Meridian, Nampa, Middleton, and Caldwell). In the case of the proposed District discharge to the Canal, there are redundancies in place.

As a practical matter, the Agreement requires the District to comply with applicable discharge "monitoring, sampling and testing" protocols." Agreement, Section A.6. As noted above, Class A standards require continuous or daily monitoring and sampling for the regulated constituents with the exceptions of Total Nitrogen and BOD5. Should a plant upset cause the Recycled Water to fall out of Class A compliance, the District is required to "immediately cease discharge" to the Canal. *Id*. And, the District cannot resume discharge again until it demonstrates the ability to meet Class A standards to the Company's satisfaction. *Id*. From a plumbing redundancy perspective, the District possesses at least 24 hours of contingency storage capacity at its plant. If any plant upset that might occur cannot be corrected within that 24-hour period, then the District is plumbed to, and will send its non-Class A compliant discharge to, the City of Boise system. In short, should an upset occur, the District will essentially flip a switch and close a valve and go a different direction with any non-compliant water.

As a general "legal insulation" matter, the Agreement requires that the District, among other things:

- Ensure that its discharge "meet[s] or exceed[s] the water quality requirements for Class A Recycled Water" as regulated by DEQ (Agreement, Section A.3);

- Comply with "all applicable local, state, and federal laws, rules and regulations" governing "the discharge of Recycled Water to the Canal" (Agreement, Section A.5); and

- "[D]efend, indemnify and save and hold harmless the Company from and for any and all losses, claims, actions, judgments for damages, or injury to persons or property and losses and expenses arising or resulting from District's discharge of Recycled Water under th[e] Agreement" (Agreement, Section C.5).

In sum, the Agreement contemplates the possibility of plant upset, addresses that possibility to the protection of the Company, and the District has its own plumbing redundancies built into its infrastructure.

Company authority—why weren't shareholders consulted?

Some have approached the Board expressing concern that the Company shareholders were not consulted about the District proposal, at least not until after Agreement was signed between

the Company and the District in October of 2024. The short answer is that the Board possessed the legal authority to enter into the Agreement for the benefit of the Company. The decision to enter into the Agreement was the Board's to make within its discretion and authority as the day-to-day manager of Company operations.

With respect to the Company's Articles of Incorporation (1894), the Company exists to procure and distribute irrigation water to its shareholders. Among other powers, the Articles expressly provide Board authority to: "acquire [and] hold water rights and privileges . . . acquire [and] hold water for irrigation . . . [and] to enter into all contracts . . . necessary to the proper and lawful carrying out of the purposes mentioned herein, and to do any and all lawful business in connection with the proper management, conduct and control of the business for which [the] corporation is established."

The Company's Bylaws (1913) authorize the Board to "exercise the general corporate powers of the Company," and proceed in the manner which the Board believes to be the "best for the interests of the Company." Article IV, Section 1. The Board President is authorized to "sign the corporate name and affix the corporate seal on behalf of the Company to all bonds, releases, contracts and instruments of every kind required to be executed by the Company." Article IV, Section 3. As noted above in relation to the Articles of Incorporation, the "general corporate powers" vested in the Board include the procurement of irrigation water, contracting, and "any and all lawful business in connection" therewith.

As a more general matter of statute, Board authority and action are further informed by Idaho Code Title 42, Chapter 22 (Irrigation "Operating Companies"), and the provisions of the Idaho Non-Profit Corporation Act (Idaho Code Section 30-30-101, *et seq.* (the "NPCA")). Idaho Code Section 42-2211 expressly contemplates ditch company acquisition of "supplemental water" supplies for irrigation use (although the Company cannot charge additional assessments for sch acquisition without an affirmative resolution of the shareholders—which resolution requirement does not apply here because the District Class A Recycled Water discharge is not being purchased).

Under the NPCA, the Company, through the Board, is authorized to purchase, receive, or otherwise acquire "water and water rights"; "make contracts"; and to otherwise "do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation." Idaho Code Section 30-30-302(4), (7), and (17).

And finally, dovetailing with the "best interests" criterion contained in the Company's Bylaws, Idaho Code Section 30-30-618 imposes the same "best interests" duty and further explains that a director, in discharging his duties, "is entitled to rely on information, opinions, reports or statements . . . prepared by: . . . legal counsel . . . or other persons as to matters the director reasonably believes are within the person's professional or expert competence." Idaho Code Section 30-30-618(2). In this case, the Board is relying on myself, District personnel, DEQ personnel, and the existence and application of the pertinent Idaho statutes and agency regulations applicable to the proposed Class A Recycled Water discharge—all of which are forms of "information" and "opinions," etc. within the "professional [and] expert competence" of those consulted.

There was nothing hidden or subversive about this process. The District has been polling its patrons and other stakeholders for multiple years. The District has held numerous public meetings and obtained the full support of the Eagle Mayor's office and the City Council. The Company addressed the matter on its website, linking it to the District's website, and openly discussed the matter during the Company's 2025 annual meeting. The Board's execution of the Agreement was well within its authority—consistent with the Company's operative Articles of Incorporation, its Bylaws, and applicable statutes.

That some may disagree with the Class A Recycled Water discharge proposal philosophically does not mean that the proposal is not in the best interests of the Company overall (explained further below), or that the Agreement is beyond the scope of the Company's (or the Board's) legal authority. Under the Agreement, the Company is procuring a highly regulated, and highly reliable source of supplemental irrigation water supply consistent with the various Idaho laws (water rights-related, water quality-related, and corporate authorities-related) governing the same.

What are Company benefits under the Agreement?

The short and obvious answer is: "the water." While statistically insignificant from a water quality standpoint (see above), 8.0 cfs of daily flow (approximately 7% of Canal flow at the proposed discharge point) is significant from a water quantity standpoint in terms of potential storage water savings and opportunity. The proposed Class A Recycled Water is beneficial to the Company for a variety of reasons:

(a) District-supplied Class A Recycled Water is a drought-proof supply of water. No matter the climate cycle, District customers (many of whom are also Company shareholders) will cook, clean, bathe, and use the facilities. The recycled water is an ever-present supplemental water source available for irrigation reuse.

(b) In terms of reservoir storage water supply, the Company owns storage water accounts in Arrowrock (2,779 AF), Anderson Ranch (5,593 AF), and Lucky Peak (10,000 AF) Reservoirs. The Company uses this storage water to supplement available river diversions as the irrigation season progresses and river flows decline and water rights fall out of priority. Though a simple (but conservative) assumption, District discharge of 8.0 cfs of Class A Recycled Water to the Canal equates to ~16.0 acre-feet of water volume per day. With the day of allocation on the Boise River typically occurring in mid-to-late June each year, the Company uses supplemental storage water ~100 days per year (mid-June to late September/early October). Use of District Class A Recycled Water has the potential to save the Company approximately 1,600 AF of storage water in a typical year (and more in lean/drought years when the Company is forced to use storage water earlier in the irrigation season). This conserved storage water serves as an additional hedge in back-to-back drought years in terms of reservoir storage refill in any given year.

(c) The ~1,600 AF volume of storage water is also financially valuable. In terms of Water District 63 (Boise River) rental pool opportunity, the current rental pool rate is $23 per

acre-foot of storage. Consequently, the rental opportunity derived from ~1,600 AF of storage water equals ~$37,000 per year.

The Company also knows from prior inquiries that others in the Boise River Basin are seeking to purchase storage water from willing sellers sourced from the storage water accounts existing in the Boise River reservoirs. Unsolicited, and in February 2024, the Company received a written offer to purchase Company storage water at a price of $3,000 per acre-foot. When further probed, the purchaser agent shared that the price/value per acre-foot of storage water when compared to the ongoing Anderson Ranch Reservoir Dam raise project (partnered by the United States Bureau of Reclamation ("BOR") and the state of Idaho) in terms of avoided cost actually ranged somewhere between $6,000 and $9,000 per acre-foot (because of the ever-increasing capital costs of the proposed dam raise construction, coupled with the extreme junior water right priority of the new storage space projected to fill only 40-50% of years). Therefore, recent (2024) economic analysis suggests a minimum FMV of $4.8M (at $3,000/AF) for 1,600 AF of storage water, and more likely a truer FMV ranging between $9.6M (at $6,000/AF) and $14.4M (at $9,000/AF) because that is the avoided cost of newly available space in the reservoir system (at least a current construction estimates).

This is not to say that the Company is on the cusp of renting more storage water than it currently does through the rental pool, let alone selling storage water. But there is no question that the District Class A Recycled Water is an asset that brings value and significant potential financial opportunity to the Company going forward.

(d) There is no cost to the Company to "develop" this supplemental source of irrigation water. As noted above, the rental of a like quantity of water would cost the Company at least ~$37,000 per year. And, the cost to purchase such water in a usable form when needed (i.e., storage water) would be cost-prohibitive (multiple millions of dollars). Other options would include the purchase of other existing, senior natural flow water rights from willing sellers (likely for millions of dollars), or the drilling of wells to supplement water supply at the cost of drilling, annual O&M of the wells, and the electricity costs to operate the wells. The District Class A Recycled Water proposal avoids all of these Company cost scenarios and conserves groundwater supplies for other uses (e.g., drinking water supply—both municipal and individual domestic systems), while also avoiding the litigation that can come from the water right application process in a protest-based administrative contested case proceeding before the Idaho Department of Water Resources ("IDWR") (multiple thousands of dollars).

(e) The proposed District Class A Recycled Water discharge forms at least some hedge against likely future water right delivery calls on the Boise River. Currently, water rights sourced from the Boise River are administered as a "two river" system. Water rights are administered in priority (e.g., 1870-prioirty water rights are senior, and first in right to 1880-priority water rights) upstream of Star Road bridge. Downstream of Star Road bridge water right administration does not yet occur because drain-based

return flows to the river replenish river flows in a quantity sufficient to meet minimum stream flows and the delivery of water rights downstream of Star Road bridge.

It is known, and currently under further study by IDWR, USGS, and Water District 63, that drain flows returning back to the river are declining due to the urbanization of the Treasure Valley. Agricultural flood irrigation is being replaced by more efficient pressurized (sprinkler) irrigation in residential and commercial subdivisions, which sprinkler-based irrigation greatly diminishes the surface water runoff and shallow groundwater seepage comprising the drain flows.

During the 2018 irrigation season (shortly after the day of allocation on the Boise River), Riverside Irrigation District (canal heading on the Boise River just west of Canyon Hill in Caldwell) attempted to initiate a water rights call before IDWR seeking to curtail water rights junior to its more senior water rights on the system. Fortunately, IDWR and Water District 63 rejected the water rights call attempt which, had it proceeded, would have started a river system-wide ripple effect legal proceeding reaching upstream of Star Road bridge because there are a number of large senior water rights sourced from the Boise River downstream of Star Road bridge. The litigation would have likely spanned multiple years and several hundreds of thousands of dollars of expense for the irrigation entities involved (including the Company) working its way from IDWR contested case proceedings, to appeal before the Idaho Adjudication Court, to ultimate appeal before the Idaho Supreme Court.

Unfortunately, it appears that the expiration of the water right administration break at Star Road bridge that has maintained relative water right peace in the valley for well over 100 years is a matter of "when," and not "if." The development and use of alternative irrigation water supplies will be critical to mitigating the impacts of decreasing drain return flows and the future water right administration caused, in large part, by that evolving hydrologic regime.

(f) The proposed District Class A Recycled Water discharge also forms at least some hedge against larger regional water supply uncertainty. The federal government has long been under pressure to use federal reservoir storage water for Endangered Species Act ("ESA")-related mitigation (for example, salmonid/anadromous fish smolt outmigration flow augmentation in the lower Snake and Columbia Rivers). Under the currently-operative Snake River Water Rights Act of 2004 (a/k/a the "Nez Perce Agreement"), the BOR provides an annual minimum of 427,000 AF of flow augmentation water from Idaho storage reservoirs in exchange for the 30-year biological opinions supporting ongoing federal reservoir operations in the state (including the reservoirs located in the Boise River Basin). The Nez Perce Agreement expires in 2034, and negotiations are just beginning on what a new agreement might look like (including its future flow augmentation requirements).

Admittedly, this Item (f) and its potential future impacts are nebulous at this point. What is not nebulous, however, is the 30 years of certainty and litigation peace that the

agreement and the 2004 Act have provided water users in the state of Idaho based in large part on the flow augmentation component of the settlement.

Boise River Valley hydrologic regimes are changing in response to climate change, population growth, and land use changes. These same issues are also occurring throughout the state of Idaho and the larger Pacific Northwest region. Water, including Recycled Water, is far more a commodity in this day and age than it is "waste," irrespective of its level of treatment prior to irrigation reuse. The Board was cognizant of these benefits to the Company when it executed the Agreement. Any suggestion or insinuation that the Company entered into the Agreement without thought or care for the "best interests" of the Company is, in my opinion, false and unsupportable.

Are there any increased regulatory concerns—any future permitting regime or added regulatory liabilities for the Company?

Some have asked whether the Company is taking on any added regulatory risk or liability under the proposed District Class A Recycled Water discharge (e.g., is the Company subjecting itself to new Clean Water Act ("CWA")/Idaho Pollutant Discharge Elimination System permitting requirements that are not present obligations of the Company). The short answer is: "No."

The longer answer is "no" because the recycled water reuse is governed by DEQ's more specific irrigation reuse permitting rules (IDAPA 58.01.17.300 - .500). Any forthcoming DEQ Reuse Permit will require disconnect from WOTUS (regulated "waters of the United States"), and the District, not the Company, will be the DEQ permittee. Thus, any violations of any future Reuse Permit are liabilities of the District, and not the Company.

As discussed above, the Agreement contains various provisions insulating the Company from added regulatory burden and/or costs:

(a) Agreement Section A.4 requires that the District "at its sole cost . . . be responsible for [the] operation and maintenance" of all infrastructure related to its Recycled Water discharge;

(b) Agreement Section A.5 requires that the District comply with "all applicable local, state, and federal laws, rules and regulations" governing "the discharge of Recycled Water to the Canal";

(c) Agreement Section C.2(b) authorizes the Company to terminate the Agreement if new or increased regulatory burdens/permitting requirements arise that the District is not willing to bear the costs and expenses therefor;

(d) Agreement Section C.5 requires that the District --"defend, indemnify and save and hold harmless the Company from and for any and all losses, claims, actions, judgments for damages, or injury to persons or property and losses and expenses arising or resulting from District's discharge of Recycled Water under th[e] Agreement"; and

(e) Agreement Section C.17 makes clear that the District is "solely responsible" for the operation and maintenance of its treatment plant, the Recycled Water infrastructure, and for "achieving and maintaining any and all applicable regulatory compliance" with its (the District's) activities. Section C.17 further provides that "[t]he Company shall not be liable for any costs or expenses associated with the ownership, operation, or maintenance of the District's WWTP or its related infrastructure, or for any of the costs or expenses related to the regulatory burdens thereof including, without limitation, any fines, penalties, expenses, fees or costs arising from any regulatory enforcement actions commenced against the District in relation thereto."

At bottom, the District is required to send only regulatorily-compliant Class A Recycled Water to the Company at the District's sole cost and expense. And, the District is obligated to indemnify and defend the Company for any failure to do so.

Some have also expressed concern over the treatment of emerging contaminants of concern such as PFAS compounds and pharmaceuticals/residues. The fact of the matter is that the United States EPA has yet to enact discharge limits for these constituents. If and when it does, the DEQ and the District (and every other municipal discharger in the Treasure Valley) will have to react and meet the new regulatory effluent limits accordingly.

With respect to District Class A Recycled Water discharge to the Canal, and as noted above, the District has the ongoing obligation to comply with all laws, rules and regulations (present and future), and send only regulatorily-compliant Class A Recycled Water to the Company. Agreement Sections, A. 3, 5, and 6; and C.17. This includes meeting "any more stringent requirements, if any, required by DEQ."

Does the Agreement present the Company with any future water right liabilities (e.g., are there any water right forfeiture or abandonment concerns)?

No. I have no water right-related concerns with the Class A Recycled Water discharge proposal—neither in terms of the need to secure any additional water rights to implement the discharge, nor any water right forfeiture or abandonment concerns in response to the discharge.

Regarding additional water right implications, Idaho Code Section 42-201(8) expressly exempts the District-Company proposal from additional water right application and permitting requirements. I litigated this very issue before IDWR, and on appeal to the Idaho Adjudication Court, in the context of the City of Nampa Class A discharge to Pioneer Irrigation District's Phyllis Canal. *See Remittitur* (Mar. 16, 2022); *Riverside Irr. Dist. V. Idaho Dept. Wat. Res. and Gary Spackman*, *et al.*, Case No. CV14-21-05008.

Regarding water right forfeiture/abandonment (in whole or in part), it is true that Idaho Code Section 42-222(2) provides for the statutory forfeiture of water rights for five continuous years of non-use (in whole or in part). The concern in this context being that the proposed District Class A Recycled Water discharge is displacing/idling Company use of portions of its own water right portfolio in response. This too, is a non-issue because Idaho Code Section 42-223 provides express exemptions from statutory forfeiture, at least a couple of which apply here.

Idaho Code Section 42-223(3) precludes statutory forfeiture when the non-use of a water right results from "land application of waste for disposal." Recycled Water irrigation reuse is a form of "land application" under Idaho Code Section 42-201(8).

Idaho Code Section 42-223(9) precludes statutory forfeiture when the non-use of a water right results from a "water conservation practice." This Recycled Water reuse proposal is a conservation practice—the irrigation reuse of treated municipal wastewater allowing the conservation (non-use) of upwards of 8.0 cfs of natural flow from the Boise River, new groundwater development, and/or the conservation of ~1,600 AF of reservoir storage water annually.

Consequently, non-use of any portion of the Company's water right portfolio is not at risk for forfeiture or abandonment merely because an alternative, lawful source of water is being used to perform/maintain the same underlying beneficial use (irrigation of lands within the Company water right place of use).

Does the Agreement create any Canal corridor easement liability concerns?

Some have expressed concern that the Company's acceptance and conveyance of Class A Recycled Water in the Canal violates the Company's Canal corridor easement rights to the detriment of property owners across whose property the Canal flows. This concern is rooted in the presumption that the Class A Recycled Water is a new, materially different (and deleterious) type of irrigation water compared to river water, and that this necessarily means that the "new"/"non-river" water constitutes an increased burden on the servient estates. In my opinion, these concerns are legally unfounded and incorrect.

First, and as explained above, Class A Recycled Water is not materially "different" water. It is a highly treated and highly regulated source of water that is a legally-recognized and approved alternative source of irrigation water in the state of Idaho. *See*, *e.g.*, Idaho Code Section 42-201(8) and IDAPA 58.01.17. And its quality is at least comparable to the background quality of the water already flowing in the Canal considering the mass balance analysis (7% of Canal flow at point of discharge) of regulated constituents post-discharge. The Company exists to procure and deliver irrigation water to its shareholders. That is what it is doing under the Agreement.

Second, there is no question that the property owners of the lands burdened by the Canal have property rights in that property. However, those underlying property rights ***are servient to*** (i.e., subordinate to) the lawful uses/purposes attributable to the existence of the Canal. *See*, *e.g.*, *Bratton v. Scott*, 150 Idaho 530, 536, 248 P.3d 1265, 1271 (2011) (citation omitted) ("The owner of an irrigation ditch has an easement right in land upon which the ditch is located. *See* I.C. § 42-1102. The owner of the ditch is the dominant estate holder, whereas the landowner where the ditch is located is the servient estate holder."). So, what does Idaho Code Section 42-1102 provide in the context of irrigation ditch easements?

Idaho Code Section 42-1102 expressly provides the Company the statutory right to "convey water to the place of use for the purposes of irrigation." I.C. § 42-1102(1). This is a general

grant of easement for the conveyance of water for irrigation purposes as subsection (2) of the statute makes clear by its non-exclusive enumeration (the "shall include but is not limited to" language) of additional incidental rights that are part and parcel of the statutory ditch easement. And "an easement that has been granted or reserved in general terms" is one of "unlimited reasonable use." *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 548-549, 808 P.2d 1289, 1293-1294 (1991) (citation omitted).

Even the scope of prescriptive easements (which are strictly and narrowly construed under the law because of their adverse/hostile nature) may be expanded over time provided that the expansion is "reasonable." *See*, *e.g.*, *Gibbens v. Weisshaupt*, 98 Idaho 633, 639, 570 P.2d 870, 876 (1977). Consequently, the applicable legal standard is not a zero tolerance/zero-increase standard; rather, it is a material, unreasonable increase standard. The seminal question, therefore, is whether the acceptance and conveyance of Class A Recycled Water within the Canal is "unreasonable" under the circumstances.

The answer in my opinion is "no"—there is no material or unreasonable increase in the burden to properties servient to the Canal corridor under the Agreement. As noted above, the post-discharge quality of the water flowing in the Canal will remain essentially the same for all regulated constituents (Total Coliform, Turbidity, Total Nitrogen, pH, and BOD5). The quantity of water flowing in the Canal at the discharge point will remain the same (approximately 110 cfs). And the physical footprint of the Canal and width of its statutory right-of-way will remain the same (i.e., the Canal is not being widened or deepened to accommodate the discharge). Class A Recycled Water is a legally-recognized and approved alternative source of irrigation water—it is not sewage, or some other form of water materially distinguishable from the Boise River water flowing in the Canal historically.

Does this type of recycled water irrigation reuse occur elsewhere?

Yes. Recycled Water reuse happens all across the nation, and there are several local examples in the Treasure Valley alone. With respect to the Boise River, the BOR estimates that the river water is recycled and reused as many as 6-times as it works its way through the valley. As discussed above, there is a water right administration "break" at Star Road bridge. This is because flow in the river downstream of Star Road bridge is comprised nearly entirely of irrigation drain and shallow subterranean return flows back to the main river channel.

Pioneer Irrigation District, Nampa & Meridian Irrigation District, and Riverside Irrigation District (to name a few) divert drain water for supplemental irrigation water reuse via pump stations, feeder canals, and other drain-based diversion mechanisms. Riverside Irrigation District operates almost entirely based on water diverted from the drainage side (as opposed to the river side) of the water system (diversions from Indian Creek—in practical reality an irrigation return drain downstream of its intersection with the New York Canal—and the West End Drain south and west of Caldwell). This water reuse concept has been going on for well over 100 years in this valley, and the concept is neither revolutionary, nor undesirable.

In terms of DEQ-regulated recycled water, Pioneer Irrigation District began receiving the full discharge of the Nampa City treatment plant (treated to Class A quality)—~20 cfs daily—for

the entirety of the 2025 irrigation season. The Pioneer-Nampa arrangement calls for a future build out flow of up to 41 cfs of Class A Recycled Water Discharge to the Phyllis Canal over time (a potential storage water savings of approximately 8,200 AF per year at build out assuming ~100 days of storage water use during the irrigation season).

The cities of Meridian and Kuna reclaim their municipal wastewater (Class A standard) and use the same within their municipal irrigation systems.

More locally, the Avimor and Hidden Springs communities do the same (reclaim and recycle their community wastewater for irrigation use within the community common areas). And Valnova is going to do the same.

Conclusion

The future is now. Water pressures are increasing regionally and locally in response to climate change, population growth, ESA-related purposes, and land use conversions. I appreciate and applaud the thoughtful and progressive thinking of the Company and other irrigation entities in the state of Idaho further stretching and developing water sources to meet current and future needs. *See*, *e.g.*, *Treasure Valley DCMI Water-Demand Projections (2015-2065)* (Aug. 8, 2016) (Petrich), and *Treasure Valley Water Supply Project Surface Water Modeling and Dashboard* (Oct. 17, 2023) (Water District 63).

I hope that the foregoing explanations and opinions allay any concerns that the Board may have with respect to the Company-District Agreement, including concerns raised amongst at least some of the Company shareholders to date. If you have any additional questions, please do not hesitate to ask.

Very truly yours,

Andrew J. Waldera