

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF POCA TELLO,

Petitioner,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES, and MATHEW
WEAVER, in his capacity as Director of the Idaho Department of Water
Resources,

Respondents,

and

CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF
DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF
HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF
PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF
SHOSHONE, CITY OF WENDELL, BURLEY IRRIGATION DISTRICT,
FREMONT-MADISON IRRIGATION DISTRICT, and IDAHO
IRRIGATION DISTRICT,

Intervenors.

Case No.

CV01-25-19039

IN THE MATTER OF THE ALLOCATION OF STORED WATER TO
THE CITY OF POCA TELLO BY WATER DISTRICT 01

BRIEF OF RESPONDENTS IDWR AND MATHEW WEAVER

Judicial Review from the Idaho Department of Water Resources
Mathew Weaver, Director

RAÚL R. LABRADOR
ATTORNEY GENERAL

JOY M. VEGA
Chief of Energy and Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
ANN N. YRIBAR, ISB #8406

Deputy Attorneys General
Idaho Department of Water Resources
PO Box 83720

Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
ann.yribar@ag.idaho.gov

Attorneys for Respondents

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
1155 Canyon St., Suite 110
Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com

Attorneys for Petitioner

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
PO Box 107
Boise, ID 83701
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Attorneys for Coalition of Cities

Travis L. Thompson
Abby R. Bitzenburg
PARSONS BEHLE & LATIMER
PO Box 63
Twin Falls, Idaho 83303-0063
tthompson@parsonsbehle.com
abitzenburg@parsonsbehle.com

John K. Simpson
IdaH2O, PLLC
PO Box 152
Boise, ID 83701-0152
jks@idahowaters.com

Attorneys for Burley Irrigation District

Jerry Rigby
Hyrum Erickson
RIGBY, ANDRUS & RIGBY LAW, PLLC
PO BOX 250
Rexburg, Idaho 83440
jrigby@rex-law.com
herickson@rex-law.com

*Attorneys for Fremont Madison Irrigation
District and Idaho Irrigation District*

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a judicial review proceeding in which the City of Pocatello (“Pocatello”) challenges an order issued by the Idaho Department of Water Resources (“IDWR”). In the order, the hearing officer found that Pocatello’s private lease of storage water in 2022 resulted in a change of place of use and purpose of use of its storage water. The hearing officer further found that, but for the application of the Last-to-Fill (“LTF”) Provision of the Water District 01 Rental Pool Procedures, Pocatello’s private lease would have injured other reservoir spaceholders because the reservoir system failed to physically fill in the year following the private lease.¹ IDWR respectfully asks this Court to uphold the decision of the hearing officer and find that IDWR properly applied the LTF Provision to the allocation of Pocatello’s storage water in 2023. IDWR further asks the Court to find its actions did not violate the Idaho Constitution or the Idaho Statutes cited by Pocatello, that IDWR did not prejudice a substantial right of Pocatello, and that Pocatello is not entitled to attorney fees.

B. Procedural Background

In 2023, Pocatello initiated, in this same Court, a facial constitutional challenge to the LTF Provision of the Water District 01 Rental Pool Procedures.² *See* R. 213–234. This Court determined that the LTF Provision was facially constitutional, stating “the City of Pocatello has

¹ Injury to junior spaceholders only occurs in water-short years when the reservoir system fails to fill completely. In years when the reservoir system physically fills, there is no injury to junior spaceholders because all storage water users receive their full allocation of storage water.

² The LTF Provision of the Water District 01 Rental Pool Procedures is found in Procedure 7.1 to 7.4. R. 589.

failed to establish that no set of circumstances exists under which the application of the last-to-fill provision would be constitutionally valid.” R. 231. The Court further found that Pocatello failed to exhaust its administrative remedies and dismissed its unconstitutional takings and other related damages claims. R. 232.

Following the Court’s decision on the facial challenge, Pocatello initiated an as-applied constitutional challenge before IDWR specific to the application of the LTF Provision to the allocation of its storage water in 2023. Pocatello did this by filing a *Petition Requesting a Hearing on WD01’s 2023 Storage Report* (“*Request for Hearing*”) pursuant to Idaho Code § 42-1701A(3). R. 1–3. IDWR granted Pocatello’s request for a hearing and assigned a hearing officer (“Hearing Officer”). R. 17–18. The Hearing Officer granted a motion to intervene filed by Burley Irrigation District, Fremont-Madison Irrigation District, and Idaho Irrigation District (collectively the “Spaceholders”). R. 29–31. The Hearing Officer also granted a motion to intervene filed by the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (collectively the “Coalition of Cities”). R. 37–40.

Pocatello filed *City of Pocatello’s Motion for Summary Judgment* (“*Motion for Summary Judgment*”), R. 44–47, and the Spaceholders filed *Intervenor Spaceholders’ Motion to Dismiss and Supporting Points and Authorities* (“*Motion to Dismiss*”), R. 549–571. The Hearing Officer denied the *Motion to Dismiss*. R. 804. The Hearing Officer also denied the *Motion for Summary Judgment*, upholding IDWR’s application of the LTF Provision to Pocatello’s 2023 storage

allocation and dismissing Pocatello's *Request for Hearing*. R. 905. Pocatello subsequently filed its *Petition for Judicial Review* with this Court.

C. Statement of Facts

There are no genuine disputes with respect to the facts relied on by the Hearing Officer in this matter.³ The undisputed material facts in this matter are:

1. The United States Bureau of Reclamation ("USBR") is the owner of record for water right 01-2068, which bears a priority date of July 28, 1939, and authorizes the storage of 940,400 acre-feet of water in Palisades Reservoir. The only four authorized purposes of use for water right 01-2068 are irrigation storage, irrigation from storage, power storage, and power from storage. R. 480–482.
2. The place of use for water right 01-2068 states it is "for irrigation from storage within the following counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, Teton and Elmore." R. 480.
3. Water right 01-2068 also lists "Other Provisions Necessary for Definition or Administration" of the right. One of those provisions states:

The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address section of this partial decree. However, as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation

³ In its opening brief, Pocatello does not object to any of the Hearing Officer's findings of fact and does not argue that summary judgment was not appropriate in this matter; it only disputes the Hearing Officer's legal conclusions. *See* Pocatello's Br. 5 ("As stated in the *As-Applied Order*, "there are no genuine disputes with respect to the facts relied on by the hearing officer," who disposed of the contested case on summary judgment without a hearing." (citing R. 904)).

organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

R. 481.

4. Pocatello is a municipality incorporated in the State of Idaho. In 1960, Pocatello entered into Contract No. 14-06-100-1825 (“Pocatello’s Contract”) with the USBR to obtain the right to use 4.1667% of the overall active capacity of Palisades Reservoir, which is the equivalent to 50,000 acre-feet. R. 78.

5. Pocatello’s Contract contains various provisions, including the following:

15. (a) The City may rent stored water which has accrued to its credit in any reservoir of the system, but such private leases shall be for only one year at a time and at rates to be approved in advance by the Secretary and the Advisory Committee. . . .

16. (a) To the extent that water is pumped from wells and from surface streams that flow into American Falls Reservoir, actual measurements at the well heads and at the discharge lines of other pumping plants delivering water for the City shall be made during each irrigation season. One-half of all water provided through the City’s system for the use of its water users from any and all sources in any irrigation season shall be accounted for as water stored for the City as provided in article 10 and charged thereto, except an amount of 7,000 acre-feet of water in each irrigation season until the first irrigation season beginning after a consolidation or merger has been made by the City with the water systems of the City of Alameda when the amount shall be increased to 10,000 acre-feet of water to reflect prior uses of that city and other nearby communities. Delivery of water to the City that as above provided in this article is chargeable to stored water for any irrigation season, shall be limited, however, to the quantities of stored water available as provided in article 10.

(b) The water chargeable to City stored water as provided in this article shall be determined during the irrigation season of each year. Corresponding credits shall be given by the watermaster to the water rights, whether natural flow or storage rights, that have been infringed on by pumping for the City. The amounts represented by such infringements, to whomsoever they shall accrue, shall be made up out of stored water available to the City under this agreement as necessary. The determination of the charges and the credits hereunder shall be under a formula to be devised by the watermaster, after consultation with the Advisory Committee taking account as one factor the so-called Newell formula with respect to the in-flow into American Falls Reservoir, as this formula is affected in the judgment of the watermaster, by the operation of this contract and by other factors that affect the formula. Departures from that formula shall be called to the attention of the Advisory Committee from time to time.

- R. 96–97. While Pocatello’s Contract refers to the watermaster and the Advisory Committee, they are not parties to that contract. R. 113.
6. Pocatello holds several ground water rights for municipal use. R. 884. In 2005, the Surface Water Coalition (“SWC”) filed a delivery call under IDWR’s Conjunctive Management Rules (IDAPA 37.03.11). As a result of orders issued in that matter, Pocatello’s municipal water rights, would, at times, be subject to curtailment unless Pocatello participated in an approved mitigation plan. R. 884–885.
7. In 2019, Pocatello, along with the Coalition of Cites and the City of Idaho Falls, filed a joint mitigation plan (“2019 Joint Mitigation Plan”) proposing to mitigate for the impacts on the SWC from their ground water pumping. The plan proposed supplying the SWC with “average annual mitigation water in the amount of 7,650 acre-feet per year . . . with a minimum requirement to supply 1,000 [acre-feet per year].” R. 885 (alteration in original) (quoting 2019 Joint Mitigation Plan Ex.1, at 3). In other

- words, Pocatello and the Cities proposed to mitigate by using storage water. IDWR subsequently approved the mitigation plan. R. 885.
8. Water District 01 is created by IDWR pursuant to statute and oversees the distribution of water among appropriators. I.C. § 42-604. The Water District 01 watermaster regulates the diversions from the Snake River and its tributaries in the Upper Snake River Basin, as well as the storage in and delivery of storage water from the Upper Snake River reservoirs. R. 885. The Director of IDWR has supervisory authority over water distribution within water districts. I.C. § 42-602.
 9. Each year, pursuant to Idaho Code § 42-605(6), Water District 01 elects an advisory committee. This committee, commonly referred to as the Committee of Nine, provides guidance to the Water District 01 watermaster. *Id.*
 10. The Idaho Water Resource Board (“IWRB”) operates the Water Supply Bank, under Idaho Code § 42-1761. The Water Supply Bank allows water users to lease and/or rent storage water. The approval of a private lease through the Water Supply Bank may act as a substitute for filing a transfer application under Idaho Code § 42-222. I.C. § 42-1764.
 11. The Committee of Nine serves as the local committee appointed, under Idaho Code § 42-1765, by the IWRB to facilitate the private lease of stored water in Water District 01. The administrative structure created to facilitate the rental of storage water in the Upper Snake River Basin is commonly referred to as the Water District 01 Rental Pool. R. 885–886.

12. Consistent with Rule 40.01 of the IWRB’s Water Supply Bank Rules (IDAPA 37.02.03), the Committee of Nine recommends Rental Pool Procedures each year to govern storage water transactions in the Water District 01 Rental Pool. The 2023 Water District 01 Rental Pool Procedures were approved by the Water District 01 water users at the annual meeting for the water district held on March 7, 2023. R. 740. The 2023 Water District 01 Rental Pool Procedures were approved by the IWRB on March 31, 2023. R. 828.
13. Procedure 7.3 of the 2023 Water District 01 Rental Pool Procedures establishes a process where private leases from all common pool, private leases, assignments, supplemental pool, and extraordinary circumstances pool become the last space to fill in a year subsequent to the private lease when the reservoir system fails to physically fill. R. 317. This procedure is commonly referred to as the Last-to-Fill (“LTF”) Provision.
14. Pocatello voluntarily participated in the Water District 01 Rental Pool in 2022 through a private lease⁴ of a portion of its storage water to “multi-cities.” R. 865–866, 856. The water was ultimately delivered to the point of diversion for American Falls Reservoir District #2 (“AFRD#2), an irrigation company that diverts water from

⁴ The Water District 01 Rental Pool Procedures define the term “lease” to mean “a written agreement entered into between a lessor and lessee to lease storage water pursuant to Procedure 6.” R. 308. Procedure 6 deals with “Private Leases.” R. 316. The transaction at issue in this matter was a “private lease” entered into between Pocatello and “multi-cities.” R. 865–866. Therefore, this brief will use the term “private lease” as being the most accurate term for the specific transaction at issue in this as-applied challenge. It should be noted that the Water District 01 Rental Pool Procedures define the term “rent” as “the rental of storage from the common pool, supplemental pool, or assignment pool.” R. 309. The LTF Provision also applies to the “rental” of water through these other pools. R. 317.

the Snake River at Milner Dam. R. 889. The lands irrigated by AFRD#2 patrons do not overlap with the municipal service area or places of use for Pocatello’s water rights. *Id.*

15. Pocatello’s delivery of storage water to AFRD#2 was intended to satisfy the mitigation obligations set forth in the 2019 Joint Mitigation Plan. R. 128–149.
16. In 2023, the Upper Snake Reservoir system did not physically fill. R. 859. Because the reservoir system did not fill, Water District 01 applied the LTF Provision to the portion of Pocatello’s storage space that was evacuated to deliver the water privately leased to “multi-cities” and delivered to AFRD#2 for mitigation. R. 857–862.

II. ISSUES PRESENTED ON APPEAL

Respondents’ formulation of the issues presented are as follows:

1. Whether IDWR correctly concluded that Pocatello’s 2022 private lease of its storage water to AFRD#2 constituted a change in the place of use of water right 01-2068.
2. Whether IDWR correctly concluded that Pocatello’s 2022 private lease of its storage water to AFRD#2 for mitigation purposes constituted a change in the nature of use of water right 01-2068.
3. Whether IDWR’s application of the LTF Provision to the fill of Pocatello’s storage water allocation in 2023 prevented injury to junior spaceholders.
4. Whether IDWR’s application of the LTF Provision to Pocatello’s storage allocation in 2023 violated the Idaho Constitution.
5. Whether IDWR’s application of the LTF Provision to Pocatello’s storage allocation in 2023 violated Idaho Code.
6. Whether IDWR’s application of the LTF Provision to Pocatello’s storage allocation in 2023 prejudiced Pocatello’s substantial rights.

7. Whether Pocatello is entitled to attorney fees under Idaho Code § 12-117(4).

III. STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992); *In re A & B v. Spackman*, 155 Idaho 640, 648, 315 P.3d 828, 836 (2011) (citing *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011)) (“The district court's review is limited to those issues raised before the administrative tribunal and those the tribunal lacked the authority to decide.”).

The court shall affirm the agency decision unless it finds the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222; *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998) (“Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a

different conclusion.”). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep’t of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).⁵

IV. ARGUMENT

As long as a storage water holder is using their storage water in accordance with the elements of the underlying water right, they have the right to have their storage water allocated in priority. *See City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) (concluding that water use must comport with the elements of a water right as decreed); R. 226. But when a storage water holder chooses to rent its water, and thereby changes the elements of use from what is set forth in the water right, it is no longer entitled to have its storage allocation filled in priority. *See* R. 226 (“While a water user has a constitutional right to have his water right administered in priority, that right extends only so far as the water right is being used within the parameters of its defined elements. A water user has no right to have his water right administered to points of diversion, places of use, periods of use, or purposes of use that differ from those authorized under his right.”). This is because enlarging the use of a water right creates a *per se* injury to other water users. *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005) (“[T]here is *per se* injury to junior water

⁵ In its opening brief, Pocatello “requests that the Court enjoin the Department from applying the LTF Provision in the absence of an enlargement. Because the requested relief is prospective in nature, Pocatello does not request that the Court remand the *As-Applied Order* to the Department for further proceedings.” Pocatello’s Br. 27. As noted in *Idaho Power*, the only options open to this Court are to affirm or to set aside, in whole or in part the decision of the agency and remand the issue for further proceedings as necessary. *Idaho Power*, 151 Idaho at 272, 255 P.3d at 1158. Therefore, the Court lacks authority to “enjoin” IDWR as requested by Pocatello.

right holders anytime an enlargement receives priority.”). Thus, any time a water user seeks to use their water in a way not outlined in the elements of the water right, IDWR must ensure that the change in use will not injure other water right holders. R. 226.

When a storage water holder seeks to change an element of their storage water use, they either need to file a transfer under Idaho Code § 42-222 or they may rent their water through the rental pool. R. 226. Both processes include consideration of whether the change in use will injure other water users. *See* I.C. § 42-222 (“The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby”); IDAPA 37.02.03.030.01 (“The Director will evaluate [water supply bank] applications . . . as to whether there will be injury to other water rights”). Rental pool procedures adopted by local committees must provide for “[p]revention of injury to other water rights.” IDAPA 37.02.03.040.01.h. Therefore, IDWR’s application of the LTF Provision in the Water District 01 Rental Pool Procedures is a constitutional method for ensuring that junior spaceholders are not injured by the private lease of storage water beyond the scope of the water right elements.⁶ *See* R. 225–231.

A. The LTF Provision Was Constitutional As Applied to the Allocation of Pocatello’s Storage Water in 2023.

IDWR properly found that Pocatello’s private lease of storage water in 2022 constituted a change in the place of use and purpose of use of the storage water. IDWR further properly found

⁶ There may be other methods that would also prevent injury to other spaceholders in these circumstances. The Water District 01 LTF Provision is, however, the only method at issue in this matter.

that, but for the application of the LTF Provision, Pocatello’s private lease of water would have injured other spaceholders if it was allowed to fill in priority because the reservoir system failed to physically fill in 2023. Therefore, IDWR’s application of the LTF Provision to the allocation of Pocatello’s storage water in 2023 was constitutional as applied to Pocatello in these circumstances.

Using a water right or a storage water allocation beyond the scope that is authorized under the law is a “privilege.” R. 226. In the case of a private lease of storage water to another user, it is a privilege that comes with monetary compensation. R. 818. To the extent a storage water user desires to use water outside the scope of the water right and their storage water contract they must seek either a transfer under Idaho Code § 42-222 or to rent the water through a rental pool. This is because:

While a water user has a constitutional right to have his water right administered in priority, that right extends only so far as the water right is being used within the parameters of its defined elements. A water user has no right to have his water right administered to points of diversion, places of use, periods of use, or purposes of use that differ from those authorized under his right.

R. 226. Any time storage water is used outside the scope of the elements of a storage water right, action must be taken to prevent injury to other storage water users. It would be inequitable to allow a storage water holder to rent their water outside the scope of the water right to the injury of other storage water holders in the reservoir system. Applying the LTF Provision to the allocation of Pocatello’s storage water in 2023 ensured that Pocatello would not be able to reap the individual financial benefits of renting its water and then, subsequently, to shift the burden of refilling its storage space to the other storage water holders in the system.

i. Pocatello’s Private Lease of Storage Water in 2022 Was Outside the Scope of the Elements of Water Right 01-2068.

Water right 01-2068 sets forth the parameters under which all water use in Palisades Reservoir must occur.⁷ See e.g. *City of Blackfoot v. Spackman*, 162 Idaho at 306–309, 396 P.3d at 1187–1190 (holding the City of Blackfoot could not use water under a water right for recharge when recharge was not listed in the purpose of use element of the water right). Any water use occurring with storage water from Palisades Reservoir that is outside the elements of water right 01-2068 is not authorized.⁸ Pocatello’s private lease of water in 2022 was outside the scope of the elements of water right 01-2068. As such, Pocatello was required to either seek a transfer under Idaho Code § 42-222 or a private lease/rental through the Water District 01 Rental Pool to effectuate the change in place of use and purpose of use. In either case, Pocatello’s private lease/rental could only be accomplished to the extent it did not injure other storage water holders.

ii. Pocatello’s 2022 Private Lease Constituted a Change in the Place of Use.

Under the decision in *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the USBR holds nominal title to water right 01-2068 and the storage water contract holders, as the end beneficial users of the water, hold equitable title. See also *Nevada v. United States*, 463 U.S.

⁷ There are several water rights associated with water use at Palisades Reservoir: 01-10043, 01-2068, 01-10621A, 01-10621B, 01-10401. For ease of reference, this brief will cite solely to 01-2068 when describing the water rights associated with Palisades Reservoir.

⁸ This Court, in CV42-23-1668, raised the question of what scope of use is authorized under Pocatello’s storage contract. R. 230. The water right governs the storage and use of water, and all use of storage water must comply with the water right. See *City of Blackfoot*, 162 Idaho at 306–309, 396 P.3d at 1187–1190. A storage water contract may be used to allocate a certain portion of water stored under a water right to individual end beneficial users. See *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). While a storage water contract may limit the use of water under the water right, the storage water contract may not expand or change the elements of the water right. See *City of Blackfoot*, 162 Idaho at 306–309, 396 P.3d at 1187–1190.

110, 126 (1983) (“Once these lands were acquired by settlers in the Project, the Government’s ‘ownership’ of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.”). In recognition of this split in ownership, the Court in *Pioneer* crafted a remark that was ultimately included verbatim in water right 01-2068. *See Pioneer*, 144 Idaho at 115, 157 P.3d at 609 (“Pioneer Remark”). The Pioneer Remark makes clear that the interest of the storage water contract holders in Palisades Reservoir is based on their beneficial use of the water on the lands within their service area boundaries. *Id.*; *see also* R. 480–481.

The place of use description in water right 01-2068 states: “Place of use for irrigation from storage is within the following counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, Teton, and Elmore.” The Pioneer Remark further clarifies the place of use under water right 01-2068 stating:

[A]s a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water *is appurtenant to the lands within the boundaries of or served by such irrigation organizations*

R. 481 (emphasis added). This language makes clear that, based on their application of the storage water to an authorized beneficial use, storage contract holders each hold equitable title to

a discrete portion of water right 01-2068.⁹ This language also makes clear that the place of use listing fifteen Idaho counties is further limited to the lands within the boundaries of the service areas for the irrigation entities that hold storage water contracts in the Upper Snake River Reservoir system. Thus, the large 15-county place of use must be read together with the Pioneer Remark to define the place of use for water right 01-2068.

The only authorized beneficial uses for water right 01-2068 are irrigation storage, irrigation from storage, power storage and power from storage. R. 480. The United States, not Pocatello, operates the hydropower operations associated with Palisades Reservoir. R. 101–102. Thus, the only decreed purpose of use applicable to Pocatello is irrigation from storage. The record reflects that Pocatello has never used its storage water for irrigation directly within its municipal service area. R. 216 (“What is clear is that the City has never taken delivery of any portion of the Storage Water into its municipal system for any purpose.”); *see also* R. 849 (The SRBA Court found: “It was also clear that Pocatello never ‘diverted’ such water”); R. 98 (Pocatello’s storage contract provides: “Under the plan of water use of the City, there will normally be no direct delivery from the Snake River of stored water.”). Thus, unlike the other irrigation entities that hold water in Palisades Reservoir, Pocatello has never used its storage

⁹ The Court should disregard Pocatello’s arguments that the Hearing Officer’s conclusion that storage contract holders each hold equitable title to a discrete portion of water right 01-2068 was rejected by the SRBA Court in litigation over SRBA subcase 01-2068Y. Pocatello’s Br. 15. The records related to SRBA subcase 01-2068Y are not in the record in this proceeding. What is clear is that Hearing Officer relied on the plain language of the *Pioneer* decision and the decree for 01-2068, including the Pioneer Remark to support his conclusion. Pocatello’s attempts to inject the litigation involving SRBA subcase 01-2068Y is an effort to obscure the real issue—what is the effect of the *Pioneer* decision and the Pioneer Remark on the place of use of water right 01-2068.

water for irrigation on its own place of use. This anomaly opens the door to the question: What is the place of use for Pocatello's storage water?

Pocatello argues that, because it has never used its storage water for irrigation within its municipal service area, the place of use for its storage water is anywhere within the identified fifteen Idaho counties. Pocatello's Br. 13–15. That argument is an impermissible collateral attack on the decree and must be rejected by this Court. *City of Blackfoot v. Spackman*, 162 Idaho at 308, 396 P.3d at 1190 (Allowing the City of Blackfoot to “collaterally attack” the decree “would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process.”). Pocatello's argument should be rejected by the Court because it ignores the connection made in *Pioneer* between the beneficial use, place of use, and equitable title. Spaceholders, including Pocatello, were given equitable title to use of the storage water because they beneficially used the water for irrigation on their lands. *See Nevada v. United States*, 463 U.S. 110, 126 (1983). Thus, place of use, beneficial use, and equitable ownership are linked. Pocatello cannot have an equitable interest in the use of water under water right 01-2068 and, at the same time, exempt itself from inclusion in the requirement of the Pioneer Remark that its place of use is limited to less than the 15 counties. The fact that Pocatello has never beneficially used its water for irrigation within its municipal service area cannot and should not be used to collaterally attack the decree to create a “super right” that allows Pocatello to use its storage water in a way that other storage water users cannot. To do so would be to read the Pioneer Remark out of the decree. *See City of Blackfoot v. Spackman*, 162 Idaho at 306, 396 P.3d at 1188 (“When interpreting a water decree this Court utilizes the same rules of interpretation

applicable to contracts”); *Nelsen v. Nelsen*, 170 Idaho 102, 134, 508 P.3d 301, 333 (2022) (“In determining the intent of the parties, this Court must view the contract as a whole.”). The Court in *Pioneer* made clear that the beneficial use of storage water is appurtenant to the lands of the individual storage contract holders. *Pioneer*, 144 Idaho at 109, 157 P.3d at 603 (“*As a matter of law*, this interest is appurtenant to the lands within the boundaries of or served by such irrigation organization.” (emphasis added)). Pocatello cannot, simply because it is in a factually unique situation, exempt itself from the requirement that use of its storage water is appurtenant to a place of use that is specific to it as an entity.

The Hearing Officer found that Pocatello’s municipal service area is the place of use to which Pocatello’s storage water is appurtenant. R. 897. This conclusion is consistent with the decree and the *Pioneer* decision, which recognized that the irrigation use was established when the water was put to beneficial use. While Pocatello may never have physically diverted water into its municipal service area for irrigation, its storage water contract clearly contemplates that it could: “If the City should, however, construct facilities which would permit the direct delivery of stored water to it from the Snake River, such delivery shall be effected by the City giving notification to the watermaster . . . of the amount of water within its entitlements as stated in this agreement to be delivered for diversion by the City.” R. 98. The fact Pocatello has never diverted its storage water for irrigation within its municipal service area should not exempt it from the requirement of having a specific place of use set forth by the Pioneer Remark. The Hearing Officer’s conclusion that Pocatello’s place of use is its municipal service area boundary was correct.

When Pocatello rented its storage water to “multi-cities” for delivery to AFRD#2’s irrigation service area, it changed the place of use for its storage water. Such a change in use is not allowed if it will injure other storage water holders. R. 226. As described below, any time a storage water user changes the place of use of their storage water it will, in years when the reservoir system fails to physically fill, injure junior storage water holders. *See infra* Section IV.B. Because Pocatello’s private lease changed the place of use where its storage water was used, and because the reservoir system did not fill, it was not error for IDWR to apply the LTF Provision to the space evacuated by Pocatello’s private lease of storage water in 2022.

iii. Pocatello’s 2022 Private Lease Constituted a Change in the Purpose of Use of Water Right 01-2068.

The purposes of use for the storage water rights in Palisades reservoir are irrigation storage, irrigation from storage, power storage, and power from storage. R. 480–482. There is substantial evidence in the record supporting the Hearing Officer’s conclusion that Pocatello’s private lease of storage water to “multi-cities” was made for the purposes of “mitigation” under the 2019 Joint Mitigation Plan. R. 865–866, 856, 128–149. It is also clear from the record that “mitigation” is not a purpose of use under water right 01-2068. R. 480–482.

Pocatello argues that, because the end-user AFRD#2 used the water for irrigation, there was no change in the purpose of use for their storage water. Pocatello’s Br. 18–19. As noted above, however, Pocatello did not rent water to AFRD#2 for irrigation, it rented water to “multi-cities” for mitigation. R. 865–866 (Pocatello’s 2022 Private Lease Agreement states: “CITY OF POCATELLO (applicant) hereby requests to rent agrees 4,855.1 acre-feet of storage *to multi*

cities for the 2022 irrigation season at a price of \$121,377.50” (emphasis added)); R. 856, 128–149. Thus, it is clear that Pocatello did not privately lease its storage water directly to AFRD#2 for irrigation. Rather, it privately leased it for mitigation, and the water was then delivered to AFRD#2 to mitigate injury to AFRD#2.

Even if this Court were to agree with Pocatello’s argument that the purpose of use was not changed by their private lease, the outcome would be the same. There need only be one change to an element of a water right to trigger the need to file either a transfer under Idaho Code § 42-222 or rent the water through the rental pool.¹⁰ And, as outlined above, Pocatello also changed the element of place of use. *See supra* Section IV.A.ii. Thus, Pocatello’s private lease would still be subject to the LTF Provision.

B. Private Leases/Rentals Cause Injury to Junior Storage Water Users when the Reservoir System Fails to Physically Fill in the Following Year.

When one storage water holder rents or privately leases water to another storage water holder it creates additional use of the storage water that would not have occurred but for the rental/private lease:

But for the Rental Pool, Water User A would not have used his water right this year. If Water User A had not used his water right, its allocated space in the reservoir would not have been evacuated, and the water under that water right would have been carried over in the reservoir for use by Water User A in the following year. The reservoir space allocated to Water User A’s water right would then not need to be filled in priority the following year to the detriment of other junior spaceholders in the system.

¹⁰ The LTF Provision applies to all rentals in Water District 01, not just to rentals that change the purpose for which the water is being used. *See* R. 317 (The LTF Provision applies to “Impacts to Spaceholders resulting from all common pool, private leases, assignments, supplemental pool, and extraordinary circumstances pool rentals . . .”). Rentals from one irrigation spaceholder to another irrigation spaceholder are also subject to the LTF Provision because they change the place of use for the storage water.

R. 227; R. 228 n.9 (“Unique to a storage right is the right to carry over unused water for use in the following season albeit consistent with its authorized purpose. . . . It follows that the use of excess or unused water for anything but carryover results in an enlargement of the storage rights and in injury to junior spaceholders rights - if that water is permitted to be refilled in priority.”). Thus, a rental/private lease of storage water from one user to another creates a “hole” in the reservoir that would not have been there absent the private lease. This “hole” must be filled the following year. If the “hole” is allowed to fill in priority it may mean, in water-short years, that junior storage water holder’s accounts fill only partially or not at all.

The “hole” created by the rental/private lease in the previous year shifts the burden of refilling senior storage water onto the junior storage water users. Without some provision to prevent injury, a senior storage water user would be able to rent/private lease their water in the first year, get paid a substantial private lease fee, and in the second year refill the “hole” created by the rental/private lease using water that would otherwise have been allocated to junior storage contract holders. In water-short years, this would injure junior storage water holders who, but for the rental/private lease, would have been allocated more water into their storage accounts.

i. The LTF Provision Was Used Appropriately to Mitigate the Injury Caused by Pocatello’s Private Lease.

Absent application of the LTF Provision, Pocatello’s private lease of its storage water in 2022 would have caused injury to other storage water users in 2023 because the reservoir system did not physically fill in that year. As noted by the Hearing Officer:

The critical question in this contested case is not whether Pocatello's delivery of storage water to AFRD#2 constituted an expansion of the right. As, described above, the delivery to AFRD#2 was an expansion of both the place of use and nature of use. The critical question in this case is whether the expanded use under Pocatello's delivery of storage water to AFRD#2 would injure other water right holders, including other spaceholders in the Upper Snake River Basin reservoir system.

R. 902. The private lease made by Pocatello in 2022 created a "hole" in its reservoir space that needed to be refilled the following year. But for the private lease, Pocatello would have carried over its storage water into the following season. Pocatello does not have the right to shift the burden of refilling the "hole" in its space caused by its private lease to other junior storage water users in water-short years. R. 227 (a private lease "results in the reservoir space allocated to the water right to be evacuated, necessitating a refill the following year. Permitting [the renter] to refill his water right in priority under these circumstances would result in impermissible injury to the priority of junior water rights under Idaho law."). Thus, it was proper for IDWR to use the LTF Provision—which has already been determined to be a facially constitutional method for preventing injury—to keep Pocatello's private lease from causing injury to junior spaceholders when the reservoir system did not fill in 2023. *See* R. 231.

Pocatello argues that storage water holders in the Upper Snake Reservoir system should be able to move their water around anywhere within the large place of use of water right 01-2068 without triggering a need for an injury analysis. Pocatello's Br. 16. Pocatello likens storage use in the Upper Snake Reservoir system to that of an irrigation organization, such as a canal company, which is allowed to move water between shareholders within their service area without filing for a transfer or going through the water supply bank. *Id.* This argument ignores the

Pioneer Remark, which clearly states that beneficial use for individual spaceholders is appurtenant to their organization's service boundary. R. 896. It also ignores the issue of injury, outlined above, that occurs when a storage water holder rents their storage instead of carrying it over.

Implementing Pocatello's argument to allow free movement of storage water anywhere within the Upper Snake would injure junior spaceholders, like Pocatello. Take, for instance, a private lease made by a senior-priority spaceholder who uses the water for irrigation, where the irrigation-entity spaceholder decides to privately lease its water to a third party who will also use the storage water for irrigation. Assume further that the place of use for both irrigators is within the large place of use allowed for by water right 01-2068.¹¹ Pocatello argues that this type of private lease should not trigger the LTF Provision because the private lease is being made from an irrigation use to an irrigation use and because the place of use for both irrigation entities is covered by the place of use set forth in water right 01-2068. Pocatello's Br. 17–18. Pocatello's interpretation ignores, however, the issue of injury that would still occur because of the private lease.

If the senior-priority irrigation spaceholder evacuates space for use by a third party, it is assumed that, but for the private lease, the water would have been kept in the reservoir as carryover. R. 228 n.9. Having created a "hole" in their reservoir space, the senior-priority irrigation spaceholder will need to refill that space in the following season. This "hole" occurs

¹¹ For purposes of this hypothetical only, IDWR will assume the place of use for water right 01-2068 is not limited by the Pioneer Remark and includes all the counties listed on the face of the decree.

even though the space was privately leased for an “irrigation” purpose and the “irrigation” occurred within the large place of use for water right 01-2068. If, during a water-short year, the senior-priority spaceholder is allowed to fill the “hole” in priority, junior spaceholders, like Pocatello, will bear the burden. The senior-priority irrigation spaceholder’s space will fill first and, if it is a water-short year, junior space will either only partially fill or fail to fill at all. The LTF Provision protects all junior spaceholders, including Pocatello, from being injured in this way.

Further, Pocatello’s as-applied challenge addressed the LTF Provision only as to one Upper Snake River Reservoir System spaceholder. The larger implications of Pocatello’s arguments for other spaceholders should also be considered by this Court. It is clear that if the LTF Provision is found to be unconstitutional as applied to Pocatello, then it may also be found to be unconstitutional as applied to other spaceholder entities who rent water in Water District 01. The above hypothetical makes clear, that if Pocatello wins its argument, private leases from one irrigation spaceholder to another irrigation spaceholder within the large place of use of the Upper Snake would also not be subject to the LTF Provision.

Finding that the LTF Provision cannot be applied to such private leases would strip any protection for junior storage water holders who may be injured by the private leases in water-short years. It would create a system in which senior-priority storage water users could rent their water, obtain a financial gain, and then refill their space in priority the following season. As explained above, this in-priority fill would, in water-short years, mean junior storage water

holders, such as Pocatello, would be left without any protection against injury. Thus, if Pocatello wins its argument in this case, it may find itself in a worse, not better, position in the future.

C. IDWR’s Application of the LTF Provision to the Fill of Pocatello’s Storage Water Allocation in 2023 Did Not Violate the Idaho Constitution.

Pocatello argues that IDWR’s application of the LTF Provision to the fill of Pocatello’s storage water allocation in 2023 violated Article XV, § 3 of the Idaho Constitution. Pocatello’s Br. 19–20. This argument fails as a matter of law.

Article XV, § 3 of the Idaho Constitution states: “Priority of appropriation shall give the better right as between those using the water” This right is not, however, absolute. As this Court has recognized: “While a water user has a constitutional right to have his water right administered in priority, that right extends only so far as the water right is being used within the parameters of its defined elements.” R. 226. As outlined above, Pocatello’s private lease of its storage water in 2022 was outside the elements of water right 01-2068. This change in use can only occur so long as other storage water holders are not injured by the change. *See A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005) (“[T]here is *per se* injury to junior water right holders anytime an enlargement receives priority.”). Here, not applying the LTF Provision would have allowed an injury to occur to other storage water holders because the reservoir system failed to physically fill in 2023. *See supra* Section IV.B. Therefore, Pocatello has no constitutional right to have had the water it rented in 2022 administered in priority in a year when the reservoir system did not fill.

Pocatello also argues that IDWR’s application of the LTF Provision constitutes a taking of Pocatello’s private property under Article I, § 14 of the Idaho Constitution. Pocatello’s Br. 20–21. This argument also fails as a matter of law.

Generally taking claims under the Fifth Amendment are divided into two categories: physical takings and regulatory takings. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001). A physical taking occurs “when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a “practical ouster of [the owner's] possession.” *Id.* A regulatory taking “arises when the government's regulation restricts the use to which an owner may put his property. In assessing whether a regulatory taking has occurred, courts generally employ the balancing test set forth in *Penn Central*, weighing the character of the government action, the economic impact of that action and the reasonableness of the property owner's investment-backed expectations.” *Id.* (citing *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124–125 (1978)). The issue of whether a government action constitutes a physical or regulatory taking is complicated and fact-specific.

The State did not take, either physically or through regulation, Pocatello’s storage water allocation. Rather, Pocatello voluntarily gave up its right to priority administration of its storage water when it chose to use that water outside the parameters of the elements of water right 01-2068. R. 226 (“While a water user has a constitutional right to have his water right administered in priority, that right extends only so far as the water right is being used within the parameters of

its defined elements.”). Thus, the argument that Pocatello’s property was the subject of a physical or regulatory taking should be disregarded by this Court.

Finally, Pocatello argues that IDWR violated Article I, § 2 of the Idaho Constitution, which provides for equal protection of all persons in like circumstances. The equal protection clause of the Idaho Constitution provides that “that all persons in like circumstances should receive the same benefits and burdens of the law.” *Alpine Vill. Co. v. City of McCall*, 154 Idaho 930,937 (2013) (quoting *Bon Appetit Gourmet Foods, Inc. v. State, Dep't of Employment*, 117 Idaho 1002, 1003, 793 P.2d 675, 676 (1989)). No equal protection “analysis is required and no violation of equal protection will be found in situations where the State has not engaged in the disparate treatment of similarly situated individuals.” *Id.* (quoting *Shobe v. Ada Cnty., Bd. of Comm'rs*, 130 Idaho 580, 585–86, 944 P.2d 715, 720–21 (1997)).

Pocatello asserts that because not all rental pool procedures in Idaho contain the exact same LTF Provision, they are being treated unequally under Article I, § 2 of the Idaho Constitution. Rental pool procedures are, however, purposefully based on local conditions:

Rental pool procedures are, by their nature, not procedures of general applicability. They are narrowly tailored by local committees to fit unique local conditions. . . . Implicit in this authorization is a recognition that water storage facilities, operations, and conditions differ throughout the state. Given these local differences, there is a recognition that a state-wide, one-size-fits-all, private lease procedures may not be feasible with respect to stored water.

R. 223. Thus, storage water users in other basins are not persons in like circumstances such that Pocatello should be compared to them for purposes of Article I, § 2. In addition, the issue of how the Water District 63 or Water District 65 rental pool procedures are applied in those basins

is outside the scope of Pocatello’s as-applied challenge in this case. Therefore, this Court should reject Pocatello’s argument that there was a violation of Article I, § 2 of the Idaho Constitution.

Moreover, if this Court concludes that Idaho law requires that IDWR apply the LTF Provision to prevent injury, the fact that other basins might not currently apply the LTF Provision in the same manner does not justify disregarding Idaho law in this case. If similarly situated basins are not complying with Idaho law, the appropriate remedy is to require those basins to do so—not to excuse noncompliance here.

D. IDWR’s Application of the LTF Provision to Pocatello’s Private Lease of Water in 2022 Did Not Violate Idaho Code §§ 42-101 or 42-602.

There was no violation of Idaho Code § 42-101 in this case for the same reason there was not a violation of Article I, § 2 of the Idaho Constitution. *See supra* Section IV.C. Similarly, there is no violation of Idaho Code § 42-602 for the same reason there was not a violation of Article XV, § 3 of the Idaho Constitution. *Id.*

E. IDWR Did Not Prejudice Pocatello’s Substantial Rights and Pocatello is Not Entitled to Attorney Fees.

i. Pocatello’s Substantial Rights Were Not Prejudiced.

Pocatello’s substantial rights were not prejudiced by IDWR’s application of the LTF Provision to its 2023 allocation of water. Pocatello’s right to priority administration of its storage water only extends to its use of the water within the parameters of water right 01-2068.

Pocatello voluntarily gave up its right to priority administration of its storage water when it chose to use that water in ways not authorized by the water right. R. 226 (“While a water user has a constitutional right to have his water right administered in priority, that right extends only

so far as the water right is being used within the parameters of its defined elements.”). Thus, Pocatello’s substantial rights were not prejudiced.

ii. *Pocatello is Not Entitled to Attorney Fees*

Pocatello seeks an award of attorney fees pursuant to Idaho Code § 12-117(4).

Pocatello’s Br. 26–27. Idaho Code § 12-117(4) states:

In any civil judicial proceeding involving as adverse parties a governmental entity and another governmental entity, the court shall award the prevailing party reasonable attorney’s fees, witness fees and other reasonable expenses. For purposes of this subsection, ‘governmental entity’ means any state agency or political subdivision.

Pocatello’s request for attorney fees must be denied because this case is a “judicial review proceeding,” not a “civil judicial proceeding” within the meaning of the statute. In *Smith v. Washington County*, the Idaho Supreme Court held that a judicial review proceeding is not a civil judicial proceeding, explaining that a “civil judicial proceeding” is commenced by “the filing of a complaint with the court.” *Smith v. Washington Cnty. Idaho*, 150 Idaho 388, 391, 247 P.3d 615, 618 (2010). The Court emphasized that judicial review proceedings are governed by the Idaho Administrative Procedure Act and are distinct from civil actions initiated under the Idaho Rules of Civil Procedure. *Id.* at 391, 247 P.3d at 616. Since this is a petition for judicial review, a proceeding that does not commence with a complaint filed in court, Idaho Code § 12-117(4) does not apply as a matter of law, regardless of whether the parties otherwise qualify as governmental entities. Accordingly, even if Pocatello were to prevail on the merits, it is not entitled to an award of attorney fees or costs under Idaho Code § 12-117(4), and its request must be denied.

Furthermore, the Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a “legitimate question for this Court to address.” *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012); *see also Westover v. Cundick*, 161 Idaho 933, 937, 393 P.3d 593, 597 (2017) (“A party is not entitled to attorney’s fees if the issue is one of first impression in Idaho.” (quotations omitted)). In this case, IDWR has raised legitimate questions regarding the LTF Provision. Pocatello is not entitled to an award of attorney fees under Idaho Code § 12-117.

V. CONCLUSION

IDWR respectfully requests the Court find that Pocatello’s private lease of storage water in 2022 resulted in a change of place of use and purpose of use of its storage water and that, but for the application of the LTF Provision to Pocatello’s storage water allocation in 2023, Pocatello’s private lease would have injured other reservoir spaceholders. As such IDWR respectfully requests the Court find the LTF Provision of the Water District 01 Rental Pool Procedures is constitutional as applied to Pocatello’s storage water allocation in 2023. IDWR further asks the Court to find its actions were not in violation of the Idaho Constitution or Idaho Statutes cited by Pocatello, that Pocatello’s substantial rights were not violated, and that Pocatello is not entitled to attorney fees.

DATED February 27, 2026.



ANN N. YRIBAR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 27, 2026, I caused to be served a true and correct copy of the foregoing via iCourt E-File and Serve, upon the following:

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
sklahn@somachlaw.com
mbricker@somachlaw.com

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

Jerry Rigby
Hyrum Erickson
RIGBY ANDRUS & RIGBY LAW
jrigby@rex-law.com
herickson@rex-law.com

Travis L. Thompson
Abby Bitzenburg
PARSONS BEHLE & LATIMER
tthompson@parsonsbehle.com
abitzenburg@parsonsbehle.com

John K. Simpson
IDAHO20, PLLC
jks@idahowaters.com


ANN N. YRIBAR
Deputy Attorney General