

Sarah A. Klahn, ISB #7928
Maximilian C. Bricker, ISB #12283
SOMACH SIMMONS & DUNN
1155 Canyon Blvd., Suite 110
Boulder, CO 80302
Telephone: (303) 449-2834
sklahn@somachlaw.com
mbricker@somachlaw.com

Attorneys for City of Pocatello

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

CITY OF POCATELLO

Plaintiff,

vs.

IDAHO WATER RESOURCES BOARD, IDAHO
DEPARTMENT OF WATER RESOURCES,
GARY SPACKMAN in his capacity as Director of
the Idaho Department of Water Resources and
TONY OLENICHAK, in his capacity as Water
District 01 Watermaster

Defendants.

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,

Intervenor-Defendants.

Case No. CV42-23-1668

**AFFIDAVIT OF
ADELHEID M. NETTER
IN SUPPORT OF CITY OF
POCATELLO'S RESPONSE TO
STATE OF IDAHO'S CROSS-
MOTION FOR SUMMARY
JUDGMENT**

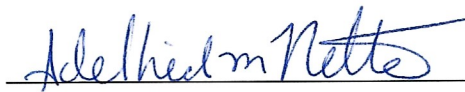
I, ADELHEID M. NETTER, being first duly sworn upon oath, depose and say the following:

1. I am over the age of 18 and state the following based on my knowledge and professional expertise.
2. I am a Professional Hydrologist and work at Spronk Water Engineers, Inc. in Denver, Colorado.
3. As a consultant, I have worked on water rights matters for the City of Pocatello since 2010.
4. In my work for Pocatello, I have been involved in reviewing and advising the City on the Water District 01 (“WD01”) storage accounting and last-to-fill (“LTF”) rules and procedures, particularly as to how they relate to Pocatello’s contract with the Bureau of Reclamation for 50,000 acre-feet of storage in Palisades Reservoir.
5. I have reviewed the following documents:
 - a. WD01 2023 Rental Pool Procedures (“Procedures”);
 - b. *Amended Complaint for Declaratory Relief to Find the WD01 Rental Pool Procedures Void, to Find Rule 7.3 Unconstitutional, and for Damages from the Unconstitutional Taking of Property*;
 - c. *City of Pocatello’s Motion for Summary Judgment; the Memorandum in Support of City of Pocatello’s Motion for Partial Summary Judgment*;
 - d. *Affidavit of Maximilian C. Bricker in Support of Pocatello’s Motion for Partial Summary Judgment*;
 - e. *State of Idaho’s Cross-Motion for Summary Judgment*;
 - f. *State of Idaho’s Memorandum in Support of Cross-Motion for Summary Judgment and Response to Plaintiff’s Motion for Partial Summary Judgment*; and the
 - g. *Affidavit of Anthony S. Olenichak in Support of State of Idaho’s Cross Motion for Summary Judgment and Response to Plaintiff’s Motion for Summary Judgment*.
6. I disagree with Mr. Olenichak’s testimony in Paragraph 6 of his Affidavit, which states, “*Any spaceholder that chooses not to participate is treated as though the Water District 01 Rental Pool Procedures do not apply to them. Non-participant storage is allocated and administered without reference to the procedures.*”
7. The WD01 storage system can be analogized to a large bucket that holds multiple storage water rights. There may be multiple spaceholders that have contracts for the water associated with each storage right.¹

¹ For example, see Exhibit 1 to the *Amended Complaint for Declaratory Relief to Find the WD01 Rental Pool Procedures Void, to Find Rule 7.3 Unconstitutional, and for Damages from the Unconstitutional Taking of Property* (“Amended Complaint”).

8. All spaceholders who wish to rent water to the common pool or lease water to specific lessees must participate in the Rental Pool (*Procedures 5.2.101, 6.1*). Thus, the Procedures regulate the storage rights of all WD01 spaceholders, as the Procedures prohibit them from otherwise renting or leasing their stored water outside of the Rental Pool.
9. The WD01 storage accounting program requires that the Watermaster allocate available storage accruals to spaceholders based on the priority system so long as the “bucket” fills.² Storage water rights are filled in order of priority and the spaceholders of each water right get pro-rata new fill based on the volume of their contracted storage space.
10. However, in years in which the entire “bucket” does not fill, or water does not spill past Milner Dam, the Watermaster allocates accrued storage to all spaceholders pursuant to the Procedures, and specifically the LTF rule (see *Amended Complaint Exhibits 4 and 7*). Under the LTF rule, non-participating spaceholder accounts are filled ahead of participating spaceholder accounts (*Procedure 7.4*) regardless of priority. Thus, the LTF rule affects all spaceholders including spaceholders who do not participate in the Rental Pool.
11. Mr. Olenichak proceeds to make contradicting statements in Paragraphs 21-29. In Paragraph 25, he states “*Leasing water through the Water District 01 Rental Pool has the potential to impact or lessen, not just non-participating spaceholder's reservoir accruals, but also the reservoir accrual of other participating spaceholders.*” Mr. Olenichak suggests that the LTF rule remedies that impact. For instance, in Paragraph 28, he states “*To ensure that non-participating and other participating spaceholders are not injured by operation of the rental pool, participating spaceholders who assign storage to the Common Pool, rent through a private lease, assign water to the supplemental pool, the assignment pool, or the extraordinary pool have the storage that was evacuated to supply those rentals become Last to Fill space in the reservoir system in the following year.*”
12. I interpret Mr. Olenichak’s statements to be an acknowledgment that he does allocate storage water “with reference to” the Procedures (specifically, *Procedures 7.0-7.4*) because the Rental Pool potentially impact all spaceholders (including non-participating spaceholders). This is contrary to his statement in Paragraph 6 of his affidavit.

DATED this 15th day of November 2023.



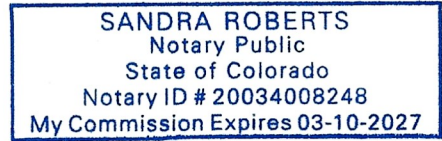
Adelheid M. Netter, P.H.

² See Exhibit 3 to the *Affidavit of Maximilian C. Bricker in Support of Pocatello's Motion for Partial Summary Judgment*.

ACKNOWLEDGEMENT

STATE OF COLORADO)
)
COUNTY OF DENVER)

The foregoing Affidavit was sworn to before me by Adelheid M. Netter who executed the above on November 15, 2023.



Witness my hand and official seal.

My commission expires: 03.10.2027

Sandra Roberts

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November 2023, I caused to be served a true and correct copy of the foregoing document via iCourt E-File and Serve, upon the following:

Garrick L. Baxter
Ann N. Yribar
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
IDAHO WATER RESOURCE BOARD
garrick.baxter@idwr.idaho.gov
ann.yribar@ag.idaho.gov

John K. Simpson
Travis L. Thompson
Sarah W. Higer
MARTEN LAW LLP
jsimpson@martenlaw.com
tthompson@martenlaw.com
shiger@martenlaw.com

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

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

Richard A. Deihl
CITY OF POCATELLO
rdiehl@pocatello.gov



Maximilian C. Bricker, ISB #12283