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Heyburn, Jerome, Paul, Richfield, Rupert,
Shoshone, and Wendell*

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

CITY OF POCA TELLO,
Plaintiff,

vs.

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

Defendants.

Case No. CV42-23-1668

**COALITION OF CITIES'
REPLY IN SUPPORT OF CITY
OF POCA TELLO'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

COME NOW the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (hereafter collectively referred to as "Coalition of Cities"), and hereby file this reply in support of the City of Pocatello's Motion for Partial Summary Judgment.

The Coalition of Cities, as set forth in its Motion for Intervention, have a vested interest in the outcome of this proceeding. To that end, the Coalition of Cities support the arguments made by the City of Pocatello that the Water District 1 Rental Pool Procedures ("Procedures") should be construed as "rules" and because they were not adopted under the requirements of Idaho's

Administrative Procedure's Act, the Procedures should be invalidated by this Court.

ARGUMENT

The Procedures Apply To Everyone Who Wants To Lease Storage Water From The Upper Snake Reservoirs

In *Pizzuto v. Idaho Dept. of Correction*, 170 Idaho 94, 508 P.3d 293 (2022) the Supreme Court stated that an action by an agency was a rule if the procedure was of “[g]eneral applicability.... The general applicability of a rule is, perhaps, the most salient characteristic distinguishing quasi-legislative rulemaking from a purely executive or quasi-judicial agency action.” Rules “apply uniformly to the public.” *Id.* at 96-97, 508 P.3d at 295-96.

In this case, the class of persons to whom the Procedures apply are all people who want to lease water from the Upper Snake River Reservoirs. *Amended Complaint* Ex. 4 at 13 - Procedure 6.1. Further, Procedure 3.1 states in part: “These procedures are intended to: a) assure that participants have priority over non-participating spaceholders and non-spaceholders in renting storage through the rental pool; b) assure that non-participating spaceholders are not impacted; and c) rentals occurring through the assignment pool and supplemental pool do not impact other spaceholders.” *Id.* at 7. You do not have to be a storage spaceholder to be covered by the rule and you are covered by the rule if you are a spaceholder whether or not you participate in the rental pool.

Definition 2.5 defines “Applicant” as “a person who files with the Watermaster an application, accompanied by the required fees, to rent or lease storage through the rental pool.” *Id.* at 4. An “applicant” by definition, can be anyone who applies to lease water from storage and is not even limited to a current water user, but is a “person” which can include businesses, cities, irrigation entities and individuals who may want to lease water for mitigation, irrigation, or other beneficial uses. (*See too* Definition 2.23 defines a “Lessee” as “a person who leases storage from a

participant under a lease pursuant to Procedure 6 and subject to Procedure 7.5.” *Id.* at 5.

Definition 2.36 defines a “Renter” as a person who rents storage from the common pool, supplemental pool, or assignment pool. *Id.* at 6.).

Procedure 6.1 states that “All leases must be transacted through the rental pool.” *Id.* at 13 (emphasis added). Thereby making “all” leases, covered, including those that may be used below Milner as contemplated by Procedure 8.4. Procedure 8.4 states that an “[a]pplication to lease storage from the supplemental pool for hydropower purposes shall be made upon forms approved by the Watermaster....” *Id.* at 16. Thus, any person or entity who wants to lease storage for hydropower purposes is covered, whether or not the location of the hydropower is above or below Milner Dam. While the Procedures admittedly put some limitations on what the water use can be leased for, when and where, the Procedures apply uniformly to anyone wishing to lease water from the Upper Snake Reservoirs. Thus, no matter who you are, you are subject to Procedures.

CONCLUSION

For these reasons, and the reasons set forth in the City of Pocatello’s Motion for Partial Summary Judgment, the Procedures should be considered rules that, as admitted by the State of Idaho, were not validly adopted under the requirements of Idaho’s Administrative Procedures Act and as such should be invalidated.

DATED this 22nd day of November, 2023.

McHUGH BROMLEY, PLLC

/s/ Candice McHugh

Candice McHugh

Attorneys for Coalition of Cities

