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**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.

Case No. CV42-23-1668

**INTERVENOR SPACEHOLDERS'
REPLY IN SUPPORT OF STATE OF
IDAHO'S CROSS-MOTION FOR
SUMMARY JUDGMENT**

COME NOW, Intervenor Burley Irrigation District, Fremont-Madison Irrigation District, and Idaho Irrigation District (hereafter collectively referred to as "Spaceholders"), by and through their undersigned counsel of record, and hereby file this reply in support of the *State of Idaho's Cross-Motion for Summary Judgment* filed on November 2, 2023. This reply addresses points raised in the *City of Pocatello's Response to State of Idaho's Cross-Motion for Summary*

Judgment (“*Poc. Resp.*”) filed on November 16, 2023 and is supported by the *Second Declaration of Travis L. Thompson* filed together herewith.

REPLY

I. Pocatello Cannot Lease its Storage Without Following State Law.

A constant theme throughout Pocatello’s case is the belief that the Water District 01 Rental Pool Procedures are invalid and that the city’s storage can be leased and temporarily transferred without conditions. *See Poc. Resp.* at 15 (“the Procedures otherwise preclude Pocatello from leasing stored water, a right that Pocatello otherwise possesses”). Pocatello further disagrees with the procedures’ “last to fill” condition believing it to be contrary to the prior appropriation doctrine. *See id.* at 14 (claim that only Procedure 7.3 is unconstitutional).

Idaho law prohibits transfers of water rights that would injure other water right holders. *See* I.C. § 42-222(1). The law also prohibits water bank rentals, including storage rentals through local committees, that would injure other water right holders. *See* I.C. § 42-1763; IDAPA 37.02.03.040.01.h. Pocatello has long understood the rental process in Water District 01 as it has voluntarily participated in both common pool rentals and private leases for well over a decade. However, Pocatello now argues in favor of a regime where it can lease unneeded storage water and have that space refill with the same priority. The Idaho Supreme Court has rejected this view:

Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water unrelated to the original rights. This is simply not the law of Idaho.

See AFRD#2 v. IDWR, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007)

II. The Water District 01 Rental Pool Procedures Do Not Have “General Applicability.”

Pocatello continues to argue that the Rental Pool Procedures apply to all spaceholders in Water District 01, regardless of participation in the rental pool.¹ *See Poc. Resp.* at 6-8. Pocatello wrongly suggests that its “undisputed facts demonstrate that the application of the Procedures impacts property rights of all spaceholders.” *Poc. Resp.* at 6. To the contrary, the *Affidavit of Anthony S. Olenichak* plainly refutes this statement.

Pocatello further claims that the conduct of non-participating spaceholders is regulated by the Procedures since it precludes “them from renting or leasing their storage water.”² *Id.* at 8. Pocatello has it backwards, a non-participating spaceholder “chooses” not to rent or lease its storage water pursuant to and in compliance with the Procedures.³ The Procedures have nothing to do with that underlying decision. On the other hand, if a spaceholder desires to rent or lease storage water outside of available statutory processes, it must participate in the Rental Pool.⁴ The fundamental decision to participate or not participate is made by the spaceholder, not the Procedures. Pocatello cannot escape the plain language of the Procedures in this regard.

¹ Pocatello does not dispute the fact that the procedures do not apply to water users with only natural flow rights or entities like the Shoshone-Bannock Tribes.

² Pocatello fails to acknowledge the potential to lease water for hydroelectric generation purposes pursuant to section 42-108A, Idaho Code. The Coalition of Cities also wrongly assumes the rental pool is a spaceholder’s only option to lease water for such purposes. *See Coalition of Cities’ Reply* at 3. Even under the statutory process the Director must still find no injury to other water rights and ensure the lease is not contrary to the local rental pool procedures. I.C. § 42-108B. The statutory process is an alternative option that Pocatello previously availed itself of back in 2008 when it opted out of the Water District 01 Rental Pool (even though its proposed statutory lease was denied in that particular instance and that denial was affirmed on judicial review). *See generally, Memorandum Decision and Order on Petitioner’s Appeal and Petition for Judicial Review of Agency Action, City of Pocatello v. IDWR*, Bannock County Dist. Ct., Sixth Jud. Dist., Case No. CV-09-3449 (Mar. 30, 2010).

³ Pocatello states that it “disputes the ‘voluntary’ idea from a factual perspective as well,” but offers no admissible evidence in support of this claim. *See Poc. Resp.* at 7.

⁴ *See* I.C. §§ 42-108A, 42-222(1), 42-240.

Pocatello further mischaracterizes the Procedures as generally applying to a non-participating spaceholder due to the watermaster’s “allocation of accrued storage to non-participants.” *Poc. Resp.* at 8. The Procedures ensure that a non-participant’s storage accrual is not impacted by the leasing activities of others. *See generally, Olenichak Aff.* For example, if a senior spaceholder does not need 100 acre-feet and decides to lease it to another water user, the Procedures ensure the subsequent fill of that 100 acre-feet does not occur to the detriment of a junior non-participating spaceholder. This accounting measure does not mean the Procedures are somehow “applied” to the non-participant in the manner alleged by Pocatello. Rather, the Procedures alter the priority accrual of the participating spaceholder’s storage in subsequent years to ensure the temporary transfer does not injure other water right holders. The non-participant receives an accrual of storage as if that lease did not occur.

Pocatello overlooks the Water Board’s water bank rules in support of its claim that the rental pool procedures must also be promulgated as agency rules. The Board expressly set out the criteria that local committees must follow in order to facilitate the rental of stored water. *See* IDAPA 37.02.03.040.01a-k. Nothing in the statute or rule requires the Board to promulgate the local committee procedures as agency “rules.” The fact the Board must review and approve local committee procedures ensures the rules’ criteria are met even if the individual water districts’ procedures vary by location across the state. *See id.* (“The local committee procedures must be approved by the Board and must provide for the following”). In this regard the Idaho APA’s definition of a “rule” is not “swallowed” as Pocatello suggests. *See Poc. Resp.* at 9. Instead, the Board retains the ability and discretion each year to review and determine whether or not the local committee procedures cover the respective criteria.

The continued Board oversight and compliance with the statute and the water supply bank rules belies Pocatello's claim that non-agency actors would be free to do what they want. In short, Pocatello's demand for a "one-size-fits-all" approach to facilitating the rental of stored water misses the mark on what the legislature intended.⁵ *See* I.C. § 42-1765.

III. Pocatello Failed to Exhaust Available Administrative Remedies.

Idaho's APA requires a party to exhaust its administrative remedies prior to seeking judicial review district court. *See* I.C. § 67-5271; *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). Pocatello argues it is free to bring the current action due to an exception to the statutory exhaustion requirement authorizing a declaratory judgment action on a rule's validity (I.C. § 67-5278). *See Poc. Resp.* at 13-14. Pocatello also argues the Board has "acted outside its authority" by impermissibly delegating rulemaking authority to the Committee of Nine and that no effective administrative remedies exist. *See id.*

Pocatello has voluntarily leased water for several years as a participant in the Water District 01 Rental Pool. Pocatello has also opted out of the rental pool and attempted to lease storage for hydroelectric generation purposes pursuant to section 42-108A in 2008. *See supra* at n. 2. Pocatello has been aware of the local Water District 01 rental pool process for decades and has accepted its annual storage allocations accordingly. This is not surprising since Pocatello received over \$4 million dollars in revenue for these annual storage rentals and leases. Not once has Pocatello challenged the procedures or its storage allocation through the available administrative process before IDWR. *See* I.C. §§ 42-1701A(3); 42-1766.

Admittedly Pocatello is not challenging the Board's Water Supply Bank rules. Instead, Pocatello attacks the Water District 01 Rental Pool procedures that facilitate the lease of stored

⁵ The Idaho Legislature has approved the Board's Water Supply Bank rules, which authorize the local committee procedures process.

water in the district. Section 67-5278 does not authorize a declaratory judgment action on local committee “procedures” that implement the Board’s rules. Idaho’s APA authorized the Board to promulgate the Water Supply Bank rules and those rules authorize the local committee to adopt procedures. Pocatello does not challenge this process, but instead claims the “procedures” are invalid rules. In this regard the failure to exhaust administrative remedies is even more applicable where Pocatello seeks to prevent the agency from reviewing applicable evidence and creating an administrative record. Just because Pocatello believes the procedures are “agency rules” does not create a jurisdictional exception, in that case merely filing a complaint would create the exception and allow parties to avoid administrative proceedings altogether. *But see Doe v. State of Idaho*, 158 Idaho 778, 782, 352 P.3d 500, 504 (2015) (declaratory judgment proceeding appropriate where agency did not provide a remedy).

Further, Pocatello’s impermissible delegation argument fails as the Committee of Nine is a duly authorized “local committee” under section 42-1765. The Board has promulgated administrative rules and criteria for the local committees to follow. *See* IDAPA 37.02.03 et seq., Ex. 4 to *Thompson Dec.* Neither the Board nor the Committee of Nine exceeded the authority set forth in the statute.

Finally, Pocatello argues the exception applies on the belief that spaceholders “receive no notice of when the Watermaster redistributes newly accrued storage pursuant to the Last to Fill Rule.” *Poc. Resp.* at 14. In other words, Pocatello alleges it has no knowledge of the annual storage allocation process. Despite claiming knowledge of the Rental Pool Rules (Ex. 6 to *Am. Compl.*) and the Water District 01 accounting process (Ex. 3 to *Bricker Aff.*), Pocatello now feigns ignorance to justify its “exception” argument.

Contrary to Pocatello's claim, Water District 01 publishes a weekly water report during the irrigation season. *See* Ex. 1 to *Second Declaration of Travis L. Thompson*. That report provides notice of when the "day of allocation" has occurred. *See id.* The report provides notice of the final storage allocation to spaceholders as well. *See id.* Given the weekly correspondence with water users, Pocatello cannot credibly claim that it does not receive notice of its annual storage allocation.

If Pocatello disagreed with the Watermaster's allocation it was required to challenge that action when it occurred and request an administrative hearing before IDWR. *See* I.C. § 42-1701A(3). Pocatello did not file any such petition despite claiming damages for alleged takings. Pocatello's failure to exhaust its administrative remedies requires dismissal of its present case.

IV. Pocatello Ignores the Voluntary Subordination Aspect of the Procedures.

Pocatello rejects the State's voluntary subordination argument on the theory that it has an unconditional "right" to lease its storage water. *See Poc. Resp.* at 15 ("a right that Pocatello otherwise possesses"). Although Pocatello argues that *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983) is distinguishable, the city cannot dispute the fact that spaceholders have the annual choice to opt out and not participate in the Water District 01 Rental Pool. While Pocatello classifies its prior participation as "involuntary," it has no factual support for this statement. *See id.* Indeed, Pocatello did not participate in the rental pool in 2009 so it admittedly knows how to "opt out" of the rental pool in any given year. *See* Ex. 8 to *Amended Complaint*.

Whereas a water user can choose to forego his or her priority in a given circumstance, the Water District 01 Rental Pool Procedures allow for temporary voluntary subordination of a

storage water right's priority for those seeking to lease water through the rental pool.⁶ Pocatello suggests that it "has not negotiated anything" but it cannot dispute the voluntary participation condition of the procedures if it chooses to lease water in the rental pool. The fact the *Idaho Power* case concerned a permanent subordination on certain water rights does not mean that a water user cannot agree to a temporary subordination in the context of an annual storage water rental.⁷ Again, the water bank and local committees provide an alternative or substitute to a permanent storage transfer and can be appropriately conditioned to prevent injury to other water right holders.

In sum, no water right holder's priority is injured if that user voluntarily decides to subordinate that priority in a given context. In this case that applies to participating spaceholders, including Pocatello, who choose to participate and lease storage water through the Water District 01 Rental Pool.

CONCLUSION

The Water District 01 Rental Pool Procedures do not have general applicability as they properly implement the Board's water supply bank rules. The procedures provide a critical mechanism to facilitate the temporary rental of stored water within local committees as authorized by state law. The Board appoints local committees and annually review the rental pool procedures to ensure compliance with the water bank rules. While Pocatello has benefited from implementation of the Water District 01 Rental Pool Procedures, the city has failed to exhaust its administrative remedies. Moreover, the "last to fill" condition is a proper condition to

⁶ The concept of a voluntary temporary subordination is supported by a stipulated mitigation plan in the context of conjunctive administration. Pocatello is a party to such a plan. *See e.g. Final Order Approving Stipulated Mitigation Plan* (Docket No. CM-MP-2019-001) (Apr. 9, 2019).

⁷ Pocatello points to no case or law that requires a voluntary subordination to be "permanent" in order to be effective and enforceable. *See Poc. Resp.* at 14-15.

prevent injury to other spaceholders and non-participants. The Spaceholders request the Court to grant the State of Idaho's cross-motion accordingly.

DATED this 24th day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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