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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE 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,
MATHEW 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

**STATE OF IDAHO'S REPLY
TO CITY OF POCA TELLO'S
RESPONSE**

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, and CITY OF WENDELL, BURLEY IRRIGATION DISTRICT, FREMONT-MADISON IRRIGATION DISTRICT, and IDAHO IRRIGATION DISTRICT,

Intervenors.

COME NOW Defendants Idaho Water Resource Board, Idaho Department of Water Resources, Mathew Weaver in his official capacity as the Director of the Idaho Department of Water Resources, and Tony Olenichak in his capacity as Water District 01 Watermaster (collectively the “State of Idaho”), by and through their counsel of record, hereby file its reply pursuant to Idaho Rules of Civil Procedure (“I.R.C.P.”) 7(b)(1) and 56(b)(2) in relation to the *City of Pocatello’s Response to State of Idaho Motion for Summary Judgment* filed November 16, 2023.

INTRODUCTION

The City of Pocatello filed its *Motion for Partial Summary Judgment, Memorandum in Support of City of Pocatello’s Motion for Partial Summary Judgment* (“*City of Pocatello Memo in Support*”), and *Affidavit of Maximilian C. Bricker in Support of Pocatello’s Motion for Partial Summary Judgment* on October 17, 2023.

The State of Idaho filed its *Cross-Motion for Summary Judgment and Response to Plaintiff’s Motion for Partial Summary Judgment* (“*State of Idaho’s Cross-Motion*”), *Memorandum in Support of State of Idaho’s Cross-Motion for Summary Judgment and Response to Plaintiff’s Motion for Partial Summary Judgment* (“*State of Idaho’s Memo in Support*”),

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 (“Olenichak Aff.”), and Affidavit of Ann N. Yribar in Support of State of Idaho’s Cross Motion for Summary Judgment and Response to Plaintiff’s Motion for Summary Judgment (collectively “Idaho’s Cross-Motion”) on November 2, 2023.

The City of Pocatello filed its *City of Pocatello’s Response to State of Idaho’s Cross-Motion for Summary Judgment (“City of Pocatello’s Response”)* and *Affidavit of Adelheid M. Netter in Support of City of Pocatello’s Response to State of Idaho’s Cross-Motion for Summary Judgment* on November 16, 2023. Pocatello filed its *Pocatello’s Reply in Support of its Motion for Partial Summary Judgment* on November 21, 2023. A hearing on these motions is set for November 30, 2023 at 9:00 a.m.

AGRUMENT

In reply to the City of Pocatello’s concerns with the *Affidavit of Ann N. Yribar in Support of State of Idaho’s Cross Motion for Summary Judgment and Response to Plaintiff’s Motion for Summary Judgment*, the State of Idaho withdraws that affidavit and replaces it with the *Affidavit of Ann N. Yribar in Support of State of Idaho’s Cross Motion for Summary Judgment and Reply to Plaintiff’s Response* and the *Affidavit of Jeff Raybould in Support of State of Idaho’s Cross Motion for Summary Judgment and Reply to Plaintiff’s Response* filed concurrently herewith.¹ The State of Idaho further replies to the City’s Response as follows.

¹ The *Affidavit of Anthony S. Olenichak in Support of State of Idaho’s Cross-Motion for Partial Summary Judgment and Response to Plaintiff’s Motion for Partial Summary Judgment* is not being altered, amended, or withdrawn and should remain a part of the record.

1. A Person May Sell or Lease Water Outside the Rental Pool Procedures so Long as they Comply with Idaho Law.²

Storage water holders are not compelled to buy or sell their water only through a rental pool. Another viable means of buying and selling storage water exist under Idaho law. The rental pools were created as a mechanism for the marketing of “stored water between consenting owners and consenting renters under rules and regulations adopted by the board.” I.C. § 42-1765. However, the Idaho Water Supply Bank Rules specifically provide: “The adoption of these rules is not intended to prevent any person from directly selling or leasing water by transactions outside the purview of the Water Supply Bank Rules where such transactions are otherwise allowed by law.” IDAPA 37.02.03.001.02. Thus, the City of Pocatello could, if it desired, sell its storage water through some other means that complies with Idaho law.

The rental pools create a convenient and efficient forum for making changes to the place of use, purpose of use, or point of diversion of storage water without having to go through the

² This statement does not apply to the United States Bureau of Reclamation’s rental of storage water for flow augmentation under the Nez Perce Agreement. The 2004 Water Rights Agreement with the Nez Perce Tribe requires that rentals for flow augmentation be done through the rental pool. It also requires that the Last to Fill Rule apply to any rentals for flow augmentation:

All flow augmentation from waters of the State of Idaho pursuant to Idaho Code § 42-1763B shall be done in compliance with Idaho state law and regulations, existing water bank rules and existing local rental pool procedures of the appropriate local committee, including but not limited to last to fill rule and the procedures for priorities among renters and lessors, unless changes are agreed to by the spaceholders within the water district(s) in which the reservoirs are located, the State of Idaho, and BOR.

Mediator’s Term Sheet 2004 Snake River Water Rights Agreement at p. 19 s. III.C.1. May 15, 2004. This requirement was codified in I.C. § 42-1763B(2)(a) which provides:

Rental of water by the U.S. Bureau of Reclamation.

- (a) Notwithstanding the legislative approval required in section 42-108, Idaho Code, any storage water released and any natural flow water rights leased or acquired by the bureau within the state of Idaho for listed anadromous fish pursuant to this section must be rented through the water bank operated by the Idaho water resource board pursuant to sections 42-1761 through 42-1764, Idaho Code, or, in the case of storage water releases, through local rental committees, created pursuant to section 42-1765, Idaho Code, under their respective water bank rules.

transfer procedures set forth in I.C. § 42-222. *See* I.C. § 42-1764. Only water transactions marketed through a rental pool are exempt from the transfer requirements of I.C. § 42-222. *Id.* Thus, to the extent lease or rental of storage water done outside a rental pool includes a change in the point of diversion, place of use, or purpose of use, it would have to comply with the transfer requirements of I.C. § 42-222.

In evaluating a transfer under I.C. § 42-222, the Director of the Idaho Department of Water Resources (“IDWR”) must evaluate, among other things, whether the change would injure other water rights or would constitute an enlargement in the use of the original right. I.C. § 42-222(1). In addition, any water right transfer filed under I.C. § 42-222 may be protested and become subject to a contested case. I.C. § 42-222(1). The injury and enlargement analysis, notice, and opportunity for protest provided by I.C. § 42-222 ensure that, when a water user seeks to change their water use, other water users are not injured and no enlargement occurs.

The processes provided under I.C. § 42-222 provide an alternative, viable means for a storage water spaceholder³ to buy or sell its storage water. To sell its storage water outside the rental pool, the City of Pocatello would need to enter into a private contract for the sale of its water and then use the transfer procedures set forth in I.C. § 42-222 to effectuate the changes of water use needed for the transaction.⁴ The existence of this alternative means for marketing water undermines the City’s argument that their participation in the Water District 01 Rental Pool Procedures is “*involuntary*” because there is no other viable means for them to sell their storage water under Idaho law. *City of Pocatello’s Response* at 15. The City may not like the

³ See footnote 2.

⁴ As the owner of the water right, the United State Bureau of Reclamation would need to give its consent to the transfer. Part of the City marketing its water outside the rental pool would also include ensuring the transaction complies with terms of its spaceholder contact with the United States Bureau of Reclamation. *See Affidavit of Ann N. Yribar in Support of State of Idaho’s Cross Motion for Summary Judgment and Reply to Plaintiff’s Response* ¶ 3.e Exhibit E.

more onerous process of using I.C. § 42-222, but not liking an alternative method of marketing its water is not the same thing as not having another viable means to market its water under Idaho law.

The City of Pocatello recognizes that it is not “entitled to lease its water as it pleases” and that it cannot injure other water users through its water transactions. *City’s Reply Brief* at 8. The City also “agrees that Idaho Code § 42-222 precludes water users from changing the place of use of their water right when doing so injures other uses.” *Id.* at 7. However, the City “believes”⁵ that the Last Fill Procedure’s “approach of not determining actual injury and disavowing decreed priority dates is unconstitutional and inequitable.” *Id.* at 8. If the City does not like how the Last to Fill Procedure deals with the issue of injury to other water users, it is free to use the alternative methods of analyzing injury and enlargement provided by I.C. § 42-222. One way or the other, however, the City must ensure that other water rights are not injured when it seeks to change the use of its storage water by selling it to another user.

Instead of availing itself of the other means under Idaho law of renting its storage water, the City has continued to *voluntarily* participate in the Water District 01 Rental Pool, knowing that the Last to Fill Procedure will apply to it. Thus, the City’s argument that it was forced into participating in the Water District 01 Rental Pool because there is no other means for marketing stored water under Idaho Law is meritless.

2. The Exceptions to the Requirement that the City Exhaust its Administrative Remedies do Not Apply.

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and the administrative remedy exhausted before the courts will act. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440

⁵ The City’s “beliefs” are not supported by any evidence in the record.

(2007). There are two exceptions to the rule that a party must first exhaust its administrative remedies before pursuing judicial review: (1) when the interests of justice so require, or (2) when the agency acted outside its authority. *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004), *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968. Neither of the exceptions apply in this case.

Under the first exception, “failure to exhaust administrative remedies is not a bar to litigation when there are no remedies to exhaust.” *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 239–40, 207 P.3d 963, 970–71 (2009). The City of Pocatello argues that this exception applies to them because:

Spaceholders receive no notice of when the Watermaster redistributes newly accrued storage pursuant to the Last to Fill Rule. Further, the redistribution occurs “on paper” as an accounting exercise. No spaceholder is made aware of the date on which the Watermaster sits down to calculate storage allocations.

City of Pocatello’s Memo in Support at 14. The City’s argument ignores the remedies and notice requirements provided by I.C. § 42-1701A(3). *See State of Idaho’s Memo* at 17–19.

First, the City provides no evidentiary support for its statements regarding notice. Indeed, its statements are belied by the City’s own assertion that it suffered losses to its 2023 storage allocation. *City of Pocatello Memo in Support* at 3. In support of its assertion the City states that the allegation is: “based on the WD01 Preliminary 2023 Storage Report; final values will not be available until 2024.” *City of Pocatello Memo in Support* at 3, footnote 4. This statement clearly demonstrates the City of Pocatello is aware that a preliminary storage report is issued, that it knows how to access that report, and that it knows the report will be finalized in the following year. Thus, the City’s own statements refute its allegation that it does not receive notice of its storage allocations

Second, the City’s implication that the moment the “Watermaster sits down to calculate storage allocations” is the moment from which a petition for review must be filed is incorrect. Idaho Code § 42-1701A(3) provides that a petition requesting a hearing must be filed with the Director of IDWR: “within fifteen (15) days after receipt of written notice of the action issued by the director, *or receipt of actual notice . . .*” Thus, the City need not have magically understood when the watermaster sat down to calculate the storage allocations. Instead, it should have filed a petition for hearing as soon as it received “actual notice” of the allocation. I.C. § 42-1701A(3). Based on the City’s own statements regarding its knowledge of the WD01 Preliminary 2023 Storage Report, it is reasonable to assume the City received actual notice of its storage allocations in the past.⁶ *City of Pocatello Memo in Support* at 3, footnote 4. However, the City never filed a petition for review of the agency action under I.C. § 42-1701A(3). Thus, the City’s argument that it was excused from exhausting its administrative remedies because no remedies existed should be disregarded by this Court.

The City also argues that it did not have to exhaust its administrative remedies because “the agency acted outside its authority.” *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004), *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 237, 207 P.3d 963, 968. The City’s argument wrongly assumes that the IWRB and IDWR acted outside their authority in adopting the Water District 01 Rental Pool Procedures and in allocating storage in accordance with the Last to Fill Procedure. This is a legal issue that is the subject of these motions and is in dispute. For all the reasons already stated, the Water District 01 Rental Pool Procedures are not rules, were not required to be adopted using APA rulemaking, and were not created outside the

⁶ Again, the City has provided no evidentiary support for its allegations that it did not receive actual notice of its storage allocations in the past.

IWRB's authority. *See generally Idaho's Cross Motion*. Thus, the second exception to the requirement that the City exhaust its administrative remedies does not apply in this case.

3. The Last to Fill Rule Does Not Effect a Physical Taking.

The City argues that the concept of physical taking applies in this case. 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 and is not an issue that is appropriate for summary judgment. The City has provided no evidentiary support for why it believes the Last to Fill Procedure effects a physical taking of its property and the fact surrounding that issue are in dispute.

In addition, the issue of whether there has been a physical taking of the City of Pocatello's property in this matter depends, first, on a legal determination of whether the City voluntarily gave up its property rights by agreeing to participate in the Water District 01 Rental Pool. That is a disputed legal issue that is the subject of these motions for summary judgment. In addition, the City has provided no evidence demonstrating that it was forced by the

government to give up its property rights. The State did not take, either physically or through regulation, the City's storage water allocation. Rather, the City voluntarily agreed to a diminution of its priority date when it agreed to participate in the rental pool. *See State of Idaho Memo in Support* at 20–21. Thus, the issue of whether the City's property was subject to a physical taking should be disregarded by this Court.

CONCLUSION

The State of Idaho respectfully requests the Court deny the City of Pocatello's Motion for Summary Judgment in its entirety, and grant the State of Idaho's Cross-Motion for Summary Judgment, dismissing all of the City's causes of action as a matter of law.

DATED this 24th day of November 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



ANN N. YRIBAR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November 2023, I caused to be served a true and correct copy of the foregoing via iCourt E-File and Serve, upon the following:

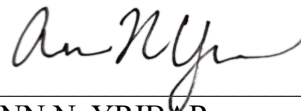
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