

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

Attorneys for Plaintiff 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,

Intervenors.

Case No. **CV42-23-1668**

**MEMORANDUM IN
SUPPORT OF CITY OF
POCATELLO'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

COMES NOW Plaintiff City of Pocatello ("Pocatello" or "City"), by and through its counsel of record, Somach Simmons & Dunn, P.C., and, having concurrently filed a Motion for Partial Summary Judgment ("Motion") pursuant to Idaho Rules of Civil Procedures

("I.R.C.P.") 56, hereby files this Memorandum in Support of Motion for Partial Summary Judgment ("Memorandum") as follows.

INTRODUCTION

Pocatello is a spaceholder in Palisades Reservoir through a 1960 contract with the Bureau of Reclamation for 50,000 acre-feet (AF) of space to store water in Palisades Reservoir. Pocatello's storage space is filled under the Bureau's junior Palisades priority with an appropriation date of July 28, 1939. Due to Pocatello's location on the Portneuf River, several miles upstream from the confluence with the Snake River, the City has historically leased its Palisades water for mitigation purposes rather than taken it into its municipal system.¹

Water District 01 has overseen an active rental pool for many years, and the Committee of Nine adopts rental pool procedures ("Procedures") annually that provide a framework for storage water leases. Since 1988,² the Committee of Nine's Procedures have included a "last to fill" rule ("Last to Fill Rule") that penalizes spaceholders who leased their water for uses below Milner Dam; in 2005,³ the Committee of Nine revised the Last to Fill Rule to penalize any spaceholders who privately lease their water—whether or not the water is leased below Milner Dam. In 2008, Pocatello suffered its first impact from the Last to Fill Rule when it was deprived of approximately 16,603 AF of storage as a penalty for its private leasing of its

¹ However, the Idaho Supreme Court found the City holds a right of access across the Shoshone-Bannock Reservation, so a pipeline for direct delivery of its Palisades water is a possibility. *City of Pocatello v. State (In re SRBA)*, 145 Idaho 497, 505 (2008) (Section 10 of the 1888 Act limited to granting Pocatello a "right of access").

² Tony Olenichak, Water Dist. #1, *Concepts, Practices, and Procedures Used to Distribute Water Within Water District #1*, 129 (2023), attached to the Affidavit of Maximilian C. Bricker in Support of Pocatello's Motion for Partial Summary Judgment ("Bricker Aff.") as Exhibit 3.

³ Bricker Aff., Ex. 3 at 133.

storage water for mitigation purposes. Pocatello suffered similar losses in 2016, 2021, and 2023.⁴ The City has engaged in years of efforts to get the Committee of Nine to exclude Pocatello from the burdens of the Last to Fill Rule to no avail.

Since 2019, the City, along with a number of other ESPA Cities, settled the Surface Water Coalition (“SWC”) delivery call by agreeing to provide 7,650 AF of mitigation water on an annual basis; that settlement was confirmed by the Idaho Department of Water Resources (“IDWR”) through an approved mitigation plan. *See* Final Order Approving Stipulated Mitigation Plan, *In re A&B Irrigation Dist.*, Docket No. CM-MP-2019-001 (Apr. 9, 2019). The primary source of the mitigation water is Pocatello’s storage contract. Application of the Last to Fill Rule in 2021 deprived Pocatello of approximately 2,738 AF of storage water, and had 2023 been as dry as 2022, the Cities collectively would have been in a difficult position to satisfy their settlement with the SWC.

Through this lawsuit, the City seeks either to have the Procedures voided altogether, or the Last to Fill Rule (currently appearing as Procedure 7.3 in the 2023 Procedures) voided specifically, and for the Court to find an unconstitutional taking from the Watermaster’s application of the Last to Fill Rule to the City’s storage contract. While the question of damages associated with the taking claim is a question of fact, the remainder of the issues are questions of law, and Pocatello seeks summary judgment for the following relief: 1) a finding that the Rental Pool Procedures are “rules” under the Idaho Administrative Procedure Act;⁵ 2) a finding that the Procedures are void because the Idaho Water Resources Board (“IWRB”)

⁴ This is based on the WD01 Preliminary 2023 Storage Report; final values will not be available until 2024.

⁵ Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 through 67-5286 (2023) (“APA”).

does not have authority to delegate rulemaking to the Committee of Nine, or that the Committee of Nine lacks authority to conduct rulemaking, thus the Procedures are not adopted in substantial compliance with the APA rulemaking requirements; 3) that Procedure 7.3 is facially unconstitutional—whether or not it is a “rule”—because through it IDWR administers storage water rights in a manner that is inconsistent with the prior appropriation system; and 4) that IDWR’s application of Procedure 7.3 to Pocatello in 2021 and 2023 deprived Pocatello of its property interest, without compensation, because water that the Watermaster should distributed to Pocatello’s account was instead distributed to other spaceholders’ accounts.

UNDISPUTED FACTS

1. Pocatello is a party to Bureau of Reclamation Contract No. 14-06-100-1825 for 50,000 AF of storage water in Palisades Reservoir. Am. Compl. Ex. 1.
2. Pocatello’s 50,000 AF of storage water is part of Reclamation’s 940,000 AF storage right in Palisades Reservoir with a priority date of July 28, 1939. *See, e.g.,* Bricker Aff., Ex. 3 at 69; Am. Compl., Ex. 3 at 1, 12.
3. As a contract holder, Pocatello is a “spaceholder” as that term is used by WD01: “a person or entity that contracts or owns space in a reservoir that may have some entitlement to storage accrued to, or allocated from, the reservoir water right.” Bricker Aff., Ex. 3 at 13.
4. IWRB has authority to “appoint local committees, including water district advisory committees . . . to facilitate the rental of stored water.” Idaho Code § 42-1765; Am. Answer at ¶ 32.

5. IWRB also has the duty to “[a]dopt rules and regulations governing the management, control, delivery and use and distribution of water to and from the water supply bank” Idaho Code § 42-1762(1); Am. Answer at ¶ 52.
6. However, IWRB does not have authority to delegate rulemaking to the local committees. Am. Answer at ¶ 42.
7. Further, the Committee of Nine does not have authority to adopt rules. Am. Answer at ¶ 44; Spaceholders’ Answer at ¶ 44.
8. On March 6, 2023, the Committee of Nine held a public meeting where it “adopted” the 2023 Procedures as amended by the Rental Pool Subcommittee. *See* Bricker Aff., Ex. 1 (Agenda for Committee of Nine Meeting dated March 6, 2023); *see also* Bricker Aff. at ¶ 3; Bricker Aff., Ex. 2 (IWRB Resolution No. 14-2023).
9. On March 7, 2023, the WD01 water users held a public meeting and, through resolution, directed the amended Procedures to be submitted to IWRB. Am. Compl., Ex. 6. at 19 (2023 WD01 Resolutions).
10. On March 31, 2023, IWRB, through resolution, “approved” the amended Procedures. Bricker Aff., Ex. 2.
11. The Procedures apply to all spaceholders in WD01. The purposes of the Procedures include:
 - a. To provide irrigation water to spaceholders for irrigation of District land with an existing primary irrigation water right. Am. Compl., Ex. 4 at ¶ 3.1.
 - b. To ensure rental pool participants have priority for rentals over non-participating spaceholders and non-spaceholders. *Id.*.

- c. “To maintain adequate controls, priorities and safeguards to insure that existing water rights are not injured. . .” *Id.* at ¶3.2.
 - d. “. . . and that a spaceholder’s allocation is not impacted without his or her consent.” *Id.*
 - e. “To prevent further declines in the Eastern Snake Plain Aquifer and tributary spring flows and reach gains, and to ensure new consumptive uses within the District do not further impact the storage supply. . .” *Id.* at ¶ 3.4.
12. The Watermaster “shall serve as the manager of the rental pool and shall administer the rental pool consistent with these procedures”. *Id.* at ¶ 4.1.
13. The Watermaster’s duties as rental pool manager include:
- (a) Determining impacts pursuant to Procedure 7;
 - (b) Calculating payments to spaceholders as prescribed in Procedures 5.2 and 7.3;
 - (c) Accepting storage into the common pool, assignment pool, and executing rental agreements on behalf of the Committee;
 - (d) Disbursing and investing rental pool monies with the advice and consent of the Rental Pool Subcommittee; and
 - (e) Taking such additional actions as may be directed by the Committee.
- Id.* at ¶¶ 4.1(a)-(e).
14. The Procedures establish a “common pool” of water available for rentals that consists of water made available by spaceholders. *Id.* at ¶¶ 5.1, 5.2.101.
15. Spaceholders that do not participate in the common pool “shall not be entitled to supply storage to, or rent storage from, the common pool. Notwithstanding this restriction, the Bureau may rent flow augmentation water from the common pool in the amounts identified in Procedure 5.2.104.” *Id.* at ¶ 5.2.102.

16. “Only participants [in the common pool] may [privately] lease storage to a Lessee subject to the provisions of these[]procedures, and non-participating spaceholders may not lease storage from participants.” *Id.* at ¶ 6.1.
17. The Watermaster approves and denies all applications for rental or lease of storage. *Id.* at ¶¶ 4.3.101-107.
18. Procedure 7.0 (titled “Impacts”) applies in “any year in which the storage rights in the reservoir system do not fill.” *Id.* at ¶ 7.1; Am. Answer at ¶ 35.
19. Under Procedure 7.3, the “impact analysis” procedure, the Watermaster fills *all* empty reservoir space that was *not* evacuated to facilitate a lease in the prior year, regardless of decreed priority, ahead of the empty reservoir space that *was* evacuated in the prior year to facilitate a lease. Am. Answer at ¶ 60.
20. The actual mechanism by which the Watermaster carries out the reallocation described in ¶ 19 is: “The priority for the space in RENTAL LTF in the water right accounting is simply changed from the original reservoir priority to a junior priority so fill in RENTAL LTF space follows the fill of other (non-*last-to-fill*) spaceholders.” Bricker Aff., Ex. 3 at 141 (emphasis in the original).
21. Spaceholders who do not participate in the rental pool are assumed to be “impacted” from the operation of the common pool and private leases, and receive storage accruals (described in Procedure 7.3 and ¶¶ 19-20 above) in their space that would otherwise have been stored in space owned by spaceholders who participate in the rental pool. Am. Compl., Ex. 4 at ¶ 7.4.
22. By the same token, spaceholders who participate in the rental pool are subject to Procedure 7.3 and accruals to their storage space will be reduced in the following year.

Am. Compl., Ex. 4 at ¶ 7.3(a); Am. Answer at ¶ 35. Similarly, spaceholders who rent their storage water under a private lease are subject to Procedure 7.3 and accruals to their storage space will be reduced in the following year. Am. Compl., Ex. 4 at ¶ 7.3(b).

23. The WD01 “Final Storage Report,” posted on the WD01 website annually, makes spaceholders aware of their storage account balance and the quantity of fill—including any reductions in accruals to their space associated with application of the Watermaster’s Procedure 7.0 “impact” analysis. Bricker Aff. at ¶ 6; Am. Compl., Ex. 3 at 37 (2021 Storage Report).
24. In the years 2008, 2013, 2014, 2016, and 2021, the Watermaster applied Rule 7.3, meaning the Watermaster assigned the portion of Pocatello’s space equal to the amount leased in the prior year the most junior priority date in the reservoir system so that this portion of Pocatello’s total space was “last to fill.” *See* Am. Compl., Ex. 7 (Memo from T. Olenichak to G. Baxter dated October 25, 2021).
25. In 2021, the portion of Pocatello’s space that was made “last to fill” by the Watermaster received zero “new accrual.” *Id.*

STANDARD OF REVIEW

“The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

I.R.C.P. 56(a). “Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law.” *Stanger v. Walker Land & Cattle, LLC*, 169 Idaho 566, 573 (2021) (citation

omitted). “If there is no genuine dispute as to any material fact, all that remains is a question of law over which this Court exercises free review.” *Id.* Finally, the standard for interpreting statutes is well established:

Where a statute is clear and unambiguous, the expressed intent of the [L]egislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent. . . . Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations. Statutory language is not ambiguous merely because the parties present differing interpretations to the court. . . . Rather, statutory language is ambiguous where reasonable minds might differ or be uncertain as to its meaning.

City of Idaho Falls v. H-K Contractors, Inc., 163 Idaho 579, 582 (2018) (citations and quotations omitted).

ARGUMENT

I. **The Procedures are Void**

A. **The Procedures are “Rules” under the APA.**

Under the relevant section of the APA:

- (24) “Rule” means all or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes:
- (a) Law; or
 - (b) The procedure or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, but does not include:
 - (i) Statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
 - (ii) Declaratory rulings issued pursuant to section 67-5232, Idaho Code; or
 - (iii) Intra-agency memoranda; or

- (iv) Any written statements given by an agency that pertain to an interpretation of a rule or to the documentation of compliance with a rule.

Idaho Code § 67-5201(24).⁶

The Idaho Supreme Court has interpreted the term “rule” under the APA twice in recent years: *State v. Haynes*, 159 Idaho 36, 43-45 (2015) (*Haynes*), and *Pizzuto v. Idaho Dep't of Corr.*, 170 Idaho 94, 96-98 (2022) (*Pizzuto*). “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*.” *Pizzuto* at 96-97 (emphasis added). “[G]eneral applicability has two meanings. First, it means that rules apply uniformly *to the public*. . . . The second way in which rules are generally applicable is that they must be applied uniformly *by the agency*.” *Id.* at 97.

In *Pizzuto*, the court held that the standard operating procedures (“SOPs”) in question were not “rules,” and thus not subject to the procedural requirements of the APA, because the statute authorizing the preparation of the SOPs, Idaho Code § 19-2716 (“[t]he director [of the Idaho department of correction] shall determine the procedures to be used in *any* execution”), connoted case-by-case decision-making by the Director, which are axiomatically not “statements of general applicability.” In *Haynes*, the Court found otherwise—the SOPs in question were “rules,” which must have been adopted in substantial compliance with the requirements of the APA, because they, *inter alia*, “set forth procedures to implement breath

⁶ At the time the Complaint (as well as the Amended Complaint) in this case was filed, this statutory provision appeared as Idaho Code section 67-5201(21). 2023 Idaho Session Laws 314 (House Bill 206), however, changed the location of this provision and made slight changes to the definition of “rule,” effective July 1, 2023.

testing under [I.C.] section 18-8004(4),” and were to “be applied generally and uniformly, which is the purpose for adopting standards and procedures.” *Haynes* at 44-45.

Further, while *Pizzuto* and *Haynes* involved the court parsing the earlier version of the definition of “rule,” the 2023 amendments to the definition of Idaho Code § 67-5201(24) would not change the result. The court’s analysis in both cases relied heavily on whether or not the challenged SOPs were statements of “general applicability,” which “is the first attribute of a rule under the [statutory] definition—and for good reason.” *Pizzuto* at 96. The Procedures apply generally to all water users within WD01 (rental pool participants, non-participants, and non-spaceholders). *See, e.g.,* Am. Compl., Ex. 4 ¶ 3.1, (“These procedures are intended to: a) assure that *participants* have priority over *nonparticipating spaceholders* and *non-spaceholders* in renting storage through the rental pool” (emphasis added)); *see also, Id. at* ¶ 5.0 (generally) and ¶¶ 5.2.101, 5.2.102, 5.2.107. The Procedures “apply comprehensively to the class of persons or course of conduct covered by the rule” (*Pizzuto* at 97), making these rules rather than “quasi-judicial agency actions” which “determine only the rights and duties of individuals.” *Id.*

In addition, the Procedures are “applied uniformly” by the Watermaster to all spaceholders. While different spaceholders may experience the effects of the Procedures differently, depending on whether or not a spaceholder participates in the rental pool (*see, infra* Undisputed Facts nos. 14-22), all spaceholders are subject to the Procedures. The effects of the Procedures also demonstrate that the Procedures do not fall under the exemption in Idaho Code § 67-5201(24)(b), as they *do* “affect[] private rights of the public or procedures available to the public” by, *inter alia*, impacting spaceholders’ ability to lease water or receive distributions of stored water in subsequent years. *See* Am. Compl. Ex. 4 ¶ 7.3. In sum, the Procedures are

“rules” as they fit squarely within the definition of Idaho Code § 67-5201(24) and relevant caselaw.

B. If the Procedures are Rules, They Must Be Invalidated.

If the Court finds that the Procedures are rules, they are *per se* invalid. “Rules may be promulgated by an agency only when specifically authorized by statute.” Idaho Code § 67-5231(1). Rules are “voidable unless adopted in substantial compliance with the requirement of this chapter.” Idaho Code § 67-5231(1). Among the requirements of the APA are that the agency adopting or amending a rule must have *specific* authority to conduct rulemaking, *id.*, must publish a notice of intent to promulgate, publish notice of proposed rulemaking, and allow for public participation. *Id.*, §§ 67-5220 through -5222. As the State of Idaho admits⁷, the IWRB has no authority to delegate rulemaking authority⁸ and the Committee of Nine has no authority to conduct rulemaking.⁹ *See also City of Sandpoint v. Indep. Highway Dist.*, 161 Idaho 121, 125 (2016) (*City of Sandpoint*).¹⁰ Thus, if the Procedures are “rules” under the APA the Court must find the Procedures legally invalid.

⁷ Am. Answer at ¶ 42.

⁸ The Spaceholders’ Answer ¶ 42 does not specifically admit or deny whether the IWRB lacks authority to delegate rulemaking authority and whether the Committee of Nine lacks rulemaking authority, which acts as a denial. *McGimpsey v. D&L Ventures, Inc.*, 165 Idaho 205, 214 (2019) (citing I.R.C.P. Rule 8(b)(3)). However, in the same paragraphs the spaceholders repeatedly deny that the Rental Pool Procedures are “rules,” and the only inference to draw from this is that if the Rental Pool Procedures *are* rules, then IWRB and the Committee of Nine have acted in excess of their authority.

⁹ Spaceholders’ Answer at ¶ 44; Am. Answer at ¶ 50.

¹⁰ “An administrative agency is limited to the power and authority granted it by the legislature. . . . [it] must exercise any authority granted by statute within the framework of that statutory grant. It may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered” (citing *Roberts v. Transp. Dep’t*, 121 Idaho 727 (1991); other internal citations omitted).

II. Rule 7.3 Directs IDWR to Commit an *Ultra Vires* Act and is Unconstitutional

A. Procedure 7.3 is contrary to Idaho law and requires IDWR to act in a manner that is *ultra vires*.

Under Idaho Code § 42-602, the Director has “direction and control of the distribution of water from all natural water sources within a water district” The Idaho Supreme Court has interpreted 42-602 to invest the Director with a “clear legal duty” to distribute water. *Musser v. Higginson*, 125 Idaho 392, 395 (1994). The details of the Director’s “clear legal duty” are left to his discretion as long as the Director distributes water “in accordance with the prior appropriation doctrine.” *Id.* (internal citations omitted); Idaho Code § 42-602. Not only does IDWR lack authority to change water users’ priorities, *see City of Sandpoint*, 161 Idaho at 125, it lacks authority to deprive spaceholders of water to which they are entitled under the prior appropriation doctrine. *See Nielson v. Parker*, 19 Idaho 727, 732 (1911) (“The [Director] has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person”). Pocatello’s contract space in Palisades is associated with the 1939 water right; it is entitled to have its storage space filled when the 1939 water right is in priority, not based on Procedure 7.3, which changes the priority date of Pocatello’s space and allocates to other water users water that would otherwise accrue in priority in Pocatello’s storage account.

Rule 7.3 is manifestly contrary to the prior appropriation doctrine, and the Watermaster’s application of Rule 7.3 is unlawful. *A&B Irrigation Dist. v. State*, 157 Idaho 385, 393 (2014) (*A&B Irrigation Dist.*).¹¹ The State admits that the Watermaster’s application

¹¹ “The Director [] shall distribute water in water districts in accordance with the prior appropriation doctrine. This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law.” (internal citations and quotation marks omitted). With regard to the Procedures, it is the Watermaster (the Director’s delegate under I.C. §§ 42-605, -607) who is distributing water contrary to the law.

of the Last to Fill Rule reallocates, without regard to appropriation priorities, water to non-leasing spaceholders that would have been distributed to certain leasing spaceholders *but for* the Last to Fill Rule. *See* Am. Compl, Ex. 4 at ¶¶ 7.1-7.4; Am. Answer at ¶ 60; *infra* Undisputed Facts nos. 19-22; Bricker Aff., Ex. 3 at 141 .

Furthermore, it is not even the Watermaster who decides the “direction and control” of storage water under Procedure 7.3. Rather, Procedure 7.3 is imposed on *all* participants in the rental pool by the Committee of Nine, purportedly to avoid alleged water rights injury to other non-leasing spaceholders, and executed by the Watermaster. Among the problems with this: (1) the administration of water rights (including the filling of storage space) is supposed to be an exercise of *discretion* by the Director and his agents; in fact, the Watermaster’s application of Procedure 7.3 is a ministerial act, carried out at the behest of the Committee of Nine; 2) to the extent a non-leasing spaceholder can be said to suffer water rights injury when other spaceholders lease their storage water, such a determination should take place in a quasi-adjudicative matter, on a case-by-case basis. Here, Procedure 7.3 is simply imposed uniformly on all rental pool participants to the detriment of their contract storage volumes.

B. Rule 7.3 is Facially Unconstitutional.

“Priority of appropriation shall give the better right as between those using the water.” Idaho Const. Art. XV, § 3. Thus, prior appropriation is the bedrock principle that controls the distribution of water by IDWR. When applying Rule 7.3, however, IDWR defies the prior appropriation system by disregarding the decreed priority date associated with spaceholders’ rights and assigning them a new priority date, and IDWR states as much. *See infra* Undisputed Fact no. 20.

Accordingly, Procedure 7.3 impairs the rights of spaceholders who, *inter alia*, enter into private leases (“Leasing Spaceholder”) for water stored in their contract space by directing IDWR to fill the Leasing Spaceholder’s storage space in a manner that is inconsistent with the prior appropriation doctrine.¹² There are *no* circumstances under which IDWR’s application of Rule 7.3 to impact the Leasing Spaceholders’ priority date is consistent with Article XV, § 3, of the Idaho Constitution. *A&B Irrigation Dist.*, 157 Idaho at 393. The Last to Fill Rule is thus facially unconstitutional. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 870 (2007) (*AFRD2*).

III. IDWR’s Application of Procedure 7.3 Works a Physical Taking

Depriving a water user of water to which it is entitled, and distributing that water to other users, requires the State to compensate the deprived water user for the taking of its private property. *See* Idaho Const. Art. XV, § 3; *id.*, Art. I, § 14; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797-98 (2011) (*Clear Springs Foods*) (“Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder.”). In Idaho, water rights are property rights entitled to legal protection. *See Clear Springs Foods* at 797; *AFRD2* at 879. *See also, United States v. Pioneer Irrigation Dist. (In re SRBA Case No 3957)*, 144 Idaho 106, 115 (2007) (“it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right.”)

The intervention into this case by Burley Irrigation District, Fremont-Madison Irrigation District, and Idaho Irrigation District directly validates the argument that

¹² Spaceholders who merely participate in the rental pool (which involves dedicating some portion of their storage water to the “common pool”) without entering into a private lease are also made “last to fill”. *See Undisputed Fact ¶ 22.*

spaceholders, including Pocatello, own a legally-protected property right and are entitled to receive allocations of “new accrual” in priority. *See* Spaceholders’ Mot. to Intervene at ¶ 4 (“Disposition of the action has the potential to impair or impede the Spaceholders’ ability to protect their water rights, which are real property right interests in the State of Idaho”); Mem. in Support of Spaceholders’ Mot. to Intervene at 5 (“the Spaceholders’ water rights represent real property interests in Idaho”) (citing Idaho Code § 55-101; *Surface Waters & Tributaries from Whatever Source of the Lemhi River Drainage Basin v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101 (1983)); Mem. in Support of Spaceholders’ Mot. to Intervene at at 3 (“Any change to that procedure or avoidance of [Procedure 7.3], therefore, necessarily has the potential to reduce or otherwise impact the Spaceholders’ allocations in 2023 and in the future thereby potentially causing direct injury to their water rights in 2023 and in future irrigation seasons”).

Thus, there is no genuine dispute that IDWR’s past application of the Last to Fill Rule effectuated *physical* takings of Pocatello’s property right without just compensation. IDWR acted “with the purpose and effect of subordinating” Pocatello’s right to receive distributions of “new accrual” to other users “whenever it saw fit,” thereby depriving Pocatello of water to which it is otherwise entitled, which is essentially “the imposition of such a servitude as [will] constitute an appropriation of property for which compensation should be made.” *Dugan v. Rank*, 372 U.S. 609, 625 (1963) (citations omitted). Moreover, IDWR’s application of the Last to Fill Rule effectively resulted in IDWR invading, or occupying, Pocatello’s storage space, or a portion thereof, to prevent that space from filling so that the water could be reallocated to other users. *Infra* Undisputed Fact ¶ 24 Bricker Aff., Ex. 3 at 141. Either way, IDWR’s takings of Pocatello’s property right are a *physical* one, which is a categorical taking. *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 783-84 (2009). Accordingly, the Court should

declare that IDWR's applications of the Last to Fill Rule have caused physical takings of Pocatello's property right.

IV. A Finding for Pocatello on Any of the Above Issues Requires the Court to Enjoin Application of Procedure 7.3

If the Court finds for Pocatello on any of the above arguments, then it must also enjoin the Director and Watermaster from applying Rule 7.3. *See Sun Ray Drive-in Dairy v. Trenhaile*, 94 Idaho 308, 309 (1971) (enjoining agency from enforcing law found to be unconstitutional against plaintiff); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 603 (2016) (holding that, if a law is found to be facially unconstitutional, then "an injunction prohibiting its enforcement is 'proper.'").

CONCLUSION

WHEREFORE, Pocatello asks the Court to find that the Procedures generally:

- a) are "rules" within the definition under Idaho law;
- b) are invalid because it is undisputed that the IWRB has no authority to delegate rulemaking and the Committee of Nine has no authority to engage in rulemaking; thus the Procedures are not adopted consistently with Idaho statute.

In addition, Pocatello also asks the Court to find that Rule 7.3:

- c) Requires IDWR to act in an *ultra vires* manner, whether or not it is a "rule" within the meaning of Idaho law, because it requires IDWR to administer storage contract volumes in a manner inconsistent with the prior appropriation doctrine; and
- d) Is facially unconstitutional;
- e) Works a physical taking on Pocatello's contract storage volume; and

f) May not be enforced.

Respectfully submitted this 17th of October, 2023.

SOMACH SIMMONS & DUNN, P.C.



Sarah A. Klahn, ISB #7928

Maximilian C. Bricker, ISB #12283

Attorneys for Plaintiff City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically:

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, ISB #6168
Sarah W. Higer, ISB #8012
MARTEN LAW LLP
jsimpson@martenlaw.com
tthompson@martenlaw.com
shiger@martenlaw.com

Jerry Rigby
Hyrum Erickson, ISB #7688
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. Diehl, Jr.
Deputy City Attorney
CITY OF POCATELLO
rdiehl@pocatello.gov



Sarah A. Klahn, ISB No. 7928