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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 POCATELLO,

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
MEMORANDUM IN
SUPPORT OF CROSS-
MOTION FOR SUMMARY
JUDGMENT AND RESPONSE
TO PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

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.

INTRODUCTION

Defendants Idaho Water Resource Board (“IWRB”), Idaho Department of Water Resources (“IDWR”), Mathew Weaver in his official capacity as the Director of the Idaho Department of Water Resources (“Director”), and Tony Olenichak in his capacity as Water District 01 Watermaster (collectively the “State of Idaho”), by and through their attorneys of record, pursuant Idaho Rule of Civil Procedure (“I.R.C.P”) 56, hereby submits this memorandum in support of the *State of Idaho’s Cross-Motion for Partial Summary Judgment and Response to Plaintiff’s Motion for Partial Summary Judgment, 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*, and *Affidavit of Ann N. Yribar in Support of State of Idaho’s Cross-Motion for Partial Summary Judgment and Response to Plaintiff’s Motion for Partial Summary Judgment* filed concurrently herewith. As a matter of law, the Water District 01 Rental Pool Procedures are not “rules” as defined by the Idaho Administrative Procedures Act (“Idaho APA”) 67-5201–5292. The City of Pocatello (“City”) has failed to exhaust its administrative remedies and is barred from bringing this action under I.R.C.P. 84(n). The City’s

arguments that the Water District 01 Rental Pool Procedures are facially unconstitutional and affect a physical taking of the City's property are without merit.

STANDARD OF REVIEW

The “purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain.” *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896 (1984). Summary judgment should be granted if the document, affidavits, admissions, interrogatory answers, and other materials show that there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56; *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990). The burden is on the moving party to prove the absence of genuine issues of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1960). In turn, the non-moving party's case must be based on more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of material fact. *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990).

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991). Where the opposing parties file cross motions for summary judgment based on the same evidentiary facts, and the same theories and issues, the parties effectively stipulate that there is no genuine issue of material facts. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).

STATEMENT OF UNDISPUTED FACTS

1. The Water Supply Bank Rules Set Forth Criteria that are Interpreted by the Rental Pool Procedures.

Idaho Code Section 42-1761 directs the IWRB to operate a water supply bank “to obtain the highest duty for beneficial use from water, provide a source of adequate water supplies to benefit new and supplemental uses, and provide a source of funding for improving water user facilities and efficiencies.” The legislature directed the IWRB to “adopt rules and regulations governing the management, control, delivery and use and distribution of water to and from the water supply bank in compliance with chapter 52, title 67, Idaho Code.” I.C. § 42-1762(1). The IWRB promulgated the Water Supply Bank Rules in IDAPA 37.02.03. The validity of the Water Supply Bank rules found in IDAPA 37.02.03 is not at issue in this matter.

The Water Supply Bank is a “water exchange market operated directly by the [IWRB] to facilitate the marketing of water rights.” IDAPA 37.02.03.010.12.¹ The Water Supply Bank is divided into two parts, the “Board’s Water Supply Bank,” which facilitates the lease and rental of natural flow water rights, IDAPA 37.02.03.010.02, and the “Rental Pool” which is a “market for exchange of stored water operated by a local committee.” IDAPA 37.02.03.010.09. Rentals of water from the Board’s Water Supply Bank must be approved by the Director of IDWR under I.C. § 42-1763. The Director must determine, among other things, that a water supply bank transaction will not “reduce the quantity of water available under other existing water rights” and will not enlarge the use “beyond that authorized under the water right.” I.C. § 42-1763.

¹ The Water Supply Bank Rules also 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.

For the rental of stored water, the IWRB “may appoint local committees . . . to facilitate the rental of stored water.” I.C. § 42-1765. Local rental pool committees may be “water district advisory committees.” *Id.*; *see also* I.C. § 42-605(6). The local rental pool committee “shall have the authority to market stored water *between consenting owners and consenting renters under rules and regulations adopted by the [IWRB].*” *Id.* (emphasis added). The Water Supply Bank Rules provide that the local rental pool procedures:

[M]ust be approved by the Board and must provide for the following:

- a. Determination of priority among competing applicants to lease stored water to the rental pool and to rent stored water from the rental pool;
- b. Determination of the reimbursement schedule for those leasing stored water into the rental pool;
- c. Determination of the rental price charge to those renting stored water from the rental pool;
- d. Determination of administrative charge to be assessed by the local committee;
- e. Allocation of stored water leased to the bank but not rented;
- f. Notification of the Department and the watermaster of any rentals where stored water will be moved from the place of use authorized by the permit, license, or decree establishing the stored water right;
- g. Submittal of applications to rent water from the rental pool for more than five (5) years to the Board for review and approval as a condition of approval by the local committee;
- h. Prevention of injury to other water rights;
- i. Protection of the local public interest, except for applications submitted pursuant to the interim authority provided by Section 42-1763A, Idaho Code;
- j. Consistency with the conservation of water resources within the state of Idaho, except for applications submitted pursuant to the interim authority provided by Section 42-1763A, Idaho Code;
- k. Management of rental pool funds as public funds pursuant to the Public Depository Law, Chapter 1, Title 57, Idaho Code.

IDAPA 37.02.03.040.01.a–k.

Four local rental pools committees have been appointed, one each for Basins 01, 63, 65, and 65K. *Affidavit of Ann N. Yribar in Support of State of Idaho’s Cross-Motion for Partial Summary Judgment and Response to Plaintiff’s Motion for Partial Summary Judgment* (“*Yribar Aff.*”) at ¶ 3. When developing their rental pool procedures, each local rental pool committee must comply with the criteria set forth in IDAPA 37.02.03.040.01.a–k. But within that criteria, each local committee may recommend rental pool procedures that respond to the specific and unique needs of each basins. *Yribar Aff.* at ¶ 4.

The current local rental pool committee for Water District 01 is the Committee of Nine, an advisory committee to Water District 01 appointed under I.C. § 42-605(6). *Yribar Aff.* at ¶ 5. A subcommittee of the Committee of Nine creates an initial draft of the Water District 01 Rental Pool Procedures. *Yribar Aff.* at ¶ 6. The subcommittee presents the draft to the whole Committee of Nine, which then presents the proposed procedures at the Water District 01 annual meeting. *Yribar Aff.* at ¶ 7–8. The rental pool procedures are adopted by the Water District and then presented to the Director of IDWR. *Yribar Aff.* at ¶ 9–10. The Director of IDWR reviews the procedures, as required by IDAPA 37.02.03.040.03, and makes his recommendation to the IWRB at an IWRB public meeting. *Yribar Aff.* at ¶ 11. After reviewing the procedures for compliance with the IDAPA 37.02.03.040.01.a–k. criteria, and making any edits it deems necessary, the IWRB adopts the procedures by resolution. *Yribar Aff.* at ¶ 12.

2. Participation in the Water District 01 Rental Pool Procedures is Voluntary

The primary purpose of the Water District 01 Rental Pool Procedures is to “provide supplemental irrigation water to spaceholders for the irrigation of District land with an existing primary irrigation water right and to maintain a rental pool with sufficient incentives such that

spaceholders supply, *on a voluntary basis*, an adequate quantity of storage for rental or lease . . .” *Yribar Aff.* at ¶ 15 Exhibit 1, Procedure 3.1(emphasis added).² Participation in the rental pool is not mandatory. Participation in the rental pool is voluntary. *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* (“*Olenichak Aff.*”) at ¶ 5. A “participant” is “a spaceholder who contributes to the Common Pool pursuant to Procedure 5.2 [Participant Contributions to Common Pool].” Procedure 2.29. Non-participants in the rental pool are spaceholders “who are not participants” and who are not “entitled to supply storage to, or rent storage from, the common pool.” Procedure 5.2.102. The procedures seek to ensure that at least 75% of contracted reservoir system space is committed to supplying the Common Pool by participating spaceholders. Procedure 5.2.101, *Olenichak Aff.* at ¶ 7. A higher percentage of participants lessens the burden on any one spaceholder of having to provide water to the rental pool and ensures there is a sufficient market of water made available for other uses. *Olenichak Aff.* at ¶ 8. In 2022–2023, two spaceholders in Water District 01 elected to be non-participants in the rental pool. *Olenichak Aff.* at ¶ 10. A non-participant spaceholder’s storage is allocated in-priority and without reference to the rental pool procedures. *Olenichak Aff.* at ¶ 6.

Participant contributions to the Common Pool are used to supply large rentals, small rentals, Blackfoot Equitable Adjustment Settlement Agreement water, 2015 Shoshone-Bannock Settlement Agreement water, and flow augmentation under the Snake River Water Rights Agreement of 2004 (“Nez Perce Agreement”). Procedure 5.2.103–105. Participants may also

² Citations to the Water District 1 2023 Rental Pool Procedures found in *Yribar Aff.* at ¶ 15 Exhibit 1 will be “Procedure [#]”.

elect to provide additional storage water through private leases, Procedure 6.0, to the Supplemental Pool, Procedure 8.0, to the Assignment Pool, Procedure 10.0, and to the Extraordinary Circumstances Pool, Procedure 11.0. Just as with the Common Pool, participation in any of these pools is voluntary.³

Participants in the Water District 01 rental pool receive benefits for participating. The rental pool provides a less procedurally-burdensome alternative to a water right transfer proceeding, under I.C. § 42-222, for changing the purpose of use or place of use of storage water. I.C. § 42-1764(1) (“The approval of a rental of water from the water supply bank may be a substitute for the transfer proceeding requirements of section 42-222, Idaho Code.”); *see also Olenichak Aff.* at ¶ 16.a, 24. Participants received monetary benefits for renting their storage water. *See* Procedure 5.2.107, 5.3, 6.3, 8.3, 10.711.3, *Olenichak Aff.* at ¶ 18.a–s, ¶ 20.a–p. Participation also creates an opportunity to obtain additional storage supplies when participants have exhausted their own storage allocations. *Olenichak Aff.* at ¶ 16.d.

Participants contributions also ensure an adequate water supply to meet the terms of certain settlement agreements, including the Nez Perce Agreement which provides protection to Water District 01 water users from federal Endangered Species Act issues by providing water from the Snake River basin to augment lower Snake River flows for anadromous fish. I.C. § 42-1763B, *Olenichak Aff.* at ¶ 16.c.

³ “Any spaceholder *may . . . elect* to contribute storage to the current year’s common pool” Procedure 5.2.101. Purpose of the supplemental pool is “To provide a *voluntary mechanism* for the lease for storage water to a participant below Milner” Procedure 8.1 (emphasis added). Purpose of the assignment pools is “To provide a *voluntary mechanism* for participating spaceholders to assign a portion of their storage allocation to be made available for flow augmentation rentals below Milner” Procedure 10.1. Spaceholders have “an *opportunity to consign* storage through the extraordinary circumstances pool.” Procedure 11.4.101. (emphasis added).

3. **The Last to Fill Procedures Protect Non-Participants and Junior-Participating Spaceholders.**

The Water Supply Bank Rules require local rental pool procedures to include provisions that ensure “[p]revention of injury to other water rights.” IDAPA 37.02.03.040.01.h. The Water District 01 Rental Pool Procedures interpret this requirement by including “adequate controls, priorities, and safeguards to insure [sic] that existing water rights are not injured and that a spaceholder’s allocation is not impacted without his or her consent.” Procedure 3.1. To ensure existing water rights and storage spaceholders are not injured, the Water District 01 Rental Pool Procedures provide for protection of both non-participating spaceholders and participating spaceholders through what are known as the “Last to Fill” procedures⁴:

To avoid impacts to spaceholders caused by rental pool storage provided under Procedures 5, 6, 8, 9.3, 10, and 11 in years when storage is not spilled past Milner, the supplying spaceholder’s storage allocation shall be reduced to ensure all other reservoir space receives a 100% fill to its storage allocation ahead of allocations to space evacuated by supply previous years leases, assignments, and rentals.

Procedure 7.3 (emphasis added).

To avoid impacts to non-participant storage allocations caused by rental pool storage provided under Procedure 5 in years when storage is not spilled past Milner, the supplying participants storage allocation shall be reduced to ensure all other reservoir space receives a 100% fill to its storage allocation ahead of allocations to space evacuated to supply common pool rentals.

Procedure 7.4 (emphasis added).

⁴ The Water District 01 Rental Pool Procedures also provide additional mechanisms to avoid injury including providing that: “A participant cannot rent water from the Common Pool if the participant is replacing storage space or water which has been evacuated due to an assignment to or private lease through the Water District 1 Rental Pool, unless an exception is granted by the Committee.” Procedure 5.4

Rather than being a penalty, the Last to Fill procedures are a protection. They protect non-participants from having their storage allocation affected by operation of the rental pool. *Olenichak Aff.* at ¶ 22, 24–29. They also protect junior-participating spaceholders, like the City of Pocatello, from being injured by senior-participating spaceholder’s rental of water.⁵ *Olenichak Aff.* at ¶ 22, 24–35. Thus, the Last to Fill procedures are an interpretation of the Water Supply Bank Rule criteria that ensure the operation of a local rental pool cannot cause injury to other water users. IDAPA 37.02.03.040.01.h.

ARGUMENT

1. The Water District 01 Rental Pool Procedures are Not Rules Under the Idaho APA.

It is undisputed that the IWRB did not follow the requirements of the Idaho APA for promulgation of a rule when it adopted, by resolution, the Water District 01 Rental Pool Procedures. However, the IWRB was not required to follow the Idaho APA because the Water District 01 Rental Pool Procedures are not rules, as defined by I.C. § 67-5201(24).

a. The Water District 01 Rental Pool Procedures Do Not have “General Applicability” because Participation in the Pool is Voluntary.

Under the Idaho APA, “rulemaking” is the process for formulation or “adoption” of “rule[s]” by an “agency.”⁶ I.C. § 67-5201(24). A “rule” is defined as:

[A]ll 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, enforces, or prescribes:
(a) Law; or

⁵ For an explanation of how junior-participating spaceholders can be affected by senior-participating spaceholders see *Olenichak Aff.* at ¶ 30–35

⁶ The IWRB and IDWR are “agenc[ies]” as defined by I.C. § 67-5201(3).

- (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.

The Idaho Supreme Court has explained that the “most salient” characteristic for defining what constitutes a “rule” under the Idaho APA is whether it has “general applicability.” *Pizzuto v. Idaho Dept. of Correction*, 170 Idaho 94, 508 P.3d 293, 295–296 (2022).⁷ The Court explained that “general applicability” has “two meanings. First, it means that rules apply uniformly *to the public*. Like statutes, rules apply comprehensively to the class of persons or course of conduct covered by the rule. . . .” *Pizzuto* at 296 (emphasis in original). And second, for rules to be “generally applicable” they “must be applied uniformly *by the agency*. . . .” *Id.* (emphasis in original).

In this case, the Water District 01 Rental Pool Procedures do not have “general applicability.” First, the rental pool procedures apply only to a small subset of water users in an individual basin and do not apply “uniformly *to the public*.” *Pizzuto* at 296. The Water District

⁷ The Court in *Pizzuto* abrogated “the decision in *Asarco Inc. v. State*, 138 Idaho 719, 722, 69 P.3d 139, 142 (2003) to the extent that it misstated the definition of ‘rule’ under the APA and adopted unnecessary factors to narrow that definition.” *Pizzuto* at 297. In its Memo, the City of Pocatello cites to *State v. Haynes*, 159 Idaho 36, 355 P.3d 1266 (2015). *Memorandum in Support of Pocatello’s Motion for Partial Summary Judgment* (“Pocatello’s Memo”) at 10–11. *Haynes* applies the criteria set forth in *Asarco* and thus its holdings based on that criteria are also abrogated by *Pizzuto*.

01 Rental Pool Procedures do not apply to *all* water right holders in Idaho. They do not apply to *all* water right holders in Water District 01. They do not even apply to *all* storage water contract holders in Water District 01. Rather, they apply only to a small subset of storage spaceholders *who voluntarily choose to participate* in a storage water market.

Second, the Water District 01 Rental Pool Procedures are not “applied uniformly *by the agency. . .*” *Pizzuto* at 296 (emphasis in original). The IWRB’s rental pools are not imposed by the agency on the water users. Rather, they are a mechanism provided by the agency for use by the water users, should the water users choose to participate in them. The voluntary nature of the rental pools is clearly delineated in statute. The flow augmentation terms of the Nez Perce Agreement were approved by the Idaho Legislature in I.C. § 42-1763B. The Legislature directed that the IWRB’s local rental pool would provide the mechanism for renting flow augmentation water to the United States Bureau of Reclamation. I.C. § 42-1763B(2)(a). Idaho Code Section 42-1763B(3)(a) provides: “Any water made available under this section shall be obtained *only from willing lessors*. Any water rented under this section from sources located within a basin having a local rental committee, established pursuant to section 42-1765, Idaho Code or section 42-1765A, Idaho Code, *shall be rented pursuant to this section only through the local rental committee.*” (emphasis added). Thus, the legislature contemplated that participation in providing flow augmentation water would be voluntary and would be transacted through the Water District 01 Rental Pool Procedures.

Idaho Code Section 42-1765 also emphasizes the voluntary nature of participation in the rental pools. It makes clear that, not only are rentals to the United States Bureau of Reclamation for flow augmentation to be voluntary, participation in *all* rental pools created by the IWRB are

voluntary. The rental pools were created “to market stored water *between consenting owners and consenting renters* . . .” I.C. § 42-1765 (emphasis added).

As outlined above, the voluntary nature of participation in the rental pool is also clearly delineated in the Water District 01 Rental Pool Procedures themselves. Spaceholders who choose to participate in the rental pool receive certain benefits but, in receiving those benefits, they cannot be permitted to injure other water users. *Olenichak Aff.* at ¶ 24, IDAPA 37.02.03,040.01.h. Spaceholders who do not participate in the rental pool forego some of the rental pool’s benefits, but in foregoing them, they receive assurance that their water supply will be protected from injury and they will receive in-priority allocation of their storage space. *Olenichak Aff.* at ¶ 6. The choice whether to participate or not participate, and the consequent risks and rewards, are left for each individual water user to assess and decide based on their unique circumstances and water needs. The City of Pocatello cannot, having chosen voluntarily to participate, argue that it was forced to do so. Nor can the City of Pocatello, having chosen voluntarily to participate in the rental pool, be exempted from the requirement, under IDAPA 37.02.03.040.01.h, that its participation not injure other water users.

Voluntary participation is anathema to the idea of “general applicability.” Thus, the Water District 01 Rental Pool Procedures do not have “general applicability” which is the first, and most salient, feature of a “rule” under I.C. § 67-5201(24); *Pizzuto* at 295–296.

b. The Water District 01 Rental Pool Procedures are Written Statements by an Agency that Pertain to Interpretation of a Rule.

The Water District 01 Rental Pool Procedures are a localized interpretation of the Water Supply Bank Rules. Idaho Code Section 67-5201(4)(b)(iv) makes clear that the term “rule” does

not include “[a]ny written statements given by an agency that pertain to an interpretation of a rule or to the documentation of compliance with a rule.” Documents or procedures that do nothing more “than explain a rule contained in the Idaho Administrative Code” and which do not “express an agency policy which was not previously expressed” do not constitute rules. *Sons and Daughters of Idaho, Inc. v. Idaho Lottery Com’n*, 142 Idaho 659, 663, 1332 P.3d 416, 420 (2006).

In *Sons and Daughters*, the Idaho State Lottery Commission promulgated Gaming Rules for bingo pursuant to the Idaho APA. *Id.* at 660, 417. After adopting the rules, the Lottery Commission sent out an “informational packet” to all licensed gaming organizations in Idaho “to assist the organizations to comply with the statutes and rules.” *Id.* at 661, 418. The packet was not promulgated as a rule pursuant to the Idaho APA. *Id.* A gaming company argued that the packet was “an invalidly enacted rule because it broadened the Gaming Rules by incorporating requirements that were not contained within the rules, specifically by requiring bingo operators to keep track of the prices charged for the bingo papers.” *Id.* at 663, 420. The Idaho Supreme Court held, however, that the packet was “better classified as a written statement interpreting agency rules rather than as a rule” because it “did nothing more than explain a rule contained in the Idaho Administrative Code” and did not “express an agency policy which was not previously expressed.” *Id.* at 663, 420.

Idaho Code Section 42-1765 explicitly provides that the local rental pool committee “shall have the authority to market stored water between consenting owners and consenting renters *under rules and regulations adopted by the [IWRB].*” (emphasis added). The IWRB has promulgated, pursuant to the Idaho APA, the Water Supply Bank Rules. IDAPA 37.02.03. As

set forth above, the Water Supply Bank Rules provide a set of criteria that must be met before rental pool procedures may be approved by the IWRB. IDAPA 37.02.03.040.01.a–k. The criteria set forth in the Water Supply Bank Rules provide specific guidance for what must be included in the rental pool procedures. But each basin’s local rental pool committee interprets the criteria of IDAPA 37.02.03.040.01.a–k to suit the specific needs of that basin. The Last to Fill procedures found in the Water District 01 Rental Pool Procedures are an interpretation of the rule’s requirement that the procedures provide for “prevention of injury to other water rights.” IDAPA 37.02.03.040.01.h; Procedure 7.3. The Last to Fill procedures are not an expression of “agency policy that has not been expressed before,” but are an interpretation of the already established agency policy of prevention of injury to other water users. *Sons and Daughters*, at 663, 420.

Thus, the Water District 01 Rental Pool Procedures are not “rules” but are, instead “written statements given by an agency that pertain to an interpretation of a rule or to the documentation of compliance with a rule.” I.C. § 67-5201(24)(b)(iv).

2. The City Cannot Bring an Action for Declaratory Ruling under I.C. § 67-5278 because the Water District 01 Rental Pool Procedures are not Rules.

The City of Pocatello cannot avoid exhausting its administrative remedies by asking the Court to issue a declaratory ruling on the validity of the Water District 01 Rental Pool Procedures. As a matter of law, such judgment is not available to the City because, as described above, the procedures are not “rules” under the Idaho APA. Idaho Code Section 67-5278 allows a party to seek a declaratory judgment on the validity of a rule “whether or not the petitioner has

requested the agency to pass upon the validity or applicability of the rule in question.” I.C. § 67-5278(3). It provides:

(1) The validity or applicability *of a rule* may be determined in an action for declaratory judgment in the district court, if it is alleged that the *rule*, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.

I.C. § 67-5278(1) (emphasis added). Idaho Code Section 67-2578 “provides a means by which a party may gain standing before a district court, prior to exhausting administrative remedies in order to seek a declaratory judgment on a rule’s validity. The statute requires that the rule itself or its ‘threatened application’ interfere with or impair, or threaten to impair, the legal rights or privileges of the petitioner.” *American Falls Reservoir Dist. No. 2 v. Idaho Dept. Water Res.*, 143 Idaho 862, 871, 154 P.3d 433, 442 (2007). Idaho Code Section 67-5278 “is intended to establish qualifications for standing and is not a vehicle by which courts may decide factual issues prior to the completion of an administrative proceeding.” *American Falls Reservoir Dist. No. 2 v. Idaho Dept. Water Res.*, 143 Idaho 862, 871, 154 P.3d 433, 442 (2007).

For all the reasons shown, the Water District 01 Rental Pool Procedures are not “rules” under the Idaho APA. Therefore, I.C. § 67-5278 is not applicable because it deals with petitioners seeking a declaratory ruling about the “validity or applicability *of a rule* . . .” I.C. § 67-5278(1). In addition, as a voluntary participant in the rental pool, the City cannot demonstrate that the procedures interfere with, impair, or threaten to impair its legal rights or privileges. If the City does not like the Last to Fill Procedures it can simply choose not to participate in the Water District 01 rental pool. Thus, the City of Pocatello cannot use I.C. § 67-

5278 to circumvent the requirement that it exhaust its administrative remedies before seeking a judgment by the District Court.

3. The City of Pocatello is Barred from Bringing this Action Because it Failed to Exhaust its Administrative Remedies.

The City of Pocatello asks this Court to determine that it sustained damages when IDWR through the Water District 01 Watermaster⁸ allocated its storage water using, in part, the Water District 01 Rental Pool Procedures. The City claims that: “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 storage water for mitigation purposes. Pocatello suffered similar losses in 2016, 2021, and 2023.” *Memorandum in Support of City of Pocatello’s Motion for Partial Summary Judgment* (“Pocatello Memo”) at 2–3.⁹ The City further claims that: “Application of the Last to Fill Rule in 2021 deprived Pocatello of approximately 2,738 AF of storage water” *Id.* at 3. All of the City’s allegations of specific injuries to their storage water allocations involve disputed issues of material fact for which the City has provided no evidentiary support. The record is devoid of evidence substantiating the numbers asserted by the City. Disputed issues of fact are not appropriate for summary judgment. I.R.C.P. 56; *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

⁸ Under I.C. § 42-605(3), the Watermaster is elected by the water district water users and is appointed by the Director of IDWR to distribute water within the water district.

⁹ The City of Pocatello’s allegation of injury and damages in 2023 was not contained in their *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* filed March 22, 2023, *Notice of Errata* filed April 20, 2023, or *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* filed May 2, 2023 (collectively the “Complaint”). Any claims regarding 2023 storage allocation are barred because they have not been alleged in the Complaint.

In addition, the City is not entitled to judicial review of IDWR/Water District 01 Watermaster's actions in allocating its storage water because it has failed to exhaust its administrative remedies. Idaho Code § 67-5270(2) provides for a right to judicial review of an agency action. An "agency action" is defined as: "(a) The whole or part of a rule or order; (b) The failure to issue a rule or order; or (c) An agency's performance of, or failure to perform, any duty placed on it by law." I.C. § 67-5201(4). A "person aggrieved by final agency action other than an order in a contested case is entitled to judicial review under this chapter if the person complies with the requirements of section 67-5271 through 67-5279, Idaho Code." I.C. § 67-5270(2). Idaho Code § 67-5271(1) provides that "a person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter."

Here, IDWR/Water District 01 Watermaster's allocation of storage water to the City of Pocatello¹⁰ constituted an "agency action" under I.C. § 67-5201(4). The City is not entitled to judicial review of that agency action until it has complied with I.C. § 67-5271(1) and "exhausted all administrative remedies." The administrative remedies in this case are provided under I.C. § 42-1701A(3) which states that "any person aggrieved by any action" of IDWR or the IWRB, "who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action." The person "aggrieved by the action" must file a petition requesting a hearing "with the director within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice" I.C.

¹⁰ The Watermaster allocates storage water to the City of Pocatello pursuant to the City's spaceholder contract with the United States Bureau of Reclamation and pursuant to the Water District 01 Rental Pool Procedures in which the City voluntarily participates.

§ 42-1701A(3), *see also Sun Valley Co. v. Gary Spackman*, CV-01-16-23173, *Order on Motion to Determine Jurisdiction, Order Dismissing Petition for Judicial Review* (Ada County Dist. Ct. Feb. 16, 2017). It is undisputed that the City of Pocatello did not file a petition requesting a hearing within 15 days of the agency actions at issue in this matter. *Yribar Aff.* at ¶ 13. Indeed, more than two years have passed since the latest alleged agency action in 2021.¹¹

Even if the City had exhausted all its administrative remedies its action here would still be time-barred under I.C. § 67-5273(2) which provides that: “A petition for judicial review of a final agency action other than a rule or order must be filed within twenty-eight days (28) days of the agency action, except as provided by other provision of law.” It is undisputed that the City did not file a petition for judicial review within 28 days of any of the alleged agency actions in 2008, 2016, or 2021. *Yribar Aff.* at ¶ 14. Failure “to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition. I.R.C.P. 84(n).” *City of Eagle v. Idaho Dep’t of Water Res.*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011) (citing I.R.C.P. 84(n)).

Thus, the City of Pocatello is barred from bringing this action because it is not contesting a “rule” as defined by the Idaho APA and because it has failed to exhaust its administrative remedies as required by I.C. § 67-5271(1) and I.C. § 42-1701A(3). The City’s Complaint should be dismissed as a matter of law.

¹¹ Fifteen years have passed since the alleged actions in 2008 and seven years since the alleged actions in 2016. As noted above, the allegations regarding 2023 have not been properly pleaded and are barred.

4. The Water District 01 Rental Pool Procedures are Not Facially Unconstitutional.

Participation in the Water District 01 Rental Pool is voluntary. *See infra* § 1.a. While it is true that a water right holder is entitled to administration of their water right by priority under Id. Const. Art. 15, § 3., it is also true that a water right holder may voluntarily agree to subordination of their water right's priority date. The Idaho Supreme Court addressed this issue head-on in *Idaho Power Co. v. State, By & Through Dep't of Water Res.*, 104 Idaho 575, 661 P.2d 741 (1983). At issue in that case was the subordination of Idaho Power Company's water rights at the Swan Falls hydropower facility. Relying on Idaho Const. Art. 15, § 3, the ratepayers and Public Utilities Commission asserted "that Idaho water law forbids subordination; and that therefore the subordination clause in the Hells Canyon license is in conflict with Idaho water law and ineffective." *Id.* at 587, 753. The Court disagreed holding:

The record here makes it clear that Idaho Power *voluntarily agreed* to have the subordination clause inserted in the Hells Canyon licenses. We find nothing in the law of this state which precludes a person from *voluntarily obtaining less than the full panoply of rights* associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society, e.g. restrictive covenants and equitable servitudes. Whatever merits such an argument may have with regard to subordination clauses forced upon an unwilling appropriator by the FPC or the state, we need not decide. *We hold only that a voluntary subordination agreement is not in violation of Idaho's water law*, and therefore we find no conflict between our state water law and the language of the subordination clause inserted in the Hells Canyon licenses.

Id.

In this matter, the City of Pocatello voluntarily agreed to participate in the rental pool. By voluntarily participating in the rental pool it agreed to make itself subject to the Last to Fill procedures, which reduce or limit its priority date in a way similar to subordination. As the

Court in *Idaho Power Co. v. State* clearly held, there is nothing unconstitutional about a water right holder voluntarily agreeing to a reduction of their property right. Therefore, the City’s arguments that the Water District 01 Rental Pool Procedures are facially unconstitutional are without merit and should be disregarded by the Court.

5. The Water District 01 Rental Pool Last to Fill Procedures Do Not Constitute a Physical Taking.

The City of Pocatello argues that IDWR affected a “physical taking of Pocatello’s property right without just compensation” because “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 allocated to other users.” Pocatello Memo at 16. A physical taking generally occurs by “a direct government appropriation or physical invasion of private property.” *Est. of Hage v. United States*, 687 F.3d 1281, 1286 (Fed. Cir. 2012) (citations omitted). A physical taking would require a showing that the City of Pocatello’s land was physically occupied for government use. *Cf. Covington v. Jefferson County*, 137 Idaho 777, 780–782, 53 P.3d 828, 831–833 (2005). The City of Pocatello does not have a property interest in the physical land in Palisades Reservoir. Rather, the City of Pocatello is contractually granted the right to “the use and benefit of four and one thousand six hundred sixty-seven thousandths percent (4.1667%)” of the capacity of the reservoir. *Yribar Aff.* ¶ 16 Exhibit 2 p. 5. The physical structure of Palisades Reservoir is owned and operated by the United States Bureau of Reclamation. *Id.* Thus, the concept of physical taking is not applicable in this case.

Even if physical taking were an appropriate legal concept, it would be inapplicable here because, as discussed above, the City has agreed to participate in the Water District 01 rental pool. In doing so, the City agreed that any storage it provided through the rental pool would become last to fill in the following year. Having voluntarily agreed to a diminution of its contractual portion of storage water it cannot claim that IDWR/Water District 01 Wastermaster's allocation of its storage water according to its voluntary agreement was a taking.

Conclusion

The Water District 01 Rental Pool Procedures are not "rules" as defined by the Idaho APA because they do not have general applicability and because they are interpretations of rules based on the unique circumstances of that basin. Therefore, the Water District 01 Rental Pool Procedures cannot be held invalid for failing to be promulgated under the rulemaking procedures of the Idaho APA. Because the Water District 01 Rental Pool Procedures are not rules, they cannot properly be reviewed by this Court in an action for declaratory judgment under I.C. § 67-5278. The City of Pocatello's claims regarding injury to its storage water allocations are wholly unproven and involve disputed issues of material fact that are not proper for summary judgment. In addition, the City of Pocatello has failed to exhaust its administrative remedies and this action should be dismissed under I.R.C.P. 84(n). Finally, the City's claims that the Water District 01 Rental Pool Procedures are facially unconstitutional and that its storage allocation was subject to a physical taking are without merit.

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 2nd 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 2nd 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:

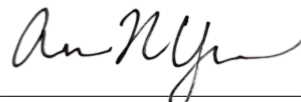
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