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

CITY OF POCATELLO,

Plaintiff,

vs.

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

Defendants.

Case No. CV42-23-1668

INTERVENOR SPACHOLDERS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW, Intervenors Burley Irrigation District, Fremont-Madison Irrigation District and Idaho Irrigation District (hereafter collectively referred to as "Spaceholders"), by and through their undersigned counsel of record, and hereby file this response in opposition to the *City of Pocatello's Motion for Partial Summary Judgment* filed on October 17, 2023. This response is supported by the *Declaration of Travis L. Thompson* filed concurrently herewith.

INTRODUCTION

This case concerns the City of Pocatello's ("Pocatello") challenge to the Water District 01 Rental Pool Procedures and the "last to fill" condition (Procedure 7.3) for certain rentals. Despite Pocatello's express support of this condition when it jointly moved the SRBA Court to approve the Nez Perce Agreement in 2005, and over decades of rentals and leases as a voluntary participant in the local rental pool, Pocatello now claims the procedures violate Idaho law. As set forth below, Pocatello's motion should be denied for several reasons. First, the procedures are not "agency rules" and do not have to be promulgated through formal rulemaking. Second, the "last to fill" priority for voluntary rentals is a valid condition for storage rentals or leases that seek to temporarily change the place or purpose of use of a decreed storage water right. Finally, Pocatello's motion and claims can be denied due to the applicable statute of limitations and other equitable defenses. As explained below, the Court should deny Pocatello's motion accordingly.

FACTS

The Spaceholders offer the additional facts for consideration by the Court and dispute certain of Pocatello's alleged "undisputed facts" identified below.

1. Pocatello's spaceholder contract ("Pocatello Contract") with the U.S. Bureau of Reclamation ("Reclamation") includes the following provisions:

> 4. WHEREAS, the United States and the City have not heretofore entered into any contracts with respect to storage rights in reservoirs in the Snake River above Milner Dam, but the City, securing water for all municipal uses by pumping from underground and from surface flow that would, if not intercepted by the City, flow into the Snake River below Palisades Dam, desires to replace in the Snake River by means of storage at Palisades Reservoir water in volume approximately the equivalent of that removed by pumping from Snake River tributary underground and surface flow, and it having been determined that 50,000 acre-feet of active capacity in Palisades Reservoir will furnish such approximate equivalent volume;
>
> * * *

> 15. (a) The City may rent stored water which has accrued to its credit in any reservoir of the system, but such rentals shall be for only one year at a time and at rates to be approved in advance by the Secretary and Advisory Committee. Rates shall not exceed the annual costs under the City's obligations to the United States which are properly apportionable to such water, plus an amount sufficient to cover other annual costs of the City which are properly apportionable thereto.
>
> * * *
>
> 16. (a) To the extent that water is pumped from wells and surface streams that flow into American Falls Reservoir, actual measurements at the well heads and at the discharge lines of other pumping plants delivering water for the City shall be made during the irrigation season. One-half of all water provided through the City's system for the use of its water users from any and all sources in any irrigation season shall be accounted for as water stored for the City as provided in article 10 and charged thereto, except an amount of 7,000 acre-feet of water in each irrigation season until the first irrigation season beginning after a consolidation or merger has been made by the City with the water system of the City of Alameda when the amount shall be increased to 10,000 acre-feet of water to reflect prior uses of that city and other nearby communities. Delivery of water to the City that as above provided in this article is chargeable to stored water for any irrigation season, shall be limited, however, to the quantities of stored waters available as provided in article 10.
>
> (b) The water chargeable to the City stored water as provided in this article shall be determined during the irrigation season of each year. Corresponding credits shall be given by the watermaster to the water rights, whether natural flow or storage rights, that have been infringed on by pumping for the City. The amounts represented by such infringements, to whosoever they shall accrue, shall be made up out of stored water available to the City under this agreement as necessary. . .

Pocatello Contract at 2, 23-24; Ex. 2 to *Yribar Aff.*

2. Pocatello voluntarily participated in the Water District 01 Rental Pool from 2005-2022. *See Olenichak Aff.*, p. 5, ¶ 17. There is no evidence that Pocatello complied with the above provisions of its Contract in those years. However, Pocatello received $512,958.07 from its voluntary common pool rentals in those years. *See id.*, pp. 5-6, ¶ 18.

3. Except for 2009, Pocatello also chose to privately lease a portion of the storage water under its Contract to third parties every year between 2007 and 2022. *See Olenichak Aff.*, p. 6-7, ¶ 20. Pocatello received $3,763,250.00 for these private rentals. *See id.* There is no evidence

that Pocatello complied with the above provisions of its Contract with respect to these private leases.

4. It is a disputed issue of material fact whether Pocatello leased storage beyond what was required to be "charged" and then credited to other water rights in Water District 01 as required by paragraph 16 of the Pocatello Contract. *See* Ex. 8 to *Amended Complaint*.

4. The Water District 01 Rental Pool Procedures do not apply to all spaceholders. For example, in 2023, two spaceholders did not participate in the Common Pool. *See Olenichak Aff.*, p. 4, ¶ 10. Other than 2009, there is no evidence that Pocatello opted out of participating in the Water District 01 Rental Pool from 2005-2022.

5. The "last to fill" condition has existed in the Water District 01 Rental Pool Procedures for certain storage rentals since at least 2008. *See* Ex. 8 to *Amended Complaint* (spreadsheet identifying when the "last to fill" was applied to Pocatello's storage allocations due to a prior year's rental).

6. Pocatello understood the condition for leasing water through the rental pool as it was aware of the "last to fill" condition. Pocatello apparently opted out of the rental pool in 2009 but opted back in for the years 2010-2022. *See* Ex. 8 to *Amended Complaint*; *Olenichak Aff.* at 5-7.

7. Pocatello did not filed any petitions or appeals with the Director of the Idaho Department of Water Resources ("IDWR" or "Department") pursuant to Idaho Code §§ 42-1701A(3) or 42-1766 or concerning any of its leases or the "last to fill" condition in the Water District 01 Rental Pool Procedures.

8. Pocatello did not file any petitions with IDWR pursuant to Idaho Code §§ 42-1701A(3) concerning the Watermaster's storage water allocations in 2008, 2013, 2014, 2016, and 2021.

9. Pocatello signed the *Joint Motion for Approval of Consent Decree, Entry of Partial Decrees, and Entry of Scheduling Order* in Consolidated Subcases: 03-10022 (Instream Flow Claims) and 67-13701 (Springs and Fountains Claims) in *In Re SRBA Case No. 39576* (Twin Falls County Dist. Ct., Fifth Jud. Dist.) (Apr. 13, 2005). *See* Ex. 1 to *Thompson Dec.* The list of parties was attached to the proposed consent decree as Attachment 1. *See* Ex. 2 to *Thompson Dec.* The Mediator's Term Sheet was attached to the proposed consent decree as Attachment 2. *See* Ex. 3 to *Thompson Dec*. The joint motion acknowledges "the undersigned parties have entered into the Snake River Water Rights Agreement of 2004 ("Settlement Agreement")". The "last to fill" provision is specifically referenced in the Mediator's Term Sheet attached to the joint motion. *See* Ex. 3 to *Thompson Dec.* at 19, ¶ C.1.

10. There is no evidence that Pocatello ever formally opposed any prior annual resolutions adopting the rental pool procedures that included the "last to fill" condition.

11. There is no evidence that Pocatello opposed the 2023 Water District 01 Rental Pool Procedures, presented at the district's annual meeting held on March 7, 2023.

12. Reclamation is the legal title owner to decreed water right 01-2068. *See* Ex. 2 to *Amended Complaint*. The water right authorizes the storage of 940,400 acre-feet per year in Palisades Reservoir for "irrigation" and "power" storage beneficial uses with a July 28, 1939 priority date. *See id.*

STANDARD OF REVIEW

Idaho Rule of Procedure 56 authorizes the filing of motions for summary judgment. *See* I.R.C.P. 56. Under Rule 56(a) 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. *See Martin v. Thelma V. Garrett Living Trust*, 170 Idaho 61, 506 P.3d 237, 241

(2022). The burden of proving the absence of material facts is on the moving party and the Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. *See id.*

When an action is tried without a jury the Court can rule upon summary judgment despite the possibility of conflicting inferences arising from undisputed evidentiary facts. *See Nettleton v. Canyon Outdoor Media, LLC*, 163 Idaho 70, 73, 408 P.3d 68, 71 (2017). Further, summary judgment dismissal of a claim is appropriate where the plaintiff fails to submit evidence to establish an essential element of the claim. *See Nelson by and through Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1114 (1996). Finally, summary judgment may be rendered for any party, not just the moving party, and on any or all of the causes of action involved under Rule 56. *See Brummert v. Ediger*, 106 Idaho 724, 726, 682 P.2d 1271, 1273 (1984).

ARGUMENT

I. Pocatello's Claims for 2008, 2013, 2014, and 2016 are Barred by the Statute of Limitations and Should be Dismissed as a Matter of Law.

The Water District 01 Rental Pool Procedures have included a "last to fill" condition for certain rentals since at least 2008. *See* Ex. 8 to *Amended Complaint*. However, while Pocatello has voluntarily participated in the rental pool for over 15 years, it never challenged the "last to fill" condition included to prevent injury to other water rights.[1] Instead, Pocatello knowingly participated in the rental pool, reaping the benefit of over $4 million dollars in storage rentals during that timeframe. *See Olenichak Aff.* at 5-7.

In this case Pocatello has alleged an unconstitutional taking resulting in an "economic diminution of its storage right." *See Amended Complaint* at 15-16; and Ex. 8. Pocatello seeks

[1] Just the opposite, Pocatello agreed to the "last to fill" provision as indicated in its agreement to the Mediator's Term Sheet and signing the *Joint Motion* in the SRBA subcases regarding the Nez Perce Agreement. *See infra* Argument Part III.

damages in excess of $50,000.00. *See id.* at 16. Although Pocatello alleges the Watermaster applied the "last to fill" rule to its space in 2013 and 2014, it does not identify any "water taken due to LTF" in those years. *Compare Memorandum in Support of City of Pocatello's Motion for Partial Summary Judgment* ("*Poc. Memo.*") at 8, ¶ 24 *with* Ex. 8 to *Amended Complaint.* Consequently, it is apparent Pocatello is only claiming damages for any alleged takings that occurred in three specific years: 2008, 2016, and 2021. *See id.*

The general, or "catch all", statute of limitations for actions not specified in Chapter 2, Title 5, is four (4) years. *See* I.C. § 5-224; *Woodland v. Lyon,* 78 Idaho 79, 298 P.2d 380 (1956). The Idaho Supreme Court has concluded that claims for inverse condemnation, or a taking, are covered by section 5-224. *See Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009). Since Pocatello filed the current action in March 2023, over fourteen years after Water District 01 included a "last to fill" condition in the rental pool procedures, the city's claim should be barred as a matter of law. After all, Pocatello knew of the procedures' condition for leasing water, chose to not rent water in 2009, but then proceeded to voluntarily participate again from 2010-2022. Moreover, since Pocatello filed the current action in March 2023, any claims for damages resulting from erroneous storage allocations in 2008, 2013, 2014 and 2016 are similarly barred as a matter of law. Even if Pocatello has a viable claim for 2021, which the Spaceholders dispute, any claims arising before March 2019 are barred by the statute of limitations in section 5-224.

In sum, Pocatello's claim challenging the "last to fill" provision, first included in the procedures over a decade ago, and any claims for damages arising before 2019 are barred by the applicable statute of limitations. *See* I.C. § 5-224. The Court should dismiss those claims with prejudice accordingly.

II. The Water District 01 Local Rental Pool Procedures are not "Rules" under the Idaho Administrative Procedures Act (APA).

Pocatello's central argument in its motion for partial summary judgment is the theory that the local rental pool procedures constitute "rules" as defined by Idaho's APA. *See Poc. Memo.* at 9-12. In making this argument Pocatello overlooks the Idaho Water Resource Board's ("Board") water supply bank rules, how those rules relate to and interface with the Water District 01 Rental Pool Procedures, as well as controlling precedent from the Idaho Supreme Court.

Despite voluntarily participating in the Water District 01 Rental Pool for over fifteen years and reaping the benefits of numerous rentals and leases to the tune of over $4 million dollars, Pocatello now claims the procedures that facilitated those rentals are void for failing to be promulgated as a "rule" under Idaho's APA. *See Poc. Memo.* at 9-10. Pocatello misunderstands the definition of a "rule" and overlooks the Board's water supply bank rules and how they related to local rental pool committee procedures. As explained below Pocatello's argument on this point is misplaced and should be denied as a matter of law.

First, the Idaho Legislature has charged the Idaho Water Resource Board with "the duty of operating a water supply bank." I.C. § 42-1761. The bank must be operated to "make use of and obtain the highest duty for beneficial use from water" in the state. *Id.* The Board was further charged with adopting rules and regulations concerning the water supply bank. *See* I.C. § 42-1762. The Board promulgated its "Water Supply Bank Rules" (IDAPA 37.02.03 et seq.) pursuant to Idaho Code § 42-1762 and the procedures in the Idaho APA. *See* Ex. 4 to *Thompson Dec.*

With respect to storage water, the legislature specifically authorized the Board to "appoint local committees, including water district advisory committees as provided in section 42-605(6), Idaho Code, to facilitate the rental of stored water." I.C. § 42-1765. Given the differences in

water storage facilities and operations throughout the state depending upon the particular basin, various local rental pool committees have been appointed and have adopted procedures to meet those unique needs within the various water districts.[2] Having flexibility to develop "local" procedures to meet the needs of a particular basin's water users furthers the statutory goal.

The statute further provides that "the committee shall have the authority to market stored water between owners and consenting renters under the rules and regulations adopted by the board." I.C. § 42-1765. The Board's water supply bank rules confirm the statutory process for appointing a "local rental pool committee" and the criteria that local rental pool procedures must meet to facilitate the lease and rental of stored water. *See* IDAPA 37.02.03.40. The local rental pool procedures can be crafted to meet the unique needs of a particular basin while following the Board's stated criteria. IDAPA 37.02.03.40.01.a – k. Moreover, the Director also reviews the procedures and makes a recommendation to the Board. IDAPA 37.02.03.40.03.

In this case, the Board appointed the Committee of Nine to serve as the local committee to facilitate the rental of stored water in Water District 01.[3] The Committee recommended and the water users approved the Water District 01 Rental Pool Procedures by resolution at the March 7, 2023 annual meeting. *See Bricker Aff.* at 2, ¶ 3. The Board approved the procedures by Resolution No. 14-2023 on March 31, 2023. *See Bricker Aff.*, Ex. 2. Pocatello does not challenge the procedures as somehow violating the Board's regulatory criteria, but instead claims the procedures themselves must be promulgated as new agency "rules" by the Board under the APA. *See Poc. Memo.* at 10-12.

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[2] *See* https://idwr.idaho.gov/iwrb/programs/water-supply-bank/administration/ (list of various local rental pool committees and procedures approved by the IWRB).

[3] Facilitating the rental of an individual spaceholder's storage through rental pool procedures is analogous to a "quasi-judicial" matter since it a substitute for a transfer application. *See Pizzuto*, 170 Idaho 94, 97, 508 P.3d 293, 296 (2022) ("quasi-judicial agency actions determine only the rights and duties of individuals").

Idaho's APA defines a "rule" as "all or 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." I.C. § 67-5201(24). The definition expressly excludes: "Any 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). The Water District 01 local Rental Pool Procedures are not "rules" that require promulgation pursuant to the Idaho APA. Instead, the procedures interpret and implement the Board's water supply bank rules that allow the temporary transfer of storage water within a given year as an alternative to a formal application for transfer pursuant to section 42-222. The unique aspects of different water districts throughout the state pools support adopting individual procedures rather than a single set of "agency rules" that would might apply statewide (i.e. Water District Nos. 01, 63, and 65).

The Idaho Supreme Court examined what constitutes a "rule" in *Pizzuto v. State*, 170 Idaho 94, 508 P.3d 293 (2022).[4] In that case the Court evaluated the Idaho Department of Corrections' execution protocol and whether it was required to comply with procedural requirements for administrative rulemaking. The Court found the following:

> "General applicability" is the first attribute of a rule under this definition – and for good reason. 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.
>
> In the context of administrative rules, 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. . . . This distinguishes rulemaking from quasi-judicial agency actions because quasi-judicial actions determine only the rights and duties of individuals.

[4] The Court abrogated portions of its prior decision in *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003) that had set out six factors intended to narrow the APA's definition of a "rule." The Court observed that "the *Asarco* factors were intended to fix a problem that does not exist in Idaho's APA." 170 Idaho at 100, 508 P.3d at 299.

> The second way in which rules are generally applicable is that they must be applied uniformly *by the agency*. . . . Thus, although an agency may have the discretion to change its rules from time to time (complying with the rulemaking procedures of the APA, of course), it does not have discretion to depart from its rules while they are in effect. This distinguishes rulemaking from purely executive actions, in which an agency (or officer) enjoys discretion so long as its actions are not contrary to express law.

Pizzuto, 170 Idaho at 96-97, 508 P.3d at 295-96 (emphasis in original).

Pocatello's entire argument hinges on the assertion that the Rental Pool Procedures "apply generally to all water users within WD1 (rental pool participants, non-participants, and non-spaceholders)." *Poc. Memo.* at 11. This is simply not true. The procedures only apply to a specific class of water users, namely those individual spaceholders that voluntarily choose to participate in the rental pool in a given year. *See* Ex. 1 to *Yribar Aff.* (Procedure 2.29 defining "participant" as "a spaceholder who contributes storage to the common pool pursuant to Procedure 5.2"; Procedure 5.2.101 Participants "Any spaceholder may, upon submitting written notice to the Watermaster prior to March 15 of the current year elect to contribute storage to the current year's common pool rentals . . .") (emphasis added). Only spaceholders that elect to participate in the rental pool are subject to the procedures. *See Olenichak Aff.* at 3, ¶ 6 ("Any spaceholder that chooses not to participate is treated as though the Water District 01 Rental Pool Procedures do not apply to them"). Therefore, Pocatello's theory that the procedures apply to all water users in Water District 01 is without merit.

Applying the Court's conclusion in *Pizzuto* it is clear that the Water District 01 Rental Pool Procedures are not "rules" as they do not "apply uniformly to the public." 170 Idaho at 97, 508 P.3d at 296. First, the procedures are unique to participating spaceholders in Water District 01, they do not have statewide applicability. The fact that local rental pool committees in Water Districts 63 (Boise River Basin) and 65 (Payette River Basin) have adopted their own procedures

supports the local applicability context. *See* https://idwr.idaho.gov/iwrb/programs/water-supply-bank/administration/. Moreover, the procedures only apply to certain water users within Water District 01. For example, water users that only hold natural flow rights, or spaceholders that choose not to participate in the rental pool, are not subject to the procedures. Pocatello recognizes this fact as the city apparently chose not to lease any water in 2009.

Next, Water District 01 does not apply the procedures "uniformly" to all water users in the district. Notably, water users without storage, storage held for the Shoshone-Bannock Tribes, and spaceholders that do not choose to participate are not subject to the procedures. Just the opposite, Mr. Olenichak's explanation as to how participating and non-participating spaceholders' storage is filled after a given year demonstrates that difference in that non-participating spaceholders are protected from any potential impacts caused by rentals and private leases. *See Olenichak Aff.* at 8, ¶¶ 28-29 ("the Last to Fill Procedure serves to protect non-participating spaceholders and participating junior spaceholders"). Pocatello mischaracterizes this fact as "different spaceholders may experience the effects of the Procedures differently" in an effort to claim the procedures are applied uniformly. If a water user or spaceholder is not subject to the procedures, then the procedures are not applied to those users as Pocatello suggests. Again, Mr. Olenichak's testimony makes it clear that "[a]ny spaceholder that chooses not to participate is treated as though the Water District 01 Rental Pool Procedures do not apply to them." *Olenichak Aff.* at 3, ¶ 6 (emphasis added). This fact dispels Pocatello's theory and plainly shows that the rental pool procedures do not fit the APA's definition of a "rule."

Based upon the Court's criteria in *Pizzuto* it is clear that the rental pool procedures are not "rules" under Idaho's APA. Therefore, the procedures do not require formal rulemaking and the Court can deny Pocatello's motion accordingly.

III. Pocatello's Inconsistent Claims Related to the "Last to Fill" Provision Threaten Implementation of the Nez Perce Agreement and Should be Estopped.

The State of Idaho, Nez Perce Tribe, and other parties including the City of Pocatello, entered into a monumental water rights settlement agreement in the Snake River Basin Adjudication (SRBA) in 2004.[5] The Agreement was approved by Congress and the Idaho Legislature. *See* Pub. L. No. 108-447, 118 Stat. 3431-41 (December 8, 2004); I.C. § 42-1763B. Upon joint motion by the parties, including Pocatello, the SRBA District Court approved a consent decree that included the Mediator's Term Sheet as Attachment 2. *See* Ex. 3 to *Thompson Dec.*

As part of the Nez Perce Agreement, federal agencies agreed to issue biological opinions under the Endangered Species Act (ESA) for the 30-year term of the agreement to provide incidental take coverage for, among other things, all Reclamation actions in the Upper Snake River Basin. *See* Ex. 3 to *Thompson Dec.*, p. 19, 23 ("The term of this component of the agreement shall be for a period of thirty (30) years . . ."). The certainty provided by the Nez Perce Agreement cannot be overstated as it has provided a stable framework for Reclamation's water operations in the Upper Snake River Basin. The continued annual storage and use of water for irrigation purposes is invaluable to the State of Idaho, including the Spaceholders and their landowners.[6] Pocatello's lawsuit and present motion seeks to undo the very mechanism that facilitates the Agreement's flow augmentation program through its challenge to the Water District 01 Rental Pool Procedures. While Pocatello has enjoyed the benefit of the Agreement's certainty for the past eighteen years, its present claims threaten the Agreement's viability.

[5] Documents related to the settlement are publicly available at: http://srba.state.id.us/NEZPERCE.HTM

[6] *See also, Olenichak Aff.* at 4, ¶ 15 (describing various mitigation and agreements that rely upon storage provided through the Water District 01 rental pool).

The Parties to the Nez Perce Agreement agreed to establish a flow augmentation program in compliance with state law and local rental pool procedures, "including but not limited to last to fill rule and the procedures for priorities among renters and lessors . . ." *See* Ex. 3 to *Thompson Dec.* at 19, ¶ C.1 (emphasis added). Pocatello expressly supported the Mediator's Term Sheet before the SRBA Court by signing on as a party to the *Joint Motion for Approval of Consent Decree et al.*. *See* Exs. 1, 2 to *Thompson Dec.*

In response to the Nez Perce Agreement, the Idaho Legislature enacted a statute providing "interim authority" for Reclamation to rent storage water to implement the flow augmentation program. *See* I.C. § 42-1763B. That authority is subject to certain conditions including the following:

> (a) 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.

I.C. § 42-1763A(3)(a).

The statute requires that storage rentals must be obtained from "willing lessors" and "only through the local rental committee." With respect to Water District 01, that means any flow augmentation storage water rentals must be supplied by "participants" in compliance with the Rental Pool Procedures. *See* Ex. 1 to *Yribar Aff.* The "last to fill" procedure has been in place and applied to certain rentals throughout the implementation of the Nez Perce Agreement. Pocatello has been aware of the provision and has accepted its application for several years.

Pocatello's storage and use thereof is provided ESA protection through implementation of the Nez Perce Agreement and the above-described flow augmentation program. Pocatello itself has participated as a "willing lessor" in the Water District 01 Common Pool and has received

over $500,000 from such rentals, which include the storage rented to Reclamation for the flow augmentation program. *See Olenichak Aff.* at 5-6. Whereas Pocatello has benefited from the Agreement, including ESA protection for its storage, and monetarily from rentals to Reclamation, it is inequitable for Pocatello to now claim, over a decade later, that the rental pool procedures somehow violate Idaho law.

Moreover, Pocatello's claims threaten the implementation of the flow augmentation program and the ESA protection provided for Reclamation's actions in the Upper Snake River Basin. *See Olenichak Aff.* at 4, ¶ 15 ("Without the rental pool, it is unclear how the State of Idaho would effectuate getting the water supplies necessary to provide the flow augmentation required by the Nez Perce Agreement . . ."). Declaring the Water District 01 Rental Pool Procedures invalid could jeopardize the existing biological opinions and the concurrent ESA protection those opinions provide to all spaceholders in Water District 01.

At a minimum, the doctrine of quasi-estoppel precludes Pocatello's present arguments and should preclude the city's motion challenging the very procedures it acquiesced to and profited from for years. *See Day v. Idaho Transp. Dept.*, 172 Idaho 431, 533 P.3d 1277 (2023). In *Day* the Supreme Court identified the doctrine and circumstances when it applies:

> "Quasi-estoppel prevents a party from changing its legal position, and as a result, gaining an unconscionable advantage or imposing an unconscionable disadvantage over another." . . . "Unlike equitable estoppel, quasi-estoppel does not require an undiscoverable falsehood, and it requires neither misrepresentation by one party nor reliance by the other." . . . Quasi estoppel applies when:
>
> (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she already derived a benefit or acquiesced in.

533 P.3d at 1238.

Applied to the facts in this case it is obvious that Pocatello has taken "a different position" on the "last to fill" provision than what it agreed to in the proceedings on the Nez Perce Agreement before the SRBA District Court. Further, Pocatello gained an advantage with that position, including the receipt of over $4 million dollars in rental revenue between 2005 and 2022. *See Olenichak Aff.* at 5-7. In light of these facts it would be unconscionable to allow Pocatello to maintain its current inconsistent position with respect to the Rental Pool Procedures since it has derived a benefit and acquiesced to the "last to fill" provision for over a decade.

Given the importance of the implementation of the Nez Perce Agreement and the flow augmentation program pursuant to the Upper Snake Biological Opinion, the Court should deny Pocatello's motion and estop its claims against the Rental Pool Procedures.

IV. Rental Pool Procedure 7.3 and its Application are not Unconstitutional.

Pocatello generally alleges that Procedure 7.3 violates the prior appropriation doctrine and is therefore "facially unconstitutional." *Poc. Memo.* at 13-15. Pocatello apparently believes that spaceholders are free to rent and temporarily transfer storage water throughout Water District 01 without any conditions. Again, Pocatello's argument belies basic Idaho water law and overlooks potential injuries resulting from such temporary water transfers.

First, facial constitutional challenges are disfavored because they: "(1) 'raise the risk of premature interpretation of statutes on factually barebone records;' (2) run contrary "to the fundamental principle of judicial restraint'; and (3) 'threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Hecox v. Little*, 470 F.Supp.3d 930, 969 (D. Idaho 2020) (citing *Washington State Grange v. Washington State Republican Party*, 552 U.A. 442, 451, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)).

Further, there is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the petitioner. *See AFRD#2 v. IDWR*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). The Idaho Supreme Court has further advised that the "judicial power to declare legislative action unconstitutional should be exercised only in clear cases" and that a "district court should not rule that a statute is unconstitutional 'as applied' to a particular case until administrative proceedings have concluded and a complete record has been developed." 143 Idaho at 869-70, 154 P.3d at 440-41.

A water right holder cannot unilaterally change the place or purpose of use of a decreed or licensed water right without obtaining IDWR approval for that change. *See* I.C. § 42-222(1). Even so, when a water user applies to make a change, the Department must ensure "no other water rights are injured . . . [and] the change does not constitute an enlargement in use of the original water right." I.C. § 42-222(1); *3G AG LLC v. Idaho Dept. of Water Resources*, 170 Idaho 251, 509 P.3d 1180 (2022); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001). The Director is authorized to approve a transfer "in whole or in part, or upon condition." *See id.*

The Board's water supply bank, and associated local rental pools, serve as a substitute process for a permanent water right transfer. Recognizing the need for a temporary transfer alternative, the legislature provided that authority through the Board's water bank:

> (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.

I.C. § 42-1764.

The State Water Plan describes the purpose of the water bank as follows:

> As the state approaches the time when there is little or unappropriated water, the Water Supply Bank, established by I.C. § 42-1761, provides an efficient mechanism for the sale or lease of water from natural flow and storage. The purpose of the Water Supply Bank is to obtain the highest duty of water, provide a source of adequate water supplies to benefit new and supplemental water uses, and provide a source of funding for improving water use facilities and efficiencies. By aggregating water available for lease, rental pools operating under the authority of the Water Supply Bank can supply the water needs of many users, provided there is no injury to other water right holders, or enlargement of the use of the water rights, and the change is in the local public interest. Idaho Code § 42-1763.
>
> The Idaho Water Resource Board has adopted rules governing the sale or lease of water through the Water Supply Bank. IDAPA 37.02.03. Pursuant to state law, the Board has authorized local entities to operate storage and natural flow rental pools in numerous water districts that meet regional needs. The Shoshone-Bannock Tribes are also authorized by the state to operate a storage water rental pool.

See Ex. 5 to *Thompson Dec*. (State Water Plan at pp. 10-11).

Voluntary participation in the state' water supply bank, and the Water District 01 Rental Pool, is a substitute for a formal application for transfer pursuant to section 42-222(1). However, the criteria for rental approvals still mirrors the transfer statute, notably, a rental that would injure another water right is prohibited. *See* I.C. § 42-1763; IDAPA 37.02.03.040.01.h ("Prevention of injury to other water rights").

Pocatello asserts that its contracted storage space is entitled to fill "in priority, not based on Procedure 7.3." *Poc. Memo.* at 13. Pocatello has that option available to it, provided the city does not participate in the Water District 01 Rental Pool. Notably, Tony Olenichak explained:

> 6. Any spaceholder that chooses not to participate is treated as though the Water District 01 Rental Pool Procedures do not apply to them. Non-participant storage is allocated and administered without reference to the procedures.
> * * *
> 22. The rental pool procedures are drafted to ensure non-participating spaceholder storage allocations are not impacted by the operation of the rental pool.

Olenichak Aff. at 3, ¶ 6; at 7, ¶ 22.

If Pocatello decided to not rent any of its water, then its storage space under water right 01-2068 would fill pursuant to the July 28, 1939 priority without any impact. However, Pocatello has made the voluntary choice to participate in the rental pool for over a decade, receiving over $4 million dollars in rental income for that participation. *See id.* at 6-7. The condition for that participation as set forth in Procedure 7.3 is that any space rented is treated as "last to fill" for purposes of accruing new storage the subsequent year. This condition applies to senior and junior storage water rights equally.

Mr. Olenichak aptly described the reason for this condition on storage rentals in order to prevent injury to other spaceholders:

> 23. The rental pool procedures are also drafted to ensure that participating senior spaceholders that lease their storage do not impact other spaceholders' storage fill and allocations.
>
> 24. A storage spaceholder in Water District 01 has the right to use their entire storage allocation at a point of diversion, place of use, and purpose of use that are consistent with the decreed water right for the storage reservoir and their storage contract. However, a spaceholder does not have the right to lease their storage to be used at points of diversion, places of use, or purposes of use outside the ones described in the decreed water right for the storage reservoir or their storage contract unless the spaceholder files a transfer under I.C. § 42-222 or leases water through the rental pool. A lease can only occur if the lease will not cause injury to other water rights. IDAPA 37.02.03.040.01.h.
>
> 25. Leasing water through the Water District 01 Rental Pool has the potential to impact or lessen, not just non-participating spaceholder's reservoir accruals, but also the reservoir accrual of other participating spaceholders.
>
> 26. The Last to Fill Procedure was put into place to protect spaceholders' reservoir accrual from being impacted or lessened as a result of other spaceholders leasing storage to be used for places of use, points of diversion, or purposes of use different than described in the reservoir's decreed water right or their storage contract. Evacuation of a spaceholder's storage to provide for a lease cannot be allowed to lessen other spaceholder's storage.

> 27. To ensure that non-participating and other participating spaceholders are not injured by operation of the rental pool, participating spaceholders who assign storage to the Common Pool, rent through a private lease, assign water to the supplemental pool, the assignment pool, or the extraordinary pool have the storage that was evacuated to supply those rentals become Last to Fill space in the reservoir system in the following year.
>
> 28. Junior and non-participating spaceholder allocations are protected by the Last to Fill Procedure. The Last to Fill Procedure causes all senior space evacuated to supply rentals to refill under the same priority as junior space evacuated to supply rentals.

Olenichak Aff. at 8, ¶¶ 25, 26-28.

Implementing Procedure 7.3 does not violate Idaho's prior appropriation doctrine and is not "facially unconstitutional." Instead, it allows temporary storage leases to occur in a manner that does not injure other water rights. Rentals are accomplished by willing lessors who agree to the procedures' stated conditions. In this sense a spaceholder makes a voluntary choice to have the priority of the storage rented fill with an equal priority with other participating spaceholders the following year. A water right holder's voluntary decision to agree to such a condition or subordinate a storage right's priority in water right administration is allowed under Idaho law. *See e.g., Idaho Power Co. v. State*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) ("We hold only that a voluntary subordination agreement is not in violation of Idaho's water law").

Pocatello cannot lease its water and seek to change the place and purpose of use of its storage water without any conditions. If Pocatello does not need all of its storage, it can choose to lease some through the Water District 01 Rental Pool, as it has done for decades, provided that lease does not injure others.[7] Procedure 7.3 and the "last to fill" condition ensures no injury to other spaceholders' water rights.

[7] Pocatello's Contract has other requirements as well. *See infra* Argument Part V.

Although Pocatello does not agree with that condition now, it has voluntarily participated in the Water District 01 rental pool and has accepted over $4 million dollars in exchange for that "last to fill" condition on its rented storage. The condition is akin to a voluntary subordination allowed by Idaho law and is wholly consistent with the constitution. Consequently, Pocatello's constitutional argument fails and should be dismissed as a matter of law.

V. Pocatello Should be Required to Comply with its Contract.

Pocatello's claims should also be denied for the reason that it has not complied with its own storage contract with Reclamation. Although Pocatello disagrees with the Rental Pool Procedures and the "last to fill" condition, it fails to acknowledge the restrictions on its own storage space according to the plain requirements of its Contract. Stated another way, how can Pocatello have a viable challenge to the Water District 01 Rental Pool Procedures when it is not complying with its own Contract regarding water delivery and rentals?

Interpretation of an unambiguous contract is a question of law, and it must be construed in its plain, ordinary, and proper sense, according to the meaning derived from the plain wording of the instrument. *See River Range, LLC v. Citadel Storage, LLC*, 166 Idaho 592, 599, 462 P.3d 120, 127 (2020). Pocatello's contract unambiguously requires the Water District 01 Watermaster to charge and deliver storage equal to 50% of the city's annual pumping to other water rights within the district (excepting 10,000 af). *See* Pocatello Contract at 23-24; Ex. 2 to *Yribar Aff.* This storage delivery is for the express purpose to allow Pocatello "to replace in the Snake River by means of storage at Palisades Reservoir water in volume approximately the equivalent of that removed by pumping from Snake River tributary underground and surface flow." *See id.* at 2; Ex. 2 to *Yribar Aff.* Pocatello acquired storage in Palisades Reservoir for this very purpose.

There is no evidence that Pocatello has complied with its Contract over the past fifteen years. Ex. 8 to *Amended Complaint*. However, Pocatello has proceeded to rent various amounts of water during that timeframe without being charged any storage required to be credited to other water rights in the district. Further, with respect to the rates that Pocatello may charge for any rentals, the Contract states:

> such rentals shall be for only one year at a time and at rates to be approved in advance by the Secretary and Advisory Committee. Rates shall not exceed the annual costs under the City's obligations to the United States which are properly apportionable to such water, plus an amount sufficient to cover other annual costs of the City which are properly apportionable thereto.

Pocatello Contract at 23; Ex. 2 to *Yribar Aff.*

There is no evidence that the rates for the private rentals Pocatello has made have been "approved in advance by the Secretary and Advisory Committee." Further, Pocatello has failed to show that its rental rates have not exceeded its annual operation and maintenance assessment to Reclamation and "other annual costs" that "are properly apportionable thereto." Again, Pocatello cannot take advantage of the rental pool procedures and then claim they violate Idaho law without complying with its own Contract. Equity requires otherwise.

The Court should find that Pocatello cannot rent water without complying with its Contract and deny its motion for partial summary judgment accordingly. At a minimum there are genuine issues of material fact as to whether Pocatello would have had any water to rent in the years it claims damages had its Contract been implemented pursuant to its plain terms. For example, if complying with the Contract would have precluded Pocatello from renting water in certain years, then its "takings" claims and requests for damages could be rendered moot.

VI. Pocatello's Motion Should be Denied and its Claims Should be Dismissed for its Failure to Exhaust Administrative Remedies.

Pocatello's motion seeks partial summary judgment on various issues, including finding that the Watermaster's allocation applying the "last to fill" condition resulted in an unlawful physical taking of the city's storage. Pocatello's complaint identifies 2008, 2016 and 2021 as years in which it suffered a loss of storage.[8] *See* Ex. 8 to *Amended Complaint*. However, the claims fail as Pocatello failed to exhaust administrative remedies in those years as provided by Idaho law. By failing to request the required administrative relief pursuant to the statutory deadlines, Pocatello's present claims should be dismissed as a matter of law.

Idaho's APA 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." I.C. § 67-5271(1); *AFRD#2 v. IDWR*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007) ("Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act"); *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004) ("Until the full gamut of administrative proceedings has been conducted and all available administrative remedies been exhausted, judicial review should not be considered"). In this case Pocatello was afforded the following statutory administrative remedies that it failed to exercise.

First, section 42-1766 provides a specific statutory appeal process related to water bank leases. The statute allows "any water right holder who determines that the lease is causing a

[8] The numbers in the spreadsheet are not verified or supported by evidence. The City has failed to show these allegations are undisputed contrary to Rule 56's requirement. I.R.C.P. 56(c)(1)(A). Moreover, despite claiming a loss in "2023" in its *Memorandum in Support*, there is no such claim in its *Amended Complaint*. *Compare Poc. Memo.* at 2-3 *with Amended Complaint* at 15, ¶ 72 ("Exhibit 8 reflects the years in which Rule 7.3 impaired Pocatello's storage right and the quantities of water of which Pocatello was deprived in those years"). Exhibit 8 does not contain 2023 or any alleged quantity of water that Pocatello may have lost in that year. The Court should disregard Pocatello's unsupported allegation in its brief regarding 2023 accordingly.

water right to which the holder is entitled, to be deprived of water to which it otherwise may be entitled, may petition the director of the department of water resources to revoke or modify the lease." I.C. § 42-1766(1). In the context of the Water District 01 Rental Procedures it is conceivable that the statute would apply to any terms of the rentals or leases that Pocatello made from 2008-2022. In other words, if Pocatello disagreed with the "last to fill" provision that attached to such leased water, the law provided an administrative appeal process to have that grievance first heard by the Director. Although it may be odd for a lessor to file such a petition, if Pocatello truly believed the "last to fill" condition in Procedure 7.3 was causing it injury at that time, the statute provided an express administrative remedy for Pocatello to exercise. Pocatello could have petitioned for relief to ask the Director to modify the lease as to the application of Procedure 7.3. Further, had Pocatello filed such a petition and felt aggrieved by the Director's decision, the statute provided an additional administrative hearing process pursuant to section 42-1701A(3). *See* I.C. § 42-1766(2). There is no evidence in the record that Pocatello followed this statute or filed any such appeal with the Director.

In addition to section 42-1766, Pocatello also had the right to challenge any of the Watermaster's actions concerning the city's storage water allocations in the years that Pocatello alleged a deprivation of its storage. *See* Ex. 8 to *Amended Complaint* (2008, 2016, 2021). Idaho Code § 42-1701A(3) allows any person aggrieved by any action of IDWR or the Board "who has not previously been afforded an opportunity for hearing on the matter shall be entitled to a hearing before the director to contest the action." The Watermaster's storage allocations can be characterized as an "agency action" under the Idaho APA. *See* I.C. § 67-5201(4). Consequently, Pocatello is not entitled to judicial review of such actions until it exhausts the available administrative remedy, in this case a hearing before the Director. *See* I.C. §§ 67-5271(1); 42-

1701A(3). By failing to exercise its administrative remedies within the statute's required deadline, fifteen (15) days, Pocatello missed its opportunity as to its claims in 2008, 2016 and 2021. Therefore, the storage allocations are final and cannot be revisited or overturned now years later.

The Spaceholders request the Court to deny Pocatello's motion and dismiss its claims for failure to exhaust the above-referenced administrative remedies.

VII. Pocatello's Claims are Barred by the Equitable Doctrine of Waiver and Unclean Hands.

Even if the Court finds merit in any of Pocatello's claims on summary judgment, the Court can still deny relief based upon the equitable defenses of waiver and "unclean hands." As noted, Pocatello voluntarily participated in the Water District 01 Rental Pool from 2007 through 2022 (excepting 2009). *See Olenichak Aff.* at 5-7. Stated another way, Pocatello accepted the conditions in the rental pool procedures, including the "last to fill" provision in Procedure 7.3, and willingly leased a portion of its storage pursuant to those requirements.

Waiver is a "voluntary, intentional relinquishment of a known right and the party asserting the waiver must show that he acted in reasonable reliance up it and that he thereby has altered his position to his detriment." *Ada County Highway Dist. v. Total Success Investments, LLC.* 145 Idaho 360, 370 (2008) (quoting *Fullerton v. Griswold*, 142 Idaho 820, 824, 136 P.3d 291, 295 (2006)). Even if Pocatello claims a right to priority water right administration, it intentionally relinquished that right by voluntarily renting water pursuant to the Water District 01 Rental Pool Procedures. To prove the "voluntary" element of waiver, an individual must be aware of their claim of right. *Id*. If there is evidence that a party "should have known" of their claim, that may sometimes rise to the level of a waiver, but typically there must be a known and intentional relinquishment of a right. *Id*.

Secondly, there must be proof that the party acted with reasonable reliance upon that waiver and affirmatively altered their position to their detriment. *Id*. In sum, the elements of waiver include: (1) voluntary and intentional relinquishment of a known right; (2) party asserting the waiver must show that he acted in reasonable reliance on it; and (3) thereby altered his position to his detriment. Other spaceholders and the Watermaster reasonably relied upon Pocatello's waiver by distributing water pursuant to the "last to fill" provision. In other words, Pocatello's rented space was given a "last to fill" priority in conformance with the procedures and other water right holders were entitled to rely upon that administration in those years after Pocatello rented its water. As such, Pocatello effectively "waived" any right to claim otherwise after other spaceholders and the Watermaster relied upon Pocatello's voluntary participation.

Alternatively, Pocatello's requested relief in this case should be barred by the equitable doctrine of "unclean hands." The doctrine of "unclean hands" stands for "the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue." *Ada County Highway Dist. v. Total Success Investments, LLC.* 145 Idaho 360, 370 (2008) (quoting *Gilbert v. Nampa Sch. Dist. No. 131*, 104 Idaho 137, 145, 657, P.2d 1, 9 (1983)). The unclean hands doctrine is not one of "absolutes." *Id*. Elements of the "unclean hands" doctrine that will be considered in the interest of equity are the conduct of the adversary, requirements of public policy, and the relation of the misconduct to the subject matter of the suit and to the defendant. *Id*.

Additionally, the Idaho Supreme Court has noted that, when determining if the "unclean hands" doctrine applies, a court has discretion to evaluate the relative conduct of both parties and determine whether the conduct of the party seeking an equitable remedy should, in the light of all

circumstances, preclude such relief. *Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004). The Court has also noted that the misconduct must be intentional, not just negligent. *Id*; *Grazer v. Jones*, 160 Idaho 268, 273 (2016). Equitable relief may be denied if conduct has been inequitable, unfair, dishonest, fraudulent, or deceitful as to the controversy at issue. *Id.*
The elements for "unclean hands" include: (1) conduct off the adversary (2) requirements of public policy (3) relation of the misconduct to the subject matter of the suit and to the defendant (4) relative conduct of both parties.

In this matter Pocatello signed on to the Nez Perce Agreement, including the Mediator's Term Sheet, and agreed to the "last to fill" provision. *See* Exs. 1-3 to *Thompson Dec.* Pocatello's representations to the SRBA Court in 2005 must be evaluated in context with its present claims to this Court. Moreover, Pocatello voluntarily participated in the Water District 01 Rental Pool and profited from numerous rentals and leases. Pocatello never formally challenged the Rental Pool Procedures but instead readily accepted the benefit they provided. It would be patently unfair and inequitable to allow a party to profit from the procedures and then decades later claim injury from their implementation. Pocatello's intentional conduct as to this issue warrants application of the "unclean hands" doctrine to preclude relief.

CONCLUSION

For the reasons set forth above Pocatello's motion for partial summary judgment should be denied.

DATED this 16th day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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