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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,
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,

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.

Case No. CV42-23-1668

**POCATELLO'S REPLY IN
SUPPORT OF ITS MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

COMES NOW Plaintiff City of Pocatello (“Pocatello” or “City”), by and through its counsel of record, Somach Simmons & Dunn, P.C., and hereby submits this Reply brief in support of its *Motion for Partial Summary Judgment* (“Motion”) filed October 17, 2023, and to specifically reply to the *State of Idaho’s Cross-Motion for Partial Summary Judgment and Response to Plaintiff’s Motion for Partial Summary Judgment* (“State’s Cross-Motion and Response”) filed November 2, 2023, and *Intervenor Spaceholders’ Response in Opposition to Plaintiff’s Motion for Partial Summary Judgment* (“Spaceholders’ Response”) filed November 16, 2023, as follows. Many of the Spaceholders’ arguments are repetitive or derivative of those made in the *State’s Cross-Motion and Response*, and Pocatello incorporates by reference its *Response to the State of Idaho’s Cross-Motion* filed November 16, 2023.

Summary

The Spaceholders and the State argue that even though *every* spaceholder in Water District 01 (“WD01”) is impacted by the WD01 Rental Pool Procedures (“Procedures”), the Procedures are not rules because a spaceholder “voluntarily” gives up an element of its property right—“bundle of sticks,” i.e., its priority, in exchange for being able to lease its water. Their arguments suggest that the power of the Committee of Nine includes the ability to modify private property rights through their Procedures. There is no legal basis for these arguments—the Procedures are rules as that term is used in Idaho, and the Watermaster acts in an *ultra vires* manner when he implements the Last to Fill Rule,¹ which by its terms is unconstitutional.

¹ Currently appearing as Procedure 7.3 in the 2023 Procedures. (*Am. Compl.*, Ex. 4 at 14).

I. The Spaceholders’ Response Contains “Facts” and Argument that are Irrelevant and/or Immaterial to the Issues Raising in Pocatello’s Motion

The Spaceholders “Facts” section contains statements that are disputed or irrelevant. An example of a disputed *and* irrelevant fact is whether or not Pocatello is in compliance with its contract.² *Spaceholders’ Response* at 2-5 (¶¶ 1-4, 12), 21-22. While Pocatello’s storage contract is critical in that it provides the basis of Pocatello’s protectable property interest that Pocatello seeks to protect in this matter,³ details regarding Pocatello’s historical uses of storage water under the contract are not. Pocatello’s use of water under its contract does not alter the legal analysis related to whether the Procedures are “rules” as defined by the Idaho APA,⁴ whether the Last to Fill Rule requires IDWR to take *ultra vires* actions, whether the Last to Fill Rule is *facially* unconstitutional, and whether IDWR’s application of the Last to Fill Rule effectuates a taking of spaceholders’ storage rights without just compensation. *See Motion* at 2-3. These are questions of law that must be resolved based on the language of the Procedures and their consistency (or not) with Idaho’s statutes, caselaw, and constitution.

With that said, damages based on IDWR’s application of the Last to Fill Rules are a disputed question of *fact*. *See Pocatello’s Mem. In Supp. of Mot. Partial Summ. J* (“Pocatello’s

² Pocatello does not concede that it has failed to comply with its contract, that the Spaceholders have standing to raise issues related to its compliance with its Contract—or even that as a factual matter (related to ¶16) its ground water diversions have reached 10,000 acre-feet during the irrigation season.

³ *A&B Irrigation Dist. v. State*, 157 Idaho 385, 393 (2014) (“[A] water right is a property right. . . . Storage water rights are entitled to the same protection as any other type of property right.”) (citations omitted); *see also United States v. Pioneer Irrigation Dist. (In re SRBA Case No 3957)*, 144 Idaho 106, 115 (2007) (“it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right.”)

⁴ If the Court determines the Procedures are “rules,” then they must be voided, as the State has admitted that they were not adopted in substantial compliance with the requirements of the Idaho APA. *State’s Cross-Motion and Response* at 10 (“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).”); Idaho Code § 67-5231 (“Rules are “voidable unless adopted in substantial compliance with the requirement of this chapter.”).

Mem.”) at 3. The Court can determine at the time of trial if Pocatello’s historical use of its storage right is relevant to resolving the damages question.⁵ In sum, the Spaceholders’ alleged facts and arguments regarding Pocatello’s use of the water under its contract are disputed, irrelevant and immaterial to the determination of the questions of law before the Court, and accordingly should be disregarded.

II. The Spaceholders Do Not Add Any New Arguments to the State’s Cross-Motion and Response Regarding Whether the Procedures are Rules

Like the State of Idaho, the Spaceholders argue that the Procedures are not rules because participation is “voluntary”. *See, e.g., Spaceholder Response.* at 8-12 (and throughout). The Spaceholders suggest that the Procedures reflect “local” needs to meet “a particular basin’s water users” statutory goals. Pocatello does not disagree: “local” procedures that facilitate the *marketing* of storage water in specific basins, under the terms of Idaho Code § 42-1765, are what is called for under the statutory scheme. The problem is that both the State and the Spaceholders omit the remainder of the statutory standard: local committees are authorized to market storage water “under rules and regulations adopted by the [IWRB].” *Id.* Insofar as the IWRB’s Storage Bank Rules state aspirational goals such as Rule 40.01(h)’s “prevention of injury to other rights,” the Committee of Nine is not authorized to fill in the gaps.

The Spaceholders suggest instead, at *Response* footnote 3, that the determination under the Last to Fill Rule is a “quasi-judicial” matter. It isn’t clear how that characterization helps their argument. If this is indeed a quasi-judicial matter (which Pocatello disputes), the

⁵ The same can be said for the Spaceholder’s statute of limitation defenses. *Spaceholders’ Response* at 6-7.

Committee of Nine is *also* not authorized to impose the mechanism by which injury determinations related to a particular rental agreement are made.

III. The Spaceholders Mischaracterize the “Benefit” that Pocatello Has Received from Participating in the WD01 Rental Pool

The Spaceholders lean heavily on the alleged benefits that Pocatello has reaped from its participation in the Rental Pool as a reason why the Procedures (including the Last to Fill Rule) are not “rules” and are not contrary to Idaho law. *See Spaceholders’ Response* at 3, 6, 8, 14-15, 16, 19, 21 (discussing the money Pocatello has received through its participation in the Rental Pool). Not only do Pocatello’s revenues have no bearing on whether the Procedures are “rules” or contrary to law,⁶ the argument mischaracterizes the benefits and burdens that Pocatello has incurred through the Rental Pool.

First, regarding revenues from common pool rentals, *see Spaceholders’ Response* at 3, 14-15 (discussing Pocatello receiving over \$0.5 million from such rentals), Pocatello disputes that its participation in the Rental Pool was “voluntary” for purposes of the legal argument made in the *Spaceholders Response*.⁷

Second, regarding revenues from private leases, *see Spaceholders’ Response* at 3 (discussing Pocatello receiving over \$3.7 million from such leases), Pocatello disputes that the Rental Pool has provided Pocatello any “benefit” in this regard. Because the Procedures mandate that spaceholders lease storage water through the Rental Pool or not lease at all,⁸

⁶ Pocatello’s revenues may be relevant to the question of damages, in that they may have mitigated the injury that Pocatello has suffered through IDWR’s distribution of Pocatello’s water to other spaceholders.

⁷ For more discussion on how Pocatello’s participation in the Rental Pool is involuntary, *see Pocatello’s Response to State’s Cross-Motion* at 7-9, 14-15.

⁸ Which begs the question, how can the Procedures not be “rules” if they have this binding effect of law? *See Pizzuto v. Idaho Dept. of Correction*, 170 Idaho 94, 97 (2022).

Pocatello has leased water pursuant to the Procedures and in exchange received money from its lessees. However, had Pocatello been able to lease its water outside of the Rental Pool—e.g., pursuant to Idaho Code § 42-222—it still would have received those funds from lessees. So, it is incorrect to frame Pocatello’s receipt of funds for its private leases as a benefit that Pocatello would not have reaped without the existence of the Rental Pool.

IV. The Spaceholders’ Equitable Arguments are Meritless

The Spaceholders try to divert attention away from the core issues before the Court by presenting various equitable arguments, including quasi-estoppel, waiver, and unclean hands. Again, no matter how virtuous or important the Procedures may be, their promulgation must be consistent with the fundamentals of Idaho water law (even if they aren’t “rules”).⁹

For example, the Spaceholders assert that Pocatello should be estopped from challenging the Procedures because it has changed its position on the Last to Fill Rule. *See Spaceholders’ Response* at 5-6, 13-16, 25-27. They cite Pocatello’s “signing [of] the *Joint Motion* in the SRBA subcases regarding the Nez Perce Agreement” as grounds to preclude Pocatello from now asserting that the Last to Fill Rule is unlawful. *Id.* at 6 n.1; *see also id.* at 13-14. In fact, the parties to the Consent Decree agreed that flow augmentation: “shall be done in compliance with Idaho state law and regulations.” *Thompson Decl.*, Ex. 3 (PDF page 31, ¶ III.C.1). If the Procedures and the Last to Fill Rule are not consistent with Idaho law, then they should not be the basis of the State of Idaho’s compliance with the Nez Perce Agreement. Furthermore, the Last to Fill Rule has changed over time—in 2004 when the Nez Perce Agreement was executed, the Last to Fill Rule applied only to leases below Milner Dam. *Compare Thompson Decl.*, Ex. 3

⁹ *See also Pocatello’s Response to State’s Cross-Motion* at 5.

(Mediator’s Term Sheet dated April 20, 2004) with *Bricker Aff.*, Ex. 3 at 133, 139 (The Last to Fill Rule only applied to rentals below Milner prior to 2005).

The Spaceholders also argue that Pocatello’s motion should be rejected based on “unclean hands.” *Spaceholders’ Response* at 26-27. As discussed *supra* at 5, Pocatello would have received a financial benefit—and possibly a greater benefit—from renting its water in the absence of the Last to Fill Rule and only “accepted the benefit,” *id.* at 27, of the Procedures because it was the only manner in which it was authorized to rent its storage water. Pocatello has objected for years to the Committee of Nine about the Last to Fill Rule, *Pocatello’s Mem.* at 3, and felt compelled to prosecute this case in 2023 given low storage carryover, consecutive years of the Watermaster applying the Last to Fill Rule, and the need to lease water to meet contractual obligations. Pocatello’s challenge to the Procedures and the Last to Fill Rule is not a switch in position.

V. Pocatello Acknowledges that it Cannot Temporarily Transfer its Storage Water Rights in a Way that Causes Injury to Other Water Users

The Spaceholders frame Pocatello’s position as “believ[ing] that spaceholders are free to rent and temporarily transfer storage water throughout Water District 01 without any conditions.” *Spaceholders’ Response* at 16. This is incorrect. Pocatello agrees that Idaho Code § 42-222 precludes water users from changing the place of purpose of use of their water right when doing so injures other users. *Id.* at 17. Pocatello disagrees, however, that “Procedure 7.3 and the ‘last to fill’ condition ensures no injury to other spaceholders’ water rights.” *Id.* at 20. Even if that is what the Last to Fill Rule purports to accomplish, it is ineffective—rather than determine the amount of injury (or if there is any actual injury at all) that a rental or lease causes other users, the Last to Fill Rule just assumes injury and penalizes leasing spaceholders

regardless of where or how their storage water was used by lease. Pocatello believes that the Watermaster’s application of the Last to Fill Rule against its space in Palisades Reservoir not only fails to protect other spaceholders’ rights, but, ironically, injures Pocatello and other leasing spaceholders’ storage rights. Pocatello does not believe that it is entitled to lease its water as it pleases,¹⁰ but it does believe that the Last to Fill Rule’s approach of not determining *actual* injury and disavowing decreed priority dates is unconstitutional and inequitable.

VI. Neither the Spaceholders nor the State Address a Key Issue in this Case: Whether the Last to Fill Rule Requires IDWR to Take *Ultra Vires* Action

Finally, neither the *Spaceholder’s Response* nor the *State’s Cross-Motion and Response* address Pocatello’s argument in its *Amended Complaint* and *Motion* that the Last to Fill Rule, in addition to being unconstitutional, requires the Watermaster to commit an ultra vires act. *See Am. Compl.* at 3, 10, 17; *Pocatello’s Mem.* at 13, 17. Regardless of whether the Procedures are “rules,” and regardless of whether the alleged voluntary subordination renders the Last to Fill Rule constitutional, the Last to Fill Rule remains invalid because it commands the Watermaster to act outside of his authority¹¹ and defy his duties under Idaho Code § 42-607¹² and the Director’s duties under Idaho Code § 42-607.¹³ If the Last to Fill Rule is a “rule,” and it

¹⁰ Further, Pocatello will consent to the conditions necessary to ensure its leases do not injure other water users—but losing its priority *a fortiori* as a condition of entering a lease is neither effective nor legally appropriate.

¹¹ *See Nielson v. Parker*, 19 Idaho 727, 732 (1911) (“The [Director] has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person”).

¹² “It shall be the duty of said watermaster to distribute the waters . . . among the water users taking water therefrom according to the prior rights of each respectively . . . under the direction of the department of water resources . . . in order to supply the prior rights of others from such stream or water supply”

¹³ “The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district Distribution of water within water districts . . . shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine.”

commands the Watermaster to deprive spaceholders of water to which they are entitled based on their priority, then the Last to Fill Rule and these statutes conflict, and the aforementioned statutes control. *See Roeder Holdings v. Bd. of Equalization*, 136 Idaho 809, 813 (2001) (“When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict.”). If the Last to Fill Rule is not a “rule,” as the State suggests, then it would be absurd for an agency statement of interpretation to supersede Idaho Code. Either way, the Last to Fill Rule simply requires the Watermaster to break Idaho law.

Conclusion

For the reasons stated within, and based on the arguments made in its Motion for Partial Summary Judgment and Response to the State of Idaho’s Cross-Motion and Response, Pocatello respectfully requests that the Court grant Pocatello’s Motion for Partial Summary Judgment.

Dated this 21st day of November, 2023.

SOMACH SIMMONS & DUNN, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2023, a true and correct copy of the foregoing document was served via iCourt E-File and Serve upon the following:

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