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Fifth Judicial District, Twin Falls County
Kristina Glascock, Clerk of the Court
By: Deputy Clerk -Schulz, Pam

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 RESOURCE BOARD, IDAHO DEPARTMENT OF WATER RESOUCES, 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, & CITY OF BLISS, CITY OF BURLEY, CITY OF CAREY, CITY OF DECLO, CITY OF DIETRICH, CITY OF GOODING, CITY OF HAZELTON, CITY OF HEYBURN, CITY OF JEROME, CITY OF PAUL, CITY OF RICHFIELD, CITY OF RUPERT, CITY OF SHOSHONE, CITY OF WENDELL, BURLEY IRRIGATION DISTRICT, FREMONT-MADISON IRRIGATION DISTRICT, and IDAHO IRRIGATION DISTRICT, Intervenors.	)	Case No: CV42-23-1668 **AMENDED ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**[1]

[1] The Court issued an *Order on Cross Motions for Summary Judgment* on January 5, 2024. That *Order* contained a clerical error. Section IV of the *Order* states in part "The Defendants' Cross-Motion for Partial Summary Judgment is hereby granted." The record reflects the Defendants' Motion was styled as a "Cross Motion for Summary Judgment." The inclusion of the word "Partial" in the subject sentence was a clerical error. This *Amended Order* is issued for the sole purpose of removing the word "Partial" from the above-quoted sentence under I.R.C.P. 60(a).

I.

BACKGROUND

A. Water Right 01-2068 and the City of Pocatello's contract with the United States.

Palisades Dam is located on the upper Snake River in eastern Idaho. It is operated by the United States Bureau of Reclamation ("USBOR"). The USBOR holds various storage water rights associated with the reservoir the dam creates. One of those is water right 01-2068. That right authorizes the diversion of 940,400 acre-feet annually of water from the Snake River into the reservoir for the following purposes of use: (1) irrigation storage; (2) irrigation from storage; (3) power storage; and (4) power from storage. The right carries a priority date of July 28, 1939. The partial decree for the water right was issued in the Snake River Basin Adjudication on August 17, 2016.[2]

In 1960, the City of Pocatello entered into a contract with the USBOR to obtain the right to 50,000 acre-feet of storage water within the 940,400 acre-feet of storage authorized under water right 01-2068. As a result of the contract, the City is a spaceholder within Palisades Reservoir and holds title to the use of the 50,000 acre-feet of contracted storage water under water right 01-2068. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). As to the City's use of the 50,000 acre-feet of contracted storage water, the preamble to the contract provides in pertinent part as follows:

> 4. WHEREAS, the United States and City have not heretofore entered into any contracts with respect to storage rights in reservoirs on the Snake River above Milner Dam, but the City, securing water for all municipal uses by pumping from underground and from surface flows 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 flows, and it having been determined that 50,00 acre-feet of active capacity in Palisades Reservoir will furnish such appropriate equivalent volume. . .
> .

Amended Complaint, Ex.1., ¶4. Thereafter, the provisions of the contract provide in pertinent part as follows:

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[2] The partial decree was subsequently amended to correct errors on March 29, 2017, and on February 8, 2020.

Rental of Water; Sale of Space

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 the Advisory Committee.

. . . .

Delivery of Water; Measurement and Losses

16.(a) To the extent that water is pumped from wells and from surface water streams that flow into American Falls Reservoir, actual measurements at the well heads and at the discharge lines of other pumping plants delivering water from the City shall be made during each 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 from any irrigation season, shall be limited, however, to the quantities of stored waters available as provided in article 10.

(b) The water chargeable to 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 whomsoever they shall accrue, shall be made up out of stored water available to the City under this agreement as necessary. The determination of the charges and the credits hereunder shall be under a formula to be derived by the watermaster . . . .

Ordering of Water

17. Under the plan of water use of the City, there will normally be no direct delivery from the Snake River of stored water. Therefore, the provisions of article 16 will govern as to the rights to water, whether charges therefor shall be against natural flow or stored water, matters of replacement of water from storage, and related problems. If the City should, however, construct facilities which would permit the direct delivery of stored water to it from the Snake River, such delivery shall be effected by the City giving notification to the watermaster, a reasonable period in advance, of the amount of water within its entitlements as stated in this agreement to be delivered for diversion by the City.

Amended Complaint, Ex.1., ¶15-17. The Court will refer to the City's 50,000 acre-feet of contracted storage water herein as the "Storage Water."

B. The City's historic use of the Storage Water from 1960-1979 and the creation of the Water Supply Bank.

The history of the City's use of the Storage Water is, at times, unclear from the record. What is clear is that the City has never taken delivery of any portion of the Storage Water into its municipal system for any purpose. Infrastructure which would physically allow the delivery of the Storage Water from Palisades Reservoir to the City's municipal boundaries has never existed. At oral argument the City also represented that the provisions of paragraphs 16(a) and (b) have never been implemented or followed by the Water District 01 Watermaster. That said, from 1960 through 1979, there is a belief on behalf of the City that it left the Storage Water in Palisades Reservoir for the purpose of making it available for rental to other water users. Further, that the rental of storage water for such purposes occurred in Palisades Reservoir and the other Upper Snake storage reservoirs during that time through a rental pool operated in the Upper Snake River Basin. While the City believes the Storage Water was used for purposes of rental from 1960 through 1979, it admits there is no record of such use in this proceeding. As a result, the history of the City's use of the Storage Water from 1960 through 1979 is not discernable from the record.

In 1979, the Idaho Legislature created the Water Supply Bank. I.C. § 42-1761; Idaho Sess. Laws 1979, ch. 193. The Water Supply Bank is a statutorily authorized "water exchange market operated directly by the Water Resource Board to facilitate the marketing of water rights." IDAPA 37.02.03.010.12. It provides a water user who is not using water under his water right an avenue to rent that water to those who need it. The Water Supply Bank provides several advantages to such a water user. One is that a water right accepted into the Water Supply Bank is not subject to forfeiture for nonuse while it is in the Bank. I.C. § 42-1764(2). Another is that the approval of a rental of water from the Water Supply Bank may be a substitute for the transfer proceeding requirements of Idaho Code § 42-222. I.C. § 42-1764(1). This, for example, may allow a water right to be rented on a temporary basis for a purpose of use other than that authorized under the right without having to go through a transfer proceeding. *Id.*

The Water Supply Bank is operated by the Idaho Water Resource Board ("Board"). I.C. § 42-1761. It has the duty of adopting rules and regulations governing the management, control, delivery and use and distribution of water to and from the Water Supply Bank. I.C. § 42-1762(1). Such rules have been adopted by the Board and are set forth in IDAPA 37.02.03. The

Board also has the option of appointing local committees to facilitate the rental of stored water in a given locale. I.C. § 42-1765. In Water District 01, where Palisades Reservoir is located, the Board has elected to appoint the Committee of Nine as the local committee authorized to facilitate the rental of stored water.

C. The City's historic use of the Storage Water from 1979-2005, the Water District 01 Rental Pool under the umbrella of the Water Supply Bank, and the introduction of the last-to-fill provision.

The Water Supply Bank Rules provide for a "rental pool" which is defined as "[a] market for exchange of stored water operated by a local committee." IDAPA 37.02.03.001.09. Evidence that is persuasive to the Court shows a rental pool has existed in Upper Snake River Basin since the early 1930s. This evidence includes Attorney General Opinion No. 91-7, which states "[t]he records of IDWR show that Water District 1 has operated a 'rental pool' to facilitate the rental of storage water in the Upper Snake River Basin since the early 1930's". Attorney General Opinion No. 91-7, pp.10-11 (August 5, 1991). It also includes the Water District 01 Water Accounting Manual, which acknowledges that:

> Prior to 1978, there was an informal process for reservoir spaceholders, whose storage allocations exceeded their irrigation need, to supply a portion of their storage allocation to other water users facing immediate water shortages. In exchange for supplying the storage, the water user would pay the spaceholder supplying the storage a rental fee for the one-time use of the storage.

Concepts, Practices, and Procedures Used to Distribute Water Within Water District #1, p.128, Tony Olenichak (April 14, 2023). However, since the creation of the Water Supply Bank in 1979, Idaho Code §§ 42-1761, et seq., have provided a formal statutory basis for the Water District 01 Rental Pool. I.C. § 42-1765. As a result, the Water District 01 Rental Pool now operates under the umbrella of the Water Supply Bank. *See e.g.*, IDAPA 37.02.03.001.12 (defining "Water Supply Bank" in part as "a general term which includes the Board's water supply bank and rental pools").

The Board has regularly appointed the Committee of Nine as the "local committee" authorized to facilitate the rental of stored water through the Water District 01 Rental Pool. When the Board elects to appoint a local committee for such purposes, the local committee is required to propose procedures pursuant to which it will facilitate rentals. IDAPA 37.02.03.040.

On an annual basis, the Committee of Nine has proposed such procedures for the Water District 01 Rental Pool. The Court will refer to those procedures herein as the "Rental Pool Procedures." The Rental Pool Procedures have been regularly reviewed by the Director of the Idaho Department of Water Resources and adopted by the Board. Among other things, they set forth procedures for supplying storage water to, and renting stored water from, the Water District 01 Rental Pool.

Beginning in 1988, the Rental Pool Procedures began to include what will be referred to herein as a "last-to-fill" provision. At that time, storage water suppliers to the Rental Pool were given the option to designate whether their storage water would be made available for rental below Milner and/or above Milner. If storage water was rented for purposes below Milner, "the space evacuated to provide the rental became '*last-to-fill*' in the reservoir for the following season, and for each season thereafter until the space refilled." *Concepts, Practices, and Procedures used to Distribute Water Within Water District #1*, p.129, Tony Olenichak (April 14, 2023). The rationale was that storage water released past Milner Dam did not provide any return flows and increased the probability of the reservoir system not filling the following year. *Id.* at 129. Therefore, the purpose of the last-to-fill provision "was to ensure the refill of the evacuated space supplied for rental below Milner did not interfere with the refill of reservoir space evacuated for purposes above Milner." *Id.*

As is the case with the period of 1960 through 1979, the history of the City's use of the Storage Water from 1979 through 2005 is unclear from the record. It is the belief of the City that it left the Storage Water in Palisades Reservoir for the purpose of making it available for rental through the Water District 01 Rental Pool during that timeframe. The record does not contain any records of such use. As a result, the history of the City's use of the Storage Water from 1979 through 2005 is not discernable from the record.

D. The City's historic use of the Storage Water from 2005-2022 and changes to the last-to-fill provision.

In 2005, a new last-to-fill provision was implemented through the Rental Pool Procedures. Prior to 2005, the last-to-fill provision applied only to rentals below Milner. It did not apply to any rentals above Milner. This changed under the new last-to-fill provision. The

new provision expanded in applicability to rentals above Milner, including those for private leases:

> 7.3 Impacts to Spaceholders resulting from all common pool, private leases, assignments, supplemental pool, and extraordinary circumstances pool rentals. 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 to supply previous year leases, assignments, and rentals. If the amount of storage in the reservoir system exceeds the amount necessary to allocate 100% fill to space that wasn't evacuated to supply leases, assignments, and rentals but is insufficient to allocate100% fill to all system spaceholders, allocations to lessors', assignors', and other space shall occur in the following priorities:
>
> (a) Storage supplied under Procedure 5. This reallocation will only occur in the year following the supply of storage.
> (b) Assigned rental under Procedure 10.0, extraordinary circumstances rental under Procedure 11.0, private leases above Milner under Procedure 6.0, and IWRB storage used for mitigating minimum flows at Murphy under Procedure 6.7. This reallocation will only occur in the year following the lease of storage.
> (c) Bureau uncontracted storage under Procedure 6.8 until the lessor's affected space fills.
> (d) Supplemental Pool leases under Procedure 8.0 until the lessor's affected space refills.
> (e) Bureau Powerhead storage under Procedure 6.9 shall be the last space to refill after all other space in reservoirs in Water District 1 until the lessor's affected space fills as identified in III.C.7.c. of the Mediator's Term Sheet of the 2004 Snake River Water Rights Agreement.

Water District 1 2023 Rental Pool Procedures, p.14. Under this new last-to-fill provision, all water rights placed into the Rental Pool become last-to-fill in the following year.

The record shows the City participated in the Water District 01 Rental Pool from 2005 through 2022. During that time, it placed Storage Water into the Rental Pool common pool each year. The "common pool" consists of storage made available to the Committee of Nine through participant contributions for subsequent rental through Procedure 5 of the Rental Pool Procedures. It supplies storage for: "large rentals, small rentals, flow augmentation under the Snake River Water Rights Agreement of 2004 ('Nez Perce Agreement'), Blackfoot Equitable Adjustment Agreement, and the 2015 Shoshone Bannock Settlement Agreement." *Olenichack Aff.*, ¶13. In addition to providing Storage Water to the common pool, the City also placed Storage Water in the Rental Pool for private leases every year during that timeframe except for

2009. Aside from its participation in the Water District 01 Rental Pool, the City did not use any portion of the Storage Water for any other purpose from 2005-2022. The City contends that during the years of 2008, 2013, 2014, 2016, and 2021, the last-to-fill provision was applied by the Defendants to the Storage Water to its detriment.

E. Complaint and summary judgment.

This case was initiated on March 16, 2023, when the City of Pocatello filed a Complaint in Bannock County case CV03-23-876 against the Defendants. On May 1, 2023, the Honorable Robert Naftz entered an *Order* transferring venue over this matter from the Sixth Judicial District to the Fifth Judicial District, Twin Falls County. Thereafter, the Idaho Supreme Court entered an *Order* directing that all further proceedings be transferred to Twin Falls, County, and that the Honorable Eric Wildman be assigned the case. The clerk of the court subsequently assigned Twin Falls County case number CV42-23-1668 to this proceeding.

Meanwhile, the City filed an Amended Complaint on May 2, 2023. The Amended Complaint sets forth several causes of action against the Defendants. The Defendants filed an Answer to the Amended Complaint on May 16, 2023. The Court subsequently entered *Orders* permitting the Intervenors to participate in this proceeding. On October 17, 2023, the City of Pocatello filed a Motion for Partial Summary Judgment. Through the Motion, the City seeks the following relief as a matter of law:

1) a finding that the Rental Pool Procedures are "rules" under the Idaho Administrative Procedure Act;

2) a finding that the Procedures are void because the Idaho Water Resource Board ("IWRB") does not have authority to delegate rulemaking to the Committee of Nine, or that the Committee of Nine lacks authority to conduct rulemaking, thus the Procedures are not adopted in substantial compliance with the APA rulemaking requirements;

3) that Procedure 7.3 is facially unconstitutional – whether or not it is a "rule" – because through it IDWR administers storage water rights in a manner that is inconsistent with the prior appropriation system; and

4) that IDWR's application of Procedure 7.3 to Pocatello in 2021 and 2023 deprived Pocatello of its property interest, without compensation, because water that the watermaster should have distributed to Pocatello's account was instead distributed to other spaceholders' accounts.

Memorandum in Support of Pocatello's Motion for Partial Summary Judgment, pp. 3-4 (Oct. 7, 2023). The following Intervenors join in the City's Motion: the Cities of Bliss, Burley, Cary, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell. The Intervenor cities will be collectively referred to herein as the "Coalition of Cities." The Defendants and Intervenors Burley Irrigation District, Fremont-Madison Irrigation District, and Idaho Irrigation District oppose the Motion.

On November 2, 2023, the Defendants filed a Cross-Motion for Summary Judgment. Through the Cross-Motion, the Defendants seek the following relief as a matter of law:

1) That the Water District 01 Rental Pool Procedures are not rules that are subject to rulemaking as defined by the Idaho Administrative Procedures Act 67-5201–5292.

2) That the City of Pocatello failed to exhaust its administrative remedies and is now time barred from bringing this action Under I.R.C.P. 84(n).

3) That the Water District 01 Rental Pool Procedures are not facially unconstitutional.

4) That the Water District 01 Rental Pool Procedures do not result in a physical taking of the City of Pocatello's property rights.

The [Defendants] further move the Court to grant judgment as a matter of law dismissing all the City of Pocatello's causes of action.

Cross-Motion for Summary Judgment, pp. 2-3 (Nov. 2, 2023). Intervenors Burley Irrigation District, Fremont-Madison Irrigation District, and Idaho Irrigation District join in the Defendants' Cross-Motion. The City of Pocatello and the Coalition of Cities oppose the Cross Motion. A hearing on the Motions was held before the Court on November 30, 2023.

II.
STANDARD OF REVIEW

Summary judgment is properly granted when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(a) & (c). The burden of demonstrating the absence of a genuine issue of material fact, and that summary judgment is proper as a matter of law, is on the moving party. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005). If reasonable people could reach different conclusions or inferences from the evidence, the motion must be denied. *Finholt*

v. Cresto, 143 Idaho 894, 896, 155 P.3d 695, 697 (2006). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Id.* at 896-897, 155 P.3d at 697-698. A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. *Id.* "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010).

III.
ANALYSIS

A. The Water District 01 Rental Pool Procedures are not rules under the APA.

The City of Pocatello requests a declaratory judgment that the Rental Pool Procedures are void on the basis they were not adopted in compliance with the rulemaking procedures of the Idaho Administrative Procedure Act ("APA"). The Defendants admit that the Board did not follow those procedures when it adopted the Rental Pool Procedures. However, they assert the Board was not required to because the Rental Pool Procedures are not rules under the APA.

The term "rule" means "all or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, enforces, or prescribes . . . [l]aw; or . . . [t]he procedure or practice requirements of an agency." I.C. § 67-5201(24). The Idaho Supreme Court has directed that "general applicability" is perhaps "the most salient characteristic distinguishing quasi-legislative rulemaking from a purely executive or quasi-judicial agency action." *Pizzuto v. Idaho Dept. of Correction*, 170 Idaho 94, 96-97, 508 P.3d 293, 295-296 (2022). In the context of administrative rules, general applicability has two meanings. *Id.* at 97, 508 P.3d at 296. First, "it means that rules apply uniformly *to the public*." *Id.* The Court has directed that "this distinguishes rulemaking from quasi-judicial agency actions because quasi-judicial actions determine only the rights and duties of individuals." Second, it means that rules "must be applied uniformly *by the agency*." *Id.* This means an agency "does not have discretion to depart from its rules while they are in effect." *Id.*

Rental pool procedures are, by their nature, not procedures of general applicability. They are narrowly tailored by local committees to fit unique local conditions. That such is the case is evidenced by the legislation creating the Water Supply Bank. The Water Supply Bank is a state-wide water market operated by the Board, which is charged with adopting rules and regulations governing its management. I.C. § 42-1762(1). The Board has adopted such rules as set forth in IDAPA 37.02.03. However, the Legislature expressly authorized the Board to appoint "local committees" to facilitate the rental of stored water on a local basis. I.C. § 42-1765. Implicit in this authorization is a recognition that water storage facilities, operations, and conditions differ throughout the state. Given these local differences, there is a recognition that a state-wide, one-size-fits-all, rental procedure may not be feasible with respect to stored water. The statute thus acknowledges that the Board may find "local committees" to be better situated than it to facilitate the rental of stored water in a given locale.

Such is the case in Water District 01. The Board has elected to appoint the Committee of Nine as the local committee authorized to facilitate the rental of stored water in that locale.[3] The Rental Pool Procedures proposed by the Committee of Nine have been regularly reviewed by the Director and adopted by the Board. *Raybould Aff.*, pp.2-3. Those Procedures are not generally applicable to the public or even to all water users. They are narrowly tailored to facilitate the rental of stored water only in Water District 01. Even within the confines of Water District 01, the Rental Pool Procedures do not apply to all water users or to all rentals of water. For instance, water users in Water District 01 who wish to lease natural flow water rights into, or rent natural flow water rights from, the Water Supply Bank are not subject to the Rental Pool Procedures. The lease and rental of natural flow water rights occurs under Rule 30 of the Water Supply Bank Rules, not the Rental Pool Procedures which govern only the rental of stored water.

The Court also notes that participation in the Water District 01 Rental Pool is voluntary. A "participant" is defined under the Rental Pool Procedures as "a spaceholder who contributes storage to the common pool pursuant to Procedure 5.2." Rental Pool Procedures 2.29. Procedure 5.2 provides that a 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

[3] At present, the Board has elected to appoint local committees in Water Districts 01, 63, 65, and 65K. Each of these Water Districts has its own rental pool procedures specific to its respective locale, which have been reviewed by the Director and adopted by the Board.

common pool rentals . . . ." Further, that "[a]ny spaceholder making such election shall be deemed a 'participant' for the current year and every year thereafter until the spaceholder provides written notice to the Watermaster prior to March 15 . . . rescinding its participation." *Id.* at 5.2. The Rental Pool Procedures, along with the testimony of the Water District 01 Watermaster, show that participation in the Rental Pool is voluntary. *Olenichak Aff.*, ¶5.

Notwithstanding, there is argument that Procedure 6.1 requires all leases in Water District 01 to be conducted through the Water District 01 Rental Pool. That provision provides as follows:

> **General.** All leases must be transacted through the rental pool. Only participants may lease storage to a Lessee subject to the provisions of these procedures, and non-participating spaceholders may not lease storage from participants.

Rental Pool Procedures 6.1. The Court's reading of Procedure 6.1 is informed by Procedure 1.2, which provides:

> These procedures shall not be interpreted to limit the authority of the Idaho Department of Water Resources, the Idaho Water Resource Board, or the Watermaster of Water District 01 in discharging their duties as prescribed by statute or rule.

Rental Pool Procedures 1.2. Procedure 1.2 makes clear the Rental Pool Procedures do not limit or supersede the Director's statutory authorities, including his authority to effectuate transfers under Idaho Code § 42-222. Therefore, Procedure 6.1 must be read to apply only to those water users who have elected to participate in the Water District 01 Rental Pool common pool.[4] The Rental Pool Procedures do not prohibit those water users who have not elected to participate in the Water District 01 Rental Pool from entering into a private lease for the rental of storage water outside of the confines of the Procedures so long as that private lease otherwise complies with Idaho law.[5]

For these reasons, the Court finds the Rental Pool Procedures are not procedures of general applicability, and are therefore not "rules" under the APA as a matter of law. It follows

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[4] Both counsel for the IWRB and Intervenor Spaceholders represented at oral argument that the IWRB also reads Procedure 6.1 to apply only to water users electing to participate in the rental pool.

[5] For instance a private lease for a water right that would require a change in the purpose of use, point of diversion, place of use, or period of use of the water right would have to comply with the transfer requirements of Idaho Code § 42-222.

the City's Partial Motion for Summary Judgment on this issue must be denied, and the Defendants' Cross-Motion must be granted.

B. The last-to-fill provision is not facially unconstitutional.

The City of Pocatello argues that the last-to-fill provision is facially unconstitutional. It is important that the Court distinguish between "facial" and "as applied" constitutional challenges. A party may challenge a statute as unconstitutional "on its face" or "as applied" to the party's conduct. *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 870, 154 P.3d 433, 441 (2007). For a facial constitutional challenge to succeed, the challenger faces the heavy burden of establishing "that the law is unconstitutional in all of its applications." *Id.* In other words, "the challenger must establish that no set of circumstances exists under which the law would be valid." *Id.* In contrast, "to prove a statute is unconstitutional 'as applied', the party must only show that, as applied to the [party's] conduct, the statute is unconstitutional." *Id.* The Idaho Supreme Court has directed 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." *Id.* Here, the only issue before the Court is whether the last-to-fill provision is facially unconstitutional.

Article XV, § 3 of the Idaho Constitution provides explicit protections to established water rights. It provides that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . ." Further, that "[p]riority of appropriations shall give the better right as between those using the water." Water users in Idaho therefore have a constitutional right to have their water rights administered in priority. Under the last-to-fill provision, all storage water rights that are placed into the Water District 01 Rental Pool become last-to-fill in the reservoir system in the following year. In other words, such waters rights are not filled in priority. They are filled only after all other storage water rights in the reservoir system that were not placed in the Water District 01 Rental Pool are filled. If there is insufficient water to satisfy all the water rights in the reservoir system, the last-to-fill water rights go without.

In addressing the facial constitutionality of the last-to-fill provision, it is important to acknowledge what the Water Supply Bank and Water District 01 Rental Pool are. They are

statutorily authorized water exchange markets. While a water user has a constitutional right to have his water right administered in priority, that right extends only so far as the water right is being used within the parameters of its defined elements. A water user has no right to have his water right administered to points of diversion, places of use, periods of use, or purposes of use that differ from those authorized under his right. However, there are certain instances where the law may provide a water user the privilege of doing just that, assuming certain conditions are met.

The Water Supply Bank, and the Water District 01 Rental Pool which operates under the umbrella of the Water Supply Bank, are examples of where the law provides such a privilege. They provide avenues to a water right holder to use water in a manner that is not otherwise authorized under his water right. However, such avenues may only be lawfully pursued under the prior appropriation doctrine if there is no injury to other water rights. *See e.g., A&B Irr. Dist v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005) (stating "there is *per se* injury to junior water rights holders anytime an enlargement receives priority").

The Water Supply Bank and the Water District 01 Rental Pool utilize different tactics to prevent injury. Water rights in the Water Supply Bank are subject to Rule 30 of the Water Supply Bank Rules. That Rule requires the Director to evaluate applications to rent water rights from the Water Supply Bank as to whether there will be injury to other water rights or whether the proposal would constitute an enlargement of the water right, among other things. IDAPA 37.02.03.030.01. This evaluation is done on a case-by-case basis to make sure rentals from the Water Supply Bank do not result in injury to other water rights. *Id.*

The Rental Pool Procedures approach the issue of injury differently. They presume injury in all instances through the last-to-fill provision, which operates to make all water rights placed into the Rental Pool last-to-fill in the following year. The reason for this presumption is that the last-to-fill provision further presumes that all water rights put into the Rental Pool will be used for purposes that are not authorized under the elements of the water right. *Olenichak Aff.*, ¶26. This presumption is generally accurate.

An example is illustrative. Water User A holds a storage water right for irrigation. Water User A is not going to use his water right for irrigation purposes this year. As a result, he elects to put his water right into the Rental Pool to make it available for rent to others. Water

User A's water right is then rented by a local municipality, which uses it for municipal purposes. Neither rental nor municipal use are authorized purposes of use under Water User A's water right. Therefore, but for the Rental Pool, Water User A would not have a legal right to use his irrigation storage right for such purposes without first going through an Idaho Code § 42-222 transfer proceeding.[6] I.C. § 42-1764(1).

Article XV, § 3 of the Idaho Constitution would not preclude the application of the last-to-fill provision to Water User A's water right in this scenario. There is no right under Idaho's Constitution to have a water right administered in priority in a manner that is not authorized under that right. To the contrary, the prior appropriation doctrine requires the application of the last-to-fill provision to Water User A's water right to prevent unlawful injury to the priority of junior water rights in the reservoir. But for the Rental Pool, Water User A would not have used his water right this year. If Water User A had not used his water right, its allocated space in the reservoir would not have been evacuated, and the water under that water right would have been carried over in the reservoir for use by Water User A in the following year.[7] The reservoir space allocated to Water User A's water right would then not need to be filled in priority the following year to the detriment of other junior spaceholders in the system.

However, instead of not being used, the Rental Pool permitted Water User A's water right to be rented to the local municipality for municipal use. This results in an enlargement in the purpose of use of the water right by permitting the water to be used for a purpose not otherwise authorized under the right.[8] It also results in the reservoir space allocated to the water right to be evacuated, necessitating a refill the following year. Permitting Water User A to refill his water right in priority under these circumstances would result in impermissible injury to the priority of junior water rights under Idaho law. *See e.g., A&B Irr. Dist v. Aberdeen-American*

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[6] An Idaho Code § 42-222 transfer may only be approved "provided no other water rights are injured thereby" and "the change does not constitute an enlargement in use of the original right" among other things. I.C. § 42-222(1).

[7] Idaho law permits reasonable carry-over under a surface storage water right. *See e.g.,* IDAPA 37.03.11.042.g ("the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years").

[8] When an enlargement receives priority there is injury to junior water rights. *See e.g., A&B Irr. Dist v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005) (stating "there is *per se* injury to junior water rights holders anytime an enlargement receives priority"); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797-98 (2011) ("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder").

Falls Ground Water Dist., 141 Idaho 746, 753, 118 P.3d 78, 85 (2005) (stating "there is *per se* injury to junior water rights holders anytime an enlargement receives priority"); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797-98 (2011) ("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder").

The last-to-fill provision operates to prevent this injury by requiring Water User A's water right to be last-to-fill the following year. This is the intent of the last-to-fill provision as explained by the Watermaster:

> 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 rights or their storage contract.*

Olenichak Aff., ¶26 (emphasis added). Therefore, application of the last-to-fill provision to this scenario is not unconstitutional. Rather, its application operates to prevent unlawful injury to the priority of junior water rights.[9]

The legal analysis that applies to Water User A's water right would apply to many water users with storage water rights in Water District 01. This is because by placing their storage water rights into the Rental Pool for purposes of rental, water under those water rights will be used for a purpose not otherwise authorized under its elements.[10] The City of Pocatello presents

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[9] As a general principle, Idaho law prohibits using a water right outside the scope of its authorized use as defined by its elements absent a transfer proceeding. A transfer proceeding ensures proposed changes will not injure existing water rights. Water right use is also governed by a duty of water and a prohibition against waste. Water cannot be diverted which exceeds the quantity that can be put to beneficial use, irrespective of the decreed quantity. Any unused or excess water must be left in the system for use by other water right holders. The use of this water for other than its authorized purpose results in an enlargement of the water right and injury to other water rights. The Water Supply Bank and the Rental Pool Procedures provide an exception to these general principles provided no other rights are injured. *See* I.C. § 42-1763. Unique to a storage right is the right to carry over unused water for use in the following season albeit consistent with its authorized purpose. Junior spaceholders need not wait to fill in priority to have the space occupied by the carried over water. It follows that the use of excess or unused water for anything but carryover results in an enlargement of the storage right and in injury to junior spaceholder rights - if that water is permitted to be refilled in priority. The last-to fill rule was adopted to prevent such injury. At oral argument, counsel for Fremont-Madison Irrigation District and Idaho Irrigation Districts represented that the last-to fill rule was adopted in 2005 in response to litigation regarding the scope of storage rights in the context of a delivery call against groundwater pumpers. Ultimately, the Idaho Supreme Court provided guidance on the scope and limitations of storage rights. *See AFRD #2 v. IDWR*, 143 Idaho 862,880, 154 P.3d 433, 551 (2007).

[10] The water rights for the Upper Snake storage reservoirs include (not including refill storage water rights): 01-4055, 01-10044, 01-10045, 01-10043, 01-2068, 01-10401, 01-10042, 01-2064, 01-219, 21-12946, 21-2161, 21-10560, 21-2156, 21-4155, and 25-7004. *Concepts, Practices, and Procedures Used to Distribute Water Within Water District #1*, p.69, Tony Olenichak (April 14, 2023). The *Partial Decrees* issued for each of these water rights in the Snake River Basin Adjudication identify authorized purposes of use of "Irrigation Storage" and "Irrigation

a unique scenario, however, as to whether the legal analysis that applies to Water User A's water right should apply to its circumstances. The City claims it is specifically authorized to use water under its storage right for purposes of "rental." *Amended Complaint*, ¶13. It relies on Paragraph 15 of its contract with the USBOR, which provides in pertinent part as follows:

> Rental of Water; Sale of Space
>
> 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 the Advisory Committee.

Amended Complaint, Ex.1., ¶15. The City argues that by placing its water right into the Rental Pool, it is using the right for a purpose consistent with its authorized use. Thus, it contends it has a constitutional right to have its water right administered in priority under Article XV, § 3 of the Idaho Constitution – an outcome the last-to-fill provision does not permit.

Resolution of that issue requires that the Court determine what the City of Pocatello's authorized uses are under its storage right in Palisades Reservoir. It would require answering questions such as are the elements of a storage right in a federal reservoir defined solely by language found on the face of the license or partial decree; or by a combination of the language found on the face of the license or partial decree and the language of the spaceholders' contracts? And if so, to what extent are the spaceholders' contracts given effect? However, the scope of the City's authorized uses presents an issue that is not squarely before the Court in this proceeding. The parties have not briefed or presented oral argument on this issue, other than counsel for the Defendants arguing the City would have to go through a transfer proceeding to change the purpose of use should it choose to rent water outside of the Rental Pool. A review of the record in this case, including historic administration of the City's storage right does little to shed light on the issue.

At oral argument, counsel for the Defendants represented that the partial decree and the spaceholder contracts serve as the "bookends" for the authorized purposes of a storage right. The Water District 01 Watermaster also explained in his testimony:

> A storage spaceholder in Water District 01 has the right to use their entire storage allocation at point of diversion, place of use, and purpose of use that are consistent

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from Storage." In addition, the *Partial Decrees* issued for water rights 01-10043, 01-2068, and 01-2064, and the license issued for water right 01-10401, identify additional authorized purposes of use of "Power Storage" and "Power from Storage." The *Partial Decree* issued for water 25-7004 identifies an additional purpose of use of "Wildlife Storage." None of these water rights include "rental: as an authorized purpose of use under the *Partial Decrees*.

> 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, place 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 lease water through the rental pool.
>
> 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 reservoirs decreed water right *or their storage contract.*

Olenichak Aff. ¶24, 26 (emphasis added). So, clearly some effect is given to the contract.[11] However, the storage right for the reservoir was decreed with an irrigation purpose of use.[12] It's undisputed that the City of Pocatello has never used its storage right for irrigation or for its own municipal purposes.[13] Historically, since its inception, the storage right has always been used for rental or lease by others and more recently by the City of Pocatello to mitigate injury caused to seniors by its own municipal rights. Counsel for the Burley Irrigation District represented at oral argument that the City of Pocatello's storage rights have not been subject to the last-to-fill rule when any of the water has been used to mitigate for its own municipal rights. Apparently, this is the case even when the City elects to participate in the Rental Pool and places all its storage rights in the Rental Pool. Consequently, it begs the question of what is the scope of authorized use for the City's storage right? And that issue is not before the Court in this proceeding. However, while resolution of the issue of the City's authorized uses may need to be resolved in

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[11] How much effect remains unclear. For example, paragraphs 16(a) and (b) of the City of Pocatello's contract, which expressly purport to be self-executing provisions to mitigate injury caused by the City of Pocatello's municipal rights, have never been given effect. Counsel for the City of Pocatello represented at oral argument that its storage rights have not been administered to mitigate for or avoid injury to senior rights. Instead, the City of Pocatello has been subject to a delivery call under the Rules of Conjunctive Management and has provided its storage water through a mitigation plan approved by the Director. As a practical matter, the Rules of Conjunctive Management have superseded paragraphs 16(a) and (b). Paragraph 17 provides that "the provisions of article (paragraph) 16 shall govern as to the rights of water" until such time as the City constructs facilities allowing for direct delivery from the Snake River. That raises the question of how this process affects the purpose of use of the City's storage right.

[12] The partial decree issued for the storage right does not address the purposes of use at issue.

[13] Paragraph 17 of the contract acknowledges that at some point in the future the City of Pocatello may have the infrastructure to divert directly from the Snake River thereby allowing it to use its storage right for its own municipal purposes. That raises the question of whether the City would have to go through a transfer proceeding to accomplish this purpose. Also, although the decree is for an irrigation purpose of use, the contract acknowledges that the storage right would be used to credit other spaceholders' rights (irrigation rights per the decree) for any infringement caused by the City's use of its municipal rights.

an "as-applied" constitutional challenge, the Court finds it is not required to resolve the "facial" constitutional challenge issue here.

For the reasons set forth herein, the Court finds the City of Pocatello has failed to establish that no set of circumstances exists under which the application of the last-to-fill provision would be constitutionally valid. It follows the Defendants' Cross Motion for Summary Judgment on this issue must be granted.

C. The City of Pocatello failed to exhaust administrative remedies on its unconstitutional takings claims and related damages claims.

The City's Amended Complaint contains a damages claim against the Defendants seeking in excess of $50,000 resulting from the alleged unconstitutional takings of its Storage Water. The City alleges the takings occurred over a period of years with the first occurrence resulting in damages taking place in 2008. The Defendants argue the City is barred from asserting damages here as a matter of law on the basis it failed to exhaust its administrative remedies.

The doctrine of exhaustion generally requires "that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act." *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004); I.C. § 67-5271(1). Idaho Code § 67-5270 provides for a right of judicial review of an agency action. An "agency action" is defined in part as "an agency's performance of, or failure to perform, any duty placed on it by law." I.C. § 67-5201(4). However, "a person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies . . . ." I.C. § 67-5271(1).

In this case, the Director has a clear legal duty to distribute water. I.C. § 42-602. The Director may carry out this duty through agents, such as the Water District 01 Watermaster. I.C. § 42-605. Each year, the Watermaster allocates water to the various storage accounts within Palisades Reservoir. To do so, the Watermaster utilizes a preliminary accounting followed by a final accounting of storage. A final storage report is then prepared including "all storage rentals and adjustments combined with the final storage allocations and final storage uses from the final water right accounting." *Concepts, Practices, and Procedures Used to Distribute Water Within Water District #1*, p.148, Tony Olenichak (April 14, 2023).

The Court finds the annual allocation of storage as set forth in the final storage report constitutes an action of the Director. If the City of Pocatello was aggrieved by any of the previous annual storage allocations, it was required to timely file a written petition with the Director stating the grounds for contesting his action and requesting a hearing under Idaho Code § 42-1701A(3):

> Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and 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 shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

I.C. § 42-1701A(3). Such a written petition was required to be filed within fifteen (15) days following the City's actual notice of any annual final storage report applying the last-to-fill procedure to its storage allocation. *Id.*

The Court finds the City had an administrative remedy available to it under Idaho Code § 42-1701A(3) in any previous year where it was aggrieved by the application of the last-to-fill provision to the Storage Water in the final storage report. The record establishes this administrative remedy has not been exhausted by the City. The policy considerations underlying the doctrine of exhaustion require that the Director be given the opportunity to address the issues raised by the City of Pocatello pertaining to his allocation of storage prior to this Court. It is the Director and his agency that must develop the factual and evidentiary record on this issue. Both the Idaho Supreme Court and the U.S. Supreme Court have instructed that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *See e.g., Regan*, 140 Idaho at 725, 100 P.3d at 619 (citing *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106, 111 (1973)). Since there has been no administrative hearing or proceeding before the Director at this time pertaining to

his allocation of storage in Palisades Reservoir in any given year, there is no factual or evidentiary record for the Court to review.

The City argues that it need not exhaust administrative remedies where the agency has acted outside of it authority. For the reasons set forth herein, the Court finds this exception does not apply because the Court has not found the Defendants have acted outside of their authority. Since the City has an adequate administrative remedy available to it which has not been exhausted, its unconstitutional takings claims and related damages claims must be dismissed. *See e.g., Regan*, 140 Idaho at 724, 100 P.3d at 618 ("if a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted"). It follows the Defendants' Cross-Motion for Summary Judgment must be granted on this issue.

IV.

ORDER

THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The City of Pocatello's Motion for Partial Summary Judgment is hereby denied.
2. The Defendants' Cross-Motion for Summary Judgment is hereby granted.

IT IS SO ORDERED.

Dated 1/10/24 .

ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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Dated: 1/10/2024 10:41 AM

Clerk of the Court

By Pam Schulz
Deputy Clerk
Pam Schulz