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Fifth Judicial District, Twin Falls County
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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, CITY OF WENDELL, BURLEY IRRIGATION DISTRICT, FREMONT-MADISON IRRIGATION DISTRICT, and IDAHO IRRIGATION DISTRICT, Intervenors.	Case No. **CV42-23-1668** **CITY OF POCATELLO'S RESPONSE TO STATE OF IDAHO'S CROSS-MOTION FOR 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 responds to the *State of Idaho's Cross-Motion for Summary Judgment* as follows.

INTRODUCTION

Pocatello filed its *Motion for Partial Summary Judgment* ("Motion"), along with its *Memorandum in Support of City of Pocatello's Motion for Partial Summary Judgment* ("Pocatello's Memo") and *Affidavit of Maximilian C. Bricker in Support of Pocatello's Motion for Partial Summary Judgment* ("Bricker Aff.") on October 17, 2023. The *Motion* requested that the Court enter judgment as a matter of law, in favor of Pocatello, on all issues in this matter except for damages associated with the taking claims, which would be determined at trial. *See Pocatello's Memo* at 3.

The State of Idaho ("State") filed its *Cross-Motion for Summary Judgment* ("Cross-Motion"), along with its *Memorandum in Support of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Partial Summary Judgment* ("State's Memo"), *Affidavit of Anthony S. Olenichak in Support of State of Idaho's Cross Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment* ("Olenichak Aff."), and *Affidavit Ann N. Yribar in Support of Idaho's Cross Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment* ("Yribar Aff.") on November 2, 2023. The *Cross-Motion* requested that the Court "grant judgment as a matter of law dismissing all the City of Pocatello's causes of action." *Id.* at 3.

A hearing on the motions is set for November 30, 2023, at 9:00 am.

STANDARD OF REVIEW

"The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). "Where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment." *Papin v. Papin*, 166 Idaho 9, 19 (2019) (citations omitted). The filing of cross-motions for summary judgment does not change the applicable standard of review, and courts "must evaluate each party's motion on its own merits." *Borley v. Smith*, 149 Idaho 171, 176 (2010). "When an action will be tried before a court without a jury, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts." *Nelsen v. Nelsen*, 170 Idaho 102, 122 (2022) (citations omitted). Doing so "is permissible because the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial." *Id.*

ARGUMENT

I. With One Exception, the State's "Undisputed Facts" are Not Facts, Not Disputed, Or Not Relevant

A. The Court Should Strike, or Alternatively, Disregard, the *Yribar Aff.* Because It Fails to Meet the Requirements of I.R.C.P. 56(c)(4).

The *Yribar Aff.* fails to meet the requirements of I.R.C.P. 56(c)(4), which provides, in pertinent part: "[a]n affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Ms. Yribar's affidavit is not made on

personal knowledge, sets out inadmissible facts, and shows that she is not competent to testify on the matters stated.

Ms. Yribar's affidavit is not based on personal knowledge, but "based on my personal knowledge in my position as counsel for the IWRB." *Yribar Aff.* at ¶ 2. The intent seems to be that as counsel for IWRB the testimony is based on "insider knowledge," but her testimony is made without supporting evidence, *id.* at ¶¶ 3-4, rendering her statements conclusory. *Eldridge v. West*, 166 Idaho 303, 311 (2020) ("A statement is conclusory if it does not contain supporting evidence for its assertion"). The affidavit describes the process by which the Procedures are prepared and adopted, *Yribar Aff.* at ¶¶ 5-12, without any indication of personal involvement in, or direct observation of, the process. The only reasonable inference is that these statements are based on hearsay and thus inadmissible.[1] *Cates v. Albertson's*, 126 Idaho 1030, 1034 (1995) (disregarding attorney's affidavit that was not demonstrated to be based on personal knowledge or competence); *see also Camp v. Jiminez*, 107 Idaho 878, 882 (Ct. App. 1984) ("affidavits of counsel based upon hearsay rather than upon personal knowledge, are insufficient to raise genuine issues of fact.").

In Idaho it is routine for attorneys to offer affidavits on the authenticity of documents. *see Thornton v. Pandrea*, 161 Idaho 301, 307 (2016) (using attorney's affidavit to certify documents); *Grenader v. Spitz*, 390 F. Supp. 1112, 1116 (S.D.N.Y. 1975),[2] *rev'd on other grounds*, 537 F.2d 612 (2d Cir. 1976). However, the Yribar Affidavit goes beyond this and offers testimony about the nature of rental pool procedures in various basin across Idaho and the

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[1] Or else based on attorney-client privileged information, which would also be inadmissible.

[2] "[I]t is permissible, though not advisable, for an attorney to present his own affidavit in support of a motion for summary judgment." "The inappropriateness of an attorney submitting an affidavit in support of a summary judgment motion is abundantly clear . . . where plaintiffs' attorney's affidavit occasionally strays from a recitation of the facts to engage in argumentation and citation of legal authorities." *Id.* at 1120 n.7.

Water District 01 (“WD01”) process to promulgate its Rental Pool Procedures (“Procedures), calling into question her ability to serve as counsel for the State while also being a potential fact witness. *Sutton v. Brown*, 85 Idaho 104, 107-08 (1962),[3] *Frantz v. Hawley Troxell Ennis & Hawley LLP*, 161 Idaho 60, 63 (2016).[4]

Based on the foregoing, Ms. Yribar’s affidavit should be stricken or disregarded in its entirety. *Dep’t of Fin., Sec. Bureau v. Zarinegar*, 167 Idaho 611, 626 (2020) (“The requirements set forth in I.R.C.P. 56(c)(4) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge”) (citations and quotations omitted). Further, Pocatello reserves the right to call Ms. Yribar as a witness on the matters to which she testified, should the need arise.

B. ”Undisputed Facts” that are Either Irrelevant or Legal Argument.

In the category of “Undisputed Facts” that are irrelevant (or possibly not even factual), the State describes the uses of water rented pursuant to the WD01 Procedures, including the statement that “participants [sic] contributions also ensure an adequate water supply to meet the terms of certain settlement agreements, including the Nez Perce Agreement . . . .” *State’s Memo* at 8. Regardless of whether this statement is true or not, and regardless of whether the Procedures assist WD01 (or certain users) in meeting important obligations, this alleged fact has no bearing on whether the Procedures are “rules” under the Idaho APA or whether the Last to Fill Rule is facially consistent with prior appropriation.

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[3] “[W]e consider it prudent to call attention to the possibility of an attorney, [who has filed an affidavit in support of summary judgment briefing], being called to testify whereby his right to conduct the trial of his client’s case, after appearing as a witness, may be questioned.”

[4] “[Idaho R. Prof. Conduct 3.7] prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness, subject to exceptions that do not apply in this case.”

In the category of "Undisputed Facts" that are actually legal argument is the assertion that Last to Fill procedures "ensure the operation of a local rental pool cannot cause injury to other water users. IDAPA 37.02.03.040.01.h." *State's Memo* at 10. This statement mirrors several arguments the State asserts within its "Argument" section. *See, e.g., id.* at 15 ("The Last to Fill procedures . . . are an interpretation of the rule's requirement that the procedures provide for 'prevention of injury to other water rights.' IDAPA 37.02.03.040.01.h"). Pocatello responds to this legal argument *infra* at II.B., and objects to the State including such legal argument in the "Undisputed Facts" section.

C. Facts That Are *Not* in Dispute.

The State does not identify specific facts in Pocatello's "Undisputed Facts" section that it disputes, and thus such facts are presumably "undisputed." In numerous instances, Pocatello's Undisputed Facts were drawn in part from admissions in the State's *Amended Answer to Complaint*, *see, e.g.*, *Pocatello's Memorandum* ¶¶ 4-7, 18-19, and thus cannot be reasonably disputed.[5] Significantly, the State does not dispute ¶¶ 18-22 in Pocatello's Undisputed Facts that detail IDWR's allocation of storage water as between Rental Pool participants and non-participants. *Id.* at 7-8. These undisputed facts demonstrate that the application of the Procedures impacts property rights of all spaceholders, whether or not they participate in the Rental Pool: non-participants may receive allocations of storage water they otherwise would not have; participants may not receive the allocations of storage water they would have in the absence of Procedure 7.0, *et seq*. *See id.*, ¶¶ 18-22; *Affidavit of Adelheid M. Netter, P.H., in*

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[5] In other instances, the content is similar or identical, so the facts are not in dispute (*see, e.g.,* facts related to the adoption of the Water District 01 Rental Pool Procedures, which are dealt with more extensively in Pocatello's *Am. Compl.* at ¶ 55and the State's *Am. Answer to Compl.* at ¶ 55).

Support of Pocatello's Response to State of Idaho's Cross-Motion for Summary Judgment ("Netter Aff.") at ¶ 10.

D. Facts That *Are* in Dispute.

The State offers the testimony of WD01 Watermaster Tony Olenichak for the proposition that spaceholders "opt in" to the Rental Pool and this opting-in renders the Procedures "voluntary." *See Olenichak Aff.* at ¶ 6. Pocatello's legal argument related to this issue is contained *infra* at sections II.A. and V., but Pocatello disputes the "voluntary" idea from a factual perspective as well. The Procedures apply to *all* WD01 spaceholders[6] but impact the spaceholders who "opt in" to the Rental Pool differently than those who opt out (i.e., non-participants). *See Netter Aff.* at ¶¶ 8, 10. This is consistent with Pocatello's Undisputed Facts ¶¶ 18-22, which demonstrate the concrete impact from the application of Procedure 7.3 on spaceholders. Moreover, on the issue of voluntariness, Mr. Olenichak contradicts himself.[7] *Netter Aff.* at ¶¶ 11-12.

II. The State's Argument that the Procedures are not Rules is Meritless

A. The Procedures Apply to All Spaceholders.

WD01 storage water contract holders ("spaceholders") are the "class of persons," to whom the Procedures apply. *Pizzuto v. Idaho Dept. of Correction*, 170 Idaho 94, 97 (2022) (*Pizzuto*). *Any* spaceholder who desires to supply water to another water user, whether by leasing to an individual lessee or renting through one of the various "pools"[8], must abide by the

[6] In fact, the Procedures regulate all leasing and rental *activity* related to storage water in the Upper Snake, so in that respect also apply to non-spaceholders in terms of regulating whether or not an individual or entity can rent water.

[7] *Compare Olenichak Aff.* at ¶ 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.") *with id.* at ¶ 27 ("Junior and non-participating spaceholder allocations are protected by the Last to Fill Procedure."); *see also, id.*at ¶ 22.

[8] *See Am. Compl.*, Ex. 4, at ¶ 5.0 (Common Pool), ¶ 8.0 (Supplemental Pool), ¶ 10.0 (Assignment Pool), ¶ 11.0 (Extraordinary Circumstances Pool).

Procedures. *See Netter Aff.* at ¶ 8; *Am. Compl.*, Ex. 4, at ¶ 4.3 (Spaceholders must use certain forms and meet certain deadlines to lease storage water); *id.* at ¶ 5.2.101 (Spaceholders must opt-in by March 15 to participate in the Rental Pool). In other words, the Procedures regulate participating spaceholders' conduct.

The Procedures also regulate *non*-participating spaceholders' conduct by precluding them from renting or leasing their storage water; absent the Procedures, there are no other statutes or "rules" that impose such a regulation. *See Am. Compl.*, Ex. 4, at ¶ 5.2.102 ("Spaceholders who are not participants shall not be entitled to supply storage to, or rent storage from, the common pool."); *id.* at ¶ 6.1 ("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."). And, contrary to Mr. Olenichak's sworn testimony, *Olenichak Aff.* at ¶ 6, the WD01 Watermaster's allocation of accrued storage to non-participants is affected by the Procedures. *See Netter Aff.* at ¶¶ 6, 10, 12; *see also Olenichak Aff.* at ¶¶ 21-22, 27-29. Even the titles of individual Procedures demonstrate that the Procedures, as a whole, apply to *all* WD01 spaceholders—whether they opt-in to the Rental Pool or not. *See, e.g.*, Am. Compl., Ex. 4,at ¶ 7.4 (entitled "Impacts to non-participants resulting from common pool rentals").

Thus, the Procedures are IWRB's statements of "general applicability" that IDWR "appl[ies] uniformly" to WD01 spaceholders regardless of the nature of their participation in the Rental Pool. *Pizzuto*, 170 Idaho at 97. Indeed, the Procedures do not grant the Watermaster discretion to not apply them, or to apply them on a case-by-case basis, against non-participants, but ministerially obligate him to apply them generally. *See id.* ("Case-by-case decisions are axiomatically not 'statements of general applicability'; they are the hallmark of executive

discretion."); *Am. Compl.*, Ex. 4, at ¶ 4.1 ("The Watermaster shall serve as the manager of the rental pool and shall administer the rental pool consistent with these procedures") (emphasis added); *id.* at ¶ 5.2.102 (Non-participants "shall not be entitled to supply storage to, or rent storage from, the common pool") (emphasis added); *id.* at ¶ 6.1 ("All leases must be transacted through the rental pool") (emphasis added). The fact that the Procedures impact participating spaceholders differently than non-participating spaceholders does not render the Procedures "generally inapplicable." The Court should reject the State's argument that voluntary participation in a "course of conduct," *Pizzuto*, 170 Idaho at 97, renders agency statements to be something other than "rules."

B. The Procedures are Not Merely "Interpretations" of Existing IWRB Rules.

If the Procedures are not "rules"—what are they? The State argues they are an exception to the Idaho Administrative Code ("IDAPA") definition of a "rule," specifically "written statements given by an agency that pertain to an interpretation of a rule or to the documentation of compliance with a rule." Idaho Code § 67-5201(24)(b)(iv). The State relies on the language of Idaho Code § 67-5201(24)(b)(iv) ("subsection (24)(b)(iv)") and *Sons and Daughters of Idaho, Inc. v. Idaho Lottery Comm'n*, 142 Idaho 659 (2006) (*Sons & Daughters*) to support the proposition that "each basin's local rental pool committee interprets the criteria of IDAPA 37.02.03.040.01.a-k to suit the specific needs of that basin". *State's Memo* at 15. This argument lacks merit on many fronts and if adopted, would effectively swallow the Idaho APA definition of a "rule."

First, the exception under subsection (24)(b)(iv) does not authorize ancillary, non-agency actors (i.e., local rental pool committees, who only have statutory authority to "*market* stored water" under Idaho Code § 42-1765(a)) to interpret IWRB's rules "to suit the specific needs of

[each] basin." *State's Memo* at 15. Under this approach, state agencies could adopt an aspirational rule and then let individual, non-agency actors in each area of the state "interpret" the rule to "suit the needs" of each area.

Second, the Procedures do not purport to interpret agency rules—they *are* the rules under which WD01 spaceholders can rent or lease their storage water to others. *See, e.g.*, Am. Compl., Ex. 4 at ¶ 3.1 (The "primary purpose" of the Procedures is to "provide supplemental irrigation water to spaceholders for the irrigation of District land with an existing primary irrigation water right and to maintain a rental pool . . ."). Under Idaho Code § 67-5201(24), a "rule" is an "[a]gency statement of general applicability that . . . implements, interprets, enforces, or prescribes: (a) Law; or (b) the procedure or practice requirements of an agency." The Procedures are *the* statements that prescribe the procedure that the Watermaster must follow when distributing storage water to spaceholders, *see Am. Compl.*, Ex. 4, at ¶ 4.1; *Am. Answer to Compl.* at ¶ 60, and prescribe the prohibition that WD01 spaceholders cannot rent or lease their storage water if they do not participate in the Rental Pool. *See Am. Compl.*, Ex. 4, at ¶ 5.2.102; *id.* at ¶ 6.1. There is no other statute or "rule" that does so.

Turning to the specific example the State raises[9], it argues that Procedure 7.3, the Last to Fill Rule, is merely an "interpretation" of IDAPA, 37.02.03.040.01(h) ("Rule 40.01(h)"), which provides that any local committee Procedures must "prevent[ ] injury to other water rights". But Procedure 7.3 does more than "interpret" the pre-existing "rule" that the Procedures must prevent injury; it is a new and original statement that implements the direction of Rule 40.01(h) by dictating how the Watermaster distributes storage water to spaceholders. *See Am. Compl.*, Ex. 4,

[9] It isn't clear if the State is arguing that the Procedures *are* rules but only that Rule 7.3, the Last to Fill Rule, is a "written statement given by the agency of an existing rule," or if the State is arguing that *all* the Procedures are "written statements given the agency of an existing rule." Either way the argument fails.

at ¶ 4.1; *Am. Answer to Compl.* at ¶ 60. Further, the Procedures "have the force and effect of law," and "are binding both on" WD01 spaceholders and the Watermaster. *Pizzuto*, 170 Idaho at 97; *cf. Mem. in Supp. of Spaceholders' Mot. to Intervene* at 3 ("Any change to [the Last Fill Rule] or voidance of [the Last to Fill Rule], therefore, necessarily has the potential to . . . impact the Spaceholders' allocations in 2023 and in the future . . ."); *id.* at 8 ("[t]he Spaceholders' water rights, and the procedures governing how those water rights are administered, will be directly affected by this action").

The State's reliance on *Sons & Daughters* does not help their argument. *Sons & Daughters* considered, *inter alia,* whether a "Gaming Update" issued by the Lottery Commission, which included direction to "bingo operators to keep track of the prices charged for the bingo papers" was an improperly promulgated rule or, as argued by the State, a "written statement interpreting agency rules" within the then-adopted exceptions to "rules" under the IDAPA. 142 Idaho at 663. The Idaho Supreme Court adopted the State's arguments, finding that the Gaming Update "does nothing more than explain a rule" related to record-keeping by bingo parlor operators.

In reaching its decision, the *Sons & Daughters* Court relied on two factors from *Asarco Inc. v. State*, 138 Idaho 719 (2003) (*Asarco*), specifically that the Gaming Update did not "prescribe[] a legal standard or directive not otherwise provided by the enabling statute" nor did it "express an agency policy not previously expressed." *Id.* at 663-64. The *Asarco* factors, however, are no longer good law and cannot inform the State's arguments related to subsection (24)(b)(iv). *Pizzuto*, 170 Idaho at 99-100 (citing *Woodland Private Study Group v. State*, 533 A.2d 387 (N.J. 1987) ("The decision in *Asarco* was manifestly wrong to the extent it provided an incomplete definition of 'rule' and adopted the six factors from *Woodland Private Study Group*

to narrow that definition. Therefore, we abrogate these portions of *Asarco*."). To the extent *Sons & Daughters* remains valid law, the facts of that case are vastly distinct from the instant case—unlike the Gaming Update, the Procedures do much more than "explain" or "interpret" Rule 40.01(h), as argued above.

In sum, the State has not established that the Procedures fit within any of the exceptions to the definition of "rule" under Idaho Code § 67-5201(24)(b)(i)-(iv). The Procedure do "affect[] private rights of," or the "procedures available to" all WD01 spaceholders, Idaho Code § 67-5201(24)(b)(i), as they regulate spaceholders' ability to rent or lease stored water, and, for those who participate in the Rental Pool, they prescribe the process by which spaceholders go about leasing their water. *Netter Aff.* at ¶ 8; *Am. Compl.*, Ex. 4, at ¶ 4.1, ¶ 5.2.102, ¶ 6.1; *Am. Answer to Compl.* at ¶ 60.

III. The State's Argument that Pocatello is Barred from Bringing Suit under I.C. § 67-5278 Wrongly Assumes the Predicate.

It is not clear what the *State's Memo* argues on pages 15-17. The State must first demonstrate that the Procedures are not "rules"; if the Court determines the Procedures are not "rules," presumably it will deny Pocatello's claims for relief. However, as argued in *Pocatello's Memo* and herein, Pocatello can show that the Procedures interfere with, impair, or threaten to impair its legal rights or privileges. *See Pocatello's Memo* at 3 n.4 (WD01's Preliminary 2023 Storage Report indicates that the 2023 Procedures threaten to impair Pocatello's storage right if the Last to Fill Rule remains in effect by the time the Final Storage Report is issued).[10]

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[10] The State takes issue with Pocatello's mention of potential injury in 2023. *State's Memo* at 17 n.9. The State's concern—that Pocatello did not allege damages in 2023 in its complaint—has no bearing on the pending motions for summary judgment, as Pocatello has stated that damages are an issue of fact for trial in the Introduction, *supra*. Pocatello notes, however, that it has until March 15, 2023 to amend its claims. *See Scheduling Order* at 4.

IV. **<u>Pocatello Did Not Need to Exhaust Administrative Remedies</u>**

Pocatello did not need to exhaust administrative remedies prior to filing a complaint in this matter, as multiple exceptions to the exhaustion standard imposed by Idaho Code § 67-5271(1) apply.

First, Idaho Code § 67-5278 provides an exception to the rule requiring exhaustion of administrative remedies in order to seek declaratory judgment on a rule's validity. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 871 (2007). Pocatello's complaint alleges the Procedures are "rules", and if they are, the exception under Idaho Code § 67-5278 applies.

Further, a plaintiff need not exhaust administrative remedies "[w]hen the agency acted outside its authority." *Fuchs v. State, Dep't of Ida. State Police*, 152 Idaho 626, 630 (2012) (citations omitted). Here, it is undisputed that: IWRB lacks the authority to delegate rulemaking authority to the Committee of Nine, *Am. Answer* at ¶ 42; the Committee of Nine lacks authority to adopt "rules," *id.* at ¶ 44; and the Watermaster's distribution of storage water pursuant to the Last to Fill Rule reallocates water to non-leasing spaceholders in a manner inconsistent with the prior appropriation doctrine. *Pocatello's Memo* at 7 (¶¶ 19-20); *but see* Idaho Code § 42-607 ("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"); *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"). This exception to the exhaustion rule applies here.

Another exception to exhaustion applies occurs when no effective administrative remedies exist. *See Doe v. State*, 158 Idaho 778, 782 (2015) ("Inadequate remedies are an exception to the general exhaustion of remedies requirement. . . . And, failure to exhaust administrative remedies is not a bar to litigation when there are no remedies to exhaust.") (quotations and citation omitted). Spaceholders receive no notice of when the Watermaster redistributes newly accrued storage pursuant to the Last to Fill Rule. Further, the redistribution occurs "on paper" as an accounting exercise, *see Am. Answer* at ¶ 60. No spaceholder is made aware of the date on which the Watermaster sits down to calculate storage allocations. Accordingly, Pocatello lacked available administrative remedies, so it was not barred from filing suit.

In sum, Pocatello meets multiple exceptions to the rule requiring administrative exhaustion, so the Court should reject the State's arguments on this point.

V. The State Cannot Avoid the Constitutional Problems with the Last To Fill Rule By Alleging Voluntary Subordination

The heading of Section 4 of the *State's Memo* argues that "the Water District 01 Rental Pool Procedures are Not Facially Unconstitutional." *Id.* at 20. To clarify, Pocatello is not asserting that the entirety of the Procedures are unconstitutional, just the Last to Fill Rule. *See Motion* at 3. The State argues that the Last to Fill Rule does not violate Idaho's constitution because voluntary subordination agreements have been upheld as lawful, relying on the Swan Falls agreement in which Idaho Power Company ("IPC") voluntarily subordinated its hydropower rights as an element of settling a dispute with the State of Idaho. *State's Memo* at 20. The comparison is inapposite: the application of the Procedures to WD01 spaceholders is distinguishable from IPC's Swan Falls Agreement.

First, while Pocatello does participate in the Rental Pool, it only does so because it must if it wants to rent or lease its stored water. *See Am. Compl.*, Ex. 4, at ¶ 5.2.102, ¶ 6.1. It is more apt to classify Pocatello's participation as *in*voluntary, as the Procedures otherwise preclude Pocatello from leasing stored water, a right that Pocatello otherwise possesses.

Second, the State's comparison of Pocatello's participation in the Rental Pool to the Swan Falls Agreement is ill-fitting. The Swan Falls Agreement was a subordination agreement between a single water user, IPC, and the State of Idaho, through the Governor and Attorney General, negotiated over many months.[11] Under the Swan Falls Agreement, IPC voluntarily agreed to subordinate its hydropower rights to water rights after October 1, 1984 in perpetuity.[12]

In contrast, Pocatello has not negotiated anything—instead, the Committee of Nine, through the IWRB, unilaterally imposes the Last to Fill Rule on WD01 spaceholders, including Pocatello, as a condition of spaceholders leasing their storage water. Unlike the permanent subordination of IPC's hydropower rights, the Last to Fill Rule temporarily subordinates the rights of spaceholders who leased water to the rights of spaceholders who did not lease water, and only when certain conditions are met (i.e., it is highly variable). *See, e.g., Am. Answer* at ¶ 35.

In sum, Pocatello's involuntary participation in the Rental Pool does not validate the constitutionality of the Last to Fill Rule.

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[11] Clive J. Strong, Michael C. Orr, *Understanding the 1984 Swan Falls Settlement*, 52 IDAHO L. REV. 223, 224 (2016).

[12] *Id.* at 275 ("The proposed partial decrees also fully subordinated the hydropower water rights to 'water rights of those persons who beneficially used water prior to October 1, 1984' if an application or claim for such use had been filed 'by June 30, 1985.'")

VI. The State's Argument that IDWR's Application of the Last to Fill Rule is not a Taking, Because Pocatello does not Own the Land, is Contrary to U.S. Supreme Court Law

The State refutes Pocatello's taking claim, arguing that "the concept of physical taking is not applicable" because Pocatello does not own the land underlying Palisades Reservoir. *State's Memo* at 21. Physical takings, however, apply to more than just land—they can also apply to airspace, *Goodman v. United States*, 100 Fed. Cl. 289, 303 (2011) (citing *United States v. Causby*, 328 U.S. 256, 266 (1946)) and water rights. *See Tulare Lake Basin v. United States*, 49 Fed. Cl. 313, 319 (2001) (citing *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931)). Accordingly, the State's argument that Pocatello does not have a protectable land interest is inapposite. *Dugan v. Rank*, 372 U.S. 609, 625 (1963) ("A seizure of water rights need not necessarily be a physical invasion of land."). Pocatello is therefore entitled to just compensation for the State's taking of its storage right in Palisades Reservoir through IDWR's applications of the Last to Fill Rule. *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). Finally, Pocatello has already addressed the State's argument regarding Pocatello's alleged voluntary agreement to have its storage right subordinated *supra*.

In sum, the State's argument that Pocatello cannot successfully bring a physical taking claim, because its land is not being invaded, disregards contrary holdings by the U.S. Supreme Court.

CONCLUSION

Therefore, Pocatello requests that the Court DENY the State's *Cross-Motion* and GRANT Pocatello's *Motion*.

Respectfully submitted this 16th of November 2023.

SOMACH SIMMONS & DUNN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 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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