

I.

BACKGROUND

A. Water Right 01-2068 license and 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. The permit for water right 01-2068 was issued by the Idaho Department of Water Resources ("Department") to the U.S. Bureau of Reclamation in 1939. Construction of Palisades Dam and Reservoir subsequently began and was finished in the late 1950s.

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 Palisades Reservoir under water right 01-2068. R., 72. As to Pocatello's use of that storage water, the preamble to the contract provides in 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 50,000 acre-feet of active capacity in Palisades Reservoir will furnish such appropriate equivalent volume.;

R., 75. Thereafter, the provisions of the contract provide 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.

....

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.

R., 96-98. The Court will refer to Pocatello's 50,000 acre-feet of contracted storage water herein as the "Storage Water." As a result of the contract, Pocatello is a spaceholder within Palisades Reservoir and holds title to the use of the Storage Water under water right 01-2068. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007).

The license for water right 01-2068 was issued by the Department on March 19, 1973.¹ It was issued with a July 28, 1939, priority date. The license authorized the diversion of 1,200,000 acre-feet annually for year-round storage for irrigation and power generation.

¹ In a footnote in its opening brief, the City of Pocatello includes a link to an electronic copy of the license issued for water right 01-2068 on the Department's website. In that footnote, the City requests the Court take judicial notice of the license. The Court in an exercise of its discretion will take judicial notice of the license on the basis it is generally known within the trial court's territorial jurisdiction and can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned (i.e., the Idaho Department of Water Resources data base).

B. Water Right 01-2068 partial decree.

Water Right 01-2068 was claimed by the United States in the Snake River Basin Adjudication (“SRBA”). The partial decree for water right 01-2068 was issued on August 17, 2016.² It 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.

An issue arose in the SRBA as to the ownership of water rights in federal reservoirs authorized and developed in Idaho pursuant to the Reclamation Act of 1902. One question was whether the entity that applies the water to beneficial use has an interest in those water rights that is more than a contractual right. The Idaho Supreme Court answered that question in the affirmative. *United States v. Pioneer Irr., Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). It held “it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right.” *Id.* The Idaho Supreme Court summed up its holding in this respect in the following remark that is included on such water rights, including water right 01-2068:

The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

Id. at 115, 157 P.3d at 609. The Court will refer to this remark as the “Pioneer Remark.”

Therefore, although the United States appears in the name and address section of the partial decree issued for water right 01-2068, Pocatello is a spaceholder within Palisades Reservoir and holds title to the use of the Storage Water under water right 01-2068. *Id.*

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

C. Last-to-fill rule.

Palisades Reservoir is located within Water District 01. Water District 01 is “an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho.” I.C. § 42-604. Water District 01 regulates the diversions from the Snake River and its tributaries in the Upper Snake River Basin. It also regulates the storage and delivery of storage water from Palisades Reservoir.

Each year, the water users in Water District 01 elect a water district advisory committee made up of nine members. I.C. § 42-605(6). This committee is referred to as the Committee of Nine. Among other things, the Committee of Nine serves as the local committee to facilitate the rental of stored water through the Water District 01 Rental Pool.³ The Committee of Nine 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 Idaho Water Resource Board. Among other things, they set forth procedures for supplying storage water to, and renting stored water from, the Water District 01 Rental Pool.

In 2005, the following rule was implemented in Water District 01 through the Rental Pool Procedures:

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 allocate 100% fill to all system spaceholders, allocations to lessors’, assignors’, and other space shall occur in the following priorities:

³ 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 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”).

- (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.

R., 317. The Court will refer to this rule herein as the “last-to-fill rule.” Under this rule, all water rights placed into the Rental Pool become last-to-fill in the following year.

D. The City of Pocatello's facial challenge to the “last-to-fill rule.”

In 2023, Pocatello filed a Complaint in Twin Falls County Case CV42-23-1668 against the Department. Pocatello sought a ruling that the last-to-fill rule is facially unconstitutional. The Court determined Pocatello failed to establish that no set of circumstances exists under which the application of the last-to-fill rule would be constitutionally valid. *Amended Order on Cross Motions for Summary Judgment*, CV42-23-1668, pp.14-16 (Jan. 10, 2024). It therefore denied the facial challenge. *Id.*

E. Application of the last-to-fill rule to Pocatello's storage water in 2023 and underlying administrative proceeding.

Pocatello participated in the Water District 01 Rental Pool in 2022 and 2023 to rent its Storage Water. R., 889. In 2022, Pocatello rented 6,290.2 acre-feet of its Storage Water to American Falls Reservoir District #2 (“AFRD#2”). R., 889. Water District 01 applied the last-to-fill rule to 2,396 acre-feet of the 6,290.2 acre-feet of the Storage Water Pocatello rented to AFRD#2. R., 254. Because of a limited water supply in 2023, “there was no water available to fill any of the space designated as last-to-fill.” R., 891. As a result, the 2,396 acre-feet of

Pocatello's Storage Water designated by Water District 01 as last-to-fill did not receive any fill in 2023. *Id.*

On April 25, 2024, Pocatello requested a hearing before the Department regarding Water District 01's 2023 Storage Report. R., 1. The Director granted Pocatello's request resulting in a contested case proceeding. R., 17. The Director appointed Department employee James Cefalo as the hearing officer in the matter. R., 17. The Burley Irrigation District, Fremont-Madison Irrigation District, and Idaho Irrigation District were subsequently permitted to intervene. R., 29. On February 18, 2025, Pocatello filed a Motion for Summary Judgment. R., 44. The Spaceholders opposed the Motion.

On September 3, 2025, the hearing officer issued a Preliminary Order Denying Motion for Summary Judgment and Upholding Action ("Final Order"). R., 881. The Final Order denied Pocatello's Motion for Summary Judgment, upheld Water District 01's application of the last-to-fill rule against 2,396 acre-feet of Pocatello's space in Palisades Reservoir in 2023 and dismissed the contested case. R., 905. On October 15, 2025, Pocatello filed a Petition seeking judicial review of the Final Order. The Petition asserts the Final Order is contrary to law and requests that it be set aside. The Intervenors were subsequently permitted to appear as parties. The parties submitted briefing on the issues raised on judicial review and a hearing on the Petition was held before the Court on April 30, 2025.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4).

Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III. ANALYSIS

The Court addressed the last-to-fill rule in CV42-23-1668. The Court stated that the Water District 01 Rental Pool provides an avenue to a water right holder to use water in a manner that is not otherwise authorized under his water right. *Amended Order on Cross Motions for Summary Judgment*, CV42-23-1668, p.14 (Jan. 10, 2024). However, such an avenue 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 Court noted the Rental Pool Procedures for Water District 01 address injury by presuming it 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. *Amended Order on Cross Motions for Summary Judgment*, CV42-23-1668, p.14 (Jan. 10, 2024). 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. *Id.* The Court found this presumption is generally accurate and provided the following illustrative example:

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.⁴ 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.⁵ 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. 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 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.

Id. at 14-16. The Court thus found the last-to-fill rule is appropriately applied where water placed into the Rental Pool under a water right is used for purposes that are not authorized under the elements of the water right. *Id.*

⁴ 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).

⁵ 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"). This also comes with the right to make a delivery call against junior rights for injury to reasonable carryover.

In this case, Pocatello placed its Storage Water into the Rental Pool in 2022. Pocatello rented 6,290.2 acre-feet of its Storage Water to AFRD#2. AFRD#2 ultimately used the rented water for irrigation purposes within the boundaries of its service area. Pocatello asserts that renting its Storage Water to AFRD#2 in this manner is authorized under the plain language of water right 01-2068 and thus is not subject to the last-to-fill rule.⁶ It argues irrigation from storage is an authorized purpose of use under the partial decree. And, that AFRD#2's service area in the Counties of Gooding, Jerome, and Lincoln is an authorized place of use under the partial decree.

The Department disagrees. It asserts Pocatello's rental of Storage Water to AFRD#2 constituted a change in the place of use element of water right 01-2068. R., 894-899. It also asserts Pocatello's rental of Storage Water to AFRD#2 constituted a change in the purpose of use element of water right 01-2068, in that the Storage Water was actually used by Pocatello for a mitigation purpose of use. R., 899-901. For these reasons, the Department found the last-to-fill rule was appropriately applied to the rented Storage Water in 2023.

A. The Department's determination that Pocatello's rental of Storage Water to AFRD#2 in 2022 constituted a change in the place of use element of water right 01-2068 is affirmed.

The place of use element of water right 01-2068 provides in pertinent part as follows: "[p]lace of use for irrigation from storage is within the following counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, Teton, and Elmore." 2nd Amended Partial Decree Water Right 01-2068, Twin Falls County Case No. 39576, p.1 (Feb. 28, 2020). This place of use element is further informed by the Pioneer Remark, which is included in the "other provisions" section of the partial decree and provides as follows:

The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the

⁶ The Court notes Pocatello's argument is based on the plain language of the partial decree for water right 01-2068. Its argument does not implicate, or rely upon, its spaceholder contract with the USBOR. Before the Department, Pocatello asserted that "[t]he scope of a Spaceholder's authorized uses should be determined by reviewing the water right; only if the water right is silent on an element does the contract fill the gap." R., 56-58. Pocatello does not assert the partial decree is silent on any element relevant to its argument. The Court notes this argument differs from the arguments previously raised by Pocatello in Twin Falls County Case CV42-23-1668.

water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. *The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.*

2nd Amended Partial Decree, SRBA Subcase 01-2068 (Feb. 28, 2020) (emphasis added).

The language of the Pioneer Remark is clear. It establishes that while the consumers or users of water under water right 01-2068 have “title to the use of the water,” that interest is appurtenant to the lands served by such consumers or users.⁷ With respect to Pocatello, this is its municipal service area.⁸ Therefore, the Court finds the Department did not err in determining that the authorized place of use for Pocatello’s 50,000 acre-feet of Storage Water under water right 01-2068 is Pocatello’s municipal service area.

When Pocatello rented 6,290.2 acre-feet of its Storage Water to AFRD#2 in 2022, it is undisputed that water was beneficially used outside of Pocatello’s municipal service area. As a result, the water was used on a place of use not authorized under the elements of the water right.

⁷ The Idaho Supreme Court found it was unnecessary to specifically identify each consumer or user in the partial decrees issued in conjunction with the federal reservoir on the Boise River system. *Pioneer*, 144 Idaho at 115-116, 157 P.3d at 609-610. Nor did it find it necessary to specifically identify the quantity of water attributed to each consumer or user in the partial decrees. *Id.* The Pioneer Remark specifically provides that the allocation (quantity) of the 01-2068 right as between spaceholders is set forth in the contracts between the spaceholders and the USBOR. Along the same lines, the Idaho Supreme Court did not specifically identify the place of use of each consumer or user. Rather, it directed that “[t]he interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations.” *Id.* at 115, 157 P.3d at 609.

⁸ That the Pioneer Remark speaks in terms of “irrigation organizations” is a product of the SRBA subcases in which the *Pioneer* case arose. *Pioneer* involved water right claims for three federal reservoirs on the Boise River system: Arrowrock, Anderson Ranch, and Lucky Peak. *Id.* at 108, 157 P.3d at 602. The spaceholders in those reservoirs were irrigation organizations, and thus the Pioneer Remark speaks in terms of irrigation organizations. *Id.* The Pioneer Remark was subsequently included on the partial decree for water right 01-2068 as a result of the stipulation of the parties and report and recommendation of the Special Master in that subcase. *Unified Stipulation*, SRBA Subcase 01-2068 (Aug. 20, 2012); *Special Master Report and Recommendation*, SRBA Subcase 01-2068 (April 15, 2015) (The Court acknowledges that Pocatello was not a signatory to the stipulation.). Even though Pocatello is a municipality, and not an irrigation organization, the Court finds the intent of the Pioneer Remark with respect to place of use to be clear. The plain language of the Pioneer Remark establishes that while the consumers or users of the water under water right 01-2068 have “title to the use of the water,” that interest is appurtenant to the lands served by such consumers or users. Notably, the license issued for water right 01-2068 listed Pocatello as one of the “organizations.”

The last-to-fill rule was thus appropriately applied to prevent impermissible injury to the priority of junior water rights under Idaho law. It follows the Department's Final Order must be affirmed.

B. The Department's determination that Pocatello's rental of Storage Water to AFRD#2 in 2022 constituted a change in the purpose of use element of water right 01-2068 is affirmed.

The partial decree for water right 01-2068 authorizes four purposes of use: (1) irrigation storage; (2) irrigation from storage; (3) power storage; and (4) power from storage. The Department found Pocatello's rental of 6,290.2 acre-feet of its Storage Water to AFRD#2 in 2022 was done for a purpose of use not authorized under the decree – mitigation. R., 899-901. The Court finds the Department's finding in this respect to be supported by substantial and competent evidence in the record.

The record reflects that in 2019, various cities, including Pocatello, entered into a Settlement Agreement Between the Surface Water Coalition, Participating Members of Idaho Ground Water Appropriators, Inc. and Signatory Cities ("Final Settlement Agreement") with members of the Surface Water Coalition.⁹ R., 129. The Final Settlement Agreement was entered into in response to a delivery call filed by members of the Surface Water Coalition in 2005. Under that call, water rights held by Pocatello would, at times, be subject to curtailment if Pocatello did not participate in an approved mitigation plan. *See e.g.*, Final Order Curtailing Ground Water Rights Junior to October 11, 1900 (July 11, 2025).

On April 20, 2023, Pocatello and various other cities filed their 2022 Mitigation Report with the Department. R., 129. The report was filed to satisfy the requirements of the Final Settlement Agreement. R., 129. The report summarizes the "mitigation activities" of the cities as follows:

The terms of the Final Settlement Agreement obligate the Cities to supply mitigation water for aquifer enhancement or other mitigation activities ("Mitigation Obligation") averaging 7,650 af per year (af/y) on a five-year running average, with a minimum requirement to supply 1,000 af/y commencing January 1, 2019. The first compliance period will be assessed in 2024 for the period 2019-2023.

⁹ The term "Surface Water Coalition" refers collectively to the A&B Irrigation District, Burley Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

The Cities allocated the Mitigation Obligation amongst themselves on a basis that accounts for priority dates of each city's groundwater rights and average annual groundwater pumping. To satisfy the Mitigation Obligation, each City may lease water from Pocatello, Water District 01, or other suppliers, or supply mitigation arising from its own water supplies. While the original Final Settlement Agreement specified mitigation via aquifer enhancement projects consistent with paragraphs 11.A.2.a. and b. as means of mitigation, in August of 2022, due to the extraordinary drought, the parties to the Final Settlement Agreement executed an Agreement for Direct Delivery in Lieu of Aquifer Enhancement Activities (Direct Delivery Agreement). The Direct Delivery Agreement, attached as Exhibit 2, specifically allows the Cities to receive mitigation credits for water directly delivered to the Surface Water Coalition ("SWC").

In 2022, the Cities supplied **7,631.1 af** of mitigation water. As reflected in Exhibit 3, **6,290.2 af** of water was supplied directly to American Falls Reservoir District No. 2 ("AFRD #2") pursuant to the Direct Delivery Agreement. An additional **504 af** was recharged by the City of Idaho Falls and **475.7 af** was recharged by the City of Rexburg. Lastly, the City of Idaho Falls, by virtue of completing surface-to-groundwater conversion projects, mitigated an additional **361.2 af**. Table 2 reflects the breakdown of mitigation activities conducted using water leased from Pocatello and other users' own water supplies:

1. Pocatello and other Cities. Direct delivery to AFRD #2 of Pocatello's Palisades Reservoir storage water.
 - a. The assignment of **6,290.2 af** of Pocatello's Palisades Reservoir storage water was provided directly to AFRD #2 to satisfy a portion of the Mitigation Obligation.

R., 129-130.

The 2022 Mitigation Report establishes Pocatello's rental of 6,290.2 acre-feet of its Storage Water to AFRD#2 in 2022 was done to satisfy its mitigation obligation to the Surface Water Coalition under the Final Settlement Agreement. That is, the water was provided to AFRD#2 for a mitigation purpose of use – i.e, to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water by the holders of junior water rights. *See e.g.*, Idaho Code § 42-5201(13) & IDAPA 37.03.11.010.15.

The Court notes that "mitigation" is a recognized beneficial use of water under Idaho law. *See e.g.*, Idaho Code § 42-223(10) ("No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for mitigation purposes . . ."). In *North Snake Ground Water District v. IDWR*, 160 Idaho 518, 526-527, 376 P.3d 722, 730-731

(2016), the Idaho Supreme Court specifically held that mitigation is a recognized beneficial use of water.

Indeed, Pocatello sought a mitigation purpose of use for water right 01-2068 in the SRBA and was unsuccessful. In the SRBA, the United States filed a notice of claim for water right 01-2068 asserting the following four purposes of use: (1) irrigation storage; (2) irrigation from storage; (3) power storage; and (4) power from storage. Amended Notice of Claim, SRBA Subcase No. 01-2068 (December 1, 2006). The Director recommended the claim with the same four purposes of use. Director's Report for Irrigation and Other Water Rights in Basin 01, Part 2, p.284, SRBA Subcase 01-2068 Recommendation (December 16, 2006).

Pocatello objected to the Director's recommendation. Pocatello Standard Form 1 Objection, SRBA Subcase 01-2068 (April 20, 2007). It sought "Mitigation Storage" and "Mitigation from Storage" as additional purposes of use under the right.¹⁰ *Id.* at p.2. Pocatello's objection was litigated at trial before the Special Master. The Special Master issued a Report and Recommendation recommending that Pocatello's objection be denied. R., 842. The Special Master found:

For over 53 years, Pocatello has been entitled to Palisades Reservoir storage water based on its 1960 contract with the BOR. Water right 01-2068 was licensed to the BOR in 1973, without objection and exclusively for irrigation and power uses. When Pocatello used its water for other uses, it did so lawfully not because the license was amended or because of an accomplished transfer, but because Pocatello put the water into a rental pool. As the State has pointed out, Pocatello's water was "rented for uses and in places other than those set forth in the elements of the underlying water rights without obtaining a transfer, without risk of forfeiture, and without effecting a permanent change in the underlying water right."

...

At trial, the evidence established that Pocatello has no diversion or conveyance works of its own to divert water from the Snake River. It was also clear that Pocatello never "diverted" such water except through a rental pool. By participation in a rental pool, Pocatello was able to use its water licensed for irrigation and power uses for non-licensed purposes and places of use. But there is no evidence of an accomplished transfer of water right 01-2068. Pocatello has failed to overcome the presumptions in the Director's recommendations for water right 01-2068 and claim 01-2068Y are correct. Finally, Pocatello's objection to the Director's recommendation of 01-2068 lacks merit and fails as a matter of law.

R. 849.

¹⁰ Pocatello sought 12 purposes of use in addition to those recommended by the Director and also filed a separate claim for its 50,000 acre-feet claiming the same purposes of use.

Pocatello subsequently filed a Motion to Alter or Amend the Special Master's recommendation, which Motion was denied. Order Denying Motion to Alter or Amend Recommendation, SRBA Subcase 01-2068 (June 24, 2013). Pocatello then filed a Notice of Challenge, which was denied on the basis it was untimely. Order Dismissing Notice of Challenge with Prejudice, SRBA Subcase 01-2068 (July 10, 2013). The partial decree for 01-2068 was issued on August 17, 2016.¹¹ The partial decree was issued without a mitigation purpose of use. Notwithstanding, Pocatello did not appeal the issuance of the partial decree and the time for doing so has expired. I.A.R. 14.

Thus, Pocatello previously believed it was authorized to use its storage water for a mitigation purpose of use under water right 01-2068. It raised that issue in the SRBA by way of objection to the Director's recommendation and presented evidence at trial before the Special Master that the right should include a mitigation purpose of use. It was unsuccessful in this respect and ultimately did not appeal the SRBA Court's decision. The SRBA Court proceeded to enter a partial decree for the right. The uses of water authorized under the decree are ascertainable from a simple reading of the purpose of use element of that partial decree. They did not include mitigation, or any other purpose of use Pocatello sought to be included in the partial decree.

It is noteworthy that Pocatello has never used the 50,000 acre-feet of Storage Water within the boundaries of its service area for the purposes of use stated in the prior license and subsequent partial decree. Pocatello acknowledged this issue in the SRBA when it objected to the Director's recommendation for water right claim 01-2068, seeking to have mitigation, among other purposes of use, included in the partial decree. Pocatello sought to establish these additional purposes of use through application of the accomplished transfer statute. It was unsuccessful in this regard and by way of a separate claim which was also unsuccessful. Curiously, and of interest to the Court, is how Pocatello established proof of beneficial use for its title to the 50,000 acre-feet of Storage Water in conjunction with the issuance of the license. Again, Pocatello has never used the 50,000 acre-feet within the boundaries of its municipal service area nor for the purposes of use set forth in the prior license. However, any issues regarding variances between the proof of beneficial use and the elements stated in the license needed to be raised at the time the license was issued. They were not.

¹¹ The partial decree was subsequently amended to correct errors on March 29, 2017, and on February 8, 2020.

Pocatello had another opportunity to raise these issues in the SRBA, as the inclusion of the Pioneer Remark would have implicated the question of Pocatello's beneficial use in establishing its interest in the 50,000 acre-feet of Storage Water.¹² However, in that proceeding Pocatello limited its argument to reliance on the accomplished transfer statute, which was unsuccessful. As for the issue regarding how the beneficial use was established giving rise to Pocatello's interest in the 50,000 acre-feet of Storage Water, the time for raising that issue too has expired and the purposes of use authorized under water right 01-2068 are limited to those set forth in the partial decree.

It is clear to the Court that Pocatello's rental of 6,290.2 acre-feet of its Storage Water to AFRD#2 in 2022 was done for a mitigation purpose of use. That is, it was done to satisfy its mitigation obligation to the Surface Water Coalition under the Final Settlement Agreement. Mitigation is not an authorized use under the purpose of use element of water right 01-2068. As mitigation is not an authorized purpose of use under water right 01-2068, the Court finds the Department's determination that Pocatello's rental of Storage Water to AFRD#2 in 2022 constituted a change in the purpose of use element of water right 01-2068 must be affirmed.

As a result, the Storage Water was used for a purpose of use not authorized under the elements of the water right. The last-to-fill rule was thus appropriately applied to prevent impermissible injury to the priority of junior water rights under Idaho law. It follows the Department's Final Order must be affirmed.

C. Constitutional arguments.

Pocatello argues the Department's application of the last-to-fill rule against it in 2023 violated Article XV, §3 of the Idaho Constitution as well as Article I, §14 of the Idaho Constitution. Because the last-to-fill rule was appropriately applied for the reasons set forth above, these arguments are unpersuasive.

Pocatello also argues the application of the last-to-fill rule violated the equal protection clause of both the Idaho and United States Constitutions. "The principle underlying the equal protection clauses of both the Idaho and United States Constitutions is that all persons in like

¹² The Court acknowledges that issues regarding a collateral attack on a prior license may have presented a hurdle. However, the Pioneer Remark was also not included in the license. Arguably, evidence of the scope of Pocatello's actual application to beneficial use in establishing the 50,000 acre-feet of Storage Water would have been relevant for defining the scope of its ownership interest to be confirmed by the Pioneer Remark on the partial decree.

circumstances should receive the same benefits and burdens of the law.” *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 937 303 P.3d 617, 624 (2013). “As a necessary corollary, no equal protection analysis is required and no violation of equal protection will be found in situations where the State has not engaged in the disparate treatment of similarly situated individuals.” *Id.*

“Equal protection claims require a three-step analysis: the reviewing court must first, identify the classification that is being challenged; second, determine the standard under which the classification will be judicially reviewed; and third, decide whether the appropriate standard has been satisfied.” *E. Idaho Reg’l Med. Ctr. v. Minidoka County*, 141 Idaho 157, 160, 106 P.3d 1123, 1126 (2005). “[S]trict scrutiny applies to fundamental rights and suspect classes; intermediate scrutiny applies to classifications involving gender and illegitimacy; and rational basis scrutiny applies to all other challenges.” *Id.* at 161, 106 P.3d at 1127. “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Id.* at 162, 106 P.3d at 1128.

Pocatello asserts the “Department applies the LTF Provision in at least four water districts in the state, but WD01 is the *only* district where the LTF Provision is applied to *all* rentals” *City of Pocatello Opening Brief*, p.23. The Court finds the rational basis test is the appropriate standard of review here because there is no suspect or quasi-suspect class.

The Court finds the rational basis standard to be satisfied. Under Idaho law, the Idaho Water Resource Board (“Board”) has the option of appointing local committees to facilitate the rental of stored water in a given locale. I.C. § 42-1765. Rental pool procedures are therefore, 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.

The Court finds the permitting of local committees to adopt rental pool procedures to facilitate the rental of stored water on a local basis to be a legitimate state interest under the rational basis test.¹³ Water storage facilities, operations, and conditions differ throughout the state. It is true that rental pool procedures should address the issue of injury where rented water is used in a manner that is not otherwise authorized under the subject water right. However, local committees have a legitimate state interest in utilizing different rules, policies, or tactics to prevent injury based on unique conditions in a given locale.¹⁴ For these reasons, the Court finds Pocatello’s equal protection argument to be unavailing.

D. Substantial rights.

Pocatello argues its substantial rights were prejudiced by the Final Order. For the reasons set forth herein, Pocatello has failed to establish the Final Order was contrary to law. Therefore, it has failed to establish its substantial rights were prejudiced. It follows the Final Order must be affirmed.

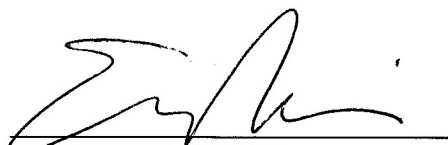
IV.

ORDER

Therefore, BASED ON THE FOREGOING, it is ordered the Department’s Preliminary Order Denying Motion for Summary Judgment and Upholding Action is affirmed.

IT IS SO ORDERED.

Dated 5/27/24


ERIC J. WILDMAN
District Judge

¹³ The Court also notes that participation in the Water District 01 Rental Pool is voluntary for the reasons set forth in the Court’s *Amended Order on Cross Motions for Summary Judgment* issued in Twin Falls County Case CV42-23-1668 on January 10, 2024.

¹⁴ The record also does not include any evidence of the circumstances existing in the other districts from which to evaluate the reasoning behind the differing applications of the last-to fill rule in addressing injury.

CERTIFICATE OF SERVICE

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

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Clerk of the Court

Dated: 5/27/2026 10:54:29 AM

By Catrina Meitz/Hutings
Deputy Clerk