

Sarah A. Klahn (ISB #7928)
Maximilian C. Bricker (ISB #12283)
SOMACH SIMMONS & DUNN, P.C.
1155 Canyon St., Suite 110
Boulder, CO 80302
Phone: (303) 449-2834
sklahn@somachlaw.com
mbricker@somachlaw.com

Attorneys for City of Pocatello

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF POCA TELLO,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES,
and MATHEW WEAVER in his capacity as Director of
the Idaho Department of Water Resources,

Respondents,

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.

IN THE MATTER OF THE ALLOCATION OF
STORED WATER TO THE CITY OF POCA TELLO
BY WATER DISTRICT 01.

Case No. CV01-25-19039

**CITY OF POCA TELLO'S
BRIEF IN SUPPORT OF
PETITION FOR
REHEARING**

Fee Category: Exempt
Idaho Code § 67-2301

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT.....	2
I. THE COURT ERRED IN FINDING THE PIONEER REMARK NARROWS THE DECREED PLACE OF USE	2
A. The Pioneer Remark Is Not Ambiguous, and the Plain Language Shows that It Means Contract Holders Have “Ownership” of the Storage Water; It Does Not Affect the “Place of Use” of Storage Water Rights.....	3
B. Alternatively, the Pioneer Remark Is Ambiguous, and Extrinsic Evidence Shows It Means Contract Holders Have “Ownership” of the Storage Water; It Does Not Affect the “Place of Use” of Storage Water Rights	6
C. When Interpreting the 01-2068 Partial Decree, the Court Must Also Adhere to I.C. Section 67-5279(5)	7
II. THE COURT ERRED IN DECLINING TO EVALUATE THE “END USE” WHEN ANALYZING THE PURPOSE FOR WHICH POCATELLO’S STORAGE WATER WAS USED IN 2022	8
III. THE COURT ERRED IN CONCLUDING THE APPLICATION OF THE LAST TO FILL PROVISION AGAINST POCATELLO WAS NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE.....	10
IV. THE <i>MEMORANDUM DECISION</i> WORKS A JUDICIAL TAKING OF POCATELLO’S PROPERTY RIGHT.....	12
CONCLUSION.....	14

TABLE OF AUTHORITIES

Page(s)

Federal Cases

<i>MBI Oil & Gas, LLC v. Royalty Ints. P'ship, LP</i> , 146 F.4th 650 (8th Cir. 2025)	4
<i>Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.</i> , 560 U.S. 702 (2010)	13, 14

Other State Cases

<i>A&B Irrigation Dist. v. State (In re SRBA)</i> , 157 Idaho 385 (2014)	8, 9
<i>Anderson v. Spalding</i> , 137 Idaho 509 (2002)	10
<i>Dill v. Yamasaki Ring, LLC</i> , 435 P.3d 1067 (Colo. 2019)	13
<i>E. Idaho Reg'l Med. Ctr. v. Minidoka Cty. (In re Bermudes)</i> , 141 Idaho 157 (2005)	10
<i>First Sec. Corp. v. Belle Ranch, Ltd. Liab. Co.</i> , 165 Idaho 733 (2019)	5
<i>Klamath Irrigation Dist. v. U.S.</i> , 67 Fed. Cl. 504 (2005)	6
<i>Langmeyer v. State</i> , 104 Idaho 53 (1982)	10
<i>McInturff v. Shippy (In re CSRBA Case No. 49576)</i> , 165 Idaho 489 (2019)	5
<i>McKay v. Walker</i> , 160 Idaho 148 (2016)	5
<i>Rangen, Inc. v. Idaho Dep't of Water Res.</i> , 159 Idaho 798 (2016)	4, 6
<i>Stott by & ex rel. Dougall v. Finney</i> , 130 Idaho 894 (1997)	8
<i>Sylte v. Idaho Dep't of Water Res.</i> , 165 Idaho 238 (2019)	4, 6
<i>United States v. Pioneer Irrigation Dist. (In re SRBA Case No. 3957)</i> , 144 Idaho 106 (2007)	3, 6

Idaho Constitution

Idaho Constitution,	
art. I, § 2	11
art. I, § 14	14
art. V, § 26	12

State Statutes and Rules

Idaho Administrative Procedure Act 37.02.03.040.01(h)	11
Idaho Appellate Rule 42(b)	1
Idaho Code, section	
42-101	11, 12
42-1411(2)	5
42-1411(2)(d)	13
67-5279(3)	11, 12
67-5279(5)	7
Idaho Rule of Civil Procedure 84(r)	1

Other Authorities

Black’s Law Dictionary 94 (5th ed. 1979)	5
Black’s Law Dictionary (12th ed. 2024)	4

COMES NOW Petitioner City of Pocatello (“Pocatello”), by and through its undersigned counsel of record, pursuant to Idaho Appellate Rule (“I.A.R.”) 42(b), Idaho Rule of Civil Procedure 84(r), and paragraph 14 of the Court’s *Procedural Order* dated October 20, 2025, and hereby submits this brief in support of the *Petition for Rehearing* (“*Petition*”) filed with the Court on June 17, 2026. Pocatello requests the Court modify the *Memorandum Decision* consistent with the arguments in this brief.

INTRODUCTION

The *Memorandum Decision* summarily rejects Pocatello’s arguments without much, if any, explanation as to why they lack merit. Regarding “place of use,” the Court adopted the Department’s novel interpretation of the Pioneer Remark and held Pocatello’s rental changed this element of the 012068 water right, even though it is undisputed the storage water was used within the express place of use in the partial decree. Regarding “purpose of use,” the Court adopted the Department’s argument that it is proper to determine the purpose for which a volume of water was used based on an intermediate or incidental use of the water, and held Pocatello’s rental changed this element of the water right, even though it is undisputed the storage water was applied to a beneficial use that is expressly authorized by the partial decree.

These two holdings are contrary to Idaho law. The Court compounds these errors by analyzing the wrong question when evaluating Pocatello’s equal protection claim: the Court affirmed local committees’ authority to adopt unique rental pool procedures, whereas Pocatello challenged the lawfulness of the Director’s application of rental pool procedures that are at war with one another because it has the effect of setting a double standard for what constitutes “injury,” which contravenes Idaho law (and the Department’s legal arguments in this case). The Court found no equal protection violation despite the fact that the Department made *no* effort to

explain why the disparate application of injury standards against similarly situated contract holders was rationally related to, or furthered, a legitimate state interest.

These errors are not harmless. If the *Memorandum Decision* stands, it will permanently deprive Pocatello of the priority date associated with its share of water right 01-2068, amounting to a judicial taking of one of Pocatello's "bundle of sticks" associated with its contractual and equitable rights to storage water in Palisades Reservoir.

Accordingly, and consistent with the Court's statement at the close of oral argument on April 30, 2026, Pocatello submits that additional briefing and argument on these issues is warranted and respectfully requests that the Court grant rehearing to modify the *Memorandum Decision* consistent with Pocatello's arguments reflected in this brief.

ARGUMENT

I. THE COURT ERRED IN FINDING THE PIONEER REMARK NARROWS THE DECREE PLACE OF USE

The Pioneer Remark (found, *inter alia*, in the partial decree for water right 01-2068¹) provides:

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.*

¹ The Pioneer Remark appears in partial decrees for storage water rights throughout the state, including the Water District 63 partial decree for Pioneer Irrigation District's water rights that spurred the Pioneer litigation. *See Opening Br.* at 15 n.18; *Reply Br.* at 12.

Memorandum Decision at 10-11 (emphasis in original). Below, the Department found that Pocatello's rental in 2022 changed the "place of use" element of water right 01-2068 because the principles in *United States v. Pioneer Irrigation Dist. (In re SRBA Case No. 3957)*, 144 Idaho 106 (2007), establish that storage water rights containing the Pioneer Remark have implied places of use that restrict contract holders from using storage water outside their respective service areas. *See* R. 894-99. Implicitly, the Department's determination involved a finding that the Pioneer Remark was ambiguous. Accordingly, Pocatello's arguments on judicial review focused on why the Department was mistaken and identified the materials in the *Pioneer* record that demonstrate the case decided issues only related to the "ownership" element of a water right, not the "place of use" element. *Opening Br.* at 12-16; *Reply Br.* at 4-7.

While affirming the Department's decision, the Court's *Memorandum Decision* rejected the Department's reasoning and found that the plain language of the Pioneer Remark is clear, holding the last sentence of the Pioneer Remark narrows the described place of use and restricts contract holders from using their storage water outside their respective service areas without an approved transfer. *Memorandum Decision* at 10-11. This conclusion is incorrect and contrary to the rules of decree interpretation, as described below.

A. **The Pioneer Remark Is Not Ambiguous, and the Plain Language Shows that It Means Contract Holders Have "Ownership" of the Storage Water; It Does Not Affect the "Place of Use" of Storage Water Rights**

The Idaho Supreme Court has established the following standard for decree interpretation:

Idaho courts interpret water decrees using the same interpretation rules that apply to contracts. Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review. Ambiguity may be either patent or latent. A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist. Idaho law permits first, the introduction of extrinsic evidence to show that the latent ambiguity actually existed;

and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.

Rangen, Inc. v. Idaho Dep't of Water Res., 159 Idaho 798, 807 (2016) (citations and quotations omitted). Additionally:

A decree is ambiguous if it is reasonably subject to conflicting interpretations. However, if it is unambiguous, a water decree's meaning and legal effect are questions of law to be determined from the plain and ordinary meaning of the decree's words. Like a contract, this Court will read the decree as a whole and will give meaning to all of its terms to the extent possible.

Sylte v. Idaho Dep't of Water Res., 165 Idaho 238, 244 (2019) (citations and quotations omitted).

Thus, if the language of the Pioneer Remark is clear, as the Court held, the Court must determine the meaning of the remark based on the “plain and ordinary meaning of decree’s words.” *Id.* at 244. Evaluating the plain language of the Pioneer Remark provides no basis to suggest that it narrows or otherwise restricts the decreed place of use for water right 01-2068 (or any other water right in which it appears).

The *Memorandum Decision* focuses on the phrase: “[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.” *Memorandum Decision* at 11 n.7 (emphasis added); *id.* at 11 n.8 (“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.”). Applying the Supreme Court’s rules of decree interpretation, the plain and ordinary meaning of interest is: “[a] legal share in something; all or part of a legal or equitable claim to or right in property.” *MBI Oil & Gas, LLC v. Royalty Ints. P’ship, LP*, 146 F.4th 650, 656 (8th Cir. 2025) (quoting *Interest*, Black’s Law Dictionary (12th ed. 2024)). The plain and ordinary meaning of appurtenant is: “A thing is ‘appurtenant’ to something else when it stands in relation of an incident to a principal and is necessarily

connected with the use and enjoyment of the latter.” *McKay v. Walker*, 160 Idaho 148, 153 n.1 (2016) (quoting Black’s Law Dictionary 94 (5th ed. 1979)).

Thus, the last sentence in the Pioneer Remark can be restated as: “[t]he ownership right of the consumers or users of the water runs with and is intended to benefit the lands within the boundaries of or served by such irrigation organizations.”

“Ownership” is a distinct element of a water right from “place of use.” *See* Idaho Code (“I.C.”) § 42-1411(2) (enumerating the elements of a water right to be determined in an adjudication, which includes “the name and address of the claimant” and “a legal description of the place of use”); *First Sec. Corp. v. Belle Ranch, Ltd. Liab. Co.*, 165 Idaho 733, 742-43 (2019) (holding “claimant” and “ownership” are synonymous for the same element). Had the parties or the Court in *Pioneer* meant for the Pioneer Remark to inform the place of use, the remark could have so stated. Indeed, some Idaho water rights contain conditions that specifically tie appurtenance to the place of use. *McInturff v. Shippy (In re CSRBA Case No. 49576)*, 165 Idaho 489, 493 (2019) (“This water right is appurtenant to the described place of use.”). While the Pioneer Remark could state, “[t]he place of use of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations,” it does not.

The Court’s holding that the Pioneer Remark is unambiguous must be accompanied by an interpretation of its words based on their plain and ordinary meaning. The *Memorandum Decision*, however, inexplicably reads the remark in a way that replaces the word interest with place of use. There is simply no basis to conclude that the Pioneer Remark “informs” the place of use element and operates to deprive contract holders of the right to deliver storage water outside their service areas even if it is within the express place of use in the partial decree. Thus,

the Court should modify the *Memorandum Decision* insofar as it holds the Pioneer Remark has any bearing on the “place of use” of water right 01-2068.

B. Alternatively, the Pioneer Remark Is Ambiguous, and Extrinsic Evidence Shows It Means Contract Holders Have “Ownership” of the Storage Water; It Does Not Affect the “Place of Use” of Storage Water Rights

Courts only review extrinsic evidence to determine the meaning of decree language if it is ambiguous, meaning it “is reasonably subject to conflicting interpretations.” *Sylte*, 165 Idaho at 244. Thus, to the extent the Pioneer Remark is ambiguous, the Court must review extrinsic evidence to determine its meaning. *Rangen*, 159 Idaho at 807. The extrinsic evidence introduced in this case—briefs from the *Pioneer* case record—together with the *Pioneer* opinion, show that the intent of the Pioneer Remark is not to limit the “place of use” of the many storage water rights associated with the United States Bureau of Reclamation (“Bureau”) projects so as to preclude rentals between consenting contract holders as a matter of right. Rather, having observed the disastrous effects the federal Endangered Species Act had on the Bureau project supplies of their colleagues in the Klamath River Basin, contract holders advocated for the Pioneer Remark to serve as a layer of protection from the Bureau un-consensually depriving them of water and instead delivering it to other places of use (below Milner) and for other purposes of use (in-stream/environmental), particularly since the Upper Snake Flow Augmentation program² had commenced in Idaho around the turn of the 21st century. *Opening Br.* at 12-16; *Reply Br.* at 4-7; *Pioneer*, 144 Idaho at 115 (citing *Klamath Irrigation Dist. v. U.S.*, 67 Fed. Cl. 504 (2005)). However, there is no extrinsic evidence more compelling than the complete absence of the term “place of use” in the *Pioneer* decision.

² For more information on Upper Snake Flow Augmentation, see https://species.idaho.gov/wp-content/uploads/2019/10/2019-10-29-Relamation_Upper-Snake-Flow-Augmentation_Governors-Salmon-Workgroup_FINAL.pdf (last visited Jun. 25, 2026). To the extent necessary, Pocatello requests that the Court take judicial notice of this document.

In sum, on reconsideration if the Court concludes the Pioneer Remark is ambiguous, then the Court should review the extrinsic evidence before the Court to determine its meaning. Because the extrinsic evidence reveals that the “place of use” was not at issue in the *Pioneer* case, the Court should hold the Pioneer Remark does not “inform,” or have any bearing on, the place of use element of water right 01-2068, and therefore service areas are not implied places of use that deprive contract holders of the right to rent water within the express place of use in the partial decree.

C. When Interpreting the 01-2068 Partial Decree, the Court Must Also Adhere to I.C. Section 67-5279(5)

In addition to the aforementioned rules regarding decree interpretation, the Court must also adhere to I.C. section 67-5279(5), which provides:

When interpreting the provisions of any state law, this chapter, or any rule, as defined in section 67-5201, Idaho Code, the court shall not defer to an agency’s interpretation of the law or rule and shall interpret its meaning and effect de novo. In an action brought by or against an agency, after applying all customary tools of interpretation, the court shall exercise any remaining doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty.

Here, when interpreting the 01-2068 partial decree (particularly the Pioneer Remark), the Court did the opposite. The *Memorandum Decision* affirmed the Department’s interpretation with minimal to no explanation as to why Pocatello’s contrary arguments lack merit. This interpretation maximizes the Department’s authority when administering storage water rights and limits Pocatello’s right to use water, in violation of I.C. section 67-5279(5).

The Court should grant rehearing and apply customary tools of interpretation to the Pioneer Remark. Should any doubt remain as to the Pioneer Remark’s meaning, the Court must interpret it in a manner that limits the Department’s power and maximizes Pocatello’s (and other contract holders’) liberties.

II. THE COURT ERRED IN DECLINING TO EVALUATE THE “END USE” WHEN ANALYZING THE PURPOSE FOR WHICH POCATELLO’S STORAGE WATER WAS USED IN 2022

In their response briefs, IDWR and the Spaceholders did not dispute the fact that the “end use” of Pocatello’s storage water in 2022 was for the purpose of “irrigation from storage.” Nor did they respond—whatsoever—to Pocatello’s argument that *A&B Irrigation Dist. v. State (In re SRBA)*, 157 Idaho 385 (2014), is controlling case law on the question of how the Department should evaluate the purpose for which a given volume of water was used, particularly since contract holders—including certain Spaceholders—argued in that case that “the proper administration of water rights is determined by the end beneficial use of the storage water.” *Opening Br.* at 17 n.21 (quoting *Pioneer Irrigation District’s Response Brief*, *In re SRBA Case No. 39576*, Subcase No. 00-91017, at 4, 9 (Jan. 11, 2013)). The Court disregarded this undisputed fact and uncontested argument and simply concluded that it is “clear” that Pocatello’s storage water was used “for a mitigation purpose of use.” *Memorandum Decision* at 16. This holding is inconsistent with Idaho law and the Department’s practice of evaluating purpose of use based on the “end use” of the storage water. *See* R. 59-60 (explaining the Department’s practice of not regulating or evaluating transactions between leasing shareholders of an irrigation organization so long as the end use is within the decreed place of use); *Opening Br.* at 16 (same).

Virtually every volume of storage water is used for multiple purposes. *See A&B*, 157 Idaho at 389 (explaining the multiple purposes of use associated with storage water rights). Storage water can be used, even if only incidentally, for: flood control; power generation; mitigation; irrigation; recreation; or fish and wildlife. *See Stott by & ex rel. Dougall v. Finney*, 130 Idaho 894, 896 (1997); *see generally A&B*, 157 Idaho 385. When a contract holder rents storage water, whether the lessor’s intent behind the rental is to make money, help their neighbor who needs additional water, or satisfy mitigation obligations, it is simply irrelevant and

immaterial for purposes of water rights administration. The operative purpose of use is and must be the “end use,” not some intermediate or incidental use. *See A&B*, 157 Idaho at 389 (“Water diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use.”).

When Pocatello rented its storage water in 2022, not only did that water irrigate crops in American Falls Reservoir District#2 (“AFRD#2”), it also generated power when passing through Palisades Dam. Thus, “power from storage” was an intermediate or incidental use of Pocatello’s storage water. In this case, the Court determined that another intermediate use, mitigation, was the end use. *Memorandum Decision* at 13, 16. Under that reasoning, the Court could have concluded Pocatello’s storage water was used for power purposes in 2022. Instead, the Court determined the purpose for which water was used based on the lessor’s presumed intent behind the rental. *Id.* at 13. This is a novel reading of *A&B* and inconsistent with the Department’s practice of determining the “end use” of storage water.

However, if the lessor’s intent is the basis for the determination of “end use,” then Pocatello’s rentals to other entities, including Southwest Irrigation District (“SWID”) and LCSC Enterprises, LLC (“LCSC”), would be consistent with the decreed purpose of use. *See R. 287*, 835-36 (showing Pocatello’s historical rentals to these entities). Pocatello is under no obligation to provide mitigation water to SWID or LCSC. Pocatello rents water to them because Pocatello has available supplies and the entities have demands for irrigation above Milner that cannot be met with their own supplies. And these rentals result in the same “end use” that occurs when Pocatello’s storage water is rented to AFRD#2: “irrigation from storage.”

In sum, as various contract holders argued in *A&B*, the Department’s administration of storage water rights must be determined by the “end use.” Basing it on something else, like an

intermediate (or incidental) use, or the lessor's intent, leads to arbitrary determinations like the one in this case. Accordingly, the Court should conclude that Pocatello's storage was used for "irrigation from storage" purposes in 2022, and modify its holding in the *Memorandum Decision* that the rental changed the purpose of use element of water right 01-2068 that year.

III. THE COURT ERRED IN CONCLUDING THE APPLICATION OF THE LAST TO FILL PROVISION AGAINST POCATELLO WAS NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE

The *Memorandum Decision* (at 16) acknowledges that Pocatello argued the Director's application of the Last to Fill ("LTF") Provision violated the equal protection clause of the Idaho Constitution, yet proceeds to analyze whether there is a rational basis for local committees to adopt or utilize unique rental pool procedures. *Id.* at 18. In so doing, the Court analyzed the wrong issue and came out with the wrong answer to the Pocatello's equal protection challenge.

The applicable test for a violation of the equal protection clause is whether such classification is "rationally related to," or "furthers," a "legitimate state interest." *Anderson v. Spalding*, 137 Idaho 509, 514 (2002); *E. Idaho Reg'l Med. Ctr. v. Minidoka Cty. (In re Bermudes)*, 141 Idaho 157, 162 (2005); *Langmeyer v. State*, 104 Idaho 53, 57 (1982). This Court previously held that the purpose of the LTF Provision is "to prevent unlawful injury to the priority of junior water rights." R. 228.

In this case, Pocatello showed the Director applied disparate injury standards between rental pools in WD01 and WD63 and that no legitimate state interest is furthered thereby. *Opening Br.* at 22-24. Pocatello also showed the rationale behind WD01's decision, as stated by WD01, to change the LTF Provision in 2005 to include rentals above Milner was not based on preventing water rights injury—it was based on the local committee's belief that its authority extended to penalizing contract holders from financial gain associated with renting surplus

storage water supplies.³ *Id.*; *Reply Br.* at 14-15 (citing R. 466). Meanwhile, the Department and the Spaceholders provided no argument in response as to how there is a rational basis for this disparate application or how it furthers a legitimate state interest. Instead, they merely engage in handwaving, asserting that whatever happens in WD63 or WD65 does not matter. *IDWR Br.* at 26-27; *Spaceholders Br.* at 19.

Pocatello has not argued that local committees cannot adopt or utilize unique rental pool procedures—e.g., setting their own rates, or creating their own pools (*compare* R. 184-92, *with* R. 304-26). And while the Idaho Water Resource Board’s rules provide that local committees’ rental pool procedures *must* include provisions that “avoid injury to other water rights”⁴, local committees are not authorized to determine *what* is injury under Idaho law—that is the role of the Director when he applies the rental pool procedures. R. 232. Indeed, the Court has held it is “clear” that the “Rental Pool Procedures do not limit or supersede the Director’s statutory authorities” R. 224. Thus, Pocatello’s challenge is to the Director’s *disparate application* of the injury standard in different rental pools across the state. All other things being equal, if Pocatello had rented storage water in WD63 for mitigation purposes to an irrigator in 2022, it would *not* have had the LTF Provision applied against it. *Opening Br.* at 15; *Reply Br.* at 2-3, 12-15. This disparate treatment is what violates Pocatello’s right to equal protection of Idaho law in contravention of article I, section 2, of the Idaho Constitution.⁵ Moreover, allowing two

³ Moreover, WD01 changed the LTF Provision in 2005—before the Pioneer Remark was finalized in 2007 and decreed in 2016—which belies the notion that WD01 made the change because it realized that only addressing rentals below Milner was insufficient in preventing injury because the Pioneer Remark “informed” the place of use of Upper Snake storage water rights.

⁴ The Court’s determination in the *Memorandum Decision* that rental pool procedures “should” address injury is plainly erroneous. *See* IDAPA 37.02.03.040.01(h).

⁵ Moreover, the Department’s disparate treatment violates I.C. section 42-101 and is arbitrary and capricious, in violation of I.C. section 67-5279(3), which are two of Pocatello’s claims that the Court did not address in the *Memorandum Decision*. *See Opening Br.* at 24-26.

different meanings of the Pioneer Remark to coexist is contrary to the Idaho Constitution, which provides that court decrees, including SRBA decrees, must be applied uniformly statewide. *See Reply Br.* at 12 n.11 (quoting Idaho Const. art. V, § 26).

As it stands, the Court has affirmed the Department's determination that what is injury in WD01 is not injury in WD63. The Director has applied the LTF Provision against in-basin rentals in WD01 but not against such rentals in WD63. There can be no question that the Director has disparately treated similarly situated contract holders in WD01 and WD63 and, in so doing, violated the equal protection clause of the Idaho Constitution, I.C. section 42-101, and I.C. section 67-5279(3).

IV. THE MEMORANDUM DECISION WORKS A JUDICIAL TAKING OF POCATELLO'S PROPERTY RIGHT

The upshot of the *Memorandum Decision* is that Pocatello is only entitled to take delivery of its storage water for irrigation uses within city limits.⁶ The *Memorandum Decision* effectively holds that Pocatello's "constitutional right to have its water right administered in priority" (R. 229) does not exist if it rents its storage water, even if the water is beneficially used for irrigation within the explicit place of use for water right 01-2068 and even though Pocatello's contract authorizes rentals and Pocatello has done so since 1960. In other words, the *Memorandum Decision* permanently deprives Pocatello of the 1939 priority date associated with water right 01-2068 notwithstanding its storage water "being used within the parameters of its defined elements" (R. 226) under an objective reading of the partial decree.

⁶ Pocatello may still have the option of renting its storage water through the WD01 Rental Pool to complete other uses, but Pocatello has no right to rent its storage water *unless* it consents to the Department applying the LTF Provision. In effect, the only way Pocatello can do what its federal contract has long authorized it to do, and which contract holders in WD63 may presently do, is by consenting to the Department's subordination of its priority date.

This ruling sounds in judicial taking because it renders Pocatello’s priority date—the most important element of a water right—nonexistent. *See* I.C. § 42-1411(2)(d) (enumerating the “date of priority” element); R. 229 (“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”) (quoting *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797-98 (2011)); *see also* *Dill v. Yamasaki Ring, LLC*, 435 P.3d 1067, 1076 (Colo. 2019) (“The priority, the location of diversion at the supply’s source, and the amount of water for application to a beneficial use are all essential elements of the appropriative water right. Of these, priority is the most important stick in the water rights bundle”) (citations and quotations omitted).

The United States Supreme Court has held “the Takings Clause [of the United States Constitution] bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.” *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 715 (2010) (emphasis in original). “If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.” *Id.* (emphasis in original). “What counts is . . . whether the property right allegedly taken was established.” *Id.* at 728.

Pocatello has long had an established property right to rent its storage water so long as the end use is for irrigation above Milner. That right was established in 1960, when Pocatello signed a contract with the Bureau (which explicitly authorizes rentals, R. 096) and then rented water for irrigation above Milner that same year. R. 117-18. That right was confirmed in 1973, when IDWR licensed water right 01-2068 with a broad place of use, thereby enabling Pocatello to continue renting its storage water above Milner. *Opening Br.* at 13 n.12. That right was

further confirmed in 2016 when the SRBA Court issued a decree for water right 01-2068 with a place of use that includes all counties above Milner Dam. R. 214 n.2, 480-82.

For decades, Pocatello exercised its property interest to lease its contract water without interference from the Director (or any other state actor) because the LTF Provision was never applied against rentals above Milner. *See* R. 053. As described above, that changed in 2005. *Id.* While the Director’s application of the LTF Provision in 2023 constituted a one-time taking of Pocatello’s property right in violation of article I, section 14, of the Idaho Constitution, the *Memorandum Decision* results in a permanent taking in that it conditions the exercise of the priority element of Pocatello’s Palisades storage space on an indefensible interpretation of the Pioneer Remark and the “purpose of use” language in 01-2068. This ruling deprives Pocatello of the key stick in its bundle of rights and violates the Fifth Amendment of the United States Constitution. *Stop the Beach Renourishment*, 560 U.S. at 715.

The Court should modify the *Memorandum Decision* to avoid effectuating a judicial taking of Pocatello’s establish property right.

CONCLUSION

Based on the above, Pocatello respectfully requests that the Court grant Pocatello’s *Petition for Rehearing* and modify the *Memorandum Decision* consistent with the arguments herein.

DATED this 30th day of June 2026.

SOMACH SIMMONS & DUNN, P.C.

By: 

Sarah A. Klahn (ISB #7928)
Maximilian C. Bricker (ISB #12283)
Attorneys for City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2026, I served the foregoing document on the persons below via iCourt unless otherwise indicated:

IDAHO DEPARTMENT OF WATER RESOURCES Director Mathew Weaver Christina Henman Sarah Tschohl Mathew.weaver@idwr.idaho.gov Christina.Henman@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov file@idwr.idaho.gov	COALITION OF CITIES Candice M. McHugh Chris M. Bromley MCHUGH BROMLEY, PLLC cbromley@mchughbromley.com cmchugh@mchughbromley.com
WATER DISTRICT 01 Craig Chandler Craig.chandler@idwr.idaho.gov	FREMONT MADISON IRRIGATION DISTRICT; IDAHO IRRIGATION DISTRICT Jerry Rigby Hyrum Erickson RIGBY ANDRUS & RIGBY LAW PLLC jrigby@rex-law.com herickson@rex-law.com
BURLEY IRRIGATION DISTRICT Travis L. Thompson Abby Bitzenburg PARSONS BEHLE & LATIMER tthompson@parsonsbehle.com abitzenburg@parsonsbehle.com jnielsen@parsonsbehle.com John K. Simpson IDAH20, PLLC jks@idahowaters.com	Richard A. Diehl, Jr.: rdiehl@pocatello.gov Jeff Raybould: jeff@raybouldbros.com Ann Yribar: ann.yribar@ag.idaho.gov Garrick Baxter: garrick.baxter@idwr.idaho.gov


Sarah A. Klahn (ISB #7928)