

**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,

**Case No.
CV01-25-19039**

v.

THE 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

**RESPONDENTS' RESPONSE TO CITY OF POCA TELLO'S
PETITION FOR REHEARING**

Judicial Review from the Idaho Department of Water Resources
Mathew Weaver, Director

RAÚL R. LABRADOR
ATTORNEY GENERAL
JOY M. VEGA
Chief of Energy and Natural Resources Division
GARRICK L. BAXTER, ISB No. 6301
ANN N. YRIBAR, ISB #8406
Deputy Attorneys General
Idaho Department of Water Resources
PO Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
ann.yribar@ag.idaho.gov
Attorneys for Respondents

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
1155 Canyon St., Suite 110
Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com
Attorneys for Petitioner

COME NOW, Respondents the Idaho Department of Water Resources (“IDWR”) and Mathew Weaver, in his capacity as Director of IDWR (collectively the “Respondents”), by and through their counsel of record, and pursuant to Idaho Appellate Rule (“IAR”) 42(d), Idaho Rules of Civil of Procedures (“IRCP”) 84(r), and the Court’s *Notice of Hearing on Petition for Rehearing*, hereby submits this *Respondents’ Response to the City of Pocatello’s Petition for Rehearing*. Respondents request the Court deny the *City of Pocatello’s Petition for Rehearing* (“*Petition*”) filed June 17, 2026, and affirm its *Memorandum Decision and Judgment* issued May 27, 2026.

INTRODUCTION

The *Memorandum Decision* correctly found that the City of Pocatello’s 2022 private lease of its storage water was outside the scope of both the place of use and purpose of use elements of Water Right 01-2068. The *Memorandum Decision* also correctly found that the application of the Last to Fill (“LTF”) procedure of the Water District 01 Rental Pool Procedures was not in violation of the equal protection clause of the Idaho Constitution. Further, the *Memorandum Decision* does not create a judicial taking of the City of Pocatello’s property interest in its storage water.

1. The Court Correctly Held Pocatello’s 2022 Private Lease Constituted a Change in the Place of Use.

This Court correctly held that the plain language of the *Pioneer Remark* limits the place of use for Water Right 01-2068 to the Palisades Reservoir contract spaceholder’s water service area boundaries. *Memorandum Decision* at 11. In its *Petition* the City of Pocatello asserts: “There is simply no basis to conclude that the Pioneer Remark ‘informs’ the place of use element . . .” *Petition* at 5. The City argues that the “plain and ordinary meaning of appurtenant” in the *Pioneer Remark* references the ownership element of Water Right 01-2068, rather than the place

of use element of the right. *Petition* at 4 (emphasis in original). This reading is in contravention of the large and well-developed body of Idaho law addressing the term “appurtenant” in the context of water rights and ignores the plain wording of the *Pioneer Remark*.

Contrary to the City of Pocatello’s assertions in this case, the word “appurtenant” refers the place of use of the water right. This reading is consistent with Idaho’s longstanding statutory treatment of appurtenant water right. Idaho Code § 42-101 clearly states:

[T]he right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but *such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . .*”

(emphasis added). Idaho’s water right statutes likewise use appurtenance to describe the relationship between a water right and identified lands. Idaho Code § 42-220 states a water right license is “*appurtenant to* and shall pass with a conveyance of, *the land* for which the right of use is granted.” (emphasis added). Idaho Code § 42-1402 states a water right decreed by the court “shall be *appurtenant to* and *shall become a part of the land on which the water is used . . .*” (emphasis added).¹ In addition, there is a considerable body of Idaho case law which links the term “appurtenant” to the land on which the water is being put to beneficial use.² Idaho law

¹ There are also statutes that address the transfer of “appurtenant” water rights with the sale or transfer of real property. *See e.g.* I.C. § 55-617(1) (“A transfer of real property passes appurtenant water rights decreed by court order, . . . permitted or licensed by the department of water resources, . . . or established by the constitutional method of appropriation, and that are owned by the seller and are not reserved by the seller in the instrument of conveyance.”) and I.C. § 55-617(6) (“A transfer of real property does not pass water rights or water entitlements and obligations that are not appurtenant to the real property.”)

² *See e.g. Eagle Creek Irrigation Co., Inc. v. A.C. & C.E. Invs., Inc.*, 165 Idaho 467, 477, 447 P.3d 915, 925 (2019) (holding an irrigation company’s water right is “appurtenant to the whole of its service area . . .”); *Koon v. Empey*, 40 Idaho 6, 231 P. 1097, 1098–1099 (1924) (holding “there can be no question that a water right becomes appurtenant to the land to which it has been applied and upon which the water has been used for irrigation.”); *Anderson v. Cummings* 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959) (holding “Appellants’ decreed water . . . is appurtenant to . . . lands to which the water represented

also makes clear that the land on which water is being beneficially used, must be designated as the “place of use” for the water right. *See* IDAPA 37.03.02.010.21 (“place of use” refers to the “location where beneficial use of appropriated water is made.”); *see also* IDAPA 37.03.08.010.09 (“Generally Described Place of Use. A place of use authorized by an existing water right or permit . . . consisting of a general area or boundary within which water diverted under the water right or permit is used”); IDAPA 37.03.08.035.03.c. (setting forth requirements for describing the place of use in a water right application).

In addition to this body of Idaho law, the plain wording of the *Pioneer Remark* clearly states the City’s use of the water is “*appurtenant to the lands* within the boundaries of or served by” the owner of the storage water. *Memorandum Decision* at 4. The word “appurtenant” in the *Pioneer Remark* plainly refers to the “lands,” and “lands” must necessarily refer to the place of use where the water is being put to beneficial use. Because the word “appurtenant” clearly and unambiguously refers to the place of use, there is no need to refer to extrinsic evidence to determine its meaning.³

The *Pioneer Remark* does not merely identify who holds the ownership interest in the stored water; it expressly provides that the consumers’ or users’ interest “is appurtenant to the lands within the boundaries of or served by such irrigation organizations.” *Memorandum*

thereby has been beneficially applied.”); *Mullinix v. Killgore’s Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015) (holding “a water right is appurtenant to the land and transfers with the conveyance of the land.”).

³ Even if there was a need to refer to extrinsic evidence, the background cited by the City of Pocatello does not provide persuasive evidence that the *Pioneer Remark* does not limit the place of use for Water Right 01-2068. The Court’s decision in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600,609 (2007) that the ownership of the water right is split does not undermine or preclude a determination that the *Pioneer Remark* limits the place of use to the service area boundaries of the consumers or users of the water.

Decision at 11. Reading the decree as a whole requires giving effect to that geographic language. The City’s interpretation would permit an individual spaceholder to privately use its storage water on lands served by another irrigation organization notwithstanding the *Pioneer Remark*’s express identification of the lands to which that spaceholder’s interest is appurtenant. The Court correctly rejected that reading and construed the general place-of-use description together with the *Pioneer Remark* to limit each spaceholder’s use to the lands within or served by that spaceholder. Thus, the Court’s determination in the *Memorandum Decision* that the wording of the *Pioneer Remark* limits the place of use for Wate Right 01-2068 was correct and should be affirmed.⁴

In addition, the City of Pocatello did not contest the Court’s finding that the service area boundary within which the City may use its storage water is its “municipal service area.” *Memorandum Decision* at 11. The City also did not contest the Court’s finding that “it is undisputed that [the City of Pocatello’s storage] water was beneficially used outside of Pocatello’s municipal service area boundary.” *Id.* at 11. Thus, it is undisputed that City’s private lease of storage water in 2022 changed the place of use for its water from its authorized location (the City of Pocatello’s municipal service area boundary) to American Falls Reservoir District #2’s service area boundary. Because the City changed the place of use element for Water Right 01-2068, it was appropriate for the watermaster to make that storage LTF as required by the Water District 01 Rental Pool Procedures when the reservoir system failed to physically fill the following year.

⁴ The City of Pocatello also argues that the court should adhere to I.C. § 67-5279(5) when “interpreting” the *Pioneer Remark*. The City’s reference to I.C. § 67-5279(5) is misplaced. That section of Idaho Code refers to interpretation of “the provisions of any *state law* . . . or any *rule* . . .” (emphasis added). The *Pioneer Remark* is neither a state law nor a rule. Thus, that section of code is inapplicable to its interpretation. In addition, as noted above, there is no need to “interpret” the *Pioneer Remark* because its use of the term “appurtenant” clearly refers to the lands of the beneficial users of the water.

2. The Court Correctly Held Pocatello’s 2022 Private Lease Constituted a Change in the Purpose of Use of Water Right 01-2068.

The Court correctly held that the City of Pocatello’s private lease of water in 2022 changed the purpose of use of Water Right 01-2068 because the evidence in the record demonstrated that the water was leased for mitigation purposes, not for irrigation. *Memorandum Decision* at 12–16. The City of Pocatello urges this Court to reconsider that finding and to, instead, adopt a new legal precedent requiring IDWR to look at the “end use” when determining whether a transfer, water supply bank transaction, or lease through the rental pool changes the purpose of use of a storage water right. In support of this new concept, the City cites *A&B Irrigation Dist. v. State (In re SRBA)*, 157 Idaho 385, 336 P.3d 792 (2014). It asserts that *A&B Irrigation* “is controlling case law on the question of how the Department should evaluate the purpose for which a given volume of water was used . . .” *Petition* at 8.

A careful reading of *A&B Irrigation*, however, reveals that the case is not “controlling law” on that topic. Indeed, the case refers only briefly to the term “end use” and its discussion regarding “end use” of storage water had no bearing on the outcome in that case. The *A&B Irrigation* case was an appeal from the SRBA Court’s decision on Basin-Wide Issue 17. *A&B Irrigation* at 387–388, 794–795. Basin-Wide Issue 17 addressed the question of whether a storage right could refill, in priority, space vacated for flood control. *Id.* at 388, 795. The Idaho Supreme Court was asked to determine whether the SRBA Court abused its discretion in so designating that issue. *Id.* at 391–392, 798–799. The Court’s discussion of “end use” is limited to the following:

The purpose of use element of a storage water right generally contains at least two authorized purposes of use. The first authorizes the storage of water for a particular purpose (i.e., “irrigation storage,” or “power storage”). The second authorizes the subsequent use of that stored water for an associated purpose, which is often referred to as the “end use” (i.e., “irrigation from storage,” or “power

from storage”). Each purpose of use is assigned its own quantity and period of use, which may or may not differ from one another. . . . 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.

Id. at 389–796. This passage is a simple, didactic description of the purpose of use elements of a storage water right. It does not discuss, nor does it stand for the proposition that the “operative purpose of use” in determining a change of purpose of use for storage water “is and must be the ‘end use,’ not some intermediate or incidental use.” *Petition* at 9 (emphasis in original).

Therefore, the City’s assertion that *A&B Irrigation* stands for the proposition that all storage water rentals purpose of use should be determined by the “end use” is incorrect.

This Court could create a new holding with regard to whether or not the “end use” or the “intermediate use” should be used to determine if there has been a change of purpose of use of storage water, but such a holding is not necessary to determine the outcome of case. Even if the Court chose to develop a new holding that the City of Pocatello’s 2022 rental of water was not for the purpose of “mitigation” but was rather for the purpose of use by AFRD #2 for “irrigation,” the result would be the same. That is because, as outlined above, the City of Pocatello’s 2022 private lease of storage water also changed the place of use for Water Right 01-2068. Only one element of a storage water right needs to be changed for there to be injury to other water users.⁵ The fact the City’s rental changed the place of use is enough for the Court to uphold IDWR’s decision to make its storage water LTF in the following year when the reservoir system failed to physically fill.

Notwithstanding that the issue of change in purpose need not be determinative, the

⁵ Indeed, it is difficult to hypothesize a situation in which a transfer, water supply bank transaction, or lease/rental of storage water would not involve a change in at least one element of the water right involved. If there were no changes to an element of the water right, there would be no need to use the transfer or water supply bank to effectuate use of the water.

Memorandum Decision correctly found that the private lease of the City of Pocatello’s storage water in 2022 constituted a change in the purpose of use element of Water Right 01-2068. The evidence in the record clearly demonstrated that the City of Pocatello’s 2022 private lease of its storage water was for the purpose of “mitigation.” *See* R. at 000129–000130; 000857–000862. Other than its novel, but incorrect, legal theory regarding “end use,” the City has provided no arguments or evidence contradicting this finding.

3. The Court Correctly Held Application of the LTF Provision to Pocatello’s 2022 Private Lease Did Not Violate the Equal Protection Clause of the Idaho Constitution.

The Court correctly recognized that its review in this matter is limited. *See Memorandum Decision* at 7–8. The Court also correctly recognized that the City of Pocatello sought its review of an IDWR decision regarding the application of the LTF provision of the Water District 01 Rental Pool Procedures to the City of Pocatello’s 2022 private lease of its storage water. *Id.* at 7.

The Court correctly found that the rental pool procedures are “not procedures of general applicability.” *Memorandum Decision* at 17. Each basin and water district has unique factual circumstances, including geography and water uses, which make local decision making regarding the rental of stored water essential. The factual circumstances of Basin 63 and Basin 65 are not in evidence in this matter. And, crucially, the Basin 63 and Basin 65 Rental Pool Procedures were not applied to the City of Pocatello’s private lease of water in 2022. The issue of how the Basin 63 and Basin 65 Rental Pool procedures deal with the question of injury is not before this Court. Because there are unique factual circumstances in each basin, and water users in those basins are not similarly situated, there can be no expectation by the City of Pocatello that it should be treated the same way as a water users in Basin 63 or 65. Therefore, the Court correctly found that the application of the LTF provision of the Water District 01 Rental Pool Procedures following the City of Pocatello’s 2022 private lease of water did not violate the equal

protection clause of the Idaho Constitution.

4. The Court's Holding in the Memorandum Decision Does Not Constitute a Taking of Pocatello's Property Right.

Pocatello is correct in stating that the outcome of the *Memorandum Decision* is that it must use its storage water in conformance with the elements of Water Right 01-2068 and that, to the extent it wants to change its water use to something not authorized by Water Right 01-2068, it must use the Water District 01 Rental Pool (or file a transfer) to effectuate that change. *Petition* at 12. The fact that the City of Pocatello might have, in the past, been able (rightly or wrongly) to use its water in ways not authorized by Water Right 01-2068 does not make that finding a judicial taking.

The *Memorandum Decision* is simply a statement of the law as it has always been, namely that a water user must comply with the elements of a decreed water right and to the extent the water user seeks to change its use of water from what is decreed it must use the available legal methods for doing so (either a transfer pursuant to I.C. § 42-222 or a lease/rental through the Water District 01 Rental Pool Procedures). *See City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) (concluding that water use must comport with the elements of a water right as decreed); *see also* See R. 000226 (“While a water user has a constitutional right to have his water right administered in priority, that right extends only so far as the water right is being used within the parameters of its defined elements. A water user has no right to have his water right administered to points of diversion, places of use, periods of use, or purposes of use that differ from those authorized under his right.”).

The City cannot claim an expectation in its storage water to anything other than what it is legally entitled to by owning that storage water. And, regardless of what occurred in the past, the City must comply with the legal requirements for changing the purpose of use and place of use

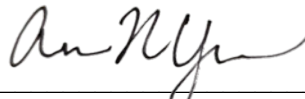
of its storage water. Indeed, the City recognizes that there are legal pathways that will allow it to continue to use its storage water in the future. *Petition* at 12 fn. 6. The *Memorandum Decision* is simply a recognition of the requirements of Idaho law. Thus, the Court did not effectuate a judicial taking of the City of Pocatello's interest in its storage water.

CONCLUSION

For the reasons set forth above, Respondents respectfully request the Court deny the *City of Pocatello's Petition for Rehearing* ("Petition") filed June 17, 2026, and affirm its *Memorandum Decision* and *Judgment* issued May 27, 2026.

DATED August 24, 2026.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



ANN N. YRIBAR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 24, 2026, I caused to be served a true and correct copy of the foregoing via iCourt E-File and Serve, upon the following:

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
sklahn@somachlaw.com
mbricker@somachlaw.com

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

Jerry Rigby
Hyrum Erickson
RIGBY ANDRUS & RIGBY LAW
jrigby@rex-law.com
herickson@rex-law.com

Travis L. Thompson
Abby Bitzenburg
PARSONS BEHLE & LATIMER
tthompson@parsonbehle.com
abitzenburg@parsonbehle.com
jnielson@parsonbehle.com

John K. Simpson
IDAH20, PLLC
jks@idahowaters.com



ANN N. YRIBAR
Deputy Attorney General