

Sarah A. Klahn (ISB # 7928)
Somach Simmons & Dunn
2701 Lawrence, #113
Denver, CO 80205
720-279-7868
sklahn@somachlaw.com

ATTORNEYS FOR THE CITY OF POCATELLO

**BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION	)	CITY OF POCATELLO’S
FOR TRANSFER NO. 81155	)	RESPONSE TO PROTESTANT’S
IN THE NAME OF	)	NOTICE OF EXCEPTIONS TO
CITY OF POCATELLO	)	PRELIMINARY ORDER DENYING
_____	)	ATTORNEY’S FEES AND COSTS

COMES NOW, City of Pocatello (“Pocatello”), by and through its undersigned attorneys, hereby submits its response to Spartan Portneuf LLC’s (“Spartan”) Notice of Exceptions to Preliminary Order Denying Attorneys’ Fees and Costs (“Exceptions Notice”), dated January 25, 2019. Pocatello submits this brief at this time in an abundance of caution, as it appears its original submission of this brief was not received by the Department, and likely also was not received by movant Spartan.

INTRODUCTION

Spartan’s Exceptions Notice is the latest in a line of grievances it has raised against a past Application for Transfer, No. 81155 (Application), Pocatello had filed. Ultimately, Pocatello withdrew its Application and intended to apply for the requested transfer at some future date. Meanwhile, Spartan filed a motion for attorneys’ fees, alleging that Spartan prevailed on the Protest it filed against Pocatello’s Application. This motion was denied. Spartan then filed the Exceptions Notice, which contains no explanation of the basis for Spartan’s exceptions, and also

does not contain any arguments in support. Accordingly, Pocatello requests that the Idaho Department of Water Resources (IDWR) and the Director decline to review the Preliminary Order issued by the Hearing Officer in this matter on January 11, 2019 because Spartan has failed to properly comply with the Idaho Code and IDWR Procedural Rules in filing its Exceptions Notice. Alternatively, Pocatello requests that the Director adopt the Preliminary Order Denying Protestant's Motion for Attorney's Fees and Costs (Preliminary Order on Attorney's Fees) as a final order because the Hearing Officer's findings are correct and supported by evidence in the record.

STATEMENT OF FACTS

In late 2014, Pocatello relocated Well #39 from its original location south of Interstate 86 to a new location north of the interstate and adjacent to the Pocatello Regional Airport, which obtains its water supply from Well #39. In order to legally pump water from the new location of Well #39, Pocatello filed three successive applications for transfer between 2015 and 2016, with Application for Transfer No. 81155 being the most recent of these three.

The Application was filed with IDWR on July 25, 2016. The Application explained that the water rights 29-2274, 29-2338, 29-7375 would be updated to reflect the new location of Well #39 and the former location decommissioned.

Spartan filed its Protest in September 2016, alleging that Pocatello's operation of Well #44, located some 12 miles from Well #39, cause injury to Spartan's water rights. In its Protest, Spartan sought curtailment or other IDWR action to reduce the volume of water Pocatello may pump from Well #44. Pocatello filed a motion to dismiss the Protest based on the fact that Well #44 was not at issue in the Application. Pocatello's motion to dismiss was granted by the

Hearing Officer after a hearing. Spartan filed a Petition for Reconsideration with the Hearing Officer, but this petition was denied.

On September 19, 2017, Spartan then filed a *Brief and Exceptions to Preliminary Order Dismissing Protest and Approving Transfer* with the IDWR. Pocatello responded to this exceptions brief on October 2, 2017. The Director remanded Spartan's Protest to the Hearing Officer, with direction to hold a full hearing on Pocatello's Application and Spartan's Protest. Pocatello appealed the Director's order, but the District Court denied the appeal and sent the matter back to the IDWR.

On September 25, 2018, the Hearing Officer held a status conference in this matter. Afterwards, on October 10, 2018, Pocatello withdrew its Application.

Spartan then filed a Motion for Attorneys' Fees on October 22, 2018. In this Motion, Spartan alleged that it was the prevailing party in the litigation because Pocatello withdrew its Application, and because Pocatello "acted unreasonably" in filing the Application in the first place. Pocatello opposed this Motion on jurisdictional and substantive grounds, arguing that Spartan did not prevail because a withdrawal did not accomplish what Spartan sought in its Protest – curtailment of Pocatello's pumping ability at Well #44. Pocatello also argued that it acted reasonably in filing its Application.

On January 11, 2019, the Hearing Officer issued a Preliminary Order on Attorney's Fees.

ARGUMENT

A. Spartan's Exceptions Notice Does Not Comply With IDWR Procedural Rules and Should be Rejected

Spartan's Exceptions Notice does not comply with the IDWR Procedural Rules, which require that parties who take exceptions with a preliminary order file a brief explaining those exceptions. IDWR Procedural Rule 730.02(c); *see also* I.C. § 67-5245(4)-(5). Specifically, Rule 730 provides that "[i]f any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee)." (IDWR Procedural Rule 730.02(c).) Briefs filed without identifying the basis for the exceptions do not satisfy due process requirements, because parties supporting the preliminary order would be ill equipped to respond to arguments not yet made. Idaho Code section 67-5245(4), relating to petitions for reconsideration, provides that the petition must state the basis for the review requested. It follows that exceptions to a preliminary order must similarly state the basis for the exceptions, and the portions of the preliminary order that the party contests.

The situation at hand is an illustration of the need for a party to file an exceptions brief rather than an exceptions notice. Spartan's Exceptions Notice is just a single page, including the caption formatting and signature block. The Exceptions Notice itself provides no detail about Spartan's exceptions—only that it is taking exception to the Hearing Officer's Preliminary Order on Attorney's Fees. This puts Pocatello, as an opposing party, in the position of responding to

the Exceptions Notice within 14 days without any inkling, beyond speculation, of the basis upon which Spartan is taking exceptions.

Furthermore, this is not the first time Spartan has taken exception to a preliminary order in this very matter. In September 2017, Spartan correctly filed a *brief* and exceptions to the preliminary order dismissing its Protest. Spartan is aware of the proper procedure for taking exception to a preliminary order, yet failed to do so in this instance.

Because Spartan did not submit a brief explaining and supporting the exceptions it is taking with the Preliminary Order on Attorney's Fees, it has failed to comply with the IDWR Rules governing exceptions. On this basis, the Exceptions Notice should be dismissed and/or disregarded, and the Preliminary Order on Attorneys' Fees should be adopted as a final order.

B. The Hearing Officer Properly Found that Spartan Is Not Entitled to Attorneys' Fees

Because Spartan's Exceptions Notice contains no information about what Spartan is taking exception to in the Preliminary Order on Attorney's Fees, Pocatello assumes Spartan takes exception to all findings made in the order.

Attorneys' fees may be awarded to a *prevailing party* in a proceeding only where the non-prevailing party "acted without a reasonable basis in fact or law." *Sopatyk v. Lemhi County*, 151 Idaho 809, 818, 264 P.3d 916 (2011); Idaho Code § 12-117. The court or agency, in its discretion, must determine whether there was a prevailing party. I.R.C.P. Rule 54(d)(1)(B). When exercising this discretion, the Department must consider the "extent to which each party prevailed relative to the final judgment or result" in the proceeding. *Bolger v. Lance*, 137 Idaho 792, 797, 53 P.3d 1211 (2002). Even if a party is deemed to have prevailed, that party may only

recover attorneys' fees where the losing party acted unreasonably. *Lake CDA Investments, LLC v. Idaho Dep't of Lands*, 149 Idaho 274, 284, 233 P.3d 721 (2010).

The Hearing Officer noted that “‘Mere dismissal of a claim without trial does not necessarily mean that the party against whom the claim was made is a prevailing party for the purpose of awarding costs and fees.’ *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 692 (Ct. App. 1984). In this case, the fact that Pocatello withdrew Application 81155 does not necessarily mean that Spartan prevailed in the matter.” Preliminary Order on Attorney’s Fees, at 3. Because there was no final judgment in the matter, the Hearing Officer then considered the result of the proceeding as it related to the relief Spartan sought. The Hearing Officer found that Spartan did not receive the relief it requested in its Protest, and therefore did not prevail:

Spartan's protest described the relief it sought in the contested case: “CURTAILMENT, REDUCTION IN VOLUME PUMPED BY CITY AT WELL #44, OR CALL.” It should be noted, it is unclear whether Pocatello's diversions at Well 44 are even relevant to the changes proposed in Application 81155. The relevance of diversions at Well 44 was an issue that would have been decided during the administrative hearing. Even assuming that Pocatello's diversions at Well 44 were found to be relevant, the withdrawal of Application 81155 did not result in any change to the quantity of water Pocatello is authorized to divert from Well 44. Prior to Application 81155, Pocatello was authorized to divert 21.45 cfs from Well 44. If Application 81155 were approved, Pocatello would have been authorized to divert 21.45 cfs from Well 44. Upon withdrawal of Application 81155, Pocatello is still authorized to divert 21.45 cfs from Well 44. In other words, there has been no curtailment or reduction in volume pumped by Pocatello at Well 44. Spartan did not get the relief it sought and, therefore, was not the prevailing party.

Id. at 4.

Spartan’s motion for attorneys’ fees and costs did not present any arguments related to the connection between the relief sought in the Protest and the result of the case: Pocatello’s withdrawal of the Application. Spartan’s Exceptions Notice is similarly devoid of any

arguments in support of its position that Spartan was the prevailing party. Thus, the Hearing Officer's finding that Spartan was not the prevailing party is correct and is supported by the record in this matter.

The Hearing Officer further determined that Pocatello did not act without a reasonable basis in fact or law by filing its Application. The Hearing Officer determined that Pocatello's actions in filing the Application were reasonable, based in part on the fact that as a water rights holder, Pocatello has a legal basis to apply for changes to its water rights. Preliminary Order on Attorney's Fees, at 4. The Hearing Officer also based this finding on the fact that Pocatello had, shortly before filing the Application, successfully transferred two other water rights from the former Well 39 location to the new location, both without protest. Preliminary Order on Attorney's Fees, at 4. "It was reasonable for Pocatello to attempt to transfer its remaining water rights in Old Well 39 to New Well 39. It would have been impossible for Pocatello to anticipate a protest from a water right holder located over twelve miles from the proposed point of diversion (New Well 39)." *Id.* at 4. The Hearing Officer also found that it was reasonable for Pocatello to continue to pursue a favorable outcome to the Application, "[g]iven the significant distance between the Spartan Well and New Well 39 and the tenuous hydrologic connection between those two locations." *Id.* at 4.

Spartan's motion for attorneys' fees only offered the lengthy duration of the transfer proceeding as evidence that Pocatello acted unreasonably. However, this ignores the fact that Spartan had sought attorneys' fees following Pocatello's appeal to the District Court, and that this request was denied. *Order Dismissing Petition for Judicial Review*, Case No. CV-01-17-23146, District Court-SRBA Fifth Judicial District (Administrative Appeals), June 4, 2018, at 6.

It also ignored the fact that no action was taken on the matter for the several months between the District Court's order and the status conference held in late September 2018, a few weeks prior to Pocatello's withdrawal.

CONCLUSION

The Preliminary Order's finding that Pocatello did not act unreasonably in this matter is correct and is supported by the record in this matter. Pocatello respectfully requests that the Director adopt the Preliminary Order on Attorneys' Fees as a final order and reject Spartan's Exceptions Notice.

Respectfully submitted this 11th day of March, 2019.

SOMACH SIMMONS & DUNN

By 
Sarah A. Klahn

ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2019, I caused to be served a true and correct copy of the attached **CITY OF POCATELLO'S RESPONSE TO PROTESTANT'S NOTICE OF EXCEPTIONS TO PRELIMINARY ORDER DENYING ATTORNEY'S FEES AND COSTS** upon the following by the method indicated below:

Eastern Regional Office Idaho Department of Water Resources 900 North Skyline Drive, Suite A Idaho Falls, ID 83402-1718 james.cefalo@idwr.idaho.gov sharla.cox@idwr.idaho.gov	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight (Original) ☐ Facsimile (208) 525-7177 ☒ Email
Gary Spackman, Director State of Idaho, Dept of Water Resources 322 E Front St P.O. Box 83720 Boise ID 83720-0098 kimberle.english@idwr.idaho.gov Garrick.baxter@idwr.idaho.gov	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☒ Federal Express ☐ Facsimile 208-287-6700 ☒ Email
Jim Browitt Laura Schroeder Spartan Portneuf LLC Schroeder Law Offices P.C. 1915 NE Cesar E. Chavez Blvd. Portland, OR 97212 schroeder@water-law.com j.browitt@water-law.com	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☒ Email
Kirk Bybee City of Pocatello P.O. Box 4169 Pocatello ID 83201 kibybee@pocatello.us	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☒ Email
Justin Armstrong City of Pocatello 911 North 7th Ave. P.O. Box 4169 Pocatello, ID 83250-4169 jarmstrong@pocatello.us	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☒ Email
Thomas J. Katsilometes PLLC P.O. Box 777 Boise, ID 83701-0777	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☐ Email

By



Sarah A. Klahn, ISB No. 7928