

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 81155 IN THE NAME OF <u>CITY OF POCATELLO</u>	)))	ORDER DENYING PROTESTANT'S MOTION FOR ATTORNEY'S FEES AND COSTS
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BACKGROUND

The City of Pocatello ("Pocatello" or "City") owns a ground water well ("Old Well 39") located in the SWNE of Section 15, T06S, R33E. Prior to May 2015, the following water rights listed Old Well 39 as an authorized point of diversion: 29-2274, 29-2338, 29-7375, 29-7450 and 29-13638.

On February 17, 2015, Pocatello filed Application for Transfer 79826 with the Idaho Department of Water Resources ("Department"), proposing to change the location of one of the points of diversion listed on water right 29-13638. Specifically, Application 79826 proposed to change the point of diversion associated with Old Well 39 to a new ground water well ("New Well 39") to be constructed in the SWSWSE of Section 10, T06S, R33E. The Department approved Transfer 79826 on May 15, 2015. Construction of New Well 39 was completed in October 2015. New Well 39 is located approximately one-half mile north of Old Well 39.

On July 25, 2016, Pocatello filed Application for Transfer 81117 with the Department, proposing to change the location of one of the points of diversion listed on water right 29-7450. Specifically, Application 81117 proposed to change the point of diversion associated with Old Well 39 to the location of New Well 39. The Department approved Transfer 81117 on December 6, 2016.

On July 25, 2016, Pocatello filed Application for Transfer 81155 ("Application 81155") with the Department, proposing to change the location of one of the points of diversion listed on water rights 29-2274, 29-2338 and 29-7375. Specifically, Application 81155 proposed to change the point of diversion associated with Old Well 39 to the location of New Well 39. Water rights 29-2274, 29-2338, 29-7375 describe thirteen points of diversion (ground water wells) scattered throughout Pocatello's municipal service area.

The Department published notice of Application 81155 on September 8 and 15, 2016. A protest was filed by Spartan Portneuf LLC ("Spartan"). Spartan owns water right 29-13425, which authorizes the diversion of water from a ground water well ("Spartan Well") located in the SWSW, Section 16, T07S, R35E. One of Pocatello's wells, Well 44, is located approximately 300 feet south of the Spartan Well. Application 81155 did not propose to make any change to Well 44 or the authorized point of diversion located in the SWSW, Section 16, T07S, R35E. Well 44 and the Spartan Well are located 12.1 miles away from Old Well 39. Well 44 and the Spartan Well are located approximately 12.4 miles away from New Well 39.

Spartan's protest included the following questions and responses:

Basis of protest (including statement of facts and law upon which the protest is based):

CONTEMPLATED TRANSFER TO OTHER WELL, SPECIFICALLY CITY WELL #44 LOCATED AT SW1/4 SW1/4 SEC 16, TWP7.S. R35E. WILL EXACERBATE EXISTING PROBLEM OF CITY'S OPERATION OF WELL #44 HAS BEEN, AND CONTINUES TO BE, INJURIOUS TO WELL OPERATED BY SPARTAN PORTNEUF LLC UNDER IT'S SENIOR RIGHT & LICENSE.

What would resolve your protest?

CURTAILMENT, REDUCTION IN VOLUME PUMPED BY CITY AT WELL #44, OR CALL. SHOULD CONDUCT FLOW MEASUREMENT STUDY FOR ONE YEAR PRIOR TO ACTION BY THE DEPARTMENT.

On June 27, 2017, Pocatello filed a *Motion to Dismiss Protest and in the Alternative Motion in Limine* ("Motion to Dismiss"). The hearing officer granted Pocatello's Motion to Dismiss on August 8, 2017. Spartan appealed the hearing officer's decision by filing exceptions with the Director of the Department. On November 20, 2017, the Director issued an order overturning the hearing officer's dismissal of Spartan's protest and remanding the contested case to the hearing officer to conduct an administrative hearing.

On October 10, 2018, Pocatello withdrew Application 81155. On October 26, 2018, Spartan filed a Motion for Attorney's Fees and Costs ("Motion"). Spartan asserts that it is entitled to attorney's fees and expenses under Idaho Code §§ 12-117(1) or 12-117(2). Spartan argues that it was the prevailing party in the contested case, at least in part, and that Pocatello acted without a reasonable basis in fact or law in pursuing Application 81155. According to Spartan, Pocatello "forced [Spartan] to endure two years of administrative and judicial wrangling, only to procedurally capitulate by withdrawing its application." *Motion* at 3. Pocatello filed a *Response to Protestant's Motion for Attorney's Fees and Costs* ("Response") on November 2, 2018.

RELEVANT LEGAL PROVISIONS

Idaho Code § 12-117 states, in pertinent part:

(1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

(2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

ANALYSIS

Jurisdiction to Address Spartan's Motion

Pocatello argues that the Department does not have the jurisdiction to address Spartan's Motion. According to Pocatello, "[o]nce a transfer application is withdrawn, there is no longer an active IDWR matter regarding the proposed modification to the water rights that were named in the transfer, and the Department is without jurisdiction to take any action regarding the withdrawn transfer, including considering claims for attorneys' fees." *Response* at 1-2.

Costs and attorney's fees are collateral issues which do not go to the merits of an action and a district court retains jurisdiction to make such an award after a suit has been terminated. *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007). While *Straub* dealt with the jurisdiction of a district court to decide claims for attorney's fees, the hearing officer sees no reason why the rule set forth in *Straub* should not apply equally to an administrative matter. The hearing officer concludes the Department retains jurisdiction to address Spartan's request for attorney's fees.

Prevailing Party

If a contested case is settled or is terminated prior to a formal decision, the presiding officer has the discretion to determine which party prevailed in the matter, if any, for purposes of awarding attorney's fees. See *Hobson Fabricating Corp. v. SE/Z Const., LLC*, 154 Idaho 45, 51 (2012). "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.

Application 81155 was not a claim or suit directed against Spartan. It was a proposal to change the point of diversion for water rights 29-2274, 29-2338 and 29-7375 from Old Well 39 to New Well 39, a well located approximately one-half mile to the north. The Spartan Well is located over twelve miles to the southeast of Old Well 39 and New Well 39. Application 81155 did not propose to make any changes to Well 44, the Pocatello well located closest to the Spartan Well.

In determining whether a party to an action is a prevailing party, an administrative agency shall consider the final judgment or the result of the action in relation to the relief sought by the respective parties. *See* I.R.C.P. 54(d)(1)(B). In this matter, there was no final judgment so the hearing officer must consider the result of the action in relation to the relief sought by Spartan.

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.

Pocatello's Actions – Reasonable Basis in Fact or Law

Even if Spartan was the prevailing party, it would not be entitled to attorney's fees because Pocatello acted with a reasonable basis in fact and law. Pursuant to Idaho Code § 42-222, "[a]ny person, entitled to the use of water whether represented by license . . . or by decree of the court . . . who shall desire to change the point of diversion . . . of all or part of the water, under the right shall first make application to the [Department] for approval of such change." Pocatello had already successfully transferred water right 29-13638 from Old Well 39 to New Well 39 through approved Transfer 79826 less than two years prior to filing Application 81155. Transfer 81117, moving water right 29-7450 from Old Well 39 to New Well 39, was approved shortly after Application 81155 was filed. 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). Therefore, Pocatello's decision to file Application 81155 had a reasonable basis in fact and law.

Pocatello's decision to pursue Application 81155, even after the protest was filed by Spartan, also had a reasonable basis in fact and law. Given the significant distance between the Spartan Well and New Well 39 and the tenuous hydrologic connection between those two locations, Pocatello had a reasonable basis in fact and law to continue to seek a favorable decision in the contested case.

CONCLUSIONS OF LAW

Spartan did not prevail in the contested case. The primary issue of protest, the impact of Well 44 on the Spartan Well, was not affected in any way by the withdrawal of Application 81155.

Pocatello's decision to file Application 81155 had a reasonable basis in fact and law. Pocatello's decision to pursue Application 81155, even after Spartan filed a protest against the application, also had a reasonable basis in fact and law.

Spartan is not entitled to attorney's fees or expenses under Idaho Code §§ 12-117(1) or 12-117(2).

ORDER

IT IS HEREBY ORDERED that Spartan's Motion is DENIED.

Dated this 11th day of January, 2019.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January 2019, I mailed a true and correct copy of the foregoing ORDER DENYING PROTESTANT'S MOTION FOR ATTORNEY'S FEES AND COSTS, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below:

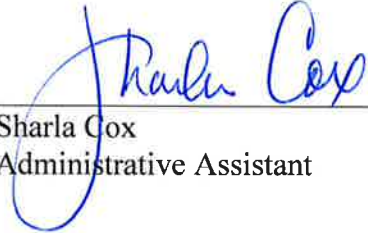
RE: APPLICATION FOR TRANSFER 81155

**Sarah Klahn
Somach Simmons & Dunn
2701 Lawrence Street, Suite 113
Denver, CO 80205**

**Laura Schroeder
James Browitt
Schroeder Law Offices, P.C.
1915 NE Cesar E Chavez Blvd.
Portland, OR 97212**

**Kirk Bybee
City of Pocatello
911 North 7th Avenue
PO Box 4169
Pocatello, ID 83205-4169**

**Thomas Katsilometes
PO Box 777
Boise, ID 83701-0777**



Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.