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DEPARTMENT OF
WATER RESOURCES

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

CITY OF POCATELLO,

Petitioners

vs.

GARY SPACKMAN in his official capacity
As Director of the Idaho Department of Water
Resources; and the IDAHO DEPARTMENT
OF WATER RESOURCES,

Respondents.

Case No. _____

**CITY OF POCATELLO'S NOTICE
OF APPEAL AND PETITION FOR
JUDICIAL REVIEW**

Fee Category:
Exempt per I.C. § 67-2301

COMES NOW, the Petitioner City of Pocatello ("Pocatello"), by and through its undersigned counsel, and hereby files this Petition seeking judicial review.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code sections 67-5270 and 67-5279 seeking judicial review of the *Order Remanding Contested Case; Order Denying Request to Exclude Evidence* ("Order") (Nov. 20, 2017) of the Director of the Idaho Department of Water Resources ("Respondent"), *In the Matter of Application for Transfer No. 81155 in the Name of City of Pocatello*. The Order is attached hereto as Exhibit A.

On July 25, 2016, Pocatello filed an Application for Transfer No. 81155 with the Department to relocate a point of diversion—Well 39—for its water rights nos. 29-2274, 29-2338, and 29-7375. In September 2016, Spartan Portneuf LLC (“Spartan”) protested Transfer No. 81155, alleging injury from Pocatello’s operations of Pocatello’s Well #44—which is not the subject of the transfer application. On August 8, 2017, the Hearing Officer dismissed Spartan’s Protest in response to *Pocatello’s Motion to Dismiss Protest and In the Alternative Motion In Limine*, filed June 26, 2017. *Preliminary Order Dismissing Protest and Approving Transfer* (“Preliminary Order”), attached hereto as Exhibit B. Spartan filed a *Brief and Exceptions to Preliminary Order Dismissing Protest and Approving Transfer*, dated September 19, 2017. In response, the Director entered his Order, remanding this matter back to the Hearing Officer and denying Pocatello’s motion in limine.

JURISDICTION AND VENUE

2. This petition is authorized pursuant to Idaho Code sections 67-5270 and 67-5279.

3. Venue lies with this Court pursuant to Idaho Code sections 42-1401D and 67-5272, as the Director’s Order was entered in Ada County. Pursuant to the Idaho Supreme Court’s Administrative Order issued on December 9, 2009, reflected in the Snake River Basin Adjudication (“SRBA”) Court’s July 1, 2010 Administrative Order (“Administrative Order”), “all petitions for judicial review . . . of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District.” The Administrative Order instructs the clerk of the district court in which the petition is filed to issue a Notice of Reassignment. Pocatello has attached a copy of the SRBA Court’s Notice of Reassignment form for the convenience of the clerk (Exhibit C).

4. The Director's Order is an interlocutory agency action pursuant to Idaho Department of Water Resources' Rule of Procedure 710. IDAPA 37.01.01.710. However, the Order reinstates Spartan Portneuf LLC's protest to Pocatello's transfer application and requires Pocatello to go through an administrative hearing to address Spartan's legal theory of injury, which Pocatello contends has no basis in fact or law, as initially found by the Hearing Officer.

5. Pursuant to Idaho Code section 67-5271(2), an interlocutory agency action is immediately reviewable if exhausting administrative remedies and awaiting a final agency action would not provide an "adequate remedy." Because exhausting administrative remedies will require Pocatello to go to the expense of a hearing on a deficient protest and to rebut a theory of injury that is inherently erroneous and outside the scope of the Department's consideration in a transfer application, Pocatello should not be required to exhaust administrative remedies. If Pocatello prevails on appeal on the issues outlined below, a hearing will not be required.

PARTIES

6. Petitioner City of Pocatello is a municipal corporation of Idaho.

7. Respondent Idaho Department of Water Resources is a state agency, with its main office located at 322 E. Front Street, Boise, Ada County, Idaho, 83702. Respondent Gary Spackman is the Director of the Idaho Department of Water Resources.

AGENCY RECORD

8. No hearing was held in this matter before issuance of the Order, and there is no transcript. Pocatello requests preparation of a record by the Department. The person who may have a copy of the agency record in this matter is the Director's Administrative Assistant, Idaho Department of Water Resources, 322 E. Front Street, P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4800, Facsimile: (208) 287-6700, email: Kimi.White@idwr.idaho.gov.

The undersigned attorneys certify that Pocatello has paid the clerk of the agency the estimated fee of \$15.00 for the preparation of the record. Pocatello is exempt from the filing fees with this Court pursuant to Idaho Code section 67-2301.

9. Service of this appeal has been made on the Respondents and all required parties at the time of the filing of this Petition with the Court.

ISSUES ON APPEAL

Pocatello requests judicial review of the following issues while reserving the right under I.R.C.P. 84(c)(5) to assert additional issues and/or clarify or further specify the issues for judicial review stated in the petition or which are discovered later:

1. Whether the Director properly rejected the Hearing Officer's dismissal of Spartan's Protest as a defective pleading that raised issues which "fall outside the scope of the Department's review authority for transfer applications." Preliminary Order at 5.
2. Whether the Director properly rejected the Hearing Officer's conclusion that in examining a transfer "the Department must assume that the water user will operate to the full extent authorized by the water right. . . . Injury should be evaluated based on the diversion rates and volumes proposed on the face of a transfer application. . . . [and] 81155 will have no effect on Pocatello's authorization to divert from Well 44." *Id.*
3. Whether the Director properly rejected the Hearing Officer's finding that "[i]f Pocatello's operation of Well 44 is causing injury to Spartan's water rights, the proper forum to address such injury is within a delivery call proceeding." *Id.*
4. Whether Spartan's protest should have been dismissed because Spartan cannot show a distinct, palpable injury to allow it to participate in this proceeding and thus lacks standing to protest. *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015).

Respectfully submitted this 15th day of December, 2017.