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DEPARTMENT OF
WATER RESOURCES

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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 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.

WHITE & JANKOWSKI LLP

Attorneys for City of Pocatello

By_____
Sarah A. Klahn

By_____
Mitra M. Pemberton

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2017 a true and correct copy of the foregoing **CITY OF POCATELLO'S NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW** was served on the following by the method indicated below:

Sarah A. Klahn
White & Jankowski LLP

Gary Spackman, Director IDWR 322 East Front St P.O. Box 83720 Boise ID 83720-0098 gary.spackman@idwr.idaho.gov kimi.white@idwr.idaho.gov	____ U.S. Mail, Postage Prepaid ____ Hand Delivery _X_ Overnight Mail – Federal Express ____ Facsimile 208-287-6700 Phone 208-287-4800 _X_ Email
Garrick Baxter IDWR P.O. Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov	_X_ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail – Federal Express ____ Facsimile 208-287-6700 Phone 208-287-4800 _X_ 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	_X_ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Federal Express Overnight ____ Facsimile _X_ Email

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 81155 IN THE NAME OF CITY OF POCATELLO	**ORDER REMANDING CONTESTED CASE; ORDER DENYING REQUEST TO EXCLUDE EVIDENCE**

BACKGROUND

On July 25, 2016, the City of Pocatello ("Pocatello") filed Application for Transfer No. 81155 ("Application 81155") with the Idaho Department of Water Resources ("Department"). Application 81155 proposes to change the location of Well 39, one of the thirteen shared points of diversion decreed for Pocatello's water right nos. 29-2274, 29-2338 and 29-7375 by the Snake River Basin Adjudication ("SRBA") Court on April 26, 2012. The existing point of diversion is located in the SWNE, Section 15, T06S, R33E. The proposed point of diversion is located approximately ½ mile to the north, in the SWSWSE, Section 10, T06S, R33E. The entire combined authorized diversion rate for water right nos. 29-2274, 29-2338 and 29-7375 (21.45 cfs) can be diverted from any one of the thirteen points of diversion identified on the rights. While the partial decrees for water right nos. 29-2274, 29-2338 and 29-7375 contain thirteen shared points of diversion, Application 81155 only proposes eleven points of diversion to be included on the water rights after the proposed change.

The Department published notice of Application 81155 on September 8 and 15, 2016. Spartan Portneuf LLC ("Spartan") filed a protest. Spartan owns water right no. 29-13425 which authorizes the diversion of water from a ground water well ("Spartan Well") located in the SWSW, Section 16, T07S, R35E. Pocatello's Well 44, one of the points of diversion for water right nos. 29-2274, 29-2338 and 29-7375, is located approximately 300 feet south of the Spartan Well. Well 44 and the Spartan Well are located 12.1 miles away from existing Well 39. Well 44 and the Spartan Well are located approximately 12.4 miles away from proposed Well 39.

Spartan's protest includes 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.

A Department hearing officer conducted a pre-hearing conference on June 9, 2017. The parties were unable to resolve the issues of protest and requested that the hearing officer conduct an administrative hearing to decide the contested case. A hearing was scheduled for October 17, 2017.

On June 26, 2017, Pocatello filed a *Motion to Dismiss Protest and in the Alternative Motion in Limine* ("Motion"). Pocatello argued Spartan's protest should be dismissed as "defective" because it "exclusively involves claims of injury from the operation of Well #44" and "does not complain of injury from the relocation of Well #39." *Motion* at 4-5.

Spartan filed a *Response to City's Motion to Dismiss Protest and Objection to Alternative Motion in Limine* ("Response") on July 10, 2017. Spartan disagreed with Pocatello's assertion that Application 81155 only "relates to the relocation and operation of Well No. 39" and pointed to Application 81155's exclusion of two points of diversion from water right nos. 29-2274, 29-2338 and 29-7375. *Response* at 2. Spartan asserted "it is not unreasonable to question how this change will affect the production demands on the other 11 wells, among them No. 44." *Id.* at 3. Spartan reiterated that it "contests the changes proposed in [Application 81155], changes it believes will 'exacerbate' the 'existing problem.'" *Id.* at 4.

On August 8, 2017, the hearing officer issued a *Preliminary Order Dismissing Protest and Approving Transfer* ("Dismissal Order"). The hearing officer determined that "Spartan's arguments are not sufficient to connect the injury concerns associated with the operation of Well 44 to the change proposed in Application 81155." *Id.* at 5. The hearing officer concluded "Spartan's protest is defective because it does not identify any issues related to the changes proposed in Application 81155." *Id.* at 6. The hearing officer dismissed Spartan's protest and approved Application 81155. *Id.* at 7.

On August 22, 2017, Spartan filed *Protestant's Petition for Reconsideration of Preliminary Order Dismissing Protest and Approving Transfer*. The hearing officer issued an *Order Denying Petition for Reconsideration* on September 5, 2017.

On September 19, 2017, Spartan filed a *Brief and Exceptions to Preliminary Order Dismissing Protest and Approving Transfer* ("Exceptions"). On October 2, 2017, Pocatello filed *Pocatello's Response to Brief and Exceptions to Preliminary Order Dismissing Protest and Approving Transfer* ("Response to Exceptions").

ANALYSIS

Spartan contends the hearing officer erred by dismissing its protest and asserts Application 81155 is deficient. *Exceptions* at 3-9. Spartan's arguments will be addressed in turn.

1. Spartan's protest should not be dismissed.

Spartan asserts the hearing officer erred by dismissing its protest and asks the Director to "allow the contested case for [Application 81155] to proceed." *Exceptions* at 8-9. Pocatello asserts the hearing officer "properly dismissed Spartan's Protest because its claim of injury from the pumping of Well #44 had nothing to do with the contemplated transfer." *Response to Exceptions* at 2.

Idaho Code § 42-222(1) requires that the Department publish notice of an application for transfer which "shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication." Idaho Code § 42-222(1) also requires that, "[u]pon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the [Director] to investigate the same and to conduct a hearing thereon." The Department's Rule of Procedure 250 states that "pleadings opposing an application or claim or appeal as a matter of right are called 'protests.'" IDAPA 37.01.01.250.01. Rule of Procedure 304 states that "[d]effective, insufficient or late pleadings may be returned or dismissed." IDAPA 37.01.01.304.

In evaluating Pocatello's request to dismiss Spartan's protest, the hearing officer focused on the language of Idaho Code § 42-222(1) that allows a person to "protest the proposed change." The hearing officer reasoned:

> Spartan's protest does not identify any issues related to the proposed change for Well 39. The protest does not even refer to Well 39 or the existing or proposed points of diversion for Well 39. Spartan's protest focuses entirely on Well 44, which is located over 12 miles away from Well 39. Application 81155 does not propose to change the diversion rate authorized at Well 44 in any way. Pocatello is already authorized to divert the full quantity listed on water rights 29-2274, 29-2338 and 29-7375 from Well 44. If Application 81155 were approved, the authorized diversion rate from Well 44 will not increase.
>
> Spartan's protest is defective because it does not identify any issues related to the changes proposed in Application 81155. Therefore, Spartan's protest should be dismissed.

Dismissal Order at 5-6.

The Director disagrees with the hearing officer's conclusion that "Spartan's protest does not identify any issues related to the proposed change for Well 39." As the hearing officer explained, Spartan argues "that eliminating points of diversion or changing the location of Well 39 may

possibly increase the demand in Well 44" and "exacerbate the alleged injury to the Spartan Well." *Id.* at 5. In other words, Spartan asserts the changes proposed in Application 81155 will cause Pocatello to alter the way it operates its system to "shift more demand to Well 44 and exacerbate the alleged injury to the Spartan Well resulting from operation of Well 44." *Id.* While the hearing officer is correct that "Pocatello is already authorized to divert the full quantity listed on water rights 29-2274, 29-2338 and 29-7375 from Well 44," that does not necessarily mean "the expected operation of the system is of little consequence in an injury analysis." *Id.* It is conceivable that Spartan could present evidence at a hearing regarding Pocatello's current operation of its system and evidence that the changes proposed by Application 81155 will cause Pocatello to shift operation of its system to demand more from Well 44 and injure the Spartan Well. Spartan's argument that eliminating points of diversion and changing the location of Well 39 could possibly increase demand in Well 44 and injure the Spartan well constitutes a protest against the "proposed change" in accordance with Idaho Code § 42-222(1). Spartan's protest is not "defective" and should not have been dismissed. It is the duty of the Department "to investigate the same and to conduct a hearing thereon." Idaho Code § 42-222(1). The Director will remand the contested case to the hearing officer to conduct a hearing on Application 81155 and consider Spartan's protest.

Pocatello asserts that, in the alternative, Spartan's protest should be dismissed because "Spartan's theory of injury amounts to a collateral attack on Pocatello's SRBA decrees." *Response to Exceptions* at 9-10. Spartan's argument that the changes proposed in Application 81155 could result in injury to the Spartan Well does not equate to an attack on Pocatello's authorization to divert the full quantity listed on the SRBA partial decrees for water right nos. 29-2274, 29-2338 and 29-7375 from Well 44. As Spartan previously stated, "[w]ith its Protest, [Spartan] simply contests this proposal on the basis that it will further injure right No. 29-13425 – it is not challenging . . . any SRBA decree." *Response* at 4.

Pocatello also asserts that Spartan's protest should be dismissed because "there is no connection between the conduct challenged in this transfer and Spartan's claimed injury" and, therefore, "Spartan does not have standing to protest this transfer." *Response to Exceptions* at 9-10. The Director disagrees. As discussed above, Spartan argues "that eliminating points of diversion or changing the location of Well 39 may possibly increase the demand in Well 44" and "exacerbate the alleged injury to the Spartan Well." *Dismissal Order* at 5. Spartan's argument alleges a connection between the changes proposed in Application 81155 and possible injury to the Spartan Well. Spartan has standing to protest Application 81155.

Finally, Pocatello argues that, "if the Director determines remand is proper," the Director should "exclude evidence regarding Well #44" pursuant to the Department's Rule of Procedure 600. Rule 600 allows a hearing officer to "exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho." IDAPA 37.01.01.600. Rule 600 also states "[e]vidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." *Id.* The Director will not exclude evidence regarding Well #44. Spartan's argument that eliminating points of diversion and changing the location of Well 39 could possibly increase demand in Well 44 relies upon presentation of evidence regarding Well 44. Such evidence is not irrelevant, repetitious, or inadmissible and exclusion of evidence regarding

Well 44 would frustrate Spartan's ability to develop the record in support of its argument. The Director will order that evidence regarding Well 44 shall not be excluded.

2. **Application 81155 is not deficient.**

Spartan asserts Application 81155 is deficient because 1) Pocatello should have submitted a "notarized statement" with Application 81155 in compliance with the Department's *Transfer Processing Memorandum No 24* ("Memo 24") identifying that Pocatello was proposing to eliminate two points of diversion from water right nos. 29-2274, 29-2338 and 29-7375 and 2) Application 81155 did not "'list the purpose for and a general statement of the reason for the proposed change.'" *Exceptions* at 3-7.

Memo 24 explains that "[a]n application for transfer is not required to relinquish a portion of a water right such as elimination of a purpose of use or a point of diversion," but "[t]he water right owners should provide a notarized statement of relinquishment including specific identification of the water right(s) and the specific reduction(s)." While Memo 24 states water right owners "should provide a notarized statement," Memo 24 does not require that water right owners do so. Failure to submit such notarized statement in support of an application for transfer that proposes removal of points of diversion such as Application 81155 does not mean the application is deficient.[1] Further, Pocatello adequately presented "the purpose for and a general statement of the reason for the proposed change" when it submitted Application 81155 to the Department. Pocatello stated in the letter enclosing Application 81155 that, "[d]ue to the recent relocation and replacement of Well 39 . . . the former well will be properly decommissioned and this point of diversion no longer utilized. [Pocatello] desires to update any formerly associated water rights at the previous location to include the new point of diversion of Well 39 . . . ." Application 81155 is not deficient.

ORDER

IT IS HEREBY ORDERED that this matter is REMANDED to the hearing officer to conduct a hearing including Spartan as a protestant to Application 81155.

IT IS FURTHER ORDERED that Pocatello's request to exclude evidence regarding Well 44 is DENIED.

DATED this 20th day of November 2017.

GARY SPACKMAN
Director

[1] Pocatello does not take "exception" with the hearing officer's exclusion of two points of diversion in the Transfer Approval 81155 issued in conjunction with the Dismissal Order. *Response to Exceptions* at 1. If Application 81155 is approved after an evidentiary hearing on remand, the Transfer Approval 81155 should continue to exclude the two points of diversion.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November 2017, I served a true and correct copy of the foregoing document by the method(s) indicated to the following:

Sarah A. Klahn Mitra M. Pemberton White & Jankowski, LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
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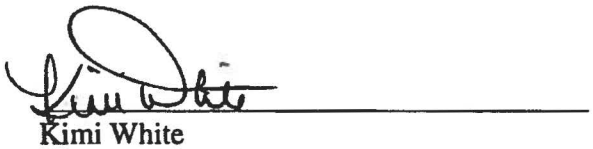

Kimi White

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 81155 IN THE NAME OF CITY OF POCATELLO	)))	PRELIMINARY ORDER DISMISSING PROTEST AND APPROVING TRANSFER

PROCEDURAL BACKGROUND

On July 25, 2016, City of Pocatello ("Pocatello") filed Application for Transfer No. 81155 ("Application 81155") with the Idaho Department of Water Resources ("Department"). The Department published notice of Application 81155 on September 8 and 15, 2016. A protest was filed by Spartan Portneuf LLC ("Spartan").

The Department conducted a pre-hearing conference on June 9, 2017. The parties were unable to resolve the issues of protest and requested that the Department conduct an administrative hearing to decide the contested case. A hearing was scheduled for October 17, 2017.

Pocatello filed a *Motion to Dismiss Protest and in the Alternative Motion in Limine* ("Motion") on June 26, 2017. Spartan filed a *Response to City's Motion to Dismiss Protest and Objection to Alternative Motion in Limine* ("Response") on July 10, 2017. Pocatello filed a *Reply in Support of Motion to Dismiss Protest and in the Alternative Motion in Limine* ("Reply") on July 13, 2017.

FINDINGS OF FACT

1. Application 81155 proposes to change[1] the location of one of the thirteen shared points of diversion for the following water rights:

Water Right No.	Priority Date	Diversion Rate	Source	Beneficial Use
29-2274	6/15/1948	9.69 cfs	Ground Water	Municipal
29-2338	9/1/1953	9.53 cfs	Ground Water	Municipal
29-7375	2/24/1977	2.23 cfs	Ground Water	Municipal

[1] In completing Application 81155, Pocatello marked that it intended to both change point(s) of diversion for and add point(s) of diversion to water rights 29-2274, 29-2338 and 29-7375. However, the other portions of the application form and the other documents submitted with the application make it clear that Pocatello only intends to change a point of diversion.

SUPPORT DATA
IN FILE # 29-2274

EXHIBIT B

2. The Snake River Basin Adjudication ("SRBA") Court issued partial decrees for water rights 29-2274, 29-2338 and 29-7375 on April 26, 2012, with the following authorized ground water points of diversion:

NESE	Sec. 10, Twp 06S, Rge 33E,	POWER County	(Well 35)
NESE	Sec. 12, Twp 06S, Rge 33E,	POWER County	(Well 11)
SWNE	Sec. 15, Twp 06S, Rge 33E,	POWER County	(Well 39)
NWSW	Sec. 15, Twp 06S, Rge 34E,	BANNOCK County	(Well 8)
NENW	Sec. 26, Twp 06S, Rge 34E,	BANNOCK County	(Well 10)
NWSE	Sec. 27, Twp 06S, Rge 34E,	BANNOCK County	(Well 9)
SENE	Sec. 35, Twp 06S, Rge 34E,	BANNOCK County	(Well 12)
SENE	Sec. 35, Twp 06S, Rge 34E,	BANNOCK County	
NWSE	Sec. 35, Twp 06S, Rge 34E,	BANNOCK County	(Well 4)
NWSE	Sec. 35, Twp 06S, Rge 34E,	BANNOCK County	(Well 6)
NWSE	Sec. 35, Twp 06S, Rge 34E,	BANNOCK County	(Well 7)
SESE	Sec. 01, Twp 07S, Rge 34E,	BANNOCK County	(Well 13)
SWSW	Sec. 16, Twp 07S, Rge 35E,	BANNOCK County	(Well 44)

3. Water rights 29-2274, 29-2338 and 29-7375 do not include any conditions limiting the amount of water which can be diverted from any single point of diversion. The entire combined authorized diversion rate for the three rights (21.45 cfs) could be diverted from any one of the thirteen points of diversion identified on the rights.

4. Application 81155 proposes to change the point of diversion associated with Well 39. The existing point of diversion is located in the SWNE, Section 15, T06S, R33E. The proposed point of diversion is located approximately ½ mile to the north, in the SWSWSE, Section 10, T06S, R33E. Application 81155 also proposes to remove two points of diversion (NESE, Sec. 12, T06S, R33E and SENE, Sec. 35, T06S, R34E) from the water rights.[2]

---

[2] Water rights 29-2274, 29-2338 and 29-7375 currently describe thirteen points of diversion. In completing Application 81155, Pocatello only identified eleven proposed points of diversion. In its Reply, Pocatello asserts it "does not intend to abandon any of its authorized points of diversion." Reply, Armstrong Aff. at ¶7. This statement, however, is not consistent with the proposed points of diversion listed in Application 81155. Pocatello acknowledges that it no longer owns the well in the NESE, Sec. 12, T06S, R33E (Well 11). Reply, Armstrong Aff. at ¶4. Further, Pocatello does not identify more than one existing well in the SENE, Sec. 35, T06S, R34E. *See* Application Map (Well 12 is the only well shown in the SENE, Sec. 35, T06S, R34E). There is no evidence in the record that a second city well has ever existed in the SENE, Sec. 35, T06S, R34E. Pocatello claims the exclusion of the two points of diversion was "due to the space constraints of the application form." Reply, Armstrong Aff. at ¶5. Such a claim is not convincing, however, in light of Pocatello identifying Wells 4, 6 and 7 in a single row on the Application form. Application 81155, page 1. The same technique could have been adopted for the other wells, or an additional page of proposed points of diversion could have been provided with the application.

5. Spartan's protest includes 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.

6. 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. The following water rights are associated with the Spartan Well:

Right No.	Priority	Rate	Volume	Owner	Beneficial Uses
29-13424	9/5/1951	1.98 cfs	453.6 af	Various (not Spartan)	Irrigation
29-13425	9/5/1951	0.676 cfs	154.4 af	Spartan	Irrigation/Stockwater
29-14148	9/5/1951	0.22 cfs	49.2 af	Paul Katsilometes	Irrigation

7. Pocatello's Well 44 is located approximately 300 feet south of the Spartan Well. Application 81155 does not propose to make any change to Well 44 or the authorized point of diversion located in the SWSW, Section 16, T07S, R35E.

8. Well 44 and the Spartan Well are located 12.1 miles away from existing Well 39. Well 44 and the Spartan Well are located approximately 12.4 miles away from proposed Well 39.

9. In April 1999, Pocatello filed Application for Transfer No. 5452 ("Application 5452"), proposing to change points of diversion for and add points of diversion to water rights 29-2274, 29-2338 and 29-7375. Prior to Application 5452, water right 29-2274 described nine points of diversion, water right 29-2338 described six points of diversion and water right 29-7375 described one point of diversion. Pocatello proposed listing the same thirteen points of diversion on all three water rights. Twelve of the thirteen proposed points of diversion were purportedly for existing wells. In addition, Pocatello proposed drilling a new well in the SWSW, Sec. 16, T07S, R35E (Well 44). The Department approved Transfer 5452 on June 28, 1999, authorizing thirteen shared points of diversion for water rights 29-2274, 29-2338 and 29-7375. The SRBA partial decrees for water rights 29-2274, 29-2338 and 29-7375 reflected the changes approved by the Department in Transfer 5452.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) states, in pertinent part:

> Upon receipt of such [transfer] application it shall be the duty of the director of the department of water resources to examine [the] same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication.

Idaho Code § 42-222(1) also sets forth the criteria used by the Department to evaluate transfer applications:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

By rule, a protest filed against an application for transfer is considered a pleading. IDAPA 37.01.01.250.01. Protests should "[f]ully state the facts upon which they are based" and "[r]efer to the particular provisions of statute, rule, order or other controlling law upon which they are based." IDAPA 37.01.01.250.02. A presiding officer has the authority to dismiss a pleading that is "defective, insufficient or late." IDAPA 37.01.01.304.

ANALYSIS

Pocatello advances three primary arguments in support of its Motion. First, Pocatello argues that Spartan's protest is defective and insufficient because it is not related to the change being proposed in Application 81155. Second, Pocatello argues that Spartan's protest constitutes an impermissible collateral attack on the SRBA partial decrees for water rights 29-2274, 29-2338 and 29-7375. Third, Pocatello argues that Spartan lacks standing to file a protest against Application 81155.

Spartan's Protest

According to Idaho Code § 42-222(1) a protest may be filed against a "proposed change." Section 42-222(1) grants the Department the authority to evaluate the "proposed change." Issues of protest which are not related to the proposed change fall outside of the scope of the Department's review authority for transfer applications.

Spartan's protest focuses on alleged injury to the Spartan Well resulting from Pocatello's operation of Well 44. In its Response, Spartan attempts to connect the Well 44 injury concerns to the change proposed in Application 81155. Spartan argues Pocatello's removal of two points of diversion from water rights 29-2274, 29-2338 and 29-7375 could alter the way Pocatello operates its interconnected municipal delivery system. Spartan also argues the change in location of Well 39 could alter the way Pocatello operates its system. Spartan asserts that any change to the structure of Pocatello's delivery system could shift more demand to Well 44 and exacerbate the alleged injury to the Spartan Well resulting from the operation of Well 44. Spartan's arguments are not sufficient to connect the injury concerns associated with the operation of Well 44 to the change proposed in Application 81155.

Spartan conflates the authorization to divert pursuant to a recorded water right with the operational decisions of a water user. When the Department evaluates a transfer application for injury to other water rights, it cannot predict how a water user will operate its system in the future. Therefore, the Department must assume that the water user will operate to the full extent authorized by the water right. If a transfer application includes multiple proposed points of diversion, and does not include an agreement to limit the amount of water diverted at any of the proposed points of diversion, the Department must assume that the full diversion rate and full diversion volume could be diverted from any one of the proposed points of diversion. In the absence of a limit on the diversion rate or diversion volume at certain points of diversion, the expected operation of the system is of little consequence in an injury analysis. Injury should be evaluated based on the diversion rates and volumes proposed on the face of a transfer application.

In this case, the changes proposed by Application 81155 will have no effect on Pocatello's authorization to divert from Well 44. Currently, water rights 29-2274, 29-2338 and 29-7375 authorize Pocatello to divert the entire combined diversion rate (21.45 cfs) from Well 44. In theory, Pocatello could abandon all of the other points of diversion listed on water rights 29-2274, 29-2338 and 29-7375, except for Well 44, and still operate within the parameters of its water rights. Spartan's argument that eliminating points of diversion or changing the location of Well 39 may possibly increase the demand in Well 44 is unavailing. As long as it does not exceed the overall rate limits of its water rights, Pocatello can already increase the demand on Well 44, regardless of the existence of other wells on Pocatello's system or the location of Well 39. If 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.

Spartan's protest does not identify any issues related to the proposed change for Well 39. The protest does not even refer to Well 39 or the existing or proposed points of diversion for Well 39. Spartan's protest focuses entirely on Well 44, which is located over 12 miles away from Well

39. Application 81155 does not propose to change the diversion rate authorized at Well 44 in any way. Pocatello is already authorized to divert the full quantity listed on water rights 29-2274, 29-2338 and 29-7375 from Well 44. If Application 81155 were approved, the authorized diversion rate from Well 44 will not increase.

Spartan's protest is defective because it does not identify any issues related to the changes proposed in Application 81155. Therefore, Spartan's protest should be dismissed.

Collateral Attack on SRBA Decrees

Spartan contends it is not asking for reconsideration of the conditions included on or excluded from water rights 29-2274, 29-2338 or 29-7375 through Transfer 5452 or the partial decrees issued in the SRBA. "With its Protest, [Spartan] simply contests this proposal on the basis that it will further injure right No. 29-13425 – it is not challenging the underlying determinations of T-5452 or any SRBA decree." Response, page 4.

Spartan's Response is inconsistent with other documents in the record. For example, an April 14, 2017 letter from Spartan to Pocatello states: "It is our position that a condition consistent with what the Idaho Supreme Court approved in *Pocatello v. Idaho* should be affixed to the three water rights subject to the proposed transfer. The condition, which the Supreme Court deemed necessary for effective administration of Pocatello's interconnected well system under the prior appropriation doctrine, is a reasonable accommodation." Response, Ex. 1, page 2.

Because Spartan has now confirmed that it is not challenging the water right conditions for water rights 29-2274, 29-2338 and 29-7375 set forth in Transfer 5452 or the SRBA partial decrees, the question of an impermissible collateral attack on the partial decrees is moot.

Standing

Because Spartan's protest is defective and will be dismissed, the hearing officer does not need to address the question of standing.

Injury to Existing Water Rights

The proposed point of diversion for Well 39 is located approximately ½ mile north of the existing point of diversion for Well 39. According to the Department's water right records, the closest ground water well to the proposed point of diversion is owned by Pocatello (Well 35). No other recorded water rights are located within ½ mile of the proposed point of diversion for Well 39. Pocatello is already authorized to divert the full combined diversion rate under water rights 29-2274, 29-2338 and 29-7375 from the existing point of diversion for Well 39. Approval of Application 81155 will not increase the authorized diversion rate from Well 39. There is no evidence in the record suggesting that approval of Application 81155 will injure existing rights.

Enlargement

There is no evidence in the record suggesting that approval of Application 81155 will result in an enlargement of use under water rights 29-2274, 29-2338 or 29-7375.

Conservation of Water Resources

There is no evidence in the record suggesting the proposed change is contrary to the conservation of water resources within the state of Idaho.

Local Public Interest

There is no evidence in the record suggesting the proposed change is not in the local public interest as the term is defined in Idaho Code § 42-202B.

CONCLUSIONS OF LAW

The protest filed by Spartan is defective because it does not identify any issues related to the changes proposed in Application 81155. Therefore, Spartan's protest should be dismissed pursuant to IDAPA 37.01.01.304.

Application 81155 satisfies the elements of review set forth in Idaho Code § 42-222(1) and should be approved.

ORDER

IT IS HEREBY ORDERED that the protest filed by Spartan against Application 81155 is DISMISSED pursuant to Rule 304 of the Department's Rules of Procedure (IDAPA 37.01.01).

Because Spartan's protest has been dismissed, and because there are no other protests against Application 81155, the hearing officer need not address Pocatello's Alternative Motion in Limine.

IT IS FURTHER ORDERED that Application 81155 is APPROVED as set forth in Transfer Approval 81155 issued in conjunction with this order.

Dated this 8th day of August, 2017.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August 2017, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER DISMISSING PROTEST AND APPROVING TRANSFER, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

US MAIL - CERTIFIED
RE: APPLICATION FOR TRANSFER 81155

Sarah Klahn
Mitra Pemberton
White & Janikowski, LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202

Laura Schroeder
Jim Browitt
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Courtesy copies sent by US Mail to:

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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.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS.

RE: PETITIONS FOR JUDICIAL REVIEW OR ACTIONS FOR DECLARATORY RELEIF OF DECISIONS FROM THE IDAHO DEPARTMENT OF WATER RESOURCES	))))))	**CASE NO. _____** **NOTICE OF REASSIGNMENT**

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A 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, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho

EXHIBIT C

83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this ____ day of _____, 201_.

CLERK OF THE DISTRICT COURT

By:_____
Deputy Clerk