

**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

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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]eeffective, 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:

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