

water rights injury it alleges is associated with the operation of the City's Well #44. Well #44 is not being relocated; and it is not one of the points of diversion that was omitted from Pocatello's application. 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.

Spartan's Exceptions Brief does not, upon inspection, in fact contest any of the Hearing Officer's findings —instead, Spartan alleges that Transfer No. 81155 is "tainted by ambiguity". Exceptions Brief at 5. The Hearing Officer properly limited the evaluation of injury under Transfer No. 81115 to the relocation of Well #39 contemplated by the City's application, properly excluded the two points of diversion that were omitted from Pocatello's application, and properly rejected Spartan's issues regarding the operation of Well #44. The Director should adopt the Hearing Officer's *Preliminary Order Dismissing Protest and Approving Transfer* ("Preliminary Order") as a final order, and reject Spartan's exceptions.

STATEMENT OF FACTS

A. Well #39

In October 2014, Pocatello decided to relocate Well #39, which serves as a water supply at the Pocatello Airport, from its original location south of the interstate to approximately ½ mile north and adjacent to the airport. See Exhibit 1² to Pocatello's *Motion to Dismiss Protest and In the Alternative Motion in Limine* ("Motion to Dismiss") (June 26, 2017). At its original location, Well #39 was authorized to pump under water right numbers 29-13638, 29-7450, 29-2274, 29-2338, and 29-7375. To obtain legal authorization to pump these five water rights in the relocated Well #39 location, the City filed three transfers:

²A map showing the location of Pocatello's wells and the Eastern Snake Plain Aquifer and Lower Portneuf River Valley Aquifer boundaries is provided in Exhibit 1 to Motion to Dismiss. A tabulation of Pocatello's water rights, which provides the legal basis for Pocatello's operation of its wells, is provided in Exhibit 2 to Motion to Dismiss.

- Transfer No. 79826. This transfer was approved in May 2015 to authorize the redrilling of Well #39 in its new location and to authorize pumping under water right number 29-13638. *Transfer of Water Right*, Transfer No. 79826, May 15, 2015, *available in* the Idaho Department of Water Resources' ("IDWR" or "Department") files. The transfer was not protested.
- Transfer No. 81117. On July 25, 2016, the City filed this transfer seeking to authorize pumping of relocated Well #39 under water right number 29-7450. *Transfer of Water Right*, Transfer No. 81117, Dec. 6, 2016, *available in* IDWR files. The transfer was not protested.
- Transfer No. 81155. Also on July 25, 2016, the City filed the captioned transfer seeking to authorize pumping of relocated Well #39 under water rights numbers 29-2274, 29-2338, and 29-7375. *Application for Transfer of Water Right – Point(s) of Diversion* ("Application"), Transfer No. 81155, July 25, 2016.

B. Pocatello's Water Right Nos. 29-2274, 29-2338 and 29-7375.

The Subject Water Rights involved in this proceeding are also the subject of an earlier transfer, Transfer No. 5452 ("T-5452" or "1999 Transfer"), which the City filed in 1999, after filing claims for the Subject Water Rights in the SRBA, but before the SRBA entered partial decrees for the Water Rights. Under T-5452, the City sought IDWR's approval to operate the Subject Water Rights out of 13 ground water points of diversion within the City's well system ("alternate points of diversion"). Exhibit 3 to Motion to Dismiss. The alternate points of diversion approved under T-5452 included existing wells (including Well #39³) along with a new well, Well #44.⁴ Exhibit 4 to Motion to Dismiss identifies the wells permitted to divert under the Subject Water Rights pursuant to the 1999 Transfer. There were no protests, and IDWR approved the transfer on June 28, 1999.

In 2007, the Subject Water Rights were partially decreed in the SRBA, along with the other water rights associated with the City's claims filed under state law. Exhibit 5 to Motion to Dismiss. The partial decrees for the Subject Water Rights authorized operation of the 13 points

³Well #39's decreed point of diversion is the SWNE of Sec. 15, Township 6S, Range 33E, Power County. *See* Exhibit 5 to Motion to Dismiss.

⁴Well #44's decreed point of diversion is the SWSW of Sec. 16, Township 7S, Range 35E, Bannock County. *See id.*

of diversion included in the 1999 Transfer (including Well #39 and Well #44), and consistent with the terms of T-5452. *Id.*; Preliminary Order at 2, 3 (Aug. 8, 2017).

PROCEDURAL HISTORY

On July 25, 2016, Pocatello filed an Application for Transfer No. 81155 with the Department. The City included a cover letter with the Application, which explained the purpose of the Application:

These water rights [29-2274, 29-2338, 29-7375] are currently associated with several listed points of diversion (POD) throughout the City of Pocatello. Due to the recent relocation and replacement of Well 39 (POD T06S, R33E, SW1/4 NE1/4, Section 15), the former well will be properly decommissioned and this point of diversion no longer utilized. The City of Pocatello desires to update any formerly associated water rights at the previous location to include the new point of diversion of Well 39, now located within T06S, R33E, SW1/4 SE1/4.

Ex. 1 to Affidavit of Justin Armstrong, attached to Motion to Dismiss. In September 2016, Spartan protested Transfer No. 81155, alleging injury from Pocatello's operations of Well #44. A hearing was scheduled for October 17, 2017 in this matter. 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.

Spartan filed a *Petition for Reconsideration of Preliminary Order Dismissing Protest and Approving Transfer* on August 22, 2017, which the Hearing Officer denied in an *Order Denying Petition for Reconsideration* on September 5, 2017. Spartan next filed an Exceptions Brief, to which Pocatello responds herein.

ARGUMENT

I. Spartan's Protest is defective "because it does not identify any issues related to the changes proposed in Application 81155." Preliminary Order at 6.

The Hearing Officer found that Pocatello was entitled to the following relief in Transfer No. 81155:

1. The relocation of Well #39; and
2. The removal of two points of diversion⁵ from the Subject Water Rights.

Preliminary Order at 2. Spartan's Protest does not allege that, if approved, either of these changes will cause injury, nor does the Protest identify the water rights Spartan alleges injury to.

Instead, the Protest states that the basis for its protest is:

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 DEPARTMENT.

Notice of Protest, Transfer No. 81155, Spartan Portneuf L.L.C. (Sept. 26, 2016).

The Hearing Officer properly found that "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," and therefore that Spartan's Protest did not raise issues relevant to injury in Transfer No. 81155. Preliminary Order at 3. "Issues of protest which are not related to the proposed change fall outside the scope of the Department's review authority for transfer applications." *Id.* at 5.

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. . . . Application 81155 does not propose to change the diversion rate authorized for Well 44 in any way.

Id. at 5–6.

⁵One point of diversion is Well 11, located in the NESE, Sec. 12, T06S, R33E, Power County; the other point of diversion is the SENE, Sec. 35, T06S, R34E, Bannock County.

Spartan's efforts to inject issues regarding the operation of Well #44 into this proceeding were properly rejected and its Protest was dismissed as defective because it failed to identify any legal basis for its alleged right to proceed with its Protest. Preliminary Order at 4; IDAPA 37.01.01.250.01; IDAPA 37.01.01.304 (defective or insufficient pleadings may be dismissed); IDAPA 37.01.01.250.02 (protest must identify the facts and "particular provisions of statute, rule, order or other controlling law" to support a claim to oppose an application); IDAPA 37.01.01.155 (limits "Protestants" to parties that "have a statutory right to contest the right, license, award or authority sought by an applicant or claimant").

II. The Hearing Officer properly approved Transfer No. 81155.

Idaho Code section 42-222(1) provides that, in approving a transfer, IDWR is required to determine, among other things, if the transfer will injure other water users. "As [the Idaho Supreme Court] noted in *Jenkins v. State Dept. of Water Resources* [103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982)], '[t]he director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights'" *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 418, 18 P.3d 219, 223 (Idaho 2001). The Hearing Officer found that Pocatello's Application, after reviewing the evidence in the record and all information available, will not injure other water rights. Preliminary Order at 6–7.

To wit, the Hearing Officer found that:

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.

Id. at 6.

Spartan has pointed to no evidence or available information in the record that would support an injury finding. Furthermore, Spartan did not object to the relocation of Well #39 or the two omitted points of diversion—instead, Spartan (in its Protest and indeed every other written submission in this proceeding) alleged that the operation of Well #44 in its current location is injuring Spartan, and that the relocation of Well #39 for which approval was sought in this transfer will somehow “exacerbate” this alleged injury. Protest; *Response to City’s Motion to Dismiss Protest and Objection to Alternative Motion in Limine* at 4 (July 10, 2017). After finding Spartan’s injury arguments regarding Well #44 were outside the scope of the proposed transfer, the Hearing Officer found that even if such evidence could be considered:

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.

Preliminary Order at 5.

Spartan argues that the Hearing Officer erred by refusing to go beyond the face of Pocatello’s application and delve into the operation of its water rights at other points of diversion not involved in this transfer. Exceptions Brief at 5. The Hearing Officer properly found that in examining a transfer, “the Department must assume that the water users will operate to the full extent authorized by the water right.” Preliminary Order at 5. “Spartan conflates the authorization to divert pursuant to a recorded water right with the operational decisions of a water user.” *Id.* “Injury should be evaluated based on the diversion rates and volumes proposed on the face of a transfer application.” *Id.* Further, the Hearing Officer agreed that Transfer “81155 will have no effect on Pocatello’s authorization to divert from Well #44.” *Id.*

Spartan also takes exception with Findings of Fact 1, 2, 4 and 9 in the Preliminary Order, which Spartan admits are “accurate” findings, but nevertheless alleges that they “underscore the

discrepancy between the City's description of the impact of T-81155 and its actual, much broader implications." Exceptions Brief at 3. Spartan has not articulated what these "broader implications" are, but presumably lead back to Spartan's complaint that the Hearing Officer ignored its theory of injury—that the above-described changes in T-81155 would somehow "exacerbate" issues Spartan has with the operation of Well #44, and generally refused to engage in a fishing expedition into matters not before the Hearing Officer in this transfer.

The Hearing Officer's findings are correct and supported by the record, and should be adopted into a final order by the Director.

III. The Hearing Officer removed the two contested points of diversion from Pocatello's Approval of Transfer; there is no additional relief available to address Spartan's complaints regarding Pocatello's supposedly "deficient" Application.

As noted above, Pocatello failed to include in its application two points of diversion that were previously authorized for diversion of the Subject Water Rights. While Pocatello's omission of these points of diversion was an oversight, the Hearing Officer granted the relief available on the face of the transfer and removed these two missing points of diversion from the Approval of Transfer. *See* Preliminary Order at 2 n.2; Approval of Transfer, Transfer No. 81155 (Aug. 8, 2017).

Despite this finding, Spartan takes issue with the Hearing Officer's decision, arguing that Pocatello did not properly relinquish these points of diversion, and that if it had, Spartan could have alleged this would cause injury in its Protest. Exception Brief at 3–4. Pocatello's Application did not list these points of diversion—which was precisely the basis for the Hearing Officer's decision to remove them. Preliminary Order at 2 n.2. Therefore, Spartan had notice and could have addressed their removal in its Protest. Further, and contrary to Spartan's assertions, there is no support in Idaho law that limits abandonment of points of diversion to the

procedure specified by Spartan's Exceptions Brief. And again, Spartan has not pointed to any facts to support a finding of injury from either of the two changes proposed by Transfer No. 81155.

IV. In the alternative, the Protest should be dismissed because Spartan's theory of injury amounts to a collateral attack on Pocatello's SRBA Decrees.

Regardless of the outcome of Transfer No. 81155, Pocatello is entitled to divert the Subject Water Rights from Well #44 pursuant to T-5452 and its SRBA partial decrees. *See* Exhibits 3 & 5 to Motion to Dismiss; Preliminary Order at 5. Well #44 is an alternate point of diversion for the Subject Water Rights, and is not at issue in this proceeding. "Pocatello is already authorized to diver the full quantity listed on water rights 29-2274, 29-2338 and 29-7375 from Well 44." Preliminary Order at 6. The Transfer 81155 does not add or subtract the water rights associated with Well #44, or affect the operation of Well #44 in any way.

By statute, "decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420(1). "[A]llowing a party to contest a partial decree outside of the SRBA would undermine any certainty or finality of the partial decree." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 201 (2016). As explained above, two prior proceedings, and not the current transfer, involved Well #44: (1) the 1999 Transfer, which added Well #44 as a point of diversion for the Subject Water Rights, and (2) the entry of partial decrees in 2007 by the SRBA for the Subject Water Rights. Importantly, the partial decrees authorize Well #44 as an alternate point of diversion for the Subject Water Rights (listed in the partial decrees as the point of diversion located in the SWSW of Section 16, Township 7S, Range 35E). *See* Exhibit 5 to Motion to Dismiss.

Spartan cannot collaterally attack these decrees through Transfer No. 81155. *See* Exceptions Brief at 4. The Hearing Officer was correct in concluding that “the changes proposed by Application 81155 will have no effect on Pocatello’s authorization to divert from Well 44.” Preliminary Order at 5. “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.” *Id.*

V. In the alternative, Spartan does not have standing to protest this transfer.

Spartan’s Protest would have also been properly dismissed for lack of standing. The Idaho Supreme Court has explained that “[s]tanding is a preliminary question to be determined by this Court before reaching the merits of the case.” *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (citation omitted). “Idaho has adopted the constitutionally based federal justiciability standard.” *Id.* (citation omitted). “[T]o establish standing a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a like[lihood] that the injury will be redressed by a favorable decision.” *Id.* (quotation marks and citations omitted). “Consistent with the federal standard . . . standing requires a showing of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct.” *Id.* (quotation marks and citations omitted).

Because the transfer before the Department does not involve the operation of Well #44, there is no connection between the conduct challenged in this transfer and Spartan’s claimed injury. Therefore, Spartan cannot show a “distinct, palpable injury” to allow it to participate in this proceeding and does not have standing to protest.

VI. Any remand should limit the hearing to issues that are relevant to the changes at issue in Transfer No. 81155.

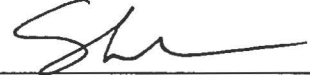
In the alternative, if the Director determines a remand is proper (a determination Pocatello vigorously opposes for the reasons set forth above), Pocatello seeks to limit the issues that are relevant to Transfer No. 81155 and exclude evidence regarding Well #44. Rule 600 of the Department's Rules of Procedure provides, in relevant part, "[t]he presiding officer, with or without objection, may 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. "Evidence should be admitted to assist, rather than frustrate, development of the record." *Chisholm v. Idaho Dep't. of Water Res.*, 142 Idaho 159, 163, 125 P.3d 515, 519 (2005).

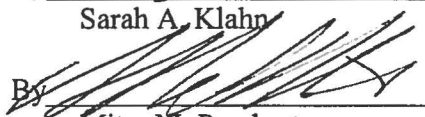
CONCLUSION

Pocatello respectfully requests that the Director adopt the Preliminary Order of the Hearing Officer as a final order and reject Spartan's Exceptions Brief.

Respectfully submitted this 2nd day of October, 2017.

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By 
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ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2017, I caused to be served a true and correct copy of the foregoing **POCATELLO'S RESPONSE TO BRIEF AND EXCEPTIONS TO PRELIMINARY ORDER DISMISSING PROTEST AND APPROVING TRANSFER in Transfer No. 81155** upon the following by the method indicated below:



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