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September 7, 2017

**RECEIVED**  
**SEP 11 2017**

Department of Water Resources  
Eastern Region

**VIA U.S. MAIL**

Idaho Department of Water Resources  
Eastern Region  
900 N. Skyline Dr., Suite A  
Idaho Falls, Idaho 83402-1718

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**SEP 07 2017**

Department of Water Resources  
Eastern Region

**RE: Matter of Transfer Application No. 81155: Petition for Reconsideration**

To Whom It May Concern:

Enclosed please find a *Petition for Reconsideration with Updated Certificate of Service* on behalf of protestant Spartan Portneuf, L.L.C. in the above referenced matter.

If you have any questions, please call our office at (503) 281-4100. Thank you in advance for your cooperation.

Very truly yours,  
SCHROEDER LAW OFFICES, P.C.

Lisa Mae Gage  
Senior Paralegal

LMG:lmg

Enclosures

cc: Service List  
Client – *via email*

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SEP 11 2017

Department of Water Resources  
Eastern Region

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7 **BEFORE THE DEPARTMENT OF WATER RESOURCES**  
8 **OF THE STATE OF IDAHO**

9  
10 IN THE MATTER OF APPLICATION  
FOR TRANSFER NO. 81155 IN THE  
11 NAME OF CITY OF POCA TELLO

PROTESTANT'S PETITION FOR  
RECONSIDERATION OF PRELIMINARY  
ORDER DISMISSING PROTEST  
AND APPROVING TRANSFER

12  
13 Protestant Spartan Portneuf, LLC ("Spartan Portneuf"), by and through Schroeder Law  
14 Offices, P.C., and its attorneys, and pursuant to Idaho Code § 67-5243(3) and IDAPA  
15 37.01.01.730, hereby petitions Hearing Officer James Cefalo ("Hearing Officer") of the Idaho  
16 Department of Water Resources ("IDWR" or "Department") to reconsider the *Preliminary Order*  
17 *Dismissing Protest and Approving Transfer* ("Preliminary Order"), issued on August 8, 2017.

18 While Spartan Portneuf requests reconsideration of all portions of the *Preliminary Order*,  
19 the impetus for said request is a challenge of IDWR's grant of the motion to dismiss filed by  
20 Applicant City of Pocatello ("Pocatello" or "City"). Spartan Portneuf asserts that the dismissal  
21 was improperly based on the Department's acceptance of the theme promoted by Pocatello —  
22 that the only change proposed in Application for Transfer No. 81155 ("T-81155") was the  
23 relocation of City Well No. 39. In accepting this erroneous premise, even though the *Preliminary*  
24 *Order* indicates additional issues should have merited consideration, IDWR precluded evidence  
25 that it was statutorily obligated to examine pursuant to Idaho Code § 42-222(1).  
26



1 In its *Motion to Dismiss Protest and in the Alternative Motion in Limine* (“*Motion to*  
2 *Dismiss*”), dated June 26, 2017, and subsequent briefing, Pocatello placed significant emphasis  
3 on narrowing the parameters of the T-81155 proceeding. The City alleged that the “only change  
4 contemplated” in T-81155 was the relocation of Well No. 39, *see, e.g., Motion to Dismiss*, p. 5,  
5 and that other issues raised by Spartan Portneuf amounted to an inappropriate attempt to expand  
6 the scope of the protest. *Reply in Support of Motion to Dismiss Protest and in the Alternative*  
7 *Motion in Limine* (“*Reply*”), dated July 13, 2017, p. 2. While the City’s efforts in this respect are  
8 not explicitly referenced in the *Preliminary Order*, they are clearly reflected in the Hearing  
9 Officer’s analysis.

10 Primarily, IDWR is fixated on the fact that both the existing and proposed locations of  
11 Well No. 39 are approximately 12 miles away from the primary point of contention in Spartan  
12 Portneuf’s protest, City Well No. 44. See *Preliminary Order*, p. 3 (Finding of Fact No. 6), and  
13 pp. 5-6. Being that Spartan Portneuf did not specifically identify any issue related only the  
14 change proposed in T-81155 — namely, the relocation of Well No. 39 — IDWR determined the  
15 protest was defective.

16 This reasoning is flawed for two reasons. First, Wells 39 and 44 are indisputably linked  
17 as part of Pocatello’s “interconnected municipal delivery system,” *id.* at p. 5, and particularly so  
18 as two of the alternate points of diversion for the three municipal water rights that are the subject  
19 of T-81155, Nos. 29-2274, 29-2338 and 29-7375. Since Spartan Portneuf alleges the City’s  
20 interconnected system is already “injurious” to its water right, No. 29-13425, any change to the  
21 system could conceivably “exacerbate” the “existing problem.” Pursuant to Idaho Code § 42-  
22 222(1), IDWR is obligated to “examine all the evidence and available information” to determine  
23 whether the proposed change will adversely affect any existing rights, including the one owned  
24 by Spartan Portneuf.

25 And second, the relocation of Well No. 39 is not the only change proposed in T-81155.  
26 As expressed by Spartan Portneuf in its *Response to City’s Motion to Dismiss Protest and*

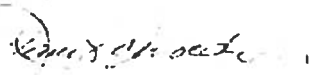
1 *Objection to Alternative Motion in Limine*, dated July 10, 2017, and acknowledged by IDWR in  
2 the *Preliminary Order*, T-81155 also prospectively removes two points of diversion from the  
3 group of 13 identified on the three subject water rights. Yet while the Hearing Officer addressed  
4 the issue at length, pointing out this and various other deficiencies included in the City's  
5 application for T-81155, *Preliminary Order*, p. 2, n. 2, it was essentially ignored in his analysis.  
6 Consequently, it is arguable that the *Preliminary Order* resulted from the evaluation of "all the  
7 evidence and available information" that Idaho Code § 42-222(1) requires.

8 Finally, even if Spartan Portneuf did inappropriately expand the scope of this proceeding  
9 by arguing points not raised in its protest, as the City alleges, *Reply*, p. 2, IDWR is not relieved  
10 of its statutory obligation to evaluate that aspect of a proposed transfer. A protest, or a specific  
11 issue identified therein, is not a prerequisite for IDWR examination under Idaho Code § 42-  
12 222(1). *Barron v. Idaho Dep't of Water Res., (in re Transfer No. 5116)*, 135 Idaho 414, 421, 18  
13 P.3d 219, 226 (2001). Therefore, IDWR is obligated to evaluate any potential injury resulting  
14 from a proposed transfer, regardless what issue may arise or how it comes to the Department's  
15 attention.

16 For the reasons stated above, Spartan Portneuf asks the Hearing Officer, on behalf of  
17 IDWR, to reconsider the *Preliminary Order*, deny the City's *Motion to Dismiss*, retract the  
18 approval of T-81155 and allow Spartan Portneuf's protest to proceed.

19  
20 DATED this 21<sup>st</sup> day of August, 2017.

21 SCHROEDER LAW OFFICES, P.C.

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24 \_\_\_\_\_  
25 Laura A. Schroeder  
26 James Browitt

*Attorneys for Protestant*



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7th day of September, 2017, I caused a true and correct copy of the PETITION FOR RECONSIDERATION to be delivered to the following by U.S. Mail.

Kirk Bybee  
City of Pocatello  
P.O. Box 4169  
Pocatello, ID 83201

Sarah A. Klahn  
White & Jankowski LLP  
511 Sixteenth Street, Suite 500  
Denver CO 80202



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