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August 21, 2017

VIA U.S. MAIL

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

RECEIVED
AUG 22 2017
Department of Water Resources
Eastern Region

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

To Whom It May Concern:

Enclosed for filing, please find a *Petition for Reconsideration* 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 M. Kane
Paralegal

LMK:lmk

Enclosures

cc: Service List
Client – *via email*

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RECEIVED
AUS 22 2017
Department of Water Resources
Eastern Region

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 21st day of August, 2017.

21 SCHROEDER LAW OFFICES, P.C.

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23
24 Laura A. Schroeder
25 James Browitt

26 *Attorneys for Protestant*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2017, I caused a true and correct copy of the PETITION FOR RECONSIDERATION to be delivered to the following by U.S. Mail.

Dean Tranmer
City Attorney for City of Pocatello
911 N. 7th Ave
P.O. Box 4169
Pocatello, ID 83205



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