

A. Dean Tranmer (ISB # 2793)
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 239-6986 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn (ISB # 7928)
Mitra M. Pemberton
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com
mitrap@white-jankowski.com

RECEIVED
JUL 13 2017
Department of Water Resources
Eastern Region

ATTORNEYS FOR THE CITY OF POCATELLO

BEFORE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 81155)
IN THE NAME OF) POCATELLO'S REPLY IN SUPPORT OF
CITY OF POCATELLO) MOTION TO DISMISS PROTEST AND IN
_____) THE ALTERNATIVE MOTION IN LIMINE

COMES NOW, City of Pocatello ("City" or "Pocatello"), by and through its undersigned attorneys, and hereby submits this *Reply in Support of Motion to Dismiss Protest and in the Alternative Motion in Limine*.

Pocatello's *Motion to Dismiss Protest and in the Alternative Motion in Limine* ("Motion") establishes the following: (1) the City's SRBA Decrees and prior transfers give the City the right to pump water rights nos. 29-2274, 29-2338 and 29-7375 ("Subject Water Rights") out of City Well #44; and (2) that Spartan Portneuf, LLC ("Spartan") has failed to causally connect the relocation of City Well #39 to any alleged injury to its water right, or for that matter the operation of Well #44. Spartan's *Response*, dated July 10, 2017 ("Response") does not

contest these facts, and confirms that Spartan does not allege injury from the relocation of Well #39. This should end the matter.

Instead, Spartan's Response argues that Transfer 81155 should be expanded to consider the effects on Spartan's water right from additional well points of diversion listed in Transfer 5452, rather than limiting these proceedings to effects on Spartan related to the relocation of Well #39. As its basis for expanding what is at issue in this matter, Spartan seizes on the fact that Pocatello's transfer application does not list all the points of diversion associated with Transfer 5452 and Spartan's suspicion that wells do not exist at some of the points of diversion identified in Transfer 5452. Response at 2 n.2, 2-4. Spartan did not include this argument in its protest, and should be barred from raising these new grounds in opposition to this transfer at this time. In fact, Pocatello's Application is complete. To wit:

- One point of diversion (the SENE Sec. 35, T6S, R34E, Bannock County) was omitted from the transfer application because it was duplicative—this quarter-quarter section was identified once in the application, and not listed twice because of the limited space on the form; and
- The well at another point of diversion (the NESE Sec. 12, T6S, R33E, Power County) has been sold and is not currently used by the City.

See Affidavit of Justin Armstrong. Further, City Well Nos. 4, 6, 7, 8 and 9 are not active points of diversion. However, this fact does not make the City's transfer application "disingenuous". Response at 3. First, the fact that decreed points of diversions do not currently have an operating well is irrelevant to the transfer at hand—the relocation of Well #39. Second, as a municipal water supplier Pocatello is authorized to maintain an ability to grow into its water supplies (including by maintaining decreed but unused points of diversion) under the Great and Growing

Cities Doctrine.¹

Although Spartan raises issues with additional points of diversion under Transfer 5452, this appears to merely be cover for Spartan's actual issue of interest: the impact on Spartan's water right from the operation of decreed water rights at Well #44. Indeed, Exhibit 1 to Spartan's Response—an April 14, 2017 letter to counsel—establishes that Spartan is fixated on operations of Well #44, and whether its operation “might reduce the quantity of water allocated under existing rights to Spartan Portneuf, LLC.” Response, Exhibit 1, at 1. It also establishes that Spartan is seeking relief precluded by prior litigation by requesting to impose a provision on the Subject Water Rights that the SRBA Court previously held does not apply. *Id.* at 2; Motion at 3 and Exhibit 6. This transfer seeks to authorize operations at relocated Well #39 under the Subject Water Rights, and the issues Spartan seeks to raise are outside the scope of the Department's jurisdiction in this transfer. If Spartan is truly concerned about impacts on its water rights from operation of Well #44, Spartan has the ability to pursue other administrative means, like a delivery call, but the transfer process is not so broad as to open up applicants to the kind of bootstrapping Spartan is trying to do here.

Finally, Spartan opposes Pocatello's alternative motion in limine, complaining that Pocatello has not adequately responded to its requests for information largely irrelevant to this transfer², and this “insistence” on only providing relevant information “raises questions as to what that information [regarding Well #44] may reveal.” Response at 5. This argument—seemingly based on Spartan's conviction that there is a conspiracy afoot—has no connection to the legal standard applicable to Pocatello's Motion. Pocatello's request that the

¹See e.g. *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151, 154 (1940) (Idaho law grants “the power [] to a municipality to acquire and hold water for future needs—an absolute necessity to the life and existence of a municipality.”).

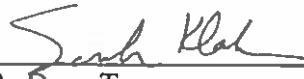
²Pocatello contests Spartan's position that it has not been responsive to Spartan's requests. However, this is irrelevant to the resolution of Pocatello's Motion.

Hearing Officer exclude irrelevant evidence about Well #44 does not somehow make that information relevant—simply put, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” I.R.E. 401. Spartan has not established that such evidence is relevant, and therefore it should be excluded.

WHEREFOR, Pocatello respectfully requests the Hearing Officer grant its *Motion to Dismiss Protest and in the Alternative Motion in Limine*.

Respectfully submitted this 13th day of July, 2017.

CITY OF POCATELLO ATTORNEY'S OFFICE

By  FOR
A. Dean Tranmer

WHITE & JANKOWSKI

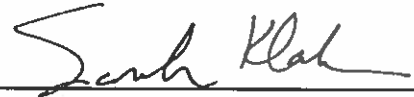
By 
Sarah A. Klahn

By 
Mitra M. Pemberton

ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2017, I caused to be served a true and correct copy of the foregoing **POCATELLO'S MOTION TO DISMISS PROTEST AND IN THE ALTERNATIVE MOTION IN LIMINE** in Transfer No. 81155 upon the following by the method indicated below:



Sarah Klahn, White & Jankowski, LLP

Eastern Regional Office Idaho Department of Water Resources 900 North Skyline Drive, Suite A Idaho Falls, ID 83402-1718 james.cefalo@idwr.idaho.gov sharla.cox@idwr.idaho.gov	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☒ Federal Express Overnight ☐ Facsimile (208) 525-7177 ☒ Email
Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello ID 83201 dtranmer@pocatello.us tolsen@pocatello.us	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☒ 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	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☒ Federal Express Overnight ☐ Facsimile ☒ Email
Justin Armstrong City of Pocatello 911 North 7 th Ave. P.O. Box 4169 Pocatello, ID 83250-4169 jarmstrong@pocatello.us	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☒ Email
Thomas J. Katsilometes PLLC P.O. Box 777 Boise, ID 83701-0777	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery ☐ Federal Express Overnight ☐ Facsimile ☐ Email

1. I am over 21 and state the following based upon my personal knowledge and professional expertise:
2. I am the Water Superintendent for the City of Pocatello ("City" or "Pocatello") and am familiar with Pocatello's water system and water rights.
3. A Response by Spartan Portneuf, LLC filed on July 10, 2017 in the above-captioned matter mentions the following points of diversion: (1) NESE Sec. 12, T65, R338, Power County, and (2) two locations at SENE Sec. 35, T65, R34E, Bannock County, among their 13 PODs.
4. The NESE Sec. 12, T65, R338, Power County formerly contained a well (Well #11) which is no longer owned by the City of Pocatello.
5. The SENE Sec. 35, T6S, R34E, Bannock County appears once on the City's Transfer application. Duplicate ¼ ¼ section descriptions of points of diversion were not included

on the application due to the space constraints of the application form.

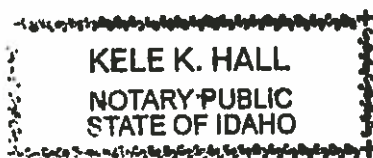
6. Exhibit 2 to the Response includes pumping records for some of the City's wells. Well Nos. 4, 6, 7, 8 and 9 are not active points of diversion.
7. Pocatello does not intend to abandon any of its authorized points of diversion. The cover letter included with the City's application (Exhibit 1 to this affidavit) explains that the only contemplated change in this transfer is the relocation of Well #39.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 12th day of July, 2017.

By  _____
Justin Armstrong

BEFORE ME, the undersigned, a Notary Public, in and for said County and State on this 12th day of July, 2017, personally appeared Justin Armstrong who executed the above as his free and voluntary act.



 _____
Notary Public
Bannock County, Idaho

My Commission Expires: 9-25-2020



WATER DEPARTMENT
911 7th Avenue
P.O. Box 4169
Pocatello, ID 83205-4169

SUPERINTENDENT'S OFFICE
(208) 234-6174
FAX (208) 234-7084
REPAIR SHOP
(208) 234-6182
FAX (208) 234-7084



July 7, 2016

RECEIVED
JUL 25 2016

Department of Water Resources
Eastern Region

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

Subject: Application for Transfer of Water Right – Point(s) of Diversion, Water Right 29-02274,
29-02338, 29-07375

Dear Agency:

Please find the enclosed Application for Transfer of Water Right – Point(s) of Diversion, as well as, the supporting documentation and payment of fees for the transfer of Water Rights 29-02274, 29-02338, 29-07375, owned and operated by the City of Pocatello.

These water rights 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.

The City of Pocatello is requesting your review of this application for POD transfer. If you should have any questions regarding this application, please do not hesitate to call my office at (208) 234-6174. Thanks for your review and assistance.

Sincerely,

Justin Armstrong
Water Superintendent
City of Pocatello
(208) 234-6174

AN EQUAL OPPORTUNITY EMPLOYER/VETERAN'S PREFERENCE

EXHIBIT I