

A 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. A tabulation of Pocatello's water rights, which provides the legal basis for Pocatello's operation of its wells, is provided in Exhibit 2.

B. Well #39

In October 2014, Pocatello determined to move 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 1.* At its original location, Well #39 was authorized to pump under water rights 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 has filed 3 transfers:

- 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 No. 13638. *Transfer of Water Right*, Transfer No. 79826, May 15, 2015, *available in IDWR files*. The transfer received no protests.
- Transfer No. 81117. On July 25, 2016, the City filed this transfer seeking to authorize pumping of relocated Well #39 under water right 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*, Transfer No. 81155, July 25, 2016.

C. Water Right Nos. 29-2274, 29-2338 and 29-7375.

Three water rights—Snake River Basin Adjudication (“SRBA”) Subcase Nos. 29-2274, 29-2338 and 29-7375 (“Subject Water Rights”) are involved in the above-captioned transfer. Associated priority dates and pumping rates for these rights are reflected in Exhibit 2.

In 1999, after filing claims for the Subject Water Rights in the SRBA, but before the SRBA entered partial decrees, the City filed Transfer No. 5452 (“T-5452” or “1999 Transfer”). 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").¹ Exhibit 3. The alternate points of diversion approved under T-5452 included 11 existing wells (including Well #39²) as well as a new well, Well #44.³ Exhibit 4 identifies the wells permitted to divert under the Subject Water Rights after 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. The partial decrees for the Subject Water Rights authorized operation of the 13 points of diversion included in the 1999 Transfer (including Well #39 and #44), and consistent with the terms of T-5452. *Id.*

Some of Pocatello's water rights decreed in the SRBA contain a term and condition that restricts operation of the wells as alternate points of diversion under certain circumstances ("APOD condition"). *See generally, City of Pocatello v. Idaho*, 152 Idaho 830, 834, 275 P.3d 845, 849 (2012). However, the Subject Water Rights' partial decrees do not contain the APOD condition because the SRBA found that the APOD condition only applied to pre-1987 accomplished transfers. "Three of Pocatello's groundwater rights (29-2274, 29-2338, and 29-7375) were recommended without the condition because those rights were subject to administrative transfer No. 5452, which did not include the condition and occurred after 1987." *Memorandum Decision and Order on Challenge* at 5 n.5, In Re SRBA, Case No. 39576, Subcase Nos. 29-00271, et al. (Nov. 9, 2009) (emphasis added). *See also Order on Summary Judgment* at 3, In Re SRBA, Case No. 39576, Subcase Nos. 29-00271 (Aug. 18, 2006) (Exhibit 6); *City of*

¹Although there are 13 possible points of ground water diversion authorized under T-5452, the City only has existing wells at 12 of the points of diversion.

²Well #39's decreed point of diversion is the SWNE of Sec. 15, Township 6S, Range 33E, Power County. *See* Exhibit 5.

³Well #44's decreed point of diversion is the SWSW of Sec. 16, Township 7S, Range 35E, Bannock County. *See* Exhibit 5.

Pocatello v. Idaho, 152 Idaho 834, 275 P.3d at 849 (“IDWR did not recommend that condition for three of Pocatello’s groundwater rights that supplied water to the in-town system (29-2774, 29-2338, and 29-7375) because those rights were subject to administrative transfer No. 5452, which did not include the condition and occurred after 1987.”).

D. Spartan’s Protest to Transfer Application 81155

In September 2016, Spartan Portneuf L.L.C. (“Spartan”) protested Transfer No. 81155 to allege injury from Pocatello’s operations of Well #44. As explained above, Well #44 is one of the 13 points of diversion for the three Subject Water Rights, as approved by the 1999 Transfer and decreed by the SRBA. Spartan’s protest does not identify the water right it alleges is injured by Transfer No. 81155, nor does it claim that the operation of Well #39 at its new location, which is the subject of this transfer, will injure its water right. However, according to IDWR’s website, Spartan has one water right, 29-13425, with a priority date of September 5, 1951, in the amount of 0.676 cfs, for irrigation and stockwater purposes. The well associated with this water right is located approximately 13 miles south of Well #39. Spartan’s requested relief is “curtailment, reduction in volume, pumped by City at Well #44, or call. Should conduct flow measurement for one year prior to action by the Department.” *Notice of Protest*, Transfer No. 81155, Spartan Portneuf L.L.C. (Sept. 26, 2016) (“Spartan’s Protest”).

ARGUMENT

Pocatello has not requested a transfer of water rights to Well #44; the relief sought is expressly limited to transferring water rights to the relocated Well #39. There are three bases to dismiss Spartan’s Protest: first, Spartan alleges injury from Well #44, not Well #39. This claim is beyond the scope of these proceedings and cannot be addressed here. Second, Pocatello has SRBA partial decrees authorizing the operation of Well #44 under the Subject Water Rights, and Spartan’s Protest, if considered, would be a collateral attack on those decrees. Third, and finally,

Spartan has failed to allege standing in this matter because the injury alleged is unrelated to operations of relocated Well #39. Because Spartan's Protest exclusively involves claims of injury from the operation of Well #44, Spartan's Protest should be dismissed as the relief it seeks is outside the scope of this transfer and cannot be granted in the above-captioned proceeding.

I. Spartan's theory of injury and requested relief is outside the scope of IDWR's jurisdiction in this transfer.

Idaho Code section 42-222(1) provides that any change in point of diversion must be approved by IDWR. In approving a transfer, IDWR is required to determine, among other things, if the transfer will injure other water users. *Id.* Here, the relevant question for the Department is whether the transfer of the Subject Water Rights from the former location of Well #39 to the new location of Well #39 will injure Spartan's (as yet unidentified) water right. However, Spartan's Protest does not complain of injury from the relocation of Well #39. Instead, Spartan's Protest alleges that Well #44 is injuring its water rights, and that this transfer will "exacerbate" this alleged injury.

Regardless of the outcome of this transfer of the Subject Water Rights to the relocated Well #39, 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. At its former location, Well #39 was also authorized to divert the Subject Water Rights pursuant to approvals in T-5452 and the SRBA decrees. The only change contemplated in the current transfer is the authorization for relocated Well #39 to continue to divert the Subject Water Rights. Stated another way, Well #44 is an alternate point of diversion for the Subject Water Rights, and is not at issue in this proceeding; therefore, Spartan's Protest is not within the scope of the issues under consideration in this transfer. The current transfer does not add or subtract the water rights associated with Well #44, or affect the operation of Well #44 in any way.

Spartan cannot inject issues regarding Well #44 into this current transfer, and its protest raises no issues with relocated Well #39. Because Spartan's Protest exclusively raises issues with the operation of Well #44 (which is not relevant to this transfer) and does not allege any injury or other issues regarding relocated Well #39, it is defective. The Protest fails to identify any legal basis for its alleged right to contest the relocation of Well #39, and should be dismissed. 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. Pocatello's partial decrees and 1999 Transfer authorize Well #44 to divert the Subject Water Rights.

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. 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. Spartan cannot collaterally attack these decrees to achieve the relief requested in its protest, and accordingly its protest should be dismissed.

III. Spartan does not have standing to protest this transfer.

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) (quotation marks and citation omitted). “Idaho has adopted the constitutionally based federal justiciability standard.” *Id.* (quotation marks and 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 [likelihood] 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 issue before the Department involves the relocated Well #39 and not the operations 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. Hence, Spartan does not have standing to protest this transfer.

ALTERNATIVE MOTION IN LIMINE

In the alternative, if the Hearing Officer does not dismiss Spartan’s Protest, Pocatello seeks to limit the issues that are relevant to the transfer of the Subject Water Rights to relocated Well #39. As explained above, the question before the Hearing Officer in this transfer is whether the transfer of the Subject Water Rights from the former location of Well #39 to the new location of Well #39 meets the requirements of Idaho Code section 42-222(1), including *inter alia* whether this new point of diversion will injure other water users. Evidence regarding Well #44 is accordingly not relevant to this matter. 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.” *Chisolm v. Idaho Dep’t. of Water Res.*, 142 Idaho 159, 163, 125 P.3d 515, 519 (2005).

Pocatello accordingly requests the Hearing Officer determine that any evidence regarding the existence, condition, size, capacity, or operation of Well #44, including alleged effects on Spartan’s water rights, is not relevant to this transfer and accordingly should be precluded from the scope of this hearing, including any discovery requests by Spartan.

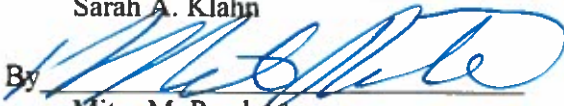
Respectfully submitted this 26th day of June, 2017.

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ATTORNEYS FOR CITY OF POCATELLO

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 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:



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