

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF POCATELLO,

Petitioner,

vs.

GARY SPACKMAN in his official capacity as  
Director of the Idaho Department of Water  
Resources; and the IDAHO DEPARTMENT  
OF WATER RESOURCES,

Respondents,

and

SPARTAN PORTNEUF, LLC,

Intervenor.

**Case No. CV01-17-23146**

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**RESPONDENTS' BRIEF**

Judicial Review from the Idaho Department of Water Resources  
Honorable Eric J. Wildman, District Judge, Presiding

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**ATTORNEYS FOR RESPONDENTS**

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**LAWRENCE G. WASDEN**  
ATTORNEY GENERAL

**DARRELL G. EARLY**  
Deputy Attorney General  
Chief, Natural Resources Division

**GARRICK L. BAXTER, ISB #6301**  
**EMMI L. BLADES, ISB #8682**  
Deputy Attorneys General  
P.O. Box 83720  
Boise, ID 83720-0098  
Telephone: (208) 287-4800  
[garrick.baxter@idwr.idaho.gov](mailto:garrick.baxter@idwr.idaho.gov)  
[emmi.blades@idwr.idaho.gov](mailto:emmi.blades@idwr.idaho.gov)

*Deputy Attorneys General for Idaho  
Department of Water Resources*

---

**ATTORNEY FOR PETITIONER**

---

**SARAH A. KLAHN**  
WHITE & JANKOWSKI, LLP  
511 6<sup>th</sup> Street, Suite 500  
Denver, CO 80202  
Telephone: (303) 585-9441  
[sarahk@white-jankowski.com](mailto:sarahk@white-jankowski.com)

*Attorney for City of Pocatello*

---

**ATTORNEYS FOR INTERVENOR**

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**LAURA A. SCHROEDER**  
**JAMES BROWITT**  
**SCHROEDER LAW OFFICES PC**  
1915 NE Cesar E. Chavez Blvd.  
Portland, OR 97212  
Telephone: (503) 281-4100  
[counsel@water-law.com](mailto:counsel@water-law.com)  
[j.browitt@water-law.com](mailto:j.browitt@water-law.com)

*Attorneys for Spartan Portneuf, LLC*

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## **I. STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This is a judicial review proceeding in which the City of Pocatello (“Pocatello”) appeals an interlocutory order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”). In the interlocutory order, the Director disagreed with a Department hearing officer’s determination that Spartan Portneuf, LLC (“Spartan”), should be dismissed as a protestant in the matter of Pocatello’s Application for Transfer No. 81155 (“Application”). The Director remanded the matter to the hearing officer to conduct a hearing including Spartan as a protestant.

Pocatello seeks review of the Director’s interlocutory order pursuant to Idaho Code § 67-5271(2), which allows immediate review of an interlocutory order only “if review of the final agency action would not provide an adequate remedy.” Pocatello asserts its right to seek review of a final order issued in the transfer proceeding pursuant to Idaho’s Administrative Procedure Act (“IDAPA”) is not an adequate remedy because Pocatello will have “to engage in an administrative hearing” before the final order is issued. *City of Pocatello’s Opening Brief on Judicial Review* at 4-5. In other words, Pocatello asserts its rights under IDAPA are not adequate because it will be required to participate in a hearing and wait for a final determination of the Department. The Court must reject Pocatello’s argument and dismiss this appeal because delay, expense, or inconvenience of a hearing are not appropriate grounds for challenging the adequacy of a remedy. Further, because Spartan alleges a traceable causal connection between changes proposed in the Application and injury to Spartan’s senior water right, the Director correctly rejected Pocatello’s argument that Spartan’s protest should be dismissed. The Department

requests that the Court dismiss Pocatello's appeal and award the Department reasonable attorney fees.

**B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND**

Pocatello filed its Application on July 25, 2016. R. at 1. The Application proposes to change the location of Well 39, one of thirteen shared points of diversion decreed for Pocatello's water right nos. 29-2274, 29-2338 and 29-7375 by the Snake River Basin Adjudication ("SRBA") District Court. R. at 1-10. The proposed point of diversion is located approximately 1/2 mile to the north of the decreed point of diversion for Well 39. R. at 1, 3, 6, 9. The entire combined authorized diversion rate for water right nos. 29-2274, 29-2338 and 29-7375 (21.45 cfs) can be diverted from any one of the thirteen points of diversion identified on the rights. R. at 1-10.; R. at 215. The Application only lists eleven points of diversion for the water rights. R. at 1.

Spartan protested the Application. R. at 21. Spartan owns water right no. 29-13425, which authorizes diversion of water from a ground water well ("Spartan Well"). R. at 215. Water right no. 29-13425 bears a priority date of September 5, 1951, which is senior to Pocatello's water right nos. 29-2338 and 29-7375. R. at 110, 112. Pocatello's Well 44, one of the points of diversion for water right nos. 29-2274, 29-2338 and 29-7375, is located approximately 300 feet south of the Spartan Well. R. at 215.

Spartan's protest includes the following statements:

Basis of protest (including statement of facts and law upon which the protest is based):

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.

R. at 21.

A Department hearing officer conducted a pre-hearing conference on June 9, 2017. R. at 216. The parties were unable to resolve the issues of protest and a hearing was scheduled for October 17, 2017. *Id.*

On June 26, 2017, Pocatello filed a *Motion to Dismiss Protest and in the Alternative Motion in Limine*. R. at 44. Pocatello asserted “the relevant question for the Department” in the transfer proceeding is whether “relocation of Well # 39” will injure Spartan’s water right no. 29-13425. R. at 48. Pocatello argued Spartan’s protest should be dismissed as “defective” because the protest “exclusively involves claims of injury from the operation of Well #44” and “does not complain of injury from the relocation of Well #39.” R. at 47-48. In the alternative, Pocatello asked the hearing officer to exclude evidence regarding Well #44 as “not relevant to this matter.” R. at 50.

Spartan filed a *Response to City’s Motion to Dismiss Protest and Objection to Alternative Motion in Limine* on July 10, 2017. R. at 83. Spartan disagreed with Pocatello’s assertion that the only relevant issue in the transfer proceeding is “the relocation and operation of Well No. 39” and pointed to the Application’s exclusion of two points of diversion from water right nos. 29-2274, 29-2338 and 29-7375. R. at 84. Spartan asserted “it is not unreasonable to question how this change will affect the production demands on the other 11 wells, among them No. 44.” R. at 85. Spartan reiterated that it “contests the changes proposed in [the Application], changes it believes will ‘exacerbate’ the ‘existing problem.’” R. at 86.

On July 13, 2017, Pocatello filed a *Reply in Support of Motion to Dismiss Protest and in the Alternative Motion in Limine* (“Reply”). R. at 100. Attached to the Reply is an Affidavit of Justin Armstrong, the Water Superintendent for Pocatello, which discusses the points of diversion excluded from the Application. R. at 105.

On August 8, 2017, the hearing officer issued a *Preliminary Order Dismissing Protest and Approving Transfer*. R. at 110. The hearing officer determined that “Spartan’s arguments are not sufficient to connect the injury concerns associated with the operation of Well 44 to the change proposed in [the Application].” R. at 114. The hearing officer concluded “Spartan’s protest is defective because it does not identify any issues related to the changes proposed in [the Application].” R. at 115. The hearing officer dismissed Spartan’s protest and approved the Application, leaving water right nos. 29-2274, 29-2338 and 29-7375 with the eleven points of diversion listed in the Application. R. at 116, 121, 123, 125.

On September 19, 2017, Spartan filed a *Brief and Exceptions to Preliminary Order Dismissing Protest and Approving Transfer*. R. at 145. On October 2, 2017, Pocatello filed *Pocatello’s Response to Brief and Exceptions to Preliminary Order Dismissing Protest and Approving Transfer*. R. at 203.

In response, the Director issued an interlocutory order in which he disagreed with the hearing officer’s determination that “‘Spartan’s protest does not identify any issues related to the proposed change for Well 39.’” R. at 217. The Director determined “Spartan’s argument that eliminating points of diversion and changing the location of Well 39 could possibly increase demand in Well 44 and injure the Spartan [W]ell constitutes a protest against the ‘proposed change’ in accordance with Idaho Code § 42-222(1).” R. at 218. The Director concluded “Spartan’s protest is not ‘defective’ and should not have been dismissed.” *Id.* The Director remanded the matter to the hearing officer to conduct a hearing including Spartan as a protestant. R. at 219. The Director also denied Pocatello’s request to exclude evidence about Well 44. *Id.* The Director determined “Spartan’s argument that eliminating points of diversion and changing the location of Well 39 could possibly increase demand in Well 44 relies upon presentation of evidence regarding Well



44.” R. at 218. The Director concluded “[s]uch evidence is not irrelevant, repetitious, or inadmissible and exclusion of evidence regarding Well 44 would frustrate Spartan’s ability to develop the record in support of its argument.” R. at 218-19.

On December 15, 2017, Pocatello filed the *City of Pocatello’s Notice of Appeal and Petition for Judicial Review* seeking the Court’s review of the Director’s interlocutory order remanding the transfer proceeding to the Department’s hearing officer. R. at 223.

## **II. ISSUES ON APPEAL**

Pocatello's opening brief does not include a statement of issues on appeal. The Department states the issues on appeal as follows:

1. Whether the Court lacks jurisdiction to hear and must dismiss Pocatello's appeal because review of a final order issued in the transfer proceeding pursuant to IDAPA will provide Pocatello an adequate remedy.
2. Whether the Director correctly determined that Spartan's protest should not be dismissed.
3. Whether the Director correctly denied Pocatello's request to exclude evidence about Well 44.
4. Whether the Department should be awarded reasonable attorney fees because Pocatello's appeal lacks a reasonable basis in fact or law.

### III. STANDARD OF REVIEW

Judicial review of an agency action “is wholly statutory; there is no right of judicial review absent the statutory grant.” *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006). Idaho Code § 67-5270(1) states that “[j]udicial review of agency action” is governed by IDAPA “unless other provision of law is applicable to the particular matter.” Idaho Code § 67-5271(2) states that “[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.” Where review of final agency action would provide an adequate remedy, an appeal pursuant to Idaho Code § 67-5271(2) must be dismissed. *See Williams v. State, Bd. of Real Estate Appraisers*, 149 Idaho 675, 679, 239 P.3d 780, 784 (2010).

Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3).

When reviewing an agency’s “evidentiary rulings, this Court applies an abuse of discretion standard.” *See Foster v. Traul*, 145 Idaho 24, 28, 175 P.3d 186, 190 (2007). An abuse of discretion review necessitates “a three-part inquiry: (1) whether the [agency] rightly perceived the issue as one of discretion; (2) whether the [agency] acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the [agency] reached its decision by an exercise of reason.” *See id.* The party asserting

the agency abused its discretion carries the burden of demonstrating “that an abuse of discretion occurred, and its failure to do so is fatal to its argument.” *See Green River Ranches, LLC v. Silva Land Company, LLC*, 162 Idaho 385, \_\_\_, 397 P.3d 1144, 1151 (2017).

The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). “Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion.” *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). “If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.” Idaho Code § 67-5279(3).

#### IV. ARGUMENT

##### **A. The Court lacks jurisdiction to hear and must dismiss Pocatello's appeal because review of a final order will provide Pocatello an adequate remedy.**

Pocatello seeks judicial review of the Director's interlocutory order remanding the transfer proceeding to the Department's hearing officer pursuant to Idaho Code § 67-5271(2). This statute allows immediate review of an interlocutory order only "if review of the final agency action would not provide an adequate remedy." Idaho Code § 67-5271(2). The Court lacks jurisdiction to hear and must dismiss Pocatello's appeal because review of a final order issued in the transfer proceeding pursuant to IDAPA will provide Pocatello an adequate remedy.

Pocatello asserts its right to seek judicial review of a final order is not an adequate remedy because Pocatello will have "to engage in an administrative hearing" before the final order is issued. *City of Pocatello's Opening Brief on Judicial Review* at 4-5. In other words, Pocatello argues its rights under IDAPA are not adequate because it will be required to participate in a hearing and wait for a final determination of the Department.

The Court must reject Pocatello's argument because delay, expense, or inconvenience of a hearing are not appropriate grounds for challenging the adequacy of a remedy. Idaho Courts have repeatedly emphasized this point. In *Rufener v. Shaud*, 98 Idaho 823, 825, 573 P.2d 142, 144 (1977), the Idaho Supreme Court stated: "This court long ago recognized that 'The adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case. If such a rule were to obtain, the law of appeals might as well be abrogated at once.'" (quoting *Willman v. District Court*, 4 Idaho 11, 35 P. 692 (1894)); *Smith v. Young*, 71 Idaho 31, 34, 225 P.2d 466, 468 (1950); *Natatorium Co. v. Erb*, 34 Idaho 209, 200 P. 348, 350 (1921) (also explaining that "[t]he adequacy of the remedy by appeal does not depend upon mere delay, expense, or inconvenience."); *Olden v. Paxton*, 27 Idaho 597, 150 P. 40, 41 (1915).

In *Blue Lakes Trout Farm, Inc., v. Spackman*, p. 3-4, Case No. CV WA 2010-19823 (Oct. 29, 2010), this Court addressed Blue Lakes' challenge to the Director's interlocutory decision to preclude Blue Lakes from presenting certain evidence at the hearing regarding Blue Lakes' water right delivery call. The Court stated: "Blue Lakes presumably contends that its rights under IDAPA are not adequate because it must wait for a final determination of the Director." *Id.* at 3. Citing *Rufener*, the Court held it was "precluded from testing the adequacy of a remedy on inconvenience grounds alone." *Id.* at 3-4. The Court cited the Idaho Supreme Court's statement in *State v. District Court*, 143 Idaho 695, 698, 152 P.3d 566, 569 (2007) that "[a] right of appeal is regarded as a plain, speedy and adequate remedy at law in the absence of a showing of exceptional circumstances or of the inadequacy of an appeal to protect existing rights." *Id.* at 3. The Court stated that "the ability of Blue Lakes to seek judicial review of decisions made by the Director in the underlying proceeding is provided for by [IDAPA]." *Id.* The Court explained that, once the Director issued a final decision in the underlying proceeding, Blue Lakes would "be entitled to take advantage of those rights afforded to aggrieved parties under IDAPA, including the right to seek judicial review." *Id.* Accordingly, the Court rejected Blue Lakes' argument that it had no adequate remedy. *Id.*

The rationale of the cases cited above equally applies in this case.<sup>1</sup> The Court should, therefore, reject Pocatello's assertion that its rights under IDAPA are not adequate. Pocatello's basis for asserting it can appeal the Director's interlocutory order is that it will be required to participate in a hearing and wait for a final determination of the Department. As Idaho courts

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<sup>1</sup> In *Willman*, *Rufener*, *Smith*, *Natatorium Co.*, *Olden*, *State*, and *Blue Lakes Trout Farm, Inc.*, the courts addressed the question of an "adequate remedy" in the context of the standard for writs that may only issue when there is no "plain, speedy and adequate remedy in the ordinary course of law." The courts' repeated determination in those cases that the adequacy of a remedy cannot be tested on inconvenience grounds equally applies in the context of Idaho Code § 67-5271(2)'s standard that interlocutory orders are only immediately reviewable "if review of the final agency action would not provide an adequate remedy."

have repeatedly determined, delay, expense, or inconvenience are not appropriate grounds for challenging the adequacy of a remedy.

Pocatello's ability to seek judicial review of a final order is provided for by IDAPA. Idaho Code §§ 67-5201, *et seq.*; *see also*, Idaho Code § 42-1701A. Once the hearing officer conducts a hearing on remand and the Department issues a final order, Pocatello will be entitled to take advantage of those rights afforded to aggrieved parties under IDAPA, including the right to seek judicial review. The Director's interlocutory order will "be reviewable in connection with a petition for judicial review of the final order ultimately entered." *Williams*, 149 Idaho at 678, 239 P.3d at 783. Review of a final order issued in the transfer proceeding will provide Pocatello an adequate remedy. Accordingly, the Court lacks jurisdiction to hear and must dismiss Pocatello's appeal. *See id.* at 678 n.3, 679, 239 P.3d at 783 n.3, 784 (dismissing appeal of interlocutory order for lack of jurisdiction because there was "no indication that review of the final order ultimately entered would not provide [the petitioner] with an adequate remedy.").

**B. The Director correctly determined that Spartan's protest should not be dismissed.**

Even if the Court determines it has jurisdiction to consider Pocatello's appeal, the record demonstrates the Director correctly determined that Spartan's protest should not be dismissed. Pocatello asserts the Director erred in reaching this determination because: 1) Spartan's protest does not allege injury related to changes proposed in the Application, 2) Pocatello's omission of two points of diversion from the Application "is a red herring," 3) Spartan lacks "standing to pursue its protest," and 4) Spartan should pursue "a water right delivery call" instead of a protest to the Application. *City of Pocatello's Opening Brief on Judicial Review* at 7-11. Pocatello's assertions will be addressed in turn.

1. Spartan's protest alleges injury related to changes proposed in the Application.

In the interlocutory order, the Director rejected the hearing officer's determination that Spartan's protest "is defective" and should be dismissed<sup>2</sup> because it "does not identify any issues related to the proposed change for Well 39." R. at 217. The Director determined "Spartan's argument that eliminating points of diversion and changing the location of Well 39 could possibly increase demand in Well 44 and injure the Spartan [W]ell constitutes a protest against the 'proposed change' in accordance with Idaho Code § 42-222(1)."<sup>3</sup> R. at 218. The Director concluded "Spartan's protest is not 'defective' and should not have been dismissed." *Id.*

Pocatello continues to assert that Spartan's alleged injury is "unrelated to the change[s] sought by Pocatello" in the Application. *City of Pocatello's Opening Brief on Judicial Review* at 7. Pocatello argues that the Department's evaluation of injury to other water rights in a transfer proceeding is limited to "injury allegedly arising from the proposed change." *Id.* at 6. Pocatello concludes that, by remanding the matter to the hearing officer to conduct a hearing on the Application and consider Spartan's protest, the Director "improperly enlarge[d] the scope of agency discretion to evaluate injury in a transfer." *Id.*<sup>4</sup>

Pocatello is correct that the Director's review of injury in a transfer proceeding is limited to "injury allegedly arising from the proposed change." *See id.* at 7; *see* Idaho Code § 42-222(1)

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<sup>2</sup> The Department's Rule of Procedure 304 states that "[d]efective, insufficient or late pleadings may be returned or dismissed." IDAPA 37.01.01.304. The Department's Rules of Procedure do not define the term "defective."

<sup>3</sup> Idaho Code § 42-222(1) requires "that anyone who desires to *protest the proposed change* shall file notice of protests with the department within ten (10) days of the last date of publication." (emphasis added).

<sup>4</sup> Pocatello appears to conclude that the Director both exceeded "the statutory authority of the agency" and abused his discretion by remanding the transfer proceeding to the hearing officer. *See* Idaho Code § 67-5279(3). However, Pocatello fails to apply the three-part abuse of discretion test set forth in *Foster*, 145 Idaho at 28, 175 P.3d at 190. Pocatello's "failure to do so is fatal to its argument." *See Green River Ranches, LLC*, 162 Idaho at \_\_\_, 397 P.3d at 1151. In addition, Pocatello does not acknowledge, much less attempt to satisfy, its burden to demonstrate that a substantial right has been prejudiced by the Director's interlocutory order. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222.



(“anyone who desires to *protest the proposed change* shall file notice of protests with the department within ten (10) days of the last date of publication.”) (emphasis added)); *see also Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (stating the “[t]he director is statutorily required to examine all evidence of whether *the proposed transfer* will injure other water rights.” (emphasis added)). However, Pocatello is incorrect in asserting that Spartan’s alleged injury is “unrelated” to changes proposed in the Application. As the Director explained in the interlocutory order, “Spartan’s argument that eliminating points of diversion and changing the location of Well 39 could possibly increase demand in Well 44 and injure the Spartan [W]ell *constitutes a protest against the ‘proposed change’* in accordance with Idaho Code § 42-222(1).” R. at 218 (emphasis added). Contrary to Pocatello’s assertion, Spartan’s argument *does* allege injury arising from changes proposed in the Application. The Department’s consideration of such injury is statutorily required, not “beyond its statutory authority” as Pocatello asserts. *City of Pocatello’s Opening Brief on Judicial Review* at 8.

Pocatello also asserts it “is authorized to divert the full rate of flow associated with” water right nos. 29-2274, 29-2338 and 29-7375 from Well 44. *Id.* Pocatello concludes that, “so long as Pocatello’s operation of” those water rights “are consistent with the terms of the SRBA partial decrees, any impact from the operation of Well 44 on the Spartan water rights is not injury that can be” considered in the transfer proceeding. *Id.*

Pocatello is correct that SRBA partial decrees authorize it to divert the full rate of flow associated with water right nos. 29-2274, 29-2338 and 29-7375 from Well 44. Neither the Department nor Spartan dispute or challenge that fact. *See* R. at 86 (explaining Spartan’s protest “simply contests this proposal on the basis that it will further injure right No. 29-13425—it is not challenging . . . any SRBA decree.”). However, just because Pocatello is authorized to increase

pumping from Well 44 does not mean Pocatello cannot cause redressable injury by doing so. If, as a result of changes proposed in the Application, Pocatello will increase pumping from Well 44 pursuant to its junior water right nos. 29-2338 and 29-7375, and if that increased pumping will injure Spartan's senior water right no. 29-13425, that is exactly the type of injury Idaho Code § 42-222(1) requires the Director to address in a transfer proceeding. *See City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (quoting the statement in *Jenkins*, 103 Idaho at 388, 647 P.2d at 1260 that "[p]riority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder."). The Director correctly determined that Spartan's protest alleges injury related to changes proposed in the Application and that Spartan should be afforded the opportunity to present evidence at a hearing before the Department to support its allegations.

2. The record contains statements regarding Pocatello's omission of points of diversion that raise questions about Pocatello's operation of its system that Spartan should have the opportunity to address at a hearing.

Pocatello argues the Director erred by concluding that omission of points of diversion from the Application supports the Director's determination that Spartan's protest should not be dismissed. *City of Pocatello's Opening Brief on Judicial Review* at 10. Pocatello asserts its "omission of two points of diversion" was "inadvertent" and "is a red herring." *Id.* Citing Mr. Armstrong's Affidavit, Pocatello asserts "the inadvertent omission of these two points of diversion will have no effect on the City's operations" and will not "affect Spartan's well." *Id.*

The record contains conflicting statements about whether Pocatello's omission of points of diversion was "inadvertent." Mr. Armstrong's Affidavit states that Pocatello did not include one point of diversion "due to space constraints of the application form," not that such omission was "inadvertent." R. at 106. Further, Mr. Armstrong's Affidavit does not state that omission of

points of diversion “will have no effect on the City’s operations.” Instead, Mr. Armstrong’s Affidavit and other information in the record raise questions about whether Pocatello will alter operation of its system as a result of the Application. For example, Pocatello’s omission of points of diversion from the Application suggests an intent to abandon the points of diversion, but Mr. Armstrong’s Affidavit states to the exact contrary that “Pocatello does not intend to abandon any of its authorized points of diversion.” R. at 106. In addition, Pocatello stated in its Reply that, while “decreed points of diversion do not currently have an operating well . . . as a municipal water supplier Pocatello is authorized to maintain an ability to grow into its water supplies. . . .” R. at 101. These statements demonstrate that questions of fact remain regarding whether Pocatello will alter operation of its system due to changes proposed in the Application. Spartan should be afforded the opportunity to address these questions and present evidence at a hearing before the Department in support of its allegation that changes proposed in the Application will cause Pocatello to alter operation of its system to the injury of Spartan’s senior water right. The Director did not err by concluding that Pocatello’s omission of points of diversion from the Application supports a determination that Spartan’s protest should not be dismissed.

3. Spartan has standing to protest the Application.

In the interlocutory order, the Director rejected Pocatello’s argument that Spartan’s “protest should be dismissed because ‘there is no connection between the conduct challenged in [the] transfer and Spartan’s claimed injury’” and, therefore, ‘Spartan does not have standing to protest [the] transfer.’” R. at 218. The Director restated Spartan’s argument “‘that eliminating points of diversion or changing the location of Well 39 may possibly increase the demand in Well 44’ and ‘exacerbate the alleged injury to the Spartan Well.’” *Id.* The Director then

determined that “Spartan’s argument alleges a connection between the changes proposed in [the Application] and possible injury to the Spartan Well.” *Id.* The Director concluded “Spartan has standing to protest” the Application. *Id.*

Pocatello asserts the Director erred by determining Spartan has “standing to pursue its protest.” *City of Pocatello’s Opening Brief on Judicial Review* at 8. Pocatello’s basis for this assertion continues to be that the Application “does not involve the operation of Well 44, and there is no connection between the conduct challenged in the [transfer proceeding] and Spartan’s claimed injury.” *Id.* at 10. Pocatello concludes, therefore, Spartan has not shown “a ‘distinct, palpable injury’”<sup>5</sup> or “‘fairly traceable causal connection between the claimed injury and the challenged conduct’” that would “allow Spartan to participate in the” transfer proceeding. *Id.* at 9-10.

As discussed above, Pocatello is incorrect in asserting that Spartan’s allegations regarding injury are unrelated to changes proposed in the Application. Spartan alleges that Pocatello may increase pumping in Well 44 due to changes proposed in the Application and such increased pumping will injure Spartan’s senior water right. Again, just because Pocatello is authorized to increase pumping from Well 44 does not mean Pocatello cannot cause redressable injury by doing so. Spartan alleges a distinct and palpable injury that is traceable to changes proposed in the Application. Spartan seeks to develop an evidentiary record to support its allegations and to participate as a protestant in a hearing before the Department. If, based on the record developed at hearing, the Department determines changes proposed in the Application will result in injury to Spartan’s senior water right, the Department must prevent that injury per

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<sup>5</sup> The Idaho Supreme Court “has defined palpable injury as an injury that is easily perceptible, manifest, or readily visible.” *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (citation omitted).

Idaho Code § 42-222(1). In other words, a decision favorable to Spartan in the transfer proceeding would prevent injury to Spartan's water right. *See State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (explaining that, "to establish standing 'a plaintiff must show . . . that the injury 'will be redressed by a favorable decision.'"' (citations omitted)). The Director did not err by concluding Spartan has standing to protest the Application.

4. Spartan's injury concerns should be addressed in the transfer proceeding, not a water right delivery call proceeding.

Pocatello asserts "Spartan's allegations about injury arise because of events that occurred prior to the filing of" the Application. *City of Pocatello's Opening Brief on Judicial Review* at 9. Pocatello concludes that Spartan must pursue a "water right delivery call" if it "believes itself to be injured from the operation of Well 44. . . ." *Id.* at 11.

While Spartan does assert in its protest that Pocatello's current operation of Well 44 "has been and continues to be injurious to" Spartan's water right no. 29-13425, Spartan also asserts that changes proposed in the Application will "exacerbate" the "existing problem." R. at 21. Spartan's avenue for seeking to remedy prior and current injury to its senior water right is through a water right delivery call pursuant to the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11). However, the transfer proceeding is precisely where Spartan must raise, and has raised, concerns about injury that could result from changes proposed in the Application. *See* Idaho Code § 42-222(1) (requiring "that anyone who desires to protest the proposed change *shall file* notice of protests with the department within ten (10) days of the last date of publication." (emphasis added). Pocatello is incorrect in asserting that Spartan should raise its concerns regarding injury due to changes proposed in the Application in a water delivery call proceeding instead of pursuing its protest in the transfer proceeding.

**C. The Director properly denied Pocatello's request to exclude evidence about Well 44.**

Pocatello asserts that, because it is authorized to divert the full quantity listed on water right nos. 29-2274, 29-2338 and 29-7375 from Well 44, evidence regarding Pocatello's operation of Well 44 is irrelevant in the transfer proceeding and the Director erred by denying Pocatello's request to exclude evidence. *See City of Pocatello's Opening Brief on Judicial Review* at 9.

The Department's Rule of Procedure 600 states: "Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." IDAPA 37.01.01.600. Rule 600 authorizes the Director to "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." *Id.*

As stated above, the Court applies "an abuse of discretion standard" when reviewing agency evidentiary rulings. *See Foster*, 145 Idaho at 28, 175 P.3d at 190. An abuse of discretion review necessitates "a three-part inquiry: (1) whether the [agency] rightly perceived the issue as one of discretion; (2) whether the [agency] acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the [agency] reached its decision by an exercise of reason." *See id.* By simply asserting the Director should have granted Pocatello's motion to exclude evidence regarding Well 44 because such evidence is irrelevant, Pocatello has not met its burden to demonstrate an abuse of discretion occurred. Pocatello's "failure to do so is fatal to its argument." *See Green River Ranches, LLC*, 162 Idaho at \_\_\_, 397 P.3d at 1151.

Further, the fact that Pocatello is authorized to divert the full rate of flow associated with water right nos. 29-2274, 29-2338 and 29-7375 does not mean that evidence about Well 44 is

irrelevant in the transfer proceeding. Again, if, as a result of changes proposed in the Application, Pocatello will increase pumping from Well 44 pursuant to its junior water right nos. 29-2338 and 29-7375, and if that increased pumping will injure Spartan's senior water right no. 29-13425, Idaho Code § 42-222(1) requires the Director to address that injury in the transfer proceeding. *See City of Pocatello*, 152 Idaho at 835, 275 P.3d at 850. As the Director explained in the interlocutory order, "Spartan's argument that eliminating points of diversion and changing the location of Well 39 could possibly increase demand in Well 44 relies upon presentation of evidence regarding Well 44." R. at 218. "Such evidence is not irrelevant, repetitious, or inadmissible and exclusion of evidence regarding Well 44 would frustrate Spartan's ability to develop the record in support of its argument." R. at 218-19. The Director properly denied Pocatello's request to exclude evidence about Well 44.

**D. The Court should award the Department reasonable attorney fees.**

Idaho Code § 12-117(1) states the Court "shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law."

Pocatello's pursuit of this appeal is unreasonable. The delay, expense, or inconvenience of having to participate in a hearing and wait for a final determination of the Department is not a reasonable basis for Pocatello to seek judicial review of the Director's interlocutory order pursuant to Idaho Code § 67-5271(2). *See Rufener*, 98 Idaho at 825, 573 P.2d at 144; *Smith*, 71 Idaho at 34, 225 P.2d at 468; *Natatorium Co.*, 34 Idaho 209, 200 P. at 350; *Olden*, 27 Idaho 597, 150 P. at 41; *Willman*, 4 Idaho 11, 35 P. 692; *Blue Lakes Trout Farm, Inc.*, Case No. CV WA 2010-19823 (Oct. 29, 2010).

Further, Pocatello's assertions that Spartan's protest is unrelated to changes proposed in the Application and should be dismissed are without a reasonable basis in fact or law. Spartan's protest connects its injury allegation to changes proposed in the Application. Information in the record raises questions about whether Pocatello will alter operation of its system due to the Application. Spartan should be afforded the opportunity to participate in a hearing before the Department to develop an evidentiary record to support its allegations. Pocatello should not be allowed to frustrate development of that record by preventing Spartan from presenting evidence regarding Well 44.

In addition, while Pocatello asserts the Director abused his discretion by remanding the transfer proceeding to the Department's hearing officer, Pocatello does not apply the three-part abuse of discretion test set forth in *Foster*, 145 Idaho at 28, 175 P.3d at 190. Pocatello also does not attempt to satisfy, or even acknowledge, its burden to demonstrate that a substantial right has been prejudiced by the Director's interlocutory order. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. Pocatello's pursuit of this appeal has simply delayed resolution of the transfer proceeding before the Department. The Department respectfully requests that the Court award the Department reasonable attorney fees for having to defend against Pocatello's unreasonable appeal.




**V. CONCLUSION**

Pocatello's appeal must be dismissed because review of a final order issued in the transfer proceeding pursuant to IDAPA will provide Pocatello an adequate remedy. In the alternative, the Director's interlocutory order remanding the transfer proceeding to the hearing officer to conduct a hearing including Spartan as a protestant and denying Pocatello's request to exclude evidence about Well 44 should be affirmed. The Court should award the Department reasonable attorney fees because Pocatello's pursuit of this appeal lacks a reasonable basis in fact or law.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of April 2018.

LAWRENCE G. WASDEN  
Attorney General

DARRELL G. EARLY  
Chief, Natural Resources Division

  
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EMMI L. BLADES  
Deputy Attorney General  
Idaho Department of Water Resources

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of April 2018, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

*Original to:*

SRBA DISTRICT COURT  
253 3RD AVENUE NORTH  
PO BOX 2707  
TWIN FALLS ID 83303-2707  
Facsimile: (208) 736-2121

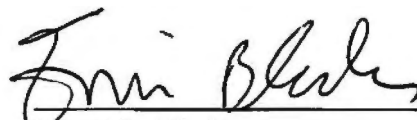
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- ☐ Email

SARAH A KLAHN  
MITRA M PEMBERTON  
WHITE & JANKOWSKI LLP  
511 16<sup>TH</sup> STREET STE 500  
DENVER CO 80202  
[sarahk@white-jankowski.com](mailto:sarahk@white-jankowski.com)  
[mitrap@white-jankowski.com](mailto:mitrap@white-jankowski.com)

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

LAURA SCHROEDER  
JIM BROWITT  
SCHROEDER LAW OFFICES PC  
1915 NE CESAR E CHAVEZ BLVD  
PORTLAND OR 97212  
[counsel@water-law.com](mailto:counsel@water-law.com)  
[j.browitt@water-law.com](mailto:j.browitt@water-law.com)

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email



Emmi L. Blades  
Deputy Attorney General