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Eastern Region

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Portneuf Watershed Users Association, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 76779 IN THE NAME OF
THE CITY OF POCATELLO

PROTESTANT PORTNEUF WATERSHED
USERS ASSOCIATION'S MOTION TO
EXCLUDE PORTIONS OF EXPERT
REPORT/OPINION

COMES NOW the Portneuf Watershed Users Association ("PWUA"), by and through undersigned counsel of record and pursuant to Rules of Procedure of the Idaho Department of Water Resources ("Procedure Rules") Nos. 260 (IDAPA 37.01.01.260), 565 (IDAPA 37.01.01.565) and the Notice of Hearing and Order Setting Pre-Hearing Deadlines dated April 21, 2011, and hereby submits this Motion to Exclude Portions of Expert Report/Opinion for the reasons, and based upon, the authorities discussed herein.

I. INTRODUCTION

On June 10, 2011, Applicant City of Pocatello ("City") submitted the expert report of Greg Sullivan entitled *Expert Report, Chesterfield Reservoir Transfer, City of*

Pocatello, Transfer Application No. 76779 (“Sullivan Report”) in support of its pending Application for Transfer. Several statements, opinions, and/or findings contained within the Sullivan Report amount to legal conclusions, lack adequate foundation, or rely upon inadmissible hearsay, and must be excluded as a result.

II. LEGAL STANDARDS

Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. I.R.E. 801. Generally speaking, hearsay is not admissible absent the application of a hearsay exception. I.R.E. 802 and 803.

Experts are those who possess scientific, technical, or other specialized knowledge that assists or helps the trier of fact to understand the evidence or to determine a fact in issue. I.R.E. 702. However, Idaho law precludes the introduction of expert opinions that are “speculative, conclusory, or unsubstantiated by the facts in the record,” because any such testimony would be of no assistance to the trier of fact. *See, e.g., Bromley v. Garey*, 132 Idaho 807, 811 (1999).

Though experts are permitted to testify in the form of an opinion based, in part, upon hearsay or otherwise inadmissible evidence, such testimony may only occur provided that the expert: (1) testifies as to the specific bases of his opinions; (2) reaches his opinions through his own independent investigation and judgment; and (3) testifies that such foundational evidence is of a type typically relied upon by experts in the relevant field. *See* I.R.E. 703; *see also, Doty v. Bishara*, 123 Idaho 329, 336 (1992) and *Basic American, Inc. v. Shatila*, 133 Idaho 726, 743-45 (1999). Further, while Idaho Rule of Evidence 703 condones the admissibility of expert opinion provided the above-referenced factors are satisfied, application of Rule 703 does

not render the otherwise inadmissible underlying facts or data admissible. *See, e.g., State v. Scovell*, 136 Idaho 587, 592 (Ct. App. 2001). In sum, experts cannot merely serve as a conduit for otherwise inadmissible evidence. *State v. Watkins*, 148 Idaho 418, 426-27 (2009).

III. ARGUMENT

Several statements and/or findings and opinions contained within the Sullivan Report are based upon hearsay, lack foundation, or offer nothing more than pure legal conclusions—conclusions that are not the province of an expert witness. The PWUA identifies the objectionable portions of the Sullivan Report in the order in which they are contained within the Report:

1. Portions of Section 4.1 of the Sullivan Report (pp. 3-6) are primarily based upon Mr. Sullivan's personal communications with Water District No. 29 Watermaster, Steve Hebdon. Of particular concern is Mr. Sullivan's conclusion that "it is likely that . . . a portion of PMVCC's storage water [is] being delivered to other Portneuf River water users." Sullivan Report, pp. 4-5. Mr. Sullivan bases this conclusion upon Mr. Hebdon's "indication" that he (Hebdon) makes conservatively high estimates of reservoir inflows in the absence of a formal reservoir inflow measuring device. *Id.*, p. 4. Mr. Sullivan further hedges his conclusion with the disclaimer that the conclusion depends upon the "assumption" that Mr. Hebdon "is consistent in estimating reservoir inflow at higher than actual reservoir inflow." *Id.*

To the extent that Mr. Hebdon's statements remain hearsay (Mr. Hebdon is currently listed as a City witness for hearing), Mr. Sullivan's conclusions based thereon are improper. Though Mr. Sullivan may be permitted to rely upon hearsay or other inadmissible evidence in forming his opinions, he may only do so where that reliance is merely one part of the process, not the entire process. Mr. Sullivan must still conduct his own investigation and lend

his own independent judgment and expertise to the process, not merely serve as a conduit for hearsay and issue speculative or conclusory opinions. Moreover, unless and until sufficient foundation is laid, Mr. Hebdon's qualifications and "eyeball" measurement protocol raise significant credibility concerns and cast doubt upon the propriety of Mr. Sullivan taking Mr. Hebdon's statements at face value, adopting them more or less as truth.

At present, the only "fact" supporting Mr. Sullivan's opinion that PMVCC storage water is likely being delivered to other Portneuf River water users is Mr. Hebdon's assertion that he "estimates" reservoir inflows "high." Mr. Sullivan has not conducted any of his own investigation to verify the truth of the assertion. Instead, Mr. Sullivan is improperly re-packaging the hearsay statements of Mr. Hebdon as expert "opinion."

2. Section 5.1 of the Sullivan Report (pp. 7-8) amounts to little more than legal conclusions, which are beyond the purview of expert testimony and are the province of the Hearing Officer, not Mr. Sullivan. Whether City is entitled to benefit from the "shrink-free" (without conveyance loss) provisions contained within the transfer water right partial decrees (29-53 and 29-589) is not for Mr. Sullivan to decide. Likewise, whether the shrink-free delivery status of the transfer water rights was "reaffirmed" by the SRBA Court is a legal conclusion that is subject to debate.

While the shrink-free delivery provisions are incorporated within the partial decrees for the transfer water rights, the PWUA contends that the shrink-free delivery status was "re-negotiated" during the course of the SRBA, not simply "reaffirmed" by the SRBA Court. The PWUA contends that the partial decrees for water right nos. 29-53 and 29-589 largely took their form based upon the negotiations of several parties, which negotiations were memorialized in the Portneuf River Settlement Agreement, filed with the SRBA Court on April 22, 2005. As

the partial decrees each note: “The operation and administration of this water right is subject to the terms and conditions of the Portneuf River Settlement Agreement, Basin 29; Portneuf River filed with the SRBA District Court April 22, 2005, and the addendum to the agreement filed December 17, 2007.” Whether City is entitled to avail itself of the benefits of a contract to which it was not a party, and for different uses of water in different locations than were contemplated within the underlying contract, remains to be argued. Regardless, Mr. Sullivan’s opinions on such legal matters are inappropriate and improper.

3. Section 5.2 of the Sullivan Report (pp. 8-9) culminates in the opinion that “Pocatello’s storage water can be delivered down the Portneuf River from McCammon to Pocatello without assessment of a transit loss.” The PWUA acknowledges that this conclusion/opinion likely only applies to the reach of river downstream of, and between, the PMVCC Canal headgate and City because this is the reach of river discussed within Section 5.2 of the Sullivan Report, and because this is the reach of river expressly mentioned within the statement itself. However, to the extent that Mr. Sullivan contends that the above-quoted opinion applies to the reach of river upstream of the PMVCC Canal headgate, between the headgate and Chesterfield Dam, that opinion is an inappropriate legal conclusion for the reasons discussed in Item No. 2, above.

4. Section 5.3 of the Sullivan Report (pp. 9-10) ends with the conclusion or assertion that according to the March 3, 2010 Storage Water Agreement (“SWA”) between City and the PMVCC, PMVCC is required to make up any conveyance losses occurring within the PMVCC Canal by the delivery of additional water to City. Besides serving as an example of the indispensable nature of the PMVCC to this proceeding (given the interpretation, application, and enforcement of the SWA against the PMVCC), Mr. Sullivan’s conclusion is nothing more than a

legal conclusion. The interpretation, application, and enforcement of the SWA is a legal matter, not a factual matter. Consequently, Mr. Sullivan's conclusion regarding the operation of the SWA is not appropriate.

5. Section 6.0 of the Sullivan Report (pp. 10-11) refers generically to "information obtained during the site visit" as providing the basis by which Mr. Sullivan gained an understanding of "historical water conditions on the Portneuf River, and the areas and alleged causes of seasonal flooding [identified] by the Protestants." Sullivan Report, p. 11. To the extent that Mr. Sullivan's opinions regarding historical conditions on the Portneuf River and localized flooding are based solely upon the hearsay testimony of unnamed individuals, those opinions are merely speculative and conclusory, and lack foundation. What specific information did Mr. Sullivan obtain? From whom? When? Where? Did Mr. Sullivan conduct any of his own independent analysis to verify this information?

Experts can rely upon hearsay and otherwise inadmissible evidence in formulating their opinions, but that "evidence" cannot serve as the sole foundation for those opinions. Otherwise, Mr. Sullivan is merely serving as a conduit for the admission of that inadmissible evidence.

6. Section 7.0 of the Sullivan Report (pp. 12-13) provides an analysis of enlargement and injury in the context of the pending transfer. That analysis includes the following statement regarding Idaho Code Section 42-222(1): "The City interprets this statute the way it historically has been applied such that a portion of an existing storage right that is not deemed to be needed by the space-holder may be transferred, assigned or leased/rented to additional users for various uses, provided no other water rights are injured." Sullivan Report, p. 12.

Mr. Sullivan's analysis and interpretation of Idaho Code Section 42-222(1) is nothing more than a legal conclusion. Mr. Sullivan's discussion certainly is not factual in nature. Moreover, Mr. Sullivan's analysis ignores the plain language of the statute by reading the term "irrigation purposes" out of the statute. Regardless, Mr. Sullivan's interpretation of Idaho Code Section 42-222 does nothing to assist the Hearing Officer in understanding evidence presented or matters of fact. Consequently, the analysis/opinion should be excluded.

7. Section 7.4 of the Sullivan Report (pp. 18-27) largely discusses the construction of, and data supporting, the Chesterfield Reservoir Operations Model ("CROM"), including the PMVCC irrigation simulation portion of the model. Section 7.4 of the Report (and consequently various CROM variables) are largely predicated upon the hearsay statements of PMVCC officials Ron Jolley, Eric Olson, and, perhaps, others.¹ For example, Ron Jolley and Eric Olson apparently provided Mr. Sullivan with PMVCC service area cropping patterns. *Id.*, p. 19. From this information, Mr. Sullivan compiled the crop irrigation requirements ("CIR") for those crops for input into the CROM model. *Id.* Similarly, Mr. Sullivan relied upon statements of Ron Jolley to determine that approximately 90 percent of the PMVCC service area is irrigated by sprinkler, as opposed to flood, irrigation. *Id.* at 20. This information was then used to determine PMVCC irrigation diversion demand for input into the CROM model. *Id.*

¹ The "References" section of the Sullivan Report (p. 38, in particular) identifies several personal communications relied upon between Mr. Sullivan and Steve Hebdon, Marshall Wheatley, Ron Jolley, Eric Olson, Dean Tranmer, and Justin Armstrong. The Report itself only directly cites to conversations with, or statements of, Messrs. Jolley, Olson, and Hebdon. Thus, it is impossible to know what information or opinions contained within the Report are attributable to Wheatley, Tranmer, and/or Armstrong. Moreover, only Hebdon and Jolley are listed as City witnesses for hearing in this matter. Consequently, Mr. Sullivan will improperly serve as a hearsay conduit for the non-witness "References," and it is impossible to determine what opinions, if any, are improperly based upon information supplied by these non-witness "References."

Again, while it is permissible for experts to rely upon hearsay or otherwise inadmissible evidence in formulating their opinions, it is only permissible to rely upon such information to the extent the expert's analysis did not stop there. *See, e.g., Doty, supra*. Stated differently, Mr. Sullivan is required to undertake his own independent investigations and analysis, and to exercise his own independent judgment, rather than merely taking the hearsay statements of others at face value (for the truth of the matters asserted) and incorporating them into the CROM model. Moreover, while Idaho Rule of Evidence 703 may render properly deduced expert opinions admissible, the rule does not operate to admit the underlying hearsay data and information itself. *See, e.g., Scovell, supra*.

The Sullivan Report contains no indication that Mr. Sullivan did anything other than take the hearsay data/information supplied by Ron Jolley and Eric Olson at face value for input into the CROM model. The Report contains no discussion of what independent steps Mr. Sullivan took in verifying or further deducing the cropping pattern and irrigation diversion demand data. It is questionable whether similarly situated experts in the field would do the same. This renders at least portions of Mr. Sullivan's CROM model impermissibly speculative, conclusory, and unreliable. This further demonstrates that Mr. Sullivan has done nothing more than improperly serve as a conduit for the hearsay statements of others—some of whom are not listed hearing witnesses who will be subject to examination and cross examination.

8. Table 4 contained within the Sullivan Report presents data obtained, in part, from Ron Jolley and from PMVCC reservoir storage records. First, the PMVCC reservoir storage records (board minutes) are not official records of either the Watermaster or of IDWR. Second, the statements of Mr. Jolley amount to inadmissible hearsay. Consequently, those

portions of Table 4 relying upon these representations and materials lack foundation and necessary authentication.

IV. MISCELLANEOUS

In addition to the foregoing, objectionable portions of the Sullivan Report, the Report also contains other problematic/inappropriate issues that require mention:

1. Section 4.2 of the Sullivan Report (pp. 6-7) states that delivery of the transfer water rights to City will occur, at times, *through* the Sorenson Hydropower Facility *penstocks*. Sullivan Report, p. 6. However, City's pending transfer application does not include a hydropower purpose of use. At most, the pending application for transfer includes only possible hydropower use of the water in the future should the transfer water (or a portion thereof) be leased to others for power generation purposes. No such lease yet exists, nor has any such lease been previously approved by IDWR as the transfer application provides. Instead, Part 1.B (Note (1)) of the transfer application states that the proposed nature of use of the transfer water rights includes only: "Irrigation, municipal, ground water recharge, mitigation recreation, aesthetic, wildlife, fish propagation, and exchange." Consequently, any hydropower use of the transfer water upon approval of the transfer would result in an illegal use of the transfer water.

2. Pages 26 and 35, and Table 3 of the Sullivan Report discuss City's proposed "ARW" (aesthetic, recreation, wildlife, and fish propagation) uses of the transfer water rights. The Sullivan Report describes these ARW uses as "in stream" and "in river" uses of the water. *Id.*, pp. 26 and 35. City is not legally authorized to hold in-stream flow water rights in natural water courses such as the Portneuf River. Only the Idaho Water Resource Board or other duly authorized state entities are able to appropriate and use water for in-stream purposes/benefits in natural water courses. *See* IDAHO CODE § 42-1501, *et seq.*, and *State, Dep't*

of Parks v. Idaho Dep't of Water Admin., 96 Idaho 440 (1974) (wherein the Idaho Supreme Court upheld a statute authorizing the State Parks Department to appropriate non-diversion natural spring flows for aesthetic, wildlife, and recreational beneficial uses).

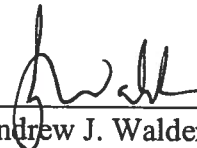
3. Table 3 of the Sullivan Report marks the first instance where City has specifically identified (by legal description) the locations of its proposed points of re-diversion of the transfer water rights. Until now, City's transfer application and supporting materials (most notably Attachment #9) only identified the proposed "Pocatello Re-diversion Reach." The PWUA contends that City's failure to more specifically identify the proposed points of re-diversion within the transfer application in August 2010, rather than via the Sullivan Report in June 2011, is an application deficiency that cannot be cured by the Sullivan Report. The transfer application required that points of diversion include "legal description labels." Failure to provide the requisite legal descriptions for the transfer points of re-diversion also likely hindered vicinity water users' ability to evaluate potential injury under Idaho Code Section 42-222(1).

V. CONCLUSION

For the foregoing, the PWUA respectfully requests that the Hearing Officer exclude the various statements, opinions, and/or findings contained within the Sullivan Report that amount to legal conclusions, lack adequate foundation, or rely upon inadmissible hearsay. Mr. Sullivan's opinions must demonstrate some independent vigor and judgment. A failure to do so renders those opinions impermissibly speculative and conclusory, and amounts to nothing more than Mr. Sullivan serving as a conduit for hearsay or otherwise inadmissible evidence.

DATED this 1st day of July, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

Andrew J. Waldera – Of the Firm
Attorneys for Portneuf Watershed Users
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of July, 2011, I caused a true and correct copy of the foregoing **PROTESTANT PORTNEUF WATERSHED USERS ASSOCIATION'S MOTION TO EXCLUDE PORTIONS OF EXPERT REPORT/OPINION** to be served by the method indicated below, and addressed to the following:

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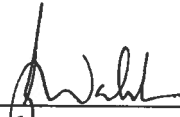
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