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Department of Water Resources
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Attorneys for Applicant City of Pocatello

**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**

**APPLICANT CITY OF
POCATELLO'S MOTION IN
LIMINE TO LIMIT WITNESSES
AND TESTIMONY**

COMES NOW, Applicant City of Pocatello (the "City"), by and through its attorneys of record, Givens Pursley LLP, respectfully moves the Idaho Department of Water Resources ("Department"), pursuant to Idaho Rule of Evidence 403 and IDAPA 37.01.01.600, for an order limiting the witnesses at the hearing of this matter.

INTRODUCTION

The City seeks an order from the Department specifically limiting the number of lay witnesses Protestant Portneuf Watershed Users Association, Inc. ("PWUA") is allowed to call at the hearing of this matter. The reason for this motion is that PWUA has listed a large number of lay witnesses in both its *Initial Disclosure of Potential Witnesses*, filed on May 16, 2011, and its

First Supplemental Disclosure of Potential Witnesses (collectively “Witness List”), filed on June 22, 2011.

According to the Witness List, PWUA intends to call the following witnesses to testify at the July 25-29, 2011 hearing :

1. Dan N. Dimick
2. Glenn Christiansen
3. Kirk Irick
4. Wayne Avery
5. Earl H. Smith
6. Shane Irick
7. Brett Casperson
8. Gene Fagnant
9. Lynden Symons
10. Scott Gunnell
11. A representative of Indian Falls Water
12. Stony Yakovac
13. Teresa Yakovac
14. Sherril Tillotson

PWUA’s description of its anticipated witnesses testimony indicates that most of these witnesses are to be called to testify to the same facts – namely, seasonal moss and plant growth in the Portneuf River, resulting alleged water shortages, and irrigation operations related to the

Portneuf River and Chesterfield Reservoir.¹ As such, the identified testimony of the above-identified 14 witnesses will be cumulative, repetitious and will needlessly prolong the hearing and increase costs to all parties.

As to the nature, scope, or parties' intent of the negotiations surrounding the Portneuf River Settlement Agreement, which PWUA has indicated certain of the above witnesses have knowledge of and, presumably, will be called to testify about, the existing contract speaks for itself. Any such potential testimony should be excluded as inadmissible parol evidence. The Department has the discretion to limit the witnesses at the hearing and exclude testimony that will waste time, cause confusion, or would be inadmissible.

ARGUMENT

A. Any witness testifying to the same information as another witness should be excluded, as such testimony is cumulative and unduly repetitious.

Idaho Rule of Evidence 403 states, in relevant part, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” I.R.E. 403 (emphasis added). Further, IDAPA 37.01.01.600 allows that “[the] 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 (emphasis added).

Thus, the Department has the discretion to exclude witness testimony that merely restates the same information or subject matter as another witness. Such repetition amounts to

¹ The descriptions are found in *Protestant Portneuf Water Users Association's Second Supplemental Answers and Responses to Applicant City of Pocatello's First Discovery Requests* dated June 21, 2011 (“Discovery Responses”), which the City understands were supplied to the Hearing Officer.

unnecessary cumulative evidence and would cause undue delay and prejudice at the July hearing. Evidence should be presented at the hearing to develop a record, and it does not need to be presented multiple times to do so.

For example, the PWUA Discovery Responses indicate that witness Dan Dimick will testify to his knowledge regarding the river, Chesterfield Reservoir, and the use of both for irrigation, seasonal moss and plant growth problems, flooding, water shortages, and the Portneuf River Settlement Agreement negotiations and proceedings. PWUA's Discovery Responses also indicate that Earl H. Smith, Wayne Avery, Brett Casperson, Glenn Christiansen, Stony Yakovac, and Teresa Yakovac, will all also testify regarding those identical issues – i.e., the river, Chesterfield Reservoir, and the use of both for irrigation, seasonal moss and plant growth problems, flooding, and water shortages; and Wayne Avery and Brett Casperson are also represented to be called to testify regarding the Portneuf River Settlement Agreement Proceedings.

There is no need for such repetitious testimony at the hearing. To allow all of these witnesses to cumulatively give the same testimony will cause undue delay and expense to the Department and the parties to this matter. Further, the expected knowledge of Kirk Irick appears to differ from Dan Dimick's only in that Mr. Irick also has knowledge of local water administration efforts and whether suitable measuring devices are in place to monitor reservoir operations. All of Mr. Irick's other expected testimony is described exactly the same as Mr. Dimick's. Similarly, the only difference between Mr. Dimick's described knowledge and that of Gene Fagnant is that Mr. Fagnant also is indicated to have knowledge of potential impacts on spring flows from increased numbers of groundwater wells.

Based on the PWUA Discovery Responses, it appears that Mr. Dimick, Mr. Irick, and Mr. Fagnant are persons who could testify as to all of the facts and issues that other identified lay witnesses would be expected to testify to.

PWUA has not fully responded to Pocatello's discovery requests seeking to learn the substance of the testimony of the other listed witnesses — namely, Shane Irick, Lynden Symons, Scott Gunnell, Sherril Tillotson, and the representative of Indian Falls Water. However, unless the personal knowledge of these witnesses and their offered testimony would fall outside the knowledge of Dan Dimick, Kirk Irick, or Gene Fagnant, they should be excluded.

B. Any testimony regarding the negotiations surrounding the Portneuf River Settlement Agreement should be excluded as inadmissible under the parol evidence rule.

PWUA indicated in the Discovery Responses that Dan Dimick, Kirk Irick, Wayne Avery, and Brett Casperson all were participants in “the Portneuf River Settlement Agreement proceedings” and are “familiar with its negotiations and participants.” Discovery Responses at pp. 29, 30, 31, 34. However, the parol evidence rule forbids the Department from considering any extrinsic evidence from these witnesses that seek to vary or contradict the express terms of the final Portneuf River Settlement Agreement (“Agreement”), and such testimony should not be permitted.

Under the parol evidence rule, if a written contract is “complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the contract.” *Belk v. Martin*, 136 Idaho 652, 657, 39 P.3d 592, 597 (2001). The Idaho Supreme Court has explained:

It is the general rule that when a contract has been reduced to writing, which the parties intend to be a complete statement of their agreement,

any other written or oral agreements or understandings (referred to in many cases as extrinsic evidence) made prior to or contemporaneously with the written “contract” and which relate to the same subject matter are not admissible to vary, contradict or enlarge the terms of the written contract.

Chapman v. Haney Seed Co., Inc., 102 Idaho 26, 28, 624 P.2d 408, 410 (1981) (emphasis added).

Further, for complete and integrated contracts, “preliminary negotiations are presumed to merge into the contract and are not allowed to contradict the plain terms of the contract...” *Belk v. Martin*, 136 Idaho 652, 658, 39 P.3d 592, 598 (2001). The Agreement expressly includes an integration clause stating it “represents the entire and integrated agreement between the Parties and supersedes all prior negotiations, representations and oral agreements.” Agreement, ¶ 11, p. 5. The Agreement speaks for itself as the written contract containing the agreement of the parties thereto, and the language in the Agreement is unambiguous and clearly indicates that it contains the entire agreement of the parties. Thus, any extrinsic evidence from a witness suggesting an intent other than the plain meaning, or proposing varying agreements and negotiations surrounding the Agreement, is inadmissible under the parol evidence rule and, as a result, should be excluded. Moreover, there were 27 parties signatory to the Agreement. Presumably, they all would have their own versions of the “proceedings” and of the “negotiations and participants,” and therefore, they would all need to be called to testify if such issues, which go beyond the substance of the City’s transfer application in any event, are to be litigated in this forum. As such, any testimony regarding the contradictory or varying circumstances, negotiations, and proceedings surrounding the Agreement should be excluded as inadmissible.

CONCLUSION

For the foregoing reasons, the City respectfully request the Department enter an order limiting the number of witnesses PWUA may call at the hearing to only those having unique, personal information to contribute to the record and excluding any testimony varying or contradicting the integrated negotiations or other agreements surrounding the Portneuf River Settlement Agreement.

Respectfully submitted this 1st day of July, 2011.

GIVENS PURSLEY LLP



Michael C. Creamer

Attorneys for Applicant City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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July 1, 2011

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Re: *In the Matter of Application for Transfer No. 76779 in the Name of
the City of Pocatello*

Dear Mr. Cefalo:

Enclosed is the **original** and one copy of *Applicant City of Pocatello's Motion in Limine to Limit Witnesses and Testimony* in the above-referenced transfer. A copy of the Motion was emailed to you today.

Please file the enclosed Motion and return a conformed copy to our office in the postage-paid envelope provided for your use.

Your assistance is appreciated.

Sincerely,


Caralea Hopingardner
Legal Assistant to Michael C. Creamer

Enclosures
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