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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

A&B IRRIGATION DISTRICT,)	
)	CASE NO. CV-07-665
Petitioner,)	
)	
vs.)	MOTION TO STRIKE AFFIDAVIT
)	OF DAVID R. TUTHILL, JR.
)	DATED OCTOBER 26, 2007
DAVID R. TUTHILL, JR., in his official)	
capacity as director of the Idaho Department of)	
Water Resources, and THE IDAHO)	
DEPARTMENT OF WATER RESOURCES,)	
)	
Respondents.)	
_____)	

COMES NOW Petitioner A&B IRRIGATION DISTRICT (“A&B”), by and through its counsel of record, and hereby moves the Court to strike the untimely *Affidavit of David R. Tuthill Jr.* that was executed on October 26, 2007 and sent to A&B’s attorneys by electronic mail on

October 26, 2007 on the grounds and for the reasons that said affidavit was not filed timely as required by the Idaho Rules of Civil Procedure, all as more fully appears as follows:

MOTION TO STRIKE

A&B filed its *Petition for Peremptory Writ of Mandate* with the Court on August 23, 2007. The Respondents filed a *Motion to Dismiss* the case on September 25, 2007 pursuant to Idaho Rule of Civil Procedure 12(b). Since the Respondents filed the first *Affidavit of David R. Tuthill, Jr.* with its motion and relied upon documents and evidence outside of the pleadings, the motion was required to be “treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” *See* I.R.C.P. 12(b). Rule 56 contains specific procedures for filing documents, including affidavits, to be considered by the Court. Under Rule 56(c), affidavits in support of the motion must be served at least 28 days before the time fixed for the hearing.

The Court set the hearing for the Respondents’ *Motion to Dismiss* to be heard on October 23, 2007. On October 19, 2007, four (4) days before the date fixed for the hearing, the Respondents filed two additional affidavits, one from Alan Wylie, and the second from David R. Tuthill, Jr. in support of their *Motion to Dismiss*. The Court held the hearing on the Respondents’ motion on October 23, 2007 and the matter was deemed fully submitted for decision. Contrary to the Court’s ordered schedule and Idaho’s Rules of Civil Procedure, the Respondents served by electronic mail yet another affidavit of Mr. Tuthill on October 26, 2007 (hereinafter referred to as “*Tuthill Affidavit*”), three days *after the hearing* on the motion. No request was ever made for the filing of an affidavit contrary to the Idaho Rules of Civil

Procedure. As described below, the affidavit is untimely and prejudicial to A&B and should be stricken from the record pursuant to Rule 12(f).

I. The October 26, 2007 Tuthill Affidavit is Untimely, Prejudicial to A&B, and Should be Stricken From the Record.

Since the Respondents relied upon documents outside of the pleadings in seeking to dismiss A&B's case, the motion was required to be treated as one for summary judgment. Rule 56 outlines specific procedures for parties to follow, and requires a "motion, affidavits and supporting brief" to be "served at least twenty eight (28) days *before the time fixed for hearing.*" I.R.C.P. 56(c) (emphasis added). Although a court may alter or shorten the time periods and requirements for "good cause" shown, nothing authorizes a court to allow affidavits and evidence to be filed after a motion is heard and deemed submitted for decision.

The Idaho Supreme Court has specifically rejected consideration of affidavits that do not comply with Rule 56's procedures, particularly when the result is prejudicial to the opposing party. In *Sun Valley Potatoes Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1 (1999), the Court was faced with the district court's decision to allow an affidavit filed in support of a motion for summary judgment three days before the hearing on the motion. 133 Idaho at 5. In vacating the district court's decision, the Supreme Court determined that because "RR&T did not serve the affidavit until shortly before the hearing, Sun Valley did not have an opportunity to depose Jensen or otherwise contradict his statements and was, therefore, prejudiced." *Id.* at 6. The Court further held that the district court abused its discretion by considering the affidavit. *Id.* This decision is consistent with other rulings wherein district courts have stricken untimely affidavits filed in support of summary judgment motions. *See also, Ernst v. Hemenway and Moser Co. Inc.*, 126 Idaho 980, 985 (1995) (the district court rejected the amended affidavit as

untimely); *Farrell v. Board of Comm'rs of Lemhi County*, 138 Idaho 378, 390-91 (2002) (the district court's striking of untimely affidavits was not an abuse of discretion).

Whereas the affidavit in *Sun Valley Potatoes* was filed before the hearing and was deemed untimely, there is no question that the *Tuthill Affidavit*, filed after a hearing and after the Respondents' motion was deemed submitted for decision is untimely as well. Here, A&B has had no opportunity to contradict or oppose the *Tuthill Affidavit* and the attachment thereto that was submitted three days *after* the hearing on the Respondents' motion, and after the matter was deemed submitted for decision. Accordingly, A&B is prejudiced by not being able to discover the facts behind the *Tuthill Affidavit*, including any discussions between the affiant and the hearing officer regarding the order that was submitted on October 26, 2007. Moreover, the Respondents have not shown any "good cause" as to why the untimely affidavit should be considered. As evidenced by the certificate of service, neither A&B nor its counsel was served with the October 26, 2007 Order (other than through service of the *Tuthill Affidavit* in this case).

While the purpose behind the *Tuthill Affidavit* is unclear, particularly since it was filed after the October 23, 2007 hearing, it is obvious the Respondents are attempting to influence the Court's decision on the *Motion to Dismiss* that has already been deemed submitted by the Court. To that end, the filing is prejudicial to A&B and should be stricken from the record. One of the issues before this court is whether or not there is a genuine issue as to any material fact submitted by A&B in the form of the verified petition and numerous affidavits, none of which have been challenged by Respondents by affidavit or otherwise, to support a finding that A&B has suffered and is suffering "material injury" as defined by Rule 042 of the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11 *et seq.*).

Alternatively, if the Court declines to strike the *Tuthill Affidavit*, A&B requests the opportunity to depose Mr. Tuthill pursuant to Rule 56(e) prior to the Court rendering its decision on the *Motion to Dismiss*.

CONCLUSION

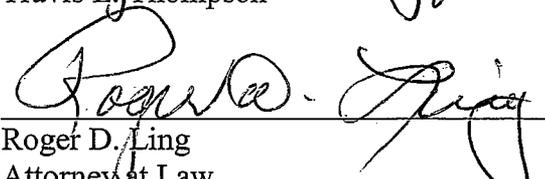
This is not the first time Respondents have disregarded Idaho's civil rules in this case (i.e. their attempt to turn show cause hearing on alternative writ into hearing on motion to dismiss and by serving 2 affidavits in support of its Motion to Dismiss 4 days before the hearing.) By filing an uncontested affidavit three days after their motion to dismiss was deemed submitted for decision, Respondents continue to take actions that are prejudicial to A&B. Pursuant to well established precedent in the Idaho Supreme Court, and Rule 12(f), the Court should strike the *Tuthill Affidavit* from the record and not consider it for purposes of deciding the Respondents' *Motion to Dismiss*. No oral argument is requested on this motion.

DATED THIS 30th day of October, 2007.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson



Roger D. Ling
Attorney at Law

Attorneys for A&B Irrigation District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of October, 2007, I served the foregoing MOTION TO STRIKE AFFIDAVIT OF DAVID R. TUTHILL, JR. DATED OCTOBER 26, 2007 upon the following by the method indicated:

The Honorable John K. Butler
District Judge
Jerome County Courthouse
233 West Main
Jerome, Idaho 83338

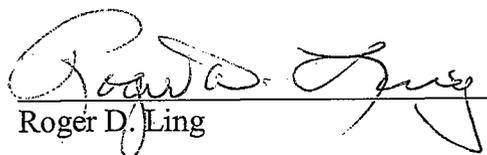
- U.S. Mail, Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

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