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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase Nos. 63-00166A 63-00166B
63-00167A 63-00167B
63-00179A 63-00179C
63-32580

**PIONEER IRRIGATION DISTRICT'S
MEMORANDUM IN SUPPORT OF
MOTION IN LIMINE**

Pioneer Irrigation District, through undersigned counsel of record, hereby files
this memorandum in support of its Motion in Limine pursuant to SRBA Rule of Procedure 1 and
Idaho Rule of Civil Procedure 7(b). It is supported by affidavits of Scott L. Campbell and Dylan
B. Lawrence, filed contemporaneously herewith.

I. INTRODUCTION

The purpose of this motion in limine is to request an order from the Court confirming that Dr. David Tuthill, Jr. cannot serve as a consultant or testifying expert witness on behalf of any of the parties in these subcases, where Dr. Tuthill acted as the independent, neutral technical advisor to the Court through his preparation of the Department's recommendations. Furthermore, Pioneer respectfully requests that the Court prohibit future *ex parte* contact with Dr. Tuthill, and that the Court order that the contents of all previous *ex parte* contact with Dr. Tuthill in these subcases be divulged.

II. STATEMENT OF FACTS

On September 17, 2010, Pioneer deposed Jan Shurte, water right supervisor in the Idaho Department of Water Resources' ("Department") Adjudication Section, who appeared as the Department's Rule 30(b)(6) representative in the above-captioned subcases. Ms. Shurte testified that Dr. David Tuthill, Jr. prepared the Department's recommendations for water right numbers 63-00166B, 63-00167B, and 63-00179C. *See* Exhibit A to the Affidavit of Scott L. Campbell ("Campbell Aff."), Rule 30(b)(6) Deposition of IDWR at 18:13-19:6 (identifying Dr. Tuthill as the person who prepared the recommendation for water right number 63-00166B); *id.* at 58:2-3 & 59:13-16 (water right number 63-00167B); *id.* at 74:4-13 & 74:23-75:1 (water right number 63-00179C). While Ms. Shurte did her best to answer the questions regarding the basis for the Department's recommendations, there were times at which Ms. Shurte was simply unable to answer questions regarding the basis for the recommendations prepared by Dr. Tuthill. *See id.* at 19:2-6 ("And he would have – well, I can't say exactly what he did"); *id.* at 20:24-21:6 (in response to a question about whether the Department examined the record on which the Stewart

Decree was based, Ms. Shurte responded: “*I don’t know whether Dave did or not. I did not.*”); *id.* at 29:23-30:9 (in response to a question about a distinction between the Stewart Decree and the Department’s recommendations, Ms. Shurte stated: “*I don’t know personally why Dave changed it. I don’t know. Or where he got that information from.*”); *id.* at 37:15-38:1 (Ms. Shurte did not know whether a duty of water analysis had been done regarding the water rights at issue, and had not asked Dr. Tuthill); *id.* at 41:9-17 (in response to a question about a remark in a Department recommendation at issue, Ms. Shurte responded: “Quite frankly, I hadn’t noticed that in the remark. It’s not familiar to me. *So I hesitate to say what Dave meant by that.*”); *id.* at 53:24-54:1 (“I don’t know what Dave was – I mean, I know what I would have done in this situation, *but I don’t know what Dave did.*”); *id.* at 81:1-4 (“... now, I don’t know, *because Dave had the meetings*, but in looking at the files, I would have gathered that right away.”).

On or about November 11, 2010, counsel for Pioneer contacted Dr. Tuthill regarding the above-captioned subcases and Ms. Shurte’s remarks that he had prepared the recommendations in question. *See Campbell Aff.* at ¶ 3. During the course of this conversation, Dr. Tuthill disclosed that he had been retained as an expert for Franklin Ditch Company. *Id.* Thereafter, counsel for Pioneer requested confirmation of Dr. Tuthill’s disclosure from counsel for Franklin Ditch Company. *See Campbell Aff.* at ¶ 4 & Ex. B. Counsel for Franklin Ditch Company responded, indicating that he had asked whether Dr. Tuthill would assist Franklin in evaluating issues regarding the subcases at issue, but that Dr. Tuthill had not yet conducted an evaluation or issued any expert report or opinion.¹ *See Campbell Aff.* at ¶ 5 & Ex. C.

¹ As counsel for Franklin notes, as of the date of the filing of this brief, Franklin has not disclosed Dr. Tuthill as an expert witness. *Lawrence Aff.*, ¶ 3, Ex. B. While the parties have stipulated to the extension of discovery cutoff to December 3, 2010, this likely will not provide Pioneer with enough time to depose Dr. Tuthill (or any other testifying expert witness retained by Franklin). Given that trial will not occur prior to April 21 and 22, 2011, Pioneer believes the

III. LEGAL STANDARDS

A motion in limine is a timely objection pursuant to Idaho Rule of Evidence 103 that allows a judge to “exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce v. U.S.*, 469 U.S. 38, 40 n.2 (1984) (discussing Federal Rule of Evidence 103). A ruling on a motion in limine allows counsel, on both sides, to make strategic decisions before the trial concerning the context and order of evidence to be presented. Admissibility of evidence is a matter of this Court’s discretion; and its decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Clark v. Klein*, 137 Idaho 154, 156, 45 P.3d 810, 812 (2002); *Morris By and Through Morris v. Thompson*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997). The propriety of this Court’s exercise of discretion depends on: “(1) whether the district court perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with applicable legal principles; and (3) whether it reached its decision through an exercise of reason.” See *Klein*, 137 Idaho at 156 (citing *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

IV. ARGUMENT

A. Allowing A Party To Retain Dr. Tuthill As An Expert Witness Violates The Independence And Neutrality Required By The Water Right Adjudication Statutes, The Rules Of Evidence, And The Standards Of Professional Conduct Governing Engineers

In this case, Dr. Tuthill investigated the water rights at issue and made his recommendations to this Court on behalf of the Department. See 30(b)(6) Deposition of IDWR

discovery cutoff should be further extended. However, if the deadline is not extended, Pioneer should be allowed the opportunity to depose any expert witnesses disclosed by Franklin or Mason at this late stage of the discovery period.

at 18:13-19:6 (identifying Dr. Tuthill as the person who prepared the recommendation for water right number 63-00166B); *id.* at 58:2-3 & 59:13-16 (water right number 63-00167B); *id.* at 74:4-13 & 74:23-75:1 (water right number 63-00179C). Dr. Tuthill's investigation and recommendations formed the basis of the Director's Reports ultimately issued in subcase numbers 63-00166B, 63-00167B, and 63-00179C.² *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 746, 947 P.2d 409, 419 (1997) (recognizing Director's authority to delegate reporting duties to Department personnel and that "Director" is synonymous with IDWR). For the reasons more specifically described below, Dr. Tuthill's status and role as the neutral, independent technical assistant to this Court in his preparation of the recommendations in these subcases precludes him from now also acting as a non-neutral expert witness on behalf of one of the parties.

1. Idaho Code Section 42-1401B Requires That IDWR Act As An "Independent Expert And Technical Assistant" To This Court

Idaho Code Section 42-1401B specifically states that IDWR's³ role in the SRBA is "as an *independent* expert and technical *assistant*" to this Court. IDAHO CODE § 42-1401B(1) (emphasis added). Further emphasizing the importance of IDWR's neutrality in the SRBA, that

² Importantly, Pioneer does *not* suggest that Dr. Tuthill cannot serve as an expert witness in any SRBA proceedings simply because he was an employee of the Department or even due to his former status as Director. Rather, Pioneer asserts that Dr. Tuthill cannot serve as an expert witness in a SRBA proceeding wherein he was the Department employee that actually investigated the water right in question and made recommendations to the SRBA Court on behalf of the Department.

³ While the statute speaks in terms of the "director's" role in the SRBA, as previously noted, the Idaho Supreme Court has confirmed the Director's ability to delegate his or her reporting duties to IDWR personnel, and that "Director" is synonymous with IDWR. *See Hagerman Water Right Owners*, 130 Idaho at 746, 947 P.2d at 419.

statute goes on to provide that IDWR “shall not be a party to an adjudication.” *Id.* at

§ 42-1401B(3). As the Idaho Supreme Court has stated:

The director is really a disinterested party. The only interest the director has is to see that all rights are accurately adjudicated. *The director does not oppose a claim, trying to subvert a valid claim.* Nor does the director stand to gain if a claim is invalidated.

In re SRBA, 128 Idaho 246, 257, 912 P.2d 614, 625 (1995) (quoting *Idaho Dept. of Water Resources v. U.S.*, 122 Idaho 116, 122-23, 832 P.2d 289, 295-96 (1992) (emphasis added).

In these subcases, Dr. Tuthill has already served as the “independent expert and technical assistant” to this Court when he issued his recommendations. Permitting Dr. Tuthill to now also serve as an expert witness on behalf of one of the parties *in those very same subcases* violates Section 42-1401B’s requirement that the technical assistant to this Court remain “independent.”

2. Idaho Rule Of Evidence 706 Requires A Court-Appointed Expert To Be Neutral

A similar analysis applies under Idaho Rule of Evidence 706, governing court-appointed expert witnesses. The preparation of Director’s Report recommendations in these subcases subjects Dr. Tuthill to the application of that rule. *See* SRBA RULE OF PROCEDURE 10(g) (outlining the Department’s involvement and referring to Presiding Judge or Special Master’s discretion to “call[] a representative as its own witness consistent with I.R.E. 706 or 614”); *Hagerman Water Right Owners*, 130 Idaho at 744 n.4, 746, 947 P.2d at 417 n.4, 419 (1997) (noting that IDWR files “706 reports” to aid the Court).

A court-appointed expert is a witness subject to Rule 706 if the expert is called to testify *or if the court relies on the expert as an independent source of evidence.* *Federal Trade Com’n v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1213 (9th Cir. 2004) (emphasis

added). In the SRBA, the Department's recommendations are *prima facie* evidence of the nature and extent of the recommended water rights. IDAHO CODE § 42-1411(4); *see also Hagerman Water Right Owners*, 130 Idaho at 746, 947 P.2d at 419 (director's report constituted rebuttable evidentiary presumption, but still constituted evidence to be considered even when rebutted).

Therefore, this Court is required by statute to rely upon Dr. Tuthill's previous work in these subcases as an "independent source of evidence" under Rule 706. As with Section 42-1401B, the result is that allowing Dr. Tuthill to also act as an expert witness on behalf of one of the parties vitiates his independence as a court-appointed expert under Rule 706. "A court-appointed expert in theory provides the trier of fact with a *neutral and more reliable* perspective on the issues." 29 WRIGHT & GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6302 (West 1997) (emphasis added); *see also G.K. Las Vegas Ltd. Partnership v. Simon Prop. Group*, 671 F.Supp.2d 1203, 1215 n.6 (D. Nev. 2009) ("[t]his Court cannot and should not rely upon evidentiary reports that are produced by a[] [court-appointed] expert that was in essence treated as and operated like one party's private expert").

3. Idaho Rule Of Evidence 403 Requires Exclusion Of Evidence If The Risk Of Unfair Prejudice And Confusion Of The Issues Substantially Outweighs The Probative Value

Idaho Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of *unfair prejudice, confusion of the issues*, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

I.R.E. 403 (emphasis added).

Given Dr. Tuthill's role as the neutral, independent expert to this Court, Pioneer believes that allowing Dr. Tuthill to offer expert testimony on behalf of Franklin (or Mason)

would result in both confusion and prejudice to Pioneer. Pursuant to Rule 706, Dr. Tuthill, as a court-appointed expert, may be deposed by any party to these subcases and may be called as a trial witness by any party to these subcases. Acting in such a neutral role, Dr. Tuthill would have no incentive, one way or the other, to conform his testimony to favor one of the parties, maintaining the neutrality and independence required by Section 42-1401B and Rule 706. Allowing Dr. Tuthill to serve as an expert witness on behalf of one of the parties necessarily undercuts this independence and neutrality.

By way of example,⁴ let us assume for the sake of argument that Dr. Tuthill did not fully investigate the claimed water rights, or perhaps that he even made an error in his recommendations. If this were established, it would rebut the presumption of validity of the Director's Report, and the recommendation would then simply be considered as evidence to be weighed against all other evidence. *Hagerman Water Right Owners*, 130 Idaho at 746, 947 P.2d at 419. While it may be uncomfortable or even a little embarrassing for Dr. Tuthill to admit that his recommendations may have been in error, in his role as an independent, neutral expert to the Court, he would have no financial incentive to deny any such errors, if they were indeed made.

However, if Dr. Tuthill is allowed to testify on behalf of one of the parties, the incentives change. Under those circumstances, Dr. Tuthill would indeed have a financial incentive to minimize or dismiss any concerns regarding the accuracy of his recommendations,

⁴ This is a hypothetical example *only*. Pioneer is not asserting that this example is necessarily true as a factual matter. In addition, it is important to clarify that Pioneer is not necessarily questioning Dr. Tuthill's integrity or truthfulness. As the Idaho Supreme Court has recognized, the "*appearance* of impropriety" of a decision maker can result in a violation of Due Process, just as actual impropriety can. *Eacret v. Bonner County*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (emphasis added). As Pioneer's example will illustrate, allowing Dr. Tuthill to act as both a neutral, independent expert to the Court and as an expert on behalf of one of the parties in the same subcases produces a sufficient "appearance of impropriety" that it should not be permitted.

because his client would benefit by preserving the *prima facie* evidence status of the recommendations under Section 42-1411(4). This new financial incentive, which would arise solely as a result of allowing Dr. Tuthill to testify on behalf of a party, would prejudice Pioneer, the party seeking in this matter to rebut that status as *prima facie* evidence. And, more generally, allowing Dr. Tuthill to testify in a dual role as both an independent, neutral expert, and as an expert acting on behalf of one of the parties, would be unnecessarily confusing for the parties and the Court. This prejudice and confusion would not arise if Franklin were to hire a different expert, leaving Dr. Tuthill exclusively in his role as an independent expert and technical assistant to the Court.

4. State Rules Governing The Professional Conduct For Engineers Require The Agreement Of All Interested Parties For Dr. Tuthill To Serve As An Expert Witness On Behalf Of One Of The Parties

Dr. Tuthill is a professional engineer. Lawrence Aff., ¶ 2, Ex. A. Indeed, the Director of IDWR is required by statute to be an engineer. IDAHO CODE § 42-1701(2). Even if it were appropriate for a court-appointed expert to also act as a party's expert (which it is not), Dr. Tuthill's receipt of compensation to represent a party to these subcases also raises issues under the Rules of Professional Responsibility of the Idaho Board of Licensure of Professional Engineers. Those rules provide that a professional engineer may only accept compensation "from more than one (1) party for services on the same project, or for services pertaining to the same project, provided the circumstances are fully disclosed, in writing, in advance and agreed to by all interested parties." IDAPA 10.01.02.008.02.

In this case, Dr. Tuthill was a paid employee of the Department when he prepared the recommendations at issue for purposes of the adjudication. If Dr. Tuthill is to be retained by Franklin Ditch Company as a paid consultant or expert on the same project—adjudication of

water right numbers 63-00166B, 63-00167B, and 63-00179C—all interested parties must agree. Therefore, both the Court (which has an interest in the maintenance of a neutral advisor and expert witness) and Pioneer must agree that Dr. Tuthill may accept compensation from Franklin Ditch Company for services related to adjudication of the water rights at issue before Dr. Tuthill may serve as Franklin Ditch Company's expert witness. No such agreement has been obtained.

B. The Court Should Order That *Ex Parte* Communication With Dr. Tuthill Cease, And That The Contents Of Previous *Ex Parte* Communications With Dr. Tuthill Be Divulged

In addition to the foregoing, the Court should also preclude any further *ex parte* communications between the parties and Dr. Tuthill. Generally, where a court appoints an expert, communications with said expert should be conducted in a manner open to all of the parties as a safeguard against bias. 29 WRIGHT & GOLD at § 6305. While the court and parties should be available to answer the expert's questions, *ex parte* communications are discouraged in order to promote the goal of impartiality, as well as to maintain the appearance of impartiality. *See id.*

While the Department's permanent status as the court-appointed expert in the SRBA admittedly presents unique circumstances that make preclusion of all *ex parte* contacts with all IDWR representatives difficult, the subcases at issue have reached a stage of litigation that calls for restrictions upon *ex parte* contacts with the court-appointed expert. Under Rule 706, any parties may examine a court-appointed expert through deposition or trial testimony. Pioneer submits that those are the methods by which communication with the court-appointed expert should occur. A Rule 706 expert is essentially an extension of the Court, and normally, *ex parte* communication with the Court is prohibited, or at least discouraged, absent exigent circumstances. Because Dr. Tuthill's testimony as the court-appointed expert in these

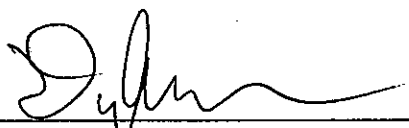
subcases might prove critical, and in order to preserve impartiality and the appearance thereof, Pioneer respectfully requests that the Court order that no parties be permitted to have unauthorized *ex parte* contact with Dr. Tuthill in reference to water right numbers 63-00166B, 63-00167B, and 63-00179C, and that the contents of any previous *ex parte* communication with Dr. Tuthill be divulged.

V.
CONCLUSION

For the foregoing reasons, Pioneer respectfully requests that the Court (1) confirm Dr. Tuthill's status as the independent, neutral court-appointed expert for adjudication of water right numbers 63-00166B, 63-00167B, and 63-00179C; (2) order *in limine* that it will not receive testimony from Dr. Tuthill as a paid consultant and/or expert for one of the parties; (3) order that future *ex parte* communication with Dr. Tuthill shall cease; and (4) order that the contents of previous *ex parte* communications with Dr. Tuthill be divulged.

DATED this 19th day of November, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Pioneer Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2010, I caused a true and correct copy of the foregoing PIONEER IRRIGATION DISTRICT'S MOTION IN LIMINE to be served by the method indicated below, and addressed to the following:

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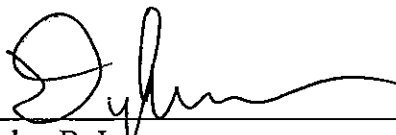
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