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July 3, 2008

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RE: In Re SRBA, Case No. 39576 - Consolidated Subcase No. 92-23

Dear Counsel:

Enclosed please find Idaho Power Company's Opposition to State's Motion to Vacate Hearing and Stay Proceedings on Motion to Strike, or in the Alternative, to Reschedule the Hearing that was fax filed today with the court. Please contact me if you have any questions. Thank you.

Sincerely,



Alison Cameron

Enclosures

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

In Re SRBA

Case No. 39576

IDAHO POWER COMPANY,

Plaintiff,

v.

STATE OF IDAHO; C.L. "BUTCH" OTTER,
Governor of the State of Idaho; LAWRENCE G.
WASDEN, Attorney General of the State of
Idaho; IDAHO DEPARTMENT OF WATER
RESOURCES; and DAVID TUTHILL, Director,
Idaho Department of Water Resources,

Defendants.

)
)
) Consolidated Subcase No. 00-92023
)
)
)

)
) **IDAHO POWER COMPANY'S**
) **OPPOSITION TO STATE'S**
) **MOTION TO VACATE HEARING**
) **AND STAY PROCEEDINGS ON**
) **MOTION TO STRIKE, OR IN THE**
) **ALTERNATIVE, TO RESCHEDULE**
) **THE HEARING**
)
)
)

Idaho Power Company ("Idaho Power"), by and through its counsel, hereby opposes the State of Idaho's Motion to Vacate Hearing and Stay Proceedings on Idaho Power Company's Motion to Strike, or in the Alternative, to Reschedule the Hearing ("State Motion to Vacate or Reschedule").

INTRODUCTION

In a manner fully comporting with the time limits of I.R.C.P. 7(b)(3), Idaho Power filed and provided to the State its Motion to Strike, or Alternatively, Motion in Limine re: Scope of State Motion for Summary Judgment ("Idaho Power Motion to Strike or in Limine") together with its supporting memorandum on June 30, 2008, and set the matter for hearing on July 15, 2008 at 2:30 p.m., when the Motion could be heard together with the related Joint Motion to Participate. Rather than respond to Idaho Power's Motion under the time limits of the I.R.C.P., or pursue a reasonable extension of time in which to file a response, the State requests in its own motion filed, served and sought to be heard immediately, that the Court deny Idaho Power the opportunity to have its Motion to Strike or Limine even considered until after the parties file their cross-motions for summary judgment and opening briefs on the recharge subordination issue. To "vacate" Idaho Power's Motion in the manner sought by the State would essentially defeat the very purpose of the Motion, which seeks to narrow the issues in the summary judgment proceedings to those issues properly included in this consolidated subcase, and to accomplish this prior to briefing.

The Court should deny the State's Motion to Vacate or Reschedule. If the State requires additional time to respond to Idaho Power's Motion to Strike or in Limine before the parties file opening briefs on the upcoming cross-motions for summary judgment on the recharge subordination issue, then the Court can grant the State a reasonable extension of time for its response, permit Idaho Power to file a reply, and proceed with a timely hearing. If the State's

need for additional time is so great that it requires the Court vacating the current summary judgment schedule, and resetting that schedule after Idaho Power's Motion has been properly considered and decided, then the Court should proceed in this manner. Such an approach would be consistent with the State's alternative request to reschedule the hearing on Idaho Power's Motion, respect Idaho Power's right to have its Motion timely heard, and allow the parties to proceed with summary judgment briefing efficiently following guidance from the Court as to the issues properly within the scope of this consolidated subcase, as sought by Idaho Power's Motion.

ARGUMENT

Idaho Power filed its Motion to Strike or in Limine after receiving not only the State's short Motion for Summary Judgment, but also the State's voluminous discovery requests on a multitude of new issues, as well as the Joint Motion to Participate filed by districts and canal companies not in this case. Together, these filings made it evident that the State, and the proposed Participants, intend to raise issues well beyond the scope of issues properly in this consolidated subcase, which pursuant to Court order encompasses "issues pertaining to ownership and interpretation and/or application of the *Swan Falls Agreement*" in specified subcases. July 24, 2007 Consolidation Order.

In summary, the issues improperly sought to be raised and briefed by the State beyond interpretation and application of the Swan Falls Agreement include the following:

- The State's administration of the Snake River as a separate source above versus below Milner – a matter of State policy and water rights administration.
- The nature and enforcement of Idaho Power's rights under a 1923 Contract and 1976 Contracts between Idaho Power and the United States concerning American Falls Reservoir, and the effect of a 1934 Federal Power Commission License for Twin Falls Power Plant.

- The effect of a subordination condition in Idaho Power's water rights for its C.J. Strike facility, when this facility and these water rights are not among those listed in the Swan Falls Agreement or included in this consolidated subcase.
- The terms of subordination of Idaho Power's water rights to two specific water rights for ground water recharge, which have yet to be licensed, and which the parties agreed not to litigate pursuant to a 2006 Stipulation between the State and Idaho Power.

In its Motion to Strike or in Limine, Idaho Power explained its understanding of the scope of this consolidated subcase, as determined by Court orders, the parties' pleadings, and other SRBA and federal court proceedings in which the issues sought to be injected into this case by the State are already being considered.¹ In order to respond to Idaho Power's Motion, the State need only attempt its own explanation as to why the issues it seeks to raise are properly encompassed within this consolidated subcase, and need not proceed to brief the merits of all of these issues, by addressing how they should be resolved substantively. Idaho Power is entitled to the State's explanation, and any guidance the Court may provide on issues properly in this case through a ruling on the Idaho Power Motion to Strike or in Limine, prior to Idaho Power framing its own cross-motion for summary judgment on recharge subordination, and having to guess what expanded issues might be in the case.

Yet the State, under its approach, would have the Court bypass Idaho Power's Motion to Strike or in Limine, while allowing the State to launch into briefing the very issues which Idaho Power maintains are not properly in this consolidated subcase and which Idaho Power seeks to limit through its Motion. Moreover, Idaho Power's Motion was effectively timed so that the Court could address at the same July 15 hearing both that Motion and the related Joint Motion to Participate, filed by parties who also seek to expand the scope of this consolidated subcase by having the Court address the propriety and impact on all of Idaho Power's water rights of the

¹ Idaho Power did not "prematurely argue the merits" of these extraneous issues, as erroneously claimed by the State, but addressed only the procedural question of whether the issues were properly included in this consolidated subcase or in other proceedings.

"separate source" or "two rivers" administration concepts implemented by legislation enacted by the State Legislature. The State's approach would deprive Idaho Power of the ability to have these related motions heard together, with the possible result that the proposed Participants (if they are allowed to participate) may also file briefing on issues beyond the scope of this case prior to Idaho Power's Motion to Strike or in Limine being heard. In all of these respects, Idaho Power would be prejudiced by the Court granting the State's motion seeking to preclude consideration of Idaho Power's Motion to Strike or in Limine until after it has been effectively mooted out by the parties' filing of their summary judgment cross-motions and briefs.

Idaho Power's Motion to Strike or in Limine does not prevent the State from being heard or deny the State its day in court on its theories regarding the recharge subordination issue in this case, as the State argues. The State is only entitled to be heard on issues that are properly pled in the case. *See Argyle v. Slemaker*, 107 Idaho 668, 669, 691 P.2d 1283, 1284 (Ct. App. 1984) ("The issues considered on summary judgment are those raised by the pleadings."). The State has never pled the broad range issues it now seeks to raise -- in any Answer, Counterclaim, Objection or Response filed in this consolidated proceeding or the subcases it encompasses. In any event, the State will have the opportunity to raise later in its summary judgment briefing all of the issues which the Court determines are properly encompassed within this case through its ruling on Idaho Power's Motion.

The State's argument that Idaho Power can allow summary judgment briefing to proceed without its Motion to Strike or in Limine being heard, and then simply file a Rule 56(f) motion -- arguing after the fact what issues are in this case and properly subject to summary judgment briefing, and further justifying why additional discovery may be needed -- is particularly disingenuous. Idaho Power followed, and the State ignored, the Court's express direction and reliance on the parties' "representations that the discovery would be limited to the recharge

issue." *See* Transcript from May 20, 2008 Status and Scheduling Conference, at p. 1, lines 21-22 (attached as **Exhibit 1** to Motion to Strike or in Limine). The State included a limited number of discovery requests relating to the recharge subordination issues, but also included numerous requests having nothing to do with recharge, the Swan Falls Agreement, or the water rights at issue in this consolidated subcase. *See* Idaho Power Motion to Strike or in Limine at 7 n. 4; 12-13 n. 8 & 9; 14-15 n. 10. As explained in Idaho Power's Motion, if the State is allowed to include in the summary judgment proceedings the expansive issues it has not pled in this case, Idaho Power should be entitled to undertake discovery on these issues as well, with the result that the time necessary for such discovery, as well as factual disputes likely on the expanded issues, will require modification of the case and trial schedule.

CONCLUSION

The State is in essence asking the Court to deny Idaho Power's timely Motion to Strike or in Limine before it is even briefed or properly heard, through the State's hurried request that the Court "vacate" the Idaho Power Motion until the State has completed briefing on the very issues which the Motion maintains are beyond the scope of this case and with respect to which briefing should be limited. The Court should deny the State's Motion to Vacate or Reschedule in its entirety for the reasons discussed above.

If the State requires additional time to respond to Idaho Power's Motion to Strike or in Limine prior to the initiation of summary judgment briefing, then the Court can grant the State a reasonable extension of time, followed by Idaho Power's reply and a hearing, as suggested in the State's alternative request for relief. Should the State need more than a short extension to respond to Idaho Power's Motion to Strike or in Limine, then the Court should vacate the schedule on the summary judgment proceedings, and reset that schedule after Idaho Power's Motion has been decided and the Court has provided guidance as to the issues properly in this

consolidated subcase. This approach would avoid prejudice to all parties and provide a full and fair opportunity for all motions to be heard.

Respectfully submitted,

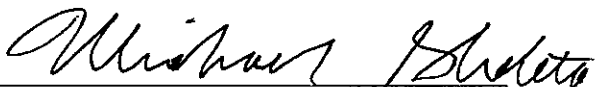
Dated this 3rd day of July, 2008

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By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S OPPOSITION TO STATE'S MOTION TO VACATE HEARING AND STAY PROCEEDINGS ON MOTION TO STRIKE, OR IN THE ALTERNATIVE, TO RESCHEDULE THE HEARING** via the method indicated below, and addressed to each of the following:

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