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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

)
) Consolidated Subcase No. 00-92023 (92-23)
)
) **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**
)

Comes now the State of Idaho, by and through its counsel of record, and pursuant to SRBA Administrative Order 1 ("AO1") and the Idaho Rules of Civil Procedure moves this Court for an order vacating the July 15th, 2008 hearing on "Idaho Power Company's Motion to Strike, or Alternatively, Motion in Limine re: Scope of State's Motion for Summary Judgment" ("Motion to Strike") filed on June 30th, 2008 in this matter, and staying

proceedings on said motion. In the alternative, the State requests that the Court vacate and re-schedule the hearing on the Motion to Strike to provide the State sufficient time to brief said motion.

ARGUMENT

Idaho Power's Motion to Strike asks this Court to strike two issues that were set forth in the State's Motion for Summary Judgment filed approximately seven weeks ago, on May 7th, 2008. Because Idaho Power filed its Motion to Strike just fourteen days prior to the hearing, the State has limited time to respond and in fact must respond by July 8th, two days after a holiday weekend, which presents great difficulty for the State. If the State had had more advance notice of the Motion to Strike, it would have been in a position to timely respond to Idaho Power's motion.

Given the timing of Idaho Power's Motion to Strike, the State is unable to adequately respond to that motion prior to the July 15th hearing. However, rescheduling the hearing will likely cause a delay in the briefing schedule on the cross-motions for summary judgment. Rather than delay the summary judgment proceedings any further, the State proposes that this Court simply vacate the hearing and stay the proceedings on the Motion to Strike until after the State has filed its affidavit and briefing in support of the State's Motion for Summary Judgment on August 1st. As will be discussed below, after the State has made these filings, the Court and Idaho Power will be in a better position to evaluate the necessity of holding further proceedings on Idaho Power's Motion to Strike and its request for additional time for discovery. Further, if the Court elects to consider Idaho Power's Motion to Strike, the State will in essence be required to argue the merits of the State's summary judgment motion before its summary judgment briefing is due.

Idaho Power's motion is an improper attempt to prevent the State from being heard on its properly filed and presented "Motion for Summary Judgment on Subordination to Ground Water Recharge" ("Motion for Summary Judgment").¹ Under Rule 56, the State is entitled to file and be heard on its Motion for Summary Judgment as the State has framed the issues, not as Idaho Power would prefer they be presented. The proper means of raising such challenges to the merits is through briefing on the motion itself, or through a properly filed cross-motion for summary judgment, not through a preemptive collateral attack that would essentially deny the State its day in court on its theory of the recharge question. Idaho Power's objections to the scope and substance of the State's Motion for Summary Judgment can and should be articulated in briefing on the motion itself.

This fact underscores another basic flaw in Idaho Power's Motion to Strike: it is premature because it is based on Idaho Power's conjecture about what the State will present and argue in its summary judgment affidavits and briefing. There is little point in requiring a round of briefing and a hearing on such hypothetical questions when the State's affidavits and briefing are due to be filed soon.² Questions of whether the State's Motion for Summary Judgment goes beyond the scope of this consolidated subcase and/or the issues properly before the Court should be evaluated on the basis of what the State **actually** presents and argues, not on the basis of Idaho Power's speculation as to what the State **may** argue.³ The interests of judicial economy and the expeditious resolution of the issues remaining in this

¹ Filed in this matter on May 7th, 2008.

² The current schedule provides for the parties to file their summary judgment affidavits and briefs on August 1, 2008. Corrected Order Amending Scheduling Order for Consolidated Subcase 00-92023 (May 28, 2008).

³ The State will demonstrate in its summary judgment brief (and, if necessary, in a separate brief on the merits of Idaho Power's Motion to Strike) that Idaho Power is entirely incorrect in arguing that the State's Motion for Summary Judgment presents matters issues outside the scope of this consolidated subcase and/or the issues properly before the Court at this stage of the proceedings.

proceeding are not served by engaging in a separate round of briefing and an additional hearing on questions that are integral to the cross-motions for summary judgment and will be fully addressed in briefing on the merits.

For similar reasons, vacating the hearing on the Motion to Strike and staying further proceedings on it pending the Court's consideration of the upcoming cross-motions will not prejudice either party. Idaho Power will still have the opportunity to argue that the State's motion goes beyond the scope of these proceedings and/or demonstrate what aspects of the State's affidavit justify allowing additional time for discovery under Rule 56(f). Indeed, staying the Motion to Strike will put Idaho Power in a better position for these purposes because the Company will be able to point to the State's actual affidavit and brief to argue the Motion to Strike.

Idaho Power's Motion to Strike circumvents the procedures established by the Idaho Rules of Civil Procedure, attempts to prematurely argue the merits of the State's summary judgment motion, is fundamentally speculative. Further, staying the Motion to Strike will not prejudice either party. These are more than sufficient grounds for vacating the hearing and staying the proceedings on the Motion to Strike. Should the Court determine, after considering the parties' summary judgment briefing, that additional briefing is necessary on the Motion to Strike, the Court can so order.

In the event the Court elects to consider Idaho Power's Motion to Strike before the State files its summary judgment affidavit and briefing, the State requests that the Court at least re-schedule the hearing to allow the State to adequately respond to the Motion to Strike, and also to allow the Court to consider a motion to compel the State will need to file in light of Idaho Power's responses to the State's discovery. Idaho Power has refused to produce

documents on those issues it now seeks to preclude through the Motion to Strike. The motion to compel will focus on Idaho Power's refusal to produce those documents.

CONCLUSION

For the reasons set forth herein, the State respectfully requests that the Court vacate the July 15th hearing on Idaho Power's Motion to Strike, and also either stay further proceedings on the motion pending the Court's consideration of the parties' cross-motions for summary judgment on recharge issue, or re-schedule the hearing for a later date.

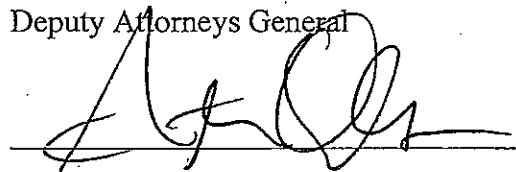
The State requests oral argument on this motion and has filed a corresponding motion to shorten time.

DATED this 3rd day of July 2008.

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN
MICHAEL C. ORR
SHASTA KILMINSTER-HADLEY
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A handwritten signature in black ink, appearing to be 'Shasta Kilminster-Hadley', written over a horizontal line.

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 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 to the following parties by the indicated methods:

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