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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

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

) **REPLY IN SUPPORT OF STATE OF**
) **IDAHO'S MOTION TO VACATE**
) **HEARING ON IDAHO POWER**
) **COMPANY'S MOTION TO STRIKE**
) **MOTION FOR SUMMARY JUDGMENT**
)

The State of Idaho submits this reply brief in support of its Motion to Vacate Hearing and Stay Proceedings on Idaho Power Company's Motion to Strike, or in the Alternative, to Reschedule the Hearing ("Motion to Vacate"), filed July 3rd, 2008 in this matter. In researching the issues raised by Idaho Power's Motion to Strike, the State has located an Idaho Supreme Court decision that makes it clear that Idaho Power's motion is not cognizable under Idaho law: *McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003). The

State located this authority after submitting its Motion to Vacate and receiving Idaho Power's response thereto.

In *McPheters*, the plaintiff filed a combined objection and motion to strike the defendant's motion for summary judgment, which the district court denied. 138 Idaho at 393, 64 P.3d at 320. On appeal, the plaintiff argued, among other things, that the district court erred in denying the motion to strike. The Idaho Supreme Court rejected this argument: "McPheters' 'motion in objection to and motion to strike' the summary judgment was properly denied **because there is no such cognizable motion.**" 138 Idaho at 396, 64 P.3d at 322 (emphasis added).

This holding is fully consistent with *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 862 P.2d 299 (1993), the Idaho decision that Idaho Power cites as supporting its Motion to Strike the State's summary judgment motion. Motion to Strike at 4. Contrary to Idaho Power's assertion, the *Tolmie Farms* decision only authorizes a motion to strike an **affidavit** that fails to comply with Rule 56(e). *Tolmie Farms, Inc.*, 124 Idaho at 610, 862 P.2d at 302.¹ Nothing in the *Tolmie Farms* decision authorizes a motion to strike a summary judgment motion. Moreover, the Idaho Supreme Court's decision in *McPheters* makes it clear that such a motion is not even allowed under Idaho law.

¹ The relevant part of the *Tolmie Farms* decision states as follows:

Idaho Rule of Civil Procedure 56(e) provides in pertinent part that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify about the matters stated therein." Simplot alleges that Donald Tolmie's affidavit failed to comply with I.R.C.P. 56(e). Simplot argues that the affidavit contained inadmissible hearsay and that the statements presented in the affidavit lacked adequate foundation and therefore should not be considered. This Court follows *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct.App.1984), where it was held that if noncompliance with Rule 56(e) is not brought to the trial court's attention by proper objection and motion to strike, it is waived. A review of the record shows no such objection or motion. We therefore will not consider this issue on appeal.

Id.

The *McPheters* holding is also consistent with federal court decisions that have applied Rule 12(f) of the Federal Rules of Civil Procedure, the federal rule analogous to the Idaho rule under which Idaho Power filed its Motion to Strike. *See, e.g., Pilgrim v. Trustees of Tufts College*, 118 F.3d 864, 868 (1st Cir. 1997) (“As Tufts points out, however, Rule 12(f) applies only to pleadings and has no applicability to motions made in pursuit of or in opposition to summary judgment”);² *Burlington Northern & Santa Fe Ry. Corp. v. Dakota Missouri Valley & Western R.R., Inc.*, 347 F.Supp.2d 708, 727 (2004) (“Courts have consistently held that the various papers submitted in support of or in opposition to summary judgment are not pleadings as contemplated by Rule 12(f).”)

The State respectfully submits that the *McPheters* holding is controlling and consequently, as a matter of law, this Court can deny Idaho Power’s Motion to Strike. Further, the Director’s Reports raised the issues upon which the State’s Motion for Summary Judgment is based, in remarks stating that “no portion of the waters of the Snake River upstream from Milner Dam shall be considered” for purposes of administering the water rights at issue, and that “[t]he required minimum daily flows at the Milner gauging station shall remain zero for purposes of administration.”³ Idaho Power objected to these remarks, and the State responded to Idaho Power’s objections.

In light of *McPheters* and the undisputed record, and in furtherance of the interests of judicial economy and the expeditious resolution of the recharge subordination question, the State respectfully submits that the Court should dismiss Idaho Power’s Motion to Strike.

DATED this 7th day of July 2008.

² *Abrogation on other grounds recognized in Crowley v. L.L. Bean, Inc.*, 303 F.3d 387 (1st Cir. 2002).

³ The remarks are in paragraph no. 6 of the section entitled “Other Provisions Necessary for Definition/Administration of this Water Right” of the relevant Director’s Reports. An example Director’s Report is attached hereto.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of July 2008, I caused a true and correct copy of the REPLY IN SUPPORT OF STATE OF IDAHO'S MOTION TO VACATE HEARING ON IDAHO POWER COMPANY'S MOTION TO STRIKE MOTION FOR SUMMARY JUDGMENT to be served to the following parties by the indicated methods:

Original to Clerk of the SRBA Court
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Twin Falls, Idaho 83303-2707

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
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Chief, Natural Resources Division
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MICHAEL C. ORR
Deputy Attorney General

SRBA

DIRECTORS REPORT 02-02001A

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IWT072

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 02-02001A

Name and Address: STATE OF IDAHO
STATEHOUSE
PO BOX 83720
BOISE, ID 83720

Although the name of the State of Idaho appears in the Name and Address section of this partial decree, legal title is held in trust by the State of Idaho, for the use and benefit of the user of the water, Idaho Power Company, for power purposes and the people of the State of Idaho, pursuant to the Swan Falls Agreement and Idaho Code 42-203B.

Equitable Title

IDAHO POWER CO

PO BOX 70

BOISE, ID 83707

Equitable Title

STATE OF IDAHO, in and for the people of the State of Idaho

STATEHOUSE

PO BOX 83720

BOISE, ID 83720

Source: SNAKE RIVER Tributary: COLUMBIA RIVER

Quantity: 1700.00 CFS

1,700 CFS is held in trust for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho. The quantity of this right is further defined below in Other Provisions Necessary for Definition and Administration of this Water Right.

Priority Date: 05-11-1908

Diversion Point: T07S R13E S02 LOT 7 (SESW)Within Gooding County
LOT 8 (SWSW)Within Twin Falls County

Purpose and

Period of Use: Purpose of Use
Power

Period of Use Quantity
01-01 TO 12-31 1700.00 CFS

Power generation is at the Lower Salmon Falls Power Plant.

Place of Use: Power

Within Gooding County

T07S R13E S02 LOT 7 (SESW)

Other Provisions Necessary for Definition / Administration of this Water Right:

1. Right Nos. 02-100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710 entitle this Company to unsubordinated average daily flows of 3900 CFS from April 1 to October 31, and 5600 CFS from November 1 to March 31, both to be measured at the Murphy USGS gauging station immediately below Swan Falls. These flows are not subject to depletion by junior water right holders. (Exceptions to the Company's unsubordinated average daily flows are listed below in paragraphs 2 through 5.) The Murphy gauging station is located at latitude 43 degrees 17 minutes 31 seconds, longitude is 116 degrees 26 minutes 12 seconds, in T01S R01W, S35, NWNESE, Boise Meridian, Ada County Hydrologic Unit 17050103, on the right bank 4.2 miles downstream from Swan Falls Power plant, 7.5 miles NE of Murphy, at river mile 453.5.
2. Right Nos. 02-100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710, when used in combination in amounts specified above shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the Idaho Department of Water Resources in accordance with State law unless the depletion violates the flows set forth in paragraph 1. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein.
3. The rights listed in paragraphs 1 and 2 above are subordinate to the water rights of those persons dismissed from Idaho Power Co. v. State of Idaho, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990) pursuant to the contract executed between the State and Company implementing the terms of I.C. sections 61-539 and 61-540.
4. The rights listed in paragraphs 1 and 2 above are subordinate to those water rights with a priority date prior to October 1, 1984.
5. The portion of Right Nos. 02-100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709 and 37-20710 in excess of the amounts set forth in paragraph 1 are held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho as provided for in the contract entered into by the governor, the attorney general and the Idaho Power Company on October 25, 1984 (Swan Falls Agreement) and ratified by the Idaho Legislature by Idaho Code section 42-203B(5).
6. For purposes of administration of Water Rights Nos. 02-100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710 no portion of the waters of the Snake River or surface or ground water tributary to the Snake

River upstream from Milner Dam shall be considered. The required minimum daily flows at the Milner gauging station shall remain as zero CFS for purposes of administration. The Milner gauging station is located at Latitude 42 degrees 31 minutes 41 seconds, Longitude 114 degrees 01 minutes 06 seconds, (revised), (NAD83), in SW1/4 NE1/4 of Section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on left bank 200 ft downstream from the highway bridge at Milner, 0.4 miles downstream from Milner Dam, and at mile 638.7

7. As provided in the Contract Between the United States of America and the Idaho Power Company Relative to Power Rights at American Falls, Idaho, dated June 15, 1923, the Company limited its power water rights on the Snake River at whatever points and in whatever counties the same may be located insofar as and no farther than the rights allowed and granted to the United States to store and use water as provided in said contract of June 15, 1923, may interfere with any rights of the Company at any lower points on the Snake River.

Explanatory Material: Basis of Claim - License

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