



U.S. Department of Justice

Environment and Natural Resources Division

DWG:DAJ

90-6-2-63c

David A. Jarvis
Labat-Anderson, Inc.
1961 Stout Street, 8th Floor
Denver, Colorado 80294

Telephone (303) 844-1485
Facsimile (303) 844-1350
E-mail: David.Jarvis2@usdoj.gov

August 27, 2007

via FedEx Mail

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

RECEIVED

AUG 30 2007

DEPARTMENT OF
WATER RESOURCES

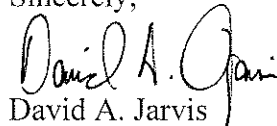
Re: SRBA Case No. 39576
Subcase Nos. 01-00217, 01-00218, 01-02017, 01-02032, 01-02046, 01-02064,
01-02068, 01-04024, 01-04025, 01-04054, 01-10382, 01-10383, 01-10531,
01-10532, 37-04007, 37-04147, and 63-00367

Dear Ms. Delaney:

Enclosed for filing in the above listed subcases is the following original document and sixteen additional copies.

1. **UNITED STATES' MOTION TO CONSOLIDATE SUBCASES AND MEMORANDUM IN SUPPORT.**

Sincerely,


David A. Jarvis
Paralegal

Enclosures

RECEIVED

AUG 30 2007

DEPARTMENT OF
WATER RESOURCES

RONALD J. TENPAS

Acting Assistant Attorney General
Environment and Natural Resources Division

DAVID W. GEHLERT

Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado 80294
Phone: (303) 844-1386
Fax: (303) 844-1350

Counsel for the United States

**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	)	Subcase Nos. 01-00217, 01-00218, 01-02017,
	)	01-02032, 01-02046, 01-02064, 01-02068,
Case No. 39576	)	01-04024, 01-04025, 01-04054, 01-10382,
	)	01-10383, 01-10531, 01-10532, 37-04007,
	)	37-04147, and 63-00367
	)	
	)	UNITED STATES' MOTION TO
	)	CONSOLIDATE SUBCASES AND
	)	MEMORANDUM IN SUPPORT
	)	

COMES NOW the United States, by and through its counsel of record, and in accordance with Idaho Rules of Civil Procedure (I.R.C.P.) Rule 42(a) and SRBA Administrative Order 1 (AO1) § 11, and hereby moves this Court for an order consolidating the above listed subcases for the purpose of addressing the common issue of whether water rights for power purposes should carry a remark limiting their exercise.

Legal Basis

I.R.C.P. 42(a) allows a court to order a joint hearing or trial of any “actions involving a common question of law or fact” pending before the court. I.R.C.P. 42(a) (2007). Likewise, AO1 allows “[a]ny matter at issue in any proceeding in the adjudication, including portions or entire subcases” to be consolidated with, or separated from, any other matter at issue in the adjudication.” AO1 § 11. AO1 § 11 further provides that “[a] motion to consolidate subcases is appropriate in situations where common issues of law or fact present themselves in more than one subcase and resolution of those issues can be most expeditiously and effectively achieved through presentation to the Presiding Judge or a Special Master in consolidated hearings.” *Id.* Similarly, the Idaho Supreme Court has explained that consolidation is appropriate whenever it serves the purpose of judicial convenience and economy of administration. *Jones v. Jones*, 117 Idaho 621, 790 P.2d 914 (1990).

As the United States shows below, the seventeen subcases identified in the caption present a common issue and should be consolidated for the purpose of conveniently and economically resolving that issue for all of the subcases.

Discussion

The United States Bureau of Reclamation (“Reclamation”) filed claims in eight of the seventeen listed subcases^{1/} and named “power” as at least one of the beneficial purposes. In its recommendation for each of those eight claims, Idaho Department of Water Resources (“IDWR”) added a following remark:

The appropriator shall exercise this right in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of

^{1/} Reclamation filed claims to water right numbers 01-217, 01-218, 01-2064, 01-2068, 01-4024, 01-4025, 01-4054, and 63-367.

others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.

Two other SRBA claims at issue, claim 37-04007 filed by Peter Bowler and claim 37-04147 filed by Aldrich Bowler, also name “power” as a beneficial use and received the same subordination remark. The other seven subcase claims addressed by this motion were filed by Idaho Power Company (“IPCO”).^{2/} Those claims also include “power” as a beneficial use, but IDWR did not recommend the historical use subordination remark for any of the claims.

Reclamation filed Objections to the Director’s Reports for each of its eight claims, objecting, *inter alia*, to the subordination remark. Similar objections to the remark were filed by A & B Irrigation District (“A & B”), Burley Irrigation District (“Burley”), Falls Irrigation District (“Falls”), and Minidoka Irrigation District (“Minidoka”) in six of the eight BOR water right subcases.^{3/} Peter Bowler filed Objections to claim 37-04007 in his own name and to claim 37-04147 as trustee for Aldrich Bowler. In both cases the Objections seek removal of the subordination language. The State of Idaho (“State”) and the Idaho Ground Water Appropriators, Inc. (“IGWA”), filed objections to each of the water rights claimed by IPCO stating, *inter alia*, that the partial decree needs to include historical use subordination remark. Thus the propriety of the proposed historical use subordination remark has been joined as an issue in all of the seventeen subcases identified in the caption.

Argument

The propriety of the historical use subordination remark proposed by IDWR is

^{2/} The IPCO claims are 01-02017, 01-02032, 01-02046, 01-10382, 01-10383, 01-10531, and 01-10532.

^{3/} A & B, Burley, Falls, and Minidoka all filed Objections to the historical use subordination remark in SRBA Subcase Nos. 01-00217, 01-00218, 01-02064, 01-02068, 01-04024, and 01-04025.

common to all seventeen subcases and has been raised by ten separate parties.^{4/} No other issue raised in these seventeen subcases concerns all of the subcases or all of these parties. With the exception of the Bowlers, each party has filed an Objection or Response to an Objection addressing the historical use issue in no less than six of the seventeen subcases.^{5/} Thus consolidation will further the efficient use of the resources of both the Court and the parties. *Cruz v. Robert Abbey, Inc.*, 778 F. Supp. 605, 613 (E.D.N.Y. 1991) (consolidation economized both judicial resources and parties' resources); *May v. United States*, 515 F. Supp. 600, 603 (S.D. Ohio 1981).

An equally important justification for consolidation is IDWR's inconsistent handling of the common issue of whether power rights should have a remark limiting their ability to make delivery calls against non-hydroppower uses. As noted above, IDWR recommended such a remark for the BOR and Bowler claims, but it did not recommend it for any of the IPCO claims. Consolidation will avoid inconsistent decisions on the same issue. *Bank of Montreal v. Eagle Associates*, 117 F.R.D. 530 (S.D.N.Y. 1987).

Further, no prejudice can possibly result from consolidation. Each subcase is at the same preliminary stage. Nor would consolidation engender unnecessary costs or potential for confusion. Indeed avoiding those problems is a sound reason for consolidation. *See May*, 515 F. Supp. at 603, 604 (consolidation favored when it has no effect on the characterization or treatment of controlling legal issues); *In Re Air Crash*, 737 F. Supp. at 394. Finally, the parties

^{4/} BOR, the State of Idaho, Idaho Ground Water Appropriators, Inc., Idaho Power Company, A & B Irrigation District, Burley Irrigation District, Falls Irrigation District, Minidoka Irrigation District, Peter Bowler, and Aldrich Bowler have all filed documents raising the historical use issue.

^{5/} Historical use is addressed in all fifteen subcases to which the State of Idaho is a party, in fourteen of fifteen where IGWA is involved, in all eight where BOR is involved; in all seven where IPCO is involved, and in six of the subcases involving the four irrigation districts (A & B, Burley, Falls, and Minidoka).

cannot be prejudiced because consolidation does not merge the suits into a single action. Even though multiple suits may be joined, tried, and adjudged together, consolidation does not make the parties in one suit parties to another. *See Midwest Community Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491, 499 (N.D. Ill. 1983).

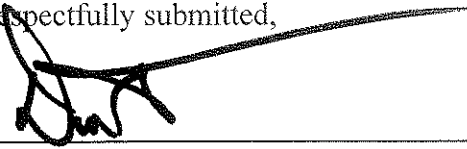
In short, the question of the propriety of the power subordination remark proposed by IDWR is at issue in all seventeen cases identified above and can be most efficiently addressed in a single common proceeding. Accordingly, consolidation is appropriate. *Jones*, 117 Idaho at 627, 790 P.2d at 920; §11 of AO1.

Conclusion

The seventeen listed subcases have one common issue, the propriety of the power subordination remark proposed by IDWR and numerous lesser issues that are distinct to each case. As offered by I.R.C.P. 42(a) and promoted by AO1 § 11, consolidation of these subcases for the purpose of addressing the common remark issue provides the appropriate means to litigate this issue, unhindered by the other separate issues. Accordingly, the United States asks this Court for an order consolidating SRBA Subcase Nos. 01-00217, 01-00218, 01-02017, 01-02032, 01-02046, 01-02064, 01-02068, 01-04024, 01-04025, 01-04054, 01-10382, 01-10383, 01-10531, 01-10532, 37-04007, 37-04147, and 63-00367 for purposes of addressing the common issue of the historical use subordination remark.

DATED this 27th Day of August, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David W. Gehlert', is written over a horizontal line.

David W. Gehlert
Attorney, Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado 80294
Phone: (303) 844-1386

Attorney for the United States of America

CERTIFICATE OF SERVICE

I certify that on this 29th day of August 2007, I served a true and correct copies of the foregoing **UNITED STATES' MOTION TO CONSOLIDATE SUBCASES AND MEMORANDUM IN SUPPORT** as indicated below:

via FedEx mail:

CLERK OF THE SRBA COURT (Original and 16 additional copies)
SRBA Courthouse
District Court
253 Third Ave. North
Twin Falls, Idaho 83301
Phone: (208) 736-3011

via first-class U.S. Mail, pre-paid:

Chief, Natural Resources Division
State of Idaho
Office of the Attorney General
P.O. Box 44447
Boise, ID 83711-4447

Roger D. Ling
Ling, Robinson & Walker
P.O. Box 396
Rupert, ID 83350

James C. Tucker
Idaho Power Company
P.O. Box 70
Boise, ID 83707

John K. Simpson
Barker, Rosholt & Simpson LLP
P.O. Box 2139
Boise, ID 83701-2139

W. Kent Fletcher
P.O. Box 248
Burley, ID 83318-0248

Peter Bowler
555 River Rd. #E
Bliss, ID 83314

Aldrich Bowler
HC 60 Box 1110
Bliss, ID 83314

James S. Lochhead
Michael A. Gheleta
Adam T. DeVoe
Brownstein Hyatt Farber Schreck, P.C.
410 17th St., Suite 2200
Denver, CO 80202

Josephine P. Beeman
Beeman & Associates
409 W. Jefferson St.
Boise, ID 83702

Travis L. Thompson
Barker, Rosholt & Simpson LLP
P.O. Box 485
Twin Falls, ID 83303-0485

Randall C. Budge
Candice M. McHugh
Racine, Olson, Nye, Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, ID 83204-1391

United States Department of Justice
Environment and Natural Resources Div.
550 W. Fort St., MSC 033
Boise, ID 83724

IDWR
Document Depository
P.O. Box 83720
Boise, ID 83720-0098



David W. Gehlert