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DEPARTMENT OF
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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	)	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.
Case No. 39576	)	
	)	STATE OF IDAHO'S RESPONSE IN OPPOSITION TO
	)	THE UNITED STATE'S MOTION TO CONSOLIDATE
	)	SUBCASES

The State of Idaho, by and through the undersigned deputy attorney general, hereby files
its *Response in Opposition to the United State's Motion to Consolidate Subcases*.

I. DISCUSSION

On August 28, 2007, the United States filed a motion to consolidate the above-entitled
subcases based upon the inclusion of, or potential inclusion of, an explanatory remark that
requires affected hydropower rights to operate "in a manner that recognizes the historic practice

STATE OF IDAHO'S RESPONSE IN OPPOSITION TO THE UNITED STATE'S MOTION TO CONSOLIDATE
SUBCASES

that the use of water for power generation is incidental to the rights of others to the use of water for other purposes.”

On September 5, 2007, the Idaho Power Company filed its status conference report in subcase nos. 37-02128, 37-02471, 37-02472, 37-20709, and 37-20710; attached thereto, the Idaho Power Company filed a motion to designate a new basin-wide issue, or alternatively, to consolidate 48 subcases, including those involved in the United States’ August 28 motion. The Idaho Power Company asserted a broader, more general, issue for consideration:

Can historic practice regarding use or administration of a water right deny a party’s right to enforce a senior priority?

Both motions are now set to be heard on October 16, 2007. This *Response* addresses the United States’ motion only; the Idaho Power Company’s motion is addressed in a separate pleading.

A. STANDARD OF REVIEW

SRBA Administrative Order 1 provides that “[a]ny matter at issue in any proceeding in the adjudication, including portions of or entire subcases, may be consolidated with or separated from any other matter at issue in the adjudication.” AO1 § 11. Consolidation 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 . . . in consolidated hearings.” *Id.*

B. THESE SUBCASES SHOULD NOT BE CONSOLIDATED

The above-entitled subcases are best left unconsolidated for the following reasons: First, the objected-to historic practice remark does not involve a common issue of law; it is merely a textual expression of underlying legal and equitable determinations and is not an independent legal principle. Second, the determinations underlying the remark require fact-specific analyses

unique to each separate subcase, and as such, consolidation of these subcases would only hinder resolution of these matters.

i. THESE SUBCASES DO NOT SHARE A COMMON ISSUE OF LAW

The United States argues that actual or potential inclusion of the following explanatory remark justifies consolidation:

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 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.

The United States' characterization of this remark as raising a common issue of law across these factually-unrelated subcases is misplaced. The only thing common to all 17 subcases is the text of the remark. The text itself, however, is merely a manifestation of independent legal and equitable theories satisfied by independent factual circumstances; it is not itself a term of art. Thus, while different recommendations may include similar remarks, the legal and equitable foundations for those remarks may vary considerably depending upon the fact-specific circumstances surrounding each water right. The remark may represent, for example, a finding based upon adverse possession, estoppel, waiver, laches, etc.¹ The remark itself, however, presents no definitive, common issue of law.

The remark was included where it was deemed necessary in order to properly and efficiently define, clarify, and/or administer a certain water right. Idaho Code section 42-1411(2)

¹ To the extent that the United States' *Motion* implicitly challenges such affirmative defenses as adverse possession, estoppel, laches, waiver, waste, forfeiture and abandonment, the courts have already upheld their application in water right disputes. See *Idaho Power Co. v. Idaho Dep't of Water Res.*, 104 Idaho 575, 661 P.2d 741 (1983) (remanding for further determination on claims of adverse possession, estoppel, laches, waiver, forfeiture and abandonment); *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* at 14 n.4, In re SRBA Case No. 39576 (July 31, 1998) ("There are exceptions to the finality of a license in that the use of a license may change subjecting the license to claims of abandonment, forfeiture, adverse possession, estoppel, or waste."), *adopted, Order on Challenge (Consolidated Issue) of "Facility Volume" Issue and "Additional Evidence" Issue*, In re SRBA Case No. 39576 (37-02078 et al.) (Dec. 29, 1999).

describes the basic elements of a water right: the claimant's name and address, the source of water, the quantity of water, the priority date, the legal description of the point of diversion or the place of use, the annual volume of consumptive use, any conditions placed on the use, and "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2). The Director is required by law to determine these elements, including determination of remarks necessary to define, clarify or administer the elements. *Id.* Inclusion of the historic practice remark is a result of that process; it is a result of detailed factual and legal analysis of each water right's fact-specific circumstances; it is a result of a determination that it was necessary for the proper and efficient definition, clarification, and/or administration of each specific water right. It is not the result of the creation of either a new basin-wide policy or a new substantive rule of law.

Use of similar remarks across different recommendations does not raise a common issue of law per se. Uniform remark language has been applied where it would otherwise be inefficient and impractical to set forth the specifics of the department's legal and factual findings supporting its conclusions. Such is the case here. The remarks may be the same, but the underlying facts and legal determinations are not.

ii. The Legal and Equitable Theories Underlying the Historic Practice Remarks Are Entirely Fact-Specific

The amount of individual fact-finding required to analyze the underlying legal and equitable theories of each subcase demonstrates that these matters are better resolved individually by the Special Masters via standard SRBA procedure. *See Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master Dolan and Stay Related Subcases* at 3 (Jan. 3, 2001). The United States' proposed common issue confirms this:

“The propriety of the historical use subordination remark proposed by IDWR is common to all seventeen subcases.” *Motion to Consolidate Subcaes and Memorandum in Support* at 3–4. Again, the only thing common to all 17 subcases is the text of the remark. The foundations for the remarks can only be determined after the parties litigate, and the Court decides, the fact-specific legal and equitable theories asserted in support thereof. Such analysis would only be hindered by consolidation of these subcases.

II. CONCLUSION

The explanatory remarks implicated in the above-entitled subcases do not raise a common issue of law, and thus, the United States’ motion to consolidate these subcases should be denied.

RESPECTFULLY SUBMITTED this October 4, 2007.

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CERTIFICATE OF SERVICE

I certify that on the October 4, 2007, I caused to be served the original and/or copy of this STATE OF IDAHO'S RESPONSE IN OPPOSITION TO THE UNITED STATE'S MOTION TO CONSOLIDATE SUBCASES on each of the following persons by the method indicated:

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Idaho Power Company
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410 Seventeenth Street, Suite 2200
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3. Copies via U.S. mail to the Certificate of Mailing for Expedited Hearings list:



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