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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: 92-26
)
)
) ORDER SEPARATING AND
) CONSOLIDATING COMMON ISSUE
) FROM SUBCASES IN "EXHIBIT A" ON
) REMARK REGARDING
) SUBORDINATION OF HYDROPOWER
) RIGHTS BASED ON "HISTORICAL
) PRACTICES";
)
) ORDER DESIGNATING MATTER AS
) CONSOLIDATED SUBCASE 92-26;
)
) ORDER RESCINDING ORDER OF
) REFERENCE TO SPECIAL MASTERS
) AS TO CONSOLIDATED ISSUE;
)
) ORDER ON SUBCASES WHERE ALL
) OBJECTIONS HAVE BEEN
) RESOLVED;
)
) NOTICE OF SCHEDULING
) CONFERENCE ON CONSOLIDATED
) ISSUE.

I. BRIEF PROCEDURAL BACKGROUND

1. This matter came before the Court pursuant to the *United States' Motion to Consolidate Subcases and Memorandum in Support* filed August 28, 2007, and Idaho Power Company's *Motion to Designate Basin-Wide Issue, or Alternatively to*

ORDER SEPARATING AND CONSOLIDATING COMMON ISSUE; DESIGNATING
CONSOLIDATED SUBCASE; NOTICE OF HEARING ETC.

Consolidate Subcases on Common Issue filed September 4, 2007.¹ In the interest of judicial economy and consistency in rulings, the *Motions* seek to have the Court establish a mechanism for resolving in a common proceeding an issue pending in forty-eight (48) different subcases involving hydropower claims. Because the subcases involve claims in different basins the subcases are spread among the three special masters.

2. The *Motions* were opposed by the State of Idaho. The Idaho Groundwater Pumpers Association (IGWA) appeared and raised concerns regarding designating the matter as a basin-wide issue based on the broad scope of the issue as framed.

3. The issue arises as a result of objections filed to the following remark which was recommended in the director's reports for the forty-eight different hydropower claims:

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.

4. The dispute regarding whether to consolidate the subcases or designate the matter as a basin-wide issue is over whether the underlying basis for the recommended remark is fact specific to the individual water right claim or based on a common legal theory involving "historical practices." The State of Idaho argues that the use of the term "historic practices" is used merely for purposes of consistency and brevity in partial decrees and is a general reference to specific underlying factual basis giving rise to the subordination. The State argues that the use of the term "historic practices" was not intended as a separate legal theory by which hydropower rights can be subordinated. The

¹ The United States filed a motion to consolidate seventeen (17) subcases, including: 01-00217, 01-00218, 01-02017, 01-02032, 01-02046, 01-02064, 01-02068, 01-04024, 01-04025, 01-4054, 01-10382, 01-10383, 01-10531, 01-10532, 37-04007, 37-04147 and 63-00367. Idaho Power's motion included the Seventeen (17) subcases listed in the United States' motion and added an additional thirty-one (31) subcases for a total of forty-eight (48) subcases. The thirty-one (31) additional subcases are: 37-00238A, 37-00239A, 37-00239D, 37-00240A, 37-00240D, 37-00447C, 37-00447D, 37-00507, 37-00607D, 37-00608D, 37-00856, 37-00859A, 37-01175A, 37-02128, 37-02471, 37-02472, 37-02778, 37-02780, 37-04112, 37-04241, 37-07108, 37-07754, 37-07857, 37-07865, 37-07920, 37-07922, 37-07944, 37-11131, 37-20709, 37-20710 and 37-21595.

United States and Idaho Power argue that there are threshold legal questions regarding the ability to subordinate which are shared in common in all subcases. The United States and Idaho Power want to avoid the potential for inconsistent rulings among the three special masters.

5. Lastly, several subcases were identified which were originally named in the *Motions* but for which all objections have since been withdrawn or settled.² It is the intent of the Court to allow all such existing and future subcases sharing this status to be allowed to proceed to partial decree.

II. DISCUSSION AND RULING

The purpose of the *Motions* was for judicial economy and expediency in resolving the various objections. At this stage in the proceedings the underlying basis for the director's recommendations pertaining to the subordination remark has yet to be established. However, after hearing the arguments of the parties, the Court finds that there is a significant likelihood the objections to the recommended subordination remark (or lack thereof) will at least share common threshold legal issues as well as similar factual scenarios. These issues would be more efficiently sorted out and addressed in a common proceeding before the presiding judge. Proceeding in such a manner avoids the possibility conducting multiple proceedings on the same issues and having inconsistent rulings between the three special masters, which then would ultimately have to be resolved by the presiding judge on various challenges.

The Court is not convinced that designating the matter as a basin-wide issue would further judicial economy and expedience. There are a relatively few number of hydropower rights at issue. The notice procedure and the re-opening of the matter to parties to the adjudication would result in significant delays. Finally, the objections

² Prior to and during the hearing the Court was informed that all objections to the following subcases had been resolved: 37-00859A, 37-01175A, 37-07108, 37-07857, 37-07865, 37-07920, 37-07922, 37-07944, 37-00238A, 37-00239A, 37-00239D, 37-00240A, 37-00240D, 37-00447C, 37-00447D, 37-00607D, 37-00608D, 37-11131 and 37-04007.

raised may result in the Court having to address more issues or sub-issues than could be properly framed in the context of a single basin-wide issue.

In balancing the concerns raised by the parties, the Court finds that the best way to proceed is to separate and consolidate the issues pertaining to the subordination remark and require those issues to proceed before the Presiding Judge. The Presiding Judge will then decide any common threshold issues on an expedited basis so as not to create further delay. All objections pertaining to other contested elements of the claims would remain with the respective special masters to proceed on a separate track. After ruling on all common issues the Presiding Judge will determine whether to refer back to the special masters any fact specific issue requiring fact finding.

III. ORDER

BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. **Order Separating and Consolidating Issue:** IT IS ORDERED that pursuant to *Administrative Order 1* § 11 and I.R.C.P. 42, any issues pertaining to the director's recommendation regarding subordination based on historic practices are separated from those subcases listed in Exhibit A and consolidated into a single subcase for purposes of resolution.

2. **Order Designating Issue as Consolidated Subcase 92-26:** IT IS FURTHER HEREBY ORDERED that the consolidated subcase is hereby designated as consolidated subcase 92-26. All further filings pertaining to said consolidated issues should be filed under said subcase number. Any party who is already a party to one of the subcases listed on Exhibit A is also included as a party to the consolidated subcase. Parties not wanting to participate in the consolidated subcase must file notice with the Court indicating that they do not wish to participate in the matter and request that they be removed from the certificate of mailing for the consolidated subcase.

3. **Order Rescinding Consolidated Issues from Orders of Reference:** IT IS FURTHER ORDERED that the consolidated issues comprising consolidated subcase 92-26 are rescinded from the previously issued Orders of Reference to the three special masters. Consolidated subcase 92-26 shall proceed before the Presiding Judge. All objections pertaining to other elements of a subject water right claim shall remain before the special masters as previously assigned. Any party asserting that the issues regarding the other elements of the water right claims cannot proceed until a resolution of the consolidated subcase is reached shall take up such matters with the assigned special master.

4. **Order Regarding Subcases where all Objections are Resolved:** IT IS FURTHER ORDERED THAT the following subcases are not included in Exhibit A and are not included in the consolidated subcase and as such may proceed before the special master for reports and recommendations: 37-00859A, 37-01175A, 37-07108, 37-07857, 37-07865, 37-07920, 37-07922, 37-07944, 37-00238A, 37-00239A, 37-00239D, 37-00240A, 37-00240D, 37-00447C, 37-00447D, 37-00607D, 37-00608D, 37-11131 and 37-04007. In the future where all outstanding objections to a subcase implicated in consolidated subcase 92-26 are settled the parties may notify the Court to have the subcase removed from the consolidated subcase.

5. **Notice of Scheduling Conference:** IT IS FURTHER ORDERED that a scheduling hearing on Consolidated Subcase 92-26 will be conducted on **November 20, 2007, at 3:30 p.m. (mst.) at the SRBA Courthouse, 253 3rd Ave. N., Twin Falls, Id.** Anyone wishing to participate by telephone may do so by calling 1-918-583-3445 and entering the participant code 406128 when prompted.

Dated Oct. 22, 2007

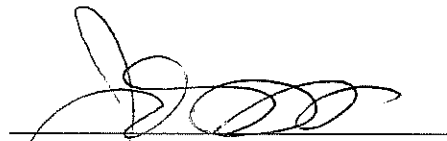

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

EXHIBIT A

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
37-00507
37-00856
37-02128
37-02471
37-02472
37-02778
37-02780
37-04112
37-04147
37-04241
37-07754
37-20709
37-20710
37-21595
63-00367

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER RE SUBORDINATION OF HYDROPOWER RIGHTS BASED ON HISTORICAL PRACTICES was mailed on October 22, 2007, with sufficient first-class postage to the following:

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