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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	)	Consolidated Subcase No. 00-92026
	)	
	)	STATE OF IDAHO'S STATEMENT OF
	)	COMMON ISSUES OF LAW OR FACT
Case No. 39576	)	AND PROPOSED SCHEDULING
	)	ORDER
	)	
	)	
	)	

The State of Idaho, by and through the undersigned deputy attorney general, hereby files
its *Statement of Common Issues of Fact or Law and Proposed Scheduling Order*.

I. BACKGROUND

On August 28, 2007, the United States filed a motion to consolidate 17 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 that the use of
water for power generation is incidental to the rights of others to the use of water for other
STATE OF IDAHO'S STATEMENT OF COMMON ISSUES OF LAW OR FACT AND PROPOSED
SCHEDULING ORDER

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 the above-entitled 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?

On October 22, 2007, the Court ordered “any issues pertaining to the director’s recommendation regarding subordination based on historic practices” in 29 of the implicated subcases be separated and consolidated as SRBA subcase no. 00-92026. On January 25, 2008, the Court ordered the Idaho Department of Water Resources (IDWR) to file I.R.E. 706 reports in those subcases where the director’s recommendations included the historic practice hydropower remark. On April 11, 2008, IDWR filed a 706 report covering seven of the eight subcases implicated in the January 25, 2008 Order. On May 19, 2008, IDWR filed a separate 706 report covering the remaining subcase.

On May 22, 2008, the Court ordered the parties to identify the common issues of law and fact which each party asserts should be decided in the context for which this subcase was initially consolidated. The Court also ordered the parties to file a proposed scheduling order. Both responses were to be due by June 3, 2008.

II. DISCUSSION

The State of Idaho maintains its position that the potential inclusion of the historic practice hydropower remark fails to raise any common issues appropriate for consolidation. As demonstrated by IDWR’s 706 reports, the remark is merely a manifestation of independent legal

and equitable theories supported by independent factual circumstances; the remark itself presents no definitive, common issue of law or fact. IDWR's 706 reports demonstrate further that analysis of the nature and extent of the subordination practices involved in each subcase will require a considerable amount of fact-finding regarding the history and operation of each project. There is no doubt that such fact-finding will overlap with that being conducted in the sister-subcases before the special masters. Judicial economy is thus best served by remand of these issues to the special masters below.

The Court's May 22, 2008 Order required the parties to submit proposed scheduling orders for this subcase. Consistent with its position to deconsolidate this subcase, the State of Idaho proposes that these issues be placed upon the same trial schedules of their underlying sister-subcases.

III. CONCLUSION

In its October 22, 2007 Order designating this consolidated subcase, the Court found that there was a significant likelihood that the underlying basis for the director's recommendation would reveal "common threshold legal issues as well as similar factual scenarios." Now having the benefit of IDWR's 706 reports, we know that such common issues do not exist and that judicial economy would be best served by deconsolidation and remand of these subcase issues back to the appropriate special master for final determination.

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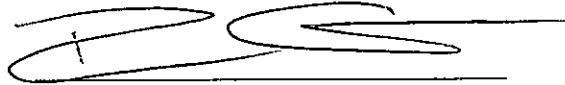
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RESPECTFULLY SUBMITTED this June 3, 2008.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'DS', with a horizontal line extending to the right.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on the 3rd day of June 2008, I caused to be served the original and/or copy of this STATE OF IDAHO'S STATEMENT OF COMMON ISSUES OF LAW OR FACT AND PROPOSED SCHEDULING ORDER on each of the following persons by the indicated methods:

1. Original to:

CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
PO BOX 2707
TWIN FALLS, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
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- ☐ Federal Express
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- ☐ Statehouse Mail

2. Copies to:

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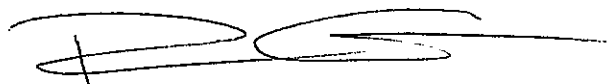
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