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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 IN
	)	OPPOSITION TO THE CONTINUED
Case No. 39576	)	CONSOLIDATION OF SUBCASE NO.
	)	00-92026
	)	
	)	

The State of Idaho, by and through the undersigned deputy attorney general, hereby files
its *Statement in Opposition to the Continued Consolidation of Subcase No. 00-92026*.

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

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 (a) 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; (b) to file proposed scheduling orders; and (c) to respond to any proposed common issues. The State of Idaho’s response to the proposed issues of the Idaho Power Company and the United States follows below.

II. DISCUSSION

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. THE HISTORIC PRACTICE HYDROPOWER REMARK DOES NOT PRESENT A COMMON ISSUE OF LAW OR FACT, AND THUS, THIS SUBCASE SHOULD BE DECONSOLIDATED.

Consolidation of this subcase was premised on the outstanding dispute 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.’” *Order Separating and Consolidating Common Issue from Subcases in “Exhibit A” on Remark Regarding Subordination of Hydropower Rights Based on “Historical Practices”* at 2 (Oct. 22, 2007). Because the underlying basis for the director’s recommendations pertaining to the subordination remark had yet to be determined, *id.* at 3, the Court ordered IDWR to file I.R.E. 706 reports in the subcases where the remark had been included. *Order Setting Deadline for I.R.E. 706 Reports* (Jan. 25, 2008). As demonstrated in the resulting 706 reports, the underlying basis for the recommended remark is fact specific to the individual water rights rather than the pronouncement of a common legal principal. As such, the potential inclusion of the historic practice hydropower remark in the water rights underlying this consolidated subcase does not raise a common issue of law or fact.

i. There Is No Single, Common Legal or Factual Scenario Underlying the Inclusion of the Historic Practice Hydropower Remark within the Water Rights at Issue Here.

The historical practice hydropower remark is a manifestation of independent legal and equitable theories supported by independent factual circumstances. Inclusion of the remark in

the various water rights at issue here relies neither on a single, common factual justification nor solely on the right holder's failure to make a delivery call in the past. To the contrary, the 706 reports demonstrate that the principle set forth in the remark is supported by long histories of subordination unique to each, individual hydropower project, as evidenced by unique legislative, executive, and private statements pertaining to the same. *See e.g.*, 706 Report, Ex. E at 25 (Supplemental Report, Palisades Dam and Reservoir Project, Idaho, at 10 (June 1949), *reprinted in* H.R. Doc. No. 81-720 (1951)) ("The production of power at Palisades Dam will be entirely incidental to the operation of the reservoir for irrigation and flood control."); 706 Report, Ex. F at 7 (Definite Plan Report, American Falls Powerplant, Minidoka Project, Idaho, at 13 (July 1956) ("The need for conserving water for irrigation use has required the limiting of the water supply for power generation, particularly the supply for the proposed American Falls powerplant, to those flows that are incidental to the operation of the Snake River reservoir system for existing and proposed irrigation development and for satisfying domestic water rights."); 706 Report, Ex. L at 1 (Memorandum from B.E. Stouteymer, Counsel, U.S.B.O.R., to Commissioner, U.S.B.O.R., at 1 (Mar. 12, 1940) ("The Government has three power plants in connection with its reclamation projects in Idaho. All of the power plants [including the Minidoka power plants] were constructed for reclamation purposes, and in so far as there has been any power production for commercial purposes it has been merely incidental to the main purpose of reclaiming the arid lands under the reclamation act.")).

Although the same historical practice hydropower remark may be included in all of the water rights involved in this subcase, the 706 reports demonstrate that the legal and equitable foundations for those remarks vary considerably depending upon the fact specific circumstances surrounding each water right. As a result, there is no common factual scenario among the

various water rights justifying continued consolidation of this subcase.

ii. The Proposed Legal Issues Do Not Support Consolidation.

In response to the Court's Order of May 22, 2008, the Idaho Power Company and the United States, respectively, set forth the following issues for continued consolidation:

Other than legal abandonment or forfeiture, can historic practice regarding use or administration of a water right, including the absence of a call in the past, deny a party's right to enforce a senior party?

Whether the priority of a water right can be subordinated to either existing or future water rights on the basis that the right holder has not placed a delivery call against junior water right holders over a certain period of time?

Although worded differently, these issues are two sides of the same coin—both challenge the viability of any and all limitations upon a water right's priority (beyond forfeiture and abandonment), neither recognize existing precedent upholding the availability of various affirmative defenses in water rights disputes. The Idaho Power Company's issue is broadly drafted, expressly challenging the viability of any and all limitations upon a water right's priority beyond forfeiture and abandonment. At first blush, the United States appears to present a narrower issue, seeking a determination of the scope of subordination in the context of where a right holder has not placed a delivery call in the past. Despite the narrower language, the question posed by the United States nonetheless implicates the same issues as that of the Idaho Power Company, for it cannot be answered without also defining the junior users' rights in any such dispute—i.e., are there other theories through which a water right's priority may be limited beyond forfeiture and abandonment?

The answer to that question has already been answered in the affirmative. The Idaho Supreme Court and the SRBA District Court have both made it clear that such affirmative defenses as adverse possession, estoppel, laches, waiver, and waste may be raised in the context of water right disputes. *See Idaho Power Co. v. Idaho Dep't of Water Res.*, 104 Idaho 575, 661
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P.2d 741 (1983) (remanding for further determination on claims of adverse possession, estoppel, laches, waiver, forfeiture and abandonment); *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981) (remanding for further factual determinations on the existence of detrimental reliance as necessary for the disposition of claimant's estoppel by laches argument); *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).

The Idaho Power Company and the United States' focus on the assertions that the senior right holders have failed to make a delivery call against junior right holders is misplaced. The relevance of such evidence can only be measured in the context of the affirmative defenses to which it would apply. Thus, the role that a right holder's failure to make a delivery call plays in any particular instance depends upon the nature and extent of the subordination practices involved, which necessarily requires fact specific and water right specific analyses. Such determinations can only be answered in factual context, and therefore, they do not pose common issues of law. Furthermore, the amount of individual fact-finding required to analyze the nature and extent of the subordination practices involved in each subcase indicates 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). This is especially true where there will undoubtedly be a considerable amount of overlap with the fact-finding required to determine the water right elements that remain unresolved in the underlying subcases.

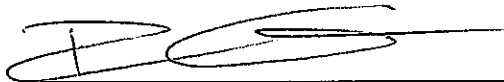
III. CONCLUSION

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. This subcase should therefore be deconsolidated, and the issues herein should be referred back to the appropriate special master for final determination.

RESPECTFULLY SUBMITTED this June 10, 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 "D. Stanish", written over a horizontal line.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on the 10th day of June 2008, I caused to be served the original and/or copy of this STATE OF IDAHO'S STATEMENT IN OPPOSITION TO CONTINUED CONSOLIDATION OF SUBCASE NO. 00-92026 on each of the following persons by the indicated methods:

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