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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 00-92026**

)
) **IDAHO POWER COMPANY'S**
) **RESPONSE TO STATEMENTS**
) **OF COMMON ISSUES FOR**
) **RESOLUTION IN**
) **CONSOLIDATED**
) **PROCEEDINGS**

The Idaho Power Company ("Idaho Power"), pursuant to the Court's Order of May 22, 2008, hereby submits its Response to Statements of Common Issues for resolution in these consolidated proceedings filed by the United States, the State of Idaho ("State"), the Ground Water Districts and the City of Pocatello ("Pocatello").

BRIEF PROCEDURAL BACKGROUND

The consolidated subcases in this proceeding are before the Court for resolution of common issues associated with: (1) the inclusion of an "historic practice" subordination remark in director's reports for numerous hydropower claims; and (2) objections by the State, and by the Ground Water Districts (through their predecessor in these actions IGWA), to recommendations on Idaho Power hydropower claims based on the lack of an historic practice subordination remark. The historic practice subordination remark is not fact-specific on its face, but instead contains the following general legal mandate:

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' filed a motion for consolidation, and Idaho Power filed a motion for designation of a basin-wide issue or alternatively for consolidation, on the historic practice subordination issue, and the State opposed both motions on the same grounds it raises now. On October 22, 2007, the Court entered its Order on those motions, providing:

[T]he 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 [of] 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.

Order Separating and Consolidating Common Issue from Subcases in "Exhibit A" on Remark Regarding Subordination of Hydropower Rights Based on "Historical Practices" at 3 (October 22, 2007) (emphasis added). No party challenged the Court's October 22, 2007 Order.

In the course of status conferences following up this order, the Court and parties discussed the possibility that common threshold legal issues in the consolidated subcase could be resolved through summary judgment proceedings. It was discussed that IDWR's preparation of I.R.E. 706 Reports on certain of the claims could help frame and put in context the common legal issues shared by all of the subcases involving the historic practice subordination issue. Accordingly, the Court ordered preparation of 706 Reports on claims of the United States for which the director's report recommended inclusion of the historic practice subordination remark. Following the preparation of two 706 Reports, and their discussion at two status conferences, the Court ordered the parties to prepare "statements identifying [and] framing common issues of law and fact which each party asserts should be decided by the Court in the context of a consolidated proceeding." Notice of Status and Scheduling Conference and Setting Deadline to File Statements of Common Issues and Responses (May 22, 2008).

DISCUSSION

A. Statements of Common Issues and Proposed Scheduling Order

Idaho Power and the United States each filed Statements of Common Issues, with each party identifying discrete common legal issues which should be resolved in this consolidated proceeding. In addition, Idaho Power filed a proposed Scheduling Order providing for the parties' filing of cross-motions for summary judgment and supporting memoranda on common issues. The United States indicated in its Statement that it concurred with the proposed Scheduling Order.

As presented by Idaho Power and the United States, the common legal issues for resolution in these consolidated subcases are:

Idaho Power's Statement of Common Issue: 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 priority?

See Idaho Power Company's Statement of Common Issues for Resolution in Consolidated Proceedings at 1-2.

United States' Statement of Common Issue: 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.

See United States' Statement of Issues and Proposed Scheduling Order at 1. Thus, the submissions of Idaho Power and the United States seek to resolve the common threshold legal issue of whether the absence of a water right call in the past precludes a water right holder's ability to make and enforce a call in the future.

The State, Ground Water Districts, and Pocatello, however, did not attempt to articulate common issues for resolution in the consolidated proceedings or submit a proposed Scheduling Order. Instead, these parties filed pleadings essentially asking the Court to reconsider and reverse its seven-month-old order consolidating these subcases and to return these proceedings to where they stood prior to consolidation. In its submission, the State simply repeats its earlier position, already rejected by the Court in consolidating these cases, that the historic practices remark "is merely a manifestation of independent legal and equitable theories supported by independent factual circumstances" and that the remark "presents no definitive, common issue of law or fact." State of Idaho's Statement of Common Issues of Law or Fact and Proposed Scheduling Order at 2-3. The Ground Water Districts, without providing any explanation, assert that they "believe these cases to be factually driven" and therefore conclude that there are no common issues of law or fact that should be decided by the Court in this consolidated proceeding. Ground Water District's Statement Re: Common Issues of Fact and Law at 1-2.

Pocatello also asserts that "there is no unresolved issue of law or fact common to these subcases." City of Pocatello's Statement of Common Issues of Fact or Law at 1 n. 1.¹

B. The Court Should Proceed Now to Resolve Common Threshold Legal Issues and Set the Legal Framework for Subsequent Resolution of Factual Issues

The Court should move the consolidated subcases forward, and not backward as would occur were the Court to accept the suggestions of the State, Ground Water Districts, and Pocatello to "deconsolidate" this matter. The Court consolidated the subcases based on its determination, following ample briefing and argument by the parties, that the subcases do "share common threshold legal issues" which "would be more efficiently ... addressed in a common proceeding. October 22, 2007 Order at 3. Idaho Power and the United States have articulated the common legal issues which may be amenable to resolution by summary judgment in this consolidated proceeding. The Court can proceed to address these common legal issues in this consolidated proceeding and set the legal context or framework within which relevant factual issues can be determined. As explained in their proposed Scheduling Order, '[t]he United States and Idaho Power would like to see an orderly and cost effective approach and believe that proceedings should initially be limited to resolution of legal issues prior to resolution of any factual issues.'" Idaho Power's [Proposed] Scheduling Order at 2.

IDWR's preparation of the two 706 Reports on certain claims does not warrant the Court reversing course on its plan to promote judicial economy, and to avoid inconsistent rulings by different special masters, by addressing common threshold legal issues in this consolidated

¹ These statements demonstrate the fallacy of their positions. If there is no common issue of fact or law that bonds these subcases together then there is no basis for a common remark in their decrees. If the loss of priority or a subordination condition is based solely on facts independent to each subcase, then the proper mechanism for imposing that restriction should be separate and independent objections where the objector(s) assumes the burden of presenting facts that justify the restriction based on principles of abandonment, forfeiture or some other applicable legal principle.

proceeding. As described at the outset, IDWR's historic practice subordination remark is stated in broad terms and on its face suggests the common legal issues articulated by Idaho Power and the United States. The fact that the 706 Reports discuss facts concerning the United States claims that are the subject of those reports does not mean that there are no common legal issues. If anything, these 706 Reports, which contain both legal and factual conclusions, confirm the relevance of the common threshold legal issues described by Idaho Power and the United States in their Statements. Both 706 Reports raise the issue of whether an appropriator's failure to place a water right call to enforce a priority in the context of historic practices can preclude that appropriator from making a call to enforce that priority in the future.² Accordingly, the Court can and should proceed to resolve this threshold common legal issue.

Moreover, "deconsolidating" based solely on preparation of these two 706 Reports would prejudice Idaho Power in this proceeding. No 706 Report was prepared with respect to the Idaho Power hydropower water right claims involved in this consolidated subcase, because the Idaho Power claims were consolidated based on objections of the State and IGWA urging inclusion of the historic practice subordination remark with respect to those claims. Under the approach advocated by the State, Ground Water Districts and Pocatello, resolution of threshold common issues would be made in a piecemeal fashion in subcases involving United States claims, and not in consolidated proceedings in which Idaho Power and those filing objections to Idaho Power claim recommendations would participate and be bound by the Court's ruling. It is thus disingenuous for the State and Ground Water Districts to invoke the limited 706 Reports

² See, e.g., May 10, 2008 Supplemental Director's Report Regarding Subcase No. 63-367 at 6 (relying on allegation that "the BOR has never made a call for water right number 63-367" to support inclusion of historic practice subordination remark); April 10, 2008 Supplemental Director's Report Regarding Subcase Nos. 1-217, 1-218, 1-2064, 1-2068, 1-4025, and 1-4054 at 5 (relying on statement that IDWR official "is not aware of a single instance when the BOR has made a call for water under these power rights against junior water right holders" to support inclusion of historic practice subordination remark).

prepared on United States claims to avoid having the Court address common issues raised by the State's and Districts' objections to Idaho Power's claims.

Finally, judicial economy, the very reason for consolidating the subcase on the historic practices issue in the first place, would be undermined by "deconsolidating" the consolidated subcase and proceeding with individual subcases before special masters. Having dozens of separate subcases proceed before several special masters certainly does not promote judicial economy, and also risks inconsistent rulings by different special masters on the same legal questions. Rather, judicial economy is promoted by resolving common legal issues in a consolidated proceeding, and then proceeding with resolution of factual issues as deemed appropriate by the Court following resolution of the legal issues.

CONCLUSION

The Court should proceed with resolution of the threshold common legal issues presented by Idaho Power and the United States, as originally envisioned when this matter was consolidated. Proceeding in this manner would promote judicial economy, and would avoid the risk of inconsistent rulings by different special masters. In addition, in order to move this consolidated subcase forward, the Court should adopt the scheduling order proposed by Idaho Power and the United States or a similar one.

Respectfully submitted,

DATED: June 10, 2008

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CERTIFICATE OF MAILING

I certify that on June 10, 2008, I fax-filed the original and served copies of this, **IDAHO POWER COMPANY'S RESPONSE TO STATEMENTS OF COMMON ISSUES FOR RESOLUTION IN CONSOLIDATED PROCEEDINGS** on each of the following persons via United States mail as indicated:

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