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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JUL - 1 2008
By _____ Clerk Deputy Clerk

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 No.: 00-92026
)
) ORDER DECONSOLIDATING
) SUBCASE 00-92026 AND ORDER OF
) RECOMMITMENT TO SPECIAL
) MASTERS
)

I.

BRIEF PROCEDURAL BACKGROUND

The detailed procedural background leading up to the consolidation of the issues in this proceeding is set forth in this Court's October 22, 2007, *Order Separating and Consolidating Common Issues from Subcases in "Exhibit A" on Remark Regarding Subordination of Hydropower Rights based on "Historical Practices"*. . . .

On April 10, 2008, the Idaho Department of Water Resources (IDWR) filed *Supplemental Director's Reports* explaining the basis for the recommendation of the "historical practices" subordination remark for hydropower claims 1-217, 1-218, 1-2064, 1-2068, 1-4024, 1-4025 and 1-4054. On May 19, 2008, IDWR filed a *Supplemental Director's Report* for hydropower claim 63-367.

After all *Supplemental Director's Reports* were filed the Court required the parties to file a statement of common issues identifying which specific issues, if any, the parties asserted could be more efficiently decided in a consolidated proceeding as opposed to being heard in individual subcases before the special masters. The United States presented the following 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.

Idaho Power identified the following 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?

Various irrigation districts jointly concurred with the common issues as presented by the United States and Idaho Power. The State of Idaho, the Ground Water Districts and the City of Pocatello opposed proceeding further on a consolidated basis.

A status conference was held on June 17, 2008, for purposes of determining how to proceed on the issue.

II. DISCUSSION

The Court has reviewed the *Supplemental Director's Reports* and listened to the arguments and representations of counsel. The Court concludes that hearing the issues as framed would not further the goal of judicial economy because the underlying bases for IDWR's recommendations are fact specific. For the reasons discussed below any decision by this Court on the legal issues as framed would have little application without a developed factual record and therefore would not expedite the process. However, in the context of this *Order*, the Court can both provide guidance to the special masters as well as address some of the concerns raised by Idaho Power and the United States.

The parties opposing proceeding on a consolidated basis argue that IDWR's use of the term "historical practices" was not intended as a separate new legal doctrine in support of the subordination recommendation. Rather, that the term was used as a uniform general term for encompassing legal doctrines such as waiver, estoppel, laches, forfeiture, abandonment, etc., all of which have recognized application to water right claims. After reviewing the *Supplemental Director's Reports* this Court is in agreement.

The Court notes that the use of the term "historical practices" has been used to support the inclusion of a general provision describing how affected rights were to be administered for purposes of avoiding future controversy where water rights were administered differently than as prescribed by law. *State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998); *State v. Nelson*, 131 Idaho 12, 951 P.2d 943

(1998). However, these cases did not hold that “historical practices” was a separate legal basis for modifying existing rights and requiring that the historical method of administration be continued. Rather the cases dealt with whether including a remark describing the method historical practices of administration met the criteria for a general provision. The cases did not involve substantive challenges to the historical method of administration. The Court does not view the cases as having application to the instant matter. Presumably, if historical practices of administration, without a supporting legal doctrine, were to be controlling a significant purpose of the adjudication would be undermined.

In an effort to address the concerns raised by Idaho Power and the United States over the use of the term “historical practices”, as well as provide guidance to the special masters, this Court will hold the parties opposing consolidation to their position that the use of the term “historical practices” was used to uniformly describe recognized legal doctrines by precluding the parties from asserting such a legal theory before the special masters. In hindsight, confusion may have been avoided by simply recommending the subordination remark without the “historical practices” language. Objecting parties then could determine the underlying basis for the subordination recommendation through a *Supplemental Director’s Report*.

THEREFORE, based on the foregoing, the following are hereby ordered:

1. Consolidated Subcase No. 00-92026 is deconsolidated.
2. The subcases listed in Exhibit A are recommitted in their entirety to the respective special masters for proceedings on the objections consistent with the conclusions contained in this **Order**.

DATED: July 1, 2008



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

37-04147
37-04241
37-07754
37-20709
37-20710

63-00367

(Subcase list: 92-26EXA)
6/30/08

Exhibit A

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DECONSOLIDA SUBCASE 00-92026 AND ORDER OF RECOMITTMENT TO SPECIAL MASTERS was mailed on July 01, 2008, with sufficient first-class postage to the following:

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REMARK REGARDING SUBORDINATION
OF HYDROPOWER RIGHTS BASED ON
"HISTORICAL PRACTICES"

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