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DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

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

DAVID I. STANISH (ISB #7310)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

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	)	Subcase Nos. 01-02017, 01-02032,
	)	01-02046, 01-02064, 01-04052, 01-10042,
	)	01-10382, 01-10383, 01-10384, 01-10485,
	)	01-10486, 01-10487, 01-10531, and
Case No. 39576	)	01-10532
	)	
	)	MOTION TO CONSOLIDATE
	)	SUBCASES AND MEMORANDUM IN
	)	SUPPORT
	)	

Pursuant to I.R.C.P. 42(a) and SRBA Administrative Order 1 (AO1) § 11, the State of Idaho, by and through the undersigned deputy attorney general, hereby moves this Court for an order consolidating the above-entitled subcases for the purpose of addressing the common issues of fact and law that arise from theses American Falls hydropower water rights claims. The grounds for this motion are as follows:

I. STANDARD OF REVIEW

I.R.C.P. 42(a) allows a court to order a joint hearing or trial on any “actions involving a common question of law or fact” pending before the court. Likewise, AO1 § 11 allows “[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 further provides that “[a] motion to consolidate subcases 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 to the Presiding Judge or a Special Master in consolidated hearings.”

II. DISCUSSION

Each of the subcases listed above shares a common thread—they all involve claims for hydropower use at the American Falls Dam and Reservoir. Development of the factual record describing the history of the American Falls project, as well as the history of the water rights and water uses associated therewith, will inevitably apply across all of these subcases, and therefore, these subcases would be most expeditiously and effectively resolved through a consolidated proceeding.

A. THESE SUBCASES SHARE A COMMON HISTORY THAT NEED NOT BE RETOLD FOURTEEN TIMES IN FOURTEEN SEPARATE PROCEEDINGS.

Each of these subcases implicates a long and common factual history surrounding the development and operation of the American Falls Dam and Reservoir. In the early 1920s, the Idaho Power Company owned three small hydropower facilities in the vicinity of American Falls, Idaho. In 1927, the United States Bureau of Reclamation constructed a large irrigation reservoir near the same location. The Power Company continued to produce power at one of its facilities just below the new dam, expanding the capacity of the facility as time went by. Some

50 years later, in the mid-1970s, the American Falls Dam was rebuilt. As part of the reconstruction, the Power Company's downstream powerplants were moved into, and became part of, the new American Falls Dam.

The history of hydropower at American Falls dates back over a century and implicates each of the 14 above-captioned subcases. Presentation of this long historical record is best done once, not 14 separate times in 14 separate proceedings; thus, these subcases should be consolidated in the interests of judicial economy and simple practicality.

B. THE INDIVIDUAL AMERICAN FALLS HYDROPOWER SUBCASES CANNOT BE DETERMINED IN ISOLATION OF ONE ANOTHER.

Stacking of the natural flow rights at issue in these subcases requires that the rights be determined together. Here, we have twelve claims for natural flow hydropower use at the same American Falls facility. We have nearly as many priorities claimed, representing the numerous transfers and facility expansions that have occurred at the facility over time. Because we are dealing with one facility—one point of diversion—beneficial use is determined by stacking the rights on top of each other. As a result, the Court cannot properly evaluate the stacking of the claimed rights without reference to those rights prior in time. This factual interconnection between these subcases clearly demonstrates that consolidation is the most proper and efficient way to resolve these matters.

C. THERE ARE MIXED ISSUES OF LAW AND FACT THAT RUN ACROSS ALL AMERICAN FALLS HYDROPOWER SUBCASES.

Whether the “use of water for power generation [at American Falls] is incidental to the rights of others to the use of water for other purposes” is an issue that arises in each of these subcases. This remark was included in the Director's recommendation for water right claim no. 01-02064 and was asserted by objection for inclusion in water right nos. 01-02017, 01-02032,

01-02046, 01-10382, 01-10383, 01-10531, and 01-10532.¹ Although implication of this remark alone does not warrant consolidation, *see Order Deconsolidating Subcase No. 00-92026 and Order of Recommitment to Special Master* (July 1, 2008), the common factual record underlying application of the remark in these particular subcases is sufficient. Here, inclusion of the remark in each of the above-entitled subcases is based on the same factual history of the development and operation of the American Falls Dam and Reservoir and its associated hydropower facilities. Judicial economy is best served by presenting and trying the factual and legal bases for inclusion of the remark in one proceeding; rather than 14 separate proceedings.

D. THE COURT SHOULD CONSOLIDATE THE ENTIRETY OF THE ABOVE-ENTITLED SUBCASES, WITH THE EXCEPTION OF 01-02064.

The State of Idaho moves the Court for an order consolidating the entirety of subcase nos. 01-02017, 01-02032, 01-02046, 01-04052, 01-10042, 01-10382, 01-10383, 01-10384, 01-10485, 01-10486, 01-10487, 01-10531, and 01-10532 and the hydropower issues in subcase no. 01-02064. Twelve of these subcases deal solely with either natural flow hydropower rights or hydropower storage rights at American Falls. Subcase no. 01-02064, however, is the main storage right at American Falls, and it involves hydropower storage as well as other purposes of use (e.g., irrigation storage). In the interests of addressing all of the hydropower issues at American Falls in one proceeding, the hydropower issues in subcase no. 01-02064 should be included in the consolidation order prayed for in this motion.

III. CONCLUSION

These subcases are all part of a single history at American Falls. They all involve many of the same facts and many of the same legal theories. None of these subcases can be

¹ Water right nos. 01-10042, 01-10384, 01-10485, 01-10486, and 01-10487 were recommended to be disallowed. The State asserts that the historic practice hydropower remark applies to all hydropower uses at the American Falls Dam and Reservoir.

determined without relation to the others. As such, the common issues of fact and law among these subcases will be most expeditiously and effectively resolved through consolidation.

DATED this 24th day of September 2008.

A handwritten signature in black ink, appearing to read 'D. Stanish', is written over a horizontal line.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 24th day of September 2008, I caused to be served the original and copies of the **MOTION TO CONSOLIDATE SUBCASES AND MEMORANDUM IN SUPPORT** on the following persons by the indicated methods:

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

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☒ Facsimile: (208) 736-2121
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TWIN FALLS, ID 83303-2707

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☐ Hand Delivery
☐ Federal Express
☒ Facsimile: (208) 736-2121
☐ Statehouse Mail

MILNER IRRIGATION DIST
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY
Represented by:
BARKER, ROSHOLT & SIMPSON LLP
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☒ Facsimile: (208) 733-0700
☐ Statehouse Mail

IDAHO POWER COMPANY
Represented by:
JAMES C TUCKER
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☒ Facsimile: (208) 388-6935
☐ Statehouse Mail

IDAHO POWER COMPANY
Represented by:
MICHAEL A GHELETA
JAMES S LOCHHEAD
BROWNSTEIN HYATT ET AL
410 17TH STREET, SUITE 2200
DENVER, CO 80202

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☒ Facsimile: (303) 233-1111
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ABERDEEN AMERICAN FALLS GWD
BINGHAM GWD
BONNEVILLE JEFFERSON GWD
CAREY VALLEY GWD
IGWA INC
JEFFERSON CLARK GWD
MADISON GWD
MAGIC VALLEY GWD
NORTH SNAKE GWD

Represented by:
RANDALL C BUDGE
201 E CENTER, STE A2
PO BOX 1391
POCATELLO, ID 83204-1391

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 232-6109
- ☐ Statehouse Mail

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
FALLS IRRIGATION DISTRICT

Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 436-6804
- ☐ Statehouse Mail

USDI BUREAU OF RECLAMATION
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC O33
BOISE, ID 83724

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 334-9375
- ☐ Statehouse Mail

MINIDOKA IRRIGATION DISTRICT

Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318

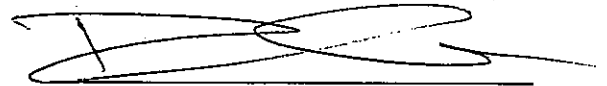
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1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

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☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail



DAVID I. STANISH
Deputy Attorney General