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DEPARTMENT OF
WATER RESOURCES

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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

**IDAHO POWER COMPANY'S
REPLY TO THE STATE OF
IDAHO'S RESPONSE IN
OPPOSITION TO MOTION TO
DESIGNATE BASIN-WIDE
ISSUE, OR ALTERNATIVELY
TO CONSOLIDATE SUBCASES**

COMES NOW the Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys, hereby files its *Idaho Power Company's Reply to the State of Idaho's Response In Opposition to Designate a Basin-Wide Issue, or Alternatively, to Consolidate*

Subcases.

I. THE MOTION SEEKS TO ADDRESS A COMMON LEGAL ISSUE TO WHICH FACT-SPECIFIC DETERMINATIONS CAN LATER BE APPLIED

The State attempts to argue that the "historic practice" subordination remark should not be designated as a Basin-Wide Issue, or in the alternative that the cases should not be consolidated, because each of the cases involve distinct questions of law and fact. Idaho Power is not requesting designation of a Basin-Wide Issue in order to determine the facts of the various cases. Idaho Power's motion, and its request in the alternative to consolidate the various matters, only seeks a determination on a common issue of law that runs through the various cases: whether historic practice regarding use or administration of a water right can deny a party's right to enforce a senior priority. After this common issue of law has been determined, then the facts can be applied in a final adjudication of the various cases.

This approach to the adjudication should not be objectionable to the State, since the State repeatedly concedes that the historic practice remark involves a common legal issue. At page 2 of the Response, the State concedes that resolution of all of the historic practice remarks involve "legal and equitable determinations" over the historic practice issue. The State attempts to differentiate the potential meaning of the historic practice remark in the various cases, but instead circles back to the inexorable conclusion that the historic practice remark is "merely a textual manifestation of . . . legal and equitable theories." Response at 2. The State simply cannot escape the common legal question, and repeats the phrase "legal and equitable theories" throughout the Response in reference to the historic practice subordination remark.

Nevertheless, the State argues that it would hinder timely resolution of the subcases to designate the Basin-Wide Issue, and suggests that 48 separate determinations in the subbasin proceedings would be more appropriate. Response at 5. Idaho Power is not seeking factual

determinations in each of the 48 pending cases, but rather seeks a single determination of law to settle a common issue and expedite the subsequent factual proceedings. The DeMoss objections also fit within this proposed adjudication process, because all of the DeMoss objections appear to be based on the absence of calls or administration against their rights generally. The DeMoss objections are thus fundamentally legal in nature and lend themselves to a determination of law prior to hearing any factual issues, like the broad hydropower remark proposed by the State, which is discussed below.

II. IDWR APPLIES THE REMARK BROADLY TO HYDROPOWER RIGHTS

All of the IDWR recommendations at issue involve the identical remark subordinating hydropower rights for reasons of "historic practice." Specifically, the IDWR Director's Report includes the following remark:

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 use the water for other purposes. The appropriator **shall not make a delivery call** for hydropower generation except as against hydropower rights. (Emphasis added).

A plain reading of this remark demonstrates that it is not a fact specific application, but a broad application of a legal subordination principle to hydropower rights generally.

Nevertheless, the State attempts to downplay the significance of this commonality by stating that "historic practice" is not a term of art, and that the legal theories underlying the phrase can only be determined after the parties litigate each of the cases individually. Response at 3. In short, it is apparently the State's position that this same remark may involve a different legal theory in every instance, and insists that it should be litigated in excess of 48 times to determine what it might mean to each individual water right. Response at 5. It strains credibility to suggest that the State intended something unique in every circumstance where an identical phrase was used, especially when all of the subcases in which the State inserted the remark have

a common thread – they are all related to hydropower rights.

Furthermore, the State's argument that "historic practice" is not a term of art, but rather a single phrase intended to encompass various legal theories that could limit the exercise of the water rights, provides an additional reason to either designate a Basin-Wide Issue or consolidate the cases. The State's interpretation that the historic practice remark presents potentially unique legal issues in every case either makes the remark unenforcably vague, or suggests that the precise legal theory limiting exercise of the water right should have been specifically set forth to put the water rights claimant on notice of the legal limitations of the claimed water right. In either case, a Basin-Wide Issue or consolidated case would clarify this dispute in a single proceeding that would preserve judicial and party resources and provide a more certain legal basis upon which to proceed to final adjudication of the rights. Resolving this singular legal issue as a Basin-Wide Issue or consolidated case will thus result in greater certainty and predictability regarding both water use and water rights administration.

Idaho Power simply seeks a single legal determination of the meaning of and limitations presented by the proposed subordination based on "historic practice." Counsel for Idaho Power has consulted with counsel for the United States, and the United States supports the approach of obtaining a broad and integrated legal determination on this issue.

II. CONCLUSION

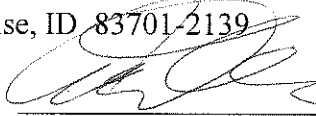
Accordingly, Idaho Power respectfully requests an order designating as a Basin-Wide Issue the issue of whether historic practice regarding use or administration of a water right can deny a party's right to enforce a senior priority. Alternatively, Idaho Power requests an order consolidating the subcases specified herein for the purpose of addressing this common issue within them.

DATED: October 11, 2007

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I certify that on October 11, 2007, I served the original and/or copy of this **IDAHO POWER COMPANY'S REPLY TO THE STATE OF IDAHO'S RESPONSE IN OPPOSITION TO MOTION TO DESIGNATE BASIN-WIDE ISSUE, OR ALTERNATIVELY TO CONSOLIDATE SUBCASES** on each of the following persons by the indicated method:

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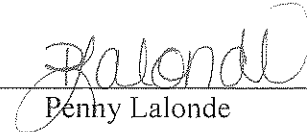
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