

Roger D. Ling, ISB #1018  
LING ROBINSON & WALKER  
P.O. Box 396  
Rupert, Idaho 83350  
Telephone: (208) 436-4717  
Facsimile: (208) 436-6804

C. Tom Arkoosh, ISB #2253  
ARKOOSH LAW OFFICES, CHTD.  
P.O. Box 32  
Gooding, Idaho 83330  
Telephone: (208) 934-8872  
Facsimile: (208) 934-8873

Attorneys for A & B Irrigation District and  
Burley Irrigation District

Attorneys for American Falls  
Reservoir District #2

John A. Rosholt, ISB #1037  
John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
BARKER ROSHOLT & SIMPSON LLP  
113 Main Ave. West, Suite 303  
Twin Falls, Idaho 83301-6167  
Telephone: (208) 733-0700  
Facsimile: (208) 735-2444

W. Kent Fletcher, ISB #2248  
FLETCHER LAW OFFICE  
P.O. Box 248  
Burley, Idaho 83318  
Telephone: (208) 678-3250  
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

Attorneys for Milner Irrigation District,  
North Side Canal Company, and  
Twin Falls Canal Company

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE REQUEST FOR )  
ADMINISTRATION IN WATER DISTRICT ) **SURFACE WATER**  
120 AND THE REQUEST FOR DELIVERY ) **COALITION'S PETITION**  
OF WATER TO SENIOR SURFACE WATER ) **REQUESTING HEARING ON**  
RIGHTS BY A&B IRRIGATION DISTRICT, ) **DIRECTOR'S DECEMBER 27, 2005**  
AMERICAN FALLS RESERVOIR DISTRICT #2, ) **SECOND SUPPLEMENTAL ORDER**  
BURLEY IRRIGATION DISTRICT, MILNER ) **AMENDING REPLACEMENT**  
IRRIGATION DISTRICT, MINIDOKA ) **WATER REQUIREMENTS**  
IRRIGATION DISTRICT, NORTH SIDE CANAL )  
COMPANY, AND TWIN FALLS CANAL )  
COMPANY )  
\_\_\_\_\_ )

COMES NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley  
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal

Company, and Twin Falls Canal Company (hereinafter collectively referred to as the “Surface Water Coalition” or “Coalition”) and hereby requests a hearing on the Director’s December 27, 2005 *Second Supplemental Order Amending Replacement Water Requirements* (hereinafter “*Supplemental Order*”), in which the Director amended and superceded his May 2, 2005 *Amended Order*. This petition supplements the other petition filed by the Coalition regarding the Director’s July 22, 2005 *Supplemental Order Amending Replacement Water Requirements*. The initial basis for the Coalition’s request and petition is as follows:

**I.**

**PROCEDURAL RECITATIONS**

1. Pursuant to the provisions of chapter 52, title 67, Idaho Code, as adopted by Idaho Code § 42-1701A, and the implementing provisions of the Department’s Rules of Procedure, IDAPA 37.01.01 *et seq.*, the Surface Water Coalition hereby petitions for the modification or amendment of the Director’s December 27, 2005 *Second Supplemental Order* and the clarification, declaration, and construction of the law administered by the Department and of the Surface Water Coalition’s rights and obligations administered by the Department. The Coalition reserves the right to supplement this *Petition* as necessary as other facts and issues are discovered through the course of this proceeding.

**II.**

**MAY 17, 2005 PETITION REQUESTING HEARING**

1. The Surface Water Coalition filed a petition on May 17, 2005 requesting a hearing on the Director’s May 2, 2005 Order. In that petition, the Coalition raised numerous issues with the Director’s findings of fact and conclusions of law. To the extent those findings of facts and conclusions of law in the Director’s May 2, 2005 Amended Order have not been

superceded or further amended by the Director's *Second Supplemental Order*, the Coalition hereby readopts and incorporates its prior petition by reference.

### III.

#### BASIS FOR PETITION

1. The Director, through his *Second Supplemental Order*, has admittedly issued findings of fact and conclusions of law that "supercede" his May 2, 2005 Amended Order.<sup>1</sup> Since, the Director has fundamentally altered the findings contained in the May 2, 2005 Amended Order, there is no question the *Second Supplemental Order* triggers the procedural rights for "aggrieved persons" under I.C. § 42-1701A(3). Given the new substantive findings, the contested case resulting from the petitions filed on the Director's May 2, 2005 Order is moot. In other words, there is no reason for the Director hold a hearing on an order that has been "superceded" and amended. Although the Director has characterized the *Second Supplemental Order* as "amending the replacement water requirements", a process that the Director created without any basis in the statutes or rules and which is the subject of repeated motions filed by the Coalition which have been continually ignored, the order plainly amends the findings in the May 2, 2005 Order. If the Director can continually amend a "final order" after it has been issued, changing the rights of the affected parties, the process can theoretically never end and remains subject to Director's decision to change the analysis at any time.

2. Apart from the amended "injury" determinations, it is now clear that the Director has changed the process for determining "reasonably likely material injury" that members of the Coalition will suffer in 2005 and in doing so has assured members of the Coalition that they will not receive any "mitigation" during the irrigation season when it is arguably needed the most. If

the “injury” determination is a moving target that effectively precludes in-season administration of junior ground water rights, then it is obvious the process created by the Director is unlawful and contrary to Idaho’s prior appropriation doctrine. The Coalition challenges this “new” process created by the Director, different than that set out in the May 2, 2005 Order.

3. Finally, in addition to objecting to the Director issuing a new “injury” analysis that precludes any in-season mitigation requirements along with the newly created “replacement water plan” process not in accordance with Idaho law, the Coalition further objects to the Director’s procedure for distributing the “replacement water”, including how the Director has interpreted the conjunctive management rule for distribution of water, “mitigation”, “replacement”, or otherwise.

### **REQUESTED RELIEF**

Whereas, the Coalition herein requests the following relief:

1. A hearing on all aspects of the Director’s December 27, 2005 *Second Supplemental Order*, including all findings of fact and conclusions of law from the May 2, 2005 *Amended Order* that have not been superceded, as contested above or on other issues as may hereafter be discovered.

2. Appointment of an independent hearing officer as provided for by Idaho Code § 42-1701A(2).

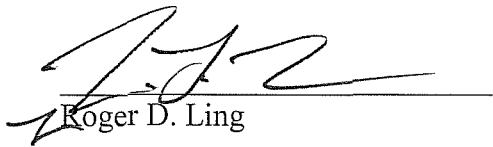
3. All other requests for relief set forth in the Coalition’s former petitions challenging the Director’s May 2, 2005 *Amended Order* and July 22, 2005 *Supplemental Order* are herein incorporated by reference.

---

<sup>1</sup> “Supercede”, a variant of the term “supersede” means: “[o]bliterate, set aside, annul, replace, make void, inefficacious or useless, repeal. To set aside, render unnecessary, suspend or stay.” Black’s Law Dictionary, 5<sup>th</sup> ed. at 1289 (1979).

DATED this 11<sup>th</sup> day of January, 2006.

LING ROBINSON & WALKER



Roger D. Ling

Attorneys for A & B Irrigation District  
and Burley Irrigation District

FLETCHER LAW OFFICES



W. Kent Fletcher

Attorneys for Minidoka Irrigation District

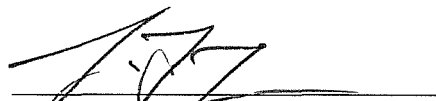
ARKOOSH LAW OFFICES CHTD.



C. Tom Arkoosh

Attorneys for American Falls  
Reservoir District #2

BARKER ROSHOLT & SIMPSON LLP



John A. Rosholt  
John K. Simpson  
Travis L. Thompson

Attorneys for Milner Irrigation District,  
North Side Canal Company, and  
Twin Falls Canal Company

## CERTIFICATE OF SERVICE

I hereby certify that on this 11<sup>th</sup> day of January, 2006, I served a true and correct copy of the foregoing *Petition Requesting Hearing on Director's December 27, 2005 Second Supplemental Order* on the following by the method indicated:

Via Email and U.S. Mail

Director Karl Dreher  
Idaho Department of Water Resources  
322 E. Front St.  
Boise, Idaho 83720-0098  
[victoria.wigle@idwr.idaho.gov](mailto:victoria.wigle@idwr.idaho.gov)

IDWR – Eastern Region  
900 N. Skyline Dr., Suite A  
Idaho Falls, Idaho 83402-1718

IDWR – Southern Region  
1341 Fillmore St., Suite 200  
Twin Falls, Idaho 83301-3380

Via U.S. Mail

Jeffrey C. Fereday  
Michael C. Creamer  
Givens Pursley LLP  
601 Bannock St., Suite 200  
P.O. Box 2720  
Boise, Idaho 83701-2720

Kathleen Marion Carr  
U.S. Department of Interior  
550 West Fort St., MSC-020  
Boise, Idaho 83724

James C. Tucker  
Idaho Power Company  
1221 West Idaho St.  
Boise, Idaho 83702

Jo Beeman  
Beeman & Assoc.  
409 W. Jefferson St.  
Boise, Idaho 83702

James S. Lochhead  
Adam T. DeVoe  
Brownstein, Hyatt & Farber P.C.  
410 17<sup>th</sup> St., 22<sup>nd</sup> Floor  
Denver, Colorado 80202

Michael Gilmore  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

Scott L. Campbell  
Moffatt Thomas Chtd.  
101 S. Capitol Blvd., 10<sup>th</sup> Floor  
P.O. Box 829  
Boise, Idaho 83701

  
Travis L. Thompson