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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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	**SURFACE WATER COALITION'S PETITION REQUESTING HEARING ON DIRECTOR'S DECEMBER 27, 2005** ***SECOND SUPPLEMENTAL ORDER AMENDING REPLACEMENT WATER REQUIREMENTS***

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Order Amending Replacement Water Requirements* (hereinafter "*Supplemental Order*"), in which the Director amended and superceded his May 2, 2005 *Amended Order*.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.[1] 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.

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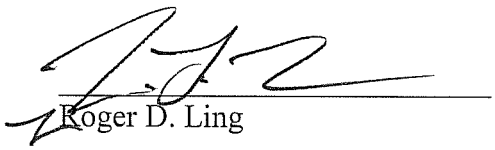
[1] "Supercede", a variant of the term "supersede" means: "[o]bliterate, set aside, annul, replace, make void, inefficacious or useless, repeal. To set aside, render unnecessary, suspend or stay." Black's Law Dictionary, 5th ed. at 1289 (1979).

DATED this 11 day of January, 2006.

LING ROBINSON & WALKER



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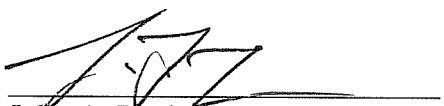

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th 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:

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