

Roger D. Ling, ISB #1018
ROBINSON & ASSOCIATES
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
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
P.O. Box 485
Twin Falls, Idaho 83303-485
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 DISTRIBUTION)
OF WATER TO VARIOUS WATER)
RIGHTS HELD BY OR FOR THE)
BENEFIT OF 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)
(Water District Nos. 34, 110, 120 and 130))

**SURFACE WATER COALITION'S
MOTION FOR RECONSIDERATION
AND REVIEW OF SIXTH
SUPPLEMENTAL ORDER
AMENDING REPLACEMENT WATER
REQUIREMENTS AND ORDER
APPROVING IGWA'S 2007
REPLACEMENT WATER PLAN**

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 (Surface Water Coalition or Coalition), by and through counsel of record, and hereby moves for reconsideration and review of the *Sixth Supplemental Order* entered in the above-entitled action, pursuant to IDAPA 37.01.01.711. This motion is based upon the following particulars:

1. In the Idaho Department of Water Resources' ("IDWR") *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 and Estimated 2007 ("Fifth Supplemental Order")*, the Director provided he would "continue to monitor water supply climactic conditions through the 2007 irrigation season and issue additional orders regarding the replacement water needs for the 2007 irrigation season or issue further instructions to the water masters for Water Districts 34, 110, 120, and 130 should material injury be predicted to occur to rights held by or for the benefits of the members of the Surface Water Coalition." *Fifth Supplemental Order* at 17, ¶ 8.

2. Thereafter, on or about June 11, 2007, the Director issued his *Order Denying Joint Motion to Vacate Hearing on IGWA's 2007 Replacement Water Plan*, wherein the Director provided that the hearing scheduled on the Coalition's objections to IGWA's replacement water plan was "limited in scope to presentation of information regarding the implementation of plan by IGWA to demonstrate that timely, in-season replacement water and reasonable carryover water can be provided to members of the Surface Water Coalition." *June 11 Order* at 2. Further, the order provided that the hearing, "will not include argument or presentation of evidence on any other orders issued by the director, or the director's method and computation material injury." *Id.*

3. On or about June 21, 2007, the Coalition filed a *Request for Updated Material Injury Determination for 2007 Water Right Administration*, accompanied by affidavits and technical memoranda documenting the current water supply and climatic conditions expected throughout the 2007 irrigation season, as well as forecasted water demand for the Coalition members. The information provided to the Director identified the measures Coalition members were being forced to take this year, including reducing water delivery to shareholders, exhaustion of storage supplies, and the rental of additional storage water. The documents further highlighted the extremely hot and dry conditions that the Upper Snake River Basin was experiencing at the time as well as forecasts for the same. These extreme conditions have not changed between June 21st and the filing of this motion.

4. On June 22, 2007, the Director conducted a hearing on IGWA's Replacement Plan. An audio file of the hearing is available on IDWR's website www.idwr.idaho.gov.

5. On July 11, 2007, the Director issued his *Sixth Supplemental Order Amending Replacement Water Requirements and Order Approving IGWA's 2007 Replacement Water Plan* ("Sixth Supplemental Order").

6. In the *Sixth Supplemental Order*, the Director reiterated that, "the scope of the [June 22nd] hearing was further limited to not include argument or presentation of evidence on any other orders issued by the director, or director's method and computation material injury." In determining "material injury" under the May 2, 2005 Amended Order and the *Fifth Supplemental Order*, the Director previously forecasted available natural flow for the Coalition members by relying upon the USBR and USACE joint operating forecast for unregulated inflow from the Upper Snake River Basin at the Heise gauge for the April 1 – July 31 period. With

respect to the *Fifth Supplemental Order*, the Director estimated available natural flow for Coalition members for the 2007 irrigation season as follows:

	<u>Total (af)</u>
A&B	2,004
AFRD #2	28,583
BID	107,337
Milner	4,759
MID	90,090
NSCC	312,009
TFCC	778,285

Fifth Supplemental Order at 10, ¶ 19.

7. Despite the above calculations using the method prescribed in the *Fifth Supplemental Order*, thereafter, the Director did, in fact, change the method and proceed to recompute material injury, but did so without consideration of the input, affidavits and technical memoranda of the Surface Water Coalition, and after arbitrarily restricting the ability of the Surface Water Coalition to present evidence concerning water conditions, supplies and demands actually existing at the time of the hearing and projected for the balance of the 2007 irrigation season and future seasons.

8. Further, insofar as the purpose of the hearing was to provide for “presentation of information regarding the implementation of plan by IGWA to demonstrate that timely, in-season replacement water and reasonable carryover water can be provided to members of the Surface Water Coalition,” IGWA has absolutely failed to provide any evidentiary basis for the same, and the arguments of American Falls Reservoir District #2 in its Renewed Motion to Strike Exhibits 1 and 2 are herein adopted in support of this request for reconsideration. The *Sixth Supplemental Order* makes no provision for timely, in season provision of water. As of the

date of this Motion, no written provision has been presented or is known to the undersigned that any water has either been actually acquired, transferred, or made available.

9. In the *Sixth Supplemental Order* the Director failed to adequately consider the record established at the June 22, 2007 hearing in approving IGWA's Replacement Plan and further failed to order timely in-season replacement water delivery to injured Coalition members.

10. Instead of adhering to the method set forth in the prior orders and without objective correlation to existing conditions, the Director arbitrarily changed methods and decided to use actual diversion data from 1992 to forecast available natural flow for TFCC from July 9 through October 31, 2007. See *Sixth Supplemental Order* at 5, ¶ 12. In doing so, the Director increased the natural flow forecast for TFCC from 778,285 af (predicted on May 23) to 798,015 af (predicted on July 11). The predicted increase in natural flow supply had the effect of lowering the predicted material injury to the Coalition members by approximately 20,000 acre-feet. The Director made this determination to use 1992 actual diversion data in his "professional judgment", despite the fact TFCC had reduced water deliveries in 1992, that reach gains and spring flows in the American Falls reach in 2007 are significantly lower than what was observed in 1992, and despite the fact temperatures have been extremely high and precipitation has been extremely low in 2007. The Director changed his method of calculating material injury for the obvious benefit of reducing the in-season replacement water obligation of IGWA. As evidenced at the June 22nd hearing, and in the Director's *Sixth Supplemental Order*, of the approximately 65,000 acre-feet that IGWA has "allegedly" secured through lease¹, at least 20,000 acre-feet has been committed to conversion acres in Water District 130 for purposes of IGWA's replacement

¹ To the best of the Coalition's knowledge and based upon the Water District 01 records and weekly water report, no water has been assigned to date through the Water District 01 Rental Pool for IGWA's replacement water obligations identified in the various orders on the SWC's delivery call as well as other calls made by senior surface water right holders in Water District 130.

water plan in response to calls by other senior surface water right holders. Coincidentally, the Director's *Sixth Supplemental Order* reduced IGWA's replacement water obligation to TFCC by 20,000 acre-feet.

11. At the time of the entry of the *Sixth Supplemental Order*, there was less water in the Snake River Plain Aquifer than had been anticipated by the Director in the *Fifth Supplemental Order*, the climactic conditions were warmer than predicted, irrigation demands and diversions were greater than predicted and the water supply is less than predicted. Despite the objective 2007 data, most of which is complied by IDWR, in the *Sixth Supplemental Order* the Director, rather than increasing the amount of material injury, and consequently the amount of mitigation necessary to make the Surface Water Coalition whole, decreased the same, without any logical reason and contrary to the restrictions of scope placed upon the hearing by the Director.

12. The Director's use of 1992 is arbitrary and capricious and further highlights the unconstitutional system of administration that he is using in applying the Department's conjunctive management rules. The Director's *Sixth Supplemental Order* arbitrarily ignores the current climatic and water supply conditions in the Upper Snake River Basin, including the reach gain information provided by the Coalition and as identified on a weekly basis by Water District 01 (demonstrating reduced flows in the Snake River below Blackfoot, even from 2001 levels).

13. The Director's failure to properly administer water rights has further forced the Coalition to reduce water deliveries to shareholders, rent additional storage supplies, and exhaust available storage water this season. Nevertheless, the Director's order continues to unlawfully allow out-of-priority junior ground water right holders to divert through the 2007 irrigation

season without restriction or limitation, thereby turning Idaho's law of prior appropriation on its head for yet another irrigation season.

14. The *Sixth Supplemental Order* fails to commence calculation of the amount of injury and consequent mitigation required with the decreed right; and, further fails to give any presumption that the decreed amount is the amount necessary to serve beneficial use.

15. The Director's actions are contrary to the Idaho Constitution and water distribution statutes and result in a taking of the Coalition's senior water rights.

16. The undersigned further request reconsideration of the amount of mitigation to be credited under the *Mitigation Agreement* signed by the Coalition and the Idaho Dairymen's Association ("IDA"). Given NSCC's obligations under that agreement, clarification of the Director's approval of the same is needed for purposes of NSCC's water deliveries for the rest of the irrigation season. Currently, it is the understanding of the Coalition that the current number of cattle committed under the agreement provides approximately 4,000 acre feet of mitigation water for 2007. See *Petition for Reconsideration of Order Approving Dairymen's and IGWA's 2007 Replacement Water Plans* filed by IDA on July 19, 2007.

REQUEST FOR RELIEF

Therefore, the Coalition requests that the Director take into the account his own directives, prior orders, and statements to the parties, concerning the scope of the June 22, 2007 hearing, or consider the actual water supply, diversions and demands existing in 2007, the affidavits and technical memoranda supplied and that addressed the same, and, in either event, reconsider the *Sixth Supplemental Order* and increase the amount of material injury to have been suffered by the Coalition to actual levels as are currently being experienced by the Coalition; and, that reconsideration be made as otherwise requested herein.

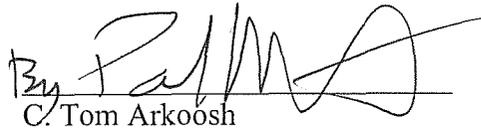
Respectfully submitted this 20th day of July, 2007.

ROBINSON & ASSOCIATES


By _____
Roger D. Ling

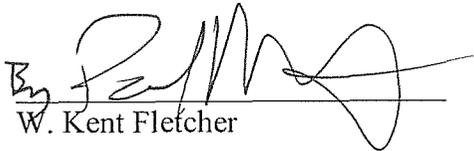
Attorneys for A & B Irrigation District
and Burley Irrigation District

ARKOOSH LAW OFFICES CHTD.


By _____
C. Tom Arkoosh

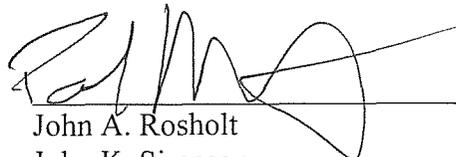
Attorneys for American Falls
Reservoir District #2

FLETCHER LAW OFFICES


By _____
W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP


By _____
John A. Rosholt

John K. Simpson
Travis L. Thompson
Paul L. Arrington

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

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2007, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S MOTION FOR RECONSIDERATION AND REVIEW OF SIXTH SUPPLEMENTAL ORDER AMENDING REPLACEMENT WATER REQUIREMENTS AND ORDER APPROVING IGWA'S 2007 REPLACEMENT WATER PLAN** on the following by the method indicated:

Via Email and U.S. Mail

Director David R. Tuthill, Jr.
Idaho Department of Water Resources
322 E. Front St.
Boise, Idaho 83720-0098
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

Randy Budge
Candice McHugh
Racine Olson
P.O. Box 1391
Pocatello, Idaho 83204-1391
rbc@racinelaw.net
cmm@racinelaw.net

Kathleen Marion Carr
U.S. Department of Interior
960 Broadway
Boise, Idaho 83706
kmariocarr@yahoo.com

James C. Tucker
Idaho Power Company
1221 West Idaho St.
Boise, Idaho 83702
jamestucker@idahopower.com

Jo Beeman
Beeman & Assoc.
409 W. Jefferson St.
Boise, Idaho 83702
jo.beeman@beemanlaw.com

James S. Lochhead
Adam T. DeVoe
Brownstein, Hyatt & Farber P.C.
410 17th St., 22nd Floor
Denver, Colorado 80202
jlochhead@bhf-law.com
adevoe@bhf-law.com

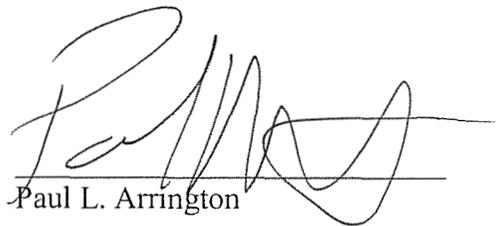
Michael Gilmore
Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010
mike.gilmore@ag.idaho.gov

Terry T. Uhling
J.R. Simplot Company
999 Main St.
Boise, Idaho 83702
tuhling@simplot.com

Mike Creamer
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701-2720
mcc@givenspursley.com

Matt Howard
USBR
1150 N. Curtis Rd.
Boise, Idaho 83706-1234
mhoward@pn.usbr.gov

Sarah Klahn
Amy Beatie
William Hillhouse II
White Jankowski
511 16th St., Suite 500
Denver, Colorado 80202
sarahk@white-jankowski.com



Paul L. Arrington