BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, AND 36-07427	)	**ORDER ON REQUESTS FOR HEARING, STAY, RECONSIDERATION, INDEPENDENT HEARING OFFICER, DISCOVERY, and PETITIONS FOR INTERVENTION (Blue Lakes Delivery Call)**

Background and Petitions

On May 19, 2005, responding to a letter dated March 22, 2005, from Gregory Kaslo of Blue Lakes Trout Farm, Inc. ("Blue Lakes"), in which Blue Lakes sought administration of water rights in Water District No. 130, the Director of the Department of Water Resources ("Director" or "Department") issued an order ("Order") in the above captioned matter. The Order was a final order of the Department. Because the Director issued the Order before an opportunity for hearing, the Order stated that "[a]ny person aggrieved by the Order shall be entitled to a hearing before the Director to contest the action pursuant to Idaho Code § 42-1701A(3)." *Order* at p. 31.

The Idaho Ground Water Appropriators, Inc. ("IGWA") filed a *Petition to Intervene* on May 25, 2005, and a *Petition for Reconsideration* on June 2. Also on June 2, the State Agency Ground Water Users ("SAGWU") filed a *Petition to Intervene* and a *Petition for Reconsideration, Hearing and Stay.* On June 3, 2005, Blue Lakes filed a *Petition Requesting: Hearing May 19, 2005 Order, Independent Hearing Officer and Discovery*, and the Idaho Power Company ("IPCO") filed a *Petition for Hearing and Request for Independent Hearing Officer.*[1] On June 6, 2005, the Director granted IGWA's Petition to Intervene. *Order Regarding IGWA's Petition to Intervene.* The Idaho Dairymen's Association ("IDA") filed a *Petition to Intervene* on June 8, 2005.

Request for Independent Hearing Officer

Citing Idaho Code § 42-1701A(2), Blue Lakes requests that the Director appoint an independent hearing officer to conduct the hearing in this proceeding.

[1] IPCO is denied party status in this matter based upon the findings, conclusions, and determinations contained in the Director's Order of July 22, 2005, 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* ("the Surface Water Coalition").

The grounds for Blue Lakes' request can be summarized as follows: (1) the Director cannot be unbiased in a proceeding where his own findings of fact, conclusions of law, and actions are contested; (2) the Director's extensive personal involvement in the development of the Order precludes his objective review; and (3) neither the Director nor employees of the Department possess the requisite independence necessary for the requested hearing.

The grounds relied upon by Blue Lakes as a basis for requesting appointment of an independent hearing officer imply that the hearing on the May 19 Order is for the purpose of providing an independent review of the Order issued by the Director. That is not the purpose of the hearing. Because the Director issued the Order before an opportunity for hearing, a hearing is now being provided pursuant to Idaho Code § 42-1701A(3). The hearing provides an opportunity for any party to demonstrate to the Director through the introduction of evidence and the presentation of legal argument why he should modify the Order before it is subjected to an independent review before the district court on a petition for judicial review.

Idaho Code § 42-1701A(2) provides that the appointment of an independent hearing officer is at the "discretion" of the Director. Based upon the reasons set forth below, the Director concludes that the request for appointment of an independent hearing officer should be denied.

Under Idaho Code § 42-602, the Director has the "direction and control of the distribution of water from all natural water sources within a water district." Idaho Code § 42-231 provides that the Director has the duty "to control the appropriation and use of the ground water of this state. . .." Since the delivery call involves ground water sources and sources of water within water districts, only the Director has the authority to grant the type of relief requested by Blue Lakes. Moreover, the appointment of an independent hearing officer would result in delay because such an officer could only draft a recommended order for ultimate review by the Director, which would then be subject to review or modification. Because of the uncertainty among holders of water rights regarding the conjunctive administration of surface and ground water sources, the delay associated with the appointment of an independent hearing officer would not serve the best interests of water users generally. Therefore, the Director denies the request to appoint an independent hearing officer.

Petitions to Intervene

The Idaho Dairymen's Association filed a timely *Petition to Intervene* on July 8, 2005. *See* IDAPA 37.01.01.352. The IDA sought intervention in accordance with Rules 200, 230, 300, 301, 350, and 352, IDAPA 37.01.01, of the Department's Rules of Procedure. Because more than seven days have passed since the IDA filed its Petition to Intervene, the Director may rule on the merits of the petition. IDAPA 37.01.01.354.

According to IDAPA 37.01.01.353,

> If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has

no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

IDA members hold ground water rights that are subject to curtailment in accordance with the Director's Order. Therefore, the IDA has a direct and substantial interest in the subject of the proceedings that may not be adequately represented by the present parties. Because the interests of the IDA will not unduly broaden the issues, the IDA is granted intervention the above captioned matter.

The Petition to Intervene filed by the State Agency Ground Water Users need not be addressed because SAGWU also filed a timely request for hearing in this matter pursuant to Idaho Code § 42-1701A(3) on June 2, 2005.

ORDER

Based upon review of the petitions, IT IS HEREBY ORDERED as follows:

1. The requests by Blue Lakes Trout Farm, Inc. and the State Agency Ground Water Users for a hearing regarding the Order are GRANTED. The request by the Idaho Power Company for a hearing is DENIED.

2. The request by Blue Lakes Trout Farm, Inc. for appointment of an independent hearing officer to preside over the hearing in this matter is DENIED.

3. The request by the Idaho Dairymen's Association for intervention in this matter is GRANTED.

4. All other requests for relief identified in this Order, including the requests for reconsideration, for a stay, and to conduct discovery, are subsumed by and will be addressed through the process of providing a hearing on the objections to the Order.

5. A status conference in this matter is scheduled for August 16, 2005, at 10 a.m. at the offices of the Idaho Department of Water Resources, Boise, Idaho. The details of the status conference are set forth in a separate *Notice of Status Conference* dated July 29, 2005.

DATED this 29th day of July 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 2005, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

JEFFREY C. FEREDAY MICHAEL C. CREAMER GIVENS PURSLEY PO BOX 2720 BOISE ID 83701-2720 (208) 388-1200 cf@givenspursley.com mcc@givenspursley.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
DANIEL V. STEENSON CHARLES L. HONSINGER RINGERT CLARK PO BOX 2773 BOISE ID 83701-2773 (208) 342-4657 dvs@ringertclark.com clh@ringertclark.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
GREGORY KASLO BLUE LAKES TROUT FARM PO BOX 1237 TWIN FALLS ID 83303-1237 (208) 733-0325 gkaslo@rmci.net	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
NORTH SNAKE GWD 152 EAST MAIN STREET JEROME ID 83338 (208) 388-1300	(x) U.S. Mail, Postage Prepaid ( ) Facsimile
MAGIC VALLEY GWD 809 EAST 1000 NORTH RUPERT ID 83350-9537	(x) U.S. Mail, Postage Prepaid ( ) Facsimile

MICHAEL GILMORE ATTORNEY GENERAL'S OFFCICE PO BOX 83720 BOISE ID 83720-0010 (208) 334-2830 mike.gilmore@ag.idaho.gov	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
SCOTT CAMPBELL MOFFATT THOMAS PO BOX 829 BOISE ID 83701 (208) 385-5384 slc@moffatt.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JAMES TUCKER IDAHO POWER CO 1221 W IDAHO ST BOISE ID 83702 jamestucker@idahopower.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JAMES LOCHHEAD ADAM DEVOE BROWNSTEIN HYATT 410 17TH ST 22ND FLOOR DENVER CO 80202 jlochhead@bhf-law.com adevoe@bhf-law.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
FRANK ERWIN WATERMASTER WATER DIST 36 2628 SOUTH 975 EAST HAGERMAN ID 83332	(x) U.S. Mail, Postage Prepaid ( ) Facsimile

ALLEN MERRITT
CINDY YENTER,
WATERMASTER - WD 130
IDWR – SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
(208) 736-3037
allen merrit@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources