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	)	**ORDER ON PETITIONS FOR RECONSIDERATION, CLARIFICATION, STAY, REQUEST FOR HEARING, AND REQUEST FOR INDEPENDENT HEARING OFFICER; and SETTING STATUS CONFERENCE**

Background and Petitions

On April 19, 2005, the Director of the Department of Water Resources ("Director" or "Department") issued an order in the above-entitled matter, which was amended on May 2, 2005 ("Amended Order"). The Amended Order was a final order of the Department. Because the Amended Order was issued before an opportunity for hearing, the Amended 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)." *Amended Order* at p. 31, ¶ 1.

Timely petitions were subsequently filed with the Department regarding the Amended Order by the following entities: Idaho Dairymen's Association, City of Pocatello, Idaho Ground Water Appropriators, J.R. Simplot Company, State Agency Ground Water Users,[1] United States Bureau of Reclamation, Idaho Power Company, and the Surface Water Coalition.[2]

The petitions included requests for reconsideration, a request for clarification, a request to conduct discovery, a request for a prehearing conference, requests for a hearing on objections to the Amended Order, requests to stay the Amended Order, and requests for the appointment of an independent hearing officer.

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[1] The State Agency Ground Water Users consists of the Idaho Department of Juvenile Corrections, the Idaho Department of Health & Welfare, the Idaho Department of Fish & Game, and the Idaho Transportation Department.

[2] The Surface Water Coalition consists 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.

Requests for Independent Hearing Officer

Citing Idaho Code § 42-1701A(2), the Surface Water Coalition ("Coalition") and the Idaho Power Company ("Idaho Power") request that the Director appoint an independent hearing officer to conduct the hearing in this proceeding.

The grounds for the Coalition and Idaho Power's requests can be summarized as follows: (1) the Director may be a fact witness because of his involvement in the reformulation and recalibration of the ESPA ground water model and use of the model in response to the Coalition's delivery call; (2) the Director should not preside over an action contesting his own order; (3) the Director's alleged reliance on conversation with extension agents in formulation of the Amended Order; and (4) the Director's participation in settlement discussions prior to the filing of the Coalition's delivery call.

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 requests for appointment of an independent hearing officer should be denied.[3]

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 the Coalition and Idaho Power. 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 great 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.

The Director's participation in the reformulation and recalibration of the ESPA ground water model and his use of the model in preparing the Amended Order does not make him a potential fact witness in the present proceeding. The ESPA ground water model was developed through a collaborative process involving the technical representative of the Coalition, Idaho Power, and technical representatives of other interveners. As such, presentation of evidence of how the ESPA ground water model was reformulated and recalibrated is possible through persons other than the Director. The practical effect of the Coalition and Idaho Power's arguments would be that the Director

[3] No party sought disqualification of the hearing officer under Idaho Code § 67-5252. Any request under Idaho Code § 67-5252 must be raised within fourteen days "after receipt of notice indicating that the person will preside at the contested case." Notice that the Director would preside over the contested case was served on February 14, 2005. Since more than fourteen days have expired since the notice was served that the Director would serve as the hearing officer, any request for disqualification without cause under Idaho Code § 67-5252 has been waived.

is precluded from ever serving as a hearing officer if he is involved in any way in the development of the tools used for administration of water rights.

Likewise, the assertion that the Director should appoint an independent hearing officer because model runs were performed under his direction as part of the preparation of the order is without merit. As part of the hearing, all parties will have an opportunity to have their experts review the model runs and to make any appropriate challenges to such runs.

An employee of the Department, not the Director, conducted all conversations with extension agents referenced by the Coalition and Idaho Power. This information represents appropriate fact gathering necessary for responding to the delivery calls. All such facts will be subject to challenge at the hearing and the employee involved in the gathering of such information can be called as a witness for purpose of cross-examination.

Finally, the assertion that the Director's participation in settlement discussions that occurred prior to the filing of this action provides grounds for appointment of a hearing officer is without foundation. Such discussions were under the auspice of the legislature. The Director has a duty to advise the legislature and his participation in such discussions were at the request of the legislature and the parties. Moreover, the settlement discussions were focused on physical solutions and did not involve the discussion of the legal strategies of the parties. Finally, immediately upon the filing of the delivery calls that are the subject of this proceeding, the Director recused himself from any further discussions. Thus, as a matter of fact, the Director has had no involvement in matters related to this proceeding. Therefore, the Director denies the request to appoint an independent hearing officer.

ORDER

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

1. The requests for a hearing regarding the Amended Order are GRANTED.

2. The requests for a stay of the Amended Order are DENIED.

3. The requests for appointment of an independent hearing officer to preside over the hearing in this matter are DENIED.

4. All other pending requests, including the requests for reconsideration, for clarification, to conduct discovery, and for a prehearing conference, are subsumed by and will be addressed through the process of providing a hearing on the objections to the Amended Order.

5. A status conference in this matter is scheduled for June 15, 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 and Scheduling Conference* dated June 3, 2005. To assist the parties with preparation for the hearing, copies of most of the documents relied upon by the Director in preparation of the Amended Order of May 2, 2005, are being served with the present Order. The documents are contained on a CD entitled *Partial Agency Record*[4] *of Documents and Ground Water Model Simulations Relied upon by the Director for the Amended Order of May 2, 2005, in the Matter of the Surface Water Coalition Delivery Call.* The compilation of additional documents relied upon will be provided at the status conference, or as soon thereafter as practicable.

DATED this 3rd day of June 2005.

KARL J. DREHER
Director

[4] The term "partial agency record" is used because under Idaho Code § 42-5249 a full record includes all pleadings and other documents that are ultimately produced through the hearing process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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