**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B, AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARMS) | ) | **ORDER ON REQUESTS FOR HEARING AND APPOINTMENT OF INDEPENDENT HEARING OFFICER; REQUEST FOR STAY; and REQUEST FOR INTERVENTION (Clear Springs Delivery Call)** |

## Background and Petition

On July 8, 2005, responding to two letters dated May 2, 2005, from Larry Cope of Clear Springs Foods, Inc. ("Clear Springs"), in which Clear Springs 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.

On July 19, 2005, the Idaho Ground Water Appropriators, Inc. ("IGWA") on behalf of its member ground water districts, filed its *Petition for Reconsideration of July 8, 2005 Order and Request for Stay (Clear Springs).*[1]

On July 25, 2005, Clear Springs filed its *Petition for Rehearing on the July 8, 2005 Order and Request for an Independent Hearing Officer* with the Department.

## Request for Independent Hearing Officer

The grounds for Clear Springs' 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 should not review his own decision in a contested case; (3) the Director's participation in settlement discussions prior to the filing of Clear Springs' delivery call; and (4) the Director's involvement in the reformulation and recalibration of the ESPA ground water model.

[1] On May 25, 2005, IGWA petitioned the Director to intervene in the above captioned matter. Because IGWA is an affected party to the Order and has requested a hearing on the Order pursuant to Idaho Code § 42-1701A(3), IGWA is entitled to party status. Therefore, IGWA's petition for intervention is moot.

The grounds relied upon by Clear Springs as a basis for requesting appointment of an independent hearing officer imply that the hearing on the July 8 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 requests 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 Clear Springs. 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.

The Director's participation in the reformulation and recalibration of the ESPA ground water model and his use of the model in preparing the 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 representatives of many groups. 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 Rangen's argument would be that the Director 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.

The assertion that the Director's participation in settlement discussions 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.

**Idaho Dairymen's Association Petition to Intervene**

On May 6, 2005, the Idaho Dairymen's Association ("IDA") filed a timely *Petition to Intervene* in the above captioned matter. *See* IDAPA 37.01.01.352. The IDA sought intervention in accordance with "IDAPA 37.01.01.2 Rules 200, 230, 300, 301, 350, and 352[.]" *Id.* at 2. 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.

## ORDER

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

1. The requests by Clear Springs Foods, Inc. and the Idaho Ground Water Appropriators, Inc. for a hearing regarding the Order is GRANTED.

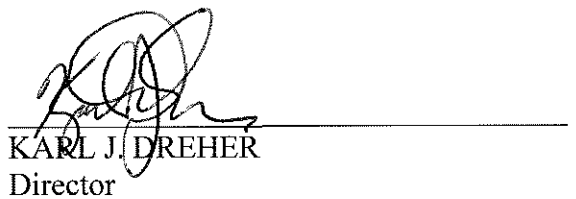
2. The request by Clear Springs Foods, Inc. for appointment of an independent hearing officer to preside over the hearing in this matter is DENIED.

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 request for reconsideration and stay, 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:

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