BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-15501, 36-02551, AND 36-07694	)	**ORDER ON REQUESTS FOR HEARING AND APPOINTMENT OF INDEPENDENT HEARING OFFICER (Rangen Delivery Call)**

Background and Petitions

On May 19, 2005, the Director of the Department of Water Resources ("Director" or "Department") issued his second amended order ("Order") in response to a call for delivery of water by Rangen, Inc. ("Rangen"). In the Order, the Director denied Rangen's delivery call.

On June 3, 2005, the Department received Rangen, Inc.'s Petition Requesting Hearing on Second Amended Order of May 19, 2005 and Requesting Appointment of an Independent Hearing Officer ("Petition"). 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. 30.

The United States Bureau of Reclamation filed a *Petition for Hearing* on June 24, 2005. On June 3, 2005, the Idaho Power Company ("IPCO") filed a *Petition for Hearing on May 19, 2005, Second Amended Order and Request for Independent Hearing Officer.*[1]

Request for Independent Hearing Officer

The grounds for Rangen's request can be summarized as follows: (1) the Director may be a fact witness; (2) the Director's involvement in the reformulation and recalibration of the ESPA ground water model and use of the model; and (3) the Director's participation in settlement discussions prior to the filing of Rangen's delivery call.

[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 relied upon by Rangen 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 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 Rangen. 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 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.

ORDER

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

1. The requests by Rangen, Inc. and the United States Bureau of Reclamation for a hearing regarding the Order are GRANTED. The request by the Idaho Power Company for a hearing is DENIED.

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

3. Any other requests for relief identified in this Order are subsumed by and will be addressed through the process of providing a hearing on the objections to the Order.

4. 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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