

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF)	
WATER TO WATER RIGHT NOS. 36-02551)	CM-DC-2011-004
AND 36-07694)	
)	
(RANGEN, INC.))	ORDER GRANTING
)	SWC'S PETITION FOR
)	LIMITED INTERVENTION
)	

Background

On July 24, 2012, 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 (collectively, the "Surface Water Coalition" or "SWC"), filed a *Petition for Limited Intervention* ("petition"), seeking an order granting intervention into the above-captioned proceedings pursuant to the Rules of Procedure 350 to 354 (IDAPA 37.01.01.350-354). The scope of intervention sought by the SWC is narrow. The SWC seeks to intervene in this proceeding for the limited purpose of addressing the application of the Eastern Snake Plain Aquifer Model 2.0 ("ESPAM 2.0"). The SWC argues that since 2005, the SWC has been involved in its own delivery call and that "[a]lthough the Director applied the prior version of the model in that call, any future conjunctive administration of Coalition water rights will utilize ESPAM 2.0." *Petition* at 2. SWC argues that decisions regarding the application of ESPAM 2.0 in this proceeding will likely become precedent for future conjunctive administration proceedings, including its own conjunctive administration proceeding. *Id.*

In response to the SWC's petition, the City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, Inc., ("IGWA") filed motions opposing the SWC's petition. These entities argue the SWC does not have a direct and substantial interest in any part of the subject matter of this proceeding. Rangen, Inc., ("Rangen") the party making the delivery call, filed a notice stating it does not oppose the SWC's request for limited intervention.

Standard for Intervention

Rule of Procedure 352 provides that to be considered timely, a petition to intervene must be:

filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice.

IDAPA 37.01.01.352.

However, that does not end the Director's consideration of this matter if the petition is found to be untimely. Rule of Procedure 352 also provides:

The presiding officer may deny or *conditionally grant* petitions to intervene that are not timely filed for failure to state good cause for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons. Intervenor who do not file timely petitions are bound by orders and notices earlier entered as a condition of granting the untimely petition.

IDAPA 37.01.01.352 (emphasis added).

The Director interprets this rule to allow for the conditional grant of a petition to intervene that is not timely filed so long as the intervenor shows a direct and substantial interest in any part of the subject matter of the proceeding and unless the applicant's interest is adequately represented by existing parties.

Application

The date set for the formal hearing in this matter is January 28, 2013. The date of the prehearing conference was January 19, 2012, although it has been subsequently continued to track the progress of ESPAM 2.0. *Order Continuing Prehearing Conference*, dated February 1, 2012. Since the SWC's petition was not submitted prior to January 19, 2012 (the earlier of the two dates), the SWC's petition is not timely. However, as discussed above, the Director may still conditionally grant an untimely petition for intervention so long as the intervenor shows a direct and substantial interest in any part of the subject matter of the proceeding and unless the applicant's interest is adequately represented by existing parties.

Direct and Substantial Interest

While the SWC is involved in a separate conjunctive administration call proceeding, commonly referred to as the Surface Water Coalition call, an earlier version of the ESPA model was used in that proceeding. ESPAM 2.0 is sufficiently different from the earlier version (ESPAM 1.1). New issues related to the application of the model will likely be raised in this proceeding. Specifically, as the SWC points out, the issue of a trim line and model uncertainty will likely arise. The Director agrees with the SWC that any future conjunctive administration calls will likely use ESPAM 2.0 and that these proceedings will likely become precedent for future proceedings. Given this, the Director finds that the SWC has direct and substantial interest in application of ESPAM 2.0 in this proceeding.

Pocatello and IGWA both point to the Department's *Order on Petitions to Intervene, and Denying Motion for Summary Judgment; Renewed Request for Information* (April 6, 2005) to support their argument that the Director should not grant the SWC intervention. In that order, the Director denied a petition to intervene filed by Idaho Power. Pocatello and IGWA analogize

the SWC to Idaho Power, arguing that the SWC does not have a direct and substantial interest in this proceeding. This matter is distinguishable from the previous proceeding involving Idaho Power, however. In that proceeding, Idaho Power sought full intervention into the proceeding, notwithstanding the fact that Idaho Power had no water rights that were subject to the proceeding and it had “other forms of relief available, such as the filing of a separate delivery call.” *Id.* at 2. Here, the SWC does not seek full intervention but seeks limited intervention with respect to the application of ESPAM 2.0. Additionally, unlike Idaho Power, the SWC has its own active delivery call and now seeks to participate in the first proceeding to apply ESPAM 2.0 because this proceeding will likely have an impact on how ESPAM 2.0 may be applied in its call proceeding. Given the differences, Pocatello’s and IGWA’s arguments on this issue are not persuasive.

Applicant’s Interest and Whether Adequately Represented by Existing Parties

The delivery call filed by Rangen asserts that diversion by junior ground water right holders is depleting flows in targeted, discrete springs named as sources of water by Rangen’s water rights that are located in a confined geographical area. In contrast, water rights held by the SWC authorize diversion of water from the Snake River. A myriad of springs emit from the ESPA into the Snake River from near Blackfoot, Idaho to Minidoka, Idaho. The discharge from these springs from near Blackfoot to Minidoka collect in the Snake River and are diverted from the Snake River by the SWC. At the Rangen hearing, simulations of ESPAM 2.0 modeling ground water/surface water interaction may fall in three broad evidentiary categories: (1) issues identically shared by Rangen and the SWC; (2) issues linked together by modeling principles but somewhat dissimilar in factual application; or (3) modeling and factual issues that are both dissimilar. It is difficult for the Director to determine where the lines of separation are for these three relational categories of issues. At least for those issues that are linked together in modeling principles but are somewhat dissimilar in fact and also for those issues that are identically shared, the Director should err on the side of ensuring that parties to delivery calls have an opportunity, for purposes of economy, to represent their interests when a matter of first impression is before the Department.

Conclusion

Because SWC’s petition to intervene is not timely, the granting of the petition is conditional. The SWC’s participation is limited to the presentation of evidence and examination of witnesses about the use of ESPAM 2.0 in conjunctive management. The Director may limit the SWC’s participation at the hearing if he determines that the SWC’s evidentiary presentation is duplicative or can adequately be raised by SWC in a subsequent proceeding.

The SWC must accept the existing schedule already established in this proceeding. The Director reserves the right to narrow or expand the scope of the SWC’s participation in the future.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The SWC's petition is CONDITIONALLY GRANTED. The SWC is designated an intervener in the proceeding for the limited purpose of addressing the application of ESPAM 2.0 in conjunctive administration.

Dated this 14th day of August, 2012.

A handwritten signature in black ink that reads "Gary Spackman". The signature is written in a cursive style and is positioned above a horizontal line.

Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of August, 2012, the above and foregoing document was served on the following by providing a copy of the **Order Granting SWC's Petition for Limited Intervention** in the manner selected:

J JUSTIN MAY
MAY BROWNING & MAY PLLC
1419 W WASHINGTON
BOISE ID 83702-5039
jmay@maybrowning.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

ROBYN BRODY
BRODY LAW OFFICE PLLC
PO BOX 554
RUPERT ID 83350-0554
robynbrody@hotmail.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

FRITZ X HAEMMERLE
HAEMMERLE HAEMMERLE
PO BOX 1800
HAILEY ID 83333-1800
fxh@haemlaw.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

RANDY BUDGE
CANDICE MCHUGH
T J BUDGE
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

SARAH KLAHN
MITRA PEMBERTON
J RYLAND HUTCHINS
WHITE & JANKOWSKI
511 16TH ST STE 500
DENVER CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com
RylandH@white-jankowski.com

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

A DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205
dtranmer@pocatello.us

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

JOHN K SIMPSON
TRAVIS L THOMPSON
PAUL L ARRINGTON
BARKER ROSHOLT & SIMPSON LLP
195 RIVER VISTA PL STE 204
TWIN FALLS ID 83301-3029
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

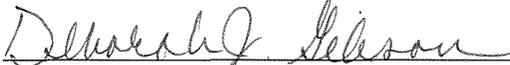
U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

W KENT FLETCHER,
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318
wkf@pmt.org

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail

C THOMAS ARKOOSH
CAPITOL LAW GROUP PLLC
PO BOX 32
GOODING ID 83330-0032
tarkoosh@capitollawgroup.net

U.S. Mail, Postage Prepaid
 Facsimile
 E-mail


Deborah J. Gibson
Administrative Assistant to the Director