



## **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.<sup>3</sup>

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

---

<sup>3</sup> 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<sup>4</sup> 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 3<sup>rd</sup> day of June 2005.

  
\_\_\_\_\_  
KARL J. DREHER  
Director

---

<sup>4</sup> 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 3<sup>rd</sup> day of June, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

TOM C. ARKOOSH  
ARKOOSH LAW OFFICES  
PO BOX 32  
GOODING ID 83330  
(208) 934-8873  
[alo@cableone.net](mailto:alo@cableone.net)

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

W. KENT FLETCHER  
FLETCHER LAW OFFICE  
PO BOX 248  
BURLEY ID 83318-0248  
(208) 878-2548  
[wkf@pmt.org](mailto:wkf@pmt.org)

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

ROGER D. LING  
LING ROBINSON  
PO BOX 396  
RUPERT ID 83350-0396  
(208) 436-6804  
[lnrlaw@pmt.org](mailto:lnrlaw@pmt.org)

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

JOHN A. ROSHOLT  
TRAVIS L. THOMPSON  
BARKER ROSHOLT  
113 MAIN AVENUE WEST, SUITE 303  
TWIN FALLS ID 83301-6167  
(208) 735-2444  
[jar@idahowaters.com](mailto:jar@idahowaters.com)  
[tlt@idahowaters.com](mailto:tlt@idahowaters.com)

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

JOHN K. SIMPSON  
BARKER ROSHOLT  
PO BOX 2139  
BOISE ID 83701-2139  
(208) 344-6034  
[jks@idahowaters.com](mailto:jks@idahowaters.com)

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

JEFFREY C. FEREDAY  
MICHAEL C. CREAMER  
GIVENS PURSLEY  
PO BOX 2720  
BOISE ID 83701-2720  
(208) 388-1200  
[cf@givenspursley.com](mailto:cf@givenspursley.com)  
[mcc@givenspursley.com](mailto:mcc@givenspursley.com)

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

SCOTT L. CAMPBELL  
MOFFATT THOMAS  
PO BOX 829  
BOISE ID 83701  
(208) 385-5384  
[slc@moffatt.com](mailto:slc@moffatt.com)

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

KATHLEEN M. CARR  
OFFICE OF THE FIELD SOLICITOR  
550 WEST FORT STREET MSC 020  
BOISE ID 83724  
(208) 334-1378

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

GAIL MCGARRY PN-3100  
US BUREAU OF RECLAMATION  
1140 NORTH CURTIS ROAD  
BOISE ID 83706-1234  
(208) 378-5066  
[emcgarry@pn.usbr.gov](mailto:emcgarry@pn.usbr.gov)

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

JOSEPHINE P. BEEMAN  
BEEMAN & ASSOCIATES  
409 WEST JEFFERSON STREET  
BOISE ID 83702  
(208) 331-0954  
[jo.beeman@beemanlaw.com](mailto:jo.beeman@beemanlaw.com)

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

SARAH A. KLAHN  
WHITE & JANKOWSKI  
511 16TH STREET, SUITE 500  
DENVER CO 80202  
[sarahk@white-jankowski.com](mailto:sarahk@white-jankowski.com)

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

MICHAEL S. GILMORE  
ATTORNEY GENERAL'S OFFICE  
PO BOX 83720  
BOISE ID 83720-0010  
(208) 334-2830  
[mike.gilmore@ag.idaho.gov](mailto:mike.gilmore@ag.idaho.gov)

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

TERRY T. UHLING  
J.R. SIMPLOT COMPANY  
999 MAIN STREET  
BOISE ID 83702  
(208) 336-2110  
[tuhling@simplot.com](mailto:tuhling@simplot.com)

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

JAMES C. TUCKER  
IDAHO POWER COMPANY  
1221 WEST IDAHO STREET  
BOISE ID 83702  
(208) 388-2112  
[jamestucker@idahopower.com](mailto:jamestucker@idahopower.com)

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

JAMES S. LOCHHEAD  
BROWNSTEIN HYATT & FARBER  
410 17TH STREET, 22ND FLOOR  
DENVER CO 80202  
(303) 223-1100  
[jlochhead@bhf-law.com](mailto:jlochhead@bhf-law.com)

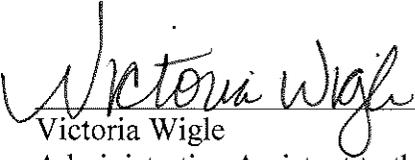
U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

RON CARLSON  
LEWIS ROUNDS  
IDWR  
900 NORTH SKYLINE DRIVE  
IDAHO FALLS ID 83402-6105  
(208) 525-7177  
[ron.carlson@idwr.idaho.gov](mailto:ron.carlson@idwr.idaho.gov)  
[lewis.rounds@idwr.idaho.gov](mailto:lewis.rounds@idwr.idaho.gov)

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

ALLEN MERRITT  
CINDY YENTER  
IDWR  
1341 FILLMORE STREET, SUITE 200  
TWIN FALLS ID 83301-3033  
(208) 736-3037  
[allen.merritt@idwr.idaho.gov](mailto:allen.merritt@idwr.idaho.gov)  
[cindy.yenter@idwr.idaho.gov](mailto:cindy.yenter@idwr.idaho.gov)

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

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