

Jerry R. Rigby, ISBN 2470
RIGBY, ANDRUS & RIGBY LAW, PLLC
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440
Telephone: 208-356-3633
jrigby@rex-law.com

RECEIVED
NOV 18 2019
DEPARTMENT OF
WATER RESOURCES

Attorneys for Fremont Madison Irrigation District, Madison Ground Water District and Idaho Irrigation District

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

	)	Docket No. AA-GWMA-2016-001
)	
IN THE MATTER DESIGNATING THE	)	FREMONT MADISON
EASTERN SNAKE PLAIN AQUIFER GROUND	)	IRRIGATION DISTRICT,
WATER MANAGEMENT AREA	)	MADISON GROUND WATER
	)	DISTRICT AND IDAHO
	)	IRRIGATION DISTRICT'S
	)	RESPONSE IN OPPOSITION TO
	)	SURFACE WATER COALITION'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT I.R.C.P. 56(c) &
	)	56(b)(2)
)	
)	

COMES NOW, Fremont Madison Irrigation District, Madison Ground Water District and Idaho Irrigation District (collectively hereinafter referred to as "UV"), acting for and on behalf of their members, by and through undersigned counsel, and pursuant to I.R.C.P. 56(b)(2) and 56(c), submit this Memorandum in Response and Opposition to the Surface Water Coalition's Motion for Summary Judgment.

UV'S RESPONSE IN OPPOSITION TO SURFACE WATER COALITION'S MOTION FOR SUMMARY JUDGMENT- Page 1

**I. RELEVANT LEGAL ISSUES AND MOTION PRACTICE
AS DETERMINED BY THE DEPARTMENT.**

Pursuant to the Idaho Department of Water Resource's ("Department") *Deadline for IDWR'S Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery*, dated September 25, 2019 ("Pre-Hearing Order"), the Department has determined that the relevant remaining legal issues in the above-entitled matter are as follows:

- 1. Whether the ESPA GWMA Final Order was procedurally deficient.**
- 2. Whether the Director should have conducted rulemaking.**
- 3. Whether the Director should have designated the ESPA GWMA in a contested case.**
- 4. Whether Adjudication and the formation of ground water districts in the ESPA forecloses the designation of a GWMA.**

Furthermore, the Director's Pre-Hearing Order set a Scheduling Order For Motion Practice on Legal Issues requiring all parties to file their "motions and/or briefing related to the remaining issues requiring legal argument" as to the remaining legal issues on or before October 21, 2019. Pursuant to said Scheduling Order, on October 21, 2019, UV filed its *Fremont Madison Irrigation District, Madison Irrigation District, Madison Ground Water District and Idaho Irrigation District's Memorandum & Written Argument as to Remaining Issues Requiring Legal Argument* ("UV Argument"). At the same time, SWC filed its *Surface Water Coalition's Motion For Summary Judgment and Supporting Points/Authorities Re: Legal Issues* (hereinafter

“SWC Motion”).

II. STANDARD OF REVIEW

Rule 56(a) of the Idaho Rules of Civil Procedure provides that summary judgment shall be granted only if the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c))

The Department, in its Pre-Hearing Order determined that the four remaining issues described above are legal in nature and that they are to be decided without any further factual evidence. Therefore, SWC can only prevail if the facts are present within the above-entitled matter AND the law would entitle them to be granted Summary Judgment on the matter.

In making this determination, the Department should liberally construe the record in favor of UV who are opposing the motion and draw all reasonable inferences and conclusions in UV’s favor. *Smith*, 128 Idaho at 718, 918 P.2d at 587 (citing *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994)). Based on the evidence and the law, SWC’s motion should be denied.

It is important to note that also pursuant to the Pre-Hearing Order, there is only one remaining factual issue to be heard on February 18-21, 2019, and because there has been no formal discovery, evidence or arguments submitted by any of the parties as to the remaining factual issue at this time, the issue should survive the legal arguments presently being lodged with the Department.

III. ARGUMENT

For all of the arguments set forth in the UV Argument, dated and filed with IDWR on October 21, 2019, SWC's Motion should be denied. The UV Argument sets forth their defenses and legal arguments which address most of the arguments set forth in SWC's Motion. Therefore, the UV Argument is incorporated herein by reference.

An additional previously un-alleged argument has now been made by SWC. Section IV of SWC's Motion asserts that the "Upper Valley Users Cannot Request Affirmative Relief under Rule 351" see SWC's Motion, page 10. UV actually filed its Petition to Intervene in Docket No. AA-GWMA-2016-001 on March 22, 2017, within the deadline for filing such interventions by the Department (hereinafter "UV Petition"). Among other stated positions, Paragraph 3 of UV Petition states: "FMID, MGWD and IID seek to intervene to advance legal argument related to the issue raised in the Petitions and the ESPA GWMA Order" thus intending to advance the Sun Valley's positions in its Petition.

In his *Order Granting Petition to Intervene*, dated April 6, 2017 (hereinafter "Petition Order"), the Director determined that Rule of Procedures 353 was met by FMID, MGWD and IID, that they "have a direct and substantial interest in this matter and will not unduly broaden the issues. . . are not adequately represented by exiting parties." Petition Order, Page 2. Therefore, the Director "ORDERED that the petition to intervene filed by Fremont Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District is GRANTED." Petition Order, Page 2.

It is important to note that the Director further stated that "The Department received no

objection to the Petition.” Petition Order, Page 2. Pursuant to IDAPA Rule 354, it sets forth the right and procedure for anyone objecting to a petition to intervene:

No order granting a petition to intervene will be acted upon fewer than seven (7) days after its filing, except in a hearing in which any party may be heard. Any party opposing a petition to intervene by motion must file the motion within seven (7) days after receipt of the petition to intervene and serve the motion upon all parties of record and upon the person petitioning to intervene.

Notwithstanding Rule 354, no one, including SWC, objected to UV’s Petition.

Furthermore, as a result of several pre-hearing conferences where the Director and the various parties addressed how to proceed in such a unique case where the original Petitioner withdrew, the Director then filed his *Order Establishing Briefing Deadlines*, dated April 24, 2017, as to whether he should proceed to hold a hearing on the ESPA GWMA Order. Based upon that Order, the parties filed their various briefings which established their positions in the matter. UV filed their *Memorandum Supporting the Need to Proceed to Hold a Hearing on the ESPA GWMA ORDER*, dated and filed on May 4, 2017 (hereinafter “May 4th Memorandum”). Within their May 4th Memorandum, UV clearly set forth their previously known opposition and their desired outcome that there should be NO GWMA designation as well as their reasons for their opposition. Again, no party, including SWC, filed any opposition to UV’s participation based upon the current arguments in SWC’s Motion.

Finally, in its *Joint Submission of Statement of Issues* dated and filed on August 1, 2019, pursuant to the Director’s *Order Adopting Deadlines; Notice of Additional Prehearing Conference*, dated July 18, 2019, UV joined in addressing all of the issues which it “believes the Director should address at hearing in this contested case.” Again, no party, including SWC, filed

opposition to UV's participation for reasons argued in SWC's Motion.

Therefore, because SWC (and for that matter, the Department or any other party) failed to file or express any opposition to FMID, MGWD & IID's (UV) petition to intervene within the seven days of receipt of the Director's Order Granting UV's 2017 intervention; and because all parties have continued to fail to object to UV's participation based upon Rule 351; and because UV's clearly stated positions and opposition to the GWMA Order through their filings as well as many status conferences, then all parties have waived their right to object to UV's participation in this matter and its continued opposition to the GWMA Order.

For the forgoing reasons, the Director should deny SWC's Motion and vacate his *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Plan*.

Dated this 18TH day of November, 2019.

RIGBY, ANDRUS & RIGBY LAW, PLLC

By:

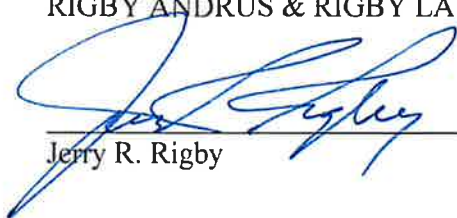

Jerry R. Rigby, Esq.

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 18th day of November, 2019.

RIGBY ANDRUS & RIGBY LAW, PLLC



Jerry R. Rigby

Director, Gary Spackman
Garrick Baxter
Kimberle English
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Rosemary.DeMond@idwr.idaho.gov
Kimberle.English@idwr.idaho.gov
Garrick.Baxter@IDWR.idaho.gov

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

Dylan B. Lawrence
J. Will Varin
Varin Ward Well, LLC
P.O. Box 1676
Boise, ID 83701-1676
dylanlawrence@varinwardwell.com
willvarin@varinwardwell.com

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

Randall C. Budge
TJ Budge
P.O. Box 1391
Pocatello, ID 83204
tjb@racinelaw.net
rcb@racinelaw.net

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

**UV'S RESPONSE IN OPPOSITION TO SURFACE WATER COALITION'S MOTION
FOR SUMMARY JUDGMENT- Page 7**

sb/fmidgwma.res.wpd

Sarah Klahn
Somach, Simmons & Dunn
2033 11th St., Ste. 5
Boulder, CO 80302
sklahn@somachlaw.com
dthompson@somachlaw.com

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

John K. Simpson
Travis L. Thompson
Albert P. Barker
Barker, Rosholt & Simpson, LLP
195 River Vista Place, Ste. 204
Twin Falls, ID 83301
tlt@idahowaters.com
jks@idahowaters.com
jf@idahowaters.com
apb@idahowaters.com

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, ID 83318
wkf@pmt.org

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

Joseph F. James
125 5th Ave. West
Gooding, ID 83330
joe@jamesmvlaw.com

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

Candice McHugh
Chris M. Bromley
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

Michael C. Creamer
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83701-2720
mcc@givenspursley.com

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

Robert L. Harris
Holden Kidwell
P.O. Box 50130
Idaho Falls, ID 83405
rharris@holdenlegal.com
arawlings@holdenlegal.com

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

Robert E. Williams
Williams, Merservy & Lothspeich, LLP
153 E. Main St.
P.O. Box 168
Jerome, ID 83338
rewilliams@wmlattys.com

Mail
 Hand Delivery
 Facsimile
 Electronic Mail

Kirk Bybee
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
kibybee@pocatello.us

Mail
 Hand Delivery
 Facsimile
 Electronic Mail