

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

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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
	)	MEMORANDUM IN REPLY TO
	)	SWC AND CLEAR SPRINGS
	)	FOOD'S JOINT RESPONSE IN
	)	OPPOSITION TO BASIN 33
	)	WATER USERS' MOTION FOR
	)	SUMMARY JUDGMENT/ UV
_____	)	MEMORANDUM

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 submit this Memorandum in Reply to SWC and Clear Springs Food's (collectively hereinafter referred to as "Joint Coalition") *Joint*

**UV'S REPLY TO SWC & CLEAR SPRINGS OPPOSITION TO BASIN 33 SJ MOTION /
UV MEMORANDUM - Page 1**

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Response in Opposition to Basin 33 Water Users' Motion for Summary Judgment / Upper Valley Water Users Memorandum.

ARGUMENT

Initially, the Joint Coalition have spent a great deal of their briefing arguing that Basin 33 Users and UV have not alleged prejudice or have not filed a formal motion requesting affirmative relief and therefore, “there is no basis for this contested case and they cannot be granted judgment as a matter of law.” Joint Coalition’s *Joint Response in Opposition to Basin 33 Water Users' Motion for Summary Judgment / Upper Valley Water Users Memorandum*, page 23. However, as addressed in UV’s *Response in Opposition to Surface Water Coalition’s Motion for Summary Judgment*, Page 4, the UV addressed the numerous filings and arguments which confirms that pursuant to IDWR’s “Scheduling Order for Motion Practice on Legal Issues”, *Deadline for IDWR’s Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery*, (hereinafter “Deadline Order”) page 2, the Director allowed for “motions **and/or** briefing related the remaining issues” (emphasis added). The remaining legal issues resulted from the originally filed *Sun Valley Company’s amended Petition for Reconsideration of Final Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, filed on November 23, 2016, wherein Sun Valley Petitioned just that. In other words, the Department should “reconsider” its Order designating the GWMA (hereinafter “GWMA Order”). This is what the matter is about and this is what the UV, Basin 33 and now even IGWA and Pocatello are all arguing. The motions and briefings of those opposing

the current GWMA Order and their various reasons and arguments are set forth in their respective motions and briefings.

Because Sun Valley withdrew from this matter before the Department, UV's initial memorandum was intended to insure and preserve Sun Valley's initial Petition and its arguments that the GWMA Order should be withdrawn; which then resulted in the Director's Deadline Order of the "four (4) issues represent the scope of legal issues remaining in this matter". Sun Valley's Petition and Arguments are and were fully supported by UV and were incorporated into UV's Petition to Intervene supporting UV's past and present position that the GWMA Order should be fully withdrawn. From UV's *Memorandum Supporting the Need to Proceed to Hold a Hearing on the ESPA GWMA Order*, filed on May 4, 2017 to their counsel and Basin 33's counsel's oral arguments made in the Pre-Hearing on July 11, 2019 and to UV's & Basin 33's memorandums and Motions filed pursuant to the Deadline Order, where there was no argument or finding that the aquifer in the upper basin was reaching a critical ground water designation as required by I.C. 42-233(b), then the GWMA Order of "one size fits all" approach would impair and unduly impact UV's water rights. It has always been UV's position that I.C. 42-233(b) was never intended (as evidenced by its past use) to cover such a large area as the ESPA. A "one size fits all" resulting from the present GWMA Order contradicts previous holdings that the natural barriers contained in the aquifer (such as the "great rift" and the "mud lake barrier") cause impacts to be more regional than treating the entire ESPA as one large homogeneous tub.

Furthermore, UV fully support the various parties who have taken the position that the Director did not issue the GWMA Order in compliance with Idaho law. One of the main

contentions deals with whether the Director was required to comply with Conjunctive Management Rules when he designated the GWMA Order. UV fully support and incorporate herein the arguments as to the authority to be given to the Conjunctive Management Rules made by Basin 33 Water Users in its *Basin 33 Water Users' Response to Coalition's Motion for Summary Judgment*. The Joint Coalition have virtually argued that the rules means nothing when the Director designates a GWMA under I.C. 42-233(b). However, as adequately briefed by those who oppose this argument, it is clear that once a statute is enacted which requires a process to implement the procedure required by the statute, promulgating rules to create the methodology in which to fully implement the statute is not only common but is virtually required in matters as presented here. I.C. 42-233(b) has no direction or implementation provisions within its brief provisions, except that it is clearly intended to be implemented only when there is evidence that the “ground water basin or designated part thereof . . . may be approaching the conditions of a critical ground water area”. Because there is no evidence that the ENTIRE ESPA basin may be approaching a critical ground water designation, to include the entire ESPA within the GWMA Order goes beyond the rights granted even within the statute itself. Therefore, the statute truly requires a promulgation of rules in order to fully protect the rights of individual water users within the basin who impact the aquifer and therefore senior water right holders in different ways and in different areas. Furthermore, based upon the Joint Coalition’s line of argument that no rules can limit the implementation of the statute, then one must go back to the constitution of the State of Idaho wherein the fundamental constitutional principle and right is that “first in time is first in right”. The CM Rules are, in part, a protection of this constitutional principle and right,

which cannot be ignored or pre-empted by a statute such as 42-233(b) without the added precautions clearly address by the CM Rules. There really is no contradiction between the Statute and the CM Rules, only sideboards.

In addition, on pages 14 and 15, the Joint Coalition quote I.C. 42-231 for the proposition that the director has an independent duty “to protect the people of the state from the depletion of ground water resources” regardless of whether senior appropriators are suffering material injury. This is antithetical to the fundamental premise of the prior appropriation doctrine that water resources should be dedicated to beneficial use, and that the director’s duty is to distribute water among those *using* water based on priority.

The Joint Coalition would have IDWR believe that even though the rules contemplated the administrative procedures to be followed when designating GWMA as provided by Sec. 42-233(b) (see IDAPA 37.03.11.020.06), those rules can be totally ignored by the Director just because the statute does not specifically authorize rules which would provide the administrative procedures to conform to the statute. Under this analysis, all statutes in the Idaho Code which do not specifically call for rules to be promulgated in order to implement such statutes, should also be ignored. That clearly is not what is intended by these statutes and is especially true and specifically applicable to this statute which is woefully vague as to how it is to be designated, implemented and administrated.

The CM Rules mean something and were promulgated for use by the Department. Even if the Director disagrees with the very rules promulgated for the Department, he should at least be required to go through the required rulemaking in order to modify or delete the limitations set

forth therein. In other words, because the rules clearly limit the designation of the GWMA to pre-adjudication rights, then this limitation must be removed before a post-adjudication designation of the GWMA can be made by the Department.


The Joint Coalition's argument that the CM Rules only apply in a delivery call and therefore not applicable to the matter before the Department is disingenuous. The designation of the GWMA Order is fully based upon and is a result of the settlement of the various and numerous "calls" made by the Joint Coalition and others over the past decades. It is clearly an attempt by the Joint Coalition, should they believe they are being injured, to push their right and obligation to make their "calls" on to the Department. In fact, their various settlements to their "calls" have required those to whom "calls" have been made, to support a GWMA designation. It is all interconnected.

CONCLUSION

Based upon the forgoing arguments as well as those cited from others opposing the GWMA Order, UV fully supports those opposing the GWMA Order and moves the original Sun Valley Petition that the Department/Director should reconsider and vacate the designation of its GWMA Order.

Dated this 2nd day of December, 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 2nd day of December, 2019.

RIGBY ANDRUS & RIGBY LAW, PLLC


Jerry R. Rigby

Director, Gary Spackman
Garrick Baxter
Kimberle English
Sean Costello
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
sean.costello@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 REPLY TO SWC & CLEAR SPRINGS OPPOSITION TO BASIN 33 SJ MOTION /
UV MEMORANDUM - Page 7**

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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
tltp@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

