

District Court - SRBA
 Fifth Judicial District
 In Re: Administrative Appeals
 County of Twin Falls - State of Idaho

SEP 10 2020

By _____ Clerk
 _____ Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNT OF ADA

BASIN 33 WATER USERS, a coalition of water right holders, and the UPPER VALLEY WATER USERS, a coalition of water right holders,

Petitioners,

vs.

SURFACE WATER COALITION, a coalition of water right holders,

Cross Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

and

CITIES OF BLISS, BURLEY, CAREY, DECLO, DIETRICH, GOODING, HAZELTON, HEYBURN, JEROME, PAUL, RICHFIELD, RUPERT, SHOSHONE, AND WENDELL; SOUTH VALLEY GROUND WATER DISTRICT, IDAHO GROUND WATER APPROPRIATORS, INC.; IDAHO POWER COMPANY; CLEAR SPRINGS FOODS, LLC; CITY OF POCA TELLO, and SNAKE RIVER STORAGE,

Intervenors.

Case No. CV01-20-8069

INTERVENOR SNAKE RIVER STORAGE'S RESPONSE TO PETITIONERS' BRIEF

IN THE MATTER OF DESIGNATING THE
EASTERN SNAKE PLAIN AQUIFER
GROUND WATER MANAGEMENT AREA

**INTERVENOR SNAKE RIVER STORAGE'S RESPONSE
TO PETITIONERS' BRIEF**

Judicial Review of the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (dated November 2, 2016),
entered by the Idaho Department of Water Resources;
Hearing Officer Director Gary Spackman, Director, Presiding.

Norman M. Semanko, ISB #4761
PARSONS BEHLE & LATIMER
800 West Main Street, Suite 1300
Boise, Idaho 83702
Telephone: 208.562.4900
Facsimile: 208.562.4901
Email: NSemanko@parsonsbehle.com
Attorneys for Intervenor Snake River Storage

Robert L. Harris (ISB No. 7018)
D. Andrew Rawlings (ISB No. 9569)
**HOLDEN, KIDWELL,
HAHN & CRAPO, P.L.L.C.**
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID
83405
Telephone: (208)523-0620
Facsimile: (208) 523-9518
Email: rharris@holdenlegal.com
arawlings@holdenlegal.com
Attorneys for Petitioner Basin 33 Water Users

Garrick L. Baxter, ISB #6301
**IDAHO OFFICE OF THE
ATTORNEY GENERAL**
322 East Front Street
Boise, ID 83702-7374
Telephone: (208) 287-4800
Facsimile: (208) 208-6700
Email: garrick.baxter@idwr.idaho.gov
Attorneys for Respondent Idaho Department of Water Resources

Jerry R. Rigby (ISB No. 2470)
RIGBY, ANDRUS & RIGBY LAW, PLLC
25 North Second East
P.O. Box 250 Rexburg, Idaho 83440
Telephone: (208) 356-3633
Facsimile: (208) 356-0768
Email: jrigby@rex-law.com
Attorneys for Fremont Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P. O. Box 248
Burley, ID 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548
Email: wkf@pmt.org
*Attorneys for American Falls Reservoir
District #2 and Minidoka Irrigation Dist.*

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
163 2nd Avenue West Twin Falls, ID 83301
Telephone: (208) 733-0700
Facsimile: (208) 735-2444
Email: jks@idahowaters.com
*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

TABLE OF CONTENTS

I. ARGUMENT1
II. CONCLUSION3

TABLE OF AUTHORITIES

Statutes

I.C. Sec. 42-233b.....1, 2

Rules

I.R.C.P 84(p) 1

Regulations

IDAPA 37.03.11 1

IDAPA 37.03.11.020.06.....2

IDAPA 37.03.11.030.053

IDAPA 37.03.11.050.01(d).....2, 3

COMES NOW Intervenor Snake River Storage (“SRS”), by and through its undersigned counsel, Parsons Behle & Latimer, pursuant to the Court’s *Order Granting Motion to Modify Briefing Schedule* (September 2, 2020) and I.R.C.P 84(p), and hereby submits its response to Petitioners’ Brief, which was filed in the above-entitled matter on the 13th day of August, 2020 (“*Petitioners’ Brief*”).

I. ARGUMENT

After reviewing the *Petitioners’ Brief*, the applicable authorities, and the record in this matter, it is apparent that the Eastern Snake Plain Aquifer (“ESPA”) Ground Water Management Area (“GWMA”) was designated without following the procedures required by law. This is of particular concern to SRS because of the unknown differences in water rights administration that are likely to be imposed through, or otherwise result from, the Director’s planned adoption of a ground water management plan for the area, pursuant to Idaho Code Section 42-233b.¹

While the parameters of administration on the ESPA are relatively well-known under the Conjunctive Management Rules² – and the existing settlement agreement³ – SRS and others are

¹ “When a ground water management area is designated . . . the director may approve a ground water management plan for the area.” I.C. Sec. 42-233b. The Director’s *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (Nov. 2, 2016) (“*Director’s Order*”) indicates that such a plan will be developed and adopted through a separate order.

² IDAPA 37.03.11, Rules for Conjunctive Management of Surface and Ground Water Resources.

³ Settlement Agreement Entered Into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc. (“*SWC-IGWA Settlement Agreement*”), available at <https://idwr.idaho.gov/files/legal/swc-igwa-settlement/SWC-IGWA-Settlement-20150630-SWC-IGWA-Settlement-Agreement.pdf>.

left guessing as to what additional reduction demands and/or private recharge obligations may ultimately result from the management plan.⁴ “[T]his significant change in water right administration” (*Petitioners’ Brief* at 16) threatens to impact SRS, which facilitates private recharge activities on the ESPA, by and for the benefit of its members, pursuant to the current *SWC-IGWA Settlement Agreement* obligations.⁵

As noted by the Petitioners, the Conjunctive Management Rules “provide the procedures that will be followed . . . in designating such areas as ground water management areas as provided in Section 42-233b, Idaho Code.” IDAPA 37.03.11.020.06; *Petitioners’ Brief* at 19. The Director did not follow the Rules in designating the ESPA GWMA. *Petitioner’s Brief* at 20.

⁴ The current obligations relating to consumptive use volume reductions and private recharge activities are set forth in the *SWC-IGWA Settlement Agreement (2015)* as follows:

3. Long Term Practices, Commencing 2016.

a. Consumptive Use Volume Reduction.

i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.

ii. Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.

SWC-IGWA Settlement Agreement at 2.

⁵ The “safe harbor” provision included in the settlement agreement provides: “No ground water user participating in this Settlement Agreement will be subject to a delivery call by the SWC members as long as the provisions of the Settlement Agreement are being implemented.” *SWC-IGWA Settlement Agreement* at 5. It does not, however, provide any assurances against additional obligations created by a GWMA designation or management plan.

The Rules prescribe the water management regime on the ESPA following completion of the Snake River Basin Adjudication ("SRBA"). IDAPA 37.03.11.050.01(d); *Petitioner's Brief* at 21. Once the SRBA was completed, administration was to be pursuant to water districts – not a ground water management area. IDAPA 37.03.11.030.05; *Petitioner's Brief* at 28. The *Director's Order* is plainly contrary to these rules. The order designates a ground water management area where water rights have been adjudicated and placed in water districts.

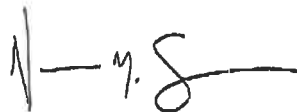
SRS agrees that the "duplicative administration regimes" resulting from designation of the ESPA GWMA "will only confuse the administration of water rights in the ESPA" and "would be an unnecessarily and perhaps conflicting layer of administration." *Petitioner's Brief* at 32–33. This speaks to the utility of the Conjunctive Management Rules' prescription that areas such as the ESPA – where water rights have been adjudicated – be administered by water districts, not through designation of a GWMA. That is the law, as set forth in the Rules, which were duly adopted by the Department and approved by the Idaho State Legislature. The Director's designation of the ESPA GWMA is plainly contrary to the Rules and must therefore be set aside.

II. CONCLUSION

For the foregoing reasons, SRS requests that the *Director's Order* creating the ESPA GWMA be set aside.

DATED this 10th day of September, 2020.

PARSONS BEHLE & LATIMER



By: _____
Norman M. Semanko
Attorneys for Intervenor Snake River Storage

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2020, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service as indicated.

Robert E. Williams
 WILLIAMS, MESERVY &
 LOTHSPREICH, LLP
 P.O. Box 168
 Jerome, ID 83338-0168
 153 E. Main Street
 Jerome, ID 83338
 Fax: (208) 324-3135
 Email: rewilliams@wmlattvs.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Chris M. Bromley
 Candice M. McHugh
 MCHUGH BROMLEY, PLLC
 380 South 4th Street, Suite 103
 Boise, ID 83702
 Fax: (208) 287-0864
 Email: cbromley@mchughbromley.com
cmchugh@mchughbromley.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

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

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Sarah A. Klahn
 SOMACH, SIMMONS & DUNN
 2701 Lawrence Street, Suite 113
 Denver, CO 80205
sklahn@somachlaw.com
dthompson@somachlaw.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Randall C. Budge
 Thomas J. Budge
 RACINE, OLSON, NYE & BUDGE, CHTD.
 P.O. Box 1391
 Pocatello, ID 83204-1391
 201 E. Center Street
 Pocatello, ID 83201
 Fax: (208) 232-6109
 Email: rcb@racinelaw.net
tjb@racinelaw.net

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Travis L. Thompson
 Jonas A. Reagan
 BARKER ROSHOLT & SIMPSON LLP
 P.O. Box 63
 Twin Falls, ID 83303-0063
 163 2nd Avenue West
 Twin Falls, ID 83301
 Fax: (208) 735-2444
 Email: tlt@idahowaters.com
if@idahowaters.com
jreagan@idahowaters.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

W. Kent Fletcher
 FLETCHER LAW OFFICE
 P.O. Box 248
 Burley, ID 83318
 1200 Overland Avenue
 Burley, ID 83318
 Fax: (208) 878-2548
 Email: wkf@pmt.org

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Albert P. Barker
 John K. Simpson
 BARKER ROSHOLT & SIMPSON LLP
 P.O. Box 2139
 Boise, ID 83701-2139
 1010 W. Jefferson, Suite 102
 Boise, ID 83701-2139
 Fax: (208) 344-6034
 Email: apb@idahowaters.com
jks@idahowaters.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Jerry R. Rigby
 RIGBY, ANDRUS & RIGBY LAW, PLLC
 P.O. Box 250
 Rexburg, ID 83440-
 0250 25 N 2nd E
 Rexburg, ID 83440
 Fax: (208) 356-0768
 Email: jrigby@rex-law.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Michael C. Creamer
 Michael P. Lawrence
 GIVENS PURSLEY LLP
 P.O. Box 2720
 Boise, ID 83701-2720
 601 West Bannock Street
 Boise, ID 83702
 Email: mcc@givenspursley.com
mpl@givenspursley.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

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

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Dylan B. Lawrence
 J. Will Varin
 VARIN WARDWELL, LLC
 P.O. Box 1676
 Boise, ID 83701-1676
 242 N. 8th Street, Suite 220
 Boise, ID 83702
 Email: dylanlawrence@varinwardwell.com
willvarin@varinwardwell.com

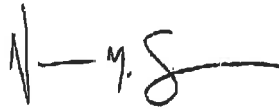
- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF

Garrick L. Baxter
 DEPUTY ATTORNEY
 GENERAL STATE OF
 IDAHO - IDWR
 P.O. Box 83702
 Boise, ID 83702-0098
 Email: Garrick.Baxter@idwr.idaho.gov

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/BCF

Robert L. Harris
 D. Andrew Rawlings
 HOLDEN, KIDWELL
 HAHN & CRAPO, P.L.L.C.
 1000 Riverwalk Drive, Suite 200
 P.O. Box 50130
 Idaho Falls, ID 83405
 Telephone: (208)523-0620
 Facsimile: (208) 523-9518
 Email: vrharris@holdenlegal.com
arawlings@holdenlegal.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Electronic Mail or CM/ECF



Norman M. Semanko