

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

Attorneys for the Basin 33 Water Users

**DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO**

)	Docket No. AA-GWMA-2016-001
IN THE MATTER OF DESIGNATING)	
THE EASTERN SNAKE PLAIN)	BASIN 33 WATER USERS'
AQUIFER GROUND WATER)	MOTION FOR SUMMARY
MANAGEMENT AREA)	JUDGMENT AND
_____)	MEMORANDUM IN SUPPORT
)	

I. INTRODUCTION

The Basin 33 Water Users, by and through their undersigned counsel, hereby submit *Basin 33 Water Users' Motion for Summary Judgment and Memorandum in Support* pursuant to the *Deadline for IDWR's Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery* dated September 25, 2019 (the "Procedural Order").

This motion and associated memorandum concern the contested case before the Idaho Department of Water Resources ("IDWR" or "Department") challenging the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("ESPA GWMA Order") dated November 2, 2016. The Director of IDWR, who issued the ESPA GWMA Order, also serves as

the hearing officer in the contested case.¹ The Director has designated the following four issues as representing the scope of legal issues remaining in this matter:

1. Whether the Order Designating the ESPA GWMA was procedurally deficient. Did the Director err when he issued the *Order Designating the ESPA GWMA* outside the auspices of the procedural requirements of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) and/or IDWR's Procedural Rules (IDAPA 37.01.01)?
2. Whether the Director should have conducted rulemaking. Did the Director err by not conducting rulemaking prior to designation of the ESPA GWMA?
3. Whether the Director should have designated the ESPA GWMA in a contested case. Did the Director err by not holding a contested case hearing to provide him the authority to designate an area of common ground water supply as a GWMA?
4. Whether adjudication and the formation of ground water districts in the ESPA forecloses the designation of a GWMA. Is the Director foreclosed from designating the ESPA GWMA because the ESPA has been adjudicated and contains existing ground water districts?

The Basin 33 Water Users hereby moves for summary judgment on each of these legal issues. While there is no specific rule in the Department's procedural rules concerning summary

¹ From an overall due process point-of-view, it would be preferable to the Basin 33 Water Users to have an independent hearing officer for this contested case as the person who issued the ESPA GWMA Order will now adjudicate legal issues raised by challengers to this order. In other words, the Director will be reviewing his own prior decision. "Due process also requires an impartial hearing officer." *Idaho State Bar v. Everard*, 142 Idaho 109, 114, 124 P.3d 985, 990 (2005) (citing *Hortonville Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976)). When acting in a "quasi-judicial" manner, a hearing officer "is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge." *Lowery v. Bd. of Cnty. Comm'rs for Ada Cnty.*, 115 Idaho 64, 71, 764 P.2d 431, 438 (Ct. App. 1988) (citation omitted). This requires that the hearing officer have a "lack of bias for or against either party to the proceeding." *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 775-76, 122 S.Ct. 2528, 2535, 153 L.Ed.2d 694, 705 (2002)).

However, because of existing Idaho law, where the hearing officer in this case is the Director—the agency head—he can only be disqualified if he receives a "private pecuniary benefit" from his participation. See *In the Matter of Distribution of Water to Water Rights Nos. 36-07072 and 36-08356, Order Denying Request for Disqualification of the Director and Denying Request for an Independent Hearing Officer; Order suspending Discovery and Vacating Hearing Date*, November 28, 2011. We are not aware of any "private pecuniary benefit" that the Director may have in this matter, and as a result, despite the self-evident policy concerns with having the same person serve in an adjudicatory capacity as a reviewing officer for an order he originally prepared and issued, there does not appear to be a basis in the Department's administrative rules or procedures for the Director to be disqualified in order to assign this matter to an independent hearing officer.

judgment, IDAPA 37.01.01.260 (as a “motion”) and 37.01.01.565 (as a “prehearing motion”) are broad enough to cover summary judgment motions.²

The Director “must grant summary judgment 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.” Idaho Rule of Civil Procedure 56(a). In considering a summary judgment motion:

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. [The] Court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party’s favor. If there is no genuine issue of material fact, only a question of law remains.

Davison v. Debest Plumbing, Inc., 163 Idaho 571, 574–75, 416 P.3d 943, 946–47 (2018) (citations and internal quotation marks omitted). While the nonmoving party is entitled to all contested facts and every reasonable inference, it “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial.” *Path to Health, LLP v. Long*, 161 Idaho 50, 54, 383 P.3d 1220, 1224 (2016) (footnote, citation, and quotation marks omitted).

For the reasons set forth below, summary judgment on all four issues in favor of the Basin 33 Water Users is appropriate and the ESPA GWMA Order must be withdrawn.

II. BACKGROUND

The ground water management area statute, Idaho Code § 42-233b, in its entirety, provides:

42-233b. GROUND WATER MANAGEMENT AREA. “Ground water management area” is defined as any ground water basin or designated part

² Concerning motions for summary judgment filed before the Department, the Department has received, considered, and ruled on them in prior administrative cases. For example, in a contested case involving Application for Permit No. 37-22852 filed by Innovative Mitigation Solutions LLC, a protestant filed a motion for summary judgment requesting dismissal of the application because the applicant had not provided a lease evidencing authority to use a canal for ground water recharge. Applying case law and Rule 56(c) of the Idaho Rules of Civil Procedure, the hearing officer granted the motion and rejected 37-22852 without a hearing. *Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852*, Hearing Officer Mathew Weaver, May 26, 2015.

thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area. Upon designation of a ground water management area the director shall publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area.

When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.

Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.

The director may require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.

The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Water right holders participating in an approved ground water management plan shall not be subject to administration on a time priority basis so long as they are in compliance with the ground water management plan.

This statute vests tremendous discretionary power—with no sideboards—in the IDWR Director, whoever he or she may be. Under a GWMA management regime, the actual need and use by senior users that serve as foundational principles under priority administration will evidently no longer be considered. Instead, a GWMA will focus on ESPA water levels alone, regardless of senior needs and actual beneficial use. And if those water level goals are not being met, Idaho Code § 42-233b mandates that the director “**shall** order those water right holders on a time priority basis . . . to cease or reduce withdrawal of water under such time as the director determines there is sufficient ground water.” (emphasis added). It is therefore possible, and likely, that a situation presents itself where the senior surface users could experience a full supply under

the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (the “Methodology Order”), and yet ground water users would still be curtailed or remain curtailed under a GWMA management regime.

And yet, this ESPA GWMA process was not initiated as a contested case with a hearing before the ESPA GWMA Order was issued, rather, it was initiated by a letter dated July 7, 2016 (the “Letter”) from Director Spackman announcing IDWR’s consideration of “creating a ground water management area for the Eastern Snake Plain Aquifer (ESPA),” and inviting “[p]otentially affected water users” to “participate in upcoming public meetings” at one or more of ten meetings scheduled across Eastern Idaho between July 25, 2016 and July 28, 2016 “to discuss the possible creation of a ground water management area for the ESPA.” It was presumed that a formal contested case process would be undertaken if the Director decided to move forward (presumably based on the public comments), but no such hearing occurred. On November 2, 2016, the Director issued the ESPA GWMA Order without holding a hearing or providing any other process other than the ESPA GWMA public meetings and a short period of time to submit written comments.

In response to the ESPA GWMA Order, various cities and the Sun Valley Company petitioned for reconsideration and Sun Valley Company requested a hearing. On January 6, 2017, the Basin 33 water users petitioned to intervene in the administrative proceeding. The petition to intervene was granted on January 12, 2017. A hearing on the ESPA GWMA Order is now scheduled for February 18-21, 2020.

However, there are important legal issues to be addressed before scheduled hearing. For the reasons set forth below, summary judgment in favor of the Basin 33 Water Users is appropriate as to all four issues listed in the Procedural Order. Consequently, the ESPA GWMA Order should

be withdrawn.

III. ARGUMENT

A. The *Final Order Designating the ESPA GWMA* was procedurally deficient because it was done in contravention of adopted Department rules found at IDAPA 37.01.01 (the “Procedural Rules”) and IDAPA 37.03.12 (the “CM Rules”). Further, under general due process considerations, designation of the ESPA GWMA should have only been done as a result of a contested case.

All four issues identified in the *Procedural Order* are interrelated, and in an effort to avoid redundancy, this section directly addresses the first, third, and fourth of these legal issues. The second issue is addressed in Section III.B. below.

At the outset, it must be remembered that the Department, as an administrative agency, has no authority other than that given to it by the Legislature. *See Wash. Water Power Co. v. Kootenai Env'tl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). “Administrative agencies are ‘creature[s] of statute’ and, therefore, are ‘limited to the power and authority granted [them] by the Legislature.’” *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (quoting *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996)). Such authority “is primary and exclusive in the absence of a clearly manifested expression to the contrary.” *Roberts v. Idaho Trans. Dep’t*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991). An agency “may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.” *Id.*

An administrative agency “exercises limited jurisdiction, and nothing is presumed in favor of its jurisdiction.” *Henderson*, 147 Idaho at 632, 213 P.3d at 722; *see also United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977). An agency’s authority and jurisdiction are “dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves....” *Wash. Water Power Co.*, 99 Idaho at 879, 591 P.2d at 126. If the provisions of

governing rules or statutes are not met and complied with, no authority or jurisdiction exists. *Id.* (citing *Arrow Transp. Co. v. Idaho Pub. Util. Comm 'n*, 85 Idaho 307, 379 P.2d 422 (1963)). Acts taken by an agency without statutory authority or jurisdiction are void and must be set aside. *See Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27; *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012); Idaho Code § 67-5279(2)(a)-(b).

The Director's authority is granted and defined in Title 42 of the Idaho Code, the Idaho Administrative Procedure Act, Idaho Code § 67-5201, *et seq.* (the "Act"); and the administrative rules promulgated in accordance therewith. However, these grants of power also properly limit jurisdiction and authority in order to comport with due process standards to protect the rights and interests of citizens. In response to a due process challenge relating to the impact of the Department's administration of an appellant's "constitutional use" water right, the Idaho Supreme Court upheld the Department's actions and recognized that "[t]he requirement of procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977). To that end, all Department proceedings and hearings must be conducted in accordance with Idaho law, including the Idaho Constitution and the Idaho Administrative Procedure Act. Idaho Code § 42-1701A.

Compliance with Title 42, the Idaho Administrative Procedure Act, and the rules promulgated thereunder ensure that appropriate procedural protections are afforded to the property interests of all water right owners. The Director has specific responsibility "[t]o promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department." Idaho Code § 42-1805(8); see also Idaho Code § 42-603.

These procedures are in place because valuable property rights are at issue. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for

public or private use except by due process of law....” *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). Procedural due process is afforded to all parties subject to the Department’s jurisdiction by virtue of compliance with Title 42 of Idaho Code and the Act. See *Nettleton, supra*. Under the Act, the Department has promulgated, and the Legislature has reviewed, the Procedural Rules and the CM Rules that supplement and implement the statutory requirements for the administration of ground water rights, pursuant to Title 42 of Idaho Code, particularly Idaho Code Section 42-233(b). See also IDAHO CODE §§ 67-5224; 67-5291.

Absent compliance with the clearly articulated rulemaking or contested case procedures of the Procedural Rules and the CM Rules, such action would be, and in this case is, *ultra vires*, and contravenes the Basin 33 Water Users’ due process rights and the procedures the Legislature and the Department have deemed mandatory. See *Henderson v. Eclipse Traffic Control*, 147 Idaho at 634-35, 213 P.3d at 724-25; *Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27. The Director has exceeded his authority as he must follow the statutes and rules that define the Legislature’s grant of authority.

How water rights are going to be administered on the ESPA is the critical question in this proceeding. A necessary component of the prior appropriation doctrine is that water allocation to Idaho’s citizens will be regulated: “A water user has no property interest in being free from the State’s regulation of water distribution in accordance with the prior appropriation doctrine[.]” *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213–14, 220 P.3d 318, 331–32 (2009). However, if the ESPA GWMA is implemented, it will fundamentally change ground water right administration in the State of Idaho on the ESPA from a priority-based system to one where ground water right holders will be subject to curtailment or other operational limitations on their right to divert ground water in order to satisfy currently

unspecified goals for the expansive and heterogenous ESPA and flows in the Snake River irrespective of the amount of water needed to avoid injury to senior surface right holders.

In Idaho, “[i]t is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 800, 252 P.3d 71, 81 (2011); *see also Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944). Prior appropriation administration applies to Idaho’s ground water:

The Idaho Constitution confirmed the doctrine of prior appropriation with respect to surface waters. Section 3 provides: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied.... Priority of appropriation shall give the better right as between those using the water....” However, the Constitution makes no mention of ground water rights. In 1899, the legislature provided a statutory basis for the appropriation of “subterranean waters” in addition to the waters of “rivers, streams, lakes, [and] springs.” Sec. 2, 1899 Idaho Sess. Laws 380, 380. We later held that the prior appropriation doctrine applies to ground water. *Bower v. Moorman*, 27 Idaho 162, 181, 147 P. 496, 502 (1915).

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 801, 252 P.3d 71, 82 (2011). And, in the application of prior appropriation administration to ground water and surface water source interaction, the Idaho Supreme Court explained that these rights must be managed conjunctively: “The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.” *Id.* at 808, 252 P.3d at 89.

While it is clear as to what water sources in Idaho priority administration applies, the question that necessarily follows is how prior appropriation administration is defined, a question that the Idaho Supreme Court answered:

The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use. Article XV, section 3 of the Idaho Constitution provides that “[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied.... Priority

of appropriation shall give the better right as between those using the water....” These two doctrines encouraged settlers to divert surface water from its natural course and put it to beneficial use, thus leading to the development of Idaho’s arid landscape. *Pocatello v. State*, 145 Idaho 497, 502, 180 P.3d 1048, 1053 (2008). This Court long ago held that prior appropriation also governs interests in groundwater. *Bower v. Moorman*, 27 Idaho 162, 181, 147 P. 496, 502 (1915) (citing *Le Quime v. Chambers*, 15 Idaho 405, 98 P. 415 (1908)).

In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist., 155 Idaho 640, 650, 315 P.3d 828, 838 (2013) (emphasis added).

Accordingly, the focus of priority administration is (1) who is entitled to water in the first place as between competing calls for water from water right holders; and (2) whoever is entitled to the water and receives it must utilize the allocated water for a beneficial use.

It is against this backdrop that the CM Rules were promulgated. The CM Rules embody the above-described principles and were promulgated for the very purpose of providing the legal framework for conjunctive administration of ground water rights alleged to be interfering with surface water supplies (generally utilized by senior water right holders). As described by the Idaho Supreme Court, “the Idaho Legislature has authorized the Director ‘to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.’ The Director has done so in the Conjunctive Management Rules (CM Rules), which were approved by the Legislature and became effective on October 7, 1994.” *In re A&B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2012) (quoting Idaho Code § 42-603).

Generally speaking, the CM Rules “give the Director the tools by which to determine ‘how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].’” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep ‘t of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (quoting

A & B Irrigation Dist., 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)).

More specifically, the CM Rules themselves describe their purposes in CM Rule 20, of which the following portions of CM Rule 20 are most critical:

1. The CM Rules “govern the distribution of water from ground water sources and areas having a common ground water supply.” IDAPA 37.03.11.020.01.
2. The CM Rules “acknowledge all element of the prior appropriation doctrine as established by Idaho law.” IDAPA 37.01.11.020.02.
3. The CM Rules “integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water.” IDAPA 37.01.11.020.03.
4. The CM Rules “provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right.” IDAPA 37.01.11.020.04.
5. The CM Rules “provide the basis for the designation of areas of the state that have a common ground water supply and 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.

The Director’s authority to create the proposed ESPA GWMA, and limitations related to his power, are set forth within Idaho Code § 42-233b **and** within the CM Rules. Administrative rules should be “construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement.” *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). “IDAPA rules and regulations are traditionally afforded the same effect of law as statutes.” *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004); *see also Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2003) (“A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein.”).

The Letter sent by the Director is clear that ground water and surface water delivery calls served as the primary basis for considering the formation of a GWMA, which the Letter described as involving “disjointed water calls and mitigation plans,” “sporadic curtailment orders and associated mitigation,” and “sporadic water right administration.” The Letter further asserts that “management utilizing a GWMA may bring consistency to administration to achieve aquifer stabilization.” Given the Director’s written basis for considering the GWMA as involving difficulties in conjunctive administration, there is no question that the CM Rules—which were promulgated for the very purpose of addressing delivery calls between surface and ground waer users—apply. In fact, the CM Rules repeatedly and expressly provide that they apply to GWMAs. The CM Rules “apply to **all situations** in the state where the diversion and use of water under junior- priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights.” IDAPA 37.03.11.020.01 (emphasis added). Although Idaho Code § 42-233b provides the Director with the authority to designate a GWMA, that authority has explicit limitations. In this case, in addition to the express language of that statute, the CM Rules provide applicable limitations.

The CM Rules “govern the distribution of water from ground water sources and areas having a common ground water supply.” *Id.* Even more explicitly, the CM Rules “provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in...**designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code.**” IDAPA 37.03.11.020.06 (emphasis added). But even more critically for purposes of the Basin 33 Water Users’ motion, the CM Rules have specific rules for the ESPA as the only specific CM Rule-designated “areas determined to have a common ground water supply.” IDAPA 37.03.11.050. It should not be surprising that the

ESPA was designed by rule as an area of common ground water supply given its scope as the “the aquifer underlying the Eastern Snake Plain.” *Rangen, Inc. v. Idaho Dep’t of Water Res. (In re Distrib. of Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.) IDWR Docket CM-DC-2011- 004)*, 367 P.3d 193, 197 (Idaho 2016). The ESPA is approximately 170 miles long and 60 miles wide and has been designated as an area having a common ground water supply (“ACGWS”). *See id.* (citing IDAPA 37.03.11.050). The ground water in the ESPA is hydraulically connected to the Snake River and tributary springs. *Id.* The ESPA “is composed predominantly of fractured quaternary basalt, which is generally characterized by high hydraulic conductivity.” *Id.* Discharge from the ESPA “to hydraulically connected surface water sources is largely dependent on ground water elevations and hydraulic conductance.” *Id.*

Relative to the ESPA, the plain language of CM Rule 50 establishes that the Director does not have the authority to create the proposed ESPA GWMA. The Director should not create an ESPA GWMA where all water rights have been adjudicated and are the proper subject of a newly created or modified water district, pursuant to Idaho Code § 42-604. CM Rule 50 is directly on point:

The Eastern Snake Plain area of common ground water supply **will** be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, **when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area.**

IDAPA 37.03.11.050.01 (d) (emphasis added).

The CM Rules provide that, upon the complete adjudication of ground water rights in the ESPA, a water district **will** be created or the ESPA ACGWS **will** be incorporated into an existing or expanded water district. The only condition before mandatory creation or incorporation is adjudication of ESPA water rights. A GWMA only was to be created, in the event necessary, before “the rights to the diversion and use of water from the aquifer have been adjudicated.” The

disjunctive “or” following the statement requiring creation or expansion of a water district upon adjudication of the aquifer demands that conclusion. There is no ambiguity there.

Administrative rules and regulations are interpreted the same way as statutes. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011). Interpretation of administrative rules should begin with an examination of the literal words of the rule, and such should be given their plain, obvious, and rational meanings. *Sanchez v. State, Dep’t of Correction*, 143 Idaho 239, 242, 141 P.3d 1108, 1111 (2006). The meaning of the word “or” is clear as it has been interpreted by the Idaho Supreme Court in several cases to be “[a] disjunctive particle used **to express an alternative or to give a choice of one among two or more things.**” *City of Blackfoot v. Spackman*, 162 Idaho 302, 306–07, 396 P.3d 1184, 1188–89 (2017) (emphasis added) (quoting *Markel Int’l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012); see also *In re Snook*, 94 Idaho 904, 906, 499 P.2d 1260, 1262 (1972) (“The word ‘or’ ... is given its normal disjunctive meaning that marks an alternative generally corresponding to ‘either’ ...”).

Again, as to the language in CM Rule 50, the **“language should be construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement.”** *Mason v. Donnelly Club*, 135 Idaho at 586, 21 P.3d at 908 (emphasis added). CM Rule 50, along with the other CM Rules, was promulgated in 1994 after the Snake River Basin Adjudication was commenced in November of 1987, but well before it was completed in 2014. From the plain language of this rule, a GWMA is a pre-adjudication administrative tool no longer applicable to the areas contemplated in the proposed ESPA GWMA.

Stated another way, the CM Rules only provide for a binary choice for water right administration on the ESPA: (1) GWMA prior to completion of adjudication where no completely accurate or recent water right list exists; or (2) prior appropriation administration post-adjudication

with a newly-completed accurate list of water rights. This alternative approach to water districts and GWMA is dependent entirely upon the status of adjudication of water rights within the basin. The meaning of the word “or” in CM Rule 50 is no different than its use in other contexts—it is a “disjunctive particle used **to express an alternative or to give a choice of one among two or more things.**” *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (emphasis added). In the *City of Blackfoot* case, when analyzing use of the word “or,” the Idaho Supreme Court clearly held that “a water decree must either contain a statement of purpose of use or incorporate one, **but not both.**” *Id.* (emphasis added). Based on this rationale, the Department cannot have both administrative regimes in place—it must be one or the other.

The fundamental concept of what form of administration is followed during the uncertain early SRBA timeframe is further evident when comparing CM Rule 30.05 and CM Rule 30.06, which reveals that adjudication of the water rights at issue is the lynchpin. If “the water rights have been adjudicated,” the Department may treat the delivery call as a petition to create a new water district. IDAPA 37.03.11.030.05. If “the water rights have not been adjudicated,” the Department may treat the delivery call as a petition for designation of a GWMA. IDAPA 37.03.11.030.06.

Also, CM Rule 30.07(h) demonstrates that the designation of a GWMA should only occur if ground water supply is insufficient “and modification of an existing water district or creation of a new water district cannot be readily accomplished **due to the need to first obtain an adjudication of the water rights.**” IDAPA 37.03.11.030.07(h) (emphasis added).

The binary choice embodied in the CM Rules makes good practical sense. If the Department was not comfortable with the veracity of the water right records it had to be able to identify water right users to curtail to satisfy existing senior rights, then until an accurate list was

completed in an adjudication, the Director could designate a GWMA and manage the source rather than curtail individual water users to yield water from the ACGWS for senior rights. But once the SRBA was finished, complete with a list of decreed valid water rights, the Director was obligated to continue with prior appropriation administration. CM Rule 41 provides further evidence of this conclusion. It requires the Director to “utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule” when he enters an order upon a delivery call in a GWMA. IDAPA 37.03.11.041. Under CM Rule 40, relating to delivery calls within organized water districts, there is no similar requirement because the water rights within a water district have been adjudicated; those within a GWMA have not. Again, an ESPA GWMA can only be a pre-adjudication administrative tool. It does not apply to the areas described in the proposed ESPA GWMA.

Water rights within the proposed ESPA GWMA have now been adjudicated with the completion of the SRBA. The CM Rules do not contemplate the creation of a post-adjudication GWMA for the ESPA. Duly created or modified water districts supplant the legal authority to create an ESPA GWMA. The CM Rules supplement Idaho Code Section 42-233b. They are integral to a complete understanding of the Department’s administration of Idaho waters. The CM Rules clearly provide that a GWMA is a pre-adjudication tool to eventually be replaced by water districts with watermasters armed with an accurate list of decreed water rights in order to administer water rights by priority (according to the two bedrock principles described by the Idaho Supreme Court of priority and beneficial use by the senior user). Consequently, the actions that resulted in proposed ESPA GWMA are not authorized under the CM Rules, which are binding on the Director. In the ESPA GWMA Order, the Director did not address Rule 50 or other portions of the CM Rules discussed herein, even though he is bound by these authorities.

Further, the binary choice provided in the CM Rules described herein makes practical sense. Otherwise, ground water right holders would be subject to duplicative administration regimes. Avoiding duplicative administrative regimes was previously used as the basis for dissolving the American Falls GWMA, where the then-Director stated that the GWMA was no longer needed in these areas because they were now covered by Water District Nos. 120 and 130 and its “continued existence within the Water District boundaries may cause confusion in the administration of water rights.” *Final Order Modifying the Boundaries of the American Falls Ground Water Management Area* (Aug. 29, 2003) at 2. The Director went on to say:

The establishment of Water District Nos. 120 and 130, which includes the area within the boundaries of the American Falls GWMA over the ESPA located in Administrative Basins 35, 36, 41, and 43, provides the Director with the more comprehensive water administration authorities available under chapter 6, title 42, Idaho Code. These authorities together with the “Rules for Conjunctive Management of Surface and Ground Water Resources” (IDAPA 37.03.11) make it unnecessary to retain the current boundaries of the American Falls GWMA.

Id. at 2. The existence of active water districts avoids the need for a GWMA and the existence of a GWMA within such districts will only confuse the administration of water rights in the areas. The water administration authorities already in place give the Department the authority to manage water use, and no additional administration procedure is required. Therefore, consistent with the Director’s reasoning and position in the American Falls GWMA matter, because the water districts have been formed over most of the ESPA with the intent that others will be formed to cover any remaining areas, any GWMA covering the same lands would most likely “cause confusion in the administration of water right” and therefore would be an unnecessarily and perhaps conflicting layer of administration.

But even if it is assumed that the Director has the authority to create the proposed ESPA GWMA, he must comply with the procedural requirements of the CM Rules and the Procedural

Rules. As discussed *supra*, the CM Rules provide the tools to determine how various water sources are interconnected, and how, when, where, and to what extent the diversion and use of water from one source impacts others. *See AFRD No. 2, supra*.

The Director's proposed ESPA GWMA clearly contemplates the interconnection of various sources of water, and an evaluation of the CM Rules in the context of the ground water management statutes cited by the Director is therefore appropriate. As described above, administrative rules and regulations are interpreted the same way as statutes. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011).

Under the CM Rules, an ACGWS" is defined as:

A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.010. 01.

Two requirements must be satisfied. First, the ACGWS must be a ground water source. Second, the diversion of ground water from the source must affect water supply in the source or affect the flow of water in a surface water source.

A "ground water management area" is defined as "any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area." Idaho Code § 42-233b. A "critical ground water area" is defined as:

any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

Idaho Code § 42-233a.

Legally, a GWMA must be co-equal with an ACGWS, because it necessarily satisfies each requirement to constitute an ACGWS. First, for the purposes of water use and administration, a “ground water basin” is a “ground water source.” Second, evaluation of the sufficiency of “ground water to provide a reasonably safe supply,” based on current or projected withdrawals from a ground water basin (*see* Idaho Code § 42-233a), clearly contemplates that diversion from the basin “affects the ground water supply available to the holders of other ground water rights.” *See* IDAPA 37.03.11.010.01. It is self-evident that a GWMA must be an ACGWS.

Because a GWMA is an ACGWS, designation of an ESPA GWMA that includes tributary basins falling outside the boundaries of the existing ESPA ACGWS requires compliance with the CM Rules. Again, the CM Rules so provide. *See* IDAPA 37.03.11.020.06 (“These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in . . . designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code.”).

Because a GWMA is an ACGWS, in order to designate a GWMA, the Director must first determine the applicable ACGWS. Upon an appropriate petition by a water user pursuant to CM Rule 30, the Director must comply with CM Rule 31, which provides guidance and criteria concerning determinations of an ACGWS. Importantly, CM Rule 31 states that the Director’s ACGWS findings “shall be included in the Order issued pursuant to Rule Subsection 030.07.” IDAPA 37.03.11.031.05. Also, CM Rule 30.07 requires consideration of a contested case under the Department’s Rules of Procedure prior to entering such an order. IDAPA 37.03.11.030.07.

In sum, the Director may not, as suggested in his Letter, simply decide whether an ESPA GWMA, inclusive of 22 tributary basins, should be created “[a]fter hearing from water users at

the public meetings and considering the issues.” Even if it were appropriate to create the contemplated ESPA GWMA, which it is not, the Director must hold a contested case hearing upon petition by a party (or a rulemaking in accordance with the Idaho Administrative Procedure Act as described in Section III.B *infra*) concerning the boundaries of any ACGWS that will comprise such a GWMA, and otherwise comply with the CM Rules. Only then will the Director have the authority to designate an ACGWS as a GWMA (if at all), subject to governance in accordance with Idaho Code § 42-233b.

Finally, even if the Director has the authority to create the proposed ESPA GWMA irrespective of the CM Rules, he still must employ a proper procedure, which he did not. A decision of such significance as implementing a new water administration regime on the ESPA warrants a contested case hearing before an ESPA GWMA Order is issued. The State cannot “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1; *see also* IDAHO CONST. art. I, § 13 (“No person shall . . . be deprived of life, liberty or property without due process of law”). As stated by the Idaho Supreme Court:

Determining procedural due process rights involves a two-step analysis: first, determining whether a governmental decision would deprive an individual of a liberty or property interest within the meaning of the Fourteenth Amendment’s Due Process Clause; and second, if a liberty or property interest is implicated applying a balancing test to determine what process is due.

In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170, 148 Idaho 200, 212-13, 220 P.3d 318, 330-31 (2009) (citing *State v. Rogers*, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007); *Mathews v. Eldridge*, 424 U.S. 319, 333–35, 96 S.Ct. 893, 901–03, 47 L.Ed.2d 18, 32–34 (1976)). The balancing test considers three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail.

State v. Rogers, 144 Idaho 738, 742, 170 P.3d 881, 885 (2007). Accordingly, the second prong of the two-step due process analysis considers “if a liberty or property interest is implicated applying a balancing test to determine what process is due.” For “quasi-judicial proceedings,” such as the administrative proceeding associated with the ESPA GWMA, “there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when [a party] is provided with notice and an opportunity to be heard.” *In re Jerome Cnty. Bd. of Comm’rs*, 153 Idaho 298, 311, 281 P.3d 1076, 1089 (2012) (quotation and citation omitted, brackets in original).

Here, the water rights of the Basin 33 Water Users are property interests worthy of due process protection, thereby satisfying the first prong of the two-step due process analysis. *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009) (holding that Thompson Creek Mining Company, as a water right owner, had a property interest in its due process challenge of the creation of Water District 170). The critical inquiry, therefore, is what process is due.

In weighing the factors described in *State v. Rogers*, 144 Idaho 738, 742, 170 P.3d 881, 885 (2007), the process employed by the Department is not a lawful substitute for a contested case hearing.

First, the private interests that are affected by the official action, as described herein, are the Basin 33 Water Users’ water rights and the current prior appropriation administrative regime associated with those rights.

Second, in terms of additional or substitute procedural safeguards, a series of public meetings with an agenda for the content of those meetings dictated by the Department with some

follow-up questions and answer time is not a proper substitute for a contested case administrative hearing where a proponent of the GWMA must satisfy applicable burdens of proof. As in any contested case, there is much to be gained by the hearing officer and other parties in building a complete administrative record upon which to base a decision. For those water users in support of an ESPA GWMA, they would have to introduce evidence—expert and otherwise—to support their position, and it is from there that an appeal to a district court can be taken. Instead, what has happened in this matter is that the Department has made its decision based on its own unchallenged and/or limited information, including the decision to expand the ACGWS to areas outside the Rule 50 boundary. On this latter issue, the Department previously attempted to expand the CM Rule 50 boundary with a final order to amend CM Rule 50 dated August 29, 2014 after engaging in a formal rulemaking process. However, on February 24, 2015 and March 11, 2015, the Idaho House and Senate approved a concurrent resolution rejecting the Department’s proposal to delete CM Rule 50. See <https://idwr.idaho.gov/legal-actions/administrative-actions/ESPA-CMR50-petition/>. Where a formal rulemaking process was initiated in the CM Rule 50 matter before a decision was issued, it follows that a formal hearing should have been held prior to the ESPA GWMA Order, particularly when a component of the ESPA GWMA Order was to impose the ESPA GWMA on the very areas outside of the CM Rule 50 definition—including portions of Basin 33—that the Idaho Legislature previously rejected.

Third, relative to the Department’s interest, it would not have been a burden for the Department to have held an administrative hearing on this matter. It has historically held many administrative hearings under the CM Rules and following this track record is not a burden nor does it impact the Department’s interests.

Accordingly, even if the CM Rules and the Procedural Rules are to be ignored, under general due process considerations, implementing a sea change in water right administration in Idaho with the enactment of an expansive ESPA GWMA warrants a pre-decision contested case hearing. It was an error for the Director to designate the ESPA GWMA without a contested case hearing, and for that reason, the ESPA GWMA Order should be withdrawn.

B. The *Final Order Designating the ESPA GWMA* was also improper because the Director failed to conduct rulemaking prior to designation of the ESPA GWMA.

Our position relative to the proper interpretation of CM Rule 50 is set forth above and is incorporated herein by reference. The CM Rule 50 is binding legal authority on the Department in terms of the defined area of the ESPA ACGWS and that the GWMA administrative regime was only available pre-SRBA by rule. If the Department intends to take action that is contrary to the plain language of this rule, it must go through the rulemaking process to amend the rule before taking its desired action. This is the process that was followed when a petition from Clear Springs Foods, Inc. seeking to amend CM Rule 50.01 (which defines the aerial extent of the ESPA) was filed with the Department. In response to that petition, the Director engaged in the formal rulemaking process. See <https://idwr.idaho.gov/legal-actions/administrative-actions/ESPA-CMR50-petition/>.

In the present matter, the rulemaking process was not followed in order to amend the provisions of CM Rule 50 to support what the Director did in the ESPA GWMA Order. As a result, any attempt by the Director or the Department to expand the boundaries of the ESPA ACGWS to include additional portions of Basin 33 by designating such portions as part of an ESPA GWMA outside the context of a formal rulemaking is in contravention of the Procedural Rules and the applicable provisions of the Idaho Administrative Procedure Act.

Commensurate with fundamental fairness and due process, if the Director intends to create

a GWMA comprised of an ACGWS that includes areas outside of the CM Rule 50 boundary, ground water users in each basin are entitled to more than a roadshow of public meetings and a brief comment period. While there can be no dispute that informal proceedings are generally contemplated and authorized under the Idaho Administrative Procedure Act and the Department's Procedural Rules, "an agency cannot unilaterally decide to utilize informal procedures to the exclusion of formal proceedings." *Laughy v. Idaho Dep 't of Transp.*, 149 Idaho 867, 872, 243 P.3d 1055, 1060 (2010). Here, the CM Rules do not contemplate informal proceedings to decide the boundaries of a GWMA, which is an ACGWS. They require either a contested case proceeding in accordance with the Department's Procedural Rules, (*see* CM Rules 30.7 and 31), and/or general due process principles, or alternatively, as the previous CM Rule 50 illustrates, a formal rulemaking process.

IV. CONCLUSION

For the reasons set forth above, summary judgment in favor of the Basin 33 Water Users is appropriate as to all four issues listed in the Procedural Order. Consequently, the ESPA GWMA Order should be withdrawn.

Respectfully submitted this 21st day of October, 2019.



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October 2019, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

Document Served: BASIN 33 WATER USERS’ MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

ORIGINAL TO: Director Gary Spackman
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, Idaho 83720
gary.spackman@idwr.idaho.gov
Garrick.Baxter@idwr.idaho.gov
Kimberle.English@idwr.idaho.gov

Attorneys and/or Individuals Served:

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

Travis L. Thompson
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
jf@idahowaters.com

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email

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

- Mail
- Hand Delivery
- Facsimile
- Courthouse Box
- Email



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.