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DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO**

IN THE MATTER OF DESIGNATING THE EASTERN SNAKE PLAIN AQUIFER GROUND WATER MANAGEMENT AREA) Docket No. AA-GWMA-2016-001))) JOINT RESPONSE IN OPPOSITION) TO BASIN 33 WATER USERS') MOTION FOR SUMMARY) JUDGMENT / UPPER VALLEY) WATER USERS MEMORANDUM)))
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COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively "Surface Water Coalition," "Coalition," or "SWC"), and Clear Springs Foods, Inc., by and through their counsel of record, and hereby submit the following *Response in Opposition to Basin 33 Water Users' Motion for Summary Judgment* and the *Memorandum & Written Argument as to Remaining Issues Requiring Legal Argument* filed by Fremont-Madison Irrigation District et al.

INTRODUCTION

The Coalition and Clear Springs agree with the Basin 33 Users that there is no genuine dispute as to any material fact regarding the identified legal issues. However, that is where the agreement ends. The Basin 33 Users' motion is based upon a mistaken interpretation of agency rules contrary to a clear legislative grant of authority to the Director of the Idaho Department of Water Resources ("IDWR"). Since the Director properly designated the Eastern Snake Plain Aquifer ("ESPA") Ground Water Management Area ("GWMA") through his November 2, 2016 order ("GWMA Order"), there is no procedural deficiency as suggested by the Basin 33 Users. The Director should therefore deny the *Basin 33 Water Users' Motion for Summary Judgment* (hereinafter "*Motion*") as a matter of law.¹

ARGUMENT

I. Agency Rules Cannot Modify or Limit a Legislative Grant of Authority.

The Basin 33 Users' primary argument is that the Director's GWMA Order did not follow the Department's Procedural (IDAPA 37.01.01) and CM Rules (37.03.11). *See generally, Motion* at 6-21. In support, the Basin 33 Users set up a strawman claiming that "[h]ow water rights are going to be administered on the ESPA is the critical question in this proceeding." *Id.* at 8. Against this false backdrop they claim the Director erred by not first holding a contested case hearing and complying with procedures set forth in the CM Rules. The Basin 33 Users fundamentally misunderstand the purpose and function of a GWMA as opposed to water right

¹ The Coalition has provided argument in response to the Basin 33 Users' *Motion for Summary Judgment*. Fremont Madison Irrigation District et al. (hereinafter "'Upper Valley Users'") submitted a filing entitled *Memorandum & Written Argument as to Remaining Issues Requiring Legal Argument*. The Upper Valley Users provided excerpts from Sun Valley Company's Amended Petition, but did not file a formal motion requesting any affirmative relief. Consequently, there is no formal pleading that requires a response. However, should the Director construe the filing as a motion for summary judgment or other request for relief, the Coalition's arguments contained herein apply to the various legal issues raised therein.

administration. Moreover, the Basin 33 Users misinterpret and misapply Idaho law in advancing their arguments. Since the Director complied with the plain language of Idaho Code § 42-233b in designating the ESPA GWMA, the Basin 33 Users' procedural arguments fail as a matter of law. The Director should deny their motion for summary judgment.

IDWR, a state administrative agency, does not have any authority other than that imparted by the Legislature. "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) (internal citations omitted).

The Director of IDWR has broad authority and expertise in water management matters. The Idaho Supreme Court has recognized the need for the Director's specialized expertise in water management and water right administration. *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (relating to the Court's need for the Director's highly technical expertise to accurately measure complex ground water data); *Keller v. Magic Water Co.*, 92 Idaho 276, 282, 441 P.2d 725, 731 (1968) (recognizing the Director's broad powers and expertise in administering water rights). The Idaho State Legislature has similarly recognized the need for the Director's expertise. Idaho Code § 42-1701 requires that a Director "shall be: a licensed civil or agricultural engineer, a registered geologist, or a hydrologist holding a hydrology degree from an accredited college or university." The Supreme Court has noted that these qualifications reaffirm "the need for the Director to have the technical expertise." I.C. § 42-1701(2); *see also, In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014).

The Director is charged with implementing the Ground Water Act, I.C. § 42-226 et seq. In the present matter, the Parties differ as to the meaning of Idaho Code § 42-233b. The plain language of Idaho Code § 42-233b states:

“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. 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.

I.C. § 42-233b.

The statute’s plain language gives the Director discretion to designate “any ground water basin or designated part thereof which the director...has determined may be approaching the conditions of a critical ground water area.” I.C. § 42-233b. The Director made such a determination in his November 2, 2016 order and published notice across the state as required. There are no other procedural conditions.

Despite the unambiguous statute, the Basin 33 Users contend that the Director’s statutory authority is restrained by the Department’s Procedural and CM Rules “that supplement and implement the statutory requirements.” *Motion* at 8. Without any statutory support the Basin 33 Users argue these rules work “limitations related to [the Director’s] power, [as] set forth within Idaho Code § 42-233b.” *Id.* at 11.

The Basin 33 Users ignore foundational definitions that limit the rules’ application or at a minimum clarify any perceived conflict with Idaho Code § 42-233b. First, the “scope” of IDWR’s Procedural Rules is clarified in Rule 7 which states the rules only govern “contested case proceedings before the Department of Water Resources and the Water Resource Board of the state of Idaho.” IDAPA 37.01.01.001.02. The rules further define a “contested case” as a “proceeding which results in the issuance of an order.” IDAPA 37.01.01.005.07 (emphasis

added). The Director designated the ESPA GWMA by order dated November 2, 2016 pursuant to his authority set forth in Idaho Code § 42-233b. There was no “contested case” or “proceeding” before IDWR or the Water Resource Board. Hence, the Procedural Rules did not apply to the Director’s designation order.² As such, any alleged procedural deficiencies for not following the rules of a formal contested case are without merit and should be denied.

The Basin 33 Users ignore similar limitations in the CM Rules. As to “title and scope,” CM Rule 1 provides:

These rules may be cited as “Rules for Conjunctive Management of Surface and Ground Water Resources.” The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. It is intended these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently.

IDAPA 37.03.11.001 (emphasis added).

By definition, the CM Rules only apply in response to a delivery call which concerns water distribution. *See also* CM Rule 20.04 (“These rules provide the basis and procedure for responding to delivery calls . . .”). The Director’s ESPA GWMA Order was not issued as a “response” to a delivery call.³ Although the Basin 33 Users would like to style this matter as a “water right administration” question in order to “shoehorn” it into the procedures outlined in the CM Rules, that is simply not the case.

² However, by law, any person aggrieved by that decision was entitled to file a petition and request a hearing within fifteen (15) days of the order’s issuance. *See* I.C. § 42-1701A(3). Neither the Basin 33 Users nor Upper Valley Users filed such a petition.

³ Although prior delivery calls provided context for litigation and prior disputes on the ESPA, the Basin 33 Users erroneously rely upon the Director’s letter to claim that the “calls served as the primary basis for considering the formation of a GWMA.” *Motion* at 12. Contrary to this claim, the GWMA Order was not issued in response to a water delivery call. The Basin 33 Users’ strained effort to link the informational letter to a formal delivery call should be rejected.

In addition to the foundational “scoping” rules, CM Rule 5 provides that “[n]othing in [the CM Rules] shall limit the Director’s authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.” IDAPA 37.03.11.005 (emphasis added). Apart from supervising water right administration, the Director is also charged with managing the state’s groundwater resources. The Legislature enacted the Ground Water Act which further charges the Director with unique responsibilities concerning groundwater. *See e.g., Baker*, 95 Idaho at 583 (“We now hold that Idaho’s Ground Water Act forbids ‘mining’ of an aquifer.”).

Notably, Idaho Code § 42-231 provides:

In addition to other duties prescribed by law, it shall be the duty of the director of the department of water resources to conduct investigations, surveys and studies relative to the extent, nature and location of the ground water resources of this state. . . It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

I.C. § 42-231 (emphasis added).

Clearly, the Director’s duty to manage the ground water resources goes beyond supervising water right administration and responding to individual delivery calls. In fact, the Director has the express authority to designate critical and groundwater management areas to protect ground water resources. *See* I.C. §§ 42-233a, b. Accordingly, given this express statutory authority, the CM Rules plainly acknowledge they cannot limit the Director’s related duties and authorities. *See* CM Rule 5.

Despite the express limitations in the above-referenced rules, the Basin 33 Users claim that because the “CM Rules do not contemplate the creation of a post-adjudication GWMA for the ESPA,” that a GWMA can “only be a pre-adjudication administrative tool.” *Motion* at 16.

Nothing in Idaho Code § 42-233b limits the Director's designations to only those areas where water rights have not been adjudicated.

Again, the Basin 33 Users' entire *Motion* is riddled with erroneous arguments in clear contravention to CM Rule 5. *See Motion* at 13 ("the plain language of CM Rule 50 establishes that the Director does not have the authority to create the proposed ESPA GWMA"); *Motion* at 12 ("in addition to the express language of [I.C. § 42-233b], the CM Rules provide applicable limitations."); *Motion* at 11 ("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") (emphasis in original). They make similar claims with respect to CM Rules 20, 30, 40, and 50, which all fail for the reasons discussed above.

The Basin 33 Users go so far to allege that "[d]uly created or modified water districts supplant the legal authority to create an ESPA GWMA." *Motion* at 16. This argument finds no support in the law as nothing in Chapter 6, Title 42 states that a watermaster can "supplant" the Director's authority and obligations to manage groundwater resources. Just the opposite, it is the Director that supervises a watermaster's water distribution activities. *See* I.C. § 42-602. Once again, the Director's authority under I.C. § 42-233b is not conditioned upon compliance with the CM Rules, which only govern "delivery calls" and administration of water rights. Arguing to that end is nothing short of overt attempt to rewrite the statute. Moreover, it defies the purpose of the Ground Water Act where a GWMA can protect a groundwater resource through a management plan and other actions but a water district is only concerned with administration of water rights. Under the Basin 33 Users' logic water users could drain or "mine" an aquifer contrary to the law without consequence as long as the water rights were adjudicated and no one filed a delivery call.

The Basin 33 Users also ignore well-established precedent that if a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict. *See Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada Cty.*, 136 Idaho 809, 813, 41 P.3d 237, 241 (2001) (involving a regulation that departed from the statute and imposed a standard not included in the statute) (citing *Idaho County Nursing Home v. Dep't of Health*, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991)). 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. *Higginson v. Westergard*, 100 Idaho 687, 690, 604 P.2d 51, 54 (1979). However, “[t]o be valid, an administrative regulation must be adopted pursuant to authority granted to the adopting body by the legislature.” *Curtis v. Canyon Highway Dist. No. 4*, 122 Idaho 73, 831 P.2d 541 (1992). A regulation that is not within the expression of the statute is in excess of the authority of the agency to promulgate that regulation and must fail. *See Levin v. Idaho State Board of Medicine*, 133 Idaho 413, 418, 987 P.2d 1028, 1031 (1999). An administrative agency may never promulgate a rule or regulation that limits its authority granted by the legislature.

In *Roeder Holdings*, the Idaho State Tax Commission limited qualifications for a statutory exemption by requiring proof of a *bona fide* profit making agricultural enterprise. 136 Idaho at 813-814, 41 P. 3d at 241-242. “Where the legislature enacted a statute requiring that an administrative agency carry out specific functions, that agency cannot validly subvert the legislation by promulgating contradictory rules.” *Id. (Roberts, supra*, 121 Idaho at 732, 827 P.2d at 1183). The agency must “adhere only to the requirements of the unambiguous statute.” *Id.* “there is no room for construction of a statute whose terms, though not defined, have a plain, obvious, and rational meaning.” *Id.* 136 Idaho at 814, 41 P.3d at 242.

To be clear, CM Rule 5's explicit language forecloses any perceived conflict between the CM Rules and the Director's statutory authority. However, the Basin 33 Users place the statute at issue, the Procedural Rules, and the CM Rules on the same level despite the fact there is a clear, recognized hierarchy that prevents any rule or regulation from limiting the Legislative authority granted the Director. To the extent the Basin 33 Users are claiming the Rules do conflict with the plain statutory authority, the Director must find that such limitations in the rules *cannot* stand to limit or prevent the Director from designating a GWMA in conformity with all requirements included *within* I.C. § 42-233b.

Based upon the above, there is no precedent to support the Basin 33 Users' position that the Director's authority to designate a GWMA is limited or conditioned by the Procedural Rules and CM Rules. The Director is prohibited from limiting the Legislative grant of authority and reading in new requirements that simply do not apply. Even if the Director promulgated the CM Rules as an "explicit limitation" on his authority to designate a GWMA, such action would be voided as conflicting with the plain language of I.C. § 42-233b. Moreover, the Director of IDWR has a long history of not construing the CM Rules and Procedural Rules as limitations to his authority under I.C. § 42-233b.

For example, since 1982 the Director has designated several GWMA's pursuant to his statutory authority under I.C. § 42-233b. None of these designations have invoked the procedural requirements in the Department's Procedural or CM Rules claimed necessary by the Basin 33 Users here. On October 29, 1982, the Director designated the Grand View – Bruneau GWMA under I.C. § 42-233b. Later that year, on November 9, 1982, the Director designated the Mountain Home GWMA when a study indicated the anticipated recharge of ground water was exceeded by anticipated ground water discharge. On April 12, 1983, the Director designated the

Banbury Hot Springs GWMA pursuant to I.C. § 42-233b after reviewing only four (4) years of data indicating a decline in artesian pressure among other internal findings. On January 11, 1984, the Director designated the Twin Falls GWMA pursuant to I.C. § 42-233b. On June 15, 1987, the Director designated the Boise Front Low Temperature Geothermal Resource GWMA pursuant to I.C. § 42-233b. On June 28, 1991, the Director designated the Big Wood GWMA pursuant to the authority granted in I.C. § 42-233b. On October 14, 1994, the Director designated the Southeast Boise GWMA under I.C. § 42-233b. On August 3, 2001, after the Director initiated the matter, he designated the American Falls and Thousand Springs GWMA. On August 12, 2001, the Director designated the Bear River GWMA under I.C. § 42-233b after resolving the City of Montpelier's petition for reconsideration of the preliminary order. On May 20, 2013, the Director designated the Lewiston Plateau GWMA under I.C. § 42-233b after waiting for aggrieved parties to file a petition for reconsideration or exceptions to the Recommended Order, or to request a hearing, which none did. After one public meeting, the Director, pursuant to I.C. § 42-233b, designated the Malad Valley GWMA on November 4, 2015. In none of the above instances was rulemaking or a prior contested case initiated as a pre-condition to a GWMA designation.

Ultimately, the final responsibility for interpretation of the law rests with the courts. *See Ware v. Idaho State Tax Comm'n*, 98 Idaho 477, 481, 567 P.2d 423, 427 (1977). A court must always make an independent determination whether the agency regulation is "within the scope of the authority conferred," and that determination includes an inquiry into the extent to which the legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing statute. *See Yamaha Corp. of America v. State Board of Equalization*, 19 Cal.4th 1,

78 Cal.Rptr.2d 1, 960 P.2d 1031, 1041 (1998) (incorporated by reference in *Roeder Holdings*, 136 Idaho 809, 41 P.3d 237).

The interpretation of a statute ““must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.”” *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 506, 284 P.3d 225, 231 (2012) (quoting *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011)). Idaho courts “have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should *not be consulted* for the purpose of altering the clearly expressed intent of the legislature.” *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (quoting *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)) (emphasis added).

The plain language of I.C. § 42-233b gives the Director discretion to designate “any ground water basin or designated part thereof which the director...has determined may be approaching the conditions of a critical ground water area.” I.C. § 42-233b. By arguing the Director must comply with rulemaking or procedures of the Department’s Procedural and the CM Rules, the Basin 33 Users are erroneously revising the statute, and limiting the authority given the Director by the Idaho Legislature. In fact, Idaho’s appellate courts have “never revised...an unambiguous statute” even “on the ground that it is patently absurd or would produce absurd results when construed as written.” *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011) (quoting *State v. Village of Garden City*, 74 Idaho 513, 525, 265 P.2d 328, 334 (1953)). “The public policy of legislative enactments cannot

be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced.” *Id.*

The Basin 33 Users take the position that there are additional requirements not included in any statute, but buried in rules and regulations promulgated by the Director. This is simply not true. First, “great weight should be given to an agency’s interpretation of its own rules.” *Angstman v. City of Boise*, 128 Idaho 575, 578, 917 P.2d 409, 412 (Ct. App. 1996); *South Fork Coalition*, 117 Idaho 857, 792 P.2d 882 (1990); *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970). The Procedural and CM Rules are all the Department’s rules. In the ESPA GWMA designation, the Director followed the statutory procedure contained in I.C. § 42-233b, and did not have any obligation to follow inapplicable procedures in the referenced rules. Therefore, IDWR interpreted its own rules and concluded they did not apply. This is not a unique situation. As discussed above, the Director previously designated several GWMA’s since 1982, and did not interpret the Procedural or CM Rules as limiting the statutory authority under I.C. § 42-233b. As such, the Basin 33 Users’ effort to inject further requirements into the agency’s prior interpretation of its own rules cannot stand and should be rejected.

Idaho courts have repeatedly upheld the “law as written” and have struck down rules and regulations that conflict with the authority imparted by the Legislature. *See Roeder Holdings, supra*; *see also Idaho County Nursing Home v. Dep’t of Health*, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991). Even if applying the legislature’s authority to designate GWMA would lead to “absurd results,” which is not the case, the Department and reviewing courts do not have the authority to revise or impose additional requirements on an unambiguous statute. Idaho law is clear. An administrative agency may not promulgate rules or regulations that conflict with its

legislative authority. The Procedural Rules and the CM Rules cannot limit or condition the Director's unambiguous discretion to designate GWMA's when the Director determines a basin or part thereof may be approaching the conditions of a critical ground water area under the legislative grant of authority in I.C. § 42-233b. The Legislature granted the Director discretion to designate "*any ground water basin or part thereof*" as a GWMA in his sole discretion upon a finding that the area may be approaching conditions of a critical ground water area. *See City of Pocatello v. Spackman, Order Dismissing Petition for Judicial Review* at 2-3 (Ada County Dist. Ct., Fourth Jud. Dist., CV-01-17-67, Feb. 16, 2017) (finding the "Director may simply act upon his own initiative and discretion under the authority granted him by [I.C. § 42-233b]").

Therefore, the Basin 33 Users' claim that the CM Rules and Procedural Rules revise the statute is erroneous. The Director should deny the Basin 33 Users' motion accordingly and find the Director properly acted pursuant to the explicit authority granted him by the Legislature, when designating the ESPA GWMA.

II. A Water Right Adjudication Does Not Foreclose a Ground Water Management Area Designation.

The Basin 33 Users claim that the ESPA cannot be designated as a GWMA because of language in CM Rule 50. *Motion* at 13. They read the rule as only allowing a GWMA in the event the water rights in that area are not adjudicated. *See id.* The Basin 33 Users argue the CM Rules create a binary choice for the Director to either include the aquifer in a water district or a GWMA, but not both. *See Motion* at 14-15. Again, this argument would rewrite I.C. § 42-233b as only allowing GWMA designations in areas where the water rights are not adjudicated.

Contrary to the Basin 33 Users' argument, the Legislature did not draw a pre-adjudication/post-adjudication distinction. Just the opposite, the statute provides that the Director may designate "any ground water basin or part thereof" as a GWMA. I.C. § 43-233b

(emphasis added). The Basin 33 Users' position is irreconcilable with the explicit legislative grant of authority over "any" ground water basin. The fact a water district may exist for purposes of water right administration does not dictate the conditions occurring in the aquifer, including whether it may be approaching the conditions of a critical ground water area. Water right administration and water resource management represent two different paradigms for purposes of the Director's duties and responsibilities.

The Basin 33 Users' adjudication distinction fails because they mistakenly conflate water districts and GWMA's. Under Chapter 6, Title 42, Idaho Code a water district is only "considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho." I.C. § 42-604 (emphasis added). In such districts it is the watermaster's duty to "distribute the waters" in accordance with the prior appropriation doctrine. *See* I.C. § 42-607. The creation of water districts only addresses water right administration and is not a substitute for necessary tools to manage the state's groundwater resources found in the Ground Water Act, Chapter 2, Title 42, Idaho Code.

The Director has multiple duties, only one of which is to oversee the administration of water rights. Recognizing that "[t]he future growth and development of the state is dependent upon effective management and efficient use of the state's water resources," (I.C. § 42-241) the Director must also "do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources." I.C. § 42-231. The Director's authority is a direct extension of the State policy "to conserve its ground water resources" and prevent groundwater "mining" conditions. *See* I.C. § 42-237a. Chapter 2 provides a litany of proactive tools the Legislature granted the Director of IDWR to protect the State's ground water resources.

Pursuant to that objective, the Director may “prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available.” I.C. § 42-237a(g) (emphasis added). The Legislature recognized that to ensure Idaho’s future would take more than “effective management,” most similar to water district’s authority under Chapter 6, but it would also take “efficient use of the state’s water resources,” which is protected through the Director’s management authority under Chapter 2. Moreover, the state has an obligation to manage groundwater resources in such a way to prevent “mining.” *See Baker*, 95 Idaho at 383.

Administration of water rights and approval of mitigation plans is not directed at protecting a declining ground water source, and therefore the Legislature granted the Director additional authority to “conserve its ground water resources” and approve management plans. It is within this context that the Legislature granted the Director the authority to, in his sole discretion, designate “any ground water basin or part thereof” as a GWMA.

If the simple fact that GWMA and water districts are located in separate chapters of Idaho Code did not sufficiently distinguish their respective purposes, the unique import of a GWMA is solidified by the context of other Chapter 2 conservation tools at the Director’s disposal in order to “protect the people of the state from depletion of ground water resources.”

The Basin 33 Users mistakenly conflate the authorities under GWMA and water districts, and erroneously apply restrictions related to water administration to the Director’s statutory authority to designate a GWMA. As set forth above, this false distinction is not found anywhere in statute and has no legal support. The Director should dismiss the Basin 33 Users’ *Motion for Summary Judgment* and hold that there is no pre/post adjudication distinction limiting the Director’s authority under I.C. § 42-233b.

III. Idaho Law Does Not Require the Director to Conduct Rulemaking Prior to a GWMA Designation.

The Basin 33 Users further allege the Director erred because he did not follow a formal rulemaking process to amend CM Rule 50. *See Motion* at 23. The Basin 33 Users view CM Rule 50 as restricting the Director from designating a GWMA different than the “area of common ground water supply” defined therein. Again, the Basin 33 Users view is misplaced given the scope of the CM Rules and the fact the Director designated the ESPA GWMA pursuant to I.C. § 42-233b, not in response to a delivery call.

In essence, the Basin 33 Users claim that regulations for responding to a delivery call completely replace groundwater management authorities in the Ground Water Act. Contrary to this theory, water right administration and water resource management are two different regime that serve different water management functions. Moreover, as discussed above, CM Rule 5 prohibits any rule from limiting the Director’s authority to take other actions “as provided by Idaho law.” Furthermore, whenever there is a conflict between a rule or regulation and a statute, the statute controls. *See Roeder Holdings, supra; Idaho County Nursing Home v. Dep’t of Health*, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991). The Basin 33 Users essentially allege a conflict between CM Rule 50 and I.C. § 42-233b.

The Basin 33 Users mistakenly identify the Director’s action as amending CM Rule 50, when he is actually acting under the statutory authority of designating “any ground water basin or part thereof” as a GWMA under I.C. § 42-233b. If the Legislature intended to limit the Director’s authority to prevent a GWMA designation that includes the CM Rule 50 boundary it could have done so, but did not.

Idaho Code § 42-233b was enacted in 1982. The CM Rules were promulgated in 1994. The Legislature did not limit the Director’s authority when the GWMA statute was enacted, and

did not condition the Director's authority upon following the CM Rules adopted over 12 years later in 1994. Again, the Basin 33 Users attempt to rewrite the statute. There is no requirement in I.C. § 42-233b for the Director to conduct a rulemaking before designating a GWMA. The Basin 33 Users' attempt to couch their argument by analogy in procedures that simply do not apply should be rejected.

The Basin 33 Users also fail to address the *Asarco* factors to show why the designation has to be treated as a "rule." In *Asarco Inc. v. State of Idaho*, the Court found that an agency action constituting a rule has the following characteristics: (1) has wide coverage; (2) is applied generally and uniformly; (3) operates only in future cases; (4) prescribes a legal standard or directive not otherwise provided by the enabling statute; (5) expresses agency policy not previously expressed; and (6) is an interpretation of law or general policy. 138 Idaho 719, 723 (2003). The Basin 33 Users failed to establish any of the foregoing factors. Therefore, the Director's GWMA Order is a designation pursuant to express authority provided by I.C. § 42-233b, and not a "rule."

The Director has designated various GWMA's through Idaho, dependent upon the facts and circumstances concerning the groundwater resources involved. None of these prior designations constituted Department "rules." The GWMA Order is geographically confined to the area within the boarder. The designation does not have "wide coverage" across the State of Idaho. Because it is limited to the area included in the Order, the GWMA designation is "not applied generally and uniformly" throughout the state, and does not "only operate in future cases." The Order and the existence of a GWMA does not prescribe a "legal standard not otherwise provided by the enabling state," but instead simply follows the legal standard to designate a GWMA as provided in I.C. § 42-233b.

The Director acted according to the plain language of the statute and therefore the GWMA Order did not “interpret the law.” None of the Asarco factors are present to trigger a rulemaking requirement. The Director should deny the Basin 33 Users’ *Motion* accordingly.

IV. Basin 33 Water Users’ Procedural Due Process Claim Violates the Director’s Order Limiting the Legal Issues in this Proceeding and is Beyond the Scope of Motion Practice.

On September 25, 2019, Director Spackman issued the *Deadline for IDWR’s Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery* (“Motion Practice Order”). In that order the Director limited the scope to four (4) issues which “represent the scope of legal issues remaining in this matter.” *Motion Practice Order* at 1. None of the issues concern due process violations. This proceeding is limited to (1) whether the Director erred when issuing the *Order Designating the ESPA GWMA* outside the auspices of the procedural requirements of the rules for Conjunctive Management and/or IDWR’s Procedural Rules; (2) whether the Director erred by not conducting rulemaking prior to designation of the ESPA GWMA; (3) whether the Director erred by not holding a contested case hearing; and (4) whether the Director is foreclosed from designating the ESPA GWMA because the ESPA has been adjudicated and contains existing ground water districts. *Motion Practice Order* at 1-2. None of these issues involve whether the Director violated procedural due process by not providing (1) an opportunity to be heard (2) at a “meaningful time and in a meaningful manner.” *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998). Attempting to shoehorn a due process claim into this proceeding violates the Director’s *Motion Practice Order*. The Director should deny the Basin 33 Users’ effort to expand this proceeding and add a due process claim at this time.

Furthermore, the Basin 33 Users are intervenors and cannot unduly broaden the issues under Rule 353. IDAPA 37.01.01.353. Attempting to expand the limited legal issues from four to five during the summary judgment phase of litigation unduly broadens the proceedings contrary to the Department's rules and the Director's order. The Basin 33 Users' due process issue should be denied and dismissed accordingly.

Moreover, even if the Basin 33 Users could raise the issue, procedural due process only requires an opportunity to be heard at a meaningful time. The Director issued the GWMA Order and then allowed for a period where "any person aggrieved by any decision, determination, order or action of the Director" who "has not previously been *afforded an opportunity for a hearing on the matter* shall be entitled to a hearing before the Director to contest" the order. The Sun Valley Company was the only party to file a petition and request a hearing on the matter. The Basin 33 Users filed no such request within the statutory timeframe, but chose to intervene instead. Through this proceeding the Basin 33 Water Users are currently being afforded their opportunity to be heard prior to any curtailment action that could abridge any rights as a result of the GWMA designation.⁴ As such, any due process argument fails as a matter of law and should be denied.

V. Clear Springs' and Other Spring Users' Shortages Further Show the Error in the Basin 33 Users' Arguments.

Clear Springs, an Idaho general business corporation, is an employee-owned food company headquartered in Buhl, Idaho. Founded in 1966, Clear Springs prepares a variety of fresh and frozen seafood for human consumption, for sale in fine restaurants and in seafood sections of major supermarkets throughout the United States and Canada. Clear Springs is the

⁴ The Surface Water Coalition reserves the right to challenge this process on judicial review since the original petitioner withdrew. Furthermore, the Basin 33 Users failed to request any affirmative relief as required under IDWR Rule 351 in their Petition to Intervene.

world's largest producer of aquaculture rainbow trout but also manufactures salmon, mahi mahi, and other premier value-added seafood products.⁵ Clear Springs filed a water right delivery call that was the subject of litigation and eventually a settlement with certain ground water users. *See generally, Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011).

The ESPA is the aquifer underlying a portion of the Eastern Snake River Plain, and provides a source of water for thousands of water users. The ESPA is hydraulically connected to the Snake River and its tributaries at varying degrees. In the Thousand Springs area, the hydraulic connectivity of the ESPA to surface water sources is evident in the form of dynamic springs, where water flows to the surface and, is diverted by water users throughout the area, including Clear Springs, for aquaculture purposes. Springs are also important features for fish, wildlife, and water quality in the Mid-Snake River. The direct hydraulic connectivity of the aquifer to the springs in the Thousand Springs area creates a situation where depletion to the aquifer impacts the ability of Clear Springs to divert water pursuant to its decreed senior surface water rights. As a result of declining spring flows over time, Clear Springs' senior surface water rights have not been filled. Other spring users in the area have experienced similar shortages to their water supplies. *See generally, <https://idwr.idaho.gov/legal-actions/archived-matters.html>* (listing several spring users' delivery calls, including Aquarius Aquaculture, ARK Fisheries, Inc, Blue Lakes, Jones, Lee, Lynclif Farms, Rangen, and Seapac).

⁵ Clear Springs is vertically integrated with its own rainbow trout brood stock and egg production, feed manufacturing, farm operations, processing and value adding plants, and distribution system, including a fleet of refrigerated tractor/trailer combinations. Clear Springs also operates a leading-edge research facility whose mission is to develop tools that enhance fish production at Clear Springs' facilities. Feed is manufactured at Clear Springs' feed mill in Buhl. Ingredients are imported from local, regional, and national suppliers.

A number of parties, including Clear Springs, have intervened in support of the Director's designation. The Basin 33 Users and Upper Valley Users dispute the designation for various reasons. In their motion for summary judgment, the Basin 33 Users assert:

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.

Motion at 4-5.

While this cite identifies an issue that the Director may find himself in when comparing the need or injury to senior surface water irrigation rights to the goal or “groundwater level” identified in the management plan, that issue is very different from what spring users, such as Clear Springs, face today.⁶ Clear Springs’ injury as a result of junior pumping was arguably mitigated by the January 4, 2012 *Settlement Agreement* between IGWA and Clear Springs. Other mitigation has been provided and approved where the senior spring user accepted something other than water as well. However, this “agreed upon” mitigation did not necessarily mean that Clear Springs’ and other spring users’ water rights were being fulfilled or that the water supplies were sufficient for full beneficial use under those rights.

⁶ Furthermore, the Surface Water Coalition is not the only group of surface water right holders that rely upon hydraulically connected sources to the ESPA. Other surface water rights are supplied by connected springs and reach gains in the Upper Snake River Basin.

Notably, if Clear Springs received additional water supplies above and beyond what was provided by the mitigation agreement under its water rights, it could put that water to beneficial use today as raceways at its facilities are not being maximized. Further, the Department's records are replete with examples of spring dependent water rights in the Thousand Springs reach which face similar circumstances where additional water supplies would be put to beneficial use. *See generally, Final Orders* re: Blue Lakes Trout Farm, Inc., Rangen, Inc., Clear Springs Foods. Protecting the aquifer will also benefit ground water users by ensuring maintenance of ground water levels that supply domestic and other water rights.

Accordingly, the Basin 33 Users' myopic focus on the Surface Water Coalition delivery call and mitigation as showing why a GWMA designation is unfounded and without merit. Regardless of injury or mitigation to individual water rights across the ESPA, a GWMA designation focuses on the source and if managed properly will result in secure or additional water for water users across the plain, including groundwater users.

That is an important distinction that the ground water management area statute addresses. That section requires the Director to determine whether supply and demand are in equilibrium for groundwater uses and hydraulically connected sources. Pursuant to Idaho Code section 42-231 the Director has the statutory obligation "to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act." This obligation extends far beyond administration of water rights and addresses broader questions of water supply and demand. The statute demands that the Director manage the resource and ensure its viability into the future.

The above examples from Clear Springs and other spring users counter the arguments by the Basin 33 Users and shows that administration pursuant to Chapter 6, Title 42 and the CM Rules does not replace or substitute for management under a GWMA designation. Clear Springs urges the Director to deny the motion for summary judgment as well.

VI. The Basin 33 Water Users Fail to Allege Prejudice or Seek Affirmative Relief.

Finally, the Basin 33 Users do not allege any prejudice in their *Motion to Intervene*, or in their *Motion for Summary Judgment*. Consequently, there is no basis for this contested case and they cannot be granted judgment as a matter of law. On judicial review a court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 760, 769, 252 P.3d 71, 77 (2010). Even if one of these conditions is met, "[a]n agency action shall be affirmed unless *substantial rights of the [party] have been prejudiced*." I.C. § 67-5279(4) (emphasis added).

The Basin 33 Users only claim that the ESPA GWMA Order was entered upon unlawful procedure, but only so far as failing to comply with the inapplicable requirements of the CM Rules and Procedural Rules. As discussed above, these procedures do not limit the Director's statutory authority under I.C. § 42-233b. Still, the Basin 33 Users have failed to allege how any of their rights **have been** prejudiced.

Although the Basin 33 Users briefly expound upon the requirements of procedural due process in their *Motion*, which is beyond the scope of the listed legal issues in this proceeding, they fail to allege how any of their substantial rights have already been prejudiced. The Basin 33

Users claim that the ESPA GWMA designation has the potential to “change ground water right administration.” *See Motion* at 8. They make no claim of past, or current prejudice. Since the Basin 33 Users have not been curtailed or prejudiced in any way by the ESPA GWMA designation, they can show no prejudice to any rights and have no legal basis for filing a summary judgment motion. Under Idaho Code, the Director was required, and did, allow for aggrieved parties an opportunity to request a hearing following the designation, a process which the Basin 33 Users failed to do. The statute and Director gave them the opportunity, and the Basin 33 Users failed to act. The Basin 33 Users cannot retroactively cry foul with procedure after failing to avail themselves of such procedures in the first place. Therefore, the Director should deny the *Motion* accordingly.

CONCLUSION

Contrary to the Basin 33 Users’ arguments, the Department’s Procedural and CM Rules did not modify or limit the Director’s statutory authority under I.C. § 42-233b to designate the ESPA GWMA. The Director complied with the statutory requirements and there are no procedural deficiencies as a matter of law. The Director was not required to follow a rulemaking procedure either. Lastly, the Basin 33 Users cannot introduce auxiliary issues not ordered as germane to this proceeding.

As set forth above, the Director should reject the claim that GWMA’s cannot exist in areas that have adjudicated water rights. The Basin 33 Users misunderstand the purpose and scope of the Director’s duties and responsibilities set forth in the Ground Water Act. Whereas administration of individual water rights addresses injury and mitigation, that does not address the groundwater resource and whether or not it is approaching a critical condition. The Basin 33

Users' effort to restrict and limit the Director's authority is not supported by statute or case law and should be rejected.

The Director should deny the Basin 33 Users' *Motion for Summary Judgment* accordingly.

DATED this 18th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2019, I served a true and correct copy of the foregoing *Joint Response in Opposition to Basin 33 Water Users' Motion for Summary Judgment / Upper Valley Water Users Memorandum* on the following by the method indicated:

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