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DEPARTMENT OF
WATER RESOURCES

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**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)	RESPONSE TO COALITION'S
MANAGEMENT AREA)	MOTION FOR SUMMARY
)	JUDGMENT
_____)	

I. INTRODUCTION

The Basin 33 Water Users, by and through their undersigned counsel, hereby submit *Basin 33 Water Users' Response to Coalition's Motion for Summary Judgment and Supporting Points/Authorities RE: Legal Issues*. This memorandum is being submitted in response to the *Coalition's Motion for Summary Judgment and Supporting Points/Authorities RE: Legal Issues* dated October 21, 2019 (the "Coalition's MSJ"). The Basin 33 Water Users and the Upper Valley Water Users (consisting of FMID, MGWD, and IID) have also filed their own motions for summary judgment and memoranda in support.

These motions and associated memoranda 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. The Director 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 *Coalition’s MSJ* asserts that (1) the Director issued the ESPA GWMA Order in compliance with Idaho law; (2) the Director was not required to conduct rulemaking for the ESPA GWMA; and (3) formation of a water district that administers ground water rights does not foreclose the designation of a GWMA. And, despite not being covered by the scope of legal issues described above, the Coalition also now argues that the Upper Valley Users (including the Basin 33 Water Users) should be dismissed from the ESPA GWMA proceedings for an alleged failure to comply with IDAPA 37.01.01.351.

The Basin 33 Water Users disagree with the Coalition for the reasons primarily described in the *Basin 33 Waters’ Users Motion for Summary Judgment and Memorandum in Support*

previously filed in this matter. In response to the specific bases outlined in the *Coalition's MSJ*, as described below, the *Coalition's MSJ* should be denied, while the Basin 33 Water Users' motion for summary judgment should be granted.

II. ARGUMENT

A. The Director did not issue the ESPA GWMA Order in compliance with Idaho law.

The ESPA is unique because it covers an area in Idaho that is specifically addressed by legislatively approved administrative rules, specifically CM Rule 50:

050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho. USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35. Township 10 South, Range 20 East, Boise Meridian. (10-7-94)

a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River. (10-7-94)

b. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. (10-7-94)

c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30. (10-7-94)

d. The Eastern Snake Plain Aquifer 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. (10-7-94)

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 Envtl. 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.

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. “When an agency is engaged in rulemaking it is acting in a legislative capacity . . .,” Gilmore and Goble, *The Idaho*

Administrative Procedure Act: A Primer for the Practitioner, 30 IDAHO L. REV. 273, 294 (1993/94), and such rules are subject to review and rejection by the Idaho Legislature—meaning that the Idaho Legislature in effect approves rules promulgated by an administrative agency. See Idaho Code § 67-5291; see also Florence A. Effron, *Legislative Review of Administrative Rules Under the Idaho Administrative Procedure Act*, 30 IDAHO LAW REV. 369, 372-3 (1993/1994) (describing the administrative rule Legislative final review statutes).

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. 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 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 (emphasis added).

Based on the foregoing, 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.

Despite the foregoing Idaho law, the *Coalition's MSJ* ignores the legal effect of CM Rule 50 and instead asserts that “the rule does not limit the Director’s authority and discretion.” *Coalition's MSJ* at 6. In support of this argument, after citing to CM Rule 5, the Coalition asserts “nothing in the CM Rules can limit the Director’s authority to act under Idaho Code § 42-233b.” CM Rule 5 provides that “[n]othing in these 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.” *Id.* The Coalition’s argument is unavailing for at least two reasons.

First, this argument asserts that a general rule can be used as a basis to ignore a specific rule. Under this rationale, any specific rule can be read out of the law, which leads to the inevitable conclusion that all specific administrative rules are meaningless as they can be completely trumped by a more general rule or the general statutory language that the administrative rules were intended to provide additional detail for in the first place. Under Idaho law, 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). Further “[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.” *Eller v. Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 174 (2019) (quoting *Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004) (emphasis added)).

The CM Rules and Procedural Rules are rules of a public administrative agency—the Idaho

Department of Water Resources—and they have the same force and effect of law because they are an integral part of Idaho’s water law. In short, the IDAPA rules described above are specific and are binding on the Director. They cannot simply be ignored.

Second, in substance, the Coalition’s argument implicates administrative rule interpretation, which under Idaho law, is engaged in the same way as statutory interpretation. The Coalition asserts that a more general rule applies over a more specific rule. Under Idaho law, this assertion is backwards.

“Administrative rules are interpreted the same way as statutes.” *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 160 Idaho 251, 256, 371 P.3d 305, 310 (2016) (quoting *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011)). Accordingly:

when considering an administrative rule,

“[I]nterpretation begins with the literal language of the [rule]. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The [rule] should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the [rule] so that none will be void, superfluous, or redundant. When the [rule’s] language is unambiguous ... the Court need not consider rules of statutory construction.

Estate of Stahl v. Idaho State Tax Comm’n, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017) (quoting *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011)). Further, “[t]he determination of the meaning of [an administrative rule] and its application is a matter of law over which this [C]ourt exercises free review.” *Woodburn v. Manco Prods., Inc.*, 137 Idaho 502, 504, 50 P.3d 997, 999 (2002).

Idaho Power Co. v. Tidwell, 164 Idaho 571, 574, 434 P.3d 175, 178 (2018), reh’g denied (Feb. 22, 2019) (brackets in original, footnote omitted).

In *Huyett v. Idaho State Univ.*, 140 Idaho 904, 104 P.3d 946 (2004), the Idaho Supreme Court affirmed the district court’s decision that a state university did not have apparent or actual

authority to enter into a multi-term employment contract with a head coach. In reaching this decision, the court analyzed IDAPA rules that governed the execution of multi-year employment contracts applicable at that time (IDAPA Personnel Rule 08.01.02.103.02.c). *Huyett*, 140 Idaho at 909, 104 P.3d at 950. In describing the interpretation of IDAPA Rules, the court explained that such interpretation is patterned after statutory construction and provided this guidance:

IDAPA rules and regulations are traditionally afforded the same effect of law as statutes. *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 813, 41 P.3d 237, 241 (2001). The legal weight attributed to Board of Education policies has never been fully articulated. Statutory language is to be given its plain, obvious and rational meaning. *Grand Canyon Dories v. Idaho State Tax Comm'n*, 124 Idaho 1, 3, 855 P.2d 462, 463 (1993). **Where two statutes apply to the same subject matter they are to be construed consistent with one another where possible, otherwise the more specific statute will govern.** *Id.* at 3, 855 P.2d at 463; *State v. Barnes*, 133 Idaho 378, 382, 987 P.2d 290, 292 (1999).

It is appropriate to use rules of statutory construction in interpreting the Board policy. Statutory language is to be interpreted based on its plain meaning. *Grand Canyon Dories*, 124 Idaho at 3, 855 P.2d at 463. Where statutory language is clear and unambiguous, statutory construction is unnecessary and the court need only apply the statute. *Kootenai Elec. Coop., Inc. v. Washington Water Power Co.*, 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995). Ambiguity is not established based solely upon differing interpretations. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

Huyett v. Idaho State Univ., 140 Idaho 904, 908-9, 104 P.3d 946, 950-11 (2004) (emphasis added); see also *Eller v. Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 168 (2019) (“A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general.” Thus, “where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute.”) (internal citations omitted).

Relative to a **ground water management area on the ESPA**, CM Rule 5 is a general rule and Rule 50(d) is a specific rule. Under rules of statutory construction, Rule 50(d) clearly governs, and it provides 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, and furthermore, if the general CM Rule 5 supersedes the specific CM Rule 50, as the Coalition asserts, then CM Rule 50 would be superfluous. In the interpretation of rules, effect must be given to all the words and provisions of the rule “so that none will be void, superfluous, or redundant.” *See Idaho Power Co. v. Tidwell*, 164 Idaho 571, 574, 434 P.3d 175, 178 (2018), reh'g denied (Feb. 22, 2019).

Other CM Rules also apply. 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.*

Based on the foregoing, the CM Rules 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.

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.

In short, as a matter of substance, the ESPA GWMA Order must be withdrawn because it conflicts with Idaho law, particularly the law contained in the IDAPA rules discussed herein.

As to the procedure the Director employed in designating the ESPA GWMA, the Coalition relies upon *Judge Wildman’s Order On Motion to Determine Jurisdiction/Order Dismissing Petition for Judicial Review* dated February 16, 2017 (Ada County Dist. Ct., Fourth Judicial Dist., CV-01-17-67) (available at <https://idwr.idaho.gov/files/legal/CV01-17-00067/CV01-17-00067-20170216-Order-on-Mtn-to-Determine-Jurisdiction-Order-Dismissing-Petition-for-Judicial-Review.pdf>). However, this district court case did not address the issues described herein in any way. Rather, Pocatello’s petition focused on whether the Director’s order was subject to judicial

review and that Pocatello had met the exhaustion requirement under Idaho law. See *City of Pocatello's Memorandum in Support of Motion to Determine Jurisdiction*, Jan. 20, 2017 (available at <https://idwr.idaho.gov/files/legal/CV01-17-00067/CV01-17-00067-20170120-Pocs-Memo-in-Support-of-Mtn-to-Determine-Jurisdiction.pdf>). Not every ground water management area situation raises issues of conjunctive administration that implicate the CM Rules, and in those situations, the CM Rules would not apply and only the statutory language of Idaho Code § 42-233b and related statutes and associated administrative rules would apply. Judge Wildman's decision focused only upon the broad jurisdictional question relating to exhaustion of administrative remedies, with no discussion of the applicability of the CM Rules.

Accordingly, the initial question in this matter is whether the ESPA GWMA implicates the CM Rules. It clearly does. 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 water calls described by the Director on the ESPA certainly include the Coalition's delivery call, which was brought under the CM Rules, and other water delivery calls brought under the CM Rules by spring water users.

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 water users—apply. Again, Judge Wildman did not address the CM Rules in any way in the decision relied upon by the Coalition.

Because the Director's proposed ESPA GWMA contemplates the interconnection of various sources of water, 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 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

II.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 and can ignore 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 first issued. See *Basin 33 Water Users' Motion for Summary Judgment and Memorandum in Support* at 20-23. 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.

For all the above reasons, the Director did not issue the ESPA GWMA Order in compliance with Idaho law. The *Coalition's MSJ* should be denied and the ESPA GWMA Order should be withdrawn.

B. Because of the specific CM Rules, the Director was required to conduct rulemaking for the ESPA GWMA because he has acted contrary to the CM Rules.

On the question of rulemaking, the Coalition argues that the ESPA GWMA Order is not a rule, but an administrative action of the Department. *Coalition's MSJ* at 8. The Coalition further notes that “the Director has designated various GWMA throughout the state, dependent upon the facts and circumstances concerning the groundwater resource involved” and that “[n]one of these prior designations constitute Department ‘rules.’” We agree with these statements, but they miss

the point. The ESPA has specific rules applicable to it and whether it can be designated as a GWMA, and it is those rules that require rulemaking if they are to be amended or ignored in order for the Director to have the legal authority to designate an ESPA GWMA post-SRBA and/or expand the ESPA boundary.

Our position relative to the proper interpretation of the CM Rules, and CM Rule 50 in particular, is set forth above and is incorporated herein by reference. 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. was filed with the Director seeking to amend CM Rule 50.01 (which defines the aerial extent of the ESPA). In response to that petition, the Director engaged in the formal rulemaking process to delete Rule 50. See <https://idwr.idaho.gov/legal-actions/administrative-actions/ESPA-CMR50-petition/>. Simply put, as to Rule 50, the Director has done this before, and he must do so again in this matter.

In the present matter, the rulemaking process with 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 implement a post-SRBA ESPA GWMA and attempt 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. While 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 an ESPA 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 proceedings illustrate, a formal rulemaking process.

C. Formation or expansion of a water district that administers ground water rights on the ESPA does foreclose the designation of the ESPA GWMA.

The Coalition next argues that under the plain language of Idaho Code § 42-233b, the Director is not limited in his discretion to designate ground water management areas. *Coalition’s MSJ* at 9. The Coalition further argues that if the CM Rules do restrict the Director’s discretion under Idaho Code § 42-233b, the statute will trump. *Id.* However, as described above, the CM Rules are not contrary to or inconsistent with Idaho Code § 42-233b, rather, 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). And, even more specifically, the CM Rules specifically address the ESPA GWMA.

If the Coalition’s argument is taken to its logical extreme, then any administrative rule that more specifically describes how an administrative agency is to address certain situations will be a conflict with the statute the rules are intended to implement and supplement. For example, the CM Rules were promulgated pursuant to provisions of Chapter 6 of Title 42 of the Idaho Code—entitled “Distribution of Water Among Appropriators”—and provide additional detail and procedure for responding to delivery calls made by senior-priority surface or ground water rights

against a junior ground water right. The additional detail and procedure outlined in the CM Rules, which are binding on the Director, have not been found to conflict with Idaho statutes or unlawfully restrict the Director's discretion merely because they provide such additional detail. Idaho Code § 42-233b and the CM Rules "should not be read in isolation, but must be interpreted in the context of the entire document." *Idaho Power Co. v. Tidwell*, 164 Idaho 571, 574, 434 P.3d 175, 178 (2018), reh'g denied (Feb. 22, 2019) (footnote omitted).

On this point, the prior CM Rule 50 procedure concerning the definition of the ESPA is instructive. Despite being urged by the Coalition and others to administer water outside the boundaries of the official ESPA boundary, and despite no restriction on his discretion to administer water rights found under any provision of Chapter 6 of Title 42 of the Idaho Code, the Director has not administered water outside of the currently-defined ESPA boundary found at CM Rule 50.01.a. In response to a petition to change this rule and expand the ESPA, which the Director agreed to do by deleting Rule 50.01.a., the Idaho Legislature rejected the change, and the Director today only administers water rights under Coalition's delivery call to the Rule 50 boundary. *See* <https://idwr.idaho.gov/legal-actions/administrative-actions/ESPA-CMR50-petition/>.

Accordingly, while the CM Rules similarly restrict the Director's discretion and authority, that does not mean the CM Rules and Chapter 6 of Title 42 are inconsistent. For all of the above reasons, the *Coalition's MSJ* on this issue should be denied.

D. The Upper Valley Users should not be dismissed from the ESPA GWMA proceedings.

The final argument asserted by the Coalition is that the Upper Valley Users, including the Basin 33 Water Users, should be dismissed for "failure to comply with IDAPA Rule 351." This is a new legal issue raised by the Coalition, and for that reason, it should not be considered as the parties have previously agreed to the scope of legal issues remaining. As described in the

Director's *Deadline for IDWR's Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery* dated September 9, 2019 (the "Procedural Order"), "the Director and parties discussed the remaining scope of potential issues and agreed upon a schedule for disposition of both legal issues through briefing and factual issues through live hearing." After listing the four remaining legal issues, the Procedural Order provided an October 21, 2019 deadline "for motions and/or briefing related to the remaining issues requiring legal argument, **as delineated directly above.**" *Id.* at 2 (emphasis added). This new issue concerning Rule 351 was never raised by the Coalition, was not delineated in the Procedural Order, and cannot be raised now. For this reason alone, the Coalition's request to dismiss the Upper Valley Users should be denied.

Yet, even considered on its merits, the Coalition's request should be denied. The Coalition has not explained in detail what it believes "affirmative relief" consists of as described in Rule 351. Black's Law Dictionary defines "affirmative relief" as "[t]he relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiff's action." BLACK'S LAW DICTIONARY at 1544 (11th Edition). Under this definition, the Basin 33 Water Users have not asserted a request for affirmative relief seeking independent action against the Director that could be maintained independently, such as a counterclaim. The Basin 33 Water Users did not assert such a claim for this type of affirmative relief, and as a result, Rule 351 does not apply.

But even viewed in a manner that the Coalition apparently advocates for, the Basin 33 Water Users have complied with all applicable procedural rules. Their petition stated that they "seek to intervene to represent and protect their interests in their water rights," which included their expressed concern of the Director designating the ESPA GWMA as including an expanded

portion of Basin 33. *Basin 33 Water Users' Petition to Intervene* at 1, 3. While it was not definitively decided by the Basin 33 Water Users at that time how they would proceed when their petition to intervene was filed, one clear avenue available to them to protect their interests is to challenge the legality of the ESPA GWMA Order and the proposed aerial extent of the ESPA GWMA. Accordingly, there is enough detail in the *Basin 33 Water Users' Petition to Intervene* setting forth their concerns to alert the parties of the relief (under the Coalition's definition) that could be sought by the Basin 33 Water Users. On this final point, it is also notable that the *Surface Water Coalition's Petition to Intervene* similarly contains no specific statement requesting affirmative relief. Rather, like all intervenors, their involvement in this case is to protect what are perceived as actions that may affect their water rights. The Basin 33 Water Users are on different. For all these reasons, the *Coalition's MSJ* on this point should be denied.

III. CONCLUSION

For the reasons set forth above, the *Coalition's MSJ* should be denied, and the ESPA GWMA Order should be withdrawn.

Respectfully submitted 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 following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

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