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DEPARTMENT OF
WATER RESOURCES

Attorneys for the Basin 33 Water Users

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

)	Docket No. AA-GWMA-2016-001
IN THE MATTER OF DESIGNATING)	
THE EASTERN SNAKE PLAIN)	REPLY TO COALITION'S
AQUIFER GROUND WATER)	OPPOSITION TO THE BASIN 33
MANAGEMENT AREA)	WATER USERS' MOTION FOR
)	SUMMARY JUDGMENT
_____)	

I. INTRODUCTION

The Basin 33 Water Users, by and through their undersigned counsel, hereby submit this *Reply To Coalition's Opposition To The Basin 33 Water Users' Motion for Summary Judgment*. This memorandum is being submitted in reply to the *Joint Response In Opposition to Basin 33 Water Users' Motion for Summary Judgment Upper Valley Water Users Memorandum* submitted by the Coalition on November 18, 2019 (the "Coalition's Response"). The Coalition's Response was submitted in response to the *Basin 33 Water Users' Motion for Summary Judgment and Memorandum in Support* submitted on October 21, 2019.

The Basin 33 Water Users' motion 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 Response* does not provide persuasive argument as to why summary judgment on all four issues in favor of the Basin 33 Water Users is not appropriate. Accordingly, the motion should be granted and the ESPA GWMA Order must be withdrawn.

I. ARGUMENT

A. The Director did not issue the ESPA GWMA Order in compliance with Idaho law because he did not comply with Rule 50.

Notably, and tellingly, the *Coalition’s Response* fails to offer any explanation or argument as to what the purpose of CM Rule 50 is or was intended to address. Rather dismissively, they essentially want the Director to ignore it as though it does not exist, and instead, only focus on language found Idaho Code § 42-233b—which is a statute that has statewide applicability.

including outside of the ESPA. In this proceeding, the Director is obligated to either grant the Basin 33 Water Users' motion for summary judgment, or if it is denied, the Director must explain why CM Rule 50 does not apply.

As to the specific arguments in the *Coalition's Response*, the Coalition's first overarching argument in response to the Basin 33 Water Users' motion is that agency rules cannot modify or limit a statutory grant of authority to the Director. *Coalition's Response* at 2. Citing to the language of Idaho Code § 42-233b only, the Coalition repeatedly argues that the Director is not required to follow or even consider administrative rules specifically promulgated by the Department and approved by the Idaho Legislature. *Id.* at 2-13. The Coalition asserts that only Idaho Code § 42-233b should be considered, and that giving effect to administrative rules promulgated by the Director in accordance with Idaho Code § 42-1805(8) is "nothing short of an overt attempt to rewrite the statute" *Id.* at 7. According to the Coalition, the Basin 33 Water Users are ignoring well-established precedent that if a conflict exists between a statute and a regulation, the regulation must be set aside. *Id.* at 8. Further, the Coalition argues that the CM Rules "only apply in response to a delivery call" by myopically citing to one only subsection of CM Rule 20 and ignoring other subsections of Rule 20 which describe the CM Rules' applicability. *Id.* at 5. And, the Coalition argues, "the Basin 33 Users set up a strawman" by asserting that how water rights are going to be administered on the ESPA is the critical question in this proceeding.

The Coalition's Response reads as though CM Rule 50 was not promulgated by the Department or was somehow imposed on the Department. We disagree. CM Rule 0 specifically provides that "[t]hese rules were issued pursuant to Section 42-1805(8), Idaho Code, **which provides the Director with authority to promulgate rules implanting or effectuating the powers and duties of the department.**" (emphasis added).

In response to the Coalition's arguments, the Basin 33 Water Users have not asserted that there is a conflict between Idaho Code § 42-233b and CM Rule 50. *Coalition's Response* at 16. Rather, they can be read in harmony with one another as CM Rule 50 more specifically addresses the ESPA area. Administrative rules and regulations are interpreted the same way as statutes. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011). Interpretation of administrative rules should begin with an examination of the literal words of the rule, and such should be given their plain, obvious, and rational meanings. *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 242, 141 P.3d 1108, 1111 (2006). Further, "[s]tatutes pertaining to the same subject are construed, as far as reasonably possible, to be in harmony with one another." *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 583, 416 P.3d 951, 955 (2018). Consistent with statutory interpretation principles, Idaho Code § 42-233b and CM Rule 50 can be read in harmony with each other in that the ESPA is unique because it covers an area in Idaho that was specifically addressed under CM Rule 50 by legislatively approved administrative rules that were promulgated by the Department under its authority found at Idaho Code § 42-1805(8) (see CM Rule 0):

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)

As explained in the Basin 33 Water Users' prior briefing, 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). 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).

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.

The interplay between Idaho Code § 42-233b and CM Rule 50 is no different than the interplay between Idaho Code § 42-203A and the Department's Water Appropriation Rules found at IDAPA 37.03.08. These rules provide additional detail and legal requirements on the submission of information and how the Department processes applications for permit and the information that must be submitted as part of the Director's evaluation of whether the application does not violate Idaho Code § 42-203A(5)(a)-(g). Indeed, these rules even have rules specific for applications to appropriate trust water, an area depicted on Exhibit A to these rules, and how the Director is to evaluate them. See Rule 45.02. The very nature of administrative rules is to provide greater detail and direction to an administrative agency than the general language found in the statute. That does not mean they automatically conflict with each other. Under the Coalition's logic, these additional requirements would have no legal effect because they are not contained in Idaho Code § 42-203A. The additional detail that CM Rule 50 provides specific to the ESPA does not mean that it automatically conflicts with Idaho Code § 42-233b. Indeed, they can be interpreted harmoniously, and they should be given that they CM Rule 50 was promulgated by the Department itself.

Furthermore, CM Rule 50 is more specific as to the ESPA—the subject of this legal proceeding—and the specific rule should govern over a general rule. The Coalition argues the reverse, which is that a general rule can be used as a basis to ignore a specific rule. *See 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).

Under the Coalition’s 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.

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.” CM Rule

20.01 (emphasis added). Although Idaho Code § 42-233b provides the Director with the authority to designate a GWMA, that authority relative to the ESPA has limitations. In this case, in addition to the express language of that statute, the CM Rules provide applicable limitations. In short, the CM Rules—rules promulgated by the Department and blessed by the Idaho Legislature—can limit the process as to how an ESPA GWMA is addressed. CM Rule 50 cannot simply be ignored. The additional detail of CM Rule 50 is not an “overt attempt to rewrite the statute,” as the Coalition asserts.

The Coalition further argues that the CM Rules “only apply in response to a delivery call,” but in support of this argument, only cites to one only subsection of CM Rule 20 while ignoring other subsections of Rule 20. *Coalition’s Response* at 5. As set forth above, the CM Rules have much broader application that the Coalition asserts:

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).

The CM Rules “govern the distribution of water from ground water sources and areas having a common ground water supply.” *Id.* Even more explicitly—and this point bears emphasis

in response to the Coalition—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.” CM Rule 20.06 (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.” ICM Rule 50. It should not be surprising that the ESPA was designed by rule as an area of common ground water supply given its significant 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).

Having established that the CM Rules are binding on the Director specific to the ESPA GWMA, the next question is how CM Rule 50 should be interpreted. This rule provides 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. And these administrative rules are not “buried in rules and regulations promulgated by the Director.” *Coalition’s Response* at 12. There are only 12 pages to the CM Rules and given the extensive litigation that has occurred over the past decade on the CM Rules, they are not voluminous and are obviously well known to the Department and all parties to this proceeding.

In specific response to the “strawman” argument asserted by the Coalition, this criticism of the Basin 33 Water Users’ position ignores that this GWMA process is and has always been interrelated with water delivery calls. Allocation of water by priority administration under chapter

5 of Title 42 and ground water management area under Idaho law are not completely separate. Even in the ESPA GWMA Order itself, the Director explained that “administration of the ground water management area and of the ground water management plan **would be accomplished through existing water districts, by the watermasters as supervised by the Director. See generally chapter 6, title 42, Idaho Code.**” *Id.* at 24. (emphasis added).

Furthermore, if the focus of a GWMA is to essentially protect ground water users from themselves by protecting the ground water supply from mining, then why is the Coalition—which is made up of surface water users (except for A&B irrigation District)—involved in this process at all? We can only conclude that it is because the Coalition wants the provisions of their settlement agreement with IGWA to be implemented as the ground water plan so that enforcement of IGWA’s contractual obligations under that agreement will be transferred from the Coalition to the State of Idaho, acting through the Department. Indeed, the Director has already stated that the “Settlement Agreement will be a key part of any future ground water management plan and it will be appropriate to incorporate all or part of the settlement into an ESPA ground water management plan.” ESPA GWMA Order at 24.

Further, the argument that water right administration actions and delivery calls are separate processes than a GWMA action and have not been a consideration in this ESPA GWMA process is disingenuous. First, letter sent by the Director is clear that ground water and surface water delivery calls served as the primary basis for considering the formation of a GWMA, which the Letter described as involving “disjointed water calls and mitigation plans,” “sporadic curtailment orders and associated mitigation,” and “sporadic water right administration.” The letter further asserts that “management utilizing a GWMA may bring consistency to administration to achieve aquifer stabilization.”

Second, the ESPA GWMA Order itself refers to water right administration issues as a basis for designating the ESPA as a GWMA. ESPA GWMA Order at 2 (“... and that ‘formation of a ground water management area would have distinct advantages’ over administering only through conjunctive management delivery calls because the Department can ‘consider the aquifer as a whole.’”); see also *Id.* at 11-12 (describing the 2005 Coalition delivery call); *Id.* at 14-15 (describing the A&B Irrigation District delivery call); *Id.* at 15-16 (describing spring delivery calls); *Id.* at 17 (describing the Coalition-IGWA Settlement Agreement). The Director even explained that “administration of the ground water management area and of the ground water management plan would be accomplished through existing water districts, by the watermasters as supervised by the Director. See generally chapter 6, title 42, Idaho Code.” *Id.* at 24.

Accordingly, despite the Coalition’s arguments otherwise, there is not a complete separation of these issues when it comes to allocation of a water supply. Priority administration and the designation of this GWMA from the Coalition’s standpoint has always been interrelated as evidenced by its original delivery call documents also calling for designation of a ground water management area in 2005 in the same proceeding (which GWMA petition was denied) as well as A&B Irrigation District’s combined delivery call and petition for designation of an ESPA ground water management area.

At the end of the day, the Coalition wants more water from ground water reach gains to the Snake River, and that will happen under either priority administration or through a ground water management area. That is why, in our view, Rule 50 was included in the CM Rules—to allow for a ground water management area during the pendency of the SRBA or for conjunctive administration once the SRBA was completed. That is not only the Basin 33 Water Users’ position, it was the position of then-Director Tuthill:

41. Since water districts created pursuant to chapter 6, title 42, Idaho Code, are in place across all of the ESPA, no additional relief to A&B would be provided for through the creation of a ground water management area encompassing all of the ESPA. Moreover, A&B is benefited by administration of junior priority ground water rights through water districts, as opposed to a ground water management area, because the Director, to the extent that he finds material injury, may order curtailment without following the notice procedure described in Idaho Code § 42-233b: "Such order shall be given only before September 1 and shall be effective for the growing season during the year *following* the date the order is given." Idaho Code § 42-233b (*emphasis added*).

In the Matter of Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area, at 47. And it was the position of then-Director Dreher:

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

Final Order Modifying the Boundaries of the American Falls Ground Water Management Area (Aug. 29, 2003) at 2.

The *Coalition's Response* does not present persuasive argument as to why Rule 50 can or should be ignored. For the reasons set forth herein, and in addition to the arguments raised in prior briefing from the Basin 33 Water Users, summary judgment in favor of the Basin 33 Water Users is appropriate as to all four issues described above. Consequently, 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 continues to argue that the ESPA GWMA Order is not a rule, but an administrative action of the Department. *Coalition's Response* at 9-10. The Coalition maintains that none of the Department's prior ground water management area

designations constitute Department rules and asserts that the Basin 33 Water Users must analyze the *Asarco* factors and explain why the ESPA GWMA is a rule. *Coalition's Response* at 17.

We agree that the ESPA GWMA Order itself was not a rule, but this misses 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 rescinded in order for the Director to have the legal authority to designate an ESPA GWMA post-SRBA and/or expand the ESPA boundary. There is no need to analyze the *Asarco* factors because they do not apply here. It is not the designation of the ESPA GWMA that is the rule, rather, rulemaking is required to rescind Rule 50 if the Director is to designate the ESPA GWMA without complying with Rule 50.

The *Coalition's Response* also argues that “[t]he Basin 33 Users essentially allege a conflict between CM Rule 50 and I.C. § 42-233b.” *Coalition's Response* at 16. This is not accurate in any way. As explained *supra*, the Basin 33 Water Users believe that CM Rule 50 and Idaho Code § 42-233b can be read harmoniously.

Our position relative to the proper interpretation of the CM Rules, and CM Rule 50 in particular, has already been addressed in prior briefing. 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. The Basin 33 Water Users procedural due process claim is not beyond the scope of the issues summarized by the Director.

The *Coalition's Response* describes the Coalition's objection to the Basin 33 Water User's arguments relative to procedural due process. *Coalition's Response* at 18-19. However, the end result of not using the proper procedure in this matter as contained in questions 1, 3, and 4 in the Director's ESPA GWMA Order is a violation of due process. This is not an expansion or enlargement of these issues.

D. The Basin 33 Water Users have alleged prejudice and are seeking affirmative relief.

The final section of the *Coalition's Response* asserts that the Basin 33 Water Users have failed to allege prejudice or seek affirmative relief. *Coalition's Response* at 23. We disagree. As explained previously, 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 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 arguments should be rejected.

Yet, even considered on its merits, the Coalition's arguments are unavailing. 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.

But even viewed in a manner that the Coalition apparently advocates for, the Basin 33 Water Users have complied with all applicable procedural rules and will suffer prejudice if the ESPA GWMA is not withdrawn. 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 even though that expanded area is outside the Rule 50 boundary. *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 no different. The Director designated the ESPA GWMA without holding a hearing to build an administrative record upon which to base a decision, and by doing so, the Basin 33 Water Users were precluded from presenting evidence in such a hearing and now must challenge the Director’s actions based only on evidence he relied upon in making his decision. These actions were prejudicial to the Basin 33 Water Users as it immediately places them in a defensive position in challenging the decision without the benefit of an administrative record.

II. CONCLUSION

For the reasons set forth above, the Basin 33 Water Users' motion for summary judgment should be granted, and the ESPA GWMA Order should be withdrawn.

Respectfully submitted this 2nd day of December, 2019.



Robert L. Harris

HOLDEN, KIDWELL, HAIN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 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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