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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 **SURFACE WATER COALITION'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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"), by and through their counsel of record, and hereby submit the following *Surface Water Coalition's Reply in Support of Motion for Summary Judgment*. For the reasons set forth below the Director should grant the Coalition's motion as a matter of law.

INTRODUCTION

The Coalition's *Memorandum in Support* of its motion for summary judgment already addresses most of the arguments set forth in the Basin 33 Water Users' *Response to Coalition's Motion for Summary Judgment* ("*Basin 33 Resp.*"), the Upper Valley Water Users' *Response in Opposition to Surface Water Coalition's Motion for Summary Judgment* ("*Upper Valley Resp.*"), IGWA's *Response to Motions for Summary Judgement* ("*IGWA Resp.*"), and the City of Pocatello's *Brief in Response to Basin 33 Water Users' and Surface Water Coalition's Motions for Summary Judgment* ("*Poc. Resp.*") (collectively hereafter referred to as "respondents"). To the extent the Coalition's prior memorandum already addresses the issues raised by the responses, such arguments are herein incorporated by reference.

Pervasive throughout the above-referenced responses is the misapprehension that agency rules and procedure trump or condition a clear legislative grant of authority to the Director of the Idaho Department of Water Resources ("IDWR") to protect a groundwater resource. Desperate to levy bureaucratic process and inefficiency on the Director, the respondents argue that protecting the State's groundwater resources is conditioned upon following inapplicable rules. However, disagreement with the GWMA designation does not justify their erroneous arguments.

Idaho Code § 42-233b provides the Director with discretion and clear authority to designate groundwater management areas in the state. Pursuant to that authority, the Director properly designated the ESPA GWMA. The Director followed the plain and unambiguous language of the statute and there is simply no procedural deficiency that warrants withdrawal of the order now. Contrary to the respondents' arguments, IDWR's Procedural and CM Rules did not apply to the Director's designation and rulemaking was not required either. Consequently, the Director should grant the Coalition's summary judgment motion on the four legal issues.

ARGUMENT

I. The Additional Issues Raised by the Basin 33 Users, IGWA, and the City of Pocatello Violate the Order Limiting the Legal Issues and Should be Rejected.

On September 25, 2019, the Director 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 of legal issues remaining in this matter" to four discrete matters. *Motion Practice Order* at 1. None of the issues identified by the Director address alleged due process violations or other new matters raised by IGWA and the City of Pocatello in their responses. The legal issues are limited to: (1) whether the Director erred when issuing the order outside the auspices of the procedural requirements of the CM Rules and Procedural Rules; (2) whether the Director erred by not conducting rulemaking prior to the designation; (3) whether the Director erred by not holding a contested case hearing prior to the designation; and (4) whether the Director is foreclosed from designating the ESPA GWMA because the ESPA has been adjudicated and contains existing ground water districts. *See Motion Practice Order* at 1-2.

Despite the Director's express limitation, the Basin 33 Users, IGWA, and the City of Pocatello are now attempting to advance additional unrelated legal arguments in their "responses" to the Coalition's motion. *See Basin 33 Resp.* at 5, 16-17 (alleging due process violation and issue regarding interpretation of CM Rules' "area of common ground water supply"); *IGWA Resp.* at 2-6, 8-9 (issues regarding administration, management plans, settlement, and due process claims); *Poc. Resp.* at 3-6 (issues regarding administration and GWMA goals). Notably, both the Basin 33 Users and IGWA now raise the question of 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."[1] *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998). A constitutional due process claim, and the other issues referenced above are not one of the four legal issues identified in the Director's *Motion Practice Order*. As such, the Director should reject these arguments which impermissibly attempt to expand legal issues in this proceeding.

Similarly, Pocatello erroneously asks the Director to make a legal ruling outside the scope of this proceeding. The City advances a specific interpretation of I.C. § 42-233b relating to the extent of the Director's powers to administer water rights within a GWMA. This issue is not ripe and unrelated to the limited legal issues identified by the Director is his *Motion Practice Order*. Since this issue is outside the scope of these proceedings the Director should ignore the City of Pocatello's efforts to broaden the issues.

For the above reasons the Director should reject the various arguments related to issues not identified in the Director's *Motion Practice Order*. These arguments do not "respond" to the Coalition's motion for summary judgment but instead wrongly attempt to raise new legal issues that are not before the Director on any properly filed motion.

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

The Basin 33 Users, the Upper Valley Users, and now IGWA, mistakenly and misapply Idaho law in claiming the Director's GWMA designation authority is limited by the

[1] Even if this issue could be heard it would fail on the merits as the Department went above and beyond what is required by I.C. § 42-233b by providing multiple opportunities for public hearing and comment on the proposed GWMA. The Department conducted ten separate public hearings across southern and eastern Idaho in the summer of 2016. The Department also received 29 letters of public comment, including letters on behalf of Fremont-Madison Irrigation District, Madison Ground Water District, the City of Pocatello, and IGWA. Individual members of the Basin 33 Users may have participated in one or more of the public hearings and provided comment as well (the Coalition has not reviewed the attendance lists or audio recordings). Regardless, the Director is now holding a contested case hearing pursuant to I.C. § 42-1701A(3) which provides yet another hearing opportunity. Still, the Coalition reserves the right to challenge whether this hearing is even allowed under the unique facts where the original petitioner withdrew.

Department's Procedural (IDAPA 37.01.01) and CM Rules (IDAPA 37.03.11).[2] Despite these arguments, it is clear the Director complied with the plain and unambiguous language of I.C. § 42-233b in designating the ESPA GWMA. As such, any arguments alleging procedural deficiencies are erroneous and fail as a matter of law.

The Basin 33 Users continue to allege the CM Rules govern the Director's authority to designate GWMAs. *See generally, Basin 33 Resp.* at 8-16. Ignoring CM Rule 1, which states "the rules prescribe procedures for responding to a delivery call by the holder of a senior-priority surface or ground water right . . .", the Basin 33 Users claim the rules restrict the Director's authority to create the ESPA GWMA.[3] *See id.* at 8. The Basin 33 Users claim that CM Rule 50.01.d is "specific" and essentially "trumps" Rule 5. *See id.* at 10-11. However, they fail to acknowledge the plain terms of the statute, which cannot be rewritten by the CM Rules.

The groundwater management statute unambiguously gives the Director authority to designate the ESPA GWMA. *See* I.C. § 42-233b. The Basin 33 Users and IGWA claim that no groundwater management area can exist because of CM Rule 50.01.d. They claim that "water districts" prohibit any groundwater management area on the ESPA. Contrary to this argument, the CM Rules prescribe procedures for "delivery calls" and "administration" and do not supplant the Director's statutory authority to manage aquifers under I.C. § 42-233b. Idaho case law is

[2] Contrary to its latest position, IGWA initially supported the GWMA designation. *See Randy C. Budge Letter to Director Gary Spackman* (June 30, 2016). Although IGWA erroneously asked the Director to exclude the ground water districts that are party to the SWC Agreement, it did not argue the Director was restrained by the CM Rules or APA in making such a designation. The Director should hold IGWA to its prior representations.

[3] The Director's July 7, 2016 letter described the upcoming public hearings and the state of aquifer declines and loss of storage since 1952. The letter generally referenced past delivery calls resulting from the aquifer declines but was not issued "in response" to a new delivery call or petition. To the contrary, the Director has conducted several contested cases and issued numerous orders in response to delivery calls made by senior surface and ground water users on the ESPA. The Basin 33 Users can point to no petition or letter to show that the ESPA GWMA designation was issued as a formal response to a delivery call. Their effort to shoehorn the Director's action into the inapplicable CM Rule procedures should be rejected.

clear on this point. *See State v. Perkins*, 135 Idaho 17, 22 (Ct. App. 2000) ("An administrative rule that is inconsistent with a statute that it purports to implement is ineffective to the extent of such inconsistency; *Hillcrest Haven Convalescent Center v. Idaho Dept. of Health & Welfare*, 142 Idaho 123, 125 (2005) ("This Court will not enforce a regulation that is, in effect, a rewriting of the statute."). Since the Basin 33 Users and IGWA claim that CM Rule 50 "rewrites" I.C. § 42-233b, their arguments fail as a matter of law.

Indeed, the Basin 33 Users and IGWA miss the point of the CM Rules altogether. The rules provide a sequence of procedures for responding to calls depending upon the state of the area in question. CM Rule 30 outlines procedures for responding to delivery calls in areas not designated as having a common ground water supply, organized into water districts, or that have not been designated as a GWMA. CM Rule 40 provides procedures for responding to delivery calls in areas having a common ground water supply with organized water districts. Finally, CM Rule 41 provides procedures for those areas that have been designated as a GWMA but that are not covered by water districts.

CM Rule 20.07 acknowledges and recites this "sequence of actions for responding to delivery calls." If a petition is filed in an area of common ground water supply without a water district, the Department may consider "such to be a petition for designation of a ground water management area. . ." CM Rule 30.06. In that sense CM Rule 50.01.d follows the rules "sequencing" in that petitions for delivery calls would be addressed in either a new or existing water district, or through a GWMA designation, depending upon whether water rights were adjudicated or not. At the time CM Rule 50.01 was promulgated in 1994 the SRBA was only seven years old and there were no water districts covering ground water rights in the ESPA. To the Coalition's knowledge none of the ground water rights on the ESPA had been partially

decreed at that time. Furthermore, there was no GWMA covering the ESPA at that time either. Accordingly, for purposes of delivery calls that could be filed the rule simply restated that the ESPA "area of common ground water supply" would either be created as a new water district, incorporated into an existing one (per CM Rule 40), or designated as a GWMA (per CM Rule 30).

Identifying the various procedures for responding to a delivery call on the ESPA "area of common ground water supply" did not mean the Director was without authority to designate a GWMA if a water district ever existed.[4] Again, the Basin 33 Users misread the statutes and the purpose of a GWMA. Contrary to their argument, a GWMA is not simply a "pre-adjudication" tool that is replaced by watermasters and water right administration. Notably, a watermaster has no authority to adopt a groundwater management plan or protect a declining aquifer. Instead, a watermaster is charged with the ministerial duty of distributing water to the various rights in a district. *See* I.C. § 42-607; *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 913, 916 (1935). Idaho's groundwater management statutes delegate such resource protective actions solely to the Director. *See* I.C. § 42-233a, b; *see also*, I.C. § 42-231.

Moreover, the Basin 33 Users misread Rule 20 in claiming that the rules provide the sole procedures for designating the ESPA GWMA. *See Basin 33 Resp.* at 12. The general statement rule, CM Rule 20.06, simply restates the above-sequencing and process that would be followed in responding to delivery calls in the various areas. Contrary to the Basin 33 Users, the rule is not a substantive prohibition or limit on the Director's statutory authority. *See Perkins*, 135 Idaho at 22; *Hillcrest Haven*, 142 Idaho at 125.

[4] There are numerous examples of where a critical groundwater area or groundwater management area and a water district overlap. *See* Water District No. 140 and Oakley Fan CGWAs; Water District No. 143 and Raft River CGWA; Water District No. 13-T and Bancroft Lund GWMA; Water District No. 37-M and Big Wood GWMA.

Next, the Basin 33 Users and IGWA disregard the fact the Procedural Rules and CM Rules are limited in title and scope. Procedural Rule 7 states the rules only apply to "contested case proceedings," not to all statutory grants of authority given the Director of IDWR. *See* IDAPA 37.01.01.001.02. As a condition precedent for the Procedural Rules to have been violated, there must have been a "contested case," which is a "proceeding which results in the issuance of an order." Procedural Rule 7. There was no "contested case" or "proceeding" and therefore IDWR's Procedural Rules did not apply.[5] IGWA's argument that the APA required the Director to first hold a hearing is similarly unavailing. *See IGWA Resp.* at 6-7. Again, the APA only applies to orders issued following contested cases, which was not the case with the Director's GWMA Order. Designating the GWMA did not determine the "legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons," rather it designated the aquifer with a particular status under I.C. § 42-233b.[6] *IGWA Resp.* at 6. Any person feeling aggrieved by that decision had a statutory right to file a petition and request a hearing. IGWA, the Basin 33 Users, and Upper Valley Users filed no such petition, providing further evidence that the GWMA Order did not determine any of their members' "legal rights" or "interests."

[5] IGWA wrongly argues that the Director had to follow the APA and create a contested case in order to issue his GWMA Order. *IGWA Resp.* at 6-7. The APA defines a "contested case" as a "proceeding." There was no "proceeding" before the Director and I.C. § 42-233b required no such action before designation.

[6] The case cited by IGWA, *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 207 P.3d 963 (2009), is distinguishable from the present matter. First, the developer in *Lochsa Falls* applied for an "encroachment permit" from the Idaho Transportation Department. 147 Idaho at 235. ITD issued the permit with certain conditions including that the developer pay for a traffic signal. The Supreme Court found that ITD's denial or approval of the "permit" determined the "legal rights and interests of a property owner in accessing their property from a state highway" and therefore judicial review of that action was governed by the APA. 147 Idaho at 239. There is no similar application or "approval or denial" of individual rights at issue in the ESPA GWMA Order. The designation of the ESPA GWMA addresses the state of the public resource, not individual rights or interests. Consequently, the APA did not apply to require a contested case before the Director designated the area pursuant to I.C. § 42-233b. Moreover, unlike the facts in *Lochsha Falls*, where ITD had no rules allowing an appeal of that approval of the permit with conditions to the agency, here I.C. § 42-1701A(3) provides an opportunity for aggrieved persons to request a hearing before the Director. The APA governs the procedures of the present contested case.

Similarly, by definition, the CM Rules only apply in response to a delivery call. IDAPA 37.03.11.001. The Director did not designate the ESPA GWMA in response to a delivery call. Consequently, neither the Procedural nor CM Rules limited the Director's authority under I.C. § 42-233b to designate the ESPA GWMA.

The Basin 33 Users further allege that the Procedural and CM Rules limited the Director's authority by arguing those rules "have the same force and effect of law because they are an integral part of Idaho's water law." *Basin 33 Resp.* at 10. This claim ignores one of the most basic legal principles in administrative law. While administrative rules may 'supplement' statutory language, they cannot "modify, alter, enlarge, or diminish provisions of a legislative act that is being administered." *See Roberts v. Transportation Dep't,* 121 Idaho 727, 827 P.2d 1178 (Ct.App.1991), *aff'd* 121 Idaho 723, 827 P.2d 1174 (1992); *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada Cty.*, 136 Idaho 809, 813, 41 P.3d 237, 241 (2001). Moreover, the Idaho Supreme Court has explained that agency rules "do not rise to the level of statutory law." *Mead v. Arnell*, 117 Idaho 660, 664 (1990). Accordingly, any argument that the Department's Rules "supplant" I.C. § 42-233b is erroneous and without merit. *See Basin 33 Resp.* at 14 (arguing that water districts replace GWMAs through the CM Rules).

The premise that agency rules cannot modify or replace statutory duties is clear according to well-established precedent in Idaho. For example, in *Roberts*, the Legislature imposed on the Transportation Department the responsibility to "[f]urnish, erect and maintain standard signs *on side highways* directing drivers of vehicles approaching a designated through highway to come to a full stop before entering or crossing the through highway." 121 Idaho at 731, 827 P.2d at 731 (citing I.C. § 40-310(12)). The "legislature in no way qualified this duty" in the statute. *Id.* The Court found that "although the legislature delegated some rule-making authority to the

Department to adopt specifications for a uniform system of traffic-control devices, the Department was not thereby permitted to institute rules or policies *limiting its ability to achieve its express statutory duties*." *Id.* 121 Idaho at 732, 827 P.2d at 1183 (emphasis added). Here, the Basin 33 Users claim that the CM Rules limit the Director's statutory duties regarding GWMAs. By claiming that a GWMA cannot exist in the ESPA, the Basin 33 Users wrongly assert that the Director's CM Rules can modify and override his statutory duty to protect the ESPA even if it found to be approaching a critical status. The holding in *Roberts* forecloses such an argument.

Furthermore, where a legislature enacts a statute requiring that an administrative agency carry out specific functions, that agency cannot validly subvert the legislation by promulgating contradictory rules. *See Roberts*, 121 Idaho at 723, 827 P.2d at 1183*; see also, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). An administrative agency is limited to the power and authority granted it by the legislature. *See Abbot v. State Tax Comm'n,* 88 Idaho 200, 398 P.2d 221 (1965). Such delegated authority is primary and exclusive in the absence of a clearly manifested expression to the contrary. *See Fischer v. Sears, Roebuck and Co.,* 107 Idaho 197, 200, 687 P.2d 587, 590 (Ct.App.1984). An agency must exercise any authority granted by statute within the framework of that statutory grant. *See Roberts,* 121 Idaho at 732 (citing *Adams v. Industrial Comm'n,* 26 Ariz.App. 289, 547 P.2d 1089 (1986)). If the administrative rules "modify, alter, enlarge or diminish the provisions of the legislative act" such "rules would be in excess of the Department's rule-making authority, and therefore invalid and unenforceable." *Roberts*, 121 Idaho at 731–32, 827 P.2d at 1182–83.

Should the Director rule that the CM Rules and Procedural Rules limit his authority clearly granted him under I.C. § 42-233b, then the particular CM Rules and Procedural Rules

would therefore be beyond his authority and void. *Pumice Products v. Robinson*, 79 Idaho 144, 147, 213 P.2d 1026, 1027 (1957) (voiding regulation for "impos[ing] additional conditions not required by statute.") (citing *Grayot v. Summers,* 75 Idaho 125, 269 P.2d 765 (1954); *Sunshine Dairy v. Peterson*, 183 Ore. 305, 193 P.2d 543 (1948); *Blatz Brewing Co. v. Collins*, 69 Cal.App.2d 639, 160 P.2d 37 (1945); *In re Application of State Board of Medical Examiners,*210 Okla. 365, 206 P.2d 211 (1949)).

In *Pumice Products*, the Department of Labor issued a regulation stating "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election was held." *Id.* The statute stated that the Commissioner of Labor must hold an election when a question arises concerning representation of employees, and when requested to hold an election by an employer or employees. *Id.* (citing I.C. § 44-107). The Court found that the "statute does not require a lapse of time of one year between elections and the rule promulgated by the Commissioner which prohibits the holding of an election for a period of one year after an initial election has been held *is not authorized by the statute*." *Id.* (emphasis added). The Court went on to find that the "statute does not confer on the Commissioner of Labor any right to make a regulation or ruling in direct conflict with its terms." *Id.* Therefore, despite being a procedural requirement, because the one-year waiting period limited the Commissioner's authority granted to him by statute, the regulation was found void.[7] In *Pumice Products*, the

[7] Other jurisdictions agree with Idaho's position. As relied upon in *Pumice Products*, a similar situation arose in *In re Application of State Board of Medical Examiners,*210 Okla. 365, 206 P.2d 211 (1949). Under the Oklahoma statute, "the possession of a diploma from a Grade A school [was] not made a condition precedent to being permitted to take the [medical] examination, but under the rule it [was]." *Id.* 210 Okla. at 369, 206 P.2d at 215. The Court found "[t]he only authorized basis for any rule is that it is a means to the accomplishment of the legislative purpose expressed in the statute and its quality is to be judged by the effect thereof when used. If conducive to such purpose it is authorized by the statute. If not so conducive it is not authorized by the statute and therefore without the force of law." *Id.* 210 Okla. at 370 (citing *Georgia Railroad & Banking Co. v. Smith*, 70 Ga. 694 (1883); *Id*, 71 Ga. 863, affirmed in 128 U.S. 174 (1884); *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 977 (1908)). The Court found the rule inoperative.

Court invalidated the agency regulation that would have prevented the Commissioner from acting for one year, yet the Basin 33 Users, Upper Valley Users, and IGWA, all assert an *implied* "requirement" to conduct a rulemaking and initiate a contested case, which would indefinitely suspend the designation of a GWMA under I.C. § 42-233b, is somehow "self-evident."

To hold that the Director must withdraw the ESPA GWMA Order because he did not conduct rulemaking or initiate a contested case is in direct conflict to accomplishing the purpose of I.C. § 42-233b, and is subverting the statute by causing the Director to wade through inapplicable procedures in order to protect a declining aquifer. Based on clear precedent such an argument cannot stand.

Similarly, in *Grayot v. Summers*, 75 Idaho 125, 269 P.2d 765 (1954), the Idaho Supreme Court struck down a Department of Law Enforcement regulation because the "legislature must expressly authorize such rules and regulations and define the limits thereof." *Grayot*, 75 Idaho at 132, 269 P.2d at 768. The Court relied on *State v. Heitz*, 72 Idaho 107, 111, 238 P.2d 439, 441 (1951), for the proposition that a legislature "may expressly authorize an administrative commission…within definite limits, to provide rules and regulations for the complete operation and enforcement of the law *within its expressed general purpose*." *Id.* Therefore, while an agency has "additional powers as are necessary for the efficient exercise of the powers expressly granted or necessary for the discharge of duties imposed upon it by law," it cannot be seriously advanced that a designation to protect Idaho's groundwater resources is conditioned upon endless rulemaking and contested cases. Such processes would not be 'necessary for the *efficient* exercise' of the Director's statutory authority, but would inhibit that authority contrary to the legislature's expressed purposes. *See* I.C. §§ 42-231; 233a; 233b; *see also*, *Grayot*, 75 Idaho at 132, 269 P.2d at 769.

The discretion to designate GWMAs conforms to the declaration of policy of IDWR which states 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). Even if the Director had the implied authority to bind his I.C. § 42-233b authority to compliance with IDWR's Procedural and CM Rules, such requirements do not conform to the Legislature's declaration of policy imposing a duty on the Director to protect Idaho's aquifers. If the Director had to initiate a contested case or conduct rulemaking, the ground water resources could be depleted or further mined before aggrieved parties arrived at resolution. Conditioning GWMA designations with implied procedural requirements is in direct contravention to the Director's statutory authority and the Legislature's declaration of policy. *See e.g., Pumice Products*, 79 Idaho at 147, 231 P.2d at 1027 (finding the election within the time period prohibited by the rule was "conformable to the declaration of policy of the labor act. . .").

Contrary to the Basin 33 Users' arguments, the Procedural Rules and the CM rules cannot limit or condition the Director's plain and unambiguous statutory authority to designate GWMAs.

III. The Director Was Not Required to Conduct Rulemaking.

The Basin 33 Users further claim that the Director was required to initiate formal rulemaking because of the perceived effect of CM Rule 50 on the ESPA. *See Basin 33 Resp.* at 19-20. This argument is not supported by the procedural history. The Director's GWMA designation was not a proposed amendment to CM Rule 50, the GWMA designation was made

pursuant to I.C. § 42-233b. Whereas the CM Rules address delivery calls and mitigating injury to a specific injured water right holder, the GWMA designation was made pursuant to express authorities in the Ground Water Act that address management of a diminishing water supply. As such, the Director should find that the APA rulemaking provisions did not apply to the ESPA GWMA Order. The Director should grant the Coalition's *Motion for Summary Judgment* and uphold the ESPA GWMA designation.

CONCLUSION

Protecting declining groundwater resources is a specific duty that the Legislature has charged the Director with fulfilling. Although the respondents disagree with the Director's actions with respect to the ESPA GWMA, that disagreement does not provide cause for withdrawing the Director's order. Contrary to IGWA's, the Upper Valley Users', and the Basin 33 Users' arguments, the Department's Procedural and CM Rules do 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 in designating the ESPA GWMA and there are no procedural deficiencies as a matter of law.

Further, the Director should reject the claim that GWMAs cannot exist in areas that have adjudicated water rights. Administration of individual water rights addresses injury and mitigation for specific water right holders, but does not address a diminishing groundwater resource and whether it is approaching a critical condition. The respondents' efforts to restrict and limit the Director's authority is not supported by statute or case law and should be rejected as a matter of law.

In sum, the Director should grant the Coalition's *Motion for Summary Judgment* and uphold the ESPA GWMA designation accordingly.

DATED this 2nd day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2019, I served a true and correct copy of the foregoing *Surface Water Coalition's Reply in Support of Motion for Summary Judgment* on the following by the method indicated:

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