

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BASIN 33 WATER USERS, a coalition of water  
right holders, and the UPPER VALLEY  
WATER USERS, a coalition of water right  
holders,

Petitioners,

vs.

SURFACE WATER COALITION, a coalition  
of water right holders,

Cross Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES,

Respondent,

And

CITIES OF BLISS, BURLEY, CAREY,  
DECLO, DIETRICH, GOODING,  
HAZELTON, HEYBURN, JEROME, PAUL,  
RICHFIELD, RUPERT, SHOSHONE, AND  
WENDELL; SOUTH VALLEY GROUND  
WATER DISTRICT, IDAHO GROUND  
WATER APPROPRIATORS, INC.; IDAHO  
POWER COMPANY; CLEAR SPRINGS  
FOODS, LLC; CITY OF POCATELLO, and  
SNAKE RIVER STORAGE,

Intervenors.

**Case No. CV01-20-8069**

**PETITIONERS' BRIEF**

IN THE MATTER OF DESIGNATING THE  
EASTERN SNAKE PLAIN AQUIFER  
GROUND WATER MANAGEMENT AREA

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## PETITIONERS' BRIEF

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Judicial Review of the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (dated November 2, 2016),  
entered by the Idaho Department of Water Resources;  
Hearing Officer Director Gary Spackman, Director, Presiding.

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The Fremont Madison Irrigation District, Madison Ground Water District, and Idaho Irrigation District (collectively the “Upper Valley Irrigators”), and the Basin 33 Water Users (together, the “Petitioners”), by and through their undersigned counsel, hereby collectively submit *Petitioners’ Brief*.

## I. STATEMENT OF THE CASE

### A. Nature of the Case.

This is a case about water administration. More specifically, this case is about the lawful and proper administrative regime to regulate and administer water rights in priority on the Eastern Snake Plain Aquifer (“ESPA”), and whether—despite the existence of numerous active water districts that cover the geographic extent of the ESPA and despite the completion of the Snake River Basin Adjudication (“SRBA”)—Director Gary Spackman (“Director”) lawfully designated the ESPA as a ground water management area (a “GWMA”) under Idaho law.

This is not the first time this Court has been faced with addressing a GWMA matter on appeal. The A&B Irrigation District—one of the individual members of the Cross-Petitioner Surface Water Coalition (the “Coalition”)—previously challenged the Director’s failure to designate the ESPA as a ground water management area. This Court decided on appeal that the Director did not err in not designating all or a portion of the ESPA as a GWMA. *Memorandum Decision and Order on Petition for Judicial Review*, Minidoka County Case No. 2009-647, at 43-48 (May 4, 2010).<sup>1</sup> In that decision, the Court agreed with the hearing officer “who ultimately concluded that ‘[t]he benefit of designating the ESPA as a [GWMA] is not apparent. There may be no harm in doing so, but it would appear to add an administrative overlay without identifiable

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<sup>1</sup> This memorandum decision is available at <https://idwr.idaho.gov/files/legal/CV-2009-647/CV-2009-647-20100504-Memorandum.pdf>.

benefits.’ **This Court agrees.**” *Id.* at 47 (emphasis added, alterations in original, internal citation omitted).

The Petitioners agree with this reasoning—that the ESPA GWMA Order (defined below) adds “an administrative overlay without identifiable benefits.” Further, the ESPA GWMA Order now allows the Director to do indirectly what he could not do directly by expanding the geographic reach of his conjunctive management authority beyond the Rule 50 boundary into some (but not all) tributary basins (including the Little Lost River Basin, from which the Basin 33 Water Users derive ground water, and on to the Rexburg Bench, from which some of the Upper Valley Irrigators derive their ground water).<sup>2</sup>

The issue of whether the ESPA should be a GWMA is now back before the Court, only this time, a mere 6 years after the Director defended its decision not to designate a GWMA for the ESPA before this Court (in 2010), the Director changed course and designated the ESPA as a GWMA (in 2016). Similar to and in addition to the issues identified by this Court in the 2010 A&B decision cited above, there are several other reasons why the Director’s decision in this matter should be reversed. For the reasons set forth below, the Director violated Idaho law by designating the ESPA as a GWMA, and for that reason, the ESPA GWMA Order should be set aside.

## **B. Course of Proceedings.**

This matter was not initiated as a contested case with a hearing in front of the Idaho Department of Water Resources (“IDWR” or “Department”). Rather, it was initiated by a letter

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<sup>2</sup> Under the conjunctive management rules (“CM Rules”), 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 the Coalition’s delivery call to the Rule 50 boundary. See <https://idwr.idaho.gov/legal-actions/administrative-actions/ESPA-CMR50-petition/>.



dated July 7, 2016 (the “Letter”) from Director Spackman announcing IDWR’s consideration of “creating a ground water management area for the Eastern Snake Plain Aquifer (ESPA),” and inviting “[p]otentially affected water users” to “participate in upcoming public meetings” at one or more of ten meetings scheduled across Eastern Idaho between July 25, 2016 and July 28, 2016 “to discuss the possible creation of a ground water management area for the ESPA.” R. 1 (referring to the July 7, 2016 letter, which is available at <https://idwr.idaho.gov/files/groundwater-mgmt/20160707-Letter-to-Waters-Users-from-Gary-Spackman-Re-Proposed-ESPA-GWMA.pdf>). Petitioners assumed that a formal contested case process would be undertaken if the Director decided to move forward on establishment of an ESPA GWMA (presumably based on the public comments), but no such hearing occurred.

Instead, without warning to anyone, the Director issued his *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“ESPA GWMA Order”) on November 2, 2016.<sup>3</sup> R. 1-28. This spawned several legal proceedings summarized in the ESPA GWMA Order as follows:

On November 16, 2016, the City of Pocatello (“Pocatello”), the Coalition of Cities, and Sun Valley Company (“SVC”) each filed petitions for reconsideration of the ESPA GWMA Order.

SVC also filed a *Petition Requesting a Hearing on Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area*. On December 2, 2016, the Director issued an *Order Granting Request for Hearing; Notice of Pre-Hearing Conference*, granting SVC’s request for hearing and scheduling a prehearing conference for January 12, 2017.

At the prehearing conference, the parties and Director agreed that the prehearing conference should be continued to March 22, 2017. The parties and Director also agreed that proceedings in this matter should be stayed until March

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<sup>3</sup> The ESPA GWMA Order is dated November 2, 2016, and subsequent newspaper notices also provide that the ESPA GWMA was designated on November 2, 2016. R. 25; R. 2328. However, in subsequent documents generating in this proceeding from the Department, they provide that the ESPA GWMA Order was issued on November 4, 2016. See R. 2977 as an example. It is unclear why there is discrepancy in the dates, and while it is not legally significant in our view, we nevertheless note this as there were not two orders issued by the Director (one on the 2<sup>nd</sup> and one on the 4<sup>th</sup>).

22, 2017, except that the Director would extend the time for filing petitions to intervene to March 22, 2017, and would accept and potentially address such petitions during the stay. Consistent with these agreements, The Director issued a *Notice of Continued Pre-Hearing Conference; Order Staying Proceedings Except Intervention* on January 17, 2017.

On March 20, 2017, SVC filed a *Notice of Withdrawal of Request for Hearing*.

On March 22, 2017, the Director held the continued prehearing conference. All parties were present except SVC. The Director questioned whether he should proceed to hold a hearing on the ESPA GWMA Order given SVC's withdrawal of its request for hearing. The parties and the Director agreed the prehearing conference should be continued to April 20, 2017. The Director extended the time for filing petitions to intervene to April 20, 2017.

On April 14, 2017, Pocatello filed with the Department the *City of Pocatello's Memorandum Regarding Procedural Posture; In the Alternative, Request for Hearing* ("Pocatello Memo"). Pocatello requested the Director "re-issue or otherwise withdraw the [ESPA GWMA Order] or permit Pocatello to proceed to hearing in this contested case" or grant Pocatello's new request for hearing on the ESPA GWMA Order pursuant to Idaho Code § 42-1701A(3). The Coalition of Cities subsequently filed *Coalition of Cities Joinder in Pocatello's Memo; In the Alternative, Request for Hearing*. Basin 33 Water Users filed *Basin 33 Water Users' Joinder in Pocatello's Memo; and in the Alternative Petition for Hearing*.

On April 20, 2017 SWC filed a response to Pocatello's memorandum, arguing that, because SVC withdrew its request for hearing, there was no outstanding petition or request that would allow for an administrative hearing on the ESPA GWMA Order. ("SWC's Response").

On April 20, 2017, the Director held a continued prehearing conference. The Director discussed the Pocatello Memo and the SWC's response and issued a briefing schedule, allowing the intervenors to address the issue of whether the Director should hold a hearing on the ESPA GWMA Order.

On May 4, 2017, the Upper Valley Irrigators filed *Upper Valley Intervenors' Memorandum Supporting the Need to Proceed to Hold a Hearing on the ESPA GWMA Order*, a memorandum arguing that the Director should hold the hearing despite SVC's withdrawal, and joining with other intervenors who previously requested a hearing.

On May 18, 2017, Pocatello filed *Pocatello's Response Brief*. The Coalition of cities subsequently filed *Coalition of Cities' Joinder in Pocatello's Response Brief*.

The matter was informally stayed from 2017 to 2019 while cities (including the City of Pocatello and cities within the Coalition of Cities) discussed settlement with the SWC related to the SWC delivery call. In early 2019, a settlement was finalized. The signatory cities agreed to “withdraw their opposition to the ESPA-GWMA Order that is subject to a contested case before IDWR (Docket No. AA-GWMA-2016-001), provided, however, that all Parties may remain as parties to the contested case to monitor the proceedings and participate as necessary.” *Cities Settlement Agreement* at 5.

On January 30, 2019, the Director convened a status conference to determine whether the intervenors wanted a hearing in light of the settlement agreement. Counsel for the Basin 33 Water Users and counsel for the Upper Valley Irrigators requested the Director conduct a hearing.

On July 11, 2019, the Director held an additional prehearing conference. All parties were at the conference except for the Big Wood & Little Wood Water Users Association and were either represented in person or by phone. The participating parties discussed, among other issues, how the case should proceed to hearing. As a result of the conference, those parties who still maintain opposition to the ESPA GWMA Order and desire to present argument and evidence at hearing were identified. The parties still in opposition were: the Upper Valley Irrigators, Basin 33 Water Users, and McCain Foods.

After the additional prehearing conference, the Director issued an *Order Adopting Deadlines; Notice of Additional Prehearing Conference*. The order set deadlines for submission of party issue statements along with response deadlines and an additional prehearing conference for September 23, 2019.

On September 23, 2019, the Director held the scheduled prehearing conference. All parties were represented either in person or by phone. The Director and parties discussed the scope of potential issues and agreed upon a schedule for disposition of legal issues through briefing and factual issues through live hearing.

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* (“Legal Issues and Hearing Order”). In the order, the Director established: (a) a deadline for the IDWR to disclose all relevant materials used or considered in issuance of the *ESPA GWMA Order*, including any additional, pertinent information compiled after issuance of the final order; (b) a motion and briefing schedule for disposition of legal issues; (c) notice and scope of hearing for the remaining factual issue(s); and (d) dates for the hearing and all relevant hearing preparation deadlines. The order also authorized discovery.

R. 2977-2980.

The Director of IDWR, who issued the ESPA GWMA Order, has also served as the hearing officer in the subsequent contested case. Based on party briefing and argument, the following fact issue was designated:

Whether areas outside of the ESPA area of common ground water supply, as defined by CM Rule 50 (IDAPA 37.03.11.050), but included within the ESPA GWMA, are located in tributary basins and are otherwise sufficiently remote or hydrogeologically disconnected from the ESPA to warrant exclusion from the ESPA GWMA.

R. 2980.

Based on party briefing and argument, the following legal issues were designated:

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 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 because the ESPA has been adjudicated and contains existing ground water districts?

R. 2690; *see also* R. 2980.

As to these legal issues, the Upper Valley Irrigators, Basin 33 Water Users, and Coalition submitted legal briefs styled as summary judgment motions and briefs on October 21, 2019. R. 2701-61. Responsive briefs were subsequently filed. On January 9, 2020, the Director issued his *Order on Legal Issues* (the "Legal Order"), which was designated as an interlocutory order at the time. In the Legal Order, the Director explained that he did not consider the briefing and argument "as motions for summary judgment, but rather, arguments to resolve legal issues." R. 2989. The Director therefore denied the motions for summary judgment but categorized his decision as

follows: “The Director’s order addressing the legal issues (this order) is a determination of legal issues.” *Id.* He decided the following:

### ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the **legal challenges** to the ESPA GWMA Order are **Without Merit**, and the Director **will not** reinstate the process for issuance of or amend the Order Designating the ESPA GWMA.

IT IS FURTHER ORDERED that there remains an issue of fact about hydrogeologic connectivity previously stated in this document that must be resolved at hearing.

IT IS FURTHER ORDERED that, when the evidence is viewed most favorably to the parties supporting designation of the ESPA GWMA, the Basin 33 Water Users are not entitled to a summary judgment as a matter of law, and the Basin 33 Water Users’ Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that, when the evidence is viewed most favorably to the parties opposing designation of the ESPA GWMA, the SWC is not entitled to summary judgment as a matter of law, and the SWC’s Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that this is an Interlocutory Order.

IT IS FURTHER ORDERED that this order does not resolve the remaining factual issue identified in the Legal Issue and Hearing Order. The Parties shall adhere to all previous hearing preparation deadlines and shall be prepared to appear and present factual evidence on **February 18-21, 2020**, as required by the Legal Issue and Hearing Order.

DATED this 9<sup>th</sup> day of January, 2020.

  
\_\_\_\_\_  
GARY SPACKMAN  
Director

A hearing was subsequently held on February 18, 2020, to address the remaining factual issue identified above. After the hearing on the factual issue, the Director issued his *Final Order on Fact Issue* on April 21, 2020 (the “Final Order”). The Final Order made final the interlocutory Legal Order. The procedural history on the determination of the factual issue is not directly relevant to the appeal filed by Petitioners as they are not challenging the Director’s decision on the

factual issue,<sup>4</sup> and for that reason, is not set forth here. Petitioners' appeal only seeks review of the legal matters addressed and decided in the Legal Order.

### **C. Statement of Facts.**

While Idaho Appellate Rule 35 provides for submission of a concise statement of facts, the matters addressed herein relate strictly to legal questions addressed and decided in the Director's Legal Order, and the Petitioners have no additional facts to add other than the items described in the Course of Proceedings section herein.

## **II. ISSUES PRESENTED ON APPEAL**

Whether the Director erred in a manner described in Idaho Code § 67-5279(3) that prejudiced a substantial right of Petitioners (Idaho Code § 67-5279(4)) with the issuance of his Legal Order in response to the following questions:

- A. Whether the Director erred in concluding that issuance of the ESPA GWMA Order was not procedurally deficient and was compliant with the procedural requirements of the Rules of Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) and/or IDWR's Procedural Rules (IDAPA 37.01.01).
- B. Whether the Director erred in concluding that the Director did not have to conduct rulemaking.
- C. Whether the Director erred in concluding that he did not have to hold a contested case hearing before issuing the ESPA GWMA Order.
- D. Whether the Director erred by concluding that formation of ground water districts in the ESPA did not foreclose designation of the ESPA GWMA under Idaho law.
- E. Whether the Director's actions prejudiced a substantial right of Petitioners.

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<sup>4</sup> The procedural history on the fact issue is set forth in detail in the Final Order. R. 3264-67.

### III. APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedures Act (Idaho Code § 67-5201, *et seq.*, hereinafter the “Act”). Idaho Code § 42-1701A. Under the Act, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). Here, where the agency “was required ... to issue an order,” the Court must affirm the agency decision unless the court finds that the agency’s findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). Further, the party challenging the decision must also show that at least one of its substantial rights have been prejudiced. Idaho Code § 67-5279(4).

The Petitioners moved for summary judgment on each of the legal questions designated by the Director in the contested case administrative proceedings. While there is no specific rule in the Department’s procedural rules concerning summary judgment, IDAPA 37.01.01.260 (which allows filing of a “motion”) and 37.01.01.565 (a “prehearing motion”) are broad enough to cover summary judgment motions.<sup>5</sup> As described above, in the Legal Order, the Director explained that

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<sup>5</sup> Concerning motions for summary judgment filed before the Department, the Department has received, considered, and ruled on them in prior cases. *See, e.g., Sylte v. Idaho Dep’t Water Res.*, 165 Idaho 238, 443 P.3d 252, (2019) (decision on appeal from IDWR final order on cross motions for summary judgment). Additionally, in a contested case involving Application for Permit No. 37-22852 filed by Innovative Mitigation Solutions LLC, a protestant filed a motion for summary judgment requesting dismissal of the application because the applicant had not provided a lease evidencing authority to use a canal for ground water recharge. Applying case law and Rule 56(c) of the Idaho Rules of Civil Procedure, the hearing officer granted the motion and rejected 37-22852 without a hearing. *Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852*, Hearing Officer Mathew Weaver, May 26, 2015.

he did not consider the briefing and argument “as motions for summary judgment, but rather, arguments to resolve legal issues.” R. 2989. The Director therefore denied the motions for summary judgment but categorized his decision as follows: “The Director’s order addressing the legal issues (this order) is a determination of legal issues.” *Id.*

On appeal, Petitioners assert that there is no difference between the Director’s characterization of what he did as a “determination of legal issues” and a grant of summary judgment on questions of law. Accordingly, on appeal, this Court “‘exercises free review over questions of law. The interpretation of a statute is a question of law subject to free review.’” *Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 502, 337 P.3d 655, 661 (2014) (internal citations omitted).

#### IV. LEGAL ARGUMENT

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

All four legal questions decided by the Director are interrelated. This section directly addresses the first, third, and fourth of these legal issues. The second issue is addressed separately in Section IV.B., below.

At the outset, it is critical in the review of the matters raised on appeal to recognize that there is clear precedent where the contents of administrative rules have limited what the Director believes he can do under his asserted broad discretion. The ESPA has a legally described boundary that is specifically defined in legislatively approved administrative rules—IDAPA 37.03.11.050 (“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)

As described in further detail below, the CM Rules directly apply to, and in specific instances limit, the Director's ability to designate an ESPA GWMA just like the CM Rules have limited the geographic extent of the Director's legal authority to conjunctively manage ground and surface water rights in response to a delivery call. The Director determined that he has no such legal restrictions under administrative rules for designation of the ESPA GWMA. However, he previously likewise attempted to do away with restrictions on his discretion and authority and was unsuccessful. In a proceeding that commenced in 2014, Director Spackman cited to his broad discretion as a basis to regulate surface and ground water sources under Idaho law as the basis for his ability to disregard the Rule 50 ESPA boundary. In discussing another proposed boundary (the ESPAM 2.1 boundary) in that proceeding, the Director found that such boundaries were "artificial" and that strictly scientific principles of sufficient hydrogeologic connection with tributary basins should control (which is also precisely what the Director asserted in justifying designation of the ESPA GWMA):

Sometimes artificial boundaries were drawn because of the lack of scientific data for some tributary basins. Given the artificial boundaries, the model boundary does not include all tributary ground water areas that supply water to a surface water source, not does it include all areas where ground water "affects" the flow of surface

water.” Ground water diversions in tributary basins deplete the volume of recharge to the ESPA and reduce tributary stream flow and ultimately the flow in certain reaches of the Snake River.

*Final Order*, In the Matter of Petition to Amend Rule 50, at 2 (August 29, 2014).<sup>6</sup> Ultimately the Director determined that he should “[e]liminat[e] Rule 50” because “the administrative hearings and deliberations associated with delivery calls is the proper venue to address which water rights should be subject to administration under a delivery call.” *Id.* at 6. In other words, the Director concluded that the Rule 50 boundary was artificial, that hydrogeologic connections could be established from areas outside the Rule 50 boundary (so-called “tributary basins”), and that he had broad discretion to regulate those areas too despite the plain language of Rule 50 and the other CM Rules.

Similar logic has been applied by the Director to this ESPA GWMA matter. The Director’s view is that administrative rules do not limit his discretion to designate a GWMA covering and expanding upon the ESPA boundary. However, in the Rule 50 matter, the Director acknowledged administrative rules are legislative enactments that limit his ability as an administrative agent. Based on this acknowledgement, after issuance of his Final Order on August 29, 2014, the “Department [took] administrative steps to repeal CM Rule 50.” *Id.* at 7. In this ESPA GWMA matter, the Director has taken no such administrative steps to repeal another subsection of Rule 50—Rule 50.01.d.—which directly limits his ability to designate an ESPA GWMA (the details of which are discussed in further detail below).

In Petitioners’ view, there is no distinction or difference in the ESPA GWMA matter on appeal to this Court and the prior CM Rule 50 boundary matter. And on this latter matter, the Idaho Legislature had something to say about the Director’s perceived discretion. “On February

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<sup>6</sup> This final order is available at <https://idwr.idaho.gov/files/legal/CMR50/CMR50-20140829-Final-Order.pdf>.

24, 2015, and March 11, 2015, the Idaho House and Senate respectively approved a concurrent resolution rejecting the Department’s proposal to delete Rule 50.” <https://idwr.idaho.gov/legal-actions/administrative-actions/ESPA-CMR50-petition/>. The Department currently acknowledges that “rule 50 remains a valid part of the conjunctive management rules.” *Id.* Because of this boundary restriction on the CM Rules, the Director has not conjunctively administered ground and surface water sources from outside of the currently defined ESPA boundary found at CM Rule 50.01 into, for example, Basin 33 and portions of the Rexburg Bench.

The Director’s attempt to do away with CM Rule 50 is a prime example of Idaho law on the larger issue of the limits on power and authority vested in administrative agencies. The Department, as an administrative agency, has no authority other than that given to it by the Legislature. *See Wash. Water Power Co. v. Kootenai Env’tl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). “Administrative agencies are ‘creature[s] of statute’ and, therefore, are ‘limited to the power and authority granted [them] by the Legislature.’” *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (quoting *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996)). Such authority “is primary and exclusive in the absence of a clearly manifested expression to the contrary.” *Roberts v. Idaho Trans. Dep’t*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991). An agency “may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.” *Id.*

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

themselves....” *Wash. Water Power Co.*, 99 Idaho at 879, 591 P.2d at 126. If the provisions of governing rules or statutes are not met and complied with, no authority or jurisdiction exists. *Id.* (citing *Arrow Transp. Co. v. Idaho Pub. Util. Comm’n*, 85 Idaho 307, 379 P.2d 422 (1963)). Acts taken by an agency without statutory authority or jurisdiction are void and must be set aside. *See Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27; *A&B Irrigation Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012); Idaho Code § 67-5279(2)(a)-(b).

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

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

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

for public or private use except by due process of law.” *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). Procedural due process is afforded to all parties subject to the Department’s jurisdiction by virtue of compliance with Title 42 of Idaho Code and the Act. 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 § 42-233(b). *See also* Idaho Code §§ 67-5224 and 67-5291.

Absent compliance with the clearly articulated rulemaking or contested case procedures of the Procedural Rules and the CM Rules, any action would be, and in this case is, *ultra vires*, and contravenes Petitioners’ due process rights and the procedures the Legislature and the Department have deemed mandatory. *See Henderson*, 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 to the Department.

Furthermore, under a GWMA management regime for the ESPA, the actual need and use by senior users that serve as foundational principles under priority administration will evidently no longer be considered. Instead, a GWMA will focus on ESPA water levels alone, regardless of senior needs and actual beneficial use. And if those water level goals are not being met, Idaho Code § 42-233b mandates that the director “**shall** order those water right holders on a time priority basis . . . to cease or reduce withdrawal of water under such time as the director determines there is sufficient ground water.” (emphasis added). It is therefore possible, and likely, that a situation presents itself where the senior surface users could experience a full supply under the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-*

*Season Demand and Reasonable Carryover* (the “Methodology Order”),<sup>7</sup> and yet ground water users would still be curtailed or remain curtailed under a GWMA management regime.

Despite this significant change in water administration, the ESPA GWMA process was not initiated as a contested case with a hearing to allow for witness testimony and other evidence to be presented explaining why existing water districts are unable to administer ground and surface rights in priority or otherwise justify designation of an ESPA GWMA. Rather, it was initiated by the Letter, without providing any other process other than the ESPA GWMA public meetings and a short period of time to submit written comments.

Obviously a necessary component of the prior appropriation doctrine is that water allocated to Idaho’s citizens will be regulated: “A water user has no property interest in being free from the State’s regulation of water distribution in accordance with the prior appropriation doctrine[.]” *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213–14, 220 P.3d 318, 331–32 (2009). However, if the ESPA GWMA is implemented, it will fundamentally change ground water right administration in the State of Idaho on the ESPA from a priority-based system to one where ground water right holders will be subject to curtailment or other operational limitations on their right to divert ground water in order to satisfy currently unspecified goals for the expansive and heterogenous ESPA and flows in the Snake River irrespective of the amount of water needed to avoid injury to senior surface right holders.

In Idaho, “[i]t is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water.” *Clear Springs Foods, Inc. v. Spackman*, 150

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<sup>7</sup> This order is available at <https://idwr.idaho.gov/files/legal/CM-DC-2010-001/CM-DC-2010-001-20160419-Fourth-Amended-Final-Order-Regarding-Methodology-for-Determining-Material-Injury-to-Reasonable-In-Season-Demand-and-Reasonable-Carryover.pdf>

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).

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. Stated another way, the CM Rules “implement” statutes passed by the Idaho Legislature relative to ground water administration, specifically including Idaho Code § 42-233b. This is not a position statement formulated by the Petitioners, rather, it is now contained on page 1 of the CM Rules:

## IDAPA 37 – DEPARTMENT OF WATER RESOURCES

### Water Compliance Bureau

#### 37.03.11 – Rules for Conjunctive Management of Surface and Ground Water Resources

**Who does this rule apply to?**

*General Public.*

**What is the purpose of this rule?**

*These rules establish the procedures to regulate the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.*

**What is the legal authority for the agency to promulgate this rule?**

*This rule implements the following statutes passed by the Idaho Legislature:*

Appropriation of Water -

General Provisions:

- [Section 42-111, Idaho Code](#) – Domestic Purposes Defined
- Permits, Certificates, and Licenses — Survey:
  - [Section 42-222, Idaho Code](#) – Change in Point of Diversion, Place of Use, Period of Use, or Nature of Use of Water Under Established Rights – Forfeiture & Extension - Appeals
  - [Section 42-230, Idaho Code](#) - Definitions
  - [Section 42-233a, Idaho Code](#) – Critical Ground Water Area Defined – Public Hearings – Publication of Notice – Granting or Denial of Application - Appeal
  - [Section 42-233b, Idaho Code](#) – Ground Water Management Area
  - [Section 42-234, Idaho Code](#) – Ground Water Recharge – Authority of Department to Grant Permits & Licenses
  - [Section 42-237, Idaho Code](#) – Abandonment of Water Right – Change of Point of Diversion & Place of Use

Distribution of Water Among Appropriators:

- [Section 42-603, Idaho Code](#) – Supervision of Water Distribution – Rules & Regulations
- [Section 42-604, Idaho Code](#) – Creation of Water Districts
- [Section 42-605, Idaho Code](#) – District Meetings – Watermaster & Assistants – Election – Removal – Oath & Bond – Advisory Committee
- [Section 42-606, Idaho Code](#) – Reports of Watermasters

Headgates and Measuring Devices:

- [Section 42-701, Idaho Code](#) – Installation & Maintenance of Controlling Works & Measuring Devices by Water Appropriators – Procedure Upon Failure to Install & Maintain – Measuring & Reporting of Diversions – Penalty for Failure to Comply – Enforcement Procedure – Report Filing Fee

IDAPA 37.03.11 at 1 (*available at* <https://adminrules.idaho.gov/rules/current/37/370311.pdf>).

Despite the foregoing legal authority, in the Legal Order, the Director summarily concludes that he “was not required to follow the conjunctive management rules in designating a ground water management area.” R. 2984. To reach this conclusion, the Director embarks on a rule interpretation course that is not persuasive or availing. At the end of the day, the main obligation of this Court on this appeal is to interpret applicable administrative rules (against the backdrop of

the above Idaho law) and decide whether and to what extent the CM Rules can under Idaho law and actually do under Idaho law limit the Director's authority to designate an **ESPA** GWMA (not merely GWMA in general).

CM Rule 50.01(d) plainly and directly describes what water administration will look like on the ESPA once the SRBA was completed in 2014:

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

IDAPA 37.03.11.050.01 (d) (emphasis added).

The Legal Order does not directly address Rule 50.01.d in any way, and instead, the Director points to other broadly worded CM Rules he believes supports his actions. The Director's first position is that CM Rule 1 provides that the CM Rules have a narrow focus only—to “prescribe procedures for responding to a deliver[y] call made by the holder of a senior-priority . . . water right . . .” R. 2984 (ellipses in original). By limiting the scope of the CM Rules, the Director's position is that the CM Rules have no bearing on the Director's ability to designate a GWMA, even on the ESPA.

The Director's second position is that, despite Rule 20's statement that the CM Rules “provide the basis” for the designation of an area having a common ground water supply (“ACGWS”) and the “procedures that will be follow[ed] in . . . designating such areas as ground water management areas,” R. 2984, the Director asserts that “[p]roviding a basis for creation does not equate to a conclusion that the conjunctive management rules are the sole procedural mechanism for creation of a ground water management area.” R. 2984. In other words, the Director believes he can ignore the CM Rules altogether and choose another mechanism because the CM Rules are not the sole procedural mechanism available to him.

The Director's third and final assertion on the question of whether he is bound by the CM Rules is based in Rule 5, the generic savings provision found in administrative rules, which 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." Because of this rule, the Director argues, the CM Rules "do not preclude the Director from taking action consistent with Idaho Code § 42-233b." R. 2984.

The Director's arguments are unavailing for at least three reasons.

First, if the Director's arguments have merit, then he would not have been limited by any administrative rule in his 2014 decision to expand his reach beyond the Rule 50 boundary he considered to be "artificial." He could have ignored the specific ESPA boundary contained in Rule 50, but the Director did not do so and could not do so. Instead, he paid proper initial respect to the rule by taking action to repeal it, but only to the point that the Idaho Legislature did not approve the change. Today, despite the Director's view that the Rule 50 boundary is artificial, he is bound to follow the plain language of this rule and cannot administer water under the CM Rules outside the Rule 50 boundary.

Second, the Director is asserting 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 trumped by a more general rule or the general statutory language that the administrative rules were intended to implement or supplement 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) (emphasis added). "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—IDWR—and they have the same force and effect of law as statutes because they are an integral part of Idaho’s water law. The IDAPA rules described above are specific and binding on the Director. They cannot simply be ignored, but they have been ignored by the Director as he has made no attempt to read Idaho Code § 42-233b, the CM Rules, and the Procedural Rules without conflict, although he is required to do so. The Idaho Supreme Court has held that “[s]tatutes and rules that can be read together without conflicts **must** be read in that way.” *State v. Garner*, 161 Idaho 708, 711, 290 P.3d 434, 437 (2017) (emphasis added). As explained in *Garner*, statutes and rules “build upon each other” with the statute being “the starting point.” *Id.* 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).

If the Director’s position is taken to its logical endpoint, then any administrative rule that “builds upon” and/or “implements” a statute will simply be read to be in conflict with the very statute the rules were intended to build upon and implement. 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 "build upon" and "implement" Chapter 6 of Title 42.

Third, in substance, the Director's argument implicates administrative rule interpretation, which under Idaho law, is performed the same way as statutory interpretation. The Director's position is that the 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 **GWMA on the ESPA**, CM Rule 5 is a general rule and CM Rule 50.01.d is a specific rule. Under rules of construction, CM Rule 50.01.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. That has been completed. An ESPA GWMA was only authorized to be created, in the event necessary, before “the rights to the diversion and use of water from the aquifer have been adjudicated.” CM Rule 50.01.d. The disjunctive “or” following the statement requiring creation or expansion of a water district upon adjudication of the aquifer demands that conclusion. 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). There is no ambiguity there, and furthermore, if the general CM Rule 5 supersedes the specific CM Rule 50, as the Director 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 Tidwell*, 164 Idaho at 574, 434 P.3d at 178.

Other CM Rules also apply and support Petitioners’ view. 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 this appeal, 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 designated 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)*, 159 Idaho 798, 802, 367 P.3d 193, 197 (Idaho 2016). The ESPA is approximately 170 miles long and 60 miles wide and has been designated as an 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 describe a binary choice for water right administration on the ESPA: (1) GWMA prior to completion of adjudication where no completely accurate or recent water rights 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. 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.**” *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (emphasis added). (emphasis added). Based on this rationale, the Department cannot have both administrative regimes in place on the ESPA—it must be one or the other.

The fundamental concept of what form of administration is followed during the uncertain early SRBA timeframe is further evident when comparing CM Rule 30.05 and CM Rule 30.06, which reveals that adjudication of the water rights at issue is the lynchpin. If “the water rights have been adjudicated,” the Department may treat the delivery call as a petition to create a new water district. IDAPA 37.03.11.030.05. If “the water rights have not been adjudicated,” the Department may treat the delivery call as a petition for designation of a GWMA. IDAPA 37.03.11.030.06. Also, CM Rule 30.07(h) demonstrates that the designation of a GWMA should only occur if ground water supply is insufficient “and modification of an existing water district or creation of a new water district cannot be readily accomplished **due to the need to first obtain an adjudication of the water rights.**” IDAPA 37.03.11.030.07(h) (emphasis added).

Despite all of the above legal authority (which was provided to the Director in briefing before he issued the Legal Order), the Director’s analysis on the issue of whether the formation of ground water districts after an adjudication precludes his ability to designate the ESPA GWMA is only three sentences long:

The method of confirmation of water rights, whether by decree or by administrative license, does not affect the authority of the Director to manage the ground water resource. Furthermore, the appointment of a watermaster to administer the water rights does not limit the Director’s authority to manage a ground water aquifer. This argument is without merit.

R. 2989. Because the Director's Legal Order does not address in any meaningful way the CM Rules and other legal authority described herein—he does not even cite to or quote CM Rule 50.01.d in the Legal Order—Petitioners submit that the Director erred in several respects and should be reversed on appeal.

Furthermore, as evidence that the Legislatively approved IDAPA rules mean what they say, the binary choice embodied in the CM Rules makes good practical sense. If the Department was not comfortable with the veracity of the water right records it had to be able to identify water right users to curtail to satisfy existing senior rights, then until an accurate list was completed in an adjudication, the Director could designate a GWMA and manage the source rather than curtail individual water users to yield water from the ACGWS for senior rights. In upholding the Director's decision to not designate the ESPA GWMA in 2010, this Court explained that water districts serve to administer water rights and stated

the creation of water districts only applies with respect to adjudicated water rights. I.C. § 42-604. Because a GWMA designation does not have the same restriction, the designation of a GWMA has been used as a mechanism prior to water rights being decreed in the SRBA and included in the boundaries of an organized water district.

*Memorandum Decision and Order on Petition for Judicial Review*, Minidoka County Case No. 2009-647, at 46 (May 4, 2010) (footnote omitted). This Court continued its analysis by describing the creation of Water District Nos. 100, 110, 120, 130 and 140 and the evidence in the record on this proceeding supporting use of water districts for administrative purposes rather than a GWMA:

Water District Nos. 100, 110, 120, 130 and 140 were either established or boundaries revised between February 19, 2002, and December 20, 2006, in order to provide for the administration of water rights diverting from the ESPA. There has also been in effect since 1992 a moratorium on permit applications for new water rights developed from the ESPA.

At the hearing Tim Luke from the Department testified as to the administrative difference between a GWMA and an organized water district:

**Q.** No effective difference between what you can do administratively in a water district and ground water management area?

**A.** I think anything that you do in a ground water management area can also be done in a water district.

**Q.** Greater flexibility of the water district.

**A.** I think so.

Tr. pp. 1324-25.

In regards to flexibility, the CMR expressly distinguish between delivery calls made within an organized water district (CMR 040), from those made in a ground water management area (CMR 041). The process for responding to a delivery call in an organized water district requires less procedural components prior to the regulation of junior water users.

The Hearing Officer ultimately concluded that “[t]he benefit of designating the ESPA as a [GWMA] is not apparent. There may be no harm in doing so, but it would appear to add an administrative overlay without identifiable benefits.” R. 3116. This Court agrees.

*Id.* at 47. Petitioners agree with this Court’s conclusion, and do not believe there is anything in the ESPA GWMA Order that describes matters to be sufficiently different today that should change the Court’s well-reasoned conclusion in 2010. Even today, water districts are actively curtailing water rights under the CM Rules in Water District 130 and 140 because of the Rangen delivery call. See, e.g., <https://idwr.idaho.gov/files/legal/curtailment/2020/20200429-RangenCurtailOrd-CoverLetter-WD130.pdf> and <https://idwr.idaho.gov/files/legal/curtailment/2020/20200429-RangenCurtailOrd-CoverLetter-WD140.pdf> (letters dated April 29, 2020

curtailing water rights on or before May 13, 2020 for ground water rights junior to July 13, 1962 not covered by an approved mitigation plan).

Idaho law provides that once the SRBA was finished, complete with a list of decreed valid water rights, the Director was obligated to continue with prior appropriation administration. CM Rule 41 provides further evidence of this conclusion. It requires the Director to “utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule” when he enters an order upon a delivery call in a GWMA. IDAPA 37.03.11.041. Under CM Rule 40, relating to delivery calls within organized water districts, there is no similar requirement because the water rights within a water district have been adjudicated while those within a GWMA have not. Again, an ESPA GWMA can only be a pre-adjudication administrative tool. It does not apply to the areas described in the proposed ESPA GWMA. The CM Rules do not allow for 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 “implement” Idaho Code § 42-233b. IDAPA 37.03.11 at 1. 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 the ESPA GWMA are not authorized under the CM Rules, which are binding on the Director. In the ESPA GWMA Order, the Director did not address Rule 50 or other portions of the CM Rules discussed herein, even though he is bound by these authorities.

Further, the binary choice provided in the CM Rules described herein makes practical sense. Otherwise, ground water right holders would be subject to duplicative administration regimes. Avoiding duplicative administrative regimes was previously used as the basis for dissolving the American Falls GWMA in 2003, where the then-Director stated that the GWMA was no longer needed in these areas because they were now covered by Water District Nos. 120 and 130 and its “continued existence within the Water District boundaries may cause confusion in the administration of water rights.” *Final Order Modifying the Boundaries of the American Falls Ground Water Management Area* (Aug. 29, 2003) at 1.<sup>8</sup> The Director went on to say:

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

*Id.* at 2. The existence of active water districts avoids the need for a GWMA and the existence of a GWMA within such districts will only confuse the administration of water rights in the ESPA. The water administration authorities already in place give the Department authority to manage water use, and no additional or other administrative regime is required. Therefore, consistent with the Director’s reasoning and position in the American Falls GWMA matter, and held by this Court in the A&B matter discussed *supra*,<sup>9</sup> because the water districts have been formed over most of the ESPA with the intent that others will be formed to cover any remaining areas, any GWMA covering the same lands would most likely “cause confusion in the administration of water right”

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<sup>8</sup> This final order is available at <https://idwr.idaho.gov/files/legal/orders/2003/20030829-American-Falls-GWMA-order-modify.pdf>

<sup>9</sup> “There may be no harm in doing so, but it would appear to add an administrative overlay without identifiable benefits.” *Memorandum Decision and Order on Petition for Judicial Review*, Minidoka County Case No. 2009-647, at 47.

and therefore would be an unnecessarily and perhaps conflicting layer of administration. For all these reasons, the ESPA GWMA Order must be set aside because it conflicts with Idaho law, particularly the law contained in the IDAPA rules discussed herein.

But even if it is assumed that the Director has authority to create the proposed ESPA GWMA solely under Idaho Code § 42-233b, he must comply with the procedural requirements of the CM Rules and the Procedural Rules. As discussed *supra*, the CM Rules provide the tools to determine how various water sources are interconnected, and how, when, where, and to what extent the diversion and use of water from one source impacts others.

As to the procedure the Director employed in designating the ESPA GWMA, the Director relies upon this Court'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).<sup>10</sup> However, our view is that this case did not address the issues described herein. Rather, Pocatello's petition in that matter focused on whether the Director's order was subject to judicial review and that Pocatello had met the exhaustion requirement under Idaho law. *See, generally, City of Pocatello's Memorandum in Support of Motion to Determine Jurisdiction*, Jan. 20, 2017.<sup>11</sup> Not every GWMA 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. This Court'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 described herein.

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<sup>10</sup> This order is 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>.

<sup>11</sup> This memorandum is 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>.

Accordingly, the initial question in this matter is whether the ESPA GWMA implicates the CM Rules. It clearly does. The Letter 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 (such as Rangen).

The Letter further asserts that “management utilizing a GWMA may bring consistency to administration to achieve aquifer stabilization.” R. 1 (referring to the July 7, 2016 letter, which is available at <https://idwr.idaho.gov/files/groundwater-mgmt/20160707-Letter-to-Waters-Users-from-Gary-Spackman-Re-Proposed-ESPA-GWMA.pdf>). 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, this Court did not address the CM Rules in any way in the decision relied upon by the Coalition.

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

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-terminal 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, of necessity, be an ACGWS.

Because a GWMA is an ACGWS, designation of an ESPA GWMA that includes tributary basins falling outside the boundaries of the existing ESPA ACGWS requires compliance with the

CM Rules. Again, the CM Rules so provide. *See* IDAPA 37.03.11.020.06 (“These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in . . . designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code.”).

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

In sum, the Director may not, as suggested in his Letter, simply decide whether an ESPA GWMA, inclusive of 22 tributary basins, should be created “[a]fter hearing from water users at the public meetings and considering the issues.” Even if it were appropriate to create the contemplated ESPA GWMA, which it is not, the Director must hold a contested case hearing upon petition by a party 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.

A decision of such significance as implementing a new water administration regime on the ESPA warrants a contested case hearing before an order is issued. The State cannot “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1; *see also* IDAHO CONST. art. I, § 13 (“No person shall . . . be deprived of life, liberty or property

without due process of law”). As stated by the Idaho Supreme Court:

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

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

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

*State v. Rogers*, 144 Idaho 738, 742, 170 P.3d 881, 885 (2007). Accordingly, the second prong of the two-step due process analysis considers “if a liberty or property interest is **implicated** applying a balancing test to determine what process is due.” (emphasis added).

In response to this argument, the Director concludes that it is “premature” because the Petitioners have not been deprived of property. R. 2986. But this is not the standard—the standard is if the liberty or property interest is “implicated.” If such interests are implicated, then the process must be adequate, and for “quasi-judicial proceedings,” such as the administrative proceeding associated with the ESPA GWMA, “there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when [a party] is provided with notice and an opportunity to be heard.” *In re Jerome Cnty. Bd. of Comm’rs*, 153 Idaho 298, 311, 281 P.3d 1076, 1089 (2012) (quotation and citation omitted, brackets in original).

Here, the water rights of the Petitioners are property interests worthy of due process protection as these rights are “implicated” by the Director’s actions in how they will be administered. This satisfies the first prong of the two-step due process analysis. *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 at 213, 220 P.3d at 331 (holding that Thompson Creek Mining Company, as a water right owner, had a property interest in its due process challenge of the creation of Water District 170). The critical inquiry, therefore, is what process is due.

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

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

Second, in terms of additional or substitute procedural safeguards, a series of public meetings with an agenda for the content of those meetings dictated by the Department with some follow-up questions and answer time is not a proper substitute for a contested case administrative hearing where a proponent of the GWMA must satisfy applicable burdens of proof. The Director’s position is that the Petitioners were afforded an opportunity to request a hearing **after** the issuance of the ESPA GWMA Order, and that remedies any procedural defect. R. 2986-87. However, in any contested case, there is much to be gained by the hearing officer and other parties in building a complete administrative record upon which to base a decision. For the Department and those water users in support of an ESPA GWMA, they would have to introduce evidence—expert and otherwise—to support their position and have their position challenged. The case should be put

through what is often referred to as “the crucible of trial.” *Roberts v. Jensen*, Idaho Supreme Court Docket No. 46675, at 19 (July 30, 2020) (Justice Moeller dissenting). In such a proceeding, of particular interest to Petitioners is why an ESPA GWMA is needed with the existence of active and effective water districts.

Instead, what has happened in this matter is the Director made his decision based on unchallenged and/or limited information, including the decision to expand the ACGWS to areas outside the Rule 50 boundary, even though the Director’s prior attempt to obviate the Rule 50 boundary was stopped by the Idaho Legislature. Where a formal rulemaking process was initiated in the CM Rule 50 matter before a decision was issued, it follows that a formal hearing should have been held prior to the ESPA GWMA Order, particularly when a component of the ESPA GWMA Order was to impose the ESPA GWMA on the very areas outside of the CM Rule 50 boundary—including portions of Basin 33 and the Rexburg Bench—that the Idaho Legislature previously rejected.

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

Accordingly, even if the CM Rules and the Procedural Rules are to be ignored, under general procedural due process considerations, implementing a major 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 reversed.

In sum, the Director’s decisions on the first, third, and fourth questions at issue in this

proceeding are in violation of constitutional or statutory provisions, are in excess of statutory authority of the agency, were made upon unlawful procedure, are not supported by substantial evidence on the record as a whole, and are arbitrary, capricious, and an abuse of discretion under Idaho Code § 67-5279(3).

**B. The Final Order Designating the ESPA GWMA was also in error because the Director failed to conduct rulemaking to amend or repeal Rule 50.01.d prior to designation of the ESPA GWMA.**

On the question of rulemaking, the Director determined that rulemaking was not required. R. 2988. The Director determined that “designation of a ground water management area does not require rulemaking” and that “the Director expressly relied on the standard provided by the enabling statute and does not prescribe a legal standard or directive not otherwise provided by the enabling statute.” R. 2988. As a general matter, we agree that designation of a ground water management area outside of the ESPA does not require rulemaking. However, as described above, the ESPA has specific rules applicable to it, and it is those rules that require rulemaking if they are to be amended or repealed in order for the Director to have the legal authority to designate an ESPA GWMA post-SRBA and/or expand the ESPA boundary.

Petitioners’ position relative to the proper interpretation of CM Rule 50 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. 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 or repeal the rule before taking its desired action. This is the process that was followed when in the process to amend CM Rule 50.01 (which defines the geographic extent of the ESPA) that was before the Department. In response to that petition, the Director engaged in the formal rulemaking process in order to rescind

Rule 50.01. The Director is also required to do so here.

In the present matter, the rulemaking process with not followed to amend the provisions of CM Rule 50 to support what the Director did in the ESPA GWMA Order. As a result, any attempt by the Director or the Department to expand the boundaries of the ESPA ACGWS to include additional portions of Basin 33 and the Rexburg Bench 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.

As described above, if the Director intends to create a GWMA comprised of an ACGWS that includes areas outside of the CM Rule 50 boundary, ground water users in each basin are entitled to more than a roadshow of public meetings and a brief comment period. While there can be no dispute that informal proceedings are generally contemplated and authorized under the Idaho Administrative Procedure Act and the Department's Procedural Rules, "an agency cannot unilaterally decide to utilize informal procedures to the exclusion of formal proceedings." *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 872, 243 P.3d 1055, 1060 (2010). Here, the CM Rules do not contemplate informal proceedings to decide the boundaries of 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 matter illustrates, a formal rulemaking process to amend or repeal CM Rule 50.

**C. The Director's actions prejudiced a substantial right of Petitioners.**

Having established that the Director's Legal Order violates each of the provisions of Idaho Code § 67-5279(3), Petitioners must also demonstrate that at least one of its substantial rights have been prejudiced. Idaho Code § 67-5279(4). On the question of substantial rights, the Idaho Supreme Court has explained:

“This Court has not yet attempted to articulate any universal rules to govern whether a petitioner's substantial rights are being violated under I.C. § 67–5279(4).” *Hawkins v. Bonneville Cnty. Bd. of Comm'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011). Instead, this determination is made on a case-by-case basis.

*Two Jinn, Inc. v. Idaho Dep't of Ins.*, 154 Idaho 1, 5, 293 P.3d 150, 154 (2013). In general, property rights, such as property rights, are substantial rights. See *Terrazas v. Blaine Cty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009). Furthermore, all parties in land-use decisions “have a substantial right to a reasonably fair decision-making process.” *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232–33, 254 P.3d 1224, 1228–29 (2011). There is also a substantial right to have a governing board “properly adjudicate their applications by applying correct legal standards”. *Id.* The Idaho Supreme Court recently held that “[t]his Court has not articulated a bright line test governing whether a petitioner’s substantial rights have been violated, however, we have held that such rights were harmed when: (1) property values are impacted; or (2) the variance will interfere with the use and enjoyment of property. *Hungate v. Bonner Cty.*, 166 Idaho 388, 458 P.3d 966, 972 (2020) (internal citations omitted).

In this case, the Petitioners have a substantial right to have the Director follow the law—contained in both statutes and administrative rules—in undertaking actions that will impact administration of their water rights. The Petitioners consist of numerous ground water users that were previously not subject to the CM Rules and curtailment under those rules because their rights are located outside of the CM Rule 50 boundary (a designated ACGWS). This has now changed in the ESPA GWMA Order. The Director’s ESPA GWMA Order, which expressly expands the ESPA boundary into areas that the Director was unable to expand previously, is a violation of their substantial rights if the Director did not follow the proper administrative rules and did not apply the correct legal standards. Petitioners assert this is precisely what has happened. Accordingly,



Petitioners' substantial rights have been violated. The private interests of Petitioners are affected by the Director's official action as it impacts the Petitioners' water rights and the current prior appropriation administrative regime associated with those rights.

## V. CONCLUSION

For the reasons set forth above, this Court should set aside the Director's decision to create the ESPA GWMA.

Respectfully submitted this 13<sup>th</sup> day of August, 2020.



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## CERTIFICATE OF MAILING

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I hereby certify that on this 13th day of August, 2020, true and correct copies of *Petitioners' Brief* were served via Email and USPS Delivery, on the following:

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