

**IN THE DISTRICT COURT OF THE FOURTH 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,

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 POCA TELLO; AND SNAKE RIVER  
STORAGE,

Intervenors.

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

**Case No. CV01-20-08069**

**RESPONDENT IDWR'S BRIEF IN  
RESPONSE TO PETITIONERS'  
BRIEF**

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**RESPONDENT IDWR'S BRIEF IN RESPONSE TO PETITIONERS' BRIEF**

Judicial Review from the Idaho Department of Water Resources  
Honorable Eric J. Wildman, District Judge, Presiding

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The Idaho Department of Water Resources (“Department” or “IDWR”), by and through its counsel, hereby submit *Respondent IDWR’s Brief in Response to Petitioners’ Brief*.

## **I. STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This case presents for judicial review the January 9, 2020, *Order on Legal Issues* (the “Legal Order”) issued by Gary Spackman, Director of the Department. In the Legal Order, Director Spackman concluded that various legal and procedural challenges to the November 2, 2016, *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“ESPA GWMA Order”) were without merit.

The ultimate issue to be decided in this case is whether and how the Director may exercise his statutory authority and administrative discretion when designating a ground water management area. The plain language of Idaho’s Ground Water Act (Idaho Code § 42-226 *et seq.*) unambiguously authorizes and supports the Director’s designation of the Eastern Snake Plain Aquifer (“ESPA”) Ground Water Management Area (“GWMA”). Furthermore, neither the Rules of Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11 *et seq.*) (hereinafter “CM Rules”) nor the Rules of Procedure of the Idaho Department of Water Resources (“IDWR’s Procedural Rules”) (IDAPA 37.01.01) preclude the Director from establishing the ESPA GWMA.

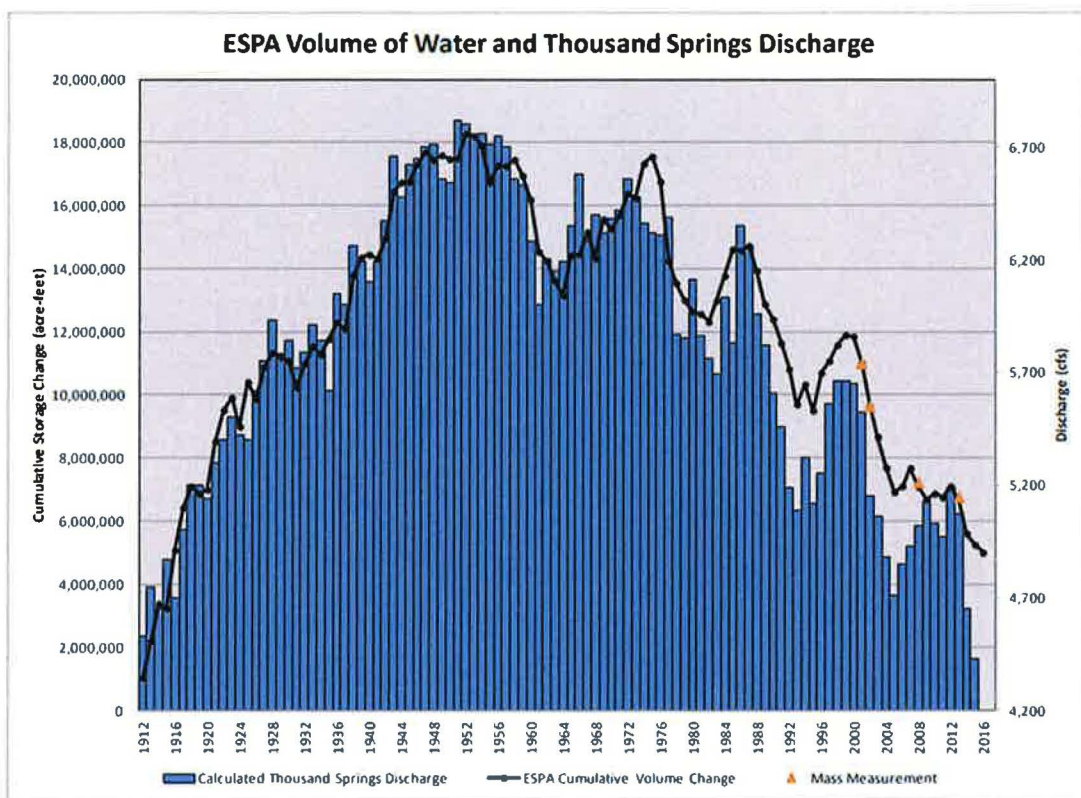
Petitioners’ arguments that these rules preclude the Director from establishing the ESPA GWMA are contrary to a plain and normal reading of the rules and as such lack a reasonable basis



in law. Accordingly, the Director's Legal Order and ESPA GWMA Order must be upheld and the Court should award IDWR its reasonable attorney fees pursuant to Idaho Code § 12-117.

## B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

In the spring of 2016, Director Spackman realized that Idaho was facing a problem that could no longer be ignored. Evidence showed a steady and irrefutable decline in the volume of water in the ESPA. The problem was highlighted in the following graph:



R. 7.

It had been more than 20 years since the first delivery calls on the ESPA were made. But the calls, which many hoped would help slow or reverse the decline, had not been successful in stemming the decline. Most concerning, in 2015, spring discharges at Thousand Springs had

dropped to an all-time low. Overwhelming evidence showed the ESPA aquifer was in trouble and the Director realized he must act to meet his duty to protect and conserve the State's ground water resources from depletion.

Director Spackman started by reaching out to water users to inform them that he was considering creating a GWMA for the ESPA and inviting them to participate in a series of public meetings to discuss the issue. In a letter dated July 7, 2016, Director Spackman stated:

[A]fter an extended period of increasing aquifer levels and spring discharge, ground water levels and water volume in the ESPA have been declining since about the mid 1950s. Spring discharges from the ESPA have also declined. . . . Between 1952 and 2013 the aquifer lost an estimated 11 million acre-feet. There have been periods of recovery (increased aquifer levels and spring discharge) since 1952, but each subsequent recovery peak is lower than the previous peak and each declining trough is lower than the previous trough.

R. 32. The Director continued:

These trends are disturbing. It is clear that the aquifer storage has declined substantially from peak levels. Discharges from springs delivering water from the aquifer have correspondingly declined as ground water elevations in the ESPA and total water stored in the ESPA have declined. The ESPA is a vital source of water for the State of Idaho. Its value cannot be overstated. Unless the trend that has existed since 1952 is at least arrested, the current declines in aquifer storage and spring discharge will continue.

R. 32-33.

Director Spackman explained the advantages of administration through a GWMA over administration through water delivery calls:

The formation of a ground water management area would have distinct advantages:

1. Rather than only administering existing disjointed water calls and mitigation plans, the Department can consider the aquifer as a whole. In contrast, under conjunctive administration the Department can only administer to individual water delivery calls. Delivery calls are manifest symptoms of a larger problem with the ESPA. The problem is the widespread and long term decline of the aquifer storage volume by over 11 million acre-feet and associated reduction in spring discharges.

A ground water management area focuses treatment on the problem, not just the symptoms.

2. Conjunctive management by water right priority results in sporadic curtailment orders and associated mitigation only in years when the water supply is insufficient to satisfy the senior priority water rights. In years when the supply is sufficient, there is no curtailment or mitigation. In years when the supply is deficient, the curtailment/mitigation obligations can be very large. Sporadic water right administration does not consistently address the chronic degradation of the ESPA. Management through a ground water management area designation may better assure that the aquifer stabilization measures are achieved.

R. 34.

The Director recognized that additional efforts were underway to stabilize the aquifer and that the Surface Water Coalition (“SWC”) and the Idaho Ground Water Appropriators, Inc. (“IGWA”), had entered into a settlement agreement that would hopefully result in improvements to the aquifer but the Director had concerns about whether they would be sufficient:

Water users and the Water Resources Board are undertaking efforts to enhance recharge and reduce ground water pumping to counter the declines. However, future conditions, including climate and water use practices are unknown.

R. 33.

Director Spackman, alongside Department ground water experts, conducted the public meetings referenced in the letter on July 25-28, 2016. At the meetings, the Department presented hydrologic information about the possible extent of the ESPA GWMA, including information related to the inclusion of tributary basins. R. 2. The Director then invited public comments and questions and also asked for the submission of written comments. *Id.* While some water users commented in opposition to the potential designation, others commented in support. R. 3. The Director gave great weight to the oral and written comments of water users and the use of a public meeting and comment period, though not required by the Ground Water Act, allowed him

to gain insight and perspective from a wide swathe of ESPA water users interested in, or opposed, to protection of the ESPA through a GWMA designation.

On November 4, 2016, after consideration of the facts and all public commentary, Director Spackman issued the ESPA GWMA Order, designating the ESPA GWMA pursuant to Idaho Code § 42-233b. R. 1-28.

On November 16, 2016, the City of Pocatello, the Coalition of Cities<sup>1</sup>, 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*. R. 2302-2306. 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.<sup>2</sup> R. 2352-2355. On March 20, 2017, SVC filed a *Notice of Withdrawal of Request for Hearing*. R. 2474-2479.

The case was informally stayed from approximately 2017 to 2019 while additional settlement discussions occurred between certain parties to the SWC delivery call. R. 2978-79.

In January of 2019, the Director held a status conference in the matter. Some intervenors indicated they wanted to continue with the case even after SVC had withdrawn its request for hearing. R. 2979. Based on legal briefing filed by parties in 2017, on June 5, 2019, the Director

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<sup>1</sup> The cities participating as the Coalition of Cities in this matter are Bliss, Buhl, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, and Wendell.

<sup>2</sup> Issuance of the ESPA GWMA Order also spawned a series of additional legal proceedings. For a full procedural background as it relates to designation of the ESPA as a GWMA, see the *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* at 1-3. R. 1-3.

issued the *Order on Briefing; Notice of Additional Prehearing Conference*.<sup>3</sup> The Director concluded intervening parties<sup>4</sup> could remain as parties and fully participate in the contested case despite SVC's withdrawal.

By the fall of 2019, the Director and parties were prepared to proceed on any remaining factual and legal issues. 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").<sup>5</sup>

The Legal Issues and Hearing Order established: (a) a deadline for 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 the scope of hearing for the remaining factual issue(s); and (d) dates for the hearing and all relevant hearing preparation deadlines.

Based on party briefing and argument in response to the issuance of the Legal Issues and Hearing Order, the following scope of legal issues was established:

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<sup>3</sup> For a full procedural and factual background of SVC's withdrawal and the Director's subsequent allowance of intervening parties to continue in the contested case, see the June 5, 2019, *Order on Briefing; Notice of Additional Prehearing Conference*. R. 2615-20.

<sup>4</sup> Timely petitions to intervene were filed by the IGWA; the SWC; Pocatello; the Coalition of Cities; McCain Foods USA, Inc.; the Basin 33 Water Users Water Users ("Basin 33"); the South Valley Ground Water District; the City of Hailey; the Big Wood and Little Wood Water Users Association; the Water District 37-B Ground Water Association; Clear Springs Foods; Idaho Power Company; Fremont Madison Irrigation District; Madison Ground Water District; and Idaho Irrigation District (collectively "Upper Valley Irrigators"). The Director issued orders granting these petitions to intervene.

<sup>5</sup> For a full procedural background as to legal issues, see the *Order in Legal Issues* at 1-4. R. 2977-80. While Petitioners do not challenge the Director's decisions related to the factual issue a full procedural background on the factual issue is available at pages 1-4 of the *Final Order on Fact Issue*. R. 3264-65.

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.

In response, on October 21, 2019, the Upper Valley Irrigators filed the *Fremont Madison Irrigation District, Madison Ground Water District and Idaho Irrigation District's Memorandum & Written Argument as to the Remaining Issues Requiring Legal Argument*. On October 21, 2019, Basin 33 Water Users submitted *Basin 33 Water Users' Motion for Summary Judgment and Memorandum in Support*. On the same day, the SWC submitted *Surface Water Coalition's Motion for Summary Judgment and Supporting Points/Authorities Re: Legal Issues*. Various parties filed responses to the initial briefs and replies.

On January 9, 2020, the Director issued the *Order on Legal Issues*, which denied both the Basin 33 Water Users and SWC's summary judgment motions. The Director addressed the parties underlying arguments and framed the parties' legal arguments from the summary judgment motions as legal challenges to the ESPA GWMA Order and underlying designation. The Director concluded the arguments were without merit and declined to reinstate the process for issuance of, or amend, the ESPA GWMA Order.



The Director's *Order on Legal Issues* was interlocutory. *See* IDAPA 37.01.01.710. Therefore, the Director's April 21, 2020, *Final Order on Fact Issue*, which resolved all previously undecided issues in the matter, made the interlocutory *Order on Legal Issues* final and subject to reconsideration or judicial review.

On May 26, 2020, Basin 33 and the Upper Valley Irrigators (collectively herein "Petitioners") jointly filed for judicial review. *See Petitioners' Brief*. Petitioners have not challenged the *Final Order on Fact Issue*, instead they again assert procedural and administrative challenges related to the issuance of the ESPA GWMA Order, as decided by the Director in the *Order on Legal Issues*. Therefore, the issues before the Court are questions of law.

### **C. ISSUES ON APPEAL**

Petitioners identify the following issues on appeal:

- A. Whether the Director erred in concluding the 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 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.

*Petitioner's Brief* at 8.

## **D. STANDARD OF REVIEW**

Judicial review of a final decision by the Department is governed by the Idaho Administrative Procedure Act (“IDAPA”), chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A (4). Under IDAPA, courts undertake judicial review of agency decision making based on the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless the court finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Court exercises free review over questions of law. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

## **II. ARGUMENT**

### **A. THE ESPA GWMA ORDER WAS NOT PROCEDURALLY DEFICIENT**

Petitioners contend the ESPA GWMA Order is procedurally deficient because the Director did not comply with the procedural requirements of the CM Rules or IDWR’s Procedural Rules. Petitioners are incorrect. The ESPA GWMA Order was issued upon proper procedure and must be upheld.

**1. The Ground Water Act Explicitly Authorizes the Director to Create the ESPA GWMA.**

The Idaho Ground Water Act (“the Ground Water Act”) (Idaho Code § 42-226 *et seq.*) explicitly and unambiguously authorizes the Director to designate the ESPA GWMA. The Director and Department have broad powers and special expertise in ground water appropriation and distribution. *See e.g., Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (“Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated [IDWR] the function of ascertaining reasonable pumping levels”). The Director has the specific delegated statutory authority to manage the State’s ground water resources. *See* Idaho Code § 42-226 (“[a]ll ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use.”). Idaho Code § 42-231 states, in relevant part:

(1) It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of ground water of this state as in this act provided and to ***do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in the act.***

(Emphasis added).

Idaho Code § 42-237a further defines the authority of the Director under the Ground Water Act and helps define the public policy of the State in relation to ground water resources:

In the administration and enforcement of this act and in effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered: [ . . . ]. g. To supervise and control the exercise and administration of all rights to the use of ground water waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any

period that he determines that water to fill any water right in said well is not there available. . . .

Therefore, the Director has the duty and authority to protect and conserve the State's ground water resources from depletion.

In order to facilitate this duty, the Idaho legislature provided the Director specific, unambiguous authority to designate ground water management areas and critical ground water areas throughout the state.

As to the designation of a GWMA, Idaho Code § 42-233b, in pertinent part, states:

“Ground water management area” is defined as any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area.

Idaho Code § 42-233a defines a Critical Ground Water Area (“CGWA”) 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.

Therefore, when the Director determines a ground water basin is approaching the point of not having enough ground water to supply a reasonably safe supply for irrigation at current rates of withdrawal, he may designate a GWMA.<sup>6</sup> In this case, the ESPA GWMA Order represents the Director's factual determination that the ESPA was approaching the point of not having sufficient water to supply a reasonably safe supply for irrigation at current rates of withdrawal.

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<sup>6</sup> The remainder of Idaho Code § 42-233b contains the Director's post-designation authority to: (1) approve a ground water management plan; (2) approve new applications within the designated GWMA (after a showing sufficient water is available and other prior water rights will not be injured); (3) order reporting of withdrawals of ground water; and (4) upon a determination that the ground water supply is insufficient to meet the demands of water rights within the GWMA, order water right holders, on a time priority basis, to cease or reduce withdrawal of water until the Director determines there is sufficient ground water.

Critically, Petitioners do not challenge the Director's factual determination, they only argue that the ESPA GWMA Order was procedurally deficient.

The authority to designate GWMA's is one tool the Director has in order to prevent and conserve the State's ground water resources from depletion. The Court has already so held: "The designation of a GWMA is one of the tools or mechanism available to the Director for carrying out his duty to manage the aquifer as required by I.C. § 42-231." *Memorandum Decision and Order on Petition for Judicial Review, In the Matter of the Petition for Delivery Call of A & B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area* at 45, Case No. 2009-000647 (5<sup>th</sup> Jud. Dist. Ct. 2010). From a procedural perspective, the Court concluded the "Director may simply act upon his own initiative and discretion under the authority granted him by statute." *Id.*

The Director's authority to designate the ESPA GWMA is unambiguous in the Ground Water Act and no further statutory interpretation is necessary. *See Payette River Property Owners Ass'n v. Board of Com'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999) ("When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the court need not consider rules of statutory construction."). This 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). There is no clearly manifested expression to the contrary in the Ground Water Act and the Director's authority to designate the ESPA GWMA must be given effect.

## **2. No Other Procedure was Necessary or Due.**

Petitioners argue the Director's designation of the ESPA GWMA was "procedurally deficient," in error, and *ultra vires* because it was designated without a hearing and/or contested case under the Idaho Administrative Procedures Act ("IDAPA") and IDWR's Procedural Rules. *Petitioners' Brief* at 10, 15-16, 36-40.

IDWR's Procedural Rules and IDAPA's hearing and contested case provisions are not applicable to the Director's *designation* of the ESPA GWMA. The Director: (a) was not required to initiate a contested case prior to designation of the ESPA GWMA; (b) did not violate water users due process as a result of not initiating a contested case; (c) was not required to hold a hearing prior to designation of the ESPA GWMA; and (d) was not required to undertake rulemaking prior to designation of the ESPA GWMA.

Each of Petitioners' arguments lack a reasonable basis in law and must be rejected.

### **a. The Director Was Not Required to Initiate a Contested Case.**

Petitioners argue the ESPA GWMA Order was a decision of such significance that it warranted a contested case prior to issuance. *Petitioner's Brief* at 36. No contested case was required.

The plain language of Idaho Code § 42-233b requires the Director to first designate a GWMA after determining that "any ground water basin or designated part thereof . . . may be approaching the conditions of a critical ground water area." After such designation "the director shall publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area." Idaho Code § 42-233b. The plain language of Idaho Code § 42-233b does not require



the Director to initiate a contested case; it simply requires the Director to make a determination, designation, and to provide notice in the area affected.

The Court has already addressed its interpretation of the Ground Water Act and the Director's authority to designate the ESPA GWMA in its *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review, In the Matter of Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, Case No. CV-01-17-67 (4<sup>th</sup> Jud. Dist. Ct. 2017) ("Order on Motion to Determine Jurisdiction").

There the Court concluded:

The Director acted pursuant to Idaho Code § 42-233b in issuing [the ESPA GWMA Designation Order]. That code section, which is part of the Idaho Ground Water Act, grants the Director the authority to designate ground water management areas within the state. He may exercise this authority when he has determined that any ground water basin or designated part thereof "may be approaching the conditions of a critical ground water area." I.C. § 42-233b. There is no requirement that the Director hold an administrative hearing prior to designating a ground water management area. Nor is there any requirement that he initiate rulemaking or a contested case proceeding under the Idaho Administrative Procedure Act ("IDAPA") prior to designating a ground water management area. The Director may simply act upon his own initiative and discretion under the authority granted him by statute.

*Order on Motion to Determine Jurisdiction* at 2-3.

In a footnote, the Court continued: "[t]hat said, the Director is required to 'publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area' upon his designation of a ground water management area. I.C. §42-233b." *Order on Motion to Determine Jurisdiction* at 3, fn. 2. The Court added, "[t]he Director did hold several public meetings prior to his designation 'to provide water users and interested persons an opportunity to learn more about the possible ground water management area and to express their views

regarding the proposal.”” (internal citations omitted). *Order on Motion to Determine Jurisdiction* at 3.

As the Court has already stated, there is no requirement the Director initiate a “contested case proceeding under [IDAPA] prior to designating a ground water management area.” The Director may simply act upon his own initiative and discretion under the authority granted to him by statute. The Director was not required to initiate a contested case in this matter based on the explicit statutory authority in the Ground Water Act.

b. *The Director Was Not Required to Conduct a Pre-Decision Hearing.*

Similarly, there was no requirement the Director hold a hearing prior to issuance of the ESPA GWMA Order. Instead, if a person was aggrieved by the ESPA GWMA Order they had the right to request a hearing under Idaho Code § 42-237e, pursuant to Idaho Code § 42-1701A:

Any person dissatisfied with any decision, determination, order or action of the director of the department of water resources, watermaster, or of any local ground water board made pursuant to this act may, if a hearing on the matter already has been held, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If a hearing has not been held, any person aggrieved by the action of the director or watermaster may contest such action pursuant to section 42-1701A(3), Idaho Code.

Idaho Code § 420237e *See also Explanatory Information to Accompany a Final Order*, issued with ESPA GWMA Order on November 2, 2016. R. 28.

Again, the Court has already weighed in on Petitioner’s argument:

IDAPA will be implemented in the underlying matter going forward as the Director proceeds on the Sun Valley Company’s written petition and request for hearing. Idaho Code § 42-1701A(3) requires the Director hold an administrative hearing on the petition in accordance with the hearing procedures set forth in IDAPA. This will require the implementation of IDAPA, the initiation of a contested case proceeding, and the designation of “parties.” Once the Director holds the administrative hearing and issues his order the parties may file a petition for reconsideration under Idaho Code § 67-5246(4) at that time.

*Order on Motion to Determine Jurisdiction* at 7, fn. 6. The Ground Water Act explicitly provides for a formal hearing and additional procedure *after* designation of a GWMA. *See* Idaho Code § 42-237e; 42-1701A(3).

This makes practical sense. The Director and the Department are charged with the authority and duty to study, manage, and prevent the depletion of the State's ground water resources. Idaho Code § 42-231. The plain language of the statute indicates the legislature's intent was to allow the Director to proceed with designation and allow any aggrieved person to petition for a formal hearing, triggering IDWR's Procedural Rules and IDAPA's contested case procedures. As alluded to by the Court above, this is exactly what occurred here and led to this action on judicial review. Petitioners appear to argue the hearing provisions of IDWR's Procedural Rules or IDAPA somehow supersede the specific hearing opportunity in the Ground Water Act. This argument must also fail.

First, IDAPA "controls agency decision-making procedures only in the absence of more specific statutory requirements." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1993). In this case the Ground Water Act provides specific statutory requirements for the Director to follow in the designation of a GWMA, including on the ESPA.

Next, to the extent Petitioners are arguing that IDWR's Procedural Rules are inconsistent with the explicit statutory requirements of the Ground Water Act described above, the rules would be ineffective in this case. *See State v. Perkins*, 135 Idaho 17, 22, 13 P.3d 344, 349 (Ct. App. 2000) ("an administrative rule that is inconsistent with a statute that it purports to implement is ineffective to the extent of such inconsistency.")

c. The Director Was Not Required to Conduct Rulemaking.

Petitioners argue the Director was required to conduct rulemaking prior to designation of the ESPA GWMA. *Petitioners' Brief* at 40. While Petitioners admit designation of any other ground water management area *would not require* rulemaking, they argue “the ESPA has specific rules applicable to it, and it is those rules that require rulemaking if they are to be amended or repealed . . . .” *Id.* Thus, the Petitioners are not arguing that the creation of a GWMA generally must go through rulemaking. Rather, they argue because of the language of existing CM Rule 50, the Director must modify CM Rule 50 through rulemaking before creating the ESPA GWMA. For the reasons discussed in subsection 3 *infra*, the CM Rules are not applicable to the designation of the ESPA GWMA and do not limit the Director’s authority to designate the ESPA GWMA. Administrative rulemaking was not required prior to the Director’s designation of the ESPA GWMA.

**3. The CM Rules Do Not Prevent the Director From Designating the ESPA GWMA.**

a. The CM Rules Are Unambiguous in Their Authority.

Petitioners dedicate the vast majority of their brief to analyzing various aspects of the CM Rules. Petitioners argue CM Rules 20 and 50 limit the Director’s authority to designate the ESPA GWMA. *Petitioners Brief* at 11, 19-21. Petitioners’ arguments fails because they ignore the plain language of CM Rule 3.

CM Rule 3 addresses the scope of the Director's authority to take alternative actions, such as creating a GWMA. The rule states in full:

**003. OTHER AUTHORITIES REMAIN APPLIABLE (RULE 3).**

Nothing in these rules limits the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.

IDAPA 37.03.11.003.

This rule states in clear and unambiguous terms that *nothing* in the CM Rules limits the Director's authority to take alternative or additional action relating to the management of water resources as provide by Idaho law. In this case Idaho Code § 42-233b specifically authorizes the Director to create a GWMA. The word "nothing" in CM Rule 3 is not ambiguous and needs no additional interpretation. *See Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 813, 41 P.3d 237, 241 (2001) (IDAPA rules are traditionally afforded the same effect of law as statutes); and *Kootenai Elec. Coop., Inc. v. Washington Water Power Co.*, 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995) (where statutory language is clear and unambiguous, statutory construction is unnecessary and courts need only apply the statute). This rule demonstrates a specific legislative intent to not have the CM Rules limit the Director's options relating to the management of Idaho's ground water resources, as provided for by Idaho law.

Petitioners attempt to distinguish CM Rule 3 by arguing the Director would not have been limited in changing the CM Rule 50 boundary in a 2014 rulemaking docket if CM Rule 3 had any meaning. *Petitioners' Brief* at 22. The Director disagrees. The Director's actions in 2014 related to the CM Rules were, by definition, *administrative rulemaking*. The Director was

seeking to change CM Rule 50. Here, the Director does not propose to change the language of CM Rule 50. The plain language of CM Rule 3 makes it clear that “nothing in the rules,” not even CM Rule 50, “limits the Director’s authority” to create the ESPA GWMA.

Petitioners also attempt to distinguish CM Rule 3 by suggesting the Director “is asserting a general rule can be used as a basis to ignore a specific rule.” *Id.* at 22. They argue “[r]elative to a **GWMA on the ESPA**, CM Rule [3] is a general rule and CM Rule 50.01.d is a specific rule.” *Id.* at 26 (emphasis in original).

A specific rule controls over a more general rule when there is any conflict between the two. *Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993). This rule of construction applies when there is a *conflict* between rules. The difference here is that there is no conflict *because* of CM Rule 3. CM Rule 3 expressly authorizes the Director to take action notwithstanding CM Rule 50. Petitioners are attempting to manufacture a conflict where none is present.

Petitioners also argue the Director has an obligation to read Idaho Code § 42-233b and the entirety of the CM Rules together:

[The CM Rules] 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 conflict **must** be read in that way.”

*Id.* at 23 (emphasis in original).<sup>7</sup>

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<sup>7</sup> As further evidence in support of the argument that the Director must read Idaho Code § 42-233b and the CM Rules together, Petitioners cite to a page on the Department of Administration’s website that includes the authorities for promulgation of the CM Rules. The cover page Petitioner’s cite to can be viewed here: <https://adminrules.idaho.gov/rules/current/37/370311.pdf>. The cover page was added by the Department of Financial Management in order to make each rule chapter in the Idaho Administrative Code more user friendly. However, the cover sheet was not not part of the Administrative Code. See Idaho Administrative Bulletin,



Again, because of CM Rule 3, there is no conflict between Idaho Code § 42-233b, the CM Rules or IDWR's Procedural Rules. CM Rule 3 clearly states that *nothing* in the CM Rules limits the Director's authority to take alternative or additional action relating to the management of water resources as provide by Idaho law. CM Rule 3 removes any argument there is a conflict between the rest of the CM Rules and Idaho Code § 42-233b. The language is clear and it must be interpreted consistent with its plain meaning. Petitioners' arguments are without a basis in law and are contrary to the plain language of the rule.

*b. Even if CM Rule 3 is Not Applicable, the Ground Water Act is Not Limited or Superseded by the CM Rules.*

Even if we look past CM Rule 3, the language of the CM Rules does not support the Petitioners' arguments. The intent of the CM Rules is to facilitate delivery calls as between conjunctively managed water resources. IDAPA 37.03.11.020.04. Whereas the intent of the Ground Water Act is to halt problematic depletion of ground water resources. Idaho Code § 42-231. The distinct legislative and practical intent of the Ground Water Act and the CM Rules precludes the former from being limited or superseded by the latter.

The argument implied by Petitioners' briefing is that the ESPA may only be managed by delivery call. *Petitioners' Brief* at 11. This argument ignores the plain, unambiguous meaning and authority of the Ground Water Act, specifically Idaho Code §§ 42-231 and 233b. The purpose and intent of the Ground Water Act is distinct from the purpose and intent of delivery calls made pursuant to the CM Rules. Delivery calls facilitate water delivery in times of scarcity

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November 20, 2019 – Vol. 19-11SE at 4635 (available at <https://adminrules.idaho.gov/bulletin/2019/11SE.pdf>). The cover sheet has no bearing on this matter, other than to accurately state the CM Rules reference the GWMA designation process in the Ground Water Act.

as between prior appropriators. The Ground Water Act does not directly concern itself with the facilitation of delivery calls. Rather, it facilitates the Director's explicit, unambiguous authority to manage the State's ground water resources, within the purview of prior appropriation.

i. *CM Rule 50 Does Not Preclude Post-Adjudication ESPA GWMA Designation.*

Petitioners assert the disjunctive "or" in CM Rule 50.01.d. means that "[a]n 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.'" *Petitioners' Brief* at 26 quoting CM Rule 50.01.d. In other words, Petitioners argue because the ESPA has been adjudicated, CM Rule 50 prevents the Director from designating the ESPA GWMA under the Ground Water Act.

To the contrary, designation of an ESPA GWMA is not tied to adjudication. Designation of a GWMA is intended to be a preemptive, intermediary action to address already-determined imbalances in water budgets that, unchecked, would lead to CGWA conditions. The designation is also meant to help forestall or prevent delivery calls. CM Rule 50.01.d. does not stand for an either/or proposition. CM Rule 50 establishes the ESPA, as defined therein, as an "area of common ground water supply" ("ACWGS"). CM Rule 50 does not define the ESPA as a GWMA, nor can it, only the Ground Water Act can.

ii. *The ESPA ACGWS and the ESPA GWMA Are Not the Same.*

Next, Petitioners assert the CM Rules can limit the Ground Water Act, because the CM Rules specifically define an ESPA ACGWS. Petitioners argue that because an ESPA ACGWS must be, or is equal to, an ESPA GWMA, the CM Rule definition of ESPA ACGWS limits the

Director's authority to otherwise define an ESPA GWMA under the Ground Water Act.

*Petitioners' Brief* at 35-36.

While CM Rule 50 defines the ESPA ACGWS, it does not define the ESPA GWMA. Regardless, Petitioners argue that it is "self-evident" that the ESPA GWMA must be the same as the ESPA ACGWS. *Id.* at 35. However, both designations have distinct definitions in the CM Rules and the Ground Water Act. *See* IDAPA 37.03.11.010.01 (CM Rule definition of ACGWS); IDAPA 37.03.11.010.09 (CM Rule definition of GWMA, "[a]ny ground water basin or designated part thereof as designated by the Director pursuant to Section 42-233(b), Idaho Code."); Idaho Code § 42-237a.g. ("In connection with his supervision and control of the exercise of ground water rights the director . . . shall also have the power to determine what areas of the state have a common ground water supply . . ."); and Idaho Code § 42-233b (defining GWMA). Under the Ground Water Act the Director has the authority to designate both ACGWSs and GWMA. Subsuming the two distinct regulatory mechanisms by arguing that one must equal the other is a misinterpretation of Idaho law.

Additionally, the fact that ACGWS is determined by describing the relationship between ground water and surface water makes it distinct from determination of a GWMA through analysis of a ground water basin (or designated part thereof). The ESPA GWMA and the ESPA ACGWS are not the same thing, nor is it "self-evident" they have to be. If the legislature desired or intended a GWMA and ACGWS to mean the same thing, they would have so stated and would not have included distinct definitions and regulatory roles in law. The definition of ESPA ACGWS in the CM Rules does not limit or supersede the Director's ability to designate an ESPA GWMA under the Ground Water Act.

iii. *CM Rule 20 Does Not Create the Procedure for Designation of the GWMA.*

Next, Petitioners argue:

[CM Rule 20] provides 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).

*Petitioners' Brief* at 19. Petitioners' argue CM Rule 20 implements the Ground Water Act by providing the procedural elements for designation of GWMA's. Petitioners' understanding of CM Rule 20 is incorrect and leads to an unreasonable result.

CM Rule 20 encompasses "General Statements of Purpose and Policies for Conjunctive Management of Surface and Ground Water Resources." Specifically, it states:

These rules apply to all situations in the state **where the diversion and use of water under junior-priority ground water rights either individual or collectively causes material injury to uses of water under senior-priority water rights.** The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

IDAPA 37.03.11.020.01 (Emphasis added). Therefore, CM Rule 20 applies only in situations where diversion of junior-priority ground water rights is causing material injury to use of water under senior-priority rights. CM Rule 20 cannot be read to supersede the intent and purpose of the Ground Water Act, as described above.

More specifically, CM Rule 20.04, entitled "Delivery Calls" states, in pertinent part: "These rules provide the basis and procedure for responding to delivery calls made by the holder of senior-priority surface or ground water right against the holder of a junior-priority ground water right." IDAPA 37.03.11.020.040. The CM Rules govern delivery calls and do not foreclose the Director taking lawful action under the Ground Water Act. The CM Rules do not implement and cannot limit the Ground Water Act, and specifically the Director's authority and

duty thereunder to designate qualifying GWMA's as a result of problematic ground water depletion.

Finally, Petitioners only quote a portion of CM Rule 20.06. In full, CM Rule 20.06. states:

**06. Areas Having a Common Ground Water Supply.** 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 **incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g. and Section 42-604, Idaho Code, or** 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). Therefore, CM Rule 20.06. relates specifically to the designation of "areas having a common ground water supply," not to ground water management areas. CM Rule 20.06 actually points back to the Ground Water Act, and specifically to the definition of GWMA therein. Further, there are no actual procedures in CM Rule 20, or in the CM Rules generally, for designating GWMA's, including the ESPA GWMA. The procedure for establishing GWMA's is solely contained in the Ground Water Act. Therefore, CM Rule 20.06 simply restates the sequencing described in CM Rule 20.05 and the process that would be followed in responding to delivery calls in either adjudicated, organized water districts, or those areas designated as GWMA's. The CM Rules does not define the procedure for establishing GWMA's.

iv. *Designation of the ESPA GWMA Was Not Foreclosed by the Preexistence of ESPA Water Districts.*

Finally, Petitioners argue the CM Rules provide 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.” *Petitioners’ Brief* at 28. Petitioners contend the Director is foreclosed from asserting the authority provided him in the Ground Water Act because water districts are now formed on the ESPA and designation of a GWMA over the same resources would cause unnecessary confusion and potentially conflicting administration. *Id.* at 32-33.

The issue raised here by Petitioners is not a matter of first impression for the Court. First, in 2010, the Court, while concluding there was no harm in the designation of the ESPA as a GWMA, concluded *that at that time* there was a lack of benefit to such designation. *Memorandum Decision and Order on Petition for Judicial Review, In the Matter of the Petition for Delivery Call of A & B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area*, Case No. 2009-000647 (5<sup>th</sup> Jud. Dist. Ct. 2010).

However, that outcome is now distinguishable. In that case the Court concluded:

Idaho Code § 42-233b sets forth the conditions for the designation of a GWMA. In this case, the Director determined factually that despite declines, the aquifer was neither being mined . . . . Further that a moratorium on new permit applications was in effect. Hence, the aquifer was not approaching critical ground water area conditions thereby triggering the need for the designation of a GWMA. However, even if the Director concluded aquifer levels met the criteria of a critical ground water area, the designation of a GWMA is still not mandatory. The designation of a GWMA is one of the tools or mechanism available to the Director for carrying out his duty to manage the aquifer as required by I.C. § 42-231.

*Id.* at 45 (emphasis added).

While the Court agreed designation of the ESPA as a GWMA was unnecessary at that time, it did not do so because ESPA GWMA designation would *never* make sense or fulfil the policy of the Ground Water Act. The Court in no way concluded there is a limited binary outcome under the CM Rules. Instead, the Court acknowledged former IDWR Director David Tuthill’s decision that

the ESPA did not fit the GWMA statutory criteria *at that time*. The Court made no blanket conclusion that the use of the Director's authority to designate GWMA was forever foreclosed or otherwise subject to the CM Rules.

At base, the Ground Water Act does not condition or otherwise limit the Director's authority to designate a qualifying ESPA GWMA only where no water districts are present. Simply put, it is not the CM Rules that dictate GWMA designation: It is the Ground Water Act.

#### **4. Petitioners' Procedural Due Process Rights Were Not Violated.**

Petitioners argue because water rights are property rights, right holders are guaranteed due process before the Director's designation of a GWMA. *Petitioners' Brief* at 14. Petitioners argue because the Director did not comply with IDWR's Procedural and CM Rules, through hearing and rulemaking procedures, the Director has contravened Petitioners' due process rights. *Id.* at 15. Petitioners' argument fail as the Director has provide Petitioners all due process required under Idaho Code.

As a threshold matter, Petitioners have neither argued nor established how designation of the ESPA GWMA has deprived them of property. Petitioners speculate about possible future deprivation because they incorrectly view designation of the ESPA GWMA as a fundamental change to Idaho's prior appropriation regime. They also admit that they may be subject to curtailment, in priority, as a result of the Ground Water Act, as opposed to a delivery call under the CM Rules. Being subject to curtailment is not the same as being deprived of water rights. *See In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213-24, 220 P.3d 318, 331-32 (2009) (being subject to water district and regulation of



distribution along with payment of proportional fees did not deprive water user of property interest).

Even if Petitioners' water rights had been affected, the Ground Water Act provides sufficient due process. The Ground Water Act expressly governs the GWMA designation and, therefore, due process must be analyzed under the lens of the Ground Water Act. Here the Director agrees with the Petitioners when they quote the Idaho Supreme Court in *Nettleton v. Higginson*: "The requirement of procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code." *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048, 1052 (1977). The ESPA GWMA Order was issued in strict compliance with the Ground Water Act under Idaho Code § 42-233b.

Again, the Ground Water Act, at Idaho Code § 42-237e provides additional procedural due process:

Any person dissatisfied with any decision, determination, order or action of the director of the department of water resources, watermaster, or of any local ground water board made pursuant to this act may, if a hearing on the matter already has been held, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If a hearing has not been held, any person aggrieved by the action of the director or watermaster may contest such action pursuant to section 42-1701A(3).

No determination, decision, or order has yet been made or issued related to Petitioners' water rights in terms of the Director ordering, on a time priority basis, "water right holders to cease or reduce withdrawal until such time as the director determines there is sufficient ground water." Idaho Code § 42-233b. At such time, Petitioners may avail themselves of the due process procedure contained with the Ground Water Act. Idaho Code § 42-237e; Idaho Code § 42-1701A(3).

However, as far as curtailment, the potential risk of Petitioners' water rights being curtailed is the same risk any user of the State's water resources face. The Director's duty and authority to conserve and protect ground water resources, as required by the legislature through the Ground Water Act, cannot be supplanted or superseded by Petitioners fear of a future unavailability of the State's water resources. "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, 213-24, 220 P.3d 318, 331-32 (2009).

Petitioners next argue the ESPA GWMA creates a "new management regime" for the ESPA. Petitioners argue if the ESPA GWMA is implemented it will change the current ESPA 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 heterogeneous ESPA and flows in the Snake River irrespective of the amount of water needed to avoid injury to senior surface right holders.

*Petitioners' Brief* at 16.

Petitioners' argument is without merit. This is exactly the purpose and intent of the Ground Water Act as it relates to the designation of GWMA's. The legislative purpose and intent is to protect the ground water resource from further depletion leading to designation of a CGWA.

At base, Petitioners' due process arguments do not represent a legal challenge to the ESPA GWMA Order. Rather, the arguments appear to be complaints their water rights may be administered. However, potential administration of water rights is an obvious and reasonable

outcome under Idaho law, the prior appropriation doctrine, and within the confines of availability and scarcity.

**5. Petitioners' Substantial Rights Have Not Been Harmed.**

Petitioners argue they have a substantial right to have the Director follow both statutory and administrative law when acting in a way that will impact the administration of their water rights. *Petitioners' Brief* at 42-43; Idaho Code § 67-5279(4). Petitioners argue because they are outside of the CM Rule 50 boundary, they may now be curtailed as a result of their inclusion in the ESPA GWMA. *Petitioners' Brief* at 42-43. Again, the Idaho Supreme Court has been clear on this issue: "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). The Director has the unambiguous authority to so regulate under the Ground Water Act:

It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

Idaho Code § 42-231.

Contrary to Petitioners' arguments above, the Director did not violate Petitioners' substantial rights because the Director *did* follow the law: The Ground Water Act. Petitioners' attempts to impose the CM Rules on the Director's authority and duty under the Ground Water Act represent an unreasonable interpretation of Idaho law. The Director's exercise of his authority under the Ground Water Act in terms of the ESPA GWMA does not fundamentally

alter the prior appropriation administrative regime. Petitioners' substantial rights have not been harmed.

### **III. ATTORNEYS FEES**

IDWR rarely seeks attorney's fees and costs in judicial reviews of its administrative decisions. However, Petitioners' petition for judicial review compels IDWR to do so in this case because Petitioners' arguments lack a reasonable basis in law.

The Court shall award attorney's fees and expenses in any proceeding involving a state agency and a person if the Court finds the "nonprevailing party acted without a reasonable basis in fact or law." I.C. § 12-117(1); *see also Hoffman v. Board of the Local Improvement District No. 1101*, 163 Idaho 464, 473, 415 P.3d 332, 341 (2017) (County boards awarded attorney's fees where landowners pursued appeal without a reasonable basis in law).

Substantively, Petitioners': (1) ignore the plain meaning of the Ground Water Act, both in terms of its intent and purpose, and the Director's authority thereunder; (2) propound an unreasonable interpretation of the interaction between the Ground Water Act and the CM Rules; (3) ignore the unambiguous procedural elements of the Ground Water Act; and (4) unreasonably argue Petitioners' substantial rights have been harmed and Petitioners were not provided due process.

IDWR has incurred substantial expenses in defending this matter. For the above reasons, the Court should rule that Petitioners' acted without a reasonable basis in law and award attorney's fees and costs to IDWR.


#### IV. CONCLUSION

The Director's ESPA GWMA Order and the Order on Legal Issues are consistent with applicable statutory provisions; not in excess of statutory authority; supported by substantial evidence on the record as a whole; made upon lawful procedure; and are not arbitrary or capricious. Petitioners' substantial rights have not been violated. The Court should affirm the Director's Order on Legal Issues and affirm the Director's designation of the ESPA GWMA in the ESPA GWMA Order.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of September, 2020.

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\_\_\_\_\_  
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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of September 2020, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods.

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