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.

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

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

**PETITIONERS' REPLY BRIEF**

# PETITIONERS' REPLY BRIEF

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' Reply Brief*. This reply addresses *Respondent IDWR's Brief in Response to Petitioners' Brief* ("*IDWR Response*"), as well as similar arguments contained in the *Surface Water Coalition's Cross-Petition/Response Brief* ("*Coalition Response*").[1] For the sake of clarity and brevity, Petitioners will use terms as defined in *Petitioner's Brief*. This reply addresses arguments made in these responses, and reiterates prior arguments made by Petitioners. To the extent any argument in the responses are not specifically addressed, Petitioners maintain their positions described in *Petitioners' Brief*.

## I. LEGAL ARGUMENT

### A. The Director erred in concluding that he was not required to follow the CM Rules in designating the ESPA GWMA. The applicable Idaho statues and CM Rules are the authorities the Director is bound by, they can be read together without conflict, and the Department's interpretations would lead to absurd results.

#### 1. The Director is required under Idaho Code § 42-602 to establish water districts with respect to adjudicated water rights and the designation of a GWMA would not confer any additional management function that is not already available in an organized water district.

At the outset, it is important to keep in mind that the Director's ESPA GWMA Order is based solely on Idaho Code § 42-233b, and not the CM Rules. The Director summarily concluded that he "was not required to follow the conjunctive management rules in designating a ground water management area[,]" R. 2984, and as a result, has made no attempt to read the relevant CM Rules and the relevant Idaho statutes together. *IDWR Response* at 26-35.

[1] Petitioners will specifically respond to the Coalition's Cross-Petition in a separate brief which is due on or before October 6, 2020.

It is well understood that administrative agencies promulgate rules to provide substance to the overarching legal principles outlined in enabling statutes. 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.

The CM Rules were promulgated by the Director in 1994 and approved by the Idaho Legislature, and they can be amended by going through the proper process. Despite this, the *IDWR Response* is surprising and concerning to Petitioners because a subsequent Director now asserts CM Rule 3 provides an escape from the CM Rules [2] where the remaining CM Rules no longer limit his discretion.[3] One would think that the Department would instead argue *against* the invalidity of its own rules like the State did in *State v. Perkins*,[4] or provide an analysis addressing the requirement 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). Instead, the Department argues that "nothing" limits the Director's authority to designate the ESPA GWMA. *IDWR Response* at 27.

As described below, the CM Rules and statutes these rules implement certainly can be read together without conflict. As explained in *Garner*, statutes and rules "build upon each other" with the statute being "the starting point." *Gardner*, 161 Idaho at 711, 290 P.3d at 437. Idaho Code § 42-233b and the CM Rules "should not be read in isolation, but must be interpreted in the

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[2] The Director cited to CM Rule 5 in his Order on Legal Issues on this issue. R. 2984. The substance of what is now contained at CM Rule 3 in the 2020 CM Rules was contained at CM Rule 5 in the 2019 CM Rules. It is unclear to Petitioners when the reassignment of this rule number was made, but nevertheless, the most current citation is to CM Rule 3 as set forth in the IDWR Response. See https://adminrules.idaho.gov/rules/current/37/370311.pdf.

[3] "CM Rule 3 expressly authorizes the Director to take action not withstanding [sic] CM Rule 50. Petitioners are attempting to manufacture a conflict where none is present." *IDWR Response* at 28.

[4] "The State, apparently not wishing to urge the invalidity of its own rule, argues that I.D.A.P.A. 11.10.03.011.08.c can be reconciled with I.C. § 18-8310(1) . . ." *State v. Perkins*, 135 Idaho 17, 22, 13 P.3d 344 (Ct. App. 2000).

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). In fact, the Idaho Supreme Court has incorporated this interpretation principle specifically upon review of the CM Rules: "While perhaps the [CM] Rules can be read in different ways, they can be read consistently with constitutional and statutory principles." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 877, 154 P.3d 433, 448, (2007).

Petitioners will get into specific interpretation of words and phrases below in response to one of the Department's arguments, but in order to fully respond, it is important to start with principles that this Court has already decided relative to the Idaho Ground Water Act (Idaho Code §§ 42-226 *et seq*.) (the "GWA"), as both the Director and Coalition assert that the Petitioners do not understand and/or misunderstand the purposes of the GWA. This Court articulated these principles in its *Memorandum Decision and Order on Petition for Judicial Review*, Minidoka County Case No. 2009-647, at 43-48 (May 4, 2010) (In the Matter of the Petition for Delivery Call of A & B Irrigation District for the Delivery of Ground Water and the Creation of a Ground Water Management Area) (hereinafter "*A&B Memorandum Decision*"),[5] and while this decision was discussed in *Petitioners' Brief*, in reply to the Director's and Coalition's arguments, further discussion is warranted.

Ground water "management", their argument asserts, can only happen through a ground water management area under the GWA—not through water districts—and for that reason, the Director was justified in proceeding with designation of an ESPA GWMA despite the plain language of the CM Rules. *IDWR Response* at 19-21; *Coalition Response* at 15 (fn. 15). But this Court has already determined that ground water management can occur through water

[5] This memorandum decision is available at https://idwr.idaho.gov/files/legal/CV-2009-647/CV-2009-647-20100504-Memorandum.pdf.

districts by the Director under his statutory authority. In the *A&B Memorandum Decision*, this court concluded:

> The Director reasoned that designation of a **GWMA would not confer any additional <u>management</u> function that is not already available in an organized water district**. This Court agrees.

*A&B Memorandum Decision* at 43 (emphasis added). This Court then further explained:

> Unlike the designation of a GWMA, **the Director is required to create water districts**. I.C. § 42-604. However, the creation of water districts only applies with respect to adjudicated water rights.

*Id*. at 45-46 (emphasis added and footnotes omitted).

In the A&B delivery call proceedings, A&B argued (in addition to several other issues) that the GWA (enacted in 1951) did not apply to its ground water right 36-2080 (which has a priority date of September 9, 1948). *Id*. at 11. If successful, then A&B's water right would not be subject to the "reasonable pumping level" provisions of Idaho Code § 42-226, and instead, A&B's ground water right to be protected to its historic pumping level under common law. In rejecting this argument, this Court provided "a comprehensive review of the GWA in its entirety." *Id*. at 12. Petitioners believe this Court's analysis provides a more complete discussion of the GWA, and perhaps most importantly, a binding analysis of the GWA for purposes of this proceeding.

This Court concluded that under the GWA, "the Legislature intended a distinction between the 'right to the use of ground water' and the 'administration' of all rights to the use of ground water.'" *Id*. at 13. Continuing, "[t]his distinction is significant in that the plain language of the Act makes clear that the Act applies retroactively to the later category unless specifically exempted." *Id*. And finally, "[i]t is also clear that under the plain language of I.C. § 42-229 the GWA applies to the administration of all rights to the use of ground water whenever or however

acquired." *Id*. at 21. Based on these conclusions, this Court concluded "the Director did not err in concluding that the reasonable pumping level provisions of the GWA apply to pre-enactment water rights." *Id*. at 22.

Having established that the GWA applies "to the administration of all" ground water rights, later in its opinion, this Court addressed A&B's argument that the Director erred in failing to designate all or a portion of the ESPA as a GWMA under Idaho Code § 42-231. While this Court concluded that the Director did not err, what is important for our purposes are reasons why this Court held the Director did not err. As quoted above, the Court started with this conclusion:

> The Director reasoned that designation of a GWMA would not confer any additional **management** function that is not already available in an organized water district. This Court agrees.

*A&B Memorandum Decision* at 43 (emphasis added). In support of this conclusion, the Court cited to and quoted from GWA statutes (Idaho Code §§ 42-231 and 42-237) as follows:

> Director. Idaho Code § 42-231 sets forth the duties of the Director with respect to the management of ground water:
>
> > It shall likewise be the duty of the [Director] to control the appropriation and use of the ground water of this state as in this [GWA] 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 [GWA].
>
> Idaho Code § 42-237a defines the power of the Director with respect to carrying out the provisions of the GWA:
>
> > 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 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. . . .

*Id*. at 44. This Court went on to explain that even if aquifer levels met the criteria of a critical ground water area, designation of a GWMA was still not mandatory. A "GWMA is one of the tools or mechanisms available to the Director for carrying out his duty to manage the aquifer as required by I.C. 42-231. Another mechanism is the creation of an organized water district pursuant to I.C. 42-602." *Id*. at 45.

At the time in 2010, as explained by this Court, "the position of the Director is that after an organized water district is created as required then **a GWMA is <u>no longer</u> necessary.**" *Id*. This position has now evidently changed under a new Director, but the new Director's changed position does not change this Court's conclusions that the water districts provide management ability to the Director in meeting his statutory obligations and adding a GWMA designation did not provide "identifiable benefits." *Id*.

All of this is significant because it informs a proper reading and understanding of Idaho law on the conjunctive management of Idaho's water resources. More specifically, with this Court's prior holding in mind, the CM Rules and the statutes implemented by the CM Rules (including Idaho Code § 42-233b) as described on the following page 1 of the CM Rules indeed "can be read together without conflicts" as required in *State v. Garner*:

**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).[6] As described below, the CM Rules must be followed by the Director, and specifically, he cannot ignore the plain language of CM Rule 50. The Director's authority to create the proposed ESPA GWMA, and limitations related to his power, are sealed by Idaho's Legislative authority, as set forth in Idaho Code § 42-233b **and** within the CM Rules.

The Department first argues "CM Rule 3 removes any argument there is a conflict between the rest of the CM Rules and Idaho Code § 42-233b." *IDWR Response* at 29. Stated another way,

[6] In footnote 7 of the *IDWR Response* (at 28-29), the Department attempts to eliminate the significance of this cover sheet. We disagree that it has no significance. There is no citation in the *IDWR Response* supporting the assertion that the cover sheet was added only to make the Idaho Administrative Code "more user friendly." By its plain language, the cover sheet explains which statutes the rules "implement," which is consistent with case law described in this brief. Petitioners did not generate this document. Someone at the State of Idaho did, and it serves as persuasive authority of the enabling statutes of the CM Rules. But even without this cover sheet, the CM Rules are clearly enabled by these statutes.

despite the thousands of other words found in the CM Rules, the Department summarily asserts that the single word "nothing" found in CM Rule 3 provides the Director with authority to ignore these additional words and rely entirely upon the language found in Idaho Code § 42-233b. Of course, as explained below, if this position is taken to its logical end, then the CM Rules—already adjudicated to be constitutional in *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep 't of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007)—have no applicability at all. Only the Director's absolute discretion matters.

In its further efforts to read away the applicability of the CM Rules, the Department secondarily asserts a very, very narrow reading of the purposes of 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." *IDWR Response* at 29.

Both arguments are unavailing.

**2. The Director's interpretation of CM Rule 3 violates Idaho law on statutory and rule interpretation, leads to an absurd result, and ignores words contained in CM Rule 3 itself.**

In its efforts to minimize the CM Rules, the Department's primary position is that CM Rule 3—not CM Rule 50—dictates the result in this matter: "CM Rule 3 expressly authorizes the Director to take action not withstanding [sic] CM Rule 50. Petitioners are attempting to manufacture a conflict where none is present." *IDWR Response* at 28.[7] The Department makes no attempt to read the rules and statutes together. Rather, the Department asserts "CM Rule 3

[7] The Director cited to CM Rule 5 in his *Order on Legal Issues* on this issue. R. 2984. The substance of what is now contained at CM Rule 3 in the 2020 CM Rules was contained at CM Rule 5 in the 2019 CM Rules. It is unclear to Petitioners when the reassignment of this rule number was made, but nevertheless, the most current citation is to CM Rule 3 as set forth in the *IDWR Response*. See https://adminrules.idaho.gov/rules/current/37/370311.pdf.

removes any argument there is a conflict between the rest of the CM Rules and Idaho Code § 42-233b." *IDWR Response* at 29.

CM Rule 3 in its entirety provides:

> **003. OTHER AUTHORITIES REMAIN APPLICABLE (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.

The Department's position is unequivocal:

> 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.

*IDWR Response* at 28. Accordingly, it appears the Department's position is that that CM Rule 3 should only be read as follows:

> **003. OTHER AUTHORITIES REMAIN APPLICABLE (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.~~

First, an interpretation by the Department that the CM Rules do not bind the Director in any way would lead to the ultimate absurd result, which is that the CM Rules are completely unnecessary as they are devoid of any binding effect on the Director. Rules are interpreted like statutes, and courts "will not read a statute to create an absurd result." *David & Marvel Benton v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016).

Second, even if the Department wants to rely on CM Rule 3 in order to read CM Rule 50 out of the CM Rules, it cannot ignore words contained in CM Rule 3 itself, such as the words "alternative" and "additional." 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). 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;

The adjective form of "alternative" means "(of one or more things) available as another possibility. 1.1 (of two things) mutually exclusive." OXFORD ONLINE DICTIONARY (*available at* https://www.lexico.com/en/definition/alternative); *see also* Bryan A. Gardner, A DICTIONARY OF MODERN LEGAL USAGE (2ND ED.) at 47 (defining "alternative as "mutually exclusive; available in place of another."). The adjective "additional" is defined as "added, extra, or supplementary to what is already present or available." OXFORD ONLINE DICTIONARY (*available at* https://www.lexico.com/en/definition/additional).

The "alternative" or "additional" actions that the Director can take are, by definition, actions *other than* those not already directly addressed in the CM Rules—*i.e.*, actions that are mutually exclusive to those options already contained in the CM Rules. The CM Rules already directly address the limitations on designation of an ESPA GWMA, which can only occur pre-adjudication. An "alternative" or "additional" action contemplated under CM Rule 3 cannot be a post-adjudication ESPA GWMA because this is directly contrary to what CM Rule 50 provides. CM Rule 3 does not provide an ever-present alternative to ignore other applicable CM Rules.

The interpretation analysis contemplated by the Department would allow the Director to take actions contrary to any CM Rule because such contrary action would be "alternative" or "additional" to what is already provided. This would clearly lead to absurd results and would not be in harmony with common sense and sound reason. For this reason, the Department's position is unavailing, and this Court should reverse the Director's *ESPA GWMA Order*.

**3. The CM Rules are not limited solely to address delivery calls as between conjunctively managed water resources.**

The Department's second main argument in support of its ability to ignore Rule 50 is to argue for a limited scope of the CM Rules to only address delivery calls. If accepted, the argument

continues, then CM Rule 50.01.d does not apply to the Director's authority to designate a post-SRBA ESPA GWMA.

Based on reported Idaho Supreme Court opinions and this Court's decisions of which Petitioners are aware, the CM Rules appear to be primarily employed and applied in water delivery calls. But, contrary to the Director's arguments, and based upon the CM Rules' plain language, that is not their only purpose. If it were, then it would make no sense for the CM Rules to contain a definition of "Ground Water Management Area" at CM Rule 10.09 or even mention Idaho Code § 42-223b at CM Rule 20.06. The CM Rules are not solely intended to address delivery calls—there are several additional purposes for the CM Rules set forth in the same CM Rule 020 that the Department cites to in support of its myopic view about the CM Rules. *IDWR Response* at 29 (citing only to CM Rule 20.04 below). These purposes include:

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 elements 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).

Further, even the definition of "conjunctive management" found at CM Rule 10.03 is not limited to responding to delivery calls as the words "delivery" and "call" are nowhere in this

definition:

> **03. Conjunctive Management**. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply. (10-7-94)

IDAPA 37.03.11.010.03. The Idaho Supreme Court has described the CM Rules as rules that "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)). There is nothing in this Idaho Supreme Court description that limits the CM Rules solely to delivery calls.

Furthermore, this Court correctly noted in 2010—before the SRBA was completed in 2014—that that "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." *A&B Memorandum Decision* at 46.[8] The CM Rules themselves embody this same principle—that GWMAs are utilized pre-adjudication while water districts are utilized post-adjudication. 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

[8] This Court correctly noted in the *A&B Memorandum Decision* that prior to entry of the final decree for the SRBA, "the Department sought interim administration from the SRBA Court, pursuant to I.C. § 42-1417, prior to creating water districts."

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.l l.030.07(h) (emphasis added).

The Department argues that the 2010 *A&B Memorandum Decision* is distinguishable from the present case because "the Court agreed designation of the ESPA as a GWMA was unnecessary at that time . . . [but the] Court in no way concluded there is a limited binary outcome under the CM Rules." *IDWR Response* at 34. The reason the Court did not address CM Rule 50.01.d is because the SRBA was not completed in 2010 when this decision was issued, and as a result, the Director could have designated a pre-adjudication ESPA GWMA under CM Rule 50.01.d at that time because this rule specifically allowed him to. The Department misses the point of the *A&B Memorandum Decision* in this proceeding, which is that the ESPA GWMA would not confer any additional management function that is not already available in an organized water district.

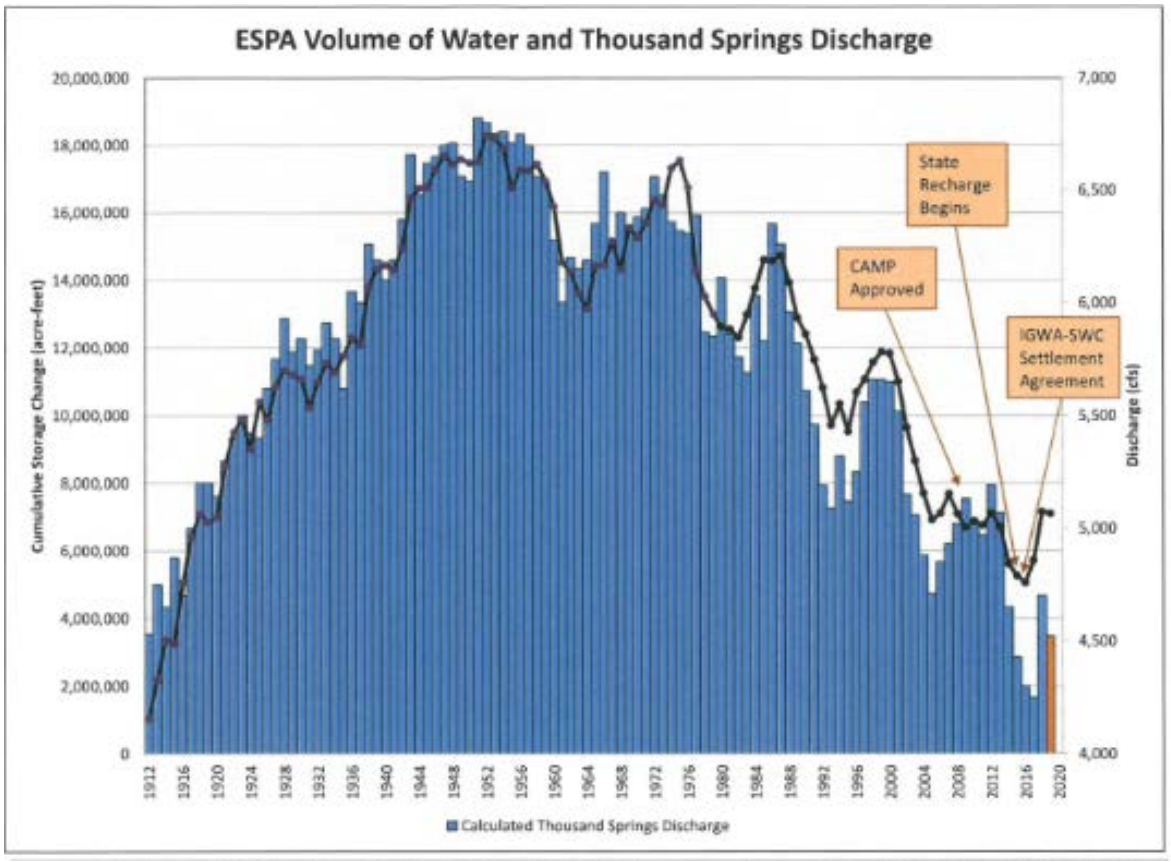
There should be little concern over the effectiveness and organization of water districts (the creation of which is mandated by statute once an adjudication is completed) in the conjunctive management of Idaho's water resources on the ESPA. They are effective tools—effective enough that even in the Director's original *ESPA GWMA Order*, he states that administration of the ESPA GWMA "would be accomplished through the existing water districts":

> 24. The designation of an ESPA ground water management area and adoption of a ground water management plan would not require or result in an additional layer of administration or bureaucracy. While a ground water management plan might in some instances or locations apply new standards or requirements as a means of "managing the effects of ground water withdrawals on the aquifer . . . and on any other hydraulically connected sources of water," Idaho Code § 42-233b, administration of the ground water management area and of the ground water management plan would be accomplished through the existing water districts, by the watermasters as supervised by the Director. *See generally* chapter 6, title 42, Idaho Code.

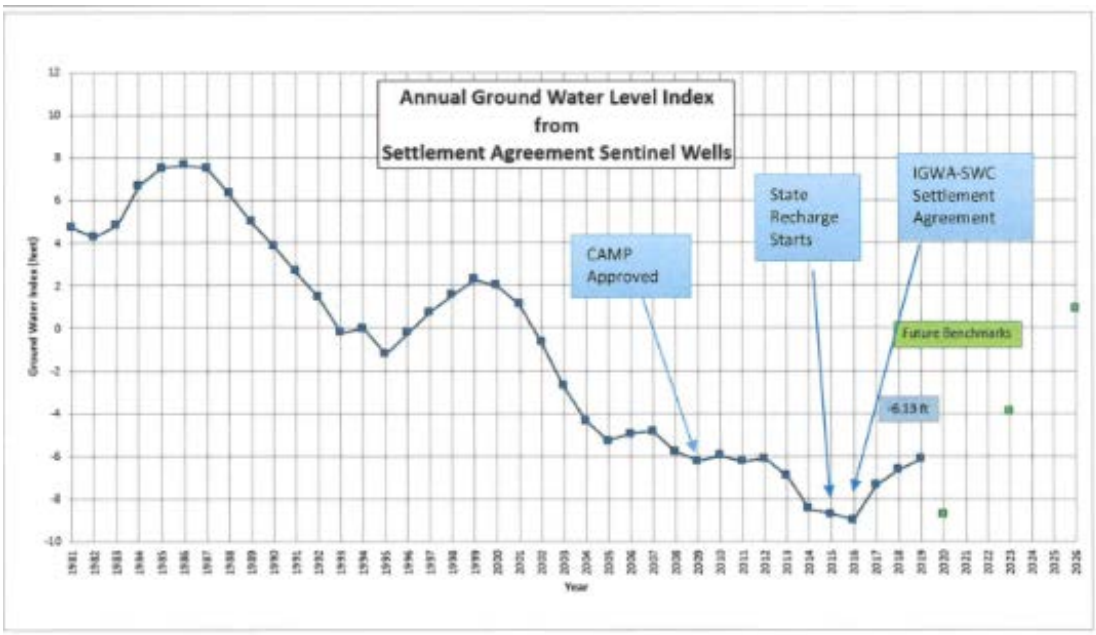
R. 24.[9]

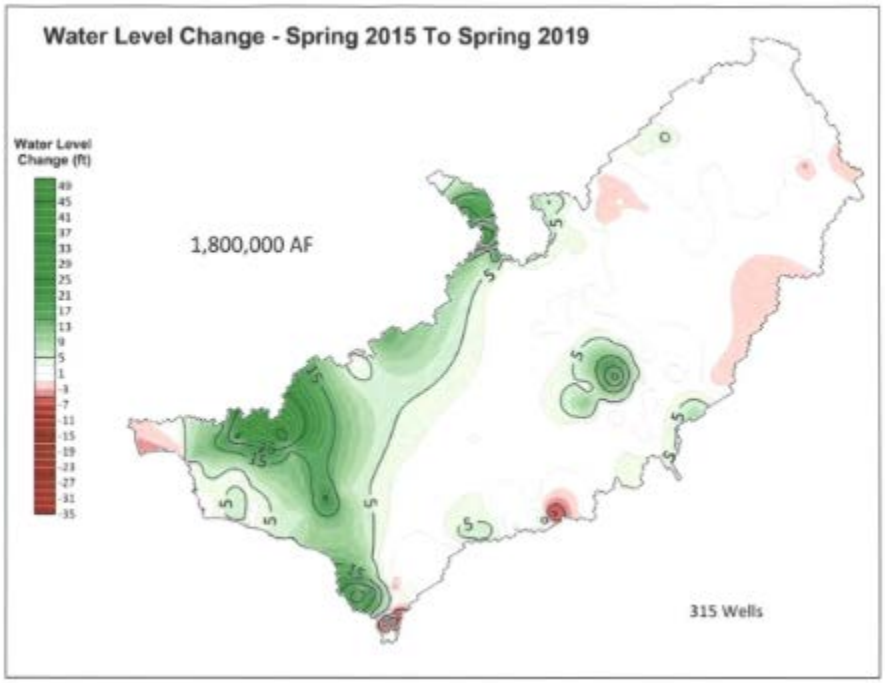
[9] This statement by the Director where the GWMA actions would be accomplished through existing water districts further complicates this contested case. CM Rule 50 provides the Director with a one or the other option—

Since the Coalition-IGWA Settlement Agreement—a CM Rule mitigation plan—was entered into and implemented, the actions taken under that agreement, along with actual curtailment actions taken by the Department through existing water districts (and threatened curtailment which has led to ground water users joining ground water districts for mitigation purposes) and ground water recharge by the Idaho Water Resource Board, these efforts have resulted in positive trends for the ESPA ground water levels as depicted on these updated graphs and maps:




pre-adjudication ESPA GWMA or post-adjudication water district management of the ESPA—but not both, and yet it appears that the Director may implement a hybrid approach.




ESPA PROGRESS REPORT at 8-9, available at https://idwr.idaho.gov/files/iwrb/2019/20191210-ESPA-CAMP-Progess-Report-Final.pdf.

Based on the foregoing, the Director's attempts to narrow the scope of the CM Rules through an interpretation that they are solely for facilitating delivery calls is without merit and requires this Court to ignore the plain language of a significant number of CM Rules. This is contrary to the principle that statues and rules "should not be read in isolation, but must be interpreted in the context of the entire document." *Tidwell*, 164 Idaho at 574, 434 P.3d at 178 (footnote omitted). "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). 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; *see also A&B Memorandum Decision* at 15 (quoting *Farber v. Idaho State Insurance Fund*, 147 Idaho 307, 208 P.3d 289 (2009) ("Courts must give effect to all the words and provisions of [the rules] so that none will be void, superfluous or redundant."). The Director's interpretation of the CM Rules makes several of its provisions "void" and "superfluous" and, most critically, are not read together without conflicts when they clearly can be.

When considering past Department action under the CM Rules, the Department's interpretation arguments are unreasonable and frivolous. As explained in prior briefing, in a proceeding that commenced in 2014, the Director cited his broad discretion to regulate surface and ground water sources under Idaho law as the basis for his ability to disregard the CM Rule 50 ESPA boundary. In discussing a new 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, nor 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).[10] 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 and that hydrogeologic connections could be established from areas outside the Rule 50 boundary (so-called "tributary basins"). At this point, however, Director acknowledged in 2014 that the administrative rules are legislative enactments that describe the bounds of his authority 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.[11] 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 CM 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 as there as been no formal determination that areas outside the CM Rule 50 boundary are an ACGWS under the CM Rules.

Conversely, 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

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[10] This final order is available at https://idwr.idaho.gov/files/legal/CMR50/CMR50-20140829-Final-Order.pdf.

[11] As explained previously, the Idaho Legislature did not approve of the Director's proposal to amend CM Rule 50. "On February 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/.

designate an ESPA GWMA. The Department did not argue in 2014 that CM Rule 3 gave the Director an ability to ignore other portions of Rule 50. Nor should he now. The Director understood the law and proper process in 2014, both of which have been ignored in this ESPA GWMA proceeding.

Based on the foregoing, the Department's interpretation arguments are unavailing and unreasonable. Under rules the Department promulgated itself, CM Rule 50.01.d prescribes the administrative mechanism for the ESPA post-SRBA, and that is management through water districts:

> **050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).**
>
> **01. Eastern Snake Plain Aquifer**. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. (10-7-94)
>
> **a.** The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River. (10-7-94)
>
> **b.** The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. (10-7-94)
>
> **c.** The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30. (10-7-94)
>
> **d.** The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area. (10-7-94)

The Director is bound by CM Rule 50.01.d. Under the applicable 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 was completed in 2014. 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.[12]

As explained above, the ESPA—the area of controversy that led to promulgation of the CM Rules in the first place—can and will continue to be managed and regulated by the Director without the GWMA designation. The Director has authority by statute and administrative rule to administer and manage ground water withdrawals. All the CM Rules can be applied in a way that does not conflict with Idaho statutes as both legal authorities describe an effective piece of legislation in harmony with common sense and sound reason. This Court should reject the Director's failure to abide by CM Rule 50.01.d. and set aside the *ESPA GWMA Order*.[13] Otherwise, if the Director's actions are upheld by this Court, the veracity and the applicability of the CM Rules in any future proceedings will be questionable.

**B. The manner upon which the Director designated the ESPA GWMA violated due process.**

Petitioners maintain that the manner upon which the ESPA GWMA was designated violated due process. In response, the Department argues that "Petitioners have neither argued nor established how designation of the ESPA GWMA has deprived them of property." *IDWR Response* at 35. But actual deprivation of property is not the standard. As described below, the

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[12] 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 <u>choice of one</u> among two or more things.**" *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (emphasis added). Accordingly, in *Blackfoot*, the Idaho Supreme Court held that "a water decree must either contain a statement of pupose or use or incorporate one, **<u>but not both</u>**." *Id*. (emphasis added).

[13] The interplay between Idaho Code § 42-233b and CM Rule 50 is no different than the interplay between Idaho Code § 42-203A and the Department's Water Appropriation Rules found at IDAPA 37.03.08. These rules provide additional detail and legal requirements on the submission of information and how the Department processes applications for permit and the information that must be submitted as part of the Director's evaluation of whether the application does not violate Idaho Code § 42-203A(5)(a)-(g). Indeed, these rules even have rules specific for applications to appropriate trust water, an area depicted on Exhibit A to these rules, and how the Director is to evaluate them. See IDAPA 37.03.08.45.02. The very nature of administrative rules is to provide greater detail and direction to an administrative agency than the general language found in the statute. That does not mean they automatically conflict with each other.

standard is whether the Petitioners' due process rights have been *implicated*, which they have, given the Director's failure to follow the CM Rules and Procedural Rules. *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).

Petitioners maintain that due process rights are implicated when an incorrect process is used and the correct process is circumvented. As we previously explained, 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' procedural 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. 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.

Petitioners believe their due process rights have been violated in two respects. First, if the Director does not follow the CM Rules, then Petitioners due process rights have been violated. The Director did not follow CM Rule 50.1.d as explained previously. Due process analysis considers "if a liberty or property interest is **implicated** applying a balancing test to determine what process is due." *State v. Rogers*, 144 Idaho 738, 742, 170 P.3d 881, 885 (2007) (emphasis added). Petitioners' rights are implicated when an administrative agent circumvents binding rules. Rules matter. Boundaries matter. As previously stated, Petitioners understand that ground water rights are subject to priority administration, and that such administration does not mean due process rights have been violated. But Petitioners do have a due process interest in the Director following the rules and engaging in the proper procedure to ensure they are regulated the right way. He did not do so with his ESPA GWMA designation.

Second, 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. Idaho Code § 42-233b is silent on the proper procedure, but the CM Rules are not.

CM Rule 20.06 states that 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." 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. The Director did not follow these procedures.

We recognize that this Court previously held that there is no requirement that the Director hold an administrative hearing prior to designating a ground water management area. *Order on Motion to Determine Jurisdiction; Order Dismissing Petition for Judicial Review*, Case No. CV-01-17-67, at 2. Our view of the Court's rationale is that there is no express requirement for a hearing contained in Idaho Code § 42-233b, which is silent on the actual procedure. However, as described above, under the CM Rules (which reference the Department's Procedural Rules) and due process considerations, it was an error for the Director to designate the ESPA GWMA without first conducting a contested case hearing, and thus, the *ESPA GWMA Order* must be reversed.

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

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 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.

The Department argues that Petitioners substantial rights have not been violated because "the Director did follow the law: The Ground Water Act." *IDWR Response* at 38. Notably, the Department did not argue that the Director's failure to follow the law (in our view, the CM Rules)

would not be a violation of Petitioners' substantial rights. Accordingly, the question of whether Petitioners' substantial rights have been violated rests entirely upon what this Court decides in terms of the applicability of the CM Rules, and in particular, CM Rule 50.1.d.

Rules matter. And boundaries matter, even though they may not be perceived to make practical sense. Consider the boundary between Wyoming and Idaho near Driggs where the headwaters of the streams on the west side of the Tetons start in Wyoming but are diverted for use in Idaho. The state line boundaries matter and must be respected in water administration, even though the water sources are obviously hydraulically connected. The same principle applies here.

Petitioners understand that they are not immune from water management and administration, but it must happen in accordance with the law. The Director has drawn in the Basin 33 Water Users and Upper Valley Irrigators under a GWMA with his ESPA GWMA Order when that was not the proper procedure. The Director must follow the CM Rules, and if he elects to do so in the future, following the proper procedure will allow the Petitioners to determine the proper course of action in responding. All that Petitioners want is to let the CM Rules and the procedures contained therein play out.

As previously explained, the areas from which Petitioners derive their ground water are outside of the CM Rule 50 ESPA boundary. The ESPA has a described boundary, even though some may argue the boundary is arbitrary (just like the Idaho/Wyoming line). These areas have not had a formal determination under the CM Rules that they are an ACGWS. Because the CM Rules apply, and in addition to the CM Rule 50.1.d arguments set forth above, it is Petitioners' view that 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 require as much. *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."). The Director did not follow the CM Rules. As a result, he did not properly address the tributary basins from which the Basin 33 Water Users and the Upper Valley Irrigators derive their ground water.

Because a GWMA is an ACGWS, 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. Finally, 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.

Because the Director did not follow the CM Rules and acted contrary to the due process rights of Petitioners, Petitioners substantial rights have been violated, and the *ESPA GWMA Order* should be set aside.

**D. Neither the Department nor the Coalition are entitled to attorney fees. Conversely, upon review of the Department's and Coalition's arguments contained in their respective responses, Petitioners should be awarded their attorney fees under Idaho law.**

In 2010, when one of the members of the Coalition—A&B Irrigation District—challenged the Director's decision not to designate the ESPA as a GWMA, the Department did not request attorney fees from A&B. *See* IDWR Respondents' Brief, Minidoka County Case No. 2009-64, January 28, 2010, *available at* https://idwr.idaho.gov/files/legal/CV-2009-647/CV-2009-647-20100128-IDWR-Respondents-Brief.pdf. Nevertheless, the Department now seeks fees from Petitioners alleging Petitioners have not proceeded with a "reasonable basis in fact or law." *IDWR Response* at 39. The Department asserts that 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 hared and Petitioners were not provided due process.

*IDWR Response* at 39. As described herein, however, the Petitioners have asserted arguments seeking recognition of the plain language of the CM Rules, including, in particular, CM Rules 3, 20, and 50. This is not an unreasonable position, rather, it is the more reasonable position. The Department has made no attempt to reconcile the language in the CM Rules the Department promulgated with relevant statutes. Instead, the Department claims that nothing limits the Director's authority with a strained reading of CM Rule 3. According meaning to words in a rule is not only reasonable, but also comports with Idaho law as set forth in the cases cited herein and other legal authority.

Furthermore, the basis for the Petitioners' arguments are centered around the CM Rules, which have been deemed constitutional by the Idaho Supreme Court. In this proceeding, the Department wants to ignore these constitutional rules entirely. It is fair and reasonable to ask this Court whether the very person who should be bound by these rules can ignore them, particularly where he took the original administrative action to designate the ESPA GWMA and then subsequently also served as the hearing officer. We are not aware of any cases where the agency that promulgated its rules—and could change them with the Legislature's approval—subsequently made no effort to follow, give effect to, or attempt to read them consistent with their enabling statutes.

It is also fair and reasonable to ask questions on appeal when the Department's position changed only 6 years after the *A&B Memorandum Decision* was issued in 2010 upholding the Department's position that the designation of a GWMA would not confer any additional management function that is not already available in an organized water district. "The position of the Director is that after an organized water district is created as required then a GWMA is **no longer necessary**." *A&B Memorandum Decision* at 45 (emphasis added). Furthermore, it is also fair to raise the question about the proper response to administrative rules that are contrary to actions the Director desires to take. The Director's actions in 2014 pertaining to the Rule 50 ESPA boundary to seek amendment of CM Rule 50 were appropriate. It is reasonable to question his failure to follow the same process with CM Rule 50.1.d in this matter.

While it remains to be seen who will prevail in this appeal, the prevailing party does not automatically receive attorney fees. Petitioners' arguments are rooted in persuasive Idaho authorities and are reasonable. At a minimum, even if unsuccessful, this Court's opinion will prove valuable moving forward in the event the Department's position prevails as such a decision

would have to describe which CM Rules are invalid. It would do no good for the regulated community to speculate about which rules are enforceable and which ones are not simply by looking at CM Rule 3 and guessing at how the Department could assert it next. In short, Petitioners' motivations for this appeal are reasonable as it is fair to ask whether the plain language of administrative rules can be disregarded or ignored in this proceeding. For these reasons, the Department's request for fees should be denied.

Similarly, the Coalition's request for fees should be denied for the same reasons described in response to the Department's position. The Coalition asserts that it is entitled to fees because "the Director previously addressed Petitioners' arguments[.]" *Coalition Response* at 34. We strongly disagree. The Director's analysis on the CM Rules and 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 did not even cite to or quote CM Rule 50.01.d in the Legal Order—Petitioners submit that they had no choice but to have this Court specifically address them in order to obtain an analysis on this applicable Idaho law. The Coalition's request for fees should be denied as well.

Having now reviewed the Department's detailed position on appeal in defense of the Director's actions as contained in the *IDWR Response*, as well as the Coalition's similar response, Petitioners have concluded that these positions are unreasonable and, if Petitioners prevail on appeal, fees should be awarded to Petitioners. It is not groundbreaking law that administrative

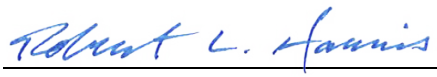
rules and case law are part of Idaho law. Idaho law consists of "[t]he constitution, statutes, **administrative rules and case law** of Idaho." IDAPA 37.03.11.010.12 (emphasis added). The applicable Idaho statues and CM Rules are the authorities the Director is bound by. They can be read together without conflict, and the Department's interpretations would lead to absurd results, particularly the position that CM Rule 3 should be read as "nothing in these rules limits the Director's authority." *IDWR Response* at 28. This unreasonable position leads to the inevitable result that the Director—under CM Rule 3—can also ignore the procedures in the CM Rules when responding to a delivery call, a position that is contrary to the Idaho Supreme Court decision in *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) that upheld these procedures as constitutional and binding upon the Director. In our view, this leads to an absurd result, but a real result if this Court condones the Director's actions on appeal.

For all the above reasons, Petitioners should be awarded their attorney fees under Idaho Code §§ 12-117 and 12-121.

## II. CONCLUSION

For the reasons set forth above, this Court should set aside the Director's decision to create the ESPA GWMA and Petitioners should receive an award of attorney fees under Idaho Code §§ 12-117 and 12-121.

Respectfully submitted this 1st day of October, 2020.



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## CERTIFICATE OF MAILING

I hereby certify that on this 1st day of October, 2020, true and correct copies of *Petitioners' Brief* were served via Email and USPS Delivery, on the following:

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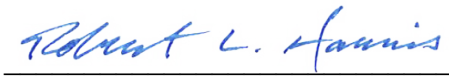

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