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

)	
)	Docket No. AA-GWMA-2016-001
IN THE MATTER OF DESIGNATING)	
THE EASTERN SNAKE PLAIN)	
AQUIFER GROUND WATER)	SURFACE WATER COALITION’S
MANAGEMENT AREA)	MOTION FOR SUMMARY
)	JUDGMENT AND SUPPORTING
)	POINTS / AUTHORITIES RE:
)	LEGAL ISSUES
)	
)	
)	
)	
_____)	

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (hereafter collectively referred to as “Surface Water Coalition” or “Coalition”), by and through counsel of record, and hereby file this *Motion for Summary Judgment Re: Legal Issues* in the above-captioned matter.

For the reasons set forth below the Director should dismiss the legal issues identified in the September 25, 2019 Pre-Hearing Order as a matter of law. *See Deadline for IDWR's Submittal of Materials; Order on Motion Practice; Notice of Hearing and Scheduling Order; Order Authorizing Discovery* ("Pre-Hearing Order").

UNDISPUTED FACTS

On November 2, 2016, the Director issued his *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* ("GWMA Order"). Thereafter, the Director published notice of the designation in two consecutive weekly issues of various newspapers in compliance with I.C. § 42-223b. *See <https://idwr.idaho.gov/legal-actions/administrative-actions/ESPA-GWMA-order.html>* (listing various affidavits of publication). The GWMA Order allowed aggrieved parties the opportunity to request a hearing on the matter and initiate a contested case within fifteen (15) days of the order's issuance. *See* "Explanatory Information" attached to GWMA Order; *see also*, I.C. §§ 42-237e; 42-1701A(3); and IDAPA 37.01.01.740.02. Only the Sun Valley Company (SVC) filed a *Petition Requesting a Hearing* on November 16, 2016. The Department has determined, based on SVC's *Petition*, that the relevant legal issues are:

- (1) whether the ESPA GWMA Final Order was procedurally deficient;
- (2) whether the Director should have conducted rulemaking;
- (3) whether the Director should have designated the ESPA GWMA in a contested case;

and

- (4) whether adjudication and the formation of water districts in the ESPA forecloses the designation of a GWMA.

See Pre-Hearing Order at 1-2.

STANDARD OF REVIEW

Summary judgment is appropriate where a party can show that, as to any claim or defense, “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(c). One of the principal purposes of the summary judgment “is to isolate and dispose of factually unsupported claims...” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). It is “not a disfavored procedural shortcut,” but is instead the “principal tool[] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources.” *Id.* at 327, 106.

The evidence must be viewed in the light most favorable to the non-moving party, and the Court must not make credibility findings. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240 (2000). The non-moving party cannot simply rely on an unsworn affidavit or the pleadings; rather the respondent must set forth the “specific facts,” supported by evidence, with “reasonable particularity” to withstand summary judgment. *Lepper v. E. Idaho Health Servs., Inc.*, 160 Idaho 104, 114 (2016). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). There must be a genuine dispute as to any *material* fact—a fact “that may affect the outcome of the case.” *Id.* at 248.

In the absence of genuine disputed issues of material fact, only questions of law remain and the Department is free to resolve the matter. *Herman ex rel. Herman v. Herman*, 136 Idaho 781, 784, 41 P.3d 209, 212 (2002). As set forth below, the legal issues identified in the Pre-Hearing Order can be disposed of on summary judgment.

ARGUMENT

The Director issued the GWMA Order upon proper procedure in compliance with the governing statutes, Idaho Code §§ 42-233b and 42-237e. The Director was not required to initiate a contested case or rulemaking prior to the designation. Furthermore, there is no law or regulation preventing designation of a GWMA where water districts also exist. As such, the Director can resolve these issues as a matter of law and dismiss them from the proceeding on summary judgment.

I. The Director Issued the GWMA Order in Compliance with Idaho Law.

The first and third legal issues pose the general question whether the Director was required to follow any specific procedure outlined in the Department's Conjunctive Management Rules (37.03.11 et seq.) ("CM Rules") or Rules of Procedure (37.01.01 et seq.) prior to the ESPA GWMA designation. Notably, Fremont-Madison Irr. Dist. et al. and the Basin 33 Water Users (hereinafter "Upper Valley Users") allege the Director entered the GWMA Order upon "improper procedure." *See Joint Submission of Statement of Issues* at 2-3.

The Director has the authority to manage ground water resources within the state. *See* I.C. § 42-226; *see e.g. In re SRBA*, 157 Idaho 385, 393-94 (2014) (noting Director's discretion and special expertise in water appropriation and distribution). Idaho Code § 42-233b states that a GWMA "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." The statute only requires the Director to publish notice of the designation in two consecutive weekly issues of a newspaper. *See* I.C. § 42-233b. This section is distinguished from I.C. § 42-233a, which controls the creation of critical ground water areas. Under that

section, the Director must conduct a public hearing and publish two notices of hearing. There is no such requirement for the creation of a GWMA under I.C. § 42-233b.¹

Besides the published notice, there are no other procedural requirements that must be followed with respect to designating a groundwater management area. The statute is unambiguous and does not predicate a GWMA designation upon any further procedure. As such, IDWR must apply the statute as written and cannot “read” in any further procedural mandates. *See Melton v. Alt*, 163 Idaho 158, 163 (2018) (“if statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction.”). Because the Director complied with all statutory requirements when designating the ESPA GWMA, there is no procedural error and the Director can dismiss any related legal issues on that point as a matter of law.

Nothing in the Department’s CM Rules or Rules of Procedure requires anything different. First, the CM Rules have a defined and limited scope. Rule 1 plainly states:

The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.

CM Rule 1.

The Director did not issue the GWMA Order in response to any delivery call, rather he issued the final order upon his own initiative. Furthermore, although the rules allow the Director to consider such “petitions” as a call for designating a GWMA in areas where water rights are not yet adjudicated, those facts were not present here. *See* CM Rule 30.06. Moreover, CM Rule 50 does not alter the Director’s statutory authority either. Although the rule references

¹ Although the Director was not required to hold a public hearing, he nonetheless held several public hearings on the proposed designation during the summer of 2016. *See* <https://idwr.idaho.gov/legal-actions/administrative-actions/ESPA-GWMA-order.html> (listing public meeting audio recordings and public comments).

incorporation of the Rule 50 area into water districts “or” designated as a GWMA, the rule does not limit the Director’s authority and discretion.² Indeed, nothing in the CM Rules can limit the Director’s statutory authority to act under Idaho Code § 42-233b. *See* CM Rule 5 (“Nothing in these rules shall limit the Director’s authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law.”).

Similar to the CM Rules, the Department’s Rules of Procedure (“Procedural Rules”) did not limit the Director’s ability to designate the ESPA GWMA either. First, on their face the rules only apply to “contested case proceedings before the Department of Water Resources and the Water Resource Board of the state of Idaho.” Procedural Rule 01.02. The Director’s ESPA GWMA order was not part of a contested case therefore the rules did not apply to his order. Because the statute did not require the Director to initiate formal proceedings prior to designating the ESPA GWMA, there was no error in designating the area without conducting a contested case first.

Moreover, the Ground Water Act specifically provides an opportunity for a subsequent formal hearing after designation of a groundwater management area and the Director is now proceeding with the present contested case. *See* I.C. §§ 42-237e; 42-1701A(3). To the extent the Upper Valley Users read the CM Rules or Procedural Rules as requiring a procedure other than what is expressed in the above statutes, that interpretation is erroneous and should be rejected. *See State v. Perkins*, 135 Idaho 17, 22 (Ct. App. 2000) (“an administrative rule that is inconsistent with a statute that it purports to implement is ineffective to the extent of such inconsistency.”)

² Even under the Upper Valley Users’ reasoning CM Rule 50 would not apply for purposes of designating a GWMA under the CM Rules since all of the water rights on the ESPA have been adjudicated in the Snake River Basin Adjudication (SRBA). The Court issued the *Final Unified Decree* in August 2014.

Furthermore, Judge Wildman previously addressed this very issue in *City of Pocatello v. Spackman* finding “[t]here 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.” See *Order Dismissing Petition for Judicial Review* at 2-3 (Ada County Dist. Ct., Fourth Jud Dist., CV-01-17-67, Feb. 16, 2017). Judge Wildman further found that the “Director may simply act upon his own initiative and discretion under the authority granted him by statute.” *Id.*

Here, the Director did not react to any petition under the CM Rules or Rules of Procedure. As the district court noted in *City of Pocatello*, the Director simply acted upon his own initiative and discretion under the authority granted him by statute. Since the Director complied with the plain and unambiguous language of I.C. § 42-233b there was no procedural error in the ESPA GWMA designation. As such, the Director should dismiss legal issues (1) and (3) as a matter of law.

II. The Director was Not Required to Conduct Rulemaking for the ESPA GWMA.

Legal issue (2) in the Director’s Pre-Hearing Order asks whether the Director erred by not conducting rulemaking prior to the designation of the ESPA GWMA. IDWR’s Procedural Rules define rulemaking as the “process for formulation, adoption, amendment or repeal of a rule.” Procedural Rule 5.21. A rule is defined as “[t]he whole or a part of an agency statement of general applicability that has been promulgated in compliance with [IDAPA].” Procedural Rule 5.20. An agency action constituting a rule has the following characteristics: (1) has wide coverage; (2) is applied generally and uniformly; (3) operates only in future cases; (4) prescribes a legal standard or directive not otherwise provided by the enabling statute; (5) expresses agency

policy not previously expressed; and (6) is an interpretation of law or general policy. *See Asarco Inc. v. State of Idaho*, 138 Idaho 719, 723 (2003).

The Director's GWMA Order is not a "rule," rather it is a designation of a groundwater management area pursuant to express authority provided by I.C. § 42-233b. The Director has designated various GWMA's throughout the state, dependent upon the facts and circumstances concerning the groundwater resource involved. *See generally*, <https://idwr.idaho.gov/water-rights/groundwater-management-areas/designated.html>. None of these prior designations constitute Department "rules." Similar to the first two legal issues, nothing in the statute requires the Director to conduct rulemaking prior to designating a GWMA. The GWMA Order does not meet the criteria of a "rule" under Idaho law. Any inference that the Director erred by not conducting rulemaking before designating the ESPA GWMA is not supported by the law.

Notably, the Director's GWMA Order is geographically confined to the area designated. The designation does not have "wide coverage" across the state, but is instead limited to the area included in the boundary of the order. Hence, the order is "not applied generally and uniformly" throughout the state and does not "only operate in future cases." Importantly, the GWMA Order and the existence of a GW Management Area does not prescribe a "legal standard not otherwise provided by the enabling statute" either. Instead, I.C. § 42-233b plainly allows the Director to exercise his discretion and designate a GWMA upon his own initiative in compliance with his water resource management duties. The Director acted in accordance with the plain language of the statute and was not "interpreting the law" through an agency rule. None of the factors are present in this case therefore the Director was not required to initiate rulemaking in order to designate the ESPA GWMA. Consequently, the Director should dismiss legal issue (3) as a matter of law.

Again, Judge Wildman’s decision in *City of Pocatello* is instructive on this issue. In that case he noted there is no “requirement that [the Director] initiate rulemaking...prior to designating a ground water management area.” See *Order Dismissing Petition for Judicial Review* at 2-3 (Ada County Dist. Ct., Fourth Jud Dist., CV-01-17-67, Feb. 16, 2017). The “Director may simply act upon his own initiative and discretion under the authority granted him by statute.” *Id.* The Director therefore did not err by designating the ESPA GWMA without first initiating unnecessary rulemaking procedures. The Director should dismiss legal issue (2) as a matter of law accordingly.

III. Formation of a Water District that Administers Ground Water Rights does not Foreclose the Designation of a GWMA.

Legal issue (4) addresses the issue of water districts and whether or not formation of a district forecloses designation of a GWMA. Under the plain language of I.C. § 42-233b, the Director may designate “any ground water basin or designated part thereof” as a GWMA. (emphasis added). The statute does not limit the Director’s discretion to only areas outside adjudicated basins and water districts. As such, the Director has the power and authority to designate a GWMA in areas that include adjudicated water rights and water districts. The fact a district is created to administer the water rights does not supplant or replace the Director’s authority under the Ground Water Act to protect the groundwater resource.

Indeed, administration of water rights within water districts and management of a groundwater resource are two different functions. Whereas administration of water rights is not concerned with the state of the water resource, the GWMA and critical ground water area statutes specifically address protecting ground water supplies. Nothing in the CM Rules can abate this authority. CM Rule 5 clearly acknowledges that “[n]othing in these rules shall limit the Director’s authority to take alternative or additional actions relating to the management of

water resources as provided by Idaho law.” CM Rule 5. To the extent that the Upper Valley Users believe that procedures or statements set forth in the CM Rules trump I.C. § 42-233b, they are clearly mistaken. *See State v. Perkins*, 135 Idaho 17, 22 (Ct. App. 2000) (“an administrative rule that is inconsistent with a statute that it purports to implement is ineffective to the extent of such inconsistency.”); *Idaho County Nursing Home v. Dep’t of Health*, 120 Idaho 933, 937 (1991) (“When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict.”). To the contrary, Idaho law does not limit the Director’s discretion to initiate the designation of a GWMA regardless of the state of adjudicated water rights and districts within that area. The Director should therefore dismiss legal issue (4) as a matter of law as well.

IV. The Upper Valley Users Cannot Request Affirmative Relief under Rule 351.

Under the Department’s Rules, a petition to intervene, if affirmative relief is sought, “must state the relief sought and the basis for granting it.” Rules of Procedure 351. Neither the Basin 33 Water Users’ nor Fremont Madison Irr. Dist. et al.’s *Petitions to Intervene* requested any affirmative relief. They argued that their respective filings were timely, that they had a direct and substantial interest in the subject matter of the proceedings, that their interests would not unduly broaden the issues involved, and that their interests were not adequately represented by existing parties, nothing more. The Director granted the petitions based on those limited representations. By failing to request affirmative relief the bases for it, both parties failed to comply with Rule 351. Because the Upper Valley Users failed to request any affirmative relief, the Director should prevent these parties from retroactively amending their involvement in these proceedings. In short, the Director should dismiss the Upper Valley Users from the proceeding for failure to comply with IDAPA Rule 351.

CONCLUSION

The Director has limited the scope of this proceeding. Because there is no genuine dispute as to material facts, summary judgment is appropriate as to the legal issues identified above. The Director issued an order designating the ESPA GWMA on his own initiative through his express statutory discretion. There is no law or rule requiring the Director to follow certain procedures in the CM Rules or Procedural Rules prior to making such a designation. There is no requirement that the Director conduct rulemaking or initiate a contested case prior to designating a GWMA either. Finally, the Director is not limited from designating GWMA's in areas where the water rights are adjudicated and water districts have been established.

The Director complied with all proper procedure in designating the ESPA GWMA. The Upper Valley Users, on the other hand, failed to request any affirmative relief, and are attempting to retroactively amend their Petitions to Intervene in violation of Department's Rules of Procedure. The Director should dismiss all legal claims challenging the ESPA GWMA designation, and dismiss the Upper Valley Users from this action for failure to comply with Rule 351. The Director should grant summary judgment on these issues accordingly.

DATED this 21st day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2019, I served a true and correct copy of the foregoing *Surface Water Coalition's Motion for Summary Judgment and Supporting Points / Authorities re: Legal Issues* on the following by the method indicated:

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