

DISTRICT COURT, WATER DIVISION NO. 1
STATE OF COLORADO
Weld County Courthouse
901 9th Ave., P.O. Box 2038
Greeley, CO 80632
(970) 475-2400

Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation,

v.

Defendants: Dick Wolfe, in his capacity as the Colorado State Engineer, et al.

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Case Number: 2015CW3018

Water Div. No. 1

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**RESPONSE TO JIM HUTTON EDUCATIONAL FOUNDATION'S MOTION FOR
CERTIFICATION OF FINAL JUDGMENT PURSUANT TO C.R.C.P. 54(b)**

The Defendants named above, through their undersigned counsel, hereby respond as follows to the Jim Hutton Educational Foundation's Motion for Certification of Final Judgment Pursuant to C.R.C.P. 54(b):

I. INTRODUCTION AND SUMMARY OF ARGUMENT

On February 29, 2016, Defendant Colorado Ground Water Commission ("Commission") filed a motion to dismiss Plaintiff Jim Hutton Educational Foundation's ("Foundation's") Second and Third Claims for Relief, based on the Court's lack of subject matter jurisdiction.¹ The Foundation filed a response to the Commission's motion, and the Commission filed a reply.² On August 29, 2016, the Court issued its *Order Granting the Commission's Motion to Dismiss the Foundation's Second Claim for Relief and a Portion of the Foundation's Third Claim for Relief* ("Dismissal Order").³ The Court's dismissal was based on its conclusion that Claim 2 and a portion of Claim 3 were not ripe, and that it therefore lacked subject matter jurisdiction. The Court did not reach the substance of either claim.

On September 28, 2016, the Foundation filed a *Motion for Certification of Final Judgment Pursuant to C.R.C.P. 54(b)* ("Certification Motion"), seeking to certify the Dismissal Order as a final judgment on the Foundation's Second Claim for Relief.⁴ During a Telephone Status Conference on October 14, 2016, the Court granted Defendants' unopposed request for an extension of time to file its Response.⁵

The Court should deny the Foundation's Certification Motion because the Foundation has not met the requirements of C.R.C.P. 54(b). However, if the Court finds that the Foundation has met the C.R.C.P. 54(b) requirements, the Court should limit certification to only the ripeness

¹ Colo. Ground Water Comm'n's Mot. to Dismiss, Feb. 29, 2016, Filing ID 2148A867E9C49.

² See Jim Hutton Educ. Found.'s Resp. to Colo. Ground Water Comm'n's Mot. to Dismiss, Apr. 8, 2016, Filing ID D586D140DAF61; Colo. Ground Water Comm'n's Reply in Support of Mot. to Dismiss, May 6, 2016, Filing ID DADDE299DB0EF.

³ Order Granting Colo. Ground Water Comm'n's Mot. to Dismiss Pl.'s Second Claim for Relief and Portion of Pl.'s Third Claim for Relief, Aug. 29, 2016.

⁴ Jim Hutton Educ. Found.'s Mot. for Certification of Final J. Pursuant to C.R.C.P. 54(b), 2, Sept. 28, 2016, Filing ID 995A59A450461 ("Certification Motion").

⁵ See Min. Order, 2-3, Oct. 14, 2016.

issue and jurisdictional defect addressed in its Dismissal Order, and expressly indicate that it is not certifying the substance of the Foundation's Second Claim for Relief concerning the constitutionality of Senate Bill 2010-52 ("SB-52"), which the Court has not ruled on.

Additionally, if the Court grants the Certification Motion, the Court should stay all proceedings concerning Claims 1 and 3 during appeal of the Claim 2 ripeness issue. This request for stay has been fully briefed by the Defendants in a separate motion. *See* Defendants' Motion for Stay, filed on November 2, 2016.

II. LEGAL STANDARD

Under C.R.C.P. 54(b), a court may direct the entry of final judgment as to one or more, but fewer than all claims or parties "only upon an express determination there is no just reason for delay, and upon an express direction for the entry of judgment." C.R.C.P. 54(b).

C.R.C.P. 54(b) "creates an exception to the universal requirement that the trial court's final judgment must resolve all claims for relief in a case before a party can bring an appeal." *E. Cherry Creek Valley Water & Sanitation Dist. v. Greeley Irrigation Co.*, 348 P.3d 434, 439 (Colo. 2015). The purpose of the general rule against the entry of separate, final judgments in stages during the course of litigation involving several parties or claims "is to avoid the dissipation of judicial resources through piecemeal appeals." *Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1127 (Colo. 1982).

A trial court may issue a C.R.C.P. 54(b) certification only if three requirements are met: "(1) the decision certified must be a ruling upon an entire claim for relief; (2) the decision certified must be final in the sense of an ultimate disposition of an individual claim; and (3) the trial court must determine that there is no just reason for delay in entry of a final judgment on the claim." *E. Cherry Creek Valley Water & Sanitation Dist.*, 348 P.3d at 439. The "no just reason

for delay” question is committed to the court’s direction; the first two requirements are “not truly discretionary.” *Id.*

III. ARGUMENT

The Court should not certify a final judgment on the Foundation’s Second Claim for Relief because just reasons for delay exist. If the Court certifies the Foundation's Second Claim for Relief as a final judgment, it would lead to piecemeal appeals of the various claims in this case, and potentially multiple trials before this Court, all of which are contrary to proper judicial administration and would not be equitable for the parties. In addition, the Foundation plans to seek a substantive ruling from the Colorado Supreme Court on the constitutionality of SB-52, and such relief would constitute an improper advisory opinion. Despite the Foundation’s asserted concerns about ongoing injury if its Second Claim for Relief is not certified immediately, the Foundation (and its predecessors) had multiple opportunities to protect its surface water rights with respect to the creation of the Northern High Plains (“NHP”) designated groundwater basin and final well permits issued in the NHP.

Alternatively, if the Court determines the Foundation has met the certification requirements of C.R.C.P. 54(b), the Court should condition the certification in two ways. First, the Court should limit certification to the scope of the Dismissal Order, which dismissed the Foundation’s Second Claim for Relief based on ripeness and lack of subject matter jurisdiction, and explicitly exclude certification regarding the merits of Plaintiff’s claims concerning the constitutionality of SB-52. Second, the Court should stay the remaining proceedings in this case until the appeal is concluded.

A. There are Just Reasons for Delaying Entry of a Final Judgment on the Foundation's Second Claim for Relief.

A certification of one claim as a final judgment, when there are multiple claims in a case, is an exception to the general rule that all claims for relief must be finally resolved before a party can bring an appeal. *See E. Cherry Creek Valley Water & Sanitation Dist.*, 348 P.3d at 439. For the exception to the general rule to apply, the Foundation must satisfy three requirements with respect to the Court's dismissal of the Second Claim: (1) the decision must be a ruling upon an entire claim for relief; (2) the decision must be final; and (3) the court must determine there is no just reason for delay in entry of a final judgment on the claim. *Id.* Defendants do not dispute that the first two requirements are satisfied for the purposes of certifying the ripeness and jurisdictional issues. However, the Foundation has failed to demonstrate that there is no just reason for delaying entry of final judgment on the Foundation's Second Claim for Relief.

In evaluating the third requirement, the court "must take into account the interests of judicial administration, as well as the equities involved." *Lytle v. Kite*, 728 P.2d 305, 309 (Colo. 1986). Certification should be denied if there is any just reason for delay. *Id.* In the instant case, certification would be inconsistent with judicial administration and not equitable when all circumstances are considered.

In its Certification Motion, and orally before the Court during a telephone status conference held in this case, the Foundation has indicated that it will seek a substantive ruling from the Colorado Supreme Court that SB-52 is unconstitutional. *See* Min. Order, Oct. 14, 2016. This would require an advisory opinion from the appellate court. This Court should deny certification because: 1) the Foundation's proposed approach would lead to piecemeal appeals and potentially multiple trials before this Court; 2) it is unlikely under the circumstances of this case that the Colorado Supreme Court would issue an advisory opinion on a constitutional claim

for which no lower court record exists; and 3) judicial economy and a balancing of the equities does not support certification at this time.

1. Certification would only lead to judicial inefficiency, and would likely lead to piecemeal appeals and multiple trials.

The Dismissal Order provides that the Foundation's Second Claim for Relief is not ripe and the Court lacks subject matter jurisdiction to hear the claim:

The court concludes that Plaintiff's constitutional challenge to SB-52 is not presently ripe for ruling and will only present an actual controversy in this action if Plaintiff successfully proves to the Commission that water within the NHP Basin is not designated ground water. If Plaintiff fails to carry its burden before the Commission, the legal character of the water remains as designated ground water, which this court has no jurisdiction over, and Plaintiff's constitutional challenge to SB-52 is moot.

Dismissal Order, 16.

Certification would likely lead to piecemeal appeals of all of the claims brought in this case, and could also result in multiple trials. As recognized by the Court, SB-52 concerns the process for modifying the boundaries of a designated groundwater basin, and how wells in the basin that pump designated groundwater are impacted by such modification. Given the case law on designated groundwater, it is unlikely the Colorado Supreme Court would reverse the Dismissal Order. *See Meridian Serv. Metro. Dist. v. Colo. Ground Water Comm'n*, 361 P.3d 392, 396 (Colo. 2015) ("We have long and consistently held that in the context of such a jurisdictional conflict, the Commission must make the initial determination as to whether the controversy implicates designated ground water."); *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842, 846-47 (Colo. 1983); *State el rel. Danielson v. Vickroy*, 627 P.2d 752, 759-60 (Colo. 1981). Due to the ripeness issue described in the Dismissal Order, this Court lacks subject matter jurisdiction, and the Colorado Supreme Court cannot remedy that defect by reversing the Dismissal Order and remanding Claim 2.

This Court expressly and intentionally did not reach the merits of the Foundation's claim that SB-52 is unconstitutional as applied to the NHP Basin, and it has already confirmed this. *See* Min. Order, 2, Oct. 14, 2016. To date, no factual record has been developed in any forum as to this as-applied constitutional challenge. However, the Foundation admitted at the October 14, 2016, telephone status conference that it will seek a substantive ruling on the constitutionality of SB-52 if the Court grants its request for a C.R.C.P. 54(b) appeal, before any factual record is established. This admission is consistent with the Foundation's Proposed Order for certification, which states that the Dismissal "Order is a ruling on the Foundation's entire Second Claim for Relief, regarding the constitutionality of Senate Bill 52."⁶

Regardless of whether any potential certification order is limited to the jurisdictional issue, the Foundation has admitted that it will seek a ruling on the constitutionality of SB-52 in a C.R.C.P. 54(b) appeal. Defendants will therefore be forced to brief and argue constitutional issues now, when it is highly unlikely the Supreme Court would issue a substantive ruling on the Foundation's Claim 2. That claim is not ripe, and unsupported by a factual record. In addition, an appeal on one claim in this case now, and later holding a trial on the other claims, could result in a second appeal and duplicative judicial processes. A certification under these circumstances goes against the interests of judicial administration and is not equitable to the parties.

The Foundation's attempt to use C.R.C.P. 54(b) in this fashion would result in inefficiency by forcing the parties to brief and argue the constitutionality of SB-52 in a Rule 54(b) appeal before the Foundation has developed any facts on the application of SB-52 to its claims. The Foundation assumes, without proof, that the Commission would deny any future

⁶ Found.'s Proposed Order re Certification of Final J. Pursuant to C.R.C.P. 54(b), ¶ 2, Sept. 28, 2016, Filing ID 995A59A450461.

petition under C.R.S. § 37-92-106 to de-designate portions of the NHP Basin. The Court has already recognized that, until such determination is made, there is no constitutional issue to be briefed at all. Proceeding with certification under these circumstances goes against the interests of judicial administration, is not equitable to the parties, and does not make sense.

2. The Foundation seeks certification to obtain an advisory opinion on appeal.

The Foundation's intent is to obtain an advisory opinion from the Supreme Court on the constitutionality of SB-52. Not only is it unlikely that the Colorado Supreme Court would issue a ruling on the constitutionality of SB-52, doing so would result in an advisory opinion not tied to established facts, as "courts may not issue advisory opinions over cases that are not yet ripe." *Bd. of Cty. Comm'rs v. Cty. Rd. Users Ass'n*, 11 P.3d 432, 439 (Colo. 2000). The Foundation's Second Claim for Relief raises an "as applied" constitutional challenge to SB-52, which requires the Foundation to allege a law is unconstitutional under a still-hypothetical fact situation. *See, e.g., Found.'s Compl.* ¶ 106.A; *Dismissal Order*, 14. This Court correctly held that the Second Claim for Relief was not ripe; therefore, it also cannot be ripe for the appellate court. As this Court recognized,

[A]ll of Plaintiff's arguments are premised on its supposition that when it eventually files a petition for de-designation of portions of the Basin with the Commission, it will successfully prove that the water withdrawn by well users in the NHP Basin is not designated ground water and that withdrawals are causing injury to Plaintiff's surface water rights. The possibility of a future claim does not suffice.

Order Re Mot. to Dismiss, 15. The Court also stated that "[e]ven if [it] were to assume that the question will be presented to the Commission at a later time, it is not appropriate for the court to enter declaratory judgment on what is presently a non-existent issue." *Id.*

The Court should not allow the Foundation to use Rule 54(b) certification for the purposes of seeking an advisory opinion from the Colorado Supreme Court on the constitutionality of SB-52. Plaintiff has admitted it seeks to appeal and get a ruling on the underlying constitutionality of SB-52, Min. Order, 2, Oct. 14, 2016; the trial court has *not* issued a final judgment on the merits of the constitutional issue. In fact, the constitutional issue of SB-52 may never be ripe if the Foundation cannot make the necessary factual showings before the Commission.

3. The Foundation can remedy any “ongoing injury” by going straight to the Commission.

The Foundation's assertions about on-going injury to its surface rights from the unresolved issue of whether SB-52 is constitutional do not satisfy Rule 54(b)'s “no just reason for delay” requirement under the circumstances of this case. The Foundation chose what claims were included in the Complaint, and that decision should be part of the Court's evaluation of the Certification Motion. The Foundation could have simultaneously brought Claim 1 before this Court and the substance of Claim 2 before the Commission.

The Foundation has presented a false sense of urgency in light of its and its predecessors' decades of inaction concerning the NHP Basin designation.⁷ Neither the Foundation nor its predecessors objected to the NHP Basin designation or designated basin well permit applications. Moreover, they never sought to de-designate portions of the basin prior to SB-52, and waited five years from the passage of SB-52 to bring this lawsuit. The Foundation is not prejudiced by a relatively brief delay in taking its appeal, considering it waited many years to take any action. *See, e.g., In re Application for Water Rights of U.S.*, 101 P.3d 1072, 1083 (Colo.

⁷ *See, e.g.,* Defs.' Resp. to Pl.'s Mot. for Summary J. on its Senate Bill 52 Claim, Apr. 8, 2016, Filing ID 5A86CBBF46592.

2004) (noting that a delay of a water court's quantification proceeding was regrettable, but despite this, the harm was minor because the proceeding had already been pending for nearly thirty years). The Foundation cannot claim now that there are no just reasons to delay because it "has long suffered the consequences of having senior surface water rights in a designated groundwater basin" when it, and not Defendants, is responsible for the passage of many years prior to filing this suit. *See Found.'s Certification Mot.*, ¶ 10.

B. If the Court Grants the Motion for Certification, the Court Should Limit the Scope of the Appeal, and Stay the Remaining Water Court Proceedings During the Appeal.

1. Certification must be limited to the scope of the Dismissal Order.

Certification must be limited to whether the Court correctly determined that the Foundation's claim was not ripe, and that the Court did not have jurisdiction to remedy the ripeness defect by proceeding to hear facts necessary for a determination on the status of the designated groundwater. *See, e.g., Kisselman v. Am. Family Mut. Ins. Co.*, 292 P.3d 964 (Colo. App. 2011) (restricting its analysis on a C.R.C.P. 54(b) appeal to the narrow and specific issue that was certified). Jurisdiction shifts to the appellate court only on the substance of a final judgment. *Musick v. Woznicki*, 136 P.3d 244, 250-51 (Colo. 2006) (holding that the trial court retained jurisdiction over matters not properly certified as final judgment); *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957, 964 (Colo. App. 2015) (citing *Musick* for proposition that appellate courts possess jurisdiction over the certified order and the matters that are relative to and affect the certified order).

The Dismissal Order dismissed the Foundation's Second Claim for Relief in its entirety because the claim was not ripe, and thus the Court did not have jurisdiction to hear the claim. The Court ruled that the Foundation could not seek a substantive determination about the constitutionality of SB-52 because it had not yet demonstrated an *actual controversy*; it had not

yet proven that water within the NHP Basin is not designated groundwater. Further, the Foundation could not remedy this ripeness defect in this case because this Court has no jurisdiction to adjudicate the status of designated groundwater; such determinations have been exclusively delegated to the Commission. *See, e.g., Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20 (Colo. 2006).

Any potential certification order should exclude the issue of the constitutionality of SB-52 because the Court did not address the merits of that claim. Such a certification would violate the first two requirements for a Rule 54(b) certification, as there has been no final ruling on the constitutionality issue. *See E. Cherry Creek Valley Water & Sanitation Dist.*, 348 P.3d at 439. As a general rule, appellate courts do not address matters not ruled upon, and courts decide constitutional issues only if necessary. *See, e.g., C.A.R. 28(a)(7)* (requiring appellant to cite to “the precise location in the record where the issue was raised and where the court ruled”); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511, 513 (Colo. 1966) (“It has long been established . . . that no inquiry will be made concerning the constitutionality of an act of the legislature if the controversy being considered by the court can be decided [sic] on other grounds.”).

It is true that appellate courts, outside the context of Rule 54(b), have occasionally ruled on constitutional issues not raised or ruled upon by the lower court. *See, e.g., People ex rel. A.M.D.*, 648 P.2d 625 (Colo. 1982) (agreeing to address issue of whether termination of parental rights under a preponderance of the evidence standard was violative of due process because the issue had “constitutional proportions”); *People ex rel. C.E.*, 923 P.2d 383 (Colo. App. 1996) (agreeing to hear issue of whether extended family members have a fundamental interest in the society and custody of kindred children arising from a parental rights termination hearing due to its “constitutional proportions”). However, these cases are distinguishable based on the

constitutional questions at issue, and because there were trials and findings of fact in the lower court; the appeal was not premised on a certification pursuant to C.R.C.P. 54(b). The constitutional issues in these cases primarily concerned alleged constitutional violations with the trial processes themselves, rather than review of an underlying claim for relief. In appeals that have been premised on a certified judgment under C.R.C.P. 54(b), the appellate court has in the past issued cautious and narrow rulings limited to the certified judgment. *See Kisselman*, 292 P.3d 964.

Additionally, there is no factual record on the constitutionality issue. These facts could not have been tried before this Court given the Commission's exclusive jurisdiction over these issues. Any certification of the Court's Dismissal Order should therefore exclude the constitutionality issue.

2. If the Court certifies appeal, Defendants request the Court stay the remaining Water Court proceedings.

If this Court does certify any portion of the Order for appeal, the Court should stay the remaining water court proceedings during the pendency of the appeal. Defendants have filed a Motion to Stay concurrent with this Response.

IV. CONCLUSION

There are a number of "just reasons for delay" under the circumstances of this case. As such, the Foundation has not met the three requirements for C.R.C.P. 54(b) certification with respect to its broad-based appeal of the Court's Dismissal Order. Therefore, this Court should deny the Foundation's Motion for Certification.

If the Court finds that the Foundation has satisfied the three requirements for certification, certification must be limited to jurisdiction and the Court should grant Defendants' Motion for Stay, filed as a separate request.

Respectfully submitted this 2nd day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2016, I served a true and correct copy of the foregoing **RESPONSE TO JIM HUTTON EDUCATIONAL FOUNDATION'S MOTION FOR CERTIFICATION OF FINAL JUDGMENT PURSUANT TO C.R.C.P. 54(b)** by ICCES e-filing addressed to the following:

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Marks Butte Ground Water Mgmt Dist	Eugene J Riordan	Vranesh and Raisch
Marks Butte Ground Water Mgmt Dist	Leila Christine Behnampour	Vranesh and Raisch
May Acres Inc	William Arthur Paddock	Carlson, Hammond & Paddock, L.L.C.
May Acres Inc	Johanna Hamburger	Carlson, Hammond & Paddock, L.L.C.
May Brothers Inc	William Arthur Paddock	Carlson, Hammond & Paddock, L.L.C.
May Brothers Inc	Johanna Hamburger	Carlson, Hammond & Paddock, L.L.C.
May Family Farms	William Arthur Paddock	Carlson, Hammond & Paddock, L.L.C.
May Family Farms	Johanna Hamburger	Carlson, Hammond & Paddock, L.L.C.
North Well Owners	Russell Jennings Sprague	Colver Killin and Sprague LLP
North Well Owners	Kimbra L. Killin	Colver Killin and Sprague LLP
Plains Ground Water Mgmt Dist	Eugene J Riordan	Vranesh and Raisch
Plains Ground Water Mgmt Dist	Leila Christine Behnampour	Vranesh and Raisch
Protect Our Local Communitys Water Llc	John David Buchanan	Buchanan Sperling and Holleman PC
Protect Our Local Communitys Water Llc	Timothy Ray Buchanan	Buchanan Sperling and Holleman PC
Republican River Water Conservation Dist	Peter J Ampe	Hill and Robbins PC
Republican River Water Conservation Dist	David W Robbins	Hill and Robbins PC
Sandhills Ground Water Mgmt Dist	Eugene J Riordan	Vranesh and Raisch
Sandhills Ground Water Mgmt Dist	Leila Christine Behnampour	Vranesh and Raisch
Saving Our Local Economy Llc	John David Buchanan	Buchanan Sperling and Holleman PC
Saving Our Local Economy Llc	Timothy Ray Buchanan	Buchanan Sperling and Holleman PC
State Engineer	Colorado Division of Water Resources	State of Colorado - Division of Water Resources
State Engineer	Ema I.g. Schultz	CO Attorney General
State Engineer	Preston Vincent Hartman	CO Attorney General
Steven D Kramer	William Arthur Paddock	Carlson, Hammond & Paddock, L.L.C.

Steven D Kramer	Johanna Hamburger	Carlson, Hammond & Paddock, L.L.C.
The Jim Hutton Educational Foundation	Steven J Bushong	Porzak Browning & Bushong LLP
The Jim Hutton Educational Foundation	Karen Leigh Henderson	Porzak Browning & Bushong LLP
The Jim Hutton Educational Foundation	Steven J Bushong	Porzak Browning & Bushong LLP
The Jim Hutton Educational Foundation	Karen Leigh Henderson	Porzak Browning & Bushong LLP
Thomas R May	William Arthur Paddock	Carlson, Hammond & Paddock, L.L.C.
Thomas R May	Johanna Hamburger	Carlson, Hammond & Paddock, L.L.C.
Timothy E Ortner	Alvin Raymond Wall	Alvin R Wall Attorney at Law
Tri State Generation And Transmission As	Aaron S. Ladd	Vranesh and Raisch
Tri State Generation And Transmission As	Justine Catherine Shepherd	Vranesh and Raisch
Tri State Generation And Transmission As	Roger T Williams JR.	TriState Generation and Transmission Assoc Inc
Wy Ground Water Mgmt Dist	Eugene J Riordan	Vranesh and Raisch
Wy Ground Water Mgmt Dist	Leila Christine Behnampour	Vranesh and Raisch
Yuma Cnty Water Authority Public Improv	Steven Owen Sims	Brownstein Hyatt Farber Schreck LLP
Yuma Cnty Water Authority Public Improv	John A Helfrich	Brownstein Hyatt Farber Schreck LLP
Yuma Cnty Water Authority Public Improv	Dulcinea Zdunska Hanuschak	Brownstein Hyatt Farber Schreck LLP

/s/ _____
/s/ signature on file
Pursuant to C.R.C.P. 121, §1-26(7)

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LAWRENCE JONES CUSTER GRASMICK LLP