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DISTRICT COURT, WATER DIVISION NO. 1 STATE OF COLORADO Weld County Courthouse 901 9th Ave., Greeley, CO 80631 P.O. Box 2038, Greeley, CO 80632 Telephone Number: (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; David Nettles, in his capacity as Division Engineer in and for Water Division No. 1, State of Colorado; Colorado Division of Water Resources; and Colorado Parks and Wildlife.	▲ COURT USE ONLY ▲
Attorneys for Marks Butte, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts: Eugene J. Riordan, Atty. Reg. #11605 Leila C. Behnampour, Atty. Reg. #42754 Vranesh and Raisch, LLP 1720 14th Street, Suite 200 Boulder, Colorado 80302 Telephone Number: (303) 443-6151 Fax Number: (303) 443-9586 E-mail: ejr@vrlaw.com; lcb@vrlaw.com Co-counsel for Arikaree Ground Water Management District: David C. Taussig, Atty, Reg. #16606 White & Jankowski, LLP 511 16th Street, Suite 500 Denver, Colorado 80202 Telephone Number: (303) 595-9441 Fax Number: (303) 825-5632 E-mail: DaveT@white-jankowski.com	Case Number: 15CW3018 Water Div: 1
MOTION TO INTERVENE	

The Marks Butte, Frenchman, Sandhills, Central Yuma, Plains, W-Y and Arikaree Ground Water Management Districts (collectively "Districts," or individually, a "District"), by and through their undersigned attorneys Vranesh and Raisch, LLP, and the Arikaree District, by and through its co-counsel White & Jankowski, LLP, hereby file this motion to intervene pursuant to C.R.C.P. 24(a)(2), C.R.C.P. 24(b)(2), C.R.C.P. 57(j), and C.R.S. § 13-51-115, and respectfully request the Court to allow their intervention as party defendants in the above-captioned case. In conjunction with this motion, the Districts have submitted a joint Answer responding to the claims and allegations raised in the Complaint filed by Plaintiff, the Jim Hutton Educational Foundation ("Foundation").

Pursuant to C.R.C.P. 121, Section 1-15(8), counsel for the Districts has conferred with counsel for Plaintiff. Counsel for Plaintiff indicated that due to other pending matters, counsel had not been able to fully analyze the issue, and could not consent as of the time of filing the motion. Counsel stated that they will determine whether to file a response opposing the motion.

As grounds for this motion, the Districts state as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Districts are local ground water management districts formed pursuant and subject to the requirements of the Colorado Ground Water Management Act of 1965, C.R.S. § 37-90-101, et seq. ("1965 Act"). They are located within the boundaries of the Northern High Plains Designated Ground Water Basin ("NHP Basin"), which encompasses the Republican River Basin. The Districts are charged by statute to regulate the use, control and conservation of designated ground water within their respective boundaries, which authority includes administering designated ground water priorities. *Upper Black Squirrel Creek Ground Water Management Dist. v. Goss*, 993 P.2d 1177, 1186 (Colo. 2000) (citing C.R.S. §§ 37-90-111(1)(a), 37-90-130(2)(j), and 37-90-131(1)(c)).

In this case, the Foundation: 1) claims that pumping of designated ground water wells in the NHP Basin is reducing surface water flows in the South Fork of the Republican River, and seeks, in part, a ruling from the Court that the State Engineer's current administrative practices concerning the curtailment of surface water diversions in the Republican River Basin for interstate compact compliance are unlawful; 2) asserts that Senate Bill 2010-52, which prevents the Ground Water Commission ("Commission") from redrawing the boundaries of an existing designated basin to

exclude land with wells that have been issued conditional or final permits, is unconstitutional when applied to the NHP Basin; and, 3) in the alternative asserts that the 1965 Act is unconstitutional if designated ground water that the Foundation argues is subject to the Republican River Compact ("Compact") curtailment requirements cannot be administered pursuant to the Compact.

The Districts seek to intervene in this case because, as statutorily-created local governmental entities whose primary purpose is to manage, conserve, *preserve*, and *protect* the designated ground water of the NHP Basin within each District's boundaries, they have a unique and compelling interest in the designated ground water and the use and administration of that ground water that is part of the property and transactions that are the subject of this case. Disposition of this case may, as a practical matter, impair or impede the Districts' abilities to protect their interests because a ruling in this case, and any appeal thereof, may result in a final decision that impacts the Districts' interests. No existing party can adequately represent the Districts' unique interests. As this case is not yet at issue, an order granting such intervention will not create any delay in the proceedings.

II. ARGUMENT

The Districts file this motion to intervene pursuant to C.R.C.P. 24(a)(2), C.R.C.P. 24(b)(2), C.R.C.P. 57(j), and C.R.S. § 13-51-115.

A. C.R.C.P. 24(a)(2) – Intervention of right

Anyone shall be permitted to intervene in an action if they make a timely request and: (1) they have an interest relating to the property or transaction that is the subject of the action; (2) their ability to protect that interest as a practical matter may be impaired or impeded by the disposition of the action; and (3) their interest is not adequately represented by an existing party. C.R.C.P. 24(a)(2). All three elements of the rule must be present to intervene; however, timeliness is a threshold question that must be determined first. *Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1987).

1. The Districts' motion is timely.

"The point of progress in the lawsuit is only one factor to be considered and is not, in itself, determinative; the timeliness of the attempted intervention is to be

gathered from all the circumstances in the case." *Id.* Here, since the case is still not at-issue, the Districts' request to intervene is timely.

Since the date of filing of the Complaint (February 23, 2015), the Court has been addressing motions concerning interested, necessary, and indispensable parties, and the type of service of process necessary to ensure that all appropriate parties have the opportunity to participate in this case. On July 1, 2015, the Court granted Yuma County Water Authority's motion to intervene as a party defendant. On July 9, 2015, the Court ruled that the Foundation must join well owners in the NHP Basin who may be affected by the relief the Foundation seeks. There are over 4,000 high capacity wells in the NHP Basin. On September 25, 2015, the Court addressed, *inter alia*, the Foundation's request for service by publication, and ruled that the Foundation could serve well owners by publication pursuant to C.R.C.P. 4(g) in addition to mailing a notice to well owners whose addresses appeared complete on the spreadsheet provided by the State and Division Engineers. Publication is now complete and responsive pleadings are due on December 16, 2015. *See* Minute Order for Case No. 15CW3018, dated December 3, 2015.

Given these circumstances, the case is still not at issue, a case management order has not been entered, no trial date has been set, and the parties have yet to begin addressing the substance of the Complaint. In other words, the case is still in its early stages. As such, the Districts' intervention request is timely, and an order granting such intervention will not create any delay in the proceedings.

2. <u>The Districts have a number of interests relating to the property or transactions that are the subject of this case.</u>

The existence of an interest relating to the property or transaction that is the subject of the action so as to permit intervention as of right "should be determined in a liberal manner." *Cherokee Metropolitan Dist. v. Meridian Service Metropolitan Dist.*, 266 P.3d 401, 404 (Colo. 2011). "The interest prong 'is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Id.* (citing *O'Hara Group Denver, Ltd. v. Marcor Housing Systems, Inc.*, 595 P.2d 679, 687 (Colo. 1979)).

a. <u>The Districts have an interest in preserving and protecting designated ground water.</u>

The Foundation claims, in part, that pumping of designated ground water wells in the NHP Basin is reducing surface water flows in the South Fork of the Republican

River, and seeks a ruling from the Court that the State Engineer's current administrative practices concerning the curtailment of surface water diversions in the Republican River Basin for interstate compact compliance are unlawful, and that the State Engineer must also curtail the pumping of wells that are permitted to pump designated ground water. The Court has indicated in a prior order issued in this case that final disposition of Plaintiff's claims could result in an order from the Court that requires a change in the State Engineer's current administrative practices, which could lead to the curtailment of designated ground water. *See* Order re: State and Division's Motion for Joinder, July 9, 2015 ("Joinder Order") at 3. It is clear from the Complaint that evidence and argument related to the permitting, use, and administration of designated ground water in the NHP Basin will likely be offered during the proceedings, and that the designated ground water within each of the Districts and the use and administration of that ground water is part of the property and transactions that are the subject of this case. The Districts are the statutorily-created local governmental entities whose primary purpose is to manage, conserve, *preserve*, and *protect* the designated ground water of the NHP Basin within each District's boundaries. C.R.S. § 37-90-130(2). Therefore, the Districts have unique and compelling interests in this case and in any rulings and orders entered by the Court that may impact the Districts' statutory duties concerning the designated ground water in the NHP Basin, including the preservation and protection thereof.

b. <u>The Districts have an interest in administering and regulating wells after well permits are issued.</u>

Within a designated ground water basin, ground water management districts may be formed through petitions of taxpaying electors and by majority vote of the residents within the proposed boundaries at local elections. C.R.S. §§ 37-90-118 through 37-90-135. The Districts were all formed through this process soon after the NHP Basin was created in 1966. Each District has an elected board of directors, and each director is a resident agriculturist who owns and actively farms or ranches land within their respective District. C.R.S. § 37-90-121(1)(b). After the issuance of a final well permit to pump designated ground water from the NHP Basin, the Districts have the authority to regulate the use, control and conservation of the designated ground water within their respective boundaries, including authority to "exercise such other administrative and regulatory authority concerning the ground waters of the district as, without the existence of the district, would otherwise be exercised by the ground water commission." C.R.S. §§ 37-90-130(2), 130(2)(j). This "administrative and regulatory authority" includes the Districts' authority to enforce permit conditions and priorities for designated ground water, and to make quasi-judicial decisions regarding well

permits and disputes between well owners. *Upper Black Squirrel Creek Ground Water Management Dist. v. Goss*, 993 P.2d 1177, 1187 (Colo. 2000).

In ruling on Plaintiff's claims concerning the lawfulness of the State Engineer's current administrative practices for Compact administration and the constitutionality of both Senate Bill 2010-52 and the 1965 Act, the Court will almost certainly be required to hear and evaluate both evidence and argument related to the creation of designated basins and the historical use and administration of designated ground water in the NHP Basin. The Districts are in a unique position to provide relevant information to the Court that will assist it in its evaluation of, and ruling on, the significant issues raised in this case. Moreover, whether directly or indirectly, any rulings and orders entered by the Court in this case could fundamentally impact or alter the Districts' statutory authority to administer and regulate designated ground water within their respective boundaries and their ability to preserve and protect the designated ground water resource within the NHP Basin.

c. <u>The Districts have an interest in upholding the constitutionality of Senate Bill 52 and the 1965 Act.</u>

The Districts have unique interests regarding the Foundation's claims with respect to the constitutionality of Senate Bill 2010-52 ("Senate Bill 52") and the 1965 Act. The Districts also have interests in the current and future administrative practices of the State Engineer. A large part of the Districts' role in administering and regulating the designated ground water within their respective boundaries is for the purpose of conserving the designated ground water resource to allow for continued pumping for beneficial uses. Designated ground water is subject to a modified system of prior appropriation, which allows appropriation only to the point of reasonable depletion. C.R.S. § 37-90-102(1); *Goss*, 993 P.2d 1177, 1184. Because the Districts are local governmental entities authorized by statute to regulate the use, control and conservation of the designated ground water resource, well users within the Districts rely on the Districts to administer and regulate designated ground water pumping to protect priorities and promote the economic pumping of designated ground water while maintaining reasonable levels of depletion. The Court's determination about the constitutionality of Senate Bill 52 and the 1965 Act, and whether the State Engineer is mandated by law to curtail the pumping of designated ground water as part of its Compact administration, could fundamentally impact how the Districts implement their statutory authority and their future interactions with the State Engineer.

Under Section 130(2)(e) of the 1965 Act, the Districts are authorized to promulgate rules and regulations to preserve and protect designated ground water within their respective boundaries. C.R.S. § 37-90-130(2)(e). The foundation for a District's rules is the 1965 Act, including Senate Bill 52. If some or all of the provisions in the 1965 Act are determined to be unconstitutional, the underlying foundation for the rules crumbles, and past rulemaking efforts to effectively manage this limited resource may be jeopardized. Along the same lines, well users within the Districts want the Districts to be involved in this case to ensure the Districts can continue to preserve and protect the designated ground water within their respective boundaries.

d. The Districts have a direct financial interest in preserving the existing boundaries of the NHP Basin.

The Districts' sole sources of funding are from collecting taxes levied on property within their respective boundaries and from issuing special assessments on water wells within their boundaries. C.R.S. § 37-90-132. As a result, the Districts have a direct financial interest in the outcome of Plaintiff's claims concerning the constitutionality of Senate Bill 52 and the 1965 Act, as a ruling in favor of the Foundation could reduce taxable land within their boundaries and exclude wells. Such a ruling would result in reduced funding for the Districts to carry out their basic duties. *See Mesa County Junior College Dist. v. Donner*, 371 P.2d 442 (Colo. 1962).

e. The Districts have an interest in any proceedings that involve designated ground water.

Finally, the Districts have an interest in the designated ground water resource by statute that both supports and compels the Districts' participation in this case. The 1965 Act includes a statutory mandate that authorizes the Districts to participate in and represent the Districts "at any hearings or proceedings conducted or authorized by the [ground water] commission affecting any water rights, either actual or potential, within the district." C.R.S. § 37-90-130(2)(i). While this case is not before the Commission and has not been authorized by the Commission, it is a proceeding that may affect designated ground water and rights to such water within the Districts, and may impact the Districts' statutory administration, conservation, protection, and preservation of this resource. The Districts' participation in this case would be consistent with the clear legislative intent expressed in the 1965 Act that the Districts have the ability and right to be involved in proceedings that will, actually or potentially, involve or impact designated ground water and the Districts' statutory authority over such water.

The Districts have historically participated in proceedings before the Commission regarding designated ground water within their boundaries, and were involved in a similar legal challenge to the validity of the NHP Basin before the Commission in Case No. 05GW14, and the appeal in District Court in Case No. 06CV31. Following those cases, the Districts supported the passage of Senate Bill 52 to clarify the Legislature's intent with respect to redrawing the boundaries of a designated basin, which was that after designation of a ground water basin, the Commission could not alter the boundaries to exclude wells with conditional or final permits. As described above, the Districts have relied on Senate Bill 52 in their attempts to effectively manage the limited ground water resource.

3. Disposition of this case may, as a practical matter, impair or impede the Districts' abilities to protect their interests

A final ruling in this case regarding the State Engineer's current administrative practices and the constitutionality issues could, as a practical matter, impact or impair the Districts from protecting their statutory interests in preserving and protecting the designated ground water and administering and regulating designated ground water and wells within their respective boundaries, and could directly impact the Districts' financial interests. As the Court has concluded, although well owners may, in a future proceeding before the Commission, have the opportunity to contest the redrawing of the NHP Basin's boundaries, "the constitutionality of SB-52 will have already been determined." Joinder Order, at 3. Similar to the well owners, the Districts' have multiple interests in this proceeding that could be prejudiced or impaired by the Court's ruling, and they are entitled to participate and provide the Court with relevant argument and evidence concerning Plaintiff's claims, to ensure that their interests are protected now.

4. The Districts' interests are not adequately represented by an existing party.

The Wright and Miller test, applied by the Colorado Supreme Court, sets forth three categories concerning adequacy of representation in a proceeding:

> [1] If the interest of the absentee is not represented at all, or if all existing parties are adverse to the absentee, then there is no adequate representation. [2] On the other hand, if the absentee's interest is identical to that of one of the present parties, or if there is a party charged by law with representing the absentee's interest, then a compelling showing should be required to demonstrate why this representation is not

> adequate. [3] *But if the absentee's interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, although intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee.*

Cherokee Metro. Dist. v. Meridian Service Metropolitan Dist., 266 P.3d 401, 407 (Colo. 2011) (citing 7C Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, Federal Practice and Procedure § 1909(3d ed. 1997) (emphasis added)); *see also Concerning Application for Underground Water Rights*, 304 P.3d 1167, 1170-71 (Colo. 2013).

The defendants in this case include: the State Engineer, the Division Engineer, Colorado Division of Water Resources, Colorado Parks and Wildlife ("CPW"), and various other parties that have filed Answers pursuant to the Joinder Order or were granted leave to intervene. No existing party adequately represents the Districts' interests. The Districts' interests are unique because the Districts are local governmental entities, established by statute to preserve and protect designated ground water and administer wells within their respective boundaries after well permits are issued. They have been created by residents in their Districts, with local resident boards elected by local residents to manage the designated ground water resource. The State and Division Engineers and the Division of Water Resources cannot represent the Districts' local interests because they also have interests relating to surface water and compact administration, and are not involved in the day-to-day administration decisions concerning the management of designated ground water that are made by the Districts. CPW and other well owners in the NHP Basin may have similar interests to those of the Districts on certain issues; however, these interests are not identical, as those entities do not function in the same capacity as the Districts. As local governmental entities with statutory authority to regulate and administer designated ground water priorities within their respective boundaries, and to levy taxes and collect assessments on wells, the Districts' interests are not identical to well owners or other parties in this case.

The Districts thus satisfy all of the requirements for intervention as of right under C.R.C.P. 24(a)(2). Their motion to intervene is timely; they have an interest relating to the property or transactions that are the subject of the action; their ability to protect that interest as a practical matter may be impaired or impeded by the disposition of the action; and their interest is not adequately represented by an existing party. Under these circumstances, the Districts are entitled to intervene in this matter as of right.

B. C.R.C.P. 24(b)(2) – Permissive intervention

If the Court does not permit intervention of right pursuant to C.R.C.P. 24(a)(2), the Districts request permissive intervention pursuant to C.R.C.P. 24(b)(2). Upon timely application, anyone may be permitted to intervene in an action when their claim or defense and the main action have a question of law or fact in common. C.R.C.P. 24(b)(2). "C.R.C.P. 24(b)(2) allows for permissive intervention when an applicant's contentions and the proceedings present common questions of law or fact, so long as the intervention will not unduly delay or prejudice the rights of the original parties." *Moreland v. Alpert*, 124 P.3d 896, 904 (Colo. App. 2005). A finding that a movant is not a necessary or indispensable party does not preclude a court from permitting intervention. *North Poudre Irrigation Co. v. Hinderlider*, 150 P.2d 304 (Colo. 1944). There is no requirement that the intervener shall have a "direct or personal or pecuniary interest in the subject of the litigation." *Id.* "It can seldom, if ever, be shown that the trial court abused its discretion in denying the permissive right to intervene." *Grijalva v. Elkins*, 287 P.2d 970, 972 (Colo. 1955).

As set forth in Section II.A.1, this motion is timely given the early stage of the case. Further, the Districts are not asserting any claims into the litigation that are not already before the Court. As a result, intervention by the Districts will not unduly delay or prejudice the rights of the existing parties to the case. Additionally, the Districts' are in a unique position to provide the Court with information concerning the use and administration of designated ground water that will be both relevant and informative concerning the resolution of Plaintiff's claims. In light of the issues to be decided in this case, permissive intervention of the Districts' is also appropriate.

C. C.R.C.P. 57(j) and C.R.S. § 13-51-115

C.R.C.P. 57(j) and C.R.S. § 13-51-115 provide, in part, "[W]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." As explained above, the Districts' have interests in the designated ground water resource could be affected or prejudiced by any declaratory or other legal or evidentiary rulings in this case. As a result, the law mandates that Districts shall be made parties.

III. CONCLUSION

The Districts respectfully request the Court to allow their intervention as party defendants in the above-captioned case.

Respectfully submitted this 16th day of December, 2015.

VRANESH and RAISCH, LLP

Signature on file pursuant to *C.R.C.P. 121 § 1-26(7)*

By: *s/ Leila C. Behnampour*
Eugene J. Riordan (#11605)
Leila C. Behnampour (#42754)

Attorneys for the Districts

WHITE & JANKOWSKI, LLP

Signature on file pursuant to *C.R.C.P. 121 § 1-26(7)*

By: *s/ Leila C. Behnampour for DCT*
David C. Taussig, # 16606

Co-Counsel for Arikaree District

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2015, I served a true and correct copy of the foregoing **MOTION TO INTERVENE** by ICCES e-filing addressed to the following:

City of Holyoke	Alvin Raymond Wall	Alvin R Wall Attorney at Law
City of Wray Colorado	Alvin Raymond Wall	Alvin R Wall Attorney at Law
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Colorado Department of Natural Resourc	Preston Vincent Hartman	CO Attorney General
Colorado Department of Natural Resourc	Daniel E Steuer	CO Attorney General
Colorado Department of Natural Resources	Ema I.g. Schultz	CO Attorney General
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By: *s/ Erich S. Fowler*
Erich S. Fowler,
Paralegal/Litigation Case Manager
/s/ signature on file
Pursuant to C.R.C.P. 121, §1-26(7)

SIGNED DOCUMENT BEING RETAINED AT THE OFFICE OF VRANESH AND RAISCH, LLP