

DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Weld County Courthouse 901 9 th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300	DATE FILED: May 8, 2015 5:14 PM
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; the Colorado Department of Natural Resources; Colorado Division of Water Resources; and Colorado Parks and Wildlife.	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
Porzak Browning & Bushong LLP Steven J. Bushong (#21782) Karen L. Henderson (#39137) 2120 13 th Street Boulder, CO 80302 Tel: 303-443-6800 Fax: 303-443-6864 Email: sjbushong@pbblaw.com; khenderson@pbblaw.com	Case Number: 15CW3018 Div. No. 1
THE JIM HUTTON EDUCATIONAL FOUNDATION'S RESPONSE TO THE MOTION TO DISMISS THE COLORADO DEPARTMENT OF NATURAL RESOURCES AS A DEFENDANT	

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through undersigned counsel, does hereby provide its Response to the Motion to Dismiss the Colorado Department of Natural Resources (“CDNR”) as a defendant in the above-captioned matter. In its Motion to Dismiss, CDNR claims that the Foundation failed to state a claim for which relief can be granted against it and therefore, CDNR has been misjoined as a defendant in this case. For the reasons set forth below, the Foundation properly named CDNR as a defendant in this action.

1. In addition to the legal standards cited by CDNR in its Motion, the Foundation further notes that motions to dismiss for failure to state a claim under C.R.C.P. Rule 12(b)(5) are viewed with disfavor so that dismissal should not be granted unless it appears beyond a doubt that plaintiff can prove no set of facts that would entitle it to relief. *Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011). Not only are all factual allegations in the Complaint accepted as true in reviewing a C.R.C.P. 12(b)(5) motion to dismiss, such factual allegations are also viewed in “the light most favorable to the plaintiff.” *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

2. CDNR is properly a party to this litigation for a number of reasons, but especially given the contracts it entered into regarding the operation of Bonny Reservoir that included protections for the Hale Ditch water rights. Those protections are not being maintained as cited in the Complaint. CDNR's failure to ensure compliance with the contract provisions that protect the Hale Ditch water rights compounds the injury being incurred by the Foundation and constitutes an explicit part of Claim 1. The following is an abbreviated summary of factual allegations in the Complaint that support including CDNR as a defendant for Claim 1:

- a. The Foundation owns a 1/3rd interest in the Hale Ditch, Priority No. 38, which was decreed for 23 cfs for irrigation purposes by decree dated September 8, 1939, with an appropriation date of January 17, 1908. (*Complaint ¶ 12*)
- b. Bonny Dam and Reservoir was constructed by the United States in the 1940's on top of the Hale Ditch headgate. To address that fact, the Dam was constructed with a special outlet works to ensure delivery of water through the Dam to the Hale Ditch. (*Complaint ¶ 15*)
- c. The State of Colorado, acting by and through CDNR, entered into a contract with the United States, by which it acquired the right to use Bonny Reservoir's conservation storage for recreation and fish and wildlife purposes (hereinafter "Water Contract"). CDNR is a signatory to the Water Contract. CDNR agreed in the Water Contract, that it "shall comply with all natural flow rights for Hale Ditch and the State Engineer shall measure and direct such releases pursuant to such rights." (*Complaint ¶ 16*)
- d. Under the Water Contract, no water may be delivered "for uses other than recreation, fish and wildlife, municipal and industrial uses under existing contracts, and irrigation uses by the water right holders of the existing Hale Ditch" without satisfying the requirements of the National Environmental Policy Act of 1969. (*Complaint ¶ 17*)
- e. CDNR also entered into a Memorandum of Understanding on behalf of the State of Colorado with the United States, dated January 26, 2002, by which CDNR leased and agreed to manage the lands under and adjacent to Bonny Reservoir consistent with the Bonny Reservoir operating plan (hereinafter the "Land Contract"). CDNR is a signatory to the Land Contract. (*Complaint ¶ 18*)
- f. Under the Land Contract and Bonny Reservoir operating plan, Bonny Reservoir is to be operated to the extent possible to maintain storage in the conservation pool leased by CDNR for recreation, fish and wildlife purposes, "without interfering with the operation of the Hale Ditch." Further, the lands associated with Bonny Reservoir are to be managed consistent with those foregoing uses, including management of noxious and/or undesirable plant species. (*Complaint ¶ 19*)
- g. In short, the Water Contract and Land Contract (collectively "Contracts") impose obligations upon CDNR, including its divisions and the State Engineer, to help ensure

water deliveries to the Hale Ditch are maintained without interference in the operation and maintenance of Bonny Reservoir and the lands underlying and adjacent thereto. (*Complaint ¶ 20*)

- h. As such, owners of the Hale Ditch water right, including the Foundation, are intended beneficiaries to the Contracts. (*Complaint ¶ 20*)
- i. CDNR has failed to satisfy its obligations under the Contracts. Injury to the Foundation's Hale Ditch water right has been exacerbated by requiring Bonny Reservoir to be drained to help achieve compliance with the Republican River Compact of 1942 (hereinafter the "Compact"), which is an undecreed use and was done without NEPA approval; by prohibiting permanent storage in Bonny Reservoir; and by failing to maintain or require maintenance of the area that was once inundated by the Reservoir in a way that has allowed extensive emergent and noxious vegetation to interfere with Hale Ditch deliveries. Such actions are not only inconsistent with Colorado and federal law, but also the obligations to the Hale Ditch set forth in the Contracts. (*Complaint ¶¶ 54 – 59, 88, 91*)

3. Irrespective of the administration of Bonny Reservoir for Compact compliance or other reasons, CDNR's obligations to the Hale Ditch remain intact pursuant to the express terms of the Contracts. In short, the above allegations plead in the Complaint create a factual basis for including CDNR as a defendant in this lawsuit.

4. While the predecessors to Colorado Parks and Wildlife ("CPW") are also parties to the Contracts, that does not relieve CDNR of its responsibilities under the Contracts. Further, the Executive Director of CDNR is the one responsible for all negotiations with the federal government on all resource and conservation matters. *See* C.R.S. §24-33-103 ("The governor, through the executive director of the department of natural resources . . . shall be responsible for negotiations with the federal government in all resource and conservation matters."). As the state agency charged with negotiating with the federal government in all resource and conservation matters on behalf of the State of Colorado and as the primary signatory to the Contracts, CDNR is bound by the terms of these contracts.

5. Further, the management, operation, and administration of Bonny Reservoir involves the coordination of at least CPW and the Division of Water Resources ("DWR").¹ Thus, pursuant to C.R.S. §37-80-102(6)(a), "[t]he state engineer and those under his supervision shall be subject to the direction of the executive director of the department of natural resources with respect to those matters concerning the division of water resources which require coordination with other branches of the department of natural resources." (*emphasis added*). This statutory authority is

¹ It may also involve some coordination with the Colorado Water Conservation Board ("CWCB"), who was responsible for the Bonny Reservoir Operating Plan and who has responsibility to "determine the effect, if any, of the withdrawal of groundwater upon aquifer supply and upon the surface flow of streams, and the information obtained thereby shall be made available to the state engineer and the ground water commission and any designate groundwater management district." *See* C.R.S. §37-90-117.

directly contrary to CDNR's claim that it does not have any power to order the State Engineer to take any actions. (*See* CDNR's Motion to Dismiss, p. 4).

6. CDNR's Motion to Dismiss is predicated on its claimed lack of responsibility on the issues raised in the Complaint. For example, CDNR states that "[a]s to DWR and CPW, the powers of the executive director are related to budgeting, purchasing, planning, reporting, publications, and related management functions..." (*See* CDNR's Motion to Dismiss, p. 5). However, CDNR's Motion to Dismiss did not address the allegations in the Complaint that are summarized above. Based upon those allegations alone, CDNR is properly a party to Claim 1 in the Complaint because of the Contracts. Further, even setting aside those issues, the Foundation does not interpret the division of powers and responsibilities between CDNR and the agencies within CDNR in the manner presented in the Motion to Dismiss.

7. CDNR is a principal or executive department that consists of several divisions, including DWR, CWCB, and CPW. *See* C.R.S. §24-1-110(n) and §§24-1-124(3)(a), 124(3)(b), and 124(3)(k)(II)(A). DWR is further broken into four sections, three of which include: (i) the office of the state engineer, (ii) the division engineers, and (iii) the ground water commission ("Commission"). *See* C.R.S. §24-1-124(4). In its Motion to Dismiss, CDNR states that DWR was a type 1 transfer to CDNR. (*See* CDNR's Motion to Dismiss, p. 3). However, this is not exactly correct. While CWCB and CPW were transferred to CDNR by type 1 transfers, DWR was not a type 1 transfer. *See* C.R.S. §24-1-124(3)(a). Rather, each section of DWR was transferred to CDNR by a type 1 transfer, but then allocated to DWR. *See* C.R.S. §24-1-124(4).

8. In its Motion to Dismiss, CDNR cites to the type 1 transfer as evidence that aside from bookkeeping and managerial aspects, DWR and CPW operate completely independently of CDNR. (*See* Motion to Dismiss, p. 4-5). While it is true that a division that is transferred to a department as a type 1 transfer "exercise[s] its prescribed statutory powers, duties, and functions . . . independently of the head of the principal department," it is also true that such a division "shall be administered under the direction and supervision of that principal department." C.R.S. §24-1-105(1). Thus, CDNR has a supervisory role even with type 1 transfers that should not be ignored.

9. The supervisory role between the executive director of CDNR and the State Engineer is made clear elsewhere in the statutes as well. For example, the state engineer is required to report to the executive director of CDNR, and the executive director of CDNR must oversee the performance of the State Engineer so that any "default in performance of his duties by the state engineer may be made the subject of charges by the executive director of the department of natural resources or the governor." C.R.S. §§37-80-112, 115. Considering that the State Engineer wears at least four different hats that pertain to water resources in the Republican River basin – one as head of DWR, a second as the State Engineer, a third as the executive director and a non-voting member of the Commission, and a fourth as Colorado's Republican River Compact Commissioner – this oversight cannot be ignored. *See* C.R.S. §24-1-124(3)(a), §37-80-101, §37-90-104(4), and §37-67-101.

10. The Foundation acknowledges that CDNR may not have obligations or authority with regard to every aspect of the allegations set forth in the Complaint. However, one or more of its divisions or agencies do have such obligations, and CDNR has oversight responsibilities over all those divisions or agencies, in addition to its own contractual obligations.

11. Further complicating matters is the fact that it is not always clear what authorities and responsibilities a type 1 transfer included. For example, “all powers and functions of the executive department of state government created or specified by law after July 1, 1968 . . . shall be assigned to a principal department, and such powers and functions shall be exercised under such principal department as if the same were transferred to such department by this article under a **type 2** transfer, unless otherwise specified by such law.” C.R.S. §24-1-134. Not all agency powers and functions at issue in this litigation were specified prior to 1968 (*See, e.g.*, Senate Bill 52, which was adopted in 2010).²

12. Given the interrelated nature of the claims, the Foundation did not believe CDNR’s participation in the lawsuit should be limited to only 1 or 2 of the claims. Briefly, Claim 1 involves a challenge to the administration, management, and curtailment of surface water rights, including curtailment under the interstate Compact, and in a manner inconsistent with the Contracts. As described in the Complaint, the unlawfulness of the surface water curtailment is especially evident given that the groundwater depletions causing the Compact shortfall are not being curtailed. In its constitutional challenge of Senate Bill 52 in Claim 2, the Foundation seeks to recover the legal rights it previously held as a surface water right owner to redraw designated groundwater basin boundaries. By excluding improperly designated groundwater, surface water right owners like the Foundation can then protect themselves by placing an administrative call. *See, e.g., Gallegos v. Colo. Ground Water Comm’n*, 147 P.3d 20 (Colo. 2006). Claim 3 of the Complaint involves a constitutional challenge to the Colorado Groundwater Management Act, but only if the Foundation is unable to get relief under its first two claims.

13. In addition, since it is appropriate, though not necessary, to name the governor as a defendant in an action challenging the constitutionality of a statute, by analogy it should also be appropriate to identify the relevant department within the governor’s executive branch that oversees the relevant agencies. *See Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004)(“when challenging the constitutionality of a statute or the lawfulness of an administrative rule, the Governor is an appropriate defendant due to his constitutional responsibility to uphold the laws of the state and to oversee Colorado’s executive agencies”).

14. In short, CDNR’s participation in Claim 1 is necessary because of its role in the Contracts and because of its different agencies or divisions involved in the Claim. *See* C.R.S. §37-80-102(6)(a). Although Claims 2 and 3 are constitutional challenges to statutory provisions that deprive and impair constitutionally appropriated surface water rights, as the executive

²As another example, although the Commission was transferred to CDNR by a type 1 transfer and then allocated to DWR, the Executive Director of CDNR is a voting member of the Commission. *See* C.R.S. §37-90-104(4). This is also evidence that not all of the powers and duties of the Executive Director of CDNR are described in C.R.S. §24-33-102, as claimed by CDNR. (*See* CDNR’s Motion to Dismiss, p. 5).

department of the State of Colorado with supervisory authority over all the state agencies associated with water and interstate compacts, CDNR's involvement in those claims is warranted as well. If the Court determines that CDNR is properly a party in less than all 3 claims, the Foundation requests the ability to amend the Complaint as necessary. See C.R.C.P. 21 ("Misjoinder of parties is not ground for dismissal of an action"); *King v. W. R. Hall Transp. & Storage Co.*, 641 P.2d 916, 920 (Colo. 1982)("The dropping of a party under Rule 21 is equivalent to dismissal without prejudice of the claim against that party").

Respectfully submitted this 8th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2015, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION'S RESPONSE TO THE MOTION TO DISMISS THE COLORADO DEPARTMENT OF NATURAL RESOURCES AS A DEFENDANT** was filed and served by the Integrated Colorado Courts E-Filing System ("ICCES") addressed to counsel for each of the parties in the above-captioned matter, as follows:

Party Name	Party Type	Attorney Name
Colorado Department of Natural Resources	Defendant	Ema I.G. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Division of Water Resources	Defendant	Ema I.G. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Parks And Wildlife	Defendant	Katie Laurette Wiktorski (CO Attorney General) Timothy John Monahan (CO Attorney General)
David Nettles, Division 1 Engineer	Defendant	Ema I.G. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Dick Wolfe, State Engineer	Defendant	Ema I.G. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)



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