



## **I. Introduction**

The CDNR Motion requested that this Court dismiss CDNR as a defendant in this matter pursuant to Rules 12(b)(5) and 21. In the alternative, CDNR requested an order to the Jim Hutton Educational Foundation (“Plaintiff”) to file a more definite statement of the claims and allegations against CDNR as a distinct entity pursuant to Rule 12(e) within fourteen (14) days of the order. Plaintiff filed its response to the CDNR Motion on May 8, 2015.

## **II. Plaintiff has failed to state a claim against CDNR for which relief can be granted.**

In its response, Plaintiff asserts that CDNR is appropriately named as a defendant because of the department’s role in contracting related to water and land in and around Bonny Reservoir and because of its supervisory role over the other divisions of CDNR named in this suit. However, as set forth in the CDNR Motion and below, Plaintiff fails to link its allegations against CDNR to any claim for relief. Moreover, CDNR’s supervisory status over divisions within its department does not supplant the statutory authorities or responsibilities of each individual agency as granted by the General Assembly. Accordingly, Plaintiff’s inclusion of CDNR as a party to this case is both unnecessary and inappropriate.

A. *Plaintiff has stated no claim for relief regarding the contracts.*

Plaintiff states that “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.” Response at ¶2. Plaintiff goes on to list several allegations stated in the Complaint, which Plaintiff argues support the inclusion of CDNR as a party defendant. Nowhere in its Complaint or response, however, does Plaintiff explain how the subject contracts are relevant to Claim 1 or how those contracts appropriately implicate CDNR as a defendant in this matter.

Claim 1 seeks a declaration that “the administration of water in the Republican River Basin and related actions and omissions by defendants are unlawful.” Complaint at 12.

Plaintiff’s allegations regarding CDNR involve the “Water Contract” entered into “by the State of Colorado, acting by and through the Department of Natural Resources for the use and benefit of the Division of Wildlife and the Division of Parks and Outdoor Recreation” and the “Land Contract” entered into by “the State of Colorado, Department of Natural Resources, . . . acting by and through the Department of Natural Resources, . . . for administration of recreation by the

Division of Parks and Outdoor Recreation and the management of fish and wildlife resources by the Division of Wildlife.”<sup>1</sup>

Plaintiff maintains that its Complaint and response clarifying the Complaint demonstrate the factual basis for including CDNR as a defendant in this lawsuit. However, the factual allegations that Plaintiff relies upon do not support a claim for declaratory relief regarding the administration of water in the Republican River Basin. Rather, these factual allegations might support a claim for breach of contract, but no such claim has been pled in the Complaint.

Plaintiff’s own arguments support this conclusion. First, Plaintiff highlights that “CDNR’s obligations to the Hale Ditch remain intact pursuant to the express terms of the contracts.” Response at ¶3. Such statement could only be potentially relevant to support a legal claim related to the alleged contractual obligations, but no such contract claim has been pled in this matter.

Second, Plaintiff explains that “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.” Response at ¶12. This statement is internally inconsistent because it combines alleged contractual obligations of certain entities with the statutory duties

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<sup>1</sup> The General Assembly combined the Division of Parks and Wildlife and Division of Parks and Outdoor Recreation to form the current Colorado Division of Parks and Wildlife (“CPW”).

of the State Engineer. If Plaintiff is seeking a breach of contract claim against CDNR, CDNR is entitled to a plain statement of that claim and the relief that Plaintiff seeks under the claim. CDNR should not have to guess what relief Plaintiff is seeking by the Complaint against CDNR. Because Plaintiff has failed to state any claim for relief against CDNR, CDNR should be dismissed as a party.

Plaintiff also argues that because the General Assembly delegated authority to negotiate with the federal government regarding resource and conservation matters to the Governor, through the director of CDNR, CDNR has individual responsibilities under the contracts. Response at ¶4; see § 24-33-103, C.R.S. (2014). However, the contract language shows that CDNR's participation was perfunctory only; it is not a real party in interest to the contract. Also, the logical extension of Plaintiff's argument is that based on the statute, which required CDNR to negotiate with the federal government, CDNR also bound every one of its unique divisions, even all the type one transfers, to every term and condition of the contract, even terms which may interfere with or abrogate the statutory duties of a completely separate type one transfer division within CDNR. This argument is untenable. As a matter of law, CDNR cannot bind a type one agency of its own accord, and any attempt to alter an agency's statutory duties by contract is void. *See e.g. State Highway Com. v. Haase*, 189 Colo. 69, 537 P.2d 300 (1975) (holding that the

Governor and the executive director of the Division of Highways do not have authority order the State Highway Commission or its chief engineer to act).

*B. CDNR's oversight and coordination duties do not alter the statutory authority held by CDNR or its agencies.*

Despite the requirement that the State Engineer coordinate with other agencies in CDNR through the executive director of CDNR, the State Engineer still retained all of his statutory duties independent of the head of CDNR, and CPW retained all of its statutory duties independent of the head of CDNR. Plaintiff argues that because the “management, operation, and administration of Bonny Reservoir” involves the coordination of agencies within CDNR, CDNR necessarily must have the power to order the State Engineer or other type one transfer agencies to take any actions. The General Assembly requires the State Engineer to coordinate, through the executive director of CDNR, with other agencies within CDNR. *See* § 37-80-102(6)(a), C.R.S. (2014). However, this statute does not vest in the executive director of CDNR all of the statutory duties and obligations of the State Engineer, or any of the coordinating agencies. Coordination of agencies within a single department promotes efficient, effective and elegant government operations but does not alter the statutory framework which preserves in each type one transfer the statutory duties and obligations independent of the head of CDNR.

Plaintiff points out that the Division of Water Resources is not in fact a type one agency transfer to CDNR, rather each of its sections are type one transfers to CDNR. While true, this distinction makes no practical difference to the argument made in the CDNR Motion, that type one transfers maintain their statutory duties and authority independent of the head of CDNR. CDNR's statutory functions as administrator and human resources evaluator do not modify the statutory duties and authority that each type one transfer agency retained when the agencies were allocated to CDNR. Just because the executive director of CDNR conducts the State Engineer's annual performance review for human resources purposes does not mean that the executive director has thereby assumed the statutory duties and authority of the State Engineer.

If the Plaintiff had named only CDNR as the defendant for the three claims asserted in the Complaint, and the Plaintiff prevailed on all counts of those claims, the relief obtained by the Plaintiff could not be afforded by CDNR. CDNR would remain without the independent authority to modify administration of the Republican River Basin for Compact compliance, without independent authority to modify management of CPW's interests in the land and water in and around Bonny Reservoir, without the duty to implement or enforce Senate Bill 52 (2010), and without the duty to implement or enforce the Colorado Ground Water Management Act. CDNR's administrative supervision, coordination, and human resources

performance evaluation of the State Engineer do not change the type one transfers which preserve the State Engineer's statutory duty in section 37-80-104, C.R.S. (2014) and Article 10 of the Republican River Compact to administer the Compact, CPW's statutory authority to manage its interest in land and water in and around Bonny Reservoir, or the Colorado Ground Water Commission's duty to implement and enforce Senate Bill 52 (2010) and the Colorado Ground Water Management Act. *See Haase*, 189 Colo. 69, 537 P.2d 300.

*C. Proper parties in a constitutional challenge need not include the principal department of the agency tasked with implementing and enforcing the statute.*

Plaintiff argues that because it may be appropriate to name the governor as a defendant in an action challenging a statute, it is necessary to include the principal department to which a type one transfer agency is assigned. However, Plaintiff admits at the outset of this argument that the governor is not a *necessary* party in every statutory challenge. Plaintiff provides no precedent or support for the argument that the law and reasoning which allow the governor, the supreme executive of the State, to be named to defend the statutes of the state should be extended to every principal department of the executive branch of government.

The basis for naming the governor as a defendant is rooted in the Colorado Constitution. *See Colo. Const. art IV, § 2*. Principal departments of the State do not share this constitutional duty and are limited by the statutes which establish

each principal department. Here, CDNR is not the entity that would have to act to satisfy a judgment in favor of the Plaintiff on any of the claims, and in particular on the constitutional challenges to statutes. CDNR does not, by itself, implement or enforce Senate Bill 52 (2010) or the Colorado Ground Water Management Act.

The only support Plaintiff relies upon for naming CDNR as a defendant in the constitutional challenges to Senate Bill 52 and the Colorado Ground Water Management Act is the fact that CDNR has an administrative supervisory role over the agencies which do enforce and enact the challenged statutes. As previously stated, CDNR's supervisory functions do not alter the type one transfer authorities and duties of the Colorado Ground Water Commission or the State Engineer independent of the head of CDNR.

*D. CDNR is not a proper party to this matter.*

CDNR has been improperly named as a defendant to this action and the relief claimed cannot be enforced by CDNR. As explained above and in the CDNR Motion, the Complaint does not state claims for which relief can be granted against CDNR. Therefore, CDNR is misjoined as a defendant in this case and should be dismissed.

WHEREFORE, CDNR respectfully moves for an order of this Court dismissing CDNR as a named defendant pursuant to Rule 12(b)(5) and 21. In the alternative, CDNR respectfully moves this Court for an order to the Foundation to

file a more definite statement of the claims and allegations against CDNR as a distinct entity pursuant to Rule 12(e) within fourteen (14) days of the order.

Dated this 15th day of May, 2015.

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*s/ Ema I. G. Schultz*

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## CERTIFICATE OF SERVICE

This is to certify that on this 15th day of May, 2015, I caused a true and correct copy of the foregoing **Reply in Support of Motion to Dismiss Colorado Department of Natural Resources as Defendant** to be served electronically via ICCES upon the following:

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney</b>
Jim Hutton Educational Foundation	Plaintiff	Karen Leigh Henderson Steven J. Bushong (Porzak Browning & Bushong LLP)
Colorado Parks and Wildlife	Defendant	Timothy J. Monahan Katie L. Wiktor
Division 1 Water Engineer	Division Engineer	Division 1 Water Engineer
State Engineer	State Engineer	State Engineer
Division of Water Resources	Defendant	Ema I. G. Schultz Preston V. Hartman
Yuma County Water Authority Public Improvement District	Defendant	Steven O. Sims John A. Helfrich Dulcinea Z. Hanuschak (Brownstein Hyatt Farber Schreck, LLP)

*Filed pursuant to C.R.C.P. Rule 121 § 1-26.  
A duly signed original is on file with the Office of the Attorney  
General for the State of Colorado.*

*Nan B. Edwards*

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