DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300	DATE FILED: May 19, 2015 2:37 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.	☐**COURT USE ONLY** ☐
Porzak Browning & Bushong LLP Steven J. Bushong (#21782) Karen L. Henderson (#39137) 2120 13th 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 STATE AND DIVISION ENGINEERS' MOTION FOR JOINDER	

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 State and Division Engineers' ("Engineers") Motion for Joinder.[1]

I. Introduction.

1. In their Motion for Joinder, the Engineers allege that groundwater users in the Northern High Plains Designated Groundwater Basin ("NHP Basin") may be affected by the requested declaratory judgment, so the Foundation should identify and personally serve all such groundwater users pursuant to C.R.C.P. 4. The Engineers also allege that the Colorado Ground Water Commission ("Commission") should be joined as a defendant in this action. As set forth below, the Foundation requests that the Engineers' Motion for Joinder be denied on the grounds that neither the groundwater users nor the Commission are indispensable parties to the above-captioned matter.

[1]The Engineers' Motion for Joinder is not signed by an attorney and is required to "be stricken unless it is signed promptly after the omission is called to the attention of the pleader." C.R.C.P. 11.

2. The Foundation filed the above-captioned matter against the State Engineer, the Division Engineer for Water Division No. 1, the Colorado Division of Water Resources, the Colorado Division of Parks and Wildlife, and the Colorado Department of Natural Resources (collectively referred to as the "State"[2]). The Foundation's Complaint includes three claims for relief.

a. The Foundation's first claim seeks declaratory and injunctive relief concerning the administration, management, and curtailment of its surface water rights. This claim includes challenges to the curtailment of the Foundation's surface water rights under the Republican River Compact ("Compact") and to the administration and management of Bonny Reservoir in a manner that injures the Hale Ditch and is inconsistent with certain contracts. As described in the Complaint, the unlawfulness of the current curtailment under the Compact is especially evident given that the groundwater pumping causing the Compact shortfall is not being curtailed.

b. In its constitutional challenge of Senate Bill 52 in Claim 2, the Foundation seeks to recover the legal right it held when the NHP Basin was created to redraw the basin boundaries as necessary to protect its surface water rights. If successful, the Foundation would then be able to initiate a separate action with the Commission to redraw the NHP Basin boundaries to exclude improperly designated groundwater so that it may place an administrative call against the excluded wells. *See, e.g., Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20 (Colo. 2006).

c. 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 causing it to bear the burden of Compact compliance.

In short, this action is about protecting and administering surface water rights. The Foundation does not seek relief from any party other than the named Defendants.

II. Law Regarding Indispensable Parties.

A. Rule 19 – Joinder of Persons Needed for Just Adjudication.

3. C.R.C.P. Rule 19(a) — Persons to be Joined If Feasible — provides, in pertinent part, that a "person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

[2]The Foundation recognizes that the each of the named state agencies have different statutory duties and obligations, but for ease of reference and without intending to impose the obligations of one agency wrongfully on another, the Foundation may refer generally to the "State" for purposes of this Motion.

4. "Rule 19 pertains not to permissive or discretionary joinder of the parties, but to the question of who must be made parties because of necessity or indispensability to a complete adjudication of rights as between the litigants." *Bender v. Dist. Court In & For El Paso Cnty.*, 291 P.2d 684, 687 (Colo. 1955). "Although Rule 19(a) does not use the term, such persons are usually described as 'indispensable parties.'" 6 Colo. Prac., Civil Trial Practice § 6.5 (2d ed.).

5. "Whether a party is characterized as indispensable—and must therefore be joined—is a mixed question of law and fact and depends on the facts and context of each case." *Bittle v. CAM-Colorado, LLC*, 318 P.3d 65, 69 (Colo. App. 2012). "The burden of persuasion should rest upon the party asserting the necessity of joining absent parties." *Williamson v. Downs*, 829 P.2d 498, 500 (Colo. App. 1992).

6. "Persons having an interest in the subject matter of litigation which may conveniently be settled therein are 'proper parties,' those whose presence is essential to determination of entire controversy are 'necessary parties,' but, if interests of parties before the court may be finally adjudicated without affecting interests of absent parties, presence of 'proper parties' is not indispensable, whereas 'indispensable parties' are those having such an interest in subject-matter of controversy that final decree between parties before the court cannot be made without affecting their interests or leaving controversy in such situation that its final determination may be inequitable." *Woodco v. Lindahl*, 380 P.2d 234, 238 (Colo. 1963).

7. Indispensable parties include a person or entity whose absence prevents complete relief from being accorded among those already parties. *See Frazier v. Carter*, 166 P.3d 193, 195 (Colo. App. 2007). "If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. ... <u>One is not an indispensable party to a suit merely because he has a substantial interest in the subject matter of the litigation</u>.... The test ... may be stated thus: Is the absen[t] person's interest in the subject matter of the litigation such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the right of such absent person?" *Woodco v. Lindahl*, 380 P.2d 234, 238 (Colo. 1963)(*internal citations omitted*) (*emphasis added*).

8. "In controversies involving the respective rights of users from flowing streams, or impounded waters, in this jurisdiction, it has been the unbroken rule that only the disputed rights between litigants were involved in such proceedings and that other users of water from the same source need not be joined." *Bender v. Dist. Court In & For El Paso Cnty.*, 291 P.2d 684, 686 (Colo. 1955). "They would become necessary and indispensable parties only in the event the action was of such a nature that the respective rights of all users must be adjudicated and determined as between each other." *Id.* at 687; *see also Model Land & Irr. Co. v. Hoehne Ditch Co.*, 202 P. 712, 713 (Colo. 1921).

9. "A decision for or against the plaintiff might indirectly affect the interests of all water users, but could not alter vested legal rights so as to raise the water users to the status of indispensable parties." *Jackson v. Colo*. 294, F. Supp. 1065, 1073 (D. Colo. 1968). Therefore,

"the practical considerations and the absence of legal prejudice preclude a finding that all water users are indispensable parties." *Id*.

B. Rule 57(j) – Declaratory Judgment; Parties

10. Pursuant to C.R.C.P. 57(j), "[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."

11. "All persons who have or claim a substantial interest in the subject matter of the controversy, which would be affected by the declaratory judgment, and whose presence is necessary to a complete and effective determination of the controversy and rights which plaintiff seeks to have declared, are necessary parties to the action, and such parties must be before the court, and be given an opportunity to be heard as to their own rights or defenses." *People ex rel. Inter-Church Temperance Movement of Colo. v. Baker*, 297 P.2d 273, 277 (Colo. 1956)(*internal citations omitted*)(*emphasis added*).

12. The analysis under C.R.C.P. 57(j) mirrors the analysis used to determine whether parties must be joined as indispensable. "The interest which a party must have in the subject matter in order to make him a necessary party defendant must be a present substantial interest, as distinguished from a mere expectancy or future contingent interest." *Game and Fish Commission v. Feast*, 402 P.2d 169, 172 (Colo. 1965) (construing necessary parties under C.R.C.P. 57(j)).

III. Argument.

A. Groundwater Users in the NHP Basin are not Indispensible Parties.

13. The basis for the Engineers' Motion for Joinder is predicated on the mistaken belief that the Foundation is asking this Court to force the State to (i) curtail designated groundwater users to protect the Foundation's senior surface water rights and (ii) to curtail designated groundwater users for compliance with the Compact. To the contrary, the relief sought in the Complaint does not seek to curtail designated groundwater use – it seeks to have the curtailment of surface water use found unlawful as explained below.

i. The Foundation is not requesting an order from this Court that would force the Engineers to curtail designated groundwater users to protect the Foundation's rights.

14. The Foundation is not asking this Court to order the Engineers to curtail designated groundwater to protect its surface water rights. Since groundwater in the NHP Basin is currently classified as designated groundwater, the Foundation may only seek to curtail well users to protect its surface water rights from injury after the NHP Basin is redrawn by the Commission. As stated in *Gallegos*, 147 P.3d at 33,

> A surface water right owner who believes that the pumping of designated groundwater injures its rights must prove to the

> Commission that the water alleged to cause the injury has been improperly designated. Upon such a showing, the Commission is required to alter the basin's boundaries to exclude the surface rights and the improperly designated groundwater. Once the groundwater is no longer designated, jurisdiction will vest in the State Engineer and the water courts for administration under the 1969 Act according to prior appropriation.[3]

See also Pioneer Irr. Districts v. Danielson, 658 P.2d 842, 846-47 (Colo. 1983)(In an action brought by surface water users to curtail designated groundwater users, it was determined that the Commission, not the Water Court, had initial jurisdiction to determine whether or not the groundwater was designated).

15. In short, and as recognized in the Complaint, if and when Senate Bill 52 is found unconstitutional under Claim 2, the Foundation may then proceed in an action before the Commission to redraw the boundaries of the NHP Basin. (*See* Complaint, ¶¶ 75, 4). It would be in that separate action that any groundwater users would have the opportunity to be heard and protect their interests.

16. Therefore, the relief sought in this case does not impair the ability of the groundwater users to protect their interests. *See Hygiene Fire Prot. Dist. v. Bd. of Cnty. Comm'rs of Cnty. of Boulder*, 205 P.3d 487, 489 (Colo. App. 2008) *aff'd sub nom. Bd. of Cnty. Comm'rs of Cnty. of Boulder v. Hygiene Fire Prot. Dist*, 221 P.3d 1063 (Colo. 2009)(finding that landowners were not indispensable parties because the determination at issue did not impair their ability to protect their interests because the landowners would have had the opportunity to be heard and protect their interests through the applicable statutory processes).

ii. The Foundation is not requesting an order from this Court that would force the Engineers to curtail designated groundwater for Compact compliance purposes.

17. Contrary to the claims in the Engineers' Motion, the Foundation is also not requesting an order from this Court that would force the Engineers to curtail designated groundwater for Compact compliance purposes. Rather, the Foundation takes issue with the Engineers administration of surface water because it is inequitable and inconsistent with state and federal law. A component of that claim is that it is unlawful for the Engineers to curtail surface water users for Compact compliance given that they are not also curtailing groundwater users and both surface water and groundwater are subject to the Compact. (*See* Complaint, ¶¶ 61-62, 79). This is not the same thing as seeking to curtail designated groundwater users and is a distinction maintained throughout the Complaint.

[3]This holding in *Gallegos* is consistent with the fact that "the General Assembly anticipated that a designated groundwater basin could include groundwater that does not properly fall within the definition of designated groundwater." *Gallegos*, 147 P.3d at 31. *See also*, *Id.* at 29("designated groundwater basins are essentially legal-political boundaries and not necessarily coincident with hydrologic boundaries")(*internal citation omitted*).

18. As evidence of the unlawful administration, the Foundation provided information in the Complaint about the depletions caused by groundwater pumping that are not being curtailed under the Compact. This includes the following information:

a. The Special Master for the United States Supreme Court ("Special Master") ruled that the Compact includes groundwater in the Ogallala aquifer and that this groundwater is hydrologically connected to the surface waters in the basin. (*See* Complaint, ¶¶ 31-32).

b. The groundwater model developed by Colorado and the other states subject to the Compact (Kansas, and Nebraska) determines the amount, timing, and location of the streamflow depletions caused by groundwater pumping ("RRCA Groundwater Model"). (*See* Complaint, ¶ 33).

c. The RRCA Groundwater Model adopted and approved by Colorado, Nebraska, Kansas, and ultimately the United States Supreme Court, documents that designated groundwater wells in the NHP Basin are depleting flows in the South Fork and other Republican River tributaries. (*See* Complaint, ¶¶ 35-40).

d. The RRCA Groundwater Model shows that groundwater depletions are increasing over time and that by 2009, the most recent year in which the Foundation was able to get RRCA Groundwater Model runs, groundwater pumping in Colorado resulted in 38,238 acre-feet of depletions in the Republican River basin, of which at least 15,907 acre-feet of depletions were in the South Fork of the Republican River. (*See* Complaint, ¶¶ 37-39).

e. Despite the fact that the groundwater depletions put Colorado out of Compact compliance, the Engineers chose to curtail surface water users and not the groundwater users. (*See* Complaint, ¶¶ 40, 43, 45, 48).

19. The foregoing information and similar allegations were not included as a basis to file a claim against groundwater users or to require groundwater curtailment, and no such claims are included in the Complaint. Instead, such information demonstrates why it is inequitable and unlawful for the Engineers to administer only surface water for Compact compliance. Specifically, pursuant to Colorado law, the State Engineer is required to equitably curtail diversions to meet Compact commitments in a manner that will restore lawful use conditions as they were before the effective date of the Compact, and, insofar as possible, to adhere to Colorado's constitutional and statutory priority law. C.R.S. §37-80-104; *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 68-69 (Colo. 2003); *People ex rel. Simpson v. Highland Irr. Co.*, 917 P.2d 1242, 1248 (Colo. 1996).

20. If the Foundation is correct that under the present circumstances it is unlawful for the Engineers to administer its surface water rights and Bonny Reservoir under the Compact, the relief will be the removal of that call. At that time, the Engineers will need to decide whether to implement further Compact compliance measures. For example, before the Engineers began curtailing surface water they developed, but did not pursue, rules and regulations that included curtailment of wells. (*See* Complaint, ¶ 42). A Compact compliance pipeline was also

implemented for the North Fork of the Republican River. (*See* Complaint, ¶ 44). Other options exist, such as developing a Compact compliance pipeline for the South Fork of the Republican River, augmentation plans, lease or purchase of surface water rights, limitations on the lawful application rates of water, and others. However, this Complaint does not seek to direct the Engineers on how best to achieve Compact compliance – only that it is unlawful to curtail only surface water rights without having first curtailed groundwater use that is also subject to the Compact.

21. In short, the relief sought pertains to the Foundation's surface rights. As evidenced by the cases below, the Foundation is not required to include the groundwater users in the above-captioned matter regarding the administration of its surface water rights.

a. In *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968), the constitutionality of the Groundwater Management Act of 1965 was challenged by a water user in response to an order from the Engineers to curtail diversions. The Supreme Court held that the enforcement of the 1965 Act in that case was discriminatory and in violation of certain constitutional protections when the division engineer sought to only curtail 39 out of the 1,600 to 1,900 wells pumping more than 100 gallons per minute. *Id*. at 992. In *Fellhauer*, there is no indication that before the owner of the water right could get relief from the subject curtailment order the other 1,561 to 1,861 wells that were not being curtailed had to be joined as indispensable parties. However, that is what the Engineers' argue should happen in this case.

b. In *Bender v. Dist. Court In & For El Paso County*, 291 P.2d 684, 687 (Colo. 1955), the Supreme Court held that other water users "would become necessary and indispensable parties only in the event the action was of such a nature that the respective rights of all users must be adjudicated and determined as between each other." In that case, the Court considered a situation where one water user sought to enjoin another water user from diverting when the water level of the aquifer became so low as to deprive the plaintiff of its use of the water. *Id*. at 685. The defendant claimed that all other users of water from the same aquifer should be joined as parties to the action and the trial court agreed. The Supreme Court, however, overruled the trial court's decision indicating that other users of water from the same source need not be joined. *Id.* at 686. Similar to the ruling in *Bender*, since the Foundation is not seeking an order from this Court to determine the priority of its water rights in relation to groundwater users "the form of the action [can] not be converted into an adjudication proceeding at the insistence of defendants and over the protests of the [Foundation]." *Id*. at 687.

22. In summary, the participation by groundwater users in the NHP Basin Foundation is not required in order for the Foundation to seek lawful administration of its surface water rights. It is the Defendants, including their administration of surface water for Compact compliance and failure to maintain contractual protections for the Hale Ditch, who are the responsible and necessary parties.

23. Lastly, the Engineers do not explain how the groundwater users meet the test of indispensability despite having the burden of persuasion to do so. Merely having a substantial interest in the subject matter of the litigation does not make the groundwater users an indispensable party. *Woodco v. Lindahl*, 380 P.2d 234, 238 (Colo. 1963). As set forth above, the Foundation is not seeking any relief against the groundwater pumpers nor is this action "of such a nature that the respective rights of all users must be adjudicated and determined as between each other." *Bender*, 291 P.2d at 687.

24. Any controversy that may exist between the Foundation and designated groundwater pumpers in the future is not involved in this action. *See LLC Corp. v. Pension Benefit Guar. Corp.*, 703 F.2d 301, 305 (8th Cir. 1983)(determining that under Rule 19(a)(1)(A) "[t]he focus is on relief between the parties and not on the speculative possibility of further litigation between a party and an absent person"). The dispute here is solely between the Foundation and the State. Therefore, designated groundwater users are not indispensable parties to this action. A decree can be entered in this case in a manner that "will do justice between the parties actually before the court without injuriously affecting the right of such absent person[s]." *Woodco v. Lindahl*, 380 P.2d 234, 238 (Colo. 1963)(*internal citations and question mark omitted*).

iii. In the event this Court determines notice is required to groundwater users in the NHP Basin, notice by publication is appropriate.

25. In their Motion for Joinder, the Engineers seek an order requiring the Foundation to identify and personally serve the well owners who have an interest in the subject matter of this action pursuant to C.R.C.P. 4. (*See* Motion for Joinder, p. 11). In addition to the analysis above on why the users of designated groundwater are not indispensable parties in this litigation, personal service of thousands of groundwater users is entirely inappropriate.

26. If the Court determines that the other water users on the South Fork of the Republican River and the groundwater users in the NHP Basin are indispensable parties and thus require notice of this Complaint, the Court should allow for notice by publication in the local newspapers pursuant to C.R.C.P 4(g)(2). This method of service is consistent with the notice requirements in both the Water Right Determination and Administration Act of 1969 and the Groundwater Management Act of 1965, *see* C.R.S. §§37-92-302(3), 37-90-112. By way of analogy, "[t]he General Assembly enacted the resume notice and newspaper publication procedure to serve the dual purpose of providing due process notice to all users of water rights on the stream, so they could decide whether to participate in the water court proceedings ... and, whether or not they do so, bind them to the results of the adjudication." *Williams v. Midway Ranches Prop. Owners' Ass'n, Inc.*, 938 P.2d 515, 524 (Colo.1997). The "United States Supreme Court has recognized and upheld the legal efficacy of Colorado's case-by-case adjudication method employing the resume notice and newspaper publication procedure ..." *S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1236-37 (Colo. 2011). "The impractically or virtual impossibility of effectuating personal service on the owners of all water rights on a large steam system, such as the Colorado, South Platte, or Arkansas watersheds, underlies this statutory procedure." *Id.* Therefore, personal service is not required to provide proper notification to both surface and groundwater users in the NHP Basin.

27. In support of their position, the Engineers refer to two orders issued by the courts in Water Division Nos. 2 and 3. These orders are neither binding nor persuasive evidence given the facts of both cases.

a. In Case No. 08CW3 (Water Division No. 3), the plaintiffs filed an action seeking declaratory relief that involved interpreting two water court decrees to resolve a dispute with the Engineers regarding the sources of water available to their water rights. The Engineers opposed and argued in a motion for joinder that a ruling in favor of the plaintiffs would enlarge the original water right and potentially injure other water users. (*See* 08CW3 Order dated July 7, 2008, p. 5). In response to the Engineers' Motion for Joinder, the court initially required the plaintiff to identify and serve other water rights holders on La Jara Creek. *Id*. However, that ruling was amended to only include "the parties to the former proceedings in which those decrees were entered, or their successors in interest ..." *Reynolds v. Cotten*, 274 P.3d 540, 542 (Colo. 2012); (*see also* 08CW3 Order regarding outstanding motions dated May 26, 2009). Therefore, contrary to the Engineers' claim, the court ultimately did not require the plaintiff to identify and personally serve all of the water users on the creek. (*See* Motion for Joinder, p. 11). Therefore, Case No. 08CW3 does not support personal service in this action.

b. In Case No. 12CW95 (Water Division No. 2), the plaintiff filed a declaratory judgment seeking clarification from the court on whether a decree granted a water right for the Horton Extension of the Campbell Ditch, and if so, it claimed a 2/3rd ownership interest in same. In response to a Motion to Dismiss, the court entered an order requiring the plaintiff to serve the two other owners of the Campbell Ditch that the objector identified in its Motion to Dismiss. (*See* 12CW95 Order re: Motion to Dismiss Pursuant to C.R.C.P. 12(b)(6) dated October 30, 2013). While it is inherently reasonable to require personal service on the other owners of a water right in an action to determine whether that water right even existed, such a situation is not applicable here.

28. Therefore, if this Court determines that the groundwater users in the NHP Basin are indispensable parties and thus require notice of this Complaint, the Court should allow for notice by publication in the local newspapers pursuant to C.R.C.P 4(g)(2). However, if the Court does require personal service, the Engineers should be required to provide the list of the applicable well pumpers since that information is in their own records. *See Williamson v. Downs*, 829 P.2d 498, 500 (Colo. App. 1992)(the party asserting the necessity of joining the absent parties have the burden of persuasion).

B. The Commission is not an indispensable party.

29. In their Motion for Joinder, the Engineers claim that the Commission should be joined "as a defendant because it would be affected by and has a strong interest in the declaratory relief sought by the Foundation." (*See* Motion for Joinder, p. 14). Specifically, the Engineers claim that the Commission is "affected" because it "is responsible for administering the very statutes that [the Foundation] claims are unconstitutional." (*See* Motion for Joinder, p. 15). The Foundation,

however, did not name the Commission as a defendant because it is not seeking any claims for relief against the Commission. While the Commission has statutory duties set forth in the Groundwater Management Act, its exercise of those duties is not at issue in this matter.

30. With regard to the constitutional issues raised in Claims 2 and 3, the Commission is not an indispensable party solely because it administers the Groundwater Management Act.[4] The Foundation is not challenging any decision or rule by the Commission, nor is it challenging the Commission's authority. Rather, under Claim 2, the Foundation is challenging the constitutionality of a 2010 legislative amendment to C.R.S. §37-90-106(1)(a) that removed the Foundation's legal right as a surface water right owner to redraw designated groundwater basin boundaries to exclude improperly designated groundwater. *See Gallegos*, 147 P.3d 20. Under Claim 3, the constitutional challenge to the Groundwater Management Act is limited to the NHP Basin if there is no relief available to the Foundation under Claims 1 and 2, such that surface right owners like the Foundation must bear the full burden of Compact compliance. (*See* Complaint, ¶¶ 115-116). The Commission has no authority on the underlying concern regarding administration of interstate compacts. *See* C.R.S. §37-80-104.

31. The Commission does not meet any of the requirements of an indispensable party requiring mandatory joinder under C.R.C.P. Rules 19(a) and 57(j) as discussed above in Section II, *supra*. Specifically, complete relief can be achieved between the parties without the Commission and the Commission is not so situated that this case will impair any legally protectable interest it would have in the subject matter. Even a substantial interest in the subject matter of the litigation does not make one an indispensable party. *Woodco v. Lindahl*, 380 P.2d at 238. Since the Foundation is challenging the constitutionality of a statute written by the legislature and not a rule drafted by the Commission, the Commission is not an indispensable party. *See Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1080 (Colo. App. 2005)("The director must be named as an indispensable party only when the appeal involves a statutory duty of the director that concerns a mandatory exercise of discretion.").[5]

32. In claiming the Commission is indispensable, the Engineers cite *Lucchesi v. State*, 807 P.2d 1185, 1193-1194 (Colo. App. 1990).[6] However, *Lucchesi v. State* does not stand for the proposition that merely being the state agency responsible for administering a relevant statute elevates that agency to the status of an indispensable party. Rather, in *Lucchesi v. State*, the attorney general argued that he was not an indispensable party and that by joining him as a party

[4] Claim 1 does not involve constitutional challenges of the Groundwater Management Act. Since the Commission has no statutory power or other obligations regarding the issues raised in Claim 1; namely, administration of surface water rights and an interstate Compact, and operation and management of Bonny Reservoir, the Engineers apparently do not seek the Commission's joinder in Claim 1.

[5] *Don Carlos Mexican Foods* involved a declaratory judgment action challenging the validity of a workers' compensation rule. The Court of Appeals recognized that the Director of the Division of Workers' Compensation had the statutory "power to adopt reasonable rules and regulations to administer the Act." *Id*. at 1080. Since the Director was the one responsible for promulgating the rule at issue in order to administer the Act, the court held that the Director was an indispensable party.

[6] Note that the "duties include implementation or enforcement of the statute being assailed" standard cited by the Engineers concerns whether a state officer may be sued in his official capacity under a §1983 claim and is not applicable to this matter.

to the case the plaintiff deprived him of the option provided in C.R.S §13-51-115 to decide whether or not to participate after receiving notice. *Id*. at 1194. The court agreed. In fact, the court indicated that while the state has an interest in whether legislation passed by the General Assembly is constitutional, the Court did not go as far as to say this interest alone makes the state an indispensable party, determining only that its joinder would not be improper. *Id*. The court went on to find that the only proper defendants for the state law claims were the county officials that actually assessed, collected, and used the funds the taxpayer sought to recover in the declaratory judgment action by claiming the real property assessment statute was unconstitutional. *Id*.

33. As in *Lucchesi v. State*, a copy of the above-captioned complaint was served on the attorney general and she was given the opportunity to be heard. *See* C.R.S §13-51-115. The attorney general did not seek to participate in this case on behalf of the Commission or otherwise separate from her representation of the State defendants.

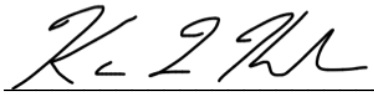
34. In short, while the Commission undoubtedly has some interest in the outcome of Claim 2 of the Complaint, it is not an indispensable party merely because it administers the Groundwater Management Act. It is noteworthy that the Commission itself did not seek to intervene and instead the Engineers sought to make the Commission's joinder mandatory.

IV. Conclusion.

35. The Engineers' Motion for Joinder should be denied because contrary to the Engineers' claims, the Foundation is not asking for a ruling that would require the Engineers to curtail designated groundwater users or otherwise impair their ability to protect their interests, if any. The Foundation has only alleged claims for relief against the named State defendants and complete relief can be accorded among those already parties. Therefore, the groundwater users in the NHP Basin and the Commission are not indispensable parties and should not be joined in this action.

Respectfully submitted this 19th day of May, 2015.

PORZAK BROWNING & BUSHONG LLP

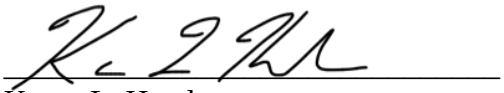


Steven J. Bushong (#21782)
Karen L. Henderson (#39137)
Attorneys for the Jim Hutton Educational Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2015, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION'S RESPONSE TO THE STATE AND DIVISION ENGINEERS' MOTION FOR JOINDER** 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 Wiktor (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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