

<p>DISTRICT COURT, WATER DIVISION NO.1  WELD COUNTY, COLORADO  901 9<sup>th</sup> Avenue / P.O. Box 2038  Greeley, Colorado 80631  (970) 351-7300</p>	<p style="text-align: right;">DATE FILED: May 29, 2015 4:23 PM</p>
<p>PLAINTIFF, The Jim Hutton Educational  Foundation,    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.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>For Defendants Dick Wolfe, State Engineer; David  Nettles, Division Engineer for Water Division No. 1;</b>  CYNTHIA H. COFFMAN, Attorney General  EMA I. G. SCHULTZ, Atty. Reg. No. 40117*  Assistant Attorney General  PRESTON V. HARTMAN, Atty. Reg. No. 41466*  Assistant Attorney General  Ralph L. Carr Colorado Judicial Center  1300 Broadway, 7<sup>th</sup> Floor  Denver, CO 80203  Telephone: (720) 508-6307 (Ms. Schultz)  (720) 508-6260 (Mr. Hartman)  <a href="mailto:ema.schultz@state.co.us">ema.schultz@state.co.us</a>;  <a href="mailto:preston.hartman@state.co.us">preston.hartman@state.co.us</a>  *Counsel of Record</p>	<p>Case No. 2015CW3018    Div.: 1</p>
<p style="text-align: center;"><b>STATE AND DIVISION ENGINEERS' REPLY IN SUPPORT  OF THEIR MOTION FOR JOINDER</b></p>	

The State Engineer and Division Engineer for Water Division No. 1 (“Engineers”), through counsel, respectfully submit this reply in support of the State and Division Engineers’ Motion for Joinder (“Motion for Joinder”).<sup>1</sup>

## I. INTRODUCTION

The Motion for Joinder requested that this Court, under C.R.C.P. 12(b)(6), C.R.C.P. 19, and C.R.C.P. 57(j), order the Plaintiff, the Jim Hutton Educational Foundation, to join necessary parties by service pursuant to C.R.C.P. 4. Plaintiff filed its Response to the State and Division Engineers’ Motion for Joinder (“Response”) on May 19, 2015.

## II. SUMMARY OF ARGUMENT

Plaintiff’s first claim for relief hinges on the legality of the way in which the State Engineer currently administers water in the Republican River Basin for compliance with the Republican River Compact (“Compact”). Plaintiff retreats in the Response somewhat from the claims made in the Complaint concerning curtailment of groundwater users in the Northern High Plains Designated Ground Water Basin. Nevertheless, the relief that Plaintiff requests would necessarily have that effect.

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<sup>1</sup> Plaintiff claims that the Engineers’ Motion for Joinder was not signed by an attorney. *See* Response at 1, n. 1. The Engineers’ motion was signed with the characters “/s/”. *See* Motion for Joinder at 16. On May 20, 2015, the Engineers contacted the Water Court clerk and were informed that the characters on the signature line suffice for a signature so that the Motion for Joinder has been accepted by the Court. The Motion for Joinder therefore is not required to be stricken under C.R.C.P. 11. The Engineers’ counsel has informed Plaintiffs’ counsel of the information contained in this footnote.

If Plaintiff obtains the relief it seeks, then well owners whom Plaintiff has not yet identified would be curtailed for Compact compliance purposes. These unidentified well owners are affected by and have a strong interest in the subject matter of this action, which is a fundamental change in the way groundwater use is regulated in the Northern High Plains Designated Ground Water Basin. Therefore, they should be joined in this action.

The Colorado Ground Water Commission should also be joined in this action. By its own admission, Plaintiff seeks to bind the Colorado Ground Water Commission to the requested relief. Tasked with carrying out the very statutes that Plaintiff would have this Court declare unconstitutional, the Ground Water Commission must be joined to protect its interest in the outcome of this action.

### **III. ARGUMENT**

*A. The relief Plaintiff requests would require the State Engineer to curtail groundwater users in the Northern High Plains Designated Ground Water Basin.*

In its Response, Plaintiff portrays the requested relief as only preventing the State Engineer from curtailing surface water rights. This portrayal ignores the fact that the State Engineer must currently administer water for Compact compliance purposes. Based on Plaintiff's allegations concerning groundwater use, well owners in the Northern High Plains Designated Ground Water Basin would have to stop using groundwater as they currently do. In fact, Plaintiff acknowledges that it

seeks an order from this Court that “it is unlawful to curtail only surface water rights without having first curtailed groundwater use that is also subject to the Compact.” Response at 6-7, para. 20.

The State Engineer has the duty to administer water use in Colorado to meet Colorado’s obligations under the Compact. *See* § 37-80-104, C.R.S. (2014); Republican River Compact, Article IX, codified at § 37-67-101, C.R.S. (2014). As the chief state water administration official in Colorado, the State Engineer “must make the necessary administrative decisions regarding the necessity, timing, amount, and location of intrastate water restrictions in order to ensure that Colorado's critical interstate delivery obligations are fulfilled.” *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 69 (Colo. 2003) (citing *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914, 923 (Colo. 1984)).

The State Engineer restricts intrastate water use to the extent necessary to ensure that Colorado continues to meet its interstate obligations. In doing so, the State Engineer does not buy water rights, lease water, finance or build compliance pipelines, or otherwise identify new sources of water to deliver to downstream states. Rather, the current tools available for the State Engineer remain curtailment of existing water uses in Colorado.

Plaintiff’s allegations and its requested relief, if taken as true, would require curtailment of groundwater uses:

. . . . The curtailment of decreed surface water rights for Compact compliance, *without first curtailing ground water diversions* that are depleting the river and which were developed after the surface water appropriations, is inconsistent with 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 insofar as possible. Lawful use conditions prior to the 1942 Compact were predominantly surface water diversions not ground water diversions, yet only surface water diversions are being curtailed.

Complaint at p. 12, paras. 79-80 (emphasis added) (internal citations removed).

In fact, Plaintiff asks this Court to order:

That *the lack of any ground water curtailment* under the Compact by the State Engineer while at the same time curtailing more senior surface water rights is contrary to Colorado and federal law, unconstitutional, in excess of authority, arbitrary and capricious, and resulting in injury to the Foundation's water rights.

Complaint at p. 14, para. 92.B. (emphasis added).

Plaintiff reiterates this requested relief in its Response to the Motion for Joinder:

. . . . 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).

Response at 5, para. 17 (emphasis added).

. . . [T]his 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.

Response at 7, para. 20 (emphasis added).

Plaintiff's prayers for relief reveal that Plaintiff is in fact asking this Court to direct how the State Engineer administers water use for Compact compliance:

Wherefore, the Foundation respectfully requests that the Court enter declaratory judgment in favor of the Foundation and consistent with the foregoing allegations and including: . . . An Order enjoining the current administrative management practices regarding water in the Republican River Basin . . .

Complaint at 18, para. B.

Regardless of any declaratory relief that Plaintiff might obtain, the State Engineer must continue restricting water use in the Republican River basin because Colorado must continue to meet its obligations under the Compact. If this Court grants the relief that Plaintiff requests and orders the Engineers to stop curtailing surface water users unless the Engineers first curtail groundwater users, then the result is inevitably that some groundwater users will be curtailed. There is no other type of water use to curtail.

If Plaintiff truly does not seek an order from this Court that would result in the curtailment of groundwater use, then it appears that Plaintiff seeks a mere

advisory opinion that would have no effect on the administration of water in the Republican River basin. Such an opinion would do nothing to resolve any controversy between the parties.

Finally, it is unclear whether Plaintiff still claims that, separate from Compact compliance concerns, the Engineers must curtail groundwater use in the Northern High Plains Designated Ground Water Basin that Plaintiff alleges injures its water rights. *See* Complaint at 9, para 58. Plaintiff states that it would only be able to “seek to curtail well users to protect its surface water rights from injury after the NHP Basin is redrawn by the Commission.” Response at 4, para 14. It appears that this claim of injury is separate from Plaintiff’s claims concerning Compact administration, because Plaintiff alleges that the State Engineer has the authority to curtail wells in the Northern High Plains Designated Ground Water Basin for Compact compliance regardless of whether the wells withdraw designated groundwater. *See* Complaint at 16-18, paras. 108-118. In any event, the declaratory relief that Plaintiff seeks would require curtailment of some well owners for Compact compliance purposes. Plaintiff should identify and attempt to join them.

*B. Unidentified well owners in the Northern High Plains Designated Ground Water Basin have an interest in this action that requires joinder.*

In addition to stating that it does not seek curtailment of groundwater use, Plaintiff contends that no well owner need be joined in this declaratory judgment action because the State Engineer is the only party that must be bound by the Court's judgment to effectuate the relief that Plaintiff seeks. *See* Response at 1-8. This argument ignores the fact that, if Plaintiff prevails, the State Engineer would be forced to issue orders to currently unidentified well owners who would then be required to turn off their wells or otherwise alter their operations to either prevent alleged injury to Plaintiff's water rights or facilitate Compact compliance. These well owners are indispensable parties in this action.

Moreover, every claim concerning water rights is a claim that seeks to change how the State Engineer's administers water rights, because the State Engineer must do so in accordance with court decrees. If such claims never required joinder of parties other than the State Engineer, then the Colorado Supreme Court would not have confronted this issue head-on in *Gardner v. State*, 614 P.2d 357, 360-361 (Colo. 1980) and *Southern Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226 (Colo. 2011). *See* Motion for Joinder at 9-14. It is sleight of hand to suggest that Plaintiff only seeks relief against the Engineers and not the well owners whom the Engineers would curtail.



Failure to join these well owners could result in many judicial challenges to the State Engineer's orders on the grounds that well owners are not bound by the judgment entered in their absence. And if some well owners successfully argue in subsequent proceedings that they are not bound by the judgment in this proceeding, then the State Engineer could incur inconsistent obligations with respect to whether well owners in the Northern High Plains Designated Ground Water Basin are responsible for preventing alleged injury to Plaintiff's water rights or must be curtailed for Compact compliance purposes. The absence of these well owners risks inconsistent decisions, multiple law suits, and could result in a judgment that may not finally resolve the controversy before this Court. *See Dunne v. Shenandoah Homeowners Ass'n*, 12 P.3d 340, 344 (Colo. App. 2000). Also, as in *Dunne v. Shenandoah*, these well owners could have conflicting interests because the relief that Plaintiff seeks might require curtailment of some wells and not others. *See id.*

Plaintiff's reliance on *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968), and *Bender v. Dist. Court In & For El Paso County*, 291 P.2d 684 (Colo. 1955), is misplaced. *See* Response at 7, paras. 21(a), (b). In *Fellhauer*, the plaintiff was the well owner whose wells were arbitrarily curtailed by the Division Engineer. *See Fellhauer*, 447 P.2d at 993. In *Bender*, the plaintiff sought relief against only one junior water user in the aquifer even though there were other juniors withdrawing water from the same aquifer. *See Bender*, 291 P.2d at 686. In both cases, the

owners of the wells to be curtailed or unlawfully curtailed were the parties who were bound by the judgment.

Here, Plaintiff has neither joined nor attempted to identify the well owners who would be curtailed if Plaintiff obtains the relief it seeks. The Engineers are not suggesting that Plaintiff join all well owners in the Northern High Plains Designated Ground Water Basin, just those that Plaintiff alleges should be curtailed. No matter how many well owners that might be, their great numbers do not diminish the interest that each well owner has in this action.

All well owners in the Northern High Plains Designated Ground Water Basin, regardless of whether Plaintiff seeks to have them curtailed for Compact compliance purposes, have a strong interest in Plaintiff's second and third claims for relief. Plaintiff asks this Court to declare unconstitutional the very statutes that protect the well owners' ability to withdraw groundwater without regard to injury to surface water rights. In fact, many of the well owners in the Northern High Plains Designated Ground Water Basin were responsible for seeking the legislative protection from their elected officials that became Senate Bill 52. Plaintiff suggests that merely having the ability to contest a redrawing of the boundaries of the Northern High Plains Designated Ground Water Basin would allow well owners to protect their interests. *See* Response at 5, para. 15. But if well owners would be bound by this Court's declaring Senate Bill 52 unconstitutional,

then they must have the opportunity in this action to defend the statute.

Essentially, Plaintiff argues that well owners are welcome to protect their interests after Plaintiff succeeds on its claims in their absence.

Finally, Plaintiff takes the untenable position that even well owners who conclude that they have an interest in this declaratory judgment action should not be allowed to intervene. *See* Plaintiff's Response to Yuma County Water Authority's Motion to Intervene, dated May 21, 2015. Plaintiff seeks to undo the current administrative regime in the Northern High Plains Designated Ground Water Basin without the presence of the water users who would be subject to the new regime that Plaintiff proposes.

*C. Plaintiff has not identified the wells that allegedly injure its water rights and that Plaintiff alleges must be curtailed to meet Colorado's obligations under the Compact.*

The Engineers argued in their Motion for Joinder that the resume notice provisions of section 37-92-302(3), C.R.S. (2014), do not relieve Plaintiff of the joinder requirements of C.R.C.P. 19 and C.R.C.P. 57(j) and the service requirements of C.R.C.P. 4. *See* Motion for Joinder at 8-14. Plaintiff does not address these arguments or contend that resume notice is proper here.

Rather, Plaintiff acknowledges that C.R.C.P. 4, 19, and 57(j) apply, but states that it is not required to attempt to identify and join interested parties pursuant to the procedures of C.R.C.P. 4 because there are no well owners who should be joined.

*See* Response at 1-8. Plaintiff also requests that, if this Court determines that there are well owners that should be joined, that this Court authorize notice by publication under C.R.C.P. 4(g).

Both of Plaintiff's arguments put the cart before the horse. Plaintiff has not identified the wells that allegedly injure its water rights or that Plaintiff alleges should be curtailed to meet Colorado's obligations under the Compact before the State Engineer may lawfully curtail surface water rights. *See, e.g.* Response at 6-7, para 20. This lack of information, coupled with the basin-wide implications of Plaintiff's factual and legal allegations, force the Engineers to assume that any well owner in the Republican River basin could be an indispensable party who would be prejudiced by not being present to protect his or her interests. In short, the Engineers cannot determine from Plaintiff's allegations which well owners are indispensable parties – only that some well owners must be. Also, in its Response to Yuma County Water Authority's motion to intervene, dated May 21, 2015, Plaintiff appears to state that only the South Fork Republican basin is at issue here. *See* Response to Motion to Intervene at 6-8, paras. 21-26. This statement further confuses the identity of the well owners that Plaintiff claims must be curtailed.

Plaintiff should be required to identify well owners who would be curtailed before its surface water use is curtailed and attempt to join them under the

procedures of C.R.C.P. 4. Before authorizing notification by publication, Plaintiff must first make an effort to identify and serve interested parties. *See* C.R.C.P. 4(g). If that proves too burdensome, then Plaintiff could move this Court to proceed with service by publication. *See id.* Before granting such a request, this Court must be satisfied that Plaintiff has made the necessary effort. *See id.*

*D. The Colorado Ground Water Commission has an interest in this action that requires joinder.*

The Colorado Ground Water Commission is undoubtedly interested in Plaintiff's second and third claims for relief, which implicate statutes that the Commission has been tasked with implementing and enforcing. *See* Motion for Joinder at 14-15. The Response highlights this interest as Plaintiff seeks to obtain a declaratory judgment that would allow it to petition the Ground Water Commission to change the boundaries of the Northern High Plains Designated Ground Water Basin. *See* Response at 5, para. 15; 9-11, paras. 29-34. If the relief that Plaintiff seeks is to be binding on the Ground Water Commission, then this action is the only place for the Commission to confront Plaintiff's arguments concerning the validity of the statutes at issue.

WHEREFORE, the Engineers respectfully request that this Court order the Plaintiff to make reasonable efforts to determine the identity and location of the well owners and wells that may be affected by this action and to proceed with service under the pertinent provisions of C.R.C.P. 4 and 19 in order to avoid dismissal under

C.R.C.P 12(b)(6). The Engineers also respectfully request that this Court order Plaintiff to join the Colorado Ground Water Commission under the pertinent provisions of C.R.C.P. 4 and 19 in order to avoid dismissal under C.R.C.P 12(b)(6).

Dated this 29<sup>th</sup> day of May, 2015.

CYNTHIA H. COFFMAN  
Attorney General

*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.*

*/s/ Preston V. Hartman*

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## CERTIFICATE OF SERVICE

This is to certify that on this 29<sup>th</sup> day of May, 2015, I caused a true and correct copy of the foregoing **STATE AND DIVISION ENGINEERS' REPLY IN SUPPORT OF THEIR MOTION FOR JOINDER** 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
Colorado Department of Natural Resources	Defendant	Ema I. G. Schultz Preston V. Hartman
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.*

*/s/ Pauline Wilber*

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Pauline Wilber