

<b>WATER DIVISION NO. 1, STATE OF COLORADO</b> DISTRICT COURT, WELD COUNTY 901 9 <sup>TH</sup> Avenue Greeley, CO 80632	DATE FILED: July 1, 2015 10:41 AM
<b>Plaintiff:</b> The Jim Hutton Educational Foundation, Colorado non-profit corporation	<b>▲ COURT USE ONLY ▲</b>
v.	
<b>Defendants:</b> 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	Case No.: 2015CW3018 Division: 1
<b>ORDER RE: YUMA COUNTY WATER AUTHORITY’S MOTION TO INTERVENE</b>	

This matter comes before the court on Yuma County Water Authority Public Improvement District’s (“YCWA”) *Motion to Intervene*. The Jim Hutton Educational Foundation (“Foundation”) filed a response, and YCWA filed a reply. The court has considered the motion, response, and reply and now enters the following findings and conclusions.

**I. BACKGROUND**

The Foundation filed a complaint in Colorado Water Court Division 1, seeking declaratory judgment and injunctive relief. First, the Foundation requests a determination from this court that the Defendants’ current administration and management of water in the Republican River basin is unlawful and asks for the court to enjoin such administration and management practices.

The Northern High Plains Basin (“NHP Basin”) covers the aerial extent of the portions of the Ogallala aquifer underlying Colorado, and includes all ground water within the Republican River basin. In its complaint, the Foundation claims ground water pumping in the NHP Basin is causing surface flows in the Republican River to increasingly decline. This ground water pumping, the Foundation claims, is preventing Colorado from meeting its Republican River Compact obligations. The Foundation asserts the Defendants are focused on curtailing only surface water diversions in order to meet Colorado’s compact obligations, and Defendants refuse to also curtail ground water diversions in the NHP Basin. Additionally, the Foundation contests the Defendants’ administration and management of Bonny Reservoir.

The Foundation further asserts the provisions of Senate Bill 52 (“SB-52”) are unconstitutional as applied to designated ground water basins. The Foundation also raises challenges to the constitutionality of Colorado’s Ground Water Management Act of 1965 (“Act”). The Foundation claims the Act is unconstitutional to the extent it precludes the Defendants from

curtailing ground water depletions along with surface water depletions, in order to achieve compact compliance.

YCWA represents owners of ground water rights in Yuma County who withdraw water from the NHP Basin. In addition, YCWA owns a significant number of the senior surface water rights on the North Fork of the Republican River. YCWA moves to intervene in this action pursuant to Rule 24(a)(2), C.R.C.P. and Rule 57(j), C.R.C.P.

## **II. LEGAL STANDARDS**

When considering a motion to intervene, the court must, as a threshold matter, determine whether the motion was timely filed. *Law Offices of Andrew L. Quiat, P.C. v. Ellithorpe*, 917 P.2d 300, 303 (Colo. App. 1995). “The determination of the timeliness of a motion to intervene is a matter which rests within the sound discretion of the trial court, which must weigh the lapse of time in light of all the circumstances of the case, including whether the applicant was in a position to seek intervention at an earlier stage in the case.” *Id.*

As a matter of right, any party shall be permitted to intervene in any action, provided the party establishes three factors: (1) The movant must have an interest relating to the property or transaction that is the subject of the action; (2) the movant’s ability to protect that interest may be impaired or impeded by the disposition of the action; and (3) the movant’s interest is not adequately represented by an existing party. C.R.C.P. 24(a)(2). All three factors must be met to establish a right of intervention. *See Denver Chapter of the Colorado Motel Ass’n v. City and County of Denver*, 374 P.2d 494, 527 (Colo. 1962). Courts must liberally construe this rule so as to avoid multiplicity of lawsuits and so that all related controversies may be settled, as much as possible, in one action. *Senne v. Conley*, 133 P.2d 381, 383 (Colo. 1943).

Additionally, Rule 57(j), C.R.C.P. and C.R.S. § 13-51-115 provides that in an action for declaratory judgment, a party may intervene if that party “[has] or claim[s] any interest which would be affected by the declaration.” Any party who is indispensable and necessary for the complete and effective determination of the controversy must be permitted to join the action. *E.g. Beacom In & For Seventeenth Judicial Dist., Adams Cnty. v. Bd. of Cnty. Comm’rs of Adams Cnty.*, 657 P.2d 440, 447 (Colo. 1983); *Dunne v. Shenandoah Homeowners Ass’n, Inc.*, 12 P.3d 340, 344 (Colo. App. 2000). In assessing indispensability, a court may consider injury to the absent party, danger of inconsistent decisions, avoidance of multiplicity of suits, and the possibility that a decision will not fully resolve the controversy. *Dunne*, 12 P.3d at 344.

## **III. ANALYSIS**

As a threshold matter, after considering the circumstances existing in this case, the court finds YCWA’s motion to intervene to be timely filed. The Foundation filed its complaint on February 23, 2015, and served the complaint on Defendants on February 27, 2015 and March 3, 2015. The Defendants filed an unopposed motion to extend the deadline for filing an answer on March 13, 2015, which was granted by the Court. The Defendants filed their answer on April 17, 2015. YCWA filed its motion to intervene on April 30, 2015 which was approximately sixty days after the complaint was served on Defendants and thirteen days after the Defendants filed

their answer. It was not unreasonable for YCWA to wait until the Defendants filed their answer before filing a motion to intervene.

The Foundation seeks, among other relief, an order finding the current administration and management of water in the Republican River basin is unlawful and for the court to enjoin such practices. Although YCWA's surface water rights are on the North Fork of the Republican River, and the Foundation's complaint concerns administration of water rights on the South Fork of the Republican River, the Republican River Compact does not require administration of each sub-basin independently. Rather, excess water originating in one sub-basin may be used by another sub-basin, to the extent that Colorado does not exceed its total statewide allocation. *See Final Settlement Stipulation, Dec. 15, 2002, IV.B.3.* Thus, if excess water exists on the South Fork, the state may use that water to meet compact obligations on the North Fork. The court agrees with YCWA that changes to the administrative practices on the South Fork can affect administration on the North Fork. Therefore, the court finds YCWA has an interest in the property or transaction that is at issue in this litigation.

Additionally, YCWA represents ground water users who withdraw ground water from the NHP Basin. The Foundation claims that, because withdrawals from the NHP Basin are causing decreased surface flows, the Defendants cannot lawfully curtail surface water rights to achieve compact compliance without also curtailing ground water diversions. If the court rules in favor of the Foundation and finds the Defendants cannot curtail solely surface water diversions, the state would need to look elsewhere for water to meet its compact obligations. One likely solution would be to curtail ground water diversions in the NHP Basin. Thus, in addition to its surface water rights, YCWA has a distinct interest, by means of its representation of ground water users in the NHP Basin, in the property or transaction that is the subject of this action.

Next, if the court enters declaratory judgment in favor of the Foundation, YCWA's surface water rights or its members' ground water rights may be curtailed as the state searches for ways to meet its compact obligations. This curtailment may occur even before an action is brought before the Colorado Ground Water Commission to redraw the NHP Basin boundaries. Furthermore, a hearing before the Commission would only concern redrawing the basin's boundaries, while the action currently before this court seeks a much broader determination that current administration in the basin is unlawful. If the court finds the Defendants are required to curtail ground water diversions, the NHP Basin boundaries may need to be redrawn to permit the Defendants to properly administer those ground water rights. Consequently, preventing YCWA from intervening at this point will limit YCWA to participating after the court has already determined the basin's boundaries must be withdrawn to permit lawful administration. Thus, the court finds disposition of this action may impede or impair YCWA's ability to protect its interests.

YCWA has also shown that its interests cannot be adequately represented by existing parties. In interpreting the final element required for intervention, the Colorado Supreme Court has held that if an absentee party's interest is similar, but not identical, to that of an existing party, intervention ordinarily should be allowed, "unless it is clear that the [existing] party will provide adequate representation to the absentee." *Cherokee Metropolitan Dist. v. Meridian Service Metropolitan Dist.*, 266 P.3d 401, 407 (Colo. 2011). Here, although the Defendants,

including Colorado Parks and Wildlife (“CPW”), have interests similar to YCWA’s interests, those interests are not identical. For example, CPW owns surface and ground water rights in the Republican River Basin, but those rights are not the same rights YCWA owns. Thus, it is not clear to the court that existing parties will adequately represent YCWA’s distinct interests. Accordingly, the court finds YCWA meets the final element required for intervention.

Similarly, as to the Foundation’s challenges to the constitutionality of SB-52 and the Ground Water Management Act of 1965, the court finds YCWA meets all three elements required for intervention in the Foundation’s action for declaratory relief. Given that these pieces of legislation protect the rights of ground water users in designated ground water basins, YCWA has an interest in the property or transaction that is the subject of this litigation. Further, a declaration by the court that these laws are unconstitutional would necessarily impair YCWA’s ability to protect its interests. Finally, as explained above, YCWA’s interests are not identical to any existing party. Therefore, the court finds YCWA’s interests cannot be adequately represented by an existing party. Thus, the court concludes YCWA may intervene in this action for declaratory relief pertaining to the constitutionality of SB-52 and the Groundwater Management Act.

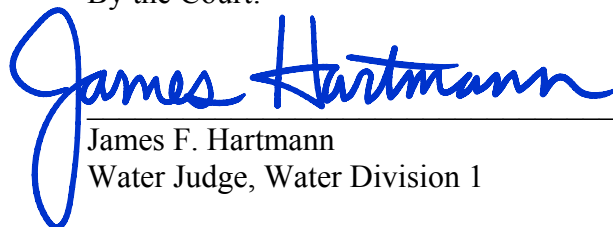
An analysis under Rule 57(j), C.R.C.P. leads the court to similar findings and conclusions. If this court issues declaratory judgment in favor of the Foundation, YCWA’s interests in its surface and ground water rights would be affected. Additionally, YCWA is an indispensable party and necessary to the complete and effective determination of this case. First, YCWA’s water rights may be injured if it is not permitted to intervene in this action and defend the basin’s current administrative regime. Second, permitting YCWA to intervene will avoid a multiplicity of suits. Third, it prevents the court from potentially having to set aside its decision later because it does not fully and finally resolve the controversy as to all parties with a substantial interest that may be affected by the court’s judgment. Thus, pursuant to Rule 57(j), C.R.C.P., YCWA will be permitted to intervene in this action for declaratory judgment.

#### **IV. ORDER**

Based on the foregoing, YCWA’s *Motion to Intervene* is granted. YCWA’s answer is hereby accepted. YCWA is granted leave to file a motion to join any other necessary parties to this action.

Dated: July 1, 2015.

By the Court:

  
James F. Hartmann  
Water Judge, Water Division 1