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: July 28, 2015 5:53 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; Colorado Division of Water Resources; and Colorado Division of 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 MOTION FOR RECONSIDERATION AND/OR CLARIFICATION, AND FOR SERVICE BY PUBLICATION PURSUANT TO RULE 4(G)	

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation ("Foundation"), acting by and through undersigned counsel, hereby respectfully moves for reconsideration and/or clarification of the Court's Order re: State and Division Engineers' Motion for Joinder dated July 8, 2015 and filed in the above-captioned matter on July 9, 2015 (the "Order"), and for an order for service by publication pursuant to Rule 4(g).

1. Certificate of Conferral. Pursuant to Rule 121 §1-15(8), C.R.C.P., undersigned counsel conferred with counsel for the State Engineer, the Division Engineer for Water Division No. 1, the Colorado Division of Water Resources (collectively "Engineers"); counsel for the Colorado Division of Parks and Wildlife ("CPW"); and counsel for Intervener, the Yuma County Water Public Improvement District ("YCWA"); and they indicated that they do not consent.

A. Introduction.

2. In the Order, the Court held in relevant part that (i) "pursuant to Rule 19(a), C.R.C.P. the ... well owners within the NHP are indispensable parties;" (ii) that the "designated groundwater well owners in the NHP Basin must be joined as parties to the present action;" and (iii) that the

"Foundation must serve all well owners in the NHP Basin who may be affected by its requested relief pursuant to Rule 4, C.R.C.P." Order, pp. 4, 6. This Motion does not involve the Court's findings in the Order regarding the Colorado Ground Water Commission.

3. The Foundation moves the Court to reconsider and/or clarify its finding that the well owners in the Northern High Plains Designated Groundwater Basin ("NHP Basin") are indispensable parties. Participation in the litigation by interested well owners would allow them to protect the interest identified by the Court, but indispensable party status for all well owners prejudices the Foundation's ability to protect its surface water rights. If service is not feasible and/or if the Foundation fails to obtain service on each and every one of the thousands of well owners—an exceedingly likely possibility—then the Foundation risks getting its Complaint dismissed pursuant to Rule 12(b)(6) for failure to join all of the indispensable parties.

4. The Foundation respectfully disagrees that the type of interest the Court has attributed to the well owners is such that they are indispensable, particularly because such a determination would leave the Foundation without an adequate remedy at law. This would result in manifest injustice particularly given that the Foundation has not alleged any claims for relief against the well owners. These concerns can be avoided if the Court determines that the well owners are not indispensable parties pursuant to Rule 19(b) and do not need to be joined as named parties, but instead, that their potential interest in the Foundation's claims entitles them to notice by newspaper publication pursuant to Rule 4(g)(2) and the right to determine whether or not to participate in this case.

B. If the well owners cannot be feasibly joined and are deemed indispensable as a result of the analysis in Rule 19(b), then the Foundation would be denied its right to due process.

5. The well owners can only be joined pursuant to Rule 19(a) if feasible. "Joinder is feasible, provided that (1) the absentee is subject to service of process, (2) his joinder will not deprive the court of jurisdiction, and (3) he has no valid objection to venue of the court. *Jacobucci v. Dist. Court In & For Jefferson Cnty.*, 541 P.2d 667, 675 (Colo. 1975). Given that the Water Court does not have jurisdiction over designated groundwater it is not clear that mandatory joinder is feasible. *See State ex rel. Danielson v. Vickroy*, 627 P.2d 752, 758 (Colo. 1981)(designated groundwater is excluded from water matters that are within exclusive jurisdiction of water courts); *see also* id. at 759("matters involving designated groundwater [are] committed exclusively to the administrative agencies and courts prescribed by the [Groundwater] Management Act"). "Where joinder is impossible (either for want of jurisdiction or because it would destroy venue), the court then considers whether the action should be dismissed. Rule 19(b)." Stephen A. Hess, *Colorado Handbook on Civil Litigation*, §5:1 at p. 338 (2014-2015 ed.).

6. If the Foundation is unable to obtain proper service over the thousands of well owners in the NHP Basin—an exceedingly likely possibility given the issues discussed above and in Section D.14 below—then pursuant to Rule 19(b) the Court is required to determine whether "in the interest of justice the action should proceed with the parties before it, or should be dismissed,

the absent person being thus regarded as indispensable." Rule 19(b) lists four factors to consider in assessing such a decision: (i) "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties"; (ii) "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided"; (iii) "whether a judgment rendered in the person's absence will be adequate"; and (iv) "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." With regard to the fourth factor, the answer is no. The Foundation would not have an adequate remedy at law. Such a dismissal, therefore, would prejudice the Foundation because "Colorado courts have consistently acknowledged that senior surface owners who can prove actual injury are guaranteed due process." Ari J. Stiller-Shulman, *No Seat at the Water Table: Colorado's New Groundwater Basin Statute Leaves Senior Surface Rights in the Lurch*, 84 U. Colo. L. Rev. 819, 852-53 (2013).

C. The Complaint does not assert any claims against the Well Owners in NHP Basin, so they are not indispensable and should not be required to participate as named parties.

7. Joinder rules are intended to deal with situations in which a third party should be brought into the lawsuit because they can be aligned as a plaintiff or defendant based on the claims for relief. *See Bender v. Dist. Court In & For El Paso Cnty.*, 291 P.2d 684, 687 (1955). The Foundation is not asserting any claim or right to relief against the well owners in the NHP Basin. The well owners in the NHP Basin are not parties to the contracts involving Bonny Reservoir, are not responsible for the administration of water in the Republican River basin, and they are not responsible for the administration of water for Compact compliance. Any order issued by the court would not be directed at the well owners. Therefore, it is inappropriate for well permit owners to be named defendants in this lawsuit and require their participation in this matter.

8. The Court found that the well owners in the NHP Basin are indispensable parties because they have "an interest in the court upholding the constitutionality of SB-52 and maintaining the current administration practices of the Republican River basin." Order, p. 4. Specifically, the Court noted that because the current version of C.R.S. §37-90-106(a)(1) provides the well owners in the NHP Basin with "some security and assurance that there [*sic*] wells cannot be removed from the boundaries of the groundwater basin" that they have a "significant interest in the Foundation's requested relief." Order, p. 3. The Court also found that if it declares SB-52 unconstitutional and that its provisions do not apply to the NHP Basin that the "well owners' ability to protect their interests may be drastically impaired." *Id*.

9. However, it is important to recognize that at the time the subject well permits were issued SB-52 (2010) had not been enacted. The well owners had no such security and assurances. Rather, the law at the time their well permits were issued required that the boundaries of the designated groundwater basin be altered "as future conditions require and factual data justify." *See Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 31-32 (Colo. 2006), *as modified on denial of reh'g* (Dec. 4, 2006)(interpreting the pre-2010 version of C.R.S. §37-90-106(1)(a) as requiring the Colorado Ground Water Commission to redraw the boundaries of a designated groundwater basin to exclude groundwater that has more than a de minimis impact on surface

water and as such cannot be properly classified as designated groundwater). Moreover, given the moratorium on new large-capacity well permits agreed to in the Republican River Compact ("Compact") Final Settlement Stipulation dated December 15, 2002 between Colorado, Kansas, and Nebraska, no large-capacity well permits have been issued since before SB-52 was enacted in 2010. Therefore, if the Court determines that SB-52 is unconstitutional as applied to the NHP Basin such an order would not change the law under which the subject well permits were issued.

10. Turning to the Foundation's claims regarding administration of its surface water rights, the requested relief is an order that the current administration of its surface water rights is unlawful and is causing injury to the Foundation's water rights. *See* Complaint ¶92. A ruling in the Foundation's favor will not necessarily result in administration of groundwater under the Compact given the very small amount of depletions associated with the remaining surface water rights in the NHP Basin. The Engineers have thus far elected not to curtail groundwater to meet the Compact despite having the results of the RRCA Ground Water Model since 2003 (*see* Complaint ¶33-40, 68, 83, 97).

11. Moreover, any final ruling entered in the above-captioned matter would not directly or indirectly subject the well owners to the Compact for the first time. The well owners are already subject to the Compact. When the State of Colorado ratified the Compact in 1942, it became binding on the State of Colorado and its citizens. *See Frontier Ditch Co. v. Se. Colorado Water Conservancy Dist.*, 761 P.2d 1117, 1123 (Colo. 1988); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 58 S. Ct. 803, 809 (1938). In addition, the Special Master for the United States Supreme Court has already 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. Therefore, current law already dictates that well owners in the NHP Basin are subject to administration for Compact compliance. In fact, the Colorado Groundwater Management Act provides that

> Any person required by valid order of ... the state engineer ... to cease diversions of designated groundwater or replace depletions caused by diversions of designated groundwater, and whose failure to adhere to the order or rule results in the violation of an interstate compact, is liable for all direct, actual, and necessary expenses incurred by the state of Colorado in performing any action, including the purchase of water or payment of damages, necessary for the state of Colorado to remedy the violation of such compact.

C.R.S. §37-90-111.5(6). The well owners in the NHP Basin do not have a legally protectable right to the continuation of unlawful Compact administration by the Engineers simply because such administration benefits them. The well owners only have a legal right to lawful administration. An order from this Court enjoining the Engineers from continuing its unlawful administration of the Foundation's surface water rights does not alter the vested legal rights of the well owners in the NHP Basin. All water use in Colorado is subject to lawful administration.

12. Based on the foregoing, the Foundation respectfully disagrees that the well owners must be named parties and that they are indispensable to the above-captioned matter. Such an order

requiring the mandatory joinder of all persons affected by a statute in an action challenging the validity of such statute would result in manifest injustice and render the otherwise valuable remedy of a declaratory judgment impractical and worthless. *See, e.g., Blooming Grove v. Madison*, 81 N.W.2d 713, 717(Wis. 1957)("We do not construe the statute as requiring that where a declaratory judgment as to the validity of a statute or ordinance is sought, every person whose interests are affected by the statute or ordinance must be made a party to the action. If it were so construed, the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity of legislative enactments, either state or local, since such enactments commonly affect the interests of large numbers of people"). Moreover, their joinder is not required for the ruling to be binding on the well owners. *See McNichols v. City & Cnty. of Denver*, 74 P.2d 99, 102 (Colo. 1937)("A judgment against [a governmental body] or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit").

D. Given the Court's findings, the well owners should be given notice by publication and the right to decide whether or not to participate.

13. While the Foundation respectfully disagrees, given the Court's finding that the well owners have an interest in this case they should be given notice by newspaper publication pursuant to Rule 4(g)(2) and the opportunity to decide whether or not to participate. Rule 4(g) allows for service by mail or publication "in actions affecting specific property or status or other proceedings in rem." This is an action affecting specific property and is a proceeding in rem. *See S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1234 (Colo. 2011)("water rights are decreed to structures, rather than individual owners ... and are proceedings in rem"). If the Court is satisfied that efforts to obtain personal service on the thousands of well owners would have been to no avail, then it shall either order the Foundation to send notice by registered or certified mail or order publication of the process in a newspaper. *See* Rule 4(g).

14. The Foundation has not yet sought to obtain personal service over the well owners in the NHP Basin because it believes any efforts to obtain personal service on all of the thousands of well owners would be to no avail for the reasons discussed above and as follows:

a. While the Foundation was under the impression that there were approximately 4,100 high-capacity wells in the NHP Basin, the information provided by the Engineers identifies a total of 6,308 surface water rights and well permits (not including small-capacity/exempt wells). Of the 6,308 rights, 162 appear to be classified as surface water rights and the remaining 6,146 appear to be classified as large-capacity designated groundwater wells. *See* the Excel Spreadsheet filed by the Engineers in the above-captioned matter on July 17, 2015. As required by Rule 4(g), this excel file is already on file with the Court and constitutes the limited address information available for the large-capacity well owners in the NHP Basin, and if an address is missing, incomplete, or otherwise incorrect therein, the address and last known address are unknown, as explained further below.

b. The Engineers recognized a number of concerns regarding the accuracy of the well owner information in their records in the Notice of List of Water Rights in the NHP Basin filed with this Court on July 17, 2015. For example, despite the requirement in C.R.S. §37-90-143 to notify the State Engineer of any changes to the name or mailing address within sixty-three days of the change, the Engineers acknowledge that well owners may fail to comply with this statute. Further, as the Engineers recognize, they do "not track title ownership" and do "not verify the information submitted to their offices." At the very least, some of the inaccuracies in the database are evident in the lack of contact information and/or addresses associated with a number of the wells in the database. In addition, some entries have incomplete addresses such as "RR" or "Route 3" without identifying a particular address on the road. In addition, the Engineers note that "[i]t is highly likely" that contact information for some of the wells is not the title owners. For example, some contact information might be for a lessee of the irrigated ground, a ranch manager, or a previous owner. In short, there are numerous potential sources of error in the database (including the fact that all the information is manually entered).

c. Further, the requirement to provide the State Engineer with a mailing address for well permits is not compatible with personal service. The list provided by the Engineers includes hundreds of post office boxes rather than street addresses.

d. There is also no data on the contact information for the owners of the small-capacity (aka exempt) wells within the NHP Basin in the list provided by the Engineers and it is the Foundation's understanding that such information is not readily available. While the Foundation does not believe small-capacity or exempt wells within the NHP Basin will be affected by this litigation (and the State Engineer appears to agree since any information on such wells was excluded), the Order does not distinguish between large-capacity wells and small-capacity wells in the NHP Basin.

e. In conclusion, the database provided by the Engineers has missing contact information and inaccuracies that will make it impossible to personally serve every well owner in the NHP Basin. To be clear, the Foundation is grateful to the Engineers for providing the information and the problems identified above are not with how the Engineers compiled the information, but rather are problems with the data available to the Engineers.

f. Moreover, the cost associated with personally serving all of the thousands of well owners in the NHP Basin would be very expensive and overly burdensome for a non-profit entity without actually accomplishing the objective of getting all of the well owners served.

15. Given both the sheer number of the well owners and the fact that the Foundation is not asserting any claims against them, notice by publication is consistent with the special statutory notice procedures set forth in the Water Right Determination and Administration Act of 1969 ("Water Right Act") and the Groundwater Management Act of 1965, *see* C.R.S. §§37-92-302(3),

37-90-112. In *Southern Ute Indian Tribe*, the Supreme Court said that personal service is required only in limited circumstances, specifically in "actions where relief is sought against a named party, as opposed to an application affecting all water rights on a stream system." 250 P.3d at 1235(*emphasis added*). While the Foundation is seeking injunctive relief against the named state agency entities, the Foundation is not seeking any relief against the well owners in the NHP Basin, so personal service should not be required.

16. The General Assembly intended for the 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 proceeding ... and, whether or not they do so, bind them to the results of the adjudication." *Id*. at 1236. Here, the Court reasoned that all of well owners in the NHP Basin have an interest because the Foundation is challenging "the Engineers' entire administrative practice in the Republican River basin." Order, p. 4. "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 [allowing notice by publication]." *Southern Ute Indian Tribe*, 250 P.3d at 1237.

17. While the Foundation appreciates the Court's reasoning on why resume-notice does not apply, the situation at hand is unique. Although the Foundation's water rights are subject to the Water Right Act, the Court is requiring the Foundation to provide notice to well owners within a designated groundwater basin. These well owners are not subject to the exclusive jurisdiction of the Water Court or the majority of the Water Right Act. *See* C.R.S. §37-92-602(1)(a)(article 92 does not apply to designated groundwater basins, except for 37-92-201 and 37-92-202). However, similar to the notice by publication allowed via the resume-notice procedure in the Water Right Act, the Groundwater Management Act requires notice by "publication in a newspaper of general circulation in each of the counties concerned ... once each week for two successive weeks." C.R.S. §37-90-112(1). Therefore, both users of surface water and designated groundwater are familiar with and aware of the need to review the local newspaper each month for potential cases that could affect their water rights. The situation here is no different.

18. The Colorado Supreme Court recognized in *Vickroy* that there "may be situations which will involve a combination of designated ground water and waters of the state. ... We do not wish to suggest that in such a situation a procedure consistent with legislative intent could not be fashioned which would permit the matter to proceed in a single court. ... This potential problem should be considered in the context of the facts in which it may arise." 627 P.2d at fn. 10(*emphasis added*). The legislative intent for notice is clear under both the Water Right Act and the Groundwater Management Act, particularly when notice must be provided to all water users within a geographic region. *See* C.R.S. §§37-92-302(3), 37-90-112. This type of notice—service by publication—has also been upheld by the United States Supreme Court. *See Southern Ute Indian Tribe*, 250 P.3d at 1236-37. Both statutory schemes provide for service by publication to provide proper notice to other water users to allow them to determine whether or not to participate and, whether or not they do so, bind them to the results of the adjudication. Therefore, the legislative intent is also clear that water users have a right to decide whether or not to participate in an action that may indirectly or directly affect their water rights.

19. The right to decide whether or not to participate in an action challenging the constitutionality of a statute is further supported by the analogous situation in *Lucchesi v. State*, 807 P.2d 1185, 1193-1194 (Colo. App. 1990). In *Lucchesi*, the attorney general argued that he was not an indispensable party and that by joining him as a party to the case challenging the constitutionality of a statute 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, indicating that while the state has an interest in whether legislation passed by the General Assembly is constitutional, such an interest alone did not make the state an indispensable party, determining only that its joinder would not be improper. *Id*. Not all of the well owners may want to participate in the above-captioned matter, but as it stands the Order deprives the well owners in the NHP Basin of their right to decide whether or not to participate in a case that may affect their groundwater rights, but in which no claims are asserted against them.

20. In the alternative, if the Court does not grant service by publication pursuant to Rule 4(g)(2), the ability to serve the well owners by mail pursuant to Rule 4(g)(1) would be preferable over personal service, but this method would still be subject to the inaccuracies and lack of contact information discussed above.

E. Conclusion.

21. The well owners' interest in the constitutionality of Senate Bill 52 (2010) and the administration of surface water in the Republican River basin is not sufficient to overcome the countervailing consideration that the Foundation would have no remedy if the well owners are considered indispensable. This is particularly true given that the Foundation has not asserted any claims for relief against the well owners. However, if the well owners were given notice by newspaper publication and the option to participate in this case, such an approach would avoid the issues associated with mandatory joinder and retain the well owner's right to decide whether or not to participate. Such an approach is consistent with the legislative intent of both the Water Right Act and the Groundwater Management Act.

22. WHEREFORE, the Foundation respectfully seeks an order that (i) the well owners in the NHP Basin are not indispensable parties and are not required to participate in the above-captioned matter as named defendants; (ii) allows the well owners in the NHP Basin to determine whether or not they want to participate in this case; (iii) allows for service by publication in the newspapers within each of the counties concerned once a week for five successive weeks pursuant to Rule 4(g)(2); or (iv) if the Court does not grant service by publication and requires service by mail pursuant to Rule 4(g)(1), then the Foundation requests guidance on how to address the incomplete and inaccurate contact information for the well owners; and/or (v) grants such other relief consistent with the concerns raised herein as the Court may find appropriate. A proposed order for publication pursuant to Rule 4(g)(2) and a proposed notice by publication are filed herewith for the Court's convenience.

Respectfully submitted this 28th day of July, 2015.

PORZAK BROWNING & BUSHONG LLP

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

STATE OF COLORADO)
) ss.
COUNTY OF BOULDER)

The undersigned states that she is one of the attorneys for and makes this verification on behalf of the Plaintiff, The Jim Hutton Educational Foundation, and being first duly sworn upon her oath, states that she has read the foregoing Motion and that the facts stated therein are true.

Karen L. Henderson

Subscribed and sworn to before me this 28th day of July, 2015, by Karen L. Henderson.

WITNESS my hand and official seal.
My commission expires:

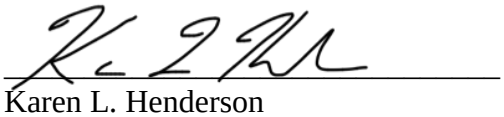
RYAN BELOHRAD
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20094031505
MY COMMISSION EXPIRES SEPTEMBER 18, 2017

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2015, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION, AND FOR SERVICE BY PUBLICATION PURSUANT TO RULE 4(G)** 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 Division of Water Resources	Defendant	Ema I.G. Schultz (CO Attorney General) Preston Vincent Hartman (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)
Colorado Division of Parks And Wildlife	Defendant	Katie Laurette Wiktor (CO Attorney General) Timothy John Monahan (CO Attorney General)
Yuma County Water Authority Public Improvement District	Intervener-Defendant	Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP) John A Helfrich (Brownstein Hyatt Farber Schreck LLP) Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP)



Karen L. Henderson