

<p>DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO</p> <p>Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300</p> <hr/> <p>PLAINTIFF, The Jim Hutton Educational Foundation,</p> <p>v.</p> <p>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>DATE FILED: August 18, 2015 4:39 PM</p> <p>▲ COURT USE ONLY ▲</p>
<p>For Defendants Dick Wolfe, State Engineer; David Nettles, Division Engineer for Water Division No. 1; and Colorado Division of Water Resources CYNTHIA H. COFFMAN, Attorney General EMA I. G. SCHULTZ, Assistant Attorney General, #40117* PRESTON V. HARTMAN, Assistant Attorney General, #41466* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 7th Floor Denver, CO 80203 Telephone: (720) 508-6307 (Schultz); (720) 508-6260 (Hartman) E-Mail: ema.schultz@state.co.us; preston.hartman@state.co.us *Counsel of Record</p> <p>For Defendants Colorado Division of Parks and Wildlife: CYNTHIA H. COFFMAN, Attorney General TIMOTHY J. MONAHAN, Atty. Reg. No. 16971* First Assistant Attorney General KATIE L. WIKTOR, Atty. Reg. No. 38025* Assistant Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 Telephone: (720) 508-6310 (Mr. Monahan) (720) 508-6761 (Ms. Wiktor) tim.monahan@state.co.us; katie.wiktor@state.co.us *Counsel of Record</p>	<p>Case No. 2015CW3018</p> <p>Div.: 1</p>
<p align="center">STATE AND DIVISION ENGINEERS' AND COLORADO DIVISION OF PARKS AND WILDLIFE'S JOINT RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION, AND FOR SERVICE BY PUBLICATION PURSUANT TO RULE 4(G)</p>	

The State Engineer and Division Engineer for Water Division No. 1 (“Engineers”), through counsel, submit this response to Plaintiff’s Motion for Reconsideration and/or Clarification, and For Service by Publication Pursuant to Rule 4(g) (“Motion for Reconsideration”), filed July 28, 2015. The Colorado Division of Parks and Wildlife joins the Engineers’ Response.

I. SUMMARY OF ARGUMENT

This Court’s conclusion that water right owners within the Northern High Plains Designated Groundwater Basin are indispensable parties under C.R.C.P. 19(a) and 57(j) should stand. Plaintiff has not presented new legal authority or previously unknown facts that demonstrate that this Court’s conclusion is based on a manifest error of fact or law, or that there exists other circumstance resulting in manifest injustice. Instead, Plaintiff contends that requiring it to follow C.R.C.P. 4 and serve indispensable parties could result in dismissal of its claims and deny Plaintiff its day in court.

Whether Plaintiff’s claims should be dismissed is not a question that is before this Court. What matters now is that Plaintiff has failed to meet the requirements for service by publication or mail under C.R.C.P. 4(g). As required by the Rule, Plaintiff has not provided the required list of names and addresses of parties that it proposes to serve by publication, and has not even attempted to identify those parties. Plaintiff’s own lack of effort cannot serve as a basis for allowing service by publication or mail under Rule 4(g).

II. ARGUMENT

A. *Plaintiff’s Motion for Reconsideration should be denied.*

Plaintiff’s Motion for Reconsideration does not meet the standard provided by rule:

. . . Motions to reconsider interlocutory orders of the court, meaning motions to reconsider other than those governed by C.R.C.P. 59 or 60, are disfavored. A party moving to reconsider must show more than a disagreement with the court’s decision. Such a motion must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice.

. . . The court may deny the motion before receiving a responsive brief under paragraph 1(b) of this standard.

C.R.C.P. 121, § 1-15(11).

Plaintiff's Motion for Reconsideration makes two arguments: (1) if water right owners in the Northern High Plains Designated Groundwater Basin are indispensable parties, then Plaintiff will be denied its day in court; and (2) well owners in the Northern High Plains Designated Groundwater Basin have nothing at stake in this case because their wells are not entitled to the protections that currently exist, and they have not always enjoyed these protections. Aside from the fact that Plaintiff has already had the opportunity to make these arguments, neither argument establishes that this Court's order is manifestly incorrect or that it works an injustice on Plaintiff.

Whether Plaintiff's claims could be dismissed for failure to join indispensable parties has no bearing on whether water right owners in the Northern High Plains Designated Groundwater Basin are indispensable parties. C.R.C.P. 19(b) sets out the factors a court considers in deciding whether to proceed in the absence of indispensable parties, not whether parties are indispensable in the first place. There is no motion in this case to dismiss Plaintiff's claims for failure to join indispensable parties, and discussion of that issue is premature. Essentially, Plaintiff asks this Court to engage in inapplicable legal analysis in order to avoid hypothetical dismissal of its claims. *See* Motion for Reconsideration at 1-3.

Plaintiff similarly gets ahead of itself when it argues that well owners in the Northern High Plains Designated Groundwater Basin have nothing at stake in this case because their wells are not legally entitled to the protections that they currently enjoy. *See* Motion for Reconsideration at 3-4. Here, Plaintiff presupposes that it has established that the current administration of groundwater in the Northern High Plains Designated Groundwater Basin is unlawful, so that the well owners cannot have an interest in the outcome of this litigation. *See* Motion for Reconsideration at 4. This argument is circular.

Plaintiff also proposes that well owners in the Northern High Plains Designated Groundwater Basin enjoy only those protections of their groundwater withdrawals that they enjoyed when their well permits were issued and, presumably, they began to withdraw designated groundwater. *See* Motion for Reconsideration at 3-4. Plaintiff offers no authority that a water right owner is entitled only to the statutory or other protections that predate the issuance of a permit or the date on which the water right owner begins to divert water from a

structure. Indeed, Plaintiff seeks enforcement of statutes that were enacted long after the priority dates and decrees of its water rights. *See, e.g.*, Complaint at 12, para. 81 (citing §§ 37-80-104 and 37-92-501, C.R.S.).

At best, Plaintiff has established that it could encounter difficulty if it attempts to identify and personally serve well owners in the Northern High Plains Designated Groundwater Basin, and that this could result in dismissal of its claims. However, Plaintiff has provided no evidence of due diligence and made no such effort. The specter of Plaintiff's failure alone does not constitute a manifest injustice that requires this Court to reconsider its ruling on the Engineers' Motion for Joinder.

B. Plaintiff has not complied with C.R.C.P. 4(g).

Plaintiff has not provided this Court with information that is required before Plaintiff can be allowed to effect service by publication or mail under Rule 4(g). First, Plaintiff must identify the parties¹ that it cannot personally serve in the usual manner provided by Rule 4(e). Rule 4(g) states:

. . . The party desiring service of process by mail or publication under this section (g) shall file a motion verified by the oath of such party or of someone in the party's behalf for an order of service by mail or publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service and *shall give the address, or last known address, of each person to be served or shall state that the address and last known address are unknown.* The court, if satisfied that due diligence has been used to obtain personal service or that efforts to obtain the same would have been to no avail, shall:

(1) Order the party to send by registered or certified mail a copy of the process *addressed to such person at such address*, requesting a return receipt signed by the

¹ As the Engineers have previously noted, these parties include surface water right owners in addition to well owners because the Court reasoned in its July 8, 2015 Order and in its Order granting the Yuma County Water Authority's intervention that the parties are indispensable due to their ownership in different water rights than the parties present in the case. *See* Notice of List of Water Rights in the Northern High Plains Designated Ground Water Basin at 4.

addressee only. Such service shall be complete on the date of the filing of proof thereof, together with such return receipt attached thereto signed by such addressee, or

(2) Order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made once each week for five successive weeks. Within 14 days after the order *the party shall mail a copy of the process to each person whose address or last known address has been stated in the motion* and file proof thereof.

C.R.C.P. 4(g) (emphasis added).

Plaintiff's Motion is deficient because they do not include a list of names and addresses of the parties that Plaintiff intends to serve by mail or publication.² Using either method of service contemplated by Rule 4(g) requires Plaintiff to compile such a list and provide it to this Court. *See* C.R.C.P. 4(g). Instead of doing so, Plaintiff states that the list that the Engineers provided to Plaintiff is insufficient to allow Plaintiff to identify the names and addresses of these parties, and that mere reference to the Engineers' the list meets the requirements of C.R.C.P. 4(g). *See Motion for Reconsideration* at 5, para. 14(a), 6.

It is unclear how the list provided by the Engineers can be insufficient to allow Plaintiff to identify the names and addresses of parties and at the same time be a list that complies with Rule 4(g). In any event, Plaintiff's explanation falls short of the text and the spirit of the requirements of Rule 4(g).

Personal service shall be had whenever it is obtainable. *Coppinger v. Coppinger*, 130 Colo. 175, 177, 274 P.2d 328, 330 (1954). Constructive service, such as service by publication, is a last resort and every requirement of Rule 4 must be strictly followed. *Id.* Simply referencing the list provided by the Engineers does not constitute giving "the address, or last known address, of *each person* to be served" or stating that the address is unknown. *See* C.R.C.P. 4(g) (emphasis added). Plaintiff

² Also, it is unclear whether Plaintiff's verification of its motion is a proper verification under Rule 4(g). *See Motion for Reconsideration* at 10. The motion itself does not contain a description of Plaintiff's efforts, if any, to obtain personal service, facts as to why personal service would be to no avail, or a list of names and addresses of parties that Plaintiff proposes to serve by publication or mail. The verification therefore appears to verify only legal argument, not facts that could support a Rule 4(g) motion.

states “if an address is missing, incomplete, or otherwise incorrect [in the Engineers’ list], the address and last known address are unknown, as explained further below.” Motion for Reconsideration at 5, para. 14(a). The key word in Plaintiff’s statement is “if.” Plaintiff has provided no evidence of its own due diligence and made no independent effort to actually determine which of the names and addresses on the list provided by the Engineers are in fact owners of the associated water rights and which are not, much less whether the addresses are correct.

Due to this lack of effort, Plaintiff’s Motion for service by publication does not provide this Court with “all of the pertinent facts in order that the court may have before it the complete picture to enable correct evaluation and determination of whether service by publication is justified or required under the circumstances.” *Weber v. Williams*, 137 Colo. 269, 276, 324 P.2d 365, 369 (1958) (quoting *Coppinger*, 130 Colo. at 179, 274 P2d at 331). Plaintiff has provided no facts to the Court that would justify or require alternative service due to the absence of any “due diligence . . . used to obtain personal service,” identification of the parties to be served, or an explanation why further efforts at personal service would be to no avail. *See* C.R.C.P. 4(g).

Using the Engineer’s list as a starting point, it may be possible to cross-reference names and addresses with other public records in order to identify the parties that must be served. The Engineers understand that Yuma County Water Authority (“YCWA”)’s Response to Plaintiff’s Motion for Reconsideration will describe one such process. Descriptions of such methods and why they would not work belong in Plaintiff’s motion. *See, e.g., BS&C Enters., L.L.C v. Barnett*, 186 P.3d 128, 133 (Colo. App. 2008) (holding that plaintiff had met its due diligence burden when it demonstrated that it had received a sheriff’s return stating inability to locate the defendant). YCWA’s efforts highlight Plaintiff’s failure to meet the due diligence requirements of C.R.C.P. 4(g).

Given Plaintiff’s lack of effort to identify the parties it proposes to serve by publication, or to explain why doing so is impossible, Plaintiff’s Motion more closely resembles an exercise in “go[ing] through the form of legalism” in order to obtain the result Plaintiff seeks than it resembles a proper C.R.C.P. 4(g) motion. *Coppinger*, 130 Colo. at 179, 274 P2d at 331. Plaintiff’s willful ignorance of the names and addresses of the parties that must be served should not be the basis for allowing service by publication or mail under C.R.C.P. 4(g).

The Engineers stand ready to assist Plaintiff by providing such information as the Engineers have in their records as they are able and as this Court may

direct. As the Engineers have already stated, they will provide additional information from their records that Plaintiff determines could be helpful. *See* Notice of List of Water Rights in the Northern High Plains Designated Ground Water Basin at 5. Ultimately, however, it is Plaintiff's responsibility to identify the parties that must be served and explain why personal service on them is not feasible.

C. Resume notice and the notice provisions of the Groundwater Management Act do not apply here.

Resume notice and the analogous procedures found in section 37-90-112(1), C.R.S. (2015) do not inform this Court's decision on Plaintiff's request to serve indispensable parties by publication or mail under C.R.C.P. 4(g). *See* Motion to Reconsider at 6-8. It is precisely the existence of these procedures that defeats Plaintiff's argument. These procedures are exceptions to the usual procedures found in C.R.C.P. 4 and are only available because the General Assembly created them for use in specific circumstances. Nothing in these alternative procedures can exempt Plaintiff from the requirements of C.R.C.P. 4 in this case.

Moreover, whether Plaintiff complies with C.R.C.P. Rule 4 implicates this Court's jurisdiction, and is not simply a question of fairness concerning whether water right owners have been given an opportunity to participate. *See Weber v. Williams*, 137 Colo. at 277, 324 P.2d at 369 ("Courts acquire jurisdiction in actions in rem as well as in actions in personam by lawful service of lawful process or by voluntary appearance"). It is not up to water right owners in the Northern High Plains Designated Groundwater Basin to determine from a notice in a newspaper whether they are one of the indispensable parties on which Plaintiff cannot obtain personal service. *See Coppinger*, 130 Colo. at 179, 274 P.2d at 331 ("it [is] not incumbent upon defendant to do anything to make service of process upon him valid or regular"). Allowing service by publication without first requiring Plaintiff to identify the parties that must be served risks entering a judgment in this case that is not binding on all water right owners in the Northern High Plains Designated Groundwater Basin.

III. CONCLUSION

The Engineers respectfully request that this Court deny in full Plaintiff's Motion for Reconsideration and/or Clarification, and For Service by Publication Pursuant to Rule 4(g). The Colorado Division of Parks and Wildlife join in the Engineers' Response and respectfully request that this Court deny in full Plaintiff's Motion for Reconsideration and/or Clarification, and For Service by Publication Pursuant to Rule 4(g).

Dated this 18th day of August, 2015.

CYNTHIA H. COFFMAN

Attorney General

*E-filed pursuant to C.R.C.P. 121. Duly signed original
on file at the Office of the Attorney General.*

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CERTIFICATE OF SERVICE

This is to certify that on this 18th day of August, 2015, I caused a true and correct copy of the foregoing **STATE AND DIVISION ENGINEERS' AND COLORADO DIVISION OF PARKS AND WILDLIFE'S JOINT RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION, AND FOR SERVICE BY PUBLICATION PURSUANT TO RULE 4(G)** to be served electronically via ICCES upon the following:

Party Name	Party Type	Attorney
Jim Hutton Educational Foundation	Plaintiff	Karen Leigh Henderson Steven J. Bushong (Porzak Browning & Bushong LLP)
State Engineer	State Engineer	State Engineer
Division 1 Engineer	Division Engineer	Division 1 Water Engineer
Yuma County Water Authority Public Improvement District	Defendant	Dulcinea Zdunska Hanuschak John A. Helfrich Steven Owen Sims (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/ Nan B. Edwards
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