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: August 28, 2015 5:47 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. and **Defendant-Intervenor:** Yuma County Water Authority Public Improvement District	☐**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 REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION AND/OR CLARIFICATION, AND FOR SERVICE BY PUBLICATION PURSUANT TO RULE 4(G)

The Jim Hutton Educational Foundation, a Colorado non-profit corporation ("Foundation"), acting by and through undersigned counsel, hereby submits its reply in support of its motion for reconsideration and/or clarification of the Court's Order re: State and Division Engineers' Motion for Joinder (the "Order"), and for service by publication.

This Reply is broken into two parts for purposes of clarity. The first part is in regards to the Foundation's Motion for reconsideration and/or clarification on whether the well owners in the Northern High Plains Designated Groundwater Basin ("NHP Basin") are indispensable parties. The second part concerns the Foundation's request for alternate service consistent with the legislative intent of the 1969 Water Rights Act and Groundwater Management Act, or alternatively, for service by publication pursuant to Rule 4(g), depending on whether the Court reconsiders its finding that the well owners in the NHP Basin must be joined in the above-captioned matter.

A. Reply in Support of the Motion for Reconsideration and/or Clarification.

i. The Foundation satisfied the requirements for a motion to reconsider.

1. Contrary to the claim by the Engineers and CPW, the Foundation did allege "a manifest error of fact of law that clearly mandates a different result or other circumstance resulting in manifest injustice" as required by C.R.C.P. 121 §1-15(11) for reconsideration. In its Order, the Court determined that the well owners are indispensable parties without considering whether joinder is feasible pursuant to Rule 19(a) and without considering the factors in Rule 19(b).[1] As explained further herein, this, respectfully, is an error of law. Furthermore, if the well owners in the NHP Basin are indispensable, then the Foundation's Complaint risks dismissal because joinder of all the well owners is not feasible. It is a manifest injustice for the Foundation's Complaint to be at risk of dismissal because thousands of well owners cannot be feasibly joined even though no claims for relief are asserted against them. The general interests of the well owners in the above-captioned matter do not outweigh the Foundation's right to relief.

ii. Joinder of the well owners in the NHP Basin is not feasible pursuant to Rule 19(a).

2. While the Foundation respectfully disagrees that the well owners have the requisite interest under Rule 19(a),[2] that is only one part of the required analysis. The second is whether joinder of such well owners is feasible. In fact, Rule 19(a) is entitled: "Persons to be Joined if Feasible." Joinder is feasible under Rule 19(a), 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).

3. Joinder of the well owners in the NHP Basin is not feasible under Rule 19(a) for a number of reasons. First, the Water Court does not have jurisdiction over designated groundwater. *See State ex rel. Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981)("matters involving designated groundwater [are] committed exclusively to the administrative agencies and courts prescribed by the [Groundwater] Management Act"). All of the well owners identified by the Engineers in the July 17, 2015 excel file (the "List") are within the NHP Basin, which means they are outside the jurisdiction of the Water Court.[3] The only way such wells are brought within

[1] *See* Order, p. 4 ("Therefore, pursuant to Rule 19(a), C.R.C.P. the court concludes the well owners in the NHP Basin are indispensable parties.").

[2] The Court found well owners indispensable 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). With regard to maintaining administration, the Foundation contends that well owners have "no constitutionally protected property interest in the unfettered use of the water in their wells." *Kobobel v. State, Dep't of Natural Res.*, 249 P.3d 1127, 1134 (Colo. 2011); *see also N. Sterling Irrigation Dist. v. Simpson*, 202 P.3d 1207, 1214 (Colo. 2009) ("past administrative practices does not give rise to a right to have water administered a certain way"); *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 58 (Colo. 1999) ("the engineer's administrative decisions do not determine the property rights of appropriators").

[3] The Engineers also provided information on some surface water rights, including wells that alternately divert surface rights as alternate points of diversion. Although the Water Court clearly has jurisdiction over these surface water rights, the Court did not state whether other surface water right users must be joined.

the jurisdiction of the Water Court is if the boundary lines are redrawn in a hearing before the Ground Water Commission to exclude wells that divert tributary groundwater as was allowed prior to SB-52. *See Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 32 (Colo. 2006) ("before jurisdiction vests in the water court, the Commission must redraw the boundaries of the basin to exclude the improperly designated ground water. Not only does the statute require this result, but our holding respects legislative intent by keeping designated ground water and ground water subject to the 1969 Act separate and distinct"). The Water Court's lack of jurisdiction over the well owners renders joinder infeasible.

4. Moreover, while the List includes 6,078 entries for wells[4] within Water Division No. 1 it also includes 64 entries for wells within Water Division No. 2. In addition to not having jurisdiction over designated groundwater in general, this Court does not have jurisdiction over wells located in Water Division No. 2.

5. Additionally, if even one well owner objects to the jurisdiction or venue of this Court, then the Foundation would fail to join all of the well owners in the NHP Basin. *See* 4 Colo. Prac., Civil Rules Annotated Rule 19 (4th ed.) ("If the new defendant interposes valid objections to jurisdiction or venue, these defects prevent the joinder ...") (*emphasis added*). Accordingly, given the jurisdiction and venue issues, joinder of all the well owners in the NHP Basin is not feasible pursuant to Rule 19(a). "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.)

iii. A party cannot be deemed indispensable before first considering the factors in Rule 19(b).

6. The Engineers and CPW claim that whether the Foundation's case could be dismissed has no bearing on whether the well owners in the NHP Basin are indispensable. (*See* Engineer and CPW Response, p. 3). Similarly, the Engineers, CPW, and YCWA (collectively "Defendants") claim that the question of whether or not the Foundation's Complaint may be dismissed is premature. These positions are not consistent with the law.

7. In *Thorne v. Board of County Commissioners of Fremont County,* 638 P.2d 69 (Colo. 1981), an action was dismissed by the trial court for failure to join indispensable parties who would "derive an economic and legal benefit" under the permits being challenged. The Colorado Supreme Court held that "C.R.C.P. 19(b) sets out the factors relevant to the determination of indispensability." *Id.* at 73. In applying those factors, the Court reversed the trial court holding that "[w]hile they are arguably persons to be joined if feasible, C.R.C.P. 19(a), **their interests are not sufficient to overcome the countervailing consideration that if they are deemed indispensable the [Plaintiff] will be left without a remedy**." *Id.* (*emphasis added*). In other words, "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" as stated in C.R.C.P. 19(b) is a factor that must be applied in determining whether a party is indispensable. *See Hicks v. Joondeph,* 232 P.3d 248, 253 (Colo. App. 2009) ("A court

[4] Some well permits have multiple owners.

must determine ... whether the party is indispensable based on the factors of C.R.C.P. 19(b)"); 4 Colo. Prac., Civil Rules Annotated Rule 19 (4th ed.) (the Colorado Supreme Court has "recognized that Rule 19(b) offers sound guidance" in making a determination of whether a party should be considered indispensable).

8. The same result exists in federal jurisprudence. U.S. Supreme Court Justice Harlan held:

> Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist. To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: **a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him.**

Provident Tradesmens Bank & Trust Co. v. Patterson, 88 S. Ct. 733, 743 (1968) (*emphasis added*); *see also* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. Rev. 745, 767 (1987) ("The drafters who amended rule 19(b) ... and the Supreme Court Justices applying the new version two years later, expressly admonished judges to determine whether absentees are indispensable only *after* treating relevant [Rule 19(b)] considerations) (*citing* Fed. R. Civ. Proc. 19, Advisory Comm. Note; 39 F.R.D. 89, 90 (1966) and *Provident Tradesmens, supra*). Accordingly, it is well-established that the factors in Rule 19(b) must be considered before concluding that a party is indispensable.

9. While the Court in this instance found that the well owners in the NHP Basin have an interest described in Rule 19(a)(2), it did not determine whether their joinder is feasible pursuant to Rule 19(a) and did not apply the factors set forth in Rule 19(b) before ruling that the well owners are indispensable parties. "To use the familiar but confusing terminology, the decision to proceed is a decision that the absent person is merely 'necessary' while the decision to dismiss is a decision that he is 'indispensable.'" *Provident Tradesmens Bank & Trust Co.*, 88 S. Ct. at 742. Since the Court has not yet analyzed whether joinder is feasible under Rule 19(a) or the factors in Rule 19(b), it was premature for the Court to find that the well owners in the NHP Basin are, in fact, indispensable parties.

iv. Rule 19(b) precludes a finding that the thousands of well owners in the NHP Basin are indispensable parties simply because they have an interest in the outcome.

10. Litigation that involves constitutional, statutory, or administrative issues by its very nature tend to affect large numbers of persons, but courts have consistently not required joinder of the affected persons in such circumstances under Rule 19(b). As stated in *Denver Beechcraft, Inc. v. Bd. of Assessment Appeals of State of Colo.*, 681 P.2d 945, 948 (Colo. 1984), "[j]oinder of all parties who could be prejudiced by litigation involving public issues is not required because such a requirement would effectively preclude such litigation against the government." (*citing Natural Resources Defense Council v. Berklund*, 458 F. Supp. 925, 933 (D.D.C. 1978) aff'd, 609 F.2d 553 (D.C. Cir. 1979).

11. In *Denver Beechcraft, Inc*., the Colorado Supreme Court found that an airport authority was not an indispensable party even though the case involved the constitutionality of a statutory provision that exempted airport authorities from property tax. The defendants had argued that the airport authority was an indispensable party "because the airport authority has an interest which may be affected by a determination of the constitutionality of [the statute]." The Colorado Supreme Court disagreed and stated that its decision "is consistent with federal precedent under Fed.R.Civ.P. 19(b)." *Denver Beechcraft*, 681 P.2d at 948 (citing numerous federal cases in support of its holding).

12. The cases cited in *Denver Beechcraft* and other federal precedent clearly support the Colorado Supreme Court's interpretation of Rule 19(b). Joinder of all parties who could be prejudiced by a challenge to the constitutionality of a statute or a challenge of an agency action with broad applicability is not required under Rule 19(b), because it would effectively preclude litigation of issues with broad ramifications. For example:

a. In *National Licorice Co. v. NLRB,* 60 S. Ct. 569 (1940), the U.S. Supreme Court held that a case seeking to prevent an employer from enforcing contracts with employees that violated the National Labor Relations Act ("NLRA") did not require joinder of the 118 employees who had signed the contracts at issue. *Id*. at 573, 578. The Court recognized that the litigation would have a practical effect upon the rights and obligations of the absent employees under the contract, but despite this conclusion the Court held that joinder was not required. *Id*. at 577. In its reasoning, the Court made it clear that the action was only against the employer (not the employees) and that the effect of the action was to preclude the employer from violating the NLRA. *Id*. at 577-578.

b. In *Natural Res. Def. Council, Inc. v. Berklund*, the plaintiff sought declaratory relief with respect to the issuance of a certain type of coal leases by the Secretary of the Interior, but was not required to join the other 183 applicants for such coal leases that the parties agreed would be affected in some way by the judgment in the case. 458 F. Supp. 925, 933 (D.D.C. 1978) aff'd, 609 F.2d 553 (D.C. Cir. 1979).

c. In *Nat'l Wildlife Fed'n v. Burford*, the plaintiff brought suit challenging a decision by federal agencies to lift protective restrictions on certain federal lands. The defendants asserted that the holders of mining claims and mineral leases on the disputed lands required joinder pursuant to Rule 19. While the court found that the mining claimants and lessees claimed an interest in the lands subject to the action and that the action could impair or impede their ability to protect their interest sufficient to satisfy Rule 19(a), it did not require their joinder in the case. The court determined that potential jurisdiction and venue problems would prevent the plaintiff from joining all of the defendants in one forum and requiring the plaintiff to combine actions through multidistrict litigation "would create enormous administrative disorder and delay." 676 F. Supp. 271, 276 (D.D.C. 1985) *aff'd,* 835 F.2d 305 (D.C. Cir. 1987). The court turned to the factors in Rule 19(b) and determined that "[b]ecause plaintiff lacks an

alternative forum, requiring joinder of all parties could foreclose forever a legitimate cause of action against the government." *Id*. at 276. "The availability of an alternative forum represents a 'critical consideration' in deciding joinder questions." *Id*. In the end, the court found that the interests of the mining claimants and lessees did not outweigh the harm to the plaintiff if the litigation was dismissed. *Id.*

d. In *Sierra Club v. Watt*, plaintiffs filed an action to test the legality of the Secretary of Interior's order excluding split-estate lands over 5,000 acres from wilderness study areas. Intervenors moved to require the plaintiffs "to join all owners of mineral interests on lands affected by this litigation in eleven western states." 608 F. Supp. 305, 318 (E.D. Cal. 1985). The court disagreed that joinder of such parties was required. Specifically, the court held that "a plaintiff who sues the appropriate federal official challenging that official's determination of an issue involving potentially hundreds of others, where identification of those individuals would be time-consuming and expensive, and where the suit is predicated on that official's purported violation or misinterpretation of a national statute, need not join all the other citizens potentially affected by the litigation." *Id*. at 328.

Intervenors alternatively argued in *Watt* that the mineral interest owners should be given notice and an opportunity to intervene because a ruling in the plaintiffs favor would "destroy the economic viability of conducting mineral and other development activities" of the absent parties. *Id*. at 319. The court rejected intervenors' alternative argument as well, stating that "[s]horn of its trappings, intervenors' argument is that any time litigation involving a national regulation is filed every American citizen affected thereby must be given notice. The mere statement of the proposition belies it. ... the law forbids the reading of statutes (much less the Constitution) to reach absurd results." *Id.* at 327.

13. The same holds true here. If the Court requires joinder of all the well owners in the NHP Basin then the Court is effectively making it impracticable to challenge the State Engineers' actions, which is inconsistent with the above-described cases regarding Rule 19(b). It is also inconsistent with the purpose of a declaratory judgment, which is "to provide a ready and speedy remedy." *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 260 (Colo. 2006); *see also* Rule 1(a) (these rules of civil procedure "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action").

14. Moreover, given that the Foundation is not asserting any claims against the well owners, the Foundation does not even have the option of certifying the well owners as a class. *See* Rule 23. Class actions are intended provide a method to move forward with cases where the large number of people involved make joinder impracticable. *See* Rule 23(a)(1) ("One or more members of a class may sue or be sued as representative parties on behalf of all only if ... [t]he class is so numerous that joinder of all members is impracticable"). "The requirement of numerosity means that a class must be large enough to make joinder of all its members impractical. Although the trial court may not speculate about the size of any class, it may make common sense assumptions to support its finding that joinder would be impractical." *Garcia v.*

Medved Chevrolet, Inc., 240 P.3d 371, 377 (Colo. App. 2009) *aff'd,* 263 P.3d 92 (Colo. 2011) (*internal citations omitted*). In fact, the "difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable." *Jackson v. Unocal Corp.*, 231 P.3d 12, 24 (Colo. App. 2009) *rev'd on other grounds,* 262 P.3d 874 (Colo. 2011) (*citing* Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:5, at 247 (4th ed.2002)). "The word "impracticable" as used in the rule means difficult, imprudent, inconvenient or impractical, rather than impossible or incapable of being performed." 4 Colo. Prac., Civil Rules Annotated R 23 (4th ed.).

15. In other words, if the Foundation were seeking claims for relief against the well owners, the Foundation would clearly meet the requirement to certify a class given the impracticability of joining thousands of well owners identified in the List. The Foundation's ability to defend its property interests in this litigation should not be rendered impracticable and infeasible simply because it has not sought any relief against the well owners.

v. Since well owners will be in no worse position than when they acquired their well permits if SB-52 is found unconstitutional, they are not indispensable parties.

16. As the Foundation explained in its Motion, no large-capacity well permits have been issued in the NHP Basin since the enactment of SB-52. Thus, if SB-52 is unconstitutional, there would be no change to the law under which the permits were issued. Although the Engineers and CPW take issue with the relevance of the Foundation's statement, (*see* Engineers and CPW Response, pp. 3-4), it is directly relevant to whether the well owners are indispensable.[5]

17. In *Hicks v. Joondeph*, 232 P.3d 248 (Colo. App. 2009), an earlier order was sought to be vacated by two parties for failure to join them as indispensable parties in that action. The Court held that the two parties were not indispensable because they "were in no worse position" as a result of the action than when they acquired their interest in the property. *Id.* at 253. The same reasoning applies here.

18. The Engineers and CPW also fail to recognize that if SB-52 is unconstitutional, it will have absolutely no impact on well owners that are properly diverting groundwater that meets the definition of designated groundwater. Only wells that divert groundwater that have more than a *de minimis* impact on surface water such that they cannot be properly classified as designated groundwater risk being transferred to the jurisdiction of the Water Court and administered with all other users of tributary waters after a hearing before the Ground Water Commission to redraw the boundaries of the NHP Basin. *See Gallegos*, 147 P.3d at 32.

[5] The related claim by Engineers and CPW that the Foundation seeks enforcement of two statutes (C.R.S. §37-80-104 and §37-92-501) enacted after the decrees of its water rights is both irrelevant and factually inaccurate. Sections 37-80-104 and 37-92-501 were both adopted prior to two of the Foundation's water rights. Moreover, the State Engineer has had the authority to administer water rights since the first water laws were passed in 1879 and 1881. *See Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1149 (Colo. 2001), *as modified on denial of reh'g* (Feb. 11, 2002). Therefore, such authority was in place before even the Foundation's oldest two water rights were decreed in 1893 and 1938.

B. Reply in Support of the Foundation's Request for Alternate Service consistent with the legislative intent of the 1969 Water Rights Act and Groundwater Management Act, or, alternatively, pursuant to Rule 4(g).

i. The well owners can be given notice and the opportunity to participate to avoid the jurisdictional problems with mandatory joinder under Rule 19.

19. Since joinder of all well owners in the NHP Basin is not feasible given the jurisdiction and venue issues discussed above, Rule 19(b) requires this Court to determine whether in the interest of justice the case can proceed without the well owners, or if dismissal would be required based on a finding that the well owners are indispensable parties. However, there is another option. The Court can require that the well owners be given notice and the opportunity to participate. *See* the second factor in Rule 19(b) ("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") (*emphasis added*). While the Foundation does not concede that such notice is required, allowing the well owners the option to participate voluntarily would avoid the jurisdiction and venue issues associated with mandatory joinder. It would also avoid issues associated with entering default judgment against well owners that fail to respond to the Complaint in a situation where no claims are asserted against them.

20. Notice via newspaper publication would be consistent with the legislative intent of the 1969 Water Rights Act and the Groundwater Management Act as suggested by the Colorado Supreme Court in *Vickroy*. *See* 627 P.2d at fn. 10 ("a procedure consistent with legislative intent could ... be fashioned which would permit the matter to proceed in a single court"). Newspaper publication is designed to "alert all water users on the stream system whose rights may be affected by the application, and provide an opportunity for any person to participate." *S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1235 (Colo. 2011). This is true whether the application is before the Water Court or before the Ground Water Commission.

ii. Alternatively, if the Court does not reconsider its finding that the well owners in the NHP Basin require joinder, then the Foundation has moved for alternate service pursuant to Rule 4(g).

21. Alternatively, if the Court does not reconsider its finding that the well owners in the NHP Basin must be joined in the above-captioned matter, then the Foundation has properly moved for alternate service pursuant to Rule 4(g). Contrary to the claims by Defendants, the Foundation's verified Motion did meet the requirements of Rule 4(g).

22. Rule 4(g) requires that the verified motion "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 Foundation provided all of the Rule 4(g) requirements as follows:

a. The Foundation stated the facts authorizing such service by indicating that this case is

an action affecting specific property and is a proceeding *in rem*. (*See* Foundation's Motion, ¶13).

b. The Foundation stated that it 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. (*See* Foundation's Motion, ¶14).

c. The Foundation stated that the List constituted 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 in the List, that the address and last known address are unknown. (*See* Foundation's Motion, ¶14(a)). Since the Court ordered the Engineers to "provide the Foundation with the well owners who may be affected," (*see* Order, p. 6), and since the List was already on file with the Court, the Foundation relied upon the List.

23. The Defendants argue that the Foundation's request for service by publication should be denied because it has not first attempted to personally serve all of the well owners. This position is not consistent with the plain language of Rule 4(g). The rule makes this clear in two instances. First, the rule allows the Court to order the Foundation to send notice by registered or certified mail or order publication of the process in a newspaper if the Court "is satisfied that due diligence has been used to obtain personal service **or that efforts to obtain the same would have been to no avail**." *See* Rule 4(g) (*emphasis added*). Second, the rule requires that the motion "show the efforts, if any, that have been made to obtain personal service." *See* Rule 4(g) (*emphasis added*). Thus, the rule expressly makes it clear that the Foundation is not required to expend tens of thousands of dollars attempting to obtain personal service before requesting alternate service.

24. Some of the potential accuracy issues with the 6,304 entries in the List are described by the Engineers in their Notice submitted with the List, while others are described in the Foundation's Motion. In addition to all of those concerns, 1,042 of the entries either have no address, an incomplete address, or are mailing addresses only. YCWA states that in Yuma County there is a tax roll for mailing tax notices, but even if those notices are mailed to the proper owners, mailing addresses are often not the physical addresses needed for personal service. Nor does YCWA address all the other concerns raised by the Foundation with trying to force thousands of well owners to become parties in a lawsuit. While service pursuant to Rule 4 first requires that joinder be deemed feasible pursuant to Rule 19(a), even if one well owner objects to jurisdiction or the venue of the Water Court then any attempt at personal service on the well owners would result in the Foundation's Complaint being considered for dismissal for failure to join all indispensable parties. In short, the Foundation would be right back where it started, after incurring more delay and financial hardship.

C. Conclusion

25. The Foundation filed this Complaint seeking relief from unlawful administration of its surface water rights and to regain the legal mechanism to protect its surface water rights from injury against wells that are not pumping water that meets the definition of designated groundwater. The Foundation is not seeking any claims for relief against the well owners nor would any order issued by this Court be directed towards those well owners. Therefore, the Foundation does not believe the law requires joinder of well owners in the NHP Basin when it challenges the Engineers' administration or the constitutionality of a statute. Such a requirement would effectively preclude litigation against the government in a manner contrary to long-standing law and negate the ability of a declaratory judgment to provide speedy relief.

26. By its Motion, the Foundation is respectfully requesting that this Court reconsider its finding that the well owners in the NHP Basin are indispensable parties given that it has not yet determined whether joinder is feasible pursuant to Rule 19(a) nor has it considered the factors identified in Rule 19(b). Moreover, in order to avoid the jurisdiction and venue issues associated with joinder, as well as the manifest injustice associated with dismissing the Complaint, the Court can alternately require that the well owners be given notice via newspaper publication and the opportunity to participate. In the alternative, if the Court does not reconsider its finding that the well owners require joinder, then the Foundation has moved for alternate service pursuant to Rule 4(g).

Respectfully submitted this 28th day of August, 2015.

PORZAK BROWNING & BUSHONG LLP

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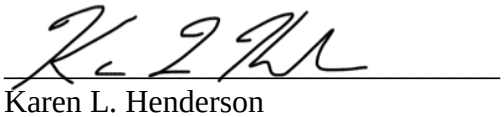
CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2015, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION'S REPLY IN SUPPORT OF ITS 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	Intervenor-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