

WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9 TH Avenue Greeley, CO 80632	DATE FILED: September 25, 2015 2:48 PM
Plaintiff: The Jim Hutton Educational Foundation, 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; the Colorado Department of Natural Resources; Colorado Division of Water Resources; and Colorado Parks and Wildlife	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No.: 2015CW3018 Division: 1
ORDER RE: THE JIM HUTTON FOUNDATION’S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION AND FOR SERVICE BY PUBLICATION	

The Jim Hutton Educational Foundation (“Foundation”) filed this action seeking, in part, a ruling from this court that the provisions of Senate Bill 52 (“SB-52”) are unconstitutional. SB-52, as codified at C.R.S. § 37-90-106(1)(a), currently allows a groundwater commission to redraw the boundaries of a designated groundwater basin if a sufficient factual basis exists to change the basin’s boundaries, but the commission may not alter the boundaries in such a way as to exclude any existing permitted wells situated within that basin.

On July 8, 2015, this court issued an order requiring the Jim Hutton Educational Foundation (“Foundation”) to join as parties in this action the well users in the Northern High Plains Designated Groundwater Basin (“NHP Basin”), finding in pertinent part that well users operating within the NHP Basin are necessary parties under C.R.C.P. 19. The Foundation requests in its present motion that the court reconsider and modify its July 8 order, and change its ruling by finding that the well users are not necessary parties. In the alternative, the Foundation requests permission from the court to serve the well users by publication, pursuant to C.R.C.P. 4(g)(2). The State and Division Engineers (“Engineers”) and the Yuma County Water Authority (“YCWA”) filed responses and the Foundation filed a reply.

The court declines the Foundation’s invitation to reconsider and modify its July 8 order, and instead finds the analysis and conclusions pertaining to joinder of the well users, as articulated in the July 8 order, remain factually and legally correct.

The court will, however, take the opportunity to briefly address the Foundation’s concern that it will be denied due process if a well user, as a necessary party, cannot be served and the court later dismisses the action. Although C.R.C.P. 19(b) directs the court to determine whether the action should continue with the parties who have been served and appeared, when not all

parties have been served, it is premature for the court to make that determination because the Foundation has not yet attempted to serve any of the well owners.

The court next turns to the Foundation's request for permission to serve the well owners with the summons by publication under C.R.C.P. 4(g)(2), rather than through personal service or by certified mail. The Foundation's motion was verified under oath by the Foundation's attorney, which the court finds satisfies the attestation requirement of C.R.C.P. 4(g). The motion also sets forth the facts the Foundation relies upon in support of its motion for publication. The present action affects the property rights of the well users, and thus the limitation of the applicability of substituted service under C.R.C.P. 4(g) to actions affecting property or in rem proceedings has been met.

The Foundation has not, however, tendered with its motion the addresses or last known addresses of the well users, as required by C.R.C.P. 4(g), although the Foundation received a spreadsheet from the Engineers containing the name and address of each of the permitted well owners operating within the NHP Basin. The court notes that the Engineers tendered a copy of this spreadsheet to the court on July 17, 2015. The spreadsheet compiled by the Engineers is forty-four pages long and contains the names and addresses of several thousand individuals and entities.

The requirement that a party seeking alternate service provide the court with the address, last known address, or a statement that the address of the opposing party is unknown, is foundational and provides a basis for the court to determine whether the moving party has acted diligently to personally serve the opposing parties, or that efforts to personally serve the other parties would have been to no avail. In this case, the list of names and addresses of the well owners was tendered by the Engineers prior to the Foundation filing its motion. The court finds that requiring the Foundation to independently file the spreadsheet containing the names and addresses of the well owners, when the court already has that same information in the file from the Engineers, would unnecessarily elevate form over substance. The court takes judicial notice of the spreadsheet filed by the Engineers on July 17, 2015, for the names and addresses of the well users in the NHP Basin.

Having found the procedural requisites of C.R.C.P. 4(g) have been satisfied, the court now addresses the questions of whether the Foundation has acted with diligence to serve the well users or efforts to obtain personal service would be of no avail. The Foundation admits it has not yet attempted to personally serve the well owners, so it cannot be said that the Foundation has exercised diligent efforts to serve those parties. The Foundation does not claim it has diligently attempted to personally serve the well users, but rather focuses on the "efforts to serve would be of no avail" section of the rule.

With regard to the question of whether efforts to personally serve the well users would be unsuccessful, the Foundation points out the spreadsheet contains over one thousand entries where either the address of the well user is not listed, is incomplete, or lists only the mailing address. As to the other four thousand or so addresses on the spreadsheet that appear to be complete, the Foundation asserts it has no way of knowing whether those addresses are accurate until it attempts personal service, which would involve great expense.

The court finds the Foundation has met its burden of showing that attempting to personally serve the well owners would be of no avail, and therefore grants the motion for service by publication under C.R.C.P. 4(g)(2). First, there are over one thousand entries on the spreadsheet that contain no address, an address that is not complete, or only a mailing address. As to those parties, personal service would most certainly be impossible without significant investigative work done by the Foundation. Second, as to the other parties for which an address appears on the spreadsheet to be complete, such information cannot be verified as accurate unless the Foundation attempts personal service. The Foundation must rely on information contained in the Engineers' records, which may or may not contain the current addresses of the well owners. To ensure their records are accurate, the Engineers are left to rely on the well owners to provide any change of address that occurs after the initial well permit is issued. Having presided over the most recent decennial abandonment proceedings for Water Division One as filed in Case Number 11CW263, the court takes notice of the fact there are many water users who neglect to update the Engineers of a change of address and those water users only learned of the abandonment proceedings after reading notice published in the newspaper. *See e.g. C.R.S. § 37-92-401(2)(a)* (the Engineers must mail a copy of the abandonment list by certified mail to the owner or last-known owner of a water right included on the abandonment list, and shall also publish the abandonment list in a newspaper in the county where the water right is diverted).

Because it cannot be determined which of the addresses on the spreadsheet are accurate, the court finds any effort made by the Foundation to obtain personal service would be of no avail. Moreover, if there are addresses contained on the spreadsheet that are valid, C.R.C.P. 4(g)(2) requires the Foundation to mail a copy of the process and the well user will receive process through the mail.

Based on the foregoing, the court grants the Foundation's motion for service by publication. The court hereby orders that the notice prepared by the Foundation shall be published in the following newspapers once a week for five successive weeks.

- Burlington Record, a newspaper published in Kit Carson County, CO.
- The Yuma Pioneer, a newspaper published in Yuma County, CO.
- Wray Gazette, a newspaper published in Yuma County, CO.
- The Holyoke Enterprise, a newspaper published in Phillips County, CO.
- Haxtun-Fleming Herald, a newspaper published in Phillips County, CO.
- Sterling Journal-Advocate, a newspaper published in Logan County, CO.
- South Platte Sentinel, a newspaper published in Logan County, CO.
- Julesburg Advocate, a newspaper published in Sedgwick County, CO.
- The Range Ledger, a newspaper published in Cheyenne County, CO.
- The Limon Leader, a newspaper published in Lincoln County, CO.
- Eastern Colorado Plainsman, a newspaper published in Lincoln County, CO.
- Akron News-Reporter, a newspaper published in Washington County, CO.

Service shall be complete on the day of the last publication. Pursuant to C.R.C.P. 4(g)(2), the Foundation is also required to mail a copy of the process by regular mail to

those well users whose mailing address appears to be complete on the spreadsheet prepared by the Engineers.

Dated: September 25, 2015.

By the Court:



James F. Hartmann
Water Judge, Water Division 1