

DISTRICT COURT, WATER DIVISION NO. 1,  
STATE OF COLORADO

Weld County Courthouse  
901 9<sup>th</sup> Avenue  
P.O. Box 2038  
Greeley, Colorado 80631  
(970) 351-7300

DATE FILED: January 6, 2016 11:12 PM

COURT USE ONLY

**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.

**Defendant-Intervenor:** Yuma County Water Authority Public Improvement District.

**Defendant – Well Owners:** Republican River Water Conservation District; City of Wray; City of Holyoke; Harvey Colglazier; Lazier, Inc.; Marjorie Colglazier Trust; Mariane U. Ortner; Timothy E. Ortner; Protect Our Local Community’s Water, LLC; Saving Our Local Economy, LLC; the “North Well Owners”; Tri-State Generation and Transmission Association, Inc.; Dirks Farms Ltd; Julie Dirks; David L Dirks; Don Andrews; Myrna Andrews; Nathan Andrews; Happy Creek, Inc.; J&D Cattle, LLC; 4M Feeders, Inc.; May Brothers, Inc.; May Family Farms; 4M Feeders, LLC; May Acres, Inc.; Thomas R. May; James J. May; Steven D. Kramer; Kent E. Ficken; Carlyle James as Trustee of the Chester James Trust; Colorado Agriculture Preservation Association; Colorado State Board of Land Commissioners; and the City of Burlington.

Case Number: **15CW3018**

Div. No. 1

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**THE JIM HUTTON EDUCATIONAL FOUNDATION’S RESPONSE TO  
THE COLORADO GROUND WATER COMMISSION’S MOTION TO INTERVENE**

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through undersigned counsel, does hereby provide its Response to the Colorado Ground Water Commission’s (“Commission”) Motion to Intervene dated

December 16, 2015 (hereinafter “Motion”). The Commission seeks to intervene as a defendant in the above-captioned matter by right pursuant to C.R.C.P. 24(a)(1) and 24(a)(2), or in the alternative, by permission of the Court pursuant to C.R.C.P. 24(b). As set forth below, the Foundation requests that the Commission’s Motion be denied.

A. *Rule 24(a)(1) – Intervention of Right based on Statute (C.R.S. § 37-92-304(3)).*

1. The Commission first seeks to intervene as a matter of right pursuant to C.R.C.P. 24(a)(1), which states that “[u]pon timely application, anyone shall be permitted to intervene in an action . . . [w]hen a statute confers an unconditional right to intervene.” (*emphasis added*). The Commission asserts such an unconditional right is provided in C.R.S. § 37-92-304(3), which provides in pertinent part that “[a]ny person may move to intervene in proceedings before the water court upon payment of a fee ... and upon a showing of mistake, inadvertence, surprise, or excusable neglect or to support a referee's ruling. The water court shall grant the motion to intervene only if ... intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.”

2. The Foundation does not agree that C.R.S. § 37-92-304(3) provides an unconditional right to intervene. The plain language of the statute makes it clear that the right is conditioned on a showing of mistake, inadvertence, surprise, or excusable neglect and that the intervention will not unduly delay or prejudice the adjudication. Therefore, even if C.R.S. § 37-92-304(3) is applicable to this case it does not provide an “unconditional right” as required by Rule 24(a)(1), C.R.C.P.

3. Moreover, the Foundation does not believe that C.R.S. § 37-92-304 is applicable to this case because it describes the proceedings for applications for water rights, not “all water matters.” Therefore, while all water matters are within the exclusive jurisdiction of the water court, C.R.S. § 37-92-203(1), not all water matters are subject to the special statutory proceedings like resume notice or referral to the water referee. Moreover, this Court has already ruled that this case is “not the type of application listed in Section 37-92-302(1)(a), C.R.S.” *See* the Court’s Order dated July 8, 2015, p. 5.

4. Even if C.R.S. § 37-92-304(3) is applicable to this case and does provide an “unconditional” right to intervene, the Commission has not made a showing of mistake, inadvertence, surprise, or excusable neglect, but rather only states that “it was unclear to the Commission what its potential role in and the scope of the litigation might be.” *See* Motion, p. 3. Setting aside for the moment the fact that the Commission has no role in this litigation, the Commission is not able to make the required showing of mistake, inadvertence, surprise, or excusable neglect. The Commission is one section of the Division of Water Resources, which is already a defendant in this case. *See* C.R.S. §24-1-124(4). Moreover, the State Engineer, another defendant in this case, is the executive director of the Commission. *See* C.R.S. §37-90-104(6). In addition, the Foundation has not amended its Complaint or otherwise changed the relief sought since it filed the Complaint on February 23, 2015, so the scope of the litigation has not changed.

*B. Rule 24(a)(2) – Intervention of Right based on Interest.*

5. The Commission also seeks to intervene as a matter a right pursuant to C.R.C.P. 24(a)(2), which provides that “[u]pon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

6. However, “according to the Advisory Committee on Civil Rules, the federal counterpart to C.R.C.P. 24(a) was written to also avoid ‘a cluttering of lawsuits with multitudinous useless intervenors.’” *Concerning Application for Underground Water Rights*, 304 P.3d 1167, 1170 (Colo. 2013)(quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L.Rev. 356, 403 (1967).

7. Intervention as a matter of right is a fact-specific determination. *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 404 (Colo. 2011). All of the elements set forth in C.R.C.P. 24(a)(2) must be present in order to intervene. *See Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1987).

8. The first element requires a party seeking to intervene by right to demonstrate an interest relating to the property or transaction which is the subject of the action. The Commission asserts that because it is the only agency charged with administering C.R.S. § 37-90-106(1)(a), it has an interest in whether the statute is found to be constitutional or not. However, this Court has already ruled otherwise in its Order finding that the Commission was not subject to joinder under C.R.C.P. 19 or C.R.C.P. 57(j):

The Commission has no substantial interest in the outcome of the litigation. **The Commission is charged with enforcing the law as it is, not litigating the constitutionality of the law.** Entry of a final decree between the parties can be made without affecting the Commission’s interest or leaving the controversy in such a situation where the final determination is inequitable to the Commission.

*See* p. 6 of the Court’s Order dated July 8, 2015. (*emphasis added*). Note that under Rule 19, the “interest” element is met by showing an “interest relating to the subject of the action,” whereas under Rule 24 the applicant for intervention must claim “an interest relating to the property or transaction which is the subject of the action,” i.e. an even more particularized interest than under Rule 19.

9. The Commission also claims that since the Foundation is challenging the application of SB-52 to the Northern High Plains Designated Basin (“NHP Basin”) that “the Commission’s actions in its administration of that statute are under review” and that the “Commission has a clear interest in defending its actions” *See* Motion, p. 3. This is incorrect. The Foundation is not

challenging any action or inaction of the Commission in the above-captioned matter. Therefore, there are no actions that the Commission needs to defend.

10. Rather, the Foundation is claiming that SB-52 is unconstitutional retrospective legislation if it is applied to a designated groundwater basin that existed prior to the enactment of SB-52, such as the NHP Basin, because it removes a statutory mechanism designed to protect surface water rights. This is a constitutional challenge to SB-52, not a challenge to a particular action or inaction of the Commission, and this Court has already determined that **the “Commission is not authorized to rule on the constitutionality of SB-52.”** See the Court’s Order dated July 8, 2015, p. 3. (*emphasis added*).

11. Moreover, the Commission does not own any wells, does not have authority to administer the Republican River Compact, nor does it have the authority to administer surface water rights, including Bonny Reservoir. Therefore, and given the foregoing, the Commission does not possess an interest in the property or transaction as necessary to meet the first element for the right of intervention under Rule 24(a)(2), C.R.C.P.

12. To meet the second element for intervention by right under C.R.C.P. 24(a)(2), a party must show that it is so situated that the disposition of the underlying action may, as a practical matter, impair its ability to protect its interest. “An intervenor’s interest is impaired if the disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue his interest.” *Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 30 (Colo. 2001). Given that this Court has already determined that the Commission has no interest in litigating the constitutionality of the law, the Commission has no interest that could be impaired as a result of this case. See the Court’s Order dated July 8, 2015, p. 6. Moreover, this Court has also already ruled that “[e]ntry of **a final decree between the parties can be made without affecting the Commission’s interest** or leaving the controversy in such a situation where the final determination is inequitable to the Commission.” *Id.* (*emphasis added*).

13. The Commission also asserts that “it is unclear how a declaration that §37-90-106(1)(a), C.R.S. is unconstitutional would have any impact on the Commission unless it was a party.” See Motion, p. 3. However, the Commission is a state agency that is “legally bound to comply with [its] enabling statutes.” *Sears v. Romer*, 928 P.2d 745, 751 (Colo. App. 1996). Any portion of the statute deemed unconstitutional would no longer be considered valid law, and the Commission is required to comply with the law. To suggest otherwise would produce absurd results, particularly when “[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.” See *McNichols v. City & Cnty. of Denver*, 74 P.2d 99, 102 (Colo. 1937). Therefore, if a ruling against state agency defendants is binding on all citizens then it seems quite clear that the Commission would be bound to any changes in the law regardless of whether it is a party.

14. For the third element, a party must demonstrate that its interest is not adequately represented by existing parties. Given that the Commission cannot satisfy the first two elements of C.R.C.P. 24(a)(2), the question of whether the Commission’s “interests” are adequately represented in the above-captioned matter is moot. See *Diamond Lumber, Inc.*, 746 P.2d at 78

(“All three elements of the rule, *i.e.*, a property interest, an impairment in the ability to protect it, and inadequate representation, must be present in order to intervene”). However, in the event the Commission does satisfy the first two elements, it is adequately represented by the existing Defendants. In particular, the Commission has not provided a reason why it is not adequately represented by its parent agency, the Division of Water Resources. There are also 28 attorneys representing the other defendants, including six assistant attorney generals. It is difficult to imagine what additional contribution the Commission would make to the proceedings, particularly given that the Answer filed by the Commission alongside its Motion to Intervene is virtually identical to the Answer filed jointly by the State and Division Engineers, Division of Water Resources, and Colorado Parks and Wildlife.

15. Timeliness. C.R.C.P. 24 requires timely intervention, and “the issue of timeliness is a threshold question.” *Law Offices of Andrew L. Quiat, P.C. v. Ellithorpe*, 917 P.2d 300, 303 (Colo. App. 1995). Since the Commission filed within the time allowed to the NHP Basin Well Owners, the Foundation recognizes that the Commission’s Motion to Intervene may be considered timely filed. However, the Commission has not demonstrated that its failure to seek to intervention until December 16, 2015 was justified. As set forth above, the Commission cannot claim lack of notice given its relationship to the other defendants. The Commission was also aware that this Court ruled that it was not an indispensable party on July 8, 2015, but yet the Commission waited over five months to intervene.

*C. Rule 24(b)(2) – Permissive Intervention.*

16. In the alternative, the Commission asserts that if the Court does not grant intervention of right, it should be granted permissive intervention pursuant to C.R.C.P. 24(b)(2), which provides in part that “[w]hen a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency . . . the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

17. When there is no showing that the intervention should be granted as a matter of right, it is within the trial court’s discretion whether permissive intervention should be granted. *See Denver Chapter of Colo. Motel Ass’n v. City & County of Denver*, 150 Colo. 524 (1962). Because the standard of review for denial of a request for permissive intervention is abuse of judicial discretion, it can “seldom, if ever, be shown that the trial court had abused its discretion in denying the permissive right to intervene.” *Grijalva v. Elkins*, 132 Colo. 315 (1955).

18. The Commission alleges that it qualifies for permission intervention because the Complaint challenges (i) the administration of wells in the NHP Basin and (ii) the application of the Ground Water Management Act, specifically C.R.S. §37-90-106(1)(a). However, as discussed above, this is not an accurate representation of the Foundation’s Complaint. While the Commission has statutory duties set forth in the Groundwater Management Act, its exercise of those duties is not at issue. The Foundation is not challenging any decision or rule by the Commission, nor is it challenging the Commission’s authority.

19. Rather, under Claim 2, the Foundation is challenging the constitutionality of a 2010 legislative amendment to C.R.S. §37-90-106(1)(a) that removed the Foundation’s legal right as a surface water right owner to redraw designated groundwater basin boundaries to exclude improperly designated groundwater.<sup>1</sup> *Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 32 (Colo. 2006), as modified on denial of reh'g (Dec. 4, 2006). It is an issue created by the legislature, not the Commission. Under Claim 3, the constitutional challenge to the Groundwater Management Act is limited to the NHP Basin if there is no relief available to the Foundation under Claims 1 and 2, such that surface right owners like the Foundation must bear the full burden of Compact compliance. *See* Complaint, ¶¶ 115-116. The Commission has no authority over surface water, and no authority over the administration of interstate compacts. *See* C.R.S. §37-80-104.

20. The fact that the Commission administers C.R.S. §37-90-106(1)(a) does not automatically allow it to intervene. Rule 24(b) “provides a conditional right to intervene to governmental officers or agencies where the existing lawsuit concerns matters in which the officer or agency has an interest.” 4 Colo. Prac., Civil Rules Annotated R 24 (4th ed.). This Court has already ruled that the Commission does not have a “substantial interest in the outcome of the litigation” because the Commission “is charged with enforcing the law as it is, not litigating the constitutionality of the law.” *See* p. 6 of the Court’s Order dated July 8, 2015. (*emphasis added*).

21. The Colorado Supreme Court has stated that permissive intervention can be desirable where “such participation [does] no harm and [makes] a more comprehensive decree possible. *N. Poudre Irr. Co. v. Hinderlider*, 112 Colo. 467, 474-75 (1944). Given the type of constitutional challenge to SB-52, there is little chance that participation by the Commission will result in a “more comprehensive decree.”

22. On the other hand, the Commission’s participation would likely cause harm to the proceedings. First, it will make the case and trial more administratively burdensome than it already is. Second and most importantly, the Commission’s participation could cause harm by confusing the issues, making judgment more difficult to render. *See Grijalva*, 132 Colo. at 318-19, which affirmed the trial court’s denial of intervention and reasoned that “[h]ad intervention been allowed, new and essentially different questions of law and fact would be injected into the case, which would not be common to the issues to be determined between [the parties]. This might complicate the case to such an extent that the jury would become perplexed and be unable to render a just verdict.” Moreover, given the number of other parties in the case with the same ultimate goal — upholding the constitutionality of SB-52 — the Commission’s intervention would result in cumulative and duplicative briefing that would be overly burdensome to the Foundation and to this Court.

23. Pursuant to the foregoing, the Foundation respectfully requests that the Commission’s Motion be denied. However, in the event the Court does grant the Commission the right to

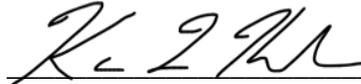
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<sup>1</sup>The Commission has no statutory power or other obligations regarding the issues raised in Claim 1; namely, administration of surface water rights and an interstate Compact, and operation and management of Bonny Reservoir.

permissively intervene, the Foundation requests that the Court use its discretion to limit the Commission's participation to briefing the constitutionality of SB-52, and to the extent applicable, the constitutionality of the 1965 Act.

Respectfully submitted this 6<sup>th</sup> day of January, 2016.

PORZAK BROWNING & BUSHONG LLP



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Steven J. Bushong (#21782)

Karen L. Henderson (#39137)

*Attorneys for the Jim Hutton Educational Foundation*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of January, 2016, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION’S RESPONSE TO THE COLORADO GROUND WATER COMMISSION’S MOTION TO INTERVENE** 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:

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
Colorado Division of Water Resources	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Parks And Wildlife	Defendant	Katie Laurette Wiktor (CO Attorney General) Timothy John Monahan (CO Attorney General)
David Nettles	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Dick Wolfe	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
4m Feeders Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
4m Feeders LLC	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Carlyle James As Trustee of the Chester James Trust	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
City of Burlington	Defendant-Well Owner	Alix L Joseph (Burns Figa and Will P C) Steven M. Nagy (Burns Figa and Will P C)
City of Holyoke	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
City of Wray Colorado	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Colorado Agriculture Preservation Assoc	Defendant-Well Owner	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Colorado State Board Land Commissioners	Defendant-Well Owner	Virginia Marie Sciabbarrasi (CO Attorney General)
David L Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Dirks Farms Ltd	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Don Myrna And Nathan Andrews	Defendant-Well Owner	Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
Happy Creek Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
J And D Cattle LLC	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
James J May	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Julie Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Kent E Ficken	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Lazier Inc	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Mariane U Ortner	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Marjorie Colglazier Trust	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
May Acres Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Brothers Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Family Farms	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
North Well Owners	Defendant-Well Owner	Kimbra L. Killin (Colver Killin and Sprague LLP) Russell Jennings Sprague (Colver Killin and Sprague LLP)
Protect Our Local Community's Water LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Republican River Water Conservation Dist	Defendant-Well Owner	David W Robbins (Hill and Robbins PC) Peter J Ampe (Hill and Robbins PC)
Saving Our Local Economy LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
		Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Steven D Kramer	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Thomas R May	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Timothy E Ortner	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Tri State Generation And Transmission As	Defendant-Well Owner	Aaron S. Ladd (Vranesh and Raisch) Justine Catherine Shepherd (Vranesh and Raisch)
Yuma Cnty Water Authority Public Improv	Defendant-Intervenor	Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP) John A Helfrich (Brownstein Hyatt Farber Schreck LLP) Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)



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Karen L. Henderson