

DISTRICT COURT, WATER DIVISION NO.1
WELD COUNTY, COLORADO
901 9th Avenue / P.O. Box 2038
Greeley, Colorado 80631
(970) 351-7300

PLAINTIFF, The Jim Hutton Educational
Foundation,

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.

^ COURT USE ONLY ^

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Colorado Ground Water Commission**
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Case No. 2015CW3018

Div.: 1

REPLY IN SUPPORT OF MOTION TO INTERVENE

The Colorado Ground Water Commission (“Commission”), by and through the
Attorney General, states as follows in support of its motion to intervene:

I. Summary of Argument

The Commission moved to intervene in this matter on three separate grounds. First, because Plaintiff invoked jurisdiction under the Water Right Determination and Administration Act of 1969, §37-92-101 et seq., C.R.S., (“1969 Act”), it gave an unconditional right to intervene upon meeting the terms of §37-92-304(3), C.R.S. Next, the Commission has a right to intervene because it has an interest in a transaction which is the subject of the complaint. Namely, Plaintiff challenges the application of §37-90-106(1)(a), C.R.S., and the establishment of a designated basin as violations of the Colorado constitution. Finally, the Commission asked for permissive intervention because Plaintiff “relies for ground of claim or defense upon any statute or executive order administered by” the Commission. C.R.C.P. 24(b). The Commission is the only entity with statutory authority to apply §37-90-306(1)(a), C.R.S. This statute forms the basis of the second claim. Plaintiff also challenged the application of the Colorado Ground Water Management Act, §37-90-101, et seq. C.R.S. (“1965 Act”), in the Northern High Plains Designated Ground Water Basin. The Commission is the sole entity that had authority to create the basin and to administer many of the Act’s provisions.

The thrust of Plaintiff’s objection is that it only filed suit against the State Engineer, Division Engineer, Division of Water Resources, and Division of Parks and Wildlife, based in part on allegations that the 1965 Act is unconstitutional as

applied. However, its response avoids the fact that the Commission applies the contested portions of the 1965 Act, not the other named agencies.

II. Argument

A. The Commission has satisfied the requirements for intervention of right by meeting the requirements of §37-92-304(3), C.R.S.

Plaintiff makes an overly constrained interpretation of C.R.C.P. 24(a) when it asserts that meeting the terms of a statute makes intervention conditional. Rule 24(a) states that intervention of right exists “[w]hen a statute confers an unconditional right to intervene.” Of course, a statute must apply to the case and the party asserting its use. This fact does not render intervention conditional. Here the Commission points out that it has met the terms of §37-92-304(3), C.R.S. This statute confers a right to intervene when a party has made a showing of excusable neglect, and no undue delay or prejudice will result. Here the Commission has explained its excusable neglect. The case had originally been filed as a water case under §37-92-302, C.R.S. Resume publication, however, did not satisfy notice to persons within a designated ground water basin. The Court then ordered service by publication. The Commission is seeking intervention at the same time as those filing answers pursuant to this service. Moreover, the identity of Defendants was in doubt for some time. The Commission is not controlled by any of the current Defendants. See, § 37-90-104, C.R.S. (nine of ten voting members appointed by the governor and confirmed by the senate.) The State Engineer is not a voting member

of the Commission. *Id.* Given that the action was filed outside of a designated basin and that it was never served, it took some time for the Commission to be able to evaluate this case and decide how to proceed. That it did not seek intervention until the time other parties were required to file an answer is excusable neglect.

Plaintiff has asserted jurisdiction under the 1969 Act. However, it has already varied many of the procedures normally followed under the 1969 Act. Now Plaintiff asserts that the normally liberal standards for allowing parties into a case under the 1969 Act should not be followed. *See, Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 747 (Colo. 1997) (allowing “any person” to file a statement of opposition to an application). While *Shirola* is about opposition to an application, it does show that the 1969 Act contemplates liberal participation standards. Upon meeting the terms of §37-92-304(3), C.R.S., the court “shall” grant intervention under the statute. Therefore, if the complaint is premised upon the 1969 Act, this statute confers a right of intervention to the Commission.

B. The Commission also meets the requirement for intervention of right because it holds an interest in the “transaction which is the subject of the action.” C.R.C.P. 24(a).

Plaintiff has alleged that the application of S.B. 10-52 and the 1965 Act are unconstitutional. It is the application of this Act which forms the transaction that is the subject matter of the second and third claims for relief. Plaintiff’s objection is that it wishes to exclude the Commission from a lawsuit seeking determinations of a statute administered by the Commission because it named another state agency

that does not, in fact, administer the challenged statute. This objection is misplaced.

Application of the 1965 Act raises facts uniquely held by the Commission. Plaintiff challenges the application of S.B. 10-52. Complaint ¶106. Likewise, Plaintiff challenges establishment of the basin and administration of the 1965 Act. Complaint ¶115. At several points, Plaintiff asserts that wells within the basin should be declared tributary to a natural stream. Complaint ¶¶61, 75, 97, 115. Elsewhere, Plaintiff claims that areas of the basin should be de-designated. Complaint at ¶72 (alleging §37-90-106, C.R.S. now prohibits exclusion of lands from a designated basin). The Commission is statutorily charged with determination of designated basins. §37-90-106, C.R.S. It must also make any initial determination whether the water at issue is designated ground water. *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842, 846-47 (Colo. 1983); *Danielson v. Vickroy*, 627 P.2d 752, 759-60 (Colo. 1981).

The State Engineer, Division Engineer, and Division of Water Resources are not in control of these determinations; therefore, they cannot adequately represent the Commission. The Commission is comprised of 12 members. Nine are appointed by the governor. §37-90-104(1), C.R.S. The only other voting member is the executive director of the department of natural resources, who is not a party. Non-voting members are the State Engineer and director of the Colorado Water Conservation Board. §37-90-104(4), C.R.S. While the State Engineer can inform

the Commission, he cannot control its decisions or discharge all of the Commission's duties under the 1965 Act. Because the Commission is the only entity that can make determinations designating a basin or whether water within a basin is designated ground water, it has a unique interest in the challenge to the application of its governing statutes.

Further, complete relief cannot be afforded to Plaintiff without the Commission. Plaintiff seeks declaratory judgment about the constitutionality of the 1965 Act. It also has made allegations that areas within the basin must be de-designated, and that some permitted wells are withdrawing tributary water rather than designated ground water. Determinations of these issues can only bind parties to the case. *Constitution Assoc. v. New Hampshire Ins. Co.*, 930 P.2d 556, 562 (Colo. 1996)(Section 13-51-115 C.R.S. (1973) and C.R.C.P. 57(j) require that all parties having any interest that might be affected by a declaratory judgment must be made parties to the action). Further, if not a party, the Commission would not be bound by the preclusion doctrine in its future application of the 1965 Act. *National Farmers Union Property & Casualty Co. v. Frackelton*, 662 P.2d 1056, 1062 (Colo. 1983). Therefore, any determination whether application of the 1965 Act is unconstitutional must include the Commission.

C. The Commission also should be allowed to intervene pursuant to C.R.C.P. 24(b).

This rule allows intervention upon a timely application when a statute confers a conditional right to intervene, or when a governmental agency administers a statute relied upon for a claim. Plaintiff has admitted that the motion to intervene is timely. Response to the Colorado Ground Water Commission’s Motion to Intervene at ¶15.

Rule 24(b) allows intervention when a statute confers a conditional right to intervene. Section 37-92-304(3), C.R.S. provides for an unconditional right to intervene in a water case if the statute’s terms apply. However, should the Court determine that the statute instead provides for conditional intervention, the Commission reiterates its discussion above for meeting the terms of the statute.

The Court should also allow the Commission to intervene because the second and third claims for relief both rely upon the 1965 Act, which are administered by the Commission. S.B.10-52 amended §37-90-106 of the 1965 Act. In its second claim Plaintiff alleges that S.B. 10-52 “is unconstitutional as applied to a designated ground water basin.” Complaint at ¶106. It also asserts that water in the basin is “properly viewed as tributary water.” Complaint at ¶97. Section 37-90-106 is administered solely by the Commission. Likewise, whether water within a designated basin is properly viewed as designated ground water is a matter dedicated to the Commission. *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842,

846-47 (Colo. 1983); *Danielson v. Vickroy*, 627 P.2d 752, 759-60 (Colo. 1981).

Therefore reliance of the second claim for relief on parts of the 1965 Act amended by S.B. 10-52 is grounds for permissive intervention.

The third claim for relief asserts that “the establishment and administration of designated ground water basins pursuant to the Ground Water Act is unconstitutional.” Complaint at ¶115. The complaint also asserts that wells pumping within the designated basin should be “administered as tributary.” Complaint at ¶115. As mentioned above, both the establishment of a designated basin and determination of designated ground water are dedicated to the initial determination of the Commission. §37-90-106, C.R.S.; *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842, 846-47 (Colo. 1983); *Danielson v. Vickroy*, 627 P.2d 752, 759-60 (Colo. 1981). Plaintiff admits that the Commission created the Northern High Plains Designated Ground Water Basin. Complaint at ¶23. It also acknowledges, “Designated ground water is ground water that in its natural course would not be available to and required for the fulfillment of decreed surface rights.” Complaint at ¶ 63. This puts at issue the Commission’s creation of the basin, as well as any Commission actions determining the existence of any designated ground water pursuant to its statutory authority. Because the claims rely on the Commission’s application of the 1965 Act, the Court should grant intervention.

III. Conclusion

The Commission is seeking to intervene because it applies the parts of the 1965 Act at issue and has an important interest in any judicial interpretation of that application. Plaintiff's argument that the Commission does not make a judicial determination on the constitutionality of the 1965 Act misses the point. Here, the issue is whether it has an interest in the transaction that forms the basis of the complaint. As the administrator of the challenged statutes, the Commission has a unique interest in the outcome of this litigation. Plaintiff cannot undermine the Commission's interest simply by naming state officials who do not administer the statutes in question. Moreover, those officials do not adequately represent the Commission. The State Engineer does not control the Commission. Further, the State Engineer's interest in Compact administration is not the same as designation and administration of a basin within the 1965 Act. Therefore, the Commission's participation is essential for a comprehensive decree.

Finally, Plaintiff offers no support for its worries about cumulative or duplicative briefing. Plaintiff invited many potential defendants when it challenged the very underpinnings of the 1965 Act and asserted that designated basin wells should be administered as tributary water. It should not be allowed to circumscribe the proceedings by naming as defendants parties that do not even administer the contested portions of the 1965 Act. Because of the far ranging impacts of Plaintiff's requested relief, including interpretations of the 1965 Act, review of basin

designations, findings of designated ground water within the basin, and administration of designated basin wells to meet priority calls of surface rights, many parties will have an interest in this proceeding. However, this does not automatically indicate that briefing will be cumulative or duplicative. The Commission has a unique interest based on its statutory directive to designate basins and administer provisions of the 1965 Act. The Court should grant the Commission's motion to intervene.

Respectfully submitted this 13th day of January 2016,

CYNTHIA H. COFFMAN
Attorney General

/s/ Chad M. Wallace

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CERTIFICATE OF SERVICE

This is to certify that on this 13th day of January, 2016, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO INTERVENE** to be served electronically via ICCES upon the following:

Party Name	Party Type	Attorney Name
Arikaree Ground Water Management District	Defendant	David C Taussig Eugene J Riordan Leila Christine Behnampour (Vranesh and Raisch)
City of Burlington, Colorado	Defendant	Alix L Joseph Steven M. Nagy (Burns Figa and Will P C)
City of Holyoke	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
City of Wray Colorado	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Colorado Agriculture Preservation Association	Defendant	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Colorado Department of Natural Resources	Defendant / Opposer	Daniel E Steuer Ema I.G. Schultz Preston Vincent Hartman (CO Attorney General)
Colorado Division of Water Resources	Defendant / Opposer	Daniel E Steuer Ema I.G. Schultz Preston Vincent Hartman (CO Attorney General)
Colorado Parks And Wildlife	Defendant / Opposer	Katie Laurette Wiktor Timothy John Monahan (CO Attorney General)
Colorado State Board Land Commissioners	Defendant	Virginia Marie Sciabbarrasi (CO Attorney General)
David L. Dirks	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
David Nettles	Defendant /Opposer	Daniel E Steuer Ema I.G. Schultz Preston Vincent Hartman (CO Attorney General)

Party Name	Party Type	Attorney Name
Dick Wolfe	Defendant / Opposer	Daniel E Steuer Ema I.G. Schultz Preston Vincent Hartman (CO Attorney General)
Dirks Farms Ltd., Julie Dirks and David L. Dirks	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Division 1 Engineer	Division Engineer	Division 1 Water Engineer (State of Colorado DWR Division 1)
Division 1 Water Engineer	Opposer	Ema I.G. Schultz Preston Vincent Hartman (CO Attorney General)
Don, Myrna and Nathan Andrews	Defendant	Geoffrey M. Williamson Stuart B. Corbridge (Vranesh and Raisch)
East Cheyenne Ground Water Management District	Defendant	John David Buchanan Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
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, and Carlyle James as Trustee of the Chester James Trust	Defendant	Johanna Hamburger William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier, Marjorie Colglazier Trust, and Lazier, Inc.	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Mariane U. and Timothy E. Ortner	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marks Butte Ground Water Management District, Frenchman Ground Water Management District, Central Yuma Ground Water Management District, WY Ground Water Management District, and Arikaree Ground Water Management District	Defendant	David C. Taussig Eugene J Riordan Leila Christine Behnampour (Vranesh and Raisch)

Party Name	Party Type	Attorney Name
North Well Owners	Defendant	Kimbra L. Killin Russell Jennings Sprague (Colver Killin and Sprague LLP)
Protect Our Local Community's Water LLC	Defendant	John David Buchanan Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Republican River Water Conservation District	Defendant	David W Robbins Peter J Ampe (Hill and Robbins PC)
Saving Our Local Economy LLC	Defendant	John David Buchanan Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
State Engineer, Colorado Division of Water Resources	State Engineer	Ema I.G. Schultz Preston Vincent Hartman (CO Attorney General)
The Jim Hutton Educational Foundation	Plaintiff / Applicant	Karen Leigh Henderson Steven J Bushong (Porzak Browning & Bushong LLP)
Tri State Generation And Transmission As	Defendant	Aaron S. Ladd Justine Catherine Shepherd (Vranesh and Raisch)
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 Edwards

Nan Edwards