

District Court, Water Division No. 1, State of Colorado 901 9 <sup>th</sup> Avenue Greeley, Colorado 80631 (970)351-7300	DATE FILED: January 18, 2016 4:06 PM
<p><b>Plaintiff:</b> The Jim Hutton Educational Foundation</p> <p>v.</p> <p><b>Defendants:</b> 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; Colorado Parks and Wildlife; Yuma County Water Authority Public Improvement District; The Republic River Water Conservation District; City of Holyoke; City of Wray; Harvey Colglazier; Lazier Inc; Marjorie Colglazier Trust; Mariane U Ortner; and Timothy E Ortner</p>	<p><b>COURT USE ONLY</b></p>
<p><i>Attorneys for East Cheyenne Ground Water Management District</i>          Timothy R. Buchanan, #12185          John D. Buchanan, #45191          Buchanan Sperling &amp; Holleman PC          7703 Ralston Road          Arvada, CO 80002          (303)431-9141          trb@tbvs.net; jbuchanan@tbvs.net</p>	Case No. 15CW3018
<p align="center"><b>EAST CHEYENNE GROUND WATER MANAGEMENT DISTRICT’S RESPONSE TO JIM HUTTON EDUCATIONAL FOUNDATION’S MOTION TO STRIKE</b></p>	

East Cheyenne Ground Water Management District (“East Cheyenne District”), by and through its counsel, Buchanan Sperling & Holleman PC, files this response to the Jim Hutton Educational Foundation’s (“Foundation”) Motion to Strike East Cheyenne District’s Answer.

East Cheyenne District agrees with and incorporates the arguments set forth in the motions to intervene filed by the Marks Butte, Frenchman, Sandhills, Central Yuma, Plains, W-

Y and Arikaree Ground Water Management Districts and the Colorado Ground Water Commission (“Commission”). In addition, East Cheyenne District states as follows:

**I. Standard of Review**

The stated purpose of declaratory judgments under the civil rule and the Uniform Declaratory Judgments Law, C.R.S. § 13-51-101 to -115, “is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.” C.R.C.P. 57(k); C.R.S. § 13-51-102. “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” C.R.C.P. 57(j); C.R.S. § 13-51-115 (emphasis added). In determining whether a party is indispensable in a declaratory judgment action, courts should consider factors such as “the danger of inconsistent decisions, avoidance of multiplicity of suits, and the reluctance of a court to render a decision which will not finally settle the controversy before it.” *Dunne v. Shenandoah Homeowners Assoc.*, 12 P.3d 340, 340 (Colo. App. 2000); C.R.C.P. 57(e); C.R.S. § 13-51-102.

**II. East Cheyenne District is the agency responsible for administration of ground water within its boundaries and is an indispensable party.**

The Foundation seeks, among other relief, a declaratory judgment finding the current administration of water in the Republican River Basin unlawful and enjoining such practices. Complaint at ¶ 92. The court has stated that potential remedies include an order requiring the State Engineer to curtail ground water diversions in the Northern High Plains Basin (“NHP Basin”). Order Re: Yuma County Water Authority’s Motion to Intervene dated July 1, 2015 at 3. Such curtailment could occur even before the Foundation brings an action to redraw the NHP Basin boundaries. *Id.*

However, East Cheyenne District, not the State Engineer, has the sole authority to administer and curtail ground water diversions within the District. C.R.S. § 37-90-130(2); *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1185-86 (Colo. 2000).

Under C.R.S. § 37-90-130, East Cheyenne District has the authority within its boundaries to, *inter alia*:

- “regulate the use, control, and conservation of the groundwater of the district...;”
- “propose[] controls, regulations, or conservation measures...;”
- “regulate the production [from wells producing ground water] so as to minimize as far as practicable the lowering of the water table or the reduction of the artesian pressure...;”
- “develop comprehensive plans for the most efficient use of the water of the groundwater aquifer or subdivision thereof and for the control and prevention of waste of such water, which plans shall specify in such detail as may be practicable the acts, procedure, performance, and avoidance which are or may be necessary to effect such plans, including specifications therefor... and to publish such plans and information and bring them to the notice and attention of the users of such groundwater within the district and to encourage their adoption and execution;”
- “In the control and administration of the quantity of groundwater extracted from the aquifer, to adopt such devices, procedures, measures, or methods as it deems appropriate to effectuate this purpose;”

– “To exercise such other administrative and regulatory authority concerning the groundwaters of the district as, without the existence of the district, would otherwise be exercised by the ground water commission.”

While the State Engineer’s “compact rule power” allows him to make and enforce regulations to enable the State to meet its compact commitments, this power arises under and is limited by the “water rule power.” C.R.S. § 37-80-104; *Kuiper v. Gould*, 196 Colo. 197, 201-02, 583 P.2d 910, 913 (Colo. 1978). The “water rule power” allows the State Engineer to adopt rules and regulations to “administer, distribute, and regulate the waters of the state.” C.R.S. § 37-92-501(1) (emphasis added). “Waters of the state” are defined as waters in or tributary to natural streams, and do not include waters in designated ground water basins. C.R.S. § 37-92-103(13). Therefore, the State Engineer’s compact rule power does not grant him authority to promulgate rules regarding the administration of designated ground water. The State Engineer may assist East Cheyenne District in its administration of ground water; he cannot curtail ground water diversions in the East Cheyenne District. C.R.S. § 37-90-110(1)(f), (g); *Goss*, 993 P. 2d at 1188.

The State Engineer’s role in enforcing compact requirements must also adhere to existing statutory provisions. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 69 (Colo. 2003). “[A]lthough the State Engineer can make rules to enforce compact compliance...the means by which he does so are both dictated and constrained by other statutory requirements. Indeed, statutory directives do not exist in a vacuum; instead, statutes – and the authority they convey – are as interrelated to one another as the legislative objectives that motivated their enactment.” *Id.* at 70-71. Within designated basins and management districts, such statutory provisions include, in addition to the

provisions describing management districts' authority cited above, the modified prior appropriation doctrine. C.R.S. § 37-90-102(1). Modified prior appropriation is intended to (1) permit full economic development of designated ground water resources, (2) protect prior appropriations of designated ground water, and (3) protect and maintain reasonable ground water pumping levels. *Id.* The ground water management districts have broad discretion in determining how to administer designated ground water consistent with these principles and those described in C.R.S. § 37-90-130. *Goss*, 993 P.2d at 1188 – 90.

Moreover, the Republican River Water Conservancy District (“RRWCD”) was created to “assist this state to carry out the state’s duty to comply with the limitations and duties imposed upon the state by the Republican river compact.” C.R.S. §§ 37-50-101, -103(1). The RRWCD’s board of directors includes 15 members appointed by the boards of the county commissioners and ground water management districts within the RRWCD boundary, and one member of the Commission. C.R.S. § 37-50-104(1). The State Engineer is not a member of the RRWCD board of directors, further indicating that the relevant statutes do not contemplate compact administration by the State Engineer.<sup>1</sup> *Id.*

East Cheyenne District has a vested interest in the administration of the water rights at issue and the potential determinations of this court. The District, not the State Engineer, was vested with this power by the legislature to ensure that water is regulated consistent with the principles of the Ground Water Management Act and the modified prior appropriation doctrine.

---

<sup>1</sup> East Cheyenne District notes that it is not included in the RRWCD boundary, and thus ground water within East Cheyenne District should not be subject to curtailment or used to meet compact obligations. However, the Foundation’s complaint refers to ground water use within the NHP Basin as a whole and East Cheyenne District is located within the NHP Basin. To the extent that curtailment of ground water within the East Cheyenne District to meet Republican River compact obligations is a potential remedy in this case, East Cheyenne District is an indispensable party to these proceedings under C.R.C.P. 57(j) and C.R.S. § 13-51-115.

If the court grants the relief requested in the Foundation's complaint, it could affect the ability of East Cheyenne District to fulfill its duties regarding the management, administration, and control of designated ground water within its boundaries. East Cheyenne District is thus an indispensable party to this proceeding under C.R.C.P. 57(j) and C.R.S. § 13-51-115.

Furthermore, to the extent that the court will consider whether the current administration of water under the compact is lawful, any judgment entered by the court will necessarily fail to terminate the uncertainty or controversy regarding how the Basin should be administered without participation of the duly organized ground water management districts within the NHP Basin. C.R.C.P. 57(k); *see also Continental Mut. Ins. Co. v. Cochrane*, 89 Colo. 462, 468, 4 P.2d 308, 310 (1931). Without participation by the ground water management districts, any relief granted under the Foundation's complaint carries the danger of inconsistent decisions and multiplicity of suits. *See Dunne v. Shenandoah Homeowners Assoc.*, 12 P.3d 340, 340 (Colo. App. 2000). For example, if the Foundation prevails on some or all of its claims, then further proceedings would be required to determine how ground water should be curtailed in the NHP Basin, and an order by this court would not fully resolve the controversy before it. If East Cheyenne District's answer is stricken, it will be forced to consider other relief such as requesting a declaratory judgment clarifying that the State Engineer cannot curtail ground water pumping in designated basins, a point of law that has been made clear in the Ground Water Management Act and numerous Colorado Supreme Court opinions. *E.g., Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 27-32 (Colo. 2006).

**III. As an indispensable party to the declaratory judgment action, East Cheyenne District is not required to file a motion to intervene.**

The Foundation incorrectly asserts that East Cheyenne District must file a motion to intervene. Requiring a motion to intervene in this context would “exalt form over substance.” *Weston v. T & T, LLC*, 271 P.3d 552, 556 (Colo. App. 2011).

As discussed above, the East Cheyenne District is an indispensable party in this proceeding in which administration of ground water diversions within the District is at issue. The Foundation should have personally served East Cheyenne District with its complaint. Instead, the Foundation was allowed to publish notice of its complaint, and East Cheyenne District filed a timely answer.

While East Cheyenne District is not a well owner, it is charged with administration of ground water for the benefit of well owners by, *inter alia*, permitting full economic development of designated ground water resources, protecting prior appropriations of designated ground water, and protecting and maintaining reasonable ground water pumping levels. C.R.S. § 37-90-102(1). The Foundation’s claim that a ground water management district must file a motion to intervene along with a timely filed answer to the published notice of a complaint seeking to curtail well pumping and enjoin the current administration of ground water within the district’s boundaries is not supported by Colorado law.

Even if East Cheyenne District should have filed a motion to intervene under C.R.C.P. 24(c), such requirement is “a technicality that [would] not result in the invasion of a substantial right” of the Foundation. *Weston*, 271 P.3d at 556. East Cheyenne District’s answer gives notice of its responses and defenses to the claims raised in the Foundation’s complaint. *See id.* Any failure to comply precisely with the rule does not prejudice the Foundation in any way. *Id.*; *see*





## CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of January, 2016, a true and correct copy of the foregoing **EAST CHEYENNE GROUND WATER MANAGEMENT DISTRICT'S RESPONSE TO JIM HUTTON EDUCATIONAL FOUNDATION'S MOTION TO STRIKE** was electronically served via ICCES upon the following parties:

<b>Party</b>	<b>Party Type</b>	<b>Attorney</b>
4M Feeders Inc.	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
4M Feeders LLC	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
Arikaree Ground Water Management District	Defendant/Opposer	David C Taussig White & Jankowski LLP Eugene J Riordan Leila C Behnampour Vranesh and Raisch
Carlyle James, as Trustee of the Chester James Trust	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
Central Yuma Ground Water Management District	Defendant/Opposer	Eugene J Riordan Leila C Behnampour Vranesh and Raisch
City of Burlington	Defendant/Opposer	Alix L Joseph Steven M Nagy Burns Figa and Will PC
City of Holyoke	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
City of Wray	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
Colorado Agriculture Preservation Association	Defendant/Opposer	Bradley C Grasmick Lawrence Jones Custer Grasmick LLP
Colorado Department of Natural Resources	Defendant/Opposer	Daniel E Steuer Ema Ig Schultz Preston V Hartman Colorado Attorney General

<b>Party</b>	<b>Party Type</b>	<b>Attorney</b>
Colorado Division of Water Resources	Defendant/Opposer	Daniel E Steuer Ema Ig Schultz Preston V Hartman Colorado Attorney General
Colorado Ground Water Commission	Defendant/Opposer	Chad M Wallace Patrick E Kowaleski Colorado Attorney General
Colorado Parks and Wildlife	Defendant/Opposer	Katie L Wiktor Timothy J Monahan Colorado Attorney General
Colorado State Board of Land Commissioners	Defendant/Opposer	Virginia M Sciabbarrasi Colorado Attorney General
David L Dirks	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
David Nettles	Defendant/Opposer	Daniel E Steuer Ema Ig Schultz Preston V Hartman Colorado Attorney General
Dick Wolfe	Defendant/Opposer	Daniel E Steuer Ema Ig Schultz Preston V Hartman Colorado Attorney General
Dirks Farms Ltd	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
Division 1 Engineer	Division Engineer	Division 1 Water Engineer CDWR Division 1
Division 1 Water Engineer	Defendant/Opposer	Ema Ig Schultz Preston V Hartman Colorado Attorney General
Don Myrna and Nathan Andrews	Defendant/Opposer	Geoffrey M Williamson Stuart B Corbridge Vranesh and Raisch
Frenchman Ground Water Management District	Defendant/Opposer	Eugene J Riordan Leila C Behnampour Vranesh and Raisch

<b>Party</b>	<b>Party Type</b>	<b>Attorney</b>
Happy Creek Inc.	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
Harvey Colglazier	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
J and D Cattle LLC	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
James J May	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
Julie Dirks	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
Kent E Ficken	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
Lazier Inc.	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
Mariane U Ortner	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
Marjorie Colglazier Trust	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
Marks Butte Ground Water Management District	Defendant/Opposer	Eugene J Riordan Leila C Behnampour Vranesh and Raisch
May Acres Inc	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
May Brothers Inc.	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
May Family Farms	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
North Well Owners	Defendant/Opposer	Kimbra L Killin Russell J Sprague Colver Killin and Sprague LLP

<b>Party</b>	<b>Party Type</b>	<b>Attorney</b>
Plains Ground Water Management District	Defendant/Opposer	Eugene J Riordan Leila C Behnampour Vranesh and Raisch
Republican River Water Conservation District	Defendant/Opposer	David W Robbins Peter J Ampe Hill and Robbins PC
Sandhills Ground Water Management District	Defendant/Opposer	Eugene J Riordan Leila C Behnampour Vranesh and Raisch
State Engineer	State Engineer	Colorado Division of Water Resources CDWR
Steven D Kramer	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
The Jim Hutton Educational Foundation	Plaintiff/Applicant	Karen L Henderson Steven J Bushong Porzak Browning & Bushong LLP
Thomas R May	Defendant/Opposer	Johanna Hamburger William A Paddock Carlson Hammond & Paddock LLC
Timothy E Ortner	Defendant/Opposer	Alvin R Wall Alvin R Wall Attorney at Law
Tri State Generation and Transmission Association Inc.	Defendant/Opposer	Aaron S Ladd Justine C Shepherd Vranesh and Raisch Roger T Williams TriState Generation and Transmission Association Inc
W-Y Ground Water Management District	Defendant/Opposer	Eugene J Riordan Leila C Behnampour Vranesh and Raisch
Yuma County Water Authority Public Improvement District	Defendant/Opposer	Dulcinea Z Hanuschak John A Helfrich Steven O Sims Brownstein Hyatt Farber Schreck LLP

*/s/ Peggy Sue Wells*  


---

Peggy Sue Wells