

<p>DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO</p> <p>Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300</p>	<p style="text-align: right;">DATE FILED: January 25, 2016 9:33 PM</p> <p style="text-align: center;"><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p>
<p>Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation,</p> <p>v.</p> <p>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.</p> <p>Defendant-Intervenors: Yuma County Water Authority Public Improvement District; Colorado Ground Water Commission; Marks Butte, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts.</p> <p>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.</p>	<p>Case Number: 15CW3018</p> <p>Div. No. 1</p>
<p>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</p>	
<p>THE JIM HUTTON EDUCATIONAL FOUNDATION’S REPLY IN SUPPORT OF ITS MOTION TO STRIKE THE EAST CHEYENNE GROUND WATER MANAGEMENT DISTRICT’S ANSWER</p>	

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through undersigned counsel, hereby replies to the East Cheyenne

Ground Water Management District's ("District") Response to the Foundation's Motion to Strike ("Response").

A. The District is not an Indispensable Party and its Answer is not Properly before the Court.

1. In its Orders dated July 8, 2015 and September 25, 2015 (collectively the "Court's Orders"), the Court ordered the Foundation to provide notice of this litigation to owners of wells in the Northern High Plains Designated Groundwater Basin (the "NHP Basin Well Owners") through a combination of mailings and newspaper publication. The NHP Basin Well Owners had until December 16, 2015 to file an Answer if they wanted to participate in the above-captioned matter. The Court's Orders only applied to NHP Basin Well Owners.
2. In its Response, the District acknowledges that it does not own any wells in the NHP Basin. Since it is undisputed that the District does not qualify as a NHP Basin Well Owner, it cannot participate in this case without obtaining leave of the Court to intervene. *See* C.R.C.P. 24(c) ("A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.").
3. The District claims that it was not required to file a motion to intervene because it should have been personally served by the Foundation as an indispensable party. *See* Response, p. 7. However, the District appears to believe that the Foundation "was allowed to publish notice of its complaint" instead of personally serving the District. *Id.* This is factually incorrect. The Foundation was allowed to notify the NHP Basin Well Owners by publication. The Court's Orders did not require the Foundation to notify the District. The District appears to be inappropriately relying on the Court's Orders concerning only the NHP Basin Well Owners in order to justify its failure to comply with Rule 24(c).
4. Moreover, the Foundation disagrees that the District is an indispensable party to this litigation pursuant to C.R.C.P. 57(j) and C.R.S. § 13-51-115. The District does not have an interest that would be affected by a ruling in this case. The interests of political subdivisions such as the District lie in enforcing the law as it is, not in litigating its constitutionality. *See Board of County Comm'rs v. Love*, 172 Colo. 121, 125 (1970) (political subdivisions are "created to carry out the will of the state."). Moreover, a ruling in this case has no potential to diminish or alter the District's statutory powers, and no actions by the District are at issue in this case. Thus, the District does not need to participate in order to protect its authority or defend its actions. A final decree between the parties can be made without affecting the District's interest or leaving the controversy in such a situation where the final determination is inequitable to the District.
5. In addition, the District argues that compliance with Rule 24(c) is a mere technicality citing *Weston v. T & T, LLC*, 271 P.3d 552, 556 (Colo. App. 2011). However, in *Weston* the court found that the potential intervenor filed an "intervention complaint" wherein the "complaint stated the grounds and facts upon which intervention was sought, together with his claim." *Id.* Therefore, the court was able to forgive the fact that the potential intervenor did not file a

separate motion to intervene given that the substance of such a motion was included in the complaint. However, this situation is distinguishable because the District did not state the grounds and facts upon which intervention was sought in its Answer.

6. The Foundation recognizes that it is within the Court's discretion to allow a party to permissively intervene in a matter. However, in the absence of leave from the Court to intervene, the District's Answer is not properly before the Court.

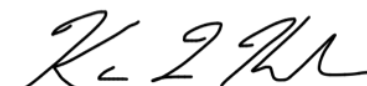
B. The State Engineer is responsible for Compact compliance.

7. In its Response, the District claims that the State Engineer lacks authority to promulgate rules regarding the administration of designated groundwater in order to ensure compliance with the Republican River Compact ("Compact"). The Foundation does not believe that the State Engineer's authority over designated groundwater is relevant to the resolution of its Motion to Strike. Nevertheless, these assertions require a brief response for two primary reasons. First, the District mischaracterizes the scope of the State Engineer's compact authority, and second, the District enlarges the Foundation's request for relief set forth in its Complaint. The Foundation purposefully plead its Complaint much more narrowly than characterized by the District.
8. In its Response, the District claims that it has the "sole authority to administer and curtail ground water diversions within the District." *See* Response, p. 3. This is not accurate. The cited case and statute only recognize that the District has certain powers with regard to designated groundwater after a permit has been issued, but it does not make the District the "sole authority." Such a position is contrary to the other provisions of the 1965 Ground Water Management Act granting the State Engineer various powers. *See, e.g.*, C.R.S. § 37-90-110 and 37-90-111.5.
9. With regard to the State Engineer's compact administrative authority, the State Engineer is the one with the "executive responsibility and authority with respect to [the] [d]ischarge of the obligations of the State of Colorado imposed by compact or judicial order on the office of the state engineer." C.R.S. § 37-80-102(a). The State Engineer, not the District, is the Commissioner for Colorado with regard to the Republican River Compact. *See* C.R.S. § 37-67-101. Moreover, the State Engineer's statutory duty to "make and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments" as set forth in C.R.S. § 37-80-104 is not limited to "waters of the state" as the District claims. The District cites *Kuiper v. Gould* and *Simpson v. Bijou Irrigation Co.*, but neither case stands for such a proposition. The plain language of the statute does not qualify the authority to a certain type of water, nor is this duty set forth in the 1969 Water Rights Act. Indeed, the State Engineer appears to believe that he does have authority because he expressly denied the Foundation's statement in the Complaint that "the Engineers maintain they have no authority to administer ground water in the Basin for Compact compliance due to the Ground Water Act." *See* the State Engineer's Answer, ¶48.

10. Ultimately, the United States Supreme Court has repeatedly confirmed that the “language of the Compact unambiguously governs the entire stream flow of the [Republican River] Basin, which includes all groundwater that would become part of the stream flow in the Basin if undepleted by the activities of man.” *Kansas v. Nebraska et al.*, No. 126, Orig., First Report of the Special Master, Subject: Nebraska’s Motion to Dismiss p. 44. To the extent that groundwater in the NHP Basin is hydraulically connected to the river system, it is accounted for in the RRCA Compact Model adopted by Colorado, Kansas, and Nebraska on September 17, 2003, and is subject to the Compact. The Republican River Compact Administration Ground Water Model adopted and approved by Colorado, Nebraska, Kansas, and ultimately the United States Supreme Court, demonstrates that designated groundwater wells in the NHP Basin are depleting surface flows in the Republican River basin, and the impact has generally been increasing over time. The impacts to the South Fork of the Republican River alone (not including depletions to Bonny Reservoir) have increased from an average of 9,595 acre-feet of depletions a year between 1981-2000, to 11,240 acre-feet in 2007, and 15,907 acre-feet in 2009. *See* Complaint, ¶¶ 35-39. Given the foregoing, the Foundation contends that the State Engineer cannot continue to inequitably administer a Compact Call only against surface water rights.
11. Therefore, while other entities may be in a position to assist the State Engineer with Compact compliance such as the RRWCD, the ultimate responsibility lies with the State Engineer. Regardless, the State Engineer’s compact authority over designated groundwater is not relevant to the resolution of the pending Motion to Strike.
12. The Foundation believes that the District should be required to file a Motion to Permissively Intervene in the above-captioned matter, or its Answer should be stricken from the record. Alternately, if the Court, on its own initiative, decides to allow the District to participate in the case, the Foundation respectfully requests that the District be included as a permissive intervenor, not as an indispensable party.

Respectfully submitted this 25th day of January, 2016.

PORZAK BROWNING & BUSHONG LLP



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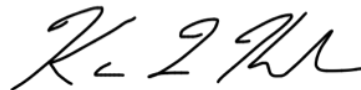
CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2016, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION’S REPLY IN SUPPORT OF ITS MOTION TO STRIKE THE EAST CHEYENNE GROUND WATER MANAGEMENT DISTRICT’S ANSWER** 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	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 Sciabarrasi (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)

Party Name	Party Type	Attorney Name
		Stuart B Corbridge (Vranesh and Raisch)
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)

Party Name	Party Type	Attorney Name
Saving Our Local Economy LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.) 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 Assn.	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)
Colorado Ground Water Commission	Defendant-Intervenor	Chad Matthew Wallace (CO Attorney General) Patrick E Kowaleski (CO Attorney General)
Arikaree Ground Water Mgmt Dist	Defendant-Intervenor	David C Taussig (White & Jankowski, LLP) Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Central Yuma Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Frenchman Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Marks Butte Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Plains Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Sandhills Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Wy Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)



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