

<p>DISTRICT COURT, WATER DIVISION NO.1 WELD COUNTY, COLORADO 901 9<sup>th</sup> Avenue / P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300</p>	
<p>PLAINTIFF, The Jim Hutton Educational Foundation,  v.  DEFENDANTS, Dick Wolfe, in his capacity as the Colorado State Engineer, et al.</p>	<b>▲ COURT USE ONLY ▲</b>
<p><b>Attorneys For Intervenor-Defendant Colorado Ground Water Commission</b> CYNTHIA H. COFFMAN, Attorney General CHAD M. WALLACE, #30022* PATRICK E. KOWALESKI, #09598* Senior Assistant Attorneys General Ralph L. Carr Colorado Judicial Center 1300 Broadway, 7<sup>th</sup> Floor Denver, CO 80203 Telephone: (720) 508-6281 Fax: (720) 508-6039 <a href="mailto:chad.wallace@coag.gov">chad.wallace@coag.gov</a> *Counsel of Record</p>	<p>Case No. 2015CW3018  Div.: 1</p>
<b>COLORADO GROUND WATER COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS</b>	

The Colorado Ground Water Commission (“Commission”), by and through the Attorney General, replies as follows in support of its motion to dismiss the second and third claims for relief for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1):

## **I. Standard of Review and Issues of Fact**

The Commission disputes a fundamental legal standard asserted by the Jim Hutton Educational Foundation (“Plaintiff”) in its response to the motion to dismiss. Plaintiff incorrectly asserts that in a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction the court must accept a plaintiff’s allegations as true.

*The Jim Hutton Educational Foundation’s Response to Colorado Ground Water Commission’s Motion to Dismiss* (“Response”) at 3. In fact,

C.R.C.P. 12(b)(1) does not [so] constrain the trial court's review. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Rather, Rule 12(b)(1) allows the court "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993).

*Loveland v. St. Vrain Valley Sch. Dist. Re-1J*, 2015 COA 138, 20 (Colo. Ct. App. 2015). “Where a party reaches beyond allegations contained in the complaint and challenges the facts upon which subject-matter jurisdiction depends, the district court may not presume the truthfulness of the complaint's factual allegations.”

*SBM Site Servs., LLC v. Severin*, 2010 U.S. Dist. LEXIS 112256, \*7-8 (D. Colo. Oct. 20, 2010). The plaintiff has the burden of proving jurisdiction. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

Moreover, Plaintiff’s arguments skip over necessary factual foundations. The Commission must make the initial determination regarding designated ground water. *Meridian v. Ground Water Comm’n*, 2015 CO 64 at \*20 (2015) (Commission must make initial determination whether the controversy implicates designated

ground water). Plaintiff failed to present the issue for the Commission's determination. Instead, it simply raises abstract challenges to the legality of Senate Bill ("S.B.") 10-52 or the Ground Water Management Act ("Management Act"), §37-90-101, et seq., C.R.S. Plaintiff's claims rely on two alternative, and unsupported, assumptions: (1) designated ground water is not implicated by the claims, or (2) the Commission committed an error in the Basin designation and the wells are pumping waters of the state rather than designated ground water. However, for the Court to conduct a hearing to determine the truth of the underlying assertions would contradict the assignment of that initial factual question to the Commission. *Meridian*, 2015 CO 64 at \*20 (2015). Moreover, delegation of that task to the Commission rather than to a court is lawful. *Larrick v. North Kiowa Bijou Mgmt. Dist.*, 510 P.2d 323, 328, 181 Colo. 395, 404 (1973).

The ground water within the Basin is presumed designated ground water until Plaintiff proves otherwise. The Commission does not agree with the factual predicates of Plaintiff's response that the designation of the Northern High Plains Designated Ground Water Basin ("Basin") was in error, that the Commission incorrectly issued designated basin permits to wells that pump waters of the state, or that such actions cause harm to Plaintiff's water rights. The Commission found in its designation that Basin ground water "would not be available to and required for the fulfillment of decreed surface rights." *In the Matter of the Proposed Designated Ground Water Basin – of the Northern High Plains of the State of*

*Colorado, Findings of Fact, Conclusions of Law, Final Order* (“Final Order”) at 3, attached as Exhibit A. This was and remains the statutory definition of designated ground water. §37-90-103(6)(a), C.R.S. Plaintiff rests its allegations of error on a computer model constructed for the Republican River Compact. However, that model does not show that Basin wells pump water that would be available to and required for the fulfillment of decreed surface water rights. Affidavit of Willem Schreuder, Ph.D., attached as Exhibit B. Therefore, the presumption remains that the ground water pumped by wells in the Basin is designated ground water and cannot cause injury to Plaintiff’s water rights.

## **II. Summary of Argument**

The complaint requires an analysis of the Commission’s actions designating the Basin and issuing well permits. Plaintiff argues that such issues can be put off to later. However, Plaintiff’s second and third claims allege that it is injured by the application of the Management Act. Because designated ground water is not available to or needed by surface water rights, Plaintiff must rebut the presumption that the ground water in the Basin is designated ground water. Therefore, Plaintiff’s constitutional challenges involve challenges to the Commission’s actions concerning designated ground water.

Plaintiff’s response leaves unclear whether it concedes that the wells are pumping designated ground water. At one point it states, “Thus, there are no conceivable determinations regarding the designated nature of any source of water

in the NHP Basin that are at issue.” Response at 5. Conversely it also seems to dispute the nature of the water, “[The Commission] will have the opportunity in a future proceeding to rule on whether the NHP Basin improperly included groundwater that was ‘more properly within the definition of ground water subject to the 1969 Act.” Response at 6. And later, “Claim 2 pertains to the ability to exclude improperly designated groundwater.” Response at 12. If jurisdiction is in doubt, the Commission must first determine whether designated ground water is implicated. Actions challenging the application of the Management Act for the designation of the Basin or issuance of will permits are statutorily assigned to the designated ground water judge.

### **III. Argument**

#### **A. The Commission is not seeking to adjudicate for itself whether the Management Act is constitutional.**

Plaintiff mistakenly asserts that the motion is seeking to have the Commission adjudicate the issue of whether the Management Act is constitutional. Instead the Commission’s motion to dismiss points out that review of the application of the Management Act is statutorily assigned to the exclusive jurisdiction of the designated ground water judge.

#### **B. Plaintiff’s second and third claims for relief are based on a challenge to designated ground water.**

Plaintiff alleges that only its surface rights are at issue in an attempt to avoid implicating designated ground water. Because Plaintiff fails to accurately

assess whether designated ground water is implicated, the Commission must make an initial determination whether designated ground water is implicated. *Meridian*, 2015 CO 64 at \*20 (2015).

It is apparent that Plaintiff has not isolated its claims to only surface water rights. The second and third claims are rooted in an allegation of error in designating the Basin or issuing well permits to withdraw designated ground water. “[W]ells that are pumping ground water that injures surface water rights.” Complaint at ¶ 96. “[W]ells in that NHP Basin are withdrawing ground water which in its natural course would be available to and required for fulfillment of decreed surface rights.” Complaint at ¶97. “[P]umping of designated ground water in the NHP Basin is having more than a *de minimis* impact on its surface water rights and is causing injury to those rights, thus requiring a redrawing of the boundaries of that basin.” Complaint at ¶ 98. “SB-52 is further unconstitutional because it violates the prior appropriation clause and results in a taking of surface water rights without just compensation.” Complaint at ¶104. “Wells in the NHP Basin are ... depleting river flows that would otherwise be available to surface water rights.” Complaint at ¶113. Despite Plaintiff’s attempt to avoid the issue, these assertions would require that the Commission determine that designated ground water is not implicated before this Court would have jurisdiction.

Plaintiff’s Response confirms that it puts the Commission’s designation determinations squarely at issue. “Senate Bill 52 directly impacts the use of surface

water rights by taking away the ability of surface right owners to redraw designated groundwater basins to exclude wells that are depleting their source of water.” Response at 11. Plaintiff’s arguments for its second and third claims for relief are essentially the same. “Claim 3 is only at issue to the extent . . . the boundaries of an existing designated groundwater basin cannot be redrawn under the GWMA to exclude wells causing surface water depletions.” Response at 11.

As a matter of law, withdrawal of designated ground water cannot cause injury to Plaintiff’s surface rights, so it must challenge the creation of the Basin and issuance of well permits for withdrawal of designated ground water. §37-90-103(6)(a), C.R.S. (designated groundwater means groundwater which in its natural course would not be available to and required for the fulfillment of decreed surface rights); *accord, Gallegos v. Colo. Ground Water Comm’n*, 147 P.3d 20, 28 (2006). The Commission has already designated the Basin and issued well permits based on withdrawal of designated ground water. Final Order at 3. Thus, Plaintiff’s claims are not just about surface rights, but require review of whether the Commission’s past actions were in error. Accordingly, §37-90-115, C.R.S. provides exclusive jurisdiction to the designated basin ground water judge to review the Commission’s actions.

**C. Plaintiff's response shows it seeks a hypothetical ruling on the constitutionality of the Management Act in a factual vacuum.**

Plaintiff's second and third claims require a determination whether wells within the Basin are withdrawing designated ground water. Plaintiff attempts to avoid this requirement by asserting that it simply makes a constitutional challenge to parts of the Management Act. However its challenge is premised on the allegation that either the Basin was improperly designated and parts require "de-designation," or that wells within the Basin are not legally operating pursuant to their permits, but are instead taking waters of the state subject to the Water Right Determination and Administration Act of 1969, § 37-92-101 et seq., C.R.S. ("1969 Act") ("Waters of the state" means all surface and underground water in or tributary to all natural streams within the state of Colorado, except water referred to in section 37-90-103(6)). Plaintiff cannot make its constitutional claims in a factual vacuum. Plaintiff's arguments show that in order to prove a constitutional violation, it must first establish that, contrary to existing determinations, wells are pumping waters of the state instead of designated ground water.

Plaintiff's claims are actually challenges to the Commission's past actions. The Commission has designated the Basin and issued well permits based on its factual findings that the water pumped is designated ground water. Final Order at 3. However, because the Commission has designated the Basin, all water is presumed designated ground water until Plaintiff can prove otherwise. *Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981). Indeed, an allegation of injury



stemming from designation of ground water, constitutional or otherwise, must proceed as a challenge under the Management Act.

Today's holding does not change this rule of law – a surface water right holder, such as the Gallegos Family, claiming injury caused by pumping within a designated ground water basin has the burden of proving that the ground water being pumped is hydrologically connected and causing injury to the surface water rights at issue. This is but another way of saying that the surface water right holder must prove the ground water alleged to cause injury is not designated ground water.

*Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 31 (Colo. 2006). Use of designated ground water cannot cause injury to Plaintiff's surface water rights as a matter of law. Therefore, Plaintiff's allegations of injury are based on an assertion that some water within the Basin is not actually designated ground water.

In order to have standing to assert a constitutional violation, Plaintiff must show injury to a legally protected right. *Wimberly v. Ettenberg*, 194 Colo. 163, 168 (Colo. 1977). Plaintiff describes its surface rights as a legally protected interest, but wants to prematurely proceed without showing that it is injured by the application of the Management Act. Plaintiff cannot merely seek a hypothetical advisory opinion. *Denver by Bd. of Water Comm'rs v. Consolidated Ditches Co. of Dist. No. 2*, 807 P.2d 23, 38 (Colo. 1991) (holding a court should avoid an advisory opinion on an abstract proposition of law, particularly when the trial record is virtually devoid of any evidentiary basis for an ultimate legal conclusion). Instead it must show injury that can be remedied by a finding that the challenged statutes are unconstitutional

as applied. The Commission has applied the Management Act by designating the Basin and issuing well permits to withdraw designated ground water. At present, the ground water in the Basin is presumed designated ground water that is not available to or needed by Plaintiff's surface rights. See pp. 3, 7, *supra*. If the waters at issue are designated ground water, they cannot harm Plaintiff's surface rights and a constitutional ruling would make no difference to its rights.

Plaintiff's arguments regarding S.B. 10-52 on page 11 of its Response further show the hypothetical nature of its claims. Section 37-90-106(1)(a), C.R.S. provides a procedure for altering the boundaries of a designated basin. Plaintiff argues that S.B. 10-52 changed the section so that it could not de-designated areas of the Basin if factual data obtained after the designation of a basin would justify it. But even under the pre-amended language, this provision is only relevant if Plaintiff actually has factual data justifying a change of the boundary.<sup>1</sup> Therefore, Plaintiff must show that it has this information. Plaintiff relies on a computer model used for the Republican River Compact, §37-67-101, et seq., C.R.S. However, it misconstrues the purpose of the model, leaving it without facts sufficient to show that it would be entitled to change the Basin's boundaries. See, *Affidavit of Willem Schreuder, Ph.D.*, attached as Exhibit B. Plaintiff's third claim is hypothetical at this point. In fact, it admits that the issue is not ready for disposition in its response to the Defendants' motion for summary judgment on the third claim for relief. *The Jim*

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<sup>1</sup> S.B. 10-52 does not preclude all changes to basin boundaries, but clarifies that wells with permits cannot be excluded from a basin.

*Hutton Educational Foundation's Response to the Amended Motion for Summary Judgment on the Constitutionality of the Ground Water Management Act of 1965* at 2. Therefore, its second and third claims only seek an advisory opinion.

**D. Jurisdiction to review the application of the Management Act is statutorily assigned to the designated ground water judge.**

Plaintiff is challenging the application of the Management Act. The Management Act is only applied by the Commission, the state engineer as the executive director of the Commission, and various ground water management districts. §37-90-101, et seq., C.R.S. The allegations in the second and third claims all center on the assertion that the original designation mistakenly designated areas that do not contain designated ground water. The Commission made this designation. See, Final Order, *passim*. Likewise, claims 2 and 3 rely on the assertion that wells in the Basin withdraw waters of the state. The wells are operating pursuant to permits issued by the Commission to withdraw designated ground water. In both instances the Commission acted pursuant to the Management Act and now Plaintiff challenges those actions. Review of the Commission's actions is exclusively before the designated ground water judge. §37-90-115, C.R.S.

Designated ground water is specifically excluded from the jurisdiction of the water court. §37-92-602(1)(a), C.R.S. The constitutional challenges are based on the premise that the water at issue is not designated ground water. However, the

water is presumed to be designated ground water. *Vickroy*, 62 P.2d at 759. Simply asserting that the dispute about the nature of the water rises to a constitutional level does not move the issue into the jurisdiction of the 1969 Act. In fact, the Management Act and 1969 Act are mutually exclusive in assigning jurisdiction to different courts.

Reading these statutory provisions together leads inescapably to the conclusion that the water right determination proceedings authorized by section 37-92-302(1)(a) do not extend to rights in nontributary ground water. See also section 37-82-101(1), C.R.S. 1973 (1982 Supp.). This result is implicit in the analysis on which we based our holding in *State ex rel. Danielson v. Vickroy*, supra, that a water judge has no jurisdiction over matters involving designated ground water. Accord, *Pioneer Irrigation Districts v. Danielson*, 658 P.2d 842 (Colo. 1983); see *Ground Water Commission v. Shanks*, 658 P.2d 847 (Colo. 1983); see also *Broyles v. Ft. Lyon Canal Co.*, 638 P.2d 244 (Colo. 1981).

*Dep't of Natural Resources v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294, 1310 (Colo. 1983)(footnotes omitted) cert. den., *Young v. Southwestern Colorado Water Conservation Dist.*, 466 U.S. 944 (1984).

Likewise, Plaintiff's reference to *Colorado Ground Water Comm'n v. Eagle Peak Farms*, 919 P.2d 212 (Colo. 1996) is not on point because a review of a rule under the Administrative Procedure Act ("APA"), § 24-4-106, C.R.S, is not at issue. *Eagle Peak Farms* dealt specifically with an appeal of a Commission Rule, which was not statutorily assigned to a designated ground water judge, but instead followed judicial review pursuant to the APA. It is noteworthy that both the

Management Act and APA challenges have specific statutorily assigned courts and in neither instance would ancillary jurisdiction lie with the water court.

There is no ancillary jurisdiction over the second and third claims for relief. Plaintiff argues that the water court may have jurisdiction over matters ancillary to its water court jurisdiction. It goes on to cite cases on that topic. These cases stand for the general premise that the water court is also a court of general jurisdiction and may hear disputes related to its water docket. However, challenges to the application of the Management Act are statutorily assigned to the designated ground water judge and not a matter for another court's general jurisdiction. §37-90-115, C.R.S.

### **III. Conclusion**

Plaintiff's second and third claims cannot be adjudicated without examining their implications to designated ground water. Plaintiff attempts to avoid this requirement by seeking a constitutional determination in a factual vacuum and putting off examination of designated ground water until a later time. However, a plaintiff must show an injury to a legally protected right. This would require Plaintiff to show that the Basin was improperly designated and that the wells in the Basin are not pumping designated ground water pursuant to their permits. These issues are reviews of Commission actions and can only be done by the designated ground water judge. Therefore, this Court should dismiss the second and third claims for relief for lack of subject matter jurisdiction.

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

CYNTHIA H. COFFMAN  
Attorney General

*/s/Chad M. Wallace*

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Colorado Ground Water Commission  
\*Counsel of Record

**CERTIFICATE OF SERVICE**

This is to certify that on this 6<sup>th</sup> day of May, 2016, I caused a true and correct copy of the foregoing **COLORADO GROUND WATER COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS** to be served electronically via ICCES upon the following:

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
Arikaree Ground Water Management District	Defendant	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 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, 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)
Don, Myrna and Nathan Andrews	Defendant	Geoffrey M. Williamson Stuart B. Corbridge (Vranesh and Raisch)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
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)
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 and Division 1 Water Engineers, Colorado Division of Water Resources	State and Division 1 Engineers	Ema I.G. Schultz Preston Vincent Hartman Daniel Steuer (CO Attorney General)
The Jim Hutton Educational Foundation	Plaintiff / Applicant	Karen Leigh Henderson Steven J Bushong



Party Name	Party Type	Attorney Name
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*

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Nan Edwards