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DISTRICT COURT, THIRTEENTH JUDICIAL DISTRICT,
YUMA COUNTY, STATE OF COLORADO

200 EAST THIRD STREET, WRAY, CO 80758

Appeal from the Colorado Ground Water Commission,
Case No. 05-GW-14

THE DIVISION OF WILDLIFE AND WILDLIFE
COMMISSION, STATE OF COLORADO,
PIONEER IRRIGATION DISTRICT, COLORADO
BOARD, a quasi municipal corporation, and certain owners of
the Laird Ditch, an unincorporated mutual ditch: JOE JAY,
JAMES W. GUERCIO, BRYCE CRIDER, RUSTY
HEATON, JERRY MURRAY and DICK GELVIN,

Plaintiffs-Appellants,

v.

COLORADO GROUND WATER COMMISSION, an
Administrative Agency of the State of Colorado, and Mr.
HAROLD D. SIMPSON, in his capacity as the COLORADO
STATE ENGINEER and as *ex officio* Executive Director of
the Colorado Ground Water Commission and as a non-voting
member of the Colorado Ground Water Commission,

Defendants-Appellees,

STULP INVESTMENT CO., LLC, JOHN AND TIMOTHY
STULP, LLC, TIMOTHY STULP, WAYNE MCKIE,
WATERCLAIM, ARIKAREE GROUND WATER
MANAGEMENT DISTRICT, GENE BEAUPREZ, CLEO
BEAUPREZ, MARKS BUTTE GROUND WATER
MANAGEMENT DISTRICT, FRENCHMAN GROUND
WATER MANAGEMENT DISTRICT, SAND HILLS
GROUND WATER MANAGEMENT DISTRICT,
CENTRAL YUMA GROUND WATER MANAGEMENT
DISTRICT, W-Y GROUND WATER MANAGEMENT
DISTRICT, PLAINS GROUND WATER MANAGEMENT
DISTRICT, CITY OF YUMA, RAYMOND E. BEEDY,
BOARD OF COUNTY COMMISSIONERS FOR THE
COUNTY OF YUMA, TOWN OF OTIS, ROBERT E.
BOYD, TOWN OF GENOA, TOWN OF FLAGLER, KIT
CARSON COUNTY, COUNTRY ACRES, INC., CLAYTON

COURT USE ONLY

<p>ROUNDTREE, DEBRA ROUNDTREE, DALE KIRCHENSCHLAGER, BETTY KIRCHENSCHLAGER, LANNY PAYNE, CONNIE PAYNE, RONALD D. RICHARDS, ARGIL A. RENZELMAN, NADINE RENZELMAN, FIVE RIVERS RANCH CATTLE FEEDING LLC, RONALD D. BRENT, DAVE KEELER, AND COLORADO GROUND WATER COMMISSION STAFF,</p> <p>Interested Party Defendants.</p>	
<p>JOHN W. SUTHERS, Attorney General JENNIFER MELE, Assistant Attorney General 1525 Sherman Street, 5th Floor Denver, CO 80203 (303) 866-5033 Registration Number: 30720</p>	<p>Case Number: _____</p>
<p>NOTICE OF APPEAL, COMPLAINT FOR <i>DE NOVO</i> REVIEW AND FOR DECLARATORY JUDGMENT</p>	

Appellant, the Division of Wildlife and Wildlife Commission, State of Colorado (“DOW”), through undersigned counsel, pursuant to C.R.S. § 37-90-115, hereby files this Notice of Appeal, Complaint for *De Novo* Review and for Declaratory Judgment, pursuant to CRS 13-51-101 *et seq.* and C.R.C.P. 57. In support of their Appeal and Complaint, the DOW alleges and seeks relief as follows:

I. INTRODUCTION

1. This is an appeal to the Court for *de novo* review of the Colorado Ground Water Commission (“Commission”) Order in Case No. 05-GW-14 dated May 19, 2006, by which the Petition for Hearing and Appeal of State Engineer Action Causing Injury (“Petition”) filed by the Pioneer Irrigation District and individual owners in the Laird Ditch (collectively “Pioneer”) was dismissed. Said Order adversely affected and aggrieved the DOW.
2. By this action, the DOW also seeks relief in the form of declaratory judgment against the Commission.

II. JURISDICTION AND VENUE

3. This matter raises questions regarding “designated ground water” under the “Colorado Ground Water Management Act,” C.R.S. §§ 37-90-101, *et seq.* (the “Ground Water

Act”). Specifically, this matter involves the Northern High Plains Designated Ground Water Basin – Ogallala (“Northern Basin”).

4. This Court, by and through the designated ground water judge, has jurisdiction over this matter pursuant to C.R.S. § 37-90-115, and has jurisdiction over the claims for declaratory relief pursuant to C.R.S. § 13-51-101 *et seq.*, and C.R.C.P. 57. Pursuant to C.R.S. § 37-90-115(1)(b)(V), and the Colorado Supreme Court’s December 19, 2005 Order Concerning the Appointment of Designated Ground Water Judges, Judge Steven E. Shinn was appointed the designated ground water judge for the Northern Basin.
5. Pursuant to C.R.S. § 37-90-115(1)(a), any party “adversely affected or aggrieved by any decision or act of the ground water commission, except for the adoption of rules, under the provisions of this article or by a decision or act of the state engineer under section 37-90-110 may take an appeal to the district court in the county wherein the water rights or wells involved are situated.” The surface water rights owned by the DOW and at issue in this matter are located in Yuma County, Colorado and are within the boundaries of the Northern Basin. Therefore, venue is proper in Yuma County District Court, Colorado.
6. Pursuant to C.R.S. § 37-90-115(1)(b)(IV), the Commission has the duty “to transmit to the district court to which the appeal is taken the papers, maps, plats, field notes, orders, decisions, and other available data affecting the matter in controversy or certified copies thereof” upon being served with this Notice of Appeal.

III. PARTIES

7. The Division of Wildlife is a division of the Department of Natural Resources, an administrative agency of the State of Colorado created under C.R.S. § 24-33-101 *et seq.*
8. Pioneer Irrigation District, Colorado Board, a quasi-municipal corporation, was created by the Yuma County Commissioners in 1929 pursuant to the Irrigation District Law of 1921 for the principal purpose of furnishing irrigation water to Pioneer-Colo’s taxpaying constituents in Colorado.
9. Joe Jay, James W. Guercio, Bryce Crider, Rusty Heaton, Jerry Murray and Dick Gelvin represent all but one of the owners of water rights in the Laird Ditch. The Laird Ditch operates under a Statement of Organization for the Laird Ditch.
10. The Commission is an administrative agency of the State of Colorado created under the authority set forth in C.R.S. § 37-90-104.
11. Harold D. Simpson is the Colorado State Engineer, and is the *ex officio* executive director of the Commission and a nonvoting member pursuant to C.R.S. § 37-90-104(6). The Commission has delegated aspects of its authority to the State Engineer pursuant to the

Ground Water Act. References to the Commission made herein also refer to the State Engineer.

12. The following were granted party status in to the underlying Commission proceedings: Stulp Investment Co., LLC, John and Timothy Stulp, LLC, Timothy Stulp, Wayne McKie, WaterClaim, Arikaree Ground Water Management District, Gene Beauprez, Cleo Beauprez, Marks Butte Ground Water Management District, Frenchman Ground Water Management District, Sand Hills Ground Water Management District, Central Yuma Ground Water Management District, W-Y Ground Water Management District, Plains Ground Water Management District, City of Yuma, Raymond E. Beedy, Board of County Commissioners for the County of Yuma, Town of Otis, Robert E. Boyd, Town of Genoa, Town of Flagler, Kit Carson County, Country Acres, Inc., Clayton Roundtree, Debra Roundtree, Dale Kirchenschlager, Betty Kirchenschlager, Lanny Payne, Connie Payne, Ronald D. Richards, Argil A. Renzelman, Nadine Renzelman, Five Rivers Ranch Cattle Feeding LLC, Ronald D. Brent, Dave Keeler, and Colorado Ground Water Commission Staff. Pursuant to C.R.S. § 37-90-115(1)(b)(I), the above are interested parties and defendants herein. *See Eagle Peak Farms, Ltd. v. Lost Creek Ground Water Dist.*, 7 P.3d 1006 (Colo. App. 2000).

IV. ORDERS BEING APPEALED

13. The DOW appeals the Commission Order in Case No. 05-GW-14 dated May 19, 2006, dismissing the Petition, which is a final Order for purposes of appeal.
14. The DOW appeal of the Commission and Hearing Officer orders and determinations are properly the subject of *de novo* review before this Court pursuant to C.R.S. § 37-90-115. A trial *de novo* is a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken. *Turner v. Rossmiller*, 532 P.2d 751 (Colo. 1975).

V. GENERAL STATEMENT OF THE NATURE OF THE CONTROVERSY

15. The DOW owns several surface water rights in the Republican River Basin, some of which are also located within the boundaries of the Northern Basin. DOW's surface water rights that divert from the North Fork of the Republican River and its tributaries are used to operate the Wray State Fish Hatchery, Stalker Lake State Wildlife Area, and the Sandsage State Wildlife Area. Additionally, the DOW owns senior surface rights within the boundaries of the Northern Basin on the South Fork of the Republican River for the use of Bonny Reservoir and the South Republican State Wildlife Area. Some of these rights are also located within the boundaries of the Northern Basin.
16. By letter dated March 30, 2005, the Pioneer Irrigation District requested that the State Engineer take action to terminate or curtail pumping of wells that are reducing surface flows in the North Fork of the Republican River and adversely affecting the Pioneer

Ditch. The State Engineer forwarded the letter to the Commission on April 28, 2005, but did not take any action to terminate or curtail pumping from such wells as was requested.

17. On July 5, 2005, Pioneer filed the Petition with the Commission. It generally requested that the Commission un-designate all ground water shown to be hydrologically connected to the surface flows of the North Fork of the Republican River, or shown to deplete surface flows in the North Fork of the Republican River when pumped; declare such water to be tributary water of the State of Colorado subject to Water Court jurisdiction; notice a hearing to alter the boundaries or description of the Northern High Plains Designated Ground Water Basin in a manner consistent with the foregoing; declare that wells pumping said tributary ground water must be administered in priority to prevent injury to senior water rights and to allow compliance with the Compact in a manner consistent with the prior appropriation doctrine; and grant injunctive relief in order to protect vested water rights.
18. On August 3, 2005, the Commission noticed a hearing concerning the Petition to occur on May 1 through May 5, 2006. The Hearing Officer vacated the hearing on December 2, 2005.
19. The Commission's Staff, together with certain other objectors, moved to dismiss the Petition on February 17, 2006. The motion to dismiss generally argued that the Petition was barred by the doctrine of collateral estoppel. The DOW filed a response in opposition to the motion on March 7, 2006, and a reply thereto was made on April 5, 2006. A hearing was scheduled before the Commission on the motion to dismiss for May 19, 2006.
20. On May 19, 2006, the Commission heard argument on the motion to dismiss and thereafter deliberated on the motion. Although the Commission did not discuss the law cited by the parties during its deliberations, it dismissed the Petition. A subsequent written Order was issued dismissing the Petition. Said Order was dated May 19, 2006, but was not mailed to the parties until May 24, 2006. Said Order did not provide specific findings of fact or conclusions of law supporting the Commission's decision; rather, the Order states: "The Commission finds that, for the reasons provided in the Motion to Dismiss, the Response, the Reply to the Motion to Dismiss and the oral arguments of the parties, this case should be dismissed." Ground Water Commission Order, ¶ 2.

VI. GENERAL ALLEGATIONS

21. The DOW incorporates the foregoing allegations as if set forth fully herein.
22. The Republican River Compact is a compact among the states of Colorado, Kansas and Nebraska that was approved by the United States Congress in 1942 (the "Compact"). The Compact equitably divides water tributary to the Republican River among the three

states that are party thereto. Article V of the Compact recognizes the Pioneer Ditch water right and includes the 50 cfs right as part of the total amount of water allocated to Colorado and Nebraska.

23. In 1998, the State of Kansas filed a complaint before the United States Supreme Court alleging that the State of Nebraska violated the Compact by allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries that caused it to use more water than allowed under the Compact. Colorado was formally joined as a party to the Compact litigation and a Special Master was appointed.
24. The Special Master heard argument from the three states on whether ground water was intended to be included in the Compact allocations. The Special Master ruled that a State's groundwater pumping, to the extent it depletes the stream flow in the Republican River basin, is included in the Compact's allocation of virgin water supply. The Special Master further held that the Compact included both alluvial and non-alluvial ground water such as the Ogallala ground water.
25. The three States subsequently entered into a settlement stipulation in December, 2002, ("Compact Settlement") by which they agreed to jointly construct a comprehensive ground water model known as the Republican River Compact Administration Ground Water Model ("RRCA Ground Water Model") to determine the amount, timing and location of depletions from ground water pumping that accrue to the Republican River and its tributaries. The Compact Settlement was approved by the United States Supreme Court.
26. The RRCA Ground Water Model was completed in 2003 and submitted to the Special Master. The Special Master filed a final report to the United States Supreme Court certifying adoption of the Model by the states of Colorado, Kansas and Nebraska. That final report was accepted by the United States Supreme Court on October 20, 2003, and the case was dismissed.
27. The RRCA Ground Water Model adopted and approved by Colorado and the United States Supreme Court in the Compact litigation, is evidence that designated ground water wells in the Northern High Plains Designated Ground Water Basin are having a significant impact on the flows in the North and South Forks of the Republican River and are thus reducing the water available for diversion by the senior surface water rights and causing injury to same.
28. Specifically, the RRCA Ground Water Model indicates that annual depletions to the North Fork of the Republican River caused by pumping from Colorado wells considered in the model were 13,173 acre-feet in the year 2000. The trend exhibited by the Model is that depletions to the North and South Forks from such well pumping is increasing at a rate of approximately 3% a year.

29. The RRCA Ground Water Model alone, and in conjunction with the fact that the wells considered in the RRCA Ground Water Model are substantially less than 100 years old, establishes that there is tributary ground water in the Northern Basin. Such tributary ground water is waters of the State of Colorado, subject to appropriation in priority under the Colorado Constitution, and the statutes and common law of the State of Colorado. Accordingly, said tributary ground water should be under the exclusive jurisdiction of the Water Court.
30. The Ground Water Act gives the Commission jurisdiction over all designated ground water in Colorado. C.R.S. § 37-90-101 *et seq.* The determination of whether disputed ground water within a designated ground water basin is designated ground water or tributary waters of the State of Colorado is appropriately brought before the Commission. *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842 (Colo. 1983). Any ground water determined to be tributary water of the State of Colorado becomes the jurisdiction of the Water Court. *Id.* at 845.
31. On April 14, 1966, the Commission created the Northern Basin, the aerial extent of which includes the drainage of the North Fork of the Republican River. The Commission's Findings of Fact, Conclusions of Law and Order designating the groundwater states "the ground water is that ground water which in its natural course would not be available to and required for the fulfillment of the decreed surface rights." Findings of Fact, Conclusions of Law and Order, p. 3, ¶ 11.
32. Ogallala ground water is within the geographical extent of the Northern Basin and thus comes within the jurisdiction of the Commission.
33. As alleged in the Petition, there were few irrigation wells in the Republican River basin prior to the 1960s, but the number of irrigation wells increased rapidly from the 1960s to the present time.
34. To the extent that surface water rights may be curtailed to satisfy Compact obligations in the future, the Wray Hatchery will suffer increasing injury to its water rights, and thus its ability to produce stocking fish. The Stalker Lake State Wildlife Area, the Sandsage State Wildlife Area, the South Republican State Wildlife Area and the DOW's use of Bonny Reservoir will also be subject to injury with additional future surface water right curtailment.
35. The decline in surface flows in the North and South Forks of the Republican River is directly attributable to the extensive well pumping in the basin.
36. Pursuant to C.R.S. § 37-90-106(1)(a), the Commission is required, from time to time, as future conditions require and factual data justify, to alter the boundaries or description of designated ground water basins. This is the same statutory section that grants the

Commission authority to create designated ground water basins and that was cited in the designation of the Northern Basin.

37. Creation of a designated groundwater basin does not establish conclusively that all ground water in the basin is designated ground water. *State Ex rel Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981).
38. The State of Colorado agreed to be bound by the results of the RRCA Ground Water Model and the Commission, as an agency of the State of Colorado, is likewise bound.
39. The results of the RRCA Ground Water Model, as well as the Compact Settlement, rulings of the Special Master of the United States Supreme Court, and available factual information regarding the drying up of the North Fork of the Republican River and senior water rights, are the type of information to be considered and relied upon by the Commission in justifying alterations of the boundaries of designated ground water basins pursuant to C.R.S. § 37-90-106.
40. The Commission is required to hold a hearing when petitioned by any person claiming to be injured within a designated ground water basin by any act of the State Engineer or the Commission under the provisions of C.R.S. § 37-90-101, *et seq.* C.R.S. § 37-90-114.

FIRST CLAIM FOR RELIEF
(*De Novo* Review)

41. The DOW incorporates the foregoing allegations as if set forth fully herein.
42. Pioneer sought a determination from the Commission that there is ground water within the Northern Basin that is tributary to the North Fork of the Republican River, and that such ground water must be excluded from the boundaries of the Northern Basin and administered in a manner consistent with the prior appropriation system.
43. The DOW is adversely affected and aggrieved by the Commission's Order dismissing the Petition and refusing to hold a hearing to consider alteration of the boundaries of the Northern Basin in compliance with its statutory obligations and applicable case law. The Commission's Order unlawfully impairs DOW's use of their water rights.
44. The Commission's Order dismissing the Petition is unlawful and should be set aside on the following grounds:
 - a. The Commission failed to comply with the requirements of its enabling statute by refusing to alter the boundaries of a designated ground water basin when presented with adequate factual data supporting such alteration.

- b. The Commission failed to comply with existing law recognizing that creation of a designated groundwater basin does not establish conclusively that all ground water in the basin is designated ground water.
 - c. The Order usurps the constitutional protections of Sections 5 and 6 of Article XVI of the Colorado Constitution and denies the DOW's constitutional and statutory right to appropriate waters of the state.
 - d. The Order ignores the Commission's obligation to recognize stream flow depletions caused by well pumping in administering the Compact pursuant to the RRCA Ground Water Model and Compact settlement, and in administering the Northern Basin.
 - e. The Commission failed to consider the results of the RRCA Ground Water Model, Compact settlement and other factual allegations in the context of statutory definitions of designated ground water and underground water, C.R.S. §§ 37-90-103(6)(a), 37-92-103(11), and Colorado case law regarding the difference between the two types of ground water, clearly indicating that tributary water exists in the Northern Basin.
 - f. The Commission failed to comply with the requirements of its enabling statute by refusing to hold a hearing on the Petition.
 - g. The Commission ignored the directive of the Colorado Supreme Court instructing Pioneer and the DOW to seek relief from the Commission. *Pioneer*, 658 P.2d at 847.
 - h. The Commission failed to provide adequate statement of findings and conclusions in support of its decision pursuant to C.R.S. § 24-4-105(14)(a).
 - i. To the extent the Commission's dismissal of the Petition was grounded on the doctrine of collateral estoppel or other legal grounds, the Order is incorrect as a matter of law.
 - j. The Commission failed to assume the facts alleged in the Petition were true for purposes of the Motion to Dismiss and failed to apply the correct burden of proof.
45. The DOW is entitled to *de novo* review of the dismissal of the May 19, 2006 Order of the Commission and Hearing Officer dismissing the Petition filed in 05-GW-14.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment)

46. The DOW incorporates the foregoing allegations as if set forth fully herein.
47. The Commission has exclusive jurisdiction concerning designated ground water pursuant to the Ground Water Act.
48. The Commission is required by law to alter the boundaries of a designated ground water basin when presented with adequate factual data supporting such alteration.
49. The State Engineer has jurisdiction over the administration of the “waters of the state” under the 1969 Act and serves as the *ex officio* executive director of the Commission.
50. All tributary waters are administered under the 1969 Act. All designated ground waters are administered under the Ground Water Act.
51. The Commission cannot by law maintain the boundaries of a designated ground water basin *ab infinito* and thus maintain the status of water within such a basin as designated ground water when presented with adequate factual data suggesting that designated ground water basins contain tributary ground water. Creation of a designated groundwater basin is not a conclusive establishment that all ground water in the basin as designated ground water.
52. A controversy exists between the DOW and the Commission regarding the appropriate boundaries of the Northern Basin, the inclusion of tributary water within the Northern Basin, and the impact on the DOW as a result of ground water pumping in the Northern Basin. That controversy can be resolved by declaratory orders from this Court which hold, under the Ground Water Act and other applicable law, as follows:
 - a. The results of the RRCA Ground Water Model, Compact settlement and other factual allegations, in the context of statutory definitions of designated ground water and underground water, C.R.S. §§ 37-90-103(6)(a), 37-92-103(11), and Colorado case law regarding the difference between the two types of ground water, demonstrate that there is tributary water in the Northern Basin.
 - b. The Commission must un-designate all ground water shown to be hydrologically connected to the surface flows of the North Fork of the Republican River, or shown to deplete surface flows in the North Fork of the Republican River when pumped, and must notice a hearing to alter the boundaries or descriptions of the Northern Basin consistent therewith.
 - c. All ground water shown to be hydrologically connected to the surface flows of the North and South Forks of the Republican River, or shown to deplete surface flows

in the North and South Fork of the Republican River when pumped is tributary water of the State of Colorado subject to Water Court jurisdiction.

- d. All wells within the Northern Basin pumping tributary ground water must be administered in priority to prevent injury to senior water rights, to protect the constitutional rights associated therewith, and to allow compliance with the Compact in a manner consistent with the prior appropriation doctrine.
- e. The Commission or State Engineer must enter an injunction or such other order that requires a sufficient number of wells in the Northern Basin to cease diversions in order to protect vested water rights, prevent injury to prior appropriators, unless an adequate replacement plan has been implemented in order to prevent such injury resulting from the well pumping.
- f. The Commission has the obligation to recognize stream flow depletions caused by well pumping in administering the Compact pursuant to the RRCA Ground Water Model and Compact settlement, and in administering the Northern Basin.

VII. ISSUES RAISED ON APPEAL

- 53. The DOW incorporates the foregoing allegations as if set forth fully herein.
- 54. Issues raised on appeal include any and all issues raised in this First Claim for Relief, the Second Claim for Relief, and in all the allegations preceding said Claims.

VIII. PRAYER FOR RELIEF

WHEREFORE, the DOW respectfully seeks the following relief from the Court:

- 1. Overturn the Commission's May 19, 2006 Order dismissing the Petition, and remand this action to the Commission consistent with Colorado law concerning designated ground water, tributary ground water, Compact administration, and alteration of designated ground water boundaries.
- 2. Conduct *de novo* review of the Commission's refusal to hold a hearing to consider alteration of the boundaries of the Northern Basin, and the Commission's refusal to alter said boundaries when presented with compelling factual data in support of such alteration.
- 3. Enter a declaratory judgment pursuant to C.R.S. §§ 13-51-101 *et seq.*, and C.R.C.P. 57 consistent with paragraph 54 above and the other allegations contained herein.
- 4. Grant the DOW such other and further relief the Court deems just and proper.

IX. APPENDIX CONTAINING COPIES OF CERTAIN RELEVANT DOCUMENTS

Pursuant to C.R.S. 37-90-115(1)(b)(IV), it is the duty of the Commission or the State Engineer to transmit to the district court such documents and other information affecting the matter in controversy. A tape of the May 19, 2006, hearing will be necessary to include in such information in order to resolve this matter. The hearing before the Commission was less than 4 hours long. Without waiving its right to supplement the record so provided, the DOW notes the following exhibits are being provided by Pioneer and therefore does not provide copies of the following:

- Exhibit A: Petition for Hearing and Appeal of State Engineer Action Causing Injury
- Exhibit B: Ground Water Commission Order, dated May 19, 2006.

Dated this 14th day of June, 2006.

JOHN W. SUTHERS
Attorney General

Signed original on file with the filer pursuant to CRCP 121, § 1-26.
s/ Jennifer Mele

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