

<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 6, 2017 5:14 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, East Cheyenne, 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>JIM HUTTON EDUCATIONAL FOUNDATION’S RESPONSE TO JOINT MOTION FOR CLARIFICATION OF CERTIFICATION AND ORDER ISSUED DECEMBER 7, 2016</p>	

Plaintiff, the Jim Hutton Educational Foundation (“Foundation”), acting by and through counsel, hereby submits this Response to the motion entitled Defendants’ Joint Motion for Clarification of Certification and Order Issued December 7, 2016 (hereafter “Motion”).

1. This Court entered an Order dated December 7, 2016, entitled Certification of Claim Two as Final Judgment Pursuant to C.R.C.P. 54(b), and Order Granting Certain Defendants' Motion to Stay the Proceedings on Plaintiff's First and Third Claims for Relief Pending Resolution of the Appeal on Claim Two, (hereinafter "Order"). The Motion filed by certain Defendant-Well Owners and Intervenors does not question the relief that was granted by the Order. Instead, the Motion seeks clarification of a part of one sentence in the background section of the Order stating that Plaintiff's water rights are "senior" to ground water appropriators. (Order, p.2).

2. The Foundation does not believe a motion to clarify is warranted over part of a sentence in the Order that does not impact the ruling. The Foundation also believes the Order is already clear that the Court was providing background information, and not making a specific ruling of fact or law on a matter that was not briefed. The Foundation reluctantly responds to the Motion because of allegations that the Foundation believes require clarification.

3. The Motion contends that the language in the Order stating that the Foundation's water rights are senior to wells was intended to be a "restatement of Plaintiff's allegations." The Foundation alleges its water rights were in use before most groundwater uses, but it has not argued that its water rights are "senior" to designated groundwater rights, because ground water and surface water are currently under separate administrative schemes.

4. The Motion also contends "there is a substantial and unresolved factual question" regarding relative priority dates, and then compares the dates that most wells were put to use (1960s – 1970s) with what it refers to as the 1977 priority date of the Hutton No. 1 and No. 2 Ditches. This compares apples to oranges and does not recognize existing law.

5. The following is intended to help clarify the above issues raised by the Motion:

A. The Foundation's Hale Ditch and Tip Jack Ditch water rights were appropriated and decreed before the Compact. The water rights for the Hutton No. 1 and No. 2 Ditches were appropriated in 1954 through actual diversion and use, as set forth in a 1955 Map and Filing statement as was the customary practice. (See Exhibit 8 to the Foundation's Motion for Summary Judgment on its Compact Administration Claim). Without further general adjudications in the Basin, the Hutton No. 1 and No. 2 Ditches were decreed by separate application filed with the Water Court in 1977, with the 1954 appropriation dates. Thus, among other tributary water rights, the Hutton No. 1 and No. 2 Ditches have a 1977 priority with a 1954 appropriation.

B. The question of how hydrologically interconnected surface water and designated ground water should be integrated for administration was discussed at length in *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 24 (Colo. 2006), wherein the Court held:

A surface water right holder who believes that pumping within a designated ground water basin is causing injury to those surface rights must prove to the Commission that the ground water alleged to cause the injury is hydrologically connected and causing injury to those rights. Upon such a showing, the Commission is statutorily required to alter the boundaries of the basin to exclude the surface water and the ground water shown to have been improperly designated. Once the boundaries are redrawn, jurisdiction vests in the State Engineer and the water courts to administrate and adjudicate the water rights according to prior appropriation.

However, as the Foundation maintains, Senate Bill 52 prevents the very type of challenge to designated groundwater that was contemplated in *Gallegos*. If Senate Bill 52 is found unconstitutional and the Foundation makes the showing described in *Gallegos*, then the excluded wells would be subject to prior appropriation like any other tributary use of water. At that time, the excluded wells would need to seek adjudication in Water Court to obtain priority dates.

C. To compare apples to apples under the current administrative schemes, one would need to compare dates when wells first put water to use to the dates when surface water rights were first put to use. Such a comparison makes sense given that “water rights vest upon appropriation, not adjudication.” *Shirola v. Turkey Canon Ranch Ltd. Liability Co.*, 937 P.2d 739, 744 (Colo. 1977); *see also, Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 34 (Colo. 1997) (“A water court decree adjudicating a right to waters of a natural stream “confirms the existence of that right which arose initially by application of water to beneficial use”). Thus, the water rights for the Hutton No. 1 and Hutton No. 2 Ditches vested in 1954, long before most wells were drilled and before the NHP Basin was designated. The purpose of confirming an existing water right in Water Court is to establish the relative priority date with other tributary rights. That has not yet happened with designated groundwater.

D. Lastly, the Foundation has asserted in this litigation that it is unlawful to only curtail surface water for compliance with the Compact, when designated ground water is subject to that Compact, causing the vast majority of Compact depletions, and was largely developed after the surface water uses that are being curtailed. This point is reiterated herein because the Foundation believes the Compact provides a separate basis for integrated administration of ground water and surface water.

6. In conclusion, it appears to the Foundation that the statement in the Order that the Foundation’s water rights are “senior” to groundwater rights was a just short-hand way of recognizing that the Foundation’s surface water rights were in use before most of the wells. The background section of the Order is not a ruling on issues that go beyond the certification and stay issues that were briefed. Although the Foundation does not believe clarification of the Order is needed, the allegations in the Motion raised complexities that required a response for the record.

Respectfully submitted this 6th day of January, 2017.

PORZAK BROWNING & BUSHONG LLP

A handwritten signature in black ink, appearing to be 'SJB', written over a horizontal line.

Steven J. Bushong (#21782)

Karen L. Henderson (#39137)

Attorneys for the Jim Hutton Educational Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2017, a true and correct copy of the foregoing **JIM HUTTON EDUCATIONAL FOUNDATION’S RESPONSE TO JOINT MOTION FOR CLARIFICATION OF CERTIFICATION AND ORDER ISSUED DECEMBER 7, 2016** 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 Sciabbarrasi (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) Stuart B Corbridge (Vranesh and Raisch)

Party Name	Party Type	Attorney Name
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)
Saving Our Local Economy LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.)

Party Name	Party Type	Attorney Name
		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	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)
East Cheyenne Ground Water Mgmt Dist	Defendant-Intervenor	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)

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