

<p>SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>Appeal from District Court, Water Division No. 1 Case No. 15CW3018 The Honorable Judge James F. Hartmann</p>	<p>DATE FILED: January 10, 2017 10:44 AM FILING ID: 5B557A377E3BD CASE NUMBER: 2017SA5</p>
<p>Appellant: The Jim Hutton Educational Foundation, a Colorado non-profit corporation,</p> <p>v.</p> <p>Appellee: 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>▲ COURT USE ONLY ▲</p>
<p><u>Attorneys for Appellants:</u> 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>Supreme Court Case Number:</p>
<p style="text-align: center;">NOTICE OF APPEAL</p>	

Appellant the Jim Hutton Educational Foundation (“Foundation”), submits the following

Notice of Appeal pursuant to C.A.R. 3 and 4(a):

I. Description of Nature of Case and Disposition in Trial Court

A. General Statement of the Nature of the Controversy

This case involves senior surface water rights in the Northern High Plains Designated Groundwater Basin (“NHP Basin”). The United States Supreme Court ruled that surface water depletions caused by wells in the NHP Basin are subject to the Republican River Compact (“Compact”). The magnitude of depletions caused by wells created Compact compliance problems for Colorado. The State and Division Engineers responded by curtailing surface water rights, not wells, and draining the on-channel Bonny Reservoir. The Foundation owns water rights that are being curtailed and water rights that cannot obtain available water through the now drained Bonny Reservoir. Further, the statutory provision in place when the NHP Basin was created that allowed surface water right owners to protect their rights by challenging whether previously designated groundwater was properly designated was taken away by Senate Bill 52 (2010).

The Foundation’s Complaint in this matter raised three claims. Claim 1 seeks a declaration that administration of surface water in the Republican River Basin is unlawful; Claim 2 seeks a declaration that Senate Bill 52 is unconstitutional when applied retrospectively to the existing NHP Basin; and Claim 3 seeks a declaration that the Colorado Ground Water Management Act is unconstitutional if there is no relief to Claim 1 and/or Claim 2. All Claims were extensively briefed by the parties in competing Motions for Summary Judgment. The Foundation’s Second Claim was also the subject of a Motion to Dismiss filed by the Colorado Ground Water Commission.

On August 29, 2016, the Water Court issued an Order dismissing Plaintiff’s Second Claim for Relief and Part of Plaintiff’s Third Claim for Relief (the “Dismissal Order”). On December 7, 2016, the Water Court certified its dismissal of the Foundation’s Second Claim for Relief as final pursuant to C.R.C.P. 54(b) (the “Certification Order”). This appeal ensued.

B. Judgment and Order being Appealed and Basis for Supreme Court's Jurisdiction

The Foundation is appealing the Water Court's dismissal of the Foundation's Second Claim for Relief regarding Senate Bill 52 (2010) as set forth in the Dismissal Order. The Colorado Supreme Court has jurisdiction pursuant to Colo. Const. Art VI, § 2(2), C.A.R. 1(a)(1), 1(a)(2) and 4(a), and C.R.S. § 13-4-102(1)(d).

C. Whether the judgment or order resolved all of the issues including attorney's fees and costs.

The Dismissal Order did not resolve all of the issues in Case No. 15CW3018. It wholly dismissed the Foundation's Second Claim for relief and partially dismissed the Foundation's Third Claim. Only the Second Claim is the subject of this appeal. No request for an award of attorney's fees and costs has been made.

D. Whether the judgment was made final for purposes of Appeal pursuant to C.R.C.P. 54(b).

In its Certification Order, the Water Court certified the Dismissal Order as final in regards to the Foundation's Second Claim pursuant to C.R.C.P. 54(b). Specifically, the Foundation moved the Water Court to certify its Dismissal Order as a final judgment for the purpose of appealing the dismissal of the Second Claim for relief. The Court found that the "first two prerequisites for certifying a final judgment have been satisfied" because the Dismissal Order encompassed the Foundation's Second Claim in its entirety and precluded the Foundation from relitigating the constitutionality of Senate Bill 52 in the present case. (*Certification Order*, p. 4). After being presented with the equities and interests of judicial administration by the parties, the Court also found that the third prerequisite for certification pursuant to C.R.C.P. 54(b) was satisfied, noting

that the parties had “presented no justifiable reasons why the court should delay entering final judgment on claim two.” *Id.* at p. 5.

E. Date the Order or Decree was entered and the date provided to counsel.

The Dismissal Order was entered on August 29, 2016 and served on the parties the same day. The Certification Order was entered on December 7, 2016, and served on the parties the same day.

F. Whether an Extension of Time was Granted to File Post-Trial Relief.

No such motions have been filed or granted.

G. Date and Motion for Post-Trial Relief was Filed.

None was filed. A Motion for Clarification was filed on December 19, 2016, but it did not pertain to the Dismissal Order being appealed, and nor did it go to the merits of the Water Court’s decision to certify Claim 2 under C.R.C.P. 54(b). Instead, it sought clarification regarding what the Water Court meant by part of a background sentence in the Certification Order. The Motion for Clarification was orally denied during a telephone Status Conference on January 9, 2017.

H. Date any Motion for Post-Trial Relief Was Denied.

No motion for post-trial relief regarding the Dismissal Order was filed.

I. Whether Extension was Granted to File any Notice of Appeal.

No extensions to file a notice of appeal were requested or granted.

II. Advisory Listing of Issues to be Raised on Appeal

A. Whether the Water Court erred in dismissing the Foundation’s Second Claim regarding Senate Bill 52 (2010).

B. Whether the Water Court erred in concluding, as a matter of law, that the Foundation’s Second Claim regarding Senate Bill 52 (2010) was not ripe because the

Foundation had not already successfully challenged the status of the designated groundwater in the NHP Basin before the Ground Water Commission.

C. Whether Senate Bill 52 (2010) is unconstitutional when applied to an existing designated ground water basin such as the NHP Basin, which at the time of designation, was subject to a statute that allowed surface water right owners to subsequently challenge the status of designated groundwater and redraw the designated ground water basin boundaries as new information became available, without any cutoff date. *See Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20 (Colo. 2006). Senate Bill 52 took away those rights and remedies. Senate Bill 52 was adopted after new information became available regarding the NHP Basin, including the Compact litigation before the United States Supreme Court and resulting groundwater model.

D. Whether Senate Bill 52 (2010) violates the prohibition against retrospective legislation in Art. II, § 11 of the Colorado Constitution, and whether it is a taking without just compensation, a violation of due process, and contrary to the prior appropriation doctrine.

III. Whether a Transcript of Evidence is Necessary

No such transcript is necessary, and none exists. Evidence in the record consists of pleadings and exhibits filed with the Water Court in this matter and related information.

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V. Appendices

Appendix 1 – *Order Granting the Colorado Ground Water Commission’s Motion to Dismiss Plaintiff’s Second Claim for Relief and a Portion of Plaintiff’s Third Claim for Relief*, entered August 29, 2016 in Case No. 15CW3018 (referred to as the “Dismissal Order” herein).

Appendix 2 – *Certification of Claim Two as a 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*, entered December 7, 2016 in Case No. 15CW3018 (referred to as the “Certification Order” herein).

Respectfully submitted this 10th day of January, 2017.

PORZAK BROWNING & BUSHONG LLP



Steven J. Bushong (#21782)

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2017, a true and correct copy of the foregoing **NOTICE OF APPEAL** was filed and served by the Colorado Courts E-Filing system or via email and addressed to the District Court, Water Division 1 and counsel for each of the parties Water Court Case No. 15CW3018, pursuant to C.A.R. 3(d)(8), as follows:

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