

<p>DISTRICT COURT, WATER DIVISION NO. 1 COLORADO</p> <p>901 9th Avenue P. O. Box 2038 Greeley, Colorado 80632 (970) 351-7300</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><b>Plaintiff:</b> The Jim Hutton Educational Foundation, a Colorado non-profit corporation,</p> <p>v.</p> <p><b>Defendants:</b> Dick Wolfe, in his capacity as the Colorado State Engineer, et al.</p>	
<p><b>Attorneys for the Colorado Division of Parks and Wildlife:</b> Cynthia H. Coffman, Attorney General Tim Monahan, First Assistant Attorney General, #16971 Katie L. Wiktor, Assistant Attorney General, #38025 1300 Broadway, 7<sup>th</sup> Floor Denver, Colorado 80203 Telephone: 720-508-6310, 720-508-6761 E-mail: <a href="mailto:Tim.Monahan@coag.gov">Tim.Monahan@coag.gov</a>; <a href="mailto:katie.wiktor@coag.gov">katie.wiktor@coag.gov</a> *Counsel of Record</p>	<p>Case Number: 2015CW3018</p> <p>Div: 1</p>
<p><b>COLORADO PARKS AND WILDLIFE’S RESPONSE TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT, OR MOTION FOR DETERMINATION OF QUESTION OF LAW, REGARDING ITS BONNY RESERVOIR CLAIM</b></p>	

Defendant, the Colorado Division of Parks and Wildlife (“CPW”), by and through its undersigned counsel, submits this Response to Plaintiff’s Motion for Summary Judgment, or in the alternative Motion for Determination of Question of

Law, regarding Plaintiff's Bonny Reservoir Claim filed on February 29, 2016 ("Plaintiff's Bonny Reservoir Motion"). This Response is limited to Plaintiff's claims relating to CPW and its use of the conservation capacity in Bonny Reservoir and the lands under and adjacent to the reservoir. Although Plaintiff generally directed its claims against the State Defendants collectively, which includes the State Engineer, Division Engineer, the Division of Water Resources and CPW, this Response only addresses claims that relate to CPW.<sup>1</sup> Genuine issues of material fact exist that preclude entry of summary judgment on Plaintiff's Bonny Reservoir claims and Plaintiff has failed prove that CPW's actions in relation to management of Bonny Reservoir are unlawful. Therefore, Plaintiff's Bonny Reservoir Motion should be denied. As grounds therefore, CPW states as follows:

### **INTRODUCTION**

On February 29, 2016, Plaintiff, the Jim Hutton Educational Foundation, filed three substantive motions with this Court, including Plaintiff's Bonny Reservoir Motion. CPW also filed a Motion for Summary Judgment on February 29, 2016, regarding Plaintiff's Bonny Reservoir claims contained in Claim No. 1 of the Complaint as they related to CPW ("CPW's Motion"). CPW requested a ruling that: (1) Plaintiff is not a third party beneficiary to the Water and Land Contracts between CPW and the United States Bureau of Reclamation ("BOR"); and (2) even if

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<sup>1</sup> The State Engineer, Division Engineer, and the Division of Water Resources will submit their own response to Plaintiff's Bonny Reservoir Motion.

Plaintiff is determined to be a third party beneficiary, CPW's management of Bonny Reservoir is not in violation of the Water and Land Contracts resulting in no injury to the Plaintiff.

As early as 1952, the BOR began working with CPW to manage public recreation on and surrounding Bonny Reservoir, which reservoir developed into one of Colorado's first State Parks.<sup>2</sup> The BOR and CPW entered into a lease for the purposes of managing the lands owned by the BOR at Bonny Reservoir, as well as the water surface of the reservoir, for recreational and wildlife purposes. The BOR excluded lands from the lease that were necessary for safety and efficient operation of the reservoir. In 2002, the BOR and CPW renewed the land lease arrangement by entering into a Memorandum of Understanding for the purpose of managing recreation, fish and wildlife and related purposes ("Land Contract"). Again, the BOR retained control and administration of certain lands for reservoir regulation purposes, including the lands underlying and immediately adjacent to the dam. These excluded lands include the outlet structure for the Hale Ditch. *See Exhibit A.*

In 1982, CPW contracted with the BOR for use of 39,922 acre-feet of Bonny Reservoir's conservation storage space for recreation and fish and wildlife purposes

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<sup>2</sup> The BOR originally contracted with the then Colorado Game, Fish and Parks Commission. The Colorado Game, Fish and Parks Commission then split and eventually became the Colorado Division of Wildlife ("DOW") and the Colorado Division of Parks and Outdoor Recreation ("CPOR"). On July 1, 2012, DOW and CPOR were re-merged into a single entity, and, pursuant to C.R.S. § 33-9-108, the Colorado Division of Parks and Wildlife and the Parks and Wildlife Commission ("CPW") is the successor in interest to DOW and CPOR's legal rights and obligations.

(“Water Contract”). Pursuant to the Water Contract, the BOR retained sole responsibility for the operation and maintenance of the dam and appurtenant facilities, which includes the outlet structure for the Hale Ditch. In addition, the BOR reserved the ability to make releases from the conservation pool for safety and maintenance, as well as releases from the flood control storage pool. The BOR continues to own the water storage right decreed for Bonny Reservoir in Case No. W-9135-77.

CPW also owns 5.0 c.f.s. of the Hale Ditch water right, Priority No. 38, decreed by the Kit Carson County District Court in Civil Action No. 2985 that it uses to irrigate lands within the South Republican State Wildlife Area.

### **LEGAL STANDARD**

Summary judgment is warranted “when the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” C.R.C.P. 56(c); *Gibbons v. Ludlow*, 304 P.3d 239, 243-44 (Colo. 2013). The party moving for summary judgment has the initial burden of showing there is no genuine issue of material fact. *Marcus v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991). A material fact is one that “will affect the outcome of the case.” *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163, 1166 (Colo. App. 2008). The burden of production requires the moving party to make a prima facie showing that it is

entitled to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). In order to make this showing, the moving party must show “credible evidence . . . that would entitle it to a directed verdict if not controverted at trial.” *Id.* Credible evidence includes pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. C.R.C.P 56(c). Once the initial burden of production has been met, the burden shifts to the non-moving party to establish there is a material issue of fact. *Marcus*, 818 P.2d at 736. At that point, the moving party is entitled to summary judgment as a matter of law only if the nonmoving party is unable to provide sufficient evidence to make out a triable issue of fact. *D.R. Horton, Inc.*, 215 P.3d at 1167.

### **DISPUTED FACTS**

Although CPW believes that summary judgment is appropriate in CPW’s favor in regards to management of Bonny Reservoir under the Water and Land Contracts, CPW contests Plaintiff’s characterization of many of the alleged undisputed facts contained in Plaintiff’s Bonny Reservoir Motion. Specifically, and without limitation, CPW does not agree with Plaintiff’s description and characterization of the Land and Water Contracts and the State of Colorado and CPW’s obligations under those contracts.<sup>3</sup> CPW seeks to clarify the following alleged undisputed facts presented by Plaintiff and instead requests the Court

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<sup>3</sup> Although CPW contests or questions the accuracy of several of Plaintiff’s alleged Undisputed Facts, these factual disputes are not relevant to the claims made against CPW and will otherwise be addressed by separate responses filed by other Defendants.

accept the Undisputed Facts presented by CPW's Motion submitted February 29, 2016. Even if the Court does not grant summary judgment in CPW's favor, there are genuine issues of material fact that preclude summary judgment on Plaintiff's Bonny Reservoir Motion.

**1. Undisputed Fact No. 6 incorrectly portrays the Parties to the Water Contract.**

Plaintiff alleges that the Water Contract was entered into by the BOR and only the Department of Natural Resources on behalf of "the State." In fact, the BOR and the State of Colorado, acting by and through the Department of Natural Resources, "*for the use and benefit of the Division of Wildlife and the Division of Parks and Outdoor Recreation,*" entered into the Water Contract for use of 39, 922 acre-feet of the reservoir's conservation storage space for recreation and fish and wildlife purposes. See CPW Motion Exhibit 2 (emphasis added). As described in this Court's Order re: Motion to Dismiss the Department of Natural Resources as a Defendant dated July 21, 2015, CPW, the State Engineer's Office, and Division Engineer's Office are Type One agencies and operate independently of the Department of Natural Resources. Although a provision of the Water Contract makes reference to the State Engineer, the State Engineer is not a party to the Contract and is not bound by the provision contained therein.

**2. Undisputed Fact No. 7 incorrectly states that the Land Contract requires CPW to manage the lands under and adjacent to Bonny Reservoir consistent with the Bonny Reservoir operating plan.**

Plaintiff alleges that it is undisputed that the Land Contract requires CPW to manage Bonny Reservoir consistent with the Operating Plan. As further described in CPW's Motion, the Land Contract does not contain a requirement that CPW manage the Bonny Reservoir Area lands "consistent with the Bonny Reservoir operating plan." See CPW Motion at ¶ I(B). The Land Contract does not reference the Bonny Reservoir Operating Plan. Instead, the Land Contract states that the parties will manage the Bonny Reservoir Area lands in accordance with the "reservoir management plan," which is a separate and distinct document from the Bonny Reservoir Operating Plan. See Land Contract at ¶ 2. Further, the Land Contract and associated Reservoir Management Plan contain no requirement that the parties comply with the natural flow rights of the Hale Ditch.

**3. Undisputed Fact No. 8 should be clarified to state that CPW uses the conservation capacity of Bonny Reservoir.**

Plaintiff states that "CPW is responsible for managing Bonny Reservoir and the surrounding lands." Plaintiff's Bonny Reservoir Motion at 5. Pursuant to the Water Contract, CPW uses the "conservation capacity of Bonny Reservoir for recreation and fish and wildlife." CPW Motion Exhibit 2 at ¶2(a). The BOR operates the dam and appurtenant facilities and reserved the right to store and

make releases from the conservation capacity for safety, maintenance, and repairs.

*Id.* at ¶ 4(a).

**4. Undisputed Fact No. 14 contains mere assertions and allegations regarding evapotranspiration that are not supported by affidavits or other supporting evidence required by C.R.C.P. 56(c).**

Plaintiff alleges as an undisputed fact that the footprint of Bonny Reservoir has become overgrown with phreatophytes. Plaintiff relies upon a “Draft Integrated Pest Management Plan for Bonny Reservoir” and unidentified “observation” for its conclusions. Contrary to Plaintiff’s unsupported allegation, Bonny Reservoir is not overgrown with phreatophytes. As set forth in the McGee affidavit, the reservoir bottom supports native vegetation that provides valuable wildlife habitat. *See* CPW Motion Exhibit 5. Further, CPW has never executed or adopted the Draft Integrated Pest Management Plan relied upon by Plaintiff. On the contrary, and as described in CPW’s Motion and supporting affidavits, CPW is in compliance with the provisions of the Land Contract and reservoir management plan that govern weed control. *See* CPW Motion at ¶ II(B) and Exhibits 5 and 6. Specifically, Section 11 of the Reservoir Management Plan titled “Weed Control” requires the BOR and CPW to develop a cooperative agreement to address the control of noxious weeds on the federal lands leased to CPW. The BOR and CPW executed such agreement in 1994. *See Exhibit B.* In addition, CPW’s weed control measures are also in compliance with the state and local noxious weed laws and regulations. As part of

its management responsibilities at the reservoir, CPW undertakes mechanical, biological, and chemical weed control measures on an ongoing and annual basis.

## **ARGUMENT**

### **I. CPW's use of the conservation capacity in Bonny Reservoir is not injuring Plaintiff's Hale Ditch Water Right.**

Plaintiff alleges the State Defendants are operating and administering Bonny Reservoir in a manner that is unlawfully injuring Plaintiff's Hale Ditch water right. Plaintiff's Bonny Reservoir Motion at 7. As further described below, CPW does not control the reservoir or dam, is not the Bonny Reservoir water right owner, and is managing the vegetation on the reservoir bottom in accordance with the Land Contract. Accordingly, Plaintiff's Bonny Reservoir Motion should be denied and all claims asserting injury by CPW to Plaintiff's Hale Ditch water right should be dismissed.

#### **A. CPW is not operating a water storage facility in a manner that is injuring Plaintiff's Hale Ditch Water Right.**

In 1982, CPW acquired the right to use Bonny Reservoir's conservation storage space for recreation and fish and wildlife purposes with incidental uses including irrigation. Pursuant to a 1952 lease, CPW was also responsible for managing certain lands, facilities and the water surface of the reservoir owned by the BOR. The BOR and CPW renewed that lease in 2002. Plaintiff alleges that the State Defendants, which include the State Engineer, Division Engineer, the

Division of Water Resources and CPW, are in violation of Section 37-87-101(a), C.R.S. (2015) because Bonny Reservoir is being operated in a manner that is injuring Plaintiff's Hale Ditch water right. Plaintiff's Bonny Reservoir Motion at 7. Section 37-87-101(a) states that "[n]o water storage facility may be operated in such a manner as to cause material injury to the senior appropriative rights of others." (2015). Colorado case law also clearly establishes that owners of water storage structures may not operate storage structures in a manner that causes material injury to the senior appropriative rights of others. *See Bd. Of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 713 (Colo. 2002) (stating that the right to store water in reservoirs is an appropriate right that may not cause material injury to decreed senior appropriative rights); *Ft. Morgan Reservoir & Irrigation Co. v. McCune*, 206 P. 393, 395 (Colo. 1922) (stating that reservoir owners only have the right to use water for storage so long as such uses are "consistent with the rights of other appropriators."); *Greeley & Loveland Irr. Co. v. Farmers' Pawnee Ditch Co.*, 146 P. 247, 248 (Colo. 1915) (affirming a trial court ruling finding that a reservoir owner unlawfully diverted out of priority with regard to storage while injuring downstream senior users).

However, contrary to Plaintiff's argument, Colorado statutes and case law do not require that water storage facilities be operated in a manner that *benefits* a downstream senior water right. Plaintiff relies upon *Larimer County Reservoir Co.*

*v. People* for the proposition that the Bonny Reservoir water right must be operated and administered in a way that provides more water to Plaintiff's Hale Ditch water right. 9 P. 794 (Colo. 1885). In actuality, *Larimer County Reservoir Co.* holds that reservoir storage rights are qualified by the same restriction as other appropriative rights; no injury to other water rights shall result from the act of storing and the legal right of prior appropriators must not be interfered with. *Id.* at 796. The Court did not hold in *Larimer County* that a reservoir owner or operator must store water in order to benefit the downstream senior water right. The reservoir owner or operator has no obligation to increase the quantity of water available to the Hale Ditch under section 37-87-101(a) or under Colorado case law.

Additionally, the statutes and applicable case law apply to the reservoir operator or owner. CPW is not operating Bonny Reservoir in a manner that is injuring Plaintiff's Hale Ditch water right. CPW does not control operation of the dam or appurtenant facilities, does not own the water storage right decreed to the reservoir, and does not have the authority to administer water rights. The BOR owns the water storage right decreed to Bonny Reservoir for 351,460 acre-feet of water for flood control, irrigation, recreation, fish and wildlife propagation. *See* "Findings and Ruling of the Referee and Decree of the Water Court, Case No. W-9135-77," (1984). The Water Contract only granted CPW use of the conservation capacity of Bonny Reservoir for recreation and fish and wildlife. The contract

defines conservation capacity as the space available in Bonny Reservoir for conservation storage of the water supply available at Bonny Reservoir as determined by the BOR, estimated to be 39,922 acre-feet between elevations 3635.5 and 3672. CPW Motion Exhibit 2 at ¶ 1(f). The BOR retained sole responsibility for operating the dam and appurtenant facilities and the right to store and make releases of the conservation capacity as safety and maintenance concerns dictated. *Id.* at ¶ 4.

CPW has no control over the reservoir or dam operations, and is not the water right owner. When the BOR determines that the water is available, CPW uses the conservation capacity for recreation, fish and wildlife purposes in accordance with the Water Contract. Plaintiff has alleged no injury under section 37-87-101(a), C.R.S. (2015) caused by CPW's use of the conservation capacity for recreation, fish or wildlife purposes. CPW has no control over the operation of the reservoir, or the water level of the reservoir, and therefore is not operating, and has no authority to operate, a water storage facility in a way that causes injury to Plaintiff's Hale Ditch water right. Instead, Plaintiff asserts the State Engineers' orders have caused the water level in Bonny Reservoir to drop below the level needed to provide water into the Hale Ditch outlet. Although CPW disagrees with Plaintiff's assertion against the Engineers, CPW also has no authority to administer water rights. In accordance with section 37-02-301(1), C.R.S. (2015), the State

Engineer, through the Division Engineer, is responsible for administration and distribution of the waters of the State. Moreover, since CPW is not the Bonny Reservoir water storage right owner, it had no obligation to contest the orders of the State Engineer requiring the Bonny Reservoir water right be released. When the water supply is available, as dictated by the BOR and subject to the administrative orders of the State Engineer, CPW uses the conservation capacity of the reservoir in accordance with the Water Contract. CPW is not operating a water storage facility in a manner injurious to Plaintiff's Hale Ditch water right and reservoir owners or operators have no obligation to store water to benefit downstream senior water rights. Any claims against CPW based on these assertions should be dismissed.

**B. CPW is not operating an on-channel reservoir to the detriment of Plaintiff's Hale Ditch water right.**

Plaintiff also alleges that CPW is operating and managing an on-channel reservoir to the detriment of Plaintiff's Hale Ditch water right. Plaintiff's Bonny Reservoir Motion at 7. Plaintiff argues that CPW's actions are causing injury by lessening the quantity of water available to the Hale Ditch. Again, reservoir owners and operators are under no legal obligation to store water in order to benefit the downstream senior water right. Moreover, Plaintiff has alleged no injury to its Hale Ditch water right from CPW's use of the conservation capacity of Bonny Reservoir for recreation, fish and wildlife purposes. Pursuant to the Water Contract, CPW neither controls the reservoir or dam operations nor owns the water right. As cited

by Plaintiff, “*the owner or operator of an on-channel reservoir*” cannot impede the superior rights of prior appropriators. Plaintiff’s Bonny Reservoir Motion at 7, referencing *Larimer Cty. Reservoir Co. v. People*, 9 P. 794, 796 (Colo. 1885) (emphasis added). CPW does not own or operate the on-channel reservoir or own the water rights associated therewith. The BOR constructed the reservoir and continues to own and operate the reservoir, dam and appurtenant facilities and to own the Bonny Reservoir water storage right. Therefore, CPW is not operating an on-channel reservoir to the detriment of Plaintiff’s Hale Ditch water right.

**C. CPW is not responsible for providing an alternate means of supplying Plaintiff’s Hale Ditch water right.**

Plaintiff alleges that CPW is not entitled to lower the water level in Bonny Reservoir to the point that it renders the means of diversion for the Hale Ditch useless without providing an alternate means of supplying the water right. Plaintiff’s Bonny Reservoir Motion at 7. In its analysis, Plaintiff relies upon two cases that determine the rights and remedies between two water rights’ holders, notably a junior appropriator versus a senior appropriator. *See Joseph W. Bowles Reservoir Co. v. Bennett*, 18 P.2d 313 (Colo. 1932); *City of Colorado Springs v. Bender*, 366 P.2d 552 (Colo. 1961). As discussed previously, CPW is not the Bonny Reservoir water storage right owner. The BOR continues to own the water storage right decreed to Bonny Reservoir and, therefore, application of these cases to CPW is inappropriate. Moreover, the cases can be further distinguished from the Bonny

Reservoir situation because those cases involved injury to the senior water right holder due to continued diversions by the junior water right holder. In this instance, it's the lack of diversion by the water right holder that is causing Plaintiff's alleged injury.

CPW acquired the use of the conservation capacity of the reservoir for recreation, fish and wildlife purposes and only at times when the water supply was available as determined by the BOR. Further, CPW agreed to manage the conservation capacity in conformity with the Republican River Compact and all federal and state laws applicable to the acquisition, including the BOR's "operation of the facility and reservation of its rights to make releases from the conservation pool." CPW Motion Exhibit 2 at ¶ 2. Thus, CPW's use of the conservation capacity was and continues to be subject to the BOR's operational direction and all orders by the Engineers to release out-of-priority water from Bonny Reservoir. Since CPW is not the junior water right owner and its use of the conservation capacity is subject to other legally controlling constraints, CPW is not responsible for lowering the water level in Bonny Reservoir and not responsible for providing an alternate means of supplying Plaintiff's Hale Ditch water right.

Plaintiff further alleges that the allowance of extensive vegetation growth is interfering with water that might otherwise be available to Plaintiff's water rights. Plaintiff's Bonny Reservoir Motion at 8. Contrary to Plaintiff's unsupported

allegations, CPW is managing and controlling the vegetation in accordance with the Land Contract and federal, state and local laws. Pursuant to the Land Contract, CPW is required to comply with all federal and state noxious weed laws and regulations for managing the federal lands under its control and is required to use erosion and weed control measures as necessary. CPW Motion Exhibit 4 at ¶¶ 4 and 15. CPW is in compliance with the provisions of the Land Contract that govern vegetation and weed control and is also in compliance with State and local noxious weed laws and regulations. *See* CPW Motion Exhibits 5 and 6. CPW actively manages the vegetation and weeds on the South Republican State Wildlife Area, which now includes the land previously inundated by the reservoir water. Based on observations and investigations by CPW staff, the vegetation growing at the bottom of Bonny Reservoir consists primarily of native plant species that are commonly found in riparian areas in Colorado and that provide beneficial habitat for wildlife species. *Id.*

Even assuming, *arguendo*, that CPW had an obligation to remove the vegetation from the reservoir bottom, Plaintiff would not be entitled to that additional water if the river was subject to an administrative call. The water hypothetically available from the phreatophyte removal would return to the river and become waters of the State. Water salvaged from phreatophyte eradication does not become the property of a particular water user outside of the priority

system. See *Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 187 Colo. 181 (1974).

Further, the Colorado Supreme Court has held that water resources are to be “utilized in harmony with the protection of other valuable state resources.” *State Eng’r v. Castle Meadows*, 856 P.2d 496, 506. (Colo. 1993). Making additional water available to the river from the removal of phreatophytes may create an incentive to eradicate vegetation, causing a detriment to the land. *Id.* See also *Southeastern Colorado Water Conservancy Dist.*, 187 Colo. at 181 (holding that persons could not obtain water rights free from the priority system by clearing land of phreatophytes, thereby making available to the stream water that the plants previously consumed); *R.J.A., Inc. v. Water Users Ass’n of Dist. No. 6*, 690 P.2d 823, 828-29 (Colo. 1984) (affirming the denial of an application for a developed water right that entailed the alteration of natural land characteristics in a manner that involved various potential detrimental effects on soil, wildlife, and other resources, and stating that the policy of maximum utilization “must be implemented with a sensitivity to the effect on other resources”).

The vegetation now growing on the lands previously inundated by the reservoir provides beneficial habitat for wildlife species, including whitetail deer, mule deer, turkey, pheasant, quail, waterfowl, dove, squirrels, cottontail and jackrabbits, and a wide variety of other non-game species. Requiring additional

vegetation removal would be detrimental to and cause injury to another valuable State resource. Plaintiff has also not provided any supporting documentation to prove that, even if vegetation removal produced additional water and the Hale Ditch could lawfully claim such water, the Hale Ditch could divert such water due to the physical limitations associated with the outlet structure. CPW has no further obligation to control or remove additional vegetation from the reservoir bottom in order to supply additional water for Plaintiff's diversion and, further, any removal of additional vegetation would be detrimental to other valuable State resources, including wildlife.

**II. CPW is not contractually obligated to protect Plaintiff's Hale Ditch Water Right and is not interfering with or injuring the Hale Ditch right of way.**

Plaintiff alleges that pursuant to the Water and Land Contracts, CPW is contractually obligated to protect Plaintiff's Hale Ditch water right. Plaintiff's Bonny Reservoir Motion at 9. However, Plaintiff is not a third-party beneficiary to the Water and Land Contracts and therefore does not have standing to claim injury under the contracts. In addition, CPW is in compliance with the Water and Land Contracts. Therefore, Plaintiff is not entitled to summary judgment and CPW's actions under the contracts are lawful.

**A. Plaintiff is not a third party beneficiary to the Water and Land Contracts and, therefore, does not have standing to bring injury claims arising under the contracts.**

As more fully described in CPW's Motion, Plaintiff is not a third-party beneficiary to the Water and Land Contracts. An individual not a party to a contract can only enforce obligations within that contract if the party is a third-party beneficiary to the contract. *Galie v. RAM Assocs. Mgmt Services, Inc.*, 757 P.2d 176, 178 (Colo. App. 1982). To have standing to bring an action to enforce a contract as a third-party beneficiary, the party claiming third-party beneficiary status must show, among other things, both a direct benefit and the contracting parties' intent to realize that direct benefit to the third party. *S K Peightal Engr's, Ltd. v. Mid Valley Real Estate Sols V LLC*, 342 P.3d 868, 872 (Colo. 2015). Plaintiff does not meet either of these requirements under the Water or the Land Contract.

In order to qualify as a third-party beneficiary Plaintiff must show that the benefit derived by Plaintiff is a direct benefit and not merely an incidental benefit of the contract. *E. B. Roberts Constr. Co. v. Concrete Contractors Inc.*, 704 P.2d 859, 865. CPW and the BOR entered into the Water Contract for CPW to acquire the use of the conservation capacity of the reservoir for recreation and fish and wildlife purposes. The direct benefit of the Water Contract was the increase of recreational activities at the reservoir and State Park and the sustainability of fish and wildlife populations in and surrounding the reservoir. The single reference to the Hale

Ditch in the Water Contract acknowledged that the Hale Ditch water right would continue to flow through the reservoir. CPW's use of the conservation capacity of the reservoir was never intended to provide additional benefit to the Hale Ditch water right.<sup>4</sup> Although maintenance of the reservoir elevations for the conservation pool may have indirectly benefited the Hale Ditch water rights by shoring up deliveries to a flawed diversion system, this was an incidental benefit of the contract. The Water Contract does not directly benefit the Plaintiff but instead merely recognized rights that already existed, all of which were subject to the Republican River Compact and administration by the State and Division Engineer.

Plaintiff must also show that the parties intended to contract for the benefit of the third party. *See Cripple Creek State Bank v. Rollestone*, 70 Colo. 434, 439 (1921). Although Plaintiff alleges that the contractual provisions are intended to protect the Hale Ditch water right, CPW and the BOR did not enter into the Water Contract for the benefit of the Hale Ditch. The stated purpose and intent of the Water Contract was for CPW to acquire the use of the conservation capacity in Bonny Reservoir for recreation and fish and wildlife purposes. *See CPW Motion Exhibit 2 at ¶ 2.a.* This acquisition was necessary in order for CPW to protect Bonny Reservoir's fish, wildlife, and recreational values. *See CPW Motion Exhibit 1*

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<sup>4</sup> Although the reference to the Hale ditch natural flow rights is under a section titled "Third Party Contracts and Permits," CPW and the BOR did not intend to convey third-party beneficiary status to the Hale Ditch water right owners. The title was directed at existing BOR contracts for the sale of water from the reservoir by the BOR for municipal, industrial, and agricultural purposes. *See CPW Motion Exhibit 2 at ¶ 5(a).* The reference to the Hale Ditch in a separate paragraph only acknowledged that the Hale Ditch water right flows through the reservoir.

at p. 12. Plaintiff's rights in the Hale Ditch existed prior to the parties entering into the Water Contract and remained unchanged after execution of the Water Contract. The expressed intentions and purpose of the Water Contract are clearly identified and were not for the benefit of the Hale Ditch. Therefore, Plaintiff does not have standing as a third party beneficiary under the Water Contract.

Plaintiff also does not meet the requirements to be considered a third-party beneficiary under the Land Contract. Unlike the Water Contract, the Land Contract contains no reference to the Hale Ditch or deliveries associated therewith. The Land Contract sets forth that CPW and the BOR will manage the Bonny Reservoir Area lands in accordance with the Reservoir Management Plan that addressed and evaluated wildlife, recreation, and reservoir operation land uses at Bonny Reservoir. The Land Contract, and its previous versions, contains no language evidencing intent to benefit owners of the Hale Ditch. Rather, the parties executed the contract for the sole purpose of having CPW manage the lands under and adjacent to Bonny Reservoir for recreation, fish and wildlife, and related purposes, with notable exceptions. The Land Contract excludes the lands under the dam and immediately adjacent thereto from CPW's management, which includes the delivery system to the Hale Ditch. *See Exhibit A.* Contrary to Plaintiff's assertions that the contractual provisions are intended to protect the Hale Ditch water right, the Land Contract actually excludes any lands associated with the Hale

Ditch from CPW's management responsibilities. Plaintiff does not have standing as a third-party beneficiary to the Land Contract because it was not an intended beneficiary and any benefit derived from the Land Contract is incidental at best.

**B. Plaintiff's injury claims fail because CPW is in compliance with the provisions of the Water and Land Contracts.**

Plaintiff alleges that the footprint of Bonny Reservoir is now overgrown with vegetation, including invasive species targeted for control and eradication by the Yuma County Pest Control District, and that these phreatophytes are further reducing the amount of water available to the Hale Ditch. Plaintiff's Bonny Reservoir Motion at 10. Plaintiff provides no factual support for its allegations. Pursuant to the Land Contract, CPW must comply with all federal and state noxious weed laws and regulations on the federal lands. Even assuming, *arguendo*, that Plaintiff has standing to bring injury claims under the Land Contract, CPW is in compliance with all provisions of the Land Contract that govern management of vegetation and weeds on the federal lands. The Land Contract and associated regulations direct the federal government to enter into cooperative agreements with State agencies to manage undesirable plant species on Federal lands. The BOR and CPW entered into such a cooperative agreement in 1994. *See Exhibit B.* CPW is in compliance with the provisions of this agreement.

Also, as more fully described in CPW's Motion and in its supporting affidavits, CPW dedicates considerable time and resources to controlling vegetation

and weeds on the South Republican State Wildlife Area. *See* CPW Motion Exhibits 5 and 6. In accordance with the Land Contract and Reservoir Area Management Plan, CPW undertakes mechanical, biological, and chemical weed control measures on an ongoing and annual basis. Based on observations and investigations by CPW staff, the vegetation growing at the bottom of Bonny Reservoir consists primarily of native plant species that are commonly found in riparian areas in Colorado and that provide beneficial habitat for wildlife species, including whitetail deer, mule deer, turkey, pheasant, quail, waterfowl, dove, squirrels, cottontail and jackrabbits, and a wide variety of other non-game species. The vegetation growing at the bottom of Bonny Reservoir does not include a significant amount of noxious weeds. *Id.*

Further, CPW is in compliance with State and local noxious weed laws and regulations and partners with Colorado State University and Yuma County in its long-term weed control efforts. In fact, Yuma County affirmatively stated in an affidavit attached to CPW's Motion that "[d]ue to CPW's efforts, they are in compliance with the Colorado Noxious Weed Act and the Yuma County weed ordinance." CPW Motion Exhibit 6 at ¶¶ 6-7. Plaintiff failed to submit with its Bonny Reservoir Motion any supporting affidavits that would rebut the statements and observations contained in CPW's and Yuma County's affidavits. As such, even if Plaintiff had standing to bring injury claims under the Land Contract, CPW is in compliance with the provisions of the Land Contract that govern vegetation and

weed control and Plaintiff is not entitled to summary judgment or a determination that CPW's actions under the contracts are unlawful.

**C. CPW's use of Bonny Reservoir or management of the surrounding lands is not interfering with or injuring the Hale Ditch right-of-way.**

The BOR's Land Purchase Contract for Bonny Reservoir states that the property is conveyed to the BOR in fee simple except for "any existing rights-of-way in favor of the public or third parties for roads, railroads, telephone lines, transmission lines, ditches, conduits, or pipelines on, over, or across said lands." Plaintiff's Exhibit 36 at ¶13. CPW's Land Contract that leased a portion of the lands acquired by the BOR includes a provision that the lease is subject to "any prior rights which have attached before the date of this agreement and any prior agreements." CPW Motion Exhibit 4 at ¶ 3(a). Plaintiff alleges that this language makes CPW's management of the lands surrounding Bonny Reservoir and its use of the conservation capacity subject to the Hale Ditch water right and right-of-way. Plaintiff's Bonny Reservoir Motion at 9-10. However, the Land Contract expressly excludes from CPW's management the federal lands that include the Hale Ditch outlet structure and the majority of the right-of-way. *See Exhibit A.* CPW's management of the lands surrounding Bonny Reservoir is only subject to the prior rights located on the lands it is responsible for managing. Accordingly, CPW's management of the federal Bonny Reservoir lands is not interfering with the Hale

Ditch right-of-way and Plaintiff is not entitled to summary judgment or a determination that CPW's management actions are unlawful.

Nor is CPW's vegetation management interfering with the Hale Ditch water right or right-of-way. Under Colorado law, CPW may not unreasonably interfere with ditch easements or inhibit ditch owners from maintaining, operating or using the ditch. *See Lazy Dog Ranch v. Telluray Ranch Corp.*, 923 P.2d 313, 316 (Colo. App. 1996); *In re Tonko*, 154 P.3d 397, 404 (Colo. 2007). CPW is adequately controlling the vegetation now existing on the reservoir bottom in accordance with federal, State and local noxious weed laws and regulations. And, when the water is available, CPW is managing the use of the conservation capacity in Bonny Reservoir for recreation, fish and wildlife purposes. Besides unsupported allegations regarding CPW's vegetation management, Plaintiff has not alleged any way that CPW's use of the conservation capacity of the reservoir is unreasonably interfering with the Hale Ditch right-of-way or inhibiting the Hale Ditch owners from maintaining, operating, or using the Hale Ditch. In fact, CPW only realizes the full benefit of the Water Contract when water is available for storage in the conservation pool. If CPW is realizing this benefit, the Hale Ditch water right is also more easily diverted. However, since CPW does not operate the reservoir or dam, own the water storage right, or administer water rights, CPW's actions are not interfering with or injuring the Hale Ditch water right or right-of-way. Plaintiff's

claims focus on the State Engineer's orders requiring the BOR to release water from the reservoir; however, the State Engineer is not a party to the Water or Land Contracts or bound by the provisions therein.

Moreover, as a Hale Ditch water right owner, any actions by CPW that would interfere or injure the Hale Ditch water rights or right-of-way would controvert CPW's efforts to sustain wildlife habitat at the State Wildlife Area. CPW also owns 5.0 c.f.s. of the Hale Ditch water right that it uses to irrigate portions of the South Republican State Wildlife Area. As stated in the Operating Plan, at the time CPW entered into the Water Contract, CPW was the "largest user of Hale Ditch water." CPW Motion Exhibit 1 at 5. As such, CPW would not and has not acted in any way that would adversely affect its rights in the Hale Ditch. CPW's use of the conservation capacity or management of the surrounding lands is not interfering or injuring the Hale Ditch water right or right-of-way. Plaintiff is not entitled to summary judgment or a determination that CPW's management activities are unlawful.<sup>5</sup>

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<sup>5</sup> Even if Plaintiff's claims alleging injury to its water right under the contracts had any basis, its claims would lie in tort. State agencies are immune from liability to all claims for injury that lie in tort, or could lie in tort, subject to limited exceptions defined by the Colorado Governmental Immunity Act, § 24-10-101, C.R.S. (2015) ("CGIA"). Any person claiming to have suffered an injury by a public entity must file written notice within one hundred eighty-two days after the date of the discovery of the injury before bringing suit. § 24-10-101, C.R.S. (2015). Plaintiff has failed to comply with the terms of the CGIA.

**D. CPW has not used the conservation capacity of Bonny Reservoir for uses other than those depicted in the Water Contract.**

The Water Contract states that “[n]o water shall be delivered...for uses other than recreation, fish and wildlife, municipal and industrial uses under existing contracts, and irrigation uses by the water right holders of the existing Hale Ditch, until...applicable provisions of the National Environmental Policy Act have been complied with.” CPW Motion Exhibit 2 at ¶ 8(a). Plaintiff appears to be alleging that the water stored in the conservation pool at Bonny Reservoir has been used for an unauthorized use without completing a NEPA analysis as required by the Water Contract. Plaintiff’s Bonny Reservoir Motion at 9. CPW has not used the conservation pool water for any use other than those outlined in the Water Contract. Again, CPW has no authority over the operation of the dam or releases from the reservoir. Those matters are controlled by the BOR and the State Engineer and Division Engineer. CPW’s use of the conservation capacity was and continues to be subject to the BOR’s operational direction and all orders by the State Engineer to release water from Bonny Reservoir that was stored out-of-priority. Plaintiff is not entitled to summary judgment or a determination that CPW’s management actions are unlawful and Plaintiff’s claims against CPW should be dismissed.

## CONCLUSION

Plaintiff has not met its burden of proof warranting summary judgment and has not proven that any CPW's actions entitle Plaintiff to prevail as a matter of law. CPW has no authority to operate the reservoir, dam or appurtenant facilities and is not the Bonny Reservoir water storage right owner. Plaintiff's alleged claims are more appropriately directed towards the Bureau of Reclamation as the owner and operator of the reservoir, dam, and water storage right. In addition, CPW is in compliance with all applicable provisions of the Water and Land Contracts governing its use and management of Bonny Reservoir. CPW requests that the Court deny Plaintiff's Bonny Reservoir Motion.

Dated this 8th day of April, 2016.

CYNTHIA H. COFFMAN  
Attorney General

*E-filed pursuant to C.R.C.P. 121. Duly signed original  
on file at the Office of the Attorney General.*

/s/Katie L. Wiktor  
KATIE L. WIKTOR, 38025\*  
Assistant Attorney General  
TIMOTHY J. MONAHAN, 16971\*  
First Assistant Attorney General  
Natural Resources & Environment  
Attorneys for Defendant CPW  
*\*Counsel of Record*

### CERTIFICATE OF SERVICE

This is to certify that on this 8th day of April, 2016, I caused a true and correct copy of the foregoing COLORADO PARKS AND WILDLIFE'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR MOTION FOR DETERMINATION OF QUESTION OF LAW, REGARDING ITS BONNY RESERVOIR CLAIM to be served electronically via ICCES upon the following:

Party Name	Party Type	Attorney Name
4M Feeders, LLC 4M Feeders, Inc.	Defendant	Johanna Hamburger William Arthur Paddock (Carlson, Hammond & Paddock, LLC)
Arikaree Ground Water Mgmt Dist	Defendant	David C Taussig (White & Jankowski, LLP) Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Carlyle James As Trustee of the Chester James Trust	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Central Yuma Ground Water Mgmt Dist	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 Assoc	Defendant	Bradley Charles Grasmick, Curran Trick (Lawrence Jones Custer Grasmick LLP)
Colorado Division of Water Resources	Opposer	Daniel E Steuer, Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Colorado Ground Water Commission	Defendant	Chad Matthew Wallace, Patrick E Kowaleski (CO Attorney General)
Colorado State Board Land Commissioners	Defendant	Virginia Marie Sciabbarrasi (CO Attorney General)
David L Dirks Julie Dirks Dirks Farms, Ltd.	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
David Nettles	Opposer	Daniel E Steuer, Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Dick Wolfe	Opposer	Daniel E Steuer, Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Division 1 Water Engineer	Opposer	Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
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 Mgmnt District	Defendant	John David Buchanan, Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
Frenchman Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Happy Creek Inc	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
J And D Cattle LLC	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Kent E Ficken	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Lazier Inc	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Mariane U Ortner	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Marjorie Colglazier Trust	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Marks Butte Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
James J. May, Thomas R. May, May Acres Inc., May Brothers, Inc.; May Family Farms	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
North Well Owners	Defendant	Kimbra L. Killin, Russell Jennings Sprague (Colver Killin and Sprague LLP)
Plains Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Protect Our Local Community's Water LLC	Defendant	John David Buchanan, Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
Republican River Water Conservation District	Defendant	David W Robbins, Peter J Ampe (Hill and Robbins PC)
Sandhills Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Saving Our Local Economy LLC	Defendant	John David Buchanan, Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
State Engineer	State Engineer	Colorado Division Of Water Resources Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Steven D Kramer	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
The Jim Hutton Educational Foundation	Plaintiff	Karen Leigh Henderson, Steven J Bushong (Porzak Browning & Bushong LLP)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
Timothy E Ortner	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law )
Tri State Generation And Transmission As	Defendant	Aaron S. Ladd, Justine Catherine Shepherd (Vranesh and Raisch)
Wy Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Yuma County Water Authority Public Improvements	Defendant	Dulcinea Zdunska Hanuschak, John A Helfrich, Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)

*E-filed pursuant to C.R.C.P. 121. Duly signed original on file at the Office of the Attorney General.*

/s/ Suzanne Burdick  
Suzanne Burdick