

<p>DISTRICT COURT, WATER DIVISION NO. 1 WELD COUNTY, COLORADO 901 9th Avenue / P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300</p>	
<p>PLAINTIFF, The Jim Hutton Educational Foundation, v. DEFENDANTS, Dick Wolfe, in his capacity as the Colorado State Engineer, et al.</p>	<p>▲ COURT USE ONLY ▲</p>
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**DEFENDANTS' RESPONSE TO CERTAIN FACTUAL ALLEGATIONS MADE BY
THE HUTTON FOUNDATION**

Come now 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, and James J. May, the City of Burlington, Colorado, the North Well Owners, the Republican River Water Conservation District, and the Yuma County Water Authority Public Improvement District (“Defendants”) and provide the Court with this Response to Certain Factual Allegations Made by the Plaintiff, the Jim Hutton Educational Foundation (“Foundation”).

Defendants are concerned that certain allegations made by Plaintiff in its various briefs are confusing or misleading. By filing this Response, Defendants are not asserting that any particular dispute as to the facts herein rises to the level of creating a question of material fact that would preclude the Court granting summary judgment in favor of Defendants. Nor is this intended to be a comprehensive refutation of every fact alleged by the Foundation that is not correct or misinterpreted. Instead, this Response is intended to provide the Court with a more complete and correct understanding of the background and facts involved in this matter.

Whether any particular fact rises to the level of a disputed material fact that precludes summary judgment in favor of the Foundation is addressed in Defendants' various legal briefs. For example, as to the Foundations' Motions on its Compact Administration Claim and Senate Bill 52 Claim, Defendants argue that the Foundation is wrong as a matter of law and no factual determinations need be made to grant Defendants' Motions for Summary Judgment; however if the court disagrees with Defendants' legal arguments, some of the facts below, as well as facts incorporated into Defendants' briefing, may show the existence of material factual questions that preclude entry of summary judgment to the Foundation.

**Response to Certain Allegations Made in the Foundation's
Three Motions for Summary Judgment.**

A. Response to Allegations Regarding the Cause of Reduction in Streamflows in the South Fork of the Republican River Basin.

The Foundation states that “[g]roundwater pumping is drying up the South Fork” and goes on with additional similar allegations without citing any authority for support. Jim Hutton Educational Foundation's Motion for Summary Judgment on its Compact Administration Claim (“Foundation Compact Claim”) at p. 2 (Filing ID C1803A64259F1). Similarly, in the Jim

Hutton Educational Foundation’s Motion for Summary Judgment on its Senate Bill 52 Claim (“Foundation SB52 Claim”) (Filing ID C1803A64259F1), the Foundation states that the “principal culprit [for reduced flows in the South Fork of the Republican River] is groundwater pumping in the Northern High Plains Designated Ground Water Basin.” Foundation SB52 Claim at p. 2. First, there are numerous reasons for the reduction in streamflow within the Republican River Basin within Colorado, including drought and changes in land management practices. Affidavit of Dick Wolfe, M.S., P.E., attached as Exhibit A to the State Engineer’s Response to the Jim Hutton Educational Foundation’s Motion for Summary Judgment on its Compact Administration Claim (April 8, 2016) (“Wolfe Affidavit”), ¶ 11. Moreover, these statements ignore the impacts that groundwater withdrawals in Kansas and Nebraska may have on the South Fork subbasin. For example, the RRCA Groundwater Model calculated an average of 7,379 acre-feet of depletions to the South Fork subbasin¹ from 1981 to 2000 from Kansas’ groundwater consumption and an average 792 acre-feet of annual depletions over that same period from Nebraska’s groundwater consumption – compared to the calculated average of 9,595 annual acre-feet due to Colorado groundwater consumption relied on by the Foundation. Final Report of the Special Master with Certificate of Adoption of RRCA Groundwater Model, *Kansas v. Nebraska and Colorado*, No. 126, Original (September 17, 2003), Appendix U at pp. U1-U3. (All Special Master Reports filed in No. 126, Original are available through the United States Supreme Court’s website at: www.supremecourt.gov/SpecMastRpt/SpecMastRpt.aspx.) The State of Colorado has no control over groundwater pumping in Nebraska or Kansas as long as those States meet their obligations under the Republican River Compact. Further, the Compact

¹ As shown below, Appendix U does not attempt to show where these depletions occur within the subbasin, only that they occur within the subbasin.

does not require any specific means to comply with the Compact, and so Kansas and Nebraska could choose to continue to pump ground water and reduce Beneficial Consumptive Use from other uses, and remain in Compact compliance. If the Foundation wishes to rely on Appendix U, it is equally likely that the reduction in streamflow alleged by the Foundation is due to Kansas and Nebraska water users.

B. Response to Allegations Regarding the Result of the Litigation in *Kansas v. Nebraska and Colorado*, No. 126, Original and the Republican River Compact.

The Foundation likewise misconstrues many aspects of the Compact litigation, originating out of Kansas's suit against Nebraska in *In Kansas v. Nebraska and Colorado*, No. 126, Original. Foundation Compact Claim at pp. 4-5. The Special Master's findings were more detailed than what the Special Master included in his summary and relied on by the Foundation:

(1) The language of the Compact unambiguously governs the entire stream flow of the Basin, which includes all groundwater that would become part of the stream flow in the Basin if undepleted by the activities of man;

(3) Prior decisions of this Court are entirely consistent with the view that an interstate compact can restrict groundwater use even though that compact does not expressly use the term "groundwater," and no decision of either this Court or any court of any of the compacting States detracts from the plain and inclusive meaning of the term "virgin water supply" as defined in the Compact: "the water supply within the Basin undepleted by the activities of man";

First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) *Kansas v. Nebraska and Colorado*, No. 126, Original (January 28, 2000) at pp. 44-45. Thus, the Compact applies to all groundwater diversions, regardless of the timing or amount of the depletions to a surface stream, which is different from Colorado law within a Designated Basin. However, neither the Special Master nor the Courts required any change of Colorado law or policy in any ruling throughout the entirety of the No. 126 litigation.

The Republican River Compact and its implementing documents do not discriminate or restrict any certain type of consumptive use. Instead, the Compact simply provides a formula for determining the Virgin Water Supply and restricts the Beneficial Consumptive Use that each state may make of the Virgin Water Supply. Republican River Compact, Art. III, Art. IV; § 37-67-101, C.R.S. All Beneficial Consumptive Use is treated the same for Compact purposes, regardless of the type of use. See, e.g., Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska and Colorado*, No. 126, Original (April 15, 2003) at p. 26; Appendix C to the Final Settlement Stipulation: Republican River Compact Administration (“RRCA”) Accounting Procedures at pp. C15; C30-C47.

C. Response to Allegations Regarding the Use and Applicability of the RRCA Groundwater Model.

The Foundation also selectively quotes the record in *Kansas v. Nebraska and Colorado*, implying that the RRCA Groundwater Model is sufficient to determine injury in time, location, and amount. Foundation Compact Claim at p. 5. However, the only purpose of the RRCA Groundwater Model is to allow depletions from groundwater pumping and accretions from imported water from the Platte River System to the Republican River to be quantified and assigned to prescribed streamflow reaches in accord with the RRCA Accounting Procedures. Final Report of the Special Master at p. 10; RRCA Accounting Procedures at p. C20;² Affidavit of Willem Schreüder, Ph.D, attached as Exhibit C to the State Engineer’s Response to the Jim Hutton Educational Foundation’s Motion for Summary Judgment on its Compact Administration Claim (April 8, 2016) (“Schreüder Affidavit”), at ¶ 6. The RRCA Groundwater Model has not

² Per order of the United States Supreme Court, the manner in which the RRCA Groundwater Model is applied through the RRCA Accounting Procedures has been changed from a four-run process to a five-run process. *Kansas v. Nebraska and Colorado*, No. 126, Original, 135 S.Ct. 1042, 1063-1064 (2015).

been approved for any intrastate administrative purposes. *See* Schreüder Affidavit at ¶¶ 8, 9; Wolfe Affidavit at ¶ 21.

Similarly, the Foundation again relies on the results of the RRCA Groundwater Model in an attempt to quantify impacts on its water rights in support of its Senate Bill 52 claims. Foundation SB52 Claim at pp. 3-4. However, the RRCA Groundwater Model is not an appropriate tool for intrastate water administration and the RRCA Groundwater Model results have to be applied through the RRCA Accounting Procedures to have any validity. Schreüder Affidavit at ¶¶ 6, 9. The Foundation’s reliance on the RRCA Groundwater Model in this matter remains a mistake.

The Foundation also referenced Case No. 2006CV31, an appeal from the Groundwater Commission, but only selectively quoted the Order on Summary Judgement dated July 23, 2007 (Foundation Exhibit 1 (February 29, 2016) (Filing ID 5486912BBC79)) (“06CV31 Order”) by Senior Judge Connie Peterson, who was sitting as the Designated Ground Water Judge. Foundation SB52 Claim at p. 4.

The Foundation correctly characterized the ruling as one that concerned whether NHP Basin boundaries could be redrawn, but significantly Judge Peterson also directed that “[t]he Commission is the appropriate forum for determining whether disputed groundwater is designated groundwater located in a designated groundwater basin... [and] [t]he Commission has initial and exclusive jurisdiction to determine if groundwater diversions in a designated groundwater basin involve the taking of designated groundwater and the Commission must make this initial determination.” 06CV31Order at p. 19 (citations omitted).

The Foundation relies on the 06CV31 Order and focused on one quote from that order discussing RRCA Groundwater Model issues. Foundation SB52 Claim at p. 4, However, Judge Peterson included much more than the Foundation’s quote when discussing the significance of the RRCA Groundwater Model findings when she ruled:

All parties are free to argue the *significance and the effects* of the RRCA Model data, findings and conclusions to the facts of this case. Plaintiffs' proposed use of the RRCA Model in this case is to expand it to show not only groundwater withdrawal for Compact accounting but also to argue that it proves the pumping of groundwater in the NHP Basin is having more than a *de minimus* impact on stream flows and is causing injury to Plaintiffs' water rights. Therefore, it is the Plaintiffs' burden to prove that their proposed expanded use and purposes of the RRCA Model may apply to the facts of this case....The Defendants may not challenge the RRCA Model's relevancy, credibility, conclusions, data and findings, but they may challenge its *application* as offered by the Plaintiffs for purposes other than Compact accounting.

06CV31 Order at p. 14 (emphasis in original).

Judge Peterson also quoted an important limitation found in the Special Master’s Final Report that “[t]he RRCA Model simulates historical and current physical conditions; it is not an optimization or operational model and does not assess the impact of land use and conservation practices, reservoir operations or other water supply or water administration practices. The RRCA Model will be used to determine groundwater depletions and imported water supply accretions in formulas prescribed in the RRCA Accounting Procedures.” 06CV31 Order at p. 14.

The Foundation then stated that on remand to the Commission, the case settled. Foundation SB52 Claim at p. 4. The Groundwater Commission, however, did make the findings required by Judge Peterson in her Order. Exhibit D (Findings and Order, In the Matter of the Pioneer Irrigation District, Colorado Board, and Laird Ditch, Located in the Northern High Plains Designated Ground Water Basin, Case No. 2005GW14 (March 16, 2009).

D. Response to Allegations Regarding this Court's Orders in Case Nos 2011CW186 and 2012CW111.

The Foundation goes on to state: “[t]he historical use of all four water rights owned by the Foundation documented by aerial photographs and other information is the subject of this Court’s orders in Case Nos. 11CW86 [sic] and 12CW111.” Foundation Compact Claim at p. 4. However, the “historic use” of the water rights was not the subject of this Court’s orders in 2011CW186 and 12CW111. Those cases concerned the place of use under existing decrees and whether or not the water rights had been abandoned. See, file and record, Case No. 2011CW186 and Case No. 2012CW111, District Court in and for Water Division No. 1. In 2011CW186, this Court found that the Foundation could lawfully irrigate certain lands it owned and that its predecessors in interest did not abandon the Hale Ditch water right. See Exhibit A at pp. 11-12 (Decree in 2011CW186). In 2012CW111, this Court ruled that the Foundation’s predecessors in interest did not abandon the Tip Jack Ditch water right and the Hutton 1 and 2 water rights. See Exhibit B at p. 9 (Decree in 2012CW111). With respect to the Hutton 1 and 2 water rights, this Court found that the Engineers had failed to establish the statutory presumption of abandonment based on non-use. See Exhibit B at p. 9. With respect to the Tip Jack water right, the Engineers did establish the statutory presumption of abandonment based on non-use, but the Foundation successfully rebutted the presumption. See Exhibit C at p. 2 (Supplemental Findings in Case. No 2012CW111). In neither case did this court make affirmative findings of use of the water rights; rather, this Court found that the water rights were not abandoned. The Court further found that the Tip Jack Ditch could not physically be diverted and applied to beneficial use at its decreed point of diversion and it could not legally be diverted through either the Hutton No. 1 or Hutton No. 2 points of Diversion. See Exhibit B at p. 5.

E. Response to Allegations Regarding the Appendix U of the Final Report of the Special Master.

The Foundation also seems to rely on Appendix U to the Final Report to support its assertion of injury due to well pumping. Foundation Compact Claim at pp. 5-6. However, Appendix U shows the impacts of Colorado's groundwater withdrawals in more than just Colorado, as the Compact operates by cross-border subbasins. *See* Schreüder Affidavit at ¶¶ 7, 8. Appendix U does not show where or even in which state the calculated depletions occur within the subbasin, only that they are above the lower outlet of the subbasin where it meets the main-stem of the Republican River Basin. *Id.* Appendix U does not show that all or any depletions to the South Fork occur at or above the Foundation's various points of diversion or in Colorado at all. *Id.*

F. Response to Allegations Regarding the State Engineer's Administration of Surface Water within the Republican River Basin.

The Foundation is correct in stating that the State has curtailed only two of its four water rights for Compact Compliance purposes. Wolfe Affidavit at ¶ 18. Foundation Compact Claim at p. 4. However, the Foundation goes on to state that these two water rights have appropriation dates of July 5, 1954. *Id.* Although the Foundation may be accurate in these dates of appropriation, the Foundation leaves out that the rights were not adjudicated until 1977, and therefore are administered according to a priority date of 1977. Findings and Ruling of the Referee and Decree of the Water Court, Case No. W-8667-77, at p. 2 (May 24, 1978) ("The priorities herein awarded said Hutton No. 1 and Hutton No. 2 were filed in the Water Court in the year 1977 and shall be administered as having been filed in that year; and shall be junior to all priorities filed in previous years.") This post-dates the 1965 Designated Ground Water

Management Act and the designation of the Northern High Plains (“NHP”) Designated Basin. *See*, Senate Bill 367, Ch. 19, Session Laws of 1965, codified at §§ 148-18-1, *et seq.* C.R.S. (1965) (current version at §§37-90-101, *et seq.* C.R.S. (2015); Findings of Fact, Conclusions of Law, Final Order, Colorado Ground Water Commission (April 14, 1966), attached as Exhibit 1 to Motion for Summary Judgment on the Constitutionality of the Ground Water Management Act of 1965 (February 29, 2016) (Filing ID 748278DF3DAA2).

By the time of the 1977 priority date, the level of pumping in the NHP Basin was nearing or had reached its maximum levels. *See*, Final Report of the Special Master, Appendix D, Pumping Estimates for Each State at p. D-8. Few to no wells in the NHP Designated Groundwater Basin were constructed after 1977 and pumping remained relatively stable during the RCCA Groundwater Model study period shown in Appendix D. *Id.*

The Foundation also argues that “the Engineers have limited their administration of groundwater use in the Basin to requiring wells to measure water – which surface water users are also required to do.” Foundation Compact Claim at p. 2. However, the Engineers have and continue to enforce the limits of permits and decrees and have taken legal action to preclude the expansion of groundwater use outside those restrictions. Wolfe Affidavit at ¶ 19.

The Foundation states that Bonny Reservoir is “one of just a few water rights being curtailed for Compact compliance on the South Fork because it is a post-1942 water right.” Foundation Compact Claim at p. 6. Again, although technically true, the Foundation ignores that all post-1942 tributary water rights are currently being curtailed for Compact purposes. If only a few rights are curtailed, that is because only a few rights exist. There are currently 11 post-Compact surface water rights on the South Fork, all of which are curtailed for Compact purposes. Wolfe

Affidavit at ¶ 15. Similarly, there are 17 post-Compact surface water rights on the North Fork, all of which are curtailed for Compact purposes. Wolfe Affidavit at ¶16. The pre-Compact surface water rights on both the North Fork and the South Fork have not been curtailed for Compact purposes. Wolfe Affidavit at ¶¶ 15, 16.

G. Response to Certain Allegations Regarding Testimony Before the General Assembly Regarding Senate Bill 52.

In paragraph 12 of the Foundation SB52 Claim, the Foundation argues that the Ground Water Commission (“Commission”) had a “non-discretionary duty” to alter the Northern High Plains Designated Groundwater Basin’s boundaries after the results of the RRCA Model were known. The Foundation then states “[i]nstead, the Commission testified in support of SB-52 in 2010 in an effort to relieve itself of its non-discretionary obligation to revisit its prior designations and remove groundwater from the NHP Basin....” Foundation SB52 Claim at p. 4. There is no support for this statement in the Transcript of the legislative hearings. *See* Attachment 1 to Defendants’ Motion for Summary Judgment on the Constitutionality of SB 52 (February 29, 2016), Transcript of Leg. Hearings (“Leg. Transcript”) (Filing ID 59A79A7BBBB48).

The only witness who appeared and testified for the Department of Natural Resources was Assistant State Engineer Kevin Rein. Mr. Rein was called to testify by the House Agriculture, Livestock and Natural Resources Committee (“House Ag. Committee”) Chairman because the Chairman wanted to hear responses to claims made about the State Engineer’s Office by prior witnesses. Leg. Transcript, p. 34, ln. 39-40; p. 35, ln. 1-6. Mr. Rein started his testimony “by stating for the record that the Department of Natural Resources takes no position

on this bill, but I can take questions if you have them.” Leg. Transcript, p. 35, ln. 14-15. This does not support a conclusion that the Commission was taking a position on the bill.

Mr. Dennis Coryell also testified at the hearing. At that time he was both the president of the Republican River Water Conservation District and chairman of the Colorado Ground Water Commission. Leg. Transcript, p. 44, ln. 9-11. While acknowledging these dual offices, Mr. Coryell immediately made clear that he was testifying from his perspective as president of the Republican River Water Conservation District. Leg. Transcript, p. 44, ln. 13-14. Mr. Coryell’s testimony was limited to the nature of the problem faced in the Republican River Basin and the activities of the Conservation District to address those problems. Leg. Transcript, pp. 44-46. He was asked one question by Representative Hulinghorst on the “practical consequences” of SB 52 not being adopted. Leg. Transcript, p. 47, ln. 12. In response Mr. Coryell described his understanding of the procedure and potential consequences, Leg. Transcript, p. 47, ln. 10-23, but never purported to testify on behalf of the Ground Water Commission in support of SB-52.

DATED this 8th day of April, 2016.

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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 **DEFENDANTS' RESPONSE TO CERTAIN FACTUAL ALLEGATIONS MADE BY THE HUTTON FOUNDATION** to be served electronically upon all parties of record via ICCES.

/s Jeri MacAllister

Jeri MacAllister