

<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 style="text-align: center;">^ COURT USE ONLY ^</p>
<p>PLAINTIFF, The Jim Hutton Educational Foundation,</p> <p>v.</p> <p>DEFENDANTS, Dick Wolfe, in his capacity as the Colorado State Engineer, et al.</p>	
<p>For Defendants Dick Wolfe, State Engineer; David Nettles, Division Engineer for Water Division No. 1; and Colorado Division of Water Resources</p> <p>CYNTHIA H. COFFMAN, Attorney General EMA I. G. SCHULTZ, Atty. Reg. No. 40117* Assistant Attorney General PRESTON V. HARTMAN, Atty. Reg. No. 41466* Assistant Attorney General DANIEL STEUER, Atty. Reg. No. #35086* Assistant Attorney General Ralph L. Carr Colorado Judicial Center 1300 Broadway, 7th Floor Denver, CO 80203 Telephone: (720) 508-6307 (Ms. Schultz) (720) 508-6260 (Mr. Hartman) (720) 508-6262 (Mr. Steuer) ema.schultz@coag.gov; preston.hartman@coag.gov; daniel.steuer@coag.gov *Counsel of Record</p>	<p>Case No. 2015CW3018</p> <p>Div.: 1</p>
<p style="text-align: center;">STATE ENGINEER, DIVISION ENGINEER, AND COLORADO DIVISION OF WATER RESOURCES' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE A MOTION FOR DETERMINATION OF QUESTION OF LAW, REGARDING ITS BONNY RESERVOIR CLAIM</p>	

Dick Wolfe, in his capacity as State Engineer, David Nettles, in his capacity as Division Engineer for Water Division 1, State of Colorado, and the Colorado Division of Water Resources (“Engineers”), hereby respond to The Jim Hutton Educational Foundation’s Motion for Summary Judgment, or in the alternative a Motion for Determination of Question of Law, Regarding its Bonny Reservoir Claim.

I. INTRODUCTION

On February 29, 2016, Plaintiff, the Jim Hutton Educational Foundation (“Foundation”), filed its Motion for Summary Judgment or Determination of Question of Law pursuant to the Court’s Minute Order of January 11, 2016. The Motion seeks summary judgment pursuant to Rule 56, C.R.C.P., on the Foundation’s claim that the Engineers and defendant, the Colorado Division of Parks and Wildlife (“CPW”), are collectively “unlawfully operating Bonny Reservoir in a manner that injures the Foundation’s interest in the Hale Ditch water right.” Motion at 2. In the alternative, the Foundation seeks a ruling pursuant to Rule 56(h), C.R.C.P., that Bonny Reservoir “may not be operated in a manner that injures the Foundation’s Hale Ditch water right.” *Id.* The Court should deny the Foundation’s motion for summary judgment and alternative motion for determination of question of law for the reasons that follow. This Response refers to the Motion for Summary Judgment as the “Motion” and the Alternative Motion for Determination of Question of Law as the “Alternative Motion.”

Throughout its Motion, the Foundation refers to the Engineers and CPW collectively as the “State Defendants” or the “State.” The Engineers and CPW are filing separate responses to the Motion and are completely separate and independent entities. The Division of Water Resources, in which the offices of the State Engineer and Division Engineer are organized, is a type 1 transfer agency in Colorado as is CPW. Order Re: Motion to Dismiss Colorado Department of Natural Resources as a Defendant, Case No. 2015CW3018, Water Division 1 at 3 (entered July 21, 2015). Both agencies are organized into the Colorado Department of Natural Resources, but, as type 1 transfers, the Engineers and CPW retain their independent statutory authorities. *Id.* The distinction between the Engineers and CPW is essential because each agency has different roles and authority concerning Bonny Dam and Reservoir. This Response focuses only on the Engineers’ roles and authority with regard to Bonny Dam and Reservoir. The Engineers dispute many of the statements of fact in the Motion because the Foundation inaccurately applies the facts to both the Engineers and CPW.

II. SUMMARY OF ARGUMENT

The Foundation’s Motion includes a section titled “Background” which contains a summary of the Foundation’s arguments. Motion at 2. The Background section contains several arguments phrased as statements of fact. *Id.* Rather than respond to each assertion in the Background section, the Engineers address the relevant arguments and facts throughout this Response. The Foundation’s

Statement of Undisputed Facts, is the exception. Due to the Foundation's assertion that such facts are undisputed, the Engineers are compelled to identify the extent to which they disagree. *See* Section IV, *infra*.

The Court should deny the Motion because the Foundation has not asserted any claim against the Engineers for which it is entitled to any relief. First, the Engineers do not operate Bonny Dam or own the Bonny Reservoir water right. Rather, the Engineers administer the Bonny Reservoir water right along with the Hale Ditch water right and other water rights throughout the State. Second, as administrators, the Engineers are not liable if their curtailment of junior water rights does not actually yield additional water to a senior calling water right. To the contrary, the Engineers are bound to rescind their curtailment orders against junior water rights if such curtailment does not cause water to become available to the senior water right at the time and place of its need. *See* §37-92-502(2)(a), C.R.S. (2015); *see also City of Colo. Springs v. Bender*, 148 Colo. 458, 463 (1961). Third, the Engineers are not parties to either contracts involving land or water in and around Bonny Dam and Reservoir. The Engineers, therefore, cannot be bound by the contracts' provisions. Fourth, the Engineers are properly administering the terms of the Bonny Reservoir water right decree and the Foundation is not entitled to any further relief from the Engineers' administration.

This Court should also deny the Alternative Motion because the Foundation has failed to request a clear determination of law or provide any argument in

support of the motion. Even if the Court determined that a valid request or argument existed, the only clear request in the Foundation's Alternative Motion is for a determination that Bonny Reservoir may not be operated in a manner that injures the Foundation's Hale Ditch water right. Motion at 2. Any determination on this issue, however, only goes to support a claim against the operator of Bonny Dam and owner of the Bonny Reservoir water. The Engineers are neither. The determination of question of law the Foundation seeks will not significantly impact the legal matters at issue in this litigation, and the Court should deny the Foundation's Alternative Motion.

III. LEGAL STANDARDS

Summary judgment is warranted only where there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Greenberg v. Perkins*, 845 P.2d 530, 531 (Colo. 1993). A material fact is a fact that will affect the outcome of the case. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791, 795 (Colo. 1993). The party that moves for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact by citing to the record and affidavits, if any. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). If the moving party meets this initial burden, then the burden shifts to the nonmoving party to make out a triable issue of fact. *Id.* at 713. "All doubts as to the existence of such an issue must be resolved

against the moving party.” *Ridgeway v. Kiowa Sch. Dist. C-2*, 794 P. 2d 1020 (Colo. App. 1989) (citing *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988)).

Under C.R.C.P. 56(h), “[a]t any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.” “The purpose of Rule 56(h) is to ‘allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds.’” *Bd. of Cty. Comm’rs v. United States*, 891 P.2d 952, 963 n. 14 (Colo. 1995).

IV. UNDISPUTED FACTS

1.-5. The Engineers agree that the facts stated in numbered paragraphs 1-5 in the Foundation’s Motion are undisputed. The Engineers will note however, that the decree in Case No. W-9135-77 was entered by the Water Court for Water Division 1, not the Yuma County District Court.

6.-7. The Engineers are not parties to the “Water Contract,” the “Land Contract,” or the Memorandum of Understanding and therefore have no basis for either disputing or agreeing with the facts stated in paragraphs 6-7. The Engineers assert that these facts are not material to the Engineers’ arguments in this Response.

8. The Engineers agree that the United States Bureau of Reclamation (“Bureau”) operates Bonny Dam and that the Engineers administer water rights, including the Bonny Reservoir storage water right.

9.-10. The Engineers do not dispute these facts.

11. In 2011, the Engineers curtailed the Foundation's diversion of its Hale Ditch water right because the Engineers then believed that the water right was being used to irrigate lands outside the lands intended to be irrigated at the time of appropriation of the Hale Ditch Priority No. 38. The Water Court found that the Hale Ditch water right was originally intended to be used on those lands.

12. The Engineers allowed the Bureau to rely on the "72-hour" policy to deliver water to the Hale Ditch in 2014. The amount of water that the Bureau delivered to the Hale Ditch in 2014 was always less than 7.67 cfs, as was the flow into the Bonny Reservoir site. Foundation's Ex. 33 at 2.

13. The Foundation relies on a data set that amounts to eight correlating measurements for its statements in numbered paragraph 13. Foundation's Ex. 33. The eight dates in 2014 when the Bureau provided both an inflow measurement into Bonny Reservoir as well as a delivery measurement to the Hale Ditch show:

- On 4/15/14, the Hale Ditch received 5 cfs, 73.4% of the Bonny Reservoir inflow.
- On 5/1/14, the Hale Ditch received 3.5 cfs, 64.3% of the inflow.
- On 5/7/14, the Hale Ditch received 3.3 cfs, 61% of the inflow.
- On 5/16/14, the Hale Ditch received 4.7 cfs, 96.7% of the inflow.
- On 5/30/14, the Hale Ditch received 0.7 cfs, 18.6% of the inflow.
- On 6/12/14, the Hale Ditch received 5.2 cfs, 113.5% of the inflow.
- On 6/24/14, the Hale Ditch received 1.82 cfs, 52.4% of the inflow.
- On 7/8/14, the Hale Ditch received 0.8 cfs, 21.4% of the inflow.

Foundation's Ex. 33.

The Engineers agree that there is at least one additional source of water which supplies Bonny Reservoir – Landsman Creek. Exhibit J, Map and Filing Statement for Bonny Dam and Reservoir. The originally decreed headgate for the Hale Ditch was below the confluence of Landsman Creek and the South Fork of the Republican River, so the Hale Ditch would have historically realized the benefit of stream flows from Landsman Creek. On three of the eight measurement dates, the Bureau's measurement of the South Fork of the Republican River below Bonny Dam was greater than the diversion at the Hale Ditch. Foundation's Ex. 33.

14. The Foundation has provided no evidence or affidavits to support its assertions as to the reasons the Hale Ditch is not receiving 7.67 cfs. The Foundation's argument or belief is not a material fact upon which the Court should decide the Motion.

V. ADDITIONAL MATERIAL FACTS THAT SHOULD BE UNDISPUTED

1. When the Foundation calls for its 7.67 cfs of Hale Ditch water, all of the water in the South Fork of the Republican River that reaches Bonny Dam is diverted into the Hale Ditch diversion works in the Dam and no water is allowed to be released through the Bonny Dam outlet works up to the 7.67 cfs. Exhibit K, Affidavit of Dave Keeler.

2. The Bureau measurements of Bonny Reservoir inflow are taken on the South Fork of the Republican River upstream of the high water mark for the River. This location is approximately 7 miles away from the originally decreed diversion point for the Hale Ditch. *Id.*

3. The Bonny Reservoir water right has been curtailed and not permitted to store water since 2011. Foundation's Ex. 29 at 19-21 (Letter from D. Wolfe, State Engineer, to A. Thompson, Bureau of Reclamation dated Sept. 20, 2011); Exhibit L (Letter from D. Wolfe, State Engineer, to A. Thompson, Bureau of Reclamation dated Mar. 2, 2012).

4. The Scherrer Ditch water right was appropriated November 10, 1885 and adjudicated by the District Court for Arapahoe County on December 28, 1893 in Case No. 18162. The Scherrer Ditch diverts from the South Fork of the Republican River below the point where the Bureau measures the Bonny Reservoir inflows and above the originally decreed diversion point of the Hale Ditch. Exhibit K.

5. The Newton Ditch Priority No. 33 water right was appropriated July 15, 1904 and adjudicated by the District Court for Kit Carson County on September 8, 1938 in Civil Action 2985. The Newton Ditch diverts from the South Fork of the Republican River below the point where the Bureau measures the Bonny Reservoir inflows and above the originally decreed diversion point of the Hale Ditch. Exhibit K.

VI. ARGUMENT

A. The Engineers do not Operate Bonny Dam.

Throughout its Motion, the Foundation utilizes the words “operate and administer” together as though they mean the same thing.¹ The Engineers do not operate Bonny Dam. The Engineers administer water rights throughout Colorado including the water rights decreed to Bonny Reservoir and the Hale Ditch. *See* §37-92-301(1), C.R.S. (2015). The Foundation argues that because the Bureau has complied with the Engineers’ curtailment orders to release and cease diverting the Bonny Reservoir water right, the Engineers have stepped in to the Bureau’s shoes as the Bonny Dam operator. The Foundation has provided no law that supports this position, and it is incorrect. Neither the State Engineer nor the federal government have ever asserted that the Engineers can usurp the role and authority of the Bureau to manage and operate a federal facility that stores water administered by the Engineers pursuant to Colorado water law.

Rather, the State Engineer’s administration of Bonny Reservoir is not unlike any other administrative curtailment the Engineers might issue in their regular duties. If the Foundation’s argument is correct, the Engineers would become the operators of every water right that complies with curtailment orders or follows the administrative call on the stream. Then the words “operate” and “operator” in the

¹ The definition of “operate” is “to work, perform, or function, as a machine does.” <http://www.dictionary.com/browse/operate?s=t>. The definition of “administer” is “to manage (affairs, a government, etc.); have executive charge of.” <http://www.dictionary.com/browse/administer?s=t>.

reservoir water statutes would have no meaning. *See e.g.* §37-87-101(1)(a), C.R.S. (2015) (“no water storage facility may be operated in such a manner as to cause material injury to the senior appropriative rights of others”); and §37-87-104(1) (“no entity or person who owns, controls, or operates a water storage reservoir shall be held liable for any personal injury or property damage resulting from water escaping from the reservoir by overflow or as a result of the failure or partial failure of the structure or structures forming that reservoir unless such failure or partial failure has been proximately caused by the negligence of that entity or person.”). Fortunately, the General Assembly has established that the word “operator” in the reservoir statutes does not apply to the Engineers. *See generally* §37-87-108.5, C.R.S. (2015). This statute only provides for the State Engineer to assume control of any dam or reservoir in the event of an emergency which threatens health and safety or life and property. §37-87-108.5(1), C.R.S. (2015). The statute further limits the State Engineer’s authority to take any actions necessary until the emergency subsides. §37-87-108.5(2)(a), C.R.S. (2015). The statute then affords the State Engineer the opportunity to recover the costs from the reservoir owner for taking the necessary emergency action. §37-87-108.5(3), C.R.S. (2015). Under this framework, the Engineers do not become operators of a dam by administering the water rights decreed to the structure.

The Foundation directs the Court to section 37-87-101(1)(a), C.R.S. (2015), in the reservoir statutes. Motion at 7. This statute states that “no water storage

facility may be operated in such a manner as to cause material injury to the senior appropriative rights of others.” §37-87-101(1)(a), C.R.S. (2015). The plain language of the statute provides direction to operators of storage facilities, not administrators of storage water rights. *Id.* There is nothing in this statute which directs the Engineers’ administration of storage water rights.

Even if section 37-87-101(1)(a), C.R.S. (2015), could be construed to compel some sort of administrative actions by the Engineers, the Foundation has failed to show material injury and that the Engineers caused the material injury by the undisputed facts and evidence in its Motion. The Foundation asserts that its material injury is “that the Hale Ditch is not receiving the water to which it is entitled.” Motion at 7. This assertion, however, is based only on unsupported statements that, when water is available for the Hale Ditch water right, the water level in Bonny Reservoir is too low to release the water to the Hale Ditch. *Id.* On the contrary, the Foundation’s exhibits show that even when a very small amount of water is available, the Hale Ditch receives at least some water. *See* Foundation’s Ex. 33 (showing Hale Ditch diversions of 0.7 cfs when the measurement above the Bonny Reservoir high water mark is 3.74 cfs on May 30, 2014). The Foundation does not provide evidence or affidavits to show it is actually entitled to the entire flow of the South Fork of the Republican River at the point where the Bureau took the water measurements above the high water mark of the reservoir. The measurement point is significantly further upstream than the originally decreed

point of diversion for the Hale Ditch. Exhibit K. In addition, there are two water rights more senior than the Hale Ditch Priority 38 that take their water supply from the South Fork of the Republican River between the Bureau's measurement and the originally decreed diversion point for the Hale Ditch. Exhibit K. The Foundation also did not provide evidence that the Hale Ditch has not been receiving the entire flow of the South Fork of the Republican River that actually reaches Bonny Dam and the Hale Ditch diversion works when the Hale Ditch has called for water. The Hale Ditch can actually receive all of the water that reaches Bonny Dam up to the Foundation's 7.67 cfs. *Id.*

The Foundation also fails to prove the Engineers caused the Foundation material injury in its Motion. The Foundation implies that its material injury of not receiving water began coincident with the Engineers' orders to release water from Bonny Reservoir in 2007. However, the Hale Ditch diversion records the Foundation supplied show that the Hale Ditch did not receive any water for the first time in 2002, not 2007. Foundation's Ex. 28. In fact, diversions by the Hale Ditch began increasing in 2007 through 2009. *Id.* In addition, the Foundation has not proven that the water level is insufficient to utilize Bonny Dam's infrastructure because diversion records show the Dam infrastructure can deliver as little as 0.7 cfs. Foundation's Ex. 33.

The Foundation has not proven that water to which it is entitled has been "lost through seepage, or because of the consumption of water occurring within the

Reservoir due to evaporation and evapotranspiration” that would not have occurred absent the construction of Bonny Dam. Motion at 7. The measurement of Bonny Reservoir inflow the Foundation relies on is well upstream of the originally decreed point of diversion for the Hale Ditch, which is the location where the amount of water the Hale Ditch is entitled to receive is properly measured in the absence of a full Bonny Reservoir. See Foundation’s Ex. 33 at 5; see also *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 673 (Colo. 2011) (upholding the water court’s adjudication of an alternate point of diversion that limits the diversion to the amount of water legally and physically available at the original ditch headgate). The Foundation also has not proven how the transit losses that occur through the drained Bonny Reservoir site now compare to those that the Hale Ditch water right suffered before Bonny Dam was constructed. And the Foundation has not proven that the Engineers caused any transit losses in the natural stream of the South Fork of the Republican River that the Hale Ditch would not have suffered from historically. All the Foundation has proven is that the Engineers ordered the Bureau to drain Bonny Reservoir over the course of five years and the Bureau complied with those orders.

The Foundation cites *Larimer County Reservoir Co. v. People*, 8 Colo. 614, 9 P. 794 (1885), to support its argument that the Engineers are operating Bonny Reservoir in a manner inconsistent with law. Motion at 7. This case established that an appropriative water right can exist in an on-channel reservoir, but the

water right must conform to the norms of all water rights: the junior on-channel reservoir may not interfere with or harm existing senior water rights. *See Larimer Cty. Reservoir*, 8 Colo. 614. The case mentions the duties of an on-channel reservoir owner. *See id.* at 617. However, the Engineers are not the owners of Bonny Dam or the Bonny Reservoir water right and the Engineers do not operate Bonny Dam. *Larimer* does not stand for the proposition that by administering the Bonny Reservoir water right, the Engineers become the operators of Bonny Reservoir and Dam.

The Foundation's reliance on *Joseph W. Bowles Reservoir Co. v. Bennett*, 92 Colo. 16, 18 P.2d 313 (1932), and *Bender* for the proposition that the Engineers should be treated as the operators of Bonny Dam or owners of the Bonny Reservoir water right is also misplaced. Both of these cases involved a senior water right owner suing the offending junior water right owner, not the water administrators. These cases stand for the proposition that when a junior water right operation interferes with a senior water right operation, the court may offer the junior a choice of ceasing operation or delivering the senior's water right by some alternate means. Again, here, the Engineers are not the owners or operators of any junior water right.

Even if the junior water right owner and operator were a party to this litigation, *Bowles Reservoir Co.* and *Bender* are not on point because the junior water right owner is not operating its water right at all in this instance. Rather,

the junior water right has been curtailed and is not diverting its water right. In both cases, the senior water rights owners sought curtailment by the courts because the junior water right owners were actually diverting their junior water rights in a manner that negatively impacted the senior water rights.

Here, the Foundation is seeking the opposite. The Foundation is asking this Court to order the junior water right to operate to improve the senior water right's operations.² While there is no evidence of the amount of water that the Hale Ditch diverted before Bonny Dam was constructed, the deliveries of the South Fork of the Republican River to Bonny Dam since the Reservoir has been drained appear to show that it was possible that the Reservoir significantly improved the reliability of the Hale Ditch water right. The Hale Ditch is not entitled to the maintenance of the deliveries it received since Bonny Dam was constructed; it is entitled to the natural flow in the South Fork of the Republican River at its original decreed point of diversion up to its decreed flow rate. *See Burlington Ditch*, 256 P.3d at 673.

The Foundation alleges that "releases are impossible or inefficient" since the draining of Bonny Reservoir. Motion at 8. However, the diversion records that the Foundation provided for 2014 prove that deliveries to the Hale Ditch at Bonny Dam are neither impossible nor inefficient. *See* Foundation's Ex. 33. If releases were impossible, the Hale Ditch would have received no deliveries. If releases were

² More accurately, the Foundation is asking the Court to order the Engineers to rescind its curtailment of the junior water right so that the junior water right can operate. The Court cannot order the junior water right owner to operate the water right because the owner of the Bonny Reservoir water right is not a party in this case.

inefficient, the Hale Ditch would not have received all of the flow in the South Fork of the Republican River that reaches Bonny Dam up to the Foundation's 7.67 cfs. Exhibit K.

The Foundation alleges that extensive seepage and vegetation growth interfere with water that would otherwise be available to the Hale Ditch but provide no evidence or law to support its claim that the Foundation is actually entitled to that water historically. Motion at 8. An appropriator takes the stream as he finds it and is entitled to the preservation of the stream conditions at the time of appropriation. *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 579, 272 P.2d 629, 631-32 (1954) (holding junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations). The Foundation is not relying on the stream conditions in the South Fork of the Republican River at the time of the Hale Ditch appropriation, but rather on the stream conditions that existed when Bonny Reservoir was full. There is no basis in law for this reliance.

The Foundation claims that evaporation has been allowed to occur without replacement, again without any evidence to support the claim. Motion at 8. The Hale Ditch historically had to take water that was available at its original decreed point of diversion on the South Fork of the Republican River. Before Bonny Dam was built, the river suffered transit losses including evaporation and evapotranspiration, as all rivers do. Bonny Reservoir also suffered evaporation. If

the Bureau delivered water to the Hale Ditch without charging that water an evaporation loss, the Hale Ditch was a beneficiary of the Bureau's water right operations. However, the Hale Ditch is not entitled to maintenance of that condition. Rather, the Hale Ditch is entitled to the water physically and legally available at its originally decreed point of diversion.

The Foundation is asking this Court to restore stream conditions that the Foundation is not entitled to receive. The Foundation states that the Engineers "must refill Bonny Reservoir, install an alternative diversion structure or pump that will function even at low water levels, or otherwise address the impacts." Motion at 8. First, the Engineers cannot refill Bonny Reservoir, only the Bureau can do that. Second, the Foundation is not entitled to have the Reservoir refilled; it is entitled to the streamflow at its original decreed point of diversion. Third, the Foundation has not proven that any alternative diversion structure is necessary for the Hale Ditch to divert what is actually available to it in the stream. Finally, if the Foundation is entitled to any relief at all, it is not relief from the Engineers because the Engineers do not operate or own the Bonny Reservoir water right or Bonny Dam.

B. The Engineers are Not Required by Their Administrative Duties to Produce Actual Water to a Senior Water Right Calling for Water.

The Foundation included among its undisputed facts the Order entered by this Court in Case No. 11CW186 which stated: "The Engineers are ordered to

provide [the Foundation] with its 1/3 interest in the Hale Ditch water right, when [the Foundation's] right is in priority." Foundation's Ex. 22 at 12. In addition, the Foundation repeatedly alleges that it is not receiving the water it is entitled to at the Hale Ditch diversion in Bonny Dam. The conclusion that the Foundation reaches is that the Engineers are required to provide more water to the Hale Ditch for the benefit of the Foundation.

The Engineers interpret this Court's Order to require the Engineers to rescind the curtailment order that had been placed on the Foundation's Hale Ditch diversion, and the Engineers promptly did so as evidenced by the Hale Ditch diversions in 2014. The Foundation alleges that some other obligation requires the Engineers to produce additional water to the Hale Ditch. In fact, the Engineers have no more authority than to administer water rights in accordance with their decrees. §37-92-301, C.R.S. (2015). Ironically, when the Hale Ditch places a call for its Priority No. 38, with the 1908 appropriation and 1938 adjudication, the Hale Ditch actually calls out the Bonny Reservoir water right that the Foundation wishes to be restored.

As administrators of the waters of the State of Colorado, the Engineers' duties require them to curtail water rights in order of priority when a senior water right is not satisfied. §37-92-502(2)(a), C.R.S. (2015). However, when such curtailment does not cause water to become available to the senior, the curtailment must be rescinded. *Id.* These situations are often called futile calls, when the

senior water right will not realize an increase in water supply from the curtailment of a junior water right. This statute shows that the General Assembly did not deem the Engineers liable for actually producing wet water for senior water rights by virtue of their administration. On the contrary, the statutory framework requires the Engineers to facilitate the maximum utilization of water by requiring the Engineers to rescind curtailment orders when those orders do not produce water for the senior water rights. *See id.* The laws are no different in the South Fork of the Republican River and the Foundation has no basis for claiming some greater obligation from the Engineers than any other water right.

C. The Engineers are Not Parties to the Land Contract or Water Contract and are Not Bound by the Provisions of Either.

The Engineers are not parties to the Land Contract or the Water Contract relied upon by the Foundation. Section IV.B of the Foundation's Motion is focused entirely upon contractual obligations. The Engineers do not respond to any arguments regarding the contractual allegations or argument because the Engineers are not parties to the contracts.

The Land Contract and Water Contract were entered into by the Colorado Department of Natural Resources for the use and benefit of the Colorado Division of Parks and Wildlife. *See* Foundation's Exs. 25 & 26. The Colorado Division of Water Resources, within which exist the office of the state engineer and the division engineers, was a type 1 transfer to the Department of Natural Resources. Order Re: Motion to Dismiss Colorado Department of Natural Resources as a Defendant, Case

No. 2015CW3018 (entered July 21, 2015) at 3. “A type 1 transfer provides that the existing department retains its statutory powers, duties, and responsibilities, and shall exercise its functions independently of the head of the principal department.”

Id. The Engineers do not become parties to contracts entered into by CPW simply because both agencies are a part of the Department of Natural Resources. See Foundation’s Ex. 32.

D. The Engineers are Enforcing the Terms and Conditions of the Bonny Reservoir Water Right Decree, and the Foundation is Not Entitled to Any Additional Relief From Such Administration.

The Foundation argues that the Engineers are not enforcing the terms and conditions of the decree confirming the Bonny Reservoir water right. Motion at 10-11. The Findings and Ruling of the Referee and Decree of the Water Court entered in Case No. W-9135-77 by the District Court, Water Division 1 contains the following provision:

Water shall not be impounded, except pursuant to the operation of a lawful exchange, unless entitled to do so by virtue of the priority herein awarded. At all other times, all inflow of water into the reservoir from any source, including precipitation, shall be removed by applicant or applicant’s successors in interest by draining, pumping or other means, and released into the nearest natural watercourse or below the reservoir, and not utilized by applicant or applicant’s successors in interest in any manner.

Foundation’s Ex. 24 at 2, ¶8.

The Foundation claims that “when there is out-of-priority water stored in Bonny Reservoir or otherwise impeded by the dam that cannot be delivered to the

Hale Ditch” the Engineers are not enforcing this provision in the Bonny Reservoir water right decree. Motion at 11. The Foundation provided no evidence to support this statement. On the contrary, the Foundation provided evidence that the Engineers are in fact enforcing the Bonny Reservoir decree and upholding the priority system in the curtailment orders issued by the State Engineer beginning in 2007. *See* Foundation’s Ex. 29. In fact, the State Engineer’s order dated September 20, 2011 specifically references this exact provision of the Bonny Reservoir decree and states that the water level maintained in the reservoir since 2007 was stored out-of-priority. *Id.*

The Foundation has not provided any evidence that there is water that is impeded by the dam that cannot be delivered to the Hale Ditch. All stream flow in the South Fork of the Republican River that reaches Bonny Dam on the surface can be delivered either to Hale Ditch or through the Bonny Dam outlet works. *See* Exhibit K. Because there is no dead pool at Bonny Reservoir, there is no water impounded by Bonny Dam that cannot be delivered by the existing gravity works. *See id.*; *see also* Foundation’s Ex. 30 at 5. The Engineers have curtailed the Bonny Reservoir water right and Bonny Reservoir is completely drained. Therefore, the Engineers have fully enforced this term in the Bonny Reservoir decree without the need to require the Bureau to use any means other than the existing outlet in Bonny Dam. As the Foundation has not proven that the existing gravity outlet works at Bonny Dam are not sufficient to bypass all inflow water into the reservoir,

the Foundation should not be entitled to seek some unnecessary pumping or other means of water delivery past Bonny Dam.

While the Engineers are satisfied that the Bureau is operating the Bonny Reservoir water right in accordance with its decree and with orders of the State Engineer, it is also important to note that the Foundation argues not that the decree terms are not being enforced, but that the Hale Ditch is not being satisfied. The Bonny Reservoir decree term is specific that, when the Bonny Reservoir water right is not in priority, the inflows in the reservoir must be “released into the nearest natural watercourse or below the reservoir,” not that the inflows must be delivered to the Hale Ditch. Decree, Case No. W-9135-77, Foundation’s Ex. 24. While the Hale Ditch is entitled to receive the water available to its priority, the Foundation may not rely upon the Bonny Reservoir water right decree to satisfy that entitlement. This term in the Bonny Reservoir decree does not recognize any specific senior water rights that the reservoir might injure. The decree recognizes that as an on-channel reservoir, Bonny Dam cannot impede the flow of the stream to any greater extent than allowed by its priority.

E. The Foundation’s Alternative Motion Should be Denied as it is Not Fully Explained or Briefed.

The Foundation included a motion for determination of question of law in its brief that has not been clearly stated or explained and therefore the request for a determination of law should be denied. A determination of a question of law is meant to provide decisions on issues that will have a significant impact on the

litigation without resolving any claims. *See Bd. of Cty. Comm'rs*, 891 P.2d at 963 n.

14. Here, the Foundation has not clearly articulated what issue it wishes to see decided that will impact this litigation. The Foundation includes three different statements of its Alternative Motion, none of which clearly articulate the same issue for decision:

- The introduction states: “Or, in the alternative, the Foundation seeks a determination of question of law on this issue in the event that there is found to exist an issue of material fact regarding whether the operation of Bonny Reservoir is injuriously impacting the Foundation’s Hale Ditch water right.” Motion at 2.
- The introduction also states: “The Foundation hereby moves the Court to determine, as a matter of law, that Bonny Reservoir may not be operated in a manner that injures the Foundation’s Hale Ditch water right.” *Id.*
- The conclusion states: “In the alternative, if the Court finds that there is a material issue of fact regarding whether such impacts are occurring, the Foundation seeks a determination that, to the extent that impacts are proven, operation of Bonny Reservoir to the injury of the Hale Ditch are unlawful.” *Id.* at 11.

The Foundation did not submit a proposed order to the Court from which the Engineers could ascertain the exact determination that the Foundation seeks. The Foundation provides no argument to support its Alternative Motion and does not explain the impact such a motion will have on this litigation. While several cases cited in the entire motion may support various arguments in support of a motion for determination of question of law, without understanding the question being asked of the Court, the applicability of the cases is hard to gauge. Given that the Foundation has not clearly stated its Alternative Motion and has not provided

argument in support of it such that the Engineers can effectively respond, the Court should deny the Foundation's Alternative Motion.

1. **If the Court rules on the Alternative Motion, the Alternative Motion should be denied because the determination will not have a significant impact on the litigation in this case.**

The plainest articulation of the Foundation's Alternative Motion is found in the moving statement in the introduction: "The Foundation hereby moves the Court to determine, as a matter of law, that Bonny Reservoir may not be operated in a manner that injures the Foundation's Hale Ditch water right." Motion at 2. This Alternative Motion should be denied because the determination will not have a significant impact on the litigation in this case. A determination that operation of Bonny Reservoir may not injure the Hale Ditch water right is only useful in litigation where the Foundation can realize some relief for proving its claim. Here, if the Court rules that Bonny Reservoir may not be operated in a manner that injures the Foundation's Hale Ditch water right as a matter of law, the next step in litigation will be for the Foundation to identify and prove at trial injury caused by Bonny Reservoir's operation and the relief that the Foundation seeks for that injury. Assuming, arguendo, that the Foundation successfully proves that its Hale Ditch water right has suffered injury; the Foundation will fail to prove both causation and any relief to which it is entitled. As explained above, the Foundation cannot prove that the Engineers have caused any injury to the Hale Ditch water right by operation of Bonny Reservoir because the Engineers do not operate Bonny

Reservoir, do not own the Bonny Reservoir water right, and do not operate Bonny Dam. In addition, the Engineers are not liable for the failure of their curtailment efforts to produce additional water for a senior water right. *See* §37-92-502(2)(a), C.R.S. (2015). Finally, any relief that the Foundation can state would be relief that the Engineers cannot provide. The Engineers cannot create additional water in a stream system where there is none. The Engineers cannot honor a call by the senior Hale Ditch water right and simultaneously allow the junior Bonny Reservoir water right to fill. The Foundation seeks a determination of law which will aid a claim against an entity that is not party in this case. Because the existing parties do not own or operate Bonny Dam and the Bonny Reservoir water right, this determination cannot aid in resolving any claims in this case.

VII. CONCLUSION

For the foregoing reasons, this Court should deny the Foundation's motion for summary judgment regarding the operation of Bonny Reservoir. The Court should also deny the Foundation's alternative motion for determination of question of law.

Respectfully submitted this 8th day of April, 2016.

CYNTHIA H. COFFMAN

Attorney General

Filed pursuant to C.R.C.P. Rule 121 § 1-26.

A duly signed original is on file with the

Office of the Attorney General for the State of Colorado.

s/ Ema I. G. Schultz

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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 **STATE ENGINEER, DIVISION ENGINEER, AND COLORADO DIVISION OF WATER RESOURCES' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE A 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
Arikaree Ground Water Management District	Defendant	David C Taussig 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 Association	Defendant	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Colorado Groundwater Commission	Defendant	Chad M. Wallace Patrick E. Kowaleski (CO Attorney General)
Colorado Parks And Wildlife	Defendant / Opposer	Katie Laurette Wiktor Timothy John Monahan (CO Attorney General)
Colorado State Board Land Commissioners	Defendant	Virginia Marie Sciabbarrasi (CO Attorney General)
David L. Dirks	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Dirks Farms Ltd., Julie Dirks and David L. Dirks	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Division 1 Engineer	Division Engineer	Division 1 Water Engineer (State of Colorado DWR Division 1)
Don, Myrna and	Defendant	Geoffrey M. Williamson

Party Name	Party Type	Attorney Name
Nathan Andrews		Stuart B. Corbridge (Vranesh and Raisch)
East Cheyenne Ground Water Management District	Defendant	John David Buchanan Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
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, and Carlyle James as Trustee of the Chester James Trust	Defendant	Johanna Hamburger William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier, Marjorie Colglazier Trust, and Lazier, Inc.	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Mariane U. and Timothy E. Ortner	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marks Butte Ground Water Management District, Frenchman Ground Water Management District, Central Yuma Ground Water Management District, WY Ground Water Management District, and Arikaree Ground Water Management District	Defendant	David C. Taussig Eugene J Riordan Leila Christine Behnampour (Vranesh and Raisch)
North Well Owners	Defendant	Kimbra L. Killin Russell Jennings Sprague (Colver Killin and Sprague LLP)
Protect Our Local Community's Water LLC	Defendant	John David Buchanan Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Republican River Water Conservation District	Defendant	David W Robbins Peter J Ampe (Hill and Robbins PC)
Saving Our Local Economy LLC	Defendant	John David Buchanan Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
The Jim Hutton Educational	Plaintiff / Applicant	Karen Leigh Henderson

Party Name	Party Type	Attorney Name
Foundation		Steven J Bushong (Porzak Browning & Bushong LLP)
Tri State Generation And Transmission As	Defendant	Aaron S. Ladd Justine Catherine Shepherd (Vranesh and Raisch)
Yuma County Water Authority Public Improvement District	Defendant	Dulcinea Zdunska Hanuschak John A Helfrich Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)

*Filed pursuant to C.R.C.P. Rule 121 § 1-26.
A duly signed original is on file with the
Office of the Attorney General for the State of Colorado.*

/s/ Nan Edwards

Nan Edwards