DISTRICT COURT, WATER DIVISION NO.1 WELD COUNTY, COLORADO 901 9th Avenue / P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300	
PLAINTIFF, The Jim Hutton Educational Foundation, v. DEFENDANTS, Dick Wolfe, in his capacity as the Colorado State Engineer, et al.	▲ **COURT USE ONLY** ▲
For Defendants Dick Wolfe, State Engineer; David Nettles, Division Engineer for Water Division No. 1; and Colorado Division of Water Resources 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	Case No. 2015CW3018 Div.: 1
STATE ENGINEER'S RESPONSE TO THE JIM HUTTON EDUCATIONAL FOUNDATION'S MOTION FOR SUMMARY JUDGMENT ON ITS COMPACT ADMINISTRATION CLAIM	

The way in which the State Engineer ensures Colorado meets its obligations under the Republican River Compact ("Compact") is legal, equitable, and effective, and the Jim Hutton Educational Foundation ("Foundation") has not shown otherwise. The relief the Foundation seeks and the allegations in The Jim Hutton Educational Foundation's Motion for Summary Judgment on its Compact Administration Claim (Feb. 29, 2016) ("Motion"), raise numerous issues of material fact. The Foundation does not address many of these issues, and many more remain disputed. Moreover, even if the Foundation had demonstrated that no disputed issues of material fact exist, the State Engineer's administration of water rights in the Republican River Basin is lawful. The Court should deny the Motion because genuine issues of material fact exist and the Foundation is not entitled to judgment as a matter of law.

I. FACTUAL BACKGROUND.

As evidenced by their answer to the Foundation's complaint, the Defendants, the State and Division Engineers and the Colorado Division of Water Resources (collectively "State Engineer"), do not dispute some of the Foundation's allegations concerning the Republican River Basin, the Compact, and actions the State Engineer has taken to ensure Colorado meets its Compact commitments. However, the Motion is oversimplified. It contains many unsupported, incomplete or misleading statements of fact, and in many ways paints an inaccurate picture of Colorado's

compliance with the Compact and the hydrogeology of the Republican River Basin. This response to the Foundation's Motion provides an accurate account of the history of the Compact, the litigation in *Kansas v. Nebraska* and its settlement, the Compact accounting that Colorado, Kansas, and Nebraska conduct, and the State Engineer's administration of the Compact in Colorado.

A. The Republican River Compact.

The Compact was approved by representatives of Colorado, Kansas, and Nebraska in 1942, was ratified by the states' legislatures in 1943, and was approved by the United States Congress and the President in 1943. Act of May 26, 1943, ch. 104, 57 Stat. 86; *see also* Foundation's Exhibit 7, *Kansas v. Nebraska*, No. 126, Original, First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), at 10-11 (Jan. 28, 2000). The Compact, codified in section 37-67-101, C.R.S., equitably apportions the waters of the Republican River to Colorado, Kansas, and Nebraska. *See* Compact, Article I. The Compact effects an equitable apportionment by computing the "virgin water supply" in the Republican River Basin and allocating to each state a portion of that supply on an annual basis. *See* Compact, Articles III-IV. The Compact identifies sub-basins that comprise the Republican River Basin in each state, and combines the volume of virgin water supply from each sub-basin to derive a total allocation for each signatory state. *See* Compact, Article III-IV.

The Compact does not specify how each state must administer its water supplies in order to comply with the Compact. It simply provides that each state must "administer th[e] [C]ompact through the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies." Compact, Article IX. In Colorado, that official is the State Engineer. *See* § 37-80-104, C.R.S. (2015).

In 1959, the three states created the Republican River Compact Administration ("RRCA") under Article IX of the Compact. *See* Foundation's Exhibit 7, First Report of the Special Master, at 14. Each state appoints one member to the RRCA. *See id.* Each year, the RRCA calculates the virgin water supply of each sub-basin and the consumptive use in each State for the previous year. *See id.* In this way, the RRCA determines whether each State has stayed within its allocation during the previous year. *See id.*

In 1999, the United State Supreme Court agreed to hear Kansas' complaint alleging Compact violations against Nebraska. *See* Foundation's Exhibit 7, First Report of the Special Master, at 3. Kansas claimed Nebraska violated the Compact because well development had allowed Nebraska to use more than its compact apportionment of the Republican River and deprived Kansas of its full equitable apportionment. *Id.* at 4. Colorado was joined in the lawsuit as a signatory state to the Compact.

For the first 58 years of the Compact's existence before *Kansas v. Nebraska*, Colorado did not consider groundwater in the Ogallala Aquifer to be part of any state's Compact apportionment. The two types of groundwater in the Republican River Basin are alluvial groundwater and groundwater in the Ogallala aquifer. *See* Foundation's Exhibit 7, First Report of the Special Master, at 5, n. 6. On Nebraska's motion to dismiss, Colorado conceded alluvial groundwater was subject to the Compact, but argued the states never intended that the Compact "restrict the consumption of table-land or Ogallala groundwater even if the effect of that consumption is to deplete stream flow in the Basin." *Id.* at 42. Colorado did not prevail on this argument. The Special Master found that "a State's groundwater pumping, to the extent it depletes stream flow in the Basin, is intended to be allocated as part of the virgin water supply and to be counted as consumptive use by the pumping State," *id.* at 23, and rejected Colorado's proposed distinction between alluvial groundwater and Ogallala Aquifer groundwater. *Id.* at 42-44.

The Special Master's ruling dramatically changed the states' understanding of their rights and obligations under the Compact. *See* Exhibit A, Affidavit of Dick Wolfe, M.S., P.E., ¶ 6 (Apr. 7, 2016). The states subsequently entered into settlement discussions that culminated in the Final Settlement Stipulation, *Kansas v. Nebraska*, No. 126, Original (Dec. 15, 2002) ("FSS"), which was approved by the Special Master in 2003. *See* Foundation's Exhibit 11, *Kansas v. Nebraska*, No. 126,

Original, Final Report of the Special Master with Certificate of Adoption of RRCA Groundwater Model, at 1 (Sept. 17, 2003). Among other provisions, the FSS included a waiver of claims related to use of water that occurred before December 15, 2002, an agreement to develop a groundwater model that would enable the states to account for the effects of groundwater withdrawals on surface stream flows, more specific accounting procedures, and procedures to encourage the resolution of disputes. *See generally,* FSS.

The states completed the RRCA Ground Water Model in 2003. *See* Foundation's Exhibit 11, Final Report of the Special Master, at 1. The Final Report of the Special Master, which was accepted by the United States Supreme Court, approved the use of the RRCA Ground Water Model for purposes of Compact accounting. *See id.* at 3, 51-52. According to the Report, the RRCA Ground Water Model provides the information "necessary for application within the prescribed annual RRCA Accounting Procedures." *Id.* at 51.

B. <u>Colorado's Efforts to Achieve Compact Compliance.</u>

In 2004, Colorado's General Assembly recognized the state's new obligations under the Compact and created the Republican River Water Conservation District ("RRWCD") to "cooperate with and assist this state to carry out the state's duty to comply with the limitations and duties imposed upon the state by the Republican river compact." § 37-50-101, C.R.S. (2015). Concurrently, the State Engineer

began evaluating ways to satisfy Colorado's ongoing Compact commitments. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 7. To this end, and after consultation and discussion with the RRWCD and water users throughout the Republican River Basin, the State Engineer adopted well measurement rules to collect the water use data necessary to administer water rights in the Republican River Basin consistent with the state's obligations under the Compact. *See* Rules and Regulations Governing the Measurement of Ground Water Diversions Located in the Republican River Basin Within Water Division No. 1, 2 C.C.R. 402-16.2(B). The State Engineer also considered adopting rules for curtailing both surface water and groundwater diversions for compact compliance purposes. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 9. However, the State Engineer declined to adopt rules at the time in light of new mechanisms being financed, developed, and constructed within the Republican River Basin to promote Compact compliance for the State. *Id.*

Specifically, to help Colorado meet its Compact commitments, the RRWCD took on the responsibility of assessing a fee on consumptive use of water within the Basin to finance construction of a Compact Compliance Pipeline ("Pipeline"), at a cost of over $66 million. *See* Exhibit B, Affidavit of Dawn Webster, ¶¶ 5, 6, 10. The Pipeline was deemed necessary because Colorado may not be able to immediately comply with the Compact under certain hydrologic conditions even if Colorado ceased all groundwater and surface water use. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 10.

It is possible that, depending on hydrologic conditions, surface flows alone would not achieve full Compact compliance, and the effect of curtailing groundwater withdrawals without the contribution of the Pipeline was determined to be too attenuated to have the necessary effect on surface flows to accomplish Compact compliance in a reasonable timeframe. *See id.*, ¶ 10.

In light of these realities, administration for Compact compliance has been twofold. First, the State Engineer curtails surface water rights that have a priority date more recent than the effective date of the Compact, while allowing those with a priority date that predates the Compact to continue diversions. *See id.*, ¶ 12. The State Engineer has also promoted and supported the operation of the Pipeline to essentially augment the depletions of groundwater uses within the Republican River Basin. *See id.*, ¶ 12. Together, these actions have enabled Colorado to meet its Compact commitments.

II. LEGAL STANDARDS FOR SUMMARY JUDGMENT.

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. Colo.R.Civ.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)).

III. ARGUMENT.

The Foundation is not entitled to judgment as a matter of law because it has not met its initial burden to prove the absence of genuine issues of material fact, and even if it has met that initial burden, there are numerous triable issues of fact that prevent a ruling in favor of the Foundation. Furthermore, the Foundation cannot prove it is entitled to judgment as a matter of law. The State Engineer has achieved Compact compliance by administering surface water and groundwater independently of each other and within the frameworks of their respective legal regimes, in a manner that is both legal and equitable. Accordingly, the State Engineer's administration of the Compact is lawful, and the Court cannot grant the Foundation's Motion.

A. Genuine Issues of Material Fact Preclude Summary Judgment for the Foundation.

The Foundation has fallen short of its initial burden to demonstrate the absence of any genuine issue of material fact. The Foundation's own allegations and exhibits to its Motion highlight disputed issues of fact and the State Engineer has shown numerous triable issues of fact concerning the legality of the State Engineer's administration of water rights in the Republican River Basin in order to meet Colorado's Compact commitments.

1. The Foundation has not met its initial burden to demonstrate the absence of any genuine issue of material fact.

The core of the Foundation's argument is its allegation that the State Engineer has administered water rights in the Republican River Basin in a manner that is inconsistent with the statutory requirements for administration of interstate compacts. *See* Motion at 8-12. These requirements are:

> "The state engineer shall make and enforce such regulations with respect to deliveries of water as will **enable the state of Colorado to meet its compact commitments**. In those cases where the compact is deficient in establishing standards for administration within Colorado to provide for meeting its terms, the state engineer shall make such regulations as will be legal and **equitable** to regulate distribution among the appropriators within Colorado obligated to curtail diversions to meet compact commitments, so as to **restore**

lawful use conditions as they were before the effective date of the compact insofar as possible."

§ 37-80-104, C.R.S. (emphasis added).

The portions of section 37-80-104 the State Engineer emphasizes above illustrate the inherently factual nature of the inquiry that the Foundation asks the Court to undertake. Three overarching fact questions are at issue – whether the State Engineer's administration of water rights in the Republican River Basin:

1. enables the state of Colorado to meet its compact commitments,
2. is equitable, and
3. restores lawful use conditions as they were before the effective date of the compact insofar as possible.

In its Motion, the Foundation reiterates allegations made in its complaint that the State Engineer has expressly denied. The exhibits to the Motion are insufficient on their own to demonstrate the absence of any genuine issue of material fact with respect to these three questions. The State Engineer identifies the issues of material fact associated with each question below.

a. <u>The State Engineer must ensure Colorado meets its Compact commitments.</u>

The Foundation makes many factual allegations concerning whether Colorado is meeting or has met its obligations under the Compact, why the State Engineer has chosen to administer water rights for compact compliance in the way he currently does, and the effect of the State Engineer's administration of water rights on the Foundation's water rights. *See, eg.* Motion at 1, 3, 6; The Jim Hutton Educational

Foundation's Complaint for Declaratory Judgment Regarding Administration of Water Rights in the Republican River Basin and the Constitutionality of Senate Bill 52 (2010), and the Ground Water Management Act at 7-8 (Feb. 23, 2015) ("Complaint"). This Court cannot conclude that the State Engineer is violating section 37-80-104 without examining how the State Engineer is ensuring Colorado meets its compact commitments. The Foundation has not produced documents or affidavits that demonstrate that these issues are undisputed.

Crucially, the Foundation has not shown that groundwater withdrawals impede Colorado's ability to comply with the requirements of the Compact and surface water users are being curtailed to make up the "shortfall." *See* Motion at 11. The depletions the RRCA Ground Water Model calculates are not depletions Colorado must replace to the streams in a certain location in order to meet its Compact commitments. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 22. Rather, the depletions are counted towards the virgin water supply that Colorado is entitled to consume. *See id.*, ¶ 22; FSS, Appendix C: Republican River Compact Administration Accounting Procedures, at C15; C30-C47. Colorado is entitled to consume its equitable apportionment of the Republican River however it chooses. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 23. The Motion inescapably encompasses the factual questions of why and how the State Engineer has chosen to administer use of Colorado's equitable apportionment.

Despite its appeal to the binding effect of the Special Master's findings in *Kansas v. Nebraska*, the Foundation has not established that the RRCA Ground Water Model shows that groundwater withdrawals reduce the amount of water available for diversion under the Foundation's water rights. *See* Complaint, ¶ 58. The RRCA Ground Water Model cannot predict stream depletions at any particular location on a stream included in the RRCA Ground Water Model. *See* Exhibit C, Affidavit of Willem Schreüder, Ph.D, ¶ 8 (Apr. 7, 2016). Moreover, the RRCA Ground Water Model predicts depletions to entire streams, including the South Fork, and cannot predict in which state the depletions occur. *See id.*, ¶ 7. Thus, the Foundation has offered no evidence that groundwater withdrawals in Colorado have impacted its water rights, and the inappropriate manner in which the Foundation seeks to use the RRCA Ground Water Model is itself a genuine issue of material fact that should be the subject of expert testimony. *See id.*, ¶ 9.

By implication, the Foundation also raises issues of material fact concerning whether Colorado could meet its Compact commitments, and therefore whether the State Engineer could comply with section 37-80-104, if the Foundation receives the declaratory judgment it seeks:

> **That the lack of any ground water curtailment under the Compact by the State Engineer while at the same time curtailing more senior surface water rights** is contrary to Colorado and federal law, unconstitutional, in excess of authority, arbitrary and

> capricious, and resulting in injury to the Foundation's water rights.
>
> Complaint at 14, ¶ A (emphasis added).

Although the Foundation may protest that it does not seek relief that would require curtailment of ground water withdrawals in order to enable Colorado to meet its Compact commitments, there are only two sources of water that the State Engineer can curtail: surface water and groundwater. This Court has already recognized that, if the State Engineer cannot curtail surface water diversions without also curtailing groundwater withdrawals, then the practical result will be curtailment of groundwater withdrawals. *See* July 8, 2015 Order Re. State and Division Engineers' Motion for Joinder at 3-4; *see also* Exhibit A, Affidavit of Dick Wolfe, ¶ 14.

The Foundation has failed to produce any evidence to establish that Colorado could meet its Compact commitments if the Foundation receives the declaratory judgement it seeks. In fact, the relief the Foundation seeks would frustrate Colorado's ability to realize any benefits from the Compact and prevent the State from meeting its Compact commitments. Even if the State Engineer curtailed all groundwater withdrawals and surface water diversions in the Republican River Basin in Colorado, it is possible that, depending on hydrologic conditions, there could be insufficient water in the streams to allow Colorado to meet its Compact commitments. *See id.*, ¶ 10. Only the operation of the Pipeline currently ensures

Colorado's ability to avoid allegations of Compact violations. *See id.*, ¶¶ 10, 12. If the State Engineer were legally precluded from curtailing surface water diversions without also curtailing groundwater withdrawals, he would have to also curtail withdrawals from the wells that serve the Pipeline. Absent the Pipeline's contribution, all other water uses within the Republican River Basin would necessarily cease and the State would still be faced with potential interstate allegations of compact violations. *See id.*, ¶ 10. Ironically, the relief that the Foundation seeks would thereby necessitate curtailment of the Foundation's Hale Ditch water right,[1] which has a priority date predating the Compact and is not currently curtailed for Compact compliance purposes, with no guarantee of protecting the State from interstate allegations of Compact violations. *See id.*, ¶ 14.

Finally, the Foundation has not produced documents or affidavits to support its allegations that its surface water rights subject to curtailment for Compact compliance purposes are "senior" to any of the wells in the Republican River Basin. *See* Complaint at 14, ¶ A. Groundwater and surface water rights cannot be viewed through the lens of relative priority within the boundaries of a designated groundwater basin. *See* Section III.B.1., *infra.* Even if they could, the Foundation

[1] The non-curtailment of surface water rights that pre-date the Compact is merely the current policy of the Division of Water Resources. The State Engineer has the power, and indeed the duty, to curtail water rights that pre-date a compact if necessary to meet the requirements of that compact. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108-110 (1938).

fails to establish that its water rights are being curtailed before any more "junior" rights.

Of the Foundation's water rights, the State Engineer currently curtails only the Hutton 1 and 2 for Compact compliance purposes. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 18. The Foundation omits any mention in its Motion or Complaint that the priority date for the Hutton 1 and 2 water rights is 1977, the date the Foundation's water court application was filed, not the date of their appropriation in 1954. *See* Exhibit D, *In re Application for Water Rights of Roscoe K. Hutton*, Findings and Ruling of the Referee and Decree of the Water Court, Case No. W-8667-77, at 2 (Water Div. 1, May 3, 1978); s*ee also* § 37-92-306, C.R.S. (2015) (The relative priority of water rights is based on the date of judicial recognition of the water right, not the appropriation date), *Shirola v. Turkey Canon Ranch Ltd. Liab. Co. (In re Turoverskey Canon Ranch Ltd. Liab. Co.)*, 937 P.2d 739, 749 (Colo. 1997) (discussing the postponement doctrine). The Foundation's own exhibit indicates roughly the same number of wells were operating in the Republican River Basin in Colorado in 1977 as are operating today. *See* Foundation's Exhibit 11, Final Report of the Special Master, at 18. Thus, the Foundation's own allegations and exhibits create a genuine issue of material fact that goes to the heart of the Foundation's argument.

b. <u>Administration for Compact compliance must be equitable.</u>

The Foundation contends it is inequitable for the State Engineer to curtail the Foundation's post-Compact surface water rights for Compact compliance without curtailing more junior groundwater withdrawals for the same purpose. *See* Motion at 10-12. Yet, the Foundation has not put forth any evidence to establish the alleged inequity in the State Engineer's administration of the Compact under section 37-80-104.

The equity requirement under section 37-80-104 requires the Court to consider a wide range of factors and the unique circumstances of this case. *See Dlug v. Wooldridge*, 538 P.2d 883, 885 (Colo. 1975) ("the court must fashion a remedy that does justice under the particular circumstances with which it is confronted"). There is no obvious result in the Foundation's favor at this stage of the litigation because "it is axiomatic that in the realm of equity, no formulation is absolute and no rule is without exception." *Id.*

The Foundation's factual allegations in support of its equity argument constitute a small number of the pertinent issues of fact, and even these issues are disputed. For example, the Foundation has not demonstrated that groundwater withdrawals are responsible for a reduction in water available for diversion under its water rights. Several other factors are very important to this missing analysis, including climate, increased irrigation efficiencies, reservoir and pond evaporation,

changes in land and tillage practices, and reduction in surface water irrigation. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 11. Also, as explained above, the Foundation has not shown that no genuine issue of material fact exists as to whether any of its water rights have been curtailed before any more "junior" water rights.

Many more issues of fact remain to be resolved in this case before the Court could determine that the State Engineer's chosen method of Compact compliance is inequitable. These include the following:

- Whether it would be inequitable to curtail a particular water user if doing so would not result in more water being available for compact compliance. Many wells in the Republican River Basin have little effect on flows in surface streams. *See id.*, ¶ 13. In any stream system, many factors determine the effect, if any, of groundwater withdrawals from a particular well on surface streams, including transmissivity, depth, and location. *Id.,* ¶ 11.

- Whether the distribution of the burden of compact compliance is equitable. The Foundation focuses only on curtailment, but well owners in the Republican River Basin have spent over $66 million to build and operate the Compact Compliance Pipeline and $13 million dollars to fallow previously productive farmland to essentially augment supplies for compact compliance. *See* Exhibit B, Affidavit of Dawn Webster, ¶¶ 5, 6, 8, 10.

- Whether it is equitable to respect settled expectations. Groundwater use began to eclipse surface water use as the predominant water use in the Republican River Basin in the 1950s, when irrigating with wells became feasible. *See* Exhibit E, Bureau of Reclamation Republican River Basin Study, at 10. Before that time, surface water irrigation was unreliable. *Id.* at 9 ("[r]esidents realized early that the Republican River was not an ideal irrigation stream as the total supply of water would not support extensive irrigation").

- Whether economic impact is an equitable concern. There are approximately 550,000 irrigated acres of farmland in the Republican River Basin in Colorado. *Id*. at 2. Groundwater is the primary water supply in the Republican River Basin, and agriculture drives the economy of the Republican River Basin. *Id*. at S-1, 3. Several of the most productive counties for agriculture in Colorado are located in the Republican River Basin. *See* Exhibit F, Value of Agricultural Products Sold by County.[2] (blue shading indicates top ten counties). Yuma, Kit Carson, and Phillips Counties, which lie entirely within the Republican River Basin, are, respectively, the number 2, 5, and 8 most productive counties for agriculture in Colorado. *See id*. The market value of agricultural products produced in those counties in 2012 was, respectively, $1,150,344,000, $499,775,000, and $208,006,000. *See* Exhibits G, H, I, United States Department of Agriculture County Profiles.[3]

These and other equitable concerns that the State Engineer considered are comprehensive and inherently factual. The Foundation has failed to demonstrate the absence of any genuine issue of material fact even under its narrow view of the equity requirement under section 37-80-104.

c. <u>Administration for Compact compliance must restore lawful use conditions as they were before the effective date of the Compact insofar as possible.</u>

The Foundation asserts without analysis that the "lawful use conditions" that section 37-80-104 instructs the State Engineer to restore are the physical conditions that existed at some time before the effective date of the Compact. *See* Motion at 10. Similarly to its argument on the equity requirement of section 37-80-104, the Foundation assumes a narrow construction of the term "lawful use conditions." *See*

[2] Available at: www.colorado.gov/pacific/sites/default/files/Colorado%20Agriculture%20Statistics%20Map_1.pdf.
[3] Available at: www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Colorado/

Section III.B.2., *infra*. Regardless of the meaning of this term, the lawful use conditions that existed before the effective date of the Compact and whether the State Engineer's administration of water rights has restored them are factual matters that inevitably affect the outcome of this case. The Foundation has not produced documents or affidavits that resolve these genuine issues of material fact.

Even if "lawful use conditions" are, as the Foundation asserts, those conditions that physically existed before the Compact, *see* Motion at 10, the Foundation has not yet begun to establish what those conditions were and how they differ from the present day. Except for pointing to the mere fact of well development, the Foundation has not come forward with documents or affidavits that establish water use practices in the Republican River Basin over time. The Foundation simply asserts that "the lawful use conditions that existed at that time was principally surface water use." Motion at 10; *see also* Complaint at 12, ¶ 80 ("[l]awful use conditions prior to the 1942 Compact were predominantly surface water diversions not ground water Diversions").

Moreover, the Foundation has offered no evidence as to how the State Engineer's alleged failure to restore lawful use conditions would mitigate any alleged injury to its water rights. The Foundation's Hutton No. 1 and 2 water rights are its only water rights subject to curtailment for Compact compliance. The priority date for these water rights is 1977, 34 years after the effective date of the Compact and

after the development of the groundwater of the Northern High Plains Designated Basin. The Foundation does not explain why the lawful use conditions that existed before the Compact include surface water rights that were appropriated and decreed after the Compact, but not groundwater rights that were also appropriated after the Compact.

Even if the Foundation could demonstrate that no genuine issues of material fact exist regarding whether the State Engineer has restored "lawful use conditions as they were before the compact," section 37-80-104 qualifies that requirement. The State Engineer must only restore those lawful use conditions "insofar as possible." Whether the State Engineer's Compact administration has met this "insofar as possible" requirement is an inherently factual inquiry the Foundation has not even attempted to address.

2. <u>The State Engineer has made out triable issues of fact.</u>

In addition to the Foundation's failing to meet its initial burden, the State Engineer has shown numerous triable issues of fact. These issues include whether Colorado is meeting or has met its obligations under the Compact, why the State Engineer has chosen to administer water rights for Compact compliance in the way he currently does, the effect of the State Engineer's administration of water rights on the Foundation's water rights, the effect of groundwater withdrawals on the Foundation's water rights, how the RRCA Ground Water Model works and for what

purposes it can be used, whether the Foundation's water rights that have been curtailed for Compact compliance are "junior" or "senior" to wells in the Republican River Basin, whether the State Engineer's chosen method of Compact compliance adequately respects various equitable concerns, what "lawful use conditions" in the Republican River Basin were before the Compact and what they are now, how much it is possible to restore pre-Compact conditions, and whether the State Engineer has restored them insofar as possible. In light of these remaining factual issues, summary judgement in favor of the Foundation is inappropriate.

B. The State Engineer's Administration of the Republican River Compact Is Lawful.

Even if no disputed issues of material fact exist, the State Engineer's administration of water rights in the Republican River Basin for Compact compliance is lawful, and the Foundation's Motion should be denied. The State Engineer has administered water within the Republican River Basin in a manner that is "legal and equitable" to ensure Colorado's compliance with the Compact. § 37-80-104, C.R.S. Under section 37-80-104, the State Engineer has the authority to administer both surface water and designated groundwater in order to comply with the Compact, but the exercise of the State Engineer's administrative discretion must occur "to the extent possible within the existing framework of Colorado statutory priority law." *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 69 (Colo. 2003).

Designated groundwater and surface water exist in two different – and mutually exclusive – legal regimes and priority systems. *See* Water Right Determination and Administration Act of 1969, §§ 37-92-101 to -602 ("1969 Act") (strict priority of surface waters); Colorado Groundwater Management Act, §§ 37-90-101 to -143 ("1965 Act") (modified priority system for designated basin wells). Here, the State Engineer has achieved Compact compliance by administering surface water and designated groundwater independently of each other and within the frameworks of their respective legal regimes. For surface water rights, he has curtailed all post-Compact diversions, and for designated basin wells, he has supported operation of the Pipeline, paid for by those who withdraw designated groundwater, to augment streamflow depletions caused by the pumping of those wells for Compact compliance. Because the State Engineer has administered the Compact in a manner that is consistent with section 37-80-104, treating all water users in the Republican River Basin in a manner that is legal and equitable, the Foundation's Motion must fail.

1. <u>Surface water and designated groundwater exist under mutually exclusive legal regimes which the Compact does not change.</u>

The Foundation asserts the Compact requires the State Engineer to administer surface water rights and designated basin well permits in the same manner. *See, e.g.*, Motion at 8-12. Specifically, the Foundation contends that if

surface water rights are curtailed based on their relation to a particular priority date, then designated basin well permits must also be curtailed based on their relation to the same priority date. *See, e.g.*, *id.* That assertion ignores the mutually exclusive legal regimes that govern surface water rights and designated basin well permits and misunderstands the outcome of the United States Supreme Court litigation regarding the Compact's inclusion of groundwater.

Under Colorado law, designated groundwater and surface water are administered under two different and completely independent regimes. Surface water and tributary groundwater are governed by the 1969 Act. These rights are subject to the traditional prior appropriation system of first in time, first in right. Under this system, junior water rights are not permitted to cause any injury to the water rights of senior appropriators. *See, e.g.*, *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 86 (Colo. 1996).

Designated groundwater, however, is governed by the 1965 Act. Under the 1965 Act, designated groundwater is, by statute, "water [that] would not be available to and required for the fulfillment of decreed surface rights." § 37-90-103(6)(a), C.R.S. Designated groundwater operates under a modified prior appropriation system that provides some protection for earlier appropriators of designated groundwater while also allowing for "full economic development of designated groundwater resources." § 37-90-102(1), C.R.S.; *see Upper Black Squirrel Creek Ground Water Mgmt. Dist. v.*

Goss, 993 P.2d 1177, 1184-85 (Colo. 2000) (holding that "the modified system of prior appropriation governing these designated groundwater basins allows appropriation only to the point of reasonable depletion" where "the appropriation . . . will not unreasonably impair existing water rights from the same source"). Thus, the 1965 Act allows for the maintenance of "reasonable . . . pumping levels" but does not "include the maintenance of historical water levels." § 37-90-102(1), C.R.S. Permits to withdraw designated groundwater are administered only in relation to other permits to withdraw designated groundwater, and such permits are akin to water court decrees. *See Thompson v. Colo. Ground Water Comm'n*, 575 P.2d 372, 377 (Colo. 1978) ("The legislative intent evidenced in the [1965 Act] is that the issuance of final permits, which requires proof and verification of the extent of beneficial use, would serve a function equivalent to the final surface water decree and establish senior rights.").

While surface water rights and designated groundwater rights both use a priority system, these two types of water rights are mutually exclusive. *See* § 37-92-103(13), C.R.S. (1969 Act explicitly excludes designated groundwater from its oversight); § 37-90-103(6)(a), C.R.S. (1965 Act explicitly excludes surface water). The Colorado Supreme Court has repeatedly affirmed the validity of these mutually exclusive systems. *See Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 27 (Colo. 2006) (noting that "we have repeatedly and consistently stated that the

administration of waters under the 1969 Act is inapplicable to the Commission's administration of designated ground water under the [1965] Act"). Because these two legal regimes are separate and independent from each other, it is not possible to combine them or to refer to a surface water right as "senior" to a designated groundwater well permit, as the Foundation frequently does. *E.g.*, Complaint at ¶¶ 60, 83, 92.B; *see Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 30-31 (Colo. 2006) (holding that "the administration of waters under the 1969 Act is inapplicable to the Commission's administration of designated ground water under the [1965] Act").

Nothing in the Compact or the FSS changed these existing legal regimes in Colorado. As explained in section I.A., *supra*, the Compact expressly indicates that waters within a state are subject to that state's laws, and Colorado, through the State Engineer, merely has to ensure that Colorado complies with the Compact. As a result of the United States Supreme Court litigation and the FSS, the RRCA Ground Water Model must include "[s]tream flow depletions caused by Well pumping for Beneficial Consumptive Use . . . and [those depletions] will be charged to the State where the Beneficial Consumptive Use occurs." FSS at 18. However, neither the FSS nor the Compact requires that Colorado administer designated groundwater and surface water together.

2. The State Engineer has the discretionary authority to administer both surface water and designated groundwater for Compact compliance.

The Colorado legislature has given the State Engineer broad discretionary powers to ensure Colorado's compliance with interstate compacts. Specifically, the State Engineer has the "executive responsibility and authority" over the "[d]ischarge of the obligations of the state of Colorado imposed by compact or judicial order on the office of the state engineer." § 37-80-102(1)(a), C.R.S. To meet those obligations, the State Engineer is authorized to "make and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments." § 37-80-104, C.R.S. If the compact in question does not provide specific standards of administration, the State Engineer's administration for Compact compliance must "be legal and equitable to regulate distribution among the appropriators within Colorado obligated to curtail diversions to meet compact commitments, so as to restore lawful use conditions as they were before the effective date of the compact insofar as possible." *Id.* On its face, this statute gives the State Engineer the discretionary authority to determine the proper methods of administration for Compact compliance, as the statute only mandates that such administration be "legal and equitable" and "insofar as possible" should "restore lawful use conditions as they were before the effective date of the compact." *Id.*; *see Bijou*, 69 P.3d at 69 (holding that the State Engineer has the discretion to "make the

necessary administrative decisions regarding the necessity, timing, amount, and location of intrastate water restrictions in order to ensure that Colorado's critical interstate delivery obligations are fulfilled").

The State Engineer's authority under section 37-80-104 extends to any waters that are subject to the Compact.[4] Under the framework described in Section I.A., *supra*, the State Engineer has exercised his Compact compliance authority upon both surface water and designated groundwater in the Republican River Basin. Specifically, he has curtailed all post-Compact surface water rights in the Republican River Basin (allowing pre-Compact surface rights to continue to divert when water is available), and has supported the operation of the Pipeline, along with other measures undertaken by designated groundwater users, that address streamflow depletions caused by the withdrawal of designated groundwater. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 12.

Administration of surface water and designated groundwater separately under section 37-80-104 comports with Colorado Supreme Court case law. In *Alamosa-La Jara Water Users Protection Association v. Gould*, 674 P.2d 914 (Colo. 1983), the Court considered the State Engineer's administration of the Rio Grande Compact under section 37-80-104. Faced with two separate tributary systems both subject to the Rio Grande Compact, the Court held that the compact did not "re-sort[]

[4] The Foundation agrees that the State Engineer's Compact authority here extends to both surface water and designated groundwater. *See* The Jim Hutton Educational Foundation's Reply in Support of Its Motion to Strike the East Cheyenne Ground Water Management District's Answer at §§ 9-11 (Jan. 25, 2016).

settled water rights on both streams into a single system of priorities." *Alamosa-La Jara*, 674 P.2d at 923. Such a result would have the effect "of reshuffl[ing] the economies of the valley according to a chronology of events unrelated to settled expectations derived from historical patterns of use and reflected in independent priority systems." *Id.* Although the Foundation cites *Alamosa-La Jara* as support for its position, the State Engineer has administered the Republican River Basin consistent with the *Alamosa-La Jara* decision. Under the Republican River Compact, the State Engineer has administered surface water and designated groundwater independently, because to do otherwise would upset the settled expectations of water users operating under two completely different legal regimes with two independent priority systems. Surface water rights and designated groundwater permits are mutually exclusive administrative schemes and cannot be reshuffled into a single system of priorities. *See* Section III.B.1., *supra*.

Yet that is exactly what the Foundation asserts here, arguing that the clear meaning of section 37-80-104 prohibits the State Engineer from curtailing surface water rights without also curtailing designated groundwater wells. *See* Motion at 10 (arguing that pursuant to section 37-80-104, curtailment of post-Compact water rights must "appl[y] to all water users whether they divert surface water or groundwater"). This "simple priority administration" argument for surface water and groundwater was rejected in *Bijou*, even though all the waters in that case were

tributary under Colorado law. 69 P.3d at 69-70. In *Bijou*, the Court recognized that "curtailing groundwater depletions by priority date alone may not result in" compliance with the South Platte River Compact, and the State Engineer must consider numerous factors for Compact compliance. *Id.*

The Foundation never attempts to interpret section 37-80-104. Instead, the Foundation asserts that the Colorado Supreme Court has given the statute "a plain reading" and then quotes a passage from *Alamosa-La Jara* that merely restates the statute. *See* Motion at 9. The Foundation then assumes that the phrase "lawful use conditions" in section 37-80-104 must mean physical conditions, and that the State Engineer must restore those physical conditions for the benefit of the surface rights that existed at the time of the approval of the Compact. *See* Motion at 10 (asserting that only uses that physically existed then should be permitted to divert). An examination of section 37-80-104, and the phrase "lawful use conditions," does not support the Foundation's construction.

The Foundation eliminates the word "lawful" from the statute, because it treats the phrase as simply "use conditions." Such a construction violates basic rules of statutory interpretation, where every word is to be given meaning and the legislature is presumed to not include superfluous language. *See Florence v. Board of Waterworks*, 793 P.2d 148, 151 (Colo. 1990) ("In interpreting a statute, whenever possible, each word should be given effect and each provision construed in harmony

with the overall statutory scheme."). The phrase "lawful use conditions" can, however, be understood by looking at the statute as a whole and its more easily discernible intent.[5] *E.g., id.*; *Young v. Brighton Sch. Dist. 27J*, 325 P.3d 571, 579 (Colo. 2014) (noting that "'a word may be known by the company it keeps'" (quoting *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 287 (2010))).

Section 37-80-104 was enacted on the same day as the 1969 Act, and gives the State Engineer authority to administer water for compact compliance, using the present-day legal regimes. *See Kuiper v. Gould*, 583 P.2d 910, 913 (Colo. 1978) (holding that the legislature intended for section 37-80-104 to operate within the broader legislative scheme of the 1969 Act). Stated another way, restoring "lawful use conditions" does not require the State Engineer to reach back in time and restore the legal regime that existed at the time of the Compact; Compact compliance rules still exist within today's legal regimes for water administration. To hold otherwise would require the State Engineer to administer water for Compact compliance based on regimes that were superseded by the 1965 and 1969 Acts, and turn water administration within Colorado on its head.

Section 37-80-104 was also enacted only four years after the passage of the 1965 Act, and three years after the creation of the Northern High Plains Designated

[5] The term "lawful use conditions" does not appear elsewhere in Colorado statutes, nor, to the State Engineer's knowledge, does any legislative history exist for section 37-80-104.

Basin, so designated basin wells obviously could not have existed before the effective date of the Compact. Yet, in enacting section 37-80-104 and authorizing the State Engineer to restore lawful use conditions at the time of the Compact, the legislature gave no indication that it intended to silently destroy the recent groundwater basin designation by forcing the State Engineer to entirely ignore such designation when considering Compact administration of the Republican River Basin under section 37-80-104. Nor, as discussed above, can section 37-80-104 require the State Engineer to restore hydrologic conditions at the time of the Compact. Thus, the best way to understand the phrase "lawful use conditions" is that the State Engineer must, "insofar as possible," restore the ability of pre-Compact rights to divert water that is physically and legally available for diversion under today's legal regimes. *See id.* Here, only the Foundation's post-Compact water rights have been curtailed, and the Foundation's Hale Ditch rights, which predate the Compact, have not been curtailed and are free to divert water when it is physically and legally available. Thus, the State Engineer's Compact administration has resulted in a Compact compliance scheme that "restores lawful use conditions as they were before the effective date of the compact." *Id.*

3. The State Engineer's administrative scheme implements the legislature's determination that surface water and designated groundwater are mutually exclusive.

In its Motion, the Foundation repeatedly asserts that if the State Engineer curtails surface water rights for Compact compliance, he must also curtail designated groundwater wells, implying curtailment is the sole tool the State Engineer has used to achieve Compact compliance. *See, e.g.*, Motion at 8. The Foundation also asserts that curtailing only surface rights "is contrary to Colorado law." *Id.* Colorado law does not, however, require the State Engineer to administer both surface water and designated groundwater in the exact same manner, but rather requires that he administer both sources in a manner that is legal and equitable. *See* Section III.B.2., *supra.* Given that the legislature has expressed the clear intent that surface water and designated groundwater are to be administered independently, the State Engineer's Compact compliance administration is lawful. *See Bijou*, 69 P.3d at 69 (holding that Compact administration must occur "to the extent possible within the existing framework of Colorado statutory priority law").

The Foundation argues that the State Engineer, by curtailing only surface water rights in the Republican River Basin, "unfairly plac[es] the burden of Compact compliance on surface water users." Motion at 8. This argument mischaracterizes the State Engineer's administration for Compact compliance. While the State

Engineer has not curtailed the withdrawal of designated groundwater, it is untrue for the Foundation to assert only surface water rights bear the burden of Compact compliance. Designated basin well owners bear the burden of construction and operation of the Pipeline (as well as the cost of other programs that contribute to Compact compliance), without which Compact compliance would be impossible. *See* Exhibit B, Affidavit of Dawn Webster, ¶¶ 3-10; Exhibit A, Affidavit of Dick Wolfe, ¶¶ 10, 12. Indeed, curtailment of surface water rights provides only a small fraction of the water needed by Colorado to achieve Compact compliance, and it is the Pipeline and other programs of the RRWCD that bear the lion's share of the burden of Compact compliance. *Id.*, ¶ 12.

The Foundation further asserts that "there is no lawful basis under Colorado law to treat water users differently for purposes of Compact administration based upon the method of diversion (i.e. groundwater pumping vs surface water diversion)." Motion at 8. That assertion ignores the fundamental legal separation between the waters at issue here; the differences in Compact administration are not based on the method of diversion, but rather the independent and mutually exclusive legal regimes that apply to surface water and designated groundwater. *See* Section III.B.1., *supra*. By enacting the 1965 Act and authorizing the creation of designated basins, the legislature expressed the clear intent that the waters of those designated basins be administered differently than surface water rights. The State Engineer's

Compact administration respects the separate legal regimes for surface water and designated basin water, and the legislature's intent in creating them, and is consistent with each legal regime's "statutory priority law." *See Bijou*, 69 P.3d at 69; *see generally* Section III.B.1., *supra*. Given that the legislature has expressed the clear intent that surface water and designated groundwater are to be administered independently, and given that both surface water rights and designated basin groundwater wells are contributing to Compact compliance, the State Engineer's Compact compliance administration is both legal and equitable. *See* § 37-80-104, C.R.S.

4. <u>The Administration of the North Fork and the South Fork of the Republican River Basin is lawful.</u>

The Foundation argues that the State Engineer's administration of the North Fork and South Fork of the Republican River "together for purposes of Compact compliance is inconsistent with Colorado law."[6] Motion at 13; *see also* Motion at 14. This argument mischaracterizes the State Engineer's Compact administration. Surface water rights on the tributaries are administered separately for purposes of intrastate administration, and the tributaries are administered separately for Compact compliance, pursuant to the FSS. *See* FSS, Appendix C, Table 4A: Colorado Compliance with the Sub-basin Non-impairment Requirement, at C63

[6] The Foundation only discusses the North Fork and South Fork of the Republican River, although the Compact allocates water to Colorado in four sub-basins. *See* Compact Art. IV.

("Non-Impairment Requirement Table"). With respect to designated groundwater, the State Engineer is administering the Northern High Plains Designated Basin consistent with Colorado law under the 1965 Act.

Contrary to the Foundation's assertions, surface waters of the North Fork and South Fork are not administered together. Surface water rights of the North Fork may not place a call on surface water rights of the South Fork, and surface water rights of the South Fork may not place a call on surface water rights of the North Fork. *See* Exhibit A, Affidavit of Dick Wolfe, ¶ 17. All post-Compact surface water rights on both the North and South Forks have been curtailed for Compact compliance, and all pre-Compact surface water rights on both tributaries are free to divert when water is physically and legally available. *Id.*, ¶¶ 15-16. However, the State Engineer administers the Northern High Plains Designated Basin under a different legal regime, because as a matter of law tributaries do not exist within a designated basin for purposes of administration of groundwater. *See* § 37-90-103(6)(a), C.R.S.; Section III.B.1., *infra*.

The Foundation further argues that the State Engineer's sub-basin administration is unlawful because "in at least one year Colorado was in compliance with its South Fork allocation under the Compact," yet the State Engineer "continued to curtail surface water rights on the South Fork . . . because Colorado was still exceeding its total statewide Compact allocation." Motion at 15. That

assertion ignores that "Compact accounting shall be done on a five-year running average." FSS at 24; *see* Exhibit A, Affidavit of Dick Wolfe, ¶ 20. It is not possible to consider Colorado's Compact compliance in a single year based only on that year's data. *See id.* Moreover, the State Engineer does administer water within each sub-basin in order to comply with the State's sub-basin obligations under the FSS. *See generally* Non-Impairment Requirement Table; Exhibit A, Affidavit of Dick Wolfe, ¶¶ 15-17; Exhibit C, Affidavit of Willem Schreüder, ¶ 8. Simply put, the State Engineer's administration for Compact compliance respects the legal regime of the designated basin under the 1965 Act. *See* Section III.B.1., *supra*. It also respects the legal regime for surface waters by administering the surface waters of the tributaries separately from each other, *see id.*, while maintaining Compact compliance with respect to each sub-basin. As such, the State Engineer's Compact compliance administration remains lawful.

5. <u>The administrative scheme is not arbitrary and capricious nor is it a violation of equal protection and due process.</u>

As demonstrated above, the State Engineer's administration of the Republican River Basin for Compact compliance is lawful. Nevertheless, the Foundation argues that the State Engineer's Compact administration is arbitrary and capricious and violates the constitutional protections of the Equal Protection Clause of the 14th Amendment of the United State Constitution and the due process clause of Article II, section 25 of the Colorado constitution. *See* Motion at 12. The Foundation never

discusses or applies any legal standard to these claims, and in support of its argument only discusses one case, *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968), while relying on the same mischaracterizations of the water rights regimes that exist in the Republican River Basin.[7] *See* Motion at 12-13. *Fellhauer*, however, is inapposite and the Foundation's water rights are not similarly situated to the designated basin well permits in the Republican River Basin. Moreover, the State Engineer's actions are supported by competent evidence and bear a rational relationship to a legitimate state objective and the Foundation's procedural due process rights have not been violated because it has been provided ample notice and opportunity to challenge the designation of the basin and the issuance of any designated basin well permits. *See Eckley v. Colorado Real Estate Comm'n*, 752 P.2d 68, 75 (Colo. 1988) (agency action is arbitrary and capricious only where "the action is unsupported by any competent evidence"); *Central Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 341 (Colo. 1994) (actions that do not infringe on fundamental rights or create classification based on suspect classes violate equal protection only where they do not "bear a rational relationship to a legitimate state objective"); *City of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1277 (Colo. 2010) (actions that do not infringe on fundamental rights violate

[7] The Foundation also repeats the assertion that their surface rights are unfairly bearing the entire burden of Compact compliance. Motion at 13. The fallacy of that assertion is addressed in Section III.B.3., *supra*.

substantive due process only where they "lack a rational relationship to a legitimate governmental interest"); *Ferguson v. People*, 824 P.2d 803, 808 (Colo. 1992 ("In the absence of a fundamental constitutional right, the applicable test for reviewing a substantive due-process challenge to a statute is the rational-basis standard of review."); *Patterson v. Cronin*, 650 P.2d 531, 536 (Colo. 1982) (procedural due process requires notice and an opportunity to be heard).

Fellhauer concerned well pumping in the Arkansas River valley and the inconsistent priority enforcement of the division engineer, where those wells were not in a designated basin and were instead legally and hydrologically part of the Arkansas River system. Thus, as a matter of law, the wells should have been included in the priority administration of the river. *Id.* at 996-97 (holding that "[t]he 1965 act states that the state engineer shall administer waters, including tributary underground waters 'in accordance with the right of priority of appropriation'" and "[t]hese wells must be administered in accordance with priority, along with other factors"). Because the division engineer curtailed only a handful of the wells and not others, the *Fellhauer* Court held that such actions were arbitrary and capricious. *Id.* at 997.

Here, the well permits in question are part of the modified priority system of a designated basin under the 1965 Act, and are, as a matter of law, not part of priority administration of the surface waters of the Republican River under the 1969 Act.

See Section III.B.1., *supra*. While both the designated basin wells and the surface waters in the Republican River Basin are part of the Compact accounting, the Compact does not require that they be administered as one system and in fact indicates that intrastate administration of waters in the Republican River Basin is "subject to the laws of the state." Compact at Art. IV; *see also* Section III.B.1, *supra*. The Foundation's surface water rights are therefore not similarly situated to designated basin well permits in the Republican River Basin.

The Foundation has failed to demonstrate that the State Engineer's separate administration of surface water and designated basin well permits is arbitrary and capricious or that it violates the Equal Protection Clause of the United States Constitution or the due process clause of the Colorado constitution. To the contrary, the State Engineer's actions are supported by competent evidence, *see* Section III.B.1-4., *supra*, bear a rational relationship to a legitimate state objective, *see id.*, and the Foundation was provided ample notice and opportunity to challenge the designation of the basin and the issuance of any designated basin well permits. *See, e.g.*, Motion for Summary Judgment on the Constitutionality of the Ground Water Management Act of 1965 at 20-24 (Feb. 29, 2016). Thus, these claims of the Foundation must be denied.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the Foundation's Motion.

CYNTHIA H. COFFMAN
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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.

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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'S RESPONSE TO THE JIM HUTTON EDUCATIONAL FOUNDATION'S MOTION FOR SUMMARY JUDGMENT ON ITS COMPACT ADMINISTRATION 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)

Party Name	Party Type	Attorney Name
Division 1 Engineer	Division Engineer	Division 1 Water Engineer (State of Colorado DWR Division 1)
Don, Myrna and Nathan Andrews	Defendant	Geoffrey M. Williamson 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)

Party Name	Party Type	Attorney Name
Saving Our Local Economy LLC	Defendant	John David Buchanan Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
The Jim Hutton Educational Foundation	Plaintiff / Applicant	Karen Leigh Henderson 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