DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300	□ **COURT USE ONLY** □
Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation, **v.** **Defendants**: Dick Wolfe, in his capacity as the Colorado State Engineer; David Nettles, in his capacity as Division Engineer in and for Water Division No. 1, State of Colorado; Colorado Division of Water Resources; and Colorado Division of Parks and Wildlife. **Defendant-Intervenors**: Yuma County Water Authority Public Improvement District; Colorado Ground Water Commission; Marks Butte, East Cheyenne, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts. **Defendant – Well Owners**: Republican River Water Conservation District; City of Wray; City of Holyoke; Harvey Colglazier; Lazier, Inc.; Marjorie Colglazier Trust; Mariane U. Ortner; Timothy E. Ortner; Protect Our Local Community's Water, LLC; Saving Our Local Economy, LLC; the "North Well Owners"; Tri-State Generation and Transmission Association, Inc.; Dirks Farms Ltd; Julie Dirks; David L Dirks; Don Andrews; Myrna Andrews; Nathan Andrews; Happy Creek, Inc.; J&D Cattle, LLC; 4M Feeders, Inc.; May Brothers, Inc.; May Family Farms; 4M Feeders, LLC; May Acres, Inc.; Thomas R. May; James J. May; Steven D. Kramer; Kent E. Ficken; Carlyle James as Trustee of the Chester James Trust; Colorado Agriculture Preservation Association; Colorado State Board of Land Commissioners; and the City of Burlington.	Case Number: **15CW3018**
Porzak Browning & Bushong LLP Steven J. Bushong (#21782) Karen L. Henderson (#39137) 2120 13th Street Boulder, CO 80302 Tel: 303-443-6800 Fax: 303-443-6864 Email: sjbushong@pbblaw.com; khenderson@pbblaw.com	Water Div. No. 1
THE JIM HUTTON EDUCATIONAL FOUNDATION'S RESPONSE TO COLORADO GROUND WATER COMMISSION'S MOTION TO DISMISS	

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation ("Foundation"), acting by and through undersigned counsel, hereby responds to the Motion to Dismiss ("Motion") filed by the Colorado Ground Water Commission's (the "Commission").

I. BACKGROUND.

The Complaint in this case continues the Foundation's struggle to protect its surface water rights located on the South Fork of the Republican River ("South Fork"). The South Fork along with other tributaries in the Republican River Basin are governed by an interstate compact among Colorado, Nebraska and Kansas adopted in 1942 (the "Compact"). In 1966, the Commission created the Northern High Plains Basin ("NHP Basin"), a designated groundwater basin which includes the Republican River Basin. The Foundation's surface water rights and other water rights on the South Fork such as Bonny Reservoir were appropriated before the NHP Basin was created. Wells in the NHP Basin are depleting the South Fork and have caused Colorado to be out of compliance with its Compact obligations.

The Complaint raises three claims. Claim 1 seeks a declaratory judgment "[t]hat the current administration of surface water in the Republican River Basin" is contrary to law. (*Complaint,* ¶ 92.A). The allegations that make up Claim 1 can be categorized into a challenge of the current Compact administration of surface water rights (whereby only surface water rights are curtailed and not groundwater users) and a challenge of the operation and management of Bonny Reservoir (which is resulting in injury to the senior Hale Ditch water right). Claim 2 is a challenge of the constitutionality of Senate Bill 10-52 ("SB 52"), which permanently locks in the boundaries of a designated basin and prevents surface right owners from protecting their supply of water from wells pumping improperly designated groundwater.[1] Claim 3 is a constitutional challenge of the Ground Water Management Act ("GWMA"), but only to the extent there is no relief available to protect the Foundation's surface water rights under Claim 1 and/or Claim 2.

The Motion to Dismiss is limited to Claims 2 and 3. (*Motion to Dismiss*, pp. 5, 6, 16). The Commission argues, in summary, that "[t]his Court should dismiss the second and third claims for lack of subject matter jurisdiction for three reasons: (1) the Commission has not yet made a determination that no designated ground water is at issue, (2) if no designated ground water is at issue the Management Act does not apply, and (3) if designated ground water is at issue judicial review is limited to the designated ground water judge." (*Id.* at 5).

The Motion is without merit. The Commission is responsible for applying the GWMA. It does not have any authority to rule on its constitutionality. Nor does a constitutional challenge of SB-52 and the GWMA require the Commission to make any initial determination regarding designated groundwater. Further, the designated ground water judge only has authority to hear appeals of specific actions and decisions by the Commission. No such actions or decisions are at issue in this case, which is why the Commission was not a defendant. By contrast, this Court has exclusive jurisdiction because all three claims in the Complaint pertain to the use or ability to use decreed water rights. Alternatively, this Court has exclusive jurisdiction over one or more claims, and ancillary jurisdiction over any remaining claims.

[1] Claims 1 and 2 are the subject of the Foundation's Motion for Summary Judgment on its Compact Administration Claim ("Foundation Motion Re: Compact Administration"), Motion for Summary Judgment, or in the Alternative a Motion for Determination of Question of Law, Regarding its Bonny Reservoir Claim ("Foundation's Motion Re: Bonny Reservoir") and Motion for Summary Judgment on its Senate Bill 52 Claim ("Foundation's Motion Re: Senate Bill 52).

II. STANDARD OF REVIEW AND FACTUAL ISSUES.

In addition to the standard of review for a 12(b)(1) motion cited by the Commission in its Motion, the Foundation adds that "[w]hen considering such a [12(b)(1)] motion, the trial court must accept the allegations of the plaintiff's complaint as true and construe them strictly against the defendant." *Crystal Lakes Water and Sewer Ass'n v. Backlund*, 908 P.2d 534, 540 (Colo. 1996). If there are disputed factual issues upon which the existence of jurisdiction is predicated, the trial court's determination on such factual matters is given substantial deference. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 -25 (Colo. 1993).

The facts relied upon by the Foundation for this Court's jurisdiction are detailed in its Complaint and further fleshed out in its three Motions for Summary Judgment. The Motion did not take issue with the facts as alleged in the Complaint. The Motion cites a portion of a few allegations of the Complaint, but none of those allegations describe Claims 2 or 3 that are the subject of the Motion. (*Motion,* p.4). Claim 2 is described in the Complaint at ¶¶ 94 – 106 and Claim 3 is described in the Complaint at ¶¶ 108 – 117.

The Motion pp. 4-5 states that the Foundation did not seek a hearing before the Commission. That's because SB-52 deprived the Foundation of the right to have the hearing by which the Commission would have been required to rectify the ongoing problem. Before SB-52, in a matter in which surface water right owners were asserting injury caused by designated groundwater use, the Colorado Supreme Court ruled as follows:

> Based upon section 37-90-106(1)(a) we hold that the Commission has jurisdiction over surface water rights to the extent that a holder of those rights seeks changes to a designated basin's boundaries. The surface right holder, in order to receive relief, must prove that the pumping of then designated ground water has more than a de minimis impact on their surface water rights and is causing injury to those rights. Upon such a showing, the Management Act requires the Commission redraw the boundaries of the designated basin to exclude the surface water rights and those wells pumping designated ground water that has been proven to fall more properly within the definition of ground water subject to the 1969 Act. After the boundaries are redrawn, the State Engineer and water court regain jurisdiction and can administer the relative water rights under the 1969 Act.

Gallegos v. Colorado Ground Water Comm'n, 147 P.3d 20, 31 (Colo. 2006). SB-52 took away that right by no longer allowing boundaries to be modified to exclude the wells causing the problem. (*See, Foundation's Motion Re: Senate Bill 52*). Thus, "[t]he Foundation is not seeking to modify the boundaries of a designated ground water basin in this action." (*Complaint,* ¶ 4). Instead, as stated in the Complaint, "[u]pon a ruling that SB-52 is unconstitutional, the Foundation intends to file a separate petition with the Commission to redraw the boundaries of the NHP Basin to exclude ground water tributary to the Foundation's surface rights, the pumping of which is causing injury." (*Complaint*, ¶ 75).

III. RESPONSE TO ARGUMENTS IN MOTION TO DISMISS

A. The Commission Has No Authority to Hear the Foundation's Constitutional Challenges of the Ground Water Act.

Claims 2 and 3 are constitutional challenges as noted above. The law is absolutely clear, however, that the Commission cannot hear constitutional challenges. As stated by the Colorado Supreme Court: "This court and the court of appeals have consistently held that administrative agencies do not have authority to pass on the constitutionality of statutes or ordinances." *Arapahoe Roofing & Sheet Metal, Inc. v. City & Cty. of Denver*, 831 P.2d 451, 454 (Colo. 1992) (emphasis added) (*citing Clasby v. Klapper*, 636 P.2d 682, 684, n,.6 (Colo. 1981); *Kinterknecht v. Industrial Comm'n*, 485 P.2d 721, 724 (Colo. 1971); *Denver Center for the Performing Arts v. Briggs*, 696 P.2d 299, 305-06, n.5 (Colo. 1985); *Industrial Comm'n v. Bd. of County Comm'rs*, 690 P.2d 839, 844, n.6 (Colo. 1984); *Lucchesi v. State*, 807 P.2d 1185, 1191 (Colo.App. 1990); *Matthews v. Industrial Comm'n*, 627 P.2d 1123 (Colo.App. 1980); *Johnson v. Robison*, 415 U.S. 361, 368 (1974); 4 K.C. Davis, *Administrative Law Treatise* § 26:6 (1983)). "When a party wishes to challenge the constitutionality of a statute or ordinance under which an administrative agency acts, the proper forum is the district court where the party can seek a declaratory judgment." *Arapahoe Roofing*, 831 P.2d at 454 (*citing Clasby*, 636 P.2d at 684, n.6; *Kinterknecht*, 485 P.2d at 724; *Steveinson v. Industrial Comm'n*, 545 P.2d 712 (Colo. 1976); *Lucchesi*, 807 P.2d at 1191); *see also Order Re: State and Division Engineer' Motion for Joinder*, dated July 8, 2015, p.6 ("The Commission is charged with enforcing the law as it is, not litigating the constitutionality of the law.")

The same conclusion is reached under the GWMA. Nowhere does the GWMA grant the Commission with the authority to opine on the validity or constitutionality of its governing legislation. "The constitutional doctrine of separation of powers mandates that agencies act only within the scope of their delegated authority." *Hawes v. Colorado Div. of Ins*., 65 P.3d 1008, 1016 (Colo. 2003). State agencies have no general, inherent, or common-law powers, but only those powers expressly conferred by the legislature." *Flavell v. Dep't of Welfare,* 355 P.2d 941, 943 (Colo. 1960); *see also* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law,* 41 Wm. & Mary L.Rev. 1463, 1498 (2000) ("As creatures of statutes lacking any independent constitutional pedigree, agencies cannot invoke some kind of inherent authority to justify actions that find no warrant in their enabling legislation").

The wisdom of such limits on the Commission's powers are especially evident in this case where the Commission testified in support of SB-52. (Exh. 1 to Defendants' Motion re: SB-52, Transcript of Legislative Hearings on SB-52, p. 11, lines 7-8; pp. 44-45) (*see also, Id.* at p. 52, lines 34-36) ("...the Colorado Ground Water Commission, the body established for regulating this kind of water has voted to support this bill."). Thus, the Commission would hardly be a fair and impartial arbiter of the constitutionality of the Bill whose adoption it supported.

In short, while the Commission has jurisdiction over designated groundwater pursuant to the GWMA, that does not include challenges to the constitutionality of the GWMA or of any

amendments thereto. Further, the Commission only has jurisdiction over surface water right owners such as the Foundation to the extent they are seeking to change the boundaries of a designated groundwater basin to protect their water rights. *Gallegos*, 147 P.3d at 31, 33. As described above, the Foundation is not seeking to change the boundaries of the NHP Basin in this case. Instead, if SB-52 is found unconstitutional, at that time the Foundation will proceed before the Commission in redrawing the boundaries of the NHP Basin to exclude wells that are pumping improperly designated groundwater.

B. <u>An Initial Commission Determination on Designated Groundwater Is Not at Issue</u>.

Even though the Commission clearly has no authority to opine on the constitutionality of SB-52 or the GWMA, the Commission argues that it nonetheless gets to first determine whether designated groundwater is implicated by the Foundation's claims. The Commission's theory is that if the Commission decides that designated groundwater is at issue, this is not a Water Court matter, and if it decides that designated groundwater is not at issue, then there is no controversy regarding the GWMA. (*Motion to Dismiss,* pp. 6-7). The Commission's arguments muddle the Foundation's otherwise clear constitutional challenges of SB-52 and the GWMA.

The Foundation's Claims 2 and 3 are not predicated on whether or not a specific source of water involves designated groundwater or tributary groundwater. They are constitutional challenges. Moreover, the constitutional challenges of SB-52 and the GWMA apply in this case to the NHP Basin, an already designated groundwater basin. It is further undisputed that the Foundation's surface water rights were appropriated before the NHP Basin was even designated. (*See, e.g., Motion,* p.3). Thus, there are no conceivable determinations regarding the designated nature of any source of water in the NHP Basin that are at issue or necessary before this Court may rule on the constitutional challenges set forth in Claims 2 and 3. The Commission is simply seeking to avoid those constitutional determinations,

The Commission relies upon *Meridian Service Metro. District v. Ground Water Comm'n*, 361 P.3d 392 (Colo. 2015). Nowhere in its Motion, however, does the Commission describe the issue being resolved in *Meridian*. In *Meridian*, a surface water right was being sought for stormwater in a designated groundwater basin that had been designated based upon the fact that it was an area not adjacent to a continuously flowing stream. *Meridian*, 361 P.3d at 394. A question was raised as to whether the stormwater was actually a source of recharge for the designated groundwater basin and thus subject to administration by the Commission as designated groundwater. The question went to the Commission to make an initial decision as to whether designated groundwater was implicated, and it decided the water was designated groundwater that would never reach a tributary stream. *Id.* at 394-395. On appeal the Colorado Supreme Court held that "[t]he jurisdictional question in this case thus turns on whether the water that Meridian sought to appropriate was 'designated ground water.' We have long and consistently held that <u>in the context of such a jurisdictional conflict</u>, the Commission must make the initial determination as to whether the controversy implicates designated groundwater." *Id.* at 396 (emphasis added) (*citing Pioneer Irrigation Dist. v. Danielson,* 658 P.2d 842, 846-47 (Colo. 1983); *Danielson v. Vickroy*, 627 P.2d 752, 759-60 (Colo. 1981)). In other words, the jurisdictional question was simply whether the specific source of water that was the subject of

the case was designated groundwater or tributary water.

The *Pioneer* and *Vickroy* cases relied upon in the holding in *Meridian* likewise raised similar jurisdictional issues on whether the water in question was designated groundwater. In *Vickroy*, for example, the State Engineer and Groundwater Management District sought to enjoin an unpermitted well from diverting groundwater in a designated groundwater basin. 627 P.2d at 758. The well owner, however, had sought to change his surface water right to the well in Water Court, *Id.* at 755, and claimed the "water sought to be diverted is not designated ground water." *Id.* at 758. The Court in *Vickroy* held that in the context of such a jurisdictional conflict between the Commission and the Water Court, "any relief sought which involves the taking of ground water in a designated ground water basin must be sought first through the administrative and judicial channels, as appropriate, prescribed for resolution of questions arising under the Management Act." *Id.* at 760.

In *Pioneer*, a case that preceded *Gallegos,* a water right owner filed a Complaint seeking to have the Water Court order that the State Engineer curtail designated groundwater wells in the NHP Basin that it believed were causing injury to its surface water rights. 658 P.2d at 844. The Court held that "[t]he primary issue is whether the wells which Pioneer seeks to curtail are pumping 'designated ground water' or 'waters of the state.'" *Id.* at 846. The Court then held that the "Commission is the forum which has the initial jurisdiction to make a determination of whether a ground water matter involves designated ground water." *Id.* at 847; *see also Id.* at 846 (the Commission makes that "initial determination of whether the controversy implicates designated ground water").

Thus, in *Meridian*, *Vickroy* and *Pioneer*, the jurisdictional issue was whether the specific water in question was or was not designated groundwater and the Commission was allowed to make that initial determination. The Commission takes the holding in these cases out of context and argues it applies to constitutional challenges that do not even bring into question whether a source of water is or is not designated. Nor does the Commission even try to explain what source of water it should be ruling upon. The NHP Basin is already designated and this case does not challenge the boundaries of that basin. The Commission's concern is, at best, premature. It will have the opportunity in a future proceeding to rule on whether the NHP Basin improperly included groundwater that was "more properly within the definition of ground water subject to the 1969 Act," *Gallegos,* 147 P.3d at 31, but only if the Foundation is successful in Claim 2. That is not, however, the issue before the Court in this case. Such a future case does not mean there is a jurisdictional question regarding the designated status of groundwater in this case that must be decided before ruling on the Foundation's constitutional challenges.

In summary, the Foundation is not seeking in this case to appropriate a specific source of water, curtail certain water users, or challenge the designated status of any groundwater in the NHP Basin. The jurisdictional issue that arose in *Meridian, Vickroy* and *Pioneer* is simply not present in the constitutional challenges that the Commission seeks to dismiss for lack of jurisdiction.

C. **The Designated Groundwater Court Only Has Jurisdiction over Appeals from the Commission.**

The GWMA provides that a party may appeal certain decisions or acts of the Commission or State Engineer taken under the GWMA to the local district court (sometimes referred to as a designated groundwater judge). C.R.S. § 37-90-115(1)(a). While seeming to recognize the statutory limitations on the jurisdiction of the designated groundwater judge set forth in the GWMA, (*see Motion*, p. 14), the Commission summarily concludes that "[i]f the Management Act is at issue" then the case may only proceed before the designated groundwater judge. (*Motion,* p.16). The Commission's position contradicts the plain language of GWMA and is inconsistent with the case law.

Under the section of the GWMA entitled "Judicial review of actions of the ground water commission or state engineer," the statute states:

> Any party . . . adversely affected or aggrieved by any decision or act of the ground water commission, except for the adoption of rules, under any provisions of this article or by a decision or action of the state engineer under section 37-90-110 may take an appeal to the district court in the county wherein the water rights or wells involved are situation."

C.R.S. § 37-90-115(1)(a) (emphasis added).

A plain reading of this statute allows for an appeal to the local district court of a decision or act by the Commission under any provision of the GWMA. The constitutional challenges of SB-52 and the GWMA set forth in Claims 1 and 2 are not appeals of any decisions or acts by the Commission taken pursuant to the GWMA. Indeed, as already discussed above, the Commission has no authority to even opine on the constitutionality of the GWMA. Appeals of decisions or actions by the State Engineer under this provision are even more limited by specifically referring only to actions or decision taken pursuant to the State Engineer's powers provided under C.R.S. § 37-90-110. Thus, this statutory section cannot be construed as requiring a constitutional challenge of SB-52 or the GWMA to proceed before the designated groundwater judge.

The Commission's expansive reading of C.R.S. § 37-90-115(1)(a) as requiring any action involving the GWMA to proceed before the designated groundwater judge is also inconsistent with judicial interpretation of the statute. In *Colorado Ground Water Comm'n v. Eagle Peak Farms*, 919 P.2d 212 (Colo. 1996), the question was whether an appeal of a Commission rule issued pursuant to the GWMA was required to proceed before the designated groundwater judge under an earlier version of section 37-90-115(1)(a) that did not include the current exception for rules. In holding that Commission rules were outside the designated groundwater judge's jurisdiction, the Colorado Supreme Court focused on what constituted a "decision or act" of the Commission under 37-90-115(1)(a). *Id.* at 218 – 19. The Court found that "[i]n providing for an 'appeal' to be taken to the district court in the county wherein the 'water rights or wells' are situated, section 37-90-112 to 115 focus on particularized activities . . . ." *Id.* at 219. The Court

described how the "acts" and "decisions" of the Commission referenced in section 37-90-115 upon which an appeal may be taken included such things as "the application of statutes or rules to specific well permit applications, water rights, change of water rights, or other matters focusing on particular water users in specific circumstances." *Id.* at 221. Given that designated ground water judges "are limited to matters assigned to them by statute," *Id.* at 218, the subject rules were more properly the subject of the Denver District Court's jurisdiction pursuant to the APA.[2] Thus, contrary to the Commission's argument, the designated groundwater judge's jurisdiction is limited to appeals regarding specific acts and decisions by the Commission pursuant to the GWMA.

The Commission seeks to support its position by contending "Plaintiff must avail itself of the procedures in the Management Act because it has alleged harm to its surface rights caused by designated ground water wells." (*Motion,* p.15). At another juncture the Commission cites to C.R.S. § 37-90-114, claiming the Foundation should have sought relief under that section of the GWMA, and then an appeal would go to the designated groundwater judge. (*Motion,* p. 16). This argument is without merit.

First, Section 37-90-114 pertains to a "person claiming to be injured within the boundaries of a designated groundwater basin by any act of the state engineer or commission under the provisions of this article, or the failure of the state engineer or commission to take any action under the provisions of this article." (emphasis added). Again, Claims 2 and 3 do not challenge acts or omissions by the Commission or State Engineer under the GWMA. They challenge the constitutionality of SB-52 and the GWMA. Ironically, if SB-52 is found unconstitutional, then at that time, the Foundation will avail itself of the procedures under the GWMA that apply to the underlying problem – namely 37-90-106(1)(a) as it existed when the NHP Basin was created. *See Gallegos*, 147 P.3d at 31.

Second, there is no requirement to use procedures of the GWMA that do not address the issues being raised in Claims 2 and 3. The policies that support "exhaustion of administrative remedies are not furthered, however, when available administrative remedies are ill-suited for providing the relief sought and when the matters in controversy consist of questions of law rather than issues committed to administrative discretion and expertise." *Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1197 (Colo. 1993) (*citing Collopy v. Wildlife Comm'n*, 625 P. 994, 1006 (Colo. 1981)). "Thus, we have recognized that a party need not exhaust available administrative remedies 'when the administrative agency does not have the "authority to pass on the question raised by the party seeking judicial action."'" *Id.* at 1197 (*quoting Fred Schmid Appliance & Television Co. v. City and County of Denver*, 811 P.2d 31, 33 (Colo. 1991), *quoting Gramiger v. Crowley*, 660 P.2d 1279, 1281 (Colo. 1983)). Thus, even assuming for the sake of argument that

[2]"Generally, the APA serves as a 'gap-filler, and its provisions apply to agency actions unless they conflict with a specific provision of the agency's statute. . . .'" *V. Bar Ranch LLC v. Cotten*, 233 P.3d 1200, 1205 (Colo. 2010) (*quoting Well Augmentation Subdist. Of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 390, 417 (Colo. 2009)); *see also* C.R.S. § 24-4-107. If the Commission were correct in its expansive interpretation of C.R.S. § 37-90-115(1)(a), it would have taken precedent over the APA in *Eagle Peak Farms*. The fact that it didn't take precedent demonstrates the narrow jurisdiction provided the designated groundwater judge under 37-90-115(1)(a).

the existing GWMA had a potentially applicable procedure, it would not be a prerequisite given that it is undisputed that the Commission is without authority to rule on the constitutional challenges in Claims 2 and 3 as described above.

IV. BASIS FOR WATER COURT'S JURISDICTION.

As described above, neither the Commission nor the designated groundwater judge were given jurisdiction over questions regarding the constitutionality of the GWMA. As described below, the Water Court has jurisdiction either under its exclusive jurisdiction or under its ancillary jurisdiction.

A. The Water Court Has Exclusive Jurisdiction to Rule on Claims 2 and 3 in the Complaint.

Water courts have "exclusive jurisdiction over all 'water matters.'" *V Bar Ranch*, 233 P.3d at 1205 (*citing* C.R.S. § 37-92-201 – 203). Pursuant to section 37-92-203, water courts "collectively acting through the water judge, have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division." Water Court judges like designated groundwater judges "are limited to matters assigned to them by statute." *Eagle Peak Farms*, 919 P.2d at 218. However, unlike designated groundwater judges who are limited to appeals of Commission actions as described above, water matters within the Water Court's jurisdiction have been broadly interpreted as described below.

Although the term "water matters" is not defined by statute, the Colorado Supreme Court has held it involves "determinations regarding 'the right to use water, the quantification of a water right, and changes in a previously decreed water right.'" *V Bar Ranch*, 233 P.3d at 1205 (*quoting In Re Tonko*, 154 P.3d 397, 404 (Colo. 2007)). By contrast, matters involving ownership of water are outside the Water Court's exclusive jurisdiction. *Humphrey v. Sw. Dev. Co.*, 734 P.2d 637, 641 (Colo. 1987). Accordingly, "[r]esolution of what constitutes a water matter turns on the distinction between the legal right to use of water (acquired by appropriation) and the *ownership* of a water right." *Id.* at 640 (emphasis in original); *see also Crystal Lakes*, 908 P.2d at 540 (same). As discussed below, this case involves the use of water acquired by appropriation – not the ownership of water rights.

"Water matters" have been found to include a wide variety of matters pertaining to the use of water, including nontributary groundwater outside of designated groundwater basins, and the effect of prior contracts on priorities, *In Re Application for Water Rights of Fort Lyon Canal Co.,* 519 P.2d 954, 956 (Colo. 1974), limitations on the use of a decreed water right, *Kobobel v. State Dep't of Natural Resources*, 215 P.3d 1218, 1220 - 1221 (Colo. App. 2009), validity of State Engineer rules and regulations, *Kuiper v. Well Owners Conservation Ass'n,* 490 P.2d 268, 274 (Colo. 1971) (overruled on other grounds), actions to define the scope of previously decreed augmentation plans, *Crystal Lakes*, 908 P.2d at 540, and other matters.

Colorado Courts interpret a Water Court's exclusive jurisdiction over the use of water broadly. For example, in *Kuiper*, 490 P.2d at 273 the question was whether a challenge to the State Engineer's rules and regulations governing groundwater pumping should proceed in Denver District Court pursuant to the APA or Water Court. In finding the matter was within the Water Court's exclusive jurisdiction, the Colorado Supreme Court ruled as follows:

> It is true that the [1969] Act does not mention specifically this type of action, but the legislative intent is apparent that the water judges have exclusive jurisdiction of determining the validity of the rules and regulations of the State Engineer. It would be illogical – in fact nearly unthinkable – for the General Assembly to set up a system for determination of 'water matters' and to provide for the selection of judges skilled in this field of law to preside as water judges, and then turn the determination to a non-water judge of a subject that goes to the very heart of the administration of water.

Id. at 274.[3]

Similarly, in *Fort Lyons Canal*, 519 P.2d at 956, the argument was made that the 1969 Act did not specifically grant jurisdiction to the Water Court over private agreements which may affect water rights. Again, the Colorado Supreme Court ruled:

> It is inconceivable to us that the legislature intended to grant the water judge jurisdiction with respect to priorities but to bar him from determining the effect of a prior contract upon priorities awarded. We hold that this jurisdiction is implied in the constitution and the statute. It must be borne in mind that the water judge is a district court judge and as such . . . would have jurisdiction to determine the effect of the contract. . . . But, absent a venue question, the judge has jurisdiction throughout the state . . . When the water judge wears two hats, it would approach an absurdity to say that he must rule in two different actions to bring about the result obtained here.

Id. at 956; *see also Oliver v. District Court*, 549 P.2d 770, 771 (Colo. 1976) ("The jurisdiction of the water judge is not limited solely to 'water matters' but his jurisdiction extends to other matters 'implied in the constitution and the statute. Colo. Const. Art. VI, § 9(1).'") (*quoting Fort Lyons Canal*); *Crystal Lakes*, 908 P.2d at 543 (same). Indeed, where "claims have more than an incidental impact on the . . . use of . . . water rights, . . . that is a matter beyond the district court's jurisdiction" and instead a matter for the water court's exclusive jurisdiction, even where other issues are also being raised in the claims. *City of Sterling v. Sterling Irrigation Co.*, 42 P.3d 72, 75 (Colo.App. 2002).

Turning to the case at hand, the Motion does not question this Court's jurisdiction over Claim 1, which pertains to the unlawful administration of surface water rights for Compact administration and the injury to the Foundation's surface water rights caused by the manner in which Bonny Reservoir is being operated and administered. Indeed, as stated in *Pioneer Irr. District*, "[t]he vested surface water rights within the designated ground water basin are

[3] In contrast to *Kuiper*, the designated groundwater judge was found not to have jurisdiction over the Commission's rules in *Eagle Peak Farms*.

recognized and specifically noted as being without the jurisdiction of the Ground Water Commission and are wholly governed by the provisions of the Republican River compact where applicable or otherwise by the surface water laws concerning tributary waters." 658 P.2d at 844, n.1 (citing the designation order for the NHP Basin.).

The constitutional challenge to SB-52 which constitutes Claim 2 is also a water matter within this Court's exclusive jurisdiction. As described above and in the Foundation's Motion Re: Senate Bill 52, Senate Bill 52 directly impacts the use of surface water rights by taking away the ability of surface right owners to redraw designated groundwater basins to exclude wells that are depleting their source of water. If the Foundation does not have that right – then the water that the Foundation can divert is at risk of being permanently reduced or dried up without a way to address it. As such, the claim directly pertains to "the right to use water" under the Foundation's decreed water rights. Moreover, the issue underlying Claim 1 is the fact that wells have caused Colorado to be out of Compact compliance, resulting in the curtailment of surface water rights and the draining of Bonny Reservoir. (*See Complaint* ¶¶ 88, 91). Although Claim 1 is separate from Claim 2, they both involve interrelated matters affecting the Foundation's right to use water and its ability to protect its water rights. Lastly, '[w]hen the water judge wears two hats [one as Water Judge and another as District Court Judge], it would approach an absurdity to say that he must rule in two different actions to bring about the result [sought to be] obtained here." *Fort Lyons Canal*, 519 P.2d at 956.

As for Claim 3, it is only at issue to the extent the Foundation does not have relief under Claims 1 and 2. Specifically, the constitutional challenge to the GWMA is expressly limited to a situation where, contrary to Claim 1, the State Engineer can only administer surface water rights for Compact compliance and/or where contrary to Claim 2, the boundaries of an existing designated groundwater basin cannot be redrawn under the GWMA to exclude wells causing surface water depletions. (*Complaint*, ¶ 115). Under such circumstances, the constitutional challenge to the GWMA in Claim 3 directly pertains to the right to use water under decreed water rights and cannot be separated from the other Claims in the Complaint.

B. The Water Court Alternatively has Ancillary Jurisdiction to Rule on Claims 2 and 3 in the Complaint.

Even if this Court were to determine that either Claim 2 or Claim 3 were not water matters within its exclusive jurisdiction, it would still have ancillary jurisdiction to hear the claims. *See Crystal Lakes*, 908 P.2d at 543 (finding that the water court, which had exclusive jurisdiction over two claims, had ancillary jurisdiction over three additional claims that were not water matters per se, but whose resolution would affect the outcome of water matters within the court's exclusive jurisdiction).

The reasoning in *Crystal Lakes* was based upon legal precedent that is equally applicable here. First, the Court relied upon wide-ranging precedent discussed above that recognizes a "water judge is not limited solely to 'water matters'" and that "the water court is also a district court with general jurisdiction." *Id.* at 543 (citations omitted). As explained above, since the constitutional issues raised in Claims 2 and 3 are not within the limited jurisdiction of the

designated groundwater judge to hear appeals as described under C.R.S. § 37-90-115(1)(a), this Court would have general jurisdiction to hear the issues even if they are not within its exclusive jurisdiction.

Second, where the Water Court has exclusive jurisdiction over some claims but not others, legal precedent recognizes the Water Court should exercise jurisdiction to resolve "ancillary claims . . . [that] would directly affect the disposition of issues in the same case involving water matters pending in the water court." *Crystal Lakes,* 908 P.2d at 543 . In this instance, all three claims are interrelated – so that resolution of one necessarily impacts the other. For example, the disposition of Claims 1 and 2 directly impact Claim 3 as it was made conditional upon the holdings on Claims 1 and 2. Claim 2 pertains to the ability to exclude improperly designated groundwater, the pumping of which is having more than a de minimis impact on surface waters. *See Gallegos,* 147 P.3d at 31 ("ground water which has more than a de minimis impact on surface waters cannot properly be classified as designated ground water"). Excluded groundwater would then become subject to administration under the prior appropriation doctrine. *Id.* This would directly impact storage in Bonny Reservoir and Compact administration issues that constitute Claim 1.

Lastly, "[j]udicial economy also supports our conclusion that the water court has jurisdiction to resolve the ancillary issues raised in this case that are not water matters. As a general rule, '[o]nce a court takes jurisdiction of an action, it thereafter has exclusive jurisdiction of the subjects and matters ancillary thereto.'" *Crystal Lakes,* 908 P.2d at 543 (*quoting People in Interest of Maddox v. District Court In and For Arapahoe County*, 597 P.2d 573, 575 (Colo. 1979)). This rationale is especially relevant here where all the detailed facts plead in the Complaint help frame the issues for all three claims and the requested relief has interrelated implications.

IV. CONCLUSION

For the reasons stated herein, the Commission's Motion must fail. Neither the Commission nor the designated ground water judge were given the authority to rule on the constitutionality of the GWMA, including SB-52. Nor do those constitutional challenges by the Foundation put at issue the designated status of any source of water or otherwise require the Commission to first determine whether designated groundwater is at issue. Instead, all of the claims in the Complaint are within the Water Court's exclusive jurisdiction in that they impact the right to use surface water. If one or both constitutional challenges are outside this Court's exclusive jurisdiction, they are still properly within this Court's ancillary jurisdiction.

Respectfully submitted this 8th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2016, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION'S RESPONSE TO COLORADO GROUND WATER COMMISSION'S MOTION TO DISMISS** was filed and served by the Integrated Colorado Courts E-Filing System ("ICCES") addressed to counsel for each of the parties in the above-captioned matter, as follows:

Party Name	**Party Type**	**Attorney Name**
Colorado Division of Water Resources	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Parks and Wildlife	Defendant	Katie Laurette Wiktor (CO Attorney General) Timothy John Monahan (CO Attorney General)
David Nettles	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Dick Wolfe	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
4m Feeders Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
4m Feeders LLC	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Carlyle James as Trustee of the Chester James Trust	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
City of Burlington	Defendant-Well Owner	Alix L Joseph (Burns Figa and Will P C) Steven M. Nagy (Burns Figa and Will P C)
City of Holyoke	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
City of Wray Colorado	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Colorado Agriculture Preservation Assoc	Defendant-Well Owner	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Colorado State Board Land Commissioners	Defendant-Well Owner	Virginia Marie Sciabbarrasi (CO Attorney General)
David L Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Dirks Farms Ltd	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Don Myrna and Nathan Andrews	Defendant-Well Owner	Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch)

Party Name	Party Type	Attorney Name
Happy Creek Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
J and D Cattle LLC	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
James J May	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Julie Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Kent E Ficken	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Lazier Inc	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Mariane U Ortner	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marjorie Colglazier Trust	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
May Acres Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Brothers Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Family Farms	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
North Well Owners	Defendant-Well Owner	Kimbra L. Killin (Colver Killin and Sprague LLP) Russell Jennings Sprague (Colver Killin and Sprague LLP)
Protect Our Local Community's Water LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Republican River Water Conservation Dist	Defendant-Well Owner	David W Robbins (Hill and Robbins PC) Peter J Ampe (Hill and Robbins PC)
Saving Our Local Economy LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.)

Party Name	Party Type	Attorney Name
		Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Steven D Kramer	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Thomas R May	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Timothy E Ortner	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Tri State Generation and Transmission Assn.	Defendant-Well Owner	Aaron S. Ladd (Vranesh and Raisch) Justine Catherine Shepherd (Vranesh and Raisch)
Yuma Cnty Water Authority Public Improv	Defendant-Intervenor	Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP) John A Helfrich (Brownstein Hyatt Farber Schreck LLP) Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)
Colorado Ground Water Commission	Defendant-Intervenor	Chad Matthew Wallace (CO Attorney General) Patrick E Kowaleski (CO Attorney General)
Arikaree Ground Water Mgmt Dist	Defendant-Intervenor	David C Taussig (White & Jankowski, LLP) Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Central Yuma Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Frenchman Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Marks Butte Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Plains Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Sandhills Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Wy Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
East Cheyenne Ground Water Mgmt Dist	Defendant-Intervenor	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)

Corina A. Hach