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 MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM 1 RE: STATE ENGINEER ADMINISTRATION OF DESIGNATED GROUNDWATER

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation ("Foundation"), acting by and through undersigned counsel, hereby responds to certain Defendants' Motion for Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater ("Defendants' Motion" or "Motion").

I. BACKGROUND.

As a surface water right owner in the Northern High Plains designated groundwater basin ("NHP Basin"), the Foundation is between a rock and a hard place. Designated groundwater wells are drying up the rivers. The response to the valid concerns of surface right owners was to change the law by passing Senate Bill 52. In short, that Bill took away the protections that were built into the Ground Water Management Act for surface water rights owners when the NHP Basin was created and which recognized "that a designated ground water basin could include ground water that does not properly fall within the definition of designated ground water." *Gallegos v. Colorado Ground Water Comm'n,* 147 P.3d 20, 31 (Colo. 2006). Moreover, the groundwater pumping depletions resulted in Colorado exceeding its allocation of water under the Republican River Compact ("Compact"). The State Engineer responded by draining Bonny Reservoir without regard to the Hale Ditch which is supplied through the Reservoir, and by imposing a "Compact call" on all surface water rights appropriated after 1942. The State Engineer did not, however, curtail the wells appropriated after 1942 that had caused the Compact problem in the first place. These issues are addressed in the Foundation's three Motions for Summary Judgment.

Defendants' Motion "addresses only the requested relief in Claim 1 that pertains to the Foundation's challenge of the State Engineer's administrative decisions concerning designated groundwater for Compact purposes." (*Motion,* p. 5). The Motion is based principally upon the argument that the State Engineer's intrastate Compact administration is discretionary so the State Engineer may choose not to curtail wells for Compact compliance.

The Foundation claims it is unlawful to curtail only surface water for Compact compliance without curtailing groundwater use – especially when groundwater depletions constitute the single largest component of Colorado's allocation under the Compact. (*See Complaint ¶¶ 78 – 87*). Such administration forces surface water users to bear the burden of Compact compliance problems caused by groundwater pumping. Under Colorado law, the State Engineer does not have the unfettered discretion claimed by Defendants in administering water for Compact compliance. Defendants' Motion raises issues similar to the issues briefed in the Foundation's Motion for Summary Judgment on its Compact Administration Claim ("Foundation's Motion Re: Compact Administration"), which is hereby incorporated into this Response by reference.

II. UNDISPUTED ISSUES OF MATERIAL FACT FOR DEFENDANTS' MOTION.

For the purpose of Defendants' Motion, Defendants accept the factual assertions in the Foundation's Complaint regarding administration and recognizes there are no disputed issues of material fact. (*Motion, pp. 8-9*). The factual allegations in the Complaint regarding administration are further described and documented in Foundation's Motion Re: Compact Administration. However, at a bare minimum, relevant factual allegations in the Complaint that frame the administration issue include the following: (1) groundwater in the Basin is the subject of the Compact (*Complaint*, ¶¶ 29 - 39); (2) groundwater depletions are "by far the single largest source of Colorado's depletion . . . under the Compact" and "caused Colorado to exceed its

Compact entitlement" (*Complaint* ¶ 40; *see also* ¶ *48*); (3) the vast majority of the wells in the Basin were developed after the Compact was approved in 1942 (*Complaint,* ¶¶ *26, 28*); and (4) the Engineers are only curtailing surface water rights appropriated after 1942 to help achieve Compact compliance, and not groundwater users (*Complaint* ¶ *48*).

.

III. ARGUMENT IN RESPONSE TO DEFENDANTS' MOTION

Colorado is allocated consumptive use under the Compact with specific limits for individual sub-basins. (Compact, Art. II, IV). The Compact's allocation of water among the states includes groundwater to the extent its use depletes the flows of the rivers. (*Foundation's Motion Re: Compact Administration,* pp. 3-6). Defendants and the Foundation agree that the Compact is largely silent on required intrastate administration of water for Compact compliance to achieve the specified consumptive use limits. (*See* Id. *at 9, Defendants' Motion*, pp. 13-14). The disagreement between the parties is instead principally over the limitations imposed by law on the administration of water for compliance under a Compact that is itself largely silent on such matters.

A. The State Engineer's Authority in Administering Water under the Compact is Limited by Colorado Statute and Case Law.

The primary argument in Defendants' Motion is that "[t]he State Engineer does not have any mandatory, non-discretionary duty to curtail pumping of designated groundwater wells in the NHP Basin for compliance with the Compact." (*Motion,* p.11*; see also Motion,* pp. 12-13). Defendants contend that since such a mandate does not explicitly exist, the State Engineer is not required to curtail groundwater to meet the Compact.

Defendants' argument misses the point. There is no explicit mandate to curtail either surface water rights appropriated after the Compact, or designated groundwater appropriated after the Compact. The lack of such specific mandates, however, does not equate to unfettered discretion. To the contrary, the State Engineer was given explicit statutory direction on how to administer water for Compact compliance in circumstances such as this:

> 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 administering 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.

C.R.S. § 37-80-104 (emphasis added). In other words, under conditions identical to this case – where the Compact is deficient in establishing standards for intrastate administration – the State

Engineer was given an explicit statutory mandate on how to administer water. *See also, Alamosa-La Jara Water Users Prot. Ass'n v. Gould,* 674 P.2d 914, 923 (Colo.1983) ("section 37-80-104 . . . mandates that compacts which are deficient in provision for intrastate administration be implemented so as to 'restore lawful use conditions as they were before the effective date of the compact insofar as possible.'") (emphasis added). The fact that neither groundwater nor surface water is specifically mentioned in the statute does not change the otherwise clear mandate imposed upon the State Engineer.

Accordingly, the State Engineer does not have unfettered discretion in administering water to achieve Compact compliance. Under the plain language of section 37-80-104, the State Engineer must, in a legal and equitable manner, regulate the distribution of water among users so as to "restore lawful use conditions as they were before the effective date of the compact insofar as possible." Although Defendants' Motion cites this language – it does not address it. It is undisputed that lawful use conditions in 1942 involved virtually no groundwater use, and in fact the NHP Basin was not even designated until 1966, 24 years after the Compact. (*Complaint, ¶¶ 23, 24, 26,* 28). The Hutton No. 1, Hutton No. 2 and Bonny Reservoir water rights were also appropriated after the Compact, but more than 10 years before the NHP Basin was even created. (*Id.*). The current administration of only surface water rights for Compact compliance, and not designated groundwater, is contrary to restoring the lawful use conditions as they were before the Compact took effect. Nor is it equitable to curtail one class of water users to meet the Compact, while another class of water users causing depletions under a Compact is allowed to continue diverting without curtailment.

Consistent with the above interpretation, it is noteworthy that the State Engineer's statutory mandate in C.R.S. § 37-80-104 does not exclude designated groundwater from its scope. If such a limitation was intended, the statute could simply have required curtailment of "waters of the state" to meet the Compact., since "waters of the state" are defined as all tributary surface and underground waters, excluding designated groundwater. C.R.S. § 37-92-103(13). In fact, "waters of the state" is used in the State Engineer's enabling statute to define other obligations where such a limitation was intended. *See* C.R.S. § 37-80-102(1)(h) (providing for "supervisory control over measurement, record keeping, and distribution of public waters of the state") (emphasis added). Courts "'are not to presume that the legislative body used the language idly and with no intent that meaning should be given to its language." *Colorado Ground Water Comm'n v. Eagle Peak Farms, LTD,* 919 P.2d 212, 218 (Colo. 1996) (*quoting McMillan v. Colorado*, 405 P.2d 672, 674 (Colo. 1965)). Defendants' Motion either ignores the State Engineer's mandate to restore lawful use conditions as they were before the Compact, or improperly reads the phrase "waters of the state" into C.R.S. § 37-80-104 in order to construe it as being inapplicable to designated groundwater.

Even the Groundwater Management Act itself recognizes that designated groundwater may need to be curtailed to avoid Compact violations. Specifically, C.R.S. § 37-90-112(6) provides that a well owner is liable for failing to comply with an order or rule "to cease diversions of designated groundwater or replace depletions caused by diversions of designated groundwater, and whose failure to adhere to the order or rule results in a violation of an interstate compact." Although this provision applies to any order or rules by the State Engineer, the

Colorado Ground Water Commission or groundwater management districts, and not just to orders by the State Engineer under its Compact authority, it nonetheless is further evidence that the Legislature understood that designated groundwater could cause interstate compact exceedances and would need to be curtailed as necessary.

Lastly, Colorado case law further recognizes that the State Engineer's Compact administration authority is constrained by Colorado law. It is "manifested that the [State] Engineer can and should enforce compact delivery requirements with regard to Colorado water rights, adhering to the terms of the Compact and consistent, insofar as possible, with Colorado constitutional and statutory provisions for priority administration." *Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1248 (Colo. 1996). "Thus, although the compact rule power is broad in scope, it still must be exercised to the extent possible within the existing framework of Colorado statutory priority law." *Simpson v. Bijou Irrigation*, 69 P.3d 50, 69 (Colo. 2003).

Defendants' Motion cites to language in *Bijou Irrigation*, 69 P.3d at 69 allowing the State Engineer to make the administrative decisions regarding groundwater for Compact compliance. (*Motion,* p. 22). That fails to recognize the holding in *Bijou Irrigation* that immediately follows the cited language, namely: "This court has nevertheless recognized that the State Engineer, while enforcing compact delivery requirements, must simultaneously adhere, insofar as possible, to Colorado constitutional and statutory provisions for priority administration." *Id.* at 69. "Therefore, although the State Engineer can make rules to enforce compact compliance in those instances where the compact itself is deficient in establishing standards, the means by which he does so are both dictated and constrained by other statutory requirements." *Id.* at 70. It is further noteworthy that in *Bijou Irrigation*, the rules and regulations at issue involved "criteria for determining out-of-priority groundwater depletions," "curtailment and replacement requirements for out-of-priority groundwater depletions," and "replacement plans" for groundwater depletions, thus reflecting an effort to actually curtail or augment groundwater depletions in contrast to the present situation. *Id.* at 56.[1]

B. <u>The Foundation Does Not Seek Improper Mandamus Relief</u>.

A related argument in Defendants' Motion is that the Foundation's relief "is tantamount to mandamus relief under C.R.C.P. 106(a)(2)." (*Motion,* p.18). Defendants' argument is that the Foundation is really seeking to compel the State Engineer to curtail designated groundwater before he curtails surface water, but since no such explicit duty exists, mandamus relief is improper. (*Motion,* pp. 10-11, 18). This argument fails for several reasons.

First, the Complaint does not actually seek to compel the curtailment of groundwater. Instead, the Complaint seeks declaratory judgment in Claim 1 "that the current administration of surface water in the Republican River Basin" is contrary to law. (*Complaint* ¶92.A). Such relief is sought by the Foundation "in order to protect its water rights and legal status, to determine the

[1] In *Bijou Irrigation*, the Colorado Supreme Court reversed the Water Court's ruling that the State Engineer was without authority to promulgate such rules to help achieve compliance with the South Platte River Compact, recognizing instead that the compact was not self-executing and there was a need to administer the impacts caused by increased well pumping. *See Id.* at 72.

validity of the administration of its water rights, and to terminate the ongoing controversy and remove uncertainty." (*Complaint* ¶ 92, *citing* C.R.C.P. Rule 57 and C.R.S. § 13051-101 et. seq.). That is not the same thing as seeking a mandamus to compel the State Engineer to curtail designated groundwater. In short, it is possible to issue an order granting the declaratory relief sought by the Foundation without a mandamus.

In this instance, given that the unlawful Compact administration being asserted is the curtailment of only surface water, the ultimate result may very well be the curtailment of designated groundwater for Compact purposes. However, the Complaint does not seek to compel such curtailment. Nor is it the only possible solution. An augmentation pipeline is already in place on the North Fork of the Republican River ("North Fork") and in use for Compact compliance in that sub-basin. (*See* Exh. 20 and 21 filed with *Foundation's Motion Re: Compact Administration; see also Complaint*, ¶ 44). Surface water rights were also purchased on the North Fork and in the process of being changed to be left in the river for Compact compliance. (*See* Case No. 14CW3135, currently pending in this Water Court). The Republican River Water Conservation District, created to help achieve Compact compliance, funded the pipeline and is a co-Applicant with the Yuma County Water Authority in the pending Water Court case. These methods and others may work on the South Fork as well. The Complaint does not seek to compel any such approaches – but instead seeks a ruling that the current practices are unlawful by curtailing only surface water rights for Compact compliance and not the groundwater pumping that caused the Compact compliance problem.

Even if the Foundation's claim were construed as seeking a mandamus, it would be to compel lawful administration.[2] Under C.R.C.P. 106(a)(2), mandamus relief may be sought to "compel a . . . governmental body, . . . officer or person to perform an act which the law specially enjoins as a duty . . . ." "Mandamus is only justified when a state agency has failed to perform a statutory duty or to adhere to its statutory responsibility." *Peoples Natural Gas Div. of Northern Natural Gas Co.*, 626 P.2d 159, 162 (Colo. 1981) (*citing County Comm'rs v. Edwards*, 468 P.2d 857 (Colo. 1970)). In addition, a "mandamus will lie when action has been taken arbitrarily or if it reflects a gross abuse of discretion." *Peoples Natural Gas*, 626 P.2d at 162 (*citing City Council of Denver v. Protective Ass'n*, 230 P. 598 (Colo. 1924)).

As described above, the State Engineer was given an explicit mandate and duty that he "shall . . . 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," and do so in a "legal and equitable" manner. C.R.S. § 37-80-104; *see also, Alamosa-La Jara Water Users,* 674 P.2d

[2] Although the Foundation does not seek a mandamus it seeks an injunction. An injunction is a protective remedy aimed to prevent future harm. *See Snyder v. Sullivan*, 705 P.2d 510, 513 (Colo. 1985). There is "normally broad discretion of the trial court to issue injunctive relief." *May Dep't Stores Co. v. State*, 863 P.2d 967, 981 (Colo. 1993). Contrary to inferences in Defendants' Motion, injunctive relief against other branches of government is appropriate "if the action complained of has caused or has threatened to cause imminent injury to an interest protected by law." *Bd. of County Comm'rs v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1054 (Colo. 1992); *see also Bd of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 971 - 972 (Colo. 1997). Although injunctive relief may be unnecessary once an agency's actions are disapproved by a Court because it is presumed the agency will comply with the Court's order, *Stjernholm*, 935 P.2d at 972 (Colo. 1997), injunctive relief is allowed against agencies. *See, e.g.,* C.R.S. § 24-4-106(7).

at 923 (Colo.1983) (referring to § 37-80-104 as a "mandate" for the State Engineer). The State Engineer failed to perform that duty or adhere to his statutory responsibility. This is very different from *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177 (Colo. 2000) cited in Defendants' Motion. In that instance, a designated groundwater well owner's concern that other designated groundwater wells were causing him well-to-well injury was a matter to be decided initially by the groundwater management district and was expressly made a discretionary matter under the Ground Water Management Act, not a mandate. *Id.* at 1188 – 1190. Accordingly, *Upper Black Squirrel* is not instructive as to the State Engineer's statutory mandate for intrastate Compact administration at issue in this case.

C. Designated Groundwater Depletions and Surface Water Depletions Are Similarly Situated under the Compact.

Defendants' Motion states that "surface water rights are not similarly situated to designated groundwater pumpers for Compact compliance." (*Motion*, p.20). Defendants then contend that this "difference between designated groundwater rights and surface water rights [provides] . . . a 'lawful basis to treat surface water diverters differently than [designated] ground water diverters in the NHP Basin for purposes of Compact compliance.'" (*Motion, p. 22).* Although there are clearly differences between how designated groundwater and tributary waters are administered in Colorado, those differences do not matter when it comes to consumptive use under the Compact or Compact administration.

By definition, designated groundwater is not supposed to be "available to and required for the fulfillment of decreed surface rights." C.R.S. § 37-90-103(6)(a). Despite that definition, however, it is well recognized that "the creation of a designated groundwater basin does not establish conclusively that all groundwater in the basin is designated groundwater." *Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981). In fact, designated groundwater basins are "essentially legal-political boundaries and not necessarily coincident with hydrologic boundaries." *Gallegos*, 147 P. 3d at 29 (*quoting Outline of Colorado Ground Water Law*, 1 U. Den. Water L. Rev., 275, 278 (1998)). Indeed, in recognition of this fact, the Ground Water Management Act (pre-SB-52) "specifically called for the boundaries of a designated basin to be revisited" as new information became available in order to exclude groundwater that was wrongly designated. *Gallegos*, 147 P.3d at 32.

Notwithstanding its designated status, it is undisputed that wells in the NHP Basin constitute by far the single largest source of depletions under Colorado's Compact allocation. (*Compact*, ¶ 40). In fact, the United States Supreme Court already rejected Colorado's argument that somehow groundwater depletions should be treated differently under the Compact. (*See Foundation's Motion Re: Compact Administration,* pp. 4 - 5, discussing First Report of the Special Master). For purposes of the Compact all consumptive use is treated the same. To now argue groundwater and surface water are not similarly situated in the eyes of the Compact – is to argue against the United States Supreme Court's interpretation of the Compact and the RRCA Ground Water Model developed, in part, to quantify groundwater depletions in light of that interpretation. (*See Id.*). The "Compact . . . is not only part of our state statutory law, but is also part of federal law, . . . and is thus preemptive of any conflicting state law on the same subject."

Frontier Ditch v. Southeastern Colorado Water Conservancy Dist., 761 P.2d 1117, 1123 (Colo. 1988). The State Engineer cannot simply ignore the fact that groundwater pumping is part of the Compact.

Defendants argue nonetheless that such information "does not provide any legal basis for changing [the] legal distinction" between tributary waters and designated groundwater. (*Motion,* p.22). Defendants' argument ignores the rulings of the United States Supreme Court, the inclusion of designated groundwater into the Compact, and the impact it has on Compact compliance. Further, Defendants fail to explain how the current curtailment of only surface water rights could possibly be consistent with the mandate to "restore lawful use conditions as they were before the effective date of the compact insofar as possible." C.R.S. § 37-80-104. In short, once designated groundwater depletions were made subject to the Compact – they needed to be administered like any other source of water that is subject to the Compact.

In addition, as explained above, the State Engineer's statutory mandate to administer waters for Compact compliance does not exclude designated groundwater. Indeed, the State Engineer already recognized its authority over designated groundwater in the NHP Basin for Compact compliance in its Answer to the Complaint and in recently adopting Rules and Regulations Governing the Measurement of Ground Water Diversions Affecting the Republican River Compact within Water Division No. 1. (*See Foundation's Motion Re: Compact Administration*, pp. 11-12). Accordingly, regardless of the legal differences that exist between surface water and designated groundwater, both are subject to regulation under the Compact.

Defendants cite to a holding in *Bijou Irrigation*, 69 P.3d at 69, that the "State Engineer [is] to exercise its Compact compliance authority 'to the extent possible with the existing framework of Colorado statutory priority law,'" suggesting that this somehow was intended to exempt designated groundwater from Compact administration. (*Motion*, p. 23). As described above, *Bijou Irrigation* was a case involving the regulations of tributary groundwater depletions for compact compliance. If anything, *Bijou Irrigation* demonstrates an intent to protect the existing priority law. That cannot be construed as an invitation to inflict harm on surface water rights by ignoring the impact that designated groundwater depletions are having on a Compact. Moreover, the modified prior appropriation doctrine in place in designated groundwater basins states that "[p]riority of claims for the appropriation of designated groundwater shall be determined by the doctrine of prior appropriation." C.R.S. § 37-90-109(1); *see also Upper Black Squirrel*, 993 P.2d at 1185 (describing the priority list for wells within a designated groundwater basin). In other words, the tools to administer designated groundwater under the Compact exist so as to restore lawful use conditions that predate the designation, and in a manner consistent "with the existing framework of Colorado statutory priority law."

D. Current Compact Administration Is Unconstitutional and Arbitrary and Capricious.

Defendants' Motion asserts that the curtailment of only surface water rights under the Compact and not groundwater is constitutional, arguing it is not discriminatory, or in violation of equal protection rights, or in violation of due process rights, or a regulatory taking without just

compensation, or a violation of the constitutional prior appropriation doctrine, or otherwise arbitrary and capricious. (*Motion,* pp. 24-27).

The case most analogous to the present situation is *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968), described in more detail in the Foundation's Motion Re: Compact Administration, pp. 12 – 13. In short, in curtailing only a few of the 1,600 – 1,900 wells that were recognized as impacting surface flows, the Division Engineer was found to have "proceeded discriminatorily in violation of the equal protection clause and the fourteenth amendment of the United States Constitution and of the due process clause in article II, section 25 of the Colorado constitution." *Id.* at 993. Such administration was also found to be "arbitrary and capricious." *Id.* at 997. By comparison, in this instance, the State Engineer has recognized that all wells throughout virtually the entire Republican River Basin within Water Division No. 1 (which includes the NHP Basin) are "Affecting the Republican River Compact." (2 CCR 402-16, § 16.1 – 16.3, 16.4(a)(1) and App'x thereto). Notwithstanding that recognized impact on the Compact, none of the wells are being curtailed, even though a Compact call is being administered on surface water users. Under such circumstances, the *Fellhauer* precedent is directly applicable. Such discriminatory administration is in violation of equal protections, due process and is otherwise arbitrary and capricious.

In addition to the *Fellhauer* decision, the following is a further response to the arguments made in Defendants' Motion. In addition, the Foundation incorporates by reference the law cited in its Response to the Motion for Summary Judgment on the Constitutionality of Senate Bill 52, pp. 17 - 24 ("Foundation's Response Re: SB-52") regarding the constitutional protections afforded to water rights.

i. <u>The State Engineer's Compact Administration Is in Violation of Equal Protection Rights</u>.

The Equal Protection Clause of the 14th Amendment proclaims that no state shall "deny to any person within its jurisdiction the equal protection of the laws." "Equal protection of the laws guarantees that persons who are similarly situated will receive like treatment by the law." *Harris v. Ark*, 810 P.2d 226, 229 (Colo. 1991). Defendants' Motion describes the rational basis test used to determine whether a statute is in violation of equal protection rights. *See Central Colorado Water Conservancy Dist. v. Simpson,* 877 P.2d 335, 341 (Colo. 1994) (the rational basis test applies to equal protection claims when the statute does not infringe on a fundamental right, nor creates an improper classification based on race, religion, national origin or gender); *see also Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901, 906 (Colo. 1993). In this instance, however, the applicable statute regarding the State Engineer's compact authority is not being challenged. The statute would appear, on its face, to be neutral as between surface water and groundwater users. Instead, this case involves the discriminatory enforcement of the State Engineer's statutory compact authority.

"A claim of discriminatory enforcement must be supported by evidence which will permit a factfinder to reasonably conclude that the enforcement not only proceeded from an unjust and illegal discrimination between persons in similar circumstances but also that the

discriminatory enforcement was intentional or purposefully carried out." *Orsinger Outdoor Advertising, Inc. v. Dep't of Highways*, 752 P.2d 55, 62 (Colo. 1988) (*citing Yick Wo v. Hopkins,* 118 U.S. 356, 373-374 (1886), *May v. People,* 636 P.2d 672, 681-82 (Colo. 1981), and *Lloyd A. Fry Roofing Co. v. State Dep't of Health Air Pollution Variance Bd.*, 553 P.2d 800, 809 (Colo. 1976)). The "similarly situated" inquiry, however, "does not end by merely acknowledging obvious superficial differences between persons or groups, but instead focuses on whether 'reasonable differences' between the two can justify a law's differential treatment." *Dallman v. Ritter*, 225 P.3d 610, 634 (Colo. 2010) (*citing Bushnell v. Sapp*, 571 P.2d 1100, 1105 (Colo. 1977)). "If the definition of similarly situated were not tethered to how persons are affected by the law, any law that could demonstrate a facial difference between two groups would escape scrutiny and pass constitutional muster, completely eviscerating the Equal Protection Clause." *Dallman*, 225 P.3d at 634.

As already described above, for purposes of Colorado's consumptive use allocation under the Compact all consumptive use is the same regardless of whether it occurs through a well or a headgate. The differences that exist between designated groundwater and surface water are irrelevant when it comes to allocating consumptive use under the Compact. Despite the fact that both surface water users and groundwater users are similarly situated with regard to consumptive use under the Compact, the State Engineer has intentionally and purposefully enforced the Compact in a discriminatory fashion so as to curtail only the class of water users that is having the least impact on the Compact.

ii. The State Engineer's Compact Administration Is in Violation of Due Process.

Under a procedural due process claim, the essential question is one of "fundamental fairness . . . [which] embodies adequate advance notice and opportunity to be heard prior to state action resulting in deprivation of a significant property interest." *Barham v. Univ. of Northern Colo.*, 964 P.2d 545, 550 (Colo.App. 1997) (*citing Mountain States Telephone & Telegraph v. Dep't of Labor*, 520 P.2d 586 (Colo. 1974)). Defendants argue this standard is not met because of "the multiple processes required under the Groundwater Management Act for designation of a designated basin and to obtain final permits for wells. . . ." (*Motion,* 25). That argument by Defendants is discussed in Foundation's Response Re: SB-52, p. 22. However, the argument is not relevant in the context of Compact administration. The question for purposes of the Motion is whether the manner of Compact administration is violating the Foundation's due process.

There was no advance notice or opportunity to be heard before the State Engineer opted to curtail only surface water rights for Compact compliance. In fact, there had not been administration or calls on this stretch of the South Fork prior to the Compact call. (*See this Court's Order in Case No. 12CW111, dated December 16, 2013, p. 7*, attached as **Exhibit 37**).[3] Yet, when groundwater depletions were included in Colorado's Compact entitlement, Colorado fell out of compliance with the Compact. (*Complaint, ¶ 40*). The State Engineer responded by deciding to curtail only surface water rights – and not the groundwater that had caused the problem. That decision was made without advance notice and without an opportunity to be

[3] Exhibits are numbered sequentially with the exhibits provided in support of the Foundation's Motions for Summary Judgment and an amended exhibit list is filed herewith.

heard. The result is a deprivation of a significant property interest by refusing to allow any diversions under the Hutton No. 1 and Hutton No. 2 Ditch water rights, and by impacting the Hale Ditch through the draining of Bonny Reservoir and preventing it from refilling.

"The Due Process Clause of the Fourteenth Amendment has a substantive component that protects certain individual liberties from state interference despite procedural safeguards, unless the infringement is narrowly tailored to achieve a compelling state interest." *People in Interest of C.E.*, 923 P.2d 383, 385 (Colo. App. 1996) (*citing Reno v. Flores*, 507 U.S. 292 (1993). "Substantive due process prohibits the government from engaging in conduct that . . . interferes with rights implicit in the concept of ordered liberty." *People v. Dash*, 104 P.3d 286, 290 (Colo. App. 2004), *cert. denied*. Although substantive due process protects a narrow range of fundamental interests, a property right such as a water right is such an interest, as reflected in the *Fellhauer* decision discussed above and in Foundation's Response Re: SB-52. Property rights cannot be deprived of value by an agency whose actions are contrary to law.

iii. The State Engineer's Compact Administration Has Taken Foundation Property Without Just Compensation.

The Colorado Constitution provides that "[p]rivate property shall not be taken or damaged for public or private use, without just compensation." Colo. Const. Art. II § 15; *see also* U.S. Const. Amend V. An inverse condemnation claim is appropriate "when state action has the effect of substantially depriving the property owner of the use and enjoyment of the property, but the State has not formally brought condemnation proceedings." *Kobobel v. State Dep't of Natural Resources*, 249 P.3d 1127, 1133 (Colo. 2011).

The elements of inverse condemnation are "'(1) that there has been a taking or damaging of a property interest; (2) for a public purpose without just compensation; (3) by a governmental or public entity that has the power of eminent domain but which has refused to exercise it.'" *Kobobel*, 249 P.3d at 1133 (*quoting Thompson v. City & County of Denver*, 958 P.2d 525, 527 (Colo. App. 1998)). "[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed … by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan.*" *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 548 (2005). A per se taking occurs where the regulation either (i) physically invades the property, or (ii) deprives "all economically beneficial us[e]" of the property" *Id.* at 538 (*citing Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) and *quoting Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). If the property owner fails to prove a per se taking, a taking may still be proven under the factors set forth in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978). *See Lingle,* 544 U.S. at 538. As further explained in *Palazzolo v. Rhode Island*, "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." 533 U.S. 606, 617 (2001) (citing *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978)).

Defendants' Motion states that no taking has occurred "because the State Engineer's actions substantially advance the legitimate state interest of Compact compliance." (*Motion,* p. 26). This argument is addressed in Foundation's Response Re: SB-52, pp. 20. As stated therein, similar arguments have been rejected by the Colorado Supreme Court in the water rights context and, in any event, the "substantially advances a legitimate state interest" inquiry is no longer a proper test because it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights or how any regulatory burden is *distributed* among property owners." *Lingle*, 544 U.S. at 529 (emphasis in original). The concerns expressed in *Lingle* are equally applicable here. Moreover, the State Engineer's actions upon which the claim is predicated do not solely pertain to Compact compliance as Defendants suggest, but instead to imposing that burden of Compact compliance on one class of water use under the Compact, but not another. There is no legitimate state interest in such selective administration. The only interests being protected are the groundwater users at the cost of the surface water rights.

Further, a per se taking has occurred in any event because the Foundation has lost the economically viable use of its surface water rights in the Hutton No. 1 and Hutton No. 2, which have been under continual curtailment for the past roughly 8 years. (*See this Court's Order in Case No. 12CW111,* dated December 16, 2013, p. 7, attached as **Exhibit 37**, noting that the Engineers placed a Compact call on the river in 2008.). Lastly, even if such a per se taking had not occurred, the more fact-specific inquiry under *Penn Central* is satisfied in this instance given the discriminatory nature of the State Engineer's actions and the resulting interference with investment backed expectations and loss of property rights.

iv. The State Engineer's Compact Administration is in Violation of the Constitutional Prior Appropriation Doctrine.

The Foundation's right to divert water for beneficial use under decreed and vested property rights are being deprived by the arbitrary administration under the Compact. In asserting that such administration is nonetheless consistent with the prior appropriation doctrine, Defendants' Motion states that "the Foundation still has decreed surface water rights, and is still entitled to divert surface water under those rights." (*Motion,* p. 26). Defendants' argument ignores the fact that the Hutton No. 1 and Hutton No. 2 water rights have been under a continuous call since 2008 and its Hale Ditch is being deprived of water from the draining of Bonny Reservoir for Compact purposes and the continuous call placed on that facility.

Defendants also assert that the prior appropriation doctrine under the 1969 Act does not apply to designated groundwater. (*Motion, p.* 26). Although that is a true statement, as described above, the differences between designated groundwater and tributary waters of the State do not matter when it comes to Colorado's use of water under the Compact. Since both sources are equally subject to the Compact – both should be equally curtailed under the Compact. It is well-established law that water right owners are entitled to the conditions on the river that existed at the time of their appropriation. *See Colorado Water Conservation Bd. v. City of Cent.*, 125 P.3d 424, 434 (Colo. 2005). This concept is built into the State Engineer's mandate to "restore lawful use conditions" in its intrastate administration. C.R.S. § 37-80-104.

The failure to do so is not only a violation of the statute – but of the constitutional prior appropriation doctrine.

v. The State Engineer's Compact Administration Is in Excess of Authority, and Arbitrary and Capricious.

Agencies of the State "are without power to act contrary to the provisions of law or the clear legislative intendment, or to exceed the authority conferred on them by law." *Flavell v. Dep't of Welfare*, 355 P.2d 941, 943 (Colo. 1960) (*quoting* 73 C.J.S. Public Admin. Bodies and Procedure § 59); *see also Colo. Dep't of Labor v. Colo. Industrial Comm.*, 665 P.2d 631, 633 (Colo.App. 1983) (same). Further, agency actions cannot be arbitrary and capricious, meaning they must be supported by competent evidence. *Dolan v. Rust*, 576 P.2d 560, 562 (Colo. 1978)

The manner in which the State Engineer's Compact administration is contrary to law and the lack of any basis for such administration has been discussed at length in this Response and not repeated here. As was made clear in *Fellhauer*, 447 P.2d at 997, it is arbitrary and capricious to selectively curtail some users that deplete a stream, and not others. Defendants' Motion references a statement in *Bijou Irrigation* that recognizes how it can be difficult to administer delayed impacts of groundwater pumping as justification for why the State Engineer's actions are not arbitrary and capricious. (*Motion,* p.27). However, as described above, the result in *Bijou Irrigation* was in support of the State Engineer's authority to promulgate rules to help achieve compliance with the South Platte River Compact, recognizing a need to administer the impacts caused by increased well pumping. *Bijou Irrigation*, 69 P.3d at 72. Moreover, in this instance, the amount of groundwater depletions and delayed impacts is already quantified in the RRCA Groundwater Model approved by the United States Supreme Court and being used for Compact administration. Indeed, that is why Colorado is out-of-compliance with the Compact in the first place.

IV. CONCLUSION

For the reasons set forth herein, Defendants' Motion should be denied and instead, a ruling entered finding that the current administration of surface water for Compact compliance is contrary to well established Colorado law, in violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution and the due process clause or Article II, section 25 of the Colorado constitution, a regulatory taking, and otherwise arbitrary and capricious.

Respectfully submitted this 8th day of April, 2016.

PORZAK BROWNING & BUSHONG LLP

Steven J. Bushong (#21782)
Karen L. Henderson (#39137)
Attorneys for the Jim Hutton Educational Foundation

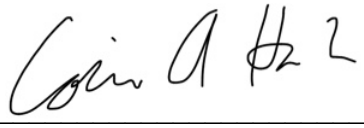
CERTIFICATE OF SERVICE

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 MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM 1 RE: STATE ENGINEER ADMINISTRATION OF DESIGNATED GROUNDWATER** 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)

Party Name	Party Type	Attorney Name
Don Myrna and Nathan Andrews	Defendant-Well Owner	Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch)
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	Defendant-Well Owner	David W Robbins (Hill and Robbins PC)

Party Name	Party Type	Attorney Name
Conservation Dist		Peter J Ampe (Hill and Robbins PC)
Saving Our Local Economy LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.) 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