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**
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THE JIM HUTTON EDUCATIONAL FOUNDATION'S RESPONSE TO THE AMENDED MOTION FOR SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF THE GROUND WATER MANAGEMENT ACT OF 1965

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation ("Foundation"), acting by and through undersigned counsel, hereby responds to the Amended Motion for Summary Judgment on the Constitutionality of the Ground Water Management Act

of 1965 dated February 29, 2015, filed by the Yuma County Water Authority Public Improvement District; the Marks Butte, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts; Republican River Water Conservation District; the "North Well Owners"; Tri-State Generation and Transmission Association, Inc.; 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; and the City of Burlington ("Defendants' Motion" or "Motion").[1]

I. INTRODUCTION.

1. The Defendants' Motion addresses the Foundation's third claim for relief that the Ground Water Management Act of 1965 ("Groundwater Act" or "Act") is unconstitutional if designated groundwater that is subject to the Republican River Compact ("Compact") cannot be administered pursuant to the Compact. The Defendants' Motion seeks summary judgment on the basis that the Groundwater Act is constitutional.

2. As set forth in the Complaint, Claim 3 is essentially an alternative claim in the event the Foundation does not get relief under Claims 1 and/or 2. This would mean that the groundwater wells within the NHP Basin are allowed to dry-up the river and senior water rights, and in response to the resulting Compact shortfall, the State Engineer is allowed to administer a Compact Call only against surface water rights and drain Bonny Reservoir. Therefore, the Groundwater Act, or some other source of authority, would have prevented the Foundation from obtaining any relief against the taking of its water rights.

3. Given that Claim 3 is an alternative claim, the Defendants' Motion is premature because it is not yet known what scenario this claim would be addressed, or if it would even need to be addressed at all. Therefore, the Foundation respectfully requests that the Court postpone addressing the Defendants' Motion until it is known whether Claim 3 needs to be addressed and if so, under what scenario.

4. In the event the Court disagrees with the Foundation that the Defendants' Motion is premature, the Foundation respectfully requests that the Court deny the Motion for the reasons set forth herein. Given the unknowns discussed above, this Response assumes the Foundation was not provided any relief under both Claim 1 and Claim 2.

5. The issues raised by Defendants' Motion are similar to the issues raised and briefed in the Foundation's Motion for Summary Judgment on its Senate Bill 52 Claim ("Foundation's SB-52 Motion"), the Foundation's Motion for Summary Judgment on its Compact Administration Claim ("Foundation's Compact Motion"), as well as the Foundation's Response to the Defendants' SB-52 Motion ("Foundation's SB-52 Response") and the Foundation's Response to

[1] The Foundation recognizes that only some of the Defendants joined in the Motion. For purposes of convenience, however, the Foundation will refer to the Defendants that did join in the Motion as "Defendants" in this Response.

the Defendants' Compact Motion ("Foundation's Compact Response"), which are fully incorporated herein by this reference.

II. UNDISPUTED FACTS.

6. In its Motion, the "Defendants ask the Court to accept the factual assertions in the Foundation's Complaint as true. Thus, for purposes of this Motion, no disputed issues of material fact exist relating to the Foundation's third claim." (Motion, p. 5). The Foundation has no issue with this approach.

III. ARGUMENT IN RESPONSE TO DEFENDANTS' MOTION.

7. The Groundwater Act is unconstitutional as applied to the Northern High Plains Designated Groundwater Basin ("NHP Basin") to the extent that it exempts the use of groundwater that has more than a *de minimis* impact on surface streams from the constitutional prior appropriation doctrine and from curtailment under the Republican River Compact ("Compact"). There must be a way to ensure that groundwater that does not meet the definition of designated groundwater is administered under the 1969 Act.

8. While the Groundwater Act presumes groundwater within the NHP Basin has little, if any, impact on surface flows based on a three-hour hearing the Colorado Ground Water Commission ("Commission") held in 1966, the United States Supreme Court and the states of Colorado, Nebraska, and Kansas all recognize that groundwater is causing streamflow depletions in the Republican River Basin based on the RRCA Model. (*See* the Foundation's Compact Motion). In fact, the Division Engineer, David Nettles, testified under oath that the Model shows that groundwater pumping depletions from wells in the NHP Basin are the single biggest source of depletions under Colorado's Compact entitlement. (*See* Excerpt of David Nettles deposition testimony dated March 5, 2013, in Case No. 12CW111, Water Division No. 1, attached as Exhibit 14 to the Foundation's Compact Motion, 68:13-17).

9. In other words, designated groundwater is both recognized as being subject to the Compact and as causing Colorado's Compact shortfall – yet it is surface water that is curtailed to meet the Compact.

10. Despite this information and despite the fact that the NHP Basin was created subject to a requirement that the Commission modify the basin boundaries to exclude improperly designated groundwater, the legislature amended the Groundwater Act in a manner that exceeds its authority and violates the constitution. The General Assembly can only enact laws regulating the distribution of water to appropriators "provided they do not substantially affect constitutional or vested rights." *See Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893).

11. The Foundation's vested water rights have been stripped of their priority in violation of the prior appropriation doctrine; have been retroactively impaired; have been taken without just compensation; and have been denied due process and equal protection under the law.

Accordingly, the Groundwater Act must be deemed unconstitutional in the event the Foundation is denied relief under Claim 1 and/or Claim 2.

A. The Groundwater Act Violates the Prior Appropriation Doctrine.

12. The Foundation's SB-52 Motion and the Foundation's SB-52 Response are fully incorporated into this section to avoid repeating the extensive discussion of the law and analysis that has already been briefed.

13. The Groundwater Act violates the prior appropriation doctrine because it allows the use of groundwater that has more than a *de minimis* impact on surface flows to operate outside the prior appropriation system. Yet, by definition, designated groundwater cannot have more than a *de minimis* impact on surface waters. *See* C.R.S. § 37-90-103(6)(a); *see also Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d at 31. Groundwater must have less than a *de minimis* effect on any surface stream to be exempt from the constitutional prior appropriation doctrine. *See Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1182 (Colo. 2000).

14. In fact, groundwater that has more than a *de minimis* impact on surface flows "must necessarily be tributary," *id.* at 30, fn. 5, and the Colorado Constitution requires it to be governed by the prior appropriation doctrine. *See* Colo. Const. art. XVI, § 5, 6; *see also Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882). Tributary groundwater is treated like surface water because it "is hydraulically connected to the surface waters of a stream … [and the] use of this ground water may reduce available surface water that decreed appropriators would otherwise be able to divert in order of priority." *Colorado Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 69-70 (Colo. 2003) (internal citations omitted). The groundwater use in the NHP Basin is depleting the surface flows in the Republican River more than a *de minimis* amount. (*See* Foundation's Compact Motion).

15. Instead of forcing the Commission to modify the boundaries of the NHP Basin as the plain language of the Groundwater Act previously required, the legislature amended the Act in a manner that prevents the boundaries of a basin from being modified and permanently insulates improperly designated groundwater users from the constitutional priority system. Such an amendment ignores the constitutional limits placed on the legislatures' plenary authority and the simple fact that the Groundwater Act violates the constitution if it applies to groundwater that does not meet the definition of designated groundwater.

16. Moreover, the General Assembly's plenary authority over water that is not part of the natural stream (i.e. less than a *de minimis* impact on surface flows) is not absolute. *Id*. It is subject to constitutional limitations. *See Passarelli v. Schoettler*, 742 P.2d 867, 869 (Colo. 1987) ("The General Assembly exercises [its] plenary power … subject only to constitutional limitations."). These constitutional limits on the General Assembly provide the Foundation with a guarantee that the legislature cannot enact laws that impair its vested water rights. *St. Jude's Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442, 448 (Colo. 2015) ("[T]he constitution guarantees Colorado's system of prior appropriation as it had developed since territorial days and protects the people of the state from divestment of appropriation."). Whenever a legislative

enactment comes into conflict with the constitution, Courts are required to enforce the constitution as the paramount law. *See Passarelli v. Schoettler*, 742 P.2d at 872 ("It is the duty of the General Assembly to obey a constitutional mandate, and where a statute and the constitution are in conflict the constitution is paramount law.").

17. The Groundwater Act violates the prior appropriation doctrine by "creat[ing] a new class of water rights not subject to the principles of prior appropriation established by Article XVI, Sections 5 and 6 of the Colorado Constitution." *Central Colorado Water v. Simpson*, 877 P.2d 335, 345 (Colo. 1994) (emphasis added). It allows groundwater in the NHP Basin that is physically impacting the stream and Colorado's Compact allocation to be treated, legally, as though it only has a *de minimis* impact on the stream. This constitutes legal fiction and is injuring senior surface water rights of their priority and is impairing Colorado's obligation to comply with the Compact. Such fiction is not allowed to "work injustice." *Lehl v. Strong Mercantile Co.*, 259 P. 512, 513 (Colo. 1927). Legal fiction also cannot be used to "preclude redress" because it "is at odds [] with fundamental fairness." *Neves v. Potter*, 769 P.2d 1047, 1051 (Colo. 1989).

18. Moreover, the cases the Defendants cite in support of their claim that this particular challenge to the Groundwater Act has already been made and rejected is misleading. (Motion, p. 11). All but one of the cases do not stand for the cited proposition.[2] The only relevant case is *Kuiper v. Lundvall*, wherein Supreme Court upheld the constitutionality of the Groundwater Act because the data showed that the groundwater would take over 100 years to reach the stream. 529 P.2d 1328 (Colo. 1974). However, the Supreme Court later refined this "100-year test" in *District 10 Water Users Assoc. v. Barnett*, 198 Colo. 291, 294, 599 P.2d 894, 896 (1979). In *District 10*, the Colorado Supreme Court made it clear that the "fundamental consideration" about whether groundwater was tributary was "the length of time in which use of the wells will affect the surface stream, not necessarily limited to a consideration of the length of time which

[2] *In re Matter of Water Rights*, 361 P.3d 392, 397 (Colo. 2015) ("… we need not address Meridian's contention that because the [Groundwater] Act interferes with its right to divert the unappropriated waters of natural streams, that act is unconstitutional."); *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177 (Colo. 2000) (The constitutionality of the Act not at issue); *Danielson v. Kerbs Ag., Inc.*, 646 P.2d 363, 372 (Colo. 1982) (did not involve a challenge that the Act violated the prior appropriation doctrine; court found that not allowing a well owner to irrigate additional land was not "an unconstitutional retroactive application of Rule 11 of the Management District and of section 37-90-107(1) of the Act"); *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981) (found no violation of due process because the Groundwater Act provided a procedure to assert the claimed right); *Thompson v. Colo. Ground Water Comm'n*, 575 P.2d 372 (Colo. 1978) (finding that the Commission's practice of applying the "three-mile test" did not violate plaintiff's right to divert unappropriated water because there was no unappropriated water to divert under the test and the same formula and factors were used in applying the test, so it did not violate equal protection); *Larrick v. North Kiowa Bijou Management District*, 510 P.2d 323, 328-329 (Colo. 1973) (holding that the Commission has "jurisdiction to adjudicate appellants' appropriation of designated ground water," but the Court expressly stated that it did not reach the question of "whether this is tributary water and, if so, whether tributary water may be included in a designated ground water basin."); and *Fundingsland v. Colo. Ground Water Comm'n.*, 468 P.2d 835, 836 (Colo. 1970) ("Plaintiff makes it very clear that he does not in any way contest the constitutionality of the Ground Water Act under which this proceeding was conducted"; no unappropriated water available to divert within the 3-mile circle, so didn't violate right to divert unappropriated water).

the water upon being left undisturbed would reach the stream." *Dist. 10 Water Users Ass'n*, 599 P.2d at 896.

19. Here, it is undisputed that the use of the wells within the NHP Basin is and has been significantly impacting the surface streams. In fact, those surface water depletions caused by well pumping are quantified by the RRCA Groundwater Model in determining Colorado's use of water under the Compact. This situation illustrates why it was so important that the NHP Basin boundaries were always subject to C.R.S. § 37-90-106(1)(a), which mandated the boundaries be redrawn based on future conditions and factual data. Indeed, it would be hard to find a clearer case of future conditions and factual data requiring the boundaries to be redrawn.

20. In short, if the Foundation is not entitled to relief under Claims 1 and/or 2 to address this problem, then there is a clear violation of the prior appropriation doctrine, and the Foundation lost its prior right to use the water. "In fact, much of the value of a water right lies in its priority: It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. The value of adjudicating this property right is that it allows a priority to the use of a certain amount of water at a place somewhere in the hierarchy of users who also have rights to water from a common source such as a lake or river." *Colorado Water Conservation Bd. v. City of Cent*., 125 P.3d 424, 434 (Colo. 2005) (internal citations omitted).

B. The Groundwater Act is Unconstitutionally Retrospective Legislation.

21. The Foundation's SB-52 Motion and the Foundation's SB-52 Response are fully incorporated into this section to avoid repeating the extensive discussion of the law and analysis that has already been briefed.

22. The Foundation does not claim that the Groundwater Act, as originally enacted in 1965, is unconstitutionally retrospective. Rather, following the change to the Groundwater Act in 2010 the Groundwater Act became unconstitutionally retrospective because, as changed, it impairs vested rights, creates new obligations, imposes a new duty, and attaches a new disability.

23. As noted above, from the time the Groundwater Act was enacted in 1965 until SB-52 became effective on August 11, 2010, the statute authorizing the Commission to establish designated groundwater basins also required the Commission to alter the basin boundaries as "future conditions and factual data justify" to exclude improperly designated groundwater. *See* C.R.S. § 148–18–5 (1966) (later became § 37-90-106(1)(a). The 1965 legislature "anticipated that a designated groundwater basin could include groundwater that does not fall within the definition of designated groundwater," *Gallegos*, 147 P.3d at 28, and that the "General Assembly … specifically called for the boundaries of a designated basin to be revisited." *Id.* at 32.

24. The Commission's non-discretionary duty to modify the basin boundaries to exclude improperly designated groundwater operated as a savings clause for the Groundwater Act. It was in place to ensure that the Groundwater Act only applied to groundwater that actually met the definition of designated groundwater. Any water that didn't meet the definition was removed

from the basin boundaries to ensure the Groundwater Act remained consistent with the Colorado Constitution. *See Gallegos*, 147 P.3d at 31 ("[G]round water which has more than a *de minimis* impact on surface waters cannot properly be classified as designated ground water."); *see also* C.R.S. § 37-90-103(6)(a).

25. Since the Groundwater Act no longer includes this savings clause and prevents the Commission from modifying the boundaries to exclude improperly designated groundwater, it operates retroactively in a manner that changes the legal consequences of the Commission's initial determination of the NHP Basin boundaries. *See Weaver v. Graham*, 450 U.S. 24, 31 (1981). A once modifiable boundary is now fixed. It also retroactively strips vested surface water rights of their senior priorities, precludes all means of redress for surface water rights against improperly designated groundwater users, prevents improperly designated groundwater from being administered under the correct statutory scheme as required by the Constitution, and changes the duties of the Commission. As such, the Groundwater Act must be deemed unconstitutionally retrospective legislation. *See Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 167 (Colo. 1878).

C. The Groundwater Act Constitutes a Taking.

26. The Foundation's SB-52 Motion, the Foundation's SB-52 Response, the Foundation's Compact Motion, and the Foundation's Compact Response are fully incorporated into this section to avoid repeating the extensive discussion of the law and analysis that has already been briefed.

27. If the Foundation is not allowed to demonstrate that the groundwater pumping is impacting its water rights, then the Foundation's water rights will have been taken without compensation and given to the groundwater users in the NHP Basin in violation of the Colorado Constitution Colo. Const. Art. II § 15 ("[p]rivate property shall not be taken or damaged for public or private use, without just compensation."); *see also* U.S. Const. Amend V. Similarly, if the State Engineer is allowed to curtail only surface water rights for Compact compliance, even though the Compact shortfall is being caused by groundwater pumping, that would further result in a taking. The takings clause is an important Constitutional protection for property rights because it ensures that the government cannot take the property from one and give it to another.

28. If the Groundwater Act insulates groundwater that does not meet the definition of designated groundwater from the priority system, then it allows junior water rights to divert water from the same source of supply ahead of senior rights thereby stripping the Foundation's water rights of their most valuable right – their priority date. Ultimately, it causes the long-standing prior appropriation doctrine — a doctrine "founded in equity" — to crumble by allowing wells to pump what is effectively tributary groundwater outside of the prior appropriation system to the injury of senior surface water rights. *See Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893) ("…to deprive a person of his priority is to deprive him of a most valuable property right ....").

29. In the context of water rights, the ability to place a call on the river and curtail all junior users from using water during times of shortage represents the right to exclude others from your property, which is "one of the most essential sticks in the bundle of rights." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). In effect, it constitutes a physical taking or appropriation of the right to use in priority. The Groundwater Act operates as a limitation on this right by preventing the Foundation from excluding improperly designated groundwater from using its property. The right to exclude others is so essential to the use that such a limitation on that right amounts to a taking. *Id*. at 179-180 ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

30. Given the foregoing, the Defendants' claim that the Groundwater Act does not constitute a regulatory taking should be dismissed for the same two reasons set forth in the Foundation's SB-52 Response. Essentially, that an analogous concept was rejected in *Armstrong v. Larimer Cty. Ditch Co*., 27 P. 235, 238 (Colo. 1891); and given that the United States Supreme Court expunged its "substantially advances a legitimate state interest" test for a takings analysis in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 529 (2005). Moreover, the loss of its senior priorities has deprived the Foundation of the economic viability of its water rights. "The value of the property right is that it allows a priority to the use of a certain amount of water at a place somewhere in the hierarchy of users who also have rights to water from a common source such as a lake or river." *Kobobel v. State, Dep't of Nat. Res.*, 249 P.3d 1127, 1134 (Colo. 2011) (internal citations omitted).

31. Further, as set forth in the Foundation's Compact Response, a regulatory 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.

C. The Groundwater Act Violates Due Process.

32. The Foundation's SB-52 Motion, the Foundation's SB-52 Response, the Foundation's Compact Motion, and the Foundation's Compact Response are fully incorporated into this section to avoid repeating the extensive discussion of the law and analysis that has already been briefed.

33. The Defendants argue that the Foundation is not entitled to due process because the Groundwater Act provided for notice back in 1966 when the NHP Basin was established. Therefore, the Foundation is precluded by claim and issue preclusion due to the need for finality with regard to the basin boundaries. This argument ignores the fact that the NHP Basin was created subject to a requirement that the Commission modify the basin boundaries to exclude

improperly designated groundwater. While the legislature essentially gutted this requirement from the Groundwater Act when it enacted SB-52, such a substantive change in the law cannot also be used to deny the Foundation its right to due process. "The hand of the legislature is restrained by the due process clause of our state constitution from overturning established principles of private rights and distributive justice." *People ex rel. Juhan v. Dist. Court for Jefferson Cty.,* 165 Colo. 253, 265-66 (1968). The due process clause is also "intended to secure the individual from the arbitrary exercise of the powers of government" *Daniels v. Williams,* 474 U.S. 327, 331 (1986). In fact, "[t]he keystone in the structure of due process is that the person aggrieved shall have the unquestioned right to his day in court." *Ace Flying Serv., Inc. v. Colorado Dep't of Agric*., 314 P.2d 278, 284 (Colo. 1957).

34. The notion that the Foundation had its chance at due process at the time the NHP Basin was designated, or even when individual well permits were issued, is a reoccurring theme of Defendants in their various motions. However, the equities cut the other way. The NHP Basin and every well permit issued thereafter was subject to the pre-SB-52 version of § 37-90-106(1)(a). This ensured the protection of water rights. More importantly, there was no cut-off to revisiting the boundaries. *See Gallegos*, 147 P.3d at 32, fn. 8. Given the rulings of the United States Supreme Court and the development of the RRCA Groundwater Model, there was no longer any doubt that much of the NHP Basin improperly included tributary groundwater. Rather than confront the problem with well curtailment or augmentation plans to protect surface water rights, the groundwater community lobbied to change the law to completely do away with the protections in § 37-90-106(1)(a). If allowed to stand, SB-52 retrospectively codifies the taking of surface water rights for use by groundwater users without due process.

35. In addition, the only reason the Defendants' arguments that claim or issue preclusion could apply in this case is if SB-52 was allowed to stand in its entirety. Prior to SB-52, this argument was flatly rejected by the Colorado Supreme Court in *Gallegos*. *See Gallegos*, 147 P.3d at 33. However, if this were the case, it would further support the fact that the Groundwater Act violates the Foundation's right to due process of law to address the injury to its vested water rights. *See People ex rel. Juhan,* 165 Colo. at 265-66 ("The hand of the legislature is restrained by the due process clause of our state constitution from overturning established principles of private rights and distributive justice.").

36. Defendants offer an analogy that compares the need for finality to an augmentation plan in that there is a limit on how long a person can claim injury as a result of the augmentation plan. (Motion for Summary Judgment on the Constitutionality of Senate Bill 10-52, p. 24). However, as stated in the Foundation's SB-52 Motion, the more accurate analogy is this: Water User B has an augmentation plan decree that for decades has included a term and condition to protect Water User A's senior water right. Water User B no longer wants this term and condition in its decree, so it has the legislature remove it. The augmentation plan continues to operate without the term and condition. When Water User A protests that the legislature's arbitrary removal of that term and condition injures its water right, Water User B responds by claiming Water User A no longer has the right to claim injury because it has a need for finality — despite the fact that the only reason the augmentation plan decree was entered in the first place was

because it had this protective term and condition. Such reasoning cannot be used to deny the Foundation its right to due process and the right to protect its water rights from injury.

37. The Defendant's other arguments regarding a regulatory taking are addressed in the Foundation's SB-52 Response.

D. The Groundwater Act Violates Equal Protection.

38. The Foundation's Compact Motion and the Foundation's Compact Response are fully incorporated into this section to avoid repeating the discussion of the law and analysis that has already been briefed.

39. Equal protection with regard to Compact administration is addressed in the Foundation's Compact Motion and the Foundation's Compact Response and is not reiterated here. In short, current Compact administration of surface water is in violation of the Foundation's equal protection rights by curtailing only surface water for compliance with the Compact, and not the groundwater use that is causing the Compact problem. To whatever extent that discriminatory administration is a result of the Management Act or the designated status of the groundwater in the NHP Basin, then it implicates the constitutionality of the Management Act itself.

40. The Groundwater Act also violates the equal protection clause if it applies to groundwater that does not meet the definition of designated groundwater. *See* U.S. Const. amend. XIV, § 1 ("The Equal Protection Clause provides that "[no State shall] deny to any person within its jurisdiction equal protection of the laws."). "Colorado's Constitution does not contain a similar provision, but the right to equal protection of the law is guaranteed to Colorado citizens by means of the due process clause of article II, section 25 of the Colorado Constitution. *Cent. Colo. Water Conservancy Dist.*, 877 P.2d at 340–41; *City & Cty. of Broomfield v. Farmers Reservoir & Irrigation Co.,* 239 P.3d 1270, 1278 (Colo. 2010).

41. Here, if groundwater users are allowed to divert water that depletes the natural stream free from the prior appropriation system, while surface owners are not, then SB-52 denied surface water right owners equal protection under the law. In essence, surface and groundwater users would be using the same water and would be similarly situated in terms of depleting surface flows, but they would not be similarly treated under the law. "The central concern behind the right to equal protection of the law has been to root out any action by government which is tainted by prejudice against discrete and insular minorities, the sort of prejudice which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities' in our society." *City & Cty. of Broomfield*, 239 P.3d at 1278 (internal citations omitted).

42. In their Motion, the Defendants point out that the equal protection clause was not violated in *Central Colorado Water Conservancy District v. Simpson*. In *Simpson*, however, the court found that SB-120 (1989), which provided a compromised augmentation exemption for evaporation losses from pre-1981 sand and gravel pits, did not alter vested water rights because they were still subject to the prior appropriation doctrine and "senior appropriators [could still]

seek legal redress for any injury caused to their water rights by holders of junior water rights." 877 P. 2d at 342-343, 348. This fact makes it distinguishable from the situation here.

43. Moreover, there is no basis for allowing such unequal treatment under the law under the guise of a legitimate state interest. *See Armstrong*, 27 P. at 238 (finding that the constitutional provision giving domestic use priority over irrigation rights in times of shortage did not apply retrospectively to irrigation rights that vested before the adoption of the constitution because it would impair, if not destroy, those property rights). In fact, in *Armstrong*, the Supreme Court stated that the case "should have been at once dismissed for want of equity" despite also finding that the junior right supplied an estimated 200 settlers and their families with domestic water – some of which were "wholly dependent" on it. *Id*. at 238, 236. The Colorado Supreme Court did not hesitate to prevent a constitutional preference from operating to the injury of vested water rights, it should be without question that any similar claim here would also be precluded.

E. The Groundwater Act Impairs Colorado's Obligations under the Compact.

44. The Foundation's Compact Motion and the Foundation's Compact Response are fully incorporated into this section to avoid repeating the extensive discussion of the law and analysis that has already been briefed.

45. In their Motion, the Defendants claim that the Groundwater Act did not alter the Compact's equitable division of waters in the Republican River basin, "nor did it alter the State Engineer's obligations under C.R.S. §37-80-104 to administer the Compact. Rather, the [Groundwater Act] was an exercise of Colorado's right under the Compact to allocate the waters to which it is entitled." (Motion, p. 26).

46. As described in detail in the Foundation's Compact Motion and Compact Response, the State Engineer does not have unfettered discretion in administering the Compact against surface water users. Pursuant to C.R.S. § 37-80-104, the State Engineer must "restore lawful use conditions as they were before the effective date of the compact insofar as possible." The State Engineer is currently not complying with this mandate by only curtailing surface water use, even though lawful use conditions at the time of the Compact involved virtually no groundwater use. (*Complaint*, ¶¶ *23*, *24*, *26*, 28). If the Groundwater Act or the designated status of the groundwater is implicated in a decision to uphold the current administration of only surface water, then the Groundwater Act is unconstitutional, in part, because it impairs Colorado's ability to meet its obligations under the Compact by preventing curtailment of the single biggest source of depletions.[3]

47. Defendants claim the Foundation does not have standing to challenge the impairment of the Compact. Under the circumstances spelled out in Claim 3 (*Complaint* ¶ *115*), the Foundation asserts it would have standing to challenge the constitutionality of the Management Act resulting from impairment of the State's obligations under the Compact. That standing stems from the

[3] There are means to achieve Compact compliance on the South Fork that do not involve curtailment, such as an augmentation pipeline like is used on the North Fork, but that would need to also be used to protect surface water rights so they are not dried up in the process.

fact that the Foundation's surface water rights are being curtailed contrary to C.R.S. § 37-80-104, which causes injury to the Foundation. If Groundwater use cannot be curtailed, even though the groundwater is subject to the Compact, the resulting impact on the State's ability to meet the Compact is borne by surface water rights who are currently being forced to bear the burden of curtailment.

48. Defendants also claim that if the Court does interpret the Groundwater Act as impacting the Compact then the Foundation's claim still fails because the Act "serves a significant and legitimate public purpose when considered against the severity of the contractual impairment." (Motion, pp. 28-29). The Defendants are claiming that the needs of the junior groundwater users in the NHP Basin are so important that they outweigh and can impair the State of Colorado's obligation to comply with the Compact and can take the vested water rights of the Foundation and other surface water users in the Republican River basin. That is not a public good. It is an end run around long-standing Colorado law that protects vested water rights acquired pursuant to Colorado's constitutional prior appropriation doctrine. Moreover, there is no basis for allowing such unequal treatment under the law under the guise of a legitimate state interest. *See Armstrong*, 27 P. at 238; *see also People ex rel. Juhan*, 165 Colo. at 265-66 ("The hand of the legislature is restrained by the due process clause of our state constitution from overturning established principles of private rights and distributive justice."); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

49. The response to the Defendants' "no specific mandate" under the State Engineer's Compact authority is discussed at length in the Foundation's Compact Response and not repeated herein.

IV. CONCLUSION.

50. For the reasons set forth herein, the Defendants' Motion should be denied.

Respectfully submitted this 8th day of April, 2016.

PORZAK BROWNING & BUSHONG LLP

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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 THE AMENDED MOTION FOR SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF THE GROUND WATER MANAGEMENT ACT OF 1965** 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.)

Karen L. Henderson