

<p>DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO</p> <p>Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300</p>	<p><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p>
<p>Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation,</p> <p>v.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>Case Number: 15CW3018</p>
<p>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</p>	<p>Water Div. No. 1</p>
<p align="center">THE JIM HUTTON EDUCATIONAL FOUNDATION’S RESPONSE TO COLORADO PARKS AND WILDLIFE’S MOTION FOR SUMMARY JUDGMENT</p>	

Plaintiff, the Jim Hutton Education Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through undersigned counsel and pursuant to Colorado Rule of Civil Procedure 56, hereby submits its Response to Colorado Parks and Wildlife’s (“CPW”) Motion for Summary Judgment (“CPW’s Motion”).

INTRODUCTION

One source of injury to the Foundation's senior Hale Ditch water rights is the operation and administration of Bonny Reservoir. Bonny Dam was originally constructed on top of the Hale Ditch and the Reservoir flooded out the ditch. To address that issue, an outlet pipe was designed and constructed into Bonny Dam specifically for delivery of water into the Hale Ditch below the dam. This Hale Ditch outlet worked for more than 50 years to deliver water through Bonny Dam to the Hale Ditch. That all changed when the State and Division Engineers ("Engineers") ordered the Reservoir to be drained for Compact purposes.

After Bonny Reservoir was drained the water level fell below the Hale Ditch outlet. Even when the Engineers allow temporary 72-hour storage in Bonny Reservoir in order to raise the water just enough to release some water through the Hale Ditch outlet, there is inadequate head pressure to deliver much water. Further, at low water levels, losses due to seepage, evaporation, and evapotranspiration deprive the Foundation of the water that would otherwise be available for the Hale Ditch. These and other relevant facts were plead in the Complaint and are listed and documented in the Foundation's Motion for Summary Judgment, or in the Alternative, A Motion for Determination of Question of Law Regarding its Bonny Reservoir Claim ("Foundation's Motion Re: Bonny Reservoir"), incorporated herein by reference.

The Foundation's claim regarding Bonny Reservoir is not limited to CPW. The Foundation alleges the injury is the result of actions by all the Defendants (collectively the "State Defendants") in the operation and management of the Reservoir. (*See* Complaint ¶¶ 92.A, 92.C). As further detailed in the Foundation's Motion Re: Bonny Reservoir, Colorado law requires on-channel storage structures such as Bonny Reservoir to be operated in a manner that does not injure senior water rights, and equally well-established law provides protection to preexisting ditch rights-of-way. Further, the Foundation asserts it is a beneficiary to the 1982 contract regarding Conservation Capacity of Bonny Reservoir (*Foundation Exhibit 25*, the "Water Contract"), and the 2002 Memorandum of Understanding regarding the Bonny Reservoir Area management (*Foundation Exhibit 26*, the "Land Contract") (sometimes collectively referred to as the "Contracts"). The Contracts entered into by CPW's predecessor contain express provisions that benefit the Foundation by obligating CPW to protect the Hale Ditch and Hale Ditch right-of-way. These provisions are binding on CPW regardless of whether the Foundation is a third-party beneficiary.

CPW's Motion pertains only to its management obligations for Bonny Reservoir and associated lands. (*CPW Motion*, p. 3). CPW claims the Foundation is not a third-party beneficiary to the Contracts and therefore CPW should be dismissed from the litigation. (*Id.* at 25). As explained below, Colorado law protects the Foundation's Hale Ditch rights regardless of the Contracts. This issue is not even addressed in the CPW Motion. To the extent the Court finds that CPW and the other State Defendants' interference with the Foundation's Hale Ditch rights through the operation of Bonny Reservoir violates Colorado law, the CPW Motion should be denied and the Court need not reach the question of whether the Contracts confer a separate benefit upon the Foundation. However, if this Court determines that the Hale Ditch rights are not already protected by law, the Foundation is a third party beneficiary to the provisions in the

Contracts that were intended to benefit and protect the Hale Ditch. As a third-party beneficiary, the Foundation is entitled to enforce the Contract provisions against CPW to protect the Hale Ditch water rights and right-of-way.

UNDISPUTED FACTS

CPW's Motion sets forth a list of undisputed facts. The Foundation does not agree that all such facts are undisputed and further seeks to qualify and/or clarify certain facts as stated below. Further, the Foundation incorporates herein the undisputed facts set forth in its Foundation's Motion Re: Bonny Reservoir, pp. 4-6.

1. CPW states that BOR owns and controls Bonny Dam and retained certain limited responsibility for releasing water and for lands underlying and immediately adjacent to the dam. (*CPW Motion, Undisputed Facts*, ¶¶ 1, 2, 9, 10, 15). While the Foundation agrees that the BOR owns and operates Bonny Dam, it makes releases of water and otherwise operates Bonny Dam in accordance with orders from the State Engineer. (*See, e.g. Foundation Exhibits 27, 29*).¹ In fact, BOR drained Bonny Reservoir because it was ordered to do so by the State Engineer and after expressing its disagreement with the State Engineer. (*Foundation Exhibit 29*). Further, the State recognized in 2010 that CPW's predecessor agencies "manage the reservoir and surrounding lands," with a "total area (both land and water) . . . consist[ing] of 7,225 acres." (*Foundation Exhibit 27, p.2*).
2. The Foundation disputes paragraph 13 of the Undisputed Facts to the extent that CPW is suggesting the Water Contract and Operating Plan confer no benefit upon the Hale Ditch.
3. The Foundation disputes paragraph 14 of the Undisputed Facts Section to the extent that CPW suggests that the Water Contract confers no benefit upon the Hale Ditch, and disputes that the Hale Ditch is not referenced in the Land Contract.
4. The Foundation disputes paragraphs 20 – 25 of the Undisputed Fact to the extent that they imply that the vegetation in the reservoir footprint is acceptable. Although CPW may perform some measures to control vegetation, the lands underlying the reservoir over which CPW has control are now filled with vegetation. Attached hereto as **Exhibit 38** and **Exhibit 39** are photographs of the current state of the bottom of the Reservoir, including a dense forest of trees growing in standing water. Affidavits regarding the photographs further document what is apparent in the photographs, namely that the river channel is not visible inside the Reservoir, and the water has spread out saturating the ground and standing in pools. (*Id.*). Much of the trees are cottonwoods, some already as tall as about 20 feet, while others might be tamerisk. The South Fork of the Republican River is creating a swamp behind Bonny Dam, and the water is growing a thick forest in an otherwise arid climate.

¹ Foundation Exhibits include the Exhibits that were already filed by the Foundation in support of its Motions for Summary Judgment. New Exhibits are listed sequentially with the earlier exhibits, denoted in bold, and added to the Foundation's Amended Exhibit list filed herewith.

ARGUMENT

I. The State Defendants are prohibited under Colorado law from injuring the Hale Ditch water right or right-of-way.

The State Defendants, including CPW, cannot legally operate Bonny Reservoir in a manner that injures senior water rights. This is confirmed by C.R.S. § 37-87-101(1)(a) (“No water storage facility may be operated in such a manner as to cause material injury to the senior appropriative rights of others.”). Longstanding case law discussed at length in the Foundation’s Motion Re: Bonny Reservoir, pp. 7-8, confirms this point and is incorporated herein by this reference. *See, e.g., Larimer Cty Reservoir Co. v. People*, 9 P. 794, 795 (Colo. 1886), *Joseph W. Bowles Reservoir Co. v. Bennett*, 18 P.2d 313 (Colo. 1932), *City of Colorado Springs v. Bender*, 366 P.2d 552 (Colo. 1961); *Kobobel v. State Dep’t of Nat. Res.*, 249 P.3d 1127 (Colo. 2011). By draining Bonny Reservoir and thereafter allowing the limited available water to be lost to evaporation, evapotranspiration and seepage, the State Defendants have caused water deliveries under the Foundation’s Hale Ditch water right to diminish or even cease all together. By failing to take proactive measures to protect the Hale Ditch from a loss in water supply, the State Defendants’ operation and management of the Reservoir is in violation of Colorado law.

CPW essentially argues that because it did not cause Bonny Reservoir to be drained, it is not responsible for the resulting injuries to the Foundation. (*CPW Motion*, p.22). The Foundation acknowledges that Bonny Reservoir was drained under orders from the State Engineer, not at the direction of CPW. However, CPW’s obligations to the Foundation did not disappear simply because Bonny Reservoir is now empty. In fact, CPW’s obligations to the Foundation have increased significantly after the Reservoir was drained. Now that Bonny Reservoir is largely empty, the Foundation’s Hale Ditch water supply must traverse the entire exposed reservoir footprint managed by CPW (including all the vegetation) in order to reach the Foundation.

In addition to protecting senior water rights from impact by Bonny Reservoir, Colorado law also does not allow a party to unilaterally impact a preexisting ditch right-of-way as is occurring here. While this issue was briefly addressed in the Foundation’s Motion Re: Bonny Reservoir, pp. 9-10, it is addressed more fully below, in part, because of its implication to the Land Contract. In both the water right and right-of-way context the result is the same – the Foundation is entitled to its available Hale Ditch water supply without a loss in water.

Turning to the right-of-way issue, the BOR acquired the land for Bonny Reservoir in 1948 from Henry M. Merriam, subject to the “existing rights-of-way in favor of . . . third parties for . . . ditches.” (*See Foundation’s Exhibit 36*, the 1948 Land Purchase Contract, ¶13). Henry M. Merriam was the owner of a 1/3rd interest in the Hale Ditch which was later conveyed to Roscoe Hutton, a predecessor of the Foundation. (*See, e.g., Foundation’s Exhibit 22*, Order in Case No. 2011CW186, pp. 3, 7 – 8). Further, the Hale Ditch was located on Mr. Merriam’s land that was the subject of the Land Purchase Contract. (*See Exhibit 40*, attached hereto, which are the relevant pages of the Bonny Reservoir Map and Filing Statement showing Mr. Merriam’s lands and the Hale Ditch highlighted in yellow). The Hale Ditch is not only located on Mr.

Merriam's land, it is the only ditch shown on the map that is located on Mr. Merriam's land. It is also undisputed that the Hale Ditch was appropriated by construction in 1908 and adjudicated in 1938, all prior to the BOR obtaining the land for a Reservoir. In short, the Hale Ditch was an existing ditch and right-of-way and the BOR's acquisition of the land for Bonny Reservoir was subject to the Hale Ditch.

Under Colorado law in existence at the time of the Land Purchase Contract, the BOR had no right "to change the location of [the Hale Ditch], or do anything which [would] interfere with the vested rights of" the Hale Ditch owners. *Cherrichigno v. Dickinson*, 167 P. 1178 (1917). The rule that "all lands are held in subordination to the dominant right" of the ditch easement owner, has long been the law in Colorado, even pre-dating the Constitution. *See Yunker v. Nichols*, 1 Colo. 555 (1872). *See also, Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1231 - 32 (Colo. 2001) (describing how the importance of ditch easements was recognized by the territorial legislature and in Colorado's constitution). Thus, in order to construct Bonny Dam across the ditch easement and flood out the ditch and headgate, BOR had to devise a solution to ensure an adequate and satisfactory means for the Hale Ditch owners to receive their water. That solution was an outlet works specifically constructed into the dam to make releases of water to the Hale Ditch. As explained in the next section of this brief, the protection of the Hale Ditch was thereafter included in the Contracts, thus obligating CPW to ensure the continued protection of the Hale Ditch. This solution worked for many decades until the Reservoir was drained.

Colorado law still provides strong protections for ditch easements. The owner of property burdened by a ditch easement is prohibited from modifying or otherwise interfering with a ditch easement, but may seek a declaratory determination from a court that the alterations will not injure the utility of the easement if consent is not obtained. *In re Tonko*, 154 P.3d 397, 404 (Colo. 2007); *Roaring Fork*, 36 P.3d at 1231. As explained in *Roaring Fork*, 36 P.3d at 1238, the question of whether there is injury to the ditch from an alteration is based upon the Restatement test, which examines whether the changes "a) significantly lessen the utility of the easement, b) increase the burden on the owner of the easement in its use and enjoyment, or c) frustrate the purpose for which the easement was created." *Roaring Fork*, 36 P.3d at 1238, 1236 (citing Restatement (Third) of Property (Servitudes) § 4.8(3) (2000)). Moreover, the owner of the servient estate must ensure "the water provided to the ditch easement owner [is] . . . of the same quantity, quality, and timing as provided under the ditch owner's water rights and easement rights in the ditch. A water right operating in combination with the collection of rights and obligations are vested property rights." *Roaring Fork*, 36 P.3d at 1238 (emphasis added), *See also Tonko*, 154 P. 3d at 404 (same).

In short, whether the Reservoir is empty or full, the Hale Ditch water rights and right-of-way are still entitled to the same protections. Contrary to Colorado law, the current operation and administration of Bonny Reservoir by State Defendants is injuring the Foundation's Hale Ditch rights by diminishing the quantity of water to which the Foundation would otherwise be entitled. Further, with Bonny Reservoir drained, CPW is the State Defendant responsible for managing the lands within the footprint. A dense forest has been allowed to grow in shallow standing water within the footprint. (*See Foundation Exhibits 38 and 39*). Moreover, the South Fork River channel is no longer even apparent on the Reservoir bottom. This impacts delivery of

water and the utility of the modified ditch right-of-way. In short, the Foundation's loss of water to evaporation, evapotranspiration and seepage under current administration and management is contrary to longstanding Colorado law.

II. If the State Defendants are not obligated to protect the Hale Ditch water rights and right-of-way under Colorado law, then the Foundation is an intended third party beneficiary to the Land and Water Contracts and as such is entitled to enforce the provisions in the Contracts that benefit the Hale Ditch.

As described above, the Foundation contends that CPW is already obligated under Colorado law to manage a reservoir and associated lands in a manner that does not impair the Foundation's Hale Ditch water rights and right-of-way. If the Court agrees, then it need not reach this question of whether this benefit was conferred by the Contracts. However, if the Court disagrees, then the Foundation is a third-party beneficiary to the Contracts.

The test for whether a non-party is a third-party beneficiary who may enforce the terms of the contract is stated by the Colorado Supreme Court as follows: "A person not a party to an express contract may bring an action on such contract if the parties intended to benefit the non-party, provided that the benefit claimed is a direct and not merely an incidental benefit." *E.B. Roberts Const. v. Concrete Contractors*, 704 P.2d 859, 865 (Colo. 1985) (citing *Haldane v. Potter*, 31 P.2d 709, 710 (Colo. 1934); *Fourth & Main Co., v. Joslin Dry Goods Co.*, 648 P.2d 178, 181 (Colo. App.), *cert. denied* (Colo. 1982)). "While the intent to benefit the non-party need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both." *E.B. Roberts*, 704 P.2d at 865 (citing *Borwick v. Bober*, 529 P.2d 1351, 1355 (Colo.App. 1974)). Where one of the parties to a contract promises "to perform a supposed or asserted duty of the" other party, and the third party "would be reasonable in relying on the promise as manifesting an intention to confer a right on him," the third party is an intended beneficiary. Restatement (Second) of Contracts § 302, Comment 'c' (1979).

The Foundation is a third-party beneficiary to both Contracts as explained below. Both Contracts contain provisions that expressly confer benefits on the Foundation by requiring CPW's management activities not to interfere with or injure the Hale Ditch right-of-way or water rights under circumstances where it was reasonable to rely upon those provisions. Second, the benefits are intentional and not incidental. Indeed, the benefit to Hale Ditch users like the Foundation from protection of the Hale Ditch rights was the intended outcome of including such provisions, not a mere incidental result.

A. The Foundation, as an owner of the Hale Ditch, was an intended beneficiary to express provisions in both Contracts.

Starting with the Land Contract, CPW's Motion states that "the Land Contract contains no reference to the Hale ditch or deliveries associated therewith." (*CPW Motion*, p. 18). This is not accurate. Although the Land Contract does not use the words "Hale Ditch," it explicitly

makes CPW's rights to the Bonny Reservoir Area subject to "any prior rights." The Hale Ditch water rights and right-of-way are clearly prior rights.

Specifically, the Land Contract provides that CPW's rights under the Land Contract are "subject to . . . [a]ny prior rights which have attached before the date of this agreement and any prior agreements thereof." (*See Foundation Exhibit 26*, ¶ 3.a). As described above, the BOR in fact took title to land for construction of Bonny Reservoir in 1948 from Henry M. Merriam, subject to "existing rights-of-way in favor of . . . third parties for . . . ditches." (*Foundation's Exhibit 36*, ¶13). The Hale Ditch was clearly such an existing ditch and right-of-way. Thus, when the BOR subjected CPW to "any prior rights," that included the Hale Ditch rights to which the BOR was already subject to.

Thus, the Foundation meets the test for a third-party beneficiary to the Land Contract. CPW agreed in the Land Contract that it was subject to "any prior rights" and that includes the protections and benefits that BOR was required to extend to the Hale Ditch. The prior rights provision in the Land Contract effectively subordinates the Land Contract to the Hale Ditch right-of-way, encumbering CPW with the same responsibilities that the BOR had as the burdened estate holder. In other words, even though BOR was relinquishing control over the Bonny Reservoir Area, the obligations to the prior-right holders remained and was passed on to CPW. CPW is thereby obligated to manage the Bonny Reservoir footprint in a manner that provides the Foundation with an adequate and satisfactory means for receiving its water right from the Hale Ditch without diminishment. Framed in the converse, the Land Contract prohibits CPW from managing the reservoir footprint in a manner such that phreatophyte growth and the accompanying water consumption, along with evaporation, and seepage, deprive the Foundation of its water. In this way, the Land Contract conferred a significant and direct benefit on the Foundation and other Hale Ditch owners.

Turning to the Water Contract, it contains a provision within the "Third Party Contracts and Permits" section that expressly benefits the Foundation and other Hale Ditch users. It states that "[t]he State of Colorado shall comply with all natural flow rights for Hale Ditch and the State Engineer shall measure and direct such releases pursuant to such rights." (*Foundation Exhibit 25*, Water Contract, ¶ 5.3). This "Hale Ditch provision" confers a benefit on the Hale Ditch owners by ensuring that Bonny Reservoir will not be operated in a manner that interferes with the release of their senior water rights. There is no qualifying language on the extent of this benefit. It encompasses all the rights for the Hale Ditch and all the owners.

Thus, the Foundation also meets the test for a third-party beneficiary to the Water Contract as CPW expressly agreed to comply with all natural flow rights in the Hale Ditch. In short, CPW cannot take actions that impair those senior water rights or the ability to deliver the water that would otherwise be available. In this way, the Water Contract also conferred a significant and direct benefit on the Foundation and other Hale Ditch owners.

CPW claims that the inclusion of the Hale Ditch provision merely "directs the State to comply with that which it was already required to do by Colorado water law." (*CPW Motion*, p. 14). This seems to be an argument by CPW that because the benefit of protection that the

Foundation seeks to enforce through the Water Contract was already guaranteed by operation of law, it could not have also been conferred by contract and thus the Foundation is not a third party beneficiary. As stated above, if the Court finds that the Foundation was already entitled to the protections and relief claimed herein under Colorado law, then it need not address the question of whether the Foundation was also conferred the same benefit by the Water Contract. Otherwise, the Hale Ditch provision in the Water Contract requiring the State to comply with the Hale Ditch water rights does confer a valuable benefit on the Foundation. While CPW dismisses this “flow rights provision” as a mere “recitation,” in reality the provision imposes an obligation on CPW by stating that CPW *shall comply* with the Hale Ditch water rights. CPW’s obligation to comply with the Hale Ditch water rights cannot be read out of the Water Contract, and CPW should be held to the terms of its bargain.

The inclusion of the prior rights provision in the Land Contract and the Hale Ditch provision in the Water Contract, and the Foundation’s reliance upon those provisions, is imminently reasonable under the circumstances. These circumstances include the following:

- Managing and operating an on-channel reservoir in Colorado is always subject to the requirement not to injure senior water rights as discussed above. Thus, a provision subjecting CPW to the Foundation’s prior rights and the Hale Ditch is consistent with this Colorado law.
- Altering a ditch easement in Colorado is always subject to the requirement that it not frustrate the purpose of the easement and that water continue to be provided in the same quantity as discussed above. Thus, a provision subjecting CPW to the Foundation’s prior rights and the Hale Ditch is consistent with this Colorado law.
- The Foundation’s predecessor-in-interest to its Hale Ditch rights (Mr. Merriam) protected the Hale Ditch in his Land Purchase Contract with the United States. While such protections should be available to all Hale Ditch owners, that is especially true of the Foundation who acquired Mr. Merriam’s interest in the Hale Ditch and stepped into his shoes.
- The Bonny Dam was originally constructed with an outlet to protect the Hale Ditch and that worked for decades as shown by the Hale Ditch diversion records. (*See Foundation Exhibit 28*). In effect, the actions of the State Defendants for years was consistent with protecting the Hale Ditch, making it reasonable to rely upon continued protection.

Essentially, as discussed above and in the Foundation’s Motion Re Bonny Reservoir, by constructing Bonny Dam on top of the Hale Ditch, the BOR undertook a non-discretionary obligation to ensure that the Hale Ditch water rights and right-of-way were not impaired. In recognition that any future modifications in the operation and management of Bonny Reservoir would still be required to accommodate the Hale Ditch, BOR included the prior rights provision in the Land Contract and the Hale Ditch provision in the Water Contract. As a result, CPW is contractually required to ensure its activities comply with the Hale Ditch rights. This assurance was the intent and effect of the provisions, and frankly, the only plausible reason for including

such provisions in the Contracts with CPW. This is exactly the benefit the Foundation enjoyed for years and is now seeking to enforce.

B. The Foundation is not a mere incidental beneficiary to the Contracts.

CPW argues that since the Land Contract was executed “for the sole purpose of having CPW manage the lands under and adjacent to Bonny Reservoir for recreation, fish and wildlife, and related purposes” the Foundation cannot be the intended beneficiary. (*CPW Motion*, p.19). Similarly, CPW argues that since the purpose of the Water Contract was for CPW to acquire the use of the conservation capacity in Bonny Reservoir for recreation and fish and wildlife purposes, and “not entered into to guarantee water storage content in the reservoir for Hale Ditch deliveries,” the Foundation cannot be a beneficiary to the Water Contract. (*CPW Motion*, pp. 15, 17). In both instances this argument misses the point. The mere fact the Contracts were entered into for a different purpose does not mean the Foundation cannot enforce provisions of the Contracts that were specifically intended to benefit the owner of prior rights on the land that CPW was to manage and the owners of the Hale Ditch. Indeed, CPW’s interpretation renders these provisions largely meaningless if an owner cannot enforce them.

None of the cases cited by CPW in its Motion where it was determined that a non-party’s benefit was merely incidental included a specific provision designed to protect the non-party’s rights. For example, in *Frisone v. Dean Automotive Center, Inc.*, 942 P.2d 1215 (Colo. App. 1996) cited by CPW, the purchaser of a used car sought to sue a repair shop that had performed an earlier inspection on the car for the original owner. The Court held the plaintiff was not a third-party beneficiary to the contract between the repair shop and the prior owner, noting that “it is not apparent from either the contract or the surrounding circumstances . . . that the parties intended to benefit subsequent purchasers.” *Id.* at 1217.

Another case cited by CPW is *Parrish Chiropractic Ctrs., P.C. v. Progressive Casualty Ins. Co.*, 874 P.2d 1049 (Colo. 1994). In that case, a health care provider was one of many such providers that patients could choose from under their insurance policy. When the health care provider was not paid by an insured patient who had received insurance benefits, the provider sued the insurance company. *Id.* at 1051 – 1052. One of the provider’s claims was that it was a third-party beneficiary to the policy. The Court found that the provider, as just one of many approved providers in the policy, was “only an incidental beneficiary” and not an intended third-party beneficiary who could enforce the terms of the policy against the insurance company. *Id.* at 1056 – 1057. No policy terms in that case could be construed as protecting the provider’s rights.

This situation is more analogous to *Nebraska Bridge Supply & Lumber Co. v. Deakin*, 125 P.2d 962 (Colo. 1942). In that case, a contract between the state highway department and a contractor contained a provision stating that the contractor was responsible to “comply with, any valid commitments” made by a previous contractor. A complaint by a creditor of the previous contractor seeking reimbursement under the contract was dismissed. On appeal, the Colorado Supreme Court held that the creditor was allowed recovery as a third party beneficiary under the prior valid commitments provision in the contract if he was able to prove his case, so the case was remanded. *Id.* at 963. In other words, even though the primary purpose of the contract was

the completion of the highway project, the prior valid commitments provision created potential third-party beneficiaries. Similarly, even though the primary purpose of the Contracts were not the protection of the Hale Ditch, the prior rights and Hale Ditch provisions created potential third-party beneficiaries. As the undisputed owner of a prior right and of the Hale Ditch, the Foundation is an intended and direct third-party beneficiary, not a mere incidental beneficiary.

In short, the Contracts provide a direct benefit – not an incidental one – to prior right owners such as the Hale Ditch. By subjecting CPW’s management of Reservoir lands to prior rights, and requiring continued compliance with and delivery of all the natural flow rights for the Hale Ditch, the intended purpose of protecting the Hale Ditch owners is clear and direct.

III. CPW is not in Compliance with the Land Contract and Water Contract.

To the extent that CPW’s management of the reservoir footprint interferes with the Hale Ditch easement and/or causes water that would otherwise be available to be lost, CPW violates its obligations under Colorado law and the Contracts as discussed above. The photographs in Exhibits 38 and 39 show that the reservoir footprint is overgrown with trees. As explained in the accompanying affidavits, the forest is predominantly cottonwoods, and possibly other species. The land is saturated with water with standing water in many places, and the water appears to spread out within the Reservoir without the clearly defined stream channel that exists downstream of the Reservoir. While such conditions may be good for wildlife, they are not good for a senior water right owner that is not receiving its water. Phreatophytes such as cottonwoods act as a “water thief,” pumping water through its roots. *See Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321, 1325 (Colo. 1974).²

BOR records confirm that the Foundation is losing water. As reflected in the Foundation’s Motion Re: Bonny Reservoir, pp. 5-6, BOR periodically measures the rate of water flowing into Bonny Reservoir and below Bonny Reservoir, and also measures the rate of delivery to the Hale Ditch. (*See also, Foundation Exhibit 33*). These records show that the delivery rate to the Hale Ditch in 2014 was on average significantly less than the measured inflow into Bonny Reservoir and dropped off to zero in July. There are also other sources of inflows into Bonny Reservoir that are not measured, suggesting water losses due to evapotranspiration, evaporation, and seepage are even more significant than represented in the BOR records. (*See Id.*, which documents that the amount of water in the river immediately below Bonny Reservoir plus the Hale Ditch deliveries are always greater than the measured flows into the Reservoir). In fact, the flows below Bonny Reservoir are typically higher than the water delivered to the Hale Ditch.

The BOR has provided the Foundation with additional records for the remainder of 2014 (beginning in mid-July), and for 2015. (BOR records attached hereto as **Exhibit 41**). For 2014, these records show no water for the Hale Ditch through the remainder of irrigation season

² Although *Shelton Farms* did not allow an Applicant to remove phreatophytes and claim a right free of the call of the river for water that would have been consumed by such trees, there is no question but that such trees consume water. *Id.* at 1323 – 1327. However, upon removal, “the water . . . must return from whence it comes – the river – and thereon down the line to those the river feeds in turn.”

despite inflows ranging from of 1.5 – 3.9 cfs. 2015 records are similar to 2014, in that the Hale Ditch received significantly less water than the inflow into the Reservoir on an average basis, and was unable to receive any water beginning in July through the rest of the irrigation season after flows into the Reservoir had dropped to less than 4 cfs.

CPW argues in its Motion that because it is in compliance with federal, state, and local noxious weed regulations, it has therefore fulfilled its obligations to the Foundation under the Land Contract. However, the presence or absence of noxious weeds is not determinative as to compliance with Colorado law or with the Contracts. Any phreatophyte species, whether native or invasive, that are interfering with the delivery of water that would otherwise be available to the Hale Ditch are inconsistent with CPW's Contract obligations.

Furthermore, the Foundation believes that there is at least an issue of fact regarding whether CPW is in compliance with the applicable local, state, and federal laws regarding invasive species. The affidavit included with Exhibit 38 suggests that at least some invasive species that are listed on the Yuma County Noxious Weed List such as tamarisk may be present in the reservoir footprint, although at this time of year that could not be confirmed. (*See also*, Foundation's Motion Re: Bonny Reservoir, p. 6) (discussing how the Draft Integrated Pest Management Plan for Bonny Reservoir documented invasive species below the high water mark before the Reservoir was even drained).

CONCLUSION

The Foundation's Hale Ditch water right and ditch easement rights have been injured by the State Defendants through the draining of Bonny Reservoir and the subsequent management of the reservoir footprint. Whether State Defendants' obligations to protect the Foundation's interests in the Hale Ditch derive from case law, statute, or contract, the result is the same: Bonny Reservoir must be managed in a manner that provides the Foundation with all of the water to which it is entitled and by an adequate and satisfactory means, or else a solution must be devised to provide water in the same amount, timing, and quality as required under the Foundation's water right. In any event, given that the CPW Motion only addresses its contract-based obligations to the Foundation and not its obligations under Colorado law, summary judgment in favor of CPW is inappropriate under any circumstances. Therefore, the Foundation respectfully requests that CPW's Motion be denied.

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 COLORADO PARK AND WILDLIFE’S MOTION FOR SUMMARY JUDGMENT** was filed and served by the Integrated Colorado Courts E-Filing System (“ICCES”) addressed to counsel for each of the parties in the above-captioned matter, as follows:

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

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

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



Corina A. Hach