

DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Weld County Courthouse 901 9 th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300	DATE FILED: February 23, 2015 6:04 PM
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; the Colorado Department of Natural Resources; Colorado Division of Water Resources; and Colorado Parks and Wildlife.	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
Porzak Browning & Bushong LLP Steven J. Bushong (#21782) Karen L. Henderson (#39137) 2120 13 th Street Boulder, CO 80302 Tel: 303-443-6800 Fax: 303-443-6864 Email: sjbushong@pbblaw.com; khenderson@pbblaw.com	Case Number: _____ Div. No. 1
<p align="center">THE JIM HUTTON EDUCATIONAL FOUNDATION’S COMPLAINT FOR DECLARATORY JUDGMENT REGARDING ADMINISTRATION OF WATER RIGHTS IN THE REPUBLICAN RIVER BASIN AND THE CONSTITUTIONALITY OF SENATE BILL 52 (2010), AND THE GROUND WATER MANAGEMENT ACT</p>	

Plaintiff, The Jim Hutton Educational Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through its attorneys, Porzak Browning & Bushong LLP, hereby files this Complaint seeking declaratory judgment and injunctive relief regarding actions and/or omissions by Defendants. Such matters include the curtailment of surface water diversions for interstate compact compliance without curtailing the ground water diversions that are causing the compact compliance problem, and the administration and management of Bonny Reservoir in a manner that causes injury to the Foundation’s water rights. The Foundation further challenges the constitutionality of Senate Bill 52 (2010), which revised the Ground Water Management Act in a way that deprives the Foundation of valuable water rights and protections. The Foundation also alleges the Ground Water Management Act itself is unconstitutional if designated ground water that causes depletions subject to an interstate compact cannot be administered under that compact so that surface water rights bear the burden of compact compliance. The Foundation’s Complaint and basis therefore are set forth below.

JURISDICTION

1. Colorado water courts have exclusive jurisdiction over “water matters” that arise in their respective water divisions. C.R.S. § 37-92-203(1). Water matters include those matters that affect the right to use water acquired by appropriation, including matters of administration.
2. Colorado water courts also have ancillary jurisdiction to resolve matters that would directly affect the outcome of water matters over which they have exclusive jurisdiction. *Crystal Lakes Water and Sewer Ass’n v. Blacklund*, 908 P.2d 534 (Colo. 1995).
3. This case involves “water matters” regarding the use and administration of surface water rights appropriated and decreed within the Republican River Basin, as well as the unlawful infringement upon those decreed water rights by Defendants and pursuant to Senate Bill 52 and/or the Colorado Ground Water Management Act.
4. The Colorado Ground Water Commission (the “Commission”) has jurisdiction over designated ground water pursuant to the Colorado Ground Water Management Act (“Ground Water Act”). C.R.S. § 37-90-101 et. seq. The Commission has jurisdiction over surface water rights only to the extent that a holder of those rights seeks changes to the boundaries of a designated ground water basin. *Gallegos v. Colorado Ground Water Comm’n*, 147 P.3d 20 (Colo. 2006). The Foundation is not seeking to modify the boundaries of a designated ground water basin in this action.

PARTIES

5. The Foundation is a non-profit corporation that raises money by leasing its ranch land, including its water rights decreed for irrigation of those lands. The lease income is used to provide low interest loans to nursing students who intend to provide medical services in rural areas of eastern Colorado.
6. The Colorado Department of Natural Resources (“CDNR”) includes the Division of Water Resources (“DWR”) headed by the Colorado State Engineer. The DWR also includes the Division Engineers. The powers, duties and functions of the State Engineer and Division Engineers (collectively referred to herein as the “Engineers”) also reside in the DWR. C.R.S. §§ 24-1-124(3), (4).
7. The Colorado State Engineer has the authority, obligation and non-discretionary duty to administer and distribute waters in the State of Colorado consistent with the constitutional prior appropriation doctrine, statutes, water right decrees and laws of the State of Colorado, including compliance with interstate compact obligations. *See* C.R.S. § 37-80-102 (1)(a).
8. The State Engineer is also the Executive Director of the Commission and a Republican River Compact Commissioner.

9. The Division Engineer for Water Division No. 1 was appointed to assist in matters pertaining to the administration of water rights in Water Division No. 1 and to perform such functions as are described in the Water Rights Determination and Administration Act. *See*, C.R.S. § 37-92-202.

10. Colorado Parks and Wildlife (“CPW”) is a division of the CDNR and administers and manages matters pertaining to Colorado parks, and fish and wildlife resources including Bonny Reservoir.

WATER RIGHTS

11. The Foundation owns the Hutton Ranch located in Yuma County, Colorado. The Hutton Ranch consists of approximately 4,000 acres located on the South Fork of the Republican River near the Kansas state line. The Ranch includes lands in Sections 1 – 3 and 10 - 12, Township 5 South, Range 43 West, and Section 4 – 9, Township 5 South, Range 42 West.

12. The Foundation owns four decreed surface water rights on the South Fork of the Republican River (“South Fork”) that are appurtenant to the Hutton Ranch. The surface water rights consist of the Tip Jack Ditch, a 1/3rd interest in the Hale Ditch, Priority No. 38, the Hutton Ditch No. 1, and the Hutton Ditch No. 2, more specifically described as follows:

- A. The Tip Jack Ditch was decreed for 2 cfs for irrigation purposes by the Arapahoe District Court in Civil Action No. 18172 by decree dated December 28, 1893, with a priority of February 8, 1889.
- B. The Hale Ditch, Priority No. 38, was decreed for 23 cfs for irrigation purposes by the Kit Carson County District Court in Civil Action No. 2985 by decree dated September 8, 1939, with an appropriation date of January 17, 1908.
- C. The Hutton No. 1 Ditch was decreed for 12.9 cfs for irrigation purposes by the District Court in and for Water Division No. 1 in Case No. W-8667-77 by decree dated May 24, 1978, with an appropriation date of July 5, 1954.
- D. The Hutton No. 2 Ditch was decreed for 4.92 cfs for irrigation purposes by the District Court in and for Water Division No. 1 in Case No. W-8667-77 by decree dated May 24, 1978, with an appropriation date of July 5, 1954.

13. Water rights in Colorado are vested property rights. Accordingly, the Foundation owns a vested property right in the Tip Jack Ditch, Hale Ditch, Hutton No. 1 Ditch, and Hutton No. 2 Ditch.

14. Bonny Dam and Reservoir was approved by U.S. Congress for construction in 1944 on the South Fork of the Republican River (“South Fork”) for flood control and irrigation purposes and construction began in about 1948. In Case No. W-9135-77, the United States acquired a

water right for Bonny Reservoir for flood control, irrigation, recreation, and fish and wildlife propagation with a priority relating back to 1948.

15. Bonny Reservoir and Dam is located immediately upstream of the Hutton Ranch and impacts the Foundation's Tip Jack Ditch and Hale Ditch in various ways, including the following:

- A. The original diversion point for the Tip Jack Ditch was destroyed by Bonny Reservoir dam and moved downstream to two different locations. The first location was described in an Amended Map of the Tip Jack Ditch dated February 5, 1950 and later decreed in Case No. W-8667-77, and the current location was described in the Map of the Roscoe Hutton Irrigation System dated January 3, 1955 and was recognized by order of the Water Court, Division No. 1, in Case No. 12CW111.
- B. The Hale Ditch diversion point is under Bonny Reservoir and the dam was built on top of a part of the Hale Ditch. Bonny Dam was constructed with a special outlet works for the purpose of delivering water to the Hale Ditch and has continued to be used for that purpose.

16. Defendant CDNR entered into a contract with the United States dated June 24, 1982 (Contract No. 2-07-70-W0556), by which it acquired the right to use Bonny Reservoir's conservation storage for recreation and fish and wildlife purposes, with incidental use associated with irrigation needs (hereinafter "Water Contract"). CDNR agreed in the Water Contract under a section entitled "Third Party Contracts and Permits" that it "shall comply with all natural flow rights for Hale Ditch and the State Engineer shall measure and direct such releases pursuant to such rights."

17. Under the Water Contract, no water may be delivered "for uses other than recreation, fish and wildlife, municipal and industrial uses under existing contracts, and irrigation uses by the water right holders of the existing Hale Ditch" without satisfying the requirements of the National Environmental Policy Act of 1969 ("NEPA"). Upon information and belief, no NEPA assessment has ever been completed to allow releases of water from Bonny Reservoir for uses other than those specifically identified in the Water Contract.

18. Defendant, CDNR entered into a Memorandum of Understanding with the United States dated January 26, 2002, by which CDNR, and the predecessors to CPW (Division of Wildlife and Division of Parks and Outdoor Recreation), leased and agreed to manage the lands under and adjacent to Bonny Reservoir consistent with the Bonny Reservoir operating plan (hereinafter the "Land Contract"). The Land Contract purports to supersede earlier lease agreements pertaining to the Bonny Reservoir lands.

19. Under the Land Contract and the Bonny Reservoir operating plan, Bonny Reservoir is to be operated to the extent possible to maintain storage in the conservation pool leased by CDNR for recreation, fish and wildlife purposes, but "without interfering with the operation of the Hale

Ditch.” Further, under the Land Contract and operating plan the lands associated with Bonny Reservoir are to be managed consistent with those foregoing uses, including management of noxious and/or undesirable plant species.

20. Pursuant to the Water Contract and Land Contract, CDNR and/or its divisions and the State Engineer have certain obligations regarding the operation and maintenance of Bonny Reservoir and the lands underlying and adjacent thereto, including obligations associated with ensuring that water deliveries to the Hale Ditch are maintained without interference. As such, owners of the Hale Ditch water right, including the Foundation, are intended beneficiaries to the Water Contract and Land Contract.

COMPACT COMPLIANCE AND GROUND WATER DEPLETIONS

21. The Republican River Compact of 1942 is codified at C.R.S. § 37-67-101 (hereinafter the “Compact”). The Compact is among the states of Colorado, Kansas and Nebraska and was approved by the United States Congress in 1942. The Compact equitably divides water tributary to the Republican River and its tributaries among the three states that are party thereto.

22. The Tip Jack Ditch and Hale Ditch priority no. 38 predate the Compact and the Hutton No. 1 Ditch and Hutton No. 2 Ditch were appropriated after the Compact.

23. The Ground Water Act was enacted in 1965, creating the Commission and empowering it to establish designated ground water basins. The appropriation dates of the Hutton No. 1 and Hutton No. 2 Ditches which reflect their original use predate the Ground Water Act by more than 10 years. The Tip Jack and Hale ditches were appropriated many decades before the Ground Water Act was adopted.

24. In 1966, roughly 24 years after the Compact was ratified, the Commission created the Northern High Plains Basin (“NHP Basin”). The NHP Basin designation order states that the hearing to create the NHP Basin lasted less than three hours.

25. The NHP Basin covers the aerial extent of the Ogallala aquifer in Colorado. The NHP Basin includes the entirety of the Republican River basin and its tributaries in Colorado, including the South Fork.

26. Irrigation wells were very few in number in the Republican River basin prior to the 1960s. The number of irrigation wells increased rapidly in the 1960s and 1970s as did the amount of ground water being pumped. Upon information and belief, there are currently about 4,000 permitted high capacity irrigation wells located in the Republican River basin.

27. Upon information and belief some of the high capacity irrigation wells have been retired in more recent years through various programs. However, the vast majority of the wells in the NHP Basin continue to pump ground water.

28. Few if any ground water wells existed in the Republican River basin before the Tip Jack Ditch, the Hale Ditch, priority no. 38, or Bonny Reservoir were appropriated, and the vast majority of ground water wells were appropriated after the Hutton No. 1 and Hutton No. 2 Ditches.
29. The surface flows in the South Fork and other Republican River tributaries declined over time in response to well pumping in the NHP Basin.
30. In 1998, the State of Kansas filed a complaint before the United States Supreme Court alleging that the State of Nebraska violated the Compact by allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries, which caused Nebraska to use more water than it was allowed under the Compact. Colorado was formally joined as a party to the Compact litigation.
31. The Special Master for the United States Supreme Court (“Special Master”) heard argument on whether ground water was intended to be included in the Compact allocations. The Special Master ruled that a State’s ground water pumping, to the extent it depletes the stream flow in the Republican River basin, is included in the Compact’s allocation of virgin water supply in that basin.
32. The Special Master specifically held that the Compact included ground water in the Ogallala aquifer and that the ground water was hydrologically connected to the surface waters in the basin.
33. Colorado entered into a settlement stipulation with Kansas and Nebraska in December, 2002, by which the three States agreed to jointly construct a comprehensive ground water model (referred to herein as the “RRCA Ground Water Model” or “Model”) to determine the amount, timing and location of stream flow depletions caused by ground water pumping. The United States Supreme Court approved the settlement stipulation, but recommitted the action to the Special Master to address issues that may arise in completing the Model.
34. The RRCA Ground Water Model was completed in 2003 and submitted to the Special Master. The Special Master filed a final report to the United States Supreme Court certifying adoption of the Model by the states of Colorado, Kansas and Nebraska and finding that the “Model construction and calibration represent the physical and hydrogeological characteristics of the Republican River Basin to a reasonable degree.” That final report was accepted by the United States Supreme Court on October 20, 2003, and the case was dismissed.
35. The RRCA Ground Water Model adopted and approved by Colorado, Nebraska, Kansas and ultimately the United States Supreme Court, documents that designated ground water wells in the NHP Basin are depleting flows in the South Fork and other Republican River tributaries.
36. At the time the Model was approved by the United States Supreme Court, the Model documented Colorado ground water pumping depletions on surface waters within the Republican

River Basin were 21,330 acre-feet a year on average during the 1981 – 2000 time period, of which an average of 9,595 acre-feet of depletions a year occurred on the South Fork (not including depletions to Bonny Reservoir).

37. The Model shows that depletions to surface water caused by pumping ground water is delayed for wells that are not close to surface streams. As a result, although depletions vary from year to year, the impact of ground water pumping on river flows in the Basin has generally been increasing over time and is expected to keep increasing over time unless wells are curtailed.

38. Model runs have continued since the Model was approved by the United States Supreme Court, but only Model runs through 2007 have been approved by the Republican River Compact Administration (“RRCA”). In 2007, the Model documents that surface water depletions caused by Colorado ground water pumping totaled 26,847 acre-feet, with depletions on the South Fork (not including Bonny Reservoir depletions) equal to 11,240 acre-feet.

39. Model runs have continued since 2007 even though they have not been approved by the RRCA. In 2009, Colorado ground water pumping resulted in 38,238 acre-feet of depletions to surface flows, with depletions on the South Fork (not including Bonny Reservoir) equal to 15,907 acre-feet.

40. Once ground water depletions were counted towards Colorado’s Compact allocation per the ruling of the United States Supreme Court, they were by far the single largest source of Colorado’s depletion to the virgin water supply of the Republican River basin under the Compact and caused Colorado to exceed its Compact entitlement.

41. Despite voluntary retirement of some wells, it was reported in 2007 that Colorado had exceeded its allocation over the four prior years by an average of 11,350 acre-feet a year.

ACTIONS TAKEN BY DEFENDANTS TO ADDRESS THE COMPACT SHORTFALL

42. In 2007, the Engineers and DWR prepared drafts of rules and regulations to begin curtailing wells in the NHP Basin to help meet Colorado’s Compact shortfall. However, the rules and regulations were never adopted and are no longer being pursued.

43. Wells are not being curtailed for Compact compliance. Upon information and belief, the Engineers and DWR have limited regulation of NHP Basin wells to requiring measurement of well pumping and enforcing existing permit limits.

44. A ground water pipeline approved by the Republican River Water Conservation District (“RRWCD”) in 2009 is intended to supply pumped designated ground water to the North Fork of the Republican River near the Colorado-Nebraska State line. Upon information and belief, the pipeline operated in 2014 but has not been permanently approved by the RRCA. The use of the pipeline in 2014 did not alter the administrative call being placed on South Fork surface rights.

45. The Engineers ordered Bonny Reservoir to be drained to help achieve Compact compliance. Upon information and belief, portions of the Reservoir were ordered to be drained as early as 2007, with subsequent releases coordinated to try and get water to reach Benkelman, Nebraska for Compact purposes but with limited success. Full active storage in the Reservoir was drained in 2011.

46. The United States congressional dedication and approval of Bonny Reservoir, including the issuance of federal funds for construction, demonstrate that Bonny Reservoir was approved principally for irrigation and flood control use as discussed above. The Bonny Reservoir water right decree recognizes that in addition to flood control and irrigation use, recreation, fish, and wildlife propagation are also beneficial uses of the water in storage.

47. Although all water rights (surface and ground water) are subject to the Compact, the United States Congress never approved the use of water lawfully stored in priority in Bonny Reservoir for Compact compliance or augmentation. Further, releases of water lawfully stored in Bonny Reservoir for such purposes are inconsistent with the Bonny Reservoir water right decree.

48. Beginning in 2010, the Engineers began to implement a 1942 administrative call in order to help achieve Compact compliance. The Engineers only implemented that call against surface water rights and not against ground water wells, even though the vast majority of the wells were drilled after 1942 and those wells are the reason that Colorado is out of compliance with the Compact. Upon information and belief, the Engineers maintain they have no authority to administer ground water in the Basin for Compact compliance due to the Ground Water Act.

49. The 1942 administrative call is being administered against Hutton Ditch No. 1, Hutton Ditch No. 2, and Bonny Reservoir and has not been lifted since it was first imposed..

50. In or about 2010, the Engineers included the Tip Jack Ditch, Hutton Ditch No. 1 and Hutton Ditch No. 2 in the preliminary abandonment list for Water Division No. 1. The Foundation successfully protested that listing in Case No. 12CW111 against the Engineers and RRWCD.

51. The Water Court's Order dated December 16, 2013 in Case No. 12CW111 did not change the point of diversion of the Tip Jack Ditch to its current location. Thus, the Foundation recognizes that it must change the point of diversion for the Tip Jack Ditch consistent with its current location, but is waiting until the Engineers and RRWCD appeal of the Tip Jack Ditch decision is resolved before seeking such a change.

52. The Engineers issued an order in 2011 prohibiting the Foundation from using its Hale Ditch water rights to irrigate the historically irrigated lands claiming such use was unlawful. The Foundation successfully challenged that order in Water Court in Case No. 11CW186 against the Engineers, RRWCD and CPW, along with new claims made in that litigation by the Engineers that the Hale Ditch had been abandoned.

53. The Order of the Water Court in Case No. 11CW186 dated December 16, 2013, included the requirement that the Engineers provide the Foundation with its Hale Ditch water when in priority.

INJURY TO FOUNDATION FROM DEFENDANTS' ACTIONS AND INACTIONS

54. The Foundation called for water under the Hale Ditch water right the morning of March 27, 2014. After numerous delays, the Foundation was finally allowed the delivery of some water through Bonny Dam into the Hale Ditch beginning in about mid-April, 2014.

55. To achieve some elevation in the water level in Bonny Reservoir as needed to deliver water to the Hale Ditch, the 72-hour temporary storage rule was invoked by the Engineers to allow a fluctuating level of storage in Bonny Reservoir to deliver some water to the Hale Ditch.

56. The water available to the Foundation's 1/3rd interest in the Hale Ditch priority no. 38 at the Bonny Reservoir Hale Ditch outlet was less than 7.67 cfs for all of 2014, averaging roughly 3.25 cfs from April through early July. Flows dropped in July and beginning about July 14, 2014, no water in the Hale Ditch reached the Foundation's turn out for the remainder of the 2014 irrigation season.

57. On November 3, 2014, the Division One Engineer ordered the Hale Ditch outlet within Bonny Dam to be closed based upon the assertion there had been hard freezes sufficient to either kill annual crops or drive perennial crops into winter dormancy. At that time, NHP Basin wells were typically still pumping ground water to either irrigate and/or build up soil moisture content because of the warm dry Fall.

58. Upon information and belief, the lack of available water to the Hale Ditch caused by ground water depletions as shown by the RRCA Model and other factors is being further exacerbated by the actions or inactions of the Defendants, including: (A) the lack of storage allowed in Bonny Reservoir to supply head pressure for delivery to the Hale Ditch; (B) the extensive emergent vegetation, including noxious weeds and trees, that have been allowed to grow on lands historically inundated by water in Bonny Reservoir, which is consuming water and which is not being adequately controlled by Defendants pursuant to the Land Contract and the Bonny Reservoir operating plan, and (C) water seeping out of Bonny Reservoir and dam.

59. The lack of reliable water being delivered to the Hale Ditch through Bonny Reservoir is limiting the amount of land and type of crops that can be irrigated by the Foundation, resulting in injury.

60. The continued administrative call against the Foundation's 1954 appropriations in the Hutton No. 1 Ditch and Hutton No. 2 Ditch is also causing injury by limiting the amount of irrigated lands and by limiting the type of crops that can be grown.

61. The Foundation contends that surface water diversions cannot lawfully be curtailed for Compact compliance without also curtailing ground water diversions. Further, if ground water developed after the Compact was being curtailed, there would be more water available for the Foundation's senior water rights and less need to place a call on Bonny Reservoir and the Hutton Ditches which were appropriated before most wells.

62. The Foundation contends that administrative actions by the Engineers, DWR and/or CDNR have unfairly and unlawfully imposed the burden of Compact compliance on surface water rights in violation of the Colorado and United States Constitutions, in violation of Colorado statutes and case law, and in a manner inconsistent with the rulings of the United States Supreme Court.

SENATE BILL 52 (2010)

63. Designated ground water is ground water that in its natural course would not be available to and required for the fulfillment of decreed surface rights or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals constituted the principal water usage for at least fifteen years preceding the date of the first hearing on designation of the basin. C.R.S. § 37-90-103(6)(a). “[G]round water which has more than a de minimis impact on surface waters cannot properly be classified as designated ground water.” *Gallegos v. Colo. Ground Water Comm’n*, 147 P.3d 20, 31 (Colo. 2006).

64. “[T]he creation of a designated groundwater basin does not establish conclusively that all ground water in the basin is designated ground water.” *Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981). *See also, Gallegos*, 147 P.3d at 29 (boundaries of designated basins are created as “essentially legal-political boundaries, and not necessarily coincident with hydrologic boundaries”) (*quoting Outline of Colorado Ground Water Law*, 1 U. Denv. Water L. Rev., 275, 278 (1998)).

65. The Ground Water Act as originally drafted and as existed when the NHP Basin was formed, created protections for surface water rights against improperly designated ground water by requiring the boundaries of designated ground water basins to be altered as future conditions require and factual data justify. C.R.S. § 37-90-106(1)(a) (2009). This plain language understanding of C.R.S. § 37-90-106(1)(a) was confirmed by the Colorado Supreme Court in *Gallegos, supra*.

66. The Colorado Supreme Court held in *Gallegos*, 147 P.3d at 31 (Colo. 2006), that “the General Assembly anticipated that a designated ground water basin could include ground water that does not properly fall within the definition of designated ground water. When future conditions and factual data reveal this to be the case, the Management Act requires that the Commission redraw the boundaries of the designated basin.”

67. Accordingly, prior to Senate Bill 52 (2010) (“SB-52”), a surface water right owner could petition the Commission under the Ground Water Act to get relief from designated ground water

depletions. If the designated basin included tributary ground water the depletion of which was causing injury to surface water rights, “the Commission must redraw the boundaries of the basin to exclude the improperly designated ground water.” *Gallegos*, 147 P.3d at 32. The excluded ground water would then fall within the Water Court’s exclusive jurisdiction.

68. The District Court in Yuma County entered a ruling in 2007 on appeal from the Commission that recognized the applicability of C.R.S. § 37-90-106(1)(a) to the NHP Basin so that the NHP Basin boundaries could be redrawn to exclude improperly designated ground water consistent with *Gallegos*. Said ruling also held that the RCRA Ground Water “Model serve as binding admissions by the State of Colorado and . . . is a binding recognition of the extent to which groundwater pumping is depleting surface flows.” (*Order Granting Summary Judgment Motions in Part and Denying Summary Judgment Motions in Part*, ¶ 41, *Case No. 06CV31, Pioneer Irrigation District v. Colo. Ground Water Comm’n*). On remand to the Commission to hold a hearing to redraw the NHP Basin boundaries, the case settled.

69. Once the judiciary has interpreted the meaning of a statute, that interpretation becomes an authoritative statement on what was always meant by that statute. Afterwards, any legislative change in that judicial interpretation is necessarily a change in the law and thus subject to the constitutional prohibition against retrospective legislation. *City of Colorado Springs v. Powell*, 156 P.3d 461 (Colo. 2007).

70. SB-52 was proposed and adopted in 2010 with the purpose of rewriting C.R.S. § 37-90-106(1)(a) in a manner directly contrary to the holding in *Gallegos*. SB-52 rewrote C.R.S. § 37-90-106(1)(a) so that any alterations to a designated ground water basin could only be used to increase the land area in that designated basin or, if land was to be excluded, it could not be land on which any designated well had been permitted.

71. Testimony in support of SB-52 was provided by Dennis Coryell (Chairman of the Colorado Ground Water Commission and RRWCD President), and other witnesses, specifically explaining the need for SB-52 in the NHP Basin. The language in SB-52 and the legislative history make it clear that the General Assembly and proponents of the legislation intended for SB-52 to apply to existing designated ground water basins to protect existing well permits, including specifically the existing NHP Basin.

72. SB-52 deprives surface water right owners of the protections that originally existed in C.R.S. § 37-90-106(1)(a) when the Ground Water Act was adopted and when the NHP Basin was created by prohibiting the exclusion of lands from a designated ground water basin when it becomes apparent that wells on those lands are having more than a de minimis impact on surface water rights.

73. The application of SB-52 to the NHP Basin is unconstitutional retrospective legislation because it impairs vested rights and creates a new disability for such rights by taking away the statutory mechanism to protect surface rights that existed when the NHP Basin was created.

74. Application of SB-52 to the NHP Basin is further unconstitutional as it allows a taking of vested property rights without compensation, violates the prior appropriation doctrine and violates the Foundation's due process rights.

75. Upon a ruling that SB-52 is unconstitutional, the Foundation intends to file a separate petition with the Commission to redraw the boundaries of the NHP Basin to exclude ground water tributary to the Foundation's surface rights, the pumping of which is causing injury.

CLAIMS FOR RELIEF
(Declaratory Judgment, Injunction)

CLAIM 1: The Administration of Water in the Republican River Basin and Related Actions and Omissions by Defendants are Unlawful.

76. The Foundation incorporates and repleads all allegations of the foregoing paragraphs as though fully set forth below.

77. Actions by the Engineers, DWR, and/or CDNR in the administration of water in the Basin are in excess of authority and otherwise contrary to law.

78. There is no lawful basis to treat surface water diverters differently than ground water diverters for purposes of Compact compliance.

79. Administration of the Compact must be consistent with Colorado's constitutional and statutory prior appropriation doctrine insofar as possible. The curtailment of decreed surface water rights for Compact compliance, without first curtailing ground water diversions that are depleting the river and which were developed after the surface water appropriations, is inconsistent with Colorado law.

80. The State Engineer is required to equitably curtail diversions to meet Compact commitments, in a manner that will restore lawful use conditions as they were before the effective date of the Compact insofar as possible. C.R.S. § 37-80-104. Lawful use conditions prior to the 1942 Compact were predominantly surface water diversions not ground water diversions, yet only surface water diversions are being curtailed.

81. The State Engineer has the duty to satisfy obligations under the Compact in a manner consistent with Colorado law, including the power to promulgate and enforce rules as necessary. C.R.S. §§ 37-80-102(1)(a); 37-80-104, 37-92-501.

82. In contrast to the State Engineer's statutory duties, the Commission has no statutory authority to administer water under the Compact.

83. In spite of the Model and other available information regarding ground water depletions, the State Engineer failed in his duties to take available measures to curtail well pumping or

require replacement thereof in the Republican River basin in order to help meet the Compact while protecting senior surface rights in a manner consistent with law.

84. The manner of administration of surface water rights in the Republican River Basin and the failure to act on ground water also ignores the rulings of the United States Supreme Court and its Special Master, the RRCA Ground Water Model, and Colorado's 2002 Stipulation with Kansas and Nebraska, all of which recognize that well pumping in the NHP Basin is significantly contributing to Colorado's depletions under the Compact.

85. Curtailing only surface water rights for Compact purposes and not the wells that first caused the problem and that were appropriated after surface rights is also unconstitutional, in that it is discriminatory, violates equal protection and due process rights, results in a taking without compensation and/or violates constitutional guarantees under the prior appropriation doctrine. U.S. Const. Amend. V, XIV; Colo. Const. Art. II §§ 15, 25. Art. XVI § 6.

86. Given that surface water and ground water irrigators in the Basin are diverting what is now recognized as the same source of water under the Compact, the Foundation's surface water rights are similarly situated in all relevant aspects under the Compact to the ground water pumpers in the Basin, except that its surface water rights predate the rights of most ground water users. There is no legitimate governmental interest or purpose for discriminating against surface water users in administering for Compact compliance.

87. Decreed water rights are valuable vested property rights and allowing current Compact administrative practices to continue results in a deprivation of those rights. The unlawful administrative practices described in this Complaint have resulted in injury to the Foundation by curtailing the Foundation's water rights and by reducing the water available to the Foundation's water rights.

88. Injury to the Foundation's Hale Ditch water rights have been exacerbated by requiring Bonny Reservoir to be drained for purposes associated with Compact compliance, by prohibiting permanent storage in Bonny Reservoir, and by failing to maintain or require maintenance of the area that was once inundated by the Reservoir in a way that has allowed extensive emergent and noxious vegetation to interfere with Hale Ditch deliveries. Such actions are inconsistent with Colorado and federal law, the Bonny Reservoir decree, and obligations to the Hale Ditch set forth in the Water Contract and Land Contract.

89. The Compact is clear that it shall not be used to impair the rights of the United States in and to the waters in the Basin. *See* Compact Art. X(a), (c). The United States has rights in and to the surface waters in the Basin that supply Bonny Reservoir and the Compact is being used to impair those rights, which in turn is causing injury to the Foundation's rights.

90. Use of federal property designated for a specific use may not be diverted and applied to another public use inconsistent with the original dedication and congressional approval, without plain and explicit legislation to that end. 43 U.S.C. § 390b(e). No federal legislation exists to

allow water that was or should have been stored in Bonny Reservoir to be released or passed through for Compact compliance purposes in order to avoid curtailment of ground water use.

91. The Foundation's use of its senior Hale Ditch water right is being unlawfully injured because of Defendants' actions and inactions regarding Bonny Reservoir as described above, and because of the decision by the Engineers, DWR, and/or CDNR to administer senior surface rights like Bonny Reservoir to achieve Compact compliance rather than the well pumping that is causing the Compact compliance problem.

92. The Foundation seeks declaratory judgment on the matters described herein and pursuant to C.R.C.P. Rule 57 and C.R.S. § 13-51-101 et. seq. in order to protect its water rights and legal status, to determine the validity of the administration of its water rights, and to terminate the ongoing controversy and remove uncertainty. Accordingly, the Foundation seeks to have its rights and status declared and established by Order of the Court on the matters described above, including without limitation, the following:

- A. That the current administration of surface water in the Republican River Basin by the Engineers, DWR, and/or CDNR, including without limitation, the administration of the Foundation's water rights and of Bonny Reservoir, is contrary to Colorado law, federal law, and applicable agreements, unconstitutional, in excess of authority, arbitrary and capricious, and resulting in injury to the Foundation's water rights; and
- B. That the lack of any ground water curtailment under the Compact by the State Engineer while at the same time curtailing more senior surface water rights is contrary to Colorado and federal law, unconstitutional, in excess of authority, arbitrary and capricious, and resulting in injury to the Foundation's water rights; and
- C. That the administration and management of Bonny Reservoir and the lands associated therewith by Defendants is inconsistent with and in violation of the Water Contract and Land Contract and is resulting in injury to the Foundation who is a beneficiary thereto; and
- D. Such other and further relief in the Court's discretion as may be appropriate under the circumstance and the law.

93. The Foundation further seeks injunctive relief regarding the administrative actions described above to prevent irreparable harm to its water rights and given the lack of an adequate remedy at law.

CLAIM 2: Senate Bill 52 is Unconstitutional When Applied to the NHP Basin.

94. The Foundation incorporates and repleads all allegations of the foregoing paragraphs as though fully set forth below.

95. Consistent with the Ground Water Act, the NHP Basin was created with statutory protections of surface water rights in place as then codified at C.R.S. § 37-90-106(1)(a).

96. SB-52 eliminated the protection that existed for surface water rights in C.R.S. § 37-90-106(1)(a) by preventing surface water right owners from thereafter seeking to exclude lands from a designated ground water basin that contain wells that are pumping ground water that injures surface water rights.

97. The RRCA Ground Water Model, stipulated to by the State of Colorado, and thereafter approved by the United States Supreme Court, is binding upon the State and its agencies. The Model is irrefutable new information not available when the NHP Basin was created, which documents that wells in that NHP Basin are withdrawing ground water which in its natural course would be available to and required for fulfillment of decreed surface rights and is thus properly viewed as tributary water of the State of Colorado, subject to appropriation in priority under the Colorado Constitution and the laws of the State of Colorado.

98. Under the law that existed when the NHP Basin was created in 1966, the Foundation is entitled to prove to the Commission that pumping of designated ground water in the NHP Basin is having more than a de minimis impact on its surface water rights and is causing injury to those rights, thus requiring a redrawing of the boundaries of that basin as described in *Gallegos* and other relevant case law.

99. Decreed water rights are valuable vested property rights and allowing SB-52 to stand deprives the Foundation of its vested property rights.

100. Under the Colorado Constitution “retrospective” legislation is prohibited. *Colo. Const. Art. II, § 11*. A statute is retrospective if it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or creates a new disability, in respect to transactions or considerations already past.

101. SB-52 is “retrospective” as applied to the NHP Basin, because it impairs vested water rights and creates a new disability by taking away the protection for surface water rights that existed when the basin was designated.

102. SB-52 states that it “reaffirms, rather than alters, the General Assembly’s original intent,” but such a statement written into SB-52 by its proponents and adopted by the 2010 General Assembly does not establish what was intended when the Ground Water Act was adopted by the 1965 General Assembly. Courts make the determination of legislative intent based upon legislative history, the plain language of the law and whether the statutory language was ambiguous before it was amended, and such a judicial interpretation of C.R.S. § 37-90-106(1)(a) by the Colorado Supreme Court occurred in *Gallegos, supra*, and that predates SB-52.

103. Under existing law, since the Colorado Supreme Court had already opined on what 37-90-106(1)(a) meant before SB-52, a change in that judicial interpretation is in fact a change in the law and subject to the constitutional prohibition against retrospective legislation.

104. SB-52 is further unconstitutional because it violates the prior appropriation clause and results in a taking of surface water rights without just compensation. U.S. Const. Amend. V; Colo. Const. Art. II § 15, Art. XVI § 6.

105. SB-52 is also unconstitutional in that it violates the Foundation's due process rights by taking away the Foundation's ability to protect its water rights. U.S. Const. Amend XIV, Colo. Const. Art. II § 25.

106. The Foundation seeks declaratory judgment on the matters described herein and pursuant to C.R.C.P. Rule 57 and C.R.S. § 13-51-101 et. seq. in order to protect its water rights and legal status, to determine the validity of SB-52, and to terminate the ongoing controversy and remove uncertainty. Accordingly, the Foundation seeks to have its rights and status declared and established by Order of the Court on the matters described above, including without limitation, the following:

- A. That SB-52 is unconstitutional as applied to a designated ground water basin that existed prior to SB-52 such as the NHP Basin and has no force and effect in the NHP Basin; and
- B. Such other and further relief in the Court's discretion as may be appropriate under the circumstance and the law.

107. Consistent with C.R.S. § 13-51-115, the Colorado Attorney General's Office is being served with a copy of this Complaint.

CLAIM 3: The Ground Water Act is Unconstitutional if Designated Ground Water that Is Subject to the Compact Cannot be Administered Pursuant to the Compact.

108. The Foundation incorporates and repleads all allegations of the foregoing paragraphs as though fully set forth below.

109. The Compact applies equally to both surface water and ground water depletions in the Republican River basin.

110. When Colorado ratified the Compact in 1942, it entered into a contract with the States of Nebraska and Kansas regarding the allocation of water in the Republican River basin. C.R.S. § 37-67-101; *Green v. Biddle*, 21 U.S. 1, 92 (1823) ("the terms compact and contract are synonymous").

111. No State may enact any law impairing the obligation of contracts, including impairment of the Compact. *See, e.g.*, U.S. Const. Art. I, §10, cl. 1.

112. The General Assembly enacted the Ground Water Act approximately 23 years after the Compact, and the NHP Basin was created thereafter.

113. Wells in the NHP Basin are not only depleting river flows that would otherwise be available to surface water rights, they are significantly contributing to Colorado's depletions under the Compact and resulting in a curtailment of surface water rights to help achieve Compact compliance.

114. The United States Supreme Court, the RRCA Ground Water Model, and Colorado's 2002 Stipulation with Kansas and Nebraska all recognize that well pumping in the NHP Basin is significantly contributing to Colorado's depletions under the Compact.

115. The establishment and administration of designated ground water basins pursuant to the Ground Water Act is unconstitutional if:

- A. Contrary to CLAIM 1 above, the Engineers, DWR and/or CDNR are prevented by the Ground Water Act from administering designated ground water under the Compact when the use thereof is causing depletions under the Compact, or if they are otherwise lawfully allowed to administer only surface water and not designated ground water under the Compact; and/or
- B. Contrary to CLAIM 2 above, the boundaries of an existing designated ground water basin cannot be redrawn under the Ground Water Act to exclude wells causing depletions under the Compact, so that said ground water wells may be administered as tributary under the Compact and consistent with Colorado law.

116. The Ground Water Act is unconstitutional as applied to the NHP Basin under the foregoing circumstances for reasons including, but not limited to, the following: (A) it results in an impairment of the state's obligations under the Compact; (B) it violates constitutional guarantees under the prior appropriation doctrine; (C) it is unconstitutionally retrospective by taking away or impairing vested water rights acquired under pre-existing laws and/or creating new obligations, duties and disabilities regarding said vested water rights; (D) it violates equal protection and due process rights; and (E) it results in a taking of vested property rights without just compensation.

117. The Foundation seeks declaratory judgment on the matters described herein and pursuant to C.R.C.P. Rule 57 and C.R.S. § 13-51-101 et. seq. in order to protect its water rights and legal status, to determine the validity of the Ground Water Act in circumstances described herein, and to terminate the ongoing controversy and remove uncertainty. Accordingly, the Foundation seeks to have its rights and status declared and established by Order of the Court on the matters described above, including without limitation, the following:

- A. That under the circumstances described above in paragraph 115, the Ground Water Act is unconstitutional; and
- B. Such other and further relief in the Court's discretion as may be appropriate under the circumstance and the law.

118. Consistent with C.R.S. § 13-51-115, the Colorado Attorney General's Office is being served with a copy of this Complaint.

PRAYER FOR RELIEF

WHEREFORE, the Foundation respectfully requests that the Court enter declaratory judgment in favor of the Foundation and consistent with the foregoing allegations and including:

- A. An Order finding that the current administration and management of water in the Republican River Basin is unlawful; and
- B. An Order enjoining the current administrative and management practices regarding water in the Republican River Basin; and
- C. An Order finding that Senate Bill 52 (2010) is unconstitutional as applied to existing designated ground water basins, and order that the changes to C.R.S. § 37-90-106(1)(a) enacted by Senate Bill 52 (2010) shall have no force and effect in the NHP Basin; and
- D. In the alternative, if the Court denies the aforementioned prayers for relief, an Order finding that the Ground Water Management Act of 1965 is unconstitutional to the extent it prevents ground water and ground water depletions that are subject to a Compact from being administered and imposes that Compact obligation on surface water rights; and
- E. An Order making such additional findings and issuing such further orders and relief that this Court may deem just and proper under the circumstances.

Respectfully submitted this 23rd day of February, 2015.

PORZAK BROWNING & BUSHONG LLP



Steven J. Bushong (#21782)

Karen L. Henderson (#39137)

Attorneys for the Jim Hutton Educational Foundation

Plaintiff's Address:

The Jim Hutton Educational Foundation

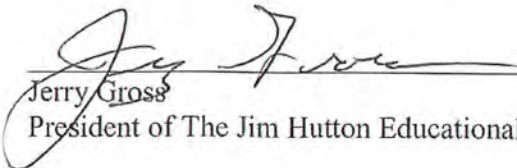
P.O. Box 427

Burlington CO 80807

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF KIT CARSON)

I, Jerry Gross, President of The Jim Hutton Education Foundation, being first duly sworn upon my oath, depose and state that I have read the foregoing Complaint and that the factual matters set forth therein are true to the best of my knowledge and belief.

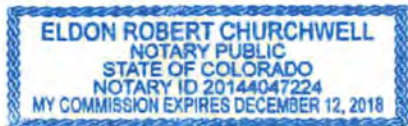


Jerry Gross
President of The Jim Hutton Educational Foundation

Subscribed and sworn to before me this 23rd day of February, 2015, by Jerry Gross,
President of The Jim Hutton Educational Foundation.

My commission expires 12-12-18.

[SEAL]





Notary Public