

<p>DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO</p> <p>Weld County Courthouse 901 9<sup>th</sup> Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300</p>	<p>DATE FILED: September 28, 2016 10:14 AM</p> <p><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p>
<p><b>Plaintiff:</b> The Jim Hutton Educational Foundation, a Colorado non-profit corporation,</p> <p><b>v.</b></p> <p><b>Defendants:</b> 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><b>Defendant-Intervenors:</b> 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><b>Defendant – Well Owners:</b> 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&amp;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: <b>15CW3018</b></p> <p>Div. No. 1</p>
<p align="center"><b>JIM HUTTON EDUCATIONAL FOUNDATION’S MOTION FOR CERTIFICATION OF FINAL JUDGMENT PURSUANT TO C.R.C.P. 54(b)</b></p>	

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through undersigned counsel, hereby requests that this Court enter an order certifying final judgment regarding the Foundation’s Second Claim for relief pursuant to C.R.C.P. 54(b). In support thereof, the Foundation states as follows:

1. Certificate of Conferral. Counsel for the Foundation initiated conferral with opposing counsel regarding the relief sought herein just prior to noon on September 23, 2016. It is authorized to state that (i) the State Engineer, Division Engineer, and Division of Water Resources take no position; (ii) Yuma County Water Authority; Tri-State Generation and

Transmission Association; the City of Burlington; the Colorado Ground Water Commission; the Republican River Water Conservation District; Colorado Parks and Wildlife; 4m Feeders, Inc; 4m Feeders, LLC; Carlyle James as Trustee of the Chester James Trust; Happy Creek, Inc; J and D Cattle, LLC; James May; Kent Ficken; May Acres, Inc; May Brothers, Inc; May Family Farms, Inc; Steven Kramer; Thomas May; the Central Yuma, Sandhills, Frenchman, Marks Butte, W-Y, Plains and Arikaree Ground Water Management Districts; East Cheyenne Ground Water Management District; Protect Our Local Community's Water, LLC; Saving our Local Economy, LLC; the State Land Board; Colorado Agriculture Preservation Association; and the North Well Owners do not consent to the motion; and (iii) the remaining Well Owners not referenced above had not responded to the conferral at the time of filing.

2. The Foundation's "Second Claim" for relief in this matter is a constitutional challenge of Senate Bill 52 ("SB-52"). SB-52 modified the language in C.R.S. § 37-90-106(1)(a) that previously allowed surface water right owners to challenge the legal status of groundwater in a designated groundwater basin and redraw the basin to exclude wells causing injury to surface water rights. The Foundation alleged, among other things, that SB-52 was unconstitutionally retrospective legislation that took away the protections and remedies that were in existence for surface water rights when the Northern High Plains Basin ("NHP Basin") was originally designated.
3. On August 29, 2015, the Court entered its Order Granting the Colorado Ground Water Commission's Motion to Dismiss Plaintiff's Second Claim for Relief and a Portion of Plaintiff's Third Claim for Relief ("Dismissal Order"). In the Dismissal Order, the Court held that it "grants the Commission's motion to dismiss Plaintiff's second claim for relief raising a constitutional challenge to SB-52." (*Dismissal Order*, p. 17). The ruling was based upon the Court's "find[ing] that Plaintiff's second claim is not ripe" because the Foundation had not yet "prove[n] to the satisfaction of the Commission . . . that water presently classified as designated ground water is hydraulically connected to surface water and that well pumping within the NHP Basin is having more than a *de minimis* impact on Plaintiff's surface water rights." (*Dismissal Order*, p. 3) (*citing Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 31-32 (Colo. 2006)).
4. The Foundation respectfully seeks to appeal the dismissal of its Second Claim pursuant to C.R.C.P. Rule 54(b). Rule 54(b) provides, in relevant part, as follows:

When more than one claim for relief is presented in an action . . . the court may direct the entry of final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims. . . .

5. "On its face, Rule 54(b) does not contain a time limitation for filing a motion seeking certification." *Lopresti v. Bradenburg*, 267 P.3d 1211, 1215 (Colo. 2011). However, in *Lopresti*, the Colorado Supreme Court explained how some jurisdictions have imposed a requirement that Rule 54(b) certification "be filed within thirty days of the entry of the

order,” while other jurisdictions have “consider[ed] timeliness on a case-by-case basis.” *Id.* Given the circumstances in *Lopresti*, the Court concluded that it “need not decide here which approach we would adopt.” *Id.* at 1215-1216. This Motion is being filed less than 30 days from the date of the Dismissal Order to avoid any issue of timeliness.

6. Rule 54(b) is “an exception to the general requirement that an entire case be resolved by a final judgment before an appeal is brought.” *Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1125 (Colo. 1982). Three requirements must be met for Rule 54(b) certification: “(1) the decision certified must be a ruling upon an entire claim for relief; (2) the decision certified must be final in the sense of an ultimate disposition of an individual claim; and (3) the trial court must determine that there is no just reason for delay in entry of a final judgment on the claim.” *East Cherry Creek Valley Water and Sanitation Dist. v. Greeley Irrigation Co.*, 348 P.3d 434, 439 (Colo. 2015) (citing *Lytle v. Kite*, 728 P.2d 305, 308 (Colo. 1986)); see also *Harding Glass*, 640 P.2d at 1125 (describing the same 3-part test); 12 Colo. Prac., Civil Procedure Forms & Commentary § 54.4 (2d. ed.) (same). “While the ‘no just reason for delay’ question is committed to the trial court’s discretion, the other two requirements are ‘not truly discretionary.’” *East Cherry Creek Valley*, 348 P.3d at 439 (quoting *Lytle v. Kite*, 728 P.2d at 308).
7. In this instance, the first two requirements to certify the Dismissal Order are clearly satisfied. The Dismissal Order disposed of the Foundation’s entire Second Claim for relief leaving no remaining issues before this Court on that claim. “[A] summary judgment or dismissal ruling regarding one or more claims is a necessary prerequisite for a 54(b) certification.” *East Cherry Creek Valley*, 348 P.3d at 442. Such a ruling exists in this case.<sup>1</sup>
8. The third requirement that there be “no just reason for delay in entry of a final judgment” is also satisfied. “In deciding whether there are just reasons to delay an appeal of an individual final judgment, a district court must take into account the interests of judicial administration, as well as the equities involved.” *Lytle v. Kite*, 728 P.2d 305, 309 (Colo. 1986) (citing *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980)). In *Lytle*, for example, the Court held that it did “not believe the interrelationship of the claims hinders judicial administration by creating piecemeal appeal” and on the question of equity, found the nine years that had lapsed since the alleged injury that gave rise to the cause of action “weighed in favor of granting a Rule 54(b) certification.” 728 P.2d at 309.
9. In this case, judicial administration will not be hindered by an immediate appeal of the Court’s Dismissal Order. The resolution on appeal of the Foundation’s Second Claim will not affect the resolution of the other claims remaining before this Court regarding the

---

<sup>1</sup> This is not a situation where, for example, a court entered judgment on only the issue of liability, but the question of damages associated with that liability had not been resolved. *Harding Glass*, 640 P.2d at 1127 (discussing case law involving such circumstances where it was determined that an entire claim was not resolved). Nor is this a situation where it must be determined whether a ruling on a question of law “had a final, dispositive effect as to claims pending in the litigation” so that “the order essentially constituted a partial summary judgment . . . [and] was properly certified under C.R.C.P. 54(b).” *East Cherry Creek Valley*, 348 P.3d at 442 (discussing opinions in *In re Estate of McCreath*, 240 P.3d 413 (Colo. App. 2009) and *ISG, LLC v. Ark. Valley Ditch Ass’n*, 120 P.3d 724 (Colo. 2005)).

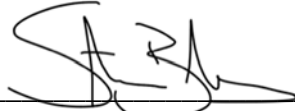
administration of surface water rights, nor will the resolution of the remaining claims affect the resolution of the Second Claim. The Second Claim is a stand-alone claim challenging the constitutionality of SB-52, and is a claim that would undoubtedly have been decided on appeal in any event.

10. As to the equities, the Foundation is a non-profit corporation that has long suffered the consequences of having senior surface water rights in a designated groundwater basin. Similar to *Lytle*, the Foundation's alleged injury has been occurring for many years. (*See, e.g.* Complaint ¶¶ 35 - 39). Moreover, in this instance, the alleged injury is ongoing and getting worse as lagged well depletions continue to accrue to the river. (*Id.*). There are no "just reasons to delay" the Foundation's appeal of the Dismissal Order. C.R.C.P. 54(b).
11. Further, as to the equities, the Dismissal Order requires the Foundation to successfully challenge the legal status of the designated groundwater in the NHP Basin before the Commission, in order to be able to challenge the constitutionality of SB-52 in court. Yet, under SB-52, "the legal status of groundwater included in a designated groundwater basin cannot be challenged" and "any request to exclude wells that are permitted to use designated groundwater from an existing ground water basin shall constitute an impermissible collateral attack on the original decision to designate the basin." C.R.S. § 37-90-106(1)(a) (2016) (in its post-SB-52 form). The Foundation believes this inherent conflict in the procedural posture of pursuing its Second Claim is another reason why an appeal, without delay, furthers the ends of justice by obtaining the Colorado Supreme Court's direction on this important issue. If the Foundation is successful in challenging the constitutionality of SB-52, it will still need to eventually proceed before the Commission – but it will only be required to have one such Commission hearing.
12. "The task of assessing whether there is just reason for delay is committed to the trial court's sound judicial discretion." *Harding Glass Co.*, 640 P.2d at 1125.
13. Accordingly, the Foundation seeks certification in order to proceed with an appeal of the Dismissal Order. *See Mission Viejo Co. v. Willows Water District*, 818 P.2d 254, 258 (Colo. 1991) ("When a case involves multiple claims for relief or multiple parties, a judgment resolving fewer than all the claims or the rights of fewer than all of the parties requires certification pursuant to C.R.C.P. 54(b) in order to support an appeal") (*citing Kempter v. Hurd*, 713 P.2d 1274 (Colo. 1986)). A proper order "[t]o certify a judgment as final under C.R.C.P. 54(b) . . . must properly and expressly determine that there is no just reason for delay and must expressly direct entry of judgment." *Mission Viejo* 818 P.2d at 258; *see also 18 Colo. Pract., Appellate Law & Practice* § 5.3 (2d ed.).

WHEREFORE, the Foundation respectfully requests that this Court enter an order pursuant to C.R.C.P. 54(b) that expressly directs entry of judgment, certifying that its Dismissal Order constitutes a final judgment that ultimately disposes of the Foundation's Second Claim for relief in its entirety, and that expressly finds there is no just reason for delay. A proposed order is filed with this Motion.

Respectfully submitted this 28<sup>th</sup> day of September, 2016.

PORZAK BROWNING & BUSHONG LLP

A handwritten signature in black ink, appearing to read 'SJB', is written over a horizontal line.

Steven J. Bushong (#21782)

Karen L. Henderson (#39137)

*Attorneys for the Jim Hutton Educational Foundation*

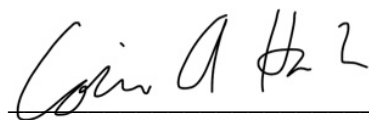
**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of September, 2016, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION’S MOTION FOR CERTIFICATION OF FINAL JUDGMENT PURSUANT TO C.R.C.P. 54(b)** 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:

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
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)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
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.)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
		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	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.)



Cori Hach