

<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>DATE FILED: February 29, 2016 9:39 PM</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 MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE A MOTION FOR DETERMINATION OF QUESTION OF LAW, REGARDING ITS BONNY RESERVOIR CLAIM</p>	

Plaintiff, the Jim Hutton Education Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through undersigned counsel, seeks summary judgment pursuant to C.R.C.P. 56 on its claim that Dick Wolfe, State Engineer; David Nettles, Division Engineer for Water Division No. 1; the Colorado Division of Water Resources; and the Colorado Division

of Parks and Wildlife (“CPW”), (collectively the “State Defendants”), are unlawfully operating Bonny Reservoir in a manner that injures the Foundation’s interest in the Hale Ditch water right. Or, in the alternative, the Foundation seeks a determination of question of law on this issue in the event that there is found to exist an issue of material fact regarding whether the operation of Bonny Reservoir is injuriously impacting Foundation’s Hale Ditch water right. The Foundation hereby moves the Court to determine, as a matter of law, that Bonny Reservoir may not be operated in a manner that injures the Foundation’s Hale Ditch water right. As grounds therefore, the Foundation states as follows:

I. Background.

The Foundation owns a 1/3rd interest in the Hale Ditch, Priority No. 38, equivalent to 7.67 cfs, for irrigation purposes that was appropriated in 1908 and decreed in 1938. After the Hale Ditch had been in use for about 36 years, construction on Bonny Dam began in 1948. The Dam was built across the Hale Ditch and the reservoir inundated the ditch and headgate on the South Fork of the Republican River. Therefore, in order to accommodate both the reservoir and the ongoing use of the Hale Ditch, a specific outlet was included in Bonny Dam to supply water to the Hale Ditch. This outlet infrastructure was used to supply the Hale Ditch with its water rights starting in or before 1951, and was used continuously until recent years.

In order to reduce Colorado’s depletions under the Republican River Compact (“Compact”), starting in 2007 the State Engineer began ordering water to be released from Bonny Reservoir. Bonny Reservoir loses significant water to evaporation and seepage when full, and these losses are counted toward the State’s allocation under the Compact. Bonny Reservoir was also placed under curtailment orders for Compact compliance beginning in about 2008. After analyzing the long-term benefits of eliminating evaporation and seepage losses, as well as accounting advantages of draining Bonny Reservoir, the State eventually decided to drain the Reservoir entirely. By 2012, Bonny Reservoir had been drained to the extent possible.¹

In addition to the orders placed on Bonny Reservoir, the State Engineer also issued an order in 2011 preventing the Foundation from diverting its Hale Ditch water rights. The Foundation successfully challenged this order in Case No. 11CW186. Despite the Court ordering the State Engineer to provide the Foundation with its water right, the Foundation did not receive its lawful entitlement to water under its Hale Ditch water right in 2014 or 2015.

There several principal causes for the shortfall experienced by the Foundation. First, groundwater pumping by wells hydraulically connected to the South Fork of the Republican River has resulted in depletions to the stream that impact the water available for surface water rights, including the Hale Ditch. However, this issue is not directly addressed in the Complaint. The groundwater depletions have also caused Colorado to fall short of its Compact obligations, resulting in a “Compact Call” administered by the State Engineer on surface rights that post-date

¹ In response to the State Engineer’s release orders, questions arose as to whether releases for compact compliance were, in effect, an undecreed change of water right under Colorado law and/or a conversion of underlying federal agreements that require the State to manage Bonny Reservoir for recreation and fish and wildlife purposes. The Foundation reserves the right to argue such issues at a later time in this litigation if necessary.

the Compact, including Bonny Reservoir. The inequitable administration of surface water rights in order to meet Compact obligations is the subject of the Foundation's Motion for Summary Judgment on its Compact Administration Claim, and is not addressed herein. Lastly, the cause of the Hale Ditch shortfall, which is the subject of this Motion, is the operation and administration of Bonny Reservoir.

The current operation and administration of Bonny Reservoir is unlawfully injuring the Foundation's Hale Ditch water right for a number of reasons. First, the outlet installed in Bonny Dam cannot function properly when the reservoir is drained. This is due to the simple fact that water cannot be provided through the outlet when the water level in the reservoir is below the level of the outlet. While the State Engineer's application of the 72-hour temporary storage rule has allowed some water to be released in recent years, this small amount of storage has not created sufficient head pressure to convey the full natural flow to which the Hale Ditch is entitled. Second, what little water does get stored in the reservoir is subject to seepage loss, further depriving the Foundation of its legal water supply. Lastly, evaporation from pooled water and evapotranspiration from phreatophytes growing in the footprint of Bonny Reservoir consume water that might otherwise be available to the Foundation. These factors result in the Hale Ditch typically receiving less water than is otherwise available upstream of Bonny Reservoir.

Therefore, the Foundation seeks summary judgment that the operation and administration of Bonny Reservoir is currently unlawfully impacting the Foundation's Hale Ditch water right, or in the alternative a determination that any such injuries are unlawful to the extent proven.

II. Legal Standards Under C.R.C.P. 56.

Summary judgment "shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." C.R.C.P. Rule 56(c). A material fact is one whose resolution will affect the outcome of the case. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). "A genuine issue of material fact cannot be established simply by allegations in pleadings or argument; rather, the opposing party must set forth specific facts by affidavit or otherwise showing that there is a genuine issue for trial." *People ex rel A.C.*, 170 P.3d 844, 846 (Colo. App. 2007). "The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail." *Id.* An uncontradicted showing of facts probative of right to judgment leaves a trial court with no alternative but to conclude that no genuine issues of material fact exist. *Civil Service Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991); *Terrell v. Walter E. Heller & Co.*, 439 P.2d 989, 991 (Colo. 1968).

In the alternative, C.R.C.P. 56(h) states that "at any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law." The Court may decide the question if "there is no genuine issue of any material fact necessary for the determination of the question of law."

III. Undisputed Facts.

The following facts are or should be undisputed in this case and frame the legal issues for this Motion:

1. The Hale Ditch, Priority No. 38 was decreed for 23 cfs for irrigation purposes by the Kit Carson County District Court on September 8, 1938 in Civil Action No. 2985, with an appropriation date of January 17, 1908. The source of supply for the Hale Ditch is the South Fork of the Republican River. The Foundation owns a 1/3 divided interest in the Hale Ditch water right, Priority 38, which was confirmed by this Court in the Findings of Fact and Conclusions of Law dated December 16, 2013 in Case No. 11CW186, attached as **Exhibit 22**.
2. Bonny Reservoir is part of the federal Arnel Unit, formerly called the St. Francis Unit, of the Pick-Sloan Missouri Basin Program managed by the United States Bureau of Reclamation (“Bureau”). The Flood Control Act of 1944 authorized this project. Construction of Bonny Reservoir began on December 8, 1948, and was completed May 4, 1951. (See excerpt of *Technical Record of Design and Construction: Bonny Dam*, attached as **Exhibit 23**, p. 8).
3. The storage water right for Bonny Reservoir was decreed for 351,460 acre-feet for flood control, irrigation of approximately 750 acres, recreation, and fish and wildlife propagation by the Yuma County District Court on October 1, 1984 in Case No. W-9135-77, with an appropriation date of December 3, 1948. Bonny Reservoir is an on-channel reservoir and takes its supply from the South Fork of the Republican River. The Decree in Case No. W-9135-77 is attached as **Exhibit 24**.
4. When Bonny Reservoir was constructed, Bonny Dam was built on top of the Hale Ditch, and the Reservoir inundated the Hale Ditch headgate and part of the ditch. This fact was admitted by the State Defendants. (See *Answer of the State Defendants* dated April 17, 2015, paragraph 15.B).
5. Bonny Dam was designed and constructed with an outlet pipe for the Hale Ditch, which was completely separate from the main spillway in order for water to be passed through the dam and reservoir into the Hale Ditch. (See Exh. 23, excerpt of *Technical Record*, p. 26).
6. The State of Colorado, acting through the Department of Natural Resources (“CDNR”), entered into a contract with the United States on 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”). The Water Contract sets forth the terms under which CPW can utilize the “conservation capacity” of Bonny Reservoir, which is the storage capacity between the elevation of approximately 3635.5 and 3672.0 feet, and historically contained about 39,922 acre-feet of water. CPW is supposed to manage this conservation capacity for recreation and fish and wildlife purposes. The State 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." (See the Water Contract, attached as **Exhibit 25**, ¶ 5.c).

7. The State of Colorado also entered into a Memorandum of Understanding with the United States dated January 26, 2002, by which the State, acting through 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"; or collectively with the Water Contract, the "Contracts"). The Land Contract is attached as **Exhibit 26**.

8. As a result of the Contracts, CPW is responsible for managing Bonny Reservoir and the surrounding lands (about 7,225 acres in total), while the Bureau operates the dam in accordance with orders by the State Engineer. (See Letter from Colorado Department of Natural Resources to United States Department of Interior dated January 14, 2010, attached as **Exhibit 27**; see also the Contracts, Exh. 25 and Exh. 26).

9. Total releases from Bonny Reservoir to the Hale Ditch averaged about 2,648 acre-feet annually between 1951 and 2001. (See Diversions records attached as **Exhibit 28**). Releases into the Hale Ditch have continued since 2001, although on a less consistent basis than occurred historically. (*Id.*).

10. In 2007, the State Engineer began ordering releases from Bonny Reservoir to help achieve Compact compliance. (See **Exhibit 29**, select correspondence between the State Engineer and Bureau, hereafter the "Release Orders"; see also *In Re: Non-Binding Arbitration to the Final Settlement Stipulation, Kansas v. Nebraska and Colorado, No. 126, Colorado, dated October 7, 2010, regarding the Bonny Reservoir Proposal Dispute* dated November 27, 2013, attached as **Exhibit 30**, pp. 5, 9; see also **Exhibit 31**, Republican River Water Conservation District Memorandum Regarding Benefits to Colorado's Compact Compliance of Draining Bonny Reservoir dated February 20, 2007). The Release Orders periodically required releases from storage between 2007 and 2011, until there was little water remaining in Bonny Reservoir. (Exh. 29). Then, in 2011, the State Engineer ordered the release of all the water stored in Bonny Reservoir to "the lowest possible level that [could] be achieved without damage to the structure." (*Id.*). By 2012 Bonny Reservoir was effectively drained. (See Exh. 30, pp. 5, 12).

11. The Foundation's portion of the Hale Ditch water right was put under a curtailment order by the State Engineer in 2011. (See Exh. 22). The Foundation challenged the curtailment order, which resulted in this Court ordering the State and Division Engineers in 2013 "to provide [the Foundation] with its 1/3 interest in the Hale Ditch water right, when [the Foundation]'s right is in priority." (See Exh. 22).

12. By using the 72-hour temporary storage rule, the Engineers were able to deliver some water to the Hale Ditch in 2014. (See **Exhibit 32**, April 2014 emails between State Engineer and Bureau of Reclamation). The amount of water being delivered to the Hale Ditch with this practice, however, was always less than the Foundation's 7.67 cfs interest and dropped so low by

mid-July of 2014 that water was not available to the Foundation. (*See, e.g., 2014 Bureau of Reclamation records*, attached as **Exhibit 33**).

13. The Bureau of Reclamation's records further show that the delivery rate to the Hale Ditch in 2014 was often significantly less than the measured inflow into the Reservoir, and sometimes less than 25% of the inflow into the Reservoir. (*See* Exh. 33). Based upon the 2014 data, the Hale Ditch was receiving, on average, less than 65% of the measured inflow into Bonny Reservoir, not including times when there were no deliveries to the Hale Ditch because inflows were inadequate. (*Id.*). There are also other sources of inflows into Bonny Reservoir that are not measured, suggesting the Hale Ditch is getting even less than it is entitled to receive. (*See* Exh. 33, 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, water in the river below Bonny Reservoir which would include seepage out of Bonny Dam, was often more than the water released into the Hale Ditch in 2014. (*Id.*)

14. The Foundation maintains that a loss of head pressure in Bonny Reservoir, seepage out of the dam, evaporation losses, and evapotranspiration losses are all reasons why it is not receiving the amount of water that would otherwise be available for the Hale Ditch. As for evapotranspiration, the footprint of Bonny Reservoir has become overgrown with phreatophytes. The Bureau's *Draft Integrated Pest Management Plan for Bonny Reservoir* states that even before Bonny Reservoir was drained, areas below the high water mark that had become exposed were being settled by invasive species including bindweed, Russian olive, tamarisk, and thistle, (*see Exhibit 34*, p. 10), many or all of which are identified on the Yuma County Noxious Weed List. Observation suggests that vegetation growth has increased due to the reservoir draining.

IV. Legal Analysis in Support of Summary Judgment that the Operation and Administration of Bonny Reservoir is Unlawfully Injuring the Hale Ditch Water Right.

As explained above, Bonny Reservoir inundated part of the Hale Ditch and its headgate on the South Fork of the Republican River. Recognizing the need to deliver water to the Hale Ditch, the Bureau specifically designed the outlet works at Bonny Dam to supply the Hale Ditch with water. (*See, e.g. Exhibit 35, Hydraulic Model Studies of the Overflow Spillway and the Hale Ditch Irrigation Outlet – Bonny Dam, Bureau of Reclamation, January 31, 1952*); (*see also* Exh. 23, *Technical Record*, p. 26). Subsequently, when the State of Colorado entered into the Water Contract with the Bureau for the perpetual use of the conservation capacity of Bonny Reservoir, the State Defendants agreed to the following requirement: "The 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." (*See* Water Contract, Exh. 25, ¶ 5.c).

Despite the foregoing Water Contract and Colorado law, the State Defendants are operating and administering Bonny Reservoir in a manner that is unlawfully injuring the Foundation's senior Hale Ditch water right. This injury stems from the State and Division Engineers' ("Engineers") decision to drain Bonny Reservoir in an attempt to meet Colorado's

consumptive use allocation under the Compact. (*See* Exh. 27.)² However, this decision must be exercised in a way that does not injure the rights of downstream seniors.

A. Operation of Bonny Reservoir May Not Injure the Senior Hale Ditch Water Right.

The State Defendants may not operate and administer Bonny Reservoir in a manner that will injure the Foundation’s senior Hale Ditch water right. *See* 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.”). By enacting this statutory provision, the Colorado legislature recognized that reservoirs have the potential to injure other water users and reiterated the “longstanding principle that senior water rights must be protected.” *See Kobobel v. State, Dep’t of Nat. Res.*, 249 P.3d 1127, 1138 (Colo. 2011). The statute does not qualify the type of injury that senior appropriators are protected from. Nor is the statutory obligation qualified by the amount of water being lawfully stored. Instead, the plain language of this statute bars *any* material injury to senior rights caused by a reservoir’s operation. Harmful changes to the timing or amount of outflows, a loss in available water, or an inability to deliver available water to seniors, are all injurious impacts from the operation of a storage structure that are prohibited under Colorado law.

The State Defendants are in violation of C.R.S. § 37-87-101(1)(a) with regard to Bonny Reservoir. While the Bureau physically operates Bonny Dam, it is the Engineers’ administrative orders that have caused the water level in Bonny Reservoir to drop below the level needed to provide water into the Hale Ditch outlet. (*See* Exh. 29). The Hale Ditch has received its supply through the Hale Ditch outlet in Bonny Dam since the 1950’s, when the reservoir inundated the headgate and a portion of the ditch, but now even when water is available the water level in Bonny Reservoir is too low for water to be released through the outlet. Whether because the water level is insufficient to adequately utilize the Dam’s infrastructure, or because water is being lost through seepage, or because of the consumption of water occurring within the Reservoir due to evaporation and evapotranspiration, or a combination of all these factors, the simple fact is that the Hale Ditch is not receiving the water to which it is entitled due to Bonny Reservoir. This is a material injury directly caused by the State Defendants’ operation and administration of Bonny Reservoir that violates C.R.S. § 37-87-101(1)(a) and must be remedied.

The State Defendants are, in this instance, also operating and managing an on-channel reservoir to the detriment of a senior water right in a manner inconsistent with Colorado law. An on-channel reservoir cannot “in any way encroach upon the superior rights or interests of others.” *Larimer Cty. Reservoir Co. v. People*, 9 P. 794, 795 (Colo. 1886). In fact, the owner or operator of an on-channel reservoir “must see to it that no legal right of prior appropriators . . . is in any way interfered with” and “cannot lessen the quantity of water, seriously impair its quality, or impede its natural flow, to the detriment of others who have acquired legal rights therein superior to his [reservoir]; and he must respond in proper actions for all injuries resulting to them by reason of his acts in the premises.” *Id.* at 796. An on-channel reservoir is not allowed to “interfere with the flow of even the surplus water to a greater extent than is requisite for the

² The DNR letter that is Exhibit 27 also makes it clear that the State chose to drain Bonny Reservoir to allow the groundwater users to continue to pump in order to preserve the economy in the NHP.

beneficial use designed.” *Id.* Indeed, the Colorado Supreme Court acknowledged that anyone who constructs an on-channel reservoir “does so at his peril” due to these obligations. *Id.* at 796. Thus, by lessening the quantity of water available to the Hale Ditch and impeding the natural flow, and by failing to address the injury to the Hale Ditch, the State Defendants are unlawfully operating the Reservoir.

Furthermore, the State Defendants are not entitled to lower the water level in Bonny Reservoir to the point that it renders the means of diversion for the Hale Ditch useless without providing an alternate means of supplying this senior water right. *See Joseph W. Bowles Reservoir Co. v. Bennett*, 18 P.2d 313, 314-315 (Colo. 1932). The facts in *Joseph W. Bowles Reservoir Co.* are analogous to the ones at issue here. In that case, a junior appropriator pumped so much water out of a reservoir that the surface level threatened to drop below the level where water would flow out of the gravity outlet, which was the means of diversion utilized by the senior water user. The court was faced with the question of, first, whether it was acceptable for the junior to, “in the course of procuring his own water by pumping, interfere with the gravity system of the senior,” and second, if such interference was allowed to continue, whether the expense of updating the senior appropriator’s diversion method should be borne by the senior or imposed upon the junior. *Id.* at 314. In response to the first question, the court concluded that the senior user’s water rights had been unacceptably “injuriously affected and practically nullified” by the juniors, who had “deprived the senior appropriator of the enjoyment of its senior right.” *Id.* at 315. As for remedy, the court offered the junior appropriator the choice between ceasing the injurious diversions or bearing the costs of replacing the senior’s diversion works with a suitable method that would eliminate any deficiency to “quantity of water and timeliness of delivery.” *Id.* at 316.

The same analysis was applied in *City of Colorado Springs v. Bender*, 366 P.2d 552 (Colo. 1961). In *Bender*, withdrawals by a junior well pumper to a “flowing aquifer” that was determined to be either part of or directly tributary to Fountain Creek threatened to drop the water table below the level of a senior appropriator’s intake pumping facilities. *Id.* at 556. Noting that the same legal principles applied to the situation as if the water had been flowing above the surface of the ground, the Court stated that “a junior appropriator may not divert the water to which he is entitled by any method or means the result of which will be to diminish or interfere with the right of a senior appropriator to full use of his appropriation.” *Id.* The Court suggested that potential solutions would be to require the junior to stop diversions in excess of a certain rate or for the senior appropriators to improve their diversion facilities at the junior’s expense.

By direct analogy, the Foundation’s Hale Ditch water rights are being “injuriously affected and practically nullified” by actions of the State Defendants. By draining Bonny Reservoir so that releases are impossible or inefficient, and allowing extensive seepage and vegetation growth to interfere with what water would otherwise be available, and by allowing evaporation to occur without replacement, the current operation and administration of Bonny Reservoir has directly impacted the Foundation. Under the holdings in these cases, the State Defendants must refill Bonny Reservoir, install an alternative diversion structure or pump that will function even at low water levels, or otherwise address the impacts. The protection of senior water rights from an on-channel reservoir does not hinge upon the extent to which the Reservoir

is being allowed to store water in priority.³ Regardless of what solution is chosen, it is clear that the State Defendants cannot continue to operate and administer a junior right, Bonny Reservoir, in a manner that injures the Foundation's senior Hale Ditch water right. *See Kobobel v. State, Dep't of Nat. Res.*, 249 P.3d 1127, 1134 (Colo. 2011) (“[t]he first person to divert unappropriated water and to apply it to a beneficial use has a water right superior to subsequent appropriators from the same water resource.”).

B. The State Defendants are Contractually Obligated to Comply with the Hale Ditch Direct Flow Rights.

Not only does Colorado law prevent the State Defendants from operating Bonny Reservoir to the injury of the Hale Ditch, but the Contracts impose an obligation to manage Bonny Reservoir within certain parameters and in a manner that recognizes and protects the senior Hale Ditch water right.

To explain, when the Bureau constructed Bonny Reservoir and inundated part of the Hale Ditch it triggered the Bureau's duty under *Larimer Cty. Reservoir Co.* to “respond in proper actions for all injuries resulting” from the project. In addition, when the Bureau acquired the land for Bonny Reservoir it took title subject to the existing ditch rights-of-way, which included the existing Hale Ditch. (*See Exhibit 36*, ¶13, 1948 Land Purchase Contract). Therefore, in accordance with its legal and equitable obligations, the Bureau provided a special outlet in Bonny Dam to deliver water to the Hale Ditch and prevent injury to that senior water right. Subsequently, when the State of Colorado entered into the Contracts with the Bureau, it too became obligated to protect the senior Hale Ditch water rights.

Pursuant to the Contracts, the State (through CPW) is responsible for managing Bonny Reservoir and the surrounding lands (about 7,225 acres in total), while the Bureau operates Bonny Dam in accordance with orders by the Engineers. The State's use of Bonny Reservoir is subject to the needs of the pre-existing Hale Ditch water right and right-of-way. The Contracts show a clear intent to comply with existing law that protects senior water rights and ditches from injury. For example:

- The Water Contract states that “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.” (*See Exh. 25*, ¶ 5.3).
- As set forth in the Water Contract, 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” must undergo National Environmental Policy Act analysis and must be submitted to the Republican River Compact Commission in advance of the use. (*See Exh. 25*, ¶ 8.a).

³ As described in the Foundation's Motion for Summary Judgment on its Compact Administration Claim, Bonny Reservoir and other surface water rights should not be curtailed for Compact compliance when the groundwater pumping that caused Colorado's shortfall under the Compact is not first being curtailed. Lifting the call on Bonny Reservoir would also help address the impacts of the Reservoir's operations on the Hale Ditch water right.

- The Water Contract also indicates that "The State shall observe all Federal and State laws, rules, and regulations applicable to this acquisition." (*See* Exh. 25, ¶ 2.b), which would include the long-standing Colorado water laws described above and which would require protection of the pre-existing ditch right-of-way.
- The Land Contract superseded all prior lease agreements and/or Memorandums of Understanding, and extends and reaffirms the State's management of the Bonny Reservoir Area. The State's rights and obligations under the Land Contract is "subject to" certain rights, including "any prior rights which have attached before the date of this agreement and any prior agreements thereof." (*See* Exh. 26, ¶ 3.a). This applies to the Hale Ditch water rights, and the right-of-way for the Hale Ditch – both of which are "prior rights" that preceded Bonny Reservoir.
- In the Land Contract, the State of Colorado agreed to manage vegetation in conformance with all Federal and State Noxious Weed Laws and Regulations, including a duty to control or contain undesirable species. (*See* Exh. 26, ¶ 4). The largely empty footprint of Bonny Reservoir is now overgrown with vegetation, including invasive species that have been identified and targeted for control or eradication by the Yuma County Pest Control District. These phreatophytes consume large quantities of water through evapotranspiration, further reducing the amount of water available to the Hale Ditch.

Given the foregoing, the Foundation has standing as a third-party beneficiary to enforce the provisions of the Contracts that are protective of the Hale Ditch and its pre-existing right-of-way. *See E.B. Roberts Const. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo. 1985) ("A person not a party to an express contract may bring an action on such contract if the parties to the agreement intended to benefit the non-party, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract."). The provisions in the above-described agreements were expressly intended to benefit and protect the Hale Ditch water right. In fact, the provision directing the State to comply with the Hale Ditch water rights in the Water Contract is in the "Third Party Contracts and Permits" section of the Contract. This only makes sense given that the land the Bureau acquired for Bonny Reservoir was subject to the Hale Ditch right-of-way, and so when it agreed to allow the State to take over management of certain aspects of Bonny Reservoir it made CPW's use and management of Bonny Reservoir also subject to the Hale Ditch water right and right-of-way. Accordingly, the Foundation has standing to enforce the contractual provisions relating to the Hale Ditch, and the contractual provisions support a determination that Bonny Reservoir cannot be operated in a manner that injures the Foundation.

C. The Decree Granting the Bonny Reservoir Water Right Demonstrates that the Draining of Bonny Reservoir does not Justify Violations of Colorado Law.

Whether the State Defendants' obligation to operate Bonny Reservoir in a manner that does not injure the Hale Ditch water right is based on case law, statute, and/or contract, it is also worth noting that the water right decree for Bonny Reservoir includes a term that requires that

any water impounded out-of-priority be promptly removed from Bonny Reservoir by “draining, pumping or other means.” (*See* Exh. 24, Case No. W-9135-77). This provision is relevant to this Motion because it shows that if the water level drops so low that ordinary gravity releases would become impossible, then the Reservoir must be operated by pumping or other means to comply with Colorado law.

Such a term is intended to protect downstream water rights from injury. Yet, when there is out-of-priority water stored in Bonny Reservoir or otherwise impeded by the dam that cannot be delivered to the Hale Ditch, the State Engineers are not enforcing the terms of this decree and requiring that such water be pumped into the Hale Ditch to satisfy that senior water right. The provision prohibiting Bonny Reservoir from storing out-of-priority water even if removal of the water requires laborious pumping or “other means” is evidence that Bonny Reservoir cannot be operated so as to cause injury to senior water rights. Nor can the State Defendants be excused from the legal duty to ensure that Bonny Reservoir does not impact senior water rights, including the Hale Ditch.

V. Conclusion.

Wherefore, the Foundation respectfully requests a determination that the State Defendants cannot operate Bonny Reservoir in a manner that injures the Hale Ditch water right. When Bonny Reservoir inundated the Hale Ditch and its headgate, the Bureau provided a special outlet in Bonny Dam to address the injury caused by the construction of the reservoir. This solution, however, does not work when Bonny Reservoir is not storing sufficient water, let alone any water. It would have been unlawful for Bonny Reservoir to injure the senior Hale Ditch when the reservoir was first constructed, and the current injury to the Hale Ditch water right and right-of-way is just as unlawful because the obligation to ensure that an on-channel reservoir does not injure senior water rights is ongoing. Such a conclusion is supported by statute, case law, and basic notions of equity.

The Foundation respectfully requests summary judgment that the operation of Bonny Reservoir is unlawfully injuring the Foundation’s Hale Ditch right. In the alternative, if the Court finds that there is a material issue of fact regarding whether such impacts are occurring, the Foundation seeks a determination that, to the extent that impacts are proven, operation of Bonny Reservoir to the injury of the Hale Ditch are unlawful.

Respectfully submitted this 29th day of February, 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 29th day of February, 2016, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION’S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE A MOTION FOR DETERMINATION OF QUESTION OF LAW, REGARDING ITS BONNY RESERVOIR CLAIM** 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 Sciabarrasi (CO Attorney General)
David L Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)

Party Name	Party Type	Attorney Name
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)
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.)

Party Name	Party Type	Attorney Name
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.) 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 Tausig (White & Jankowski, LLP) Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Central Yuma Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Frenchman Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Marks Butte Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Plains Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Sandhills Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Wy Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
East Cheyenne Ground Water Mgmt Dist	Defendant-Intervenor	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)



Karen L. Henderson