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DISTRICT COURT, WATER DIVISION 1, STATE OF COLORADO 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80632 (970) 351-7300	
PLAINTIFF: The Jim Hutton Educational Foundation, a Colorado non-profit corporation v. **DEFENDANTS:** Dick Wolfe, in his capacity as the Colorado State Engineer, et al.	**▲COURT USE ONLY▲**
Attorneys For Colorado Agriculture Preservation Association Bradley C. Grasmick, #35055 Alyson K. Scott, #41036 Curran A. Trick, #44914 Lawrence Jones Custer Grasmick LLP 5245 Ronald Reagan Blvd., Suite 1 Johnstown, CO 80534 Phone: (970) 622-8181 Email: brad@ljcglaw.com; aly@ljcglaw.com; curran@ljcglaw.com *Attorneys for Defendant North Well Owners* COLVER KILLIN AND SPRAGUE LLP Kimbra L. Killin, #24636 Russell J. Sprague, #40558 216 S. Interocean Holyoke, CO 80734 Phone: (970) 854-2423 Email: rsprague@cksllp.com ; kkillin@cksllp.com *Attorneys for Defendants 4m Feeders, Inc., 4m Feeders LLC, Carlyle James as Trustee of the Chester James Trust, Happy Creek Inc., J and D Cattle LLC, James J. May, Kent E. Ficken, May Acres, Inc., May Brothers Inc., Steven D. Kramer, Thomas R. May* CARLSON, HAMMOND & PADDOCK, LLC Johanna Hamburger, #45052 William Arthur Paddock, #9478	Case Number: 15CW3018 Div. No. 1

1900 Grant Street, Suite 1200 Denver, CO 80203 Phone: (303) 861-9000 Email: bpaddock@chp-law.com ; jhamburger@chp-law.com *Attorneys for Defendant Republican River Water Conservation District* HILL AND ROBBINS PC David W. Robbins, #6112 Peter J. Ampe, #23452 1660 Lincoln St., Suite 2720 Denver, CO 80264 Phone: (303) 296-8100 Email: davidrobbins@hillandrobbins.com ; peterampe@hillandrobbins.com *Attorney for Defendant Arikaree Ground Water Management District* WHITE & JANKOWSKI, LLP David C. Taussig, #16606 511 16th Street, Suite 500 Denver, CO 80202 Phone: (303) 595-9441 Email: davet@white-jankowski.com *Attorneys for Defendant City of Burlington* BURNS, FIGA & WILL P.C. Alix L. Joseph, #33345 Steven M. Nagy, #38955 6400 South Fiddler's Green Circle, Suite 1000 Greenwood Village, CO 80111 Phone: (303) 796-2626 Email: ajoseph@bfwlaw.com ; snagy@bfwlaw.com *Attorneys for Defendant Yuma County Water Authority Public Improvement District* BROWNSTEIN HYATT FARBER SCHRECK LLP Dulcinea Hanuschak, #44342 John Helfrich, #34539 Steven Sims, #9961 410 17th Street, Suite 2200 Denver, CO 80202 Email: ssims@bhfs.com ; jhelfrich@bhfs.com ; dhanuschak@bhfs.com	

Attorneys for Defendants Central Yuma Ground Water Management District, Arikaree Ground Water Management District, Frenchman Ground Water Management District, Marks Butte Ground Water Management District, Plains Ground Water Management District, Sandhills Ground Water Management District, WY Ground Water Management District
VRANESH & RAISCH
Eugene J. Riordan, #11605
Leila Behnampour, #42754
1720 14th Street, Suite 200
Boulder, CO 80302
Phone: (303) 443-6151
Email: ejr@vrlaw.com ; lcb@vrlaw.com

Attorneys for Defendant Tri State Generation and Transmission
VRANESH & RAISCH
Aaron S. Ladd, #41165
Justine Shepherd, #45310
1720 14th Street, Suite 200
Boulder, CO 80302
Phone: (303) 443-6151
Email: asl@vrlaw.com ; jcs@vrlaw.com

Attorney for Defendant Tri State Generation and Transmission
Roger T. Williams, #26302
1100 West 116th Avenue
Westminster, CO 80234
Phone: (303) 254-3218
Email: rwilliams@tristategt.org

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

For the reasons set forth herein, the Defendants named above move for summary judgment, pursuant to Colo. R. Civ. P. 56, on the third claim for relief in the Complaint filed by the Jim Hutton Educational Foundation ("Foundation").

The theories the Foundation presents to invalidate the 1965 Ground Water Management Act ("1965 Act" or "Act" or "Ground Water Act") under Claim 3 fail as a matter of law. In exercise of its plenary authority over water not part of the natural stream, the Legislature enacted the 1965 Act. The Act has been challenged as violating the Colorado Constitution on numerous occasions and each time the Colorado Supreme Court has declared the Act to be constitutional. The Foundation cannot meet the standards required to prove that the 1965 Act violates equal protection and due process because the state has a legitimate interest in developing and managing groundwater aquifers under mining conditions, and adequate procedural safeguards, including notice and a hearing, were included in the designation of the Northern High Plains Basin. The 1965 Act does not affect a taking under the Colorado Constitution because designated groundwater pumped by wells permitted within the Northern High Plains Basin ("Basin" or "NHP Basin") has been determined to have a *de minimus* impact on surface rights, and that groundwater is not legally part of the waters appropriated by the Foundation pursuant to its decreed water rights. The 1965 Act is not unconstitutionally retrospective because it is not retroactive, it does not impair the Foundation's rights, and the public interest underlying the 1965 Act is significant. The relief the Foundation seeks, as it relates to permitted wells in the Basin, is also barred by claim and issue preclusion. Plaintiff's claim that the 1965 Act impairs the Republican River Compact ("Compact") must fail because the Plaintiff is not a party to the Compact and the 1965 Act does not alter Colorado's or any other state's contractual rights under the Compact.

C.R.C.P. 121, § 1-15(8) CERTIFICATION AND JOINING PARTIES

Counsel for the Defendants has conferred with counsel for all other parties. Plaintiff opposes the relief requested herein.

The following defendants have joined in this Motion: Colorado Agriculture Preservation Association; Tri-State Generation and Transmission Association, Inc.; City of Burlington; 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, and Carlyle James as Trustee of the Chester James Trust; Marks Butte, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts; North Well Owners; Republican River Water Conservation District; and Yuma County Water Authority Public Improvement District. Other parties may individually file statements of joinder in this Motion. Collectively, the above joining defendants are referenced herein as "Defendants."

FACTUAL BACKGROUND AND UNDISPUTED FACTS

For the limited purposes of this Motion, Defendants ask the Court to accept the factual assertions in the Foundation's Complaint as true. Thus, for purposes of this Motion, no disputed issues of material fact exist relating to the Foundation's third claim.

I. THE REPUBLICAN RIVER COMPACT

The States of Colorado, Kansas and Nebraska approved the Republican River Compact in 1943. Act of March 15, 1943, 1943 Colo. Sess. Laws 362, codified at C.R.S. §§ 37-67-101 – 102; Act of February 22, 1943, 1943 Kan. Sess. Laws 612, codified at Kan. Stat. Ann. § 82a-518; Act of February 24, 1943, 1943 Neb. Laws 377, codified at 2A neb Rev. Stat., App. § 1-

106. Congress and the President approved the Compact. Act of May 26, 1943, ch. 104, 57 Stat. 86. The Compact allocates 54,100 acre-feet per year to Colorado for beneficial consumptive use, divided among four sub-basins, with the additional right to consume the entire water supply of Frenchman Creek and Red Willow creek drainage basins within Colorado. Compact, art. IV. If the Virgin Water Supply for any drainage basin varies by more than ten percent from the Virgin Water Supply quantities set forth in the Compact, the allocations to the States from that drainage basin is increased or decreased by the same percentage. Compact, art. III. Article nine of the Compact provides that the Compact will be administered through the official in each State who is charged with the duty of administering the public water supplies. Compact, art. IX. Pursuant to Article IX, the States formed the three-member Republican River Compact Administration ("RRCA") in 1959. Each year, "the RRCA makes retrospective computations of the virgin water supply of each sub-basin and of the consumptive use in each State, for the purpose of determining whether each State has stayed within its allocation during the previous year." First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Original, p. 14 (January 28, 2000).

II. THE NORTHERN HIGH PLAINS DESIGNATION

On May 13, 1966, following notice and a hearing pursuant to the provisions of the 1965 Act described above, the Commission designated the Northern High Plains Basin. **Attachment 1**, Order Approving the Proposed Designated Ground Water Basin – of the Northern High Plains of the State of Colorado ("Order"). The Order recognizes "vested surface water rights" within the NHP Basin, and specifically notes that such rights are outside the jurisdiction of the

Commission and "wholly governed by the provisions of the Republican River compact where applicable or otherwise by the surface water laws concerning tributary waters." *Order* at 4.

III. THE REPUBLICAN RIVER WATER CONSERVATION DISTRICT

As discussed in **Attachment 2** ("Affidavit") to this brief, The Republican River Water Conservation District ("RRWCD" or "District") was authorized by the Legislature in 2004 under Senate Bill 04-235 for the purpose of compliance with the duties imposed upon the State by the Republican River Compact. 2004 Colo. Sess. Laws Ch. 390 (now codified at C.R.S. § 37-50-101 et seq. (2015)). The RRWCD district boundaries encompass the Republican River drainage and Northern High Plains Basin. The RRWCD has created a Water Activity Enterprise to provide a service to the water users of Colorado within the District boundaries by collecting water use fees annually to fund efforts to assist the State of Colorado in meeting its Compact obligations. Currently, water users are assessed fees that are based on the type of use; the Enterprise assesses wells used for irrigation a fee of $14.50 per irrigated acre, municipal and commercial wells a fee of $11.60 per acre-foot of groundwater pumped, and surface water irrigation a fee of $13.45 per acre-foot of consumptive use as determined by the Republican River Administration Accounting ("RRCA"). The RRWCD has acquired designated basin rights (62 designated groundwater permits from 53 wells, which have been permitted to include compact compliance use and combined into 15 compact compliance wells to apply the historic consumptive use to compact purposes) and has funded and built a Compact Compliance Pipeline (CCP). The CCP has operated since 2014 under annual approvals from the RRCA and has delivered 18,220 acre-feet to the North Fork compact gage. The RRWCD has also worked to obtain and provide

compensation to well owners to voluntarily retire wells as a means of meeting the state's Compact obligations.

In addition to the activities discussed above, water users in the basin have become involved in RRWCD programs to reduce the consumptive use of water in the Basin. These programs include permanent fallowing of irrigated lands through the Conservation Reserve Enhancement Program (CREP) and temporary fallowing through the Environmental Quality Incentives Program ("EQIP") and Agricultural Water Enhancement Program ("AWEP"). The RRWCD has also purchased various surface water rights to reduce consumptive use and increase streamflows. At the present time there are approximately 19,755 acres in the CREP program and 13,147 acres in the EQIP and AWEP programs at a total cost to the RRWCD of approximately $13,202,500. The RRWCD, along with the state, are currently pursuing both an increase in the annual rental rate of the CREP program and an expansion of the program to a larger geographic area within the RRWCD and to allow an additional 30,000 acres to enroll into the program.

STANDARD OF REVIEW

A trial court may enter summary judgment when there is no disputed issue of material fact and the moving party is entitled to judgment as a matter of law. *Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011). The undersigned defendants also hereby adopt the standard of review contained in the brief filed by the defendants Happy Creek et al. as to the standard for as-applied Constitutional Claims.[1]

[1] A number of the legal standards have been discussed in the other defendant's motions regarding summary judgment and constitutional claims, and the same will be applicable in this motion. Defendants have attempted to keep the restatement of those legal doctrines to a minimum.

SUMMARY OF THE FOUNDATION'S THIRD CLAIM

As an alternative to Claims 1 and 2 in its Complaint the Foundation argues that, *if* the Act precludes administration of designated ground water when it is causing depletions under the Compact, or *if* the boundaries of the Northern High Plains Basin cannot be redrawn to exclude designated groundwater wells causing depletions under the Compact, the establishment and administration of designated groundwater basins under the 1965 Act is unconstitutional, as applied to the Basin, because:

> (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.

Compl. at ¶¶115-116. Essentially, the Foundation claims that if designated ground water wells within the Northern High Plains designated basin cannot be curtailed for purposed Compact administration, the creation of designated basins under the 1965 Act is unconstitutional. Compl. at ¶ 116.

ARGUMENT

The 1965 Ground Water Management Act is Constitutional. Although Defendants' arguments in this section follow a different organizational outline than the arguments in the Complaint, this section addresses each of the Foundation's theories in the third claim for relief. This motion will begin with a discussion of the Foundation's constitutionality claim under the prior appropriation doctrine, including a discussion of the purposes behind the enactment of the 1965 Ground Water Management Act. Many of the tests of constitutionality focus on the

Legislative purposes behind a particular statute, and that purpose is most easily explained in the context of discussing the modified prior appropriation doctrine under the 1965 Act in relation to the strict prior appropriation doctrine. The brief will then discuss retrospectivity, equal protection, due process, and takings, and will refer back to the prior appropriation section that has outlined the policies behind the passage of the 1965 Act. Finally, the brief will discuss the Foundation's Compact claims.

I. THE GROUNDWATER ACT IS CONSTITUTIONAL

A. The 1965 Ground Water Management Act does not violate constitutional guarantees under the prior appropriation doctrine.

The Management Act does not violate the Constitutional principles of prior appropriation. Tributary waters[2] of the state of Colorado are legally administered under the 1969 Water Rights Determination and Administration Act ("1969 Act"), C.R.S. § 37-92-101, et seq., and designated groundwater[3] is administered under the separate statutory standards in the 1965 Ground Water Management Act, C.R.S. § 37-90-101 et seq., Groundwater is either: allocated and administered under the 1965 Act or appropriated, adjudicated, and administered under the 1969 Act. *See*, §§ 37-92-602(1)(a); 37-90-103(6)(a); 37-92-103(11)(13); 37-92-102(1)(a); *Upper Black Squirrel Creek Groundwater Management District v. Goss*, 993 P.2d 1177, 1183 (Colo. 2000).

[2] As defined in C.R.S. § 37-92-103(13) (2015).

[3] Groundwater that has been determined as "designated groundwater" is "that ground water which 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 have constituted the principal water usage for at least fifteen years preceding January 1, 1965; and which in both cases is within the boundaries, either geographic or geologic, of a designated ground water basin." C.R.S. § 148-18-2(3) (1965) (current version at C.R.S. § 37-90-103(6)(a) (2015)).

The Foundation alleges that the 1965 Act violates the prior appropriation doctrine contained in the Colorado Constitution, Article XVI, §§ 5 and 6. Compl. at ¶116. This challenge to the 1965 Act has previously been made and rejected by the Supreme Court on numerous occasions. *See In re Matter of Water Rights*, 361 P.3d 392 (Colo. 2015); *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177 (Colo. 2000); *Danielson v. Kerbs Ag., Inc.*, 646 P.2d 363 (Colo. 1982); *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981); *Thompson v. Colo. Ground Water Comm'n*, 575 P.2d 372 (Colo. 1978); *Kuiper v. Lundvall*, 529 P.2d 1328 (Colo. 1974); *Larrick v. North Kiowa Bijou Management District*, 510 P.2d 323 (Colo. 1973); *Fundingsland v. Colo. Ground Water Comm'n.*, 468 P.2d 835 (Colo. 1970).

Due to the separate manner of allocation under the 1965 Act and the 1969 Act, and the types of waters they are applied to, the prior appropriation doctrine does not apply to "designated groundwater" allocated by the 1965 Act. *Goss*, 993 P.2d at 1182-83; *e.g. Kuiper v. Lundvall*, 529 P.2d at 1331-32. The Colorado Legislature purposefully proscribed a separate regime of "modified prior appropriation" for designated groundwater by the passage of the 1965 Act based on specific policy choices, and the doctrine has been affirmed by Colorado courts. *Larrick*, 510 P.2d at 327-29 (holding that the 1965 Act did not violate the Colorado Constitution Article XVI, § 6 (appropriation of water clause), Art. III, § 1 (separation of powers clause), or Art. VI, § 1 (delegation of judicial power clause), and upheld the modified prior appropriation doctrine created under the 1965 Act); *Fundingsland*, 468 P.2d at 839 (holding that the Commission's denial to issue a designated ground water permit in the Northern High Plains Basin did not violate Article XVI, § 6 of the Colorado Constitution, and discussing the necessity to manage ground water differently than tributary waters); *Danielson v. Kerbs Ag., Inc.*, 646 P.2d at 370-72

(recognized the need for different policies underlying the laws of the State for surface water and for ground water in designated basins, recognized the need for the doctrine of modified prior appropriation, and held that the Ground Water Act was not unconstitutionally retroactive); *See Jaeger v. Colo. Ground Water Comm'n*, 746 P.2d 515 (Colo. 1987) (providing overview of policies underlying the 1965 Act). The fact that designated groundwater is administered separate and distinct from "waters of the state" does not render the 1965 Act unconstitutional.

In determining whether a statute is constitutional, a court "must presume that it was passed with deliberation by the legislature and with full knowledge of all existing law dealing with the same subject." *Times-Call Pub. Co. v. Wingfield*, 410 P.2d 511, 513 (Colo. 1966) (quoting *Cooper Motors v. Board of County Commissioners*, 279 P.2d 685 (Colo. 1955)). The Legislature's choice in prescribing a modified prior appropriation system for designated groundwater was the result of comprehensive studies conducted by the 1964 Legislative Council's Committee on Water, which included meetings with water users in all of the state's basins. **Attachment 3**, Colorado Legislative Council Report, 45th Colo. Gen. Assemb., Research Publication No. 93: *Water Problems in Colorado*, at Page 1 (November 1964). What is clear from the Legislature's 1964 report is that the state was faced with a policy decision on how to administer waters in the state as a total resource in light of the fundamental differences between renewable surface water and generally non-renewable groundwater resources. *Id.*; *See also Thompson*, 575 P.2d at 381, 194 Colo. at 501. Development of the groundwater resource was analogized as similar to mining whereby its use must be regulated as a finite resource. *Water Problems in Colorado*, at 11. As to the Ogallala formation, which underlies the Northern High Plains Basin, the studies concluded that the groundwater contained in it was generally "non-

tributary to surface flow," and that the aquifer is recharged only by precipitation with a minimal recharge rate. With that in mind, the studies reported that the Ogallala aquifer could be developed in one of two ways:

> 1) It could be developed only to the extent of the salvageable recharge so that the supply, although comparatively small, will last indefinitely; or 2) its water can be considered an expendable resource similar to oil, gas, lead, or zinc and can be 'mined' over a period of several generations, after which it will be depleted to the point where it can no longer be used for large-scale irrigation.

Id. Based on this, the Legislature's report recommended that "[t]here should be two different types of state laws – one involving groundwater tributary to surface flow and another dealing with closed basins such as the Ogallala, with the latter law being based on local control." *Id.* at 11, 14. Finally, the Committee also discussed the need for economic certainty in developing the groundwater resources in Colorado in aquifers such as the Ogallala:

> Because there are no firm property rights so far as ground water is concerned, the state is losing new additions to its economy since farmers and industries need assurance of available water supplies for 50 to 100 years in the future or they will not make large investments in Colorado….Controls on pumping should be provided by the administering agency but not on the basis of a 'call' as in the case of surface decrees. The General Assembly will have to decide which aquifer will be mined and which will be maintained…that is, the state should have the power to say how much ground water can be pumped.

Id. at 19.

The Legislature specifically considered the method of allocation and protections provided by the "pure" prior appropriation doctrine, and determined that it did not serve the same purposes for groundwater "which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or groundwater in areas not adjacent to a continuously flowing natural stream wherein groundwater withdrawals have constituted the principal water usage for at least fifteen years." C.R.S. § 37-90-103(6)(a) (2015). The legislature was mindful of

the importance of the prior appropriation doctrine and the need for this distinction; the 1965 Act specifically stated, "[w]hile the doctrine of prior appropriation is recognized; such doctrine should be modified to permit the full economic development of designated groundwater resources." C.R.S. § 37-90-102 (2015). Ultimately, the Legislature chose to exercise its plenary power over this type of groundwater by enacting the 1965 Act and modifying the "normal presumption that all groundwater is tributary to a surface stream," to allow for full economic development of these designated groundwater resources within the State. *Goss*, 993 P.2d at 1183, fn 7; C.R.S. § 37-90-102(1) (2015). Since its designation, the Ogallala aquifer in the Basin has been managed and allocated under the modified prior appropriation doctrine of the 1965 Act in order to protect vested rights from the same source of supply and promote its economic development and beneficial use. C.R.S. § 37-90-102(2) (2015).

"A statute should be construed in a manner to harmonize it with existing constitutional provisions if it is reasonably possible to do so." *Times-Call*, 410 P.2d at 513 (quoting *Cooper Motors*, 279 P.2d 685 (Colo. 1955)). The 1965 Act can be both harmonized and reconciled with the constitutional guarantees of the prior appropriation doctrine by recognizing the different character of the water it governs. The 1965 Act does not conflict with the prior appropriation doctrine; rather, it applies to groundwater which has been classified by the legislature and subsequently determined by the Groundwater Commission after a public process to have a *de minimus* impact on surface water rights. *See e.g. Kuiper*, 529 P.2d at 1331-32. Once the groundwater is determined to be designated groundwater it is no longer "waters of the state" that are subject to strict priority administration. *Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 32 (Colo. 2006).

The 1965 Act was specifically tailored to protect vested rights and promote the economic development and beneficial use of water resources in aquifers where the withdrawal of water was determined to have a *de minimus* impact on surface water rights. It is consistent with Colorado law, does not violate the prior appropriation doctrine and is constitutional.

B. The 1965 Ground Water Management Act is not unconstitutionally retrospective.

In alleging that the 1965 Ground Water Management Act is unconstitutionally retrospective, the Foundation is essentially re-purposing its Claim 2 argument regarding Senate Bill 52 by applying it in the alternative to the 1965 Act in the event its second claim fails. The Foundation's arguments for unconstitutionally retrospective legislation under its third claim for relief fail for similar reasons that the Foundation's arguments fail on its second claim for relief.

Retrospective legislation is prohibited by the Colorado Constitution, Article II, § 11 to prevent unfairness in changing the legal consequences of events or transactions after they have occurred. *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990); *In re Estate of Dewitt*, 54 P.3d 849, 854 (Colo. 2002). A statute is presumed to be prospective in its operation, and new legislation is presumed constitutional. C.R.S. § 2-4-202 (2015); *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006). A *retroactive* law may be permitted and is not unconstitutional in certain circumstances, but a *retrospective* law is that which is retroactive, but is also unconstitutional. *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 11 (Colo. 1993). For the sake of clarity, in this brief the term "unconstitutionally retrospective" is interchangeable with "retrospective."

In determining whether a statute is unconstitutionally retrospective, the courts utilize a two-step inquiry. *Dewitt*, 54 P.3d at 854. The first step is to determine whether the Legislature

had "clear intent" that the new provision should apply *retroactively*, that is, to transactions that have already occurred or rights and obligations that existed before the enactment's effective date. *Id*.; *Ficarra*, 849 P.2d at 14. If the answer is no, the analysis ends and the statute is not unconstitutionally retrospective. If the court determines that the Legislature did intend for the law to apply retroactively, then the analysis moves to the second step of determining whether the statute is unconstitutionally retrospective. *DeWitt*, 54 P.3d at 854.

Under the second step of the analysis, a statute is impermissibly retrospective if it either: a) impairs a "vested right," or b) creates a new obligation, imposes a new duty, or attaches a new disability. *DeWitt*, 54 P.3d at 855. A right becomes "vested" when it is not dependent on the common law or statute under which it was acquired, but instead has an independent existence. *City of Greenwood Vill. v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 445 (Colo. 2000). However "a finding that a statute impairs a vested right, although significant . . . is not dispositive as to retrospectivity; such a finding may be balanced against the public interest in the statute." *DeWitt*, 54 P.3d at 855. *See Ficarra*, 849 P.2d at 21; *Van Sickle*, 797 P.2d at 1271; *Lakewood Pawnbrokers, Inc.*, 517 P.2d 834,838 (Colo. 1973). A statute can be permissively retrospective due to public interest considerations if the law bears a rational relationship to a legitimate government interest. *Ficarra*, 849 P.2d at 22; *Dewitt*, 54 P.3d at 855 (Colo. 2002). If a law creates a new obligation, imposes a new duty, or attaches a new disability, with respect to transactions or considerations already past, the statute is not rendered unconstitutionally retrospective "merely because the facts upon which it operates occurred before the adoption of the statute." *Dewitt*, 54 P.3d at 855 (quoting *City of Greenwood Village*, 3 P.3d at 445).

As a matter of law, the 1965 Act is constitutional under the first step of the analysis. The 1965 Act was intended to apply prospectively by governing the creation of future designated basins under Commission procedures to determine that the groundwater underlying the designated area met the definition of "designated groundwater" as defined in the original 1965 Act. Permits issued for wells after May 17, 1965[4] were to be made in accordance with this process, and would not be issued if the permit would unreasonably impair any existing use or would result in the unreasonable lowering of the water table. **Attachment 4**, Colorado Legislative Council Report, 46th Colo. Gen. Assemb., Research Publication No. 114: *Implementation of 1965 Water Legislation*, at pg. xiv (December 1966). Under the test for unconstitutionally retrospective legislation, the 1965 act is not intended to be retroactive and is therefore constitutional.

Moreover, even assuming *arguendo* that the 1965 Act was intended to be retroactive and the Court moves to the second part of the test, the 1965 Act cannot be found to impair any "vested" surface water rights, such as the Foundation's, because 1) the Act does not apply to the administration of surface rights, and 2) the Act applies to designated ground water that was determined to have a *de minimus* impact on surface rights as a matter of law. Groundwater that is found to have a *de minimus* impact on surface water flows cannot also be found to impair them. Also, as stated above, a law cannot create an obligation, impose a new duty, or attach a new disability "merely because the facts upon which it operates occurred before the adoption of the statute." *Dewitt*, 54 P.3d at 855. The Foundation cannot claim that the 1965 Act is

[4] Wells existing prior to May 17, 1965 did not have priority dates. Therefore, the Act addressed this by prescribing that they would be assigned priority dates as to other wells based on the date of placing designated groundwater to beneficial use. C.R.S. § 148-18-7 (1965) (now codified at C.R.S. § 37-90-109(2015).

unconstitutionally retrospective merely because its surface water rights existed before the enactment of the 1965 Act. Finally, the public interest associated with economically developing and managing the Ogallala aquifer within Colorado, as discussed herein, is important and legitimate and the 1965 Act is rationally related that goal.

C. The 1965 Ground Water Management Act does not violate equal protection.

Equal protection is guaranteed by the 14th Amendment to the U.S. Constitution and Article II, Section 25 of the Colorado Constitution. *E.g. Central Colorado Water Conservancy District v. Simpson*, 877 P.2d 335, 340-41 (1994). If a statute does not "infringe on a fundamental right or create a classification based on race, religion, national origin or gender," the rational basis standard is used to review an equal protection claim. *Id.; Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1016 (Colo. 1982); *E.g., People v. Blankenship*, 119 P.3d 552, 554–55 (Colo. App. 2005); *Pace Membership Warehouse, Div. of K–Mart Corp. v. Axelson*, 938 P.2d 504, 506 (Colo. 1997). Under the rational basis standard of review, courts presume that a statutory classification is constitutional and does not violate equal protection principles unless the challenging party proves *beyond a reasonable doubt* that the classification does not bear a rational relationship to a legitimate legislative purpose or government objective, or the classification is unreasonable, arbitrary, or capricious. *Pace*, 938 P.2d at 506 (emphasis added). A statute may be invalidated under the rational basis standard only if there exists "no reasonably conceivable set of facts to establish a reasonable relationship between the statute and a legitimate governmental purpose." *Id*. at 506.

The Foundation alleges that the establishment and administration of designated basins under the 1965 Act is unconstitutional because it violates equal protection by not allowing

curtailment of designated ground water for purposes of Compact compliance. Compl. at ¶¶115-116. The 1965 Act, and administration of designated groundwater wells under the modified prior appropriation doctrine, does not infringe upon a fundamental right or create a classification based on race, religion, national origin or gender, therefore the rational basis test is used. *See Central v. Simpson*, 877 P.2d at 341 (Applying rational basis test to Constitutional challenge to SB-120, which exempted gravel pits excavated prior to January 1, 1981 from priority administration and requirement to obtain an augmentation plan for out of priority depletions, finding SB-120 did not infringe upon a fundamental right, and did not violate equal protection or due process guarantees under the Colorado Constitution).

The legitimate purposes and governmental objectives behind the 1965 Act have been discussed in previous sections of this brief. That discussion demonstrates that the 1965 Act is rationally related to the government purpose for which it was enacted; that is, a system for determining if groundwater has a *de minimus* impact on surface rights and for allocating and administering that designated groundwater in a way that protects vested rights in the resource. The Act takes into account the need to manage groundwater under "mining" conditions, and promotes the viable economic development of the aquifer and beneficial use of the water. C.R.S. § 37-90-102(1) (2015); *See generally Water Problems in Colorado*, supra. The 1965 Act therefore does not violate equal protection under the U.S. or Colorado Constitutions.

D. The 1965 Ground Water Management Act does not violate due process; the Foundation is barred by Claim and Issue Preclusion.

The 1965 Act does not violate the due process guarantees of the United States or Colorado Constitutions. U.S. Const. Amend. XIV, § 1; Colo. Const. Art. II, § 25. In the event

the Foundation's challenge is a substantive due process challenge, the first consideration is whether the challenged rule infringes upon a fundamental constitutional right. *People v. Young*, 859 P.2d 814, 818 (Colo. 1993). If the statute does not infringe upon a fundamental constitutional right, then the applicable test for reviewing a substantive due process challenge is the rational basis test. *Id.*; *City & Cty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1277 (Colo. 2010). As discussed above under the analysis for equal protection, the rational basis test is applicable to the instant case. *E.g. Central v. Simpson*, 877 P.2d at 341. The rationale behind the 1965 Act was reasonably related to the Legislature's legitimate purpose of administering designated groundwater in a way that conserved the aquifer under mining conditions, while promoting its viable economic development under a modified prior appropriation system. *Water Problems in Colorado*, supra. Therefore, the rational basis standard is met as it pertains to the 1965 Act.

In the event the Foundation's due process claim is procedural, the challenge likewise fails. "The essence of procedural due process is fundamental fairness; this embodies adequate advance notice and opportunity to be heard prior to state action resulting in deprivation of a significant property interest." *Meridian Ranch Metro. Dist. v. Colorado Ground Water Comm'n.*, 240 P.3d 382, 391 (Colo. App. 2009). The 1965 Act provides for procedural due process both when designating a basin and when issuing a new well permit. C.R.S. §§ 37-90-106-108, 112-113 (2015) (formerly §§ 148-18-5-7, 11-12, C.R.S. (1965)). In regards to the Northern High Plains basin, the Commission provided notice and held a hearing on April 14, 1966 to determine whether the basin should be designated under the 1965 Act. *Order*, supra. In that process, the Commission found "the groundwater in the Ogallala-Alluvium aquifer of the drainage area of the

Northern High Plains. . . is 'designated groundwater'. . . and is ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights." *Order* at 3. The Foundation or its predecessors in interest had the opportunity to challenge the designation of the basin at the time of the hearing. The Foundation's predecessor in interest also had an opportunity to appeal the designation order following its entry. *See* C.R.S. § 37-90-107 and 115 (2015) (formerly C.R.S. § 148-18-14 (1965)). The time for appealing the Order has long since passed. Further, the Foundation or its predecessors in interest had opportunity to challenge individual permits as part of the notice and hearing process when each final well permit was issued in the Basin. *See* C.R.S. § 37-90-115 (2015) (formerly C.R.S. § 148-18-14 (1965)). The Foundation's argument that the 1965 Act denied it due process in the creation of the Northern High Plains designated basin ignores these procedural safeguards, which as a matter of law satisfy any due process requirements under the U.S. Constitution or Colorado Constitution.

In spite of these procedural protections, the Foundation infers that the Commission mistakenly designated groundwater within the Basin. However, the Foundation's argument fails to give weight to the importance of having finality and certainty regarding determinations made after notice and a hearing. Under C.R.S. § 37-90-106 (2015), the Foundation may petition the Commission to re-draw the boundaries to exclude groundwater which it can prove was not properly designated; however, they cannot alter the determinations made as to final permits that have been issued by the Commission for the withdrawal of designated groundwater from the NHP Basin. "After a determination of a designated groundwater basin becomes final, the commission may alter the boundaries to exclude lands from that basin only if factual data justify

the alteration and the alteration would not exclude from the designated groundwater basin any well for which a conditional or final permit to use designated groundwater has been issued." C.R.S. § 37-90-106(1)(a) (2015).

Respect for the finality of judgements which affect interests in property following notice and a hearing is found in the doctrines of claim and issue preclusion. “Claim preclusion prevents re-litigation of claims that were or could have been litigated in a prior proceeding.” *Gallegos*, 147 P.3d 20, 32 (Colo. 2006). The claim preclusion doctrine applies when (1) the judgment in the prior proceeding was final; (2) the prior and current proceedings involved identical subject matter; (3) the prior and current proceedings involved identical claims for relief; and (4) the parties to the proceedings were identical or in privity with one another. *Id.*, *e.g. In Matter of Water Rights*, 361 P.3d 392, 398 (Colo. 2015). Issue preclusion provides that when a court enters a final decision on an issue previously litigated, the decision is conclusive in a subsequent action involving the same parties or those in privity with the original parties. *Concerning Application for Water Rights of Sedalia Water & Sanitation Dist. in Douglas Cty.*, 343 P.3d 16, 22 (Colo. 2015) (C.R.S. § 37-92-305(3)(d) and (3)(e), discussed in the *Sedalia* case, were subsequently amended by Senate Bill 15-183, approved May 4, 2015). Four criteria must be met for issue preclusion to apply: (1) the issue is identical to an issue actually litigated and necessarily adjudicated in the prior action; (2) the party against whom estoppel is sought was either a party to the prior action or in privity with a previous party; (3) a final judgment was entered on the merits in the prior proceeding; and (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issues in the prior proceeding. *Id.*, *e.g. Gallegos*, 147 P.3d at 32. The doctrines of claim and issue preclusion apply to administrative actions as well as

judicial proceedings, and also apply in water right adjudications. *Id.* ("Indeed, the application of these doctrines is a cornerstone of stability and reliability of Colorado water rights."); *See, e.g., Upper Eagle Reg'l Water Auth. v. Simpson*, 167 P.3d 729, 737 (Colo. 2007) (explaining that to hold that findings regarding the quantification of a water right are not entitled to preclusive effect would "undermine the stability and reliability of Colorado's prior appropriation regime.").

The Colorado Supreme Court in *Gallegos* stressed that "there obviously must be some 'cut-off' time when water within a designated ground water basin can no longer be adjudicated in our courts as water that is not so designated." *Gallegos*, 147 P.3d 20 at 32, fn8 (quoting *Sweetwater Dev. Corp. v. Schubert Ranches, Inc.*, 535 P.2d 215, 218 (Colo. 1975)). The Court stated that in the absence of the Legislature calling for the boundaries of a designated basin to be revisited (the process that has since been modified by Senate Bill 52), "we might agree that the Gallegos family is barred from seeking relief." *Id.* at 32-33.

The legislature clarified its intent as to the proper "cut off time" for challenging a designated groundwater determination and the current situation is exactly the one that the Court contemplated in *Gallegos* when discussing issue and claim preclusion. The Foundation's claims effectively raise an impermissible collateral attack on designated basin wells permitted within the Northern High Plains basin and are barred by issue and claim preclusion. The Foundation is bound by the determination of the Commission and the Order creating the Northern High Plains basin and the final permits that were subsequently issued. Their water rights existed prior to designation of the basin and their predecessors in interest were provided notice and given the opportunity to challenge the designation and subsequent permits. C.R.S. § 148-18-5 (1963) (providing hearing process for basin designation); C.R.S. § 148-18-6 (1963) (providing notice

process for permit applications and objection process); C.R.S. § 148-18-11(1963) (notice requirements under any section of Article 18); C.R.S. § 148-18-12, 13, 14 (1963) (Commission hearing requirements and appeals processes); *See also Order, supra*. Through the process of designating the Northern High Plains Basin, the Commission determined that groundwater within the Ogallala-Alluvium formation within the Basin was not available to fulfill decreed surface rights and would thereafter be subject to allocation under the 1965 Act. Thus, claim and issue preclusion prevent any attempt to re-litigate the issue of whether ground water being withdrawn by permitted wells within the Northern High Plains Basin has more than a *de minimus* impact on the Foundation's surface water rights and is therefore a part of the water supply available to the Foundation's surface rights. These issues were already decided in the processes creating the designated basin and the issuance of permits provided by the 1965 Act. In regards to all final permits that have been issued to withdraw designated ground water from the Basin, that determination is final.

E. The 1965 Ground Water Management Act does not result in a taking of vested property rights without just compensation.

The 1965 Management Act does not affect a regulatory taking of the Foundation's water rights. A regulatory taking occurs "when a regulatory or administrative action places such burdens on ownership of private property that essential elements of such ownership must be viewed as having been taken." *211 Eighth, LLC v. Town of Carbondale*, 922 F. Supp. 2d 1174, 1185 (D. Colo. 2013) (quoting *Kemp v. United States*, 65 Fed. Cl. 818, 821 (2005)(citation and internal quotation marks omitted)). A regulatory taking is distinguishable from a *per se* taking, which is actual occupation of or damage to one's property. *Animas Valley Sand and Gravel, Inc. v. Board of Cnty. Comm'rs of La Plata*, 38 P.3d 59, 63 (Colo. 2001). The United States Supreme

Court has established two tests to determine whether a compensable regulatory taking has occurred "absent a physical encroachment onto the land." *Id.* at 64. First, a regulation constitutes a per se taking when it "does not substantially advance legitimate state interests." *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992)). Second, a per se taking occurs when a regulation "denies an owner economically viable use of his land." *Id.*

The Foundation cannot establish either test for a regulatory taking. Legitimate state interests were advanced through passage of the 1965 Act, namely, to provide a comprehensive plan for the development, conservation, and management of the underground water supplies in Colorado, and to provide a degree of economic certainty in developing the resource. *Water Problems in Colorado*, supra. Another purpose behind the Act was to place management decisions of each unique basin in the hands of the people of the region by creating groundwater management districts within the designated basins. *Id.* With limited surface supplies, groundwater pumping represents the almost exclusive source of water in the Basin. The Legislature's interest in promoting the economic development and beneficial use of the designated groundwater in Eastern Colorado has been substantially advanced by passage of the 1965 Act, which is a legitimate State interest. The first test for a regulatory taking cannot be met.

Second, the Foundation has not alleged that the use of designated groundwater deprives them of all economically viable use of their water right. By the designation order and the issuance of permits, the Commission has determined that the groundwater within the Northern High Plains basin which is diverted by wells with a final permit would not in its natural course be available to and required for the fulfillment of decreed surface water rights, in other words, *de*

minimus. The doctrines of claim and issue preclusion as discussed previously apply in this instance as well. The Foundation is bound by this determination. Administrative decisions regarding the curtailment of designated basin wells in the NHP Basin vis-a-vis the Foundation's surface rights does not prevent the Foundation from diverting and beneficially using waters of the state pursuant to their decrees and therefore does not deprive the Foundation of all economically viable use of their water right.

F. The 1965 Ground Water Management Act does not impair Colorado's Compact obligations; the Foundation is not a party to the Compact and may not bring a claim of impairment

The Republican River Compact is codified in C.R.S. §37-67-101 (2015). As parties to the Compact, Colorado, Kansas and Nebraska agreed to the equitable division of the waters of the Republican River Basin among the three states. C.R.S. §37-67-101 (2015); Compl. at ¶ 21. The Foundation is alleging that, if designated basin wells cannot be curtailed for Compact purposes, the 1965 Act "results in an impairment of the state's obligations under the [Republican River] Compact." Compl. at ¶¶115-116. However, the Compact specifically provides that each state may determine how to allocate its allotment of the waters being apportioned to it "subject to the laws of the state, for use in which the allocations are made." C.R.S. §37-67-101 (2015). The passage of the 1965 Act did not alter the equitable division of the waters of the Republican River Basin under the Compact, nor did it alter the State Engineer's obligations under C.R.S.§ 37-80-104 to administer the Compact. Rather, the 1965 Act was an exercise of Colorado's right under the Compact to allocate the waters to which it is entitled thereunder. In addition, there is no specific mandate in C.R.S. §§ 37-80-102(1)(a) and 37-80-104 that requires the State Engineer to employ any certain method to meet the State's Compact obligations. C.R.S. § 37-67-101 (2015).

In actuality, the State of Colorado may employ various tools that are lawfully available to it to ensure the State's Compact requirements are met and the State has taken steps to do so as discussed in the Factual Background section above.

Article I, § 10, cl. 1 of the United States Constitution provides that "No State shall…pass any…Law impairing the Obligation of Contracts." The Colorado Constitution contains a similar clause prohibiting the Legislature from passing "law[s] impairing the obligation of contracts." Colo. Const. art. II, § 11. To assess whether or not an alleged contract clause violation has occurred, the United States Supreme Court has held that the first inquiry is "whether the change in state law has operated as a substantial impairment of a contractual relationship." *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)); *E.g. Dewitt*, 54 P.3d at 858; *Justus v. State*, 336 P.3d 202, 208 (Colo. 2014). The inquiry has three parts, "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors*, 503 U.S. at 186; *Dewitt*, 54 P.3d at 858. *E.g.*, *Justus v. State*, 336 P.3d at 208. To establish a contractual relationship, a party must demonstrate that the contract gave them a vested right. *DeWitt*, 54 P.3d at 858. The second and third portions of the test are often considered together. *DeWitt*, 54 P.3d at 858; see also *Allied Structural Steel*, 438 U.S. at 245 (1978). The Colorado Supreme Court has adopted these tests, and the analysis is the same under both the U.S. and Colorado Constitutions. *Justus v. State*, 336 P.3d at 208.

It is clear that Compacts are contracts. *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013). However, in order to bring a claim alleging impairment of a contract,

the Foundation need be a party to that contract, which they are not. *See e.g.*, *Hagar v. Reclamation Dist. No. 108*, 111 US 701, 713 (1884) (plaintiff not party to any contract, if one was in fact created, between the United States and California by the passage of the Arkansas Swamp Act of 1850); *Williams v. Eggleston*, 170 US 304, 309 (1898) (Entire stranger to contract cannot raise question of validity of state law under contract clause). The Republican River Compact is between the States of Colorado, Kansas and Nebraska, and therefore those three states are the only parties who may properly bring a claim for impairment of that contract. That the Foundation is not a party to the Compact should also be considered in light of the first part of the impairment test outlined above. *DeWitt*, 54 P.3d at 858. The Foundation cannot meet this test. Nothing in the 1965 Act defeats Colorado's obligations to uphold its contractual promises under the Compact, and again, if it did, it would be for Kansas and Nebraska to bring a claim to enforce the Compact against Colorado, not the Foundation. Where a court finds no contractual relationship exists under the first part of the inquiry, there is no need to complete the following two steps of the analysis. *Justus v. State*, 336 P.3d at 208.

Assuming, *arguendo*, this court does determine that the 1965 Act impacts the Compact, the Foundation's claim still fails. The prohibition on impairment contained in the U.S. and Colorado Constitutions should be interpreted, not as absolute, but to "permit legislative action that promotes the common weal, or [that is necessary for the] general good of the public, though contracts previously entered into between individuals may thereby be affected." *DeWitt*, 54 P.3d at 858 (quoting *Ohio & Colo. Smelting & Refining Co. v. Pub. Util. Comm'n*, 187 P. 1082, 1084-85 (Colo. 1920)); *e.g.*, *Allied Steel*, 438 U.S. at 241; *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21 (1977)("[T]he prohibition is not an absolute one and is not to be read with literal

exactness."). Accordingly, a finding that a law impairs a contract does not end the inquiry. Notwithstanding such a finding, a court should uphold a challenged statute if it is reasonable and appropriately serves a significant and legitimate public purpose when considered against the severity of the contractual impairment. *DeWitt*, 54 P.3d at 858. In other words, the contract clause is not an "absolute bar" to legislative impairment of contracts, but should be assessed against the severity of the impairment, should "defer to the legislature's judgment regarding the necessity and reasonableness of the statute," and should consider whether "the statute in question touches on an area that has historically been regulated by the legislature." *DeWitt*, 54 P.3d at 858-59. If so, "the statute is less likely to be found to violate the contract clause." *DeWitt*, 54 P.3d at 859. *See also Allied Steel*, 438 U.S. at 249; *Justus v. State*, 336 P.3d at 208. The necessity and reasonableness of the 1965 Act has been discussed throughout this brief. Furthermore, the fact that the Legislature has plenary authority over designated groundwater, along with the other actions taken by the Legislature regarding the administration and regulation over the use of water, demonstrates that the 1965 Act represents legislation in an area that where the Legislature has historically legislated and been vested the authority to regulate.

In sum, the 1965 Act does not alter Colorado's obligations or apportionment under the Compact, nor does it alter its ability to employ various tools to meet those obligations. The Foundation is not a party to the Compact, and therefore has no ability to bring a claim for impairment of the Compact under the contract clauses of the U.S. and Colorado Constitutions.

CONCLUSION

The Foundation has failed to meet its burden of proof demonstrating that the 1965 Act is unconstitutional as a matter of law. Summary judgment is proper as it pertains to the Foundation's third claim regarding the 1965 Ground Water Management Act, and the Court should deny the relief sought pursuant to the Foundation's third claim.

Respectfully submitted this 29th day of February, 2016.

[signature blocks on the following page]

LAWRENCE JONES CUSTER GRASMICK LLP

Bradley C. Grasmick, #27247
Alyson K. Scott, #41036
Curran A. Trick, #44914
Attorneys for Defendant Colorado Agriculture Preservation Association

COLVER KILLIN AND SPRAGUE LLP

/s/

Kimbra L. Killin, #24636
Russell J. Sprague, #40558
Attorneys for Defendant North Well Owners

CARLSON, HAMMOND & PADDOCK, LLC

/s/

Johanna Hamburger, #45052
William Arthur Paddock, #9478
Attorneys for Defendants 4m Feeders, Inc., 4m Feeders LLC, Carlyle James as Trustee of the Chester James Trust, Happy Creek Inc., J and D Cattle LLC, James J. May, Kent E. Ficken, May Acres, Inc., May Brothers Inc., Steven D. Kramer, Thomas R. May

HILL AND ROBBINS PC

/s/

David W. Robbins, #6112
Peter J. Ampe, #23452
Attorneys for Defendant Republican River Water Conservation District

WHITE & JANKOWSKI, LLP

/s/

David C. Taussig, #16606
Attorney for Defendant Arikaree Ground Water Management District

BURNS, FIGA & WILL P.C.

/s/

Alix L. Joseph, #33345
Steven M. Nagy, #38955
Attorneys for Defendant City of Burlington

VRANESH & RAISCH

/s/
Eugene J. Riordan, #11605
Leila Behnampour, #42754
Attorneys for Defendants Central Yuma Ground Water Management District, Arikaree Ground Water Management District, Frenchman Ground Water Management District, Marks Butte Ground Water Management District, Plains Ground Water Management District, Sandhills Ground Water Management District, W-Y Ground Water Management District

BROWNSTEIN HYATT FARBER SCHRECK LLP

/s/
Steven Sims, #9961
Dulcinea Hanuschak, #44342
John Helfrich, #34539
Attorneys for Defendant Yuma County Water Authority Public Improvement District

VRANESH & RAISCH

/s/
Aaron S. Ladd, #41165
Justine Shepherd, #45310
Attorneys for Defendant Tri-State Generation and Transmission Association, Inc.

TRI-STATE GENERATION AND TRANSMISSION ASS'N, INC.

/s/
Roger T. Williams, #26302
Attorney for Defendant Tri-State Generation and Transmission Association, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 29, 2016, a true and correct copy of the foregoing AMENDED MOTION FOR SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF THE GROUND WATER MANAGEMENT ACT OF 1965 was duly delivered to all parties of record via ICCES:

Party Name	Party Type	Attorney Name
4m Feeders Inc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
4m Feeders Llc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Arikaree Ground Water Mgmt Dist	Defendant	David C Taussig (White & Jankowski, LLP) Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Carlyle James As Trustee of the Chester James Trust	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Central Yuma Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
City of Burlington Colorado	Defendant	Alix L Joseph (Burns Figa and Will P C) Steven M. Nagy (Burns Figa and Will P C)
City of Holyoke	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)

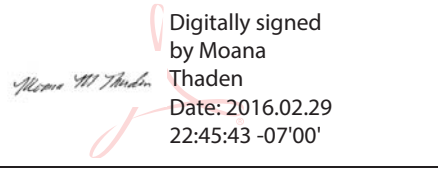
Party Name	Party Type	Attorney Name
City of Wray Colorado	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Colorado Agriculture Preservation Assoc	Defendant	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Colorado Department of Natural Resourc	Opposer	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Department of Natural Resources	Defendant	Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
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 Division of Water Resources	Opposer	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Ground Water Commission	Defendant	Chad Matthew Wallace (CO Attorney General) Patrick E Kowaleski (CO Attorney General)
Colorado Parks And Wildlife	Defendant	Katie Laurette Wiktor (CO Attorney General) Timothy John Monahan (CO Attorney General)
Colorado Parks And Wildlife	Opposer	Katie Laurette Wiktor (CO Attorney General) Timothy John Monahan (CO Attorney General)
Colorado State Board Land Commissioners	Defendant	Virginia Marie Sciabbarrasi (CO Attorney General)
David L Dirks	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)

Party Name	Party Type	Attorney Name
David Nettles	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
David Nettles	Opposer	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)
Dick Wolfe	Opposer	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Dirks Farms Ltd	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Division 1 Engineer	Division Engineer	Division 1 Water Engineer (State of Colorado DWR Division 1)
Division 1 Water Engineer	Opposer	Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Don Myrna And Nathan Andrews	Defendant	Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch)
East Cheyenne Ground Water Mgmnt Dist	Defendant	John David Buchanan (Buchanan Sperling and Holleman PC) Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
Frenchman Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)

Party Name	Party Type	Attorney Name
Happy Creek Inc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
J And D Cattle Llc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
James J May	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Julie Dirks	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Kent E Ficken	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Lazier Inc	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Mariane U Ortner	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marjorie Colglazier Trust	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marks Butte Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
May Acres Inc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock,

Party Name	Party Type	Attorney Name
		L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Brothers Inc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Family Farms	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
North Well Owners	Defendant	Kimbra L. Killin (Colver Killin and Sprague LLP) Russell Jennings Sprague (Colver Killin and Sprague LLP)
Plains Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Protect Our Local Communitys Water Llc	Defendant	John David Buchanan (Buchanan Sperling and Holleman PC) Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
Republican River Water Conservation Dist	Defendant	David W Robbins (Hill and Robbins PC) Peter J Ampe (Hill and Robbins PC)
Sandhills Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Saving Our Local Economy Llc	Defendant	John David Buchanan (Buchanan Sperling and Holleman PC) Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)

Party Name	Party Type	Attorney Name
State Engineer	State Engineer	Colorado Division Of Water Resources (State of Colorado - Division of Water Resources) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Steven D Kramer	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
The Jim Hutton Educational Foundation	Plaintiff	Karen Leigh Henderson (Porzak Browning & Bushong LLP) Steven J Bushong (Porzak Browning & Bushong LLP)
The Jim Hutton Educational Foundation	Applicant	Karen Leigh Henderson (Porzak Browning & Bushong LLP) Steven J Bushong (Porzak Browning & Bushong LLP)
Thomas R May	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Timothy E Ortner	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Tri State Generation And Transmission As	Defendant	Aaron S. Ladd (Vranesh and Raisch) Justine Catherine Shepherd (Vranesh and Raisch) Roger T Williams (TriState Generation and Transmission Assoc Inc)
Wy Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Yuma Cnty Water Authority Public Improv	Defendant	Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP) John A Helfrich (Brownstein Hyatt Farber Schreck LLP) Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)



E-filed per Rule 121. Duly signed copy on file at the law offices of Lawrence Jones Custer Grasmick LLP