

DISTRICT COURT, WATER DIVISION NO. 1
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, P.E., in his capacity as the Colorado State Engineer; David Nettles, P.E. in his capacity as Division Engineer in and for Water Division No. 1; State of Colorado; Colorado Division of Water Resources; and , and Colorado, Division of Parks and Wildlife.

Defendant-Intervenors: Yuma County Water Authority Public Improvement District; Colorado Ground Water Commission; Marks Butte, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management District and East Cheyenne Ground Water Management District.

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.

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<p>Kramer; Kent D. 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>Attorneys for the Colorado Division of Parks and Wildlife: Cynthia H. Coffman, Attorney General Tim Monahan, First Assistant Attorney General, #16971 Katie L. Wiktor, Assistant Attorney General, #38025 1300 Broadway, 7th Floor Denver, Colorado 80203 Telephone: 720-508-6310, 720-508-6761 E-mail: Tim.Monahan@coag.gov; katie.wiktor@coag.gov *Counsel of Record</p>	<p>Case Number: 2015CW3018</p> <p>Div: 1</p>
<p>COLORADO PARKS AND WILDLIFE’S MOTION FOR SUMMARY JUDGMENT</p>	

The Colorado Division of Parks and Wildlife (“CPW”), by and through its undersigned counsel and, pursuant to Colorado Rule of Civil Procedure 56(c), respectfully submits this Motion for Summary Judgment on Plaintiff’s Claim No. 1 as it relates to CPW and requests that the Court find that, there being no genuine issue of any material fact, CPW is entitled to a ruling that (1) Plaintiff is not a third party beneficiary to the Water and Land Contracts between CPW and the United States Bureau of Reclamation (the “BOR”); and, (2) even if they are determined to be a third party beneficiary, CPW’s management of Bonny Reservoir is not in violation of the Water and Land Contracts resulting in no injury to the Plaintiff. In Support of this Motion, CPW states as follows:

C.R.C.P. 121, § 1-15(8) CERTIFICATION

In accordance with Rule 121, Section 1-15(8) C.R.C.P., counsel for the Defendants has conferred with counsel for the other Parties concerning this Motion for Summary Judgment. Plaintiff will not consent to the relief requested herein. Yuma County Water Authority Public Improvement District joins in this Motion and the

relief requested herein. The remaining Defendants and Defendant-Intervenors take no position on this Motion.

INTRODUCTION

In its Complaint, the Jim Hutton Educational Foundation seeks declaratory and injunctive relief regarding certain actions and inactions by the Defendants, including CPW through its involvement in the management of Bonny Reservoir. This Motion for Summary Judgment addresses only the requested relief in Claim No. 1 that pertains to CPW's management of the conservation capacity of Bonny Reservoir and the state-controlled lands associated therewith. CPW is not taking a position on Claim Nos. 2 and 3 in the Complaint or on any other aspects of Claim No. 1.

In response to a major flood event on the Republican River, Congress authorized the construction of the Bonny Dam and Reservoir. The BOR finished construction of Bonny Dam and Reservoir and appurtenant facilities in 1951. Bonny Reservoir is located in the southwest corner of Yuma County on the South Fork of the Republican River. The reservoir has a total capacity of 176,230 acre-feet and the authorized purposes of the reservoir include flood control, irrigation, recreation and fish and wildlife conservation. In addition, the BOR secured a water storage right for Bonny Reservoir for flood control, irrigation, recreation, fish and wildlife propagation.

Although the primary purpose of the dam and reservoir is emergency flood control, the original plans for the reservoir and surrounding area also included the

development of an irrigation water project. After construction of the dam and reservoir, irrigation development proved to be no longer economically feasible and, in 1952, BOR began working with the then Colorado Game, Fish, and Parks Commission to manage recreation in the area. In 1966, Bonny Reservoir became one of Colorado's first state parks and the federal lands surrounding the reservoir were managed as part of the State Park and the adjoining South Republican State Wildlife Area.

In the late 1970s, out-of-state interests attempted to purchase a large portion of the water in Bonny Reservoir as it was no longer allotted for irrigation development in the region. As this threatened to diminish the wildlife and conservation values at the reservoir and the surrounding lands, CPW began investigating acquisition of the conservation capacity available in the reservoir. In 1980, at the request of CPW, the Colorado Water Conservation Board prepared a report titled the "Bonny Reservoir Operating Plan" (the "Operating Plan") that evaluated CPW's potential acquisition of the use of the conservation storage space in the reservoir, as the reservoir had "proven itself to be one of the finest wildlife areas in Colorado." *See Exhibit 1 at p.1.*

The Operating Plan recommended CPW's purchase of the use of the conservation storage space with the option to lease project water for irrigation and other uses. *See Exhibit 1 at p.14.* Accordingly, in 1982, the State of Colorado, acting by and through the Department of Natural Resources for the use and benefit

of the Division of Wildlife and the Division of Parks and Outdoor Recreation¹, contracted with the BOR for use of the reservoir's conservation storage space of up to 39,922 acre-feet for recreation and fish and wildlife purposes ("Water Contract").

In 1985, the BOR, in cooperation with CPW, developed the Bonny Reservoir Area Management Plan ("RAMP"), which analyzed the various land uses at Bonny Reservoir to ensure that the lands were being used according to the recognized standards of proper land use. In 2002, the BOR and CPW entered into a Memorandum of Understanding for the purpose of managing recreation, fish and wildlife and related purposes on the lands in and around Bonny Reservoir that are owned by the BOR ("Bonny Reservoir Area Lands"), including the water surface area of the reservoir ("Land Contract"). The BOR retained control and administration of certain lands for reservoir regulation purposes, which included the lands underlying and immediately adjacent to the dam. *See* Exhibit 4. The BOR also retained ownership of the water storage right for Bonny Reservoir.

The Land Contract superseded all prior agreements between the parties for administration and management of the lands around Bonny Reservoir that related back to 1952. The Land Contract states that the BOR and CPW will manage the Bonny Reservoir Area lands in accordance with the approved RAMP and any modifications or updates made thereto. Exhibit 4 at ¶ 2. Among other things, the

¹ On July 1, 2012, the Colorado Division of Wildlife and Wildlife Commission ("DOW") and the Colorado Division of Parks and Outdoor Recreation ("CPOR") were merged into a single entity, and, pursuant to C.R.S. § 33-9-108, the Colorado Division of Parks and Wildlife and the Parks and Wildlife Commission ("CPW") is the successor in interest to DOW and CPOR's legal rights and obligations.

Land Contract states that CPW shall comply with all Federal and State Noxious Weed Laws and Regulations for managing the federal lands. Exhibit 4 at ¶4.

Up until 2011, CPW, in coordination with the BOR, managed use of the conservation storage pool and the lands adjacent to Bonny Reservoir for recreation, fish and wildlife purposes as a State Park. In 2011, the State Engineer ordered the BOR to release the water stored in Bonny Reservoir due to the water being stored out of priority. Since that time, the reservoir holds only a small amount of water that cannot be physically drained and the reservoir area has been managed by CPW along with other State-owned and controlled lands primarily as a State Wildlife Area. The South Fork of the Republican River continues to flow through the bottom of the reservoir and through the outlet structure.

In February of 2015, Plaintiff filed its Complaint claiming, among other things, that CPW's management of Bonny Reservoir and the lands associated therewith is inconsistent with and in violation of the Water and Land Contract resulting in injury to the Plaintiff.

LEGAL STANDARD

Summary judgment is warranted “when the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” C.R.C.P. 56(c); *Gibbons v. Ludlow*, 304 P.3d 239, 243-44. The party moving for summary judgment has the initial burden of showing there is no genuine issue of material fact, but once

the initial burden of production has been met, the burden shifts to the non-moving party to establish there is a material issue of fact. *Marcus v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991). A material fact is one that “will affect the outcome of the case.” *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163, 1166 (Colo. App. 1984). If the nonmoving party is unable to provide sufficient evidence to make out a triable issue of fact, the moving party is entitled to summary judgment as a matter of law. *D.R. Horton, Inc. v. D&S Landscaping*, 215 P.3d 1163, 1167 (Colo. App. 2008).

UNDISPUTED FACTS

1. The BOR finished construction of Bonny Dam and Reservoir in 1951. Exhibit 3 at ¶ II(A). The United States secured a water right for Bonny Reservoir for flood control, irrigation, recreation, fish and wildlife propagation with an appropriation date of December 3, 1948. See “Findings and Ruling of the Referee and Decree of the Water Court, Case No. W-9135-77,” (1984). The BOR continues to own and control Bonny Dam, and owns the lands formerly inundated by the reservoir and the lands directly adjacent thereto.

2. The original headgate for the Hale Ditch was inundated by the construction of Bonny Dam and Reservoir. Bonny Dam was constructed with a special outlet that delivers water to the Hale Ditch. Complaint at ¶ 15(B). The BOR manages the land underlying and immediately adjacent to the dam, which includes the outlet for the Hale Ditch. See Exhibit 4 at Exhibit A.

3. Plaintiff owns a one third interest in the Hale Ditch Priority No. 38. Complaint at ¶ 12.

4. In approximately 1952, the then Colorado Game, Fish and Parks Commission began working with BOR to manage the lands surrounding Bonny Reservoir for recreation, fish and wildlife purposes. See Exhibit 3, Appendix A.

5. In 1980, the Colorado Water Conservation Board prepared the Operating Plan at the request of CPW, which recommended an operating plan for the reservoir should CPW acquire use of the conservation pool. See Exhibit 1.

6. The Operating Plan recommended that “Bonny Reservoir, except as provided [in the Operating Plan] and subject to the Compact and state and federal laws, would be operated as nearly as possible to maintain the storage contents at the top of the conservation pool, elevation 3672 without interfering with the operation of the Hale Ditch.” Exhibit 1 at p. 14.

7. In 1982, the Division of Wildlife and the Division of Parks and Outdoor Recreation, now collectively known as CPW, entered into the Water Contract with the BOR for use of the reservoir’s conservation storage space of up to 39,922 acre-feet for recreation and fish and wildlife purposes. See Exhibit 2.

8. Pursuant to Paragraph 2(a) of the Water Contract, CPW agreed to manage use of the conservation capacity in conformity with the terms and

conditions of the contract, the Operating Plan, and the provisions of the Republican River Compact.

9. The BOR retained jurisdiction and responsibility for releases of water contained in the flood control storage pool of the reservoir. *See* Exhibit 2 at ¶2.c.

10. The BOR operates Bonny dam and the appurtenant facilities and reserves the right to store and make releases from the conservation capacity as safety, maintenance, and repair considerations dictate. *See* Exhibit 2 at ¶4.a. CPW was granted full use of water developed within the reservoir's conservation capacity for the uses described in the Operating Plan subject to the provisions of the Water Contract. *Id.*

11. The Water Contract states that BOR will assign to CPW all of the existing contracts from the sale of water by BOR for municipal, industrial, and agricultural purposes. *See* Exhibit 2 at ¶5.a. The Water Contract further requires the State to honor the terms and conditions of said contracts and structure its Operating Plans consistent with this requirement. *Id.*

12. In a separate Paragraph, the Water Contract includes language stating that “[t]he State of Colorado shall comply with all natural flow rights for Hale Ditch and the State Engineer shall measure and direct such releases pursuant to such rights.” *See* Exhibit 2 at ¶5.c.

13. Neither the Water Contract nor the Operating Plan include reference to any benefit to be derived for Hale Ditch owners from CPW's management of the

use of the conservation capacity for recreation, fish and wildlife purposes. *See* Exhibits 1 and 2.

14. In 1985, the BOR, in cooperation with CPW, developed the RAMP. *See* Exhibit 3. The stated purpose of the RAMP was to ensure that lands and water under BOR jurisdiction are used according to current recognized standards of proper land use and that the highest utilization of such lands and water is achieved. The RAMP addressed and evaluated wildlife, recreation, and reservoir operation land uses. Exhibit 3 at ¶ I(A).

15. In 2002, the BOR and CPW entered into the Land Contract for the purpose of managing recreation, fish and wildlife and related purposes on the Bonny Reservoir Area lands, which included the water surface of the reservoir. The Land Contract retained unto the BOR control and administration of certain lands for reservoir regulation purposes. Exhibit 4.

16. The Land Contract superseded prior existing agreements for management of Bonny Reservoir lands. *See* Exhibit 4 at p.1.

17. By entering into the Land Contract, the BOR and CPW agreed to manage the Bonny Reservoir Area lands in accordance with the RAMP and any modifications or updates made thereto. Exhibit 4 at ¶ 2.

18. Pursuant to the Land Contract, CPW is required to comply with all Federal and State Noxious Weed Laws and Regulations for managing the federal

lands. *See* Exhibit 4 at ¶4. In addition, CPW is required to use erosion control and weed control measures as necessary. *See* Exhibit 4 at ¶15.

19. Neither the Land Contract nor its associated RAMP includes any reference to interference with the operation of the Hale Ditch or any benefit to be derived to Hale Ditch owners from CPW's management of the Bonny Reservoir Area lands.

20. As part of its management responsibilities, CPW dedicates considerable time and resources to controlling vegetation and weeds on the South Republican State Wildlife Area, which includes the Bonny Reservoir Area lands. Exhibit 5 at ¶ 9.

21. CPW also undertakes mechanical, biological, and chemical weed control measures on an ongoing and annual basis. *Id.*

22. Based on observations and investigations by CPW staff, the vegetation growing at the bottom of Bonny Reservoir consists primarily of native plant species that are commonly found in riparian areas in Colorado and that provide beneficial habitat for wildlife species. Exhibit 5 at ¶ 6.

23. The vegetation growing at the bottom of Bonny Reservoir does not include a significant amount of noxious weeds. Exhibit 5 at ¶ 8.

24. CPW is in compliance with the provisions of the Land Contract and RAMP that govern weed control.

25. Further, CPW is in compliance with State and local noxious weed laws and regulations. *See* Exhibit 6 at ¶¶ 6 and 7.

ARGUMENT

I. CPW is entitled to Summary Judgment on Plaintiff's First Claim for Relief as it relates to the management of Bonny Reservoir because Plaintiff is not a third party beneficiary to the Water or Land Contract and therefore cannot enforce the terms of such contracts.

In its First Claim for Relief, Plaintiff claims that it is a third-party beneficiary to the Water and Land Contracts and asserts that the management of Bonny Reservoir and its associated lands by Defendants is inconsistent with and in violation of those contracts causing injury to Plaintiff. Complaint at ¶ 92. The undisputed facts demonstrate that Plaintiff is not a third party beneficiary to the Water and Land Contracts and therefore cannot enforce the terms of such contracts. Accordingly, Plaintiff's claim as it relates to CPW's management of Bonny Reservoir should be dismissed.

A. Plaintiff is not a third party beneficiary to the Water Contract because the parties to the Water Contract did not intend the contract to benefit Plaintiff and any benefits derived from the Water Contract by Plaintiff are merely incidental.

Under Colorado law, an individual not a party to a contract may nonetheless enforce certain contractual obligations within that contract if the party is a third

party beneficiary to the contract. *Galie v. RAM Assocs. Mgmt Services, Inc.*, 757 P.2d 176, 178 (Colo. App. 1982). To have standing to bring an action to enforce a contract as a third party beneficiary, the party claiming the status must show, among other things, a direct benefit and intention by the contracting parties that a direct benefit be realized to the third party. *S K Peightal Engr's, Ltd. v. Mid Valley Real Estate Sols V LLC*, 342 P.3d 868, 872 (Colo. 2015). The undisputed facts show that neither of these requirements has been met.

First, the actual parties to the contract must intend the contract to benefit the third party. *E. B. Roberts Constr. Co. v. Concrete Contractors Inc.*, 704 P.2d 859, 865 (Colo. 1985). While the intent to benefit the non-party need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement or the surrounding circumstances. *Id.* The question of intent is a question of fact which is “determined by the terms of the contract taken as a whole, construed in the light of circumstances under which it was made and the apparent purpose the parties were trying to accomplish.” *Concrete Contractors, Inc. v. Roberts Constr. Co.*, 664 P.2d 722, 725 (Colo. App. 1982). Notably, the intent of the parties must appear from the contract itself or be shown by necessary implication. *Id.*

CPW and BOR did not intend for Plaintiff to be a beneficiary of the Water Contract. The stated purpose and intent of the Water Contract was for CPW to acquire the use of the conservation capacity in Bonny Reservoir for recreation and fish and wildlife purposes. See Exhibit 2 at ¶ 2.a. This acquisition was necessary in

order for CPW to protect Bonny Reservoir's fish, wildlife, and recreational values. *See* Exhibit 1 at p. 12. The expressed intentions and purpose of the Water Contract are clearly identified.

Notably absent from the Water Contract is any reference, much less indicia of intention, that CPW and BOR intended that Hale Ditch owners, including Plaintiff, be a direct beneficiary of the Water Contract for the purposes it was entered into. Instead, the Water Contract contains a single recitation that the State of Colorado comply with the natural flow rights of the Hale Ditch. *See* Exhibit 2 at ¶5.c. The inclusion of this statement by CPW and BOR merely recognizes that Hale Ditch water has and will continue to flow through the reservoir. It does not make Plaintiff a beneficiary to the contract. *See generally Parrish Chiropractic Ctrs., P.C. v. Progressive Casualty Ins. Co.*, 874 P.2d 1049, 1056 (Colo. 1994) (finding that the inclusion of a health care provider as one of numerous potential providers of medical treatment does not make the healthcare provider an intended beneficiary to an insurance contract). Nor does it give Plaintiff the right to enforce the terms of the Water Contract against CPW or the BOR. Rather, the contractual recitation directs the State to comply with that which it was already required to do by Colorado water law and directs the State Engineer, who is not a party to the contract or bound by it, to measure and direct releases of the Hale Ditch water.

The Operating Plan also provides helpful context to the circumstances surrounding development and execution of the Water Contract in regards to the Hale Ditch. The Operating Plan includes descriptions of the already existing Hale Ditch uses and information regarding leases of project water to Hale Ditch users to supplement their direct-flow water rights. It also contains a “recommendation” that the reservoir should be operated to maintain the storage contents at the top of the conservation pool “without interfering with the operation of the Hale Ditch.” *See* Exhibit 1 at p. 14.

Again, absent from the Operating Plan is any discussion or reference of benefits to be conferred to Hale Ditch users, specifically Plaintiff, by CPW’s acquisition of the use of the conservation capacity. Plaintiff infers that this recommendation, which was not included in the Water Contract, is an obligation to ensure Plaintiff’s water deliveries to the Hale Ditch were maintained. In fact, the Operating Plan “recommendation” merely recognized CPW’s existing uses of the Hale Ditch, as the largest user of the Hale Ditch water right at the time and party to the Water Contract, for irrigation of the South Republican State Wildlife Area for fish and wildlife purposes.

The parties’ intent was to acquire use of the conservation capacity in order to protect the fish, wildlife, and recreational values of the reservoir and surrounding lands and not to disrupt the existing uses, which also benefitted the recreational, fish and wildlife values of the State Wildlife Area. Neither the provisions of the

Water Contract nor the surrounding circumstances demonstrate intent to benefit the Plaintiff. Therefore, Plaintiff does not have standing as a third party beneficiary. *See S.K. Peightal Eng'rs*, 342 P.3d at 872 (holding that non-party Mid Valley was a third party beneficiary to the contract since a provision of the contract actually named Mid Valley and specifically acknowledged that the parties expressly intended to benefit Mid Valley by granting it some property interest).

Second, Plaintiff's alleged benefit, continued deliveries of Hale Ditch water, is not a direct benefit of the contract, but merely incidental. The remaining requirement for standing as a third-party beneficiary requires a showing that the benefit claimed by the third party be a direct benefit and not merely an incidental benefit of the contract. *E. B. Roberts Constr. Co.*, 704 P.2d at 865. In this instance, CPW and the BOR entered into the Water Contract for the sole purpose of describing CPW's use of the conservation capacity in Bonny Reservoir for recreation and fish and wildlife purposes.

Although CPW's acquisition and management of the conservation capacity may have assisted keeping the reservoir full, and thus providing more reliable water deliveries to the Hale Ditch, CPW's actions were not intended to directly benefit Plaintiff. *See, e.g., Frisone v. Deane Auto. Ctr.*, 942 P.2d 1215, 1217 (Colo. App. 1996) (finding a subsequent purchaser of a vehicle an incidental beneficiary of repairs performed on the vehicle by the prior owner). Instead, the direct benefit of the Water Contract was the increase of recreational activities and the sustainability

of fish and wildlife populations. This is further supported in the Operating Plan which states that the quality of the fish, wildlife, and recreational activities at the reservoir depends on maintaining specific water surface elevations, minimizing fluctuations during critical times of the year, and avoiding large mud-flat areas. See Exhibit 1 at p. 6.

Plaintiff requests the Court consider it a direct beneficiary of the Water Contract; a contract by which it is not mentioned, referenced, nor a beneficiary of. The undisputed facts and the provisions of the Water Contract do not support this claim. CPW and the BOR entered into the Water Contract with the intention that CPW's acquisition and management of the use of the conservation pool provide a direct benefit to fish, wildlife, and recreational uses at the Reservoir. Contrary to Plaintiff's assertions, the Water Contract was not entered into to guarantee water storage content in the reservoir for Hale Ditch deliveries.

Moreover, although the Water Contract states that the State must comply with the natural flow rights of the Hale Ditch, CPW has no control over deliveries of water to the Hale Ditch. BOR retained sole responsibility for the operation and maintenance of the dam and appurtenant facilities, which included the Hale Ditch diversion point. Exhibit 2 at ¶ 4. CPW's management is simply limited to recreational, fish and wildlife uses of the conservation pool. Any benefit derived outside of these described uses is incidental and not intended by CPW or the BOR. As a result, the undisputed facts demonstrate that Plaintiff was not intended to

directly benefit from the Water Contract and therefore does not have standing to enforce the Water Contract as a third party beneficiary.

B. Plaintiff is not a third party beneficiary to the Land Contract because the parties to the Land Contract did not intend the contract to benefit Plaintiff and any benefits derived from the Land Contract by Plaintiff are merely incidental.

For the same reasons that Plaintiff does not have standing to enforce the terms of the Water Contract as a third party beneficiary, Plaintiff also does not have standing to enforce the terms of the Land Contract as a third party beneficiary. In 2002, the BOR and CPW entered into the Land Contract for CPW to manage the Bonny Reservoir Area lands for recreation, fish, and wildlife purposes. *See* Exhibit 4. As part of that contract, CPW and the BOR were to manage the Bonny Reservoir Area in accordance with the RAMP. Plaintiff was not a party to the Land Contract.

Much like the Water Contract, there is no indicia of evidence to show that Plaintiff was intended to be a direct beneficiary of the Land Contract. In fact, the undisputed facts show that Plaintiff has no claim for a benefit, incidental or otherwise, under the Land Contract. Unlike the Water Contract, the Land Contract contains no reference to the Hale Ditch or deliveries associated therewith.² The

² In the Complaint, Plaintiff confuses the Land Contract with the Water Contract by alleging that the Land Contract requires the parties to not interfere with operation of the Hale Ditch. *See* Complaint. at ¶19. However, the provision relied upon by Plaintiff exists only in the Water Contract and associated Operating Plan, not the Land Contract. *See* Exhibit 2 at ¶ 5(c). The Land Contract

Land Contract sets forth that CPW and the BOR will manage the Bonny Reservoir Area lands in accordance with the RAMP that addressed and evaluated wildlife, recreation, and reservoir operation land uses at Bonny Reservoir. The Land Contract, and its previous versions, contains no language evidencing intent to benefit owners of the Hale Ditch. Rather, the parties executed the contract for the sole purpose of having CPW manage the lands under and adjacent to Bonny Reservoir for recreation, fish and wildlife, and related purposes. Therefore, Plaintiff does not have standing as a third party beneficiary to the Land Contract because it was not an intended beneficiary.

Similarly, Plaintiff garners no direct benefit from the operation of the Land Contract. Again, the benefit claimed by Plaintiff is maintenance of Hale Ditch deliveries without interference. This claimed benefit has no direct relation to any of the provisions of the Land Contract. Plaintiff alleges that the vegetation growing on the land historically inundated by water in the reservoir is consuming water and not being adequately controlled by the Defendants pursuant to the Land Contract causing interference with Hale Ditch deliveries. Complaint at ¶¶ 58, 88, 92.

Contrary to Plaintiff's assertions, CPW is actively managing the vegetation on the land previously inundated by the reservoir. The Land Contract requires CPW to comply with all Federal and State Noxious Weed Laws and Regulations for

does not control how CPW manages use of the conservation pool. Moreover, the Operating Plan, which described management operations with regard to use of the conservation pool, is not even referenced in the Land Contract.

managing the federal lands. See Exhibit 4 at ¶4. It also requires CPW to use erosion control and weed control measures as necessary. See Exhibit 4 at ¶ 15. As part of its management responsibilities, CPW dedicates considerable time and resources to controlling vegetation and weeds on the South Republican State Wildlife Area, which includes the Bonny Reservoir Area lands. CPW undertakes mechanical, biological, and chemical weed control measures on an ongoing and annual basis. These measures help provide and sustain beneficial habitat for fish and wildlife species, which in turn increases recreational activities at the State Park and State Wildlife Area, but have no relation to delivery of water to the Hale Ditch.

Plaintiff alleges that the vegetation growing on the lands historically inundated by water in the reservoir is consuming water and not being adequately controlled by the Defendants pursuant to the Land Contract causing interference with Hale Ditch deliveries. Complaint at ¶¶58, 88, and 92. In reality, CPW adequately controls noxious weeds on the Bonny Reservoir Area lands consistent with the requirements of the Land Contract and its activities are intended to directly benefit the recreation, fish and wildlife opportunities on the lands.

Neither the Land Contract nor associated RAMP includes any reference to interference with the operation of the Hale Ditch or any benefit to be derived to Hale Ditch owners from CPW's management of the Bonny Reservoir Area lands. If the Hale Ditch owners receive any benefit as a result of CPW's vegetation and weed

control measures, such as increased or more reliable water deliveries, this benefit is incidental, and not a direct benefit of the Land Contract. Therefore, for this additional reason, Plaintiff does not qualify as a third party beneficiary to the Land Contract and cannot enforce the terms therein.

II. CPW is entitled to Summary Judgment on Plaintiff's First Claim for Relief as it relates to the management of Bonny Reservoir because CPW is not in violation of the Water and Land Contracts.

Even assuming, *arguendo*, that Plaintiff has standing as a third party beneficiary to the Water and Land Contracts, the undisputed facts demonstrate that CPW is entitled to judgment dismissing Plaintiff's claim because CPW is not in violation of either contract. Accordingly, Plaintiff's claim as it relates to CPW's management of Bonny Reservoir should be dismissed.

A. CPW is not in violation of the terms of the Water Contract.

CPW's responsibility under the Water Contract is to manage use of the conservation capacity of the reservoir for recreation, fish and wildlife purposes. Exhibit 2 at p.2. CPW acquired only the right to use the reservoir's conservation storage space for recreation and fish and wildlife purposes. *Id.* CPW does not own or control the water right decreed to Bonny Reservoir, nor does CPW administer

water rights in the Republican River basin.³ Moreover, BOR retained sole responsibility for the operation and maintenance of the dam and appurtenant facilities, including responsibility for releases of water contained in the reservoir. Exhibit 2 at ¶4. Bonny Dam was constructed with special outlet works for the purpose of delivering water to the Hale Ditch. Complaint at ¶ 15. Accordingly, as between the parties, BOR would be responsible for delivering water to the Hale Ditch. Further, as stated in the RAMP, BOR “directs all activities related to the storage and release of irrigation water in and from Bonny Reservoir” and “Bonny Reservoir inflows...are released into Hale Ditch as requested by the Colorado State Engineer.” Exhibit 3 at Chapter 5 (II and III). As such, CPW has no control over the water rights or inflows that fill the reservoir and supply head pressure for delivery to the Hale Ditch and has no control over deliveries to the Hale Ditch through the Bonny Reservoir Dam. CPW’s jurisdiction extends only to use of the conservation capacity of the reservoir for recreation, fish and wildlife purposes. Plaintiff provides no evidence as to how CPW’s management of the use of the conservation capacity is causing interference with Hale Ditch deliveries. Therefore, CPW’s management activities of the conservation capacity are not in violation of any terms of the Water Contract and are not interfering with deliveries to the Hale Ditch.

³ “The state engineer shall be responsible for the administration and distribution of the waters of the state, and, in each division, such administration and distribution shall be accomplished through the office of the division engineer.” § 37-92-301(1), C.R.S. (2014).

B. CPW is not in violation of the terms of the Land Contract.

In its Complaint, Plaintiff alleges that management of Bonny Reservoir and its associated lands by Defendants is inconsistent with and in violation of the Land Contract and is resulting in injury to Plaintiff. Complaint at ¶ 92. Specifically, Plaintiff alleges that the vegetation growing on the lands historically inundated by water in the reservoir is consuming water and not being adequately controlled causing interference with Hale Ditch deliveries. Complaint at ¶¶58, 88, and 92. The undisputed facts show that Plaintiff's claims are without support and must be dismissed.

The Land Contract requires CPW to comply with all Federal and State Noxious Weed Laws and Regulations for managing the federal lands. Exhibit 4 at ¶ 4. It also requires CPW to use erosion control and weed control measures as necessary. Exhibit 4 at ¶ 15. As part of its management responsibilities, CPW dedicates considerable time and resources to controlling vegetation and weeds on the South Republican State Wildlife Area, which includes the Bonny Reservoir Area lands. Exhibit 5 at ¶ 9. In accordance with the Land Contract and RAMP, CPW undertakes mechanical, biological, and chemical weed control measures on an ongoing and annual basis. *Id.*

Based on observations and investigations by CPW staff, the vegetation growing at the bottom of Bonny Reservoir consists primarily of native plant species that are commonly found in riparian areas in Colorado and that provide beneficial

habitat for wildlife species, including whitetail deer, mule deer, turkey, pheasant, quail, waterfowl, dove, squirrels, cottontail and jackrabbits, and a wide variety of other non-game species. Exhibit 5 at ¶ 6. The vegetation growing at the bottom of Bonny Reservoir does not include a significant amount of noxious weeds. Exhibit 5 at ¶ 8. As a result, CPW is in compliance with the provisions of the Land Contract and RAMP that govern weed control.

Further, CPW is in compliance with State and local noxious weed laws and regulations and partners with Colorado State University and Yuma County in its long-term weed control efforts. C.R.S. § 35-5.5-110 requires each state board, department, or agency that administers or supervises state lands to manage noxious weeds on any lands under its jurisdiction using the methods prescribed by the local governing body in whose jurisdiction such state lands are located.

Bonny Reservoir and the surrounding lands are located in unincorporated Yuma County and therefore CPW's noxious weed management in this area is subject to regulation by the Yuma County Pest Control District. CPW is not currently under any advisement or notice from Yuma County for its failure to manage noxious weeds on the lands under its jurisdiction. As CPW is in compliance with the provisions of the Land Contract and in compliance with State and local noxious weed laws, Plaintiff's claim as a third party beneficiary enforcing the terms of the Land Contract fail and must be dismissed.

CONCLUSION

Plaintiff is not a third party beneficiary to either the Water Contract or Land Contract. Neither CPW nor BOR intended that Plaintiff benefit from either contract and any alleged benefits derived by Plaintiff are entirely incidental.

Furthermore, CPW is and has continued to be in compliance with the relevant provisions of both the Water and Land Contracts, including those provisions regarding the control of noxious weeds. As result, Plaintiff has no basis for which it can submit its claims against CPW.

CPW is entitled to summary judgment on Plaintiff's Claim No. 1 as it relates to CPW's management regarding Bonny Reservoir and the lands associated therewith. Claim No. 1 is the only claim stated against CPW and, as such, CPW respectfully requests this Court dismiss Plaintiff's claim and CPW from this litigation, and grant such other and further relief as this court deems just and proper.

Dated this 29th day of February, 2016.

CYNTHIA H. COFFMAN
Attorney General

*E-filed pursuant to C.R.C.P. 121. Duly signed original
on file at the Office of the Attorney General.*

/s/ Katie L. Wiktor

KATIE L. WIKTOR, 38025*

Assistant Attorney General

TIMOTHY J. MONAHAN, 16971*

First Assistant Attorney General

Natural Resources & Environment

Attorneys for Defendant CPW

**Counsel of Record*

Joining in this Motion:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: /s/ Katie L. Wiktor for

Steven O. Sims, #9961

John A. Helfrich, #34539

Dulcinea Z. Hanuschak, #44342

SPECIAL COUNSEL FOR YUMA COUNTY WATER
AUTHORITY PUBLIC IMPROVEMENT DISTRICT

CERTIFICATE OF SERVICE

This is to certify that on this 29th day of February, 2016, I caused a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT to be served electronically via ICCES upon the following:

Party Name	Party Type	Party Status	Attorney Name
4m Feeders Llc	Defendant	Active	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Arikaree Ground Water Mgmt Dist	Defendant	Active	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	Active	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Central Yuma Ground Water Mgmt Dist	Defendant	Active	Eugene J Riordan (Vranesh and Raisch) Leila Christine

Party Name	Party Type	Party Status	Attorney Name
			Behnampour (Vranesh and Raisch)
City of Burlington Colorado	Defendant	Active	Alix L Joseph (Burns Figa and Will P C) Steven M. Nagy (Burns Figa and Will P C)
City of Holyoke	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
City of Wray Colorado	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Colorado Agriculture Preservation Assoc	Defendant	Active	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Colorado Division of Water Resources	Opposer	Active	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Ground Water Commission	Defendant	Active	Chad Matthew Wallace (CO Attorney General) Patrick E Kowaleski (CO Attorney General)
Colorado State Board Land	Defendant	Active	Virginia Marie

Party Name	Party Type	Party Status	Attorney Name
Commissioners			Sciabbarrasi (CO Attorney General)
David L Dirks	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
David Nettles	Opposer	Active	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Dick Wolfe	Opposer	Active	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Dirks Farms Ltd	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Division 1 Water Engineer	Opposer	Active	Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)

Party Name	Party Type	Party Status	Attorney Name
Don Myrna And Nathan Andrews	Defendant	Active	Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch)
East Cheyenne Ground Water Mgmt Dist	Defendant	Active	John David Buchanan (Buchanan Sperling and Holleman PC) Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
Frenchman Ground Water Mgmt Dist	Defendant	Active	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Happy Creek Inc	Defendant	Active	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
J And D Cattle Llc	Defendant	Active	Johanna Hamburger (Carlson, Hammond & Paddock,

Party Name	Party Type	Party Status	Attorney Name
			L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
James J May	Defendant	Active	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Julie Dirks	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Kent E Ficken	Defendant	Active	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Lazier Inc	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Mariane U Ortner	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marjorie Colglazier Trust	Defendant	Active	Alvin Raymond Wall

Party Name	Party Type	Party Status	Attorney Name
			(Alvin R Wall Attorney at Law)
Marks Butte Ground Water Mgmt Dist	Defendant	Active	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Thomas R. May, May Acres Inc., May Brothers, Inc.; May Family Farms	Defendant	Active	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
North Well Owners	Defendant	Active	Kimbra L. Killin (Colver Killin and Sprague LLP) Russell Jennings Sprague (Colver Killin and Sprague LLP)
Plains Ground Water Mgmt Dist	Defendant	Active	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Protect Our Local Communitys Water Llc	Defendant	Active	John David Buchanan (Buchanan Sperling and Holleman PC) Timothy Ray Buchanan

Party Name	Party Type	Party Status	Attorney Name
			(Buchanan Sperling and Holleman PC)
Republican River Water Conservation Dist	Defendant	Active	David W Robbins (Hill and Robbins PC) Peter J Ampe (Hill and Robbins PC)
Sandhills Ground Water Mgmt Dist	Defendant	Active	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Saving Our Local Economy Llc	Defendant	Active	John David Buchanan (Buchanan Sperling and Holleman PC) Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
State Engineer	State Engineer	Active	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	Active	Johanna Hamburger

Party Name	Party Type	Party Status	Attorney Name
			(Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
The Jim Hutton Educational Foundation	Plaintiff	Active	Karen Leigh Henderson (Porzak Browning & Bushong LLP) Steven J Bushong (Porzak Browning & Bushong LLP)
Timothy E Ortner	Defendant	Active	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Tri State Generation And Transmission As	Defendant	Active	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	Active	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)

Party Name	Party Type	Party Status	Attorney Name
Yuma Cnty Water Authority Public Improv	Defendant	Active	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 pursuant to C.R.C.P. 121. Duly signed original on file at the Office of the Attorney General.

/s/ Suzanne Burdick
Suzanne Burdick