

<p>DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO</p> <p>Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300</p>	<p style="text-align: right;">DATE FILED: May 6, 2016 7:58 PM</p> <p style="text-align: center;"><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p>
<p>Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation,</p> <p>v.</p> <p>Defendants: Dick Wolfe, in his capacity as the Colorado State Engineer; David Nettles, in his capacity as Division Engineer in and for Water Division No. 1, State of Colorado; Colorado Division of Water Resources; and Colorado Division of Parks and Wildlife.</p> <p>Defendant-Intervenors: Yuma County Water Authority Public Improvement District; Colorado Ground Water Commission; Marks Butte, East Cheyenne, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts.</p> <p>Defendant – Well Owners: Republican River Water Conservation District; City of Wray; City of Holyoke; Harvey Colglazier; Lazier, Inc.; Marjorie Colglazier Trust; Mariane U. Ortner; Timothy E. Ortner; Protect Our Local Community’s Water, LLC; Saving Our Local Economy, LLC; the “North Well Owners”; Tri-State Generation and Transmission Association, Inc.; Dirks Farms Ltd; Julie Dirks; David L Dirks; Don Andrews; Myrna Andrews; Nathan Andrews; Happy Creek, Inc.; J&D Cattle, LLC; 4M Feeders, Inc.; May Brothers, Inc.; May Family Farms; 4M Feeders, LLC; May Acres, Inc.; Thomas R. May; James J. May; Steven D. Kramer; Kent E. Ficken; Carlyle James as Trustee of the Chester James Trust; Colorado Agriculture Preservation Association; Colorado State Board of Land Commissioners; and the City of Burlington.</p>	<p style="text-align: center;">Case Number: 15CW3018</p>
<p>Porzak Browning & Bushong LLP Steven J. Bushong (#21782) Karen L. Henderson (#39137) 2120 13th Street Boulder, CO 80302 Tel: 303-443-6800 Fax: 303-443-6864 Email: sjbushong@pbblaw.com; khenderson@pbblaw.com</p>	<p style="text-align: center;">Water Div. No. 1</p>
<p>THE JIM HUTTON EDUCATIONAL FOUNDATION’S REPLY TO DEFENDANTS’ RESPONSE TO CERTAIN FACTUAL ALLEGATIONS MADE BY THE HUTTON FOUNDATION</p>	

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through undersigned counsel, does hereby file this Reply to

Defendants' Response to Certain Factual Allegations Made by the Hutton Foundation ("Response").

The Response generally recognizes that it does not create genuine issues of material fact, except as may be argued in certain responses to the Foundation's pending motions. (*Response*, p. 3). The Foundation agrees that the Response does not create genuine issues of material fact. The Response clarifies or emphasize facts that were disclosed elsewhere, and in some instances argues those facts, but does not disclose any new facts. The following is a brief reply to each category of facts discussed in the Response.

A. Reduction in Stream Flows in the South Fork. The Response recognizes that Colorado groundwater pumping is impacting flows in the South Fork of the Republican River ("South Fork"), but points out that Kansas and Nebraska groundwater pumping is also impacting South Fork flows. (*Response*, pp. 3-5). There is no dispute on that issue, but nor is it material to the claims. The South Fork travels through the Northern High Plains Basin designated groundwater basin in Colorado ("NHP Basin") before entering Kansas, and then eventually Nebraska. The Foundation has no claims against Kansas or Nebraska as they did not curtail the Foundation's water rights, drain Bonny Reservoir, or preclude the Foundation from redrawing the designated groundwater basin. Moreover, wells located downstream in Kansas and Nebraska would cause depletions downstream. Lastly, the mere fact that other factors, such as precipitation or land use, may change streamflow is not material to the Foundation's claims.

B. Kansas v. Nebraska and Colorado Litigation. The Response confirms the allegations in the Complaint and provides additional detail contained in the Special Master's rulings. (*Response*, pp. 5-6). There is no dispute. In short, the Compact includes groundwater and groundwater pumping depletions to stream flows. Further, all beneficial consumptive use is treated the same under the Compact, regardless of whether it is caused by groundwater pumping or surface water diversions. That is because such consumption depletes the Virgin Water Supply. There is also no dispute that the Supreme Court litigation, like the Compact itself, does not direct the States how to achieve their allocations. That is why the Compact is deficient for intrastate administration, thus triggering the mandates for Compact administration set forth in § 37-80-104.

C. Use and Applicability of the RRCA Groundwater Model. The Response argues the RRCA "Model has not been approved for any intrastate administration" and the Foundation improperly relies upon the Model to quantify impacts to its water rights. (*Response*, pp. 6-8). These are not material facts in this litigation as the Foundation is not using the Model at this time for intrastate administration or to quantify specific impacts to its water rights. The Foundation relies upon the RRCA Model to show the extent to which Colorado groundwater pumping is depleting Colorado's Compact allocation and generally to show the amount of depletions being caused by groundwater pumping in Colorado. Importantly, "ground water which has more than a de minimis impact on surface waters cannot properly be classified as designated ground water." *Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 31 (Colo. 2006).

The Foundation does not agree, however, with the implication that a MODFLOW model such as the RRCA Model cannot be used to determine groundwater depletions at locations reflected by cells in the Model domain. Although not an issue presented in this litigation – a few clarifying points are necessary. The Foundation provided an Affidavit of Dale Book, M.S., P.E., who was on the technical team that developed the RRCA Model and who was qualified as an expert in the United States Supreme Court litigation. (*Dale Book, M.S., P.E., Affidavit, Exhibit 42*). As Mr. Book clarifies, the RRCA Model is currently being used to quantify groundwater depletions at four points on the South Fork for the Compact accounting. Two of those locations are in Colorado above Bonny Reservoir and are combined with a third location below Bonny Reservoir and outside of Colorado to make up the “South Fork” entry reported in the RRCA Model groundwater depletion tables. (*Id.* ¶ 11; *see also, App’x U to Final Report of Special Master, Exh. 11; Exh. 12; and Exh. 13*). It is Mr. Book’s understanding that most of those “South Fork” depletions are upstream from Bonny Reservoir. (*Exh. 42, ¶ 11*). The fourth location is a small reach associated with Bonny Reservoir and is reported in the RRCA Model depletion tables as “Bonny.” (*Id.*).

The Response also discussed Case No. 06CV31, which was a pre-Senate Bill 52 case in which irrigators on the North Fork of the Republican River petitioned the Ground Water Commission (“Commission”) to redraw the boundaries of the NHP Basin. The Commission dismissed the petition without hearing evidence based upon the belief it was an improper collateral attack on the prior designation. (*06CV31 Order, Exh. 1, pp. 3, 8-9*). On appeal, the district court overturned the Commission decision and remanded back to the Commission for an evidentiary hearing, but the case settled before any hearing. The Response emphasizes two points in the Order. First, that the Commission needed to make the determination regarding designated groundwater that had been raised in the Petition and second, that while the Defendants could not challenge the Model results, they could argue over the significance of the Plaintiff’s application of the RRCA Model. (*Response, pp. 7-8*).

The 06CV31 Order is instructive in its entirety. The undisputed facts, summary of the law, description of the RRCA Model, and how the Commission failed to comply with its statutory duty under C.R.S. § 37-90-106(1) are all explained in detail in the Order.¹ The Order speaks for itself and thus does not create a factual dispute. While the Defendants in the case were allowed to argue over the significance of the RRCA Model results as noted in the Response, other holdings are worth repeating to put that in context:

Colorado entered into the Compact Stipulation and agreed to be bound by the Compact Model in determining the amount of depletions to surface streams caused by well pumping. The Compact Stipulation and Model serve as binding admissions by the State of Colorado and, by extension, its agency, the Commission. The Compact Model is a binding recognition of the extent to which groundwater pumping is depleting surface flows.

¹ Senate Bill 52 changed that statutory duty as explained in the Foundation’s Motion for Summary Judgment Regarding its Senate Bill 52 Claim.

The Compact Model is competent and admissible evidence to prove groundwater depletions and anything else supported by the Compact Model's findings and conclusions. The Commission cannot dispute the Compact Model's findings and conclusions but the Commission may determine their weight and effect on the Plaintiffs' burden of proof.

(*Exh. 1*, pp. 12 - 13) (emphasis added).

D. Water Court Orders in Case Nos. 2011CW186 and 2012CW111. Although immaterial, the Response takes issue with a statement by the Foundation that the historical use of the Foundation's water rights was documented by aerial photographs and other information as referenced in this Court's Orders in Case Nos. 2011CW186 and 2012CW111. (*Response*, p. 9). There is no disagreement that the Water Court found that the Hutton No. 1, Hutton No. 2, and Tip Jack Ditches had not been abandoned in 2012CW111. Contrary to the inference in the Response, the same ruling was entered with regard to the Hale Ditch in 2011CW186, after the parties alleged abandonment of that water right too. (*2011CW186 Order, Exh. 22*, pp. 9-11). Also contrary to the Response, evidence cited by the Water Court on the lack of abandonment for all four rights included aerial photographs, testimony and other information documenting the use of the water rights over time. (*Id.* at 10 – 11; *12CW111 Order, Exh. 37*, pp. 5-8).

E. Appendix U and Other RRCA Model Results. The Response states that "Appendix U shows the impacts of Colorado's groundwater withdrawals in more than just Colorado." (*Response*, p. 10). Although not material – this is not entirely accurate. As described above, the "South Fork" entry for depletions may include some Colorado groundwater depletions that accrue downstream of the State line on the South Fork, but most of the depletions are from two locations quantified in the Model that are located upstream of Bonny Reservoir. Further, the "Bonny" entry in Appendix U and the other RRCA Model depletion tables reflect Colorado's groundwater depletions in the short reach of the South Fork associated with Bonny Reservoir, which is also upstream of the Foundation's water rights. (*Exh. 42, ¶ 11*). To state that "Appendix U does not show that all or any depletions to the South Fork occur at or above the Foundation" is misleading.

F. State Engineer's Surface Water Rights Administration. The Response raises arguments regarding the priority of the Hutton No. 1 and Hutton No. 2 water rights. (*Response*, pp. 10 – 11). There is no dispute that the water rights were first appropriated by use in 1954 as reflected in a 1955 Map and Filing Statement (*Exh. 8*), and then later confirmed by decree in W-8667-77 (*Complaint, ¶12; Foundation Motion Re: Compact Administration*, p. 4, Undisputed Fact ¶ C). For purposes of administration with other surface water rights, that is a 1977 priority with a 1954 appropriation. Although adjudicated after the designation of the NHP Basin as stated in the Response, the water rights were appropriated and in use before that designation. Wells in the NHP Basin have never been adjudicated unless they serve as alternate points of diversion for surface water rights. Thus, the appropriation dates are relevant for comparing when water was first put to use by wells or surface diverters. This issue is discussed in more detail in

the Foundation's Reply in support of its Motion for Summary Judgment on Compact Administration Claim, Section IV.D.5.

The Response seeks to clarify a statement by the Foundation that the State Engineer's administration of wells in the NHP Basin is limited to requiring measurement – which is also a requirement impose on surface water users. (*Response*, p. 11). The Response states that the State Engineer also “enforce[s] the limits of permits and decrees and have taken legal action to preclude the expansion of groundwater use outside those restrictions.” (*Id.*). Although that may very well be true, it does not change the point. The State Engineer is not curtailing any wells for Compact compliance – but is curtailing all post-1942 surface water rights.

G. Commission Testimony Before the General Assembly Regarding Senate Bill 52. The Response takes issue with the Foundation's assertion that the Commission testified in support of Senate Bill 52 (“SB-52”). (*Response*, pp. 12-13). Again, the record speaks for itself.

It was made very clear to the legislature that the Commission supported SB-52. (*See Exh. 1 to Defendants' Motion re: SB-52, Transcript of Legislative Hearings on SB-52*, p. 11, lines 7-8) (“The Colorado Ground Water Commission voted in November to support the bill.”); (*see also, Id.* p. 52, lines 34-36) (“...the Colorado Ground Water Commission, the body established for regulating this kind of water has voted to support this bill.”).

In addition, Dennis Coryell testified before the legislature and started off by stating he was both the President of the Republican River Water Conservation District and the “chairman of the Colorado Ground Water Commission.” (*Id.* at p. 44, lines 9-11). Mr. Coryell then indicated that he was starting his testimony from the perspective of the District. (*Id.* at p. 44, lines 13-14) (“Let me first begin from my perspective with the Water Conservation District.”). This suggests he would also be testifying from the perspective of the Commission. In fact, he later fielded a question from the perspective of the Commission. (*Id.* at p. 47, lines 17-23) (“As I understand it, if this bill is not passed and if the Opponents were to file a petition with the Colorado Ground Water Commission, the Commission would be obligated to hear testimony and to establish a boundary or a, an area of de minimus standard within the basin...”); *see also* (*Id.* at p. 45, line 4) (referring to “our” groundwater permitting process). Mr. Coryell testified in support of SB-52 and never once said his testimony was only on behalf of the District. If Mr. Coryell did not intend to testify on behalf of the Commission after introducing himself as the Chairman of the Commission, he should have made that point clear.

Respectfully submitted this 6th day of May, 2016.

PORZAK BROWNING & BUSHONG LLP

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

Steven J. Bushong (#21782)

Karen L. Henderson (#39137)

Attorneys for the Jim Hutton Educational Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2016, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION’S REPLY TO DEFENDANTS’ RESPONSE TO CERTAIN FACTUAL ALLEGATIONS MADE BY THE HUTTON FOUNDATION** was filed and served by the Integrated Colorado Courts E-Filing System (“ICCES”) addressed to counsel for each of the parties in the above-captioned matter, as follows:

Party Name	Party Type	Attorney Name
Colorado Division of Water Resources	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Parks and Wildlife	Defendant	Katie Laurette Wiktor (CO Attorney General) Timothy John Monahan (CO Attorney General)
David Nettles	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Dick Wolfe	Defendant	Daniel E Steuer (CO Attorney General) Ema I.g. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
4m Feeders Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
4m Feeders LLC	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Carlyle James as Trustee of the Chester James Trust	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
City of Burlington	Defendant-Well Owner	Alix L Joseph (Burns Figa and Will P C) Steven M. Nagy (Burns Figa and Will P C)
City of Holyoke	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
City of Wray Colorado	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Colorado Agriculture Preservation Assoc	Defendant-Well Owner	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Colorado State Board Land Commissioners	Defendant-Well Owner	Virginia Marie Sciabbarrasi (CO Attorney General)
David L Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Dirks Farms Ltd	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Don Myrna and Nathan Andrews	Defendant-Well Owner	Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch)

Party Name	Party Type	Attorney Name
Happy Creek Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
J and D Cattle LLC	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
James J May	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Julie Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Kent E Ficken	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Lazier Inc	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Mariane U Ortner	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marjorie Colglazier Trust	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
May Acres Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Brothers Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Family Farms	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
North Well Owners	Defendant-Well Owner	Kimbra L. Killin (Colver Killin and Sprague LLP) Russell Jennings Sprague (Colver Killin and Sprague LLP)
Protect Our Local Community's Water LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Republican River Water Conservation Dist	Defendant-Well Owner	David W Robbins (Hill and Robbins PC) Peter J Ampe (Hill and Robbins PC)
Saving Our Local Economy LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.)

Party Name	Party Type	Attorney Name
		Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Steven D Kramer	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Thomas R May	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Timothy E Ortner	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Tri State Generation and Transmission Assn.	Defendant-Well Owner	Aaron S. Ladd (Vranesh and Raisch) Justine Catherine Shepherd (Vranesh and Raisch)
Yuma Cnty Water Authority Public Improv	Defendant-Intervenor	Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP) John A Helfrich (Brownstein Hyatt Farber Schreck LLP) Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)
Colorado Ground Water Commission	Defendant-Intervenor	Chad Matthew Wallace (CO Attorney General) Patrick E Kowaleski (CO Attorney General)
Arikaree Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Central Yuma Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Frenchman Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Marks Butte Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Plains Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Sandhills Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Wy Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
East Cheyenne Ground Water Mgmt Dist	Defendant-Intervenor	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)



Corina A. Hach