

<p>DISTRICT COURT, WATER DIVISION NO. 1 COLORADO</p> <p>901 9th Avenue P. O. Box 2038 Greeley, Colorado 80632 (970) 351-7300</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</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, et al.</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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT REGARDING BONNY RESERVOIR</p>	

Defendant, the Colorado Division of Parks and Wildlife (“CPW”), by and through its undersigned counsel, and pursuant to C.R.C.P 56(c), submits this Reply in support of CPW’s Motion for Summary Judgment regarding Bonny Reservoir. In support thereof, CPW states as follows:

INTRODUCTION

On February 29, 2016, CPW filed a Motion for Summary Judgment regarding Plaintiff's Claim No. 1 as it related to CPW and its management of Bonny Reservoir ("CPW's Motion"). CPW requested 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 Plaintiff is determined to be a third-party beneficiary, CPW's management of Bonny Reservoir is not in violation of the Water and Land Contracts. Plaintiff also filed a Motion for Summary Judgment or, in the alternative, a Motion for Determination of a Question of Law on February 29th, regarding its Bonny Reservoir claims ("Plaintiff's Bonny Reservoir Motion").

In accordance with the Case Management Plan, on April 8, 2016, CPW filed a Response to Plaintiff's Bonny Reservoir Motion ("CPW Response"). Plaintiff also filed a Response to CPW's Motion ("Plaintiff's Response"). In Plaintiff's Response, Plaintiff again asserts its claims are not limited to CPW and that its alleged injury is the result of actions by all the Defendants in the operation and management of Bonny Reservoir, collectively referred to by Plaintiff as the "State Defendants." Plaintiff's Response Motion at 2. Plaintiff alleges that the State Defendants' interference with the Plaintiff's Hale Ditch rights through the operation of Bonny Reservoir violates Colorado law and that Plaintiff is a third-party beneficiary to the provisions of the Water and Land Contracts and therefore entitled to enforce the contract provisions.

As represented in CPW's Response and the Response filed by the State Engineer, the Division Engineer for Water Division 1, and the Colorado Division of Water Resources

(the “Engineers”), the Engineers and CPW are separate and independent agencies and each agency has independent statutory authorities. As such, Plaintiff’s continued assertions that the “State Defendants” are collectively operating and managing Bonny Reservoir unlawfully are misapplied. This Reply only addresses Plaintiff’s claims as they relate to CPW and its use of the conservation capacity of Bonny Reservoir and management of the lands under and surrounding the reservoir. CPW does not own or operate Bonny Reservoir, nor does it have any role in the administration of water rights.

As described in more detail in CPW’s Motion and CPW’s Response, CPW began managing public recreation on and surrounding Bonny Reservoir in 1952, after construction of the reservoir. In 2002, the BOR and CPW renewed their management relationship by entering into a Memorandum of Understanding for the purpose of managing recreation, fish and wildlife and related purposes (the “Land Contract”). In the Land Contract, the BOR specifically excluded lands from CPW’s management responsibilities that were necessary for safety and efficient operation of the reservoir. These excluded lands include the dam and the current outlet structure for the Hale Ditch. In 1982, CPW also contracted with the BOR for use of 39,922 acre-feet of Bonny Reservoir’s conservation storage space for recreation, fish and wildlife purposes (“Water Contract”). Similar to the Land Contract, in the Water Contract, the BOR retained sole responsibility for the operation and maintenance of the dam and appurtenant facilities, which includes the current outlet structure for the Hale Ditch. As described in the Land and Water Contracts, CPW does not own, operate, or control Bonny Reservoir or dam. Additionally, CPW does not own the Bonny Reservoir water right nor does it administer water rights.

As further set forth in CPW's Motion, CPW's Response and in this Reply, Plaintiff is not a third-party beneficiary to the Land or Water Contracts and CPW's management is not injuring the Hale Ditch water right or right-of-way under Colorado law. Therefore, CPW is entitled to summary judgment and Plaintiff's claims against CPW should be dismissed.

REPLY IN SUPPORT OF UNDISPUTED FACTS

There is no genuine issue as to any material fact listed in CPW's Motion and CPW is entitled to summary judgment. CPW does not agree with Plaintiff's qualifications or clarifications to CPW's Undisputed Facts.

1. Undisputed Facts Nos. 1,2,9,10,15. Plaintiff acknowledges, as it must, that the BOR continues to own, control, and operate Bonny Dam, and that the BOR retained responsibilities to release water and manage lands underlying and adjacent to the dam. However, Plaintiff attempts to clarify that releases of water from Bonny Dam are at the direction of the State Engineer. This information is not relevant to CPW's actions and does not demonstrate CPW's facts are disputed. CPW, and its predecessor agencies, use the conservation capacity of Bonny Reservoir, manage the surface of the reservoir, and manage designated lands under and surrounding the reservoir as described in the Water and Land Contracts only for recreational and fish and wildlife purposes. The information contained in CPW Motion's Undisputed Facts Nos. 1,2,9,10, and 15 are expressly stated in the Water and Land Contracts and remain undisputed.
2. Undisputed Fact No. 13: CPW asserts that neither the Water Contract nor the Operating Plan include reference to any benefit to be derived for Hale Ditch owners

from CPW's use of the conservation capacity of Bonny Reservoir. The Water Contract does state that the "State of Colorado shall comply with the natural flow rights for the Hale Ditch." However, this provision does not expressly convey any benefit upon Hale Ditch owners.

3. Undisputed Fact No. 14: CPW's Undisputed Fact No. 14 discusses the creation of the Reservoir Area Management Plan, not the Water Contract or the Land Contract as represented by Plaintiff.
4. Undisputed Fact Nos. 20-25: Plaintiff asserts CPW's vegetation management is not acceptable. However, unlike the affidavits submitted by CPW, Plaintiff has presented no credible evidence showing CPW's vegetation management is not in compliance with CPW's obligations under the Water or Land Contract or in violation of federal, state or local noxious weed laws. Undisputed Fact Nos. 20-25 accurately represent CPW's vegetation management efforts in and around Bonny Reservoir, are uncontested, and demonstrate CPW is in compliance with both the Water and Land Contracts.

ARGUMENT

I. Plaintiff is not a third party beneficiary to the Land and Water Contracts and, therefore, does not have standing to bring injury claims arising under the contracts.

Plaintiff alleges it is an intended third-party beneficiary to the Land and Water Contracts and is entitled to enforce the provisions in the contracts benefiting the Hale Ditch. Plaintiff's Response at 6. CPW maintains that Plaintiff does not meet the requirements to qualify as a third-party beneficiary under the Land or Water Contract as

Plaintiff cannot show the contracting parties intended to benefit Hale Ditch owners and that the benefit derived by Plaintiff is anything other than incidental.

A. 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 are incidental.

Plaintiff argues CPW's rights under the Land Contract are subject to any rights that attached prior to the date of the contract and prior to the date the BOR took title to the land, subject to existing rights-of-way in favor of third parties for ditches. Plaintiff's Response at 7. Plaintiff further alleges that the Hale Ditch was clearly an existing ditch and right-of-way and therefore the Foundation meets the test for a third-party beneficiary. Although the Land Contract does make CPW's management subject to prior rights, this is only applicable to prior rights existing on the lands CPW is responsible for managing.

CPW and the BOR entered into the Land Contract for the sole purpose of having CPW manage the lands under and adjacent to Bonny Reservoir for recreation, fish and wildlife. However, the Land Contract specifically excludes from CPW's management the lands under the dam and immediately adjacent thereto, which includes the diversion structure for the Hale Ditch and the majority of the current Hale Ditch right-of-way that is physically present on federal lands. *See* CPW Response Exhibit A. In fact, the BOR reserved for itself primary jurisdiction over such excluded lands in order to ensure proper operation and protection of the reservoir. CPW Motion Exhibit 4 at ¶3(d).

In order to qualify as a third-party beneficiary, the third party must show the contracting parties intended to confer a direct benefit upon the third party and not merely

an incidental benefit. *E. B. Roberts Constr. Co. v. Concrete Contractors Inc.*, 704 P.2d 859, 865 (Colo. 1985). Contrary to Plaintiff's assertions that the "prior rights" contractual provision is intended to require CPW to protect the Hale Ditch water right, the BOR excluded any lands from CPW's management that have a direct connection to the Hale Ditch. Since the Land Contract contains no other reference to the Hale Ditch or deliveries associated therewith, and the Hale Ditch diversion point and the majority of the existing right-of-way were excluded from CPW's management responsibilities, there is no support for the argument that CPW and the BOR intended to confer a direct benefit on Hale Ditch owners, and particularly so with regard to actions required of CPW under the Land Contract. If the Hale Ditch garnered any benefit from CPW's management activities under the Land Contract, those benefits were incidental. Plaintiff simply does not qualify as a third-party beneficiary and does not have standing to bring injury claims under the Land Contract.

B. 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 are incidental.

Plaintiff also alleges the Water Contract contains a provision expressly benefiting Plaintiff and other Hale Ditch users making Plaintiff a third-party beneficiary to the contract. Plaintiff claims this provision confers a benefit on the Hale Ditch owners by ensuring Bonny Reservoir will not be operated in a manner that interferes with the release of their senior water rights. Plaintiff's Response Motion at 7. Again, Plaintiff infers a benefit in the Contract that was not intended by the parties. In order to have standing to

bring an action to enforce a contract, a third party must show both a direct benefit and the contracting parties' intent to realize that direct benefit 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). Plaintiff does not meet either of these requirements under the Water Contract.

CPW and the BOR entered into the Water Contract for CPW to acquire the use of the conservation capacity of the reservoir for recreation, fish and wildlife purposes. The direct benefit of the Water Contract was the increase of recreational activities at the reservoir and State Park and the sustainability of fish and wildlife populations in and surrounding the reservoir. The purpose of the Water Contract had nothing to do with the Hale Ditch. The single reference to the Hale Ditch acknowledged that the Hale Ditch water right would continue to flow through the reservoir. Although the reference to the Hale Ditch natural flow rights is under a section titled "Third Party Contracts and Permits," CPW and the BOR did not intend to convey third-party beneficiary status to the Hale Ditch water right owners. The title was directed at existing BOR contracts for the sale of water from the reservoir by the BOR for municipal, industrial, and agricultural purposes. *See* CPW Motion Exhibit 2 at ¶ 5(a). The reference to the Hale Ditch in a separate paragraph only acknowledged the Hale Ditch water right flows through the reservoir. The State of Colorado was required to comply with the natural flow rights of the Hale Ditch. That is, when CPW is using the conservation capacity of the reservoir, as determined by the BOR, CPW cannot impede the flows of the Hale Ditch and never has.

Plaintiff continues to assert the intent of this language was to ensure continued deliveries of Hale Ditch water by CPW. However, if CPW and the BOR intended to confer

this benefit on the Hale Ditch, they would have expressly stated so. *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). In contrast, Plaintiff's alleged benefit, continued deliveries of the Hale Ditch water, is not a direct benefit of the contract, but merely incidental. Although recreational use 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 by ensuring deliveries, but instead to increase recreational activities and sustain fish and wildlife populations on the reservoir.

Moreover, CPW does not "operate" Bonny Reservoir and has no control over deliveries of water to the Hale Ditch. The BOR does. Again, the actual parties to the contract must intend the contract to benefit the third party. The question of intent is determined by the terms of the contract as a whole 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). If the parties' intent was to actually protect diversions and releases to the Hale Ditch, then CPW would have been responsible for making such releases. It was not. Although maintenance of the reservoir elevations in the conservation pool may have indirectly benefited the Hale Ditch water rights by making deliveries more reliable, this was an incidental benefit of the contract. The Water Contract does not directly benefit the Plaintiff but instead merely recognized the Hale Ditch water rights already existed and would continue to flow through the reservoir for release by the BOR.

Plaintiff relies solely upon *Nebraska Bridge Supply & Lumber Co. v. Deakin* to support its argument that it is a third Party beneficiary to the contracts. Plaintiff's Response at 9. Contrary to Plaintiff's description, *Nebraska Bridge* does not stand for the proposition that the prior valid commitments provision created a third-party beneficiary and Plaintiff's reliance on this case is misguided. In *Nebraska Bridge*, a contractor named Carlson entered into a contract with the State to complete a gravel surfacing project. 125 P.2d at 962. Carlson purchased lumber from a creditor on credit before filing for bankruptcy. *Id.* at 962-63. A trustee was subsequently appointed to handle Carlson's debts and finances. *Id.* at 963. A second contractor agreed to work with the State on the project and signed an offer letter stating that the second contractor would comply with any valid commitments made by Carlson in connection with his contract. *Id.* The second contractor purchased the lumber from the trustee and the creditor filed a complaint seeking compensation from the trustee. *Id.* The trustee filed a motion to dismiss and the trial court sustained it. *Id.* at 962.

On appeal, the Colorado Supreme Court's analysis was focused solely on whether the trial court erred in dismissing the case. *Id.* Contrary to Plaintiff's assertion, the Court did not make a finding with regard to third-party beneficiaries. Instead, the Court held there was not sufficient evidence in the record for the trial court's decision to sustain the dismissal. *Id.* at 963. Notably, in assessing statements made by the creditor, the Court concluded that it was not "obvious that the provision was clearly inserted for the benefit of those in [the creditor's] position." *Id.* at 963. The court thus remanded the case to the trial

court to determine whether the creditor could claim third-party beneficiary status under the applicable standards for third-party beneficiaries. *Id.* at 964.

More analogous to the facts here is the Colorado Supreme Court's holding in *S.K. Peightal Engr's Ltd.* 342 P.3d at 872. In *S.K. Peightal Engr's Ltd.*, the Court held that a third party was an intended third-party beneficiary to the contract since a provision of the contract actually named the third party and specifically acknowledged that the parties expressly intended to benefit the third party by granting it a property interest. *Id.*

Although the Water Contract acknowledges the Hale Ditch, the language is distinguishable from *S.K. Peightal* in that the Water Contract does not include language that the parties expressly intended to benefit the Hale Ditch. It merely recites that the State shall comply with, as in not impede, the existing flow rights of the Hale Ditch, and CPW has not.

Plaintiff must also show the parties intended to contract for the benefit of the third party. *See Cripple Creek State Bank v. Rollestone*, 70 Colo. 434, 439 (1921). Although Plaintiff alleges the contractual provisions are intended to protect the Hale Ditch water right, CPW and the BOR did not enter into the Water Contract for the benefit of the Hale Ditch. The stated purpose and intent of the Water Contract was for CPW to acquire use of the conservation capacity in Bonny Reservoir for recreation, fish and wildlife purposes. *See* CPW Motion Exhibit 2 at ¶ 2.a. This acquisition was necessary in order for CPW to protect Bonny Reservoir's fish, wildlife, and recreational values and not to protect the Hale Ditch. *See* CPW Motion Exhibit 1 at p. 12. Plaintiff insists CPW's interpretation of the contract renders the Hale Ditch provision meaningless if Plaintiff cannot enforce the provision. Plaintiff's Response Motion at 9. The contract provision is not meaningless but instead

recognized existing rights. Moreover, Plaintiff's assertion that the contract provision requires delivery and protection of the natural flow rights of the Hale Ditch by CPW would lead to an absurd result. Under the Water Contract, the BOR retained operational control of the dam and appurtenant facilities and the relevant provision states the State Engineer shall measure and direct releases pursuant to such rights, even though the State Engineer was not a party to the Contract. CPW has no authority to make releases of water from the dam or to administer water rights. If Plaintiff's theory is correct, the contract placed an obligation on CPW that CPW could not meet and had no authority to control. The parties did not intend to contract for the benefit of the Hale Ditch but instead to recognize their existing rights. The expressed intentions and purpose of the Water Contract are clearly identified and were not for the benefit of the Hale Ditch. Therefore, Plaintiff does not have standing as a third party beneficiary under the Water Contract.

II. CPW is in compliance with its obligations under the Water and Land Contracts.

Plaintiff alleges CPW is violating its obligations under the Water and Land Contracts resulting in the Hale Ditch not receiving its water. Plaintiff's Response at 10. CPW maintains Plaintiff is not a third-party beneficiary to the Water or Land Contract and therefore does not have standing to enforce the terms of the contracts. However, even if it is assumed Plaintiff has standing under the contracts, CPW is not in violation of either contract.

First, the Water Contract contains no provisions that CPW could violate that would impact Plaintiff's Hale Ditch water rights. CPW only acquired the right to use the

reservoir's conservation storage space for recreation, fish and wildlife purposes. CPW does not own or control the water right decreed to Bonny Reservoir, nor does CPW administer water rights. Moreover, in the Water Contract, the BOR specifically retained sole responsibility for the operation and maintenance of the dam and appurtenant facilities, including responsibility for releases of water contained in the reservoir. CPW Motion Exhibit 2 at ¶4. Accordingly, the BOR, not CPW, is responsible for delivering water to the Hale Ditch. Further, as stated in the Reservoir Area Management Plan, 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). 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 authority and obligations extend only to use of the conservation capacity of the reservoir for recreation, fish and wildlife purposes.

Plaintiff has provided no evidence as to how CPW's use of the conservation capacity is causing interference with Hale Ditch deliveries. In fact, CPW's use of the conservation capacity has also ceased since the reservoir was drained and, therefore, CPW's actions under the Water Contract are not affecting operations at the reservoir, much less the Hale Ditch. Thus, CPW's use of the conservation capacity is not in violation of any terms of the Water Contract and are not interfering with deliveries to the Hale Ditch.

Nor has CPW violated the terms of the Land Contract, much less in any way that impacts the Plaintiff. Plaintiff alleges the vegetation growing in the reservoir footprint is

interfering with the delivery of water that would otherwise be available to the Hale Ditch in a manner that is inconsistent with CPW's contract obligations. Plaintiff's Response at 11. However, Plaintiff uses comparisons of diversion records upstream of Bonny Reservoir and measurements to the Hale Ditch to support its assertion it is not receiving the entire flow it is entitled to. As discussed more fully below and in the Engineers' Response to Plaintiff's Bonny Reservoir Motion, Plaintiff has provided no evidence to show it is entitled to the entire flow of the South Fork of the Republican River where the BOR measures the water above the reservoir. The measurement point is upstream of the original decreed point of diversion for the Hale Ditch and there are senior water rights that divert between the BOR's measurement structure and the original Hale Ditch diversion point. Engineers' Ex. K, Affidavit of Dave Keeler (Apr. 8, 2016).

Moreover, Plaintiff has provided no evidence the alleged decreases in its diversions due to evaporation, evapotranspiration and seepage, are losses that would not have occurred even before Bonny Dam was constructed. Appropriators are entitled to continuation of the stream conditions as they existed at the time of their appropriation. *Farmers Highline Canal & Reservoir Co. v. Golden*, 129 Colo. 575, 579 (1954). Plaintiff argues that the phreatophyte species growing in the reservoir footprint are interfering with the delivery of water that would otherwise be available to the Hale Ditch. Plaintiff's Response at 11. However, the Bonny Dam Technical Record described the Hale ditch diversion structure as "a poor structure for diverting water from the river." Plaintiff's Bonny Reservoir Motion, Exhibit 23 at Chapter 1, Section 4. In addition, the Technical Record also describes the low lying lands as already consisting of mainly willows and

cottonwood trees. *Id.* at Section 2. The Hale Ditch has likely always suffered from diversion issues and cannot now place the blame solely on consumption of water from phreatophytes.

Further, although Plaintiff insinuates the reservoir bottom is overgrown with trees and CPW is not doing enough to manage this vegetation, CPW is managing and controlling the vegetation in accordance with the Land Contract and federal, state and local laws. *See* CPW Motion Exhibit 5. 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 under its control and is required to use erosion and weed control measures as necessary. CPW Motion Exhibit 4 at ¶¶ 4 and 15. CPW is in compliance with the provisions of the Land Contract governing vegetation and weed control and is also in compliance with State and local noxious weed laws and regulations. *See* CPW Motion Exhibits 5 and 6. CPW actively manages the vegetation and weeds on the South Republican State Wildlife Area, which now includes the lands previously inundated by the reservoir water. 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. *Id.*

Even assuming, *arguendo*, that CPW had an obligation to remove the vegetation from the reservoir bottom, Plaintiff would not be entitled to any additional water if the river was subject to an administrative call. The water hypothetically available from the phreatophyte removal would return to the river and become waters of the State. Water salvaged from phreatophyte eradication does not become the property of a particular water

user outside of the priority system. *See S.E. Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 187 Colo. 181 (1974).

Further, the Colorado Supreme Court has held that water resources are to be “utilized in harmony with the protection of other valuable state resources.” *State Eng’r v. Castle Meadows*, 856 P.2d 496, 506. (Colo. 1993). Making additional water available to the river from the removal of phreatophytes may create an incentive to eradicate vegetation, causing a detriment to the land. *Id.* *See also R.J.A., Inc. v. Water Users Ass’n of Dist. No. 6*, 690 P.2d 823, 828-29 (Colo. 1984) (affirming the denial of an application for a developed water right that entailed the alteration of natural land characteristics in a manner that involved various potential detrimental effects on soil, wildlife, and other resources, and stating that the policy of maximum utilization “must be implemented with a sensitivity to the effect on other resources”); *S.E. Colo. Water Conservancy Dist.*, 187 Colo. at 191 (holding that persons could not obtain water rights free from the priority system by clearing land of phreatophytes, thereby making available to the stream water that the plants previously consumed).

The vegetation now growing on the lands previously inundated by the reservoir is the same vegetation historically present and provides 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. CPW Motion Exhibit 5. Requiring additional vegetation removal would be detrimental to and cause injury to other valuable State resources. CPW has no obligation to control or remove vegetation from the reservoir bottom in order to supply additional water for Plaintiff’s

diversion. Further, any removal of additional vegetation would be detrimental to other valuable State resources, including land and wildlife.

Plaintiff also alleges there may be an issue of fact regarding whether CPW is in compliance with the applicable local, state and federal laws regarding invasive species based on observations by a local citizen who lacks any expertise in noxious weed evaluations.¹ Plaintiff asserts at least some of the invasive species listed on the Yuma County Noxious Weed List may be present in the reservoir footprint. Plaintiff's Response at 11. In contrast to Plaintiff's unsubstantiated allegations, the Yuma County Pest Control District affirmatively stated that due to CPW's vegetation control efforts, CPW is in compliance with the Colorado Noxious Weed Act and the Yuma County weed ordinance. CPW Motion Exhibit 6 at ¶¶6-7.

III. CPW's use of the conservation capacity of Bonny Reservoir and management of the lands under and adjacent to Bonny Reservoir is not injuring the Hale Ditch water right under Colorado law.

Plaintiff argues CPW is operating and managing Bonny Reservoir in violation of Colorado law. CPW is not. Since these claims were not clearly raised against CPW in the Complaint, these claims were not addressed in CPW's Motion. CPW now responds to Plaintiff's remaining allegations in its Response as follows.

¹ Plaintiff's sole source of evidence to establish a triable issue of fact is two affidavits containing statements that should not be considered. See C.R.C.P. 56(e) ("opposing affidavits should be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence."). Both affidavits provided by Plaintiff contain statements that lack foundation, personal knowledge and are speculative. Therefore, these affidavits are insufficient. *People v. Hernandez & Associates, Inc.*, 736 P.2d 1238, 1240 (Colo. App. 1986) (stating that affidavits based upon hearsay or speculation are insufficient for purposes of summary judgment). Plaintiff has failed to provide sufficient evidence to establish a material fact with regard to CPW's management under the Land and Water Contracts and CPW is entitled to summary judgment as a matter of law.

A. CPW is not operating Bonny Reservoir in a manner that injures senior water rights.

Plaintiff relies upon section 37-87-101(1)(a), C.R.S. (2015) and a series of cases standing for the proposition that water storage facilities and junior water rights cannot be operated in a manner that causes injury to the senior appropriative rights of others. Plaintiff alleges that by draining Bonny Reservoir and then allowing the limited available water to be lost to evaporation, evapotranspiration and seepage, CPW has caused water right deliveries to the Hale Ditch to diminish or even cease all together. Plaintiff's Response at 4. CPW is not operating Bonny Reservoir in a manner that injures Plaintiff's Hale Ditch water rights. In fact, CPW is not operating Bonny Reservoir at all. The BOR retains those responsibilities.

In 1982, CPW acquired the right to use Bonny Reservoir's conservation storage space for recreation and fish and wildlife purposes with incidental uses including irrigation. The Water Contract only granted CPW use of the conservation capacity of Bonny Reservoir for recreation and fish and wildlife. The BOR retained sole responsibility for operating the dam and appurtenant facilities and the right to store and make releases of the conservation capacity as safety and maintenance concerns dictate. CPW Motion Exhibit 2 at ¶ 4. Plaintiff alleges CPW's actions are injuring Plaintiff's senior water right under Section 37-87-101(1)(a), C.R.S. (2015) and "longstanding case law." Plaintiff's Response at 4. Plaintiff instead should be looking to the BOR for relief.

Section 37-87-101(1)(a), C.R.S. (2015) states "[n]o water storage facility may be operated in such a manner as to cause material injury to the senior appropriative rights of

others.” First, the statute provides direction to owners and operators of water storage facilities and CPW does not own or operate Bonny Reservoir, dam or appurtenant facilities or own the Bonny Reservoir water storage right. Pursuant to the Water Contract, CPW acquired use of the conservation capacity of the reservoir for recreation, fish and wildlife purposes. The BOR retained responsibility for operating the dam and appurtenant facilities, which includes the outlet structure for the Hale Ditch. When the water is available, CPW simply uses the conservation capacity of the reservoir for the defined purposes, as determined by the BOR. Plaintiff’s allegation that CPW is injuring Plaintiff’s senior water right by operating a water storage facility is misapplied as to CPW.

Similar to the Engineers’ Response, Plaintiff has failed to show material injury under the statute or that CPW has caused such material injury. Plaintiff alleges CPW’s actions have caused its water deliveries to decrease. However, Plaintiff has provided no evidence to show it is entitled to the entire flow of the South Fork of the Republican River where the BOR measures the water above the reservoir. The measurement point is upstream of the original decreed point of diversion for the Hale Ditch and, in fact, there are senior water rights that divert between the BOR’s measurement structure and the original Hale Ditch diversion point. Engineers’ Ex. K, Affidavit of Dave Keeler (Apr. 8, 2016).

Moreover, Plaintiff has provided no evidence the alleged decreases in its diversions due to evaporation, evapotranspiration and seepage, are losses that did not occur historically prior to Bonny Dam construction. Plaintiff is only entitled to water that is legally and physically available at its original decreed point of diversion up to its decreed amount. *See Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation*

Dist., 256 P.3d 645, 673 (Colo. 2011)(affirming the water court’s decision that an alternate point of diversion is limited to the amount of water legally and physically available at the original point of diversion); *see also Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1224 (Colo. 1988)(holding that a change in point of diversion cannot confer the right to divert a greater quantity of water from the stream than the water right owner was previously entitled to.). Plaintiff is relying on water measurements taken at a point upstream of the original point of diversion of the Hale Ditch but such measurements are not an accurate depiction of what Plaintiff is actually entitled to. As referenced in the Technical Record for design and construction of Bonny Dam in 1954, the pre-Bonny Hale Ditch had a “poor structure for diverting water from the river.” Plaintiff’s Bonny Reservoir Motion, Exhibit 23 at Chapter 1, Section 4.

Plaintiff also asserts that its cited case law confirms CPW’s operation and management of Bonny Reservoir is in violation of Colorado law. Plaintiff alleges CPW has failed “to take proactive measures to protect the Hale Ditch from a loss in water supply” resulting in injury to Plaintiff’s water rights. Plaintiff’s Response at 4. The cases cited by Plaintiff generally stand for the proposition that junior water rights holders, including reservoir storage rights, may not interfere with or harm existing senior water rights. See *Larimer Cty. Reservoir Co. v. People*, 9 P. 794 (Colo. 1885); *Joseph W. Bowles Reservoir Co. v. Bennett*, 18 P.2d 313 (Colo. 1932); and *City of Colorado Springs v. Bender*, 366 P.2d 552 (Colo. 1961). However, these cases do not support Plaintiff’s assertion that junior water right holders or operators of reservoirs must “protect” or *benefit* the senior water right holder, much less by removal of vegetation. Although water stored in Bonny Reservoir

arguably improved the reliability of the Hale Ditch water right, the Hale ditch is only entitled to the water legally and physically available at its original decreed point of diversion. *Burlington Ditch*, 256 P.3d at 673. Since CPW does not operate Bonny Reservoir or own the Bonny Reservoir water storage right, the cases cited by Plaintiff are inapplicable as to CPW.

B. Plaintiff is not entitled to protection of the original Hale Ditch right-of-way and CPW's management of the reservoir lands is not injuring the Hale Ditch water right or right-of-way.

Plaintiff also argues the BOR acquired the land for Bonny Reservoir subject to existing rights-of-way in favor of ditches and that this language obligates CPW to ensure the continued protection of the Hale Ditch. Plaintiff's Response at 4-5. Plaintiff's argument does not apply to CPW either legally or chronologically. CPW briefly addressed this issue in the CPW Response but focused its analysis on the existing Hale Ditch right-of-way that diverts out of Bonny Reservoir dam. However, since Plaintiff has now expanded its claims regarding the Hale Ditch water right and right-of way in its Response, and now asserts protection for the original ditch right-of-way that no longer exists, CPW responds as follows.

i. CPW is not interfering with the Hale Ditch water right or right-of-way since the current point of diversion and right-of-way are not located on lands managed by CPW.

Colorado law provides that the owner of property burdened by a ditch easement may not unreasonably interfere with the ditch easement or inhibit a ditch owner from maintaining, operating or using the ditch. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 923

P.2d 313, 316 (Colo. App. 1996); *In re Tonko*, 154 P.3d 397, 404 (Colo. 2007). Further, the owner of the burdened property may not move or alter that easement *unless the owner has the consent* of the ditch easement holder. See *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1239 (Colo. 2001) (holding that the owner of property burdened by a ditch easement has no right to move or alter the easement without consent of the benefitted owner unless he first obtains a declaration of a court that such alterations will cause no damage to the benefitted owner); see also *Cherrichigno v. Dickinson*, 63 Colo. 443, 445 (1917). The BOR acquired land for Bonny Reservoir in 1948, which land included the original Hale Ditch right-of-way. Plaintiff's Response at 4. The BOR finalized construction of Bonny Dam and Reservoir in 1951. The reservoir inundated the original ditch right-of-way and the dam included special outlet works to continue delivering water to the Hale Ditch.

Although the BOR acquired the land for Bonny Reservoir subject to existing rights-of-way, subsequent construction of the reservoir required modification to these rights-of-way, including the Hale Ditch, and the Hale ditch owners impliedly consented to such modification. Such modifications to the original easement included inherent risks such as how the ditch would receive water if the reservoir was drained and significant landscape changes once the reservoir was constructed. Hale Ditch owners likely believed that the benefits of the modification outweighed the risk as a full reservoir could increase reliability of the Hale Ditch diversions.

CPW's predecessor began leasing the lands surrounding Bonny Reservoir and the water surface of the reservoir in 1952. At the time CPW incurred its management

obligations, the Hale Ditch point of diversion and right-of-way had already been modified and moved to a new location with the Hale Ditch owners' *consent*. By consenting to the relocation, the Hale Ditch owners relinquished protection of the original ditch easement and abandoned the original ditch right-of-way. See *Rivera v. Queree*, 145 Colo. 146, 150 (1960) (holding that abandonment of an easement is accomplished by the voluntary act of the lessee).

Plaintiff now argues the Hale Ditch water rights and the original right-of-way are entitled to the same protections existing at the time of the BOR's acquisition and CPW's management is subject to these rights. Plaintiff's Response at 5. The Hale Ditch owners consented to the alteration and modification of the original point of diversion and right-of-way when they allowed the diversion point to be moved to the Bonny Reservoir dam. Such modification included inherent risks such as a modified diversion structure, a modified river channel, and a modified landscape from which the Hale Ditch would now divert.

Plaintiff argues CPW's management is subject to prior rights existing on the federal lands. However, at the time CPW began managing the lands, the Hale Ditch point of diversion had already been voluntarily moved to the dam site and the original right-of-way had been abandoned. The Land Contract expressly excludes the new Hale Ditch point of diversion and the majority of the existing right-of-way from CPW's management responsibilities. See CPW Response Exhibit A. CPW's management of the lands under and surrounding Bonny Reservoir may be subject to prior rights on the land it currently manages, but not to rights that were abandoned or no longer exist.

ii. Plaintiff is precluded from claiming protection of the original ditch right-of-way under the equitable doctrines of waiver and laches.

Plaintiff cannot now object or claim interference caused by conditions its predecessors in interest consented to or failed to object to for 60 plus years. Plaintiff should be precluded from raising protection of the original ditch right-of-way under the equitable doctrines of waiver and laches. Waiver is the intentional relinquishment of a known right. *Dep't of Health v. Donahue*, 690 P.2d 243, 248 (Colo. 1984). Waiver may be implied when a party engages in conduct which manifests an intent to relinquish a right. *Id.* By consenting to the relocation of the Hale Ditch diversion point and delivery system, Hale Ditch owners, including Plaintiff's predecessor, relinquished their right to protect the original Hale Ditch right-of-way.

Laches is a form of estoppel that contemplates a delay in asserting one's rights that works to another party's prejudice. *City of Thornton v. Bijou Irrigation. Co.*, 926 P.2d 1, 73 (Colo. 1996). The elements required to demonstrate laches are: "(1) full knowledge of the facts, (2) unreasonable delay in assertion of available remedy; and (3) intervening reliance by and prejudice to another." *Id.* Hale Ditch owners had full knowledge of the facts by consenting or acquiescing to the relocation of the Hale Ditch diversion point and the right-of-way and diverting water from the new location for 60 plus years. Plaintiff has provided no evidence that the Hale Ditch owners objected to or did not have knowledge of the relocation. Now, more than 60 years later, Plaintiff is attempting to claim interference with, and require protection of, the original ditch right-of-way after the original right-of-way has been abandoned. CPW and the BOR have managed the property in reliance on the

relocated structures. Plaintiff's untimely attempt to now claim protection of the original right-of-way is unreasonable. Under the doctrines of waiver and laches, Plaintiff is precluded from now claiming interference with or injury to the original Hale Ditch right-of-way.

iii. Plaintiff has not demonstrated that CPW's actions are interfering with or injuring the original Hale Ditch water right or right-of-way.

If Plaintiff is allowed to claim interference with or injury to the original Hale Ditch water right or right-of-way, Plaintiff has also failed to show that any of CPW's actions are actually interfering with the Hale Ditch easement or inhibiting the Hale Ditch owners from maintaining, operating or using the ditch. Under *Roaring Fork*, ditch easement owners are entitled to delivery of water of the same quantity, quality, and timing as provided under the ditch owner's water rights. *Roaring Fork*, 36 P.3d at 1238. Plaintiff has provided no evidence of the timing and amount of water the Hale Ditch historically diverted before Bonny Dam was constructed and whether its diversions have been injured. Although Hale Ditch diversions likely benefitted from the modified diversion location when the reservoir was full, Plaintiff is not entitled to protection of these conditions. The Hale Ditch owners are only entitled to maintenance of deliveries of water the ditch received before Bonny Dam was constructed at the Hale Ditch's original decreed point of diversion up to its decreed flow rate. *Burlington Ditch*, 256 P.3d at 673. Further, senior appropriators are not entitled to enlarge the historical use of a water right by changing the point of diversion and then diverting a greater amount when the historical use at the original point of diversion might have been less. *Orr*, 753 P.2d at 1224.

According to Plaintiff's own exhibits, the Hale Ditch is still able to divert water when it is legally and physically available and Plaintiff has provided no evidence the amount of water diverted since the reservoir was drained is less than it is legally entitled to. Plaintiff alleges, based on completely unsubstantiated affidavits², that CPW has "allowed" vegetation to grow on the lands within the footprint of the reservoir and that this is impacting delivery of water and the utility of the modified right-of-way. Again, Plaintiff has provided no evidence that historical deliveries of water before Bonny Dam was constructed have been affected in any way. An appropriator is entitled to continuation of the stream conditions as they existed at the time of their appropriation. *Farmers Highline*, 129 Colo. at 579. Plaintiff is relying on stream conditions after Bonny Reservoir was constructed and storing water. However, Plaintiff cannot claim protection for deliveries that were increased or made more reliable based on storage in Bonny Reservoir. As stated previously, the Bonny Reservoir Technical Record described the Hale ditch diversion structure as "a poor structure for diverting water from the river" and stream conditions were also likely poor. Plaintiff's Bonny Reservoir Motion, Exhibit 23 at Chapter 1, Section 4. In addition, the Technical Record also describes the low-lying lands in and surrounding the reservoir as consisting of mainly willows and cottonwood trees. *Id.* at Section 2. Plaintiff asserts the vegetation on the bottom of the reservoir is now interfering with the Hale Ditch diversions, when the same vegetation, including cottonwood trees, were present as early as 1954. Further, CPW is managing vegetation on the lands formerly inundated by

² Plaintiff's assertions are based on affidavits that include statements that lack foundation and are speculative. The affiants have no specialized knowledge of vegetation or weed identification.

the reservoir in accordance with the provisions of the Land Contract and local, state, and federal laws and owes no further obligation to any party under the Land Contract or otherwise. If the Land Contract subjected CPW's management to prior rights, CPW is only subject to prior rights existing on the lands it actually manages. The Land Contract expressly excludes the relocated Hale Ditch point of diversion and the majority of the current right-of-way from CPW's management.

CONCLUSION

Plaintiff is not a third party beneficiary to either the Water Contract or Land Contract and, even if it was, CPW is complying with the relevant provisions regarding vegetation control. Further, Plaintiff has failed to establish under statute, case law, or the Land and Water Contracts that CPW is injuring the Hale ditch water right or right-of-way through its use of the conservation capacity of Bonny Reservoir or by its management of the lands under and surrounding the reservoir. CPW has no authority to operate the reservoir, dam, or appurtenant facilities and is not the Bonny Reservoir water storage right owner. As stated previously, Plaintiff's allegations are more appropriately directed towards the Bureau of Reclamation as the owner and operator of the reservoir, dam, and water storage right. As such, CPW is entitled to summary judgment on Plaintiff's Claim No. 1 as it relates to CPW's use and management of Bonny Reservoir and all claims stated against CPW should be dismissed.

Dated this 6th day of May, 2016.

CYNTHIA H. COFFMAN

CPW's Reply in Support of its Motion for Summary Judgment
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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

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**Counsel of Record*

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of May, 2016, I caused a true and correct copy of the foregoing CPW'S REPLY TO PLAINTIFF'S RESPONSE TO CPW'S MOTION FOR SUMMARY JUDGMENT REGARDING ITS BONNY RESERVOIR CLAIM to be served electronically via ICCES upon the following:

Party Name	Party Type	Attorney Name
4M Feeders, LLC 4M Feeders, Inc.	Defendant	Johanna Hamburger William Arthur Paddock (Carlson, Hammond & Paddock, LLC)
Arikaree Ground Water Mgmt Dist	Defendant	David C Taussig (White & Jankowski, LLP) Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Carlyle James As Trustee of the Chester James Trust	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Central Yuma Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
City of Burlington Colorado	Defendant	Alix L Joseph, Steven M. Nagy (Burns Figa and Will P C)
City of Holyoke	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
City of Wray Colorado	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Colorado Agriculture Preservation Assoc	Defendant	Bradley Charles Grasmick, Curran Trick (Lawrence Jones Custer Grasmick LLP)
Colorado Division of Water Resources	Opposer	Daniel E Steuer, Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Colorado Ground Water Commission	Defendant	Chad Matthew Wallace, Patrick E Kowaleski (CO Attorney General)
Colorado State Board Land Commissioners	Defendant	Virginia Marie Sciabbarrasi (CO Attorney General)
David L Dirks Julie Dirks Dirks Farms, Ltd.	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)

Party Name	Party Type	Attorney Name
David Nettles	Opposer	Daniel E Steuer, Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Dick Wolfe	Opposer	Daniel E Steuer, Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Division 1 Water Engineer	Opposer	Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Don Myrna And Nathan Andrews	Defendant	Geoffrey M Williamson, Stuart B Corbridge (Vranesh and Raisch)
East Cheyenne Ground Water Mgmt District	Defendant	John David Buchanan, Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
Frenchman Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Happy Creek Inc	Defendant	Johanna Hamburger, 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, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Kent E Ficken	Defendant	Johanna Hamburger, 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, Leila Christine Behnampour (Vranesh and Raisch)
James J. May, Thomas R. May, May Acres Inc., May Brothers, Inc.; May Family Farms	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)

Party Name	Party Type	Attorney Name
North Well Owners	Defendant	Kimbra L. Killin, Russell Jennings Sprague (Colver Killin and Sprague LLP)
Plains Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Protect Our Local Community's Water LLC	Defendant	John David Buchanan, Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
Republican River Water Conservation District	Defendant	David W Robbins, Peter J Ampe (Hill and Robbins PC)
Sandhills Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Saving Our Local Economy LLC	Defendant	John David Buchanan, Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
State Engineer	State Engineer	Colorado Division Of Water Resources Ema I.G. Schultz, Preston Vincent Hartman (CO Attorney General)
Steven D Kramer	Defendant	Johanna Hamburger, William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
The Jim Hutton Educational Foundation	Plaintiff	Karen Leigh Henderson, Steven J Bushong (Porzak Browning & Bushong LLP)
Timothy E Ortner	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Tri State Generation And Transmission As	Defendant	Aaron S. Ladd, Justine Catherine Shepherd (Vranesh and Raisch)
Wy Ground Water Mgmt Dist	Defendant	Eugene J Riordan, Leila Christine Behnampour (Vranesh and Raisch)
Yuma County Water Authority Public Improvements	Defendant	Dulcinea Zdunska Hanuschak, John A Helfrich, 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