DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300	DATE FILED: May 6, 2016 7:58 PM □ **COURT USE ONLY** □
Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation, **v.** **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. **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. **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.	Case Number: **15CW3018**
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THE JIM HUTTON EDUCATIONAL FOUNDATION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON COMPACT ADMINISTRATION CLAIM

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation ("Foundation"), acting by and through undersigned counsel, does hereby file this Reply in support of its Motion for Summary Judgment on Compact Administration Claim ("Foundation

Motion"), by which it addresses the State Engineer's Response to the Motion ("SEO Response") and a response to the Motion related to designated groundwater ("Groundwater Response"), filed by the various groundwater users and entities related thereto (the "Groundwater Users").

I. INTRODUCTION

The Foundation's Hutton No. 1 and Hutton No. 2 water rights have remained under a continuous administrative call for 8 years to help achieve compliance with the Republican River Compact ("Compact"). In addition, that Compact call resulted in the draining of Bonny Reservoir, which impacts the Foundation's Hale Ditch water rights. The Compact call was triggered when Colorado was required to include in its Compact allocation the depletions to surface flow caused by Colorado groundwater pumping in the Northern High Plains Basin ("NHP Basin") from over 4,000 high capacity irrigation wells. Based upon the State Engineer's own groundwater model ("RRCA Model" or "Model") approved by the United States Supreme Court, those depletions totaled over 38,000 acre-feet in 2009 alone (the last year in which Model results were made available to the Foundation), and depletions have been increasing over time. Groundwater depletions make up the vast majority of Colorado's depletions under the Compact. Notwithstanding, Colorado has not curtailed any of the groundwater wells that caused the Compact compliance problem – only surface water rights.

The issue raised by the Foundation's Motion is simply whether it is lawful for the Engineers to curtail only surface water to help comply with the Compact, without curtailing groundwater, when groundwater depletions are causing Colorado's overdraft. There would ordinarily be no question that such administration is unlawful. The main argument by the Groundwater Users and the State Engineer in this case is that the designated status of the groundwater protects it from curtailment under the Compact – even though the State Engineer concedes the designated groundwater is subject to the Compact and to his Compact rule powers.

This Compact administration issue has already been the subject of considerable briefing. The Groundwater Users filed their own Motion for Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater that addressed Compact administration ("Groundwater Motion"). The Foundation's Response to the Groundwater Motion ("Foundation Response") addresses many of the same issues raised by the Groundwater Response and the SEO Response. Accordingly, the Foundation Response is incorporated herein.

II. UNDISPUTED FACTS

The dispute regarding Compact administration is not about the underlying facts. The dispute pertains to whether designated groundwater is immune to curtailment under the State Engineer's Compact administration. For example, the Groundwater Users accepted the factual allegations in the Complaint for purposes of their motion regarding Compact administration. (*Groundwater Motion,* pp. 8-9). That is because the facts are well recognized and predicated upon publically available documents and sworn testimony. The Foundation reiterated many of the undisputed facts set forth in the Complaint and documented the allegations with over 20 exhibits. (*Foundation Motion,* pp. 3 – 7, 14, 15).

Although there are several pages of factual details contained in the Foundation Motion, the Foundation summarized the most important undisputed facts for purposes of Compact administration, as follows: (1) groundwater in the Basin is the subject of the Compact (*Complaint*, ¶¶ 29 - 39); (2) groundwater depletions are "by far the single largest source of Colorado's depletion . . . under the Compact" and "caused Colorado to exceed its Compact entitlement" (*Complaint* ¶ 40; *see also* ¶ *48*); (3) the vast majority of the wells in the Basin were developed after the Compact was approved in 1942 (*Complaint,* ¶¶ *26, 28*); and (4) the Engineers are only curtailing surface water rights appropriated after 1942 to help achieve Compact compliance, and not groundwater use appropriated after 1942. (*Complaint* ¶ *48*). (*Foundation Response*, pp. 2-3). None of these critical facts are in dispute.

Once material facts are documented, they cannot be brushed away with a wave of the hand. "The movant [for summary judgment] bears the burden of establishing the lack of a genuine issue of material fact, but once the burden is met, the opposing party must demonstrate that a controverted factual questions exists." *Closed Basin Landowners Ass'n v. Rio Grande Water Conse. Dist.,* 734 P.2d 627, 632 (Colo. 1987) (*citing Pueblo West Metro. Dist. v. Southeastern Colo. Water Conserv. Dist.,* 689 P.2d 594, 600 (Colo. 1984)). As stated under C.R.C.P. Rule 56(e):

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If there is no response, summary judgment, if appropriate, shall be entered.

See also Ginter v. Palmer & Co., 585 P.2d 583, 585 (Colo. 1978) ("Once a movant makes a convincing showing that genuine issues are lacking, C.R.C.P. 56(e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists") (*citing Sullivan v. Davis*, 474 P.2d 218 (Colo. 1970)).

In this instance, the Groundwater Users state that they "dispute many of the facts," yet they do not even identify which facts are in dispute. (*Groundwater Response,* p, 5). Instead, the Groundwater Users refer to the Defendants' Response to Certain Factual Allegations (which they refer to as the "Companion Brief"), and the Affidavits attached to the SEO Response[1] As described below, none of the factual assertions in the Affidavits contradict any of the factual underpinnings of the Foundation's Compact administration claim. Likewise, the Companion Brief discusses facts disclosed elsewhere, but does not disclose any new information to refute the Foundation's undisputed facts. The Companion Brief is the subject of a separate reply by the Foundation.

[1] The Groundwater Users also refer to the Amended Motion for Summary Judgment on the Constitutionality of the Ground Water Management Act, but in that Motion the "Defendants ask the Court to accept the factual assertions in the Foundation's Complaint as true. Thus, for purposes of this Motion, no disputed issues of material fact exist." *Id.* at p.5.

The SEO Response notes that there is no dispute regarding some of the Foundation's factual allegations, but claims the Foundation Motion is "oversimplified" and contains some "unsupported, incomplete or misleading statements of fact." (*SEO Response,* p. 2). The SEO Response does not, however, take issue with any specific undisputed fact identified and documented by the Foundation, and provides a factual summary that is largely identical with the facts in the Complaint and the Foundation Motion. (*Id.,* pp. 3-8). While the Affidavits attached to the SEO Response provide some new or clarifying facts as discussed below, the undisputed facts set forth in the Foundation Motion remain undisputed. Efforts to create a genuine issue of material fact based, in part, upon the information in the Affidavits is addressed at Section IV.D, *infra*.

1. Affidavit of Dawn Webster. Although there are certain details in Ms. Webster's Affidavit that the Foundation cannot at this juncture confirm or deny, none create a genuine issue of material fact for purposes of the Foundation Motion. Importantly, Ms. Webster does not dispute the underpinnings of the Foundation Motion in her Affidavit and her statements are consistent with the facts alleged in the Foundation Motion and Complaint.

For example, the Republican River Water Conservation District Water Activity Enterprise ("Enterprise") provides a service "by minimizing the potential of well curtailment due to noncompliance of the Republican River Compact." (*Webster Affidavit*, ¶ 4). The Enterprise collects water use fees to fund such things as the purchase and lease of water rights, conservation programs such as CREP and EQIP, and to build and operate an augmentation pipeline. (*Id.* ¶ 5). These are all programs or projects designed to help achieve Compact compliance. (*Id.* ¶ 10). The pipeline has helped keep Colorado in Compact compliance since 2014 by providing a total of 18,220 acre-feet of water deliveries to the North Fork of the Republican River ("North Fork"). The Enterprise not only assesses wells a fee to pay for these matters, it also assesses "surface water irrigation a fee." (*Id.* ¶ 6).

2. Affidavit of Dick Wolfe, M.S., P.E. Nothing in Mr. Wolfe's Affidavit contradicts the undisputed facts disclosed by the Foundation and most of the facts are consistent with the Complaint. Mr. Wolfe states that he decided not to adopt rules to govern the curtailment of both surface water and groundwater diversions for the Compact because of the plan to build the augmentation pipeline. (*Wolfe Affidavit*, ¶ 9). Consistent with the basis for the Foundation Motion, Mr. Wolfe states that he satisfies the Compact by "curtailing surface water rights that have an administrative priority date after the Compact" while the pipeline and other programs "provide[] the additional water that is needed after post-Compact surface water rights are curtailed." (*Id.* ¶ 12). In other words, the administration relies first on curtailing all post-1942 surface water rights – then makes up any remaining shortfall with the pipeline and other programs. This is evidence that the problem will continue without judicial intervention.

There are two statements in Mr. Wolfe's Affidavit that require some clarification. One is that curtailing all water use may not be sufficient in some years for Compact compliance and the other is that if the State Engineer curtailed wells he might be required to curtail the wells that supply the augmentation pipeline. (*Id.* ¶¶ 10, 14). Although not germane to the basis for the Foundation Motion, these statements are addressed in Section IV.D, *infra*, in responding to

related arguments made in the SEO Response. Briefly, if all water use was curtailed as posited by the State Engineer, any Compact exceedance would be reduced and gradually eliminated, replaceable by the augmentation pipeline, and is the result of many years of not curtailing any wells and allowing lagged depletions to continue growing. Further, augmentation wells are not ordinarily curtailed by a call because they are used to augment the call.

3. Affidavit of Willem Schreüder, Ph.D. Dr. Schreüder's Affidavit likewise does not contest any of the undisputed facts set forth in the Foundation Motion. Dr. Schreüder's main point is his belief that it would be inappropriate to use the RRCA Model for purposes other than determining groundwater depletions and imported water supply accretions for Compact accounting. (*Schreüder Affidavit,* ¶¶ 6 – 9). While the Foundation disagrees as described in Section IV.D, *infra*, it is not a material factual issue for Compact administration. The Foundation is not, for example, using the RRCA Model at this time to quantify the groundwater depletions at its headgates. Instead, the RRCA Model is primarily cited by the Foundation for precisely what Dr. Schreüder states the Model is intended to show – to document the amount of depletions to river flows caused by groundwater pumping in Colorado under the Compact. (*See Foundation Motion*, pp. 5-6, Undisputed Facts ¶¶ I, K, P, R-T, W). As will be explained below however, the RRCA Model is currently being used to quantify groundwater depletions at three locations immediately above the Foundation's surface water rights. *See,* Section IV.D, *infra*,

III. RELIEF SOUGHT BY FOUNDATION IN MOTION AND COMPLAINT

To be clear, the Foundation seeks a determination that the current "intrastate administration of surface water is unlawful." (*Foundation Motion,* p. 7). "[G]iven that the unlawful Compact administration being asserted is the curtailment of only surface water, the ultimate result may very well be the curtailment of designated groundwater for Compact purposes. However, the Complaint does not seek to compel such curtailment. Nor is it the only possible solution." (*Foundation Response,* p. 6) (emphasis in original). The point is that given the undisputed facts – the current administration is unlawful because it forces surface water users who make up a very small part of Colorado's Compact consumption to solely bear the burden of curtailment for Compact compliance.

If the Foundation is correct, the State Engineer will need to devise a method of Compact administration that is lawful and in compliance with this Court's order. In short, "[t]he Complaint does not seek to compel any such approaches [referring to an augmentation pipeline and water right purchases employed on the North Fork] – but instead seeks a ruling that the current practices are unlawful by curtailing only surface water rights for Compact compliance and not the groundwater pumping that caused the Compact compliance problem." (*Id*). (*See also, Complaint* ¶¶ 92.A and B) (seeking an order "[t]hat the current administration of surface water in the Republican River Basin" is contrary to law, and "[t]hat the lack of any ground water curtailment under the Compact by the State Engineer while at the same time curtailing more senior surface water rights" is unlawful) (emphasis added).

The relief being sought by the Foundation is not the same thing as seeking "equal curtailment" of groundwater and surface water. (*Groundwater Response,* pp. 21, 23). By

focusing on complications that may arise in achieving truly equal Compact administration – the Groundwater Users hope this Court will not notice the absolute lack of any semblance of equality in the current administration. In short, under the law, it is not permissible to curtail only surface water users to achieve Compact compliance when groundwater depletions constitute the vast majority of Compact depletions.

IV. ARGUMENT IN SUPPORT OF FOUNDATION'S MOTION

A. The State Engineer Is Mandated to Curtail Diversions Equitably to Meet Compact Commitments and Restore Lawful Use Conditions as they Were Before the Compact Insofar as Possible.

The Groundwater Users argue the "State Engineer has no mandatory, non-discretionary legal duty to curtail designated groundwater pumping in the NHP Basin for Compact compliance." (*Groundwater Response,* p. 10). The State Engineer likewise argues it has "broad discretionary power" that allows its chosen administration. (*SEO Response,* p.27). This is the same arguments made in the Groundwater Motion which were addressed in the Foundation's response thereto.[2]

The State Engineer's obligation is clear. Where the Compact is "deficient in establishing standards for administering within Colorado to provide for meeting its terms, the state engineer shall make such regulations as will be legal and equitable to regulate distribution among the appropriators within Colorado obligated to curtail diversions to meet compact commitments, so as to restore lawful use conditions as they were before the effective date of the compact insofar as possible." C.R.S. § 37-80-104. The requirement in § 37-80-104 is a mandate. *See Alamosa-La Jara Water Users Prot. Ass'n v. Gould,* 674 P.2d 914, 923 (Colo.1983) ("section 37-80-104 . . . mandates that compacts which are deficient in provision for intrastate administration be implemented so as to 'restore lawful use conditions as they were before the effective date of the compact insofar as possible.'") (emphasis added). The fact that neither groundwater nor surface water is specifically mentioned does not change the mandate.

There is no dispute amongst the parties that the Compact itself is deficient for intrastate administration. Thus, under the plain language of the statute, the State Engineer is mandated to ensure, in a legal and equitable way, that he is distributing the obligation to curtail diversions to meet the Compact in a way that restores lawful use conditions that existed before the Compact. There is no dispute that the current "distribution" of curtailment falls only on surface water users, even though groundwater use was largely nonexistent before the effective date of the Compact. The question raised by the Foundation Motion is whether that is lawful given the mandate set forth in § 37-80-104 – and clearly it is not.

The lack of an express mandate to curtail designated groundwater to meet the Compact is not a justification to ignore more than 38,000 acre-feet of designated groundwater depletions

[2] The Groundwater Users briefly repeat their argument that a determination of unlawful administration is in effect an unlawful mandamus action to compel a discretionary act. Since this argument was responded to in detail in the Foundation Response, pp. 5 – 7, it is not repeated here.

under the Compact, especially when that is what caused Colorado to be out of compliance with the Compact in the first place. The Foundation maintains that the decision to curtail only surface water rights for the Compact is inconsistent with the law.

B. The Groundwater Users' and State Engineer's Arguments to Justify Curtailing Only Surface Water Rights Are without Merit.

The Groundwater Response and SEO Response spend a combined 77 pages trying to explain away the mandate in § 37-80-104, or justify the current administration. Their arguments are all without merit as described below.

1. The Status of Designated Groundwater Does Not Exempt it from Compact Curtailment.

The principal argument in trying to justify the current administration of only surface water rights is that the groundwater in the Republican River Basin ("Basin") is designated. (*See, e.g., Groundwater Response,* pp. 11-20; *SEO Response,* pp. 23 - 26). Indeed, most of the arguments by the Groundwater Users and State Engineer eventually come back to this central theme. Essentially, the argument is that once groundwater is designated, it should be treated differently than other depletions under the Compact and should not be subject to curtailment. There is no dispute that in Colorado, designated groundwater and surface water are subject to separate rules of administration outside of the Compact context. (*See Foundation Motion, pp. 11-12; Complaint*, ¶¶ 1, 4). That difference in administration is because designated groundwater is not supposed to be "available to and required for the fulfillment of decreed surface rights." C.R.S. § 37-90-103(6)(a). However, that distinction does not justify ignoring the plain language of C.R.S. § 37-80-104 in intrastate Compact administration as explained below.

First, the mandate in C.R.S. § 37-80-104 does not exclude designated groundwater. If such a limitation was intended as both the Groundwater Users and State Engineer suggest, the statute could simply have required curtailment of "waters of the state" to meet the Compact, which by definition do not include designated groundwater. *See* C.R.S. § 37-92-103(13). "Waters of the state" is used to define other obligations of the State Engineer where such a limitation was intended. *See* C.R.S. § 37-80-102(1)(h). The Legislature's decision not to use that limitation in the context of the State Engineer's Compact mandate can only mean that the mandate applies to any source of water causing depletions under the Compact.

Second, the State Engineer argues that the timing of § 37-80-104, being adopted shortly after the 1964 Groundwater Management Act, should affect this Court's interpretation of 37-80-104. (*See SEO Response*, pp. 31 - 32) ("the legislature gave no indication that it intended to silently destroy the recent groundwater basin designation by forcing the State Engineer to entirely ignore such designation when considering Compact administration"). To the contrary, given that timing, it is all the more reason why one would expect the Legislature to carve out designated groundwater if that was the intent. Moreover, by choosing not to do so, the Legislature acted consistent with the Colorado Supreme Court's interpretation of the Groundwater Management Act when it held that the "General Assembly anticipated that a

designated groundwater basin could include groundwater that does not fall within the definition of designated groundwater," and as a result "specifically called for the boundaries of a designated basin to be revisited" as future conditions and factual data justify. *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 28, 32 (Colo. 2006).[3]

Third, the Groundwater Management Act itself recognizes that designated groundwater may need to be curtailed to avoid Compact violations. *See* C.R.S. § 37-90-112(6) (making a well owner liable for failing to comply with an order or rule "to cease diversions of designated groundwater or replace depletions caused by diversions of designated groundwater, and whose failure to adhere to the order or rule results in a violation of an interstate compact"). Although this provision is not limited to curtailment orders by the State Engineer issued under its Compact authority, it is further evidence that the Legislature always understood that designated groundwater could cause interstate compact exceedances and would need to be curtailed as necessary. There is nothing in the Groundwater Management Act that would remotely suggests that designated groundwater was given a free pass when it came to Compact administration.

Fourth, it is undisputed that the United States Supreme Court interpreted the Compact as including designated groundwater depletions. (*See Foundation Motion,* pp. 4-6; *see Defendants' Companion Brief*, pp. 5-6). The State Engineer's Office has even conceded that groundwater depletions are the single largest source of depletions under Colorado's Compact allocation. (*Foundation Motion,* p. 6, Undisputed Facts ¶ S). Once designated groundwater depletions were made subject to the Compact – it needed to be administered under the Compact. Indeed, the "Compact . . . is not only part of our state statutory law, but is also part of federal law, . . . and is thus preemptive of any conflicting state law on the same subject." *Frontier Ditch v. Southeastern Colorado Water Conservancy Dist.*, 761 P.2d 1117, 1123 (Colo. 1988). Thus, once the Compact was determined to include designated groundwater, the State Engineer cannot ignore it in complying with its mandate under § 37-80-104.

Fifth, the State Engineer has previously recognized that designated groundwater is subject to its Compact rule power and that it has legal authority over designated groundwater for purposes of meeting the Compact. (*See Foundation Motion*, pp. 11 – 12) (describing the State Engineer's rules adopted under its Compact rule powers requiring measurement of designated groundwater use for wells affecting the Compact). Since designated groundwater is subject to § 37-80-104, it is all the more inconceivable that only surface water is curtailed under § 37-80-104.

Lastly, the State Engineer concedes that "section 37-80-104 extends to <u>any</u> waters that are subject to the Compact," while arguing it has complied with that requirement.[4] (*SEO Response,* p.28) (emphasis added). Groundwater Users also appear, at one point, to concede that designated groundwater is subject to § 37-80-104, while arguing that does not equate to a requirement to curtail designated groundwater. (*Groundwater Response*, p.20). These

[3] The false notion that designated groundwater basin boundaries were always intended to be permanent and never subject to change as new information became available is discussed at length in the Foundation's briefing of the Senate Bill 52 (SB-52) issue before this Court and incorporated herein by reference.

[4] The State Engineer's argument that it's Compact administration practice of curtailing only surface water use is appropriate under § 37-80-104 is discussed in Section IV.C, *infra*.

arguments ignore the plain language of § 37-80-104. The State Engineer is mandated by § 37-80-104 to equitably regulate the curtailment of diversions to meet the Compact commitments, so as to restore lawful use conditions that predate the Compact. Waters subject to § 37-80-104 are subject to being curtailed. The only exception are waters that were being used as part of the lawful use conditions that existed prior to the Compact. It is undisputed that the lawful use conditions prior to the Compact included virtually no wells. (*Foundation Motion,* p.5, Undisputed Facts, ¶ O).

2. The Plain Language of § 37-80-104 does Not Exempt Designated Groundwater.

The Groundwater Users and State Engineer attempt to parse the language in § 37-80-104 in a way that would exempt designated groundwater basins. For example, Groundwater Users argue that "the State Engineer's administration must be 'legal' as well as equitable, and restoration of prior lawful use conditions is required only 'insofar as possible.'" (*Groundwater Response,* pp. 21-22). The Groundwater Users then attempt to argue that curtailment of designated groundwater would be neither legal nor possible.

In arguing it is not legal, the Groundwater Users state that "the current legal landscape" includes and protects designated groundwater. (*Groundwater Response*, p.22); (*see also SEO Response,* pp.31-32) (arguing the mandate of § 37-80-104 should be subject to "todays legal regimes"). The "current legal landscape" is not, however, the standard set by § 37-80-104. The standard is to "restore lawful use conditions as they were before the effective date of the compact …." C.R.S. § 37-80-104 (emphasis added). In other words, protecting the "current legal landscape" of designated groundwater is not part of the mandate and neither the Groundwater Users nor the State Engineer offer any legal support for adding such language to the statute. Not only was such language not used by the Legislature, it contradicts the language that was used. Further, as described above, there is nothing unlawful about curtailing designated groundwater to achieve Compact compliance when that groundwater is already subject to the Compact.

To claim "[i]t is not possible" to curtail designated groundwater pursuant to § 37-80-104, Groundwater Users state the impossibility in terms of achieving absolute equality with 1969 Act priorities. (*Groundwater Response*, pp. 22-23). Again, the analysis starts and ends with the State Engineer's mandate in § 37-80-104. What is required is an equitable distribution in the curtailment to restore lawful use conditions that previously existed. 100% curtailment of surface water users appropriated after the Compact, and 0% curtailment of groundwater use appropriated after the Compact, makes this an easy question to answer.

Groundwater Users contend that equally curtailing groundwater and surface water use would "unfairly prejudice" designated groundwater users who do not have water right priorities. (*Groundwater Response*, p.22). The potential difficulty in developing an equitable distribution for curtailment is not justification for choosing to curtail only surface water use. In fact, the State Engineer at one time developed rules to begin curtailing designated groundwater use to meet the Compact, but elected not to pursue it. (*SEO Response*, p.7; *Complaint,* ¶ 42). Further discussion of relative priorities between surface water and groundwater is discussed at Section IV.D.5, *infra*. The important point is that the mandate set forth in § 37-80-104 not only can be

met, it must be met. A lack of political will to curtail designated groundwater use does not equate to an impossibility.

3. Colorado Case Law Regarding Intrastate Administration for Compact Compliance Does Not Support Treating Surface Water Differently from Designated Groundwater.

The Groundwater Users and State Engineer cite cases that describe administering Compacts consistent with priority law and argue such rulings should be construed to support exempting designated groundwater from curtailment for Compact purposes. (*Groundwater Response*, pp. 11 – 12, 16; *SEO Response*, pp. 28 - 30). The cases relied upon involved tributary groundwater, not designated groundwater, and thus cannot be construed as exempting designated groundwater from curtailment. Further, as explained below, such cases support protecting water rights obtained under the State's constitutional prior appropriation doctrine – not preferential treatment to designated groundwater users.

Simpson v. Bijou Irrigation Co., 69 P.3d 50 (Colo. 2003), was a case involving the regulation of tributary groundwater depletions for compact compliance. In that case, the Court held the "State Engineer [is] to exercise its Compact compliance authority 'to the extent possible with the existing framework of Colorado statutory priority law.'" *Id.* at 69. *See also Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1248 (Colo. 1996) (the State "Engineer should enforce compact delivery requirements with regard to Colorado water rights . . . consistent, insofar as possible, with Colorado constitutional and statutory provisions for priority administration."). These rulings cannot, as described below, reasonably be construed as an invitation to inflict harm on surface water rights based on the argument that designated groundwater is not subject to the same constitutional and statutory provisions for priority administration as surface water rights.[5] Moreover, designated groundwater has its own "statutory priority law" as referenced in *Bijou Irrigation*. C.R.S. § 37-90-109(1) ("[p]riority of claims for the appropriation of designated groundwater shall be determined by the doctrine of prior appropriation"); s*ee also Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177, 1185 (Colo. 2000)

Bijou Irrigation and similar cases, if anything, demonstrate an intent to protect the existing priority law that is part of Colorado's Constitution by regulating the impact of groundwater depletions under a Compact. As described in *Bijou Irrigation*, 69 P.3d at 56, the subject rules and regulations included "curtailment and replacement requirements for out-of-priority groundwater depletions" to help meet the Compact. Not surprisingly, the plans being implemented were "to replace depletions injurious to senior water rights" caused by wells. *Id.* at 67. As in this case, the increase in wells and groundwater depletions in *Bijou Irrigation* were well recognized and needed to be addressed. *Id.* at 70. The Court ultimately upheld the State Engineer's authority to "promulgate rules pursuant to his compact rule power in section 37-80-104," to address the groundwater use. In other words, *Bijou Irrigation* does not remotely stand for the proposition that groundwater users may circumvent curtailment under a compact.

[5] The Arkansas River Rules developed for compact compliance are cited by Groundwater Users, noting that they do not apply to designated groundwater. (*Groundwater Response,* p. 13, n.4). However, unlike in the Republican River Basin, Groundwater Users cite to no information to suggest that designated groundwater use and resulting depletions were made a part of the Arkansas River Compact.

Groundwater Users also rely upon the discussion in *Bijou Irrigation*, 69 P.3d at 70 regarding complicating factors to be considered in administering groundwater under a compact – as if that is a reason to forego any curtailment of designated groundwater in this instance. (*Groundwater Response*, pp. 15, 23; *see also SEO Response, p.29*). What the Groundwater Users fail to mention is that those groundwater factors are described in *Bijou Irrigation* because of their impact on the "lag effect caused by groundwater pumping" and how that can complicate the "extent curtailment or augmentation must occur to ensure adequate delivery at the state line." *Bijou Irrigation*, 69 P.3d at 70. Even more importantly, the decision in *Bijou Irrigation* does not rely upon the existence of these groundwater factors to rule against administering groundwater for compact compliance. To the contrary, it is used to explain why the compact's own terms were inadequate for compliance under priority administration, thus supporting the State Engineer's adoption of rules to curtail and/or replace groundwater use for compact compliance. *Id.* at 70 - 71. Again, if anything, *Bijou Irrigation* contradicts the position taken by the Groundwater Users and the State Engineer.

In addition, and in contrast to *Bijou Irrigation*, a computer model already exists in this instance that was approved by the State Engineer and the United States Supreme Court to determine the depletions resulting from groundwater pumping. Further, unlike in *Bijou Irrigation*, there are no rules whatsoever in the Basin requiring any curtailment or replacement of well pumping depletions. Instead, the State Engineer has elected to place the burden of curtailment for the Compact exclusively on surface water rights.

Lastly, the State Engineer interprets the *Alamosa-La Jara*, case as requiring Compact administration that protects "settled expectations of water users," and then argues that the holding justifies its decision to curtail only surface water rights. (*SEO Response*, p. 29). First, the State Engineer misconstrues the case. *Alamosa-La Jara* actually held that § 37-80-104 was not applicable "[b]ecause we do not believe that the compact is deficient in establishing standards for administration within Colorado." 674 P.2d at 924 – 925. The Compact on its face required separate delivery schedules for two tributaries, and that was enforced even though the impact on water users could be severe. *Id.* at 925. Second, the State Engineer's argument begs the question. Surface right owners have settled expectations. Meanwhile, designated groundwater basins were created under a statute requiring the boundaries to be redrawn to exclude improperly designated groundwater as "future conditions require and factual data justify." *Gallegos*, 147 P.3d at 31 (citing § 37-90-106(1)(a)). Indeed, "the plain language of the statute requires that no hard 'cut-off' exist if 'future conditions require and factual data justify' altering a designated groundwater basin's boundaries." *Id.* at 32, n.8. Any expectation otherwise was contrary to the law under which the designated basin was created. In short, the State Engineer is subordinating the settled expectations of surface water rights in favor of designated groundwater.

4. <u>The United States Supreme Court's Rulings Support the Foundation's Position</u>.

The Groundwater Users argue the "Foundation is wrong to characterize the [United States Supreme Court's] holding as a determination that the Compact restricts groundwater consumption to whatever extent it depletes stream flow in the Basin." (*Groundwater Response,*

p. 25). Actually, that is virtually identical to the holding of the Special Master. The Special Master held that "the Compact restricts groundwater consumption to whatever extent it depletes stream flow in the Republican River Basin." (*First Report of Special Master*, *Exh. 7*, pp. 2-3). (*See also Id.* at p.34) ("as a matter of law, the Compact restricts, and allocates . . . any ground water that would become part of the stream flow in the Basin if not previously depleted through an activity of man such as pumping"). The United States Supreme Court thereafter affirmed the Special Master. *Kansas v. Nebraska and Colorado*, 530 U.S. 1271 (2000).

The point of the Foundation's discussion of these rulings is simply that groundwater depletions were required to be included in Colorado's allocation of consumptive use under the Compact. In other words, an acre-foot of consumption is the same whether caused by groundwater pumping or headgate diversions. There is no dispute on this issue. (*See Companion Brief,* p.6) ("All Beneficial Consumptive Use is treated the same for Compact purposes, regardless of the type of use). It was this ruling of the Special Master that precipitated the RRCA Model to quantify stream flow depletions caused by groundwater pumping.

The Groundwater Users' argue the Foundation's position is misleading because the Compact does not specify how each state is to administer water to comply with the Compact. (*Groundwater Response*, p.25). However, the Foundation was very clear that the Compact itself does not specify precisely how each State is to achieve its allocation. (*See Foundation Motion*, p.9) ("With limited exceptions, the Compact does not instruct the individual States how to manage their consumptive use allocation. Instead, the Compact states that '[t]he use of the waters hereinabove allocated shall be subject to the laws of the state, for use in which the allocations are made.' (Compact, Art. IV)"). That is why the Compact is deficient in establishing standards for intrastate administration, which triggers the mandate in § 37-80-104. Given the Compact restricts both groundwater and surface water consumption equally, the question is whether it is lawful to curtail only surface water use for Compact compliance.

5. Compact Compliance Does Not Justify Continuation of Current Administration.

The Groundwater Users suggest that current compliance with the Compact justifies the approach of "separate administration of surface water and designated basin groundwater when administering the Republican River for Compact purposes." (*Groundwater Response*, pp. 16-17). By "separate administration" the Groundwater Users apparently mean curtailment of one and not the other. To the contrary, although Compact compliance is required, the question raised is whether that compliance is being achieved in a manner consistent with the law.

6. Prior Designation Does Not Immunize Groundwater to Curtailment under a Compact.

Another argument raised in various contexts is that once designated – that is the end of the story. "Despite what the RRCA Model may or may not show today," the groundwater was finally determined to be "ground water which in its natural course would not be available to and required for the fulfillment of decreed water rights." (*Groundwater Response*, p. 22). What the RRCA Model shows is undisputed. The question is the validity of the Compact administration when groundwater pumping from wells developed after the Compact are causing the vast

majority of depletions under the Compact, but only surface water rights are curtailed. The argument by Groundwater Users rings especially hollow when they banded together to change the Groundwater Management Act through the adoption of SB-52, after the RRCA Model results were already known and had been approved by both the State Engineer and the United States Supreme Court. Moreover, as discussed above, the Groundwater Management Act specifically recognizes that curtailment of designated groundwater may be needed for Compact purposes. C.R.S. § 37-90-112(6)

C. The Current Compact Administration Is Not Consistent with § 37-80-114.

A separate but related argument is that the current administration is lawful under § 37-80-114. In essence, designated groundwater is meeting its portion of the Compact obligation by the augmentation pipeline now being used to deliver pumped groundwater to the North Fork for Compact compliance purposes and other programs. (*SEO Response,* pp. 23, 34; *Groundwater Response*, p. 26). The pipeline is described in the Foundation Motion, pp. 14 – 15, in Foundation Exhibits 20 and 21, in the Complaint, ¶ 44, and in the Webster Affidavit. There are multiple reasons why this approach remains inconsistent with the law.

First, the express language of § 37-80-114 requires equitably distributing the obligation to curtail diversions to meet the Compact in a way that restores lawful use conditions that existed before the Compact. The use of the pipeline to help Colorado achieve Compact compliance does not change the existing inequitable curtailment policy that is not restoring lawful use conditions. All surface water rights appropriated after the Compact are curtailed, and none of the wells appropriated after the Compact are curtailed. At no point in any of the Groundwater Users or State Engineer briefing is it explained how that is an equitable distribution of the Compact curtailment obligation and designed to restore lawful use conditions that existed before the Compact.

Second, the undisputed facts do not support the assertion that the pipeline is satisfying designated groundwater's depletions. The Webster Affidavit states that both surface water and groundwater users are assessed fees that are used to help pay for programs for Compact compliance. (*Webster Affidavit,* ¶ 6). The benefits associated with such programs should not exclusively apply to groundwater. Moreover, groundwater is a much larger component of Colorado's depletions than surface water. (*See Foundation Motion*, p.6, Undisputed Facts ¶ S). In fact, the total 18,220 acre-feet delivered thus far to the North Fork by the pipeline as reported in the Webster Affidavit, is less than 50% of the groundwater depletions in a single year (relying upon the 38,238 acre-feet of groundwater depletions from Colorado pumping in 2009, the last year data was made available to the Foundation). (*Exh. 13*).

Third, the State Engineer's own Affidavit makes it clear that the pipeline and other programs are being used to offset the Compact overdraft only after curtailing surface water. (*Wolfe Affidavit*, ¶ 12) (the pipeline and other programs "provide[] the additional water that is needed after post-Compact surface water rights are curtailed") (emphasis added). In other words, the amount of water delivered through the pipeline for augmentation of Compact obligations is reduced by first curtailing surface water rights.

Fourth, even if one accepts for the sake of argument that the pipeline is satisfying the groundwater obligation under the Compact as to the North Fork where it discharges,[6] then by the same logic, the lack of any pipeline on the South Fork means that groundwater users are not satisfying their Compact obligation on the South Fork where the Foundation's water rights and Bonny Reservoir are located. The Compact allocates consumptive use to the States on an individual sub-basin approach, and the South Fork and North Fork have separate allocations. (*See Compact*, Art. IV). The lack of any augmentation or replacement water in the South Fork means there is no possible way that groundwater users are meeting their burden of Compact compliance in that sub-basin. As described in the Foundation Motion, and not refuted in either the SEO Response or the Groundwater Response, "any intrastate administration that allows Colorado to increase its depletions on the South Fork through augmentation of the North Fork is directly contrary to Colorado law." (*Foundation Motion*, p. 15).

Lastly, when the State Engineer attempted to approve the unadjudicated augmentation of groundwater depletions in it groundwater rules for the South Platte River Compact, that was expressly rejected by the Colorado Supreme Court. *Bijou Irrigation*, 69 P.3d at 64. In that case, the Court ruled that under the water rule power, "any plan implemented by out-of-priority water users to replace depletions injurious to senior water rights must be subject to water court approval." *Id.* at 67. By analogy here, the State Engineer cannot rely upon an unadjudicated augmentation pipeline on one river, to explain away his decision to curtail surface water rights on another river. At a bare minimum, such an augmentation plan to address Compact compliance requires Water Court approval and a demonstration of no injury to surface water rights.

D. There are No Genuine Issues of Material Fact that Preclude Judgment on the Compact Administration.

Although the State Engineer did not contest the undisputed facts set forth by the Foundation as described in Section II, *supra* of this Reply, it goes to great lengths to try and create the impression that a genuine issue of material fact exists in an effort to preclude this Court from ruling. (*SEO Response*, pp. 10 - 19). "A material fact is simply a fact that will affect the outcome of the case." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). As explained below, it is all smoke and no fire. The facts argued by the State Engineer are either not in dispute or do not "affect the outcome." Thus, they are not genuine issues of material fact. The following is a brief response to each factual argument raised in the SEO response.

1. Current Method of Compact Compliance. The State Engineer argues that compliance with C.R.S. § 37-80-104 requires an examination of how the State Engineer meets the Compact. (*SEO Response*, pp. 11-12). Yet, there is no dispute as to how the State Engineer meets the Compact. As explained in even the State Engineer's own Affidavit, he curtails surface water rights appropriated after the Compact and "the additional water that is needed after post-

[6] To be clear, all surface water rights appropriated after the Compact are being curtailed both on the North Fork and the South Fork – so the pipeline is not even preventing curtailment on the river it is augmenting.

Compact surface water rights are curtailed" is provided by the pipeline and other programs. (*Wolfe Affidavit,* ¶ 12). It is this form of administration that the Foundation claims is unlawful.

Similarly, the State Engineer claims the Foundation has not demonstrated that "groundwater withdrawals impede Colorado's ability to comply with the requirements of the Compact and surface water users are being curtailed to make up the shortfall." (*SEO Response,* p.12). There is no dispute that groundwater depletions are the single biggest source of depletion under Colorado's Compact entitlement, and that Compact compliance only became a problem once groundwater depletions were determined to be part of Colorado's entitlement. (*Foundation Motion,* p.6, Undisputed Facts ¶¶ S - U). That is when surface water rights first began being curtailed for the Compact. (*Id*). There is also no dispute that the Compact is currently being met through surface water curtailment, the pipeline, and other programs, without curtailment of groundwater. (*Id.* ¶ W; *Wolfe Affidavit* ¶ 12; *Webster Affidavit*.¶ 10). Again, the facts are not in dispute – the question is whether such administration is lawful.[7]

2. Evidence on the Impact of Groundwater Withdrawals at the Foundation's Headgates. Next, it is argued that "the Foundation has offered no evidence that groundwater withdrawals in Colorado impacted its water rights." (*SEO Response*, p.13). The Foundation does not base its Compact administration claim on the declining physical water supply at its headgates. Instead, it is based upon the unlawful administration imposed on surface water rights, including specifically the curtailment of the Hutton No. 1 and Hutton No. 2 (collectively "Hutton Ditches") and Bonny Reservoir. The quantity of groundwater depletions impacting each of these facilities is not a material fact for the Foundation Motion.

Further, to clarify certain statements in Dr. Schreüder's Affidavit, attached as **Exhibit 42** is an affidavit of Dale Book, M.S., P.E. Mr. Book was also a member of the technical team that developed the RRCA Model and was qualified as an expert in the United States Supreme Court litigation regarding the Compact. (*Id.* ¶¶ 3, 4). 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 above Bonny Reservoir and are combined with a third location below Bonny Reservoir 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. (*Book Affidavit,* ¶ 11). The fourth location is a small reach associated with Bonny Reservoir itself and is reported in the RRCA Model depletion tables as "Bonny." (*Id.*). In short, most of the reported depletions are upstream of the Foundation.

[7] The SEO Response states the RRCA Model does not calculate depletions that must be replaced to the stream – but instead the "depletions are counted towards the virgin water supply that Colorado is entitle to consume." (*SEO Response*, p.12). Again, it is undisputed that "[t]hese depletions are counted against the amount of the Virgin Water Supply that the Compact allows Colorado to consume." (*Wolfe Affidavit*, ¶ 22). That is, of course, the whole problem. Groundwater and surface water depletions count against Colorado's allocation, but only surface water is curtailed.

3. Other Impacts on Surface Flows. The State Engineer's related argument that other factors can reduce the water that would otherwise be available at a headgate is immaterial to the Compact administration claim. (*SEO Response,* pp. 17-18). None of that matters if a call is being administered against the water right. Further, the RRCA Model quantifies the depletion caused by Colorado groundwater pumping. (*See Final Settlement Stipulation, Exh. 9*, pp. 18-19)

4. Meeting the Compact in the Future. It is also argued that the Foundation fails "to produce any evidence to establish that Colorado could meet its Compact commitments if the Foundation receives the declaratory judgment it seeks." (*SEO Response*, p. 14). If the current administration of surface water is found unlawful, the State Engineer will need to develop rules in compliance with § 37-80-104 and the Court's order to meet the Compact. The details surrounding such rules is not the Foundation's burden to specify in order for this Court to find the current administration unlawful.[8]

The SEO Response seeks to support its concern by claiming that curtailment of all use of water may not be enough for Compact compliance in some years. (*SEO Response,* p. 14, *citing Wolfe Affidavit*). To clarify, Colorado consumes its allocation of water under the Compact by using water. Thus, curtailing water use will eventually solve the Compact overdraft. Having said that, the benefit of curtailing wells further from rivers is delayed – just as the depletions from those wells are delayed. This is a typical issue for wells. Thus, any compliance problem that would remain for some period of time after curtailment is because of the many years of groundwater pumping and resulting lagged depletions that are increasing over time. (*See Book Affidavit*, ¶¶ 12, 13). The augmentation pipeline is used to make up the shortfall – and curtailment would decrease or eliminate that shortfall. Lastly, it is important to point out the circular reasoning of the State Engineer's argument. In effect, by not previously curtailing or even limiting any groundwater pumping in the NHP Basin and allowing groundwater depletions to continue increasing – the State Engineer is now maintaining it should not curtail groundwater pumping.

The SEO Response further seeks to support its concern by suggesting the augmentation pipeline might also need to be curtailed. (*SEO Response,* p.15, *citing Wolfe Affidavit*). As stated in Section III, *infra*, the Foundation seeks a determination that the current administration of surface water for the Compact is unlawful – not an order curtailing all groundwater use. A finding that the current administration of surface water is unlawful does not necessarily equate to shutting off the augmentation pipeline. (*See, e.g. Foundation Response*, p. 6) (discussing options available on the South Fork that have been used on the North Fork for Compact compliance). Moreover, under Colorado water law, augmentation plans are not curtailed by a call as they are designed to augment the call. Augmentation wells that pump groundwater and deliver it many miles to a stream likewise operate when there is a call. (*Exh. 42,* ¶ 14). In fact, the Final Settlement Stipulation specifically recognizes that augmentation wells are an exception to the moratorium against new wells. (*Exh. 8*, p.16).

[8] Even a brief glance at the undisputed facts suggests this is a manufactured concern. The complete lack of any groundwater curtailment, the limited surface water depletions (pre-Compact and post-Compact), the pipeline, and other available tools such as those discussed in the Webster Affidavit and in the Foundation Response, p.6, offer many options to allow the State Engineer to comply with his mandate.

5. Relative Priorities of Surface Water Rights and Groundwater Rights. Next, it is argued there is no evidence that the "surface water rights subject to curtailment for Compact compliance purposes are 'senior' to any wells," although the State Engineer then argues that the "[g]roundwater and surface water rights cannot be viewed through the lens of relative priority." (*SEO Response*, pp. 15 – 16). Again, there are no genuine issue of material facts.

Bonny Reservoir's priority is 1948. (*Exh. 24*). That predates virtually every well that was ever constructed in the Basin. (*See Foundation Motion,* p.5, Undisputed Facts, ¶ O). Second, the Hutton Ditches were first appropriated by use in 1954 as reflected in a 1955 Map and Filing Statement as was the custom at the time. (*Exh. 8*). *See, Metro. Suburban Water Users Ass'n v. Colorado River Water Conservation Dist.*, 365 P.2d 273, 286 (1961) (an appropriator who complies "with the Map and Statement Act, CRS '53, 147-4-1 [] is entitled to the benefit of the doctrine of relation of its priority date back to the date it commenced its survey"). That appropriation was later confirmed by decree in W-8667-77 (*Complaint,* ¶12; *Foundation Motion*, p.4, Undisputed Fact ¶ C). There is no dispute that for purposes of administration with other surface water rights, the Hutton Ditches have a 1977 priority with a 1954 appropriation. However, under Colorado law, the water right existed in 1954. *See City of Boulder v. Boulder & Weld Cty. Ditch Co.*, 367 P.3d 1179, 1186, (Colo. 2016) ("[w]ater rights are created by appropriation"); *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1148 (Colo. 2001) ("a decree confirms the existence of the water right but does not create the right.")

The Groundwater Users express concern they will be "unfairly prejudiced" if administered with surface water right priorities. (*Groundwater Response*, p.22). That is because wells in the NHP Basin have never been adjudicated unless they serve as alternate points of diversion for surface water rights. If the 1969 Act is applied to the wells for that portion of NHP Basin with more than a de minimis impact on surface flows, the Hutton Ditches would be senior to all such wells. *Gallegos*, 147 P.3d at 31 ("ground water which has more than a de minimis impact on surface waters cannot properly be classified as designated ground water" and once excluded, becomes subject to administration pursuant to "the relative water rights under the 1969 Act"). Alternatively, the appropriation dates are relevant for comparing when water was first put to use by both wells and surface diverters. *See* C.R.S. § 37-90-109(1) ("[p]riority of claims for the appropriation of designated groundwater shall be determined by the doctrine of prior appropriation"). The Hutton Ditches were appropriated before the vast majority of wells which were developed in the later 1960s and the 1970s.

7. Alleged Inequities in Current Administration. Lastly, the State Engineer argues the Foundation "has not put forth any evidence to established the alleged inequity" and then sets forth the following justifications for the current administration: (1) curtailment of some wells may not produce water; (2) the money spent by well owners for the pipeline and fallowing of land; (3) the settled expectations of well owners; and (4) the potential impact to the local economy.

The basis for the Foundation's claim that the State Engineer has not complied with §37-80-104 has been fully briefed and does not need to be repeated. In addition, in response to the listed facts, the Foundation states as follows: (1) a fact that some wells may be having a de

minimis impact on surface flows so that curtailment would not produce water, is not a reason to curtail only surface water rights; (2) money spent by groundwater users on programs is because groundwater depletions have put Colorado at risk of noncompliance. Plus, surface water users have also helped fund measures to help achieve Compact compliance (*Webster Affidavit*, ¶ 6); (3) as explained above, designated groundwater users have, if anything, far less in the way of "settled expectations" than surface water rights given the statutory requirement to redraw designated groundwater basin boundaries as future conditions require; and (4) the potential impact on the economy was the same rationale cited by the Division Engineer for not curtailing wells in *Fellhauer v.* People, 447 P.2d 986 (Colo. 1968), discussed in more detail below, and was rejected by the Court. Moreover, the importance of the groundwater economy is not a reason to take surface water rights without compensation. "The Government has broad powers, but the means it uses to achieve its ends must be consistent with the letter and spirit of the constitution. As Justice Holmes noted, a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Horne v. Dep't of Agric*., 135 S. Ct. 2419, 2428 (2015) (internal citations omitted).

In conclusion, despite all of its efforts to create genuine issues of material fact, the simple undisputed facts remain. Designated groundwater wells developed several decades after the Compact have resulted in large river depletions and caused Colorado to exceed its Compact entitlement. The State Engineer responded by curtailing all surface water rights appropriated after the Compact and not any of the groundwater wells. Those are the material facts and they are undisputed.

E. The Current Compact Administration Violates Equal Protection, Due Process, and Is Arbitrary and Capricious.

The Groundwater Users and State Engineer claim that current Compact administration is not arbitrary and capricious, and does not violate equal protection and due process concerns, relying principally upon the designated status of groundwater. (*Groundwater Response*, pp. 27-28; *SEO Response*, pp. 37 – 39). As discussed above, the State Engineer has already recognized that designated groundwater is subject to the Compact. (*See Section* IV.B.1, *supra*). Since surface water and designated groundwater depletions are both subject to the Compact, the designation status does not change the State Engineer's mandate set forth in § 37-80-104 for equitable curtailment to meet Compact commitments and restore lawful use conditions as discussed in detail above.

The Foundation supported its position, in part, upon the holding in *Fellhauer v.* People, 447 P.2d 986, 991 (Colo. 1968). (*Foundation Motion*, pp. 12 – 13). *Fellhauer* involved analogous factual circumstances in which only a few of the 1,600 – 1,900 similarly situated wells impacting surface flows were curtailed because of concerns for the local economy if more wells were curtailed. Such selective enforcement was found to be "discriminatorily in violation of the equal protection clause . . . and of the due process clause," and was deemed "arbitrary and capricious." *Id.* at 993, 997. The same principles apply here where only a small handful of surface water users that would impact surface flows are curtailed, while none of the more than 4,000 irrigation wells that have already been determined by the State Engineer to impact the

Compact are being curtailed.[9] Although the Groundwater Users claim that the Foundation did not provide legal basis for its argument (*Groundwater Response*, p.27, n.5), they do not even address the Foundation's reliance upon *Fellhauer*. The SEO Response claims *Fellhauer* is inapposite, but the only distinguishing fact cited is that the wells depleting the surface flows in this case are in a designated groundwater basin. (*SEO Response*, p.39).

The Foundation also sets forth the legal standard for discriminatory enforcement citing Colorado Supreme Court and United States Supreme Court cases (*Foundation Motion,* p.13). Neither the Groundwater Users nor the State Engineer even respond to those cases. Instead, the Groundwater Users and State Engineer rely upon cases in which the rational basis test is used to determine whether a statute or ordinance is in violation of equal protection rights, just as they did in the Groundwater Motion. That test is not applicable. In this instance, § 37-80-104 is not being facially challenged. On its face, § 37-80-104 is neutral and equitable between surface water and groundwater users that are subject to the Compact. Instead, this case involves the discriminatory enforcement of the State Engineer's statutory compact authority. Accordingly, and as detailed in the Foundation Motion, p. 13, the test for discriminatory enforcement under the equal protection clause is whether the enforcement involved (1) unjust and illegal enforcement between persons in similar circumstances, and (2) discriminatory enforcement that was intentional or purposefully carried out. (*See also, Foundation Response,* pp. 8-13, for more detail in responding to arguments on equal protection, due process, and how the State Engineer's Compact administration is in excess of authority, arbitrary and capricious).

F. The Foundation Has Been Sufficiently Injured by the State Engineer's Compact Administration in Order to Challenge it.

The Groundwater Users alternatively argue that the Foundation cannot show sufficient injury to challenge current Compact administration. (*Groundwater Response*, pp. 29 – 31). As stated in the Groundwater Response, the required showing of injury is "somewhat relaxed in declaratory judgment actions," although a party "must still demonstrate that the challenged statute or ordinance will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future." *Mt. Emmons Min. Co. v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984),

The Groundwater Users argue the Foundation's injury is hypothetical, but fails to mention the undisputed fact that the Hutton Ditches have been under a continuous call by the State Engineer since 2008 because of the Compact. (*Foundation Motion,* p.6, ¶ III.U). That is a direct and material injury resulting from the unlawful Compact administration that is being challenged. Moreover, Bonny Reservoir was drained and continuously being curtailed for Compact compliance. (*Id.* at ¶ III.V). The associated impacts caused to the Hale Ditch from

[9] *See* Rules and Regulations Governing the Measurement of Ground Water Diversions Affecting the Republican River Compact, within Water Division No. 1, 2 CCR 402-16, adopted pursuant to the State Engineer's Compact rule authority and recognizing that essentially the entire NHP Basin is impacting the Compact.

draining Bonny Reservoir are described in the Foundation's briefing on the Bonny Reservoir issue.[10]

The lone case relied upon by the Groundwater Users is instructive in its complete contrast to the subject case. In *Mt. Emmons Min. Co.*, a complaint was filed regarding a watershed ordinance that had not even been applied to the plaintiff. The Court held that depending upon how the ordinance was applied, it "conceivably might have no bearing on [the plaintiff's] activities at all", and even if the plaintiff was subject to the ordinance, there were procedures available to lessen or eliminate any injury to the plaintiff. *Id.* 690 P.2d at 241. Thus, under those circumstances, the Court held that the adverse impact alleged by plaintiff was based on "mere hypothetical possibilities" that did not support summary judgment. *Id.* at 242; *see Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1053-54 (Colo. 1992) (confirming that *Mt Emmons* was decided based upon "the number of unresolved factual issues that rendered the case inappropriate for resolution by summary judgment"). In direct contrast, the Compact administration in this case has been applied to curtail the Foundation's water rights and Bonny Reservoir for many consecutive years. Curtailment under the current Compact administration is not a mere hypothetical possibility – it is reality.

Groundwater Users related argument is that judgment in the Foundation's favor may not provide relief or terminate the controversy, so the Court should not rule. (*Groundwater Motion*, p. 31). Pursuant to C.R.C.P. Rule 57(f), a "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." The general rule has been stated as follows:

> Declaratory judgment actions should be considered only in cases where 'the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed.'"

People v. Baker, 297 P.2d 273. 277 (Colo. 1956) (*quoting* Borchard, Declaratory Judgments, 2d. Ed., p. 20).

In this instance, the relief being sought is a determination that the current administration of surface water in the Republican River Basin is unlawful, including injunctive relief regarding that administration. (*Complaint*, ¶¶ 92, 93). Clearly, a ruling in the Foundation's favor "will serve a useful purpose in clarifying and settling the legal relations" and will "terminate and afford relief from the uncertainty . . . and controversy." The Groundwater Users argue that the "lag time" in groundwater depletions and other factors could still result in the State Engineer

[10] *See,* Foundation's Motion for Summary Judgment, or in the Alternative a Motion for Determination of Question of Law, regarding its Bonny Reservoir Claim; Foundation's Response to Colorado Parks and Wildlife's Motion for Summary Judgment; and Foundation's Reply in Support of its Motion for Summary Judgment, or in the Alternative a Motion for Determination of Question of Law, Regarding its Bonny Reservoir Claim.

administering surface water for the Compact after this Court rules. (*Groundwater Response*, p.31). That argument assumes a ruling that is not fully in the Foundation's favor and/or a delayed, but eventual benefit to the Foundation associated with curtailing groundwater. Moreover, it appears to assume the augmentation pipeline is not in use. In any event, this action challenges the present administration – not possible future administration that may or may not comply with the law. Once the existing dispute is resolved, the legal parameters of administration for surface water to meet a Compact in a designated groundwater basin will be clarified and the Foundation will have "obtain[ed] a declaration of [its] rights, status, or other legal relations" under the law. *C.R.C.P. Rule 57(b).*

V. CONCLUSION

For the reasons set forth herein and in the Foundation Motion, the current administration of surface water for Compact compliance is contrary to well established law. The Foundation seeks partial summary judgment on its Compact administration claim.

Respectfully submitted this 6th day of May, 2016.

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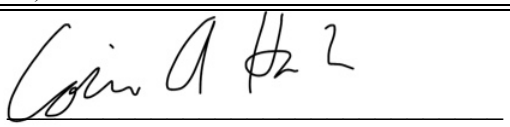
CERTIFICATE OF SERVICE

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 IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON COMPACT ADMINISTRATION CLAIM** was filed and served by the Integrated Colorado Courts E-Filing System ("ICCES") addressed to counsel for each of the parties in the above-captioned matter, as follows:

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