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| <p>DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO</p> <p>Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300</p> | <p style="text-align: right;">DATE FILED: May 6, 2016 10:03 PM</p> <p style="text-align: center;"><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p> |
| <p>Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation,</p> <p>v.</p> <p>Defendants: Dick Wolfe, in his capacity as the Colorado State Engineer; David Nettles, in his capacity as Division Engineer in and for Water Division No. 1, State of Colorado; Colorado Division of Water Resources; and Colorado Division of Parks and Wildlife.</p> <p>Defendant-Intervenors: Yuma County Water Authority Public Improvement District; Colorado Ground Water Commission; Marks Butte, East Cheyenne, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts.</p> <p>Defendant – Well Owners: Republican River Water Conservation District; City of Wray; City of Holyoke; Harvey Colglazier; Lazier, Inc.; Marjorie Colglazier Trust; Mariane U. Ortner; Timothy E. Ortner; Protect Our Local Community’s Water, LLC; Saving Our Local Economy, LLC; the “North Well Owners”; Tri-State Generation and Transmission Association, Inc.; Dirks Farms Ltd; Julie Dirks; David L Dirks; Don Andrews; Myrna Andrews; Nathan Andrews; Happy Creek, Inc.; J&D Cattle, LLC; 4M Feeders, Inc.; May Brothers, Inc.; May Family Farms; 4M Feeders, LLC; May Acres, Inc.; Thomas R. May; James J. May; Steven D. Kramer; Kent E. Ficken; Carlyle James as Trustee of the Chester James Trust; Colorado Agriculture Preservation Association; Colorado State Board of Land Commissioners; and the City of Burlington.</p> | <p style="text-align: center;">Case Number: 15CW3018</p> |
| <p>Porzak Browning & Bushong LLP Steven J. Bushong (#21782) Karen L. Henderson (#39137) 2120 13th Street Boulder, CO 80302 Tel: 303-443-6800 Fax: 303-443-6864 Email: sjbushong@pbblaw.com; khenderson@pbblaw.com</p> | <p style="text-align: center;">Water Div. No. 1</p> |
| <p style="text-align: center;">THE JIM HUTTON EDUCATIONAL 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</p> | |

Plaintiff, the Jim Hutton Education Foundation, a Colorado non-profit corporation (“Foundation”), acting by and through undersigned counsel, hereby submits its 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 (“Motion re: Bonny Reservoir,” or “Motion”), by which it addresses the Responses filed by Colorado Parks and Wildlife (“CPW”) and the State Engineer, Division Engineer, and Colorado Division of Water Resources (collectively “Engineers”) (CPW and the Engineers are collectively referred to as the “Defendants”).

INTRODUCTION

The Foundation has been materially injured by the draining of Bonny Reservoir and ensuing management of the Reservoir footprint. The unlawful administration of surface water rights in the Northern High Plains designated groundwater basin (“NHP Basin”) has led to all surface water rights appropriated after the Compact being curtailed, while all the wells appropriated after the Compact are allowed to continue pumping.¹ One result of that administration was the Engineers ordered Bonny Reservoir to be drained for Compact compliance purposes. It should have been clear before draining Bonny Reservoir that such an action would materially injure the Hale Ditch. Yet, the Engineers ordered the Reservoir drained without a solution in place to protect the senior water right.

The Engineers cannot lawfully administer a 1942 Compact call in a way that injures an intervening 1938 water right. The purpose of administration is to avoid injury to senior water rights, not cause injury. The draining of Bonny Reservoir without protections in place has left the Foundation between a rock and hard place. The original headgate and ditch easement were destroyed by the construction of Bonny Dam and Reservoir, and the Hale Ditch delivery system built into the dam to protect the Hale Ditch was rendered inadequate.

Making matters worse, CPW’s management of the Reservoir footprint has left it overgrown with native and invasive vegetation that consumes water. Standing water is also allowed in the Reservoir footprint – further consuming water to which the Hale Ditch is entitled. Indeed, there is no apparent stream channel that remains within the Reservoir footprint. The Engineers have also failed to enforce the provision in the Bonny Reservoir Decree requiring that any water impounded out-of-priority be promptly removed from Bonny Reservoir by “draining, pumping or other means.” (*See Exhibit 24*). This is all evidenced by the photos of a lush forest growing in standing water within the reservoir and the associated Affidavits. (*See Exhibits 38 and 39*).

The Foundation intentionally included both CPW and the Engineers in its claim regarding Bonny Reservoir because both have contributed to its injury. The Engineers’ administration resulted in the draining of Bonny Reservoir, and CPW’s management of the Reservoir footprint

¹ The unlawful administration is discussed in detail in the Foundation’s Motion for Summary Judgment Regarding its Compact Administration Claim, its Reply in support of that Motion, and its Response to Defendants’ Motion for Partial Summary Judgment on Administration of Designated Groundwater, all of which is incorporated herein by reference. (*See also Complaint*, ¶¶ 76-93).

compounded the problem. The Defendants have responded to the Foundation's Motion separately, and each attempts to avoid responsibility by pointing the finger elsewhere. (*CPW's Response*, pp. 12-13) ("Although CPW disagrees with Plaintiff's assertion against the Engineers, CPW also has no authority to administer water rights. In accordance with section 37-02-301(1), C.R.S. (2015), the State Engineer, through the Division Engineer, is responsible for administration and distribution of the waters of the State."); (*Engineers' Response*, p. 17) ("if the Foundation is entitled to any relief at all, it is not relief from the Engineers because the Engineers do not operate or own the Bonny Reservoir water right or Bonny Dam.").

These protests and deflections do not change the fact that the injury to the Foundation's Hale Ditch water right was caused by the Defendants and must be redressed by the Defendants. Many of the issues raised in the Responses have been covered in the Foundation's Response to CPW's Motion for Summary Judgment ("Foundation's Response re: Bonny Reservoir"), which is fully incorporated herein. Therefore, this Reply only focuses on the assertions in the Responses that have not already been addressed.

UNDISPUTED FACTS

The Foundation provided with its Motion a list of facts that it believed were or should be undisputed. In their Responses, the Defendants provided some clarifications and objections. The following updates the status of the Foundation's "Undisputed Facts":

- The Foundation's Undisputed Fact Nos. 1 – 7 are undisputed by all the parties. The Foundation does not disagree with the corrections offered by the Defendants to certain of those facts.
- The Foundation agrees with CPW's clarification to Undisputed Fact No. 8 that CPW uses the conservation capacity of Bonny Reservoir, but with the understanding that CPW is responsible for managing the surrounding lands, including, when exposed, the Reservoir footprint.
- The Foundation's Undisputed Fact Nos. 9 – 11 are undisputed by all the parties.
- In its Undisputed Fact No. 12, the Foundation noted that the amount of water delivered to the Hale Ditch in 2014 was always less than 7.67 cfs. (*See Exhibit 33*). The Engineers acknowledge that the amount of water "delivered to Hale Ditch in 2014 was always less than 7.67 cfs," but also add "*as was the flow into the Bonny Reservoir site.*" (emphasis added). The Foundation has no knowledge of the rate of inflow into Bonny Reservoir except on the dates for which it has flow data (*See Exhibit 33 and Exhibit 41*), and thus cannot speak to whether the inflows exceeded 7.67 cfs at any point during the irrigation season. After submitting its Motion, the Foundation received additional flow data for 2014 and 2015 from the Bureau, which shows that inflows did in fact exceed 7.76 on at least three dates. (*See Exhibit 41*).

- The Foundation does not disagree with any of the Engineers’ comments regarding Undisputed Fact No. 13. This fact is undisputed by all the parties.
- The Defendants take issue with the Foundation’s assertion in its Undisputed Fact No. 14 that the water losses between the gaging station on the South Fork of the Republican River above Bonny Reservoir and the Hale Ditch outlet are caused by the Defendants, specifically arguing that the Foundation submitted insufficient evidence of the claimed conditions in the Reservoir footprint. Foundation’s Exhibits 38 and 39 address these concerns, in that they show dense and pervasive vegetation growing in standing water in the Reservoir footprint. Note that the Defendants do not dispute that the listed plant species appear on the Yuma County Noxious Weed List.

RELIEF SOUGHT BY FOUNDATION IN MOTION

Contrary to the Engineer’s assertion, the Foundation has requested a clear determination of law. (*Engineers’ Response*, p. 4). The Foundation seeks a declaration that the current administration of Bonny Reservoir by Defendants is unlawful. (*Complaint* ¶¶ 92.A, 92.C). The Engineers, by unlawfully ordering Bonny Reservoir to be drained without a way to ensure the Hale Ditch receives the water that would otherwise be available and by not enforcing the terms of the Bonny Reservoir Decree. CPW, by managing the empty Reservoir footprint in a manner that deprives the Foundation of water, interferes with the Hale Ditch right-of-way, and/or violates their contractual obligations to protect the Hale Ditch water rights and right-of-way. The result is that Bonny Reservoir is being administered in a way that injures the senior Hale Ditch rights. A favorable declaration will provide relief to the Foundation by requiring administration in compliance with the law.

The reason that the Foundation alternately requested a determination of question of law is that to the extent there remained any genuine issues of material fact precluding summary judgment, rulings on the legal questions raised in the Foundation’s Motion would clarify and narrow the issues for trial.

ARGUMENT IN SUPPORT OF THE FOUNDATION’S MOTION

I. Colorado Law Preventing Water Storage Facilities from Injuring Senior Water Rights is Binding on the Defendants.

“No water storage facility may be operated in such a manner as to cause material injury to the senior appropriative rights of others.” C.R.S. § 37-87-101(1); (*Foundation’s Motion re: Bonny Reservoir*, p. 7). Both CPW and the Engineers argue that this law is not applicable because they are not the “owner or operator” of Bonny Reservoir. (*CPW Response*, p. 12) (“CPW has no control over the reservoir or dam operations, and is not the water right owner.”); (*Engineers’ Response*, p. 11) (“The plain language of the statute provides direction to operators of storage facilities, not administrators of storage water rights”). However, nowhere in this statutory requirement are the protections of senior water rights limited to owners or operators. Use of the word “operated” does not so imply. Any party that is responsible for a reservoir being

“operated in such a manner as to cause material injury the senior appropriative rights of others” is in violation of this provision and such actions should cease, as further discussed below.

The Defendants also argue that the cases cited by the Foundation, *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) are not applicable to them because they are not the owner of the Bonny water right. (*Engineers’ Response*, p. 14); (*CPW’s Response*, p. 14). However, the holding in those cases – that the method relied upon by a senior appropriator may not be interfered with – is applicable to the Defendants for the reasons discussed below.

A. The Engineers’ Administration of the Bonny Reservoir is Prohibited under Colorado Law.

The Engineers ordered the Bureau to drain Bonny Reservoir. Although the Bureau vigorously questioned the propriety and legitimacy of the Engineers’ orders, it ultimately agreed to comply with the order. (*See Exhibit 29*). The Engineers cannot now blame the Bureau for following their orders.² Further, the Engineers knew or should have known that draining Bonny Reservoir would impact the Hale Ditch. The Engineers made the choice to drain Bonny Reservoir to help comply with the Compact in spite of the injury that would result to the Hale Ditch and notwithstanding the fact that Bonny Reservoir is not decreed to augment depletions for Compact compliance purposes. Instead of lawfully administering all of the sources of water under the Compact, the Engineers chose instead to drain Bonny Reservoir and then place the burden of Compact curtailment solely on the surface water rights appropriated after the Compact such as Bonny Reservoir. The Engineers’ unlawful administration of Bonny Reservoir is directly tied to the injury suffered by the Hale Ditch.

The Engineers also argue that the holdings in *Bowles* and *Bender* do not apply to them because in those cases the defendant, a junior water right owner, was ordered to cease diversions, whereas the water right was curtailed in this instance. (*Engineers’ Response*, pp. 14-15). The Engineers construe these cases too narrowly.

The standards set forth in *Bowles* and *Bender* are not limited to or predicated upon junior water users. In both *Joseph W. Bowles Reservoir* and *Bender*, the Court recognized that lowering water levels to a point that causes issues for a senior water user’s means of diversion is an injury that must be remedied, stating in *Bowles* that interfering with the means of diversion “practically nullified” the senior water right. 18 P.2d at 315. The underlying principal in the cases is to protect senior water rights. The manner in which the problem is solved is not limited to curtailing use. In fact, in both *Bowles* and *Bender* the court offered the defendant a choice between curtailment and providing the senior with an alternative solution. This demonstrates broader applicability. If the holdings were limited in application to junior appropriators, then simply curtailing diversions would have been sufficient. Thus *Bowles* and *Bender* apply to any entity that unlawfully interferes with the means of diversion used by a senior appropriator.

² The Foundation notes that the Engineers cite various statutes regarding their “authority” over reservoirs. These statutes, however, all concern dam safety, not administration and are not relevant to C.R.S. §37-87-101(1). (*Engineers’ Response*, p. 10).

Therefore, these cases confirm that a senior water right owner is entitled to the continuation of the diversion method it has historically relied upon. A senior's diversions cannot simply be rendered unusable with no recourse.

Finally, the fact remains that the Engineers' unlawful actions have injured the Foundation's Hale Ditch water right. The Engineers unlawfully ordered the draining and curtailment of Bonny Reservoir and are now administering a 1942 Call against Bonny Reservoir that is injuring the 1938 Hale Ditch water right in the process. Such administration of Bonny Reservoir to the injury of a senior water right is not consistent with the Engineers' statutory mandate regarding lawful administration to prevent injury to senior water rights. C.R.S. § 37-92-301(3).

B. CPW is Liable for the Hale Ditch Shortfall Caused by its Management of the Reservoir Footprint and Interference with Right-of-Way.

Like the Engineers, CPW argues that it is not bound by the rule in C.R.S. §37-87-101(1) that a storage facility may not injure senior water rights because it does not control the dam or appurtenant facilities. (*CPW Response*, p. 12). However, a "storage facility" is not limited to the dam, but includes all aspects of the facility, including the reservoir itself and, in this case, the Reservoir footprint. *See* C.R.S. § 37-87-101(1) (describing a wide range of real property interests that can be acquired by eminent domain for a reservoir). Further, there is nothing in the prohibition against injuring senior water rights to support an interpretation that the statute only applies when the reservoir is full. As CPW acknowledges, the Land Contract makes CPW responsible for managing certain lands, facilities, and the water surface of the reservoir. (*CPW's Response*, p. 9). CPW also acknowledges responsibility for managing the vegetation in the footprint of the reservoir. (*CPW Response*, p. 9). CPW's management of these aspects of Bonny Reservoir is contributing to the injury to the Hale Ditch. Moreover, given CPW's management responsibilities it should be without question that CPW must comply with C.R.S § 37-87-101(1). There is no basis for interpreting C.R.S. §37-87-101(1) in a manner such that it would not apply to CPW, since it has jurisdiction and control over the Reservoir footprint.

CPW has emphasized that the Bureau retained control over the land underneath and immediately downstream of Bonny Dam. (*CPW Response*, p. 3). However, this is not relevant. What is relevant is the point that CPW has not disputed – that it has responsibility over the footprint of the reservoir. CPW's statement that "the Land Contract actually excludes any lands associated with the Hale Ditch from CPW's management responsibilities" (*CPW's Response*, pp. 21-22.). In fact, the Land Contract does the opposite. The portion of the historical right-of-way that the Foundation's Motion is concerned with traverses the Reservoir footprint.³ It is definitely within the area that CPW manages, as shown on Exhibit A to the Land Contract. (*Exhibit 26*). That is the area of concern and the portion of the right-of-way where CPW's management is causing water that historically would have flowed toward or into the Hale Ditch to instead be

³ While it is true that the majority of the Hale Ditch is downstream of Bonny Dam, the historical right-of-way traverses portions of Sections 15, 16, and 21 in Township 5 South, Range 43 West, 6th P.M, as shown on the Reservoir map and filing statement. (*Exhibit 40*).

blocked, consumed, and lost to evaporation and seepage, resulting in artificially low water availability at the Hale Ditch outlet in Bonny Dam. This is further discussed in the Foundation’s Response re: Bonny Reservoir, pp. 4-6.

CPW also argues that *Bowles* and *Bender* do not apply to it. However, CPW’s management of the Reservoir footprint is allowing losses to occur that render the Foundation’s means of diversion far less efficient than it would be with more flows. Thus, the holdings in *Bowles* and *Bender* — that it is unlawful to interfere with the means of diversion relied upon by a senior water user — apply to CPW.

In addition to C.R.S. § 37-87-101(1) and Colorado case law preventing CPW from managing its portion of Bonny Reservoir to the injury of the Hale Ditch, CPW is also bound by other sources of law to manage the Reservoir footprint in a manner that does not interfere with the Hale Ditch water right. Specifically, CPW’s interest in the Reservoir footprint is subject to the dominant estate that is the Hale Ditch right-of-way, and (or in the alternative) CPW is bound by provisions in the Land and Water Contracts that were intended to benefit the Hale Ditch and prevent CPW from injuring it. Both of these obligations are discussed in greater detail in the Foundation’s Motion re: Bonny Reservoir and the Foundation’s Response to CPW’s Motion Re: Bonny Reservoir.⁴

II. The Relief Requested does not Exceed what the Hale Ditch is Entitled to under its Priority.

The Foundation is not claiming entitlement to more water than is allowed under its decree, as the Defendants assert.

A. The Foundation is entitled to the stream conditions that existed when Hale Ditch was appropriated.

It is undisputed that the Foundation is entitled to the stream conditions at the time of the Hale Ditch appropriation. (*Engineers’ Response*, p. 16) (“An appropriator takes the stream as he finds it and is entitled to the preservation of the stream conditions at the time of their respective appropriations.”) (citing *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d

⁴CWP’s argument that it has no duties to the Hale Ditch stemming from the Land and Water Contracts was addressed in the Foundation’s Response re: Bonny Reservoir, pp. 4-11. First and foremost, that Response clarifies that CPW’s obligation arises from Colorado law protecting senior water rights from injury associated with Reservoir operations, and protecting ditch right-of-ways from injury. Second, the Land and Water Contracts impose such duties because of the provisions in each Contract that were intended to benefit the Hale Ditch water right. In fact, CPW’s use of the Bonny Area is expressly subject to the Hale Ditch right-of-way pursuant to the Land Contract. CPW’s claim that it is in compliance with federal, State, and local noxious weed control rules does not mean that it is in compliance with its contractual obligations to the Hale Ditch, because native vegetation such as cottonwood trees are causing just as much interference with the Hale Ditch as invasive species that may be present. Since these arguments have been thoroughly briefed, the Foundation does not further address CPW’s arguments regarding the Land and Water Contracts and instead respectfully directs the Court to its Response to CPW’s Motion re: Bonny Reservoir.

629, 631-32 (1954)). This means that the Foundation is entitled to the stream conditions that existed in 1908, when the Hale Ditch was appropriated.

At that time, there was a defined stream channel for the South Fork of the Republican River and no Bonny Reservoir. Bonny Reservoir did not initially cause injury to the Hale Ditch because any seepage and evaporation losses came out of its storage instead of the Hale Ditch water rights. Now, with the Reservoir drained, there is not even a stream channel where the ditch headgate was located, and instead, there is a forest growing in saturated soils and standing water. (*See Exhibits 38 and 39*). Providing the conditions to which the Foundation is entitled could require storage in the Reservoir or, if not, restoration of the stream channel through the Reservoir footprint with a delivery system to divert the water through the dam without the significant seepage losses that occur today. Regardless of the precise remedy, what should be clear is that stream conditions to which the Foundation is entitled do not currently exist.

B. There are no factual issues actually in dispute.

The Defendants are attempting to muddy the waters by raising factual “issues” that they already know the answers to and/or are not at issue. They raise these issues in order to imply that there is an explanation for the Foundation’s injuries aside from their own unlawful actions, but this is not the case. The Foundation addresses each of these alleged factual assertions below.

1. The reduced water availability cannot be explained or justified by transit losses.

The Engineers suggest that water lost to seepage and evaporation occurred when Bonny Reservoir was full, so the Foundation is not in a position to complain about such losses now. (*Engineers’ Response*, pp. 16-17). In fact, the Engineers go as far as to state that the Foundation benefitted under prior operations because no evaporation losses were charged against the water “delivered” to the Hale Ditch. (*Engineers’ Response*, p. 17).

First of all, the water provided to the Hale Ditch is under its senior direct flow right, not water stored under the Bonny Reservoir right. It would have been absolutely inappropriate to charge evaporative losses against the Hale Ditch simply because a reservoir was constructed on top of it and an alternate means of water delivery was required.

Second, when Bonny Reservoir was full, the loss of water due to seepage and/or evaporation was charged against the Bonny Reservoir storage right, as was appropriate. Now, however, those losses associated with an on-channel reservoir are continuing to occur due to the conditions within the Reservoir footprint – and the Hale Ditch is the water right bearing those losses. Thus, the Foundation is not, as the Defendants claim, suggesting that the Defendants must not only avoid harming the Foundation, but also benefit the Foundation. (*Engineers’ Response*, p. 16); (*CPW Response*, p. 11). To the contrary, the Foundation is simply objecting to the seepage and evaporation losses properly attributed to Bonny Reservoir’s storage right being applied against the Hale Ditch instead, under the guise of “transit losses.”

Third, the Engineers suggest that transit losses between the gage at the South Fork of the Republican River upstream of Bonny Reservoir and the Hale Ditch outlet could be the source of the diminishment in flows and imply that the Hale Ditch was always subject to transit losses even when Bonny Reservoir was full. (*Engineers' Response*, p. 13) ("The Foundation has not proven how the transit losses that occur through the drained Bonny Reservoir site now compare to those the Hale Ditch suffered before Bonny Dam was constructed."). To be clear, the Hale Ditch did not "suffer" any river transit losses before Bonny Reservoir was constructed. It was entitled to the flow in the river at the decreed point.

Whether or not the reach upstream of Bonny Reservoir is currently a gaining or losing reach of stream, it is clearly losing water once it hits the Reservoir footprint as shown by the photographs of the Reservoir footprint. Moreover, the measurements at the upstream gage provide a very conservative quantification of that loss. That is because additional inflows come in from Landsman Creek and possibly other sources that exceed any suggested "transit losses." (*See Engineers' Response*, p. 7) ("The Engineers agree that there is at least one additional source of water which supplies Bonny Reservoir – Landsman Creek," which contributes water to the South Fork of the Republican River downstream of the gaging station but upstream of the Hale Ditch). The best evidence of this fact is that the measured seepage losses downstream of Bonny Reservoir plus the Hale Ditch deliveries exceed the measurements upstream of Bonny Reservoir. (*Exhibits 33 and 41*). In other words, even with the losses of water occurring within the Reservoir footprint, there is still more water going out than is coming in. The problem, of course, is that the inefficiency of a drained Reservoir means that much of the water is being lost to seepage.

In conclusion, alleged river transit losses do not account for the dramatic reductions in flow demonstrated by the flow data. The Engineers are suggesting, without explanation or substantiation, that losses averaging over sixty percent are the result of "transit losses." In fact, the losses are likely even greater than sixty percent due to offsets from Landsmen Creek and other sources of inflow, and these are evaporation and seepage losses attributable to the existence of the on-channel Bonny Reservoir and historically charged to Bonny Reservoir. That these losses are now being charged against a senior direct flow right, the Hale Ditch, is unlawful.

2. *No senior water rights diverted between the upstream gage and the Hale Ditch outlet in Bonny Dam in 2014 or 2015.*

The Engineers claim that the Foundation has not shown that it is entitled to the entire flow of the South Fork of the Republican River at the measuring station upstream of Bonny Reservoir because there are two water rights, the Newton Ditch and the Scherrer Ditch, that are located downstream of the gaging station, but upstream of the Hale Ditch's original headgate. (*Engineers' Response*, p. 11). As explained below, the existence of these water rights does not affect the proper inferences that may be drawn from the flow data for 2014 and 2015, as set forth in Exhibit 33 and Exhibit 41.

As the Engineers are well aware, neither of these ditches diverted in 2014 or 2015. While diversion records maintained by the Engineers on the South Fork have historically not provided

useful information regarding diversions or the lack thereof, the Engineers have for several years required any surface water right that wants to divert to have a measuring device. The Engineers have even required the Foundation to install a measuring device on its lateral off the Hale Ditch. Therefore, if diversions by either the Newton or Scherrer Ditch had occurred, there would be record of those diversions. However, there are no recorded diversions in 2014 or 2015 for either ditch. (**Exhibit 43**).

Consistent with the lack of diversion records, the Republican River Water Conservation District purchased the Newton Ditch⁵ water rights in 2010. (Special Warranty Deed attached hereto as **Exhibit 44**). It purchased this water right for Compact compliance purposes, but has not yet filed a change of water right application with this Court to put it to such use. Additionally, George Homm, owner of the Scherrer Ditch, confirmed that the Scherrer Ditch did not divert any water from the South Fork in 2014 or 2015. (Affidavit of George Homm, attached hereto as **Exhibit 45**).

Lastly, as explained above, with the other sources of inflows into the Reservoir that the Bureau does not measure, and with the losses occurring within the Reservoir footprint and the measured seepage losses, there can be no dispute that the Foundation did not receive the amount of water to which it was entitled in 2014 and 2015.

III. The Hale Ditch water right has not received the full flow of the South Fork of the Republican River up to the Decreed Amount.

The Engineers also state that the Foundation “did not provide evidence that the Hale Ditch has not been receiving the entire flow of the South Fork of the Republican River *that actually reaches Bonny Dam and the Hale Ditch diversion works* when the Hale Ditch has called for water.” (*Engineers’ Response*, p. 12) (emphasis added). For several reasons this is both inaccurate and immaterial.

First, the Foundation provided the Bureau’s records which show considerable amounts of water immediately downstream of Bonny Dam. (*Exhibits 33 and 41*). It is a fair assumption that this is water that has reached Bonny Dam and/or otherwise exited as seepage. As described above, when water was kept in storage such seepage losses came out of the storage right. Now such losses come out of the Hale Ditch water right. Moreover, given the very limited head pressure available to deliver the water through the Hale Ditch outlet works in the dam, the lack of efficient delivery would be expected.

Second, the assertion is largely irrelevant. The principal basis of the Foundation’s injury is that insufficient water is reaching the dam outlet to begin with after the losses within the Reservoir footprint and seepage losses. As evidenced by the photographs and Affidavits, there is standing water in the footprint of the reservoir that is being consumed by vegetation and/or lost

⁵ The point of diversion for 7.15 cfs out of the total 14.30 cfs decreed to the Newton Ditch was changed to the Hale Ditch outlet of the Bonny Dam facilities in Civil Action No. 4433, dated June 15, 1961.

to evaporation and seepage due to the mismanagement of the Reservoir footprint, as well as the lack of defined stream channel. (*Exhibits 38 and 39*).

The question is whether the Hale Ditch water right is receiving the full flow of the South Fork of the Republican River to which it is entitled by virtue of its priority. The water available at the Hale Ditch diversion is not representative of this amount because of the depletions taking place as the South Fork spreads out through the Reservoir footprint. Instead, the amount of water that the Hale Ditch would receive if not for unlawful interference by the Defendants is conservatively estimated by comparing the deliveries to the Hale Ditch to the water measurements at the gaging station above Bonny Reservoir, because this is the last measuring station on the South Fork.

The diversion records from 2014 and 2015 clearly show that the Hale Ditch water right has received nowhere near the amount of water it would receive if not for losses within the Reservoir footprint. In 2014, when the Hale Ditch was actually receiving water, releases averaged less than 65 percent of the measured inflow at the gaging station above Bonny Reservoir. (*Exhibits 33 and 41*).⁶ When the five dates in 2014 between July and September when inflows to the reservoir were recorded, but no water was available to be released to the Hale Ditch are included in the average, it drops to only 38 percent on average. This does not even take into account water from Landsmen Creek. Importantly, water was available in July through September yet none was delivered. It is not possible to grow crops when the water disappears part way through the growing season.

In 2015, the situation was similar. The data provided by the Bureau contain thirteen days between April and September when measurements were taken above Bonny Reservoir. (*Exhibit 41*). The releases to Hale Ditch were only 56.2 percent of the measured flow rate at the gage upstream of Bonny Reservoir. (*Id.*)⁷ If the dates when no water at all was released to Hale Ditch are included in the calculation, the average delivery drops to 34.6 percent of the water measured above Bonny Reservoir. These are very similar numbers to 2014. Also similar to 2014, there was almost no water delivered to the Hale Ditch after mid-July in 2015, despite the continuous presence of water above the Reservoir through early September. (*Id.*)

In addition, the records for the gaging station immediately below Bonny Dam speak for themselves. (*Exhibits 33 and 41*). In 2014 and 2015, there were always recorded flows below Bonny Dam, ranging from 1.6 cfs to 38.1 cfs. Some or all of that water should have been available for diversion into the Hale Ditch but for (1) the inefficiency of an empty Reservoir, drained to help achieve Compact compliance without curtailing or limiting the well pumping that put Colorado out of compliance with the Compact to begin with; and (2) the management of the Reservoir footprint without a defined stream channel.

⁶This number was reached by dividing the flow rate at the Hale Ditch Diversion at Bonny Dam by the flow rate measured at the gaging station for the same day, and averaging these percentages. While there are fluctuations which are likely, at least in part, due to the 72-hour storage rule being used to deliver water, the overall data is clear.

⁷ Because the 2015 data contain a table with average daily canal discharge at the Hale Ditch for every day of the irrigation season, the Foundation used the numbers in this table for its comparisons.

IV. The Defendants' Draining of Bonny Reservoir and Interference with the Hale Ditch Right-of-Way are the Cause of the Foundation's Injury.

Both the Engineers and CPW claim that the Foundation has failed to prove that the Defendants' actions are the cause of its injuries. As discussed in the Undisputed Facts Section, above, the Foundation provided recent photographs of the Reservoir footprint, along with affidavits describing the photographs. This information documents a forest growing within the footprint of Bonny Reservoir in standing water or saturated soils. The uncontrolled vegetation consumes water that would otherwise continue to flow downstream, and it slows the water, further causing increased seepage and evaporation. This conclusion is fully supported by the flow data provided by the Foundation. Moreover, such losses are also the result of the unlawful administration and draining of Bonny Reservoir.

Nevertheless, the Engineers attempt to raise additional factual questions by stating:

The Foundation implies that its material injury of not receiving water began coincident with the Engineers' orders to release water from Bonny Reservoir in 2007. However, the Hale Ditch diversion records the Foundation supplied show that the Hale Ditch did not receive any water for the first time in 2002, not 2007. Foundation's Ex. 28. In fact, diversions by the Hale Ditch began increasing in 2007 through 2009.

(*Engineers' Response*, p. 12). As the Engineers very well know from the proceedings in Case No. 11CW186, the reason for the lack of diversions in 2002 and the years immediately following was the death of Jim Hutton in 2002. (*Findings of Fact and Conclusions of Law in Case No. 11CW186, Exhibit 22*, p. 10.) Moreover, the fact that some water has been available to the Foundation under its Hale Ditch right since the Engineers ordered Bonny Reservoir to be drained does not mean that the Defendants' actions have not caused injury. The Foundation's claim is that the unlawful draining of Bonny Reservoir by the Engineers, followed by the detrimental management of the Reservoir footprint and administration of the Bonny Reservoir water right by the Defendants, has caused material injury to the Foundation's Hale Ditch. Colorado water law does not require a senior water user to be completely deprived of water in order show injury; any material injury is redressable.

V. Conditions within Bonny Reservoir Are Causing Losses of Water to which the Hale Ditch is Entitled and Interfering with the Use of the Hale Ditch Outlet.

The Engineers claim that "there is no water that is impounded by Bonny Dam that cannot be delivered by the existing gravity works." (*Engineers' Response*, p. 21). Although the Engineers insist that it is possible to release water to the Hale Ditch even at very low elevations, this is contrary to the Foundation's understanding. It is also, evidently, contrary to CPW's understanding. (*CPW's Response*, p. 18) ("Plaintiff has also not provided any supporting documentation to prove that, even if vegetation removal produced additional water and the Hale

Ditch could lawfully claim such water, the Hale Ditch could divert such water due to the physical limitations associated with the outlet structure.”).

According to the Technical Record of Design and Construction for Bonny Dam, the outlet is capable of providing water flow to the Hale Ditch at a rate of 10 cfs when the reservoir water level is at an elevation of 3640 feet. (*Exhibit 23*). It is not stated what the effect is when the water surface level drops below this level. The Engineers ordered the Bureau to “continue the release of water below elevation 3639.0 to the lowest possible level that can be achieved without damage to the structure” on December 19, 2011. (*Exhibit 29*). In other words, the Engineers ordered the water below the specified water surface elevation at which the Hale Ditch outlet was designed to function according to the Technical Record of Design and Construction. Further, the Engineers admit that they have “allowed the Bureau to rely on the ‘72-hour’ policy to deliver water to the Hale Ditch,” suggesting that gravity alone is insufficient to facilitate releases of water and additional head pressure must be built up. (*Engineers’ Response*, p. 7); (*Exhibit 32*).

In addition, the Engineers claim that “Bonny Reservoir is completely drained.” (*Engineers’ Response*, p. 21). However, the photos attached to the affidavits of John Cure and Ryan Cure show that the Engineers are allowing pools of standing water to stagnate in the reservoir bottom. (*Exhibits 38 and 39*). Moreover, CPW is unlawfully using the inflows for the purpose of supporting wildlife habitat. (*CPW’s Motion*, p. 17) (“The vegetation now growing on the lands previously inundated by the reservoir provides beneficial habitat for wildlife species . . .”).⁸

The Bonny Reservoir Decree requires that unless entitled to store water, “all inflow of water into the reservoir from *any* source, including precipitation, shall be removed by applicant or applicant’s successors in interest by draining, pumping, or other means . . . and not utilized by applicant or applicant’s successors in interest in any manner.” (*Exhibit 24*) (emphasis added). Such a requirement is designed to protect downstream water rights. Given the Hale Ditch is water short, that water should be delivered to the Hale Ditch. CPW, as the Bureau’s “successor in interest” to the management of the Reservoir footprint, is responsible for ensuring that this term is complied with, and the Engineers, as the agency responsible for administering water rights by their decrees, is responsible for enforcing this term. The Defendants are failing.

⁸ CPW claims that even if additional water was made available by clearing vegetation, this water would not be available to the Foundation, citing *Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321 (1974). The Foundation cited *Shelton Farms* in its Response to CPW’s Motion Re: Bonny Reservoir in order to illustrate that phreatophytes are recognized by Colorado courts as significant water consumers, but disagrees with any suggestion that the facts of that case are analogous to this situation. In *Shelton Farms*, the Court held that water savings from clearing existing phreatophytes were to be administered under the priority system. In that case, the appropriator desired to use the water outside the priority system. The case at bar is distinguishable first because the phreatophytes in Bonny Reservoir did not exist until the Reservoir was unlawfully drained, and CPW was legally bound to stop the vegetation from obstructing the Hale Ditch right-of-way. Second, in *Shelton Farms*, the party who removed the phreatophytes claimed that this “salvaged” water could be the basis of a new water right immune from the priority system. The Foundation does not argue that the water recovered by the proper management of the Reservoir footprint should be administered outside of the priority system. To the contrary, it should be administered within the priority system, which would help alleviate the injury being suffered by the Hale Ditch.

In short, the Defendants are attempting to create factual disputes where none exist. The decrease in water availability between the gaging station on the South Fork of the Republican River and the Hale Ditch outlet is the clear result of conditions unlawfully permitted to occur by the Defendants, and the Engineers are not sufficiently enforcing the terms of the Bonny Reservoir Decree. Between the photographs showing extensive vegetation and standing water and the flow data showing the unmistakable effects of these conditions, the Foundation has presented sufficient evidence to demonstrate injury.

CONCLUSION

For the reasons set forth herein and in the Foundation's Motion re: Bonny Reservoir, the Engineers and CPW have injured the Foundation by interfering with and impairing its Hale Ditch water right and the means of diversion for same. The Foundation seeks summary judgment that such interference is unlawful, or in the alternative seeks a determination that such interference is unlawful to the extent that the Foundation can prove its injuries at trial.

Respectfully submitted this 6th day of May, 2016.

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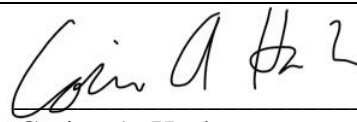
CERTIFICATE OF SERVICE

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, OR IN THE ALTERNATIVE A MOTION FOR DETERMINATION OF QUESTION OF LAW, REGARDING ITS BONNY RESERVOIR 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) |

| Party Name | Party Type | Attorney Name |
|---|----------------------|---|
| Don Myrna and Nathan Andrews | Defendant-Well Owner | Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch) |
| 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 | Defendant-Well Owner | David W Robbins (Hill and Robbins PC) |

| Party Name | Party Type | Attorney Name |
|---|----------------------|---|
| Conservation Dist | | Peter J Ampe (Hill and Robbins PC) |
| Saving Our Local Economy LLC | Defendant-Well Owner | John David Buchanan (Buchanan and Sperling, P.C.) 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