

<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) 475-2400</p>	<p>DATE FILED: March 11, 2019 7:55 AM CASE NUMBER: 2015CW3018</p> <p><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: Kevin G. Rein, in his capacity as the Colorado State Engineer; Corey DeAngelis, 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; and the Marks Butte, 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>Case Number: 15CW3018</p> <p>Div. No. 1</p>
<p style="text-align: center;">ORDER GRANTING STATE AND DIVISION ENGINEERS' MOTION FOR STAY OF PROCEEDINGS</p>	

I. BACKGROUND

The Jim Hutton Educational Foundation (“Plaintiff”) holds decrees to four water rights to divert surface flow from the South Fork of the Republican River (“South Fork”) for irrigation use on its ranch—the Tip Jack Ditch right, the Hale Ditch right, and the Hutton No. 1 and No. 2 rights. The Hutton Ranch is located near the Colorado-Kansas border in eastern Colorado.

Plaintiff filed a complaint in this action on February 23, 2015, seeking declaratory relief against several state agencies, including the State and Division Engineers (“Engineers”). Plaintiff’s complaint originally contained three claims for relief; however, Plaintiff’s second claim was dismissed by the Court for lack of subject matter jurisdiction. The Court also previously ruled that the portion of Plaintiff’s third claim relating to the Colorado Groundwater Commission’s (“Commission”) lack of statutory authority to redraw the boundaries of the Northern High Plains Designated Ground Water Basin (“NHP Basin”) involves speculative injury to Plaintiff. For both claim two and that portion of claim three, the Court ruled that Plaintiff must first prove to the Commission in a separate action that the ground water is hydraulically connected to surface water and well pumping is causing injury to Plaintiff’s water rights. If the Commission issues a decision adverse to Plaintiff’s position, Plaintiff may then seek review of the Commission’s ruling in the district court.

Plaintiff also alleges in claim three that the Colorado Groundwater Management Act of 1965 (“Groundwater Act”) is unconstitutional if the Engineers are precluded

under the Groundwater Act from administering ground water to meet Colorado's Republican River Compact ("Compact") obligations. The Court previously held that this portion of claim three is intertwined with Plaintiff's first claim for relief and it does not require a determination by the Commission as to whether the water is designated ground water. Therefore, that portion of claim three remains part of this action.

Plaintiff's first claim for relief seeks three rulings from this Court. First, Plaintiff requests a declaration that the current administration of surface water rights by the Engineers in the Republican River Basin, which includes curtailing Plaintiff's water rights and ordering Bonny Reservoir to be drained, is contrary to Colorado law, federal law, and applicable agreements, and that the Engineers' arbitrary and capricious acts exceed statutory authority and are unconstitutional.

Second, Plaintiff similarly challenges the Engineers' decision to curtail surface water rights without also curtailing any ground water rights when seeking to meet Colorado's obligations under the Compact. According to Plaintiff, the Engineers have disregarded the provisions of C.R.S. § 37-80-104, which requires the Engineers, when curtailing diversions to meet Colorado's Compact obligations, to make and enforce regulations in a manner that is legal and equitable between all water appropriators. Moreover, Plaintiff asserts that the Engineers are statutorily required to restore, to the extent possible, lawful water use conditions as they existed before the effective date of the Compact. *Id.* Plaintiff disagrees with the Engineers' decision to only curtail surface

water diversions and not ground water diversions, even though pre-Compact conditions consisted predominantly of surface water diversions.

Third, Plaintiff alleges that the administration and management of Bonny Reservoir, as well as the land surrounding and underlying the reservoir, violate two contracts in place between the United States and Colorado, resulting in injury to Plaintiff as a beneficiary to both agreements. Plaintiff refers to these contracts as the Water Contract and the Land Contract. Plaintiff alleges that the draining of Bonny Reservoir and the subsequent use of the water for Compact compliance, in violation of each contract, exacerbated injury to Plaintiff's Hale Ditch water right in two ways: (1) there now is little to no water available for diversion from Bonny Reservoir to the Hale Ditch through the diversion structure in the dam, and (2) there has been a pronounced increase in vegetative growth in areas that were previously submerged when the reservoir was full. Plaintiff contends that plants growing on what was once the reservoir floor are intercepting surface flow of the South Fork, thereby reducing the amount of water available for diversion under Plaintiff's Hale Ditch right.

Plaintiff's claims are premised on the Engineers' administration of surface and ground water in the Republican River basin to meet Colorado's Compact obligations and the settlement reached between Colorado, Nebraska, and Kansas on apportionment of water between the three states. After Plaintiff filed the claims in this case the Engineers—in an effort to assist with administering water rights and to provide water users in this area with more certainty—met with stakeholders to seek input in

developing rules and regulations relating to diversion and use of water in the Republican River Basin. Plaintiff participated in these meetings and provided input during the promulgation of the new rules.

After considering the information presented during stakeholder meetings, the requirements of the Compact, and the water rights and hydrology in the Republican River Basin, the State Engineer adopted the *Rules and Regulations Governing the Diversion and Use of Water Resources in the Republican River Compact Administration Groundwater Model Domain for Compliance with the Republican River Compact* (“Rules”) on January 11, 2019, and the proposed Rules were filed with this Court that same day in Case No. 2019CW3002. The Court granted the Engineers leave to publish notice of the proposed Rules in the Division One Water Court resume. Anyone wishing to protest the Rules may do so by filing a written protest with this Court. The Court has not received any protests to the Rules, but the protest period has not yet expired.

Plaintiff’s remaining claims are presently set for a two-week trial in June 2019. The Engineers request a stay of Plaintiff’s claims until after the Rules case is completed. The Engineers assert Plaintiff’s claims relate to an administrative system that will be significantly modified if the Rules are adopted, and the Engineers contend the majority, if not all, of the administrative requirements and policies Plaintiff seeks in this action will either be resolved or rendered moot. The Engineers argue that it would result in significant financial hardship to all Defendants if the Plaintiff’s claims proceed to trial before resolution of the Rules in 19CW3002, as this will require the Engineers to litigate

the propriety of an administrative system that is subject to being completely revamped and superseded upon approval of the Rules. The Engineers contend Plaintiff will suffer little prejudice if a stay is granted because Plaintiff will have the ability to participate fully in the Rules case, thereby allowing Plaintiff to challenge the Compact compliance strategy embodied in the Rules. Several Defendants joined the Engineers' motion for stay and none of the Defendants opposed the motion.

Plaintiff opposes a stay and asserts that it will suffer great harm if resolution of its claims is delayed until the Rules case concludes. Plaintiff argues that its water rights have been curtailed by the Engineers since 2008 to meet Compact obligations, without similar restrictions on ground water users in the area, and Plaintiff should be permitted to hail the Engineers into court to address the propriety of their prior water administration decisions. Plaintiff expresses concern that it will continue to be denied water it is legally entitled to, regardless of whether the Rules are approved, and requests its day in court as quickly as possible. If the Court grants a stay, Plaintiff requests an order directing the Engineers to allow Plaintiff to fully divert its Hutton No. 1 and No. 2 water rights pending resolution of the Rules case.

II. LEGAL STANDARD

The decision whether to grant a motion for stay rests in the sound discretion of the trial court. *In re Application of Water Rights of the United States*, 101 P.3d 1072, 1080 (Colo. 2004). "Parties have the right to a determination of their rights and liabilities without undue delay." *Id.* at 1081. When considering a request for a stay, the court

must consider all relevant facts and circumstances of the case, and then balance the prejudices to and interests of the parties. *Id.* When balancing the competing interests of the parties, the court should consider lesser measures to a stay that would adequately protect the moving party's interests. *Id.* at 1082. After considering all facts and circumstances existing in the case, the motion for a stay should be denied if the court determines that the harm to the non-moving party outweighs the prejudice to the moving party. *Id.*

III. ANALYSIS

The Engineers include in their motion for stay a very detailed history of the evolution of water administration in the Republican River Basin, which will be summarized by the Court below.

The Compact was ratified by the Colorado General Assembly in 1942¹ to equitably apportion the waters of the Republican River Basin between Colorado, Kansas, and Nebraska, and received consent of the United States Congress in 1943. *Act of May 26, 1943, ch. 104, 57 Stat. 86.* The Compact is codified at C.R.S. § 37-67-101. Pursuant to Article III of the Compact, the streams and their respective basins that are included in the Compact are the North Fork and South Fork of the Republican River, Arikaree River, Buffalo Creek, Rock Creek, Frenchman Creek, Blackwood Creek, Driftwood Creek, Red Willow Creek, Medicine Creek, Beaver Creek, Sappa Creek, and Prairie Dog Creek. Each state is allotted a specific total amount of acre feet of water per

¹ Ch. 123, sec. 1, 1943 Colo. Sess. Laws 362.

year under the Compact, with Colorado's yearly allotment further quantified between waters flowing in the North Fork, South Fork, Arikaree River, Beaver Creek, Frenchman Creek, and Red Willow Creek. *See* Article IV. The Compact requires each state to administer the Compact through an official designated by the state, which in Colorado is the State Engineer. *See* Article IX; C.R.S. § 37-80-104.

The Northern High Plains Basin was designated in 1966, under the provisions of the 1965 Groundwater Act, after a finding by the Commission that the ground water in the Northern High Plains Basin was not available to and required to fulfill decreed surface water rights. From that point forward, ground water in the Northern High Plains Basin was administered under the Groundwater Act, separately from the surface water and tributary ground water in the Republican River Basin, which remains subject to administration under the Water Right Determination and Administration Act of 1969. C.R.S. § 37-92-101, *et seq.*

The impact of Republican River Basin ground water removal on Compact obligations was raised in 1999, when Kansas sued Nebraska in the United States Supreme Court under the theory that well pumping in Nebraska deprived Kansas of its full allotment of Compact water. Colorado was joined in the lawsuit. The Special Master concluded that well pumping of ground water within a state counts against that state's apportionment of the Compact water, to the extent ground water pumping depletes surface flows. First Report of the Special Master, p. 23. This finding led to the three states developing the Republican River Compact Administration Ground Water

Model (“RRCA Ground Water Model”) in 2003, which has been used since 2003 as part of the Republican River accounting formula.

In 2004, the General Assembly created the Republican River Water Conservation District (“RRWCD”) to carry out Colorado’s duties under the Compact and to assist with the conservation, use, and development of water in the Republican River Basin. C.R.S. § 37-50-101. The RRWCD developed a plan to construct a pipeline to transport water to meet Colorado’s Compact obligations when surface flows do not suffice. It was further determined that simply curtailing well pumping and surface water use would not immediately provide water to meet Compact obligations under certain hydrologic conditions. The cost of the pipeline was \$66 million, which was raised through fees assessed for water use in the district. The Engineers drained Bonny Reservoir, which had a water right priority date junior to the date the Compact was ratified, and applied the water to meet Colorado’s Compact requirements.

Plaintiff asserts that the new Rules should have been filed years ago, after the 2003 RRCA Ground Water Model was put into place and before the Engineers began curtailing the Hutton No. 1 and No. 2 rights in 2008. Plaintiff further contends that this action has been pending since 2015 and further delay of the trial will result in continued curtailment of its water rights. Under the new Rules, Plaintiff believes there are only two options available to water users, neither of which will provide relief to Plaintiff. First, a water user may obtain an Alternative Compliance Plan, which is similar in design to an augmentation plan, where replacement water can be delivered through

Kansas for measurement at a gage in Benkleman, Nebraska. According to Plaintiff this is not a viable option because ground water depletions have dried up the South Fork between Plaintiff's land and the Benkleman gage, and replacement water cannot be transported through a dry streambed. The second option is to participate in a water fee assessment program proposed by the RRWCD as part of the new Rules, which would require payment of \$14.50 per irrigated acre for ground water use and \$154.00 for each acre foot diverted by surface water users. Plaintiff argues that the drastically higher rate for surface water users to participate in the fee assessment program is not only economically unfeasible, but also inequitable. And finally, Plaintiff asserts that the proposed Rules are silent on how Bonny Reservoir will be administered in the future; however, given the proposed RRWCD fee assessment as part of the Rules of \$257.00 per acre foot of evaporation for water stored in reservoirs, Plaintiff believes it is highly unlikely that the Bureau of Reclamation will ever refill Bonny Reservoir. Because Plaintiff believes that it will receive no relief under the proposed Rules, Plaintiff argues that its claims for declaratory and injunctive relief should proceed to trial in June 2019.

The Court agrees with the Engineers that much of the delay in this case is the result Plaintiff's filing and procedural decisions. Plaintiff first filed for declaratory and injunctive relief against the Engineers in 2011 for enforcement of its Hale Ditch right, yet Plaintiff chose not to include its Hutton No. 1 and No. 2 rights in the 2011 suit. Plaintiff filed the present claims, which include the Hutton No. 1 and No. 2 rights, against the Engineers, the Colorado Division of Water Resources, and Colorado

Division of Parks and Wildlife in 2015. Several parties moved to intervene as parties to this action, including the Colorado Groundwater Commission, which was granted by the Court. The Court also ruled that Plaintiff was required to publish notice of this action and allow other interested parties to join this lawsuit. Numerous parties joined the lawsuit after notice was published and there are now over forty defendants named in this case. The failure by Plaintiff to join necessary parties resulted in delay.

A trial was initially scheduled for August 2017. Plaintiff opted to include claims for relief that were clearly within the exclusive jurisdiction of the Groundwater Commission, which could have been filed with the Commission in 2015, if not earlier in time. After the Court dismissed Plaintiff's second claim and part of claim three in 2016 for lack of jurisdiction, Plaintiff moved this Court to certify the order dismissing claim two as a final judgment to enable Plaintiff to appeal that decision to the Colorado Supreme Court. The Court granted that request and certified the order as a final judgment. Plaintiff asked to proceed to trial on its remaining claims in August 2017 and await the decision by the Colorado Supreme Court as to claim two. If successful on appeal, Plaintiff would request a separate trial on claim two. Defendants moved for a stay of all claims pending the outcome of the appeal. The Court granted the request for a stay, finding that litigating Plaintiff's claims in piecemeal fashion would increase costs to the parties and result in judicial inefficiencies. The order dismissing Plaintiff's second claim was affirmed by the Colorado Supreme Court in May 2018. *See Jim Hutton*

Ed. Found. v. Rein, 418 P.3d 1156 (Colo. 2018). Plaintiff's decision to appeal this Court's order dismissing claim two resulted in additional delay.

Plaintiff has not filed a petition with the Groundwater Commission for a determination whether the designated ground water in the Northern High Plains Basin is, in fact, hydrologically connected to surface water and the withdrawal of ground water is causing injury to Plaintiff's water rights. Instead, Plaintiff requested that a trial be held to address the remaining claims, which is presently scheduled for June 2019.

Although not directly relevant to the claims remaining in the present case, Plaintiff has also filed several separate cases² since 2016 seeking to change the diversion point for its Tip Jack Ditch right—which it has allegedly been diverting from a non-decreed and unapproved diversion point since 1977—pursuant to several different statutory provisions, all of which have been decided against Plaintiff. The Court includes reference to Plaintiff's Tip Jack Ditch cases simply because they are part of the Engineers' impetus to promulgate the new Rules for administration of water in this area of the state.

The claims asserted by Plaintiff in this case are not as simple and straightforward as Plaintiff portrays. The Republican River Basin involves a complex hydrological dichotomy of surface and designated ground water rights, coupled with an overriding obligation by the Engineers to comply with Colorado's Compact responsibilities. The

² The cases are 2016CW3092, 18CW3031, and 18CW3032.

Engineers have promulgated the proposed Rules to address the Compact requirements in the most equitable way they believe is possible for all water users in the area.

Although there are forty Defendants listed in this case, the reality is that there are thousands of water users whose interests are included in this action because there are several cities, ground water management districts, and the Groundwater Commission named as Defendants. These entities and individuals not only have a stake in the present case, but they are also exceedingly interested in the outcome of the Rules case. It would result in an unfair financial hardship for the Defendants to litigate an individual water user's claims in the present case, which will not address the entirety of the proposed Rules, and then later be required to address the remaining issues in the Rules case. Moreover, if the Court allowed Plaintiff to proceed with its claims in the present matter before the Rules case is completed, there may be other water users in the Republican River Basin who would now believe it essential to participate in this case, where initially they did not see such a need, because Plaintiff will be seeking to show in the present case why the new Rules will not provide relief to Plaintiff. In addition, the Court agrees with the Engineers that Plaintiff, as well as all other water users in the Republican River Basin, will have a full and fair opportunity to address concerns if they elect to participate in the Rules case.

The Court denies Plaintiff's request for an order directing the Engineers to allow Plaintiff to divert its Hutton No. 1 and No. 2 water rights pending resolution of the Rules case. If the Engineers determine that water is legally available to Plaintiff for

diversion under the Hutton No. 1 and No 2 rights, after considering all relevant factors including the Compact requirements, the Court is confident that the Engineers will authorize such diversions.

IV. ORDER

The Court grants the Engineers' motion and hereby stays all proceedings in this action until after the Rules case, 19CW3002, is completed. The Court vacates the trial scheduled for June 3-14, 2019. The Court retains the telephone status conference date of March 12, 2019 at 8:15 a.m., to schedule a future review date.

Dated: March 11, 2019.

BY THE COURT:


James F. Hartmann
Water Judge, Water Division 1