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<tr><td>DISTRICT COURT, WATER DIVISION NO. 1,
STATE OF COLORADO

Weld County Courthouse
901 9th Avenue
P.O. Box 2038
Greeley, Colorado 80631
(970) 475-2400</td><td>DATE FILED: August 29, 2016 7:24 AM

COURT USE ONLY</td></tr>
<tr><td>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; and the Marks Butte, 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.</td><td>Case Number: 15CW3018

Div. No. 1</td></tr>
<tr><td colspan="2">ORDER GRANTING THE COLORADO GROUND WATER COMMISSION'S MOTION TO DISMISS PLAINTIFF'S SECOND CLAIM FOR RELIEF AND A PORTION OF PLAINTIFF'S THIRD CLAIM FOR RELIEF</td></tr>
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This matter comes before the court for ruling on the Colorado Ground Water Commission's (Commission) motion to dismiss claims two and three of Jim Hutton Educational Foundation's (Plaintiff) complaint for declaratory relief for lack of subject matter jurisdiction. Plaintiff filed a response and the Commission filed a reply.

Plaintiff's second claim for relief seeks a ruling from this court that a portion of C.R.S. § 37-90-106(1)(a), as amended by the General Assembly in 2010 through enactment of Senate Bill 10-52 (SB-52), is unconstitutional as applied to Plaintiff's surface water rights. Plaintiff's constitutional challenge focuses on a provision found in the current version of the statute that prohibits the Commission from removing permitted wells from the boundaries of a designated ground water basin, even when a surface water right holder establishes that the ground water within the basin is tributary to surface water. This provision, according to Plaintiff, unconstitutionally removes a statutory remedy, i.e. the authority of the Commission to remove wells from a basin proven to be pumping tributary ground water, which was previously available to surface water users to protect their decreed rights.

Plaintiff's third claim for relief involves the interaction between the Colorado Groundwater Management Act of 1965 (Management Act) and Colorado's obligations under the Republican River Compact (Compact). Plaintiff asserts that the Management Act is unconstitutional if the State and Division Engineers (Engineers) decide, during the litigation of Plaintiff's first claim for relief, that the Engineers are prevented by the Management Act from administering designated

ground water to satisfy Colorado's obligations under the Compact. In addition, Plaintiff contends the Management Act is unconstitutional if the Commission later determines that it lacks authority to redraw the boundaries of a designated ground water basin to exclude wells depleting tributary ground water, which Plaintiff believes would cause Colorado to be non-compliant with its responsibilities under the Compact.

The court finds that Plaintiff's second claim is not ripe for ruling because Plaintiff's claim of injury is speculative. Plaintiff seeks to have the boundaries of the Northern High Plains Designated Ground Water Basin (NHP Basin) redrawn to exclude permitted wells operating within the Basin, which would then require those wells to operate within the priority system in place for surface water rights. However, Plaintiff has yet to prove that the water at issue is not designated ground water. To meet this burden, Plaintiff must prove to the satisfaction of the Commission, not this court, that water presently classified as designated ground water is hydraulically connected to surface water and that well pumping within the NHP Basin is having more than a *de minimis* impact on Plaintiff's surface water rights. *See Gallegos v. Colo. Ground Water Comm'n,* 147 P.3d 20, 31–32 (Colo. 2006). Under the Management Act, the Commission is vested with exclusive jurisdiction to decide whether the water involved in this controversy is designated ground water. *Meridian Serv. Metro. Dist. v. Colo. Ground Water Comm'n*, 361 P.3d 392, 396 (Colo. 2015). If the Commission determines that the water at issue is not designated ground water, but instead is ground water tributary to surface water,

then jurisdiction over the water would transfer to the water court. *Id.* If, however, the Commission concludes that the water is designated ground water, which it is currently presumed to be, Plaintiff's claim that C.R.S. § 37-90-106(1)(a) is unconstitutional is moot.

The court also concludes that the portion of Plaintiff's third claim relating to the Commission's lack of statutory authority to redraw the boundaries of the Basin, if Plaintiff subsequently proves that the ground water is hydraulically connected to surface water and that well pumping is causing injury, involves speculative injury to Plaintiff, too, for the same reasons articulated in the previous paragraph. The court finds that Plaintiff must first petition the Commission for a determination as to whether the water at issue is designated ground water before it may litigate this component of the third claim for relief in the district court.

As to Plaintiff's assertion that the Management Act is unconstitutional if the Engineers are precluded under the Act from administering ground water to meet Colorado's Compact obligations, the court concludes that this part of claim three is entwined 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 is properly before this court and will remain part of this action.

I. BACKGROUND

Plaintiff, a non-profit corporation, owns the Hutton Ranch, a sprawling four thousand acre ranch located in close proximity to the South Fork of the Republican

River in Yuma County, Colorado. Plaintiff holds decrees to four water rights to divert surface flow from the South Fork of the Republican River for irrigation use on the ranch:

(1) Two cubic feet per second (cfs) of water to the Tip Jack Ditch with an appropriation date of February 8, 1889, and a decree date of December 28, 1893;

(2) Twenty-three cfs diverted to the Hale Ditch with an appropriation date of January 17, 1908, and a decree date of September 8, 1939; and

(3) The Hutton No. 1 Ditch for 12.9 cfs and the Hutton No. 2 Ditch for 4.92 cfs of water with an appropriation date of July 5, 1954, and a decree date of May 24, 1978.

The water rights described above were historically used to flood irrigate native pasture grasses for cattle grazing on the ranch. Plaintiff presently leases its land and corresponding water rights to generate revenue to provide low interest loans to students pursuing nursing degrees.

In 1942,[1] the states of Colorado, Kansas, and Nebraska entered into the Compact to create mechanisms for the most efficient use of the waters in the Republican River basin and to establish an equitable division of said waters between the three states. C.R.S. §§ 37-67-101, -102. Pursuant to Article IV of the Compact, Colorado is allotted a total of 54,100 acre-feet of water annually from the

[1] The Republican River Compact became effective in 1943 when its provisions were consented to by the United States Congress. *See* C.R.S. § 37-67-102.

following four sources: (1) the North Fork of the Republican River drainage basin (10,000 acre-feet); (2) the Arikaree River drainage basin (15,400 acre-feet); (3) the South Fork of the Republican River drainage basin (25,400 acre-feet); and (4) the Beaver Creek drainage basin (3,300 acre-feet). C.R.S. § 37-67-101. In addition, Colorado is entitled to use the entire water supply of the portions of the Frenchman Creek and Red Willow Creek drainage basins located within Colorado. *Id.*

Very few ground water wells operated in the area surrounding the Hutton Ranch prior to 1965, and those then in existence involved withdrawals of relatively small quantities of water. In an attempt to maximize development and beneficial use of Colorado's water resources, and in recognition of the availability of potentially non-tributary ground water in certain areas of the state, the General Assembly enacted the Management Act in 1965.[2] The Management Act provides the mechanism for designating ground water basins, as well as establishing the policies and procedures for the use and permitting of wells and the preservation of ground water. C.R.S. §§ 37-90-102 to -111. The legislature created the Commission to facilitate the provisions of the Management Act. C.R.S. §§ 37-90-103(8), -104. The Commission consists of twelve members, comprised of ten voting members—nine persons appointed by the Governor, consisting of a mix of agriculturalists and persons representing municipal or industrial interests, and the Executive Director of the Colorado Department of Natural Resources—and the State Engineer and the

[2] The Management Act was originally found in article 18 of chapter 148, C.R.S., but is now located at C.R.S. §§ 37-90-101 to -143.

Director of the Colorado Water Conservation Board as two non-voting members. C.R.S. § 37-90-104(1), -(3), -(4).

In 1966, a petition was filed with the Commission to establish the NHP Basin. Notice of the petition was published in several newspapers serving the counties encompassing the area of the proposed basin, and a single entity—Pioneer Irrigation District—filed a protest. Eight individuals filed written statements in support of the petition. A hearing was held before the Commission on April 14, 1966, in Wray, Colorado, after which the Commission issued written findings of fact, conclusions of law, and a final order designating the NHP Basin. In its findings, the Commission determined that six geological formations holding water existed within the proposed boundaries of the NHP Basin: (1) the Ogallala-Alluvium formation; (2) the Chadron formation; (3) the Niobrara formation; (4) the Benton formation; (5) the Dakota formation; and (6) the Morrison formation. At the time of the designation hearing, the Commission estimated that 96,688,000 acre-feet of water was stored in the Ogallala-Alluvium formation. No estimates were made for the other five geological formations because the Commission determined that those formations did not produce sufficient quantities of water to be significant sources of ground water. The Commission concluded that the water in the Ogallala-Alluvium formation was ground water that in its natural course would not be available to and required for the fulfillment of decreed surface water rights, and therefore the water met the definition of designated ground water under C.R.S. §

148-18-2(3) (1963). The Commission established the NHP Basin boundaries to correspond with the boundaries of the six underlying geological formations.

As required by C.R.S. § 148-18-5(1)(g), the Commission projected the yearly ground water usage in the NHP Basin for the fifty-year period following designation using ten-year increments. The Commission projected that water use in the NHP Basin would steadily increase over time, with 1,035,000 acre-feet of water usage estimated for year ten (1975) and 3,706,000 acre-feet for year fifty (2015).

Plaintiff estimates that there are now more than four thousand wells removing ground water within the boundaries of the NHP Basin, which Plaintiff asserts has caused surface flows in the South Fork of the Republican River to decline considerably over time. This, in turn, has resulted in the State Engineer curtailing surface water usage in the Basin, including Plaintiff's water rights, to ensure that Colorado does not exceed the annual amount of water it is allocated under the Compact. Although the State Engineer curtails surface water use to meet Compact obligations, Plaintiff contends that no such restrictions are placed on designated ground water use within the NHP Basin.

Plaintiff filed a complaint for declaratory and injunctive relief in this action on the premise that certain actions and inactions by the named defendants have caused injury to Plaintiff's surface water rights. Within the complaint are three claims for declaratory relief: (1) a request for a finding by this court that the administration of water in the Republican River basin by the defendants, in electing to curtail only surface water use and not designated ground water withdrawals by

NHP Basin well users to meet Colorado's Compact obligations, is improper; (2) that SB-52 is unconstitutional as applied to the NHP Basin because surface water users no longer have the ability to petition the Commission to redraw the NHP Basin boundaries to exclude permitted well users from the NHP Basin upon a showing that ground water was improperly designated when the Basin was designated; and (3) the Management Act is unconstitutional if designated ground water cannot be administered by the State Engineer under the same framework as surface water to ensure Colorado's compliance with the Compact or, in the alternative, if the Commission is precluded by statute from redrawing the NHP Basin boundaries to remove well users that are withdrawing tributary ground water and injuring surface water rights.

II. ANALYSIS

In its motion to dismiss Plaintiff's second and third claims, the Commission argues that this court lacks subject matter jurisdiction because this court cannot grant the relief Plaintiff requests until the Commission first decides whether designated ground water is involved in this controversy. With regard to its second claim, Plaintiff counters that it is not seeking a determination from this court regarding the legal character of the water involved, i.e. whether the water removed by well operators within the NHP Basin is or is not designated ground water; instead, Plaintiff asserts that it is merely requesting a finding that if Plaintiff later pursues an action with the Commission to de-designate portions of the NHP Basin and establishes that the ground water is hydraulically connected to surface water

and well pumping is causing injury to Plaintiff's surface water rights, then the Commission must apply the pre-SB-52 statutory language and exclude any well found to be withdrawing tributary ground water from the boundaries of the NHP Basin. Plaintiff further argues that the Commission, as an administrative agency, lacks authority to decide constitutional challenges to SB-52 and the Management Act; therefore, jurisdiction over these claims is vested with the water court under either its exclusive jurisdiction or ancillary jurisdiction over water matters.

To resolve the subject matter jurisdiction question raised by the Commission, the court must decide whether Plaintiff's constitutional challenges are ripe for ruling in this declaratory judgment action. This analysis necessarily includes consideration of the statutory authority delegated to the Commission under the Management Act and that which is assigned to the water courts under the Water Right Determination and Administrative Act of 1969 (1969 Act).

Plaintiff acknowledges that the Commission determined in 1966 that the water within the boundaries of the NHP Basin is designated ground water. Plaintiff also concedes that the decision as to whether the water in question continues to meet the definition of designated ground water must be made by the Commission, based on factual data obtained after designation of the Basin, and not the water court. *See* C.R.S. § 37-90-106(1)(a). Nevertheless, Plaintiff believes its claim that SB-52 is unconstitutional is a "water matter" under the 1969 Act, regardless of whether the water at issue is designated ground water, and thus falls under the water court's jurisdiction. The court disagrees.

The General Assembly, in the 1969 Act, assigned to the water court exclusive jurisdiction over water matters arising within its division. C.R.S. § 37-92-203(1). A "water matter" under the 1969 Act includes not only all water in or tributary to a natural stream, C.R.S. § 37-92-102(1)(b), but also all non-tributary ground water located outside of a designated ground water basin. C.R.S. § 37-92-203(1). Designated ground water, however, is excluded from the definition of "waters of the state" in the 1969 Act, C.R.S. § 37-92-103(13), and therefore must be administered through the Management Act. The General Assembly, when enacting the Management Act, conferred exclusive authority to the Commission to "supervise and control the exercise and administration of all rights acquired to the use of designated groundwater." C.R.S. § 37-90-111(1)(a). Thus, the legislature has clearly established one procedural framework for the appropriation and administration of designated ground water under the Management Act, with authority delegated to the Commission, while creating a separate system in the water courts for the appropriation and administration of all other types of waters of the state under the 1969 Act. *State ex rel. Danielson v. Vickroy,* 627 P.2d 752, 757–58 (Colo. 1981).

Pursuant to the Management Act, the Commission, and not the water court, is tasked with the authority to make the initial determination as to whether the controversy involves designated ground water. *Meridian*, 361 P.3d at 396; *Pioneer Irrigation Dists. v. Danielson,* 658 P.2d 842, 846 (Colo. 1983) (interpreting *Vickroy* to hold that the Commission must make the initial factual determination whether wells operating within the boundaries of a designated ground water basin are

pumping designated ground water or waters of the state). Jurisdiction only shifts to the water court if the Commission determines that designated ground water is not involved in the controversy. *Id.* Because the Commission established the NHP Basin in 1966, a presumption exists that the ground water within the boundaries of the Basin is designated ground water, and Plaintiff has the burden of overcoming this presumption. *See Vickroy,* 627 P.2d at 759 ("[A]fter creation of a designated ground water basin[,] the proponent of the proposition that certain ground water within the basin is not designated ground water has the burden of proving that proposition.").

With the clear understanding in place that the Commission, and not this court, must decide whether the water at issue is designated ground water or water subject to the 1969 Act, the court now turns to the question of whether Plaintiff's constitutional challenges to SB-52 are ripe for ruling.

As the backdrop to Plaintiff's claims, prior to the passage of SB-52 in 2010, C.R.S. § 37-90-106(1)(a) provided that the boundaries of a designated ground water basin could be altered, after initial designation, "as future conditions require and factual data justify." The Colorado Supreme Court, when interpreting the pre-SB-52 version of C.R.S. § 37-90-106(1)(a), determined that the General Assembly "anticipated that a designated ground water basin could include ground water that does not properly fall within the definition of designated ground water." *Gallegos,* 147 P.3d at 31. The Supreme Court further held that to obtain relief from the Commission, the surface water right holder "must prove that the pumping of then-

designated ground water has more than a *de minimis* impact on their surface water rights and is causing injury to those rights." *Id.* If the surface water user made such a showing, the Supreme Court ruled that the Commission was required to redraw the basin boundaries to exclude the surface water rights and wells removing designated ground water that was shown to more properly fall within the definition of ground water under the 1969 Act. *Id.* The Court stressed, however, that it was improper for the Commission and the plaintiff in *Gallegos* to "jump[ ] straight to the issue of what the relief would be if the asserted injury were true" prior to the plaintiff making a factual showing to the Commission that ground water within the designated basin was hydrologically connected and causing injury to the plaintiff's surface rights. *Id.* at 32.

In response to the *Gallegos* decision, the General Assembly enacted SB-52 and, when doing so, stated that the legislature was merely clarifying and reaffirming the General Assembly's original intent that the boundaries of a designated ground water basin may only be altered upon a showing of sufficient factual data justifying the redrawing of the basin's boundaries, but that the boundaries may not be altered in such a way as to exclude any existing permitted well operating within the basin. Plaintiff argues that the 2010 revisions to the statute, whereby surface water users no longer have the ability to seek exclusion of permitted wells from the designated basin boundaries, is unconstitutional when applied to designated ground water basins created prior to the enactment of SB-52.

The constitutionality of legislation may be challenged in two ways. A plaintiff may make an "as-applied" challenge, as raised by Plaintiff here, which alleges the statute is unconstitutional under specific circumstances in which the plaintiff has acted or proposes to act in the future, but does not render the statute completely inoperable, or a plaintiff may raise a facial challenge to the statute, meaning that there are no circumstances under which the statute can be applied constitutionally. *Sanger v. Dennis,* 148 P.3d 404, 410–11 (Colo. App. 2006). A statute found to be facially unconstitutional renders the statute utterly inoperable.

A complaint for declaratory judgment is remedial in nature and by design is intended to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . . ." C.R.S. § 13-51-102; *see also* C.R.C.P. 57(a) (District courts have the power to declare rights, status, and other legal relations.). Although courts are to liberally construe the provisions of the Uniform Declaratory Judgments Law, C.R.S. § 13-51-102, a plaintiff must nevertheless assert "present and cognizable rights" to satisfy the ripeness doctrine. *Cacioppo v. Eagle Cnty. Sch. Dist. Re-50J*, 92 P.3d 453, 467 (Colo. 2004). The existence of cognizable rights is necessary because a declaratory judgment action "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Farmers Ins. Exch. v. Dist. Court,* 862 P.2d 944, 947 (Colo. 1993) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242, 57 S. Ct. 461, 465, 81 L. Ed. 617 (1937)). A complaint for declaratory relief asserting a constitutional challenge to a statute must present a justiciable issue and be ripe for

ruling. *Cacioppo,* 92 P.3d at 467; *see also Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445, 108 S. Ct. 1319, 1323, 99 L. Ed 2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

Plaintiff discusses extensively in its response to the motion to dismiss the reasons why it believes the constitutionality of SB-52 must be decided by the water court before Plaintiff files a petition to de-designate the NHP Basin with the Commission. However, all of Plaintiff's arguments are premised on its supposition that when it eventually files a petition for de-designation of portions of the Basin with the Commission, it will successfully prove that the water withdrawn by well users in the NHP Basin is not designated ground water and that the withdrawals are causing injury to Plaintiff's surface water rights. The possibility of a future claim does not suffice. *Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co.,* 105 P.3d 653, 656 (Colo. 2005) ("The mere possibility of a future claim is not an appropriate predicate for the exercise of judicial power."). Even if this court were to assume that the question will be presented to the Commission at a later time, it is not appropriate for this court to enter declaratory judgment on what presently is a non-existent issue. *Am. Civil Liberties Union of Colo. v. Whitman*, 159 P.3d 707, 709 (Colo. App. 2006) ("Declaratory judgment proceedings may not be invoked to obtain advisory opinions or resolve nonexistent questions, even where it may be assumed that the question may arise at some future time.").

Plaintiff, through its second claim for relief, attempts to jump to the question of what relief it would be entitled to receive from the Commission before it makes a factual showing to the Commission of hydrological connection and injury to its surface water rights. This is the same procedural path attempted by the parties in *Gallegos*, and it was made clear by the Supreme Court that the question of whether designated ground water is involved in the controversy must be decided prior to litigating the form of relief.

The court concludes that Plaintiff's constitutional challenge to SB-52 is not presently ripe for ruling and will only present an actual controversy in this action if Plaintiff successfully proves to the Commission that water within the NHP Basin is not designated ground water. If Plaintiff fails to carry its burden before the Commission, the legal character of the water remains as designated ground water, which this court has no jurisdiction over, and Plaintiff's constitutional challenge to SB-52 is moot.

Plaintiff's third claim for relief raises, in part, a constitutional challenge to the provisions of the Management Act prohibiting the Commission from redrawing the boundaries of the designated ground water basin to exclude permitted well users from the boundaries of the basin should it later be proven that the well operators are withdrawing tributary ground water and causing injury to surface water users. Once again, Plaintiff's standing to raise this constitutionality claim arises only if the Commission first determines that designated ground water is not involved in this controversy.

III. CONCLUSION AND ORDER OF THE COURT

The Commission, and not the water court, has exclusive jurisdiction over the question of whether designated ground water is involved in this controversy. Thus, Plaintiff's ability to challenge the constitutionality of the current version of C.R.S. § 37-90-106(1)(a), as amended by SB-52, depends entirely on a decision by the Commission that water removed by permitted well owners in the NHP Basin is not designated ground water and that the withdrawals are injuring Plaintiff's water rights. If the Commission finds that the water within the boundaries of the Basin continues to meet the definition of designated ground water, Plaintiff's constitutional challenges to SB-52 become moot. The same rationale applies to the portion of Plaintiff's third claim for relief raising a constitutional challenge to the provisions of the Management Act that prevent the Commission from redrawing the NHP Basin boundaries.

Based on the forgoing, the court grants the Commission's motion to dismiss Plaintiff's second claim for relief raising a constitutional challenge to SB-52. The court also dismisses the portion of Plaintiff's third claim for relief asserting a constitutional challenge to the provisions of the Management Act that prohibit the Commission from redrawing the boundaries of a designated ground water basin to exclude permitted wells.

Dated: August 29, 2016.

BY THE COURT:

James F. Hartmann
Water Judge, Water Division 1