

Appendix 2

<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: January 10, 2017 10:33 AM CLASSIFICATION: 2017SA5 CASE NUMBER: 2017SA5</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: 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>Case Number: 15CW3018</p> <p>Div. No. 1</p>
<p>CERTIFICATION OF CLAIM TWO AS A FINAL JUDGMENT PURSUANT TO C.R.C.P. 54(b), AND ORDER GRANTING CERTAIN DEFENDANTS’ MOTION TO STAY THE PROCEEDINGS ON PLAINTIFF’S FIRST AND THIRD CLAIMS FOR RELIEF PENDING RESOLUTION OF THE APPEAL ON CLAIM TWO</p>	

This matter comes before the court on the motion of the Jim Hutton Educational Foundation (Plaintiff) for certification of the court's order dismissing claim two of Plaintiff's complaint as a final judgment under C.R.C.P. 54(b). Several defendants filed a response opposing Plaintiff's request for final certification, arguing that there is no just reason for certifying the order dismissing claim two as a final judgment. The Yuma County Water Authority Public Improvement District, on behalf of itself and numerous other defendants, filed a motion to stay the proceedings on claims one and three, should the court grant Plaintiff's motion to certify claim two as a final judgment. Many other defendants filed notices of joinder to the motion to stay the proceedings pending resolution of an appeal on claim two. The court will refer to the defendants requesting a stay of the proceedings collectively as "Defendants" in this order.

After considering the relief requested by Plaintiff and Defendants in their respective motions, and the contents of the file, the court enters the following findings and conclusions.

Plaintiff owns four surface water rights in the Republican River basin which it uses to irrigate a large ranch in eastern Colorado. Plaintiff's ranch is situated over the Northern High Plains Designated Groundwater Basin (NHP Basin). Plaintiff estimates that there are approximately four thousand wells in the NHP Basin withdrawing vast quantities of ground water, which, according to Plaintiff, has significantly diminished the amount of surface water because the ground water and surface water are hydraulically connected in this area. Plaintiff asserts that many of the ground water appropriators' wells were permitted and began operating after Plaintiff received its water rights decrees. Although Plaintiff's water rights are senior to these ground water appropriators' rights, Plaintiff contends the state and division engineers have been curtailing only the senior surface water rights to meet Colorado's Republican River Compact obligations to deliver water to Nebraska and Kansas, rather than first curbing the junior rights of the ground water appropriators.

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 water rights. The complaint contains three claims for relief, which can be summarized as: (1) the administration of water in the Republican River basin by the defendants is unlawful; (2) Senate Bill 52 ("SB-52") is unconstitutional as applied to the NHP Basin; and (3) the Colorado Groundwater Act is unconstitutional if designated ground water cannot be administered by the state and division engineers under the same framework as surface water to ensure compliance with the Republican River Compact.

With regard to its second claim, Plaintiff is requesting a ruling from this court that SB-52 is unconstitutional because the Colorado Groundwater Commission no longer has the authority, under C.R.S. § 37-90-106(1)(a), to adjust the boundaries of the NHP Basin to exclude wells that are removing tributary ground water from the Basin. On August 29, 2016, this court entered an order granting the Colorado Ground Water Commission's motion to dismiss Plaintiff's second claim for relief. The court held that Plaintiff's constitutional challenge to SB-52 was not ripe for ruling by the water court because, under the Colorado Groundwater Act, Plaintiff must first seek a determination by the Colorado Groundwater Commission that the water in the NHP Basin no longer meets the definition of designated ground water. Plaintiff now seeks an order from this court certifying the order dismissing its second claim as a final judgment, pursuant to C.R.C.P. 54(b), to allow Plaintiff to pursue an appeal of that ruling to the Colorado Supreme Court.

As the parties correctly note in their pleadings, three requirements must met before the trial court is authorized to certify as a final judgment an order resolving less than all of the claims filed in a case. First, the decision must consist of a ruling upon the entire claim for relief. *Cherry Creek Valley Water and Sanitation Dist. v. Greeley Irrigation Co.*, 348 P.3d 434, 439 (Colo. 2015). Second, the decision must be final in the sense of an ultimate disposition of the claim. *Id.* And finally, the trial court must find that there is no just reason to delay entry of final judgment on the claim. *Id.*

Here, the court dismissed Plaintiff's second claim for relief in its entirety—not based on the merits of Plaintiff's constitutional challenge, but instead because the court found Plaintiff's constitutionality claim was not ripe for ruling. Plaintiff has not yet proven to the Colorado Groundwater Commission that the water at issue no longer meets the criteria for designated ground water; therefore, Plaintiff's contention that it will be harmed if the Groundwater Commission cannot, pursuant to the provisions of SB-52, alter the NHP Basin boundaries to remove wells that are withdrawing tributary groundwater is premature.

Plaintiff seeks to resolve these issues in a different fashion by first litigating the constitutionality of SB-52 before this court, and thereafter it plans to file a petition with the Colorado Groundwater Commission to de-designate portions of the NHP Basin, in an attempt to remove wells operating in the Basin. The court's order dismissing Plaintiff's second claim is a ruling encompassing Plaintiff's second claim entirely and precludes Plaintiff from litigating the constitutionality of SB-52 in the present case, and therefore the first two prerequisites for certifying a final judgment have been satisfied.

There are times when certifying a ruling that resolves less than all of the claims filed in the case will result in "piecemeal" litigation of the claims, and thus, to avoid such a result, the court may elect to not certify the ruling as a final judgment. Plaintiff's claims differ significantly from most cases, however, because Plaintiff concedes that at some point in time it will be required to petition the Colorado Groundwater Commission if it seeks to have the boundaries of the NHP Basin redrawn. The parties also recognize that this court, and not the Groundwater Commission, has jurisdiction over those of Plaintiff's claims pertaining to the state and division engineers' administration of surface water rights. Thus, it is very possible, perhaps even likely, that certain of Plaintiff's claims will be litigated before this court and others will be decided by the Colorado Groundwater Commission, due to jurisdictional requirements and limitations. Therefore, certifying the order dismissing Plaintiff's claim two will not result in piecemeal litigation that would otherwise be avoided if the court opted not to certify the order

as a final judgment. The parties have presented no justifiable reasons why the court should delay entering final judgment on claim two.

Although Plaintiff's claims will likely be litigated in two forums, the court nevertheless finds good cause exists to stay the proceedings on claims one and three in the present case. Based on the opinion of the Colorado Supreme Court on the appeal of Plaintiff's second claim for relief, the parties may decide to litigate the claims simultaneously or in one forum before the other.

Based on the foregoing, IT IS HEREBY ORDERED:

1. Plaintiff's motion to certify the August 29, 2016 Order dismissing Plaintiff's second claim for relief as a final judgment, pursuant to C.R.C.P. 54(b), is granted.
2. Defendant's motion to stay the proceedings on Plaintiff's first and third claims for relief until the Colorado Supreme Court issues a mandate on the appeal of the order dismissing Plaintiff's second claim for relief, is granted.
3. The court is not vacating the telephone status conference scheduled for January 9, 2017 at 8:30 a.m. The court will discuss with the parties during that status conference whether the trial should be vacated, as well as scheduling other future events.

Dated this 7th day of December, 2016.

BY THE COURT:


James F. Hartmann
Water Judge, Water Division One