

DISTRICT COURT, WATER DIVISION NO. 1,
STATE OF COLORADO

Weld County Courthouse
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DATE FILED: October 4, 2016 11:46 AM

COURT USE ONLY

Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation,

v.

Defendants: Dick Wolfe, in his capacity as the Colorado State Engineer; David Nettles, in his capacity as Division Engineer in and for Water Division No. 1, State of Colorado; Colorado Division of Water Resources; and Colorado Division of Parks and Wildlife.

Defendant-Intervenors: Yuma County Water Authority Public Improvement District; Colorado Ground Water Commission; 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.

Case Number: 15CW3018

Div. No. 1

**ORDER DENYING PLAINTIFF’S MOTIONS FOR SUMMARY JUDGMENT,
COLORADO PARKS AND WILDLIFE’S MOTION FOR SUMMARY JUDGMENT,
AND DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT ON
PLAINTIFF’S FIRST CLAIM FOR RELIEF**

The Jim Hutton Educational Foundation (Plaintiff), a non-profit corporation, owns the Hutton Ranch, which is 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) A one-third interest in 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.

Plaintiff filed a complaint in this action for declaratory relief against several state agencies. Although Plaintiff's complaint contains three claims for relief, this order pertains only to Plaintiff's first claim for relief in which Plaintiff seeks three rulings from this court. First, Plaintiff requests a declaration that the current

administration of surface water rights by the State and Division Engineers (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 in an effort to comply with Colorado's obligations under the Republican River Compact (Compact). According to Plaintiff, the Engineers have disregarded C.R.S. § 37-80-104, which requires the Engineers, when curtailing diversions to meet Colorado's Compact obligations, to 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. 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 water in Bonny Reservoir, as well as the land surrounding and underlying the reservoir, violate two contracts entered into between the United States and the State of Colorado, resulting in injury to Plaintiff as a beneficiary to both agreements. Plaintiff refers to these two 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 exacerbated injury to Plaintiff's Hale Ditch water right, in violation of each contract, 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 previously the reservoir floor are intercepting surface flow of the South Fork of the Republican River, thereby reducing the amount of water available for diversion under Plaintiff's Hale Ditch right.

Four separate motions seeking summary judgment on claim one, including two filed by Plaintiff, were filed. In its motion on the Compact administration portion of claim one, Plaintiff argues that it is unlawful for the Engineers to curtail only surface water use and not ground water use to aide in Compact compliance because both surface water and ground water usage must acquiesce to the Compact when water is needed to satisfy Colorado's Compact obligation. The Engineers counter that genuine issues of material fact preclude summary judgment for Plaintiff because the Engineers will present evidence at trial showing that, by administering surface water and ground water independently within the frameworks of their respective legal regimes, the Engineers are able to ensure Compact compliance in a legal and equitable manner, as required by C.R.S. § 37-80-104. Several water users in the Northern High Plains Basin (NHP), as well as

public and private entities operating in the NHP (collectively Private Defendants) point out that neither the Compact nor Colorado law requires the Engineers to administer surface water and ground water in the same manner.

In its summary judgment motion on the Bonny Reservoir portion of claim one, Plaintiff contends that the State Defendants unlawfully operate Bonny Reservoir in a manner that injures Plaintiff's Hale Ditch water right. Alternatively, Plaintiff seeks determination of a question of law, in the event the court finds summary judgment is not warranted, regarding whether the operation of Bonny Reservoir injuriously impacts Plaintiff's Hale Ditch water right. CPW counters that genuine issues of material fact exist as to whether the agency's use of the conservation capacity of the reservoir injures Plaintiff's water right. In addition, CPW argues that the agency is not obligated, under either contract with the United States, to protect or avoid interference or injury to the Plaintiff's water right. The Engineers contend that Plaintiff failed to assert a claim against the Engineers that entitles Plaintiff to relief because: (1) the Engineers neither operate Bonny Reservoir nor own the storage water right; (2) the Engineers are not required to curtail a junior water right if such curtailment does not actually yield additional water to a senior calling water right; (3) the Engineers are not a party to the Land Contract or Water Contract; and (4) the Engineers are properly administering the terms of the water right decree for the Bonny Reservoir.

CPW argues in its motion for summary judgment that it is entitled to a ruling that Plaintiff is not a third-party beneficiary to the Water Contract and Land

Contract. Moreover, even if the court finds that Plaintiff is a third-party beneficiary, CPW argues that its management of Bonny Reservoir is in accordance with the Water Contract and Land Contract and no injury to Plaintiff's water rights occurred. In response, Plaintiff contends that C.R.S. § 37-87-101(1)(a) precludes the State Defendants, including CPW, from operating a water storage facility in a manner that materially injures the Hale Ditch water right or the ditch right-of-way. In the alternative, Plaintiff asserts it is an intended third-party beneficiary of the Land Contract and Water Contract, enabling it to enforce contract provisions that protect its Hale Ditch water right. Plaintiff asserts CPW has not complied with the Land Contract and Water Contract.

The Private Defendants request partial summary judgment on claim one regarding the challenge Plaintiff raises to the Engineers' administrative, discretionary decisions to curtail only surface water use to meet Colorado's compact obligations. Private Defendants argue that no mandatory legal requirement exists for treating surface water and ground water equally when it comes to curtailing use for Compact compliance. Plaintiff disagrees, contending that the true issue at hand concerns the limitations imposed by law on the administration of water for compliance on a Compact that is largely silent on such matters.

After reviewing the pleadings, the court finds that genuine issues of material fact exist regarding the Engineers' current administration of surface water and ground water for Compact compliance, which necessarily includes curtailment decisions made by the Engineers and the draining of Bonny Reservoir. Genuine

issues of material fact also exist regarding CPW's management of the land surrounding and beneath Bonny Reservoir, and whether those decisions caused injury to Plaintiff's Hale Ditch water right. The court finds that the question of whether CPW's Bonny Reservoir management decisions caused injury to Plaintiff's water rights exists, based on the provisions of C.R.S. § 37-87-101(1)(a), irrespective of whether Plaintiff is a third-party beneficiary of the contracts with the United States. Therefore, summary judgment is not appropriate on any of the four motions for summary judgment on Plaintiffs' first claim for relief.

I. LEGAL STANDARD

Under C.R.C.P. Rule 56(c), summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 360 (Colo. 1994); *City of Westminster v. Church*, 445 P.2d 52, 59 (Colo. 1968). The moving party must demonstrate the absence of a triable factual issue, and any doubts as to the existence of such an issue must be resolved against that party. *Greenberg v. Perkins*, 845 P.2d 530, 531 (Colo. 1993); *Elm Distribs., Inc. v. Tri-Centennial Corp.*, 768 P.2d 215, 218 (Colo. 1989). In determining whether summary judgment is proper, the trial court must resolve all doubts as to whether an issue of fact exists against the moving party. *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981); *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998).

Where the court is presented with cross-motions for summary judgment, neither party's burden is diminished, and the court must consider both motions to determine whether a dispute of material fact exists with regard to either motion. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1340 (Colo. 1988). Where affidavits show conflict, there is a genuine issue of material fact which should be determined by a fact-finding body after both parties have presented evidence in support of their respective positions. *McKinley Constr. Co. v. Dozier*, 487 P.2d 1335, 1337 (Colo. 1971). "Even if it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate." *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997).

II. ANALYSIS

Plaintiff alleges that it has not received its full entitlement of water under its decreed rights due to decisions, acts, and the failure to act by several Colorado state agencies. Because the decisions by the state agencies are driven by Colorado's Compact obligations, the court will begin with a brief discussion of the history of the Compact and its impact on Colorado water users. The court will then turn to the administrative actions taken by the Engineers to meet Colorado's Compact obligations, presently challenged by Plaintiff as being unlawful, including decisions to curtail water use and the draining of Bonny Reservoir. The court will then consider Plaintiff's claims that CPW's management of the land surrounding and beneath Bonny Reservoir has caused injury to Plaintiff's water rights. Central to

the court's review, of course, will be ascertaining whether any genuine disputes of material fact exist, thus preventing the court from entering summary judgment.

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 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.*

Shortly after Colorado entered into the Compact, the United States Congress, as part of the Flood Control Act of 1944, authorized construction of Bonny Reservoir along the South Fork of the Republican River. Work began on the reservoir in 1948 and construction was completed in 1951. The reservoir is operated by the United States Bureau of Reclamation (United States).

Bonny Reservoir was designed as an on-channel reservoir. To enable the reservoir to fill, a dam was built across the channels of the South Fork of 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.

Republican River and the Hale Ditch, upstream of the Hutton Ranch. The original diversion point for the Hale Ditch was consumed by water after Bonny Reservoir filled, so an outlet structure was incorporated into the dam works to release water to the Hale Ditch downstream of the original diversion point.

The United States filed an application in Water Division One for water rights associated with Bonny Reservoir in 1977 in Case No. W-9135-77. In a ruling issued by this court in 1984, the United States was granted a decree for 351,460 acre-feet of water storage in Bonny Reservoir for use in flood control, irrigation of 750 acres, recreation, and fish and wildlife propagation. The priority date for this water right is December 3, 1948, which was the date construction of Bonny Reservoir commenced. Because Bonny Reservoir operates under Colorado's surface water priority system, the decree requires that water entering the reservoir outside of the priority system be released from the reservoir to the nearest available natural watercourse through draining, pumping, or other means. Plaintiff's Hale Ditch water right is senior in priority to the United States' Bonny Reservoir storage water right.

In 1982, the Colorado Department of Natural Resources (CDNR) entered into a contract (Water Contract) with the United States for the right to use the conservation capacity of the reservoir for recreational, fish, and wildlife purposes, with an incidental use for CDNR's irrigation needs. Section 5 of the Water Contract specifies that the State of Colorado must comply with all natural flow rights for the

Hale Ditch with the State Engineer shouldering the responsibility of measuring and releasing water from the reservoir to satisfy the Hale Ditch water rights.

The United States and CDNR signed a memorandum of understanding and lease in 2002 (Land Contract), whereby the CDNR was granted authority to manage the lands surrounding and beneath Bonny Reservoir, as part of Colorado's use of Bonny Reservoir for recreation, fish, and wildlife purposes under the 1982 Water Contract. Pursuant to the provisions of the Land Contract, CDNR must comply with all state and federal laws regarding eradication of noxious or undesirable plant species.

Bonny Reservoir was filled at or near its water holding capacity for many years. Plaintiff asserts that a yearly average of 2,648 acre-feet of water was released from Bonny Reservoir to the Hale Ditch between 1951 and 2001, which were years when the reservoir contained ample amounts of water. Beginning in 2007, the Engineers ordered the release of large amounts of water from Bonny Reservoir to meet Colorado's Compact obligations. Regular water releases for Compact compliance continued between 2007 and 2011 at the Engineers' direction. In 2011, the Engineers issued an order for all remaining water to be released from Bonny Reservoir. Other than a few isolated instances when the Engineers have allowed water to be temporarily stored in Bonny Reservoir, the reservoir has essentially been empty since 2012.

The State Engineer is charged with ensuring that Colorado complies with its Compact obligations through water deliveries to Nebraska and Kansas. C.R.S. § 37-

80-104. The State Engineer is not only tasked with the responsibility of enforcing the existing regulations written in the Compact, but he must also promulgate state administrative regulations when the Compact “is deficient in establishing standards for administration within Colorado” to meet Colorado’s Compact obligations. *Id.* When promulgating regulations for the curtailment of water to meet Compact commitments, the State Engineer must ensure that the rules are “legal and equitable” to all water users and, to the extent possible, restore the lawful use conditions in existence prior to the effective date of the Compact. *Id.*

In order to meet Colorado’s Compact water delivery obligations, the Engineers placed an administrative call on surface water use in the Republican River Basin for rights decreed after the date the Compact was ratified. The Engineers have not, according to Plaintiff, curtailed well pumping in the Northern High Plains Designated Groundwater Basin to satisfy Compact obligations. The Engineers also ordered the release of all water stored in Bonny Reservoir in 2011, and the released water was delivered to the other Compact states.

Disputed issues of material fact exist as to whether the Engineers’ administrative decisions regarding the means used to deliver water to Kansas and Nebraska under the Compact were arbitrary and capricious, inequitable, or otherwise violated state or federal law. Indeed, it cannot be questioned that Colorado water appropriators, regardless of whether the water is derived through surface water diversions or designated groundwater withdrawals, are subject to Colorado’s Compact obligations. *See Hinderlider v. La Plata River & Cherry Creek*

Ditch Co., 304 U.S. 92, 101–02, 58 S.Ct. 803, 807, 82 L.Ed. 1202 (1938) (holding that Colorado water users are bound by compact obligations). Moreover, the Engineers, when delivering water under the Compact, must also adhere to Colorado constitutional and statutory water laws whenever possible. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 69 (Colo. 2003). As pointed out by the Engineers, the Engineers must rescind a call placed on a junior water user if the call does not result in water becoming available to the senior water right. C.R.S. § 37-92-502(2)(a). This is often referred to as a “futile call.” As relevant here, whether placing a call on other water users, including wells operating in the NHP, would be futile involves the determination at trial of disputed facts, and thus, summary judgment cannot be granted on that basis alone.

With regard to Plaintiff’s claims that the Engineers’ administration of the Bonny Reservoir storage right has caused injury to Plaintiff’s Hale Ditch right, genuine questions of material fact exist as to whether the stream conditions Plaintiff enjoyed prior to construction of the reservoir have been changed as a result of the Engineers’ recent water administration decisions. For example, the parties disagree about the amount of water that is available for diversion by Plaintiff at the Hale Ditch outlet on the dam. The Engineers assert Plaintiff is able to take the entire flow of the South Fork of the Republican River existing at that location. Plaintiff counters that significant amounts of water seep under the dam and enter the stream below the Hale Ditch outlet, which Plaintiff attributes to the Engineers’ management of the reservoir footprint. Plaintiff points to the lack of a discernable

stream channel in the reservoir footprint, which results in water from the South Fork of the Republican River radiating over the entire reservoir base. According to Plaintiff, the spread of water behind the dam causes both an increase in the amount of water lost to seepage under the dam and an expansion of the area in which plants intercept stream flow, thereby diminishing the amount of water available for diversion to the Hale Ditch.

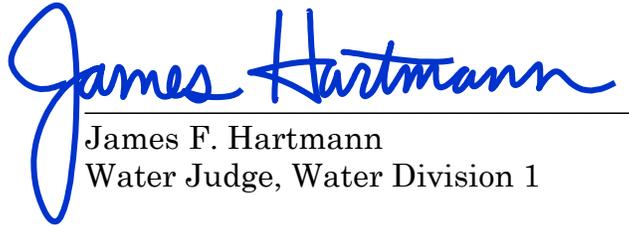
A question of material fact also exists regarding CPW's management of the land under the reservoir and in particular whether the decision by CPW to allow extensive vegetative growth in the reservoir footprint has led to a reduction in the amount of water available to the Hale Ditch, thereby causing injury to Plaintiff's water right. Although CPW places great emphasis on the question of whether Plaintiff is a third party beneficiary to the Land Contract and Water Contract, the court finds instead that the relevant inquiry is whether CPW's management of the Bonny Reservoir footprint has caused injury to Plaintiff's water rights under C.R.S. § 37-87-101(1)(a). Even though water has not been stored in Bonny Reservoir since 2012, the reservoir structure nevertheless remains a "water storage facility," as contemplated by C.R.S. § 37-87-101(1), because, theoretically, the Engineers could permit the United States to store its water right in the reservoir in future years. With regard to the "operation" of the empty reservoir, the information received by the court in conjunction with the motions for summary judgment points to CPW, and not the United States, as the agency that has made the decisions regarding management of the vegetation in the reservoir footprint since 2012.

III. ORDER OF THE COURT

Based on the forgoing, the court denies all four motions for summary judgment.

Dated: October 4, 2016

BY THE COURT:


James F. Hartmann
Water Judge, Water Division 1