

River Water Conservation District, Thomas R. May, and Tri-State Generation and Transmission Assoc., Inc. (collectively “Defendants”).

Pursuant to C.R.C.P. 121-1-15(8), counsel for YCWA has conferred with counsel of Plaintiff, The Jim Hutton Educational Foundation (the “Foundation”), concerning the relief requested in this motion and the Plaintiff opposes the motion.

INTRODUCTION

As detailed in Defendants’ response to Plaintiff’s September 28, 2016, Motion for Certification of Final Judgment Pursuant to C.R.C.P. 54(b) (“Defendant’s Response”), Defendants oppose Plaintiff’s request to certify for appeal its Second Claim for Relief. In its Motion, Plaintiff seeks an order allowing it to appeal the Court’s decision in its August 29, 2016 Order that Plaintiff’s Second Claim was not ripe and it did not have jurisdiction to consider the merits of this claim prior to a determination by the Groundwater Commission about whether or not the groundwater at issue is properly classified as designated groundwater in the Northern High Plains Designated Groundwater Basin (“NHP Basin” or “Basin”). However, Plaintiff also seeks to appeal the merits of its claim that SB-52 is unconstitutional. As described in the Defendant’s Response, the Rule 54(b) motion should be denied.

In the event that the Court grants Plaintiff’s Motion, Defendants request a stay of all claims currently pending before the Court until the resolution of Plaintiff’s appeal. A stay is appropriate in this case because Plaintiff’s dismissed claims, including Plaintiff’s Second Claim which is the subject of its Rule 54(b) Motion, are entwined with Plaintiff’s pending claims, which include the First Claim and a portion of the Third Claim for Relief.

Central to these pending claims is the question of whether it is appropriate for the State Engineer to regulate surface water and designated groundwater resources separately, through the administrative provisions of the Water Right Determination and Administration Act of 1969 (“the 1969 Act”) for surface rights and through the Colorado Groundwater Act (“the 1965 Act”) for designated groundwater. A decision by the Colorado Supreme Court regarding the merits of Plaintiff’s Second Claim will necessarily impact a decision on the claims pending in this Court because it bears on whether designated groundwater and surface water resources are properly administered separately, or whether they should be administered together by the State Engineer as alleged by Plaintiff.

Because of the interconnection between Plaintiff’s dismissed and pending claims, a stay pending appeal will not prejudice any party. Rather, but it will allow the parties to avoid not only multiple lawsuits, thus conserving their resources and those of the Court, but also potentially inconsistent judgments. Accordingly, Plaintiff’s pending claims should be stayed pending resolution of any appeal authorized by the Court under Rule 54(b).

STANDARD OF REVIEW

The trial court has discretion to stay proceedings pending an interlocutory appeal. *Christel v. E.B. Engineering*, 116 P.3d 1267 (Colo. Ct. App. 2005). Generally, a stay is appropriate when the moving party demonstrates that it will suffer prejudice that exceeds potential harm to the parties if the stay is not granted. *See United States v. Colo. State Eng’r et al.*, 101 P.3d 1072 (Colo. 2004).

PROCEDURAL BACKGROUND

On August 29, 2016, the Court entered its 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 ("Dismissal Order").

Plaintiff's Second Claim for Relief is a constitutional challenge to Senate Bill 52 ("SB 52"). Plaintiff alleges that SB-52 is unconstitutional as applied to Plaintiff's surface water rights because SB-52 prevents the Colorado Ground Water Commission ("Commission") from changing the status of vested designated basin wells following a hearing under C.R.S. § 37-90-106. . See Complaint at ¶¶94-107.

In its Dismissal Order, the Court dismissed the Second Claim for Relief on grounds of ripeness and lack of jurisdiction. Dismissal Order at 16-17. The Court determined that the claims were premature and not justiciable because Plaintiff has not yet demonstrated to the Commission that any wells in the NHP Basin are not designated groundwater. See Dismissal Order at 15-17.

On September 28, 2016, Plaintiff filed its Motion for Certification of Final Judgment Pursuant to C.R.C.P. 54(b), requesting certification of its Second Claim for Relief for appeal.

The issues that currently remain for trial are: (a) Plaintiff's First Claim for Relief, seeking declaratory and injunctive relief regarding the administration of water in the Basin to meet Compact obligations and concerning administration and operation of Bonny Reservoir that may affect Plaintiff's surface water rights; and (b) the portion of Plaintiff's Third Claim for Relief that asserts that the 1965 Act is unconstitutional if the Act prevents the Engineers from

administering designated groundwater to meet Colorado's Republican River Compact obligations. *See* Dismissal Order at 3-4.

ARGUMENT

If the Court grants any portion of Plaintiff's Rule 54(b) Motion, Plaintiff's pending claims should be stayed until the appeal is resolved. For the reasons stated in Defendants' response brief in opposition to Plaintiff's motion for Rule 54(b) certification, the Plaintiff's Motion should be denied, or, in the alternative, the only issue certified for appeal should be whether the Court properly determined that Plaintiff's Second Claim is not ripe, and whether the Court has jurisdiction over Plaintiff's "as applied" challenge to the constitutionality of SB-52 prior to any determination by the Ground Water Commission regarding the status of the designated groundwater.

The remaining claims pending in this Court are Plaintiff's First Claim and a portion of Plaintiff's Third Claim, which are entwined and raise issues of Compact administration. Both claims involve issues of disputed fact including 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 lacked a rational basis. *See* 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 (Oct. 4, 2016) ("SJ Order") at 12. Additional disputed factual issues include whether placing a call on other water users, including wells operating in the NHP, would be futile. SJ Order at 13.

In order to resolve these disputed factual issues, the Water Court must view the nature of the State Engineer's actions in the context of the administrative scheme the water rights operate

within. In other words, the Water Court will have to consider whether the two sets of water rights are in two separate water administration systems – *i.e.*, one administered under the 1965 Act and one administered under the 1969 Act – or whether the water rights are administrable within the same system. Based upon its ruling dismissing Claim 2, the Water Court initially must assume that the surface water rights and designated groundwater rights are in different administrative systems and because the designated groundwater rights do not have judicially determined 1969 Act priority dates, there is no established procedure for the State Engineer to determine how to integrate designated basin wells into 1969 Act priority administration, including the futile call doctrine, when performing the compact enforcement duties required by § 37-80-104, C.R.S. But, if the Supreme Court in some manner finds that both surface and designated groundwater rights should be administered and evaluated in the same system, the Water Court would have to hold a second trial to infer priority dates for the designated groundwater rights and then determine how the futile call doctrine applies when all rights are subject to the same system of priority administration.

The Plaintiff contends that the State Engineer acted in an arbitrary and capricious manner when he ordered the draining of Bonny Reservoir instead of curtailing designated groundwater rights. *See* Complaint at ¶¶76-93. Like the issues concerning the propriety of compact administration, the questions surrounding the administration and operation of Bonny Reservoir are also affected by the decision as to whether the designated groundwater and surface water rights are administered separately or together. If this Court's ruling on the Second Claim is reversed, an earlier trial on the Bonny claims in the First Claim may also result in incomplete relief and lead to multiple trials. This would waste resources of the Court and the parties.

The pending portion of Plaintiff's Third Claim for Relief is entwined with the part of the First Claim concerning the State Engineer's actions (see Order at 4) and concerns whether the 1965 Act is unconstitutional if the Engineers are precluded under the Act from administering ground water to meet Colorado's Compact obligations. Therefore, the argument made above on the First Claim also applies to the Third Claim.

Any decision by the Supreme Court regarding the Water Court's jurisdiction over the Second Claim will also impact the portion of the Third Claim that the Water Court dismissed in its Dismissal Order. The Water Court dismissed the portion of the Third Claim that raised a constitutional challenge to the provisions of the 1965 Act that prohibited the Commission from redrawing the boundaries of the designated basin. As with the Second Claim, the Court found that this claim was not ripe since the Commission had not yet made a determination regarding whether or not "designated groundwater is . . . involved in this controversy." Dismissal Order at 16-17. Plaintiff does not request certification of this issue in its Rule 54(b) Motion, but the Supreme Court's decision regarding the scope of the Water Court's jurisdiction prior to a ruling by the Commission will necessarily impact the dismissed portion of the Third Claim, in addition to the Second Claim, and will potentially result in piecemeal appeals.

Accordingly, if the Court grants certification under Rule 54(b) on the Water Court's jurisdiction over the Second Claim prior to a determination by the Commission pursuant to a petition filed in accordance with C.R.S. §37-90-106 concerning modification of the boundaries of the Basin or the constitutionality of SB-52, the Plaintiff's remaining claims should be stayed. A stay would ensure that Defendants are not required to litigate Plaintiff's claims more than once, depending on the outcome of an appeal pursuant to Rule 54(b). No party will be

prejudiced by a stay, since it will allow both Plaintiff and Defendants to conserve resources that would otherwise be spent in multiple lawsuits.

In conferral with Plaintiff and during the October 14, 2016 status conference, Plaintiff argued that it would be prejudiced by the delay caused from the stay because it would be without water until the proceedings concluded. Plaintiff's contention presents a false sense of urgency, and ignores the history of the designation of the NHP Basin and adoption of the Republican River Compact Administration ("RRCA") Ground Water Model ("Model"), which quantified on a basin-wide basis the interaction of groundwater and surface water resources on the virgin water supply of the Republican River Basin.

On May 13, 1966, following notice and a hearing pursuant to the provisions of the 1965 Act described above, the Commission designated the Northern High Plains Basin. Attachment 1, Order Approving the Proposed Designated Ground Water Basin – of the Northern High Plains of the State of Colorado ("Designation Order"). On October 20, 2003, the United States Supreme Court accepted its Special Master's report recommending adoption of the Model.

Notwithstanding that more than four decades have passed since the designation of the Basin and more than a dozen years have passed since adoption of the model, Plaintiff has waited to assert these claims. In these circumstances, if the Court decides that Rule 54(b) certification is appropriate, a relatively short delay based on staying the remaining claims until the Colorado Supreme Court rules does not constitute a prejudicial delay to the Plaintiff. *See United States v. Colo. State Eng'r et al.*, 101 P.3d 1072 (Colo. 2004) (determining that given the fact that the quantification proceeding for the Black Canyon had already been delayed nearly thirty years, no

prejudice would result from a temporary stay in proceedings until after federal litigation on related issues was resolved).

By eliminating the need for multiple trials, the stay will conserve judicial resources and the resources of the parties. The stay will also prevent inconsistent judgments, to the extent that issues on appeal impact the litigation of Plaintiff's pending claims. Defendants therefore request that the Court stay Plaintiff's pending claims until the resolution of any appeal of the Second Claim for Relief pursuant to Rule 54(b).

CONCLUSION

In the event that the Court grants Plaintiff's request for Rule 54(b) certification, Defendants request that the Court stay all pending proceedings in this case during the pendency of the appeal on Plaintiff's Second Claim for Relief in order to conserve the Court's and the parties' resources.

Respectfully submitted November 2, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2016, a true and correct copy of the foregoing document, titled Defendants’ Joint Motion for Stay Pending Appeal was filed via ICCES who will send notification of such filing to the following recipients:

Party Name	Party Type	Attorney Name
4m Feeders Inc.	Defendant	Johanna Hamburger William A. Paddock Carlson, Hammond & Paddock, LLC
4m Feeders LLC	Defendant	Johanna Hamburger William A. Paddock Carlson, Hammond & Paddock, LLC
Arikaree Groud Water Mgmt. District	Defendant	Eugene J. Riordan Leila C. Behnampour Vranesh and Raisch
Carlyle James as Trustee of the Chester James Trust	Defendant	Johanna Hamburger William A. Paddock Carlson, Hammond & Paddock, LLC
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City of Burlington, Colorado	Defendant	Alix L. Joseph Michael Y. Ley Burns Figa and Will, PC
City of Holyoke	Defendant	Alvin R. Wall
City of Wray, Colorado	Defendant	Alvin R. Wall
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Colorado Division of Water Resources	Defendant, Opposer	Daniel E. Steuer Ema Schultz Preston V. Hartman

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James J. May	Defendant	Johanna Hamburger William A. Paddock Carlson, Hammond & Paddock, LLC
Julie Dirks	Defendant	Alvin R. Wall
Kent E. Ficken	Defendant	Johanna Hamburger William A. Paddock Carlson, Hammond & Paddock, LLC
Lazier, Inc.	Defendant	Alvin R. Wall
Mariane U. Ortner	Defendant	Alvin R. Wall
Marjorie Colglazier Trust	Defendant	Alvin R. Wall
Marks Butte Ground Water Mgmt. District	Defendant	Eugene J. Riordan Leila C. Behnampour Vranesh and Raisch
May Acres, Inc.	Defendant	Johanna Hamburger William A. Paddock Carlson, Hammond & Paddock, LLC
May Brothers Inc.	Defendant	Johanna Hamburger William A. Paddock Carlson, Hammond & Paddock, LLC
May Family Farms	Defendant	Johanna Hamburger William A. Paddock Carlson, Hammond & Paddock, LLC
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Protect Our Local Community's Water, LLC	Defendant	John D. Buchanan Timothy R. Buchanan Buchanan Sperling and Holleman, PC
Republican River Water Conservation	Defendant	David W. Robbins Peter J. Ampe Hill and Robbins, PC
Sandhills Ground Water Mgmt. District	Defendant	Eugene J. Riordan Leila C. Behnampour Vranesh and Raisch
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Timothy E. Ortner	Defendant	Alvin R. Wall
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