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| DISTRICT COURT, WATER DIVISION NO.1 WELD COUNTY, COLORADO 901 9 th Avenue / P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300 | DATE FILED: April 17, 2015 3:20 PM |
| PLAINTIFF, The Jim Hutton Educational Foundation, 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; the Colorado Department of Natural Resources; Colorado Division of Water Resources; and Colorado Parks and Wildlife. | ^ COURT USE ONLY ^ |
| For Defendant Colorado Department of Natural Resources; CYNTHIA H. COFFMAN, Attorney General EMA I. G. SCHULTZ, Atty. Reg. No. 40117* Assistant Attorney General PRESTON V. HARTMAN, Atty. Reg. No. 41466* Assistant Attorney General Ralph L. Carr Colorado Judicial Center 1300 Broadway, 7 th Floor Denver, CO 80203 Telephone: (720) 508-6307 (Ms. Schultz) (720) 508-6260 (Mr. Hartman) ema.schultz@state.co.us ; preston.hartman@state.co.us *Counsel of Record | Case No. 2015CW3018 Div.: 1 |
| MOTION TO DISMISS COLORADO DEPARTMENT OF NATURAL RESOURCES AS DEFENDANT | |

Defendant Colorado Department of Natural Resources (“CDNR”), by and through the Attorney General and undersigned Assistant Attorneys General, hereby respectfully moves this court to dismiss CDNR as a defendant in this matter. In support of this Motion to Dismiss, CDNR states as follows:

CERTIFICATION

Pursuant to section 1-15(8), Rule 121, C.R.C.P., counsel for CDNR certify that they have contacted counsel for the Plaintiff regarding the relief requested by this motion. Plaintiff's counsel has indicated that Plaintiff does not consent to the relief requested by this motion. Plaintiff's counsel has indicated that Plaintiff will review the bases for the motion to dismiss on the grounds of misjoinder and the alternative motion for more definite statement before determining whether Plaintiff will consent to amend that complaint in this matter accordingly.

BACKGROUND

I. Overview of the Case

The Jim Hutton Educational Foundation's Complaint for Declaratory Judgment Regarding Administration of Water Rights in the Republican River Basin and the Constitutionality of Senate Bill 52 (2010), and the Ground Water Management Act ("Complaint") was filed on February 23, 2014. The CDNR was served with the Complaint on February 27, 2015. By Order of this Court, CDNR's answer or other response to the Complaint is due no later than April 17, 2015.

The Complaint asserts three separate claims for relief against each of the five separate defendants. The stated claims for relief are:

Claim 1: The administration of water in the Republican River Basin and related actions and omissions by defendants are unlawful.

Claim 2: Senate Bill 52 is unconstitutional when applied to the [Northern High Plains Designated Ground Water] Basin.

Claim 3: The Ground Water Act is unconstitutional if designated ground water that is subject to the [Republican River] Compact cannot be Administered pursuant to the Compact.

II. Statutory Duties and Powers of CDNR

As stated at Paragraphs 6 and 10 of the Complaint, the Colorado Division of Water Resources (“DWR”) and the Colorado Division of Parks and Wildlife¹ (“CPW”) are divisions within the CDNR. § 24-1-124(3), C.R.S. (2014). Both DWR and CPW are type one transfers to CDNR. *Id.* The General Assembly describes a type one transfer as follows:

Under this article, a type 1 transfer means the transferring intact of an existing department, institution, or other agency, or part thereof, to a principal department established by this article. When any department, institution, or other agency, or part thereof, is transferred to a principal department under a type 1 transfer, that department, institution, or other agency, or part thereof, shall be administered under the direction and supervision of that principal department, but it shall exercise its prescribed statutory powers, duties, and functions, including rule-making, regulation, licensing, and registration, the promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications, independently of the head of the principal department. Under a type 1 transfer, any powers, duties, and functions not specifically vested by statute in the agency being transferred, including, but not limited to, all budgeting, purchasing, planning, and related management functions of any transferred department, institution, or other agency, or part thereof,

¹ The Colorado Division of Parks and Wildlife is referred to in the Complaint, and commonly referred to as “Colorado Parks and Wildlife.”

shall be performed under the direction and supervision of the head of the principal department.

§ 24-1-105, C.R.S. (2014).

CDNR, DWR, and CPW are all distinct entities with separate powers and responsibilities. CDNR was created as a principal department. §§ 24-1-110(n) and 24-1-124(1), C.R.S. (2014). As type one transfers, DWR and CPW retain all of their statutory duties, authorizations, powers, and functions independent of CDNR. *See e.g. Cold Springs Ranch, Inc. v. State, Dep't of Natural Resources, Mined Land Reclamation Div.*, 765 P.2d 1035, 1036-1037 (Colo. App. 1988) (holding that the Department of Natural Resources is a distinct entity from the Mined Land Reclamation Board); *see also* § 24-1-107, C.R.S. (2014) (authorizing but limiting any reallocation of powers, duties and functions by the head of a principal department such that no substantive function vested by law in any officer or agency within a principal department shall be removed from the jurisdiction of such officer or agency). The executive director of CDNR does not have the power to order DWR or CPW to take any actions. *See e.g. State Highway Com. v. Haase*, 189 Colo. 69, 537 P.2d 300 (1975) (holding that the Governor and the executive director of the Division of Highways do not have authority order the State Highway Commission or its chief engineer to act).

The powers and duties of the executive director of the CDNR are described in section 24-33-102, C.R.S. (2014). These powers and duties include, but are not limited to, requiring each division head to provide an annual report to the executive director, approving all publications from the CDNR and all its divisions, acting as the commissioner of mines, and other powers, duties, and functions as are prescribed for heads of principal departments in the Administrative Organization Act of 1969, sections 24-1-101, *et seq.* *Id.* As to DWR and CPW, the powers of the executive director of CDNR are related to budgeting, purchasing, planning, reporting, publications and related management functions, including those matters concerning DWR or CPW which require coordination with other branches of DNR. §§ 24-1-105, 24-33-102, 37-80-102(6)(a), 33-1-101 *et seq.*, 33-9-101 *et seq.*, and 33-10-101 *et seq.*, C.R.S. (2014). These powers are not implicated by the present complaint. The General Assembly stated its legislative intent for CDNR as:

The state policy shall be to encourage, by every appropriate means, the full development of the state's natural resources to the benefit of all of the citizens of Colorado and shall include, but not be limited to, creation of a resource management plan to integrate the state's efforts to implement and encourage full utilization of each of the natural resources consistent with realistic conservation principles.

§ 24-33-103, C.R.S. (2014). These legislative mandates for the head of the CDNR and the department itself do not include the administration of water rights,

enforcement of designated ground water basins, or the administration of ground water in Colorado.

ARGUMENT

I. Summary of Argument

Plaintiff has failed to state a claim against CDNR for which relief can be granted in the Complaint. Even if this Court grants all claims for relief in Plaintiff's favor, no action by CDNR could or would result in the relief requested by the Plaintiff. CDNR is not responsible for administration of water in the Republican River Basin, for the management of CPW's interests in the land and water in and around Bonny Reservoir, for the application or enforcement of Senate Bill 52 (2010), and is not directed nor controlled by the Ground Water Act. Plaintiff has misjoined CDNR as a party in this matter. In the alternative, CDNR moves this Court to order Plaintiff to provide a more definite statement of the claims asserted against CDNR.

II. Plaintiff has failed to state a claim against CDNR for which relief can be granted.

Rule 12(b)(5), C.R.C.P., provides that before the responsive pleading is filed, the pleader may make a motion to dismiss on the grounds of the plaintiff's "failure to state a claim upon which relief can be granted." A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of a plaintiff's

complaint. *Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011). Whether a claim is stated is determined solely from the matters stated within the four walls of the complaint. *Dillinger v. North Sterling Irrigation Dist.*, 135 Colo. 100, 101 (Colo. 1957). “A complaint should not be dismissed for failure to state a claim upon which relief can be granted if, after examining the complaint, the allegations provide for relief on any possible theory.” *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992) (internal quotation and citation omitted). The court must accept all of the material facts alleged in the complaint as true. *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122 (Colo. 1992). However, the court is “not required to accept as true legal conclusions that are couched as factual allegations.” *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

Each of the three claims for relief asserted in this matter is directed at distinct entities of the State of Colorado, none of which are CDNR. Even if this Court assumes all the material facts of the Complaint are true and grants all claims for relief in the Complaint in Plaintiff’s favor against CDNR, the Plaintiff will not realize any actual relief from CDNR itself. CDNR’s statutory duties and relationship to DWR and CPW prevent CDNR from taking actions which might be mandated by an order granting Plaintiff’s claims for relief.

A. *Claim 1: The administration of water in the Republican River Basin and related actions and omissions by defendants are unlawful.*

CDNR is not responsible for administration of water in the Republican River Basin and cannot make acts or omissions which affect such administration of water. “The state engineer shall be responsible for the administration and distribution of the waters of the state, and, in each division, such administration and distribution shall be accomplished through the office of the division engineer.” § 37-92-301(1), C.R.S. (2014). Pursuant to the State Engineer’s type one transfer to CDNR, the State Engineer retained all of his statutory duties independent of the head of CDNR. Likewise, CDNR is not responsible for the management of CPW’s interests in the land and water in and around Bonny Reservoir. CPW is responsible for perpetuating “the wildlife resources of the state...and providing enjoyable and sustainable outdoor recreation opportunities” for the public, which includes the responsibility to develop, manage, and maintain state parks and state recreational facilities and programs for hunting and wildlife-related outdoor recreational activities. § 33-9-101(12)(b), C.R.S. (2014); *see also* §§ 33-1-104 and 33-10-106, C.R.S. (2014). Pursuant to CPW’s type one transfer to CDNR, CPW retained all of its statutory duties independent of the head of CDNR. If this Court grants all of the relief claimed in Claim 1 in the Complaint, CDNR has no statutory authority to satisfy such an order.

B. Claim 2: Senate Bill 52 is unconstitutional when applied to the [Northern High Plains Designated Ground Water] Basin.

Senate Bill 52 is codified in section 37-90-106(1)(a), C.R.S. (2014). Article 90 of Title 37 is the Colorado Groundwater Management Act. § 37-90-101, C.R.S. (2014). Article 90 establishes the Colorado Ground Water Commission, of which the State Engineer is the ex officio executive director. § 37-90-104, C.R.S. (2014). The Colorado Ground Water Commission was also a type one transfer to CDNR allocated to the DWR. § 24-1-124(4)(c), C.R.S. (2014). Section 106 of the Colorado Groundwater Management Act directs the Colorado Ground Water Commission to “determine designated groundwater basins and subdivisions thereof by geographic description.” § 37-90-106(1)(a), C.R.S. (2014). Senate Bill 52 (2010) modified this statute to reaffirm the Colorado Ground Water Commission’s authority to alter the boundaries of a designated groundwater basin to exclude land from the basin. *Id.*

Similar to DWR and CPW, the Colorado Ground Water Commission and CDNR are separate and distinct entities. In a constitutional challenge, the entity sued “must be those whose duties include implementation or enforcement of the statute being assailed.” *Lucchesi v. State*, 807 P.2d 1185, 1194 (Colo. App. 1990) (citation omitted). As CDNR does not have the duty to implement or enforce the statute enacted by Senate Bill 52 (2010), CDNR is not an appropriate defendant to

this claim. If this Court grants Plaintiff all the relief sought in Claim 2, CDNR has no statutory authority to implement or enforce the relevant statute.

C. Claim 3: The [Colorado] Ground Water [Management] Act is unconstitutional if designated ground water that is subject to the [Republican River] Compact cannot be administered pursuant to the Compact.

As previously stated, the Colorado Groundwater Management Act is implemented by the Colorado Ground Water Commission and the State Engineer, as ex officio executive director of the Commission. The General Assembly has required that the State Engineer “shall make and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments.” § 37-80-104, C.R.S. (2014). The relief requested in Claim 3 is not clear, but even if this Court grants the relief requested in Claim 3, the resulting order will not affect CDNR’s obligations or authority.

III. CDNR is a misjoined party in this proceeding.

Rule 21, C.R.C.P., states that “parties may be dropped or added by order of the court on motion of any party . . . at any stage of the action and on such terms as are just.” CDNR has been improperly named as a defendant to this action and the relief claimed cannot be enforced by CDNR. As explained above, Claims 1, 2, and 3 in the Complaint do not state claims for which relief can be granted against CDNR. Because there are no claims against CDNR, CDNR is misjoined as a defendant in

this case. If CDNR is required to answer the Complaint, the CDNR and the State will be forced to expend additional resources to defend an action in which CDNR has no real interest.

IV. In the alternative, CDNR moves for a more definite statement of the claims asserted.

In the alternative, if this Court does not dismiss CDNR as a named defendant in this action pursuant to Rules 12(b)(5) and 21, C.R.C.P., CDNR respectfully moves this Court to order the Plaintiff to file a more definite statement of the claims and allegations against CDNR pursuant to Rule 12(e), C.R.C.P.

WHEREFORE, CDNR respectfully moves for an order of this Court dismissing CDNR as a named defendant pursuant to Rule 12(b)(5) and 21. In the alternative, CDNR respectfully moves this Court for an order to the Foundation to file a more definite statement of the claims and allegations against CDNR as a distinct entity pursuant to Rule 12(e) within fourteen (14) days of the order. A proposed order is filed herewith.

Dated this 17th day of April, 2015.

CYNTHIA H. COFFMAN
Attorney General

/s/ Ema I. G. Schultz

EMA I. G. SCHULTZ, 40117*

PRESTON V. HARTMAN, 41466*

Assistant Attorneys General

Water Units

Natural Resources & Environment

Attorneys for Defendant Colorado Department
of Natural Resources

*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that on this 17th day of April, 2015, I caused a true and correct copy of the foregoing **Motion to Dismiss Colorado Department of Natural Resources as Defendant** to be served electronically via ICCES upon the following:

| Party Name | Party Type | Attorney |
|-----------------------------------|-------------------|---|
| Jim Hutton Educational Foundation | Plaintiff | Karen Leigh Henderson Steven J. Bushong (Porzak Browning & Bushong LLP) |
| Colorado Parks and Wildlife | Defendant | Timothy J. Monahan Katie L. Wiktor |
| Division 1 Water Engineer | Division Engineer | Division 1 Water Engineer |
| State Engineer | State Engineer | State Engineer |
| Division of Water Resources | Defendant | Ema I. G. Schultz Preston V. Hartman |

*Filed pursuant to C.R.C.P. Rule 121 § 1-26.
A duly signed original is on file with the Office of the Attorney
General for the State of Colorado.*

Nan B. Edwards

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