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| WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9 TH Avenue Greeley, CO 80632 | DATE FILED: July 9, 2015 10:20 AM |
| Plaintiff: The Jim Hutton Educational Foundation, 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; the Colorado Department of Natural Resources; Colorado Division of Water Resources; and Colorado Parks and Wildlife | ▲ COURT USE ONLY ▲ Case No.: 2015CW3018 Division: 1 |
| ORDER RE: STATE AND DIVISION ENGINEERS' MOTION FOR JOINDER | |

This matter comes before the court on the *Motion for Joinder* filed by the State Engineer and Division Engineer for Water Division No. 1 (“Engineers”). The Jim Hutton Educational Foundation (“Foundation”) filed a response, and the Engineers filed a reply. The court has considered the motion, response, and reply and now enters the following findings and conclusions.

I. BACKGROUND

Prior to the passage of Senate Bill 10-52 (“SB-52”), Section 37-90-106(1)(a), C.R.S. provided that a designated groundwater basin’s boundaries could be altered “as future conditions require and factual data justify.” SB-52 clarified this standard and reaffirmed the General Assembly’s original intent that a designated groundwater basin’s boundaries may only be altered upon a showing of sufficient factual data justifying redrawing the basin’s boundaries and that the boundaries may not be altered to exclude any existing permitted well presently within the basin. As a result, the current version of Section 37-90-106(1)(a), C.R.S. provides certain assurances and protections to owners of permitted wells withdrawing groundwater from designated groundwater basins.

The Northern High Plains Basin (“NHP Basin”) is a designated groundwater basin, and is therefore governed the provisions of Section 37-90-106(1)(a), C.R.S. The NHP Basin underlies the Republican River basin and there are likely thousands of permitted wells withdrawing groundwater from the NHP Basin.

The Foundation currently owns four decreed surface water rights within the Republican River basin. In its complaint for declaratory judgment and injunctive relief, the Foundation claims SB-52 is unconstitutional as applied to designated groundwater basins, including the NHP

Basin. The Foundation asserts that, as originally drafted, Section 37-90-106(1)(a), C.R.S. created protections for surface water rights against improperly designated groundwater basins by allowing the basin's boundaries to be redrawn as future conditions required and factual data justified. The Foundation argues SB-52 impairs vested surface water rights by effectively removing a statutory mechanism designed to protect surface rights in existence before the basin was designated. Therefore, the Foundation claims, SB-52 is unconstitutional retrospective legislation. The Foundation also claims SB-52 amounts to a taking without proper compensation, violates Colorado's prior appropriation doctrine, and violates its due process rights.

Additionally, the Foundation claims the Engineers are improperly administering water in the Republican River basin. Currently, the Engineers are only curtailing surface water diversions to meet Colorado's obligations under the Republican River Compact. However, the Foundation asserts groundwater pumping in the NHP Basin is causing surface flows in the Republican River basin to increasingly decline, making it difficult for Colorado to meet its compact obligations. Thus, the Foundation argues, the Engineers are improperly limiting curtailment to surface water diversions and instead should curtail junior groundwater diversions before curtailing senior surface water diversions. Accordingly, the Foundation seeks declaratory judgment that the current administration and management of water in the Republican River basin is unlawful and requests the court to enjoin such practices.

After the Foundation filed its complaint, the Engineers moved to join well owners within the NHP Basin as necessary parties. The Engineers argue these well owners are indispensable parties to the present action. The Engineers also argue the resume notice provided by the Foundation in this case is insufficient, and the Foundation must serve these well owners with notice of the Foundation's complaint pursuant to C.R.C.P. 4. Finally, the Engineers argue the Foundation must join the Colorado Ground Water Commission ("Commission") as a necessary party to this proceeding.

II. LEGAL STANDARDS

Under Rule 19(a), C.R.C.P., a person must be joined as a party to an action if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may...[a]s a practical matter impair or impede his ability to protect that interest." This rule requires the trial court to join all indispensable parties falling within its provisions. *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1033 (Colo. App. 1996). "[A]n indispensable party has such an interest in the controversy's subject matter that a final decree between the parties cannot be made without affecting the nonparty's interests or leaving the controversy in such a situation that its final determination may be inequitable to the nonparty." *Bittle v. CAM-Colorado, LLC*, 318 P.3d 65, 69 (Colo. App. 2012). "Whether a person or entity is indispensable turns on practical considerations particular to the facts of a case, including the nature of the party's claimed interest and the character of the claim for relief." *Frazier v. Carter*, 166 P.3d 193, 195 (Colo. App. 2007) (internal citations omitted).

Additionally, Rule 57(j), C.R.C.P. and C.R.S. § 13-51-115 provides that in an action for declaratory judgment, a party may intervene if that party "[has] or claim[s] any interest which

would be affected by the declaration.” Any party who is indispensable or necessary for the complete and effective determination of the controversy must be permitted to join the action. *E.g. Beacom In & For Seventeenth Judicial Dist., Adams County v. Board of County Comm'rs of Adams County*, 657 P.2d 440, 447 (Colo. 1983); *Dunne v. Shenandoah Homeowners Ass'n, Inc.*, 12 P.3d 340, 344 (Colo. App. 2000). In assessing indispensability, a court may consider injury to the absent party, danger of inconsistent decisions, avoidance of multiplicity of suits, and the possibility that a decision will not fully resolve the controversy. *Dunne*, 12 P.3d at 344.

III. ANALYSIS

A. Joinder of Well Users in the NHP Basin

The Foundation seeks a declaration from this court that SB-52 is unconstitutional as applied to existing groundwater basins and therefore the amended Section 37-90-106(1)(a), C.R.S. has no effect in the NHP Basin. The current version of the statute provides that a well owner's well may not be excluded from a designated basin, provided it is well that has been issued a conditional or final permit to operate, even upon the presentation of data to the Commission that would otherwise support alteration of the basin boundaries. Thus, owners of permitted wells (“well owners”) in the NHP Basin enjoy some security and assurance that their wells cannot be removed from the boundaries of the groundwater basin, as provided by Section 37-90-106(1)(a), C.R.S. As such, the wells owners within the NHP Basin clearly have a significant interest in the Foundation's requested relief. If the court finds in favor of the Foundation, the well owners would lose protection against exclusion of their wells from the designated basin and possibly face de-designation of the NHP Basin's current boundaries. This could potentially result in well owners being required to augment what may then be considered out-of-priority depletions to surface waters.

Further, if the court rules in favor of the Foundation and declares SB-52 unconstitutional and that its provisions do not apply to the NHP Basin, the wells owners' ability to protect their interests may be drastically impaired. The Commission is not authorized to rule on the constitutionality of SB-52. Thus, if the well owners are not joined in the action currently before this court, they will be prevented from arguing in support of the constitutionality of SB-52. If the court finds the Engineers' current water administration practices in the NHP Basin to be unlawful, the basin's boundaries may need to be redrawn by the Commission to permit the state to properly administer groundwater diversions. This redrawing of the NHP Basin boundaries will likely occur if the court finds SB-52 to be unconstitutional. Therefore, although the well owners may have the opportunity to contest the redrawing of the NHP Basin's boundaries at a hearing before the Commission, the constitutionality of SB-52 will have already been determined without any ability for the well owners to participate in the constitutionality analysis.

The Foundation also requests a declaration from this court that, in order to achieve compact compliance, the Engineers cannot curtail senior surface water rights before first curtailing more junior groundwater diversions. Although the Foundation argues it is not seeking to curtail groundwater rights, such curtailment would almost certainly result if the court rules the Engineers' current water administration practices are unlawful and that SB-52 is unconstitutional. Thus, the requested relief would more than alter the vested legal rights of well

owners within the NHP Basin; it would directly affect their interests. *See Jackson v. State of Colorado*, 294 F. Supp. 1065, 1073 (D. Colo. 1968) (finding that water users within groundwater management district were not indispensable parties to an action brought by Plaintiff. “A decision for or against the plaintiff might indirectly affect the interests of all water users, but could not alter vested legal rights so as to raise the water users to the status of indispensable parties.”)

In arguing it should not be required to join the well owners, the Foundations cites to *Fellhauer v. People* and *Bender v. District Court in & For El Paso County* as support. However, the court does not find these cases to be persuasive. In *Fellhauer*, a well owner challenged the division engineer’s curtailment of his well. 447 P.2d 986 (Colo. 1968). The Supreme Court held the engineer’s actions to be discriminatory and unconstitutional. The Foundation points out in *Fellhauer*, the court did not require the plaintiff to join other well owners and likewise, the Foundation should not be required to join other well owners here. However, this case is inapposite. The plaintiff in *Fellhauer* challenged the division engineer’s curtailment of his well, whereas in the present case, the Foundation challenges the Engineers’ entire administrative practice in the Republican River basin. The court finds *Bender* to be inapplicable to the present case as well. In *Bender*, the plaintiff sought to enjoin another water user’s diversion of water from a shared aquifer. 291 P.2d 684 (Colo. 1955). The Supreme Court held, in part, that other users of the aquifer did not need to be joined. In *Bender*, the controversy only implicated the rights of two parties and the court’s decision in favor of the plaintiff would only affect the one defendant. In contrast, the court’s decision here as to the constitutionality of SB-52 and the current administration of the basin has a high likelihood of also affecting the well owners’ rights.

As users of groundwater within the Republican River basin, the well owners clearly have an interest in the court upholding the constitutionality of SB-52 and maintaining the current administration practices of the Republican River basin. Disposition of this action will impair or impede their ability to protect this interest. Therefore, pursuant to Rule 19(a), C.R.C.P. the court concludes the well owners within the NHP Basin are indispensable parties. The court reaches a similar conclusion pursuant to Rule 57(j), C.R.C.P. Accordingly, the court finds the designated groundwater well owners in the NHP Basin must be joined as parties to the present action.

B. Resume Notice

Next, the court finds resume notice is not sufficient to place the well owners on notice of this litigation. Though all “water matters” in Colorado fall within the jurisdiction of the water courts, C.R.S. § 37-92-203(1), not all “water matters” can be noticed through the resume process. *See C.R.S. §§ 37-92-302(1)(a), (3)*. The court concludes that the type of relief the Foundation seeks here is not the type of water matter that is subject to resume notice.

In *Gardner v. State*, the Colorado Supreme Court held “[u]nder the Water Right Act, the types of applications the water judge may determine under the resume-notice procedure of section 37-92-302(3) are those applications expressly authorized to be filed under section 37-92-302(1)(a).” *Gardner v. State*, 614 P.2d 357, 360 (Colo. 1980). In holding that a request for a determination that certain others’ water rights had been abandoned does not fall within the resume-notice procedure, the Supreme Court pointed out that Section 37-92-302(1)(a)

enumerates specific types of water applications. None of those applications included an application for determination of abandonment. *Id.* at 361. Therefore, a request for a finding of abandonment was not subject to the resume-notice provisions of Section 37-92-302(3). The Supreme Court also explained that because the applicant's water right would be "enhanced" by a deamination of abandonment, it was reasonable to require the applicant to utilize notice procedures more likely to apprise the water right owners of the pending action than the resume-notice process. *Id.*

The court finds *Gardner* be instructive. Here, a request for declaratory judgment that the state's current administration of a basin is unlawful, or a declaration that an amendment is unconstitutional, are not the type of applications listed in Section 37-92-302(1)(a), C.R.S. Therefore, they are not the type of actions permitted to be noticed through the resume process provided in Section 37-92-302(3). Furthermore, a finding by the court that SB-52 is unconstitutional would allow the Foundation to seek alteration of the NHP Basin's boundaries in front of the Commission, which could potentially exclude several permitted wells. This would allow the Engineers to administer those wells and possibly curtail the junior groundwater diversions in order to meet compact obligations. A curtailment of junior wells would make more water available for the Foundation's senior surface rights. Such a result would undoubtedly "enhance" the Foundation's water right.

The court also finds *Southern Ute Indian Tribe v. King Consolidated Ditch Co.* to be instructive. 250 P.3d 1226 (Colo. 2011). In that case, various ditch companies filed an application to confirm the priorities of existing water rights previously decreed to their ditches. The applicants only provided resume-notice. In holding that resume-notice was sufficient and personal service on the plaintiffs was not necessary, the Supreme Court stated

"[T]he General Assembly designed the resume notice and newspaper publication procedure for water matters that involve the interrelationship of all the water right priorities on the stream. This procedure is calculated to alert all water users on the stream system whose rights may be affected by the application, and provide an opportunity for any person to participate in the water right proceeding and to oppose the application....The applicants in this case filed an application to confirm the priorities of existing water rights decreed in prior adjudications to their ditches. This was not an attack on the Tribe's ownership interest in its decrees; rather, it was a bona fide effort to determine the relative priority of the Ditch Companies' rights in relation to all other water decreed uses of stream water."

Id. at 1235 (internal citations omitted).

Here, unlike the application in *Southern Ute*, the relief requested by the Foundation is not to merely confirm its existing priorities or determine its priorities in relation to other users on the stream. Instead, the Foundation seeks to have the court declare the current administration of the basin to be unlawful and SB-52 unconstitutional. A ruling in favor of the Foundation will have a profound effect on the rights and protections currently enjoyed by well owners within the designated NHP Basin.

For many types of water rights applications, the resume-notice process is sufficient. *See* C.R.S. §§ 37-92-302(1)(a), (3). This somewhat relaxed resume-notice process is appropriate for those types of applications because those applications only carry the potential to impact other water users. In fact, the process is only to place other water rights owners on inquiry notice of the application. *Closed Basin Landowners Association v. Rio Grande Water Conservation District*, 734 P.2d 627, 634 (Colo. 1987). On the contrary, the relief requested in this case will *almost certainly* impact other water users. Therefore, more than mere inquiry notice is necessary.

Therefore, the court concludes the Foundation must serve all well owners in the NHP Basin who may be affected by its requested relief pursuant to Rule 4, C.R.C.P. The Engineers shall provide the Foundation with the well owners who may be affected. However, the Foundation shall be responsible for paying the reasonable retrieval and copying costs associated with generating this list. At this time, the Foundation has not moved the court for an alternative means of service. Accordingly, the court defers ruling on the proper type of notice under Rule 4 until such motion is made.

C. Joinder of the Colorado Ground Water Commission

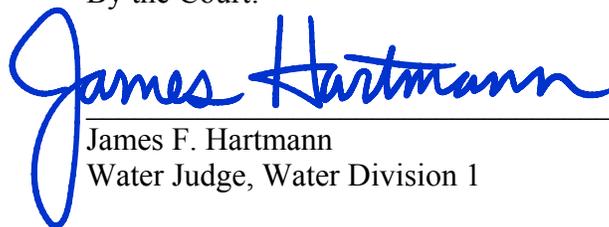
The Engineers also request the Commission be joined as a party. However, the court finds the Commission is not an indispensable party under Rules 19(a) or 57(j), C.R.C.P. The Commission has no substantial interest in the outcome of the litigation. The Commission is charged with enforcing the law as it is, not litigating the constitutionality of the law. Entry of a final decree between the parties can be made without affecting the Commission's interest or leaving the controversy in such a situation where the final determination is inequitable to the Commission. *Bittle*, 318 P.3d at 69. Therefore, the court denies the Engineers' request to join the Commission to this action.

IV. ORDER

Based on the foregoing, the Engineer's *Motion for Joinder* is granted in part and denied in part. The Foundation must join well owners in the NHP Basin who may be affected by the relief the Foundation seeks. However, the Foundation is not required to join the Commission as a party to this action.

Dated: July 8, 2015.

By the Court:



James F. Hartmann
Water Judge, Water Division 1