

Bill 52 (“SB-52”) in unconstitutional as applied to the NHP Basin; and (3) the Colorado Groundwater Act is unconstitutional if designated ground water cannot be administered by the Engineers under the same framework as surface water to ensure compliance with the Republican River Compact.

The Foundation named the CDNR as a defendant in this action. The Colorado Attorney General filed a motion to dismiss the CDNR as a party to this action, pursuant to C.R.C.P. 12(b)(5), arguing that the Foundation failed to state a claim against CDNR for which relief can be granted. In the alternative, should the court deny the motion to dismiss, the CDNR requests an order from the court directing the Foundation to file a more definite statement of claims, pursuant to C.R.C.P. 12(e).

The Foundation responds that the CDNR was a party to a contract with the United States to operate Bonny Reservoir (referred to by the Foundation as the “Water Contract”) and the contract provides that water released from the reservoir may only be used for specified purposes by the CDNR, so long as water continues to be delivered to the Hale Ditch to fulfill the Foundation’s surface water rights. The CDNR entered into a second contract with the United States (the “Land Contract”) to manage the land beneath and adjacent to Bonny Reservoir for recreational, fish and wildlife purposes, provided the use of the land does not interfere with the Hale Ditch water rights. The Foundation asserts it is a beneficiary of these two contracts because the CDNR must manage Bonny Reservoir in a manner that will protect the Foundation’s Hale Ditch water rights. The Foundation argues the CDNR’s failure to protect its Hale Ditch water rights is part of the overall mismanagement of the water in the Republican River and NHP basins by state agencies, resulting in injury to the Foundation. Moreover, the Foundation argues the CDNR is a principal agency that supervises the other state agencies named in the lawsuit. For those reasons, the Foundation believes the CDNR is properly named as a defendant in this action.

Although the Foundation’s complaint for declaratory and injunctive relief contains several facets, it can be summed up succinctly as the desire by the Foundation to receive water it believes has been unlawfully withheld from it by the state and division engineers as the result of current water administration practices. Under Colorado law, the state engineer is responsible for administering surface and tributary ground water, not the CDNR. The CDNR has a very limited supervisory and administrative role with regard to the state engineer, and the CDNR does not have the authority – either pursuant to statute or through the contracts it entered with the United States for operating Bonny Reservoir – to direct the actions of the state engineer when it comes to managing the state’s surface and tributary ground water. The court concludes the Foundation’s complaint does not state a claim against the CDNR for which relief can be granted. The motion to dismiss the CDNR as a defendant in this action is granted.

II. LEGAL STANDARDS

In lieu of filing an answer to a claim at the inception of a case, a party may instead file a motion to dismiss on the theory the claimant has not filed a claim upon which relief can be granted. C.R.C.P. 12(b)(5). The purpose of such a motion is to test the formal sufficiency of the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo.1992). Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are “viewed with disfavor and are rarely granted.” *Id.* at 1291 (quoting *Davidson v. Dill*, 180 Colo. 123, 131, 503 P.2d 157, 162 (1972)). A trial court may not dismiss a

complaint for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of the claim. In addition, the allegations of the complaint must be viewed in the light most favorable to the plaintiff. *Id.*

When passing on a motion to dismiss a complaint, the court may only consider the matters stated in the pleadings. *Glover v. Southard*, 894 P.2d 21 (Colo. App. 1994). The material allegations are deemed admitted and the motion to dismiss should only be granted if plaintiff would not be entitled to relief under the facts pleaded. *Id.*

III. ANALYSIS

The CDNR is a legislatively-created entity under Colorado's Administrative Organization Act of 1968 ("Act"). See C.R.S. §§ 24-1-101, 24-1-124. The CDNR is designated as a "principal department" under the Act. C.R.S. § 24-1-110(1)(n). The CDNR is comprised of several divisions, two of which are the division of water resources ("Water Resources"), C.R.S. § 24-1-124(3)(a), and the division of parks and wildlife ("Parks & Wildlife"), C.R.S. § 24-1-124(3)(k)(II)(A). Water Resources and Parks & Wildlife are also named as defendants in this action.

The legislature has authorized the transfer of powers, duties, and responsibilities from an existing department or agency to a principal department. C.R.S. § 24-1-101. There are three types of transfers from an existing department to a principal department, which are designated as type 1, type 2, and type 3 transfers. C.R.S. § 24-1-105. Each of the three types of transfer specifies the authority retained by the existing department and the powers and duties delegated to the principal department. *Id.* A type 1 transfer provides that the existing department retains its statutory powers, duties, and responsibilities, and shall exercise its functions independently of the head of the principal department. *Id.* Under a type 1 transfer, the principal department is tasked with administrative and supervisory duties over the existing department. *Id.*

Water Resources is comprised of four separate units: the office of the state engineer, C.R.S. § 24-1-124(4)(a); the division engineers, C.R.S. § 24-1-124(4)(b); the ground water commission, C.R.S. § 24-1-124(4)(c); and the state board of water well construction and pump installation, C.R.S. § 24-1-124(4)(d). These four entities within Water Resources were transferred to the CDNR as type 1 transfers. *Id.* Parks & Wildlife was also a type 1 transfer to the CDNR. C.R.S. § 24-1-124(3)(k)(II)(A). Thus, the CDNR's role with regard to Water Resources and Parks & Wildlife is statutorily limited to the administration and supervision of those divisions. Parks & Wildlife and Water Resources, which includes the offices of the state and division engineers, exercise their powers, functions, and responsibilities independently of the head of the CDNR.

The CDNR argues the relief the Foundation seeks in this action relates to the administration of water in the Republican River and the NHP basins, and that the CDNR has no authority to direct the actions of the state and division engineers or the ground water commission, as type 1 transfer entities, regarding any duties, functions, or responsibilities in administering ground or surface water. The CDNR also asserts the Foundation's argument that the CDNR is responsible for ensuring the Foundation receives its Hale Ditch water rights under the two contracts the CDNR entered with United States for the operation of Bonny Reservoir is without merit, because a judgment in favor of the

Foundation would require the state and division engineers, not the CDNR, to administer the flow of water into the Hale Ditch.

The Foundation relies on the two contracts the CDNR entered into with the United States for the operation of Bonny Reservoir for recreational, fish, and wildlife uses as one basis for including the CDNR as a defendant. Each of these contracts contains a provision that the flow of water in Hale Ditch must be maintained for water users when the CDNR operates Bonny Reservoir for recreational, fish, and wildlife uses. While it is correct that the CDNR was the state entity that entered into the contracts with the United States, the responsibility for maintaining the flow in Hale Ditch under the Water Contract is placed solely upon the state engineer and not the CDNR. See ¶16 of the Complaint (the CDNR “shall comply with all natural flow rights for Hale Ditch and the *State Engineer* shall measure and direct such releases pursuant to such rights” (emphasis added)). The contract does not confer any legal authority to the CDNR to direct, control, or even influence the actions of the state engineer with regard to administration of the state’s waters.

The Foundation also argues the CDNR has a supervisory role over the state and division engineers, and this oversight responsibility includes taking action against the state engineer if the state engineer defaults in any performance of the engineer’s duties. C.R.S. § 37-80-115(3). The Foundation’s argument is misplaced. This statute places the responsibility on the executive director of the CDNR to bring charges against the state engineer if the engineer defaults in the performance of his duties, and such charges would be lodged with the state personnel board. C.R.S. § 37-80-115(4). This statute requires the CDNR executive director to file an administrative grievance against the state engineer, but does not confer authority to overrule or set aside actions of the state engineer.

The Foundation has not cited to any provision of law that would require, or even permit, the CDNR to direct the actions of the state engineer regarding water administration in the Republican River basin or under the Republican River Compact.

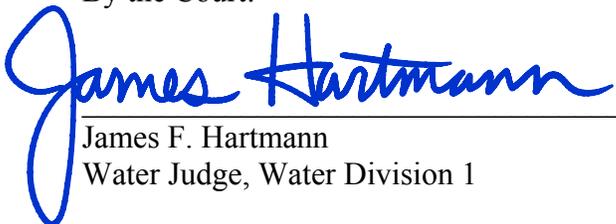
Based on the foregoing, if the Foundation proves its claims in this action the resulting declaratory and injunctive orders issued by the court would be directed to the state and division engineers and not the CDNR. The Foundation has not established a legal or factual basis to support a claim for injunctive or declaratory relief against the CDNR.

IV. ORDER

The *Motion to Dismiss Colorado Department of Natural Resources* is granted.

Dated: July 21, 2015.

By the Court:



James F. Hartmann
Water Judge, Water Division 1