DISTRICT COURT, WATER DIVISION NO. 1 STATE OF COLORADO Weld County Courthouse 901 9th Ave., P.O. Box 2038 Greeley, CO 80632 (970) 475-2400	DATE FILED: February 29, 2016 6:45 PM
Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation, v. **Defendants:** Dick Wolfe, in his capacity as the Colorado State Engineer, et al.	▲COURT USE ONLY▲
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MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM 1 RE: STATE ENGINEER ADMINISTRATION OF DESIGNATED GROUNDWATER

The Defendants named above, by and through their undersigned attorneys, hereby submit their Motion for Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater ("Motion") pursuant to C.R.C.P. 56, and in support thereof, state as follows:

C.R.C.P. 121, § 1-15(8) Certification and Joining Parties

Counsel for the Defendants has conferred with counsel for all other parties. Plaintiff opposes the relief requested herein.

The following defendants have joined in this Motion: City of Burlington; Colorado Agriculture Preservation Association; Don Andrews, Myrna Andrews, and 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, and Carlyle James as Trustee of the Chester James Trust; Marks Butte, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts; North Well Owners; Republican River Water Conservation District; Tri-State Generation and Transmission Association, Inc.; and Yuma County Water Authority Public Improvement District. Other parties may individually file statements of joinder to this Motion. Collectively, the above joining defendants are referenced herein as "Defendants."

I. INTRODUCTION

In its Complaint, The Jim Hutton Educational Foundation ("Foundation") asserts three claims for relief. In its first claim for relief ("Claim 1"), the Foundation asserts that the State Engineer's administration of water in the Republican River Basin and its actions related to such administration are unlawful. More specifically, the Foundation asserts, in part, that there is no lawful basis for the State Engineer to administer surface water and groundwater differently for purposes of meeting the State of Colorado's obligations under the Republican River Compact ("Compact"). To address the State Engineer's alleged unlawful administrative practices, the Foundation seeks a declaration that it is unlawful for the State Engineer to curtail senior surface water for Compact compliance purposes, while not also curtailing groundwater. The Foundation also seeks injunctive relief concerning the State Engineer's administrative actions. *See* Compl. ¶¶ 78-80, 92, 93.

Inherent in the Foundation's Claim 1 assertions and requested relief is the argument that, for Compact compliance purposes, the State Engineer has a mandatory, non-discretionary legal duty to administer designated groundwater and wells in the Northern High Plains designated basin ("NHP Basin") in the same manner or using the same administrative system as it uses for surface water, including curtailing the pumping of designated groundwater and wells before it can legally curtail surface water rights that were developed prior to the designated groundwater rights. The Foundation does not single out designated groundwater in its allegations and requested relief in Claim 1. However, one type of groundwater in the NHP Basin is designated groundwater, and most of the wells in the NHP Basin are pumping designated groundwater pursuant to vested rights associated with final permits approved by the Colorado Ground Water Commission ("Commission").

This Motion addresses only the requested relief in Claim 1 that pertains to the Foundation's challenges of the State Engineer's administrative decisions concerning designated groundwater for Compact compliance purposes.[1] As set forth in this Motion, the Foundation's legal arguments concerning Compact administration are not supported by the applicable law, a review of which shows that the State Engineer's administrative authority for Compact compliance purposes allows for discretionary action in determining what measures are required to meet Colorado's Compact obligations. There is simply no mandatory legal requirement for implementation of an administrative approach that treats surface water and designated groundwater the same. The Foundation is therefore incorrect that the State Engineer's administrative decisions with respect to curtailment of designated groundwater are unlawful in any manner. The Court should so rule and dispose of this issue on partial summary judgment.

In addition, the Court should also deny the Foundation's request for injunctive relief to the extent that the Foundation seeks an order from the Court requiring the curtailment of pumping by designated basin wells or administration of both surface water rights and designated groundwater rights under a unified administrative approach for Compact compliance purposes. Such an order would violate the doctrine of separation of powers and Colorado case law, as the Court does not have the authority to force a state agency to take a discretionary action.

As a matter of law the Foundation is not entitled to its requested declaratory and injunctive relief, and thus summary judgment on this portion of Claim 1 is proper.

[1] Defendants are not taking a position in this Motion on any aspects of Claim 1 that pertain to the administration of any other water within the Republican River Basin (e.g., surface waters, tributary groundwater); on any other aspects of Claim 1 (*e.g.*, administration and management of Bonny Reservoir); or on the other two claims for relief, which claims are addressed in separate motions.

II. SUMMARY OF ARGUMENT

There are several statutory systems in Colorado for the administration of in-state waters. Tributary groundwater is allocated and administered along with surface water rights in accordance with the traditional prior appropriation system—first in time, first in right—and is statutorily regulated by the Water Right Determination and Administration Act of 1969, C.R.S §§ 37-92-101 *et seq*. ("1969 Act"). In contrast, designated groundwater is allocated and administered in accordance with a modified prior appropriation system that is set out in the Colorado Groundwater Management Act, C.R.S. §§ 37-90-101 *et seq*.[2] ("Groundwater Management Act"). *See, e.g., N. Kiowa-Bijou Mgmt. Dist. v. Ground Water Comm'n*, 505 P.2d 377, 379-80 (Colo. 1973). The separate system for designated groundwater was enacted in recognition of its unique character to "permit[] the full development of [these designated] ground water sources while protecting against depletion of the underground aquifer, which is not subject to the same ready recharge enjoyed by surface streams and tributary ground water." *Danielson v. Kerbs Ag., Inc.*, 646 P.2d 363, 370 (Colo. 1982).

Despite this separate system of allocation and administration, the Foundation contends that "surface water diversions cannot lawfully be curtailed for [Republican River] Compact compliance without also curtailing [these designated] ground water diversions" in the NHP Basin. Compl. ¶ 61. The Foundation's apparent factual basis for this contention is information provided by the groundwater model that was jointly developed by Colorado, Kansas, and Nebraska to determine the depletions to certain streamflow reaches in accord with Republican River Compact Administration Accounting Procedures (the "RRCA Ground Water Model" or

[2] C.R.S. § 37-90-137 concerns tributary and nontributary groundwater, but the vast majority of Article 90 concerns designated groundwater.

"Model"). According to the Foundation, the Model shows that designated groundwater wells in the NHP Basin are depleting flows in the South Fork of the Republican River and its other tributaries. Based on this information, the Foundation argues that the State Engineer is legally required to curtail such pumping to meet the State's obligations under that Compact before curtailing the Foundation's "more senior surface water rights." Compl. ¶¶ 79, 92.B.

The Foundation's Claim 1 (as it relates to administration of designated groundwater wells in the NHP Basin) fails because any authority of the State Engineer to curtail pumping from designated groundwater wells in the NHP Basin for Compact compliance is *discretionary*. It is beyond the power of this Court to order the State Engineer to exercise its administrative discretion in a particular manner. *See, e.g., Jones v. Colo. State Bd. of Chiropractic Exam'rs*, 874 P.2d 493, 494 (Colo. App. 1994).

In accordance with Colorado law, the State Engineer has exercised its discretion in a manner that correctly recognizes both the legal differences between surface water rights and designated groundwater rights, and the practical realties inherent in the administration of these two water sources. These types of waters are allocated and administered in fundamentally different ways under Colorado law. The Final Order creating the NHP Basin in 1966 confirmed the factual and legal differences: "The vested surface water rights within the designated groundwater basin are recognized and are specifically noted as being without the jurisdiction of the Ground Water Commission and are wholly governed by the provisions of the Republican River compact where applicable or by the surface water laws concerning tributary groundwater." In the Matter of Designated Ground Water Basin of the NHP Basin, State of Colorado, Findings of Fact, Conclusions of Law, and Final Order, p. 4, ¶ 2 (1966) ("1966 NHP Basin Order"), *attached hereto as* Exhibit A. Contrary to the Foundation's assertions, as a matter of law the

Foundation's surface water rights are not "similarly situated in all relevant aspects under the Compact to the [designated] ground water pumpers in the Basin." Compl. ¶ 86. Under these circumstances, the State Engineer's administrative decision to not curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance before it curtails "more senior surface water rights" is not "contrary to Colorado and federal law, unconstitutional, in excess of authority, [or] arbitrary and capricious." Compl. ¶ 92.B.

As a result, Defendants are entitled as a matter of law to the following summary judgment determinations on Claim 1 as it relates to the administration of designated groundwater wells in the NHP Basin:

a. The State Engineer is not legally required to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance before it can curtail the Foundation's surface water rights;

b. This Court does not have the power to order the State Engineer to exercise its administrative discretion for Compact compliance in any specific manner, including that preferred by the Foundation; and

c. The State Engineer's administrative decision to not curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance before it curtails the Foundation's surface water rights is not contrary to Colorado and federal law, unconstitutional, in excess of authority, or arbitrary and capricious.

III. UNDISPUTED FACTS

For the limited purposes of this Motion, and without waiving any rights to contest such factual assertions in other motions, at hearings, at trial, or in or at any other matter, the Defendants ask the Court to accept the factual assertions in the Foundation's Complaint related

to the administration of designated groundwater in the NHP Basin as true. Thus, for purposes of this Motion, no disputed issues of material fact exist.

IV. LEGAL STANDARDS

A. Standard of Review for Summary Judgment

Summary judgment is appropriate "when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004); *see also* C.R.C.P. 56(c). The party seeking summary judgment "bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record and of the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact." *Quist v. Specialties Supply Co., Inc.*, 12 P.3d 863, 868 (Colo. App. 2000).

If the movant meets its "initial burden of production . . . the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact." *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009). "The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to existence of a triable issue of fact must be resolved against the moving party." *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002); *see also Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011).

B. Declaratory Judgments

The courts "have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." C.R.S. § 13-51-105; C.R.C.P. 57(a). The Court's "declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." *Id.*

"The primary purpose of a declaratory judgment is to enable parties, in a proper case, to obtain a determination of their rights and duties in advance of the time when litigation might possibly arise or before the repudiation of obligation, the invasion of rights, or the commission of wrongs." *Cann v. Bd. of Water Comm'rs of City & Cty. of Denver*, 534 P.2d 346, 347 (Colo. App. 1975).

Any person "whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." C.R.S. § 13-51-106; C.R.C.P. 57(b). A court may refuse declaratory judgment or decree "where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." C.R.S. § 13-51-110; C.R.C.P. 57(f). *See also Bd. of Cty. Comm'rs v. Park Cty. Sportsmen's Ranch, LLP*, 45 P.3d 693, 698-99 (Colo. 2002).

C. <u>Injunctive Relief</u>

Under Colorado law, "[t]he power of the courts to order executive agencies to take any action is extremely limited. Injunctive relief is not generally available against an administrative agency performing the duties delegated to it." *Jones*, 874 P.2d at 494 (evaluating request for injunctive relief as if it was a request for mandamus under C.R.C.P. 106(a)(2)).[3]

Mandamus relief is a form of injunctive relief, and is only appropriate where "1) the plaintiff has a clear right to the relief sought; 2) the agency has a clear duty to perform the act

[3] C.R.C.P. 106(a) provides: "In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure: . . (2) Where the relief sought is to compel a . . . governmental body, . . . officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person."

requested; and 3) there is no other available remedy." *Jones*, 874 P.2d at 494 (emphasis added). Mandamus is "inappropriate when the agency or official has discretion." *Id.*

Moreover, "[m]andamus is only justified when a state agency has failed to perform a statutory duty or to adhere to its statutory responsibility. Generally, this remedy is improper if the court must give directions about the manner in which administrative discretion is to be exercised." *Peoples Nat. Gas Div. of N. Nat. Gas Co. v. Pub. Utils. Comm'n*, 626 P.2d 159, 162 (Colo. 1981) (citations omitted). Thus, while mandamus may "lie to compel an administrative body to exercise its discretion, . . . a court may not through mandamus relief direct *how* the discretion of an executive agency is to be exercised." *Rocky Mountain Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d 508, 517-18 (Colo. App. 2004) (finding no abuse of trial court's discretion in refusing to provide mandamus relief, as it "would improperly direct the manner in which administrative discretion is to be exercised."). *See also Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1181 (Colo. 2000) (affirming Ground Water Judge's holding that "a writ of mandamus did not lie against the Management District because the statute affords discretion in its administration of wells, rather than establishing a non-discretionary duty.").

V. ARGUMENT

Defendants are entitled to partial summary judgment on Claim 1 as a matter of law because the Foundation is not entitled to the requested relief. The State Engineer does not have any mandatory, non-discretionary duty to curtail pumping of designated groundwater wells in the NHP Basin for compliance with the Compact. Thus, such curtailment would not be "ministerial in nature . . . [where the State Engineer] has a clear legal duty to perform" such curtailment. *See Jones*, 874 P.2d at 494. Instead, any such curtailment would be premised on the State Engineer's

discretion, and this Court does not have the power to order the State Engineer to exercise that discretion in a particular manner. *See id.* (power of courts to order executive agencies to take any action is extremely limited and is inappropriate when the agency or official has discretion). Furthermore, the State Engineer's differing administration of surface water and designated groundwater is supported by law, constitutional, and is not arbitrary or capricious.

The Foundation's specific request under Claim 1 relating to the administration of groundwater in the Republican River Basin is:

a. a declaration "[t]hat the lack of any ground water curtailment under the [Republican River] Compact by the State Engineer while at the same time curtailing more senior surface water rights is contrary to Colorado and federal law, unconstitutional, in excess of authority, [and] arbitrary and capricious, …" Compl. ¶ 92.B; and

b. "injunctive relief regarding the" State Engineer's failure to so curtail such groundwater withdrawals. Compl. ¶ 93.

As noted above, the Foundation's assertions and requested relief involve designated groundwater. Simply put, the Foundation is essentially asking this Court to declare that the State Engineer is legally required to curtail pumping of designated groundwater wells in the NHP Basin for Republican River Compact compliance <u>before</u> it can curtail "more senior surface water rights," and then order the State Engineer to implement such curtailment.

Because the State Engineer does not have any mandatory, non-discretionary duty to curtail designated groundwater wells before surface water rights, and because no genuine issues of material facts exist as to this portion of Claim 1, Defendants are entitled to summary judgment as a matter of law.

A. The State Engineer is not required by law to curtail pumping of designated groundwater wells in the NHP Basin for compliance with the Republican River Compact.

To prevail on the groundwater administration aspect of Claim 1, the Foundation must show that the State Engineer has an affirmative, non-discretionary duty to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance before it can curtail "more senior surface water rights." Such a legal requirement would be found in one of three potential sources of authority—the Compact, the State Engineer's enabling statute, or the Groundwater Management Act. As explained below, there is no mandatory, non-discretionary legal requirement for the State Engineer to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance purposes.

1. The Compact does not require the State Engineer to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance.

The Compact is set out in C.R.S. § 37-67-101. The Compact describes the "computed average annual virgin water supply" in the Republican River Basin (Article III), and then allocates that supply to the states of Colorado, Kansas, and Nebraska (Article IV). C.R.S. § 37-67-101. Under the Compact, the use of the allocated waters "shall be subject to the laws of the state, for use in which the allocations are made." C.R.S. § 37-67-101, Article IV (emphasis added). The Compact is silent as to what those state laws were at the time, or what they can be in the future.

In Article IX, the Compact imposes a duty on each of the three states "to administer this compact through the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies." C.R.S. § 37-67-101. Article IX also empowers those officials to "by unanimous action, adopt rules and regulations consistent with the provisions of [the Compact]." However, the Compact does not describe or dictate how the states are to meet

their respective obligations under the Compact and does not provide any criteria for administering intrastate water for Compact compliance. With the exception of specific provisions related to the Pioneer Canal not relevant here,[4] Colorado is free to administer the Compact and to satisfy its obligations under the Compact in its sole discretion. Unlike the South Platte River Compact, there is no provision in the Compact that specifies how and when particular water right priorities will be curtailed for Compact compliance. *See* C.R.S. § 37-65-101, South Platte River Compact, Article IV, section 2 ("Between the first day of April and the fifteenth day of October of each year, Colorado shall not permit diversions from the Lower Section of the river, to supply Colorado appropriations having adjudicated dates of priority subsequent to the fourteenth day of June, 1897, to an extent that will diminish the flow of the river at the Interstate Station, on any day, below a mean flow of 120 cubic feet of water per second of time, except as limited in paragraph three (3) of this Article."); *see also* C.R.S. § 37-63-101, La Plata River Compact, Article II.

Moreover, Colorado did not lose its broad discretion under the Compact as a result of the Compact litigation and subsequent settlement described by the Foundation in its Complaint at ¶¶ 30-35. The Settlement Stipulation entered into by the three states requires the states to factor in the impacts of well pumping on calculations of Compact allocations, and the amount of water that is consumed by each state, when performing the Compact Administration Accounting. *See* Final Settlement Stipulation, Kansas v. Nebraska, No. 126 (Dec. 15, 2002),

[4] There is one minor exception in Article V of the Compact (not relevant here) that specifically recognizes the binding nature of the judgment pertaining to the Pioneer Canal entered in *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498 (1922); that Colorado "shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal in conformity with said judgment;" and that 50 cfs adjudicated to the Pioneer Canal by the District Court of Colorado "is included in and is a part of the total amounts of water hereinbefore allocated for beneficial consumptive use in Colorado and Nebraska." C.R.S. § 37-67-101.

http://www.supremecourt.gov/SpecMastRpt/Orig%20126_041603_finalsettlestip_vol1.pdf.[5] That Stipulation did not dictate how Colorado must satisfy its obligations under the Compact. Thus, regardless of any Compact impacts that may be associated with withdrawals of designated groundwater from the NHP Basin, neither the Compact nor the Settlement Stipulation requires Colorado to curtail such withdrawals for Compact compliance. The Compact mandates compliance, but how such compliance is achieved remains within the sound discretion of Colorado.

2. The State Engineer's enabling statute does not require the State Engineer to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance.

The office of the State Engineer is a creation of statute. *See* C.R.S. §§ 37-80-101 *et seq*. The powers delegated by the General Assembly to the State Engineer pertaining to compliance with compacts, including the Compact, are as follows:

a. In C.R.S. § 37-80-102(1)(a) the State Engineer has been granted "executive responsibility and authority with respect to . . . [the d]ischarge of the obligations of the state of Colorado imposed by compact or judicial order on the office of the state engineer." The State Engineer appoints a deputy state engineer who also has the authority to administer interstate river compacts. *See* C.R.S. § 37-80-114(1).

b. In C.R.S. § 37-80-104, the State Engineer is authorized to:

> [M]ake and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments. In those cases where the compact is deficient in establishing standards for administration within Colorado to provide for meeting its terms, the state engineer shall make such regulations as will be legal and equitable to regulate distribution among the appropriators within Colorado obligated to curtail diversions to meet compact

[5] The Compact litigation documents, including all appendices to the Final Settlement Stipulation, are available at http://www.supremecourt.gov/SpecMastRpt/SpecMastRpt.aspx.

> commitments, so as to restore lawful use conditions as they were before the effective date of the compact insofar as possible.

These statutory provisions do not specifically mandate that the State Engineer administer surface water and designated groundwater in the manner asserted by the Foundation, or otherwise contain any specific administrative requirements by which the State Engineer is to satisfy Colorado's obligations under the Compact, or any other compact for that matter. They cannot be read as imposing a mandatory, non-discretionary duty on the State Engineer to curtail designated groundwater basin well pumping. Rather, these provisions are broad delegations of authority to take care of "the obligations of the state of Colorado imposed by" such compacts. The delegation is necessarily broad because the State Engineer "must make the necessary administrative decisions regarding the necessity, timing, amount, and location of intrastate water restrictions in order to ensure that Colorado's critical interstate delivery obligations are fulfilled." *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 69 (Colo. 2003) (emphasis added).

These provisions do not impose upon the State Engineer a "clear legal duty" to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance. As a result, any action by the State Engineer under these provisions would not be "ministerial in nature." *See Jones*, 874 P.2d at 494.

3. The Groundwater Management Act does not require the State Engineer to curtail pumping of designated groundwater wells.

The General Assembly enacted the Groundwater Management Act to specifically administer designated groundwater. *See* S.B. 367, ch. 19, 1965 Colo. Sess. Laws 1246, codified at C.R.S. §§ 148-18-1, *et seq.* (1965) (current version at C.R.S. §§ 37-90-101 *et seq.* (2015)). Designated groundwater is allocated and administered in accordance with the modified prior appropriation doctrine set out in the Groundwater Management Act. C.R.S. § 37-90-102(1), -

109. In that Act, the General Assembly created the Ground Water Commission and management districts for administration of designated groundwater, but also delegated certain powers and responsibilities to the State Engineer. *See* C.R.S. §§ 37-90-104, -110, -111.5.

Significantly, subsection 6 of C.R.S. § 37-90-111.5 is the only provision in the Groundwater Management Act that specifically refers to both the State Engineer and interstate water compacts. However, it pertains solely to the potential liability of a recalcitrant well pumper: (a) who has failed to adhere to a valid order or an existing rule; where (b) that failure results in the violation of an interstate compact. *See* C.R.S. § 37-90-111.5(6). That provision does not create a mandatory, non-discretionary legal duty for the State Engineer to curtail pumping from a designated groundwater well in the NHP Basin in accordance with its final permit for Compact compliance, and there are no other provisions in the Groundwater Management Act that create such a duty.

B. <u>This Court lacks the power to declare that the State Engineer must exercise its discretion to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance, or to order the State Engineer to curtail such pumping.</u>

As explained above, the Compact (including the Settlement Stipulation) does not tell Colorado how to administer the waters within its borders to comply with its obligations under the Compact. That administration is left to the sound discretion of Colorado. In turn, the Colorado General Assembly has delegated the responsibility and authority with respect to such Compact compliance to the State Engineer, but in a general manner with little specificity. The General Assembly has not provided any mandatory legal duty for the State Engineer to administer surface water rights and designated groundwater rights in the manner asserted by the Foundation, or to curtail pumping of designated groundwater wells in the NHP Basin for compliance with the Compact <u>before</u> curtailing surface water rights.

The Foundation's requested relief—declaratory and injunctive relief to compel a governmental body, the State Engineer, to take a specific action—is tantamount to mandamus relief under C.R.C.P. 106(a)(2) (writ of mandamus "to compel a . . . governmental body, . . . officer or person to perform an action which the law specially enjoins as a duty resulting from an office, trust, or station."). Thus, the Court should evaluate the Foundation's requested relief under the mandamus legal standard. *See Jones*, 874 P.2d at 494 (refusing to let the plaintiff circumvent a mandamus analysis simply because he pled his requested relief as injunctive relief).

Mandamus is only appropriate where there is a clear right to relief sought, a clear duty by the agency to perform the act requested, and no other available remedy. *See, e.g., Jones*, 874 P.2d at 494. In *Upper Black Squirrel Ground Water Management District*, for example, the Designated Ground Water Judge held that a writ of mandamus would not lie against a management district because the statute at issue—the Groundwater Management Act—did not compel a particular action, but instead afforded discretion in the district's administration of designated groundwater wells. 993 P.2d at1181. The Colorado Supreme Court upheld this ruling based on the agency's discretion. *Id.*

The underlying rationale for a court's limited mandamus power is the separation of powers doctrine. That doctrine "imposes upon the judiciary a proscription against interfering with the executive or legislative branches and operates to prohibit the judiciary from preempting an executive agency from exercising powers properly within its own sphere." *Kort v. Hufnagel*, 729 P.2d 370, 373 (Colo. 1986); *see also Moore v. Dist. Ct.*, 518 P.2d 948, 951 (Colo. 1974) ("This Court has reiterated on numerous occasions the general rule that district courts do not have jurisdiction to interfere with the executive branch of the government in the performance of its statutory duties."). Furthermore, "[t]he reviewing court should not substitute its judgment for

that of the agency's when the General Assembly by statute has consigned the matter to the exercise of the agency's sound discretion." *Freedom Colo. Info. Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008).

Given the above, the Foundation's requested injunctive relief necessarily must fail. The Foundation is seeking to compel a particular administration scheme for compliance with the Compact. The State Engineer has no mandatory, non-discretionary legal duty to curtail designated groundwater wells in the NHP Basin to achieve Compact compliance. Thus, the Foundation cannot meet the second element of its mandamus claim and, as a result, this Court does not have the power to order the relief requested by the Foundation.

C. The State Engineer's discretionary decision to not curtail pumping of designated groundwater wells in the NHP Basin for Republican River Compact compliance is lawful.

There is likewise no merit to the Foundation's claim that the State Engineer's discretionary administrative decision to not curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance before it curtails "more senior surface water rights" is "contrary to Colorado and federal law, unconstitutional, in excess of authority, [and] arbitrary and capricious." Compl. ¶ 92.B. The underlying basis for this claim is the Foundation's assertion that, given the predictions of the Model about depletions from groundwater pumping, the Foundation's surface water rights are "similarly situated in all relevant aspects under the Compact to the [designated] ground water pumpers in the Basin." Compl. ¶ 86. As explained below, this assertion is not true because it ignores the significant legal differences between tributary surface water rights and designated groundwater rights in Colorado, and the practical differences inherent in administering those rights. These types of waters are allocated and administered in fundamentally different ways under Colorado law and, as a result, the State

Engineer's decision to treat the two waters differently is fully consistent with Colorado and federal law.

1. The Foundation's surface water rights are not "similarly situated" to designated groundwater pumpers for Compact compliance.

The General Assembly delegated authority to the State Engineer to take care of "the obligations of the state of Colorado imposed by" the Compact. *See* C.R.S. § 37-80-102(1)(a). Although broad, the State Engineer must exercise that delegation "to the extent possible within the existing framework of Colorado statutory priority law." *Simpson*, 69 P.3d at 69. One of the relevant "statutory priority law[s]" that the State Engineer must consider when addressing designated groundwater is the Groundwater Management Act. The allocation and administration of designated groundwater under that Act differs from the allocation and administration of surface waters in several significant ways.

The Groundwater Management Act creates a modified prior appropriation system for the allocation and administration of designated groundwater that is different from the prior appropriation system governing surface water and tributary groundwater. *See, e.g., N. Kiowa-Bijou Mgmt. Dist.*, 505 P.2d at 379-80; *Fundingsland v. Colo. Ground Water Comm'n*, 468 P.2d 835, 839 (Colo. 1970). Unlike tributary groundwater, the Commission has, through the statutory process set forth in the Groundwater Management Act, made a binding determination that designated groundwater "would not be available to and required for the fulfillment of decreed surface rights." C.R.S. § 37-90-103(6)(a). Additionally, the 1969 Act explicitly excludes "waters referred to in section 37-90-103(6)," i.e., designated groundwater, from its framework. *See* C.R.S. § 37-92-103(13). This exclusion of designated groundwater was intended to advance the General Assembly's interest in the full economic development of designated groundwater resources, protecting prior appropriation of designated groundwater, and allowing for reasonable

depletion of the aquifer. C.R.S. § 37-90-102(1). The 1966 Order creating the NHP Basin recognized the separate systems in Colorado by: (1) concluding that this was designated groundwater "which in its natural course would not be available to and required for the fulfillment of decreed surface rights"; and (2) recognizing that surface water rights were not within the jurisdiction of the Ground Water Commission, and instead would be governed by the Republican River Compact and surface water laws. *See* Ex. A, 1966 NHP Basin Order, pp. 3-4.

Designated groundwater rights confirmed under the Groundwater Management Act are administered in relation to the priorities of other designated groundwater rights in accordance with the provisions of that Act, and such administration is not tied to or governed by that mandated under the 1969 Act for surface water rights. *See* C.R.S. § 37-90-109; *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 30 (Colo. 2006). Vested rights to withdraw designated groundwater and their associated priorities are determined by the Commission, and are described in final permits issued after an extensive public process. This process includes notice of the initial designation of the basin under C.R.S. §§ 37-90-106, -112; application for and notice of conditional and final permits under C.R.S. §§ 37-90-107, -112; and issuance of those permits under C.R.S. § 37-90-108. The Colorado Supreme Court has recognized that final permits concerning the withdrawal of designated groundwater are tantamount to final water court decrees (*see, e.g., Thompson v. Colo. Ground Water Comm'n*, 575 P.2d 372, 377-78 (Colo. 1978)), and the rights and priorities associated with such permits and their administration is legally tied to the Groundwater Management Act. Given the different structures and goals of the 1969 Act and the Groundwater Management Act, and the development of the law in Colorado concerning groundwater and its administration, there is no legal basis for the Foundation's suggestion that

there are surface water rights that are "more senior" than designated groundwater rights for purposes of Compact administration. *See, e.g.*, Compl. ¶ 92.B.

In addition, the administration of surface water and designated groundwater raises inherent practical considerations that require discretionary administrative decisions. The Colorado Supreme Court has recognized this issue with respect to a compact administration situation involving tributary groundwater. *See Simpson*, 69 P.3d 50. In that case, the Court recognized that the South Platte River Compact actually provided for priority administration. *Id.* Nevertheless, the Court explained that curtailing groundwater pumping "by priority date alone may not result in increased flows at the state line at the time they are needed" given the delayed impact of such pumping. *Id.* at 69. According to the Court, the State Engineer, as the chief state water administration official, must, for compact compliance purposes, "make the necessary administrative decisions regarding the necessity, timing, amount, and location of intrastate water restrictions" taking into account the delayed impact of groundwater pumping on the river. *Id.* Administration of designated groundwater for Compact compliance requires similar, if not more complex, discretionary administrative decisions.

In summary, tributary surface water and designated groundwater are not "similarly situated in all relevant aspects under the Compact"; they are legally different regardless of any predictions by the Model, and that Model and any information it provides does not provide any legal basis for changing that legal distinction.

2. The differences between designated groundwater rights and surface water rights support the State Engineer's decision.

Given the legal differences between designated groundwater rights and surface water rights, there is a "lawful basis to treat surface water diverters differently than [designated] ground water diverters in the NHP Basin for purposes of Compact compliance." Compl. ¶ 78.

Thus, a discretionary decision by the State Engineer to not curtail pumping of designated groundwater wells in the NHP Basin for Republican River Compact compliance before it curtails "more senior surface water rights" is not unlawful.

a. The State Engineer's decision is **not** contrary to Colorado and federal law.

As explained in Section V.A. of this Motion, the State Engineer is nowhere required by law to curtail pumping of designated groundwater wells in the NHP Basin for compliance with the Compact. Thus, any authority of the State Engineer to curtail pumping from designated groundwater wells in the NHP Basin for Compact compliance would be *discretionary*. The State Engineer's decision not to perform an act that is not compelled by Colorado or federal law cannot, as a matter of law, be "contrary to" Colorado and federal law.[6]

Additionally, pursuant to the "existing framework of Colorado statutory priority law" pertaining to the groundwater being pumped by wells in the NHP Basin with final permits, that groundwater is "designated groundwater." As a matter of law, wells in the NHP Basin authorized by final permits to pump designated groundwater are subject to a different statutory process than applicable to tributary surface water rights. *See* Ex. A, 1966 NHP Basin Order, pp. 3-4. Thus, the State Engineer's discretionary decision to not curtail pumping from such permitted wells for Compact compliance fully adheres to the *Simpson* Court's directive for the State Engineer to exercise its Compact compliance authority "to the extent possible within the existing framework of Colorado statutory priority law." *Simpson*, 69 P.3d at 69.

[6] Defendants have assumed that the federal laws in question are the constitutional challenges (which Defendants address in Section V.C.2.b. below), and the Compact which has been enacted as a federal law, *see* Act of May 26, 1943, Pub. L. No. 78-60, ch. 104, 57 Stat. 86 (granting the consent of Congress to the Republican River Compact), since the Foundation has not cited to any other specific federal law that the State Engineer is allegedly violating.

b. The State Engineer's decision to not administer surface water and designated groundwater in the manner asserted by the Foundation is **not** unconstitutional.

In order to establish that the State Engineer's administrative decision is unconstitutionally discriminatory or violates equal protection rights, the Foundation bears the burden of showing that the decision is not reasonable and does not bear a rational relationship to a legitimate state objective. *See, e.g., Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 906 (Colo. 1993); *see also Cent. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 341 (Colo. 1994) (applying rational basis standard because statute, regarding augmentation plans for sand and gravel pits, did "not infringe on a fundamental right or create a classification based on race, religion, national origin or gender."); *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1015 n.7, 1016 (Colo. 1982) (rational relationship standard of review applies where no fundamental right, suspect classification, or gender classification is involved; "[f]undamental rights are essentially those rights which have been recognized as having a value essential to individual liberty in our society," including right to privacy, right to vote, and right to marriage). Constitutionality is presumed under this rational basis review, and the Foundation must demonstrate that the decision is unconstitutional beyond a reasonable doubt. *Scholz*, 851 P.2d at 906.

The Foundation cannot meet its burden given the differences between its surface water rights and designated groundwater rights. Those differences were imposed by the General Assembly to advance the legitimate government purpose of promoting full economic development of designated groundwater. The General Assembly, in defining designated groundwater, established a separate allocation and administration regime for designated groundwater than that used for water administered under the 1969 Act. This separate regime is

rationally based on the legitimate state objective of promoting economic development, and thus the decision passes the muster of the "rational relationship" test.

Nor can the Foundation show that its due process rights have been violated. Both the U.S. and Colorado constitutions mandate that a person may not be deprived by the state of life, liberty, or property without due process of law. U.S. Const. amend XIV, § 1; Colo. Const. art. II, § 25. The Foundation does not specify whether it is raising a procedural or substantive due process challenge. In the event the Foundation's challenge is a substantive due process challenge, the initial question is whether the challenged rule infringes upon a fundamental constitutional right. *See City & Cty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1277 (Colo. 2010) (citing *Lujan*, 649 P.2d at 1014-16). "If the statute does not infringe upon a fundamental constitutional right, then the applicable test for reviewing a substantive due process challenge is the rational basis test." *Id*. Analysis demonstrating the lack of a fundamental right in question and the existence of a rational basis for the State Engineer's administrative decision is provided above in this section.

In the event the Foundation's challenge is a procedural due process challenge, the challenge likewise fails. "The essence of procedural due process is fundamental fairness; this embodies adequate advance notice and opportunity to be heard prior to state action resulting in deprivation of a significant property interest." *Meridian Ranch Metro. Dist. v. Colo. Ground Water Comm'n*, 240 P.3d 382, 391 (Colo. App. 2009). As discussed more fully in the Defendant's motion concerning the Foundation's constitutional challenge of Senate Bill 10-52, the multiple processes required under the Groundwater Management Act for designation of a designated basin and to obtain final permits for wells, including notice to the public and opportunities to participate, is clearly sufficient to satisfy the concept of fundamental fairness

with respect to the determination and allocation of designated groundwater.[7] Under these circumstances, the Foundation cannot now argue that it is somehow deprived of due process because the State Engineer is making discretionary administrative decisions concerning designated groundwater that are different than those applied to the Foundation's tributary surface water rights. The Foundation or its predecessors in interest were free to challenge the initial designation of the NHP Basin, the application for conditional and final permits, and the issuance of final permits, and participate concerning what groundwater and wells would be subject to administration under the Groundwater Management Act.

Furthermore, the State Engineer has not taken any of the Foundation's property or violated the Foundation's rights under the constitutional prior appropriation doctrine. First, the Foundation's taking argument fails because the State Engineer's actions substantially advance the legitimate state interest of Compact compliance. *See Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs of La Plata*, 38 P.3d 59, 64 (Colo. 2001) (a regulatory taking occurs when the action (1) "denies an owner economically viable use of his land" and (2) "does not substantially advance legitimate state interests.") (emphasis added).

Second, as to the prior appropriation doctrine argument, the Foundation still has decreed surface water rights, and is still entitled to divert surface water under those rights. Due to the separate categories of water subject to the Groundwater Management Act and the 1969 Act, the prior appropriation doctrine applicable to 1969 Act waters does not apply to designated groundwater. Designated groundwater is subject to a modified prior appropriation doctrine, and is not subject to the same administration as surface water rights. *See* C.R.S. § 37-90-102. The

[7] Moreover, there was a six month window of time from the date that SB 52 was adopted to the date that it went into effect, during which time the Foundation could have filed a petition to redraw the NHP Basin boundaries. *See* SB 52, ch.63, 2010 Colo. Sess. Laws 223.

modified prior appropriation doctrine has been affirmed by Colorado Courts. *See, e.g., Larrick v. N. Kiowa-Bijou Mgmt. Dist.*, 510 P.2d 323, 328 (Colo. 1978). The fact that designated groundwater is subject to a separate and distinct administration mechanism does not violate the Foundation's rights under the prior appropriation doctrine.

c. The State Engineer's decision is **not** in excess of authority, arbitrary or capricious.

In reviewing an action by an administrative agency, the Court "must find that the decision is unsupported by any competent evidence before the court may set aside the agency's decision as arbitrary or capricious." *Bd. of Cty. Comm'rs v. Colo. Bd. of Assessment Appeals*, 628 P.2d 156, 158 (Colo. App. 1981). As explained above, the State Engineer is not legally required to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance before it curtails the Foundation's surface water rights. Rather, the State Engineer has been delegated Compact compliance authority, but has been directed to exercise that authority "to the extent possible within the existing framework of Colorado statutory priority law." *Simpson*, 69 P.3d at 69. The State Engineer's decision not to curtail groundwater pumping is within its discretion and scope of authority, and such a decision is fully supported by the different legal status of designated groundwater, as well as the practical difficulties in administering the "delayed impact [of groundwater pumping] on the flow of the river." *Id.* As a result, the State Engineer's decision is neither arbitrary nor capricious.

VI. CONCLUSION

Summary judgment is proper as a matter of law on Claim 1 of the Foundation's Complaint as it pertains to actions or inactions by the State Engineer concerning the administration of wells in the NHP Basin with final permits that authorize the withdrawal of designated groundwater because the Foundation is not entitled to the requested relief.

Respectfully, this Court does not have the power to order the State Engineer to exercise its discretion in any particular manner, let alone the manner which the Foundation is proposing. Additionally, given the legal differences between designated groundwater rights and the Foundation's surface waters, the State Engineer's decision not to curtail pumping of designated groundwater wells in the NHP Basin for Republican River Compact compliance before it curtails "more senior surface water rights" is not contrary to Colorado or federal law.

Respectfully submitted this 29th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of February, 2016, I served a true and correct copy of the foregoing **MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM 1 RE: STATE ENGINEER ADMINISTRATION OF DESIGNATED GROUNDWATER** by ICCES e-filing addressed to the following:

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Pursuant to C.R.*C.*P. *121, §1-26(7)*

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