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: May 6, 2016 4:39 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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**REPLY IN SUPPORT OF 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 Reply in Support of Motion for Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater ("Reply") pursuant to C.R.C.P. 56, and in support thereof, state as follows:

I. INTRODUCTION

The Jim Hutton Educational Foundation ("Foundation") does not like the manner in which the State Engineer is exercising its discretion under C.R.S. § 37-80-104 to meet Colorado's commitments under the Republican River Compact ("Compact"). As the owner of certain junior surface water rights in the Northern High Plains ("NHP") Basin that are being curtailed for Compact compliance, the Foundation argues it is unlawful for the State Engineer "to curtail only surface water for Compact compliance without curtailing [designated] groundwater use [in that Basin]." Foundation's Response to Motion for Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater, 2 (filed Apr. 8, 2016) ("Foundation's Response"). The underlying basis for the Foundation's argument is its unsupported assertion that "once designated groundwater depletions were made subject to the Compact – they needed to be administered like any other source of water that is subject to the Compact." *Id*. at 8.

The Foundation has not cited to any statute or case opinion that provides legal support for this illusory administrative requirement. Neither the Special Master nor the U.S. Supreme Court held in the Compact litigation[1] that Colorado had to administer designated groundwater in the same manner as surface water. Rather, their rulings required only that designated groundwater pumping that depletes the Republican River be "counted" against the amount of water allocated to Colorado under the Compact. Importantly, the Special Master's report explained, consistent with the plain language of Article IV of the Compact, "it is up to each State to decide how to use the water it is allocated." First Report of the Special Master (Subject: Nebraska's Motion for Dismiss), State of Kansas v. State of Nebraska, No. 126, at 29 (Jan. 28, 2000) ("First Report") (emphasis added) (previously filed as the Foundation's Ex. 7, also available at 2000 WL 35789995).

The Foundation's premise is also directly contrary to the Colorado Supreme Court's analysis in *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003). *Simpson* instructs the State Engineer to exercise its compact compliance authority under C.R.S. § 37-80-104 "to the extent possible within the existing framework of Colorado statutory priority law." *Id.* at 69. That "framework" includes different allocation and administration systems for surface water and designated groundwater under the Water Right Determination and Administration Act of 1969, C.R.S. §§ 37-92-101 *et seq.* ("1969 Act"), and the Colorado Groundwater Management Act, C.R.S. §§ 37-90-101 *et seq.* ("Groundwater Management Act"), respectively. This existing framework does not allow for the "equal" administration proposed by the Foundation.

[1] In using the term "Compact litigation," Defendants intend to refer to the litigation in the U.S. Supreme Court initiated by Kansas in 1998, which cumulated in the Final Settlement Stipulation in 2002, and subsequent court affirmation of such stipulation in 2003. The Reply contains citations to specific rulings from the Compact litigation.

For the limited purposes of Defendants' Motion for Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater ("Defendants' Designated Groundwater Administration Motion"), Defendants have asked the Court to accept the factual assertions in the Foundation's Complaint related to the administration of designated groundwater as true. The Foundation has raised no disputes of material fact in its Response. As a matter of law, the Foundation cannot prevail on its claims for (1) a declaration "[t]hat the lack of any ground water curtailment under the 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," and (2) injunctive relief regarding the State Engineer's failure to curtail such groundwater withdrawals. Compl. ¶¶ 92.B, 93. Therefore, Defendants are entitled 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.

II. UNDISPUTED FACTS

As explained above and in Defendants' Designated Groundwater Administration Motion, the factual assertions in the Foundation's Complaint related to the administration of designated groundwater in the NHP Basin have been accepted as true for the limited purposes of the 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. Thus, for purposes of both the Defendants' Designated Groundwater Administration Motion and this Reply, no disputed issues of material fact exist.[2] That said, the Foundation makes three assertions in its Response that warrant attention in this Reply.

The first assertion is not a factual allegation but is the Foundation's characterization of Senate Bill 10-52 ("SB 52") as a bill that "took away the protections that were built into the Ground Water Management Act for surface water rights owners when the NHP Basin was created." Foundation's Resp. at 2. As explained in Defendants' Motion for Summary Judgment on Constitutionality of Senate Bill 10-52 ("Defendants' SB 52 Motion"), Defendants' Response to Plaintiff's Motion for Summary Judgment on its Senate Bill 52 Claim ("Defendants' Response to Plaintiff's SB 52 Motion"), and Defendants' Reply Brief in Support of Defendants' SB 52 Motion ("Defendants' SB 52 Reply"), this characterization finds no support in either the pre-SB

[2] The Defendants' acceptance of the factual assertions in the Foundation's Complaint for the purposes of their Designated Groundwater Administration Motion at pages 8-9 is to be contrasted with the Defendants' opposition to the Foundation's Motion for Summary Judgment on its Compact Administration Claim ("Foundation's Compact Motion"). *See* Defendants' Response to the Jim Hutton Educational Foundation's Motion for Summary Judgment on its Compact Administration Claim Related to Designated Groundwater, 5-6 (filed Apr. 8, 2016) ("Defs.' Resp. to Foundation's Compact Mot."). Simply put, the Defendants' Designated Groundwater Administration Motion should be granted because the Foundation's claim is wrong as a matter of law even if the Court assumes that all of the factual allegations in the Complaint are true. In contrast, the Foundation's Compact Motion is wrong as a matter of law and, in addition, the Foundation cannot prevail on its Compact Motion because the Defendants dispute a number of material facts (*e.g.*, whether the Foundation's surface water rights are actually injured by the State Engineer's current administration practices for Compact compliance, and whether such injury, if any, would be remedied by the relief requested by the Foundation) for which an evidentiary record must be fully developed before resolution.

52 version of the Groundwater Management Act or in *Gallegos v. Colorado Ground Water Commission*, 147 P.3d 20 (Colo. 2006). Defs.' SB 52 Mot. at 13-19; Defs.' Resp. to Pls.' SB 52 Mot. at 12-16; Defs' SB 52 Reply. SB 52 was adopted to clarify a potential ambiguity created by the Court in *Gallegos*. Defs.' SB 52 Mot. at 25, 33; Defs.' Resp. to Pls.' SB 52 Mot. at 12-16. It was not a change in the law. It did not take away the protections that were built into the Groundwater Management Act for surface water rights owners when the NHP Basin was created. Rather, the provisions for redrawing basin boundaries were limited to redrawing those boundaries; they did not extend to altering final permits as the Foundation has suggested in the Foundation's Response, as well as the Foundation's Compact Motion.

The second assertion is that "groundwater in the [NHP] Basin is the subject of the Compact." Foundation's Resp. at 2. This is also not a factual allegation. Rather, it is the Foundation's legal characterization of one element of the Compact litigation. This legal characterization is incorrect in that it fails to articulate the actual holding in the Compact litigation pertaining to groundwater. All that the United States Supreme Court held in the Compact litigation was that "a State's groundwater pumping, to the extent it depletes stream flow in the [Republican River] Basin, is intended to be <u>allocated as part of the virgin water supply and to be counted as consumptive use</u> by the pumping State." First Report at 23 (emphasis added). There has never been a legal determination that the requirement to "count" the groundwater creates a legal obligation for Colorado or the State Engineer to curtail well pumping in a particular fashion. Even assuming the Foundation's assertions are correct, there is simply no credible support for the Foundation's argument that the Compact litigation imposed upon Colorado a legal requirement to administer designated groundwater in a particular manner for Compact compliance.

The third assertion is that the State and Division Engineers are only curtailing surface water rights appropriated after 1942 to help achieve Compact compliance, and not designated groundwater rights. Foundation's Resp. at 3. Defendants acknowledge that the State Engineer is not generally curtailing the pumping of designated basin wells. However, as the Foundation has already conceded in the section of its Complaint titled "Actions Taken by Defendants to Address the Compact Shortfall," the State Engineer and well users in the Republican River Basin are taking actions to assist with the state's Compact compliance obligations. *See* Compl. ¶¶ 42-53. As one example, the Compact Compliance Pipeline delivers pumped designated groundwater to the North Fork of the Republican River, and the State and Division Engineers and the Division of Water Resources require measurement of well pumping and enforce existing permit limits. *See* Compl. ¶¶ 43-44; Foundation's Resp. at 6. *See also* State Engineer's Response to the Jim Hutton Educational Foundation's Motion for Summary Judgment on its Compact Administration Claim, 7-8 (filed Apr. 8, 2016) ("State Engineer's Resp. to Foundation's Compact Mot."). Thus, although the State Engineer is not generally curtailing designated groundwater diversions, the State Engineer's administration recognizes that well users are offsetting their impacts on virgin water supply as part of Colorado's greater effort to ensure Compact compliance.

III. ARGUMENT

A. The State Engineer's Authority in Administering the Compact Is Limited by Colorado Statutes and Case Law.

1. Colorado law does not allow for "unfettered" discretion by the State Engineer.

The Foundation argues that the State Engineer's authority in administering the Compact is limited by Colorado statute and case law, and that the State Engineer does not have "unfettered discretion." *See* Foundation's Resp. at 3-5. Defendants agree, and described in their Designated

Groundwater Administration Motion several statutes and cases that are relevant to Compact administration and preclude "unfettered discretion" by the State Engineer, including: (1) the Compact itself, including Article IV, which provides that the use of the allocated waters "shall be subject to the laws of the state," Defs.' Designated Groundwater Administration Mot. at 13 (citing C.R.S. § 37-67-101, Art. IV); (2) the State Engineer's enabling statute, which demonstrates that the office of the State Engineer is a creation of statute, and is thus limited by statutorily-granted powers, *id*. at 15 (citing C.R.S. §§ 37-80-101 *et seq*.); and (3) the Groundwater Management Act, which establishes a system of modified prior appropriation for designated groundwater that is separate and distinct from the strict prior appropriation system for surface waters set out in the 1969 Act. *Id*. at 17 (citing C.R.S. §§ 37-90-101 *et seq*.). Defendants cite these statutes and case law to describe the legal framework in which Compact administration should occur to the extent possible,[3] and also to demonstrate that there is no mandatory, non-discretionary duty to curtail pumping of designated groundwater wells in the NHP Basin for Compact compliance as the Foundation would prefer.

2. The State Engineer's current administration complies with C.R.S. § 37-80-104.

The Foundation ignores the broad legal framework in which the State Engineer must exercise its discretion, and instead focuses on a single phrase in C.R.S. § 37-80-104 ("Section 104") as support for its preferred Compact administration.[4] Section 104 provides:

[3] *See Simpson*, 69 P.3d at 69.

[4] The Foundation claims that the "Defendants and the Foundation agree that the Compact is largely silent on required intrastate administration of water for Compact compliance to achieve the specified consumptive use limits." Foundation's Resp. at 3. On this basis, the Foundation claims C.R.S. § 37-80-104 provides "explicit statutory direction" on how to administer in-state water when the Compact is silent. *Id.* Defendants disagree that the Compact is silent on required intrastate administration. As Defendants have explained, the Compact is not silent on required intrastate administration; rather the Compact is silent as to what the state laws were at the time the Compact was ratified, or what they can be in the future. *See* Defs.' Designated Groundwater Administration Mot. at 13.

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

C.R.S. § 37-80-104. The Foundation argues that the language "so as to restore lawful use conditions as they were before the effective date of the compact" demonstrates that curtailment of only surface water rights for Compact compliance is unlawful because there was virtually no groundwater use when the Compact was ratified in 1942. Foundation's Resp. at 4. The phrase "lawful use conditions" is not defined. Nonetheless, the Foundation applies its own definition—the physical condition of virtually no groundwater use in 1942—and asks the Court to read the phrase in a vacuum, ignoring the rest of Section 104 and other relevant law. *See id.* This contradicts the Foundation's statement that courts "are not to presume that the legislative body used the language idly with no intent that meaning should be given to its language." *Id.* (quoting *Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 218 (Colo. 1996)). The State Engineer must restore lawful use conditions "insofar as possible" and in a manner that is both legal and equitable, meaning the State Engineer must also consider the current legal framework, including the Groundwater Management Act and the 1969 Act. Even if there was virtually no groundwater use in 1942 in the NHP Basin, the State Engineer cannot go back in time and ignore the current legal landscape. Moreover, the Foundation has not provided any

specific legal support for the conclusion that the State Engineer is automatically required to curtail all groundwater use that was initiated after 1942.[5]

A further flaw in the Foundation's reasoning is its assertion that the "current administration of only surface water rights for Compact compliance" is contrary to restoring lawful use conditions. Foundation's Resp. at 4 (emphasis added). As explained above in Section II, and as conceded by the Foundation, the State Engineer is taking actions with regard to designated groundwater to assist the state with Compact compliance. *See* Compl. ¶¶ 43-45. The State Engineer's Response to the Foundation's Compact Motion further describes these actions, and other actions taken for Compact compliance. *See* State Engineer's Resp. to Foundation's Compact Mot. at 6-8; Affidavit of Dick Wolfe, M.S., P.E. ¶¶ 8-10, 12 (Ex. A. to State Engineer's Resp. to Foundation's Compact Mot.).

The Foundation further argues it is noteworthy that Section 104 does not explicitly exclude designated groundwater, or limit its scope to "waters of the state," therefore Section 104 must apply to designated groundwater. *See* Foundation's Resp. at 4. The issue is not whether Section 104 applies to designated groundwater; the Foundation has already conceded that the State Engineer is taking actions with respect to designated groundwater for Compact compliance, and those actions are presumably occurring under Section 104. *See* Foundation's Resp. at 6. The Foundation simply dislikes the State Engineer's current Compact administration. Given the separate allocation and administrative systems for surface water and designated groundwater under the 1969 Act and the Groundwater Management Act, the State Engineer's current administration is lawful because it recognizes and gives effect to both Acts and, as a result of

[5] Under the Foundation's apparent theory, its Hutton No.1 and No. 2 water rights would never be able to divert, and Bonny Reservoir could not be filled because these water rights have a priority date after 1942.

those Acts, it is simply not possible to treat the surface water and designated groundwater the same as the Foundation would prefer.

3. The State Engineer's current administration complies with Colorado case law.

The Foundation argues that Colorado case law constrains the State Engineer's Compact administration. Foundation's Resp. at 5. Defendants agree. The Foundation cites to *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, but fails to apply its direction to this case. *See id.* at 5, 8, 13.

In *Simpson*, the Court concluded "that the State Engineer, while enforcing compact delivery requirements, must simultaneously adhere, insofar as possible, to Colorado constitutional and statutory provisions for priority administration." 69 P.3d at 69. The Court also concluded that "although the State Engineer can make rules to enforce compact compliance in those instances where the compact itself is deficient in establishing standards, the means by which he does so are both dictated and constrained by other statutory requirements." *Id.* at 70. "Colorado constitutional and statutory provisions for priority administration" include the systems of prior appropriation and modified prior appropriation. Given the fact that designated groundwater is at issue in this case, the "statutory provisions" the State Engineer must incorporate into its Compact administration must include the Groundwater Management Act and the allocation and administration system set out in that Act, which is different from the allocation and administration system set out in the 1969 Act.

The Foundation simply discounts these legal differences and argues the waters should be treated the same because surface water and designated groundwater are both "counted" under the Compact. *See* Foundation's Resp. at 2-3, 7-8. The Foundation has failed to cite any case that supports its preferred administration of curtailment of surface water and designated groundwater

based strictly on priority, disregarding the separate and distinct legal systems of prior appropriation and modified prior appropriation.

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

The Foundation argues that C.R.S. § 37-90-111.5(6)[6] provides "further evidence that the Legislature understood that designated groundwater could cause interstate compact exceedances and would need to be curtailed as necessary," demonstrating the Groundwater Management Act itself "recognizes that designated groundwater may need to be curtailed to avoid Compact violations." Foundation's Resp. at 4-5. It is important to underscore the limited effect of the referenced provision. As the Foundation appears to concede, this provision does not actually grant the State Engineer any authority to issue orders or adopt such regulations with regard to designated groundwater. *See* C.R.S. § 37-90-111.5(6). Rather, the provision presumes, and is specifically premised on, the State Engineer's statutory ability to issue such orders or regulations pursuant to some other statutory provision, such as Section 104. In addition, the fact that this provision may contemplate curtailment of designated groundwater does not create a mandatory duty on the State Engineer to curtail designated groundwater for Compact compliance purposes. In drafting this provision, the General Assembly may have understood that designated groundwater "could cause interstate compact exceedances." Foundation's Resp. at 5. However, it is simply wrong to read into this provision an automatic mandate for the State Engineer to curtail designated groundwater before surface water. Nothing in the provision specifies that outcome.

[6] The Foundation cites to C.R.S. § 37-90-112(6), but there is no subsection (6) in Section 112, and given the text of the Foundation's Response, it appears that the section actually being referred to is C.R.S. § 37-90-111.5(6) of the Groundwater Management Act.

B. Designated Groundwater Depletions and Surface Water Depletions Are Not Similarly Situated Under the Compact.

The Foundation admits there are clear differences in how designated groundwater and tributary waters are administered in Colorado, yet asserts that "those differences do not matter when it comes to consumptive use under the Compact or Compact administration." Foundation's Resp. at 7. The basis for this assertion is the Foundation's argument that "once designated groundwater depletions were made subject to the Compact – they needed to be administered like any other source of water that is subject to the Compact." *Id*. at 8.

There are two main flaws in the Foundation's reasoning, both of which are explained in greater depth in the Defendants' Response to the Foundation's Compact Motion. *See* Defs.' Resp. to Foundation's Compact Mot. at 24-27. First, the Foundation fails to give effect to Article IV of the Compact, which grants the states the right to administer water within their respective boundaries in accordance with state law. C.R.S. § 37-67-101, Art. IV.[7] Under the Compact, so long as there is no conflict between the Compact and state law, the State Engineer must administer Compact commitments in accordance with state law. *Id.*; *see, e.g.*, Defs.' Resp. to Foundation's Compact Mot. at 18.

Second, the Foundation has mischaracterized the outcome of the Compact litigation as creating a new mandate for the State Engineer to curtail designated groundwater pumping and surface water diversions according to strict prior appropriation. In his Report to the U.S. Supreme Court, the Special Master found that "a State's groundwater pumping, to the extent it depletes stream flow in the [Republican River] Basin, is intended to be allocated as part of the virgin water supply and to be counted as consumptive use by the pumping State." First Report at

[7] The last sentence of Article IV provides: "The use of the waters hereinabove allocated shall be subject to the laws of the state, for use in which the allocations are made." C.R.S. § 37-67-101, Art. IV.

23. In evaluating the plain language of the last sentence of Article IV of the Compact, the Special Master recognized the state's discretion in managing the waters allocated to it when he concluded that "it is up to each State to decide how to use the water it is allocated." *Id.* at 29. In approving the Special Master's Report, the U.S. Supreme Court simply approved the requirement that the depletions caused by groundwater pumping be counted against the allocated share of the state where the pumping was occurring. Nothing in the Compact litigation imposed a mandatory duty to administer designated groundwater and surface water the same.

Finally, *Upper Black Squirrel Creek Ground Water Management District v. Goss*, 993 P.2d 1177 (Colo. 2000), does not stand for the proposition that tools are already in place to incorporate designated basin priorities into surface water priority lists. As the Foundation concedes, that case described the priority list for wells within a designated groundwater basin. *See Upper Black Squirrel Creek Ground Water Mgmt. Dist.*, 993 P.2d at 1185; Foundation's Resp. at 7-8. The fact that designated basin groundwater wells have priorities does not provide an automatic basis for administration of surface water and designated groundwater under strict prior appropriation; nor does it mean that those priorities relate in any way to the priority system under the 1969 Act or could be administered like surface water rights under the 1969 Act.

C. The State Engineer's Current Compact Administration Is Not Unconstitutional, or Arbitrary or Capricious.

1. The State Engineer's administrative decisions are not analogous to *Fellhauer v. People*, and the State Engineer's current Compact administration is not arbitrary and capricious and does not violate equal protection.

The Foundation places heavy reliance on the case of *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968) (*see* Foundation's Resp. at 9, 13); this reliance is misplaced. *Fellhauer* involved a challenge to the division engineer's inconsistent priority enforcement of tributary wells in the

Arkansas River Basin. *Id.* at 988.[8] The division engineer was curtailing wells based on agreements with certain water users rather than based on priority administration of the Arkansas River. *Id*. at 992-93. Because the curtailment decisions were not based on a valid scheme or any system of priority, the court held that the division engineer's curtailment decisions were unconstitutional and arbitrary and capricious. *Id.* at 993, 997.

Here, the State Engineer is not arbitrarily curtailing surface water rights. Rather, the State Engineer issued an administrative Compact call of surface water rights with priorities junior to 1942. The State Engineer's administrative decisions are not analogous to *Fellhauer* because, as described herein and in Defendants' Designated Groundwater Administration Motion, surface water and designated groundwater are allocated and administered differently under state law. Moreover, there is not a lawful means of administering surface water rights and designated groundwater rights under the same appropriation scheme. *See, e.g., Gallegos*, 147 P.3d at 30-31. Contrary to the factual situation in *Fellhauer*, the State Engineer is acting within the confines of the law and is administering pursuant to a priority system, not in violation of equal protection or in an arbitrary and capricious manner.

2. The State Engineer's current Compact administration does not violate equal protection.

The Foundation argues this case "involves the discriminatory enforcement of the State Engineer's statutory compact authority." Foundation's Resp. at 9. In a claim of discriminatory enforcement, "[i]t is presumed that state officials perform their tasks in a regular manner, and the

[8] In *Fellhauer*, the division engineer was acting under a statutory provision enacted in 1965 that involved engineer administration of tributary wells. 447 P.2d at 989-90; *see* Act of May 3, 1965, ch. 318, 1965 Colo. Sess. Laws 1244 (originally codified at C.R.S. § 148-11-22 (1965)). The provision was amended in part and repealed in part by the 1969 Act. *See* Act of June 7, 1969, ch. 373, 1969 Colo. Sess. Laws 1200. The Groundwater Management Act, also enacted in 1965 (*see* Act of May 17, 1965, ch. 319, 1965 Colo. Sess. Laws 1246), was originally codified in C.R.S. §§ 148-18-1 *et seq.*, and is currently codified at C.R.S. §§ 37-90-101 *et seq.*

party asserting an equal protection claim of discriminatory enforcement bears the burden of rebutting that presumption." *Orsinger Outdoor Advert., Inc. v. Dep't of Highways*, 752 P.2d 55, 62 (Colo. 1988). An individual pursuing a claim of discriminatory enforcement must support its claim "by evidence which will permit a factfinder to reasonably conclude that the enforcement not only proceeded from an unjust and illegal discrimination between persons in similar circumstances but also that the discriminatory enforcement was intentionally or purposefully carried out." *Id*. (emphasis added).

The Foundation has not presented evidence that the State Engineer's actions "proceeded from an unjust and illegal discrimination." As repeatedly underscored by these Defendants, the treatment of surface water and designated groundwater differently is not "illegal." Rather, the law justifies differential treatment.

The Foundation further argues that "for purposes of Colorado's consumptive use allocation under the Compact all consumptive use is the same regardless of whether it occurs through a well or a headgate. The differences that exist between designated groundwater and surface water are irrelevant when it comes to allocating consumptive use under the Compact." Foundation's Resp. at 10. As discussed in Section II above, the Foundation misconstrues the meaning of "allocation" under the Compact, and this premise finds no support in the Compact or the Compact litigation. Pursuant to state law, which governs the State Engineer's administration insofar as possible, the type of water is relevant under Colorado law. The State Engineer's administration scheme does not violate equal protection and is not discriminatory enforcement.

3. The State Engineer's current Compact administration does not violate due process.

The Foundation argues that the State Engineer has violated both its procedural and substantive due process rights. Foundation's Resp. at 10-11. Under procedural due process, the Foundation challenges the State Engineer's decision to place a Compact call on tributary waters as being made "without advance notice and without an opportunity to be heard." *Id.* The fact that the Foundation owns water rights with junior priorities may be sufficient advance notice that its water rights may be subject to a call. Moreover, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Van Sickle v. Boyes*, 797 P.2d 1267, 1273 (Colo. 1990). In determining what procedures are required by due process in a particular situation, courts will weigh various factors such as:

> (1) [T]he importance of the individual interest at stake; (2) the weight of the governmental interest in retaining challenged procedures, including the interest in avoiding increased administrative and physical burdens; and (3) the risk of an erroneous deprivation of liberty or property through the procedures used and the degree to which proposed procedures will lessen risk of erroneous decision.

Id. at 1274. The Foundation has not cited any case for the proposition that due process requires advance notice (beyond that already had by virtue of owning a junior water right), nor has it demonstrated what process might be due weighing these factors. As such, the Foundation's procedural due process argument fails.

The Foundation further claims that "[a]lthough substantive due process protects a narrow range of fundamental interests, a property right such as a water right is such an interest." Foundation's Resp. at 11. However, courts have not treated water rights as fundamental interests subject to strict scrutiny, but rather have applied rational basis review to water rights. *See Cent. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 341 (Colo. 1994); *Fellhauer*, 447 P.2d 986. The separate allocation and administration regimes for designated groundwater

administered under the Groundwater Management Act and water administered under the 1969 Act are rationally based on the legitimate state objective of promoting economic development,[9] and thus the State Engineer's Compact call satisfies the "rational relationship" test and does not violate due process.

4. The State Engineer's current Compact administration has not taken Foundation property.

The Foundation claims the State Engineer's actions have resulted in a taking of its water rights. Foundation's Resp. at 11-12. The Colorado Supreme Court has held that owners of water rights subject to the 1969 Act (such as tributary groundwater) "have no constitutionally protected property interest in the unfettered use of the water . . . [and] consequently, they cannot show that the State has 'taken' their property by curtailing the out-of-priority use of their wells." *Kobobel v. State, Dep't of Nat. Res.*, 249 P.3d 1127, 1134 (Colo. 2011). The same result applies here since, like *Kobobel*, the Foundation's water rights are surface water rights subject to the 1969 Act, and they are currently subject to a valid administrative call.

5. The State Engineer's current Compact administration is not in violation of the constitutional prior appropriation doctrine.

The Foundation next argues the State Engineer's Compact administration violates the prior appropriation doctrine. *See* Foundation's Resp. 12-13. This argument likewise fails. The Foundation admits that "the prior appropriation doctrine under the 1969 Act does not apply to designated groundwater," but claims this is immaterial because both surface water and designated groundwater are subject to Colorado's allocation under the Compact. Foundation's Resp. at 12. As highlighted in this Reply, the Foundation's argument is premised on the mistaken

[9] *See* C.R.S. § 37-90-102(1).

belief that simply because surface water and designated groundwater are both counted under the Compact, the waters must be equally administered under the Compact. For the reasons set forth in Section III.B. above, this argument is wrong.

The Foundation further argues that the "well-established law that water right owners are entitled to the conditions on the river that existed at the time of their appropriation," is built into the State Engineer's mandate to restore lawful use conditions under Section 104. Foundation's Resp. at 12 (citing *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005)). While it is a correct statement of the law that water rights owners are entitled to the physical conditions on the river that existed at the time of their appropriation, this statement is intended to protect junior water rights holders from a senior water right holder expanding its water right in a manner that could injure the junior water rights holder. *Id*. at 434-35. Moreover, *City of Central* did not interpret Section 104; the Foundation's use of *City of Central* is inapplicable to the current controversy.

As discussed more fully in Defendants' Response to the Foundation's Compact Motion, the State Engineer's administration must be "legal" as well as equitable, and restoration of prior lawful use conditions is required only "insofar as possible." *See* Defs.' Resp. to Foundation's Compact Mot. at 21-23 (citing C.R.S. § 37-80-104). The State Engineer cannot simply administer surface water and designated groundwater under a single administrative system to restore pre-Compact use conditions.

6. The State Engineer's current Compact administration is not in excess of authority, and is not arbitrary or capricious.

Finally, the Foundation argues that the State Engineer's Compact administration is arbitrary and capricious, citing to both *Fellhauer* and *Simpson*. Foundation's Resp. at 13. As

discussed above in Section III.C.1, *Fellhauer* is distinguishable, and does not demonstrate that the State Engineer's current compact administration is arbitrary and capricious.

Likewise, despite the Foundation's arguments to the contrary, *Simpson v. Bijou* does not demonstrate that the State Engineer's current Compact administration is arbitrary and capricious. *See* Foundation's Resp. at 13. *Simpson* demonstrates that the State Engineer must exercise its compact authority "to the extent possible within the existing framework of Colorado statutory priority law." 69 P.3d at 69. In *Simpson*, the State Engineer was administering only surface water and tributary groundwater, which were both subject to the 1969 Act. *Id.* at 69-70. Notably, despite the waters being under the same statutory scheme (unlike the present situation), the Colorado Supreme Court rejected an "equal curtailment" administration of surface water and tributary groundwater for compact compliance, given the complexity of determining when and to what extent curtailing of tributary groundwater pumping must occur to ensure adequate delivery at the state line. *Id*. Thus, even if the allocation and administration of designated groundwater was not different and distinct from surface water, *Simpson* provides absolutely no support for the Foundation's "equal curtailment" administration proposal in this case.

D. The Foundation's Request for Injunctive Relief Is Tantamount to Improper Mandamus Relief.

The Foundation asserts it is not seeking mandamus relief because the Complaint "does not actually seek to compel the curtailment of groundwater." Foundation's Resp. at 5. This assertion is rebutted by a simple review of the Complaint in which the Foundation specifically seeks a declaration (1) "[t]hat the lack of any ground water curtailment under the 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"; and (2) "injunctive relief regarding the" State Engineer's failure to curtail such groundwater withdrawals. Compl. ¶¶ 92.B, 93. The injunctive relief that logically follows from these statements is an order for the State Engineer to curtail surface water and designated groundwater "equally" because to do otherwise is unlawful. Indeed, that is precisely how the Foundation has characterized its Complaint in its Motions and Responses. *See, e.g.*, Foundation's Compact Mot. at 2-3, 8, 10-13, 15; Foundation's Resp. at 2, 4, 8-13.[10] The Foundation cannot circumvent the mandamus requirements by requesting injunctive relief. *See Jones v. Colo. State Bd. of Chiropractic Exam'rs*, 874 P.2d 493, 494 (Colo. App. 1994) (holding that although the plaintiff had requested injunctive relief, the nature of the relief sought was akin to mandamus, and plaintiff could not circumvent the mandamus requirements by requesting injunctive relief).

In the alternative, the Foundation argues that if its claim was construed as seeking mandamus, such relief would be appropriate because it is seeking only to compel lawful administration of the Compact. Foundation's Resp. at 6. This, too, is unfounded. The Foundation wants the Court to declare "unequal" curtailment to be unlawful and seeks injunctive relief regarding the State Engineer's failure to so curtail designated groundwater withdrawals. While it is true that 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 (Colo. App. 2004). In other words "[m]andamus lies to compel the performance of a purely ministerial duty involving no discretionary right and not requiring the exercise of judgment." *Bd. of Cty.*

[10] Moreover, in reviewing the Foundation's Complaint, the Court has concluded that "[a]lthough 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." Order Re: State and Division Engineers' Motion for Joinder, 3 (dated July 8, 2015, issued July 9, 2015).

Comm'rs v. Cty. Rd. Users Ass'n, 11 P.3d 432, 437 (Colo. 2000). The court has no power to tell the State Engineer how it has to exercise its discretion under Section 104.

IV. CONCLUSION

For the reasons stated herein and in Defendants' Designated Groundwater Administration Motion, Defendants are entitled to Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater as described in Section I above.

Respectfully submitted this 6th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2016, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF 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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