DISTRICT COURT, WATER DIVISION 1, COLORADO 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80632 (970) 351-7300	
PLAINTIFF: The Jim Hutton Educational Foundation, a Colorado non-profit corporation, v. DEFENDANTS: Dick Wolfe, in his capacity as the Colorado State Engineer; at al.	**▲COURT USE ONLY▲**
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DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS SENATE BILL 52 CLAIM

This Response to the Foundation's Motion for Summary Judgment on its Senate Bill 2010-52 Claim ("Foundation's SB 52 Motion") is submitted by the Defendants named above.

INTRODUCTION

The Foundation's SB 52 Motion should be denied for four reasons. First, SB 52 is not unconstitutionally retrospective because it is not retroactive and served only to clarify, not change, existing law and eliminated the uncertainty created by *Gallegos v. Colorado Ground*

Water Commission, 147 P.3d 20 (Colo. 2006). If SB 52 is interpreted as a retroactive change in the law, it changed only a remedy, not a vested right, and SB 52 did not create a new obligation, impose a new duty, or attach a new disability to the Foundation or its water rights. Second, the Foundation has failed to establish that SB 52 violates the appropriation doctrine or the takings clause, due process clause, or equal protection clause of the United States and Colorado Constitutions. Third, the Foundation's claim constitutes a collateral attack on wells with final permits, and is barred by the doctrines of claim and issue preclusion. Fourth, summary judgment on the Foundation's request for a declaration that SB 52 is unconstitutional is inappropriate because the Foundation has yet to develop a complete evidentiary record for numerous material questions including, without limitation, whether and to what extent the Foundation is actually injured by the alleged unconstitutionality and whether such injury will be remedied by a finding of unconstitutionality. *See Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

UNDISPUTED FACTS

Defendants contest many of the facts, or the characterization of the facts, contained in the Foundation's "Background" and "Undisputed Facts" sections of its SB 52 Motion. *See* Foundation's SB 52 Motion at ¶ 14. For a discussion of disputed facts and characterization of facts, please see the Defendants' companion brief titled Defendants' Response to Certain Factual Allegations Made by the Hutton Foundation ("companion brief"). As the companion brief demonstrates, there are unresolved factual questions relating to the existence, nature, and extent of any injury the Foundation has or may sustain from the alleged unconstitutionality of SB 52 and whether the requested relief will remedy that injury. As explained more fully in Section V of

this brief, the Foundation has also failed to demonstrate injury sufficient to entitle it to its requested relief under the Uniform Declaratory Judgments Law, C.R.S. §§ 13-51-101 *et seq.* To the extent the Foundation relies on these disputed material facts for its Motion for Summary Judgment, its motion must fail.

STANDARD OF REVIEW

The standards applicable to summary judgment and as-applied constitutional challenges are set forth in Sections I and II of the Standards of Review Section of Defendants' Motion for Summary Judgment on Constitutionality of Senate Bill 10-52 ("Defendants' SB 52 Motion"). Importantly, statutes are presumed constitutional, and the Foundation, as the party asserting that a statute is unconstitutional, bears the burden of establishing the alleged constitutional violation beyond a reasonable doubt. *See People v. DeWitt*, 275 P.3d 728, 731 (Colo. App. 2011), *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1083 (Colo. 2011), *E-470 Pub. Highway Auth. v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004). Finally, "where a statute . . . admits of more than one possible construction, one of which is constitutional, the constitutional construction must be adopted." *Mt. Emmons Min. Co.*, 690 P.2d at 240.

ARGUMENT

I. The Foundation's "Background" Section Raises Numerous Issues of Fact that are Either Irrelevant to its Claims or Show the Need for Further Factual Development by the Foundation.

The Foundation's SB 52 Motion begins with an extended "Background" section about why the Court should find it has a vested right in a remedial provision of the 1965 Act. Before responding to the legal arguments that are actually relevant to Claim 2 of the Complaint, the

Defendants wish to address the context of this dispute, which is important in assessing the Foundation's claims.

The Foundation fails to mention, much less explain, why it waited some twelve years after it, by its own admission, knew of potential well impacts on stream flows, and nearly five years after the adoption of SB 52, to bring this lawsuit. Since at least 2004, one year after the RRCA Model was developed, the Foundation has been aware of the potential effect of well pumping on the South Fork of the Republican River. Attachment 1, Email from Foundation to Greg Brophy. The Foundation was also fully aware of the introduction of SB 52, as its attorney at the time appeared and testified against the bill before the House Agriculture, Livestock and Natural Resources Committee ("House Ag. Committee"). *See* Attachment 1 to Defendants' SB 52 Motion, Transcript of Leg. Hearings ("Leg. Transcript"), pgs. 17-24, 66-67. The Foundation was also fully aware that SB 52 passed in March 2010, but waited until February 2015, nearly five years after the adoption of SB 52, to file this lawsuit.

The Foundation now seeks to avoid the fact that it slept on its remedies by claiming SB 52 is unconstitutional. However, as demonstrated here and in the Defendants' SB 52 Motion, SB 52 is not unconstitutionally retrospective because, among other reasons, it affects only a remedy, not a vested right. Moreover, the Foundation's ultimate goal is to reopen final well permits in the NHP Basin. Such claims are an impermissible collateral attack that are barred by the doctrines of claim and issue preclusion. Accordingly, the Foundation's SB 52 Motion must be denied.

II. Senate Bill 52 is a Constitutional Clarification of a Remedial Provision of the 1965 Act.

Courts apply a two-step process in assessing whether a law is unconstitutionally retrospective: (1) determining whether the General Assembly intended the challenged statute to operate retroactively; and (2) if so, determining whether the challenged statute is unconstitutionally retrospective. *Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002); *City of Greenwood Vill. v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 444 (Colo. 2000). Here, the statute was neither intended to operate retroactively nor is it retrospective in effect.

A. SB 52 is Not Retroactive.

Statutes are presumed to apply prospectively; overcoming this presumption requires "clear legislative intent that the law apply retroactively," which the Foundation has not shown. *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006); *see also Hickman v. Catholic Health Initiatives*, 328 P.3d 266, 269 (Colo. App. 2013) (courts presume that a statute "operates on transactions occurring after its effective date") (quoting *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 977 (Colo. App. 2004)). In determining whether a statute is prospective, the court begins with the plain language of the statute. *Frazier v. People*, 90 P.3d 807, 810 (Colo. 2004). If the language is unambiguous, the court looks no further and applies the words as written. *Slack v. Farmers Insurance Exchange*, 5 P.3d 280, 284 (Colo. 2000). There is nothing in the language of SB 52 that is ambiguous or indicates legislative intent that it be applied retroactively.

Remedial statutes are constitutionally permitted to apply retroactively to all pending claims because they affect only procedural as opposed to substantive rights. *Kuhn v. State*, 924 P.2d 1053, 1057 (Colo. 1996). SB 52 is a prospective remedial statute; it clarifies the scope of a

statutory remedy for altering the boundaries or description of designated groundwater basins. Thus, SB 52 affects procedural rights, not substantive rights.

However, because there was litigation pending before this Court in *Gallegos v. Colorado Ground Water Commission*, SB 52 expressly limited even its permissible retroactive application, stating that it does not "affect litigation brought under this section that is pending on or before January 1, 2010." § 37-90-106(a.5), C.R.S. (2015). Thus, the plain language of the statute demonstrates the legislature's intent that SB 52 not apply retroactively, and specifically not to litigation over the boundaries or description of designated groundwater basins pending on its effective date.

Nevertheless, the Foundation argues that "SB-52 operates retroactively with regard to the NHP Basin because it 'ascribes to certain transactions that occurred before the effective date of the Act different legal effects from that which they had under the law when they occurred.'" Foundation's SB 52 Motion at ¶ 16 (quoting *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 12 (Colo. 1993)). It asserts that SB 52 ascribes a different legal effect to the 1966 and 1967 Orders ("the Orders") creating the NHP Basin. *Id.* Notably, the "different legal effects" language cited by the Foundation is not a standard set forth in *Ficarra*, but rather appears in the Court's characterization of the parties' arguments. Regardless, a statute is not retroactive merely because the facts on which it operates occurred before its adoption. *See, e.g., City of Golden*, 138 P.3d at 290.

SB 52 did not ascribe a legal effect to the Orders creating the NHP Basin different from the effect the Orders had when they were entered. Instead it prospectively clarified a separate remedial provision of the 1965 Act for altering the boundaries or description of a basin. Since

they were not appealed, the Orders creating the NHP Basin became final and conclusive when they were entered. § 37-90-115(1)(b), C.R.S. (2105). The boundaries could then only be modified when "future conditions require and factual data justify" pursuant to § 148-18-5(1)(a), C.R.S. (1963). Thus, under the 1965 Act, the act of creating a designated groundwater basin is necessarily a separate and distinct "transaction" from any subsequent action by the Commission to alter a basin's boundaries or description. SB 52 did not, therefore, ascribe a legal effect to the Orders different from the effect they had when they were entered.

Since there was no pending legal action to modify the boundaries or description of the NHP Basin when SB 52 was adopted, there was no transaction that occurred before the effective date of SB 52 that was changed in legal effect by the bill. Instead, SB 52 clarified the scope of the Commission's statutory authority to subsequently alter the boundaries or description of an existing basin when "future conditions require and factual data justify." This is a separate "transaction" from the Orders creating the NHP Basin in the first place.

The Foundation seeks to avoid this point by claiming the Commission had a non-discretionary duty "to alter the basin boundaries . . . to exclude improperly designated groundwater." Foundation's SB 52 Motion at ¶ 16. This is incorrect.[1] Whether such a duty exists is not a "transaction" that occurred before the effective date of SB 52 that has a different effect after its passage. Under the plain language of SB 52, the boundaries or description of a designated groundwater basin may only be altered if the alteration will not exclude any well for

[1] The *Gallegos* court held "[a] surface water right holder who believes that pumping within a designated ground water basin is causing injury to those surface rights must prove to the Commission that the ground water alleged to cause the injury is hydrologically connected and causing injury to those rights. Upon such a showing, the Commission is statutorily required to alter the boundaries of the basin to exclude the surface water and the ground water shown to have been improperly designated." *Gallegos*, 147 P.3d at 24.

which conditional or final permits have been issued. § 37-90-106(1)(a), C.R.S. (2015). This language is prospective because it applies only to actions that seek to alter a basin's boundaries or description, not to the Orders creating the basin in the first place.

B. SB 52 Clarified the Law and Eliminated Uncertainty Created by the *Gallegos* Decision.

Contrary to the Foundation's claim, SB 52 did not change the 1965 Act, but rather clarified it. An amendment to a statute either clarifies it or changes it. *Acad. of Charter Schs. v. Adams Cnty. Sch. Dist. No. 12*, 32 P.3d 456, 464 (Colo. 2001). A clarification of an existing law does not change the law, and therefore cannot be retrospective. *Id.* "To distinguish between a change and a clarification, [the courts] employ a three-pronged analysis by looking to the legislative history surrounding the amendment, considering the plain language used by the General Assembly, and assessing whether the provision was ambiguous before it was amended." *Powell v. City of Colo. Springs*, 156 P.3d 461, 465 (Colo. 2007).

Legislative clarifications to a law may be made even after it has been interpreted by a court. The Foundation asserts that "there is no question that SB-52 changed the law because the Colorado Supreme Court had already interpreted the statutory provision in *Gallegos*" and the Court's interpretation was an "authoritative statement" such that "any legislative effort to undo that interpretation is not a clarification, but a change in that law . . . ." Foundation's SB 52 Motion at ¶¶ 25, 29-30. But the presumption that legislative amendments change existing law may be rebutted by showing that the "legislature meant only to clarify an ambiguity in the statute by amending it," *Powell*, 156 P.3d at 465, and if an amendment clarifies the law, then the law remains unchanged. *Acad. of Charter Schs.*, 32 P.3d at 464. Moreover, this may be the case even if a statute has already been interpreted by the Colorado Supreme Court. *Colo. Civil Rights*

Comm'n ex rel. Ramos v. Regents of University of Colo., 759 P.2d 726, 734 (Colo. 1988) (amendments to the Colorado Open Records and Public Records Acts repudiated prior decisions construing the laws as not applying to the Regents of University of Colorado, and therefore the laws should be interpreted differently).

Courts look to the circumstances surrounding enactment of an amendment to determine whether the amendment effected a change in the law. *Kern v. Gebhardt*, 746 P.2d 1340 (Colo. 1987). If the circumstances indicate that the legislature intended to interpret the original act, the presumption is rebutted. *Id*.; *Douglas Cnty. Bd. of Equalization v. Fidelity Castle Pines, Ltd*., 890 P.2d 119 (Colo. 1995). When the court determines an amendment is a clarification of existing law, it will not undertake a retrospectivity analysis. *See Acad. of Charter Schs.*, 32 P.3d at 464-69.

1. The Plain Language of SB 52 Indicates Legislative Intent to Clarify Rather than Change the Law.

SB 52 unambiguously demonstrates that the General Assembly clarified and reaffirmed the original legislative intent that "there be a cut-off date beyond which the legal status of groundwater included in a designated groundwater basin cannot be challenged . . . . After this cut-off date has passed, *any request to exclude wells that are permitted to use designated groundwater* from an existing groundwater basin shall constitute an impermissible collateral attack on the original decision to designate the basin." § 37-90-106(1)(a), C.R.S. (2015) (emphasis added). It is difficult to conceive of a clearer or more unambiguous statement of legislative intent to clarify rather than change the existing law.

2. Legislative History Shows that the General Assembly Adopted SB 52 to Clarify its Intent that Wells with Final Permits Cannot be Excluded from a Designated Basin and Resolve an Ambiguity Regarding the Effect of the Basin Boundary Changes on Vested Rights in Designated Groundwater Well Permits.

If the language of section 37-90-106(1)(a) was unclear or ambiguous, "a court may look to pertinent legislative history to determine the purpose of the legislation . . . [and] to determine and give effect to the intent of the General Assembly." *In re Marriage of Parker*, 886 P.2d 312, 314 (Colo. App. 1994) (citations omitted). Here, the pertinent legislative history includes that of SB 52, since a subsequent clarification of ambiguous legislation is one accepted aid to determine legislative intent. *Frank M. Hall & Co. v Newsom*, 125 P.3d 444, 451 (Colo. 2005).

Both the language and the legislative history of SB 52 demonstrate that the statute was enacted to clarify, not alter, existing law and to eliminate any uncertainty created by the *Gallegos* decision. Before adoption of SB 52, section 37-90-106(1)(a) provided:

> The commission shall, from time to time as adequate factual data becomes available, determine designated ground water basins and subdivisions thereof by geographic description and, as future conditions require and factual data justify, *shall alter the boundaries* or description thereof.

§ 148-18-5(1)(a), C.R.S. (1971) (emphasis added). While this section authorizes the Commission to alter basin boundaries or descriptions, it does not say how the boundaries or description of a designated groundwater basin may be altered, or, importantly, whether wells with final permits can be retroactively excluded from a designated groundwater basin.

SB 52 provides, in relevant part:

> If factual data obtained after the designation of a groundwater basin justify, the Commission *may alter the boundaries or description of that designated groundwater basin by adding lands to the basin*. After a determination of a designated groundwater basin becomes final, the Commission may alter the boundaries to exclude lands from that basin only if factual data justify the

> alteration *and the alteration would not exclude from the designated groundwater basin any well for which a conditional or final permit to use designated groundwater has been issued*.

2010 Colo. Sess. Laws Ch. 63 (emphasis added) (now codified at § 37-90-106(1)(a), C.R.S. (2015)). SB 52 thus clarifies how the Commission may alter the boundaries or description of a designated groundwater basin through the inclusion or exclusion of land. It supplies details not expressly stated in the original act, and thereby clarifies the meaning of the original act.

Representative Sonnenberg, whose House District 67 included much of the NHP Basin, explained the need to clarify the law:

> All this bill does is clarify what a judge asked to be clarified in 2006. We created Ground Water Commission, the Ground Water, Designated Ground Water Basin in 1965, for forty years we lived by those rules . . . . We need clarification, members, that's what this bill does.

Leg. Transcript, pg. 89, lines 25-29.

Representative Sonnenberg went on to state:

> The legislature didn't change anything, we wanted to go back to the same as it was in 1965 to 2006, and that's what this bill does. This simply allows the same thing to continue happening . . . .

Leg. Transcript, pg. 80, lines 5-13.

When a legislative change is made in response to a controversy that arose over the proper interpretation of the statute, courts have logically concluded that the amendment was adopted to make plain what the original legislation meant all along. 1A Norman J. Singer, *Sutherland Statutes and Statutory Construction*, § 22:30, at 375 (7th ed. 2008); *Frank M. Hall & Co.*, 125 P.3d at 451. As shown by Representative Sonnenberg's comments, this is exactly what was intended by SB 52.

This is further supported by the comments of Representative Curry, the bill's sponsor, who summarized the purposes of the bill at the conclusion of the House Ag. Committee hearing:

> Mr. Shimmin, I think he just spelled it out so clearly, saying, what we're faced with is an underground policy question, what is our intent? What is the general assembly's intent on this matter? Are designated basins and the wells within, are those final permits, are they final or not? And we — and we simply have to weigh in and because of this litigation and the uncertainty . . . .

Leg. Transcript, pg. 70, lines 23-27.

In the debates in the House of Representatives she again summarized the bill, stating:

> So what the bill does is, . . . why you have it front of you is that we have recently in the last couple of years a lawsuit to change the boundaries of a — the phrase that you will hear a lot is this term de-designate. So that the concept in response to a judicial ruling, several years ago, was to change the boundaries of the District if the surface user felt that their particular surface right was being impacted by the pumping. Now bear in mind that these were established in the late 60's, early 70's. So these designated basins are decades old, there are folks that have well permits within these basins, have permits that in some cases, are 40 years old. Dozens and dozens of permits that are decades old. And what we're looking for in this bill is some certainty for those well owners . . . . The bill deals with where those boundaries should sit, should the Ground Water Commission change the designated basin boundaries, what happens to the wells that were within that boundary before? That's what this bill tackles is the status of those wells in the cross-fire or in the buffer zone.

Leg. Transcript, pg. 74, lines 8-40; pg. 75, lines 1-11. Rep. Curry later explained:

> If the bill passes we as a body are saying that the final well permits that were issued to the folks in the designated basins are in fact final. This is not a new concept in Colorado water law. When you get a decreed water right and you have your augmentation plan decreed, and you're on a surface system, you can't come in at the eleventh hour and challenge all the decrees that the water court has issued.

Leg. Transcript, pg. 96, lines 12-17.

As the legislative history discussed here and in the Defendants' Motion for Summary Judgment on the Constitutionality of SB 52 demonstrates, SB 52 was adopted to clarify the permissible scope of the alteration of basin boundaries, and thereby eliminate the uncertainty created by the *Gallegos* decision over the finality of final well permits within designated basins. In response to footnote 8 of the *Gallegos* decision, the General Assembly reaffirmed its "original intent that there be a cut-off date beyond which the legal status of groundwater included in a designated groundwater basin cannot be challenged," § 37-90-106(1)(a), C.R.S. (2015), to protect local economies and allow wells with final permits to use designated groundwater.

3. *Gallegos* Did Not Address Whether Designated Basin Boundary Changes Could Strip Vested Rights in Well Permits.

In this case, the Foundation seeks not simply to alter the boundaries of the NHP Basin, but to change the legal status of groundwater withdrawn by wells holding final permits from designated groundwater to tributary ground water. The 1965 Act contains no mechanism for such a change. Instead, once a final permit is issued, the Commission's determination that the well withdraws designated groundwater is final. Meanwhile, prior to *Gallegos*, the Colorado Supreme Court consistently upheld the finality of a basin designation order. But the *Gallegos* Court's interpretation of section 37-90-106(1)(a) created ambiguity over the finality of final well permits. SB 52 therefore clarified that an alteration to the boundary or description of a basin cannot "undo" final permits by excluding them from a designated groundwater basin. Allowing such a collateral attack on final permits was not contemplated in the 1965 Act and in adopting SB 52 the General Assembly simply made that clear.

Significantly, *Gallegos* did not involve parties with final well permits and the Court did not review the 1965 Act to ascertain if the General Assembly intended for final permits to be

"undone" by a change in the boundary or description of a designated ground water basin. Likewise, in *Gallegos* the Court did not address or decide whether such a change in boundary or description of a designated basin could invalidate final well permits. As the Foundation notes, the Court has only recognized that "the creation of a designated groundwater basin does not establish conclusively that all groundwater in the basin is designated ground water." Foundation's SB 52 Motion at ¶ 6 (quoting *State ex rel. Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981). The Court did not hold that final permits do not conclusively establish that the specific groundwater withdrawn pursuant to the final permit is designated groundwater under the 1965 Act. Likewise, the Court never held that the legal status of final permits could be changed by new factual information that becomes available after issuance of a final permit.

Indeed, the policy goals of the 1965 Act would be destroyed if the right to withdraw groundwater in accordance with a final permit could be stripped away at any time. *See Gallegos*, 147 P.3d at 31 (administration of designated groundwater pursuant to the 1969 Act "would frustrate legislative intent"); *Danielson v. Kerbs Ag., Inc.*, 646 P.2d 363, 371 (Colo. 1982) (1965 Act contains provisions "designed to protect prior appropriations of groundwater while, at the same time, insuring that reasonable groundwater pumping levels are maintained").

C. If SB 52 is Construed as a Change in the Law Intended to be Applied Retroactively, then it is Not Unconstitutionally Retrospective.

If the Court concludes that SB 52 did change the law, and that the legislature did intend it to apply retroactively, then the Court must evaluate whether such retroactivity is unconstitutionally retrospective. A statute is considered retrospective only if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Estate of DeWitt*, 54

P.3d at 854. The Foundation has not proven, beyond a reasonable doubt, that SB 52 constitutes unconstitutionally retrospective legislation. *See People v. DeWitt*, 275 P.3d at 731.

1. If SB 52 Effected a Change to the Law, the Change Was to a Remedy, Not a Vested Right.

The Foundation claims that SB 52 impairs its vested surface water rights "by prohibiting the exclusion of tributary groundwater from a designated basin when it becomes apparent that the use of such water is having more than a *de minimis* impact on surface water rights." Foundation's SB 52 Motion at ¶ 39. Assuming for purpose of argument that SB 52 did effect a change in the law, it did not change a vested right, as the Foundation alleges, but rather changed a remedy available under the 1965 Act to alter the boundaries or description of a designated groundwater basin.

A remedial statute "is one that relates to practice, procedure, or remedies and does not affect substantive or vested rights." 3 Norman J. Singer, *Sutherland Statutes and Statutory Construction*, § 60:2 at 266 (7th ed. 2008). The term "'remedial' is used in connection with legislation which is not penal or criminal in nature." *Id.* The ability to alter the boundaries or description of a designated basin constitutes a remedy because it may prevent, redress, or compensate for the violation of a right. *See* Black's Law Dictionary 1485 (10th ed. 2009). This is precisely what the Foundation claims was available to it prior to the adoption of SB 52: a *remedy* to protect its surface water rights. *See* Foundation's SB 52 Motion at ¶¶ 12, 16.

The law is well settled that there is no vested right in a particular remedy. *Abromeit v. Denver Career Servs. Bd.*, 140 P.3d 44, 51 (Colo. App. 2005) ("The abolition of an old remedy, or the substitution of a new one, neither constitutes the impairment of a vested right nor the imposition of a new duty, for there is no such thing as a vested right in remedies.") (quoting

Cont'l Title Co. v. Dist. Court, 645 P.2d 1310, 1315 (Colo. 1982)). "If a law is remedial, it is still considered to be procedural and not substantive, even if its repeal disadvantages the party asserting it." *Id*.

While a vested right may originate from a statute or common law, it is only vested if it is not dependent for its assertion on the common law or statute under which it was acquired. *Parker*, 138 P.3d at 294. In other words, to be vested, the right must survive repeal of the statute or common law from which it originated. *Id.* Thus, a vested right "must be a contract right, a property right, or a right arising from a transaction in the nature of a contract which has become perfected to the degree that it is not dependent on the continued existence of the statute." *Id.* (quoting 1A Norman J. Singer, *Sutherland Statutory Construction* § 23:35 (6th ed. 2002)).

Here, the ability to alter a basin boundary or description is a remedy created by the 1965 Act that is wholly dependent upon the continued existence of the statute. Water rights decreed under the 1969 Act do not encompass the right to any particular remedy under the 1965 Act. Because the ability to alter a basin's boundaries would not survive the repeal of section 37-90-106(1)(a), it is not a vested right. "[I]n the usual case, no person has a vested right in any rule of law entitling that person to insist it shall remain unchanged for his or her future benefit." *Nye v. Indus. Claim Appeals Office*, 883 P.2d 607, 609 (Colo. App. 1994). Thus, that the Foundation may have expected that this provision would not be clarified or changed is of no legal consequence; such an expectation does not give rise to a vested right. *See Ficarra*, 849 P.2d at 16. Since the Foundation had no vested right in the ability to alter the boundaries of a designated basin in a particular manner, the alleged change of this remedy does not constitute retrospective legislation.

2. SB 52 Did Not Create a New Obligation, Impose a New Duty, or Attach a New Disability on the Foundation or its Water Rights.

The Foundation alleges that SB 52 is unconstitutionally retrospective because it imposed "a new disability by injuring the Foundation's vested surface water rights and leaving them without any redress to protect their rights from injury." Foundation's SB 52 Motion at ¶ 44. But even a law modifying a remedy intended to protect vested water rights does not alter the underlying water right. *Central. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 348-49 (Colo. 1994). The *Simpson* case is very similar to this one. There, Senate Bill 120, chapter 314, 1989 Colorado Session Laws 1422 (hereafter "SB 120") was challenged as unconstitutional. SB 120 addressed the regulation of evaporative losses from groundwater exposed by sand and gravel pits, preventing the Division Engineer from requiring replacement of evaporation losses from gravel pits that exposed groundwater to the atmosphere before January 1, 1981. The Appellants argued that SB 120 was retrospective legislation altering water rights. The Court disagreed, stating that while SB 120 established new procedures to protect water rights and created different classes of water rights for certain owners and operators of sand and gravel pits, it did not alter the vested rights of Appellants and, therefore, did not constitute retrospective legislation. *Id.* As such, the Appellants' water rights were unchanged by the passage of SB 120. The same is true here. While SB 52 clarified the scope of the Commission's authority to alter the boundaries and descriptions of designated groundwater basins, it did not alter the Foundation's water rights or impose a new disability on them.

Alternatively, the Foundation argues that SB 52 is retrospective because it improperly "creates a new obligation and imposes a new duty *on the Commission* to regulate groundwater that has more than a de minimis impact on surface water." Foundation's SB 52 Motion at ¶ 45

(emphasis added). There is a substantial question whether the Foundation has standing to bring a claim alleging SB 52 is retrospective because the alleged new duty is not placed on the Foundation.[2] Assuming that the Foundation has standing to bring such a claim, the imposition of this alleged new obligation or duty on the Commission does not make SB 52 retrospective.

A statute is retrospective only if it "'impose[s] a "disability" of constitutional magnitude.'" *Hickman*, 328 P.3d at 273 (quoting *Estate of DeWitt*, 54 P.3d at 857). A court will not find such a disability when an entity operates in "a highly regulated industry." *Id.* The *Hickman* court found that the health care industry, similar to the insurance industry and the probate process, is highly regulated under state law such that the Defendant, a hospital, "should have recognized the risk of further regulation . . . including legislative shifts in policy." *Id.* (internal quotations omitted). The *Hickman* court therefore declined to find that a change in legislative policy is a disability of constitutional magnitude, even where it increased potential liability for damages. Similarly, surface water and groundwater are highly regulated in Colorado under the 1969 Act and the 1965 Act, respectively. The Foundation, like the Defendant in *Hickman*, should have recognized that the General Assembly could adopt further legislation, including a shift in policy that could affect remedies to protect surface water rights. Thus, the

[2] Even assuming that SB 52 imposed a new duty on the Commission, the Foundation has not proven, even alleged, that the Commission's "new duty" has resulted in injury to the Foundation. To establish standing under Colorado law, "a plaintiff must satisfy a two-part test requiring: (1) that the "plaintiff 'suffered injury in fact,' and (2) that the injury was to a 'legally protected interest as contemplated by statutory or constitutional provisions.'" *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008) (quotation omitted). "To constitute an injury-in-fact, the alleged injury may be tangible, such as physical damage or economic harm, or intangible, such as aesthetic harm or the deprivation of civil liberties." *Id.* at 245-46 (citation omitted). "However, an injury that is overly indirect and incidental to the defendant's action will not convey standing." *Id.* at 246 (quoting *Ainscough*, 90 P.3d at 856) (internal quotations omitted). The Foundation has not alleged or proven an injury in fact sufficient to meet the standard set forth above.

alleged change in legislative policy in SB 52 does not impose a disability of constitutional magnitude.

In this respect, it is well established the legislature has the power and authority to determine how to administer water rights, and to place administrative duties with the Commission. As explained in *Central v. Simpson:*

> The rights established by these constitutional provisions have not been deemed absolute, however. Such a view would create impossible obstacles to any effective administrative policies designed to effectuate the constitutional scheme. Thus we have recognized that the General Assembly may impose reasonable regulations on the manner and method of appropriation.

877 P.2d at 344.

3. *City of Colorado Springs v. Powell* is Inapplicable to the Foundation's Claims because the Powell Plaintiffs had Exercised their Remedies Prior to the General Assembly's Change of Existing Law.

The Foundation relies on *Powell,* 156 P.3d 461, for the proposition that any legislative change after a judicial interpretation is necessarily a change in the law subject to the prohibition against retrospective legislation. *See* Foundation's SB 52 Motion at ¶ 30. However, *Powell* is fundamentally different from this case and in fact demonstrates that SB 52 is not retroactive legislation.

In *Powell,* the Colorado Supreme Court analyzed House Bill 03-1288 ("HB 1288"), which added new definitions to the Colorado Governmental Immunity Act ("CGIA"), § 24-10-101, -102, C.R.S. (2001). *See Powell,* 156 P.3d at 464. HB 1288 changed the CGIA's definition of a "public sanitary facility" to exclude the types of facilities that caused the injuries claimed by the plaintiffs in *Powell*. HB 1288 was enacted in direct response to appellate court interpretations of that definition in two pending cases that held that governments were not

immune to liability for injuries from such facilities. *Id.* The result of the amendment, if applied retroactively, would have been to undo those decisions, and accord governmental immunity for the plaintiffs' claimed injuries. After passage of HB 1288, the defendants in the two pending court cases filed new motions to dismiss in their respective cases, arguing that the new legislation applied retroactively and immunized them from liability. *Id.* The Court disagreed, concluding that HB 1288 applied prospectively only. *Id.*

In reaching this conclusion, the Court looked to whether the amendment clarified or changed existing law. Based on the language in HB 1288 stating that it made "modifications of, and additions to, the definitions," the Court concluded that HB 1288 effected a change in the law and was not simply a clarification. *Powell*, 156 P.3d at 465. Further, the Court found no language in the statute that overcame the presumption that the law only applied prospectively. *Id*. Instead, the Court concluded that neither the General Assembly's use of the word "clarify" in the face of the legislature's recognition that modifications and additions to the existing definitions were necessary, nor its expressed concern about the future application of the appellate courts' decisions established retroactive intent, especially in the absence of any clear statement of retroactive intent.

Thus, the factual situation in *Powell* was entirely different from that before this Court. In *Powell* the cause of action had accrued, *and* the remedy at issue had been exercised by the litigants prior to the General Assembly effecting the change in remedy. *See Powell*, 156 P.3d at 463-64. Indeed, the General Assembly was responding directly to the prior appellate decisions involving the same litigants, and the defendants sought to apply the change retroactively to change their liability. The *Powell* court found that the word "clarify" was not compelling

precisely because of these facts. *Id.* at 466 ("Under these facts, the mere invocation of the word "clarify" cannot counteract the language . . . ." Here the Foundation did not exercise the remedy it alleges was available prior to the enactment of SB 52, and there has been no effort to apply SB 52 retroactively to pending litigation, as was done in *Powell*. Moreover, SB 52 expressly provides that it does not apply to litigation under section 37-90-106(1)(a) pending as of January 1, 2010. Thus, the circumstances addressed in *Powell* are not comparable to this case and *Powell* is not controlling. Rather, in light of *Powell*, the express statement in SB 52 that it does not apply to pending litigation confirms the legislature's intent that it is not retroactive and is indeed a true clarification.

III. The Foundation Has Failed to Satisfy its Heavy Burden of Showing SB 52 is Otherwise Unconstitutional Beyond a Reasonable Doubt.

A. SB 52 Does Not Constitute an Unlawful Taking of Private Property under the United States' Constitution or Colorado's Constitution.

Although the Foundation asserts that SB 52 effects a taking of its water rights, this allegation is merely conclusory. Its SB 52 Motion does not address the legal standards applicable to a regulatory takings claim, let alone demonstrate that those legal standards apply to its situation. Courts employ two tests to determine when a taking has occurred despite lack of physical encroachment onto land. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of La Plata*, 38 P.3d 59, 63 (Colo. 2001). First, a regulation effects a taking when it "does not substantially advance legitimate state interests." *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992)). Second, a taking occurs when a regulation "denies an owner economically viable use of his land," *id.*, that is, renders it essentially valueless.

The Foundation has not shown that SB 52 fails to substantially advance legitimate state interests. The Foundation also has not alleged, let alone proven, that the value of its water rights has been rendered de minimis by the clarification to the law enacted in SB 52. Finally, the Foundation has not met the three-prong test to determine if a taking has occurred when a property right retains some value by showing: (1) the economic impact of the regulation, (2) the regulation's interference with investment-backed expectations, and (3) the character of the governmental action. *Id.* (citing *Lucas*, 505 U.S. at 1019 n.8).

The Foundation has stated that "[w]ithout a means to enforce a senior priority over those using water from a common source of supply divests a senior water right of its value [sic] . . ." and that the Act "result[s] in destroying most valuable rights." Foundation's SB 52 Motion at ¶ 42. However, beyond these sweeping, conclusory, and incorrect statements, the Foundation has not attempted to demonstrate the alleged loss in value of its water rights, and therefore has failed to prove that a taking has occurred.

B. SB 52 Does Not Violate Colorado's Constitutional Prior Appropriation Doctrine.

The Foundation's argument that SB 52 violates Colorado's constitutional prior appropriation doctrine is also refuted by *Central v. Simpson*, which makes clear that rights established by the Constitution's prior appropriation doctrine are not absolute. 877 P.2d at 344. Instead, the General Assembly can impose reasonable regulation on the manner and method of appropriation. *Id.* This is necessary because, as explained in *Simpson v. Bijou Irr. Co.*, 69 P.3d 50, 70 (Colo. 2003), administration of surface water and groundwater is a complex matter:

> [T]he lag effect caused by groundwater pumping makes estimation of when surface flows will arrive at the state line considerably more difficult. While it is clear that unreplaced groundwater depletions eventually reduce the surface flows

> of the river, when and by how much this reduction actually occurs depends upon a multitude of factors, including: (a) the distance of the well from the stream, (b) transmissibility of the aquifer, (c) depth of the well, (d) time and volume of pumping, and (c) return flow characteristics. *Fellhauer v. People*, 167 Colo. 320, 332, 447 P.2d 986, 992 (1968). As a result, it is an extremely complex matter to determine when and to what extent curtailment or augmentation must occur to ensure adequate delivery at the state line.

Moreover, as the Court recognized in *Gallegos*:

> The Management Act created the Commission, an administrative body charged with designating ground water basins, issuing well permits within designated basins, and administering rights to designated ground water. § § 37-90-104 to -111, C.R.S. (2006). The Management Act acknowledges the doctrine of prior appropriation, but specifically calls for a modified prior appropriation system to apply to designated ground water. § 37-90-102(1). Under the modified system, the Commission is charged with the task of permitting the full economic development of designated ground water resources, protecting prior appropriators of designated ground water, and allowing for reasonable depletion of the aquifer. *Id.*; *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 933 P.2d 1177, 1183-84 (Colo. 2000). Although the rights of prior appropriators are to be protected under the Management Act, that protection does not extend to the maintenance of historic water levels. § 37-90-102(1). Consistent with this intent, the General Assembly made the Commission's powers to curtail the pumping of junior wells for the benefit of senior appropriators discretionary. *Goss*, 933 P.2d at 1188.

147 P.3d at 27. Implementing both the constitutional doctrine of prior appropriation and the modified doctrine of prior appropriation in the 1965 Act requires the General Assembly to balance two different and potentially competing goals in a manner that protects vested rights. *See Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1182 (Colo. 2000) (noting that the General Assembly has "plenary authority" over the allocation and administration of, among other things, designated groundwater, which is not part of the natural stream waters subject to the prior appropriation provisions of the Colorado Constitution). As

made clear by *Central v. Simpson*, the manner in which the General Assembly has chosen to do so does not violate the prior appropriation doctrine.

C. SB 52 Does Not Violate the Foundation's Right to Due Process.

The Foundation's SB 52 Motion fails to address the legal standards applicable to either procedural or substantive due process claims, let alone explain how those legal standards apply to its situation. While the Foundation correctly asserts that "'due process always implies a hearing, or trial, and judgment'", the Foundation has not asserted that such due process was denied to it or its predecessor. Furthermore, "[c]onstitutional guarantees of due process . . . are applicable only to rights, not remedies." *Simpson*, 877 P.2d at 342 (internal quotations omitted). Since SB 52 affected a remedy, not a vested right, its enactment does not represent a violation of the Foundation's due process rights.

Importantly, both designated groundwater basin designation and issuance of well permits within the basin provided for notice, a hearing, and an opportunity for judicial review. § 148-18-5(2), C.R.S. (1965) (current version at § 37-90-106(3), C.R.S. (2015)), § 148-18-14, C.R.S. (1965); §§ 148-18-6, -7, -8, -11, -12, -14, C.R.S. (1965) (current versions at §§ 37-90-107, -108, -109, -112, -113, -115, C.R.S. (2015)). Neither the Foundation nor its predecessor appear to have availed themselves of the due process provided to them to challenge the basin designation or the approximately 3,000 final well permits issued for wells within the NHP Basin. *See* Attachment 2, Affidavit of Keith Vander Horst. It cannot now complain that it was deprived of due process when it failed to exercise these due process rights.

D. SB 52 Does Not Violate the Foundation's Right to Equal Protection of the Law.

Finally, the Foundation's SB 52 Motion does not make a single mention of equal protection. The Foundation does not address the legal standards applicable to equal protection or apply those legal standards to its situation. In a water rights context, a statute "does not contravene equal protection guarantees if it bears a rational relationship to a legitimate state objective." *Simpson*, 877 P.2d at 340-41 (internal citations omitted). SB 52 bears a rational relationship to a legitimate state objective because it represents an effort to clarify existing law regarding administration of the state's natural resources, it affirms the finality of administrative actions, and it furthers the purposes of the 1965 Act to permit the full economic development of designated groundwater resources, while protecting prior appropriators, and allowing for reasonable depletion of the aquifers. Therefore the Foundation's equal protection claim should be denied.

IV. The Foundation's Objective to Subject Final Well Permits to Priority Administration is Barred by the Claim Preclusion and Issue Preclusion.

The Foundation states that "[u]pon a ruling that SB-52 is unconstitutional, the Foundation intends to file a separate petition with the Commission to redraw the boundaries of the NHP Basin to exclude groundwater tributary to the Foundation's surface rights, the pumping of which is causing injury." Compl. at ¶ 75. However, because for decades the Foundation and its predecessor failed to challenge the issuance of well permits in the NHP Basin, any attack it now seeks to make on such vested groundwater rights is barred by claim and issue preclusion.

The Declaratory Judgment Act provides that "[t]he court may refuse to render or enter a 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." § 13-51-110, C.R.S. (2015). In this case, the declaration sought by the Foundation is merely an attempt to pave the road for actions that are clearly precluded. In that respect, granting such relief would not affect the alleged controversy giving rise to the present litigation, and therefore should not be granted.

Claim preclusion prevents litigation of claims that were or could have been litigated in a prior proceeding. *Argus Real Estate v. E-470 Pub. Highway Auth*., 109 P.3d 604, 608 (Colo. 2005). Claim preclusion applies when four requirements are met: (1) finality of the first judgment; (2) identity of subject matter; (3) identity of claims for relief; and (4) identity or privity between parties to the actions. *Id.*

In contrast, issue preclusion prevents relitigation of issues actually litigated and decided in a prior proceeding. *Antelope Co. v. Mobil Rocky Mountain, Inc*., 51 P.3d 995, 1003 (Colo. App. 2001); *Indus. Comm'n of the State of Colo. v. Moffat Cnty. Sch. Dist. Re No. 1*, 732 P.2d 616, 620 (Colo. 1987). Issue preclusion is not limited to identical claims for relief, but rather may apply to causes of action that are different from those raised in the original proceeding. *Id.* Issue preclusion bars relitigation of an issue when: (1) the issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) the party against whom estoppel is sought was a party to or was in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d 660, 667 (Colo. 2006); *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001).

The doctrines of claim and issue preclusion apply to administrative actions as well as judicial proceedings. *Moffat Cnty. Sch. Dist.*, 732 P.2d at 620; *Dale v. Nat'l Ins. Co.*, 948 P.2d 545, 549 (Colo. 1997). "The findings and conclusions of an administrative agency may be binding upon the parties in a subsequent proceeding if the agency that rendered the decision acted in a judicial capacity and resolved disputed issues of fact which the parties had an adequate opportunity to litigate." *Moffat Cnty. Sch. Dist.*, 732 P.2d at 620. Notably, while the *Gallegos* Court found claim and issue preclusion to be inapplicable to claims that sought to modify the boundaries of the designated basin, the Court did not address the application of these doctrines to the vested rights represented by final well permits. *Gallegos*, 147 P.3d at 32.

A. The Foundation's Proposed Attack on Final Permits is Barred by Claim and Issue Preclusion.

The 1965 Act provides for a notice, hearing, and appellate process for the issuance of conditional and final permits for wells in a designated basin. §§ 148-18-6, -7, -8, -11, -12, -14, C.R.S. (1965) (current versions at §§ 37-90-107, -108, -109, -112, -113, -115, C.R.S. (2015)). This process provides other well owners and surface water users with the opportunity to object to issuance of a permit on the grounds that there is no unappropriated water available, that other water rights would be unreasonably impaired, or that the appropriation would create unreasonable waste. *See, e.g.*, § 37-90-107, C.R.S. (2015), *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842, 845 (Colo. 1983), *Vickroy*, 627 P.2d at 759. This process also provides for judicial review of Commission decisions. *See* § 37-90-115, C.R.S. (2015). Therefore, the Foundation and its predecessor had the opportunity to challenge issuance of well permits in the NHP Basin by demonstrating that there was no unappropriated water, or that their water rights

would be unreasonably impaired. Since they never availed themselves of this remedy, an attempt to do so now is barred by claim and issue preclusion.

All elements of claim preclusion are met. First, final well permits represent final judgments that establish vested rights. "The legislative intent evidenced in the Colorado Ground Water Management Act is that the issuance of final permits, which requires proof and verification of the extent of beneficial use, would serve a function equivalent to the final surface water decree and establish senior rights." *Thompson v. Colo. Ground Water Comm'n*, 575 P.2d 372, 377 (Colo. 1978); *N. Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 75-76 (Colo. 1987). Since a final well permit is the equivalent of a decree, a final well permit operates as a final judgment. Pursuant to section 148-18-14(2), C.R.S. (current version at § 37-90-115, C.R.S. (2015)) the Commission's action is "final and conclusive," if not appealed. Thus, the Commission's final permits comprise final judgments that bind the Foundation.

Second, the subject matter, whether there was unappropriated water or whether a well would unreasonably impair existing water rights from the same source, is the same as when the well permits were applied for. Third, the claim for relief is substantially identical to the one that the Foundation and its predecessor would have brought had they chosen to challenge issuance of well permits in the NHP Basin, namely that there was no unappropriated water or that issuance of the permit would impair its water rights, and the permit should be denied. Today, the Foundation's goal in challenging SB 52 is to allow it to remove wells with final permits from the NHP Basin due to alleged unreasonable impairment of its water rights, and to force their curtailment. Thus, the Foundation's proposed claim for relief is substantially similar to what it would have been had the Foundation or its predecessor challenged the issuance of well permits.

Finally, there is privity between the Foundation and its predecessor-in-interest because their interests, which lie in protecting their water rights from impairment, are substantially identical. "Privity exists when there is a substantial identity of interests between a party and a non-party such that the non-party is virtually represented in [the] litigation." *Natural Energy Res. Co. v. Upper Gunnison River Water Conservancy Dist*., 142 P.3d 1265, 1281 (Colo. 2006) (quoting *People in Interest of M.C*., 895 P.2d 1098, 1100 (Colo. App. 1994)). "[A] finding of privity is simply a conclusion that something in the relationship of party and non-party justifies holding the latter to the result reached in litigation in which only the former is named." *Goldsworthy v. Am. Family Mut. Ins. Co*., 209 P.3d 1108, 1115 (Colo. App. 2008) (quoting *Pub. Serv. Co. v. Osmose Wood Preserving, Inc.*, 813 P.2d 785, 788 (Colo. App. 1991)). Therefore, the Foundation is bound by its predecessor's inaction and is barred from seeking relief against wells operating with final permits. Moreover, the Foundation itself had the ability to challenge any permits that were applied for after the Foundation acquired its surface rights from its predecessor. Therefore, all elements of claim preclusion are present and the Foundation is barred from challenging final permits in the NHP Basin.

The Foundation's proposed attack is also barred by issue preclusion. First, the issue of whether there is unappropriated water or whether a well would unreasonably impair existing water rights, is the same question as when the well permits were applied for. Second, the Foundation is in privity with its predecessor-in-interest and the Foundation itself could have challenged any permits issued subsequent to acquiring its water rights. Third, final permits are the equivalent of final judgments. Finally, the Foundation and its predecessor had a full and fair opportunity to contest the issuance of final permits on the grounds of a lack of unappropriated

water or that the wells would unreasonably impair their surface water rights. They failed to do so, and thus the Foundation's proposed attack on final well permits in the NHP Basin is barred.

In sum, the Foundation and its predecessor had the opportunity and responsibility to protect their surface water rights from potential impairment by wells permitted over the past 50 years in the NHP Basin. Although the Foundation complains of the inequity of SB 52 and the Act's alleged impact on its surface rights, the Foundation ignores the fact that it has slept on its rights for decades while allowing a substantial economy to develop based on the final permits it now seeks to invalidate. The Foundation's consistent, long term pattern of inaction is precisely the reason that the doctrines of claim preclusion and issue preclusion exist. Any other conclusion would put in jeopardy thousands of vested groundwater rights, and the many livelihoods that depend on them. *See* Leg. Transcript, pg. 12, lines 28-39, pg. 13, lines 1-2, pg. 17, lines 19-22, pg. 37, lines 21-39, pg. 38 1-2, 31-40, pg. 39, lines 1-14, 20-40, pg. 40, lines 1-4, 19-20, 36-39, pg. 45, lines 35-37, pg. 49, lines 4-10, 18-33.

V. The Foundation is Not Entitled to Summary Judgment Because It Has Not Demonstrated Injury or that the Relief Requested Will Remedy that Injury.

As the foregoing demonstrates, SB 52 is not unconstitutionally retrospective legislation as a matter of law, and on that basis alone the Foundation's SB 52 Motion should be denied. There is a separate and independent basis upon which the Court could also deny the Foundation's SB 52 Motion. The Foundation alleges that it is seeking a declaration that SB 52 is unconstitutional "in order to protect its water rights and legal status." *See* Compl. at ¶ 106. Specifically, the Foundation argues that SB 52 "deprives surface water right owners of the protections" that existed in the original Ground Water Management Act. Thus, the premise for

the Foundation's SB 52 Motion is that the alleged unconstitutionality of SB 52 is causing injury to the Foundation's surface water rights.

The Uniform Declaratory Judgments Law, C.R.S. §§ 13-51-101 *et seq.*, is a remedial statute. *See, e.g., Mt. Emmons Mining Co.*, 690 P.2d at 240. "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 & Cnty. of Denver*, 534 P.2d 346, 347 (Colo. App. 1975).

While "the required showing of demonstrable injury is somewhat relaxed in declaratory judgment actions," a party "must still demonstrate that the challenged statute or ordinance will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future." *Mt. Emmons Mining Co.*, 690 P.2d at 240. "Thus, while summary judgment might be an appropriate remedy in a declaratory judgment action involving a declaration of rights under a statute or an ordinance, it simply does not follow that the requirements for granting summary judgment should be any less stringent because constitutional issues are raised in a declaratory judgment context." *Id.*

Legal injury to the Foundation's surface water rights requires distinct factual findings. "The issue of injurious effect is inherently fact specific and one for which [the courts] have always required factual findings." *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496, 508 (Colo. 1993), *see also, City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 88 (Colo. 1996). The Foundation has asserted numerous "historical facts" pertaining to its alleged injury but these "historical facts," even if undisputed, do not demonstrate that actual injury to the Foundation's

surface water rights is caused by the alleged unconstitutionality of SB 52. Likewise, those "historical facts" do not prove that the relief requested by the Foundation—declaring SB 52 unconstitutional as applied in the NHP Basin—will remedy the alleged injury.

The Foundation's alleged injury is similar to the situation in *Mt. Emmons Mining Co.*, 690 P.2d 231. There the Court found there were unresolved factual questions relating to the existence, nature, and extent of any injury the plaintiffs might suffer. *Id.* at 241. In granting summary judgment in favor of the plaintiffs, the district court had reached a "summary adjudication of issues based on a series of assumed facts." *Id.* at 242. The Colorado Supreme Court, in reversing the entry of summary judgment, stated: "these assumptions are mere hypothetical possibilities and nothing more . . . [and] point up once again the broad array of questions that must yet be resolved before . . . [plaintiffs'] claims can be appropriately resolved by summary judgment." *Id.* As an example of the hypothetical possibilities, the *Mt. Emmons* Court explained that:

> [T]he manner in which the ordinance might ultimately be applied, in addition to raising mixed questions of law and fact, could well undercut [plainitffs'] constitutional challenges or otherwise significantly alter the issues raised in its complaint.

Id. Given these uncertainties, the Court in *Mt. Emmons* concluded that a decision must be withheld "until such time as the issues are solidly fixed by an evidentiary record that will permit a final resolution of the controversy." *Id*. at 241-42.

Similarly here, the manner in which the Commission may ultimately apply SB 52 and how such application might injure the Foundation, if at all, raises mixed questions of law and fact for which there is no evidentiary record. Likewise, there is no evidentiary record on how a

ruling in favor of the Foundation on its unconstitutionality claim would provide any relief from such injury. Thus, based on *Mt. Emmons*, the Foundation has not met its burden of proof and, therefore, the Court should deny the Foundation's request for summary judgment on its claim that SB 52 is unconstitutional.

CONCLUSION

As the foregoing demonstrates, SB 52 is not unconstitutional retrospective legislation. The Foundation has plainly failed to meet its heavy burden of proof to demonstrate that SB 52 is unconstitutional under any of the five theories listed in the Complaint. Therefore, the court should deny the Foundation's motion for summary judgment.

Respectfully submitted April 8, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on this 8th day of April, 2016, I caused a true and correct copy of the foregoing **Defendants' Response to the Foundation's Motion for Summary Judgment on its Senate Bill 2010-52 Claim** to be served electronically via ICCES upon the following:

Name	Attorney	Organization
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s/Rachel St. Peter
E-filed pursuant to C.R.C.P. 121.
Duly signed original on file at the
Office of the Carlson, Hammond
& Paddock, LLC.