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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; David Nettles, in his capacity as Division Engineer in and for Water Division No. 1, State of Colorado; Colorado Division of Water Resources; Colorado Parks and Wildlife; State Board of Land Commissioners, Yuma County Water Authority Public Improvement District; Republican River Water Conservation District; City of Holyoke; City of Wray; Harvey Colglazier; Lazier Inc.; Marjorie Colglazier Trust; Mariane U. Ortner; Timothy Ortner; East Cheyenne Ground Water Management District; North Well Owners; Protect Our Local Community Water, LLC; Saving Our Local Economy, LLC; Tri-State Generation and Transmission Association; Don Andrews; Myrna Andrews; Nathan Andrews; David L. Dirks; Julie Dirks; Dirks Farms LTD.; Happy Creek, Inc.; J&D Cattle, LLC; 4M Feeders, Inc.; May Brothers, Inc.; May Family Farms; 4M Feeders, LLC; May Acres, Inc.; Thomas R. May; James J. May; Steven D. Kramer; Kent E. Ficken; and Carlyle James as Trustee of the Chester James Trust.	**▲COURT USE ONLY▲**
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MOTION FOR SUMMARY JUDGMENT ON CONSTITUTIONALITY OF SENATE BILL 10-52

The Defendants named above move for summary judgment, pursuant to C.R.C.P. 56, on the Plaintiff's, Jim Hutton Educational Foundation's ("Foundation") second claim for relief. The Foundation's second claim seeks a determination that Senate Bill 10-52, 2010 Colo. Sess. Laws 223 ("SB 52"), is unconstitutional as applied to the Northern High Plains designated ground water basin ("NHP Basin") for five reasons: (1) it constitutes retrospective legislation because it impairs vested surface water rights; (2) it results in a taking of vested property rights without just compensation; (3) it violates the prior appropriation doctrine; (4) it violates the Foundation's due process rights; and (5) it violates the Foundation's equal protection rights. Compl. at ¶¶ 72-75, 85, 116.

The Court should deny the relief requested in the Foundation's second claim and enter summary judgment in favor of Defendants upholding the constitutionality of SB 52 for two reasons. First, SB 52 is not unconstitutionally retrospective because: (1) it is not retroactive, and (2) even if it is retroactive, it did not impair a vested right because the statute provided only a process for altering the boundaries of a designated basin, to which there is no vested right to continuance of that particular process, and the statute did not impose a new obligation, duty, or disability. Second, the Foundation has failed to establish that SB 52 violates the appropriation doctrine in Art. XVI, Section 6 of the Colorado Constitution or violates the United States and Colorado Constitution's takings clause, due process clause, or equal protection clause.

C.R.C.P. 121, § 1-15(8) Certification

Counsel for Defendants has conferred with counsel for the Foundation. The Foundation opposes the relief requested in this motion.

FACTUAL BACKGROUND

The legislative history of SB 52, in the form of a transcription of the available testimony before the House Agriculture, Livestock and Natural Resources Committee and the debates in the Colorado State Senate and House of Representatives is filed herewith as Exhibit 1. The original CD-ROMs prepared by the Colorado State Archives that were used to prepare the transcript are being lodged with the Court. The remaining legislative history, in the form of the bill, committee reports, Senate and House journals, and the copies of the bill when adopted by the Senate and House are not provided because there was no substantive amendment to SB 52 during the legislative process. These legislative materials, however, are available on the Colorado General Assembly's website, *http://www.leg.state.co.us/clics/cslFrontPages.nsf/PrevSessionInfo?OpenForm*. SB 52, as signed by the Governor on March 31, 2010, effective[1] on August 11, 2010, is attached as Exhibit 2.

The interpretation of SB 52 is a question of law and thus there are no genuine issues of material fact relating to the Foundation's claim that SB 52 is unconstitutional.

[1] SB 52 became effective 91 days after final adjournment of the General Assembly in 2010 because no referendum petition was filed against it pursuant to section 1(3) of Article V of the Colorado Constitution. Exhibit 2.

STANDARDS OF REVIEW

I. Standard Applicable to Summary Judgment under C.R.C.P. 56.

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c); *see also Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, Inc.*, 155 P.3d 621, 623-24 (Colo. App. 2007). "It is well established that on a motion for summary judgment, the moving party carries the burden of proof, and he must show that no genuine issue of material fact exists." *Ginter v. Palmer & Co.*, 585 P.2d 583, 585 (Colo. 1978) (citation omitted). If the movant meets its "initial burden of production . . . the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact." *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009). "This rule requires the opposing party to adequately demonstrate by relevant and specific facts that a real controversy exists." *Id.* "The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002); *see also Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011).

II. Standard Applicable to As-Applied Constitutional Challenges.

Statutes are presumed constitutional, and a party asserting that a particular statute is either facially unconstitutional or unconstitutional as applied bears the burden of establishing violation of a constitutional provision 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).

"Unlike a statute that is held unconstitutional on its face, which *cannot be enforced* in any future circumstances, a statute that is held unconstitutional as applied *can be enforced* in those future circumstances where it is not unconstitutional." *Gessler v. Colo. Common Cause*, 327 P.3d 232, 236 (Colo. 2014) (emphasis in original). When a party challenges the constitutionality of a statute as-applied, "the question is whether the challenging party can establish that the statute is unconstitutional 'under the circumstances in which the plaintiff has acted or proposes to act.'" *Qwest Servs. Corp.*, 252 P.3d at 1085 (quoting *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008)). For a party to obtain a declaration that the statute is unconstitutional as applied, "there must be an actual application or at least a reasonable possibility of enforcement or threat of enforcement." *Developmental Pathways*, 178 P.3d at 534.

III. Applicable Standards of Statutory Interpretation.

Statutory interpretation is a question of law. *See, e.g., Well Augmentation Subdist. of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 418 (Colo. 2009); *Klinger v. Adams Cnty. Sch. Dist. 50*, 130 P.3d 1027, 1031 (Colo. 2006). Under the basic principles of statutory interpretation, the Court looks first to the plain language of the statute. *Colo. Water Conservation Bd. v. Upper Gunnison River Conservation Dist.*, 109 P.3d 585, 593 (Colo. 2005); *Meridian Ranch Metro. Dist. v. Colo. Ground Water Comm'n*, 240 P.3d 382, 386 (Colo. App. 2009). The Court must "give effect to the words that the General Assembly has chosen" and "reconcile, whenever possible, seemingly conflicting provisions." *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1186 (Colo. 2000). The Court will determine

"whether the statutory language has a plain and unambiguous meaning." *Fischbach v. Holzberlein*, 215 P.3d 407, 409 (Colo. App. 2009).

A statute should be construed as a whole, "giving consistent, harmonious, and sensible effect to all of its parts." *Well Augmentation Subdist.*, 221 P.3d at 418 (quotations omitted); *Meridian Ranch Metro. Dist.*, 240 P.3d at 386 (quotations omitted). The Court must ascertain and give effect to the General Assembly's intent and the purposes for which the General Assembly enacted a particular provision, and must refrain from rendering a judgment that is inconsistent with that purpose or intent. *Meridian Ranch Metro. Dist*., 240 P.3d at 387; *State Eng'r v. Castle Meadows, Inc.*, 856 P.2d 496, 504 (Colo. 1993).

If the statutory language is unambiguous, the court need go no further; there is no need to resort to interpretive rules of statutory construction. *Well Augmentation Subdist.*, 221 P.3d at 418; *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1218 (Colo. 2002). If the language is ambiguous, "the court looks to the statute's legislative history, the consequences of a given construction, and the overall goal of the statutory scheme to determine the proper interpretation of the statute." *Well Augmentation Subdist*., 221 P.3d at 418; *see also Castle Meadows*, 856 P.2d at 504.

"[W]hen the General Assembly adopts legislation, it is presumed to be cognizant of judicial precedent relating to the subject matter under inquiry." *Castle Meadows*, 856 P.2d at 504. Because it is presumed that "legislation is intended to have just and reasonable effects, [the Court] must construe statutes accordingly and apply them so as to ensure such results." *Id.* The Court is "to avoid, if possible, a statutory construction which may result in constitutional

invalidity." *Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd*., 919 P.2d 212, 221 (Colo. 1996).

To determine whether a legislative enactment changes existing law, or merely clarifies existing law, the courts employ a three-part analysis that involves: "(1) assessing whether the statute was ambiguous before it was amended, (2) reviewing the legislative history surrounding an ambiguous amendment, and (3) considering the statute's plain language." *Mesa Cnty. Land Conservancy, Inc. v. Allen*, 318 P.3d 46, 50 (Colo. App. 2012); *Acad. of Charter Schs. v. Adams Cnty. Sch. Dist. No. 12*, 32 P.3d 456, 464-65 (Colo. 2001); *see also Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1385 (Colo. 1997) ("This court may find a legislative amendment to be a clarification where the legislative history or the language of a statute clearly indicates an intent to clarify."). When examining legislative history, "statements made during committee hearings reveal the understanding of legislators and thus, help identify their intent." *Mesa Cnty*., 318 P.3d at 51. "Testimony of a bill's sponsor concerning its purpose and anticipated effect can be powerful evidence of legislative intent." *Id.* at 52; *see also Swieckowski*, 934 P.2d at 1385 (citing the statements of the bill sponsor that the "purpose of the statute was to clarify the definition of the word 'maintain'").

ARGUMENT

I. Senate Bill 52 is Not Unconstitutionally Retrospective

SB 52 is not unconstitutionally retrospective for the following reasons. First, SB 52 clarified existing law rather than changed it. The unambiguous language of SB 52, and the legislative history of SB 52 and the Groundwater Management Act of 1965 ("1965 Act" or "Groundwater Management Act"), demonstrates that the General Assembly's intent in enacting

SB 52 was to clarify existing law. Second, even if SB 52 can be interpreted as a change in the law, SB 52 is not retrospective. SB 52 only affected a remedy, the criteria for modifying the boundaries of a designated basin. It did not affect a substantive, vested right. Additionally, SB 52 does not create a new obligation, impose a new duty, or attach a new disability. Finally, the circumstances surrounding the adoption of SB 52 are materially different from the circumstances in *City of Colorado Springs v. Powell*, 56 P.3d 461 (Colo. 2007), the case relied on by the Foundation, and that decision is simply not apposite here. *See* Compl. at ¶ 69.

A. Applicable Legal Standards on Retrospectivity.

The Foundation's primary argument is that SB 52 is unconstitutional because it constitutes retrospective legislation. Colorado's constitutional prohibition on retrospective legislation states: "[n]o ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly." Colo. Const. art. II, § 11.

Legislation can apply prospectively, retroactively, or retrospectively. *See Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 12 (Colo. 1993). Legislation is applied prospectively "when it operates on transactions that occur after its effective date." *Id.* Legislation applies retroactively "when it operates on transactions that have already occurred or rights and obligations that existed before its effective date." *Id.* "Although disfavored, retroactive application of a statute is not necessarily unconstitutional; it is permitted where the statute effects a change that is procedural or remedial. *In re Estate of Dewitt*, 54 P.3d 849, 854 (Colo. 2002). In contrast, retrospective legislation refers to a law or statute whose retroactive application is always unconstitutional. *Id.* at 855. A statute is considered retrospective 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." *Id.* at 854.

Courts utilize a two-step process for determining whether a law is unconstitutionally retrospective. *Id.* at 854; *City of Greenwood Vill. v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 444 (Colo. 2000). First, the court determines whether the General Assembly intended the challenged statute to operate retroactively. *Estate of DeWitt*, 54 P.3d at 854. Second, if the General Assembly intended retroactivity, the court then determines whether the challenged statute is unconstitutionally retrospective. *Id.*

B. SB 52 is Not Retroactive.

A statute is retroactive "if it operates on transactions that have already occurred or on rights and obligations that existed before its effective date." *DeWitt*, 54 P.3d at 854. Retroactive application is generally disfavored, and courts "require a clear legislative intent that the law apply retroactively to overcome the presumption of prospectivity. However, express language of retroactive application is not necessary to find that a law is intended to apply retroactively." *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006) (internal citations omitted). But the "clear legislative intent must appear from the statute in order to overcome the presumption that legislation is presumed to have prospective effect." *Ficarra*, 849 P.2d at 14.

1. SB 52 Is Not Ambiguous and Clarified the Intent of the General Assembly in Enacting the 1965 Act with Respect to Finality of Basin Designation and Well Permits in Designated Basins.

SB 52 did not change, but rather clarified the Groundwater Management Act. The Groundwater Management Act establishes the Ground Water Commission ("Commission"). §

148-18-3, C.R.S. (1965); § 37-90-104, C.R.S. (2015). The Act directs the Commission, after notice and a hearing, to "determine" designated groundwater basins. § 148-18-5(1)(a), C.R.S.; § 37-90-106(1)(a), C.R.S. The Commission is also empowered to alter the boundaries or description of a designated basin pursuant to the criteria established by statute. *Id.*

The Commission's determination creating the proposed designated basin, altering the boundaries, or dismissing the basin proposal must consider the factual information presented or available. § 148-18-5(2), C.R.S. (1965); § 37-90-106(3), C.R.S. (2015). The Ground Water Management Act requires that such determination include findings on a number of facts related to the creation or alteration of a designated basin such as: the aquifer boundaries, the quantity of water in each aquifer, and the estimated use of the groundwater. § 148-18-5(1)(b)–(h), C.R.S. (1971); § 37-90-106(1)(b)(I)–(V), C.R.S. (2015).

When the NHP Basin was designated the Groundwater Management Act provided that:

> The commission shall, from time to time as adequate factual data becomes available, determine designated ground water basins and subdivisions thereof by both geologic and[2] 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. (1965) (current version § 37-90-106(1)(a), C.R.S. (2015)).

In 2010, this provision was amended by SB-52, which was signed by the Governor on March 31, 2010 and became effective on August 11, 2010. Prior to the enactment of SB-52, section 106(1)(a) mirrored the language in section 148-18-5(1)(a), C.R.S. (1971). SB-52 revised section 106(1)(a) to read, in part:

[2] In 1971 this provision was amended to delete "both geologic and." 1971 Colo. Sess. Laws 367.

> 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 further states that it "reaffirms, rather than alters, the General Assembly's 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). SB 52 also expressly provides that it does not apply to litigation brought under section 37-90-106(1)(a) that was pending as of January 1, 2010. *Id.*

SB 52 was enacted to eliminate potential uncertainty over the finality of boundaries of Designated Ground Water Basins and status of final well permits that resulted from the Colorado Supreme Court's discussion of section 37-90-106(1)(a) in *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20 (Colo. 2006). In interpreting a statute, the court first looks to the statute's plain language. *Meridian Ranch Metro. Dist.*, 240 P.3d at 386. The court must give consistent, harmonious, and sensible effect to all parts of the statute. *Well Augmentation Subdist.*, 221 P.3d at 418. Under the plain language of SB 52, the boundaries of a designated groundwater basin may only be altered if the alteration will not exclude any wells for which conditional or final permits have been issued. Thus, the plain language of SB 52 unambiguously provides that in enacting the bill the General Assembly was clarifying and reaffirming the original legislative intent that once a designated basin was created and its boundaries established, any alteration of

the boundaries could not exclude any well for which a conditional or final well permit had been issued. This expressed intent is consistent with other provisions of the Groundwater Management Act.

In enacting the Groundwater Management Act, the General Assembly created a specific process for both the creation of a designated basin and for the review and issuance of conditional and final permits authorizing the withdrawal of designated groundwater. *See, e.g., Eagle Peaks Farms, Ltd.*, 919 P.2d at 215, *Meridian Ranch Metro. Dist*., 240 P.3d at 387. With respect to the creation of a basin, the Groundwater Management Act has always included provisions requiring notice of the proposed basin designation, a hearing, § 148-18-5(2) C.R.S. (1965) (current version at § 37-90-106(3), C.R.S. (2015)), and an opportunity for judicial review of the Commission's final determination. § 148-18-14, C.R.S. (1965) (current version at C.R.S. § 37-90-115, C.R.S. (2015)); *see also Eagle Peaks Farms, Ltd.*, 919 P.2d at 215-16.

The Groundwater Management Act also has always provided a notice, hearing, and appellate process for the issuance of final permits for wells in a designated basin, including wells existing at the time of creation of the basin and new wells. §§ 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)). *See also Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist*., 77 P.3d 62, 75-76 (Colo. 2003), *Eagle Peaks Farms, Ltd.*, 919 P.2d at 215-16, *Jaeger v. Colo. Ground Water Comm'n*, 746 P.2d 515, 520-23 (Colo. 1987). This process provides other well owners and surface water users with the opportunity, even after the designated basin is created, to ensure that the final permits approved by the Commission are appropriate, that designated groundwater is actually the source for the appropriation, and other water rights from the same source are not

unreasonably impaired thereby. *See, e.g.*, § 37-90-107, C.R.S. (2015), *Pioneer Irrigation Dists. v. Danielson*, 658 P.2d 842, 845 (Colo. 1983), *State ex rel. Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981). It also provides the opportunity for judicial review of Commission decisions. *See* § 37-90-115, C.R.S. (2015).

Section 148-18-14(2), C.R.S. (current version at § 37-90-115, C.R.S. (2015)) states that, if not appealed, the Commission's action is "final and conclusive." Such action includes the Commission's approval of final permits for the use of designated groundwater. This statutory language confirms that final permits issued by the Commission have always been intended to be just that, "final and conclusive" and not subject to subsequent collateral attack.

The Colorado Supreme Court has held that final permits for the withdrawal of designated groundwater are the Groundwater Management Act's equivalent of a decree confirming a tributary water right. *N. Kiowa-Bijou Groundwater Mgmt. Dist*., 77 P.3d at 75-76; *Thompson v. Colo. Ground Water Comm'n*, 575 P.2d 372, 377 (Colo. 1978) ("The legislative intent evidenced in the Colorado Groundwater 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."); *Meridian Ranch Metro. Dist.*, 240 P.3d at 387. In reaching this conclusion, the Colorado Supreme Court has recognized the process set forth in the Groundwater Management Act for obtaining a final permit, including an evaluation by the Commission of actual beneficial use prior to the issuance of a final permit. *Thompson*, 575 P.2d at 378-79. The Court has also held that the right created under a final permit reflects an appropriation of water and a vested, protectable water right. *N. Kiowa-Bijou Groundwater Mgmt. Dist*., 77 P.3d at 75-76 ("Only upon the issuance of a final permit would the

landowner be able to obtain a determination of his use right, at which time the use right will vest.") (citing *Thompson*, 575 P.2d at 379-80); *Meridian Ranch Metro. Dist.*, 240 P.3d at 387; *Upper Black Squirrel Creek Ground Water Mgmt. Dist.*, 993 P.2d at 1181 ("[W]e agree that Goss enjoys a vested right to withdraw ground water, in accordance with the terms of his permit[] . . . .").

With respect to decrees issued under the Water Right Determination and Administration Act of 1969 ("1969 Act"), the Colorado Supreme Court has held that such decrees, even if wrong, are not subject to collateral attack. *See, e.g.*, *Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co*., 115 P.3d 638, 646 (Colo. 2005) ("Decrees for irrigation rights that erroneously determined tributary water sources to be 'nontributary' or 'independent of other priorities,' despite their tributary characteristics, are protected by res judicata . . . ."); *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist*., 734 P.2d 627, 637 (Colo. 1987) ("A trial court has jurisdiction to render an erroneous decision, which may be reviewed on appeal. Consequently, a judgment entered within the jurisdiction of the court, even though wrong, is not subject to collateral attack."). The same standard applies to final well permits issued under the procedures of Groundwater Management Act because such permits represent a vested and enforceable water right that became final and conclusive when not appealed. § 37-90-115, C.R.S. (2015); *see also N. Kiowa-Bijou Management Dist. v. Larrick*, 510 P.2d 323, 329 (Colo. 1973) (creation of designated basin cannot be collaterally attacked).

Although section 148-18-5(1)(a), C.R.S. (1965) (current version at § 37-90-106(1)(a), C.R.S. (2015)) contemplates the alteration of "the boundaries or description" of a designated basin under certain circumstances, there is no specific language in that section (either before or

after the enactment of SB 52) that provides for any change to the water rights represented by a final permit as part of that process. Section 148-18-5(1)(b)–(h), C.R.S. (1965) requires specific findings from the Commission when either creating a designated basin, or altering its boundaries, including:

> (b) The name or names of the water bearing geological member or members of a defined formation;
>
> (c) The boundaries of each formation or member being considered;
>
> (d) The estimated quantity of water stored in each formation or member;
>
> (e) The estimated annual rate of recharge;
>
> (f) The estimated use of the ground water in the area;
>
> (g) The estimated projected use of the ground water in the succeeding fifty years at ten-year intervals; [and]
>
> (h) If the source is an area of use exceeding fifteen years as defined in section 148-18-2(3), the commission shall list those users who have been withdrawing water in excess of the fifteen-year period, the use made of the water, the average annual quantity of water withdrawn, and the year in which the user began to withdraw water.

See current version at § 37-90-106(1)(b), C.R.S. (2015).

Importantly, none of the required findings concern the modification or limitation of the vested water rights represented by final permits or identification of wells for which final permits could be modified or limited. Had the General Assembly intended that altering the boundaries of a designated basin could modify or limit the vested water rights represented by final permits, it would have specifically so provided. It did not, and in fact, by enacting SB 52 the General Assembly has now clarified and confirmed that it did not intend such an outcome. This result is further confirmed by the fact that there is no other provision in the Groundwater Management Act that contemplates, much less requires, that the vested water right represented by a final permit could be modified or limited in any manner by a change in basin boundaries.

When construed as a whole, giving consistent, harmonious, and sensible effect to all of its parts, the most logical, rational, and reasonable interpretation of the Groundwater Management Act as originally enacted is that the statutory process for modifying the boundaries of a basin was not intended to provide the Commission, other water users, or a reviewing court, with an unlimited, perpetual pass to alter the boundaries of a designated groundwater basin, or to do so in a manner that modified or limited the vested water right represented by a final permit. Such a construction of the Act is fundamentally inconsistent with the General Assembly's intent and policy decisions in creating designated ground water basins; it is fundamentally inconsistent with basic principles of Colorado water law; and it would result in the deprivation of vested water rights held by appropriators of designated groundwater. Like a decree for tributary water, a designated basin final permit reflects the Commission's final and conclusive determination of a lawful appropriation and beneficial use of designated groundwater. The Groundwater Management Act should not, and simply cannot, be interpreted in a manner that allows perpetual challenge to such final permits or to the lawful source of groundwater supplying the appropriation. The General Assembly has made this intention clear in its enactment of SB 52.

When section 148-18-5 and SB 52 are interpreted in accordance with the established standards for statutory construction, the most logical and reasonable conclusion is that SB 52 clarifies the General Assembly's intent that alterations to the boundaries of a designated basin cannot affect the finality of final permits to withdraw designated groundwater. The Foundation's argument that SB 52 changed existing vested rights or otherwise results in an unconstitutional infringement on the Foundation's surface water rights is simply incorrect when viewed in light of the statute's plain language and history of Groundwater Management Act.

2. If SB 52 is Ambiguous, then the Legislative History Demonstrates the General Assembly's Intent to Clarify the Law and Eliminate the Uncertainty Created by the *Gallegos* Decision.

The Foundation asserts that the language in SB 52 stating that it "reaffirms, rather than alters the General Assembly's original intent," "does not establish what was intended when the Ground Water Act was adopted by the 1965 General Assembly." Compl. at ¶ 102. The Foundation therefore appears to allege that SB 52 is ambiguous with respect to whether the original Groundwater Management Act created a cut-off date for challenging the legal status of groundwater in a designated basin. If the language of a statutory provision is ambiguous and "its intended scope is unclear, a court may look to pertinent legislative history to determine the purpose of the legislation." *In re Marriage of Parker*, 886 P.2d 312, 314 (Colo. App. 1994) (citing § 2-4-203(1)(c), C.R.S.); *Passamano v. Travelers Indemnity Co.*, 882 P.2d 1312 (Colo. 1994)). "The goal is to determine and give effect to the intent of the General Assembly and adopt the statutory construction that best effectuates the purposes of the legislative scheme." *In re Marriage of Parker*, 886 P.2d at 314 (citing *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237 (Colo. 1992)). In light of the Foundation's allegation, it is appropriate for this court to examine legislative history so it may best effectuate the legislative purpose of SB 52.

SB 52 was introduced in the Colorado State Senate on January 13, 2010 and assigned to the Senate Agriculture and Natural Resources Committee ("Ag. Committee"). Its original sponsors were Senators Brophy and Hodge and Representative Curry. The Senate Ag. Committee heard testimony[3] on the bill on January 21, 2010, and adopted it with a favorable

[3] State Archives reports that it does not have a recording of the hearing before the Senate Agriculture and Natural Resources Committee.

recommendation to the Committee of the Whole. It passed unanimously on the third reading. Exhibit 1, *Transcript of Legislative Hearings on Senate Bill 10-52*, pg. 4, lines 1-20. In the House of Representatives, the bill's primary sponsor was Representative Curry, and the bill was co-sponsored by Representatives Fischer, C. Gardner and S. King. The bill was referred to the House Agriculture, Livestock and Natural Resources Committee ("Ag. Committee"). The Ag. Committee held a hearing on the bill on March 3, 2010, at the conclusion of which it was adopted with a favorable recommendation to the Committee of the Whole. Ex. 1, pg. 5, lines 1-8, pg. 73, line 25. After extensive debate it passed second reading in the House on March 9, 2010, passed third and final reading on March 10, 2010. Ex. 1, pg. 85, lines 1-4, pg. 88, lines 28-37, pg. 97, lines 7-12. The governor signed the bill on March 31, 2010. Exhibit 2, *Session Laws of Colorado 2010, Senate Bill 10-052*.

The Colorado Supreme Court's discussion of section 37-90-106(1)(a), C.R.S. in *Gallegos* created uncertainty over the finality of boundaries of Designated Ground Water Basins and status of final well permits. The legislative history of SB 52 demonstrates that the statute was enacted to clarify, not alter, existing law and to eliminate uncertainty created by the *Gallegos* decision. Senator Brophy explained the bill's purpose on second reading in the Senate, stating: "[T]he purpose of Senate Bill 52 is to ensure the certainty that water users have when they, when they construct and develop a water well in a designated groundwater basin for, for, for beneficial use. Senate Bill 52 has, is that simple of a bill." Ex. 1, pg. 1, lines 34-37.

The testimony before the House Ag. Committee also plainly demonstrates that the purpose of the bill was to provide clarity and finality, and to remove the uncertainty created by the *Gallegos* decision. Witness Mike Shimmin addressed these issues, explaining:

> What we're asking you as the General Assembly to do is to go on record and tell the courts what you think the policy is of this state should be about how to resolve this issue. In other words, do you intend, did you intend, have you always intended that these designated basins were to have finality when they were established and that's really what this bill is about. And, that's why it's written the way it is. As we told you before, our view of this was that all of us believed and the Supreme Court believed, until 2006, that it makes sense to have finality in the designated basins. But they read one sentence in the 1965 Act to say, 'Well, when we read those words, we don't see it there.' And that footnote[4] in the Supreme Court's opinion was, I believe, an invitation to the General Assembly to weigh in and say if we're not getting this the way you intended, then please come and tell us.
>
> So, what this bill is about is asking you to go on record and tell the courts that you intended for these designated basins and the final permits that were issued to these well owners to have finality.

Ex. 1, pg. 68, lines 4-18.

> The bill's sponsor, Representative Curry concurred:
>
> I think Mr. Shimmin did my wrap up for me . . . . This is such an important issue to the people who live in these areas. It's everything to them . . . . and they're trying to, as you've heard, are trying to find certainty and 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 . . . .

Ex. 1, pg. 70, lines 16-27. Representative Curry went on to explain that her "intent as the sponsor is to bring finality." Ex. 1, pg. 70, lines 34.

> Representative Sonnenberg agreed, stating:

[4] *Gallegos v. Ground Water Commission*, 147 P.3d at 32, N. 8.

> I just want to make sure that we understand that this is our job. We have three branches of government and the Supreme Court is trying to make decisions with our court system is trying to make decisions on the laws that we write. And if indeed we need to provide clarity, and that's what this bill does so we can have finality in that, I think we do that. I think that's our job.

Ex. 1, pg. 71, lines 20-24. He went on to explain: "one of the answers we have to have is some sort of certainty on how this process — how things will work in a basin. We thought we had that certainty but the Ground Water Commission and the statutes that were in place 40 years ago and the 2000s when the Supreme Court didn't see it that way and now we're trying to fix that to remain secure." Ex. 1, pg. 71, lines 36-39.

On second reading before the House Committee of the Whole, Representative Curry explained: "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 . . . ." Ex. 1, pg. 74 line 40, pg. 75, lines 1-7. She then addressed the finality provided by SB-52 in relation to surface water right owners:

> But I can tell you that they can't go to the Ground Water Commission if they feel they are being injured. Reason for that members, is they had 40 years to do that. They have had time to come forward and all of a sudden at the 11th hour we have three surface users that have come forward on the South Fork of the Republican to say, 'Hey, I might be injured, if these wells maintain their status.' So what we are going to have today is a good policy debate of over whether you want to provide the certainty for those wells that have been permitted for decades in these designated basins. Do they have the right to maintain their status after all of these years, after multiple opportunities for the surface users to come forward?

Ex. 1, pg. 75, lines 32-40. Representative Curry went on to explain:

> Now, we as the body have to make a decision, up or down, do we want to provide certainty for these wells or not? Do we want to have the door open for folks that come in and say, 'You know what, even though we haven't had a problem with your pumping for 40 years, today we do.'

Ex. 1, pg. 76, lines 8-11.

Representative Sonnenberg agreed, explaining the need to clarify the law and the fact that surface water users had had ample opportunity to protect their surface water rights:

> What has caused the confusion, prior courts have agreed and upheld that, in 2006, the Gallegos decision a judge looked at that and said there's a little confusion. What we're doing as a legislature with this bill is answering the question about that confusion and saying, 'Look, the intention of the legislature from 1965 to 2006 was this.' 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, and it is no threat to surface owners. If the surface owners had a problem and had issues, they should have been here 45 years ago, quite frankly. They had the opportunity with 3,000 wells.

Ex. 1, pg. 80, lines 5-13.

Representative Sonnenberg went on to explain: "This provides certainty, the same certainty as we had the last 40 years until 2006, the certainty was lost after 2006 . . . in the Gallegos case." Ex. 1, pg. 85, lines 22-24. During third reading in the House Representative Sonnenberg explained:

> 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.

Ex. 1, pg. 89, lines 25-29.

Also during third reading, bill co-sponsor Representative Gardner explained:

> When you talk about the doctrine of prior appropriations remember there is a difference when you're dealing with a designated ground water basin. What we've heard in Committee, what we've heard through proponents of the bill, what we've heard many people talk about, is that difference. Created in the 1960s, in 2005, roughly 2005, the Gallegos family brought a court case all the way up through the court system. The court granted a remedy that was never asked for, that was never sought, and that was certainly never created by statute in the state of Colorado . . . . What I'm trying to get through though is in terms of water policy, you saw a Supreme Court, a court make a remedy that was not provided for in law and not intended by the state legislature.
>
> ****
>
> This is our interjection of policy to say that decision they made was never intended by the Colorado legislature.

Ex. 1, pg. 90, lines 29-38, pg. 91, lines 12-13.

At the conclusion of the House debate on third reading Representative Curry summarized the bill stating:

> What happens if you pass this thing? 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. There's finality even in the surface realm.

Ex. 1, pg. 96, lines 11-17. Representative Curry continued, saying:

> I want to thank you first for your consideration of the bill and say that I'm greatly honored to be running a bill brought to me by farmers on the eastern plains that number in the thousands. These folks that rely on these wells are looking for certainty and they're asking us to establish that. It's not that complicated. Thousands of people are, rely on these designated wells and they have requested that we as a general assembly express our intent regarding whether or not they can continuously be challenged. The bill takes effect in August, if it's not referred to the people. It takes effect in August if the surface users that have come forward and hired lobbying, hired folks to bring their point and their issue forward, if they

> are still concerned that they think they have data regarding injury they have until August to submit that. Members, we might bear that in mind and, in fact, after meeting with these folks when I asked if they had information to show they were being injured I did not get a straight answer. I frankly think that that issue is still on the table, but they've really had forty years to bring their points forward. At what point do the well users have a right? They have relied on a state permit for decades and you heard about the water pipelines that we have funded using state loans. There's a lot at stake for these folks.

Ex. 1, pg. 96, lines 20-37.

As this legislative history amply demonstrates, SB 52 was adopted to clarify the potential ambiguity and eliminate the uncertainty over the finality of boundaries of Designated Ground Water Basins and status of final well permits created by 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 designated groundwater permit holders. *See Acad. of Charter Schs.*, 32 P.3d at 464-69 (analyzing two amendments and finding one was a clarification, not a change, and thus it was not unconstitutionally retrospective. When the court determines an amendment is a clarification of existing law, then the court will not undergo a retrospectivity analysis).

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

If the court finds that the General Assembly changed the law and intended the change to apply retroactively, the court evaluates whether such retroactivity is unconstitutionally retrospective. Retroactive application of a statute "is permitted where the statute effects a change that is procedural or remedial." *DeWitt*, 54 P.3d at 855. 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." *Id.* at 854.

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

"A right is vested only when it is not dependent upon the common law or the statute under which it was acquired for its assertion, but has an independent existence." *In re Estate of Morning*, 24 P.3d 642, 646 (Colo. App. 2001) (citing *Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d 1002 (Colo. 1997)); *see also People v. D.K.B.*, 843 P.2d 1326 (Colo. 1993), *Abromeit v. Denver Career Serv. Bd.*, 140 P.3d 44, 51 (Colo. App. 2005). "[A] vested right 'must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.'" *Ficarra*, 849 P.2d at 16 (citations omitted).

In contrast, there is no vested right in a particular remedy. *Abromeit*, 140 P.3d at 51 ("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 considered to be procedural and not substantive, even if its repeal disadvantages the party asserting it. *Id*. Thus, a law modifying a remedy for protection of a vested water right does not alter the water right. *Cent. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 355, 348-49 (Colo. 1994).

The Foundation argues that SB 52, which prevents modification of the boundaries of a designated groundwater basin if it would exclude any well with a conditional or final permit, constitutes retrospective legislation. Compl. at ¶¶ 72-73. The Foundation argues it is retrospective because it impairs vested surface water rights by removing statutory protections for surface rights that allegedly existed in the original Groundwater Management Act. *Id.* Specifically, it argues that SB 52 is unconstitutional because it "prohibit[s] the exclusion of lands from a designated ground water basin when it becomes apparent that wells on those lands are having more than a de minimis impact on surface water rights." Compl. at ¶ 72. This argument ignores the distinction between remedies and vested rights.

Colorado law makes a clear distinction between laws that impair vested rights and laws that simply change or eliminate remedies to protect vested rights. In this case, the Foundation has vested surface water rights. *See Qualls v. Berryman*, 789 P.2d 1095, 1098 (Colo. 1990). The Foundation does not, however, have a vested right in any particular remedy to protect those water rights. Thus, the Foundation's argument that SB 52 is unconstitutional because it eliminates a remedy is simply wrong.

Moreover, the ability to petition the Commission to redraw basin boundaries does not have the characteristics of a vested right. A right is vested only when it has an existence that is independent of the statute under which it was acquired. *In re Estate of Morning*, 24 P.3d at 646. The Groundwater Management Act created the Commission and empowered it to alter the boundaries of a designated basin. § 37-148-18-5 (1965), C.R.S. The *Gallegos* decision discussed that section as allowing the removal of land from a designated basin upon showing that groundwater within the basin does not meet the definition of designated groundwater. Thus, it is

obvious that the right to seek an alteration of the boundaries of the designated basin as interpreted by the *Gallegos* Court is not a vested right that exists independently of the Groundwater Management Act. Rather, it is a right that is only provided for by the statute, and therefore is not a vested right.

Furthermore, any interest in the remedy afforded by the Groundwater Management Act as interpreted in *Gallegos* did not rise to the level of a title to enjoyment of property, the enjoyment of a legal demand, or an exemption from a demand made by another. As case law makes clear, there is a distinction between a vested right and the availability of a particular remedy to protect a vested right. *In re Estate of Morning*, 24 P.3d at 646; *see also Abromeit*, 140 P.3d at 50. Here, the enjoyment of property is the enjoyment of a water right, not enjoyment of the ability to protect this water right by excluding land from a designated groundwater basin. As such, the ability to "de-designate" was not a "title to enjoyment of property." In the Foundation's case, SB 52 clarified a statutory provision for altering the boundaries of a designated basin; it did not alter the Foundation's water rights, which are set forth in various decrees. *See Simpson*, 877 P.2d at 348-49. That the Foundation expected this mechanism to continue to be available in the future to protect its rights is of no legal consequence because such an expectation does not give rise to a vested right. *See Ficarra*, 849 P.2d at 16 (the courts do not find retrospectivity where the ability to redress an injury is founded on "a mere expectation based upon an anticipated continuance of the existing law."). Therefore, the alleged ability to ask the Commission to redraw the boundaries of designated basin pursuant to the Groundwater Management Act as interpreted in *Gallegos* prior to SB 52 is not a vested right.

Instead, the ability to petition to remove portions of land from a designated basin has the hallmarks of a remedy. A remedy prevents, redresses, or compensates for the violation of a right. Black's Law Dictionary 1485 (10th ed. 2009). Removing land from a designated basin when evidence indicates that groundwater was improperly included within a designated basin allows redress. The Foundation acknowledges this by stating: "SB-52 deprives surface water right owners of the protections that originally existed in C.R.S. § 37-90-106(1)(a) . . . ." Compl. at ¶ 72. The Foundation therefore distinguishes between water rights, which are vested, and the remedy afforded by the Groundwater Management Act as interpreted in *Gallegos* to alter the boundaries of a basin. Colorado law holds that a remedy is not a vested right, even when a party is harmed by the removal of the remedy. *Abromeit*, 140 P.3d at 51. Therefore, even though the Foundation may claim injury from its inability to remove certain lands from the boundaries of the NHP Basin, the Foundation had no vested right in this remedy, and SB 52 is not unconstitutionally retrospective legislation.

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

If there is not a vested right at issue, the court looks to the second prong of the retrospectivity analysis: whether the statute creates a new obligation, imposes a new duty, or attaches a new disability with respect to past transactions or considerations. However, a law is not deemed retrospective "merely because the facts upon which it operates occurred before the adoption of the statute." *Id.* (quoting *City of Greenwood Vill.*, 3 P.3d at 445).

In evaluating this prong, the courts have stated that "although 'imposition of a new disability' may make a statute retrospective, a court will so conclude only if the statute 'impose[s] a "disability" of constitutional magnitude.'" *Hickman v. Catholic Health Initiatives*,

328 P.3d 266, 274 (Colo. App. 2013) (quoting *DeWitt*, 54 P.3d at 857). Thus, the limited case law interpreting this provision establishes that, at the very least, alleging an "attachment of a new disability" is a very high bar to clear.

Evaluation under this prong inexorably leads to the conclusion that SB 52 is not unconstitutionally retrospective. Here, the legislature clearly intended that SB 52 clarify and affirm *existing* practices; it did not create a new practice which would attach a new disability. As discussed more fully in the section below, the Foundation had not exercised a remedy under the Groundwater Management Act at the time SB 52 was enacted.

3. The Foundation's Reliance on *City of Colorado Springs v. Powell* is misplaced.

The Foundation relies on *City of Colorado Springs v. Powell*, 156 P.3d 461, for the proposition that any legislative change after a judicial interpretation is necessarily retrospective legislation. Compl. at ¶ 69. However, *Powell* is fundamentally different from this case, and provides further support for the conclusion that SB 52 was not retroactive legislation.

In *Powell*, the Court was analyzing House Bill 03-1288 ("H.B. 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. H.B. 1288 changed the definition of a "public sanitary facility" in the CGIA to exclude the types of facilities that caused the injury claimed by the plaintiffs in *Powell*. H.B. 1288 was enacted in direct response to appellate court interpretations of that definition in two pending court cases that found that governmental immunity for the claimed injuries from such facilities had been waived by the CGIA. *Id.* The result of the amendment, if applied retroactively, would have been to immunize the defendants from liability for the plaintiffs' claimed injuries. After passage of H.B. 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 Colorado Supreme Court disagreed, reaching the conclusion that H.B. 1288 applied prospectively only. *Id.*

In reaching this conclusion, the Colorado Supreme Court looked to whether the amendment clarified or changed existing law. Based on the language in H.B. 1288 stating that it made "modifications of, and additions to, the definitions," the court concluded that H.B. 1288 effected a change in the law and was not simply a clarification. *Powell*, 156 P.3d at 465. The court found no language in the statute that overcame the presumption that the law only applied prospectively. *Id.* Instead, the court concluded that: (1) the General Assembly's use of the word "clarify" could not overcome its recognition that modifications and additions to the existing definitions were necessary, (2) the General Assembly's expressed concern about the future application of the appellate courts' decisions, and (3) the lack of any clear statement of retroactive intent.

Thus, the situation in *Powell* was entirely different than the case before this court. In *Powell* the remedy had been exercised by the litigants prior to the General Assembly effecting the change in the law. *See Powell*, 156 P.3d at 463-64. Indeed, the General Assembly was directly responding to the decisions in prior appellate decisions involving the same litigants, and the defendants sought to apply the change retroactively to dismiss the pending litigation in reliance on H.B. 1288. Here the Foundation had not attempted to exercise the remedy it alleges was available prior to the enactment of SB 52. 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 in *Powell* were very different and make it inapposite here.

Finally, *Powell* and *Gallegos* are also distinguishable because the Court's opinion in *Powell* was a direct holding. *See Powell*, 156 P.3d at 467. Conversely, the Court's discussion in *Gallegos* was dicta, in which the Court acknowledged, in footnote 8, that there was a problem caused by earlier decisions of the Court. *See Gallegos*, 147 P.3d at 32 n. 8.

II. The Foundation's Other Claims Fail to Satisfy the Heavy Burden of Showing SB 52 is 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.

Both the United States and Colorado Constitutions contain takings clauses. The federal takings clause provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This provision applies to the states through the Fourteenth Amendment. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of La Plata*, 38 P.3d 59, 63 (Colo. 2001) (citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1887)). The Colorado takings clause provides, in relevant part, "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation." Colo. Const. art. II, § 15.

The Colorado Supreme Court "has interpreted the Colorado takings clause as consistent with the federal clause" and the Court "look[s] to both Colorado and federal case law for guidance" to analyze whether a taking has occurred. *Animas Valley Sand*, 38 P.3d at 64; *see also Simpson*, 877 P.2d at 346. "A taking may be effected by the government's physical occupation of the land or by regulation." *Animas Valley Sand*, 38 P.3d at 63. Since the Foundation contends that SB 52 is unconstitutional because it results in a taking of its surface water rights without just compensation, the Foundation's argument is grounded not in the government's physical

occupation of land, but in the passage of a statute that it apparently asserts effectuates a regulatory taking.

The United States Supreme Court has established two per se tests to determine whether a compensable regulatory taking has occurred "absent a physical encroachment onto the land." *Id.* at 64. First, a regulation constitutes a per se 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 per se taking occurs when a regulation "denies an owner economically viable use of his land." *Id.*

The Foundation cannot meet the requirements of either test. Regarding the first test, SB 52 substantially advances legitimate state interests. The statute was designed to clarify the potential ambiguity and eliminate the uncertainty created by *Gallegos* and to reaffirm the intended protection of existing designated groundwater users and the economic activity supported by those users, as discussed above, which are legitimate state interests. *See* Argument Section I.B.2. Regarding the second test, SB 52 does not deprive the Foundation of the economic viability of its water rights. The Foundation has failed to establish, and indeed has not even alleged, that SB 52 deprives it of economic use of its water rights. Thus, the Foundation has not met its burden to demonstrate that a per se taking has occurred.

However, that is not the end of the takings inquiry. When a property right still retains reasonable value, the courts will examine an additional three factors: the economic impact of the regulation, the regulation's interference with investment-backed expectations, and the character of the governmental action. *Id.* (citing *Lucas*, 505 U.S. at 1019 n. 8). Therefore, if a landowner fails to meet its burden of proving a per se taking, it can still prove a taking under a fact-specific

inquiry. *Id.* at 65. When examining economic impact, the Colorado Supreme Court has found that "a mere decrease in property value is not enough. This is true because a landowner is not entitled to the highest and best use of his property." *Id.* Instead, the inquiry is designed to "provide[] a safety valve to protect the landowner in the truly unusual case" where a landowner's property retains a value that is "slightly greater than de minimis." *Id.* (the level of interference with property values "must be very high"). To determine this, the court will compare the value of the water rights affected by particular legislation with the value of those rights before the legislation's adoption. *Simpson*, 877 P.2d at 347-48.

The Foundation has not alleged, much less established, that the value of its water rights has been rendered de minimis by the clarification to the law enacted in SB 52. More importantly, as demonstrated above, SB 52 did not alter existing law; it merely clarified it. Therefore, SB 52 could not have resulted in a change of the value of the Foundation's water rights.

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

The Foundation argues that SB 52 violates the Colorado's constitutional prior appropriation doctrine because "[t]he curtailment of decreed surface water rights for Compact compliance, without first curtailing groundwater diversions that are depleting the river and which were developed after the surface water appropriations, is inconsistent with" the prior appropriation doctrine. Compl. at ¶ 79. This is the same argument that was made, and rejected, in *Simpson*.

Article XVI, Section 5 of the Colorado Constitution, provides in pertinent part: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the

state, subject to appropriation as hereinafter provided." Colo. Const. art. XVI, § 5. Article XVI, Section 6, provides in pertinent part: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes." Colo. Const. art. XVI, § 6.

The *Simpson* case dealt with Senate Bill 120 (1989) ("SB 120"), which prohibits the state from ordering curtailment of diversions attributable solely to evaporation from exposed groundwater in sand and gravel pits excavated prior to 1981. *Id.* at 344-45. The court held that in order to violate these constitutional provisions, a statute would need to "create a new class of water rights not subject to the principles of appropriation established by Article XVI, Sections 5 and 6, of the Colorado Constitution." 877 P.2d at 345. The court also considered whether the statute would "insulate[]" particular water rights owners "from judicial scrutiny" of the impact of the exercise of their water rights on senior rights. *Id.* at 345. Ultimately, the court concluded that "[w]hile the provisions of SB 120 alter the manner in which senior and junior water right appropriators may obtain relief from injury," this did not constitute a violation of the prior appropriation doctrine. *Id.*

The facts at issue in this case are quite similar to those at issue in *Simpson*. Although SB 52 may have altered a remedy available to the Foundation, SB 52 did not create a new class of

water rights that are insulated from judicial review. Therefore, the statute is not unconstitutional for violating the prior appropriation doctrine.

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

The Foundation argues that SB 52 violates its due process rights "by taking away the Plaintiff's ability to protect its water rights." Compl. at ¶ 105 (citing U.S. Const. amend XIV, Colo. Const. art. II § 25). From this allegation it is not possible to determine whether the Foundation is alleging a violation of procedural or substantive due process.

With respect to procedural due process, the Colorado Supreme Court, citing a decision by the United States Supreme Court, held that:

> [I]n order to be entitled to the protections of procedural due process, a person must establish that he has a protected liberty or property interest at stake . . . and that a person has a protected property interest at stake only if he has "a legitimate claim of entitlement to it" as opposed to "a unilateral expectation of it."

Ficarra, 849 P.2d at 19 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70, 577 (1972)). The Colorado Supreme Court has also held that the "[c]onstitutional guarantees of due process, however, are applicable only to 'rights, not remedies.'" *Simpson*, 877 P.2d at 342 (quoting *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 907 (Colo. 1993)). As addressed above, even if this Court finds that SB 52 changed the law, it modified only a remedy previously available to the Foundation, but did not alter the Foundation's vested water rights. The Foundation had no interest in this remedy beyond a unilateral expectation that the remedy continue to be made available, which does not create a vested right. Therefore, no procedural due process protections attached to the ability to redraw the boundaries of the basin, and the removal of that remedy is not unconstitutional.

And, as explained in the Motion for Summary Judgment on Claim 1, in the event the Foundation's challenge is a substantive due process challenge, the initial question is whether the challenged rule infringes upon a fundamental constitutional right. *See Lujan v. State Board of Education*, 649 P.2d 1005, 1014-16 (Colo. 1982). "If the statute does not infringe upon a fundamental constitutional right, then the applicable test for reviewing a substantive due process challenge is the rational basis test." *City & Cnty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1277 (Colo. 2010). *Simpson* (as explained in the next section) establishes that the Foundation's water rights are not a fundamental right. For the reasons set forth in the explanation of the Ground Water Management Act and the legislative history of SB 52 above, there is a rational basis for SB 52. Therefore, the enactment of SB 52 does not violate due process.

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

The Foundation argues that its right to equal protection was violated because SB 52 "treat[s] surface water diverters differently than groundwater diverters for purposes of Compact compliance." Compl. at ¶¶ 78, 85, 116; *see also* U.S. Const. XIV. Under the Colorado Constitution, equal protection is guaranteed through the due process clause of article II, section 25. *Firelock Inc. v. Dist. Court*, 776 P.2d 1090, 1097 (Colo. 1989). Colorado courts have held that the three standards of review adopted by the U.S. Supreme Court's for analysis of equal protection issues arising under the federal constitution, are generally applicable to equal protection issues arising under the Colorado Constitution. *Simpson*, 877 P.2d at 340-41 (citing *Scholz*, 851 P.2d at 906 n. 7, *Harris v. The Ark*, 810 P.2d 226, 229-30 (Colo. 1991)). These three standards are strict scrutiny, intermediate scrutiny and rational basis. *Id.* The *Simpson* court, in

analyzing SB 120, held that since the statute did "not infringe on a fundamental right or create a classification based on race, religion, national origin or gender, the equal protection claims asserted by the appellants must be resolved by application of the rational basis standard." *Id.* at 341 (citing *Sigman v. Seafood Ltd. P'ship I*, 817 P.2d 527, 532 (Colo. 1991)). Pursuant to this standard, the statute at issue "does not contravene equal protection guarantees if it bears a rational relationship to a legitimate state objective." *Id.* (citing *Scholz*, 851 P.2d at 906). The *Simpson* Court held that SB 120 "expressly refers to water rights appropriations and to interstate compacts and court decrees respecting water . . . [t]he General Assembly has the authority and the responsibility to establish policies and procedures affecting this state's natural resources." *Id.* The court also found that SB 120 was adopted to "address issues of administration of the appropriation system . . . ." *Id.* Therefore, the court concluded that the legislation was a "rational effort by the General Assembly to achieve [a] legitimate governmental purpose." *Id.* at 342.

SB 52 similarly bears a rational relationship to a legitimate state objective: appropriations and policies and procedures that affect the administration of the state's natural resources. It also represents an effort to clarify existing law and affirm the finality of administrative actions and thereby protect economies and ground water users that depend on final permits for the use of designated groundwater. *See* Argument Section I.B.2.

CONCLUSION

The Foundation has failed to meet its heavy burden of proof to demonstrate that SB 52 is unconstitutional for the five reasons listed in the Complaint. Therefore, the Court should enter summary judgment in favor of Defendants upholding the constitutionality of SB 52 and deny the Foundation's second claim for relief.

Respectfully submitted February 29, 2016.

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This is to certify that on this 29th day of February, 2016, I caused a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT to be served electronically via ICCES upon the following:

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