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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; at al.	**▲COURT USE ONLY▲**
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DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF SENATE BILL 10-52

Defendants named above hereby submit their Reply in Support of Motion for Summary Judgment on the Constitutionality of Senate Bill 10-52 ("Defendants' Reply").

INTRODUCTION

The Defendants' Motion for Summary Judgment on Constitutionality of Senate Bill 10-52 ("Defendants' SB 52 Motion") explains why this Court should uphold the constitutionality of Senate Bill 10-52 ("SB 52"). The Foundation's argument that SB 52 is unconstitutionally

retrospective fails for the following reasons. First, SB 52 operates prospectively, not retroactively. Second, it did not change the legal effect of the orders creating the NHP Basin. Third, the statute served only to clarify, not change, existing law. Finally, SB 52 did not remove all remedies available to the Foundation to protect its water rights, even though the General Assembly may constitutionally remove all such remedies.

Furthermore, SB 52 did not affect the ability to remove wells with final permits from the designated basin, because such a remedy was never available under C.R.S. § 37-90-106 ("section 106"). The underlying premise for the Foundation's Response to Defendants' SB 52 Motion is: (1) the pre-SB 52 version of section 106 of the Groundwater Management Act ("Management Act") provided a perpetual vested right to alter the legal character of the water pumped by a well with a final permit in a designated basin from designated groundwater to tributary groundwater; (2) the *Gallegos* Court addressed and confirmed that right; and (3) SB 52 took that vested right away. This premise does not withstand scrutiny. The Foundation's argument that the pre-SB 52 version of section 106 provided a perpetual vested right to alter final permits is unfounded, and the *Gallegos* decision cannot be interpreted as an "authoritative statement" in support of this theory.

Lastly, the Foundation has failed to demonstrate that SB 52 constitutes a taking or violates the prior appropriation doctrine or the due process clause of the United States and Colorado Constitutions.

In light of the above, the Foundation has failed to meet its substantial burden of demonstrating SB 52 is unconstitutional. In contrast, Defendants have provided the Court with a rational and constitutional interpretation of section 106, the Management Act, and SB 52. Under

these circumstances, the Court should grant Defendants' SB 52 Motion and uphold the constitutionality of SB 52.

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' SB 52 Motion. Importantly, statutes are presumed constitutional, and the Foundation, as the party asserting that SB 52 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). Furthermore, "where a statute . . . admits of more than one possible construction, one of which is constitutional, the constitutional construction must be adopted." *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984). By adhering to the presumption of constitutionality, the judiciary respects the roles of the legislature and the executive in the enactment of laws. *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000).

ARGUMENT

The Defendants' SB 52 Motion should be granted for three reasons. First, SB 52 is not unconstitutionally retrospective because: (1) it operates prospectively, not retroactively to pending litigation; (2) it did not change the legal effect of the orders creating the NHP Basin; (3) it served only to clarify, not change, existing law; (4) if SB 52 could be interpreted as a change in the law, then it changed a remedy, not a vested right; and (5) it did not preclude all remedies available to the Foundation to protect its water right, even though the General

Assembly may constitutionally remove all remedies, as demonstrated by statutes of limitations and repose. Second, the Foundation's arguments that SB 52 is unconstitutional are premised on an unsupported interpretation of the plain language of section 106, the plain language of the Management Act concerning final well permits, and the holding in *Gallegos v. Colorado Ground Water Commission*, 147 P.3d 20 (Colo. 2006) ("*Gallegos*"). SB 52 did not affect the ability to remove wells with final permits from the designated basin, because such a remedy was never available under section 37-90-106 of the Groundwater Management Act and *Gallegos* did not extend the reach of section 37-90-106 to the alteration of final permits. Finally, the Foundation has not proven that SB 52 constitutes a taking or violates the prior appropriation doctrine or the due process clauses of the United States and Colorado Constitutions.

I. Senate Bill 52 Is Not Unconstitutionally Retrospective.

A. SB 52 Operates Prospectively.

Courts follow a two-step process to determine whether a law is unconstitutionally retrospective: they first determine whether the General Assembly intended the challenged statute to operate retroactively; if it did, they determine whether the challenged statute is unconstitutionally retrospective. *Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002). Statutes are presumed to apply prospectively, and a "clear legislative intent that the law apply retroactively," is required to overcome the presumption of prospective operation. *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006). The General Assembly intended SB 52 to apply prospectively, as demonstrated by the statute's plain language, which states 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). This provision refutes any claim that SB 52 was intended to apply retroactively.

B. SB 52 Did Not Change the Effect of the Orders Creating the NHP Basin.

The premise of the Foundation's retrospectivity argument is that SB 52 changed the legal consequences of the orders creating the NHP Basin and thereby retroactively impaired the Foundation's vested rights. Foundation's Response at ¶¶ 5-12. As explained at pages 8-10 of Defendants' Response to Foundation's Motion for Summary Judgment on Constitutionality of SB 52 ("Defendants' Response"), SB 52 did not ascribe a different effect to the orders than they had when they were entered. After the time to appeal passed, the orders became final and conclusive. § 37-90-115(1)(b), C.R.S. (2015). Thereafter, the NHP Basin boundaries could only be altered in a separate and distinct action brought under § 148-18-5(1)(a), C.R.S. (1963) (current version at § 37-90-106(1)(a), C.R.S. (2015)). Thus, SB 52 did not change the effect of the orders creating the NHP Basin, but rather clarified the remedy of subsequently altering those boundaries. Because the Foundation does not have a vested right in a particular remedy, *Abromeit v. Denver Career Serv. Bd.*, 140 P.3d 44, 51 (Colo. App. 2005), SB 52 could not and did not retroactively impair a vested right.

C. SB 52 Does Not Deprive the Foundation of Any Vested Right.

The Foundation argues that SB 52 was a change in law, not a clarification, and is therefore unconstitutionally retrospective. Foundation's Response at ¶¶ 14-16. The Defendants disagree that SB 52 is an unconstitutional change of the law for the reasons stated at pages 11-25 of Defendants' SB 52 Motion, and at pages 11-16 of Defendants' Response. Importantly, the fact that a statute may change the law does not make it unconstitutionally retrospective. Rather, to be unconstitutional the law must take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability with respect to past

transactions. *In re Estate of DeWitt*, 54 P.3d at 854. The Foundation did not have a vested right in the remedy created by §148-18-5(1)(a), C.R.S. (1963), because a vested right must exist independently from the common law or the statute under which it was acquired. *In re Estate of Morning*, 24 P.3d 642, 646 (Colo. App. 2001). The Foundation's claimed right to a remedy enabling it to alter the boundaries of the NHP Basin is wholly dependent on the statute and therefore is not a vested right. Moreover, the modification of a remedy available to protect a vested water right does not alter the water right itself. *Cent. Colo. Water Cons. District. v. Simpson*, 877 P.2d 355, 348-49 (Colo. 1994). Thus, SB 52 did not alter the Foundation's water rights or create a new obligation or impose a new duty on those rights.

The Foundation also ignores important policy considerations that informed the Court's retrospectivity analysis in *DeWitt*. The Court held that "a finding that a statute impairs a vested right, although significant, is not dispositive as to retrospectivity; such a finding may be balanced against public health and safety concerns, the state's police powers to regulate certain practices, as well as other public policy considerations." 54 P.3d at 855 (upholding a statute that retroactively changed the manner life insurance beneficiary designations were treated after a divorce); *see also Van Sickle v. Boyes*, 797 P.2d 1267, 1271-72 (Colo. 1990) (upholding the retroactive application of safety code to pre-existing building and building permits, because "the constitutional ban of retrospective operation does not prevent a city from enacting and enforcing ordinances to protect the health and safety of the community"). Here, SB 52 and the Management Act were enacted to "permit the full economic development of designated groundwater resources." *See* § 37-90-102, C.R.S. Consistent with the policies underlying the Management Act, SB 52 provided clarity and confirmation that final permits relied on by

designated groundwater users were, in fact, final. Testimony before the House Agriculture Committee established that the finality confirmed by SB 52 was crucial to protecting the economies and investments that were based on use of groundwater in designated basins. As stated during the hearings, "[t]he agriculture economy of areas within designated basin is estimated at 2 billion dollars." *Transcript of Legislative Hearings on Senate Bill 10-52*, at page 46, lines 4-5. "In most of these basins ground water is literally the only physical source of water available for economic use. So the entire economies in these basins are based on the use of wells that pump designated ground water." *Id.* at page 12, lines 34-36. The Foundation would have the Court ignore the public interest based on a tenuous assertion that there is some unspecified and unquantified injury to the Foundation's water rights.

D. SB 52 Did Not Eliminate All Remedies for "Protection" of the Foundation's Water Rights.

1. The Foundation Has Recourse to other Remedies to Protect its Water Rights.

The Foundation's claim that it has no remedy available to protect its water rights other than "de-designating" thousands of wells is incorrect. Specifically, nothing in SB 52 limits the Foundation's right to: (1) exercise the priority of its water rights against junior tributary water rights on the South Fork of the Republican River; (2) seek wells as alternate points of diversion for its surface water rights; (3) seek redress against the Bureau of Reclamation to the extent that its operation or maintenance of Bonny Dam and Reservoir and surrounding lands have injured its surface water rights; or (4) seek the exclusion from the NHP Basin of lands where conditionally or finally permitted wells do not exist so as to prevent new well permits within the existing NHP Basin.

Moreover, the Management Act provided the Foundation and its predecessors with significant remedies and due process with respect to the designation of the basin and subsequent issuance of well permits, including the right to: (1) challenge the basin boundaries when the NHP basin was designated in 1966 and 1967; (2) seek an alteration of those boundaries; and (3) challenge applications for well permits in the NHP Basin. As explained in the Defendants' Response, the Foundation's opportunity to avail itself of the due process provided to it under the Management Act by exercising these three remedies has long expired and therefore the Foundation is now barred from pursuing these remedies. To now go back in time and give the Foundation unlimited "bites at the apple" would disrupt the expectations of thousands of well users who have depended on the specific procedures of the Management Act to acquire and rely on their own valuable property rights. The fact that the Foundation repeatedly failed to exercise remedies when they were available to it and its predecessor, and dislike the remedies that currently remain available to it, does not make SB 52 unconstitutional.

2. The General Assembly May Constitutionally Eliminate Remedies.

Even assuming the Foundation's assertion that SB 52 completely removes its ability to protect its water rights is correct, that does not make SB 52 unconstitutional. Statutes that eliminate all remedies, or even eliminate rights, have been upheld against challenges that they are unconstitutionally retrospective. This is evident in courts' approval of statutes of repose and statutes of limitations. Therefore, the Foundation's assertion that SB 52 effects a substantive, as opposed to a remedial, change because "the retroactive exception does not apply when the legislature abolishes all means of protecting and remedying injury to a vested property right," Foundation's Response at ¶ 44, finds no support in Colorado law.

"[A] statute of repose extinguishes both rights and remedies whereas a statute of limitations extinguishes only the remedy." *Two Denver Highlands Ltd. Liability Ltd. Partnership v. Stanley Structures, Inc.*, 12 P.3d 819, 824 (Colo. App. 2000) (citing *Southard v. Miles*, 714 P.2d 891 (Colo. 1986)). "The application of a remedial statute of limitation or repose to an existing claim for relief does not violate the prohibition against retroactive legislation." *Woodmoor Imp. Ass'n v. Property Tax Adm'r*, 895 P.2d 1087, 1089 (Colo. App. 1994). "Indeed, a statute of repose can appropriately bar a claim which arises from events that occurred prior to its adoption." *Id.* Therefore, statutes of limitations and repose are not unconstitutionally retrospective legislation even though they eliminate not only a remedy, but in some instances a right.

SB 52 could be viewed as having the same effect as a statute of limitations by cutting off the ability to alter the boundaries of a designated groundwater basin so as to exclude existing permitted wells if that remedy ever actually existed. While Defendants disagree that section 106 ever allowed wells authorized by final permits to be excluded from a designated basin, as discussed in detail below, if this were a remedy eliminated by SB 52, its elimination did not constitute unconstitutional retrospective legislation because the elimination of a remedy is not unconstitutional.

The Foundation improperly relies on *Brown v. Challis*, 46 P. 679 (Colo. 1896), for the proposition that the removal of a remedy amounts to the removal of the right itself. *See* Foundation Response at ¶¶ 46 and 51. *Brown* only applies when the plaintiff has instituted legal proceedings to exercise its only remedy, and that sole remedy is eliminated while the action is pending, a situation that does not apply to the Foundation. In *Brown* the right to the particular

remedy being exercised had vested due to plaintiff's initiation of a legal proceeding, and elimination of the remedy that plaintiff was in the process of exercising deprived him of a vested right. *Brown*, 46 P. at 148-49 (Because Plaintiff had already instituted suit the court held "it would be unjust to turn him out of court, render a judgment against him for the defendant's costs, and leave him to another remedy, in the pursuit of which he might again be defeated in the same manner by another statute") (quotations omitted); *see also Taxpayers for the Anima-La Plata Referendum v. Animas-La Plata Water Conservancy District*, 739 F.2d 1472 (10th Cir. 1984) (citing *Day v. Madden*, 9 Colo. App. 464, 48 P. 1053 (1897) (a remedy, "when it accrued *and was exercised* while the statute was in force permitting it . . . gave to the attachment plaintiff a right which may be called either 'vested' or 'substantial' . . . .") (emphasis supplied).

This case is fundamentally different: the Foundation never sought to exercise the remedy it asserts was provided by section 106 before the enactment of SB 52, did not file an action in the six month period between when the statute was signed and when it went into effect, and the Foundation had remedies it failed to exercise and still has other remedies available to protect its water rights. Moreover, to avoid the issue addressed in *Brown*, the General Assembly specifically indicated that SB 52 would not limit pending litigation. Therefore, *Brown* does not support the Foundation's claim.

II. On its face, the Management Act does not Describe or Create a Right or Process to Alter the Character of the Water being Pumped under Final Designated Basin Well Permits.

It is clear that the Foundation is searching for a way to alter the legal character of the water being pumped under final well permits issued by the Ground Water Commission ("Commission") so that pumping from such wells can be curtailed under the 1969 Act. *See, e.g.,*

Compl. at ¶ 115.B.; Foundation's SB 52 Mot. at ¶ 8; Foundation Response at ¶¶ 67, 69. To accomplish this goal, the Foundation has manufactured an argument that SB 52 is unconstitutional, based on the unsupported assumptions that: (1) the pre-SB 52 version of section 106 of the Management Act provided a right to alter the nature of water pumped pursuant to final permits; (2) the *Gallegos* Court confirmed that right; and (3) SB 52 took away that right. As explained below, none of these assertions withstand judicial scrutiny and thus they fail to support the Foundation's claim that SB 52 is unconstitutionally retrospective.

A. The Plain Language of both the Pre- and Post-SB 52 Versions of Section 106 Specifically Authorize only the Alteration of Basin Boundaries, not Final Permits.

Prior to the enactment of SB 52, the plain language of section 106 specifically authorized only the alteration of basin boundaries. section 106 stated: "[t]he 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. (1965) (current version § 37-90-106(1)(a), C.R.S. (2015)). Notably absent from this provision is any mention of final well permits.

SB 52 did not alter this process. Section 106 continues to allow the boundaries of a designated basin, including the NHP Basin, to be altered, but clarifies that such alteration cannot exclude wells with conditional or final permits. This clarification is consistent with the Management Act as a whole.

The standards for issuance of well permits are contained in § 37-90-107, C.R.S. (2015) of the Management Act. The issuance of well permits is based on a site-specific assessment of the

groundwater to be withdrawn under the requested well permit and the effects of the planned withdrawal, § 37-90-107(5), C.R.S. (2015). The statute provides notice and an opportunity to challenge the claim that the groundwater to be withdrawn meets the definition of designated groundwater. § 37-90-107(3), C.R.S. (2015). If an objection is filed to the application, a hearing is held. §§ 37-90-107(3)-(4), C.R.S. (2015). Based on the evidence at the hearing the Commission must determine, among other things, whether the requested permit will "unreasonably affect the rights of other appropriators" § 37-90-107(5), C.R.S. (2015). In making this determination the Commission must "take into consideration the area, geologic conditions, the average annual yield and recharge rate . . . the priority and quantity of existing claims . . . to use the water and all other matters appropriate to such questions." *Id.* The hearing allows "other appropriators", including holders of both surface water and groundwater rights to challenge whether a proposed well will withdraw designated groundwater. Once this process is complete, and the time to appeal has passed, the decision of the Commission is final and conclusive. § 37-90-115(1)(b)(I), C.R.S. (2015).

When an appropriation of designated groundwater has been completed, a final permit is issued under section 108. Notably, in contrast to the modification of boundaries language in section 106, section 108 does not contain any provisions that allow a final permit to be altered if "future conditions require and factual data justify." There is no provision in the Management Act that describes the revocation of a final permit or that provides for a process for such revocation, pursuant to section 106 or otherwise. The Foundation has both ignored the issue of final permits and has not provided any citation to the Management Act in support of its section 106 "plain language" argument suggesting that the legal character of water pumped pursuant to final

permits could be altered. Nonetheless, the Foundation is asking this Court to interpret section 106 in a manner that is not supported by either the plain language of section 106 or other sections of the Management Act.

The lack of any provision authorizing the revocation of final permits for wells within a designated basin is significant given the explicit provision for altering basin boundaries under section 106. When the General Assembly includes a provision in one section of a statute, but excludes the same provision from another section, courts presume that the General Assembly did so purposefully. *Well Augmentation Subdist. of Central Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009) (discussing the difference between §§ 37-92-308(3) and (11) and § 37-92-308(4)(c) and concluding that because subsections (3) and (11) provided for de novo review, but subsection (4)(c) did not, that the General Assembly did not intend de novo review to apply to subsection (4)(c)) (citing *Romer v. Bd. of Cnty. Comm'rs of Cnty. of Pueblo*, 956 P.2d 566, 567 (Colo. 1998) (absence of specific provisions or language in a statute "is not an error or omission, but a statement of legislative intent")). If the General Assembly intended for final permits to be revoked, it would have included specific language in the Management Act (perhaps in section 108, or at minimum in section 106) evidencing a clear intent that modification of the basin boundaries was also intended to affect final permits. The fact that it did not is a strong indication that the General Assembly did not intend for final permits to be affected.

As argued by Defendants in their opening motion on this issue, additional support for this interpretation of the pre-SB 52 Management Act comes from *Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management District*, 77 P.3d 62, 75-76 (Colo.

2003) and *Thompson v. Colorado Ground Water Commission*, 575 P.2d 372, 377, 379-80 (Colo. 1978), where the Colorado Supreme Court recognized that final permits for the withdrawal of designated groundwater are the Management Act's equivalent of a decree confirming a tributary water right. Under this standard, once final permits are issued they are final and not subject to collateral attack, even if they are wrong. *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 as long as the water right is operated in conformity with the decree.") (citing *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 637 (Colo. 1987); *see also State Eng'r v. Smith Cattle, Inc.*, 780 P.2d 546, 549 (Colo. 1989)).[1] Accordingly, the pre-SB 52 version of the Management Act did not expressly authorize and cannot be read to authorize final permits to be collaterally attacked under the section 106 process.

Thus, under the pre-SB 52 version of section 106, even if a party can provide new information, the groundwater right evidenced by a final permit cannot be collaterally attacked in an effort to exclude the well and authorized pumping from a designated basin and subject it to curtailment under the 1969 Act. The Foundation's argument that SB 52 changed the Management Act by preventing the removal of lands with final permits is incorrect; the vested

[1] In addition, the analysis in *Gallegos* concerning claim and issue preclusion suggests that, absent specific direction by the General Assembly to revisit a final determination, claim and issue preclusion would bar any such relief. *Gallegos*, 147 P.3d at 32-33. As applied to final permits, for which the General Assembly has provided no specific mechanism for revisiting the determinations made in those permits, claim and issue preclusion would apply, and would prevent the Foundation from altering the legal character of water pumped pursuant to final well permits.

water rights represented by final permits have never been subject to collateral attack by removal from a designated basin.

B. The Colorado Supreme Court's holding in *Gallegos* does not Support the Expansive Legal Interpretation of that Opinion Proffered by the Foundation.

The Foundation argues in its Response that the *Gallegos* Court held as a matter of law that the pre-SB 52 version of section 106 created a vested right in surface water users to alter the nature of the water pumped pursuant to final designated basin well permits. Defendants strongly disagree with this interpretation of *Gallegos* – it is an expansion of both the issue on appeal and the Court's analysis of that issue, and is not supported by the plain language of section 106 and the other provisions of the Management Act.

In its *Gallegos* opinion the Court summarized the issue on appeal and its holding on that issue as follows:

> This case presents questions regarding the Colorado Ground Water Commission's jurisdiction over vested surface water rights within a designated ground water basin. We hold that the Commission has jurisdiction over surface water rights located within a designated ground water basin for the purpose of redrawing the basin's boundaries. A surface water right owner who believes that the pumping of designated ground water injures its rights must prove to the Commission that the water alleged to cause the injury has been improperly designated. Upon such a showing, the Commission is required to alter the basin's boundaries to exclude the surface rights and the improperly designated ground water. Once the ground water is no longer designated, jurisdiction will vest in the State Engineer and the water courts for administration under the 1969 Act according to prior appropriation.

147 P.3d at 24.

In addition to its holding that the Commission has jurisdiction over surface water rights located within a basin for the purpose of re-drawing the boundaries of the basin, the Court also held that before jurisdiction over groundwater vests in the water court, the Commission must

redraw the boundaries of a designated basin to exclude groundwater that has been improperly designated. *Id.* at 32.

The specific issue addressed by the Court in *Gallegos* was the scope and extent of the Commission's jurisdiction over vested *surface water rights* within a designated groundwater basin. *Id.* at 26 ("Resolution of this case lies in an examination of the Commission's statutorily-granted jurisdiction."). Notably, the impact of a section 106 proceeding on previously issued final designated basin well permits was not an issue raised on appeal.[2] *See* C.A.R. 3(d)(3) (requiring Notice of Appeal to include "[a]n advisory listing of the issues to be raised on appeal"); C.A.R. 28(a)(7) (requiring appellant's opening brief to include a specific discussion of the issues on appeal, as well as the "precise location in the record where the issue was raised and where the court ruled"); *Comm. for Better Health Care for All Colo. Citizens by Schrier v. Meyer*, 830 P.2d 884, 888 (Colo. 1992) (issues must "be properly presented for . . . [appellate court] consideration"). The opinion also does not specifically analyze the issue of whether the Commission could revisit the legal character of the groundwater pumped pursuant to final designated basin permits, discuss the relationship between the section 106 boundary alteration process and final permits, include any substantive analysis of this matter, or explain what is

[2] See the following documents filed in *Gallegos v. Colorado Ground Water Commission*, 147 P.3d 20 (Colo. 2006) (No. 05SA253, appeal in Case No. 03CV1335): Notice of Appeal of Gallegos Appellants at 6-7; Notice of Cross Appeal of Anderson Appellees/ Cross Appellants at 6; Notice of Cross Appeal of Nussbaum Appellants/ Appellees at 6; Opening Brief of Gallegos Appellants at 1; Opening-Answer Brief of Anderson Defendants/ Appellees/ Cross Appellants at 5-6; Opening/ Answer Brief of Nussbaum Defendants/ Appellees/ Cross Appellants at 1-2; Opening/ Answer Brief of the Colorado Groundwater Commission at 1-2; Answer-Reply Brief of Gallegos Appellants at 1-2; Reply Brief of the Anderson Defendants/ Appellees/ Cross Appellants at 1; Reply Brief of the Nussbaum Defendants/ Appellees/ Cross Appellants at 1; Reply Brief of the Colorado Groundwater Commission at 2.

meant by the phrase "improperly designated." Rather, the Court's holding simply affirms the plain language of section 106 – that, upon the requisite showing, and when appropriate, "the Commission is required to alter the basin's boundaries to exclude the surface rights and the improperly designated ground water." *Gallegos*, 147 P.3d at 32.

The Foundation would have the Court interpret this language as requiring that final permits be altered along with redrawing the boundaries; however, the Court does not specifically address whether groundwater pumped pursuant to a final permit could ever be "improperly designated ground water" or provide any of the legal analysis one would expect to accompany such an important declaration. This absence of analysis supports a narrower reading of the *Gallegos* opinion than the Foundation proposes. Had the *Gallegos* Court intended its holding to extend to final permits, it would have: (1) squarely addressed this issue and the various sections of the Management Act governing basin boundary modification, the process for issuing final permits, and their interrelationship; (2) explained why Colorado's overarching policy for finality of final judicial and quasi-judicial decisions should not apply to final permits issued by the Commission; and (3) distinguished the prior pronouncements made by the Court with regard to the finality of well permits.[3] None of this analysis appears in the *Gallegos* decision.

Even if the clause in *Gallegos* concerning "improperly designated groundwater" could be read as a suggestion of what might happen to final permits if a section 106 challenge was

[3] In its opinions issued in *N. Kiowa-Bijou Groundwater Mgmt. Dist*. and *Thompson v. Colo. Ground Water Comm'n*, the Court recognized that final permits are like water court decrees. In *Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co*. and *State Eng'r v. Smith Cattle, Inc.* the Court held that decrees are final even if wrong. In *Gallegos*, at FN 8, the Court did address prior inconsistent holdings with regard to the finality of designated basin boundaries; the fact that it did provide any similar analysis with regard to prior case law concerning the finality of well permits is further evidence that the Court did not intend that its opinion be read to require, or even allow, revisiting aspects of final permits.

successful, that language should be read as *dicta*. Such observations were not necessary to the Court's resolution of the limited issue on appeal in the case. Dictum is generally defined as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." Black's Law Dictionary. *See also People ex rel. Gallagher v. Dist. Court*, 666 P.2d 550, 553 (Colo. 1983); *Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009) (only conclusions of an appellate court on issues presented to it as well as rulings logically necessary to sustain such conclusions become the law of the case). Given the limited nature of the issues on appeal, and in light of the complete lack of analysis concerning the scope of the right granted by section 106 and the relationship between any rights available under section 106 and final permits, the *Gallegos* Court's observations about designated basin well pumping and improperly designated groundwater were gratuitous; resolution of the issue before the Court did not require it to either address or pronounce a holding concerning the relationship, if any, between the rights granted under section 106 and final permits.

Accordingly, there is no support for the Foundation's assertion that the *Gallegos* Court provided the "authoritative statement" that the pre-SB 52 Management Act and section 106 provided a right to alter final permits. Such a conclusion is fundamentally inconceivable in light of the scope of the opinion and the significance of the issue.

C. SB 52 clarified potential ambiguity created by *Gallegos* suggesting that the Section 106 process extended to final permits.

Although the Colorado Supreme Court did not make any express holding in *Gallegos* concerning the use of the section 106 process to reopen final permits, language in the opinion arguably creates a potential ambiguity or uncertainty concerning the effect of a basin boundary alteration on final permits under the pre-SB 52 version of section 106. This potential ambiguity

is evidenced by the Foundation's argument that the language in *Gallegos* should be read to hold that the Commission's alteration of a basin would also result in an automatic alteration of previously issued final permits.

Accordingly, as discussed in Defendants' SB 52 Motion at pages 19-25, the General Assembly adopted SB 52 to address the potential ambiguity created by *Gallegos*. In adopting SB 52, the General Assembly clarified and confirmed that the ability to alter basin boundaries under the section 106 process does not also create an ability to reopen final well permits. The reopener provision in section 106 was only for revisiting basin boundaries; it did not permit reopening of final permits.

III. The Foundation Cannot Satisfy its Heavy Burden of Showing SB 52 is Otherwise Unconstitutional Beyond a Reasonable Doubt, and the Court should Declare that SB 52 is Constitutional as Applied to the NHP Basin.

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

The Foundation's argument that SB 52 violates the prior appropriation doctrine rests on the premise that SB 52 denies the Foundation of any means to protect its surface water rights. Foundation's Response at ¶¶ 55-57. As demonstrated in Section I.D.1 above, the Foundation had remedies it failed to exercise and still has other remedies available to protect its surface water rights, so its argument is incorrect. Moreover, as explained at pages 24-26 of Defendants' Response to Plaintiff's SB 52 Motion, the Foundation's argument that SB 52 violates Colorado's constitutional prior appropriation doctrine is 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. Implementing both the constitutional doctrine of prior appropriation and the modified doctrine of prior appropriation in the Management 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). Therefore, the General Assembly can impose reasonable regulation on the manner and method of appropriation such as that contained in SB 52. *Central v. Simpson*, 877 P.2d at 344.

B. SB 52 Does Not Constitute an Unlawful Taking of Private Property under the United States or Colorado Constitutions.

The Foundation argues that SB 52 effects both a regulatory and physical taking. Regarding regulatory takings, the Foundation also alleges that the "substantially advances a legitimate state interest" test is no longer a proper standard for a takings analysis. This is not true in Colorado. Although the United States Supreme Court no longer applies this test, pursuant to its ruling in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the Colorado Supreme Court has declined to invalidate this standard. The issue of whether the "substantially advances" test was still good law in Colorado after the *Lingle* case arose in *Animas Valley Sand and Gravel, Inc. v. Bd. of Cnty. Comm'rs of the Cnty. of La Plata*, 2006 WL 871718 (Colo. App. Apr. 6, 2006) (unpublished), where the Colorado Court of Appeals affirmed the district court's application of the "substantially advances" test. The decision was appealed to the Colorado Supreme Court, which denied the petition for writ of certiorari.[4] *Animas Valley Sand and Gravel, Inc. v. Bd. of Cnty. Comm'rs of the Cnty. of La Plata*, No. 06SC403 (Colo. Nov. 13, 2006). The denial of

[4] Only one Justice would have granted the petition for writ of certiorari on the following issue: "Whether in light of the United States Supreme Court's recent holding that the question of whether a regulation substantially advances a legitimate state interest is not a valid takings test and has no proper place in our takings jurisprudence, the court of appeals erred when it held that the fact that the complained of regulation serves a legitimate government purpose militates against finding that a taking had occurred." *Animas Valley Sand and Gravel, Inc. v. Bd. of Cnty. Comm'rs of the Cnty. of La Plata*, No. 06SC403 (Colo. Nov. 13, 2006).

certiorari was then appealed to the United States Supreme Court, which also denied the petition for writ of certiorari. *Animas Valley Sand and Gravel, Inc. v. Bd. of Cnty. Comm'rs of the Cnty. of La Plata*, 550 U.S. 956 (May 21, 2007). This effectively upheld the "substantially advances" test within Colorado jurisprudence. Since 2006, the Colorado Court of Appeals has applied the "substantially advances" test in three cases: *Rogers v. Bd. of Cnty. Comm'rs of Summit Cnty.*, 363 P.3d 713 (Colo. App. 2013) (overruled on other grounds, 355 P.3d 1253); *G & A Land, LLC v. City of Brighton*, 233 P.3d 701 (Colo. App. 2010); and *Wolf Ranch, LLC v. City of Colorado Springs*, 207 P.3d 875 (Colo. App. 2008). The Colorado Supreme Court has not taken up this issue. Therefore, the Defendants' reliance on this standard is proper, and the Foundation has failed to meet this standard.

Regarding a physical taking, the Colorado Supreme Court has held that a physical "taking is effected by a legal interference with the physical use, possession, enjoyment, or disposition of property, or by acts which translate to a governmental entity's exercise of dominion and control." *Public Service Co. of Colorado v. Van Wyk*, 27 P.3d 377, 387 (Colo. 2001) (addressing placement of telephone poles near private property). In light of the strong presumption in favor of constitutionality, the Foundation must show, beyond a reasonable doubt, that it has been forced to endure a de facto exercise of government dominion and control as a result of SB-52. The Foundation takes a circuitous route in an effort to meet this high standard, arguing that SB 52 "insulates" groundwater the Foundation believes to be improperly designated and therefore prevents it from presenting evidence to the Commission regarding potential injury by those whom it considers "junior groundwater users." *See* Foundation Response at ¶¶ 62-63. The Foundation has not met this standard either.

The Foundation predicates both its physical taking and regulatory taking argument upon its belief that SB 52 "operates as a limitation . . . by preventing the Foundation from excluding improperly designated groundwater from using its property . . . . Accordingly it constitutes a physical taking or appropriation of the right to use in priority." Foundation's Response at ¶ 60; *see also* Foundation's Response at ¶ 69. SB 52 did not alter the Foundation's decreed water rights in any manner. As discussed in Section I.D.1, above, the Foundation historically had certain remedies it did not exercise, and continues to have other remedies to protect its surface water rights. Therefore, SB 52 does not constitute either a physical or regulatory taking of the Foundation's water rights.

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

The Foundation argues that SB 52 violates both its procedural and substantive due process rights, asserting that SB 52 violates its rights of procedural due process because it "eliminated the Foundation's ability to protect its water rights from injury" by eliminating any avenue for legal redress. Foundation's Response at ¶ 72. As discussed in Section I.D.1 above, the Foundation historically had certain remedies it did not exercise, and continues to have other remedies available to protect its water rights. Nothing in SB 52 took away that due process, and its adoption thus does not violate the Foundation's right to procedural due process.

The Foundation goes on to claim that SB 52 violates substantive due process because water rights constitute a fundamental right, so any statute impacting those rights is subject to strict scrutiny. Foundation's Response at ¶¶ 79-80. In *Central v. Simpson* the Colorado Supreme Court determined that SB 120, which exempted certain gravel pits from being administered in priority and required to replace all stream depletions did "not infringe on a fundamental right or

create a classification based on race, religion, national origin or gender . . . ." 877 P.2d at 341. The Court therefore held that the appellants' claims "must be resolved by application of the rational basis standard." *Id.* (citing *Sigman v. Seafood Ltd. P'ship I*, 817 P.2d 527, 532 (Colo. 1991)).

In that appeal Central argued that SB 120 violated equal protection by treating similarly situated water rights differently. "Both equal protection and substantive due process challenges require a court to determine whether the challenged policy or statute . . . affects a fundamental right." *Snook v. Joyce Homes, Inc*., 215 P.3d 1210, 1216 (Colo. App. 2009) (quoting *Jaffe v. City and County of Denver*, 15 P.3d 806, 811 (Colo. App. 2000)). In the absence of a fundamental right, courts apply the rational basis standard. *Id*. In *Central v. Simpson* the court decided that a statutory scheme that treated similarly situated water rights differently did not affect a fundamental right. Thus, *Central v. Simpson* establishes that a water right is not a fundamental right when it comes to questions of how the legislature chooses to administer water rights, and the rational basis standard applies to substantive due process challenges of such statutes. As explained in Defendants' SB 52 Motion, SB 52 is rationally related to a legitimate state interest in the administration of water rights in designated ground water basins and therefore does not violate substantive due process standards.

CONCLUSION

The Foundation's Second Claim fails as a matter of law. In the absence of any genuine issue of material fact to support the arguments in Foundation's Second Claim, the Court should enter summary judgment in favor of Defendants and should declare SB 52 constitutional, as applied to the NHP Basin.

Respectfully submitted May 6, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on this 6th day of May, 2016, I caused a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF SENATE BILL 10-52** to be served electronically via ICCES upon the following:

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