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DISTRICT COURT, WATER DIVISION 1, STATE OF 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, et al.	**▲COURT USE ONLY▲**
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REPLY IN SUPPORT OF AMENDED MOTION FOR SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF THE GROUND WATER MANAGEMENT ACT OF 1965

The Defendants named above reply in support of their Amended Motion for Summary Judgment on the Constitutionality of the Ground Water Management Act of 1965, dated February 29, 2016 ("Defendants' Claim 3 Motion"), and state as follows:

I. INTRODUCTION

Many of the Foundation's arguments in its Response to the Amended Motion for Summary Judgment on the Constitutionality of the Ground Water Management Act of 1965, dated April 8, 2016, Filing ID: 4921961B4093A ("Foundation Claim 3 Resp.") are actually responses to Defendants' Motion for Partial Summary Judgment on Claim 1 re: State Engineer Administration of Designated Groundwater ("Claim 1 Administration Motion"), or to Defendants' Motion for Summary Judgment on Constitutionality of Senate Bill 10-52 ("Claim 2 SB-52 Motion"). *See* Foundation Claim 3 Resp., ¶¶ 5, 10, 12, 15, 19, 21, 25, 26, 34, 36.

To the extent that the Foundation incorporated its Motion for Summary Judgment on its Senate Bill 52 Claim ("Foundation's SB-52 Motion"), its Motion for Summary Judgment on its Compact Administration Claim ("Foundation's Compact Motion"), as well as its Response to the Defendants' SB-52 Motion ("Foundation's SB-52 Response") and Response to the Defendants' Motion for Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater (Foundation's Designated Groundwater Administration Response"), the undersigned Defendants do not address arguments relating to those motions herein, but hereby incorporate Defendants' Reply in support of Motion for Partial Summary Judgment on Claim 1 Re: State Engineer Administration of Designated Groundwater ("Claim 1 Administration of Designated Groundwater Reply") and Defendants' Reply Brief in Support of Motion for Summary Judgment on the Constitutionality of Senate Bill 10-52 ("Claim 2 SB-52 Reply") filed contemporaneously with this Reply. This Reply will focus on the arguments made by the Foundation specifically related to Claim 3, the Constitutionality of the Ground Water Management Act of 1965.

For the limited purposes of Defendants' Claim 3 Motion, Defendants have asked the Court to accept the factual assertions in the Foundation's Complaint as true. The Foundation has raised no disputed issues of material fact in its Response.

Therefore, Defendants are entitled to summary judgment on Claim 3 as it relates to the Constitutionality of the Ground Water Management Act of 1965 ("Management Act") because: 1) the Foundation's presumption that water that is legally classified as "designated groundwater" should have no impact on surface waters is incorrect, and does not result in the Management Act violating the prior appropriation doctrine, 2) the Foundation has not met its burden to demonstrate that the Management Act applies retroactively and is therefore unconstitutionally retrospective, 3) the Foundation has not met its burden to show that the Management Act fails to substantially advance legitimate state interests under the constitutional takings doctrine, or denies the Foundation all economically viable use of its water rights, 4) the Foundation failed to avail itself of the due process protections in the Management Act, and has not demonstrated that the Management Act does not meet the rational basis standard of review, and therefore cannot assert that its due process rights are violated, 5) the Foundation has failed to show that the Management Act cannot meet the rational basis standard of review under equal protection analysis, and 5) the Foundation is not a party to the Republican River Compact of 1942 ("Compact"), cannot assert impairment of the Compact, and has failed to show that the Management Act impairs Colorado's ability to meet its Compact obligations to Nebraska and Kansas.

II. ARGUMENT

A. Even if Claim 3 is an alternative claim, it should be dismissed

The Foundation states that ruling on the Defendants' Claim 3 Motion supporting the constitutionality of the Management Act is premature, because Claim 3 is an alternative claim and it is not yet known under what scenario this claim would be addressed, or if it would even need to be addressed at all. Foundation Claim 3 Resp., ¶ 3. Even if the Foundation's Claim 3 is an alternative ground for relief, the Foundation cannot meet the burden of proof demonstrating that the Groundwater Management Act of 1965 is unconstitutional as a matter of law, and Claim 3 should be dismissed.

Alternatively, if the Court grants Defendants' Motions to dismiss the Foundation's Claim 1 or Claim 2, then this motion is also ripe for determination. Essentially, the Foundation has argued that without the ability to re-adjudicate prior Ground Water Commission ("Commission") determinations related to the issuance of permits to withdraw and beneficially use designated groundwater, the Management Act would be unconstitutional. Contrary to the Foundation's arguments, the Management Act satisfies all constitutional requirements, regardless of the Claim 1 and Claim 2 issues raised in the Foundation's Complaint. Determination of this motion in connection with Defendants' Claim 1 and Claim 2 Motions will allow the court to fully dispose of the administrative and constitutional challenges made in the Foundation's complaint at this time, and is both proper and just.

B. The 1965 Ground Water Management Act does not violate constitutional guarantees under the prior appropriation doctrine

The prior appropriation doctrine applies to tributary groundwater that is hydraulically connected to the surface waters of a stream. *Colo. Ground Water Comm'n v. N. Kiowa-Bijou*

Groundwater Management District, 77P.3d 62, 69 (Colo. 2003). The Foundation appears to argue that the Management Act is unconstitutional because it allegedly exempts groundwater that may have some impact on surface flows from the prior appropriation system. For example, the Foundation asserts that the Management Act is unconstitutional as applied to the Northern High Plains ("NHP") Basin because "it exempts the use of groundwater that has more than a *de minimis* impact on surface streams from the constitutional prior appropriation doctrine," and it "presumes groundwater within the NHP Basin has little, if any, impact on surface flows based on a three-hour hearing[1] the Colorado Ground Water Commission held in 1966." Foundation Claim 3 Resp., ¶¶ 7-8. However, the term *de minimis* does not stand for the proposition that designated groundwater in the Northern High Plains Basin must have *zero* impact on tributary waters. The term "designated groundwater" is statutorily defined as:

> that ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding January 1, 1965; and which in both cases is within the boundaries, either geographic or geologic, of a designated ground water basin.

C.R.S. § 148-18-2(3) (1965); C.R.S. § 37-90-103(6)(a) (2015). Under this provision, there is no specific amount of impact attributable to designated groundwater in the law when determining whether the impact is *de minimis*.

[1] Implicit in this sentence is the notion that the duration of the hearing somehow has a bearing on the validity of the hearing or the Commission findings designating the Northern High Plains Basin, which is incorrect. In preparation for the hearing, the Commission reviewed an extensive engineering report conducted for the purposes of NHP Basin designation, attached as **Exhibit 1** to this Reply: *Geologic and Ground Water Study of the Northern Portion of the Colorado High Plains*, Woodward-Clyde-Sherard & Associates, Job No. 8878, February 1, 1966 ("Northern High Plains Designation Report").

The term *de minimis* has been applied in caselaw as a descriptive term for water that has an immaterial significance on tributary waters. *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1182 (Colo. 2000); *e.g. Gallegos v. Colorado Ground Water Comm'n.*, 147 P.3d 20 (Colo. 2006), *as modified on denial of reh'g* (Dec. 4, 2006). However, *de minimis* does not mean that there must also be *zero effect* on tributary waters. Rather, *de minimis* means that the rate of depletion from groundwater affecting surface waters is acceptable based on the amount of groundwater to be diverted and beneficially used. For example, in *Kuiper v. Lundvall*, 529 P.2d 1328, 1329 (Colo. 1974), a case concerning wells located within the Northern High Plains Designated Basin, the Colorado Supreme Court held that water in the area underneath wells that was deemed to take 178 years to reach the Republican River, and 356 years to reach the Arikaree River, was *de minimis*, not a part of the natural stream, and was therefore not subject to the doctrine of prior appropriation and the laws governing tributary waters.[2]

The Foundation seeks to rely on *District 10 Water Users Assoc. v. Barnett*, 599 P.2d 894 (Colo. 1979), a case that discussed the *Lundvall* case, for the proposition that the *Lundvall* ruling on the constitutionality of the Management Act is not valid. Foundation Claim 3 Resp., ¶ 18. The Foundation's argument is misplaced and the *Lundvall* decision is still valid in Colorado. In *Lundvall*, the Colorado Supreme Court reviewed the trial court's decision that denied the Commission's request for an injunction to prevent defendant-appellee Lundvall from irrigating

[2] "To protect decreed surface rights and the terms of an inter-state compact, the Commission is attempting to protect the flows of the two rivers by preventing the drilling of wells within the three miles thereof. It is managing the use of the water in the basin so that 40% of the present storage will be depleted within a 25-year period. We hold that as to the water taking over a century to reach the stream, the tributary character is De minimis and that this is not a part of the surface stream as contemplated by our Constitution." *Lundvall*, 529 P.2d at 1331.

new lands with his appropriation of designated groundwater from existing wells. 529 P.2d at 1329. The Supreme Court also reviewed the trial court's determination that the Ground Water Management Act was unconstitutional, reversed this decision by the trial court, and reaffirmed the constitutionality of the Management Act. *Id*. at 1331-32.

The Foundation states that "[i]n *District 10*, the Colorado Supreme Court made it clear that the 'fundamental consideration' about whether groundwater was tributary was 'the length of time in which use of the wells will affect the surface stream, not necessarily limited to a consideration of the length of time which the water upon being left undisturbed would reach the stream.'" Foundation Claim 3 Resp., ¶ 18. Aside from the fact that the Colorado Supreme Court stated in *District 10* that "[w]e had this in mind in *Lundvall*," 599 P.2d at 896, a close reading of *District 10* demonstrates that it is not at odds with the *Lundvall* holding, nor with the declaration in *Lundvall* that the Management Act is constitutional.

Groundwater in the Denver Basin Aquifer, portions of which are a type of "nontributary groundwater,"[3] was the groundwater at issue in the *District 10* case. In 1985, and subsequent to *District 10*, the Legislature enacted Senate Bill 5, which provided a specific definition of "nontributary," and the assumptions that should be employed when determining whether water in certain of the Denver basin aquifers, and other areas outside the boundaries of a designated basin, meets this definition. 1985 Colo. Sess. Laws Ch. 285 (now codified at C.R.S. § 37-90-101 et seq. (2015)). The legislative definition of "nontributary groundwater" specifically allows for a certain level of impact on surface streams. As to "nontributary groundwater" found in the

[3] "Nontributary Groundwater" means that groundwater, located outside the boundaries of any designated groundwater basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years of continuous withdrawal, deplete the flow of a natural stream…at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal." C.R.S. § 37-90-103 (10.5) (2015).

Denver Basin aquifers, in C.R.S. § 37-90-103 (10.5) the legislature mandated that, when determining whether the groundwater in the Denver Basin aquifers meet the "nontributary definition," the State Engineer must assume that the hydrostatic pressure in those aquifers has been lowered to at least the top of the aquifer. C.R.S. § 37-90-103 (10.5). This was due to the Legislature's "recognition of the *de minimis* amount of water discharging from [the Denver Basin aquifers] into surface streams . . . when compared to the great economic importance of the groundwater in those aquifers, and the feasibility and requirement of full augmentation by wells located in the tributary portion of those aquifers." *Id.* The Legislature recognized that there is some impact from Denver Basin well pumping on surface streams and required an assumption regarding the lowering of the hydrostatic pressure when determining whether the water is "nontributary." This is one illustrative example of a type of groundwater that has been classified by the legislature as having a *de minimis* impact on surface flows, yet does not have *zero* impact.

"Designated groundwater," such as that at issue in *Lundvall* and in the NHP Basin, is another type of water that has been legislatively defined as having an immaterial level of impact on tributary waters in comparison to the large benefits created by its beneficial use. The Legislature defined "designated groundwater," then left the determination of the boundaries of designated basins and the classification of the groundwater within those basins to the Groundwater Commission: "[t]he General Assembly left categorization [of designated groundwater] as a factual matter to be resolved by the Commission when it established designated ground water basins." *Pioneer Irr. Districts of Yuma Cty., Colo. & Dundy Cty., Neb. v. Danielson*, 658 P.2d 842, 845 (Colo. 1983).

Those waters that have a *de minimis* impact and fall under the Legislature's plenary authority have varying degrees of impact on surface water flows, but all have been determined to be *de minimis* when that impact is analyzed and compared to the amount of groundwater that can be beneficially used in in relation to the much smaller impact on surface streams. *See Gallegos*, 147 P.3d at 25 ("[I]mplicit in the Basin's designation was a determination by the Commission that withdrawals of the designated ground water have only a *de minimis* effect on surface waters").

The Foundation argues that the Management Act violates the doctrine of prior appropriation because "[i]t allows groundwater in the NHP Basin that is physically impacting the stream and Colorado's Compact allocation to be treated, legally, as though it only has a *de minimis* impact on the stream." Foundation Claim 3 Resp., ¶ 17. The Foundation cites to the Republican River Compact Administration ("RRCA") Groundwater Model ("RRCA Model") as evidence in support of this proposition. *Id.* at ¶ 19.

However, as stated in the Affidavit of William Schreüder, Ph.D., the RRCA Model is inappropriate to use as a tool to determine the existence of injury under Colorado state law. Exhibit C, State Engineer's Response to the Jim Hutton Educational Foundation's Motion for Summary Judgment on its Compact Administration Claim, Affidavit of William Schreüder, Ph.D., ¶¶ 8-9 (Apr. 7, 2016). Further, the Foundation has failed to compare or address the amount of impact they allege in comparison to the amount of designated groundwater pumped and beneficially used within the NHP Basin.[4]

[4] When designating the NHP Basin, the Commission made a determination that the water in the Ogallala-Alluvium within the NHP Basin met the definition of designated ground water and is "ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights." Defendants' Claim 3 Motion,

Designated groundwater in the NHP Basin is the primary source of water in that region of the state, and its economic importance is without doubt. *See* **Exhibit 1**, *Geologic and Ground Water Study of the Northern Portion of the Colorado High Plains*, Woodward-Clyde-Sherard & Associates, Job No. 8878, February 1, 1966 at Pg. 14 ("Northern High Plains Designation Report") ("The agricultural and economic growth in the High Plains of Colorado can be expected to be heavily influenced by the development of ground water supplies and ground water irrigation."). The ability to obtain other tributary surface water rights in order to develop the type of augmentation plan required under the 1969 Water Rights Determination and Administration Act to fully augment the amount pumped is not feasible in these basins, due to the immense discrepancy between the amount of groundwater available for diversion as compared to the amount of surface water available within the Basin. *See, id.* at 5-6. The *de minimis* concept is not the absolute standard the Foundation would like it to be, but rather allows for the development of groundwater in areas that could not otherwise be economically developed. Further, as discussed in *Lundvall*, its impact on surface streams is quite attenuated and thus immaterial. 529 P.2d at 1331.

Moreover, the final *de minimis* impact determination for a particular well was made by the Commission when it issued a final permit for that well. Like all legislative mechanisms for quasi-judicial actions, the Management Act provided an opportunity to contest the Commission's determination. C.R.S. §§ 37-90-107, 108, 112-113 (2015) (formerly §§ 148-18-6, 7, 11-12, C.R.S. (1965)). Once the time to object passed, the final permit bestowed a right on the permit

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Attachment 1, *Northern High Plains Order*, ¶ 11; *Id.* at "Conclusions of Law," ¶ 1. That Order estimated that over 96 million acre feet of water was in storage in the Ogallala formation in the NHP Basin. Order at ¶ 7.

holder that is tantamount to a final water court decree which cannot be collaterally challenged even if wrong. *Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 75-76 (Colo. 2003); *Thompson v. Colo. Ground Water Comm'n*, 575 P.2d 372, 377 (Colo. 1978); *Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co*., 115 P.3d 638, 646 (Colo. 2005). The Foundation, or its predecessor in interest, had full opportunity to challenge the Commission's *de minimis* determination during the final permit process but chose not to. The Foundation cannot now argue that the Management Act is unconstitutional because the Act doesn't provide for a second opportunity. Accordingly, the Foundation has not met its burden to demonstrate that the Management Act is unconstitutional or violates the doctrine of prior appropriation, and the Defendants' Claim 3 Motion for Summary Judgment should be granted.

C. The 1965 Ground Water Management Act is not unconstitutionally retrospective

The Foundation asserts that the Management Act, subsequent to Senate Bill 10-52 ("SB-52" or "Senate Bill 52"), is unconstitutionally retrospective because it no longer includes a "savings clause," i.e. the ability to modify the boundaries of a designated groundwater basin to exclude areas previously included. Foundation Claim 3 Resp., ¶¶ 22-23, 25. To the extent that this is actually a Claim 2 argument by the Foundation, which is addressing Senate Bill 52 issues, the Defendants' refer to the Claim 2 SB-52 Reply and incorporate those responses herein.

Nonetheless, for Claim 3 purposes, the Foundation's assertion that the Management Act now "prevents the commission from modifying the boundaries to exclude improperly designated groundwater," is incorrect. The Management Act does not prevent the modification of designated basin boundaries. It only prevents the exclusion of a well for which a conditional or

final permit has been issued. C.R.S. § 37-90-106(1)(a) (2015) ("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***." (emphasis added)). Areas in a designated groundwater basin where conditional or final permits have not been issued may still be modified in a way that would not exclude such permits. *Id.*

Furthermore, the Management Act has never contained a "re-opener" provision for final permits. C.R.S. § 148-18-1 et seq. (1963, 1965). Final permits for the withdrawal of designated groundwater are the Management Act's equivalent of a decree confirming a tributary water right. *N. Kiowa-Bijou*, 77 P.3d at 75-76; *Thompson*, 575 P.2d at 377. As a permit is the equivalent of a decree, it is a vested, protectable water right, and thus must also have protections in place once it has been issued.

The Foundation cites the *Gallegos* case as support for its argument that the Management Act always provided a blanket protection for surface water rights prior to Senate Bill 52, and that if this "savings clause" is removed, the Management Act is unconstitutional. Foundation Claim 3 Resp., ¶¶ 24-25. However, the *Gallegos* decision does not stand for this proposition, and is much more limited in its application in light of the facts of that case. In *Gallegos*, the Plaintiff Gallegos family asserted that the curtailment of the pumping of junior wells within the basin was needed for fulfillment of its senior surface rights. 147 P.3d at 24-25. The Court declined to adopt the Gallegos family's argument that curtailment of designated basin wells was the proper result. In finding that the Gallegos family must prove that modification of the boundaries of the

designated basin was the proper remedy, the Court stressed that "the Gallegos Family's petition for modifying the [Crow Creek] Basin's boundaries must fail if they are unable to present evidence on connectivity and injury other than that which was before the Commission when the Basin was originally designated." *Gallegos*, 147 P.3d at 24-25. In this instance, the designation of the Crow Creek Basin was based on the factual finding that "Upper Crow Creek is not a continuously flowing stream and…ground water withdrawals have constituted the principal water usage for at least fifteen years prior to October 30, 1986." ***Id.*** at 24.

In contrast, the Northern High Plains designated basin was designated under the standard whereby the ground water within it was "ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights." Defendants' Claim 3 Motion, Attachment 1, *Northern High Plains Order*, ¶ 11; C.R.S. § 37-90-103(6)(a). In the instant case, the Foundation is seeking curtailment of designated groundwater wells that it alleges will make water available for Compact compliance purposes. They have argued that this *might or should* reduce or eliminate the curtailment of their rights for Compact compliance. The Foundation ignores that the Commission has already specifically considered evidence regarding the existence of rights like the Foundation's surface rights and the Republican River Compact in the NHP Designation Order. The Commission found:

> The vested surface water rights within the designated ground water basin are recognized and specifically noted as being without the jurisdiction of the Ground Water commission and are wholly governed by the provisions of the Republican River compact where applicable or otherwise by the surface water laws concerning tributary waters.

Northern High Plains Order at "Final Order," ¶ 2.

Also unlike the *Gallegos* decision, the Foundation obtained its decree for the Hutton No. 1 and No. 2 Rights *after* entry of the NHP Designation Order. Administration of the Foundation's Hutton No. 1 and No. 2 surface rights for the purpose of achieving compact compliance is wholly consistent with its decree, the NHP Designation Order and the 1969 Water Rights Determination and Administration Act. The Foundation also ignores that the State of Colorado and the well owners in the NHP Basin have taken actions to address NHP Basin well impacts on Compact compliance. Defendants' Claim 3 Motion, Attachment 2, Affidavit of Dawn Webster (February 29, 2016). The actions taken by the State and the well owners in the basin to date are also consistent with the NHP Designation Order and the Management Act. There has been no increased burden or modification of the Foundation's rights imposed by the designation of the NHP Basin or the Management Act after the passage of SB-52.

Finally, the Foundation has not met its burden under the tests for unconstitutionally retrospective legislation as it concerns the Management Act. A statute is presumed to be prospective in its operation, and new legislation is presumed constitutional. C.R.S. § 2-4-202 (2015). In determining whether a statute is unconstitutionally retrospective, the first step is to determine whether the Legislature had "clear intent" that the statute should apply retroactively. *In re Estate of Dewitt*, 54 P.3d 849, 854 (Colo. 2002); *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 14 (Colo. 1993). If the answer is no, the analysis ends and the statute is not unconstitutionally retrospective.

If the answer is yes, a statute is impermissibly retrospective if it either: a) impairs a "vested right," or b) creates a new obligation, imposes a new duty, or attaches a new disability. *DeWitt*, 54 P.3d at 855. A statute can be permissively retrospective due to public interest

considerations if the law bears a rational relationship to a legitimate government interest. *Ficarra*, 849 P.2d at 22; *Dewitt*, 54 P.3d at 855. The Management Act is constitutional under this standard because it applies prospectively. Even assuming *arguendo* that the Management Act does not apply prospectively, it is still constitutional because it does not create a new obligation, impose a new duty, or attach a new disability to any surface water rights, and the Management Act is rationally related to the legitimate public purpose of economically developing and managing the Ogallala aquifer within Colorado. *See* Attachment 3 to Defendants' Claim 3 Motion, Colorado Legislative Council Report, 45th Colo. Gen. Assemb., Research Publication No. 93: *Water Problems in Colorado* (November 1964). For these reasons, the Court should grant the Defendant's Claim 3 Motion.

D. The 1965 Ground Water Management Act does not result in a taking

The Foundation asserts that the Management Act constitutes a taking because it "allows junior rights to divert water from the same source of supply ahead of senior rights thereby stripping the Foundation's water rights of…their priority date." Foundation Claim 3 Resp., ¶ 28. First, the Foundation's use of "senior" vs. "junior" in this context is misleading. Even though designated basin groundwater wells have priorities, it does not automatically follow that surface water and designated groundwater can or should be viewed in the context of priority as to one another. "We have repeatedly and consistently stated that the administration of waters under the [Water Rights Determination and Administration Act of 1969] is inapplicable to the

Commission's administration of designated groundwater under the Management Act." *Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 30 (Colo. 2006).[5]

Nor has the Foundation met its burden to demonstrate that the Management Act fails to substantially advance legitimate state interests, or denies the Foundation all economically viable use of its water rights, i.e. constitutes a "taking." *See Animas Valley Sand and Gravel, Inc. v. Board of Cnty. Comm'rs of La Plata*, 38 P.3d 59, 64 (Colo. 2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). As illustrated by Defendants' Claim 3 Motion, the economic development of Eastern Colorado and the management of the Ogallala aquifer as a finite resource under mining conditions are legitimate state interests. Finally, the Foundation continues to have the use of its surface water rights, subject to the 1969 Water Rights Act and the Compact, and the Foundation may still seek wells as alternate points of diversion for its surface water rights, which demonstrates that as a matter of law the Foundation is not stripped of all economically viable use of those rights vis-à-vis the Management Act.

E. The 1965 Ground Water Management Act does not violate due process

Despite its many arguments related to Senate Bill 52 and Claim 2 in the Foundation's Claim 3 Response when discussing due process, the Foundation has not demonstrated that the Management Act, either previous to or following the passage of SB 52, violates the due process clauses of the U.S. or Colorado Constitutions. As in *Central Colorado Water Conservancy District v. Simpson*, the rational basis test is the applicable test for reviewing a substantive due

[5] Furthermore, as discussed in the State Engineer's Response to the Jim Hutton Educational Foundation's Motion for Summary Judgment on its Compact Administration Claim, dated April 8 2016, Pg. 16, the priority date for the Hutton 1 and 2 water rights that are currently subject to administration is 1977, the date the Foundation's water court application was filed, not the date of its appropriation in 1954. If the court were to accept the Foundation's classification of priority between designated basin wells and surface water rights as "senior" versus "junior" vis-a-vis one another, the majority of wells in the NHP Basin would be "senior" to the Foundation's rights.

process challenge. 877 P.2d 335, 341 (Colo. 1994). The Foundation cannot demonstrate that the Management Act fails to reasonably relate to a legitimate government purpose. As discussed numerous times in the Defendants' Claim 3 Motion and this Reply, the opposite is true. As it pertains to procedural due process, the Management Act clearly does and has always provided for notice and a hearing prior to designation of a basin, and prior to the final determination of individual well permits. *See* C.R.S. §§ 37-90-106-108, 112-113, 115 (2015) (formerly §§ 148-18-5-7, 11-12, 14 C.R.S. (1965)).

The fact remains that the Foundation did not avail itself of the procedural protections afforded to water users under the hearing procedures and appeal provisions for challenging either the 1966 Northern High Plains designation or the individual permit applications. *See* C.R.S. §§ 37-90-106-108, 112-113, 115 (2015) (formerly §§ 148-18-5-7, 11-12, 14 C.R.S. (1965)). The Foundation is now barred by claim and issue preclusion as to challenging final permits. *See Gallegos*, 147 P.3d at 32. Notably, it was also in *Kuiper v. Lundvall* that the Colorado Supreme Court confirmed that:

> [n]o appeal was taken by anyone to contest the formation of either the [Northern High Plains Designated] Basin or the [Central Yuma Ground Water Management] District…We ruled [in *Larrick v. North Kiowa Bijou Management District*, 510 P.2d 323 (Colo. 1973)] that the [Ground Water Act of 1965] was not violative of Colo. Const. Art. XVI, Sec. 6 [the appropriation of water clause]. Conceivably we might repeat the reasons which we there stated and let the matter rest at that point. Also, we might rule that, since Lundvall did not object to the creation of the Basin or the District, he does not have standing to object to its administration under the Act.

529 P.2d 1328, 1330-31 (Colo. 1974). Similarly, for the Foundation to now assert that the Management Act violates its constitutional due process rights because it chose not to exercise the due process rights afforded under the Management Act is incorrect.

The Foundation neglected to assert alleged injury to its water rights in hundreds, if not thousands of permit applications. Under such circumstances, even if the Foundation had constitutional claims, those claims should be deemed to be waived. *Fifth Church of Christ, Scientist v. Pigg*, 122 P.2d 887, 888 (Colo. 1942) ("A constitutional right may be waived by acts or omissions."). In *Fifth Church*, the Court held that property owners waived constitutional claims related to zoning where "for approximately fourteen years [they] . . . entirely acquiesced in its zoning classification while others made large investments relying thereon which would now be materially depreciated by the proposed elimination of the status quo." *Id*. The Court concluded that, in the case of an as-applied constitutional challenge, "it is clear, on reason and justice and supported by respectable authority, that he who claims injury must be reasonably diligent to protest, and that his long acquiescence upon which others have relied to their detriment bars belated action." *Id*. Therefore, the Defendants are entitled to Summary Judgment on Claim 3. To the extent that the Foundation's arguments in its Claim 3 Response are actually related to Senate Bill 52 issues, the Defendants incorporate the due process arguments contained in the Claim 2 SB-52 Reply.

F. The 1965 Ground Water Management Act does not violate equal protection

Despite the Foundation's assertion that the Management Act violates equal protection because the Act is "implicated" by the State Engineer's administration of the Republican River Compact "by curtailing only surface water…and not the groundwater," Foundation Claim 3 Resp., ¶ 39, the Foundation has not met its burden to demonstrate that the Management Act is unconstitutional as a matter of law under the rational basis review for equal protection. Under the rational basis standard of review, courts presume that a statutory classification is

constitutional and does not violate equal protection principles unless the challenging party proves beyond a reasonable doubt that the classification does not bear a rational relationship to a legitimate legislative purpose or government objective. *Pace Membership Warehouse, Div. of K–Mart Corp. v. Axelson*, 938 P.2d 504, 506 (Colo. 1997).

The Management Act does not infringe upon a fundamental right or create a classification based on race, religion, national origin or gender, nor does its application in this case implicate a suspect class that is entitled to the higher levels of scrutiny under equal protection analysis. *Cent. Colorado Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 340-41 (Colo. 1994); *See, e.g.*, *Evans v. Romer*, 854 P.2d 1270, 1275 (Colo. 1993); *People v. Blankenship*, 119 P.3d 552, 554–55 (Colo. App. 2005); *Mayo v. National Farmers Union Property and Cas. Co.*, 833 P.2d 54, 57 (Colo. 1992). Therefore, the rational basis standard is the appropriate standard of review.

A statute may be invalidated under the rational basis standard only if there exists "no reasonably conceivable set of facts to establish a rational relationship between the statute and a legitimate governmental purpose." *Pace*, 938 P.2d at 507. The Foundation cannot demonstrate that the legitimate government purposes behind the Management Act are insufficient to meet this test. On the contrary, the promotion of the economic development of and the management of aquifers under a mining condition like the Ogallala, in regions where that resource provides the dominant supply of water like the Northern High Plains Basin, are legitimate government purposes. *See Generally* Attachment 3 to Defendants' Claim 3 Motion, *Water Problems in Colorado*.

Furthermore, the Management Act does not violate equal protection by virtue of the State Engineer's Compact administration efforts in the NHP basin. The State Engineer is required to administer the Compact in accordance with state law, which provides for designated groundwater to be administered under the modified prior appropriation system and the Management Act. *See Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 69 (Colo. 2003); C.R.S. § 37-90-101 et seq. Therefore, the Management Act does not violate equal protection and the Court should grant the Defendants' motion for summary judgment on Claim 3.

G. The 1965 Ground Water Management Act does not impair Colorado's Compact obligations

The Foundation states that the Management Act is also "implicated in a decision to uphold the current administration of only surface water," and therefore impairs Colorado's obligations under the Compact. Foundation Claim 3 Resp., ¶ 46. The Foundation also asserts that it would have standing to challenge the constitutionality of the Management Act based on the Contracts Clause of the U.S. Constitution because "the Foundation's surface water rights are being curtailed contrary to C.R.S. § 37-80-104, which causes injury to the Foundation." *Id.* at ¶ 47.

As stated in Defendants' Claim 3 Motion, in order to bring a claim alleging impairment of the Compact, the Foundation needs to be a party to the Compact. *E.g.*, *Hagar v. Reclamation Dist. No. 108*, 111 US 701, 713 (1884); *Williams v. Eggleston*, 170 US 304, 309 (1898). The Republican River Compact is between the States of Colorado, Kansas and Nebraska, and therefore those three states are the only parties who may bring a claim for impairment of that contract. In addition, nothing in the Management Act defeats Colorado's obligations to uphold its contractual promises under the Compact to Kansas and Nebraska. The Foundation does not

have standing to bring an impairment claim under the Compact, nor has it demonstrated that the Management Act fails to "serve a significant and legitimate public purpose when considered against the severity of the contractual impairment." *DeWitt*, 54 P.3d at 858. Therefore, the Court should grant Defendant's Motion for Summary Judgment on Claim 3.

III. CONCLUSION

The Foundation has failed to meet its burden of proof demonstrating that the Management Act is unconstitutional as a matter of law. Summary judgment is proper as it pertains to the Foundation's third claim regarding the 1965 Ground Water Management Act, and the Court should deny the relief sought pursuant to the Foundation's third claim.

Respectfully submitted this 6th day of May, 2016.

[signature blocks on the following page]

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 6, 2016 true and correct copies of the foregoing, REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, were served via ICCES upon the following:

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4m Feeders Llc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
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Carlyle James As Trustee of the Chester James Trust	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Central Yuma Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
City of Burlington Colorado	Defendant	Alix L Joseph (Burns Figa and Will P C) Steven M. Nagy (Burns Figa and Will P C)
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City of Wray Colorado	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
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Colorado Parks And Wildlife	Defendant	Katie Laurette Wiktor (CO Attorney General) Timothy John Monahan (CO Attorney General)
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Frenchman Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Happy Creek Inc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
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J And D Cattle Llc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)

James J May	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
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Marjorie Colglazier Trust	Defendant	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marks Butte Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
May Acres Inc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Brothers Inc	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Family Farms	Defendant	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)

North Well Owners	Defendant	Kimbra L. Killin (Colver Killin and Sprague LLP) Russell Jennings Sprague (Colver Killin and Sprague LLP)
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Protect Our Local Communitys Water Llc	Defendant	John David Buchanan (Buchanan Sperling and Holleman PC) Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
Republican River Water Conservation Dist	Defendant	David W Robbins (Hill and Robbins PC) Peter J Ampe (Hill and Robbins PC)
Sandhills Ground Water Mgmt Dist	Defendant	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Saving Our Local Economy Llc	Defendant	John David Buchanan (Buchanan Sperling and Holleman PC) Timothy Ray Buchanan (Buchanan Sperling and Holleman PC)
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