DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80631 (970) 351-7300	DATE FILED: May 6, 2016 7:58 PM □ **COURT USE ONLY** □
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; and Colorado Division of Parks and Wildlife. **Defendant-Intervenors**: Yuma County Water Authority Public Improvement District; Colorado Ground Water Commission; Marks Butte, East Cheyenne, Frenchman, Sandhills, Central Yuma, Plains, W-Y, and Arikaree Ground Water Management Districts. **Defendant – Well Owners**: Republican River Water Conservation District; City of Wray; City of Holyoke; Harvey Colglazier; Lazier, Inc.; Marjorie Colglazier Trust; Mariane U. Ortner; Timothy E. Ortner; Protect Our Local Community's Water, LLC; Saving Our Local Economy, LLC; the "North Well Owners"; Tri-State Generation and Transmission Association, Inc.; Dirks Farms Ltd; Julie Dirks; David L Dirks; Don Andrews; Myrna Andrews; Nathan Andrews; 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; Carlyle James as Trustee of the Chester James Trust; Colorado Agriculture Preservation Association; Colorado State Board of Land Commissioners; and the City of Burlington.	Case Number: **15CW3018**
Porzak Browning & Bushong LLP Steven J. Bushong (#21782) Karen L. Henderson (#39137) 2120 13th Street Boulder, CO 80302 Tel: 303-443-6800 Fax: 303-443-6864 Email: sjbushong@pbblaw.com; khenderson@pbblaw.com	Water Div. No. 1

THE JIM HUTTON EDUCATIONAL FOUNDATION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ITS SENATE BILL 52 CLAIM

Plaintiff, the Jim Hutton Educational Foundation, a Colorado non-profit corporation ("Foundation"), acting by and through undersigned counsel, hereby submits its Reply in Support of its Motion for Summary Judgment on its Senate Bill 52 Claim ("Motion"), by which it

addresses the Defendants' Response to the Motion dated April 8, 2016 ("Defendants' Response").

INTRODUCTION.

1. As set forth in its Motion, the Foundation seeks a determination that Senate Bill 52 (2010) ("SB-52") is unconstitutionally retrospective, and/or, in the alternative, that SB-52 violates the prior appropriation doctrine, is an unconstitutional taking of vested surface water rights, and/or is a violation of the due process clause.

2. The majority of the issues raised in the Defendants' Response have been addressed in greater detail in the Foundation's Response to the Defendants' SB-52 Motion ("Foundation's SB-52 Response"), so that Response is fully incorporated herein.

3. From the time the Groundwater Act was enacted, the statute authorizing the Colorado Ground Water Commission ("Commission") to establish designated groundwater basins included an ongoing limitation on those basins requiring the Commission to alter the boundaries as "future conditions and factual data justify." The purpose of this limitation was to remove improperly designated groundwater. That's because it was always anticipated that a designated groundwater basin could include groundwater that does not meet the definition of designated groundwater. Given the rulings of the United States Supreme Court regarding the groundwater and the RRCA Groundwater Model described at length in the Complaint, the writing was on the wall. The Northern High Plains Designated Groundwater Basin ("NHP Basin") contained improperly designated groundwater. Rather than address that issue directly, the groundwater users in the NHP Basin got the legislature to remove this limitation with SB-52.

4. The question posed by the Foundation's Motion is simple: Is SB-52 unconstitutional as-applied to the NHP Basin? The Foundation believes the answer — yes — is clear.

UNDISPUTED FACTS.

5. In direct contradiction to their own Motion regarding SB-52, wherein the Defendants stated there are no issues of material fact, the Defendants now claim that they "contest many of the facts, or the characterization of the facts" in the Foundation's Undisputed Fact section of its Motion.[1] However, nowhere in the Response or in the referenced "companion brief" do the Defendants actually contest any of the undisputed facts set forth in paragraph 14 of the Foundation's SB-52 Motion. In fact, the only item at issue in the referenced "companion brief" related to SB-52 is that the Defendants dispute the Foundation's conclusion that the Commission took a position on SB-52. (*Defendants' Response to Certain Factual Allegations*, p. 12-13); (*Foundation's Motion*, ¶¶12, 22).

[1] The Foundation disagrees with the Defendants' inaccurate commingling of the Background Section of the Motion with the Undisputed Facts Section of the Motion.

6. While the evidence is clear that the Commission did support SB-52,[2] such a fact is not material to finding that SB-52 is unconstitutional. *See Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992) ("A material fact is simply a fact that will affect the outcome of the case."). Therefore, since the Defendants do not actually contest any of the undisputed facts set forth in the Foundation's SB-52 Motion, there are no material facts in dispute that would preclude a determination that SB-52 is unconstitutional. "The movant bears the burden of establishing the lack of a genuine issue of material fact, but once the burden is met, the opposing party must demonstrate that a controverted factual questions exists." *Closed Basin Landowners Ass'n v. Rio Grande Water Conse. Dist.,* 734 P.2d 627, 632 (Colo. 1987) (*citing Pueblo West Metro. Dist. v. Southeastern Colo. Water Conserv. Dist.,* 689 P.2d 594, 600 (Colo. 1984)). As stated under C.R.C.P. Rule 56(e):

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If there is no response, summary judgment, if appropriate, shall be entered.

See also Ginter v. Palmer & Co., 585 P.2d 583, 585 (Colo. 1978) ("Once a movant makes a convincing showing that genuine issues are lacking, C.R.C.P. 56(e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists") (*citing Sullivan v. Davis*, 474 P.2d 218 (Colo. 1970)).

7. Accordingly, summary judgment is proper given the undisputed facts relied upon by the Foundation.

LEGAL ANALYSIS IN SUPPORT OF THE FOUNDATION'S MOTION.

A. SB-52 is Retrospective Legislation.

8. As set forth in the Foundation's Motion, the Foundation's SB-52 Response, and as further described below, SB-52 must be deemed unconstitutionally retrospective. Colorado's constitution explicitly prohibits the General Assembly from passing retrospective legislation. Colo. Const. Art. II, §11 ("No … law impairing the obligation of contracts, or retrospective in its operation ... shall be passed by the general assembly.").

9. The law has long been clear that "[u]pon principle, every statute, which 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, must

[2] It was made very clear to the legislature that the Commission supported SB-52. (Exh. 1 to Defendants' Motion re: SB-52, Transcript of Legislative Hearings on SB-52, p. 11, lines 7-8 ("The Colorado Ground Water Commission voted in November to support the bill."); p. 52, lines 34-36) ("...the Colorado Ground Water Commission, the body established for regulating this kind of water has voted to support this bill."). For further discussion, see Section G of the *Foundation's Reply to Defendants' Response to Certain Factual Allegations*.

be deemed retrospective." *Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 167 (Colo. 1878); *see also City of Colorado Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007); *In re Estate of DeWitt*, 54 P.3d. 849, 855 (Colo. 2002); *Miller v. Florida*, 482 U.S. 423, 430 (1987); *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"). "The general prohibition against retrospective legislation is intended to prevent any unfairness that might result from the application of new law to rights already in existence." *City of Golden v. Parker*, 138 P.3d 285, 289 (Colo. 2006).

10. SB-52 is retrospective legislation regarding the NHP Basin because it changes the legal consequences of acts completed before its effective date. *See Weaver v. Graham*, 450 U.S. 24, 31 (1981) ("The critical question is whether the law changes the legal consequences of acts completed before its effective date."). It also impairs vested rights, creates new obligations, imposes a new duty, and attaches a new disability. As such, SB-52 is unconstitutional.

I. SB-52 is Retroactive.

11. In their Response, the Defendants surprisingly claim that SB-52 is prospective legislation. (*Defendants' Response*, p. 7-10). If that is the case, then there is no dispute here because SB-52 cannot be applied in the NHP Basin because that basin was established prior to the enactment of SB-52. The Defendants' claim that SB-52 is prospective because it only applies to "actions that seek to alter the basin's boundaries or description, not to the Orders creating the basin in the first place." (*Defendants' Response*, p. 10). Essentially, the Defendants are claiming that SB-52 protects the existing boundaries of the NHP Basin from being modified while at the same time claiming it only operates prospectively because, according to them, SB-52 only applies to future challenges to those boundaries. Not only is this reasoning inconsistent with the law, but it is an attempt at an end run around the constitutional prohibition against retrospective legislation.

12. In order to support their claim that SB-52 operates prospectively, the Defendants assert that SB-52 is prospective because the plain language of the amendment indicates that it does not apply to litigation pending as of January 1, 2010. (*Defendants' Response*, p. 8). In other words, on its face, the amendment is prospective. However, "it is the effect, not the form, of the law" that determines whether a statute is retrospective. *See Weaver*, 450 U.S. at 31 (a statute that facially appeared to apply prospectively, but had the effect of substantially altering the consequences of an event that occurred before its effective date was deemed retrospective).

13. In addition, the Defendants argue that the order[3] establishing the NHP Basin is a separate transaction from any later modifications to the basin boundaries. (*Defendants' Response*, p. 9). First, this argument ignores the simple fact that both the creation and modification of a designated basin were part of the same sentence in the original statute:

[3] The Defendants refer to 1966 and 1967 orders creating the NHP Basin. (*Defendants' Response*, p. 8). The Foundation is not aware of a 1967 order, nor was one attached to any of the Defendants' Motions or Responses.

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

(*See* Exhibit 3 to the *Foundation's SB-52 Motion*, § 148–18–5). To parse them out would be inconsistent with the plain language of the statute.

14. Second, such a narrow view of the word "transaction" is inconsistent with how courts have analyzed whether or not a statute is retroactive. To ascertain whether a statue is retroactive, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf v. USI Film Products,* 511 U.S. 244, 269-70 (1994). Prior to SB-52 and when the NHP Basin was established, the Commission had a non-discretionary obligation to alter the basin boundaries as "future conditions and factual data justify" to exclude improperly designated groundwater. *See* C.R.S. § 148–18–5 (1966) (later became § 37-90-106(1)(a)).[4] Following the enactment of SB-52, once the Commission issued a well permit, that groundwater can no longer be excluded from the basin boundary even if it has more than a *de minimis* impact on surface water. Accordingly, SB-52 changes the legal consequences of an order designating the NHP Basin because it made a modifiable boundary a fixed boundary. Therefore, if SB-52 applies to the NHP Basin it must be characterized as retroactive.

15. The "legal consequences" test has also been described as ascribing "different legal effects" than it had under the law when it occurred. *Ficarra v. Dept. of Reg. Agencies*, 849 P.2d 6, 12 (Colo. 1993). The Defendants try to dismiss this characterization of the test by claiming the Court was only describing the parties' arguments. (*Defendants' Response*, p. 8). The Foundation disagrees. When the Court used this language, it was explaining why it disagreed with the Division's characterization that the act was prospective[5] and why it agreed with the Administrative Law Judge that the statute applied retroactively because it "ascribes to certain transactions that occurred before the effective date of the Act different legal effects from that

[4] This was to ensure that any groundwater later determined to have more than a *de minimis* impact on surface waters would be excluded from the designated basin and administered pursuant to the constitutional prior appropriation doctrine. *See Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 32 (Colo. 2006) (legislative intent to keep "designated groundwater and groundwater subject to the 1969 Act separate and distinct."). In fact, in *Gallegos* the Colorado Supreme Court determined that, as originally enacted, the "General Assembly anticipated that a designated groundwater basin could include groundwater that does not fall within the definition of designated groundwater," *Gallegos*, 147 P.3d at 28, and that the "General Assembly … specifically called for the boundaries of a designated basin to be revisited." *Gallegos*, 147 P.3d at 32.

[5] The Division applied the act to the plaintiffs (thus the challenge), but appeared to not understand that this meant they were applying it retroactively. *Ficarra*, 849 P.2d at 12 ("The Division argues in its brief that its application of the Act to the plaintiffs is merely prospective because it applies 'only to the [plaintiffs'] conduct as bailbondsmen after passage of the [Act].' On the contrary, however, we agree with the ALJ that, as applied to the plaintiffs, 'the import of [the Act] is not merely to regulate future bail bondsmen activities but to affect the criminal convictions which have already occurred. The application of [the Act to the plaintiffs] thus affects past conduct and cannot be characterized as merely prospective in its application.'").

which they had under the law when they occurred." *Ficarra*, 849 P.2d at 12. It went on to hold that "the Division correctly construed the intent of the General Assembly when the Division applied the Act retroactively to the plaintiffs." *Id* at 15.

16. The Defendants also claim that SB-52 is not retroactive because the non-discretionary duty of the Commission is not a "transaction" that occurred before the effective date of SB-52. This argument is also not supported by the law. (*Defendants' Response*, p. 9). The analysis regarding retroactive legislation is not limited to "transactions" as the Defendants incorrectly imply. A statute is also deemed retroactive it if "operates on … rights and obligations that existed before its effective date." *Ficarra*, 849 P.2d at 11. The Commission's non-discretionary obligation to modify the boundaries to exclude improperly designated groundwater was in effect prior to SB-52. Moreover, the plain language of the statute did not limit this duty to only apply when a surface water user petitions the Commission as alleged by the Defendants (*Defendants' Response*, p. 9, fn. 1). *Gallegos* involved a surface water user, so that was the situation addressed in that case, but neither the plain language of the statute nor the holding in *Gallegos* support such a limitation.

17. By preventing the Commission from modifying the boundaries of the NHP Basin to exclude improperly designated groundwater once a well permit has been issued, SB-52 unquestionably imposes new legal consequences and changes the legal effect of the Commission's order establishing the NHP Basin. SB-52 also changed the Commission's obligations when it enacted SB-52. Accordingly, if SB-52 applies to the NHP Basin it must be deemed retroactive.

II. SB-52 is a Change in the Law, Not a Clarification.

18. SB-52 changed the law. It did not clarify it.

19. The presumption is that SB-52 constitutes a change in the law. *Powell*, 156 P.3d at 465 ("A legislative amendment either clarifies or changes existing law, and we presume that by amending the law the legislature has intended to change it.); *see also Union Pac. R. Co. v. Martin*, 209 P.3d 185, 188 (Colo. 2009) ("In the absence of any clear indication to the contrary, statutory enactments are presumed to be intended to change the law, and to do so only prospectively."). This presumption cannot be rebutted with regard to SB-52, nor would it matter if it could because SB-52 is a substantive change in the law.

a. SB-52 was not ambiguous before SB-52 was enacted, so it could only be changed, not clarified.

20. SB-52 cannot be considered a clarification because C.R.S. § 37-90-106(1)(a) was not ambiguous before the legislature amended it with SB-52. *See Martin*, 209 P.3d at 189 ("An amendment of an unambiguous statute indicates a purpose to change the law…") (quoting 1A Norman J. Singer, Sutherland Statutory Construction, §22:30, at 373 (6th ed. 2000). Since it was not ambiguous the presumption that SB-52 changed the law cannot be rebutted because the only way to rebut this presumption is to show that the "legislature meant only to *clarify an ambiguity*

in the statute by amending it." *See Powell*, 156 P.3d at 465 (emphasis added); *see also Academy of Charter Schools v Adams County School District*, 32 P.3d 456, 464 (Colo. 2001).

21. As set forth in the Foundation's SB-52 Motion and SB-52 Response, C.R.S. § 37-90-106(1)(a) was not ambiguous before SB-52 was enacted for the following reasons:

a. It had a plain, clear meaning that was not susceptible to "multiple meanings." *See Colorado Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 599 (Colo. 2005) (effectively defining the word ambiguous); *see also Dep't of Transp. v. Gypsum Ranch Co., LLC*, 244 P.3d 127, 131 (Colo. 2010). A plain language reading of the statute makes it clear that the Commission is required to alter the basin boundaries as "future conditions and factual data justify" to exclude improperly designated groundwater. If the language of a statute is plain and its meaning clear then it must be applied as written. *See Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004) ("If a statute is clear and unambiguous on its face, then we need not look beyond the plain language, ... and we must apply the statute as written.") (internal citations omitted).

b. In *Gallegos*, the Colorado Supreme Court sought to "discern the intent of the General Assembly" through its own plain language interpretation of C.R.S. § 37-90-106(1)(a). *Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 28 (Colo. 2006); *see also Vigil*, 103 P.3d at 327 ("Our primary duty in construing statutes is to give effect to the intent of the General Assembly, looking first to the statute's plain language."). In doing so, the Court held that "the General Assembly anticipated that a designated groundwater basin could include groundwater that does not properly fall within the definition of designated groundwater. When future conditions and factual data reveal this to be the case, the [Groundwater] Act requires that the Commission redraw the boundaries of the designated basin" to exclude such groundwater. *Gallegos*, 147 P.3d at 31. The *Gallegos* decision was based upon the plain language of C.R.S. § 37-90-106(1)(a) and long-standing Colorado law regarding the policy differences underlying the Groundwater Management Act and the constitutional prior appropriation doctrine as codified in the 1969 Act. *Gallegos*, 147 P.3d at 30, 32.

c. Therefore, the Colorado Supreme Court's construction of this statute in *Gallegos* "rendered it unambiguous." *Powell*, 156 P.3d at 468 ("Our construction of this term rendered it unambiguous, because the decision lent the phrase a defined, plain meaning not reasonably susceptible to different interpretations."). Thus, the Court in *Powell* held that even if it found that an ambiguity had previously existed, "that ambiguity was put to rest when we issued [a decision that] . . . rendered it unambiguous." *Id*. Therefore, as in *Powell*, the holding in Gallegos rendered the original statutory language unambiguous prior to the enactment of SB-52.

b. The plain language interpretation of Section 106(1)(a) in Gallegos is the authoritative statement of the law leading up to the enactment of SB-52.

22. Once the Colorado Supreme Court interpreted C.R.S. § 37-92-106(1)(a) in *Gallegos,* that became the "authoritative statement of what the statute meant before as well as after the decision." *See Rivers v. Roadway Express, Inc*., 511 U.S. 298, 312–13 (1994). Any legislative effort to undo that interpretation is not a clarification, but a change in that law subject to the constitutional prohibition against retrospective legislation. *Powell*, 156 P.3d at 468 ("there can be no doubt that [the bill], directed at responding to our decisions in [prior cases] affirmatively changed, rather than clarified, the settled definition established in those decisions."); *see also Martin*, 209 P.3d at 188-89 ("Especially where an existing statute has already undergone construction by a final judicial authority, further legislative amendment necessarily reflects the legislature's understanding of that construction, or perhaps simply disagreement with how it is being … interpreted by other courts. Such an amendment can fairly be presumed to intend a change in the law…"). The effect of this is that when the NHP Basin was created the law that applied was C.R.S. § 37-90-106(1)(a), as interpreted by *Gallegos*.

23. The Defendants claim that the determination in *Powell* — that a legislative change after a judicial interpretation constitutes a change in the law — does not apply in this situation because of procedural differences between this case and *Powell*.[6] (*Response*, pp. 21-23). Neither the decision in *Powell* nor the identical decision in *Martin* are predicated upon the procedural posture of those cases. Instead those decisions were based upon well-established precedent that is applied, plus the practical conclusion that when the General Assembly modifies a statutory section to contradict a Court's interpretation of that statute, "there can be no doubt that [the bill is] . . . directed at responding to our decisions." *Powell*, 156 P.3d at 468. Moreover, Defendants' argument ignores the "well-established presumption that when the legislature amends a law, it intends to change that law." *See Daniel v. City of Colorado Springs*, 327 P.3d 891, 896 (Colo. 2014). This presumption is likewise not dependent on the procedural posture in *Powell. See also Samples v. Bd. of Comm'rs of Elbert Cty.*, 286 P. 273, 274 (Colo. 1930) ("A fundamental rule of construction requires us to attribute to this change of language some change of meaning.").

24. The Defendants also assert that even if the statute has already been interpreted by the Supreme Court, it can still be considered a clarification. In support of this claim, the Defendants cite *Colorado Civil Rights Comm'n ex rel. Ramos v. The Regents of the Univ. of Colorado,* 759 P.2d 726 (Colo. 1988). (*Defendants' Response*, p. 11). However, this case does not stand for the proposition cited. Instead, it simply discusses the basic principle that the legislature can change the law and overrule prior judicial decisions. *Id.* at 734. The Foundation does not dispute the fact that the legislature has the power to change the law. The legislature's ability to amend the

[6] The Defendants point out that the Foundation did not exercise its remedy prior to the enactment of SB-52 (i.e. it had not petitioned the Commission to redraw the boundaries of the NHP Basin before the August 11, 2010 enactment date of SB-52 (though the cut-off for pending litigation was January 1, 2010). (*Defendants' Response,* p. 23). To be clear, there was no time limit included in section 106(1)(a) as originally enacted. The fact that the 1965 legislature did not include one conflicts with the argument made by Defendants that one was intended, and further supports the fact that SB-52 changed the law. In addition, as this Court is well-aware the Foundation has spent the past five defending its water rights in Water Court and the Colorado Supreme Court.

law, however, is subject to the constitutional prohibition against retrospective legislation. *See People v. Juvenile Court, City & Cty. of Denver*, 893 P.2d 81, 89 (Colo. 1995) ("Absent constitutional concerns, the General Assembly may amend or repeal prior legislation as the result of the adoption of policies that differ from those previously embraced by that governmental institution.").

25. In addition, the Defendants state that "[w]hen a legislative change is made in response to a controversy that arose over the proper interpretation of the statute, courts have logically concluded that the amendment was adopted to make plain what the original legislation meant all along." (*Defendants' Response,* p. 13). As support for this statement, the Defendants cite Section 22:30 of *Sutherland* and page 451 of the decision in *Frank M. Hall & Co.* However, undersigned counsel could not locate anything to support such a statement in the cited section of *Sutherland*. This section of *Sutherland* does, however, cite a 2011 Colorado Court of Appeals case that says the exact opposite: "When an amendment follows closely on a judicial decision interpreting a statute, and the plain meaning of the amendatory language manifests a modification of the statute as previously construed, courts assume the legislature intended to change the law." 1A *Sutherland Statutory Construction* § 22:30, fn. 1 (7th ed.) (*quoting C.P. Bedrock, LLC v. Denver County Bd. of Equalization*, 259 P.3d 514 (Colo. App. 2011)). Furthermore, the Defendants' statement in its Response appears to be from a parenthetical taken out of context. *See Frank M. Hall & Co. v. Newsom*, 125 P.3d 444, 451 (Colo. 2005) ("Subsequent legislative acts certainly cannot dispositively interpret earlier ones for the courts, but subsequent clarification of ambiguous legislation is one accepted aid to the discovery of legislative intent. … [citations omitted] … (especially where the amendment was adopted soon after the interpretive controversy arose and was for the purpose of making plain what the legislation had been all along).") (emphasis added). In other words, clarification of an ambiguous statute on the heels of a controversy can serve only as one piece of evidence in assessing intent. However, the legislative intent in 2010 is irrelevant to the intent of the legislature in 1965 even as one piece of evidence because, as discussed above, Section 106(1)(a) was not ambiguous before SB-52 was enacted.

c. A subsequent legislature can't establish the intent of an earlier one.

26. The Defendants appear to be under the impression that whether an amendment is deemed a clarification rests solely on what the legislature intended. However, intent is only one piece of the analysis and, if found, it certainly does not end the analysis. The two cases cited by the Defendants, *Kern* and *Douglas County*, do not stand for the proposition that the presumption is rebutted solely based on the legislature's intent. (*Defendants' Response*, p. 11). *See Kern v. Gebhardt*, 746 P.2d 1340, 1345-46 (Colo. 1987) (finding that the legislature changed the law despite noting legislative testimony indicating a disagreement with a prior judicial decision and wanting to put the law "back like we all thought it was."). In addition, the change at issue in *Kern* was not applied retroactively. *Id.* The court in *Douglas County* merely reiterated that the "presumption may be rebutted by a showing that the General Assembly amended the statute in order to clarify an ambiguity." *Douglas Cty. Bd. of Equalization v. Fid. Castle Pines, Ltd.*, 890 P.2d 119, 125 (Colo. 1995) (determining that an amendment that changed the term "cost of development" to "direct costs of development" and disallowing deduction of indirect costs of

development was a change, not a clarification). It also notes that the only times a court has found an amendment to be a clarification is "where legislative history or the language of the statute clearly indicates an intent to clarify. *Id.* There is no basis, however, for the claim that intent alone rebuts the presumption, as purported by the Defendants.

27. Moreover, "even a clear indication of intent to clarify cannot dispositively establish the meaning of previous legislation." *Union Pac. R. Co. v. Martin*, 209 P.3d 185, 188 (Colo. 2009); *see also Dep't of Transp. v. Gypsum Ranch Co., LLC*, 244 P.3d 127, 131 (Colo. 2010); *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the interpretation of an earlier enacted statute"). The 2010 legislature cannot establish the intent of the 1965 General Assembly when the original statute was first enacted. *See A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862, 872 (Colo. 2005); *see also O'Gilvie v. United States*, 519 U.S. 79, 90 (1996).

28. The prevailing rule is that "[t]he views of a subsequent general assembly cannot establish the intent of an earlier general assembly." *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862, 872 (Colo. 2005); *see also United States v. Price*, 361 U.S. 304, 313 (1960) ("... the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). Accordingly, the 2010 General Assembly is not the arbiter of what the General Assembly intended in 1965 when the Groundwater Act was enacted. While the language in SB-52 provides that it "reaffirms, rather than alters, the general assembly's original intent," such a statement by the General Assembly was provided 45 years after the fact and by a different legislature. Therefore, such language does not establish the intent of the legislature in 1965 when the statute was first enacted. This well-established law provides a check on the legislature by preventing drafters of a bill from simply inserting language in the bill claiming to clarify the law in an attempt to avoid the prohibition against unconstitutional retrospective legislation.

29. Moreover, it is important to recognize that not all of the members of the legislature agreed with the statements cited by the Defendants that SB-52 was only intended to be a clarification. (*Defendants' Response*, p. 14). For example, Representative Palmer discussed the fact that SB-52 directly contradicts existing law:

> So they passed the law saying okay, there are these designated ground water basins that are not tributary and we're basing that on the best science we have. In the future, though, as you get better data change the boundaries, because we're not saying that these people who can pump from these designated basins have a right to be just exempt from the prior appropriation system, we're saying we think scientifically they're just not connected to it. But if in the future we learn better what's underground and find out they are connected, change the boundaries. And I think that's important because we're always learning more about science and if we pass a law that's based on science I think we have to have the ability to revise that based on better science.
>
> So here we had this law in place, so to me if you got a well permit you knew that that well permit was contingent on that aquifer not being connected to the surface

> water system. Now, we're changing that very clear law that says this is based on science, if the science changes, we're going to change the boundaries, and we're now saying that factual data obtained after the designation of the basin justified the condition they alter the boundaries or descriptions, but, and this is what we're adding, the alteration would not exclude from the designated ground water basin any wells with a conditional or final permit to use designated ground water has been issued. Well that directly contradicts what was already in the law. The law said if the science changes and we find out that you're actually pumping water that belongs to somebody who has a stream water right to it, then you are going to lose your permit. And now we're going back years later and saying no, no, no, if the science shows that your well is pumping water that actually is owned by someone in the stream well you get to keep doing that because, you know, you've already been doing it.

(*Exhibit 1 to Defendants' Motion*, pp. 94-95) (emphasis added).

30. In short, SB-52 constitutes a change to the law and is subject to the constitutional prohibition against retrospective legislation. *See Martin*, 209 P.3d at 188-89. While the legislature can amend or repeal prior legislation, it is unconstitutional to apply such changes retrospectively to the existing NHP Basin.

III. SB-52 is a substantive statute, not a remedial one.

31. The Defendants' claim, in the alternative, that if SB-52 did change the law, then the change was to a remedy, not a vested right, and therefore, is not retrospective. (*Response*, pp. 17-18). The Foundation disagrees. SB-52 is a substantive statute, not a remedial one.

32. As cited by the Defendants, a remedial statute "does not affect substantive or vested rights." (*Defendants' Response*, p. 17). On the other hand, "substantive statutes create, eliminate or modify vested rights or liabilities" *People v. D.K.B.*, 843 P.2d 1326, 1331 (Colo. 1993). SB-52 is a substantive statute because, as described below, it permanently locked in the boundaries of a designated basin once the Commission issues a well permit; changed the duties of the Commission; prevented improperly designated groundwater from being administered under the correct statutory scheme; stripped vested surface water rights of their senior priorities; and eliminated all means of redress for injury to surface water rights due to the use of improperly designated groundwater. In short, SB-52 changed the legal consequences of the original designation order for the NHP Basin. *See Landgraf*, 511 U.S. at 270.

a. SB-52 created a new obligation and imposed a new duty on the Commission.

33. SB-52 changed the meaning and significance of the designation of the NHP Basin boundaries by permanently locking in the boundaries once well permits were issued, notwithstanding the changes to those boundaries that "future conditions require and factual data justify." As a result of having permanently fixed boundaries, SB-52 imposed a new obligation or duty on the Commission to regulate groundwater that has more than a *de minimis* impact on

surface water.[7] Not only is this duty inconsistent with the legislative intent to keep groundwater subject to the 1965 and 1969 Acts separate and distinct, but it is also contrary to the Commission's own statutory authority. *See* C.R.S. § 37-90-103(8). The General Assembly has been clear that the Commission has no statutory authority to regulate water that has more than a *de minimis* impact to the stream because that category of water is subject to the 1969 Act and the jurisdiction of the Water Court and State Engineer. *See Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 32 (Colo. 2006).

34. This new obligation or duty imposed on the Commission with regard to the existing NHP Basin makes SB-52 retrospective. *See Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 167 (Colo. 1878) ("[u]pon principle, every statute, which … creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."). This directly contradicts the Defendants' uncited and unexplained claim that such a new obligation or duty on the Commission does not make SB-52 retrospective. (*Defendants' Response*, p. 20).

35. Lastly, the Defendants claim that the Foundation does not have standing with regard to this aspect of the claim because it has not demonstrated injury as a result of the Commission's new duty to regulate tributary groundwater within the NHP Basin. (*Defendants' Response*, p. 20). To the contrary, the Foundation is injured by not being able to enforce its priority over water that uses a common source of supply as discussed herein, as well as in the Foundation's SB-52 Response and its SB-52 Motion.

b. SB-52 impairs and eliminates vested rights.

36. As set forth in the Foundation's SB-52 Motion and SB-52 Response, water rights are vested rights under Colorado law and are entitled to protection against retrospective legislation. (*SB-52 Motion*, ¶¶ 36-43; *SB-52 Response*, ¶¶ 42-43). This well-established law will not be reiterated here. SB-52 is retrospective legislation because it impairs the Foundation's water rights.

c. Even if SB-52 is deemed to only impact a remedy, then it would still be a substantive statute because it did not change a remedy — it eliminated it.

37. In their Response, the Defendants ignore the fact that water rights are property rights, and instead focus their argument on their belief that SB-52 only provided a remedy, and the fact that there is no right to a particular remedy. (*Defendants' Response*, pp. 17-18). The Defendants take this position because if SB-52 only impacts a remedy, then it can take advantage of an

[7]*See Gallegos*, 147 P.3d at 31 ("[G]round water which has more than a *de minimis* impact on surface waters cannot properly be classified as designated ground water."); *see also* C.R.S. § 37-90-103(6)(a). As the Colorado Supreme Court has recognized, "the creation of a designated groundwater basin does not establish conclusively that all ground water in the basin is designated ground water." *Danielson v. Vickroy*, 627 P.2d 752, 759 (Colo. 1981). In recognition of these realities, C.R.S. § 37-90-106(1)(a) required the Commission to redraw the boundaries "[w]hen future conditions and factual data reveal this to be the case" to exclude such groundwater. *Gallegos*, 147 P.3d at 31. SB-52 removed this provision.

exception in the law that allows a statute to apply retroactively if it only "effects a change that is procedural or remedial." *See DeWitt*, 54 P.3d at 854 ("Although disfavored, the retroactive application of a statute is not necessarily unconstitutional; it is permitted where the statute effects a change that is procedural or remedial."). However, such an exception does not apply here.

38. Even assuming, for the sake of argument, that SB-52 was remedial as the Defendants claim. The exception for remedial or procedural statutes does not apply here. The reason is simple: SB-52 did not change a remedy. It eliminated it.

39. The key part of the analysis that the Defendants state, but overlook, is the that "there is no vested right in a particular remedy." (*Defendants' Response*, p. 17) (emphasis added). In other words, the legislature can swap one remedy for another or modify a remedy, and those types of changes in the law can apply retroactively without running afoul of the constitutional prohibition against retrospective legislation. However, SB-52 completely eliminated the remedy available to surface water users to petition the Commission and protect their water rights from injury against the use of improperly designated groundwater. It did not provide an alternative means of redressing this injury.

40. As a result, the Foundation does have a right to a remedy since one no longer exists. *See* 2 *Sutherland Statutory Construction* § 41:6 (7th ed.) ("There is no vested right in a particular remedy or procedure so long as an adequate remedy exists.") (*citing Moore v. Chalmers-Galloway Live Stock Co.*, 10 P.2d 950 (Colo. 1932) (emphasis added). The reason is because a "right and remedy are reciprocal. Take away a plaintiff's remedy, and you destroy the value of his right." *See Brown v. Challis*, 46 P. 679, 680 (Colo. 1896) (finding that a statute prohibiting the sale of mining property in a partition proceeding was unconstitutionally retrospective because mining property is not susceptible to partition and the only remedy available was to sell the property, which the statute would eliminate completely if applied retroactively.)

41. By eliminating the ability to "de-designate" groundwater based on new scientific data, SB-52 not only effects a substantive change in the boundaries by making them permanent, it completely eliminates a surface water right owner's ability to protect its water rights from injury against improperly designated groundwater. *Gallegos* found that surface water users "… must have the opportunity to prove that 'future conditions require and factual data justify' modification to the Basin's boundaries under the [Groundwater] Act." 147 P.3d at 33. This change is particularly egregious given that the NHP Basin was established subject to the Commission's non-discretionary obligation to modify the boundaries to exclude improperly designated groundwater. The Foundation's right to protect its senior surface water rights from injury is not a right that can be retroactively taken away by the General Assembly. In fact, the right to protect property is a right in and of itself. *See* Colo. Const. art. II, § 3. Therefore, it should be without question that this right to protect vested water rights exists independently of SB-52 and is more than a mere expectation.

42. The Defendants cite a Colorado Court of Appeals case, *Abromeit v. Denver Career Service Bd.*, 140 P. 3d 44 (Colo. App. 2005), as support for their position that there is no vested right in a particular remedy. (*Defendants' Response*, p. 17). The origin of the quoted language

from *Abromeit* — "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 — is a 1932 case, *Moore v. Chalmers-Galloway Live Stock Co*., 10 P.2d 950, 952 (Colo. 1932). The *Moore* case, in turn, cites *Lockett v. Usry*, 28 Ga. 345, 350-51 (1859) ("If the legislature sees fit to alter the law as to the manner of pleading either at law or in equity, or in any summary or anomalous proceeding, and the statute takes effect before the defense is made, the party must conform to the new rule. And he cannot complain of having been deprived of a vested right. There is, we apprehend, no such thing as a vested right in remedies. All the courts say is, that the legislature cannot so change the remedy as to render it nugatory."). In essence, the legislature has the right to modify a particular procedure, but they cannot change the remedy so as to render it meaningless or inoperative. *See also* 2 Sutherland Statutory Construction § 41:9 (7th ed.) ("There is no constitutional objection to a retroactive statute which makes a reasonable change in a remedy.").

43. The same concept distinguishes *Central Colorado Water Conservancy District v. Simpson*, which the Defendants cite for support that "a law modifying a remedy for protection of a vested water right does not alter the water right." (*Defendants' Response*, p. 19). In *Simpson*, the court found that SB-120 (1989), which provided a compromised augmentation exemption for evaporation losses from pre-1981 sand and gravel pits, did not alter vested water rights because "senior appropriators [could still] seek legal redress for any injury caused to their water rights by holders of junior water rights." 877 P. 2d 335, 342-343, 348 (Colo. 1994). In other words, it was not retrospective because it did not abolish all legal means of seeking redress for injury to vested water rights. That makes it distinguishable from the situation in this case. Following SB-52, surface water users do not have any legal means to seek redress for injury against improperly designated groundwater users, and as such it is distinct.

44. Accordingly, it would be of manifest injustice to determine that the legislature can retroactively eliminate all remedies and leave the Foundation without the ability to protect its water rights from injury and enforce its water right against other water users that are utilizing the same source of supply. *See Brown v. Challis*, 46 P. 679, 680 (Colo. 1896) ("In one sense, such legislation would affect the remedy only; but, in the constitutional sense, it would be retrospective, injurious, oppressive, and unjust, and therefore unconstitutional … the test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong. … It is idle to attempt to draw a distinction in law between a right which does not exist and one that cannot be enforced.").

d. SB-52 imposes a new disability of constitutional magnitude.

45. In their Motion, the Defendants claim that SB-52 does not impose a disability of constitutional magnitude because "surface water and groundwater are highly regulated." (*Defendants' Response*, p. 20). In other words, the Defendants argue that changes in the law can be applied retroactively without being deemed retrospective because water is "highly regulated." (*Id*.). First, it is important to recognize that the case the Defendants cite as support, *Hickman v. Catholic Health Initiatives*, found the change in the law to be a remedial one, not a substantive one. 328 P.3d 266, 274 (Colo. App. 2013). Second, while the use of water is subject to

reasonable regulations, the Defendants provide no support for their claim that it would be considered a "highly regulated industry" such as a hospital. *Id*. at 273. The fact that the legislature recognizes the need to protect existing water rights when enacting new legislation, particularly sweeping changes like the 1969 Act, seems to refute such an argument. *See, e.g.*, C.R.S. § 37-92-102(2)(a) ("Water rights and uses vested prior to June 7, 1969, in any person by virtue of previous or existing laws, including an appropriation from a well, shall be protected subject to the provisions of this article.").

46. The Defendants also point to the fact that the legislature has power and authority over the administration of water rights. (*Defendants' Response*, p. 21). However, the legislature's power and authority over the administration and management of water is constrained by Colorado's Constitution. While the Colorado legislature has plenary authority over the allocation and administration of groundwater that has less than a *de minimis* impact on any surface stream, *see Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1182 (Colo. 2000), its exercise of its plenary power is subject to "constitutional limitations." *Passarelli v. Schoettler*, 742 P.2d 867, 869 (Colo. 1987).[8] Courts are required to enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it. *See Passarelli,* 742 P.2d at 872 ("It is the duty of the General Assembly to obey a constitutional mandate, and where a statute and the constitution are in conflict the constitution is paramount law."). SB-52 has eliminated all means for a surface water user to claim injury against the use of improperly designated groundwater, and has eliminated all means to remedy the situation. As such, SB-52 exceeds the legislature's plenary power by allowing certain users to divert tributary groundwater from large capacity wells outside the constitutional prior appropriation doctrine, thereby divesting surface water users of their appropriations.

47. Moreover, the right to protect property is an inalienable right recognized by the Colorado Constitution. *See* Colo. Const. art. II, § 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."). "There is no adequate way to protect property if resort to the judicial process is withdrawn. … The constitution, in guaranteeing to every person access to the courts for redress and speedy remedy 'for every injury to person, property or character,' did not discriminate against those whose injury to property was occasioned by acts of the State of Colorado." *Ace Flying Serv., Inc. v. Colorado Dep't of Agric.*, 314 P.2d 278, 284-85 (Colo. 1957). As noted above, there is no question that water rights are property rights in Colorado.

[8] The Colorado Constitution requires that both surface water and tributary groundwater be governed by the prior appropriation doctrine. *See* Colo. Const. art. XVI, § 6; *see also Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882). In order to have more than a *de minimis* impact on surface flows such groundwater "must necessarily be tributary." *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d at 30, fn. 5. "The constitution [also] guarantees Colorado's system of prior appropriation as it had developed since territorial days and protects the people of the state from divestment of appropriation." *St. Jude's Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442, 448 (Colo. 2015).

B. SB-52 Violates Constitutional Protections.

I. SB-52 Violates the Prior Appropriation Doctrine.

48. The Defendants argue that SB-52 does not violate the prior appropriation doctrine because the legislature "can impose reasonable regulation on the manner and method of appropriation." (*Defendants' Response*, p. 24). They also note the legislature's plenary power over water that is not part of the natural stream. (*Id.*, p. 25). Therein lies the crux of the matter. The entire premise of a modified prior appropriation doctrine established by the 1965 Act is based on the understanding that the groundwater has less than a *de minimis* impact on the surface flows and is therefore, not part of the natural stream. However, if evidence acquired later demonstrated that the groundwater was having more than a *de minimis* impact on surface flows, then it had to be allocated and administered pursuant to the 1969 Act. In other words, it had to be removed from the modified system under the 1965 Act. This provision allowed the legislature to develop the modified system without running afoul of the constitutional limits on its authority, as discussed in Section A.III.d. above. Take it away, as SB-52 did, and the statute violates the prior appropriation doctrine.

49. SB-52 allows large-capacity wells to divert what is effectively tributary groundwater outside the prior appropriation system and insulates such use from any claim of injury by senior surface water rights. As the Colorado Supreme Court determined — a statute would have to "create a new class of water rights not subject to the principles of prior appropriation established by Article XVI, Sections 5 and 6 of the Colorado Constitution" in order to violate the prior appropriation doctrine. *Central Colorado Water Conservancy District v. Simpson*, 877 P.2d 335, 345 (Colo. 1994) (emphasis added). That is exactly what SB-52 does, as Representative Pace recognized: "What this bill attempts to do is carve out a certain group of people who do not have to adhere to the doctrine of prior appropriation. …." (House 2nd Reading - March 9, 2010, which is transcribed at Exhibit 1 to *Defendants' SB-52 Motion*, p. 77 lines 26-27; for audio see Exhibit 5 to the *Foundation's SB-52 Motion*, Disc 5.2 at 11:19 – 14:40).

50. A statute that precludes any means to enforce a senior priority over those using water from a common source of supply divests a senior water right of its value and violates the constitutional prior appropriation doctrine upon which users have justifiably relied. "The objective of the water law system is to guarantee security [and] assure reliability" of a "scarce and valuable resource. Security resides in the system's ability to identify and obtain protection for the right of water use. Reliability springs from the system's assurance that the right of water use will continue to be recognized and enforced over time." *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1146 (Colo. 2001). Yet, SB-52 gives the improperly designated groundwater users the better right to the tributary supply that had already been appropriated by senior, surface water rights.

51. Accordingly, SB-52 is unconstitutional because it violates the prior appropriation doctrine.

II. SB-52 Constitutes a Taking.

52. The Defendants claim that the Foundation has not proved that a taking of its water rights has occurred because it did not set forth the law regarding regulatory takings or prove each of the elements contained therein. (*Response*, pp. 23-24). As explained in the Foundation's SB-52 Response, the taking at issue in this case meets the standard of a physical taking that has been recognized under Colorado law long before the concept of a regulatory taking was acknowledged by the courts. Therefore, the Foundation cited this long-standing Colorado law in its Motion, which was interwoven in the section explaining how SB-52 impaired the Foundation's water rights. (*See, e.g., Foundation's SB-52 Motion*, ¶¶ 38 – 43).

53. A water right is a "right to use in accordance with its priority." *Frees v. Tidd*, 349 P.3d 259, 264 (Colo. 2015). Therefore, the ability to place a call on the river and curtail all junior users from using water during times of shortage represents the right to exclude others from your property, which is "one of the most essential sticks in the bundle of rights." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). SB-52 operates as a limitation on this right by preventing the Foundation from excluding improperly designated groundwater from using its property. The right to exclude others is so essential to the use that such a limitation on that right amounts to a physical taking of property. *Id. at* 179-180. ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."). As a result, interference with the priority system constitutes a physical taking of property. *See Armstrong v. Larimer Cty. Ditch Co.*, 27 P. 235, 238 (Colo. 1891); *Town of Sterling v. Pawnee Ditch Extension Co.*, 94 P. 339, 341 (Colo. 1908); *see also Kobobel v. State, Dep't of Nat. Res.*, 249 P.3d 1127, 1137, fn. 9 (Colo. 2011).

54. SB-52 insulates improperly designated groundwater from the priority system by preventing the removal of groundwater from a designated basin that has more than a *de minimis* impact on the surface flows despite the fact that the NHP Basin was designated subject to a requirement that mandated the opposite occur. Therefore, it allows the use of water from the same source of supply without regard to the priority of the Foundation's water rights. Thereby stripping the Foundation's water rights of their most valuable right – their priority date. *See Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893) ("…to deprive a person of his priority is to deprive him of a most valuable property right ...."). Not only does it allow the surface flows to be depleted without regard to the senior right, but it protects those junior well users from being administered pursuant to the priority system and from any claim of injury by those senior rights. "To divest such [a] right and confer it upon another without compensation would be clearly an infraction of constitutional guaranties, and the inequitable character of the decree becomes at once apparent." *Armstrong v. Larimer Cty. Ditch Co.*, 27 P. 235, 238 (Colo. 1891).

55. Moreover, the RRCA Ground Water "Model serve[s] as [a] binding admission[] by the State of Colorado and . . . is a binding recognition of the extent to which groundwater pumping is depleting surface flows." (*Order Granting Summary Judgment Motions in Part and Denying Summary Judgment Motions in Part*, ¶ 41, *Case No. 06CV31, Pioneer Irrigation District v. Colo. Ground Water Comm'n*, a copy of which was attached as Exhibit 1 to the Foundation's SB-52

Motion). This is the type of future conditions and factual data that the 1965 legislature had in mind when, in its wisdom, it built in a statutory requirement that required the boundaries of a designated basin to be modified to ensure that all rights diverting the same source of supply would be administered in priority of each other and in a manner consistent with the Colorado Constitution. However, as a result of SB-52 this evidence cannot be presented to the Commission and the valuable priorities of the Foundation's water rights have been taken and given to junior groundwater users.

56. Ultimately, if the Foundation is not allowed to demonstrate that the groundwater pumping is impacting its water rights, then the Foundation's water rights will have been taken without compensation and given to the groundwater users in the NHP Basin in violation of the Colorado Constitution Colo. Const. Art. II § 15; *see also* U.S. Const. Amend V. The takings clause "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Nav. Co. v. U S*, 148 U.S. 312, 325 (1893).

57. Lastly, the Court should reject the Defendants' claim that the Foundation has not shown that SB-52 "fails to substantially advances legitimate state interests." (*Defendants' Response*, p. 24). As discussed in the Foundation's SB-52 Response, the "substantially advances" analysis is no longer a proper test for a takings analysis. (*Foundation's SB-52 Response*, ¶ 68). The Defendants' other arguments regarding the loss of economic value should also be rejected. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (2015) ("[W]hen there has been a physical appropriation, 'we do not ask ... whether it deprives the owner of all economically valuable use' of the item taken." (citing *Tahoe–Sierra Preservation Council*, 535 U.S., at 323, 122 S.Ct. 1465); *for further discussion, see the* (*Foundation's SB-52 Response*, ¶ 69).

58. "The Government has broad powers, but the means it uses to achieve its ends must be consistent with the letter and spirit of the constitution. As Justice Holmes noted, a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Horne,* 135 S. Ct. at 2428 (internal citations omitted).

III. SB-52 Violates the Due Process Clause.

59. As the Foundation explained in its SB-52 Motion, as well as its SB-52 Response, the protection against unconstitutional retrospective legislation is part and parcel with the due process guarantees of the Constitution. The retroactive operation of SB-52 changes the legal consequences of the 1966 designation of the NHP Basin and denies the Foundation the ability to protect its water rights. "[T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971). In fact, "[t]he keystone in the structure of due process is that the person aggrieved shall have the unquestioned right to his day in court." *Ace Flying Serv., Inc. v. Colorado Dep't of Agric*., 314 P.2d 278, 284 (Colo. 1957).

60. As further discussed in the Foundation's SB-52 Response, this case is distinguishable from *Central Colorado Water Conservancy District v. Simpson*, 877 P.2d at 342-343. (*Foundation's SB-52 Response*, ¶72). In *Simpson*, there was no due process violation because "any holder of a water right who may suffer injury by the exercise of a junior right … may seek protection from such injury in the appropriate court." *Id.* at 343. Here, SB-52 completely eliminated the Foundation's right to seek protection from injury thereby violating the due process clause.

61. The Defendants also reiterate their position that SB-52 does not violate the Foundation's constitutional right to due process because SB-52 only affected a remedy, not a right. (*Defendants' Response*, p. 26). First, the Foundation's water rights and their respective priorities are entitled to the constitutional protections of due process. *See Ficarra*, 849 P.2d at 19; *see also Nichols v. McIntosh*, 34 P. 278, 280 (Colo. 1893) ("[a] priority of right to the use of water, being property, is protected by our constitution so that no person can be deprived of it without 'due process of law.") (citing Const. Colo. art. 2, § 25; Cooley, Const. Lim. (6th Ed.) 431 et seq.). Second, and as explained above, if SB-52 is deemed to only impact a remedy, then such a change can only operate as a bar to due process if an adequate remedy exists. It does not apply in a situation where the remedy has been completely eliminated. *See Moore v. Chalmers-Galloway Live Stock Co*., 10 P.2d 950 (Colo. 1932); *see also Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). Accordingly, while the Foundation may not have a right in a particular remedy, it does have a right to some effective procedure to protect its senior water rights. Therefore, SB-52 cannot act as a bar to the Foundation's right to due process regardless of whether SB-52 impacted vested rights or only eliminated a remedy.

62. In addition, the Defendants argue that the Foundation had its chance at due process at the time the NHP Basin was designated or for each of the final well permits. (*Defendants' Response*, p. 26). What the Defendants fail to acknowledge, however, is that when the NHP Basin was designated and each of the well permits issued, both were created or issued subject to the provision that required the Commission to modify the basin boundaries when evidence to exclude improperly designated groundwater. As analogized in paragraph 73 of the Foundation's SB-52 Response, that provision was a protective term and condition. The retroactive removal of such a term and condition changed the legal consequences of these transactions and cannot be used to deny the Foundation its right to due process. "The hand of the legislature is restrained by the due process clause of our state constitution from overturning established principles of private rights and distributive justice." *People ex rel. Juhan v. Dist. Court for Jefferson Cty.*, 165 Colo. 253, 265-66 (1968).

IV. Equal Protection.

63. The Foundation did not mention equal protection in its Motion because the Foundation's Complaint did not make the allegation that SB-52 violates the equal protection clause. The Foundation has alleged equal protection violations with regard to some of its other claims, but not with regard to SB-52.

C. Certain Issues Raised by The Defendants are Unrelated to the Relief Requested.

I. The Defendants raise issues that are not relevant to the relief requested.

64. The Defendants' Response includes an entire section that raises an issue that is not relevant to the Foundation's SB-52 Motion or the relief requested in the above-captioned case. (*Defendants' Response*, pp. 27-32). Specifically, the Defendants argue that the Foundation's "proposed attack on final permits" is barred by claim and/or issue preclusion (*Id*.) (emphasis added). The issue is with a "proposed attack" — not with any relief actually requested by the Foundation in this case. The Defendants are asking this Court to use its discretionary authority to not only put the cart before the horse, but to deny the Foundation's SB-52 Motion based on arguments that seek to prevent a relief the Foundation has not requested in the Complaint, let alone in its SB-52 Motion.

65. The Defendants also mischaracterize the relief sought by the Foundation by its SB-52 Motion and the Complaint by stating that the "Foundation seeks not simply to alter the boundaries of the NHP Basin, but to change the legal status of groundwater withdrawn by wells holding final permits from designated groundwater to tributary groundwater." (*Defendants' Response*, p. 15). To be clear, the Foundation is not seeking such relief in this case or by its SB-52 Motion. Therefore, the Foundation will only provide a limited response. First, the Defendants claim the 1965 Act does not provide a mechanism for a change in legal status. (*Id*.). It doesn't need to. If groundwater is no longer part of a designated groundwater basin, it is allocated and administered pursuant to the 1969 Act. Second, the Defendants do not provide any citations to support their claim that the "Colorado Supreme Court consistently upheld the finality of a basin designation order" up until *Gallegos*. (*Id*.). Therefore, the Foundation is unable to assess the validity of such a statement. Regardless, it is a moot point because the Colorado Supreme Court explicitly rejected this "collateral attack" argument in *Gallegos*. 147 P.3d at 32. Third, the policy goals of the 1965 Act are predicated on the groundwater having less than a *de minimis* impact on surface flows. Legislative intent would only be frustrated by not keeping "designated groundwater and groundwater subject to the 1969 Act separate and distinct." *Gallegos*, 147 P.3d at 32.

II. The Foundation has been sufficiently injured to challenge the constitutionality of SB-52.

66. In the alternative, the Defendants argue that the Foundation cannot show sufficient injury to challenge the constitutionality of SB-52. (*Defendants' Response*, p. 32-35). Contrary to the Defendants' assertions, the Foundation does have standing to challenge SB-52.

67. Under the Uniform Declaratory Judgments Law, "[a]ny person …whose rights, status, or other legal relations are affected by a statute … may have determined any question of construction or validity arising under the … statute … and obtain a declaration of rights, status, or other legal relations thereunder." C.R.S. § 13-51-106. The "purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." C.R.S. § 13-51-102. Jurisdiction exists if the

"controversy contains a currently justiciable issue or an existing legal controversy, rather than the mere possibility of a future claim." *Schwartz ex rel. Estate of Schwartz v. Schwartz*, 183 P.3d 552, 553 (Colo. 2008) (internal citations omitted).

68. "[Th]e required showing of demonstrable injury is somewhat relaxed in declaratory judgment actions." *Mt. Emmons Min. Co. v. Town of Crested Butte,* 690 P.2d 231, 240 (Colo. 1984). In fact, "[a] plaintiff seeking a declaratory judgment on the validity of a regulatory scheme need not violate the regulation and thus become subject to punishment 'in order to secure the adjudication of uncertain legal rights.'" *Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1053 (Colo. 1992). "The injury-in-fact element of standing is established when the allegations of the complaint, along with any other evidence submitted on the issue of standing, establishes that the regulatory scheme threatens to cause injury to the plaintiff's present or imminent activities." *Id.* "Once the plaintiff has sufficiently alleged or demonstrated an injury in fact, it then must be determined whether the injury is to a legally protected interest—that is, whether the plaintiff's interest emanates from a constitutional, statutory, or judicially created rule of law that entitles the plaintiff to some form of judicial relief." *Id.*

69. As discussed at length in the Foundation's SB-52 Motion and its SB-52 Response, the Foundation does have a legally protected interest that is being injured by SB-52. Despite this, the Defendants indicate that the "historical facts" apparently used by the Foundation to demonstrate injury are not sufficient. It is unclear what the Defendants mean or refer to by their use of "historical facts." (*Defendants' Response*, p. 33). To the extent the Defendants are referring to the mention of the RRCA Model in the background section of the SB-52 Motion, the RRCA Model is cited because it shows there is new information demonstrating the extent to which wells are having much more than a *de minimis* impact – more than 38,000 acre-feet of depletions back in 2009. The Foundation is not, at this juncture, quantifying the impact to its water rights caused by designated groundwater well depletions, although it believes that can be done if needed for a de-designation hearing before the Commission if SB-52 is found unconstitutional.

70. The lone case relied upon by the Defendants is instructive in its complete contrast to the subject case. In *Mt. Emmons Min. Co.*, a complaint was filed regarding a watershed ordinance that had not even been applied to the plaintiff. The Court held that depending upon how the ordinance was applied, it "conceivably might have no bearing on [the plaintiff's] activities at all", and even if the plaintiff was subject to the ordinance, there were procedures available to lessen or eliminate any injury to the plaintiff. 690 P.2d at 241. Thus, under those circumstances, the Court held that the adverse impact alleged by plaintiff was based on "mere hypothetical possibilities" that did not support summary judgment. *Id.* at 242; *see Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1053-54 (Colo. 1992) (confirming that *Mt. Emmons* was decided based upon "the number of unresolved factual issues that rendered the case inappropriate for resolution by summary judgment"). In direct contrast, it is undisputed that SB-52 applies to the NHP Basin and prevents any changes to the basin boundaries that would exclude existing well permits. It is not a mere hypothetical possibility – it is reality.

71. In addition, the Defendants use *Mt. Emmons* as a basis to allege there are mixed questions of law and fact regarding "the manner in which the Commission may ultimately apply SB-52 and how such application might injure the Foundation." (*Defendants' Response*, p. 34). This assertion has no merit. In fact, the Colorado Supreme Court clarified that the holding in *Mt. Emmons* was not based on the plaintiff's "failure to first seek and be denied a permit before challenging the validity of the watershed ordinance" *Bd. of Cty. Comm'rs, La Plata Cty.*, 830 P.2d at 1053-54.

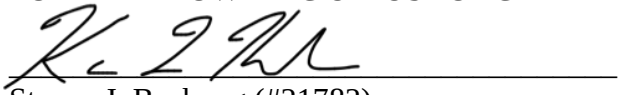
72. In this instance, the relief sought is a determination that SB-52 is unconstitutional as-applied to the NHP Basin. Clearly, a ruling in the Foundation's favor "will serve a useful purpose in clarifying and settling the legal relations" and will "terminate and afford relief from the uncertainty . . . and controversy." *People v. Baker*, 297 P.2d 273. 277 (Colo. 1956).

CONCLUSION.

For the reasons set forth herein, in the Foundation's SB-52 Response, and in the Foundation's SB-52 Motion, the Foundation seeks partial summary judgment on its SB-52 Claim, which requires a finding that SB-52 is unconstitutional.

Respectfully submitted this 6th day of May, 2016.

PORZAK BROWNING & BUSHONG LLP



Steven J. Bushong (#21782)
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Attorneys for the Jim Hutton Educational Foundation

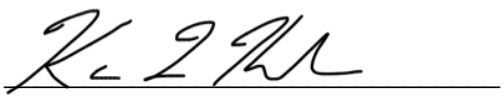
CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2016, a true and correct copy of the foregoing **THE JIM HUTTON EDUCATIONAL FOUNDATION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ITS SENATE BILL 52 CLAIM** was filed and served by the Integrated Colorado Courts E-Filing System ("ICCES") addressed to counsel for each of the parties in the above-captioned matter, as follows:

Party Name	**Party Type**	**Attorney Name**
Colorado Division of Water Resources	Defendant	Daniel E Steuer (CO Attorney General) Ema I.G. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Colorado Parks and Wildlife	Defendant	Katie Laurette Wiktor (CO Attorney General) Timothy John Monahan (CO Attorney General)
David Nettles	Defendant	Daniel E Steuer (CO Attorney General) Ema I.G. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
Dick Wolfe	Defendant	Daniel E Steuer (CO Attorney General) Ema I.G. Schultz (CO Attorney General) Preston Vincent Hartman (CO Attorney General)
4m Feeders Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
4m Feeders LLC	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Carlyle James as Trustee of the Chester James Trust	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
City of Burlington	Defendant-Well Owner	Alix L Joseph (Burns Figa and Will P C) Steven M. Nagy (Burns Figa and Will P C)
City of Holyoke	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
City of Wray Colorado	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Colorado Agriculture Preservation Assoc	Defendant-Well Owner	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Colorado State Board Land Commissioners	Defendant-Well Owner	Virginia Marie Sciabbarrasi (CO Attorney General)
David L Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Dirks Farms Ltd	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Don Myrna and Nathan Andrews	Defendant-Well Owner	Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch)

Party Name	Party Type	Attorney Name
Happy Creek Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Harvey Colglazier	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
J and D Cattle LLC	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
James J May	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Julie Dirks	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Kent E Ficken	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Lazier Inc	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Mariane U Ortner	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Marjorie Colglazier Trust	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
May Acres Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Brothers Inc	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
May Family Farms	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
North Well Owners	Defendant-Well Owner	Kimbra L. Killin (Colver Killin and Sprague LLP) Russell Jennings Sprague (Colver Killin and Sprague LLP)
Protect Our Local Community's Water LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Republican River Water Conservation Dist	Defendant-Well Owner	David W Robbins (Hill and Robbins PC) Peter J Ampe (Hill and Robbins PC)
Saving Our Local Economy LLC	Defendant-Well Owner	John David Buchanan (Buchanan and Sperling, P.C.)

Party Name	Party Type	Attorney Name
		Timothy Ray Buchanan (Buchanan and Sperling, P.C.)
Steven D Kramer	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Thomas R May	Defendant-Well Owner	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Timothy E Ortner	Defendant-Well Owner	Alvin Raymond Wall (Alvin R Wall Attorney at Law)
Tri State Generation and Transmission Assn.	Defendant-Well Owner	Aaron S. Ladd (Vranesh and Raisch) Justine Catherine Shepherd (Vranesh and Raisch)
Yuma Cnty Water Authority Public Improv	Defendant-Intervenor	Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP) John A Helfrich (Brownstein Hyatt Farber Schreck LLP) Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)
Colorado Ground Water Commission	Defendant-Intervenor	Chad Matthew Wallace (CO Attorney General) Patrick E Kowaleski (CO Attorney General)
Arikaree Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Central Yuma Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Frenchman Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Marks Butte Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Plains Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Sandhills Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
Wy Ground Water Mgmt Dist	Defendant-Intervenor	Eugene J Riordan (Vranesh and Raisch) Leila Christine Behnampour (Vranesh and Raisch)
East Cheyenne Ground Water Mgmt Dist	Defendant-Intervenor	John David Buchanan (Buchanan and Sperling, P.C.) Timothy Ray Buchanan (Buchanan and Sperling, P.C.)



Karen L. Henderson