WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9th Avenue Greeley, CO 80631	
Plaintiffs: PAWNEE WELL USERS, *et al.* **and** **Plaintiff-Intervenors: DAVID C. BLACK, *et al.*** **v.** **Defendants: DICK WOLFE, in his capacity as COLORADO STATE ENGINEER, *et al.*** **and** **Defendant-Intervenors: BP AMERICA PRODUCTION COMPANY *et al.***	**▲COURT USE ONLY▲** Case No.: 10CW89 Div. 1
FINAL JUDGMENT AND DECREE	

This matter comes before the court on the briefing of Plaintiffs, Plaintiff-Intervenors, Defendants, and Defendant-Intervenors.

Plaintiffs Pawnee Wells Users, Inc., the Harmony Ditch Company, the City of Boulder, Centennial Water and Sanitation District, Natural Soda, Inc., the Purgatoire River Water Conservancy District, the City of Sterling, William S. Vance, Jr. and Elizabeth S. Vance, James G. Fitzgerald and Mary Theresa Fitzgerald, the Oil and Gas Accountability Project, San Juan Citizen's Alliance, Vista Pacifica, LLC, Dale Bell, Simon Land & Cattle Co., James and Diane Benesch, Mike Meschke, LLH Operations, LLLP, and Sheryl Cantalano and Plaintiff-Intervenors David C. Black, et al. (collectively "Plaintiffs") filed an Opening Brief on November 9, 2010[1].

The Colorado State Engineer ("State Engineer") filed a Response on April 6, 2011.

Defendant-Intervenors BP America Production Co., Noble Energy, Inc., Anadarko Petroleum Corp., K.P. Kauffman Co., Inc., Petroleum Development Corp., Encana Oil & Gas (USA) Inc., Pioneer Natural Resources USA, Inc., XTO Energy Inc., El Paso E&P Co., L.P., ConocoPhillips Co., Chevron USA, Inc. and its Affiliates Chevron Midcontinent, L.P. and Four Star Oil & Gas Co., Samson Resources Co., Diamond Operating, Inc., Energen Resources Corp., EOG Resources, Inc., Colorado Oil and Gas Assoc., Gunnison Energy Corp., Southern Ute

[1] The City of Sterling, William S. Vance, Jr. and Elizabeth S. Vance, James G. Fitzgerald and Mary Theresa Fitzgerald, the Oil and Gas Accountability Project and San Juan Citizen's Alliance did not join in Section IV.D.2 of the Opening Brief regarding the State Engineer's authority to make determinations regarding specific locations of nontributary ground water.

Indian Tribe, and Colorado Petroleum Assoc. (collectively "Defendant-Intervenors") filed a Response on April 6, 2011.

The Southern Ute Indian Tribe ("Tribe") filed a separate Response in regards to the State Engineer's adoption of Rules 17.3.F and 17.7.D.2 on April 6, 2011.

Plaintiffs City of Sterling, William S. Vance, Jr. and Elizabeth S. Vance, James G. Fitzgerald and Mary Theresa Fitzgerald, San Juan Citizen's Alliance, and the Oil and Gas Accountability Project (collectively "Sterling Plaintiffs") filed a Reply on April 26, 2011.

Plaintiffs Pawnee Well Users, Inc., the Harmony Ditch Co., City of Boulder, Centennial Water and Sanitation District, Natural Soda, Inc., Purgatoire River Water Conservancy District, Vista Pacifica, LLC, Dale Bell, Simon Land & Cattle Co., James and Diana Benesch, Mike Meschke, LLH Operations, LLLP, and Sheryl Cantalano, filed a Reply on May 24, 2011.

Defendant-Intervenors BP America Production Co., Noble Energy, Inc., Anadarko Petroleum Corp., K.P. Kauffman Co., Inc., Petroleum Development Corp., Encana Oil & Gas (USA) Inc., Pioneer Natural Resources USA, Inc., XTO Energy Inc., El Paso E&P Co., L.P., ConocoPhillips Co., Chevron USA, Inc. and its Affiliates Chevron Midcontinent, L.P. and Four Star Oil & Gas Co., Samson Resources Co., Diamond Operating, Inc., Energen Resources Corp., EOG Resources, Inc., Colorado Oil and Gas Assoc., Gunnison Energy Corp., Southern Ute Indian Tribe, and Colorado Petroleum Assoc. filed a Sur-Reply on House Bill 11-1286 on June 20, 2011.

The State Engineer filed a Sur-Reply on House Bill 11-1286 on June 20, 2011.

Plaintiffs and Plaintiff-Intervenors filed a Final Reply on July 5, 2011. The parties have not requested oral argument.

The court has considered the Opening Brief, Defendants' Response Brief, Defendant-Intervenors' Response Brief, the Southern Ute Indian Tribe's Response Brief, Certain Plaintiffs' Reply Brief, Plaintiffs' and Plaintiff-Intervenors' Reply Brief, Defendant-Intervenors' Sur-Reply, Plaintiff-Intervenors' Final Reply, exhibits, and the record, and hereby finds as follows.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2005, two ranching families sued the State Engineer in the Division 7 Water Court asserting that the diversion of ground water to facilitate coalbed methane ("CBM") production was a beneficial use. The Water Court agreed, and found that the State Engineer was obligated to regulate CBM ground water diversions by requiring well permits and augmentation plans. In April of 2009, the Colorado Supreme Court affirmed. *See Vance v. Wolfe*, 205 P.3d 1165 (Colo. 2009). The Court further found that the production of oil and gas, in addition to being regulated by the Colorado Oil and Gas Conservation Commission ("COGCC"), was also subject to the Water Right Determination and Administration Act, C.R.S. §§ 37-92-101-602 ("Water Rights Act") and the Colorado Ground Water Management Act, C.R.S. §§ 37-90-101-143 ("Ground

Water Act"). As a result, the Court concluded that the State Engineer must evaluate, administer, and potentially permit over 40,000 existing wells that withdraw water in the course of oil and gas operations ("produced water").

Prior to the Colorado Supreme Court's ruling in *Vance*, the State Engineer requested rulemaking authority from the General Assembly in the event the case was affirmed. The General Assembly enacted House Bill 09-1303 ("H.B. 1303"), which authorized, *inter alia*, State Engineer rulemaking authority under C.R.S. § 37-90-137(7) of the Ground Water Act. Pursuant to H.B. 1303, the State Engineer initiated rulemaking proceedings that resulted in the State Engineer's Produced Nontributary Ground Water Rules, 2 CCR 402-17 ("Final Rules").

On August 31, 2009, the State Engineer initiated the rulemaking process by filing Proposed Rules and Regulations for the Determination of the Nontributary Nature of Ground Water Produced through Wells in Conjunction with the Mining of Minerals ("Proposed Rules"). The Proposed Rules set forth a procedure by which persons could obtain a determination from the State Engineer that certain water was nontributary for the purposes of permitting and administration under C.R.S. § 37-90-137(7). The State Engineer also filed a notice allowing persons to submit proposed alternate rules ("Proposed Alternate Rules"). The Proposed Alternate Rules would allow the State Engineer to make nontributary determinations regarding ground water found in particular geologic formations for permitting and administrative purposes. In October 2009, the Hearing Officer bifurcated the rulemaking process into two phases. The first phase considered the Proposed Rules and Proposed Alternate Rules. The second phase considered the Proposed Alternate Rules of oil and gas producers seeking determinations of nontributary groundwater for areas of conventional oil and gas production.

The Final Rules were adopted by the State Engineer in December 2009, and have two primary objectives. First, they delineate areas of the State as nontributary for purposes of the State Engineer's administration of produced water. Second, the Rules establish an adjudicatory procedure governing the State Engineer's individual nontributary produced water determinations. The Final Rules became effective and subject to judicial review on January 30, 2010.

In addition to the Final Rules, the State Engineer adopted Basin Specific Rules, which are a sub-set of the Final Rules and relate to Proposed Alternate Rules submitted by CBM operators. The Basin Specific Rules were incorporated into the Final Rules by means of appendices and maps. Additional Basin Specific Rules were adopted by the State Engineer at the conclusion of a hearing in early 2010 involving Proposed Alternate Rules regarding nontributary determinations of ground water in various oil and gas formations.

On March 1, 2010, Plaintiffs filed identical complaints ("Complaint") with the water courts in Water Divisions 1 (10CW89), 2 (10CW11), 4 (10CW26), 5 (10CW46), 6 (10CW20), and 7 (10CW13). By order of the Multidistrict Litigation Panel ("MDL Panel") in Case No. 10MDL09, the cases were consolidated under Case No. 10CW89 into a single proceeding before this court. Plaintiffs' Complaint raises several issues concerning the legal sufficiency of the Rules and seeks relief under the State Administrative Procedure Act ("APA") and the Uniform Declaratory Judgment Law ("UDJL").

The Plaintiffs challenge the Final Rules, the Basin Specific Rules, and the Additional Basin Specific Rules, *inter alia*, on the basis of the constitutional and statutory adequacy of the notice of the rulemaking, the pre-hearing and hearing procedures, and on the basis that the State Engineer exceeded the agency's statutory authority. For ease of reference, the court will refer to the Final Rules, the Basin Specific Rules, and the Additional Basin Specific Rules as the "Rules."

II. STANDARD OF REVIEW

The State Engineer adopted the Rules pursuant to the authority granted by the General Assembly in C.R.S. § 37-90-137(7)(c). Section 137(7)(c) provides that judicial review of rules promulgated pursuant to subsection (7) is governed by the APA, specifically C.R.S. § 24-4-106. *See also Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.,* 919 P.2d 212, 216 (Colo. 1996).

Rules adopted by the State Engineer "are presumed to be valid until shown otherwise by a preponderance of the evidence." *Simpson v. Cotton Creek Circles, LLC,* 181 P.3d 252, 261 (Colo. 2008). The standard of review when examining an agency rulemaking is "reasonableness." *Id.* at 217. "When courts review rules, the administrative record provides the basis for relating the rule to the applicable law, in the process of ascertaining whether the agency has complied with the required legal standards." *Id.*

If the court finds no error, it shall affirm the agency action. C.R.S. § 24-4-106(7). If the court finds that the agency action is arbitrary and capricious, denial of a statutory right, contrary to a constitutional right, in excess of statutory jurisdiction, an abuse of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence, or otherwise contrary to law then the court shall set aside the agency action. *Id.* The court may not substitute its judgment for that of the agency. *Amax, Inc. v. Colo. Water Quality Control Comm'n*, 790 P.2d 879, 883 (Colo. App. 1989), *modified* (March 29, 1990). As a result, the court applies a deferential standard of review to factual and policy determinations made by the agency. *Alamosa-La Jara v. Gould*, 674 P.2d 914, 929 (Colo. 1983), *modified* (January 23, 1984). In addition, an agency's interpretation of its own regulations and enabling legislation is entitled to great weight. *See Amax*, 790 P.2d at 883. Courts "give deference to the interpretation of a statute by the agency charged with enforcement of that statute." *Brighton Pharmacy, Inc. v. Colo. State Pharmacy Bd.*, 160 P.3d 412, 418 (Colo. App. 2007).

"[W]hile courts defer to policy determinations in rule-making proceedings, that deference 'does not extend to questions of law such as the extent to which rules and regulations are supported by statutory authority.'" *Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252, 261 (Colo. 2008) (citing *Alamosa-La Jara v. Gould*, 674 P.2d 914, 929 (Colo. 1983)).

III. LEGAL AUTHORITY

A. House Bill 09-1303

In 2009, the Colorado General Assembly enacted H.B. 1303. The section of H.B. 1303 pertaining to the present action was codified at C.R.S. § 37-90-137(7)(c). In relevant part, this subsection provided:

> In the case of dewatering of geologic formations by withdrawing nontributary ground water to facilitate or permit mining of minerals:
>
> . . .
>
> (c) The state engineer may, pursuant to the "State Administrative Procedure Act", adopt rules to assist with the administration of this subsection (7). In all rule-making proceedings authorized by this subsection (7), the state engineer shall afford interested persons the right of cross-examination. Judicial review of all rules promulgated pursuant to this subsection (7) shall be in accordance with the "State Administrative Procedure Act"; except that venue for such review shall lie exclusively with the water judge or judges for the water division or divisions within which the ground water that is the subject of such rules is located. Any rules promulgated pursuant to this subsection (7) shall not conflict with existing laws and shall not affect the validity of ground water well permits existing prior to the adoption of such rules.

Then in 2011, the Colorado General Assembly passed House Bill 11-1286 ("H.B. 1286"), modifying this subsection.

B. House Bill 11-1286

With the passage of H.B. 1286, the Colorado Assembly amended C.R.S. § 37-90-137(7)(c), which now provides:

> In the case of dewatering of geologic formations by withdrawing nontributary ground water to facilitate or permit mining of minerals:
>
> . . .
>
> (c) The state engineer may, pursuant to the "State Administrative Procedure Act", article 4 of title 24, C.R.S., adopt rules to assist with the administration of this subsection (7). The rule-making authority includes the promulgation of rules pursuant to which ground water within formations and basins, in whole or part, is determined to be nontributary for the purposes of this subsection (7). The rules may also provide rule-making and adjudicatory procedures for nontributary determinations to be made after the initial rule-making pursuant to this subsection (7). In all rule-making proceedings authorized by this subsection (7), the state

engineer shall afford interested persons the right of cross-examination. Judicial review of all rules promulgated pursuant to this subsection (7), including all nontributary determinations made pursuant to this subsection (7), is in accordance with the "State Administrative Procedure Act"; except that venue for such review lies exclusively with the water judge or judges for the water division or divisions within which the ground water that is the subject of such rules or determinations is located. In any judicial action seeking to curtail the withdrawal, use, or disposal of ground water pursuant to this subsection (7) or to otherwise declare such activities unlawful, the court shall presume, subject to rebuttal, that any applicable nontributary determination made by the state engineer is valid. Any rules promulgated pursuant to this subsection (7) must not conflict with existing laws and do not affect the validity of ground water well permits existing prior to the adoption of such rules.

In addition, the "applicability" section provides:

SECTION 2. Applicability. This act shall apply to nontributary determinations made and rules promulgated before, on, or after the applicable effective date of this act.

C. Colorado Administrative Procedure Act, Rulemaking Procedure, C.R.S. § 24-4-103

The relevant parts of the Colorado APA, C.R.S. § 24-4-103, provide:

(2.5)(a) At the time of filing a notice of proposed rule-making with the secretary of state as the secretary may require, an agency shall submit a draft of the proposed rule or the proposed amendment to an existing rule and a statement, in plain language, concerning the subject matter or purpose of the proposed rule or amendment to the office of the executive director in the department of regulatory agencies.

(3)(a) Notice of proposed rule-making shall be published as provided in subsection (11) of this section and shall state the time, place, and nature of public rule-making proceedings that shall not be held less than twenty days after such publication, the authority under which the rule is proposed, and either the terms or the substance of the proposed rule or a description of the subjects and issues involved.

(4)(a) At the place and time stated in the notice, the agency shall hold a public hearing at which it shall afford interested persons an opportunity to submit written data, views, or arguments and to present the same orally unless the agency deems it unnecessary. The agency shall consider all such submissions. Any proposed rule or revised proposed rule by an agency which is to be considered at the public hearing, together with a proposed statement of basis, specific statutory authority, purpose, and the regulatory analysis required in subsection (4.5) of this section,

shall be made available to any person at least five days prior to said hearing. The rules promulgated by the agency shall be based on the record, which shall consist of proposed rules, evidence, exhibits, and other matters presented or considered, matters officially noticed, rulings on exceptions, any findings of fact and conclusions of law proposed by any party, and any written comments or briefs filed.

(b) All proposed rules shall be reviewed by the agency. No rule shall be adopted unless:

(I) The record of the rule-making proceeding demonstrates the need for the regulation;
(II) The proper statutory authority exists for the regulation;
(III) To the extent practicable, the regulation is clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation;
(IV) The regulation does not conflict with other provisions of law; and
(V) The duplication or overlapping of regulations is explained by the agency proposing the rule.

(c) Rules, as finally adopted, shall be consistent with the subject matter as set forth in the notice of proposed rule-making provided in subsection (11) of this section.

D. Colorado Administrative Procedure Act, Judicial Review, C.R.S. § 24-4-106

The relevant section of C.R.S. § 24-4-106 pertaining to judicial review of an agency's action provides:

(7) If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional

provisions involved and shall apply such interpretation to the facts duly found or established.

IV. ANALYSIS

A. Standing

At the outset, the court finds that the Plaintiffs have standing. Based on the allegations in the Complaint, it appears to the court that the Plaintiffs have sufficiently alleged injury in fact to a legally protected interest. *See e.g., Bd. Of County Comm'rs of County of Adams v. Colo. Dept. of Public Health & Env't*, 218 P.3d 336, 338 (Colo. 2009); *see also Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009) (If one plaintiff has standing, the court need not determine whether other plaintiffs have standing as well.). Several Plaintiffs own water rights in the areas in which the State Engineer made nontributary determinations. These determinations, if erroneous, could injure the vested water rights of certain Plaintiffs.

B. State Engineer Authority

The dispute between the parties centers on whether the General Assembly delegated to the State Engineer authority to make nontributary determinations pursuant to C.R.S. § 37-90-137(7) in administrative rulemaking and adjudicative proceedings. Plaintiffs argue that the State Engineer's adoption of the Rules is unlawful because the State Engineer exceeded his statutory authority. Moreover, Plaintiffs maintain that the State Engineer encroached upon the authority of the water court by making water rights determinations for the benefit of the oil and gas industry. The State Engineer argues that Plaintiffs 1) mischaracterize the nature of determinations made pursuant to the Rules; 2) misstate the scope of State Engineer authority; 3) ignore H.B. 1303; and 4) mischaracterize the legal effect of the Rules.

1. State Engineer Authority to Administer Water Rights

"While it is generally true that all disputes involving 'water matters' are within the exclusive jurisdiction of the water court, the General Assembly has specifically delegated authority over certain 'water matters' to the State Engineer." *V-Bar Ranch LLC v. Cotten*, 233 P.3d 1200, 1206 (Colo. 2010). There are several examples of statutory grants of authority to the State Engineer.

The Water Rights Act includes a general grant of authority to the State Engineer. C.R.S. § 37-92-301(1) ("The state engineer shall be responsible for the administration and distribution of the waters of the state, and, in each division, such administration and distribution shall be accomplished through the offices of the division engineer as specified in this article."). This general grant of authority includes the duty to curtail water rights to prevent injury to senior water rights, C.R.S. § 37-92-502(2)(a); curtailing water rights if water is not being applied to beneficial use, *Id.*; approving substitute water supply plans, C.R.S. § 37-92-308; and approving interruptible water supply agreements, C.R.S. § 37-92-309.

In addition, the Ground Water Act authorizes the State Engineer to issue well permits if there is unappropriated water available and the vested water rights of others will not be injured. C.R.S. § 37-90-137(2)(b)(I)(A). The permits cover tributary and nontributary wells, and wells that facilitate the mining of minerals. In order to perform his duty of issuing well permits, the State Engineer must determine whether there is water available for appropriation, C.R.S. § 37-90-137(2)(b); whether issuance of the permit will cause material injury, *Id.*; whether the permit must include provisions to prevent waste, pollution, or material injury to existing rights, C.R.S. § 37-90-137(2)(c); and whether proposed terms and conditions will prevent material injury, *Id.*. Notably, he must also determine whether to issue a tributary or nontributary permit, C.R.S. § 37-90-103(10.5); and the amount of water that may be withdrawn pursuant to C.R.S. § 37-90-137(4).

Under Colorado water law, both the State Engineer and the water courts have authority to make nontributary determinations. *See Bayou Land Co. v. Talley*, 924 P.2d 136, 149 (Colo. 1996); *Colo. Ground Water Comm'n v. North Kiowa-Bijou Groundwater Management Dist.*, 77 P.3d 62, 71-72. (Colo. 2003) (The right to nontributary ground water vests through construction of a well pursuant to a State Engineer issued permit or through a water court adjudication.). Thus, the remaining question for this court to answer is whether the General Assembly granted authority to the State Engineer to make nontributary determinations pursuant to C.R.S. § 37-90-137(7).

2. C.R.S. § 37-90-137(7), as Amended by H.B. 1303, Grants Authority to the State Engineer to Make Nontributary Determinations

The crux of the current dispute is whether the General Assembly granted the State Engineer authority to make nontributary determinations pursuant to C.R.S. § 37-90-137(7). The court finds that the General Assembly granted the State Engineer, through implementation of H.B. 1303, authority to make nontributary determinations in Section 137(7).

Section 137(7) governs the "dewatering of geologic formations by withdrawing nontributary groundwater to facilitate or permit mining of minerals." It is apparent from the statutory language that the State Engineer must make a nontributary determination before issuing a permit. If the State Engineer did not have authority to make a nontributary determination prior to issuing a permit, the water court would be the only entity with jurisdiction to make that determination. In light of the *Vance* decision and the purposes behind implementation of H.B. 1303, such a result was not what the General Assembly contemplated. Moreover, case law affirms the State Engineer's authority to make nontributary determinations in certain instances. *See e.g. Bayou Land Co. v. Talley*, 924 P.2d 136, 149 (Colo. 1996); *Colo. Ground Water Comm'n v. North Kiowa-Bijou Groundwater Management Dist.*, 77 P.3d 62, 71 (Colo. 2003).

It is "well-established that agencies possess implied and incidental powers filling the interstices between express powers to effectuate their mandates. Thus, the lawful delegation of power to an administrative agency carries with it the authority to do whatever is reasonable to fulfill its duties." *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1016 (Colo. 2003). Integral to the delegation contained in Section 137(7) is the authority to make nontributary determinations. If the State Engineer were not authorized to make such determinations, he could not complete his

delegated task of administering ground water for mining of minerals. Subsection 137(7)(c) is not superfluous; it merely clarifies how the State Engineer may administer ground water for mining following the *Vance* decision.

C.R.S. § 37-90-137(7)(c), as amended by H.B. 1303, is an express grant of authority to the State Engineer to adopt rules to assist in administering Section 137(7). Because the court finds that Section 137(7)(c) grants authority to the State Engineer to make nontributary determinations and because Section 137(7)(c) grants rulemaking authority to the State Engineer, it follows that the State Engineer may make such nontributary determinations through rulemakings.

3. Authority to Conduct Adjudications that Make Nontributary Determinations

Rule 17.5 provides that the State Engineer may conduct adjudications to make nontributary determinations: "As an alternative to requesting a rulemaking proceeding, an Operator may obtain a determination regarding the nontributary nature of Produced Water through an adjudicatory proceeding before the State Engineer." While H.B. 1303 expressly states that the State Engineer may make rules, it is silent as to whether the State Engineer may conduct adjudications in order to make nontributary determinations.

Plaintiffs argue that Subsection 137(7)(c), prior to H.B. 1286, did not impliedly delegate authority to the State Engineer to conduct adjudications to make nontributary determinations. The State Engineer and Defendant-Intervenors maintain that H.B. 1303 included the implied authority of the State Engineer to make nontributary determinations by adjudication. Plaintiffs, however, submit that when the General Assembly delegates authority to the State Engineer to conduct adjudications, it has done so expressly. Plaintiffs cite C.R.S. § 37-90-105(6), outlining adjudicatory procedures available to challenge a grant or denial of a small capacity well permit, and C.R.S. § 37-90-137(2)(b)(II), regarding a hearing concerning permits to construct wells outside a designated basin. Defendant-Intervenors nonetheless contend that the authority to promulgate rules lends itself to establish adjudicatory procedures. In support, Defendant-Intervenors quote the Colorado Supreme Court in *Zamarripa v. Q & T Food Stores, Inc.*, in which the Court concluded that rulemaking is the "preferred means for delineating more specific criteria to guide the exercise of agency quasi-adjudicatory discretion." 929 P.2d 1332, 1342 (Colo. 1997).

Defendant-Intervenors urge the court to find that the adjudications are a valid exercise of power considering the liberal grants of discretion to state agencies to make rules. The State Engineer and Defendant-Intervenors cite no examples where the legislature has granted rulemaking authority to an agency, and the agency used the delegation to enact rules that provide for adjudications to complete the delegated task. However, they cite *Hawes v. Colo. Div. of Ins.*, in which the Colorado Supreme Court explained that the delegation of power to an administrative agency comes with authority to do whatever is reasonable to fulfill its duties. 65 P.3d 1008, 1016 (Colo. 2003). In addition, Defendant-Intervenors outline the numerous procedures the State Engineer established for the adjudications and argue that such procedures

afford third parties "substantially more notice and opportunity to participate than existed for many years under previous practice."

While rulemaking and adjudications may involve similar procedures, different statutory requirements apply to adjudications and rulemakings under the APA. *AviComm, Inc. v. Colo. Public Utilities Comm'n*, 955 P.2d 1023, 1030 (Colo. 1998). C.R.S. § 24-4-103 applies to rulemakings, which require notice, publication, and content guidelines. A rulemaking is the "process for the formulation, amendment, or repeal of a rule." C.R.S. § 24-4-102(16). A rule is "the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency." *Colo. Office of Consumer Counsel v. Mtn. States Tel. & Tel. Co.*, 816 P.2d 278, 284 (Colo. 1991). "[I]f the proceeding was meant to, or in effect does, determine policies of general applicability for the future, then it is deemed to be rulemaking." C.R.S. § 24-4-105 applies to adjudications. An adjudication is "the procedure used by an agency for the formulation, amendment, or repeal of an order and includes licensing." C.R.S. § 24-4-102(2). "[P]roceedings that resolve issues affecting a specific party by applying previously determined rules or policies to the circumstances of a particular case are found to be adjudicatory proceedings." *Cotton Creek Circles, LLC v. Rio Grande Water Conservation District*, 218 P.3d 1098, 1107 (Colo. 2009).

The court finds that the State Engineer acted within the authority provided by the General Assembly in H.B. 1303, when he implemented adjudicatory procedures as part of the Rules. Although H.B. 1303 did not specifically reference "adjudications", the directive of H.B. 1303 clearly authorized the State Engineer to implement "Rules" to assist with the administration of C.R.S. § 37-90-137(7) and implicit therein was the ability of the State Engineer to create an adjudicatory procedure as part of the Rules. Additionally, as discussed in more detail in Section IV(E) below, the General Assembly clarified through H.B. 1286 the parameters of the authority it intended to delegate to the State Engineer in H.B. 1303.

4. Rules for Areas Where There is No Oil and Gas Development

Plaintiffs argue that the State Engineer lacks authority to make nontributary determinations in areas where there are no existing or proposed wells. They contend that, to the extent the State Engineer has authority to make nontributary determinations pursuant to Section 137(7)(c), such authority is limited to well permitting and administration for existing and proposed wells. Thus, Plaintiffs claim that where there are no existing or proposed wells, there is no need for the State Engineer to make nontributary determinations. Plaintiffs ask the court to declare such determinations void. In addition, Plaintiffs cite C.R.S. § 37-90-103(10.5) to emphasize that nontributary determinations must be made at the time of the permit application, based on aquifer conditions, and cannot be made prior to a permit application.

The State Engineer argues that his decision to include areas where oil and gas development was not proposed but is likely to occur is a reasonable interpretation of his authority under Section 137(7)(c). The State Engineer contends that the plain language of Section 137(7) broadly states that he may adopt rules to assist with the administration of subsection (7), and thus, on its face, Section (7) does not prohibit him from making such rules.

The court finds that the State Engineer reasonably interpreted his authority under Section 137(7)(c) to include making nontributary determinations for areas where oil and gas production was likely. The court, however, concludes that the State Engineer, prior to the issuance of a permit under the Rules in an area where oil and gas wells presently do not exist, must consider whether aquifer conditions have changed, based on C.R.S. § 37-90-103(10.5). The court further finds that the State Engineer has acknowledged that Rule 17.10 requires him to interpret the Rules so that they do not conflict with existing laws, rules, or decrees.

C. Constitutional Due Process

Now that the court has determined that the State Engineer had authority to make nontributary determinations in rulemakings, the court will consider Plaintiffs' due process arguments. First, the court must determine what process must be afforded and, second, whether the Plaintiffs were provided sufficient procedural due process.

1. Parties' Positions

Plaintiffs argue that the State Engineer violated due process requirements by failing to comply with certain constitutional protections, including providing prior notice, opportunity for a hearing, and time to evaluate evidence and prepare for cross-examination. In support of their claim that the Rules are beyond the scope of the notice, Plaintiffs argue that the during the rulemaking, the State Engineer heard argument and took evidence on Proposed Alternate Rules that sought to modify the procedures in the Proposed Rules and that requested a determination that ground water in certain geographical formations was nontributary. Plaintiffs contend that the notice failed to describe particular areas of the state for which a nontributary determination would be sought. They maintain that, nonetheless, industry submitted 14 Proposed Alternate Rules that designated nontributary ground water in 33 geologic formations. They take issue with the fact that Proposed Alternate Rules were disclosed October 2, 2009, seven days after party status deadline, therefore only parties to the rulemaking received notice of the Proposed Alternate Rules. Plaintiffs also challenge the fact that clarification memoranda issued by the State Engineer expanding the scope of the rulemaking were not published in the Colorado Register. Without notice of the Proposed Alternate Rules, the Plaintiffs argue that they were denied the opportunity to comment on the Basin Specific Rules and Additional Basin Specific Rules. Moreover, when several Plaintiffs attempted to intervene as parties to the rulemaking, the Hearing Officer denied the intervention.

The State Engineer argues that Plaintiffs are not entitled to constitutional procedural protections because prior notice due process protections do not apply to administrative procedures regulating water rights matters. The State Engineer cites a series of cases involving water matters in which the Colorado Supreme Court and this court have ruled that the General Assembly has the authority to place reasonable restrictions on water rights protected by the state constitution. *Central Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 344 (Colo. 1994) ("The rights established by these constitutional provisions have not been deemed absolute, however. . . . Thus we have recognized that the General Assembly may impose reasonable regulations on the manner and method of appropriation."); *North Sterling Irrigation Dist. v.*

Simpson, 202 P.3d 1207, 1211 (Colo. 2009) (explaining how the state and division engineers are vested with authority to institute a fixed water year in order to fulfill statutory obligations to administer the one-fill rule); *Kobobel v. State of Colorado*, 2001 WL 1106978 (Colo. 2011) ("[t]he risk of curtailment is inherent to Colorado water rights holders"); *Findings of Fact, Conclusions of Law, Judgment and Order of the Water Court*, dated March 10, 2008, *In re: Water Rights of Wellington Water Works LLC*, 2005CW343 and 2005CW344, District Court, Water Div. No. 1, Colorado, at 10-12 (issuance of a nontributary well permit did not trigger a prior notice requirement for another well owner whose interests potentially could be affected by issuance of the permit).

Defendant-Intervenors argue that a rulemaking is a quasi-legislative process that does not require the notice and a hearing. In addition, they claim that Plaintiffs fail to identify specific water rights that may be injured, and that a hypothetical deprivation does not implicate due process protections. Moreover, Defendant-Intervenors contend that to the extent Plaintiffs were entitled to constitutional due process requirements, the process given was sufficient.

2. Plaintiffs Were Given Sufficient Procedural Due Process

It is not disputed that a water right is a property right. *People ex rel. Danielson v. City of Thornton*, 775 P.2d 11, 17 (Colo. 1989); *Nichols v. McIntosh*, 19 Colo. 22, 34 P. 278, 280 (Colo. 1893) ("this court has repeatedly held that priorities of right to the use of water are property rights"). A water right is a usufructuary right; one does not own the water, but instead owns the right to use the water within the limits of the prior appropriation doctrine. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982). "The uncertain nature of the property right in water is evidence that its primary value is in its relative priority and the right to use the resource and not in the continuous tangible possession of the resource." *Id.* Water rights are protected by the due process clause of the constitution. *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.'"). Nonetheless, while water rights are protected by the due process clause, the right "is subject to a proper exercise of the police power." *Eason v. Bd. of County Commissioners of County of Boulder*, 70 P.3d 600, 605 (Colo. App. 2003).

The due process clauses in the United States and Colorado Constitutions impose procedural restraints on governmental decisions that deprive individuals of property interests. When evaluating a procedural due process claim, the court must consider 1) whether a property right has been identified; 2) whether governmental action with respect to that property right amounts to a deprivation; and 3) whether the deprivation, if one be found, occurred without due process of law. *Hillside Community Church v. Olson*, 58 P.3d 1021, 1025 (Colo. 2002). Due process is a flexible requirement, calling for "such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). "The law is clear that where an administrative agency is acting in a quasi-legislative capacity, there is no Constitutional requirement that the agency provide the opportunity for a hearing to anyone." *Shoenberg Farms, Inc. v. People ex rel. Swisher*, 444 P.2d 277, 282 (Colo. 1968).

Applying *Olson*, the court finds that the process given to Plaintiffs was constitutionally sufficient. First, the Plaintiffs sufficiently identified specific vested water rights in areas where the State Engineer made nontributary determinations. The record includes several examples of Plaintiffs' vested water rights that may be impacted by erroneous State Engineer nontributary determinations. Second, the action by the State Engineer does not amount to deprivation of a property right. While Plaintiffs have identified water rights, they have not put forth any evidence of deprivation. Instead, Plaintiffs maintain that the rulemaking may deprive them of water rights if certain nontributary determinations are proved to have been erroneous at some point in the future. Plaintiffs' assertion at most alleges an indirect effect. "[T]he due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). Third, because the court finds that Plaintiffs were not deprived of property as a result of rulemaking procedures, the court need not address the third *Olson* factor. However, even if the court had found that Plaintiffs had been deprived of a property interest, the process afforded to Plaintiffs was sufficient. They were provided with a hearing and the opportunity to cross examine witnesses. Based on a review of the record, the process given was sufficient.

The three-part *Mathews v. Eldridge* test also sets forth guidelines for the court to consider when examining a due process challenge to the administrative procedures employed by an agency. *See* 424 U.S. 319 (1976). With the understanding that due process requirements are flexible to a particular situation, courts consider:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 334-35. Here, Plaintiffs' private interests are their vested water rights. Plaintiffs, however, have not provided evidence to the court that their water rights will be affected. The second factor requires the court to consider the procedures used by the State Engineer. The State Engineer was delegated the task to initiate rules to assist with the administration of Section 137(7) for the entire state. The court finds that the process the State Engineer used was sufficient in light of the scope of his rulemaking delegation. Third, the State Engineer had a strong governmental interest in the procedures used. The State Engineer had until April 1, 2010 to ensure that approximately 40,000 wells were in compliance with the revised well permitting requirements in H.B. 1303.

D. Substantial Compliance with the APA

The Colorado Administrative Procedure Act ("APA") sets forth substantive statutory requirements to ensure the due process protections under the United States and Colorado Constitutions are followed. C.R.S. § 24-1-103 sets forth the substantive requirements for agency rulemaking. The reviewing court must set aside agency action not in substantial compliance

with the APA procedures. *Studor, Inc. v. Examining Bd. of Plumbers of Div. of Registrations, Dep't of Regulatory Agencies, State of Colo.*, 929 P.2d 46, 48 (Colo. App. 1996).

Plaintiffs argue that 1) the notice of rulemaking did not comply with the APA; 2) Plaintiffs were not afforded adequate opportunity to cross examine during the hearings; and 3) the cost-benefit analysis accompanying the Final Rules was deficient.

1. Notice

Plaintiffs challenge the notice on the basis that the Rules are not consistent with the subject matter of the notice. The APA requires that any rules adopted "shall be consistent with the subject matter as set forth in the notice of proposed rule-making." C.R.S. § 24-4-103(4)(c). The State Engineer's Notice of Proposed Rulemaking provided, *inter alia*:

> The subject of the proposed rulemaking is the adoption by the State Engineer of rules and regulations *to assist the State Engineer in the administration* of the dewatering of geologic formations by withdrawing nontributary ground water to facilitate or permit mining of minerals. The State Engineer proposed rules establish procedures pursuant to which an operator may obtain a determination from the State Engineer that water that is being or that may be withdrawn from geologic formations to facilitate or permit the mining of minerals is nontributary. Additionally, the proposed rules *identify certain areas or formations within the State as nontributary or tributary* for the purposes of dewatering of geologic formations to facilitate or permit mining of minerals. *The rules as currently proposed may be modified in the course of the rulemaking hearing to revise the proposed procedures and to identify additional areas or formations within the state as nontributary or tributary*. The scope of this proposed rulemaking includes matters that the State Engineer determines are ancillary to or implicated by the nontributary determinations that are the central subject of this rulemaking . . . . The State Engineer *anticipates that the rules may be modified* to address these and other ancillary issues.

Record at pages 000023-000024 (emphasis added). In regards to the Proposed Alternate Rules, the notice provides that "[a]ny person who has submitted an application for party status may propose *Alternate Proposed Rules* to be adopted by the State Engineer in lieu of or in addition to all or a portion of the State Engineer's proposed rules." R. at 000025 (emphasis added). "Alternate Proposed Rules may only be considered by the State Engineer if the subject matter of the Alternate Proposed Rules is consistent with and fits within the Subject Matter and Scope of the Proposed Rulemaking as set forth in this notice." R. at 000025.

The court finds that the Rules are consistent with the notice. The notice states that the Rules may be modified; it sets forth a procedure for considering Alternate Proposed Rules; and explains that the Rules may be modified. Moreover, the notice explained that the State Engineer would be identifying certain areas within the state as nontributary or tributary. Given the scope of the rulemaking, the court finds that the Rules are within the subject matter identified in the notice.

2. Cross-Examination

C.R.S. § 37-90-137(7) provides that the State Engineer shall allow interested persons the right of cross-examination during rulemaking proceedings. Section 137(7) does not elaborate on the length of time for cross-examination or the time allowed for interested persons to prepare. Plaintiffs have failed to convince the court that the amount of time Plaintiffs were provided to prepare and cross-examine was deficient. Moreover, Plaintiffs have not identified facts they could have developed if given more time to prepare.

3. Cost-Benefit Analysis

Finally, the APA requires an agency to conduct a cost-benefit analysis that includes "adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness." C.R.S. § 24-4-103(2.5)(a). The State Engineer's cost-benefit analysis included all of the categories listed in the APA. As a result, the court finds that the cost-benefit analysis was sufficient in light of the APA requirements.

Additionally, the State Engineer considered three alternatives to the Proposed Rules, including the cost of each. Specifically, the State Engineer considered: 1) ceasing production of the oil and gas wells to achieve cessation of production of water; 2) requiring oil and gas operators to comply with voluntary standards; and 3) changing the legal basis for administration of the wells. The State Engineer concluded that the first option would seriously jeopardize Colorado's local economies and tax revenues, and therefore was not a viable alternative. Regarding the second option, the State Engineer found that Colorado statute establishes the required standards and such voluntary efforts are not permitted. As to the third option considered, the State Engineer believed that changing the legal basis for administration of the wells was not a viable option because this would not accomplish the legal or political policies of the state. The State Engineer was required only to consider two alternatives in his cost-benefit analysis, but he considered three.

Even if the court concluded that the State Engineer's cost-benefit analysis was not in compliance with the APA requirements, the court is authorized to invalidate the Rules for failing to comply with the requirements of the cost-benefit analysis only if the court finds that the agency failed to make a good faith effort to comply with the requirements. C.R.S. § 24-4-103(2.5)(d). There is nothing in the record to show that the State Engineer did not make a good faith effort to comply with the cost-benefit analysis requirements.

E. House Bill 11-1286

1. This Court May Consider H.B.11-1286

A court may consider legislation enacted during pending litigation to determine if applying the legislation would be unconstitutionally retrospective. *See e.g., City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427 (Colo. 2000) (trial court properly applied in annexation case a statute passed while case was pending that required the

annexation petition be held in abeyance); *JAM Restaurant, Inc. v. City of Longmont*, 140 P.3d 192, 194-95 (Colo. App. 2006). While the Colorado Supreme Court has elected not to consider statutes enacted during a pending litigation, these cases do not support the assertion that courts should disregard legislation enacted during the pendency of a case. *See e.g., Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 215 (Colo. 1996) (without explanation, applying statute governing venue for appeal of actions taken by the Ground Water Commission in effect at time of agency action); *State Dept. of Natural Resources, Div. of Water Resources, State Engineer v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294 (Colo. 1983) (declining to grant petition for rehearing to address effect of statute enacted after opinion was issued).

Sterling Plaintiffs appear to take the position that H.B. 1286 is beyond the scope of the current proceeding either because it became law after the State Engineer promulgated the Rules or because it became law during the pendency of this litigation. Plaintiffs, Defendant, and Defendant-Intervenors take the position that this court should consider H.B. 1286; however their respective arguments concerning the bill's effect are quite varied. For example, Plaintiffs argue that this court's rulings on whether the State Engineer has authority to make nontributary determinations in subsequent proceedings could be rendered obsolete should the court refrain from examining H.B. 1286.

The court finds that because a court may consider legislation promulgated during pending litigation to determine if it would be unconstitutionally retrospective to apply, and that because courts have applied legislation enacted during pending litigation, it follows that this court may consider H.B. 1286. The scope of review thus includes whether the legislation changes or clarifies existing law and whether applying the legislation would be unconstitutionally retrospective.

2. Change or Clarify

H.B. 1286 amends C.R.S. § 37-90-137(7)(c) by adding the following provisions:

> The rule-making authority includes the promulgation of rules pursuant to which ground water within formations and basins, in whole or part, is determined to be nontributary for the purposes of this subsection (7). The rules may also provide rule-making and adjudicatory procedures for nontributary determinations to be made after the initial rule-making pursuant to this subsection (7).
>
> . . .
>
> Applicability. This act shall apply to nontributary determinations made and rules promulgated before, on, or after the applicable effective date of this act.

"Amendments to a statute either clarify the law or change it." *Acad. of Charter Schools v. Adams County School Dist. No. 12*, 32 P.3d 456, 464 (Colo. 2001) (citing *Douglas County Bd. of Equalization v. Fidelity Castle Pines, Ltd.*, 890 P.2d 119, 125 (Colo.1995). When the legislature amends a statute, the presumption is that the intention is to change the law. *Id.* This presumption can be rebutted by a showing that the legislature merely intended to clarify existing law. *Id.* In determining whether an amendment changed or clarified the law, courts should

consider 1) whether the statute was ambiguous before it was amended; 2) the plain language of the amendment; and 3) the legislative history of the amendment. *Id.*

Starting with the rebuttable presumption that the General Assembly intended to change the law, the task of this court is to determine whether the General Assembly instead sought to clarify the law. Applying the three-part test set forth in *Academy of Charter Schools*, the court finds that the General Assembly sought to clarify, not change, the law.

Part one of the three-part tests requires the court to consider whether C.R.S. § 37-90-137(7)(c), as amended by H.B. 1303, was ambiguous. The court finds that H.B. 1303 was ambiguous: it directed the State Engineer to promulgate rules to assist in the administration of Section 137(7), however it did not provide any details as to how to complete this task. The term "administration" is broad, and refers to a multitude of duties of the State Engineer, including, *inter alia,* curtailing water rights to prevent waste, approving substitute water supply plans, and issuing permits for tributary and nontributary ground water wells. Plaintiffs and Plaintiff-Intervenors counter that even if the term "administration" were ambiguous, H.B. 1286 does nothing to clarify the term because H.B.1286 addresses the State Engineer's rulemaking authority, which is separate from his administrative duties.

Section 137(7)(c), both prior to, and as amended in H.B. 1286, begins: "The state engineer may . . . adopt rules to assist with the administration of this subsection (7)." The court finds that rulemaking is part of the State Engineer's administrative duties. H.B. 1286 clarifies the administrative duty of rulemaking by setting forth specific direction to the State Engineer with regard to rulemaking.

Part two of the three-part test requires the court consider the plain language of the amendment. Legislation is "clarifying" if "arguably more specific sections are added to a general section." *People v. Davis*, 794 P.2d 159, 181 (Colo. 1990), *overruled on other grounds by People v. Miller,* 113 P.3d 743 (Colo. 2005). An amendment that "makes more specific what might have been implicit in the prior statutory terminology" is likely clarifying. *Bar 70 Enterprises, Inc. v. Tosco Corp.*, 703 P.2d 1297, 1304 n.5 (Colo. 1985). H.B. 1286 provides that the scope of rulemaking authority "includes the promulgation of rules pursuant to which ground water within formations and basins, in whole or part, is determined to be nontributary." Moreover, H.B. 1286 states that State Engineer nontributary determinations are subject to the rebuttable presumption of validity. Finally, H.B. 1286 provides that the act applies to nontributary determinations made and rules promulgated before and after the effective date of the statute. The court finds that the plain language indicates that the General Assembly intended to clarify, not change, H.B. 1303. Based on the plain language, the court finds that H.B. 1286 adds specificity to the statute, does not introduce any conflicting terms, and thus clarifies H.B. 1303.

Part three of the *Academy of Charter Schools* test requires an examination of legislative history. "There are a variety of recognized sources of the General Assembly's intent within a statute's legislative history-namely, 'the object the legislature sought to obtain by the enactment, the circumstances under which it was adopted, and the consequences of a particular construction.'" *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy*

Dist., 109 P.3d 585, 599 (Colo. 2005). "The circumstances of a statute's enactment more specifically include 'the state of the law prior to the legislative enactment,' 'the problem addressed by the legislation,' and the chosen statutory remedy." *Id.* (internal citations omitted).

The legislative history indicates that the object of H.B. 1286 was to clarify, not change, existing law. For example, at the March 21, 2011 House Agriculture Committee discussion of the bill, Representative Sonnenberg stated that H.B. 1286 "confirms and clarifies the State Engineer's authority on rule making and to determine ground water in non-tributary situations for mineral production as was provided in House Bill 1303." Another sponsor of the bill, Representative Vigil, explained that H.B. 1286 "does not change anything. It just codifies the intent of the legislature in the first two bills [House Bill 1303 and Senate Bill 165]." Mike King, Director of the Department of Natural Resources reiterated, stating "[i]t is our position that this legislature authorized [the Rules] to be promulgated and what we're asking here today is an affirmation of that, to remove all doubt." This testimony, in addition to similar testimony in the record, indicates that the General Assembly promulgated H.B. 1286 to address any potential ambiguity in H.B. 1303, and to clarify its earlier grant of authority to the State Engineer.

Plaintiffs and Plaintiff-Intervenors, however, urge the court to not consider the legislative history. They argue that the plain language of H.B. 1286 clearly indicates the bill was intended to apply retroactively, and as a result, is unconstitutional retrospective legislation. Specifically, Plaintiffs rely on the following provision: "This act shall apply to nontributary determinations made and rules promulgated before, on, or after the applicable effective date of this act." The court will address Plaintiffs' argument in the following section. Nonetheless, the court finds that applying the *Academy of Charter Schools* three-part test and the foregoing analysis, the General Assembly's intent was to clarify, not change, existing law.

3. *Retrospective Legislation*

Legislation can be prospective, retroactive, or retrospective. *Ficarra v. Dept. of Regulatory Agencies, Div. of Ins.*, 849 P.2d 6, 11 (Colo. 1993). Although retroactive statutes are generally disfavored, they are not always unconstitutional. *Id.* "[L]egislation may be given retroactive effect if the statute indicates a clear legislative intent to achieve such retrospective application" and does not impair vested rights. *People v. Fagerholm*, 768 P.2d 689, 692 (Colo. 1989); *Ficarra*, 849 P.2d at 13. Retrospective legislation refers to legislation that would be unconstitutional if applied retroactively. A statute is retrospective if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Ficarra*, 849 P.2d at 15 (citing *Denver S. Park & Pac. Ry. Co. v. Woodward*, 4 Colo. 162, 167 (1878)).

Based on the plain language of H.B. 1286, all parties seem to agree that the General Assembly's intention in H.B. 1286 was to apply the statute retroactively. The "applicability" section provides: "This act shall apply to nontributary determinations made and rules promulgated before, on, or after the applicable effective date of this act." The dispute thus centers on whether H.B. 1286 is permissible retroactive legislation or unconstitutional retrospective legislation.

Plaintiffs argue that H.B. 1286 is retrospective legislation because it takes away Plaintiffs' and the right of all Coloradoans, to an administrative rulemaking process in conformance with the law. Specifically, they claim that retroactive application of H.B. 1286 would result in unconstitutional retrospective legislation because it would take away their legal expectations and rights to a reversal of State Engineer nontributary determinations under the APA. Plaintiffs contend that H.B. 1303 does not grant the State Engineer authority to make nontributary determinations. They claim that H.B. 1286 retroactively authorized the rulemaking, resulting in the deprivation of Plaintiffs' vested water rights.

As set out in the previous section, the State Engineer argues that H.B. 1286 clarified, and did not change, the law; thus, Plaintiffs' argument that it is retrospective legislation fails. In his brief, the State Engineer analogized the present set of facts to *Academy of Charter Schools*. In *Academy of Charter Schools*, the Academy sued a local school district. 32 P.3d 456 (Colo. 2001). The Court of Appeals dismissed the suit, holding that the Academy could not sue without legislative authority. Subsequently, the General Assembly amended previously enacted legislation concerning authority of charter schools to enter into contracts, adding a provision granting charter schools the right to sue local school district for enforcement of contracts. The Colorado Supreme Court applied the three-part test and found that the legislation was clarifying and did not change existing law. The Court held that because the legislation was clarifying, it found that the Academy always had standing to sue their local school districts, and the legislation was not retrospective.

The State Engineer contends that even if this court found that H.B. 1286 changed the law, it would not be unconstitutionally retrospective. In support, he argues that laws may be applied retroactively so long as they do not impair the vested rights acquired under existing law, create new legal obligations, or attach new disabilities with respect to past transactions. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 444 (Colo. 2000). The State Engineer argues that such rights are inchoate, not vested. Defendant-Intervenors claim that H.B. 1286 is a procedural and remedial statute, not a substantive statute, and therefore it is not unconstitutionally retrospective. In support, Defendant-Intervenors cite *People v. D.K.B.*, in which the Colorado Supreme Court explained that substantive statutes eliminate or modify vested rights, while procedural statutes relate "only to remedies or modes of procedure to enforce such rights or liabilities." 843 P.2d 1326, 1331 (Colo. 1993).

The State Engineer and Defendant-Intervenors have correctly stated the law. "A right is only vested when it is not dependent upon the common law or the statute under which it was acquired for its assertion, but has an independent existence." *Greenwood Village*, 3 P.3d at 445 (citing *People v. D.K.B.*, 843 P.2d 1326 (Colo. 1993)). "The enactment of a statute that alters the litigation posture of the parties to a pending lawsuit in regard to inchoate rights is not retrospective." *Id.* Plaintiffs' argument that H.B. 1286 robbed them of vested rights in remedies and modes of procedure concerning agency action fails because such rights are inchoate and not vested.

F. The Tribe Rules: 17.7.D.2 and 17.3.F

1. The Tribe Rules

The Tribe Rules consist of Rule 17.3.F and Rule 17.7.D.2. Rule 17.3.F provides:

> These Rules and regulations shall not be construed to establish the jurisdiction of either the State of Colorado or the Southern Ute Indian Tribe over nontributary ground water within the boundaries of the Southern Ute Indian Reservation as recognized in Pub. L. No. 98-290, § 3, 98 Stat. 201 (1984).

Rule 17.7.D.2, also known as the "Fruitland Rule" identifies nontributary ground water in the Fruitland Formation within the Southern Ute Reservation.

2. Parties' Positions

During the rulemaking, the Tribe challenged the State Engineer's authority to administer nontributary ground water underlying its reservation.[2] The final stipulation entered into during the rulemaking between the Tribe and the State Engineer established that the State Engineer would not decide the question of his jurisdiction over nontributary ground water beneath the external boundaries of the reservation. The State Engineer also agreed to adopt the Tribe's Proposed Alternate Rules, which are the Tribe Rules.

Plaintiffs argue that if the court finds the Rules to be valid, the court should delete Rule 17.3.F.[3] Plaintiffs claim that the State Engineer created legal uncertainty when he "exercises jurisdiction to make the nontributary determinations requested by the Tribe, while simultaneously declining to determine whether he has jurisdiction to regulate this same nontributary ground water." Thus, Plaintiffs submit that the court should declare that the State Engineer has the authority to administer nontributary ground water on the reservation, and any failure by the State Engineer to regulate such water is error.

The State Engineer clarified that he did not decline jurisdiction; instead he declined to decide whether he had jurisdiction. Moreover, the State Engineer contends that this court does not have jurisdiction to declare the Tribe Rules void. Defendant-Intervenors do not address the issue; however the Tribe submitted an individual response. The Tribe argues that the APA provides the court with jurisdiction to determine the general validity of the Tribe Rules. Moreover, the Tribe maintains that the court may review whether the State Engineer's decision not to determine its jurisdiction was unlawful. The Tribe sets forth two main arguments: 1) that the Tribe Rules do not conflict; and 2) that the State Engineer lacks authority to decide jurisdictional questions.

In their Reply, Sterling Plaintiffs argue that the Tribe Rules are logically inconsistent. They submit that this court need not resolve a jurisdictional question in order to grant Plaintiffs' requested relief. Remaining Plaintiffs reiterate that the Tribe Rules are void.

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[2] No party disputes that the State Engineer has authority to administer tributary ground water underlying the Tribe's land.

[3] The Opening Brief asks the court to delete Rule 17.3, but the court believes this is a typographical error and Plaintiffs seek a deletion of Rule 17.3.F.

3. APA Review

C.R.S. § 24-4-106(7) provides for judicial review of agency action. The State Engineer must have authority to promulgate any rule. The court finds that the State Engineer exceeded his authority when he adopted the Fruitland Rule. The Fruitland Rule makes a nontributary determination; however, the State Engineer did not have the authority to determine whether he had jurisdiction over nontributary waters underlying the reservation. Rule 17.3.F clearly states that the Rules shall not be construed to establish jurisdiction of the State of Colorado or the Southern Ute Tribe over nontributary ground water located within the boundaries of the reservation. Thus, the State Engineer promulgated a rule in an area where his jurisdiction was not established. Additionally, C.R.S. § 37-90-137(7) limits the State Engineer's authority to engage in rulemaking in conjunction with dewatering geological formations by withdrawing nontributary ground water to facilitate or permit mining of minerals, and for no other purpose. Therefore, the State Engineer did not have statutory authority to provide an advisory opinion, in the form of a Rule, to the Southern Ute Indian Tribe that the Fruitland Formation contains nontributary ground water.

As all parties agree and this court explained in its Order Regarding Defendant-Intervenors' Motions to Dismiss, this court does not have jurisdiction to determine whether the State Engineer has authority over nontributary ground water on the reservation. Thus, this court's review is limited to reviewing agency action under the APA. The court finds, pursuant to the APA, that the State Engineer acted in excess of his jurisdictional authority when he promulgated the Fruitland Rule. The court therefore declares the Fruitland Rule invalid pursuant to its authority under the APA. Should the State Engineer obtain a determination from a court of proper jurisdiction as to the scope of his authority over nontributary water within the Southern Ute Reservation, he may then consider promulgating the Fruitland Rule. However, the State Engineer's action of making a nontributary determination without a clear determination of whether he had jurisdiction was erroneous. Therefore, the court finds that Rule 17.7.D.2 shall be set aside and removed from the Final Rules.

With regard to Rule 17.3.F, the State Engineer is authorized to clarify that the Rules and regulations shall not be construed to establish the jurisdiction of either the State of Colorado or the Southern Ute Indian Tribe over nontributary ground water within the boundaries of the Southern Ute Indian Reservation. Therefore, the court will not disturb Rule 17.3.F.

G. Legal Effect of the Rules

Plaintiffs ask the court to find that the State Engineer's determinations made pursuant to C.R.S. § 37-90-137(7)(c) have no effect in water court proceedings unless C.R.S. § 37-92-305(6) applies. In the court's Order Re: Defendant-Intervenors' Motions to Dismiss, this court explained:

> [J]udicial review under the APA begins with a review of the scope and extent of an agency's authority to determine whether the agency action was valid. If an agency acted within its statutory authority, the legal effect of the agency action naturally follows. For example, if an agency acted within its statutory authority,

> the legal effect of its action is determined by the statutes and rules governing the action. . . . Therefore, the APA allows the court to determine the legal effect of the Rules because legal effect is invariably intertwined with the determination of the scope and extent of the SEO's authority. The APA does not prevent a reviewing court from determining the general legal effect of agency action.

The court cannot issue a ruling as to the general legal effect of the Rules. The legal effect of State Engineer administrative determinations is contingent upon the type of determination and the proceeding. *See e.g.*, C.R.S. § 37-92-305(6) (granting different legal effect to State Engineer findings regarding well operations, depending on type of finding and type of proceeding); *Well Augmentation Subdist.*, 221 P.3d 399, 417 (Colo. 2009) (applying different standards of review to State Engineer approval of substitute water supply plans, depending upon the type of plan). Thus, the court finds that the nontributary determinations made pursuant to the Rules do not have independent legal effect. Instead, the legal effect is limited to the State Engineer's administrative duties pursuant to C.R.S. § 37-90-137(7), which applies only to dewatering of geological formations by withdrawing nontributary ground water to facilitate or permit mining of minerals.

V. FINAL JUDGMENT AND DECREE

1. The court finds that Plaintiff's request to declare Rule 17.7.D.2 void is meritorious and should be granted. The court orders that Rule 17.7.D.2, the "Fruitland Rule", shall be set aside and removed from the Final Rules.

2. The court hereby affirms all other provisions of the State Engineer's Final Rules.

3. The court is not addressing the claims relating to Basin Specific Rules and Amended Basin Specific Rules, filed in cases 10CW14 and 10CW35 currently pending in Water Division 7, and case 10CW121 pending in Water Division 1, because those claims were not consolidated by the Multidistrict Litigation Panel in the present action.

Dated: September 8, 2011

By the court:

James Hartmann

James F. Hartmann
Water Judge
Water Division No. 1