
STATE OF MINNESOTA

IN COURT OF APPEALS

Meriwether Minnesota Land & Timber LLC, et al.,

Respondents,

vs.

State of Minnesota; Myron Frans, Commissioner, Minnesota Department of Revenue,

Appellants.

APPELLANTS' BRIEF AND ADDENDUM

Sarah E. Crippen (#223074)
Timothy A. Sullivan (#107165)
Elizabeth C. Borer (#389943)
Best & Flanagan, LLP
225 South Sixth Street, Suite 4000
Mpls., MN 55402

Telephone: (612) 339-7121

Attorneys for Respondents

LORI SWANSON
Attorney General
State of Minnesota

ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678

KEVIN FINNERTY
Assistant Attorney General
Attorney Reg. No. 0325995

JASON PLEGGENKUHLE
Assistant Attorney General
Atty. Reg. No. 0391772

445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 757-1450

Attorneys for Appellants

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
LEGAL ISSUES	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS.....	8
A. Timing Of The SFIA Program’s Application Process, Annual Certification, And Annual Incentive Payments.	8
B. The SFIA Program’s Eligibility Provisions.....	10
C. Respondents’ Ongoing Participation In Private Forest Management Certification Programs That Are Far More Stringent and Detailed Than The SFIA.....	11
D. Respondents’ Advertising On Their Websites Of Their Participation In The Private SFI And FSC Certification Programs.	13
1. Potlatch’s Website.	13
2. Blandin’s Website.	15
3. Meriwether’s Website.....	16
E. Respondents’ Participation In The SFIA Program.	17
F. The SFIA Annual Incentive Payment Provisions.	18
G. The 2010 Amendments to the SFIA.	19
H. The 2011 Amendments to the SFIA.	21
SCOPE OF REVIEW	22
ARGUMENT	23
I. THE SFIA DID NOT CREATE A CONTRACT OR PROMISSORY ESTOPPEL RIGHT TO A 2010 ANNUAL INCENTIVE PAYMENT IN A PARTICULAR AMOUNT.....	23

A.	The SFIA Did Not “Clearly and Unequivocally” Create A Contract Right.....	24
B.	Respondents Cannot Satisfy the Demanding Promissory Estoppel Standards.....	25
1.	The SFIA Does Not “Clearly and Unequivocally” Promise that the Incentive Payment Provisions Would Remain Unchanged.	26
2.	Respondents Did Not Reasonably Rely On Any Purported Promise.....	28
3.	Respondents Did Not Rely To Their Substantial Detriment.	29
4.	Equity Does Not Support Respondents’ Promissory Estoppel Claim.....	30
II.	EVEN ASSUMING <i>ARGUENDO</i> THAT A CONTRACT OR PROMISSORY ESTOPPEL RIGHT EXISTS, THE STATUTORY CAP ON SFIA PAYMENTS DID NOT UNCONSTITUTIONALLY IMPAIR THAT RIGHT.....	35
A.	Respondents’ Purported Contract Or Promissory Estoppel Right Was Not Substantially Impaired.	36
B.	In Any Event, the Challenged Statute Furthers the Fiscal Stability of the State, and Avoids Payment of Large Windfalls, Which Are Significant and Legitimate Public Purposes.	37
C.	The Amendment to the SFIA Was A Reasonable and Appropriate Legislative Response to the State’s Financial Crisis.	37
III.	APPLICATION OF THE CAP TO RESPONDENTS’ 2010 SFIA PAYMENTS DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING.....	39
A.	An SFIA Payment Is Not A Property Interest Within the Meaning of the Takings Clause.....	39
B.	Even Assuming <i>Arguendo</i> That Respondents Had A Property Interest Within The Meaning Of The Takings Clause, Application Of The Cap Does Not Constitute A Taking.....	42
IV.	RESPONDENTS’ EQUAL PROTECTION CLAIM IS WITHOUT MERIT BECAUSE ALL SFIA CLAIMANTS ARE SUBJECT TO THE CAP, AND IN ANY EVENT, THE LAW IS RATIONALLY BASED.....	43

V. THE DISTRICT COURT SHOULD HAVE DENIED RESPONDENTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTED PARTIAL SUMMARY JUDGMENT TO APPELLANTS..... 45

VI. IN THE ALTERNATIVE, THE DISTRICT COURT SHOULD HAVE ALLOWED APPELLANTS TO CONDUCT DISCOVERY PURSUANT TO MINN. R. CIV. P. 56.06. . 47

VII. THE “STATE OF MINNESOTA” IS NOT A PROPER PARTY..... 49

CONCLUSION 52

ADDENDUM

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Adams v. United States</i> , 391 F.3d 1212 (Fed. Cir. 2004), <i>cert. denied</i> 546 U.S. 811 (2005).....	1, 39, 40
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972).....	40, 41
<i>Cohen Dev. Co. v. JMJ Props., Inc.</i> , 317 F.3d 729 (7th Cir. 2003).....	29
<i>Commonwealth Edison Co. v. United States</i> , 271 F.3d 1327 (Fed. Cir. 2001).....	40, 41
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970).....	45
<i>E. Enters. v. Apfel</i> , 524 U.S. 498 (1998).....	1, 40
<i>Energy Reserves Grp., Inc. v. Kansas Power & Light Co.</i> , 459 U.S. 400 (1983).....	1, 36, 37, 38
<i>Estate of McCall v. United States</i> , 663 F. Supp. 2d 1276 (N.D. Fla. 2009).....	2, 43
<i>Home Bldg. & Loan Ass'n v. Blaisdell</i> , 290 U.S. 398 (1934).....	36
<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> , 480 U.S. 470 (1987).....	37
<i>LeBeau v. United States</i> , 474 F.3d 1334 (Fed. Cir. 2007).....	41
<i>Nat'l Educ. Ass'n-Rhode Island v. Ret. Bd. of the Rhode Island Emps.' Ret. Sys.</i> , 172 F.3d 22 (1st Cir. 1999).....	2, 41
<i>Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.</i> , 470 U.S. 451 (1985).....	1, 24, 27, 41

<i>Penn Cent. Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978)	42
<i>Pittman v. Chicago Bd. of Educ.</i> , 64 F.3d 1098 (7th Cir. 1995).....	24, 40
<i>Quinones v. City of Evanston, Illinois</i> , 58 F.3d 275 (7th Cir. 1995).....	2, 49
<i>Timbisha Shoshone Tribe v. Salazar</i> , 766 F. Supp. 2d 175 (D. D.C. 2011)	41
<i>Travis v. Reno</i> , 163 F.3d 1000 (7th Cir. 1998).....	49
<i>United States Trust Co. of New York v. New Jersey</i> , 431 U.S. 1 (1977)	36
<i>Yee v. City of Escondido, California</i> , 503 U.S. 519 (1992)	40

State Cases

<i>AFSCME Councils 6, 14, 65 & 96, AFL-CIO v. Sundquist</i> , 338 N.W.2d 560 (Minn. 1983).....	passim
<i>Am. Fed'n of Labor v. Mann</i> , 188 S.W.2d 276 (Tex. Civ. App. 1945)	50
<i>Am. Nat'l Fire Ins. Co. v. Cordie</i> , 478 N.W.2d 531 (Minn. Ct. App. 1991)	2, 45
<i>Anderson v. State</i> , 435 N.W.2d 74 (Minn. Ct. App. 1989)	1, 26, 38
<i>Bearder v. State</i> , ___ N.W.2d ___, ___ (Minn. 2011).....	23
<i>Brayton v. Pawlenty</i> , 781 N.W.2d 357 (Minn. 2010).....	20
<i>Christensen v. Minneapolis Mun. Emps. Ret. Bd.</i> , 331 N.W.2d 740 (Minn. 1983).....	34, 36
<i>DRD Pool Serv., Inc. v. Freed</i> , 5 A.3d 45 (Md. 2007).....	2, 44

<i>Drewes v. First Nat'l Bank of Detroit Lakes,</i> 461 N.W.2d 389 (Minn. Ct. App. 1990)	36
<i>Duluth Fireman's Relief Ass'n v. City of Duluth,</i> 361 N.W.2d 381 (Minn. 1985).....	35
<i>Elecs. Corp. of Am. v. City Council of Cambridge,</i> 204 N.E.2d 707 (Mass. 1965)	51
<i>Empire Trust Co. v. Bd. of Commerce & Navigation,</i> 11 A.2d 752 (N.J. 1940).....	50
<i>Faimon v. Winona State Univ.,</i> 540 N.W.2d 879 (Minn. Ct. App. 1995)	30
<i>Finn v. Rendell,</i> 990 A.2d 100 (Pa. Commw. Ct. 2010).....	2, 49
<i>Harrison v. Bunnell,</i> 420 S.W.2d 777 (Tex. Civ. App. 1967)	51
<i>Hebrink v. Farm Bureau Life Ins. Co.,</i> 664 N.W.2d 414 (Minn. Ct. App. 2003)	2, 46
<i>ILHC of Eagan, LLC v. Cnty. of Dakota,</i> 693 N.W.2d 412 (Minn. 2005).....	44
<i>In re Jordan's Estate,</i> 199 Minn. 53, 271 N.W. 104 (1937).....	31
<i>Javinsky v. Comm'r of Admin.,</i> 725 N.W.2d 393 (Minn. Ct. App. 2001)	26
<i>John Hancock Mut. Life Ins. Co. v. Comm'r of Revenue,</i> 497 N.W.2d 250 (Minn. 1993).....	2, 43
<i>Kolton v. County of Anoka,</i> 645 N.W.2d 403 (Minn. 2002).....	43
<i>Lienhard v. State,</i> 431 N.W.2d 861 (Minn. 1988).....	1, 2, 37, 44
<i>McGraw v. Caperton,</i> 446 S.E.2d 921 (W. Va. 1994).....	51

<i>Mesaba Aviation Div. v. Cnty. of Itasca,</i> 258 N.W.2d 877 (Minn. 1977).....	25
<i>Minneapolis Teachers Ret. Fund Ass'n v. State,</i> 490 N.W.2d 124 (Minn. Ct. App. 1992).....	37
<i>Peterson v. Holiday Recreational Indus.,</i> 726 N.W.2d 499 (Minn. Ct. App. 2007).....	31
<i>Peterson v. Humphrey,</i> 381 N.W.2d 472 (Minn. Ct. App. 1986).....	23, 24
<i>Peterson v. Minnesota Dept. of Labor & Indus.,</i> 591 N.W.2d 76 (Minn. Ct. App. 1999).....	45
<i>Ralston Purina Co. v. Hagemeister,</i> 188 N.W.2d 405 (N.D. 1971).....	51
<i>Retail Clerks Local 187 AFL-CIO v. Univ. of Wyoming,</i> 531 P.2d 884 (Wyo. 1975).....	51
<i>Ridgewood Dev. Co. v. State,</i> 294 N.W.2d 288 (Minn. 1980).....	25
<i>Riverview Muir Doran, LLC v. Jadt Dev. Group, LLC,</i> 790 N.W.2d 167 (Minn. 2010).....	22
<i>Sletto v. Wesley Constr., Inc.,</i> 733 N.W.2d 838 (Minn. Ct. App. 2007).....	33
<i>State ex rel. Minn. Amusement Co. v. Cnty. Bd. of Ramsey Cnty. Commr's,</i> 255 Minn. 413, 96 N.W.2d 580 (1959).....	27
<i>State v. Cox,</i> 798 N.W.2d 517 (Minn. 2011).....	23
<i>State v. Larsen,</i> 650 N.W.2d 144 (Minn. 2002).....	23
<i>State v. Larue's, Inc.,</i> 154 N.E.2d 708 (Ind. 1958).....	50
<i>State v. Schwartz,</i> 628 N.W.2d 134 (Minn. 2001).....	23

<i>State v. Tennin</i> , 674 N.W.2d 403 (Minn. 2004).....	23
<i>Welscher v. Myhre</i> , 231 Minn. 33, 42 N.W.2d 311 (1950).....	26
<i>Wensmann Realty, Inc. v. City of Eagan</i> , 734 N.W.2d 623 (Minn. 2007).....	2, 39, 42
<i>Zinter v. Univ. of Minn.</i> , 799 N.W.2d 243 (Minn. Ct. App. 2011).....	25
<i>Zurich Am. Ins. Co. v. Bjelland</i> , 710 N.W.2d 64 (Minn. 2006).....	23

State Statutes

2001 Minn. Laws 1st Spec. Sess., ch. 5, art. 8, §§ 5-15.....	8
2003 Minn. Laws ch. 127, art. 5, §§ 35-42	28
2004 Minn. Laws ch. 228, art. 1, § 48	28
2005 Minn. Laws ch. 151, art. 5, §§ 38-40	28
2006 Minn. Laws ch. 236, art. 2, §§ 1-4	18, 28
2008 Minn. Laws ch. 154, art. 13, §§ 45-49	4, 19, 28
2008 Minn. Laws ch. 154, art. 2, § 23	4, 19
2009 Minn. Laws ch. 88, art. 10, §§ 15-16	4, 19, 28
2010 Minn. Laws 1st Spec. Sess., ch. 1, art. 13, § 4, subd. 3	4, 20, 27
2011 Minn. Laws 1st Spec. Sess., ch. 7, art. 6, §§ 12, 26.....	5, 21
Minnesota Statutes Chapter 290C (2010)	<i>passim</i>
Minn. Stat. § 290C.01	8
Minn. Stat. § 290C.02	8
Minn. Stat. § 290C.03	10
Minn. Stat. § 290C.04	<i>passim</i>

Minn. Stat. § 290C.05	9
Minn. Stat. § 290C.07	3, 27
Minn. Stat. § 290C.07 (2002).....	18, 19
Minn. Stat. § 290C.08	3, 9, 27
Minn. Stat. § 290C.10	8, 9
Minn. Stat. § 555.11	2, 51
Minn. Stat. § 555.13	2, 50
Minn. Stat. § 645.27	2, 50
Minn. Stat. § 645.31, subd. 2	27

Federal And State Constitutions

U.S. Const. art. I, § 10	35
U.S. Const. amend. V	39
Minn. Const. art. I, § 11	35
Minn. Const. art. I, § 13	39

State Rules

Minnesota Rule of Civil Procedure 5A	2, 51
Minnesota Rule of Civil Procedure 56.03	45
Minnesota Rule of Civil Procedure 56.06	2, 6, 47, 49
Minn. R. Gen. Prac. 111.02	47
Minn. R. Gen. Prac. 111.03	2, 47

LEGAL ISSUES

1. Did the Sustainable Forest Incentive Act (“SFIA”) grant to Respondents a contract or promissory estoppel right to a 2010 incentive payment in a particular amount, where, among other things, the SFIA does not “clearly and unequivocally” refer to such rights and equity does not support the payment of a windfall?

The district court held that Respondents had a promissory estoppel right to a 2010 SFIA payment not subject to the \$100,000 cap enacted by the Legislature as part of a budget-balancing bill.

Apposite Authority: Minn. Stat. § 290C.01-.13 (2010); *Nat’l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985); *AFSCME Councils 6, 14, 65 & 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560 (Minn. 1983), *superseded by statute on other grounds*; *Anderson v. State*, 435 N.W.2d 74 (Minn. Ct. App. 1989).

2. Assuming *arguendo* that a contract or promissory estoppel right exists, was that right unconstitutionally impaired by the Legislature’s enactment of a budget-balancing bill in 2010 that rationally included a \$100,000 cap on 2010 SFIA payments?

The district court held that application of the \$100,000 cap to Respondents’ 2010 SFIA payments unconstitutionally impaired their promissory estoppel right to such payments because the amount saved by applying the \$100,000 cap to Respondents, \$7.7 million, was “*de minimis*.”

Apposite Authority: *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *Lienhard v. State*, 431 N.W.2d 861 (Minn. 1988); *Anderson, supra*.

3. Did the legislation placing a cap on the 2010 SFIA payments constitute a taking where Respondents voluntarily elected to participate in the SFIA program, they have not alleged any diminution in the value of their forest land, and the legislation was rationally based?

The district court summarily held that application of the \$100,000 cap to Respondents’ 2010 SFIA payments constituted an unconstitutional taking.

Apposite Authority: *E. Enters. v. Apfel*, 524 U.S. 498 (1998); *Adams v. United States*, 391 F.3d 1212 (Fed. Cir. 2004), *cert. denied* 546 U.S. 811 (2005); *Nat’l Educ. Ass’n-Rhode Island v. Ret. Bd. of the Rhode Island Emps.’ Ret. Sys.*, 172

F.3d 22 (1st Cir. 1999); *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007).

4. Did the legislation placing a cap on the 2010 SFIA payments violate equal protection where all SFIA program participants were subject to the same cap and the cap was rationally based?

The district court declined, “without comment,” to address Respondents’ equal protection claim.

Apposite Authority: *John Hancock Life Ins. Co. v. Comm’r of Revenue*, 497 N.W.2d 250 (Minn. 1993); *Lienhard, supra*; *Estate of McCall v. United States*, 663 F. Supp. 2d 1276 (N.D. Fla. 2009); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2007).

5. Did the district court err by failing to grant summary judgment in Appellants’ favor where the plain language of the SFIA, proper application of the controlling law, and the undisputed facts show that Respondents’ claims are without merit?

The district court refused to grant summary judgment in Appellants’ favor.

Apposite Authority: Minn. R. Civ. P. 56.03; *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. Ct. App. 2003); *Am. Nat’l Fire Ins. Co. v. Cordie*, 478 N.W.2d 531 (Minn. Ct. App. 1991).

6. In the alternative, did the district court err in refusing to allow Appellants to conduct discovery before granting partial summary judgment to Respondents?

The district court held that discovery is unlikely to produce genuine issues of material fact.

Apposite Authority: Minn. R. Civ. P. 56.06; Minn. R. Gen. Prac. 111.03.

7. Is the “State of Minnesota” a proper party to this action?

Without any legal analysis, the district court retained the “State of Minnesota” as a defendant, but ordered no relief against the State.

Apposite Authority: Minn. Stat. §§ 555.11, 555.13, 645.27 (2010); Minn. R. Civ. P. 5A; *Quinones v. City of Evanston, Illinois*, 58 F.3d 275 (7th Cir. 1995); *Finn v. Rendell*, 990 A.2d 100 (Pa. Commw. Ct. 2010).

STATEMENT OF THE CASE

This appeal¹ concerns the constitutional authority and discretion of the Legislature, as a separate and co-equal branch of government, to amend state legislation as part of a budget-balancing bill. The district court's analysis could have serious adverse consequences for the Legislature in the upcoming legislative session where the balancing of the State's budget may again be at issue.

Respondents Meriwether Minnesota Land & Timber LLC, Blandin Paper Company, and Potlatch Corporation (including its affiliated corporate entities) (collectively "Potlatch"), are all large timber and paper companies. All of Respondents' forest land is subject to rigorous sustainable forest management practices prescribed by private certification programs. It is in Respondents' own business self-interest to participate in these private programs so they can effectively compete in the lumber and paper markets and ensure they have a healthy inventory of forest land to harvest for their business purposes.

Respondents also voluntarily enrolled their Minnesota forest lands in the Sustainable Forest Incentive Act ("SFIA") program, Minnesota Statutes Chapter 290C (2010). Under the SFIA program, Respondents received annual incentive payments by October 1 for their participation in the program during that same calendar year. *See* Minn. Stat. §§ 290C.04; .07; .08. Since its enactment, the Legislature has repeatedly

¹ The underlying case is venued in Ramsey County District Court, the Honorable John B. Van De North, Jr., presiding.

amended the SFIA, including its incentive payment provisions. *See, e.g.*, 2008 Minn. Laws ch. 154, art. 2, § 23; 2009 Minn. Laws ch. 88, art. 10, §§ 15-16.

In May 2010, the Legislature capped the SFIA incentive payments to be made to program participants in calendar year 2010 at \$100,000 per claimant. 2010 Minn. Laws 1st Spec. Sess., ch. 1, art. 13, § 4, subd. 3. On October 1, 2010, Respondents, as well as three other SFIA participants, were each paid the \$100,000 maximum for their participation in the SFIA program during calendar year 2010. *See, e.g.*, Minn. Stat. § 290C.04; Add. 39-40.

On January 31, 2011, Respondents filed this action against the Minnesota House of Representatives, the Minnesota Senate, the Governor, the “State of Minnesota,” and the Commissioners of the Minnesota Departments of Revenue and Management and Budget. App. 3. The complaint challenged the Legislature’s constitutional authority to cap the 2010 SFIA incentive payment at \$100,000 per claimant and its authority to modify the incentive payments thereafter. App. 3-5. Respondents alleged that they had contractual and promissory estoppel rights that were unconstitutionally impaired by application of the cap. App. 5. Respondents also claimed the cap violated equal protection and constituted an unconstitutional taking. *Id.*

On February 9, defendants (including the two Appellants) filed a motion to dismiss, asserting that only the Commissioner of Revenue was a proper party defendant and that Respondents had failed to state a claim upon which relief can be granted. App. 39-41. On April 8, Respondents filed a motion for partial summary judgment with regard to their 2010 SFIA incentive payments. App. 42-47. No party engaged in any

discovery. See *infra* at 47-49. The court heard the parties' respective motions on May 18. S.R. 325. At the court's request, on June 17, the parties filed proposed findings of fact, conclusions of law, and orders and the court then took the parties' motions under advisement. S.R. 337-39.

On July 21, defendants provided to the district court newly amended portions of the SFIA that were enacted on July 20. See Letter from Alan Gilbert to Judge Van de North (July 21, 2011); 2011 Minn. Laws 1st Spec. Sess., ch. 7, art. 6, §§ 12, 26. Among other changes, the 2011 amendments continued the \$100,000 cap per claimant on annual SFIA payments. The legislative findings also stated, in part, that the SFIA provided only a "modest amount of tangible public benefits" and that "the participants with the largest amounts of acreage in the program do follow and would likely continue to follow similar or more stringent management practices, regardless of whether the program exists." *Id.*

On August 4, Respondents filed a motion to supplement the record with additional factual information and legislative history regarding the 2011 amendments. App. 48-49. Defendants opposed the motion to the extent Respondents sought to introduce new factual information but did not object to the court taking judicial notice of the legislative history. See Defs.' Resp. to Pls.' Mot. Supp. R. Based on Respondents' motion to supplement the record, the court again took the motions to dismiss and for partial summary judgment under advisement as of August 10. App. 52.

On October 25, Respondents filed a motion to supplement and amend the complaint concerning the 2011 amendments, and to extend their claimed damages into 2011. App. 53-54, 57-85. Defendants opposed the motion, asserting that the proposed

supplemented and amended complaint still failed to state a claim upon which relief could be granted. See Defs.' Resp. to Pls.' Mot. Supp. & Am. Compl.

On November 3, the court filed its Findings of Fact, Conclusions of Law and Order for Judgment regarding the parties' motions to dismiss and for partial summary judgment. Add. 1-24. The court dismissed with prejudice the House, the Senate, and the Governor. *Id.* at 2. The Commissioner of Minnesota Management and Budget was dismissed without prejudice. *Id.* The court retained the "State of Minnesota" as a defendant, but ordered no relief against the State. *Id.* at 2-3. The court granted Respondents' motion to supplement the record but stated that none of the supplemental information "materially impact[ed]" its decision. *Id.* at 15.

The district court denied defendants' (including Appellants') motion to dismiss the complaint and granted Respondents' motion for partial summary judgment. *Id.* at 3. The court held that Respondents had a promissory estoppel right to a 2010 incentive payment which was unconstitutionally impaired by the \$100,000 cap. *Id.* at 17-21. The court reasoned that the legislature did not have a legitimate basis to enact the cap because the savings resulting from application of the cap to Respondents, \$7.7 million, was "*de minimis.*" *Id.* at 20-21. The court also summarily found that application of the cap constituted an unconstitutional taking and refused to allow Appellants to conduct discovery pursuant to Minn. R. Civ. P. 56.06. *Id.* at 19, 21-23.

The district court then determined that an appropriate per acre 2010 payment for Respondents was \$10.38. *Id.* at 23-24. Accordingly, the court ordered the Commissioner of Revenue, by December 1, 2011, to recalculate and disburse supplemental 2010 SFIA

payments to Respondents at \$10.38 per acre, without application of the cap. *Id.* at 3. The court's judgment was entered on November 9. App. 88.

On November 8, a hearing was held on Respondents' motion to supplement and amend the complaint. S.R. at 340-41. During the hearing, the court elaborated upon its November 3 order as follows:

THE COURT: . . . [Y]ou can show me all the stuff in the world about how essential it is to their business operation to be in these private certification programs. That's great. *If I'm Potlatch and I've got this easy money there from the State of Minnesota*, whether it be a million, two million, \$3 million a year, I'm a bad business person and I am not meeting my obligations to my shareholders if I don't fill out an application and get that 3 million bucks, I'm crazy. That's what I'm saying. And if the State made a bad deal, if they created a bad program which they're now saying creates minimal benefits, that is the bad of the State; that's not a problem for Potlatch and Meriwether and Blandin. *That's wonderful, if you want to call it a windfall, fine.* And the State put them in that position. They didn't put themselves in that position. *They're just filling out the application and saying, send us the money. They'd be stupid not to.*

Id. at 342-43. (emphasis added). The court granted Respondents' motion to supplement and amend the complaint. *Id.* at 344.

On November 23, the court stayed the portion of its judgment requiring disbursement of supplemental 2010 SFIA payments to Respondents pending Appellants' appeal, but required the recalculation, by December 1, 2011, of Respondents' 2010 SFIA payments in accordance with its order. App. 92. On November 30, an affidavit was submitted on behalf of the Commissioner of Revenue recalculating the supplemental 2010 SFIA payments as follows: \$1,887,193.45 for Respondent Blandin; \$567,310.49 for Respondent Potlatch; and \$2,720,993.75 for Respondent Meriwether. S.R. 332-33.

STATEMENT OF FACTS

The SFIA was enacted in 2001 to “promote sustainable forest resource management.” Minn. Stat. § 290C.01 (2010); 2001 Minn. Laws 1st Spec. Sess., ch. 5, art. 8, §§ 5-15. The legislation became effective January 1, 2002. 2001 Minn. Laws 1st Spec. Sess., ch. 5, art. 8, § 5. The Commissioner of Revenue (“Commissioner”) is the official charged with administering the SFIA program. *See, e.g.*, Minn. Stat. § 290C.02, subd. 4; 290C.03-.05; 290C.06-.13.

A. Timing Of The SFIA Program’s Application Process, Annual Certification, And Annual Incentive Payments.

The SFIA program is administered on an annual calendar year basis pursuant to the provisions of the SFIA. Persons who own forest land in Minnesota may apply to enroll their land in the SFIA program by submitting an application to the Commissioner by September 30 “in order for the land to become eligible beginning in the next year.” *Id.* § 290C.04(a).

Within 90 days of receipt of the landowner’s application, the Commissioner must notify the landowner whether “the land has or has not been approved for enrollment.” *Id.* § 290C.04(a), (b). If the application is approved by the Commissioner, as noted above, the enrolled forest land is eligible to participate in the SFIA program starting on January 1 of the year following approval of the application. *Id.* § 290C.04(a); Add. 38. Similarly, termination of enrollment in the program occurs on January 1 of a given year. *See, e.g.*, Minn. Stat. § 290C.10.

Approximately six months after the land becomes eligible to participate in the SFIA program (on or about July 1) the Commissioner sends the enrolled landowner—referred to as a “claimant”—an “annual certification form.” *Id.* § 290C.05. The certification form lists the claimant’s total number of forest land acres that are “eligible” for participation in the SFIA program as of January 1 of that calendar year. *Id.*; see, e.g., S.R. 15-30, 37-54, 63-71, 78-85. “The claimant must sign the certification, attesting that the requirements and conditions for continued enrollment in the program are currently being met, and must return the signed certification form to the commissioner by August 15 of that same year.” Minn. Stat. § 290C.05. An “annual incentive payment” is then made to the claimant on or before October 1 “based on the certification[] due August 15 of that year.” *Id.* § 290C.08, subd. 1; Add. 38.

The timing of the “annual certification form” and the “annual incentive payment” are the same for claimants in their subsequent years of participation in the SFIA program. Minn. Stat. §§ 290C.05, .08, subd. 1; Add. 38. Accordingly, the annual incentive payment is made three months before (by October 1) a claimant has completed its participation in the program for a given calendar year. Minn. Stat. §§ 290C.04, .05, .08, subd. 1.

Landowners began applying to enroll their forest land in the SFIA program during calendar year 2002. Add. 38. Thus, landowners who submitted an application to the Commissioner by September 30, 2002, and were accepted into program after the Commissioner’s ninety day review period, became eligible to participate in the program as of January 1, 2003. Minn. Stat. § 290C.04(a), (b); Add. 38. The first certifications,

listing claimants' total number of acres eligible for participation in the program as of January 1, 2003, were received by the Commissioner on or before August 15, 2003. The first annual incentive payments based on those certifications were made by the Commissioner on October 1, 2003. Add. 38; see also Exs. I & K of Borer Aff. in Supp. Pls.' Mot. Partial Summ. J ("Borer Aff."). The Commissioner paid 320 claimants a total of \$1,582,715.31 for their participation in the program during calendar year 2003. Add. 38.

B. The SFIA Program's Eligibility Provisions.

In order to participate in the SFIA program, a claimant must implement a forest management plan; follow timber harvesting and forest management guidelines; enroll the land in the program for a minimum of eight years; and timely pay all property taxes for the eligible land. Minn. Stat. § 290C.03(a)(2)-(5). A claimant enrolling more than 1,920 acres must provide "nonmotorized access to fish and wildlife resources" on the enrolled land, § 290C.03(a)(6), but is not required to advertise or post the land as being open for such purposes. Add. 44.

A claimant must also voluntarily place a covenant on the enrolled forest land providing that "the land is not and shall not be developed in a manner inconsistent with the requirements and conditions" of the SFIA program. Minn. Stat. § 290C.04(a)(vii). The SFIA requires the Commissioner to specify the form of this covenant. *Id.* Pursuant to this statutory directive, the Commissioner established the form of the covenant, and included the following express disclaimer:

This covenant *is not a contract*; it is a condition of the SFIA. *The conditions of the SFIA and of this covenant are requirements of current law that could change in the future.* All references in this covenant to ‘sections’ and ‘chapter’ are to sections and chapters of the Minnesota Statutes as currently in effect and as amended or renumbered in the future.

See, e.g., Add. 45 (emphasis added). This language was used in all the SFIA covenants executed in 2003 to the present.² See Exs. 1-38 of Rosalez Aff. in Supp. Defs.’ Mot. Dismiss (“Rosalez Aff.”).

Throughout their participation in the SFIA program, Respondents (and the predecessor owner of property subsequently acquired by Respondent Meriwether) signed the SFIA covenant, including the disclaimer, 38 separate times. *Id.*

C. Respondents’ Ongoing Participation In Private Forest Management Certification Programs That Are Far More Stringent and Detailed Than the SFIA.

Apart from the SFIA program, Respondents engage in sustainable forest management of all of their forest land through participation in private certification programs, the Sustainable Forestry Initiative (“SFI”) and/or the Forest Stewardship Council (“FSC”). S.R. 10, 34, 57. The SFI and FSC require compliance with various standards, which are far more stringent and detailed than the requirements of the SFIA.

Add. 43-44; S.R. 90-104; SFI Standards, *available at* <http://www.sfiprogram.org/files/pdf>

² The SFIA covenant signed in 2002 contained a similar express disclaimer, which provided:

This covenant is a condition of the SFIA. *The conditions of the SFIA and of this covenant are requirements of current law that could change in the future.* All references in this covenant to ‘sections’ and ‘chapter’ are to sections and chapters of the Minnesota Statutes as currently in effect and as amended or renumbered in the future.

Rosalez Aff., Ex. 5.

/sfi_requirements_2010-2014.pdf (last visited Dec. 14, 2011) (consisting of 119 pages that include 14 core principles, 20 objectives, 38 performance measures and 115 indicators); S.R. 105-226 (consisting of 122 pages of FSC principles, criteria, indicators, applicability, intent, and guidance standards); S.R. 241-64.

These private certification programs also require, unlike the SFIA, that Respondents submit to annual on-site third-party audits to ensure that they are complying with the SFI and/or FSC standards for sustainable forestry. Add. 38, 43-44; S.R. 104, 193. Application of the rigorous SFI and FSC standards prohibit Respondents from converting or developing their certified forest lands. Add. 43-44; S.R. 95-98, 113, 126, 132, 152, 161-62. The FSC explicitly prohibits the conversion of forest lands to other non-forest land uses except in an extremely limited circumstance and only if the conversion will enable “clear, substantial, additional, secure, long term conservation benefits.” *Id.* at 161-62.

The SFI and FSC standards also require recreational opportunities for the public on certified forest lands. Add. 43-44; S.R. 93-94, 98, 128-29, 154, 157, 169, 242, 249, 256. The SFI standards require program participants to “support and promote recreational opportunities for the public,” and prepare a written policy to “provide recreational opportunities for the public” on their certified land. Add. 43-44; S.R. 93, 98. The FSC standards state that forest management operations should “recognize, maintain, and, where appropriate, enhance” the value of forest services and resources that serve public values such as “recreation and tourism.” S.R. 129. In addition, the independent third-party auditors who conduct annual on-site SFI and FSC audits require the certified

landowners to specifically identify the recreational opportunities provided to the public, as required by the SFI and FSC standards. Add. 44.

Respondents have a critical economic need to seek SFI and FSC certification because their participation in these private programs allow them to market and sell their timber products as being “green.” Indeed, participation in these programs is essential for Respondents to compete in the forest products industry. Add. 44; S.R. 241-64, 319-20; 2011 Minn. Laws 1st Spec. Sess., ch. 7, art. 6, § 26.

D. Respondents’ Advertising On Their Websites Of Their Participation In The Private SFI And FSC Certification Programs.

As a result of their economic need to gain entry to the certified-timber market, Respondents’ websites extensively describe and tout their participation in these private certification programs, while not even mentioning the SFIA program or their participation in it.

1. Potlatch’s Website.

Respondent Potlatch proclaims on its website that in 2002 it became “the first major, publicly traded forest products company to achieve certification under the [FSC’s] strict environmental, social, and cultural standards.” S.R. 252. Its website also states:

How do you derive commercial value from a forest while ensuring its long-term sustainability? We’ve led the way in answering that question since 1903 — as a landowner, as a grower and harvester of trees, and as a manufacturer of forest products.

....

Every acre that we use for silviculture is certified under the rigorous standards of the [FSC], and every acre is managed for maximum value.

....

It's one thing to proclaim your environmental commitment. It's quite another when the [FSC] does it for you. . . . Sustainable practices are central to our business model. We believe stewardship is not only the right thing to do, but also crucial to securing the future of our industry and our leadership position within it.

....

[FSC] certification of our forestlands is the most obvious example of our commitment to well-managed forests. Our day-to-day practices and policies demonstrate that commitment as well. . . . Thanks to these and many other practices, 'sustainability' isn't something we just pay lip service to. It is integrated in the way we do business every day, and has been for over a century.

....

We are Potlatch Corporation, a verified leader in sustainable forestry. With 1.5 million acres certified to FSC standards, we grow trees, sell timber, and manufacture solid wood products. Since 1903, we have sought the common ground that enables us to unlock the value of our lands while conserving our forests for generations to come.

Id. at 249, 251-54. Potlatch further relates its commitment to “systematically monitor, measure, and report [its] performance through regular internal and external audits” as well as “publicly report certification results and environmental performance to ensure all stake holders that [it is], in fact, performing” in compliance with the FSC. *Id.* at 251.

Since the commencement of this action, Potlatch has updated its website to further promote its FSC certification:

FSC certification is the gold standard. The FSC's stringent social, economic, and environmental criteria are considered the most far-reaching and the most effective for fostering responsible forest management. As a result, FSC standards have been endorsed by many environmental and nongovernmental organizations. Similarly, FSC-certified wood products are increasingly favored by commercial builders and developers because

using FSC-labeled wood helps in attaining LEED status from the U.S. Green Building Council.

See Potlatch and Forest Stewardship Council (FSC) Certification, Potlatch, <http://www.potlatchcorp.com/FSCCertification.aspx> (last visited December 14, 2011).

2. Blandin's Website.

Respondent Blandin's website likewise declares that all its forest land is SFI-certified and boasts of its longstanding commitment to sustainable forest management practices. S.R. 255-64. Respondent Blandin has even developed and registered "Smart Forestry," its own sustainable forest management system. *Id.* at 256. Blandin's website states further:

Forests are the source of our' most important raw material, wood. This natural and renewable resource is used to make a variety of different paper and wood products. For us it is important that these products contain only wood fibers from sustainably managed forests.

....

Who Really Cares About The Environment?

We do. As the frontrunner of the new forest industry, [Blandin] leads the integration of bio and forest industries into a new, sustainable and innovation-driven future. [Blandin] paper is quality crafted, it's created with the environment in mind. From our choice of fiber to the fuel that powers our plants, we are ever-conscious of our impact on the environment.

[BLANDIN] CARES ABOUT THE ENVIRONMENT

One of the key ways in which we protect our resources is through sustainable forestry. [Blandin] is one of the world's largest forest owners and managers.

- All of our wood raw materials are harvested from sustainably managed Forests

...

All [Blandin] land is SFI certified.

Id. at 255-56, 262.

3. Meriwether's Website.

Respondent Meriwether's website³ declares that all of its forest land is actively managed "under sustainable guidelines set forth by the [SFI]. The SFI process includes the establishment of a rigorous set of standards, and third-party field audits to ensure compliance." S.R. 241. The website further states:

SFI certification continues the commitment to sustainable forestry that [Meriwether] established at its inception.

....

As a large and well-capitalized organization, we have the required resources (monetary, scientific, and personnel) to sustain our holdings. We are not forced to over-harvest or sell land to meet debt obligations.

....

Our entire approach to forest management is ideally suited to progressive commercial management, with an emphasis on sustainability that upholds the spirit as well as the letter of forest rules and regulations.

Id. Respondent Meriwether further states in a press release that it "is a leading grower of environmentally certified timber products and an active participant in non-timber forest markets." *Id.* at 242.

Respondents' websites also tout the recreational opportunities they provide to the public on their SFI and FSC certified forest lands. Respondent Blandin states on its

³ The website belongs to Forest Capital Partners, which holds land in Minnesota through Respondent Meriwether. S.R. 32.

website that “[c]ommercial forests are generally open to the public for hunting, fishing, berry picking, bird watching and hiking.” *Id.* at 256. On its website, Respondent Potlatch devotes an entire tab to the recreational activities that it provides to the public on its forest land. *Id.* at 249, 252. Moreover, Respondent Meriwether boasted in a press release that it provides “recreational opportunities throughout [its] working forests includ[ing] hunting, fishing, hiking, cross-country skiing, and recreational vehicle use.” *Id.* at 242.

E. Respondents’ Participation In The SFIA Program.

Respondent Blandin first applied to enroll forest land in the SFIA program in 2002, and its land became eligible to participate in the program starting on January 1, 2003. S.R. 56, 60; see also *supra* at 8-10. On October 1, 2003, it received its first “annual incentive payment” in the amount of \$582,331.31. *Id.* at 56; Borer Aff., Ex. I.

Respondent Potlatch first applied to enroll forest land in the SFIA program in 2005, and its land became eligible to participate in the program starting on January 1, 2006. S.R. 9, 13-14; see also *supra* at 8-10. On October 1, 2006, it received its first “annual incentive payment” in the amount of \$141,333.28. *Id.* at 9; Borer Aff., Ex. I.

On or about February 4, 2005, the same year “it became an SFI licensee,” Respondent Meriwether purchased Minnesota forest land from Boise Cascade Corporation, Inc. that was already enrolled in the SFIA program. S.R. 241, 293, 295.

Respondent Meriwether received an annual incentive payment of \$935,000 for the SFIA-eligible land it purchased in 2005.⁴ *Id.* at 32, 298-99.

In subsequent years, Respondents applied to enroll more land in the SFIA program. *Rosalez Aff.*, Exs. 1-38. They continued to receive “annual incentive payments” based on their participation in the program during the same calendar year in which the payments were made. *Id.* 38. By 2010, Respondents had enrolled more than 500,000 acres of forest land in the SFIA program, comprising approximately 60% of the total forest land enrolled in the program. *Rosalez Aff.*, Ex. 39. Respondents have not alleged any diminution in value to this land as a result of its participation in the program, or that they would have used or developed the land differently if it had not been enrolled in the program. See generally *App.* 3-24.

F. The SFIA Annual Incentive Payment Provisions.

The SFIA initially provided that the program’s annual incentive payments “shall equal the greater of” \$1.50 per acre of eligible land or an amount per acre based on a statutory formula. *See Minn. Stat.* § 290C.07 (2002). The statutory formula rates for 2003-2009, as calculated by the Commissioner, always exceeded the minimum incentive payment of \$1.50 per acre:

⁴ The Commissioner paid Meriwether a pro-rata share of the 2005 annual incentive payment based on the date it purchased the property. *S.R.* 298-99. The SFIA was thereafter amended to deal with similar future situations. *See* 2006 Minn. Laws ch. 236, art. 2, § 1 (“In the case of property sold or transferred, the former owner and the purchaser or grantee must determine between them which person is eligible to claim” the annual incentive payment).

Year	Rate
2003	\$3.19/acre
2004	\$3.62/acre
2005	\$4.32/acre
2006	\$5.24/acre
2007	\$7.18/acre
2008	\$8.61/acre
2009	\$8.74/acre

S.R. 6. In 2008, the Legislature amended the annual incentive payment provisions of the SFIA by changing the minimum incentive payment for eligible lands from \$1.50 to \$7.00 per acre. *See* 2008 Minn. Laws ch. 154, art. 2, § 23 (modifying § 290C.07).

Effective in 2010, the Legislature amended the statutory formula for calculating the SFIA program’s annual incentive payments due to a change in the statutory property tax classification for “timber lands.” *See* 2009 Minn. Laws ch. 88, art. 10, §§ 15-16. The purpose of the amendment was to make sure that the statutory calculation remained “consistent with [the] prior year’s calculations.” Add. 39; S.R. 233, 305-09; App. 37. Thus, the Commissioner did not expect the amendment to the statutory formula to significantly affect the annual incentive payment calculation and prepared a Revenue Analysis that concluded the legislation would have a negligible fiscal impact. *Id.* However, the amendment unexpectedly increased the statutory formula rate for the 2010 annual incentive payments to \$15.67 per acre, approximately an 80% increase from the \$8.74 per-acre formula rate from the prior year. Add. 39; App. 37.

G. The 2010 Amendments to the SFIA.

In July of 2009, Governor Pawlenty approved various “unallotments” of appropriated funds to correct a projected state budget deficit of \$2.7 billion. The

unallotments included placing a \$100,000 cap per claimant on the annual SFIA incentive payments to be made in calendar year 2010. App. 4-5. The Governor's unallotment of another state program was subsequently enjoined because the conditions for invoking the unallotment authority were not satisfied. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 368 (Minn. 2010). In May 2010, the Legislature ratified the SFIA unallotment and placed a \$100,000 per-claimant limit on the annual incentive payments to be made on or before October 1, 2010. *See* 2010 Minn. Laws 1st Spec. Sess. ch. 1, art. 13, § 4, subd. 3 (modifying § 290C.07).

On October 1, 2010, annual incentive payments were made to the 1700 SFIA claimants based on their participation in the program throughout calendar year 2010. Minn. Stat. §§ 290C.04(a), .08, subd. 1; Add. 38-40; see also *supra* at 8-10. Six claimants were paid the \$100,000 maximum amount, including the three Respondents. Add. 39-40. The Commissioner issued a total of \$5,711,146.58 in annual SFIA incentive payments to claimants in 2010. *Id.* at 40.

On October 12, 2010, the Department of Revenue sent a letter to the SFIA claimants explaining why the 2010 per acre rate was unexpectedly higher than the 2009 per acre calculation *Id.* at 39; App. 37. The letter stated that the unexpected increase would likely be a "one-time occurrence" and that the Commissioner planned to work with the Legislature to further amend the SFIA so that future payments will stabilize near the 2009 rate and not "be subject to unintended fluctuations." App. 37.

H. The 2011 Amendments to the SFIA.

The Legislature amended the annual incentive payment provisions of the SFIA on July 20, 2011, as part of a budget-balancing bill that resolved a government shutdown. 2011 Minn. Laws 1st Spec. Sess., ch. 7, art. 6, §§ 12, 26 (modifying § 290C.07). It removed the statutory formula for calculating annual incentive payments and set the annual incentive payment amount at \$7 per acre. *See id.* § 12. The Legislature also continued the \$100,000 annual incentive payment cap per claimant and authorized any claimant who received the maximum \$100,000 payment in either 2010 or 2011 to terminate their participation in the SFIA program by December 31, 2011, without penalty. *Id.*

The Legislature also stated, as legislative findings, the following:

Given the limits on state budgetary resources for the current and future fiscal biennia, the projected cost of the sustainable forest resource management incentive program under Minnesota Statutes, chapter 290C, of over \$31,000,000 for the fiscal 2012 and 2013 biennium, and the modest amount of tangible public benefits of that program, the legislature determines that it is prudent and necessary to reduce that program effective immediately to help balance the state budget for the fiscal 2012 and 2013 biennium and to help provide permanent structural balance to the state budget. The legislature takes notice of and finds that many of the eligibility requirements for participants in the sustainable forest incentive program are in the participants' own financial interests, determined without regard to whether they receive state payments for doing so, and that the participants with the largest amounts of acreage in the program do follow and would likely continue to follow similar or more stringent management practices, regardless of whether the program exists.

Id. § 26(a) (emphasis added).

On May 12, 2011, the legislature heard testimony from representatives of the paper and timber industry regarding the SFIA program. See S.R. 310-21. Wayne Brandt,

the Executive Vice President of the Minnesota Forest Industries and the Minnesota Timber Producers Association, testified that all of the owners of large tracts of land enrolled in the SFIA must and do participate in the SFI and/or FSC private certification programs in order to sell their forest products:

[H]aving certified inputs *is crucial* to us to sell into certain markets. There are a number of purchasers that will not buy your paper unless you have one, the other, or both [private certification] labels on it . . .

...

It's just that some consumers require -- Time magazine will not buy the paper made by Verso Paper in Sartell or by Blandin Paper in Grand Rapids if it's not certified. They just won't buy it. They're not buying uncertified paper, but they're not paying more for certified paper.

...

[I]t's [private certification of timber products] *a requirement* and profitability in the forest products industry is highly variable.

S.R. 319-20. Tom Duffus, the Upper Midwest Director for the Conservation Fund, likewise testified that private certification programs such as the SFI and FSC provide “access to the markets:”

It's basically maintaining market share for our forest products. It's not paying a premium but it's something that landowners and producers of forest products have realized *that they need to have* in order to have a market for their forests now.

Id. at 320.

SCOPE OF REVIEW

This Court reviews the district court's decision de novo. *Riverview Muir Doran, LLC v. Jadt Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In so doing, the Court must view the facts in the light most favorable to the party against whom summary

judgment was granted. *Bearder v. State*, ___ N.W.2d ___, ___ (Minn. 2011). Determining whether a statute creates a contract or promissory estoppel right is a legal question subject to the Court's de novo review. *Zurich Am. Ins. Co. v. Bjelland*, 710 N.W.2d 64, 68 (Minn. 2006). It is presumed that a statute does not create such a right. *Peterson v. Humphrey*, 381 N.W.2d 472, 475 (Minn. Ct. App. 1986), *rev. denied* (Minn. Apr. 11, 1986).

The constitutionality of a statute is a question of law, which the Court also reviews de novo. *State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011). "Statutes are presumed constitutional and will be declared unconstitutional 'with extreme caution and only when absolutely necessary.'" *State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004) (quoting *State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002)). The Court must invoke every presumption in favor of upholding a statute that is challenged on constitutional grounds. *State v. Schwartz*, 628 N.W.2d 134, 138 (Minn. 2001). To successfully challenge the constitutionality of a statute, the challenger "must overcome the heavy burden of showing beyond a reasonable doubt that the statute is unconstitutional." *Tennin*, 674 N.W.2d at 407.

ARGUMENT

I. THE SFIA DID NOT CREATE A CONTRACT OR PROMISSORY ESTOPPEL RIGHT TO A 2010 ANNUAL INCENTIVE PAYMENT IN A PARTICULAR AMOUNT.

Respondents have neither a contract nor promissory estoppel right to a particular annual incentive payment for their participation in the SFIA program in calendar year 2010. The SFIA does not "clearly and unequivocally establish" such rights and

Respondents have failed to meet the demanding promissory estoppel standards.

A. The SFIA Did Not “Clearly and Unequivocally” Create A Contract Right.

A party claiming that a statute creates a contract right must overcome the longstanding “presumption that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.” *Nat’l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985) (quotations omitted); *Peterson*, 381 N.W.2d at 475 (same). As the Supreme Court explained in *National Railroad*:

This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not *clearly and unequivocally* expressed would be to limit drastically the essential powers of a legislative body.

470 U.S. at 466 (citations omitted) (emphasis added); *accord Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (Posner, C.J.) (“To treat statutes as contracts would enormously curtail the operation of democratic government. Statutes would be ratchets, creating rights that could never be retracted or even modified without buying off the groups upon which the rights had been conferred.”).

Even a cursory review of the SFIA shows that it does not create a contract but rather declares the State’s inherently revisable and repealable interest in promoting “sustainable forest resource management.” *See* Minn. Stat. §§ 290C.01-.13 (mentioning neither “contracts” nor “contractual obligations”). In addition, the covenant explicitly

states: “This covenant is not a contract, it is a condition of the SFIA. The conditions of the SFIA and of this covenant are requirements of current law that could change in the future.” See *supra* at 10-11. Respondents signed the disclaimer 38 separate times. See Rosalez Aff., Exs. 1-38. Accordingly, the SFIA, including the incentive payment provisions, were repeatedly amended by the Legislature prior to 2010, while Respondents were participating in the program. See note 5, *infra*. Respondents never complained that the SFIA could not be amended until an amendment proved unfavorable to them.

The district court implicitly rejected the contract argument by stating “[t]he SFIA does not purport to limit the inherent power of the legislature to modify the program from time to time.” Add. 8. Instead, the court considered whether the SFIA created a promissory estoppel right. See, e.g., *Zinter v. Univ. of Minn.*, 799 N.W.2d 243, 246 (Minn. Ct. App. 2011) (recognizing a claim for promissory estoppel can only apply “where no contract exists in fact.”).

B. Respondents Cannot Satisfy the Demanding Promissory Estoppel Standards.

Courts apply the equitable remedy of promissory estoppel “sparingly,” and a plaintiff “has a heavy burden of proof to prevail on such a claim against the government.” *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292-94 (Minn. 1980); *Mesaba Aviation Div. v. Cnty. of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977) (stating that the court does “not envision that estoppel will be freely applied against the government”). To prove they have a promissory estoppel right to a particular incentive payment for their participation in the SFIA program in calendar year 2010, Respondents must first show

that the SFIA “clearly and unequivocally” made such a promise. *See Anderson v. State*, 435 N.W.2d 74, 80 (Minn. Ct. App. 1989) (stating same presumption against creation of contract right is “applicable to a [promissory] estoppel theory”); *see also Javinsky v. Comm’r of Admin.*, 725 N.W.2d 393, 398 (Minn. Ct. App. 2001) (stating a promise must be “clear and definite”).

In addition, Respondents must establish that they reasonably relied on this purported promise to their substantial detriment. *AFSCME Councils 6, 14, 65 & 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560, 568 & n.10 (Minn. 1983), *superseded by statute on other grounds*, and that enforcement of the promise is required to prevent injustice. *Javinsky*, 725 N.W.2d at 398. A party must specifically explain why its alleged reliance was reasonable and substantially detrimental to it. *See, e.g., Sundquist*, 338 N.W.2d at 568-69 (rejecting appellants’ promissory estoppel claim because they failed to specifically explain how they reasonably relied to their substantial detriment); *Javinsky*, 725 N.W.2d at 398-400 (same); *Anderson*, 435 N.W.2d at 80-81 (same).

1. The SFIA Does Not “Clearly and Unequivocally” Promise that the Incentive Payment Provisions Would Remain Unchanged.

For all the reasons discussed *supra* at 24-25, the SFIA does not “clearly and unequivocally” promise to provide a particular payment for Respondents’ participation in the SFIA program in calendar year 2010. For example, the covenant clearly states that the provisions of the SFIA “could change in the future.” *See supra* at 10-11. Nor did the SFIA “limit the inherent power of the Legislature to modify the program from time to time.” Add. 8; *see, e.g., Welscher v. Myhre*, 231 Minn. 33, 36, 42 N.W.2d 311, 313

(1950) (“Needless to say, what the legislature has authority to enact it obviously has like authority to amend or even to repeal.”).

The district court failed to hold Respondents to their strict burden of proof. Rather than apply or even reference the controlling law, the court summarily concluded that a promise to provide uncapped 2010 annual incentive payments was “implied” by Minn. Stat. §§ 290C.07, .08. Add. 17-18. That reasoning is clearly wrong because a statutory implication cannot create a “clear and unequivocal” or a “clear and definite” promise. *See, e.g., Nat’l R.R. Passenger Corp.*, 470 U.S. at 466 (“The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.”) (quotations omitted).

The district court also failed to consider the statutory framework of the SFIA and the effect the 2010 amendment had on it. The SFIA merely states that an incentive payment “will be made annually to each claimant in the amount determined under section 290C.07.” Minn. Stat. § 290C.08, subd. 1. In May 2010, the Legislature amended section 290C.07 to include the \$100,000 cap on the payments to be made on or before October 1, 2010. 2010 Minn. Laws 1st Spec. Sess. ch. 1, art. 13, § 4, subd. 3.

Thus, the court also erred in failing to recognize that the 2010 amendment supplanted a portion of section 290C.07 with regard to the 2010 annual incentive payments. *See, e.g.,* Minn. Stat. § 645.31, subd. 2 (explaining that where a law “adopts the provisions of another law by reference it also adopts by reference any subsequent amendments of such other law”); *State ex rel. Minn. Amusement Co. v. Cnty. Bd. of*

Ramsey Cnty. Commr's, 255 Minn. 413, 416, 96 N.W.2d 580, 584 (1959) (“The amendatory portion of [a] new statute takes the place of the amended portion of the former one.”).

2. Respondents Did Not Reasonably Rely On Any Purported Promise.

Even assuming *arguendo* that the SFIA “clearly and unequivocally” promised to provide a particular incentive payment, Respondents cannot have reasonably relied on this promise. Respondents failed to even allege that their reliance was reasonable, let alone support such an allegation with evidence. See App. 15.

By signing their covenants, Respondents repeatedly acknowledged that they knew the provisions of the SFIA were subject to change. See *supra* at 10-11. Moreover, the provisions of the SFIA, including the annual incentive payment provisions, were continually revised by the Legislature throughout Respondents’ participation in the SFIA program.⁵ Under such circumstances, it would be “patently unreasonable” for Respondents to rely on any purported promise that the SFIA’s annual incentive payment

⁵ See 2003 Minn. Laws ch. 127, art. 5, §§ 35-42 (modifying definition of “claimant” in section 290C.02, subd. 3); 2004 Minn. Laws ch. 228, art. 1, § 48 (amending section 290C.04(d) regarding application of data practices act); 2005 Minn. Laws ch. 151, art. 5, §§ 38-40 (modifying sections 290C.05 and .10 relating to annual certification and withdrawal of property from the program); 2006 Minn. Laws ch. 236, art. 2, §§ 1-4 (amending definitions in section 290C.02, subsd. 3, 7, and 8, including definition of “claimant”); 2008 Minn. Laws ch. 154, art. 13, §§ 45-49 (amending definition of “claimant” in section 290C.02, subd. 3, the annual certification provision of section 290C.05, and the penalties for removal provision in section 290C.11); 2008 Minn. Laws ch. 154, art. 2, § 23 (modifying incentive payment formula in section 290C.07); 2009 Minn. Laws ch. 88, art. 10, §§ 15-16 (amending sections 290C.06 and .07 regarding calculation of average estimated market value for purposes of calculation of the incentive payment).

provisions would forever remain unchanged. *See, e.g., Sundquist*, 338 N.W.2d at 568-69 (holding employees' expectation that pension contribution rates would remain fixed was "patently unreasonable" where the record demonstrated the Legislature had changed the rates in the past and that the employees were aware of such changes); *Anderson*, 435 N.W.2d at 80 (holding appellants' alleged reliance that a statutory tax exclusion would not be repealed was unreasonable).

3. Respondents Did Not Rely To Their Substantial Detriment.

In addition, Respondents have not submitted any evidence establishing the requisite substantial detrimental reliance. Respondents do not assert that they would have used or developed their forest land differently had they not participated in the SFIA. Respondents also do not allege any diminution in the value of their land as a result of its participation in the SFIA program. *See generally* App. 3-24.

Respondents are in the forest product industry and necessarily must have healthy forest lands for their business purposes. They must also manage their lands to sustain them, and in particular, participate in the far more demanding SFI and FSC private certification programs. *See supra* at 11-17. There is no evidence that Respondents would have utilized even one acre of their land, let alone all 500,000 acres, differently had they not allegedly relied on the purported promise.

Simply put, Respondents would have engaged in sustainable forest management practices even if the SFIA program did not exist. Accordingly, Respondents' SFIA program performance is illusory. *Cf. Cohen Dev. Co. v. JMJ Props., Inc.*, 317 F.3d 729, 737-38 (7th Cir. 2003) (finding performance under an alleged contract to be "illusory")

because the performance “was not motivated solely by the alleged contract.”). As the district court acknowledged, Respondents’ enrollment of their SFI and FSC-certified lands in the SFIA program allowed them to obtain the “easy money” of the annual incentive payments. S.R. 342-43.

The district court erroneously concluded that Respondents relied to their substantial detriment by simply participating in the SFIA program. Add. 18-19. As discussed above, any restrictions on the development of Respondents’ land imposed by the SFIA did not change the manner in which Respondents used their land. Accordingly, Respondents have failed to prove the necessary detrimental reliance, let alone substantial detrimental reliance, resulting from their participation in the SFIA program.

4. Equity Does Not Support Respondents’ Promissory Estoppel Claim.

For numerous reasons, equity also does not support Respondents’ promissory estoppel claim. First, as discussed *supra* at 28-30, Respondents’ reliance on the purported promise was not reasonable. *See Faimon v. Winona State Univ.*, 540 N.W.2d 879, 883 n.2 (Minn. Ct. App. 1995) (recognizing in determining whether injustice would result, the court considers “the reasonableness of the promisee’s reliance . . . [and the reliance’s] definite and substantial character in relation to the remedy sought.”).

Second, as recognized by the Legislature, and as Respondents own public declarations make clear, the implementation of SFI and FSC sustainable forest management practices are critical for Respondents to remain competitive in the forest-products industry. *See supra* at 13-17, 21-22. It is undisputed that Respondents would

engage in this conduct (which is also undisputedly far more stringent than the SFIA's requirements) regardless of their participation in the SFIA or their receipt of annual incentive payments under the program. See *supra* at 11-17, 21-22. Under such circumstances, it would be inequitable to allow Respondents to reap a windfall for conduct they already necessarily engage in to support their private business interests.

Third, the annual incentive payment provisions have previously been amended to increase the amount of these payments. Yet, Respondents now claim that these payment provisions cannot be changed by the Legislature. Equity does not support this position. See, e.g., *Peterson v. Holiday Recreational Indus.*, 726 N.W.2d 499, 505 (Minn. Ct. App. 2007) (“[H]e who seeks equity must do equity, and he who comes into equity must come with clean hands.”) (quotations omitted).

Fourth, in requesting a 2010 SFIA annual incentive payment at the rate \$15.67 per acre, App. 5, 11-12, Respondents sought to benefit from an error that mistakenly resulted in an approximate 80% increase in the 2010 payment. Their own request is inequitable.

Fifth, by not asserting their claims until January 2011, Respondents deprived the Legislature of an opportunity to consider reallocation of the available 2010 SFIA monies as part of the budget balancing bill. See, e.g., *In re Jordan's Estate*, 199 Minn. 53, 63, 271 N.W. 104, 108 (1937) (“[E]quity aids the vigilant, not those who sleep upon their rights.”).

In referencing the equities, the district court simply stated that “in view of the *de minimis* impact on the State's budget and the significantly greater impact on [Respondents], the balance properly tilts in favor of [Respondents].” Add. 20. This

conclusion is erroneous because the court failed to give any deference to the Legislature's policy choices and judgment in balancing the State's budget, did not consider the compelling equities that support a contrary decision, and failed to view the facts in the light most favorable to Appellants.

The court also stated that Appellants did not "suggest" that Respondents' participation in the SFI and FSC programs produces economic benefits comparable to the incentive payments under the SFIA. Add. 19, 22. To the contrary, the undisputed facts submitted by Appellants show that Respondents abide by the far more stringent SFI and FSC standards and that such participation is critical for them to continue to sell their forest products. See *supra* at 11-17, see also *infra* at 46, 48. It is Respondents' burden to prove their promissory estoppel claim, and in any event, the facts must be viewed in favor of Appellants.

The court also misconstrued the SFIA by finding that Respondents had fully "earned" their 2010 annual incentive payments before the Legislature enacted the \$100,000 cap. The SFIA is administered on an annual calendar year basis. See Minn. Stat. § 290C.04(a) (stating claimants must apply by September 30, "in order for the land to become eligible *beginning in the next year.*"); Add. 38. As explained *supra* at 8-10, the annual incentive payments are for a claimant's participation in the program throughout the same calendar year and are actually made three months before such performance is complete.

The court's analysis is therefore contrary to applicable law as well as the Affidavit of John Hagen. Add. 38-39. Indeed, rather than "retroactively divest[ing]" Respondents

of their “earned” 2010 payments, Add. 20, the \$100,000 cap—enacted before Respondents’ submission of their 2010 annual certification and payment of their 2010 annual incentive payments—operated prospectively. *See also Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 842 (Minn. Ct. App. 2007) (stating that statutes are presumed to operate prospectively).

5. Neither the *Swanson* nor the *Christensen* Cases Support the District Court’s Order.

Contrary to the court’s reasoning, the prospective nature of the law at issue here is even more apparent than in *Swanson et al. v. State et al.*, No. 62-CV-10-05285 (Ramsey Cnty. Dist. Ct. June 29, 2011). *See* S.R. 265-91. In *Swanson*, the court upheld legislation that reduced the statutory formula used to calculate already-retired public employees’ pension annuities against a challenge that the legislation unconstitutionally and retroactively took away the formula they were entitled to at the time of their retirement. *Id.* at 267. Even though the public employees were already retired and had fully performed years, if not decades before, the court found the legislation operated prospectively because it did not affect benefits previously paid to the retirees. *Id.* at 280-81.

Just as in *Swanson*, here the \$100,000 cap did not alter or divest the annual incentive payments already paid to Respondents. Moreover, unlike *Swanson*, at the time the cap was enacted Respondents had not even fully earned their 2010 payments. *See supra* at 8-10. Accordingly, the court in this case plainly erred in distinguishing *Swanson*

and finding that the cap “retroactively” divested Respondents of their earned 2010 payments.

It should also be noted that *Swanson* properly rejected a promissory estoppel claim stating that “[s]ince the statutory language does not demonstrate the existence of a binding contract, it fails to reflect the existence of a promise to refrain from amending the statutory formula.” S.R. 285. The district court did not even mention this portion of the *Swanson* opinion.

Nor does *Christensen v. Minneapolis Mun. Emps. Ret. Bd.*, 331 N.W.2d 740 (Minn. 1983) support the court’s decision. In *Christensen*, a 48-year-old public official, who had already been receiving pension benefits for 10 years, challenged legislation setting the new minimum age requirement for such benefits at 60, thereby suspending his eligibility for such benefits. The court concluded that public employees did not have a contractual or due process property-interest in their public pensions. *Id.* at 746-48. However, the court found the official had a promissory estoppel right in his pension based, in part, on the *special employment relationship* between public employees and the State and overruled prior case law finding that a public pension was a “gratuity.” *Id.* 746-49.

The court reasoned that the pension was a part of the employee’s contract of employment and “[e]mployees in the public sector undertake employment, at times on less favorable terms than in the private sector, with the expectation that they will have a measure of security in their retirement years.” *Id.* at 747. The court also relied on the fact that the Legislature did not enact the new pension age requirements until *after* the

official had fully performed on his employment contract, retired from public service, and began receiving his pension benefits. *Id.* at 749.

This case does not involve the special public employment relationship at issue in *Christensen*, nor are the facts in *Christensen* similar to this case. Unlike *Christensen*, at the time the Legislature enacted the \$100,000 cap Respondents had not completed their 2010 SFIA performance and thus had not already earned, let alone received, their 2010 incentive payments. See *supra* at 8-10. Accordingly, the particular considerations and facts involved in *Christensen* are not present in this case.

The unique circumstances of the *Christensen* case are also reflected in the fact that Minnesota public employee pension cases decided since *Christensen* have all rejected promissory estoppel claims. See, e.g., *Swanson*, No. 62-CV-10-05285 at 20 (Ramsey Cnty. Dist. Ct. June 29, 2011); *Duluth Fireman's Relief Ass'n v. City of Duluth*, 361 N.W.2d 381, 386 (Minn. 1985); *Sundquist*, 338 N.W.2d at 568-69. In fact, Appellants are unaware of any Minnesota appellate case other than *Christensen* that has found a promissory estoppel right based on a statute.

For all the above stated reasons, the district court erred in finding that Respondents have a promissory estoppel right.

II. EVEN ASSUMING ARGUENDO THAT A CONTRACT OR PROMISSORY ESTOPPEL RIGHT EXISTS, THE STATUTORY CAP ON SFIA PAYMENTS DID NOT UNCONSTITUTIONALLY IMPAIR THAT RIGHT.

The United States and Minnesota constitutions contain impairment of contract provisions, neither of which are absolute. See U.S. Const. art. I, § 10; Minn. Const. art. I, § 11. Rather, “the economic interests of the State may justify the exercise of its

continuing and dominant protective power notwithstanding interference with contracts.” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 437 (1934). See also *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977) (“[T]he contract clause does not prohibit the states from repealing or amending statutes generally”).

The Supreme Court has adopted a three-part test for determining whether a contract has been unconstitutionally impaired. This test has also been adopted by the Minnesota Supreme Court. Respondents must first show that the legislation has substantially impaired a contractual or promissory estoppel right. If a substantial impairment exists, the legislation is nevertheless constitutional if it serves a significant and legitimate public purpose, and the legislation is reasonably appropriate to accomplish the public purpose. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983); *Christensen*, 331 N.W.2d at 750-51 (applying test to promissory estoppel claim). Application of these factors demonstrate that the challenged statute is constitutional even assuming that a contract or promissory estoppel right exists.

A. Respondents’ Purported Contract Or Promissory Estoppel Right Was Not Substantially Impaired.

There is no substantial impairment of an alleged contract or promissory estoppel right because the statutory amendment at issue provided for payment to Respondents. See *Christensen*, 331 N.W.2d at 742-43 (finding substantial impairment based on *full* suspension of benefits); *Drewes v. First Nat’l Bank of Detroit Lakes*, 461 N.W.2d 389, 392 (Minn. Ct. App. 1990) (finding substantial impairment where statutory change *completely* eliminated any contract remedies available to debtors). Moreover, as *Energy*

Reserves explained, in determining whether an alleged impairment of contract is substantial, a court must also consider whether the plaintiff could reasonably foresee a possible change in law. 459 U.S. at 416-17. As discussed above, *supra* at 24-25, 28-31, it certainly was reasonable for Respondents to expect a change in the SFIA.

B. In Any Event, the Challenged Statute Furthers the Fiscal Stability of the State, and Avoids Payment of Large Windfalls, Which Are Significant and Legitimate Public Purposes.

Even if a substantial impairment existed, the challenged law serves significant and legitimate purposes. It responded to the immediate fiscal crisis of the State, helped satisfy the balanced budget required by the State constitution, *see Brayton*, 761 N.W.2d at 360, and supports the fiscal integrity of the State's finances. *See, e.g., Lienhard v. State*, 431 N.W.2d 861, 967 (Minn. 1988) (stating that "the protection of a governmental entity's financial stability is a legitimate public purpose"); *Sundquist*, 338 N.W.2d at 570-71 (concluding that legislation addressing state budget deficit furthered a legitimate public purpose). Avoiding the use of public money to pay windfalls, *see supra* at 7, 11-17, 21-22, also constitutes a significant and legitimate public interest.

C. The Amendment to the SFIA Was A Reasonable and Appropriate Legislative Response to the State's Financial Crisis.

When evaluating the third factor of the *Energy Reserves* test, courts do not second-guess a state's manner of addressing a public issue. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987); *Minneapolis Teachers Ret. Fund Ass'n v. State*, 490 N.W.2d 124, 131 (Minn. Ct. App. 1992) ("It is not within the power of the court to second guess the policy determinations of the legislature."). If the purpose of the

legislation is furthered by the means chosen, the legislation will be upheld. *See Energy Reserves*, 459 U.S. at 418.

In balancing the State's budget, the Legislature imposed the maximum SFIA payment amount of \$100,000 for calendar year 2010, saving the State vital financial resources and preserving the program. This is a reasonable and appropriate approach to dealing with the State's financial condition. A similar conclusion was reached in *Anderson*, 435 N.W.2d at 79-80 (reasoning that, even if the repeal of a tax exclusion constituted a substantial impairment of contract, the Legislature's actions were "reasonable and appropriate" as part of a comprehensive reform package to address the economic conditions of the State). The reasonableness of the Legislature's action to prevent the payment of windfalls is also demonstrated by the fact that large forest landowners, like Respondents, greatly benefit from forest management and would engage in more stringent sustainable forest management practices even if the SFIA did not exist. *See supra* at 11-17, 21-22.

The district court concluded that the cap was not rationally-based because the budget savings with respect to Respondents, \$7.7 million, was "*de minimus*." Add. 20-21. In so doing, the court erred by failing to give any deference to the Legislature's policy judgments, including the need for a comprehensive budget balancing bill. *See supra* at 37. In addition, although the court recognized the windfall received by Respondents under the program, S.R. 342-43, it failed to give deference to the Legislature on that important point as well.

For all of the above reasons, even if a contract or promissory estoppel right exists (which it does not) Respondents' unconstitutional impairment of contract claim has no merit.

III. APPLICATION OF THE CAP TO RESPONDENTS' 2010 SFIA PAYMENTS DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING.

Both the United States and Minnesota Constitutions provide that private property shall not be "taken" for public use, without just compensation. U.S. Const. amend. V; Minn. Const. art. I, § 13. A "takings" claim involves the government's physical invasion or direct appropriation of private property, or the involuntary imposition of a government regulation, like a zoning ordinance, that "unfairly diminish[es] the value of the individual's property." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007).

A takings claim entails a two-step analysis. A court must first determine whether Plaintiffs "possessed a cognizable property interest in the subject of the alleged taking for purposes of" the Takings Clause. *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004), *cert. denied* 546 U.S. 811 (2005). Only if Respondents meet this initial requirement does the Court need to address whether the government act constituted a "taking." *Id.* at 1218. Plaintiffs' takings claim fails as a matter of law under both steps.

A. An SFIA Payment Is Not A Property Interest Within the Meaning of the Takings Clause.

Respondents voluntarily elected to participate in the SFIA program and place restrictions on their land. Therefore, no land has been taken against Respondents' will, and their voluntary decision to participate in the SFIA program precludes any physical or

regulatory takings claim. *See, e.g., Yee v. City of Escondido, California*, 503 U.S. 519, 527 (1992) (“The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.”). Nor do Respondents allege a diminution in the value of their land.

Respondents real complaint is that they purportedly have been denied a specific payment under the SFIA, and they seek to recover that payment. However, Respondents have no cognizable Takings Clause interest in a SFIA payment. *See, e.g., E. Enters. v. Apfel*, 524 U.S. 498, 540, 554, 556 (1998) (where a majority of the Court recognized that “property” for purposes of Takings Clause claims refers to physical, personal, and intellectual property and does not include a statutory provision that “simply orders A to pay B”); *Adams*, 391 F.3d at 1219-25 (holding that payment of money is not “protected as property under the Takings Clause.”); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (same); *Pittman*, 64 F.3d at 1104-05 (recognizing that “property” as used in the Takings Clause does not extend to “statutory entitlements”); *Swanson*, No. 62-CV-10-05285, at 26 (rejecting takings claim and stating, “Plaintiffs provided no law to support their theory that a statutory formula is “property” that can be protected by the Takings Clauses”).

The district court’s reliance on *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), Add. 21, a procedural due process case, is misplaced for at least two reasons. First, “[p]roperty’ as used in the [the Takings] clause is defined much more narrowly than in the due process clauses.” *Pittman*, 64 F.3d at 1104; *accord E. Enters.*, 524 U.S. at 540, 554, 556; *Adams*, 391 F.3d at 1219-25; *Commonwealth Edison Co.*, 271

F.3d at 1338-40. As discussed above, the payment of money is not a cognizable interest under the Takings Clause.

Second, even under *Roth*, Respondents do not have a property interest in a particular 2010 SFIA payment. As *Roth* stated: “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Roth*, 408 U.S. at 576-77; *see also Nat’l R.R. Passenger Corp.*, 470 U.S. at 465-66 (stating presumption that a statute does not create “vested rights but merely declares a policy to be pursued until the Legislature shall ordain otherwise).

At the time the Legislature enacted the cap in May 2010, Respondents’ 2010 incentive payments were not even earned, let alone distributed to them by the Commissioner. *See supra* at 8-10. Thus, Respondents’ “unilateral expectation” that they would receive a particular 2010 SFIA payment does not constitute a property interest under any constitutional analysis. *See, e.g., LeBeau v. United States*, 474 F.3d 1334, 1342-43 (Fed. Cir. 2007) (stating that “[t]he lineal descendants’ right to their per capita share of the Judgment Fund was always subject to modification by Congress until distribution of their share occurred, which would vest the lineal descendants’ rights in the Judgment Fund.”); *Timbisha Shoshone Tribe v. Salazar*, 766 F. Supp. 2d 175, 185 (D. D.C. 2011) (stating “there is a great deal of authority indicating that no individual or entity possesses a property interest in [money from a] fund until that fund has actually been distributed.”); *see also Nat’l Educ. Ass’n-Rhode Island v. Ret. Bd. of the Rhode Island Emps.’ Ret. Sys.*, 172 F.3d 22, 30 (1st Cir. 1999) (rejecting due process and takings

claims and stating that it would be “nonsense” to “conclude that an expectancy insufficient to constitute an enforceable contract against the state could simply be renamed ‘property’ and [be] enforced as a promise through the back door under the Takings Clause”) (citations omitted).

B. Even Assuming *Arguendo* That Respondents Had A Property Interest Within The Meaning Of The Takings Clause, Application Of The Cap Does Not Constitute A Taking.

Even if Respondents reached the second step of the takings analysis, their claim again fails as a matter of law. Under the second step, courts analyze a takings claim using the so-called *Penn Central* factors: (1) “the economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the government action.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); accord *Wensmann Realty, Inc.*, 734 N.W.2d at 632-33.⁶

As to the first *Penn Central* factor, Respondents have failed to offer any evidence, let alone prove, a significant adverse economic impact. To the contrary, as the Legislature recognized, it is financially beneficial for Respondents to follow forest management practices, regardless of their participation in the SFIA. See *supra* at 11-17, 21-22.

With regard to the second factor, Respondents have not alleged nor provided any evidence that they would have used or developed their property differently if they had not participated in the SFIA. See generally App. 3-24.

⁶ The district court did not apply or even mention the *Penn Central* factors.

Concerning the final *Penn Central* factor, as discussed previously, the \$100,000 cap was part of a comprehensive effort by the Legislature to share the burdens associated with a huge budget shortfall. It also prevented the payment of a windfall. Accordingly, the budget balancing bill was a legitimate government action. See *supra* at 37-39.

For all of the above reasons, Respondents takings claim has no merit.

IV. RESPONDENTS' EQUAL PROTECTION CLAIM IS WITHOUT MERIT BECAUSE ALL SFIA CLAIMANTS ARE SUBJECT TO THE CAP, AND IN ANY EVENT, THE LAW IS RATIONALLY BASED.

The equal protection clauses of the U.S. and Minnesota constitutions require similarly situated individuals to be treated alike, but only "invidious discrimination" violates the constitutions. *Kolton v. Cnty. of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002). The challenged statute treats similarly situated persons alike because all participants in the SFIA program are paid an amount per acre until they reach the \$100,000 maximum. In other words, the statutory maximum payments applied to *all* participants in the SFIA program for calendar year 2010, so there was no dissimilar treatment.

Respondents complain about the effect the cap has on the per acre payment to them compared to others, App. 11-13, but that is not a basis for an equal protection claim. See, e.g., *John Hancock Mut. Life Ins. Co. v. Comm'r of Revenue*, 497 N.W.2d 250, 253 (Minn. 1993) (noting plaintiffs challenging the application of a statute were really complaining about the "uneven effects" that were the result of the taxpayer's financial situation, and not some invidious discrimination associated with the classification); *Estate of McCall v. United States*, 663 F. Supp. 2d 1276, 1303 (N.D. Fla. 2009) (rejecting equal protection challenge to cap on non-economic damages and reasoning "that although

the statute at issue may have different practical effects on different sized families, it draws no distinctions based on the size of a family”); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 57 (Md. 2007) (rejecting equal protection challenge to cap on non-economic damages and stating that effect of cap “does not create a classification between affected parties”).

Even assuming *arguendo* that the challenged statute classifies SFIA claimants as “capped” or “uncapped”, this classification satisfies the rational basis standard.⁷ Unlike participants with smaller holdings, Respondents derive huge economic benefits from sustainable forest management, which are magnified by the sheer size of Plaintiffs’ holdings (i.e., over 500,000 acres that comprise approximately 60% of the total forest land that was eligible to participate in the SFIA program in 2010). See *supra* at 11-17, 18, 21-22. Respondents also differ from other SFIA enrollees because it is in their own financial business interests to engage in forest management even apart from their participation in the SFIA, including the private certification programs. See *supra* at 11-17, 21-22.

By imposing the statutory maximum payment, the Legislature was able to achieve multiple legitimate legislative purposes. See *supra* at 37-39; see also *Lienhard*, 431 N.W.2d at 867 (rejecting equal protection challenge to cap on state tort liability);

⁷ Since no suspect classification or fundamental right is involved in this case, the Court must sustain any rational distinction, if Respondents are even treated differently than SFIA participants with smaller forest land holdings. *ILHC of Eagan, LLC v. Cnty. of Dakota*, 693 N.W.2d 412, 422 (Minn. 2005). See also *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 288 (Minn. Ct. App. 1996) (stating legislation satisfies rational basis review as long as its grounds are not “irrelevant to the achievement of a plausible governmental objective”), *rev denied*, (Minn. Oct. 29, 1996).

Dandridge v. Williams, 397 U.S. 471, 483-87 (1970) (holding maximum monthly amount paid under AFDC program does not violate equal protection clause); *Peterson v. Minnesota Dept. of Labor & Indus.*, 591 N.W.2d 76, 79-80 (Minn. 1999) (holding rule establishing a maximum amount of fees that could be charged by qualified rehabilitation consultants does not violate equal protection clause).

The district court did not expressly address the equal protection claim. However, the court's analysis implicitly rejected the argument because it provided Respondents with a smaller per acre 2010 incentive payment than other SFIA participants. Add. 23-24.

V. THE DISTRICT COURT SHOULD HAVE DENIED RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTED PARTIAL SUMMARY JUDGMENT TO APPELLANTS.

The district court should have not only denied Respondents' motion for partial summary judgment, but should have granted partial summary judgment in Appellants' favor. As discussed above, Respondents' claims regarding the cap on the 2010 incentive payment are without merit as a matter of law.⁸

Partial summary judgment should have been granted to Appellants by converting Respondents' motion to dismiss into a summary judgment motion based on the factual record submitted by Appellants. *See, e.g.*, Minn. R. Civ. P. 56.03 (permitting either party to receive a judgment under a single motion for summary judgment); *Am. Nat'l Fire Ins. Co. v. Cordie*, 478 N.W.2d 531, 533 (Minn. Ct. App. 1991) (recognizing a non-moving

⁸ Alternatively, if the Court determines that there are material disputed facts, then Respondents' motion should be denied on that basis.

party may be granted summary judgment as a matter of law). In addition, the court was authorized *sua sponte* to award summary judgment to Appellants, as they requested the court to do. See, e.g., *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. Ct. App. 2003); S.R. at 328-29.

Not only does the law support summary judgment for Appellants, but the undisputed facts do as well. Respondents never disputed, for example, that they abide by the FSC and/or SFI certification standards; they have critical business interests, including the ability to effectively compete in the timber and paper industry, for abiding by these private certification standards; they benefit greatly from sustainable forest management because it provides them with a healthy inventory of forest land for harvesting to further their business interests; the SFI and FSC certification program standards are far more stringent than the SFIA; the private certification standards require access to the public for recreational opportunities; Respondents would continue to engage in sustainable forest management and comply with the SFI and/or FSC certification standards even if they did not participate in the SFIA program; and the 80% increase in the 2010 per acre formula amount was based on a mistake and therefore represents a windfall. See *supra* at 11-17, 19, 21-22; S.R. 326-36; see also *infra* at 48.

For the same reasons the court should have denied partial summary judgment to Respondents, it should have granted partial summary judgment to Appellants.

VI. IN THE ALTERNATIVE, THE DISTRICT COURT SHOULD HAVE ALLOWED APPELLANTS TO CONDUCT DISCOVERY PURSUANT TO MINN. R. CIV. P. 56.06.

On March 23, Appellants (and the other defendants) filed their informational statement pursuant to Minn. R. Gen. Prac. 111.02, requesting that the district court's scheduling order provide that discovery in the case be deferred until defendants' motion to dismiss the various defendants and the complaint was decided. S.R. 1-4. The court never issued a scheduling order even though it was required to do so 60 to 90 days after the case was filed on January 31, 2011. Minn. R. Gen. Prac. 111.03. Nor did the court otherwise address the defendants' request to defer discovery until after the motion to dismiss was decided.

In any event, although the court recognized the presumption in favor of allowing discovery, it denied Appellants' Rule 56.06 request. The court reasoned that "there has been no suggestion by Defendants that Plaintiffs' participation in private conservation programs produces any benefit reasonably comparable to the property tax relief incentive payments available under the SFIA or that premature withdrawal from such programs could result in the type of significant financial penalties attending withdrawal from the SFIA program." Add. 22. The court further stated "additional discovery is not likely to produce" such facts. Add. 19, 23. This reasoning is flawed for at least six reasons.

First, it is not Appellants' burden to disprove that Respondents had a promissory estoppel or any other right. Rather, Respondents had the affirmative burden to prove each of their claims, including promissory estoppel. See *supra* at 22-26, 35-36, 39-40, 43.

Second, the issue raised by the court is not dispositive of any claim in this case, including promissory estoppel. See *supra* at 23-45.

Third, the record overwhelmingly shows that Appellants not only “suggested” the fact the court referenced; but submitted undisputed facts in support. See *supra* at 11-17, 21-22, 46; S.R. 326-36; Defs.’ Mem. in Opp’n to Pls.’ Mot. Partial Summ. J. at 3-6, 13; Defs.’ Proposed Findings of Fact, Conclusions of Law & Order Denying Pls.’ Mot. Partial Summ. J. at 5-8, 26-27, 36, 39-40; Defs.’ Resp. to Pls.’ Mot. Supp. R. at 6-8; Defs.’ Resp. to Pls.’ Mot. Supp. & Am. Compl. at 6-11. Participation in the private certification programs is essential to Respondents’ very ability to market their products. See *supra* at 13-18, 21-22. SFIA payments, as well as SFIA penalties referenced in the court’s opinion, are miniscule compared to the billions of dollars in revenue generated by these national and multinational companies.⁹ Indeed, the lifeblood of Respondents’ businesses is dependent on their participation in the private certification programs.

Fourth, in light of the undisputed facts already submitted by Appellants, it is apparent that similar additional facts would likely be obtained through discovery.

Fifth, contrary to the court’s opinion, when considering Respondents’ motion for summary judgment, the facts must be viewed in the light most favorable to Appellants.

⁹ For example, UPM—Blandin’s parent-corporation headquartered in Helsinki, Finland—reported approximately 8.924 billion euros in revenue in 2010, which when converted to U.S. dollars amounts to approximately \$12 billion. See UPM 2010 Annual Report at p. 151, *available at* http://files.shareholder.com/downloads/UPMKYM/1132165752x0x443813/9B22C65E-9414-4DFC-BC37-72E2061AA5D0/WEB_VSK10_ENG.pdf (last visited December 14, 2011).

At a minimum, Appellants disputed the fact referenced by the court. See *supra* at 11-17, 21-22, 46.

Finally, pursuant to Rule 56.06, Appellants identified ten other issues for discovery not mentioned by the court. These issues included, among others: (1) Respondents' reliance on the SFIA in light of their participation in the SFI and FSC programs; (2) Respondents' SFIA timing mischaracterizations; (3) the public access Respondents provide on its land; (4) Respondents' decisions to buy and hold Minnesota land; and (5) the value of Respondents' Minnesota land holdings over time. S.R. 239-40.

VII. THE "STATE OF MINNESOTA" IS NOT A PROPER PARTY.

A "proper party" defendant is a party who has caused the plaintiffs' injury. As explained by Judge Easterbrook in *Quinones v. City of Evanston, Illinois*, 58 F.3d 275, 277 (7th Cir. 1995):

A person aggrieved by the application of a legal rule does not sue the rule *maker*—Congress, the President, the United States, *a state*, a state's legislature, the judge who announced the principle of common law. He sues the person whose acts hurt him.

(Emphasis in original and added); *accord Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998) ("[T]he proper defendant is the person whose actions cause injury, not the author of the legal rule that leads to those actions.").

In this case, that State official is the Commissioner of Revenue who administers the SFIA program and not the "State of Minnesota." See, e.g., *Quinones*, 58 F.3d at 278 (concluding that a state is not a proper party to a case challenging the application of a statute and explaining that "[n]othing can be gained by adding Illinois as a party."); *Finn*

v. Rendell, 990 A.2d 100, 106 (Pa. Commw. Ct. 2010) (dismissing Commonwealth of Pennsylvania and reasoning that “[a] request that the Commonwealth be ordered to do something begs the question which of the many actors comprising state government is to be held accountable.”).

Declaratory relief cannot even be obtained against the State because it is not a “person” within the meaning of the Declaratory Judgments Act. The State is “not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.” Minn. Stat. § 645.27. Under the Declaratory Judgments Act, “person” is defined as “any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character.” Minn. Stat. § 555.13. Absent from this definition is the State and therefore, in accordance with section 645.27, the State cannot be sued under the Act.

Other jurisdictions have concluded that a state is not a person within the meaning of the Uniform Declaratory Judgments Act. *See, e.g., State v. Larue’s, Inc.*, 154 N.E.2d 708, 712 (Ind. 1958) (holding Uniform Declaratory Judgments Act does not apply against the state); *Empire Trust Co. v. Bd. of Commerce & Navigation*, 11 A.2d 752, 754 (N.J. 1940) (same); *Am. Fed’n of Labor v. Mann*, 188 S.W.2d 276, 279 (Tex. Civ. App. 1945) (recognizing the definition of “person” under the Uniform Declaratory Judgment Act “significantly omits any reference to the State as a party against which suit may be brought”); *Retail Clerks Local 187 AFL-CIO v. Univ. of Wyoming*, 531 P.2d 884, 886

(Wyo. 1975) (holding Wyoming’s Uniform Declaratory Judgments Act contains “no words of clear or direct consent to suit against the State”).

In addition, under the Act, the State is given notice of a constitutional challenge, which merely provides the Attorney General the discretionary opportunity to be heard on behalf of the State if she so chooses. Minn. Stat. § 555.11. *See also Ralston Purina Co. v. Hagemeister*, 188 N.W.2d 405, 408 (N.D. 1971) (holding that state should not be made a party to a declaratory judgment action challenging the validity of a state statute); *Elects. Corp. of Am. v. City Council of Cambridge*, 204 N.E.2d 707, 710 (Mass. 1965) (holding that attorney general was not a proper party and “[a]n allegation of unconstitutionality is only ground for notice to him”); *Harrison v. Bunnell*, 420 S.W.2d 777, 779 (Tex. Civ. App. 1967) (same); *McGraw v. Caperton*, 446 S.E.2d 921, 925 (W. Va. 1994) (recognizing “[a]n opportunity to be heard is a world apart from being considered a ‘person interested’” for purposes of the declaratory judgments act).

Minnesota Rule of Civil Procedure 5A similarly provides that the State, through the Attorney General, be notified by a party making a constitutional challenge. “[T]he purpose of the notice is to permit the Attorney General . . . to decide whether to intervene in the action.” Advisory Comm. Notes, 2007 Amend. to Rule 5A. “The rule does not require any action by the Attorney General and in many instances intervention will not be sought until the litigation reaches the appellate courts.” *Id.*; *see also* Minn. R. Civ. App. P. 144 (requiring notice to Attorney General when the constitutionality of a Minnesota statute is challenged in any appellate proceeding).

Without *any* legal analysis, the district court refused to dismiss the “State of Minnesota” as a defendant, but awarded no relief against the State.¹⁰ Add. 2-3. The “State of Minnesota” is not a proper defendant and should be dismissed.

CONCLUSION

Based on the foregoing, Appellants respectfully request that the district court’s order be reversed, the judgment be vacated, and summary judgment be ordered in Appellants’ favor.

Dated: December 15, 2011

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678

KEVIN FINNERTY
Assistant Attorney General
Attorney Reg. No. 0325995

JASON PLEGGENKUHLE
Assistant Attorney General
Atty. Reg. No. 0391772

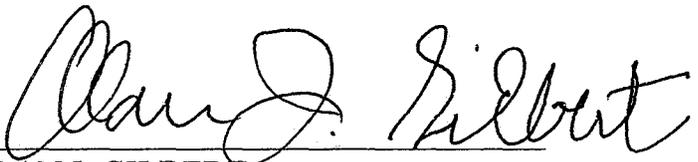
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 757-1450

ATTORNEYS FOR APPELLANTS

¹⁰ The court mentioned that the State was a named defendant in the *Swanson* case. Add. 2, n.2. However, in that case no attempt was made to separately dismiss the State as a defendant and therefore the proper-party defendant issue was not considered in *Swanson*.

**CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 13,980 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.


ALAN I. GILBERT

AG: #2914573-v1