

IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

HORACE BOUNDS, JR. and JO BOUNDS,)
and THE SAN LORENZO COMMUNITY)
DITCH ASSOCIATION; and Intervenor,)
NEW MEXICO FARM & LIVESTOCK)
BUREAU.)
) No. 32,713
Plaintiffs-Appellants,) (Ct. App. No. 28,860)
)
vs.)
)
THE STATE OF NEW MEXICO, and)
JOHN R. D'ANTONIO, JR.,)
NEW MEXICO STATE ENGINEER,)
)
Defendants-Appellees.)

**AMICUS CURIAE BRIEF OF
THE NATIONAL GROUND WATER ASSOCIATION
IN SUPPORT OF APPELLEES, THE STATE OF NEW MEXICO AND
THE NEW MEXICO STATE ENGINEER**

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INTRODUCTION

The National Ground Water Association (“NGWA” or the “Association”) submits this Brief as *amicus curiae* in support of Defendants-Appellees, the State of New Mexico and the New Mexico State Engineer. The Association filed a Motion for Leave to file a Brief as *Amicus Curiae* on July 21, 2011. For the reasons set forth in this Brief, the Association believes the Court of Appeals rightly ruled in favor of Defendants-Appellees, and held the Domestic Well Statute, NMSA 1978, Section 72-12-1.1 (2003), to be constitutional. It is significant to the determination of this case that the courts below found that Plaintiff-Appellant Horace Bounds, Jr. (“Bounds”) has suffered no injury in fact. Of equal significance is the lack of hydrological science and data available to this Court (and the courts below), despite the call of Bounds for the judiciary to declare a sweeping change to the existing water administration policies of New Mexico.

The District Court found, and the Court of Appeals affirmed, that Bounds could show no imminent injury, and without such showing the Court of Appeals rightly concluded that he could not sustain a declaratory judgment claim. Despite the fact that Bounds has shown no injury, he still maintains that the Domestic Well Statute cannot be administered without causing injury and should be overturned entirely. Such a sweeping change to the New Mexico’s water use policy should not be made without proof that even a single person’s rights have been impaired.

Moreover, even if one individual could show actual injury under the Domestic Well Statute, any new administrative policy should be formed with the benefit of reasoned debate employing the best available science. Gone are the days when the nature of ground water was so mysterious and hidden that courts and legislatures were unequipped to fairly administer the rights to it. Today, the science of hydrology is very exacting and no decision-making body need make an uninformed decision regarding the administration of ground water without the full benefit of those exacting scientific principles. No decision maker need orchestrate a sweeping policy change that could impact the lives of hundreds of thousands of people, such as proposed by Appellants, without first adequately consulting the available science.

The NGWA urges this Court to affirm the holding of the Court of Appeals and uphold the constitutionality of the Domestic Well Statute for all of the reasons set forth in the State of New Mexico and New Mexico State Engineer's Brief in Chief. Given the deft handling of the constitutional arguments by the State Engineer and the other *amici*, the NGWA need not revisit those arguments.

SUMMARY OF PROCEEDINGS

This is an appeal from the Court of Appeals, which reversed the Grant County District Court's rulings (i) granting a declaratory judgment in favor of Bounds on the grounds that the Domestic Well Statute is unconstitutional because

it violates the due process rights of water right owners and (ii) ordering the State Engineer to begin administering all applications for domestic well permits “the same as all other applications to appropriate water.”¹ *Bounds v. D’Antonio*, No. D-608-CV-2006-166 (Grant Cty. Dist., July 8, 2008) (Decision). The District Court made its rulings despite finding no actual or imminent harm to Bounds and rejecting Bounds' regulatory taking and 42 U.S.C. Section 1983 claims. *Id.* (“Plaintiff’s Other Claims,” ¶¶ 3 – 6). The State of New Mexico and the New Mexico State Engineer timely filed a Notice of Appeal on July 25, 2008, from the District Court's Decision and Final Judgment. The Court of Appeals rightly overturned the District Court in an opinion dated October 29, 2010. *Bounds v. D’Antonio*, No. 28,860 (Ct. App., October 29, 2010). Bounds filed for, and was subsequently granted, Certiorari on January 27, 2011. *Bounds v. D’Antonio*, Sup. Ct. No. 32,713.

INTEREST OF THE NATIONAL GROUND WATER ASSOCIATION

Amicus curiae National Ground Water Association is a leading trade association and professional society comprised of more than 12,000 U.S. and international members who are mostly groundwater practitioners. In recent years, NGWA has cooperated with more than 200 other organizations worldwide, and maintains affiliated organizations in 46 states including New Mexico. NGWA

¹ The District Court’s Final Judgment dated July 22, 2008 adopts and incorporates the findings of fact and conclusions of law set out in its July 10, 2008, Decision. *Bounds v. D’Antonio*, No. CV-2006-166 (Grant Cty. Dist. July 22, 2008).

serves as executive secretary of the Subcommittee on Ground Water of the federal Advisory Committee on Water Information.

The NGWA wields a national voice on nearly all issues impacting ground water rights and ground water use. The NGWA's members have formed a variety of sub-groups focusing on important areas including Aquifer Protection, Deep Ground Water Investigations, Ground Water Availability, Ground Water Law, Ground Water Modeling, and Regulators. The NGWA's membership supports a diversity of water-related interests and perspectives. Scientists, water well contractors, engineers, and many other types of water professionals are well represented within, and by, the Association. The NGWA has unparalleled expertise and is a national leader in water resource planning, and the Association is uniquely suited to critically analyze any water policy. With the benefit of this knowledge, the Association will provide special expertise to the Court regarding the scientific underpinnings of the two alternative permitting processes facing the Court.

POSITION OF *AMICUS CURIAE*

The NGWA acknowledges that amicus *curiae* must accept a case in which it participates "on the issues as raised by the parties" and cannot raise novel issues for court consideration. *State ex rel. Castillo Corp. v. N.M. State Tax Comm'n*, 79 N.M. 357, 443 P.2d 850, 855 (1968). The NGWA hopes, instead, to aid the court by calling its attention to the issues that have been raised and highlighting certain

limitations inherent to the facts before the Court. *See* 3B C.J.S. Amicus Curiae § 12 (2008) (function of amicus “is to aid, assist, and advise the court ... by calling the court's attention to law, or to facts or circumstances that may have escaped consideration”).

ARGUMENT

Recognizing its function as an *amicus* party, the NGWA will only discuss certain policy concerns relating to the specific issues raised in this case. NGWA notes that Appellants’ desired outcome would have this Court dismantle New Mexico’s water permit policy without the benefit of extensive scientific debate. In fact, Bounds would have the Court rewrite legislation without a showing that even a single citizen’s rights have been deprived by the Domestic Well Statute.

I. **The Science of Hydrology is Well Developed, Exacting, and Well Suited to Help Develop Policies and Procedures that Affect and Determine the Rights of Water Users.**

Hydrology is a well-developed science. There once was a time when ground water was so mysterious to the courts, that it was considered too “secret, occult and concealed” to regulate. *Frazier v. Brown*, 12 Ohio St. 294 (1861). In the 150 years since Justice Brinkerhoff’s now immortal description of ground water, so much has changed that we now find it preposterous to think that the contents of the aquifer were ever so closely related to black magic.

Even before the infamous Ohio case, Henry Darcy had already published the mathematical formula that governs the flow of ground water, *Les fontaines publiques de la ville de Dijon* (1856). Soon thereafter, in 1870 Adolph Thiem developed what is widely regarded as the first work in which an author explained the effects that pumping from one well could have on other wells in the vicinity. By 1923, the “father” of modern hydrology (or hydrogeology), Oscar E. Meinzer, had published his milestone paper, weaving together his theory of artesian flow with other developing science. *Outline of Ground-Water Hydrology*, U.S. Geological Survey Water-Supply Paper 494, U.S. Gov. Printing Office (1923).

In subsequent years, hydrology has developed into a very precise science. Modern methodologies allow hydrologists to measure not only the static levels of the aquifer, but also to model the impact that various activities may have on the aquifer over time. *See generally*, Douglas P. McAda & Peggy Barroll, *Simulation of Ground Water Flow in the Middle Rio Grande Basin Between Cochiti and San Acacia, New Mexico*, U.S. Geological Survey, Water-Resources Investigations Report 02-4200 (2002). A variety of techniques exist allowing scientists to predict shortages and to plan mitigation activities. Many states deploy monitoring wells in areas of concern to ensure public welfare and protect the water rights of others. *See e.g.*, *Statewide Network*, Ground Water Information Center, Montana Tech of The University of Montana, <http://mbmggwic.mtech.edu/sqlserver/v11/reports/>

StatewideNetwork.asp. Water planners have the capability of mapping the current underground water supply in any given area and predicting the ways in which that map may change over a course of years given a variety of intervening circumstances. Donna M. Cosgrove, Gary S. Johnson, Charles E. Brockway & Clarence W. Robinson, *Development of a Transient Ground-Water Model for the Twin Falls Area, Idaho* 44, Idaho Water Resources Institute, University of Idaho (1998) (describing the planning strategies used in Twin Falls, Idaho based upon long term and seasonal transient water models).

In turn the Courts have recognized that ground water rights can and should be protected by applying modern scientific principles. *See Cline v. American Aggregates Corporation*, 474 N.E.2d 324 (Ohio 1984)(citing scientific advancements that allow for better monitoring of water so that water use rights could be apportioned by the law). In fact, this very Court has long relied on the hydrological science to determine the effects of new wells on the rights of prior appropriators. *See Templeton v. Pecos Val. Artesian Conservancy Dist.*, 65 N.M. 59, 65 (1958) (relying on the testimony of two scientists to determine that the relative depth of a well and a related course of surface water were determinative of the effects of such well on the surface water).

There are many examples of hydrological tools that can be, and are, used in New Mexico and nationally to promote responsible maximize beneficial

groundwater use and protection. Legislatures, engineers, and courts no longer have to rely on bare legal theory and unproven allegations to determine whether water rights are being impacted. Water availability and water use can be measured. Cosgrove & Johnson at 44. The State engineer already utilizes metering devices. *See, e.g.* 19.27.5.13 (C) NMAC. The State also employs monitoring wells to determine the effect that certain activities have upon groundwater. *See, e.g.* 19.27.5.13 (B)(5) NMAC (requiring a domestic well permit holder to allow the State Engineer access to the permit holder's property for metering activities). In fact, the State Engineer utilizes the Water Rights Reporting System ("WRRS") to maintain "comprehensive data about domestic, irrigation, commercial and other water rights, location of rights, and owners of rights, as well as details of well construction." New Mexico Office of the State Engineer, Interstate Stream Commission, *2008-2009 Annual Report* at 26. With that data, the State Engineer "can determine the amount of permitted water use in a water basin, track changes in water use patterns, bring together regional data on water use, and compile and analyze data to build water-use models." *Id.* Moreover, "WRRS is capable of downloading to a geographic information system to create maps of water rights and water wells." *Id.*

Where water shortages exist, other scientific tools allow for mitigation. There is a national movement towards utilizing these scientific tools to optimize

water planning strategies and water protection. *See, e.g.* Charles J. Taylor & William M. Alley, Ground-Water-Level Monitoring and the Importance of Long-Term Water-Level Data, Circular 1217 (2001) (promoting a broad based approach to monitoring and modeling water levels and use over time). There is no longer a need for reliance upon unfounded legal theories regarding the mysteries of the aquifer. Some states have utilized temporary restrictions on water users, temporary permits allowing for a recharge of the aquifer, water metering, leak detection, and alternative source strategies (i.e. artificial recharge during wet periods, utilization of snowmelt waters). *See Drought in Utah: learning from the Past—Preparing for the Future*, Utah State Water Plan, 59 – 62 (The Utah Division of Water Resources 2007). The State of New Mexico, and specifically the New Mexico State Engineer, has these tools at its disposal. When the State sets its water policy and develops its procedures for adjudicating water rights, it can do so with the confidence that strong science is available to inform those policies and procedures. As a matter of good governance, the State need not, and should not, abandon or re-work its current system of permitting, water use management, and water rights adjudication unless such changes are made in accordance with the science-based hydrological tools that are available to it.

II. Bounds Has Failed to Introduce Sufficient, Scientifically-Supportable Evidence into the Record to Justify Judicial Abandonment of a Significant Piece of the State of New Mexico's Legislative Scheme of Water Planning and Right Adjudication.

A. The State of New Mexico should not implement new water planning and right adjudication procedures without confirming through hydrological evidence both that the current system is inadequate to protect the rights of prior appropriators and that the new system is better suited for meeting the needs and goals of the State.

- (i) Because a well permit does not confer upon domestic well applicants an affirmative right to *use* any water that has been previously appropriated, any inadequacy in the current system of water adjudication must lie within the other procedures available to protect appropriation rights.

The Court has been well briefed on the threshold issue presented in this case: Is the current exemption permitting the drilling of a domestic well a *per se* violation of the water rights of a prior appropriator? This question should be answered while considering that the domestic well permit exemption is but one of a number of procedural mechanisms designed to protect water rights, and others remain in place to protect prior appropriators. Though we will not rehash the well-reasoned arguments of the State Engineer and the *amici* parties, there are two facets of this issue that warrant further discussion.

First, if the rights conferred by a water permit are expressly limited by the rights of prior appropriators, then this Court must consider whether the issuance of a permit itself has a negative impact on the water rights of prior appropriators. Keeping in mind that the conditions applicable to every water permit in the State

are clear that the water use associated with such permit is limited by administrative, judicial, and local oversight—and by the process of adjudication—we think it a matter of logical fact that the mere issuance of a water permit (as opposed to the use of water pursuant to that permit) has no impact on the water supply. *See generally*, General Conditions of Approval, Application for Permit to Use Underground Waters (N.M. Office of the State Engineer). While it is conceded that the purpose of a water permit is to provide an avenue through which the well owner can access the water supply, the water supply is itself unaffected by the simple existence of the permit.

Second, because it is clear that it is the *use* of water by a well owner, and not the existence of a permit, that affects the water supply, there is no need to implement a new permitting system unless it can be shown that the other procedural protections available to prior appropriators are both inadequate to protect their rights and incapable of redress through better enforcement or better management.

- (ii) Given that a well permit does not grant an applicant the right to *use* appropriated water, the State of New Mexico should consider its existing scheme for water planning as a whole and not narrow its focus on the issuing of a permit.

In order to properly put in perspective the advisability and constitutionality of the domestic well exemption for drilling permits, this Court should consider the entire scheme into which it was adopted. The New Mexico State Legislature, for its

part, considered whether the rights of prior appropriators were so fragile as to require a prior hearing before allowing any new applicants a simple domestic drilling permit.

In fact, the Legislature did find that such a system was warranted. The Legislature adopted a system in which a prior hearing was required in all instances, other than those instances specifically exempted. NMSA 1978, Section 72-12-1 *et seq.* (2003). While the Legislature saw a need to increase the procedural protections of prior appropriators against certain new uses, the Legislature felt that more traditional protections such as adjudication, priority administration, and State Engineer oversight were adequate with respect to domestic wells. *See* NMSA 1978, Section 72-12-1.1 (2003).

The Legislature may have drawn its conclusion about the domestic well exemption for any number of logical reasons. One may argue that the exemption was justified in light of evidence that domestic wells have a *de minimus* impact on the water supply. The Legislature may also have been concerned that the cumbersome process of conducting a hearing prior to the issuance of ANY well drilling permit was too costly and burdensome on new and replacement domestic well applicants to be justified. After all, current experience with standard well permits shows that it can take many months, and sometimes many years, for a prior hearing to conclude. Brief for *amicus curiae* New Mexico Ground Water

Association at 22 – 23, *Bounds v. D’Antonio*, No. 28,860 (Ct. App., October 29, 2010).

Regardless of the Legislature’s precise reasoning for the domestic well exemption, the fact is that the exemption was enacted as part of a larger scheme to protect water rights within the State. Because the Legislature believed other procedural protections to be available to protect prior appropriators from subsequent domestic users, it did not adopt any particular hearing process that would be applicable to domestic applicants. Overturning the domestic exemption would have the unintended effect of both (a) subjecting domestic users (including those drilling replacement wells) to a procedure designed for large stakeholders and not for *de minimus* users, and (b) putting additional strain on the procedural system that would have the effect of producing even longer delays in the commercial context as well as the domestic context. Overturning the domestic well exemption would essentially task the State Engineer with an unfunded mandate to address both of these issues.

- B. Despite the abundance of available hydrological science and tools, Bounds has offered little or no scientific support that would justify abandoning the Legislature’s reasoned scheme of water planning.

In the courts below, Bounds alleged that “serious water shortages [lead] to economic harm and damages” and that domestic well permits “caused lowering of the water table.” [RP 4]. Despite Bounds’ allegations, the District Court

recognized that Bounds provided absolutely no evidence to support a 42 U.S.C. Section 1983 claim, Bounds provided absolutely no evidence of monetary damages, and Bounds provided no substantial evidence of impairment from domestic wells. *Bounds v. D'Antonio*, No. D-608-CV-2006-166 (Grant Cty. Dist., July 8, 2008) (Decision, "Plaintiff's Other Claims," ¶¶ 3 – 6). Still, Bounds asserts, without any evidentiary support, that domestic well drilling reduces the water supply available to senior water right owners.

Bounds contends that "domestic uses lower an already depleting water table" and have taken his "surface water through groundwater domestic withdrawals." [RP 383, 4]. However, evidence presented in the case below shows that, at the time he filed suit, Bounds had been receiving all of the water to which he was entitled. [RP 235].

The State Engineer has argued that it can regulate water use and protect water rights using the tools that it currently has. Even the trial court, which found in favor of Bounds with respect to certain claims, noted that Bounds did not show that some inadequacy of the State Engineer's tools resulted in a substantial impairment to Bounds' water rights. *Bounds v. D'Antonio*, No. D-608-CV-2006-166 (Grant Cty. Dist., July 8, 2008) (Decision, "Plaintiff's Other Claims," ¶ 6). In light of the advanced nature of water-science, one would expect that Bounds could present hydrological data proving some damage to his right—if any existed. At

least in that instance, this Court would have had the benefit of scientific data. Instead, (and due in part to the fact that Bounds could show no injury in fact), the Court does not have the benefit of reliable hydrological data developed from sound hydrological tools detailing the water use of the parties involved.

Moreover, there are a multitude of reasons to suggest that the current permit exemption could be administered in a way that completely protects the rights of prior users. The permit application itself states that “the drilling of the well and amount and uses of water permitted are subject to such limitations as may be imposed by a court or by lawful municipal or county ordinance which are more restrictive than the conditions of this permit and applicable State Engineer regulations.” 06H, General Conditions of Approval, Application for Permit to Use Underground Waters (N.M. Office of the State Engineer). All permit holders are required to grant the State Engineer “access to the well for meter reading and water level measurement.” *Id.* at 06K. Moreover, the permit states that the “right to divert water under this permit is subject to curtailment by priority administration as implemented by the State Engineer or court.” *Id.* at 06M. In other words, even if an applicant were granted a permit for drilling to an aquifer that was suffering from a depleted supply of water, the permit holder’s rights would still be subject to both (a) the oversight of the State Engineer, and (b) the procedural protections afforded by priority administration.

Given that the State Engineer has such broad authority to monitor and limit a new applicant's water use, one would expect the record in this case to be replete with a discussion over whether there are adequate tools available to the State Engineer to protect prior appropriators from exempt wells in light of this authority. After all, even if a new well would ordinarily cause demonstrable harm to a prior appropriator, or to the water supply generally, the modern hydrologist often employs a variety of tools to mitigate or eliminate that harm. But the record, until now, is devoid of any such evidence.

The effect of a new well can often be addressed by limiting the usage rights of its owner, a power that is held by the New Mexico State Engineer. The State Engineer currently requires, or may require, domestic well users to install metering devices in a variety of circumstances, including: when the domestic well is within a domestic well management area; when a metering requirement is imposed by the courts; for drinking and sanitary domestic use that is incidental to the operations of a governmental, commercial, or non-profit facility; for multiple households domestic use; when the domestic well is a supplemental domestic well; and in other relevant contexts. 19.27.5.13 (C) NMAC. In fact, the State Engineer may require such a device as a condition of issuance on a domestic well permit. *Id.* While domestic well users are generally limited to one acre-foot per annum of water use, the State Engineer must further limit all new domestic well users in a

domestic well management area to 0.25 acre-foot per annum of water use, and the State Engineer is permitted to impose a more restrictive limitation or require the new domestic user to transfer or acquire a sufficient water right to support such user. 19.27.5.14 (C) NMAC. In sum, if there is insufficient water to support a new water user, the State Engineer is empowered to prevent even the domestic well permit holder from using water without separately obtaining the rights to do so.

Moreover, even in cases where a new water use may otherwise impact the water rights of prior appropriators, a well may be constructed in such a way as to reduce its effect on the water supply sufficiently to avoid an intrusion on the prior appropriator's rights. For instance, a new permit holder may mitigate the impact of a new well by utilizing a more efficient system for return flow. *See Drought in Utah*, 59 – 62. While the ultimate impact of a return flow system is highly dependent upon the circumstances surrounding a given well and aquifer, it has been shown that in riparian zones of perennial streams, return flow from domestic wells “may afford a net gain of water recharged to the water table due to the drawn-field return flow,” W. Peter Balleau & Steven E. Silver, *Hydrology and Administration of Domestic Wells in New Mexico*, 45 Nat. Resources J. 807, 816 (2005). This point is particularly salient given that a well permit holder (whether such permit is “exempt” or not) is required to use a licensed driller, employ the “highest and best technology available to ensure conservation of water,” and the

permit is subject to cancellation if any of the conditions are violated. General Conditions, 06E, 06I, 06L.

CONCLUSION

Ruling in favor of Bounds would overturn decades of water planning policy that has adapted through the efforts of the office of the State Engineer as the science of ground water has evolved. Ruling for Bounds would result in residential well-users being subjected to a procedure that was designed and developed by the Legislature and the state engineer for commercial users only. And the ruling would be made without the benefit of readily available hydrological evidence regarding the appropriateness of the procedure.

Bounds has argued that as a matter of absolute consequence, every new permit negatively affects the water supply. But as we know, the permit itself is not the problem, but rather it is the unmitigated activity of removing water from the aquifer (and failing to return it) that threatens the rights of prior appropriators. There are many other tools available to the State and to the State Engineer that could be effective in protecting water rights, and these tools could be implemented within the framework of the current system.

We have no doubt that the courts of New Mexico should play a role in vigorously protecting water rights, but that protection is only necessary where a scientifically proven threat exists to those rights. Despite the vast library of

hydrological science available to Bounds, he was unable to prove damage in this case. This case brings to mind the age-old maxim that bad facts make bad law; decades of precedent and water planning policy should not be tossed aside without a sufficient scientific basis.

For the foregoing reasons, amicus curiae National Ground Water Association respectfully requests that this Court affirm the decision of the Court of Appeals and find the Domestic Well Statute constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by first-class mail, postage prepaid, to all counsel of record, on July 28, 2011, as follows:

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