IN THE COURT OF APPEALS OF 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,

Plaintiffs – Appellees,

vs.

THE STATE OF NEW MEXICO, and JOHN R. D'ANTONIO, JR., NEW MEXICO STATE ENGINEER

Defendants – Appellants.

No. 28,860

BRIEF IN CHIEF OF AMICI CURIAE 4 DAUGHTERS LAND & CATTLE COMPANY, GREAT WESTER RANCH, LLC, SANDERS LAND & CATTLE, INC., WESTERN NEW MEXICO WATER PRESERVATION ASSOCIATION AND VERDE REALTY

On Appeal From the Sixth Judicial District
For the County of Grant
Grant County Cause No. D-608-CV-200600166
Before the Honorable J. C. Robinson

Dated: December 4, 2008

Respectfully submitted,

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SUMMARY OF PROCEEDINGS

On June 15, 2006, Plaintiff-Appellee Horace Bounds, Jr., Jo Bounds, and the San Lorenzo Community Ditch Association filed suit against the State of New Mexico and the State Engineer. Plaintiffs sought a declaration that the domestic well statute, NMSA 1978, § 72-12-1.1 (2003), was unconstitutional. Plaintiffs also sought to enjoin the State Engineer from issuing domestic well permits, alleged a regulatory taking of their property rights, and claimed a violation of 42 U.S.C. § 1983. **[RP 1-9]**. The New Mexico Farm & Livestock Bureau was permitted to intervene on behalf of Plaintiffs. **[RP 378-87]**.

On May 7, 2008, Defendants-Appellants moved for summary judgment on the entire complaint. **[RP 389-495]**. On July 10, 2008, the district court granted Defendants-Appellants' motion in part and: (1) dismissed Plaintiff Jo Bounds with prejudice, (2) dismissed the Ditch Association without prejudice, (3) dismissed (without prejudice) Plaintiff Horace Bounds's § 1983 and takings claims, finding he had suffered no monetary damages, and (4) declined to issue an injunction. **[RP 844]**. Nonetheless, the district court entered the following declaration: "NMSA 1978, § 72-12-1.1 is declared to be unconstitutional as a matter of law and Defendant State Engineer shall hereafter administer all applications for domestic well permits the same as all other applications to appropriate water." **[RP 856]**. In support, the district court quoted Article XVI, Section 2 of the New Mexico

Constitution: "Priority [of] appropriation shall give the better right." Curiously, the order mandating the State Engineer to issue domestic well permits as prescribed by NMSA 1978 72-12-3 (2001), was in the nature of a writ of mandamus—relief not requested in the complaint, and which requires very specific pleadings and requirements strictly enforced by New Mexico courts. *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 10, 140 N.M. 168, 140 P.3d 1117 (mandamus proceedings are "technical" and "strictly regulated").

The district court made no finding that Plaintiff Horace Bounds' surface water rights had in fact been impaired by any domestic or stock well (hereinafter also "*de minimis* well"). Indeed, the district court found that they had *not* been impaired and that Plaintiff Horace Bounds (hereinafter "Plaintiff") had not suffered any monetary damages, **[RP 844]** but that "Bounds does not have to suffer actual impairment to attack the constitutionality of the statute." **[RP 841, ¶ 21]**. Further, the district court determined that "[w]hether § 72-12-1.1 is constitutional is a question of law." **[RP 843]**. Thus, this case squarely presents the purely legal question whether Section 72-12-1.1 is constitutional on its face. This is the only question amici will address in this brief.

STATEMENT OF FACTS AND INTERESTS OF AMICI

Amici 4 Daughters Land & Cattle Company, Sanders Land & Cattle, Inc., and Great Western Ranch, LLC (hereafter "Stock Well Owners") are owners of

cattle ranches in New Mexico situated in areas of the state that are great distances from any streams or are within mined groundwater basins with no hydraulic connections to surface waters. Stock Well Owners rely on shallow stock wells for watering their cattle. These wells also provide water to wildlife such as deer and antelope and smaller predators. These wells produce very small amounts of water through windmills, solar pumps or, occasionally, low voltage pumps, and typically are used to fill small water tanks. These wells have been permitted pursuant to NMSA 1978, § 72-12-1.2 (2003) without a complex publication and hearing process. These stock wells are precisely the kind that resulted in the express legislative finding in NMSA 1978, § 72-12-1 (2003) that because they produce such "small amounts of water consumed in the watering of livestock" there was no need to extend New Mexico State Engineer jurisdiction over them so as to require a complex hearing process prior to the issuance of a permit for their use.

Although stock wells are governed by Section 72-12-1.2 and not Section 72-12-1.1, invalidated by the district court, there is little to no legal difference between these two sections (which were, at one point, part of the same statute). Stock Well Owners, therefore, seek amicus status because they fear that the reasoning applied by the district court to domestic wells under Section 72-12-1.1, if allowed to stand, would apply with equal force to stock wells under Section 72-12-1.2.

Amicus Western New Mexico Water Preservation Association ("WNMWPA") is an association composed of over one hundred individuals in the Zuni Underground Water Basin that utilize small *de minimis* wells in locations miles from any stream and, often, miles from their nearest neighbor.

Amicus Verde Realty owns a platted development in an area where the local government has approved small, shared wells as a water supply. The New Mexico State Engineer has made a finding there is a groundwater supply to sustain the development, resulting in development approval. The New Mexico State Engineer granted this development *de minimis* well permits. Verde Realty, in reliance on those permits, has drilled *de minimis* wells that will be used to serve multiple lots. Because multiple houses will share one small *de minimis* well, the use for dwelling will be limited to around .25 acre feet per annum—an amount much less than the statutorily-permitted three acre feet per annum under the domestic well statute. *See* NMSA 1978, § 72-12-1.1 (2003). If the district court decision stands and the *de minimis* well statute is held to be unconstitutional, the already platted subdivisions with water plans approved by the New Mexico State Engineer will be subject to entirely different requirements under the New Mexico Subdivision Act, capital already invested in the development will be lost, and the well permits already issued to Verde Realty will be rendered void.

The WNMWPA domestic wells and the Verde Realty shared wells are

precisely the kinds of *de minimis* wells that resulted in the legislative finding that "the relatively small amounts of water consumed...in household or other domestic use" did not require imposition of a costly and complex hearing requirement prior to their issuance. *See* NMSA 1978, § 72-12-1 (2003). As discussed more fully below, legal rules that have been in place since prior to statehood place the burden of proof to invalidate the wells used by Amici on the party asserting that drilling or use of those wells will cause impairment to their water rights. Were the district court decision to stand, that burden would be reversed. To replace or obtain new *de minimis* use wells, Amici would be forced to attend an expensive hearing in which Amici would have the burden of proving a negative—that the new or replacement well would not impair the rights of other users. *See* NMSA 1978, § 72-12-3 (2001).

The Legislature has repeatedly rejected this proposed change in burden of proof ordered by the district court. *See* S.B. 120 & H.B. 285, 2005 Leg. Sess. (N.M. 2005); S.B. 89, 2004 Leg. Sess. (N.M. 2004); S.B. 565 & H.B. 307, 2003 Leg. Sess. (N.M. 2003); H.B. 307, 2002 Leg. Sess. (N.M. 2002). Amici explain below why such a draconian shift in water policy by judicial legislation is supported neither by valid legal reasoning nor by rational water policy.

STANDARD OF REVIEW AND STATEMENT OF PRESERVATION

When analyzing a statute, the reviewing court will presume that the statute is constitutional and will afford a statute a constitutional construction if it is reasonably supported by the statutory language. *State v. Fleming*, 2006-NMCA-149, ¶ 3, 140 N.M. 797, 149 P.3d 113. When reviewing constitutional challenges to statutes, there exists a strong "presumption of constitutionality," and the party attacking the constitutionality of the statute has "the burden of proving the statute is unconstitutional beyond all reasonable doubt." *American Civil Liberties Union [ACLU] v. City of Albuquerque*, 2006-NMCA-078, ¶ 10, 139 N.M. 761, 137 P.3d 1215. The Court conducts the analysis as a mixed question of law and fact, affording deference to findings of fact made in the district court and determining the law applicable to such facts under de novo review. *Fleming*, 2006-NMCA-149, ¶ 3. The State Engineer preserved the argument that Section 72-12-1.1 is constitutional in its motion for summary judgment. **[RP 389-495]**.

ARGUMENT

I. THE DISTRICT COURT VIOLATED THE DOCTRINE OF SEPARATION OF POWERS AND ENGAGED IN JUDICIAL LEGISLATION WHEN IT ORDERED THE NEW MEXICO STATE ENGINEER TO APPLY SECTION 72-12-3 TO PERMITS FOR *DE MINIMIS* WELLS.

A. The Legislature Made Express Legislative Findings that Support Its Choice Not To Require A Formal Hearing Prior to Issuance of

Permits for *De Minimis* Wells. Rejection of Those Findings Violated the Doctrine of Separation of Powers.

Two separate statutory provisions govern domestic wells. Section 72-12-1 applies to *de minimis* wells and contains express legislative findings that domestic wells and stock wells use *de minimis* amounts of water:

> by reason of the varying amounts and time such water is used and the relatively small amounts of water consumed in the watering of livestock; in irrigation of not to exceed one acre of noncommercial trees, lawn or garden; in household or other domestic use ... application for any such use shall be governed by the provisions of Sections 72-12-1.1 through 72-12-1.3 NMSA 1978.

NMSA 1978, § 72-12-1 (2003). Because these uses are nominal, when a person applies for one of these uses the Legislature has found that no elaborate hearing is required; rather, the State Engineer: "shall issue a permit to the applicant to use the underground waters applied for." Section 72-12-1.1.[1]

Taken together, these two provisions reflect a clear legislative choice not to fully extend State Engineer jurisdiction over these *de minimis* wells and not to require a complex hearing prior to their issuance. *Cf.* § 72-12-3. Rather, as noted above, the burden is on a party who believes the well will impair his water right to bring a legal action to prevent its use. *See La Madera Community Ditch v. Sandia Peak Ski Co.*, 119 N.M. 591, 593, 893 P.2d 487, 489 (Ct. App. 1995).

[1] Section 72-12-1.2 contains similar provisions for stock wells.

De minimis well permits provide a cause of action for any third party who believes he is being injured by the granting of the permit, since the permit is expressly subject to judicial findings of impairment of others' water rights. *See* New Mexico Office of the State Eng'r, Application for Permit to Use Underground Waters in Accordance with Sections 72-12-1.1, 72-12-1.2, or 72-12-1.3,[2] Gen. Conditions of Approval Nos. 06H, 06L (permits are "subject to cancellation for non-compliance with conditions of approval," including "such limitations as may be imposed by a court" or ordinance). Furthermore, they are expressly subject to curtailment by a priority call. *Id.*, Gen. Conditions of Approval No. 06M ("The right to divert water under this permit is subject to curtailment by priority administration as implemented by the State Engineer or a court."). *See also* 19.27.5.13(B)(12) NMAC (same).

Public and legislative debate on *de minimis* wells has been robust and highly visible. *See, e.g., Measures Restart Debate on Wells*, Albuquerque Journal, Jan. 28, 2005. Faced with an exemplary degree of public scrutiny and accountability, the Legislature has selected the approach it believes is most properly supported by its legislative findings and has maintained its policy choice for over fifty years. *See* 1953 N.M. Laws Ch. 61, § 1 (containing the precursor to the current Section

[2] *available at* http://www.ose.state.nm.us/doing-business/forms-inst/wr-01.pdf.

72-12-1.1). The United States Constitution "presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Numerous proposals for legislative amendments with which the district court would likely have agreed have been rejected by the Legislature. *See* S.B. 120 & H.B. 285, 2005 Leg. Sess. (N.M. 2005); S.B. 89, 2004 Leg. Sess. (N.M. 2004); S.B. 565 & H.B. 307, 2003 Leg. Sess. (N.M. 2003); H.B. 307, 2002 Leg. Sess. (N.M. 2002).[3]

The district court's displacement of legislative findings and choices, declaring Section 72-12-1.1 unconstitutional by virtue of a policy disagreement, under an improper method of facial analysis, and without any factual basis in a real injury, violates numerous dimensions of the doctrine of separation of powers.[4]

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[3] For a scientific view supporting the Legislature's choice, *see* W. Peter Balleau & Steven E. Silver, *Hydrology and Administration of Domestic Wells in New Mexico*, 45 Nat. Resources J. 807, 833-34 (2005) (reviewing the hydrologic impacts of domestic wells and concluding that the impacts of the domestic well permit exception are minimal, in part because "[c]urtailing access to domestic wells would convert the self-served household use into consequent increased public system demand with greater resource impacts").

[4] This Brief will not fully address jurisdictional or prudential judicial considerations regarding separation of powers, such as standing, although these are also implicated in the district court's decision. *See, e.g., Am. Civil Liberties Union v. City of Albuquerque*, 2008-NMSC-045, ¶¶ 18-19, 144 N.M. 471, 188 P.3d 1222 (noting the importance of maintaining an injury-in-fact requirement for standing for avoiding unnecessary constitutional determinations and establishing proper relationships between the judiciary and other branches of the government).

The New Mexico Court of Appeals has very recently emphasized proper judicial deference to legislative policy choices, asserting that "it is not the place of the courts to question the wisdom, policy, or justness of legislation unless the legislation is constitutionally flawed." *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 52, 144 N.M. 636, 190 P.3d 1131. The district court flouted this attitude of circumspection and usurped the legislative policy-making role when it substituted a policy disagreement for rigorous constitutional or statutory analysis.

The district court made several findings of *policy*, which were inadequately supported by the New Mexico Constitution and statutes: "The OSE must be able to account for all water usage in the state" and "It is not logical . . . to require the OSE to issue domestic well permits without any consideration of the availability of unappropriated water or the priority of appropriated water." **[RP 840-42, ¶¶ 14, 23]**. These policy findings stand in stark contradiction to this Court's recent observation that "[i]t is but a decent respect due to the wisdom [and] the integrity . . . of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." *Id.* ¶ 52; *see also State v. Druktenis*, 2004-NMCA-032, ¶ 105, 135 N.M. 223, 86 P.3d 1050; *State ex rel. Gomez v. Campbell*, 75 N.M. 86, 92, 400 P.2d 956, 960 (1965) ("[For] the court to sit as a final arbiter of all actions of the executive

and legislative departments is not in accordance with our scheme of government."). Further, the district court's order that the procedures of Section 72-12-3 be written into Section 72-12-1.1 stands in equally vivid contrast to this Court's affirmation, "We will not rewrite a statute." *Martinez v. Sedillo*, 2005-NMCA-029, ¶ 7, 137 N.M. 103, 107 P.3d 543. (citing *James v. N.M. Human Servs. Dep't*, 106 N.M. 318, 320, 742 P.2d 530, 532 (Ct. App. 1987) ("we will not rewrite or add words to a statute")).

Moreover, the district court's order mandating the State Engineer to issue domestic well permits as prescribed by Section 72-12-3, was in the nature of a writ of mandamus, and should be limited to the same circumstances, *Miguel v. McCarl*, 291 U.S. 442, 452 (1934), and governed by the same rules. *Laumbach v. Bd. Of County Comm'rs*, 60 N.M. 226, 233, 290 P.2d 1067, 1070 (1955). Federal courts have recognized that the discretion to grant mandamus relief should be exercised only when a court finds "compelling *equitable* grounds" *after* the three "*legal* requirements for mandamus jurisdiction have been satisfied": i.e., "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *In re Medicare Reimbursement Litigation*, 414 F.3d 7 (D.C. Cir. 2005) (emphases added). The New Mexico Supreme Court has made it clear that "equity is ancillary, not antagonistic, to the law," so that equitable relief is not available "when the grant

thereof would violate the express provision of a statute" and it cannot be used to "overcome the public policy established by the Legislature." *Mannick v. Wakeland*, 2005-NMSC-022, ¶ 8, 138 N.M. 108, 117 P.3d 914. *See also Gunaji v. Macias*, 2001-NMSC-028, ¶ 21, 130 N.M. 734, 31 P.3d 1008 (acknowledging that courts can "fill in gaps in statutory schemes in order to achieve just results" but must do so in accordance with objectives that are "in harmony and legally compatible with" the applicable statute).[5] The district court's displacement of the legislative findings and policy choices embodied in Section 72-12-1.1 with its own rewritten statute is a patent violation of separation of powers.

B. Judicial Legislation by the District Court Violating the Doctrine of Separation of Powers and Ordering the State Engineer to Conduct Hearings for *De Minimis* Wells Under Section 73-12-3 Was Not Required Because Senior Water Users' Have Remedies to Protect them from Impairment by Junior Wells.

Each *de minimis* well permit is issued subject to the rights of senior users, *see* Gen. Conditions of Approval No. 06M, and creates no entitlement of a well owner to take water out of priority. The district court's rewriting of Section 72-12-

[5] For a district court to exercise its discretion to issue an order that is not merely inconsistent with the *de minimis* well exemption but apparently in defiance of the legislative policy behind it is a staggering departure from *Mannick* and *Gunaji*'s models of judicial circumspection. Further, New Mexico courts have very recently reiterated that they will strictly enforce the formal and procedural requirements of mandamus pleading, as established by statute and case law. *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶¶ 12-19, 140 N.M. 168, 140 P.3d 1117 (citing NMSA 1978, §§ 44-2-1 to -14 (1953)).

1.1 to include the procedures of Section 72-12-3 was therefore unnecessary, because senior water users' remedies for enforcing priorities were undisturbed under Section 72-12-1.1, and it is primarily these common law remedies that Article XVI, Section 2 guarantees. *See State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207, 217, 182 P.2d 421, 427 (1947) (holding that Article XVI, Section 2 is "*only* declaratory of prior existing law") (emphasis added and internal quotation omitted).

So eager was the district court to declare the *de minimis* well statute unconstitutional, that it did so even though Plaintiff would not have had a right under the common law either to seek an injunction against the well or to enforce a priority call. That is, the district court found that the *de minimis* wells had not impaired Plaintiff's senior rights but nevertheless ordered that the State Engineer conduct a hearing to determine whether there was impairment. **[RP 844]**. The opinion suggests, incorrectly, that such a hearing would be a plaintiff's only remedy for injury by a junior user. To the contrary, Plaintiff would have had the right either to seek an injunction against the use of the well by the junior, *La Madera Community Ditch v. Sandia Peak Ski Co.*, 119 N.M. 591, 593, 893 P.2d 487, 489 (Ct. App. 1995), to bring the individual into the stream adjudication on the Mimbres river, NMSA 1978, § 72-4-17 (1965), or to supplement his surface

water use with a reliable groundwater well under the *Templeton* and *Herrington* cases discussed below.

In *La Madera Community Ditch*, the Court of Appeals determined that a water rights holder claiming trespass by a junior appropriator has the right to enjoin the junior user and prevent impairment without initiating a full stream adjudication under Section 72-4-17: "It is not necessary to consider whether La Madera's right is the most senior right in the entire stream system in order to determine whether Sandia Peak is committing a trespass. Thus, only the parties to this trespass action will be bound by any findings which the district court might make regarding the nature and extent of their water rights." *La Madera Community Ditch*, 119 N.M. at 593, 893 P.2d at 489. *Cf. State v. City of Las Vegas*, 2004-NMSC-009, ¶ 59, 135 N.M. 375, 89 P.3d 47 (where the litigants are already parties to the adjudication, a trespass claim cannot be initiated while the adjudication is pending).

Had Plaintiff actually been injured, he could have sought injunctive relief in the district court, and it was not necessary for the district court to provide him a remedy under Section 72-12-3. The New Mexico Supreme Court has made this point expressly: "In the western states, where the public waters are held subject to use by prior appropriators, it has always been the law that a prior appropriator from a stream may enjoin one from obstructing or taking waters from an underground

source which would otherwise reach the stream and which are necessary to serve the stream appropriators' prior right. *City of Albuquerque v. Reynolds*, 71 N.M. 428, 436-37, 379 P.2d 73, 79 (1963).[6]

Plaintiff could also have drilled a supplemental well to prevent impairment. In the *Templeton*[7] case, as clarified by *Herrington v. State ex rel. Office of the State Engineer*, 2006-NMSC-014, 139 N.M. 368, 133 P.3d 258, the New Mexico Supreme Court carefully defined the administrative discretion of the State Engineer to allow supplemental wells so that the State Engineer would not have to engage unilaterally in attempting to enforce priorities on stream systems.

In *Herrington*, the Supreme Court determined that because the State Engineer does not enforce priorities, a senior surface water user can, under certain circumstances, utilize a supplemental well to augment his surface flows reduced by junior groundwater appropriators in lieu of going to court to seek an injunction against a junior well. "Therefore, the core requirements for a successful *Templeton* supplemental well include: (1) a valid surface water right; (2) surface water fed in part by groundwater (baseflow); (3) junior appropriators intercepting that

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[6] Plaintiff-Appellee could also have sought monetary relief for any impairment caused by junior well users. *Id.*; *see also Chavez v. Gutierrez*, 54 N.M. 76, 82, 213 P.2d 597, 601 (1950).

[7] *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 65 N.M. 59, 332 P.2d 465 (1959).

groundwater by pumping; and (4) a proposed well that taps the same groundwater that was the source of the applicant's original appropriation." *Id.* ¶ 23.

In summary, had Plaintiff been injured he could have sought injunctive relief, sought damages or drilled a supplemental well. It is undoubtedly true that the Legislature has been aware of these alternative remedies when it has repeatedly rejected the application of Section 72-12-3 to *de minimis* wells. For the district court to, in effect, repeal Section 72-12-1 and order the State Engineer to apply Section 72-12-3 to these wells when the Legislature would not do so violated the doctrine of separation of powers.

II. THE LEGISLATURE'S ENACTMENT OF THE *DE MINIMIS* WELL STATUTES DID NOT CREATE "AN IMPERMISSIBLE EXCEPTION TO THE PRIORITY ADMINISTRATION SYSTEM CREATED BY N.M. CONSTITUTION ART. XVI, § 2."

Section 72-12-1.1 and N.M. Const. Art. XVI, § 2 are simply not in conflict. The former directs the OSE to issues permits for *de minimis* wells, "subject to curtailment by priority administration," Gen. Conditions of Approval No. 06M, and in no way derogates from common law causes of action of which the constitutional provision is declaratory. Hence, Section 72-12-1.1 creates no exception to the prior appropriation doctrine.

Contrary to the district court's apparent assumption, even if *de minimis* well permits did not expressly protect prior rights, Article XVI, Section 2 is not relevant

to the question of whether the Legislature has the power to direct the State Engineer to issue these groundwater permits. *See infra* Point III. The New Mexico Constitution does not require that there be a State Engineer nor, if the Legislature chooses to create a State Engineer, does the Constitution direct the State Engineer to regulate groundwater. Most decisively, it does not direct, or even permit, the State Engineer to enforce priorities when regulating groundwater.

The Legislature has determined that the State Engineer may only exercise jurisdiction over groundwater if a basin is declared by the State Engineer to have reasonably ascertainable boundaries. NMSA 1978, § 72-12-20 (1983). Before a basin is declared, the State Engineer has no authority to regulate groundwater in the basin, has no authority to require a well driller to obtain a permit, and has no authority to require a hearing before a well is used. *Id.* After declaration, the Legislature has determined that the State Engineer may only require that a hearing be held before issuance of a permit if the well is one that is not *de minimis*. But whether for a *de minimis* well or a larger well where a full hearing is held, the history of the groundwater statutes demonstrates that the issuance of the permit has no effect on the prior appropriation doctrine. Therefore, Section 72-12-1 cannot even conceivably create an exception to priority administration. A study of the interesting history of groundwater law in New Mexico makes this clear.

A. The History of Groundwater Regulation in New Mexico Demonstrates that the Constitutionally-Required Prior Appropriation Doctrine Applies Independently of State Engineer Administration of the Groundwater Code, and Therefore, the *De Minimis* Well Statutes Cannot Run Afoul of that Doctrine.

Because the technology for groundwater appropriation was developed later than that of surface water, the legal framework for groundwater use was likewise delayed. *See* Ira G. Clark, *Water in New Mexico: A History of its Management and Use* 234 (1987) ("Western modifications of groundwater law quite naturally lagged behind that applicable to the surface supply."). The 1907 Water Code applied only to "[a]ll natural waters flowing in streams and water courses, whether such be perennial, or torrential, within the limits of the Territory of New Mexico." 1907 N.M. Laws Ch. 49, § 1 (codified as amended at NMSA 1978, § 72-1-1 (1941)). Neither the 1907 Water Code nor the relevant constitutional provision spoke to the rules that should be applied for groundwater appropriations. *See* N.M. Const. art. XVI, § 2. Since prior to statehood, in the absence of legislative authorization, the territorial engineer has had no jurisdiction to issue permits for withdrawal of groundwater, with or without a hearing.

1. Early Case Law.

Early pre-Code water cases suggested that the prior appropriation doctrine applied to withdrawals of groundwater, even without a constitutional or statutory basis. In *Keeney v. Carillo*, 2 N.M. 480, 1883 WL 3515 (1883), for example, the

Territorial Court sided with a plaintiff claiming impairment from the drying of a marsh that provided groundwater for a downstream spring. The Court noted that "a well-defined and constant stream in a subterranean channel is protected to the owner [of a water right] as much as though it ran through a natural channel on the surface." 1883 WL 3515, at *8. That case, of course, pre-dated the creation of the Territorial Engineer; however, the plaintiff had recourse through the courts sitting in equity for impairment to the use of water that had its origins in groundwater.

In *Vanderwork v. Hewes*, 15 N.M. 439, 110 P. 567 (1910), the Territorial Court was faced with a question related to the jurisdiction of the newly-created Territorial Engineer over percolating or seepage water (categories of groundwater). The Court concluded that the Territorial Engineer lacked jurisdiction to grant the permit to a user of percolating or seepage water under specific provisions of the 1907 Water Code. *Id.* at 570. Importantly, however, the Territorial Court indicated that were the water subject to appropriation under the 1907 Water Code, "it would be governed by the general law of prior appropriation which is applicable to the arid lands of the West." *Id.* That is, the Court noted that even water not subject to the administrative jurisdiction of the Territorial (or State) Engineer is subject to the doctrine of prior appropriation.

2. First Groundwater Act.

In 1927, the State Legislature passed the first version of what became the groundwater provisions of the water code. *See* 1927 N.M. Laws, Ch. 182. For the first time in legislation, this Act declared that all waters in New Mexico "found in underground streams, channels, artesian basins, reservoirs, or lakes, the boundaries of which may be reasonably ascertained by scientific investigations or surface indications" are public and subject to appropriation for beneficial use "under the existing laws of this state relating to appropriation and beneficial use of waters from surface streams." *Id.* § 1. The act contained the precursor to the current domestic well statute at issue in this case: "This act is not intended to apply to the construction of wells by persons, corporations, or municipalities *to obtain waters for domestic or stock watering purposes*." *Id.* § 4.

This Act was immediately challenged as violating vested property rights when the State Engineer sought to enjoin two people from sinking wells in the newly-petitioned Roswell artesian basins. *See Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929). The challengers claimed that the Act "overrides vested property rights of those who, antedating the enactment, were private owners of lands overlying the basin" who, the challengers claimed, held a "vested property right in the corpus or the *usufruct* of the underlying waters." 286 P. at 971. As the Court noted, this claim is based on the view that, prior to the enactment of the act, "it was the law of

New Mexico either that the owner of the land had absolute ownership and dominion over such portion of the underlying waters as he could capture or that he had the right to reasonable use of such waters correlative with similar rights of other owners." *Id.* at 971-72.

The Court rejected this view, holding instead that it has always been the law in New Mexico that water use, whether of the surface or groundwater, is governed by principles of prior appropriation. *Id.* at 972. "Fortunately, that (prior appropriation) is the rule best adapted to our condition and circumstances, *and the rule which the Legislature has declared."* *Id.* (emphasis added).[8] Thus, the Court agreed with the State Engineer that "prior appropriation to beneficial use has always been, in this jurisdiction, the basis and measure of the right to the use of artesian water and that [the new groundwater act] is merely declaratory of the prior existing law on the subject." *Id.* at 972.

Because the 1927 groundwater act simply restated the pre-existing law of prior appropriation, the Court concluded that it was "fundamentally sound," but invalidated the Act on technical grounds. *Id.* at 977.

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[8] Importantly, the *Yeo* Court analyzed *Vanderwork*, and noted that it suggested that "the mere statutory subjection of some classes of water to the jurisdiction of the state engineer does not necessarily change the law as to other waters." *Id.* at 976. The *Yeo* Court agreed with this principle: "That being undoubtedly true, there would be nothing to prevent later extensions of such jurisdiction." *Id.*

3. Second Groundwater Act.

In 1931, the Legislature fixed the technical problem identified in *Yeo*. *See* 1931 N.M. Laws, Ch. 131. Presumably because of the substantive strength of the *Yeo* case, this new act was not challenged until 1950. *See State ex rel. Bliss v. Dority*, 55 N.M. 12, 31, 225 P.2d 1007, 1019 (1950) ("Whether [*Yeo*] stated the correct rule of law (and we are of the opinion that it did), it is now a rule of property that we will not disturb."). This 1931 act, as amended and extended by subsequent legislation, is codified at NMSA 1978, §§ 72-12-1 through –28 (as amended through 2003).

The *Yeo* Court made it clear that the Legislature's choice to grant the State Engineer authority to extend jurisdiction over groundwater in certain circumstances was not based upon the prior appropriation doctrine. Rather, it was based on the Legislature's general power to pass laws to protect the public welfare including the regulation of groundwater. Therefore, no adjudication was required to allow the State Engineer to regulate groundwater in a particular area. *Dority*, 55 N.M. at 18, 225 P.2d at 1011 (affirming that assumption and noting that "there is no provision in the law that requires an adjudication in court to define or determine the area or boundaries of any of the described waters before the statutory jurisdiction of the State Engineer becomes effective"). There was no need for an adjudication because the prior appropriation doctrine was not affected when the

State Engineer exercised authority to require permits for the extraction of groundwater. *See also Hanson v. Turney*, 2004-NMCA-069, ¶ 2, 136 N.M. 1, 94 P.3d 1 ("The State Engineer exercises administrative control over a particular groundwater basin by declaring it and defining its boundaries. NMSA 1978, § 72-12-1 (2003)."); *McBee v. Reynolds*, 74 N.M. 783, 788, 399 P.2d 110, 114 (1965) ("There must be affirmative action by the state engineer to declare a basin before he obtains jurisdiction."); 19.27.23 to .68 NMAC (defining the boundaries of groundwater basins).[9]

That there was no impact on the prior appropriation doctrine when the Legislature granted the State Engineer authority to require individuals to obtain permits to drill wells is best illustrated by a comparison of the role of that doctrine before and after State Engineer jurisdiction over a groundwater basin. Prior to the declaration of a basin, there was no obligation to request a permit to drill a well, nor was there any process for a hearing because no statute required it. *See Spencer v. Bliss*, 60 N.M. 16, 18, 287 P.2d 221, 222 (1955). Nonetheless, the relationship between the new well owner and the existing well owner was governed by the doctrine of prior appropriation. *State ex rel. Reynolds v. Mendenhall*, 68 N.M.

[9] As of September 23, 2005, the State Engineer has declared every basin in the State, such that he now has jurisdiction over any underground waters in New Mexico. *See* 19.27.63 to 19.27.68 NMAC (declaring or extending the last basins in New Mexico).

467, 468-69, 362 P.2d 998, 999 (1961). After the passage of the statutes allowing the State Engineer to require permits, the relationships among well owners remained the same, and the prior appropriation doctrine continues to apply with equal force. *See Yeo*, 34 N.M. 611, 286 P. 970; *Hanson,* 2004-NMCA-069; *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73 (1963). It is certainly counterintuitive to argue, as did the district court, that the groundwater regulation statutes that were passed to restrict drilling of wells without a permit somehow dilute the rights of prior appropriators. Neither the history of the groundwater code nor legal precedent support a holding that these statutes have any effect on the prior appropriation doctrine.

B. Even if Application of the *De Minimis* Well Statutes Raised a Constitutional Issue, There Was No Basis for Holding them Unconstitutional on their Face.

The district court erroneously concluded that the Legislature has *no* authority to limit the regulatory power of the New Mexico State Engineer over *de minimis* wells. It further held that Article XVI, Section 2 of the New Mexico Constitution imposes an affirmative duty on the Legislature to pass legislation extending State Engineer authority over all groundwater wells, irrespective of size or impact. The district court's order rewriting Section 72-12-1.1 to include the provisions of Section 72-12-3 presumes, astoundingly, that the Constitution mandates *precisely* these provisions for *all* groundwater diversions.

Under the district court's logic, the Legislature also would have acted unconstitutionally when it limited State Engineer authority to basins having reasonably ascertainable boundaries, *see* NMSA 1978, § 72-12-20 (1983), despite judicial recognition of this limitation throughout New Mexico case law. *See generally McBee v. Reynolds*, 74 N.M. 783, 788, 399 P.2d 110, 114 (1965) (prior to declaration of a basin, the acceptance of applications to appropriate "could have no effect").

The district court's assumption that the Constitution's prior appropriation provision is self-executing is both unreasoned and unwarranted. *See State ex rel. Noble v. Fiorina*, 67 N.M. 366, 367-68, 355 P.2d 497, 498 (1960) (Article XX, Section 4 of the Constitution is not self-executing, as it "merely indicates a principle without laying down rules having the force of law"); *Jaramillo v. City of Albuquerque*, 64 N.M. 427, 329 P.2d 626 (1958) (Constitution's provision that "[e]ight hours shall constitute a day's work" was not self-executing and required legislation to provide an enforceable right and a remedy). *Cf. In re Applications A-16027, et al.*, 495 N.W.2d 23, 31-33 (Neb. 1993) (Nebraska Constitution's provision limiting the Legislature's right "to enact laws denying the right to appropriate water" is "a declaration of policy"; since it does not prescribe "the mechanisms by which it may be accomplished," it is not self-executing, and

therefore cannot support a finding of unconstitutionality of a statute enacted to specify its criteria).

Because the Legislature can constitutionally preclude OSE authority over groundwater in basins not having reasonably ascertainable boundaries (thus requiring *no* permitting prior to a diversion), it necessarily can take the lesser step of granting the State Engineer *some* authority over *de minimis* wells, albeit with fewer preliminary procedures.[10] *See Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (the Legislature has the prerogative to address issues "one step at a time" and to "select one phase of one field and apply a remedy there, neglecting the others").[11]

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[10] Section 72-12-1.1 does not remove State Engineer oversight entirely. The State Engineer still has the authority to license well-drillers and proscribe the form of the application. *See* NMSA 1978, § 72-12-1.1 (1941) (allowing the Engineer to proscribe the form of the application); NMSA 1978, § 72-12-12 (1949) (requiring well drillers to be licensed); 19.27.5.13(B)(4) NMAC (requiring domestic well to be drilled by licensed well driller). In addition, the State Engineer has enacted regulations that regulate the permitting and use of domestic wells, particularly in Domestic Well Management Areas. 19.27.5 NMAC.

[11] All economic regulation is analyzed under this deferential "rational basis" standard. *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). *See, e.g., N.M. Mining Ass'n v. Water Quality Control Comm'n*, 2007-NMCA-084, ¶ 23, 142 N.M. 200, 164 P.3d 81 (a regulation defining "surface water(s) of the state" affects "*purely economic* interests of property owners") (emphasis added); *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 11, 138 N.M. 348, 120 P.3d 430 ("Rational basis review applies to general social and economic legislation"). *Cf. Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996) (citing *Dukes* for the same proposition in a water rights context).

When the Legislature declines to grant authority to an agency, its actions are presumed to be constitutional absent a showing to the contrary. *State v. Fleming*, 2006-NMCA-149, ¶ 3, 140 N.M. 797, 149 P.3d 113. The district court not only failed to rebut the presumption, it took the additional improper step of declaring the *de minimis* well statues unconstitutional *on their face*, without undertaking the required search for their constitutional construction or application. **[RP 843-44, ¶¶ 2, 6]**.

A facial constitutional challenge to a statute can only succeed if a plaintiff establishes that a law is "unconstitutional in all of its applications," *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct 1184, 1190 (2008), or in other words, where "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). This means that where a court can identify "situations in which [a statute] could be validly enforced," then "any further analysis would [be] superfluous." *Id.*

Since a successful facial challenge requires that a statute is "incapable of any valid application," a court "must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). As discussed below, there are numerous circumstances in which the statutes can be applied without any colorable conflict with senior water rights. Therefore, the district court, if it

intended to reach a constitutional issue, should have undertaken an "as-applied" analysis and investigated the question whether the statute was unconstitutional as applied to the Bounds' specific facts. It could then have essentially severed those parts of the statute that factual development in this particular case showed could never be applied constitutionally. *See Fla. League of Prof'l Lobbyists v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996). However, this option was made impossible because the district court specifically found that the Bounds were not injured and therefore could not lodge an attack on the statute as applied to them. **[RP 844, ¶ 6]**

A recent case before the Idaho Supreme Court, addressed facial unconstitutionality in the water law context. In *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 154 P.3d 433 (Idaho 2007), the Idaho Department of Water Resources had promulgated rules for responding to priority calls against junior groundwater right holders in hydraulically-connected basins. These rules gave the Department discretion not to enforce priorities when to do so would not benefit the senior users. A district court held the rules facially unconstitutional, lacking "procedural components" of prior appropriation that the district court found were constitutionally mandated. *Am. Falls*, 154 P.3d at 443.

The Idaho Supreme Court explained that the district court had conflated "facial" with "as-applied" review. The district court had "recognized" that a plaintiff "must choose" between a "facial" and an "as-applied" constitutional

challenge, and that the latter is inappropriate before exhaustion of administrative remedies. However, the district court had erred by implicitly or explicitly incorporating factual elements of the plaintiffs' case into a "facial" analysis. *Id.* at 442. The Supreme Court admonished, "The district court should not blur the lines between a facial and as applied analysis by engaging in a hybrid analysis." *Id.* at 443. Since an "as-applied" analysis is improper without a complete factual record, the *only* proper review of the Rules that was ripe was a facial analysis, that is, "whether the challenged provisions are void in all possible applications, or whether there are a set of circumstances in which they may be constitutionally applied." *Id.*

As in *American Falls*, application of Section 72-12-1 could not possibly reach an unconstitutional result in all cases. Indeed, many of Amicis' wells are in non-hydraulically-connected basins, are miles from any stream, or are spaced so as to minimize effects on any other wells. Because the *de minimis* wells statute can be applied in those cases without conflicting with senior water rights, a facial constitutional challenge must fail. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *cited in Rio Grande Kennel Club*, 2008-NMCA-093, ¶¶ 24-26.

Furthermore, had the district court made a factual investigation of the manner in which the statute is applied by the State Engineer, it would have discovered that the State Engineer has proffered a "limiting construction," *Hoffman*

Estates, 455 U.S. at 494 n.5, by promulgating regulations that protect the rights of prior water users. *See* 19.27.5.13(B)(12) NMAC. Rather than search for a way to find the statute constitutional, as all authority requires, the district court searched for a way to hold it unconstitutional. Ironically, the district court cited as a rule of law that a statute is unconstitutional on its face if under any state of facts it could be applied unconstitutionally. "It is not what has been done, but what **can be done** under a statute that determines its constitutionality." **[RP 841, ¶ 20 (emphasis in original)]**. This principle turns the rule for facial challenges on its head. In facial challenges, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases". *Wash. State Grange*, 128 S. Ct at 1190.[12]

The *de minimis* well statutes are capable of application in a way that avoids any alleged constitutional infirmity, and the State Engineer has applied them constitutionally. Regulations implementing NMSA 1978 72-12-1 preclude conflicts between *de minimis* wells and prior appropriators, both in stream-connected aquifers and in the non-rechargeable mined aquifers wherein Amici's

[12] The district court was apparently citing to a different test for whether an agency enabling statute violates the *doctrine of nondelegation of legislative functions to the executive*, authoritatively stated in *State v. Spears*, 57 N.M. 400, 405, 259 P.2d 356, 360 (1953) ("[t]he constitutionality of a law is to be determined by its provisions, and not by the manner in which it may be administered").

wells are located. Conflicts in the former are precluded by "domestic well management areas," which the State Engineer may declare "to prevent impairment to valid, existing surface water rights." 19.27.5.14 NMAC. Prior users in the latter are protected by declaration of "critical management areas." *Id.* In a domestic well management area, the State Engineer limits the permitted diversion of a domestic well to .25 acre feet per annum, 19.27.5.15(E) NMAC, and the State Engineer may require the applicant "to transfer a valid, existing consumptive use right into the 72-12-1.1 domestic well permit," 19.27.4.14(E) NMAC, so as not to increase the total diversions from the basin.

Mined groundwater basins are governed by a distinct set of rules. *Compare City of Albuquerque v. Reynolds*, 71 N.M. 428, 441-42, 379 P.2d 73, 82 (1963) (approving State Engineer conjunctive management of hydraulically-connected aquifers), *with Mathers v. Texaco*, 77 N.M. 239, 421 P.2d 771 (1967) (approving State Engineer management of a mined aquifer to extend its economic life). In non-recharging groundwater basins, the rights of all appropriators are subject to a time limitation—typically forty years—irrespective of priority. *Mathers*, 77 N.M. at 245-46, 421 P.2d at 776. Therefore, in a mined aquifer, even if a junior *de minimis* well causes the aquifer to decline—resulting in higher pumping costs and lower pumping yields for prior users—this may not impair the rights of other users, and mined basin regulations may allow these effects to occur. *Id.* at 243, 421 P.2d

at 775. As with all wells in a mined basin, the State Engineer regulates *de minimis* wells with an eye toward enforcing reasonable mined basin water table decline rates. If granting numerous *de minimis* well permits would be inconsistent with this goal, then the State Engineer will step in and protect existing wells through creation of critical management areas. 19.27.5.14 NMAC.

Thus, even had the district court had a factual basis for holding the domestic well statute unconstitutional as applied to the Plaintiff in the context of a particular stream-connected aquifer, this holding could not legitimately be extended across all hydrologic circumstances and in disregard of basin-specific limiting constructions proffered by the State Engineer. In other words, an "as-applied" analysis of Section 72-12-1.1 requires a complete factual record, while a "facial" analysis requires an exhaustive, but unsuccessful, search for circumstances giving rise to Section 72-12-1.1's application consistent with the Constitution's prior appropriation provision. Neither requirement was fulfilled by the district court's findings and decision.

III. THE *DE MINIMIS* WELL STATUTES CANNOT VIOLATE N.M. CONST. ART. XVI, § 2, BECAUSE THAT PROVISION DOES NOT APPLY TO GROUNDWATER.

New Mexico Constitution Article XVI, Section 2 makes no reference to groundwater. It provides: "The unappropriated water of every *natural stream, perennial or torrential*, within the State of New Mexico is hereby declared to

belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." (Emphasis added). The Supreme Court has already declined to extend this section's reach to groundwater.

In *Yeo*, this constitutional distinction between ground and surface was highlighted:

> Upon what does the claimed vested right [for a landowner to use groundwater] rest? It is not declared by Constitution or statute. The irrigation code declares public "all natural waters flowing in streams and water courses" and subjects them to appropriation for beneficial use. The constitutional provision is substantially the same. Appellees argue that the statutory and constitutional inclusion of this class of waters, as subject to appropriation, amounts to an exclusion of all others. It will be admitted, however, that both the statute and the Constitution in these affirmative provisions are merely declaratory of existing law. Under a well-known cannon of construction, the rule invoked does not apply.

286 P. at 972 (citations omitted). The *Yeo* court found the prior appropriation doctrine for groundwater not from any constitutional provision, but from the common-law, as adapted to New Mexico's unique situation. *See id.* at 972-73.

Because regulation of groundwater is not constrained by the Constitution but rather the common law, the Legislature is free to regulate the resource in a manner that meets the needs of the public. "[T]he Legislature, as the policy-making branch of government, can alter or abrogate the common law...." *City of Albuquerque v.*

New Mexico Public Regulation Com'n, 2003-NMSC-028, ¶ 16, 134 N.M. 472; *see also State Highway Commission v. Southern Union Gas Co.*, 65 N.M. 84, 96, 332 P.2d 1007, 1016 (1958) ("In reply to the appellee's contention that the legislature can change the common law to provide for future payment of utility relocation costs, it is beyond question that the common law is subject to change by statute."); *Deats v. State*, 84 N.M. 405, 407, 503 P.2d 1183, 1185 (Ct. App. 1972) ("Having adopted the rule of common law, ... that rule remains in effect until changed by the Legislature.").

Because Article XVI, Section 2 has no application to groundwater and because even if it did, enforcement of Section 72-12-1 has no effect on the doctrine of prior appropriation, the *de minimis* well statute cannot be said to violate the Constitution.

IV. GRANTING OF A PERMIT TO DRILL A *DE MINIMIS* WELL CANNOT VIOLATE DUE PROCESS BECAUSE THE PERSON PUMPING FROM THE WELL AND ALLEGEDLY CAUSING THE HARM TO OTHER USERS IS NOT A STATE ACTOR.

The district court's conclusion was limited to finding that Section 72-12-1.1 conflicted with Article XVI, Section 2, and it dismissed Plaintiff's 42 U.S.C. § 1983 civil rights and takings claims. However, its decision suggested that Section 72-12-1.1 "lacks any due process provisions to protect senior water rights from out of priority review of domestic well applications," **[RP 841, ¶ 19]**, and that Section

72-12-1.1 "has no due process safeguards including, but not limited to, notice to senior water rights owners, a determination whether an application, if approved, will impair existing rights or a hearing." **[RP 842, ¶ 27(b)]**.

Had the district court sought to invalidate Section 72-12-1.1 on due process grounds, this would have been error. The Due Process clause of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." This provision applies only if the *deprivation* (of life, liberty or property) is the result of *state action*. *E.g. Druktenis*, 2004-NMCA-032, ¶ 47.

As noted, the district court found that Plaintiff had suffered no actual deprivation of his property interest in his water rights. **[RP 844]**. Even if domestic well users had impaired Plaintiff's water rights, these are purely private actors, and the state would not have caused the deprivation.

Although the United States Supreme Court has acknowledged that the distinction between purely private action and state action "frequently admits of no easy answer," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), it has set forth a series of guides to assist in the evaluation of whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. Most relevantly, mere approval by regulation or statute of

a private actor's conduct does *not* convert that conduct into state action for purposes of due process. *Id.* at 357; *see also Mondragon v. Tenorio*, 554 F.2d 423 (10th Cir. 1977) (Land Grant statutes authorizing private land board to regulate land within the land grant do not convert land grant board into a state actor).

State action in this instance is even more attenuated. The State Engineer does not pump water from wells or impair private water rights. The State Engineer does no more than issue a permit. Enactment of a statute or issuance of a permit to private parties is not state action for purposes of the due process clause. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) (licensing of private activity "does not sufficiently implicate the State" to be state action); *Reitman v. Mulkey*, 387 U.S. 369, 376-77 (1967) (reasoning that a statute must go far beyond the repeal of existing protections, to "expressly authoriz[ing] and constitutionaliz[ing]" unconstitutional behavior, before it could be considered state action).

Under the district court's expansive view of state action, the State of New Mexico, by the issuance of a driver's license, would be liable for a deprivation of due process for the loss of life or property when a reckless driver causes an accident that might have been prevented with more extensive licensing proceedings. New Mexico case law consistently finds no state action based on private conduct even though the conduct is authorized by the state, whether by license or contract. *See, e.g., Duran v. New Mexico Monitored Treatment*

Program, 2000-NMCA-023, ¶¶ 20-24, 128 N.M. 659, 996 P.2d 922 (no state action by addiction recovery clinic operating on contract with state).

If a domestic well user impairs the rights of a senior water right holder, with or without a permit, then the senior right holder may file suit under common law causes of action of which Article XVI, Section 2 is "declaratory" and which remain unaffected by Section 72-12-1.1. *See supra* Point I.B; *see also State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207, 217, 182 P.2d 421, 427 (1947) (holding that Article XVI, Section 2 is "only declaratory of prior existing law") (internal quotation omitted). The injury and deprivation of property in the use of his water right is not caused by the state and constitutional due process is not implicated.

V. ADJUDICATION AND ENFORCEMENT OF PRIORITIES IS A JUDICIAL FUNCTION; THE DISTRICT COURT CANNOT ORDER THAT PRIORITIES BE ENFORCED IN HEARINGS ON *DE MINIMIS* WELL APPLICATIONS.

The district court held that it is inconsistent with the Constitution "to require the OSE to issue domestic well permits without any consideration of the availability of unappropriated water *or the priority of appropriated water*" **[RP 842, ¶ 23 (emphasis added)]**, and that the State Engineer, along with the Legislature and the State, is "charged with protection of the senior water right owner's property." **[RP 842, ¶ 25]**. Accordingly, the district court ordered the

State Engineer to "administer domestic well applications the same as all other applications" **[RP 843, ¶ 3]**, presumably by enforcing priorities in the application process.[13] This mistaken conception of the State Engineer's role and authority at the basis of the district court's order provides further support for reversal of its decision.

The New Mexico Supreme Court has consistently held that "The determination of priority of water rights and whether junior appropriation does in fact impair a prior existing right is a judicial function, not administrative." *Tevis v. McCrary*, 72 N.M. 134, 136, 381 P.2d 208, 209 (1963); *see also Templeton v. Pecos Valley Artesian Conservancy Dist.*, 65 N.M. 59, 332 P.2d 465 (1958) ("It is true that the State Engineer cannot conduct a proceeding to adjudicate the priorities of water rights."). Because the adjudication and enforcement of priorities is a judicial function, it would have violated principles of separation of powers had the Legislature delegated that authority to the State Engineer in the *de minimis* wells statute. *See Pueblo of Isleta v. Tondre*, 18 N.M. 388, 395-96, 137 P. 86 (1913) (on rehearing) ("The wisdom of postponing the jurisdiction of the state engineer until

[13] Under the district court's holding, in these application hearings to enforce priorities, the State Engineer would be obligated to determine the appropriate "duty" of water for the protestants and the applicants, the priority dates of the protestants, whether the protestants rights have been abandoned or forfeited and would have to join all other users on the stream system if the decision were to bind other water users. NMSA 1978, 72-4-13 to –19 (1982).

after adjudication of the priorities is at once apparent. Without adjudication there is no evidence before the state engineer, except such as he may gather *ex parte* in his investigations of the various stream systems, upon which to base his action as to the rights and priorities of water right owners who acquired their rights prior to the passage of the act.").

Another district court recently determined that the State Engineer's "Active Water Resource Management" regulations that would enforce priorities prior to an adjudication were invalid. *See* Memorandum Decision, *Tri-State Generation & Transmission Assoc. v. D'Antonio*, N.M. Seventh Jud. Dist. Ct. No. D-0725-CV-200500003 (filed May 16, 2007) **[RP 700, 726-34]**.[14]

The district court in this case went too far. It ordered the State Engineer to enforce priorities in ruling on all well applications. This is authority not vested in the State Engineer, cannot be exercised by the State Engineer and has not been sought by the State Engineer. It is vested exclusively in the judiciary and for this additional reason the district court ruling should be reversed.

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[14] The Amici take no position as to the outcome in that case as those issues are not presented here. Nor do the amici opine as to what would happen in the event of an emergency need to ensure compliance with interstate compacts. None of those facts pertain to amici. However, amici points out that the State Engineer is clearly not powerless to take action in areas where numerous junior domestic wells affect senior surface right holders. Notwithstanding *Tri-State Generation,* where the state engineer determines that the number of wells cause critical issues of effects on stream systems he has authority to order the retirement of water rights to offset the effects of such wells on senior surface users. *See* Section II(B), *supra.*

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the final judgment and order of the district court and hold that the *de minimis* well statutes are constitutional. In all other respects, *amici* request that this Court affirm the decision of the district court.

Dated: December 4, 2008

Respectfully submitted,

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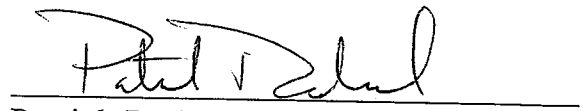

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