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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,

Appellants.

Ct. Appeals No. 28,860
Grant County
No. D-608-CV-2006-166
Judge J. C. Robinson

INTERVENOR-APPELLEE NEW MEXICO FARM & LIVESTOCK BUREAU'S ANSWER BRIEF

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SUMMARY OF ARGUMENT

The Appellants have stated in their Brief-in-Chief that "At the heart of this case is a question of whether the Domestic Well Statute, NMSA 1978, § 72-12-1.1 (2003) is constitutional...". Brief-in-Chief at 1. The New Mexico Farm & Livestock Bureau (hereinafter "Farm Bureau") agrees with the Appellants that this is the core issue that must be resolved. Beyond the agreement as to the pivotal issue, Farm Bureau adamantly disagrees with the Appellants' analysis of the law and their criticism of the decision by the Honorable J. C. Robinson, Sixth Judicial District Court.

The attempt by the Appellants to describe the history of the Domestic Well Statute is, at best, an incorrect summarization of the law governing the appropriation of ground water, and the role of the State Engineer in administering the appropriation of water for domestic purposes. In addition, the Appellants attempt to gloss over the issue of domestic wells by labeling their permits as "*de minimis* ground water uses." Brief-in-Chief at 3. At the same time, the Appellants purposely include a discussion regarding § 72-12-1.2 as authority that § 72-12-1.1 is constitutional. Brief-in-Chief at 3. It is important to note that the constitutionality of Section 72-12-1.2 and Section 72-12-1.3 were never raised at the District Court level. Finally, the Appellants ask the Court to relieve the State Engineer of his constitutional and statutorial mandated duties to supervise and protect the public waters of the State of New Mexico, and

instead, shrug his obligations off onto the individual senior water right owners to pursue claims against junior users wherever they are found in the State of New Mexico. Brief-in-Chief at 4.

The Appellants have consistently argued that this case was brought without any proof of hydrologic impact or other impairment to the surface and ground water supplies in the Mimbres Basin. Brief-in-Chief at 5. The scientific evidence introduced by Bounds was more than sufficient to support the claim that the pumping of domestic wells was diminishing the supply of surface and ground water to senior users in the Mimbres Basin. RP 213 - 222, 237-264; *See Deposition of Dr. Thomas Maddock, III, pp. 38, 56-60, 70, 79-80.*

Farm Bureau is a free, independent, and non-governmental organization of farm and ranch families united for the purposes of analyzing agricultural problems and formulating action to achieve educational awareness and social advancement, both statewide and on a national level. In New Mexico alone, Farm Bureau advocates for over 14,000 farm and ranch families and has been an active party in the legislature of New Mexico and State and Federal courts in New Mexico.

For several years, Farm Bureau has been concerned with the State Engineer's policy regarding the issuance of permits for domestic wells. Of extreme importance is the subdivision of large tracts of land and the issuance of domestic permits for lots

within the subdivisions. In many instances, farm land has been taken out of production and the appurtenant water rights transferred to municipalities and other users miles from the farm land. Domestic well permits are then issued to the lot owners. While the domestic permit may limit the annual quantity of water to be diverted, in most, if not in all cases, the domestic well owner is free to pump as much water as they need or the well will produce. This is because the State Engineer does not enforce the domestic well permit.

Farm Bureau has continually advocated a policy requiring applicants for domestic well permits to obtain water rights in areas where the rights of senior appropriators have been fully adjudicated and no unappropriated water is available. Farm Bureau's members are owners of water rights and have asserted that the Domestic Well Statute constitutes a confiscation and taking of their private property. RP 193-206. Based upon its concerns and the inaction of the State Engineer, Farm Bureau filed its Motion to Intervene on April 11, 2007. RP 193-206.

ARGUMENT

POINT I: SECTION 72-12-1.1, NMSA 1978 IS UNCONSTITUTIONAL BECAUSE IT CONSTITUTES A TAKING OF PROPERTY CONTRARY TO N.M. CONST. ART. XVI.

The assertion by the Appellants that § 72-12-1.1 is constitutional is fundamentally flawed because of their erroneous reliance upon the interpretation of

Smith v. City of Santa Fe, 2006-NMCA-48, 133 P.3d 866, affirmed in part, 2007-NMSC-55, 171 P.3d 300 and Stennis v. The City of Santa Fe, 2006-NMCA-125, 143 P.3d 756, affirmed 2008-NMSC-8, 176 P.3d 309. Despite the Appellants' arguments, neither of these two cases addressed the constitutionality of NMSA 1978, § 72-12-1.1.

As a matter of law, all waters flowing in the streams and water courses within the State of New Mexico belong to the public and are subject to appropriation for beneficial use. Priority of appropriation shall give the better right. N.M. Const. art. XVI, § 2; NMSA 1978, § 72-1-1. State ex rel. State Engineer v. Crider, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967). *See also*, State ex rel. Martinez v. City of Las Vegas, 2004-NMSA-009, 135 N.M. 375, 89 P.3d 47, citing State ex rel. Cmty. Ditches v. Tularosa Community Ditch, 19 N.M. 352, 371, 143 P.2d 207, 213 (1914); Hagerman Irrigation Company v. McMurray, 16 N.M. 172, 181, 113 P. 823, 825 (1911); Crider, 78 N.M. at 315, 431 P.2d at 48; Yeo, 34 N.M. at 620, 286 P. at 974.

The supervision and administration of the public waters is vested in the State Engineer pursuant to NMSA 1978, § 72-2-1. The State Engineer is charged with the measurement, appropriation, and distribution of the public water. While the State Engineer is vested with this broad authority (*see also*, §§ 72-2-8, 72-2-9, 72-2-9.1), the State Engineer is prohibited from acting arbitrarily, capriciously, and contrary to

State law and regulations. Archuleta v. Santa Fe Police Department, ex rel. City of Santa Fe, 2005-NMSC-006, 137 N.M. 161, 108 P.3d 1019; Rio Grande Chapter of the Sierra Club v. New Mexico Mining Commission, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806.

In State, ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, the Supreme Court conducted an extensive review of the laws governing the appropriation of water in New Mexico, and detailed the history of the prior appropriation doctrine. In conducting its analysis, the Court stated:

> Although "[t]he water in the public stream belongs to the public," Snow v. Abalos, 18 N.M. 681, 693, 140 P. 1044, 1048 (1914), unappropriated water is "subject to appropriation for beneficial use." N.M. Const., art. XVI, § 2. Once appropriated, "[p]riority of appropriation shall give the better right." N.M. Const., art. XVI, § 2. New Mexico water law, then stands in contrast to the State Engineer's reliance on a theory of common use, under which reasonable use and equitable sharing would control. Although the State Engineer relies on Spanish and Mexican law in support of equitable distribution, the current system of water law in New Mexico is based upon this Court's interpretation of antecedent sovereigns. *Id.* at ¶ 28.
>
> When the question came before the courts for adjudication [Albuquerque Land & Irrigation Company v. Gutierrez, 10 N.M. 177, 240, 61 P. 357, 360-61 (1900), affirmed, 188 U.S. 545 (1903)], the doctrine of prior appropriation was recognized by the courts and became the settled law of the territory. The judicial declaration, however, did not make the law, it only recognized the law as it had been established and applied by the people and as it had always existed from the first settlement of this portion of the country. This construction of the law

> by the courts has been consistently adhered to by the legislature of the territory... *Id.* at ¶ 28.
>
> Snow, 18 N.M. at 693, 140 P. at 1048 ; accord State ex rel. State Game Commission v. Red River Valley Company, 51 N.M. 207, 226, 182 P.2d 421, 433 (1945) (stating that prior appropriation has been applied in New Mexico "for some two or three centuries"); United States v. Rio Grande Dam and Irrigation Company, 9 N.M. 292, 306, 51 P. 674, 678 (1898) ("the law of prior appropriation existed under the Mexican Republic under the time of the acquisition of New Mexico..."), reversed on other grounds, 174 U.S. 690 (1899). *Id.* at ¶ 28.

The Court in City of Las Vegas made it clear that it had previously rejected equitable proportionment as being inconsistent with a prior appropriation system. In Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929), the Court rejected Yeo's rights to ground water as a consequence of his ownership of the surface land, and as such, the right to capture rule was rejected by the Supreme Court. The decision in Yeo further cemented the doctrine of prior appropriation in New Mexico.

In City of Las Vegas, the Court was clear that new appropriations may only be made from a supply not being put to beneficial use. The Court recognized that allowing the appropriation of water which has been allocated for beneficial use would reduce the value of the senior right, and as a result, the land with appropriated water would be reduced to "...a condition of non-productiveness...". *Id.* at ¶ 29.

The ownership of water rights is as basic a constitutional right of ownership as the ownership of real property. This absolute right of an individual to possess and

enjoy property is protected by the 5th and 14th amendments of the United States Constitution and Article II, § 18 of the New Mexico Constitution. The rule of ownership has been further defined and established by numerous holdings declaring that an individual's property rights should not be disturbed by the State. Duncan v. Brown, 18 N.M. 579, 139 P. 140 (S. Ct. 1914). The principle enunciated by the Court in Duncan v. Brown was extended to and applied in the case of State ex rel. Bliss v. Dority, et al., 55 N.M. 12, 31, 225 P.2d 1007, 1019 (1950). *See also*, Bogle Farms, Inc. v. Baca, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184.

The inherent right of property ownership and the right to enjoy the benefits from such ownership was acknowledged in City of Las Vegas. The Court in citing Bogle Farms and Duncan stated: "Instead, we believe that the rule of property is designed to protect the 'stability of land titles and commercial transactions entered into in reliance on the settled nature of the law.'" *Id.* at ¶ 30; ¶ 46.

The absolute right of ownership of water rights cannot be diminished or the owner deprived of the right of ownership by the legislature or the State Engineer under the present domestic well statutory schemes. If the State of New Mexico, its agencies, subdivisions, or individuals seek to seize the property of another, the seizure must be done in compliance with the Constitutions of the United States and New Mexico.

The establishment of a water right and adjudications are governed by several statutes. NMSA 1978, § 72-4-13 requires the State Engineer to conduct hydrographic surveys of each stream system and its source of supply. The purpose of the hydrographic survey is simply to compile the data needed to determine the available water supply and to subsequently adjudicate the existing rights to the use of the water in the system. Thereafter, the State Engineer must then provide the survey to the Attorney General who then commences the adjudication of the system. NMSA 1978, § 72-4-15. After adjudication, a certified copy of the decree is then filed with the State Engineer. The decree identifies the party, the priority, amount, purpose and place of use. If the decree is for the purpose of irrigation, the specific tracts of land to which the water right is appurtenant is to be further defined. NMSA 1978, § 72-4-19.

Each of the statutes cited above are specific as to the duties of the State Engineer and Attorney General. This specificity is what sets the claim of right to the use of water apart from the domestic well provisions contained in NMSA 1978, § 72-12-1.1. In attempting to justify their position, the Appellants argue that Smith v. Santa Fe "suggests" that the legislature provided for a "special class of uses previously governed by § 72-12-3" Brief-in-Chief at 20. Thus, the Appellants advocate that Section 72-12-1.1 "...simply eliminates the pre-appropriation form

while leaving unaffected the protections for water right owners found in administrative and judicial remedies." Brief-in-Chief at 21. The position of the Appellants has no basis in law and is absolutely contrary to the inherent rights of water right owners who have established and proven their ownership interests over decades of complying with statutory laws and court decisions. At best, the only holding from Smith and Stennis that can be derived is that NMSA 1978, § 72-12-1 is a general law and that NMSA 1978, § 72-12-1 is intended to insure that the OSE is simply aware of domestic wells and that they are drilled by a qualified person. Smith at 416.

The court in Smith made two other important determinations which the State Engineer has failed to bring to the attention of this Court. First, the court determined that there are no statutory requirements before a domestic well permit is approved, and second, the authority granted to the State Engineer under NMSA 1978, § 72-12-1 is limited and without discretion. *Id.* at 416, 417.

The Appellants, without any legal authority also suggest that the Smith and Stennis decisions confirm the constitutionality of §72-12-1.1 because it constitutes "a ministerial notice" statute, and as such, the State Engineer is not vested with any regulatory authority over domestic wells. Brief in Chief, Footnote 1, p. 24. This argument by the Appellants can, at best, be described as a desperate last gasp. The

Appellants offer absolutely no support for this contention. The Appellants also attempt to shore up their argument regarding the constitutionality of § 72-12-1.1 by relying upon this Court's decision on State ex rel. State Engineer v. Lewis, 2007-NMCA-08, ¶¶ 35, 37, 141 N.M. 1, 150 P.3d 375, 385-86. While the State Engineer correctly cites the language from the Court's decision, the State Engineer's reliance is misplaced. The language from the Lewis decision arose from the question of whether the settlement agreement reached between the interested parties was in some way an avoidance of the requirement of priority administration. The Court in Lewis decided that the settlement agreement was an acceptable alternative to the enforcement of water rights through priority administration. What is absolutely lacking from the Court's decision in Lewis is any discussion regarding the appropriation of water by domestic well users as allowed under § 72-12-1.1.

The right to appropriate water under NMSA 1978, § 72-12-1.1 is in complete conflict with the provisions governing the appropriations of surface water found in Article 5 and the appropriation of ground water found in Article 12 of the Water Code. The foundation of the Water Code is contained in New Mexico Const. art. XVI, §§ 1, 2, and 3. Within these sections are found the guidance system for the legislature for the establishment of laws and their application by the State Engineer.

The statutes governing the appropriation and use of surface water and the appropriation and use of ground water clearly establish that the legislature intended for the State Engineer to determine the quantity of water available from either the surface source or the ground water basin for appropriation and the rights of the appropriator including seniority and diversion amounts. *See* NMSA 1978, §§ 72-5-1, et seq. and 72-12-1, et seq. Furthermore, the legislature saw fit to protect the appropriator's right by establishing procedures to be followed by the State Engineer and the appropriator in the use and transfer of the water. *See* NMSA 1978, §§ 72-5-22, 72-5-23, 72-5-24, 72-12-3, 72-12-7, and 72-12-8.

In contrast, NMSA 1978, §§ 72-12-1 and 72-12-1.1 lack any methodology for the State Engineer to follow in protecting the rights of individuals who have clearly established a recognized right to appropriate water and who have complied in their entirety with the laws governing the appropriation and use of the public waters. Instead, §§ 72-12-1 and 72-12-1.1 direct the State Engineer to unlawfully seize or otherwise take the private property of water right owners by directing him to issue domestic well permits anywhere in the State of New Mexico without regard to the effects the appropriation of water may have on water right owners who have fully complied with the provisions of the Water Code. Sections 72-12-1 and 72-12-1.1 place absolutely no requirements on the State Engineer or the applicant to

demonstrate the quantity of water put to beneficial use, nor do their provisions require the State Engineer to take any action to limit the amount of water the applicant seeks to divert. While the legislature is free to grant the State Engineer broad authority to administer the waters of the State of New Mexico, the law is clear that the State Engineer cannot deprive a water right owner of their constitutionally mandated right to appropriate and put to beneficial use the waters which have been declared available for appropriation by the State Engineer.

In the court below, the State Engineer argued that a domestic well permit does not "rise to the level of a water right with attendant property right such as a right of transfer." RP 389 - 495. The Appellants' position is absolutely contrary to the day-to-day administrative procedures followed over the past several decades as demonstrated by the granting of permits and by granting domestic well owners standing to protest applications filed by owners of valid and adjudicated water rights. Despite the State Engineer's recognition of a "domestic water right", John D'Antonio testified in this matter that in the event of a water shortage, he would not subject domestic wells to a priority call in the event such an action became necessary. *See Deposition of John D'Antonio, April 1, 2008, p. 28, Lines 19-25, p. 29, Lines 1-3.*

The Appellants argue the fact that the Domestic Well Statutes have been in place for years and have gone unchallenged is a reasonable inference "that under most

if not all circumstances the DWS is constitutional." Brief-in-Chief at 33. Again, the Appellants rely upon Smith v. City of Santa Fe as legal authority for this position. The argument that an unconstitutional law somehow gains constitutionality because it goes on unchallenged, flies in the face of the basic tenets of the American jurisprudence system.

Likewise, the argument of the Appellants that senior water right owners have a remedy in that they can bring their own cause of action against junior users is absolutely ridiculous. The State Engineer cannot simply "stick his head in the sand" and hope that the matter will go away with time. The State Engineer has a mandated duty to the citizens of the State of New Mexico to administer the waters and protect the senior users. He has been called upon to fulfill that role, and he has refused.

It is undeniable that senior water right owners have a constitutional right to protect their property from the taking by others, including the State of New Mexico. When an infringement of this property right is threatened or actually takes place, the Court must strictly scrutinize the actions of the State to determine whether the differential treatment is necessary to achieve a compelling State interest. The lack of such a compelling State interest prohibits any denial of due process including the taking and depravation of property. Valdez v. Walmart Stores, 1998-NMCA-30, 142

N.M. 655, 954 P.2d 87; Mieras v. Dynacorp, 1996-NMCA-095, 122 N.M. 401, 925 P.2d 518.

The issue before this Court is not complicated nor does it require extensive scientific evidence to reach a decision. Instead the question is simply, after the State Engineer makes a determination that all of the water in a declared basin has been fully appropriated, can the State Engineer continue to issue domestic well permits to the detriment and impairment of existing water right owners. The answer is a resounding no, and the property rights of the water rights owners must be preserved.

The arguments raised by *amici* in their separate briefs can be condensed into one simple assertion; that the granting of domestic well permits constitute a *de minimis* use of water, and that senior water right owners cannot and will not suffer any harm as a result of the granting of the permits. Simply put, *amici* argue that the granting of domestic well permits are equivalent of "no harm, no foul". While *amici* utilize the *de minimis* water use as the basis of their argument, the District Court did not render its decision based upon a *de minimis* use analysis. To the extent that *amici* seek a review based upon *de minimis* appropriation analysis, their argument should be disregarded. This Court has held that it will not consider any arguments of an *amicus* that have not been raised by the parties to the case. K. R. Swerdfeger Construction, Inc. v. Board of Regents, 2006-NMCA-117, 140 N.M. 374, 142 P.3d

962. *Amici* must accept the case as it stands on appeal with the issues as framed by the parties. Id. at 382-383. Notwithstanding the inquiry as to the breadth of *amicis'* briefs, *amici* New Mexico Ground Water Association (hereinafter "GWA") asks this Court to disregard the evidence submitted to the District Court, and instead, accept the opinions of W. Peter Balleau and Steven E. Silver, as expressed in their article *Hydrology and Administration of Domestic Wells in New Mexico,* 45 Natural Resources Journal 807 (2005).

Unfortunately, GWA fails to bring to the Court's attention the article by Frank B. Titus, Ph.D. *On Regulating New Mexico Domestic Wells,* 45 Natural Resources Journal 807 (2005), which is in response to the Balleau and Silver article. In rebutting Balleau and Silver's position, Dr. Titus provides a well reasoned opinion regarding domestic wells and the appropriation of ground water.

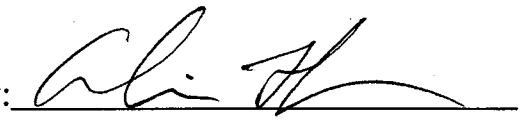
Dr. Titus argues that owners of valid water rights suffer the loss of water as a result of domestic consumption. Dr. Titus explains that when people switch from domestic wells to community wells, they go from an exempt water right priority system to an administrative priority system. Thus, Dr. Titus reasons that restricting domestic wells to a priority system makes priority administration, the State's basic tenet of water law, "more efficient and more equitable". Titus at 853-855.

CONCLUSION

For the foregoing reasons and authorities, NMSA 1978, § 72-12-1.1 should be declared invalid and in violation of New Mexico Constitution, art. II, § 4, and art. II, § 18, and the U.S. Constitution, amend. V and XIV.

Respectfully submitted,

HENNIGHAUSEN & OLSEN, L.L.P.

By: 

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CERTIFICATE OF SERVICE

I certify that on this 12th day of February, 2009, a true and correct copy of the foregoing Intervenor-Appellee New Mexico Farm & Livestock Bureau's Answer Brief was served by first class mail to the counsel of record as follows:

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