IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

HORACE BOUNDS, JR. AND JO BOUNDS, Husband and Wife; and the SAN LORENZO COMMUNITY DITCH ASS'N; and Intervenor, NEW MEXICO FARM & LIVESTOCK BUREAU,

Plaintiffs – Appellees,

v.

THE STATE OF NEW MEXICO, and JOHN D'ANTONIO, New Mexico State Engineer,

Defendants – Appellants.

No. 28,860
Grant County
No.CV-2006-166
Judge J.C. Robinson

NEW MEXICO ASSOCIATION OF COUNTIES' AMICUS BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Decisions

New Mexico Constitution and Statutes

Other Authorities

I. ARGUMENT

A. The Domestic Well Statute as Currently Implemented Defeats the State Legislative Scheme for Land Use Regulation

Land use in New Mexico is regulated primarily by local government bodies such as counties. The counties' authority is conferred by NMSA 1978, Section 4-37-1 (1974), which generally grants counties the same powers as municipalities. Such powers include planning and platting authority, NMSA 1978, Sections 3-19-1 to -12 (1975), subdivision authority, NMSA 1978, Sections 3-20-1 to -16 (1979), and zoning authority, NMSA 1978, Sections 3-21-1 to -26 (2007). Counties are specifically directed to "consider ordinances and codes to encourage water conservation and drought management planning." NMSA 1978, Section 4-37-9.1 (2003).

As a practical matter there is a great deal of growth in counties throughout the state of New Mexico particularly on the urban fringe of the larger metropolitan areas. In more rural areas there are established long time agricultural users who have senior water rights. The statutory scheme in New Mexico, as with most states, is to require that local governments regulate using their general "health, safety and welfare" powers. Specific legislative goals for county planning are set forth in NMSA 1978, Section 4-57-2 (1961) which states "[s]uch planning shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and

harmonious development of the county which will, in accordance with existing and future needs, best promote health, safety, morals, order, convenience, prosperity or the general welfare as well as efficiency and economy in the process of development." In order to reach this goal counties must evaluate the real costs and impacts of new development upon the existing infrastructure including roads, schools, courthouses, and utilities. Growth management is an essential part of the planning process because non-sustainable development will simply not meet the "future needs" planning requirement. The statutory scheme is well conceived and designed to ensure that local government can meet the expectations and needs of the community in the long term.

The authority to permit domestic wells has been delegated to the State Engineer's Office. NMSA 1978, Sections 72-2-1 to -28 (1982). This effectively bifurcates the decision making process. While counties are required to plan for sustainable and harmonious development they do not have any say in domestic well approvals utilized as a source of water for the developments. Only recently have the courts and legislature of New Mexico construed and amended the statutes to permit some municipal regulation. *Smith v. City of Santa Fe*, 2007-NMSC-55, 142 N.M.786, 171 P.3d 300, *Stennis v. City of Santa Fe*, 2008-NMSC-8, 143 N.M. 320, 176 P.3d 309,

NMSA 1978, § 72-12-1.1 (2003). Importantly, the express statutory authority does not extend to counties. Therefore, the counties of New Mexico appear to be responsible for ensuring the orderly planning and development of their communities but without authority to require, or even inquire into, the viability of proposed development relying upon domestic wells or the impacts upon senior well owners in traditional rural communities.

Because the State Engineer's Office is issuing domestic well permits as of right it makes no attempt in the permit process to assess the detrimental impacts upon public welfare. (*Compare,* § 72-12-1.1 containing no evaluation criteria with NMSA 1978, Section 72-12-3 which requires some minimal assessments of the impacts). There is no assessment of how many such wells can be reliably sustained in the decades to come. There is no assessment of the impact upon existing water rights and water users. In summary, the whole issue of how the public welfare impacts future sustainability of development is being swept under the rug and deferred until the wells run dry at which point the cry will go out to the counties of New Mexico to provide water for the existing residents.

We can hope that none of the wells ever run dry. But better than a vain hope is a good plan. And to be effective the plan for the growth and

development of the counties of New Mexico must come to grips with the possibility that continued development based upon individual domestic wells is not going to be sustainable and could be detrimental to senior users. Persons impacted by the decision to issue a domestic well permit should be given due process of law and should have assurances that their future water supply is not being eroded. The counties of New Mexico should be able to participate in the hearings and decisions which impact their future. The process should comport with both reason and law.

The Domestic Well Statute, Section 72-12-1.1, ("DWS") may have been functional when the state was largely rural and agrarian but it is increasingly dis-functional because it encourages non-sustainable growth adjacent to urban areas and erodes the existing rights of established users in rural areas. The statute, as administered, allows precisely the type of unmanaged and unsustainable growth patterns that will inevitably lead to large amounts of developed housing relying upon a limited and dwindling resource. These development patterns are often adjacent to areas that have existing water infrastructure which is designed into the development approval, permitting, and utility rate structure. But water from a domestic well is free from those costs, constraints and burdens and thus encourages each individual to seek an illusory sense of water autonomy by relying upon

a domestic well. If these individuals and communities begin to run out of water they will create a crisis situation and a pressing demand for extension of existing water utilities into areas that were not designed or built to accommodate the requisite infrastructure. This is an untennable growth pattern that causes grave concern for the counties and municipalities of New Mexico and this is the reason why the New Mexico Association of Counties feels compelled to file this *amicus* brief.

B. The Domestic Well Statute is Unconstitutional as it fails to Provide Property Owners with Due Process of Law

Water rights are real property in New Mexico. *Posey v. Dove*, 57 N.M. 200, 210, 257 P.2d 541, 547 (1953). ("It is generally conceded by all of the authorities that a water right, or an interest in water, is real property, and it is so treated under all the rules of law appertaining to such property.") *See also*, *New Mexico Prods. Co. v. New Mexico Power Co.*, 42 N.M. 311, 77 P.2d 634; *Elephant Butte Irr. Distr. v. Regents of N.M.*, 115 N.M. 229, 849 P.2d 372 (App. 1993). Such interests are protected property interests under the law and are specifically constitutionally protected. U.S. Const., Amend. V; N.M. Const. art. II, § 4; N.M. Const. art. II, § 20. *See Also*, *Albuquerque Commons v. City of Albuquerque*, 2008-NMSC-025,184 P.3d 411, downzoning real property implicates constitutionally protected property

interest; *R & R Deli v. Santa Ana Star Casino*, 2006-NMCA-020, 139 nm 085, 128 P.3d 513, obtaining and holding a professional license implicates constitutionally protected property interest.) When real property is affected by the regulatory actions of the State there are viable constitutional claims. *Manning v. N.M. Energy, Minerals & Natural Resources*, 2006-NMSC-027, 140 N.M.528, 144 P.3d 87, (finding that the regulatory action of the state was actionable as a taking under the Constitution and holding that there is no sovereign immunity for such regulatory taking claims because the fifth amendment is self executing.) If the state has a process for allowing individuals to acquire a property interest and that process may impair existing property owners, the state must provide a due process hearing to protect against impairment.

The seminal New Mexico case on due process is *In re Miller,* 88 N.M. 492 (1975), 542 P.2d 1182. In that case the state adopted a statutory scheme for the taxation of real property that implicated the due process considerations. The outline of why and when due process is required to be given by the state to a property owner is closely analagous to the present case. It reads in pertinent part:

The Fourteenth Amendment guarantees every citizen the right to procedural due process in state proceedings. By "procedural due process" we mean the following:

> Procedural due process, that is, the element of the due process provisions of the Fifth and Fourteenth Amendments which relates to the requisite characteristics of proceedings seeking to effect a deprivation of life, liberty, or property, may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact (that is, he must be given notice of the proceedings against him); he must be given an opportunity to defend himself (that is, a hearing); and the proceedings looking toward the deprivation must be essentially fair.
>
> Annot.: Suspension or revocation of medical or legal professional license as violating due process — federal cases, 98 L.Ed. 851, 855 (1954).

In the matter of Miller, 88 N.M. 492, 497-98 (1975), 542 P.2d 1182.

Furthermore, that court found that state agencies which make decisions affecting real property should have due process protections in place for affected property owners. The court stated:

> "Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law." *Waupoose v. Kusper*, 8 Ill. App.3d 668, 290 N.E.2d 903, 905 (App.Ct. 1st Dist. 1972). A litigant must be given a full opportunity to be heard with all rights related thereto. *In Re S-M-W*, 485 S.W.2d 158 (Mo.App. 1972).
>
> As noted by the courts quoted from, supra, a notion of fairness is included within the concept of procedural due process. In a hearing before an administrative agency, the agency must examine both sides of the controversy in order to fairly protect the interests and rights of all who are involved. A refusal to allow witnesses to be called is a denial of procedural due process. *Nichols v. Eckert*, 504 P.2d 1359 (Alaska, 1973). This includes the taking and weighing of evidence that is offered, and a finding of fact based upon consideration of the evidence. *Kentucky Alcoholic BeverageControl Bd. v. Jacobs*, 269 S.W.2d 189 (Ky. 1954).

> "The essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty." *Mid-Plains Telephone, Inc. v. Public Service Com'n*, 56 Wis.2d 780, 202 N.W.2d 907, 911 (1973).

Id.

Not only is due process required for decisions affecting property rights but it is also ordinarily expected that due process of law will be provided prior to a deprivation of property. *Sandia v. Rivera* 2002-NMCA-057, 132 N.M. 201, 46 P.3d 108. *Sandia* is a very interesting and analagous case because it clearly establishes that if a statute fails to provide a hearing and if even a lesser property right (temporary taking of a vehicle) is implicated then the statute is facially unconstitutional. If a temporary deprivation of a vehicle is grounds for granting due process then the issuance of a permit that could dry up a senior water right is all the more worthy of due process.

Sandia also addresses the argument that availability of other remedies vitiates the need for due process holding that "a right, if any, to sue the government for damages does not satisfy the demands of due process" and "[a] replevin action ... would not remedy the deprivation of property without due process. Due process is required upon towing, not sometime later..." *Id.*, at 205. In fact, that court went further in rejecting the subsequent civil action as an alternative to due process and said "such civil actions may entail

considerable delay and do not adequately alleviate the immediate due process concern ... a hearing months or more down the road does not prevent wrongful detention; rather, it prolongs wrongful detention." *Id.* Likewise, in this case, due process is required before a junior water right begins pumping water from a well not at some later time when a senior water user's well runs dry.

There is no question that there must be due process and the only issue is "the amount of process due." *Id.* In making this evaluation the *Sandia* court looked at the statute in question to "evaluate the risk of an erroneous deprivation of [the private] interest though the procedures used, and the probable value, if any of additional or substitute procedural safeguards." *Id.* It is noteworthy that because "no hearing procedure existed," the *Sandia* Court held the statute unconstitutional. *Id.,* at 206. Without a hearing process for domestic wells, the counties of New Mexico do not have a forum in which to offer meaningful and proactive input on individual well applications.

C. Prior Appropriation Doctrine is Constitutionally Mandated and Due Process is Therefore Required to Implement the Constitution's Requirement

The ability to use water at an individual residence is a very real and pressing interest to property owners throughout the state and can not be

understated. When a domestic well runs dry there is an immediate and irreparable injury to the water user who can not continue to meet very basic health and safety needs that water provides. In order to ensure that this right is protected the State Constitution has unambiguously created specific constitutional rights for water users. "Beneficial use shall be the basis, the measure and the limit of the **right** to the use of water." (emphasis added) N.M. Const. Art. XVI, § 3. The state specifically mandated that "Priority of appropriation shall give the better right." N.M. Const. Art. XVI, §2. This establishes an unambiguous system of evaluating conflicting rights of the various water users which applies to groundwater *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (1961). The constitutional scheme creating and balancing these rights must be honored by the state and the state can only honor these rights by guaranteeing due process of law to the affected property owners.

It should also be noted that the issuance of permits by a state agency clearly constitutes "state action" and creates a basis for constitutional claims. Specifically, the issuance of a domestic well permit is state action within the meaning of the 14th amendment of the United States Constitution because it is performed by an agency of the state. *See, Pinnell v. Board of County Comm'rs*, 1999-NMCA-074, 127 N.M. 452, 982 P.2d 503. This implicates

potential liability for the state that could be avoided if the state would simply provide due process of law before issuing the domestic well permits.

As the *Miller* court so aptly and succinctly stated "the essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty." *In re Miller,* 88 N.M. 492 (1975), 542 P.2d 1182. The Appellants arguments that there are remedies available to senior water rights holders and that the State Engineer can administer permits through a simplified application process completely misses the mark. The fundamental issue is not whether there are remedies for those who lose their property. The issue is that the domestic well statute fails to provide any due process for the people whose existing constitutional rights are affected by the ministerial administrative decision.

The rights of individual well owners can not be constitutionally administered without a notice and hearing procedure that gives impacted parties an opportunity to have their issues heard. This also applies to the counties of New Mexico who have a very real stake in ensuring that the water supplies relied upon by the county residents is reliable and respects prior user's priority. Without any form of hearing the counties will simply have no forum in which to address their concerns.

D. The Constitution Does Not Include and the Court Should Not Infer a *de minimis* Exception to the Requirements of Prior Appropriation

The Appellants rely heavily upon the argument that the Court should yield to the legislative determination that some water rights are "*de minimis.*" The essence of the argument is that the "*de minimis*" characterization of certain water rights removes them from the express constitutional provisions regarding the measuring and balancing of water rights. The Appellants argue that the legislature has the power to allow real property to be conveyed without regard for impairment of other property rights under a process that provides no due process. But there is no basis in New Mexico law for pre-screening some water rights under a "*de minimis*" standard. The only measure of all water rights in New Mexico is beneficial use. "Beneficial use shall be **the** basis, **the** measure and **the** limit of the right to the use of water." (emphasis added) N.M. Const., art XVI, §2. If the drafters of the Constitution had intended there to be other additional criteria for evaluation such as the "*de minimis*" amount put to use, they would not have used the word "the" but would instead have said "a." The Constitution's plain meaning is that all water rights of any size, amount or nature are judged solely upon beneficial use and balanced only in accordance with their priority. There is no qualifying or limiting language in the Constitution that

says if a water user puts a well to beneficial use and the amount is *de minimis* that it should be exempted from the constitutional system of evaluation. Because the Constitution is plain and clear there is absolutely no reason that this Court should infer an exception to the constitutional scheme for "*de minimis*" uses of water.

The legislature clearly has relied upon this "*de minimis*" categorization as a loophole to allow additional water rights to be acquired notwithstanding impacts upon senior water rights holders. For example, in NMSA 1978, Section 72-12-3.1 the state recognizes that with respect to "ground water hydrologically related to the Rio Grande at or below Elephant Butte dam ... the amount sought to be appropriated in pending applications far exceeds available supplies..." But the statute goes on to provide that "[n]othing in this section shall preclude the granting of permits...to appropriate ground water for domestic ... and other uses pursuant to Section 72-12-1 NMSA 1978."

In this statute the legislature has manifestly demonstrated the unconstitutionality of the scheme for appropriation of domestic well water under § 72-12-1.1. It has, on the one hand, affirmatively concluded that there is not enough water and, on the other hand, concluded that nevertheless the State Engineer "shall issue a permit to the applicant to use the

underground waters applied for." § 72-12-1.1. The statutory scheme is logically inconsistent as it both concludes that there is not enough water to issue permits to existing applicants and requires the continued issuance of permits to new applicants for domestic wells.

The Appellants argue that the current scheme which consists solely of filing an application with the State Engineer but includes no review or analysis of applications (because the permits are issued as of right) comports with the legislative scheme because the amount of water involved is *de minimis* and the permit process is justifiably made simpler. Individual property owners are not concerned with whether the amount of water they use is small in comparison to an agricultural or industrial user. They are concerned about the continued availability of water for their basic household and domestic needs regardless of how that quantity compares to other users. Saying the amount is *de minimis* ignores the fact that each and every additional well takes actual wet water out of the ground and the cumulative impact over a planning horizon will in fact be substantial.

If the intent is to allow permits as "*de minimis*" because they will not impact existing users then there should be an attempt to analyze the impacts and verify that there is no impairment of existing wells. To continue to assume that there will be no impact from each individual domestic well flies

in the face of reason. Each well does have a small impact. It may well be that some of the domestic wells are sustainable and that they do not impact other users ability to use their water rights; but we will never know unless there is a process for analyzing and assessing the individual applications. Such a process would be essential for rational decision-making and the counties of New Mexico would greatly benefit from the opportunity to participate in such proceedings because they would be able to address growth management issues prior to an emergency response in aid of impacted residents.

E. Constitutionality of a Statute is in No Way Affected by Longstanding Administrative Practices or Justified by a Desire to Simplify the Process

The Appellants correctly observe that there is no basis for making any distinction between general appropriations of water under NMSA 1978, Section 72-12-3 (E) and those under § 72-12-1.1. [BIC 1-2]. The historical administrative practices of the State Engineer's Office were simply codified in 1953 without any attempt to comply with the general requirement that "the State Engineer has the positive duty to determine whether existing rights would be impaired." *City of Roswell v. Berry*, 80 N.M. 110, 112, 452 P.2d 179, 181 (1969); *Templeton v. Pecos Valley Artesian Cons. Dist.*, 65

N.M. 59, 32 P.2d 465 (1958); S*ee also City of Albuquerque v. Reynolds*, 71 N.M. 428, 433, 379 P.2d 73, 77 (1962).

The Appellants argue that the statute is intended to "simplify the application process for certain limited groundwater uses only..." [BIC 9-26]. But this is a rhetorical device that fails to express the true nature of the statute. It does not "simplify" the application. Rather, it "permits use" as a matter of right. There is no balancing of interest, no hearing, no procedural protection of adversely impacted property owners. The statute is very plainly a green light to anyone who wants to take water from the ground without even a cursory attempt to address the constitutional issues of "prior appropriation" under section N.M. Const. art. XVI, §2, or to measure the "beneficial use" amount under N.M. Const. art. XVI, §3.

The Appellants argue that the permit itself does not restrict the ability of the State Engineer or an impaired senior water user from taking subsequent legal action. But that is sidestepping the real issue; that the permit allows the applicant to put water to use without any procedural due process protection for senior water rights holders. The availability of the courts and priority administration to provide a remedy is not even the question. Rather, the question is what pre-deprivation process should senior

water rights holders rely upon to ensure that their property is not taken without due process of law?

The Appellants make rhetorical arguments that the statute does not violate the Constitution because permits may be conditioned, priority "administration" can be implemented after the fact, and there is post-deprivation relief possible through the courts. [BIC 19-25]. They bravely argue that "[t]he DWS expresses a clear and reasonable basis for eliminating notice and hearing requirements." [BIC 26] But they provide no case or law in support of the proposition that a statute can abridge or suspend the fundamental due process rights of property owners simply because the statute states a "clear and reasonable basis." [BIC 26] This is not the law of New Mexico. Due process rights are fundamental constitutional rights and may not be suspended for the sake of administrative convenience or because the legislature had provided a "clear and reasonable basis." [BIC 26]

CONCLUSION

The domestic well statute is patently unconstitutional. It does not comply with the constitutional requirement that prior appropriations give the better right and it does not provide any notice, hearing or opportunity to appraise the relative rights of existing and new domestic well users. The statute is legally and logically inconsistent with fundamental constitutional

requirements affecting the real property rights of New Mexicans and the District Court's finding of unconstitutionality should be upheld.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing, New Mexico Association of Counties Amicus Brief, was served by first class mail upon the parties listed below.

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