IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

HORACE BOUNDS, JR. and JO BOUNDS, and THE SAN LORENZO COMMUNITY DITCH ASSOCIATION; and Intervenor, NEW MEXICO FARM & LIVESTOCK BUREAU,	)	
Plaintiffs-Appellees,	)	
vs.	)	
THE STATE OF NEW MEXICO, and JOHN R. D'ANTONIO, JR., NEW MEXICO STATE ENGINEER	)	**No. 28, 860** **Grant County** **No. CV-2006-166** **Judge J. C. Robinson**
Defendants-Appellants,	)	

STATE OF NEW MEXICO AND NEW MEXICO STATE ENGINEER'S BRIEF IN CHIEF

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Recorded transcript provided by Court Monitor from FTR Gold Digital Recording to CD: The District Court's April 17, 2008, hearing on the Defendants' Motions to Dismiss, Plaintiffs' Application for Preliminary Injunction, and New Mexico Farm and Livestock Bureau's Motion to Intervene, was recorded verbatim to CD (CD No. 639). The District Court's July 8, 2008, hearing on Defendants' Motion for summary Judgment and separate Motion for Reconsideration was recorded verbatim to CD (CD No. 691).

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I. INTRODUCTION

At the heart of this case is the question of whether the Domestic Well Statute, NMSA 1978, § 72-12-1.1 (2003) ("DWS") is constitutional, a question the District Court should not have reached. Defendants-Appellants, the State of New Mexico ("State") and John R. D'Antonio, Jr., P.E., New Mexico State Engineer ("State Engineer") (jointly, "Appellants") seek to reverse the Final Judgment and Order of the District Court for the Sixth Judicial District, the Honorable J.C. Robinson, holding the DWS to be unconstitutional. Although the District Court dismissed (without prejudice) the actual claims against Appellants, the court nonetheless held that the DWS is an impermissible exception to the doctrine of prior appropriation under Article XVI §2 of the New Mexico Constitution.

A. BACKGROUND OF DOMESTIC WELL STATUTE

The New Mexico Constitution declares that waters of the state belong to the public, and unappropriated waters are subject to appropriation for beneficial use in accordance with the laws of the state. N.M. Const. art. XVI, § 2; N.M. Const. art. XVI, § 3 ; NMSA 1978, Sections 72-12-1 and 72-12-2 (2003). Article XVI, § 2 also states, "Priority of appropriation shall give the better right." The Legislature, since territorial days, has enacted a comprehensive Water Code governing the appropriation of water. Groundwater appropriations are governed by NMSA 1978, § 72-12-1 *et seq*. Under Section 72-12-1, the underground waters of the state that

have reasonably ascertainable boundaries belong to the public and are subject to appropriation for beneficial use.

Generally, new appropriations of groundwater are governed by Section 72-12-3, which requires the State Engineer to issue a permit where he finds either "unappropriated waters or that the proposed appropriation would not impair existing water rights from the source, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state." Section 72-12-3(E). In reaching a determination under Section 72-12-3(E), "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); *see also City of Albuquerque v. Reynolds*, 71 N.M. 428, 433, 379 P.2d 73, 77 (1962).

Prior to 1953, there was no statutory distinction between domestic and non-domestic purposes of use in the application process for the appropriation of groundwater, and all applications were subject to the requirements now contained in Section 72-12-3. *See, e.g.,* 1941 Comp. § 77-1103; Laws 1943, ch. 70 § 1. In 1953, the statute governing groundwater uses within the state was amended to codify the State Engineer's administrative practices that excepted applications for domestic, livestock watering, and certain temporary uses from certain procedures required under Section 72-12-3. NMSA 1978, Section 72-12-1 (1953, prior to

amendments through 2003). Section 72-12-1 has been amended several times, but has consistently been intended to provide a streamlined application process for the issuance of permits for *de minimus* groundwater uses. For example, the 2001 version provided in part that anyone:

> desiring to use any of the water described in this act for watering livestock, for [noncommercial] irrigation of not to exceed one acre...or for household or other domestic use shall make application...to the state engineer....Upon the filing of each such application, describing the use applied for, the state engineer shall issue a permit to the applicant to so use the waters applied for.

Section 72-12-1 (2001). Applicants for these limited *de minimus* water uses were no longer required to follow the general groundwater application requirements of Section 72-12-3 for publication of notice of appropriation, protests, or hearing.

In 2003, the Legislature amended Section 72-12-1 into four sections, including stand alone provisions for domestic and stock watering wells (Sections 72-12-1.1 and 72-12-1.2). Section 72-12-1 now provides that:

> [b]y reason of the varying amounts and time such water is used and the relatively small amounts of water consumed in the water of livestock; in irrigation of not to exceed on acre of noncommercial trees, lawn or garden; in household or other domestic use....applications for any such use shall be governed by the provisions of [the DWS].

Anyone desiring to use groundwater for limited noncommercial irrigation or for household or other domestic uses shall file an application with the State Engineer, and the State Engineer "shall issue a permit to the applicant to use the underground

waters applied for." Section 72-12-1.1. Section 72-12-1.2 establishes the same process for livestock well permits. Under Section 72-12-1.3, applications for temporary uses for prospecting, mining public works construction and certain drilling operations require review by the State Engineer; to protect senior water rights from impairment, he may even require notice and hearing as provided by Section 72-12-3.

As argued below, the provisions of Sections 72-12-1.1 and 1.2 simplify the application process for certain limited groundwater uses only, and do not address subsequent State Engineer administration of these permitted uses or affect the judicial remedy available to existing water rights owners to protect against impairment, that being suit to enjoin diversions by the junior appropriator through the courts rather than administrative hearings before the State Engineer.

B. SUMMARY OF PROCEEDINGS

In 2006, Plaintiffs-Appellees Horace Bounds, Jr. ("Mr. Bounds"), Jo Bounds, and the San Lorenzo Community Ditch Association ("Ditch Association") (collectively, "Appellees") asserted constitutional regulatory takings and due process, 42 USC 1983 Claims against Appellants, seeking a declaration from the District Court that the DWS is unconstitutional and an injunction to prevent the State Engineer from issuing new domestic well permits. **[RP 1-9]**. During the

course of proceedings, the New Mexico Farm & Livestock Bureau ("Bureau") intervened in support of Appellees.

Mr. Bounds is a rancher who holds a senior surface water right on the Upper Rio Mimbres, diverting surface flows through the San Lorenzo Community Ditch for irrigation purposes. Mr. Bounds also has the right to divert ground water from his existing wells to supplement any shortage of surface water. **[RP 1-2, 390]**. During the 1990s, he and Jo Bounds developed a small residential subdivision near their ranch, comprised of twelve lots to be served by individual domestic wells. **[RP 394]**. Rather than taking action against domestic well owners or seeking a priority call against all junior water rights (including domestic well permittees) to protect his senior water rights, Mr. Bounds sued the State and the State Engineer, alleging that ongoing pumping from existing domestic wells has caused a regulatory taking of his property rights, a violation of his constitutional right to due process, and a violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. **[RP 5-6]**. The suit was filed without any actual proof of hydrologic impact to the supply of surface and groundwater, on the theory that existing domestic wells, and domestic wells drilled as part of anticipated subdivision development in the Mimbres River Valley (which included domestic wells for their own subdivision), can and will impair Mr. Bounds' senior surface water right in the future. **[RP 1-9, 392-93]**.

Mr. Bounds and the other Appellees did not specifically allege harm based on a lack of notice and opportunity to protest applications for domestic wells prior to permits being issued under Section 72.12-1.1. Rather, they claimed that the State Engineer lacks authority to enforce their senior priority against junior domestic wells. They further claimed the "legislature's scheme of requiring the [State Engineer] to issue domestic well permits upon application despite impairment to existing water rights in order to fuel economic development, acting under color of state law, has damaged the Plaintiffs by an unconstitutional taking of their vested water rights without due compensation." **[RP 4-5]**.

Appellants opposed Appellees' request for injunction, and filed separate Motions to Dismiss for Failure to Join Necessary Parties and Based on Ripeness. **[RP 63-76]**. The motions sought dismissal because Appellees failed to join the forty-five domestic well owners allegedly impairing their water rights, and because Appellees were receiving sufficient water to meet the amount of their water rights and therefore had suffered no injury giving rise to their constitutional claims. Appellents also argued that Appellees' claims were not ripe because they had not exhausted administrative remedies with the State Engineer or exercised direct judicial remedies against the alleged offending domestic well owners. **[RP 63-68]**. Following an April 17, 2008, evidentiary hearing, the District Court denied

Appellees' request for a preliminary injunction, and denied Appellants' Motions to Dismiss. **[RP 378-87]**.

Appellants then moved for summary judgment on the entire Complaint based on the absence of any material facts to support Mr. Bounds' regulatory takings, due process, and Section 1983 claims, or the constitutional challenge to the Statute. **[RP 389-495, 809-834]**. The District Court's July 10, 2008, Decision resolved the Motion for Summary Judgment by dismissing Plaintiff Jo Bounds from the lawsuit with prejudice, dismissing the San Lorenzo Community Ditch without prejudice, denying Plaintiffs' request for a permanent injunction, and finding there were no genuine issues of material fact that precluded summary judgment on Mr. Bounds' regulatory takings, due process and Section 1983 claims. **[RP 839-844]**.

The District Court specifically found there was no evidence to support Mr. Bounds' due process claims. The District Court held that Mr. Bounds had opposed summary judgment on his constitutional claims "without reference to facts," that there was no evidence to support the takings and Section 1983 claims, and no evidence of either monetary damages or impairment. **[RP 843-44]**.

However, despite finding no actual or imminent harm to Mr. Bounds, the District Court nevertheless granted his request for relief under the Declaratory Judgment Act, NMSA 1978, § 44-6-1 *et seq.* (1975). The court found (without

stating the material facts or either the level of scrutiny required or the test applied to evaluate the statute's constitutionality), that as a general matter "§ 72-12-1.1 lacks any due process provisions to protect senior water rights from out of priority review of domestic well applications", and that the state engineer does not have a statutory or regulatory process in place "to give senior appropriators procedural or substantive due process." **[RP 842-843]**. The District Court held that because the DWS "has no due process safeguards," it therefore "creates an impermissible exception to the priority administration system created by N.M. Constitution Art. XVI §2." **[RP 842-843]**.

The District Court's Final Judgment and Order decrees that "Section 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 other words, the State Engineer must review domestic well applications pursuant to the requirements of Section 72-12-3, as occurred prior to the passage of the DWS.

C. STATEMENT OF ISSUES

The District Court's declaration that the DWS is unconstitutional should be reversed for several reasons.

First, based on the findings and conclusions of the District Court, Appellants' Motion for Summary Judgment should have been granted in its

entirety, and the balance of Mr. Bounds' claim should have been dismissed with prejudice without the District Court reaching the "dispositive issue" of the constitutionality of the DWS. **[RP 844]**. Because the District Court found no evidence of actual or imminent harm to Mr. Bounds amounting to an actual controversy regarding the constitutionality of the Statute, it should not have reached the declaratory judgment claim.

Second, in deciding to adjudicate the declaratory judgment claim, the District Court erred by failing to accord the DWS a presumption of constitutionality. Nor did it consider or adopt a reasonable construction of the DWS that supported its constitutionality, and that would give effect to its objective and purpose. Instead, because the District Court was concerned that Mr. Bounds' water rights *could be* jeopardized in the future if domestic well permits continued to be issued without "administrative safeguards," the District Court determined that the DWS' streamlined application process automatically rendered it unconstitutional under N.M. Const. art. XVI, §2. **[RP 842-43]**. Despite finding Mr. Bounds lacked any facts demonstrating that the 72-12-1.1 permits issued in the Upper Rio Mimbres Valley resulted in any constitutional violation of his rights, the Court opined, based on the requirement that the State Engineer issue domestic well permits and the DWS' lack of so called "due process safeguards," that there *could be* an instance when a domestic well permittee could impair a senior appropriator

after having been issued a permit, and on that basis held the DWS unconstitutional. **[RP 842-43]**. Applying this flawed constitutional analysis, the District Court erroneously concluded the DWS violates N.M. Const. art. XVI, §2, and therefore is unconstitutional. **[RP 843]**.

Ignoring its findings with regard to Mr. Bounds' claims as well as canons of statutory construction, the District Court justified the entry of declaratory judgment based on its own unsupported assertions and speculation. The Court found that the State Engineer "has issued domestic well permits without regard to availability of unappropriated water or priority of appropriated water" and that "OSE has recognized its lack of power to protect senior water rights." **[RP 841-42]**. While such statements may have been included in media reports, there was no substantial evidence to support such conclusions. The District Court also held that the State Engineer has no authority to administer domestic well permit in priority. **[RP 841-42]**. In fact, the record demonstrates that the State Engineer's position is that he does have such authority by his issuance of administrative orders and Domestic Well Regulations for priority administration of permitted domestic well permits. **[RP 55-58**, Order No. 177, *In the Matter of Priority Administration of the Direct Flow of the Mimbres River within the Upper Mimbres Water Master District, New Mexico* ("Order No. 177"), pp.2-3)]; *see* Domestic Well Regulations, 19.27.5.13(B)(12) NMAC (2006) (domestic well conditions of approval; "[t]he

right to divert under this [72-12-1.1 domestic well] permit is subject to curtailment by priority administration as implemented by the state engineer or a court").

Finally, in finding that senior appropriators have no ability to protect their priority of right absent notice and hearing on domestic well permit applications, the District Court conflated the domestic well application process with the priority administration of water rights by the State Engineer as well as common-law remedies. **[RP 841-42]**. As explained below, senior appropriators have administrative and judicial remedies for enforcing their priorities against all junior water rights, including Section 72-12-1.1 permits for domestic uses. The District Court instead assumed that the State Engineer would refuse to enforce Mr. Bounds' senior priority against junior domestic well permittees in the future, and conjectured that delaying consideration of the Statute's constitutionality would leave Mr. Bounds or other senior appropriators open to attack on grounds of laches and other equitable and legal defenses should they bring such a challenge in the future, essentially rejecting any common-law right to seek injunctive relief from the courts. **[RP 841-42]**. The court, ignoring facts in the record to contrary **[RP 55-58]**, further concluded that a statement by the State Engineer that he would not subject domestic wells to a priority call and would first curtail outdoor and not indoor uses constitutes "a derogation of his duty under the N.M. Constitution and § 72-12-1.3." **[RP at 841-42]**. Based on this rationale, the issue as framed by the

District Court properly becomes a matter for mandamus (a remedy Appellees did not seek), not whether the DWS is unconstitutional.

II. ARGUMENT

A. STANDARD OF REVIEW ON APPEAL

The District Court decided this case on summary judgment and pursuant to the Declaratory Judgment Act. Where the material facts are undisputed as in this case, the legal questions presented on summary judgment are reviewed *de novo*. *See Self v. United Parcel Serv., Inc.*, 1998-NMSC-46, ¶6, 126 N.M. 396, 970 P.2d 582. A court's decision to grant or refuse declaratory relief is reviewed on appeal for an abuse of discretion. *Sunwest Bank, N.A. v. Clovis IV*, 106 N.M. 149, 154, 740 P.2d 699, 704 (1987). Having decided to address this case under the Declaratory Judgment Act, the District Court's substantive interpretation of New Mexico statutes and the state constitution is a question of law that the appellate courts review *de novo*. *Stennis v. City of Santa Fe,* 2008-NMSC-8, ¶ 13, 143 N.M. 320, 176 P.3d 309, 313 citing *Smith v. Bernalillo County*, 2005-NMSC-12, ¶ 18, 137 N.M. 280, 171 P.3d 300).

B. THE DISTRICT COURT ERRED BY ENTERING DECLARATORY JUDGMENT WHEN THERE EXISTED NO CASE OR CONTROVERSY

1. The District Court Dismissed The Takings And Civil Rights Claims without Directly Ruling on Appellants' Motion for Summary Judgment.

Rule 1-056(C) NMRA 2008 requires that summary judgment "be rendered *forthwith* if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." (Emphasis added). The District Court found Mr. Bounds failed to support his Section 1983 and regulatory takings claims with any evidence, and therefore should have granted Appellants' summary judgment motion on all issues or should have dismissed these claims with prejudice.

In moving for summary judgment, the State was required to make a prima facie showing of no genuine issue of material fact and that it was entitled to judgment as a matter of law. *Savinsky v. Bromley Group*, 106 N.M. 175, 176, 740 P.2d 1159, 1160 (Ct. App. 1987). The State submitted evidence that: (1) Mr. Bounds since 2006 received sufficient water to meet the full amount of his adjudicated water right; (2) Mr. Bounds has no measuring device on his point of delivery and has never measured the amount of surface water delivered to his irrigated acreage and thus could not rebut the State Engineer Water Master's determination that he received his full appropriation in so called "shortage" years;

(3) the total combined effect of existing upstream domestic wells on the surface water supply at Mr. Bounds' point of diversion would be less than 0.3 percent; (4) there was no instance where domestic well pumping prevented Mr. Bounds from appropriating the full amount of his water right; (5) Mr. Bounds has existing supplemental wells that are permitted to supplement surface water in the event of a shortage; and (6) Mr. Bounds sustained no economic harm or interference with investment-backed expectation as a result of the hydrologic impacts of domestic well pumping. **[RP 392-93, 814-16]**. These material facts met the State's *prima facie* burden to show that Mr. Bounds cannot, as a matter of law, prove a *per se* regulatory taking of his water rights or a taking under the *Penn Central* standard. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005) (holding that regulatory action may be considered a *per se* taking where property owner suffers physical invasion of his property, or where regulation denies all economically beneficial or productive use of property); *Penn Central Transport. Co. v. New York City*, 438 U.S. 104, 124-28 (1978) (articulating fact-intensive inquiry for finding regulatory taking where challenged regulation does not effect a *per se* taking through physical invasion of property or by rendering property economically useless).

Rather than controvert these facts, Mr. Bounds argued the general proposition that any diminution in surface water available for his appropriation

caused by pumping from domestic wells is *per se* impairment which equates to a *per se* regulatory taking of his water rights. This argument was unavailing because New Mexico does not recognize *per se* impairment. *See Montgomery v. Lomos Altos*, 2007-NMSC-2, ¶¶21-24, 141 N.M. 21, 150 P.3d 971 (rejecting the argument that any new depletion in water supply in a fully appropriated system constitutes *per se* impairment, and holding that impairment is a fact-based determination of injury to water rights). Mr. Bounds offered no competent evidence that the hydrologic impact from existing domestic wells on his water rights constitutes impairment under the standard articulated in *Montgomery*. **[RP 414-16, 814-16]**. Thus, he not only lacked a viable takings claim, but his Section 1983 claim also failed as a matter of law. *See Crown Point I LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1216 (10th Cir. 2003) ("In order to prevail on its 42 U.S.C. § 1983 claim, plaintiff must demonstrate that it suffered a deprivation of a federally protected right."). *See also Moongate Water Co. v. State of New Mexico*, 120 N.M. 399, 404, 902 P.2d 554, 559 (Ct. App. 1995) ("Section 1983 does not itself establish or create any rights, it only authorizes the granting of relief when a claimant demonstrates a violation of rights created by the federal Constitution or statute.").

The District Court found that Mr. Bounds failed to meet his burden in responding to the State's summary judgment motion, observing that "Plaintiff

[Horace Bounds] argues, *without reference to facts*, his other claims should not be dismissed," and further held that "there is no evidence at this time to support...Bounds' 42 U.S.C. § 1983 civil rights and takings claims." (Emphasis added). **[RP 843-44, 857]**. "The party opposing the summary judgment motion *must* adduce evidence to justify a trial on the issues." *Spears v. Canon de Carnuel Land Grant*, 80 N.M. 766, 769, 461 P.2d 415, 418 (1969) (emphasis added). Once the District Court found Mr. Bounds had not met his summary judgment burden, it should have granted summary judgment in favor of the State. **[RP 844]**. Dismissal of the takings and Section 1983 claims without prejudice violated Rule 1-056(C) and the policy underlying summary judgment. *See Agnew v. Libby*, 53 N.M. 56, 58, 201 P.2d 775, 776 (1949) ("The purpose of summary judgment is to hasten the administration of justice and to expedite litigation by avoiding needless trials."). Moreover, as addressed below, because the District Court disposed of the alleged case and controversy presented by the Appellees, it should have dismissed the request for declaratory judgment on that basis and granted summary judgment to the State on the entire Complaint.

2. The District Court Erred In Declaring The DWS Unconstitutional Because There Was No Actual Controversy.

There being no actual controversy giving rise to a need for declaratory relief, the District Court should have refused to enter a declaratory judgment that the

DWS is unconstitutional. The Declaratory Judgment Act grants district courts the "power to declare rights, status and other legal relations whether or not further relief is or could be claimed." NMSA 1978, Section 44-6-2 (1975). While the Declaratory Judgment Act "[is] intended to be liberally construed and administered as a remedial measure," *Smith*, 2005-NMSC-12, ¶13, the Act requires an "actual controversy." Section 44-6-2; *see Sunwest Bank, N.A. v. Clovis IV*, 106 N.M. 149, 154, 740 P.2d 699, 704 (1987) ("The exercise of discretion to grant or refuse declaratory relief under Section 44-6-7 must find its basis in good reason."). To make that threshold determination, courts generally look for an injury in fact that is "concrete and particularized and imminent or actual, as opposed to conjectural or hypothetical," to avoid premature adjudication and entanglement in "abstract disagreements." *See Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1237 (10th Cir. 2004). Here, the District Court concluded that there was no factual basis for Mr. Bounds' claims against the State **[RP 843-44]**, and properly should have declined to grant declaratory relief regarding the constitutionality of the DWS.

In ordering the dismissal of a declaratory judgment claim for lack of an actual controversy, the New Mexico Supreme Court explained in *State ex rel. Overton v. New Mexico State Tax Comm'n*, 81 N.M. 28, 31, 462 P.2d 613, 616 (1969) (citation omitted), that a request for declaratory relief must present "a real

and not theoretical question ... As desirable as it may be to have our opinion on questions of public importance as soon as possible, it is always dangerous to 'function in the abstract.'...We must avoid 'ill-defined controversies over constitutional issues.'" More recently, the Court of Appeals affirmed dismissal of a facial constitutional challenge for lack of an actual controversy where plaintiffs sought a declaratory judgment that a city ordinance effected a taking of their property, but did not allege to have suffered actual economic loss. *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-93, ¶¶24-26, 190 P.3d 1131. This Court explained, "[A]bsent the concrete factual background of an enforcement action by the City, Plaintiffs' takings claim is entirely theoretical and, therefore, premature." *Id.*, ¶24 (citation omitted).

In contrast to the *Rio Grande Kennel Club* plaintiffs, Mr. Bounds attacked the constitutionality of the DWS based on specific allegations of hydrologic impairment and economic harm. However, once the factual record confirmed the absence of any evidence of actual or imminent harm, there was no actual controversy regarding the constitutionality of the DWS. Absent a controversy, the District Court should have dismissed the request for declaratory relief, as was the case in *Rio Grande Kennel Club*. *See* Sections 44-6-2, 44-6-7 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy

giving rise to the proceeding"); *Rio Grande Kennel Club*, 2008-NMCA-93, ¶¶24-26. The declaratory judgment should be vacated and the case remanded to the District Court for entry of an order dismissing the request for declaratory judgment as there was no actual controversy.

C. THE DISTRICT COURT INCORRECTLY EQUATED ISSUANCE OF A PERMIT WITH PRIORITY ADMINISTRATION OF WATER RIGHTS

Mr. Bounds argued, and the District Court agreed, that mandatory issuance of domestic well permits (and by implication, livestock well and stock water impoundment permits) establishes a hierarchy of appropriative right by type of use. **[RP 840]**. The District Court noted that any form of hierarchy of use by type of right rather than strictly in accordance with priority was contrary to the State Constitution and had been rejected by the 1910 Constitutional Convention. **[RP 840]**. The DWS does not create an unconstitutional hierarchy nor unconstitutionally interfere with priority administration because it addresses only the application process for domestic well permits.

1. The DWS Does Not Create An Unconstitutional Exception to the Priority Administration System.

The District Court erred in specifically concluding that the DWS creates an unconstitutional exception to the "priority administration system created by N.M. Constitution Art. XVI § 2" on the grounds it lacks mandatory "due process

safeguards" for senior water rights holders, including a right to notice of domestic well applications, a determination of whether an application will impair existing water rights if approved, and a right to protest. **[RP 842-43]**. Contrary to the District Court's conclusion, the issuance of a permit, including domestic well permits, does not guarantee unfettered use as to all other water rights owners, and without regard to priority in time. The requirement that the State Engineer issue a domestic well permit, is not a requirement that the well be drilled or water placed to use, *See Stennis v. City of Santa* Fe, 2006-NMCA-125, ¶ 11, 143 P.3d 756, 759, and, most importantly, provides no exception from curtailment under priority administration for such permitted uses or injunction to prevent impairment.

The legislative requirement that a permit be issued, without more, does not preclude the State Engineer from placing conditions or restrictions on the permit's use, such as compliance with priority administration. In the *Smith* decision, the Court of Appeals concluded that the purpose of the DWS is primarily to provide notice to the State Engineer that a domestic well is being drilled and to ensure that it is drilled by a qualified person, and that "there are no statutory requirements that must be met before a domestic well application is approved." 2006-NMCA-48, ¶ 21, 139 N.M. at 416, 143 P.3d at 872.

The *Smith* decision, therefore, suggests this Court may find that the Legislature provided for a special class of uses previously governed by Section 72-

12-3, which provides water rights owners with a forum to protect their rights before there is any appropriation. The state, as owner of all the public waters, has the right to prescribe how the public waters may be used, and what process shall be followed for new appropriations. *See State ex rel. Erickson v. McLean*, 62 N.M. 264, 271, 308 P.2d 98, 987 (1957). Because the Legislature has articulated a rational reason and means to allow water to be used at any time for specified purposes, this court could find that Section 72-12-1.1 simply eliminates the pre-appropriation forum while leaving unaffected the protections for water rights owners found in administrative and judicial remedies. Such judicial protections exist or existed as the only protections for existing senior water rights owners prior to the declaration of groundwater basins.

While the *Stennis* Court of Appeals specifically rejected the contention that the State Engineer lacks authority to issue conditional language in a domestic well permit or to delegate its authority to a municipality to regulate the use and amount of water or even ban drilling of such wells, and found that the State Engineer had not delegated its authority over the beneficial use of water, 2006-NMCA-125, ¶ 14, 143 P.3d 756, 760 (citing *Smith,* 2006-NMCA-48, ¶¶ 18-25), it should be noted that the Court nonetheless declined to reconsider its characterization in *Smith* of the DWS as a "notice" statute, or to affirmatively address whether the state engineer has the discretion or obligation to impose conditions or refuse to accept

applications if existing rights will be impaired or no unappropriated water is available "because the underlying facts do not require us to decide whether the *Smith* opinion mischaracterized the [State Engineer's] authority." 2006-NMCA-125, ¶¶ 27-28.

The Legislature may vest significant discretionary authority in administrative agencies, and need not do so solely within the scope of a single statute. *Cobb v. N.M. State Canvassing Board*, 2006-NMSC-034, ¶¶40-41, 140 N.M. 77, 88-89, 140 P.3d 498, 509-10. The Water Code as whole grants this type of discretionary authority to the State Engineer. The broad authority vested in the State Engineer within the Water Code is intended to provide an administrative framework for the supervision and distribution of the public waters of the state. *See, e.g., Herrington v. State ex rel. Office of State Engineer*, 2006-NMSC-014, 139 N.M. 368, 133 P.3d 288 (State Engineer has administrative discretion to allow supplemental wells as alternative to priority enforcement). The State Engineer has "general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required." NMSA 1978, Section 72-2-1 (2005). Further, he may "adopt regulations to implement and enforce any provision of any law administered by him" and "may issue orders necessary to implement his decisions," which provisions of law are to be liberally construed. NMSA 1978, Section 72-2-8 (1967). His interpretations of the law are presumed

correct. *Id.* The State Engineer has the authority to administer groundwater in a manner intended to provide a reasonable measure of protection to existing water rights without unduly restricting the full economic utilization of water supplies. *Stokes v. Morgan*, 101 N.M. 195, 199, 680 P.2d 335, 339 (1984). The State Engineer can establish water districts and appoint water masters to administer rights in priority, and any person may appeal to either the State Engineer or to the district courts from acts or decisions of the water master. NMSA 1978, Sections 72-3-2, 72-3-3 (1907). Indeed, "[a]ny applicant or other party dissatisfied with the decision, act or refusal to act of the state engineer may appeal to the district court." NMSA 1978, Section 72-7-1(A) (1971).

The DWS has been and can be interpreted and implemented in conformity with the Water Code as a whole and N.M. Const. art. XVI, § 2, as evidenced by the state engineer's exercise of administrative authority to promulgate domestic well regulations and administer permitted domestic wells in priority. *See* 19.27.5.13(B)(12) NMAC (domestic well permits are issued with condition that permitted well is subject to curtailment during priority administration by state engineer or court); *see also* Order No. 177, pp. 2-3. **[RP 55-58]**. Appellate courts have found that local regulation of domestic wells is consistent with the DWS: "The domestic well permit application process resulting in an automatic and unrestricted permit does not approximate a comprehensive or exhaustive regulation

of such wells. Additional regulation at the local level does not inhibit the notice-oriented mandates of Section 72-12-1."[1] *Smith*, 2006-NMSC-48, ¶ 18. The Water Code grants the State Engineer the necessary legislative delegation of authority to supervise, condition, and administer domestic well permits in accordance with Article XVI, § 2.

This is not to say that an unconstitutional statute may be "cured" by administrative action of a state agency. It is for the courts to determine whether the administrative agency has complied with the legislative will. *See Cobb*, 2006-NMSC-034, ¶40-41 (New Mexico Supreme Court has found proper delegation of legislative authority where administrative discretion occurs within a governmental scheme, policy, or purpose) (citation omitted). As the District Court itself noted, "It is not what has been done but what can be done under a statute that determines its constitutionality." *State ex rel. Holmes v. State Bd. of Finance,* 69 N.M. 430, 440, 367 P.2d 925, 932 (1961).

Importantly, however, the courts have found that effective administration of the State's public waters requires a flexible interpretation of Article XVI, § 2 in dealing with the prior appropriation doctrine. The *Lewis* Court found that a priority call on the Pecos River was not necessarily the only method of water

[1] It is possible to interpret the *Smith* and *Stennis* decisions to hold that the DWS is constitutional while nonetheless finding that it is a "ministerial notice" statute that provides the state engineer with no authority to supervise or regulate domestic wells in any manner.

administration and resource management that could be used in times of water shortages:

> We see no reason to read Article XVI, Section 2 of the Constitution and Article IX of the Compact to require a priority call as the first and only, and thus exclusive, response to water shortage concerns. Rather, we think it reasonable to construe these provisions to permit a certain flexibility within the prior appropriation doctrine in attempting to resolve the longstanding Pecos River water issues. We do not find in the language of the Constitution or the Compact an exclusive right to a priority call. The relevant provisions do not by their terms require strict priority enforcement through a priority call when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods.
>
> Thus, although priority calls have been and continue to be on the table to protect senior users' rights, such a fixed and strict administration is not designated in the Constitution or laws of New Mexico as the sole or exclusive means to resolve water shortages where senior users can be protected by other means.

State ex rel. State Engineer v. Lewis, 2007 NMCA 8, ¶¶35, 37, 141 N.M. 1, 150 P.3d 375, 385-86.

Finding the DWS to be constitutional will not interfere with senior water rights owners' right to protection under Article XVI, § 2, because they have effective remedies to protect their water right. Where there remains access to the courts or the administrative process, "albeit at a different point or under different theories, there is no interference with constitutional scheme of due process." *Trujillo v. City of Albuquerque*, 1998-NMSC-31, ¶¶14-16, 125 N.M. 721, 726-27,

965 P.2d 305, 310-11 (applying rational basis test to equal protection analysis of damages cap in Tort Claims Act).

There is no absolute constitutional right to participate in the application process; water rights owners' rights to due process have not been abrogated by Section 72-12-1.1., even if they are only available after water is placed to beneficial use pursuant to a permit for a new appropriation. As argued below, procedure for its own sake is not a constitutional guarantee. *See Crown Point I*, 319 F.3d at 1217, especially in the face of a strong legislative rationale that streamlining the permit process is unlikely to affect existing water rights owners.

2. The DWS Does Not Deprive Water Rights Owners of Due Process.

The DWS expresses a clear and reasonable basis for eliminating notice and hearing requirements from the permitting process for certain necessary water uses. This means of acquiring a permit to appropriate water is not unique to the DWS: the same mandatory permit issuance in Section 72-12-1.1 is also found in the Livestock Well Statute (NMSA, 1978 § 72-12-1.2 (2003)) and the Stock Water Impoundment Statute (NMSA 1978, § 72-9-3(B)(2004)). In fact, the Livestock Well Statute employs identical procedures and mandates (upon proof of legal access to public lands). *Compare* Section 72-12-1.1 *with* Section 72-12-1.2.

The New Mexico Constitution states that appropriation of the public waters for beneficial use shall be "in accordance with the laws of the state." NM Const. art. XVI, § 2. The courts have held that the statutory means of acquiring a water right are exclusive. *See State ex. rel. Reynolds v. King*, 63 N.M. 425, 321 P.2d 200 (1958) (citing *Bliss v. Dority,* 55 N.M. 12, 225 P.2d 1007 (1950)). Article XVI, § 2 prescribes no particular administrative process applicable to new appropriations of water, domestic or otherwise, and the absence of so called "due process safeguards" does not violate senior water rights holders' (including Mr. Bounds) right to due process. "Procedural due process ensures the state will not deprive a party of property without engaging in fair procedures to reach a decision." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000). The DWS does not violate senior appropriators' due process rights.

As the Tenth Circuit Court of Appeals explained in *Hyde Park Co.*, "Due Process is not an end in itself. Rather, the constitutional purpose of due process 'is to protect a substantive interest to which ... [a party] has a legitimate claim of entitlement." 226 F.3d at 1210 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)). The courts have held that "there can be no property right in mere procedure." *See Crown Point I, LLC v. Intermountain Rural Elec. Assoc.*, 319 F.3d 1211, 1217 (10th Cir. 2003) (quoting *Hillside Comty. Church v. Olson*, 58 P.3d 1021, 1027 (Colo. 2002)). As a matter of law, the lack of a procedure for

notice and hearing for other water rights holders during the permitting process amount to property deprivation. The provisions of the DWS must be read in *para materia* with the Water Code, which together with the common law provides due process protections for water rights owners. *See, e.g., N.M. Indust. Energy Consumers v. Public Reg. Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 540, 168 P.3d 105, 112 (citing *State ex rel. Quintana v. Schnedar,* 115 N.M. 573, 575-76, 855 P.2d 562, 564-65 (1993) (in ascertaining legislative intent, provisions of statute must be read together with other statutes in *pari materia* under presumption legislature acted with full knowledge of relevant statutory and common law and statutes covering same subject matter should be harmonized and construed together when possible to facilitate their operation and achievement of their goals)).

The District Court erroneously concluded that due process requires a hearing on domestic well applications because senior appropriators have no other remedy to prevent injury by junior domestic well permittees. Under the constitutional scheme of prior appropriation in Art. XVI, § 2, a senior appropriator has the right to take action to protect his water right from impairment by a junior appropriator that interferes with his right to appropriate by requesting that the state engineer enforce a priority call (NMSA 1978, Sections 72-3-1 through 72-3-6) or by bringing a complaint to enjoin a diversion by junior domestic well permittee in district court to protect his water supply. *See, e.g., La Madera Community Ditch*

Assoc. v. Sandia Peak Ski Co., 119 N.M. 591, 893 P.2d 487 (Ct. App. 1995) (senior water right owner entitled to pursue trespass action against junior appropriator based on alleged impairment without initiating formal stream system adjudication). The District Court failed to recognize or even acknowledge that senior appropriators are not deprived of procedural due process, because both administrative and judicial remedies are available under Section 72-12-1.1.

D. THE DOMESTIC WELL STATUTE IS CONSTITUTIONAL AS A MATTER OF LAW.

Whether the DWS is constitutional under the New Mexico State Constitution is a matter for statutory construction by the Court. There is a strong judicial aversion to declaring statutes to be unconstitutional. Courts thus afford the Legislature the presumption that legislation is constitutional, that the Legislature has a rational basis for enacting statutes that promote reasonable legislative goals, and is aware of the constitutional provisions relating to the public waters of the state, including Art. XVI, § 2. Applying mandatory canons of constitutional analysis, this Court should find that the DWS' prescribed administrative process for issuing domestic well permits is constitutional.

1. The District Court Failed to Apply Mandatory Canons of Statutory Construction to Determine Whether the DWS Coud be Construed and Applied in a Constitutional Manner.

The District Court was bound by the canon of statutory construction that "if a statute is susceptible to [multiple] constructions, one supporting it and the other rendering it void, [the court] should adopt the construction which will uphold its constitutionality." *Johnson v. New Mexico Oil Conservation Comm'n*, 1999-NMSC-21 ¶17, 127 N.M. 120, 978 P.2d 327, 331 (citation omitted). The District Court therefore should have proceeded from the presumption that the Legislature kept within the boundaries of the Constitution in enacting the DWS. *State ex rel. Udall v. Public Employees Retirement Bd.*, 120 N.M. 786, 907 P.2d 190 (1995) (statutes enjoy a strong presumption of constitutionality). In considering the constitutionality of a statute, courts must also attempt to apply a reasonable interpretation of the statute, and where there is a reasonable interpretation, must find the statute to be constitutional. *Johnson*, *supra.* (court should adopt construction that upholds constitutionality); *see also* NMSA 1978, Section 12-2A-18(A)(3)(1997) (Uniform Statute and Rule Construction Act; a statute is construed, if possible, to avoid an unconstitutional result). Additionally, the Legislature is assumed to have been aware of the constitutional doctrine of prior appropriation in enacting the DWS. *See State ex rel. State Engineer v. Lewis*, 2007-NMCA-8, ¶¶35, 37, 141 N.M. 1, 150 P.3d 375, 385-86 (holding that Pecos River settlement agreement that allowed for alternative to strict priority enforcement by priority call did not violate NM Const. art. XVI, § 2). The District Court erred by ignoring

these principles of statutory construction, choosing to determine the DWS' constitutionality based on whether there is *any* circumstance in which the DWS could be applied in an unconstitutional manner, and if so, it was constitutionally flawed on its face. **[RP 841]**. *See Am. Falls Revservoir Dist. No. 2 v. Idaho Dep't of Water Res.,* 154 P.3d 433 (Idaho 2007)*Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 154 P.3d 433 (Idaho 2007) (outlining standards for finding statutes or regulations facially unconstitutional versus as-applied).

In *Am. Falls,* regulations intended to govern administration of priority calls against junior groundwater right owners in hydraulically connected basins were challenged as a violation of Idaho's constitutional prior appropriation doctrine. The Idaho district court held the rules facially unconstitutional because they lacked "procedural components" of prior appropriation that the district court found were constitutionally mandated. *Id.* at 445. Like the district court in *Am. Falls*, the District Court in this case conflated the standard for facial analysis of the DWS by looking for any set of facts, beyond those presented by Mr. Bounds, under which the DWS could be applied unconstitutionally. **[RP 841]**.

The Idaho Supreme Court explained that a party may challenge a statute as unconstitutional "on its face" or "as-applied" to the party's conduct. *Id.* at 441. Under the "as applied" standard, a district court must rule on the constitutionality of the statute within the context of required administrative proceedings, or judicial

proceedings based upon the factual record that is developed for that party. *Id.* at 441. The Supreme Court further warned against combining the standards, stating, "a court may hear both types of challenges to a [statute's] constitutional validity; however, it may not do a 'hybridized' form of either test, in which the two tests are combined into a single analysis." *Id.* at 442 (citation omitted).

The Idaho district court had acknowledged that a plaintiff must choose between a facial or as-applied constitutional challenge, and that an as-applied challenge in that instance required exhaustion of administrative remedies, which had not occurred in that case. The Idaho district court, as occurred here, nonetheless improperly combined a facial with as-applied analysis, performing its judicial review by incorporating factual elements of the plaintiffs' case into a facial analysis of the rules. *Id.* In reversing the district court, the Idaho Supreme Court explained that absent a complete factual record, the only ripe constitutional review is facial analysis which presents one issue: "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.* at 443.

In this case, the factual record was fully developed that Mr. Bounds has sustained no harm as a result of enactment and enforcement of the DWS, and thus the District Court failed to conclude the DWS is constitutional under the "as-applied" test. The test the District Court then should have analyzed but did not, is

whether the DWS is facially unconstitutional. 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) (if there are any circumstances under which the statute can be found to be constitutional, the courts cannot find it to be unconstitutional). Accordingly, Mr. Bounds was required to demonstrate that the Legislature intended the DWS to be an abrogation of the New Mexico Constitution, and that under no circumstances could the DWS be read in harmony with Article XVI, § 2. *Espanola Hous. Auth. v. Atencio*, 90 N.M. 787, 568 P.2d 1233 (1977) (the party challenging the statute has the burden to prove it is unconstitutional beyond a reasonable doubt).

The streamlined application process in the DWS has been in place and unchallenged for many years. Given the long-standing nature of the law, and based on recent appellate decisions, it can reasonably be inferred that under most if not all circumstances the DWS is constitutional. The DWS has been recently scrutinized in the context of the City of Santa Fe's local regulation of domestic wells permitted under the DWS. *See Smith v. City of Santa Fe*, 2006-NMCA-48, ¶9, 139 N.M. 410, 133 P.3d 866, 869, *aff'd in part,* 2007-NMSC-55, ¶28, 142 N.M. 786, 171 P.3d 300, 308. In that case, the Court of Appeals held that neither

the DWS' general requirement that the State Engineer issue a domestic well permit, nor the language of the permit itself, could be read to negate the City of Santa Fe's authority to deny a permit to drill the well within its area of municipal authority; and that the plain meaning of the permit language of approval as conditioned was clear and ambiguous and allowed an applicant to drill a Section 72-12-1.1 well if not limited by a more restrictive municipal ordinance. 2006-NMCA-55, ¶16.

Further, the State Engineer has implemented regulations for the administration of domestic wells that provide protections for senior appropriators and address the District Court's basis for finding the DWS to be contrary to the constitutional doctrine of prior appropriation. *See* 19.27.5 NMAC (2006). These regulations are one way of addressing any specific hydrologic implications, which vary among the different groundwater basins declared throughout the state, that could result from mandatorily issuing domestic wells permits based on *de minimus* effects to the groundwater supply. Additionally, as is the case for senior appropriators in undeclared groundwater basins, the common law cause of action to enjoin diversions by a junior groundwater appropriator is also available to senior water rights owners such as Mr. Bounds. Accordingly, because the DWS cannot be found facially unconstitutional under all circumstances, the District Court was

required to find the DWS was constitutional as a matter of law. *See Espanola, supra.; Salerno, supra.*

2. The Domestic Well Statute Is Constitutional Because it is Rationally Related to a Legitimate State Interest.

The District Court also failed to consider whether there were legitimate legislative goals achieved by the DWS. Under the rational basis test, if legislation bears a rational relationship to legitimate goals and applies equally to all persons within such class, it is constitutional. *Mieras v. Dyncorp*, 1996-NMCA-95, ¶30, 122 N.M. 401, 925 P.2d 518 (statutory attorneys' fee cap on workers' compensation awards is rationally related to important state interest in limiting financial burden on employers and insurers and protecting workers). The DWS is the type of general social and economic law that ordinarily is afforded only a rational basis review when analyzed for its constitutionality. *See, e.g., Pena Blanca Partnership v. San Jose de Hernandez Community Ditch et al.*, Court of Appeals Opinion No. 28, 005 (October 20, 2008) (the Acequia Consent Statute, NMSA 1978, § 73-2-21 (2003) is general social and economic legislation subject to rational basis review) (citing *City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 100, 678 P.2d 1170, 1175 (1984); *but see McGeehan v. Bunch*, 88 N.M. 308, 310, 430 P.2d 238, 240 (1975) (applying rational basis test to hold "guest" statute unconstitutional); *Trujillo v. City of Albuquerque*, 1998 NMSC 31,

¶¶14-16, 125 N.M. 721, 726, 965 P.2d 305, 310 (applying rational basis test to uphold statutory damages limits under the Tort Claims Act).

The DWS has been recognized by the courts as a statute of general application, on the ground that the permitting of domestic wells is a statewide concern because access to water is a necessity for all inhabitants of the state. *Smith*, 2006-NMCA-48, ¶9, 133 P.3d 866, 869, *aff'd in part,* 2007-NMSC-55, ¶28, 171 P.3d 300, 308. Appellees did not show – nor did the District Court find – that the DWS creates a suspect class or affects a fundamental constitutional right. Consequently, in order to uphold the District Court's determination that the DWS is unconstitutional, this Court must be clearly satisfied that the legislature overstepped its constitutional authority by enacting legislation that is not rationally related to a legitimate state goal. *Mieras v. Dyncorp*, 1996-NMCA-95, ¶¶29, 34, 122 N.M. 401, 409, 925 P.2d 518, 526. The DWS does not fail the rational basis test.

The paramount rule of statutory interpretation is that the plain language of a statute is the primary indicator of legislative intent. *See Gen. Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 703 P.2d 169 (1985). The intent of the DWS is to provide a less burdensome permitting processes, "[b]y reason of the varying amounts and time such water is used and the relatively small amounts of water consumed," for a specified group of appropriators. The DWS creates a streamlined

application process to allow for certain appropriations of water, with the same or similar application processes being afforded through other statutes to livestock uses and certain temporary uses. *See* Sections 72-9-3(B), 72-12-1.2, 72-12-1.3.

In applying the rational basis test in *Mieras*, this Court looked to the general objective underlying the challenged legislation, including consideration of reducing the costs of administrative proceedings and not unduly burdening participants or precluding a financially disadvantaged employee from pursuing a claim. 1996-NMCA-95, ¶30. The Legislature rationally enacted the DWS in recognition that the general application process would be burdensome to household water users and would generally not change the outcome of the application because few if any *de minimus* household uses could be demonstrated to cause impairment to existing appropriators.

The Court of Appeals recently reiterated the courts' deference to legislative policy choices in *Rio Grande Kennel Club*, admonishing "it is not the place of the courts to question the wisdom, policy, or justness of legislation unless the legislation is constitutionally flawed." 2008-NMCA-093, ¶52, 190 P.3d 1131 (citing *State v. Druktenis*, 2004-NMCA-032, ¶ 105, 135 N.M. 223, 86 P.3d 1050 ("It 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.")); *see*

also Mieras, 1996-NMCA-95, ¶29 (statutes are to be upheld where a plaintiff does not demonstrate that the statute is "clearly arbitrary and unreasonable, not just that it is possibly so"). Such deference in this case confirms the DWS' constitutionality under the rational basis review.

The exception from notice and protest provisions in the issuance of domestic well permits because resulting impacts (to the extent there are any) are likely minimal, is reasonably balanced by the legitimate goal of a less burdensome administrative process for persons seeking to use minimal amounts of water for essential purposes such as domestic uses and livestock watering, and by existing appropriators' ability to bring legal action to prevent impairment by junior domestic wells in the same manner available prior to the State Engineer's declaration of the groundwater basin. *See La Madera Comm. Ditch Assoc. v. Sandia Peak Ski Co.*, 119 N.M. 591, 593-96 893 P.2d 487, 489-92 (Ct. App. 1995)(senior water right owner entitled to pursue trespass action junior appropriator based on alleged impairment without initiating adjudication).

III. CONCLUSION

Although the District Court correctly determined that there was no actual controversy to support the Appellees' constitutional claims, the court erroneously went on to decide that the DWS is unconstitutional. On appeal, this Court should find that the District Court should not have reached the issue of the DWS'

constitutionality and dismissed the entire case with prejudice. Alternatively, this Court should hold, that under applicable canons of statutory construction, the Domestic Well Statute, Section 72-12-1.1, is constitutional.

Respectfully submitted,

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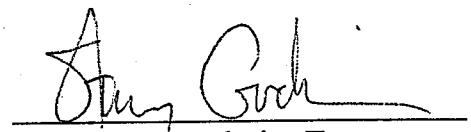
CERTIFICATE OF SERVICE

I certify that a copy of Defendants' Docketing Statement was served on the 25th day of August, 2008 by overnight delivery on the Sixth Judicial District Court Clerk, the Honorable Judge J.C. Robinson, and the Sixth Judicial District Court's court monitor or court reporter, and was served by first class mail on the counsel of record listed below.



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