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,	No. 28,860
vs.	On Appeal from the Sixth Judicial District Grant County
THE STATE OF NEW MEXICO, and JOHN R. D'ANTONIO, JR., NEW MEXICO STATE ENGINEER,	No. D-608-CV-2006-166 Judge J.C. Robinson
Defendants-Appellants.	

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

Respectfully submitted,

TAYLOR & McCALEB, P.A.
Jolene L. McCaleb
Elizabeth Newlin Taylor
P.O. Box 2540
Corrales, NM 87048-2540
(505) 888-6600
(505) 888-6640 (*fax*)

Attorneys for *Amicus Curiae* New Mexico Ground Water Association

DATED: January 5, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Constitution of the State of New Mexico

State Statutes

New Mexico Administrative Code

Other Authority

INTRODUCTION

The New Mexico Ground Water Association ("NMGWA" or the "Association") submits this brief as *amicus curiae* in support of Defendants-Appellants, the State of New Mexico and the New Mexico State Engineer. This Court authorized the filing of the Association's brief in its Order dated December 8, 2008. For the reasons set forth in this brief, the Association believes the District Court's judgment in favor of Plaintiffs-Appellees, which declares the Domestic Well Statute, NMSA 1978, Section 72-12-1.1 (2003), to be unconstitutional, should be reversed. As a threshold issue, it is significant—and the NMGWA believes fatal to the District Court's July 10, 2008, Decision ("Decision") and July 22, 2008, Final Judgment and Order ("Final Judgment")—that Plaintiff-Appellee Horace Bounds, Jr. ("Bounds") has suffered no injury in fact.

Because Bounds has suffered no injury, he had no standing to bring the declaratory judgment claim underlying the District Court's Decision and Final Judgment. This Court may therefore vacate the District Court's Final Judgment and leave the question of the constitutionality of the Domestic Well Statute for another day—a day when, and *if*, a water right owner proves he has been injured by one or more wells permitted under the Domestic Well Statute. Because of the *de minimus* nature of domestic well impacts (*see* discussion in Section I(B), below), the NMGWA believes it is unlikely that day will ever come. Moreover,

significant policy concerns counsel reversal of the District Court because hydrological evidence proves that domestic wells generally are *de minimus* and the Legislature therefore has determined that domestic well applications are entitled to a streamlined permit process.

Should this Court nevertheless elect to decide the constitutional question raised in this case on its merits, the NMGWA urges the Court to reverse the District Court's Decision and Final Judgment and affirm the constitutionality of the Domestic Well Statute for all of the reasons set forth in the State of New Mexico and New Mexico State Engineer's Brief in Chief and the Brief in Chief of Amici Curiae 4 Daughters Land & Cattle Company, Great Western Ranch, LLC, Sanders Land & Cattle, Inc., Western New Mexico Water Preservation Association and Verde Realty (hereinafter the "4 Daughters Brief"). The constitutional arguments already made by the State Engineer and other *amici* are thorough and well-reasoned and need not be repeated here.[1]

---

[1] The NMGWA does disagree with one constitutional argument raised in the 4 Daughters Brief. In that brief, *amici* argue (at 32-34) that domestic wells cannot violate Article XVI, Section 2 of the New Mexico Constitution because it does not apply to groundwater. The NMGWA believes *amici* are incorrect because the New Mexico Supreme Court held, in *McBee v. Reynolds*, 74 N.M. 783, 787-88, 399 P.2d 110, 114 (1965), that "waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, . . . are included within the term 'water' as used in Art. XVI §§ 1-3, of our Constitution."

SUMMARY OF PROCEEDINGS

This is an appeal from the Grant County District Court's rulings (i) granting a declaratory judgment in favor of Plaintiffs-Appellees on the ground that the Domestic Well Statute is unconstitutional because it violates the due process rights of water right owners and (ii) ordering the State Engineer to begin administering all applications for domestic well permits "the same as all other applications to appropriate water."[2] [RP 843, 856] The District Court made its rulings despite finding no actual or imminent harm to Bounds and rejecting Bounds' regulatory taking and 42 U.S.C. Section 1983 claims. [RP 841, 844] The State of New Mexico and the New Mexico State Engineer timely filed a Notice of Appeal on July 25, 2008, from the District Court's Decision and Final Judgment. Bounds filed no appeal.

INTEREST OF THE NEW MEXICO GROUND WATER ASSOCIATION

Amicus curiae New Mexico Ground Water Association is a trade association comprised of approximately 235 well drillers and other contractors employed in the groundwater industry in New Mexico. The Association works closely with the State Engineer on issues of well driller licensing, continuing education for well drillers and other issues associated with the drilling of domestic and livestock wells

[2] The District Court's Final Judgment [RP 856-57] adopts and incorporates the findings of fact and conclusions of law set out in its July 10, 2008, Decision [RP 839-44].

in the State of New Mexico. The Association is the primary provider of the continuing education courses required to maintain a well driller's license and is the major interface between the State Engineer and well drillers with respect to the ongoing development of a testing program for drillers.

The Association has a unique understanding of the purpose for the permitting of domestic wells, the scope of the well drilling industry in New Mexico, and the potential impacts of the District Court's decision on both well users and well drillers throughout the state. Therefore, the Association can provide special expertise to the Court regarding the potential impacts of declaring unconstitutional the Domestic Well Statute and its associated permitting process. For example, as discussed in Section I(C), below, affirming the District Court's Decision and Judgment will have a severe adverse impact on water supply for thousands of citizens (particularly rural residents, farmers and ranchers) around the state, will cause the well drilling industry economic hardship, and likely will overwhelm the State Engineer's staff. Residents of New Mexico should not suffer from such impacts as the result of this case, where the Plaintiff lacked standing to challenge the constitutionality of the Domestic Well Statute to begin with, and appropriate legal analysis supports the constitutionality of the Domestic Well Statute.

STANDARD OF REVIEW/ISSUE PRESERVATION/ POSITION OF *AMICUS CURIAE*

An *amicus curiae* must accept a case in which it participates "on the issues as raised by the parties" and cannot raise novel issues for court consideration. *State ex rel. Castillo Corp. v. N.M. State Tax Comm'n*, 79 N.M. 357, 362, 443 P.2d 850, 855 (1968). The Association accepts that condition on its participation. The policy arguments addressed by the Association do not raise a novel legal issue for court consideration, but merely identify policy concerns and impacts arising from the District Court's decision. It is appropriate for an *amicus* to bring such concerns to the Court's attention. 3B C.J.S. *Amicus Curiae* § 12 (2008) (function of *amicus* "is to aid, assist, and advise the court . . . by calling the court's attention to law, or to facts or circumstances that may have escaped consideration").

With respect to the legal issue of standing, the Association believes it has been raised below through the issue of ripeness, or should be raised *sua sponte* by the Court. The District Court dismissed Plaintiffs-Appellees' regulatory taking, due process and 42 U.S.C. Section 1983 claims for lack of ripeness, holding that:

> 3. There is no evidence to support a 42 USC § 1983 claim.
>
> 4. There is no evidence of monetary damages.

> 5. There is no substantial evidence of impairment at this time and, therefore, an injunction will not be issued.
>
> 6. Plaintiff's claims are dismissed without prejudice. This decision is based on the facts, or lack of facts, in this case. The Court has decided the dispositive issue and, therefore, the other claims are not ripe for hearing. Plaintiff has the right to bring claims in the future if facts so warrant.

[RP 844] Although Defendants-Appellants argued below that the case should be dismissed for a lack of ripeness [RP 63-68], in their Brief in Chief Defendants-Appellants more generally refer (at 16-19) to the lack of the required "controversy" for the award of declaratory relief. All of these concerns go to the issue of justiciability, and they are interrelated. *See Manning v. Mining & Minerals Div.*, 2006-NMSC-027, ¶¶ 54-57, 140 N.M. 528, 144 P.3d 87 (Minzner, J., dissenting) (ripeness, standing and mootness are rooted in the general principle of justiciability). For example, ripeness and standing both require the existence of an injury in fact, and often they "boil down to the same question . . . ." *See Roe No. 2 v. Ogden*, 253 F.3d 1225, 1229-31 (10th Cir. 2001) ("injury in fact" is required for standing and for a ripe claim); *American Civil Liberties Union v. City of Albuquerque*, 2008-NMSC-045, ¶¶ 18-19, 144 N.M. 471, 188 P.3d 1222 ("injury in fact" is required for standing); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (case in which standing and ripeness "boil[ed] down to the

same question"). Regardless of the label, the Association asserts that the issue of standing has been raised in this appeal and therefore addresses it below.

Standing is a question of law reviewed *de novo* by an appellate court. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 5, 130 N.M. 368, 24 P.3d 803. Should this Court determine that the issue of standing has not been properly raised by the parties, the Association urges the Court to raise the issue *sua sponte*. *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734, 31 P.3d 1008 (standing may be raised *sua sponte* by an appellate court). The lack of an injury in fact in this case makes the constitutional question a remote, hypothetical problem inappropriate for judicial determination, and thus the District Court should be reversed because of the Plaintiffs-Appellees' lack of standing. *See N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n*, 111 N.M. 622, 629-30, 808 P.2d 592, 599-600 (1991) (purpose of ripeness law is to conserve judicial machinery and not squander it on abstract, hypothetical or remote problems).

ARGUMENT

The purpose of an *amicus curiae* brief is to aid a court by pointing to law, facts or circumstances that may have escaped consideration. For that reason, in this brief, the Association will address only two issues: standing and policy concerns. The Association's discussion of the standing issue is intended to supplement the case or controversy argument briefed by Defendants-Appellants.

The Association's policy discussion is intended to provide the Court with information concerning the unwarranted, likely adverse impacts that will be suffered by Association members and others if the District Court's rulings are affirmed.

I. In Addition to Sound Legal Arguments in Opposition to the District Court's Decision and Final Judgment, Policy Considerations Support Reversal of the District Court.

The Association urges this Court to reverse the District Court either for lack of standing or because it finds that the Domestic Well Statute is constitutional. As Defendants-Appellants have argued thoroughly in their Brief in Chief, the District Court erred because this case presents no actual controversy, the Domestic Well Statute neither creates an unconstitutional exception to the priority administration system nor deprives water right owners of due process, and the District Court failed to apply either the appropriate canons of statutory construction or the appropriate level of scrutiny when determining the constitutionality of the Domestic Well Statute. The 4 Daughters Brief of other *amici* also sets out sound legal arguments in support of the constitutionality of the Domestic Well Statute.

Without duplicating the legal arguments of Defendants-Appellants and the other *amici*, the Association believes it is important to highlight certain policy concerns resulting from the District Court's rulings. In particular, the District Court's requirement that domestic well permit applications be subject to the notice,

protest and hearing requirements of Section 72-12-3 will cause severe harm to water users and the well drilling industry in New Mexico. Such harm should not be imposed because there will be no resulting benefit—hydrologic evidence shows that domestic wells are *de minimus* water uses that generally cause no impairment to senior water right owners.

A. The District Court's Decision and Final Judgment Require a Full Notice and Hearing Process Before a Domestic Well Permit Can Be Issued—a Burdensome Requirement That Has Not Been Imposed on Domestic Well Applicants for More Than 65 Years.

As a general rule, new groundwater appropriations are subject to notice, protest and hearing requirements, as well as a State Engineer finding that the appropriation will not impair existing water rights. NMSA 1978, Section 72-12-3 (1931, as amended through 2001). The governing statute requires the State Engineer to issue a permit to appropriate groundwater if he determines that there are "unappropriated waters or that the proposed appropriation would not impair existing water rights from the source, is not contrary to the conservation of water within the state and is not detrimental to the public welfare of the state . . . ." § 72-12-3(E). Such determinations are made after notice of a groundwater appropriation application is published in a local newspaper, protests from existing water right owners are accepted, and a full hearing is held (if the application is protested). In counsel's experience, this process, from the filing of the application to the issuance of a permit, takes anywhere from eight months (where no protest is

received and there is no disagreement between the applicant and State Engineer staff) to seven years or more (when a full hearing is held to hear protests from other water right owners and/or disagreements between the applicant and the State Engineer's staff). In addition, this process often requires the assistance of counsel and expert hydrologists, and a protested application can cost an applicant hundreds of thousands of dollars, depending on the number of protests filed against his application, the availability of pre-existing hydrologic models of the region, and other considerations. While hearings on domestic well applications may not be as lengthy or costly as some general groundwater appropriation hearings, the District Court's mandate without a doubt will significantly increase the amount of time and money it takes to obtain a domestic well permit.

Historically, beginning in 1943, the State Engineer administratively exempted applications for domestic and livestock wells from the groundwater appropriation notice and hearing procedures.[3] The Legislature codified the administrative exemption in 1953 in NMSA 1953, Section 75-11-1, which statutorily established a less burdensome application process and required the State Engineer to issue permits without applying the notice, protest and hearing

---

[3] New Mexico State Engineer John D'Antonio, P.E., *Update from the State Engineer: Current Developments and New Initiatives*, Address to the 16th Annual Super Conference on New Mexico Water Law (July 31, 2008) (referencing a February 5, 1943 State Engineer order removing the requirement of publishing notice in order to simplify the application process).

requirements now found in Section 72-12-3. In 2003, the Legislature amended Section 72-12-1 and recognized that the automatic issuance of domestic and stock well permits is "[b]y reason of the varying amounts of time such water is used and *the relatively small amounts of water consumed in the watering of livestock [and] in household or other domestic use . . . .*" (Emphasis added.) In other words, the Legislature specifically recognized that domestic wells are *de minimus* water uses and articulated, in statute, the reason why domestic and stock wells have been exempted, either administratively or statutorily, from the burdensome application procedure of Section 72-12-3 for more than 65 years.

The District Court's Final Judgment orders the State Engineer to "hereafter administer all applications for domestic well permits the same as all other applications to appropriate water." [RP 856] In other words, Section 72-12-3 now applies to domestic well applications (and likely to stock well applications). The Association believes it is unconscionable to impose these new requirements on domestic and stock well applicants through the case at bar, where (i) the District Court overturned 65 years of administrative practice and 55 years of statutory law based on a questionable constitutional law analysis and (ii) the Plaintiffs failed to prove any harm from the existing statutory and administrative scheme.

B. The Notice and Hearing Requirements of Section 72-12-3 Should Not Be Required Because Hydrology Supports the Legislature's Conclusion that Domestic Wells Constitute *De Minimus* Water Uses and Thus There Will Be No Benefit to Water Right Owners.

In its Decision, the District Court held that "[i]t is not logical, let alone consistent with constitutional protections, to require the [State Engineer] to issue domestic well permits without any consideration of the availability of unappropriated water or the priority of appropriated water." [RP at 842] With all due respect to the District Court, what is illogical is the District Court's decision to impose the burdensome, timely and expensive Section 72-12-3 application process on water uses that the Legislature already has determined are *de minimus*—especially where, as here, the record is devoid of any evidence that domestic wells have more than a *de minimus* impact.

Below, Bounds alleged "serious water shortages [leading] to economic harm and damages" and that domestic well permits "caused lowering of the water table." [RP 4] Despite Bounds' allegations, the District Court recognized that Bounds provided absolutely no evidence to support a 42 U.S.C. Section 1983 claim, Bounds provided absolutely no evidence of monetary damages, and Bounds provided no substantial evidence of impairment from domestic wells. [RP 844, 857] Nevertheless, the District Court imposed the requirements of Section 72-12-3 on domestic well applicants because "[i]t will do little good for Bounds, and others similarly situated, to sit idly and wait for actual impairment. When the water is

gone it will be too late." [RP 841] Thus, the District Court assumed, without any evidentiary support, that domestic well diversions reduce the water supply available to senior water right owners.

Both Bounds and the District Court made a fatal error in assuming that domestic wells impair other water users. Bounds contended that "domestic uses lower an already depleting water table" and have taken his "surface water through groundwater domestic withdrawals." [RP 383, 4] However, evidence presented in the case below shows that, at the time he filed suit, Bounds had been receiving all of the water to which he was entitled. [RP 235] Further, the only evidence Bounds submitted in support of his contention is speculative and without hydrologic support. For example, although Bounds' expert, Thomas Maddock, III, testified that "the granting of any new domestic well permits in the Upper Mimbres Basin without an offset will, in fact, appropriate and take the Plaintiffs' water rights," he supported his testimony only with an article he had written ten years earlier for the 43rd Annual Proceedings of the Rocky Mountain Mineral Law Institute. [RP 252] A review of that article shows that it does not focus on New Mexico, it contains no hydrologic analysis, and it simply makes unsupported, speculative statements like "[o]ur supposition is that [domestic] wells often dramatically impact rivers and streams" and domestic wells will "ultimately" impact rivers. [RP 258, 261]

The District Court apparently bought into the scientifically unsupported idea that domestic wells must take water from prior appropriators. [RP 841 ("When the water is gone it will be too late")] There is no evidence in the record that the District Court considered the fact that the consumptive use of water from domestic uses, by its very nature, often is significantly less than the amount of water diverted because much of the water is returned to the system.[4] In fact, in riparian zones of perennial streams, return flow from domestic wells "may afford a net gain of water recharged to the water table due to the drain-field return flow," and approximately one-half of the domestic wells in the state are located in a "shallow water table setting."[5]

Contrary to the scientifically indefensible assumptions of Bounds, his expert and the District Court, significant hydrologic evidence supports the Legislature's determination that domestic wells are *de minimus* and explains why Bounds did

---

[4] This is a well-known hydrologic fact recognized by the State Engineer. In larger domestic systems, such as city supplies, the "return flow" or non-consumptive use of water diverted for domestic purposes regularly is calculated at 50% or more, meaning that half or more of the water diverted returns to the system. Relevant to this case, for individual domestic well sites, the return flow to the aquifer can be as high as 94%. For example, a New Mexico hydrogeologist has found that, in alluvial sites with effluent return flow to a shallow water table, a diversion of 0.35 acre feet per year ("AFY") results in a return of 0.238 AFY, a net stream effect of 0.09 AFY depletion and a net aquifer effect of 0.02 AFY depletion. W. Peter Balleau & Steven E. Silver, *Hydrology and Administration of Domestic Wells in New Mexico*, 45 Nat. Resources J. 807, 836 (2005) (hereinafter "*Balleau*").

[5] *Balleau* at 817.

not, and cannot, prove impairment from domestic wells. A comprehensive 2005 article published in the *Natural Resources Journal* by Certified Professional Hydrogeologist Peter Balleau and his associate, Steven Silver, concludes that "no area of New Mexico appears to have a systematic problem with resource depletion from domestic wells." W. Peter Bal leau & Steven E. Silver, *Hydrology and Administration of Domestic Wells in New Mexico*, 45 Nat. Resources J. 807 (2005) (hereinafter "*Balleau*"). Balleau and Silver conducted hydrologic modeling to analyze the hydrologic effect of various proposed administrative and legislative policies for domestic wells, and their article describes "the collective hydrologic effects of domestic wells on various scales (local, basin-wide, statewide)." *Balleau* at 808, 809.

With respect to effects on aquifers and other wells, Balleau and Silver's scientific study led them to conclude that they "are not aware of any site where the water table in New Mexico has been dewatered to the point that there is no potential for new domestic wells to be constructed (or for old wells to be replaced) by accessing deeper stratae." *Id.* at 814. This finding is significant because the New Mexico Supreme Court has held that, even if a well lowers the water table, there is no *per se* impairment—even in a non-rechargeable basin. *Mathers v. Texaco*, 77 N.M. 239, 242, 246, 421 P.2d 771, 774, 776 (1966); *cf. Stokes v.*

Morgan, 101 N.M. 195, 201, 680 P.2d 335, 341 (1984) ("'No impairment' does not necessarily mean 'no change in conditions'").

> Considering that properly constructed wells provide tens of feet of water column to accommodate water level trends, there is no prospect of systematic interference between properly constructed domestic wells that are spaced at more than two-to-five acre lots (300 to 500 feet spacing). In poor aquifers, the individual well effects do not reach adjacent wells, and in good aquifers the individual effects are small.

Balleau at 823. Nor will the collective effects of "thousands" of domestic wells "dry up the aquifers in a regional groundwater basin" because, even in highly developed basins, domestic well impacts "do not exceed five feet [of drawdown] in the 40-year nominal lifetime of a properly constructed well. That amount of water-table decline will not affect water service from a properly constructed well." *Id.* at 823, 824. Even assuming that the number of domestic wells grows to 203,000 by the year 2040, "the sustainability of well production is not affected anywhere [in the state] because of domestic well effects." *Id.* at 825, 826.

Balleau and Silver reached a similar conclusion with respect to domestic well impacts on surface water. Their research shows that prohibiting an increase in the total number of domestic wells between the year 2000 and the year 2040 will salvage only 5,140 acre feet per year of streamflow *statewide* in the year 2040. *Id.* at 827. Of course, the amount of water salvaged by so limiting domestic wells likely would be offset by the fact that those water users will be hooked-up to public

water supplies. *Id.* "The foreseeable result of domestic well curtailment is equivalent, if not greater, drawdown and stream depletion." *Id.* at 829.

If there is evidence that a minor tributary is more susceptible to impacts from domestic wells, any impact can be controlled through "priority enforcement rather than by curtailing new permits . . . ." *Id.* at 828. However, as a general rule, domestic wells impact "a few thousandths of the interstate streamflow," are therefore *de minimus*, and "are not penalizing other rights." *Id.* at 849. "Nothing in the hydrologic situation has altered the [Legislature's] supposed 1953 rationale for exempting domestic wells from an impairment analysis. The cost of policing domestic wells is minimized without harm." *Id.* at 851.

It is important to remember that "[p]roblems with water availability more often involve well design than aquifer functions." *Id.* at 818. As noted by Balleau and Silver, "[t]he role of the well driller is critical to a properly-constructed domestic well" because "[s]erviceability, lifetime, and impairment questions depend on the good relationship of two factors: pumping water level and pump setting." *Id.* at 812. This explains the reason for the Legislature's grant of limited jurisdiction over domestic wells to the State Engineer. As explained by this Court in *Smith v. City of Santa Fe*, 2006-NMCA-048, ¶¶ 18, 20, 139 N.M. 410, 133 P.3d 866, *aff'd in part*, 2007-NMSC-055, ¶ 28, 142 N.M. 786, 171 P.3d 300, the Domestic Well Statute

> is intended to ensure that the [State Engineer] is simply aware of new domestic wells and that they are drilled by a qualified person. This application to the [State Engineer], which results in an automatic and unrestricted permit, does not approximate a comprehensive or exhaustive regulation of such wells. . . . There are no statutory requirements that must be met before a domestic well application is approved. The application requires information regarding the location of the well and the use of the water, as well as information regarding the driller and the technical specifications of the well. There is no evidence of intent to regulate the use of domestic wells in areas of concern . . . such as depletion of the local aquifers . . . .

It always has been the Association's understanding that, through the Domestic Well Statute, the Legislature simply has mandated that the State Engineer be given notice of the drilling of domestic wells in order to ensure they are drilled appropriately by licensed drillers. The Association aids the State Engineer in that regard by providing continuing education classes for licensed drillers, and it also is working to encourage the State Engineer to develop, and aid the State Engineer in developing, the New Mexico rules and regulations test required by well driller regulations previously adopted by the State Engineer.

Given the *de minimus* nature of domestic wells, there has been no reason for the Legislature to expand State Engineer jurisdiction over domestic wells beyond well construction concerns or to impose the additional permit requirements of Section 72-12-3. In fact, the State Engineer provided evidence below supporting the conclusions of both the Legislature and Balleau and Silver that requiring notice

and hearing on every domestic well application will serve no purpose because such procedures "would most likely not result in denial of future applications even if protested" because domestic wells have a *de minimus* impact on the system "that under existing state law results in a finding of no impairment to existing appropriators." [RP 823 & n.5]

In areas where domestic wells may have an appreciable impact on surface or groundwater, the State Engineer can establish Domestic Well Management Areas through regulation. 19.27.5 NMAC (8/15/2006). The State Engineer already has established Domestic Well Management Areas in various regions of the state, even though Balleau believes, based on his hydrologic data, that "[n]o area of the state appears to qualify as a 'critical management area' requiring that domestic wells be limited . . . ." *Balleau* at 826. Thus, despite the fact that such regulation is not required by the Domestic Well Statute, the State Engineer is being proactive and regulating domestic wells in areas of concern to the State Engineer, so no additional protection would result from striking down the Domestic Well Statute.

C. Requiring Compliance with Section 72-12-3 Notice and Hearing Procedures Will Cause Severe Harm to Water Users and the Well Drilling Industry in New Mexico and Overburden the State Engineer.

Without a doubt, the District Court's determination that the Domestic Well Statute is unconstitutional will have severe negative consequences for both water users and the well drilling industry in New Mexico. With respect to well users, it is

estimated that, as of the year 2000, 136,816 domestic wells served approximately 360,000 New Mexico residents, or approximately 19.8 percent of the state's year 2000 population.[6] Despite serving such a large percentage of the population, only 1.35 percent of all groundwater pumped in New Mexico comes from domestic wells. N.M. Office of the State Engineer Tech. Report 51, *Water Use by Categories in New Mexico Counties and River Basins, and Irrigated Acreage in 2000* 75 (2003).

Because the Office of the State Engineer processes up to 8,000 domestic well permit applications a year, the number of New Mexico residents served by domestic wells likely has significantly increased since 2000. *Judge's Ruling Could Impact Domestic Well Permits*, ABQJournal.com, July 12, 2008 (hereinafter "*Albuquerque Journal* Article"). As already noted, hydrogeologist Peter Balleau predicts that, by the year 2040, the number of domestic wells in use throughout the state will approach 203,000. *Balleau* at 825.

---

[6] *See* Hydrology Bureau, N.M. Office of the State Engineer, *Domestic Wells in New Mexico: The Impact of, and Problems Associated with Domestic Water Wells in New Mexico* 23 (2000); National Ground Water Ass'n, *Ground Water's Role in New Mexico's Economic Vitality* (2008) (referencing the U.S. Geological Survey's March 2004 Report on 2000 Water Use); Bur. of Bus. & Economic Research, Univ. of N. M., *U.S. and State Population Estimates from the U.S. Bureau of the Census* (2008) (total New Mexico population in 2000 was 1,820,704). The National Ground Water Association's publication also indicates that, according to federal census data, 97,042 New Mexico households were served by privately owned domestic wells in 1990.

The number of domestic well users that could be served by community or municipal water supply systems is unknown. Based on its knowledge of the well drilling industry, the Association is certain that the large majority of domestic well users are located in rural areas throughout the state where no alternative domestic water supply is available. Similarly, tens of thousands of stock wells have no alternative supply.[7]

If the District Court's decision stands, residents, ranchers and farmers in rural areas of the state with no access to public water supplies may be forced to leave their land, or at the very least, the value of their property will plummet because they will be unable to develop it as they wish in an economically beneficial manner. Although landowners already may have domestic and/or stock wells, it will be difficult, if not impossible, to obtain new wells to make additional use of their land, or to replace failing existing wells. Properly constructed wells typically have a 25- to 40-year service life, *Balleau* at 814, so many properly constructed wells may be nearing the end of their service life. Also, it is estimated that one-third of existing wells in the state "do not have adequate water column upon initial construction to expect a full service life from the well." *Id.* at 833.

---

[7] Stock wells are permitted under NMSA 1978, Section 72-12-1.2 (2003). Like domestic well permits, stock well permits are issued without a notice and hearing process. The Association believes that this Court's determination concerning the constitutionality of the Domestic Well Statute will apply equally to stock wells because the two statutes are, in pertinent part, identical.

Thus, thousands of existing wells may require replacement at any given time, and the District Court's mandated licensing scheme will cost well owners significant amounts of time and money to obtain those replacement wells.[8]

The District Court ruled that domestic well permits, to be constitutional, must be issued in the same type of proceeding required of other water appropriations—including public notice, a staff decision about potential impairment of existing water rights, and a full hearing if there is a protest. The State Engineer has stated that such a requirement will overwhelm his staff, bog down his agency and slow down the permitting process. *Albuquerque Journal* Article. Bill Hume, Planning and Policy Director in the Office of Governor Bill Richardson, in a statement to the Legislature's Interim Water & Natural Resources Committee on August 5, 2008, predicted that the District Court's directive will "bring the processing of *all* water rights applications to a gridlocked halt." This is not good news, given the fact that undersigned counsel are aware of groundwater

---

[8] It is unclear whether the Section 72-12-3 procedures will apply to replacement domestic wells, but it is likely they will. Currently, both new and replacement domestic wells are automatically permitted. § 72-12-1.1; 19.27.5.11 NMAC (8/15/2006). Section 72-12-3 procedures currently apply to applications to appropriate groundwater, and the replacement of wells permitted under Section 72-12-3 are governed by the same requirements in the absence of an emergency. NMSA 1978, §§ 72-12-22 (1959) (replacement well within 100 feet of the original well), 72-12-23 (1959) (replacement well more than 100 feet from the original well). However, even in the case of emergencies, notice and hearing ultimately is required before a permit is issued for a replacement well. Thus, it is likely the Section 72-12-3 notice and hearing requirements also would apply to replacement domestic wells if the District Court's Final Judgment stands.

applications that already have taken more than seven years to obtain. Obviously, these requirements will greatly increase the cost of, and the amount of time required to obtain, a well permit, as described in Section I(A), above. In the interim, without water, property owners may be unable to live on their property, and it may become essentially worthless.

The Association believes that both a property owner's access to a water supply for domestic use for his own living purposes, and his right to increase the value of his property through the use of domestic and stock wells, are fundamental rights guaranteed by the New Mexico Constitution under Article II, Section 4, which declares that "[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." Indeed, this Court has recognized that access to water is a necessity for all inhabitants of New Mexico. *Smith*, 2006-NMCA-048, ¶ 9. The District Court's decision will unduly impinge these rights, especially in the poor and rural areas of the state where there is no infrastructure for delivery of domestic use water.

There also will be significant adverse economic impacts on the well drilling industry. The State Engineer has licensed approximately 300 well drillers in the state, and more than 400 employees of licensed drillers are licensed drill rig

supervisors.[9] Of the 300 licensed well drillers, approximately 280 represent small businesses, and the remainder represent mid-size companies with 20 or more employees.[10] In 1997, New Mexico well drillers had annual estimated sales of $31,746,000.[11] This figure does not include the value of sales to companies supplying equipment to well drillers, nor does it include payroll figures. Since 1997, the well drilling industry has increased substantially in size.[12] If this Court affirms the District Court, the number of domestic wells drilled in the state will plummet—not for the legitimate reason of protecting senior water rights, but simply because the application process will become much more expensive and time consuming and because the State Engineer's office will be overburdened and unable to process permits in a timely manner. Such consequences may sound a death knell for many well drillers around the state.

D. Conclusion: Policy Concerns Support Reversal of the District Court.

The automatic issuance of domestic well permits allows property owners to obtain needed access to water as quickly and efficiently as possible, without the added time and expense burdens of the Section 72-12-3 notice and hearing

---

[9] Telephone Interview with Robin Irwin, Secretary, N.M. Ground Water Ass'n (Oct. 27, 2008).

[10] Telephone Interview with Robin Irwin, Secretary, N.M. Ground Water Ass'n (Dec. 30, 2008).

[11] National Ground Water Association, *Ground Water's Role in New Mexico's Economic Vitality* (2008) (referencing 1997 U.S. Economic Census data).

[12] Telephone Interview with Robin Irwin, Secretary, N.M. Ground Water Ass'n (Jan. 5, 2009).

requirements. This has been the practice in New Mexico for more than 65 years. Plus, in those areas where the State Engineer believes domestic wells do pose a hydrologic danger to senior water rights, the State Engineer can regulate, and in fact has regulated, the use of domestic wells. The District Court, with one stroke of the pen, has unraveled this decades-long practice and has subjected domestic well applicants to the time and expense burdens associated with the Section 72-12-3 ground water appropriation procedure. Because this change in procedure will provide no benefit to existing water right owners, but will greatly burden the State Engineer, the well drilling industry and those seeking to drill domestic and stock wells, the District Court should be reversed. The Legislature has properly recognized that domestic wells constitute *de minimus* water uses and has determined that such uses should not be required to undergo the burdensome application process of Section 72-12-3. "[I]t is not the place of the courts to question the wisdom, policy, or justness of legislation," where, as here, a statute is not unconstitutionally flawed. *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 52, 144 N.M. 636, 190 P.3d 1131. The Domestic Well Statute clearly is not unconstitutionally flawed, as shown by the able arguments of both the State Engineer, in his Brief in Chief, and other *amici*, in the 4 Daughters Brief.

This Court must determine whether the New Mexico Constitution requires the imposition of the time-consuming and expensive application process set out in

Section 72 -12-3 on citizens seeking a permit to drill a domestic well. The Association believes pertinent law supports reversal of the District Court and that reversal would be in the best interest of the citizens of the state. In a nutshell:

> Among the major categories of water use, domestic well use is the smallest category and the most sustainable of water uses with the least impact on the water resource and the interrelated streams. The New Mexico practice of granting domestic water without administrative review is compatible with the view that domestic water is a universal human right. Domestic wells support a persistent economic activity by households that is, as a rule, highly-valued, safe, and harmless to other water users.

Balleau at 833.

II. The District Court Should Be Reversed Because Bounds Has Suffered No Injury in Fact and Thus Had No Standing to Challenge the Constitutionality of the Domestic Well Statute.

"Standing is a judicially created doctrine designed to 'insure that only those with a genuine and legitimate interest can participate in a proceeding.'" *Protection & Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 18, 145 N.M. 156, 195 P.3d 1 (quoting *De Vargas Sav. & Loan Ass'n v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1322 (1975)). In order to acquire standing, Bounds was required to

> demonstrate the existence of (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. In addition, the interest sought to be protected must be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

Forest Guardians, 2001-NMCA-028, ¶ 16 (internal quotations and citations omitted); *cf. City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 16, 124 N.M. 640, 954 P.2d 72 (outlining the requirement for an "actual controversy" in declaratory judgment actions). The record shows—and the District Court expressly found—that Bounds has suffered no injury in fact; thus, Bounds cannot meet the test for standing. Because standing is a jurisdictional question, this Court can, and should, reverse the District Court without deciding the constitutionality of the Domestic Well Statute. *Rio Grande Kennel Club*, 2008-NMCA-093, ¶ 7 (quoting *Town of Mesilla v. City of Las Cruces*, 120 N.M. 69, 70, 898 P.2d 121, 122 (Ct. App. 1995)).

To establish an injury in fact, Bounds was required to prove a "concrete and particularized . . . invasion of a legally protected interest . . . ." *Forest Guardians*, 2001-NMCA-028, ¶ 24 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In addition, Bounds needed to show that his injury was "actual or imminent, not conjectural or hypothetical." *Id.* To support his attack on the constitutionality of the Domestic Well Statute, Bounds alleged hydrologic impairment and economic harm from "serious water shortages" resulting from the State Engineer's issuance of domestic well permits that "caused lowering of the water table . . . ." [RP 4] However, during the entire pendency of his case, Bounds failed to provide any evidence of hydrologic impairment or economic harm. On the

other hand, the State Engineer provided undisputed evidence that Bounds had received the entire amount of his adjudicated water right, that upstream domestic wells had a *de minimus* effect on Bounds' water supply, and that Bounds had suffered no economic harm. [RP 392-93, 814-16] As a result, the District Court specifically held that, "at this time," there is no evidence that Bounds has suffered any monetary damages or impairment from the State Engineer's issuance of domestic well permits. [RP 844]

Despite the District Court's time qualification on its finding, there is no "real risk of future injury" to Bounds from the Domestic Well Statute. *Corn v. N.M. Educators Fed. Credit Union*, 119 N.M. 199, 202, 889 P.2d 234, 237 (Ct. App. 1994), *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031. As discussed fully in Section I(B), above, hydrologic evidence shows that domestic wells, regardless of their number in a particular region, generally impair neither surface nor groundwater rights. If the hydrologic situation is different in the Upper Mimbres Basin, Bounds has failed to prove it. Bounds clearly has no standing in this case.

The New Mexico Supreme Court has dictated that no court should unnecessarily litigate constitutional rights. *Gunaji*, 2001-NMSC-028, ¶ 20. That rule particularly applies to a case in which there is a lack of standing because the lack of standing "is a potential jurisdictional defect [that] 'may not be waived and

may be raised at any stage of the proceedings, even *sua sponte* by the appellate court.'" *Id.* (quoting *Alvarez v. State Taxation & Revenue Dep't*, 1999-NMCA-006, ¶ 6, 126 N.M. 490, 971 P.2d 1280). Because the issue of standing is jurisdictional, this Court must decide it before it can address the constitutionality of the Domestic Well Statute. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300.

The late Justice Minzner's warning against deciding cases that are not ripe is instructive here:

> [T]he ripeness doctrine serves important judicial interests: protecting the court from issuing advisory opinions by requiring a present controversy between the parties, ensuring that facts are sufficiently developed for decision, avoiding intrusion on the powers of other branches of government and reserving judicial resources for present, rather than hypothetical questions. This case presents a question which may arise in the future, but can be resolved or reviewed at that time and is unlikely to evade such review. In light of the Court's strong interest in avoiding unripe cases, I conclude that this case does not warrant any exception to our general rules, limiting our jurisdiction to ripe cases.

Gunaji, 2001-NMSC-028, ¶ 56 (Minzner, J., dissenting). Bounds has not been harmed, nor will he be harmed, by the Domestic Well Statute. If that statute is to be analyzed, and perhaps invalidated, pursuant to a constitutional analysis, such analysis should take place in a case where the facts show that a water right owner

has suffered harm as a result of the issuance of domestic well permits without the notice and hearing procedures of Section 72-12-3.

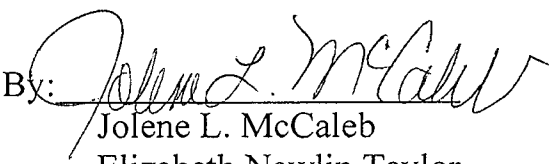
CONCLUSION

For the foregoing reasons, *amicus curiae* New Mexico Ground Water Association respectfully requests that this Court reverse those portions of the District Court's Final Judgment holding the Domestic Well Statute unconstitutional and ordering the State Engineer to impose the permit requirements of Section 72-12-3 on domestic well applications.

Dated: January 5, 2009

Respectfully submitted,

TAYLOR & McCALEB, P.A.

By: 

Jolene L. McCaleb
Elizabeth Newlin Taylor
P.O. Box 2540
Corrales, NM 87048-2540
(505) 888-6600
(505) 888-6640 (*fax*)

CERTIFICATE OF SERVICE

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

Attorneys for Plaintiffs-Appellees

Stephen A. Hubert, Esq.
Beverly J. Singleman, Esq.
Hubert & Hernandez, P.A.
P.O. Drawer 2587
Las Cruces, NM 88004

A.J. Olsen, Esq.
Alvin F. Jones, Esq.
Henninghausen & Olsen, L.L.P.
P.O. Box 1415
Roswell, NM 88202-1415

Attorneys for Amici Curiae 4 Daughters Land & Cattle Co., et al.

Charles T. DuMars
Stephen Curtice
Patrick J. Redmond
Law & Resource Planning Assoc's.
Albuquerque Plaza
201 Third St. NW, Suite 1750
Albuquerque, NM 87102

Attorneys for Defendants-Appellants

D.L. Sanders, Esq.
Arianne Singer, Esq.
Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102

Stacey J. Goodwin, Esq.
Law Offices of Randall W. Childress, P.C.
300 Galisteo St., Suite 205
Santa Fe, NM 87501

Jolene L. McCaleb