IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

Horace Bounds, Jr. et al.,	)	
	)	
Appellees	)	
vs.	)	**Ct. App. No. 28,860**
	)	
The State of New Mexico;	)	
John R. D'Antonio, Jr.,	)	
New Mexico State Engineer,	)	
	)	
Appellants.	)	

On Appeal from the Sixth Judicial District Court
No. D-608-CV-2006-166
The Honorable J.C. Robinson

APPELLEE BOUNDS' ANSWER BRIEF

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TABLE OF CONTENTS

A recorded transcript was provided by the Court Monitor from FTR Gold Digital Recording to CD. The District Court's April 17, 2008 hearing was recorded verbatim on CD No. 639. The District Court's July 8, 2008, hearing was recorded verbatim on CD No. 691. All references in this brief to the Record Proper shall be by R.P. ____; all references to the CD Transcript will be by "Tr. 4/17/08, 10:25" indicating the date, and minute and seconds from the start of the recording.

Appellee Bounds hereby certifies that this Answer Brief has been prepared using Times New Roman, with proportionately-spaced type, and that there are 10,716 words contained in the body of this Answer Brief, using WordPerfect 13.

TABLE OF AUTHORITIES

NEW MEXICO CASES:

NEW MEXICO CONSTITUTION, STATUTES AND RULES:

CASES FROM OTHER JURISDICTIONS:

OTHER AUTHORITIES:

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case: This appeal involves a declaratory action brought by Appellee/Plaintiff Bounds [hereinafter "Bounds"] against Appellants/Defendants State of New Mexico and State Engineer [hereinafter "State/Engineer"] seeking a determination that New Mexico's domestic well statute, NMSA 1978, § 72-12-1.1 (2003) ["Domestic Well Statute"], which mandates the State Engineer to issue permits for domestic wells upon application only, without any administrative due process, is unconstitutional. Appellee Bounds argued below that the statute is facially unconstitutional in violation of New Mexico's Constitution that protects existing water rights based upon priority in time, not priority of use.

B. Course of Proceedings: On June 15, 2006, Horace and Jo Bounds, husband and wife, filed a declaratory action in the Sixth Judicial District Court of New Mexico against the State of New Mexico and State/Engineer. [R.P. 1-9] [1] The first claim in the complaint was for a declaratory judgment that the Domestic Well Statute, which requires the State Engineer without discretion to issue permits for domestic wells solely upon application, unconstitutionally permitted continued withdrawals of groundwater and takings of surface water of senior water rights to the detriment of the Bounds' vested property rights. [R.P. 4-5]

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[1] An additional name Plaintiff, San Lorenzo Community Ditch Association, was dropped as a party early in the litigation due to a conflict between two competing elected boards. The Association never participated in the lawsuit and was dismissed without prejudice by the district court in its final judgment. [R.P. 843-44; 857]

In the second count of the complaint, the Bounds asked for a further declaratory judgment that the State's legislative scheme requiring the State Engineer to issue such domestic well permits even in fully appropriated basins such as along the Mimbres River at issue in this case, was an unconstitutional takings of their vested property rights and a violation of 43 U.S.C. § 1983. [R.P. 1-9]

The State/Engineer responded first by filing a Motion for More Definite Statement on July 21, 2006, which was denied, then an Answer on August 31, 2006, denying all of the Bounds' claims, listing fourteen "affirmative defenses." [R.P. 20-28; 45-46; 48-58] Two weeks later, the State/Engineer filed three new motions, two to dismiss based upon ripeness and failure to join indispensable parties, and a third seeking a stay. [R.P. 63-83] The Bounds filed responses opposing all three motions. [R.P. 96-152]

On January 29, 2007, a sua sponte order granting a stay of the lawsuit was issued based upon the State/Engineer's assertions to the court below that this Court on appeal would be addressing the very issue of the State Engineer's authority under the Domestic Well Statute in the then pending cases Smith v. City of Santa Fe and Stennis v. City of Santa Fe. [R.P. 190-92] Despite the Bounds' argument that this Court had no such issue before it on appeal and that the State Engineer as amicus could get no such issue before this Court, the Bounds' lawsuit was put on hold for nearly a year until the stay was vacated on November 9, 2007. At that time, the State/Engineer's two motions to dismiss, as well as a Motion to Intervene by the New Mexico Farm and Livestock Bureau [hereinafter "Farm Bureau"], and

an Application for Preliminary Injunction by the Bounds were all pending. [R.P. 193-206; 213-22]

After an evidentiary hearing was held April 17, 2008 on all pending motions, an order was entered granting the Farm Bureau's Motion to Intervene and denying the State/Engineer's motions to dismiss on ripeness and for indispensable parties. Appellee Bounds' request for a preliminary injunction was also denied. [R.P. 378-87] Shortly thereafter, on May 7, 2008, the State/Engineer filed a Motion for Summary Judgment asking the Court to determine that the Domestic Well Statute was constitutional and that there was no regulatory takings of the Bounds' property or damages for which the State was liable. [R.P. 389-495]

After a second hearing held on May 27, 2008, an Order was entered vacating the three day trial based upon the parties' agreement that the district court could hear and decide the issue of the constitutionality of the Domestic Well Statute, a strictly legal issue, upon the pleadings, prior record, and evidence submitted in support or opposition to summary judgment. [R.P. 389-495; 521-35; 541-42; 551-808; 809-834] [2]

[2] During the summary judgment briefing, Appellants State/Engineer filed yet another motion, this time asking the district court to reconsider its April 25, 2008 Order in which it denied their Rule 19 and ripeness motions to dismiss. Appellants did not ask the lower court to change its rulings, only that certain findings and conclusions be omitted they deemed "unnecessary." [R.P. 497-506] Both Appellees Bounds and Farm Bureau filed responses opposing the Motion to Reconsider, and this latest motion too was ultimately denied. [R.P. 536-37; 543-50; 839-44]

On July 10, 2008, Judge Robinson filed a six page decision ruling among other issues that Section 72-12-1.1 was unconstitutional because it created an impermissible exception to the priority administration system created by N.M. Constitution, art. XVI, § 2. He also dismissed Plaintiff Jo Bounds as a party with prejudice, dismissed San Lorenzo Community Ditch Association as a party without prejudice, dismissed Appellee Bounds' regulatory takings and 42 U.S.C. § 1983 claims without prejudice, and declined to issue an injunction "at this time." [R.P. 843-44] A Final Judgment and Order was entered on July 22, 200. [R.P. 856-57] Appellants filed a timely Notice of Appeal on July 27, 2008. [R.P. 867-76].

C. Summary of Facts on Appeal: The pertinent facts in this appeal are those findings made by the district court in both its April 24, 2008 Order and July 10, 2008 Decision. None of these findings have been which challenged on appeal by Appellants, and they are, therefore binding on this Court. See, e.g., Ellingwood v. N.N. Investors Life Ins. Co., 111 N.M. 301, 805 P.2d 70 (1991); Scott v. Jarden, 99 N.M. 567, 661 P.2d 59 (Ct. App. 1983); Torris v. Dysart, 72 N.M. 26, 380 P.2d 179 (1963). In ruling that the Domestic Well Statute was unconstitutional because it created an impermissible exception to the priority administration system found in the Constitution [R.P. 843], the district court made numerous findings.

Horace Bounds, Jr. owns irrigation water rights for 157.63 acres with an 1869 priority in the Upper Mimbres. Farm Bureau represents 14,000 farm and ranch families having an interest in this action. The entire Mimbres Basin has been closed since 1972. In a closed

basin there is no water available for appropriation. The entire basin has been adjudicated, including all ground water and surface water. The adjudication did not include domestic wells or livestock uses. [July 10, 2008 Decision, Findings Nos. 1-6, R.P. 239-40]

Appellee Bounds filed this declaratory action to declare the exemption for domestic well applications in § 72-12-1.1 (mandating OSE "shall" issue domestic well permits and exempting domestic well applications from the notice and hearing requirements applicable to all other groundwater applications) is unconstitutional. N.M. Constitution Art. XVI, §2 states:

> The unappropriated water of every stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority appropriation shall give the better right.

An appropriative right is property. It is a property right of high order. Such a right is real estate. Walker v. United States, 142 N.M. 45, 162 P.3d 882 (2007). The rule that priority of appropriation gives priority of right as between two appropriators from the same source of supply is an essential feature of the doctrine of appropriation. The right of a junior appropriator is at all times subservient to the rights of prior appropriators and can only be exercised after the needs of the prior appropriators have been supplied. Harkey v. Smith, 31 N.M. 521, 247 P. 550 (1926). [Id., Findings Nos. 7-11, R.P. 840]

The 1910 Constitutional Convention considered water rights, including domestic use. The 1910 Constitutional Convention refused to adopt a hierarchy of appropriation by use and enacted appropriation based on priority in time. Water is, and has been, a critical resource.

The Mimbreños left the valley in the 13th Century due to drought. In 1907 and 1910, water was primarily used for agriculture and ranching in a sparsely populated state. Today, New Mexico is an increasingly urban state with 2,000,000 people. Water is, and will continue to be an increasingly important and less available resource. The OSE must be able to account for all water usage in the state. Laws 1953, Ch. 60 at 105, the predecessor to § 72-12-1 through § 72-12-1.3, created an exception to the prior in time appropriative right by exempting domestic wells and livestock. [Id., Findings Nos. 12-15, R.P. 840-41]

The OSE has long considered this statute to be mandatory and, since 1953, has issued domestic well permits without regard to availability of unappropriated water or priority of appropriated water. OSE has recognized its lack of power to protect senior water rights and has attempted, without success, to get the Legislature to amend § 72-12.1.1. Recently, in this case, OSE has decided the statute is constitutional and has indicated it may have regulatory authority to control domestic wells. This is questionable. Rivas v. Bd. of Cosmetologists, 101 N.M. 592, 686 P.2d 934 (1984). Section 72-12-1.1 lacks any due process provisions to protect senior water rights from out of priority review of domestic well applications. [Id., Findings Nos. 16-19, R.P. 841]

It is not what has been done, but what can be done under a statute that determines its constitutionality. Cobb v. State Canvassing Bd., 2006 N.M.S.C. 34, ¶ 4. Bounds do not have to suffer actual impairment to attack the constitutionality of the statute. It 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. Any litigation then will result in claims of laches, waiver, statute of limitation, estoppel and the like. Water in New Mexico is a finite resource and has long been recognized as such. It is not logical, let alone consistent with constitutional protections, to require the OSE to issue domestic well permits without any consideration of the availability of unappropriated water or the priority of appropriated water. [Id., Findings Nos. 20-23, R.P. 841-42]

D'Antonio testified he would not subject domestic wells to a priority call notwithstanding this is a derogation of his duty under the N.M. Constitution and § 72-12-1.3. This lack of protection for senior appropriators is a violation of due process. The OSE, State of New Mexico and the Legislature are charged with the protection of the senior water right owner's property. [Id., Findings Nos. 24-25, R.P. 842]

This Court does not believe Smith and Stennis are applicable to this case under a less restrictive reading or otherwise. However, these cases state: a) There are no statutory requirements before approval of a domestic well; and b) OSE's authority is limited and without discretion. The bottom line is: a) OSE has always treated § 72-12-1.1 as mandatory; b) § 72-12-1.1 has no due process safeguards including, but not limited to, notice to senior water right owners, a determination whether an application, if approved, will impair existing rights or a hearing; and c) OSE argues Bounds has not been denied due process. This argument is not sound. OSE has no statutory or regulatory process in place to give senior appropriators procedural or substantive due process. Senior appropriators do not even get

notice of application, let alone a hearing. Smith states the Declaratory Judgment Act is to be liberally construed and gives the district court the power to "declare the rights, status and other legal relations whether or not further relief is or could be sought." If § 72-12-1.1 is declared unconstitutional, it will merely require OSE to administer domestic well applications the same as all other applications, nothing more, nothing less. [Id., Findings Nos. 26-29, R.P. 842-43]

With regard to Defendants' Motion to Dismiss based on Ripeness, Defendants assert Plaintiffs' claims are not ripe because they failed to exhaust the administrative remedies available to them, i.e., to invoke a priority call. Defendants further argue a declaratory judgment is unnecessary as they may curtail water rights regardless of what the statute and Court of Appeals suggest. Defendants' Answer, however, asserts an exception to their ability to curtail. Specifically, they do not curtail any water rights sufficient to meet essential livestock and indoor domestic needs while admitting drought conditions are affecting stream system and the water supply available to water rights owners, including those within the Mimbres District. [April 24, 2008 Order, Findings Nos. 34-36; R.P. 383]

Plaintiffs have attempted, albeit not perfectly, to request Defendants to curtail junior water rights, including domestic wells, prior to filing this lawsuit. Plaintiffs attempted to utilize administrative remedies but were frustrated in their attempts by Defendants. Plaintiffs' also assert the administrative remedy, a priority call, is inapplicable; they assert a priority call does not address the problem, as it is a short-term fix in times of drought.

Plaintiffs instead seek a declaratory judgment declaring the Domestic Well Statute unconstitutional because domestic uses lower an already depleting water table. [Id., Findings 37-38, R.P. 383]

Second, NMSA § 44-6-4 (1975) specifically permits:

> [A]ny person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations.

The New Mexico Supreme Court recently affirmed a party's right to bring a declaratory judgment prior to exhausting its administrative appeals where the question presented as a question of law. Smith v. City of Santa Fe, 2007-NMSC-055, 142 N.M. 786. [Id., Findings Nos. 39-40; R.P. 383-84]

In Smith, the Court explained the Declaratory Judgment Act is intended to be liberally construed and gives the district court the power to "declare rights, status and other legal relations whether or not further relief is or could be sought." NMSA § 44-6-2 (1975) The Act provides an alternative means of presenting controversies to the courts, rather than waiting to appeal an administrative decision. Smith, 2007-NMSC-055 at ¶ 13. While Smith involved a local ordinance, its reasoning and language applies to interpreting statutes as well. Smith cautioned declaratory judgments should not be used to circumvent necessary fact-finding by administrative agencies or discourage reliance on special expertise, but upheld

such an action where it was legal in nature. Smith, 2007-NMSC-055 at ¶¶ 15-16. [Id., Findings 41-43; R.P. 384]

Plaintiffs' main cause of action, requesting the Court to issue a declaratory judgment that the language found in NMSA § 72-12-1.1 is unconstitutional, is legal in nature. Defendants' witness testimony indicates there is a question regarding whether the statute permits the state engineer's office to refuse to grant a domestic well or at least a non-consumptive well. Defendants' takings claim concerns some factual issues which would be normally determined by an administrative agency. [Id., Findings Nos. 44-46; R.P. 384-85]

The Court will consider claims that should have been first heard by an administrative agency where the legal or statutory procedures/remedies are inadequate. Callahan v. New Mexico Fed'n of Teachers-TVI, 2005-NMCA-011, ¶ 16, 104 P.3d 1122 [citations omitted] *aff'd in part and rev'd in part on other grounds.* Plaintiffs attempted to use administrative remedies but were frustrated by Defendants' unwillingness to complete a priority call and original assertion they were unable to deny domestic well permits. The Water Master testified he had not done a priority call, even though it had been requested, because he did not believe it necessary. [Id., Findings 47-49, R.P. 385]

Courts are required to set hearings to determine whether requested relief should be granted. The Defendants, with broad regulatory powers, should be held to the same standard. Defendants did not hold a hearing to determine whether a priority call was necessary, they simply ignored Plaintiffs. Had Defendants acted differently, this Court might agree

Plaintiffs' takings claim should first be decided by an administrative agency. [Id., Findings Nos. 40-51; R.P. 385]

Defendants' actions compromise Plaintiffs' right to due process and serve to delay and confuse the issues. Plaintiffs are not required to exhaust an administrative remedy when to do so would be an "exercise in futility." Callahan, 2005-NMCA-011 at ¶ 16. The Court further believes it is a reasonable inference a defendant who would refuse a hearing would also later claim statute of limitations, waiver or laches if Plaintiffs were to wait until they suffered actual severe impairment of their water rights. [Id., Findings Nos. 52-54; R.P. 385-86]

Because both parties agreed the dispositive issue in this case was the constitutionality of Section 72-12-1.1, as to "Plaintiffs other claims" (regulatory takings and 42 U.S.C. § 1983), the court declined to enter summary judgment and dismissed them without prejudice on the basis those claims were not yet ripe for hearing. [R.P. 844]

II. LEGAL ARGUMENT AND AUTHORITIES

A. Introduction

As Appellee Bounds argued below before Judge Robinson, water rights in New Mexico have assumed a protected position under the state constitution unseen in other jurisdictions. The New Mexico Constitution devotes an entire article to the subject of water rights - the right to put water to beneficial use with priority in time, not priority by type of use, establishing the better right. See N.M. Const. art. XVI, §§ 1-3. Appropriation for beneficial

use is controlled under the laws of the State, the Constitution, statutes, and cases which interpret both, not just the statutes as implied in the State/Engineer's Brief in Chief. See United States v. Ballard, 184 F. Supp. 1, 11-22 (D.N.M. 1960) In this appeal, Appellants State/Engineer continue their strategy to elevate the State Engineer's administrative statutory powers and regulations above the important constitutional protections of due process. Judge Robinson in his well reasoned and articulate decision was not fooled.

The State/Engineer and both amici would have this Court believe the issue on appeal is the State Engineer's administrative powers under the Domestic Well Statute. They arbitrarily substitute the word "de minimus" throughout their arguments instead of "domestic" well, all in an attempt to put issues before this Court not argued below (i.e., the stock well exemption). They do so by trying to ignore the gorilla in the room - - the unconstitutional Domestic Well Statute.

Procedural due process requires that property right owners be given prior notice and an opportunity to be heard prior to deprivation of a property right. See, e.g., Sandia v. Rivera, 2002 NMCA 057, ¶ 19, 132 N.M. 201, 46 P.3d 108; City of Albuquerque v. Reynolds, 71 N.M. 428, 434, 379 P.2d 73, 77 (1962).

> State law governs the rights of individual water users. In New Mexico, state law provides for a hierarchy of water users along a river such as the Rio Grande. Those who first appropriate water for beneficial use have rights superior to those who appropriate water later. *See* N.M. Const. art. XVI, § 2; *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044, 1048 (N.M. 1914) (affirming that New Mexico follows the "prior appropriation" doctrine). In years of drought or when the water level is otherwise low, those with priority use their appropriation as they wish; those with inferior rights may be left without. *See* Norman K. Johnson & Charles T.

DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 Nat. Resources J. 347, 350 (1989) (describing the "first in time is first in right" characteristic of prior appropriation doctrine).

United States v. City of Las Cruces, 289 F.3d 1170, 1176-77 (10th Cir. 2002). Until the State/Engineer bring domestic wells under the aegis of the State Engineer's administrative due process protections, the same as all other applications for new appropriations, their actions are unconstitutional and void. As ruled by the district court below after thorough consideration of all the evidence presented: "If § 72-12-1.1 is declared unconstitutional, it will merely require OSE to administer domestic well applications the same as all other applications, nothing more, nothing less." [Finding No. 29, R.P. 843]

B. Standard of Review

Appellee Bounds filed a declaratory action asking the district court to declare that the Domestic Well Statute unconstitutional because it exempts domestic well applications from the notice and hearing requirements applicable to all other groundwater applications. It is unconstitutional in the Bounds' case because it grants water rights to junior users in a closed basin which is fully appropriated. This matter was heard and decided by the lower court upon a Motion for Summary Judgment filed by Appellants State/Engineer.

Although the constitutionality of statutes, a question of law, is heard de novo, this is not strictly the case where the district court has made findings upon which the rulings are based, involving mixed questions of finding and fact by the district court. "Where we are

confronted with mixed questions of law and fact, we give deference to the lower court's factual findings, but we review the application of the facts to the law de novo." State of New Mexico v. Cantrell, 2008 NMSC 016, ¶ 26, 179 P.3d 1214; accord Cordova v. LeMaster, 2004 NMSC 026, ¶ 10, 136 N.M. 217, 96 P.3d 778. In reviewing the application of law to facts, this Court views the facts in a manner most favorable to the prevailing party, in this case Appellee Bounds. See, e.g., State v. Ponce, 2004 NMCA 137, ¶ 6, 136 N.M. 614, 103 P.3d 54; State v. Jason L., 2000 NMSC 018, ¶ 10, 129 N.M. 119, 2 P.3d 856.

Judge Robinson made substantial findings of fact in his decision, as well as in his early Order denying the motion to dismiss challenging ripeness, based upon the evidentiary record and testimony. [R.P. 378-87; 839-44] Both Appellants and the amici who support them totally ignore the lower court's findings of fact in their briefs. This is particularly true as to Appellants' arguments alleging there was no case or controversy and for this reason alone, summary judgment should have been granted on all claims against the Bounds. [State/Engineer Brief in Chief, at 13-19] [3] The district court, as stated in the Summary of

[3] Appellants in their "Introduction" improperly set forth four pages of argument, without any citation to the law or the record proper, setting forth their version of the historical background of the domestic well statute. Appellee Bounds objects to the State/Engineer's implicit argument in this section of the brief, which more properly belonged in their legal argument, that these facts or inferences are in any manner undisputed or supported by evidence in the record. The only evidentiary facts relating to the history of the Domestic Well Statute are those found in the trial court's decision itself, which findings Appellants fail to specifically challenge on appeal with citation to the record, and are thereby binding on this Court. [R.P. 378-87; 839-44] See, e.g., Rule 12-213(A)(4) NMRA 2009; Maloof v. San Juan County Valuation Bd., 114 N.M. 755, 845 P.2d 849 (Ct. App. 1992); State ex rel. Thorton v. Hesselden Const. Co., 80 N.M. 121, 452 P.2d 190 (1969).

Material Facts on appeal, made substantial findings as to the existence of a case or controversy in the April 24, 2008 Order, which order Appellants did not appeal.

C. Declaratory relief was properly available as a remedy to Appellee Bounds on his claim that the New Mexico Domestic Well Statute is unconstitutional by mandating that applications for domestic wells be automatically granted by the State Engineer despite whether any water is available.

1. There was an actual case and controversy between Appellee Bounds, a fourth generation rancher and senior water rights owner on the Mimbres River, and Appellants State/Engineer regarding the unconstitutional domestic well statute.

As their first issue on appeal, Appellants State/Engineer argue that the lower court erred in granting Bounds' declaratory relief on the grounds their was no "case or controversy." [Brief in Chief, at 13-19] With little or no citation to the record or to the district court's extensive findings below, they seek dismissal of the entire case, as they did below in their earlier denied Motion to Dismiss Based on Ripeness. [R.P. 63-68; 378-87] Appellants' arguments regarding "ripeness" or "case and controversy" are identical, and their prior motions on this issue were denied not once, but twice before the district court below. [R.P. 63-68; 378-87; 497-506; 844] Both the law, and the district court's unchallenged findings below support its ruling that the case was ripe for declaratory judgment.

The State/Engineer filed a motion below seeking dismissal of Appellee Bounds' complaint on the basis the constitutional claim was not "ripe" for review. Under federal law, this would be an allegation of a failure to state a "case and controversy." This doctrine, as described in Appellants' motion and now on appeal is intended to prevent advisory opinions

and to conserve judicial economy for problems that are real and imminent. Ripeness is a tool of the court, used to avoid rendering an advisory opinion on some future set of circumstances. See, e.g., In the Matter of the US West Comm., Inc. v. New Mexico State Corporation Comm'n, 1998 NMSC 032, ¶ 8, 125 N.M. 798, 965 P.2d 917; City of Las Cruces v. El Paso Elec. Co., 1998 N.M. 006, ¶ 18, 124 N.M. 640, 954 P.2d 72; City of Sunland Park v. Harris News, Inc., 2005 NMCA 128, ¶ 50, 138 N.M. 588, 124 P.3d 566.

There is no question that there was a viable controversy between Appellee Bounds, a senior water rights owner on the Mimbres River, and the State/Engineer, arising from their actions in continuing to grant domestic well permits in a fully appropriated stream system. The controversy is based on past and continuing behavior and actions of the Appellants in failing to institute priority administration while at the same time granting further new domestic well permits detrimental to Appellee's senior water rights. Appellants' argument that Mr. Bounds had an alternative administrative remedy - - to make a priority call - - is specious in light of the State/Engineer's continuing failure and refusal to curtail junior users water rights, including domestic wells. As to the false allegation that the Bounds never made such a request, Appellee Bounds would direct the Court's attention not only to the district court's unchallenged findings on this issue, as well as to the numerous examples of the Bounds' futile requests found in the record. [Findings Nos. 35-39, R.P. 383-84; Findings Nos. 48-52, R.P. 385; R.P. 100-110, 174, 601-04, 608-09, 679-80]

Furthermore, Appellee Bounds did not need to exhaust administrative remedies in this declaratory action, where the issues to be resolved, as in the case at bar, are legal and not factual. See, e.g., Smith v. City of Santa Fe, 2006 NMCA 048, ¶ 5, 133 P.3d 866. This is because the theory which underlies administrative law is that factual issues which deal with an agency's expertise should be decided by the experts. See Grand Lodge of Ancient and Accepted Masons of New Mexico v. Taxation and Revenue Dept. of State of New Mexico, 106 N.M. 179, 181, 740 P.2d 1163, 1165 (Ct. App. 1987). The question whether the Domestic Well Statute is unconstitutional and/or whether Appellants' actions in enacting and enforcing the statute amount to a regulatory takings, are not factual issues to which the State Engineer's expertise must be deferred. There is significant authority in New Mexico law that ordinances, statutes, etc., may be challenged in a declaratory action, as well as by administrative appeal. See, e.g., Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 487, 427 P.2d 397, 401 (1966); Moriarty Mun. Sch. v. Pub. Sch. Ins. Auth., 2001 NMCA 096, ¶¶ 10, 34, 131 N.M. 180, 34 P.3d 124.

Contrary to the State/Engineer's and amici's argument in their briefs, there was a controversy present between the parties, and the facts were sufficiently developed for a decision on the legal issue of the unconstitutionality of the Domestic Well Statute. No judicial resources were wasted, nor did the district court address hypothetical questions. The case was ripe for consideration under all of the above criteria, and the case and controversy requirement of the declaratory judgment act was fulfilled. See Manning v. Mining &

Minerals Division of the Energy, Minerals, and Natural Resources Dept. of the State of New Mexico, 2006 NMSC 027, ¶ 56, 2006 N.M. LEXIS 280 (J. Minzner, dissenting opinion). Moreover, Appellants' argument that Mr. Bounds had an adequate administrative remedy in seeking a priority call flies in the face of their own failure to ever respond to such requests, as found by the court below. [Findings Nos. 47-54, R.P. 385-86; Findings Nos. 27-29, R.P. 842-43]

A priority call in times of drought or water shortage, however, was not the relief sought, but rather a curtailment of the State/Engineer's actions in issuing domestic well permits in the future, which, because the basin was fully appropriated, would impair all senior water rights at all times, even more than what had already occurred. It is the unconstitutional Domestic Well Statute from which Appellee Bounds sought relief and he was entitled to seek declaratory action to protect his existing senior water rights.

2. The District Court, after ruling that the Domestic Well Statute was unconstitutional, further ruled that Plaintiff Bounds' takings and civil right claims would be dismissed, but without prejudice. In doing so, the District Court in effect denied Appellants' Motion for Summary Judgment as to said claims.

On appeal, Appellants State/Engineer and amici opine that the district court erred in not dismissing Appellee's takings and civil rights claims on summary judgment. They do so by mischaracterizing the district court's limited findings in the "Plaintiff's Other Claims" section of his six-page decision. They edit the court's ruling, arguing that Appellee could prove no "actual damages," coming full circuit to their mantra that the whole case should have been thrown out for failure to prove a "case or controversy." This argument is

particularly egregious in Amicus New Mexico Ground Water Association's ["GWA"] brief. [GWA Amicus Brief, 26-30] GWA argues that the "record shows" and the district court "expressly found" that Bounds suffered no injury in fact. [Id. at 27] In doing so, GWA conveniently fails to cite to either the lower court's findings, let alone to the record.

Contrary to the State/Engineer's and Amicus GWA's mischaracterization of the lower court's rulings in their briefs, the district court undisputedly ruled, not once but twice, that Appellee's injury was real and the case was ripe to be heard under the declaratory judgment statutes. Nowhere in the lower court's decision in the section addressing the Domestic Well Statutes' unconstitutionality is there any ruling by the trial court that Appellee had suffered no injury.

> 24. D'Antonio testified he would not subject domestic wells to a priority call notwithstanding this is a derogative of his duty under the N.M. Constitution and § 72-12-1.3.
>
> 25. This lack of protection for senior appropriators is a violation of due process. The OSE, State of New Mexico and the Legislature are charged with the protection of senior water right owner's property.
>
> 27(c). OSE argued Bounds has not been denied due process. This argument is not sound. OSE has no statutory or regulatory process in place to give senior appropriators procedural or substantive due process. Senior appropriators do not even get notice of appropriation, let alone a hearing.

[R.P. 842-43] In the last section of his decision addressing Appellee's takings and civil rights claims, in denying them without prejudice, it is correct that the lower court found:

> 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 issue.

6. Plaintiffs' other claims are dismissed without prejudice. . . . Plaintiff has the right to bring claims in the future if facts so warrant. . . . If OSE complies with its constitutional and statutory duty to protect senior water rights owners' property, future litigation should not be necessary.

[R.P. 844] The district court was correct - - there was no evidence of monetary damages. That was true because Appellee Bounds did not file a Fifth Amendment takings claim seeking damages. The lawsuit was for prospective declaratory relief only - - that the court declare the Domestic Well Statute unconstitutional and also rule as a matter of law that Appellants' actions in granting domestic well permits in this fully appropriated closed underground basin was a takings of his property rights. As the district court ruled - - this matter of monetary damages and injunctive relief may be brought in the future if facts so warrant. [R.P. 844]

D. New Mexico's Domestic Well Statute, excepting said permits from any administrative due process requiring notice and right to protest, is unconstitutional under N.M. Const., art. XVI, § 2 providing that water rights are protected by priority in time, not priority by use.

In the case at bar, because both parties agreed that the constitutionality of the Domestic Well Statute was a dispositive issue which could be ruled on as a matter of law, Appellants' summary judgment and Appellee Bounds' response were treated as "briefs" on the issue and the matter was decided based upon the evidence submitted. [R.P. 389-495; 521-35; 551-808; 809-34; 843]

Before the district court below, as well as again now on appeal, Appellants avoid the true issue in this case, the unconstitutionality of the Domestic Well Statute based upon New Mexico's Constitution - - the gorilla in the room which they want the Court to ignore by dancing around, throwing out extraneous issues such as that the Court must defer and abide by their "administrative" interpretation that the statute is not unconstitutional. As will be argued subsequently, neither the district court below nor this Court owes the State Engineer any such deference, even if one could guess whether such deference was to be to their interpretation of the statute over the past three years after this lawsuit was filed, or instead their consistent interpretation for years prior to this lawsuit when they were trying to get the Legislature to amend the statute to no longer require the State Engineer to automatically issue domestic well permits upon application only. Appellee Bounds agreed with the district court's findings and conclusions in its April 24, 2008 Order that the dispositive issue in this declaratory action - - that the Domestic Well Statute is facially unconstitutional - - was a question of law that the court was entitled to decide in a summary proceeding. [Finding No. 45, R.P. 384]

1. New Mexico's Domestic Well Statute exemption mandates that the State Engineer shall issue domestic well permits upon application without notice and hearing or a determination of impairment regardless whether a stream system or underground basin is fully appropriated. This statutory exemption for domestic wells violates N.M. Constitution art. XVI, § 2 which provides that "priority of appropriation shall give the better right.

The New Mexico Constitution adopted January 21, 1911 contains the following three provisions:

1. All existing rights to the use of any waters in this State for any useful or beneficial purpose are hereby recognized and confirmed.

2. The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the State. Priority of appropriation shall give the better right.

3. Beneficial use shall be the basis, the measure and limit of the right to the use of water.

N.M. Const. art. XVI, §§ 1-3 (emphasis added).

An appropriative right is a usufructuary right and "is therefore the right to divert water from a natural stream by artificial means and apply the same to beneficial use." Murphy v. Kerry, 296 F. 536, 541 (D.N.M. 1923).

> The right obtainable with reference to the water of a public stream in New Mexico is the right to appropriate so much thereof as is actually used for some beneficial and legal purpose. . . .
>
> The appropriative right as property. - - The appropriative right, which is a usufructuary right, is property. It is a property right of high order. Such a right is real estate.

[R.P. 776-77]; accord Murphy, supra, 296 F. at 541; New Mexico Products Co. v. New Mexico Power Co., 42 N.M. 311, 321, 77 P.2d 634 (1938); Lindsey v. McClure, 136 F.2d 65, 70 (10th Cir. 1943); Posey v. Dove, 57 N.M. 200, 210, 257 P.2d 541 (1953).

The New Mexico Constitution, in declaring unappropriated water to belong to the public subject to appropriation for beneficial use, provides unambiguously that: "Priority of appropriation shall give the better right." See N.M. Const. art. XVI, § 2. This constitutional provision that priority "in time" shall give the better right is also codified in NMSA 1978,

Section 72-1-2 (1907) (Section 2 of the original 1907 water code). Regardless of the State/Engineer's efforts to make a distinction without a difference that water users do not "own" water, but rather only the right to use it, water rights in New Mexico are indeed property rights "of high order" under the prior appropriation doctrine that protect senior water users, such as Appellee Bounds, from junior rights during times of shortage or from those who have no water right at all.

> The rule that priority of appropriation gives priority of right as between two appropriators from the same source of supply is an essential feature of the doctrine of appropriation.

[R.P. 778], citing Murphy v. Kerr, 296 F. 536, 542 (D.N.M. 1923); Lindsey v. McClure, 136 F.2d 65, 69 (10th Cir. 1943); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 98 (1938).

> Water was placed in a unique category in our Constitution - - something that cannot be said of lumbering, coal mining, or any other element of industry. The reason for this is of course too apparent to require elaboration. Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival. Recognition of these facts, as well as a conviction that the doctrine of prior appropriation was better suited to accomplishing the desired ends than was the common land riparian doctrine must have been the principal reason for the adoption in this state of the prior appropriation doctrine as the law applicable to water.

State ex rel. Martinez v. City of Las Vegas, 2004 NMSC 009, ¶ 34, 135 N.M. 375, 89 P.3d 47 (2004), quoting Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 407 P.2d 986, 989 (1970).

The right of a junior appropriator to the use of water is at all times subservient to the primary right of prior appropriators to the use of the same water, and can be exercised only after the needs of the prior appropriators have been supplied. See Harkey v. Smith, 31 N.M. 521, 530-31, 247 P. 550 (1926), cited in Hutchins, supra, Pls. Ex. 3, at 30. A right to the continued use of a vested and accrued water right will be maintained and protected as fully as the right to a continued use of the easement in the works by which use of the water and water right is effectuated. Id. at 30; First State Bank of Alamogordo v. McNew, 33 N.M. 414, 437, 269 P. 56 (1928).

"All water within New Mexico, whether above or beneath the surface of the ground belongs to the state, which authorizes its use . . ." Erickson v. McLean, 62 N.M. 264, 271, 308 P.2d 983, 987 (1957). The state as owner of water has the right to prescribe how it may be used and it has done so by providing that beneficial use is the basis, the measure, and the limit to any right to use of water. [4] Id.

The facts are undisputed in this case that Wigwam Ranches, Inc. in 1993 was adjudicated along with other members of the San Lorenzo Ditch the most senior water rights on the Mimbres River, being 415.4 acres with a priority date of 1896. [R.P. 1-2, 48-49, 582-85] Mr. & Mrs. Bounds testified in their depositions and at the April 17, 2008 hearing

[4] Amicus 4 Daughters Land & Cattle Co., et al., makes a convoluted argument in its amicus brief that the constitutional provision adopting prior appropriation only applies to surface water, not groundwater. [Amicus 4 Daughters, et al. Brief, at 32-34] As stated above, the fundamental principle of beneficial use is applicable to all appropriated public waters. See, e.g., State ex rel. Martinez, supra, 2004 NMSC 009, ¶ 34, quoting State ex rel. State Engineer v. Crider, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967).

that they purchased these water rights and the farm to which they are appurtenant from Mr. Bounds' parents, and that permits issued by OSE for said water rights are in Appellee Bounds' name. Therefore, any proof that water being appropriated by junior users' domestic wells, which take and deplete water from the river, is an impairment of all senior water users' surface water rights, particularly those of Appellee Bounds who, as a member of San Lorenzo Ditch Association, owns, diverts, and has historically used more than one half (208.3 acres) of the most senior surface water rights on the Mimbres River. Obviously, in a closed basin such as the Upper Mimbres Underground Basin, all water has been fully appropriated. [Finding No. 4, R.P. 839] Continuing to issue more and more domestic well permits, simply upon application, means someone's existing senior water rights are being intercepted and impaired.

The 1931 groundwater appropriation statutes recognized the Constitution's mandate of applying water to beneficial use, and the priorities of such right. See NMSA 1978, §§ 72-12-2, 72-12-4 (1931). In these statutes enacted in 1931, there were no exceptions to the application, publication (notice), and hearing procedures to obtain a well permit, including the right of other water right owners to protest the application. See NMSA 1978, § 72-12-3 (1931), previously codified at § 75-11-3, 1953 Compilation; Sess. Laws 1931, ch. 131, § 3.

There is no question that the members of New Mexico's constitutional convention intended to adopt a priority in time hierarchy of uses, not priority according to use.

> Immediately following passage of the Enabling Act, territorial officials arranged for a constitutional convention which began its proceedings at Santa Fe on 3 October 1910. A sixteen-member, committee chaired by Malequias Martinez of Taos drafted the article dealing with irrigation and water rights. . . . Sections of these proposals dealing with the post of state engineer were not incorporated into the final committee draft, and two sections were deleted during the debate over its adoption. One of these would have guaranteed the right to appropriate unappropriated water and would have established domestic use as the highest priority, with agriculture superior to mining and manufacturing. . . . The delegates unanimously adopted an amendment . . . that "priority of appropriation shall give the better right."

[R.P. 790]

Despite this clear intent of the framers of New Mexico's Constitution when they enacted a hierarchy of appropriation based on "first come, first served," the New Mexico Legislature in 1953 promulgated an exception to the priority in time appropriative right by exempting stock wells and domestic wells, to comply with State Engineer regulations that had been in effect for years without any such statutory authority. The 1953 statute merely "blessed" what the State Engineer was already doing, or more appropriately was not doing. [R.P. 791] This 1953 statute was the predecessor of present NMSA 1978, §§ 72-12-1 through 72-12-1.3.

In 2003, the Legislature took the exemptions first codified in the 1953 statute and set them apart in three separate statutes, without substantive change as admitted by Appellants in their Motion for Summary Judgment. Therefore, there is no dispute that for the past fifty years, Appellant State Engineer, contrary to the New Mexico Constitution, was required to

issue domestic well permits, regardless of priority or availability of unappropriated water. [R.P. 791] The current form of the statute challenged by Appellee Bounds reads as follows:

> **72-12-1.1 Underground Waters; domestic use; permit.**
>
> A person, firm or corporation desiring to use public underground waters in this section for irrigation of not to exceed one acre [three acre feet] of noncommercial trees, lawn or garden or for household or other domestic use shall make application to the state engineer for a well on a form to be prescribed by the state engineer. **Upon the filing of each application describing the use applied for, the State Engineer shall issue a permit to the applicant to use the underground waters applied for**; provided that permits for domestic water within municipalities shall be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978.

(Emphasis added) Under any rules of statutory construction, this exemption for domestic wells violates the constitution on its face and is void and of no effect. [5]

> 2. Under the canons of statutory construction, the language in the Domestic Well Statute mandating that domestic well permits "shall" be issued is unambiguous and not subject to interpretation.

Contrary to the State/Engineer's unsupported argument in their Brief in Chief, the domestic well exemption originally enacted in 1953 and now codified in Section 72-12-1.1,

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[5]Amici New Mexico Ground Water Association and 4 Daughters Land & Cattle Co., et al., both argue that they are concerned the Bounds' case will be applied to stock wells, also exempted in NMSA 1978, § 72-12-1.2 (2003). This statute is not at issue in this appeal, and whether it will ever be challenged as unconstitutional will have to await another lawsuit. Appellee Bounds objects to amici using this appeal to promote their own agenda as to any matters relating to ranches and stock wells, none of which was raised below, based upon law review articles, hydrology reports, and "Interviews," none of which is evidence in the record, nor before this Court on appeal. [Amicus GWA Brief, at 20-26; Amicus 4 Daughters Brief, at 5-10]

is not subject to interpretation by the Court, being clear and unambiguous in its intent. The first canon of statutory construction is to first look at the plain meaning of the statutory language. See, e.g., Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 90, 908 P.2d 776, 783 (Ct. App. 1995); General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). "In construing a statute, we assume that the legislative purpose is expressed by the ordinary meaning of the words used." Id., 103 N.M. at 76, 703 P.2d at 173; accord Waksman v. Albuquerque, 102 N.M. 41, 43, 690 P.2d 1035, 1037 (1984).

It is a fundamental principle of statutory construction that this Court may not rewrite or add language to a statute in order to make it constitutional. See State of New Mexico v. Frawley, 2007 NMSC 057, ¶ 30, 172 P.3d 144. "The question how to ultimately fix the constitutional problem inherent in our sentencing scheme lies with the Legislature." Id., citing United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 479 (1995) (courts have obligation to avoid judicial legislation by refusing to rewrite a statute).

As previously argued, the plain language of the statute is the primary indicator of legislative intent. See General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 172 (1985). There is nothing ambiguous about the language in the Domestic Well Statute which mandates that, upon application only for a domestic well, the State Engineer shall issue a permit. Any drafter of legislation knows that "shall" is mandatory and

"may" is permissive. See, e.g., Gandy v. Wal-Mart Stores, Inc., 117 N.M. 441, 442, 872 P.2d 859, 861 (1994).

> Since the Montano v. Williams decision, this Court [Supreme Court], as well as the Court of Appeals has continually held "shall" to be mandatory.

Security Trust v. Smith, 93 N.M. 35, 37, 596 P.2d 248, 250 (1979). As Appellee D'Antonio said in his deposition, in asking the Legislature on several occasions to amend the Domestic Well Statute, he only wanted to change one word. He wanted the Legislature to change "shall issue" to "may issue." He agreed that the Constitution's priority scheme does not provide an exception for domestic wells. [R.P. 623-24]

New Mexico has a statute which itself sets forth rules of statutory construction, providing that the words "shall" and "will" are mandatory and "may" is permissive or directory. See, e.g., NMSA 1978, § 12-2-2, Security Trust, supra, 93 N.M. at 37, 596 P.2d at 250; Bursam v. Bursam, 2004 NMCA 133, ¶ 17, 136 N.M. 584, 102 P.3d 651; Jaramillo v. Heaton, 2004 NMCA 123, ¶ 16, 136 N.M. 498, 100 P.3d 204. This is the only statutory construction this Court need make de novo - - that "shall" means "shall."

The Appellants State/Engineer argue that this Court should instead defer to the State Engineer's own interpretation of the statute and constitution. Although it is true courts may defer to an agency's interpretation of a statute to rely on said agency's expertise, this deference does not apply where, as in the case at bar, the State Engineer's expertise does not include that of constitutional legal scholar.

> We may afford some deference to the commission, particularly if the question at hand implicates agency expertise. However, the Court may always substitute its interpretation of the law for that of the Commission because it is the function of the court to interpret the law.

Johnson v. New Mexico Conservation Comm'n, 1999 NMSC 021, ¶ 16, 127 N.M. 120, 978 P.3d 327.

In their brief, Appellants argue that the State Engineer does have the authority to restrict domestic wells under its recently enacted regulations, despite what the mandatory statute requires. The State Engineer, an executive officer of an agency created by statute, however, has no more authority than what is granted to him/her by statute. See, e.g., Gonzales v. New Mexico Retirement Bd., 109 N.M. 592, 595, 788 P.2d 348, 351 (1990); Rivas v. Board of Cosmetologists, citing 101 N.M. 592, 686 P.2d 934 (1984). The State Engineer was granted no authority in Section 72-12-1.1 to promulgate regulations restricting issuance of domestic well permits - - quite the opposite. The constitutionality of these regulations is, in fact, the subject of another appeal pending before this Court. [R.P. 706-772] And as a practical member, they have never been implemented. [R.P. 621, 623, 629-30, 637-39, 652]

Furthermore, the fact that the State Engineer may act "under certain self imposed restraints can in no way serve to supply what has been omitted in a statute." See Cobb v. State Canvassing Bd., 2006 NMSC 034, ¶ 41, 140 P.3d 498. As stated by the New Mexico Supreme Court in the Cobb case, "it is not what has been done but what can be done under a statute that determines its constitutionality." [Finding No. 20, R.P. 84] Id., citing State ex rel. Holmes v. State Bd. of Finance, 69 N.M. 430, 440, 367 P.2d 925, 932 (1961)

No promises of self regulation by the Appellant State Engineer after this case was filed can cure an unconstitutional statute. See Cobb, at ¶ 46; Holmes at 440. Contrary to Appellants' argument on appeal, the unconstitutional mandatory exemption of domestic wells from the State Engineer's notice and hearing administrative process cannot be cured by State Engineer regulations, even if they were being implemented rather than being just pieces of paper. It is a well-established rule of constitutional law that an unconstitutional statute is wholly void from the time of its enactment and cannot be validated, even by a subsequent constitutional change which would have allowed the enactment of such a statute. See, e.g., Fellows v. Schultz, 81 N.M. 496, 501, 469 P.2d 141, 146 (1970). In summary, the present Domestic Well Statute, as well as its predecessor, is facially unconstitutional and always has been since its initial passage by the Legislature in 1953.

3. Until this lawsuit was filed, Appellants consistently interpreted the Domestic Well Statute to be mandatory, over which the State Engineer had no discretion.

If Appellants State/Engineer are serious when they argue that this Court should defer to the State Engineer's "long held interpretation" of a statute, then they should be asked - - which "long held" interpretation? The one the State Engineer has espoused the past three years after this lawsuit was filed? Or his long standing interpretation for years prior to this lawsuit, when he consistently believed the statute was mandatory, giving the State Engineer no discretion to restrict or deny domestic well applications? Here are just a few examples of the State Engineer's "long held" interpretations:

Originally codified in 1953, the right to a domestic well permit, called a 72-12-1 permit, with use not to exceed three acre feet per year, represents an exception to the State's priority administration system.

[R.P. 795]

Only domestic well permits are issued automatically by the OSE, as required by state statute 72-12-1.

[R.P. 796]

Since domestic wells were first authorized in 1927, statewide population has quadrupled, while the rural population has remained roughly the same. In the intervening 75 years, most of the groundwater basins and streams have been declared by the State Engineer and perennial streams have become fully appropriated.... [D]epletions due to domestic wells statewide are creating a debt to legitimate water right owners that will grow into the future. New appropriations will exacerbate the situation.

[R.P. 798]

In summary, perennial streams are estimated to suffer depletions of 5800 to 16,312 af per year from existing wells within a 1-mile flood plain corridor.

[R.P. 797]

New Mexico law currently provides that anybody wishing to drill a well for domestic water use is entitled to a permit. It is the only use of public water in New Mexico for which no water rights are required.

The addition of numbers of new wells in such areas potentially reduce availability for existing wells - - but with no authority to deny domestic well permits, the State Engineer has no mechanism for carrying out his constitutional duty to protect existing users . . . There is a very real question of whether the domestic well statute is unconstitutional because it limits the State Engineer's power to protect senior water rights by allowing new appropriations. . . .

There may well be a concept or method for addressing this issue that hasn't been considered. But to be acceptable, any compromise has to incorporate the power

to protect threatened acquifers and surface water supplies substantially as would the bill giving the State Engineer the power to deny permits.

[R.P. 806-08]

Q: Who regulates domestic wells?

A: Domestic wells are permitted differently from other water rights in New Mexico. The OSE is required by state law to grant these permits for residential use in declared underground basins, no matter what the consequences.

[R.P. 799-800]

The State Engineer supported statutory amendments in 2005 clarifying the State Engineer's authority to deny domestic well permits.

[R.P. 788]

Defendants admit the bills seeking amendments to the domestic well statutes during the 2005 legislative session were not passed by the Legislature.

[Id.]

Prior New Mexico regulations provide that anyone wishing to drill a domestic well for domestic water use could acquire a permit for a $5 fee. It is the only use of public water in the State for which no notice or hearing is required to protect existing senior water rights. Concentrations of domestic wells can affect the flows of adjacent streams . . .

[R.P. 801-02]

The statutory provisions governing domestic wells have been a contentious issue in the past several legislative sessions. Rather than attempting again to revise the process of issuing domestic well permits through legislation, I am exercising new limits on the amount of water that may be diverted under domestic well permits.

[R.P. 803-05; R.P. 801-02]

Based upon the foregoing arguments and authorities, the undisputed legislative history of the Domestic Well Statute, the intent of the Constitutional Commission in adopting the scheme of priority in time to protect water rights, and the State Engineer's own comments in his news releases and staff reports over the past many years that the statute may be unconstitutional, Appellee Bounds respectfully requests the Court to affirm the district court's ruling declaring the Domestic Well Statute unconstitutional on its face as a clear violation of Article XVI, § 2.

4. As the district court ruled in lifting the stay imposed in this case for a year at Appellants' request, there is nothing in the Smith decision that addresses the issue of the unconstitutionality of the Domestic Well Statute, the only issue before this Court.

Now that State Engineer has been shot down in numerous past attempts as amicus to get this Court and the Supreme Court in the Smith and Stennis cases to rule that he has the administrative authority to regulate/restrict domestic well applications under the Domestic Well Statute, Appellants State/Engineer once again ask this Court on appeal to give those cases "a restrictive" view, arguing that domestic wells are not even an appropriation of water under New Mexico law.

Evidently it wasn't enough that Appellants State/Engineer already wasted a year of the district court's time and Appellee's property rights while continuing to approve more and more domestic wells without restriction, arguing three years ago that the appellate courts were going to rule on the issue of the State Engineer's authority under the Domestic Well Statute. Now that the State Engineer lost that battle in both the Smith and Stennis cases, he

asks this Court once more to rule as a matter of law that a domestic well water right is not really a water right at all, is not subject to the prior appropriation doctrine, and, therefore, the statute is constitutional.

There is nothing in the Smith opinion that comes within a million miles of saying any such thing. And because no such issue is before this Court, Appellee Bounds strongly objects to the State/Engineer's blatant attempt to get this Court to bless their latest spin on trying to avoid what is crystal clear to every one else – that the Domestic Well Statute is unconstitutional, pure and simple. Nowhere in the New Mexico Constitution is there one iota of evidence or even a hint that the Constitutional Commission wanted domestic well water to be free for the taking - - quite the contrary. Nowhere in the New Mexico Constitution is there any mention of "de minimus" uses getting a free ride. The original proposal to adopt a priority of use scheme making domestic use the highest priority was voted down. What clearer indication of intent is needed that domestic use (i.e., appropriation of domestic well water) was to be treated no differently than any other appropriation of water? This is why Appellants fail to cite any New Mexico law that says they can.

> [T]he fundamental principle of the doctrine of prior appropriation, one which has its origin in Spanish and Mexican law before 1848, is "first in time, first in right," and one in which the earliest appropriator has an exclusive right "to use of the water to the extent of his appropriation, without material diminution in quantity or deterioration in quality, . . .

State ex re. Office of State Engineer v. L.T. Lewis, 2007 NMCA 008, ¶ 27, 141 N.M. 1, 150 P.3d 375.[6]

Appellants State/Engineer urge this Court to interpret the Smith case to be a decision that due process procedures in Section 72-12-3 do not apply to domestic wells, because the amendment in 2003 which split off domestic wells from the original statute was implicitly some sort of an intent that certain groundwater uses, such as domestic wells and stock wells, were no longer considered to be an "appropriation." This premise is not only a stretch beyond comprehension, but is desperate indeed. Appellants urge that this convoluted interpretation "can be read harmoniously" with New Mexico's Constitution. Appellee Bounds does not attempt to fathom what constitution Appellants State/Engineer are reading. The New Mexico Constitution unambiguously refers to all appropriations.

> The unappropriated water of every stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority appropriation shall give the better right.

N.M. Const. at. XVI, § 2. (Emphasis added)

All the Legislature did when it enacted the single addition to the Domestic Well Statute in 2003, which as stated by the Court of Appeals in Smith is the only restriction to an otherwise totally unrestricted and mandatory domestic well permit under Section 72-12-1.1,

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[6] This Court in the Lewis case cited as one of its authorities the seminal treatise on western water law, Wells A. Hutchins' Water Rights Laws in the Nineteen Western States (1971). Id. This is the same author who wrote the 1955 State Engineer's Technical Report No. 4, Pls. Ex. 3, previously cited in this brief. [R.P. 774-79]

was to add a new proviso at the end providing that if the proposed new domestic wells are located within the boundaries of a municipality, the applicants must also comply with restrictions imposed by municipal ordinances, if any. See Smith v. City of Santa Fe, 2006 NMCA 048, ¶ 18, 143 P.3d 300. Although dicta, this Court clearly read the issuance of domestic well permits in Section 72-12-1 to be mandatory.

Appellee Bounds understands Appellants' need to distinguish this Court's language in Smith. This Court did state that Section 72-12-1 mandates "an automatic and unrestricted" permit for domestic wells. Id. at ¶ 18. However, to urge this Court to now commit error by ruling that a domestic well appropriation is not really an appropriation of the public's water at all is disingenuous. It is also not an issue before this Court.

5. The Domestic Well Statute constitutes a taking of Appellee Bounds' property rights in violation of his constitutional right to due process under the United States Constitution and Constitution of New Mexico.

Appellant State Engineer appears to have changed tactics for purposes of opposing this lawsuit. Based upon documents provided during discovery, including several of his press releases, the evidence showed that the State Engineer worked in the past for several years attempting to get the Legislature to repeal or amend this unconstitutional statute. What is unconstitutionally lacking in the Domestic Well Statute since 1953 is a notice and objection due process provision to protect senior water right holders from new appropriations through domestic well permit applications. Despite attempts by the State Engineer on numerous occasions to convince Appellant State of New Mexico through the Legislature to repeal or

amend the Domestic Well Statute, the exemption for domestic wells remained in effect for more than 50 years when this lawsuit was filed, in violation of all senior water right holders', including Mr. Bounds' right to due process.

> The issue in proceedings under § 75-11-7 [presently § 72-12-7], supra, is whether approval of the application would impair existing rights. In reaching a decision in connection with the application, the State Engineer has the positive duty to determine whether existing right would be impaired. The principle underlying the statutory requirement of application, notice and hearing is to insure that the change proposed in the application will not impair the rights of other appropriators.

City of Roswell v. Berry, 80 N.M. 110, 112, 452 P.2d 179, 181 (1969).

"Due process generally requires that affected parties receive reasonable notice. Case law suggests that the minimum protection upon which administrative action may be based, are according to interested parties a simple notice and right to comment." See Rivas v. Board of Cosmetologists, 101 N.M. 592, 594, 686 P.2d 934, 936 (1984). This is the federally protected due process right of which Appellee Bounds and all other existing water right owners have been deprived - - a taking of their property rights without compensation by a statute depriving them of due process. See, e.g., U.S. Const., amend. 5; N.M. Const. art. II, § 20; Crown Point v. Intermountain Rural Elec. Assoc., 319 F.3d 1211, 1216 (10th Cir. 2003)

> A property interest includes a "legitimate claim of entitlement" to some benefit created and defined by "existing rules or understandings that stem from an independent source such as state law."

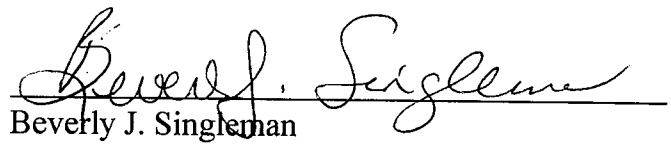
Crown Point, supra, 319 F.3d at 1216. The New Mexico Supreme Court has recognized the effect of Darcy's law on surface water that well pumping effects nearby streams. "The relationships show . . . that ultimately the annual stream-flow is reduced by the amount equal

to the ground-water appropriations." City of Albuquerque, 71 N.M. 428, 440, 379 P.2d 73, 81 (1962). Appellee Bounds did not seek compensation or damages in the case at bar and may never do so. The lawsuit was only for declaratory relief. The district court had ample undisputed facts before it that the State's legislative scheme in adopting the domestic well exemption 1953 and in its 2003 remake, unconstitutionally granted domestic well applications an exemption from all the notice and hearing requirements applied to all other well applications. The district court as a matter of law properly declared such scheme unconstitutional in this declaratory judgment action.

III. CONCLUSION

Based upon the unchallenged finding of facts in this case and the foregoing arguments and authorities, including the Constitution's provisions that "priority of appropriation shall give the better right," Appellee Bounds respectfully submits that the district court's ruling that the Domestic Well Statute was unconstitutional on its face, and is void and of no effect, should be affirmed in all respects.

HUBERT & HERNANDEZ, LLC



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CERTIFICATE OF MAILING

I hereby certify that on this 24th day of February, 2009, a true and correct copy of the foregoing Appellee Bounds' Answer Brief was sent by United States first class mail, to the following counsel of record:

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