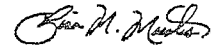


IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

MAR 30 2009



HORACE BOUNDS, JR. and JO BOUNDS,)
And THE SAN LORENZO COMMUNITY)
DITCH ASSOCIATION; and)
Intervenor, NEW MEXICO FARM &)
LIVESTOCK BUREAU,)

Plaintiffs-Appellees,)

vs.)

THE STATE OF NEW MEXICO, and)
JOHN R. D'ANTONIO, JR.,)
NEW MEXICO STATE ENGINEER,)

Defendants-Appellants.)

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

APPEAL FROM THE SIXTH DISTRICT COURT
GRANT COUNTY, NEW MEXICO
HONORABLE J.C. ROBINSON, DISTRICT JUDGE

BRIEF OF *AMICI CURIAE*
THE PUEBLO OF SAN FELIPE, THE ZUNI TRIBE, THE NAVAJO
NATION, THE PUEBLO OF SANTA ANA,
AND THE PUEBLO OF ISLETA
SUPPORTING PLAINTIFFS-APPELLEES BOUNDS *ET AL.*

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BRIEF OF AMICI CURIAE
THE PUEBLO OF SAN FELIPE, THE ZUNI TRIBE, THE NAVAJO
NATION, THE PUEBLO OF SANTA ANA, AND THE PUEBLO OF
ISLETA SUPPORTING
PLAINTIFFS-APPELLEES BOUNDS, ET AL.

This Brief in support of Appellees is submitted by *Amici Curiae* the Pueblo of San Felipe, the Zuni Tribe, the Navajo Nation, the Pueblo of Santa Ana, and the Pueblo of Isleta (“Amici Tribes”).

INTERESTS OF AMICI

The Amici Tribes, together with the other Indian tribes and Pueblos whose tribal lands are located in New Mexico, hold the senior water rights within the

state.¹ New, junior appropriations of water from the proliferation of domestic wells, and any action or non-action of the State in connection with the automatic permitting of such wells, inevitably will have an impact on available water supplies to satisfy the owners of senior water rights, whether Indian or non-Indian. Thus, the policies and administrative practices of the State Engineer with respect to domestic wells will have a direct impact on tribal water rights and the availability of water to satisfy those rights.

The Amici Tribes stand mute on the procedural and constitutional issues raised by the State Engineer in his appeal. They are compelled, however, to voice their deep concerns about the consequences of the current statutory and administrative treatment of domestic wells across the state. Those concerns are described below.

ARGUMENT

The Current Statutory and Administrative Treatment of Domestic Wells Does Not Rationally Protect Senior Rights Holders

Whatever the ultimate ruling on the constitutionality of the Domestic Well Act, the current approach to permitting domestic wells poses state-wide problems

¹ None of the water rights for the Amici have been quantified to date. However, time immemorial rights have been recognized for Pueblos in New Mexico. *New Mexico ex rel. Reynolds v. Aamodt*, 618 F.Supp. 993, 1009-10 (D.N.M. 1985). Indian tribes are recognized to have early priorities based on the date that the United States entered into treaties with the intent of creating a reservation. *State of New Mexico, ex rel., Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235, 244 (N.M. Ct. App. 1993).

and threats to the holders of senior water rights. NMSA 1978, Section 72-12-1.1 (2003), provides in pertinent part that, “upon the filing of each application [for domestic use], the state engineer *shall* issue a permit” (Emphasis added.) Current administration is premised on the assumption that domestic wells involve only a *de minimis* use of water. NMSA 1978, § 72-12-1 (2003) (“the relatively small amounts of water consumed in ... domestic use....”). What may have been *de minimis* in 1952, or even 1990, is no longer insignificant. The construction of residences – the users of domestic wells – has skyrocketed as the population of New Mexico has increased exponentially.²

The State Engineer argues that senior rights holders are adequately protected by the administrative remedy of enforcing a priority call and the judicial remedy of enjoining impairment. Brief in Chief of State of New Mexico and State Engineer (“S.A. Br.”) at 28-29. That approach provides no comfort in the real world. Even if a tribe possessed an adjudicated water right,³ the State’s argument would require

² The total population of New Mexico increased from 327,000 in 1910, to 1.3 million in 1980, to approximately 1.9 million in 2005, and is projected to reach over 2.5 million by 2020. See www.census.gov/population/www.censusdata/files/urpop0090.txt (last visited February 12, 2009) and www.mrcog-nm.gov/content/view/56113/ (last visited February 12, 2009). The population of Sandoval County, in which the Pueblos of San Felipe and Santa Ana are located, increased 86% between 1990 (63,319) and 2007 (117,866). (U.S. Census Bureau estimates, see <http://tinyurl.com/b6mt26> and <http://tinyurl.com/bzvoxo> (last visited February 22, 2009)).

³ The general stream adjudications in New Mexico have not resulted in many decreed water rights, especially for tribes; the adjudication process has proved to

a tribe to wait until a large residential development were fully constructed on its borders, domestic wells permitted and drilled, water used, and, finally, the tribe's senior rights impaired, before the tribe could test the impact on the tribe's water rights.

The Amici Tribes doubt very much that any court, examining the relative interests of the parties for purposes of permanent injunctive relief, would significantly curtail domestic well use after an enormous economic investment and occupied, expensive homes become a *fait accompli*.⁴ Certainly, courts generally have not done so to date. Injunctive relief to enjoin impairment after homes are developed and the wells are drilled bears too much resemblance to closing the barn door after the cows have escaped.⁵

be largely ineffective to resolve water rights issues in a timely manner. See J. E. Thorson, et al., *Dividing Western Waters: A Century Of Adjudicating Rivers And Streams*, Part II, 9 U. Denv. Water L. Rev. 299 (2006).

⁴ In considering whether to grant a permanent injunction against impairment, the court would examine (1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction, when compared to other remedies; (3) the interests of third parties; (4) the practicability of granting and enforcing the order; (5) the relative hardship likely to result to the defendant if granted and to the plaintiff if denied; (6) the delay, if any, in bringing suit; and (7) plaintiff's misconduct, if any. See *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶ 5, 128 N.M. 611, 614, 995 P.2d 1053, 1056 (N.M. Ct. App. 2000); *Wilcox v. Timberon Protective Association*, 111 N.M. 478, 486, 806 P.2d 1068, 1076 (1991).

⁵ Tribes have the additional concern that, in many instances, they may not have used their groundwater and surface water to the same extent as their non-Indian

Nor would tribes benefit from the opportunity to seek preliminary injunctive relief.⁶ It is unlikely that a tribe or other senior rights holder could ever successfully enjoin impairment on a well-by-well basis. A tribe could never prove that a single well would irreparably impair the tribe's water rights. Nor is it likely that a tribe could meet its burden of demonstrating likelihood of success on the merits, because it is the cumulative effect of many new domestic wells – not the isolated effect of each single new domestic well – that results in the impairment. Thus, whether looking at the standards for preliminary or permanent injunctive relief, litigating on a well-by-well basis will never favor the party claiming impairment, and the tribes' time immemorial rights will always be the loser.

neighbors. Notwithstanding the fundamental tenets of federal Indian reserved rights law recognizing that the entirety of a tribe's reserved rights vest at the time of the creation of the reservation regardless of actual use, *Arizona v. California*, 373 U.S. 546 (1963), the tribes note an increasing tendency of courts to protect vested non-Indian water uses from the claims of tribes who have yet to put water to beneficial use. *See In Re: General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68, 81 (Ariz. 2001) (“We believe that such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users' water rights”). *See also United States v. New Mexico*, 438 U.S. 696, 718 (1978) (Powell, J., dissenting in part) (concurring that the *Winters* doctrine “should be applied with sensitivity to its impact upon those who have obtained water rights under state law”).

“To obtain a preliminary injunction, a plaintiff must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.” *LaBalbo v. Hymes*, 115 N.M. 315, 318, 850 P.2d 1017, 1021 (N.M. Ct. App.) (1993).

Only by having the opportunity and uniform procedure to determine the potential impact of domestic wells *before* they are drilled can the rights of both the senior rights holders and the prospective residential interests be fully and fairly protected. It is irrational – and equally unfair – to require either a senior water rights holder to bear the burden of proving that a new domestic well will have an impact or a proponent of a domestic well to prove that it will not. It is the cumulative effect of the unregulated proliferation of domestic wells that is creating the crises that tribes and other senior rights holders disproportionately bear.⁷ The State Engineer’s current practices and procedures simply do not adequately deal with the real problem. The real problem can be dealt with only through a comprehensive legislative solution or through an administrative scheme with sufficient authority, funding, and governmental will to make it work.

The Amici Tribes offer two examples to illustrate the current problems.

1. Zuni Tribe.

Six years ago, developers of the Southern Cross Ranch proposed building a residential subdivision development within the upper Rio Nutria watershed

⁷ As a general proposition, other than in the context of Section 72-12-1 wells, New Mexico water law recognizes that the party seeking to make the new appropriation of water ordinarily has the burden of proof. *McBee v. Reynolds*, 74 N.M. 783, 789, 399 P.2d 110 (1965).

abutting Zuni tribal lands.⁸ The upper Rio Nutria watershed is the gateway to the Zuni Reservation, where water comes down from the Zuni Mountains through streams used by the Zuni since time immemorial, and fills the lakes and wetlands of the Reservation. This particular development would have built a public water system using 90 acre-feet of water to serve approximately 241 homes. Because state law governing withdrawal of groundwater in amounts over 3 acre-feet per year requires the approval of the State Engineer through a process requiring application and public comment, the Zuni Tribe had the opportunity to protest the ground water application upon which the public water supply system for the development would have relied. NMSA 1978, § 72-12-3 (2003). The developer ultimately withdrew the plan.

Several years later, a different developer proposed a residential subdivision plan for the same site, this time proposing individual domestic wells for a proposed subdivision anticipated to contain 491 homes. Because this development now proposes hundreds of individual wells rather than a public well system, the Zuni Tribe has no direct forum to compel the State Engineer to examine what impact these proposed wells might have on the Tribe's senior rights. Current law compels this result despite the fact that the new development proposes more homes and will

⁸ These lands are also located near the Navajo community of Bread Springs. The Navajo Nation shares the concern of the Zuni Tribe.

ultimately use more water than the original plan. This result is of grave concern to the Tribe. It is also irrational.

2. Pueblos of San Felipe and Santa Ana.

The Middle Rio Grande Pueblos (comprised of the Pueblo de Cochiti, Pueblo of Santo Domingo, Pueblo of San Felipe, Pueblo of Santa Ana, Pueblo of Sandia, and Pueblo of Isleta), which lie on an already over-appropriated water system, face different but equally troubling problems. There exists a strong hydrologic connection between the ground and surface water of the Middle Rio Grande within the already severely over-appropriated waters of the Rio Grande. Impacts from withdrawals affect the entire watershed as regional groundwater levels continue to decline in response to climate change, excessive urban groundwater pumping, and an over-appropriated stream system. Because of this interconnection, State Engineer administrative guidelines require withdrawals of groundwater to be offset by the retirement of surface water rights somewhere within the Middle Rio Grande basin. *Middle Rio Grande Administrative Area Guidelines for Review of Water Right Applications*, Office of the State Engineer, September 13, 2000. The Guidelines, however, do not apply to domestic wells. *Id.* at Section 7; *see also* Section 12.

Under these Guidelines, an applicant can retire surface water rights near Socorro to support a proposed new groundwater withdrawal near the Pueblo of San

Felipe or the Pueblo of Santa Ana. While the Middle Rio Grande Pueblos have voiced concern over the failure of the State Engineer to adequately address localized stream system impacts and the effects of such a surface water retirement/groundwater withdrawal, the Guidelines do not even address -- much less require analysis of -- the exacerbating and cumulative effects of existing and new domestic wells. There are upwards of 90,000 domestic wells within the Middle Rio Grande, and the number grows daily.⁹ Thus, even within the extraordinarily over-appropriated Middle Rio Grande system, there is currently no administrative oversight or regulation of the proliferation of domestic wells. The failure to require pre-drilling review of the cumulative impact of domestic wells exacerbates the threat to groundwater and surface water posed by the administrative practices in the Middle Rio Grande. It, too, is irrational.

Given the unprecedented population growth in New Mexico, every Tribe and Pueblo in the state -- and undoubtedly every other senior water rights holder -- can point to past and present threats to their rights that cannot, under current law and practice, be evaluated until after the damage has already been done. Neither

⁹ For estimates of the growth of domestic wells within the Middle Rio Grande Basin, see generally 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* (2000).

the Tribes nor the State can afford such a profligate and irrational system of apportioning our dwindling water supply.

CONCLUSION

The Amici Tribes respectfully ask this Court to consider their interests in determining this appeal.

Dated: February 25, 2009

Respectfully submitted,

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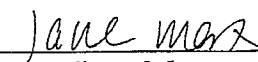
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