



By Don Gregory and Jeremiah Thomas

The Measures and "Bounds" of Domestic Well Permits

New Mexico appellate court deals a blow to prior appropriators and preserves status quo.

As another year begins, groundwater continues to take center stage in struggles over water rights across the country.

As 2010 drew to a close, senior appropriators took a big hit in that fight. A New Mexico appellate court reinstated a 100-year-old law exempting domestic wells from the state's approval process for new wells—reversing a trial court decision that had been hailed as a victory for the rights of prior appropriators and criticized as a threat to the water well drilling industry in the state.

The backdrop for the *Bounds vs. State of New Mexico* case was the prior appropriations rule as embodied in the New Mexico state constitution. The prior appropriations rule dictates that the first landowner to beneficially use a water source receives a priority right to the water from that source. To protect this right, the state requires a landowner to apply for a well permit before drilling for, or otherwise diverting, groundwater.

Following most applications, the state engineer's office is required to consider whether either prior appropriators or simple scarcity provide an adequate reason to deny the application. When prior appropriators are identified,

Don Gregory and Jeremiah Thomas practice law at Kegler, Brown, Hill & Ritter in Columbus, Ohio, and can be reached at www.keglerbrown.com. Kegler, Brown, Hill & Ritter serves as general counsel to the National Ground Water Association.

Procedure, and not
substance, often dictates
the outcome of these
important cases.

they are given notice and an opportunity to contest the application.

Not All the Same

But each permit is not subject to the same statutory procedure. For instance, an application for domestic use only is automatically approved pursuant to a long-standing statute. The statute, in fact, mandates that the state engineer grant a permit whenever an application is filed for a domestic well.

In 2008, the Grant County Circuit Court declared that the statute ran afoul of the state's constitution. The trial court found that the automatic issuing of domestic permits deprived prior appropriators of due process protections. Notably, the court found for the prior appropriators despite the fact that the action was filed before new domestic wells were shown to impair prior rights. Still, the court concluded that the best solution was to require domestic well applications to go through the same review used for other applications.

In late October 2010, the New Mexico Court of Appeals overturned the trial court's holding. The court ruled that the

doctrine of prior appropriation "does not dictate any particular manner of administration of appropriation and use of water or how senior water rights are to be protected from junior users in time of water shortages."

The court reasoned that the state's constitution does not require any evaluation of water availability or impairment prior to the issuance of a well permit. In part, because state law provides the opportunity for prior appropriators to obtain relief after a well permit is issued, the court determined that the state's legislature would be a better vehicle for addressing issues related to automatically issued permits than would a facial attack on the statute's constitutionality. The court noted that no party had shown its rights to have been actually impaired by the permit policy, and the opinion appeared to leave open the possibility for future attack in the event of such impairment.

Procedure, Not Substance

The *Bounds* decision extends an interesting trend in water rights precedent. Procedure, and not substance, often dictates the outcome of these important cases. The *Bounds* court itself acknowledged the practical difficulties with New Mexico's domestic well policies, but the court declined to address these difficulties because of what it viewed as procedural constraints.

The *Bounds* decision is another interesting twist in the ebb and flow for water rights across the country. Some

had viewed the *Bounds* trial court decision as a potential catalyst for broadly eliminating private well exemptions.

But even as the New Mexico Court of Appeals was preparing to deliver a blow to senior appropriators in the Southwest, the Montana Department of Natural Resources was moving to implement new limitations on the state's domestic well exemption. Montana's Water Use Act provides well permit exemptions for small wells, and a loophole in the definition of such wells has allowed developers in the state to drill multiple wells in a subdivision without permit and without oversight on the use of the water. As long as the developer does not connect the wells, the current rules provide prior appropriators without meaningful recourse.

The Montana Department of Natural Resources declared its intention in August to revisit the rule, and the department recently settled a dispute that will require the rule to be revised within the next 15 months. Ultimately, domestic wells in Montana will be subject to some permitting process, though many believe that process will be less cumbersome

than what is currently required for a beneficial water use permit in the state.

Issues Remain

The questions faced in New Mexico and Montana spotlight enduring issues regarding domestic water use and appropriation. On the one hand, domestic use has long enjoyed preferential treatment over other uses. Domestic exemptions reduce the cost of building homes, and abbreviated procedures allow for builders to be more responsive to home buyers' needs.

But not everyone appreciates or realizes these lower costs, and some believe that higher costs lead to more responsible water use. Moreover, some argue that a reflective, considerate approach to new water appropriations is essential in areas where water is so scarce.

Unchecked use by developers and others who drill new wells, taken as a whole, can have a dramatic impact on the sustainability of local water sources. What's more, prior appropriators in states like New Mexico—some of whom have invested considerable

resources in obtaining and developing their water rights—may be deprived of substantial property rights. Even where after-the-fact procedures are available to challenge these issuances of domestic well permits, judges are often reluctant to enforce the rights of senior appropriators after significant resources have already been expended to develop new subdivisions.

Local governments complain they are hamstrung by domestic well exemptions, as the locality's wells are often subject to evaluation regarding the impact that such wells have on surrounding domestic wells. But new domestic wells drilled outside of the local government's jurisdiction are not subject to review, and can substantially impact the availability of water to the locality.

One thing is certain. Water disputes in the arid West are not likely to disappear anytime soon. Montana expects to spend the next year or so addressing various concerns with regard to that state's domestic well controls. And as of the time of this writing, the *Bounds* decision is being appealed to the New Mexico Supreme Court. [WWWJ](#)