

Groundwater Issues in the United States Part 3: Exempt Wells in the West

Highlighted by the *Bounds v. State of New Mexico* case, groundwater takes center stage in the struggle over water rights.

By Mike Price

An old-fashioned spaghetti western water war is being waged throughout the western region of the United States.

Most western states have laws or regulations allowing landowners to install “exempt” wells. These small, private wells are assumed to withdraw small or “de minimis” (very little) amounts of groundwater and are exempt from certain water rights permitting procedures, adjudication, or both. There are more than a million exempt domestic and livestock wells dotting the western landscape.

“Contrary to western water lore, issues with exempt wells are not limited to the western United States,” says Todd Jarvis, Ph.D., associate director of the Institute for Water & Watersheds and Oregon Climate Change Research Institute at Oregon State University. “British Columbia does not regulate groundwater and is trying to figure out how to regulate exempt wells, if at all.”

In southern New Mexico, farmer Horace Bounds Jr. filed a lawsuit against the state engineer, claiming the state’s domestic well law was unconstitutional. Bounds, a senior water-rights holder along the Upper Mimbres River, claimed new domestic wells drilled in the valley were affecting his surface water rights from the river.

Bounds took his fight to the courts, where the Grant County District Court ruled that the state statute requiring the state engineer to issue a permit for domestic exempt wells was unconstitutional. The Court of Appeals overturned that July 8, 2008 decision by the Grant County District Court in the case of *Bounds v. D’Antonio*. The case is now in the New Mexico Supreme Court with oral arguments being held this month.

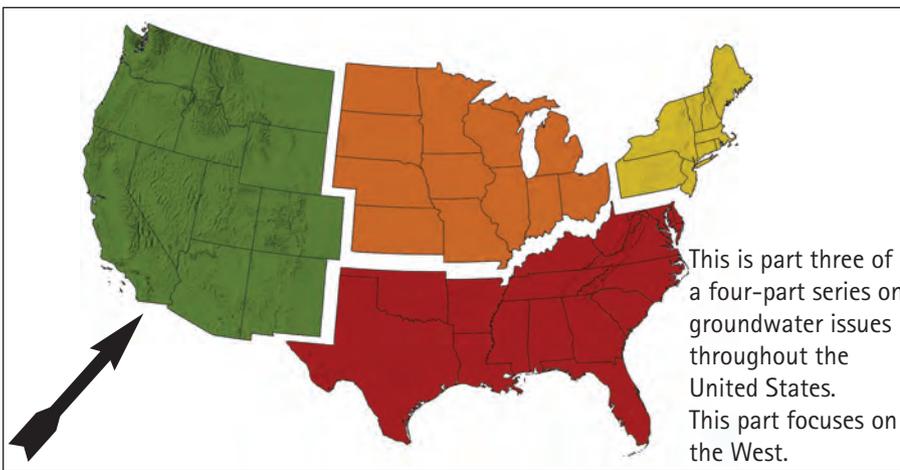
Further west, the Washington State Supreme Court ruled that Kittitas County failed to protect groundwater resources when it reviewed and approved subdivision requests, allowing developers to evade legal limits on the use of exempt wells. At the same time, the county is investigating whether the

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NGWA will present a series of Webinars that will address "Aquifers of the United States" that will begin on November 9. Check www.NGWA.org for registration information.



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Washington State Department of Ecology violated the law as the agency worked to impose groundwater well restrictions in 2009.

The agency implemented a groundwater well moratorium that went into effect on July 16, 2009, for Upper Kittitas County, which sits at the head of the Yakima River Basin. This struck a blow to the housing market and local economy in the blue-collar county of 40,900.

Along with groundwater sustainability, restricting the use of exempt wells to manage population growth lurks beneath the surface in both New Mexico and Washington, playing a central role in this third part of a four-part series looking at groundwater issues in the United States.



The backdrop of New Mexico has changed significantly since the Bounds family secured their water right in 1869.

Their priority right in the Upper Mimbres Basin to irrigate 157.63 acres of land came at a time when the then Territory of New Mexico was thinly populated and most of the water was used for agriculture and ranching. Today, New Mexico has more than 2 million residents and is one of the fastest growing states in the nation.

The entire Mimbres Basin has been adjudicated and "closed," thus the scope and priority of all water rights in the basin have been determined by judicial proceeding, but domestic wells were not included in the adjudication.

Bounds claims these domestic wells drilled in the Mimbres Basin caused the water level in the Mimbres River to decline. While the Grant County District Court found that Bounds' water rights had not been impaired, it ruled in favor

of Bounds on his declaratory action condemning the exemption of domestic well applications as unconstitutional.

"The bottom line is you have to find a legitimate water right," states Steve Hernandez, attorney for the Bounds. "We are not going to create a water right out of thin air to create a domestic well. *Bounds* had to happen because no one would do anything. Sometimes you have to push the issue to a point where someone has to listen to you."

Numerous legislative bills have been introduced since 2001 to change the current domestic well statute. These attempts have proven unsuccessful in the New Mexico Legislature. With the state engineer office understanding the need to protect senior users against impairment but unable to deny domestic well applications, it reduced the maximum amount of water pumped under new permits.

In 2006, an administrative change was implemented that decreased the 3 acre-feet per year (AFY) limit to 1 AFY. However, the state engineer didn't impose a meter requirement on a domestic well serving a single household (without meters the true withdrawals by exempt wells are unknown).

The state engineer also added, "As hydrologic conditions require, the state engineer may declare all or part of a stream connected aquifer as a domestic well management area to prevent impairment to valid, existing surface water rights." DWMA's are limited to .25 AFY and require metering. In addition, the state engineer's office can also declare a "critical management area" if it determines further protection is required.

"Some bills have been spurred by organizations who want to stop continued growth in New Mexico," says Marvin Magee, owner of Maverick Drilling in

Mesilla Park, New Mexico, and president of the New Mexico Ground Water Association.

"We have been successful in stopping these bills. The NMGWA supports reasonable limits on groundwater withdrawals only after groundwater studies in each area have been completed."

A domestic well for New Mexicans living in rural areas has been a way of life for generations. As of 2009, one in five New Mexicans was self-served by a domestic well.

The Bureau of Business and Economic Research at the University of New Mexico released population predictions through the year 2060 that anticipate further concentration of the "New Mexico population into 'centers' in the Albuquerque metro area, Las Cruces, and Santa Fe."

In the report, migration is cited as the "real impetus in New Mexico population dynamics," and from 2001 to 2005 "sustained growth has been the defining characteristic of the New Mexico population."

The current drought and others since 2002 in New Mexico and the southwest are placing much stress on surface supplies, with farmers and urban areas turning to groundwater to supplement their allotment.

"Probably 90 percent of the wells I drill are exempt," says Alan Eades, CWD/PI, partner of Eades Drilling & Pump Service in Hobbs, New Mexico. "Regardless of the ruling in the *Bounds* case, people are still going to need water, and I think that the ruling will force a legislative fix."

"The sad part of all of this is that the vast majority of exempt well owners are very responsible water users and their rights are being threatened due to a few not being responsible."

With the New Mexico Supreme Court set to hear oral arguments this month, a ruling can take anywhere from three months to a year, according to the NMGWA's attorney.

Meanwhile, the National Ground Water Association filed a "friend of the court" brief as an association with expertise and experience in groundwater science on July 29 (see sidebar).

A 400-foot, 6-inch domestic exempt well (6 gpm) is drilled outside of Cle Elum, Washington, in Upper Kittitas County.

Photo courtesy Bach Drilling



“One of the most important aspects to the *Bounds* case is the fact that we have a serious risk to the water well drillers in that state by virtue of making a very complex permit process for domestic wells that hadn’t existed previously,” explains Don Gregory, who practices law at Kegler, Brown, Hill & Ritter in Columbus, Ohio, which serves as general counsel to NGWA.

“But our overriding concern is that there is not adequate science in the record to support throwing out 65 years of water well law in New Mexico. We ought to have a science-based analysis of what is happening with the aquifers and the water well drilling permits to get to a science-based conclusion.”

Beyond the possible administrative burden of having to formally approve domestic well permits, the *Bounds* decision could impact plans for land development and rural land values.

It’s more cost effective for developers to drill domestic wells than it is to buy and transfer water rights. In populated areas such as Albuquerque and Santa Fe, or in areas with limited water sources, water rights are expensive and sellers are hesitant to cut these rights from their land. The question then becomes should the state engineer make decisions based on land planning concerns?

Santa Fe requires developers to purchase water rights for proposed subdivisions before the city allows them to set their subdivision plans, which in turn has limited the amount of growth and new wells drilled.

“This case has caught the attention of many throughout the United States, and according to some, the possible outcome could have repercussions nationwide,” Magee says. “A decision in favor of

NGWA Files Brief in New Mexico *Bounds* Water Rights Case

The National Ground Water Association filed a brief on July 29 with the New Mexico Supreme Court, arguing that the state’s current laws and regulations regarding domestic water wells adequately protect water rights.

In doing so, NGWA supports a Court of Appeals ruling that overturned a July 8, 2008 decision by the Grant County District Court in the case of *Bounds v. D’Antonio*. The district court decision declared that New Mexico’s domestic well statute unconstitutionally violated the due process rights of water right owners.

The district court also ordered the state engineer to process applications for domestic wells in the same manner as other applications, such as commercial applications, which could result in significant costs and delays to people seeking domestic wells. The lead plaintiff, Horace Bounds Jr., argued that his surface water rights were affected by groundwater withdrawals by domestic wells.

Not a direct party to the case, NGWA filed a “friend of the court” brief as an association with expertise and experience in groundwater science.

NGWA’s brief states:

- The plaintiffs failed to provide scientifically supportable evidence to justify overturning the state’s laws and regulations governing water rights.
- New Mexico’s current laws and regulations adequately protect water rights.

NGWA notes in its brief that even the district court which ruled in favor of the plaintiff found that *Bounds* “provided absolutely no evidence of monetary damages, and *Bounds* provided no substantial evidence of impairment from domestic wells.”

Moreover, NGWA’s brief states: “There are many other tools available to the State and to the State Engineer that could be effective in protecting water rights, and these tools could be implemented within the framework of the current system.”

In summary, NGWA concludes: “This case brings to mind the age-old maxim that bad facts make bad law; decades of precedent and water planning policy should not be tossed aside without a sufficient scientific basis.”

To download a copy of NGWA’s brief, visit the “Press room” under the Media Center tab at www.NGWA.org.

Bounds would devastate the drilling industry in New Mexico.”



Jeremy Bach was finishing up drilling a 6-inch domestic well on the north side of Kittitas Valley when he first heard the Washington State Department of Ecology’s groundwater well moratorium went into effect.

“Once I found out, the first thing that I thought was how it would directly affect all of the customers I had on my drilling schedule,” recalls the vice president of Bach Drilling in Ellensburg, Washington. “Next thought was how we could start fighting it.”

Located in central Washington, Kittitas County and the Washington State Department of Ecology spent two years working to establish a permanent rule to manage exempt groundwater wells. More information was sought about the aquifers and water supplies in Upper Kittitas County, which sits at the head of the Yakima River Basin.

The new rule would have established interim and long-term management

measures and calls for development of a comprehensive groundwater study. However, on July 16, 2009, the Department of Ecology announced that it was unable to gain a commitment from the Kittitas County Board of Commissioners to move forward with a revised memorandum of agreement and alternative rule approach. The Department of Ecology filed an emergency rule that closed Upper Kittitas County to all new groundwater withdrawals that went into effect on July 16, 2009, and remains so to this day. The county is investigating whether the agency violated the law.

To manage groundwater resources in Upper Kittitas County, the state agency also adopted a rule that establishes a pathway for developers, contractors, and individuals to construct water budget neutral projects by identifying water rights that can be placed into the trust water right program to offset their consumptive use of groundwater.

“I wish to heck that groundwater in the western states was a riparian right

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and not a first in right, first in time,” says Glen Smith, the Washington State Ground Water Association government affairs coordinator whose committee offered alternative considerations to the groundwater well moratorium. “The riparian dealing with river flow is brilliant because you have a situation whether you’re a small user, big user, in lean water times everybody goes by the rule of okay, we need to meter back, and everybody gets along.

“But when you’ve got the mentality of ‘I was here first and you’re using my water’ with a growing population, you’ve got a problem.”

Like New Mexico, Washington has grown significantly, from 1.9 million in 1945 to more than 6.7 million today. The WSGWA predicts there are more than one million users of exempt wells within the state.

“These small wells use less than one percent of the water used in the state,” says Scott Fowler, CWD/PI, president of Dahlman Pump & Well Drilling Inc. in Burlington, Washington. “But the issue is being raised as a problem by some. The fact is that the individual

NGWA Ground Water Expo Workshop to Focus on Recent Key Actions Affecting Exempt Wells in the West

This workshop at 4 p.m. on November 29 will outline state “exempt” well laws, provide the hydrologic framework within which these wells are utilized, highlight some recent actions that may impact the future use of these systems, and offer tools to assist local efforts.

Presented by Jeremiah Thomas of Kegler, Brown, Hill & Ritter in Columbus, Ohio, which serves as general counsel to NGWA, along with NGWA Director of Science and Technology David R. Wunsch, Ph.D.

Visit www.groundwaterexpo.com to register.

homeowners are not united to fight for their rights. Those who have wells got their piece of the pie and those who may need water will not see the problems with accessing it until they start the process.”

The state agency has continued to say the Upper Kittitas County moratorium was needed to protect senior water rights and instream flows from the proliferation of permit-exempt wells that were not being properly reviewed and managed. Kittitas County commissioners are now concerned that the moratorium will expand to other parts of the state.

In the Lower County, some have already begun setting up water banks in anticipation of that style of groundwater

mitigation and water budget neutrality.

Nevertheless, the effects of the moratorium in the Upper County are apparent to the 40,900 residents. Less land development has crippled the cottage industry and local economy.

Bach Drilling, a fifth-generation family business since 1894, used to keep one drill rig in the Upper County full-time. The moratorium has lopped off half of its business.

“We’ve just had to switch gears and work in other counties,” says Jeremy Bach, who is a board member of the WSGWA and its legislative committee.

“We’re spending a lot more time on the road than we used to, but we don’t have a choice. If you don’t do that, you’re sitting around.” *WWW*