



By Jeremiah Thomas and Donald Gregory

# In Search of *Bounds*

New Mexico Supreme Court upholds state's domestic well permit exemption.

The New Mexico case of *Bounds v. State of New Mexico* finally reached its climactic conclusion in July as the New Mexico Supreme Court handed down an opinion upholding the constitutionality of the state's long-standing domestic well permit exemption.

The backdrop for *Bounds*, referred to in previous articles as *Bounds v. D'Antonio* in honor of the former New Mexico state engineer, was the prior appropriations rule as embodied in the New Mexico state constitution.

The prior appropriations rule dictates 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 diverting groundwater.

Following most applications, the New Mexico state engineer's office is required to consider denying the application, based upon scarcity and the rights of prior appropriators. When prior appropriators are identified, they are given an opportunity to contest the application. But an application to drill a well for domestic use is not subject to the same procedure. Such applications are automatically approved due to a long-standing statute.

In 2008, the Grant County Circuit Court declared the statute violated the state's constitution by depriving holders

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of senior water rights of due process protections. In October that same year, the New Mexico Court of Appeals overturned the trial court's holding. The court reasoned the state's constitution does not require any evaluation of water availability or impairment prior to issuing a well permit, and prior appropriators have the ability to obtain relief after a well permit is issued if any actual injury can be shown. Horace Bounds, the plaintiff in the case, then appealed to the New Mexico Supreme Court.

### Lack of Evidence

At that time, the National Ground Water Association filed a friend of the court brief with the New Mexico Supreme Court, supporting the state engineer and the constitutionality of the domestic well permit exemption.

NGWA was particularly concerned New Mexico courts might overturn long-standing water permitting procedures despite a lack of demonstrable scientific evidence challenging the validity of the law.

As the trial court noted and the state court of appeals confirmed, the plaintiff failed to show any injury to his own water rights. And neither court con-

ducted any extensive analysis of the available hydrological tools in order to determine the validity of their findings.

Given the position of NGWA to address matters of hydrological science, it hoped to provide the New Mexico Supreme Court with vital insight regarding the types of information that can and should be considered whenever a state is making important decisions or changes regarding water law.

The contents of NGWA's brief foreshadowed the state supreme court's decision and many of NGWA's positions were adopted by the court. Most notably, the court agreed it should disregard arguments that the state's domestic well permit exemption violated the state constitution's protection of prior appropriators due to a complete lack of scientific evidence to support that assertion.

The court also reaffirmed the responsibility of the legislature, the state engineer, and the courts to protect senior water rights, using the existing regulatory tools and scientific analysis available to each.

NGWA's brief also advised the court that a domestic well permit does not allow the permit holder to use water that had been appropriated by a prior user under New Mexico law. The brief stated:

While it is conceded that the purpose of a water permit is to provide an avenue through which the well owner can access the water supply, the water supply is itself unaffected by the simple existence of the permit.

NGWA's brief went on to note:

There is no need to implement a new permitting system unless it can be shown that the other procedural

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protections available to prior appropriators are both inadequate to protect their rights and incapable of redress through better enforcement or better management.

The brief also showed many hydrological tools are used by the New Mexico state engineer to protect senior water rights. As stated in the brief:

The State Engineer is empowered to prevent even the domestic well permit holder from using water without separately obtaining the rights to do so.

The New Mexico Supreme Court largely adopted NGWA's position. The court explored in some detail "the difference between a permit issued pursuant to the domestic well statute, and the subsequent use of that permit subject to priority administration."

After examining the adequacy of the other procedural protections available to prior appropriators, the state supreme court determined:

The same protections for senior users apply against domestic wells as against any other junior water right. and

A water user who is able to show actual or impending impairment can make a priority call against junior users and, if that fails, the water user could then file an as-applied challenge against the domestic well statute.

The court specifically urged the state engineer to continue "to fulfill its superintending responsibility by applying priority administration for the protection of senior water users."

### The Science Exists

Of course, NGWA's brief went much further than simply describing the procedural and hydrological tools in use in New Mexico. NGWA's analysis also reminded the court a rich body of hydrological science exists and is well suited to inform regulators who endeavor to make water decisions.

NGWA's brief discussed at length how the *Bounds* case contained little scientific backing and yet called for far-reaching change to the state's laws. With so little scientific support, NGWA took the position *Bounds* was an ill-suited vehicle for overturning the state's domestic well exemption. NGWA noted that "despite the vast library of hydrological

science available to Bounds, he was unable to prove damage in this case."

The brief went on to urge additional regulatory protection is "only necessary where a scientifically proven threat exists" to senior water rights. With so much available science, and so little scientific discussion in the *Bounds* record, NGWA reasoned a sweeping change to existing New Mexico law was not warranted.

Not surprisingly, the New Mexico Supreme Court agreed. The court noted hydrological experts employed by Bounds in connection with the case "did not make any calculations or present any models to quantify the effect of domestic wells on Bounds' water rights."

The court went on to "reject this kind of conclusory statement as a substitute for scientific analysis" and stated:

Without any demonstration of actual impairment or imminent future impairment to Bounds' water rights, or at least something more than a speculative inference from the fact of a closed and fully appropriated basin, the remaining due process analysis is straightforward.

The court then concluded that without any such hydrological evidence calling into question the domestic well permitting statute, the statute must be found constitutional.

Following the case, there is no doubt "tensions" will remain with "competing demands for [water] in the arid west." And while the *Bounds* decision closes argument regarding the facial validity of the New Mexico domestic well permitting statute, we don't anticipate this decision slowing discussion in New Mexico or other states where water is scarce.

The *Bounds* court itself left the door open for future cases so long as prior appropriators can show "actual impairment" of their water rights. Also, the court urged the state legislature to continue to evaluate water regulation and positively cited recent legislation that tightens permitting restrictions for clusters of domestic wells.

We'll leave those battles for another day, but in the case of *Bounds*, score one for a scientific and evidentiary approach to water rights. WWJ

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