



SIXTH JUDICIAL DISTRICT
COUNTY OF GRANT
STATE OF NEW MEXICO

FILED IN OPEN COURT

DATE 7/22/08 at 10:24 am

HORACE BOUNDS, JR. and JO BOUNDS,
Husband and Wife; and the SAN LORENZO
COMMUNITY DITCH ASSOCIATION; and
Intervenor, NEW MEXICO FARM & LIVESTOCK
BUREAU

J. C. H.
DISTRICT JUDGE

Plaintiffs,

vs.

THE STATE OF NEW MEXICO, and
JOHN D'ANTONIO, New Mexico State Engineer,

No. CV-2006-166

Defendants.

FINAL JUDGMENT AND ORDER

THIS MATTER came before the Court on July 8, 2008 for hearing on Defendants' Motion for Summary Judgment and separate Motion for Reconsideration; the parties being fully represented by their attorneys at the telephone conference hearing; the Court having heard oral argument, reviewed the pleadings, and fully considered the matter, entered its Decision on July 10, 2008, which findings of fact and conclusions of law are hereby adopted and incorporated as if fully set forth herein.

IT IS ORDERED AND DECREED Defendants' timely Motion for Reconsideration of the Court's April 24, 2008 order is denied.


IT IS FURTHER ORDERED AND DECREED NMSA 1978, Section 72-12-1.1 is declared to be unconstitutional as a matter of law and Defendant State Engineer shall hereafter administer all applications for domestic well permits the same as all other applications to appropriate water.

IT IS FURTHER ORDERED AND DECREED Plaintiff Jo Bounds is dismissed as a party with prejudice.

IT IS FURTHER ORDERED AND DECREED Plaintiff San Lorenzo Ditch Association is dismissed as a party without prejudice.

IT IS FURTHER ORDERED AND DECREED that, because there is no evidence at this time to support Plaintiff Horace Bounds' 42 U.S.C. §1983 civil rights and takings claims, no injunction will be issued involving said claims at this time, which claims are hereby dismissed without prejudice.

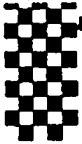
IT IS FINALLY ORDERED AND DECREED each party shall bear their own costs and fees.


By TC 7/22/08
J. C. ROBINSON
DISTRICT JUDGE, DIV. III

Certificate of Mailing

I hereby certify a copy of the foregoing was mailed to all parties of record this 22nd day of July, 2008.


Trial Court Administrative Assistant



STATE OF NEW MEXICO
COUNTY OF GRANT
SIXTH JUDICIAL DISTRICT

FILED IN OPEN COURT
DATE 7/10/08 at 1:42 pm

No. CV-2006-166

HORACE BOUNDS, JR. and JO BOUNDS,
Husband and Wife, and the SAN LORENZO
COMMUNITY DITCH ASSOCIATION

JCRJ
DISTRICT JUDGE

Plaintiff,

vs.

THE STATE OF NEW MEXICO, ex. rel.,
JOHN D'ANTONIO, New Mexico State Engineer,

Defendants.

DECISION

THIS MATTER came before the Court on Defendant's Motion for Summary Judgment, Plaintiffs' Response, Farm Bureau's Response; Defendants' Reply, Defendants' Motion for Reconsideration and Plaintiffs' Reply on July 8, 2008. All parties appeared by telecon. The Court being advised FINDS:

1. Horace Bounds, Jr. owns irrigation water rights for 157.63 acres with an 1869 priority in the Upper Mimbres.
2. Jo Bounds has no ownership interest of record in the water rights.
3. Farm Bureau represents 14,000 farm and ranch families having an interest in this action.
4. The entire Mimbres Basin has been closed since 1972. In a closed basin there is no water available for appropriation.
5. The entire basin has been adjudicated, including all ground water and surface water.

6. The adjudication did not include domestic wells or livestock uses.
7. Inter alia, 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.
8. 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.
9. The appropriative right is property. It is a property right of high order. Such a right is real estate. *Walker v. United States* 142 NM 45, 162 P3d. 882 (2007)
10. 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.
11. 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 NM 521, 247 P. 550 (1926).
12. The 1910 Constitutional Convention considered water rights, including domestic use.
13. The 1910 Constitutional Convention refused to adopt a hierarchy of appropriation by use and enacted appropriation based on priority in time.
14. Water is, and has been, a critical resource. The Mimbrenos 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.

15. 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.

16. 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.

17. 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.

18. 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 NM 592, 686 P2d. 934 (1984)

19. §72-12-1.1 lacks any due process provisions to protect senior water rights from out of priority review of domestic well applications.

20. 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, P.4

21. Bounds does 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.

22. Water in New Mexico is a finite resource and has long been recognized as such.

23. 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.

24. 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.

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 the senior water right owner's property.

26. 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.

b) OSE's authority is limited and without discretion.

27. 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.

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.

28. *Smith* states the Declaratory Judgment Act is to 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."

29. 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.

CONCLUSION

1. Whether §72-12-1.1 is constitutional is question of law.
2. §72-12-1.1 is unconstitutional because it creates an impermissible exception to the priority administration system created by N.M. Constitution Art. XVI §2.
3. The OSE shall administer domestic well applications the same as all other applications to appropriate water

PLAINTIFF'S OTHER CLAIMS

In his response, Plaintiff agrees the dispositive issue in this case is the constitutionality of §72-12-1.1. Plaintiff argues, without reference to facts, his other claims should not be dismissed. There are no genuine issues of material fact as to the following claims:

1. Jo Bounds has no record ownership interest in the water rights and is dismissed as a party.
2. San Lorenzo Ditch Association is not a party because it has not participated in this case. Bounds has no actual or apparent authority to represent San Lorenzo Community Ditch. San Lorenzo Community Ditch is dismissed as a party.

- 3. There is no evidence to support a 42 USC §1983 claim.
- 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 be issued.

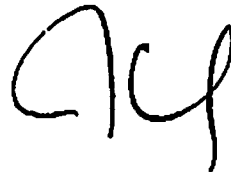
6. Plaintiff's claims are dismissed without prejudice. This decision is based on the facts, or lack of facts, in this case. The Court has decided the dispositive issue and, therefore, the other claims are not ripe for hearing. Plaintiff has the right to bring claims in the future if facts so warrant. Hopefully, in such event, the OSE will provide a hearing fully complying with the rights of procedural and substantive due process. If OSE complies with its constitutional and statutory duty to protect senior water right owners' property, future litigation should not be necessary.

MOTION FOR RECONSIDERATION

- 1. Defendants' timely filed Motion for Reconsideration (or editing) of the April 24, 2008 order is denied.

Plaintiffs' counsel shall prepare an appropriate order, submit to counsel and to the Court pursuant to LR6-208(F)

IT IS SO ORDERED.



J. C. ROBINSON
DISTRICT JUDGE, DIV. III

I hereby certify a copy of the foregoing was mailed to all parties of record this 10th day of July, 2008.



Trial Court Administrative Assistant