Domestic Wells

"As more and more domestic wells are granted, the numbers will eventually lead us back into a shortfall. What do we do then? Go back and ask the Legislature for more money to further ensure compact deliveries because more domestic wells are being granted?"

Attorney Steve Hernandez, discussing the Pecos River Basin (October 2008)

The domestic well statutes direct that the State Engineer "shall" issue a permit for certain types of temporary or low volume wells, including wells for household use. For the past fifty-five years, the Office of the State Engineer (OSE) has interpreted this to mean that such permits are granted with no evaluation, public notice, or hearing.

In August of 2008, Judge Robinson, of the 6th Judicial District of New Mexico, ruled that the domestic well statute is unconstitutional. The ruling came in a suit initiated by Horace Jr. and Jo Bounds, who irrigate land in the Mimbres River Basin under water rights exercised since 1869. The Mimbres Basin has been closed to any new requests to appropriate water since 1972, and an adjudication of Mimbres water rights was completed in 1993. Nevertheless, the Bounds complained that since the completion of the adjudication, forty-five new domestic wells had been permitted and drilled in the area, putting the availability of their water at risk. Judge Robinson found that this system of permitting domestic wells was inconsistent with the state constitution's requirement that all water be administered according to the prior appropriation system. The OSE appealed the case, and the Court of Appeals reversed the district court in 2010. This decision was appealed to the New Mexico Supreme Court.

The Supreme Court affirmed the appellate decision in July of 2013, holding the domestic well statute does not violate the doctrine of prior appropriation as set forth in the New Mexico Constitution. It held that domestic well statute "dictates the procedure for how one acquires a permit to drill a domestic well." The Court expressly set forth that domestic well rights are "inherently conditional" on the "availability of water" just like any other water right. Accordingly in the event of a water shortage, the priority administration doctrine dictates that a junior domestic right may be curtailed or cut off to protect senior users.

History

New Mexico's first groundwater statute was enacted in 1927. It directed the OSE to identify groundwater basins and to administer water use under the prior appropriation system. At that time, approximately 1/8 of all water used in the state was groundwater. However, advances in well-drilling technology began to provide water users access to more groundwater so that by the early 1950s groundwater comprised half of all water used in the state. The administrative burden of the OSE grew proportionally. As groundwater basins were identified, more well applications had to be evaluated for the possibility of impairment of other water rights, more

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notices of applications published, and more hearings held. Recognition of the interconnectedness of surface-water and groundwater made the determination of "impairment" even more complex. For more information, please see the chapter "Groundwater" in this edition of *Water Matters!*.

In 1943, the OSE stopped requiring publication of notice for domestic well applications. The legality of treating domestic well applications differently was questionable, so the legislature acted to confirm the OSE's judgment that certain types of wells did not require a full evaluation because of minimal production or temporary use. Thus, in 1953, the first version of today's domestic well statute was enacted.

The 1953 statute directed the OSE to issue a permit to any applicant for a well for watering livestock, for non-commercial irrigation of no more than one acre, or for domestic use; or for temporary use (no more than one year) for mining or prospecting. A permit typically allowed use of up to three acre-feet per year of water. Only a temporary well application would be subject to a hearing and only if the OSE believed it would permanently impair existing rights. The statute remained substantially unchanged for nearly forty years.

Circumventing Management Efforts

A domestic well may be the only feasible source for household water in some rural areas of New Mexico. Average household use in New Mexico is approximately 1/4–to1/3 acre-foot per year. In this context of high utility, low volume, and widely dispersed usage, the automatic approval of domestic well applications made sense. However, New Mexico's population has more than doubled since the passage of the domestic well statute and is mostly concentrated in and around urban areas. This concentrated growth has brought intense pressure on local water supplies, necessitating careful water management. The unchecked development of domestic wells can make this difficult.

Before 2013, water for new suburban households might come from an extension of a municipal system, a new community well system, or domestic wells. To connect to a municipal utility, a developer might have to pay a fee, acquire water rights, or just wait until the utility can provide service. Community well systems are subject to state and federal drinking water regulations and require water rights for their supply. However, every subdivision lot was entitled to a domestic well, subject to municipal or county regulations. Developers have taken advantage of the domestic well law to avoid the difficulty of dealing with water rights or complying with drinking water regulations. But the additional withdrawals from the common water supply and the cumulative impacts of domestic wells cause concern among existing users.

Subdivision Act and 1995 Revisions

Subdivision development outside of municipalities is governed by the local county commissions through their zoning authority and the Subdivision Act. The Subdivision Act requires counties to adopt appropriate rules of procedure for approval of subdivision proposals. Prior to 1995, the Subdivision Act required only that the developer provide information about local water availability and how water would be supplied. The OSE evaluated the information for completeness and accuracy. It remained up to the county commission to decide whether the water supply plan was acceptable.

The legislature amended the Act in 1995. Those revisions require counties to develop rules for quantifying a subdivision's water needs, assessing the availability of water to meet those needs, and conserving water. The revised statute requires the OSE to evaluate

whether a subdivision's water supply proposal conforms to county rules, whether the developer can fulfill the proposal, and whether water is available to fulfill the proposal. If the developer proposes to use domestic wells, the OSE does not evaluate whether the wells will impair other users.

The 1995 revisions made the OSE's approval a mandatory prerequisite of subdivision approval. In 1997, however, the legislation was amended and now a county commission can approve a subdivision against the OSE's recommendation.

Recent Changes

Two bills were signed into law following the 2013 legislative session. Both bills prevent the development of domestic wells for subdivisions and require that developers prove they have acquired an adequate water supply before the subdivision plans are approved. The goal of the bills is to protect the rights of prior water appropriators.

The first bill added a requirement of proof of adequate water supply on lands from which irrigation water rights have been severed. It provides two procedural options for a developer seeking approval for a proposed subdivision of land from which irrigation rights have been severed. NMSA 1978, § 3-20-9.1.

One option requires the developer to provide proof of a commitment to provide service from a water provider and a verification from the State Engineer that the commitment fulfills the two requirements: a) whether the developer can furnish water sufficient in quantity to fulfill the maximum annual water requirements of the subdivision; and b) whether the developer can fulfill the proposals in the developer's disclosure statement concerning water, excepting water quality.

The other option requires the developer to supply proof of a water right secured by a permit other than one for a domestic well. Prior to approval, the State Engineer must determine whether the amount of water secured by the permit is sufficient to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses.

On August 15, 2006, after a series of public hearings, the State Engineer adopted extensive new regulations for the administration of domestic well permits.

The second bill amends NMSA 1978, § 47-6-11.2 and relates to the approval of subdivisions containing ten or more parcels, any one of which is two acres or less in size. The statute sets forth two options for subdivision approval. The first option requires a proof of service from a water provider and verification from the State Engineer that the developer can fulfill the requirements of Paragraph (1) of Subsection F. The second option requires a developer to supply proof of a right to use water from a source other than a domestic well before a subdivision can be approved.

Both statutes were enacted to safeguard senior water rights from possible encroachment resulting from domestic well use. The first statute seeks to discourage the practice of "double dipping," whereby a developer purchases land with water rights, subdivides the land, then severs and sells the water rights to a third party. New landowners, with no appurtenant water, resort to drilling individual domestic wells for each subdivided plot. The second statute precludes dense clusters of domestic wells and their potential for adversely affecting senior appropriators.

Domestic Well Management Regulations

On August 15, 2006, after a series of public hearings, the State Engineer adopted extensive new regulations for the administration of domestic well permits. N.M. Code R. § 12.27.5. On October 31, 2011, several amendments to NMAC § 19.25.5 were adopted.

Under the regulations, a domestic well permit allows use of up to one acre-foot per year for a single household or up to three acre-feet per year in areas where an applicant can show that the total diversion will not impair existing rights. Where a right serves multiple households, the permitted diversion shall not exceed one acre-foot per year per household and shall not exceed three acre-feet per year for a combined diversion serving three or more households. Valid water rights may be transferred from elsewhere within the basin into a domestic well, but no well may divert more than three acre-feet per year. Public notice is still not required, and there is no opportunity for protest to any domestic well application. No change to the point of diversion or place or purpose of use is allowed in connection with these wells, except under a court-approved water rights settlement or an OSE-approved regionalization plan of a mutual domestic water consumers association. The regulations include a new fee structure.

A domestic well application may be approved, rejected, or approved with conditions. In locations where a court order restricts water use or the government has recommended against drilling wells due to water quality concerns, the application may be rejected. Conditions may be imposed on a permit, such as minimum distance from adjacent wells, metering and monitoring requirements, compliance with local ordinances, restrictions on purpose of use, or other conditions as the situation warrants. A permit may be cancelled if a permit holder fails to comply with conditions.

To prevent impairment of surface rights where groundwater is connected to a stream, the OSE may declare a domestic well management area (DWMA) and impose further restrictions on domestic wells. Draft guidelines for administration of a DWMA must be reviewed at a public hearing. Within a DWMA, a domestic well may divert only 1/4 acre-foot per year per household (or less, per local guidelines), or up to three acre-feet per year total if the well serves multiple households. All wells must be metered. For approval of a new well within the DWMA, the OSE may require the transfer of a valid water right from another user within the DWMA. To date, the OSE has not designated any domestic well management areas.

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Municipalities also have the authority to regulate the drilling of domestic wells. In 2001, the legislature enacted a new section of the municipal code, NMSA 1978, § 3-53-1.1, giving municipalities the authority to restrict drilling of domestic wells by ordinance. Within a municipality that has enacted such an ordinance, an applicant for a domestic well must obtain a permit from the municipality after receiving a permit from the OSE, NMSA 1978, § 72-12-1.1. The municipality may refuse to permit the domestic well only if municipal water lines run within 300 feet of the property, the cost to the applicant of hook-up is no more than the cost of drilling the well and the municipality can provide water service within ninety days. The New Mexico Supreme Court confirmed the authority of municipalities to restrict domestic wells in the 2007 case *Stennis v. City of Santa Fe.*

Legislative Initiatives

There have been several bills in recent years proposing changes to domestic well administration. Some would have given the OSE authority to declare critical management areas (CMAs) and to implement a more restrictive permitting process where domestic wells are impairing other water rights (similar to the Domestic Well Management Areas described above). Others would have changed the current statute's wording from "the State Engineer *shall* issue a permit" to "the State Engineer *may* issue a permit," allowing the OSE to

develop procedures for restricting domestic well permits where appropriate. Other states have legislated a special status for domestic wells that limits their use and exempts them from priority administration.

Status of Domestic Wells

The OSE's records show a recent decline in the issuance of domestic well permits throughout New Mexico. Between 2009 and 2011, District I domestic well technicians issued only 2,377 permits. District I serves Albuquerque and Santa Fe. This reduction is a direct result of the continued decline in the housing market. In contrast, applications to drill replacement domestic wells have increased due to the drop in groundwater levels. District V in Aztec also experienced a decreased demand for domestic well permits. Instead, technicians have received more requests to transfer surface-water rights.

The OSE's records show that 26 percent of the estimated 137,000 domestic wells statewide (year 2000 data) are within one mile of a perennial stream. Withdrawals from these wells may have an almost immediate impact on streamflow. (For hydrologic modeling purposes, the OSE assumes that wells within one mile of a stream have a 100 percent same year effect on streamflow.) An additional 27 percent of domestic wells are within five miles of a perennial stream. The impact of these wells is delayed over time but nevertheless eventually reduces streamflow. Former State Engineer Tom Turney estimated in 2002 that ultimate cumulative depletions from domestic wells on the Rio Grande would be 36,000 acre-feet per year. These impacts affect senior water rights holders, including Pueblos and tribes, and jeopardize fulfillment of the State's compact obligations to Texas. In 2005, the OSE estimated that domestic wells in the Rio Grande Basin withdrew 24,556 acre-feet of water. The OSE continues to process thousands of domestic well applications each year—4,934 in fiscal year 2007. As a result of the current economic downturn, the number of applications processed in the last couple of years has dropped dramatically for the time being. By October 2012, there were an estimated 160,000 domestic wells throughout the state.

The legislature and the State Engineer both have a role in regulating the use and proliferation of these wells where the groundwater tables are at risk: the legislature through enactment of new regulations such as the subdivision statutes of 2013; and the State Engineer through the development and enforcement of regulations.

Conclusion

Domestic wells are important part of the state's water supply, especially in rural communities and as such are permitted upon request. The legislature and the State Engineer both have a role in regulating the use and proliferation of these wells where the groundwater tables are at risk: the legislature through enactment of new regulations such as the subdivision statutes of 2013; and the State Engineer through the development and enforcement of regulations. The goal of these actions is to protect senior surface and groundwater right owners from depletions and to protect the aquifers upon which domestic wells and others rely.

By Paul Bossert, Esq. (2008)

Latest Update by Sarah Armstrong, University of New Mexico School of Law, Class of 2015 (2013)

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