Domestic Wells

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. (NMSA §72-12-1.1 through §72-12-1.3) For the past 55 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, 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, 45 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 October 2010. The Bounds and the New Mexico Farm and Livestock Bureau have appealed to the Supreme Court and as of the date of this publication, the decision as to whether the appeal will be heard is still pending.

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 on 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 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.

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

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)
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. The permit 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 - 1/3 acre-feet 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 availability of domestic wells makes this difficult.

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. However, every subdivision lot is 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 (NMSA §47-6-1 through §47-6-29). 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

The Legislature enacted a new section of the municipal code in 2001 (§3-53-1.1), giving
within a municipality that has enacted such an ordinance, an applicant for a domestic well must now obtain a permit from the municipality after receiving a permit from the OSE. 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. In 2007, in the case of Stennis v. City of Santa Fe, the New Mexico Supreme Court confirmed the authority of municipalities to restrict domestic wells.

Domestic Well Management Regulations

In August, 2006, after a series of public hearings, State Engineer John D’Antonio adopted extensive new regulations for the administration of domestic wells. Under these regulations, a domestic well permit allows use of up to one acre-foot per year (per household, up to three acre-feet total, if the well serves multiple 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. There is still no notice to the public required nor protest allowed on any domestic well application. Therefore, no change to the point of diversion or place or purpose of use is allowed, 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 surface 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 use 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 are required to 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.

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 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 in New Mexico

The OSE’s records show that 26% of the estimated 137,000 domestic wells state-wide (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% same year effect on streamflow.) An additional 27% 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.

Court of Appeals

The New Mexico Court of Appeals issued its ruling on October 29, 2010. While acknowledging the potential problems created by domestic wells – a proliferation of domestic wells can adversely impact senior water rights, unacceptably affect surface and groundwater supplies, interfere with the ability of cities and counties to engage in effective and orderly planning for growth – the Court nonetheless held that the domestic well statute is not facially unconstitutional. In spite of the language in the statute, “the State Engineer shall issue a domestic well permit” upon the filing of the application, the Court found that the State Engineer has the discretion to exercise regulatory authority to protect senior water rights from impairment. Further, the State Engineer has a duty to do so.

The opinion is interesting in illuminating the Court’s view of the priority administration doctrine: “It is up to the Legislature and the State Engineer to create an efficient, effective, and fair administrative process to reach the required balance and to protect senior water rights…. [T]he priority doctrine is not a system of administration. It 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 holds that the New Mexico Constitution establishes a broad “priority principle,” requiring the Legislature to enact laws to set out a process for adhering to the principle. “The State Engineer must see to it that senior water rights are not impaired by new appropriations.” The State Engineer is to adopt rules and regulations. A fair reading of the opinion is that the State Engineer’s 2006 domestic well regulations are a step in the right direction. Given the problems created by domestic wells that the pueblos and tribes, counties and cities complain of and which are re-stated by the Court, it is clear the Court expects the Legislature and State Engineer to take steps to address these problems.

By Paul Bossert, J.D. (October 2008)
Updated by Susan Kelly (2010)
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