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## Bounds v. New Mexico ex rel. D'Antonio, Nos. 32,713 32,717, 306 P.3d 457 (N.M. 2013)

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1896 notice—actually represented the same water right. The Court stated that another reasonable interpretation of the survey was that the two water rights were distinct. The Court held that the Ranch failed to prove error on the part of the water court.

Accordingly, the Court affirmed the water court's denial of the Ranch's motion to amend its water right.

*Gabriel Kester*

## NEW MEXICO

**Bounds v. New Mexico ex rel. D'Antonio**, Nos. 32,713 32,717, 306 P.3d 457 (N.M. 2013) (holding (i) New Mexico Domestic Well Statute ("DWS") requiring state engineer to issue domestic well permits without regard to the availability of unappropriated water did not violate prior appropriation principles as enshrined in the New Mexico Constitution; and (ii) the plaintiffs failed to demonstrate how the DWS deprived holders of a property interest in senior appropriative rights).

Horace Bounds ("Bounds"), a farmer and rancher in the Mimbres basin in southwestern New Mexico, brought a facial constitutional challenge against New Mexico's DWS, which requires the state engineer to issue domestic well permits without also determining the availability of unappropriated water. On June 15, 2006, Bounds filed an action for declaratory judgment in New Mexico's Sixth Judicial District Court ("district court"), arguing three counts in his complaint. The first count asked the district court to rule the DWS unconstitutional as it requires the state engineer to issue domestic well permits without determining the availability of unappropriated water. Bounds argued this permitting system operated to the detriment of senior water holders and in violation of New Mexico's prior appropriation standard. The second count asked for a ruling that the issuance of domestic well permits, in accordance with the DWS, constituted a taking under the United States and New Mexico Constitutions. Lastly, Bounds asked for an injunction preventing the state engineer from issuing new domestic well permits without also determining if unappropriated water was available. The New Mexico Farm and Livestock Bureau ("NMFLB"), an independent and nongovernmental agency representing many farm and ranch families, filed a motion to intervene, which the district court granted. The state engineer then filed a motion for summary judgment arguing the language of the DWS evidenced clear legislative intent that domestic well permits were outside the scope of the general prior appropriation system.

The district court: (i) ruled the DWS unconstitutional as a matter of law as it concluded the DWS was an impermissible exception to the prior appropriation standard; and (ii) rejected Bounds's takings claim because he was unable to show any injury to his existing senior water rights as a result of the DWS. The state engineer appealed the district court's constitutional holding to the Court of Appeals, which reversed the district court's holding. The Court of Appeals reasoned that the prior appropriation doctrine contained in Article XVI of the New Mexico Constitution sets forth only general and broad principles, while the New Mexico legislature had authority to enact a specific statuto-

ry system for administrating for water appropriation. Therefore, the legislature's exception to the existing priority administration system was not a per se violation of the priority doctrine. Bounds and NMFLB ("Petitioners") then each filed petitions of certiorari to the Supreme Court of New Mexico ("Court") to review the Court of Appeals' constitutional holding.

The Court addressed two of the Petitioners' challenges: (i) the DWS required the state engineer to issue domestic well permits without acknowledging whether unappropriated water was available, thereby violating New Mexico's Constitutional prior appropriation doctrine; and (ii) the failure to provide notice prior to the state engineer's issuance of those domestic well permits violated the Petitioners' due process rights.

First, the Court considered Petitioners' facial constitutional challenge *de novo*. Although Petitioners failed to establish that the DWS creates specific risk of impairment to water rights holders- a necessary element to sustain a facial constitutional challenge- the Court exercised its discretion and decided nevertheless to rule on the merits of the case. Article XVI, Section 2 of the New Mexico Constitution states, "[P]riority of appropriation shall give the better right." With the language of the DWS in mind, the Court held that the language "better right" merely provides guidance when two existing water rights are in conflict. The Court noted that the DWS was just a permitting statute; it was silent on how the state engineer was to administer domestic well permits. Nothing in the DWS prevented the state engineer from administering domestic well permits in a priority system, as the New Mexico Constitution requires. Mistakenly, Petitioners equated the issuance of a permit under the DWS with an absolute right to acquire and utilize that water pursuant to the issued permits. However, contrary to the Petitioners' contentions, the DWS did not grant applicants an absolute right. Like all water rights, any drilling rights granted by the DWS were ultimately conditioned on the availability of water. Therefore, because the DWS dealt with permitting and not administration, it did not facially violate the New Mexico Constitution's prior appropriation standards.

Next, the Court addressed the Court of Appeals' ruling that the prior appropriation doctrine set forth broad principles and nothing else. The Court specifically rejected this ruling and stated that such an interpretation could lead to an improper level of legislative and administrative discretion over priority water rights.

Last, the Court considered whether the DWS violated the Petitioners' procedural and substantive due process rights. In order for the Court to declare a violation of due process, the Petitioners must show an actual and personal deprivation or injury. However, as the district court held, Petitioners, specifically Bounds, were unable to show DWS caused any injury to their water rights. The Court rejected Bounds's claim that any new appropriations in a closed and fully appropriated basin would necessarily cause Bounds injury. Although Bounds produced an expert witness, that expert failed to show the effect of the domestic wells on Bounds' water rights. Thus, the Court rejected the due process challenge, concluding that any alleged injury was only speculative.

Accordingly, the Court affirmed the Court of Appeals's decision that the DWS did not violate the United States Constitution and the New Mexico Constitution, and that the DWS did not violate Petitioners' due process rights.

*Devon Bell*

## NORTH DAKOTA

**Maddock v. Andersen**, 830 N.W.2d 627 (N.D. 2013) (holding that the district court did not err in denying injunctive relief to appellants in challenge to stop water flow onto their land from a drainage ditch on appellees' adjacent property by holding (i) appellees demonstrated a reasonable necessity and use for the drainage ditch; (ii) appellees could not reasonably avoid injury to appellants' property; (iii) the appellees' benefit of homestead protection outweighed the injury to appellants' crops; (iv) "Act of God" designation properly described increased rainfall, and; (v) appellants failed to mitigate the water flow's damage).

Appellants Francis and Deborah Maddock ("the Maddocks") appealed the District Court, Dickey County, Southeast Judicial District's denial of permanent injunctive relief in the Maddocks' suit against Larry and Jane Andersen ("the Andersens") to stop water flow onto the Maddocks' farmland from a drainage ditch on the Andersens' property. The Maddocks alleged the Andersens' drainage ditch, which in the past properly drained water into a slough on the Andersens' farm, now unreasonably drained and pooled water onto the Maddocks' land and caused injury to a portion of their crops. Expert witnesses from both parties testified at trial about water flow from the drainage ditch, slough, and other areas. The district court concluded the Maddocks failed to prove the drainage ditch contributed primarily to the pooled water on their land. The district court also concluded the Andersens satisfied the reasonable use doctrine as applied to surface water drainage by showing they needed the open drainage ditch to protect their homestead, and they took reasonable care to prevent unnecessary injury to the Maddocks' property.

The Maddocks appealed the district court's ruling to the Supreme Court of North Dakota ("court"), arguing that the district court erred in (i) finding the Andersens complied with the reasonable drainage use rule and (ii) denying the Maddocks' prayer for injunctive relief.

The court defined the surface water drainage reasonable use doctrine: a landowner, acting in good faith and with a legitimate purpose, could drain surface waters from his land to another's land. The court further stated that surface water drainage satisfies the reasonable use doctrine if: (i) there is reasonable necessity for such drainage; (ii) the draining land's owner takes reasonable care to prevent unnecessary injury to the receiving land; (iii) the benefit to the drained land outweighs the receiving land's injury; and (iv) the draining land's owner reasonably improves the natural drainage system, where practicable, or adopts an artificial drainage system.

The Maddocks first argued that the district court should order the drainage ditch's closure because the Andersens did not show a reasonable necessity