**IN THE SUPREME COURT**
**FOR THE STATE OF NEW MEXICO**

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

Plaintiff-Appellants,

v.

Case No. 32,713

THE STATE OF NEW MEXICO, and JOHN R. D'ANTONIO, JR., NEW MEXICO STATE ENGINEER,

Defendants-Appellees.



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# *AMICUS CURIAE* BRIEF OF WATER SYSTEMS COUNCIL AMICI IN SUPPORT OF THE STATE OF NEW MEXICO AND THE STATE ENGINEER JOHN D'ANTONIO

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On Appeal from the Sixth Judicial District Court, County of Grant,
Honorable J.C. Robinson, No. CV-2006-166

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*La Madera Comm. Ditch Ass'n v. Sandia Peak Ski Co.*, 119 N.M. 591, 893 P.2d 487 (Ct. App. 1995) ..... 21

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*Mathers v. Texaco, Inc.*, 77 N.M. 239, 421 P.2d 771 (1966) ..... 19

*Mieras v. Dyncorp*, 1996-NMCA-095, 122 N.M. 401, 925 P.2d 518 ..... 14, 24

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*Burger v. McElroy*, No. 97 Civ. 8775, 1999 U.S. Dist. LEXIS 15105 (S.D.N.Y. Sept. 27, 1999) ..... 28

*City & County of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270(Colo. 2010) ..... 26

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*Conway v. Searles*, 954 F. Supp. 756 (D. Vt. 1997) ..... 28

*Delaware River Basin Com. v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087 (3d Cir. 1981) ..... 26

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*Golden v. City of Columbus*, 404 F.3d 950 (6th Cir. 2005) ..... 26

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*Skelly v. INS*, 168 F.3d 88 (2d Cir. 1999) ..... 27

*Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252 (Colo. 2008) ..... 26

*Spofforth v. Athens*, No. 1487, 1992 Ohio App. LEXIS 1216 (Ohio Ct. App. Mar. 9, 1992) ..... 26

*Thompson Bldg. Wrecking Co. v. Augusta*, No. CV 108-019, 2010 U.S. Dist. LEXIS 31193 (S.D. Ga. Mar. 31, 2010) ..... 28

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Wash. Rev. Code §§ 90.44.050, 90.44.052 ..... 9, 11

Wyo. Stat. Ann. §§ 41-3-907, 41-3-911, 41-3-930, 41-3-935, 41-3-936 ..... 9, 10

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**Other Authorities**

A. Dan Tarlock, *et al.*, *Water Resource Management:*
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H.B. 307, 2003 Leg. (N.M. 2003) ..... 3

Joseph L. Sax *et al.*, *Legal Control of Water Resources: Cases and Materials* (4th ed. 2006) ..... 6

*Judge's Ruling Could Impact Domestic Well Permits*, Albuquerque Journal Online (July 12, 2008) ..... 27, 32

National Ground Water Association, *Ground Water's Role in New Mexico's Economic Vitality* (2008) ..... 32

Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010) ..... 9

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S.B. 89, 2004 Leg. (N.M. 2004) ..... 3

W. Peter Balleau and S.E. Silver, *Hydrology and Administration of Domestic Wells in New Mexico*, 45 Nat. Resources J. 807 (2005) ..... 28

Washington State Groundwater Ass'n, *White Paper Focusing On Instream Flows and Exempt Wells* (2004) ..... 29

Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011) ..... 9, 10

Water Systems Council, *Who Owns the Water: A Summary of Existing Water Rights Laws* (Oct. 2009) ..... 8

Wayne B. Solley, Robert R. Pierce, and Howard A. Perlman, *Estimated Use of Water in the United States in 1990*, in U.S. Geological Survey 26 (1993) ..... 33

Western States Water Council, *Water Laws and Policies for a Sustainable Future: A Western States Perspective* (June 2008) ..... 29, 32

## STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A), (F) & (G) NMRA, Water Systems Council *Amici* state that the total word count contained in the body of the brief is 9,285 words, using Microsoft Office Word 2007.

_____ _____

Dated Tiffany E. Dowell

## INTRODUCTION

Water Systems Council, 2M Company, Inc., the Arizona Water Well Association, Austin Pump and Supply Company, Inc., Danfloss Flomatic Corporation, the Empire State Water Well Drillers Association, Flexcon Industries Corporation, Franklin Electric Co., Inc., the Idaho Ground Water Association, Maass Midwest Manufacturing, Inc., Merrill Manufacturing Company, the Montana Water Well Drillers Association, the South Atlantic Well Drillers JUBILEE, Inc., the Virginia Water Well Association, the Washington State Ground Water Association, and the Water Systems Division of A. O. Smith (the "*Amici*" or "Water Systems Council *Amici*") submit this brief in support of the Respondants-Appellees State of New Mexico and State Engineer D'Antonio (the "Appellees" or the "State").

Water Systems Council *Amici* supports the conclusion of the New Mexico Court of Appeals that the Domestic Well Statute, NMSA 1978 Sections 72-12-1 to -1.3 ("DWS") is constitutional. Consequently, Water Systems Council *Amici* believe that the decision of the Court of Appeals contains no error and prays that this honorable Court affirm the judgment of the Court of Appeals.

## INTEREST OF AMICI

Water Systems Council ("WSC") is the only national, nonprofit organization solely focused on household wells and small water well systems. WSC is

committed to ensuring that Americans who get their water from household, private wells have safe, reliable drinking water and to protecting our nation's groundwater resources. WSC maintains voluntary industry standards to promote excellence in the manufacturing of components for water well systems. The other *Amici* consist of private companies in the water well industry that do business nationwide, including in New Mexico, and associations of groundwater professionals.

## BACKGROUND

Under New Mexico law, the waters of the State belong to the public and citizens may appropriate water for beneficial use. *See* N.M. Const. art. XVI, § 2. In order to appropriate water, a party must file an application with the State Engineer. For most appropriations, the Legislature requires an extensive permitting process and analysis prior to a permit being granted. *See* NMSA 1978, § 72-12-3. However, in 1953, the New Mexico Legislature created a separate procedure for small amounts of water use in the DWS. *See* § 72-12-1. Specifically, the DWS provides that because of the "relatively small amounts of water consumed" for domestic purposes, the watering of livestock, and small-scale irrigation, applications for such use should be excused from the general permitting process, and permits issued upon application. *See id.* The New Mexico Legislature has repeatedly rejected attempts to modify the DWS and, in so doing, has affirmed the importance of the statute. *See, e.g.,* S.B. 120, 2005 Leg. (N.M.

2005); H.B. 285, 2005 Leg. (N.M. 2005); S.B. 89, 2004 Leg. (N.M. 2004); S.B. 565, 2003 Leg. (N.M. 2003); H.B. 307, 2003 Leg. (N.M. 2003).

This case arose when Mr. Bounds, a senior water appropriator in the Mimbres basin filed suit alleging that the DWS is unconstitutional. Mr. Bounds claimed that by requiring the State Engineer to issue domestic well permits without consideration of whether unappropriated water was available, the DWS violates the rights of senior water appropriators, asserting the following claims: a declaratory judgment action, a prayer for injunctive relief, an alleged violation of due process contrary to 42 U.S.C. § 1983, and an unconstitutional takings claim. The District Court granted a declaratory judgment in favor of the Mr. Bounds, on the grounds that the DWS is unconstitutional pursuant to N.M. Const. art XVI, section 2, and ordered the State Engineer to begin administering applications for domestic permits "the same as all other applications to appropriate water." *See* Final Judgment and Order at 1. The District Court dismissed Mr. Bounds' remaining claims without prejudice because there was "no evidence" to support such claims. *See id.* at 2.

The State appealed this decision, and the New Mexico Court of Appeals reversed, finding that the DWS did not facially violate the priority doctrine, nor constitute an impermissible exception to that doctrine. *See Bounds v. State*, 2011-NMCA-011, ¶ 4, 252 P.3d 708. The Court also found that Mr. Bounds had waived

any appeal of his due process claim. *See id.* ¶ 13. Mr. Bounds and the New Mexico Farm and Livestock Bureau ("NMFLB") filed a petition for *certiorari*, which was granted by this Court. Specifically, the *certiorari* petitions sought review of the Court of Appeals' decision that the DWS did not violate the priority doctrine and was not facially unconstitutional. *See* Bounds Pet. for Writ of Cert. at 1; NMFLB Pet. for Writ of Cert. at 2.

## ARGUMENT

In support of the State's position, the *Amici* address four issues. *First*, the DWS does not contravene the prior appropriation doctrine. *Second*, Petitioners fail to satisfy the burden required to succeed on a facial constitutional challenge. *Third*, Petitioners have waived any due process claim and such claim would fail because the DWS is rationally related to a legitimate governmental purpose. *Fourth*, important policy considerations support exempt wells and the DWS.

### I. THE DOMESTIC WELL STATUTE DOES NOT CONTRAVENE THE PRIOR APPROPRIATION DOCTRINE.

The main assignment of error put forth by the Petitioners alleges that the DWS is unconstitutional because it violates the doctrine of prior appropriation. *See* [Bounds BIC 19]; [NMFLB BIC 9, 18-19]. Petitioners argue that the mandatory nature of granting permits to domestic well applicants constitutes a violation of prior appropriation, giving a special status to domestic well users, regardless of their junior status. *See id.* This argument misconstrues the DWS.

Prior appropriation is a flexible doctrine that adapts over time and all prior appropriation states except for Utah include a provision similar to New Mexico's DWS. The DWS does not contravene the prior appropriation doctrine and does not constitute an "exception" to the doctrine. To the contrary, all domestic wells in New Mexico are required to comply with the principles of prior appropriation.

### A. Prior Appropriation Law in New Mexico.

The concept of prior appropriation is grounded in the New Mexico Constitution, which provides:

> The unappropriated water of every natural 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 of appropriation shall give the better right.

N.M. Const. art. XVI, § 2 (emphasis added).

The New Mexico Legislature has, over the past century, created an extensive water code, including the DWS at issue here, which reads as follows:

> A person, firm or corporation desiring to use public underground waters described in this section for irrigation of not to exceed one acre of noncommercial trees, lawn or garden or for household or other domestic use shall make application to the state engineer for a well on a form to be prescribed by the state engineer. Upon the filing of each application describing the use applied for, the state engineer shall issue a permit to the applicant to use the underground waters applied for; provided that permits for domestic water use within municipalities shall be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978.

§ 72-12-1.1. These provisions provide the background for this appeal.

### B. Prior Appropriation Is an Evolving Doctrine.

In "pristine" form, prior appropriation includes the following elements: (1) Rights to the water do not follow land ownership; (2) Water is held by the State for acquisition by users; and (3) One acquires a right in water by withdrawing it and applying it to a beneficial use. *See* Joseph L. Sax *et al.*, *Legal Control of Water Resources: Cases and Materials* 124-26 (4th ed. 2006). However, "[a]lmost all of these rules have been subject to modification and controversy." *Id.* at 126.

Both courts and legal scholars have recognized that the prior appropriation doctrine is not a static concept. Instead, the doctrine has constantly evolved to "meet the needs of a changing West." Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, at 3 (Draft article to be published Colo. Law Rev. 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1839923 (citing A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 Nat. Resources J. 769, 770 (2001)) ("Benson"). State legislatures began changing basic prior appropriation principles in 1890 and these changes have continued throughout the past century. *See id.* at 7. "The courts have continually ushered changes into prior appropriation law, modifying its characteristic features as necessary to respond to society's evolving demands and values." A. Dan Tarlock, *et al.*, *Water Resource*

*Management: A Casebook in Law and Public Policy* 158 (5th ed. 2002). *See, e.g., Joyce Livestock Co. v. United States*, 156 P.3d 502, 507-08 (Idaho 2007) (stating that prior appropriation has "evolved to meet the specific needs of each state"); *In re. Adjudication of Existing Rights to the Use of all Water*, 55 P.3d 396, 399 (Mont. 2002) (noting that the doctrine of prior appropriation has adapt[ed] flexibility to the needs of a developing society").

This is not surprising due to the broad nature of the prior appropriation doctrine. Courts and legislatures have had to fill in the gaps of the skeletal framework of prior appropriation. Indeed, the New Mexico Constitution expressly recognizes this gap-filling necessity when laying out the prior appropriation doctrine as the prevailing doctrine in the state, providing that water "be subject to appropriation for beneficial use, *in accordance with the laws of the state.*" N.M. Const. Art. XVI, Section 2 (emphasis added). The highlighted phrase recognizes and affirms the continuing role of the Legislature in shaping the contours of prior appropriation and defining the specifics of the doctrine.

For example, one major reform of the prior appropriation doctrine involves consideration of instream flows. *See* Benson, at 13-14. Under traditional "use it or lose it" principles, the appropriator must actually divert the water to preserve the right. State legislatures passed laws, essentially modifying traditional prior appropriation principles, allowing instream uses such as fish habitat to qualify as

beneficial use protected by prior appropriation. *See id.* Courts rejected challenges to these laws that characterized the protection of instream flows as inconsistent with prior appropriation. *Id.* (citing *Nebraska Game & Parks Comm'n v. The 25 Corp.*, 463 N.W.2d 591 (Neb. 1990), *Dep't of Parks v. Idaho Dep't of Water Admin.*, 530 P.2d 924 (Idaho 1974), and *Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.*, 594 P.2d 570 (Colo. 1979)).

Exempt well provisions for domestic wells similarly involve state legislatures utilizing the existing flexibility of prior appropriation to accommodate "other important goals." Benson, at 33. In fact, the New Mexico DWS merely "ensures that property owners have continued access to the groundwater beneath their land for purposes of meeting their basic household needs - access they have enjoyed for decades, predating even the 1953 statute." *Id.* at 34 (citing *Bounds v. State of New Mexico*, 2011-NMCA-11, _ N.M. _, 252 P.3d 708.

### C. Exempt Wells Are an Almost Universal Element of the Prior Appropriation Doctrine in the United States.

Thirteen states use the prior appropriation rule for groundwater: Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. Water Systems Council, *Who Owns the Water: A Summary of Existing Water Rights Laws*, at 3 (Oct. 2009). Each of these states includes exempt well provisions in the system of prior

appropriation with the exception of Utah.[1] In addition, four other states use legal approaches to groundwater rights other than prior appropriation, but have permitting systems that provide at least some limited exemption from those rules for some water wells: Arizona, Nebraska, Oklahoma, and Texas. *See* Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011); Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010).[2]

New Mexico, along with each of the states that provide special provisions for domestic wells, regulates domestic wells by subjecting them to special provisions, either explicitly or by giving different requirements for low yield wells or low quantity withdrawals.[3] These regulations include quantity and/or yield

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[1] *See* Alaska Admin Code tit. 11, §§ 93.035, 05.010; Ariz Rev. Stat. Ann. §§ 45-402, 45-454; Colo Rev. Stat § 37-90-105, 37-92-602; Idaho Code Ann. §§ 42-111, 42-227, 42-914; Kan. Stat. Ann. §§ 82a-701, 82a-703, 82a-703a, 82a-705a, 82a-728; Mont. Code Ann. § 85-2-306; Neb. Rev. Stat. §§ 46-602, 46-714 , 735, 46-740; Nev. Rev. Stat. §§ 533.024, 533.370, 534.013, 534.180; NMSA 1978, §§ 72-12-1 to -1.3; 19.27.5.14 NMAC; N.D. Cent. Code §§ 61-04-01.1, 61-04-01.2, 61-04-02, 61-04-06.1, 61-04-06.3; Okla. Stat. tit. 82 §§ 1020.1, 1020.3; Or. Rev. Stat. § 537.545; S.D. Codified Laws §§ 46-1-5, 46-1-6, 46-5-8, 46-5-8.2, 46-5-50 to -52; Texas Water Code §§ 11.121 11.201 to 11.207, § 36.117; Utah Code Ann. §§ 73-3-2, 73-3-5.6, 73-3-8; Wash. Rev. Code §§ 90.44.050, 90.44.052; Wyo. Stat. Ann. §§ 41-3-907, 41-3-911, 41-3-930, 41-3-935, 41-3-936; *see generally*, Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011); Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010).

[2] Some of these states also appear to incorporate priority into their permitting systems. *See id.*

[3] Only Idaho, South Dakota, Wyoming exempt domestic wells from priority and only South Dakota appears to completely exempt domestic wells from regulation under the prior appropriation doctrine. *See* Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011).

limitations, geographic limitations, and irrigation limits. Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011). New Mexico's DWS, which allows the appropriation of only one acre foot per year ("AFY"), contains one of the strictest quantity limitations on domestic wells of the 16 states with exempt well regulations.

With regard to diversion for domestic use, four states, Idaho, Kansas, North Dakota and Oklahoma, place no quantity or capacity limits on exempt domestic wells.[4] Several other states have relatively lenient restrictions on the amount of water that may be diverted. Nebraska restricts withdrawals to 50 gallons per minute, or 80.65 AFY. *See* Neb. Rev. Stat. §§ 46-602, 46-714 , 735 and 46-740. Arizona and Montana each allow a maximum capacity of 35 gallons per minute (56.46 AFY). *See* Ariz. Rev. Stat. §§ 45-402, 45-454; Mont. Code Ann. § 85-2-306.[5] Wyoming limits diversions to.056 cubic feet per second or 25 gallons per minute, which translates to 42.01 AFY. *See* Wyo. Stat. Ann. §§ 41-3-907, 41-3-911, 41-3-930, 41-3-935, 41-3-936. South Dakota limits the amount to 18 gallons/minute, or 29.03 AFY, while Texas limits diversions in groundwater management districts to 25,000 gallons/day (28.00 AFY). *See* S.D. Codified Laws

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[4] *Idaho Code Ann.* §§ 42-111, 42-227, 42-914; *Kansas Statutes Ann.* §§ 82a-701, 82a-703, 82a-703a, 82a-705a, 82a-728; *North Dakota Centennial Code* §§ 61-04-01.1, 61-04-01.2, 61-04-02, 61-04-06.1, and 61-04-06.3; *Oklahoma Statutes* Title 82 §§ 1020.1, 1020.3.

[5] However, Arizona includes a 10 AFY quantity limit in certain active management areas and Montana imposes the same annual capacity limit. *See id.*

§§ 46-1-5, 46-1-6, 46-5-8, 46-5-8.2, 46-5-50 to 46-5-52; Texas Water Code §§ 11.121, 11.201 to 11.207, § 36.117. Colorado allows a maximum capacity of 15 gallons per minute (24.195 AFY), with an annual limit of 5 AFY in designated groundwater basins. *See* Colo. Rev. Stat. Ann. § 37-90-105, 37-92-602. Oregon limits diversions to 15,000 gallons per day, or 16.80 AFY. *See* Or. Rev. Stat. § 537.545.

Other states, including New Mexico, place stricter limits on domestic diversion. Washington allows diversions of 5,000 gallons per day (5.60 AFY), while Nevada caps diversions at 2 AFY. *See* Wash. Rev. Code §§ 90.44.050, 90.44.052; Nev. Rev. Stat. §§ 533.024, 533.370, 534.013, and 534.180. Only one state, Alaska, limits domestic well diversions more than New Mexico, allowing withdrawals of 500 gallons per day (.56 AFY). *See* Alaska Admin Code tit. 11.

Consistent with this strict domestic limitation, New Mexico likewise imposes a stringent limitation on the amount of water available for irrigating. Only nine of the 16 states impose any limit on water diverted for irrigation, and of these, New Mexico's limit of one acre foot is again among the most limited.

Table 1 lists the state limitations on withdrawals or capacity of domestic water wells from the most stringent to the least stringent, expressed as AFY, and includes irrigation limits.

| State | Capacity Limit | Diversion Limit | Irrigation limits |
|---|---|---|---|
| Alaska | None | .56 AFY | None |
| New Mexico | None | 1 AFY | 1 acre |
| Nevada | None | 2 AFY | None |
| Washington | None | 5.6 AFY | None |
| Oregon | None | 16.80 AFY | ½ acre |
| Colorado | 15.195 AFY (5 AFY in designated groundwater basins) | none | 1 acre |
| Texas | None | 28.00 AFY in groundwater management districts | None |
| South Dakota | None | 29.03 AFY | None |
| Wyoming | None | 42.91 AFY | 1 acre |
| Arizona | 56.46 AFY | 10 AFY in certain active management areas | 2 acres in certain active management areas |
| Montana | 56.46 AFY (but 10 AFY limit) | none | None |
| Nebraska | None | 80.65 AFY | None |
| Idaho | None | none | ½ acre (but limit of 13,000 gallons/day) |
| Kansas | None | none | 2 acres |
| North Dakota | None | none | 5 acres |
| Oklahoma | None | none | 3 acres |

### D. The DWS Is Subject to the Prior Appropriation Doctrine.

Not only are domestic wells strictly limited in terms of the quantity of water utilized as described above, but they are also subject to prior appropriation. Thus,

there is a fundamental flaw in the Petitioners' attempt to claim that the DWS is an "exception" to prior appropriation. This claim is simply false.

The phrase "exempt well" is a misnomer. The New Mexico DWS statute does not exempt domestic wells from the priority system and all remedies for the senior appropriators remain intact. Senior appropriators may enforce their rights under prior appropriation by requesting a priority call or filing suit against a junior appropriator to enjoin any use that harms the senior user's receipt of water. The only "exemption" afforded to domestic wells is with regard to the permitting process, as domestic wells applicants are not required to proceed under the stringent and time consuming permitting procedures that other larger well applicants must follow. Further, the Legislature has essentially decided to shift the burden of proof in cases of domestic wells. Specifically, applicants for large withdrawals have the burden of proving no impairment to senior appropriators by their water use, while in applications for small withdrawals, the senior appropriators bear the burden of showing impairment. Again, this does not somehow create an exception to prior appropriation, it merely creates a different procedure for the enforcement of the doctrine. The discretion to create this procedure lies squarely in the hands of the Legislature.

Thus, although domestic wells are an exception to, and exempt from the same permitting process as other well applicants, they are fully governed by the

doctrine of prior appropriation. The Court should reject Petitioners' misconstruction of the DWS and affirm the Court of Appeals.

## II. PETITIONERS FAIL TO SATISFY THE BURDEN REQUIRED TO SUCCEED ON A FACIAL CONSTITUTIONAL CHALLENGE.

Petitioners have brought a facial challenge to the constitutionality of the DWS. *See* [Bounds BIC 1]. Accordingly, to succeed with their challenge, they must show that, as written, the statute cannot be applied constitutionally under any circumstances. They have failed to meet this burden. Indeed, as shown below, the DWS can be applied constitutionally. The Petitioners' facial challenge to the constitutionality of the DWS must therefore be rejected.

### A. Facial Challenges Succeed Only When a Statute May Never Be Constitutionally Applied.

In considering a facial challenge to a statute, courts begin with the presumption that the legislation is constitutional. *See Marrujo v. New Mexico State Hwy. Transp. Dep't*, 118 N.M. 753, 756, 887 P.2d 747, 750 (1994); *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 31, 122 N.M. 401, 925 P.2d 518 ("When reviewing a constitutional challenge to the validity of a statute, we indulge in every presumption in favor of the validity of the statute."); *Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 99, 678 P.2d 1170, 1174 (1984) (considering constitutionality of provision in New Mexico Water Code and noting that "Courts must uphold the efficacy of statutes unless they are satisfied beyond all reasonable

doubt that the legislature went outside the Constitution in enacting the challenged legislation."). Courts disfavor and rarely use facial invalidation for a variety of reasons, including that facial challenges frequently rest upon speculation, raise the risk of "premature interpretation of statutes on the basis of factually barebones records[,]" threaten the rule of judicial restraint by asking courts to address constitutional issues unnecessarily, and short cut the democratic process by preventing laws embodying the will of the people from being implemented consistently with the Constitution. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008) (internal quotation omitted); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) ("Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort.").

With this presumption in mind, courts faced with a facial challenge consider whether the statute as written may ever be applied constitutionally. *See United States v. Tafoya*, 541 F. Supp. 2d 1181, 1183 (D.N.M. 2008).[6] The challenger must establish "that no set of circumstances exists under which [the challenged statute] would be valid[.]" *United States v. Salerno*, 481 U.S. 739, 745 (1987).

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[6] *See, e.g.,* Benson, at 30 (explaining the burden of proof in facial challenges and stating that the Court of Appeals decision below and the opinions in two other facial challenges to statutes related to prior appropriation "certainly do not provide an unqualified endorsement of the disputed statutes and rules" and noting that as applied challenges are available in these situations) .

Under this test, if there is any set of circumstances in which the statute may be applied constitutionally, the facial challenge fails and the statute will be upheld. *See id.* Conversely, only if there is no set of facts under which the statute may be applied consistent with the constitution will it be deemed facially unconstitutional. *See Am. Ass'n of Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1240 (D.N.M. 2008); *State v. Frawley*, 2007-NMSC-057, ¶ 25, 143 N.M. 7, 172 P.3d 144 (statute was facially unconstitutional because "it can never be applied in a manner consistent with the Sixth Amendment"). Thus, the burden upon a challenger is extremely high. *See Am. Ass'n of Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1221 (D.N.M. 2010).

### B. Petitioners Have Failed To Show the DWS Is Facially Unconstitutional.

Although Petitioners do not dispute that they bring only a facial challenge to the DWS, their arguments are directed not to the DWS itself, but instead to its specific application to this case and upon hypothetical scenarios where the statute could potentially be applied in an unconstitutional manner.[7]

For example, Petitioners claim that the DWS is facially unconstitutional because the State Engineer testified in his deposition that he would not conduct a priority call against domestic well users and because the water master in this case

[7] The City of Santa Fe's *Amicus* brief in support of Petitioners likewise includes this type of case specific argument. *See* City of Santa Fe Br. at 11.

refused a priority call after finding that one was unnecessary. *See* [Bounds BIC 7, 11]; [NMFLB BIC 7, 19].[8] Likewise, the NMFLB offers an unsupported statement that although a domestic well permit limits the amount of water that may be diverted, the State Engineer fails to enforce these provisions and instead allows users to pump as much water as they wish as evidence of facial unconstitutionality. *See* [NMFLB BIC 2]. These arguments are immaterial to a facial challenge because they do not show that the DWS cannot be constitutionally applied as written, but that it may not be constitutional in certain cases based on case-specific facts and circumstances. Indeed, Petitioners appear to fail to understand that the proper test for a facial challenge to the DWS is not whether there is any case where the statute may be *unconstitutionally* applied, but instead whether there is any case where the statute may be applied *constitutionally*. By addressing the constitutionality of the DWS based on the unique facts of this case, Petitioners

[8] To the extent that Petitioners may cite to certain amendments to the NMAC regarding domestic water use, any such reference would similarly be inappropriate under a facial challenge. Until such regulations have been the proper subject of a public hearing, and then duly promulgated and published, and all subsequent challenges have properly been resolved, these regulations should not be considered by this Court. *See* NMSA 1978, § 14-4-5 ("no rule shall be valid and enforceable until it is filed with the records center and published in the New Mexico Register..."). *See also Lummi Indian Nation v. Washington*, 241 P.3d 1220, 1231 (Wash. 2010) ("the challengers have cited no case, and we have found none, where mere potential impairment of some hypothetical person's enjoyment of a right has been held to be sufficient for a successful facial due process challenge.").

have failed to prove a successful facial challenge to the constitutionality of the DWS.

A recent decision by the Idaho Supreme Court provides helpful guidance. In *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 154 P.3d 433 (2007), the plaintiffs brought a facial challenge to various rules that they alleged violated the prior appropriation doctrine. In particular, the plaintiffs challenged rules setting the procedure to be followed when responding to delivery calls made by senior appropriators against junior appropriators, including that the rules failed to contain any requirement that proceedings were to be done in a timely manner and did not expressly state which party had the burden of proof, nor what that burden was. *See id.* at 437-38, 445.

In reaching its decision that the plaintiffs had failed to prove that the rules were facially unconstitutional, the Supreme Court of Idaho distinguished as-applied constitutional challenges. *See id.* at 444. Thus, although the court agreed with the plaintiffs that the constitutional convention intended that there be no unnecessary delays in the delivery of water, and that based on this, a timely response to a delivery call is clearly required, the court concluded that this fact did not establish a successful facial challenge because there was nothing in the rules that would prevent a timely response from occurring. *See id.* at 445. Likewise, the court reasoned that the rules' failure to provide a burden of proof did not

necessarily mean the rules would not or could not be applied constitutionally. *See id.*

In short, a mere possibility that the rules might, in a specific case, be applied in an unconstitutional manner, failed to establish that the rules could never be constitutionally applied. *See id.* at 445, 446-47. For this reason, the court found that any analysis dependent upon the procedural background of a specific case would be inappropriate for a facial challenge. *See id.* at 447. For the same reason, the court rejected a facial challenge to a rule exempting domestic wells from priority calls and failure to expressly require repayment for any shortages, as is required in the constitution. *See id.* at 452 ("The case before us is a facial challenge; until faced with an appropriate actual record complaint, we decline to speculate about whether a senior water rights holder will be properly compensated.").

Similarly, New Mexico courts have indicated that whether a user's water rights have been impaired is a factual question that must be decided based upon the specific circumstances present in each case. *See Mathers v. Texaco, Inc.*, 77 N.M. 239, 245, 421 P.2d 771, 776 (1966). In *Mathers*, Texaco applied for a withdrawal permit in a nonrenewable basin. The State Engineer had determined the amount of water contained in the basin, the amount already appropriated and the amount that could be appropriated in the future. *See id.* at 242, 421 P.2d at 774. In making the

determination, the State Engineer calculated the amount of water that could be withdrawn while leaving one-third of the water in the basin after forty years. *See id.*

The State Engineer granted the permit and senior appropriators in the basin objected, claiming that the withdrawal by Texaco would lower the water table for the wells of the senior appropriators, result in increased pumping costs and shorten the time period within which the senior appropriators could economically withdraw water. *See id.* at 243, 421 P.2d at 775. This court found that the definition of impairment "must generally be decided upon the facts in each case" and that providing a definition of impairment would not only be "difficult" but would "lead to severe complications." *See id.* at 245, 421 P.2d at 776.

The same reasoning and conclusions are proper here. Because the Petitioners' challenge to the DWS is based upon its application to the specific facts at issue in this case, they have failed to prove that the DWS is facially unconstitutional. Accordingly, like the facial challenge in *Am. Falls*, Petitioners' challenge to the DWS must fail.

### C. The DWS Is Constitutional on Its Face.

Although Petitioners' facial challenge must fail because they have failed to meet their burden of proof, it is significant that the DWS may, as written, be applied constitutionally. As written, the DWS provides that once a party files an

application for a domestic well permit, the permit "shall" be issued. *See* § 72-12-1.1. The New Mexico Administrative Code provides several limitations that may be placed on a domestic well permit, including the condition that the right to divert water "is subject to curtailment by priority administration as implemented by the state engineer or a court." 19.27.5.13(B)(12) NMAC.

Thus, if water utilized pursuant to a domestic permit impairs the rights of a senior appropriator, the senior appropriator may request a priority call. Alternatively, a senior water user may file suit against a junior appropriator to enjoin any use that harms the senior user's receipt of water. *See, e.g., La Madera Comm. Ditch Ass'n v. Sandia Peak Ski Co.*, 119 N.M. 591, 893 P.2d 487 (Ct. App. 1995) (senior water holder entitled to sue junior appropriator based on alleged impairment of rights). Therefore, if the Court considers the statute as written, the DWS does not violate the doctrine of prior appropriation, nor due process. The options available to senior appropriators not only ensure that their senior water rights are protected as required by prior appropriation, but also provide sufficient notice and opportunity to be heard to protect a senior appropriator's due process rights.

One may easily imagine a situation where the DWS may be constitutionally applied. For example, the following scenario would result in the constitutional application of the DWS: (1) a new appropriator applies for and is granted a

domestic well permit and drills a domestic well; (2) his well interferes with the amount of water available for a senior appropriator; (3) the senior appropriator requests a priority call; (4) the Water Master determines a priority call is required; (5) the State Engineer conducts an analysis and finds that the senior appropriator's rights have been violated; and (6) the junior water user's use is subsequently curtailed and the senior user's water rights are restored. The DWS simply cannot be facially unconstitutional because as written, the statute may constitutionally be applied. In light of this, Petitioners' facial challenge to the constitutionality of the DWS must fail.

## III. PETITIONERS HAVE WAIVED ANY DUE PROCESS CLAIM AND SUCH CLAIM WOULD FAIL BECAUSE THE DWS IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE.

*Amici* agree with the State Engineer and the Court of Appeals that Petitioners have waived any claim that the DWS violates due process. *See Bounds*, 2011-NMSC-011, ¶ 13. A due process challenge is not, therefore, before this Court for review. Even if, however, the issue was not waived and the Court was to consider the issue, Petitioners would not succeed. Petitioner NMFLB incorrectly argues that the right to utilize appropriated water is a "fundamental right" that requires the most stringent due process analysis. *See* [NMFLB BIC 9].[9] In fact,

[9] The City of Santa Fe's *amicus* brief filed May 10, 2011 also makes this flawed argument. *See* [City of Santa Fe Br. 29].

the right to appropriate and use water is not a fundamental right and the State is only required to show that the DWS is rationally related to a legitimate governmental purpose.

The first step in any due process challenge under the New Mexico Constitution is to determine the proper standard of review to be applied. *See Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 8, 138 N.M. 331, 120 P.3d 413. The standard of review informs both the level of proof required and the party upon whom the burden falls. *See id.* Courts reviewing the New Mexico Constitution apply one of three standards of review: strict scrutiny, intermediate scrutiny, and rational basis review. *See id.* ¶ 11.

Strict scrutiny applies in cases involving suspect classes, such as race or national origin, or fundamental rights, such as first amendment rights, voting, interstate travel, and privacy, and requires the State to prove that the legislation is necessary to achieve a compelling state interest. *See id.* ¶¶ 12, 18. Intermediate scrutiny requires the State to show that legislation is substantially related to an important government interest and applies in cases involving "important individual rights" or sensitive classes, such as gender and illegitimacy, and courts have found that"[s]ystemic denial from the political process is a particularly persuasive reason to apply intermediate scrutiny[.]". *See id.* ¶¶ 13, 17, 19; *Marrujo v. New Mexico State Hwy. Transp. Dep't*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994). Rational

basis review is the most deferential standard, which applies in all other cases, including general social and economic laws, and requires the challenger must show that the statute at issue is not rationally related to a legitimate governmental interest. *See Breen*, 2005-NMSC-028, ¶ 11.

In applying rational basis review, legislation is presumed valid, and is only unconstitutional if the plaintiff can show that the challenged legislation is "clearly arbitrary and unreasonable." *Thompson v. McKinley County*, 112 N.M. 425, 430, 816 P.2d 494, 499 (1991); *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 31, 122 N.M. 401, 925 P.2d 518 ("we indulge in every presumption in favor of the validity of the statute"). Courts will not second guess decisions of the legislature, and will uphold a statute if any set of facts can be reasonably conceived to justify the law. *See id.* Thus, only if a statute is "so devoid of rational support or serves no valid governmental interest" will it be struck down under rational basis review. *See Richardson v. Carnegie Lib. Rest., Inc.*, 107 N.M. 688, 693, 763 P.2d 1153, 1158 (1988).

The third standard of review, rational basis, would apply here -- assuming a due process challenge had been preserved for review in this appeal -- because the DWS is a general social or economic law, and Petitioners have failed to prove that the legislation impacts the exercise of a fundamental or important right. *See Breen*, 2005-NMSC-028, ¶ 11; *see also Wagner v. AGW Consult.*, 2005-NMSC-016, ¶ 16,

137 N.M. 734, 114 P.3d 1050 (although prior appropriation is a constitutional concept, this does not automatically deem it a fundamental or important right; instead, the challenger must prove that the legislation at issue "impacts the exercise of [the] right."). Furthermore, water rights have never been held to constitute fundamental or important rights to trigger heightened scrutiny. In fact, the opposite is true.

In *Pena Blanca P'ship v. San Jose de Hernandez Comm. Ditch*, 2009-NMCA-016, ¶ 4, 145 N.M. 555, 202 P.3d 814, the court considered the constitutionality of NMSA 1978, § 73-2-21(E), which states that a party proposing a change in the use of water rights may appeal a decision of the water commissioners, but the decision may only be reversed if the commissioners acted fraudulently, arbitrarily, capriciously or not in accordance with the law. Plaintiffs argued this statute violated article XVI, section 5 of the New Mexico Constitution, which states that owners of water rights are afforded a de novo hearing on appeal to the district court "unless otherwise provided by law" and equal protection. *See id.* ¶¶ 8, 13. The court deemed this statute "just the sort of general social and economic laws that are ordinarily afforded only rational basis review." *Id.* ¶ 13. In so doing, they rejected the plaintiffs' assertion that water rights were "important constitutional rights" deserving intermediate scrutiny. *See id.*; *see also City of Raton v. Vermejo Conserv. Dist.*, 101 N.M. 95, 100, 678 P.2d 1170, 1175 (1984)

(finding statute to be "rational part" of a scheme to exempt water rights in a conservancy district from the requirement that water rights are lost if not put to beneficial use). Courts in other states have found that rights involving water are not fundamental rights. *See, e.g., City & County of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1277 (Colo. 2010) (holding that the right to oppose another's water application is not inherent in the Colorado Constitution and is not a fundamental right).[10]

Because a rational basis review would apply to a due process challenge, Plaintiffs must prove that the legislation is not rationally related to a legitimate

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[10] *See also San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179, 187-88 (Ariz. 1999) ("We read the amendments as regulating property rights in water rather than limiting fundamental rights" and "see no need to apply strict scrutiny."); *Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252, 263 (Colo. 2008) (applying rational basis review to statute that drew distinctions based on whether diversions were new or existing, and whether water was withdrawn from a confined or unconfined aquifer); *Haik v. Town of Alta*, No. 97-4202, 1999 U.S. App. LEXIS 6280, at *11-12 (10th Cir. Apr. 5, 1999) (holding that the interest in water for real estate development is not a fundamental right and citing cases in support thereof); *Golden v. City of Columbus*, 404 F.3d 950, 961 (6th Cir. 2005) ("Because there is no fundamental right to water service, we apply rational basis scrutiny to the City's water policy.") (internal citations omitted); *Delaware River Basin Com. v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087, 1101 (3d Cir. 1981) ("even if the important issue of access to water were involved here, which it is not, we would nonetheless employ minimal scrutiny [because] access to water is not the kind of fundamental constitutional right that merits equal protection strict scrutiny"); *Spofforth v. Athens*, No. 1487, 1992 Ohio App. LEXIS 1216, at *33-34 (Ohio Ct. App. Mar. 9, 1992) (noting that courts have been very cautious in creating new fundamental rights and that "no court has yet to find that the right to water is so protected").

governmental purpose. *See Breen*, 2005-NMSC-028, ¶ 11. This they simply cannot do.

The DWS is rationally supported and serves valid governmental interests. The State Engineer has in fact expounded several legitimate governmental purposes served by the Domestic Well Statute. First and foremost, the Domestic Well Statute provides a streamlined approach to permitting, which reduces the hours and resources expended by the State in processing such permits.[11] Further, the statute allows for permits to be granted quickly and efficiently, preventing a backlog in the Office of the State Engineer. Indeed, the State Engineer has made clear that without the domestic well statute, the processing not only of domestic well permits, but of all water permits, would come to a grinding halt. *See Judge's Ruling Could Impact Domestic Well Permits*, Albuquerque Journal Online (July 12, 2008). Various courts have found administrative efficiency and convenience to constitute a legitimate governmental interest.[12] Clearly the Domestic Well Statute

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[11] New Mexico courts have repeatedly held that protecting the public treasury and ensuring the viability of agencies constitutes not only legitimate, but important interests. *See, e.g., Trujillo v. City of Albuquerque*, 110 N.M. 621, 628, 798 P.2d 571, 578 (1990) ("we are inclined to take it as self-evident that preservation of the public treasury constitutes an important governmental interest") (internal quotations omitted); *Breen*, 2005-NMSC-028, ¶ 33 (recognizing that protecting the viability of Workers' Compensation is an important governmental interest).

[12] *See, e.g, Skelly v. INS*, 168 F.3d 88, 91 (2d Cir. 1999) (recognizing the "legitimate aim of saving resources"); *Abbound v. INS*, 140 F.3d 843, 848 (9th Cir. 1998) (holding that avoiding repetitious and wasteful review of documents and promoting agency efficiency was a legitimate governmental interest); *Thompson*

is rationally related to these legitimate goals of administrative efficiency, and is not arbitrary or unreasonable. Consequently, Petitioners' due process challenge fails.

## IV. IMPORTANT POLICY CONSIDERATIONS SUPPORT EXEMPT WELLS AND THE DWS

The exempt well policies across the west were developed to promote a number of important benefits to both citizens and to government agencies. In particular, New Mexicans greatly benefit from the DWS.

### A. The DWS Benefits Rural Residents.

Domestic wells are vital for New Mexicans. In fact, one in five New Mexicans are not connected to a public water supply and are served instead by a domestic well. *See* W. Peter Balleau and S.E. Silver, *Hydrology and Administration of Domestic Wells in New Mexico*, 45 Nat. Resources J. 807, 833 (2005). Domestic wells are most prevalent in rural areas. Indeed, according to the New Mexico Ground Water Association, the large majority of domestic well users

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*Bldg. Wrecking Co. v. Augusta*, No. CV 108-019, 2010 U.S. Dist. LEXIS 31193, at *29 (S.D. Ga. Mar. 31, 2010) ("the Court acknowledges a legitimate governmental purpose in exhibiting efficient internal governmental operations"); *Burger v. McElroy*, No. 97 Civ. 8775, 1999 U.S. Dist. LEXIS 15105, at *18 (S.D.N.Y. Sept. 27, 1999) ("Under rational review, administrative convenience does constitute a legitimate governmental interest."); *Conway v. Searles*, 954 F. Supp. 756, 771 (D. Vt. 1997) ("It cannot be disputed that improving the performance and efficiency of a state agency is a legitimate government interest."); *Alaska Civ. Liberties Union v. State*, 122 P.3d 781, 791 (Alaska 2005) ("We have recognized that administrative efficiency is a legitimate governmental interest."); *Phoenix Newspapers v. Purcell*, 927 P.2d 340, 345 (Ariz. Ct. App. 1996) (noting the "legitimate governmental interests of administrative efficiency...and convenience").

are located in rural areas. A public water supply is not a viable option in rural New Mexico due to its high cost and the remoteness of most New Mexico counties from metropolitan centers. *See* Washington State Groundwater Ass'n, *White Paper Focusing On Instream Flows and Exempt Wells*, at 3, 9 (2004), *available at* http://www.wsgwa.org/News/InstreamFlows.pdf.

Not only are these wells the most practical and efficient source of water available to rural citizens, in many cases, they are the only viable option for obtaining potable water for households. *See* Western States Water Council, *Water Laws and Policies for a Sustainable Future: A Western States Perspective* (June 2008), *available at* "http://www.westgov.org/wswc/laws%20&%20policies%20report%20(final%20with%20cover).pdf; Washington State Groundwater Ass'n, *White Paper Focusing On Instream Flows and Exempt Wells* 1. These considerations likely led the State Engineer to apply an administrative exception to the permitting process some 65 years ago, and prompted the legislature to pass the DWS just 10 years later.

Without the DWS, any person in New Mexico seeking to drill a domestic well would be required to apply with the State Engineer, who would then have to publish notice in a newspaper for three weeks, hear any objections or protests, and then determine whether the proposed appropriation would impair existing water rights, whether the appropriation would be contrary to the conservation of water

within the state, and whether the appropriation would be detrimental to the public welfare before granting the application. *See* § 72-12-3(D)-(E). This type of delay and the potential inability to obtain a domestic well permit will provide a major disincentive preventing people from moving to rural areas and will adversely impact the ability of property owners to live on their property.

Statistics are clear that populations in many rural counties are already declining. Between 2000 and 2007, New Mexico's rural population declined by 0.04%. *See* April Rupasingha and Michael Patrick, *Rural New Mexico Economic Conditions and Trends*, at 1-2 (NMSU Apr. 2010), *available at* http://aces.nmsu.edu/pubs/_circulars/CR-651.pdf. The gap in population growth between urban and rural areas has only increased since 1969, with rural New Mexico lagging behind. *See id.* at 1. Most rural counties lost more residents than they gained during the past decade. *See id.* at 2.

Further, the additional costs of this application process will prove problematic. Often, the application process under Section 72-12-3 requires the assistance of counsel and expert hydrologists. If an application is protested, the process can cost an applicant hundreds of thousands of dollars. Again, this is particularly problematic for rural residents, who would have no other option but to pay the costs or to move elsewhere.

### B. The DWS Helps To Promote Industry and Is Important to the Economy.

Domestic wells are also critical for rural development. *See, e.g.,* Resolution and Recommendation of the Umatilla County, Oregon Critical Groundwater Task Force (Jan. 6, 2005), *available at* http://www.co.umatilla.or.us/planning/pdf/EXEMPTWE-1.pdf. A recent moratorium on exempt wells in a portion of Kittitas County, Washington resulted in "lost jobs, reduced property value, investments wiped out, shifting tax burdens, significant local economic damages, and significant opportunity costs." Presentation of Paul Jewell, Kittitas County Board of Commissioners, summarized in Conference White Paper, *Exempt Wells: Problems and Approaches in the Northwest*, at 7 (May 17 & 18, 2011), *available at* http://watercenter.montana.edu/pdfs/Exempt_Wells_Conference_Report_FINAL.pdf. Additionally, where public water is not available or feasible, exempt wells allow the development of individual rural lots. *See, e.g.,* Exempt Wells Topic Paper, Island County, Washington (2004), *available at* http://www.islandcounty.net/health/WatershedPlanning/WatershedPlanning/TopicPapers/Exempt%20Wells%20_final.pdf.

Further, in addition to the burden on water users, requiring a cumbersome, time consuming permitting process would also have a negative impact on the water well industry in the state. Studies have shown that well drillers in New Mexico

have estimated sales of over $31 million annually. *See* National Ground Water Association, *Ground Water's Role in New Mexico's Economic Vitality* (2008) (relying upon 1997 census). Any legislation slowing the processing of domestic well permits would significantly impact this important industry in New Mexico.

In light of national recognition of the struggles facing rural Americans, *see, e.g.*, Exec. Order No. 13,575, 76 Fed. Reg. 34,841 (June 14, 2011) (President Obama creating a council to focus on rural economies and improving the quality of life in rural communities), doing away with New Mexico's DWS would be unsound from a policy perspective. Adding a time consuming, burdensome, and expensive hurdle for rural residents to overcome in order to have domestic water on their properties will only cause further difficulties in rural communities.

### C. The DWS Allows for Efficient Agency Administration of Well Permits.

From the perspective of administrative agencies, the licensing, permitting and metering of wells that are presently exempt could place an overwhelming burden on the agencies and the public. *See* Western States Water Council, *Water Laws and Policies for a Sustainable Future: A Western States Perspective* (June 2008). Indeed, the State Engineer has confirmed this potential is a reality in New Mexico. Indeed, the State Engineer has made clear that without the domestic well statute, his office will be overwhelmed and likely unable to process domestic well permits in a timely manner. *See Judge's Ruling Could Impact Domestic Well*

*Permits*, Albuquerque Journal Online (July 12, 2008). Not only will this delay processing of domestic well permits, but it will also impact all permits for appropriation of water in New Mexico.

### D. The Benefits of the DWS Outweigh any Burdens that it Might Impose.

The benefits of additional regulation of exempt wells are likely to be far less than the significant costs of the additional regulation. *See, e.g.,* Presentation of Dave Tuthill, Idaho Water Engineering, *Exempt Wells: Problems and Approaches in the Northwest* (May 17 & 18, 2011), Walla Walla, Washington, *available at* https://www.eiseverywhere.com/file_uploads/b2ebaa7026619363260f1eaf978bb16c_Tuthill.pdf, last accessed July 13, 2011. Most households use less than the DWS limitation of 1acre-foot per year --900 gallons--a day, of water. *Id.* A United States Geological Survey study in 1990 indicated that the average household uses .27 acre-feet of water per year per person, or about 79 gallons per day. Wayne B. Solley, Robert R. Pierce, and Howard A. Perlman, *Estimated Use of Water in the United States in 1990*, in U.S. Geological Survey 26 (1993), *available at* http://water.usgs.gov/watuse/wucircular2.html. Because of this, domestic wells consequently have a very small impact on groundwater and hydrologically connected streams. *See id. See also* Resolution and Recommendation of the Umatilla County, Oregon Critical Groundwater Task Force, January 6, 2005.

Additionally, exempt wells drawing small amounts of water may actually provide environmental benefits. One large municipal well creates a large cone of depression, while smaller wells would create much smaller cones of depression. Thus, smaller domestic wells may, for example, prevent salt water intrusion. *See* Exempt Wells Topic Paper, Island County, Washington (2004), *available at* http://www.islandcounty.net/health/WatershedPlanning/WatershedPlanning/TopicPapers/Exempt%20Wells%20_final.pdf. In light of the negligible impact of domestic wells and the environmental benefits caused by such wells, it does not make sense from a policy perspective to impose a costly and time consuming burden on New Mexico residents seeking a domestic well.

## CONCLUSION

Petitioners attempt to achieve in this litigation what they have been unable to accomplish in the state legislature. The DWS is not an exception to the priority doctrine, and indeed all domestic wells are subject to priority calls from senior water appropriators. That it would be inconvenient to resort to priority calls and other remedies for impairment, or that it would be difficult to prevail on an as applied claim provides no reason for this court to accede to a facial attack on the DWS. For the reasons stated above, the *Amici* respectfully request that this court affirm the decision of the Court of Appeals.

Respectfully Submitted,

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