



## DOMESTIC GROUNDWATER EXEMPTIONS:

COMPETING USES PRESSURE REQUIREMENTS FOR WATER RIGHTS, BUT CONSTITUTIONAL RIGHT TO LIFE MAY TRUMP THE PRIOR APPROPRIATION DOCTRINE

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The prior appropriation doctrine administers water use on a basis of first in time, first in right. Under this doctrine, domestic and stockwater uses were declared exempt from water right permitting. Now, times are changing – some tribunals have held that allowing an exemption for domestic and stockwater is contrary to the prior appropriation doctrine and that water right permitting should be required. Those opposed claim that domestic and stockwater uses, exempted or not under the true prior appropriation system, are trumped by the U.S. Constitution’s “Right to Life.”

Many state constitutions acknowledge all men are by nature free and equal and have certain inalienable rights to defend life, own property and obtain safety and happiness. These constitutions imply that man’s “inalienable rights” include the ability to obtain those things upon which survival is based, i.e. the right to water. Arguably, the prior appropriation doctrine and the domestic exemption could be shoved behind the implied right of humans to effect water uses for domestic purposes. Is the right for human water consumption automatic in all instances, or can a balance be achieved?

The prior appropriation doctrine is recognized in most western states and identified in statute. Most western prior appropriation states recognize the need and implied right for domestic water use by codifying water use exemptions in favor of homeowner, domestic and homesite uses. However, population growth, urban flight and competing uses are causing the courts and legislatures to examine exempt water uses and effectively strip out the meat in these laws. How will these new laws be applied to the rural water user versus the quasi-rural water user?

As people move away from the cities in favor of rural homesites with acreage and wells, large parcels are being subdivided into smaller parcels, with each parcel drilling its own well to support the domestic homesite. While water law in most western states allows regulation in favor of the senior and prior water appropriator (usually not the new rural homesite well), most state agencies would rather not regulate off the domestic user. Yet western states have done little to limit the number of new exempt uses created by urban flight. Regulation is especially lacking in viewing ground water basins designated as limited or exhibiting declining water level and recharge.

The legislatures in western states are slowly noticing these issues, and looking into the future of exempt uses. Many states passed laws in recent years to chip away at exempt use laws by limiting the amount of water eligible to be withdrawn from an exempt use. Currently a New Mexico court holds that the domestic exemption statute was unconstitutional.<sup>1</sup>

Is the writing on the wall? Is this the “beginning of the end” for the domestic exemption? In typical legal fashion we answer this question with “yes” and “no.” We can predict a likely end to the domestic exemption as a prior appropriate right subject, to a call under “first in time, first in right.” However, there will be no end to limited domestic water use subject to some amount that is constitutionally protected under “right to life.”

If domestic groundwater use is constitutionally protected, then how do uses allowed under the prior appropriation doctrine stack up? Will continued population growth in water-limited areas, relying on domestic groundwater exemptions

for water under the domestic exemptions, strip away prior appropriative rights? This question may be academic, given that, in Nevada, homeowners using water under the domestic exemption account for 6 percent of the population and withdraw less than 5 percent of the water used in the state.<sup>2</sup>

However, when the conflicts increase in a closed or critical basin, those relying on the domestic ground water exemption may find the court further stripping the exemption and imposing a “right to life” constitutional limit on domestic groundwater use. It is possible that the “right to life” constitutional limit, as determined by the courts, could be determined as a groundwater supply, limited to drinking, cooking and sanitation.

In the meantime, how does a rural homeowner protect his domestic-exempt groundwater use? Instead of relying on the exemption, the authors continue to encourage homeowners to apply for, and obtain, prior appropriative rights for sufficient groundwater withdrawal to cover all domestic uses as those are presently defined: drinking, cooking, showering, toileting, lawn and garden watering and pet and livestock watering. **NI**

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1 See unpublished decision dated July 10, 2008, in *Bounds v. New Mexico*, Sixth Judicial District Court of New Mexico, Case No. CV-2006-166; currently on appeal.  
 2 Nevada Division of Water Resources. *Nevada State Water Plan, Part 3: Water Planning and Management Issues, Section E. Domestic Wells.* [water.nv.gov/WaterPlanning/wat-plan/PDFs/pt3-1e.pdf](http://water.nv.gov/WaterPlanning/wat-plan/PDFs/pt3-1e.pdf).

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