

**DOMESTIC GROUNDWATER EXEMPTIONS:
COMPETING USES PUT PRESSURE ON WESTERN
WATER RIGHT REQUIREMENTS, BUT
CONSTITUTIONAL RIGHT TO LIFE MAY TRUMP
PRIOR APPROPRIATION DOCTRINE**

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I. INTRODUCTION

The Prior Appropriation Doctrine is the dominant guiding theory for the administration of water use in the western United States.¹ The doctrine regulates disputes between water users on a “first in time, first in right” basis. Moreover, modern statutory codification of the

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1. See, A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:30 (2010).

Prior Appropriation Doctrine requires would-be appropriators to obtain a permit for water use prior to any diversion or withdrawal.

Despite these basic tenets of western water law, many domestic and stock water uses of groundwater are declared exempt from water permitting codes of western states. But now, times are changing! The tides have begun to turn, and at least one tribunal has held that allowing domestic and stock water exemptions is contrary to the Prior Appropriation Doctrine itself and that permitting should be required for these traditional, exempt uses. Pressure for such decisions is caused by increasing demand and competition for groundwater resources. On the other side of the argument are those who claim exemptions are unnecessary because the Constitution's "Right to Life"² trumps any restriction on access to water for human needs.

Many state constitutions acknowledge that all men are by nature free and equal and have certain inalienable rights, including the right to defend life, to own property and to pursue safety and happiness. It may be implied from these constitutional provisions that a man's "inalienable rights" include the ability to obtain those things upon which basic survival is based, i.e. *water*. Arguably then, water use provided by domestic exemptions from permitting requirements under the Prior Appropriation Doctrine could be deemed required by an implied right that living beings have to access water for domestic purposes. But is this right to water for human consumption automatic in all instances, or is a balance needed whereby some restrictions are implemented?

This paper examines the Human Right to Water in the context of the Prior Appropriation Doctrine in the western United States. Section II explains the current state of exempt uses of groundwater in selected western states and the challenges created by exempt uses. Section III explores the trends in western water law, including demographic shifts, changes in types of water uses and the effects on groundwater uses. Section IV considers the international Right to Water, and state constitutional bases for the Right to Life and its implications on water laws in the West. Section V concludes that although the law in this area is still somewhat undefined, the international Right to Water and national Right to Life could stand in the way of states as they try to limit or eliminate domestic exempt groundwater uses.

2. U.S. CONST. amend. V and XIV. The "right to life" referred to here is the United States Constitution's "right to life, liberty and property" under the Due Process Clauses of the Fifth and Fourteenth Amendments.

II. EXEMPT WATER USES

A long-standing tradition in western water law is the exemption from permitting requirements for certain domestic uses of groundwater.³ This section first presents a survey of particular state statutes providing for such exemptions, and next discusses competing uses of groundwater.

A. State Domestic Groundwater Exemptions

Nevada: In Nevada, the “domestic use” exemption includes culinary or household purposes of a single-family dwelling.⁴ This includes “the watering of a family garden and lawn and the watering of livestock and any other domestic animals or household pets.”⁵ Developing water for domestic purposes is generally exempt from permitting requirements; however, the State Engineer has authority to require well monitoring and metering, and registration in certain basins or sub-basins.⁶ The State Engineer may require an owner of a well drilled on or after July 1, 1981 to stop using a well if water becomes available to that user through a political subdivision of the State, or through a public utility, so long as the charge for connecting to the service is less than two-hundred dollars.⁷

Nevada’s water code contains provisions that allow for group domestic groundwater users to seek a permit exemption. The State Engineer is directed to waive the typical permitting requirements for use and development of underground water from a well if three conditions are met: 1) the well existed on or before July 1, 1983; 2) it is used solely for domestic purposes by no more than three single-family dwellings; and 3) each dwelling uses no more than two acre-feet of water annually.⁸ Group users must file a written request with the State Engineer, including a written agreement between the affected property owners.⁹

Oregon: In Oregon, exempt groundwater uses include, but are

3. Note that Utah is the only western state without a statute relaxing domestic groundwater use requirements, thus enforcing permitting requirements for all groundwater users.

4. NEV. REV. STAT. § 534.013 (2009).

5. *Id.* at § 543.013(2).

6. *Id.* at § 534.180(1)-(2).

7. *Id.* at § 534.180(3).

8. *Id.* at § 534.185(1).

9. *Id.*

not limited to: stock watering purposes; watering any lawn or noncommercial garden not exceeding one-half acre; single or group domestic purposes in an amount not exceeding 15,000 gallons per day; down-hole heat exchange purposes; and more.¹⁰ To the extent that domestic exempt uses meet beneficial use requirements, they constitute rights to appropriate water equal to certificated rights.¹¹ The Oregon Water Resources Department may require any groundwater user, whether exempt or permitted, to submit information to the Department regarding the well use.¹² Landowners with an exempt well must submit a map to the Department showing the location of the well on the tax lot, and must register the exempt use within thirty days of completion of the construction of the well, with the recording fee of \$300.¹³

Washington: In Washington, wells drawing groundwater for purposes such as stock watering, watering of lawns or non-commercial gardens not exceeding a half-acre in area, and single or group domestic uses not exceeding 5,000 gallons a day, are exempt from permitting requirements.¹⁴ These exempt uses have the same status, and hold the same rights, as those rights granted under the water code for non-exempt uses, to the extent that the water is continuously put to a beneficial use.¹⁵ The Department of Ecology may request persons making domestic withdrawals to report information regarding the means and quantity of the withdrawals.¹⁶

Washington allows exempt users to file an application or declaration at their option.¹⁷ In this way, permits and certificates may be obtained for exempt uses in the same manner and under the same requirements as other non-exempt water uses.

Additionally, Washington has implemented a pilot project for exempting clustered residential developments seeking the use of water from underground sources from the normal permitting

10. OR. REV. STAT. § 537.545(1) (2009).

11. *Id.* at § 537.545(2).

12. *Id.* at § 537.545(3).

13. *Id.* at §§ 537.545(5)-(7).

14. WASH. REV. CODE § 90.44.050 (2011). *See* State Dep't of Ecology v. Campbell & Gwinn, LLC, 43 P.3d 4, 10 (Wash. 2002) (holding that development subdivisions relying on domestic exempt wells are limited to 5,000 gallons per day for the entire subdivision).

15. *Id.*

16. *Id.*

17. *Id.*

requirements associated with groundwater appropriations.¹⁸ Under the program, residential developments, with an overall density equal to or less than one resident per ten acres and a minimum of six homes, are exempt so long as the amount of water withdrawn in total does not exceed 1,200 gallons of water per day.¹⁹

Idaho: In Idaho, certain “domestic purposes” are exempt. These include the use of water for homes, organizational camps, public campgrounds, livestock and for any other purpose connected to those uses, including irrigation of up to one-half acre of land, so long as the total use does not exceed 13,000 gallons of water each day.²⁰ This does not include water for multiple ownership subdivisions.²¹

The opening and excavation of, and withdrawal from, wells for domestic purposes are exempt from permitting requirements.²² Domestic wells are also exempt from water department fees.²³ Further, domestic exempt wells are not subject to measuring or reporting requirements.²⁴ The rights to groundwater for domestic purposes may only be acquired by actual withdrawal and use.²⁵ The wells and the withdrawals are subject to inspection by the Department of Water Resources and the Department of Environmental Quality.²⁶

New Mexico: In New Mexico, domestic groundwater uses include irrigation of one acre or less of non-commercial trees, lawn or garden, or other domestic use.²⁷ This does not include watering livestock. New domestic uses are limited to one acre-foot per year per household, or three acre-feet per year for wells serving multiple households.²⁸ Domestic users are not exempt from permitting requirements, but the State Engineer does not have the statutory discretion to deny permits for domestic wells.²⁹ A user need only apply to the State Engineer describing the domestic use applied for,

18. *Id.* at § 90.44.052(1).

19. WASH. REV. CODE § 9.44.052(2).

20. IDAHO CODE ANN. § 42-111 (2011).

21. *Id.*

22. *Id.* at § 42-227 (2003). Low temperature geothermal wells for domestic uses require permits. IDAHO CODE ANN. § 42-233(1) (2003).

23. *Id.* at § 42-221(K)(1).

24. *Id.* at § 42-701(7).

25. *Id.* at § 42-227.

26. *Id.*

27. N.M. STAT. ANN. § 72-12-1.1 (1978).

28. N.M. CODE R. § 19.27.5.9 (D).

29. N.M. STAT. ANN. § 72-12-1.1 (1978).

and, upon receipt of the application, the State Engineer “shall” issue a permit for the use.³⁰ A permit issued within a municipality will include a requirement that the permittee comply with any applicable municipal ordinances.³¹

The State Engineer retains the authority to deny an application for a domestic groundwater permit if the well is located in a geographic area in which a court has limited the use of water.³² Additionally, the State Engineer may deny an application for appropriation for domestic use if the well would be located in an area in which a government entity has recommended against drilling additional wells due to water quality issues.³³ Finally, the State Engineer may require domestic wells serving multiple households to be metered.³⁴

B. Resolving Conflicts between Exempt and Permitted Groundwater Users

In the West, the Prior Appropriation Doctrine creates a hierarchal system of junior and senior water users, under which water use is regulated on a “first in time, first in right” basis.³⁵ Senior water rights are superior to the rights of juniors, and juniors may not be able to take water from its source at times when supply is insufficient to satisfy those senior rights.³⁶ If a senior user is not receiving all the water he is entitled to, then he may make a “call”³⁷ on the water source, which begins the process of regulating the amount of water junior users may take. In a dry year, a junior may not receive any water at all.³⁸

Priority, which is one of the core components of western water

30. *Id.*

31. *Id.*

32. N.M. CODE R. § 19.27.5.13A.

33. *Id.*

34. *Id.* at § 19.27.5.9(C).

35. WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, WATER IN THE WEST: THE CHALLENGE FOR THE NEXT CENTURY § 5-4 (June 1998).

36. MARC REISNER & SARAH BATES, OVERTAPPED OASIS: REFORM OR REVOLUTION FOR WESTERN WATER 63 (Island Press 1990).

37. A “call” is the action of a senior water right holder to restrict water use of a junior water right holder when there is not enough water to satisfy the senior’s rights. The senior user will make a “call” on the water, which typically involves reporting the situation to the local watermaster. The watermaster then investigates the call and may order the junior user to cease water use until the senior’s rights are satisfied.

38. REISNER & BATES, *supra* note 36, at 63.

law, is sometimes challenged by the emergence of exempt groundwater uses. The question arises about how senior vested rights can be protected in the face of exempt uses popping up all over the landscape.

In order to deal with the inevitable conflicts that follow from multiple parties using and competing for the same resource, each state has designed a method for resolving disputes between permitted users and exempt users. This section briefly outlines the strategies utilized by certain states, and the politics involved with sorting out water use disputes.

Nevada: The priority date for permitted or certificated groundwater rights in Nevada, issued after code adoption, is the date when application is made to the Office of the State Engineer.³⁹ In contrast, the date of priority for exempt domestic groundwater uses is the date of well completion, either as stated in well logs recorded by the well driller and filed with the State Engineer, or as otherwise demonstrated by other documentation or evidence by the State Engineer.⁴⁰

Nevada's stated policy is "[t]o recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects . . ."⁴¹ Municipal, quasi-municipal and industrial applicants must give notice to domestic users within 2,500 feet of the proposed well if the expected rate of diversion is one-half cubic feet per second or more.⁴² Moreover, the State Engineer has the ability to deny permits for appropriations that would interfere with existing exempt domestic wells.⁴³ Thus, Nevada provides significant protections to domestic exempt users. On the other hand, if an exempt user is pumping more than allowed by statute, the State Engineer has the authority, and will regulate the exempt use.⁴⁴

Oregon: In Oregon, the priority date for permitted or certificated groundwater uses, issued after code adoption, is the date the application was received by the Oregon Water Resources

39. N.R.S. § 534.080(3).

40. *Id.* at § 534.080(4).

41. *Id.* at § 533.024(1)(b).

42. *Id.* at § 533.360(3).

43. *Id.* at § 533.370(5).

44. *See supra* footnotes 4-7 and accompanying text.

Department.⁴⁵ Generally, exempt domestic groundwater uses are not assigned priority dates. However, if it is necessary for the Oregon Water Resources Department to regulate the use or distribution of groundwater as between the permitted and exempt users, then the Department issues a priority date for the exempt use based on the well log for the exempt well, or other evidence from the well owner that evidences when water use first began.⁴⁶ In this way, exempt groundwater uses may be regulated along with permitted and certificated uses.

In times of declared drought, the Oregon Water Resources Commission has the power to grant preference to rights for human consumption “[n]otwithstanding the priority of water rights.”⁴⁷ Therefore, if a severe drought forces the regulation of competing uses, domestic uses for human consumption should prevail, including domestic exempt groundwater uses, despite competing senior interests.

The Oregon Water Resources Commission designates Critical Groundwater Areas, and this designation may affect the regulation of domestic exempt groundwater uses. Critical Groundwater Areas are designated if the groundwater levels in the area are declining or have declined extensively, there is a pattern of substantial well interference between wells within the area, the groundwater supply is being overdrawn, groundwater temperatures have been altered, or water quality is declining or is reasonably expected to decline.⁴⁸ If a Critical Groundwater Area is designated, then the Commission may regulate all wells, including an exempt well, and may even order discontinuance of a well under certain circumstances.⁴⁹

Washington: In Washington, the priority date for a permitted groundwater right is the date the application was filed with the

45. OR. REV. STAT. § 537.150(2).

46. *Id.* at § 537.545(4).

47. *Id.* at § 536.750(1)(c). Note that when proposed uses of water are in “mutually exclusive conflict” or when there is an insufficient amount of water in the source to support both uses, Oregon has a preference statute that directs the Oregon Water Resources Department to give preference to appropriations for human consumption over all other uses, and then for livestock consumption over all other uses. OR. REV. STAT. § 536.310(12). Note that the other western states with similar preference provisions include California, Colorado, Alaska, and Idaho, discussed *infra*.

48. OR. REV. STAT. § 537.730(1). Additional reasons for designating a Critical Groundwater Area are listed in the statute.

49. *Id.* at § 537.775(1).

Department of Ecology.⁵⁰ For exempt domestic uses, the priority date is the date the water was first put to beneficial use.⁵¹ However, exempt domestic users may apply to the Department for issuance of a permit for the domestic groundwater use.⁵² If a permit or certificate is issued for the qualifying exempt use, then the priority date is the same as that for any other permitted use: the date the application was filed with the Department of Ecology. The Washington statute provides an appealing way for qualifying exempt water users to gain priority by applying for a permit before beginning construction to sink a domestic well.

Domestic exempt groundwater uses are subject to “first in time, first in right” requirements and all other substantive water law requirements, despite being exempt from the permitting process. The Washington Department of Ecology will regulate domestic exempt groundwater uses in favor of senior rights holders and in-stream flows.⁵³

Idaho: In Idaho, the priority date for permitted or certificated groundwater uses, issued after code adoption, is the date of application to the Idaho Department of Water Resources.⁵⁴ The priority date for exempt domestic groundwater uses is the date the waters are withdrawn and used.⁵⁵

Idaho’s constitution, as well as water code, establishes that priority governs which water user holds a superior right.⁵⁶ However, the state constitution provides that in times of water scarcity, there is a preference among water users, so that certain types of uses may trump others with earlier priority dates.⁵⁷ Domestic users have a preference over all other types of users, then agricultural users, and then mining.⁵⁸ The ability to “leapfrog” ahead of senior water users is, however, subject to laws related to the taking of private property for

50. WASH. REV. CODE ANN. § 90.03.3 (2011).

51. *Id.* at § 90.44.130 (2011).

52. *Id.* at § 90.44.050.

53. *State Water Use Laws: Compliance and Enforcement*, WASH. DEP’T OF ECOLOGY, http://www.ecy.wa.gov/programs/wr/comp_enforce/gwpe.html (last visited Feb. 6, 2011).

54. IDAHO CODE ANN. § 42-202(1) (West 2010).

55. *Id.* at § 42-227. “Rights to ground water for such domestic purposes may be acquired by withdrawal and use.” *Id.*

56. IDAHO CONST. art. XV, § 3 (2010).

57. *Id.*

58. *See id.* at art. 1, § 14 (dealing with takings of private property for public and private use).

public and private uses.⁵⁹ Thus, the Idaho Supreme Court has held that the ability to reorganize priority dates based on the preference of domestic uses over all others can only be accomplished if “just compensation” is paid to the senior owners who are deprived of their property rights in water.⁶⁰

Where a domestic use of groundwater is exempt under Idaho’s water code, a delivery call by a senior right holder will not be effective against the domestic use, regardless of the date of priority.⁶¹ The exception to this rule is where a holder of an exempt domestic water right is suffering material injury and makes a delivery call against the holder of another exempt domestic water right.⁶² In that situation, the call against the domestic user will be effective.

In addition to the “first in time, first in right” principle, Idaho’s groundwater use is also tempered by the reasonable use principle. The water code states that the “first in time, first in right” principle “shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided.”⁶³ Therefore, uses may also be regulated by their degrees of reasonableness as determined by the Department of Water Resources.

New Mexico: In New Mexico, all groundwater uses require permitting. However, the State Engineer does not have the discretion to deny a permit for a domestic groundwater use that meets certain requirements.⁶⁴ The state statute reads: “Upon the filing of each application . . . the state engineer *shall* issue a permit to the applicant to use the underground waters applied for.”⁶⁵ Because domestic wells are subject to permitting requirements, the date of priority is established by the date on which the permit application was filed.

New Mexico has enacted statutes that allow for Domestic Well

59. *Id.* The section of the Idaho Constitution that deals with takings of private property for public and private use is Article I, § 14.

60. *Basinger v. Taylor*, 164 P. 522, 523 (1917).

61. Idaho Administrative Procedures Act (“I.D.A.P.A.”) § 37.03.11.20.11, available at <http://adm.idaho.gov/adminrules/rules/idapa37/0311.pdf>.

62. *Id.*

63. IDAHO CODE ANN. § 42-226 (West 1987).

64. N.M. STAT. ANN. § 72-12-1.1 (West 2003). See also *supra*, notes 24-27 and accompanying text.

65. *Id.* (emphasis added).

Management Areas in areas in which there is a hydrological connection between surface water and groundwater.⁶⁶ Such a designation allows the State Engineer to protect existing surface rights by creating guidelines that limit diversions.⁶⁷ However, no Domestic Water Management Areas have been designated to date.⁶⁸

III. DIMINISHING GROUNDWATER RESOURCES & STATE REACTIONS REGARDING EXEMPT USES

During the settlement of the West, groundwater resources were still largely misunderstood. Groundwater was referred to as the “occult,” meaning people tended to think of groundwater as a mystical and hard to understand resource.⁶⁹ For this reason, among others, groundwater codes were generally enacted long after surface water codes.⁷⁰

All water resources on Earth have a hydraulic connection.⁷¹ Yet the lack of knowledge regarding groundwater resources leads many states to govern surface water and groundwater as separate resources. As separate resources, different rules were created pertaining to the appropriation of each resource that sometimes did not even recognize the hydraulic connection between the two resources.⁷² This dual system has threatened the security of existing water rights because once a hydrologic connection is recognized, the two separate priority systems then become one, to the disadvantage of the usually later priority groundwater rights. Thus, a senior groundwater right becomes junior to the connected surface water right. This conflict has led some

66. N.M. CODE R. § 19-27-5.7.

67. Nathan Bracken, Western States Water Council, *Exempt Well Issues in the West*, 40 ENVTL. L., 173 (2010), available at http://aquadoc.typepad.com/files/exempt_wells_in_the_west_n_bracken.pdf.

68. *Id.*

69. *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 76 (Tex. 1999).

70. Nevada enacted its surface water code in 1905 (with significant revisions in 1913), and its groundwater code in 1939. 4 WATERS AND WATER RIGHTS, *Nevada 2* (Robert E. Beck ed., 3rd ed. 2009). Washington State enacted its surface water code in 1917, and its groundwater code in 1945. *Id.* at *Washington 1*. Oregon enacted its surface water code in 1909, and its groundwater code in 1955. *Id.* at *Oregon 1-2*.

71. 2 WATERS AND WATER RIGHTS 18-14, 18-22 (Robert E. Beck ed., 3rd ed. 2009).

72. Nevada’s surface waters are governed by N.R.S. §533, and groundwaters by N.R.S. §534. There are no provisions in the Nevada water code for conjunctive use management of surface and groundwater resources. Texas follows the Prior Appropriation Doctrine for surface water, but the “rule of capture” for groundwater. 4 WATERS AND WATER RIGHTS, *Texas*, 3, 8 (Robert E. Beck ed., 3rd ed. 2009). The rule of capture entitles landowners to pump unlimited quantities of water below their lands without liability to other landowners. *Id.*

states to recognize the connection between surface and groundwater resources when permitting new appropriations to the degree of connection.⁷³ Now recognizing this connection, some states have created rules to regulate the hydrologic connection of groundwater and surface water as one source, thus regulating both surface and ground water rights under one system.

The western United States is an arid region and water resources are scarce. Surface water rights were the first to be developed by western settlers,⁷⁴ and today surface waters are generally fully subscribed.⁷⁵ The limited availability of surface water resources, coupled with the fact that surface water sources are very dispersed in the West, sometimes requiring expensive diversion infrastructure that has its own operation, maintenance, and efficiencies issues, has led appropriators to turn to groundwater resources.

The use of groundwater has increased so dramatically that some groundwater basins have become overdrawn to a point where continued withdrawals are not sustainable.⁷⁶ Certain groundwater basins are closed to further permitted appropriations.⁷⁷ However, exempt domestic groundwater uses create a potentially giant loophole restricting groundwater appropriations. Due to the fact that many domestic uses are exempt from permit requirements, states may face

73. For example, in Oregon, surface and groundwater are managed conjunctively if there is a hydraulic connection. OR. ADMIN. R. 690-009-0010(1) (2010). Groundwater permits will not be issued if they impair or substantially interfere with existing surface rights. OR. REV. STAT. § 537.629 (1995). Finally, there is a rebuttable presumption that wells in unconfined aquifers are hydraulically connected to streams less than a quarter mile away. OR. ADMIN. R. 690-009-0040(2) (2010).

Washington has extended its surface water code to govern groundwater resources as well. WASH. REV. CODE §§ 90.44.020, 90.44.060 (1945). Groundwater appropriations may not harm existing surface rights or other groundwater rights. WASH. REV. CODE §§ 90.44.030, 90.44.070; WASH. ADMIN. CODE § 173-150-050. *See also* Hubbard v. State of Washington, 936 P.2d 27, 29 (Wash. Ct. App. 1997).

In Idaho, the Department of Water Resources has enacted an administrative code section entitled Conjunctive Management of Surface and Groundwater. IDAHO ADMIN. CODE r. 37.03.11. *See generally* American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources, 154 P.3d 433, 454 (Idaho 2007) (upholding conjunctive management rules as facially constitutional).

74. 1 WATERS AND WATER RIGHTS 11-4 (Robert E. Beck ed., 3rd ed. 2009).

75. WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, *supra* note 35, at 3-6 (“surface supplies often are fully appropriated under state law”).

76. *See e.g.*, *Critical Groundwater Allocations*, WATER RESOURCES DEPARTMENT, http://www.wrd.state.or.us/OWRD/GW/gw_critical_allocations.shtml (last visited Jan. 29, 2011). *See also*, 2 WATERS AND WATER RIGHTS § 18.05 (Robert E. Beck ed., 3rd ed. 2009).

77. *Id.*

difficulty in regulating groundwater resources in the face of continued growth of exempt groundwater uses. This section discusses the challenges created by exempt domestic groundwater uses in certain states.

A. The Potential Effects of Exempt Groundwater Wells

One author reports that the policy behind exempting domestic uses is the belief that exempt uses are *de minimis*.⁷⁸ However this policy is undercut by the sheer number of domestic exempt wells in existence and the number being drilled every year: there are more than a million exempt domestic wells in the West and tens of thousands more being drilled each year.⁷⁹ Even if domestic exempt wells do not substantially impact governance of water resources in the present, they have the potential to do so in the future as their numbers increase.

Settlement across the United States typically occurs in clusters; thus exempt domestic wells are also clustered. This close proximity creates a greater impact on fellow users from pumping and on the particular groundwater sources. When combined, there is the very real potential for exempt well uses to constitute a very large withdrawal.⁸⁰

Currently, domestic uses account for a very small percentage of all water used in the United States, and in the West.⁸¹ However, as land uses change, domestic exempt uses have the ability to quickly multiply. In the West, traditionally rural farmland is being converted to residential and other types of land at alarming rates.⁸² Additionally, in the West, landowners are able to sever water rights from generally appurtenant land.⁸³ The fact that water rights may be severed from the

78. Bracken, *supra* note 67, at 195.

79. *Id.*

80. *Id.* at 195-96 (Arizona has over 100,000 exempt wells and 3,000 new exempt wells each year; Colorado has 200,000 exempt wells; Idaho has 4,500 new exempt wells each year; Montana has issued over 100,000 permits for exempt wells; New Mexico has 136,000 domestic wells and 6,000 to 8,000 new permitted domestic wells each year; Oregon has 230,000 exempt wells and 3,800 more are drilled annually; Washington has over 500,000 wells and over 6,000 new annually; and Wyoming has 70,053 domestic and stockwater wells).

81. See also *The Oregon Story*, OREGON PUBLIC BROADCASTING, http://www.opb.org/programs/oregonstory/water/or_water/page_3.html (last visited Jan. 29, 2011) (In Oregon, "domestic use adds up to less than 6% of the state's water withdrawals."). This figure is not atypically low when compared to other western states.

82. See WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, *supra* note 35, at 2-28-30.

83. In many western states, water is appurtenant to the land and is transferred with the

land means that rural landowners may sell their water rights to other landowners, and in turn sell the rural land without water rights. A developer can then create a subdivision, supplying domestic water from exempt domestic wells. In this way, the use of exempt groundwater wells in rural communities may skyrocket, with water withdrawals potentially increasing exponentially.

B. State Reactions to Growing Concern over Groundwater Resources

In *Bounds v. New Mexico*,⁸⁴ New Mexico's Sixth Judicial District Court recently ruled that the state's permitting process for domestic groundwater uses is unconstitutional because it violates the due process rights of private senior water right holders. The current statutory scheme required the State Engineer to approve domestic groundwater applications without consideration of the amount of available water, the effect on existing users, and the effect on public welfare. This means that the State Engineer does not have the discretion to reject a domestic groundwater application.⁸⁵ The Court ruled that, because the statute was unconstitutional, the State Engineer would have to permit domestic groundwater applications in the same fashion as other groundwater applications.⁸⁶ This ruling was appealed to the New Mexico Court of Appeals wherein the Court reversed the decision of the District Court finding that the statute was constitutional on its face.⁸⁷ The Court of Appeals noted other avenues for recourse focusing on a legislative fix, or a case by case basis of curtailment, considering that the State Engineer has authority to regulate water uses in priority. This case is one of the first "test cases" on this very issue that we will likely see again in other jurisdictions.

At present, no other state court has ruled that exemptions for domestic groundwater uses from the typical permitting requirements are unconstitutional. However, as groundwater resources become scarce, states may attempt to place limitations on exempt wells. In the meantime, some states have taken less drastic approaches to regulating domestic groundwater users.

land, unless expressly reserved by the seller. *See, e.g.*, NEV. REV. STAT. §§ 533.382–.384 (2010); OR. REV. STAT. § 540.510 (2010); IDAHO CODE ANN. § 42-220 (2010).

84. *Bounds v. New Mexico*, No. CV-2006-166, slip op. at 4 (N.M. 6th Jud. Dist. July 10, 2008); *rev'd*, Case No. 28,860 (N.M. Ct. App. Oct 29, 2010).

85. N.M. CODE R. § 19.27.5.13A, *available at* <http://www.nmcpr.state.nm.us/nmac/parts/title19/19.027.0005.htm>.

86. *Bounds*, No. CV 2006-166 at 5.

87. *Bounds*, No. 28,860.

For example, in Oregon, water basins may be categorized as “Critical Groundwater Areas” or “Groundwater Limited Areas.”⁸⁸ First, the Oregon Water Resources Department will designate a critical or limited area by rule.⁸⁹ Next, restrictions are incorporated into water basin plans.⁹⁰

In Critical Groundwater Areas, the Water Resources Commission may regulate all wells, including exempt domestic wells, and may require decommission of any well if wasteful or interfering use is found.⁹¹ The Department may also initiate contested case proceedings in order to regulate existing water rights and water withdrawals based on apportionment of permissible total withdrawals, preferences for certain uses, reductions of withdrawals by one or more appropriators, abatement for pollution of groundwater, or rotation agreements within the area.⁹² In Groundwater Limited Areas, the focus is generally on prevention and the cessation of additional withdrawals, rather than the curtailment of existing rights.⁹³

Additionally, Oregon has started a pilot program called the “Neighborhood Ground Water Network” to better manage the Eola Hills Ground Water Limited Area (“EHGLA”). The EHGLA was created as part of the Willamette Basin Program in 1992.⁹⁴ There are many other Ground Water Limited Areas listed by regulation.⁹⁵ The Program is voluntary, and teaches landowners groundwater science to allow the landowners to regulate their own consumption and prevent overuse.⁹⁶

Finally, a bill was introduced by the Oregon Legislature in 2009 that would have reduced the exemption for group domestic exempt

88. OR. REV. STAT. §§ 537.730(1) (2009); ADELL LOUISE AMOS, FRESHWATER CONSERVATION: A REVIEW OF OREGON WATER LAW AND POLICY 100-102 (April, 2009), available at: <http://www.law.uoregon.edu/faculty/aamos/docs/tnc.pdf>; see also e.g., OR.ADMIN.R. § 690-502-0170 et. seq. (listing subbasin programs within the Willamette Basin which have been designated as Groundwater Limited Areas).

89. OR. REV. STAT. § 537.735.

90. Amos, *supra* note 88 at 100.

91. OR. REV. STAT. § 537.775 (2009).

92. OR. REV. STAT. § 537.742(2).

93. Amos, *supra* note 88 at 102.

94. *Neighborhood Ground Water Network*, OREGON WATER RESOURCES DEPARTMENT, http://www.oregon.gov/OWRD/GW/NGWN_homepage.shtml. (Last visited April 28, 2011).

95. OR. ADMIN.R. § 690-502-0170 et. seq.

96. *Neighborhood Ground Water Network, Frequently Asked Questions*, OREGON WATER RESOURCES DEPARTMENT, http://www.oregon.gov/OWRD/GW/NGWN_faq.shtml. (Last visited April 28, 2011).

uses from 15,000 gallons per day to 1,000 gallons per day.⁹⁷ Although the measure did not pass, it is another example of states beginning to recognize that exempt uses could significantly affect water resources in total and attempting to limit exempt uses.

IV. THE RIGHT TO WATER: INTERNATIONAL AND DOMESTIC PERSPECTIVES

Internationally, there is no constitution that lays out human rights. Thus, international conferences are held between countries, and representatives try to reach consensus about what rights, if any, are fundamental to all human beings. Although not always enforceable, these fundamental human rights work as guideposts for government action. If governments do not try to protect fundamental rights within their countries, then other governments may look on those countries as uncooperative and aid organizations may refuse to fund the uncooperative governments' projects.

A. The Human Right to Water on an International Level

In 1948, the United Nations passed the Universal Declaration of Human Rights. Article 3 declared: "Everyone has a right to life, liberty and security of person."⁹⁸ Additionally, Article 25 provided: "Everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food[.]"⁹⁹ Arguably, the right to life and the right to a healthy standard of living include the right to water.

In 1997, the United Nations adopted the Convention on the Law of Non-Navigable Uses of International Watercourses.¹⁰⁰ The substance of the convention centers on five points: "[T]he idea of a human right to water, the principle of equitable and reasonable utilization, the obligation not to cause significant harm to other shares in the watercourse, the principle of sharing information related to the

97. H.B. 2859, 75th Leg. (Or. 2009), available at <http://www.leg.state.or.us/09reg/measpdf/hb2800.dir/hb2859.intro.pdf>.

98. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>.

99. *Id.*

100. U.N. Convention on the Law of the Non-navigational Uses of Int'l Watercourses, G.A. Res. 51/229, U.N. Doc. A/RES/51/229 (July 8, 1997).

watercourse, and methods of mediation.¹⁰¹

The Convention did not receive enough votes to become law. However, it is argued that the Convention was merely attempting to codify already-existing customary international law, which is binding on countries.¹⁰² The recognition of customary law in the international context paves the way for future law and policy on the inherent right to water for life.

In 2000, the United Nations Committee on Economic, Social and Cultural Rights declared that the right to safe drinking water and water for sanitation are essential to a person's right to health.¹⁰³ In 2002, the Committee recognized that the right to water was an independent right, stating in General Comment 15 that "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."¹⁰⁴ Thus, countries have the obligation to provide their citizens with enough water to prevent dehydration or disease.¹⁰⁵

Recently, the United Nations adopted the United Nations Resolution on the Human Right to Water and Sanitation.¹⁰⁶ The resolution was passed by 122 votes in favor, and 41 against. Notably, Canada, the United States, the United Kingdom and Australia abstained from the vote.¹⁰⁷ The Resolution recognizes "the right to

101. Russell Mason, *Natural Law*, THE HARVARD POLITICAL REV. (Apr. 2, 2009), <http://hpronline.org/beyond-borders/natural-law/>.

102. *Id.*

103. WORLD HEALTH ORG. [WHO], THE RIGHT TO WATER 8 (2003), *available at*: www2.ohchr.org/english/issues/water/docs/Right_to_Water.pdf.

104. *Id.*

105. *Id.* at 9.

106. G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010).

107. Press Release, Security Council, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation, U.N. Press Release GA/10967 (July 28, 2010), *available at* <http://www.un.org/News/Press/docs/2010/ga10967>.

The delegate for the United States expressed the country's support of finding solutions to global water issues, but felt that the text of the Resolution fell short because it acknowledged a right to water and sanitation which had not existed previously without "formulating, articulating and upholding universal rights." *Id.* Additionally, the delegate expressed that the Assembly had not yet considered the full legal implications of declaring a human right to water. *Id.*

The delegate for Canada expressed the country's concern that the Resolution declared a right to water and sanitation without defining the scope of that right. *Id.* Because there was no consensus on that issue, Canada abstained from the vote. *Id.*

The delegate for the United Kingdom explained that the government was abstaining because there was not sufficient legal basis for declaring the rights to water and sanitation as free-

safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all other human beings.”¹⁰⁸

Although many international documents pay lip service to the Human Right to Water, the scope of the right is poorly defined, and enforcement is difficult to achieve. For these reasons, until such a time as the international Right to Water is more concrete, the constitutions of individual countries may provide the best avenue for defining and enforcing the Human Right to Water. For instance, South Africa,¹⁰⁹ Australia,¹¹⁰ Ecuador,¹¹¹ and Uganda¹¹² acknowledge the Right to Water in their constitutions.

B. The United States and the Right to Life

The United States grants its citizens the “right to life”¹¹³ in the Bill of Rights.¹¹⁴ The Fifth Amendment provides that the federal government may not deprive a person of life without due process of law,¹¹⁵ and the Fourteenth Amendment extends this prohibition to the States.¹¹⁶ This section considers how the “right to life” affects the policy of exempting domestic groundwater wells from permitting requirements.

Many state constitutions also provide for the “right to life.” For example, the Nevada and Idaho Constitutions state: “All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty. . . .”¹¹⁷ The Washington Constitution reads: “No person shall be deprived of life. .

standing human rights, or that they constitute customary international law. *Id.*

The delegate for Australia stated that the government had reservations about declaring a human right in a General Assembly Resolution, and that consensus, which was not reached, was needed. *Id.*

108. G.A. Res. 64/292, *supra* note 100, at 2.

109. S. AFR. CONST., 1996, ch. II, §. 27(1)(b).

110. AUSTL. CONST. 100 (“The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.”), *available at* <http://www.aph.gov.au/senate/general/constitution/chapter4.htm>.

111. ECUADOR CONST., art. 3, ¶1 (2008).

112. UGANDA CONST., “National Objectives and Directive Principles of State Policy,” art. XIV(b) (1995).

113. *See supra* note 2.

114. The “Bill of Rights” is the section of the United States Constitution comprised of the first ten amendments to the Constitution.

115. U. S. CONST. amend. X.

116. U. S. CONST. amend. XIV, § 1.

117. NEV. CONST. art. I, § 1 (1864); IDAHO CONST. art. I, § 1 (1889).

.without due process of law.”¹¹⁸ The Montana Constitution provides: “All persons are born equally free, and have certain natural, essential and inalienable rights, among which may be reckoned the right to enjoying and protecting lives and liberties”¹¹⁹

But what does this “right to life” mean? Surely the most basic meaning must be the right to sustain one’s own life. It follows from this line of reasoning that a person must be able to obtain those things essential for sustaining life. Water is the most essential ingredient for life, as one cannot live without water for more than a few days. In addition to drinking water, one must be able to grow food, also an essential requirement for life. Finally, basic sanitation is implied by a right to life because without basic sanitation one may become ill and die. Therefore, it appears that any grant of the right to life impliedly grants water for drinking, food production, and sanitation purposes.

What obligations does the right to life, and thus right to water, place on the government? Does the right to life require that the government treat and deliver water to each citizen free of cost, or at a reasonable cost? Does it require an exemption from paying water treatment and delivery fees if an individual cannot afford to pay? These questions have not been answered, and any attempt to define the right to water in the United States to include free treatment and delivery would be mere speculation.

At least one state has passed a law providing for the right to water. The California Public Utilities Code states that access to an adequate supply of healthful water is a basic necessity for human life, and shall be made available to all residents of California at an affordable cost.¹²⁰ Thus California has defined the right to water to require water be made available by the state government at an affordable cost.

It is interesting to note the interplay between the right to water and domestic exempt groundwater uses. Most states have defined what constitutes a “domestic use” of water.¹²¹ Most states also recognize the “right to life.” Because domestic uses of water are essential to life, these domestic uses could be held to be protected by state constitutions and the United States Constitution. Therefore, the right to life may trump prior appropriation concerns about priority of

118. WASH. CONST. art. I, § 3 (1889).

119. WASH. CONST. art. I, § 3 (1889).

120. CAL. PUB. UTIL. CODE § 739.8(a) (2009).

121. See footnotes 4-34 and accompanying text.

interests in water.

V. CONCLUSION

In the western United States, water use is governed under the Prior Appropriation Doctrine, which states that the first in time has the superior right to use water. In modern times, water appropriations require state permitting. The priority of the right to use water depends on the statutory permitting of the right to withdraw water.

Certain domestic uses of groundwater are exempt from permitting requirements in nearly every western state. The lack of permitting for these water rights creates complications when resolving water disputes between permitted and exempt water uses. Disputes may also arise between exempt groundwater users and surface water users if the sources are hydraulically connected. Further, the situation may become even more complicated as land uses change and more exempt wells are drilled.

In the West, many rural lands are being subdivided and converted into residential lands. Water rights that were once appurtenant to the land are being sold separately from the land, thus encouraging developers to supply subdivided lots with private exempt domestic wells. Although in most areas this phenomenon has not yet proved to be a problem, increasing conflicts may arise in the future.

Fear of a domestic exempt well explosion has driven some western states to seek regulation and limitation of exempt wells. The *Bounds v. New Mexico*¹²² case constitutes an attack on exempt domestic uses, declaring the discretion-less permitting of domestic wells unconstitutional. But how far can states go to stop the drilling of domestic exempt wells?

It has been argued internationally that the Human Right to Water is a fundamental human right, and that the right requires that human beings be provided with water treatment and delivery in amounts necessary for domestic uses and sanitation. Nationally, the United States Constitution and state constitutions provide citizens with the "right to life." It is possible that the international right to water and the national right to life may stand in the way of cutting off domestic uses, even if that means stepping over the Prior Appropriation Doctrine and tradition in order to do so.

122. *Bounds*, *supra* note 84.