



Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AQUIFER SCIENCE, LLC,

Applicant-Appellant,

v.

No. A-1-CA-39080

**SCOTT A. VERHINES, New Mexico
State Engineer,**

Appellee-Appellee,

and

COUNTY OF BERNALILLO, et al.,

Protestants-Appellees/Appellees.

Appeal from the Second Judicial District Court
The Honorable C. Shannon Bacon/The Honorable Clay Campbell

ANSWER BRIEF OF APPELLEES BERNALILLO COUNTY

September 13, 2021

JALBRIGHT LAW, LLC
Jeffrey H. Albright
201 Third St., Suite 1880
Albuquerque, NM 87110
Attorney for the County of Bernalillo

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING TRANSCRIPT CITATIONS

Citations to the trial and hearings are to the stenographic transcripts filed in this Court on December 4, 2020. All transcript citations substantially follow the form in Rule 23-112, NMRA, Appendix Part X.A.

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G), NMRA, this brief complies with the type-volume limitations set forth in Rule 12-318(F)(3), NMRA, because it is prepared in a proportionally spaced typeface, 14-point Times New Roman, and the body of the brief contains 2,277 words.

TABLE OF AUTHORITIES

New Mexico Statutes

to NMSA 1978, Section 72-7-1 (1971).....1

Other Authorities

Bernalillo County Commissioners Resolution 2013-15.....6

I. INTRODUCTION

This matter arose from a Notice of Appeal *de novo* filed by Aquifer Science, LLC (“Applicant or “Aquifer Science”) pursuant to NMSA 1978, Section 72-7-1 (1971) on November 19, 2014 with the Second Judicial District Court (Case No. D-202-CV-2014-07209) following an adverse decision for Aquifer Science by the Office of the State Engineer (“OSE”) in the administrative evidentiary hearing below. In that proceeding, the OSE denied Aquifer Science’s Application No. S-02618 (as subsequently amended, the “Application”) to appropriate groundwater within the Sandia Underground Basin based on the determination that there was no unappropriated groundwater in the Sandia Basin to satisfy the Application. **[1 RP 8-9; 11 RP 2623, FOF 9]**. A trial on the merits was held before Judge C. Shannon Bacon from March 5-19, 2018. Judge Bacon issued her Findings of Fact and Conclusions of Law in Case No. D-202-CV-2014-07209 on January 29, 2019.

The District Court entered judgment against Aquifer Science in September 2019, finding that the Application (as amended) would impair existing water rights and be contrary to conservation **[12 RP 2911]**. Aquifer Science followed with this appeal to the Court of Appeals of the State of New Mexico.

Bernalillo County (“County”) has been a party in the proceedings before the Office of the State Engineer, the Second Judicial District Court, and in the appeal before the Court of Appeals. The Application directly affects groundwater within Bernalillo County. [1 RP 2622, FOF 3] Moreover, testimony from several expert witnesses, as discussed more thoroughly below, clearly stated that substantial portions of projected water reuse were dependent on Village 1 buildout, which is the last of the four villages scheduled for development [11 RP 2628, FOF 34] and which has not been annexed by the Town of Edgewood and is still under the jurisdiction of the County [*Id.* FOF 30.]

As an additional general statement, and to avoid unnecessary duplication, Bernalillo County supports the Answer Brief presented by Appellees San Pedro Creek Estates Homeowners Association, *et al.* filed this date. However, we have provided some additional amplifying information in the Statement of Facts and in the Argument Sections to provide some additional details and to amplify some of the County’s unique jurisdictional circumstances as reflected in the record.

II. STATEMENT OF FACTS

A. Background Facts

1. Aquifer Science, a Nevada LLC, is comprised of two entities – Vidler New Mexico, a wholly owned subsidiary of Vidler, Nevada (individually and collectively referred to as “Vidler”), and Campbell

Farming Corporation (“Campbell” or “CFC”), a Montana Corporation. [1 RP 7; 4 RP 972] Vidler is the managing member and 95% interest holder of Aquifer Science and Campbell has a 5% interest. [11 RP 2625 FOF 19; 11 RP 2625 FOF 20]

2. Vidler and CFC formed Aquifer Science in 2008 for the primary purpose “to own, explore, joint venture, develop, manage, maintain, lease and/or transfer water resources and related infrastructure . . . and to develop a deep aquifer water resource” capable of providing water for the Master Plan and for future development and to other users. [11 RP 2625 FOF 20; Ex. AS7]
3. The Master Plan area is located north of the Town of Edgewood (“Edgewood”) in the San Pedro Grant area. [3-05-18 Tr. 112:14-113:3; RP 2625 FOF 21]

B. Facts about the Application

1. The Master Plan is a multiple use development project consisting of four villages with residential, commercial, recreation/resort element, such as open space and two golf courses. [3-05-18 Tr. 108:16-17; 3-15-18 Tr. 158:1-24]

4. A total of 4,024 housing units are proposed throughout the Villages, housing a total of approximately 10,000 people. **[3-05-18 Tr. 114:17-115:21; 11 RP 2626 FOF 24; Ex. AS 10]**
5. Village 1, located on the west side of State Highway 14, was not annexed by Edgewood and is under the jurisdiction, from a planning perspective, of Bernalillo County, but Village 1 is still part of the Master Plan according to Aquifer Science. **[03-05-18 Tr. 159:7-160:4; 128:17-129:2]**. Bernalillo County has not annexed Village 1 nor has the County approved the Master Plan. **[11 RP 2627, FOF 30]**
6. Village 1 is comprised of 1,220 acres and 807 dwelling units. It requires 120.8 acre-feet of the 716.9 acre-feet per year under the Master Plan and would generate 70.7 acre-feet per year of the effluent on which the total water demand depends. **[11 RP 2627 FOF 31 and FOF 32]**
7. If Village 1 is not annexed into the Master Plan, Aquifer Science will not need and will not be able to use 350 acre-feet per year. Aquifer Science has not presented a plan for the water it will not need if Village 1 is not annexed into the Master Plan. Further, Aquifer Science has not presented an alternate plan for generation

of effluent if Village 1 is not annexed into the Master Plan. [11 RP 2628 FOF 34; 3-12-18 Tr. 171:19-172:13]

C. Facts about the State Engineer proceeding

The County supports the facts about the State Engineering Proceeding presented by Appellees San Pedro Creek Estates Homeowners Association, *et al.*

D. Facts about Aquifer Science's *de novo* appeal to the district court

The County supports the facts concerning the *de novo* Appeal to the district court presented by Appellees San Pedro Creek Estates Homeowners Association, *et al.*

E. Facts supporting the district court's conclusion that granting the application would impair existing water rights

The County supports the facts presented by Appellees San Pedro Creek Estates Homeowners' Association, *et al.*, but provides the following additional findings of fact of the district court that further support the conclusion that granting the application would impair existing water rights.

The application identifies four proposed points of diversion. Those points of diversion are within a 2,000 foot radius of the following

specified locations in the Sandia Basin (on the U.S.G.S. Sandia Peak Quadrangle map, denoted UTM Zone 13 in meters/NAD 83):

Well 1: East 380500 (m), North 3894500 (m)

Well 2: East 379430 (m), North 3892969 (m)

Well 3: East 379980 (m), North 3893719 (m)

Well 4: East 380680 (m), North 3895000 (m)

[11 RP 2624 FOF 16] Only ASE-1 and ASE-2 were modeled for potential impairment **[4 RP 976]**. Simply stated, there are two other potential locations within a 2000 foot radius for which there could be additional impairment of other wells. However, there is no way of knowing this, since the burden of proof was on the applicant – and those other two locations were not modeled.

F. Facts supporting the district court’s conclusion that granting the application would be contrary to the conservation of water

The County supports the facts presented by the applicants that granting the application would be contrary to the conservation of water. In addition, the County calls attention to the testimony of County expert Daniel McGregor who presented testimony concerning the Town of Edgewood Annexation and Development Agreement and specifically Bernalillo County Board of Commissioner’s Resolution 2013-15 BC Water Conservation Ordinance Chapter 30, Article VII which has

conservation requirements well defined and not consistent with those proposed by the Applicants in their Master Plan. [3-12-18 TR 63:6; BC Ex 14 A, G, H]

III. ARGUMENT

The County supports the legal argument presented by San Pedro Creek Estates Homeowners Association, *et al.* except to add that regarding costs, Bernalillo County was reimbursed for its costs by Aquifer Science (Vidler) without objection. The County's costs were significantly less because the County witnesses were employees or former employees of the County who testified at no additional cost to the County. The County contends that the San Pedro Creek Homeowner Appellees should be reimbursed for their costs which were much greater due to having to obtain hydrology and modeling experts.

IV CONCLUSION

The Court of Appeals should reject any additional attempts by the Applicants who have had multiple opportunities to make their case with numerous modified applications. The burden was on the Applicants to make their legal case – and neither the facts nor the law indicate that they have done so.

Respectfully submitted,

JALBRIGHT LAW LLC

By: /s/ Jeffrey H. Albright

Jeffrey H. Albright
201 Third St. NW, Ste. 1880
Albuquerque, NM 87102
(505) 926-4105

JA@Jalblaw.com

AE@Jalblaw.com

*Attorneys for County of Bernalillo,
New Mexico*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of September 2020, a true and complete copy of the foregoing *Answer Brief of Appellees Bernalillo County* was served as indicated below and through Odyssey File and Serve.

/s/ Jeffrey H. Albright

Edward R. Ricco
Jocelyn Drennan
Rodney Diskason Sloan Adkin & Robb PA
Post Office Box 1888
Albuquerque, NM 87103
(505) 768-7314
ericco@rodey.com
jdrennan@rodey.com

Julia A. Sakura
Dana S. Hardy
Hinkle, Hensley, Shanor & Martin LLP
P.O. Box 2068
Santa Fe, NM 87504
(505) 982-4554
jfornaciari@hinklelawfirm.com

jsakura@hinklelawfirm.com

dhardy@hinklelawfirm.com

Attorneys for Appellant Aquifer Science

Gregory C. Ridgley, General Counsel

Maureen C. Dolan

Stefen W. Sloane, Special Assistant Attorneys General

Office of the State Engineer

Post Office Box 25102

Santa Fe, NM 87504-5102

(505) 827-3824

greg.ridgley@state.nm.us

maureen.dolan@state.nm.us

stefen.sloane2@state.nm.us

Attorneys for New Mexico State Engineer

Paul Hultin

1237 ½ Cerro Gordo Rd.

Santa Fe, NM 87501

(505) 929-1060

paul@phultin.com

Attorneys for San Pedro Creek Homeowners' Association

Douglas Meiklejohn

New Mexico Environmental Law Center

1405 Luisa Street, Ste. 5

Santa Fe, NM 87505

(505) 989-9022, Ext. 114

dmeiklejohn@nmelec.org

Attorney for San Pedro Creek Homeowners Association

Justin R. Kaufman

Rosalind B. Bienvenu

Durham, Pittard & Spalding, L.L.P.

505 Cerrillos Rd., Suite A209

Santa Fe, NM 87501

(505) 986-0600

jkaufman@dpslawgroup.com
rbienvu@dpslawgroup.com

Attorneys for San Pedro Creek Homeowners' Association

Attorneys for San Pedro Creek Homeowners' Association and Frances Lusso, Rosemary Amspaugh, Phyllis Bergman, Nathanael Brown, Carolyn K. Bryan, Peggy M. Bryan, George T. Bryan, Jack Campbell, John Campbell, Margaret M. Carroll, Tom Christensen, Beth Corwin, Barbara Davis, Richard F. Davis, Barbara S. Herrington, Joanne Hilton, David J. Holcomb, Dale Kennedy, Charles R. King, Mary A. Laraia, Marlys Lesley, Patrick Lesley, Julie Lynch (Selmers), James E. Mallinson, Marilyn H. Mallinson, Barbara McCarty, Donald McCarty, Kathy McCoy, Arjan Melwani, Sharmila Melwani, Kerry Molnar, Peter Molnar, Andrew Mooney, Jim Mullany, Marjorie Mullany, Jerry Page, Karen Page (Walker) Andree Peek, Doug Peek, Richard Ragle, Doug Salmi, Karen Salmi, Carol A. Sanders-Reed, Rebecca Schnelker, Carolyn J. Simmons, Jerry A. Simons, Sue Ann Slates, Antoinette Smith, Robert Smith, Roger Southward, Anne Strader, David Weaver, and Jane Wiste.

Dr. David E. Thompson
57 Via Entrada
Sandia Park, NM 87047
(505) 504-5741
dthomp@thuntek.net
Protestant-Appellee pro se

Saul Berry Wax
Sabawa1@gmail.com
Protestant/Appellee

Tina M. Nenoff
Tmnenof@gmail.com
Protestant/Appellee

William & Dee Butler
Butlerbd44@q.com
Protestant/Appellee

Carolyn K. Bryan
Carolyn.k.bryan@gmail.com
Protestant/Appellee

Caryl Baron
Chb4675@gmail.com &
Spcecaryl@gmail.com
Protestant/Appellee

Ronald Bohannan
jetabacchi@gmail.com
Protestant/Appellee

David & Nancy Benson
dabenson@ieee.org
Protestant/Appellee

Darielle Dexheimer
Ddex911@yahoo.com
Protestant/Appellee

Clifford and Gale Morris
Nmmaddog1@yahoo.com
Protestant/Appellee

Mark & Susan Pickering
huntwine@gmail.com
Protestant/Appellee

Jack & Erin O'Neil
Ejoneil@zianet.com
Protestant/Appellee

Bernie & Margo Vaughn
vaughabf@aol.com
Protestant/Appellee

Scott and Wendy Barron
scottabarron@mac.com
Protestant/Appellee

Dale W. Gunn
dwgunn@aol.com
Protestant/Appellee

Patti and Reese Jones
Rcpjones2@msn.com
Protestant/Appellee

Mark Taylor
dwgunn@aol.com

Michael Camp
eastmtmike@gmail.com
Protestant/Appellee

Susan I. Giambattista
Sigfly52@gmail.com
Protestant/Appellee

Lorna and Paul Morrow
Lornapaul1@aol.com
Protestant/Appellee

Jo Elise Tabacchi
jetabacchi@gmail.com
Protestant/Appellee

Barry Silbaugh & Janet Winchester-Silbaugh
silbaugh@swcp.com
Protestant/Appellee

Russell and Charoltee Abbink
reacra@aol.com
Protestant/Appellee

Joseph A., and Kathy G. Cooper
Jnkcooper@q.com
Protestant/Appellee

Curtis Johnson
holacurt@gmail.com
Protestant/Appellee

Theodore I. Lambert
tj@tjlambert.net
Protestant/Appellee

Dan R. and Judith Richey
Dr.richey@gmail.com

Protestant/Appellee

Thomas P. Boyce
tpboyce@aol.com
Protestant/Appellee

Maria V. Cunningham
Jmc345@gmail.com
Protestant/Appellee

Richard A. Dunn
radunn@msn.com
Protestant/Appellee

Larry Ifeld
lifeld@q.com
Protestant/Appellee

Vera Sprunt
mcookheart@gmail.com
Protestant/Appellee

David W. and Jeanne S. Wentworth
woodburn@direcway.com
Protestant/Appellee

Protestant/Appellee

Michael Cook, SPCE
mcookheart@gmail.com
Protestant/Appellee

Joel and Lisa Darnold
lisad@gcad.com
Protestant/Appellee

Lynn Henrickson
lahenrickson@gmail.com
Protestant/Appellee

Jill Schumacher
emsdvm@gmail.com
Protestant/Appellee

Elaine M. Stephens
emsdvm@gmail.com
Protestant/Appellee

Jan Wiste
jwiste@swcp.com
Protestant/Appellee

The following individuals had no known e-mail address or no forwarding address and to the knowledge of counsel, have not been involved in the proceeding since the initial appeal to the Second Judicial District Court:

Rebecca and William Alzheimer
[current email unknown]
Protestant/Appellee

Don and Marie Cain
[current email unknown]
Protestant/Appellee

Rod Baker
[current email unknown]
Protestant/Appellee

Don and Mina Carnicom
[current email unknown]
Protestant/Appellee

Rodney Carnes

Mark Gunter

[current email unknown]
Protestant/Appellee

[current email unknown]
Protestant/Appellee

Mark Farber
[current email unknown]
Protestant/Appellee

Rebecca S. Hartley
[current email unknown]
Protestant/Appellee

James and Kathleen A. Hanlon
[current email unknown]
Protestant/Appellee

John F. Hays
[current email unknown]
Protestant/Appellee

Carol J. and James A. Wood
[current email unknown]
Protestant/Appellee

Tracy Hudson
[current email unknown]
Protestant/Appellee

Bradley and Zita Hosmer
[current email unknown]
Protestant/Appellee

Patrick Lesley
[current email unknown]
Protestant/Appellee

Arnold G. Klein
[current email unknown]
Protestant/Appellee

Robert M. Lopez
[current email unknown]
Protestant/Appellee

Nancy A. Logan
[current email unknown]
Protestant/Appellee

Mark Manzutto
[current email unknown]
Protestant/Appellee

Julie Lynch
[current email unknown]
Protestant/Appellee

Paula and Tom Michel
[current email unknown]
Protestant/Appellee

Ronald E. Massie
[current email unknown]
Protestant/Appellee

John and Jacqueline Orr
[current email unknown]
Protestant/Appellee

James and Vanesse Mildren
[current email unknown]
Protestant/Appellee

Sylvia Pierce
[current email unknown]
Protestant/Appellee

Michael Mosley
[current email unknown]
Protestant/Appellee

David J. Roesch
[current email unknown]
Protestant/Appellee

Hans Peterson
[current email unknown]
Protestant/Appellee

Donna and Richard Schuyler
[current email unknown]
Protestant/Appellee

Katrina Rivers
[current email unknown]
Protestant/Appellee

Jonathan Thomas
[current email unknown]
Protestant/Appellee

John N. Sanderseed
[current email unknown]
Protestant/Appellee

Ovifiu Viorica
[current email unknown]
Protestant/Appellee

Margaret Burges and Robert K. Taylor
[current email unknown]
Protestant/Appellee

Albert and Denise Webb
[current email unknown]
Protestant/Appellee

Brian Tyree
[current email unknown]
Protestant/Appellee

Tim Willis
[current email unknown]
Protestant/Appellee

Bruce Waterson
[current email unknown]
Protestant/Appellee

Jan Wright and Mary Ann Zanner
[current email unknown]
Protestant/Appellee

Angela Welford
[current email unknown]
Protestant/Appellee

VIA U.S. MAIL

Hermosilla Estates NA
c/o Jury Fry P.O. Box 655
Cedar Crest 87008

Wildflower Neighborhood Association
P.O. Box 666
Sandia Park, NM 87047

Old Sand Park Service Coop.
(National Park Service)

Ponderosa Ranch Estates Landowners,
Inc.

1100 Old Santa Fe, NM 87505

P.O. Box 484
Cedar Crest, NM 87008

Karen C. and Michael D. Haworth
1 Limita Linda
Sandia Park, NM 87047
Protestant/Appellee

Dorothy Mitchel
124 Overlook Dr.
Placitas, NM 87043
Protestant/Appellee