IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AQUIFER SCIENCE, LLC,

Applicant-Appellant/Appellant,

vs. No. A-1-CA-39080

SCOTT A. VERHINES, New Mexico State Engineer,

Appellee/Appellee,

and

COUNTY OF BERNALILLO, SAN PEDRO CREEK ESTATES HOMEOWNERS ASSOCIATION, et al.,

Protestants-Appellees/Appellees.

Appeal from the Second Judicial District Court, Bernalillo County, New Mexico
The Honorable C. Shannon Bacon and The Honorable Clay Campbell, Judges

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REPLY BRIEF

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TABLE OF CONTENTS

Statement of Compliance with Type-Volume Limitations: The body of the attached brief exceeds the 15-page limit set forth in Rule 12-318(F)(2) NMRA. As required by Rule 12-318(G) NMRA, we certify that this brief complies with Rule 12-318(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 3,841 words. This brief was prepared and the word count determined using Microsoft Word 2010.

TABLE OF AUTHORITIES

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

STATUTES AND RULES

OTHER AUTHORITIES

Introduction

This reply brief sets forth Aquifer Science's response to the arguments made in the answer brief ("AB") filed by Protestants San Pedro Creek Estates Homeowners Association, et al. ("Protestants"). Bernalillo County also filed an answer brief, in which it states that it "supports" Protestants' legal arguments, makes no merits argument of its own, and makes clear that it has no stake in the costs issue presented on appeal. (AB of Bernalillo County, at 7.) The State Engineer settled its costs dispute with Protestants and, in settling, agreed to "not challenge the district court's findings of fact or advocate for the reversal of the district court's merits or costs rulings." (See Aquifer Science LLC's Resp. to N.M. State Engineer's Mot. to Dismiss, Ex. A at 4-5, ¶ 11 (filed Apr. 27, 2021).) The State Engineer has not filed a brief on appeal.

Argument

I. THE DISTRICT COURT'S ANALYSIS OF IMPAIRMENT, CONSERVATION, AND LAND USE IS FAULTY.

Standard of Review: Aquifer Science's issues relate to errors in the district court's legal determinations or analysis, such as its construction of statutory law or its application of the Morrison guidelines. It may be a fair criticism, however, that Aquifer Science's appeal also touches on a factual matter. (AB at 17.) The district court's factual findings are reviewed for substantial evidence. (Id.) Aquifer Science challenges the district court's finding of impairment where no evidence

logically supports the finding. (BIC at 20-21.) Infra pp. 3-4.

Preservation of Issues: Aquifer Science preserved its issues, or an exception to the preservation requirement applies. Aquifer Science was candid in its brief in chief regarding the state of the record on issue preservation. Protestants point to issues admittedly not raised below, but they go no further. (AB at 21, 27.) They do not dispute that the district court's own words demonstrate its awareness of the need to address whether the Sandia Basin exhibits "similar hydrologic conditions" to a thick, alluvial aquifer, obviating the need for Aquifer Science to expressly raise the issue. (BIC at 19.) They do not controvert Aquifer Science's showing that interpreting the conservation requirement of NMSA 1978, § 72-12-3(E) (2019) presents a question of general public interest that is reviewable on appeal even if not preserved. (BIC at 24-25.) These issues are substantial and merit the Court's exercise of discretion to address them.

A. The Court Erred in Analyzing Impairment.

The district court opted to apply the Morrison guidelines as the basis for its impairment analysis. Having adopted that standard, the district court had the obligation to apply the guidelines correctly and draw proper conclusions from them.

The 2-foot drawdown allowance adopted by the district court is a permissible figure under the guidelines, but only if the Sandia Basin is not a thick

alluvial aquifer and does not exhibit "similar hydrologic conditions" to one. Otherwise a 10-foot allowance is appropriate. (BIC at 10.) But the district court only considered whether a thick alluvial aquifer existed, not whether the basin is similar hydrologically to such an aquifer – a point on which the evidence is conflicting. (BIC at 20-23.) Protestants' assertion that the court "was free to credit" testimony favoring Protestants regarding hydrological similarity (AB at 22) wholly misses the point: there is no sign that the district court ever considered the question. That is the primary reason why the court's determination of impairment based on a 2-foot drawdown is defective and requires remand.

Even if the district court had properly arrived at a 2-foot drawdown allowance, its assessment of impairment still could not be sustained. The number of affected wells increases as the allowable drawdown decreases. The court heard testimony that 11 or 12 wells would be impacted using a 10-foot allowance and 100 wells would be impacted with no allowance. (BIC at 7; see also AB at 24.) But without evidence of the number of wells that would be affected using a 2-foot allowance, the district court could only say that the number fell within a range extending to "as many as 100 wells." (COL 21.) The number could be 100 wells, or it could be as few as 13.

That imprecision is fatal to the court's analysis, not "beside the point" as Protestants maintain. (AB at 21.) While Protestants discuss their impairment case

at length, they point to no evidence from which the court could determine, or even reasonably estimate, the number of wells impacted using the court's choice of a 2-foot allowance.

The court determined impairment based on the magnitude of the impairment "and whether the impairment can be offset." (COL 17.) It reasoned that offset "is not feasible" for "as many as 100 wells." (COL 21, 23.) But Aquifer Science presented evidence that the 11 wells it projected to be impacted at a 10-foot drawdown could be offset. (E.g., Tr. (3/7/18) 148.) The court's conclusion that offset would be infeasible for any number of wells between 13 and 100 is not logically sound. The court's determination of impairment, besides being incomplete in its analysis, is not supported by a logical deduction from the evidence.

B. The Court Erred in Addressing Conservation.

Section 72-12-3(E) requires that an application be "not contrary to conservation of water." The statutory standard should be applied as written. Determining what the standard means does not involve "semantic gymnastics" (AB at 27); nor is Aquifer Science's interpretation of the statute "made-up" with "no source of law" (id.).

Interpreting the statute calls for no more sophisticated a tool than the plain meaning rule, which results in a construction of the statute that is both reasonable

and consistent with the balance of policies underlying the state's established water law. (BIC at 25-26.) A proposed use is "not contrary to conservation" if it consumes the water needed for the use, and no more. (Id.) The legislature intended the statute to discourage waste. Protestants read the statute as discouraging use. The latter view is unreasonable, because it would mean that any application to use previously undeveloped water would be self-defeating.

Aquifer Science's plan avoids waste because it requires the best technology to achieve economy (BIC at 27) and provides for the replacement of potable water by reused water as increasing amounts of effluent become available (BIC at 28-29). The plan uses less water per capita than would be used if the property were to be developed as a collection of rural lots rather than as an efficient, planned community. (BIC at 27.)

Protestants' contention that the project's conservation goals depend on land-use approval of the entire project, including Village 1 (AB at 32), is addressed in Point I(C), infra. Protestants also contend that the entire project is "speculative" and might not be built as planned. (AB at 33.) The Vidler company's initial projections were based on its experience with other projects. (See Tr. (3/5/18) 180-83.) In any event, a water right granted and then not used because the project does not come to fruition does not imperil conservation goals. A witness representing the State Engineer's office testified that if a permit to use groundwater

is not exercised, the State Engineer has the authority to cancel the permit. (Tr. (3/15/18) 195.)

It is incorrect to brand this project as speculating in water. (AB at 34-35.) Aquifer Science was established for the specific purpose of "obtain[ing] water from the Campbell Ranch property for the Campbell Ranch master plan." (Tr. (3/5/18) 103.) The goal was to provide attainably priced housing and currently unavailable public works services for the region. Aquifer Science was not set up to acquire water rights for potential future profit. The speculative practices condemned in the cases cited by Protestants involve present efforts to appropriate water without a plan for its beneficial use, precluding use of the water by others. Aquifer Science seeks a permit to appropriate groundwater for beneficial use pursuant to an existing master plan. (See Ex. AS 10.)

Climate change (AB at 27-30) is not a factor in determining whether a water use is "not contrary to conservation" under Section 72-12-3(E). It is unlikely that the legislature had climate change on its mind nearly 40 years ago when it added the conservation element to the statute. See 1983 N.M. Laws ch. 2, § 2. See Montoya v. City of Albuquerque, 1970-NMSC-132, ¶ 15, 82 N.M. 90 ("A statute must be interpreted as the Legislature understood it at the time it was enacted."). Dealing with the consequences of climate change requires policy formulation on a local, national, and even global level. (See AB at 49.) Protestants see this case as

a means to achieve broader environmental goals, but the formulation of policy "is a matter for the legislature, not one for the court." State ex rel. Denton v. Vinyard, 1951-NMSC-030, ¶ 12, 55 N.M. 205.

C. The Court Effectively Required Land-Use Approval as a Precondition to Obtaining a Permit.

On summary judgment, the district court held that land-use approval of Village 1 was not a precondition to Aquifer Science's application for a permit to appropriate. (See AB at 37.) That is not an appellate issue. But in ruling on the merits of the application, the district court concluded that Aquifer Science could not qualify for a permit while the land-use status of Village 1 remained indeterminate. The practical effect of the court's approach is to make land-use approval a requirement for obtaining a permit. There is no statutory basis for doing so.

Protestants argue that hinging permit approval on the status of Village 1 does not invoke land-use issues but relates to water use and conservation. To the extent that may be a concern, Aquifer Science's witness on water use indicated that the supply-and-demand analysis would not necessarily fail if Village 1 was not approved and developed. "[Y]ou would not have as much effluent . . . , but you also would not have as much land to irrigate if Village 1 was not built." (Tr. (3/6/18) 37.) Since this case must be remanded for consideration of the "public welfare" factor if Aquifer Science prevails (BIC at 6, 46), the then-current status of

Village 1 and the potential effect of not developing that part of the project could appropriately be considered on remand.

II. THE COURT SHOULD VACATE THE DISTRICT COURT'S AWARD OF COSTS AND REMAND THE ISSUE FOR FURTHER PROCEEDINGS IN CONFORMANCE WITH RULE 1-054.

A. Protestants Confuse Both the Record and Their Burden Under Rule 1-054.

Rather than address Aquifer Science's core contention that the filed bill of costs, together with the attached "Exhibit B," did not provide sufficient detail for Aquifer Science to lodge objections contemplated by Rule 1-054, Protestants tellingly engage with a strawman and argue instead that they are "entitled to a presumption" in favor of the award of costs. (AB at 38.) Of course, whether Protestants are entitled to costs is not the issue in this appeal – Aquifer Science has not argued that the Protestants were not the prevailing party in the district court proceedings below, nor has it alleged the bad faith or misconduct that would result in overcoming the presumption in favor of awarding costs. See Marchman v. NCNB Texas Nat'l Bank, 1995-NMSC-041, ¶ 65, 120 N.M. 74 ("The losing party may overcome the presumption by showing bad faith on the part of the prevailing party, or misconduct during the course of the litigation, or that an award would be unjust, or that other circumstances justify the denial of costs." (internal quotation marks &citation omitted)).

Protestants' argument therefore wholly misses the mark: the question is not whether Protestants are entitled to their costs, but which costs they are entitled to and whether the procedure used to award those costs was proper. On these questions, Protestants argue that they are entitled to reimbursement for every litigation cost incurred, based on the "presumption in favor of awarding costs," unless Aquifer Science effectively rebuts the request and that the procedure, although unusual, was, in any event, Aquifer Science's fault. (AB at 40-41.) These arguments, however, are in stark contrast to the Supreme Court's well-established policy that "all costs submitted by the prevailing party (or by the party entitled to recover costs under Rule 1-068) should be carefully scrutinized by the district court, in the interest of reducing insofar as possible the burdensome cost of litigation." Dunleavy v. Miller, 1993-NMSC-059, ¶ 41, 116 N.M. 353 (emphasis added) (internal quotation marks & citation omitted). Protestants' account of the post-judgment district court proceedings also does not accurately reflect the record, leaving out key facts in an attempt to cast Aquifer Science as an irresponsible party.

Protestants have not explained how their filed bill of costs and attachments permit careful scrutiny by the district court, or how Aquifer Science could have made objections contemplated by the rule based solely on the general descriptions contained in the bill of costs – the filed bill of costs contains only conclusory

assertions of the bases for the claimed costs. (See 12 RP 2918-34.) As noted in Aquifer Science's Brief-in-Chief, a cursory review shows that the invoices, which were not attached to the bill of costs, reveal multiple bases to object to the claimed costs that could not possibly have been discerned based on the bill of costs alone. (See 12 RP 2931-32 (requesting compensation for deposition videographer expenses but not identifying the deposition and extensive block billing entries for expert witnesses).)

Protestants respond by making a general argument that Aquifer Science could have made objections if it wanted to and failed to ask for more time. (AB at 44) ("But Aquifer Science never asked for more time to file objections.") These representations are inaccurate. Aquifer Science, as admitted by Protestants, did not receive the invoices until only a few days before its objections to the bill of costs were due, not the ten days permitted by the statute. (See 14 RP 3490-92.) Protestants then sent a binder containing the invoices provided to Aquifer Science (and other handwritten notes not on the invoices submitted electronically to Aquifer Science) to the district court via an ex parte communication. See State v. Ashley, No. A-1-CA-32974, 2015 WL 6108085, ¶ 21 (N.M. Ct. App. Sep. 9, 2015) (non-precedential) ("An ex parte communication, by definition, is a communication between counsel and the court when opposing counsel is not present." (internal quotation marks omitted) (alteration omitted) (citing *Black's*

Law Dictionary 337 (10th ed.2014))). Protestants did not alert Aquifer Science to the fact that the binder had been provided to the district court until more than a month after Aquifer Science had filed its objections to the cost bill. (12 RP 3028 (ex parte transmission letter to district court).) Once Aquifer Science learned that the binder was sent to the district court, it moved to strike the binder, or alternatively, for additional time to file objections incorporating the invoices. (14 RP 3490-92.) The district court denied the motion and denied Aquifer Science's oral motion at the hearing for additional time to file objections. (See 14 RP 3396-3446.) Moreover, not only did Aquifer Science request more time as a matter of record, it also proposed to Protestants that they re-file the bill of costs with the supporting invoices and provide Aquifer Science with additional time to make objections based on the new exhibits. (See 12 RP 3018-21.) Protestants rejected that offer and have apparently forgotten this discussion. (Id.) Thus, Aquifer Science responded to the filed bill of costs and did not respond to documents that it did not know were provided to the district court; it never was permitted a ten-day period to lodge objections based on the documents considered by the district court in awarding Protestants substantially all of their costs, and the district court never even considered Aquifer Science's request for additional time based on the late, ex parte submission of the binder.

B. Protestants Identify No Authority Permitting the Imposition of Interest on a Cost Award.

Protestants have not identified any New Mexico authority holding that interest is statutorily authorized for an award of costs pursuant to Rule 1-054. There is no authority to suggest that New Mexico impliedly permits recovery of interest without clear statutory authorization. See, e.g., 47 C.J.S. § 69 (no interest on fees or costs unless authorized by statute is the general rule); Catlin v. Tormey Bewley Corp., 219 P.3d 407, 412 (Colo. Ct. App. 2009) ("Colorado awards moratory interest on costs only in rare circumstances—not present here—where the costs constitute an item of special damages."). Instead, Protestants assert that other jurisdictions have awarded interest on costs "without fanfare" and urge the Court to do so here. (AB 48.) Protestants fail to include any analysis of these out-of-state cases, however, which neither bind this Court nor address the issues in this appeal. (Id.)

In Sintra, Inc. v. City of Seattle, 980 P.2d 796, 800 (Wash. Ct. App. 1999), one of the two out-of-state cases cited by Protestants, the court did not even examine the issue of costs, providing no guidance or discussion of the law. See id. ("From the Court's silence on the issue of costs, we conclude that the 1994 award of costs was affirmed on review."). In contrast to the dicta pointed to by Protestants, Washington courts have held that whether post-judgment interest may be awarded on costs depends on whether the award is a "judgment" within the

meaning of RCW 4.56.110(3), a statutory provision defining judgments; New Mexico has no analogous statutory provision. See Bowles v. Wash. Dep't of Retirement Sys., 847 P.2d 440, 452 (Wash. Ct. App. 1993). Washington therefore recognizes that interest is not proper on costs unless the costs are part of a judgment, the same holding as Genuine Parts Co. v. Garcia, 1978-NMSC-059, 92 N.M. 57. Protestants also point to one case from Utah to support their assertion that interest on costs is the norm in our sister states, Brown v. David K. Richards & Co., 978 P.2d 470 (Utah Ct. App. 1999). In Brown, the Utah Court of Appeals was asked to determine when prejudgment interest on a cost award began to accrue; the court did not consider whether interest was proper on the cost award. Id., ¶ 38. The Utah court's failure to analyze the issue, however, is readily explainable. Utah follows the rule that prejudgment interest and prejudgment costs merge with the judgment (a rule New Mexico has not adopted) but that post-judgment interest and post-judgment costs do not. See Hart v. Salt Lake Cty. Comm'n, 945 P.2d 125, 138 (Utah Ct. App. 1997). Thus, under Utah law, the issue of interest on costs is determined by well-settled law, explaining the lack of "fanfare" and analysis of the issue.

Protestants also incorrectly suggest that "the Supreme Court affirmed an award of post-judgment interest under § 56-8-4(D)" in Albuquerque Commons Partnership v. City Council, 2011-NMSC-002, 149 N.M. 308. The Supreme

Court, in fact, held that Section 56-8-4 permitted the imposition of post-judgment interest against a governmental body and did not address whether interest on costs was proper. Id. The case was a federal constitutional claim brought in state court pursuant to 42 U.S.C. § 1983 and thus the case is inapposite.

Without New Mexico authority to support their position, Protestants resort to a public policy argument, arguing the Court should affirm the award of interest merely because it "makes sense." (AB at 47.) These considerations are, however, inappropriate because the issue of whether a district court may award interest on a cost award is question that must be determined through Supreme Court rule or by statute. See Reck v. Robert E. Mckee Gen. Contractors, Inc., 1955-NMSC-074, ¶ 39, 59 N.M. 492 ("Costs are a creature of statutes and may not be imposed in the absence of clear legislative intent."); see also Pub. Serv. Co. of N.M. v. Diamond D Construction Co., 2001-NMCA-082, ¶ 54, 131 N.M. 100 (court does not have discretion to award post-judgment interest beyond statutory authorization).

Moreover, Protestants' conflation of a judgment and a cost award does not make sense. Courts have long distinguished between damages, which are incurred prior to the commencement of a lawsuit, and costs, which are incurred as a consequence of the lawsuit itself. In Farmers Reservoir & Irrigation Co. v. City of Golden, 113 P.3d 119 (Colo. 2005), the Colorado Supreme Court, in an en banc decision, reversed the Colorado water court's award of interest on an attorney fee

and cost award, reasoning that "[c]osts are not damages, but a separate item of monetary relief, made to the successful party for his expenses in prosecuting or defending an action or a distinct proceeding within an action." Id. at 133. For this reason, the court held that "the water court abused its discretion in awarding moratory interest on the cost award." Id. at 134. The court explained that interest on costs may be proper where costs constitute an item of special damages. Id. at 133. When the costs are purely for litigation expenses, however, neither Colorado nor New Mexico statutory law permits such an award. See id. at 133-334. Rule 1-054 also confirms this distinction by containing separate subsections which address judgments from those which address costs.

Moreover, each Protestant in this case was and is a voluntary participant, choosing to incur costs as part of a deliberate litigation strategy. Costs incurred by an intervening party, not a necessary party, are even less similar to a money judgment because the party itself chooses to participate in the suit. Parties in the same position as Protestants can and do incur massive costs in proceedings such as those below and should not be able to recover a windfall based on these large, voluntary costs which are to a large extent determined by the Protestants' own litigation strategy such as the number of expert witnesses retained and the extent of the experts' participation in the litigation. Dunleavy, 1993-NMSC-059, ¶ 41

(policy of New Mexico courts is to reduce litigation costs through careful scrutiny of cost bills).

C. Garcia Demonstrates That Interest Is Not Recoverable on a Cost Award.

Protestants' attempts to distinguish the clear reasoning of Genuine Parts Co. v. Garcia, 1978-NMSC-059, 92 N.M. 57, are unconvincing. Protestants emphasize that the Supreme Court's holding was limited to the particular statutory section at issue. The Supreme Court's "limited" holding, however, was that "under the circumstances outlined in § 59-10-23(D) attorney fees are part of the judgment proper and are not costs." Id. ¶ 21. The limitation was solely to clarify that attorneys' fees may be costs under other circumstances, not an expression that interest on costs may be appropriate under other circumstances. Based solely on this holding, the Supreme Court found that the district court could not impose interest on the fee award, thus holding that interest is proper for judgments but not on costs, the same rule expressed by the Colorado Supreme Court in Farmers Reservoir and Irrigation Co., 113 P.3d 119. Id. ("Since the award of attorney fees is included within the compensation award the fees are considered part of the judgment and interest thereon is proper.").

Conclusion

Aquifer Science is entitled to the relief requested in the brief in chief.

Respectfully submitted,

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We certify that on the 6th day of October, 2021, the foregoing pleading was filed through the Odyssey File-and-Serve electronic filing system, which caused a copy to be served automatically on all counsel of record, and that on the same date other parties were served via email or first-class mail, all as set forth below:

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VIA U.S. MAIL

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s/ Edward Ricco
By_____
Edward Ricco