

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AQUIFER SCIENCE, LLC,

**Applicant-Appellant/Appellant
/Cross-Appellee,**

v.

No. A-1-CA-38539

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

Appellee/Appellee/Cross-Appellant,

and

COUNTY OF BERNALILLO, et al.,

Protestants-Appellees/Appellees.

**AQUIFER SCIENCE LLC'S RESPONSE TO THE
NEW MEXICO STATE ENGINEER'S MOTION TO DISMISS**

Aquifer Science, LLC (“Aquifer Science”), by and through the undersigned counsel, submits this response to the New Mexico State Engineer’s (“State Engineer”) Motion for Voluntary Dismissal (“the Motion”). Aquifer Science does not oppose the State Engineer’s request to dismiss the appeal on the merits. Aquifer Science does respectfully request that the Court deny the State Engineer’s request to dismiss his appeal directed to the cost award. In support, Aquifer Science states as follows.

INTRODUCTION

The State Engineer provides the Court with no other explanation for its decision to abandon its two appeals other than “the State Engineer has resolved its disputes with Protestants-Appellees.” This resolution, however, has been accomplished through a highly irregular settlement agreement between the State Engineer and other parties to this case (“the Settlement Agreement”). *See* Exhibit A (Settlement Agreement). It appears from the Settlement Agreement that the State Engineer has chosen to close the Sandia Basin to future appropriations, at least in part, *as consideration* for escaping liability on the cost award entered by the district court. *See* Exhibit A, ¶ 12(B) (agreement only becomes effective upon closure of the Sandia Basin). Aquifer Science and others may challenge the legality of this agreement in a separate proceeding, on the grounds that it may constitute a direct sale of public property for the benefit of the Office of the State Engineer and for the private benefit of the other parties to the agreement.

Moreover, the Settlement Agreement, essentially a gag order on the State Engineer, also creates substantial confusion with respect to these consolidated appeals. The agreement requires the State Engineer 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 id.*, ¶ 12. A central issue in this case, however, is whether the district court properly deferred to the State Engineer’s factual findings and legal

conclusions. *See Aquifer Science's Docketing Statement* at 23-31 (filed in Case No. A-1-CA-38539); *see also Public Service Co. of N.M. v. N.M. Taxation and Revenue Dept.*, 2007-NMCA-050, ¶ 41, 141 N.M. 520 (internal quotes omitted) (“In construing statutes and regulations, courts will give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them.”). Notwithstanding Aquifer Science’s concern that the Settlement Agreement improperly constrains the State Engineer’s role in these appeals, Aquifer Science does not oppose the State Engineer’s request to dismiss the merits appeal. The State Engineer’s counsel, of course, is required under the Rule of Professional Conduct to be candid with the tribunal. *See* Rule 16-303(A)(1) NMRA (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact...”).

With respect to the State Engineer’s appeal of the cost award, Aquifer Science opposes the request. The State Engineer should be required to participate in its own appeal of the cost award entered because, unlike a typical Settlement Agreement, this agreement will almost certainly result in *further* litigation and appeals. The district court imposed joint and several liability for the cost award on both Aquifer Science and the State Engineer. *See* Exhibit A, ¶ 5. The Settlement Agreement, however, *requires* the State Engineer to appeal in the event that Aquifer Science is ultimately able to recover any amount of the liability on the cost award from the

State Engineer. *Id.*, ¶ 9. Thus, the State Engineer is bound to appeal its liability on the cost award if Aquifer Science is able to collect any amount in contribution – the State Engineer’s objections to the cost award and its imposition of joint and several liability should therefore be determined now, without the threat of costly piecemeal litigation in future.

LEGAL STANDARD

Under Rule 12-401(B)(2) NMRA, “an appeal...may be dismissed by the appellate court after motion by the appellant after motion...upon such terms as are fixed by the appellate court...” Aquifer Science’s opposition to the Motion is therefore directed to the Court’s discretion.

ARGUMENT

A. Allowing the State Engineer to Not Participate in the Cost Appeal will Likely Result in Additional Litigation and Appeals.

The State Engineer’s support of Aquifer Science’s application in the proceedings below resulted in the district court’s imposition of joint and several liability on both Aquifer Science and the State Engineer for the full liability of the district court’s cost award. *See generally, State Engineer’s Docketing Statement* (filed in Case No. A-1-CA 38539). Thus, if Aquifer Science’s appeal challenging the validity of the cost award is unsuccessful, it will be liable for the full amount of the cost award and will likely have a right to pursue contribution from the State Engineer if the full award is collected from Aquifer Science. *See, e.g., Ortho-McNeil*

Pharmaceutical v. Mylan Laboratories, 569 F.3d 1353 (Fed. Cir. 2009) (applying 4th Cir. law) (where one action settled with the parties bearing their own costs but costs were awarded in a separate action in another district court and discovery had been conducted jointly between the two cases, the settlement value of the first case needed to be accounted for to prevent double recovery in the cost award in the non-settled case); *In re Wholesale Grocery Products Antitrust Litigation*, No. 09-MD-2090 ADM/TNL, 2019 WL 413554 (pro rata reduction in costs appropriate where one liable party settles with prevailing party with each agreeing to bear costs); *Breaud v. Breaud*, No. 1:15-cv-00053, 2018 WL 4680325 (M.D. Tenn. Sept. 28, 2018 (settlement by one defendant prior to trial must offset the ultimate cost award). But, according to the Settlement Agreement, this likely scenario will necessarily result in the State Engineer appealing any such judgment, even, apparently, if the appeal is frivolous. *See* Exhibit A, ¶ 9 (“In the event a judgment is entered in favor of Aquifer Science and against the State Engineer relating to the Cost Award, the State Engineer shall appeal any award of any judgment awarding Aquifer Science relief).

For this reason, the State Engineer should not be allowed to forego substantively engaging in the cost appeal, with the intent of filing a separate additional appeal on largely the same issues at a later date. It is unfair and prejudicial to Aquifer Science to be required to engage in still more litigation and appeals after

the present appeal is resolved. *See Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 12, 116 N.M. 412 (“There is a strong policy in New Mexico of disfavoring piecemeal appeals.”). The Court should either require the State Engineer to raise any objection he might have to the district court’s cost award in this proceeding, or, alternatively, enter an order stating that the State Engineer will waive any objection to liability on the cost award if he fails to raise the objection here.

CONCLUSION

For the reasons stated above, Aquifer Science requests that the State Engineer’s Motion to Dismiss the appeal directed to the cost award be denied or, alternatively, that the Court enter an order requiring the State Engineer to raise any objection to the cost award in this proceeding on penalty of waiver.

Respectfully submitted,

HINKLE SHANOR LLP

/s/ Julie A. Sakura

Julie A. Sakura

Dioscoro A. Blanco

218 Montezuma Ave.

P. O. Box 2068

Santa Fe, NM 87504

(505) 982-4554 telephone

(505) 982-8623 facsimile

jsakura@hinklelawfirm.com

dblanco@hinklelawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Aquifer Science, LLC's Response to the State Engineer's Motion to Dismiss was electronically filed in the Odyssey filing system, and the following counsel of record were served by e-mail or first-class mail, on this 27th day of April, 2021:

Jeffrey H. Albright
JALBRIGHT LAW LLC
201 Third St., NW, #1880
Albuquerque, New Mexico 87102
(505) 926-4100
ja@jalblaw.com
ea@jalblaw.com
Attorney for Bernalillo County

Paul Hultin
123 7 1/2 Cerro Gordo Rd.
Santa Fe, New Mexico 87501
Telephone: (303) 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, New Mexico 87505
Telephone: (505) 989-9022, Ext. 114
dmeiklejohn@nmele.org
*Attorneys 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, New Mexico 87501
Telephone: (505) 986-0600

jkaufman@dpslawgroup.com

rbienvenu@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, Ronald 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 Jan Wiste

Dr. David E. Thompson

57 Via Entrada

Sandia Park, NM 87047

(505) 504-5741

dthomp@thuntek.net

Protestant-Appellee pro se

Seth R. Fullerton

KATZ HERDMAN MACGILLIVRAY & FULLERTON PC

P.O. Box 250

Santa Fe, NM 87504

srf@santafelawgroup.com

Attorneys for Pico Holdings, Inc., Vidler

Water Company and Vidler New Mexico, LLC

William D. Teel

WILLIAM D TEEL ATTORNEY AT LAW PC

P.O. Box 1289

Corrales, NM 87104-1289

(505) 250-7242

wdteel@cybermesa.com

Attorneys for New Mexico State Engineer

Meghan Thomas

Administration Litigation Unit

New Mexico Office of the State Engineer

Special Assistant Attorney General

meghan.thomas@state.nm.us

Greg Ridgley

NM OFFICE OF THE ATTORNEY GENERAL

Special Assistant Attorney General

P.O. Box 25102

Santa Fe, NM 87504-5102

greg.ridgley@state.nm.us

Saul Barry Wax

sabawal@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

Michael Camp

eastmtmike@gmail.com

Protestant/Appellee

Darielle Dexheimer

ddex911@yahoo.com

Protestant/Appellee

Susan I. Giambattista

sigfly52@gmail.com

Protestant/Appellee

Clifford and Gayle Morris

nmmaddog1@yahoo.com

Protestant/Appellee

Lorna and Paul Morrow

lornapaul1@aol.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
gwgunn@aol.com
Protestant/Appellee

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

Mark Taylor
dwgunn@aol.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

Jo Elise Tabacchi
jtabacchi@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
olacurt@gmail.com
Protestant/Appellee

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

Dan R. and Judith Ritchy
Dr.richey@mail.com
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

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

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 all counsel, have not been involved in the proceeding since the initial appeal to the Second Judicial District:

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
[current email unknown]
Protestant/Appellee

Mark Gunter
[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 Venesse 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 Watson
[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 Judy 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)
1100 Old Santa Fe Trail
Santa Fe, NM 87505

Ponderosa Ranch Estates Landowners,
Inc.
P.O. Box 484
Cedar Crest, NM 87008

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

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

/s/ Julie A. Sakura
Julie A. Sakura