IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AQUIFER SCIENCE, LLC,

Applicant-Appellant/Cross-Appellee,

v. **No. A-1-CA-39080**

SCOTT A. VERHINES,
New Mexico State Engineer,

Appellee-Appellee/Cross-Appellant,

and

COUNTY OF BERNALILLO, et al.,

Protestants-Appellees/Appellees.
______________________________________/

STATE ENGINEER'S REPLY IN SUPPORT OF MOTION FOR VOLUNTARY DISMISSAL

The New Mexico State Engineer ("State Engineer"), pursuant to Rule 12-401(B)(2) NMRA, submits this Reply in Support of its Motion for Voluntary Dismissal of its cross-appeal filed October 17 and 18, 2019 and appeal filed June 3, 2020 ("Appeals"). Aquifer Science, LLC ("Aquifer Science") filed a Response in Opposition ("Response") on April 27, 2021. The Response does not provide any basis for the denial of the motion, and makes several misstatements regarding the effect of the Settlement Agreement entered into by the State Engineer. The State Engineer requests that the Court grant its motion.

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Aquifer Science does not cite any case law regarding the circumstances under which it is appropriate to deny a party's Motion for Voluntary Dismissal. The State Engineer has not found any New Mexico case law on point. But other courts and commentators have explained that such denials are exceedingly rare, because they conflict with the basic principle of an adversary system – if parties do not seek to pursue their claims and appeals, they normally should not be forced to do so. 16AA *Wright & Miller's Fed. Practice & Procedure*, § 3988 (5th ed. 2021 update). That is particularly true with respect to a State agency that must manage expenditures and risks to public funds. Essentially the only circumstances that other courts have recognized as sufficient to require parties to pursue their appeals against their wishes are when the court has already invested significant resources in resolving the case, *see In re Nexium Antitrust Litigation*, 778 F.3d 1, 2 (1st Cir. 2015) (denying motion that was filed after appeal was fully briefed, oral argument had been conducted, and court had prepared draft opinion), or when the request is seen as tactical gamesmanship, *see Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004) (denying motion to dismiss appeal filed after oral argument as part of attorney's plan to raise the same issue with a different client, before a different panel, to obtain a different result), or when there are doubts as to the party's competency to dismiss the appeal, *see United States v. DeShazer*, 554 F.3d 1281, 1285 & n.1 (10th Cir.

2009) (denying criminal defendant's *pro se* request to dismiss appeal after district court found defendant lacked competency to make that decision).

There is nothing remotely similar here. The case has not been briefed. The State Engineer has settled with certain of the appellees. State public policy strongly favors settlements. *Builder's Contract Interiors, Inc. v. Hi-Lo Indus., Inc.*, 2006-NMCA-053, ¶ 7, 139 N.M. 508. The Settlement Agreement calls for the State Engineer to dismiss its appeals, and places the State Engineer in the position that it would be in had the appeals not been filed – as an appellee in Aquifer Science's appeals. The State Engineer and other settling parties should be permitted to effectuate the Settlement Agreement.

Aquifer Science acknowledges that this is not the appropriate forum for it to challenge the Settlement Agreement. [Response at 2]. Nonetheless, it makes several unfounded claims with respect to the Settlement Agreement that the State Engineer must correct. First, Aquifer Science questions the legality of the State Engineer's issuance of a Closure Order that was referenced in the Settlement Agreement that closed portions of two groundwater basins to new appropriations under NMSA 1978, § 72-12-3; *see also* Order Closing Sandia Underground Water Basin and a Portion of the Rio Grande Underground Water Basin to New Appropriations, *available at* https://www.ose.state.nm.us/Orders/Underground/ORDER%20SANDIA%20UNDERGROUND%20WATER%20BASIN%203%2012%202021.pdf. While there is

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nothing remotely unlawful about the Closure Order, this is not the forum for litigating the question, because any challenge to the Closure Order must be raised through the State Engineer's statutorily-mandated administrative hearing process. *See* NMSA 1978, §§ 72-2-16 and 72-7-1. Moreover, the Closure Order does not affect the issues raised in this appeal. The Closure Order is prospective in nature, and therefore, does not apply to Aquifer Science's underlying application for a new appropriation of groundwater that is the subject of this appeal. If Aquifer Science were to prevail on its merits appeal and obtain reversal of the district court's decision, the Closure Order would not prevent the State Engineer from acting on the application however he was directed on remand.

Aquifer Science also alleges that the Settlement Agreement will multiply litigation. [Response at 4-5]. That is untrue. The district court imposed joint and several liability for costs against both Aquifer Science and the State Engineer. Aquifer Science believes, as demonstrated in its Response, that it will have a claim for contribution against the State Engineer if it satisfies the cost award. [Response at 4-5]. The State Engineer does not agree that such a claim exists under these circumstances, but even if the claim exists, it is not because of the Settlement Agreement – the contribution claim would already exist as a result of the joint and several nature of the cost award.

In order to mitigate some of the risk of such a contribution action, the State Engineer obtained, as part of the Settlement Agreement, partial indemnity from some of the settling appellees. In order to receive such indemnity, however, the State Engineer will need to defend against the contribution action through all available appeals. Aquifer Science twists this unremarkable provision and alleges that the Settlement Agreement obligates the State Engineer to raise "frivolous" appeals. [Response at 5]. The Settlement Agreement does nothing of the sort. It does not obligate the State Engineer to raise any defenses the State Engineer believes lack merit, and the State Engineer's attorneys will in any event be bound by Rule 1-011 NMRA ("The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief there is good ground to support it. . ."). Thus, the Settlement Agreement does not heighten the risk of further litigation. That risk already exists – the Settlement Agreement simply limits the State Engineer's exposure in any subsequent litigation.

Finally, Aquifer Science claims, without support, that the State Engineer might sandbag and raise its objections to the cost award in a subsequent proceeding. It asks this Court to "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

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award if he fails to raise the objection here." [Response at 6]. There is no basis for such a request. The doctrines of issue and claim preclusion will apply to control which claims and issues the State Engineer may litigate in a subsequent contribution proceeding – just as they always do whenever a party voluntarily dismisses its appeal. Aquifer Science's requested order would add nothing but the potential for confusion, and is therefore unnecessary.

CONCLUSION

The State Engineer's Motion to Voluntary Withdraw his Appeals is a normal, run-of-the mill request by a party that has settled the issues raised in its appeals. The State Engineer requests that the motion be granted, so that the settling parties can obtain the benefits they bargained for, and so that the Court is not forced to expend resources on appeals that an appellant no longer seeks to pursue.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the State Engineer's Reply in Support of Motion for Dismissal was served on the following counsel and parties, as indicated below on this 6th day of May, 2021.

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