IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AQUIFER SCIENCE, LLC,

Applicant-Appellant/Cross-Appellee,

vs. 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.

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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BRIEF IN CHIEF

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ORAL ARGUMENT REQUESTED

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Introduction

Appellant Aquifer Science, LLC, brings this appeal from a judgment of the district court denying Aquifer Science's application to appropriate groundwater in a de novo trial pursuant to NMSA 1978 § 72-7-1 (1971). Under the Water Code, to appropriate groundwater an applicant must establish that there is unappropriated water available from the proposed source "and that the proposed appropriation would not impair existing water rights from the source, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state." NMSA 1978, § 72-12-3(E) (2019).

Despite agreeing with both Aquifer Science and the State Engineer – who supported Aquifer Science's application – that there is sufficient water available for appropriation to support Aquifer Science's proposed use, the district court denied the application under the impairment and conservation prongs of the statute. This Court should reverse the district court for three reasons.

First, the district court's decision on impairment was based on a misapprehension of the facts and a misapplication of the law. The district court incorrectly applied the State Engineer's guidelines for assessing impairment of existing water rights, which require consideration of hydrologic conditions overlooked by the district court. The district court found that "up to 100" wells would be affected by Aquifer Science's application without evidence that would

allow it to more precisely quantify that figure. This finding was apparently based on testimony that 100 wells would be affected if a zero-foot drawdown allowance was applied to existing wells, contrary to the State Engineer's approach. The district court, however, applied a two-foot allowance – an erroneous application of the controlling guidelines that no party advocated for, nor did any party present evidence of the effect that a two-foot drawdown allowance would have on the number of affected wells. Most significantly, the district court wholly disregarded the OSE's technical evaluation that application of a 10-foot drawdown allowance is the appropriate figure to use in analyzing Aquifer Science's application based on the hydrologic conditions present in the Sandia Basin. The OSE's technical evaluation was entitled to deference, not wholesale rejection based upon a misapprehension of the technical factors pertaining to impairment analyses.

Second, the district court's findings and conclusions regarding the issue of conservation are based on a misapplication of Section 72-12-3(E), requiring Aquifer Science to demonstrate that its planned use would conclusively achieve state-of-the-art water conservation measures, rather than the applying the correct standard: that the planned use is "not contrary to" conservation.

Third, the district court based its decision partly on the fact that the Campbell Ranch project has not yet received full land-use approval from the local governments involved. But Section 72-12-3(E), which prescribes the factors to be

considered in evaluating water rights applications, does not condition issuance of a groundwater permit on governmental approval of the proposed land use.

Aquifer Science also appeals from the district court's award of costs to a group of protestants who opposed its application in the district court proceedings. The protestants' cost bill was not adequately and timely supported. The district court erred in awarding costs and in allowing post-judgment interest on the cost award.

Summary of Facts and Proceedings

The district court entered extensive findings of fact and conclusions of law. (See 11 RP 2622-75 (findings of fact), 2675-81 (conclusions of law).) Many of the court's conclusions of law actually are factual findings and are treated here as such. Findings of fact that are mislabeled as conclusions of law may nevertheless be treated as findings. Sheraden v. Black, 1988-NMCA-016, ¶ 14, 107 N.M. 76; see also Apodaca v. Payroll Express, Inc., 1993-NMCA-141, ¶ 9, 116 N.M. 816 ("This Court may treat a conclusion of law as a finding of fact under certain circumstances.").

The District Court's Denial of Aquifer Science's Application To Appropriate Groundwater

Aquifer Science is a limited liability company formed to obtain water for the Campbell Ranch project. (FOF 1, 14.) Campbell Ranch is a master planned, mixed-use development located in the East Mountain area of Bernalillo County

north of the Town of Edgewood. (FOF 21, 23; see Ex. AS 10 (master plan).) The project includes 4,024 housing units grouped into four villages, plus commercial elements, open space, and two golf courses. (FOF 23, 24.) Villages 2, 3, and 4 have been annexed by Edgewood, which has approved the associated master plan. (FOF 29.) Village 1 is under the jurisdiction of Bernalillo County, has not been annexed by Edgewood, and is included in the master plan. It includes 807 of the projected dwelling units. (FOF 30, 31.)

Aquifer Science filed an application, No. S-2618, with the State Engineer to appropriate up to 1500 acre feet per year (afy), subsequently amended to 717 afy, within the Sandia Basin for use by Campbell Ranch. (FOF 15; see Ex. AS 1 (original application).) The State Engineer denied the application on the ground that no unappropriated groundwater was available. (FOF 8, 9; see 1 RP 4-10.) Following Aquifer Science's appeal pursuant to Section 72-7-1, the district court considered the application de novo during the course of a 10-day bench trial addressing all the factors set out in Section 72-12-3(E). (FOF 11-13.) The court permitted Aquifer Science to amend its application to reduce the quantity of water sought to 350 afy. (FOF 15.) Aquifer Science was opposed by Bernalillo County and by a number of individuals and entities represented by the New Mexico Environmental Law Center and a number of pro se individuals (collectively,

"Protestants"). (FOF 3.) At trial, the State Engineer's office took a position supportive of Aquifer Science's application. (FOF 2.)

Aquifer Science's case consisted primarily of presenting expert testimony addressing water usage and conservation measures under the master plan and the geology and hydrology of the Sandia Basin, including observational data and numerical modeling of groundwater flow, with the purpose of demonstrating the availability of water, the absence of impairment to existing rights that could not be mitigated, conservation of water, and benefit to the public welfare. Witnesses for the State Engineer supported Aquifer Science's application based on their technical expertise, experience with evaluating proposed groundwater appropriations, and interpretation of the State Engineer's own guidelines. Bernalillo County and the Protestants relied on cross-examination and on their own experts to attempt to call into question the evidence favoring the application. (See generally trial transcript.)

The district court adopted the majority of the findings proposed by Aquifer Science and rejected many of the contrary positions espoused by the opposing witnesses. (Compare 10 RP 2461-2542 with 11 RP 2622-81.) Based on the results of testing an exploratory well designated as ASE-2, the court found that there was "sufficient unappropriated water available in the Sandia Basin to supply" the application in the amended amount of 350 afy. (COL 12.) Well ASE-2 was constructed as a production well for the project. It drew water from the highly

productive aquifer called the San Andres-Glorieta formation. In a constant-rate test conducted for seven days, the well produced water at a rate of approximately 1600 afy, more than three times the requested appropriation. (FOF 65, 68, 70, 71, 112.)

The district court also found that Aquifer Science's groundwater flow model produced "reasonable" results when compared with observations and was "a reliable tool for predicting the future effects" of Aquifer Science's application on groundwater in the Sandia Basin. (FOF 163, 164.) But despite finding water available and generally subscribing to Aquifer Science's groundwater model, the district court denied the application. The court found that the application would result in "significant" and "substantial" impairment of existing water rights. (COL 23, 25.) The court also found that the application was "not consistent with conservation." (COL 45.) Because these determinations were sufficient in the court's view to dispose of the application, the court determined that there was "no need to reach the issue of public welfare." (COL 47.) Further background pertinent to these two issues follows. Other aspects of the district court's decision are discussed where relevant to the argument, infra.

- *Impairment of Existing Water Rights*

Aquifer Science's approach to demonstrating non-impairment of existing rights was to introduce evidence based on its groundwater model to estimate the

effect of pumping water from well ASE-2 at the anticipated rate over a 40-year period. Aquifer Science's expert identified 11 wells that would be drawn down below an allowable 10-foot amount derived from the State Engineer's Morrison 2006 guidelines, which are used to assess impairment. Aquifer Science also introduced evidence that the impact on the affected wells could be mitigated by deepening or redrilling the wells, which Aquifer Science would accept as a condition on its permit. (Tr. (3/5/18) 138-39, 193-94; Tr. (3/7/18) 55-56, 126-45, 148, 186-87; Tr. (3/8/18) 43-46.) The State Engineer presented its own expert, who agreed that the model developed by Aquifer Science was accurate and projected that 12 wells would be drawn down below the allowable 10-foot amount. (Tr. (3/15/18) 40, 50-55, 87, 91-95.)

Protestants presented an expert witness who conducted no modeling of his own but used the effects on other wells projected by Aquifer Science's groundwater model. According to this witness, the Morrison guidelines did not support use of a 10-foot benchmark for allowable drawdown in the Sandia Basin. Without the 10-foot allowance, the witness testified that 100 wells would be impacted by Aquifer Science's application. (Tr. (3/14/18) 51-64, 124, 143-44, 153-60, 176-78.)

The district court recognized that in evaluating impairment, "[a] lowering of the water table is not necessarily impairment . . . . The trial court must assess the

magnitude of the impairment and whether the impairment can be offset." (COL 16, 17.) The court partially followed the State Engineer's approach of applying the Morrison 2006 guidelines, including a drawdown allowance, to evaluate the magnitude of impairment. (FOF 180, 181.) The guidelines "include administrative drawdown allowances that the State Engineer or decision-maker applies to evaluate drawdown impacts on existing wells. These drawdown allowances range from 2 feet to 10 feet over 40 years . . . and are based on the thickness of the aquifer or formation." (FOF 187.) "For thick alluvial aquifers, the Morrison 2006 [g]uidelines allow a 10 foot drawdown allowance; for thin alluvial aquifers only a 2-4 foot drawdown allowance is allowed." (FOF 182.)

The court noted that Aquifer Science's expert "applied the Morrison 2006 [g]uidelines for thick alluvial aquifers" and the OSE's expert "also applied the ten-foot . . . drawdown allowance in his evaluation of the 40-year simulation of groundwater impacts." (FOF 188, 189.) Using this figure, these experts concluded that 11 (Aquifer Science) or 12 (State Engineer) wells "would be impacted by [Aquifer Science's] proposed pumping." (FOF 190, 191.) Protestants' expert, on the other hand, "testified that as many as 100 wells would be identified as impaired due to pumping under the Morrison 2006 [g]uidelines by eliminating use of the 10 foot drawdown[.]" (FOF 193; see also COL 18.)

Although the district court stated that it "agree[d] with Protestants' analysis" (COL 19), it did not actually fully agree. The court determined that "the correct application of the Morrison 2006 [g]uidelines requires an allowable 40-year drawdown of two feet" where Protestants' expert allowed none. (COL 21.) Two feet is the smallest drawdown allowance used in the Morrison guidelines. (Ex. AS 79, at 5.) "With the application of a two foot drawdown," the court found, "the [a]pplication will impair as many as 100 wells." (Id.) The court found that "offset of the impairment is not feasible." Aquifer Science "provided no testimony regarding the feasibility of replacing 100 wells (if such remediation is even contemplated by section 72-12-3(E))." (COL 23, 24.)

The court's finding that "as many as" 100 wells would be impaired by the application using a 2-foot drawdown allowance apparently was based on Protestants' testimony that 100 wells would be affected if no drawdown at all was allowed for existing wells. Supra p. 7. But the court could not determine the number of wells actually affected using a 2-foot allowance, because no party presented evidence of that figure.

The court selected two feet as the drawdown allowance based on its finding that "[t]he San Andres-Glorietta [sic] is not a thick alluvial basin." (COL 19; see also FOF 183 ("The Sandia Basin is not a basin with a thick alluvial aquifer."), FOF 188 ("[T]he Sandia Basin is not a thick alluvial aquifer.").) In the court's

view, Aquifer Science and the State Engineer "improperly applied the Morrison 2006 [g]uidelines for thick alluvial aquifers," which allowed them "to utilize a ten foot drawdown allowance . . . result[ing] in a calculation that only 11 to 12 wells could be impaired." (COL 20.)

As the court's findings indicate, determining the appropriate drawdown allowance under the Morrison guidelines is a critical step in assessing an application's potential impairment of existing rights and whether the impairment can be mitigated. The Morrison guidelines refer to certain Critical Management Areas (CMAs) where basin-specific guidelines have been adopted to assess impairment.

> The approach used to select administrative drawdown allowances for the CMAs may also be applied to wells.
>
> For basins with thick alluvial aquifers, such as Middle Rio Grande Basin (MRGB), a drawdown allowance of 10.0 feet over a 40-year period has been selected for the CMA. This administrative drawdown allowance may be selected for wells within the MRGB or for wells in other basins with similar hydrologic conditions. A value of 4.0 feet over a 40-year period was selected for the Estancia and Tularosa CMAs. For basins with thin alluvial aquifers, such as in southeastern New Mexico, an allowable 40-year drawdown of 2.0 feet upon a CMA is being considered. These allowances may be considered in the selection of drawdown allowances for other basins.

(Ex. AS 79, at 4-5 (footnote omitted) (emphasis added).)

While the district court recited several times over that the Sandia Basin or the underlying San Andres-Glorieta formation is not a thick alluvial aquifer, the

court's findings and conclusions do not indicate that the court ever considered whether the Sandia Basin exhibits hydrologic conditions that are similar to a thick alluvial aquifer.

- *Conservation of Water*

At trial, Aquifer Science presented evidence of its "very aggressive" plan for water conservation (Tr. (3/5/18) 126), which exceeded its burden under Section 72-12-3(E) to show that its proposed appropriation is "not contrary to conservation of water within the state." An expert on State Engineer practices in evaluating groundwater applications testified that the State Engineer considers efficiency as the major aspect of conservation and looks to whether an applicant meets the highest standards for efficient water use at the time. (Tr. (3/8/18) 49, 76-77.) Aquifer Science's water usage estimates under its plan are based on the use of commercially available fixtures and appliances that meet or exceed EPA requirements for water conservation. (Tr. (3/7/18) 204-06.) Aquifer Science's plan would use drip-irrigated native landscapes for residential properties and would apply treated effluent – estimated at 80 percent of the volume of interior water usage – to irrigate the golf course and exterior common areas and to replace water in San Pedro Creek that would be lost by reduced spring flow. (Tr. (3/5/18) 220-22.)

Under Aquifer Science's plan, average domestic water use for Campbell Ranch would amount to approximately 48 gallons per person per day, in contrast to the State Engineer's estimate of 80 to 100 gallons as the average use for rural, self-supplied homes and an average of around 60 gallons for 15 public water systems that supply water within the Sandia Basin. (Tr. (3/15/18) 183-84.) Residential water usage under Aquifer Science's plan would be below the conservation goals set by Bernalillo County. (Tr. (3/5/18) 227; Tr. (3/6/18) 34; Tr. (3/12/18) 122.)

The county's expert on water policy understood that reusing water as soon as it becomes available is a best conservation practice and that there necessarily is a delay while a project is developed to the point that there is water available for reuse. The expert generally agreed that there is nothing nonconservation-minded about the process of phasing development to generate reusable water. (Tr. (3/12/18) 112-14.) The State Engineer's expert on water rights administration also agreed that it would take time for the project to generate reusable wastewater and that using potable water initially to irrigate the golf course should not be considered contrary to conservation. (Tr. (3/15/18) 203-04.) The expert took the position that, considering the projected low amounts of domestic consumption and the reuse of treated effluent under Aquifer Science's plan, the conservation measures included in the plan met the conservation requirement of Section 72-12-3(E). (Id. at 184-85.)

Aquifer Science's expert on water resource management testified that he believed any effects of climate change or global warming could be mitigated by using highly efficient methods of irrigation – e.g., drip irrigation rather than a spray. (Tr. (3/6/18) 39-40.) Aquifer Science's expert on groundwater recharge testified that he accounted for future climate conditions by his choice of model parameters relating to snowpack sublimation and soil dryness and that the model was conservative enough to account for the predicted effects of global warming over the next 40 years on the Southwest. (Tr. (3/8/18) 128-29, 132, 137-38, 188-90.)

Through cross-examination or direct testimony, Aquifer Science's opponents brought out evidence that Aquifer Science's projected conservation goals that were more restrictive than existing legal standards could not be enforced by any governmental entity. (Tr. (3/12/18) 116-17, 119-21.) There also was evidence that a developer could impose and enforce conservation requirements through covenants and conditions. (Id. at 121.) Because the availability of treated effluent to irrigate the golf course and replenish San Pedro Creek depended on building out the full project, for the first ten to 12 years of development most of the water obtained through Aquifer Science's application would be used to water the golf course and replace stream flow. (Tr. (3/5/18) 176-77; see also (Tr. (3/12/18) 84-85.) If the Campbell Ranch project was not fully built out, less effluent would

be available for reuse. (Tr. (3/6/18) 26, 36-37.) The available effluent also would be reduced if the residential units that were permitted to use septic systems under the master plan did so. (Tr. (3/12/18) 78-80.) But there was evidence that there would be no septic systems or domestic wells in the development. (Id. at 172-73.) An expert on climate science testified regarding the projected effects of climate change and global warming on temperature and precipitation in the Southwest, forecasting serious, sustained drought. The expert believed that conservation of water is an even more important consideration in light of these predicted effects. (Tr. (3/14/18) 197-220.)

The district court found that Aquifer Science "proposes to use the most efficient fixtures and appliances currently marketed," "to limit exterior residential landscaping to native vegetation," and "to reuse treated effluent for watering of the golf course and common areas." (FOF 207, 209.) The court took note of the projected average consumption of 48 gallons of water per person per day under Aquifer Science's application and found that the figure is "at the lower end" of use by rural, self-supplied homes in Bernalillo, Santa Fe, and Torrance Counties and for certain public water systems in the Sandia Basin. (FOF 210, 212.) The projected consumption also was "consistent with efficient water use standards in the [State Engineer's] Conservation Guide for Public Utilities." (FOF 213.)

The court also found, however, that Aquifer Science did not "offer a per capita cap on water use" and that the master plan "allow[ed] the use of independent wells and septic systems," although Aquifer Science "would agree to a permit condition that there would be no septic systems or domestic wells as a part of the development of the Villages." (FOF 33, 214, 215.) The court considered it "speculative" whether local governments could enforce Aquifer Science's conservation proposals and found that "covenants and restrictions which may be put in place by any developer of the [m]aster [p]lan are insufficient to enforce actual implementation" of Aquifer Science's proposals. (COL 27-30, 38.) It was also "speculative," in the court's view, whether Village 1 would be fully built out, calling into question whether sufficient wastewater would be available to achieve Aquifer Science's reuse projections. (COL 31, 34.)

The court rejected Aquifer Science's "argu[ment] that using reclaimed water on the golf course shows conservation," where Aquifer Science's "own plan uses 100 out of the 350 af/y of potable, not reclaimed, water on the golf course for the first 2 years" and "the courses . . . will require 37% (131 af/y) of potable water, even after 11 years." (COL 39-41.) The court found that due to climate change "the availability of surface water will decline" and Aquifer Science's "failure to include this in its analysis, suggests a lack of long-term planning regarding

conservation." (COL 43, 44.) The court concluded that Aquifer Science's application was "not consistent with conservation." (COL 45.)

The district court entered a final judgment denying Aquifer Science's application, from which Aquifer Science timely appealed. (12 RP 2911, 3029.)

The District Court's Award of Costs to Protestants

Following the district court's issuance of its findings of fact and conclusions of law, Protestants filed their bill of costs. (12 RP 2918-38.) Aquifer Science filed objections to Protestants' cost bill. (12 RP 2955-72.) The cost bill lacked any supporting documentation, and Protestants did not provide all the supporting documents to Aquifer Science until shortly before the deadline for its objections. Protestants submitted the supporting documents ex parte to the district court, prompting Aquifer Science to file a motion requesting that the court disregard the submission. (12 RP 2999 (corrected motion), 12 RP 3067 (response); 13 RP 3147 (reply).) The district court held a hearing at which it denied the motion to disregard (see 13 RP 3254) and awarded costs to Protestants in the amount of $379,854.05, with post-judgment interest at the rate of 8.75 percent per year (13 RP 3257).[1]

[1] The cost award was assessed jointly and severally against Aquifer Science and the Office of the State Engineer. (13 RP 3259, ¶ 6.) The State Engineer has since moved to dismiss its appeal from the cost award pursuant to a settlement with Protestants. (See Motion for Voluntary Dismissal, filed Apr. 9, 2021.)

Aquifer Science moved for reconsideration of the cost award. (13 RP 3327; see also 14 RP 3363 (response), 14 RP 3458 (reply). Further details regarding the proceedings on costs are included in the argument, infra. Following denial of the motion (14 RP 3540), Aquifer Science timely appealed (14 RP 3591).

This Court consolidated Aquifer Science's appeals from the final judgment and cost award. (Order, filed Aug. 21, 2020.)

Argument

I. THE DISTRICT COURT ERRED IN UPHOLDING THE STATE ENGINEER'S DENIAL OF AQUIFER SCIENCE'S APPLICATION TO APPROPRIATE GROUNDWATER.

Standard of Review: The district court heard Aquifer Science's appeal from the State Engineer's denial of its application de novo. See NMSA 1978, § 72-7-1(E). In such cases, the district court "consider[s] the evidence anew" and has "the power to find facts" and "to form conclusions based upon those facts, and to enter enforceable judgments, orders and decrees supported by those facts and conclusions." Ft. Sumner Irrigation Dist. v. Carlsbad Irrigation Dist., 1974-NMSC-082, ¶¶ 13, 17, 87 N.M. 149. On appeal, this Court's "role is to determine whether the trial court's findings are supported by substantial evidence and whether it correctly applied the law to these findings." State v. Aragon, 1999-NMCA-060, ¶ 10, 127 N.M. 393. Aquifer Science's appeal regarding the district

court's merits determination raises only legal issues, which "are reviewed de novo." Duncan v. Kerby, 1993-NMSC-011, ¶ 7, 115 N.M. 344.

# # #

In this appeal, Aquifer Science challenges the district court's adverse findings regarding impairment and conservation. The court's analysis of impairment is defective as a matter of law, because the court failed to correctly apply the State Engineer's Morrison 2006 guidelines and omitted a necessary part of the impairment analysis – whether the Sandia Basin exhibits "similar hydrologic conditions" to those of a thick alluvial basin. The court also based its impairment ruling on the finding that application of a two-foot drawdown allowance would result in impairment of "up to 100 wells." There is, however, no evidence from which the court could quantify this important figure with any precision.

The court's treatment of the conservation requirement of Section 72-12-3(E) is legally erroneous. It is based on an overly strict construction of the statute, requiring Aquifer Science to affirmatively prove that its plan would achieve an undefined standard of conservation rather than the showing that its plan is "not contrary to conservation," the correct standard.

Finally, the court erred in treating land-use approval of Aquifer Science's entire project as a requirement for a permit to appropriate water. Such approval is not required under the governing statute.

A. The District Court Failed To Conduct a Full Analysis of Impairment Under the Morrison 2006 Guidelines, Because It Failed To Consider Whether the Sandia Underground Basin Presents Hydrologic Conditions Similar To Those of a Thick Alluvial Aquifer.

Preservation of Issue: The record may not reflect that Aquifer Science specifically requested the district court to consider whether the Sandia Basin is similar hydrologically to a thick alluvial aquifer in conducting its impairment analysis under the Morrison 2006 guidelines. See Woolwine v. Furr's, Inc., 1987-NMCA-133, ¶ 20, 106 N.M. 492 (discussing issue preservation requirement). But an exception to the preservation requirement applies here, because the court's own statements indicate it was aware that the guidelines applicable to thick alluvial aquifers apply also to aquifers with "similar hydrologic conditions." During cross-examination of Protestants' expert, the witness was asked to read from the Morrison guidelines. He misread the language, and the court corrected him. (Tr. (3/14/18) 157 (The Court: "No. It says 'similar hydrologic conditions.'").) It is not necessary to call the court's attention to a point when the record indicates that the court already was aware of it. E.g., State v. Conn, 1992-NMCA-052, ¶ 11, 115 N.M. 101 ("[D]efendant was not required to object on the specific grounds [raised on appeal] . . . because the trial court's previous declaration clearly indicated it was aware [of requirements of evidence rule].").

# # #

The State Engineer "uses the Morrison 2006 [g]uidelines and its draw down allowance to analyze impacts on existing water rights." (FOF 180.) The district court in turn adopted the Morrison 2006 guidelines as the standard governing its impairment analysis. Supra pp. 7-10. The guidelines explicitly permit use of a 10-foot drawdown allowance "[f]or basins with thick alluvial aquifers . . . or for wells in . . . basins with similar hydrologic conditions." (Ex. AS 79, at 4.)[2]

The district court rejected Aquifer Science's and the State Engineer's use of a 10-foot allowance because the Sandia Basin "is not a thick alluvial aquifer." (FOF 188.) Supra p. 9. But, although the court seemingly understood that the guidelines required consideration of "the geophysical properties" of the aquifer involved (COL 19), there is no indication anywhere in the court's lengthy findings and conclusions that it expanded its inquiry beyond the narrow question whether the Sandia Basin qualifies as a "thick alluvial aquifer" to consider the equally pertinent question whether the hydrologic conditions of the basin are "similar" to those of a thick alluvial aquifer.

Instead, the court made its own choice – different from the State Engineer's expert determination – that a two-foot drawdown allowance was "correct." (COL 21.) But because there was no evidence of the number of wells that would be

[2] An "alluvial" aquifer is one that is sand-like. (Tr. (3/15/18) 52.) "Thickness" under the Morrison guidelines refers to the aquifer's depth. (Tr. (3/8/18) 108; see also Tr. (3/15/18) 52.)

impaired using a two-foot allowance, the court could do no more than say that "as many as 100" wells would be affected in that case. The court in effect conflated Protestants' testimony that 100 wells would be affected using no drawdown allowance with its own selection of a two-foot allowance to arrive at an imprecise estimate of the maximum number of wells that could be affected using a drawdown allowance between zero and two feet.

The district court's failure to consider all relevant aspects of the impairment analysis, including whether the Sandia Basin exhibits hydrologic conditions similar to a thick alluvial aquifer, constitutes legal error and invalidates the court's finding of impairment. "[I]mpairment analyses must be tailored to each particular application to ensure that . . . both local and regional hydrologic conditions are adequately considered." Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth., 2014-NMCA-032, ¶ 87, 320 P.3d 492.

The error cannot be considered harmless, because there was conflicting evidence regarding the hydrologic condition of the Sandia Basin. Protestants' expert testified that the Sandia Basin "doesn't resemble [a] deep alluvial basin in any way that I can tell." (Tr. (3/14/18) 63; see also id. at 54 (stating that there is no single, thick, highly permeable unit characterizing the basin), 52-53 & 159-60 (stating that 10-foot drawdown allowance for thick alluvial basins does not apply

to the Sandia Basin), 178 (stating that area "is not similar hydrologically to a thick alluvium").)

On the other hand, Aquifer Science and the State Engineer presented evidence from which the court could find that the hydrologic condition of the Sandia Basin is similar to a thick alluvial aquifer within the contemplation of the Morrison guidelines. One expert for Aquifer Science agreed that the Sandia Basin is not a thick alluvial aquifer but pointed out that the basin has numerous aquifers, including thick ones. (Tr. (3/8/18) 59.) The expert testified that the significance of thickness under the Morrison guidelines is that an excessive decline in water level can be mitigated by deepening a well if the basin is thick. (Id. at 40-41.) An expert for the State Engineer testified that, although the Sandia Basin is not a thick alluvial aquifer, use of a 10-foot drawdown allowance under Morrison was appropriate because wells that were impacted could be deepened into the Chinle formation or drilled deeper into the underlying San Andres-Glorieta, "a fantastic aquifer." (Tr. (3/15/18) 53, 93; see also id. at 95 (stating that there is a very thick Chinle formation available down to about 1000 feet and 200 to 300 feet of San Andres-Glorieta below that can be accessed).)

Evidence that the State Engineer considered the 10-foot drawdown allowance to be appropriate for the Sandia Basin is of particular significance, because it demonstrates the State Engineer's understanding of how its own

guidelines should be applied in the circumstances. See Lantz v. City of Santa Fe Extraterritorial Zoning Auth., 2004-NMCA-090, ¶ 11, 136 N.M. 74 (noting that an "agency is particularly well situated to determine the intent behind its own language"); cf. N.M. State Bd. of Psychologist Exam'rs v. Land, 2003-NMCA-034, ¶ 5, 133 N.M. 362 ("Ordinarily, the court must defer to an agency's interpretation of its own regulations."). Moreover, a court "generally will defer to the agency's interpretation if it implicates agency expertise." Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶ 17, 133 N.M. 97 (internal quotation marks & citation omitted). The Supreme Court has expressly acknowledged the State Engineer's "expertise in hydrology." Lion's Gate Water v. D'Antonio, 2009-NMSC-057, ¶ 24, 147 N.M. 523. Had the district court considered the question of "similar hydrologic conditions" and given appropriate deference to the State Engineer's application of the Morrison guidelines in this highly technical area, the court's finding on impairment could very well have changed. The State Engineer's expert testified that there would be no impairment if the affected wells were deepened. (Tr. (3/15/18) 171.) See Stokes v. Morgan, 1984-NMSC-032, ¶ 24, 101 N.M. 195 (stating that in de novo appeal from State Engineer's decision, State Engineer's finding of no impairment "is considered strong evidence of no impairment").

For the foregoing reasons, the district court's finding of impairment should be reversed or, at a minimum, this matter should be remanded to the district court to reassess the question of impairment under a proper application of the Morrison guidelines.

B. The District Court Adopted an Unduly Strict Interpretation of Section 72-12-3(E) in Ruling That Aquifer Science's Application Is "Inconsistent with Conservation."

Preservation of Issue: Aquifer Science preserved its argument regarding the conservation requirement of Section 72-12-3(E), at least in part, by requesting that the district court make factual findings relating to the efficient use of water under Aquifer Science's plan and conclude that the plan satisfies the requirements of the statute. (10 RP 2534-36, ¶¶ 249-258; id. at 2542, ¶ 20.) To the extent Aquifer Science's argument regarding the proper construction of Section 72-12-3(E) may be more developed on appeal than that presented to the district court, the argument may be considered because it concerns a matter of general public interest. See Rule 12-321(B)(2)(a) NMRA. The statutory standard at issue – not contrary to conservation – applies broadly in water law.[3] Construing the standard presents a purely legal question that is likely to arise in numerous future situations. See

[3] In addition to Section 72-12-3(E), see NMSA 1978 §§ 72-5-6 & -7 (1985) (appropriation of surface water), 72-5-23 (1985) (change of purpose or place of use), 72-5A-4(B)(11)(d) & -6(A)(4) (1999) (storage and recovery facilities), 72-6-5(A)(2) (2003) (water use leasing), 72-12-7(A) (1985) (change of location of well or use of water), 72-12B-1(C) (2019) (transportation and use of water outside state).

DeFillippo v. Neil, 2002-NMCA-085, ¶ 14, 132 N.M. 529 (considering proper standard for setting aside default and stating that, as alternative if issue was not adequately preserved, it "involves a matter of general public interest and is likely to be repeated in other situations").

# # #

In addition to relying on a deficient analysis of impairment, the district court based its denial of Aquifer Science's application on a conclusion that the application "is not consistent with conservation." (COL 45.) But Section 72-12-3(E) does not require an applicant to prove affirmatively that its use is consistent with conservation. Rather, the statute requires only that the applicant show that its plan is "not contrary to conservation of water." NMSA 1978, § 72-12-3(E). The district court's erroneous phrasing of the relevant inquiry belies its more fundamental misunderstanding of the statutory requirement regarding conservation. Aquifer Science met its burden under section 72-12-3(E) of demonstrating that its application is not contrary to water conservation.

A court's "principal command in construing a statute is to effectuate the intent of the legislature by using the plain language of the statute. . . . [C]ourts often use the dictionary for guidance." State v. Stephenson, 2015-NMCA-038, ¶ 10, 346 P.3d 409 (internal quotation marks & citations omitted) (alterations omitted). In this case, the intent underlying Section 72-12-3(E) and the language

employed by the legislature inform the interpretation of the statute's conservation requirement.

The Supreme Court has recognized that "the purposes of our water laws" are twofold: they are "intended to encourage use and discourage nonuse or waste." State ex rel. Reynolds v. S. Springs Co., 1969-NMSC-023, ¶ 15, 80 N.M. 144. To "conserve" a resource is to "minimize [its] use," Black's Law Dictionary (10th ed. 2014), at 370, or to "keep [it] from being . . . wasted," Webster's New World Dictionary (college ed. 1968), at 313 – i.e., to use only as much of the resource as is required. Combining these concepts, an application to appropriate groundwater is "not contrary to conservation" as long as the proposed use is a beneficial use and no more water is appropriated than is needed to achieve the beneficial purpose. This interpretation of the statute comports with the State Engineer's focus on efficient use of water as the touchstone for conservation. Supra p. 11. The State Engineer's understanding of a statute it administers is entitled to deference, see Pub. Serv. Co. v. N.M. Pub. Serv. Comm'n, 1987-NMSC-124, ¶ 12 106 N.M. 622, and is presumed to be correct, see NMSA 1978, § 72-2-8(H) (1967).

The evidence demonstrates that the statutory standard is met here. The Campbell Ranch plan puts water to beneficial use in a planned community that will provide residential and recreational opportunities to residents and others, economic benefits to the community, and tax revenues to local and state governments. The

master plan sets high goals for efficiency through the use of the best available fixtures and appliances. Supra p. 14. The plan is projected to achieve a substantial per capita saving over the average water use in the Sandia Basin and other rural areas, as the district court found. Supra pp. 11-12, 14. The plan further promotes conservation by reusing some 80 percent of the water devoted to interior use as treated effluent to water common areas and the golf course and replenish stream flow in San Pedro Creek. Supra p. 11. Cf. City of Alamogordo v. Tulorosa Cmty. Ditch Corp., No. A-1-CA-28643 (N.M. Ct. App. Nov. 3, 2009) (non-precedential) (upholding district court's finding that city's proposed use was not contrary to conservation, in view of evidence that projected daily consumption per person was consistent with usage in other southwestern cities and considering evidence of city's other conservation efforts).

The district court's contrary finding is based on an unreasonable reading of the statute. A court should "give effect to legislative intent by adopting a construction which will not render [a] statute's application absurd or unreasonable[.]" Gutierrez v. City of Albuquerque, 1981-NMSC-061, ¶ 7, 96 N.M. 398. The district court discounted Aquifer Science's commendable efforts to achieve conservation by requiring the most efficient fixtures and appliances commercially available because it considered implementation of the plan through covenants and conditions to be insufficient and questioned the ability of local

governments to enforce Aquifer Science's requirements. Supra p. 15. But by building requirements into its plan that can be imposed through enforceable covenants and conditions, Aquifer Science did everything it reasonably could to accomplish its goal of efficient water use. Section 72-12-3(E) does not require an applicant to ensure that its efforts to achieve water conservation at the planning stage will be actualized by others. Whether local governments are willing to adopt standards for efficiency equivalent to those required under Aquifer Science's plan should have no bearing on whether Aquifer Science's plan is "not contrary" to conservation under Section 72-12-3(E).

The district court recognized that using water for the golf course is a beneficial use. (FOF 220.) Still, the court was dissatisfied with Aquifer Science's phased approach under which treated effluent is increasingly used to irrigate the golf course and common areas as development proceeds and increasing volumes of effluent become available. Supra p. 15. There is evidence supporting the view that Aquifer Science's approach to reusing water is consistent with reasonable development practices. Supra p. 12. To satisfy the district court seemingly would require Aquifer Science to defer constructing the golf course until its project was built out and generating the maximum amount of effluent. But that is unreasonable; it is hardly realistic to suppose that the thousands of residential units at Campbell Ranch could be sold to buyers under a marketing campaign which

promised that a golf course would be built at some future time when there was enough wastewater to sustain it.

Although the district court's findings mention climate change, the court does not integrate those findings into its analysis of considerations under Section 72-12-3(E). That is not surprising, given that the State Engineer does not consider climate change in evaluating applications for groundwater appropriation. (Tr. (3/8/18) 83.) The court's statement that Aquifer Science "fail[ed] to consider" the effects of climate change (COL 44) is contrary to the evidence. Supra pp. 12-13. And the court's statement that that supposed failure "suggests a lack of long-term planning regarding conservation" (COL 44 (emphasis added)) is not a finding of fact adverse to Aquifer Science. Cf. Ellen Equip. Corp. v. C.V. Consultants & Assocs., 2008-NMCA-057, ¶ 20, 144 N.M. 55, 183 P.3d 940 (holding that trial court's finding that transferor "may not" have received value for allegedly fraudulent transfer was insufficient to set transfer aside).

The district court's ruling regarding conservation should be reversed. The evidence demonstrates that Aquifer Science's plan meets the conservation standard of Section 72-12-3(E), properly construed. At a minimum, this matter should be remanded to the district court to consider the evidence relating to conservation of water under a correct interpretation of the statute.

C. The District Court Improperly Required Aquifer Science To Show That It Had Land-Use Authorization for Its Entire Project, Which Is Not a Proper Consideration Under Section 72-12-3(E).

Preservation of Issue: Aquifer Science preserved this issue by urging in its written closing argument that consideration of whether Bernalillo County had granted land-use approval for Village 1 would "improperly . . . raise immaterial land-use planning matters in what is undisputedly a water rights case." (10 RP 2546.)

# # #

The district court at several points in its findings and conclusions refers to the as yet unresolved status of land-use approval for Village 1 by Bernalillo County as a reason to deny Aquifer Science's application. (FOF 30; COL 26, 31.) In so doing, the court in essence added to Section 72-12-3(E) a requirement that, in order to obtain a permit to appropriate groundwater, an applicant must demonstrate that it has obtained any necessary governmental approval of the land use associated with the appropriation. The district court erred, because Section 72-12-3(E) does not require an applicant to obtain approval of its proposed land use as a precondition to obtaining water rights.

Section 72-12-3(E) lists four showings that an applicant must make to obtain a permit to appropriate groundwater – availability of water, non-impairment of existing rights, appropriation not contrary to conservation, and appropriation not

contrary to public welfare. Supra p. 1. Land-use approval is not included in this list, and the district court should not have added it. "Courts . . . may not read language into a statute that is not there, particularly if it makes sense as written." Irvine v. St. Joseph Hosp., 1984-NMCA-107, ¶ 10, 102 N.M. 572 (internal quotation marks & citation omitted) (alteration omitted).

Section 72-12-3(E) makes perfect sense as written, without the inclusion of a requirement of land-use approval. Adding the requirement, however, would produce a statute that is unreasonable or unworkable in the common situation in which water rights are necessary for approval of land use but water cannot be obtained until the land use is authorized. See Gutierrez v. City of Albuquerque, 1981-NMSC-061, ¶ 7 (declining to adopt "a construction which will . . . render the statute's application absurd or unreasonable"). Bernalillo County's expert on water policy and land use testified that the county requires a showing of physical and legal availability of water at the first stage of the land use planning process. (Tr. (3/12/18) 102.) Under the district court's interpretation, a developer could easily find itself in a "Catch-22" situation: land-use approval could not be sought without a permit for water, and a permit could not be obtained unless the land use had been approved.

A witness from the State Engineer's office who testified as an expert on water rights administration testified that local land-use approval is not a factor in

granting water rights. Rather, the availability of water is a consideration for local governments at the subdivision approval stage. (Tr. (3/15/18) 190.) The State Engineer's understanding of the statute is entitled to deference and is supported by a presumption of correctness. Supra p. 26.

This Court should hold that an applicant under Section 72-12-3 is not required to show that it has obtained any related land-use authorization as a precondition to obtaining a permit to appropriate groundwater. Any finding or conclusion of the district court based on the unresolved land use approval of Village 1 by Bernalillo County should be set aside as irrelevant to Aquifer Science's required showing under Section 72-12-3(E).

II. THE DISTRICT COURT ERRED IN ITS AWARD OF COSTS TO PROTESTANTS.

Standard of Review: A district court's award of costs is reviewed for abuse of discretion. Pioneer Sav. & Trust, F.A. v. Rue, 1989-NMSC-079, ¶ 12, 109 N.M. 228.

Preservation of Issue: This issue was preserved by Aquifer Science's objections to Protestants' cost bill, its motion to disregard Protestants' documentary submissions, the district court's ruling on the motion and award of costs, Aquifer Science's motion for reconsideration, and the district court's ruling denying reconsideration. See supra p. 16.

# # #

Protestants' response to Aquifer Science's motion to reconsider the award of costs to Protestants best illustrates the confusing and improper procedure that resulted in the district court's imposition of nearly $400,000 in costs on Aquifer Science. (See 14 RP 3363-69.) In contrast to the straightforward procedure outlined in Rule 1-054 NMRA, Protestants devote nearly seven pages to summarizing the procedural history of the cost bill and related submissions. (Id.) On September 5, 2019, two days after the district court entered judgment denying Aquifer Science's application, Protestants filed their cost bill with the clerk. (14 RP 3490-92.) The filed cost bill, however, did not contain an attachment of supporting invoices or other documentation. (See 12 RP 2918-34.) The filed cost bill is generic and does not explain the bases for many of the requested costs. (Id.) The filed cost bill lists the various costs that Protestants sought to recover, identifies the category of the cost and the dates the cost was incurred, and provides citation to the subsections of Rule 1-054 that Protestants contend support an award of costs. (Id.)

The filed cost bill, however, does not contain the degree of detail required by Rule 1-054(D), which, at the very least, requires the party requesting costs to itemize the costs and provide information sufficient for the district court to determine that the costs are recoverable under Rule 1-054(D)(2) and for the opposing party to lodge objections contemplated by Rule 1-054(D)(3). For

example, Protestants requested compensation for costs incurred by deposition attendance and videography. (12 RP 2931.) But the filed cost bill does not even identify the depositions for which these costs were incurred. Thus it is inexplicable how the district court could have determined that these costs were for depositions that were (i) used at trial, (ii) used in support of a successful summary judgment motion, or (iii) reasonably necessary to the litigation. Id.; see also Rule 1-054(D)(2)(e). The district court could not make such a determination based on the filed cost bill and neither could Aquifer Science.

Counsel for Aquifer Science attempted to learn the bases of Protestants' requested costs. In email communications between counsel, Protestants disclosed the supporting invoices ultimately made part of the record in this case by email productions on September 3, 5, and 11, 2019. (See 14 RP 3490-92.) Thus, Aquifer Science did not have all the supporting invoices in its possession until four days prior to the expiration of the 10-day deadline to object provided by Rule 1-054(D)(4). (Id.) In an ex parte communication with the district court, Protestants then provided a physical binder of the supporting invoices to the district court, which contains handwritten edits to the invoices provided to Aquifer Science via email. (Id.; see also 12 RP 3028.) Aquifer Science did not receive a copy of this binder until mid-October 2019, well after its deadline to object to the cost bill had passed. (Id.)

Faced with this unusual procedure, Aquifer Science first attempted to find a reasonable compromise, proposing to the Protestants that they file the invoices into the record and permit Aquifer Science a brief extension to amend its objections – a proposal that was rejected. Aquifer Science then filed a motion seeking to have the district court disregard the extra-record documents; Aquifer Science's obligation under Rule 1-054(D)(4) was to lodge objections to the filed cost bill, not to supplement the record on behalf of Protestants. (See 12 RP 3018-21; 14 RP 3503.) The district court denied Aquifer Science's motion to disregard these unfiled documents and sua sponte admitted the physical binder into the record at the December 4, 2019, hearing on the cost bill. Aquifer Science then orally requested additional time to object to Protestants' bill of costs, in light of the district court's admission of the supporting invoices into the record. The district court refused to rule on Aquifer Science's motion for additional time and awarded Protestants substantially all of their requested costs. (See 14 RP 3396-3446)

The cost award also awards Protestants interest on the cost award at a rate of 8.75%. (See 13 RP 3257-59.) This decision is also legal error; neither the New Mexico Rules of Civil Procedure nor statutory law provides a basis for imposition of interest on a cost award. Costs are distinct from damages, and New Mexico district courts are not empowered to impose post-judgment interest on costs.

A. The District Court Erred by Finding That Protestants' Filed Cost Bill Satisfied the Requirements of Rule 1-054, Because the Filed Cost Bill Lacks the Specificity Necessary for the Non-Prevailing Party to Raise Appropriate Objections.

Recovery of costs is tightly regulated by the rules of procedure. Rule 1-054 sets forth not only the procedure for recovery of costs, but also the categories of costs that are properly recoverable and which are not. See Rule 1-054(D)(2), (3). Expert witness fees, for example, are recoverable "when the court determines that the expert witness was reasonably necessary to the litigation." Rule 1-054(D)(2)(g). Thus, a cost bill filed pursuant to Rule 1-054 must, at the very least, provide sufficient detail for the district court to discern an appropriate basis under Rule 1-054(D)(2) for each item in the cost bill to be taxed against the non-prevailing party. See Rule 1-054(D)(4) ("[T]he clerk of the district court shall tax the claimed costs which are allowable by law. The judge shall settle any objections filed.").

The district court's duty in this regard is to carefully scrutinize the cost bill. See Dunleavy v. Miller, 1993-NMSC-059, ¶ 41, 116 N.M. 353 ("As a matter of policy, all costs submitted by the prevailing party (or by the party entitled to recover costs under Rule 68) should be carefully scrutinized by the district court, in the interest of reducing insofar as possible the burdensome cost of litigation." (quoted authority omitted) (emphasis added)). The district court itself recognized

this high level of specificity, required for both a cost bill and objections to a cost bill; at the hearing on this matter, the district court stated "That really means the only way to attack it, from my perspective, is line by line." (14 RP 3439.)

Protestants' generic bill of costs, filed without any supporting documentation, was insufficient for this purpose and does not meet Protestants' burden under Rule 1-054. See, e.g., Allen v. Santee Community School, Order on Motion for Further Review of Clerk's Denial of Defendants' Bill of Costs, No. 4:07CV313 l, 2009 WL 1606478 (D. Neb. June 4, 2009) (relying on Federal District Court Bill of Costs Handbook to conclude that bill of costs filed without attached invoices is deficient). For example, even a cursory review of the extra-record documents reveals items that are not recoverable under the rule: page 117 reflects monthly charges for the "Dropbox" software service; and page 78 reflects witness travel for a "Santa Fe meeting." See Rule 1-054(D)(3)(g) (disallowing costs for general office expenses); see also Rule 1-054(D)(2)(g) (governing witness travel). Even more egregiously, page 79 contains an eight-hour entry – in part – for one expert witness to attend the deposition of another expert witness. (See 13 RP 3338-3341.) These details were omitted from Protestants' filed bill of costs, effectively denying Aquifer Science its right to raise appropriate objections, such as whether it is reasonable for an expert to attend depositions of other experts rather than review the

transcripts, or whether the costs have any basis whatsoever. Id.; see also SP Technologies, LLC v. Garmin International, Inc., Memorandum Opinion and Order, No. 08 CV 3248, 2014 WL 300987 at *2 (N.D. Ill. Jan. 10, 2014) (stating that bill of costs without supporting invoices requires the court to impermissibly award costs based on speculation); Manson v. City of Chicago, 825 F.Supp.2d 952, 955 (N.D. Ill. 2011) (stating that cost bills require review in "scrupulous detail" and citing cases); Banas v. Volcano Corp., 47 F.Supp.3d 957, 980 (N.D. Cal.) (reducing cost award based on failure to provide sufficient detail or supporting invoices); Scwhweiger v. China Doll Restaurant, Inc., 673 P.3d 927, 932 (Ariz. Ct. App. 1983) ("In order for the court to make a determination that the hours claimed are justified, the fee application must be in sufficient detail to enable the court to assess the reasonableness of the time incurred."); Daddio v. A.I. duPont Hosp. for Children of Nemours Foundation, No. 05-441, 2011 WL 3563671 at *4 (E.D. Penn. Aug. 12, 2011) ("Here, the defendants have provided the following documents to the Court: (1) an affidavit of counsel attesting to costs; (2) a list of dates and amounts, but not descriptions, for photocopies totaling $2,861.75; (3) an invoice in the amount of $122.26 from defendants' printing company. Based on the information provided—merely dates and the rate charged—it is impossible to determine whether the copies were necessary. Therefore, they are not taxable.").

For these reasons, the district court's determination that Protestants' filed bill of costs, alone, met the requirements of Rule 1-054 was error. Though the rule does not require attachment of supporting invoices, as many federal district courts have required, Rule 1-054 requires a party to disclose sufficient information for the district court to properly determine that each itemized cost is recoverable under Rule 1-054(D)(2) and not an unrecoverable cost under Rule 1-054(D)(3). The filed bill of costs, without the supporting invoices, does not satisfy this standard.

B. The District Court Erred by Not Permitting Aquifer Science Ten Days to Lodge Objections to Protestants' Cost Bill After the Supporting Invoices Were Admitted Into the Record.

Thus, by failing to follow the proper procedure and file an itemized cost bill sufficient for Aquifer Science to make appropriate objections, Protestants have not only harmed Aquifer Science's procedural rights under the rule but have avoided the substantive restrictions on recovery of costs. See Hall v. Hall, Order, No. 2011-54; 2013-95, 2018 WL 1414842 (D.V.I. Mar. 20, 2018) (denying bill of costs when invoices were submitted by attachment to reply rather than to motion).

In response, Protestants have stressed that the extra-record documents were, in fact, provided to Aquifer Science and to the Court – a point that the Court also emphasized in denying Aquifer Science's request for additional time. While Protestants did provide a Dropbox link with the extra-record

documents on September 3, 2019 at Aquifer Science's request, it was not until the second half of October that Aquifer Science received the binder submitted to the Court, which contains certain handwritten additions to the invoices. (See 14 RP 3502-12; 14 RP 3457.) And as the above discussion of the discrepancies between the filed cost bill and the unfiled invoices demonstrates, Aquifer Science's insistence that the rules of civil procedure be followed is anything but technical. Aquifer Science was put in the awkward position of having to respond and object to a cost bill that was not supported by any properly filed documentation.

Under these circumstances, a party should not be required to guess at what documents constitute the record and which documents the party should properly respond to. See 4 C.J.S. Appeal and Error § 571 (1993)(stating that an order to make documents part of the record "should designate and point out with reasonable certainty the matters intended to be made a part of the record, leaving nothing to inference, speculation, or surmise, and should be rendered in due time" (emphasis added)). The district court's reference to the fact that Aquifer Science had the extra-record invoices for over two months prior to the motion hearing, and the suggestion that this length of time corrects for any harm to Aquifer Science do not accurately capture the dilemma faced by Aquifer Science.

Under Rule 1-054(D)(4), a party objecting to a cost bill has only ten days to file its objections. Thus, Aquifer Science had only ten days to decide on the appropriate response to Protestants' improper disregard for the rule. And at that point in time, there had been no indication that Protestants were going to provide the Court with the unfiled documents. Based on the circumstances and the clarity of Rule 1-054(D), Aquifer Science determined that it was proper to file objections only directed to the cost bill filed with the clerk, rather than respond to documents that were not part of the record in this case. When Protestants did, in fact, provide the Court with the extra-record documents, Aquifer Science filed a motion seeking to have the Court disregard the documents or, alternatively, grant Aquifer Science additional time to file objections. See Grand Canyon Trust v. U.S. Bureau of Reclamation, Order, No. CV-07-8164-PHX-DGC, 2009 WL 941341 (D. Ariz. Apr. 6, 2009) (requiring party to file motion before court would consider extra-record documents). Aquifer Science also sought an agreement with Protestants, proposing that they file the supporting invoices into the record and provide Aquifer Science a brief extension to file additional objections – a proposal that Protestants rejected. (See 14 RP 3503.) Aquifer Science orally requested additional time at the hearing, once the Court ordered the documents admitted into the record, to provide additional objections. The request was not ruled on. (See

14 RP 3396-3446 (Court's response to Aquifer Science's and the State Engineer's oral request for additional time to provide objections: "All right. I mean, I'm not going to rule on it.")); see also Auto Wax Co. Inc. v. Mark V Products, Inc., No. CIV.A.3:99-CV-0982-M, 2002 WL 265091 at *3 (N.D. Tex. Feb. 22, 2002) (stating that chosen procedure by prevailing party, namely submitting supporting invoices to court for in camera review, is "improper," and ordering prevailing party to refile bill of costs with invoices attached); Allen v. Santee Community School, Order on Motion for Further Review of Clerk's Denial of Defendants' Bill of Costs, No. 4:07CV3131, 2009 WL 1606478 (D. Neb. June 4, 2009) (relying on Federal District Court Bill of Costs Handbook to conclude that bill of costs filed without attached invoices is deficient); SP Technologies, LLC v. Garmin International, Inc., Memorandum Opinion and Order, No. 08 CV 3248, 2014 WL 300987 at *2 (N.D. Ill. Jan. 10, 2014) (stating that bill of costs without supporting invoices requires the court to impermissibly award costs based on speculation); Hall v. Hall, Order, No. 2011-54; 2013-95, 2018 WL 1414842 (D.V.I. Mar. 20, 2018) (denying bill of costs when invoices were submitted by attachment to reply rather than to motion).

This course of action by Aquifer Science was rejected by the district court, which denied the motion to disregard on the same day it granted Protestants' request for costs. Thus, the district court – through its oral rulings

and order – suggests that the only course Aquifer Science could have taken, when faced with a binder of documents not filed with the clerk, was to file objections referencing these documents, rather than insist on the requirements of Rule 1-054(D)(4). This ruling is based on a mistake of law, namely the application of Rule 1-054(D)(4), and should be reversed and remanded to allow Aquifer Science to provide objections directed to these previously unfiled documents.

C. The District Court's Imposition of Interest on the Cost Award Is Error; Interest Is Not Permitted on an Award of Costs Pursuant to Rule 1-054.

Section 56-8-4(A), which governs the computation of interest, states that interest "shall be allowed on judgments and decrees for the payment of money." NMSA 1978, § 56-8-4(A) (2004). It is inarguable that an award of costs is not part of a judgment. See Genuine Parts Co. v. Garcia, 1978-NMSC-059, ¶ 21, 92 N.M. 57 (distinguishing costs and judgment). A cost award is also not a "decree," which is the equitable equivalent of a judgment at law. The first listed definition of "decree" in Black's Law Dictionary is a "judicial decision in a court of equity, admiralty,or probate" as opposed to a decision of a court of law. Black's Law Dictionary (10th ed. 2014). Section 56-8-4's pairing of "decree" with "judgment" shows that this definition of "decree" is the one meant by the statute – the equivalent of a judgment from a court sitting in equity, probate, or

other court not issuing judgments at law. See In re Gabriel M., 2002-NMCA- 047, ¶ 19, 132 N.M. 124 (canon of statutory construction, noscitur a sociis, "looks to the neighboring words in a statute to construe the contextual meaning of a particular word in the statute").

Thus, based on the language of the statute, interest cannot be charged on an award of costs. This interpretation is supported by the great weight of authority, all of which appears to agree that, generally, interest is not available on costs absent clear statutory authorization. See, e.g., 47 C.J.S. Interest § 69 (1982)(no interest on fees or costs unless authorized by statute is the general rule); Eberhardt v. Eberhardt, 672 N.W.2d 659, 665 (N.D. 2003) (no interest on attorneys' fees without statutory authorization); Schwartz v. Kunze, 22 P.3d 618, 623 (Kan. Ct. App. 2001) (interest on attorneys' fees not proper); Catlin v. Tormey Bewley Corp., 219 P.3d 407, 412 (Colo. App. 2009) ("Colorado awards moratory interest on costs only in rare circumstances—not present here—where the costs constitute an item of special damages.").

Our Supreme Court's analysis in Garcia, 1978-NMSC-059, is consistent with this general rule and demonstrates that district courts are not empowered to impose interest on an award of costs. In Garcia, the appellant challenged a district court ruling awarding interest on an award of attorneys' fees. Id., ¶ 18. The appellant contended that attorneys' fees were costs rather than part of the

judgment. Id. This argument rests on the unstated premise that interest is not allowed on costs. The Supreme Court resolved the issue by holding that under the circumstancesof the case, under the Worker's Compensation Act, attorneys' fees were part of the judgmentrather than costs and thus were recoverable. Id., ¶¶ 20-21 ("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. . . . [A]ttorney fees are part of the judgment proper and not costs."). Implied in the holding is the proposition that if the fees were not part of the judgment, and were costs, then interest would not be proper.

Conclusion

The district court's erroneous application of the Morrison guidelines and incorrect interpretation of the conservation requirement of Section 72-12-3(E), both contrary to the expert guidance provided by the State Engineer, have had the unfortunate consequence of thwarting a project of great potential benefit and have established a precedent that reflects negatively on the state's receptivity to sound resource management and economic development. This Court should rectify those errors.

On Aquifer Science's appeal on the merits of its application to appropriate groundwater, this Court should reverse the district court's findings adverse to Aquifer Science on the issues of impairment and conservation. At the very least,

the Court should remand with instructions to the district court to consider, in connection with impairment, whether the Sandia Basin exhibits similar hydrologic conditions to a deep alluvial aquifer and to address the question of conservation under a correct interpretation of the statutory standard of "not contrary to conservation of water." The district court also should be instructed that the land-use approval status of Village 1 is not a proper consideration in determining whether Aquifer Science's application should be granted. Finally, the district court should be directed to address on remand the statutory "public welfare" factor that it has yet to consider.

The award of costs to Protestants should be reversed, regardless of the disposition of the merits appeal. At a minimum, the Court should strike the unauthorized award of post-judgment interest on the cost award.

Statement Regarding Oral Argument

This appeal presents important questions regarding the criteria that must be satisfied under New Mexico law to obtain a permit to appropriate groundwater. Aquifer Science requests oral argument to address these questions.

Respectfully submitted,

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We certify that 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 this 18th day of May, 2021. Additional service was made on the same date as set forth below.

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