

**SECOND JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF BERNALILLO**

AQUIFER SCIENCE, LLC
Applicant-Appellant,

-v-

SCOTT A. VERHINES,
NEW MEXICO STATE ENGINEER,

Appellee,

and

COUNTY OF BERNALILLO, NEW MEXICO, et al.,

Protestants-Appellees.

No. D-202-CV-2014-07209

PROTESTANTS MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 1-056 NMRCP, Protestants-Appellees respectfully file this Motion for Summary Judgment on the grounds that the application to appropriate 717 acre feet/year of groundwater by Applicant-Appellant Aquifer Science, LLC, [“AS”], which is the subject of this *de novo* appeal, is an unlawful “Dog in the Manger” scheme to speculate in groundwater, contrary to the New Mexico Constitution, statutes, and public welfare of the people of New Mexico. *See* SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES, § 368 (3d. ed. 1911).¹

As there are no genuine issues of material fact in dispute contravening the fact that the Aquifer Science Application seeks unlawful speculative profits for PICO Holdings, Inc. (which, through a complex structure of shell companies, is the 95% beneficial owner of AS), and because the application requests more water than the Campbell Farming Corporation Master Plan [“MP”] can beneficially use, as a matter of law Protestants-Appellees are entitled to judgment denying the AS appeal.

¹ Weil uses Aesop’s “Dog in the Manger” fable to illustrate how water speculators block legitimate projects, just as the dog, who did not eat hay, blocked cattle from eating hay. *See also Harkey v. Smith*, 1926-NMSC-011, ¶ 20, 247 P. 550, 553 (citing the same fable).

I. UNDISPUTED FACTS.

1. Pico Holdings, Inc., [“PICO”] is a California-based investment holding company and developer of water in the Southwestern United States. PICO is a publically owned company whose stock is listed on the NASDAQ stock exchange. In a March 2, 2017 Press release, PICO’s President and Chief Executive Officer Max Webb stated, “As part of our stated strategy of monetizing assets to enable return of capital to our shareholders, we entered into a number of transactions aimed at furthering this goal: We entered into significant water sales transactions in 2016 that closed in the first quarter of 2017 pursuant to which we realized gross proceeds of \$25 million.”² PICO operates its water development business through Vidler Water Company (Vidler) which it owns.

2. The ownership structure and flow of funds between PICO, PICO owned shell companies including Vidler and Vidler New Mexico (Vidler NM) which is owned by Vidler, and AS are established in the deposition testimony of Vidler executives and as well as in reports filed by PICO with the United States Securities and Exchange Commission (“SEC”).³

3. Applicant AS is a limited liability company which is 95% owned by Vidler New Mexico LLC (“Vidler NM”) and 5% owned by Campbell Farming Corporation (CFC). AS was created in November, 2008 when Vidler NM and CFC entered into agreements defining ownership, funding, capital structure and distribution of revenues for the operations of AS. Vidler NM is 100% owned by Vidler. Deposition of Stephen Hartman, Executive Vice President of Vidler Water Company, at 4-5 (February 8, 2017) (“*Hartman*”); Deposition of Robert Gately, President of Campbell Farming Corporation, at 65-67:18-7 (March 24, 2017) (“*Gately*”).

4. Vidler NM does not have any employees and is wholly owned by Vidler. Vidler is wholly owned by PICO and has current water holdings in Colorado, New Mexico, Arizona, and Nevada. All the funds invested in the AS project were paid directly by PICO to the various drilling contractors, consultants and lawyers working for AS. The salaries of the Vidler employees who are working on the AS project are paid by Nevada Land and Resource Holdings, which is wholly owned by PICO. Deposition of Gregory Bushner, Vice President of Water Resource Development for Vidler Water Company, Inc., at 6:23-24; 6-7:14-15; 15-16:18-22 (January 31, 2017).

5. Vidler and Vidler NM do not directly invest funds in the AS Application. Vidler and Vidler NM maintain bank accounts only for petty cash. All revenues from Vidler projects are paid to PICO and all money invested, profits and losses, and assets acquired and sold with PICO’s cash are recorded on PICO’s audited financial statements and are reported to the SEC. Deposition of Dorothy Timian-Palmer, President of Vidler Water Company, Inc., at 10-11:12-14; 15-21:7-16 (February 7, 2017) (“*Timian-Palmer*”).

² <http://investors.picoholdings.com/phoenix.zhtml?c=112782&p=irol-newsArticle&ID=2250928>
(Last visited April 4, 2017).

³ Required SEC Commission filings for PICO are available via SEC file number 33-36383.

6. Vidler is owned by PICO. PICO is a publically owned investment holding company whose stock is listed on the NASDAQ stock exchange.⁴ PICO has three operating segments: water, real estate, and corporate. Vidler/PICO has ongoing water investments in New Mexico, Colorado, Arizona, and Nevada.⁵

7. Vidler holds itself out to the public on the PICO web page as a successful and profitable investor in water: “Since 1995, we [Vidler] have invested over \$300 million in more than 20 water resource development projects and through 2013 have realized in excess of \$200 million from the sale of eight of these projects.”⁶

8. To date, not including attorney fees and costs and the costs of this appeal, PICO has directly invested \$5,800,000 in preparing and prosecuting the AS Application. *Timian-Palmer* at 9-10 (February 7, 2017) (“*Timian-Palmer*”). Vidler plans to continue to invest in the AS application. *Id.* at 9-10:25-5.

9. The proposed place of beneficial use for the water sought by the AS Application is the Campbell Farming Corporation Master Plan (“MP”) adopted by the Town of Edgewood in 2002. Exhibit ‘A’ attached hereto (Excerpts from Exhibit 97 from depositions in this case); see also *Timian-Palmer* at 27-28.

10. The MP covers 8,046 acres of which 6,826 acres have been annexed by Edgewood. (Ex. ‘A’ at 1) and will be comprised of four distinct villages. (Ex. ‘A’ at 7). Village 1 is described in the MP as a community of approximately 1,220 gross acres and 807 dwelling units (Ex. ‘A’ at 8).

11. The approved MP does not include Village 1. *Gately* at 41-42:4-4.

12. Village 1 is located in Bernalillo County and was not annexed by Edgewood. *Gately* at *id.*; *see also* 61-63:13-21.

13. Vidler did not learn that Village 1 was not part of the approved MP until the 2013 OSE hearing in the case. *Timian-Palmer* at 82:5 -11.

14. Ms. Timian-Palmer has never worked on a master plan where some of the land was not annexed as part of the master plan. *Timian-Palmer* at 82-83:22-2.

15. Mr. Hartman did not know that Village 1 was not part of the MP when Vidler and CFC entered into their agreements in 2008; Hartman considered this to be a material misrepresentation by Mr. Gately. *Hartman* at 41-42:22-7.

⁴ <http://investors.picoholdings.com/phoenix.zhtml?c=112782&p=irol-irhome>

⁵ <http://www.picoholdings.com/core-businesses.html>

⁶ <http://www.vidlerwater.com/company.html>

16. Ms. Timian-Palmer admitted that if Bernalillo County does not approve the Village 1 portion of the MP, that approximately 100 acre-feet of water would not be put to beneficial use. *Timian-Palmer* at 62-63: 20-2; *id.* at 63-64:24-1.

17. The MP states that the owner of the property, Campbell Farming Corporation (“CFC”) has enough water to complete “more than one half” of the project water requirements—and that amount was calculated with Village 1 included in the MP. Exhibit ‘A’ at 97. The MP states that the amount of water required for the buildout of the MP (including Village 1) is 1,186 ac-ft./yr. *Id.* Half of that is 593 ac-ft. The AS Application on appeal requests 717 acre-feet of water per year.

18. The owner of the MP land and proponent of the MP is Campbell Farming Corporation [“CFC”]. President Robert Gately is the only employee of CFC. *Gately* at 16:4:14.

19. CFC’s office is currently located in Las Vegas, Nevada where it has been located for approximately three months. *Gately* at 16-17:13-2. Before that CFC’s office was located in Phoenix for about a year. *Id.* at 17:7-11.

20. As of the date of the Gately deposition, CFC had a web site,⁷ but according to Mr. Gately it had not been updated since 2005 because CFC is not actively developing or marketing any property. *Gately* at 33:6-18. When questioned, Mr. Gately indicated that he was not even following changes to Edgewood’s regulations regarding master plans, stating, “I’m not saying there aren’t any. I’m just - I’m not aware of any.” *Id.* at 157-158:25-4.

21. Ms. Timian-Palmer testified that she has no basis for any opinion that the real estate market in the area of the MP has rebounded since the great recession of 2008, and, notwithstanding PICO’s \$5.8 million investment (not including the amount of attorney fees which Vidler refuses to disclose), she does not know anything about the real estate market in the area of the MP. *Timian-Palmer* at 51:12 -15; *id.* at 52:1- 8, 9 -14.

22. Mr. Hartman testified: “[I]f there is no water there is no project. If there is no project there’s no market. And the market doesn’t matter. You don’t go jump off that cliff until you have your parachute.” *Hartman* at 28-29: 22-1.

23. Mr. Hartman testified that without a master plan AS has no beneficial use for water, and that Vidler has made no investigation of the economic viability of the MP. *Hartman* at 47:10-18 (“until there is water, we’re not going to jump off that bridge”).

24. Mr. Gately testified that CFC had no documents regarding any analysis of the commercial real estate and housing markets in the area of the MP, and that any such market studies or analyses would be much more than a decade old. *Gately* at 83-94:24-10.

25. Like Vidler, CFC has done no analysis of the economic viability of the MP since the great recession of 2008. *Gately* at *id.*

⁷ <http://campbellcorporation.com>

26. Mr. Hartman testified that Vidler owns 95% of the water if the application is granted. *Hartman* at 51:18-21.

27. Mr. Hartman testified that, assuming that the permit was granted, he had no idea how the money invested by PICO would come back to it: “at this point in time we just don’t know. It could end up being any number of things.” *Hartman* at 50:8-10. He testified that Vidler has all the economic power to decide whether and on what terms to sell the water should the application be granted. *Hartman* at 52:6-9.

28. Ms. Timian-Palmer also testified that Vidler did not have an agreement with CFC on how to market the water and that she did not know the economic terms of how PICO would recover its investment. *Timian-Palmer* at 66:5-17.

29. PICO has no plans to invest any cash in the development of the MP, and Mr. Hartman said that Vidler does not know who will develop the project. *Hartman* at 54:4-23; *id.* at 55:11-17.

30. Mr. Hartman concisely summarized the utter lack of how PICO plans to put the water to beneficial use should the AS Application be approved:

Q. Okay. So assuming that you get the permit and the case becomes final, then at that point you and Mr. Gately are going to sit down and talk about what’s next; is that right.

A. Yes

Q And at this point you have no idea with that is?

A. I do not.

Hartman at 55:3-10.

III. LEGAL ARGUMENT.

A. The Summary Judgment Standard.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, 242 P.3d 280. All reasonable inferences are construed in favor of the non-moving party; however, the alleged facts at issue must be material to survive summary judgment. *Id.* The purpose of summary judgment is to expedite the process of litigation, and avoid unnecessary trials where there are no genuine issues of material facts supporting claims or defenses. *Goradia v. Hahn Co.*, 1991-NMSC-040, 810 P.2d 798. In this *de novo* appeal, the applicant has the

burden of proof that the application meets the statutory criteria under NMSA 1978, § 72-12-3 and should be accepted. *In re City of Roswell*, 1974-NMSC-044, 522 P.2d 796; *Hanson v. Turney*, 2004-NMCA-069, 94 P.3d 1.

B. Summary Judgment Is Appropriate As A Matter Of Law Based Upon Undisputed Facts In This Case.

This case is about whether AS--a business formed by Vidler Water New Mexico, a single purpose entity beneficially owned by a large water speculator, PICO Holdings, Inc., and the Campbell Farming Corporation, a Montana Corporation with no office or operations in New Mexico which owns a dubious master plan approved in part 15 years ago by the Town of Edgewood--is engaged in an unlawful speculative scheme to appropriate irreplaceable groundwater owned by the people of New Mexico. This Court has ruled that all four of the statutory requirements for granting a ground water appropriation application are at issue in this case: whether there are (1) unappropriated waters, (2) that the proposed appropriation would not impair existing water rights from the source, (3) is not contrary to conservation of water within the state, and (4) is not detrimental to the public welfare of the state. NMSA 1978, § 72-12-3; *see generally*, Report and Recommendation of the Hearing Examiner and Order of the State Engineer Denying the Aquifer Science Application (11/14/2014), Exhibit 'B' attached hereto, and the Court's letter to counsel on the scope of the proceeding (2/24/2016).

Beneficial use of water in New Mexico is the basis, measure and limit of the right to use water. An application to use water where the proposed beneficial use is speculative and not based on a concrete and viable plan is contrary to conservation of water within the state and detrimental to the public welfare. N.M. Const. Art. XVI, § 3; NMSA 1978, § 72-12-3; *see also Jicarilla Apache Tribe v. United States*, 657 F. 2d 1126, 1131-1136 (10th Cir. 1981) (absent evidence of contracts, plans, negotiations, under New Mexico law, trial Court was correct in hold

a proposed project to be “too wasteful and speculative to constitute a beneficial use”); *see also id.* at 1135 (mere hope of possible sales of water in the future is speculative and inconsistent with beneficial use), citing *Colorado River Water Conservation District v. Vidler Tunnel Water Co.*, Colo., 197 Colo. 413, 594 P.2d 566 (1979) (other citations omitted).

Recently, the New Mexico Supreme Court reaffirmed the importance of conservation and public welfare⁸ in relation to the use of water in the State. In a unanimous opinion, Chief Justice Daniels stated, in pertinent part, that, “Water is both a scarce and a vital resource in New Mexico, and its responsible management is crucially important to all New Mexicans.” *State Eng. v. Diamond K Bar Ranch, LLC*, 2016-NMSC-036, ¶ 1; 385 P.3d 626; *see also State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 34, 135 N.M. 375, 89 P.3d 47 (because New Mexico only has enough water to supply its most urgent needs, thus, utilization for maximum benefits is a requirement *sine qua non*, not only for progress, but for survival). *Diamond K Bar Ranch* is a surface water case, however, it is well settled law that, “All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use.” *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 23, 62 N.M. 264, 308 P.2d 983; *see also Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) (affirming the state legal principle that only a usufructuary right to water is permitted, as the state does not part with ownership of the water, hence, controlling it).

⁸ “Even if an applicant meets the threshold requirements of water availability and lack of impairment to existing rights for new permits or transfers, most western states give state water officials the discretion to deny new permits and transfers that are not in the public interest. [U]nder public interest statutes, state agencies have an affirmative duty to grant new permits and transfers only if the proposed use will be in the public interest. Amber Weeks, “Defining the Public Interest,” 50 Nat. Res. Jour. at 259-260 (2010); *see also* Susanne Hoffman-Dooley, “Determining What Is In The Public Welfare In Water Appropriations and Transfers,” 36 Nat. Res. Jour. 104 (1996); Consuelo Bokum, “Implementing the Public Welfare Requirement In New Mexico’s Water Code,” 36 Nat. Res. Jour. 681 (1996).

It is within this context that New Mexico's statutory provisions concerning applications to use the waters of the people of the State must be interpreted *de novo* by this Court. NMSA 1978, § 72-12-3. The statutory requirements that the granting the application will not be contrary to conservation of water within the state and not detrimental to the public welfare of the state *must* be satisfied in any determination of whether a use is beneficial before an appropriation may be granted. *Id.* Protestants contend that as a matter of law, where an applicant does not have a beneficial use under a concrete and economically viable plan, the application must be rejected. Further, speculation in water is not consistent with beneficial use and anathema to the need for sound conservation and continued assurance of the public welfare of the people of New Mexico. In this case, the undisputed facts demonstrate that the application is speculative, contrary to conservation of water within the state, and detrimental to the public welfare.

The undisputed facts in this matter reveal that neither PICO nor Vidler nor AS made any investigation of the economic viability of the Campbell Ranch project or its MP since at least 2008. Nonetheless, PICO/Vidler expended \$5.8 million (not including attorney fees) on this project and continues to spend money with no end in sight. During the past fifteen (15) years since the MP was written and presented to the town of Edgewood, there have been major changes in the world and local economy, including a seismic change in the economy that has adversely affected the real estate market in New Mexico. Yet, the undisputed facts in this matter establish that neither PICO nor Vidler nor AS has conducted any due diligence on the economic viability of the Campbell Ranch project or its MP, including investigating the current real estate market or feasibility of the project, despite having spent millions of dollars on this project. In fact, Ms. Timian-Palmer, the President, and Mr. Hartman, the Executive Vice President, did not even know that Village 1 was never in the MP. Without Village 1, according to Ms. Timian-

Palmer, there would be a 100 acre-ft/year water surplus⁹--a fact revealing both major defects in the “Master Plan” and its inconsistency with conservation and public welfare.

Mr. Gately testified that he did not even know if there have been changes in Edgewood's regulations that would affect the MP. Furthermore, neither Mr. Gately, nor his 95% “partner” PICO Holdings/Vidler Water NM have done anything to advance the development of his property since 2005. Both Mr. Hartman and Mr. Gately claim that there is nothing to be done until they have the water. Mr. Hartman admitted that they actually have no plan for beneficial use now. He said that he and Mr. Gately would figure that out after they get the water: “until there is water, we’re not going to jump off that bridge.” Mr. Hartman also agreed that at this point, he has no idea what comes after they get the water application approved.

The undisputed evidence is clear: AS has ability to put the requested water to beneficial use under a financially sound pre-existing plan for such use. The application at issue in this case is defective on its face. It is nothing less than a proverbial ‘Dog in the Manger.’ The application requests some 100 acre feet of water for Village 1 of the MP even though it is undisputed that Village 1 is not part of the approved MP, it is predicated upon a MP that is not consistent with the AS application concerning the amount of water needed to satisfy the application, and AS has done no work whatsoever since at least 2008 to give any concrete definition to the MP or any part thereof or to determine whether it is economically viable. Of even greater concern about this situation is that the principals involved admit they have no plan for beneficial use and that they will figure out what to do with the water *after* the application is approved.

The foregoing undisputed facts and law demonstrate that the application is merely the attempt by out-of-state speculators—the PICO/Vidler corporations--to use AS to secure New

⁹ Protestants hereby incorporate herein by reference the facts, law and argument of Bernalillo County’s motion for summary judgment on this issue.

Mexico's water for their speculative purposes to makes profits for PICO's shareholders. Allowing the application to move forward contravenes the constitutional principle of beneficial use embodied in our statutes: speculation for profit on New Mexico's scarce water resources for profit is patently contrary to conservation of water within the state and detrimental to the public welfare of the state. NMSA 1978, § 72-12-3.

IV. CONCLUSION

For the reasons set out above, there are no genuine issues of material fact and Protestants-Appellees are entitled to judgment as a matter of law rejecting the application in this case.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER



Jonathan M. Block, Eric D. Jantz,
Douglas Meiklejohn, Jaimie Park
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
(505) 989-9022
jblock@nmelc.org

Paul Hultin /s/ electronic signature by permission

Paul Hultin
1237 1/2 Cerro Gordo Rd.
Santa Fe, NM 87501
(505) 982-6227
paul@phultin.com

Counsel for Protestants-Appellants

CERTIFICATE OF SERVICE

I, Jonathan Block, certify that on April 11, 2017 the foregoing *Protestants-Appellees' Motion for Summary Judgment* was filed electronically through the CM/ECF System, causing parties and counsel of record to be served by electronic means as more fully reflected on the Notice of Electronic Filing.



Jonathan Block

CAMPBELL RANCH MASTER PLAN



February, 2002

Town of Edgewood

I. EXECUTIVE SUMMARY

A. INTRODUCTION

The purpose of this Master Plan is to establish an overall zoning and land use framework for the development of Campbell Ranch in the Town of Edgewood (see *Regional Vicinity map on page 2*). The Master Plan area is comprised of 8,046 acres and includes Monte Largo, a mountain to be preserved in its entirety as open space (2,932 acres or 36% of the total Master Plan area). The bulk of the Campbell Ranch Master Plan area (6,826 acres) was annexed by the Town on December 3, 2001, and zoned MP - Master Plan.

Numerous innovative concepts and techniques for development have been carefully crafted to accentuate and preserve the unique physical, geographic, and aesthetic attributes of Campbell Ranch. The Master Plan area has been divided into four Villages to respond to the natural conditions of the site and to provide a planning structure for long-term development of Campbell Ranch.

Preservation of open space is a key defining element of the Master Plan. In addition to Monte Largo, there will be an interwoven system of major open space comprised of drainageways, hillsides, greenbelts, regional trails, and golf courses, etc. Combining this major open space system with the preservation of Monte Largo, open space comprises 60% of the total Campbell Ranch Master Plan area.

In order to achieve this level of open space, the Master Plan provides cluster development and sets a development cap of 4,023 total dwelling units. This will maintain an overall average density of 1 dwelling unit per 2 acres (1 du/2 ac).

Prior to development at Campbell Ranch, subsequent submittals will be made to the Town of Edgewood for approval of subdivision plats. Development submittals will be consistent with the overall concepts, principles, and development standards set by this Master Plan.



Monte Largo



Rock Formation

Water Conservation

- Provide for water conservation through recycling (re-use of treated effluent), restrictions relative to native and drought tolerant vegetation, stormwater retention facilities, and other water harvesting techniques.
- Protect groundwater quality through utilization of community water and wastewater systems in all small lot or higher density areas, with use of wells only in certain, very low-density areas.

Transportation Network

- Provide a system of roadways designed to adequately handle projected traffic volumes while minimizing access points to La Madera Road and New Mexico State Highway 14 (NM 14) through roadways connecting villages internal to Campbell Ranch.

These guiding principles have led to the development of the Campbell Ranch Master Plan. It represents an environmentally sensitive "state of the art" plan, consistent with existing public policies. The sections of the Plan document that follow describe how the guiding principles have been applied to each issue relevant to the development of Campbell Ranch.

C. VILLAGE PLANNING CONCEPT

The Campbell Ranch Master Plan area will be comprised of four distinct Villages (Villages 1-4), each with its own Village Center. Within each of these Villages, exist unique Planning Areas (typically A-E) that contain specific uses which will be governed by an overall zone category. These planning and zoning categories are described in greater detail in Section 4: Development Standards.

The four Villages are unique and respond to their physical settings. In addition, a diversity of housing types and development patterns has been sought to provide alternatives not currently available in the area. All Villages will be designed and constructed with the governing principles of the Master Plan in mind to ensure environmental sensitivity with the highest quality standards.

Another unique feature of the Campbell Ranch Master Plan is that each Village will contain an estimated dwelling unit count. However, a 20 percent trade of dwelling units will be allowed between Villages and/or Planning Areas in order to allow flexibility to respond to changing market and other conditions over the lifetime of a project of this magnitude. However, the lot standards and maximum gross densities of each Planning Area will remain intact, and the overall unit cap (4,023 dwelling units) remains the cutoff point for residential



Drainageways

building permits in the Master Plan area. It is also the intent of the Campbell Ranch Master Plan to adhere to the average, allowable 2 acre density over the entire project. This results in a lower total number of units being allowed under the Master Plan than what is allowed under the Town's existing zoning. The Town of Edgewood's Subdivision Ordinance and Zoning Ordinance, September 1999, allow for clustering development and averaging density (see Table 1a: Development Plan Summary on page 16 for the unit numbers, typical lot sizes, and average densities of the four Villages in the Master Plan).

Village 1 - West of La Madera

Village 1 is a community of approximately 1,220 gross acres located along La Madera Road. It is physically separated from the eastern portion of Campbell Ranch by the Paa-Ko Master Planned Community and borders Cibola National Forest land on the west. The Village will have an estimated 807 dwelling units.

Village 1 is envisioned to be a community consisting primarily of single family lots. The majority of land within Village 1 is zoned Very Low and Low. The zoning categories and descriptions of allowable uses are located in Section 4: Development Standards. The western-most areas of the Village (Planning Areas D through H) will be developed with larger, estate-type lots that range in size from 1/3 acres to 40 acres and will account for 723 acres. A small portion (17%) of the Village will be zoned Mixed Use and Medium density. Smaller lots ranging from 6,500 square feet to 1/2 acres, and multi-family uses (such as townhomes) will be blended together on the eastern edge of the Village right off La Madera Road. The higher density uses will be developed as a clustered pedestrian-scaled development that will function as the Village Center and be located near the Village entrance at La Madera Road (Planning Area A), near the existing San Antonito Elementary School and Vista Grande Community Center activities.

This type of clustered development will also ensure the preservation of the network of open space that will run through the middle of the property and be connected through a trail system. The open space network will link each of the Planning Areas within the Village together. In addition to the open space network, neighborhood parks and trails are planned for the Village to serve area residents.

One of the two regional trails runs through the southerly portion of Village 1, connecting Cibola National Forest land to the Monte Largo Regional Open Space on the eastern part of the property. This will also provide a major linkage between the east and west portions of the property. Village trails connect to the regional trail and run north and south through the Village (see Trails Network Diagram on page 79).

At the far southwestern end of Village 1 adjacent to the Cibola National Forest land are 20 acres located donated by the Campbell family to the Civilian Conservation Corp. (CCC). The CCC's goals for the site include the construction of a CCC memorial museum, a co-ed residential facility for the New Mexico Youth Conservation Corps staff and campers, a Girl Scout camp, and year round recreation open to the public. The CCC envisions that the site should

7. WATER OVERVIEW

A. INTRODUCTION

Water service for Campbell Ranch will be supplied primarily via a community water system and potentially, via shared wells for large lots that are not easily served by the community system. The community system will serve all non-shared well lots and commercial areas. The system will be divided into east and west areas separated by NM 14, with each area having several pressure zones. The two areas will function independently of each other, but will be connected so that water can be easily transferred from one area to the other.

The Campbell Ranch water system, relative to construction, maintenance, and other issues, is further governed by the development agreement approved by the Town of Edgewood at the time of Campbell Ranch annexation.

Campbell Ranch currently controls sufficient water rights for more than half of the total project. A summary of Campbell Ranch water rights is included in this section.

B. MASTER PLAN

System Demand

In order to determine the water demand required by the Campbell Ranch development, the amount of water use was calculated by using the Office of the State Engineer method as presented in their publication "Water Conservation and Quantification of Water Demands in Subdivisions; A Guidance Manual for Public Officials and Developers", by Brian C. Wilson, P.E. The water demand per the calculations is 78.3 gallons per person per day. Each dwelling unit is assumed to have 2.69 persons (Bernalillo County average). The average size house is assumed to be 2,600 sf. with no residential irrigation. Cooling is assumed to be by evaporative cooler. For preliminary calculation purposes, these assumptions yield 0.28 ac.-ft. per annum per dwelling unit. At total build-out of 4,023 units, and 84 acres of non-residential development, annual water demand is estimated to be 1,186 acre-feet, or approximately 1.059 million gallons per day (MGD).

Supply, Storage, and Fire Protection

Initially, water is expected to be supplied by a local water provider. Extension or expansion of the local provider's system may be necessary in order to deliver water to Campbell Ranch. The shared wells for large lots will also be used to supply water to the development. Shared wells will be subject to independent geohydrology studies to verify water availability. Ultimately, several on-site wells are expected to supply water to the Campbell Ranch community system.

The proposed sites for the storage tanks are shown on the Water Supply and Distribution Plan (see page 99). General locations, sizes, and elevations are given, and can be adjusted during design of the system. The west area will be

2014 NOV 14 PM 12: 35

BEFORE THE NEW MEXICO STATE ENGINEER

OFFICE OF THE
STATE ENGINEER
PERMITS UNIT
SANTA FE, NM

IN THE MATTER OF THE APPLICATION BY)
 AQUIFER SCIENCE, LLC FOR PERMIT TO) Hearing No. 10-020
 APPROPRIATE GROUNDWATER WITHIN THE)
 SANDIA UNDERGROUND WATER BASIN IN) OSE File No. S-2618
 THE STATE OF NEW MEXICO)

**REPORT AND RECOMMENDATION
OF THE HEARING EXAMINER**

This matter came on for hearing before Andrew B. Core, the State Engineer's designated Hearing Examiner, on March 25-28, April 1-2, May 30-31, and June 25-28, 2013, in Santa Fe, New Mexico. The parties appeared as follows: Jeffrey Fornaciari, Esq., and Dulcinea Hanuschak, Esq., represented Applicant Aquifer Science, LLC; Maria O'Brien, Esq., and Christina Sheehan, Esq., represented Protestant New Mexico Water Service Company; Jeffrey Albright, Esq., represented Protestant County of Bernalillo; R. Bruce Frederick, Esq., and Paul Hultin, Esq., represented a group of fifty-nine individual Protestants and four organizations: the Intermountain Conservation Trust, the San Pedro Creek Estates Homeowners Association, the Wildflower Neighborhood Association (through its President, Joe Gober), and the Old Sandia Park Service Cooperative; Dr. David Thompson participated *pro se*; Dr. William Alzheimer participated *pro se*; and Hilary Lamberton, Esq., and Jane Yee, Esq., represented the Water Rights Division (WRD) of the Office of the State Engineer (OSE). There are approximately 44 other *pro se* parties of record in the case. Having considered the testimony and evidence presented, the Hearing Examiner recommends the following findings and order denying the Application.

PROCEDURAL HISTORY

On June 11, 2009, Applicant Aquifer Science, LLC filed Application No. S-2618 with the State Engineer for permit to appropriate groundwater within the Sandia

Underground Water Basin in Bernalillo County, New Mexico. The Applicant proposed to divert up to 1,500 acre-feet per year (afy) of groundwater, subject to filing and approval of a return flow plan, from four (4) proposed wells; each located within two-thousand (2,000) feet of the points shown in Table 1.

Table 1
Well Locations
(Meters, in UTM Zone 13N, NAD83)

WELL #	X=	Y=
1	380,500	3,894,500
2	379,430	3,892,969
3	379,980	3,893,719
4	380,680	3,895,000

The proposed uses were stated as domestic, livestock, irrigation and commercial; specifically subdivision, domestic, educational, recreational, commercial and related uses, on 25,000 acres of land owned by Campbell Farming Corporation, located within the San Pedro Grant, Bernalillo, Sandoval, and Santa Fe Counties. The wells are to be located, generally, east of the intersection of La Madera Road and North Highway 14, Bernalillo County, New Mexico. The lands to be developed are generally located between La Madera Road and New Mexico 344 along North Highway 14, Bernalillo, Sandoval, and Santa Fe Counties, New Mexico.

By letter dated September 15, 2011, Applicant amended the Application to reduce the quantity of water sought to a maximum diversion and consumptive use of 1,010 afy. Then, by letter dated March 27, 2013, Applicant amended the Application to reduce the area of the place of use to "the Campbell Ranch Master Plan area consisting of approximately 8,000 acres of land owned by the Campbell Farming Corporation within the San Pedro Grant, Bernalillo, Sandoval and Sandoval Counties." Then, by Notice of Settlement dated June 10, 2013, Applicant amended the Application to reduce the quantity of water sought to a maximum diversion and consumptive use of 717 afy. Based on an agreement with the Applicant concerning the amendment of the

Application to a maximum diversion and consumptive use of 717 afy, Protestant New Mexico Water Service Company withdrew its protest on May 29, 2013.

Affidavits of Publication filed with the WRD reflect that legal notice of the Application was published in the *Santa Fe New Mexican* on July 2, 9, and 16, 2009; in the *Albuquerque Journal* on July 1, 8, and 15, 2009; and in the *Mountain View Telegraph* on July 2, 9, and 16, 2009. The WRD received approximately two-hundred and sixty-two (262) timely protests to the granting of the Application. By Order entered on September 9, 2010 approximately one-hundred and fifty-three (153) Protestants were dismissed as parties to the captioned matter for failure to timely submit the required hearing fee pursuant to OSE rule 19.25.2.17 NMAC [now 19.25.2.10 (B)(D) NMAC (2013)].

FINDINGS OF FACT

1. The State Engineer has jurisdiction of the parties and subject matter.
2. The jurisdiction of the State Engineer is invoked pursuant to Articles 2, 5 and 12 of Chapter 72 NMSA 1978.
3. The State Engineer declared the Sandia Underground Water Basin on November 16, 1966.
4. A Scheduling Order was entered on November 5, 2010 wherein the issues to be heard were identified as; Availability of water to satisfy the application, Whether granting the application would result in impairment to existing water rights, Whether granting the application would be detrimental to the public welfare of the state, and Whether granting the application would be contrary to the conservation of water within the state.
5. At the scheduling conference held on October 28, 2010, all of the Parties present agreed that properly disclosed expert witnesses, whose areas of expertise are similar, could converse freely with one another outside the presence of counsel or *pro se* party, it being understood that said conversations were to be considered informal and not generally admissible as evidence at hearing.

6. Arguments made throughout the hearing, by the Protestants represented by New Mexico Environmental Law Center, that interaction between the Applicant's experts and the Water Rights Division's experts constitutes conspiracy or collusion, are hereby specifically rejected.
7. At hearing on March 23, 2013, a Motion for Summary Judgment, filed by Protestants represented by New Mexico Environmental Law Center on January 7, 2013 was denied by the Hearing Examiner. The argument that the State Engineer has no authority to accept a phased pumping schedule was rejected.
8. Applicant Aquifer Science LLC is comprised of two entities: Vidler Water Company and Campbell Corporation.
9. Vidler Water Company, Campbell Corporation and Aquifer Science LLC are all private entities and none are a forty-year planning entity as defined by NMSA 1978, Section 72-1-9.
10. Aquifer Science was specifically formed to supply water to Campbell Corporation for its development of the Campbell Ranch Master Plan Project, a residential community with resort elements such as a golf course and hotel that consists of four residential "villages" located in Bernalillo County, New Mexico.
11. The total number of dwelling units proposed to be developed within the four "villages" is 3,990.
12. The Town of Edgewood annexed the area of "villages" 2, 3, and 4 and approved a master plan as to that area.
13. "Village" 1 is in Bernalillo County, but not within the Town of Edgewood.
14. Existing wells within the Sandia Underground Water Basin produce from one or more of several aquifers; primarily the Pennsylvanian Madera Group, the Permian San Andres/Glorieta Formations, the upper portion of the Chinle Group, and the Quaternary alluvium.
15. The Applicant applied for, and was granted, exploratory well permits for four locations near the south central part of the Campbell Ranch property.
16. Two exploratory wells, S-2618 POD1 (also called ASE-1) and S-2618 POD3 (also called ASE-2) were drilled prior to hearing.
17. S-2618 POD1 (ASE-1) was drilled to a depth of 3,694 feet below land surface.

18. S-2618 POD2 (ASE-2) was drilled to a depth of 710 feet below land surface.
19. One operating assumption made by the Applicant at the inception of the development project was that large quantities of potable water could be obtained from wells drilled in the Pennsylvanian Madera Group aquifer on the Campbell Ranch property.
20. Zonal testing of potential yield and water quality at S-2618 POD1 (ASE-1) found that the Pennsylvanian Madera Group was not a productive zone.
21. S-2618 POD1 (ASE-1) was backfilled to a depth of 2,140 feet and screened the Permian Abo Formation.
22. S-2618 POD2 (ASE-2) was screened across the Permian San Andres/Glorieta Formations.
23. Jointly, the Permian San Andres/Glorieta Formations are considered the most productive aquifer within the Sandia Underground Water Basin.
24. The experts for all Parties agreed that constructing a groundwater flow model of the multiple aquifers within the Sandia Underground Water Basin is extraordinarily difficult.
25. A groundwater flow model prepared by Daniel B. Stephens and Associates, experts for the Applicant, to evaluate the instant Application was modified by the expert for the WRD (modified DBSA model) to better reflect regional hydrologic conditions.
26. The modified DBSA model is adequate for the evaluation of the instant Application but would not necessarily be applicable to any other analyses.
27. Model runs, made with no new pumping, predict that significant drawdown in existing wells (>50 feet) will occur within the next forty years within the Sandia Underground Water Basin; especially shallow wells in the areas of Sandia Knolls, Sandia Park, San Pedro Estates and the Village of Cedar Crest.
28. Some, but not all, of the wells predicted to be affected could be deepened or replaced to regain supply.
29. Previous actions by the State Engineer have called into question the availability of water for appropriation within the Sandia Underground Water Basin.

30. On August 20, 1986 and again on August 10, 1987, following remand by the district court, the State Engineer denied Application S-1065 et al., filed by Ameriwest Corporation, on the grounds that the Applicant had not shown that unappropriated water was available in the Sandia Underground Water Basin.
31. On July 17, 1987, the State Engineer denied Application S-1216 et al., filed by Ameriwest Corporation, on the grounds that the Applicant had not shown that unappropriated water was available in the Sandia Underground Water Basin.
32. Application S-1065 et al. proposed to appropriate 900 afy of groundwater from the Permian San Andres/Glorieta Formations at a point approximately one mile from wells S-2618 POD1 (ASE-1) and S-2618 POD2 (ASE-2).
33. Application S-1216 et al. proposed to appropriate 200 afy of groundwater from the Permian San Andres/Glorieta Formations at a point approximately one mile from wells S-2618 POD1 (ASE-1) and S-2618 POD2 (ASE-2).
34. On March 31, 2004, the County of Bernalillo filed Application S-2361 to appropriate 30 afy of groundwater from the Triassic Santa Rosa Sandstone and the Permian San Andres/Glorieta Formations for domestic and irrigation purposes at the Vista Grande Community Center, located at a point approximately two miles from wells S-2618 POD1 (ASE-1) and S-2618 POD2 (ASE-2).
35. On August 16, 2005, the State Engineer denied Application S-2361 on the grounds that granting the Application would cause impairment of and be detrimental to existing water rights, and would be contrary to the conservation of water within the State of New Mexico, and would be detrimental to the public welfare of the state.
36. The previous actions of the State Engineer and the most recent modeling of the groundwater within the Sandia Basin, described during the hearing for the instant Application, make it reasonable to conclude that there is no unappropriated groundwater available in the Sandia Underground Water Basin to satisfy the Application.
37. The Application S-2618 should be denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Application No. S-2618, originally filed on June 11, 2009, is **denied**.

Respectfully submitted,

Andrew B. Core

Andrew B. Core
Hearing Examiner

I ACCEPT AND ADOPT THE REPORT AND RECOMMENDATION OF THE HEARING EXAMINER THIS 13th DAY OF NOVEMBER, 2014.

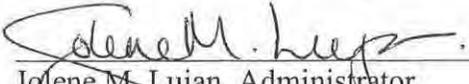
Scott A. Verhines

SCOTT A. VERHINES, P.E.
NEW MEXICO STATE ENGINEER



CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Report and Recommendation of the Hearing Examiner was mailed to all parties of record this 14th day of November, 2014. A complete copy of the service list may be obtained at the OSE website, www.ose.state.nm.us. Click on the "Help Me Find" menu, scroll down to "Hearing Information" then click on "Aquifer Science, LLC Service List - HU No. 10-020". The service list will be updated as necessary.



Jolene M. Lujan, Administrator
(505) 476-7411