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November 15, 2018

New Mexico Environment Department
c/o Pam Castañeda, Hearing Clerk
Harold Runnels Building, Room S-2100
1190 St. Francis Drive
Santa Fe, NM 87505



Re: **EBID's Proposed Findings of Fact and Conclusions of Law Regarding Hearing for Groundwater Discharge Permit for the Copper Flat Mine (DP-1840); Docket No. GWB-18-06(P).**

Dear Ms. Castañeda,

Enclosed you will find an original and one copy of Elephant Butte Irrigation District's Proposed Findings of Fact and Conclusions of Law for filing in the above-referenced proceeding. Please ensure that this document is filed in the pending matter. A self-addressed, postage-paid envelope is also enclosed for your use in returning to this office a file-stamped copy of this document.

Sincerely,

BARNCASTLE LAW FIRM

By 
Samantha R. Barncastle

Enclosures

xc: Gary Esslinger, w/encl., via email only
Ms. Felicia L. Orth, Hearing Officer w/encl.
Mr. Andrew P. Knight, NMED w/encl.
Mr. Stuart Butzier, NM Copper Corporation w/encl.
Mr. Charles de Saillan, NMELC w/encl.
SRB/jlc

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**



**IN THE MATTER OF:)
THE APPLICATION OF)
NEW MEXICO COPPER CORPORATION)
FOR A GROUNDWATER DISCHARGE)
PERMIT FOR THE COPPER FLAT MINE)
(DP-1840))**

Docket No. GWB-18-06 (P)

**ELEPHANT BUTTE IRRIGATION DISTRICT'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the New Mexico Environment Department's Permit Procedures, 20.1.4.500(B) NMAC, the Elephant Butte Irrigation District ("EBID"), through its counsel Samantha R. Barncastle of the Barncastle Law Firm, hereby submits the following Proposed Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Rio Grande Project is a United States Bureau of Reclamation Project. It was authorized by Congress in 1905. TR 1331, Lines 20-22.
2. Water rights were appropriated for the Rio Grande Project in 1906 and 1908, with the 1908 notice appropriating "all tributary flow" in the Lower Rio Grande. TR 1331, Lines 23-24 and TR 1370, Lines 1-6.
3. The Rio Grande Project serves approximately 159,000 irrigated acres in southern New Mexico and West Texas, with 90,640 acres being located within EBID. TR 1332, Lines 4-9.
4. The Rio Grande Project also delivers water to the Country of Mexico under an international agreement signed in 1906. TR 1332, Lines 9-12.

5. The Rio Grande Project is served by two major water storage reservoirs known as Elephant Butte Reservoir, completed in 1916, and Caballo Reservoir. TR 1332, Lines 1-3, and TR 1333, Lines 18-19.

6. Caballo Dam was built around 1938 for the purpose of regulating releases from Elephant Butte Reservoir and providing flood control from the west side of the Rio Grande, particularly flows from the Animas, Greyback and Percha Creeks that provide a significant amount of water to Caballo Reservoir that is then used for irrigation within the Rio Grande Project. TR 1333, Lines 18-24 and TR 1334, Lines 7-13.

7. The farmers of EBID paid off their debt for the construction of the Rio Grande Project and began taking over the operation and management of the irrigation systems from the United States government in the 1990s. TR 1339, Lines 2-3.

8. Under the Rio Grande Compact, the Rio Grande Project is located within (legal) Compact Texas, but geographic New Mexico. TR 1338, Lines 11-13.

9. Caballo Reservoir is a key feature of the Rio Grande Project, which is relied upon by EBID, the El Paso County Water Improvement District Number 1 (“El Paso No. 1”), and Mexico. TR 1349, Lines 7-13.

10. The allocation to Mexico is based on the planned release from Caballo Reservoir. TR 1363, Line 25 and TR 1364 Line 1.

11. The allocation to El Paso No. 1 is based on the relationship between release from Caballo Reservoir and diversion from the river. TR 1364, Lines 4-8.

12. EBID’s allocation is also based on releasable water from Caballo Reservoir. TR 1364, Lines 9-11.

13. EBID is a political subdivision of the State of New Mexico with the statutory responsibility of operating and maintaining the New Mexico portion of the Rio Grande Project. NMSA § 73-10-1 et seq.

14. The City of El Paso also relies on water from Caballo Reservoir to serve its customers drinking water. TR 1384, Lines 17-24.

15. The water sources within the Rio Grande Project, i.e. the surface water and the groundwater, are interconnected and interact with each other. TR 1348, Lines 4-11.

16. The City of Las Cruces pumps groundwater from the Lower Rio Grande interconnected surface water and groundwater system for its drinking water. TR 1385, Lines 1-5.

17. Allocation of water to Project beneficiaries in the Rio Grande Project is handled pursuant to the 2008 Operating Agreement, which recognizes the groundwater and surface water systems are interconnected and that there is a duty to deliver water to a downstream state and country. TR 1364, Lines 12-19.

18. The Rio Grande Project has a history of lengthy and complex litigation regarding the use of water within the Project area. See Generally TR 1366, Lines 12-17.

19. The State of Texas is currently suing the State of New Mexico in the United States Supreme Court over concerns related to the interception of surface water by groundwater pumping, and in this proceeding the State of Texas has raised concerns that the quality of water delivered to Elephant Butte may be placed in jeopardy by the proposed mine. TR 1369, Lines 3-19.

20. There is no dispute that the proposed mining activity will affect the Rio Grande Project water supply both in Caballo Reservoir and in the river downstream. TR 1373, Lines 14-21.

21. Pumping by the mine will intercept water that would otherwise have been tributary to

Caballo Reservoir, thereby reducing the amount of releasable water for allocation to EBID, El Paso No. 1, and Mexico. TR 1374, Lines 19-25 and TR 1375 Line 1.

22. In addition to impacts on Caballo Reservoir that affect both irrigation districts and Mexico, there are also significant impacts on the river below Caballo, which impacts will be borne solely by EBID. TR 1375, Lines 21-25 and TR 1376, Lines 1-2.

23. The State of Texas shares the concerns raised by EBID in this proceeding. TR 1376, Lines 3-9.

24. The proposed offset provided for in what is known as the Jicarilla Lease is not a sufficient offset to protect the Rio Grande Project from impacts by the proposed mining activity. TR 1377, Lines 14-20, TR 1378, Line 5, TR 1379 Lines 22-25 and TR 1380, Lines 1-2.

25. For any offset to be sufficient, it would have to fit within the accounting provided for in the Rio Grande Compact and the allocation process of the Rio Grande Project. TR 1380, Lines 7-10.

26. The New Mexico Environment Department (“NMED”) permitting process has impacts far beyond just groundwater quality contamination issues in this case. TR 1380, Lines 13-17.

27. There is a high likelihood of contamination from the copper mine spreading through the groundwater system and reaching Caballo Reservoir. TR 1383, Lines 15-18.

28. There is no Emergency Action Plan in place to address a catastrophic spill event from the mining activity. TR 1384, Lines 8-16.

29. If Caballo Reservoir were to become contaminated, releases from it would have to be shut down which would affect EBID, El Paso No. 1, Mexico, and the City of El Paso. TR 1386,

Lines 3-21.

30. Failure to contain contaminants in Caballo Reservoir would cause release of contaminants into the groundwater system where they would reside indefinitely. TR 1386, Lines 22-25 and TR 1387, Lines 1-6.

31. Since the proposed mine is proposing to retain all contaminated water on site, that would be considered a wastewater reuse under NM law. TR 1406, Lines 20-24.

32. The Letter of Understanding between NMED and the New Mexico Office of the State Engineer (EBID Exhibit 8) calls for coordination for certain types of water projects within New Mexico, including wastewater reuse. TR 1407, Lines 15-19.

33. The proposed Copper Flat mine project is one of the projects that would be the subject of coordination and collaboration called for in the Letter of Understanding (EBID Exhibit 8). TR 1410, Lines 1-11.

34. Interagency collaboration and cooperation is important because the Lower Rio Grande stream system is fully appropriated (the water rights are all appropriated). TR 1411, Line 25 and TR 1412, Line 1.

35. The water quality and quantity aspects of the proposed mining activity are intrinsically linked and related. TR 1415, Lines 14-16.

36. Some of the activities proposed in the Discharge Permit (“DP-1840”) that NMED proposes to issue are de facto appropriations of water. TR 1417, Lines 7-11.

37. While NM Copper Corporation does have some water rights, it does not have a sufficient quantity to cover the activities proposed, so it has applied for additional water rights with the New Mexico Office of the State Engineer (“NM OSE”). TR 1417-1419.

38. The tailings storage facility dam is a jurisdictional dam that will require a permit from the NM OSE Dam Safety Bureau to construct and operate. TR 1460, Lines 15-20 and 1462, Lines 10-11.

39. An application to the Dam Safety Bureau must include documentation of water rights, design report that includes hazard potential documentation by a dam breach and flood routing analysis, hydraulic analysis, spillway design, geological assessment, geotechnical assessment, seepage and interior drainage assessment, stability analysis, seismic design analysis, dam geometry, erosion protection, structural design, construction drawings, construction specifications, survey, dam site security plan, an instrumentation plan, operation and maintenance manual, and emergency action plan which also requires a dam breach and flood routing analysis. TR 1463, Lines 1-12.

40. None of the items from the above punch list of requirements for an application to the Dam Safety Bureau currently exist. TR 1463, Lines 13-17.

41. The Dam Safety Bureau could impose dam structure and safety requirements that make the tailings dam look different than what has been proposed to, reviewed by, and approved by NMED in this proceeding.

42. The diversion channels in the Greyback Arroyo need to be analyzed for the same design storm as the tailings dam to ensure these channels cannot overtop if such an event occurred within the contributing area. TR 1464, Lines 12-16.

43. If a storm event exceeded the capacity of diversion channels, the Greyback Arroyo could contribute to the capacity of the tailings dam, causing it to exceed capacity and breach.

44. There is insufficient information in the record to determine the specific classification the NM OSE Dam Safety Bureau will assign to the tailings storage facility. TR 1470, Lines 2-4.

45. The design requirements for the tailings dam will ultimately depend on what classification the dam receives from the NM OSE Dam Safety Bureau. TR 1467, Lines 15-19.

46. The design of the tailings dam could impact the potential discharge to groundwater or surface water. TR 1470, Lines 12-14.

47. The dam breach analysis is important because it shows the consequences of what a failure of the tailings storage facility dam would be, and so an emergency action plan can be prepared based upon the consequences of a breach. TR 1472, Lines 2-9.

48. A dam breach analysis has not been performed, so we do not have information sufficient to create an emergency action plan.

49. The emergency action plan referred to by Witness Libbin is different than the emergency action plan referred to by Witness Dr. King. TR 1473, Lines 6-8.

50. The current (existing) pit lake that resulted from the small period of prior mining in this area is contaminated by acid rock drainage and/or mine-impacted water. TR 1505, Lines 18-23 and TR 1516, Lines 11-13.

51. Operation of the proposed mine will likely increase contamination discharged into groundwater. TR 1505, Lines 24-25 and TR 1506 Lines 1-3.

52. Some of the contaminants in the pit lake have exceeded water quality standards. TR 1516, Lines 14-20.

53. To mine in the pit lake, the contaminated water currently in the pit lake will have to be pumped out of the pit lake, which will take it outside of the protected hydrologic sink, increasing the risk of release and discharge outside of the hydrologic sink. TR 1516, Line 25 and TR 1517, Lines 1-7.

54. Groundwater monitoring wells near the pit lake have also showed signs of contamination. TR 1517, Lines 17-21.

55. Materials within the pit lake walls are known to be generating acid rock drainage. TR 1517, Lines 17-21.

56. The pit walls that are generating contaminants and acidity will be mined and a lot of that material will be low enough grade that it will be placed in waste rock piles. TR 1518, Lines 1-5.

57. The intent of the proposed cover system is to extract water that makes its way into the area via precipitation and infiltration, and the only way to do that is through vegetation. If vegetation does not remove a sufficient amount of water, the water will flow both laterally and vertically through the system. It has been confirmed that there is a high probability that at least some amount of water will migrate through the cover system, would not be evapotranspired, and would migrate in through the tailings facility and waste rock facility. TR 1520, Lines 10-25 and TR 1521, Lines 1-4.

58. A steady-state, long-term condition, meaning no change in storage, would cause inflow and outflow to become equal, which would mean that a certain amount of mine-impacted water would be discharging if no underlining liner system exists for the waste rock storage facilities. TR 1521, Lines 24-25, TR 1522, Lines 1-25, and TR 1523, Lines 1-3.

59. Probable Hydrologic Consequences Figure 3-18 from JSAI, 2018 (EBID Exhibit 20) shows that there will be infiltration on the sides of the waste rock, and testimony established that other infiltration into the andesite will occur, both establishing there will be some discharge and infiltration from the waste rock stock piles. TR 1523, Lines 4-25 and TR 1524, Lines 1-5.

60. The waste rock stock piles are the likely source of the existing sulfate plume. TR 1553, Lines 7-9.

61. A low permeability material layer (non-soil) overlying cover is necessary to limit the impact of clean water and conversion of clean water into mine-impacted water. TR 1506, Lines 14-20.

62. Surface water falling within the footprint of the surface water catchment area for the open pit would propagate toward the pit, but groundwater discharge as a hydraulic sink would be limited to a smaller footprint, meaning groundwater contamination that is outside of the hydraulic sink may still propagate from the west to east rather than being contained by the pit lake, even though it is inside the open pit surface drainage area. TR 1545, Lines 1-20.

63. The East Animas Fault is not a no-flow barrier boundary to groundwater flow. TR 1545, Lines 21-25 and TR 1546, Lines 1-12.

64. Available groundwater elevation maps and models suggest that groundwater and contaminants could migrate from the mine permit property toward Caballo Reservoir. TR 1546, Lines 15-25 and TR 1547, Lines 1-24.

65. The existing groundwater monitoring wells are not sufficient to fully characterize the groundwater flow, including solute transport in this area, i.e. the groundwater monitoring system is insufficient to adequately detect mobilization of contaminants that are already in, or may be introduced into, the system. TR 1548, Lines 9-18.

66. At least one well, Well Number 3 near the permit boundary, shows concentrations of contaminants in excess of groundwater quality allowable levels. TR 1554, Lines 9-22.

67. There is not enough data to conclude that groundwater contaminants will not migrate toward Caballo and, instead, data exists to show that contamination will migrate toward Caballo. TR 1548, Lines 19-22.

68. Additional groundwater discharge will allow more discharge to occur from west to east, which would potentially allow existing contaminants to migrate across the mine permit boundary. TR 1555, Lines 13-24.

69. Geochemical samples measuring the potential for acid generation using static tests showed fewer samples that are confirmed to be nonacid-generating, a significant amount that are uncertain, and several more certain of creating acidity. TR 1558, Lines 8-12.

70. The uncertainty must be considered, rather than simply using a favorable prediction that assumes there is no acid generation. TR 1558, Lines 13-18.

71. Static testing allows for completion of the acid generation and acid neutralization reactions, and by letting the reactions proceed to equilibrium, one can figure out which is going to win — whether there is going to be more acid generation, or whether acid generation is going to be consumed by the buffering and neutralization capacity of the material. TR 1560, Lines 1-9.

72. Static testing is useful for looking at long-term behaviors when considering aquifer assessment. TR 1560, Lines 9-10.

73. Kinetic testing is also useful for purposes of modeling. TR 1561, Lines 5-8.

74. Generally testing should allow concentrations to stabilize to more of a constant value, then one would use the constant long-term value as a long-term weathering rate to use as model inputs. TR 1561, Lines 22-25 and TR 1562, Lines 1-5.

75. Instead of staying consistent, NM Copper Corporation was selective with the data it used as inputs into the aquifer assessment model, choosing to use all data for major ions and only data collected after week 20 of testing for regulated water quality constituents, ignoring some data in the process. TR 1563, Lines 6-24.

76. Data was ignored for some regulated toxic contaminants that would be considered in an aquifer assessment, and averaging only the lower concentration late time data may have resulted in a lower input in to the geochemical mode. TR 1564, Lines 1-5.

77. The aquifer assessment did not consider a lot of the uncertainty that was available at this site, and there was some data that could have been used to evaluate the impact to groundwater that was not used or considered. TR 1507, Lines 15-22.

78. Any aquifer assessment should include all available geochemical and hydrologic data. TR 1507, Lines 23-25.

79. The geochemical modeling is done to predict the concentrations in the water in the future that will be in the pit lake and that will be flowing through the waste rock stock piles and through the tailings facilities, so it is important to consider what inputs go into the model and the full range of data available for modeling the potential range of environmental impacts to reach a proper aquifer assessment. TR 1566 Lines 1-10.

80. It is possible that a thorough examination of the long-term weathering rates at steady-state have not been examined because the humidity cell tests were not performed for a long enough period of time, which is evidenced by the fact that at least three of the humidity cells did not complete to zero neutralization potential. TR 1566, Lines 23-25, TR 1567, Lines 1-25, TR 1568, Lines 1-25, and TR 1569, Lines 1-15.

81. In addition, the data from the static tests did not match the data from the humidity cell tests. TR 1569, Lines 24-25 and TR 1570, Lines 1-4.

82. As a result, NM Copper Corporation made predictions based upon favorable data rather than the entire available data set. TR 1570, Lines 5-21.

83. For a proper aquifer assessment, all available interpretations of the available data should be considered, not just data favorable to the outcome one hopes for. TR 1570, Lines 22-23.

84. NM Copper Corporation's John Shomaker & Associate's Report indicates that there will be possible consequences to the groundwater not only from pumping the supply wells, but also due to the mining and activities that occur at the site, and there will be potential groundwater discharges from the tailings facility and/or the waste rock stock piles. TR 1572, Lines 3-12.

85. It would be best to mitigate the flow of additional water through the waste rock and tailings facilities. TR 1573, Lines 7-9.

86. There are not enough wells to define the boundary and transport directions of the existing groundwater plume that should be abated; additional monitoring wells are needed for additional groundwater characterization. TR 1574, Lines 7-25 and TR 1575, Line 1.

87. Many aspects of the proposed mine project do not have sufficient data on which to rely to properly determine the effect of the proposed mine on the Rio Grande Project. TR 1576, Lines 4-18.

CONCLUSIONS OF LAW

1. The Copper Rule provides that "the secretary shall approve a discharge permit provided that it poses neither a hazard to public health nor undue risk to property." 20.6.7.10(J) NMAC.

2. A water right is a property right in New Mexico. *Walker v. United States*, 2007-NMSC-038, ¶27, 142 N.M. 45, 53.

3. EBID, as a political subdivision of the State of New Mexico, and on behalf of its members, is seeking to protect valid property rights under the Copper Rule.

4. Multiple municipalities, including the City of Las Cruces and the City of El Paso rely on water from the Rio Grande Project and the interconnected underground aquifer for water service to their constituents.

5. The regulations implementing the Water Quality Act define hazard to public health as a condition that “exists when water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds at the time and place of such use, one or more of the numerical standards of Subsection A of 20.6.2.3103 NMAC, or the naturally occurring concentrations, whichever is higher, or if any toxic pollutant affecting human health is present in the water.” 20.6.2.7AA NMAC.

6. Multiple others, including EBID, El Paso No. 1, and Mexico, rely on surface and groundwater in the Lower Rio Grande and they have property rights that would be adversely impacted by a groundwater contamination event caused by the proposed copper mine.

7. An Emergency Action Plan to address a catastrophic event that causes contamination of Caballo Reservoir and the interconnected surface and groundwater system, developed in consultation and collaboration with Rio Grande Project beneficiaries and all affected state agencies, should be required as a permit condition to DP-1840. Such permit condition should be met prior to commencing mining activity.

8. To the extent DP-1840 permits discharge of wastewater, the water originating to produce that wastewater and the subsequent discharge are an appropriation of water under New Mexico Law.

9. Since the proposed mine is proposing to retain all contaminated water on site, that would be considered a wastewater reuse under NM law, and the Letter of Understanding between

NMED and the NM OSE (EBID Exhibit 8) requires collaboration on such wastewater reuse projects.

10. The water rights in the Lower Rio Grande are fully appropriated and the proposed mining activity will infringe upon Rio Grande Project water rights.

11. The Letter of Understanding between NMED and NM OSE contemplates interagency collaboration and coordination on large water projects that have far reaching consequences such as the propose Copper Flat Mine Project.

12. While water rights issues are within the purview of NM OSE, a mining activity of the type proposed here, particularly of this magnitude and given its geographic situation, is such that a high degree of interagency collaboration and coordination is expected.

13. A permit condition requiring further agency coordination between NMED and the NM OSE should be imposed to require coordination on the issue of water rights, similar to the coordination required regarding compliance with OSE Dam Safety Bureau regulations.

14. The tailing storage facility dam proposed for the Copper Flat mining project is a “jurisdictional dam” under 19.25.12.7D(1)(a) NMAC.

15. NM Copper Corporation must obtain a permit from the NM OSE Dam Safety Bureau to construct and operate the dam.

16. It would assist the Hearing Officer to have access to items that are part of the NM OSE Dam Safety Bureau application process, which have not yet been created, such as design report that includes hazard potential documentation by a dam breach and flood routing analysis, hydraulic analysis, spillway design, geological assessment, geotechnical assessment, seepage and interior drainage assessment, stability analysis, seismic design analysis, dam geometry, erosion protection, structural design, construction drawings, construction specifications, survey, dam site security plan,

an instrumentation plan, operation and maintenance manual, and emergency action plan which also requires a dam breach and flood routing analysis.

17. Consistent with the level of interagency collaboration and coordination expected of a project like this, the permit from the NM OSE Dam Safety Bureau should be obtained prior to issuance of DP-1840, not just as a condition of issuance of DP-1840, but so that a dam breach analysis and emergency action plan can be prepared to inform the Hearing Officer regarding the possible hazard to public health and/or risk to property and to ensure compliance with Section 20.6.7.10(J) NMAC.

18. Water from the pit lake should be required to be treated to meet Water Quality Act standards when it is pumped out of the pit lake to begin mining within the pit lake so as to avoid the possibility of a spill and contamination event.

19. In the interests of preventing additional groundwater contamination, it would be best to mitigate the flow of additional water through the waste rock and tailings facilities.

20. Underlying liners and overlying covers consisting of low permeability material (not just soil or bedrock) should be required for any of the mine waste materials or facilities that are outside the open pit hydraulic sink, including the waste rock storage facilities in addition to the tailings storage facilities, to prevent uncontaminated water from mixing with mine-impacted water and to prevent further contamination of the groundwater.

21. A groundwater interceptor system should be required such that contaminated groundwater may be properly monitored, reclaimed, and treated.

22. Additional groundwater monitoring wells should be required to help detect future contaminants and to assess the nature and extent of the current groundwater contamination.

23. A new aquifer assessment should be performed, this time taking into account all available geochemical and hydrologic data. For a proper aquifer assessment, all available interpretations of the available data should be considered, not just data favorable to the outcome one hopes for. TR 1570, Lines 22-23.

24. The purpose of the Water Quality Act is to prevent or abate water contamination.

25. The application and corresponding proposed permit are technically incomplete due to the lack of information related to risk to public health and property interests, the lack of a proper aquifer assessment, and the lack of emergency action plans regarding a catastrophic breach of the tailings storage facility and any coinciding event of contamination of Caballo Reservoir.

26. The Hearing Officer does not have sufficient information with which to make a determination regarding compliance with the Copper Rule.

27. DP-1840, as proposed, does not contain adequate permit conditions to protect against hazards to public health, protect property rights of others, or to prevent or abate water contamination.

28. With what is at stake for the State of New Mexico in the Texas v. New Mexico United States Supreme Court original action, further agency coordination on the issue of water rights and emergency action plans is necessary prior to issuance of the proposed DP-1840.

29. The lack of cooperation among permitting agencies within New Mexico may jeopardize the property interests of EBID and its members and/or create a hazard to public health.

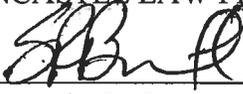
30. Issuance of a permit is premature at this time, given that adequate information to determine the risk to public health and property interests is unavailable.

WHEREFORE, EBID respectfully requests that the foregoing Proposed Findings of Fact and Conclusions of Law be entered by the Hearing Officer.

Respectfully submitted this 15th day of November, 2018.

Respectfully submitted,

BARNCASTLE LAW FIRM

By  _____

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CERTIFICATE OF SERVICE

I hereby certify that, on the 15th day of November, 2018, the foregoing was sent via first class mail to the following:

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By  _____
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