

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 RESPONSE REGARDING
NEW MEXICO COPPER CORPORATION'S MOTION IN LIMINE**

Pursuant to the New Mexico Environment Department's Permit Procedures, 20.1.4.200(D)(4) NMAC, the Elephant Butte Irrigation District ("EBID"), through its counsel Samantha R. Barncastle of the Barncastle Law Firm, hereby submits this Response regarding the New Mexico Copper Corporation's Motion in Limine and, as grounds, would show as follows:

As an initial matter, in its Motion, the New Mexico Copper Corporation ("NMCC") cherry picks portions of EBID's Statement of Intent to support its argument regarding whether the testimony that will be offered is relevant. When read as a whole, it is clear that EBID's experts are relying on principles of law provided by the Copper Rule and other pertinent regulations that make the entirety of their testimony relevant in this proceeding.

First, all three of EBID's experts that are the subject of the Motion in Limine will provide testimony that relates to the Copper Rule requirement that the proposed action not pose an undue risk to property. 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. While the property EBID seeks to discuss are water rights, that does not necessarily mean the discussion is irrelevant. ("Under prior appropriation, as a separate protected property right, a vested water right can be sold, leased, or transferred." *Walker v. United States*, 2007-NMSC-038, ¶27, 142 N.M. 45,

53, quoting, *KRM, Inc. v. Caviness*, 1996-NMCA-103, ¶5, 122 N.M. 389.) With testimony describing the interests EBID represents downstream of the proposed mine, including an explanation of the water rights and agriculture industry within the Rio Grande Project, the Secretary will be in a better position to determine whether an undue risk to property (both real property and water rights) is present. Without such testimony, no evidence regarding property interests at stake will be included in the record, which situation is obviously not what was contemplated by the Legislature, the Courts, and the drafters of the Copper Rule when the requirement to ensure property rights were not harmed was included in the rule. Finally, there is no risk of re-litigating the Copper Rule in this instance and, instead, all EBID seeks to do is apply the rule. The issue of whether the rule, *as applied*, is valid is still open for discussion as the New Mexico Supreme Court specifically avoided that issue when it decided that the rule was valid on its face. *See Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, 417 P.3d 369.

Further, and as important as the Copper Rule itself, NMED and the Office of the State Engineer (“OSE”) have entered into a Letter of Understanding, dated March 30, 1999, which requires NMED to “assure that OSE is involved as early as possible on all policies and projects that potentially include both water quantity and water quality concerns.” *See Attached Letter of Understanding and designated as EBID Exhibit 8, which document EBID intends to introduce at the merits hearing in this matter.* The testimony offered by the witnesses NMCC challenges will establish the water quantity concerns and how they dove-tail with the water quality concerns, thus concluding that NMED has erred in proceeding with permitting at this time in absence of involving the OSE. EBID will conclude that, before the permit at issue in this proceeding can be issued, OSE must be involved and the water rights and related property rights issues must be sufficiently resolved. An example of this is already acknowledged by NMED through the amended proposed DP 1840, in

which NMED will now seek to require that OSE Dam Safety Bureau permitting is accomplished prior to beginning construction of the tailings facility. A similar contingency to the validity of the permit as a whole is appropriate on the issue of appropriation of water rights and, therefore, EBID's testimony on this issue is relevant to the issue of whether NMED has complied with all requirements in issuing the proposed permit.

A strong understanding of what is in play and at stake downstream will inform not only the risk to property issue as provided by the Copper Rule, but will also inform the issue of whether the proposed financial assurance is adequate. The testimony offered by EBID witnesses will compliment that offered by the Ranches through its witness, Mr. Kuipers. Rather than providing EBID's own testimony on this issue, EBID has chosen to dove-tail its presentation with that of Mr. Kuipers, thus avoiding issues of undue delay and duplicative testimony.

Additionally, a portion of Mr. Fuchs' testimony will focus on how the OSE has treated issues similar to the pit lake in the past, as an appropriation of jurisdictional water, which will serve the dual purpose of further substantiating the testimony that will be offered by the Ranches that the water at issue is not "private water" and instead surface water quality standards should likewise apply, in addition to those issues included in EBID's Statement of Intent that form the primary purpose for Mr. Fuch's testimony. Mr. Fuchs is appropriately situated to provide such testimony as a former District Manager for the Office of the State Engineer in the Lower Rio Grande (the area that encompasses the proposed mine). Again, rather than providing its own separate testimony on this issue, EBID has chosen to add to what will be offered by the Ranches, thus avoiding issues of undue delay and duplicative testimony.

That EBID brings other facts and perspectives to the hearing, even if the testimony occasionally compliments the testimony provided by the Ranches, does not take away from the

relevance of either EBID or the Ranches' proposed testimony on this or any other issue. However, that EBID has chosen not to duplicate technical discussions that other parties will provide should be considered when determining whether to limit the time allowed of either EBID or the Ranches. Further, it is worth noting, yet again, that the NMCC is in an absolute hurry to force this permit through, even at the expense of depriving other parties of adequate time to present evidence. This urgency is again related to NMCC's perception that they will get a better deal under the current administration than if a final decision on this permit is to wait until a new governor takes office. In this context, an order limiting testimony of any party before actually hearing the testimony to determine whether it is relevant, or unreasonably placing time constraints on any party in the presentation of their case in chief, is unwarranted and would amount to a denial of due process. The amount of time proposed by each party is not unreasonable given the magnitude of the project at issue, and thus, no party should be unnecessarily cut off in its presentation of evidence.

WHEREFORE, EBID respectfully requests that the Hearing Examiner deny the Motion in Limine, and for such other and further relief as she may deem just and equitable.

Respectfully submitted,

BARNCASTLE LAW FIRM

By  _____
Samantha R. Barncastle
Attorney for Elephant Butte Irrigation District
P.O. Box 1556
Las Cruces, NM 88004
Ph: 575-636-2377
Fax: 575-636-2688
Email: samantha@h2o-legal.com

CERTIFICATE OF SERVICE

I hereby certify that, on the 13th day of September, 2018, the foregoing Response was sent via first class mail and e-mail to the following:

Andrew P. Knight
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue, NE #1000
Albuquerque, NM 87102
Email: Andrew.knight@state.nm.us
*Counsel for the New Mexico Environment
Department Ground Water Bureau
Via email only*

Stuart R. Butzier
Christina C. Sheehan
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 9318
Santa Fe, NM 87504
Email: stuart.butzier@modrall.com
and christina.sheehan@modrall.com
*Counsel for New Mexico Copper Corporation
Via email only*

Charles de Saillan
Jamie Park
Douglas Meiklejohn
Eric Jantz
Jonathan Block
New Mexico Environmental Law Center
1405 Luisa St., Suite 5
Santa Fe, NM 87505
Email: cdesaillan@nmelc.org
and dmeiklejohn@nmelc.org
*Counsel for Turner Ranch Properties and
Hillsboro Pitchfork Ranch, LLC
Via email only*

New Mexico Environment Department
(Original and two copies for filing)
c/o John Baca, Hearing Clerk
Harold Runnels Building, Rm S-2100
1190 St. Francis Drive
Santa Fe, NM 87505
Email: John.Baca2@state.nm.us
Via email and first class mail

Felicia L. Orth, Hearing Officer
20 Barranca Rd.
Los Alamos, NM 87544
Email: Felicia.L.Orth@gmail.com
Via email only

By 

Samantha R. Barncastle
Counsel for Elephant Butte Irrigation District



GARY E. JOHNSON
GOVERNOR



THOMAS C. TURNEY
STATE ENGINEER

State of New Mexico
Environment Department
Office of the State Engineer (12/28/07)
Notebook of Water Rights Guidelines and Policies



PETER MAGGIORE
SECRETARY

99 APR 26 PM 3:28

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO

LETTER OF UNDERSTANDING
BETWEEN THE NEW MEXICO ENVIRONMENT DEPARTMENT
AND THE OFFICE OF THE STATE ENGINEER

This Letter of Understanding (LOU) is by and between the New Mexico Environment Department (NMED) and the Office of the State Engineer (OSE), or jointly (the parties).

The parties agree to work together as follows:

A. General Terms:

1. The parties agree that active and ongoing communication and cooperation is necessary to accomplish the purposes of this LOU.
2. All appropriate staff of the participating agencies will be provided a copy of this LOU and fully trained in its intent and meaning.
3. The parties agree to establish a task force to identify specific areas of concern and to develop policies, procedures, guidelines and subgroups as necessary to facilitate the parties working together in the areas identified.
4. Each party will within 30 days of execution of this agreement designate a liaison for implementation of this LOU and notify the other party of that designation.
5. Within 45 days of execution of this agreement, each party will delegate two representatives, one of whom should be the liaison named under this LOU, to be members of the task force.
6. At the end of each fiscal year, the task force shall issue an annual report to the Secretary and State Engineer, describing the annual joint activities as viewed necessary.

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO
99 APR 26 PM 3:28

NMED-OSE LOU
Page 2

B. NMED Responsibilities:

1. Assure that OSE is involved as early as possible on all policies and projects that potentially include both water quantity and water quality concerns.
2. Provide the OSE electronic access to water related databases, and access or copies of agency documents, as is feasible.
3. Provide notification to OSE of permitting actions which include water quantity, wastewater reuse, and artificial recharge issues.
4. Provide timely written comments on proposed regulations, policies, water rights applications, and other documents, as requested by OSE.
5. Incorporate OSE's comments on proposed regulations, policies, permit applications, and other documents, as is practicable.
6. Provide timely determination to OSE that water rights applications or transfers will not adversely affect public welfare.

C. OSE Responsibilities:

1. Assure that NMED is involved as early as possible in the process for all projects and policies that potentially include both water quantity and water quality concerns.
2. Provide NMED electronic access to existing water right databases, and access or copies of agency documents, as is feasible.
3. Provide notification to NMED of water right permits which include wastewater reuse, in-stream flow, water diversions and artificial recharge issues, or potentially adversely impact water quality.
4. Provide timely written comments on proposed regulations, policies, permit applications, and other documents, as requested by NMED.
5. Incorporate NMED's comments on proposed regulations, policies, water rights applications, and other documents as is practicable.
6. Provide timely notification to NMED of water rights applications or transfers which pose major public welfare issues in terms of adversely impacting water quality.

NMED-OSE LOU
Page 3

D. Limitations.

1. This LOU is not intended to modify, in any way, the respective duties, obligations, right, privileges, or immunities of the parties.
2. Nothing contained herein shall require any agency to expend money in excess of appropriations authorized by law.

E. Effective Date and Termination.

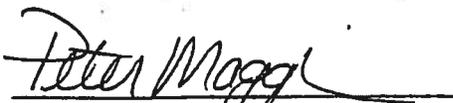
This LOU shall become effective as soon as it is signed by the parties hereto and filed with the New Mexico Secretary of State and shall continue in force unless terminated by any party upon thirty days notice, in writing, to the other party of intent to terminate upon an indicated date.

F. This LOU may be amended if done so in writing and approved by both parties.

IN WITNESS THEREOF, the parties hereto have caused this LOU to be executed.

NEW MEXICO ENVIRONMENT
DEPARTMENT (NMED)

OFFICE OF THE STATE ENGINEER
(OSE)


PETER MAGGIORE
Cabinet Secretary

3/30/99
DATE


THOMAS C. TURNEY
State Engineer

3/30/99
DATE

BARNCASTLE LAW FIRM, LLC

1100 South Main, Ste. 20
Las Cruces, NM 88005

P.O. Box 1556
Las Cruces, NM 88004

Phone: (575) 636-2377

Fax: (575) 636-2688

September 13, 2018

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

Re: **EBID Response to New Mexico Copper Corporation's Motion in Limine Regarding Hearing for Groundwater Discharge Permit for the Copper Flat Mine (DP-1840); Docket No. GWB-18-06(P).**

Dear Mr. Baca,

Enclosed you will find an original and one copy of Elephant Butte Irrigation District's Response to New Mexico Copper Corporation's Motion in Limine filed September 7, 2018 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 the Response.

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., via email only
Mr. Andrew P. Knight, NMED w/encl., via email only
Mr. Stuart Butzier, NM Copper Corporation w/encl., via email only
Mr. Charles de Saillan, NMELC w/encl., via email only
SRB/jlc