

**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). )**

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**Docket No. GWB-18-06 (P)**



**MEMORANDUM OF TURNER RANCH PROPERTIES, L.P.  
AND HILLSBORO PITCHFORK RANCH, LLC IN SUPPORT OF  
ELEPHANT BUTTE IRRIGATION DISTRICT MOTION FOR RECONSIDERATION**

In accordance with the New Mexico Environment Department Permit Procedures, 20.1.4.100.F(2) and 20.1.4.200.D NMAC, the New Mexico Environmental Law Center, on behalf of Turner Ranch Properties, L.P. and Hillsboro Pitchfork Ranch, LLC. (the “Ranches”) hereby submit their Memorandum in Support of the Motion for Reconsideration of Merits Hearing Setting and Related Deadlines (“EBID Motion”) that Elephant Butte Irrigation District (“EBID”) filed in this matter on June 26, 2018. In support of the EBID Motion, the Ranches state the following:

1. After having held a scheduling conference on June 14, 2018, the Hearing Officer issued a Scheduling Order on June 15, 2018 setting forth the schedule for this proceeding. The Hearing Office set the hearing to begin on September 24 and to continue through September 28, 2018. If necessary, the hearing would resume on October 9 and continue through October 12, 2018. The order also set forth related deadlines for filing statements of intent to present technical testimony, filing motions, and so forth.

2. On June 26, 2018, Elephant Butte Irrigation District filed a Motion for Reconsideration of Merits Hearing Setting and Related Deadlines. The Motion proposed that the hearing be postponed by two weeks; the hearing would begin on October 9 and continue through

October 19, 2018, as necessary. Related deadlines would be postponed commensurate with the hearing date. As grounds for the Motion, EBID stated that its counsel was due to give birth on August 19, 2018 (approximately), 5 days before the statements of intent to present technical testimony are due, and 35 days before the hearing is scheduled to begin. Counsel for the EBID attached to the EBID Motion a letter from her obstetrician recommending that she not return to work until October 1, 2018. The EBID Motion also explained that the EBID could not practically obtain alternative counsel in this proceeding because the EBID, as a subdivision of the State, must follow the New Mexico Procurement Code, NMSA 1978, §§ 13-1-1 to 13-1-199. The Procurement Code requires the EBID to follow a rather lengthy bidding process to hire counsel, as described in the EBID Motion.

3. Under the Environment Department’s Permit Procedures, the “Hearing Officer . . . may continue a hearing upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to the other parties and undue delay to the proceeding.” 20.1.4.100.F(2) NMAC.

4. In accordance with section 20.1.4.100.F(2) NMAC., the EBID Motion is “timely.” It was filed approximately 90 days prior to the scheduled hearing, and 11 days after the Scheduling Order.

5. In accordance with section 20.1.4.100.F(2) NMAC, the EBID is a “party” to this proceeding. A “party” is defined in the regulations to include “a person who files an entry of appearance on or before the deadline set forth in the Notice of Hearing.” 20.1.4.7.A(16) NMAC. The Barncastle Law Firm initially filed an appearance in this matter on or about May 4, 2018, prior to the date of the Scheduling Order (June 15, 2018) – at which time the hearing date was set – and prior to date that the Environment Department published a notice of hearing.

6. In accordance with section 20.1.4.100.F(2) NMAC, EBID has shown good cause in its Motion. Counsel for EBID is due to give birth on August 19, a few weeks before the scheduled hearing date of September 24. Her doctor has advised against her returning to work before October 1. Moreover, the EBID is legally constrained from obtaining alternative counsel in time to prepare for the September 24 hearing date. It is difficult to conceive of a more compelling showing of good cause.

7. Under section 20.1.4.100.F(2) NMAC, the proposed postponement of the hearing would not cause prejudice to the parties. Specifically, a short postponement of the hearing would not prejudice the applicant, New Mexico Copper Corporation (“N.M. Copper Corp.”). The groundwater discharge permit at issue in this proceeding will not determine the date on which the Copper Flat Mine can begin operating; N.M. Copper Corp. still faces several other regulatory hurdles. Before it can operate the mine, N.M. Copper Corp. must obtain a permit from the Mining and Minerals Division of the New Mexico Department of Energy, Minerals and Natural Resources (“MMD”) under the New Mexico Mining Act, NMSA 1978, §§ 69-38-1 to 69-36-20. Counsel for MMD estimates that the hearing for that permit will begin in early 2019. In addition, N.M. Copper Corp. will need a minimum of 3,800 gallons per minute of water to operate the mine. This volume converts to 6,133.5 acre-feet of water per year. In a recent decision, the New Mexico District Court, Third Judicial District, ruled that N.M. Copper Corp. had abandoned or forfeited a large portion of its claimed water rights, and that it had only 861.84 acre-feet per year of water rights from production wells, and 34.45 acre-feet per year of water rights associated with the open pit. *New Mexico ex rel Office of the State Eng’r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (3d Jud. Dist. Dec. 28, 2107). Although N.M. Copper Corp. has appealed this decision, briefs have not yet been filed, and it will be months before the

Court of Appeals issues a decision. N.M. Copper Corp. is likely searching for other water rights to use for its proposed mining operation, but it would need a permit from the State Engineer to appropriate new water rights, or to change the place and purpose of use of existing water rights. NMSA 1978, §§ 72-5-1, 72-5-24. The permitting process is a lengthy one, taking several months – usually more than a year – especially if the permit application is protested. Thus, postponing the discharge permit hearing by two weeks will not in any way prejudice N.M. Copper Corp.

8. Likewise, under section 20.1.4.100.F(2) NMAC, the proposed postponement of the hearing would not cause undue delay to this proceeding. The EBID seeks only a two-week postponement of the start of the hearing. Moreover, because the EBID proposes that the hearing proceed continuously, as necessary, for two weeks, without an intervening week, the resulting postponement of completion of the hearing could be as little as one week. This postponement of the hearing – whether for one week or for two weeks – would not be undue delay.

9. The Ranches support the EBID Motion as a matter of courtesy and cooperation and out of concern for the health and well-being of an expectant mother and her child.

10. In addition, postponing the hearing by two weeks would give the Environment Department – and MMD – more of an opportunity to propose financial assurance for the Copper Flat Mine, and it would allow the parties more of an opportunity to review the financial assurance and address any issues in their statements of intent to present technical testimony. The New Mexico Water Quality Act authorizes the Water Quality Control Commission to adopt regulations for permit conditions requiring financial responsibility. NMSA 1978, § 74-6-5(G). The Commission regulations include such requirements. 20.6.2.3107.A(11) NMAC. The Mining Act regulations also require permit conditions establishing financial assurance. 19.10.12

NMAC. Consequently, the Environment Department largely defers to MMD to prepare and approve financial responsibility conditions. In this case, MMD has not yet determined that the mining permit application is technically complete, and proposed financial assurance has not yet been submitted. Ultimately, a two-week postponement of the hearing may not be sufficient time for the parties to address the financial responsibility issues at the hearing; nevertheless, the postponement would increase the likelihood that those issues could be addressed without further delay of this proceeding.

11. For the foregoing reasons, the Ranches support the EBID Motion. The EBID Motion demonstrates good cause to continue the hearing, and such continuance will not cause prejudice to the other parties or undue delay of this proceeding. 20.1.4.100.F(2) NMAC. The Ranches concur with the proposed alternative schedule set forth in the EBID Motion.

Respectfully submitted,

June 27, 2018



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2018, a copy of the foregoing Memorandum of Turner Ranch Properties, L.P. and Hillsboro Pitchfork Ranch, LLC in Support of Elephant Butte Irrigation District Motion for Reconsideration was sent by first class mail, postage prepaid, and electronic mail to:

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