

**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)

**MOTION FOR RECONSIDERATION OF
MERITS HEARING SETTING AND RELATED DEADLINES**

Pursuant to the New Mexico Environment Department’s Permit Procedures, 20.1.4.200(D) NMAC, the Elephant Butte Irrigation District, through its counsel Samantha R. Barncastle of the Barncastle Law Firm, hereby files this Motion for Reconsideration of the Merits Hearing Setting and Related Deadlines, and as grounds would show as follows:

1. The Elephant Butte Irrigation District (“EBID”) is a political subdivision of the State of New Mexico responsible for the management and distribution of Reclamation Project water within the New Mexico portion of the Rio Grande Reclamation Project, consisting of 90,640 acres of land in Sierra and Doña Ana Counties. EBID is also responsible for ensuring delivery of water to the downstream State of Texas’ irrigation district, an entity similar to EBID known as the El Paso County Water Improvement District No. 1. EBID makes those deliveries pursuant to Reclamation Contracts, including the Rio Grande Compact. The Rio Grande Compact and other Reclamation Contracts are presently at issue in the Supreme Court of the United States Original Action commonly referred to as Texas v. New Mexico (Original No. 141). EBID, as the Reclamation Project contractor under New Mexico law, and its constituents who hold the right to beneficially use the water it

delivers, both hold a substantial interest in the water quality issues raised in this proceeding. Traditionally, EBID represents both its interests and the interests of its members in proceedings such as this in order to protect those collective, and often undivided, interests.

2. On Thursday June 14, 2018, a pre-hearing scheduling conference was held in the above captioned matter during which a date for a hearing on the merits and attendant deadlines were set. The merits hearing was set to begin on September 24, 2018. The following day, a scheduling order was entered confirming the hearing on the merits and attendant dates discussed at the pre-hearing scheduling conference.

3. The undersigned notes that she is more than 7 months pregnant, with an expected due date of August 19, 2018 (of course, the actual due date cannot be accurately determined at this time). Therefore, the dates for the hearing on the merits and attendant deadlines that were set at the pre-hearing scheduling conference pose a significant problem in that the undersigned will not be provided adequate time to prepare for hearing, take a leave of absence to give birth and recuperate after (a six week leave of absence is planned from August 18, 2018 to October 1, 2018 pursuant to Doctor's request; see note from Doctor attached hereto as **Exhibit A**), and return to work in time to properly represent the interests of the Elephant Butte Irrigation District ("EBID") at hearing in this matter.

4. EBID, as a political subdivision of the State of New Mexico subject to the Procurement Code, and is unable to obtain other counsel through the procurement process in time to be meaningfully represented at the hearing in this matter in the absence of the undersigned. *See generally* NMSA 1978, §13-1-1 et seq (Procurement Statutes). While EBID has other counsel under contract for other matters (such as employment and human resources matters), none are

environmental and natural resources lawyers capable of participating at a hearing on the merits on the matters that will be at issue in this case. EBID is not in a position to contract with other counsel who may be able to participate in this proceeding in place of the undersigned. The process for procuring legal services EBID must follow involves obtaining approval of the Board of Directors to publish a Request for Proposals, which approval must take place at a public meeting after proper notice of the meeting.¹ *See generally* NMSA 1978, §10-15-1 et seq. (Open Meetings Act). Followed by the direction from the Board of Directors, EBID's Chief Procurement Officer prepares a Request for Proposals, which must then be published for not less than ten days prior to opening of bids. NMSA §13-1-104. Once the bids are opened, a winning bid is selected by the Chief Procurement Officer and the Board of Directors in compliance with the Procurement Code. *See generally* NMSA 1978, §13-1-1 et seq. The actual hiring of the successful bidder must then be handled by the Board of Directors at another public meeting after proper notice of the meeting. *See generally* NMSA 1978 §10-15-1 et seq. (Open Meetings Act). Following the above procedure, it takes EBID approximately two months to hire new counsel. Even if EBID were to rush the procurement process and seek to hire new counsel, new counsel would have an extremely difficult time getting up to speed enough to proceed to hearing on the merits under the current deadlines, considering that he or she will only be brought on board by sometime in early August if the procurement process were to begin as of the date of the filing of this Motion (which it cannot). In such case, EBID would not only be deprived of its original choice of counsel, but it would also be placed in a substantially similar situation to what it is currently in, given the short amount of time that its new counsel would have to prepare to meet hearing deadlines and to attend the hearing on the merits.

¹ EBID's next public meeting is schedule for July 11, 2018.

5. EBID has not been provided a sufficient amount of time to meaningfully prepare for hearing on the merits in this matter. On February 14, 2018, EBID sent an Inspection of Public Records Act Request (“IPRA”) to the New Mexico Environment Department (“NMED”) in which all documents making up the record for DP-1840 were requested. The request was sent in an effort to gather all documents and information necessary for purposes of providing clear and complete comments related to the proposed discharge permit. On or about March 30, 2018, NMED provided a large set of unindexed documents, which it indicated to the undersigned formed the entire record for DP-1840. After a diligent review of the documents by the undersigned and experts engaged by EBID for this matter, it was clear that not all documents that make up the administrative record were provided to EBID. On or about May 10, 2018, the undersigned received in the mail the remainder of the documents EBID requested under its original IPRA request dated February 14, 2018. Given the need to review several thousand pages of technical documents not previously available to EBID or its experts, the the current dates for the hearing on the merits and attendant deadlines do not give EBID’s counsel and experts sufficient time to review the entire record, prepare for the merits hearing before EBID’s counsel will be unavailable for maternity leave, and meaningfully participate at the hearing. Instead, all preparation for participation at the hearing must be done by the end of July to accommodate EBID counsel’s necessity of being out of the office during most of the months of August and September. This will include the necessity of preparing for live testimony in July, rather than sometime closer to the start of the hearing in September. It is important to note that each of the other parties to this proceeding have had many months, and possibly even years, to contribute to and review the administrative record and prepare for hearing on the merits, while EBID has only recently been provided with the unorganized and unindexed administrative record for its review.

6. As the current merits hearing setting and attendant deadlines stand, EBID will be deprived of the opportunity to fully and fairly participate. Instead, its experts will not have adequate time to review the thousands of pages of unindexed technical documents and adequately prepare for hearing, including preparation of live testimony prior to the start of the hearing, with the assistance of EBID's natural resources attorney prior to August, 2018 when the undersigned will be out on leave due to the birth of her first child. Instead, EBID's team will only have approximately two and one half months from the time the IPRA request was complied with, and less time from the date the indexed record is made available to the public by NMED (no later than June 30, 2018), to review and prepare for the merits hearing before attendant deadlines must be met and the undersigned is necessarily on leave. Such an expedited schedule for allowing participation by the public is not in the interests of fairness or justice, nor is it necessary in this case.

7. As an alternative, the undersigned proposes to revise the deadlines and merits hearing setting contained in the Scheduling Order dated June 15, 2018 as follows:

Hearing to commence: Oct. 9, 2018 and continuing through Oct. 19, 2018 as necessary;

Public Comment to be provided during hearing beginning at 5pm on October 10;

Pre-Hearing filings for technical testimony set out in 20.1.4.300.B NMAC: Sept. 10, 2018;

Pre-Hearing motions: Sept. 24, 2018;

Pre-Hearing teleconference regarding Pre-Hearing Motions: Oct. 1, 2018.

A Proposed Revised Scheduling Order incorporating the above alternative deadlines is attached hereto as **Exhibit B**.

8. The proposed alternative dates and merits hearing setting are reasonable in that the overall extension requested would only postpone the start of the hearing by two weeks and would

only extend final completion of hearing in this matter by one week. The proposal would provide for the hearing to begin on October 9, 2018, and the hearing to end on October 19, 2018, at the latest, instead of on October 12, 2018. The proposed alternative schedule will also allow EBID's counsel the time necessary to give birth and recuperate, allow EBID's counsel and experts the necessary time to review the substantially large administrative record not otherwise available to EBID as it was available to the other parties previously, and to adequately prepare for hearing, all of which are necessary to provide EBID a full and fair opportunity to meaningfully participate at the merits hearing on this matter.

9. Counsel for the other parties have each been contacted to obtain their position regarding this Motion, and each have responded as follows:

New Mexico Environment Department: Oppose

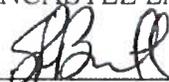
New Mexico Copper Corporation: Oppose

Turner Ranch Properties and Hillsboro Pitchfork Ranch, LLC: Concur with the proposed schedule included in this Motion.

WHEREFORE, EBID respectfully requests that the Hearing Examiner grant its Motion for Reconsideration of Hearing Setting and Related Deadlines and for such other and further relief as the 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 26th day of June, 2018, the foregoing Motion was sent via first

class mail and e-mail to the following:

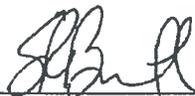
Andrew P. Knight
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue, NE #1000
Albuquerque, NM 87502
Email: Andrew.knight@state.nm.us
*Counsel for the New Mexico Environment
Department Ground Water Bureau*

Stuart R. Butzier
Christina C. Sheehan
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 9318
Santa Fe, NM 87505
Email: stuart.butzier@modrall.com
and christina.sheehan@modrall.com
Counsel for New Mexico Copper Corporation

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*

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

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

By 

Samantha R. Barncastle
Counsel for Elephant Butte Irrigation District

SALOPEK, SAMANTHA R (id #10171, dob: 08/07/1985)



OBGC_OBGYN CONSULTANTS
4351 E LOHMAN AVE, STE 401
LAS CRUCES, NM

Date: 06/25/2018
RE: Samantha Salopek, DOB: 08/07/1985, PT ID #10171

To Whom it May Concern,

Samantha Salopek is currently under my care at OBGYN Consultants. Samantha is expected to deliver August 19, 2018. Patients are considered to be completely incapacitated for at least six weeks post delivery. Based on her estimated due date, Samantha is expected to be able to return to work on October 1st, 2018. Please accommodate our patient as best you can. Thank you in advance!

Sincerely,

A handwritten signature in black ink, appearing to read "Surjit R. Moolamalla", written in a cursive style.

Electronically Signed by: SURJIT R. MOOLAMALLA, MD

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

**IN THE MATTER OF THE APPLICATION
OF NEW MEXICO COPPER CORPORATION FOR
A GROUNDWATER DISCHARGE PERMIT FOR
THE COPPER FLAT MIN, DP-1840**

No. GWB-18-06 (P)

AMENDED SCHEDULING ORDER

Pursuant to Section 20.1.4 NMAC, Counsel for all parties and the Hearing Officer and staff participated in a pre-hearing scheduling conference on June 14, 2018. Agreement was generally reached as to the following procedural matters, and it is so ordered:

1. The hearing on the merits of this matter will begin October 9, 2018 and proceed through October 19, 2018 as necessary to complete the evidentiary record.
2. The hearing will be held in Truth or Consequences, New Mexico, the closest community to the mine in which a venue of size can be reserved. The Ground Water Bureau is responsible for making the necessary facility arrangements, and for preparing and publishing a timely notice of hearing.
3. The hearing will begin at 9 a.m. each morning and generally end by 7 p.m. each evening, with a mid-day lunch break and other breaks as appropriate.
4. Public comment will be invited and accepted throughout the hearing at breaks in the presentation of the technical testimony. Public comment will also be taken beginning at 5 p.m. on October 10, 2018 and continuing as long as there is comment to be given.
5. The hearing will be recorded and transcribed by Kathy Townsend and Associates. The Applicant is responsible for making the necessary court reporting arrangements and has

agreed to supply the Hearing Clerk with a complete copy of the transcript. Other parties may purchase a copy of their own. The transcript also eventually becomes a public record which may be viewed by contacting the Hearing Clerk.

6. The order of presentation is as follows: Applicant has the burden of proof that the permit should be issued and will make its presentation first. The Bureau will follow the Applicant. Turner Ranch Properties, Hillsboro Pitchfork Ranch and Elephant Butte Irrigation District will follow the Bureau in the order they choose. Rebuttal testimony will be accepted in the same order.
7. Each party may offer an opening statement not to exceed fifteen minutes either at the beginning of the hearing or at the beginning of their own presentation. Closing statements will not be accepted at the end of the hearing; post-hearing submittals may include written closing statements in the discretion of each party in addition to proposed findings of fact and conclusions of law.
8. Parties may choose to present witnesses in a panel for purpose of cross-examination. No panel shall be larger than 2 witnesses. Others cross-examining a panel may nevertheless direct their questions to one witness in particular. All testimony will be taken under oath.
9. The pre-hearing filings for technical testimony set out in 20.1.4.399.B NMAC are due September 10, 2018. This includes a copy of any exhibit that is not already part of the record, a full summary of each witness' testimony, any opinion to be offered by each witness, an explanation of the basis for each opinion, and a list of all technical materials relied upon in making their statements. Witness technical testimony or exhibits not summarized, identified, or provided will be excluded. Non-technical public comment

requires no pre-filing.

10. Pre-hearing motions related to the pre-hearing filings must be filed by September 24, 2018. Counsel and the Hearing Officer will participate in a teleconference on October 1 at 3 p.m. to discuss any motion filed.
11. The Bureau has agreed to file the administrative record in this matter with the Hearing Clerk as soon as it is indexed and number-stamped, no later than June 30, 2018. The Bureau has further agreed to post documents filed in this appeal on its webpage.

Felicia L. Orth, Hearing Officer

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

**IN THE MATTER OF THE APPLICATION
OF NEW MEXICO COPPER CORPORATION FOR
A GROUNDWATER DISCHARGE PERMIT FOR
THE COPPER FLAT MIN, DP-1840**

No. GWB-18-06 (P)

SERVICE LIST

Andrew P. Knight
Assistant General Counsel
New Mexico Environment Department

121 Tijeras Avenue, NE #1000
Albuquerque, NM 87502
Email: Andrew.knight@state.nm.us
*Counsel for the New Mexico Environment
Department Ground Water Bureau*

Stuart R. Butzier
Christina C. Sheehan
Modrall, Sperling, Roehl, Harris & Sisk,
P.A.
P.O. Box 9318
Santa Fe, NM 87505
Email: stuart.butzier@modrall.com
and christina.sheehan@modrall.com
*Counsel for New Mexico Copper
Corporation*

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*

Samantha R. Barncastle
Barncastle Law Firm
P.O. Box 1556
Las Cruces, NM 88004
Email: samantha@h2o-legal.com
*Counsel for Elephant Butte Irrigation
District*

By _____
John Baca, Hearing Clerk
Harold Runnels Building, Rm. S-2100
1190 St. Francis Drive
Santa Fe, NM 87505
Email: John.Baca2@state.nm.us