

## 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

July 18, 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 Reply Regarding Motion for Reconsideration Re Application by NM Copper Corporation 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 two copies of Elephant Butte Irrigation District's Reply Regarding Motion for Reconsideration of Merits Hearing Setting and Related Deadlines 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 the Reply.

Sincerely,

BARNCASTLE LAW FIRM

By *Samantha R. Barncastle*  
Samantha R. Barncastle

Enclosures

xc: Gary Esslinger, EBID w/encl.  
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)

**REPLY REGARDING 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 ("EBID"), through its counsel Samantha R. Barncastle of the Barncastle Law Firm, hereby files this Reply regarding its Motion for Reconsideration of the Merits Hearing Setting and Related Deadlines and, as grounds, would show as follows:

The New Mexico Copper Corporation ("NMCC") has opposed the Motion for Reconsideration on three grounds: (1) EBID was previously provided an extension of the comment period thereby "[amplifying] its already substantial opportunity to come up to speed on the issues it may wish to present at hearing", (2) EBID's counsel has had extended notice of her pregnancy and failed to take reasonable steps to find other counsel, and (3) NMCC will be unfairly prejudiced if a final determination on their permit is not reached within the current administration. Each argument will be dealt with in order of the above list.

First, although an extension on the comment period was allowed, said extension was necessary to allow the public a full and fair opportunity to participate in providing comments to the agency. With over 17,000 pages of documents in the record as of the date notice to the public of the proposed discharge permit was provided, it is not unreasonable that the public would want, and even need, additional time to review the pertinent documents in order to provide comments. Further, even though an extension was granted, EBID was still not in a position to participate fully and fairly given

that the administrative record was not completely provided to EBID until after the deadline for comments passed. The explanation provided by the agency for not extending the comment period further to allow EBID the opportunity to review the record was: “The Department will not be extending the comment period for this permit, as a determination has already been made to grant a public hearing in this matter.” (Email from NMED dated May 2, 2018.) Although the original request for extension and corresponding email are included in the administrative record as documents numbered 17611 and 17612, the May 2, 2018 email is not included, but is attached hereto as **Exhibit C**. Such a determination necessarily contemplated that EBID would be given a more full opportunity to present its concerns at the hearing, where it was denied such opportunity in the comment phase.

Regardless of the extension of the comment period and the corresponding trouble with receiving the full administrative record during that time, the fact that an extension was provided is only pertinent here when considering its tie to NMCC’s second and third arguments regarding counsel’s knowledge of her pregnancy and the claim of unfair prejudice to NMCC if a two-week extension were to be granted. NMCC argues that the extension gave EBID additional time to hire new counsel, insinuating that the undersigned should have acted immediately to replace herself rather than continue to represent her client on this matter given that she is pregnant. NMCC further argues that EBID’s failure to find new counsel and to now seek a short extension is prejudicial because it increases the chances that a determination on the proposed discharge permit will not be handled by the current administration. Such arguments must fail.

The undersigned, on behalf of EBID, is counsel of record in multiple administrative, State Court, Federal Court, and United States Supreme Court cases involving a broad range of issues, some of which overlap with the instant proceeding. *See Texas v. New Mexico*, Original No. 141,

*United States v. EBID*, 1:97-CV-00803, *State of New Mexico v. United States, EBID, et al.*, 1:11-CV-00691, *State of New Mexico v. EBID, et al.*, D-307-CV-96-888, among others. To suggest that EBID should have gone to the great expense of hiring new counsel to get up to speed on EBID's broad purposes, policies, responsibilities, and litigation positions spanning decades all to avoid a short delay of proceedings is unreasonable. New counsel cannot possibly be expected to get up to speed on such issues (in the less than six months since the notice of publication to the public of the instant discharge permit) in such a manner that would avoid a misstep that may cause severe detriment to EBID in this or other pending litigation. Such an argument is even more unreasonable in light of the prejudice claimed by NMCC. That NMCC believes it will have a better chance of prevailing under the current administration than under a new one is to suggest that it has undertaken to pursue politics to secure its permit in place of actual compliance with regulatory standards. The evidence at the hearing will be what it is, and there is no reason to assume an administration will cause delay unless the current Secretary has already prejudged the application and proposed discharge permit. It is not poor planning on EBID's part that is unreasonable here, but rather, it is banking on a particular politician to push a permit through the regulatory process to the detriment of the public that is unreasonable, or even the suggestion of such.

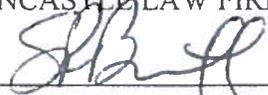
The Supreme Court has stated that "the amount of process due depends on the particular circumstances of each case." *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 87, 410 P.3d 201, 216. However, "to prevent erroneous deprivation in the administrative context, due process requires reasonable notice and opportunity to be heard and present any claim or defense." *Id.*, citing *Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm.*, 2014-NMSC-006, ¶ 20, 319 P.3d 639. In addition, the Court of Appeals has said "the essence of due process is notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *State ex rel. Children Youth & Families*

*Dep't v. Maria C.*, 2004–NMCA–083, ¶ 26, 94 P.3d 796. Further, “procedural due process requires a reasonable identification of the issues to be considered and an opportunity to be heard.” *Joab, Inc. v. Espinosa*, 1993-NMCA-113, ¶ 15, 865 P.2d 1198, 1202, citing *Jones v. New Mexico State Racing Comm'n*, 100 N.M. 434, 436, 671 P.2d 1145, 1147 (1983). Absent allowing EBID a full and fair opportunity to present its case through its counsel, while also depriving EBID of the ability to participate in the public comment phase, due process will have been denied, and the whole proceeding will be placed in jeopardy. It would seem that NMCC would want a more final determination to be made, rather than one that is subject to appeal for procedural failures, though given its arguments, it appears there may be other reasons it is in such a hurry at this time. Nonetheless, a two week extension is not unreasonable under the circumstances, and should be granted.

WHEREFORE, EBID respectfully requests that the Hearing Examiner grant its Motion for Reconsideration of Merits Hearing Setting and Related Deadlines, 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](mailto:samantha@h2o-legal.com)

CERTIFICATE OF SERVICE

I hereby certify that, on the 18<sup>th</sup> day of July, 2018, the foregoing Reply 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](mailto: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](mailto:stuart.butzier@modrall.com)  
and [christina.sheehan@modrall.com](mailto: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](mailto:cdesaillan@nmelc.org)  
and [dmeiklejohn@nmelc.org](mailto: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](mailto:John.Baca2@state.nm.us)

Felicia L. Orth, Hearing Officer  
20 Barranca Rd.  
Los Alamos, NM 87544  
Email: [Felicia.L.Orth@gmail.com](mailto:Felicia.L.Orth@gmail.com)

By   
\_\_\_\_\_  
Samantha R. Barncastle  
*Counsel for Elephant Butte Irrigation District*

## **Samantha Barncastle**

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**From:** Knight, Andrew, NMENV <Andrew.Knight@state.nm.us>  
**Sent:** Wednesday, May 02, 2018 4:21 PM  
**To:** Samantha Barncastle  
**Subject:** RE: EBID Request for Additional 60 Day Extension of Comment Period for DP-1840 (Copper Flat Mine)

Samantha,

The Department will not be extending the comment period for this permit, as a determination has already been made to grant a public hearing in this matter.

Andrew P. Knight  
Assistant General Counsel  
New Mexico Environment Department  
Office: (505) 222-9540  
Cell: (505) 907-8836

**From:** Samantha Barncastle [mailto:samantha@h2o-legal.com]  
**Sent:** Wednesday, May 02, 2018 9:29 AM  
**To:** Knight, Andrew, NMENV <Andrew.Knight@state.nm.us>  
**Subject:** FW: EBID Request for Additional 60 Day Extension of Comment Period for DP-1840 (Copper Flat Mine)

Barncastle Law Firm  
PO Box 1556  
Las Cruces, NM 88004  
1100 South Main Ste. 20  
Las Cruces, NM 88005  
Ph: 575-636-2377  
Fax: 575-636-2688

**From:** Janet Correll  
**Sent:** Tuesday, May 01, 2018 2:08 PM  
**To:** [Brad.Reid@state.nm.us](mailto:Brad.Reid@state.nm.us)  
**Cc:** Samantha Barncastle <[samantha@h2o-legal.com](mailto:samantha@h2o-legal.com)>; Esslinger, Gary <[gesslinger@ebid-nm.org](mailto:gesslinger@ebid-nm.org)>  
**Subject:** EBID Request for Additional 60 Day Extension of Comment Period for DP-1840 (Copper Flat Mine)

Dear Mr. Reid,

I emailed a letter request from attorney Samantha Barncastle to you last Thursday, April 26<sup>th</sup> regarding the above matter. I received a notification that you did in fact receive that email, however we have not yet received a response to the request for an additional 60 day extension of time in which to submit comments regarding the Copper Flat Mine DP-1840. May we please have your response? We would appreciate hearing from you as soon as possible, given the looming May 4<sup>th</sup> deadline. I have attached Ms. Barncastle's April 26<sup>th</sup> correspondence again for your ready reference. Please advise. Thank you.

Janet L. Correll, Paralegal for Samantha R. Barncastle  
Barncastle Law Firm  
P.O. Box 1556  
Las Cruces, NM 88004  
Ph: 575-636-2377