

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF:)
TWO PETITIONS FOR REVIEW OF THE)
SECRETARY'S DECISION TO ISSUE)
DISCHARGE PERMIT NO. DP-1840)
FOR THE COPPER FLAT MINE,)
)
ELEPHANT BUTTE IRRIGATION)
DISTRICT, and)
)
TURNER RANCH PROPERTIES, L.P.,)
HILLSBORO PITCHFORK RANCH, LLC,)
AND GILA RESOURCES INFORMATION)
PROJECT,)
)
Petitioners.)

Docket No. WQCC-19-02(A)



**APPEAL TO THE WATER QUALITY CONTROL COMMISSION
OF THE DECISION OF THE SECRETARY OF THE ENVIRONMENT
GRANTING DP-1840 TO THE NEW MEXICO COPPER CORPORATION**

**ELEPHANT BUTTE IRRIGATION DISTRICT'S BRIEF IN CHIEF
REGARDING ISSUES FOR REVIEW
BY THE WATER QUALITY CONTROL COMMISSION**

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ELEPHANT BUTTE IRRIGATION DISTRICT'S BRIEF IN CHIEF
REGARDING ISSUES FOR REVIEW
BY THE WATER QUALITY CONTROL COMMISSION

Pursuant to the NMSA, Section 20.1.3.16(A)(4), the Elephant Butte Irrigation District (“EBID”), through its counsel Samantha R. Barncastle of the Barncastle Law Firm, hereby submits its Brief in Chief Regarding Issues for Review by the Water Quality Control Commission (“the Commission”) on the decision to issue DP-1840, which decision was rendered by the Secretary of Environment on December 19, 2018 and, as grounds therefor, would state as follows:

I. SUMMARY OF PROCEEDINGS & STATEMENT OF ISSUES

On February 2, 2018, the New Mexico Environment Department, Groundwater Quality Bureau (“the Department”), published notice to the public of the Department’s proposal to issue Discharge Permit 1840 (“DP-1840”) to the Copper Flat Mine, together with information regarding the public comment period which was to extend through March 5, 2018. Several parties, including the Elephant Butte Irrigation District, requested an extension of the deadline to file comments with the Department regarding DP-1840, and on March 2, 2018 the Department published a supplemental notice to the public extending the comment period to May 5, 2018. On March 30, 2018 the Department requested a Hearing for DP-1840 and, thereafter, on June 7, 2018, the Secretary of the New Mexico Environment Department (“the Secretary”) appointed a Hearing Officer and a Notice of Docketing was filed.

Formal proceedings commenced following the June 7 Notice of Docketing, and from September 24 to September 28, 2018 a formal hearing on the merits regarding DP-1840 was held in Truth or Consequences, New Mexico. The Elephant Butte Irrigation District participated in the formal proceedings, including the hearing in Truth or Consequences. Following the hearing on the merits, the participating parties filed Proposed Findings of Fact and Conclusions of Law, after which

the Hearing Officer issued a Report which was filed on December 3, 2018. The Secretary accepted comments regarding the Hearing Officer's Report through December 13, 2018 and, on December 19, 2018, he issued his Final Order. The Final Order granted New Mexico Copper Corporation's application for proposed DP-1840, thereby issuing the permit. The Elephant Butte Irrigation District, having participated in the underlying proceedings and having a valid property interest to protect, which property interest is adversely affected by the permitting action, has standing pursuant to NMSA 1978 Section 74-6-5(O) and hereby appeals the decision of the Secretary granting the permit at issue. EBID requests review of Permit DP-1840 by the Water Quality Control Commission.

At the hearing on the merits in this matter, EBID contended that the issues of undue risk to property and hazard to public health had not been properly addressed by simply applying the minimum technical requirements found in the Copper Mine Regulations, or "the Copper Rule". The mine and the Department contended that the minimum technical requirements of the Copper Rule were met in the application and, therefore, the discharge permit should be issued.

The Hearing Officer recognized that "apart from [the] issue of undue risk, the recommended findings and conclusions support the issuance of the Bureau's final draft groundwater discharge permit as based on substantial evidence and as fully compliant with the Copper Rule. Without apparent guidance, however, on the question of undue risk in connection with this mine, in this location, I am forwarding the record to the Secretary for his consideration and decision-making without a recommendation as to final disposition, and will prepare a Final Order following further direction." Report of the Hearing Officer filed Dec. 3, 2018. The Hearing Officer was aware that she was required to give some meaning to the term "undue risk to property", but did not know what meaning to give in this context given the overwhelming evidence presented by EBID regarding the

impact this proposed mine will have on the downstream water supply of two states and another nation (Mexico).

The Secretary determined that this requirement only applies “to potential impacts to water quality from the permitted discharges, not to the depletion of groundwater.” Final Order Filed December 19, 2018. The Secretary’s reading of the rule is far too narrow to allow the Department to fulfill its obligations under the Copper Rule, and is not consistent with the law in New Mexico that requires a “liberal” interpretation of the regulations so as to effect the purposes of the Water Quality Act. A plain reading of the Copper Rule reveals that there is no such limitation on the Department when considering impacts to property, therefore, there is no basis to support the Secretary’s erroneous conclusion that the Department’s ability to evaluate harm to property interests is so restrained. For those reasons, EBID has appealed the Secretary’s determination.

EBID hereby fully incorporates its Statement of Issues as laid out in its Petition for Review by Water Quality Control Commission filed January 17, 2019. EBID further incorporates and proposes acceptance by the Commission of the Proposed Findings of Fact and Conclusions of Law as originally proposed by EBID on November 19, 2018.

II. STANDARD OF REVIEW

Pursuant to NMSA 1978, Section 74-6-5(Q), the Commission shall undertake a “review of the record compiled before the constituent agency, including the transcript of any public hearing held on the application or draft permit, and shall allow any party to submit arguments. The commission may designate a hearing officer to review the record and the arguments of the parties and recommend a decision to the commission. The commission shall consider and weigh only the evidence contained in the record before the constituent agency and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the constituent agency.

Based on the review of the evidence, the arguments of the parties and recommendations of the hearing officer, the commission shall sustain, modify or reverse the action of the constituent agency. The commission shall enter ultimate findings of fact and conclusions of law and keep a record of the review.” N.M. Stat. Ann. § 74-6-5(Q).

III. ARGUMENT

The purpose of the Water Quality Act is “to abate and prevent water pollution.” *Bokum Resources Corp. v. N.M. Water Quality Control Comm’n*, 93 N.M. 546, 555, 603 P.2d 285, 294 (1979). The express purpose of the Water Quality Regulations is “to protect all groundwater of the state of New Mexico which has an existing concentration of 10,000 milligrams per liter or less [total dissolve solids], for present and potential future use as domestic and agricultural water supply.” 20.6.2.3101(A) NMAC.

The purpose of the Copper Mine Regulations is to supplement the Water Quality Regulations to control discharges of water contaminants specific to copper mine facilities and their operations to prevent water pollution. 20.6.7.7 NMAC. The Copper Mine Regulations provide that the Environment Department shall approve a discharge permit if “it poses neither a hazard to public health nor undue risk to property” and otherwise meets the minimum requirements of the Copper Mine Regulations. 20.6.7.10(J) NMAC. The Copper Mine Regulations authorize the Environment Department to impose additional conditions on permits that go beyond the substantive requirements of the regulations, provided the Department prepares a written explanation of the reasons for the conditions. 20.6.7.10(I) NMAC. Finally, the Environment Department has a duty to interpret the regulations liberally in order to realize the purposes of the Act. *Colonias dev. Council v Rhino Envntl. Servs.*, 2005-NMSC-024, ¶34, 138 N.M. 133, 142.

A. UNDUE RISK TO PROPERTY

1. The decision of the Secretary in failing to ascribe any meaning to the language “undue risk to property” was contrary to substantial evidence, arbitrary and capricious, and not supported by law.

“A decision is arbitrary and capricious if substantial evidence does not support it.” *Jarita Mesa Livestock Grazing Ass’n v. U.S. Forest Service*, 140 F.Supp.3d 1123, 1167 (U.S.Dist.Ct., D.N.M.2015). “Under this standard, the Court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment.” *Copar Pumice Co., Inc. v. Bosworth*, 502 F.Supp.2d 1200, 1209 (U.S.Dist.Ct., D.N.M. 2007). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* “This is something more than a mere scintilla but something less than the weight of the evidence.” *Id.* “Evidence is generally substantial under the APA if it is enough to justify, if the trial were to a jury, refusal to direct a verdict on a factual conclusion.” *Id.*

A survey of state laws and regulations revealed the term of art “undue risk to property,” as it relates to groundwater permitting (or permitting in general), is unique to New Mexico. Even further, New Mexico law does not define that term. Nonetheless, the term must be ascribed some meaning. “Regulations are generally subject to the same rules of construction as statutes.” *Murrietta v. United States Department of Justice, Civil Division*, 217 F.Supp.3d 1301, 1304 (U.S.Dist.Ct., D.N.M.2016). “The cardinal principle of statutory construction is to save and not to destroy.” *United States v. Menasche*, 348 U.S. 528, 538, 75 S.Ct. 523, 520 (1955). “In discerning the Legislature’s intent, we are aided by classic canons of statutory construction, and we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended.” *Marbob Energy Corp. v. New Mexico Oil Conservation Com’n*, 2009-NMSC-013, ¶9, 146 N.M. 24, 28. “The absences of specific legislative history in no way modifies the conventional

judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.” *United States v. Bornstein*, 423 U.S. 303, 310, 96 S.Ct. 523, 529 (1976). “If the language is clear and the meaning of the words used is unambiguous, then a common-sense reading of the statutes will suffice, with no construction necessary.” *State v. Richardson*, 113 N.M. 740, 741, 832 P.2d 801, 802 (NMCA 1992).

Black’s Law Dictionary defines “undue” as “excessive or unwarranted”. As the Hearing Officer pointed out in her Report filed December 3, 2018, Ballentine’s Law Dictionary defines “undue” as “inappropriate, unsuitable, or unjust.” Black’s Law Dictionary defines “risk” as “the uncertainty of a result, happening, or loss; the chance of injury, damage, or loss esp., the existence and extent of the possibility of harm.” A water right is a property right in New Mexico. *Walker v. United States*, 2007-NMSC-038, ¶27, 142 N.M. 45, 53.

At the hearing in this matter, EBID put on almost an entire day worth of testimony and evidence regarding the potential impact of the proposed mine on the Lower Rio Grande water supply. EBID concluded that, given the information available at this time, there is insufficient information to determine the limits of a potential contamination event, and further, that no level of proper planning has occurred to deal with such a situation. *See* Generally EBID’s Proposed Findings of Fact and Conclusions of Law. Under the circumstances, there cannot be a determination that the mine does not pose an “undue risk” or even any level of “risk” to downstream water users. Without information sufficient to determine whether there is an undue risk, this permit cannot be issued, and the Secretary’s determination that the Copper Rule has been complied with is necessarily arbitrary and capricious. Without considering the impacts to the water supply of an entire region, the agency cannot simply conclude that there is no “undue risk”. At the hearing and in its Proposed Findings of Fact and Conclusions of Law, EBID gave examples of the type of permit conditions that would

alleviate concerns related to “undue risk”, such as the requirement of coordinating with the NM Office of the State Engineer (OSE), the Rio Grande Compact Commission, the City of El Paso and other water users who may be affected by contamination events, the preparation of risk assessments and response strategies, and further design planning with the NM OSE Dam Safety Bureau. The decision of the Secretary should be reversed, and further evidence should be developed to allow a proper assessment of risk to other property interests, together with imposition of permit conditions appropriate to control the impact to those other property interests.

- 2. The proposed mine poses an “undue risk to property” given the substantial evidence pointing to the likelihood of contamination, the lack of planning for how to deal with such contamination, and the substantial property interests downstream of the proposed mine site that would be adversely affected by such contamination event(s).**

EBID’s proposed Findings of Fact and Conclusions of Law establish three things relevant to the issue of “undue risk to property”: (1) The proposed mining activity will cause groundwater contamination, (2) The groundwater and surface water are hydrologically connected in the area of the proposed mine and throughout all of the Lower Rio Grande where the proposed mine is located, and (3) That there are multiple, significant property interests downstream and down gradient of the proposed mine that rely on the hydrologically connected surface and groundwater that is proposed to be contaminated.

Clearly, some meaning must be given to the term “undue risk to property” and, in the absence of a legislative record regarding what was meant when the drafters of the Copper Rule included that language in its text, this Commission must give the plain language its common sense meaning. The language in the Copper Rule is intended to ensure that property risks of any kind are not placed in jeopardy by new mining activity. Common sense dictates that this proposed mine project poses an

undue risk to property downstream or, at the very least, that additional work must be done to further analyze the situation to ensure there is no “undue” risk.

Consider a situation where a discharge permit caused harm to other types of property interests that were not directly related to the use of water. As an example, consider a situation where the proposed mine is located near building structures in a local town, and there was evidence put into the record during a hearing on the merits that showed the use of the large, heavy equipment necessary for the mining activity would cause the ground to shake in such a way as to disrupt the foundation of local buildings owned by homeowners and businesses in the immediate area. Granting the discharge permit would allow the mining activity to commence despite the harm that would be caused to the local homeowners’ and business owners’ property interests in their real property, which would be destroyed within a matter of years. The recourse the homeowners and business owners would have would be to sue the mine for harm to their property interests, obtain damages, and otherwise relocate to another area where the mining activity could not impact their property. In that case, should the Department have denied the discharge permit on the basis that it created an “undue risk to property”?

Under the Secretary’s reading of the Copper Rule, the answer would be “No” despite the fact that the harm to others’ property interests is apparent. If the answer is “No”, what, then, are the types of property interests that must not be harmed before a discharge permit may be issued? If the answer is simply that compliance with water quality standards must be met, as is the reading by the Secretary, then there is no meaning given to the plain language of the rule’s requirement that no undue risk to property occur. This situation is no different from the above hypothetical, except that there is confusion here because the Department is under the mistaken view that it cannot also consider impacts to water rights that belong to others because there is another state agency set up for

just that purpose. Such a reading is incorrect and ascribes no meaning to the term “undue risk to property” in violation of the law.

Even under this restrained reading of the Copper Rule, the Secretary’s determination is not supported by substantial evidence. 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. That, alone, is enough to conclude the proposed mine creates an undue risk to property of others. Even further, 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. The failure to require this as a permit condition creates another undue risk to property that is impermissible under the Copper Rule.

Additionally, it would assist the Commission 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 a 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. Without this information, there is insufficient evidence on which to base a determination that there is no undue risk to property. The permit from the NM OSE Dam Safety Bureau should be obtained prior to commencing mining activity so that a dam breach analysis and emergency action plan can be prepared to inform the Commission regarding the possible hazard to public health and/or risk to property and to ensure

compliance with Section 20.6.7.10(J) NMAC. The Commission should retain the ability to revisit DP-1840 to require additional conditions as may be necessary to protect other property interests following further analysis as described. Until that further analysis is performed, the decision of the Secretary is not supported by substantial evidence and, therefore, it must be reversed.

The Department has unnecessarily restricted itself from preventing groundwater and surface water contamination in this case. Before there can be a determination that is supported by substantial evidence, there must be analysis. The Department's actions in preventing itself from accessing such analysis are not supported by law and, therefore, must be reversed in favor of additional analysis and imposition of permit conditions that will protect property downstream of the proposed mine. The Department should not wait until a catastrophic event occurs to plan for how it should be handled through abatement proceedings, and instead, should be proactive in looking at what is likely to result if a breach of the tailings storage facility were to occur. Having completely failed to analyze issues such as the direction and distance contaminated water may flow in the event of a breach of the tailings storage facility or other spill event, there is no evidence to support the conclusion that the proposed activity does not constitute an undue risk to property. This information could be available to the Department -- it simply needs to require the Applicant to produce the information for evaluation. Once that is done, an appropriate evaluation of the risk to other property interests can be made, including water rights, which are property interests under New Mexico law, and appropriate permit conditions imposed. Until then, the decision of the Secretary is not supported by law, and it cannot be said that this project does not pose an undue risk to property. In such a situation, the plain language of the Copper Rule has not been complied with. To allow this permit at this time, ignoring the requirement that "undue risk to property" be considered and adequately addressed before a permit may be issued, is unlawful.

3. The Department must coordinate further with NM OSE and consider issues related to depletion of others' water rights as part of its analysis on the issue of "undue risk to property."

Permit DP-1840 Condition C105(C)(2) provides: "Prior to initiation of construction of any portion of the TSF and associated dam, the permittee shall submit to NMED documentation of compliance with the Dam Safety Bureau of the Office of the State Engineer permitting requirements pursuant to Section 72-5-32 NMSA 1978, and rules promulgated under that authority, unless exempt by law from such requirements. [RP 18753] In adding this permitting condition, the Department noted that the "requirement [was] added in response to comments received from members of the public and several organizations including the Elephant Butte Irrigation District" and many others. This permit condition is an example of the type of collaboration the two agencies (NMED and NM OSE) should engage in to ensure that water users downstream of the proposed mine project are not improperly impacted by the proposed mining operation.

As previously stated, water rights are property rights under New Mexico law. Even though water rights are typically not within the purview of the New Mexico Environment Department, there is no justification for ignoring certain property rights when considering discharge permits for copper mines given the Copper Rule's requirement that property rights be considered. The language in the Copper Rule regarding "undue risk to property" is similar to language in water rights permitting jurisdiction afforded to the NM OSE which provides that, in considering permitting any water use in the state, a determination that the use is "not detrimental to the public welfare of the state" must first be made before the use is allowed. Under that standard, the NM OSE must look to a wide range of issues before granting permits for the use of water, and it is not restrained on what may constitute detriment to the public welfare of the state. Since the Legislature has provided no definition of "public welfare," the determination is left to the NM OSE and the Courts on a case by case basis.

This requirement expands the issues NM OSE must consider in permit proceedings beyond simply looking at whether water is available and whether the new use will somehow infringe upon existing (or senior) water uses.

A particularly relevant example of how NM OSE has used the public welfare doctrine to deny a water use permit can be found in the 2009 case *In re Waterfall Community Water Users Ass'n*. There the association submitted an application for 320 acre-feet per year of surface water from the Culberson Spring within the Pecos River stream system. *In re Waterfall Community Water Users Ass'n*, 2009-NMCA-101, ¶1, 147 N.M. 20. The State Engineer denied the application finding “that the waters of Culberson Spring are tributary to the Pecos River, the Pecos River and its tributaries are fully appropriated, and thus there are no unappropriated waters available in the Pecos River stream system.” *Id* at ¶5. “Based on these facts, the State Engineer concluded that granting Waterfall’s application would impair existing rights to water in the Pecos River stream system, would be detrimental to the public welfare, and would be contrary to the conservation of water within New Mexico.” *Id*.

Important here are the parallels between this case and *In re Waterfall Community*. Here, EBID put on evidence that all of the water of the Lower Rio Grande is appropriated, including all tributary flow, and that the groundwater and surface water are interconnected such that the groundwater contributes as tributary flow to the surface water supplies of EBID, El Paso No. 1, and Mexico. Despite having proven that this proposed mine will interfere with water already appropriated by others to their detriment, the Department has determined that it is constrained and must still issue the discharge permit. Such a reading of the Copper Rule effectively ascribes no meaning to the “undue risk to property” language.

Consider the situation where the proposed mine seeks a discharge permit that in part covered an area of real property that another person or entity claimed ownership of. At the hearing on the merits regarding the proposed hypothetical discharge permit, the other owner provided substantial evidence to support its claim to ownership of the real property, and the mine did not provide any evidence to contradict the ownership claim. Additionally, in the proposed hypothetical, all other requirements of the Copper Rule were met for the proposed discharge permit, and the only outstanding issue was the resolution of the ownership of the real property. Could the Department issue the discharge permit without requiring the parties to resolve the ownership issues first? Under the Secretary's reading of the Copper Rule's requirement regarding "undue risk to property", the permit must be issued regardless of the fact that such a decision would necessarily ignore issues related to undue risk to property because those issues are more properly resolved in another setting, such as the Courts of the State of New Mexico. While EBID does not propose that NMED suddenly be transformed into a Court with jurisdiction over land ownership claims, or somehow usurp the authority of the NM OSE to resolve issues related to water rights, it is also clear that issues related to risk to other property interests cannot be ignored. The Department must strike a balance, and to do so, proper permit conditions preventing the depletion of water can be imposed.

Additionally, interagency coordination and cooperation must occur between the Department and the NM OSE to properly address the depletion issue in this permit setting. The Department and the OSE entered into a Letter of Understanding that requires interagency cooperation on projects that have the ability to impact both water quantity and water quality. Under the Letter of Understanding, the Department has a responsibility to involve the OSE in projects such as the proposed mining operation at issue here, and to incorporate OSE's comments on such projects. Aside from testimony at the hearing in this matter that OSE was involved in meetings early in the process, there is no

evidence that OSE was consulted regarding the impact of this project on the water users of the Lower Rio Grande or on New Mexico's Compact obligations under the Rio Grande Compact. At a minimum, the issuance of this proposed discharge permit should be conditioned upon receiving the NM OSE approval that the use of water would not be contrary to conservation of water or detrimental to the public welfare.

Of significance here is the fact that the OSE may not have the opportunity to consider issues of public welfare related to the mine's use of water. The mine is currently appealing the decision of the Lower Rio Grande Adjudication Court finding that the vast majority of water rights claimed by the mine have been extinguished. If the mine were to prevail in that appeal, or otherwise determine that it can proceed with mining with only the water that remains existing in its water rights portfolio, issues related to public welfare, conservation of water, and impairment to other water users will never come before the NM OSE for consideration. In such a case, the issues of harm to others' water rights will not ever be brought to bear in a manner that allows EBID and others to raise the issues that are raised in this proceeding. In such a situation, not only will the Department have failed to protect other water users' property rights through issuance of DP-1840, but those water users will also not have any other recourse available to them to ensure their own rights are not infringed upon.

There is no exception in the Copper Rule to allow water rights to be excluded from the undue risk to property consideration, therefore the Environment Department has failed to properly apply its own regulations by failing to ensure that water rights and other water users downstream of the proposed mine will not be harmed. Further, there is no ability to separate the water quality and water quantity aspects of this case. The purpose of the Letter of Understanding is to require the two agencies to work together on issues exactly like this one to ensure the interests of the public are protected without unnecessarily dividing and conquering the public through archaic jurisdictional

principles. The Copper Rule also provides the appropriate avenue for dealing with impacts to property, including water rights, which are property rights, and provides the Department with the necessary authority to condition the permit in any way necessary to protect the public. The Department should not avoid its responsibility to protect other property interests through a constrained reading of the Copper Rule and, for those reasons, the determination of the Secretary should be reversed. 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.

B. HAZARD TO PUBLIC HEALTH

- 1. The decision of the Secretary in failing to consider the hazard to public health was contrary to substantial evidence, arbitrary and capricious, and not supported by law.**

Title 20, Chapter 6, Part 7 incorporates the definitions set forth in Title 20, Chapter 6, Part 2 of the NMAC. Therefore, the definition of “hazard to public health” is that a “hazard to public health 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 standards of Subsection A of 20.6.2.3101 NMAC or the naturally occurring concentrations, whichever is higher, or if any toxic pollutant affecting human health is present in the water; in determining whether a discharge would cause a hazard to public health to exist, the secretary shall investigate and consider the purification and dilution reasonably expected to occur from the time and place of discharge to the time and place of withdrawal for use as human drinking water.” 20.6.2.7(AA) NMAC.

At the hearing on the merits in this matter, EBID also presented evidence regarding the municipalities that rely on the surface water and groundwater for drinking water supply down gradient of the proposed mine. *See Generally* EBID’s Proposed Findings of Fact and Conclusions of

Law. However, no investigation into the actual risk the mine poses on those drinking water supplies was conducted because, as discussed above, there was no assessment of what would occur in the event the tailings storage facility breached, or other contamination event occurred such as a spill of water being pumped out of the open pit lake. Likewise, there was no assessment of the “purification and dilution reasonably expected to occur” as required by the definition of hazard to public health. Until further analysis is performed to evaluate the likely risks to the public drinking water supply downstream of the proposed mining operation, there is not substantial evidence to support the conclusion that the proposed mine does not pose a hazard to public health.

2. The proposed mine poses a “hazard to public health” given the substantial evidence pointing to the likelihood of contamination, evidence of already existing exceedances, and the fact that multiple municipalities rely on the affected water for their human drinking water supply.

Operation of the proposed mine will likely increase contamination discharged into groundwater. TR 1505, Lines 24-25 and TR 1506 Lines 1-3. 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. Some of the contaminants in the pit lake have already exceeded water quality standards. TR 1516, Lines 14-20. 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.

These facts show an immediate risk of additional groundwater contamination that can reasonably be expected to mix with other groundwater and migrate toward Caballo Reservoir. Additionally, given that the pit lake already exceeds water quality standards for multiple contaminants, and that water must continually be pumped out of the existing pit lake to allow mining to occur, additional analysis is necessary to determine the risks posed on the human drinking water

supply by such activity. The issue of undue risk to property, discussed at length above, is necessarily tied to a proper determination of hazard to public health. If there is found to be an undue risk to property, it is likely that a hazard to public health will also follow. Likewise, if there is a proper evaluation of the risk to other property interests, that may also satisfy the requirements of evaluating issues such as “purification and dilution” as required under the definition of “hazard to public health”. As the situation currently stands, there is inadequate information to determine there is no hazard to public health and, therefore, the Secretary’s determination is not supported by substantial evidence and must be reversed. Additional analysis is required to properly support such a conclusion.

IV. RELIEF REQUESTED

EBID provided ample evidence regarding the impact the mine may and will have on the downstream water users within the Lower Rio Grande. The proposed Findings of Fact and Conclusions of Law provided by EBID should be accepted, and the determination of the Secretary should be reversed in favor of finding that:

1. The possibility of the contamination of Caballo Reservoir has not been evaluated through the appropriate dam breach analysis, or review of possible spill events by virtue of pumping contaminated water out of the pit lake, and until such time as those issues are properly evaluated, it cannot be said that there is no undue risk to property or potential hazard to public health;
2. The proposed mine poses an undue risk to property because of the depletion effect the mine will have on the local groundwater, which would otherwise be tributary to Caballo Reservoir, but which will now be captured by the open pit hydrologic sink;

3. The proposed mine poses an undue risk to property because of the depletion effect the mine will have on the local groundwater because groundwater pumping will interfere with the tributary flow to Caballo Reservoir.

The Commission should further require that proper permit conditions be added to DP-1840 following evaluation of the risk this project poses to other property interests to allow the proposed activity to move forward while protecting against the undue risk to others' property.

V. CONCLUSION

The definition of "undue risk to property" is not settled in New Mexico law, however, if ever there were a case of "undue risk to property", this is the case. With the interests at stake downstream of the mine, including the interests of irrigators, municipalities, another state (Texas) and another nation (Mexico), even the smallest amount of contamination should not be ignored. The Commission should heed the warning of the Hearing Officer who, after hearing all of the evidence first-hand, acknowledged that the issue of "undue risk to property" is real in this case, and should not be ignored. See Report of Hearing Officer at Pages 30-31.

The Commission should disregard the mine's argument that the "undue risk to property" language is general and can be ignored if the other technical requirements of the permit are met. Instead, the language should be read as a final requirement to be met, above and beyond the technical requirements of the Copper Rule, compliance with which can only be determined on a case by case basis similar to the public welfare doctrine. That the proposed mine purports to have met all of the bare minimum technical requirements of the Copper Rule does not outweigh the danger it poses to all water resources downstream of it. Reading the Copper Rule as the Secretary has, consistent with the theory put forth by the mine, effectively disregards the "undue risk to property" language, thereby assigning it no meaning within the rule. Such a reading of the law is not consistent with principles of

statutory interpretation in New Mexico, which requires meaning be given to all words in a statute or regulation. *See Marbob Energy Corp. v. New Mexico Oil Conservation Com'n*, 146 N.M. 24, 206 P.3d 135 (2009). Further, such a reading of the Copper Rule is not supported by substantial evidence, and is, therefore, unreasonable, arbitrary, and capricious.

Instead, to give meaning to the language prohibiting “undue risk to property”, the Copper Rule, self-imposed by the Department, should be read to prevent both depletion and contamination of others’ water rights by permitted activities. At a minimum, the Department should be required to coordinate with NM OSE on the issue of depletion of others’ water rights, though the issue of refusing to allow contamination of others’ rights is squarely within the jurisdiction of the Department. The Department, in failing to properly collaborate with the NM OSE, has allowed, through its permitting procedures, a de facto appropriation of water that will interfere with others’ appropriations in the Lower Rio Grande. In doing so, the Department has ignored the language prohibiting it from allowing an “undue risk to property” belonging to others and, instead, it has directly permitted the mine’s use of others’ property.

This more liberal application of the Copper Rule language is the only way to remain consistent with New Mexico Law and the Department’s mission to prevent or abate water contamination and protect others’ access to clean water. As such, the Commission should reverse the decision of the Secretary and deny the application for DP-1840 as premature, or, at the very least, it should impose permit conditions to require the undue risk to property posed by the proposed mine to be dealt with properly through coordination with all affected agencies, including NM OSE and EBID, prior to commencing mining activities.

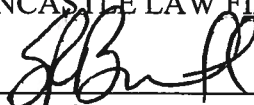
WHEREFORE, EBID respectfully requests that the decision granting DP-1840 be reversed on the basis that the mine's current application poses a hazard to public health and an undue risk to property.

Respectfully submitted this 17th day of June, 2019.

Respectfully submitted,

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By



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CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of June, 2019, the foregoing was sent via first class mail to the following:

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