STATE OF NEW MEXICO
WATER QUALIFY CONTROL COMMISSION

IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2, THE COPPER MINE RULE,

No. WQCC 12-01(R)

New Mexico Environment Department,

Petitioner.

NEW MEXICO MINING ASSOCIATION'S CONSOLIDATED MEMORANDUM IN RESPONSE TO ATTORNEY GENERAL'S MOTION TO REMAND PROPOSED COPPER MINE RULES AND VARIOUS ORGANIZATIONS' JOINT MOTION TO DISMISS PETITION FOR RULEMAKING

As the members of the Commission ("WQCC") know, the numerical standards contained in 20.6.2.3103 (A) and (B) NMAC ("Section 3103 standards") were designed to assure that ground water used for drinking water was adequately protected and generally correspond with EPA maximum contaminant levels for public water systems.[1] The members of the New Mexico Mining Association ("NMMA") have repeatedly pointed out to the WQCC that the conduct of mining necessarily involves some impact upon ground water since most mining occurs in or below water sources. Thus, without exaggerating, it is infeasible to maintain drinking water quality throughout the mine site at all times during the mining process. WQCC, when it adopted the original WQCC Regulations in 1977, must have understood that fundamental concept because it exempted "[n]atural ground water seeping or flowing into conventional mining workings" from compliance with the Section 3103 standards. 20.6.2.3105(K) NMAC.

[1] *See* 40 CFR Part 141, Subpart B.

Absent a variance (or alternative abatement standards),[2] the mining industry simply cannot attain the Section 3103 standards under the interpretation of the regulations imposed by the New Mexico Environment Department ("NMED") under prior administrations.

The NMMA supports NMED's proposed Copper Mine Rules because, if enacted, the place where the Section 3103 standards apply would be better defined--and defined in a manner that would allow mining operations to go forward. Since the proposed Copper Mine Rules may become a template for rules and permitting decisions applicable to other minerals, the matter is one of serious concern to the mining industry as a whole.

POINT I

The WQCC is Fully Authorized to Adopt the Proposed Copper Mine Rules, including the Point of Compliance ("POC") Provisions, Notwithstanding Past Interpretations of the WQCC Regulations.

The crux of this matter, from the standpoint of the mining industry, centers around the phrase "place of withdrawal of water for present or reasonably foreseeable future use," contained in NMSA 1978, §74-6-5(E) of the Water Quality Act ("WQA") and 20.6.2.3109(C) and 20.6.2.4103(B) NMAC. The "place of withdrawal," of course, is the statutory and regulatory designation of the geographic location where the Section 3103 standards are applied.

For years, the ambiguity of the "place of withdrawal" phrase has bedeviled the mining industry, the regulators and the courts. *See N.M. Mining Assn. v. N.M. Water*

[2] The effect of available variance procedures contained in the "WQCC Regulations" is discussed in Point II below.

Quality Control Comm, 2007-NMCA-10, 141 N.M. 41, 150 P.3d 991 (2006); *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502 (2006). The proposed Copper Mine Rules do nothing more than confirm the obvious reality that a mine site, particularly a hydrologically evaporative open pit, is not a "place of withdrawal for present or reasonably foreseeable future use."

A New Mexico statute lays down essentially the same rule: "[T]he following aids to construction may be considered in ascertaining the meaning of [statutory] text: . . . "an administrative construction of the . . . statute . . ." NMSA 1978, §12-2A-20(B)(4). Thus, administrative agencies in New Mexico have the power to exercise their expertise in defining otherwise undefined statutory terms. The proposed Copper Mine Rules simply define what is meant by a "present or reasonably foreseeable use," thus resolving decades of controversy and uncertainty.

The Attorney General and the NGOs mistakenly rely on statutory provisions, as well as judicial and administrative decisions, stating that the purpose of the WQA is to "abate and prevent water pollution." *See, e.g., Bokum Resources Corp. v. New Mexico Water Quality Control Comm*, 93 N.M. 546, 555; 604 P.2d 285, 294 (1979); NMSA 1978, 74-6-4(E). General formulations of legislative purpose are overridden by specific language contained in a statute. *In re Camino Real Environmental Center, Inc.*, 2010-NMCA-057, ¶17, 148 N.M. 776, 242 P.3d 343. Here, by, in effect, defining "place of withdrawal," the proposed Copper Mine Rules are enacting regulations, not adopting standards. That is, the proposed regulations define the location where the standards apply. In *Phelps Dodge Tyrone, Inc.* 2006-NMCA-115, ¶37, the court noted a POC

approach could serve as a "proxy" for the "place of withdrawal" formulation, because "authorities dealing with 'point of compliance' can and should be used in a case like this one." Contrary to the Attorney Generals' and NGOs' assertions, then, use of a POC approach is fully compatible with the statutory requirement that the standards be applied at a place of withdrawal for present or reasonably foreseeable future use.

The Joint Motion to Dismiss (at 1) filed by the New Mexico Environmental Law Center, Turner Ranches, Inc. and High Desert Energy + Environment Law Partners, LLC (collectively "NGOs"), dismisses NMED's proposed definition of the vague statutory phrase "place of withdrawal" as a "license to pollute" creating a "sacrifice zone." Not so. The very essence of rulemaking is to provide definition of unclear statutory terms. As the court in *Professional Fire Fighters of Massachusetts v. Com.*, 888 N.E. 2d 981, 993 (Mass. App. 2008) observed in rejecting a challenge to a regulatory definition that was alleged to be contrary to the purpose of a statute,

> [a]n agency has broad and reasonably implied powers to promulgate regulations, may exercise considerable leeway in the interpretation of its enabling legislation, and may *define* the legislation more precisely by regulation. A reviewing court will not declare a regulation void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate. The plaintiff must show the absence of any conceivable grounds in support of the regulation.

Emphasis added, citations and internal punctuation omitted; *accord*, *Howell v. Heim*, 118 N.M. 500, 504, 882 P.2d 541, 545 (1994)("The agency's authority is not limited to the express powers granted by statute, but also includes those powers that arise from the statutory language by fair and necessary implication.")(citations omitted).

In enacting regulations, moreover, WQCC is expressly empowered to take "technical practicability and economic reasonableness" into account. NMSA 1978, §74-6-4(D)(3); *see The Regents of University of California v. New Mexico Water Quality Control Comm*, 2004-NMCA 073, ¶25, 136 N.M. 45, 94 P.3d 788 ("Section 76-4-6(D) requires the [WQCC] to consider, among other things, the technical practicability and economic reasonableness of a regulation before adopting it."). Saying that every drop of groundwater within the exterior boundaries of a mine site must attain drinking water quality is both impracticable and economically unreasonable. In fact, the imposition of such a requirement would threaten the economic viability of the mining industry contrary to the following provision in the New Mexico Mining Act:

> The purposes of the New Mexico Mining Act include promoting responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals that are *vital to the welfare of New Mexico*.

NMSA 1978, §69-36-2 (emphasis added); *see also Phelps Dodge Tyrone*, 2006 NMSA-010, ¶29 ("[M]ining is a necessary and important component of our economy and our modern way of life.")(interpreting the WQA).

The Attorney General and the NGOs also err in relying on NMSA 1978, §74-6-5(E)(3), which provides:

> The constituent agency shall deny any application for a permit or deny the certification of a federal water quality permit if: . . . (3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharge's effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use.

Under the preceding provision, WQA's prohibition against discharges without an approved discharge permit cannot be violated unless one knows where the "place of withdrawal" is located. It begs the question to argue that, by defining the "place of withdrawal," the WQCC would be sanctioning violations of the WQA.

An administrative agency also has exceedingly broad powers to regulate within the scope of its authority. *E.g.*, *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶¶13-36, 289 P.3d 1232. Quite apart from its authority to define unclear statutory terms, the WQCC has general authority to decide where the Section 3103 standards should apply. There is a "strong presumption" that its authority will be upheld. *Id.*, ¶ 15 (citation and internal quotation marks omitted). For example, in NMSA 1978, §74-6-4(E) and (K), the WQCC is given the power to classify waters, to specify prevention and monitoring measures for various industries, and to take other steps which will have the effect of determining where the Section 3103 standards apply. The WQCC may exercise all authority that is necessarily implied from that statutory authority. *See Tri-State*, 2012-NMSC-039, ¶13.

The Attorney General and the NGOs also miss the mark when they repeat the often quoted, but unilluminating, observation that 90% of New Mexicans use groundwater as their primary source of drinking water supply. While this may be true, no reasonable person would expect to use all groundwater contained within a past or active mine site, or open pit, as a public drinking water supply. Moreover, the groundwater derived from municipal drinking water supplies is required to meet EPA drinking water standards. As long as water outside the monitoring system envisioned by the proposed

Copper Mine Rules remains unimpaired, public health will be protected in a manner that will provide a reasonable balance between environmental concerns and economic well-being.

The NGOs' assertions that the proposed Copper Mine Rules would license water pollution in a so-called "Sacrifice Zone" are misplaced. The idea that the Legislature, by adopting the WQA, intended that every drop of groundwater in the state be maintained at drinking water quality is directly contradicted by NMSA 1978, Section 74-6-12(F), which provides: "[R]easonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded." The NGOs point to the qualifier contained in the final sentence of the above-quoted provision. Once again, however, their reasoning is circular. Water quality standards apply only at "any place of withdrawal of water for present or reasonably foreseeable future use." NMSA 1978, Section 74-6-5(E)(3). Unless one knows where that place is, it is impossible to determine whether water quality standards have been "exceeded."

The Attorney General (Motion at 3) and the NGOs (Joint Motion at 10) suggest that the WQA is somehow violated if prior "long standing interpretations" or "former long-held positions" are changed to embrace a POC approach. To the contrary, even if the unsupported premise of a long-standing interpretation is assumed in this instance, when past interpretations prove unworkable, that is precisely the time that "long-held positions" need to be changed. Indeed, the Court of Appeals in *Tyrone* recognized the same flaws in past interpretation which we are discussing and ordered the WQCC to take

corrective action. 2006-NMCA-115, ¶ 35. The Attorney General's and NGO's position that the status quo should be maintained, with no realistic definition of what constitutes a "place of withdrawal," directly contradicts the Court of Appeals mandate in *Tyrone*.

Adoption of NMED's prior interpretations of the WQA and accompanying regulations (which are more recent than they are long-standing) has led to the unsupportable conclusion that all groundwater within a copper mining facility that has admirably served New Mexico's economic needs for 110 years must be maintained at drinking water quality during mining and abated to drinking water quality. That is a manifestly absurd result. The Legislature foresaw the possibility that past administrative interpretations might become unworkable and therefore specifically provided the WQCC with authority to "amend" them. NMSA 1978, §74-6-6. WQCC is not even required to adopt numerical standards. *See Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm.*, 98 N.M. 240, 245, 647 P.2d 873, 878 (1982) ("The lack of numerical standards is, therefore, not a basis for finding the statute unconstitutional.") In such circumstances, adopting reasonable regulations concerning where those standards apply is well within WQCC's authority. Indeed, numerous jurisdictions have adopted, by regulation, a POC approach to regulating groundwater quality. *E.g.*, 40 CFR §264.95(a) (2005); Ariz. Rev. Stat. Ann. § 49-244 (Thomson/West 2013) (aquifer protection controls; hazardous substances); Cal. Admin. Code tit. 22, § 66264.95 (Thomson/West 2013) (hazardous waste management); 5 CO ADC 1002-41:41.6 (Thomson/West 2013) (basic standards for ground water); Haw. Admin. Rules, § 11-264-95(a) (Thomson/West 2013) (hazardous waste management standards); ID ADC 58.01.11.401 (Thomson/West

2013) (ground water quality rule); 35 IL ADC 615.203 (Thomson/West 2013) (ground water monitoring requirements); Code Me. R. 06-096 Ch. 854, § 8(D)(2) (hazardous waste management); MN ADC 7045.0484 (Thomson/West 2013) (groundwater protection); 25 Pa. Code § 264a.97(3) (West 2013) (hazardous waste treatment); Tenn. Comp. R. & Regs. § 1200-1-13-08 (Thomson/West 2013) (hazardous substance remediation); WA ADC 173-200-060 (Thomson/West 2013) (water quality standards for ground waters).

POINT II

The Flaws in the Current Regulatory Regime are not Cured by the Availability of Variance Procedures.

As we established in Point I, it is not feasible to maintain all groundwater at a mining site to drinking water quality.[3] With little explanation, the Attorney General (Motion at 17, 19) and the NGOs (Motion at 4-5) both suggest that the existence of variance procedures somehow informs the present inquiry. To the contrary, promulgating an unattainable regulation, and then attempting to justify it by saying that a variance can be obtained, is bad public policy, arbitrary and capricious, and contrary to law.

A variance procedure by its very nature is discretionary. *Duke City Lumber Co. v. New Mexico Environmental Imp. Bd.*, 95 N.M. 401, 409, 622 P.2d 709, 717 (Ct. App. 1980). "This is a *powerful weapon* placed in [a board's] hands." *Id.* (emphasis added).

[3] We note that one factor the WQCC may weigh in adopting regulations is the "feasibility of a user or subsequent user treating the water before a subsequent use." NMSA 1978, §74-6-4(E)(5).

If, as here, meeting the primary regulation is unfeasible, and if the only way to mine would be to seek a variance, that would necessarily vest in the WQCC discretionary control over whether the owner of mineral rights could develop its property.

In *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000), the court succinctly stated that although a waiver provision may be "legitimate," it "cannot save a rule that on its own has no rational basis . . ." *See also U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 571 (D.C. Cir. 2004) ("[T]he mere existence of a safety valve does not cure an irrational rule."). Otherwise, any rule, "no matter how irrational, could be struck down, provided only that a waiver procedure was attached." *ALLTEL Corp. v. F.C.C.*, 838 F.2d 551, 561-62 (D.C. Cir. 1988).

In *ALLTEL*, the court likened such a rule to a regulation which denies all brown-haired people operating licenses, but then gives a commission the authority to grant licenses to brown-haired people born in odd-numbered years in its sole discretion. *Id.* at 558-59. Additionally, the regulated party is entitled, in the first instance, to sufficient content and definiteness to amount to a meaningful exercise in rulemaking. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997). Put more colorfully: "It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' " *Id.*

POINT III

The Use of a Drinking Water Standard for Operating Mines Would Potentially Deprive the State of Significant Sources of Revenue and Economic Development.

As noted previously, the Legislature has found that mining is "vital to the welfare of New Mexico," NMSA 1978, §69-36-2, and the Court of Appeals has found that mining is a necessary and important component of our economy. *Tyrone*, 2006-NMCA-010, ¶29. In the succeeding material, we discuss why those pointed observations are true.

New Mexico is currently ranked 46th among the states in manufacturing production.[4] Its ranking among the states in agricultural production is 37th.[5] New Mexico ranks in the second to last quintile of states in manufacturing growth (1.2%),[6] and was "dead last" among the states and the District of Columbia in job growth between January 1, 2010 to October 2012.[7] As a consequence of New Mexico's lagging standing in other areas of economic endeavor, the State has depended upon the resource extraction

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[4] U.S. Bureau of Labor Statistics, Current Employment Statistics program. Statistical Abstract of the United States, 2010 (available at http://www.census.gov/compendia/statab/2012/ranks/rank26.html. New Mexico's GDP slipped 2.2% in 2009. New Mexico Business Weekly, (November 18, 2010) (available at http://www.bizjournals.com/albuquerque/news/2010/11/18/new-mexicos-gdp-slipped-22-in09 .html).

[5] *See* New Mexico Department of Agriculture website, chart entitled "Top 5 agriculture exports, estimates, FY 2007", (available at http://www.nasda.org/cms/8813.aspx).

[6] *See* Economic Recovery Widespread across States in 2010, U.S. Bureau of Economic Analysis (available at http://www.bea.gov/newsreleases/regional/gdp_state/gsp_newsrelease.htm).

[7] *See* Lagging Economy Tests N.M. Leaders, (January 7, 2013) (available at http://www.santafenewmexican.com/PrintStory/010813NMeconomy).

industry as a significant source of private economic activity. As one commentator observed, "[i]t is difficult to overestimate the effect that mining has had on the history and development of New Mexico.[8]

Much data has been collected showing the relative importance of mining in New Mexico. In the 1960s, mining represented 3.5 percent of all New Mexico employment. In the 1980s, total mining employment was 16,500 persons. However, by 2008, the number of mine workers dropped to 4,620. This is tragic since wages in the mining industry are so much higher than in other sectors. The total contribution of mining to state GDP in 2008 was $2.562 billion. Total tax contribution was $620 million. Direct and indirect mining salaries and wages were $1.299 billion.[9]

New Mexico is among the largest producers in the country in potash (ranked first among the fifty states), copper (ranked third), molybdenum (fifth) and coal (twelfth).[10] In addition to New Mexico's ranking in actual production, so-called "world class" or "significant" reserves, emphasize the State's even greater potential. According to the

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[8] John Pfeil, Economic Impact of Mining on New Mexico, p. 90, Policy, Economics, and the Regulatory Framework, Mining and Minerals Division, Energy, Minerals and Natural Resources Department (Decision-Makers Field Guide 2005) (available at http://www.geoinfo.nmt.edu/publications/decisionmakers/2005/DM_2005_Ch3.pdf).

[9] John Pfeil, Economic Impact of Mining on New Mexico, p. 91, Policy, Economics, and the Regulatory Framework (available at http://www.geoinfo.nmt.edu/publications/decisionmakers/2005/DM_2005_Ch3.pdf); PricewaterhouseCoopers for the National Mining Association, The Economic Contributions of U.S. Mining in 2008, Detail-33 (October 2010).

[10] *Id.*

U.S. Geological Survey National Mineral Resource Assessment teams, the following deposits are found in New Mexico:

- 2 short tons (58,333 ounces) gold
- 85 short tons (2,479,166 ounces) silver\50,000 short tons (100,000,000 pounds) copper
- 35,000 short tons (70,000,000 pounds) lead
- 50,000 short tons (100,000,000 pounds) zinc
- 1,000 short tons molybdenum
- 100,000 short tons fluorite
- 100 short tons tin
- 1,000,000 long tons iron
- 100,000 short tons manganese
- 50 short tons tungsten
- 20,000 short tons titanium[11]

Another area of significant potential impact is uranium. If that potential was realized, the following are likely outcomes:

- Capital expenditures - $3.1 billion
- Annual Economic Impact - $865 million
- Tax revenue - $1.3 billion
- Jobs – approximately 12,000

[11] Virginia T. McLemore, Significant Metal Deposits in New Mexico Resources and Reserves at 102, New Mexico Bureau of Geology and Mineral Resources (Decision-Makers Guide 2005) (available at http://www.geoinfo.nmt.edu/publications/decisionmakers/2005/DM_2005_Ch3.pdf).

Estimated production from 2012 to 2042 on fiscal impacts of base case uranium mining and milling would generate employment output of $248.681 billion and labor income output of $14.197 billion or about 8,300 jobs per year. Interference with those potential sources of jobs, tax revenue and economic development prevents maximization of New Mexico's opportunities.[12]

Notwithstanding the economic importance of mining, the United States is ranked by one leading mining industry consultant behind countries like Mexico, Brazil and Chile in "political risk" for mining exploration and development.[13] This is largely due to regulatory delays and environmental compliance issues.[14] Another commentator noted:

> Uncertainties in the potential cost of the environmental program, the likely success of the regulatory permitting process, socio-economic impacts, including worker and public health risks, all play a role in the decision-making process [in determining whether to develop a mine].[15]

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[12] James Peach and Anthony V. Popp, The Economic Impact of Proposed Uranium Mining and Milling Operations in the State of New Mexico at 81, 86-87, Office of Policy Analysis, Arrowhead Center, Inc., New Mexico State University, Las Cruces, New Mexico (August 1, 2008) (available at http://www.arrowhead.nmsu.edu/Arrowheadcenter/policyanalysis/documents/uraniumreportaugust/2008final.pdf).

[13] Behre Dolbear Group, Inc., 2011 Ranking of Countries for Mining Investment Where "NOT TO INVEST," at 15 (February 1, 2011) (available at http://www.dolbear.com/news-resources/pressreleases).

[14] *Id.*

[15] Henry N. McCarl and Wade E. Martin, Mineral Economics and Management Society at 245, 250, Sixth Annual Professional Meeting (MEMS): the minerals industry, responding to global challenge (February 27 – March 1, 1997) (Published May 9, 1997) (Arthur Lakes Library, Colorado Scholl of Mines: available at http://library.mines.edu/).

It is no coincidence that, as the following graphic material demonstrates, mineral claims activity has decreased dramatically in the last few decades:

Table 6. Number of Public Land Survey sections that have had claims since 1976 and number of sections with active claims in 2010.

State	Number of PLSS sections in which a claim was recorded since 1976	Number of PLSS sections in which there was an active claim in 2010
Arizona	19,994	5,241
Arkansas	541	5
California	23,023	5,314
Colorado	15,168	2,207
Florida	22	4
Idaho	12,481	2,795
Montana	9,771	2,031
Nebraska	59	1
Nevada	37,552	15,099
New Mexico	8,891	1,410
North Dakota	1	0
Oregon	7,917	1,893
South Dakota	1,671	448
Utah	20,211	2,772
Washington	3,783	475
Wyoming	13,915	3,791
Total	172,290	43,486

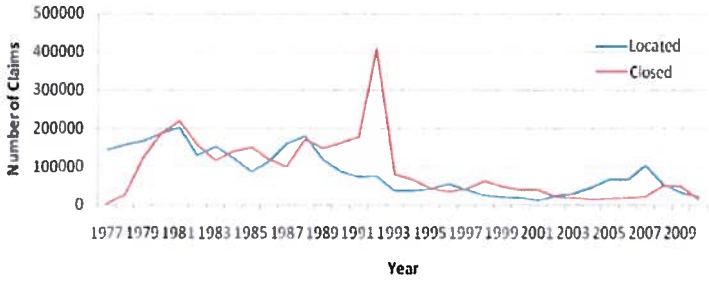

Figure 6. Number of new and closed claims each year from 1979 to 2010 in the conterminous United States. [16]

[16] USGs Mining Claim Activity in Federal Lands in the United States – Version 4, 2011 Supplement. Additionally, the number of mining claims on public lands in the West plummeted from 1 million in 1990 to approximately 300,000 in 1994. *2 American Law of Mining* §44.07[1] at 44-47, 44-48 (2d ed. 2008).

NMMA fears that adding additional uncertainties over whether unattainable water quality standards will be enforced may tip the balance against development of available resources in the minds of many operators.

If the Attorney General's and the NGO's interpretation of existing regulations is allowed to persist without intervention by the WQCC, mining and its positive economic impacts in New Mexico would be imperiled. We know of no mining company that would be willing to risk the uncertainty of expending mining startup costs of $100,000,000+ per site only to be told that an operator must maintain drinking water quality throughout the extraction process.

CONCLUSION

For the following reasons, NMMA requests that the Attorney General's Motion to Remand the Proposed Copper Mine Rule to NMED and the NGO's Joint Motion to Dismiss Petition for Rulemaking be denied.

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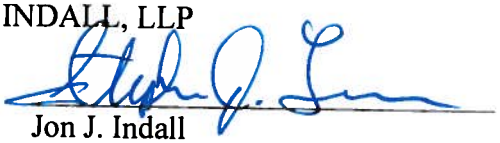
By: 
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CERTIFICATE OF SERVICE

It is hereby certified that on January 11, 2013, a true and correct copy of the foregoing *New Mexico Mining Association's Consolidated Memorandum In Response To Attorney General's Motion To Remand Proposed Copper Mine Rules and Various Organizations' Joint Motion To Dismiss Petition For Rulemaking* was mailed first class mail to the following counsel of record:

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