

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NOS. S-1-SC-35279, 35289, & 35290

GILA RESOURCES INFORMATION PROJECT,
AMIGOS BRAVOS, TURNER RANCH PROPERTIES, L.P.,
STATE OF NEW MEXICO, ex rel., HECTOR BALDERAS,
Attorney General, and WILLIAM C. OLSON,

Appellants-Petitioners,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION,

Appellee-Respondent,

and

FREEPORT-MCMORAN CHINO MINES COMPANY, FREEPORT-
MCMORAN TYRONE, INC., FREEPORT-MCMORAN COBRE
MINING COMPANY, and NEW MEXICO ENVIRONMENT DEPARTMENT,

Intervenors-Respondents.

APPELLANTS-PETITIONERS' BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

SUPREME COURT OF NEW MEXICO
FILED

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NEW MEXICO
ENVIRONMENTAL LAW CENTER
Douglas Meiklejohn, Jaimie Park, Eric
Jantz, Jonathan Block
1405 Luisa Street, # 5
Santa Fe, NM 87505
Telephone: (505) 989-9022;
dmeiklejohn@nmelc.org; jpark@nmelc.org

Attorneys for Appellants-Petitioners

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Request for Oral Argument and Statement of Compliance

Request for Oral Argument

Pursuant to NMRA 12-214.B, the Appellants-Petitioners request that the Supreme Court set this matter for oral argument. This request is made on the grounds that this matter involves both complex legal issues (*see* Brief in Chief pages 30-46) and complicated issues of hydrology (*see* Brief in Chief pages 3-30). Oral argument therefore would assist the Court by providing the members of the Court an opportunity to question and dialogue with counsel of the parties about these issues.

Statement of Compliance

Counsel for the Appellants hereby certifies that the text and footnotes of this 47 page Brief in Chief are typed in Times New Roman 14 point font. Counsel for the Appellants further certifies that the Word count for the number of words in the body of this Brief in Chief, including text and footnotes, indicates that this Brief in Chief consists of 10,845 words. This Brief in Chief therefore complies with the requirements of NMRA 12-213.F(3) of the Rules of Appellate Procedure.

SUMMARY OF PROCEEDINGS

I. Nature of Case, Course of Proceedings, and Disposition Below.

This certiorari proceeding arises from an appeal concerning an administrative rulemaking under the New Mexico Water Quality Act (“the Act”), NMSA 1978, Sections 74-6-1 through -17 (1967, as amended through 2009). Petitioners Gila Resources Information Project (“GRIP”), Amigos Bravos and Turner Ranch Properties, L.P. (“TRP”) respectfully request this Court to reverse the Court of Appeals’ opinion in *Gila Resources Inform. Proj. v. N.M. Quality Control Comm’n*, 2015-NMCA-076, 355 P.3d 36 (“*Gila*”). The opinion below upholds the Copper Mine Rule (“the Rule”), which the New Mexico Water Quality Control Commission (“the Commission” or “WQCC”) adopted to regulate the “discharge”¹ of “water contaminants”² into ground water at copper mines through

¹ “Discharge” means “spilling, leaking, pumping, pouring, emitting, emptying, or dumping into water or in a location and manner where there is a reasonable probability that the discharged substance will reach surface or [ground water].” 20.6.2.1203.C(1) NMAC.

² “Water contaminant” or “contaminant” means “any substance that could alter, if discharged or spilled, the physical, chemical, biological or radiological qualities of water.” NMSA 1978, §74-6-2(B).

the issuance of “discharge permits.”³ The New Mexico Environment Department (“NMED”) is responsible for implementing the Rule, codified at 20.6.7 NMAC.

The Commission entered an Order and Statement of Reasons (“Statement of Reasons” or “SOR”) in support of the Rule. [29 RP 006640-006853] The Statement of Reasons is 214 pages and includes 1,388 findings and conclusions. Freeport-McMoRan, Inc. (“Freeport”), owner of three large open pit copper mines in Grant County, New Mexico, prepared the Commission’s Statement of Reasons, almost in its entirety. [35 SRP⁴ 06973-07315]

The Rule requires NMED to issue discharge permits that allow existing and new copper mines to pollute ground water above the human health and other ground water quality standards set out at 20.6.2.3103 NMAC (02/18/1977, as amended through 09/26/2004) and referred to herein and in the opinion below as “3103 Standards.” As described in detail below, the Rule violates the Act because it does not prevent water pollution or protect ground water for present or reasonably foreseeable future use.

Ground water is essential to life in New Mexico.

³ “Discharge permit” is “a discharge plan approved by the [NMED],” and a “discharge plan” means “a description of any operational, monitoring, contingency, and closure requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water.” 20.6.2.7.O, R NMAC.

⁴ “SRP” means supplemental record proper.

Approximately ninety percent of the people in New Mexico rely on groundwater for drinking water, and approximately ten percent of the population obtain their drinking water from private supply systems that are not subject to the federal drinking water standards.

N.M. Mining Assn. v. WQCC, 2007-NMCA-010, ¶ 23, 141 N.M. 41.

As noted by the Court of Appeals, “Water has constitutional significance” and its “scarcity and overall importance in our semiarid state precludes our taking ... a casual view of water.” *Bybee v. City of Albuquerque*, 1995-NMCA-061, ¶ 10, 120 N.M. 17; *see also* NMSA 1978, §74-1-12(A)(1993, as amended through 1999) (describing water as “the state’s most precious resource.”). The Court’s resolution of this matter will determine whether the copper industry can pollute ground water, as a matter of right, or whether the Commission and NMED have an affirmative duty under the Act to prevent water pollution and protect New Mexico’s limited ground water supplies for present and future beneficial use.

II. Background.

This appeal requires the Court to have a basic grounding in several complex legal, factual and technical matters relating to ground water movement and pollution. Sections A through F below provide the necessary background; Sections G and H describe how the Rule allows the copper industry to pollute good quality ground water above human health and other water quality standards wherever its mines are located; and Section I briefly summarizes the undisputed history of ground water pollution at copper mines in New Mexico.

A. Water Quality Act.

The Commission's authority comes from the Water Quality Act. "The objective of the ... Act" ... is to abate and prevent water pollution." *Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546. To carry out this purpose, the Act requires the Commission to "adopt ... regulations to prevent or abate water pollution," NMSA 1978, § 74-6-4(E), and "water quality standards for surface and ground waters of the state based on credible scientific data" NMSA 1978, § 74-6-4(D). The stated objective of the Rule is to control discharges at copper mines that pollute ground water, and therefore, the focus of this brief is on the Act's protection of ground water.

The Act does not protect all ground water in the state from pollution, but only ground water for which there is a present and or reasonably foreseeable future use. The Act does this by requiring the Commission and its "constituent agencies,"⁵ including the NMED, to enforce water quality standards in ground water "at any place of withdrawal for present or reasonably foreseeable future use." NMSA 1978, § 74-6-5(E)(3); *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, ¶¶ 26-27, 140 N.M. 464 ("Tyrone").

The legislative intent behind the phrase, "any place of withdrawal for present or reasonably foreseeable future use," is the primary issue here. This

⁵ NMSA 1978, § 74-6-2(K) (defining "constituent agency" as eight state agencies, including the NMED, which is responsible for implementing the Rule).

critical statutory language, which must be understood in the context of the prior appropriation and beneficial use, determines which ground water is protected under the Act and which may be polluted. For convenience, the statutory phrase is referred to here and the opinion below as the “Place of Withdrawal.”

The Act requires NMED to deny a permit whenever the proposed discharge would cause water quality standards to be exceeded in ground water at any Place of Withdrawal, *id.*, and it imposes potentially severe consequences, including steep monetary penalties, on dischargers who violate water quality standards. NMSA 1978, § 74-6-10.1(B) (imposing “civil penalties up to the amount of ... \$10,000 per day for each violation”); NMSA 1978, § 74-6-10(A)(1) (authorizing issuance of administrative “compliance order[s] requiring compliance” with water quality standards); NMSA 1978, § 74-6-5(M)(3) (authorizing termination or modification of discharge permits if water quality standards are violated). The Act allows “reasonable degradation of water quality resulting from beneficial use,” but not above standards:

Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded.

NMSA 1978, § 74-6-12(F). As described in Section II(G) below, and in contrast to the Act, the Rule grants the copper industry the right to exceed any and all water quality standards in ground water wherever its mines are located.

Although the Act does not authorize the Commission to grant any industry a blanket exemption from water quality standards, the Act does allow the Commission to “grant an individual variance from any [Commission] regulation ... whenever it [finds] that compliance ... will impose an unreasonable burden upon any lawful business, occupation or activity.” NMSA 1978, § 74-6-4(H). However, the Commission must first hold a hearing and, if a variance is granted, it “must be conditioned upon [the] person effecting a particular abatement of water pollution within a reasonable period of time.” *Id.* Thus, individual dischargers may obtain variances from 3103 Standards for particular discharges under appropriate circumstances, provided that the Commission first conducts an adjudicatory hearing and the discharger agrees to abate the resulting water pollution within a “reasonable time.”

The Rule, however, allows the copper industry to pollute ground water above 3103 Standards without a variance. It does not require abatement of this pollution within any particular time but allows the pollution to remain unabated, in perpetuity.

B. The Commission’s Original Regulations and Ground Water Quality Standards.

In accordance with the Act, in 1977 the Commission adopted numeric ground water quality standards (*i.e.*, the 3103 Standards) along with regulations to prevent ground water pollution. 20.6.2.3000 to 20.6.2.3114 NMAC (“Original

Regulations”). The stated objective of the Rule is “to supplement the general permitting requirements of [the Original Regulations] to control discharges of contaminants specific to copper mine facilities and their operations to prevent water pollution.” 20.6.7.6 NMAC. However, unlike the Rule, the Original Regulations expressly forbid discharges that would pollute ground water above 3103 Standards at Places of Withdrawal.

(1) Place of Withdrawal under the Original Regulations.

The express purpose of the Original Regulations is to “protect all ground water of the state of New Mexico which has an existing concentration of 10,000 [milligrams per liter (“mg/l”)] or less TDS,⁶ for present and potential future use as domestic and agricultural water supply.” 20.6.2.3101.A NMAC. Thus, “domestic and agricultural water supply” are the designated uses of ground water having a TDS concentration of 10,000 mg/l or less. *See* NMSA 1978, § 74-6-4(D) (requiring the Commission to designate uses of water, as appropriate). Ground water meeting the TDS standard is referred to herein as “good quality ground water” or simply “ground water.”

The Original Regulations take a practical approach to regulating ground water by eliminating highly saline water, *i.e.*, ground water having a TDS

⁶ “TDS” means the “total dissolved solids” in ground water. 20.6.2.7.VV NMAC. Sea water and ground water produced from oil and gas wells, called “produced water,” have high TDS concentrations and thus are highly saline.

concentration of 10,000 mg/l or greater, from being protected as a Place of Withdrawal. Accordingly, under the Original Regulations, dischargers may pollute highly saline ground water above 3103 Standards. The Rule, in contrast, allows the copper industry to pollute *any* ground water above 3103 Standards, even good quality ground water that the Court of Appeals described as “pristine” and worthy of protection. *Tyrone*, 2006-NMCA-115, ¶ 29 (expressing “no doubt that the legislature intended to limit” the migration of “[c]ontaminated waters ... into areas that were previously pristine”).

(2) Adoption and Enforcement of Water Quality Standards.

In accordance with the Act, the Commission adopted the 3103 Standards to assure that ground water is fit for its designated uses, “domestic and agricultural water supply.” 20.6.2.3101.A NMAC. 3103 Standards are “numbers that represent the pH range and maximum concentrations of water contaminants in ground water which still allow for present and future use of ground water resources.” 20.6.2.3101.B NMAC. It is the 3103 Standards that apply wherever the Act requires water quality standards to be met in ground water. Moreover, it is through the 3103 Standards that the Commission fulfilled its mandate under the Act to adopt ground water quality standards that “at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act.” NMSA 1978, § 74-6-4(D).

The Rule refers to different types of standards—3103 Standards, “alternative abatement standards” (described in Section 20.6.2.4103.F NMAC), and “applicable standards.” Alternative abatement standards exceed 3103 Standards. They are considered and approved by the Commission only on a case-by-case basis in individual variance proceedings; they apply only to polluted ground water that cannot be reclaimed to meet 3103 Standards. 20.6.2.4103.F NMAC. The Rule’s “applicable standards” may be 3103 Standards, but they may also be alternative abatement standards that exceed 3103 Standards or background concentrations that also exceed 3103 Standards. 20.6.7.7.B(3) NMAC. Accordingly, ground water meeting “applicable standards” will not necessarily meet 3103 Standards.

Contrary to the Court of Appeals’ opinion below (*Gila*, 2015-NMCA-076, ¶¶ 24-26, 34, 38 and 40), the Rule does not require ground water to meet 3103 Standards. As described below, the Rule only requires ground water to meet “applicable standards” and only at discrete monitoring well locations outside the areas of expressly permitted water pollution.

In contrast, the Original Regulations require 3103 Standards to be met everywhere in ground water at Places of Withdrawal. 20.6.2.3103 NMAC (setting out 3103 Standards and generally prohibiting ground water pollution above these Standards at Places of Withdrawal); 20.6.2.3109.C(2) NMAC (requiring denial of permit if an applicant fails to demonstrate that proposed discharge will not pollute

ground water above 3103 Standards at Places of Withdrawal). But the Rule expressly exempts the copper industry from these provisions of the Original Regulations. 20.6.7.10.J(2) NMAC; 20.6.7.24.D NMAC; 20.6.7.33.D NMAC.

C. Origin of the Place of Withdrawal Language and the Intent to Protect Ground Water for Present and Future Beneficial Use.

Although the Original Regulations have protected Places of Withdrawal since 1977, the Legislature did not incorporate the Place of Withdrawal concept into the Water Quality Act until 1993. The idea of protecting “any place of withdrawal of [ground] water for present or reasonably foreseeable future use,” as well as the 10,000 mg/l TDS standard, came from New Mexico’s longest serving State Engineer (1955 to 1990), Steve Reynolds. *See generally* G. Emlen Hall, *Steve Reynolds—Portrait of a State Engineer as a Young Artist*, 38 Nat. Resources J. 537 (1998) (describing Mr. Reynolds’ tenure as State Engineer).

The New Mexico Oil and Gas Act requires the Oil Conservation Division (“OCD”) to regulate disposal of highly saline ground water produced from oil and gas wells “in a manner that will afford reasonable protection against contamination of *fresh water supplies* designated by the state engineer.” NMSA 1978, § 70-2-12(B)(15)(1978, as amended through 2004) (emphasis added).⁷ In a 1967 letter to

⁷ This requirement pre-dates the 1978 codification by many years and was formerly set out at NMSA 1953, Section 65-3-1.

then OCD director, A.L. Porter, Mr. Reynolds designated the following ground water (also called “underground water”) as protected “fresh water supplies”:

... all underground water in the State of New Mexico containing 10,000 parts per million or less of dissolved solids ... pursuant to NMSA 1953, Section 65-3-11(15); except that this designation shall not include any water for which there is no present or reasonably foreseeable beneficial use that would be impaired by contamination.

[Remand Order at 11-12, 24 RP 004483-004484 ¶ 43]⁸

State Engineer Reynolds sat on the Commission at the time it considered and adopted the Original Regulations in the mid-1970s. The minutes of the Commission’s 1976 deliberations regarding the Original Regulations provide:

Before consideration of the section by section wording of the amendments was begun, there was, at the request of Mr. Reynolds, a discussion of the general philosophy of the proposed amendments. Mr. Reynolds said that there is an obvious need for the [Commission] to *protect ground water for use*, but there have been difficulties in determining where the measurements shall be made and in making it clear where the burden of proof lies. Mr. Reynolds distributed copies of language he would propose for inclusion in [the Original Regulations], which he believed would *place the basic burden of proof where it belongs, on the discharger to prove that his discharge would not impair any other use of ground water.*

⁸ “Remand Order” refers to the Commission’s *Decision and Order on Remand, In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge-Tyrone, Inc.*, Nos. 03-12(A) and 03-13(A). The Commission entered the Remand Order on remand from *Tyrone*. It is in the record as William C. Olson (“WCO”) Exhibit 10 [24 RP 004473-004557]

[*Id.* at 14, 24 RP 004486 ¶ 52] (emphasis added) At Mr. Reynolds' suggestion, the Original Regulations do not protect *all* ground water from pollution, but only ground water for which there is a present or reasonably foreseeable future use.

Consistent with the New Mexico Water Code, Mr. Reynolds stated that the standard for obtaining a discharge permit under the regulations “would be parallel to water rights law where a permit cannot be granted except with a finding that other water rights will not be impaired.” *Id.*; *cf.* NMSA 1978, § 72-12-3(E) (2001) (requiring that permits to appropriate ground water “not impair existing water rights”). “Parallel” to the burden of an applicant seeking a permit for a new ground water appropriation under the Water Code, the applicant for a discharge permit under the Original Regulations bears the burden of proving that its discharge will not impair any present or reasonably foreseeable future use of ground water. *Cf. Cross v. Erickson*, 1963-NMSC-061, ¶ 10, 72 N.M. 73 (burden on applicant to prove non-impairment of existing water rights); 20.6.2.3109.C(2) NMAC (burden on applicant to “demonstrate” that discharge will not impair any Place of Withdrawal). The Rule relieves the copper industry of this burden.

Furthermore, just as the State Engineer has a duty under the Water Code to protect existing water rights from impairment by new appropriations, the NMED has a parallel duty under the Act and the Original Regulations to protect existing and future beneficial uses from impairment by contaminant discharges. *Compare*

NMSA 1978, § 72-12-3(E) (requiring State Engineer to deny permit if proposed appropriation would impair existing water rights) *and* 20.6.2.3109.C NMAC *with* NMSA 1978, § 74-6-5(E)(3) (requiring NMED to deny permit if 3103 Standards would be exceeded at any Place of Withdrawal); *Heine v. Reynolds*, 1962-NMSC-002, ¶ 8, 69 N.M. 398 (“The state engineer had a positive duty to determine if existing rights would be impaired”). It has long been established that water rights may be impaired by pollution. *Heine*, 1962-NMSC-002, ¶¶ 9-10, 12 (upholding State Engineer’s denial of permit because new appropriation would increase salt content of ground water and thus impair existing rights).

D. The 2006 *Tyrone* Decision and Commission’s 2009 Place of Withdrawal Determination.

The Court of Appeals did not have the benefit of the foregoing history when it decided *Tyrone*⁹ in 2006, the only prior case to consider “the legislature’s intent in using the phrase ‘any place of withdrawal of water for present or reasonably foreseeable future use’ in Section 74-6-5(E)(3).” *Tyrone*, 2006-NMCA-115, ¶¶ 27-29. *Tyrone* involved an existing open pit copper mine that had already extensively polluted ground water. [Remand Order at 8-11, 24 RP 004480 ¶ 25 - ¶ 42] (describing pollution) In this context, the Court characterized the Place of Withdrawal standard as “one of beguiling simplicity,” meaning that although it is “apparently clear and unambiguous on its face, [it] may give rise to legitimate

⁹ The Commission first described the history on remand from *Tyrone*.

differences of opinion concerning the statute's meaning.” *Tyrone*, 2006-NMCA-115, ¶ 27 (internal citation and quote omitted).

The Court did not believe that the Legislature intended 3103 Standards to be met “at the bottom of [an existing] waste rock pile” or at “the bottom of [an existing] mine pit” *Id.* ¶¶ 28, 36. However, the Court was also concerned that “[c]ontaminated waters migrate into areas that were previously pristine,” and it had “no doubt that the legislature intended to limit that kind of migration.” *Id.* ¶ 29. Additionally, although the Court shared the “Mining Association's concern that water at the bottom of [an existing] mine pit should not have to be drinkable,” the Court did “not necessarily agree ... that water ‘underneath’ a mine site need not be protected,” because:

We can conceive of a situation in which an aquifer underneath a mine site may be negatively impacted, and consequently it might be appropriate to protect that water.

Id. ¶ 36. The Court was correct. However, its comment reveals that it may not have fully appreciated that the “water at the bottom of a mine pit” is hydrologically connected to the “aquifer underlying the mine site,” as explained in Section II(F) below.

The narrow holding in *Tyrone* is only that the Place of Withdrawal language, in its application to an existing and already polluted mine site, is ambiguous. The Court therefore remanded the case to the Commission to “create some general

factors or policies to guide its determination” of Place of Withdrawal. *Id.* ¶ 35. Although the Court felt “hampered” by its lack of “technical expertise in hydrology, geology, or other applicable scientific topics,” it suggested “some possible factors that the Commission might consider.” *Id.* ¶ 36.

First, the Court suggested that “the unique geology and hydrology of the area and the particular site (including the mining or other operations and its scale) may be appropriate factors.” *Id.* ¶ 36.

Second, the Court cited a “federal EPA regulation, 40 C.F.R. § 264.95(a) (2005), defining a *point of compliance* as ‘a vertical surface located at the hydraulically downgradient limit of the waste management area that extends down into the uppermost aquifer underlying the regulated units’ also may be appropriate for consideration” *Id.* ¶36 (emphasis added). However, the Court suggested point of compliance as a possible factor *only* “insofar as it addresses the spread of [existing] contamination into groundwater outside the mine boundary.” *Id.* ¶ 36.

And the court was quick to add:

[We] decline to adopt the [Place of Withdrawal] standard as “point of compliance” It is possible that “point of compliance” is a reasonable proxy for [Place of Withdrawal] ... in a case like this one. However, there may be reasons, such as differences in statutory language, that may make federal law or law from other jurisdictions inapplicable or inappropriate in New Mexico.

Id. ¶ 37. As argued below, the Act’s purposes of preventing water pollution and protecting ground water for beneficial use makes the point of compliance system “inapplicable [and] inappropriate in New Mexico.”

On remand from *Tyrone*, the Commission conducted a 24-day hearing involving multiple parties and experts and, in the end, entered the Remand Order. [Remand Order at 1-2, 24 RP 004473-004474] The Remand Order sets forth seven objective factors to consider in identifying Places of Withdrawal in the vicinity of a particular discharge: (1) site hydrology and geology, (2) the quality of ground water prior to discharge, (3) past and current land use, (4) future land use, (5) past and current water use, (6) potential future water use and potential future water demand, and (7) population trends. [Remand Order at 78-79, 24 RP 004550-00455 ¶¶ 15-21] The Commission clarified that a Place of Withdrawal is an aquifer, and specifically determined that “the regional and alluvial aquifers underlying portions of the Tyrone mine site are places of withdrawal of water for present and reasonable foreseeable future use pursuant to Section 74-6-5(E)(3).” [Remand Order at 81, 24 RP 004553 ¶ 33; *see also id.* at 23, 24 RP 004495 ¶ 89] (“The aquifer and the ground water underlying the surface is the place of withdrawal of water.”)

At the Court of Appeals’ suggestion, the Commission also considered whether point of compliance is an appropriate proxy for Place of Withdrawal.

[Remand Order at 80, 24 RP 004552 ¶¶ 26-28] Phelps Dodge Tyrone (“Tyrone”) urged the Commission to make its permit boundary under the New Mexico Mining Act the point of compliance, an area encompassing nearly 10,000 acres:

Tyrone took the position that the lands inside the [Mining and Minerals Division (“MMD”)] Permit Boundary do not constitute places of withdrawal of water for present or reasonably foreseeable future use and, therefore, with minor exceptions, [3103 Standards] need not be met [in ground water] inside the MMD Permit Boundary.

[Remand Order at 5, 24 RP 004477 ¶ 10] The Commission rejected Tyrone’s position, because “[n]othing in the Act or the Commission Regulations provides for a ‘point of compliance,’ hydraulically up-gradient of which ground water need not be protected.” [Remand Order at 80, 24 RP 004552 ¶ 28] However, the Commission has now reversed itself and codified Tyrone’s point of compliance position into the Rule.

Finally, the Commission concluded on remand from *Tyrone* that if “it is not technically feasible for [3103 Standards] to be met in [polluted] ground water underneath the Tyrone Mine, the appropriate remedy for Tyrone is to seek [alternative] abatement standards under the Commission Regulations at section 20.6.2.4103.F NMAC.” [Remand Order at 84, 24 RP 004556 ¶ 52] As mentioned, the Commission considers and grants alternative abatement standards, on a case-by-case basis, pursuant to its authority to grant variances under the Act.

See NMSA 1978, § 74-6-4(H); 20.1.3.2.A(3) NMAC (adjudicatory hearing procedures); 20.6.2.4103.F NMAC (providing alternative abatement standards); *N.M. Mining Assn. v. WQCC*, 2007-NMCA-010, ¶ 35, 141 N.M. 41 (discussing alternative abatement standards).

E. 2009 Amendments to the Act.

The Legislature amended the Act in 2009. *Gila*, 2015-NMCA-076, ¶¶ 3-4. Prior to 2009, the Water Quality Act provided that regulations “shall not specify the method to be used to prevent or abate water pollution” *Tyrone*, 2006-NMCA-115, ¶ 12 (quoting former NMSA 1978, § 74-6-4(D)). The 2009 amendments reversed this requirement. Now the Act requires the Commission to “specify in regulations the measures to be taken to prevent water pollution and to monitor water quality.” NMSA 1978, § 74-6-4(K). The amendments also specifically require the Commission to “adopt regulations [to prevent water pollution] for the dairy industry and the copper industry,” *id.*, and further provide that:

After regulations have been adopted for a particular industry, permits for facilities in that industry shall be subject to conditions contained in the regulations.

NMSA 1978, § 74-6-5(D). Thus, unless the NMED imposes “additional conditions,” the Rule is intended to set out each and every permit condition applicable to the copper industry. The 2009 amendments, however, did not change

the Act's fundamental purposes of preventing water pollution through enforcement of water quality standards and protecting ground water for present and future beneficial use.

F. Basic Hydrologic Principles in Relation to Copper Mines and the Rule.

Because open pit copper mines profoundly influence the quality and movement of ground water, and because several provisions of the Rule are based on this undisputed fact, an understanding of basic hydrologic principles is necessary to understand the issues on appeal. [**Remand Order at 39-43, 24 RP 004511-004515 ¶ 155 - ¶ 185**] (discussing impact of Tyrone Mine on ground water quality and movement)

Before a copper mine or other development occurs, ground water migrates in aquifers (permeable rock formations) beneath the undisturbed land surface, moving from the highlands where it enters as aquifer recharge, to the lowlands where it discharges into streams to become surface water "baseflow." This basic hydrologic connection between ground and surface waters is well-known and described in several New Mexico water law cases. For example:

Baseflow is that portion of streamflow coming from groundwater that discharges into a stream or river. Where the groundwater table intersects with the ground surface, groundwater discharges to the surface and becomes surface water in the form of wetlands, lakes, streams, or springs. This often occurs at the lower elevations of a valley. Baseflow provides a consistent contribution of groundwater to

perennial rivers, and is the primary source of stable stream flow between rainstorms.

A corollary ... is that neighboring wells reduce surface flows by intercepting groundwater that, but for the interception, would still discharge into the surface stream.

Herrington v. Office of State Eng'r, 2006-NMSC-014, ¶¶ 18 and 19, 139 N.M. 368; see also *Albuquerque v. Reynolds*, 1962-NMSC-173, ¶¶ 1, 20-21, 71 N.M. 428 (ground water withdrawn from wells located “six or seven miles east of the Rio Grande” would eventually deplete surface flow in the river). In attempting to decipher the meaning of Place of Withdraw in *Tyrone*, the Court of Appeals opined, “the issue is complicated by the fact that groundwater and surface water systems are interconnected.” *Tyrone*, 2006 NMCA 115, ¶ 29.

Cappaert v. U. S., 426 U.S. 128, 96 S.Ct. 2062 (1976), a federal water law case, is helpful in understanding basic hydrologic principles in the present context because it involves a very deep sink hole, called Devil’s Hole, which is the natural equivalent to an open pit at a copper mine.¹⁰ Ground water flows into Devil’s Hole in essentially the same way that it flows into the Rio Grande, or the bottom of an open pit, forming a deep and permanent lake that provides habitat for a unique endangered species called the desert pupfish. 426 U.S. at 131-134. The Court

¹⁰ However, in contrast to a sink hole, open pits at copper mines are not hollowed out cylinders in the ground. The sides of an open pit are stepped back, sloped and benched as mining progresses, forming a “open pit surface drainage area” covering many square miles. See 20.6.7.7.B(42) NMAC (defining “open pit surface drainage area”).

characterized the lake in Devil's Hole as "surface water," (426 U.S. at 142) and ruled that the United States could enjoin ground water pumping from wells located miles away because the pumping drew water from Devil's Hole lake and threatened to destroy the pupfish's habitat. 426 U.S. at 135-138.

Like Devil's Hole, the open pits at copper mines typically intersect one or more aquifers, which induces ground water in those aquifers to flow towards and ultimately into the pit, creating a body of surface water referred to herein as the "pit lake." As ground water enters a pit it must continuously be pumped out, a process called "dewatering," during active mining operations.¹¹ No different in principle than pumping a well, dewatering an open pit lowers the water table and draws ground water towards and into the pit from miles around.¹² [**See Remand Order at 23, 24 RP 004495 ¶ 87(a)**] (describing Tyrone's withdrawal and beneficial use of water entering the open pit at Tyrone Mine) Two key definitions in the Rule are based on this well-known hydrologic principle:

(42) "Open pit surface drainage area" means the area in which storm water drains into an open pit and cannot feasibly be diverted by gravity outside the pit perimeter, *and the underlying ground water is hydrologically contained by pumping or evaporation of water from the open pit.*

¹¹ Even without active pumping, ground water that enters an open pit is removed passively by evaporation from the lake surface, which may create what the Rule calls an "evaporative sink." 20.6.7.33.D(1) NMAC.

¹² This lowers the water table and often causes wells in the vicinity to go dry, as recognized in the Mine Dewatering Act, NMSA 1978, §§ 72-12A-1 to -13 (1980), which provides for replacement water supplies to impacted well owners.

(5) “Area of open pit hydrologic containment” means, for an open pit that intercepts the water table, the area where ground water drains to the open pit and is removed by evaporation or pumping, and is interior to the department approved monitoring well network installed around the perimeter of an open pit pursuant to Paragraph (4) of Subsection B of 20.6.7.28 NMAC and also limited to the area of disturbance authorized by a discharge permit.

20.6.7.7.B(42), (5) NMAC (emphasis added). Because there is no significant difference in the areas described in the foregoing definitions, they are collectively referred to as the “Surface Drainage Area.”

The Surface Drainage Area encompasses several square miles and may include within it one or more open pits, waste rock piles, leach stockpiles, and other mine units. [4-18-13 6 Tr. 1500:23 to 1501:6] (regarding size of area at Tyrone Mine) *See also, e.g.,* 20.6.7.28.B(2) NMAC (imposing monitoring requirements on “each new leach stockpile, waste rock stockpile and tailings impoundment” but only if they are “located outside of the open pit surface drainage area”). Although ground water underlies the entire Surface Drainage Area, the pit lake occupies only a small portion of it, just as a river occupies only a small portion of its drainage basin. The Rule employs the Surface Drainage Area concept, not to *prevent* water pollution, but to allow the copper industry to design

and construct massive stockpiles, impoundments and other mine units that pollute ground water.¹³

G. The Rule Allows Extensive Ground Water Pollution Above 3103 Standards, in Perpetuity.

On its face, the Rule allows the copper industry to pollute good quality ground water above 3103 Standards wherever its mines are located. The Rule allows this pollution during active mining operations simply by waiving all 3103 Standards within the Surface Drainage Area. 20.6.7.24.D NMAC (“During operation of an open pit, [3103 Standards] do not apply to the area of open pit hydrologic containment,” *i.e.*, within the Surface Drainage Area). The Court of Appeals below acknowledged that “3103 standards do not apply” to this area, but held that the Rule nevertheless provides “ground water protection in that area by removing the contaminated water from the open pit.” *Gila*, 2015-NMCA-076, ¶ 39. It is unclear what the court meant by “protection” but it clearly did not mean that the Rule *prevents* pollution above 3103 Standards. The necessity of “removing “contaminated water” from the open pit arises only because the ground water in the surrounding aquifers has already been polluted, as allowed by the Rule.

¹³ In general, the Rule imposes few to virtually no requirements on mine units located inside the Surface Drainage Area. *E.g.*, compare 20.6.7.21.B(1) NMAC (requirements for waste rock stockpiles *outside* Surface Drainage Area) with 20.6.7.21.B(2) NMAC (requirements *inside* Surface Drainage Area).

The Rule also permits ground water pollution at copper mines by setting up a point of compliance system, under which all ground water within the Surface Drainage Area and other ground water upgradient from designated monitoring wells may exceed 3103 Standards. Under the Rule, ground water is only required to meet “applicable standards” at discrete monitoring well locations downgradient from the massive open pits, waste rock and leach stockpiles, tailings impoundments, and other mine units at copper mines. *E.g.* 20.6.7.21.B(1)(e) NMAC (pertaining to waste rock stock piles), 20.6.7.22.A(4)(e) NMAC (tailings impoundments), 20.6.7.28.B NMAC (monitoring requirements generally), 20.6.7.30.A NMAC (contingency requirements); 20.6.7.33.D(2) NMAC (requirements for flow-through open pits). Although the downgradient wells outside the Surface Drainage Area¹⁴ must be located “as close as practicable to” the mine units, the Rule imposes no minimum distance and the location of each may vary significantly depending on the “surface topography, hydrogeologic conditions, geologic controls, infrastructure, engineering design plans, depth to ground water, working distance and safety.” 20.6.7.28.B(2) NMAC.

The Rule’s point of compliance system thus allows new mine units covering thousands of acres to pollute the underlying ground water above 3103 Standards. This pollution is then allowed to migrate downgradient an indeterminate distance

¹⁴ The Rule requires no monitoring wells inside the Surface Drainage Area.

towards “perimeter” monitoring wells, where only “applicable standards” need be met. *Id.* Applicable standards, as mentioned, may exceed 3103 Standards. 20.6.7.7.B(3) NMAC.

According to the Court of Appeals below, the Rule does not allow this permitted ground water pollution to linger after mining operations cease. *Gila*, 2015-NMCA-076, ¶ 40. This is not a correct reading of the Rule. The Rule expressly allows ground water pollution at copper mines to remain, in perpetuity, after active operations cease, *i.e.* after “closure.” It does this in three ways.

First, 3103 Standards “do not apply” after closure within the Surface Drainage Areas surrounding open pits that are “considered to be a “hydrologic evaporative sink,” meaning that “the evaporation from the surface of [the pit lake] is predicted to exceed the water inflow”¹⁵ 20.6.7.33.D(1) NMAC. Second, even in so-called “flow-through” pits¹⁶ the Rule allows 3103 Standards to be exceeded if the discharger actively maintains hydrologic containment, *i.e.* stops the ground water “flow-through,” by continual pumping to keep the pit dewatered. 20.6.7.33.D(2) NMAC (requiring the water in “a flow-through pit” to “meet” 3103

¹⁵ The continual evaporative loss of water from the pit lake naturally causes ground water within the Surface Drainage Area to flow towards the pit, similar to active pumping.

¹⁶ The name is descriptive—ground water flows in one end of the pit and out the other.

Standards¹⁷ “or the open pit must be pumped in order to maintain an area of open pit hydrologic containment”) (emphasis added). [See also SOR at 179, 29 RP 006818 ¶ 1165] And third, nothing in the Rule requires the thousands of acres of polluted ground water within the “perimeter” monitoring wells to meet 3103 Standards ever, much less within a “reasonable period of time.”

H. The Rule Defines Place of Withdrawal Based on the Location of Perimeter Monitoring Wells.

The Court of Appeals attempted to harmonize the Rule’s point of compliance system with the Act’s “Place of Withdrawal” requirement, as follows:

Pursuant to the [Rule], all areas within a mine facility except areas that fall within the perimeter of the monitor wells must meet the 3103 standards.¹⁸ ... Thus, within a mine facility, any place at or beyond the monitor-well perimeter is water that may now and may in the future be withdrawn for human uses. Accordingly, every place within a mine facility at and beyond the monitor-well perimeters is protected from ground water pollution, and therefore, may be used as a “place of withdrawal.”

Gila, 2015-NMCA-076, ¶ 34. In other words, all ground water *outside* the monitoring well perimeters of a given copper mine is, *ipso facto*, a protected Place of Withdrawal, but all ground water *inside* the network is not and may be polluted

¹⁷ However, this requirement does not apply even to flow-through pits unless “applicable standards” are predicted to be exceeded in perimeter monitoring wells. 20.6.7.33.D(2) NMAC.

¹⁸ The Rule actually requires compliance with “applicable standards,” which may exceed 3103 Standards.

to any degree with any type of contaminant.¹⁹ Thus, under the Rule, Place of Withdrawal is not a “place” that exists apart from a copper mine. Its existence and location depend entirely on the location of monitoring wells installed at a particular copper mine. Accordingly, if two monitoring well perimeters are across the street from one another, only the ground water underlying the street would be protected as a Place of Withdrawal. If either monitoring well network is later changed to include the street, then the ground water underlying the street would no longer be a Place of Withdrawal.

By defining Place of Withdrawal as outside the areas of pollution defined by perimeter monitoring wells, the Commission eliminated any need for the copper industry to demonstrate that Places of Withdrawal will not be impaired by pollution. By definition, the areas of pollution permitted within the perimeter monitoring wells are *never* Places of Withdrawal so long as the pollution remains. [SOR at 204, 29 RP 006843 ¶ 1333] (“during mine operations,²⁰ these areas are not available as ‘places of withdrawal’ within the meaning of the [Act].”) As to the copper industry only, the Commission’s Statement of Reasons expressly “supersedes” the factors it formerly adopted on remand from *Tyrone* to identify

¹⁹ [See also Statement of Reasons at 204, 29 RP 006843 ¶ 1333] (“during mine operations, these [polluted] areas are not available as ‘places of withdrawal’ within the meaning of the [Act]”)

²⁰ As already explained, the Rule also allows the pollution to linger, in perpetuity, after active mining operations cease.

and protect Places of Withdrawal. [SOR at 203-204, 29 RP 006842-006843 ¶¶ 1327-1330]

The Commission found below that the areas of ground water pollution permitted under the Rule “could become ... place[s] of withdrawal” in the future. [SOR at 107, 29 RP 006746 ¶ 700] *See also Gila*, 2015-NMCA-076, ¶ 31 (holding that the Rule “protect[s] ground water underlying mine facilities so that areas within a mine facility may *become* places of withdrawal”) (emphasis added). But it is unclear what the Commission meant by this finding, especially in the context of a new mine or new mine unit overlying pristine ground water. The Act protects “any place of withdrawal for present or reasonably foreseeable *future* use.” Thus, to say that an area of polluted ground water may “become” a Place of Withdrawal in the future is to say, in effect, that there may be a future use for the polluted ground water in the future. In any event, no finding of the Commission discloses how the Rule, which allows ground water pollution across-the-board at all copper mines, actually prevents water pollution at copper mines or protects good quality ground water for present *or* reasonably foreseeable future use.

I. Copper Mines Have Caused Extensive Ground Water Pollution in New Mexico.

The opinion below includes no mention of the undisputed testimony and other evidence in the record showing that open pit copper mines have caused tens of thousands of acres of ground water pollution in New Mexico and that this

pollution persists for hundreds of years. [See, e.g., Final Groundwater Restoration Plan for the Chino, Cobre, and Tyrone Mine Facilities (“Final Restoration Plan”), Attorney General Exhibit 11 [22 RP 003558-003604] (documenting more than 20,000 acres of aquifer pollution at Freeport’s mines); [Remand Order at 9-11, 24 RP 004481-004483 ¶¶ 28-42] (documenting extensive aquifer pollution at the Tyrone Mine); [4-11-13 3 Tr. 577:5-17; 4-11-13 3 Tr. 696:15-20; 4-23-13 7 Tr. 1592:13 – 1595:9; 4-30-13 10 Tr. 2368:21 – 2369:25; 4-30-13 10 Tr. 2459:14 – 2460:6]

In contrast to its opinion below, the Court of Appeals in *Tyrone* took notice that open pit copper mines can cause extensive pollution that may persists for hundreds of years:

The process of mining copper produces acid drainage that significantly and adversely affects groundwater. Piles continue to create acid drainage for hundreds of years after mining has ceased, as the piles are exposed to water and oxygen.

2006-NMCA-115, ¶ 6; see also *Id.* ¶ 33 (“The potential environmental impacts from a mine the size of Tyrone are enormous, both in scope and duration.”). On remand from *Tyrone*, the former Commission described how stockpiles and tailings at copper mines generate acid rock drainage that can pollute ground water for hundreds of years:

The leach ore stockpiles, waste rock piles and tailing impoundments at the Tyrone Mine all contain mineral sulfides which, when oxidized, generate acidic solutions. ... Acid rock drainage occurs both in the

leach ore stockpiles, which are actively leached, and in the waste rock piles, which are not. ... This leachate from the acid rock drainage and from the leaching process has moved directly or indirectly into surface water and ground water. ... Tyrone studies have concluded that acid generation in the leach ore stockpiles and waste rock piles will continue to occur for 300 years or more.

[Remand Order at 8-9, 24 RP 004480-004481 ¶¶ 25-28] A case in point is the Tyrone Mine. Discharges of acid rock drainage, leaching solution and other water contaminants have caused thousands of acres of ground water pollution at that Mine. [See, e.g., Remand Order at 9-11, 24 RP 004481-004483 ¶¶ 31-38, 42] The Rule allows similar pollution at all copper mines.

ARGUMENT

III. Standard of Review and Preservation of Issues.

This Court should set aside the Rule if it finds that the Rule or the Commission's decision to adopt it is: "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." NMSA 1978, § 74-6-7(B) (1993). The Court reviews "de novo whether a ruling by [the Commission] is in accordance with the law." *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶18, 137 N.M. 161.

The Rule is contrary to the Act because, on its face, the Rule does not prevent water pollution or protect ground water for present or reasonably foreseeable future use. It does the opposite. It permits the copper industry to

pollute ground water above 3103 Standards without a variance and without regard to Places of Withdrawal.

Petitioners preserved these issues by raising and arguing them before the Commission and the Court of Appeals. [*E.g.*, 13 RP 000121-000132, 23 RP 004146-004308, 26 RP 005171-005235, 29 RP 006327-006355] *See generally Gila*, 2015-NMCA-076.

IV. The Court Should Set Aside the Rule as Contrary to the Water Quality Act.

This appeal turns on the meaning of the critical statutory phrase, “any place of withdrawal of [ground] water for present or reasonably foreseeable future use,” *i.e.*, Place of Withdrawal. NMSA 1978, § 74-6-5(E)(3). Although the Court of Appeals cited with apparent approval its prior decision in *Tyrone*, where it required the Commission to adopt factors to guide its Place of Withdrawal determinations, the opinion below nevertheless holds that the determination is “left to the Commission's discretion.” *Gila*, 2015-NMCA-076, ¶ 32. “One could read that statement to mean that” the Commission’s duty to protect ground water for present and reasonably foreseeable future use under the Act is “nothing more than an aspiration, subject to ... administrative discretion.” *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 47, 306 P.3d 457. This is not the case. Just as prior appropriation cannot be undermined by “administrative discretion,” *id.*, neither can

the Act's fundamental purposes of preventing water pollution and protecting ground water for present and future beneficial use.

A. The Act Does Not Give the Commission Unbridled Discretion to Define Place of Withdrawal.

As a “creature of statute,” the Commission does not have unbridled discretion. *Pub. Serv. Co. of New Mexico v. New Mexico Env'tl. Imp. Bd.*, 1976-NMCA-039, ¶ 7, 89 N.M. 223 (“PNM”). Statutes “delegating powers to administrative agencies must clearly provide reasonable standards [to] guide ... the exercise of ... discretionary powers.” *Amador v. New Mexico State Bd. of Ed.*, 1969-NMSC-076, ¶ 4, 80 N.M. 336. Thus:

[W]hen the legislature delegates powers to an agency, boundaries of authority must be defined and followed. ... Similarly, an agency must conform to some statutory standard ... or intelligible principle.

AA Oilfield Serv., Inc. v. New Mexico State Corp. Comm'n, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (internal citations and quotes omitted). The “intelligible principles” behind the Act are prevention of water pollution and protection of ground water for beneficial use, and the Act requires the Commission's regulations to conform to these principles:

[The Commission] ... shall not adopt or promulgate a standard or regulation that exceeds a grant of rulemaking authority listed in the statutory section of the Water Quality Act authorizing the standard or regulation[.]

NMSA 1978, § 74-6-4(C).

The Commission no doubt has some discretion to interpret the Act, but that discretion does not “justify altering [or] modifying ... a law created by the Legislature.” *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M. 343. An agency should exercise its discretion “to permit the fullest accomplishment of the legislative intent” underlying the Act, but not to “amend or enlarge its authority under the guise of making ... regulations.” *PNM*, 1976-NMCA-039, ¶ 10. Even “considerable discretion” does not give an agency “boundless” authority to “pour any meaning it desires into the statute” or “abdicate its statutory responsibilities by setting at naught an explicit provision of the Act.” *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, ¶¶ 16-17, 127 N.M. 272 (internal citations and quoted omitted). A regulation that “conflicts with or infringes upon what is the essence of legislative authority—the making of law” “violates separation of powers principles.” *Id.* ¶ 12 (internal citations and quotes omitted).

B. By Making Place of Withdrawal Contingent on the Location of Perimeter Monitoring wells, the Rule Conflicts with the Plain Meaning of, “Any Place of Withdrawal for Present or Reasonably Foreseeable Future Use.”

“When construing statutes, [the] guiding principle is to determine and give effect to legislative intent.” *New Mexico Indus. Energy Consumers v. PRC*, 2007-NMSC-053, ¶ 20, 142 N.M. 533. To determine legislative intent, courts “first [look] to the plain language of the statute, giving the words their ordinary meaning,

unless the Legislature indicates a different one was intended.” *Id.* If “there is no ambiguity in the plain language of a statute, and where no absurd or unreasonable result will occur,” the courts “apply the plain meaning rule and refrain from further statutory construction.” *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 11, 146 N.M. 223. In making Place of Withdrawal contingent on perimeter monitoring wells at a copper mine, the Rule conflicts with the plain meaning of “any place of withdrawal”

As explained in Section II(A) above, the legislative intent behind the Act is to prevent and abate water pollution through enforcement of water quality standards. As to ground water, this intent is carried out by enforcing 3103 Standards at “any place of withdrawal of [ground] water for present or reasonably foreseeable future use,” *i.e.*, at any Place of Withdrawal. Although various “factors” may assist in determining the exact dimensions of a Place of Withdrawal, such as those adopted by the Commission on remand from *Tyrone* [**Remand Order at 78-79, 24 RP 004550-004551 ¶¶ 15-21**], the plain meaning of the statutory language is clear and unambiguous—it literally means a place where ground water is presently being used or foreseeably could be used in the future. The intent of the Act is to conserve these places.

As the Commission found on remand from *Tyrone*, Places of Withdrawal are aquifers or portions of aquifers from which ground water is, or foreseeably will be,

withdrawn for beneficial use. Such places exist in the world just as lakes, rivers, reservoirs and other valuable water supplies exist. For 38 years, the Original Regulations have imposed the burden on discharge permit applicants to demonstrate that their proposed discharges would not impair any existing Place of Withdrawal. 20.6.2.3109.C(2) NMAC. The Legislature clearly approved of this requirement, because it took the Place of Withdrawal language, *verbatim*, from the Original Regulations and incorporated it into the Act in 1993. Moreover, when the Legislature amended the Act in 2009 it was presumptively aware of the *Tyrone* case and the Commission's Remand Order, which respectively required and established rational "factors" to guide the Commission's Place of Withdrawal determinations. *Alexander v. Anderson*, 1999-NMCA-021, ¶ 17, 126 N.M. 632 (Legislature presumed aware of "administrative construction of a statute"); *State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205 (Legislature presumed aware of case law). Accordingly, the Legislature implicitly approved of the Commission's method of determining Places of Withdrawal, since the 2009 amendments did nothing to change that method. *Id.*

Finally, interpreting Place of Withdrawal according to its plain meaning, *i.e.*, as a place having an existence apart from copper mines, does not lead to absurd or unreasonable results. On the contrary, it protects and conserves an essential and

limited resource for maximum beneficial use. *Cf. Clodfelter v. Reynolds*, 1961-NMSC-003, ¶ 22, 68 N.M. 61.

The Rule is thus contrary to the plain meaning and purpose of the Act. By making Place of Withdrawal dependent on the location of perimeter monitoring wells, the Rule effectively deletes “place” from Place of Withdrawal, rendering this key phrase meaningless and allowing the copper industry to pollute the ground water wherever its mines are located.

C. The Rule Does Not Protect Present or Reasonably Foreseeable Future Uses of Ground Water From Being Impaired by Pollution.

As set out in Section II(C) above, the Place of Withdrawal standard protects ground water for present and future use. Therefore, because “beneficial use” is the only basis, measure, and limit of the right to use water in New Mexico, N.M. Const. art. XVI, § 3, the Place of Withdrawal language of the Act must be harmonized with the statutes and well-developed common law of prior appropriation. *Sandel*, 1999-NMSC-019, ¶ 13 (statutes “must be ... harmonized with other statutes concerning the same subject matter.”)

All unappropriated water in New Mexico belongs to the public and is subject to appropriation (N.M. Const. art. XVI, § 2), and all “public waters of this state are owned by the state as trustee for the people.” *Bliss, State ex rel. v. Dority*, 1950-NMSC-066, ¶ 11, 55 N.M. 12. Under the water code, the State Engineer thus has a statutory and fiduciary duty to assure that existing water rights are protected from

impairment by new appropriations, which necessarily requires the State Engineer to first identify the existing rights entitled by protection. *See, e.g., Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶¶ 28-31, 141 N.M. 21. The Commission has a parallel duty under the Act. However, its duty extends beyond identifying and protecting existing uses of ground water from pollution; it must also protect reasonably foreseeable future uses. The Rule fails in this duty, because it does not require NMED to identify, much less protect, Places of Withdrawal where ground water is being used or may reasonably be used in the future.

In identifying Places of Withdrawal, the Commission must take into account the “basic and universal principles of prior appropriation” that are “[e]mbedded in the New Mexico Constitution.”

These include the right to appropriate public waters for beneficial use, one of the defining features of prior appropriation.

Bounds v. State ex rel. D'Antonio, 2013-NMSC-037, ¶ 19, 306 P.3d 457. To facilitate maximum beneficial use of scarce water supplies, both water and water rights are highly mobile:

[A] primary feature of the prior appropriation doctrine and its concomitant beneficial use requirement was the need for water to be mobile or divertible to other areas of use and not tied to the surrounding land. ... Because water is a scarce commodity in the West, mobility and transferability are necessary to meet changing social goals.

Walker v. United States, 2007-NMSC-038, ¶ 26, 142 N.M. 45. Thus, under principles of prior appropriation, ground water underlying even a remote copper mine may be a Place of Withdrawal.

First, the present withdrawal and beneficial use of ground water by the mining company itself renders the underlying ground water, *i.e.*, the source of supply, a Place of Withdrawal. [Remand Order at 50-52, 24 RP 004522-004524 ¶ 223 – ¶ 234] (describing current beneficial uses of water at Tyrone Mine) This is reasonable because, under prior appropriation, water rights once used for mining are inherently changeable to different purposes of use, such as domestic and agricultural purposes. *See Herrington*, 2006-NMSC-014, ¶ 46. Second, prior appropriation allows the ground water underlying a remote copper mine to be withdrawn in the future and transported to different places of use, even “over significant distances.” *Herrington*, 2006-NMSC-014, ¶ 47. [Remand Order at 52-62, 24 RP 004524-004534 ¶ 234 - ¶ 276] (describing future plans to export ground water from Tyrone Mine to different places and purposes of use in the future) The Rule fails to take the basic principles of prior appropriation into account, and therefore, it fails to protect Places of Withdrawal from being impaired by pollution.

D. The Rule Does Not Prevent Water Pollution.

The Act requires the Commission to “specify in regulations the measures to be taken to prevent water pollution” by “the copper industry.” NMSA 1978, § 74-

6-4(K). As set out below, contamination of ground water above water quality standards constitutes “water pollution” within the meaning of the Act. On its face, the Rule permits the copper industry to contaminate ground water above 3103 Standards, and therefore, it permits rather than prevents water pollution. Accordingly, the Rule is contrary to the Act and must be set aside.

In the *PNM* case, the Court of Appeals set aside a regulation of the New Mexico Environmental Improvement Board (“EIB”) as contrary to the New Mexico Air Quality Control Act (the “AQCA”), NMSA 1978, §§ 74-2-1 to -22 (1967). *PNM*, 1976-NMCA-039. The AQCA and Water Quality Act were enacted in the same year and both statutes require prevention of pollution through enforcement of numeric standards. *Compare* NMSA 1978, §§ 74-2-2(A), (B) (defining “air contaminant” and “air pollution”) *with* NMSA 1978, §§ 74-6-2(B), (C) (defining “water contaminant” and “water pollution”); *compare* NMSA 1978, § 74-2-5(B) (imposing duty on EIB to adopt air quality standards and regulations to prevent or abate air pollution) *with* NMSA 1978, §§ 74-6-4(D) and (E) (imposing duty on the Commission to adopt water quality standards and regulations to prevent or abate water pollution). The AQCA’s regulation of “air contaminant” emissions is parallel to the regulation of “water contaminant” discharges under the Act.

At issue in *PNM* was EIB's amendment of a regulation governing emissions of sulfur dioxide from coal burning equipment. *PNM*, 1976-NMCA-039, ¶¶ 4-5. Emissions of air contaminants are regulated to prevent the exceedance of air quality standards. However, EIB did not adopt the regulation at issue in *PNM* for this reason, but rather:

[To] protect welfare, property, and the public interest by reducing the significance of air quality as a limiting factor to economic growth. By reducing the amount of sulfur dioxide permitted in the air from existing sources, more room will be made available, up to the state sulfur dioxide standard, for new industry in the Four Corners area.

Id. ¶ 6. The court took issue with this rationale. First, after noting that administrative agencies have only those powers delegated by statute, the court held:

The legislative mandate [under the AQCA] is expressed in simple and direct language: The board shall prevent or abate air pollution.

Id. ¶ 7.

Second, the court held that the EIB's air quality standard for sulfur dioxide constituted the "criterion ... for determining what concentration of this particular air contaminant ... constituted air pollution," *id.* ¶ 8; and "having set the standard," EIB was "bound by it, the same as anyone else." *Id.* ¶ 19. And third, the court held that EIB had no authority under the Act to promote economic development, because:

There is nothing in the [EIB's] mandate [under the AQCA] that gives it the authority to plan for the industrial development of the area or any other area in the State. We recognize that the standards and regulations promulgated by the [EIB] will have an impact on the industrial development of the area; but such an impact should be as a consequence not by design.

Id. ¶ 10. The court set aside the regulation as contrary to the AQCA, because it did not “prevent air pollution.”

This Court should set aside the Rule for an analogous reason. The 3103 Standards adopted by the Commission establish the concentration of contaminants in ground water that constitute “water pollution,” just as the standards at issue in *PNM* defined “air pollution.” It is undisputed that (1) open pit copper mines cause water pollution above of 3103 Standards, and (2) the Rule permits all copper mines to pollute ground water above 3103 Standards. Accordingly, the Rule is contrary to the Act because, on its face, it expressly permits rather than prevents water pollution.

Both the opinion below and that in *Tyrone* attempt to justify water pollution at copper mines because mining “is a necessary and important component of our economy and our modern way of life.” *Gila*, 2015-NMCA-076, ¶ 23; *Tyrone*, 2006-NMCA-115 ¶ 29. Although this may be true, so are many other industries, and the Act does not establish any lesser duty on the Commission to prevent water pollution at copper mines than it does regarding other types of polluting industries.

Moreover, although the Commission may consider (among other things) the economic value of pollution sources and the economic reasonableness of control technologies, *Gila*, 2015-NMCA-076, ¶ 37, the Commission is not empowered to disregard its primary mission under the Act—preventing water pollution—in order to further the economic interests of the copper industry. The AQCA includes virtually the same factors for adoption of air quality regulations, *PNM*, 1976-NMCA-03, ¶ 3, yet this did not justify EIB adopting a regulation to promote economic development. As discussed below, the Act allows case-by-case variances from water quality standards, but not a wholesale disregard of standards.

E. The Rule’s Point of Compliance System is Contrary to Legislative Intent.

The Court of Appeals did not dispute that the Rule establishes a point of compliance system. *Gila*, 2015-NMCA-076, ¶¶ 27 – 29. It merely assumed that the Legislature was aware of the concept based on *Tyrone* and the “pervasiveness in other jurisdictions of laws and regulations pertaining to point of compliance systems.”²¹ *Gila*, 2015-NMCA-076, ¶ 28. Therefore, according to the court, if the Legislature had intended to affirmatively prohibit a point of compliance system, it

²¹ The court did not cite any such laws or regulations.

would have done so expressly.²² *Id.* In line with its holding that Place of Withdrawal is “left to the Commission’s discretion,” the court held:

[Our] Legislature chose to leave the decision whether to establish a point of compliance system or an alternative to the expertise of the Commission

Id. However, although the Court of Appeals disregarded it out-of-hand (*Gila*, 2015-NMCA-076, ¶ 28), statutory language from Arizona demonstrates that the legislative intent to establish a point of compliance system and allow ground pollution is easily expressed. That the New Mexico Legislature did not use such language in the Act shows clearly that the Legislature did not intend to set up a point of compliance system when it required water quality standards to be met at Places of Withdrawal.

In contrast to New Mexico, Arizona’s Legislature clearly expressed its intent to establish a point of compliance system and allow ground water pollution.²³

Under Arizona law:

The director shall designate a point or points of compliance for each facility receiving a permit under this article. For the purposes of this chapter, *the point of compliance is the point at which compliance must*

²² The Court of Appeals did not consider the Legislature’s presumed awareness of the Commission’s longstanding treatment and protection of Places of Withdrawal under the Original Regulations.

²³ Significantly different than New Mexico, ground water in Arizona does not belong to the public and is not subject to prior appropriation. *Davis v. Agua Sierra Res., LLC*, 203 P.3d 506, 508 (Ariz. 2009) (“under Arizona’s common law, groundwater is not appropriable and may be pumped by the overlying landowner, subject to the doctrine of reasonable use”).

be determined The point of compliance shall be a vertical plane downgradient of the facility that extends through the uppermost aquifers underlying that facility.

Ariz. Rev. Stat. (“A.R.S”) § 49-244 (emphasis added). Moreover, Arizona’s Legislature expressly allowed open pit mines to pollute Arizona’s ground water, but only where:

The mine pit creates a *passive containment* that is sufficient to capture the pollutants discharged and that is hydrologically isolated to the extent that it does not allow pollutant migration from the *capture zone*. For the purposes of this paragraph, “passive containment” means natural or engineered topographical, geological or hydrological control measures that can operate *without continuous maintenance*.

A.R.S. § 49-243(G)(1) (emphasis added).

There is no similar language in the New Mexico Water Quality Act, yet the Rule sets up a point of compliance system and allows ground water pollution within Surface Drainage Areas just as Arizona allows it within open pit “capture zones.”²⁴ But the Rule goes further than Arizona. It permits ground water pollution not only where there is “passive containment” of ground water, but also where containment requires “continuous maintenance” of “interceptor systems” and Surface Drainage Areas through active ground water pumping, in perpetuity. 20.6.7.21.B(1)(d)(vii), -.22.A(4)(c), -.24, and -.33.D(2) NMAC.

²⁴ The two concepts are substantially the same. Tyrone proposed the capture zone approach in *Tyrone*. 2006-NMCA-115, ¶ 8. Phelps Dodge, now Freeport, operates a very large open pit copper mine in Arizona.

If the New Mexico Legislature had intended to adopt a point of compliance system and to permit the copper industry to pollute ground water, then, like the Arizona Legislature, it could have easily expressed that intent. But instead of doing this, the New Mexico Legislature required the Commission to adopt regulations to prevent water pollution and protect ground water that has a present or reasonably foreseeable future use. Accordingly, because the Commission has no authority to rewrite the Act under the guise of regulations, the Rule must be set aside as contrary to law.

F. The Rule is Contrary to the Act Because it Exempts the Copper Industry from Complying with Water Quality Standards in Derogation of the Act's Variance Requirements.

As described above, the Act requires prevention of water pollution through enforcement of water quality standards. However, the Legislature recognized that strict compliance may not be appropriate at all sites, and therefore, it authorized the Commission (not NMED) to grant variances under certain limited, site-specific circumstances. NMSA 1978, § 74-6-4(H). To obtain a variance, a discharger must: (1) show “that compliance with the regulation [at issue] will impose an unreasonable burden”; (2) agree to effect “a particular abatement of water pollution within a reasonable period of time”; and (3) agree to come into compliance within a “period of time specified by the Commission.” *Id.* The Act also requires the

Commission to first conduct an adjudicatory hearing before granting a variance. *Id.*; 20.1.3.18 NMAC.

The Rule circumvents the Act's variance requirements because it permits widespread ground water pollution above 3103 Standards at all copper mines without a variance. The Rule requires no site-specific showing that enforcement of standards would pose an "unreasonable burden," nor does it require any abatement of water pollution within a "reasonable time." On the contrary, the Rule expressly allows water pollution to persist in perpetuity at all copper mines, as a matter of course. The Rule also deprives the public and affected landowners of their right under Section 74-6-4(H) to a site-specific adjudicatory hearing before the Commission, a hearing at which the discharger bears the burden of proof. The Rule simply grants the copper industry the unfettered right to pollute ground water above 3103 Standards wherever its mines are located, and anyone adversely affected is consigned to quibbling over the placement of monitoring wells. *Gila*, 2015-NMCA-076, ¶ 35.

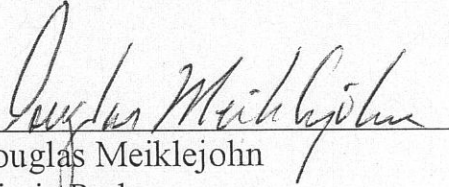
CONCLUSION AND REQUEST FOR RELIEF

The Rule is contrary to the Act because it does not prevent water pollution at copper mines or protect New Mexico's limited ground water supplies for present and reasonably foreseeable future use. Based on all the foregoing reasons, Petitioners respectfully request the Court to reverse the Court of Appeals' opinion

below and to set aside the Rule. Petitioners further request the Court to remand the Rule to the Commission to adopt a regulation that carries out its statutory mandates under the Act.

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NEW MEXICO
ENVIRONMENTAL LAW CENTER



Douglas Meiklejohn

Jaimie Park

Eric Jantz

Jonathan Block

1405 Luisa Street, Suite 5

Santa Fe, N.M. 87505

Telephone: (505) 989-9022;

dmeiklejohn@nmele.org

jpark@nmele.org

Attorneys for the Appellants-Petitioners

Certificate of Service

I certify that on October 19, 2015 copies of this Brief in Chief were sent by mail and electronic mail to:

Thomas Hnasko
Hinkle, Hensley, Shanor & Martin
P.O. Box 2068
Santa Fe, N.M. 87504-2068
thnasko@hinklelawfirm.com

*Attorney for New Mexico Water
Quality Control Commission*

Andrew Knight
Kathryn Becker
Assistant General Counsels
New Mexico Environment
Department
P.O. Box 5469

Santa Fe, N.M. 87502-5469
andrew.knight@state.nm.us
kathryn.becker@state.nm.us

*Attorneys for New Mexico
Environment Department
Department*

Tannis Fox
Assistant Attorney General
Office of the Attorney General
P.O. Box 1508
Santa Fe, N.M. 87504-1508
tfox@nmag.gov

*Attorney for the State of New Mexico ex rel
Hector Balderas, Attorney General*

Stuart Butzier
Modrall, Sperling, Roehl,
& Sisk, P.A.
P.O. Box 9318
Santa Fe, N.M. 87504-9318
stuart.butzier@modrall.com

Dalva Mollenberg
T.J. Trujillo
Gallagher & Kennedy, P.A.
1239 Paseo de Peralta
Santa Fe, N.M. 87501-2758
DLM@gknet.com
ajt@gknet.com

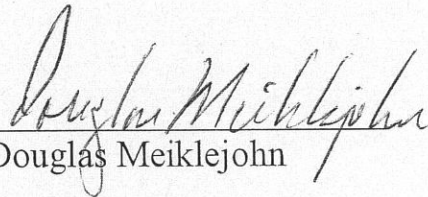
John J. Kelly
Law Office of John J. Kelly
P.A.
P.O. Box 31085
Albuquerque, N.M. 87190
john@johnjkellylaw.com

*Attorneys for Freeport
McMoRan, Inc.*

Charles Noble
409 E. Palace Avenue, Unit 2
Santa Fe, N.M. 87501
noble.ccae@gmail.com

Tracy Hughes
High Desert Energy & Environment
Law Partners, LLC
P.O. Box 8201
Santa Fe, N.M. 87504
hughes@energyenvironmentlaw.com

Attorneys for William C. Olson


Douglas Meiklejohn