

STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.*,
OFFICE OF THE STATE ENGINEER
Plaintiff

vs.

ELEPHANT BUTTE IRRIGATION
DISTRICT, *et al.*,
Defendants.

Copper Flat Expedited *Inter Se*

FILED

2017 DEC 28 PM 4:27

DISTRICT COURT
DOÑA ANA COUNTY, NM

CV-96-888
James J. Wechsler
Judge Pro Tempore

Lower Rio Grande
Adjudication

Outlying Areas Section

Subfile No. LRO-28-008-9009
Case No. 307-OA-9703126
New Mexico Copper Corporation

Subfile No. LRO-28-008-9010
Case No. 307-OA-9702236
William Frost

Case No. 307-OA-9702237
Harris Gray

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter came before the Court pursuant to a joint motion, filed January 14, 2014, requesting that the Court designate a stream system issue and expedited *inter se* proceeding to determine water rights claimed by New Mexico Copper Corporation (NMCC) and William Frost and Harris Gray.¹ After responses and

¹ Joint Motion for Designation of Stream System Issue and Expedited *Inter Se* of Water Rights Claimed by New Mexico Copper Corporation, et al., Under Subfile Numbers LRO-28-008-9010 and LRO-28-008-9009 (filed 1/14/14). Parties filing the joint motion were: Charles Barrett, Melody Sears, R. William and Nolan Winkler, Robin Tuttle, Robert Shipley, Jim Groton, John and Agnes McGarvey,

replies were filed,² the Court held a hearing on the joint motion on September 17, 2014. On September 26, 2014, the Court entered an order designating the water rights claims of NMCC and Frost and Gray as an expedited *inter se* proceeding, pursuant to Rule 1-071.2(B) NMRA.³

A ten-day trial was held on March 14 through 18, 2016 and June 27 through July 1, 2016. After trial on the issues and after considering the parties' proposed findings of fact and conclusions of law, the Court CONCLUDES that (1) any

John and Cindy Cornell, Stanley and Joyce Brodsky, Arlene Lynch, Turner Ranch Properties, L.P., New Mexico Pecan Growers, and Hillsboro Mutual Domestic Water Consumers' Association.

(Titles to documents in the footnotes are taken from the website for LRO-28-008-9009/9010; Rights of NM Copper, Gray and Frost - <https://lrgadjudication.nmcourts.gov/lro-28-008-9009-9010-rights-of-nm-copper-gray-and-frost.aspx>, last visited November 2, 2017).

² Response to Joint Motion for Designation of Stream System Issue and Expedited *Inter Se* of Water Rights Claimed by New Mexico Copper Corporation, et al., Under Subfile Numbers LRO-28-008-9010 and LRO-28-008-9009 (filed 2/3/14); State of New Mexico's Response to Motion to Set Stream System Issue on Right of New Mexico Copper, et al., and Reply to Response of New Mexico Copper, et al. (filed 2/19/14); Joint Movants' Reply to New Mexico Copper's Response to Joint Motion for Designation of Stream System Issue and Expedited *Inter Se* of Water Rights Claimed by New Mexico Copper Corporation, et al., Under Subfile Numbers LRO-28-008-9010 and LRO-28-008-9009 (filed 2/28/14); and Reply to the SNM's Response to the Joint Motion for Designation of Stream System Issue and Expedited *Inter Se* of Water Rights Claimed by New Mexico Copper Corporation, et al., Under Subfile Numbers LRO-28-008-9010 and LRO-28-008-9009 (filed 4/14/14).

³ Order Designating Expedited *Inter Se* Proceeding (entered 9/26/14).

inchoate water rights are extinguished, (2) the combined amount of the water element for LRG-4652, LRG-4652-S, LRG-4652-S-2, and LRG-4652-S-3 is 861.84 acre-feet per year (*afy*); (3) LRG-4652, LRG-4652-S, LRG-4652-S-2, and LRG-4652-S-3 have an additional, combined stock right; (4) LRG-4652-S-8 has a stock right; and (5) the amount of the water element for the open pit, LRG-4652-17, is 34.45 *afy*.⁴

NATURE OF THIS PROCEEDING AND PROCEDURAL HISTORY

This is an expedited *inter se* proceeding under Rule 1-071.2 NMRA to determine the amount-of-water element for a number of points of diversion associated with the Copper Flat mine (Copper Flat),⁵ located near the community of Hillsboro in Sierra County, New Mexico. The following is a brief description of this proceeding.

The Court commenced this proceeding on September 26, 2014 with its Order Designating Expedited *Inter Se* Proceeding. NMCC and Frost and Gray jointly filed a statement of claims on November 24, 2014.⁶ The State of New

⁴ Points of diversion will be referred to by the number assigned by the Office of the State Engineer (e.g., LRG-4652, etc.).

⁵ For the sake of convenience, the mine and the property on which the mine is located will be referred to throughout as "Copper Flat," regardless of who owned the mine and its associated claims.

⁶ Statement of Claims Under Subfile Numbers LRO-28-008-9009 and LRO-28-008-9010 (by NM Copper, Harris Gray and William J. Frost) (filed 11/24/14).

Mexico *ex rel.* Office of the State Engineer filed a disclosure describing the State's offer of judgment with regard to the Frost and Gray claims on December 2, 2014.⁷

On November 4, 2015, Turner Ranch Properties, L.P. (TRP) and the State each filed a motion for partial summary judgment concerning the Frost and Gray claims, and the State and Charles P. Barrett, et al. (the Hillsboro Claimants)⁸ filed

⁷ State's Disclosure of Offers of Judgment (filed 12/2/14).

⁸ The Hillsboro Claimants are comprised of the following: Charles P. Barnett, Stanley and Joyce Brodsky, John and Cindy Cornell, Jim Goton, Arlene Lynch, Agnes and John McGarvie, Melody K. Sears, Robert Shipley, Robin Tuttle, R. William and Nolan Winkler, and the Hillsboro Mutual Domestic Water Consumers Association.

joinders in support of TRP's motion.⁹ After responses in opposition,¹⁰ the State withdrew its motion for partial summary judgment.¹¹ Replies were filed.¹²

On November 16, 2016, NMCC and Frost and Gray filed a motion to dismiss TRP and the Hillsboro Claimants for lack of standing.¹³ The State, TRP, and the Hillsboro Claimants filed respective responses in opposition to the motion

⁹ Turner Ranch Properties, L.P.'s Motion for Partial Summary Judgment and Memorandum in Support as to Claims of Gray and Frost Under Subfile No. LRO-28-008-9010 (filed 11/4/15); Hillsboro Claimants' Joinder in the Turner Ranch Properties, L.P.'s Motion for Partial Summary Judgment and Memorandum in Support as to Claims of Gray and Frost Under Subfile No. LRO-28-008-9010 (filed 11/9/15); SNM's Motion for Partial Summary Judgment, Joinder in Support of Partial Summary Judgment Motion of Turner Ranch Properties, and Memorandum in Support (filed 11-16-15).

¹⁰ New Mexico Copper Corporation's, Harris Gray's and William Frost's Response to Turner Ranch Properties, L.P.'s Motion for Partial Summary Judgment as to Claims of Gray and Frost Under Subfile No. LRO-28-008-9010 (filed 11/19/15); NM Copper Corporation's, Harris Gray's and William Frost's Response to the Joinder by Hillsboro Defendants in Turner Ranch Properties, LP's Motion for Partial Summary Judgment as to Claims of Gray and Frost Under Subfile No. LRO-28-008-9010 (filed 11/23/15).

¹¹ SNM's Withdrawal of Partial Summary Judgment Motion (filed 11/24/15).

¹² Reply to NMCC's Opposition to Partial Summary Judgment (filed by Hillsboro Claimants 12/8/15); Turner Ranch Properties, L.P.'s Reply to NM Copper Corporation's, Harris Gray's and William Frost's Response to its Motion for Partial Summary Judgment as to Claims of Gray and Frost Under Subfile No. LRO-28-008-9010 (filed 12/8/15).

¹³ New Mexico Copper Corporation's, Harris Gray's and William Frost's Motion to Dismiss Defendants from this Expedited *Inter Se* Proceeding for Lack of Standing (filed 11/16/15).

to dismiss.¹⁴ NMCC and Frost and Gray filed replies.¹⁵ The Court heard oral argument on all dispositive motions on January 7, 2016 and denied both TRP's motion for partial summary judgment and NMCC and Frost and Gray's motion to dismiss.¹⁶

The Court set the trial for March 14, 2016.¹⁷ After five days of trial, the Court and the parties agreed that additional days were required, and an additional five days of trial began on June 27, 2016.¹⁸ At the Court's request, the parties

¹⁴ Turner Ranch Response in Opposition to NM Copper, Gray and Frost's Motion to Dismiss Defendants from this Expedited *Inter Se* Proceeding for Lack of Standing or, Alternatively, Request for Stay of Proceedings (filed 12/1/15); Response in Opposition to Motion to Dismiss; 12-1-15 (Charles P. Barrett, Melody K. Sears, R. Wm. and Nolan Winkler, Robin Tuttle, Robert Shipley, Jim Goton, John and Agnes McGarvie, John and Cindy Cornell, Stanley and Joyce Brodsky, Arlene Lynch and the Hillsboro Mutual Domestic Water Consumers Association ("Hillsboro Claimants" or "Hillsboro") Responding to the New Mexico Copper Company, William J. Frost and Harris Gray's ("NMCC's") Motion to Dismiss) (filed 12/1/16); SNM's Response in Opposition to the Motion of the Copper Flat Claimants to Dismiss Participating Parties from this Expedited *Inter Se* Proceeding for Lack of Standing (filed 12/4/15).

¹⁵ William Frost's, Harris Gray's and New Mexico Copper Corporation's Consolidated Reply Brief in Support of Motion to Dismiss (filed 12/23/15).

¹⁶ Order Denying Motion for Partial Summary Judgment (entered 1/15/16); Memorandum Order Denying Motion to Dismiss for Lack of Standing (entered 1/15/16).

¹⁷ Notice of Trial (entered 2-17-16).

¹⁸ Notice of Continuation of Trial (entered 5/16/16).

submitted proposed findings of fact and conclusions of law, written closing arguments, and post-trial briefs on January 26, 2017.¹⁹

With this background, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

PARTIES

1. NMCC was incorporated in New Mexico in 2009, with its principal place of business in New Mexico. NMCC is a wholly-owned subsidiary of THEMAC Resources, a Canadian company that is publically traded on the Toronto Stock Exchange. THEMAC Resources was formed for the purpose of developing natural resource projects. Copper Flat is its primary asset. [1 Tr. 74:3-75:14; TRP-213 at 19]²⁰

2. Frost and Gray are residents of New Mexico and are co-owners of water rights described in the files of the New Mexico Office of the State Engineer (OSE)

¹⁹ NM Copper Corporation's, William Frost's and Harris Gray's Closing Arguments (filed 1/26/17); NM Copper Corporation's and William Frost's and Harris Gray's Requested Findings of Fact and Conclusions of Law (filed 1/26/17); Hillsboro's Additional Closing Argument, Post-Trial Brief, Requested Findings of Fact and Conclusions of Law (filed 1/26/17); Turner Ranch Properties, L.P.s Post-Trial Brief (filed 1/26/17); Turner Ranch Properties, L.P.s Proposed Findings of Fact and Conclusions of Law (filed 1/26/17); State of New Mexico's Proposed Findings of Fact, Conclusions of Law, and Post-Trial Brief (filed 1/26/17).

²⁰ Page numbers for exhibits refer to the page number of the PDF versions, not the page number within the actual exhibits.

with the following well numbers: LRG-4652 (production well 1 or PW-1); LRG-4652-S (production well 2 or PW-2); LRG-4652-S-2 (production well-3 or PW-3), LRG-4652-S-3 (production well-4 or PW-4), LRG-4652-S-11, LRG-4652-S-12, LRG-4652-S-13, LRG-4652-S-14, LRG-4652-S-15, and LRG-4652-S-16. [TRP-114]

3. The Hillsboro Claimants are water rights claimants with claims located in the Outlying Areas Section of the Lower Rio Grande Basin, an administrative area established by the OSE. [HILLS-002; HILLS-003; HILLS-004; HILLS-005; HILLS-006; HILLS-007a; HILLS-007b; HILLS-008; HILLS-009; HILLS-010; HILLS-011; HILLS-012a; HILLS-012b]

4. TRP is a water rights claimant with claims located in the Outlying Areas Section of the Lower Rio Grande Basin. TRP purchased Ladder Ranch in 1992 and is the current owner of the ranch, which is adjacent to, and shares a boundary with, Copper Flat. TRP owns groundwater rights used for wildlife and livestock purposes. [8 Tr. 184:17-196:1, 206:18-207:20; TRP-217; TRP-135;TRP-228]

THE COPPER FLAT MINE

5. Copper Flat is a mineral deposit located near the town of Hillsboro, in the Hillsboro Mining District, Sierra County, New Mexico. Copper Flat contains copper, silver, gold, and molybdenum minerals that are capable of being developed

under the Mining Law of 1872, 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-43, 47 (1872). [TRP-213 at 20-23]

6. Copper Flat is located in the Outlying Areas Section of the Lower Rio Grande Basin. The OSE has assigned to NMCC Subfile No. LRO-28-008-9009. [7 Tr. 151:17-154:3; TRP-163]

WATER RIGHTS AND CLAIMS AT ISSUE

7. The trial in this matter focused on two disputes concerning the amount-of-water element of the four production wells drilled at Copper Flat beginning in 1975: (1) the amount of water put to beneficial use by Copper Flat Partnership (CFP) in 1982, and (2) whether Frost and Gray and NMCC met their burden to prove continuing diligent development of water rights, on their part and on the part of their predecessors in interest, according to CFP's original, pre-basin plan, under the standards set forth in *State ex rel. S. E. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998.

8. NMCC and Frost and Gray are requesting the Court to determine that:

- a. a vested water right in the amount of 1,963 *afy* exists for use at Copper Flat; and
- b. an inchoate water right not exceeding 7,481 *afy* exists for use at Copper Flat. [NMCC Brief at 119]

9. The State is requesting the Court to determine that:

- a. a vested water right of 861.84 *afy* exists in the production wells;
- b. a vested water right of 34.45 *afy* exists in LRG-4652-S-17;
- c. a vested water right of 3 *afy* exists for livestock and domestic use;
and
- d. all other water rights claims were either forfeited, abandoned, or
otherwise not valid under the law. [State Brief at 21, 36]

10. TRP is requesting the Court to determine that:

- a. a vested water right of 34.45 *afy* exists in LRG-4652-S-17; and
- b. all other water rights claims were either forfeited, abandoned, or
otherwise not valid under the law. [Turner Brief 58-60]

11. The Hillsboro Claimants are requesting the Court to determine that all water rights and claims in this proceeding were abandoned. [Hillsboro Brief at 43]

IDENTIFICATION OF POINTS OF DIVERSION AT ISSUE

12. The following eighteen wells and one open pit are at issue in this proceeding:

- a. Four production wells: LRG-4652 (PW-1), LRG-4652-S (PW-2),
LRG-4652-S-2 (PW-3), and LRG-4652-S-3 (PW-4) (the four
production wells). [NMCC-037; NMCC-038; NMCC-039;
NMCC-040]

- b. Seven miscellaneous wells: LRG-4652-S-4, LRG-4652-S-5, LRG-4652-S-6, LRG-4652-S-7, and LRG-4652-S-8; LRG-4652-S-9; and LRG-4652-S-10 (the miscellaneous wells). [NMCC-041; NMCC-042; NMCC-043; NMCC-044; NMCC-045 NMCC-046; NMCC-047]
- c. Six monitoring wells: LRG-4652-S-11, LRG-4652-S-12, LRG-4652-S-13, LRG-4652-S-14, LRG-4652-S-15, and LRG-4652-S-16 (the monitoring wells). [NMCC-048; NMCC-049; NMCC-050; NMCC-051; NMCC-052; NMCC-053]
- d. LRG-4652-S-17 (the open pit), which collected water and is not a well. [NMCC-054]
- e. LRG-4654, (the "Dolores well"), a six-inch casing installed in the Old El Oro mineshaft. [NMCC-055]

ACQUISITION OF COPPER FLAT BY INSPIRATION AND LEASE BY QUINTANA MINERALS

13. Inspiration Development (Inspiration), a mining company based in Arizona, acquired Copper Flat in 1967 and conducted further investigation of the site's mineral reserves. By 1973, Inspiration conducted a feasibility study and developed a plan for an open pit mine. Inspiration drilled two wells seeking an adequate water supply for a mill. [9 Tr. 59:18-25; NMCC-001; NMCC-086 at 1]

14. On July 15, 1974, Quintana Minerals Corporation (Quintana) leased Copper Flat from Inspiration and undertook a program of exploration to estimate ore reserves. Quintana's investigation continued through 1976 at a cost of \$3.32 million. Quintana expanded the Copper Flat project to 12,000 acres of private, state, and federal lands. Quintana suspended its work at Copper Flat in late-1976 due to the low price of copper. [NMCC-005 at 1; NMCC-028; NMCC-030 at 1-2; TRP-006]

15. As of September 1978, Quintana intended to mill about 15,000 tons of ore per day. [NMCC-004 at 35; TRP-003 at 2, 14]

16. In 1979, Quintana resumed work at Copper Flat. [NMCC-028]

17. As of January 1980, Quintana estimated that the project would cost \$75 million. [NMCC-030 at 10]

18. Quintana could not put the mining project into production due to the low price of copper, an inability to successfully negotiate a smelter contract, and difficulties with obtaining the necessary permits to operate the mine. [NMCC-005 at 1]

THE COPPER FLAT PARTNERSHIP AND THE OPERATION OF THE COPPER FLAT MINE

The Creation of the Copper Flat Partnership

19. In September 1979, Quintana and Phibro, Inc., a Delaware corporation, signed a letter of intent to form a partnership to develop a mining operation at Copper Flat. [NMCC-030 at 9; TRP-004]

20. Quintana and Phibro jointly renewed efforts to develop Copper Flat in June 1980 under the name Copper Flat Partnership (CFP) with Quintana having a separate role as the operator and managing agent of the mine and mill. [9 Tr. 129:13-24; NMCC-006 at 3; NMCC-037; NMCC-038; NMCC-039; NMCC-040; NMCC-041; NMCC-042; NMCC-043; NMCC-044; NMCC-045; NMCC-046; NMCC-047; NMCC-048; NMCC-049; NMCC-050; NMCC-051; NMCC-052; NMCC-053; NMCC-054; NMCC-055; TRP-008]

21. CFP leased Copper Flat from Inspiration. The lease consisted of twenty-three patented mining claims totaling 430 acres, 294 unpatented mining claims, and 160 unpatented millsites. [NMCC-072]

a. A patented mining claim is a claim owned by the holder of the patent. [NMCC-149 at 26:21-22]

b. An unpatented mining claim is a claim that is leased for a fee. [NMCC-149 at 26:22-25]

22. By July 1980, Quintana had invested over \$7 million in the project. [NMCC-030 at 10-11]

23. CFP's plan was to develop a mining operation at Copper Flat.

Financing by the Canadian Imperial Bank of Commerce

24. CFP arranged financing for the Copper Flat project in the amount of \$75 million with the Canadian Imperial Bank of Commerce (CIBC), based in Toronto, Canada. CFP signed a promissory note in favor of CIBC. [NMCC-143]

25. On June 11, 1980, CFP and CIBC executed a deed of trust, with CFP as the borrower/debtor, CIBC as the creditor/lender, and the First National Bank of Albuquerque as the trustee. Under the deed of trust, CIBC agreed to lend CFP \$75 million in exchange for a promissory note, a security interest in all current and future property and mining interests, and a conveyance of legal title of the property to First National Bank of Albuquerque as trustee. The deed of trust conveyed title to all current and future real property to the trustee to be held for the benefit of CIBC. The deed of trust was to be delivered to CIBC in the event of CFP's default.

[*Id.*]

WELLS DRILLED AT COPPER FLAT

Wells Drilled by Quintana

26. In December 1975 and January 1976, Quintana drilled three production wells, PW-1, PW-2, and PW-3, at Copper Flat in order to assure an adequate water supply for the project. [NMCC-037; NMCC-038; NMCC-039]

27. Between December 1974 and August 1975, Quintana drilled the six monitoring wells for exploration and monitoring of groundwater quality. [NMCC-48; NMCC-49; NMCC-50; NMCC-51; NMCC-52; NMCC-53]

The Production Well Drilled by CFP

28. CFP drilled a fourth production well, PW-4, around September 1980. [NMCC-030 at 12-13]

Miscellaneous Wells

29. From 1931 to 1972, the seven miscellaneous wells were drilled. Five of these wells were drilled in 1931 and 1932 for placer mining that had largely terminated by 1943. Two of these wells (LRG-4652-S-9 and LRG-4652-S-10) were drilled in 1971 and 1972 in search of an adequate supply for mining at Copper Flat. [NMCC-041; NMCC-042; NMCC-043; NMCC-044, NMCC-045; NMCC-046, NMCC-047]

Other Points of Diversion

30. The open pit (LRG-4652-S-17) was in use during mining operations at Copper Flat and intermittently after.
31. In 1932, the "Dolores" Well (LRG-4654) was developed by installing a six-inch casing in the Old El Oro mineshaft. [NMCC-055]

CONSTRUCTION OF CFP'S COPPER FLAT OPERATION

32. Site testing and preconstruction activities began at Copper Flat in 1976. CFP began construction in July 1980. [NMCC-030 at 11]
33. CFP undertook the following construction activities:
 - a. installation of a water pipeline from the well field and the water distribution infrastructure in the fall of 1980; [NMCC-030 at 13-14]
 - b. installation of six 30,000-gallon-water storage tanks and a 150,000 gallon fire/potable tank in March 1981; [NMCC-030 at 14]
 - c. employment of a 350 KW electrical generator to power a pump on PW-1 for construction purposes and installation of permanent electric power in October 1981; [*Id.*]
 - d. installation of a twenty-inch freshwater delivery pipe in September 1980; [*Id.* at 14] and

- e. connection of the production wells to the twenty-inch delivery pipe and permanent electrical power by November 1980. [*Id.* at 14]

34. CFP planned to mill 15,000 tons per day of ore. [TRP-003 at 2]

COPPER PRODUCTION AT COPPER FLAT

35. In March 1982, CFP began producing copper concentrate. It took about seven years to get the project into operation. [10 Tr. 43:23-44:5; NMCC-030 at 16]

36. During the months of April, May, and June 1982, CFP processed an average of 14,908, 15,981, and 14,014 tons per day, respectively, of copper ore. [NMCC-30 at 17]

37. At the beginning of operations from March to July 1982, CFP employed about 250 people at Copper Flat. [NMCC-065 at 5]

Water Use at Copper Flat During Mining Operations

38. Water from the production wells and other wells was used during the construction process. However, no records of the amount of water pumped were kept until March 1982, when measuring instrumentation was installed on the production wells. [NMCC-019; and NMCC-028; NMCC-030 at 14]

39. In 1982, CFP put 861.84 *afy* of water to beneficial use from the production wells for mining, milling, reclamation, dust control, wash water, and employee consumptive and sanitary use. [7 Tr. 158:22-160:19; STATE-025]

40. During the period the mill was in operation, CFP used water from the open pit for dust control. [2 Tr. 14:3-10; NMCC-030 at 1]

41. As late as November 1983, CFP used water from various wells at Copper Flat for maintaining equipment, human consumption, sanitary uses, fire protection, and cleanup. [NMCC-019]

Copper Prices During Mining Operations at Copper Flat

42. When CFP began construction on the processing equipment in 1980, the global price of copper was \$ 0.953 per pound. [NMCC-030 at 16]

43. When CFP began production in March 1982, the global price of copper was \$ 0.623 per pound. [*Id.*]

44. During the time in which CFP operated Copper Flat, CFP calculated that the price of copper at which Copper Flat would break even was \$ 0.90 per pound. [2 Tr. 21:22-22:2]

End of Mining Operations at Copper Flat

45. CFP ceased mining operations at Copper Flat in July 1982. On June 30, 1982, the price of copper was \$ 0.642 per pound. [2 Tr. 133:5-8]

46. CFP kept forty-three employees on at Copper Flat until the end of 1982. By February 1983, nineteen employees remained, including a small security and maintenance crew and others engaged in claim assessment, environmental

monitoring and testing, basic engineering, accounting, and secretarial work.

[NMCC-30 at 18-19]

47. When CFP ceased operations at Copper Flat in June 1982, CFP hoped and expected that the mine would reopen if (1) an investor could be identified that would fund a potential resumption of operations, and (2) the global price of copper would increase such that a resumption of operations was feasible. [1 Tr. 190:17-191:10]

48. It is common practice in the copper mining industry to cease operations of a mine when the global price of copper drops such that continued operation is no longer feasible. The degree to which operations are terminated varies, ranging from a temporary cessation of operations in which the mine's infrastructure remains in place ready to resume when copper prices recover, to permanent abandonment of a mine with no intent to resume. [2 Tr. 160:5-161:6]

49. Between July 1982 and the end of 1983, CFP hosted three or four potential investors or purchasers at Copper Flat. Ultimately, these efforts were not successful. [1 Tr. 191:11-192:11; NMCC-30 at 18-19; NMCC-032 at 18-19]

CFP'S DECLARATIONS OF WATER RIGHTS

50. After CFP ceased operations at Copper Flat, it was aware of its legal counsel's belief that the water rights, if perfected, could possibly be worth millions of dollars. [TRP-028 at 4]

51. On September 17, 1982, approximately two months after the Copper Flat mine ceased operations, the State Engineer declared the Lower Rio Grande Underground Water Basin (the LRG basin). The mine and associated wells were located within the LRG basin.

52. In response to the declaration of the LRG basin, and on advice of legal counsel, CFP began gathering the necessary information to file a Declaration of Underground Water Right for each of the eighteen wells and the open pit. [2 Tr. 138:6-23; TRP-028]

- a. On September 7, 1983, CFP's consulting geologist provided draft declarations based on the assumption that all water uses at Copper Flat would require 2,160 *afy* from the production wells with supplemental water, if needed, from the monitoring and miscellaneous wells and the open pit. [STATE-104 at 1]
- b. An engineer employed by CFP performed an alternative calculation, finding that 6,462 *afy* was required for all water use at the mine. [NMCC-032 at 7]
- c. After revision for the alternative calculation, the declarations (the 1984 declarations) were filed on February 17, 1984. [NMCC-037; NMCC-038; NMCC-039; NMCC-040; NMCC-041; NMCC-042; NMCC-043; NMCC-044; NMCC-045; NMCC-046; NMCC-047;

NMCC-048; NMCC-049; NMCC-050; NMCC-051; NMCC-052;
NMCC-053; NMCC-055]

53. In the 1984 declarations, CFP declared that 278,385,500 gallons of water (854.33 *afy*) were used for mining in 1982 and that it had the right to use 6,462 *afy* at Copper Flat. [NMCC-037 at 1, 3]

54. For the 1984 declarations, CFP calculated the amount of water used during operations using power consumption and known pumping volumes per kilowatt hour. [NMCC-032 at 1]

THE OSE'S SEPTEMBER 1984 FIELD CHECK

55. The OSE conducted a field check on September 13, 1984 (the 1984 field check) to verify the claims documented in the 1984 declarations. During the 1984 field check, the OSE found that the production wells were equipped and in operation to provide water for mine construction, employee consumption, equipment maintenance and operations, sanitary purposes, fire protection, and maintenance of water levels in shotcrete reservoirs. [NMCC-120 at 9-10; STATE-005 at 1; TRP-055 at 1]

56. During the 1984 field check, the OSE found that of the thirteen miscellaneous wells and monitoring wells, nine were not equipped or in use (LRG-4652-S-4, LRG-4652-S-5, LRG-4652-S-7, LRG-4652-S-10, LRG-4652-S-11, LRG-4652-S-13, LRG-4652-S-14, LRG-4652-S-15, LRG-4652-S-16), three were

equipped and in use (LRG-4652-S-6 for placer mining, LRG-4652-S-8 for domestic and livestock, and LRG-4652-S-12 for livestock), and one was equipped but not in use (LRG-4652-S-9). The open pit (LRG-4652-S-17) was not in use. [NMCC-120 at 9-10; STATE-005 at 2; TRP-055 at 2]

DEFAULT OF CFP AND THE ROLE OF CIBC

57. By March 1984, CFP had defaulted on its loan from CIBC. [NMCC-056; NMCC-143 at 22-24, 28; TRP-052]

58. On March 31, 1984, Quintana relinquished its management responsibilities for Copper Flat, and effective April 1, 1984, CFP assumed direct control over Copper Flat. [TRP-053]

59. By sometime in 1985, CIBC exerted more control over the Copper Flat project, with CFP acting as CIBC's representative with regard to the management and eventual closure and liquidation of Copper Flat. [2 Tr. 137:15-23; NMCC-066; TRP-067, TRP-071, TRP-072 at 1-2; TRP-103]

CIBC's Consideration of Selling the Water Rights

60. By April 1985, CIBC sought advice of counsel concerning the sale of the water rights associated with Copper Flat. CIBC was advised that it was "virtually certain" that any potential buyers would require the ability to transfer the point of diversion and place and type of use of the water rights. [NMCC-056]

Plans to Liquidate the Copper Flat Assets

61. By April 1985, CIBC was planning the sale of the mining and milling equipment at Copper Flat. [NMCC-057]

62. By April 1985, CIBC and CFP were exploring options for reclamation efforts at the Copper Flat site. Milton W. Hood, a consultant advising CIBC, recommended two options for reclamation of the site: (1) total stripping and sale of assets from the site and return of leases to Inspiration, or (2) sale of the buildings and equipment and capping the wells, but leaving in place water lines, water tanks, and foundations for “‘possible’ future rebuilding.” [NMCC-057]

63. On May 7, 1985, Hood proposed two alternatives to CFP for reclamation of the mine after the equipment was “dismantled and sold.” The first proposed that CFP leave the foundations, tunnels, and tailings systems intact for possible reuse of the mine. The second proposed a “complete abandonment of the property,” requiring burying of the foundations, capping of dumps and tailings, and terracing of roads, yards and other areas showing erosion. [TRP-061 at 1-2]

64. In his May 7, 1985 letter, Hood opined that “[t]he water rights could be the most valuable of the assets if they could be severed from the property.” Hood recommended that CFP hire an agent to “search for possible buyers” of the water rights. [*Id.* at 2]

65. A May 21, 1985 interoffice correspondence discussed preliminary plans for abandonment of Copper Flat. The author, P. A. Weyler, mill supervisor, noted that, with regard to the proposed plans, "[m]ost of the following refers to complete abandonment of the property." This preliminary plan of complete abandonment included using dirt and rock "to cover the SAG mill and ball mill foundations." [TRP-063 at 1-2]

66. On June 25, 1985, F. W. Knackstedt, resident manager at Copper Flat, outlined two reclamation alternatives for CIBC to consider. The alternatives were based on meetings CFP had with the BLM and ESCON, Inc., an Arizona contractor that prepared for CFP a budget estimate for reclamation. "Plan A" consisted of removing mining equipment and fencing the area. "Plan B" was much more detailed and was referred to as "Complete Abandonment." Under Plan B, complete abandonment consisted of, among other things, destroying all buildings; covering the crusher shaft to ground level and covering the crusher's foundations; covering both ends of the reclaim tunnel; filling completely the tailings thickener, reclaim water storage area, and gatehouse area with demolition refuse; filling the decant reservoir and tail dam seepage collection pond to ground level; covering the pump station foundation with alluvium; and covering all concrete slabs with nine inches of top soil. In its budget proposal for complete abandonment, ESCON noted that it did not include

removing any underground buried items such as pipe, conduit and septic tanks. Also we have not planned on removing any concrete foundations or concrete slabs on grade.

[TRP-064; TRP-066]

67. On August 2, 1985, Knackstedt informed the BLM that CFP was considering the two reclamation scenarios developed by ESCON and provided a description of both alternatives that was virtually identical to the ESCON proposals. He stated that CFP had no definite plans to abandon Copper Flat at that time. [TRP-069]

68. On November 26, 1985, the BLM sent a letter informing CFP that the two alternatives detailed in Knackstedt's August 2, 1985 letter would be considered by the BLM at the appropriate time. The BLM informed CFP that stabilization measures were required at Copper Flat to control erosion on the site. [TRP-080]

69. Sometime in 1985, CIBC undertook efforts to market the Copper Flat water rights in the amount of 6,462 *afy* to the City of Las Cruces. Las Cruces declined to purchase the right. [2 Tr. 97:4-98:15]

70. By September 25, 1986, CFP entered into discussions with a private contractor to salvage the water pipeline and electrical lines. During this time, CFP also discussed with Phelps-Dodge Corporation the purchase of Copper Flat. These discussions did not result in the salvaging of material or in a sale of the site.

[NMCC-070]

71. Upon liquidation of the mine's assets, CFP and CIBC did not intend for the water rights to be used exclusively for mining.

Sale and Removal of the Copper Flat Assets

72. As of April 11, 1986, CIBC had sold all removable physical assets of Copper Flat to OK Tedi Mining Ltd. (OK Tedi), a company headquartered in Papua, New Guinea. CIBC retained all "land holdings, permits, rights-of-way, roads, and water rights." [NMCC-067]

73. OK Tedi intended to remove all the buildings and equipment from Copper Flat down to the concrete foundations by December 31, 1986. [*Id.*]

74. All buildings and mining equipment were removed from Copper Flat in accordance with OK Tedi's plans.

ABANDONMENT OF COPPER FLAT

"Mothballing" a Mining Operation

75. "Mothballing" is a phrase used in the mining industry to describe a type of mine closure in which the mine is intended to be reopened at some point in the future. Typically, a mine is "mothballed" when conditions for mining are unfavorable, such as low copper prices. When a mine is "mothballed," the workforce is reduced to a small maintenance crew, the mill is cleaned, and the mill bearings are protected and maintained. In some cases, the mill may be operated periodically to protect the bearings from damage. The idea behind "mothballing" is

to keep the mine in such a state that it can returned to operation quickly after favorable conditions for mining return. [9 Tr. 70:3-71:6]

76. In the copper mining industry, when the global price of copper declines, it is not uncommon for mining operations to be “mothballed.” [*Id.*]

77. In New Mexico, it is common practice for mining operators to respond to low copper prices by “mothballing” their operations and putting their infrastructure on standby status. According to Jim Kuipers, a professional engineer, mines may remain “mothballed” for to up five years. [TRP-224 at 17-18]

78. Copper Flat was not “mothballed.” CFP closed the mine and terminated operations at Copper Flat.

Reclamation Plans for Copper Flat

79. On April 18, 1986, CFP informed the BLM about “developments regarding the abandonment of the mine” and subsequent reclamation. [NMCC-068]

80. On October 7, 1986, a memorandum was circulated within CFP concerning “Abandonment of Copper Flat,” which outlined estimates of alluvium and other materials needed to accomplish reclamation tasks. This outline was virtually identical to the description of “Complete Abandonment” in the ESCON recommendations of June 1985. [TRP-064; TRP-097]

81. On October 9, 1986, a delegation from the BLM met with CFP to assist in “identifying final reclamation requirements for the abandonment of the Copper

Flat mine and mill.” At the meeting, CFP informed the BLM that final reclamation efforts would begin early in 1987 [NMCC-071]

82. At the October 9, 1986 meeting, CFP and the BLM established requirements for final reclamation of the Copper Flat site that were virtually identical to the “final reclamation” plan proposed by ESCON: covering tunnels and filling shafts and reservoirs with earth and stone; contouring, grading, and performing re-vegetation of the site to minimize erosion; covering the concrete foundations with alluvium; erecting safety fences; and capping the production wells. [NMCC-071 at 1-3]

83. In the Mine Data Retrieval System maintained by the federal Mining Safety and Health Administration, the status of Copper Flat, identified as Mine ID No. 2901520, is shown as “Abandoned.” [TRP-005]

84. In a 1978 environmental assessment of Copper Flat, the BLM defined “abandonment” as “[a] period after the termination of normal mining operations which results in a termination of economically-oriented activities at the site.” The BLM presumed that after the termination of mining operations a “close out workforce” would remain on-site to complete the abandonment process. [NMCC-004 at 54, 122]

The Termination of CFP's Lease

85. In January 1986, CIBC informed Inspiration that CIBC was going to remove all structures from the mine and undertake reclamation efforts to the "satisfaction of the governing agencies involved." CIBC offered to leave the office/lab building on the site for Inspiration's use, but Inspiration declined because it had "no immediate use" for the buildings and did not want the liability and maintenance costs associated with keeping the building on site. [NMCC-066]

86. On December 31, 1986, CFP cancelled its lease interest in the Copper Flat property, and the property reverted to Inspiration. [NMCC-072]

87. The four production wells and the six monitoring wells were located on land acquired entirely by Quintana and did not revert to Inspiration. [NMCC-062]

88. In February 1987, CFP informed the New Mexico Environmental Improvement Division that "the Copper Flat property is [p]ermanently [c]losed and will not be restarted." [HILLS-023]

89. By February 5, 1987, CFP's reclamation efforts with regard to BLM lands at Copper Flat were completed. [*Id.*]

Infrastructure Left in Place at Copper Flat

90. In late 1986, CIBC and CFP considered an offer to purchase the Copper Flat water pipeline, subject only to BLM approval of the sale. The BLM would not approve the sale on the grounds that digging up the pipeline would cause "undue

and unnecessary degradation” of the BLM lands within Copper Flat. [HILLS-018; HILLS-028; TRP-103]

91. It is typical industry practice to leave underground pipelines and electrical power lines in place as part of the reclamation process. Upon the initial installation of underground appurtenances, reclamation activities such as covering with soil and vegetation take place soon after the installation, and removal would only serve to further disturb the area. [9 Tr. 215:13-216:11]

92. Kuipers testified that over the course of his career he had reviewed “literally hundreds of reclamation and closure plans” and that the burial of foundations was “entirely consistent with abandonment of a site and doing final reclamation and closure.” He further testified that “as long as [the foundations] were covered [and] there was vegetation growing over the top of them, BLM accepted that as meeting the final reclamation requirements.” [9 Tr. 213:12-214:5]

93. Kuipers also testified that, in his experience, he had never encountered a mine operator that buried foundations in order to preserve them for future use. Kuipers explained that if reuse of the foundations was the goal, there would be evidence of an attempt to protect the foundations and equipment-mounting hardware and that he saw no evidence of such steps taken at Copper Flat. [9 Tr. 214:6-215:12]

94. Only .75 miles of the 2.5 mile access road were on BLM land. The remaining 1.75 miles of the access road were on private land, which did not require reclamation. [NMCC-004 at 23]

95. Roads on BLM lands are commonly left in place after a mine closure because they allow public access to publically-owned lands. [Tr. 9 218:12-20; Tr. 10 138:15-140:5]

96. Wells drilled on BLM land during mining activities are often left in place for other uses after mining activities cease. [9 Tr. 218:21-220:1]

97. The majority of CFP's tailings pond and dam was located on privately-owned land over which BLM had no authority to require reclamation. [9 Tr. 184:11-187:1; TRP-104]

98. The OSE had permitting authority over the tailings pond. [TRP-101; TRP-106; TRP-108]

99. Around the beginning of 1987, the OSE had discussed reclamation of the tailings dam with the BLM. The BLM informed the OSE that the BLM had considered requiring CFP to breach the dam for the sake of safety. The OSE replied that the OSE had determined that breach was not necessary since the dam was in safe condition and would not need maintenance for many years. [TRP-109]

CFP'S TERMINATION OF MINING OPERATIONS AT COPPER FLAT

100. CFP abandoned its mining operations at Copper Flat.

101. When CFP abandoned mining operations at Copper Flat, it abandoned its plans to develop a mine at Copper Flat.

CFP's TRANSFER APPLICATION

102. CFP filed with the OSE an Application for Permit to Change Location of Wells and Place and Purpose of Use of Underground Waters, dated February 28, 1986 (CFP's transfer application). In CFP's transfer application, CFP explained that it had entered into "an agreement with the State of New Mexico Office of the Commissioner of Public Lands" to transfer its rights to "wells located on State lands located in the general vicinity of Las Cruces, Dona Ana County, New Mexico," approximately fifty to sixty miles south of Copper Flat. CFP sought to transfer 6,462 *afy* to "private or public utilities" for "recreational, aesthetic, industrial, manufacturing, utility, municipal, residential, subdivision, construction, stock-raising, and mining" purposes. [NMCC-065 at 1-2, 5, 20-21; TRP-082]

103. In CFP's transfer application, CFP stated that the Copper Flat project was forced to cease operations due to an "industry wide and worldwide depression in mineral prices generally and copper prices in particular" and that "at this time there is no reasonable likelihood that the operation can be made economic presently or that it will be economic in the near future." CFP concluded that "the valuable water

resource that Copper Flat has developed . . . cannot be economically be used at Copper Flat.” [NMCC-065 at 5]

104. Notice of CFP’s transfer application was published in the *Las Cruces Bulletin* on May 7, 14, and 21, 1986. [TRP-083 at 22]

105. Elephant Butte Irrigation District (EBID), Strahmann Farms, Inc., County of Doña Ana, City of El Paso, Texas, and Afton Sod Farm protested CFP’s transfer application. [TRP-094 at 1-2]

106. EBID, Doña Ana County, and Strahmann Farms each argued in their protests that the transfer of the inchoate right would be contrary to New Mexico law. [TRP-094 at 6, 9, and 12]

WILLIAM FROST, HARRIS GRAY, AND THE COPPER FLAT WATER RIGHTS

107. Frost, of Las Cruces, New Mexico, is a former real estate agent who practiced primarily in Las Cruces and Silver City, New Mexico, in the years between 1973 and 2010. Frost had been involved in the transfer of other water rights and developed an understanding of the monetary value of water rights in New Mexico. [2 Tr. 96:5-25; 99:6-11]

108. Gray, of Silver City, New Mexico, is a retired Certified Public Accountant, who practiced accounting in Silver City for forty-three years. Gray’s clients were primarily farmers and ranchers who owned water rights, and Gray was familiar with the monetary value of water rights. [5 Tr. 116:14-25-118:5]

109. Neither Frost nor Gray ever worked in the mining industry in any capacity.
[2 Tr. 202:23-203:6; 5 Tr. 142:24-143:12]

Purchase of the Water Rights

110. Sometime in 1985, an attorney, J. W. Woodbury, informed Frost that the Copper Flat water rights were being marketed and asked Frost if he would approach the City of Las Cruces to ascertain whether it would be interested in purchasing the rights. Frost presented the proposal to Las Cruces, but it declined. At this time, Frost was not aware of who owned the water rights. [2 Tr. 97:8-98:8]

111. Between 1985 and 1986, Frost became aware that the Copper Flat assets were being liquidated. He understood that any such water rights would be a valuable financial investment. [*Id.* at 98:11-15; 98:25-99:17]

112. After January 1, 1986, Frost suggested to Gray that Gray consider purchasing the Copper Flat water rights as an investment. Frost informed Gray that the amount of water associated with the rights was significant and that there was a possibility of obtaining the rights for \$20,000. [2 Tr. 99:18-23, 100:7-11; 5 Tr. 117:4-16]

113. Gray thought that if he could purchase the Copper Flat water rights, he could lease them back to copper mining operations at Copper Flat. He decided to purchase the rights and asked Frost to make inquiries to that end. [2 Tr. 100:14-16; 5 Tr. 118:6-16]

114. By verbal agreement, Frost and Gray became partners in the venture to purchase the Copper Flat water rights. Under the partnership agreement, Gray would put up the investment capital and Frost would undertake efforts to market the rights. [5 Tr. 118:21-25]

115. Frost began making inquiries with regard to purchasing the Copper Flat water rights. He made a verbal offer to CIBC on Gray's behalf to purchase the rights and received a verbal acceptance. [2 Tr. 100:18-101:18]

116. On March 26, 1987, Frost made a written offer to CIBC of \$20,000 for "all water right assets of Copper Flat Partnership." [NMCC-073]

117. Gray received a quitclaim deed and a bill of sale for the water rights from CFP. Gray specifically acknowledged that CFP made no representations or warranties concerning the water rights. [2 Tr. 101:20-102:4; NMCC-074; NMCC-075]

118. The quitclaim deed transferred "title, if any, in and to inchoate and beneficially used water rights of approximately 6,462 acre-feet" associated with the four production wells and six monitoring wells. [NMCC-074]

119. On March 31, 1987, Gray filed with the OSE a Change of Ownership of Water Right for the four production wells and the six monitoring wells, in the amount of 6,462 *afy*. [TRP-114]

120. Gray was put on notice that the water rights were subject to CFP's transfer application, and, on April 1, 1987, Gray requested that the OSE withdraw the application. [5 Tr. 145:20-147:7; TRP-113]

121. Frost and Gray purchased the water rights for investment purposes. [2 Tr. 202:23-203:6; 5 Tr. 142:24-143:12]

Frost and Gray's Application to Transfer Water Rights to Ladder Ranch

122. After the transaction was complete in 1987, Frost and Gray believed that the best return on their investment would be to keep the water rights associated with Copper Flat, in the hope that the mine would be put back into operation and that the rights could be leased to a mine operator. [2 Tr. 103:11-13; 5 Tr. 119:12-15]

123. Because of a concern that they could lose their water rights through non-use, Frost and Gray entered into an agreement with Gerald Lyda to transfer the water rights to Lyda's Ladder Ranch and change the type of use to agriculture, build a dam, and create a farm. [2 Tr. 104:1-17; 5 Tr. 119:16-120:4]

124. On September 2, 1988, Gray filed with the OSE an Application to Change Point of Diversion and Place and/or Purpose of Use from Ground Water to Surface Water (the Gray transfer application). The Gray transfer application requested that the claimed 6,462 *afy* of water rights be transferred to Ladder Ranch for "recreation & irrigation" uses. It listed the new point of diversion as "Seco Creek," from which surface water would be impounded behind an "earthen dam, 65 feet in

height, 365 feet at the base.” The application indicated that Gray intended that the wells at Copper Flat would be plugged following the transfer. [NMCC-078]

125. On February 10, 1989, Frost and Gray and Gerald Lyda reduced to writing their agreement to develop Ladder Ranch. As part of the agreement, on the condition that the parties meet their obligations and that the OSE approve the transfer, Frost and Gray agreed to convey to Lyda an “undivided one-half (½) interest in all the water rights transferred.” Frost and Gray also reserved the right to sell their half of the water rights to “whomever they wish.” While Frost and Gray had hoped that the filing of the transfer application might attract the attention of mining interests, they fully intended to follow through on their obligations under this agreement. [2 Tr. 210:22-211:5; NMCC-082]

126. As of September 1988, Frost and Gray were not aware of any competing claims to the water rights.

FROST AND GRAY’S CONFLICT WITH HYDRO RESOURCES

127. On August 24, 1987, Hydro Resources Corporation acquired an option from Inspiration to acquire Inspiration’s interest in Copper Flat. [NNCC-086]

128. On November 16, 1989, Inspiration conveyed by quitclaim deed to Hydro Resources, “all the right, title and interest . . . in those patented and unpatented mining claims” along with any appurtenances to Copper Flat. Water rights were not included in the quitclaim deed. [TRP-123]

129. On September 23, 1988, Hydro Resources filed an objection and protest to the Gray transfer application. Hydro Resources objected on the grounds that (1) the transfer of inchoate water rights was contrary to New Mexico law, and (2) the Gray transfer application constituted an application to make an inter-basin transfer that Hydro Resources opposed. [NMCC-079]

130. On July 5, 1989, Frost and Gray filed with the OSE a motion to strike Hydro Resources' objection and protest on the grounds that (1) Hydro Resources' stated grounds were not cognizable under New Mexico law, and (2) Hydro Resources had no standing to file an objection or protest because it made no showing of owning a relevant water right. [TRP-122]

131. On July 25, 1989, Cobb Resources, Inc., which controlled Hydro Resources, entered into an agreement to sell Copper Flat to the Copper Flat Mining Company (CFMC), based in Denver, Colorado. CFMC planned to develop Copper Flat with prospective partners. [NMCC-086 at 1]

132. Hydro Resources filed a response to Frost and Gray's motion to strike, arguing that Inspiration was the actual owner of the water rights and therefore Frost and Gray had no lawful interest to transfer. [NMCC-083]

133. On January 5, 1990, CFMC filed with the OSE an application for Change of Ownership of Water Right from CFP to CFMC. In the application, CFMC set forth the theory that upon the termination of CFP's lease of Copper Flat, the water rights

associated with the mine were “tied to the mining enterprise and reverted to Inspiration and . . . [are] now owned by CFMC.” [NMCC-084 at 1, 4]

134. On January 9, 1990, the OSE informed CFMC of the pending Gray transfer application for Ladder Ranch. CMFC’s legal counsel informed CMFC about Frost and Gray’s ownership claim. Legal counsel advised CFMC to proceed due to “the extraordinary amount of water involved and the extreme value of the rights,” if CFMC were to prevail in its challenge. [NMCC-084 at 54; NMCC-085 at 6]

135. CFMC’s application for a Change of Ownership of Water Right conflicted with the Gray application for change of ownership filed on April 3, 1987. This conflict created a question as to the title of Frost and Gray’s water rights.

GOLD EXPRESS CORPORATION’S ACQUISITION OF COPPER FLAT

136. Gold Express Corporation purchased the mining claims from CFMC on April 11, 1990. [*Hydro Resources Corp. v. Gray*, 2007-NMSC-067, ¶ 8, 143 NM 142, 173 P.3d 749]

137. During discussions concerning the possible lease by Gold Express of the water rights, Frost and Gray learned that Gold Express claimed an ownership interest in the water rights and that CFMC had filed a change of ownership form with the OSE. [2 Tr. 111:1-113:19]

138. In April 1990, Gold Express acquired title to Copper Flat. [NMCC-089 at 7; NMCC-094 at 14]

139. On January 4, 1991, Gold Express and Frost and Gray agreed to settle their dispute over the use and ownership of the water rights. The agreement stated in part that (1) Frost and Gray would withdraw the Gray transfer application and not interfere with Gold Express' use at Copper Flat of the beneficially used and inchoate water rights, (2) Frost and Gray would receive 20,000 shares of Gold Express stock, and (3) Frost and Gray would receive annual payments of \$50,000 to \$100,000 for Gold Express' use of the water rights. [NMCC-087]

140. On January 7, 1991, pursuant to the agreement with Gold Express, Gray notified the OSE that he wished to withdraw the Gray transfer application. [NMCC-088]

141. On January 31, 1991, Gold Express submitted to the BLM a proposed plan of operations for Copper Flat. Gold Express proposed to "rebuild the entire Copper Flat mining facility as it existed in 1986." [NMCC-089 at 7]

142. Gold Express did not put water to beneficial use at Copper Flat.

ALTA GOLD'S ACQUISITION OF COPPER FLAT

143. By September 31, 1993, Alta Gold Corporation, a publically-traded company that engaged in gold, silver, lead, and zinc mining, had acquired an option to purchase Copper Flat from Gold Express. It exercised the option in 1994. [NMCC-106; NMCC-097; NMCC-149 at 21:7-9, 21-25]

144. On November 24, 1993, Gold Express quitclaimed to Alta Gold its right, title, and interest, "if any," to the 6,462 *afy* of water rights that Gold Express acquired from CFMC in May 1990. [NMCC-108 at 7, 12]

145. On May 3, 1994, Frost and Gray entered into an agreement with Alta Gold that Alta Gold would succeed to Gold Express' rights and obligations under the January 4, 1991 agreement between Frost and Gray and Gold Express. [NMCC-104]

146. Alta Gold had hoped to reopen Copper Flat for a cost of \$35 million. The footprint of Alta Gold's proposed operations at Copper Flat was very similar to CFP's, and Alta Gold intended to recover and reuse the salvageable infrastructure remaining from CFP's operations. [NMCC-149 at 44:3-17, 70:4-10, 181:18-182:23, 184:1-14]

147. Between February 1996 and 1999, Alta Gold waited for the BLM to issue the final Environmental Impact Statement. During this period, Alta Gold made efforts to purchase a SAG mill and have it moved to Copper Flat and to lease trucks in order to begin operations. [NMCC-149 at 88:15-90:8]

148. From 1991 to 1999, Gold Express and Alta Gold paid Frost and Gray a total of \$400,000 for Frost and Gray's consent to use the water rights. [5 Tr. 179:2-5; NMCC-104]

Alta Gold's Bankruptcy and Claim to the Water Rights

149. In 1999, Alta Gold filed for bankruptcy in the United States Bankruptcy Court for the District of Nevada (the bankruptcy court). Alta Gold claimed ownership of the water rights in its bankruptcy filings. [2 Tr. 118:20-119:11; NMCC-149 at 87:3-88:10]

150. Alta Gold's assets, including those associated with Copper Flat, were liquidated in an auction ordered by the bankruptcy court. [NMCC-139 at 1-3; NMCC-149 at 191:23-192:6]

151. Frost and Gray hired legal counsel licensed in Nevada to represent their interest in Alta Gold's bankruptcy. The bankruptcy court recognized Frost and Gray's ownership of the water rights. [2 Tr. 119:12-120:4; 5 Tr. 126:22-127:3]

152. On December 21, 2000, the bankruptcy court ordered Alta Gold to execute a quitclaim deed for its claims to the water rights to Frost and Gray. [NMCC-113]

153. Ultimately, Alta Gold did not follow through on the permitting process for Copper Flat and did not reopen the mine because it filed for bankruptcy in 1999. [NMCC-0149 at 86:1-87:3]

154. Alta Gold did not put water to beneficial use at Copper Flat.

THE LOWER RIO GRANDE HYDROGRAPHIC SURVEY

155. The OSE completed the Lower Rio Grande Basin Hydrographic Survey in December 2000. In the hydrographic survey, the OSE found that the following

wells had no right of use, stating, “[w]ells were originally declared as mining wells, but only limited stock use found”: LRG-4652-S-3; LRG-4652-S-4; LRG-4652-S-5; LRG-4652-S-6; LRG-4652-S-7; LRG-4652-S-8; LRG-4652-S-9; LRG-4652-S-10; LRG-4652-S-11; LRG-4652-S-12; LRG-4652-S-13; and LRG-4652-S-15. [TRP-163 at 21]

156. The other wells at issue in this case were not located by the OSE. [*Id.*]

157. The hydrographic survey indicated “no right” for Subfile No. LRO-28-008-9009, the subfile number then assigned by the OSE to Alta Gold and currently assigned to NMCC. [7 Tr. 151:17-154:3; TRP-163 at 21]

HYDRO RESOURCES LITIGATION

158. On January 8, 2001, Hydro Resources filed suit in New Mexico’s Seventh Judicial District Court against Frost and Gray seeking a declaratory judgment to quiet title to the water rights. Hydro Resources contended that the water rights were appurtenant to the mining claims developed for Copper Flat. Litigation between Hydro Resources and Frost and Gray proceeded in district court, the New Mexico Court of Appeals, and the New Mexico Supreme Court for nearly seven years between January 2001 and November 2007. [2 Tr. 120:20-122:8, 214:7-215:2; *Hydro Resources Corp. v. Gray*, 2007-NMSC-067, ¶ 10; *Hydro Resources Corp. v. Gray*, 2006-NMCA-108, ¶ 1, 140 N.M. 363, 142 P.3d 951]

159. On November 9, 2007, the New Mexico Supreme Court recognized Frost and Gray's title to the water rights, holding that since "water rights are not considered appurtenant to land under a lease," 2007-NMSC-067, ¶ 1, title to the Frost and Gray rights did not pass to Hydro Resources with the conveyance of title to the mining claims.

160. On January 22, 2008, the Seventh Judicial District Court entered a quiet title decree to the water rights in favor of Frost and Gray. [NMCC-114]

FROST AND GRAY'S RESUMPTION OF MARKETING THE WATER RIGHTS

161. When litigation between Hydro Resources and Frost and Gray was completed, Frost and Gray resumed marketing the water rights with a preference for leasing the rights to a mining interest. [2 Tr. 195:1-17, 231:7-13; TRP-179; TRP-181]

162. Over time, Frost and Gray have been paid approximately \$1.5 million for the use of the water rights. [2 Tr. 235:5-7]

ABSENCE OF MINING ACTIVITY AT COPPER FLAT, 1990-2008

163. Max Yeh, a resident of Hillsboro, New Mexico, made between five and seven personal visits to the Copper Flat site over the course of ten to fifteen years beginning in the early-1990s. He often hiked to the top of the hills overlooking the mine. On none of these occasions did Yeh see any mining operations or personnel at Copper Flat. Yeh testified that there were no signs of the former buildings, other

than the imprints; that the open pit was ringed with lightish-yellow crystals; and that the dam was overgrown with brush, weeds, and small shrubs. [Max Yeh Tr. 30:8-19, 34:4-35:1, 36:1-37:9]

164. In a field report dated April 17, 2008, OSE staff reported that it had

[f]ound all wells, none of which are in current use. None of them are equipped and have locked covers on each of them. All but two had concrete pads with the casing right in the middle. The other two had metal covers over with locks on them and no concrete pads.

The OSE staff described the location of the wells as

Large open ranch land. There are currently large native brush and cactus over the entire area. There were rough roads leading to some of the wells, however we had to really hunt down to find.

[STATE-008]

NMCC'S PURCHASE OF COPPER FLAT

165. On July 23, 2009, NMCC entered into an option agreement with Hydro Resources to purchase Copper Flat and the associated mineral claims. [NMCC-116]

166. On September 9, 2010, Frost and Gray entered into an option agreement with NMCC for the sale of the declared water rights. At the time of trial, there remained conditions precedent to the transfer of ownership of the rights to NMCC. [2 Tr. 24:11-21, 124:20-125:25; NMCC-117]

167. On September 27, 2010, Frost and Gray filed an Amended Declaration of Ownership of Underground Water Right (2010 amended declaration) for the

production wells, claiming that 1,267 *afy* had been placed to beneficial use at the mine, rather than the 854.333 *afy* claimed in the 1984 declarations. [NMCC-118 at 1-4]

NMCC's Application to Repair and Deepen Wells

168. On February 28, 2012, NMCC filed an Application for Permit to Repair and/or Deepen Well for the four production wells and five supplemental wells (LRG-4652-S-4, LRG-4652-S-5, LRG-4652-S-6, LRG-4652-S-7, and LRG-4652-S-8). [STATE-017 at 1-3]

169. On May 5, 2012, OSE employees, Cheryl Thacker and Craig Cathey, conducted a field check of Copper Flat. Thacker and Cathey found that the four production wells were not equipped or operational and that the well casings were capped with an access point for well-monitoring purposes. [STATE-001 at 9]

170. On August 2, 2012, Thacker, an OSE Lower Rio Grande Basin supervisor, summarized in a memorandum her analysis and evaluation of NMCC's application to repair and deepen wells. Thacker recommended that:

- a. the water rights associated with LRG-4652 be limited to 888.783 *afy*, "reflecting the largest amount of water diverted and consumed in any one year" at Copper Flat; and
- b. the OSE consider CFP's pre-basin claim of 6,462 *afy* as "entirely inchoate" and "relinquished when thirty-seven years elapsed

without the resumption of mining operations or construction of a copper concentrator.”

[STATE-001 at 15]

171. On August 16, 2012, the OSE approved in part, and denied in part, the application. The request to deepen and repair the wells was approved for the four production wells and six of the miscellaneous wells (LRG-4652-S-4, LRG-4652-S-5, LRG-4652-S-6, LRG-4652-S-7, LRG-4652-S-8, and LRG-4652-S-10). The conditions of approval limited the total diversion for the four production wells and the thirteen supplemental wells to 888.783 *afy* for mining, milling, reclamation, dust control, wash water, and domestic and sanitary uses. The conditions of approval required that all the wells be equipped with measuring technology approved by the OSE. The OSE denied the pre-basin claim of 6,462 *afy* as “entirely inchoate” and “at no time been put to beneficial use.” NMCC aggrieved the OSE’s partial approval, and the matter is pending and currently stayed.

[STATE-017 at 4-7]

THE POINTS OF DIVERSION

The Four Production Wells

172. LRG-4652, LRG-4652-S; LRG-4652-S-2; and LRG-4652-S-3:

- a. LRG-4652 and LRG-4652-S were drilled in December 1975, LRG-4652-S-2 was drilled in January 1976, and LRG-4652-S-3 was drilled in 1980. [NMCC-037; NMCC-038; NMCC039; NMCC-040]
- b. The 1984 declarations for the four production wells declared an estimated future use from a combination of these wells of 6,462 *afy* and declared that the amount of water put to beneficial use was 278,385,500 gallons (854.33 *afy*). [*Id.*]
- c. The 1984 field check found that the wells were supplying water “for maintaining the equipment, human consumption, sanitary purposes, fire protection, and cleanup.” [TRP-055]
- d. The 2000 hydrographic survey found that LRG-4652-S-3 was utilized only for “limited stock use.” [STATE-007 at 21; TRP-163 at 21]
- e. The 2010 amended declaration claimed that 1,227 *afy* was put to beneficial use, rather than the 854.333 *afy* declared in 1984. [NMCC-118 at 10]
- f. During an April 2008 field visit, the OSE found that all four production wells were not equipped, not in use, and closed with a locked cover. [STATE-008]

- g. On March 14, 2011, a private consulting firm conducted a field visit (the 2011 field visit) to assess the status of the four production wells and the seven miscellaneous wells. A report (the 2011 report) summarizing the findings of the field visit states that the production wells were not equipped and that the wellhead on each well was capped with a welded steel plate that would require a cutting torch to remove. On each of the four wells, there was a steel pipe secured with a padlock that allowed the measuring of water levels. Access to the wells was hindered by overgrowth of brush. Photographs of the production wells show that the caps and pipes on each well were rusted and apparently not in use for an extended period of time. [TRP-195 at 1-5]
- h. During a May 2012 field check, the OSE found that all four production wells were not equipped, not operable, capped, and locked. [STATE-018 at 10-12]
- i. The OSE determined in August 2012 that the 6,462 *afy* inchoate claim had never been put to beneficial use. [*Id.* at 16]
- j. In July 2014, the OSE offered to recognize Frost and Gray's vested right of 861.84 *afy* in the four production wells and six monitoring wells. The OSE calculated the amount using metered and estimated

amounts actually used by the wells in 1982. [7 Tr. 159:19-160:19; STATE-011; STATE-025]

- k. 861.84 *afy* is the total amount of water put to beneficial use from the productions wells.
- l. No water has been put to beneficial use from LRG-4562, LRG-4562-S, and LRG-4562-S-2 since December 31, 1984.
- m. No water has been put to beneficial use from LRG-4562-S-3 since December 31, 2000.

The Miscellaneous Wells

173. LRG-4652-S-4:

- a. LRG-4652-S-4 was drilled in 1931 for placer mining and used for that purpose until 1943. The well was used only for watering livestock from 1943 to 1980. [NMCC-041]
- b. The 1984 field check found that LRG-4652-S-4 was not equipped or in use. [7 Tr. 32:20-24; 8 Tr. 92:25-94:11; STATE-044; TRP-055]
- c. The 2011 field visit found that LRG-4562-S-4 was equipped with a windmill with the blades missing. Access to the wellhead was somewhat blocked by brush in which an animal was nesting. Next to the well was a corroded stock tank with holes in it. Photographs

show that the well was apparently not in use for an extended period of time. [TRP-195 at 10]

- d. No credible evidence was introduced at trial excusing nonuse of water for mining purposes from LRG-4652-S-4 from 1943 to 1980, a period of approximately thirty-seven years.
- e. Water from LRG-4652-S-4 was not put to beneficial use after December 31, 1980.

174. LRG-4652-S-5:

- a. LRG-4652-S-5 was drilled in 1931 for placer mining and used for that purpose until 1943. The well was not used from 1943 to 1982. For about seven months, the well was again used for placer mining from September 1, 1982 to April 20, 1983. [NMCC-042]
- b. The 1984 field check found that LRG-4652-S-5 was not equipped and not in use. [STATE-005 at 2]
- c. The 2011 field visit found that LRG-4562-S-5 was unequipped, uncovered, and contained rocks inside the well. The roads to the well site were in poor condition and in need of repair. The 2011 report suggested that, if the well could not be cleaned out, it might be simply filled, capped, and abandoned. Photographs show that

the well was obscured by overgrowth of brush and apparently not in use for an extended period of time. [TRP-195 at 11]

- d. No credible evidence was introduced at trial excusing nonuse of water for mining purposes from LRG-4652-S-5 from 1943 to 1982, a period of approximately thirty-nine years.
- e. Water from LRG-4652-S-5 has not been put to beneficial use after December 31, 1983.

175. LRG-4652-S-6

- a. LRG-4652-S-6 was drilled in 1931 for placer mining and used for that purpose until 1943. The well was not used from 1943 to 1963. The well was used for placer mining again from 1963 to 1964, was not in use from 1964 to 1975, and was again used for placer mining from 1975 to 1984. [NMCC-43]
- b. The 1984 field check found that LRG-4652-S-6 was equipped and in use for placer mining. [STATE-005 at 2]
- c. The 2011 field visit found that LRG-4562-S-6 was unequipped, uncovered, contained rocks, and had a bee hive inside the well. The road to the well site was in poor condition and in need of repair. Photographs show that the well was obscured by an overgrowth of grass, that the cap was almost entirely rusted away,

and that the well was apparently not in use for an extended period of time. [TRP-195 at 12]

- d. No credible evidence was introduced at trial excusing nonuse of water for mining purposes from LRG-4652-S-6 from 1943 to 1963, a period of approximately twenty years.
- e. Water from LRG-4652-S-6 has not been put to beneficial use after December 31, 1986. [Tr. 7 176:15-23]

176. LRG-4652-S-7

- a. LRG-4652-S-7 was drilled in 1932 for placer mining and used for that purpose until 1943. The well was next used to water stock from 1943 to 1975 and was used for domestic purposes from 1975 to 1980. [NMCC-44]
- b. The 1984 field check found that LRG-4652-S-7 was not equipped and not in use. [STATE-005 at 2]
- c. The 2011 field visit found that LRG-4562-S-7 was unequipped and covered by a sheet of rubber and a rusted steel plate, both unsecured. The well was surrounded by grass and branches. Photographs show that the well was apparently not in use for an extended period of time. [TRP-195 at 7]

- d. No credible evidence was introduced at trial excusing nonuse of water for mining purposes from LRG-4652-S-7 from 1943 to 1980, a period of approximately thirty-seven years.
- e. Water from LRG-4652-S-7 has not been put to beneficial use after December 31, 1980.

177. LRG-4652-S-8

- a. LRG-4652-S-8 was drilled in 1932 for placer mining and used for that purpose until 1943. The well was next used to water stock and for domestic purposes from 1943 to 1984 and has a perfected pre-basin water right of 3 *afy* for domestic and stock watering purposes. [7 Tr. 178:18-179:1-7; NMCC-45]
- b. The 1984 field check found that LRG-4652-S-8 was equipped and in use for domestic and livestock purposes. [STATE-005 at 2]
- c. The 2011 field visit found that LRG-4562-S-8 was equipped with a submersible pump and was providing non-potable water for the NMCC office. Photographs show that the metal plate covering the well was rusted and that the well appears to have been rehabilitated. [7 Tr. 178:18-180:24; TRP-195 at 6]

178. LRG-4652-S-9

- a. LRG-4652-S-9 was drilled in 1971 to explore for adequate water for Copper Flat, and it cannot be determined if the well was used between 1972 and 1974. From 1974 to 1978, the well was in use for unknown purposes. From 1978 to 1980, there was little or no use of the well. The well pumped approximately 22,922,500 gallons of water (70.35 *afy*) for a construction project from October 1980 to March 1982. [NMCC-46]
- b. The 1984 field check found that LRG-4652-S-9 was equipped but not in use. [STATE-005 at 2]
- c. The 2011 field visit found that LRG-4562-S-9 was equipped with a pump and 30 hp motor dating back to March 2010 and located inside an aluminum shed. Photographs of the wellhead show the cap and pipes and shed frame to be rusted. The well appears to have been rehabilitated. [TRP-195 at 8]
- d. No credible evidence was introduced at trial excusing nonuse of water from LRG-4652-S-9 from December 31, 1982 to at least March 2010, a period of over twenty-seven years.
- e. Water from LRG-4652-S-9 was not been put to beneficial from December 31, 1982 to March 31, 2010.

179. LRG-4652-S-10

- a. LRG-4652-S-10 was drilled in 1972 to explore for adequate water for Copper Flat, and it cannot be determined if the well was used between 1972 and 1974. From 1974 to 1978, the well was used for placer mining. From 1978 to 1980, there was little or no use of the well. The well pumped approximately 18,000,000 gallons of water (55.24 *afy*) for a construction project from October 1980 to March 1982. [NMCC-47]
- b. The 1984 field check found that LRG-4652-S-10 was not equipped and not in use. [STATE-005 at 2]
- c. The 2011 field visit found that LRG-4562-S-10 was unequipped and covered by a sheet of rubber and a piece of plywood held in place by a rock. The eastern side of the well was partially covered by a shrub. Photographs show that the well was apparently not in use for an extended period of time. [TRP-195 at 7]
- d. No credible evidence was introduced at trial excusing nonuse of water from LRG-4652-S-10 from December 31, 1982 to June 2016, a period of over thirty-three years.
- e. Water from LRG-4652-S-10 has not been put to beneficial use after December 31, 1982.

The Monitoring Wells

180. LRG-4652-S-11

- a. LRG-4652-S-11 was drilled in December 1974, with a capacity of 20 *gpm*, with 32 *afy* available for “standby use for mining, milling, and reclamation purposes, to supplement supply” from the production wells. [NMCC-048]
- b. The 1984 field check found that LRG-4652-S-11 was not equipped and not in use. [STATE-005 at 2]
- c. Water from LRG-4652-S-11 has never been put to beneficial use.

181. LRG-4652-S-12

- a. LRG-4652-S-12 was drilled in April 1975, with a capacity of 106 *gpm*, equipped with a cylinder pump powered by a windmill. The 1984 declaration claimed 171 *afy* available for “standby use for mining, milling, and reclamation purposes, to supplement supply” from the production wells, and 3 *afy* “since 1982 for stock watering.” [NMCC-49]
- b. The 1984 field check found that LRG-4652-S-12 was equipped and in use. [STATE-005 at 2]

- c. As of June 2016, LRG-4652-S-12 was in use for stock watering under a separate permit, independent of this proceeding. [7 Tr. 187:12-24-188:2]
- d. No credible evidence was introduced at trial excusing nonuse of water from LRG-4652-S-12 for mining purposes from December 31, 1982 to June 2016, a period of over thirty-three years.
- e. Water from LRG-4652-S-12 has not been put to beneficial use for mining purposes after December 31, 1982.

182. LRG-4652-S-13

- a. LRG-4652-S-13 was drilled on May 12, 1975, with a capacity of 97 *gpm*. The 1984 declaration claimed 156 *afy* available for “standby use for mining, milling, and reclamation purposes, to supplement supply” from the production wells. [NMCC-050]
- b. The 1984 field check found that LRG-4652-S-13 was not equipped and not in use. [STATE-005 at 2]
- c. As of June 2016, LRG-4652-S-13 was in use for stock watering under a separate permit, independent of this proceeding. [7 Tr. 188:5-17]

- d. No credible evidence was introduced at trial excusing nonuse of water from LRG-4652-S-13 for mining purposes from December 31, 1975 to June 2016, a period of over forty years.
- e. Water from LRG-4652-S-13 has not been put to beneficial use for mining purposes after December 31, 1975.

183. LRG-4652-S-14

- a. LRG-4652-S-14 was drilled on August 22, 1975, with a capacity of 262 *gpm*. The 1984 declaration claimed 423 *afy* available for “standby use for mining, milling, and reclamation purposes, to supplement supply” from the production wells. [NMCC-51]
- b. The 1984 field check found that LRG-4652-S-14 was not equipped and not in use. [STATE-005 at 2]
- c. No credible evidence was introduced at trial excusing nonuse of water from LRG-4652-S-14 for mining purposes from December 31, 1975 to June 2016, a period of over forty years.
- d. Water from LRG-4652-S-14 has not been put to beneficial use for mining purposes after December 31, 1975.

184. LRG-4652-S-15

- a. LRG-4652-S-15 was drilled on September 22, 1975, with a capacity of 208 *gpm*. The 1984 declaration claimed 336 *afy*

available for “standby use for mining, milling, and reclamation purposes, to supplement supply” from the production wells.

[NMCC-52]

- b. The 1984 field check found that LRG-4652-S-15 was not equipped and not in use. [STATE-005 at 2]
- c. No credible evidence was introduced at trial excusing nonuse of water from LRG-4652-S-15 for mining purposes from December 31, 1975 to June 2016, a period of over forty years.
- d. Water from LRG-4652-S-15 has not been put to beneficial use for mining purposes after December 31, 1975.

185. LRG-4652-S-16

- a. LRG-4652-S-16 was drilled on October 31, 1975, with a capacity of 110 *gpm*. The 1984 declaration claimed 177 *afy* available for “standby use for mining, milling, and reclamation purposes, to supplement supply” from the production wells. [NMCC-53]
- b. The 1984 field check found that LRG-4652-S-16 was not equipped and not in use. [STATE-005 at 2]
- c. No credible evidence was introduced at trial excusing nonuse of water from LRG-4652-S-16 for mining purposes from December 31, 1975 to June 2016, a period of over forty years.

- d. Water from LRG-4652-S-16 not has been put to beneficial use for mining purposes after December 31, 1975.

The Open Pit and the Dolores Well

186. LRG-4652-S-17, the open pit

- a. LRG-4652-S-17 was declared separately as a point of diversion, not as a well, and with no associated drill rig or well casing. The 1984 declaration estimated that 75 *gpm* could be removed, but no pump was installed. 120 *afy* was declared available for “dust control” and “reclamation,” but no information was included concerning the calculation of this amount. [7 Tr. 26:12-19; NMCC-054]
- b. LRG-4652-S-17 is hydrologically connected to groundwater and evaporates at an amount of 34.45 *afy*. [STATE-001 at 12]

187. LRG-4654, the Dolores well

- a. LRG-4654 was drilled in 1932 for mining purposes and was used in that capacity from 1932 to 1934. The well was used intermittently for mining between 1932 and 1981. [NMCC-055]
- b. No evidence was introduced at trial excusing nonuse of water from LRG-4654 from December 31, 1981 to June 2016, a period of over thirty-four years.

- c. Water from LRG-4654 has not been put to beneficial use for mining purposes after December 31, 1981.

RECENT ACTIVITIES AT COPPER FLAT

188. No mining company has operated a copper mine at Copper Flat since July 1982. [State-033 at 5-16]

189. No water from the production wells has been put to beneficial use for mining since the acquisition of water rights by Frost and Gray. [5 Tr. 138:14-22]

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this proceeding. N.M. Const. art. VI, § 13.
2. The Hillsboro Claimants have standing to participate in this proceeding. NMSA 1978, § 72-4-17 (1965); Rule 1-071.2(B), (C).
3. Turner Ranch Properties has standing to participate in this proceeding. *Id*
4. As water rights claimants, NMCC and Frost and Gray must prove each element of their respective water rights by a preponderance of the evidence.

NEW MEXICO WATER LAW

5. Unappropriated surface water and groundwater belong to the people of New Mexico and are subject to beneficial use in accordance with New Mexico law. N.M. Const. art. XVI, § 2; NMSA 1978, § 72-12-1 (2003); NMSA 1978, § 72-12-

18 (1983). See *City of Albuquerque v. Reynolds*, 1962-NMSC-173, ¶ 28, 71 N.M. 428; 379 P.2d 73 (holding that the substantive law relating to the appropriation of surface waters is the same as that relating to groundwater)(internal citations omitted).

6. “Beneficial use is the basis, the measure and the limit of the right to the use of water.” N.M. Const. art. XVI, § 3; § 72-12-18.

INCHOATE RIGHTS AND THE *MENDENHALL* RULE

7. Under *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, ¶ 29; 68 N.M. 467; 362 P.2d 998, an appropriator who develops groundwater resources prior to the declaration of an underground basin by the state engineer, continues to diligently develop the water after the declaration of the basin, and places it to beneficial use within a reasonable time may acquire a valid water right to the water put to beneficial use.

8. In order to benefit from the rule set forth in *Mendenhall*, appropriators must “(1) legally commence drilling their well prior to declaration of the basin; (2) proceed diligently to develop the water pursuant to a plan; and (3) apply the water to beneficial use.” *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, ¶ 13, 95 N.M. 560, 624 P.2d 502.

9. For the purposes of this case, “inchoate rights” are incomplete water rights that had not vested at the time the OSE declared the basin because, although the

appropriator had begun development of the rights, the water had not been put to beneficial use.

10. For purposes of the *Mendenhall* rule, diligence in developing water requires that the developer take reasonable efforts in pursuit of a pre-basin plan.

11. The requirement to show diligence is not met by attempts to develop water for projects different from the developer's pre-basin plan.

12. In accordance with New Mexico law, the OSE declared the Lower Rio Grande Underground Water Basin on September 11, 1980. NMSA 1978, § 72-2-8 (1967); 19.27.48 NMAC.

INCHOATE WATER RIGHT CLAIMS

13. The claims to inchoate water rights in this proceeding are connected to the mining operations at Copper Flat because of the *Mendenhall* requirement that a developer of such a water right proceed with diligence to develop the right pursuant to a plan.

14. CFP did not meet the *Mendenhall* requirements because it did not diligently develop water in accordance with its pre-basin plan.

15. Specifically, CFP did not diligently pursue the development of inchoate water rights because it terminated mining operations at Copper Flat and, with CIBC, sold and moved the mining equipment and sold the water rights used for mining operations at Copper Flat.

16. CIBC, to the extent that it was a successor of CFP's interest in Copper Flat, did not diligently pursue the development of inchoate water rights because it sold and moved the mining equipment and sold the water rights used for mining operations at Copper Flat.

17. CFP's and CIBC's actions described in conclusion nos. 15 and 16 are inconsistent with CFP's pre-basin plan under *Mendenhall*.

18. CFP's filing of the transfer application of February 28, 1986 was inconsistent with its pre-basin plan and inconsistent with a diligent effort to pursue the pre-basin plan under *Mendenhall*.

19. The sale of the water rights to Frost and Gray was inconsistent with a diligent effort in pursuit of CFP's pre-basin plan because the sale severed the water rights from the mining operations.

20. CFP's and CIBC's actions extinguished any inchoate water rights under *Mendenhall*.

21. Alternatively, Frost and Gray did not meet the *Mendenhall* requirements because they did not diligently develop water in accordance with CFP's pre-basin plan.

22. Frost and Gray's actions in filing the transfer application of September 2, 1988 and in pursuing a plan to transfer the inchoate water rights to Ladder Ranch for agricultural purposes were inconsistent with CFP's pre-basin plan.

23. Frost and Gray's failure to diligently develop water in accordance with CFP's pre-basin plan extinguished under *Mendenhall* any inchoate rights they may have owned.

24. Efforts by subsequent entities seeking to restart mining operations at Copper Flat did not constitute diligence for purposes of the *Mendenhall* rule.

25. NMCC and Frost and Gray have failed to meet their respective burdens of proof to establish compliance with the requirements of the *Mendenhall* rule.

26. There are no continuing claims to inchoate water rights in this proceeding.

FORFEITURE AND ABANDONMENT OF WATER RIGHTS

Forfeiture

27. When a party entitled to appropriate groundwater failed to apply the water to beneficial use for a period of four or more years prior to June 1, 1965, the water right is forfeited. The forfeiture occurs by operation of law, and the holder of the forfeited right is not entitled to notice or a period to cure the nonuse. NMSA 1978 § 72-12-8(A) (2002); NMSA 1978, § 72-5-28(A) (2002).

28. A person is not entitled to receive more water than is necessary for the person's actual use. *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 20, 62 N.M. 264, 308 P.2d 383.

29. As a matter of public policy, New Mexico law provides that "municipalities, counties, school districts, state universities, member-owned

community water systems, special water users' associations and public utilities supplying water to municipalities or counties" have up to forty years to develop a water use plan. NMSA 1978, § 72-1-9 (2006).

30. An appropriator may be exempt from the requirements of beneficial use "either by an extension of time or other statutory exemption," which stops the running of the four-year forfeiture period. § 72-12-8(E).

31. Any period of nonuse of a groundwater right by a municipality or county for the purpose of implementing water development or conservation plans is not included when computing the forty-year forfeiture period. § 72-12-8(F).

32. New mining operations are not included in the statutory forty-year planning exemptions; therefore the forfeiture exemptions do not apply to NMCC. *See* NMSA 1978, § 69-36-3(I) (1993) (defining, under the New Mexico Mining Act, a "new mining operation" as a mining operation developed after the 1993 effective date of the act); § 72-1-9 (establishing a forty-year planning period for municipalities and other entities), § 72-12-8(E), (F) (creating exemptions from the computation of the statutory forfeiture period).

33. Individual ownership of water rights is not included in the statutory forty-year planning exemptions; therefore the forfeiture exemptions do not apply to Frost and Gray. § 72-12-8(E), (F).

Abandonment

34. Water rights can be lost by abandonment through nonuse. *See State ex rel. Reynolds v. South Springs Co.*, 1969-NMSC-023, ¶ 9, 80 N.M. 144, 452 P.2d 478 (“[A]bandonment is the relinquishment of the [water] right by the owner with the intention to forsake and desert it[.]” (internal quotation marks and citation omitted)).

35. Nonuse of water alone is not sufficient to establish abandonment of a water right, “[b]ut where by clear and convincing evidence it is shown that for an unreasonable time available water has not been used, an intention to abandon may be inferred in the absence of proof of some fact or condition excusing such nonuse.” *Id.* ¶ 22 (quoting *Commonwealth Irrigation Co. v. Rio Grande Canal Water Users’ Ass’n*, 45 P.2d 622, 623 (Colo. 1935)).

The Burden of Proof in Abandonment Proceedings

36. The proponent of an abandonment claim has the burden of proving an intent to abandon by clear and convincing evidence. *See Id.*; *State ex rel. Office of State Eng’r v. Elephant Butte Irrigation Dist.*, 2012-NMCA-090, ¶ 23, 287 P.3d 324 (noting that nothing indicated that the special master did not apply the correct standard of proof of clear and convincing evidence to an abandonment claim when required to do so).

37. “[A]fter a long period of nonuse, the burden of proof [of abandonment] shifts to the holder of the right to show the reasons for the nonuse.” *Id.* ¶ 24 (internal quotation marks and citation omitted).

38. An owner of a valid water right can overcome allegations of common law abandonment “after a protracted period of nonuse by establishing the absence of intent to abandon the water right.” *Id.*

FROST AND GRAY’S RIGHTS IN THE PRODUCTION WELLS

39. Water from the production wells has not been put to beneficial use for an unreasonable amount of time.

40. However, the successive efforts of CFP and Frost and Gray to put water from the production wells to beneficial use demonstrate that neither CFP nor Frost and Gray intended to abandon the vested water rights associated with the production wells.

41. Frost and Gray’s litigation to protect their interests demonstrates that they did not intend to abandon the vested water rights.

42. The economic, financial, and logistical difficulties of CFP and the legal challenges of Frost and Gray excuse the long period of nonuse of the vested water rights.

43. As the proponents of abandonment, the Hillsboro Claimants and TRP did not meet their burden to prove by clear and convincing evidence that either CFP or Frost and Gray abandoned the water right associated with the production wells.

44. The amount-of-water element for LRG-4652, LRG-4652-S, LRG-4652-S-2, and LRG-4652-S-3 is 861.84 *afy*, which may be diverted from any combination of these four wells.

45. LRG-4652, LRG-4652-S, LRG-4652-S-2, and LRG-4652-S-3 have an additional water right for stock use, which may be diverted from any combination of these four wells.

46. Frost and Gray are co-owners of a vested water right in the amount of 861.84 *afy* from LRG-4652, LRG-4652-S, LRG-4652-S-2, and LRG-4652-S-3.

RIGHTS IN THE MISCELLANEOUS WELLS

47. As the proponents of abandonment, the State, TRP, and the Hillsboro Claimants have established abandonment by clear and convincing evidence in LRG-4652-S-4, LRG-4652-S-7, LRG-4652-S-9, and LRG-4652-S-10.

48. As the proponents of abandonment, the State, TRP, and the Hillsboro Claimants failed to establish abandonment by clear and convincing evidence in LRG-4652-S-8.

49. The water right to LRG-4652-S-4 for mining use was forfeited by operation of law no later than January 1, 1948.

50. The stock right to LRG-4652-S-4 was abandoned.
51. All water rights to LRG-4652-S-5 were forfeited by operation of law no later than January 1, 1948.
52. All water rights to LRG-4652-S-6 were forfeited by operation of law no later than January 1, 1948.
53. The water right to LRG-4652-S-7 for mining use was forfeited by operation of law no later than January 1, 1948.
54. The stock right to LRG-4652-S-7 was abandoned.
55. The water right to LRG-4652-S-8 for mining use was forfeited by operation of law no later than January 1, 1948.
56. LRG-4652-S-8 has a water right for stock use.
57. The water right to LRG-4652-S-9 for mining use was abandoned.
58. The water right to LRG-4652-S-10 for mining use was abandoned.

RIGHTS IN THE MONITORING WELLS

59. As the proponents of abandonment, the State, TRP, and the Hillsboro Claimants have established abandonment by clear and convincing evidence in LRG-4652-S-11, LRG-4652-S-12, LRG-4652-S-13, LRG-4652-S-14, LRG-4652-S-15, and LRG-4652-S-16.
60. The water right to LRG-4652-S-11 for mining use was abandoned.
61. The water right to LRG-4652-S-12 for mining use was abandoned.


62. The water right to LRG-4652-S-13 for mining use was abandoned.
63. The water right to LRG-4652-S-14 for mining use was abandoned.
64. The water right to LRG-4652-S-15 for mining use was abandoned.
65. The water right to LRG-4652-S-16 for mining use was abandoned.

The Open Pit

66. The amount-of-water element of the water right for the open pit, LRG-4652-17, is 34.45 *afy*.

The Dolores Well

67. As the proponents of abandonment, the State, TRP, and the Hillsboro Claimants have established abandonment in LRG-4654 by clear and convincing evidence.
68. The water right to the Dolores well, LRG-4654, for mining use was abandoned.


James J. Wechsler
Judge Pro Tempore

CERTIFICATE OF MAILING


I hereby certify that I have caused to be mailed and/or emailed a true and correct copy of the foregoing instrument to the following counsel and/or parties of record on the above file stamped date.

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