



## RIO GRANDE COMPACT COMMISSION

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May 17, 2018

Via Electronic Delivery

Mr. Doug Haywood, Project Lead  
BLM Las Cruces District Office  
1800 Marquess Street  
Las Cruces, New Mexico 88005

RE: Comments of the Draft Environmental Impact Statement from the Bureau of Land Management ("BLM") for the Copper Flat Copper Mine

Notice of violation of the Rio Grande Compact

Dear Mr. Haywood:

As the Texas Rio Grande Compact Commissioner, on behalf of the State of Texas, I submit these comments on the Draft Environmental Impact Statement ("DEIS") for the New Mexico Copper Corporation ("NMCC") proposed Copper Flat Copper Mine ("Mine" or "Project"). I understand that the DEIS was published in the Federal Register, Vol. 80, No. 229 on November 30, 2015. I understand the final EIS may be released in the summer of 2018.

Texas only recently became aware of the Mine in a meeting with the Bureau of Reclamation ("BOR") when during the meeting, the BOR informed Texas and Colorado that it had, in 2015, approved a lease contract for the delivery of San Juan Chama Water to the Elephant Butte Reservoir ("EBR") and Caballo Reservoir ("Caballo") for the Apache Jicarilla Tribe.<sup>1</sup>

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<sup>1</sup> Texas does not believe that San Juan Chama waters can be delivered by the BOR to Texas as Usable Water under the Compact without agreement of the Rio Grande Compact Commission. No accounting method is in place for delivery to Caballo as Usable Water in Project Storage. Further, the BOR does not have authority to augment deliveries without Compact Commission approval. The statements on page 15 of the John Shomaker & Associates, Inc. Hydrologic Report dated December 2017 that flows from the Jicarilla lease water will arrive at Caballo Dam are not accurate.

Texas is interested in the DEIS because of the effects that the proposed action and the proposed alternatives the Mine will have on the quantity and quality of waters apportioned and delivered to Texas under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 758 (the "Compact"). The Compact is an agreement between the States of Colorado, New Mexico and Texas which has been approved by Congress. The Compact apportions the waters of the Rio Grande among the States of Colorado, New Mexico and Texas. The apportionment is based on both the quantity and quality of water in the Rio Grande. Under the Compact, New Mexico is required to deliver to Texas its apportioned water from the Rio Grande. New Mexico is required to relinquish control of these delivered waters at EBR, which is above Caballo. The Compact also provides for the delivery of water from the Rio Grande to Mexico under a 1906 Treaty between the United States ("US") and Mexico.

Based upon our review of the DEIS, Texas has serious concerns regarding the Mine's affect upon the quantity and quality of water apportioned and delivered to Texas by New Mexico under the Compact. These concerns include the following:

1. Section 3.6.2.3.3 Summary of Groundwater Assessment of the DEIS states that the "Impacts to the regional water budget, including flows of the Rio Grande, would be significant." It further states that "These impacts would be large in magnitude, long-term, and certain" and that the "Impacts to water levels caused by the supply well field would be significant."<sup>2</sup>

These adverse impacts will have a clear and unmistakable adverse effect on the Compact as well as Texas's apportioned and delivered water under the Compact. Examples of the issues associated with the Mine's adverse impact on the Compact are described in the February 26, 2016 letter from New Mexico's own state agency, the New Mexico Interstate Stream Commission ("NISC"), where the NISC opposed the DEIS based in part on concerns that the diversion would adversely impact Usable Water in Project Storage in violation of the Compact. The NISC also described other significant Compact issues that would be created by the Mine, including storage impacts to the States of New Mexico and Colorado.

The DEIS itself and reports prepared for NMCC by its consultant, John Shomaker & Associates, corroborate that the Mine's operations, with wells situated in close proximity to Caballo, will impact Rio Grande flows and deplete water stored in Caballo.

2. Section 3.6.3 Mitigating Measures of the DEIS states that NMED and OSE (both New Mexico state agencies) have the authority to require mitigation of impacts "that are judged unacceptable in accordance with New Mexico regulations." It further states that "The BLM intends to rely on the State agencies to exercise their statutory authority in determining which impacts exceed allowable limits and what mitigating measures may be required by diversions caused by the Mine."<sup>3</sup>

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<sup>2</sup> The DEIS concludes that the impacts will last over 100 years. See pages 3-59 and 3-60.

<sup>3</sup> The concept that depletions from the Rio Grande or Caballo (water belonging to Texas under the Compact) can somehow be offset with waters below or upstream of the depletion (not in real time) based on New Mexico state law

This, however, is inconsistent with the Compact. Under the Compact, New Mexico is required to deliver annually an amount of apportioned water to Texas.<sup>4</sup> The delivery occurs in EBR in time for each irrigation season. Under the Rio Grande Project (“RGP”), which has been fully incorporated into the Compact, waters (defined as Usable Water in Project Storage) are released from EBR to Caballo for delivery to users (under contract) in New Mexico and Texas. All water in the Rio Grande released from EBR, including water stored in Caballo, is Texas’s apportioned water delivered by New Mexico under the Compact. This water is for the exclusive use of Texas for delivery to users (under contract) in New Mexico and Texas.

In 2013 Texas sued New Mexico and joined Colorado in the United States Supreme Court for violating the Compact. See Texas v. New Mexico, Original 141. The US intervened in the lawsuit against New Mexico. The Court appointed a Special Master to prepare a report. As stated in the Special Master’s report, “New Mexico must relinquish all control over the water delivered to Texas.” Therefore, any diversion of Texas’s water in the Rio Grande and Caballo for the Mine violates the Compact. The Compact does not provide that New Mexico (under its state law) can “offset” or “pay back” Texas for waters delivered to Texas under the Compact.<sup>5</sup> Once the water is delivered by New Mexico to Texas at EBR, New Mexico must relinquish all control over the water and further must not take any action to divert or interfere with Texas’s water to be delivered to its contract users.<sup>6</sup>

The DEIS assumes that under New Mexico state law, the impact to the Rio Grande and Caballo will be made whole by the New Mexico OSE as it determines under New Mexico State law. Even assuming New Mexico State law would apply, the Application for diversion filed in January 2018 which the OSE assumes that water under the Jicarilla lease will be used to offset any adverse impacts to the Rio Grande and Caballo does not come close to offsetting damages to the basin as referenced in the DEIS. The lease between NMCC and the Jicarilla is for 15 years, and is only based on when water is available. The lease also expires when the New Mexico OSE on its own decides further offsets are not required. The Mine is estimated to operate for approximately 12 years, but the damages to water basin (including the Rio Grande and Caballo) will be for over a 100 years.<sup>7</sup>

The US is a party to the Compact and is responsible for ensuring compliance by Colorado, New Mexico and Texas. This was unanimously confirmed by the United Supreme Court in its opinion decided on March 5, 2018 in which it recognized a significant role for the US in protecting the RGP as well as the integrity of the Compact. The Court further noted that

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and should not apply to waters delivered by New Mexico to Texas under the Compact. These delivered waters are not subject to New Mexico state law, which may permit exchanges or offsets among upstream its water users.

<sup>4</sup> The Compact also requires that the water be of a certain quality.

<sup>5</sup> There is no assurance for any offset. The lease provides for San Juan Chama only if available. As stated by the NISC, any meaning offset would have to be on a “real-time” basis.

<sup>6</sup> Even if possible, any offset would be downstream and would not mitigate actual upstream depletions to the Rio Grande and Caballo. Further, offsets would not be in real time.

<sup>7</sup>See pages 3-59 and 3-60 of the DEIS.

the US “as a sort of agent of the Compact” was charged with ensuring that the Compact’s equitable apportioned waters were delivered to contracting parties in Texas and New Mexico.

Based on the Court’s opinion, the BLM, as an agency of the US, should not simply delegate Compact obligations to a New Mexico state agency “to exercise their statutory authority in determining which impacts exceed allowable limits, and what mitigation measures may be required.” This is not a state issue. Any adverse impact of Texas’ water in the Rio Grande and Caballo violates the Compact.

3. The BLM has failed to undertake a groundwater basin study recommended by its own DEIS.<sup>8</sup> Page 4-8 of the DEIS states, “Surface Water Use: The Proposed Action and alternatives would reduce groundwater discharge to Caballo Reservoir and the Rio Grande, decreasing surface water quantities there. This impact is expected to have a long-term, large-extent, and probable cumulative effect on these surface water resources. The cumulative magnitude of the effect can only be determined through a comprehensive mid-basin study of Caballo Reservoir and the Rio Grande.”

No such study has been conducted. The DEIS has a deficient and obviously glossed over and flawed hydrologic study of the impacts to the basin, including that amounts that would divert Rio Grande river flows and Caballo. The NISC estimates that the Mine would extract approximately 60,000 acre feet of water from the groundwater system and any recovery would come directly from the Rio Grande and Caballo. The NISC expressed concern that the estimates of damages to the water system in the DEIS are suspect and fail to accurately take into account that the recovery could take a hundred years. We concur with the NISC and along with other parties believe that a further supplemental hydrology study of the basin is critical and should be conducted to determine a true and accurate impact to the water basin. This should be done before the DEIS is finalized.

4. In addition to the impact on the quantity of water delivered to Texas under the Compact, Texas is concerned that the Mine will adversely impact the quality of water required to be delivered by New Mexico under the Compact. The DEIS describes the Mine as an open pit mine operation with open trailing ponds in close proximity to Caballo. Any spill or leak from these ponds would have a disastrous environmental impact on Texas’s water which is used by farmers in Southern New Mexico and Texas and the City of El Paso.

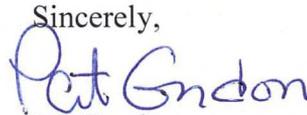
In summary, the Mine’s proposed actions impact Texas’s apportioned waters in the Rio Grande and Caballo that have been delivered by New Mexico to Texas, which violate the Compact. BLM has failed to do a supplemental comprehensive groundwater basin study as stated in the DEIS to determine the magnitude of these impacts. The DEIS improperly delegates the responsibility to protect Texas under the Compact to a New Mexico State agency. The Compact does not allow New Mexico to divert and then allegedly offset (or put back) waters that belong to Texas under the Compact. Texas will not be protected as stated in the DEIS. As confirmed by the USSC in its recent unanimous decision, the US as an agent for the Compact is responsible for ensuring that Compact water deliveries are made to Texas. Your DEIS violates your duty to Texas.

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<sup>8</sup> See pages 4-8 of the DEIS, which recommends a supplemental study of the basin.

We request that the BLM reconsider its position under the DEIS and take a closer look and evaluate the obligations that the US owes to Texas under the Compact.<sup>9</sup> We also believe supplemental studies to the basin should be conducted.

If you have questions, we are available to meet to present our concerns.

Sincerely,  
  
Pat Gordon  
Rio Grande Commissioner,  
State of Texas

cc: David Bernhardt, Deputy Secretary of Interior

Senator John Cornyn

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<sup>9</sup> The US owes and obligation to protect Colorado and Mexico as well.