

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



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

No. WQCC 12-01(R)

New Mexico Environment Department,
Petitioner.

**ATTORNEY GENERAL'S MOTION TO ESTOP NMED FROM TAKING
INCONSISTENT POSITIONS IN PROCEEDINGS BEFORE THE COMMISSION**

Preliminary Statement

In its Closing Argument, the New Mexico Environment Department (“NMED”) takes positions inconsistent with positions that it took, based on sworn testimony, before the Water Quality Control Commission (“Commission”) in the *Tyrone* adjudication and in this current rulemaking. In its closing, NMED takes the position, for the first time, that the criteria proposed by NMED and adopted by the Commission to determine “place of withdrawal of water for present and reasonably foreseeable future use” under the Water Quality Act (“WQA”) should be changed, and that the specific locations proposed by NMED and adopted by the Commission to be places of withdrawal at the Tyrone Mine should be changed. *See* NMED Closing Argument, pp. 2-11. NMED changes these positions despite the fact that its policy witness in this proceeding testified otherwise.

Under the well-established doctrine of judicial estoppel, which applies to administrative proceedings, parties are estopped from playing “fast and loose” in legal proceedings, and taking such inconsistent positions in order to preserve the integrity of the legal process. *Citizens Bank v. C & H Constr. & Paving Co.*, 89 N.M. 360, 366, 522 P.2d 796, 802 (Ct. App. 1976). To preserve the integrity of these proceedings, the Commission should estop NMED from taking

inconsistent positions, and seeking changes to the place of withdrawal determinations by the Commission.

Background

As the Commission is aware, it initially held a 10 day hearing in 2003 on an appeal brought by Phelps Dodge Tyrone, Inc. (“Tyrone”) challenging NMED’s closure permit for the Tyrone Mine. The Commission issued a decision in 2004 holding *inter alia* that the Tyrone Mine was a “place of withdrawal” under the WQA.¹

Tyrone appealed the Commission’s decision to the New Mexico Court of Appeals. The appellate court found, in 2006, that the Commission’s determination was overly broad, and remanded the matter to the Commission to “create some general factors or policies to guide its determination” as to what constitutes a “place of withdrawal” under the WQA. *Phelps Dodge Tyrone, Inc.*, 2006-NMCA-115, ¶ 35, 140 N.M. 464, 473, 143 P.3d 502, 511. The court stated that the Commission could create the factors through the *Tyrone* permit adjudication or a rulemaking. *Id.*

Pursuant to the court’s mandate, the Commission decided to create the factors to determine place of withdrawal through the *Tyrone* adjudication. Decision and Order on Remand, p. 1 (“Comm’n Decision”), *In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge Tyrone, Inc.*, Nos. 03-12(A) and 03-13(A) (“*Tyrone*”) [AGO Ex. 1]. During the subsequent remand hearing, NMED took the position that the Commission should adopt seven factors to determine place of withdrawal. These factors were: site hydrology and geology, quality of water prior to discharge, past and current land use in the

¹ Commission’s Partial Final Decision and Order Affirming Supplemental Discharge Permit and Requesting a Modification to Condition 22, Conclusion of Law ¶ 29 (June 10, 2004).

vicinity, future land use in the vicinity, past and current water use in the vicinity, and population trends in the vicinity. Comm'n Decision, Findings of Fact ("FOF") ¶¶ 127-34. During the hearing, Tyrone proposed various factors which included the nature, extent and history of permitted activities at the site and land ownership status of the site. *Id.* FOF ¶ 136.

NMED also took the position during that adjudication that the Tyrone main open pit and at least 13 other specific locations within the Tyrone Mine site are places of withdrawal (in addition to the two Fortuna wells onsite). *Id.* FOF ¶¶ 253-58, 125; *see also* Roepke Test., pp. 3, 7-8 [AGO Ex. 23].² These other locations included the areas around the open pits at the Tyrone Mine and areas around leach stockpiles, waste rock piles and tailings impoundments. *Id.* FOF ¶ 125(e).

After 24 days of hearing, the Commission decided the factors to determine place of withdrawal in its 2009 Decision. The Commission adopted all seven factors proposed by NMED. *Id.* COL ¶¶ 15-21. The Commission did not adopt any of the factors proposed by Tyrone that were not proposed by NMED; the Commission specifically rejected land ownership

² These locations were:

- a. Areas on the north side of the mine around the Mangas Valley Tailings Impoundment;
- b. Areas to the west and to the east of the 1A Tailings Impoundment;
- c. An area immediately south of the 1A Tailings Impoundment;
- d. An area to the southeast of the 3A Stockpile and to the east of the 3B Waste Rock Pile around the old mill site;
- e. Open areas around the pits;
- f. The area on the east side of the mine south of the 5A Waste Rock Pile;
- g. An area south of the Gettysburg Pit;
- h. Areas on the southwest corner of the mine;
- i. An area to the west of the Gettysburg Pit, along the 1C Stockpile;
- j. Areas on the southeast side of the mine along and within Oak Grove Draw;
- k. An area on the east side of the mine to the southeast of the No. 1 Stockpile;
- l. Areas in the southeast corner of the mine, around the reclaimed Burro Mountain Tailings; and
- m. Areas on the west side of the mine in Deadman Canyon.

Comm'n Decision, FOF ¶ 125.

as a factor. *Id.* FOF ¶¶ 135-40, COL ¶¶ 22-24. Furthermore, the Commission adopted the Tyrone open pits and each of NMED's 13 other proposed locations as places of withdrawal at the Tyrone Mine. *Id.* COL ¶¶ 40, 49.

During the rulemaking hearing presently before the Commission, NMED's policy witness, Tom Skibitski, affirmed these prior positions of NMED. He testified that NMED did not disagree with any of the seven factors adopted by the Commission in the *Tyrone* proceeding to determine place of withdrawal. Skibitski Test. Tr. vol. 2, p. 412, ll. 4-10.³ He testified that NMED did not disagree with any of the Commission's determinations of the specific places of withdrawal at the Tyrone Mine. *Id.* p. 334, ll. 16-24.⁴

In its closing brief, however, NMED takes for the first time positions inconsistent from its prior positions in the *Tyrone* litigation and from the sworn testimony of its policy witness in this proceeding. First, NMED requests in its closing brief that the Commission reconsider the factors to determine place of withdrawal. NMED Closing Argument, p. 10; *see also* NMED Statement of Reasons FOF ¶ 1325 (Commission should reconsider criteria used to determine place of withdrawal). NMED proposes that the Commission adopt new factors that include "copper mining activity, water usage supported by water rights and land ownership." NMED

³ Q. Those are the criteria that the Court directed the Commission to adopt, are they not?

A. Okay. Yes. Yes.

Q. Okay. And does the Environment Department have any disagreement with those factors?

A. I am unaware of any disagreement with these factors. I believe we supported these factors.

Skibitski Test. Tr. vol. 2, p. 412, ll. 4-10.

⁴ Q. So they -- they identified, you know, in their decision a number of places of withdrawal at the Tyrone Mine site.

So my question is, as a policy matter, does the Department have any disagreement with the findings of the Commission that -- about these specific places of withdrawal at the Tyrone Mine site?

A. No. To my knowledge, there is no disagreement.

Skibitski Test. Tr. vol. 2, p. 334, ll. 16-14.

Closing Argument, p. 10. Second, NMED takes the position that the Commission determine that ground water underneath “mine units” and “open pits” are *not* places of withdrawal. *Id.* pp. 2, 7;⁵ *see also* NMED Statement of Reasons, ¶¶ 1326-28 (NMED proposes that the specific locations the Commission determined to be places of withdrawal at the Tyrone Mine should be changed). Under NMED’s Proposed Copper Mine Rule, water quality standards are not required to be met within the area of open pit hydrologic containment and beneath mine units – such as leach stock piles, waste rock piles and tailings impoundments – and their associated capture systems up to the designated monitor well(s) for the particular mine unit. 20.6.7.24.A(4), - 28.B(2), -33.D(2) NMAC [NMED].

Both of these positions now taken by NMED are inconsistent with the positions NMED took during the *Tyrone* hearing and with the sworn testimony of its policy witness in the current rulemaking hearing before the Commission.

Argument

I. NMED IS ESTOPPED FROM TAKING POSITIONS CONTRARY TO ITS PRIOR POSITIONS BASED ON SWORN TESTIMONY

A. Judicial Estoppel Protects the Integrity of Legal Proceedings and Applies to Administrative Proceedings

The doctrine of judicial estoppel is a rule of fairness that prevents a party from taking inconsistent positions in litigation to the detriment of other parties:

The doctrine of "judicial estoppel" is a rule which estops a party from playing "fast and loose" with the court during the course of litigation. *Chapman v. Locke*, 63 N.M. 175, 315 P.2d 521 (1957). It is not, however, strictly a question of estoppel. "Judicial estoppel" simply means that a party is not permitted to maintain inconsistent positions in judicial proceedings. Where a party assumes a

⁵ *See also id.* p. 1 (“[t]he rulemaking before the Commission concerns the applicability of groundwater standards at copper mines”); p. 12 (“[i]t is reasonable for the Commission to conclude that Section 3103 standards do not apply to ground water beneath an active mine unit”); p. 2 (same).

certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. *In re Madison (Appeal of Marron)*, 32 N.M. 252, 255 P. 630 (1927); *Clay v. Texas-Arizona Motor Freight*, 49 N.M. 157, 159 P.2d 317 (1945); *Ollman v. Huddleston*, 41 N.M. 75, 64 P.2d 97 (1937).

Citizens Bank, 89 N.M. at 366, 522 P.2d at 802; *Keith v. ManorCare, Inc.*, 2009 NMCA 119, ¶¶ 36-37, 147 N.M. 209, 218, 218 P.2d 1257, 1266 (Ct. App. 2009); *Rodriguez v. La Mesilla Constr. Co.*, 1997 NMCA 62, ¶ , 123 N.M. 489, 494, 943 P.2d. 136, 141 (Ct. App. 1997); *Johnson v. Aztec Well Servicing Co.*, 117 N.M. 697, 701, 875 P.2d 1128, 1132 (Ct. App. 1994); *Rainville v. J.T.S. Enterprises, Inc.*, 101 N.M. 803, 805, 689 P.2d 1275, 1276 (Ct. App. 1984).

There are two distinct objectives behind judicial estoppel, both of which seek to protect the judicial system. *Simon v. Safelite Glass Corp.*, 943 F. Supp. 261, 264-65 (E.D.N.Y. 1996). First, the doctrine seeks to preserve the sanctity of the oath by demanding absolute truth and consistency in all sworn positions. Preserving the sanctity of the oath prevents the perpetuation of untruths which damage public confidence in the integrity of the judicial system. *Id.* 943 F. Supp. at 265. Second, the doctrine seeks to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings. *Id.*

The doctrine applies equally to administrative proceedings. “If, indeed, it is the sanctity of the oath and the integrity of the process that lies at the heart of the doctrine of judicial estoppel then ‘the truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.’” *Id.* 943 F. Supp. at 268; *Simo v. Home Health & Hospice Care*, 906 F. Supp. 714, 718 (D.N.H. 1995) (administrative and quasi-judicial proceedings, such as those conducted by the Social Security Administration are considered prior legal proceedings under the doctrine of judicial estoppel); *UNUM Corp. v. United States*, 886 F.

Supp. 150, 158 (D. Me. 1995) (administrative proceedings are considered proceedings under doctrine of judicial estoppel); *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth.*, 731 F. Supp. 747, 750 (E.D. La. 1990) (doctrine of judicial estoppel applies equally to positions taken in quasi-judicial administrative proceedings as it does in courts of law). Thus, the doctrine of judicial estoppel applies to the *Tyrone* adjudicative proceeding and this administrative rulemaking, where parties' positions are based on testimony taken under oath.

There are three elements of judicial estoppel. First, the party against whom the doctrine is to be used must have successfully assumed a position during the course of litigation. Second, that first position must be "necessarily inconsistent" with the position the party takes later in the proceedings. Finally, while not an absolute requirement, judicial estoppel is especially applicable when the party's change of position "prejudices a party who had acquiesced in the former position." *Keith*, 2009 NMCA 119, ¶ 37, 147 N.M. at 218, 218 P.2d at 1266; *Rodriguez*, 1997 NMCA 62, ¶ 20, 123 N.M. at 494, 943 P.2d at 141.

B. Judicial Estoppel Applies to NMED's Change of Positions

All three elements of judicial estoppel apply here. First, NMED successfully took positions in the *Tyrone* litigation that the Commission should adopt specific criteria to determine place of withdrawal and should identify certain locations within the Tyrone Mine as places of withdrawal, including the open pits, areas around the open pits, and areas around leach stockpiles, waste rock piles and tailings impoundments. NMED confirmed both these positions in sworn testimony in this rulemaking before the Commission.

Second, NMED's positions in its closing brief are necessarily inconsistent with those prior positions. NMED's positions in its closing brief are that (1) different factors than

previously proposed by NMED to determine place of withdrawal should be adopted by the Commission, including factors specifically opposed by NMED previously, *i.e.*, land ownership and copper mining activity at the site and (2) open pits, areas around open pits and areas around mine units should not be considered places of withdrawal. NMED's just-announced positions in its closing brief are diametrically opposed to the positions it took in the *Tyrone* proceeding and through its sworn testimony in this rulemaking proceeding.

Third, these two inconsistent positions prejudice the Attorney General because these positions are opposed by the Attorney General, and the Attorney General had no notice of the change of position during the rulemaking hearing and had no opportunity to present evidence in opposition. Indeed, the Attorney General relied on NMED maintaining these positions based on the sworn testimony of NMED's policy witness, Mr. Skibitski.⁶

Conclusion

Fair is fair. NMED cannot take inconsistent positions in proceedings before the Commission. To preserve the sanctity of the oath and the integrity of the Commission's legal proceedings, NMED should be estopped from taking the position that the Commission's criteria for determining place of withdrawal should be changed, and that areas around mine units and open pits are not places of withdrawal under the WQA.

⁶ NMED's new positions, as well, are not based on *any* evidence in the record, let alone *substantial* evidence, as required to sustain a finding. There is no evidence in the record that the Commission should change its factors to determine place of withdrawal, let alone evidence to support the proposition that the Commission should adopt copper mining activity, water usage supported by water rights and land ownership as factors. Similarly, there is no evidence in the record that the Commission should reconsider the specific locations it determined to be places of withdrawal at the Tyrone Mine so as not to include ground water underneath mine units and within open pits.

Respectfully submitted,

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