

**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION**



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

**WQCC 12-01 (R)**

**New Mexico Environment Department,  
Petitioner.**

**NEW MEXICO ENVIRONMENT DEPARTMENT'S  
CONSOLIDATED RESPONSE TO THREE MOTIONS  
FILED BY THE OFFICE OF THE ATTORNEY GENERAL**

All three motions filed by the Office of the Attorney General have the same mistaken predicate that the New Mexico Environment Department has taken inconsistent positions before the Water Quality Control Commission. Similarly, all three motions seek the same unfounded remedy of removal of paragraphs from the Department's Statement of Reasons. All three motions must be denied as a matter of fact, as a matter of law, and a matter of timing.

**AS A MATTER OF FACT**

The Attorney General alleges that the Department seeks, post hearing, to change the criteria contained in the Commission's Decision on Remand and to change the specific locations at the Tyrone mine site where place of withdrawal has been determined. See, AG's Motion to Estop NMED. This is not true in either instance. First, from the onset of this proceeding, the Department's Notice of Intent identified that the Department was not seeking to alter or define the place of withdrawal of water for present or reasonably foreseeable future use. See, Skibitski Direct Written Testimony, P. 8. Similarly, from the beginning the Department has identified that it may not be until post-closure that ground water is accessible for domestic and agricultural use. See, Brown's Direct Written Testimony, p. 42. The Department further clarified, through

rebuttal testimony, that the Department's Proposed Copper Rule supports a use by use and unit by unit approach to determining groundwater protection as it becomes accessible. See, Brown's Rebuttal Testimony, p. 3-4. At no time in the hearing did the Department ask or suggest that the Commission change or modify the Commission's 2009 Decision on Remand. There is no need. The Decision speaks for itself. Throughout the hearing the testimony by the Department's witnesses did not challenge the criteria as contained within the Tyrone Decision on Remand. See, Skibitski Direct, p. 5-6. Rather, since the Department filed its Petition on October 30, 2012, it identified a different approach to permitting copper mines as directed by the legislature. See, Skibitski Direct Testimony, p. 6-9. One that looks at a subset of the criteria, with an emphasis on use and site specific information contained within the application. *Id.*

There is no conflict with the Tyrone Decision on Remand because the Commission's findings of fact and conclusions of law on the places of withdrawal are identified in areas outside of active mining units. See, AGO Motion to Strike NMED's Proposed Findings, p. 3 (noting that all areas as places of withdrawal are specifically *around* pits, tailings impoundments, and piles)(emphasis added). To the extent there is a conflict between regulation of active open pits in the Department's Proposed Copper Rule and current discharge permits for the existing open pits at the Tyrone mine site, it is not certain or clear. See *id.*, (noting that the Commission found *aquifers* underlying *portions* of the Tyrone mine site are places of withdrawal)(emphasis added). There can be absolutely no surprise when the difference in approach between the proposed rule and the 2009 Decision on Remand was the subject of much debate during the hearing just completed. It is incredible that the Attorney General would allege a 'fast and loose' play by the Department when the provisions of the Proposed Copper Rule relating to standards not applying below active mine units have not changed in approximately one year. See, Department's

Petition, Pleading #4 (specifically 20.6.7.24.A(4) NMAC; 21.B.(1)(c) NMAC; and 22.A(4)(a)(vi) NMAC.

**AS A MATTER OF LAW**

The Attorney General alleges that the perceived conflict in positions requires that the Department's Closing Arguments and Proposed Statement of Reasons, ¶¶ 1308-31, be stricken from the record. The allegation is incorrect and misplaced. First, there is no necessary conflict as described above.

Second, collateral estoppel generally does not apply to the government, especially in a rulemaking context. *United States v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568, 572, 78 L. Ed. 2d 379 (1984) (finding that government is not the same as a private litigant and a rule allowing non-mutual collateral estoppel against the government would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue). Even if collateral estoppel was applicable to the government, the exact same issue in a separate cause of action would have to be before the Commission. *Id.* The Attorney General fails to recognize that the Commission's Decision on Remand was in the context of an appeal of a discharge closure permit for one particular mine and specifically called into question the Department's authority to issue conditions to that permit. Freeport Closing Arguments, p. 16. This is different from a rulemaking affecting all copper mining in the State of New Mexico. In alleging collateral estoppel, the Attorney General would have to show that it would be fundamentally unfair and cause a re-litigation of issues. *Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 474, 745 P.2d 380, 382.

Third, the law allows that, to the extent there is any conflict between the 2009 Decision and Order and the Department's Proposed Copper Rule, the Copper Rule supersedes the 2009

adjudicative decision of the Commission. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'*, 93 N.M. 546 (1979) (providing that “[t]he whole rulemaking process, which has for its end product a set of judgment calls that will have the force and effect of law, is hardly subject to characterization as ministerial in nature”). Generally, public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. *Thoma v. Thoma*, 1997-NMCA-016, 123 N.M. 137, 140, 934 P.2d 1066, 1069 (citing *Baldwin*, 283 U.S. at 525, 51 S.Ct. at 518). However, the Commission, by rulemaking, is not essentially re-litigating the same issue of where the place of withdrawal is applied to the Tyrone mine site. That time and issue passed when the Commission approved the Tyrone Settlement Agreement and ordered its Decision to be held in abeyance. In the Settlement Agreement, it was contemplated that there would be a rulemaking and concomitant changes in the law:

The requirements of this Tyrone Agreement could be affected by future changes in laws applicable to the Tyrone Mine. If a future change in law materially affects a requirement of this Tyrone Agreement, the closure permit, the abatement plan, or financial assurance, the change in law will supersede any conflicting requirement of this Tyrone Agreement. In that event, the Parties may amend this Tyrone Agreement to reflect the change in law, and if the Parties cannot agree on an amendment, then Tyrone may terminate this Tyrone Agreement by written notice to the other Party.

See, AGO, Exhibit 10, Paragraph 57. As a result, the Commission is free to make its own judgment that will have the force and effect of law, and it is the Tyrone Settlement Agreement that may change, not the Commission’s 2009 Decision on Remand. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'*, 93 N.M. 546 (1979).

### AS A MATTER OF TIMING

Regardless of the baseless allegations by the Attorney General, it is premature for the Attorney General to allege that the adoption of a Copper Rule conflicts with the Commission's 2009 Decision on Remand. As, it stands, the Decision on Remand has been appealed and the appeal has been stayed pending the full implementation of the Tyrone Settlement Agreement. The adoption of a Copper Rule is one of the terms of the Settlement Agreement. See, AGO Exhibit 10. To date, the Commission's Decision on Remand has not been implemented and the Commission has approved a different approach than outlined in the Decision on Remand in the Tyrone Settlement Agreement.

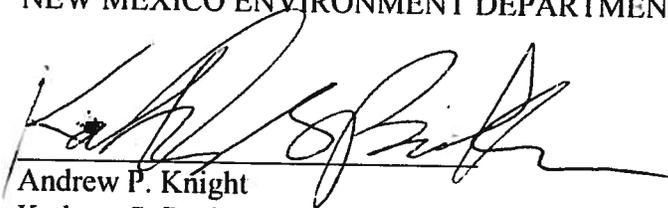
Furthermore, the Decision on Remand only addressed two conditions in a single closure permit. Should the Department's Proposed Copper Rule be adopted by the Commission, then regulation of the Tyrone mine site will continue pursuant to the Tyrone Settlement Agreement until such time as a discharge permit at the Tyrone mine site is either renewed or modified. See, Department's Proposed Final Rule, 20.6.7.10.E. NMAC. At the time of renewal or modification, the Copper Rule would govern the application process. *Id* and see, 20.6.7.2 NMAC. For the Commission's Decision on Remand to see the light of day, the Settlement Agreement would have to be terminated. See, AGO Exhibit 10, p. 16. Even then, the termination of the Settlement Agreement allows the New Mexico Court of Appeals to resolve the pending appeal of the Commission's Decision on Remand. *Id* at P. 17. Only if the Court of Appeals were to rule in favor of the Commission's Decision on Remand would it take effect. The issue is simply not mature.

## CONCLUSION

As a matter of fact there is no conflict between the Commission's 2009 Decision on Remand in which the Commission determined that there were portions of the Tyrone mine site that were places of withdrawal with the Department's proposed Copper Rule. The Department's Proposed Copper Rule does not preclude or predetermine all of the locations where a determination of place of withdrawal will be made at the Tyrone mine site during operations. As a matter of law, collateral estoppel simply does not apply in the administrative rule making context in New Mexico, and the Attorney General has cited no authority for the proposition that it does. Importantly, the Tyrone Settlement Agreement contemplated a copper specific rule and provides that the law supercede any conflict with the agreement. Finally, to the extent there is a presumed conflict, the Commission's 2009 Decision on Remand is not subject to implementation until such time as the Tyrone Settlement agreement fails and the New Mexico Court of Appeals has ruled in favor with the Commission. For these reasons the Department opposes the three motions filed by the Office of the Attorney General.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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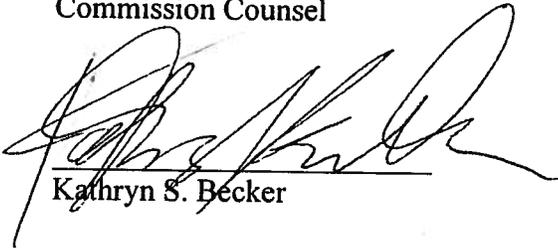
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