

**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 RESPONSE
TO THE JOINT REQUEST FOR STAY OF 20.6.7 NMAC**

The New Mexico Environment Department (“Department” or “NMED”) files this response in opposition to the Joint Request for Stay of 20.6.7 NMAC (“Joint Request”), filed by Gila Resources Information Project (“GRIP”), Turner Ranch Properties (“TRP”), and Amigos Bravos (collectively referred to as “Opponents”). Following eleven days of testimony and public comment, the Water Quality Control Commission (“WQCC” or “Commission”) adopted 20.6.7 NMAC (“the Copper Rule”), one of the most prescriptive and protective state regulations for copper mining in the country. NMED NOI, Brown, Direct, p. 9, 17, 19, 31, 44. The Opponents filed a Joint Notice of Appeal (“Appeal”) of the rule in the Court of Appeals on October 9, 2013. The Opponents subsequently filed a Notice of Proposed Testimony and Other Evidence Offered in Support of Motion to Stay on December 15, 2013. In addition, the Attorney General’s Support of Joint Request for Stay of 20.6.7 was filed on the same day (hereafter referred to as “AGO”). The Opponents’ fail to show good cause for the Commissions promulgation of the Copper Rule to be stayed and therefore the Request for Stay should be denied.

I. Stays generally.

NMSA 1978, Section 74-6-7.C of the Water Quality Act states that “[a]fter a hearing and a showing of *good cause* by the appellant, a stay of the action being appealed may be granted

pending the outcome of the judicial review.” (Emphasis added). The Commission has additional guidelines established for granting a stay.

502. STAY OF COMMISSION REGULATIONS. - -

A. The Commission may grant a stay pending appeal of any regulatory change promulgated by the Commission. The Commission may only grant a stay if a motion is filed, a hearing is held and good cause is shown.

B. In determining whether good cause is present for the granting of a stay, the Commission shall consider:

- (1) the likelihood that the movant will prevail on the merits of the appeal;
- (2) whether the moving party will suffer irreparable harm if a stay is not granted;
- (3) whether substantial harm will result to other interested persons; and
- (4) whether harm will ensue to the public interest.

C. If no action is taken within ninety (90) days after filing of the motion, the Commission shall be deemed to have denied the motion for stay.

WQCC Guidelines, §502. The Opponents fail to show good cause for stay of the Copper Rule. The Opponents and the AGO lack standing in the appellate court and have not shown a likelihood that they will prevail on the merits. There is no harm that will befall the Opponents or the AGO, real or imagined, before the appellate court hears the case. And, supporters of the rule *will* be harmed by a stay of the rule.

II. The Opponents fail to show good cause because they do not meet any of the Commissions’ standards for good cause.

Good cause is determined by a four part test: “(1) the likelihood that the movant will prevail on the merits of the appeal; (2) whether the moving party will suffer irreparable harm if a stay is not granted; (3) whether substantial harm will result to other interested persons; and (4) whether

harm will ensue to the public interest.” *Guidelines, supra*. The Opponents fail to meet any of these standards, all of which are required to be met.

A. The Opponents are not likely to prevail on the merits.

The Opponents claim that the Copper Rule violates the state constitution, state law and case law. Yet within their Joint Request, the Opponents make no specific assertion of any constitutional provision that is violated or legal precedent that would be violated. As articulated in the *Phelps Dodge* decision, the Court of Appeals wrangled over the application of place of withdrawal and rejected the determination that the entire mine site was a place of withdrawal, stating “such a broad and impractical interpretation of the Act: so interpreted, it would not reflect a balance between the competing policies of protecting water and yet imposing reasonable requirements on industry”. *Phelps Dodge Tyrone, Inc., v N.M. Water Quality Control Comm.*, 2006-NMCA-115 ¶33, 140 N.M. 464. The Commission’s Order is afforded discretion and deference. Department’s Closing Argument, pp. 2-9. To assert that the Court of Appeals is likely to rule in the Opponents favor is contrary to legal precedent. *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786. The Opponents will likely fail on the merits of the appeal for two reasons. First, they lack standing to appeal. Second, even if they did have standing to appeal, the Opponents have not proven the merits.

1. The Opponents Lack standing to Appeal the WQCC regulation

For the Opponents to have the ability to challenge the Rule, they must have proper standing. The WQA provides that only a “person who is adversely affected by a regulation adopted by the commission or by a compliance order approved by the commission or who participated in a permitting action or appeal of a certification before the commission and who is adversely affected by such action” has standing to challenge the Rule. NMSA 1978, §74-6-7(A)

(emphasis added). See *New Mexico Cattle Growers' Ass'n v. New Mexico Water Quality Control Comm'n*, 2013-NMCA-046, 299 P.3d 436, 440 cert. granted, 300 P.3d 1181 (N.M. 2013) cert. quashed, 2013-NMCERT-010 (dismissing an appeal of a WQCC rule for failure to state an adverse effect). For the Opponents to have standing and be successful on appeal, they, at minimum, must show injury or a real risk of future injury rather than an undifferentiated threat of hypothetical harm to some unidentifiable person. *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶18, 144 N.M. 471, 478, 188 P.3d 1222, 1229. “Where the Legislature has granted specific persons a cause of action by statute, the statute governs who has standing to sue.” *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 8, 150 N.M. 64 (citing *ACLU of New Mexico*, 2008–NMSC–045, ¶ 9 n.1). Furthermore, the harm stated must be in the “zone of interest” protected or regulated by the statute or constitutional provision on which the Opponents rely. The concepts of harm and zone of interest are intertwined. See *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, ¶ 41, 134 N.M. 243, 252, 75 P.3d 843, 852 (requiring the party to show that the statute or constitutional provision relied on reaches or provides protection against the injury in fact).

All of the docketing statements filed with the Court of Appeals from the Attorney General, Amigos Bravos, GRIP, and Mr. William Olson fail to demonstrate any real harm. GRIP states that it has “several members who live, recreate, and depend on ground water in the vicinity of Freeport’s copper mines in Grant County NM.” Appellants’ Joint Docketing Statement, Ct. App. No. 33,237 ¶ 6, p. 3. Simply being in the vicinity of a mine is insufficient to show an adverse effect. Furthermore, the Opponents note that the Chino and Tyrone mines are currently regulated under the existing permitting scheme. Attorney General’s Support of Joint Request for Stay of 20.6.7 NMAC, No. WQCC 12-01(R), page 6. In order to show harm, copper mining

permits would have to be modified or renewed and *then* subject to regulation pursuant to the Copper Rule. 20.6.7.11 NMAC. At the very least, it is necessary to show that the ground water used by GRIP's members is in the same aquifer, that the ground water used by GRIP's members is down gradient of the mine, and that the ground water will be impacted adversely by the regulation of the copper mine pursuant to the Copper Rule. This hypothetical is in no way assured to happen prior to the resolution of the appeal. This is the type hypothetical threat that *ACLU* prohibits. Until draft permits for the modification or renewal of the existing permits at Tyrone and Chino mines have been issued, there is no risk of injury.

Similarly, TRP states that the Ladder Ranch generally uses the same ground water resources as Copper Flat Mine. However, there is no showing that the Copper Flat mine would discharge up gradient to TRP's property or that the discharge would be in excess of groundwater standards. In fact, the Copper Flat mine is cross-gradient and down gradient to TRP. *See, Model of Groundwater Flow in the Animas Uplift and Palomas Basin, Copper Flat Project, Sierra County, New Mexico*, Aug. 22, 2013, pp. 24-29, attached as Exhibit A. Finally, TRP asserts that their water rights will be impaired by Copper Flats' use of water. While such an event, if true, could be a future harm, the Copper Rule is in no way related to water right adjudication in the state of New Mexico. As noted above, the harm must coincide with a "zone of interest" protected or regulated by the statute. The Department is not charged with the legal authority to regulate water allocation. "The purpose of the Environmental Improvement Act is to create a department that will be responsible for environmental management and consumer protection ...". NMSA 1978, § 74-1-2. This authority rests with the state engineer. *See* NMSA 1978, §§ 72-2-1 to 18. The Opponents and the AGO have not shown they face an imminent threat of injury within the

zone of interest of the law. Therefore, on appeal, they will lack standing and are unlikely to prevail on the merits.

2. The Opponents are not likely to succeed on the merits

Of the two claims that the Opponents make, that state water quality standards will be exceeded due to the Copper Rule and that the Commission provided insufficient reasoning for its decision, neither is likely to prevail on appeal. In order to prevail on appellate review, the Opponents must show that the Commission's Order was arbitrary, capricious, not supported by substantial evidence on the record, or otherwise not in accordance with the law. NMSA 1978, § 74-6-7(B). The duty of the Commission was to adopt regulations for the copper industry. NMSA 1978, § 74-6-4.K. The Copper Rule was tailored to address particular mine units at particular times of operation and closure. NMED NOI, Brown, Direct, pp. 4-5. The Commission's Order is bolstered by a 200 page decision detailing its statement of reasons for the Copper Rule. The Commission's Copper Rule is consistent with the intent of the WQA and facilitates its operation and the achievement of its goals. *State ex rel. Quintana v. Schnedar*, 115 N.M. 573, 575-76, 855 P.2d 562-65 (1993). Based on the history of litigation and legislation giving rise to the promulgation of the Copper Rule, the Opponent's cannot assert a more likely than not basis for success upon the merits. *Phelps Dodge Tyrone, Inc., v N.M. Water Quality Control Comm.*, 2006-NMCA-115, ¶ 15,140 N.M. 464 (expressly reviewing and approving the Department's authority to impose permit conditions based on the Department's interpretation of the WQA but not approving a broad and impractical conclusion that the entire mine site is a place of withdrawal). The Opponents should expect the Court of Appeals to support the Commission's Order considering the spectrum of participation and satisfaction of due process, the extensive evidentiary record and the detailed and comprehensive statement of reasons for adoption.

As to the Opponent's assertion that the Copper Rule will inevitably and irreparably cause state water quality standards to be exceeded at a place of withdrawal, it is not supported by the record. The alleged harm claimed by the Opponents is a future hypothetical of an unrealized and unplanned scenario that the Copper Rule is designed to prevent. The Opponents have repeatedly made the legal argument that allowing for a determination to be made that differs from current practice by the Department is a violation of law. See generally, *AGO Motion to Estop*. The Commission has heard this argument and found that a rational basis for another interpretation exists, namely, to not apply ground water quality standards below active mine units. *Order and Statement of Reasons*, ¶¶ 1332-1333. Barring an express prohibition in the WQA, the Commission's Order concluding that an active mining unit is not a place of withdrawal is lawful. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 27, 133 N.M. 97 (looking to the statute for express restrictions of legislative intent, and not finding any, not reading any in).

The Court of Appeals does not review the Commission's interpretation of statutes *de novo*. NMRA 10-74. Rather, the Court of Appeals will be reviewing whether the Commission, in its quasi-legislative rulemaking capacity, decided the Copper Rule in accordance with the law. NMSA 1978, § 74-6-7. The reasonableness of the Copper Rule, as articulated in the Commission's Order and Statement of Reasons, and the deference afforded the Department favor that the Copper Rule be upheld. See, *Department's Closing Arguments*, p. 9; *Department's Consolidated Response to Three Motions Filed by the AGO*, p. 4; SOR ¶¶ 1320-1325, pp. 199-202.

The Court of Appeals may overturn an administrative agency's decision if there is insufficient reasoning behind its decision. *City of Roswell v. New Mexico Water Quality Control*

Comm'n, 1972-NMCA-160, 84 N.M. 561, 565, 505 P.2d 1237, 1241 (stating “[w]e do not undertake to tell the Commission what it should do in this case. That is not our function. We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours.”). The court laid out what a minimum amount of reasoning would look like in *The Regents of Univ. of California v. New Mexico Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788. In *Regents*, the Commission provided much less reasoning than it did for the Copper Rule. The court found that the Commission gave sufficient reasons for adopting the entire set of amendments to the standards:

1. The changes approved herein to New Mexico's water quality standards protect public health and welfare, enhance the quality of New Mexico's waters, and serve the purposes of the Clean Water Act and the New Mexico Water Quality Act.
2. The changes approved herein ... respect the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes.
3. The regulatory changes affected herein are designed to meet the EPA *Guidelines*.

Regents 136 N.M. 45 at 48, 94 P.3d 788 at 791. The Commission provided extensive and detailed reasons for adopting the Copper Rule in its 214 page Order and Statement of Reasons, containing 1388 paragraphs. This is substantially more than the Commission did to support its reasoning in *Regents*. Furthermore, the contention by the Opponents that a “point-by-point” rebuttal is necessary, *Joint Motion* at 5, is not supported by the case law the Opponents. *Regents* 136 N.M. 45 at 49, 94 P.3d 788 at 792 (stating “[w]e disagree...that the statement of reasons must state why the Commission adopted each individual provision of the standards or must respond to all concerns raised in testimony. Such a requirement would be unduly onerous for the

Commission and unnecessary for the purposes of appellate review.”). The Opponents contention that the record is insufficient or irrational will fail on appeal because the record provides a reasoned, realistic and legal basis for establishing a new regulatory paradigm that is protective of New Mexico’s groundwater.

B. The Opponents state a *speculative harm* may occur as a result of permits issued pursuant to the Copper Rule, but fail to show irreparable harm as a result of the adoption of the Copper Rule.

At best, the Opponents show a speculative harm from a permit issued pursuant to the Copper Rule at some point in the future. An irreparable injury is an “injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction.” INJURY, Black's Law Dictionary (9th ed. 2009). In New Mexico, “[m]ere allegations of irreparable harm are not, of course, sufficient. A showing of irreparable harm is a threshold requirement in any attempt by applicants to obtain a stay.” *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, 105 N.M. 708, 710, 736 P.2d 986, 988. A speculative harm, like what the Opponents have shown here, is not enough “to support the issuance of an injunction.” *State ex rel. State Highway & Transp. Dep't of N.M. v. City of Sunland Park*, 2000-NMCA-044, 129 N.M. 151, 157, 3 P.3d 128, 134.

In the Joint Request, the Opponents claim that the Copper Rule “will do irreparable damage to public groundwater,” that they or their members use. Joint Request at 6. The damage that the Opponents claim is purely speculative. The Opponents claim, but do not provide evidence to support that: (1) permits will be issued in the next year pursuant to the Copper Rule; (2) the permits will not require standards to apply below active mine units and within the open pit hydrologic containment area; (3) contamination in excess of the state groundwater quality standards will occur; (4) the contaminated ground water will not be captured and contained as is

required by the Copper Rule; (5) the contaminated groundwater will travel undetected outside of the capture and containment system; and (6) the contaminated groundwater will not be abated and will be unusable at a place of withdrawal for present or reasonably foreseeable future use. None of the Opponents' claims have occurred, nor is there certainty they will. There is no irreparable harm.

In addition, all active mine units are currently operating under valid discharge permits issued by the Department under existing Groundwater Rules. The Copper Rule will only begin to have an effect as these permits are renewed or modified. Currently there are 17 permits up for renewal and the renewal process for each permit is expected to last several of years. "Speculative injury is not sufficient... [a stay] will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown."§ 2948.1 Grounds for Granting or Denying a Preliminary Injunction—Irreparable Harm, 11A Fed. Prac. & Proc. Civ. § 2948.1 (2d ed.). Thus, the Opponents' possible harms are speculative at best and do not meet the irreparable harm standard required to show good cause to grant a stay.

C. Substantial harm will result if a stay is granted.

The Department has limited resources. The granting of the stay will result in waste of the Departments limited staff time, as staff has spent considerable time reviewing, commenting and preparing to issue draft permits pursuant to the Copper Rule effective December 1, 2013. Here, the Department has been prevented from issuing expired copper mine permits for approximately ten years due to litigation, legislation and rulemaking. If the rule is stayed, the pendency of the appeal before the Court of Appeals is such that the Department will be further unable to renew expired permits at the Tyrone and Chino Copper Mines. Though the Department could proceed with issuing permits under the general permitting rules of 20.2.6 NMAC, the anticipated

challenges to the draft permit language will result in hearings, appeals and further litigation. There is no reason for the Department to proceed with issuing renewals under the general permitting rules knowing that the permitting application process will require the applicant to resubmit or update an application based on the general permitting rules, resulting in more time and money for review and draft issuance. Therefore, there is substantial harm to the Department's programmatic ability to perform its statutory duties. NMSA 1978, § 74-6-5 and 8.

D. Granting a Stay will harm the public interest.

The Opponents correctly frame the issue of water rights in New Mexico belonging to the public. NMSA 1978, ¶72-12-1. For that important reason, the Department's Copper Rule was written to capture and contain contamination so that water quality standards are not exceeded outside of active mine units and groundwater is ultimately available for consumptive use. See, NMED NOI, Brown, Direct, pp. 4-5. Testimony at the hearing affirmed that the Copper Rule, as it was proposed and ultimately adopted, would not significantly alter the present day permitting practices for existing mine units upon promulgation. See NMED NOI, Skibitski, Direct, pp. 12-13. The Opponents have made no showing that groundwater beneath the copper mines in New Mexico will be treated, used, or consumed any differently than is presently the case under the existing permitting rules.

Moreover, the AGO falsely alleges changes in the monitoring, abatement and contingency planning of the Copper Rule that do not exist. There was extensive testimony at the hearing from witness Mr. Brown (NMED) and Mr. Blandford (Freeport) that abatement will continue pursuant to 20.6.7.28.A NMAC of the Copper Rule. SOR, ¶¶ 890-900. Contingency planning is addressed in the Copper Rule in Section 20.6.7.30 NMAC; SOR ¶¶ 1028-1128 pp. 158-171. Monitoring will be expanded around the open pit surface drainage area. 20.6.7.28.A

and B, NMAC; SOR ¶¶ 890-934, pp. 140-146. Consequently, there is no harm to the public by the Copper Rule becoming effective on December 1, 2013. Instead, the public has an interest in the smooth, efficient, and consistent execution of the state's laws and regulations.

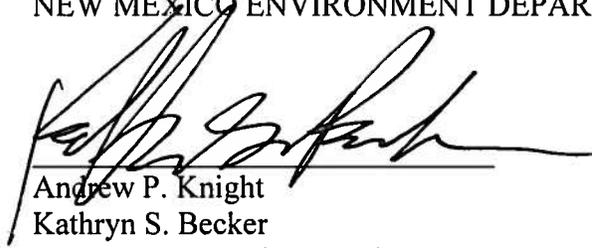
E. Conclusion

The AGO repeatedly argues that the Copper Rule on its face allows the exceedance of ground water quality standards at places of withdrawal. *See*, AGO Support of Joint Request for Stay of 20.6.7 NMAC, p. 2. This statement is not true for a number of reasons; 1) the inapplicability of standards is not, de facto, an exceedance of standards; 2) open pit copper mining necessitates large scale open pits; 3) to date, there have been only two instances where monitoring wells were located within active open pits, stockpiles or tailings ponds in New Mexico because it is often impractical to drill a well in an active mining unit; 4) the Legislature directed the Department to propose a copper permitting rule for the *continuation* of copper mining in New Mexico; and 5) the place of withdrawal determination is made by the Department during the course of the permit application review and in the context of the Copper Rule. *See*, Department's Closing Argument, p. 10.

The Opponents fail to show good cause as defined in Section 502 of the WQCC's guidelines. They have shown no likelihood of prevailing on the merits before the Court of Appeals and they have shown no immediate or direct harm to either their members or to the public. Furthermore, granting of the stay would harm the Department, the economy, and the citizens of New Mexico. Therefore, NMED respectfully requests that the WQCC deny the Opponents' Motion to Stay.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT



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CERTIFICATE OF SERVICE

I certify that a copy of the Department's Response to the Joint Request to Stay was served by email on the following on this 26th day of November, 2013:

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**MODEL OF GROUNDWATER FLOW
IN THE ANIMAS UPLIFT AND PALOMAS BASIN,
COPPER FLAT PROJECT,
SIERRA COUNTY, NEW MEXICO**

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5.0 CALIBRATION DATA

This section describes the data on aquifer stresses and responses available to guide the development and calibration of a numerical groundwater-flow model. These include information on (1) regional water levels, (2) the Palomas Graben and the area of the water-supply wells (well field), (3) the former tailings facility, (4) the open pit, and (5) the artesian zone in the lower Las Animas Creek and lower Percha Creek basins.

5.1 Regional Water Levels

Locations of wells and water-level measurements are presented with recent (December, 2012) potentiometric surface contours on Figure 5.1. Interpreted contours are shown for three aquifers: (1) bedrock and SFG of the Animas Uplift and Animas Graben, (2) the SFG aquifer of the Palomas Basin, and (3) the shallow alluvial aquifer along Las Animas Creek. Groundwater levels range from above 5,800 ft amsl at the western edge of the Animas graben to about 4,200 ft amsl at Caballo Lake.

Piezometers and production wells discussed below are shown on Figure 5.2. Available well construction diagrams are shown in Appendix B.

5.2 Well Field Area

The NMCC water supply wells (PW-1, PW-2, PW-3, and PW-4) were constructed and tested in 1975-80 (Green and Halpenny, 1976, 1980). Local transmissivity of the SFG aquifer is estimated below from the PW-1 and PW-2 test data. Effects of the period of well field operation, from March through June 1982, are then discussed. Next, results of a 1994 pumping test of MW-9, evaluating vertical transmission of effects, is presented. Finally, results of a 2012 aquifer test are discussed.

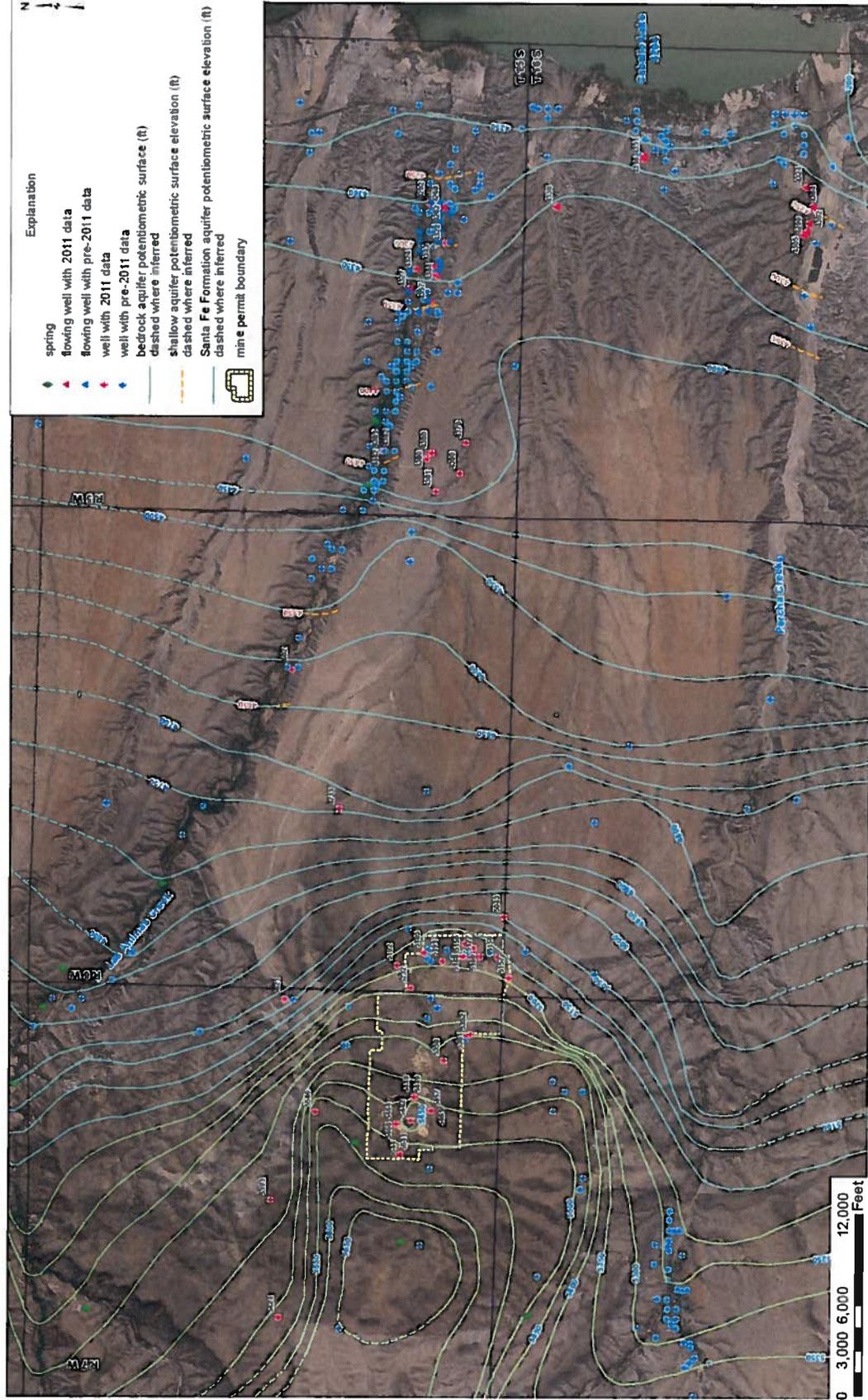


Figure 5.1. Regional water-level measurements and potentiometric surface contours.

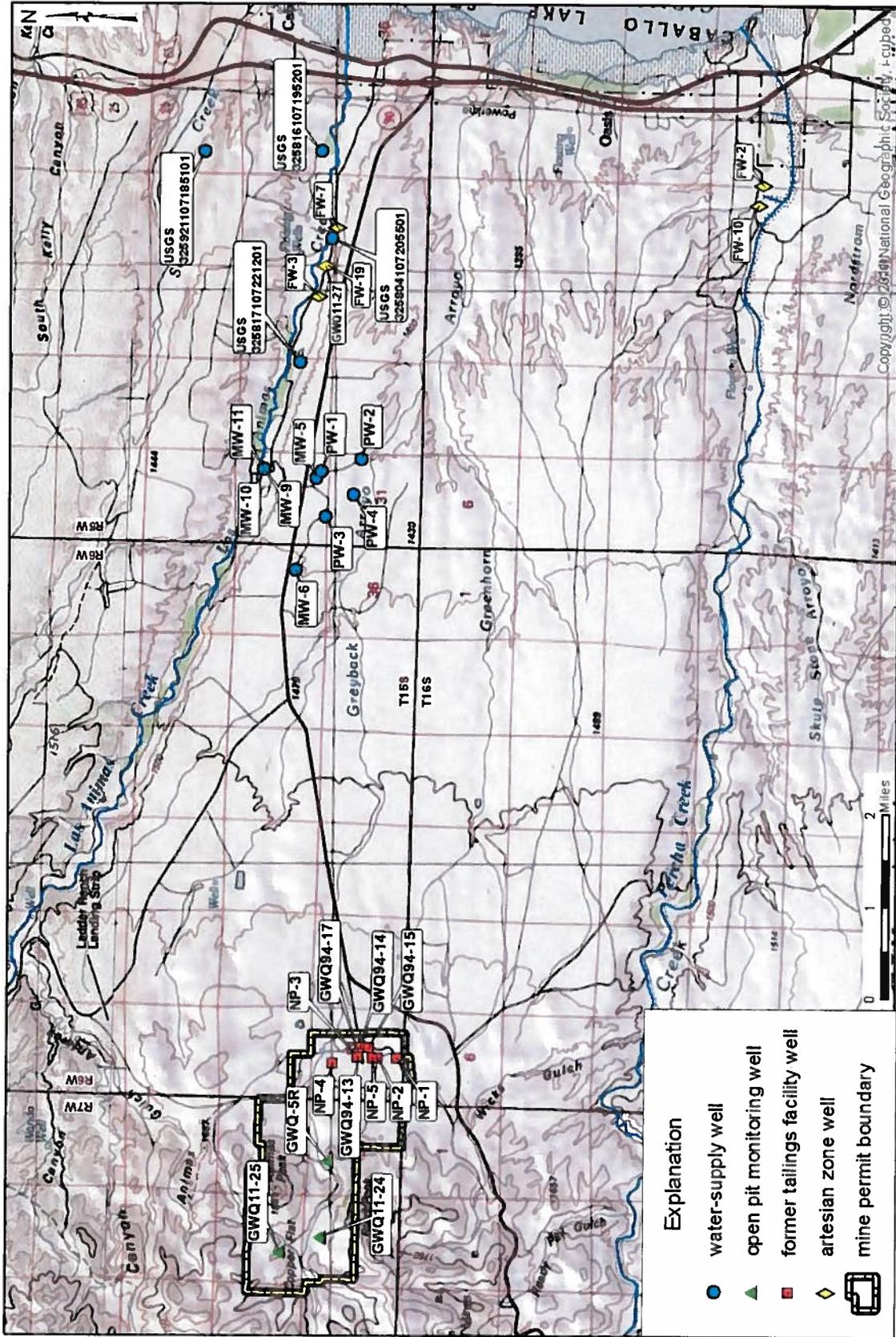


Figure 5.2. Well locations.

5.2.1 Initial Production Well Testing, 1975-1976

PW-2 was pumped at 2,020 gpm for 72 hours in January 1976 (Appendix C1). Measured drawdown and recovery at observation wells PW-1 and MW-5 are shown on Figures 5.3 and 5.4. Aquifer transmissivity is estimated at about 20,000 ft²/day by matching the solution of Theis (1938) to measured drawdown and recovery at PW-1 and MW-5 (WDC, 1976).

Measured drawdown and recovery at the pumping well PW-2, is shown on Figure 5.5, along with the Theis solution match. In addition, because the PW-2 curves exhibit a shape characteristic of a leaky confined aquifer, the modified Theis solution of Hantush (1956) is shown as an alternate analysis.

PW-1 was pumped at 1,500 gpm for 70 hours in December 1975 (WDC, 1976). Measured drawdown and recovery at observation well MW-5 are shown on Figure 5.6. Aquifer transmissivity of about 17,000 ft²/day is estimated by matching the solution of Theis (1938) to measured drawdown and recovery at MW-5, and to measured recovery at the pumping well PW-1, shown on Figure 5.7. In addition, the PW-1 curves exhibit a “leaky” shape and a Hantush curve match is shown as an alternate analysis.

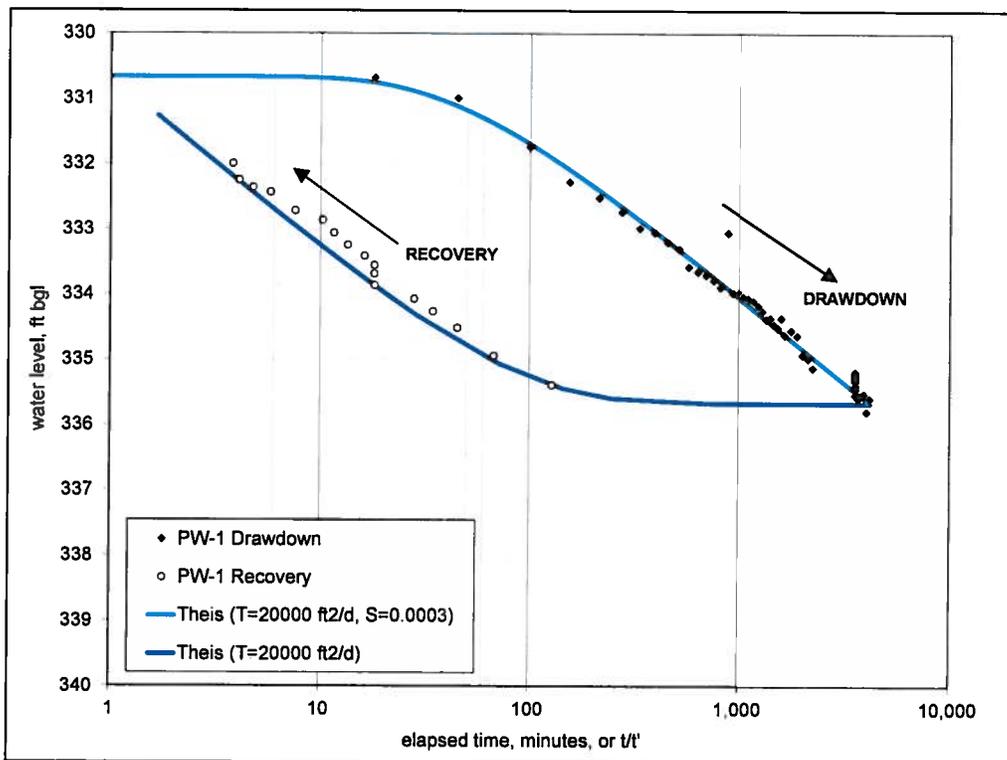


Figure 5.3. Drawdown and recovery in PW-1 during January 1976 PW-2 pumping test.

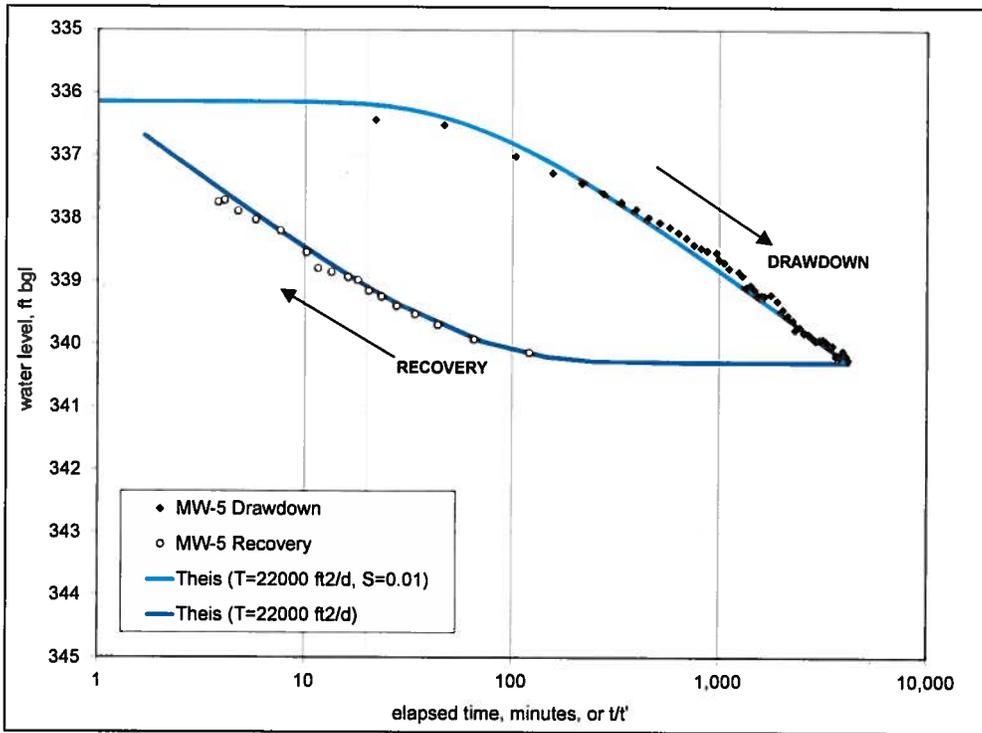


Figure 5.4. Drawdown and recovery in MW-5 during January 1976 PW-2 pumping test.

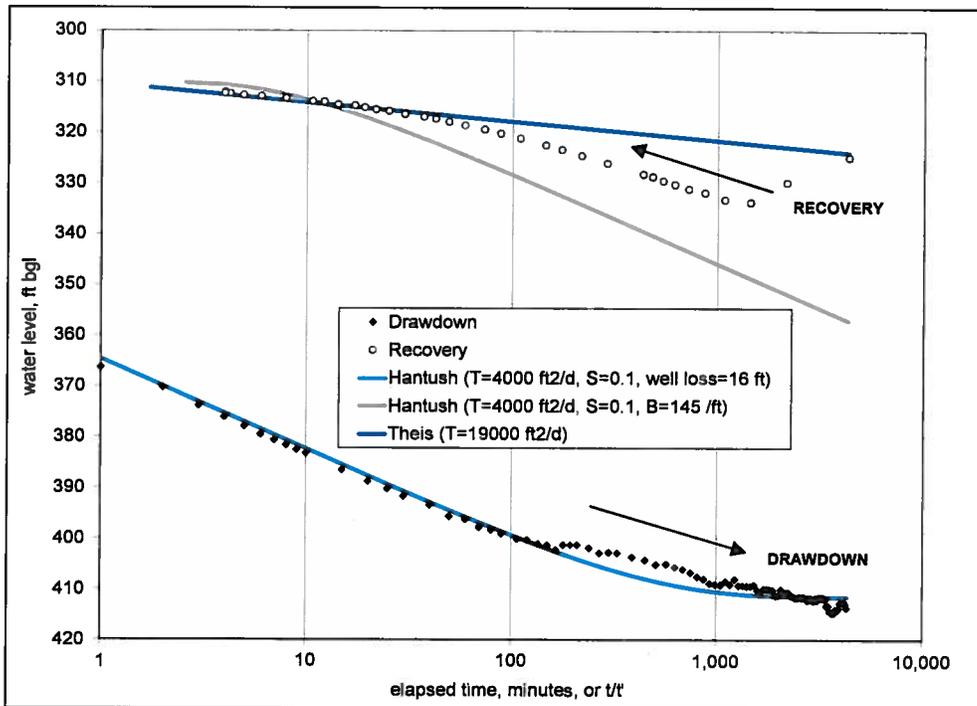


Figure 5.5. Drawdown and recovery in PW-2 during January 1976 PW-2 pumping test.

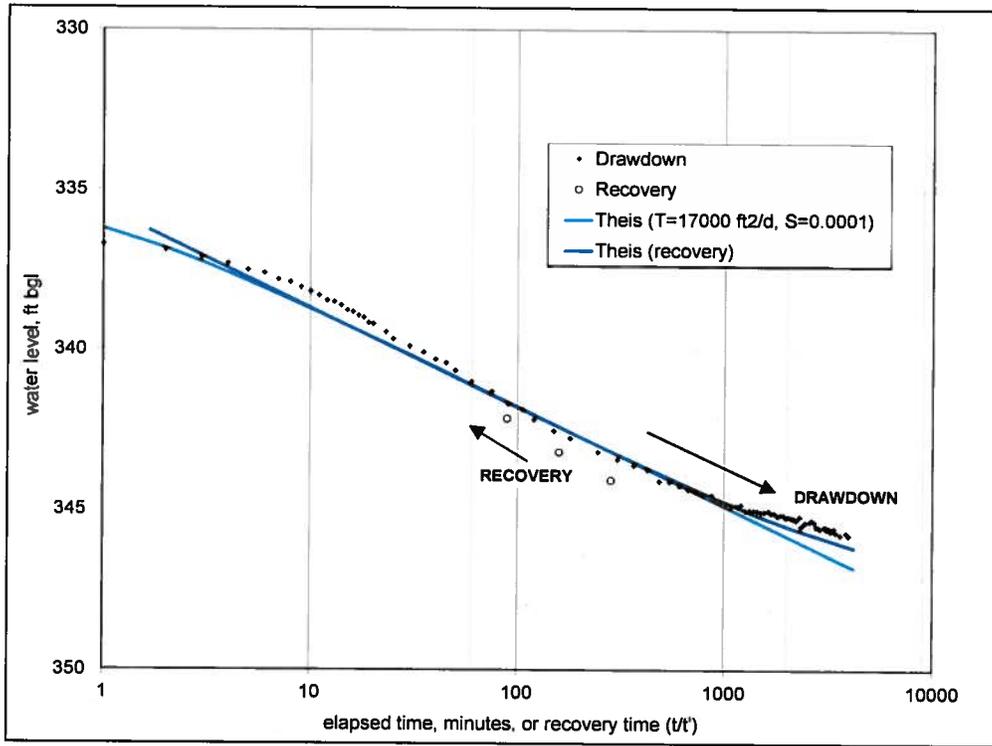


Figure 5.6. Drawdown and recovery in MW-5 during December 1975 PW-1 pumping test.

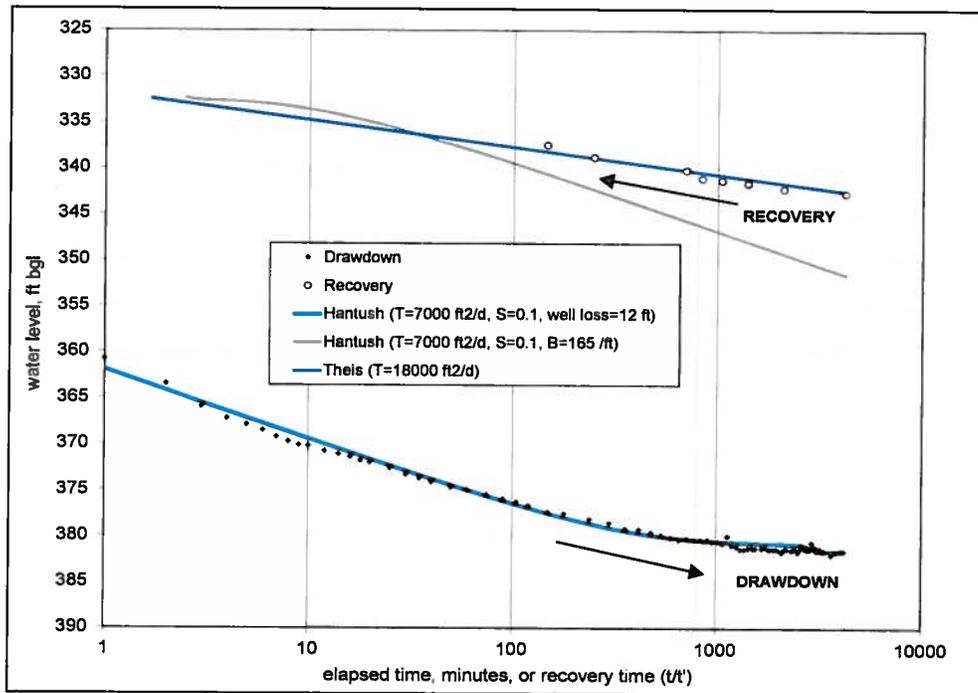


Figure 5.7. Drawdown and recovery in PW-1 during December 1975 PW-1 pumping test.