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## Freeport-McMoRan Fails Financial Soundness Test

**Mining company must meet financial assurance rules or start reclamation**

by Harry Browne, GRIP Secretary/Treasurer

On March 18, New Mexico's Mining and Minerals Division (MMD) sent Freeport-McMoRan (FCX) a shocking letter. "Unless the Third-Party Guarantee(s) are adjusted to meet the financial soundness test," the division's director, Fernando Martinez, wrote, "or (are) replaced with another form of financial assurance, within 90 days, FCX shall cease mining and shall immediately begin to conduct reclamation, closeout, and closure..."

Due to a steady decline in copper prices and the company's risky, leveraged investment in oil and gas properties, the corporation no longer passes this Mining Act test that guarantees that money is available to clean up a mine, even if a mining company goes out of business.

### A Brief History (or, Mining the Public Treasury)

The principle that companies that profit by digging large holes in the earth should set aside money for eventual cleanup seems eminently reasonable. But for more than a century, under the 1872 Mining Law, there has been no legal requirement that they do so, nor does the federal government charge royalties on hardrock mining to cover clean-up costs should mine operators walk away. As a result, the American West is pockmarked with tens of thousands of abandoned mines that are as dangerous and damaging as they were the day miners stopped digging. They contaminate billions of gallons of water each year and are largely responsible for the fact that 40 percent of the headwaters of western rivers are contaminated, according to the Environmental Protection Agency.

Liability for this pollution can be extremely difficult to determine, and even when that's possible, resources for clean-up are nonexistent or shielded by bankruptcy rules. Efforts to clean up one such mine caused last year's Gold King Mine disaster near Silverton, CO (see article on p. 2), which contaminated hundreds of miles along Concrete Creek, the Animas River, and the San Juan River. The fact that the EPA was in charge of the Gold King clean-up, and that taxpayers are now on the hook for the damages caused by that spill, highlight the extent to which private industry has transferred the financial liability of mining to the public after reaping its private profits.

SEE *FREEPORT* ON P. 7

## NM AG Determines CAP Entity Violated Open Meetings Act in Gila Diversion Discussions

by Allyson Siwik, Executive Director

In response to a complaint filed by former New Mexico Interstate Stream Commission (ISC) Director Norm Gaume, the New Mexico Attorney General (NM AG) has determined that the New Mexico Central Arizona Project Entity (NM CAPE) violated the Open Meetings Act (OMA). In a July 12, 2016, letter sent to NM CAPE attorney Pete Domenici, Jr., NM Assistant Attorney General Dylan Lange concludes that the NM CAPE violated the OMA during meetings it held on January 14 and March 1, 2016.

Lange states in the letter: "...We conclude that the NM CAP Entity violated OMA when it improperly discussed matters in closed session that were not covered by an exception from OMA's requirements for open, public meetings."

Specifically, the NM CAPE held closed sessions during otherwise open meetings to discuss a contract negotiation process involving an ISC request for proposals for an engineering services contract. The contract relates to design work relevant to the proposed New Mexico Unit of the Central Arizona Project (NM Unit) pursuant to the 2004 Arizona Water Settlement Act (AWSA).

Although the exemption to the OMA claimed by the NM CAPE was discussion of "the contract negotiation process regarding competitive sealed proposals for engineering design," the NM AG properly found

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## BACK TO SQUARE ONE

**NM CAP Entity approves costly and harmful Gila River diversion alternative**

by Allyson Siwik, Executive Director

The New Mexico Central Arizona Project (CAP) Entity recently approved a large-scale Gila River diversion proposal for environmental analysis that could cost well over \$800-million to construct, operate, and maintain. After the latest round of project analysis and study, the Entity has made little progress in identifying a viable project. The proposed action greatly exceeds the amount of available funding, will harm the

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### Mission Statement

Recognizing that human and environmental systems are inseparable and interdependent, Gila Resources Information Project pursues two goals: to protect and nurture human communities by safeguarding the natural resources that sustain us all; and to safeguard natural resources by facilitating informed public participation in resource use decisions.

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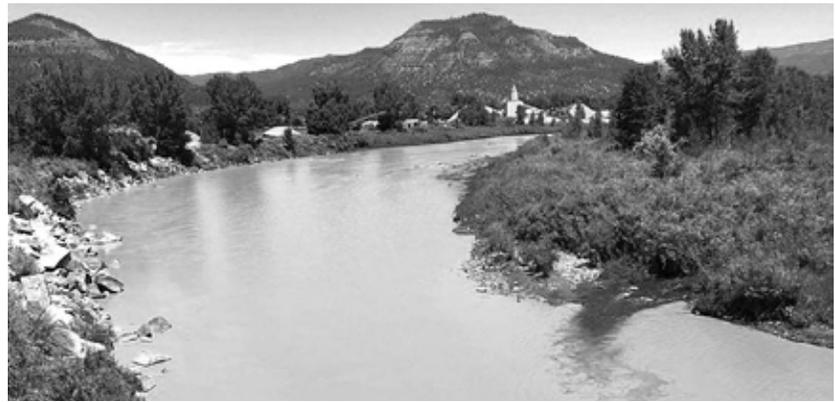
GRIP was founded in 1997. It is supported by foundation grants and individual donations. Special gratitude for ongoing support is owed to the McCune Charitable Foundation.

To become a member and receive a copy of *Get A GRIP*, a minimum annual donation of \$20.00 is appreciated. (\$10 for students and low-income residents.) GRIP is a 501(c)(3), tax-exempt organization; your contribution is tax-deductible.

Other Sites:

[www.vivaverdenm.com](http://www.vivaverdenm.com)

[www.gilaconservation.org](http://www.gilaconservation.org)



*THE ANIMAS RIVER'S MAIN STEM AND ITS TRIBUTARIES, FLOWING FROM COLORADO INTO NEW MEXICO, WERE CONTAMINATED FOR HUNDREDS OF MILES LAST YEAR. (SUSAN MONOTOYA BRYAN/AP PHOTO)*

## **STATE OF NM SUES EPA AND STATE OF COLORADO OVER 2015 GOLD KING MINE SPILL**

### **Reacting to disaster, New Mexico legislators seek reform of nation's outdated hardrock mining laws**

by Richard Mahler, Newsletter Editor

In a stinging criticism of the Environmental Protection Agency and the State of Colorado, the State of New Mexico has filed lawsuits in the U.S. Supreme Court against both entities and others involved in an August 2015 Colorado mining waste spill that dumped nearly three million gallons of highly contaminated waste into the Animas and San Juan rivers, which provide drinking and irrigation water for three states and the Navajo Nation.

In connection with its May suit, the New Mexico Environment Department (NMED) said the EPA "failed to monitor and test critical environmental media, selectively 'cherry-picked' data to downplay the seriousness of the spill, misrepresented facts about the release, and made unsubstantiated conclusions and assertions" about the accident and its outcome.

A plug impounding contaminated water burst while an EPA contractor was trying to clean up the inactive Gold King Mine, near Silverton. As a result, some three million gallons spilled into the Animas River, which flows into the San Juan. The liquid is believed to have contained lead, copper, cadmium, mercury, nickel, zinc, and arsenic.

A federal investigation released in October found that EPA was to blame for the spill, as its contractors did not drill into the mine from above to evaluate the possibility of a blowout. The EPA has taken full responsibility for the accident and proposed in April the Bonita Peak Mining District for Superfund designation and priority for clean up funds. For decades, the Silverton, CO area refused a Superfund designation fearing bad publicity and has now agreed to joining the clean-up program after the Gold King spill.

The lawsuit filed by NM officials charges that the EPA, its contractor, and the mine owners broke three federal laws and was "grossly negligent" for their role in dumping water containing an estimated 880,000 pounds of dangerous metals. The suit alleges that the defendants violated the federal Superfund law, the Resource Conservation and Recovery Act, and the Clean Water Act by spilling the waste and failing to clean it up immediately and thoroughly.

In late June, NMED sued Colorado over the spill. NM Attorney General Hector Balderas claimed the disaster was "the result of two decades of disastrous environmental decision-making by Colorado, for which New Mexico and its citizens are now paying the price." New Mexico also alleged that Colorado downplayed the spill's effects. Colorado Attorney General Cynthia Coffman questioned the move stating "An interstate lawsuit just gives the EPA another excuse to delay and does nothing for the environment or the citizens that have been impacted. It could take years, even decades, to resolve this costly litigation."

SEE *NM SUES EPA* ON P. 3

In a separate action, New Mexico's U.S. senators, Tom Udall and Martin Heinrich, joined NM Rep, Ben Ray Lujan and other legislators in calling for a major update of an antiquated federal hardrock mining law.

Gold King and thousands of other toxic waste sites in the West are the legacy of the federal 1872 Mining Law that to this day allows hardrock mining companies free reign to mine anywhere on our public lands without paying any royalties on the minerals extracted and without any federal environmental requirements for cleanup. These mines continue to degrade water quality, impact wildlife, and impair recreational opportunities. The EPA estimates that 40% of the headwaters of Western watersheds have been polluted by mining and that it will take \$50 billion to clean them up.

In an attempt to update the 144-year-old mining law, last year Rep. Raul Grijalva (D-AZ) introduced HR 963, the Hardrock Mining and Reclamation Act, and New Mexico's Senator Tom Udall introduced S.2254 on the Senate side, co-sponsored by Sen. Martin Heinrich. The proposed House legislation would make mining companies pay royalties for extracting resources from new and existing mines on public lands, while the Senate version would exempt existing mines from paying royalties. Both bills would require payment of reclamation fees that would be used to clean up abandoned mines that continue to leak waste and ensure that taxpayers would not have to pay for rectifying future spills. Both bills would require exploration and operation permits and demonstrations of adequate financial assurance to cover reclamation should the mine operator go bankrupt. The legislation still pending in Congress, designates certain wilderness study areas, areas of critical environmental concern, and related areas as not open to location of mining claims. It also permits a state or local government or Indian tribe to petition the Secretary of the Interior for withdrawal of specific federal land from operation of the general mining laws in order to protect specific values. The Fund created by the legislation would be distinct from the existing Superfund program, which remediates a range of toxic waste sites that includes mines.

The EPA Inspector General investigation of the Gold King accident is following more than a dozen lines of inquiry, including whether the agency was following its own rules and what kind of legal protection the EPA gave the contractor it hired to work at Gold King.

In its evaluation of the accident, the EPA claimed that "irrigation ditches that impacted crops and livestock were shut down" when the contaminated water flowed through the San Juan and Animas rivers in New Mexico. The state disputes the claim that all potentially impacted irrigation ditches were closed and the EPA's supposition that crops irrigated with water from these rivers were therefore "safe for consumption."

The EPA is also accused of setting a false safety standard for lead contamination in soils along a New Mexico stretch of the Animas, setting a weaker recreational level for what were clearly some residential areas along that river. In NMED comments sent to the EPA, the state maintained that the federal agency's "use of skewed baselines (in its soil testing for lead) brings EPA's supervision and judgment into question." It further demanded that the Superfund cleanup of the Gold King site adequately protect "public health, safety, welfare, water quality and the environment for downstream communities within the State of New Mexico."



GILA RIVER AT MOGOLLON BOX. (RICHARD MAHLER PHOTO)

river's threatened and endangered species, and will negatively impact recreation opportunities in the upper Cliff-Gila Valley.

The Entity's proposed project consists of a large diversion dam at the Gila River water-flow measurement gage at the upper end of the Cliff-Gila Valley, storage reservoirs in Spar and Winn canyons, aquifer storage and recovery (ASR) at multiple locations, pump stations, a reconfiguration of the existing irrigation diversions and ditches, and an extensive system of pipelines and siphons. Technical concerns remain, such as significant environmental impacts, the amount of water the project can provide given the limitations on when water can be diverted under the AWSA, and feasibility of aquifer storage.

Additionally, the CAP Entity discussed an initial phase including aquifer storage and recovery, an approach the Bureau of Reclamation rejected in a 2014 study as infeasible on technical and financial grounds. The amount of water available with this ASR scheme is unknown due the lack of information about aquifer storage capacity and how long the water would stay in the Cliff-Gila Valley before running downstream. It's possible that all the available funding could be exhausted on building the project with little water being made available.

According to engineering contractor AECOM, Phase 1 construction costs are estimated at \$124.5-million and more than \$700-million for full build-out. Operations and maintenance costs are estimated over a ten-year period at \$2-million for Phase 1 and more than \$30-million for full build-out. These estimates do not include exchange costs that could add \$1-million or more per year depending upon the amount of water New Mexico diverts.

The Entity's proposed action would remove a significant amount of water from the river at critical times, negatively impacting its natural flow pattern and consequently harming the myriad plant and animal species that depend on the river's free-flowing nature.

On July 15, the Entity notified the Bureau of Reclamation of its proposed action, initiating the first step in the environmental compliance phase of the diversion project. Scoping under the National Environmental Policy Act (NEPA) will begin in late 2016/early 2017.

The NM CAP Entity Alternatives Report is available for viewing and download at [nmawsa.org](http://nmawsa.org)

## SEPTEMBER'S 12TH ANNUAL GILA RIVER FESTIVAL HIGHLIGHTS NATURAL AND CULTURAL HISTORY

**Speakers include Dave Foreman, Audrey Peterman, Fort Sill Apache Fire Dancers, Liz Archuleta, Phil Connors, and Hakim Bellamy**

by Richard Mahler, Newsletter Editor



*Honoring Our Heritage: The Natural and Cultural History of the Gila* is the theme of the upcoming 12th Annual Gila River Festival, scheduled for September 22–25. and will look at the importance of preserving our region's cultural and natural history. This year's centennial of the National Park Service provides an opportunity

to explore the philosophy behind our nation's preservation of its cultural and natural heritage. The festival seeks to help us understand future challenges to preserving biologically important landscapes, such as the Gila River watershed, and to protecting public lands held in trust for all Americans. It also celebrates the fact that the nation's first wilderness area was established in our area in 1924 and the Mogollon culture's cliff dwellings along the Gila River have enjoyed federal protection since 1907.

One of the Southwest's premier nature-oriented gatherings, the Gila River Festival attracts an audience of nature lovers and outdoor enthusiasts eager to learn about and experience the Gila's many wonders. This year it offers birding, fishing, and kayaking, and guided hikes in the Gila National Forest and along the river, as well as guest speakers, spoken-

word poetry, performance art, puppet parade, a downtown art walk, street dance, Sunday brunch, and more. The Fort Sill Apache Fire Dancers with the Gooday Family will perform the



FORT SILL APACHE FIRE DANCERS  
(SANTA FE SELECTION PHOTO)

Dance of the Mountain Spirits as part of the Gila River Extravaganza Saturday night at 9:00 p.m. at Yankie & Texas Streets. For many generations, the Chiricahua Apaches, now known as the Fort Sill Apache Tribe, have performed the Dance of the Mountain Spirits yearly and during sacred occasions to drive away sickness and evil and bring good health and good fortune. The Fire Dancers are a traditional group and rarely perform for the public.



CONSERVATIONIST AND AUTHOR DAVE FOREMAN (GCC PHOTO)

Life-long conservationist and New Mexico-based author Dave Foreman returns to the festival, providing attendees on Thursday, September 22, with historical perspectives on Gila protection in a talk entitled *Gila Headwaters: World-Class Wilderness But Threatened—Once Again*. From the opposition to the Hooker and Conner dams and current Gila River diversion to wilderness protection, Foreman has been at the forefront of these battles and will provide us with a front-row seat in viewing successes of the past and the challenges to come.

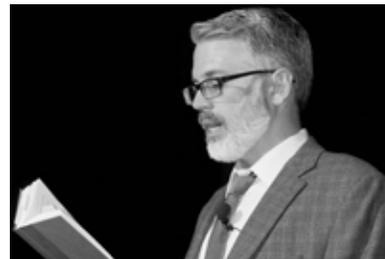
Scheduled on Friday evening, September 23, keynote speaker Audrey Peterman is the author of *Legacy on the Land: A Black Couple Discovers Our National Inheritance and Tells Why Every American Should Care* and *Our True Nature: Finding a Zest for Life in the National Park System*. She will speak about the philosophy behind and the need for preservation of public



AUDREY PETERMAN (COURTESY PHOTO)

lands, the repositories of much of our cultural and natural history. Peterman will also highlight the contributions of some unsung heroes of the conservation movement: women and people of color. Among other activities, for two decades Peterman has been involved in the effort to save Florida's Everglades.

The first poet laureate of Albuquerque, Hakim Bellamy, will perform a spoken word piece entitled *Everywhere Is a Gila*, accompanied by musician Colin Hazelbaker. Last year, the pair collaborated on a video of the same title with Santa Fe-based filmmaker David Smith, which went viral, generating thousands of views. Local performers will join Bellamy at an outdoor film projection/spoken word event produced by Peter Bill, a Western New Mexico University New Media professor, artist, and filmmaker. Bill's projections of films, images, and animations on the Murray Hotel in Silver City, will explore our collective relationship to the wild Gila River.



AUTHOR PHIL CONNORS (SILVER CITY DAILY PRESS PHOTO)

Phil Connors, author of *Fire Season: Field Notes from a Wilderness Lookout*, will speak Sunday morning, September 25, at a special fundraising brunch. Connors will survey the import-

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*“Secrecy has been the pattern and practice of the Interstate Stream Commission and the NM CAPE. I hope the Attorney General’s determination will cause that illegal secrecy to stop.”*

*—former ISC Director Norm Gaume*

that the OMA only allows closed sessions regarding “the contents of competitive sealed proposals.”

According to Lange, “the NM CAP Entity and other public bodies subject to OMA may conduct business in private only for the narrow purposes set forth in OMA. Because the NM CAP Entity discussed matters in closed session that were not excluded from OMA’s requirement for open, public meetings, we determine that the January 14 and March 1 meetings were unlawfully closed.”

Because “action taken by a public body at a meeting that violates OMA is invalid and without effect,” the NM CAPE has 30 days to correct the violations, report back to the Attorney General, and avoid further legal proceedings.

Former ISC Director Norm Gaume explained, “The NM CAP Entity was really deciding the location, configuration, and cost of the Gila River diversion and storage project. That violated the law, which requires these discussions take place in public. Secrecy has been the pattern and practice of the Interstate Stream Commission and the NM CAPE. I hope the Attorney General’s determination will cause that illegal secrecy to stop.”

As the NM Attorney General found, the NM CAP Entity needs to clean up its act and follow the provisions of the state’s Open Meetings Act. Citizens have a legal right to public access to its proceedings.

The Entity’s decisions related to a Gila River diversion could saddle New Mexico taxpayers and water users with hundreds of millions of dollars in construction costs and do irreparable harm to the state’s last wild river. The NM CAPE was scheduled to address the OMA complaint at its Aug. 2 meeting.

ance of the Gila as both symbol and tangible enactment of the conservation impulse. His talk will also provide a glimpse of how the “world’s first wilderness” will continue to accrue and evolve meaning in a changing climate on a crowded planet.

Liz Archuleta, the Arizona Spokesperson for Hispanics Enjoying Camping, Hunting and the Outdoors (HECHO), will speak about how outdoor recreation on public land is important to Hispanic/Latino communities and is fundamental to the future of our public lands and natural resource policy.

Other festival speakers slated to appear include Chairman Jeff Haozous and Historian Michael Darrow of the Fort Sill Apache Tribe, Continental Divide Trail Coalition Director Teresa Martínez, the CDT Coalition’s gateway community program coordinator Christy Curd, Gila Cliff Dwellings National Monument’s interpretation chief Rita Garcia, ecologist Dr. Esteban Muldavin of Natural Heritage New Mexico, The Nature Conservancy’s Martha Cooper, botanist and plant researcher Dr. Richard Felger, rock art expert Alex Mares, anthropologist Rick Quezada of Ysleta del Sur pueblo, writer/photographer Diana Molina of the JUNTOS Art Association, WNMU Museum director and archeologist Dr. Cynthia Ann Bettison, former interpretive park ranger Alex Mares, Tom Vaughn of the Council for American Indian Interpretation, and author Ron Hamm.

Expert birder Jarrod Swackhamer will lead a Sept. 22 field trip to Mangas Springs and mesquite pods will be gathered in an outing led by Asher Gelbart, long-time harvester; Rita Herbst, community kitchen manager at The Volunteer Center; and Kristln Lundgren, community kitchen manager at The Commons. Nathan Newcomer, area grassroots organizer of the New Mexico Wilderness Alliance will lead a hike to the Gila River Middle Box and a tour of the River Ranch, along the Mimbres River, will be led by wildlife biologist Ron Troy of the New Mexico Land Conservancy and habitat specialist Mark Watson of the NM Department of Game and Fish.

On Sept. 23, Rick Quezada and Alex Mares will guide *Water Is Life*, an interpretive field trip to Mogollon-era cliff dwelling and pictograph site, while on the same day ecologist Este Muldavin and The Nature Conservancy’s Martha Cooper will show visitors changes to flood-plain habitat along the Gila River in the Iron Bridge Conservation Area. Todd Schulke, a founder of the Center for Biological Diversity, will lead a Sept. 23 field trip to proposed Gila River diversion and storage sites, while later that day a collaborative performance at WNMU’s Fine Arts Theater will feature a multimedia co-creation of a “Gila forest” on stage. On Sept. 24, local birder Brian Dolton will lead a birding trip to the Iron Bridge Conservation Area along the Gila River, while an archaeological tour of a Mimbres Culture site is facilitated by Marilyn Markel.

For more information, contact the Gila Conservation Coalition at 575.538.8078 or [info@gilaconservation.org](mailto:info@gilaconservation.org). Credit card payment and on-line registration is available at [http://www.gilaconservation.org/wp/?page\\_id=245](http://www.gilaconservation.org/wp/?page_id=245)



## **T or C RESCINDS SUPPORT FOR COPPER FLAT MINE:**

### ***Yunnan-Haliliya to acquire interest***

by Allyson Siwik, Executive Director

At its April 26 meeting, the Truth or Consequences City Council voted 4–1 to rescind a January resolution of support for the proposed Copper Flat mine, near Hillsboro, based on numerous challenges to the Bureau of Land Management’s draft Environmental Impact Statement (EIS).

According to the *Herald of Truth or Consequences* newspaper, the T or C city council rescinded its support for Copper Flat “with the stipulation that the issue will be revisited when new information comes to light concerning water usage rights currently under litigation.”

In late April, parent company THEMAC Resources Group Limited announced that Yunnan-Haliliya Nonferrous Metal Import and Export Company is interested in obtaining a 6.85% stake in the Copper Flat mine with the possibility of acquiring as much as 50% ownership in the project.

The New Mexico Copper Corporation (NMCC) proposes reestablishing a poly-metallic mine and processing facility located near Hillsboro. The 2,190-acre project would utilize Bureau of Land Management (BLM) public land and private property to mine and process copper and molybdenum. Because part of the mine is located on BLM property, a draft Environmental Impact Statement (DEIS) was prepared by the BLM’s Las Cruces office.

As proposed, the Copper Flat Mine would cause surface and groundwater contamination, reduce the amount of water flowing to adjacent streams and springs, the Rio Grande and Caballo Lake, and have significant negative impacts on wildlife, air quality, roads, traffic, recreation, tourism, cultural resources, and the economy.

Because the mine’s water rights are in dispute, the Office of the State Engineer, residents of Hillsboro, and Turner Ranch Properties (which owns Ladder Ranch adjacent to the mine) are in litigation with NMCC over the water rights available to the project, asserting that the mine’s water rights were abandoned long ago.

GRIP and its conservation partners believe that the Draft EIS does not provide adequate and accurate information for the public to fully evaluate the proposed action and alternatives as required by the National Environmental Policy Act. We recommended that the BLM amend the DEIS to ensure that the Agency makes a decision based on a complete understanding of the environmental consequences of the proposed action and alternatives in order to facilitate taking actions that protect, restore, and enhance the environment.

The Copper Flat Mine is not the answer to Sierra County’s economic woes. Like Grant County’s copper mines, it will be subject to the boom and bust economic cycle caused by volatile global copper prices and will potentially create a huge environmental liability for the public to clean up.

Our thanks to all who submitted public comments to the BLM about the Copper Flat mine. All comments are available for viewing on the BLM website at: [www.blm.gov/nm/st/en/fo/Las\\_Cruces\\_District\\_Office/LCDO\\_NEPA/copper\\_flat\\_mine\\_eis/foia\\_docs.html](http://www.blm.gov/nm/st/en/fo/Las_Cruces_District_Office/LCDO_NEPA/copper_flat_mine_eis/foia_docs.html)

## **DIRECTOR JILL HRUBY GIVING AUG. 12 SANDIA LABS TALK IN SILVER CITY**

*Jill Hruby, director of Sandia National Laboratories and president of Sandia Corporation, will give a talk about Albuquerque-based SNL as a vibrant, multi-mission engineering national research center at WNMU’s Global Resource Center (GRC) auditorium on Friday, August 12, 2016, at 7:00 pm. Hruby will describe the broad applications of the lab’s national security work. A meet-and-greet reception (6:30 pm) will precede the talk in the GRC lobby (on 12th Street in Silver City).*

*Co-sponsors of the event are Gila Friends Meeting (Quaker), WNMU, GRIP, Gila/Mimbres Community Radio, and the Silver City Unitarian Universalist Fellowship. Sandia’s roots lie in World War II’s Manhattan Project, which built the world’s first atomic bombs, and its history reflects the changing national security needs of postwar America. Hruby is the first woman to lead a National Nuclear Security Administration laboratory.*

## **GRIP LENDING LIBRARY RECEIVES NEW BOOKS**

*OUR THANKS TO DAVID ROSE, CEIL MURRAY, AND WALTER SZYMANSKI*

After their recent move from Crested Butte to become full-time residents of Silver City, GRIP board member David Rose and his wife, Ceil Murray, donated two boxes of books to the GRIP lending library, with titles such as *Aldo Leopold His Life and Work*, a biography of the conservation hero by Curt Meine,

and *Animal Dialogues: Uncommon Encounters in the Wild*, by Craig Childs. David and Ceil’s contribution augments GRIP’s current collection that includes a large collection of books on water issues thanks to a donation from Walter Szymski, who left Silver City with his wife, Annie Lessem, to be closer to family in Colorado. Books are available for short-term loan during GRIP business hours.



## Closing the Barn Door – a Bit Late

The 1991 New Mexico Mining Act aims to protect state taxpayers from being stuck with the cleanup bill when mines here close down. It requires companies to develop and obtain state approval of plans for closing their mines, cleaning them up, preventing ongoing pollution, and returning the land to other productive uses or to self-sustaining ecosystems. The cost of doing all that work must be estimated and that amount set aside as “financial assurance.”

Pressuring the state to enforce these provisions was the primary focus of GRIP’s work for its first seven years. After years of technical study, hearings, lawsuits and appeals, direct negotiations, and indirect public pressure, we reached an agreement with the Chino and Tyrone mines and with state agencies to require \$500-million in financial assurance.

Although this was a huge victory—and resulted in the mines finally beginning to reclaim tailing ponds that had been inactive for decades—there were a number of devilish details that weakened it. One such detail was the form of the financial assurance. Whereas landlords generally require cash deposits to cover possible damages, and contractors post bonds to cover their liabilities, the Mining Act allows mining companies to be more creative. Among other things, they are allowed to use “third-party guarantees” as financial assurance. The idea is that an independent company promises to pay the bill if the miner goes bankrupt. As long as that “third party” is large and financially stable, the guarantee should protect taxpayers. Over GRIP’s strong objections, the Mining and Minerals Division (MMD) agreed with Chino and Tyrone that Phelps Dodge (the predecessor of Freeport) itself could act as a “third party” to the mines and could provide the guarantee for its subsidiaries.

In order to qualify as a third-party guarantor, Phelps Dodge had to pass a “financial soundness test” and provide quarterly updates verifying it continued to meet the test. A financial guarantee from a company that is itself financially unstable is not much of a guarantee, after all.

Two financial soundness tests are actually used, and the company simply has to pass one or the other. The first is a complex comparison of the company’s tangible net worth, its working capital, its total U.S.-based assets, the value of all of its third-party guarantees, its total liabilities and net worth, its current liabilities and assets, and its net income plus depreciation, depletion, and amortization. [Interested readers can find the requirement in the New Mexico Administrative Code at 19.10.12.1208.G(8)(a).] The second test is simple: the guarantor’s most recently issued senior credit obligation is rated “BBB” or higher by Standard and Poor’s or “Baa” or higher by Moody’s.

## Fixed Debt in a Variable Industry: Didn’t We Already Know That’s a Bad idea?

For FCX, the first shoe dropped in late January of this year. Citing “deterioration in (the company’s) debt protection metrics and increase in leverage as a result of the more precipitous drop in copper prices in 2015... as well as the collapse in oil prices,” Moody’s dropped Freeport’s senior bond rating three notches to B1; commonly known as “junk”

status. Two weeks later, Standard and Poor’s dropped its rating two notches to BB.

The second shoe dropped soon after. In early March, Freeport notified the MMD that, based on its fourth quarter results from 2015, it did not pass the other financial soundness test. Its working capital was too low for the value of its environmentally-related financial guarantees, which totaled over \$534-million (about \$200-million of which was for Chino and Tyrone). FCX’s total liabilities were more than twice its net worth. And its net income was less than ten percent of its total liabilities. In fact, it was negative.

Thus it was that the MMD sent its warning letter to Freeport. The company had anticipated the letter, proposing to replace \$10-million of “third-party” guarantee with earnings from the cash trust set up to cover part of its financial assurance. At the time, this would have brought all three mines into compliance. But Freeport’s financial condition has continued to deteriorate, and when 2016’s first-quarter results came out, the gap between the third-party guarantee and what the state’s formula requires had grown to \$67-million. The MMD sent a second noncompliance letter, threatening the mines with closure, based on the company’s worsening situation.

## Onward through the Fog

Superseding the March 18 letter, MMD’s June 9 notice gave Freeport 90 days to return to compliance with the financial soundness test. But under the Mining Act, the company can apply for up to two 30-day extensions. MMD is evaluating Freeport’s proposal to replace part of the third-party guarantee with increased collateral from ranching properties pending conclusion of an independent review of appraisals of those properties to verify the company’s claims that they are worth more now than they were when they were first pledged as part of the financial assurance package. Neither GRIP nor MMD have any opposition to increasing the amount of the cash portion of that package, which will happen when interest earned by the cash trust is credited back to the fund.

Replacing another \$57 million of third-party guarantee could prove considerably more troubling for FCX. Raising cash by selling more bonds is at best a very expensive possibility, given the firm’s current junk rating. And the added debt would only move the company further from meeting the financial soundness tests. As GRIP argued 13 years ago, allowing a parent company to guarantee its subsidiaries’ cleanup obligations has proved an untenable situation, since the same economic forces that might force the mines to close also weaken the parent’s ability to come up with cash.

GRIP will continue to closely monitor this situation. A mine closure would be a huge blow to workers, contractors, and the local economy. It would also imperil cleanup, reclamation, and long-term protection of groundwater from what is projected to be hundreds of years of acid mine drainage. In the event of forfeiture, the state would have the challenging job of taking over the mine sites and keeping all water balanced and contained, protecting Grant County from spills and pollution. But a failure to enforce the financial assurance provisions of New Mexico’s Mining Act would do little to prevent the firm’s financial demise if copper and oil prices remain low and Freeport’s debt obligations remain high. And in that case, New Mexico agencies’ first obligation is to ensure that a bankruptcy doesn’t leave state taxpayers holding the bill for Freeport’s poor investment decisions.



## Gila Resources Information Project

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- **COPPER FLAT MINE UPDATE**
- **CAP ENTITY PROPOSES COSTLY NEW GILA RIVER DIVERSION PLAN**
- **12TH GILA RIVER FESTIVAL DETAILS**

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### CALENDAR OF UPCOMING EVENTS

**August 11 - Town Hall Meeting on Silver City Comprehensive Plan Update** - For Residents of District 4; 6 - 7pm - Silver City Rec Center, 1016 N. Silver St. Silver City. RSVP to Community Development Department at 575-534-6348. See article in this issue for details about this year's events.

**August 12 - Sandia's Work in Service to the Nation**, 7 pm WNMU Global Resource Center Auditorium - Presentation by Sandia National Lab Director Jill Hruby on broad applications of the laboratory's national security work. Sponsored by Gila Friends Meeting (Quaker), WNMU, Gila Resources Information Project (GRIP), Gila/Mimbres Community Radio—KURU 89.1 FM, and the Silver City Unitarian Universalist Fellowship.

**August 17 - Town Hall Meeting on Silver City Comprehensive Plan Update** - For Residents of District 2; 6 - 7pm WNMU Student Memorial Building 3rd Floor. RSVP to Community Development Department at 575-534-6348.

**August 25 - Town Hall Meeting on Silver City Comprehensive Plan Update** - For Residents of District 1; 6 - 7pm Silver High Little Theater; RSVP to Community Development Department at 575-534-6348.

**September 22-25 - 12th Annual Gila River Festival - Honoring our Heritage: The National and Cultural History of the Gila** - Various locations, including the Gila River and Silver City. Schedule and on-line registration at [www.gilaconservation.org](http://www.gilaconservation.org). Info: [www.facebook.com/GilaRiverFestival](http://www.facebook.com/GilaRiverFestival), or 575.538.8078.

**November 8 - Election Day** - Don't forget to vote. Early voting starts Oct. 10.

**January 2017 - 6th Annual Wild & Scenic Film Festival**

**January 17 - March 18, 2017 - New Mexico Legislative Session** - State Capitol

## Earth Matters

A show about earthly matters that impact us all!

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New Mexico Wilderness Alliance

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