BEFORE THE NEW MEXICO MINING COMMISSION

IN THE MATTER OF THE PETITION FOR REVIEW OF THE DIRECTOR'S ACTION DATED AUGUST 19, 2009 GENERAL PERMIT MK001DRY

No. 09-01

REE-CO URANIUM LP,
Petitioner.

DECISION AND ORDER

THIS MATTER came before the New Mexico Mining Commission (the "Commission") upon the petition filed by Petitioner Ree-Co Uranium LP ("Ree-Co") on September 15, 2009 in the above-titled matter. In accordance with 19.10.14 NMAC, the Commission held 5 days of hearing between November 13 and December 23, 2009, during which it afforded all parties, as well as the Commission, the opportunity to examine witnesses. It received testimony from five witnesses and heard public comment. On November 30, 2009, the parties submitted legal briefs regarding the relationship of the federal General Mining Law of 1872 to the instant proceeding. The parties also submitted proposed findings of fact, conclusions of law and written closing arguments on February 12, 2010. On February 23, 2010, Petitioner Ree-Co submitted Supplemental Closing Argument and on the same date the Mining and Minerals Division of the New Mexico Energy Minerals and Natural Resources Department ("MMD") submitted a Motion to Strike Ree-Co's Supplemental Closing Argument. At its March 3, 2010 meeting, before going into executive session to deliberate on Petition 09-01, the Commission denied MMD's Motion to Strike Ree-Co's Supplemental Closing Argument. The Commission deliberated on the matter on March 3, 2010 and briefly on March 15, 2010. The Commission announced its decision on March 15, 2010, after which the Commission instructed its counsel to prepare a written order consistent with its decision and containing findings of fact and conclusions of law.

The Commission, being familiar with the hearing record, which consists of 6 volumes of certified hearing transcripts totaling approximately 936 pages, the pleadings submitted by the parties, and the exhibits duly admitted into the record, hereby enters the following findings of fact and conclusions of law and enters its decision and order:

Findings of Fact

1. On or about April 6, 2009, Ree-Co submitted its application for a General Permit (Dry) to MMD. Ree-Co Exhibit C-7 at 000114-000123; MMD Exhibit 1.
2. MMD returned the application to Ree-Co, pending resolution of the Notice of Violation No. N09-15-2 MMD had issued to Ree-Co on or about February 4, 2009 for drilling without a permit on BLM land in an area known as the West Ranch. Hollen, Tr. Vol. 4, p. 538: 11-20; MMD Exhibit 4.[1]
3. Sometime in late 2008, Ree-Co began conducting drilling activities on the West Ranch without first obtaining a permit from MMD and without providing notice to BLM. The West Ranch drilling activities involved both shallow and deep drill holes. Hollen, Tr. Vol. 5, p. 661: 15-21; Snyder, Tr. Vol. 1, p. 191: 13 to 192: 24; MMD Exhibit 2.
4. In its meetings with Ree-Co prior to execution of the settlement agreement aimed at settling Notice of Violation No. N09-15-2, MMD made clear and did not waiver from its position that a general permit was required for the shallow, up to 50-feet deep holes, and an exploration permit was required for the larger, deeper holes. Shepherd, Tr. 6, p. 840:18 to 845: 7; Hollen, Tr. Vol. 4, p. 553: 6-25; Tr. Vol. 5, p. 652: 17-21, 742: 16-21; Snyder, Tr. Vol. 1, p. 191: 14 to 193: 7; p. 202: 15 to 203: 1.

[1] Citations to the Commission Hearing Transcript of Proceedings Volumes I through Volume VI shall be as follows: Tr. Vol. __, p. __ : __ .

5. In these pre-settlement meetings, MMD informed Ree-Co that it had environmental concerns about the deep holes, particularly with respect to groundwater. Shepherd, Tr. Vol. 6, p. 841: 5-14.
6. MMD and Ree-Co entered into a Settlement Agreement dated effective May 27, 2009. MMD Exhibit 2.
7. Under the terms of the Settlement Agreement, MMD issued and settled Amended Notice of Violation No. N09-15-2 (conducting mineral exploration without obtaining an exploration permit) and Notice of Violation No. N09-15-3 (conducting mineral exploration without a general permit). MMD Exhibit 2.
8. Amended Notice of Violation No. N09-15-2 addressed Ree-Co's deep drilling activity on the West Ranch, which involved opening 34 previously drilled locations, down-hole washing the drill holes, and using an air rotary reverse circulating drilling rig and water to clear each 6-inch diameter borehole of any residual material and to facilitate down-hole radiation logging. MMD Exhibit 2.
9. Notice of Violation No. N09-15-3 addressed Ree-Co's shallow drilling activity on the West Ranch, which involved drilling to between 25 and 50 feet to contact bedrock, using a hand-held hand-carried air-hammer drill to sink two dry 2-inch diameter holes, approximately 20 feet away from the center stake at each of location, resulting in approximately 190 holes. MMD Exhibit 2.
10. In its reclamation plan for the West Ranch project, Ree-Co reported having encountered three wet mine drill holes with water levels several hundred feet below the surface. Snyder, Tr. Vol. 3, p. 264: 16 to 266: 23.

11. Mr. Snyder further acknowledged that there are other drill holes on the West Ranch that have struck water several hundred feet below the surface. Snyder, Tr. Vol. 3, p. 266: 13-22.
12. Ree-Co resubmitted its application for a General Permit (Dry) on May 27, 2009. Ree-Co's application stated that it was "for discovery work on six sections northeast of Prewitt, New Mexico in USGS 7.5 Minute Quadrangles." Ree-Co Exhibit C-7 at 000114-000123; MMD Exhibit 1.
13. Ree-Co's application for a General Permit (Dry) was prepared by Jay T. Snyder, P.G. Snyder, Tr. Vol. 1, p.133: 3-6; Tr. Vol. 2, p. 213: 22-24.
14. Even though Mr. Snyder has worked on other drilling projects, Ree-Co's project is the first mining exploration project Mr. Snyder has worked on. Snyder, Tr. Vol. 2, p. 230: 22 to 231: 11; Tr. Vol. 5, p. 769: 4-7.
15. Mr. Snyder was aware that MMD typically issued general permits for hobby mining activities and that Ree-Co's activities are not hobby mining. Snyder, Tr. Vol. 1, p. 151:7 to 152:2; Tr. Vol. 2, p. 246: 3-11.
16. Before Mr. Snyder submitted Ree-Co's application for a General Permit (Dry), he reviewed posted general permit and minimal impact exploration permit applications to get an idea of how other applicants were calculating disturbed volume, although he was unable to discern which were general permit applications and which were minimal impact exploration permits. Snyder, Tr. Vol. 1, p. 184:20 to 185: 5; Tr. Vol. 3, p. 312: 14 to 314: 2.

17. Mr. Snyder therefore decided to file Ree-Co's application for a General Permit (Dry) and address any comments or concerns as MMD brought these to his attention. Snyder, Tr. Vol. 3, p. 288: 16 to 289: 4; Tr. Vol. 2, p. 245: 5-22.
18. Mr. Snyder agreed that he took this approach to filing the application "so we wouldn't have a moving target and have discretion come in and new issues come in." Snyder, Tr. Vol. 3, p. 288: 16-22.
19. Mr. Snyder anticipated that MMD would seek clarification regarding Ree-Co's proposed drilling activity because Ree-Co's application did not contain such fundamental information as the number, size and depth of holes that Ree-Co intended to drill. Snyder, Tr. Vol. 5, p. 774: 24 to 777: 5; Tr. Vol. 2, p. 227: 5-14 and p. 228: 10-16.
20. Mr. Snyder estimated that the total disturbance created by Ree-Co's deep-drilling program would be spread out over between 20 and 30 acres. Snyder, Tr. Vol. 1, p. 166: 10 to 167: 6.
21. Even though Ree-Co intended to drill to below known depths where ground water may occur, Mr. Snyder stated that he did not expect Ree-Co's proposed deep-drilling activity to intersect groundwater. Snyder, Tr. Vol. 3, p. 257: 22 to 275: 11.
22. Even though Mr. Snyder did not expect Ree-Co's deep-drilling activity to intersect groundwater, Mr. Snyder stated that Ree-Co was prepared to deal with either condition - dry or wet drill holes. Snyder, Tr. Vol. 3, p. 257: 24 to 260: 24.
23. After filing Ree-Co's application for a General Permit (Dry), the Office of the State Engineer brought to Mr. Snyder's attention that 1200-foot deep drill holes at a minimum "may be intersecting a potentiometric surface of subsurface water and, in fact, may be intersecting water-bearing strata." Snyder, Tr. Vol. 1, p. 163: 25 to 164: 16.

24. James Hollen, one of MMD's surface reclamation specialists, acted as the permit lead on Ree-Co's application for a General Permit (Dry). Hollen, Tr. Vol. 4, p. 529: 22 to 530: 4.
25. By letter dated June 2, 2009, Mr. Hollen forwarded a copy of Ree-Co's application for General Permit (Dry) to the Bureau of Land Management ("BLM") and requested its review and comment on the application within two weeks of receipt. MMD Exhibit 7.
26. While it was not MMD's practice to send general permit applications to BLM for review, Mr. Hollen forwarded Ree-Co's application for General Permit (Dry) because of Ree-Co's earlier drilling activity on the West Ranch without a permit from MMD or notice to BLM. Hollen, Tr. Vol. 5, p. 668: 19 to 669: 3.
27. By letter dated June 17, 2009, BLM commented that: (1) the application did not state what type of equipment will be used to drill the discovery holes; (2) the map attached to the application did not show the proposed location of the discovery holes, nor did the application state how many holes would be drilled; (3) the application did not describe the amount of disturbance per discovery hole or how the surface would be reclaimed and the discovery holes abandoned; and (4) Ree-Co had not submitted a Notice to BLM so they had no authority to conduct the proposed activities. MMD Exhibit 8.
28. Without a BLM-approved Notice of Intent, Ree-Co was not authorized to conduct any type of drilling activity on BLM land. Hollen, Tr. Vol. 5, p. 672: 8-13; p. 674: 12-19; MMD Exhibit 8.
29. Ree-Co submitted to BLM a Notice of Intent under 43 C.F.R. § 3809 for Ree-Co's East Ranch Drilling Project "for ground disturbance activities associated with drilling 20 boreholes under pending General Permit MK001DRY" on or about July 6, 2009, almost 6 weeks after submitting its general permit application to MMD, and a Revised Notice of

Intent under 43 C.F.R. §3809 on July 16, 2009, 7 weeks after submitting its general permit application to MMD. Ree-Co Exhibit C-8 at 000028-000078; MMD Exhibit 9.

30. At the time of their submission to BLM, Ree-Co did not provide copies of its July 6, 2009 Notice of Intent or its July 16, 2009 Revised Notice of Intent to MMD. Hollen, Tr. Vol. 5, p. 671: 13-15; p. 674: 24 to 675:13.
31. Mr. Hollen did not intentionally delay processing Ree-Co's general permit application. Hollen, Tr. Vol. 5, p. 692: 5 to 693: 13.
32. From mid-June to mid-July 2009, Mr. Hollen was working on a draft reclamation plan for the West Ranch, as well as on other projects, in addition to Ree-Co's general permit application. Hollen, Tr. Vol. 5, p. 678: 22 to 679: 7; p. 681: 15 to 682: 20.
33. By letter dated July 20, 2009, Mr. Hollen requested from Ree-Co additional information, including (1) technical description of the proposed drilling, in addition to the total number of proposed drill holes, final total depth, drill hole diameter, and location; (2) technical description of the proposed equipment to be used for drilling the holes; (3) the amount of disturbance associated with each proposed discovery hole, how the surface will be reclaimed and the holes abandoned; and (4) copies of its BLM Notice of Intent and Plan of Operations upon approval from BLM. MMD Exhibit 10.
34. By letter dated July 27, 2009, Mr. Snyder responded on Ree-Co's behalf to MMD's request for additional information by submitting Ree-Co's BLM Notice of Intent, BLM's July 14, 2009 electronic request for clarification, and Ree-Co's BLM Revised Notice of Intent, indicating that the Revised Notice contained most of the information MMD had requested. Snyder, Tr. Vol. 1, p. 156:13 to 159:18; Ree-Co Exhibit C-8 at 000026-000078; MMD Exhibit 3.

35. Ree-Co's application for General Permit (Dry) was deemed complete on July 28, 2009, upon submission of Ree-Co's July 27, 2009 letter to MMD and the attached BLM Revised Notice of Intent. Hollen, Tr. Vol. 5, p. 685: 12 to 686: 9; Snyder, Tr. Vol. 2, p. 228: 10-16.
36. Ree-Co's General Permit application was for a drilling program on federal land and mineral estates 10 miles northeast of Prewitt, Section 6, T14N, R10W, NMPM, McKinley County, New Mexico, to include 56 drill holes, 2 inches in diameter, up to a depth of 50 feet, and 20 drill holes, 4 7/8 inches in diameter, up to depth of 1200 feet at borehole locations identified in Figures 1 and 2 attached to BLM Revised Notice of Intent. Ree-Co Exhibit C-8 at 000026-000078; MMD Exhibit 3.
37. By letter dated July 31, 2009, BLM approved Ree-Co's Revised Notice of Intent for the East Ranch Drilling Project. To ensure that Ree-Co's operations do not cause undue and unnecessary degradation, BLM required that Ree-Co obtain "[a]ll applicable State and Federal permits . . . prior to surface disturbing." Ree-Co Exhibit C-8 at 000013-000014; MMD Exhibit 12.
38. By letter dated August 19, 2009, MMD issued General Permit MK001DRY to Ree-Co. Condition 2 of the permit authorizes Ree-Co "to use a hand-held hammer drill, to drill up to 56 dry mine drill holes, each hole being no greater than 2 inches in diameter and no deeper than 50 feet, at the borehole locations in Figures 1 and 2 of the Application." Ree-Co Exhibit C-7 at 000125-000127; MMD Exhibit 11.
39. Condition 3 authorizes Ree-Co "to site the location of each 2-inch diameter hole identified in Figures 1 and 2 of the Application in, and directly upon, existing ground surfaces without clearing or blading, or otherwise mechanically clearing the existing

surfaces, except that the existing surface may be disturbed only so much as is necessary to use the hand-held drilling device to access the drilling site via all-terrain vehicle or pick-up truck, and to reclaim the area as required by this permit. Ree-Co must also utilize any existing two-track trails and private roads, wherever possible, for site access, including, but not limited to, 2-inch hole drilling and subsequent reclamation activities." Ree-Co Exhibit C-7 at 000126; MMD Exhibit 11.

40. Condition 5 provides that "[d]rilling will take place at the borehole locations provided in Figures 1 and 2 of the application. No work shall extend beyond the Permit Area, as identified in Figures 1 and 2 of the application." Ree-Co Exhibit C-7 at 000126.

41. Condition 10 provides that "[i]f any habitation sites, human remains, objects of cultural patrimony or any buried cultural resources are discovered or inadvertently uncovered during work conducted pursuant to the general permit, all work should immediately cease within the area of discovery, the remains should be protected in place and the New Mexico Department of Cultural Affairs, Historic Preservation Division should be notified immediately." Ree-Co Exhibit C-7 at 000126; MMD Exhibit 11.

42. The General Permit further states that "[t]his permit does not authorize any drilling, disturbance or equipment use, whatsoever, other than the 2-inch diameter, 50-foot-deep holes, as described herein. Specifically, this permit does not authorize the drilling, disturbance or equipment use related to the 4 7/8 inch, 1200-foot-deep holes contemplated by the Application Supplement. Such work will require either a minimal impact exploration permit or a regular exploration permit, pursuant to 19.10.3.302 NMAC or 19.10.4.402 NMAC, respectively." Ree-Co Exhibit C-7 at 000127; MMD Exhibit 11.

43. The general permit category is intended to be a simple and straightforward, non-detailed permitting process for recreational or small miners that does not require the applicant or MMD to expend significant amounts of time and resources monitoring the miners' activities. Shepherd, Tr. Vol. 6, p. 811: 19 to 812: 4; p. 873: 25 to 875: 9.
44. Ree-Co's proposed deep drilling program would require more site visits and more administrative time than is performed under a general permit. Shepherd, Tr. Vol. 6, p. 814: 13-15.
45. General permit applications generally are handled in a quick manner and, once it understood the nature of the drill holes Ree-Co proposed, MMD acted quickly and approved Ree-Co's request for permitting the 56 shallow drill holes under its general permit application. It also gave Ree-Co direction about what to do with the deeper drill holes. Brancard, Tr. Vol. 3, p. 475: 9-18.
46. Even though MMD had not previously permitted such activity under the general permit category, the Director determined that Ree-Co's proposed 2-inch diameter, 50-foot deep drill holes properly fit under the general permit category because the potential impacts from this type of activity are minimal. Brancard, Tr. Vol. 3, p. 347: 21 to 348:5.
47. The general permit rule, 19.10.3.301 NMAC ("Rule 301"), does not contemplate or provide the appropriate standards or review for the level of activity proposed by Ree-Co's deep drilling program. Brancard, Tr. Vol. 3, p. 347: 1-11; Shepherd, Tr. Vol. 6, p. 810: 20 to 812: 4; Snyder, Tr. Vol. 1, p. 162: 18 to 163: 12.
48. Unlike the minimal impact exploration or regular exploration rules, Rule 301 does not provide standards for the proper plugging and abandonment of deep drill holes. Shepherd, Tr. Vol. 6, p. 810: 24 to 811: 5.

49. Unlike the minimal impact or regular exploration rules, Rule 301 does not require applicants to provide financial assurance. Shepherd, Tr. Vol. 6, p. 851: 19-21; p. 874: 25 to 875: 5.

50. The requirement for financial assurance guarantees that the State has sufficient funding to properly complete the reclamation and plugging and abandonment associated with an exploration or mining project in the event that the mine operator fails to do so. Shepherd, Tr. Vol. 6, p. 851: 8-18.

51. Drill holes the size and depth of Ree-Co's proposed deep drilling program have the potential of placing the State at risk for reclamation costs in the range of $4,800 to $5,000 per dry hole and $10,000 to $11,000 per wet hole. Shepherd, Tr. Vol. 6, p. 852: 1 to 854: 11.

52. Beginning in late 2008, Ree-Co reported to MMD three times – twice in writing and once through Mr. Snyder - that it had properly plugged the drill holes it created on the West Ranch, from bottom to top, within 12 feet from the surface, and concrete plug installed. Hollen, Tr. Vol. 5, p. 655: 24 to 657: 25; MMD Exhibits 5 and 6.

53. In an April 2009 site inspection, Mr. Hollen discovered that a string of drill holes Ree-Co reported as plugged had not been plugged from bottom to top. The drill holes had a surface cap only, making it appear that they had been plugged. Hollen, Tr. Vol. 5, p. 659: 9 to 660: 15.

54. During the site inspection, Mr. Hollen sounded one of the holes to its bottom, at a depth of 450 feet, to verify whether it had been plugged, and found that it had not been plugged. Hollen, Tr. Vol. 5, p. 660: 11-22.

55. Under a general permit, Ree-Co would not be required to provide financial assurance for its proposed deep drilling activity. Shepherd, Tr. Vol. 6, p. 851: 19-21.

56. Drill holes the size and depth of Ree-Co's proposed 4 7/8-inch diameter, 1200-foot deep drill holes are normally exclusively permitted as exploration permits pursuant to the exploration rules. Brancard, Tr. Vol. 3, p. 333: 18-23; p. 336: 11-17.

57. MMD has permitted uranium exploration projects pursuant to the minimal impact exploration rule, 19.10.3.302 NMAC ("Rule 302"), or the regular exploration rule, 19.10.4.402 NMAC ("Rule 402"). MMD Exhibit 13.

58. Generally, the number of drill holes, the amount of disturbance, and any potential impacts on the environment will determine which permit category a proposed drilling program will fall under. Brancard, Tr. Vol. 3, p. 423: 1-4.

59. Rule 302 and Rule 402 provide for a higher level of permit processing, with their concomitant requirements for review, inspection, and reporting. Shepherd, Tr. Vol. 6, p. 810: 24 to 816: 15; p. 879: 1-15; Brancard, Tr. Vol. 3, p. 419: 14 –24.

60. Mr. Snyder asserted that Ree-Co would have agreed to the placement of Rule 302 conditions on its General Permit MK001DRY. Snyder, Tr. Vol. 162: 18 to 165: 15.

61. MMD does not attach Rule 302 minimal impact exploration permit conditions to a Rule 301 general permit because, unlike the minimal impact exploration permitting process, the general permitting process does not include steps to ensure that reclamation and plugging and abandonment are adequately addressed. Shepherd, Tr. Vol. 6, p. 810: 24 to 811: 11, p. 879: 1-15.

62. When MMD has denied applications for minimal impact exploration permits, its decisions have been based on a site's proximity to other exploration sites being drilled at

the same time by the same operator, the site's designation as a traditional cultural property ("TCP"), or an operator's lack of right to access a site. Shepherd, Tr. Vol. 6, p. 860: 13-25; p. 869: 16 to 871: 2.

63. Since 2002, the average length of time for MMD to process and approve first-time minimal impact exploration permits for any commodity, including uranium, is approximately 3.4 months. Shepherd, Tr. Vol. 6, p. 850: 3-22; MMD Exhibit 13.

64. Since 2006, the average length of time for MMD to process and approve minimal impact exploration permits for uranium is 4.8 months. MMD Exhibit 13; Shepherd, Tr. Vol. 6, p. 856: 2 to 860: 9.

65. MMD received one regular exploration permit application for uranium for the Marquez Canyon Confirmation Drilling Program in December 2007 and, after an administrative hearing, issued the permit in March 2009. MMD Exhibit 13; Shepherd, Tr. Vol. 6, p. 859: 14 to 860: 1; Brancard, Tr. Vol. 3, p. 420: 21 to 421: 19.

66. Before determining that Ree-Co's proposed 4 7/8-inch diameter, 1200-foot deep drilling activity should be processed under Rule 302 or Rule 402, the Director considered several factors, including the number, size and depth of the proposed drill holes, the potential for disturbing habitat and cultural resources, the proper plugging and abandonment procedures, the potential reclamation risks to the State in the absence of financial assurance, and the likelihood of intersecting groundwater. Brancard, Tr. Vol. 3, p. 377: 2 to 378: 10; Tr. Vol. 4, p. 473: 14 to 474: 2.

67. The Director also considered that Ree-Co's total disturbance area was not contiguous, but would be disbursed over a 20 to 30 acre area. Brancard, Tr. Vol. 4, p. 474: 3-15; Snyder, Tr. Vol. 1, p. 167: 2-10.

68. These factors led MMD's Director to conclude that the nature of Ree-Co's proposed deep drilling program was such that other agencies, including the Departments of Game & Fish and Cultural Affairs, would have an interest in reviewing the proposed activity. Brancard, Tr. Vol. 3, p. 377: 2-10; Tr. Vol. 4, p. 473: 14 to 474: 19.
69. The Director determined that the nature of the Ree-Co's proposed 4 7/8-inch, 1200-foot deep drill holes and their potential impacts are the type of activity and impacts that trigger the need for review by the Environment Department and Office of the State Engineer. Brancard, Tr. Vol.3, p. 348: 10-16; Tr. Vol. 4, p. 378: 1-10.
70. The Director determined that the nature of the Ree-Co's proposed 1200-foot deep drill holes and their potential impacts are the type of activity and impacts that fall within and are more appropriately regulated under the exploration category of permits. Brancard, Tr. Vol. 3, p. 335: 24 to 336: 10, and p. 348: 10-16.
71. The Director determined that Rule 302 or Rule 402 provide the appropriate standards and level of review for Ree-Co's proposed deep drilling activities. Brancard, Tr. Vol. 3, p. 347: 1-7.
72. Requiring MMD to address concerns such as those arising from Ree-Co's general permit application under a general permit would require more staff time, more documentation, inspections, reporting requirements and detailed guidance documents, making it likely that the general permit would no longer be a quick and easy permit for the casual or hobby miner, thereby defeating its original purpose. Shepherd, Tr. Vol. 6, p. 811: 17 to 812: 4, p. 878: 14 to 880: 17.
73. No evidence was offered that either the New Mexico Mining Act or the Commission rules, either as written or as applied by the Director in this case, stand as an obstacle to

the accomplishment of the full purposes and objectives of the federal General Mining Law of 1872.

74. No evidence was offered that it is physically impossible to comply with the General Mining Law of 1872 and with either the New Mexico Mining Act or the Commission rules, either as written or as applied by the Director in this case.

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of these proceedings. See NMSA 1978, Section 69-36-15 (1993).
2. The Commission complied with all notice requirements of the New Mexico Mining Act, NMSA 1978, Sections 69-36-1 through 69-36-20 (1993 and as amended)(the "Act"), and the Commission's rules governing adjudicatory review, 19.10.14 NMAC.
3. The Commission conducted the hearings in this matter in accordance with the procedures set forth in 19.10.14 NMAC and afforded Petitioners all process due under the Act and the Commission rules.
4. The stated purposes of the Act include promoting the responsible utilization and reclamation of lands affected by exploration, mining, or the extraction of minerals that are vital to the welfare of New Mexico. See NMSA 1978, § 69-36-1(1993).
5. Reclamation, as used in the Act, means "the employment during and after a mining operation of measures designed to mitigate the disturbance of affected areas and permit areas and, to the extent practicable, provide for the stabilization of a permit area following closure that will minimize future impact to the environment from the mining operation and protect air and water resources." NMSA 1978, § 69-36-3(K) (1993).

6. The overall purpose of the Act is to strike a balance between the economic and environmental impacts of mining. See Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-5, ¶ 28, 133 N.M. 97, 107 (2002); see also NMSA 1978, § 69-36-7(A)(1) (1993).
7. The Mining Act as a whole gives broad discretionary authority to the Commission and the Director to implement the purposes of the Mining Act. Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2001-NMCA-047, ¶ 20, 130 N.M. 497, 501 (2001).
8. Section 69-36-9 of the Act expressly vests the Director of MMD with discretion to "exercise all powers of enforcement and administration arising under the New Mexico Mining Act [] not otherwise expressly delegated to the commission, to execute and administer the commission's regulations and coordinate the review and issuance of permits for new and existing mining operations and exploration with all other state and federal permit processes applicable to the proposed operations." See NMSA 1978, § 69-36-9 (1993).
9. MMD and its Director must have considerable discretion in order to fulfill their responsibilities effectively. See Sierra Club, 2003-NMSC-005, ¶ 25, 133 N.M. at 106.
10. The objective of the rules adopted by the Commission is to establish regulations to implement the Act, which regulations are designed to ensure proper reclamation through permitting for operations subject to the Act's provisions. See 19.10.1.6 NMAC.
11. Because the Commission's rules are promulgated in response to broad legislative concerns, the standards developed by the Commission are necessarily broad and somewhat flexible. See Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2001-NMCA-047, ¶ 20, 130 N.M. at 501.

12. The Commission's rules define "minimal impact mining operation" as "a mining operation or an exploration operation *determined by the Director*, in consultation with other state agencies, likely to have minimal environmental impact if operated and reclaimed in accordance with the approved permit." 19.10.1.7(M)(2) NMAC (emphasis added).

13. Subparagraph (d) of 19.10.1.7(M)(2) NMAC excludes from minimal impact status operations with certain characteristics, including operations having or expected to have a direct impact on ground water that has a total dissolved solids concentration of less than 10,000 mg/l, except exploratory drilling intersecting ground water may be performed as a minimal impact operation. See 19.10.1.7(M)(2)(d) NMAC.

14. Notwithstanding the presence of certain disqualifying characteristics, "the Director *may determine* that an operation . . . may qualify for minimal impact status *if the Director finds* that the operation is likely to have minimal environmental impact if operated and reclaimed in accordance with the approved permit," provided the Director obtains the written concurrence of certain agencies. See 19.10.1.7(M)(2)(j) NMAC (emphasis added).

15. Section 19.10.3 NMAC of the Commission's rules sets forth the permitting scheme for the various types of minimal impact mining operations. See 19.10.3 NMAC.

16. In addition to a general permit under Rule 301, minimal impact operations may be permitted under a Rule 302 minimal impact exploration operation permit, a Rule 303 minimal impact existing mining operation permit, or a Rule 304 minimal impact new mining operation permit. See 19.10.3.301, -302, -303 and -304 NMAC.

17. Rule 301 provides that mining operations *may apply* to the Director for one of two types of general permits - dry and wet - if they meet certain requirements. See 19.10.3.301 NMAC.

18. Nothing in the language of Rule 301 mandates that the Director *shall issue* a general permit for which application has been made. See 19.10.3.301 NMAC.

19. Subsection F of 19.10.3.301 NMAC states in its entirety:

> Operations not excluded from the Act or *not eligible for a general permit* must meet the requirements of the definition of "Minimal impact mining operation" in 19.10.1.7 NMAC in addition to the specific requirements set forth below for each type of operation in order to be granted minimal impact status. If the operation does not meet minimal impact status it must be permitted in accordance with 19.10.4 NMAC, 19.10.5 NMAC or 19.10.6 NMAC.

(emphasis added).

20. A careful reading of 19.10.1.7(M)(2) NMAC defining minimal impact mining operations and 19.10.3 NMAC setting forth the requirements for minimal impact operations permits makes clear that the Director has discretion to determine the eligibility of a proposed mining operation for minimal impact status, as well to determine the eligibility of a proposed mining operation for the type of permit for which application has been made.

21. Ree-Co's application for a General Permit (Dry) was for a drilling program on federal land and mineral estates 10 miles northeast of Prewitt, Section 6, T14N, R10W, NMPM, McKinley County, New Mexico, to include 56 drill holes, 2 inches in diameter, up to a depth of 50 feet, and 20 drill holes, 4 7/8 inches in diameter, up to depth of 1200 feet at borehole locations identified in Figures 1 and 2 attached to BLM Revised Notice of Intent.

22. Conditions 2, 3, and 5 of General Permit MK001DRY allow Ree-Co to use a hand-held hammer drill to drill up 56 drill holes, 2 inches in diameter, up to a depth of 50 feet, at the borehole locations identified by Ree-Co.
23. Conditions 2, 3, and 5 of General Permit MK001DRY ensure that the shallow drilling activities conducted by Ree-Co under the General Permit are "likely to have minimal environmental impact if operated and reclaimed in accordance with the approved permit." See 19.10.1.7(M)(2) NMAC.
24. Conditions 2,3 and 5 of General Permit MK001DRY therefore are reasonable and not an abuse of discretion.
25. Condition 10 of General Permit MK001DRY ensures that the activities conducted under the general permit are protective of the State's natural and cultural resources.
26. Condition 10 of General Permit MK001DRY is consistent with the Ree-Co's BLM-approved Revised Notice of Intent for the East Ranch Drilling Project, wherein BLM requires Ree-Co to suspend all operations until authorization to proceed is issued by BLM, in the event any cultural and/or paleontological resource is discovered during the course of Ree-Co's activities.
27. Condition 10 of General Permit MK001Dry is reasonable and not an abuse of discretion.
28. The Act and Commission's rules define "exploration" as "the act of searching for or investigating a mineral deposit, including sinking shafts, tunneling, drilling core and bore holes, digging pits, making cuts and other works for the purpose of extracting samples prior to commencement of development or extraction operations and the building of roads, access ways and other facilities related to such work; however, activities that cause no, or very little, surface disturbance, such as airborne surveys and photographs, use of

instruments or devices that are hand carried or otherwise transported over the surface to perform magnetic, radioactive or other tests and measurements, boundary or claim surveying, location work or other work that causes no greater disturbance than is caused by ordinary lawful use of the area by persons not engaged in exploration are excluded from the meaning of "exploration."" NMSA 1978,§ 69-36-3(F); 19.10.1.7(E)(3) NMAC.

29. Ree-Co's proposed discovery work - drilling twenty 4 7/8-inch, 1200-foot deep boreholes, followed by sampling and logging - falls within the definition of exploration. See 19.10.1.7(E)(3) NMAC.
30. Ree-Co's proposed deep drilling activity using an air-hammer drill rig is not among those activities excluded from the meaning of exploration.
31. Drilling twenty 4 7/8-inch, 1200-foot deep boreholes using an air-hammer drill rig is not an activity that "cause[s] no, or very little, surface disturbance, such as . . . . location work or other work that causes no greater disturbance than is caused by ordinary lawful use of the area by persons not engaged in exploration."
32. The Director's determination that Ree-Co's deep drilling program was not eligible for processing under a Rule 301general permit, based on the number, size and depth of Ree-Co's 1200-foot deep drill holes, and the potential environmental impact of the deep drill holes, was reasonable and not arbitrary, capricious, or contrary to law.
33. The Director's determination that Ree-Co's deep drilling program may be more properly processed under a Rule 302 minimal impact exploration permit or Rule 402 regular exploration permit, based on the number, size and depth of Ree-Co's 1200-foot deep drill holes and their potential environmental impact, was reasonable and not arbitrary, capricious, or contrary to law.

34. Congress prescribed two prerequisites to the vesting in a competent locator of the complete possessor title to a lode mining claim. They are *location*, that is, the distinct marking of the boundaries of his claim, so that they can be readily traced, and the *discovery* upon unappropriated public land of the United States, within the limits of his claim, of a mineral-bearing lode. No appropriation of the land is made until *both* these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but, when these requirements have been complied with, the land is no longer public, but the possession, the right to the possession, and the right to acquire the title are irrevocably vested in the locator. See Nevada Sierra Oil Co. v. Home Oil Co. et al., 98 F. 673 (S.D. Cal. 1899) (internal citations omitted); see also 30 U.S.C. §§ 23 and 28.

35. The Commission's rules define "location work" as "the minimum amount of labor or improvements required to establish a federal mining claim." 19.10.1.7(L)(2) NMAC.

36. Section 69-3-1 describes the "minimum amount of labor or improvements" required to establish a mining claim, including a federal claim within the State.

37. Section 69-3-1 sets forth the requirements for locating a mining claim on lands within the state. These include distinctly marking the location on the ground, posting written notice in some conspicuous place on such location, monumenting the claim, and filing a written notice of location for the claim with the clerk of the county in which the claim is located. See NMSA 1978, § 69-3-1 (1981).

38. Section 69-3-1 does not require discovery of a mineral and is consistent with federal mining rules governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim. See 30 U.S.C. 28.

39. Location work, as defined by the Commission's rules, does not include discovery work of the kind Ree-Co proposes with its deep drilling program.

40. The Mining Act and the Commission's rules govern location work and the requirements for locating a mining claim within the State, without regard to whether location work leads to discovery of a mineral in place.

41. Location work is necessary to establish a federal mining claim. See 30 U.S.C. § 28.

42. Discovery of a mineral in place is necessary to perfect a federal mining claim. See 30 U.S.C. § 23.

43. It would be inconsistent with the statutory and regulatory definition of "exploration" to interpret the regulatory definition of "location work" to include in "location work" any activity that is undertaken to perfect a federal mining claim, without regard to the nature and extent of the activity.

44. It would be internally inconsistent with its references to "minimum amount of labor and improvements" to interpret 19.10.1.7(L)(2) NMAC's use of the word "establish" to include "location work" activity that is undertaken to perfect a federal mining claim, without regard to the nature and extent of the activity.

45. The word "establish" as used in 19.10.1.7(L)(2) NMAC does not include protecting a claimant's interest in a mining claim from the rights of third parties.

46. Neither location work nor discovery work guarantee discovery of a mineral in place.

47. The doctrine of pedis possessio determines who has the better right of *possession* on public lands, based on actual occupancy and work towards discovery, without consideration to compliance with statutory requirements for locating a mining claim. See Adams v. Benedict, 64 N.M. 234, 244 (1958) (it is not necessary to decide what

constitutes a discovery of uranium in order to decide the right of possession, for, as a practical matter, exploration must precede discovery and some occupation of the land is necessary for adequate exploration); see also Geomet Exploration, LTD. v. Lucky Mc Uranium Corp., 1224 Ariz. 55, 601 P. 2d 1339, 1340-1 (1979) (third party was entitled to exclusive possession of disputed claim after qualified locator left claim unattended and third party peaceably entered and made discovery of mineral).

48. MMD's requirement that Ree-Co obtain either a minimal impact exploration permit or a regular exploration permit for its deep drilling activities does not stand in the way of any rights Ree-Co has or may acquire pursuant to the doctrine of pedis possessio.

49. Requiring Ree-Co to obtain a Rule 302 minimal impact exploration permit or a Rule 402 regular exploration permit does not interfere with Ree-Co's ability to meet the federal requirements for discovery of a mineral.

50. Preemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).

51. State law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

California Coastal Comm'n v. Graphite Rock Co., 480 U.S. 572, 581, 107 S.Ct. 1419, 1425 (1987) (internal citations and quotations omitted).

52. The General Mining Law of 1872 [2] does not preempt, expressly or implicitly, the New Mexico Mining Act or the Commission rules.

53. The General Mining Law of 1872 does not displace the permitting requirements of the New Mexico Mining Act or the Commission rules, either as written or as applied by the Director to Ree-Co.

54. Federal regulation of the environmental aspects of mining under the General Mining Law of 1872, or under the regulations promulgated pursuant to the General Mining Law of 1872, is not so pervasive as to impliedly preempt the New Mexico Mining Act or the Commission rules, either as written or as applied by the Director in this case.

55. A general statement of policy encouraging mining is not sufficient to demonstrate a congressional intent to preempt all state legislation that may have an adverse impact on mining. See Commonwealth Edison Co. v. Montana, 453 U.S. 609, 633-636 (1981) (federal statutes encouraging the use of coal did not preempt by implication state law imposing state severance tax on coal mined in the state).

56. Federal mining policy is not limited to the encouragement of mining, but includes environmental protection as well. See, e.g., 30 U.S.C. §§ 21a and 1602.

57. In order to demonstrate that the New Mexico Mining Act or the Commission rules conflict with federal law, Ree-Co was required to present substantial evidence in the record that the application of the Act or the Commission rules (a) stand as an obstacle to the accomplishment of the full purposes and objectives of the Congress, or (b) rendered

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[2] See 30 U.S.C. §§ 22 to 24, 26 to 28, 29, 30, 33 to 35, 37, 39 to 43, 47.

Ree-Co's proposed deep drilling activity physically impossible. See California Coastal Comm'n v. Graphite Rock Co., 480 U.S. at 581, 107 S.Ct. at 1425 (1987)).

58. Ree-Co failed to demonstrate by substantial evidence that the New Mexico Mining Act or the Commission rules, either as written or as applied by the Director in this case, stand as an obstacle to the accomplishment of the full purposes and objectives of Congress with respect to mining.

59. Ree-Co failed to demonstrate by substantial evidence that the New Mexico Mining Act or the Commission rules, either as written or as applied by the Director in this case, effectively stand as an obstacle to the accomplishment of their proposed deep drilling program.

60. Ree-Co failed to demonstrate by substantial evidence that it is physically impossible to comply with the General Mining Law of 1872 and with either the New Mexico Mining Act or the Commission rules, either as written or as applied by the Director in this case.

61. Requiring Ree-Co to obtain a Rule 302 minimal impact exploration permit or a Rule 402 regular exploration permit is not preempted by federal law when the federal laws assume that the mine operator will comply with state laws and the state permit imposes environmental regulation rather than land use planning. See California Coastal Comm'n v. Graphite Rock Co., 480 U.S. at 593, 107 S. Ct. 1431 (1987).

62. The primary focus of the New Mexico Mining Act and Commission is minimization of damage to the land being mined, not land use and development. See San Pedro Mining Corp. v. Board of County Commissioners of Santa Fe County, 121 N.M. 194, 199 (Ct.App. 1995)

63. BLM's approval of Ree-Co's Revised Notice of Intent assumes that Ree-Co will comply with State law and obtain a State permit prior to initiating any activity on the East Ranch.
64. BLM regulations clearly state that "there is no conflict with federal law if the State law or regulations require a higher standard of protection for public lands than" the federal law. See 43 C.F. R. § 3809.3.
65. Subsection B of Rule 402 imposes on the Director the duty to not disclose information designated by the applicant as confidential. It expressly states: "[i]f the operator designates as confidential an exploration map, financial information, information concerning the grade or location of ore reserves or trade secret information, the Director shall maintain the information as confidential and not subject to public records or disclosure laws." See 19.10.4.402(B) NMAC.
66. Rule 402's confidentiality provision applies to Rule 302 minimal impact exploration permit applications. See 19.3.302(G) NMAC.

Based on the foregoing Findings of Fact and Conclusions of Law, and in accordance with 19.10.14.1441 NMAC, the **NEW MEXICO MINING COMMISSION ORDERS THAT:**

1. Conditions 2, 3, 5, and 10 on General Permit MK001DRY are hereby **Affirmed**.
2. The decision of the Director finding that Ree-Co's proposed twenty 4 7/8-inch diameter, 1200-foot deep drill holes on the East Ranch project may not be permitted under general permit is hereby **Affirmed**.
3. The decision of the Director requiring that Ree-Co obtain either a Rule 302 minimal impact exploration permit or a Rule 402 regular exploration permit for its proposed

twenty 4 7/8-inch diameter, 1200-foot deep drill holes on the East Ranch project is hereby **Affirmed**.

4. The New Mexico Mining Act and the Commission rules, either as written or as applied by the Director in this matter, do not conflict with and are not preempted by the General Mining Law of 1872.

NEW MEXICO MINING COMMISSION

By:

Dated: May 3, 2010