

STATE OF NEW MEXICO
MINING COMMISSION

**IN THE MATTER OF PETITION
TO REVIEW ORDER OF MMD
DIRECTOR**

95-05

Copar Pumice Company, Inc.,
Petitioner

DECISION AND ORDER

This matter came before the Commission at a hearing held February 27, 1996. The Commission, having reviewed the record and being fully advised, deliberated on this matter at public meetings held on April 3, 1996 and April 24, 1996, and reached the following decision.

THE COMMISSION FINDS THAT:

1. Copar Pumice Company, Inc. ("Copar") filed a Petition with the Commission on December 14, 1995. Pursuant to the New Mexico Mining Act, NMSA 1978, Section 69-36-15, the Petition seeks a review of a decision by the Director of the Energy, Minerals and Natural Resources Department Mining and Minerals Division ("MMD") dated October 26, 1995 (the "order"). The order is a determination that the named Copar facility does not meet the definition of a "minimal impact new mining operation" and therefore must be permitted under the Mining Act Rules Subpart 6, "New Mining Operations," 19 NMAC 10.2 Subpart 6 (the Mining Act Rules, 19 NMAC 10.2, are hereinafter referred to as the "Rules").

2. The Petition not only challenges the minimal impact status determination by the Director but also raises several claims as to why the Copar facility should be exempt from the

coverage of the Mining Act, NMSA 1978, Sections 69-36-1 et seq. ("Act"). These claims include: (a) that the pumice to be extracted at the facility falls under exemptions to the definition of "mineral" under the Act and Rules, and (b) that the Act is preempted by federal laws that govern the facility. In addition, Copar raised during the hearing and in post-hearing submittals the argument that the application of Rules Subpart 6 to the facility would duplicate requirements imposed under federal law to protect endangered or threatened species in violation of 19 NMAC 10.2.1303.A(1). None of these claims were addressed in the order of the Director, nor is there any evidence that they were raised before the Director. The Commission allowed these claims to be argued while reviewing the order.

3. The Commission held a hearing on the Petition on February 27, 1996 in Santa Fe. At the hearing, all interested persons were given an opportunity to present views and evidence. Testimony was presented by Copar and MMD. After the hearing, the Commission requested and received proposed findings of fact, conclusions of law and written closing arguments from the parties.

4. This matter involves a proposal by Copar to operate a 9.3 acre open pit pumice mine called the "South Pit Mine". The proposed site for the South Pit Mine is in Section 25, Township 18 North, Range 3 East, in the Jemez Mountains, Sandoval County, on federal public lands managed by the U.S. Forest Service ("USFS"). Copar's right to enter the federal lands in which the South Pit Mine is proposed derives from two federal unpatented mining claims which have been leased to Copar.

5. Copar submitted a permit application to MMD on June 29, 1995, to operate the South Pit Mine as a minimal impact new mining operation under Rules Subpart 3. (19 NMAC

10.2 Subpart 3). MMD submitted the application to the New Mexico Environment Department ("NMED") and requested comments from NMED pursuant to Rules Section 304.H. NMED received the permit application on July 14, 1995, and submitted comments to MMD on August 3, 1995, within the 20-day period required by Section 304.H.

6. NMED determined that the proposed operation would have direct adverse impact on a perennial stream and an intermittent stream and therefore did not meet the definition of a minimal impact mining operation.

7. The entire South Pit Mine is located within designated critical habitat for the Mexican Spotted Owl.

8. The MMD Director determined that the South Pit Mine could not be permitted as a minimal impact operation and must be permitted as a new mine under Subpart 6 because NMED determined that the proposed mine would have a direct adverse impact on a perennial stream and an intermittent stream, 19 NMAC 10.2.107.W.1, and because the proposed mine is located entirely within designated critical habitat area for a threatened species under the Endangered Species Act, 19 NMAC 10.2.107.W.2.

9. Copar claims that the pumice to be extracted from the South Pit Mine falls under one or more of these exemptions from the definition of "mineral" under the Act and Rules: "sand," "gravel" or "quarry rock used as aggregate in construction." NMSA 1978, Section 69-36-3(G); 19 NMAC 10.2.107.V. Therefore, Copar claims the South Pit Mine should be exempt from the coverage of the Act and the Rules.¹

¹ Neither "sand" nor "gravel" is defined by the Mining Act or the Rules. During deliberations, the Commission requested that MMD submit proposed definitions of "sand" and "gravel" for consideration as possible additions to the Mining Act Rules. The Commission made

10. "Quarry rock used as aggregate in construction" is defined by the Rules as "rock extracted from a surface mine which is actually used in construction." 19 NMAC 10.2.107.GG. MMD and Copar agree that pumice is both a quarry rock and an aggregate. Copar plans to sell approximately 25% of the pumice extracted from the South Pit Mine for use in industrial laundries and 75% for use in construction. Copar is able to determine the percentage of the pumice that will be sold for industrial laundry uses because such uses require pumice fragments that are at least 3/4 of an inch in diameter.

11. Copar has not applied for a permit to operate the South Pit Mine as a new mine pursuant to Subpart 6. Copar submitted a plan of operations for the South Pit Mine to USFS on April 12, 1995. USFS has drafted, but has not completed, an Environmental Assessment to identify and evaluate possible environmental impacts from the South Pit Mine. USFS has not made a decision allowing Copar to begin operating the South Pit Mine; Copar does not have USFS approval to operate the South Pit Mine.

12. The USFS Plan of Operations necessary for the operation of the South Pit Mine would require the facility to comply with any other applicable state or federal laws, rules and regulations.

13. Copar has not identified any requirements imposed on the South Pit Mine by the Director under Subpart 6 that duplicate requirements imposed by the federal government to protect endangered or threatened species.

no findings related to whether pumice is sand or gravel, an issue which was not before MMD when it denied minimal impact status to the proposed Copar South Pit Mine.

THE COMMISSION CONCLUDES THAT:

1. The Commission has jurisdiction to review the order of the MMD Director. NMSA 1978, Section 69-36-15(A).

2. The Commission followed the requirements of the Act to hold a hearing and to consider evidence in support of, and to challenge, the action of the director. NMSA 1978, Section 69-36-15.

3. It would be reasonable for the Director to determine that a proposed mine that will use 25 percent of its pumice for non-construction purposes does not fall under the "quarry rock used as aggregate in construction" exemption and, therefore, that the proposed mine is not exempt from the Act.

4. It would be reasonable for the Director to determine that the Act and the Rules are not preempted by federal regulation of the proposed mine because:

a. a requirement that a mining operation on federal land obtain a state permit is not preempted by federal law when federal laws assume the mine will comply with state law, and the state permit law imposes environmental regulation rather than land use planning, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 94 L.Ed 2d 577, 107 S.Ct. 1419 (1987);

b. federal laws assume the South Pit Mine will comply with state law; and

c. the New Mexico Court of Appeals has held that the Act and Rules focus on minimizing damage to the land being mined and do not govern land use. San Pedro Mining Corp. v. Board of County Commissioners of Santa Fe County, ___ N.M. ___, 909 P.2d 754, 759 (Ct. App. 1995), cert. denied, 121 N.M. 57, 908 P.2d 750 (1996).

5. The Director correctly determined that the South Pit Mine, as proposed by Copar, does not meet the requirements for a minimal impact new mining operation under 19 NMAC Or10.2.107.W and 304, because the facility, as proposed, is located in designated critical habitat area and will have a direct impact on perennial or intermittent streams.

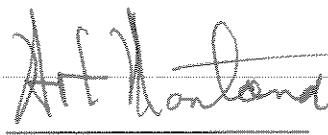
6. The Director correctly determined that the South Pit Mine as proposed cannot be permitted under Rules Subpart 3 (19 NMAC 10.2 Subpart 3) and must be permitted under Rules Subpart 6 (19 NMAC 10.2 Subpart 6).

7. The Director has not imposed any requirements on the South Pit Mine under Rules Subpart 6 that duplicate federal regulations to protect endangered or threatened species.

THE COMMISSION ORDERS THAT:

The action of the Director, dated October 26, 1995, denying minimal impact status and requiring a permit application under the New Mining Operations regulations for the proposed Copar South Pit Mine is hereby sustained.

MINING COMMISSION



Art Montana
Chairman

May 16, 1996

B.11 B.

NEW MEXICO MINING COMMISSION

Received

FEB 19 1998

IN THE MATTER OF THE APPEAL
OF COPAR PUMICE CO., INC.,

South Pit Mine

New Mexico Mining Commission

95-05

FINAL ORDER

This matter is on remand from the First Judicial District Court in the matter entitled *Copar Pumice Co., Inc. v. New Mexico Mining Commission, et al.*, No. SF 96-1327(C). The New Mexico Mining Commission held a regular meeting on January 14, 1998, at Santa Fe, New Mexico, and heard this matter. After consideration of all the evidence and being otherwise duly advised, the Commission makes the following findings and conclusions.

a. FINDINGS.

1. In an Order dated December 18, 1997, the First Judicial District Court directed this Commission to consider whether the operator's extracted materials were sand and gravel and whether this matter is now moot.

2. Regarding the mootness issue:

A. there is more than one pumice mine in New Mexico;

B. there is more than one mine on federal land in New Mexico; and,

C. the issues of whether pumice of the type mined from the South Pit Mine is sand and gravel and whether New Mexico mining statutes and regulations are pre-empted by federal law are capable of repetition.

3. Regarding the issue of whether the pumice extracted from the South Pit Mine qualifies as "sand" or "gravel" as those terms are used in the New Mexico Mining Act:

A. the Commission heard testimony and received technical documents that presented several definitions for "sand" and "gravel;"

B. Copar argued for broad definitions limited solely by the size of the rock fragments and presented evidence that the pumice deposits mined at South Pit fell within the size ranges for their definitions of sand or gravel;

C. The Mining and Minerals Division (the Division) presented evidence that sand and gravel should not be solely defined by size, but should also be defined by their origin and presented further evidence that sand and gravel are unconsolidated rock fragments of detrital, alluvial origin derived by weathering and erosion of pre-existing rocks.

4. The record contains substantial evidence to support the Division's definition of sand and gravel.

5. Pumice originates as a volcanic eruption or extrusion of undefined mineral composition that accumulates as a primary deposit, a characteristic that substantially distinguishes it from detrital, alluvial rock fragments derived by weathering and erosion of pre-existing rocks.

5. The materials Copar Pumice Co., Inc., extracts from the South Pit Mine is pumice and is generally less than three inches (3") in diameter.

b. CONCLUSIONS OF LAW.

1. The Commission continues to have jurisdiction to hear and decide the matters the District Court remanded.

2. The issue of whether the equities would compel a court to consider this matter even though the operator possesses a permit to operate is a purely legal issue over which

the District Court will have de novo review, so the Commission defers to the District Court on the issue.

3. NMSA 1978, Section 69-36-3(H) (Repl. Pamp. 1997) excludes from the Mining Act regulation of "exploration and extraction of ... sand [and] gravel...."

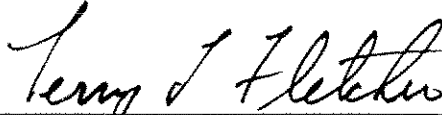
4. To define sand and gravel by reference only to size-based criteria would be to expand the exclusion of Section 69-36-3(H) to include any kind of operation, so long as the extracted materials met the size criteria, an unreasonably broad exclusion.

5. The definition of sand and gravel that includes reference to the origin of the materials to be extracted is more consistent with the Act.

6. The materials from the South Pit Mine are not sand and gravel as contemplated by Section 69-36-3(H) because the materials are not detritus.

Accordingly, the Commission orders that it **REAFFIRMS** its May 16, 1996, Decision and Order and, in making the foregoing findings and conclusions, complies with the District Court mandate.

DATED: 2/16/98


Terry L. Fletcher, Chair
New Mexico Mining Commission