

BEFORE THE NEW MEXICO MINING COMMISSION

In re the Appeal of

Nº 97-01

SAN PEDRO NEIGHBORHOOD
ASSOCIATION from Permit
No. SF001RE

FINDINGS AND CONCLUSIONS

THIS MATTER was heard by the Commission at a regular meeting on April 16, 1997, at the State Capital Building, Room 317, in Santa Fe, New Mexico. The Commission, after consideration of the testimony and exhibits, makes the following findings and conclusions.

FINDINGS

a. Jurisdictional Findings.

1. The San Pedro Mining Corporation (the operator) owns the San Pedro Mine, located in Santa Fe County, approximately two miles southeast of Golden, New Mexico.

2. Appellant is an association of residents living in close proximity to the community of the San Pedro Mine.

3. On November 8, 1996, the New Mexico Energy, Minerals and Natural Resources Department, Minerals and Mining Division (the Division) issued Permit No. SF001RE to the San Pedro Mining Corporation to operate the San Pedro Mine.

4. On January 6, 1997, Petitioner timely filed its Petition for Review of Permit No. SF001RE.

5. On April 16, 1997, pursuant to a stipulated extension of time, the Commission held a hearing on the merits of Permit No. SF001RE.

b. Substantive Findings.

6. The San Pedro Mine was operated for more than two years between 1970 and 1993 and produced copper, gold and silver during that time.

7. The operator submitted a timely site assessment for the San Pedro Mine as well as a timely application for a permit for an existing mine for the San Pedro Mine.

8. The site assessment identifies all existing and proposed mine facilities in the permit area.

9. There are aspects of the San Pedro Mine operation which will be distinct from prior operations, but these new aspects will not expand the previously disturbed area.

10. The operator, through its site assessment and subsequent correspondence with the Division, has submitted information regarding San Pedro Mine's effects on ground and surface water, cultural resources and the local community.

11. The site assessment includes information on new features of the mining operation.

12. The Division did not produce an explanation of its determination on the evidence that the site assessment analysis of the effects on local communities was sufficient or adequate.

13. The Division sought input from the New Mexico Environment Department, the State Historic Preservation Office and the State Engineer regarding potential effects the San Pedro Mine will have on ground and surface water, cultural resources and the local community.

14. On June 14, 1996, pursuant to extensions of time, the operator submitted a closeout plan to the Division.

15. The Division has not responded to the closeout plan submission and has not established a compliance schedule for doing so except that the plan must be in place by December 31, 1997.

16. The Division issued Permit No. SF001RE for an existing mine with no new units, and did so without a closeout plan or financial assurance.

CONCLUSIONS OF LAW

1. NMSA 1978, Section 69-36-15(A) (Repl. Pamp. 1993), provides jurisdiction for the Commission to consider this Petition for Review.

2. The New Mexico Mining Act (the Act), NMSA 1978, Sections 69-36-1 through 69-36-20 (Repl. Pamp. 1993), recognizes only three types of mines for permitting purposes, and those mines are:

a. existing mining operations, defined at Section 69-36-3(E) as extraction operations that "produced marketable minerals for a total of at least two years" between 1970 and 1993;

b. new units to existing mining operations, defined at Section 69-36-7(D) as any "new discrete processing, leaching, excavation, storage or stockpile unit located within the permit area of an existing mining operation and not identified in the permit of an existing mining operation, and for each expansion of such a unit identified in the permit for an existing mining operation

that exceeds the design limits specified in the permit;"
and

c. new mining operations, defined at Section 69-36-3(I) as any "mining operation that engages in a development or extraction operation after the effective date of the [Act] and that is not an existing mining operation."

3. The San Pedro site is an existing mining operation because the operator's predecessors in interest extracted copper, gold and silver between 1970 and 1993, and said minerals are marketable.

4. The appropriate way to address the new features of the San Pedro operation is through presentation of the information about the features in the site assessment.

5. 19 NMAC 10.2.502.D.4 requires a permit applicant to provide proof that mining at a proposed site will not be contrary to the property interests of whoever owns the site; if the regulation meant the operator must possess all local permits to mine that would be internally inconsistent with 19 NMAC 10.2.502.D.7.

6. Section 69-36-5(B)(5) requires a mining operation site assessment to include "an analysis of the mining operation's impact on local communities."

7. There is ambiguity in the statutes about the timing of the operator's submission of financial assurance:

a. Section 69-36-7(G) requires the Division to modify a permit to incorporate financial assurance once the operator has provided it;

b. Section 69-36-7(Q) requires the filing of financial assurance with the Division prior to issuance of a permit; and

c. Section 69-36-11(B) requires the filing of financial assurance after approval of a closeout plan and in conjunction with modification of a permit.

8. According to Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 90, 908 P.2d 776, 783 (Ct. App. 1995), cert. denied 120 N.M. 828, 907 P.2d 1009 (1995), when the Act creates uncertainties this Commission must resolve them with the statutory scheme as a whole even if it means looking behind the literal words of an isolated statute.

9. The only way to reasonably reconcile the conflict in the statutes related to the timing of filing of financial assurance is to infer the existence of "may" between the words "applicant" and "file" in the first sentence of Section 69-36-7(Q).

10. 19 NMAC 10.2.501(B) allows an operator to submit either a closeout plan or a compliance schedule for a closeout plan, and this reasonably accommodates the controlling statutes on the timing of submission of a closeout plan.

11. Section 69-36-11(B) mitigates concerns over whether an operator will or can acquire financial assurance after beginning to operate a mine because the statute allows the Division discretion to expedite post-permit submission and approval of a closeout plan.

12. 19 NMAC 10.2.1201.B requires an operator to file a financial assurance proposal "as soon as practicable" after the Division determines a closeout plan is approvable.

13. According to Section 69-36-7(Q), financial assurance may not be a self-guarantee or self-insurance.

14. San Pedro Mining Corp. v. Board of County Comm'rs of Santa Fe County, 121 N.M. 194, 199, 909 P.2d 754, 759 (Ct. App. 1995), cert. denied 121 N.M. 57, 908 P.2d 750 (1996), within an "occupation of the field" preemption analysis, stated that the Act requires filing of a closeout plan prior to granting a permit, but states nothing about financial assurance.

15. 19 NMAC 10.2.501.B requires an application to include either a closeout plan or a compliance schedule for completion of a closeout plan within the shortest time practicable.

ORDER

After due consideration, it is the Order, Judgment and Decree of the New Mexico Mining Commission that the Permit No. SF001RE be, and hereby is, conditionally AFFIRMED and REMANDED in part with the instruction that the Division shall produce an explanation of its determination on the evidence that the site assessment's analysis of the operation's effects on the local communities was sufficient and adequate.

DATED July 1, 1997.

BY: Terry S. Fletcher
Vice-Chair
NEW MEXICO MINING COMMISSION