

## NEW MEXICO MINING COMMISSION

IN THE MATTER OF CHALLENGE MINING'S  
PETITION FOR REVIEW OF THE DIRECTOR'S  
ORDER ON PENALTIES FOR NOTICE OF  
VIOLATION NO. N99-1-1 AND CESSATION  
ORDER NO. C99-1-1

No. 99-06

### FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter is before the Commission on the petition of Challenge Mining Company for review of an order by the Director of the Mining and Minerals Division (the Division) upholding notice of violation no. N99-1-1 and cessation order no. C99-1-1. By order of the Commission filed October 20, 1999, pursuant to a joint motion by both parties, the parties submitted all evidence and argument by briefs only. The New Mexico Mining Commission held a regular meeting on December 15, 1999, at Santa Fe, New Mexico, to deliberate on this matter. After consideration of all the evidence submitted by the parties and argument of counsel, and being otherwise duly advised, the Commission makes the following findings and conclusions.

#### A. Findings of fact supported by a preponderance of the evidence:

1. The Division issued Notice of Violation No. N99-1-1 to Challenge Mining Company on January 20, 1999, for failure to pay annual permit fees for 1997.
2. The Division issued Cessation Order No. C99-1-1 to Challenge Mining Company on January 1, 1999, for failure to abate an earlier notice of violation N97-1-4, which was previously issued for failure to pay annual permit fees for 1996.

3. On May 10, 1999, in response to a request by Challenge Mining Company, the Division held a conference and informal hearing to review the proposed penalties for Notice of Violation No. N99-1-1 and Cessation Order No. C99-1-1. All parties appeared either in person or telephonically.

4. The Conference Officer heard testimony from both sides, and recommended that there was sufficient evidence to support Notice of Violation No. N99-1-1 and Cessation Order No. C99-1-1, further finding that the penalty amount for C99-1-1 should be reduced by five points.

5. By letter to Challenge Mining Company dated June 8, 1999, the Division Director concurred with the Conference Officer's recommendations, and assessed total penalties of \$2,500.

6. Challenge Mining Company timely appealed the June 8, 1999 decision of the Division to this Commission.

7. The complex issues involved in approving permits and close-out plans pursuant to the Act often result in the Division not approving such permits and plans for months, or even years.

8. During the pendency of an application, an applicant may commence or continue to conduct mining operations or both, in the absence of any contrary order by an administrative or judicial authority with jurisdiction over such matters.

9. By collecting fees annually, the Division better matches actual expenses with fees, and recovers a steady stream of revenue to pay the costs of implementing the Act.

10. If fees were not collected annually, the Division would have to estimate the total expenses incurred in processing the permit, and would have to require payment in a

large lump sum, up front, which would create an economic obstacle for many mining operations.

11. The collection of annual fees prevents an applicant from having the incentive to delay the permit process.

12. The mere fact that an annual permit fee can be assessed even when the mine owner does not yet have a permit does not result in a blurring between the annual and permit fees, or a *de facto* increase in the schedule of application fees set forth in Mining Act Rule 201.

#### B. CONCLUSIONS OF LAW

13. The Commission enjoys jurisdiction to hear and decide the matters presented in this case.

14. Section 69-36-7(M) of the New Mexico Mining Act, (the Act) authorizes the Commission to establish annual administrative and permit fees "which shall not exceed the estimated costs of administration, implementation, enforcement, investigation and permitting pursuant to the New Mexico Mining Act."

15. Subpart 2 of the Mining Act Rules outlines three types of fees to be assessed by the Division, namely: application fees pursuant to section 201, annual permit fees pursuant to section 202, and facility-related fees pursuant to section 203.

16. The permit fee is submitted at the same time as the permit application.

17. Pursuant to sections 202.A.3 and 202.B.3 of the Mining Act Rules, the annual permit fee for both existing mining operations and new mining operations, respectively, "shall be due on or before December 31, 1995, and each subsequent year for the duration of the permit."

18. In the separate case of Agronics, Inc. v. The New Mexico Minerals & the Natural Resources Department, the New Mexico Mining Commission, and the Mining and Minerals Division, Thirteenth Judicial District Court, No. 97 D-1329-CV783, the court found, by order dated December 10, 1999, that Mining Act Rule 202 does not violate the Act or the Mining Act Rules.

19. Pursuant to Old Abe Co. v. New Mexico Mining Commission, 121 N.M. 83, 90, 908 P.2d 776, 783 (Ct. App. 1995), the Mining Act Rules require a schedule from which an applicant can determine the amount of the applicable annual and application fees:

20. Mining Act Rules 201 and 202 do not violate the requirements for fee structures as set forth in Old Abe Co. v. New Mexico Mining Commission, 121 N.M. 83, 90, 908 P.2d 776, 783 (Ct. App. 1995), both as written and as applied in this case.

21. The Division assessed all annual and permit fees against Challenge Mining Company in accordance with all applicable Mining Act Rules, including Rules 201 and 202.

22. Mining Act Rules 201 and 202 satisfy all applicable due process requirements, both as written and as applied to Challenge Mining Company in this case.

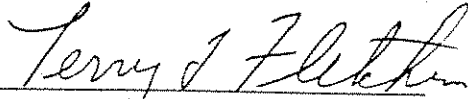
23. Mining Act Rules 201 and 202 are consistent with the language and purpose of both the Act and the Mining Act Rules, both as written and as applied in this case.

24. The judicial decision in Agronics, Inc. v. The New Mexico Minerals & the Natural Resources Department et. al. further supports, and is consistent with, the foregoing conclusions of law in this case.

**C. ORDER**

Based on the foregoing findings and conclusions, the Commission votes to **AFFIRM** the decision of the Division dated June 8, 1999, including its cessation order and its decision to assess total penalties of \$2,500 against Challenge Mining Company. Pursuant to Mining Act Rule 1442, the Commission further **ORDERS** that Challenge Mining Company shall pay the full amount of the civil penalty within sixty days after receipt of this order by forwarding a cashier's check or certified check in the amount of \$2,500 to the Hearing Clerk.

DATED: 1/12/00

  
Terry L. Fletcher, Chair  
New Mexico Mining Commission