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N.M. MINING COMMISSION

BEFORE THE NEW MEXICO MINING COMMISSION

**IN THE MATTER OF THE PETITION FOR
REVIEW OF THE DIRECTOR'S ACTION
DATED NOVEMBER 13, 2023, PERMIT MODIFICATION 23-1
TO PERMIT NO. CA027EM**

STANLEY E. KING and "MOGOLLON CONCERNED CITIZENS"

Petitioners

**MINING AND MINERALS DIVISION'S OBJECTIONS TO PETITIONER'S
RESPONSE**

The Mining and Minerals Division ("MMD") hereby objects to the Petitioner Stanley E. King and Mogollon Concerned Citizen's (together, "Petitioners") January 19, 2024, Response to MMD's Motion to Dismiss the appeal of Summa Silver Corporation's ("Summa") Permit Modification 23-1 ("Modification") to Permit No. CA027EM ("Permit") as untimely, outside the jurisdiction of the New Mexico Mining Act ("Act") and the New Mexico Mining Commission's ("Commission") jurisdiction, and for failure to state a claim on which relief can be granted.

Procedural History

On April 20, 2023, Summa applied for the Modification to the Permit to drill additional exploratory holes on six additional drill pads and use 1,075 feet of newly constructed additional road. On December 19, 2023, MMD received the Petition to the Commission for review of MMD's approval of the Modification. On January 4, 2024, MMD filed a timely Response to the Petition. On January 19, 2024, Petitioners filed their Response to MMD's Motion to Dismiss.

Discussion

Before discussion of MMD's objections, the issue of representation for the Petition before the Commission appears to be resolved as Stanley King has provided evidence that he is the authorized representative of the additional people named in the Petition¹.

MMD objects to four issues with Petitioners' Response:

Objection One

The Response by Petitioner dated January 19, 2024, is not timely under New Mexico Mining Act Rule ("Rule") 19.10.14.1421(C) NMAC which states that any party upon whom a motion is served shall have 10 days after service of the motion to file a response. A party failing to file a timely response shall be deemed to have waived any objection to the granting of the motion. Petitioners filed their Response to MMD's Motion 15 days after MMD filed the Motion to Dismiss. Petitioners should be deemed to have waived any objection to the granting of MMD's Motion.

Objection Two

Petitioners do not address the lack of jurisdiction MMD raised with Petitioners' first three enumerated claims from their Petition regarding a "taking" of a threatened species, and the alleged impact of Summa's activities on State Highway NM 159 with respect to noise, traffic, and alleged unsafe travel conditions. The first three enumerated issues on page one of the Petition are not within MMD's nor the Commission's jurisdiction under the Act and Rules and are not relevant to the Modification. Additionally, there is failure to state a claim for relief on which the Modification should be denied pursuant to New Mexico Rules of Civil Procedure 1-012(B)(6).

¹ As of January 23, 2024, Mogollon Concerned Citizens does not appear in the New Mexico Secretary of State's online files as a registered legal entity.

Petitioners' claims one through three should be dismissed as a matter of law.

Objection Three

Petitioners misconstrue Rules 19.10.1.7(P)(3) "Permit Area" and 19.10.1.7(D)(2) as they apply to Rule 19.10.3.302(D)(2) and incorrectly rely on a map from page 150 of the permit application as the "permit area." Petitioners argue that the "permit area" is a singular area and it is defined by a specific map.

MMD regularly and consistently defines the "permit area" as concurrently being the "disturbed area" when interpreting Rules 19.10.1.7(P)(3) "Permit Area" and 19.10.1.7(D)(2) "Disturbed Area" for exploration mining activity permits.

Rule 19.10.1.7(P)(3) states the "Permit Area means the geographical area defined in the permit for a new mining operation or for an existing mining operation on which mining operations are conducted or *cause disturbance.*" [italics added]

Rule 19.10.1.7(D)(2) states the "Disturbed area means an area where the earth's surface is *disturbed as a result of mining or activities facilitating mining.*" [italics added]

The permit area is the same as the specific areas disturbed by mining activities. In this case the permit area is the 19 drill pads and the roadways Summa identified and MMD recognized in the Permit. This is demonstrated by the correct map found in Summa Silver Corporation's memo as a response to New Mexico State Agency Comments received on June 29, 2021 (see attachment) not the map Petitioners rely on- which is a map solely for the purpose of delineating a biological survey area.

Under the Rules, a permit area is not required to be defined by a singular boundary and the permit area was never defined this way under the Permit or Modification. As Petitioners

incorrectly interpret the Act and Rules and incorrectly rely on a biological survey map, and as there is failure to state a claim for relief pursuant to New Mexico Rules of Civil Procedure 1-012(B)(6), Petitioners' claims regarding Rule 19.10.3.302(D)(2) should be dismissed as a matter of law.

Objection Four

Petitioners request the Commission re-evaluate the minimal impact status of the Permit. As a matter of law, the Commission cannot re-evaluate the minimal impact status of the Permit as Petitioners did not make a timely appeal of the granting of the Permit. Rule 19.10.14.1417 states that a petition to appeal the MMD Director's decision shall be filed 60 days from the date of notice of MMD Director's action. Petitioners did not object to the issuance of the Permit in 2021, its first renewal in 2022, and its second renewal in 2023. Petitioners cannot now use the Modification to object to the issuance of the Permit. Petitioners may only ask the Commission to review and decide on Permit Modification 23-1.

CONCLUSION

For the reasons stated above, Objection One should be granted as Petitioners did not file a timely response to MMD and Petitioners should be deemed to have waived any objection to the granting of MMD's Motion; under Objection Two, claims one through three of the Petition should be dismissed for lack of MMD and Commission jurisdiction as well as a failure to state a claim for relief; under Objection Three, Petitioners' claims regarding Rule 19.10.3.302(D)(2) should be dismissed as a matter of law as Petitioners incorrectly interpret the Act and Rules and incorrectly rely on a biological survey map as well as a failure to state a claim for relief; and

Objection Four should be granted as Petitioners cannot use the Modification to object to the issuance of the Permit. Petitioners' request for relief should be denied as a matter of law.

MMD requests a hearing be set to determine whether all claims will be dismissed as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2024, a true and correct copy of the foregoing filing was electronically mailed to:

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