



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 RESPONSE

Mining and Minerals Division ("MMD") hereby responds to the Petition ("Petition") of Stanley E. King and "Mogollon Concerned Citizens" (together, "Petitioners") regarding MMD's decision to issue a modification to Summa Silver Corporation's ("Summa") request to drill additional exploratory holes on six additional drill pads and use 1,075 feet of newly constructed additional road under Permit Modification 23-1 ("Modification") to Permit No. CA027EM ("Permit").

Background

Summa Silver's Permit and Modification are for a minimal impact mining operation to explore for silver in the Mogollon Mountains of southwest New Mexico, in proximity to the town of Mogollon. As discussed below, a minimal impact operation is likely to have a minimal environmental impact if operated and reclaimed in accordance with New Mexico law. The original MMD decision to grant Summa Silver a minimal impact permit was made in 2021. The original permit was valid until 2022 and was renewed. The Permit is valid until September 2023.

MMD adhered to all applicable law in granting the Permit, addressed all issues raised by the Petitioner under MMD jurisdiction, and even responded to Petitioner regarding issues not under MMD jurisdiction.¹

Procedural History

The Petition being considered before the New Mexico Mining Commission (“Commission”) procedurally begins on April 20, 2023, with an application by Summa to drill additional exploratory holes on six additional drill pads and use 1,075 feet of newly constructed additional road. MMD processed the application under Modification 23-1 to Permit No. CA027EM. The Modification went through an administrative completeness review and approval, other cooperating state agency review and comments, and an increase in financial assurance as required by the New Mexico Mining Act, 69-36-1 to 69-36-20 NMSA 1978 (“Act”) and 19.10.1 NMAC *et. seq.* (“Rules”). On November 13, 2023, MMD found that Summa had complied with the Act and Rules requirements of a Minimal Impact Mining Operation and granted the Modification. On December 19, 2023, MMD received the Petition to the Commission for review of MMD’s approval of the Modification pursuant to Rule 19.10.14.1417 NMAC.

DISCUSSION

Petitioners appear to raise five issues regarding the decision by MMD to grant the Modification. However, not all the claims are enumerated and some appear to be combined or re-stated claims. The first three claims are enumerated. MMD is treating the first two paragraphs on page two of the petition as claim four as they appear to be the same claim restated. Claim five is

¹ Additionally, MMD has inspected the Summa Silver site 7 times to date in part in response to issues raised by the Petitioner. This greatly exceeds the required amount of inspections under the Mining Act.

the last two paragraphs on page two of the petition as it makes vague reference to several Rules MMD applied in granting the Permit.

Before discussion of the substantive issues, there is the issue of who is bringing this Petition before the Commission. The Petition appears to be made by Stanley King on behalf of the “Mogollon Concerned Citizens.” It is not clear if this organization exists as a legal entity, nor that Stanley King is an authorized representative of the entity, or the additional people named in the Petition². MMD requests that Mr. King provide actual evidence that he is an authorized representative of both the “Mogollon Concerned Citizens” and/or the people listed in the Petition as its members.

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. Claim number four references a typographical error in the Modification and is not substantive. Claim five does cite to the Rules, but the claim has two procedural issues: 1) MMD’s decision to grant Summa a minimal impact mining permit was granted in September 2021, renewed in August 2022 and renewed again in September 2023. Petitioners did not appeal the decision as required by the Act and Rules. Petitioners cannot contest the issuance of the Permit through this appeal of a Modification. 2) Claim five is vague and does not provide MMD enough information to substantively respond to the Petition.

As a result, claims one through three of the Petition should be dismissed for lack of jurisdiction, claim four of the Petition should be denied as the typographical error has been corrected by a simple amendment to the Modification so there is no substantive issue for the Commission to decide on, and claim five should be dismissed as 1) Petitioners do not provide any

² As of December 20, 2023, Mogollon Concerned Citizens does not appear in the New Mexico Secretary of State’s online files as a registered legal entity.

factual basis that the Modification alters the existing minimal impact mining operation status, and an appeal of MMD's granting of a minimal impact mining permit is not timely and 2) there is failure to state a claim on which the Modification should be denied pursuant to New Mexico Rules of Civil Procedure 1-012(B)(6)³.

Petitioner's Claims 1-3

Petitioners claim number one appears to have two separate claims combined. The first being a claim of "threat of pollution," and the other a "take" of endangered species. The threat of pollution claim is restated in claim five on page two of the Petition and will be discussed under claim five.

Petitioner's claims one through three are not within the jurisdiction of MMD and the Commission to consider under the Act and Rules.

Claim One

The claim of a "taking" of a threatened species, in this case the Mexican Spotted Owl, jurisdictionally lies within the federal Endangered Species Act- not MMD's jurisdiction under the Act and Rules. The Act and Rules require MMD to consult with the New Mexico Game and Fish Department ("NMGFD") regarding potential affects of the Permit on threatened species and refer to the federal United States Forest Service ("USFS") Spotted Owl guidelines. Pursuant to the consultation, MMD added a condition to the Permit requiring Summa to conduct two years of Spotted Owl surveys to ensure the Spotted Owl is unlikely to be adversely affected by Permit activities. This was done for both the renewals of the Permit as well as for the Modification. During both annual surveys, nesting Spotted Owls were not found within the buffer zone

³ See Mining Act Rule 19.10.14.1401 NMAC for the applicability of the Rules of Civil Procedure

recommended by the USFS Spotted Owl guidelines, nor did NMGFD find an adverse affect on the Spotted Owl from the proposed exploratory mining activities⁴. As MMD properly considered the potential affects of the Permit on the Spotted Owl according to the Act and Rules and a “taking” claim under the Endangered Species Act is not within MMD’s or the Commission’s jurisdiction, claim one should be dismissed.

Claims Two and Three

The alleged impact of Summa’s activities on State Highway NM 159 with respect to noise, traffic, and alleged unsafe travel conditions is clearly not within MMD’s nor the Commission’s jurisdiction. State Highway NM 159 is not part of the MMD Permit area. The Petitioners have raised the issues to MMD previously and MMD has responded by informing Petitioners of MMD’s lack of jurisdiction. MMD has referred Petitioners to the correct jurisdictional agency, the New Mexico Department of Transportation.

Petitioner’s claims one through three are not within the jurisdiction of MMD and the Commission to consider under the Act and Rules and should be dismissed.

Petitioner’s Claim Four

Petitioner claims that the Modification does not properly describe the Permit area because of a typographical error where Section 27 is referenced incorrectly instead of Section 33. During review of the application, MMD determined Summa adequately defined the proposed modified Permit area in written descriptions and figures submitted as part of the application package to be located in Sections 28 and 33, per the requirements of 19.10.3.302(D)(2) NMAC. During preparation of the Modification, Section 27 was erroneously included in the Modification

⁴ NMGFD did recommend limiting drilling during Spotted Owl breeding season and to limit drilling to specific hours. The Modification adopted both recommendations.

description instead of Section 33. However, the Permit area is described in great detail in Summa's submitted materials. It is important to note that the Section description is to orient the public to the Permit's general area and is not the "project area" as defined by the Permit. The project area is the specific location of the drill pads and boreholes which comply with the definition of a Minimal Impact Mining Operation. MMD has corrected the typographical error, despite the typographical error having no bearing on the validity of the Permit or definition of the permit area.

Petitioner's claim that the subject permit does not correctly define the "project area" or "permit area" due to this typographical error should be dismissed.

Petitioner's Claim Five

Petitioner's Claim Five centers around the potential threats to threatened and endangered species, proximity to historical sites and the threat of pollution to nearby waters. Additionally, Petitioners generally cite to the criteria MMD must use to determine whether a mining operation qualifies to be a minimal impact mining operation under Rule 19.10.1.7(M)(2). There are two legal and factual issues with Petitioner's claims.

First, the Petitioners do not provide any factual basis for the claims of adverse affect, instead they refer to potential harm to threatened and endangered species (previously addressed in Claim one), "proximity to historical sites", and the "threat of pollution" to nearby waters. With respect to historical sites, the New Mexico Historic Preservation Division ("HPD") was consulted as required by the Rules during issuance of Permit and Modification. HPD concluded that the scope of work for Modification "will not adversely affect historic properties eligible for, or listed on, the National Register of Historic Places or the State Register of Cultural Properties." With respect to the "threat of pollution" to nearby waters, this is too speculative and vague for MMD to

substantively respond to. MMD consulted with the New Mexico Environment Department (“NMED”) as required by the Rules. NMED did not find a threat of pollution to nearby waters. MMD demonstrates in detail how the criteria of Rule 19.10.1.7(M) has been complied with in Section 4, Findings of Fact, of the Permit.

Secondly, Petitioners do not provide any factual basis to demonstrate that the Modification itself conflicts with the criteria of Rule 19.10.1.7M(2). Instead, Petitioners appear to object to the issuance of the Permit as a minimal impact project in the first place. As the Petitioners did not object to the issuance of the Permit in 2021, its first renewal in 2022, and its second renewal in 2023, they cannot now use the Modification to object to the issuance of the Permit. Therefore, Petitioner’s claim is without merit, isn’t timely, and should be dismissed.

CONCLUSION

For the reasons stated above, claims one through three of the Petition should be dismissed for lack of MMD and Commission jurisdiction. Claim four of the Petition should be dismissed as the typographical error has been corrected and there is no substantive issue for the Commission to decide on. Claim five should be dismissed as 1) Petitioners do not provide any factual basis that the Modification alters the existing minimal impact mining operation status, and an appeal of MMD’s granting of a minimal impact mining permit is not timely and 2) there is failure to state a claim on which the Modification should be denied pursuant to New Mexico Rules of Civil Procedure 1-012(B)(6). As a matter of law, all claims made by Petitioner should be dismissed.

MMD requests a motions 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 5, 2024, a true and correct copy of the foregoing filing was electronically mailed to:

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