

STATE OF NEW MEXICO

MINING COMMISSION

IN THE MATTER OF PROPOSED
AMENDMENTS TO THE MINING
ACT RULES (RULE 2 - FEES)

STATEMENT OF REASONS FOR AMENDMENT OF REGULATIONS

THIS MATTER came before the New Mexico Mining Commission ("Commission") for public hearings in September and November, 1995. During meetings held October 27 and November 29, 1995, the Commission reviewed the record, deliberated and voted to amend the Mining Act Rules for the reasons set forth below.

This Statement of Reasons is intended by the Commission to fulfill the requirement that rulemaking bodies "must give some indication of their reasoning and of the basis upon which the regulations were adopted". New Mexico Mun. League, Inc. v. New Mexico Env'tl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975). See also Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979); Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1987).

This summary of the Commission's deliberation should be read in conjunction with the Minutes of the Commission meetings which list the specific actions taken by the Commission.

I. Process

The New Mexico Mining Act, NMSA 1978 Sections 69-36-1 to 69-36-20 ("Act"), authorizes the Commission to adopt regulations to

implement the Act and allows any person to propose regulatory changes to the Commission. Section 69-36-8(A).

This Statement of Reasons covers regulatory changes initiated by a petition filed by the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department ("MMD") to replace Mining Act Rule 2 with a new Rule ("MMD Proposal").

At its meeting of June 16, 1995, the Commission scheduled a rulemaking hearing to begin on September 5, 1995. The hearing was conducted in accordance with the requirements of the Act and with the Guidelines for Rulemaking adopted by the Commission. Public notice of the hearing, which included publishing in newspapers and in the New Mexico Register and mailing to persons on the Commission mailing list, was provided in advance of the hearing.

The notice required persons who intended to present "technical testimony" at the hearing to provide the Commission notice of their intent at least 10 working days prior to the hearing. Notices of intent, some of which included proposed amendments to the MMD Proposal, were received from MMD, the New Mexico Mining Association ("Association"), Quivira Mining Company the Department of Game and Fish ("Game & Fish"), the Office of Cultural Affairs ("OCA") and the Environment Department.

A public hearing was held on September 5 and 6, 1995 in Santa Fe. A quorum of the Commission was present throughout the hearing, and the Commission Chairman acted as hearing officer. At the hearing, all persons who wished to present written or oral comments or to question witnesses were allowed to do so. At the end of the

hearing, the Commission kept the record to allow participants an opportunity to first, comment on certain exhibits and submit further proposed amendments to the MMD Proposal, and second, submit final arguments based on the record.

MMD and the Association then jointly requested an extension of the post-hearing submittal deadlines which was granted by the Hearing Officer. MMD and the Association then submitted a "Joint Final Proposed Revision to Rule 2 - Fees" ("Joint Proposal") on October 6, 1995, and final arguments in support of or in opposition to the Joint Proposal were submitted.

Prior to the Commission's deliberation, the New Mexico Court of Appeals issued a decision in an earlier appeal of the Mining Act Rules. Old Abe Co. v. Mining Comm'n, (Ct. App. No. 15,750, Oct. 24, 1995). This decision invalidated those provisions of the existing Rule 2 that did not set a "determinate fee". At the October 27 Commission meeting, the Commission took action on most of the Joint Proposal and other proposed amendments, but voted to reopen the record and continue the public hearing on those provisions which may not comply with the Court of Appeals decision. The Commission set November 29, 1995 to continue the hearing to consider new proposals that comply with the court opinion, and provided public notice of the reopening of the record and continuation of the hearing.

Prior to the November hearing, the Commission received one proposal, filed jointly by MMD and the Association, addressing those portions of Rule 2 not adopted by the Commission in October.

In addition, the Commission received a Motion for Reconsideration from the Association on the Commission's adoption of a surcharge to support Game & Fish activities.

On November 29, the Commission continued the public hearing and heard testimony from MMD and the Association in support of their proposal; no other testimony was provided. The Commission adopted the proposal with a few grammatical changes. The Commission also decided to reconsider its decision on Rule 2.5. After an extended discussion, the Commission decided to retain Rule 2.5, but amended the rule to correct potential problems and clarify its duration.

II. Proposals

The Mining Act requires the Commission to:

establish by regulation a schedule of annual administrative and permit fees, which shall equal and not exceed the estimated costs of administration, implementation, enforcement, investigation and permitting pursuant to the provisions of the New Mexico Mining Act. The size of the operation, anticipated inspection frequency and other factors deemed relevant by the commission shall be considered in the determination of the fees.

NMSA 1978, Section 69-36-7(M).

MMD Proposal. The MMD Proposal differed from the existing fee rule in two significant ways. First, the amount of fees collected under the MMD Proposal would be substantially higher to cover what MMD claimed were the actual current, and estimated future, costs of implementing the Act and Rules. Second, the fee structure would change from a system where most fees were set by the MMD Director based on the estimated costs associated with a specific facility

limited by a cap on the total fee, to a system where fees are established by a formula that uses the amount of disturbed acreage as the primary variable.

At the hearing, MMD presented evidence to support the need for increased funding, and to support the revised fee structure. MMD testified that the current fee revenue did not cover the cost of MMD's activities under the Act. MMD had been required to use funds from other sources, and to delay certain activities. The Association attacked MMD's claims and argued that no increase in funding was necessary.

Other Agencies. OCA and Game & Fish testified in favor of their proposed amendments to the MMD Proposal that would increase the fees to fund the Mining Act related activities of these agencies. OCA requested \$47,000 to fund one FTE to work on Mining Act activities. Game & Fish requested \$17,500 to partially fund one FTE that would devote 80% to Mining Act activities; 75% of the funding for the position would come from federal funds. Both agencies presented testimony on the Mining Act related activities performed by the agency.

The Association argued that the Act does not authorize funding through fees of agencies other than MMD. The Association also argued that the activities of OCA and Game & Fish were conducted pursuant to laws other than the Mining Act, and therefore not covered by the fee provision of the Act. Section 69-36-7(M).

Joint Proposal. The Joint Proposal amended the MMD Proposal by seeking to produce fee revenues greater than produced by the

present fee structure but less than the MMD Proposal. The Joint Proposal is designed to produce a minimum of \$391,000 in revenue for the next two fiscal years. MMD argued that this amount is sufficient to fund MMD's Mining Act program; if new mines apply for permits, additional fees would be generated to cover the additional work.

The Joint Proposal includes a sunset provision that terminates the annual fees as of July 1, 1997. This allows MMD to collect annual fees for 2 years, when the costs of the program are fairly certain, and requires MMD to propose a new fee schedule to the Commission in 1997 when the costs of the program for future years will be ascertainable.

The Joint Proposal maintains the fee structure of the MMD Proposal but adjusts the dollar amounts to produce the revenue goal of \$391,000. The Joint Proposal does not address the proposed amendments of OCA and Game & Fish; MMD took no position on the additional fees and the Association continued to strongly oppose them.

III. Deliberation and Decision

The Commission deliberated on the Joint Proposal and the proposed amendments at their October meeting.

Joint Proposal. The Commission found that the Joint Proposal provides a schedule of fees that equal and not exceed the estimated costs of MMD to implement the Mining Act and the Mining Act Rules for the next two fiscal years. Given the experience of MMD in implementing the Act over the past two years, and given that the

number, size and complexity of facilities regulated under the Act is relatively well known, and given that the obligations of MMD are well established by the Act and the Rules, the Commission found that the estimated costs of implementing the Act can be reasonably estimated and that \$391,000 is a reasonable estimate of MMD's annual costs of implementing the Act for the next two fiscal years.

The Commission found that the fee structure in the Joint Proposal will equal and not exceed the estimated costs of MMD. Given that the size and complexity of existing mines is known, the amount of fees produced by the proposed annual fee formulas are ascertainable and will produce an amount equivalent to the overall estimated costs. For unknown costs, such as processing new mine or variance or permit revision applications, the fee structure provides for additional application fees that should cover such additional costs.

The Commission further found that the use of a formula linked to the size and complexity of the regulated facilities is authorized by the Act and provides a fair correlation between the relative cost of implementing the Act at each facility and the fees paid. The Commission also found that the caps on the fees for minimal impact mines are necessary to avoid adverse economic impacts.

Court of Appeals The Commission reviewed the Joint Proposal in light of the Court of Appeals opinion in the Old Abe case. The Court of Appeals found that a "schedule" of fees should allow an applicant to readily determine their fee based on the type of

operation they conduct. For most fees, the existing Rule 2 required the MMD Director to set the fee for each operation based on the Director's estimate of the cost of investigation and permit issuance.

The Commission found that most application and annual fees in the Joint Proposal complied with the Court of Appeals opinion. Some fees, such as those for smaller operations and for exploration, are fixed amounts (See 2.1 C-G and 2.2 C and D). For the larger operations, application and annual fees are determined by formulas that use the amount of disturbed acreage and types of facilities. These variables are known to the applicant or permittee and are usually required as part of an application; therefore, these fees can be easily determined at the time the fee is due.

The Commission also found that some proposed fees in the Joint Proposal may violate the intent if not the letter of the Old Abe opinion. Under the Joint Proposal, fees for closeout plans, permit revisions, variances and permit transfers allow or require the MMD Director to determine the fee. The Commission decided to not adopt those fees and reopened the record for consideration of alternative proposals that comply with the Court of Appeals opinion.

At the November Commission meeting, the Commission heard testimony and adopted amendments to the Joint Proposal that provide for determinate fees. The amendments include fees for closeout plans, permit revisions, permit modifications, and variances. Each proposal is either a flat fee or a scale of fees based on the size

of the facility. The amendments also include a fee waiver when there is little or no cost for processing an application, and a provision that grandfathers fee payments made under the Rule stricken by the Court of Appeals. The Commission found that these amendments are determinate fees that comply with the Court of Appeals opinion, and are correlated to the estimated costs of processing applications while considering the economic impact of the fees.

Other Agencies. After reviewing the Joint Proposal, the Commission addressed the proposed amendments from OCA and Game & Fish to increase the fees to fund activities at the two agencies. The deliberation on the Game & Fish proposal spanned two meetings.

The Commissioners disagreed on the underlying issue. While some Commissioners argued that the Commission should not fund any agencies other than MMD, a majority of the Commission found that fees could and should be used to fund the Mining Act related activities of other agencies.

The Commission also split on the agency proposals. The Commission found that the OCA request of \$47,000 exceeded the costs, if any, that OCA may incur in implementing the Act. Some Commissioners argued that OCA may have some costs under the Act but less than what was requested. The Commission rejected the OCA proposed amendment.

The Commission found that the work of Game & Fish included activities that were necessary to implement the Mining Act. The Act and the Rules require evaluations of impacts on wildlife and

Game & Fish provides the expertise in state government for such evaluations. Game & Fish also has a representative on the Commission.

Game & Fish estimated that Mining Act related activities would require 80% of one FTE plus secretarial costs. Game & Fish proposed that 75% of the FTE be funded through other sources and only 25% of the personnel costs for Mining Act activities be funded through fees. The Commission found that the partial funding of one FTE through fees did not exceed the estimated costs of Game & Fish's implementation of the Act.

The Commission amended Game & Fish's proposal to limit the funding of Game & Fish activities to one year. The Commission adopted Rule 2.5 that applies a surcharge to application and annual fees only during the remainder of Fiscal Year 1996 (July 1995 to June 1996). The fees collected from this surcharge can only be transferred to Game & Fish during Fiscal Year 1997 to cover the "reasonably necessary costs" incurred by Game & Fish in implementing the Act. The surcharge was calculated at 4.5 percent by the Commission based on MMD's estimate of \$391,000 in fee collections and Game & Fish's estimate of \$17,500 in costs.


IV. Conclusion

After deliberation, the Commission adopted the proposed changes to the Mining Act Rules as amended by the Commission during deliberation for the following reasons:

1. The process followed in adopting the amendments complied with all procedural requirements;

2. The amendments are supported by substantial evidence in the record, and are reasonable regulations that are consistent with the purposes and intent of the Act, that are necessary to implement the Act, and that consider the economic and environmental effects of their implementation.

MINING COMMISSION



Art Montana
Chair

Date: 12/1/95