

**BEFORE THE STATE OF NEW MEXICO
MINING AND MINERALS DIVISION**

**IN THE MATTER OF RIO GRANDE RESOURCES
CORPORATIONS' APPLICATION TO CHANGE
THE STATUS OF ITS EXISTING MINE PERMIT
FROM STANDBY STATUS TO ACTIVE STATUS;
PERMIT REVISION 13-2 (PERMITC1002RE)**

**Multicultural Alliance for a Safe Environment's and Amigos Bravos' Post Hearing
Submission**

The Multicultural Alliance for a Safe Environment ("MASE") and Amigos Bravos ("Amigos") hereby submit the following comments and evidence in addition to the evidence presented to the Mining and Minerals Division ("Division") at the December 4, 2015 public hearing ("Public Hearing") held pursuant to 19.10.9 *et. seq.* NMAC.

I. Introduction

Rio Grande Resources' ("RGR") Application for Revision of Mine Permit C1002RE from Standby to Active Status and Modification of Groundwater Discharge Permit DP-61 (Revision 1, November 2013) ("Application") submitted pursuant to the New Mexico Mining Act ("Act" or "Mining Act") is premised on the fantastical and unsupported hope that one day in the indeterminate future, the uranium market will recover enough to support ore production at its Mt. Taylor Mine ("Mine"). RGR's overly optimistic application is not just fantasy; it also violates a fundamental mandate of the Act: that the Legislature intended for mines to be inactive for only a limited time period,

and if a mine cannot produce at the end of that period, the mine must close and reclaim. Because granting RGR's Application would result in an indefinite period of inactivity contrary to the Act's requirement, the Division Director ("Director") must deny RGR's Application and require that RGR immediately begin reclamation activities. Alternatively, the Director should deny RGR's application and issue a permit revision renewing the Mine's standby status for a period of no longer than two years.

II. Legal Framework

A. The New Mexico Mining Act

1. *The Mining Act's purpose.*

The purposes of the New Mexico Mining Act “include promoting responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals that are vital to the welfare of New Mexico.” NMSA, 1978 § 69-36-2. Based on this clear directive, the Legislature's obvious intent was for the Mining Act to promote and regulate either actual mineral extraction or mine reclamation. The Mining Act's plain language as to its purpose leaves no room for indefinite maintenance and regulation of mines that have not been reclaimed but that are not actively producing minerals.

2. *Division's and Commission's delegated authority.*

In order to realize the Mining Act's purposes, the New Mexico legislature delegated authority for its implementation to the New Mexico Mining Commission

("Commission") and the Director. *Id.*, §§ 69-36-7, 69-36-9; *see also, Rio Grande Chpt. of the Sierra Club v. Mining and Minerals Div.*, 2001-NMCA-047, ¶ 20, 130 N.M. 497, 501, (Ct. App. 2001). The Legislature delegated the Commission the responsibility for promulgating regulations that require new and existing mining operations to obtain and maintain permits for standby status. NMSA 1978, § 69-36-7(E). Included in the Legislature's mandate is the requirement that the Commission adopt regulations for standby permits that, at a minimum, ensure that a mining operation on standby status meet applicable federal and state environmental standards and regulations for the duration of the standby period. *Id.* at § 69-36-7(E)(3). The Commission's regulations implementing the Mining Act must also ensure that a permittee comply with the application requirements of the Act and its regulations. *Id.* at § 69-36-7(E)(5). Most important to this case, the Legislature specifically mandated that the Commission could not promulgate regulations that grant more than four standby permits with a maximum term of five years each. *Id.* at § 69-36-7(E). In other words, no mine may remain inactive for a total of more than 20 years. *Id.*

The Act also places a particular emphasis on public notice and participation. The Act requires the Commission to promulgate regulations that give "all interested persons ... a reasonable chance to submit data, views, or arguments orally or in writing and to examine witnesses testifying at the hearing." *Id.* at § 69-36-7(K).

The Legislature also delegated specific duties to the Director. Under the Mining Act the Director is required to exercise all powers of enforcement and administration under the Act not delegated to the Commission, and execute and administer the Commission's regulations. *Id.* at § 69-36-9(A). Additionally, the Director is required to "confer and cooperate with the secretary of the environment in administering the New Mexico Mining Act, in developing proposed regulations and obtain the concurrence of the secretary of the environment regarding areas of the regulations that have an impact upon programs administered by the department of the environment." *Id.* at §69-36-9(D).

B. Mining and Minerals Division Regulations

Pursuant to its responsibilities under the Act, in 1996 the Commission promulgated regulations implementing the Mining Act. These regulations govern the Director's implementation of the Act.

1. *Regulations governing permit revisions and modifications.*

Section 505 governs permit revisions and modifications. That section requires the Director to determine whether a proposed permit revision will result in a change in financial assurance. 19.10.5.505.B.1.b. It also requires that a public hearing be held on the permit revision application. *Id.* at 19.10.5.505. B. Section 505 further requires the Director to conduct an environmental impact analysis. *Id.* at 19.10.5.505.B.1.

The regulations that govern periods of mine inactivity, like the Mining Act, expressly forbid the Director from issuing more than four standby permit revisions for a maximum of five years each, for a total of no more than 20 years of inactivity. *Id.* at 19.10.7.701.I.

2. *Regulations governing public participation.*

Pursuant to the Act, the Commission adopted regulations encouraging public participation. Those public participation procedures include procedures for public hearings, where any interested person may testify or submit written statements containing data, views or arguments. 19.10.9.905.C, E NMAC.

III. Procedural Issues

A. RGR's Pre-Hearing Statement

On December 2, 2015, RGR submitted a pre-hearing document entitled "Rio Grande Resources Corporation's Pre-Hearing Statement with Continuing Objections to Anticipated Public Offerings" ("Pre-Hearing Statement"). In its Pre-Hearing Statement, RGR argues for limiting the scope of issues the Director may consider in this case, in part by raising certain objections to issues that RGR anticipated the public, including MASE and Amigos, would testify about.

In its Pre-Hearing Statement, RGR urges the Hearing Officer (and by extension the Director) to limit the scope of issues that should be "appropriately" considered in its Application to those relating to its updated closeout/closure plan. Pre-Hearing

Statement at 2-3. Additionally, RGR urges the Hearing Officer to limit the scope of testimony she considers to environmental issues related to application submissions under the Act's regulations, such as whether compliance with environmental standards is expected to be achieved if closeout is performed as described in RGR's closeout/closure plan. *Id.* at 3-4.

RGR also raised specific objections to issues it anticipated would be raised, and were in fact raised, at the public hearing. *Id.* at 4-6. Relevant to MASE's and Amigos' position are the objections relating to any testimony about uranium milling and any testimony or evidence about uranium prices, markets or economic viability. *Id.* at 5-6. However, none of RGR's objections have merit and MASE and Amigos urge the Hearing Officer and Director to reject all of them.

B. The Hearing's Scope Should not be Limited to Closure/Close Out Issues and the Mine's Economic Viability is Relevant to the Director's Decision

RGR's arguments limiting the scope of this matter and its evidentiary objections should be rejected for two reasons. First, the New Mexico Supreme Court's decision in *Colonias Development Council v. Rhino Environmental Services ("Rhino")*, which applies to the Mining Act,¹ mandates broad public participation in permitting proceedings where the Legislature's public participation provisions so provide. Second, the issues related

¹ See, *Multicultural Alliance for a Safe Environment, et. al. v. New Mexico Mining Commission, et. al.*, No. D-101-CV-2012-02318, Order Vacating New Mexico Mining Commission Order and Certifying Case No. D-101-CV-2012-02318 to the Court of Appeals at ¶¶ 14-15 (Aug. 27, 2013).

to uranium market economics and uranium milling that MASE and Amigos raise are relevant and indeed, central, to whether revising RGR's permit to active status is consistent with the Act and its regulations.

1. *The Rhino case requires broad and inclusive public participation.*

The Mining Act requires the Commission to promulgate regulations that give “all interested persons ... a reasonable chance to submit data, views, or arguments orally or in writing and to examine witnesses testifying at the hearing.” NMSA 1978, § 69-36-7(K). The Commission promulgated regulations further defining the boundaries of public participation, but still seeking to maximize public input on regulatory and permitting decision-making by mandating that all interested persons have a reasonable opportunity to present testimony, data, views or arguments. 19.10.9.905.C, E NMAC. Moreover, both the Act and the regulations have extensive notice requirements to ensure that the public can take advantage of the public participation process. NMSA 1978, § 69-36-7(K)(1)-(6); 19.10.902, 903 NMAC. Based on these extensive statutory and regulatory notice and hearing requirements, the Legislature’s intent to promote broad and meaningful public participation in permitting proceedings under the Mining Act is clear.

The New Mexico Supreme Court has interpreted virtually identical public participation provisions in another statute to require broad inclusion of public testimony in an administrative agency’s decision-making processes. In *Colonias*

Development Council v. Rhino Environmental Services, Inc., the Supreme Court interpreted the New Mexico Solid Waste Act's public participation provisions and concluded that the New Mexico Environment Department ("NMED"), through the Secretary of the Environment, was required to hear and consider public testimony on the social and cumulative impacts of a proposed landfill on the nearby community. *Id.*, 2005-NMSC-24, 138 N.M. 133 (N.M. 2005).

In *Rhino*, the petitioner community group appealed a decision by the NMED approving a landfill in their community pursuant to the New Mexico Solid Waste Act. *Id.*, 2005-NMSC-24, ¶¶ 2- 7. On appeal, the community group argued that although the hearing officer conducting the public hearing on the solid waste permit application had allowed community members to present "quality of life" and cumulative impacts testimony, NMED violated the Solid Waste Act's public participation provisions by failing to consider their testimony as beyond the scope of issues the agency was allowed to consider under its regulations. *Id.* at ¶¶ 8-10. The Supreme Court agreed. *Id.* at ¶ 21.

The Court reasoned that the extensive public notice and hearing provisions in the Solid Waste Act demonstrated the Legislature's intent to foster broad and meaningful public participation in solid waste permit proceedings. *Id.* at ¶¶ 21-27. The public participation provisions also evinced that the Legislature intended the public to play a vital role in the permitting process. *Id.* at ¶ 21. The NMED's failure to consider "quality of life" and cumulative impacts public testimony violated these provisions and NMED's

decision was set aside and remanded for further proceedings. *Id.* at ¶ 42. Ultimately, the Court held that the NMED was required to consider any public concern raised at a public hearing that related to a violation of the Solid Waste Act or its regulations. *Id.* at ¶ 24.

Like the public participation provisions at issue in *Rhino*, the Mining Act's public participation provisions require meaningful public involvement in the permitting process. *See*, 19.10.9 *et. seq.* NMAC. Thus, like the Solid Waste Act's public participation provision, the Mining Act's public participation provisions must be read to maximize meaningful public participation. The Hearing Officer and Director should therefore consider any evidence presented that relates to not only whether RGR's Application has met all the applicable technical requirements, but also whether the Application has environmental impacts, impacts on quality of life, including public health, and whether the Application violates any of the Mining Act's or implementing regulations' provisions. *See*, *Rhino*, 2005-NMSC-24 at ¶ 24. Because MASE's and Amigos' testimony about milling capacity, uranium markets, uranium prices, and uranium supply and demand relate directly to whether RGR will violate the Legislature's 20-year limit on mine inactivity², the Director should admit and consider that testimony.

² MASE's and Amigos' argument is explained more fully in Section III.B.2.

Significantly, RGR has already attempted to limit public participation at a prior public hearing relating to the Mine. At an August 2011 public hearing,³ by upholding RGR's evidentiary objections, the Director repeatedly prohibited MASE and Amigos from presenting any evidence on the issue of groundwater contamination at the Mt. Taylor Mine site or the adequacy of RGR's financial assurance. *Multicultural Alliance for a Safe Environment, et. al. v. New Mexico Mining Commission, et. al.*, No. D-101-CV-2012-02318, Order Vacating New Mexico Mining Commission Order and Certifying Case No. D-101-CV-2012-02318 to the Court of Appeals at ¶¶ 3-4, 6-10, 13. MASE and Amigos appealed that decision and the First Judicial District Court determined that the Director acted contrary to law by limiting public testimony. *Id.* For the reasons stated in that case, the Director should likewise not limit relevant testimony, such as testimony related to milling capacity and uranium markets, in this case. For all the foregoing reasons, the Director should reject RGR's request to limit the scope of this proceeding and its evidentiary objections.

2. *MASE's and Amigos' testimony is related to whether RGR's permit revision application violates the Mining Act.*

Further, limiting this proceeding's scope, as RGR seeks in this case, to only those issues that relate to its updated closeout/closure plan as enumerated in 19.10.5..506.J NMAC, and to certain classes of testimony that it deems appropriate for the Director to

³ The 2011 public hearing was held pursuant to the same regulatory provisions, i.e., 19.10.9 *et. seq.* NMAC, as the current proceeding's public hearing.

consider, would effectively eliminate a fundamental determination the Director is required to make. As discussed more fully in Section IV.A below, whether or not RGR can actually produce uranium is central to any decision by the Director to allow the Mine to resume active status. RGR's ability to produce, due to the limitations of the market or milling capacity, relate directly to the questions of 1) whether the Mine will remain inactive for more than the maximum 20 years the Legislature has allotted; and 2) whether the Mining Act requires the Director to make an independent evaluation of economic viability in an application for a permit revision to active status. Because any decision regarding whether a return to active status revision is appropriate must necessarily hinge on these two pre-conditions, RGR's request to limit the scope of this proceeding should be rejected.

IV. Granting RGR's Permit Revision Request Would Violate the Mining Act.

RGR's Application seeking to revise its permit under the Act to "active" status is contrary to the Mining Act for three reasons. First, based on undisputed evidence in the record, RGR will be unable to produce a single ounce of uranium for at least ten years, and more likely many more. Thus, the mine will violate the 20-year maximum inactivity period the Legislature has mandated in the Mining Act. Second, there is insufficient information in the Application to make a determination of compliance with worker safety and public health laws. Third, the Application contains insufficient

information to determine whether RGR has or will secure all necessary state and federal permits.

For all these reasons, MASE and Amigos urge the Director to deny RGR's Application for permit revision and order immediate reclamation of the Mine. Alternatively, the Director should deny RGR's Application and issue another standby permit revision for a period of not more than two years.

A. Granting RGR's Application will Violate the Mining Act's Twenty Year Limit on Inactivity

In very plain and clear terms, the New Mexico Legislature expressed the two purposes of the Mining Act. First, the Legislature emphasized that mines in New Mexico should produce minerals to benefit New Mexico and its citizens. NMSA, 1978 § 69-36-2. Second, the Legislature required that once mines had ceased production, that land be reclaimed to protect the environment. *Id.* Understanding, however, that for a variety of reasons mines may be forced to temporarily cease production, the Legislature provided the Director with the authority to issue permit revisions allowing for temporary periods of inactivity lasting more than 180 days. *Id.* at § 69-36-7(E). The period of inactivity is not unlimited or indefinite. The Legislature specifically limited the total period of mine inactivity to 20 years. *Id.*

1. *Definition of "inactive".*

a. Mining Act and regulatory provisions.

While the Mining Act does not expressly define "inactive," it is clear from the Act's and regulations' context that the Legislature intended for mines that are considered "active" to be actually extracting minerals. For example, the Act defines "mining" as:

the process of obtaining useful minerals from the earth's crust or from previously disposed or abandoned mining wastes, including exploration, open-cut mining and surface operation, the disposal of refuse from underground and in situ mining, mineral transportation, concentrating, milling, evaporating, leaching and other processing.

Id. at § 69-36-3.H. Thus, the Act's plain language clearly indicates that the Legislature intended that mining should encompass active extraction activities, rather than mere preparatory measures in anticipation of active extraction. This interpretation is further bolstered by the regulations' definition of "standby status." The regulations define "standby status" as "the permitted temporary cessation of a mining operation which is expected to resume." 19.10.1.7.S.(5) NMAC.

This interpretation of the Act and its regulations is further bolstered by the regulation governing standby, or inactive, status. The Commission's standby regulation allows for a 180 day period where an operator can cease reclamation and other activities at a mine without having to apply for a permit. 19.10.7.701.A NMAC. Thus, operators have a lengthy time period after which mining operations have ceased to prepare for

mining resumption without being encumbered with applying for a permit. However, nothing in the Act or regulations indicates that the Legislature or Commission contemplated allowing actual mineral extraction to be suspended indefinitely while an operator "prepares" to resume mining.

Further, nothing in the standby permit regulation or Mining Act prohibits an operator from undertaking steps to prepare for mining resumption during the period of standby. Indeed, RGR has already taken several steps toward reactivating the Mine, even though the Mine has been on standby status. *See*, Testimony of Joe Lister ("Lister Testimony"), Transcript ("Tr.") at 55:16-20 (testing water purification systems for mine water discharge); 56:7-14 (groundwater contamination abatement); 65:1-7 (locating hoists and underground pumps).

Moreover, because the Mining Act contemplates only temporary mining activity suspensions of not more than 20 years total, the Act and regulations assume that mines on standby will be properly maintained to resume operations in a timely manner, rather than for indefinite and indeterminate time frames. For example, the Act and regulations require that the operator identify the projected standby term (NMSA 1978, § 69-36-7(E)(1); 19.10.7.701.B.1 NMAC) and that the operator comply with all the applicable requirements of the Act and Chapter 10 of the regulations (NMSA 1978, § 69-36-7(E)(5); 19.10.7.701.B.5 NMAC), including maintaining and updating financial assurance for reclamation and maintaining applicable federal and state permits.

MASE's and Amigos' expert witness, Mr. Paul Robinson, testified to this point at the Public Hearing when he identified several steps in RGR's proposed reactivation plans that could have been taken during standby to assure an expeditious return to mining. Testimony of Paul Robinson ("Robinson Testimony") Tr. at 138:18-25 - 139:1-17; *Cf.*, Lister Testimony, Tr. at 54:15-16 (Mr. Lister's Mine Manager duties include maintaining the Mine in a condition to restart). Nowhere does the Act contemplate allowing indefinite periods of inactivity to accommodate operators ill-prepared for restarting their mines.

b. "Inactive" defined in other jurisdictions.

Further, this reading of the Mining Act is consistent with how other jurisdictions determine whether or not a mine is inactive. For example, Colorado's mining regulations provide seven indicators which state regulators should consider in determining when a mine is inactive. 2 CCR 407-1, Rule 1.13.2.(1)-(7). These indicators include: personnel, other than security personnel, present at the site, engaging in maintenance or related activities; there is no sale or processing of materials or movement of stockpiled material; there is only minimal mineral excavation; and mining has ceased and has not recommenced. *Id.*

Likewise, the U.S. Bureau of Land Management's ("BLM") Surface Management Handbook gives the BLM guidance about when a mine is inactive. The Surface Management Handbook provides that if there is minimal or no activity "on the ground"

at a mine during a two year notice period, the BLM can reasonably conclude the mine is inactive. BLM Handbook H-3809-1 at § 7.1.1 (Sept. 17, 2012). By any reading of the Mining Act and by reference to external definitions, it is obvious that the Mt. Taylor Mine will continue to be inactive in fact for the next 10-20 years. Under the Mining Act, if a mine is not producing minerals and has been inactive for twenty years, it must conduct reclamation, and the Director lacks the discretion and authority to determine otherwise.

2. *Adopting RGR's definition of "active" would render the Legislature's 20-year limit on inactivity meaningless.*

Ultimately, if the Director grants RGR's revision Application it will open the door to a parade of abuses that the Legislature did not intend and that the Mining Act does not permit. First, approving RGR's application will set a precedent for allowing mining companies to evade limitations on inactive periods simply by asserting that a company is "taking steps to prepare" for mine operations. This perversion of how "active" is defined not only subverts the Mining Act, it is also inconsistent with how other jurisdictions regulate mining. *See*, Section IV.A, above; 2 CCR 407-1, Rule 1.13.2.(1)-(7); BLM Handbook H-3809-1 at § 7.1.1.

Second, approving RGR's Application would elevate rank market speculation to the same policy level as actually producing minerals. Thus, rather than actually producing minerals to be deemed an "active" mine, to secure active status, operators would only need to produce speculation that the commodity market in question will

"eventually" rebound and that the operator is taking steps to be positioned to produce minerals when the anticipated rebound happens. As the record in this case demonstrates, such speculation - especially when offered by an operator who has financial interests at stake - is typically wildly inaccurate and should not serve as the foundation for mining policy decisions. Permit Application, Mt. Taylor Mine at PA-12 (Dec. 20, 1994). The result is that mines would be considered "active" for years and perhaps decades before actually producing any minerals at all.

Third, allowing operators to subvert the Mining Act's limitations on inactivity simply by asserting that they will take (or are even actually taking) steps to allegedly resume mining, in lieu of actually producing minerals, has significant environmental consequences. During the time a mine is undergoing steps toward reactivation, existing waste at the mine will continue to contaminate the surrounding environment, including communities.

Finally, allowing operators to evade the Legislature's 20-year limit on inactivity simply by revising the permit to active status effectively eliminates any limit on mine inactivity. Hence, a mine operator could speculate that the mineral market will recover enough to allow for profitable production in, for example, 15 years, and revise its application to "active" based on steps it promises to take to meet anticipated market conditions. Then, at the end of the 15 years, if the market has not yet recovered, the operator could again produce speculative economic testimony that even though the

mineral market did not recover in the originally anticipated time frame, the market will surely recover in the next ten years. The cycle is repeated indefinitely. This indefinite period of inactivity is not only contrary to the Mining Act, making the Legislature's 20-year limit on inactivity meaningless, it vests unfettered discretion in the Director to determine when - or even if - a mine is required to undergo closure and reclamation.

In sum, even if RGR's hopes of returning to production are sincere, they are no more than wishes. A wish for future riches should not be the basis for the Director's decision that will affect the public health and environment of nearby communities.

RGR's Application should be denied.

3. *RGR's testimony demonstrates the Mine will be inactive for more than 20 years.*

The evidence presented in this matter indicates that even accepting RGR's factual assertions as true, RGR cannot begin extracting minerals for at least ten more years.

Therefore, by any interpretation of the factual record, granting RGR's permit revision request will result in the Mining Act's 20-year limit on inactivity being violated.

It is undisputed that the Mine has not produced any uranium since 1990. Application at 2, § 1.2. It is also undisputed that the Mine has not produced uranium or any other mineral since the Mining Act was enacted in 1993 and its implementing regulations promulgated in 1995. *Id.* Further, the Mine has been on "standby" status pursuant to the Mining Act and its implementing regulations since December 18, 1998. *See, e.g.,* Mt. Taylor Mine Permit, Renewal Application for Standby Status at 1 (June 16,

2010). Thus, it is undisputed that the Mine has been effectively inactive for 25 years and legally inactive under the Mining Act for 17 years. Giving RGR the benefit of the doubt that the clock on the Act's 20-year limit on inactivity began running when it received its first standby permit in 1998, the 20-year limit will expire for the Mt. Taylor Mine on December 18, 2018.

At the Public Hearing in this matter, RGR presented two witnesses: Mr. Joe Lister, the Mine manager, and Dr. Alan Kuhn. In that hearing, Mr. Lister testified that in order to dewater the mine - a pre-condition to producing ore - a particular kind of pump would be necessary, and those pumps would not be available for approximately 48 months, or four years. Lister Testimony, Tr. at 67:8-10. Thus, assuming the Director approves the Application in the first quarter of 2016, mine dewatering will not be started before 2020. Once dewatering begins, it will take approximately four to five years before RGR will be able to gain access to the underground mine shafts. Application at 42-43. Only after approximately eight to nine years, or between 2024-2025 would RGR be able to even start actually producing minerals.

Another pre-condition to producing ore is the existence of a uranium mill that has the capacity to process the uranium from the Mine. Mr. Lister testified that RGR intends to build a mill to process ore from the Mt. Taylor Mine. Lister Testimony, Tr. at 73:7-12. Mr. Lister further testified that RGR would not submit a license application to the U.S. Nuclear Regulatory Commission ("NRC") for its proposed mill for another four

to five years. *Id.* at 72:17-20. Dr. Kuhn testified that NRC typically does not process mill license applications in fewer than five years. Kuhn Testimony, Tr. at 74:25-75:1.⁴ Again, assuming Application approval in 2016, based on RGR's experts' testimony there would be no mill to process ore from the Mine - and therefore no ore production - until at least 2025.

Irrespective of whether RGR may begin producing ore in 2024 or 2025, the Mine will have exceeded the Mining Act's limit for inactivity before then.⁵ Unless RGR can begin producing ore before 2018, a prospect the evidence cannot support, the Director must deny the Application and require RGR to begin reclamation immediately.

4. *The evidence does not support a uranium market recovery.*

Notwithstanding that the evidence that RGR presented cannot support approving its permit revision request, rejecting RGR's Application is further supported by MASE's and Amigos' evidence. Each time RGR sought standby status its rationale was that the uranium market was depressed and RGR could therefore not produce uranium profitably. *See*, Mt. Taylor Mine Permit, Renewal Application for Standby

⁴ This timeframe for NRC license processing is consistent with Mr. Robinson's testimony. Robinson Testimony, Tr. at 142:5-25 - 143:1-14.

⁵ Realizing the Mining Act's limits on inactivity, the mining industry attempted to amend the Act in the 2015 legislative session. *See* HB 625, attached as MASE Post-Hearing Exhibit 1. HB 625 failed to pass. Ironically, this legislative attempt to deal with the issue of the Legislature's limit on mine inactivity was the proper means to address any issues with the Act's inactivity limit, and is the remedy RGR should be seeking, rather than asking the Director to exceed his delegated authority.

Status at 1 (Sept. 24, 2004); Mt. Taylor Mine Permit, Renewal Application for Standby Status at 1. Nevertheless, each time RGR sought standby status it has assured the Division and the public that the uranium market would rebound in the "near" future. *Id.* However, because it is a privately owned company, RGR has never revealed - and the Division has never required it to reveal - the specific sources and methodology for its projections of uranium price, demand, and supply. *See, e.g.*, Sept. 19, 2014 Letter from Fernando Martinez, MMD Director to Eric Jantz and Stuart Butzier Re: *MASE et. al. v. MMD et. al.*, No. D-101-CV-2012-02318: August 27 Order, Decretal No. 3 (explaining MMD rationale for not revealing RGR's economic projections, methodology, and sources related to Permit Revision 10-1, renewal of standby status).

RGR's current application for a permit revision is different in only one respect: RGR is now characterizing its permit revision as a return to active status. Application at 1, § 1.1.1. The evidence presented at the public hearing, however, showed that there is no credible possibility that the uranium market will recover anytime in the next ten years.

While RGR witness Mr. Joe Lister asserted "the market would be there" to mine uranium at a profit by the time the Mine was ready to produce, neither Mr. Lister nor RGR's other witness was able to produce data to support such an assertion.⁶ In contrast,

⁶ Perhaps Mr. Lister's and Dr. Kuhn's reluctance to provide even a tentative schedule is because RGR's past market projections have been wildly inaccurate. For example, in 1994 RGR predicted that production at the Mine would begin no later than 2010. *See,*

MASE's and Amigos' witness, Mr. Paul Robinson, who has extensive experience analyzing and testifying about the uranium market, presented evidence that in a best case scenario for the uranium mining industry, current uranium mining capacity will satisfy worldwide demand until approximately 2024. Robinson Testimony, Tr. at 136: 18-24, MASE Ex. 2, Slide 8. In a worst case scenario for the uranium mining industry, current mining capacity will meet worldwide demand until beyond 2035. *Id.*, Tr at 136: 24-25 and 137: 1-7; MASE Ex. 2, Slide 8.

Mr. Robinson further testified⁷ that even when additional mining capacity is needed to fill domestic and worldwide demand, currently permitted and producing uranium mines are operating at less than a quarter of their permitted capacity. *Id.*, Tr. at 133: 4-25 and 134: 14-19; MASE Ex. 2, Slide 4. Thus, already producing mines have significant room to expand production to meet any future demand without needing to bring any additional new capacity online.

Finally, Mr. Robinson testified that in the absence of demand it was unlikely that the price of uranium would reach a level that would sustain production at the Mt. Taylor Mine. While RGR has refused to disclose the uranium price that would sustain profitable mining at Mt. Taylor, Mr. Robison analyzed data from a comparable mine,

Permit Application, Mt. Taylor Mine at PA-12 (Dec. 20, 1994), attached as MASE Post Hearing Exhibit 2.

⁷ This, and all other, aspects of Mr. Robinson's testimony was unrebutted.

the nearby proposed Roca Honda Mine, and testified that the Roca Honda Mine operator can only profitably produce uranium at a price of between \$65 and \$75 per pound. *Id.*, Tr. at 130: 1-4; *see also*, excerpt of Roca Honda LLC, NI 43-101⁸ Technical Report on the Roca Honda Project, McKinley County, State of New Mexico, USA (Feb. 27, 2015), attached as MASE Post Hearing Exhibit 3. Mr. Robinson then testified that the current spot price of uranium is \$36/lb and the long term contract price is \$45-\$50/lb. *Id.*, Tr. at 130: 20-25.

In sum, the evidence is clear that worldwide and domestic uranium demand will not support a price at which RGR can produce uranium for at least ten more years, and more likely, much further into the future. The evidence in the record cannot support a determination that the Mine will resume production by 2018, and the Director should therefore deny the Application and direct RGR to immediately begin reclamation.

5. *There is no mill to process ore from the mine.*

Moreover, the evidence presented at the hearing indicates that RGR will not be able to mill ore from the Mine for at least ten years, and therefore cannot produce any ore before then. In his testimony, Mr. Robinson presented an email from Mine manager, Joe Lister, to the U.S. Nuclear Regulatory Commission ("NRC") in which Mr. Lister indicated that RGR did not intend to submit an application for a license to build a

⁸ Mr. Robinson testified that the National Instrument or "NI" 43-101 Report is a report required by the Canadian Government for publicly traded mining companies traded on Canadian stock exchanges that contain certain disclosures, including the price at which a commodity can be produced profitably. Robinson Testimony, Tr. at 129: 14-19

mill for Mine ore until late 2019 or early 2020. Robinson Testimony, Tr. at 141: 12-22; MASE Exhibit 4. Further, Dr. Kuhn testified that once a mill license application is submitted to the NRC, in his experience, the NRC takes a minimum of five years to process the license application. Kuhn Testimony, Tr. at 74: 25 and 75: 1.

The record, then, is clear that the Mine will not produce a single ounce of uranium for at least ten years because RGR 's alleged preparations will take at least that long, market demand will not support profitable mining until then, and no mill will be available to process ore. The record does not support granting RGR's Application.

B. The Application is Incomplete

In addition to violating the time limitation on inactivity as described in Section IV.A, above, the Application is incomplete. First, the Application does not contain complete groundwater sampling from the Point Lookout aquifer. The Revised Closeout/Closure Plan indicates that after dewatering is completed, water from the Point Lookout formation will be monitored for a list of pollutants provided in Table 2.2. Closeout/Closure Plan, Rev. 1 (Nov. 2013) at 46. Table 2.2, in turn provides a list of nine pollutants. *Id.* at Table 2.2. However, this list does not include all pollutants in 20.6.2.3103 NMAC. The groundwater testing protocol should therefore be amended to include all Section 3103 standards.

Second, the Application contains no operations, health or safety plan. Application at 5. Indeed, although RGR concedes that the Mine's current operations,

health and safety plans do not comply with New Mexico or MSHA requirements, it will not provide such a plan until after the requested permit revision has been approved. *Id.* at 48. The Director should require RGR to provide an updated operations, health and safety plan.

C. The Application Cannot be Approved Without RGR First Securing all State and Federal Permits.

The Mining Act requires that the Director coordinate the review and issuance of permits for new and existing mining operations with all other state or federal permit processes. NMSA 1978, § 69-36-9(A). The regulations further require that "during the term of a permit issued pursuant to 19.10 NMAC, the permittee must maintain environmental permits required for the permit area."

In this case, RGR concedes it does not have and will not obtain, until some indeterminate time in the future, the permits necessary to fulfill New Mexico and MSHA health and safety requirements. Application at 5. Further, the Mine likely needs an air pollution permit for radon emissions for its modification of the Mine from standby to active status. 20.2.72.200.A.2,3 NMAC. Those provisions require that NMED issue a permit for any modification of a hazardous pollutant source. *Id.* However, the New Mexico regulations exclude certain provisions of 40 C.F.R. Part 61 dealing with emissions from uranium mines from state regulations. 20.2.78.10.B NMAC. Thus, RGR is required to comply with Federal regulations for any radon emissions associated with the Mine.

Federal regulations require a permit when there is any "physical or operational change to a stationary source which results in an increase in the rate of emission to the atmosphere of a hazardous pollutant to which a standard applies". 40 C.F.R. § 61.115(a). Radon is a hazardous air pollutant to which a standard applies. *Id.* at § 61.22. Moreover, changing from inactive status, where no radon is being vented from the Mine, to active status, where radon will be vented from the mine to the atmosphere, is an operational change that will increase the rate of radon emissions. Thus, RGR is required to receive a permit from the U.S. Environmental Protection Agency.

Nevertheless, RGR asserts no such permit is necessary and that it does not intend to apply for such a permit. Application at 30-31. The Director cannot approve the Application prior to RGR securing the above noted permits.

V. CONCLUSION

The Legislature was very clear in the Mining Act that the value of mining in New Mexico lies in the actual production of minerals. It was also very clear that despite the vicissitudes of mineral markets, mines must either produce or reclaim - there could be no room for indefinite periods of inactivity. For that reason, the Legislature placed a 20-year time limit on inactivity for mines.

In this case, RGR seeks to evade that 20-year limit on inactivity simply by re-characterizing its Mt. Taylor Mine as active, without actually producing minerals. The Director should not allow RGR to accomplish administratively what the mining

industry could not accomplish legislatively. The Director should reject RGR's Application and require RGR to immediately begin reclamation activities. Alternatively, the Director should reject RGR's application and renew RGR's standby status for a period of no more two three years, at which time he should require reclamation to begin.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2016, I have delivered a copy of the foregoing pleading in the above-captioned case via U.S. mail, first class, or hand delivery to the following:

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