STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

MULTICULTURAL ALLIANCE FOR A SAFE ENVIRONMENT, and AMIGOS BRAVOS,

Appellants,

v.

D-101-CV-2018-02492
Judge Francis J. Mathew

NEW MEXICO MINING COMMISSION,

Appellee,

and

MINING AND MINERALS DIVISION OF THE ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, and RIO GRANDE RESOURCES, LLC,

Intervenors.

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The Multicultural Alliance for a Safe Environment (“MASE”) and Amigos Bravos (“Amigos”) (collectively “Community Groups”) submit the following brief demonstrating why the New Mexico Mining Commission's ("Commission") Final Order affirming the New Mexico Mining and Minerals Division ("Division") Director's decision to approve Revision 13-2 to Permit No. CI002RE ("Final Order") should be vacated because the Final Order conflicts with the New Mexico Mining Act's plain language and structure by concluding that a mine which is not producing minerals and will not produce minerals indefinitely is "operational."

I. Statement of Issues

The Commission's Final Order should be vacated for five reasons: 1) the Commission's Final Order allowing the Mt. Taylor Mine to return to "operational" status when the Mine is not producing minerals and will not produce minerals for the foreseeable future violates the plain language, structure and intent of the New Mexico Mining Act, NMSA 1978, §§ 69-36-1 *et seq.*("Mining Act"); 2) the Commission's Final Order violates its regulations implementing the Mining Act; 3) the Commission engaged in an improper rulemaking; 4) the Commission Hearing Officer's decision to prohibit evidence about the Mine's lack of economic viability was arbitrary and capricious; and 5) the Commission's misinterpretation of the Mining Act and its implementing regulations notwithstanding, the Commission's Final Order was arbitrary, capricious and unsupported by substantial evidence in the whole record.

Based on the Mining Act's plain language and structure, the New Mexico Legislature clearly intended for "existing mines" to be either producing minerals, i.e., "operational"; on standby, i.e., "nonoperational" or "inactive"; or reclaiming, i.e., cleaning up the areas impacted

by a mining operation. The Commission's unlawful, arbitrary, and unsupported determination that the Mine, which has not produced minerals for nearly thirty years and does not expect to produce minerals for at least another eight years, is an "operational" mine, is not only an affront to common sense, but also violates the Mining Act's plain and express terms. Further, the Commission's interpretation of what constitutes an "operational" mine contradicts the plain language and structure of the Mining Act's implementing regulations.

In addition to this fundamental error, during the adjudication on the Community Groups' petition to review the Director's decision, the Commission made procedural errors that prejudiced Community Groups. In particular, the Commission erred by failing to allow Petitioners to address economic issues, while allowing Rio Grande Resources Corporation ("Operator") to premise its testimony on economic assertions.

Finally, in the alternative, even if an existing mine could be considered "operational" if it is not producing minerals, the Commission's decision that the Mine is an existing mine that is returning to operational status after standby is unsupported by substantial evidence in the record. Instead, the record evidence indicates that the Mine is an existing mine that closed but did not conduct reclamation and is now opening as a new mine.

II. Standard of Review and Legal Framework

A. Standard of Review

The Mining Act provides that Commission adjudications are appealed under § 39-3-1.1 of the New Mexico statutes. NMSA 1978, § 69-36-16(C). Section 39-3-1.1 provides that a district court may set aside, reverse or remand a final agency decision if it determines that the

agency decision is: 1) fraudulent, arbitrary or capricious; 2) unsupported by substantial evidence; or 3) not in accordance with law. NMSA 1978, § 39-3-1.1(D)(1)-(3).

An administrative agency decision is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors. *The Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 793 (citations omitted). Agencies may not ignore inconvenient or difficult facts and issues, nor may agencies only select and discuss facts that support their ultimate conclusions. *Id.*

The substantial evidence standard of review contemplates the reviewing court canvassing the entire record for both favorable and unfavorable evidence bearing on a finding or decision, and determining whether there is substantial evidence to support the agency's decision. *Tallman v. ABF*, 1988-NMCA-091 ¶ 9, 108 N.M. 124, 128 (superseded by statute). The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the agency's conclusion. *Id*. at ¶ 13.

An agency decision is not in accordance with law if the agency action is based on an error of law, is arbitrary and unreasonable, or is based on conjecture, and is inconsistent with established facts. *Perkins v. Dep't of Human Svcs.*, 1987-NMCA-148 ¶ 22, 106 N.M. 651, 656.

B. Statutory and Regulatory Framework

The Mining Act has a cogent framework designed to realize the Legislature's goal of balancing environmental and public health protection and extraction of minerals that are "vital to the welfare of New Mexico." NMSA 1978, § 69-36-2; *Rio Grande Chapter of Sierra Club v.*

New Mexico Mining Comm'n, 2003-NMSC-005 ¶ 28, 133 N.M. 97, 107. In furtherance of this goal, the Legislature created a statutory framework that reflects the actual mining process.

When the Mining Act was enacted in 1993, the Legislature determined that certain mines which had actually produced marketable minerals for at least two years between 1970 and the Mining Act's effective date would be exempt from many of the most stringent environmental and public health requirements. NMSA 1978, §§ 69-36-3(E), 69-36-11 *et seq.*; *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005 ¶ 28. The primary requirement for existing mines is that they must provide the Division with a closeout plan that demonstrates that the existing mine will appropriately reclaim the land within its permit area when the mine closes. NMSA 1978, § 69-36-11(B); *see also*, 19.10.5 *et seq.* NMAC.

Likewise, the Legislature made a policy decision that certain small exploration and mining operations, denominated "minimal impact mines" would also be exempt from the most stringent environmental and public health requirements because of their presumed minimal environmental impacts. NMSA 1978, § 69-36-7(L); 19.10.3 *et seq.* NMAC.

In contrast, new mines, i.e., mines which had little or no production prior to the Mining Act's enactment or that were established after the Mining Act was enacted, would be subject to the most demanding environmental requirements. NMSA 1978, § 69-36-12; 19.10.6 *et seq.* NMAC; *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005 ¶ 29. In addition to stricter requirements, the Legislature significantly provided that the initial permit term for a new mine would be twenty years, to accommodate mine development, and

once a mine became "operational", i.e., producing minerals, subsequent permit terms would be ten years. NMSA 1978, § 69-36-7(C).

In addition to the statutory and regulatory framework governing mines, the Legislature created a framework governing pre-mining exploration projects. Similar to the regulatory framework for mines, the framework for pre-mining exploration projects includes certain operational and reclamation requirements that would be enforced if an exploration project did not lead to mine development and operation or did not occur concurrently with mine operation. *Id*. at § 69-36-13; 19.10.4 *et seq.* NMAC. Cognizant that exploration activities also typically occur concurrently with mineral extraction activities, the Legislature and Commission provided that exploration activities that lead to mining or occur during mining are not required to have a separate reclamation plan, but can be incorporated into final mine reclamation plans. NMSA 1978, § 69-36-13(F); 19.10.4.401.E NMAC.

Finally, both the Legislature and the Commission realized that circumstances might require mines to temporarily cease mineral extraction, i.e., go on "standby status", and therefore provided a framework that would allow mines to become temporarily inactive. NMSA 1978, § 69-36-7(E); 19.10.7 *et seq.* NMAC. The Mining Act requires that, at a minimum, a temporarily inactive mine receive a permit for standby status which requires that certain maintenance activities take place to insure environmental protection. NMSA 1978, § 69-36-7(E)(1)-(5). A standby permit term may not exceed five years and in no event may a mine be inactive for more than four five year terms or a total of twenty years. *Id*. at § 69-36-7(E).

The Commission's regulations implementing the standby permit provisions allow a mine to temporarily cease operations for fewer than 180 days without obtaining a standby permit. 19.10.7.701.A NMAC. Temporary cessation of more than 180 days requires a permit modification or revision that must include the minimum requirements for an inactive mine in the Mining Act. *Id*. at 19.10.7.701.B.(1)-(6). Standby status ends upon revision or modification of the permit to "return to operating status" or expiration of the permit term or renewal period. *Id*. at 19.10.7.701.H.

III. Summary of the Proceedings

The Mt. Taylor Mine first became operational in 1980 when it began producing uranium. Administrative Record ("AR") at 1218. The Mine produced intermittently between 1980 and 1990. Testimony of Mr. Joe Lister ("Lister Testimony"), Transcript ("Tr.") at 264:4-5; 268:20 - 269:2, AR at 4409; 4413-4414. The Mt. Taylor Mine has not produced any uranium since 1990, when the Mine's operator allowed the Mine's underground tunnels to flood with water, making mineral extraction impossible and indicating the Mine had closed. *Id*., Tr. at 278:13-16, AR at 4423; *see also*, AR at 1218.

The Division issued the Operator an "existing mine" permit for the Mine in 1995 because it produced marketable minerals for at least two years between 1970 and the date the Mining Act became effective. *See*, NMSA 1978, § 69-36-3(E); AR at 1217. The Operator received its first standby permit revision on October 12, 1999 for a five year period. *Id*. The Division granted a

second five year standby permit revision in 2005. *Id*. The Operator received a third standby permit revision in 2012[1], which expired in 2014. *Id*.

In April 2013, the Operator applied for a permit revision allowing it to return to "active" status. AR at 1212 - 1342. This application was updated later that year. AR at 2365 - 2603. The Division held a public hearing on the Operator's revision application in 2015, where Community Groups participated and presented technical and non-technical testimony, including economic testimony. The Director granted the Operator's permit revision application in 2017. AR at 4069-4092.

Community Groups timely appealed the Director's decision to the Commission, pursuant to the Mining Act. AR at 35-94. The Commission held an adjudicatory hearing on Community Groups' petition for review of the Director's decision, after which it affirmed the Director's decision. AR at 4069-4092.

IV. Argument

A. The Commission's Final Order Determining that the Mine is "Operational" is Contrary to Law

The fundamental issue in this appeal is whether the Commission violated the Mining Act's plain language and structure when it concluded that an existing mine that has not produced minerals for nearly thirty years, is not producing minerals currently, and will not produce minerals for the foreseeable future is "operational". The Mining Act's language and structure

[1] Because of Petitioners' appeal of the Operator's third standby revision, while the permit was granted in 2012, it was granted to be effective retroactively, with an effective date of July 5, 2010. AR at 1217.

unequivocally indicate the Legislature's intent that an "operational" mine is a mine that is actually producing minerals.

1. *The Commission's interpretation of the Mining Act's provisions conflicts with the Mining Act's plain language indicating the Legislature's intent*

The canons of statutory construction govern the review of an agency's statutory interpretation. *City of Albuquerque v. AFSCME Council No. 18*, 2011-NMCA-021 ¶ 17, 149 N.M. 379, 383. Statutory construction is outside an agency's expertise and therefore courts review an agency's interpretation of a statute *de novo*. *Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013 ¶ 50, 148 N.M. 21, 39; *see also*, *City of Albuquerque v. AFSCME Council No. 18*, 2011-NMCA-021 ¶ 8 (district court sitting in its appellate capacity review agency legal conclusions *de novo*). Courts rely on a statute's plain language to determine the legislature's intent. *State v. Juan*, 2010-NMSC-41 ¶ 37, 148 N.M. 747, 759. Where statutory language is clear and unambiguous, courts must give effect to that language and cease further interpretation. *Perez v. Dept. of Workforce Solutions*, 2015-NMSC-008 ¶ 17, 345 P.3d 330, 335-336.

Words in a statute are given their ordinary meaning unless the legislature expressly determined otherwise. *Id*. at ¶ 13. A word's ordinary meaning is guided by its dictionary definition; a word's ordinary meaning will be used unless it leads to an absurdity, contradiction or injustice. *N.M. Attorney General v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042 ¶ 26, 309 P.3d 89, 97. The legislature's failure to define a word indicates the legislature's intent that its ordinary meaning should be used. *Id*. at ¶ 27.

In this case, the Mining Act does not define the term "operational" or "mining operation." Because the Mining Act does not define "operational" or "mining operation," the Commission relied on the Mining Act's definition of "mining" to determine whether the Mine was "operational" or not. Final Order ¶¶ 5-8, AR at 4088-4089. Although the Mining Act gives no indication that the Legislature intended "mining operations" to include pre-mineral extraction mine development or exploration, the Commission chose to erroneously interpret the definition of "mining" to include those activities. *Id*. at ¶¶ 7-9, AR at 4089.

The Commission's interpretation, however, disregards the Mining Act's plain language. In relevant part, the Mining 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, evaporation, leaching or other processing.

NMSA 1978, § 69-36-3(H). The definition of mining also excludes certain ore extraction and processing activities that are regulated by other statutory frameworks. *Id*.

The Mining Act's definition of "mining" indicates that the Legislature intended that an operation engaged in mining would be conducting activities that are actively removing and processing minerals for sale. *Id*. Each item on the list of activities in the definition of "mining" has the character of being an activity that produces minerals or supports the production of minerals, rather than an activity that merely sets the stage for perhaps eventually producing

minerals.[2] *Id.*; Rocky Mountain Mineral Law Foundation, *American Law of Mining, 2d. ed.*, § 1.01(5)(c) at 1-11 - 1-13, § 2.04 at 2-30 - 2-31 (Lexis Nexis, 1984) (describing the distinction between development and mining). The Division's witness conceded as much during the hearing before the Commission. Testimony of Mr. Holland Shepherd ("Shepherd Testimony") Transcript of Proceedings May 7-8, 2018 ("Tr.") at 138:4-140:5, AR at 4230-4232.

Conversely, none of the activities included in the definition of "mining" have the character of pre-mineral extraction planning and development such as road construction, constructing mine related buildings, land preparation and installing mining equipment such as hoists, headframes, generators, and power plants. *American Law of Mining, 2d. ed.*, § 1.01(5)(b) at 1-10 - 1-11. Absent actively removing or processing minerals for sale, an operation cannot be "mining" and thus cannot be "operational."

In this case, it is undisputed that the Mt. Taylor Mine will not be producing minerals for at least eight years during the time the Commission considers the Mine to be "operational." AR at 1030 - 1035; Kuhn Testimony, Tr. at 410:17-25, AR at 4555 (Mt. Taylor Mine will be "ready" to produce

[2] The Commission relies on the inclusion of "exploration" in the definition of "mining" to justify its interpretation that "mining" includes planning and development activities. Final Order ¶¶ 6-9, AR at 4089. However, exploration also occurs during mineral extraction activities. Shepherd Testimony, Tr. at 139:1-2, AR at 4231; Testimony of Mr. James Kuipers ("Kuipers Testimony"), Tr. at 211:11-16, AR at 4303; Tr. at 217:5-11, AR at 4309. The Commission's reliance on the presence of the word "exploration" in the definition of "mining" to conclude that "mining" includes pre-extraction exploration effectively renders the language in § 69-36-13(F) and 19.10.4.401.E NMAC superfluous. Those provisions allow pre-extraction exploratory reclamation to be folded into a mine permit. Under the Commission's interpretation that would occur automatically making the aforementioned provisions unnecessary. Moreover, the presence of the word "exploration" in the definition of "mining" in no way leads to the conclusion that the Legislature intended for *all* pre-extraction mine development activities to be included in the definition of "mining".

uranium at the end of "reactivation" activities). Because the Mine will not be producing minerals for at least eight years and likely for the foreseeable future, it cannot be considered "operational" pursuant to the Mining Act during that time and should either resume standby status or begin final reclamation.

2. *The Mining Act's structure demonstrates that an "operational" mine must be producing minerals*

Statutory provisions cannot be read in a vacuum. *N.M. Hosp. Ass'n v. A.T. & S.F. Mem'l Hosp.*, 1987-NMSC-017 ¶ 7, 105 N.M. 508, 511. An agency may not interpret one section of a statute in such a way that would render another section superfluous or absurd. *Id*. at ¶ 8. Each statutory provision must be construed in relation to every other provision in accordance with common sense and reason to give effect to legislative intent. *Id*. Not only does the Commission's interpretation of the Mining Act contradict its plain language, it is also contrary to the Mining Act's structure. Based on the Mining Act's structure, the Legislature intended for existing mines to be either producing minerals, on standby, i.e., "inactive" or "nonoperational", or reclaiming.

a. The Commission's interpretation of the Mining Act renders significant provisions superfluous

As noted above, the plain language of the definition of "mining" indicates that term is limited to activities that effectuate or support actual mineral production. Additionally, the Mining Act contains several provisions supporting the interpretation that the Legislature intended for an "operational" mine to be actually producing minerals.

First, as noted in Section II, above, the Legislature provided minimum requirements for mines that are *not* producing minerals: the standby provision. NMSA 1978, § 69-36-7(E). That provision allows a mine to temporarily cease mineral production. *Id*. Further, the Mining Act's standby

provision indicates that a mine may not remain inactive, i.e., on standby, for a period of more than twenty years in total. *Id.*

However, the Commission's interpretation of the Mining Act renders the Legislature's twenty year limit on mine inactivity superfluous, because under the Commission's interpretation, an operator would merely need to state an intent to begin mining at an indeterminate time in the future to be considered "operational." Shepherd Testimony, Tr. at 151:11-17, AR at 4243; Tr. at 154:8-15, AR at 4246; Lister Testimony, Tr. at 303:3-10, AR at 4448. As a result of this interpretation, a mine could be considered "operational" and never produce an ounce of marketable minerals.

Indeed, in this case, it is undisputed that the Mine has not produced minerals since 1990 and has been on standby pursuant to the Mining Act since October 1999. AR at 1217. The Operator admits that the Mine will not be able to even begin producing minerals for at least eight years, far beyond the twenty year limit on inactivity the Legislature mandated. Testimony of Dr. Alan Kuhn ("Kuhn Testimony"), Tr. at 410:17-25, AR at 4555. Moreover, based on the record, ore production will likely not occur for even longer. Kuhn Testimony, Tr. at 391:25 - 392:6, AR at 4536 (reactivation timeline is "optimistic"); Lister Testimony, Tr. at 288:18-25, AR at 4433 (conceding there will be unforeseen delays in reactivating the Mine). If the Legislature's twenty year limit on mine inactivity is to be given any effect, the Commission's interpretation of the Mining Act should not be accepted.

Second, the Commission's interpretation of the Mining Act concluding that an "operational" mine includes exploration and development activities renders the entire standby provision superfluous. If, as the Commission found, "mining" consists of pre-extraction activities such as "planning" and

"site management," it is difficult to envision a situation where a mine would ever need or be required to go on standby, since "planning" and "site management" could happen continuously and indefinitely. Final Order ¶ 27, AR at 4078. Under the Commission's interpretation, the entire standby permit framework becomes superfluous.

b. The Commission's interpretation of the Mining Act leads to absurd results

The Commission's interpretation of the Mining Act also leads to absurd results. In particular, the Commission's interpretation of the Mining Act would allow the Director to make a determination that a mine is "operational" without any discernible standards or limitations. Giving the Director unfettered discretion to determine that a mine is "operational" even though it is not producing minerals and will not produce minerals indefinitely is contrary to law. *State ex rel. N.M. Gaming Control Bd. v. Ten Gaming Devices*, 2005-NMCA-117 ¶ 11, 138 N.M. 426, 430 (State Gaming Control Board had no authority to seize gaming devices where Board's interpretation of the Gaming Control Act resulted in granting it unfettered discretion); *Smith v. Bd. of County Comm'rs*, 2005-NMSC-012 ¶ 33, 137 N.M. 280, 288 (court rejected interpretation of zoning code that resulted in zoning decisions being made solely at a zoning official's discretion without standards); *Camino Real Envt'l Ctr., Inc. v. N.M. Dept. of the Env't*, 2010-NMCA-057 ¶¶ 17-18, 148 N.M. 776, 782 (Environment Secretary's discretion to modify solid waste permit term was not unlimited when legislature provided specific time limitation in statute); *NRDC v. Abraham*, 355 F.3d 179, 197 (2nd Cir. 2004) (it is "inconceivable" that Congress would grant the Secretary of Energy unfettered discretion to amend appliance efficiency standards).

Here, the record is replete with admissions from the Division that there are no standards or guidance for determining when a mine is operational. Testimony of Mr. David Ohori ("Ohori Testimony"), Tr. at 50:20-23, AR at 4142; Shepherd Testimony, Tr. at 104:24 - 105:3, AR at 4196-4197; 108:4-15, AR at 4200; 110:9-14, AR at 4202; 114:2-9, AR at 4206; 122:4-17, 4214; 123:7-10, AR at 4215; 129:12-18, 4221; Tr. at 163:19-23, AR at 4255 (the Division has required reactivation plans for some mines coming off standby, but not for others). Moreover, the Division's *ad hoc* process of determining whether a mine is operational contains no standards that are consistently applicable. Indeed, even when a mine is purportedly subject to some kind of standard in the form of a reactivation plan, the Division may change or disregard the alleged standards, often without public input. Shepherd Testimony, Tr. at 140:18 - 142:2, AR at 4232-4234 (Division would not automatically require return to standby status or commencement of reclamation even in the case of significant delays in reactivating the Mine).

B. The Commission's Interpretation of the Mining Act's Implementing Regulations is Contrary to Law

As with its interpretation of the Mining Act's statutory language, the Commission's interpretation of the Mining Act's implementing regulations is contrary to law. Agency regulations, like statutes, are subject to the rules of interpretation. NMSA 1978, § 12-2A-1; *Albuquerque Bernalillo Co. Water Util. Auth v. N.M. Public Regulation Comm'n,* 2010-NMSC-013 ¶ 51, *citing Johnson v. N.M. Oil & Conservation Comm'n,* 1999-NMSC-021 ¶ 27, 127 N.M. 120, 126. When interpreting agency regulations, courts use the rules of statutory interpretation. *Id.* A court will generally defer to an agency's interpretation of its own regulations, but is not bound by the agency's

interpretation and may substitute its own interpretation if the agency's interpretation is unreasonable or unlawful. *Id*. (citation omitted).

In this case, the Commission's interpretation of the regulations implementing the Mining Act violate the rules of statutory interpretation for two reasons. First, the Commission's interpretation fails to use the ordinary meaning of undefined terms. Second, the Commission's interpretation renders key regulatory provisions superfluous.

1. *The Commission failed to use the ordinary meaning of undefined terms*

Like the Mining Act itself, the Mining Act's implementing regulations leave certain words undefined. Under the rules of interpretation, those words should be given their ordinary meaning. *Perez v. Dept. of Workforce Solutions*, 2015-NMSC-008 ¶ 13.

In this case, the regulation governing reactivation of a mine that has been on standby, i.e., inactive, provides, in relevant part, standby will end when the standby permit is revised to "return to operating status". 19.10.7.701.H NMAC. Neither the Mining Act nor its implementing regulations define "operating status". Final Order ¶ 3, AR at 4072-4073. Because the term "operating status" is not defined, the Commission should have relied upon the dictionary definition of that term. The Commission failed to do so.

Had the Commission followed the rules of interpretation, it would have realized that "operating status" in the context of mineral exploitation means a mine that is extracting or producing minerals. The Merriam-Webster online dictionary defines "operating" as: "of, relating to, or used for or in operations." Merriam-Webster Online Dictionary, https://www.merriam-

webster.com/dictionary/operating (last viewed Feb. 19, 2019). "Operation", in turn, is defined as: "2.a: the quality or state of being functional or operative." *Id.*, https://www.merriam-webster.com/dictionary/operations (last viewed Feb. 19, 2019). "Status" is defined as: "2: the condition of a person or a thing in the eyes of the law; 3: state or condition with respect to circumstances." *Id.*, https://www.merriam-webster.com/dictionary/status (last viewed Feb. 19, 2019). Thus, the ordinary meaning of "operational status" is that a mine must be in a state of being functional in the eyes of the law or with respect to circumstances. In the context of mineral mining, an ordinary meaning interpretation of "operational status" indicates that a mine must be functional, that is, producing minerals.

2. *The Commission's interpretation of its regulations renders the standby provision of the regulations superfluous*

Similar to interpreting statutes, regulations should be read as a whole such that giving one provision effect does not render another provision superfluous or absurd. *N.M. Hosp. Ass'n v. A.T. & S.F. Mem'l Hosp.*, 1987-NMSC-017 ¶ 7. In this case, the Commission's interpretation of its regulations renders two important regulatory provisions superfluous.

The regulations define "standby status" as the "permitted temporary cessation of a mining operation that is expected to resume." 19.10.1.7.S.(5) NMAC. The regulation governing inactivity further allows a permit to be modified or revised to return to operating status. 19.10.7.701.H NMAC. The Commission's interpretation of the Mining Act regulations renders the entire standby regulatory provision superfluous.

The ordinary meaning of undefined words within the definition of "standby" and the provision allowing resumption of operations supports the interpretation of the Mining Act that standby was intended to be a limited status where the operator maintained their operation to be ready for resumption. "Temporary" is defined as "lasting for a *limited* time". Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/temporary (emphasis added) (last viewed Feb. 19, 2019). Additionally, as used in Section 701, "expected" means: "transitive verb, 4a: to consider probable or certain". Merriam-Webster online dictionary https://www.merriam-webster.com/dictionary/expect (lasted viewed Feb. 19, 2019). The ordinary meaning reading of the standby rule indicates that it is intended to govern limited pauses in mineral production, which will probably or certainly resume.

The ordinary meaning is consistent with how mining experts understand temporarily ceased operations. Kuipers Testimony at 208:4-9, AR at 4300; *see also*, Shepherd Testimony, Tr. at 117:11-12, AR at 4209 (Little Rock mine took approximately one year to produce minerals after coming off standby); 118:15-17, AR at 4210 (Continental Mine expected to produce minerals less than a year after coming off standby).

The Commission's interpretation of its regulations, however, renders Section 701 superfluous. First, the Commission's interpretation would eliminate any limitation on "temporary" cessation allowing mines to be inactive indefinitely. Shepherd Testimony, Tr. at 142:22 - 143:2, AR at 4234-4235 (the Operator could be allowed to delay actual mineral

production for twelve or more years[3] after being designated "operational"); Tr. at 433:7-9, AR at 4578 (implying that the Operator could go beyond the statutory limit of twenty years for standby). Second, the Commission's interpretation would eliminate the regulations' requirement of a reasonable certainty, i.e., the expectation of resuming actual mineral production, in favor of allowing operators to merely speculate that the mine may one day produce minerals. Because the Commission's interpretation renders an entire provision of the regulations superfluous, it should be rejected.

C. The Commission's Decision is an Improper Rulemaking

While the Commission addressed the question of when an inactive mine becomes operational in the context of a permit revision adjudication, its conclusion effectively amounts to a rulemaking, which the Commission conducted contrary to the Mining Act. Administrative agencies typically carry out both legislative and judicial functions. *KOB-TV, LLC v. City of Albuquerque*, 2005-NMCA-049 ¶¶ 19-20, 137 N.M. 388, 396. Quasi-legislative actions, i.e., rulemaking, are policy decisions that are general in nature and not restricted to identifiable people or groups. *Id*. at ¶ 19. Agency quasi-judicial actions are those that determine the rights and duties of individuals by applying existing legal standards or policy considerations to a particular circumstance. *Id*. at ¶ 20. Implementing the broad policy decisions in statutes is, under most circumstances, reserved for rulemaking. *SEC v. Chenery Corp.*, 332 U.S. 194, 202

[3] Community Groups were prevented from exploring how long the Division might allow the Operator to delay actual mineral production when the Commission Chair arbitrarily prevented Petitioners from pursuing this line of cross examination. Tr. at 142:6-9, AR at 4234.

(1947); *McDonald v. Watt*, 653 F.2d 1035, 1043 n. 18 (5th Cir. 1981). To determine whether an adjudicatory rulemaking is appropriate, a court must consider: 1) whether the issue is one which the agency could reasonably foresee arising; 2) whether the issue must be solved despite the absence of a general rule; 3) whether the agency has insufficient experience with the particular issue to warrant rigidifying its judgment into a hard and fast rule; and 4) whether the problem is so specialized and varying such that it would be impossible to capture within the bounds of a general rule. *SEC v. Chenery Corp*., 332 U.S. at 202-203. If an agency can answer each of the *Chenery* prongs affirmatively, an adjudicatory rulemaking is appropriate. *Id*. at 203.

In this case, the Commission's decision that an "operational" mine is not required to produce minerals meets none of the *Chenery* prongs and is therefore an improper rulemaking. First, the Commission could have easily foreseen that it would have to determine what "operational" means because the Operator's return to active status permit application has been pending since 2013 (AR at 1212 - 1342) and because two other mines in New Mexico returned to "operative" status before the Mine (Shepherd Testimony, Tr. at 162:17-167:11, AR at 4254-4259).

Second, the issue of operative status did not need to be solved in the absence of a general rule, because the Commission could have engaged in a rulemaking to solve this issue prior to the Operator's permit being granted. That fact notwithstanding, a general rule for when a mine is "operational" already exists in the Mining Act's definition of "mining", which limits a mining operation to one that is producing minerals. NMSA 1978, § 69-36-3(H).

Third, neither the Commission nor the Division has insufficient experience with the issue since two mines had gone from "inactive" to "operational" before the adjudication on the present permit revision. (Shepherd Testimony, Tr. at 162:17-167:11, AR at 4254-4259).

Finally, the problem of when a mine becomes "operational" is not so specialized that it is not amenable to a generalized rule. The record contains no evidence that the issue of when a Mine becomes "operational" is unique, particularly specialized, or in any way not amenable to a general rule. Indeed, the Division's witness, Mr. Shepherd, expressed the possibility that a rule or guidance governing "re-activation" might be forthcoming. Shepherd Testimony, Tr. at 166:22-25, AR at 4258. The Commission's decision is an impermissible rulemaking that is contrary to law.

D. The Commission's Decision to Prohibit Economic Evidence was Arbitrary and Capricious

During the course of the proceeding before the Commission, the Commission's chair, Commissioner Heaton,[4] sustained the Division's objection to the Community Groups providing evidence that the Mine would be unable to economically produce uranium in the foreseeable future on the grounds that such evidence was irrelevant. Tr. at 195:4-9, AR at 4287. Commissioner Heaton's decision was arbitrary and capricious because it eliminated the only objective and verifiable means to test whether the Mine will be able to produce minerals in the foreseeable future.

[4] Community Groups raised the issue that Commissioner Heaton had revealed conflicts of interests and demonstrated bias during the course of the Commission's proceedings. AR 967-972; Final Order, AR at 4071. Commissioner Heaton subsequently recused himself from the decision on Community Groups petition before the Commission, but his evidentiary ruling prohibiting economic evidence was allowed to stand. Final Order, AR at 4071.

1. *The Mining Act gives the Commission authority to consider economic evidence*

While the Mining Act does not authorize the Director and the Commission to interject themselves into a mining company's business decisions, its structure and purpose clearly indicate that in order to protect public resources and maintain the integrity of the Mining Act and its attendant regulatory processes, the Director and Commission may make inquiries into the economic rationale for particular requests for regulatory action. In this case, the Commission acted arbitrarily and capriciously by refusing to consider whether or not the Mine will be able to actually produce saleable minerals in the foreseeable future.

Administrative agencies are creatures of statute and may not exceed the authority granted them by the legislature. *State ex rel. Stapleton v. Skandera*, 2015-NMCA-044 ¶ 8, 346 P.3d 1191, 1194. However, the powers of an administrative agency are not limited to those the legislature expressly grants. *Morrow v. Clayton*, 326 F.2d 36, 44 (10th Cir. 1963) (citations omitted). Agency power also includes all the powers that may be fairly implied from its express power. *Id*. These implied powers are all the powers necessary and proper to fulfill a statute's purpose. *Id*.; *see also*, *Winston v. N.M. State Police Bd.*, 1969-NMSC-066 ¶ 3, 80 N.M. 310, 311.

Here, the Mining Act's goal and framework indicate that the Director and the Commission have the discretion to evaluate whether there is a realistic economic possibility that the Mine will produce minerals in the foreseeable future. The Mining Act's purpose is to promote the "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. The Legislature's indication that extracting minerals is vital to the welfare of New Mexico evinces the Legislature's intent to prioritize mining's economic benefits to the state. This goal was confirmed in *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, where the court noted that "the overall purpose of the Mining Act [is] to strike a balance between the economic and environmental impacts of mining." *Id.*, 2003-NMSC-005 ¶ 28.

Additionally, the Mining Act's substantive provisions and the Commission's regulations indicate the importance of economic considerations in implementing the Mining Act. The Commission is instructed to "establish by regulation a continuing process of review of mining and reclamation practices in New Mexico that provides for periodic review and amendment of regulations and procedures to provide for the protection of the environment and consider the economic effects of the regulations." NMSA 1978, § 69-36-7(N). Pursuant to this requirement, the Division's annual report to the Commission must include "a general description of mining operations and reclamation practices in the state including production figures for the state" and "proposed amendments to 19.10 NMAC, if any, to provide for the protection of the environment and to consider the economic effects of 19.10 NMAC." 19.10.13.1302 NMAC. The Director is also instructed to consider economic feasibility and potentially undue economic burdens when evaluating applications for variances and waivers of closeout and reclamation standards. 19.10.10.1002.A.(7) NMAC.

All mining and exploration operations are required to provide the Commission with an annual production report, including value of extracted minerals. NMSA 1978, § 69-36-7(A)(3).

The Division produces an annual report, available to the public, detailing annual production figures throughout the state.

Further, the Mining Act's definition of "mineral" indicates that economics should be considered when evaluating a mining operation. That definition provides that minerals under the Mining Act must be, or converted into, a saleable or useable product. NMSA 1978, § 69-36-3(G).

Finally, the Mining Act provides that certain members of the Commission have economic expertise. The Mining Act specifically provides that the Commission must have a representative from the Bureau of Geology and Mineral Resources and the State Land Commissioner. NMSA 1978, § 69-36-6(A)(1) and (4). One of the duties of the State Land Commissioner is to evaluate the economics of state trust land resources. NMSA 1978, § 19-1-2. The Bureau of Geology and Mineral Resources conducts research, including economic research, on New Mexico's mineral resources. https://geoinfo.nmt.edu/about/home.html (last viewed Feb. 25, 2019). The Mining Act's requirements not only evince the Legislature's intent that the Commission consider economic factors in its decisions, but also provides the expertise to do so.

2. *Economic evidence is relevant because the Operator's application to modify its permit to "operational" status is premised on the assumption that it will be able to economically produce uranium*

Despite having the authority to inquire into whether the Mine would be actually "operational" by reviewing economic evidence, the Commission chair determined that such evidence was irrelevant. Tr. at 195:4-9, AR at 4287. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence. *State v. Balderama*, 2004-NMSC-008 ¶ 23, 135 N.M. 329, 335. Any doubt whether the evidence is relevant should be resolved in favor of admissibility. *Id.*

In this case, the very foundation of the Operator's application to revise its permit to operational status is that the uranium market will sustain ore production at the Mine. Lister Testimony, Tr. at 271:4-12, AR at 4416; 285:6-15, AR at 4430; 300:18-23, AR at 4445 (the Operator is moving off standby because it believes the "market will be there" and wants to take advantage of the market); Lister Testimony, December 2015 Public Hearing, Tr. at 57:23-58:24, AR at 3348-3349 (the Operator has been asserting since 1994 that the uranium market will recover).

Moreover, much of the Operator's testimony and the Commission's questioning was an implicit acknowledgement that economic considerations are integral to the determination about whether a return to operational status - as opposed to continuing standby status - is warranted. *See, e.g.*, Lister Testimony cited *supra*; Testimony of Mr. Mike Bowen, Tr. at 187:5-189:24, AR at 4279-4281; exchange between Commissioner McLemore and Mr. Bowen regarding market for nuclear energy, Tr. at 191:5-2, AR at 4283; exchange between Commissioner Freeman and Mr. Kuipers regarding uranium prices, Tr. at 231:8-17, AR at 4323; comment of Commissioner Heaton on the projected demand for nuclear power and the global uranium market, Tr. at 239:10-22, AR at 4331; exchange between Commissioner Bower and Mr. Lister regarding profitable ore grade, Tr. at 333:13 - 334:4, AR at 4478-4479.

Based on the Operator's testimony and the Commission's questions, the record demonstrates that economic evidence is relevant to the determination of whether the Mine is or will be "operational" within a reasonable time frame. Additionally, the question of whether there is currently or will be a market for uranium in the foreseeable future and whether the Mine can produce uranium at a profit to meet projected demand reveals whether the Mine becoming "operational" is more or less likely. Therefore, economic evidence is relevant to determining whether the Mine should have been allowed to "re-activate" or whether it is more appropriate to continue standby. Because economic evidence is relevant, the Commission's refusal to consider such evidence was arbitrary and capricious.

E. In the Alternative, if this Court Determines the Commission's Interpretation of the Mining Act and its Implementing Regulations is Correct, the Commission's Decision in this Case was Arbitrary, Capricious, and Unsupported by Substantial Evidence in the Record

In the alternative, if this Court determines that the Commission correctly interpreted the Mining Act and its implementing regulations, the Commission's decision is still arbitrary and capricious in this case for two reasons. First, the Commission's determination that the Mine is operational is premised entirely on the financial needs of the Operator rather than on objective and neutral criteria.

Second, the Commission's decision would result in less environmental and public health protection, contrary to the Mining Act's purpose.

Finally, in addition to being arbitrary and capricious, the Commission's decision is unsupported by substantial evidence in the record because the substantial evidence indicates the Mine is closed and should be required to obtain a new mine permit.

1. *The Commission's determination that the Mine is "operational" in this case is arbitrary and capricious*

    a. The Commission's determination that the Mine is "operational" is premised entirely on the Operator's subjective and unsupported assertions

The record in this case unequivocally demonstrates that neither the Commission nor the Division relied on any objective, neutral or independently verifiable standard to conclude the Operator's permit should be revised to reflect operational status of the Mine. When the Operator applied to the Division for a revision of its permit to return to operational status, the Division did not investigate whether re-activation of the mine was appropriate. Final Order ¶ 69, AR at 4084. Instead, the record reflects that the Division relied entirely and without question on the Operator's assertion that at some indeterminate time in the future, the Mine would produce ore. Shepherd Testimony, Tr. at 123:7-10, AR at 4215; Tr. at 129:12-18, 4221; Tr. at 131:17-23, AR at 4223; Tr. at 143:20-144:11, AR at 4235-4236; 151:3-152:19, AR at 4243-4244; Tr. at 172:4-17, AR at 4264; Lister Testimony, Tr. at 289:12-19, AR at 4434.

The Division's and Commission's reliance on the Operator's subjective intent that it may someday resume mineral production ignores relevant factors that should have been considered to support the conclusion that re-activation, rather than continuing standby or ordering final reclamation, was appropriate. First, the Division and Commission failed to investigate whether

there would be a market for minerals for the Mine at the end of the mine development period or at any time in the foreseeable future. Final Order, ¶ 15, AR at 4090; Shepherd Testimony, Tr. 146:12-18, AR at 4238. Second, the Division and the Commission failed to investigate whether the Operator has the means to realistically produce minerals in the foreseeable future. For example, before the Mine can produce minerals the underground mine workings must be dewatered. Lister Testimony, Tr. at 300:1-4, AR at 4445. However, there is no evidence in the record that the Operator has the required mine dewatering permit or has taken any steps to obtain one. NMSA 1978, § 72-12A-6; AR at 1977. Additionally, the record indicates that minerals from the Mine will need to be processed at a uranium mill. Lister Testimony, Tr. at 317:16-318:15, AR at 4462-4463. However, the Operator's witness, Mr. Lister, testified that ore from the Mine would not be transported to the only operating uranium mill in the United States, but would instead either be processed in a mill that is allegedly being developed overseas and whose design is untested and unproven or the Operator would build a conventional mill. Lister Testimony, Tr. at 282:17-20, AR at 4427; Tr. at 317:16-318:15, AR at 4462-4463. The record contains no evidence that the Operator has applied for the proper permits to construct a mill. The Division's and Commission's exclusive reliance on the Operator's subjective and unverified assertions that reactivation is appropriate has resulted in a complete inability to evaluate when a mine is "operational" and when it is "inactive" or at what point an "inactive" mine becomes "operational".

Nevertheless, the Commission determined that a mine on standby is "inactive" - it is neither mining nor reclaiming. Final Order ¶ 36, AR at 4079; Shepherd Testimony, Tr. at

126:11-12, AR at 4218. At the same time, the record indicates that an inactive mine is not completely inactive; even on standby, some activities occur at a mine. Shepherd Testimony, Tr. at 123:7-10, AR at 4215; Tr. at 129:12-18, 4221; Tr. at 131:17-23, AR at 4223; Tr. at 143:20-144:11, AR at 4235-4236; 151:3-152:19, AR at 4243-4244; Tr. at 172:4-17, AR at 4264. This inability to articulate when a mine is "inactive" and when it becomes "operational" is unsurprising given that the line between the two appears entirely dependent on an operator's financial needs and the Division's and Commission's unwillingness to apply the Legislature's guidance given in the definition of "mining". The Commission's failure to grapple with these most fundamental facts is arbitrary and capricious. *The Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24.

b. The Commission's interpretation of the Mining Act and its implementing regulations will not further the Mining Act's purpose of environmental and public health protection

In its Final Order, the Commission concludes that its "broad" interpretation of the definition of mining to include exploration and development activities in addition to actual mineral production, offers greater environmental protection than the interpretation Community Groups offered. Final Order ¶¶ 3, AR at 4072-4073; 11-13, AR at 4090. The Commission's conclusion, however, ignores significant provisions of the Mining Act.

The Commission's conclusion is premised on the testimony of Division witness Holland Shepherd, who testified that the regulatory definition of "disturbed area," which contains the term "activities facilitating mining", indicates that "mining" is intended to encompass exploration and development activities. Shepherd Testimony, Tr. at 110:21 - 111:8, AR at 4202 - 4203. Mr.

Shepherd concluded that if the Community Group's interpretation of "mining" were accepted, the Division would lose authority to regulate all activities that support mineral extraction, such as waste piles, roads and evaporation ponds. *Id*., Tr. at 111:13 - 112:21, AR at 4203 - 4204 (referring to map at AR at 1024). Mr. Shepherd's assertion is wrong for two reasons.

First, the Division's regulatory authority extends throughout the Mine's permit area, which includes not only areas where mining is conducted, but also where any disturbance has occurred. NMSA 1978, § 69-36-3(J); 19.10.1.7.P.(3) NMAC; *see also*, AR at 2412. Thus, even if the regulatory definition of "disturbed area" did not exist, the Division's authority to regulate activity within the permit area would be unaffected. Mr. Shepherd conceded as much on cross-examination. Shepherd Testimony, Tr. 148:23 - 150:12, AR at 4240 - 4242. The Division's and Commission's interpretation of the scope of "mining" offers no greater environmental or public health protection than the interpretation Community Groups offered.

Second, the Commission's rationale ignores significant portions of the Mining Act's implementing regulations in order to support its conclusion. The Commission's exclusive reliance on the definition of "disturbed area" to support its conclusion that a "broad" interpretation of "mining" offers greater environmental protection than Community Groups' interpretation discounts the operational and reclamation requirements in its regulations.

Part 5 of the Commission's regulations governs the requirements for existing mine permits. Section 507, which contains performance and reclamation requirements for existing mines begins by indicating that "[t]he permit area will be reclaimed to a condition that allows for re-establishment of a self-sustaining ecosystem appropriate for the life zone of the surrounding

areas following closure ...". 19.10.5.507.A NMAC. Part 5 also mandates that negative impacts on the hydrologic balance within the permit area must be minimized and then provides a list of methods to insure that minimization. *Id*. at 19.10.5.508.B.(4)(a) - (d). Likewise, after closure, the regulations require the permit area to be stabilized. *Id*. at 19.10.5.508.C. Requirements for new mines, found in Part 6 are similar. *See*, 19.10.6.603 *et seq*. Again, even if the definition of "disturbed area" did not exist, the Division's authority to protect public health and the environment would be unaffected.

If anything, the Commission's "broad" interpretation of the definition of mining results in less environmental and public health protection. The Commission's interpretation allows final reclamation to be delayed indefinitely, so long as an operator is engaging in planning and maintenance activities. During these periods of inactivity, mine waste is exposed to the elements and infrastructure falls into disrepair. It is inconceivable that an unreclaimed mine provides more public health and environmental protection than a reclaimed mine that is stabilized such that a self-sustaining ecosystem is re-established. *See*, 19.10.5.507.A NMAC. Because the Commission's conclusion that a "broad" interpretation of the term "mining" is more protective of public health and the environment than the interpretation offered by Community Groups has no logical connection to the Mining Act or its implementing regulations, the Commission's conclusion is arbitrary and capricious. *The Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24.

2. *The Commission's decision is not supported by substantial evidence in the record*

The Commission's decision that the Operator's existing mine permit should be revised to indicate the Mine has returned to "operational status" is not supported by substantial evidence in the record. Final Order, AR at 4091- 4092. The evidence in the whole record demonstrates the Mine closed in 1990, was left unreclaimed, and is now opening as a new mine.

The Commission views re-activating a mine as being similar to, yet distinct from, the process for permitting a new mine. Final Order at ¶ 38, AR at 4079. This view ignores the record evidence in this case.

"Standby" is the temporary cessation of mineral production and suspension of concurrent reclamation activities. 19.10.7.701.A NMAC. This status is understood in the mining industry as relatively short terms of mine inactivity while maintaining the ability to quickly resume mineral extraction. Kuipers Testimony, Tr. at 207:21-208:9, AR at 2299-2300. This understanding is reflected in the Mining Act's implementing regulations. 19.10.7.701.A NMAC.

In contrast, closure is understood in the mining industry to mean dismantling mine infrastructure and allowing a mine to flood. Kuipers Testimony, Tr. at 209:4-211:6, AR at 4301-4303. A leading treatise on mining and mining law describes closure as a decision that is made when an operator can no longer sustain operating losses and drain on cash flow. *American Law of Mining, 2d. ed.*, § 1.01(5)(d) at 1-14. If the operator decides that mineral prices might one day sustain renewed mining, the mine may be placed on care-and-maintenance, i.e., standby, status. *Id.*; 19.10.7.701.A NMAC. This status incurs certain costs such as mine dewatering and water treatment. *American Law*

of Mining, 2d. ed., § 1.01(5)(d) at 1-14. At this point, the operator must weigh final closure against the cost of keeping the mine on standby. *Id*. Closure occurs when mine plant and facilities are dismantled and removed, with salvaged equipment and fixtures being sold or redeployed at other mines. *Id*. After closure, the mine is reclaimed. *Id*.; NMSA 1978, § 69-36-3(K).

In this case, the record has ample evidence that the Mine is effectively closed and has been closed since 1990. The Commission's Final Order indicates that the Mine was allowed to flood and all underground equipment was removed. Final Order ¶¶ 49, 50, AR at 4081. A witness for the Operator, Joe Lister, testified that a prior Mine operator determined that the cost of continuing to dewater the mine was too expensive, so the mine was allowed to flood. Lister Testimony, Tr. at 266:1-8, AR at 4411. Mr. Lister also testified that all the mining equipment was removed and sold. *Id*., Tr. at 273:9-14, AR at 4418; Tr. at 297:15 -298:10, AR at 4442-4443. The objective evidence, particularly allowing the Mine to flood, indicates that the Mine is closed. Kuipers Testimony, Tr. at 209:4-211:6, AR at 4301-4303; Tr. at 235:2-8, AR at 4327. The weight of this evidence is perhaps why one of the witnesses for the Division, Mr. Shepherd, could not explain, when asked, why the Division did not consider the Mine closed. Shepherd Testimony, Tr. at 429:20 - 430:4, AR at 4574 - 4575. Mr. Shepherd's confused explanation can be summed up as: because the Operator has a closeout plan and has been granted standby permits, the Mine is not closed. *Id*.

In addition, all the "re-activation" activities the Operator has indicated will occur are activities that typically occur when a new mine is developed after exploration, not when an existing mine renews operations after a standby period. New mine development activities include construction and related activities to ready the ore deposit for exploitation and constructing necessary infrastructure

such as roads, power plants, transmission lines, evaporation ponds and other construction to facilitate ore extraction. *American Law of Mining, 2d. ed.*, § 1.01(5)(b) at 1-10 - 1-11. The record indicates that the Operator's "re-activation" activities include: constructing a mine waste treatment area; constructing waste disposal cells; constructing mine runoff retention ponds; constructing stormwater runoff infrastructure; mine dewatering; constructing a water treatment plant; constructing a power plant; and constructing roads. Final Order ¶¶ 73 - 80, AR at 4084 - 4086 . These activities are indicative of development activities for a new mine. *American Law of Mining, 2d. ed.*, § 1.01(5)(b) at 1-10 - 1-11; 19.10.6.603.C.(6), (9) NMAC.

In contrast, the evidence that the Mine is not closed is limited. First, the record contains evidence of a 1983 report evaluating the stability of the Mine's underground workings under a flooded condition. Final Order ¶ 50, AR at 4081; Operator Exhibit 2, AR at 1104-1176. This report was cited as evidence of the Operator's intent that the Mine was not closed in 1990. Lister Testimony, Tr. at 265:6-267:14 , AR at 4410-4412. Second, the record contains testimony from a witness for the Operator that the Operator did not intend to close the Mine in 1990. Lister Testimony, Tr. at 298:15-20, AR at 4443.

The evidence in the whole record does not support the Commission's conclusion. A single report and the self-serving statements of the Operator's employee do not support the conclusion that the Mine has been open since 1990 when compared with the substantial objective evidence indicating that the Mine has been closed for 29 years, yet unreclaimed in violation of the Mining Act. A reasonable mind could not conclude that the substantial evidence in the record supports the Commission's conclusion. *Tallman v. ABF*, 1988-NMCA-091 ¶ 13.

V. Relief Sought

Because the Commission's Final Order is contrary to law, arbitrary, capricious, and not supported by substantial evidence, Community Groups request that this Court grant the following alternative requests for relief:

1. Vacate the Commission's Final Order and remand this matter to the Commission for further proceedings to consider a permit revision for standby for the Mine in accordance with the law; or

2. Vacate the Commission's Final Order and remand this matter to the Commission for further proceedings to consider a new mine permit application in accordance with the law; or

3. Vacate the Commission's Final Order and remand this matter to the Commission with instructions to order commencement of final reclamation of the Mine in accordance with the law.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2019, I have delivered a copy of the foregoing pleading in the above-captioned case via U.S. mail, first class, or electronic mail, to the following:

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