

COAL SURFACE MINING COMMISSION

R. Q. ROGERS, CHAIRMAN

PUBLIC MEETING AND HEARING

MARCH 15, 2000

9:30 A.M.

IN ROOM 321 OF THE STATE CAPITOL BUILDING

(the Roundhouse)

SANTA FE, NEW MEXICO

- 1. Roll call**
- 2. Approval of the agenda**
- 3. Adoption of minutes of January 12, 2000 Coal Surface Mining Commission Meeting and Hearing**
- 4. Discussion and possible action on the appeal by the Pueblo of Zuni (99-02) of the MMD Director's determination not to conduct de novo review and hearing on the effect of the mining operations under permit 96-04 on the Sanctuary surrounding the Zuni Salt Lake**
- 5. Discussion and consideration of proposed amendments to the Coal Surface Mining Regulations (19 NMAC 8.2)**
- 6. Other business**
- 7. Adjourn**

NEW MEXICO COAL SURFACE MINING COMMISSION
MEETING and HEARING
March 15, 2000

A New Mexico Coal Surface Mining Commission Public Meeting was held on March 15, 2000 at 9:15 a.m., in room 321 of the State Capitol Building (the Roundhouse) Santa Fe, New Mexico.

The following members were present:

Mr. Robert Q. Rogers, Jr.,	Chairman, State Engineer's Office
Ms. Gretchen Hoffman	Bureau of Mines and Mineral Resources
Ms. Jami Bailey	State Land Office
Mr. Greg Lewis	Environment Department
Mr. Tod W. Stevenson	Department of Game and Fish
Mr. J. R. Roybal	Soil and Water Conservation Districts
Mr. Dushan P. Milovich	Public Member

The following members were absent:

Mr. John Bokich	Public Member
Dr. Robert McCaslin	Agricultural Experiment Station

Also present:

Mr. Patrick Simpson	Counsel for Commission
Mr. Mr. Veronica Aragon	Commission Clerk
Mr. James O. Browning	Browning & Peifer, P.A.
Ms. Carol Leach	Attorney, Mining and Minerals Division
Ms. Bruce Rogoff	Attorney, Mining and Minerals Division
Mr. Mark Smith	Rodey Law Firm
Mr. Dave Clark	NMEMNRD / MMD
M. Brenner	
Mr. Bob Barnard	SRP
Jocelyn Drennar	Rodey Law Firm

Chairman Rogers calls the meeting to order at 9:35 a.m.

1. Roll call

Chairman Rogers asks the Commission Clerk to perform the roll call.

2. Approval of the agenda

Chairman Rogers asks if there are any changes to the agenda. Motion by Ms. Bailey to approve the agenda; second by Mr. Stevenson. The motion passes unanimously on a voice vote.

3. Adoption of minutes of January 12, 2000 Coal Surface Mining Commission Meeting and Hearing

Chairman Rogers asks if there is a motion to accept the minutes of January 12, 2000. A motion by Ms. Bailey to accept the minutes; second by Mr. Lewis. The motion passes unanimously on a voice vote.

4. Request for Oral Argument

5. Discussion and possible action on the appeal by the Pueblo of Zuni (99-02) of the MMD Director's determination not to conduct de novo review and hearing on the effect of the mining operations under permit 96-04 on the Sanctuary surrounding the Zuni Salt Lake

After a short discussion on the appeal by the Pueblo of Zuni (99-02) of the MMD Director's determination not to conduct de novo review, a motion to go into executive session on the Appeal of Zuni 99-02 was made by Mr. Roybal and seconded by Ms. Hoffman. Motion passed unanimously on a roll call vote. Mr. Browning stated that the Commission would go into executive session pursuant to Section 10-15-1(H)(3) and (H)(7) of the Open Meetings Act. The purpose of the closed deliberation would be to discuss the Request for Oral Argument and the Appeal of 99-02.

The commission went into executive session for approximately one half-hour.

Mr. Browning advised that the issues discussed in executive session were the request for oral argument and the Appeal of 99-02.

A motion was made to deny the Request for Oral Argument by Zuni Pueblo by Mr. Roybal and seconded by Mr. Stevenson. Motion passed unanimously by a roll call vote.

A motion was made to deny Zuni's request that the Commission reverse the MMD decision not to conduct a de novo review by Mr. Milovich and seconded by Mr. Roybal. Motion passed unanimously by a roll call vote.

6. Discussion and consideration of proposed amendments to the Coal Surface Mining Regulations (19 NMAC 8.2)

Mr. Dave Clark, Vegetation specialist for the Coal Reclamation Program, gave a brief explanation of the vegetation standards. A motion to adopt the amendments to the Coal Surface Mining Regulation (19 NMAC 8.2) was made by Ms. Bailey and second by Mr. Stevenson. Motion passes unanimously by vote.

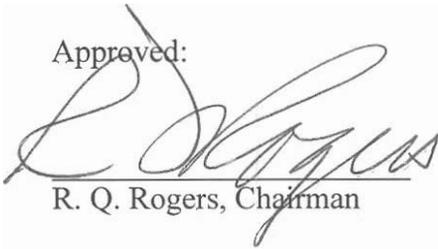
7. Other business

None

8. Adjourn

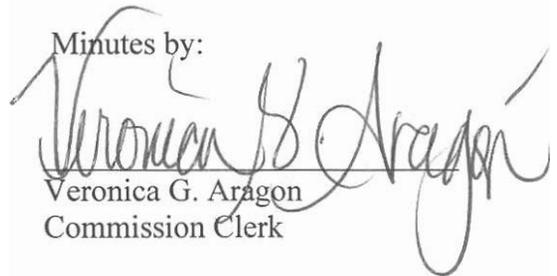
Chairman Rogers asks if there is any other business before the Commission. After hearing none he asks if there is a motion to adjourn. Motion to adjourn by Mr. Stevenson, second by Ms. Hoffman. The motion passes unanimously on a voice vote. The meeting adjourns at 10:33 a.m.

Approved:


R. Q. Rogers, Chairman


Date

Minutes by:


Veronica G. Aragon
Commission Clerk

RECEIVED

APR 12 2000

NM COAL SURFACE MINING COMM.

BEFORE THE NEW MEXICO COAL SURFACE MINING COMMISSION

APPEAL OF DIRECTOR'S DETERMINATION
NOT TO CONDUCT DE NOVO REVIEW AND
HEARING ON EFFECT OF MINING OPERATIONS
UNDER PERMIT NO. 96-04 ON THE SANCTUARY
DISTRICT SURROUNDING ZUNI SALT LAKE.

No. 99-02

**ORDER DENYING ZUNI'S APPEAL ASKING THE COMMISSION TO
REVERSE THE DIRECTOR'S DECISION**

THIS MATTER came before the New Mexico Coal Surface Mining Commission (the "Commission") on March 15, 2000 at a hearing on the appeal by the Pueblo of Zuni (99-02) (filed December 7, 1999) of the Mining and Minerals Division Director's determination not to conduct a de novo review or hearing regarding the effect of the mining operations under permit 96-04 on the Sanctuary surrounding the Zuni Salt Lake. The Pueblos of Zuni ("Zuni"), the Salt River Project Agricultural Improvement and Power District, and the Mining and Mineral Division ("MMD") each filed briefs, and the Commission reviewed the briefs before the hearing. The Commission has unanimously decided to: (i) deny Zuni's appeal; (ii) decline to reverse the Director's decision; and (iii) decline to give Zuni leave to present additional evidence to the Director of the Mining and Mineral Division on the impact of the mining operations on the Sanctuary District surrounding Zuni Salt Lake. The Commission has done so for the following reasons:

1. Zuni has heretofore agreed throughout these proceedings and on appeal of the Permit that MMD lacks jurisdiction to make changes while the Permit is on appeal. The Commission should keep the record before the Court unchanged and preserved as much as possible so that the Court can decide the issues regarding the issuance of the Permit as soon and as efficiently as possible.

2. Zuni argues that the Director must conduct a de novo review and hearing to assess the impact of the mining operation on the Zuni Salt Lake Sanctuary District, and to consider and to implement measures to minimize these impacts. Zuni makes two arguments why it contends the Director must conduct a new hearing. The Commission rejects both arguments.

3. First, Zuni argues that de novo review is necessary because the Director wrongly concluded that the Sanctuary District was not eligible for the National Register of Historic Places. The Director was not, however, wrong at the time she made her decision. The BLM had made a determination that the Sanctuary District was ineligible, and the BLM had complied with the National Historic Preservation Act. There is no reason to reverse the Director on that basis.

4. Second, Zuni argues that, as a result of her allegedly wrong conclusion that the Sanctuary District was not eligible for the National Register, the Director failed to provide measures to protect the Sanctuary District. Zuni is not correct. The Director's February 3, 1997 Decision and Order found that reclamation is the appropriate measure for minimizing impact to the Sanctuary District. Even if the Sanctuary District was eligible in 1996 or is eligible today, there is substantial evidence in the record to support the Director's decision that reclamation is the appropriate mitigation measure for the Sanctuary District. There is testimony in the record that, even if the Sanctuary District were on eligible property, reclamation would be the appropriate mitigation. Dr. Sebastian of the New Mexico State Historic Preservation Office stated that reclamation was the appropriate mitigation measure for the Sanctuary District. Dr. Bruson agreed. In the February 3, 1997 Decision and order of the Director of MMD, which was entered

after the administrative review of the permit decision, the Director specifically found: "SRP has proposed that reclamation is the appropriate measure for minimizing impacts to the neutral zone. Reclamation appears to be the best option based on the testimony presented and the requirements of CSMS Rule 80-1." Decision and Order ¶66. Hence, even if the Sanctuary District is now eligible for the National Register, the Director provided appropriate mitigation measures.

5. Despite there being substantial evidence in the record to support the Director's decision, Zuni asks that this Commission remand the Director's decision so that he can conduct de novo review and hold a hearing to take additional evidence. The Commission does not believe that de novo review or any new review by the Director is appropriate at this time, for the reasons stated in his November 8, 1999 letter to Paul Bloom and Rebecca Dempsey. The permit provides that the BLM, in consultation with the State Historic Preservation Office, SRP, and the tribes, will review the impact, determine the appropriate mitigation measures, and establish a treatment plan for the Neutral Zone. The Programmatic Agreement, which was incorporated into the Director's Order on Permit No. 96-04, provides for that procedure. The inclusion of a new eligible property triggers the process that the Programmatic Agreement provides. Specifically, Sections II and III are designed to address the adverse effects and to develop appropriate mitigation measures. Indeed, Zuni concedes in its brief (p.9) that "there is a process in the PA for development of a treatment plan. . . ." Stipulation III of the Programmatic Agreement provides that the BLM will consult with the parties, including Zuni, about effects to historic properties and about ways to avoid or reduce the adverse effects to historic properties. If appropriate, SRP can submit the treatment plan to MMD as a permit

permit modification or revision, and MMD can then decide whether to incorporate it into the permit condition.

6. In addition, the Commission denies Zuni leave to present additional evidence to the Director because Zuni did not show to the satisfaction of the Commission what additional evidence it wants to present, and that the additional evidence is material, or that there is good reason for failure to present it in the initial proceeding. Zuni articulated its position that the Sanctuary District was eligible at the hearing in 1996.

7. The United States Department of Interior has not yet approved SRP's mining plan. The Director has granted SRP an extension of time to commence mining under Permit 96-04. SRP has not begun mining activities in the Sanctuary Area or anywhere else in the permit area. Zuni has already notified BLM of the situation. Zuni has stated, and the Commission agrees, that BLM will thoroughly and diligently take all steps necessary to ensure compliance with both §106 of the NHPA and the federal statutes governing the process.



Robert Q. Rogers, Jr.
Chairman, New Mexico Coal Surface Mining
Commission

RECEIVED

APR 12 2000

NM COAL SURFACE MINING COMM.

No. 99-02

BEFORE THE NEW MEXICO COAL SURFACE MINING COMMISSION

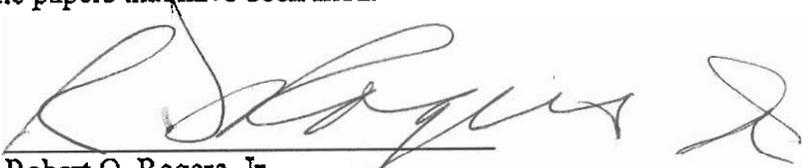
APPEAL OF DIRECTOR'S DETERMINATION
NOT TO CONDUCT DE NOVO REVIEW AND
HEARING ON EFFECT OF MINING OPERATIONS
UNDER PERMIT NO. 96-04 ON THE SANCTUARY
DISTRICT SURROUNDING ZUNI SALT LAKE.

ORDER DENYING PUEBLO OF ZUNI'S REQUEST FOR ORAL ARGUMENT

THIS MATTER comes before the New Mexico Coal Surface Mining Commission (the "Commission") on Pueblo of Zuni's Request for Oral Argument. (filed March 14, 2000). Salt River Project Agricultural Improvement and Power District, and the Mining and Mineral Division ("MMD") filed responses opposing Zuni's request. The Commission has unanimously decided not to grant Zuni's request for oral argument for the following reasons:

1. It has been the practice of the New Mexico Coal Surface Mining Commission not to allow oral argument on matters before it, at least with respect to the complex and numerous issues regarding the Fence Lake Mine Project.
2. Zuni does not identify any issue of specific concern that needs to be addressed.
3. The Commission believed that the parties had fully advised it about the motion in their briefs and that it could decide the issue raised by the appeal on the briefs that the parties submitted.

NOW THEREFORE, the Commission denies Zuni's Request for Oral Argument and will make its decision based on the papers that have been filed.


Robert Q. Rogers, Jr.
Chairman, New Mexico Coal Surface Mining
Commission