

NEW MEXICO LAND CONSERVATION INCENTIVES ACT GUIDELINES

MINERALS: REPORTS AND RESTRICTIONS

Energy, Minerals and Natural Resources Department



Surface extraction of minerals, though essential to our society, is generally damaging to natural and esthetic values on lands that are specifically protected for one or more conservation purposes. Therefore, charitable donations of land or interests in land need to protect the conservation values from surface extraction of minerals to qualify for tax benefits. The New Mexico Land Conservation Incentives Act's (LCIA) implementing rule 3.13.20 NMAC and federal IRS regulation Title 26, Chapter 1, Part 1, Section 1.170A-14 provide the rules for mineral interests in charitable donations of land or conservation easements (CE). These guidelines are intended to help LCIA applicants prepare their tax credit applications to the Energy, Minerals and Natural Resources Department (EMNRD).

To qualify for a New Mexico LCIA tax credit, the donation of land or CE must protect the conservation purpose(s) in perpetuity. Perpetual protection can only be affirmed when one of the following occurs:

- The landowner owns the mineral estate and the deed of CE either prohibits surface mining or allows surface extraction methods that have only limited, localized effects and are not irretrievably destructive of conservation interests. **NO LARGE-SCALE SURFACE MINING IS PERMITTED.** ("Surface extraction methods" include drilling for fluid or gas minerals.)
- The landowner cannot prove mineral ownership or does not own the mineral estate, but obtains a professional geologist's report that finds the probability of surface mining on the property to be so remote as to be negligible (commonly called a "remoteness determination" or "remoteness test").

MINERALS

Tax credit applicants often ask what EMNRD considers to be a 'mineral' for the purposes of the LCIA. We consider any solid, fluid, or gas that can be taken from the earth by surface extraction methods to be an LCIA relevant mineral.

Mineral categories used by the federal government are useful for this discussion and consist of:

- salable minerals - sand, gravel, pumice, cinder, clay, and stone;
- leasable minerals - coal, oil, gases, salts, and geothermal resources; and
- locatable minerals - may be claimed under the 1872 Mining Act, which includes all metals, but also makes gemstones and some industrial minerals like silica, perlite, mica, limestone, gypsum, barite, fluor spar, and sulfur available to public claim.

(These federal mineral categories are not applicable to state-owned minerals in New Mexico since these may only be leased from the State Land Commissioner.)

If the surface and mineral estates are not separate, a private landowner can prohibit surface mining or severe extraction methods in a deed of CE that is charitably donated for the LCIA tax credit. The landowner must provide an attorney's or title company's title opinion, or complete chain of title from patent to present, to EMNRD that proves the leasable or locatable kinds of minerals are not separate from the surface estate. Salable minerals like sand, gravel, and stone are rarely severed from surface estates and, if not specifically identified in the deed as separate, may be assumed by the landowner and EMNRD to be among the rights of the surface owner - without obtaining a title opinion.

RETAINED MINERAL RIGHTS

The LCIA does allow tax credit for CE donations where the donor owns the mineral rights and retains the right to develop those mineral rights, if the mineral extraction is restricted to methods that have only limited, localized negative effects and are not irretrievably destructive of significant conservation interests. Working farm and ranch CEs will often need to retain mineral interests for sand and gravel used on roads or other allowable uses within the property. Sand, gravel, and stone quarries for the personal use of the landowner are usually allowable if the disturbance area is small (½ acre or less), does not impair a conservation value, and is reclaimed to the satisfaction of the CE grantee before another area is disturbed.



Applications from LCIA tax credit applicants who retained mineral rights for commercial extraction of minerals will receive greater scrutiny by the EMNRD Secretary and the Natural Lands Protection Committee (NLPC) and applicants should include an extraction plan in the LCIA assessment application. EMNRD will need detailed descriptions of the extraction method, term of extraction, maximum area of disturbance, reclamation requirements, and locations and extent of all direct and indirect impacts - including pits, waste piles, well pads, stationary equipment, roads, pipelines, power lines, etc. An EMNRD representative or NLPC member(s) may inspect the property to determine the impacts on conservation values and report to the NLPC. If the EMNRD Secretary, in consultation with the NLPC, determines the proposed limited mining or drilling is a compatible use, the extraction plan must be made a part of the deed of CE.

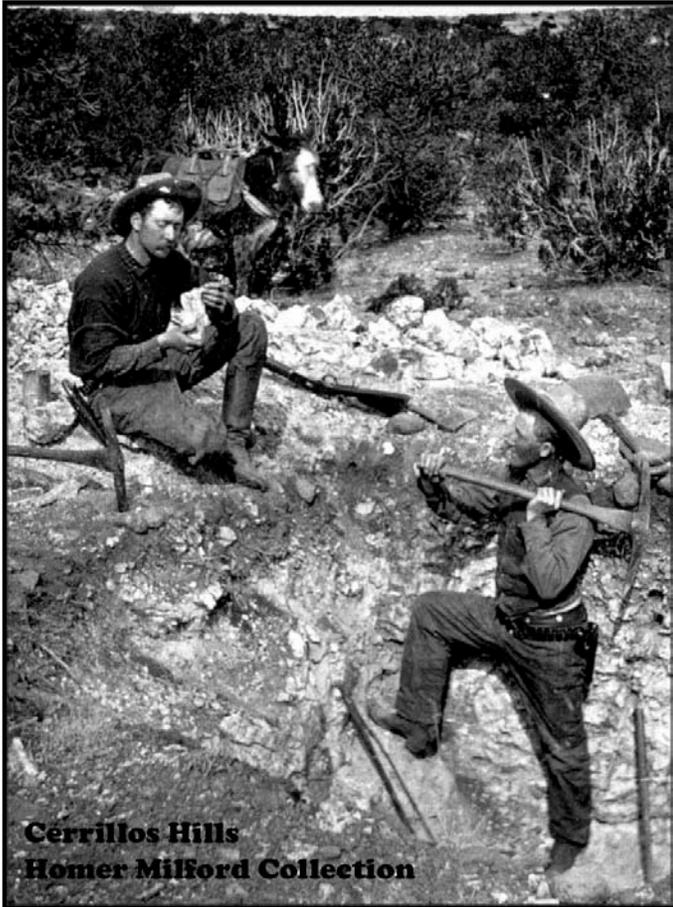
Minerals under a CE-protected surface may also be removed by underground methods that originate from an unencumbered property. For instance, tapping a retained oil or gas mineral interest by directional drilling from a well pad on property

adjacent to a CE may have no impact on the conservation values of the CE.

SPLIT ESTATES

A mineral interest is severed when the landowner does not own some or all of the mineral rights to the property. When surface rights and subsurface rights (right to develop minerals) are separate, the property is in a split estate situation. Split estates are common in New Mexico and result from:

- federal laws, like the Homestead Act, that conveyed public domain into private ownership and reserved some or all of the subsurface rights in federal ownership when the surface estates were patented as private property;



- conveyances of state trust land to private ownership that did not include mineral rights reserved by the state;
- privately owned mineral rights being sold-off or reserved by previous landowners and are not in the possession of the current surface estate owner.

The mineral estate has priority rights in most split estate situations. Many New Mexican landowners do not own the minerals under their land and cannot deny or limit the mineral estate owner's rights to extract those minerals. Mineral leases that have not expired also impair a landowner's ability to place the surface estate within a CE.

FIND SPLIT ESTATES AND MINERAL POTENTIAL EARLY

Since donations of land or CEs on split estates with potential for mineral extraction are not eligible for the LCIA tax credit, it is wise to determine subsurface ownership as soon as possible in the donation process. The following are places to look for split mineral estates.

- The original patent may, or may not, identify government mineral reservations. The patent will identify the law that conveyed the land and that law must be examined for explicit mineral reservations.
<http://www.gloreCORDS.blm.gov>
- Bureau of Land Management (BLM) 1:100,000 scale Mineral Management Status Maps show federally-owned minerals in relation to surface ownership.
- BLM Geocommunicator website has GIS map layers showing all federal mineral ownership in New Mexico.
<http://www.geocommunicator.gov>
- A recent title insurance policy or title commitment from a title company will usually show any government or private party mineral reservations.

If the surface and subsurface estates are found to be separate, the landowner must hire a professional geologist to research and write a geology report for the property and make a remoteness determination for surface extraction of minerals. If the property is in an area of current or historic minerals development, it would be wise to obtain the geologist's report before spending much time, effort, and money on other due diligence.

If only one mineral interest such as coal has been severed from the surface estate, the geologist's remoteness determination need only assess that mineral. However, the landowner would need to provide proof that no other



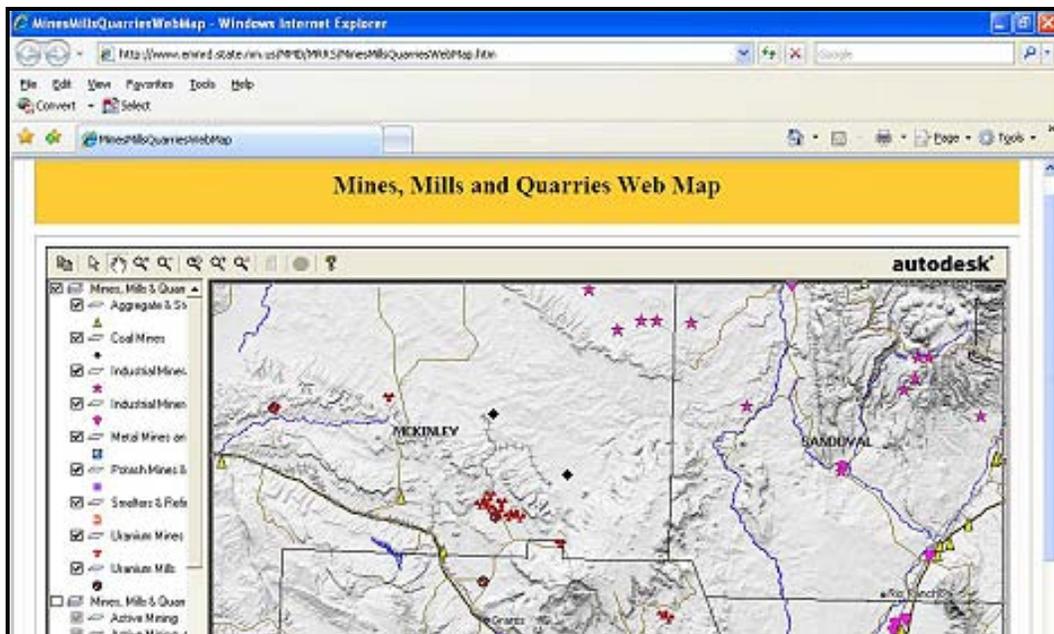
minerals have been severed from the property. It may be easier to have the geologist make a remoteness determination on all leasable and locatable minerals in lieu of proving mineral ownership.

GEOLOGIST'S REPORT

The geologist's report must be prepared by a professional geologist so should contain the geologist's resume or statement of qualifications. The report must explicitly state whether the probability of mineral extraction from the subject property IS or IS NOT so remote as to be negligible. The geologist's remoteness determination for mineral mining is a professional opinion based upon science and data. It should show the geologist has gathered enough data to arrive at an informed opinion. At a minimum, the report should document site specific and relevant regional information on:

- the geology of the subject area, the economic minerals associated with that geology, and known deposits of economic mineral reserves;
- historic and current mining activities in the subject area, proximity to mining districts and processing facilities, and any mineral claims on or near the subject property; and
- historic and current well production of fluid and gas minerals on or near the subject property and availability of processing and transportation infrastructure.

The map of known mineral deposit areas in New Mexico (locatable minerals) at http://rgis.unm.edu/loader_div.cfm?theme=Geology is a handy reference, but too generalized to be entirely relied upon for a remoteness determination on the site specific geology of the subject property. The geologist should consider all the available relevant data and use professional judgment. Exploratory drilling and assays are expensive and not required. A site visit to visually assess the topography and surface may not be necessary if the geologist is already familiar with the local geology and has sufficient data.



Probability of mineral extraction is a judgment of geologic potential for economic reserves of one or more minerals. An economic reserve has economic quality, quantity, and conditions of accessibility. The geologist should base a remoteness determination on the geological, geophysical or economic data showing the absence of mineral reserves on the property, or lack of commercial feasibility at the time of the CE donation.

If the CE is large and the potential for economic mineral reserves is mixed, the geologist's report should distinguish the areas within the subject property that might be mined from those areas where the probability of mining is so remote as to be negligible.

Links to some on-line information:

- <http://geoinfo.nmt.edu/publications/maps/geologic/home.html> New Mexico Tech - Bureau of Geology and Mineral Resources. Web site for geological maps of New Mexico.
- <http://geoinfo.nmt.edu/publications/openfile/home.cfm> New Mexico Tech - Bureau of Geology and Mineral Resources. Web site of geological publications (including many maps) for New Mexico.
- <http://www.emnrd.state.nm.us/MMD/GISMapandMineData.htm> EMNRD-Mining and Minerals Division. Map with New Mexico coal mine locations and map with New Mexico mineral mines, mineral mill locations, and mining districts.
- <http://www.geocommunicator.gov> GIS map of federal database for federal mineral ownership, claims on locatable minerals, and agreements on leasable minerals.
- <http://octane.nmt.edu/gotech/Main.aspx> New Mexico interagency web site with GIS map and well data for New Mexico oil and gas production.
- <http://geoheat.oit.edu/bulletin/bull23-4/art2.pdf> Article on geothermal regions and geothermal development in New Mexico.