

GENERAL MINING LAW OF 1872 DOES NOT PREEMPT NEW MEXICO'S EXPLORATION PERMITTING REGIME

By Stuart R. Butzier

The New Mexico Mining Commission (“Commission”) has held that New Mexico’s exploration permitting regime under the New Mexico Mining Act of 1993 (the “1993 Act”) is not preempted—either on its face or as applied by the Director of the Mining and Minerals Division (“MMD”) to a uranium exploration company—by the General Mining Law of 1872 (the “1872 Law”). See Decision and Order, *In the Matter of Ree-Co Uranium LP’s Petition for Review of Director’s Action*, No. 09-01 (May 3, 2010), appeal pending. The Commission also upheld the MMD Director’s exercise of discretion in determine appropriate categories of exploration permitting under New Mexico’s multi-tier exploration permitting program.

The 1993 Act established a hard-rock reclamation permitting regime for exploration and mining projects. Under it, the Commission serves as both the rulemaking body and administrative appellate authority, while MMD administers the Commission’s regulations. In regulations adopted in 1994, as amended, exploration projects not associated with existing mining either may be excluded from permitting altogether, in the case of “location work” or where “no or very little disturbance” of under 2 cubic yards per year (see 19.10.3.300 NMAC), or may fall within one of three separate permitting categories, with increasing degrees of regulatory oversight. “General” permits may be obtained for dry or wet operations under very narrowly prescribed circumstances under 19.10.3.301 NMAC (“Rule 301”). “Minimal Impact” exploration permits may be obtained if the operation will not exceed 1000 cubic yards of

excavation per permit or more than five acres of other disturbances, and so long as several disqualifying circumstances do not apply. 19.10.3.302 and 19.10.1.7.M(2) NMAC. Exploration projects deemed not eligible for a General or Minimal Impact permit are permitted under the Commission's "Part 4" exploration permitting regulations. 19.10.4.1, *et seq.* NMAC.

The appellant in the case, Ree-Co Uranium LP ("Ree-Co") applied for a General permit for "discovery work" under the 1872 Law consisting of drilling a series of 56 shallow "dry" borings of up to 50 feet deep, as well as 20 drill holes up to 1200 feet deep spread out across 20 to 30 acres. The MMD Director ultimately permitted only the shallow drill holes under a General permit, and he conditioned the permit by requiring Ree-Co to make a Minimal Impact or Part 4 application for any deeper drilling. Ree-Co appealed, arguing (among other things) that the proposed "discovery work" either qualified for New Mexico's exclusion of "location work" from the definition of "exploration," or was preempted by the 1872 Law based on the theory that other claimants could win a race to perfect competing mining claims to the same ground by making a valid discovery of minerals while Ree-Co sought permits through lengthy public processes required under the Minimal impact and Part 4 categories of permitting. According to Ree-Co, the maps that it would have to disclose in the permit application and public hearing processes would clue competing claimants into Ree-Co's exploration targets, thus defeating the 1872 Law's land tenure aspects and general policy of encouraging mineral development on federal public lands.

The Commission was not persuaded by any of Ree-Co's several points in the appeal. First, the Commission concluded that New Mexico's exclusion of "location work" (to stake,

monument publish and file location notices) did not include an exclusion of the separate “discovery work” needed in order to perfect a mining claim by the discovery of a valuable mineral. Second, the Commission held that Ree-Co’s concerns over competing claimants were not real given New Mexico’s provisions for confidentiality of proprietary materials and the possessory rights obtained by a mining claimant under the doctrine of *pedis possessio* as the New Mexico Supreme Court recognized in *Adams v. Benedict*, 64 N.M. 234, 244 (1958). Third, relying in part on the landmark U.S. Supreme Court preemption case of *California Coastal Comm’n v. Granite Rock Co.*, among other cases, the Commission rejected Ree-Co’s “field” and “conflicts” preemption theories, concluding that New Mexico’s exploration permitting regime did not “stand as an obstacle” to the objectives of Congress under the 1872 Law. Finally, the Commission upheld the MMD’s authority to condition the General permit granted for the shallow drill holes, by requiring that Ree-Co separately seek any deeper drill hole permitting under either the Minimal Impact or Part 4 permitting categories, citing the Director’s discretion and flexibility as recognized by the New Mexico Court of Appeals in *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n*, 2001-NMCA-047, 130 N.M. 497 (2001).