

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

**MULTICULTURAL ALLIANCE FOR A SAFE ENVIRONMENT,
And
AMIGOS BRAVOS,**

Appellants,

v.

No. D-101-CV-2012-02318

NEW MEXICO MINING COMMISSION

Appellee,

**And
NEW MEXICO MINING AND MINERALS DIVISION,
RIO GRANDE RESOURCES,**

Intervenor-Appellees.

APPELLANTS' MOTION TO CERTIFY APPEAL

The Multicultural Alliance for a Safe Environment (“MASE”), including all of its members, and Amigos Bravos (“Amigos”) (collectively, “Appellants”), respectfully move that their appeal of the July 23, 2012 Memorandum and Order of the New Mexico Mining Commission (“Commission”) affirming an order of the Director of the New Mexico Mining and Minerals Division (“Director”) be certified to the New Mexico Court of Appeals pursuant to NMSA, 1978, 39-3-1.1(F) and SCRA, 1986 Rules 1-007.1 and 1-074(S). In support of their Motion, Appellants STATE:

1. Appellant Multicultural Alliance for a Safe Environment is a non-profit coalition of organizations from uranium-impacted communities dedicated to restoring and protecting the natural and cultural environment in their communities.

2. Appellant Amigos Bravos is a non-profit conservation organization dedicated to preserving and protecting the rivers of New Mexico, supporting the environmentally sound and sustainable traditional lifeways of indigenous cultures, and ensuring that environmental justice and social justice are considered equally.

3. On June 16, 2010, Rio Grande Resources (“RGR”) submitted an application to the Mining and Minerals Division (“Division”) for renewal of its standby permit for the Mt. Taylor Mine. In the Matter of the Petition for Review of the Director’s Action Dated January 31, 1012, Permit Revision 10-1 to Permit No. CI002RE (“Petition for Review”) (March 30, 2012), Administrative Record (“A.R.”) at 00013.

4. Pursuant to the New Mexico Mining Act’s public hearing and participation provisions and relevant implementing regulations, MASE and Amigos requested a public hearing on RGR’s standby permit renewal application. *Id.*, A.R. at 00015; *see also*, NMSA 1978, § 69-36-7(K); 19.10.902, 903 NMAC; 19.10.9.905.C, E NMAC.

5. The Division scheduled a public hearing for August 17, 2011 in Grants. Permit Revision 10-1 to Permit CI002RE, A.R. at 00039.

6. Amigos Bravos and MASE appeared at the August 17 hearing through their representatives and legal counsel. Petition for Review, A.R. at 00015.

7. As described in detail in the accompanying Memorandum, during the public hearing, MASE and Amigos Bravos attempted to present testimony on whether RGR’s financial assurance for reclamation was adequate, whether the Division has an independent duty to conduct an environmental review and whether RGR’s economic viability analysis was adequate.

8. With respect to the issues of financial assurance review and the Division’s independent duty to conduct an environmental review, the Director, upon RGR’s objection,

determined that MASE's and Amigos' concerns were beyond the scope of the standby permit review process. *See, e.g.*, A.R. at 00010, Audio Recording of August 17 Hearing ("Hearing Audio") at 2:52:28.

9. With respect to the adequacy of RGR's economic viability analysis, MASE and Amigos learned at the public hearing that the Division's decision would be made based on information that was not publicly available. *Id.* at 22:03.

10. MASE and Amigos subsequently attempted to obtain the economic viability analysis through an Inspection of Public Records Act request, but the Director denied their request. October 31, 2011 Letter from Fernando Martinez to Eric Jantz and Stuart Butzier, A.R. at 00046-00049.

11. The Director issued RGR a revision to its permit for standby status on January 31, 2012. A.R. 00037-00043.

12. MASE and Amigos subsequently petitioned the Commission for review of the Director's decision, and made the following arguments:

a. Because the New Mexico Mining Act's public notice and hearing provisions are virtually identical to those in the New Mexico Solid Waste Act, the New Mexico Supreme Court's holding from *Colonias Dev. Council v. Rhino Env't'l Svcs., Inc.* 138 N.M. 133, 117 P.3d 939 (N.M. 2005) should also apply to the current case. Petition for Review, A.R. 00016-00018. Thus, the Director and later the Commission arbitrarily undermined the Legislature's intent, as the NMED did in the *Rhino* case, that for public participation in public hearings to be meaningful agencies are required not only to hear public testimony, but also consider it.

b. The requirements of the Inspection of Public Records Act notwithstanding, as a party to an adjudication under the New Mexico Mining Act, MASE and Amigos were entitled to review the economic information that the Director and Commission determined were confidential and which formed the basis for the Director's and Commission's conclusion that the Mt. Taylor Mine would be economically viable during the standby permit period. Petition for Review, A.R. at 00025-00027.

c. The Director impermissibly abdicated his duty to conduct an independent environmental review of RGR's permit revision application by accepting, without question, NMED's determination that RGR would comply with all environmental laws. *Id.*, A.R. at 00029-00032.

d. The New Mexico Mining Act's implementing regulations require that the Division review RGR's financial assurance plan as part of the permit revision review process and that a public hearing on the financial assurance plan is likewise required. *Id.* A.R. at 00019-00020.

13. On July 23, 2012, the Commission issued an order affirming the Director's decision to grant RGR's permit revision application. A.R. 000145-000163.

14. Appellants timely filed their Notice of Appeal of the Commission's decision to this court on August 21, 2012.

15. As demonstrated in Appellants' accompanying Memorandum, the issues that Appellants raised before the Commission and intend to raise on appeal, are issues of "substantial public interest", and are therefore appropriate for certification to the New Mexico Court of Appeals.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 2012, I have delivered a copy of the foregoing pleading in the above-captioned case via email or U.S. mail, fist class, to the following:

Sally Malave
New Mexico Mining Commission
New Mexico Office of the Attorney General
PO Drawer 1508
Santa Fe, NM 87504-1508
smalave@nmag.gov

Stuart Butzier
Larry Ausherman
Modrall Law Firm
500 Fourth St., NW
Albuquerque, NM 87102
sbutzier@modrall.com

Mark Smith
New Mexico Mining and Minerals Division
1220 South St. Francis Dr.
Santa Fe, NM 87505
marka.smith@state.nm.us

By: /s/ Eric Jantz
Eric Jantz